

IN THE IOWA DISTRICT COURT FOR WASHINGTON COUNTY

HSBC BANK USA, NATIONAL
ASSOCIATION, AS INDETURE
TRUSTEE OF THE FIELDSTONE
MORTGAGE INVESTMENT TRUST
SERIES 2005-2,

Plaintiff,

v.

SANTOS V. PEREZ, JUDY K. PEREZ,
AND PARTIES IN POSSESSION,

Defendants.

No. EQ4870

RULING ON MOTION
FOR SUMMARY JUDGMENT

APPEARANCES: Attorney Matthew Laughlin for Plaintiff HSBC Bank
Attorney Charles Pierce for Defendants Santos and Judy Perez

RULING (NOVERMBER 19, 2009)

The parties appeared on October 02, 2009 for a hearing on Plaintiff's Motion for Summary Judgment. The Plaintiff was represented by attorney Matthew Laughlin, who appeared by telephone; the Defendants were represented by their attorney, Charles Pierce, who appeared in person. Also on October 02, 2009 the Court entered an Order instructing the Plaintiff to file a Supplemental Reply to Defendant's Supplemental Resistance by October 09, 2009. Plaintiff's failed to file a Supplemental Reply and the matter was deemed submitted on October 09, 2009.

Issue: Whether an issue of material fact exists regarding Plaintiff's right to foreclose certain residential property owned by Santos V. and Judy K. Perez.

PROCEDURAL HISTORY

1. On April 08, 2009 HSBC Bank USA, National Association, (Hereinafter the Plaintiff) filed the present Foreclosure Action, seeking to foreclose a residential property mortgaged by Santos V. and Judy K Perez.
2. On May 05, 2009, Santos V. and Judy K Perez responded with a Demand for Delay of Sale per I.C.A. 654.20-26.
3. On June 23, 2009 Plaintiff filed a Motion for Default Judgment. On the Same day, the Perez's filed an Answer to the Foreclosure Petition.
4. On July 31, 2009 Plaintiff filed a Motion for Summary Judgment alleging that the Defendant's Answer failed to allege an issue of Material fact. The Plaintiff also renewed its Motion for Default judgment.
5. On August 18, 2009 the Defendants filed a Resistance to Plaintiff's Motion for Summary Judgment, alleging several issues of material fact, including whether the Plaintiff's owned the mortgage, whether the Plaintiff had standing to bring this foreclosure action, and whether the Defendants were given an opportunity to cure any default. Additionally, the Defendant's stated that they had not been able to complete discovery.
6. Also on August 18, 2009 the Defendant's filed an Amended Answer containing affirmative defenses.
7. On August 24, 2009 the Plaintiff's filed a reply to the Perez' resistance to the Motion for Summary Judgment.
8. On October 02, 2009 the Perezs filed a supplement to their resistance to the Plaintiff's

Motion for Summary Judgment.

9. Also on that date, a hearing was held on the Plaintiff's Motion for Summary Judgment. The Plaintiff was granted one week in which to file a Supplemental Reply to Defendant's Supplemental Resistance.
10. This matter was deemed submitted on October 09, 2009, after Plaintiff's failed to file a Supplemental Reply to Defendant's Supplemental Resistance.

STATEMENT OF FACTS

1. On or about June 21, 2005, Santos and Judy Perez (hereinafter the Perezs) made, executed and delivered to Fieldstone Mortgage Company one certain promissory note in writing for the sum of \$79,200.00.
2. To secure payment of said note, the Perezs executed and delivered to Mortgage Electronic Registration Systems, Inc. solely as nominee for Fieldstone Mortgage Company (herein after Fieldstone) one certain Mortgage in writing dated June 21, 1995 which Mortgage was filed June 28, 2005, said Mortgage being upon certain real estate located in Washington County, Iowa, specifically "lot 5 in block 7, in the town of Crawfordsville, Washington County, Iowa."
3. The Mortgage dated June 21, 2005 was recorded on June 28, 2005 as No. 05-2772 at the Washington County Recorder's office.
4. The mortgage and notes provide that in case of default in the payment of any installment represented by the note, the holder may declare the entire principal and the interest accrued thereon immediately due and payable, and the mortgage may be foreclosed.

