IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX AT KINGSHILL

CITIBANK, N.A., formerly known as First National City Bank,	)	**CIVIL NO. 675/1997**
Plaintiff,	)	
vs.	)	**ACTION FOR DEBT AND MORTGAGE FORECLOSURE**
CAIPHUS JENKINS, NADINE JENKINS And WENDY JENKINS,	)	
Defendant.	)	**NOT FOR PUBLICATION**

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CABRET, P.J.

MEMORANDUM OPINION

(October 9, 2001)

THIS MATTER is before the Court on the defendant's, Caiphus Jenkins ("Jenkins" or "Purchaser"), Motion to Dismiss and the plaintiff's, Citibank, N.A. ("Citibank" or "Mortgagee"), opposition. Also before the Court is the plaintiff's Motion for Summary Judgment and the defendant's opposition. For the reasons which follow, the defendant's Motion to Dismiss and the plaintiff's Motion for Summary Judgment will be denied.

FACTS AND PROCEDURAL POSTURE

Before reaching the merits of the parties' respective motions, a brief exposition of the facts is necessary. On October 29, 1976, Arnulfo and Angelita Agravante ("Mortgagors" or "Agravantes") executed a mortgage of $28,500 at 9 percent interest in favor of First National City Bank, which was secured by the property at Plot 423 Estate Strawberry Hill. In 1978, the mortgagors sold the mortgaged property to Andres Perez Thillet and Julia Navarro de Perez ("Perezes"). The Perezes appear to have assumed the mortgage note with Citibank. Subsequently, the Perezes sold the property to the defendants in this action on June 15, 1979. However, although the defendants initially signed an agreement with the Perezes to assume payments under the mortgage, no assumption was ever acknowledged or accepted by Citibank. Therefore, a warranty deed executed in 1979 which included assumption language was never recorded. Rather, a new warranty deed which did not contain assumption language was recorded in 1983. Nevertheless, it was undisputed that Jenkins continued to make monthly payments on the mortgage to First National City Bank, which later became Citibank and later to Banco Popular de Puerto Rico ("Banco Popular"), which was charged with the responsibility for administering the loan on behalf of Citibank.

Jenkins asserts that he made such payments until 1996, when he was advised by a representative of Banco Popular that the loan had been fully paid. Jenkins testified he subsequently received a check from Banco Popular and, upon inquiring as to the reasons for such payment, was told by a bank representative that the check reflected a refund from the escrow account for the mortgage loan. In 1997, Citibank resumed administration of its loans in lieu of Banco Popular and instituted this foreclosure action.

The Court scheduled a trial in this matter for September 10, 2001. However, following the plaintiff's presentation of evidence, the defendant moved to dismiss the complaint. As reasons for its motion, Jenkins asserted that he was not a party to the mortgage contract or any other agreement with the mortgagee and, thus, is not properly named in the complaint seeking foreclosure and deficiency judgment. Without reaching the merits of the case or the issues raised in the defendant's opposition to Citibank's Motion for Summary Judgment, the Court concluded the hearing for consideration of the motion to dismiss.

DISCUSSION

Defendant's Motion to Dismiss

The Court may dismiss a complaint, pursuant to Federal Rule of Civil Procedure 12 (b)(6), where it determines that the complaint fails to state facts sufficient to show the existence of a claim for which relief is available. *See Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 103, 2 L.Ed.2d 80 (1957). All allegations of the plaintiff are taken as true, and the plaintiff is given the benefit of all inferences that may be drawn from them. *See Pennsylvania v. Pepsico, Inc.*, 836 F.2d 173, 175-179 (3d Cir.1988). On review, "the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim." *Espinosa v. Gov't of the Virgin Islands*, 20 V.I. 78, 83 (Terr. Ct. 1983). A motion to dismiss should, therefore, be denied unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Quinones v. United States*, 496 F. 2d 1269, 1271, 1273 (3d Cir. 1974).

Jenkins contends that, because he was not a party to the mortgage contract, he may not be held liable on the mortgage debt, thus depriving Citibank of the relief sought. Therefore, the issues presented are: whether Citibank has standing to assert this action for foreclosure against

Jenkins personally, given the absence of any express contractual relationship between the parties for this debt obligation or assumption of the mortgage, and whether Jenkins is a proper party to the complaint.

At the outset, the Court finds that Jenkins is a proper party to this action. A mortgagee retains legal interest on secured property during the duration of a mortgage, while the mortgagor holds only an equitable interest or the equity of redemption. It is axiomatic that one may transfer only as much interest in property as he has. Hence, Jenkins gained in the sale only what the original mortgagor possessed – that is, the equitable interest in the property. Because he claims rights and interest in the property, acquired subsequent to the mortgage, Jenkins is a proper – and indeed, necessary -- party to this action. *See* 59 CJS *Mortgages* § 550 (1998); 59A CJS §§ 708, 723.

However, while Jenkins may be properly named in this action, any relief that may be had binds only the mortgaged property. It is undisputed that Jenkins did not expressly assume the mortgage with Citibank or join in the mortgage contract; therefore, he is not personally liable on the mortgage instrument. *See* RESTATEMENT (THIRD) OF PROPERTY, *Mortgages* §§ 5.1, cmt. b. 5.2, 8.2 (a)(1997) (purchaser liable on the mortgage only where he assumes the mortgage or debt). This fact, however, does not defeat Citibank's legal interest in the property nor its ability to enforce its rights under the mortgage. *See id.* at §§ 5.2 (a), 8.2 (a), (b); 59 CJS § 550.

