

**IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY,
PENNSYLVANIA**

CIVIL DIVISION

PHH MORTGAGE CORPORATION,	:	
f/k/a CENDANT MORTGAGE	:	
CORPORATION,	:	
Plaintiff	:	
v.	:	C-0048-CV-2009-13890
	:	
PERMA J. MILLER,	:	
Defendant.	:	

ORDER OF COURT

AND NOW, this 16th day of June 2011, Defendant’s Motion to Set Aside Sheriff’s Foreclosure Sale is hereby **GRANTED**, as set forth more fully in the attached Statement of Reasons. Accordingly, all Sheriff’s Sale proceeds shall be reimbursed consistent with the Sheriff’s Schedule of Distribution.

STATEMENT OF REASONS

This matter commenced on December 11, 2009 when Plaintiff PHH Mortgage Corporation (“Plaintiff”) filed an action in mortgage foreclosure against Defendant Perma J. Miller in connection with a mortgage on a real property located at 1320 East Fifth Street in the City of Bethlehem, Pennsylvania. In accordance with Northampton County’s Mortgage Foreclosure Diversion Program, a stay was entered by the Honorable President Judge F.P. Kimberly McFadden upon the filing of the Complaint, and a conciliation conference was scheduled for March 12, 2010. At the time of the conciliation conference, the stay was extended for an additional sixty (60) days to enable the parties to settle the matter. On July 8, 2010, after the expiration of the sixty (60) day extension, Plaintiff filed a praecipe for the entry of an *in rem* judgment and the same was

entered by the Prothonotary in the amount of Ninety-Seven Thousand Ninety-Four Dollars and Nineteen Cents (\$97,094.19) representing the principal and interest due on the mortgage.

Thereafter, Plaintiff filed a Motion to Reassess Damages to account for additional fees and interest, and pursuant to an Order entered by the Honorable Michael J. Koury, the *in rem* judgment was adjusted to One Hundred Two Thousand Five Hundred Thirty-Three Dollars and Sixty-Seven Cents (\$102,533.67). Also subsequent to the entry of the initial *in rem* judgment, the property was listed for Sheriff's Sale. The sale occurred on November 5, 2010. On December 1, 2010, Defendant filed the present Motion to Set Aside Sheriff's Foreclosure Sale to which Plaintiff filed a response on December 22, 2010. On May 3, 2011, a praecipe was filed placing the matter on the Miscellaneous Hearing list of June 10, 2011, at which time it came before the undersigned for hearing. All evidence having been received, it is now ready for disposition.

Standard of Law

The Rules of Civil Procedure governing the setting aside a sheriff's sale provide that:

Upon petition of any party in interest before delivery of the personal property or of the sheriff's deed to real property, the court may, upon proper cause shown, set aside the sale and order a resale or enter any other order which may be just and proper under the circumstances.

PA. R.CIV.P. 3132.

A petition to set aside sheriff's sale is rooted in equitable principles and as such, the decision of whether or not to grant a petition rests within the sound discretion of the trial court. Bornman v. Gordon, 527 A.2d 109, 111 (Pa. Super. 1987). Where a petition is filed prior to the delivery of a Sheriff's deed, the petitioner bears the burden of

demonstrating proper cause to set aside the sale. Id. Proper cause is a judicial determination, but the petitioner must prove the material allegations of his or her petition by clear evidence. Id. In cases where a petition is filed subsequent to the delivery of a deed, the petitioner is limited to demonstrating that the Sheriff's sale was made without authority or otherwise fraudulent. Id.

Discussion

At hearing, Petitioner testified that she has resided at the mortgaged premises with her minor child for over ten years.¹ In that time, she has suffered serious health problems, and as a result, fallen behind on the mortgage more than once. Each time, her mortgage company has facilitated a loan modification, the most recent having occurred in 2009. Petitioner further testified that per the terms of the modification, her monthly mortgage payments were supposed to be withdrawn directly from her bank account. She did not receive a payment book. Given that she was in and out of the hospital due to health problems around the time of the modification, it took a few months before the Petitioner realized that her mortgage payments were not being deducted from her bank account per her understanding. Upon discovering the error, the Petitioner sent PHH an estimated payment by check. PHH did not accept the check, and it assessed late fees, thereby increasing the amount due. As a result, Petitioner was unable to make the required payment, and foreclosure proceedings were instituted. In the months that followed, the Petitioner sought the assistance of a community action group, and the consult of several attorneys relative to the foreclosure. Subsequently, the Petitioner received notice that her home would be sold at Sheriff's Sale.

¹ This opinion was written from the Court's own notes. As such, it is devoid of citation to the record made at hearing.