5. The mortgage also provides that the holder shall be entitled to collect all expenses of foreclosure including, but not limited to, reasonable attorney's fees, and costs of documentary evidence, abstracts, and title reports.
6. The Perezs have failed to pay the note and interest thereon as provided by the terms of the note.
7. On January 05, 2009, duplicate letters entitled "Notice of Default and Intent to Accelerate" were mailed to the Perezs individually from Litton Loan Servicing on behalf of Fieldstone. The letters were sent via certified mail to the Perezs at PO Box 247, Crawfordsville, IA 52621. They stated that that the mortgage is "in default" and that: "If you have not cured the default within forty five (45) days of this notice, Litton will accelerate the maturity date of the Note and declare all outstanding amounts under the Note immediately due and payable. Your property that is collateral for the Note may then be scheduled for foreclosure in accordance with the terms of the Deed of Trust/Mortgage and the applicable state laws." The letters went on to state that, ""You have the right to reinstate your loan after acceleration and the right to bring a court action to claim that your loan is not in default or any other defense to acceleration and sale that you may have. This notice remains in effect until the default is cured."
8. On February 02, 2009 Fieldstone Mortgage Company assigned and sold to HSBC Bank USA, National Association, (hereinafter the Plaintiff) as Indenture Trustee of the Fieldstone Mortgage Investment Trust all of Fieldstone's rights, title, and interests in the Perezs mortgage. On April 24, that assignment was recorded in Washington County,

Iowa.

9. Litton Loan service continued to act as servicer for the note and mortgage on behalf HSBC Bank USA, National Association, As Indenture Trustee of the Fieldstone Mortgage Investment Trust.
10. In accordance with the terms of the note and mortgage, the Plaintiff declared the whole note due and payable. The Plaintiff also elected to enforce payment of the entire note as provided by the note and to foreclose the mortgage given to secure the same.
11. The unpaid balance due on the note after allowing all credits due the Perezs is the sum of \$77, 138.59, plus interest calculated through October 01, 2008 with interest equaling \$19.28 per day thereafter.
12. The Plaintiff claims that they have expended the sum of \$200.00 for a report of title, \$160.13 for late charges, and \$225.50 for corporate advances.
13. Under the terms of the note, in the event of a foreclosure, the Perezs agreed to pay all attorney fees associated with the foreclosure proceeding.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is proper only when the entire record demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007) (citing *Carr v. Bankers Trust Co.*, 546 N.W.2d 901, 903 (Iowa 1996)); I.C.A. Rule 1.981(3). An issue of fact is material to the case when a dispute exists over facts that may affect the outcome of the suit, given the applicable governing law. *Fees v. Mutual Fire & Auto. Ins. Co.*, 490 N.W.2d 55, 57 (Iowa 1992) (citing *Hike v.*

Hall, 427 N.W.2d 158, 159 (Iowa 1988)). The requirement that the issue be genuine “means the evidence is such that a reasonable jury could return a verdict” for the party resisting the motion. *Id.* (citing *Hike*, 427 N.W.2d at 159). In determining whether a motion for summary judgment should be granted, the court ““must determine whether any facts have been presented over which a reasonable difference of opinion could exist that would affect the outcome of the case.’” *Id.* (quoting *Behr v. Meredith Corp.*, 414 N.W.2d 339, 341 (Iowa 1987)).

The party requesting summary judgment bears the burden of proof. *Clinkscales v. Nelson Sec., Inc.*, 697 N.W.2d 836, 841 (Iowa 2005) (citing *Estate of Harris v. Papa John's Pizza*, 679 N.W.2d 673, 677 (Iowa 2004)). “A court entertaining a motion for summary judgment must view the evidence in the light most favorable to the nonmoving party.” *Id.* (citing *Harris*, 679 N.W.2d at 677). “Even if the facts are undisputed, summary judgment is not proper if reasonable minds could draw different inferences from them and thereby reach different conclusions.” *Id.* (citing *Walker Shoe Store, Inc. v. Howard's Hobby Shop*, 327 N.W.2d 725, 728 (Iowa 1982)).

The nonmoving party should be afforded every legitimate inference that can be reasonably deduced from the evidence. *Id.* (citing *Cent. Nat'l. Ins. Co. v. Ins. Co. of N. Am.*, 522 N.W.2d 39, 42 (Iowa 1994)). However, “[t]he resistance must set forth specific facts constituting competent evidence to support a prima facie claim.” *Hoefler v. Wisconsin Educ. Ass'n Ins. Trust*, 470 N.W.2d 336, 339 (Iowa 1991) (citing *Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 454 (Iowa 1989); *Prior v. Rathjen*, 199 N.W.2d 327, 330 (Iowa 1972)). Courts “indulge in every legitimate inference that the evidence will bear in an effort to ascertain the existence of a fact question.” *Coralville Hotel Assocs., L.C. v. City of Coralville*, 684 N.W.2d 245, 247-48 (Iowa 2004) (quoting *Crippen v. City of*

Cedar Rapids, 618 N.W.2d 562, 565 (Iowa 2000)).

“An inference is legitimate if it is ‘rational, reasonable, and otherwise permissible under the governing substantive law.’ On the other hand, an inference is not legitimate if it is ‘based upon speculation or conjecture.’” *McIlravy v. N. River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002) (citations omitted). The adverse party “may not rest upon the mere allegations or denials in the pleadings, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered.” I.C.A. Rule 1.981(5).

