

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

INDYMAC BANK, FSB	: AUGUST TERM, 2001
Plaintiff,	
	: No. 3200
v.	
	: (Commerce Program)
CARL C. BEY, and	
AMERICAN BUSINESS CREDIT, INC.	: Control No. 070452
Defendants.	

ORDER

AND NOW, this 12th day of September 2002, upon consideration of defendant American Business Credit, Inc.'s Preliminary Objections to the Amended Complaint, the plaintiff's response in opposition, the respective memoranda, all matters of record and in accord with the contemporaneous Opinion, it is **ORDERED** that:

1. Defendant's Objection seeking the dismissal of request for monetary relief in Count III is **Sustained**;
2. Defendant's remaining Objections are **Overruled**.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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OPINION

Albert W. Sheppard, Jr., J. September 12, 2002

Before the court are the preliminary objections (“Objections”) of defendant, American Business Credit, Inc. (“Defendant” or “ABC”), to the Amended Complaint of plaintiff, IndyMac Bank (“Plaintiff” or “IndyMac”). The Amended Complaint embodies claims against two defendants, Carl C. Bey (“Bey”) and ABC. Counts I and II are directed against Bey. Count III is directed against ABC. For the reasons discussed, this court is issuing a contemporaneous Order **overruling** the Objections, in part, and **sustaining** the Objections, in part.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff alleges that defendant Bey executed two mortgages to secure Bey's obligations under two corresponding notes in favor of IndyMac. Complaint, ¶¶ 4, 9. The first mortgage, executed on August 30, 2000, secured a loan in the amount of \$47,500, and granted IndyMac a lien on property situated on Limekiln Pike, Philadelphia (the "Limekiln Premises"). Complaint, ¶¶ 4-5. The second mortgage, executed on October 10, 2000, secured a loan in the amount of \$38,000, and granted IndyMac a lien on property situated on Cecil Street, Philadelphia (the "Cecil Premises"). Id., ¶¶ 9-10. IndyMac duly recorded the mortgage liens on both the Limekiln and Cecil Premises. Id., ¶¶ 6-7, 11-12.

On February 1, 2001, IndyMac received two letters from a third party transmitting utility which enclosed two money orders, each purportedly in full satisfaction individually of the two loans and mortgages on the Premises. Id., ¶¶ 14-15. The first money order purporting to satisfy the Limekiln note was in the amount of \$50,000, the second, for the Cecil note, was in the amount of \$39,000. Id. IndyMac forwarded both money orders to the United States Secretary of Transportation (the "USSOT"). Id., ¶ 16. Thereafter and as early as the first week in March, IndyMac executed and recorded releases of mortgages on both properties. Id., ¶¶ 17-18.

On August 13, 2001, the USSOT informed IndyMac that the money orders were fraudulent. Id., ¶ 19. IndyMac, therefore, never received payment on either money order. Id. Nonetheless, a title search conducted on July 26, 2001 revealed that Bey was the record owner of both premises and that neither mortgage remained of record. Id., ¶¶ 20-21. On September 5, 2001, IndyMac filed Lis Pendens with respect to both the Limekiln and Cecil Premises. Id., ¶ 22.

In the meantime, on August 29, 2001, Bey executed and delivered mortgages on the same properties, Limekiln and Cecil, to defendant ABC for loans of \$38,500 secured by the Limekiln Premises, and for \$28,000, secured by the Cecil Premises. Id., ¶¶ 23, 25. ABC recorded those mortgages on September 6, 2001, one day later than the Lis Pendens filed by IndyMac. Id., ¶¶ 24-26.

Plaintiff initially filed a complaint against Bey on August 29, 2001, unaware of the ABC mortgages. Id., ¶ 29. Upon learning of the ABC mortgages, on December 3, 2001, plaintiff moved to amend to add ABC as a defendant. Id. On May 2, 2002, the court granted that motion.

