

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

|                                    |                      |
|------------------------------------|----------------------|
| BEAL BANK, Assignee of First Union | : AUGUST TERM, 2001  |
| National Bank                      | :                    |
|                                    | : No. 02522          |
| Plaintiff,                         | :                    |
|                                    | :                    |
| v.                                 | : COMMERCE PROGRAM   |
|                                    | :                    |
| PIDC FINANCING CORPORATION and     | :                    |
| SMF REALTY ASSOCIATES, L.P.        | :                    |
|                                    | :                    |
| Defendants.                        | : Control No. 040915 |

**ORDER**

AND NOW, this 9th day of September 2002, upon consideration of plaintiff, Beal Bank's Motion for Summary Judgment against defendant SMF Realty Associates, L.P. ("SMF"), SMF's response in opposition, the respective memoranda, all matters of record, and in accord with the contemporaneous Opinion filed of record, it is hereby **ORDERED** that the Motion is **Granted, in part**, and judgment is entered in the amount of \$4,035,462.34 for the principal balance.

It is further **ORDERED** that a hearing will be scheduled to determine (a) the interest due and (b) the reasonable attorney fees.

**BY THE COURT,**

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**ALBERT W. SHEPPARD, JR., J.**

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|                                    | :                    |
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**O P I N I O N**

**Albert W. Sheppard, Jr., J. .... September 9, 2002**

Plaintiff, Beal Bank, has filed a Motion for Summary Judgment (“Motion”) against defendant, SMF Realty Associates, L.P. (“SMF”), on the sole cause of action for mortgage foreclosure.<sup>1</sup> For the reasons set forth, the court is issuing a contemporaneous Order granting the Motion.

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<sup>1</sup> Plaintiff did not bring this Motion against the other defendant, PIDC Financing Corporation.

## BACKGROUND

Beal Bank is a savings bank chartered in Texas, and is the assignee of First Union National Bank (“Bank”), a national banking association, pursuant to an assignment dated December 18, 2001.<sup>2</sup> Motion, ¶ 1; Amended Compl., ¶ 1. SMF is a limited partnership. Motion, ¶ 2; Answer<sup>3</sup>, ¶ 2.

On or about November 15, 1999, the Bank made a construction loan to SMF of up to \$4,500,000 (“Loan”), and SMF executed and delivered to the Bank a promissory note (“Note”) for that amount. Motion, ¶¶ 3-4; Answer, ¶¶ 3-4; Answer to Amended Compl., ¶ 6.

SMF also executed and delivered to the Bank a mortgage dated November 15, 1999 (“Mortgage”). Motion, ¶ 5; Answer, ¶ 5; Answer to Amended Compl., ¶ 6. According to plaintiff, the Mortgage serves as security for the Note. Motion, ¶ 5. SMF denies this as a conclusion of law to which it need not respond. Answer, ¶ 5. The Mortgage covers the real property located at 2722 Commerce Way, Philadelphia, Pennsylvania (“Property”), and is recorded at Mortgage Book JTD 3369, page 593, Philadelphia County Records. Motion, ¶¶ 5-6; Answer, ¶¶ 5-6. SMF is the equitable owner of the Property, and defendant PIDC Financing Corporation (“PIDC”) is the record owner of the Property. Amended Compl., ¶¶ 7-8; Answer, ¶ 6.

According to the affidavit of Donald Bordelon, Senior Commercial Loan Officer for Beal Bank, SMF “was to obtain a loan of \$1,750,000 from the Pennsylvania Industrial Development Authority

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<sup>2</sup> By order entered April 11, 2002, this court granted First Union National Bank’s petition to substitute Beal Bank SSB as plaintiff in this action.

<sup>3</sup> References to “Answer” in this Opinion refer to SMF’s Answer to this Motion whereas references to “Answer to Amended Compl.” refer to SMF’s Answer to plaintiff’s Amended Complaint.

(“PIDA”) to pay down the [ ] Loan.” Bordelon Aff.<sup>4</sup>, ¶ 6. SMF states that it “made every effort to obtain a loan to down the indebtedness, but that despite such efforts, SMF was unable to procure such a loan.” Answer, ¶ 7.

According to plaintiff, the Note and Mortgage matured on October 31, 2000, and SMF is in default of its obligations under the Note and Mortgage, including the obligation to repay the full amount of the Loan on or before October 31, 2000. Amended Compl., ¶ 9. In response to the allegation that it has defaulted, SMF has stated that “the Note is a writing which speaks for itself, and any characterizations of the Note are specifically denied,” and “the remaining averments in ¶ 9 [of the Amended Complaint] are denied as conclusions of law, to which no response is required.” Answer to Amended Compl., ¶ 9.

Plaintiff asserts that SMF owes the entire principal balance of the Loan, as well as interest, late fees, attorneys’ fees and costs. Motion, Ex. A (bills reflecting attorneys’ fees and costs); Amended Compl., ¶¶ 10-11. SMF denies that it owes any of these amounts to plaintiff. Answer to Amended Compl., ¶¶ 10-11.

