

**THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS**

**MELLON BANK, N.A.,
Plaintiff/Appellee**

V.

**GWENDOLYN JACKSON AND
PATRICIA GRAY,
Defendants/Appellants**

**TRIAL DIVISION-CIVIL
SEPTEMBER TERM, 1996
NO. 1295
Superior Court Docket No.
1987 EDA 2008**

OPINION

PROCEDURAL HISTORY

Defendant Patricia Grey appeals from the June 4, 2008 Order denying Ms. Gray's Petition to Strike off the Order Discontinuing this Action without prejudice.

FACTUAL BACKGROUND

On January 30, 1981, a mortgage note was executed in the principal sum of \$52,000.00. On that same date, Gwendolyn Jackson and Patricia Gray (hereinafter Defendants) entered into a Mortgage under which Mellon Bank is now the successor in interest by assignment.¹ (Complaint, pg. 1-2). This mortgage secured Defendants' debt to Mellon Bank under the note. (Id.). The real property, which is the subject to the Mortgage, is located at 2276-2278 N. 51st Street, Philadelphia PA.

¹ The original mortgage was Philadelphia Savings Fund Society. It later became Meritor Savings and the FDIC took over Meritor Savings and assigned the mortgage to Mellon Mortgage.

Because Defendants failed to make payments as they became due and owing, the mortgage fell into default.

As a result of their failure to make payments, on September 13, 1996, Mellon Bank instituted this foreclosure action against Defendants seeking damages in the amount of \$51,731.28, which represents the principle balance, interest, late charges and attorney fees incurred at the time of filing the Complaint.² (Complaint, pg.2). Mellon Bank also sought additional interest, court costs and attorney fees that they incurred subsequent to filing suit. The Complaint alleges that Defendants Jackson and Gray owned the property and that their mortgage is now in default for failure to make payments. (Complaint, pgs. 1-3).

On May 5, 1997, a default judgment was entered in favor of Mellon Bank and against Defendants Gray and Jackson for their failure to file an Answer to Mellon Bank's Complaint within the time required by the rules.

Counsel for Defendant Jackson entered his appearance on May 6, 1997 and filed an Answer to the Complaint on June 24, 1997. On June 23, 1997, the Court granted Mellon Bank's petition to vacate the default judgment. (See Docket Entry November, 19 2004).

On August 5, 1997, Defendant Gray filed an Answer to Plaintiff's Complaint that included a cross-claim against Defendant Jackson. In Gray's New Matter Cross-Claim against Defendant Jackson, she alleges that Jackson is solely liable for the Mortgage because Jackson resides at the property and was required to submit her rental payment directly to Mellon Bank to pay the mortgage. (Gray Answer and New Matter and New

² On July 27, 2004, Counsel for Mellon Bank requested that Credit Based Asset Servicing and Securitization, LLC, who was the assignee of the loan that is the subject of this Mortgage Foreclosure Action, be substituted as Plaintiff in place of the Mellon Bank, NA.

Matter in the Nature of a Cross-Claim, pgs. 4). Gray also contends that she never became aware of the default until a judgment was obtained. (Id., pgs. 3-5).

Defendant Jackson's admits that she resides at the property with her son and that Gray does not reside there. (Jackson Answer and New Matter, pg.2). Jackson denies that the mortgage is in default because payments previously made were not credited to the mortgage loan account. (Id.).

By Order dated September 20, 2002, the Honorable Esther Sylvester granted a Motion for Sanctions agreed to by Plaintiff and Defendant Jackson which stated: 1) It is agreed and stipulated by Plaintiff and Defendant Jackson that her Answer and New Matter is Stricken; 2) Plaintiff shall be awarded costs of suit and attorney's fees and reasonable expenses relating in obtaining an Order granting Sanctions, in the amount of \$250.00 to be paid by Jackson before October 21, 2002; 3) Plaintiff and Defendant Jackson agree and stipulate to the entry of summary judgment against Defendant Jackson and in favor of Plaintiff. (Order dated 9/12/2002). The Order came as a result of the refusal of Defendant Jackson to comply with multiple requests by the Plaintiff to supply them with answers to request for production of documents. (Plaintiff's Motion for Sanctions, 9/5/02 pgs. 2-3).

On March 14, 2005, the case was placed in deferred status due to Defendant Gray's declaration of bankruptcy on March 11, 2005. The case was removed from deferred status on August 25, 2005.

On January 30, 2006, a hearing commenced before the Honorable Myrna Field, who is now deceased. Judge Field took the case under advisement. The issues that needed to be addressed by Judge Field were whether the mortgage was in default and, if

so, who was responsible for the default under the mortgage. On February 1, 2006, Judge Field entered the following Findings and Order:

“Finding for Defendant, Patricia Gray on Complaint. No Finding on counterclaim as irrelevant at this time.” (Trial Court Worksheet).

Because Judge Field’s Findings did not address all issues that need to be addressed at trial, Plaintiff discontinued the action without prejudice on November 2, 2007 pursuant to Pa.R.C.P. 229. (Plaintiff’s Praeceptum to Discontinue). Defendant Gray subsequently filed a Motion to Strike Plaintiff’s discontinuance on April 22, 2008 and Plaintiff responded. By Order dated June 4, 2008, this court denied Defendant Gray’s Motion to Strike. The Order also specifically stated that Mellon Bank may proceed with a new foreclosure action. The Order prohibited Mellon Bank from pursuing an in personam action against Defendant Gray. Defendant Gray is also not precluded from pursuing an action seeking monetary damages against Defendant Jackson in furtherance of her cross-claim. (See June 4, 2008 Order).

