

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

CHERYL G. WILSON,)
)
Plaintiff,)
)
v.) C.A. No. 03C-06-012 MMJ
)
BANKERS TRUST COMPANY OF)
CALIFORNIA, N.A., and WILSHIRE)
CREDIT CORPORATION,)
)
Defendants.)

ORDER

Submitted: December 20, 2004

Decided: January 5, 2005

Upon Defendants' Motion for Summary Judgment with Respect to Plaintiff's Complaint

DENIED

1. On October 28, 2002, Bankers Trust Company of California, N.A. ("Bankers Trust") filed a foreclosure action against Cheryl G. Wilson ("Wilson"), Sandra L. Burgoyne, Robert M. Burgoyne and the United States of America. Bankers Trust claims that in accordance with the express terms of the Mortgage, Bankers Trust has the right to foreclose upon 525 Cherry Street, New Castle, DE 19720 ("Property") in the event of a default under the Note or Mortgage. Bankers

Trust argues that the defendants in the foreclosure action have committed a material default in connection with the Note and Mortgage by failing to make regular payments in accordance with the express terms of the Note and Mortgage for well over a year. Bankers Trust claims that the express terms of the Note and Mortgage permit Bankers Trust to declare the entire outstanding balance of the Note and Mortgage due and payable. The foreclosure defendants claim that summary judgment cannot be granted because payments have been made. Payment is a valid defense to a foreclosure action.¹

2. Wilson does not dispute that she was in arrears on payments. However, Wilson asserts that Bankers Trust entered into a forbearance agreement with Wilson. Wilson attempted to make all payments under the forbearance agreement. The final payment to Bankers Trust was wrongfully rejected. Subsequently, Wilson attempted on several occasions to make payments that Bankers Trust wrongfully rejected. Wilson argues that Bankers Trust cannot wrongfully reject a payment and then use that fact as a basis to proceed with foreclosure.

3. On June 3, 2003, Wilson filed the instant action, a Complaint for Declaratory Judgment against Bankers Trust Company of California, N.A. and

¹See *Gordy v. Preform Building Components, Inc.*, 310 A.2d 893, 895 (Del. 1973).

Wilshire Credit Corporation (collectively “Defendants”).² The Complaint alleges that Defendants failed to comply with the forbearance agreement. The counts include breach of contract, fraud, declaratory judgment, violations of the Fair Debt Collection Practices Act, negligent infliction of emotional distress, and libel.

4. On August 25, 2004, Defendants filed a Motion for Summary Judgment. In response, Wilson claims that Defendants have: (a) refused to explain any of their defenses and denials in answer to the Complaint; (b) refused to provide information about the procedures, training and experience of Bankers Trust and Wilshire Credit in handling foreclosure matters; and (c) refused to provide copies of their files indicating the correspondence and dealings they had with Wilson. In addition, Wilson asserts that the claims under the Fair Debt Collection Practices Act should remain because Bankers Trust and Wilshire Credit have continued to breach their agreements to Wilson up to and through the time of the filing of the complaint.

5. Summary judgment is appropriate when the moving party has shown that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.³ In considering such a motion, the Court

²*Wilson v. Bankers Trust Co.*, C.A. No. 03C-06-012 MMJ.

³*Moore v. Sizemore*, 405 A.2d 679, 680-81 (Del. 1979).

must evaluate the facts in the light most favorable to the non-moving party.⁴

Summary judgment will not be granted under circumstances where the record reasonably indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.⁵

6. After consideration of the written submissions and oral argument of counsel, the Court finds that there remain genuine issues of material fact including: (a) the parties' understanding upon entering into the forbearance agreement; (b) how payments made pursuant to the forbearance agreement were to be allocated; (c) whether taxes or other payments generally placed in escrow by a lender were to be paid by the lender or by the borrower; (d) whether the intention of the forbearance agreement was to bring the loan current as of the time of the final payment; and (e) whether the course of dealing between the parties constituted consistent waiver of late payments.

THEREFORE, Defendants' Motion for Summary Judgment with Respect to Bankers Trust 's Complaint is hereby **DENIED**. The parties shall continue with

⁴*Id.*

⁵*Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

discovery immediately and in an expeditious manner. A teleconference will be scheduled for the purpose of entering a revised case scheduling order. The trial presently scheduled to begin January 10, 2005 will be continued.

IT IS SO ORDERED.

The Honorable Mary M. Johnston

cc: Prothonotary - Civil Division