NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

JP MORGAN CHASE BANK, N.A., s/b/m CHASE HOME FINANCE, LLC, s/b/m/t CHASE MANHATTAN MORTGAGE CORPORATION,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellee	:	
v.	:	
LUNDES GARRETT,	:	
Appellant	:	No. 2436 EDA 2013

Appeal from the Order Entered August 5, 2013,
In the Court of Common Pleas of Monroe County,
Civil Division, at No. 7192 CV 2010.

BEFORE: BENDER, P.J.E., SHOGAN and FITZGERALD*, JJ.

MEMORANDUM BY SHOGAN, J.: **FILED JULY 15, 2014**

Lundes Garrett ("Appellant") appeals *pro se* from the order entering summary judgment in favor of JP Morgan Chase Bank, N.A., s/b/m Chase Home Finance, LLC, s/b/m/t Chase Manhattan Mortgage Corporation ("Chase"). We affirm.

Appellant executed a loan agreement on August 7, 2003, with Wachovia Mortgage Corporation ("Wachovia"), for the purchase of real estate located at 8 Rose Drive, Saylorsburg, Pennsylvania 18353 ("the Property"). Appellant signed a note as evidence of the loan ("the Note") and granted a mortgage in favor of Mortgage Electronic Registration Systems ("MERS") as nominee for Wachovia ("the Mortgage"). The Note required

*Former Justice specially assigned to the Superior Court.

that Appellant make interest only payments until September 1, 2010, after which the Note matured, and the entire principal became due.

Chase acquired the Mortgage by an assignment of mortgage recorded in the Monroe County Recorder of Deeds on July 22, 2010. Although the record is unclear as to how, Chase came into possession of the Note, which was endorsed in blank.

Appellant defaulted on the loan by failing to make a monthly payment on April 1, 2010, and each month thereafter. Consequently, Chase sent Appellant a notice of intent to foreclose and notice of homeowner's emergency mortgage assistance on May 29, 2010. Chase then filed a mortgage foreclosure action on August 2, 2010, demanding, *inter alia*, an *in rem* judgment against the property. Appellant filed an answer and affirmative defenses, along with twenty-nine counterclaims based on the Truth in Lending Act, 15 U.S.C. §§ 1601–1693r, the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601–2617, and fraud. Appellant's affirmative defenses challenged Chase's standing as the real party in interest. In response to Appellant's counterclaims, Chase filed preliminary objections, a praecipe for argument, and a supporting memorandum of law. Appellant did not file a response. The trial court sustained Chase's preliminary objections and dismissed Appellant's counterclaims on March 8, 2011.

Following Appellant's foray into bankruptcy court and resulting discharge, Chase filed a motion for summary judgment on July 7, 2013. The trial court scheduled argument on Chase's motion for August 5, 2013. Appellant did not file a response to the motion for summary judgment; rather, he filed a motion for a continuance on July 25, 2013, which the trial court denied on July 31, 2013. In Appellant's absence, the trial court proceeded with the hearing on August 5, 2013, granted Chase's motion for summary judgment, and entered an *in rem* judgment in the amount of $222,090.62, together with interest and costs. Appellant filed a timely appeal and, along with the trial court, complied with Pa.R.A.P. 1925.[1]

On appeal, Appellant presents twenty-nine issues for our review. Appellant's Brief at 13–18. However, when we compare Appellant's statement of questions presented with his Pa.R.A.P. 1925(b) statements of errors complained of on appeal, we observe that Appellant has waived many of his twenty-nine issues. ***See Greater Erie Indus. Development Corp. v. Presque Isle Downs, Inc.***, 88 A.3d 222, 224 (Pa. Super. 2014)

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[1] Appellant actually filed two notices of appeal: one related to the July 30, 2013 order denying his motion for a continuance (Superior Court Docket 2437 EDA 2013) and the other related to the August 5, 2013 order granting Chase's motion for summary judgment (Superior Court Docket 2436 EDA 2013). As directed by the trial court, Appellant filed two concise statements of errors complained of on appeal. By order dated September 25, 2013, this Court quashed the appeal at 2437 EDA 2013 as duplicative of the appeal at 2436 EDA 2013.