The Amended Complaint sets forth two counts against Bey requesting identical relief, with Count I relating to the Limekiln mortgage and Count II to the Cecil mortgage. In each count, plaintiff essentially seeks: (i) monetary relief (in Count I for \$50,000, in Count II for \$39,000), (ii) a declaration that the releases are null and void, (iii) to reinstate the mortgages, and (iv) to subordinate all other mortgages. In Count III against ABC, plaintiff seeks the same relief, requesting it in one count as to both the Limekiln and Cecil mortgages, and for monetary damages of \$89,000.

Defendant, ABC, raises five Objections to the Amended Complaint.

DISCUSSION

1. Improper Form of Cause of Action

Defendant argues that the Amended Complaint should be dismissed, without prejudice, because this action should have been brought either in equity or as an action to quiet title under Rule 1061(b)(3). Memorandum of Law in Support of Preliminary Objections (“Defendant’s Memorandum”), p. 2; Pa. R.C.P. 1061. Plaintiff responds that where plaintiff is not in possession of the property, it may not maintain an action to quiet title. Memorandum of Law in Support of Plaintiff’s Response to Preliminary Objections

of Defendant American Business Credit, Inc. (“Plaintiff’s Memorandum”), p. 4. The court disagrees.

Rule 1061 was intended to be liberally construed and, where plaintiff has neither possession nor an immediate right to possession (as is the case here) plaintiff may nonetheless sustain an action under either Pa. R.C.P. 1061 (b)(2) or (b)(3). Brennan v. Shore Brothers, 380 Pa. 283, 286, 110 A.2d 401, 403 (1955); Pa. R.C.P. 1061. See also, Grossman v. Hill, 384 Pa. 590, 122 A.2d 69 (1956) (finding that where plaintiffs are merely equitable owners and have no present right of possession, action to quiet title may nonetheless be maintained under Rule 1061); Kean v. Forman, 752 A.2d 906 (Pa. Super. 2000) (finding that where the case involves “a cloud” on plaintiff’s property but does not involve a possessory interest, action may be maintained under Rule 1061(b)(3)). Indeed, an action could be maintained in this case under Pa. R.C.P. 1061(b)(3):

[T]o compel an adverse party to file, record, cancel, surrender, or satisfy of record, or admit the validity, invalidity or discharge of, any document, obligation or deed affecting any right, lien, title or interest in land;

Pa. R.C.P. 1061 (b)(3).

That plaintiffs apparently did not realize that their action was within the purview of the Rule is not critical, however, because courts “have the power to permit a change in the form of action.” Brucker v. Burgess, 376 Pa. 330, 335, 102 A.2d 418, 420 (1954) (finding that Rule 1061(b)(2) was available to plaintiffs to enforce an “interest” in the land). Furthermore, it is not necessary for plaintiff to plead a specific legal theory, Pennsylvania is a fact pleading jurisdiction. See Sevin v. Kelshaw, 417 Pa. Super. 1, 7, 611 A.2d 1232 (1992); Burnside v. Abbott Laboratories, 351 Pa. Super. 264, 277, 505 A.2d 973, 980 (1985). This action may therefore be considered as having been filed under Pa. R.C.P. 1061.

Plaintiff further responds that the Amended Complaint is filed in equity. Plaintiff's Memorandum, p. 4. The Amended Complaint, indeed, claims equitable relief along with claims for money damages in all Counts. As such, this action could have been filed either solely with the equity side of the court, or been split into two complaints, one at law seeking quiet title and/or money damages, and one at equity seeking to reinstate mortgages.¹ See Lustig v. Lustig, 438 Pa. Super. 320, 323, 652 A.2d 393, 395 (1995) (citing D'Alessandro v. Wasse, 526 Pa. 534, 587 A.2d 724 (1991) for the conclusion that there is no procedural rule allowing the joinder of an action at law with an action at equity); City of Philadelphia v. Pennrose Management Co., 142 Pa. Cmwlt. 627, 635-636, 598 A.2d 105, 110 (1991) (rather than strike the equity count in an action at law, the trial court should have severed the claims with leave to assert the equity claim in a separate action).