CONCLUSIONS OF LAW

After reviewing the party’s submissions, it appears that there are two primary issues before the Court: Whether Plaintiff has provided the Perezs with the appropriate notice and right to cure and whether Plaintiff has authority to hold, own and act on the defaulted mortgage in question. Because the Court finds there is a genuine material issue regarding whether the Plaintiff has authority to hold and act on the mortgage in question, Plaintiff’s Motion for Summary Judgment should be denied. Additionally, because there is at least one genuine issue of material fact present, the Court need not address the other issues presented by the Perezs.

I) Plaintiff’s Authority to Hold and Own the Mortgage and HSBC’s Right to Foreclose under the Mortgage

As the Perezs correctly state in their brief, “trustees may exercise only the power specifically conferred by the trust’s terms or necessary to carry out its purposes. *City of Dubuque v. Iowa Trust*, 519 N.W.2d 786, 789 (Iowa 1994) citing *Van Gorden v. Lunt*, 234 Iowa 832, 836,

13 N.W.2d 341, 344 (1944). The Perezs argue that the Polling and Servicing Agreement for Fieldstone Mortgage Investment Trust Series 2005-2 governs when and how the Trustee in this case, HSBC Bank, the Plaintiff, may acquire notes and mortgages. Additionally, that agreement governs when and how a mortgage owned by the trust may be foreclosed upon. The Perezs further state that the agreement prohibits the acquisition of mortgages that are in default. It is undisputed that the agreement to transfer interest in the mortgage at issue in the present case, after the Perezs defaulted. The Plaintiff has submitted documentation that portends that the Perezs were given notice of default on January 05, 2009. The Plaintiff has also submitted documentation that shows the transfer of interest in the mortgage from Fieldstone to HSBC occurred on February 05, 2009. Clearly, based upon the Plaintiff's own documentation, the default occurred prior to the transfer.

According to the Transfer and Servicing Agreement submitted by the Perezs, and allegedly applicable to the Plaintiff, the trust servicer is only allowed to "substitute a defaulted Mortgage Loan with a Qualifying Substitute Mortgage Loan." That same document goes on to say that "in the case of a Mortgage Loan substituted for a Deleted Mortgage Loan pursuant to the terms of this Agreement, a Mortgage Loan that, on the date of such substitution...is current, as of the date of substitution." This document seems to state that the mortgage at issue could only be transferred if it were current on the date it was transferred. Accordingly, it appears that this mortgage was inappropriately transferred to the Plaintiff as it was in default at the time of transfer. As such, a question is raised regarding whether the present Plaintiff has standing to bring this foreclosure action.

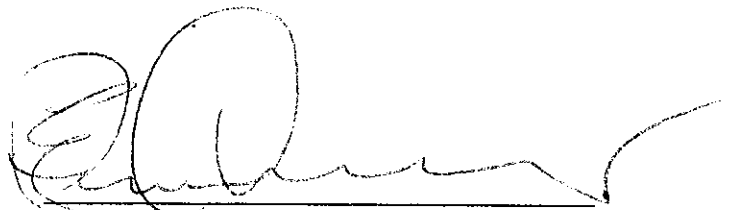
As noted above, on a Motion for Summary Judgment, the moving party carries the burden of proof to show that there is no genuine issue material to the outcome of the case. The Plaintiff did not meet that high burden. The Plaintiff has failed to rebut the arguments presented by the Perezs, much less prove that there is no issue upon which this matter can proceed. Accordingly, there is a genuine issue for trial as to whether the Plaintiff has the right, authority, and standing to bring the present foreclosure action against the Perezs.

Additionally, it should be noted the Plaintiff requested that the Court extend the deadline for submissions so that the Plaintiff had an opportunity to supplement their reply to the Perezs' resistance. The Court gave the Plaintiff until October 09, 2009 to file an additional supplemental reply on this matter, but the Plaintiff failed to do so. (Nor did the Plaintiff request or apply for any further extension of time on or after October 09, 2009.)

ORDER

FOR THE REASONS SET OUT ABOVE THE COURT ENTERS THE FOLLOWING: The Plaintiff's Motion for Summary Judgment is denied.

Dated: December 17, 2009.



E. RICHARD MEADOWS, JR.
JUDGE, EIGHTH JUDICIAL DISTRICT

CERTIFICATE OF SERVICE: The undersigned certifies that the foregoing instrument was served upon all parties by U.S. mail or hand delivered (unless otherwise noted). Dated: 12-21-09

~~Michael C. Vance~~ Laughlin ✓
~~Ted J. Wallace~~
~~Robert A. Engberg~~ Pierce ✓
~~Court Administration~~ Perez
Signed: BL
Clerk/Designee