(instructing that failure to include issue in Rule 1925(b) statement results in waiver). Specifically, Appellant failed to include questions 5, 8, 13, 14, 16–20, and 24–29 in his Rule 1925(b) statements. Hence, we shall not address those issues. ***Greater Erie Indus. Development Corp.***, 88 A.3d at 224. We shall review the remainder of Appellant's issues, which are subsidiary questions fairly comprised within the issues raised in his Rule 1925(b) statements and reproduced verbatim, as follows:

> 1. Did the Court violate Appellant rights to Due Process, Right to be Heard, and Right to Present Evidences, when the Court held a hearing on March 8, 2011, without notice of date and time of hearing.
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> 2. Does the Court Policy for delegating the safeguards of Due Process to the opposing attorney relieves the Court of its sole responsibility for safeguarding the rights of Appellant, and did this delegation violate Appellant's rights to be Heard, in regards to the hearing held on March 8, 2011.
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> 3. Did the Appellee's attorney violate Appellant's rights to Due Process, Right to be Heard, and Right to present Evidences and Oral Argument when Appellee and his attorney caused to be sent a totally inadequate notice of a hearing on March 8, 2011.
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> 4. Did the Appellee and his attorney intentionally manipulation of the inadequate notice of the hearing date and time caused a deprivation of Due Process in order to secure an uncontested favorable decision in violation of Appellant's rights, in regard to hearing held on March 8, 2011.
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> * * *
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> 6. Did the Court abuse its discretion when it denied Appellant's Application for Continuance, in light of the fact that Appellee's Counsel Agreed on a 30 days Contiuance.

7. Did the Court abuse its discretion and violate Due Process when the Court Appellant's first Application for Continuance, which deprived him of additional time to seek representation of counsel and file a response to Appellee's Motion for Summary Judgment.

* * *

9. Did the Court violate Appellant's rights to Due Process, Right to be Heard, and Present Edvidences when Notice of the Court's Order was sent out in an untimely manner.

10. Did the Court Err in granting Appellee's Motion for Summary Judgment when Appellee's criminally manufactured "Assignment of Mortgage" was the sole and only basis for invoking the Court jurisdiction.

11. Did the Court Err in granting Appellee's Motion for Summary Judgment when Appellee's totally failed to prove "Assignment of Note".

12. Did the Court Err in granting Appellee's Motion for Summary Judgment when Appellee created "perjury" when stating to the Court that Appellee received "debt instrument" (Note) from MERS along with an assignment.

* * *

15. Did the Court Err in granting Appellee's Motion for Summary Judgment when Appellee commenced this Complaint for Mortgage Foreclosure without attaching a copy of the "note" to the Complaint.

* * *

21. Did the Court Err in granting Appellee's Motion for Summary Judgment when Appellee caused to be held a hearing in absent of Appellant, when Appellant could have provided prima facie evidence of Appellee's release of lien.

22. Did the Court Err in granting Appellee's Motion for Summary Judgment when Appellee totally refused to respond to

Discovery Requests, thereby refusing to release evidences in favor of Appellant.

23. Did the Court Err in granting Appellee's Motion for Summary Judgment when Appellee totally refused to respond to Qualified Written Requests, four (4) of them.

Appellant's Brief at 13–17.

