

DEUTSCHE BANK NATIONAL TRUST COMPANY v. PATRICIA E. TURK, et al

No. 2017-SU-002616

Preliminary Objections – Mortgage Foreclosure - *Res Judicata*

1. Defendants filed timely preliminary objections on the theory of *res judicata*.
2. The Court dismissed the preliminary objections, finding that, in the absence of controlling precedent, and in the spirit of the equitable approach of the Florida decisions as described in Malenfant, this Court will decline to award “Free Houses.”

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

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| DEUTSCHE BANK NATIONAL TRUST COMPANY | : | No. 2017-SU-002616 |
| | : | |
| Plaintiff | : | |
| | : | |
| v. | : | |
| | : | |
| PATRICIA E. TURK, et al | : | CIVIL ACTION - LAW |
| | : | |
| Defendants | : | |

For the Plaintiff: Brandon R. Gamble, Esquire

For the Defendant: John N. Elliot, Esquire

ORDER DENYING DEFENDANT’S PRELIMINARY OBJECTIONS

AND NOW this 7th day of February 2018, upon consideration of Defendants Patricia E Turk et al.’s Preliminary Objections to Complaint in Mortgage Foreclosure and Brief in Support thereof, and Plaintiff Deutsche Bank National Trust Company’s Brief in Opposition thereto, and Defendants’

Reply Brief in Support thereof, and after hearing oral arguments from the Parties, the Court hereby **DENIES** Defendants Patricia E. Turk et al.'s Preliminary Objections.

The Prothonotary shall provide Notice of the entry of this Order as required by law.

BY THE COURT:

N. Christopher Menges, Judge

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

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| DEUTSCHE BANK NATIONAL TRUST COMPANY | : | No. 2017-SU-002616 |
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| Plaintiff | : | |
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| PATRICIA E. TURK, et al | : | CIVIL ACTION - LAW |
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| Defendants | : | |

For the Plaintiff: Brandon R. Gamble, Esquire
For the Defendant: John N. Elliot, Esquire

MEMORANDUM OPINION AND ORDER

Before the Court for disposition are Defendants Patricia E. Turk, et al.’s Preliminary Objections to Plaintiff Deutsche Bank National Trust Company’s (DBNTC) Complaint in Mortgage Foreclosure. The Objections seek to dismiss the complaint on the grounds of *res judicata*. For the reasons discussed below, Defendants’ Preliminary Objections are hereby denied.

BACKGROUND

Defendant Patricia Turk executed a mortgage on the property located at 3765 Compton Lane, York PA 17402, on December 13, 2006, along with the now deceased Larry I. Turk. Patricia is also the Administratrix of Larry’s estate. Plaintiff DBNTC originally filed a suit in Mortgage Foreclosure against the Defendants on December 24, 2008, in the York

County Court of Common Pleas. Plaintiffs alleged that that the mortgage in question entered into default for lack of payment April 1, 2008. The 2008 Complaint is docketed at 2008-SU-006282-06. Defendants offered no proof that mortgage payments had been made, nor that the mortgage ought not to be in default. The Turks, in their Requests for Admissions, admitted not paying on the Note after April 2008. The Turks only defense was that DBNTC lacked standing to foreclose.

Ultimately, after hearing testimony, the trial judge found in the Turks' favor. After appeal the trial court stated in its remand opinion:

Essentially, the bottom line is [sic] reviewing all the evidence, I cannot conclude Plaintiff has established either ownership of the note or its entitlement to enforce the note while holding an assignment of the mortgage. As confirmed by the Superior Court, in order to be the real party in interest in a mortgage foreclosure action, Plaintiff must own both the note and the mortgage. *US Bank NA v. Mallory*, 982, A.2d 986 994 (*Pa Super.* 2009). *Deutsche Bank National Trust Company v. Larry Turk, et al.* (Ct. Com. Pl 2011).

Thus, because DBNTC did not hold both the mortgage and the note, the trial court affirmed its finding for the defendant. Now, the Turks would like to invoke the doctrine of *res judicata* to prevent, as they say in their Brief in Support of Preliminary Objections, DBNTC having a "second bite at the apple."

DISCUSSION

"Preliminary objections, the end result of which would be dismissal of a cause of action, should be sustained only in cases that are clear and free from doubt." *Bourke v. Kazaras*, 746 A.2d

642, 643 (Pa.Super. 2000) (citing *Bower v. Bower*, 611 A.2d 181, 182 (Pa. 1992)). The Defendants' Preliminary Objections currently before the Court would indeed end in dismissal of the cause of action, but they are not clear and free from doubt. As stated, the Turks would argue that the doctrine of *res judicata* prevents DBNTC from ever bringing suit to foreclose on the property in question. As they point out in their Brief in Support of Preliminary Objections, *res judicata* applies where an earlier and present case share four common elements 1) the thing sued upon; 2) the cause of action 3) identity of the parties to the action and 4) the identity of the capacity of the parties suing or being sued. Defs.' Br. Supp. Prelim Objections at 3, Deutsche Bank National Trust Company v. Patricia E. Turk et al. No. 2017-SU-002616 (Ct. Com. Pl. 2017). Here, the first three elements may be met, but the Defendants fail to recognize that the identity of the capacity of the parties has indeed changed. As the trial judge in the original recognized, DBNTC did not, at that time have the right to sue. The Plaintiffs allege in their Brief in Opposition that a Corrective Assignment of Mortgage was recorded, following the close of the record in the first action, on November 1, 2011. Br. of Pl. in Opp'n Prelim. Objections of Defs. At 2, Deutsche Bank National Trust Company v. Patricia E. Turk et al. No. 2017-SU-002616 (Ct. Com. Pl. 2017). Taking that statement as true, it would seem that the Plaintiff's capacity has indeed changed. Thus the fourth element fails, and the doctrine of *res judicata* is not a bar.