On July 2, 2008, Defendant Gray filed her Notice of Appeal to the Superior Court and issued her Statement of Errors Complained of on Appeal accordingly.

The issue before this Court is whether an error of law or abuse of discretion occurred in granting Plaintiff’s praecipe to discontinue this action pursuant to Pa.R.C.P. 229.

LEGAL ANALYSIS

The remedy in Pennsylvania for a default of a mortgage is an in rem foreclosure action. Pa.R.C.P. 1141 et seq. According to Pa.R.C.P. 1144, which is one of the rules that specifically addresses actions in mortgage foreclosure cases:

(a)The plaintiff shall name as defendants:

- (1) the mortgagor;
- (2) the personal representative, heir or devisee of a deceased mortgagor, if known; and
- (3) the real owner of the property, or if the real owner is unknown, the grantee in the last recorded deed.

Mellon Bank's discontinuance of this in rem foreclosure action is also governed by the Pennsylvania Rules of Civil Procedure.

Pursuant to Pa.R.C.P. 229(a), "A discontinuance shall be the exclusive method of voluntary termination of an action, in whole or in part, by the plaintiff before commencement of the trial."

Defendant Gray argues that discontinuance by Mellon Bank should have been stricken because trial had commenced before Judge Field. (Plaintiff's Petition to Strike Off Praecipe Pursuant to 229(c)). However, all trial issues were not addressed by Judge Field at this hearing and only a partial decision was made. The denial of Defendant Gray's Petition to Strike Off the Discontinuance was proper because Gray demonstrated no prejudice, inconvenience or deprivation of a substantial right that would warrant the striking off of the discontinuance and Mellon Bank would have been severely prejudice by allowing Judge Field's partial decision to stand.

The authority to strike off a discontinuance is vested in the sound discretion of the trial court, and will not be reversed absent an abuse of that discretion. *Hopewell v. Hendrie*, 386 Pa. Super. 264, 562 A.2d 899, (1990). The Rules of Civil Procedure, specifically Rule 229(c), provides for the striking of a discontinuance in order to "...protect the rights of any party from unreasonable inconvenience, vexation, harassment, expense, or prejudice." The prerequisite to such an action by the Court is that the party seeking to have a discontinuance stricken must show that he has been deprived

of a substantial right or will be prejudiced by the discontinuance. *Martinelli v. Mulloy*, 223 Pa. Super. 130, 299 A.2d 19 (1972).

Although Defendant Gray generally alleges that she has been prejudiced by the discontinuance, she does not specify the prejudice. (Gray's Petition to Strike Off Plaintiff's Praecipe to Withdraw Complaint, ¶3). Defendant Gray also does not allege any unreasonable convenience, vexation, harassment, expense or deprivation of rights suffered by her. (Id.). Without any evidence of prejudice, inconvenience or deprivation of rights, this Court is bound by the entry of discontinuance.

In the alternative, Plaintiff's would have been prejudiced were the action not discontinued because Judge Field's Findings did not dispose of the ultimate issue in this case, whether there was a default of the mortgage and which party caused the property to go into default. As stated by Plaintiff, the Mortgage Loan executed by both defendants still remains in default and payments remain due. (Plaintiff's Response to the Petition to Strike Off Praecipe Pursuant to 229(c), pg. 2).

In this case, a proceeding was held on January 30, 2006, intending to adjudicate all issues involved in this action. When Judge Field issued her Findings, the only determination made was a "Finding for defendant, Patricia Gray on Complaint."

Based on the pleadings filed in this case and the transcript of the hearing, Judge Field's Findings addressed only the issue that Defendant Jackson is liable for the Mortgage. The Findings did not address the ultimate issue of whether Mellon Bank obtained judgment against the Defendants as to the default under the terms of the Mortgage. In addition, no further action was taken by Judge Field in this case to make a determination on this issue.

A discontinuance of this action allowed plaintiff to commence a new foreclosure action against the defendants. This new foreclosure action would permit all previously unresolved issues that remain open from Judge Field's partial decision to be addressed by the Court.

Since Defendant Gray and Jackson are both property owners and mortgagors according to Pa.R.C.P. 1144(a), they would both be defendants in the new action as well.

If Mellon Bank were precluded from commencing a new foreclosure action, they would be severely prejudiced because defendants would continue to occupy the premises while still in default under the mortgage. Defendants could also continue occupancy without payment of the mortgage and Mellon Bank would be without legal remedy.

Thus, Mellon Bank was within its right to discontinue this action so that they could seek redressibility of all claims, which includes proving that there was a default and obtaining a judgment against the responsible party for the default of the mortgage. Pursuant to this Court's June 4, 2008 Order, Defendant Gray is protected from any in personam action against her and retains her right to seek monetary damages against Defendant Jackson in furtherance of Gray's cross-claim.

Based on the foregoing, Defendant Gray has failed to prove any prejudice, unreasonable convenience, vexation, harassment, expense or deprivation of substantial right suffered by her, which would persuade this Court to strike the discontinuance entered on November 2, 2007.

CONCLUSION

For all the aforementioned reasons this Court properly denied Defendant's Petition to Strike off the November 2, 2008 Order Discontinuing this Action and this Court respectfully requests that the June 4, 2008 Order be affirmed.

BY THE COURT:

Date

ALLAN L. TERESHKO, J.

cc:

Patricia R. Gray, pro se
Sheetal R. Shah-Jani, Esq.
Stokes E. Mott, Jr., Esq.