Questions 1 through 4 concern the March 8, 2011 hearing on Chase's preliminary objections; therefore, we address them together. Appellant argues that the hearing was improper because the trial court held it without Appellant being present. According to Appellant, Chase's counsel was responsible for providing notice of the hearing but did not do so; as a result, Appellant did not attend the hearing and, therefore, did not have an opportunity to be heard. Appellant's Brief at 23. Specifically, Appellant complains that Chase's counsel "manipulated the court by scheduling a hearing, and intentionally submitted to Appellant a hearing notice with a two (2) months expanded date of Feb-March of 2011." ***Id.***

Due process rights entitle Appellant "to be heard at a meaningful time and in a meaningful manner." ***BuyFigure.com, Inc. v. Autotrader.com, Inc.***, 76 A.3d 554, 559 (Pa. Super. 2013), *appeal denied*, 84 A.3d 1061 (Pa. 2014) (quoting ***Commonwealth v. Maldonado***, 838 A.2d 710, 714 (Pa. 2003)). However, "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). "[W]here a claim of error is not properly preserved for review, an appellate court must

not consider that claim on appeal." ***Benson v. Penn Central Transportation Company***, 342 A.2d 393, 395 (Pa. 1975) (footnote citing cases omitted).

Here, the record reveals that Appellant filed an answer to Chase's mortgage foreclosure action, affirmative defenses, and twenty-nine counterclaims on November 15, 2010. In response to the counterclaims, Chase filed preliminary objections on December 7, 2010, a *praecipe* for argument on January 11, 2011, and a memorandum of law on January 21, 2011. Appellant did not file a response to Chase's preliminary objections. Chase's *praecipe* for argument requested that the preliminary objections be placed "on the Argument List for the ___ day of February or March 2011." Certified Record No. 24. Appellant professes he never received notice of the exact date for the argument, and nothing in the record indicates that he did. Notably, Chase did not address the notice issue in its appellate brief, and the trial court dismissed it as a "vague allegation." Trial Court Opinion, 10/18/13, at 7.

Although the record supports Appellant's lack-of-notice claim, we conclude that no relief is due. The record confirms that Appellant received the trial court's order sustaining Chase's preliminary objections by regular mail. Certified Record No. 25. Having received the order, Appellant did not bring the lack of notice to the trial court's attention in a timely manner,

thereby giving it an opportunity to address and correct the issue; rather, he raises this issue for the first time on appeal. Accordingly, we shall not address this issue because Appellant did not properly preserve it. ***Benson***, 342 A.2d at 395.

Next, we address Questions 6, 7, and 9, all of which concern the denial of Appellant's motion for a continuance. Our standard for reviewing the denial of a request for a continuance is an abuse of the trial court's discretion. ***In re J.K.***, 825 A.3d 1277, 1280 (Pa. Super. 2003). "An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record discloses that the judgment exercised was manifestly unreasonable, or the results of partiality, prejudice, bias, or ill-will." ***Id.*** Furthermore, "[a] court's discretion in handling its own docket has long been recognized." ***Commonwealth v. Coward***, 414 A.2d 91, 95 (Pa. 1980) (citing ***In Re Road in McCandless Township***, 1 A. 594 (Pa. 1885)); ***Commonwealth v. Renchenski***, 52 A.3d 251, 256 (Pa. 2012).

The record reveals that Chase filed a motion for summary judgment and a *praecipe* for argument on July 3, 2013, asking for an *in rem* judgment and placement on the August 5, 2013 argument list. The next docket entry is an order rescheduling the argument on August 5, 2013, from 9:30 a.m. to 11:00 a.m., with an affidavit of service to Appellant by regular mail. Order

of Court, 7/17/13; Affidavit of Service, 7/17/13. In response, Appellant requested a continuance:

> I am requesting a rescheduled hearing date due to the fact that I have not found an attorney for representation and need more time to find an attorney, and file a response. Attorney for Chase has agreed on a 30 days [sic] continuance. Your understanding and rescheduling of the hearing would be greatly appreciated.

Application for Continuance, 7/25/13. The trial court denied Appellant's application by order entered July 31, 2013, and served by regular mail on August 1, 2013. Order of Court, 7/31/13; Affidavit of Service, 8/1/13.

