

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

WILLIAMSPORT NATION BANK	: No. 00-00426
	:
Plaintiff	:
	:
vs	: CIVIL ACTION - LAW
	:
FRED L. HAMILTON, II	:
Defendant	:

**OPINION IN SUPPORT OF ORDER IN
COMPLIANCE WITH RULE 1925(a) OF
THE RULES OF APPELLATE PROCEDURE**

This Opinion is written in support of this Court’s Verdict of March 14, 2001, which was rendered after a non-jury trial held on March 13, 2001.

This is a mortgage foreclosure action instituted by the plaintiff Williamsport National Bank (hereinafter “Bank”) against defendant Fred L. Hamilton, II, (hereinafter “Hamilton”) for foreclosure under a mortgage dated February 25, 1999 on certain real estate situate in Moreland Township, Lycoming County Pennsylvania. The mortgage secures the indebtedness of Hamilton under a promissory note to the Bank dated February 25, 1998 in the principal amount of \$140,000 payable with interest at an adjustable rate over a term of twenty (20) years in consecutive payments beginning April 2, 1999 and on the same day of each month thereafter.

The Complaint was filed in March 2000. Hamilton filed an answer on September 29, 2000 through his attorney, Ralph W. Thorne, esquire. A pre-trial conference on the case was held before the Honorable William S. Kieser on February 1, 2001 where Hamilton was represented by Attorney Ralph W. Thorne. Following the

conference, Judge Kieser entered an Order dated February 6, 2001. Judge Kieser noted the following stipulations were reached by the parties at the pre-trial conference:

As to the execution and validity of the Note and Mortgage and recording of the Mortgage.

As to the balance due for principal, interest, late charges, and credit insurance premiums, including daily and monthly accruals.

That the Defendant defaulted under the Note and Mortgage as of October 2, 2000 and that the default has not been cured.

That notice was given in accordance with Pennsylvania law, i.e., Act 160 of 1998.

In Judge Kieser's Order he noted that trial would be before the undersigned during the March 12-30, 2002 civil trial term. Under "Miscellaneous Trial Matters", Judge Kieser also noted that Attorney Frank McNaughton (Hamilton's present counsel) was expected to file a separate lawsuit against the Bank alleging mismanagement of the construction loan. Judge Kieser's Order then specifically stated:

It does not appear at this time that such action is a defense to the foreclosure nor does it appear that it should be litigated in the same proceeding. That action has not yet been filed.¹

Subsequent to the pre-trial conference, Attorney Thorne withdrew his appearance in this case and Attorney Frank J. McNaughton, Jr. entered his appearance for Hamilton. This occurred on February 5, 2001. On February 5, 2001, Attorney McNaughton filed an answer, new Matter and counterclaim. In this untimely

¹In Section H of his Order, Judge Kieser noted the defense asserted by the defendant was that "following bankruptcy the mortgage foreclosure action could not proceed once the stay was lifted but rather a new mortgage foreclosure action was required."

pleading which was filed without consent of the plaintiff or leave of court, Attorney McNaughton attempted to join Laura Buries and Kathleen M. Stahl, employees of the Bank, as additional defendants. Attorney McNaughton also sought to assert an action against the Bank for alleged mismanagement of a construction loan, which Judge Kieser in his pre-trial conference Order noted would not be a defense to the mortgage foreclosure action and should not be litigated in the same proceeding. Undaunted by the Order and without leave of court, Attorney McNaughton still sought to add new defendants, a new defense to the action and a counterclaim, within weeks of the scheduled trial.

Predictably, the Bank filed preliminary objections to Attorney McNaughton's amended answer, new matter and counterclaim. Argument on these objections was heard by the Court on or about March 1, 2001. In its Order of March 9, 2001, the Court granted the Bank's Motion to Strike the Answer, New Matter and Counterclaim filed on February 5, 2001. Consistent with Judge Kieser's prior ruling, the Court found it was patently unfair to allow Hamilton to join new parties to the action and to change nature of his defense on the eve of trial. The Court also believed the counterclaim regarding the prior construction loan with the Bank should be filed in a separate action. See the Court's Order of March 9, 2001.

This case was called to trial before the Court four days later on March 13, 2001. At the beginning of trial the Court summarized its position on the counterclaim for purpose of the record. On March 14, 2001, Attorney McNaughton filed an appeal to the Pennsylvania Superior Court to the Order of March 9, 2001 and contended this appeal should stay the trial. The Court disagreed and felt the trial should proceed. See N.T., trial

pp. 3-7. The case proceeded to trial and the Court found in favor of the Bank. On or about March 26, 2001, Hamilton filed post trial motions, which were summarily denied on or about March 29, 2001. Hamilton then filed another appeal.

