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

MARVIN W. FACTOR AND KATHLEEN M. FACTOR	:	March Term 2004
Plaintiffs,	:	No. 03542
v.	:	Commerce Program
ALLIANCE BANK, et al.	:	Control No. 020508, 011330
Defendants.	:	

ORDER and MEMORANDUM

AND NOW, this 29TH day of March 2005, upon consideration of Defendants' Preliminary Objections to Plaintiffs' Counterclaims, Defendants' Motion for Judgment on the Pleadings, all responses thereto, all other matters of record, and in accordance with the Opinion being filed contemporaneously with this Order, it hereby is **ORDERED** and **DECREED** as follows:

1. Defendants' Preliminary Objections are **sustained** and Plaintiffs' Counterclaim is **stricken** as an impermissible pleading under Pa.R.C.P. 1017 (a); and

2. Defendants' Motion for Judgment on the Pleadings is **granted** and Plaintiffs' Amended Complaint is **dismissed**.

BY THE COURT:

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HOWLAND A. ABRAMSON, J.

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MEMORANDUM OPINION

HOWLAND W. ABRAMSON, J.

Before the Court are Defendants' Preliminary Objections to Plaintiffs' Counterclaim and Defendants' Motion for Judgment on the Pleadings. For the reasons fully discussed below, Defendants' Preliminary Objections are **sustained** and their Motion for Judgment on the Pleadings is **granted**.

BACKGROUND[1]

This action essentially relates to a mortgage foreclosure. Beginning in 1999, Plaintiffs, Marvin and Kathleen Factor, executed a series of promissory notes and mortgage and security agreements (collectively, the "Business Loan Agreements") with defendant Alliance Bank (the "Bank") in connection with a business property located at 1234 Locust Street, Philadelphia (the "Business Property"). The Business Loan Agreements were amended in 2000 and again in 2001, at which time the principals of the Loans were increased. Sometime thereafter, Plaintiffs

1 The foregoing factual background has been taken directly from the facts set forth in the parties' respective pleadings.

defaulted on the Business Loans. Following the defaults, Plaintiffs and the Bank entered into a Forbearance Agreement dated March 21, 2002, which outlined the indebtedness and obligations of Plaintiffs to the Bank (the "Forbearance Agreement"). Under the terms and conditions of the Forbearance Agreement, Plaintiffs were required to execute and deliver to the Bank, the deed for the Business Property which left the grantee and date blank (the "Deed"). According to the Forbearance Agreement, the Bank would be permitted to complete and record the Deed upon the event of Plaintiffs' further default under Forbearance Agreement. Def. Ans., Exh. A at 7, ¶ 6 and 10,

¶ 15.

Plaintiffs did in fact default under the terms of the Forbearance Agreement. However, in August 2002, before the Bank recorded the Deed, Plaintiffs filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Pennsylvania. In December 2003, the Bank filed a petition with the Bankruptcy Court seeking relief from the automatic stay, which was granted in February 2004. On March 12, 2004, as permitted by the Forbearance Agreement, the Bank recorded the Deed with the Recorder of Deeds for the County of Philadelphia, Pennsylvania. Defendant 1234 Locust Properties, L.P., ("1234 Locust") was designated as the grantee by the Bank and the Deed was dated the day it was recorded.

Thereafter, on March 16, 2004, following a hearing on the Bank's motion to surrender the leasehold of tenant Locust Development Company, an entity owned by Kathleen Factor, Plaintiffs were ordered by the Bankruptcy Court to vacate the Business Property. That same date, Plaintiffs commenced this litigation against the Bank, 1234 Locust, the law firm that represented the Bank, as well as several individuals who worked for the foregoing entities,

asserting claims for quiet title, ejectment and fraud. Also commenced a complicated procedural history. Defendants filed Preliminary Objections and, in response, Plaintiffs filed an Amended Complaint. Defendants then filed an Answer, New Matter and Counterclaim to the Amended Complaint. Plaintiffs in turn filed an "Answer, New Matter and Counterclaim" in response to Defendants' Counterclaim. Defendants filed Preliminary Objections to Plaintiffs' Counterclaims and a Motion for Judgment on the Pleadings. Each will be discussed in turn.

DISCUSSION

I. Defendants' Preliminary Objections

Defendants have filed Preliminary Objections to the three untitled counts set forth in Plaintiffs' "counterclaim." The "counterclaim" filed by Plaintiffs is not a pleading permitted by the Pennsylvania Rules of Civil Procedure:

> (a) …the pleadings in an action are limited to a complaint, an answer thereto, a reply if the answer contains new matter or a counterclaim, a counter-reply if the reply to a counterclaim contains new matter, a preliminary objection and an answer thereto.

Pa.R.C.P. 1017 (a). Under the Rules, in a reply to a counterclaim, a plaintiff may include new matter and any affirmative or other defenses. *See* 2 Goodrich-Amram 2d § 1031(a):6; 1 P.L.E. § 75. There is, however, no provision for a reply containing a "counter-counterclaim." *See* Standard Pennsylvania Practice § 30:6; Shuman v. Colasono, 9 Pa. D&C 3d 113 (1978). As such constitutes an impermissible pleading, Plaintiffs' "counterclaim" hereby is stricken.[2]

II. Defendants' Motion for Judgment on the Pleadings

2 The appropriate means of making the allegations contained within the Factor's "counterclaim" part of this action would have been to file a Motion for Leave to Amend their complaint. Pa.R.C.P. 1033. However, such speculation

With the dismissal of Plaintiffs' extraneous counterclaim, the pleadings are now closed and this court may properly consider Defendants' Motion for Judgment on the Pleadings. Pa.R.C.P. 1034.