The trial court disposed of this issue with the following analysis:

> Appellant similarly raises two interrelated complaints regarding his Motion to Continue. Specifically, Appellant claims that this Court abused its discretion when Appellant requested a continuance, and that we discriminated against Appellant when he requested a continuance. . . . In the case at bar, Appellant sought a continuance eleven days prior to the scheduled Argument to afford him more time in which to seek counsel and respond to Appellees: Motion for Summary Judgment. We denied Appellant's motion reasoning that a denial would not unduly prejudice Appellant because he has been on notice regarding the present mortgage foreclosure action since August of 2010 and has therefore had ample time in which to procure counsel.

Trial Court Opinion, 10/18/13, at 6–7.

Upon review, we discern no abuse of the trial court's discretion or error of law in its denial of Appellant's request for a continuance. The record confirms that Appellant was aware of the mortgage foreclosure since August 2010, almost three years before Chase filed its motion for summary

judgment. That was more than sufficient time to secure counsel, and Appellant does not explain his inability or failure to do so. Moreover, opposing counsel's agreement to a continuance is not sufficient to overcome the trial court's exercise of discretion in handling its own docket. ***Coward***, 414 A.2d at 95. Appellant's contrary claims lack merit.

Additionally, Appellant argues that notice of the trial court's order denying his request for a continuance was untimely and, therefore, prejudicial to his due process rights:

> On July 30, 2013, the [trial court] denied my request, and filed an Order on July 31, 2013. The postage stamp on the envelope is August 2, 2013 (Exhibit 2). Appellant received the Order [of] Court on August 5, 2013, when he came home at night. The Court held the hearing on this same day, August 5, 2013.
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> * * *
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> Appellant was prejudiced by the Court [sic] lack of care for his rights to equal treatment of the law . . .

Appellant's Brief at 29–30.

Upon review, we acknowledge that Appellant may have received the trial court's order after the hearing. Nevertheless, we discern no basis for relief. The date of the order denying Appellant's request for a continuance was July 31, 2013, a Wednesday. The record does not indicate why the order was not mailed until Friday, August 2, 2013. The intervening weekend could have resulted in Appellant's untimely receipt of the order denying a continuance. Nevertheless, Appellant chose not to attend the hearing as

scheduled, presumably on the assumption that the trial court granted his motion for a continuance but without actual knowledge of the trial court doing so. Given the lack of an order disposing of his motion, Appellant could have called the courthouse on the morning of August 5, 2013, to determine its status. His failure to do so does not amount to trial court error.

Appellant's remaining issues—10, 11, 12, 15, 21, 22, and 23—challenge the entry of summary judgment in favor of Chase on various grounds, including Chase's lack of standing due to a "criminally manufactured" assignment of mortgage and "a fraudulent and fake Note;" Chase's failure to attach the Note to the mortgage foreclosure complaint; false verifications; and discovery violations. Appellant's Brief at 31, 39, 41, 72, 83. In response, Chase submits that Appellant waived any challenge to the entry of summary judgment by failing to file a response to its motion for summary judgment. Chase's Brief at 13.

Our standard of review of a court's grant of a motion for summary judgment is well settled. We "may disturb the order of the trial court only where it is established that the court committed an error of law or abused its discretion. As with all questions of law, our review is plenary." ***Babb v. Ctr. Cmty. Hosp.***, 47 A.3d 1214, 1223 (Pa. Super. 2012) (citations omitted).

Pa.R.C.P. 1035.3 provides, in relevant part, as follows:

> (a) Except as provided in subdivision (e), **the adverse party** may not rest upon the mere allegations or denials of the

pleadings but **must file a response within thirty days after service of the motion** identifying

(1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or

(2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.

* * *

(d) **Summary judgment may be entered against a party who does not respond**.

(e)(1) Nothing in this rule is intended to prohibit a court, at any time prior to trial, from ruling upon a motion for summary judgment without written responses or briefs if no party is prejudiced. A party is prejudiced if he or she is not given a full and fair opportunity to supplement the record and to oppose the motion.

(2) A court granting a motion under subdivision (e)(1) shall state the reasons for its decision in a written opinion or on the record.

Pa.R.C.P. 1035.3(a), (d), and (e) (emphasis supplied).