On or about April 19, 2001, the Court ordered Hamilton to file a concise statement of matters complained of on appeal. To date, no such statement has been filed.

Pennsylvania Rule of Appellate Procedure 1925(b) provides that the Court may enter an Order directing the appellant to file a concise statement of matters complained of on appeal. The Rule further provides that a failure to comply with such direction may be considered by the appellate court as a waiver of all objections to the order, ruling or other matter complained of. Pursuant to this Rule, in order to preserve their claims for appellate review, appellants must comply whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to Rule 1925. Any issues not raised in a 1925(b) statement will be deemed waived. Commonwealth v. Lord, 719 A.2d 306 (Pa. 1998). As the Court's Order directing that a statement of matters complained of on appeal has not been complied with, this Court would find that the issues should be deemed waived.

In the event the appellate courts would not find a waiver, the Court believes the issues raised by Hamilton are without merit. The issues raised by Hamilton revolve around the Court striking the defendant's answer, new matter and counterclaim filed on February 5, 2001 and precluding testimony on the matters raised therein. The Court believes the February 5, 2001 pleading was a nullity and therefore it was proper to strike the pleading and preclude testimony regarding the matters raised therein. The rationale

for the Court's decision is as follows.

On September 29, 2000, Attorney Thorne filed a pleading on behalf of the defendant. Although not captioned as such, this pleading was treated by the parties and the court as an answer. See Pa.R.Civ.P. 1017(a). On February 5, 2001, Attorney McNaughton filed an answer, new matter and counterclaim. Since an answer had already been filed as of September 29, 2000, the filing of February 5 would necessarily be an amended pleading. In order to amend a pleading, the defendant must obtain the consent of the opposing party or leave of court. Pa.R.Civ.P. 1033; Catanese v. Taormina, 437 Pa. 519, 522-23, 263 A.2d 372, 374 (1970). The defendant did not obtain consent or leave of court to file his pleading on February 5, 2001. Therefore, that pleading is a nullity. Catanese, 437 Pa. at 523, 263 A.2d at 374.

Even when the Bank filed preliminary objections seeking to strike the answer, new matter and counterclaim, Hamilton did not file a motion or petition to seek leave of court to file an amended pleading. The Court is not required to sua sponte order or require a party to amend his pleading. Werner v. Zazyczny, 545 Pa. 570, 681 A.2d 1331, 1338 (1996). Therefore, the Court properly struck the answer, new matter and counterclaim filed on February 5, 2001 as it was a nullity. Moreover, the Court did not err in failing to allow Hamilton to amend his pleading as he never made such a request.

Even if Hamilton had requested leave to amend, the counterclaim asserted is not permissible in a mortgage foreclosure action. Rule 1148 of the Pennsylvania Rules of Civil Procedure, which permits pleading a counterclaim in an action of mortgage foreclosure, authorizes only those counterclaims arising from the same transaction from

which the plaintiff's cause of action arose. Pa.R.Civ.P. 1148. This rule must be interpreted narrowly. Cunningham v. McWilliams, 714 A.2d 1054, 1057 (Pa.Super. 1998), appeal denied, 557 Pa. 653, 734 A.2d 861; Federal Land Bank of Baltimore v. Fetner, 269 Pa.Super. 455, 410 A.2d 344 (1979), cert. denied, 446 U.S. 918, 100 S.Ct. 1853, 64 L.Ed.2d 273. Thus, only those counterclaims that are part of or incident to the creation of the mortgage relationship itself are permitted. Cunningham, supra; Chrysler First Business Credit v. Gourniak, 411 Pa.Super. 259, 264-66, 601 A.2d 338, 341 (1992). Hamilton's counterclaim did not arise out of the 1999 mortgage relationship with the Bank, but out of a previous loan from 1997. Therefore, the counterclaim was not permissible in this mortgage foreclosure action.

Hamilton's defenses and new matter were nothing more than restatements or continuations of their counterclaim. To allow Hamilton to bring such defenses would circumvent Rule 1148. Therefore, the Court properly precluded the answer, new matter and counterclaim and any testimony pertaining thereto. See Chrysler First Business Credit v. Gourniak, 411 Pa.Super. at 267, 601 A.2d at 342.

Finally, additional defendants Buries and Stahl were not properly joined as additional defendants under Rules 2251-2253 of the Rules of Civil Procedure. Pa.R.Civ.P. 2251-2253. Furthermore, the allegations in the counterclaim are insufficient to give rise to a cause of action against Buries and Stahl in their individual capacities.

DATED _____

By The Court,

Kenneth D. Brown, Judge

cc: Frank McNaughton, Esquire
David Lingenfelter, Esquire
Law Clerk
Work file
Gary Weber, Esquire (Lycoming Reporter)
Superior Court (original and 1)