Entry of judgment on the pleadings is permitted under Pa. R. Civ. P. 1034 which provides for such judgment after the pleadings are closed, but within such time as not to delay trial. A motion for judgment on the pleadings will be granted where "the moving party's right to succeed is certain and the case is so free from doubt that trial would clearly be a fruitless exercise." Conrad v. Bundy, 2001 Pa. Super. 142, 777 A.2d 108 (2001). Such is the case at bar. Even assuming, *arguendo*, that all facts properly pled by Plaintiffs are true, they cannot prove is entitled to judgment on any of the asserted claims.

First, Plaintiffs' case is based upon the faulty premise that deeds in lieu of foreclosure are somehow unlawful or improper. This, however, is incorrect. While a deed cannot generally exist as such without a grantee, the law controlling such instruments is vastly different from that covering a deed without a grantee where, as here, the authority is given to someone to insert the grantee's name. Calhoun v. Drass, 319 Pa. 449, 453-454, 179 A. 568 (1935). A valid deed may be signed, acknowledged and delivered with the name of the grantee left blank provided there is authority, oral or written, express or implied in someone to fill in the blank. Id. It is undisputed that such authority exists here. Section 6 of the Forbearance Agreement specifically states:

> Deed In Lieu. Plaintiffs, shall, simultaneously with the execution and delivery of this Agreement, execute in blank a deed (the "Deed") for the Building Property, powers of attorney and/or such other instruments of convenience of title in and to all of the Building Property necessary or appropriate to carry out the intent and purposes of this Agreement, and deliver such other documents to [the Bank] or its *designated representative* to be held and disposed of in accordance with the terms of this Agreement.

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is purely academic: the amendment of a pleading will not be permitted where, as here, the amendment would be futile. Carlino v. Whitpain Investors, 499 Pa. 498, 505, 453 A.2d 1385, 1388-9 (1982).

Def. Ans. Exh. A at 7, ¶ 6 (emphasis added). The Forbearance Agreement further provides:

> Remedies. Upon the occurrence of an event of Default and the failure of the Debtors or any of them to cure any such Event of Default within (10) days following the giving of written notice thereof to the Debtors specifying the nature of the Event of Default, the Bank *(sic)* may, ***without the necessity of giving any further notice of any kind:*** (a) terminate the Forbearance Period; (b) ***record the deed***; (c) exercise any of all of their rights and remedies under this Agreement, any of the other Loan Documents and/or otherwise as permitted by law or in equity.

Id. at 10, ¶ 15. Thus, it is clear that the "wrongs" alleged by Plaintiffs in their Amended Complaint were expressly permitted by the Forbearance Agreement, which they signed as consideration for the Bank's forbearance after a series of defaults in 2000 and 2001.

The Factor's further claim that the recordation of the Deed in the name of an entity other than the Bank somehow caused Plaintiffs to suffer damages. As previously stated, this is not only permissible under Pennsylvania law, but Plaintiffs expressly agreed to such a result in executing the Forbearance Agreement. Moreover, the assignment of the deed to 1234 by the Bank does not have any bearing on the critical fact that Plaintiffs no longer own the Business Property. Obviously, in light of these facts, there can be no finding of fraud. Plaintiffs can not sustain causes of action for either quiet title or ejectment for these same reasons: they have neither title to nor possession of the Business Property, nor do they have a legitimate claim for either in light of the Forbearance Agreement, which they executed for valid consideration, and the Bankruptcy Court's Order that they vacate the Business Property. [3]

Based on the foregoing, this court finds that, even in reviewing the facts of record in a light most favorable to Plaintiffs, as this court is required to do, they can not sustain the causes of

3 It appears that many of the issues raised by Plaintiffs were likely before the Bankruptcy Court, thus, such claims may also be barred by either *res judicata* or collateral estoppel. However, such arguments are not currently before this court and need not be considered in light of its earlier conclusions.

action pled in the Amended Complaint.[4] Accordingly, Plaintiffs' Amended Complaint is dismissed.

CONCLUSION

For the above-stated reasons, this court finds as follows:

1. Defendants' Preliminary Objections are **sustained** and Plaintiffs' Counterclaim is **stricken** as an impermissible pleading under Pa.R.C.P. 1017 (a); and

2. Defendants' Motion for Judgment on the Pleadings is **granted** and Plaintiffs' Amended Complaint is **dismissed** with prejudice.

This Court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT:

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HOWLAND A. ABRAMSON, J.

4 In light of the fact that Plaintiffs' entire complaint is being dismissed, this court need not address the issue of the propriety of the claims against the individuals named in this case. However, the court would like to point out that, as pled, Plaintiffs have failed to set forth facts sufficient facts to give rise to a claim against the individual defendants.