Also in their brief, the Defendants quote *Chada*: "The essential inquiry is whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties had an opportunity to appear and assert their rights." Chada v. Chada, 756 A.2d 39, 42 (Pa Super, 2000) quoted in Defs.' Br. Supp. Prelim Objections at 3, Deutsche Bank National Trust Company v. Patricia E. Turk et al. No. 2017-SU-002616 (Ct. Com. Pl. 2017). The Court is not convinced that the "ultimate and controlling issues have been decided in a prior proceeding." Indeed, the only thing that

seems to have been settled in the prior proceeding is that DBNTC did not hold both the note and the mortgage.

As both parties seem to recognize, the concept of *res judicata* as applied to mortgage foreclosures is not a well-settled area of law in this jurisdiction. Appropriately, both parties then cite *Hoffman v. Wells Fargo Bank, NA*, which discusses three alternative approaches taken by sister states in considering the application of *res judicata* to mortgage foreclosures. *Hoffman v. Wells Fargo Bank, NA*, 031717 PAEDC, C.A. 16-4230 (U.S. Dist. E.D. PA. 2017) quoted in Defs' Br. in Supp. at 5. Naturally, the Parties offer opposing views of which, if any, of the competing approaches ought to be adopted. On one end of the spectrum, and most favorable to Defendants, is the approach adopted by Ohio and Maine. In Ohio, the Supreme Court has acknowledged that generally, each missed payment due under a contract gives rise to a separate cause of action, but recognized an exception for suits brought under the acceleration clause of a contract, whether due to nonpayment or not. *Censlar FSB v. Malenfant*, 151 A.3d 778, 787 (Vt. 2016). Maine has been equally harsh, stating that a case dismissed with prejudice in favor of the borrower invalidates the attempted acceleration as though the case had been decided on the merits, and precludes future attempts by the lender to collect. *Id.* At 788. Thus, in Maine and Ohio, a strict interpretation of *res judicata* is applied to foreclosure cases.

On the opposite end of the spectrum, and most favorable to Plaintiff, is the approach taken by Florida courts. There, the Supreme Court recognized the unique problem that arises from imposing *res judicata* upon mortgage foreclosures, and allowed a plaintiff's action to collect for ongoing nonpayment following an unsuccessful attempt to foreclose:

This seeming variance from the traditional law of *res judicata* rests upon a recognition of the unique nature of the mortgage obligation and the continuing obligations of the parties in that relationship. For example, we can envision many instances in which the application of the [contrary view] would result in unjust enrichment or other inequitable results. If *res judicata* prevented a mortgagee from acting on a subsequent default even after an earlier claimed

default could not be established, the mortgagor would have no incentive to make future timely payments on the note.

Singleton v. Greymar Assocs., 882 So.2d 1004 (Fla. 2004) quoted in Malenfant, 151 A.3d at

787. The concern is clear: that a borrower who continues to default or subsequently defaults following an unsuccessful attempt by a lender to foreclose is awarded a free house. Vermont carved out a middle path, allowing a lender to bring suit to recover real estate taxes which lender paid in order to protect its interest in the property. Malenfant, 151 A.3d at 792. The Malenfant Court, however, specifically pointed out that this path was not an equitable approach, but was based on specific provisions in the contract's acceleration clause.Id. at 792

Defendants offer the Malenfant dissent, which cites extensively from a Yale Law Journal comment tiled *In Defense of "Free House,"* in support of their *res judicata* argument. Defs.' Br. in Supp. at 6. The segment of the article sampled seems to be more concerned with punishing lazy lawyers and lenders, than in justly and equitably settling the dispute between lender and borrower.

In short, this Court is persuaded by Plaintiff's argument that the Hoffman Court was rightly persuaded by the Dimou and Milligan decisions, which approvingly cite the Florida approach taken in Singleton, discussed above, despite their non-precedential status. Mortg. Elec. Registration Sys., Inc v. Dimou, No. 911 EDA 2013, 2014 WL 10965798 (Pa. Super Ct. Apr. 28, 2014), Fairbank's Capital Corp. v. Milligan, 234 FedAppx. 21 (3d Cir. 2007). Accordingly, in the absence of controlling precedent, and in the spirit of the equitable approach of the Florida decisions as described in Malenfant, this Court will decline to award "Free Houses." The Preliminary Objections are hereby denied.

BY THE COURT:

N. Christopher Menges, Judge