We have explained the impact of Rule 1035.3 as follows:

In cases preceding the promulgation of Rules 1035.2 [regarding summary judgment motion] and 1035.3, . . . the premise established by former Rule 1035 was that the burden of persuasion on summary judgment remained with the moving party and that the non-moving party had no duty even to respond to a summary judgment motion. In the absence of a response, the Rule imposed a duty on the trial judge to conduct an independent review of the record to discern the movant's entitlement to judgment as a matter of law. . . .

> By contrast, under Rule 1035.2 and its corollary, Rule 1035.3, the non-moving party bears a clear duty to respond to a motion for summary judgment. ***See*** Pa.R.C.P. 1035.3(a)(1), (2) (requiring non-moving party to file a response "within thirty days after service of the motion identifying . . . one or more issues of fact arising from evidence in the record controverting the evidence cited [by the movant] in support of the motion or . . . evidence in the record establishing the facts essential to the cause of action"). If the non-moving party does not respond, the trial court may grant summary judgment **on that basis**. ***See*** Pa.R.C.P. 1035.3(d).

Harber Phil. Ctr. City Office, Ltd. v. LPCI Ltd., 764 A.2d 1100, 1104 (Pa. Super. 2000) (quotation marks and case citation omitted; emphasis in original). ***See also Payton v. Pennsylvania Sling Co.***, 710 A.2d 1221 (Pa. Super. 1998) (explaining that failure to respond appropriately to summary judgment motion permits entry of judgment in favor of moving party).

Here, Appellant had a full and fair opportunity to supplement the record and oppose Chase's motion for summary judgment, but he failed to respond to it. Instead, Appellant requested a continuance. Moreover, the trial court stated its reasons for granting summary judgment in a written opinion as follows:

> In a mortgage foreclosure action, summary judgment is properly granted "where the mortgagor admits that he is delinquent in mortgage payments. [*First Wisconsin Trust Co. v.*] *Strausser*, 653 A.2d [688,] at 694 [Pa. Super. 1995] (*citing New York Guardian Mortg. Corp. v. Dietzel*, 362 Pa. Super. 426, 429, 524 A.2d 951, 952 (Pa. Super. Ct. 1987). A mortgagor admits that he is delinquent in mortgage payments by failing to

> specifically deny a mortgagee's allegation. *Strausser*, 653 A.2d at 692, Pa.R.C.P. 1029(b).
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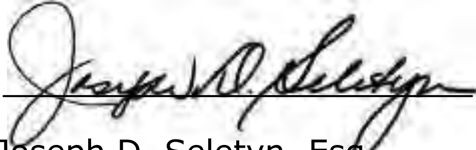
> In the case at bar, [Chase] alleged in paragraph seven of [its] complaint that "Defendant is in default under the terms of the aforesaid Mortgage and note for, inter alia, failure to pay the monthly installments of principal and interest when due. Defendant is due for the April 1, 2010 payment." Appellant's answer to paragraph seven is a denial which states: "(a) Denied based upon the fact that no mortgage 'note' has been submitted in the Complaint herein. (b) Denied based upon the fact that Plaintiff refused to accept the April 1, 2010 payment, because of Plaintiff forced manipulated default." We do not believe that this allegation of manipulation rises to the level of denial. Like the Superior Court in *Strausser*, we find that Appellant's response to [Chase's] allegation of default fails to specifically deny the alleged default. As such the purported denial is deemed an admission pursuant to Pennsylvania Rule of Civil Procedure 1029(b) and summary judgment is proper. This Court's Order granting [Chase's] Motion for Summary Judgment is further supported by Pennsylvania Rule of Civil Procedure 1035.3(d) (providing that "summary judgment may be entered against a party who does not respond.").

Trial Court Opinion, 10/18/13, at 4–5.

Based on the clear language of Rule 1035.3 and the trial court's reasoning, we conclude that it was within the trial court's discretion to grant summary judgment in Chase's favor based on Appellant's failure to respond. ***Harber***, 764 A.2d at 1104. Thus, Appellant is not entitled to relief.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/15/2014