

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

U.S. BANK NATIONAL)
ASSOCIATION F/K/A FIRST)
BANK NATIONAL ASSOCIATION)
TRUST U/A DATED 6/9/98,)
ASSIGNEE OF EQUICREDIT)
CORPORATION OF DE,)
Plaintiff,)

v.)

LEISA J. JOHNSON and)
ROBERT L. JOHNSON,)
Defendants,)

LA MAR GUNN,)
Intervenor.)

C.A. No.: 02L-07-075 FSS
No. 102, 2009

Submitted: February 19, 2010
Decided: February 25, 2010

Order On Remand – *CASE RETURNED*

SILVERMAN, J.

Intervenor, La Mar Gunn, appealed the denial of his motion to set aside sheriff's sale, and on December 1, 2009, the Supreme Court remanded the case to allow Gunn to conduct discovery on the "contested issue," which the Supreme Court characterizes as "the validity of the Assignment [from EquiCredit Corporation to U.S. Bank] and U.S. Bank's status as a real party in interest."¹ The Supreme Court has retained jurisdiction.

I.

On November 21, 1997, Defendants, Leisa J. Johnson and Robert L. Johnson, obtained a note for \$235,000.00 from EquiCredit Corporation of DE, secured by a mortgage on Defendants' property at 201 Cornwall Drive, Bear, Delaware. The mortgage was recorded on December 3, 1997. On April 22, 1998, Defendants obtained a note from Colonial Mortgage Group, LLC, secured by a mortgage on the same property. According to Gunn, this second mortgage was recorded and later assigned to Master Financial, Inc.

In May 2001, Defendants defaulted. Over a year later, on July 19, 2002, U.S. Bank foreclosed, and on August 29, 2002, the court entered default judgment against Defendants for \$299,354.72. That was over seven years ago.

¹*Gunn v. U.S. Nat'l Bank Ass'n*, No. 102, 2009, at 7 (Del. Dec. 1, 2009) (ORDER).

According to the parties, on September 30, 2002, EquiCredit assigned its interest in the mortgage to a securitization trust, with U.S. Bank acting as trustee. On June 30, 2003, U.S. Bank requested a writ of *levari facias* to satisfy the default judgment. Defendants, in turn, filed for bankruptcy under Chapter 13 of the Bankruptcy Code on August 11, 2003, which stayed the sheriff's sale.

Knowing the loan was in default and in foreclosure, Gunn purchased the April 1998 mortgage in November 2003. On December 16, 2003, Gunn purchased Defendants' property by quitclaim deed, which he recorded on March 4, 2004. Gunn allegedly spent over \$200,000 to improve the property.

In February 2004, the bankruptcy petition was dismissed, and U.S. Bank requested a second writ of *levari facias*. The sheriff's sale was stayed when Defendants again filed for bankruptcy under Chapter 7 of the Bankruptcy Code in June 2004.

The Bankruptcy Court for the District of Delaware subsequently lifted the stay on the sheriff's sale, and on October 5, 2004, U.S. Bank requested a first pluries writ of *levari facias*. On November 9, 2004, Gunn claimed ownership of the property and filed a motion to stay the sheriff's sale. Gunn claimed that the assignment from EquiCredit to U.S. Bank was never recorded. The sheriff's sale was

stayed on December 14, 2004, and on December 30, the assignment from EquiCredit to U.S. Bank was recorded.

On November 17, 2006, U.S. Bank filed a second pluries writ of *levari facias*. In response, Gunn filed a second motion to stay the sheriff's sale. On January 5, 2007, oral argument was held, and Gunn requested a stay of the sale "so we can make an attempt to resolve it." Plaintiff's counsel agreed that a temporary stay of the sale would allow "Mr. Gunn to do what he needs to do to try to get the property from under this particular mortgage, whether it's by making a title claim or by refinancing or whatever it is that he wants to do." Accordingly, the court ordered the sheriff's sale stayed until April 6, 2007, and the stay would "automatically expire[] as of that date unless some further action [was] taken."

On May 4, 2007, U.S. Bank filed a third pluries writ of *levari facias*. Gunn filed a third motion to stay the sheriff's sale, as well as a motion to vacate the default judgment and to intervene. The court denied Gunn's motion on July 6, 2007, but the sheriff's sale was temporarily stayed while the parties unsuccessfully tried to settle.

On July 7, 2008, U.S. Bank filed a fourth pluries writ of *levari facias*, but the sale was stayed on September 9, 2008, at U.S. Bank's request. U.S. Bank

filed a fifth pluries writ of *levari facias* on October 7, 2008, and Gunn filed another motion to stay the sheriff's sale. Declining to enter an eighth stay, the court denied Gunn's motion, and the sale proceeded on December 9, 2008.

