

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

INDYMAC BANK,	:	JUNE TERM, 2006
	:	
Plaintiff,	:	NO. 00124
	:	
v.	:	COMMERCE PROGRAM
	:	
ARCZIP, INC. and MICHAEL KOVARIK,	:	Control No. 073197
	:	
Defendant.	:	

ORDER

AND NOW, this 28TH day of November, 2006, upon consideration of defendants' Preliminary Objections to plaintiff's Complaint, and in accord with the Opinion issued simultaneously, it is hereby **ORDERED** that said Preliminary Objections are **OVERRULED**. Defendants shall file an Answer to the Complaint within twenty (20) days of the entry of this Order.

BY THE COURT,

MARK I. BERNSTEIN, J.

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OPINION

The Preliminary Objections of defendants, Arczip, Inc and Michael Kovarik (collectively “Arczip”) to the Complaint of plaintiff, Indymac Bank (“Indymac”), are before the court. In its Complaint, Indymac asserts four counts for declaratory judgment against Arczip, and Arczip objects to the first three. Arczip’s objections are without merit.

Both Indymac and Arczip are creditors of the Kogans.¹ The Kogans owned real property in Bucks County (the “Property”) against which a mortgage was recorded on April 8, 2002. On January 5, 2004, Arczip obtained an \$800,000 consent judgment against the Kogans in a California court action (the “Judgment”).² On April 23, 2004, Arczip filed its Judgment with the Prothonotary in Bucks County, and Arczip thereby claims that it has a valid lien against the Kogans’ Property.

¹ The Kogans are not parties to this action since they are bankrupt, and they no longer have any interest in the Property or the proceeds from its sale.

² The Judgment was by stipulation as part of a Settlement Agreement between Arczip and the Kogans. Under the terms of the Settlement Agreement, the Kogans agreed to pay \$30,000 immediately and \$210,420 over time to Arczip. However, if the Kogans defaulted in payment, Arczip reserved the right to seek the entire Judgment. *See* Complaint, Ex. A.

On April 30, 2004, the Kogans refinanced the 2002 mortgage on the Property with Indymac's predecessor in interest.³ A portion of the new loan was used to pay off the existing mortgage, and additional sums were loaned to the Kogans. Indymac alleges that, at the time its predecessor received the Mortgages, it had no knowledge of the Judgment, which had been filed one week prior to the closing on the refinancing. The Kogans did not notify Indymac's predecessor of the existing Judgment, and the Prothonotary did not record the Judgment until after the closing on the refinancing.⁴ On June 2, 2004, first and second mortgages in favor of Indymac's predecessor were indexed against the Kogans' Property (the "Mortgages").

In May, 2005, the Kogans defaulted on their settlement payments to Arczip and filed for bankruptcy. Both Arczip and Indymac participated as creditors in the Kogans' bankruptcy. Arczip and Indymac entered into a Stipulation under which they agreed that the Bankruptcy Trustee would sell the Kogans' Property and put the net proceeds in escrow. This was done, and \$725,702.83 is in an escrow account at Wachovia Bank. This sum cannot satisfy the Kogans' debts to both Arczip and Indymac.

Arczip claims that, because its Judgment was filed before Indymac's Mortgages, Arczip has priority of lien and is entitled to the proceeds. Indymac claims that Arczip's lien is improper for several reasons and that Indymac's Mortgages are entitled to priority. Indymac previously asserted its claims against Arczip in bankruptcy court, but the bankruptcy court dismissed the action for lack of subject matter jurisdiction. Under the terms of the parties' bankruptcy Stipulation, in the event of dismissal by the bankruptcy judge, the parties agreed to have their

³ The lender was Money Warehouse, Inc. Money Warehouse assigned the First and Second Mortgages to Indymac on May 5, 2005.

⁴ Because the Judgment was not yet reflected in the court records, the title company did not discover it before the closing on the refinancing.

claims heard by this court. Therefore, Indymac seeks a declaratory judgment from this court. Arczip filed objections to Indymac's first three counts for declaratory judgment.

