

VERMONT SUPERIOR COURT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 288-6-11 Wrcv

BAC Home Loan Servicing, LP
Plaintiff

v.

Gary Collins
Judith Kimball
Defendant

DECISION ON MOTION FOR SUMMARY JUDGMENT

Plaintiff has moved for summary judgment against Defendant, Judith Kimball. Ms. Kimball opposes the motion. A hearing was held on the motion on January 2, 2013. Richard Volpe, Esq. represented the Plaintiff. Andrew Delany, Esq. represented Defendant, Judith Kimball, who was present. Defendant Gary Collins did not attend.

Undisputed Facts

Plaintiff holds a mortgage and note on property located at 154 Spooner Road in Pomfret, Vermont. Defendants are on the deed to the property and both signed the mortgage with Countrywide Home Loans, Inc. Also on the mortgage is Ray Kimball, Judith Kimball's husband, who, mysteriously, is not a party to the proceedings. Mr. and Mrs. Kimball live at the subject premises.

The note, which is secured by the mortgage, is signed only by Gary Collins. Plaintiff is not claiming Ms. Kimball has any financial obligation under the note. Ms. Kimball does not dispute that the note is in default, although she had apparently kept it current for several months or more after Gary Collins stopped making payments.

Ms. Kimball claims that she and her husband made many improvements to the subject premises totaling between \$40,000–\$50,000. Plaintiff has not contested this but claims whatever has been paid by way of improvements is not material to their right to foreclose on a defaulted note.

Gary Collins has not taken an active role in these proceedings. Mrs. Kimball has what purports to be a power of attorney from Mr. Collins which enables her to "act on [Collins'] behalf for all decisions for the property". The purported power of attorney does not give Mrs. Kimball the express power to sign any documents for Mr. Collins.

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Mrs. Kimball claims that Plaintiff did not “work with her” when she was trying to sell the house. She acknowledges that Gary Collins has taken minimal, if any, interest in getting the property sold. She claims the bank would not provide her with a loan balance, refused to recognize a power-of attorney, and refused to allow a sale of the subject premises. She further claims that her husband, Ray Kimball, should have been joined as a party to this action.¹

Procedural History

Plaintiff filed a motion for summary judgment on October 17, 2012. Defendant opposed the motion on November 16, 2012.

Standard of Review

The Court grants summary judgment if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” V.R.C.P. 56(c)(3). The Court makes all reasonable inferences and resolves all doubts in favor of the non-moving party. *Lamay v. State*, 2012 VT 49, ¶ 6. Nevertheless, the non-moving party cannot rely solely on the pleadings to rebut credible evidence. *Boulton v. CLD Consulting Eng’rs, Inc.*, 2003 VT 72, ¶ 5, 175 Vt. 413.

Discussion

The first issue in this case is whether Ray Kimball must be joined in this action for the Court to issue summary judgment. Defendants make two arguments to explain why Ray Kimball should be a party. First, Defendants note that Ray Kimball has a homestead interest in the property under 27 V.S.A. § 141. Second, Defendants argue Ray Kimball is a necessary party under V.R.C.P. 19(a). The Court will address each argument separately.

Section 141(a) of Title 27 provides that an interest in a homestead cannot be conveyed except by a purchase money mortgage unless both a husband and wife join “in the execution and acknowledgement of such conveyance.” In this case, both Ray and Judith Kimball signed the mortgage. Moreover, paragraph twenty-four of the mortgage “waives all rights of homestead exemption in the Property...” Thus, by the terms of both 27 V.S.A. § 141(a) and the mortgage document, Ray Kimball’s homestead interest in the property does not prevent this foreclosure action.

V.R.C.P. 19(a) requires joining a party where “complete relief cannot be accorded among those already” without the party, or where the judgment would “impair or impede the person’s ability to protect” a property interest. Apart from the homestead exemption listed above, Defendants do not explain what interest Ray Kimball has in the property. Although he signed the mortgage, he is not on the deed and did not sign the promissory note. Accordingly, he has no interest that a foreclosure will extinguish and is not a necessary party.²

¹ Mr. Kimball says (without explanation) that bank refused to allow them to sell the property (see affidavit of R. Kimball para. 9).

² Plaintiffs will likely have to join Ray Kimball in this suit or start a separate action to receive clear title on the property. Nevertheless, those considerations do not prevent foreclosure of Defendants’ interests.

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Next, Defendants argue the bank cannot foreclose because Judith Kimball is not personally liable on the promissory note. Although that statement is likely true, it does not prevent foreclosure. Judith Kimball's lack of personal liability on the promissory note would likely prevent Plaintiff from asserting a deficiency claim against her. In this case, however, Plaintiff only requests foreclosure of the property, not a deficiency judgment. Plaintiffs may proceed against the property.

Defendants argue the Court should refuse to allow foreclosure because of the equities of their situation. "Because foreclosure actions are by their nature equitable actions, it is proper for the court to weigh the equities of the circumstances in determining whether to grant foreclosure." *New England Educ. Training Serv., Inc. v. Silver St. P'Ship*, 156 Vt. 604, 612 (1991). The Court finds all of Defendants' equitable claims unavailing. Defendants may have had a difficult time trying to alter their obligations due to the structure of their commitments. Those difficulties, however, do not create grounds to prevent foreclosure. Instead, Judith Kimball should seek relief from her former husband, Gary Collins, to the extent permitted by the bankruptcy order.

On a related point, the Judith Kimball argues that she invested over \$40,000 into improving the property. She asserts that the Plaintiff's failure to work with her caused her to lose the value of these improvements. However, the root cause of Ms. Kimball's predicament is her ex-husband's failure to cooperate in selling the property as he assured her he would.

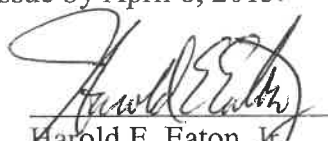
In an appropriate case, as a matter of equity, the Court would consider refusing to grant a deficiency judgment against a bank which had acted in bad faith. In this case, Plaintiff does not request a deficiency judgment against Judith Kimball, and there is no basis for one as she is not liable on the note. Similarly, Ms. Kimball is not entitled to any surplus proceeds, if there are any, from the sale. Simply stated, she is not financially obligated to the bank and not a person entitled to surplus proceeds upon sale. Further, the conduct of the Plaintiff, in this instance, even if proven is not such that the equities would prevent foreclosure. The Court sees no grounds to stop the foreclosure. Again, Judith Kimball's only remedy for the lost value in her home would be against Gary Collins, if permitted by the bankruptcy order.

The Court finds that there are no material disputed facts and Plaintiff is entitled to judgment as a matter of law.³ See V.R.C.P. 56(c)(3).

Order

The Court *grants* Plaintiff's motion for summary judgment. Plaintiff to submit affidavits and other documents necessary for clerk's accounting to issue by April 8, 2013.

Dated at Woodstock, Vermont on March 6, 2013.


Harold E. Eaton, Jr.
Superior Court Judge

³ Although unimportant to the outcome of this order, the Court notes it read the file while preparing for this order and discovered an email exchange between Attorney Delaney and Attorney Volpe that took place between May 22, 2012 and May 25, 2012. The tone of Attorney Delaney's emails adds nothing to his arguments.

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