II.

On January 8, 2009, Gunn filed a motion to set aside the sheriff's sale and his second motion to intervene. The court allowed Gunn to intervene, but denied the motion to set aside the sale, explaining:

[There were] several attempts by U.S. Bank to sell the property . . . [but movant had a] history of waiting until the eve of sale in order to raise a series of objections to the sale which have evolved over time. . . . [M]ovant . . . has had more than enough time to get to the bottom of any concerns he has about the default judgment that was in place when he appeared, the first mortgage that was of record when he appeared, and the question of whether the plaintiff on the foreclosure was the correct party all along, and all the other issues that the movant has thrown up over the years. At the very latest, the questions that we're considering now should have been presented to the court after [Gunn's counsel] promised the court that the movant would do that.

The court further held:

[T]aking the history of this litigation into account generally and the specific issues that have been raised, in particular, the question as to whether U.S. Bank is the appropriate plaintiff here in the sale – the court is satisfied that the movant is estopped from challenging U.S. Bank's bona fides as assignee for the first mortgage holder.

In summary, the court's allowing Gunn to intervene merely reflected the fact that Gunn owned the property and the court had granted several stays at Gunn's behest. Thus, Gunn's intervention seemed a formality.

In considering Gunn's post-sale request for discovery (and further delay), however, the court took Gunn's pre-sale, foot-dragging into account. Hence, the court applied estoppel against Gunn's post-sale discovery request. In hindsight, instead of invoking estoppel, the court should simply have denied Gunn's motion to intervene as untimely.

Gunn timely appealed the decision, and the Supreme Court held that having granted intervention, the court "should have stayed the sheriff's sale [for the eighth time] to allow Gunn to conduct discovery on the contested issue."² The Court specifically referred to Gunn's January 5, 2009, post-sale request to depose U.S. Bank.

III.

On remand, Gunn did not depose U.S. Bank, despite the Supreme Court's having granted his request to do so. Instead, on January 22, 2010, Gunn submitted amended supplemental answers to interrogatories from the related case, *Gunn v. Select Portfolio Servicing, Inc.*, C.A. 09C-04-102 FSS, dated November 23,

²*Id.* at 9.

2009, as well as four documents unrelated to the “contested issue.” In his supplemental filing, Gunn refers to specific interrogatories, but appears to focus too narrowly on the answers provided by U.S. Bank, which do not undermine U.S. Bank’s legitimate role as Plaintiff. The parties also rely on their Supreme Court briefs.

U.S. Bank responded on January 29, 2010, stating that “Intervenor failed to serve additional discovery requests,” and that “U.S. Bank is the proper party in the interest herein.” U.S. Bank further objected to Gunn’s supplementing the record with discovery regarding an argument “which is not the subject of the Supreme Court’s remand.” U.S. Bank also submitted four exhibits, to which Gunn objected on February 16, 2010. The court has not considered the materials to which Gunn objects, so it is not an issue here.

IV.

It still appears that U.S. Bank is assignee to the EquiCredit mortgage. EquiCredit assigned its interest in the mortgage to a securitization trust, “Trust U/A dated 6/9/98,” for which U.S. Bank acts as trustee. It appears that the mortgage was assigned to U.S. Bank on September 30, 2002, and it is undisputed that the assignment from EquiCredit to U.S. Bank was properly recorded, albeit after-the-fact, in December 2004.

Thus, it continues to appear to this court that although Gunn may not have known about the assignment when he took from Defendants, he knew he was buying a property with a first mortgage. (He also had actual notice that the note and mortgage were in serious default.) It also appears that this mortgage has been in default since May 2001, and no one else has stepped forward to collect.

It further appears that the delay in filing the assignment has been legally insignificant since December 30, 2004. Moreover, the record continues to support the finding that Gunn failed to assert his position for years, even after promising the court that he would act. Meanwhile, the December 9, 2008 sale came after seven foiled attempts by U.S. Bank and seven and a half years after the secured loan went into default.

Finally, this court sees nothing in the papers submitted on remand that dispels the belief that Gunn is not proceeding in good faith. Rather, he seems to be using the courts to maneuver for advantage.³ If Gunn had taken the opportunity before the sale to present the materials he has presented now, the sale would have happened and it would have been confirmed, in due course.

³At oral argument concerning a procedural matter on February 5, 2010, the court learned that Gunn, *pro se*, filed an action in the Court of Common Pleas to knock out a Wachovia loan. That action has been removed by the lender to the District Court. Thus, the combined effect of Gunn's proceedings is to acquire the property free and clear of all mortgages.

V.

The Prothonotary **SHALL** return the case to the Supreme Court of Delaware forthwith.

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary (civil)
Douglas A. Shachtman, Esquire
Margaret F. England, Esquire