In Count I of its Complaint, Indymac claims that Arczip's Judgment was filed in violation of the Uniform Enforcement of Foreign Judgments Act.⁵ The Act provides as follows:

A copy of any foreign judgment including the docket entries incidental thereto authenticated in accordance with act of Congress or this title may be filed in the office of the clerk of any court of common pleas of this Commonwealth. The clerk shall treat the foreign judgment in the same manner as a judgment of any court of common pleas of this Commonwealth. A judgment so filed shall be a lien as of the date of filing and shall have the same effect and be subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of any court of common pleas of this Commonwealth and may be enforced or satisfied in like manner.⁶

Indymac alleges that Arczip violated the Act by failing to include the docket entries from the California action when it filed the Judgment in Bucks County. Arczip objects that Indymac does not have standing to bring a collateral action to strike the Judgment; instead, Indymac should have intervened in the Bucks County proceeding in which Arczip filed the Judgment. There are several problems with Arczip's objection.

Firstly, Indymac is not seeking to strike Arczip's Judgment.⁷ Instead, Indymac is seeking to have this court declare that Arczip's claimed lien priority, rather than the Judgment itself, is invalid, which is a legitimate claim for Indymac to raise. Secondly, Indymac has standing to challenge Arczip's lien in this action.

Prior to judicial resolution of a dispute, an individual must as a threshold matter show that he has standing to bring the action. The traditional concept of standing focuses on the idea that a person who is not adversely impacted by the matter he seeks to challenge does not have standing to proceed with the court system's dispute resolution process. . . . Stated another way, a controversy is worthy of

⁵ See 42 Pa. C. S. § 4306.

⁶ *Id.* at § 4306(b).

⁷ See Pa. R. Civ. P. 2959 (striking or opening confessed judgment); *id.* at 3051 (striking or opening judgment of non pros).

judicial review only if the individual initiating the legal action has been ‘aggrieved.’ . . . With respect to this requirement of being aggrieved, an individual can demonstrate that he is aggrieved if he can establish that he has a substantial, direct, and immediate interest in the outcome of the litigation in order to be deemed to have standing. An interest is ‘substantial’ if it is an interest in the resolution of the challenge which surpasses the common interest of all citizens in procuring obedience to the law. Likewise, a ‘direct’ interest mandates a showing that the matter complained of caused harm to the party’s interest, *i.e.*, a causal connection between the harm and the violation of law. Finally, an interest is ‘immediate’ if the causal connection is not remote or speculative. The keystone to standing in these terms is that the person must be negatively impacted in some real and direct fashion.⁸

Indymac is an aggrieved lien creditor of Arczip’s Judgment debtors, the Kogans. As such, Indymac has a substantial, direct, and immediate interest in the determination of whether Arczip’s apparently superior lien was not properly perfected in accordance with the statutory requirements of the Act.⁹ Thirdly, Indymac could not intervene in the Bucks County action. “It is a mistaken notion that a subsequent execution creditor can intervene in a suit between his judgment debtor and [a prior judgment creditor].”¹⁰ Indymac did not receive notice of the Bucks County proceedings. Instead, Arczip simply filed its Judgment with the Bucks County clerk of court after giving the required notice to the Kogans.¹¹ Indymac could only raise the question of Arczip’s Judgment lien status in this collateral action.

⁸ Pittsburgh Palisades Park, LLC v. Commonwealth of Pa., 585 Pa. 196, 203-204, 888 A.2d 655, 659-660 (2005).

⁹ See Equibank v. Adle, Inc., 407 Pa. Super. 553, 595 A.2d 1284 (1991) (mortgage holder had standing to challenge compliance with statutory filing requirements, and priority, of mechanics’ lien judgments).

¹⁰ Sklaroff v. Weiner, 204 Pa. Super. 273, 203 A.2d 366 (1964). See also State Street Bank v. Petrey, 819 A.2d 581 (Pa. Super. 2003) (junior lien holder was permitted to challenge senior lien holder’s judgment lien in subsequent sheriff’s execution proceeding, but not as an intervenor in mortgage foreclosure action that produced judgment).