In response to the notice, Petitioner immediately contacted PHH and expressed her intention to make an Eight Thousand Dollar (\$8,000.00) mortgage payment and stop her home from going to Sheriff's Sale. On October 26, 2010, Petitioner spoke with a customer service representative who advised her to submit a loss mitigation package. She completed and returned the package, and followed up with phone calls to PHH on November 3rd, 4th and 5th. Per her testimony, Petitioner stated that in the course of that series of phone calls, she was given false assurances that the Sheriff's Sale had been postponed and that PPH would work with her to reinstate her mortgage. Those representations were corroborated by the testimony of Andrew Smith, who testified in his capacity as an employee of PHH, and the custodian of the records regarding Petitioner's account.

PHH records reflect the fact that Petitioner contacted customer service on October 26, 2010 seeking to make an Eight Thousand Dollar (\$8,000.00) payment to stop the Sheriff's Sale. She was faxed the loss mitigation package and told to call back five days before the sale date to put in a stop request. While she was given no assurances at that time, she was told that PPH would try to postpone the sale. Petitioner then called back on November 1, 2010 to check on the status of her loss mitigation package, at which time she was informed that it had been received. On November 3, 2010, Petitioner again called customer service and she was assured that a request to postpone the sale had been submitted. On November 4, Petitioner called and was advised that it looked as though the postponement had been approved but that their records did not yet reflect a change in the date of the sale. In the course of a second phone call on November 4, Petitioner was notified that a decision was still pending regarding her loss mitigation package and it

wasn't until November 5 that the Petitioner was apprised that the sale might not be postponed, but she was further assured that it might be stopped or rescinded upon the receipt of a payment in the amount of Eight Thousand Dollars (\$8,000.00).

The records further reflect the fact that the sale occurred on November 5, 2010. PHH was the buyer. On November 8, the Petitioner spoke with a loss mitigation counselor, who advised her that the sale could be rescinded upon the immediate payment of Eight Thousand Dollars (\$8,000.00) via Western Union. The Petitioner could not afford the fees charged by Western Union and the payment was not made.

In support of her petition, the Petitioner argues that the steps she took to prevent her home from going to Sheriff's Sale were directed by assurances from PHH representatives that the completion of a loss mitigation package would be satisfactory to postpone the sale. In reliance on these assurances, Petitioner contends that she opted to continue working with PHH in the days before the sale, thereby foregoing other avenues available to her, such as the filing of a bankruptcy proceeding to stop the sale, only to then lose her home. Accordingly, she argues that equity demands that the Sheriff's Sale be set aside.

In response, PHH contends Petitioner's failure to set forth proper cause in support of her petition, and argues the same is barred by the Statute of Frauds. As noted *supra*, the sufficiency of a petitioner's showing of proper cause is a matter of equity for the Court to decide. As to the contention that Petitioner's request for relief is barred by the Statute of Frauds ("SOF"), we begin by noting that per the SOF, all agreements relative to the ownership of real property must be in writing. 33 P.S. § 1. As Plaintiff notes, the

Courts have specifically applied the SOF to mortgages. Eastgate Enterprises, Inc. v. Bank & Trust Co. of Old York Road, 345 A.2d 279 (Pa. Super. 1975).

In Eastgate Enterprises, the Superior Court affirmed a trial court ruling sustaining preliminary objections to an action for costs and attorneys fees, on the basis of Appellant/Plaintiff's failure to state a cause of action. In so ruling, the Court found evidence of an alleged oral agreement between mortgagor and mortgagee to stop foreclosure and cancel the sale of the subject property barred by the SOF. Id. at 281. While holding that mortgages are subject to the SOF, the Court further noted that "[s]pecific evidence that would make rescission of an oral contract inequitable and unjust will take the contract out of the Statute of Frauds." Id. at 280 (internal citations omitted). Such is the case in this matter. Here, the evidence offered by both parties demonstrates that PHH made certain oral representations to Petitioner with regard to the subject mortgage, and she acted in reliance on the same.² Accordingly, the Court finds the SOF inapplicable to the present case and we move to the merits of the petition.

In determining whether the Petitioner has adduced sufficient evidence to demonstrate proper cause to set aside the Sheriff's Sale of the subject property, we note, in the first instance, the results of the Sheriff's Sale. Given that PHH purchased the property at a loss, the resolution of this petition does not bear on the property rights of a third party. With regard to the bases for the petition itself, we note, as set forth *supra*, the hearing testimony of both parties substantiating the fact that agents of PHH made oral representations to Petitioner regarding the status of pending sheriff's sale, and

² Additionally, we note that the Courts have specifically held that the Statute of Frauds is inapplicable to judicial property sales inclusive of sheriff's sales, which is precisely the nature of the matter before this Court. See Hankin v. Hankin, 420 A.2d 1090, 1107 (Pa. Super. Ct. 1980).

Petitioner's testimony that she acted in reliance thereupon. Upon consideration, the Court finds such evidence sufficient to warrant the requested relief.

BY THE COURT:

CRAIG A. DALLY, J.