It is well-established that the mortgagor's sale of mortgaged property does not deprive the mortgagee of its legal interest in the property. *See* RESTATEMENT (THIRD) OF PROPERTY §§ 1.1, 5.2. Rather, the mortgagee retains an enforceable lien -- regardless of whether or not anyone is personally liable on the note. *Id.*; *see also* 59 CJS §§ 385-86. As such, the mortgagee may proceed either against the original mortgagor, based on personal liability for the debt, or against the grantee to enforce its interest in the property under the mortgage. *See* RESTATEMENT (THIRD) OF PROPERTY §§ 8.2, 5.2, committee note.

The plaintiff in this case does not dispute the assertion that Jenkins did not expressly assume the mortgage with Citibank. Thus, as a subsequent, non-assuming purchaser, Jenkins' liability is limited to the interest in the property, which he stands to lose in a foreclosure sale.

Moreover, Citibank's action is not defeated because Jenkins is personally named in the complaint. A determination whether an action is against the property (*in rem*) or against the person (*in personam*) is one of substance rather than form. Thus, the inquiry is not whether the complaint is styled against an individual defendant but, rather, whether the requested relief seeks to enforce the mortgage debt against the secured property rather than the individual. *See, e.g. Peoples National Bank of Lebanon v. Noble*, 487 A.2d 912, 913-14 (E.D.Pa. 1985); *Bank of Pa. v. G/N Enterprises, Inc.*, 463 A.2d 4, 6-7 (E.D.Pa. 1983).

In that regard, a mortgage foreclosure action is, by its very nature, deemed *in rem*, because its main import is to claim the creditor's property interest. *See Insilco v. Rayburn*, 543 A.2d 120, 123 (E.D. Pa. 1988). Such actions are aimed to resolve interest in property and are premised, not on the Court's jurisdiction over the person, but rather over the subject property. *Se, e.g. G/N Enterprises*, 463 A.2d at 6. This action is, therefore, proper, to the extent Citibank attempts only to recover its interest in the mortgaged property and does not seek to recover a deficiency judgment or impose other personal liabilities against Jenkins.[1]

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[1] Citibank does not dispute Jenkins' immunity from personal liability on the mortgage note and has, accordingly, moved to amend its complaint to remove any request for deficiency judgment.

Plaintiff's Motion for Summary Judgment

Summary judgment is appropriate where there are no genuine issues of material fact, thus entitling the movant to a ruling as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct 2548, 91 L. Ed 2d 265 (1986). A factual issue is material if it would affect the outcome of an action and allow a reasonable jury to find for the non-movant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-52, 106 S. Ct 2505, 2511-12, 91 L. Ed 2nd 202 (1986). In reviewing a motion for summary judgment, the Court must view all evidence and factual inferences in the light most favorable to the non-movant and resolve all doubts in his favor. *See* Celotex, 477 U.S. at 325.

Citibank argues it is entitled to judgment as a matter of law because, it contends, the fact of the mortgage debt and the amount of delinquency on the note may not be subject to dispute. However, Jenkins opposes the motion, arguing the amount of the debt, if any, is anything but certain.

Jenkins first challenges the accuracy of Citibank's accounting which raises questions regarding the actual amount of any indebtedness. Specifically, Jenkins notes that he was told by a bank representative sometime around November 1996 that the mortgage had been fully paid. Subsequently, Jenkins was sent a refund check representing the balance in an escrow account. Upon inquiry, he was told that the refund was necessary since the mortgage had been paid. These representations are further supported in an accounting entry by Citibank in February 1996 reflecting the mortgage as paid in full. Jenkins additionally claims that there were substantial irregularities in the accounting of the mortgage and in the escrow account balance for various periods during the term of the loan, further adding to the difficulty in determining the amount of any debt owed from the current record. These facts, Jenkins asserts, should preclude Citibank from recovering certain late charges, attorney's fees and costs, mortgage insurance premiums, and interest charges which accrued after its representations to the defendant that the debt had been fully paid.

The Court concludes that the facts presented thus far, which must be viewed in the light most favorable to the defendant, raise genuine issues of material fact which may not be resolved as a matter of law. Accordingly, summary judgment is inappropriate in this instance.

CONCLUSION

As a subsequent purchaser claiming equitable interest in the mortgaged property, Jenkins is a proper party to this action. However, because he was not a party to the mortgage contract and did not subsequently assume the mortgage with Citibank, Jenkins is not personally liable on the note. Citibank may, therefore, proceed in this action only to the extent it seeks to enforce its security interest on the mortgaged property. The defendant's motion to dismiss will, therefore, be denied.

Summary judgment is also inappropriate, because there remain issues of material fact in dispute with regard to the amount of the debt and whether Citibank contributed to the delay in payments and should be precluded from recovering any charges which accrued as a result of such delays. An appropriate order will issue.

MARIA M. CABRET
Presiding Judge

A T T E S T:
DENISE D. ABRAMSEN
Clerk of the Court
By: ______________
Deputy Clerk
Dated: 10/9/01