¹¹ See 42 Pa. C.S. § 4306(b). See also *id.* at § 4306(c)(2) (only the judgment debtor, and not its other creditors, receives notice of the filing of the judgment.)

Generally, a lien holder has the opportunity to contest the priority of another creditor's lien in connection with a sheriff's execution proceedings.¹² However, in this case, the sale of the Property was conducted by the Bankruptcy Trustee, so normal lien challenge procedures did not apply. The parties were not given the right to challenge lien priority in the bankruptcy court, and they stipulated that this court is the proper forum for such proceedings. Accordingly, this court must provide a venue in accordance with the rules governing sheriff's sales.¹³

In Count II of the Complaint, Indymac claims that Arczip conspired with the Kogans to defraud Indymac. Arczip objects that Indymac has not properly plead either a claim for fraud or conspiracy. In support of its fraud claim, Indymac alleges that Arczip filed its Judgment against the Kogans one week before Indymac refinanced the Kogans' mortgage and that Arczip did so "with knowledge that [the] judgment would not appear in any title search performed in the ordinary course of business by reason of a delay in the indexing and recording of documents in the office of the Bucks County Prothonotary."¹⁴ Indymac argues that Arczip's tactical use of known filing delays amounts to an omission or misrepresentation by Arczip upon which a claim of fraud may be based. It does not.

The elements of intentional misrepresentation are as follows: (1) A representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and, (6) the resulting injury was proximately caused by the reliance. The tort of intentional non-disclosure has the same elements as intentional misrepresentation except in the case of intentional non-disclosure, the

¹² See Mid-State Bank & Trust Co v. Globalnet Int'l, Inc., 710 A.2d 1187, 1190 (Pa. Super. 1998) ("The method and procedure by which competing lien creditors may litigate their claims to sale proceeds is established by Rule 3136, Pa.R.C.P."), *aff'd*, 557 Pa. 555, 735 A.2d 79 (1999). See also Federal Land Bank of Baltimore v. Sustrik, 367 Pa. Super. 582, 533 A.2d 169 (1987) (court determined priority between judgment and mortgage lien creditors based on petitions and exceptions filed in connection with sheriff's sales of real property).

¹³ See Pa. R. Civ. P. 3121 (stay of execution with respect to enforcement of judgments); *id.* at 3136 (exceptions filed to sheriff's proposed schedule of distribution of proceeds); *id.* at 3183 (stay of execution with respect to mortgage foreclosure).

¹⁴ See Complaint, ¶ 42.

party intentionally conceals a material fact rather than making an affirmative misrepresentation.¹⁵

If any misrepresentation by omission was made regarding Arczip's Judgment, it could only have been made by the Kogans, who allegedly did not disclose the Judgment's existence to Indymac's predecessor at the closing on the Mortgage refinancing. Since Arczip could not have made the alleged misrepresentation, it cannot be liable for fraud.

Although Indymac has not alleged sufficient facts to make out a claim for fraud against Arczip, Indymac has sufficiently pled a claim for conspiracy against Arczip.

A cause of action for conspiracy requires that two or more persons combine or enter an agreement to commit an unlawful act or to do an otherwise lawful act by unlawful means. Proof of malice is an essential part of a cause of action for conspiracy. The mere fact that two or more persons, each with the right to do a thing, happen to do that thing at the same time is not by itself an actionable conspiracy.¹⁶

Indymac alleges that, by filing its Judgment just before the Mortgage closing, such that it would not appear of record, Arczip knowingly assisted the Kogans to defraud Indymac. Indymac has thereby pled a claim for civil conspiracy against Arczip.

In addition to its conspiracy claim, Indymac also bases its claim for declaratory judgment in Count II on "principles of equity and estoppel." Arczip objects that estoppel is not properly pled. In execution proceedings, where two competing lien creditors are fighting over proceeds that are insufficient to pay both creditors, the courts have permitted creditors to raise both equity and estoppel as bases for re-ordering the parties' lien priority. Generally,

[t]he priority of liens as they appear on record is prima facie evidence of the manner in which the proceeds are to be distributed. However, if the exceptant can produce evidence that he is equitably entitled to priority, the order of payment of the proceeds of a foreclosure sale will be changed.¹⁷

¹⁵ Bortz v. Noon, 556 Pa. 489, 499, 729 A.2d 555, 560 (1999).