Notwithstanding the appropriateness of such separate filing, this court believes that dismissing with leave to amend so Plaintiff may file two actions is an unnecessary and inefficient use of judicial resources. See Rule 126. Our Supreme Court has expressed its aversion for piecemeal litigation where a court of equity may resolve both legal and equitable claims. See White v. Young, 409 Pa. 562, 566, 186 A.2d 919, 921-22 (1963) (finding that where an action which should have been brought under Rule 1061 also would eventually necessitate equitable relief, trial court properly had jurisdiction to hear it in equity). This court is vested with the full jurisdiction of the whole court and may sit in equity and in law. 42 Pa. C. S. §952. Furthermore, there is no procedural mechanism to transfer a matter from the civil to the equity side

¹ “[A]n Action to Quiet Title is not a proceeding in equity . . . but an action at law created by Pa. R.C.P. No. 1061.” Kister v. Commonwealth, 77 Pa. Cmwlt., 430, 434, 465 A.2d 1333, 1335 (1983).

of court. See Lustig v. Lustig, 438 Pa. Super. 320, 321, 652 A.2d 393, 394 (1995). Rather, “The equity side of the court shall always be open.” Pa. R.C.P. 1502.

The Objection to “Improper form of cause of action” is **overruled**.

2. Misjoinder of Causes of Action

Defendant next contends that Count III should be dismissed with leave to amend because the causes of action as to each mortgage should be separated as provided by Pa. R.C.P. 1020(a). Defendant’s Memorandum, pp. 2-3; Pa. R.C.P. 1020. Pa. R.C.P. 1020(a) provides:

The plaintiff may state in the complaint more than one cause of action against the same defendant heretofore asserted in assumpsit or trespass. Each cause of action and any special damage related thereto shall be stated in a separate count containing a demand for relief.

Pa. R.C.P. 1020(a).

Plaintiff responds that it is asserting only one cause of action in Count III, albeit as to two separate mortgaged properties. Plaintiff’s Memorandum, p. 5. Plaintiff’s argument is undermined by its treatment of the claims related to these same properties against defendant Bey, where plaintiff sets forth separate counts as to each property. See Complaint, Counts I and II. The claims as to the mortgages do involve distinct monetary relief, and if only for the sake of consistency, plaintiff could have separated the cause of action pertaining to the Limekiln Premises from that pertaining to the Cecil Premises as to defendant ABC.

Nonetheless, the court will overrule this Objection. Defendant’s argument that it may be prejudiced further along the proceedings if those purportedly separate causes of action are kept together is not persuasive. The underlying relevant facts pled are identical for the sake of any legal analysis and conclusion as to Count III for both mortgages. The law is the same. The ruling as to the relief requested for each

mortgage would necessarily be the same. “The Court at every stage of [every] action or proceeding may disregard an error or defect of procedure which does not affect the substantial rights of the parties.” Pa. R.C.P. 126. Because “[c]ourts should not be astute in enforcing technicalities to defeat apparently meritorious claims.” West Penn Sand & Gravel Co. v. Shippingport Sand Co., 367 Pa. 218, 222-223, 80 A.2d 84, 86-87 (1951), the court overrules this Objection.

3. Demurrer

A. Legal Standards

For the purposes of reviewing preliminary objections in the form of a demurrer, all well-pleaded material, factual averments and all inferences fairly deductible therefrom are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa. Super. 2000) (citations omitted). When presented with preliminary objections in the nature of a demurrer, a court should sustain the objections where “it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief.” Bourke v. Kazaras, 746 A.2d 642, 643 (Pa. Super. 2000). Furthermore,

[I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa. Super. 1999) (citations omitted).

B. Plaintiff’s Claim for Money Damages from ABC in Count III

Even when taking all facts pled as true, and assuming that ABC was aware of the priority of plaintiff's mortgages, plaintiff has no grounds upon which to obtain monetary relief from ABC. ABC was joined as a defendant, as stated by plaintiff itself, because "the relief which IndyMac requested in the Complaint would affect ABC and the priority of the ABC Mortgages." Plaintiff's Memorandum, p. 3. There are no allegations that ABC caused any damages to IndyMac. There are no allegations that ABC did anything legally impermissible by recording its mortgages, even with the knowledge of a Lis Pendens. Plaintiff's alternative monetary relief is available only against Bey. The Objection to strike money damages from Count III is **sustained**.