¹⁶ Burnside v. Abbot Laboratories, 351 Pa. Super. 264, 277-8, 505 A.2d 973, 980 (1985).

¹⁷ Farmers Trust Co. v. Bomberger, 362 Pa. Super. 92, 96-8, 523 A.2d. 790, 792-3 (1987).

Although Arczip's alleged tactic use of the Buck's County clerk's known filing delays does not give rise to legal claim for fraud, it may serve as the basis for a claim for equitable estoppel.

An estoppel requires the presence of two essential elements. The first is an inducement to act. The second is a justifiable reliance on that inducement. The burden rests upon the party asserting estoppel to establish the elements thereof by evidence which is clear, precise, and unequivocal.¹⁸

In this case, Indymac alleges that Arczip filed its Judgment one week before the refinancing knowing that it would not appear of record, and the failure of the Judgment to appear of record caused Indymac justifiably to believe that its Mortgages would stand as first and second liens against the Property. Indymac has set forth a claim for estoppel against Arczip.

Furthermore, other equitable rules, such as the equitable subrogation rule, may be applicable.

The doctrine of equitable subrogation is recognized in Pennsylvania, and equitable subrogation is a widely-recognized exception to the 'first in time' rule. . . [E]quitable subrogation permits a person who pays off an encumbrance to assume the same priority position as the holder of the previous encumbrance.¹⁹

Since money from Indymac's Mortgages was used to pay off the existing mortgage on the Property, it is possible that Indymac's lien is entitled to the same priority as the prior mortgage.

In addition, the equitable subordination rule may apply to prevent inequity due to Indymac's claimed lack of notice of Arczip's lien. The Pennsylvania Supreme Court has held that the subordination rule is the applicable rule of distribution in a circular lien situation that arises from the failure of one party to make a required filing:

A circularity involving failure-to-file arises from the operation of Pennsylvania's race-notice recording system where proper recording of an interest or lien is necessary for priority as to all except those with actual notice of the prior lien. Successive mortgages may be used to illustrate: A takes a first mortgage which he

¹⁸ *Id.*, 362 Pa. Super. at 99, 523 A.2d at 793-4.

¹⁹ First Commonwealth Bank v. Heller, 863 A.2d 1153, 1156 (Pa. Super. 2004).

fails to file. B takes a second mortgage, with notice of the mortgage to A, and files. C takes a third mortgage, without notice of the mortgage to A. A has priority over B (because of B's knowledge); B has priority over C because of prior filing; C has priority over A (because of A's failure to file and C's lack of knowledge). In this situation, the circularity arises because of A's failure to file. On a theory of fault, A seems to be the appropriate person to bear the loss.²⁰

Indymac's lack of knowledge is obviously a question of fact which must be resolved at a later stage of these proceedings, so Indymac's equitable claims based on such factual allegations cannot be dismissed.

In Count III of the Complaint, Indymac claims that Arczip should be limited to receiving the amount it agreed to accept from the Kogans in settlement, \$210,420, less all sums the Kogans paid Arczip under their settlement agreement, and that Arczip should not be permitted to recover the full Judgment amount of \$800,000. Arczip objects that Indymac may not challenge the Judgment amount. Arczip is incorrect. A junior creditor may require a senior creditor to explain how the amount it claims due was calculated.²¹ Therefore, Indymac is entitled to demand that Arczip produce evidence to show that the amount its claims under the Judgment is correct.

CONCLUSION

Arczip's Preliminary Objections to Indymac's Complaint are denied.

BY THE COURT:

MARK I. BERNSTEIN, J.

²⁰ In re 250 Bell Road, 479 Pa. 222, 229, 388 A.2d 297, 301(1978).

²¹ State Street Bank v. Petrey, 819 A.2d 581 (Pa. Super. 2003).