C. Demurrer as to Count III in its Entirety

ABC asserts that plaintiff was so negligent in releasing the mortgages that, by law, it should not be afforded any relief. Defendant's Memorandum, pp. 12-13. Defendant refers to the money orders and letters (attached to the Amended Complaint) which plaintiff had relied upon to execute the releases of the mortgages, stating that those documents, "on their face, [are] so ludicrous that they are reproduced in their entirety herewith, without further comment." *Id.*, at 4-5; Amended Complaint, Exhs. G & H. Defendant cites cases holding that when a party releases a mortgage by mistake or due to its own negligence, the rights of third-parties should not be made to suffer any consequence thereof as ABC's rights may be here. Defendant's Memorandum, pp. 13-14.

The cases cited by defendant involve allegations of mistake rather than fraud, as is the case here.²

² See e.g., First National Bank of Sunbury, 333 Pa. 553, 555, 5 A.2d 205, 205-206 (1939); St. Clement's Building and Loan Association v. McCann et ux, 126 Pa. Super. 20, 21, 190 A. 393, 393 (1937); Youngstown Electric Light Co., v. Butler County Poor District, 21 Pa. Super. 95, 1902 WL 3842, *2 (1902); Penn Savings Bank v. Best Homes and Properties, 20 Pa. D. & C. 4th

At this stage, the court must accept the facts as pled, and presume that plaintiff was presented with documents which appeared legitimate but were not. The question of whether, on their face, the documents were “utter nonsense,” as defendant maintains, is not properly before the court. Objections, p. 3. The court should not sustain a demurrer unless there is no doubt that plaintiff will be unable to prove fraud. See Bourke v. Kazaras, 746 A.2d 642, 643 (Pa. Super. 2000). That is not the case here. The Objection in the nature of a demurrer to the remaining claims in Count III is **overruled**.

4. Dismissal as to ABC for Improper Joinder

ABC claims that it was not properly added as a defendant and never had the opportunity to oppose the amendment and thus the Amended Complaint must be dismissed as to it. Defendant’s Memorandum, pp. 16-17. ABC cites two cases where the court did not allow amendments seeking to add parties. Id., 17. These cases are not controlling. In Borough of Berwick v. Quandel Group, Inc., 440 Pa. Super. 367, 655 A.2d 606 (1995), plaintiff sought to add another plaintiff after the statute of limitations for the action had run. Borough of Berwick v. Quandel Group, Inc., 440 Pa. Super. 367, 371-372, 655 A.2d 606, 608 (1995). The amendment would have been merely a tool to bypass the statute of limitations thus affecting defendant’s substantive rights. Id. In Commonwealth v. Carlow, 687 A.2d 22 (Pa. Cmwlth. 1996), plaintiff, who was not in privity of contract with defendant, had initially sued to confess judgment. The trial court found that the “right” plaintiff and the original “wrong” plaintiff were essentially the same entity and allowed amendment to substitute one for the other. Id., at 24. The Commonwealth court reversed, holding that warrants to confess judgments were to be strictly construed with any ambiguities resolved against the

Footnote 2 continued
335, 337 (C.C.P., Pike Co. 1992).

party in whose favor the warrant is given, thus the entities were not the same and substitutable. Id. In both of the cases cited by ABC, an amendment would have actually changed the cause of action thus prejudicing existing parties. Id.; Borough of Berwick v. Quandel Group, Inc., 440 Pa. Super. 367, 655 A.2d 606 (1995).

ABC puts the cart before the horse in objecting that it did not have notice of, or an opportunity to oppose the amendment seeking to add it as a defendant. Defendant's Memorandum, p. 13. In fact, plaintiff would have prejudiced ABC if it had not joined ABC as a defendant because ABC's mortgages would have been the subject of litigation without ABC having the wherewithal to have its position placed before the court. The Objection to Improper Joinder/Lack of Jurisdiction is **overruled**.

CONCLUSION

For the reasons discussed, this court will enter a contemporaneous Order sustaining the Objection as to the request for monetary damages from ABC, but overruling the remaining Objections.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.