On October 17, 2001, the Bank filed an Amended Complaint in mortgage foreclosure against SMF and PIDC.<sup>5</sup> Motion, ¶ 8; Answer, ¶ 8. On November 6, 2001, SMF filed an Answer to the Amended Complaint. Motion, ¶ 10; Answer, ¶ 10. SMF did not file a new matter, counterclaim or preliminary objections to the Amended Complaint. Discovery closed on February 4, 2002, and neither party filed a petition to extend discovery. Beal Bank now brings this Motion asserting that it is entitled to summary judgment because no genuine issue of material fact exists. Motion, ¶¶ 14-15.

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<sup>4</sup> Donald Bordelon’s affidavit is attached to the Motion and supporting memorandum of law.

<sup>5</sup> The Bank filed the original complaint on August 23, 2001, and served it upon SMF on August 29, 2001.

## DISCUSSION

### I. Standard for Summary Judgment

“Summary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Horne v. Haladay, 728 A.2d 954, 955 (Pa. Super. 1999) (citing Pa. R. Civ. P. 1035.2). Further, “in determining whether to grant summary judgment, a trial court must resolve all doubts against the moving party and examine the record in a light most favorable to the non-moving party.” Id. Summary judgment may only be granted in cases where it is “clear and free from doubt that the moving party is entitled to judgment as a matter of law.” Id. (citations omitted).

Rule 1035.3 provides, however, that when confronted with a motion for summary judgment,

[t]he adverse party may not rest upon the mere allegations or denials of his pleading, but must file a response . . . 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.

Pa. R. C. P. 1035.3. A non-moving party is required to “adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor.” Ertel v. Patriot News Co., 544 Pa. 93, 101-02, 674 A.2d 1038, 1042 (1996) (holding that the trial court’s grant of summary judgment in favor of the defendants was proper pursuant to Pa. R. C. P. 1035, as amended effective July 1, 1996). Otherwise, summary judgment should be granted.

In a mortgage foreclosure action, summary judgment is properly granted where “the mortgagors admit that the mortgage is in default, that they have failed to pay interest on the obligation, and that the recorded mortgage is in the specified amount.” Cunningham v. McWilliams, 714 A.2d 1054, 1057 (Pa. Super. 1998), citing Landau v. Western Pennsylvania National Bank, 445 Pa. 217, 225-26, 282 A.2d 335, 340 (1971). “This is so even if the mortgagors have not admitted the total amount of the indebtedness in their pleadings.” Id. Our Superior Court has further explained that “[i]n an action on a note or bond secured by a mortgage, a plaintiff presents a *prima facie* case by showing ‘the execution and delivery of the [note] and its nonpayment . . . .’” Corestates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1056 (Pa. Super. 1999), citing Philadelphia Workingmen’s Sav. Loan & Bldg. Ass’n v. Wurzel, 355 Pa. 86, 90, 49 A.2d 55, 57 (1946).

## **II. Legal Analysis**

Plaintiff argues that each of the elements enumerated in Cunningham, *infra.*, exist to warrant summary judgment. Plaintiff first contends that SMF has admitted its execution and delivery of the Mortgage, an executed copy of which plaintiff attached to its Amended Complaint as Exhibit C. Motion, ¶ 11; Pltf’s Memo of Law, p. 3. The Amended Complaint avers:

In consideration of and to secure the Loan, SMF as equitable owner executed and delivered to the Bank a certain Mortgage (the “Mortgage”) dated November 15, 1999 which is recorded of record . . . and which Mortgage created a lien in favor of the Bank on certain real property located at 2722 Commerce Way, Philadelphia, Pennsylvania which property is more fully described in the metes and bounds description attached hereto as Exhibit “B” (the “Mortgaged Property”). . . . A true and correct copy of Mortgage is marked as Exhibit “C,” attached hereto and incorporated by reference.

Amended Compl., ¶ 6 and Exs. B and C. In response, SMF stated:

Admitted in part, denied in part. It is admitted that SMF executed and delivered to the Bank a certain mortgage dated November 15, 1999 (“Mortgage”). It is admitted that there is a document attached to the Amended Complaint as Exhibit “B,” which includes a two-page meets [sic] and bounds description. The averments in ¶ 6 which pertain to the contents of the Mortgage are denied, as the Mortgage is a writing which speaks for itself, and any characterizations of the document are expressly denied. The remaining averments in ¶ 6 are denied as conclusions of law, to which no response is required.

Answer to the Amended Compl., ¶ 6. Although SMF does not specifically state that it admits that Exhibit C to the Amended Complaint is a true and correct copy of the Mortgage it executed, plaintiff argues that SMF has made such an admission.

Rule 1029 of the Pennsylvania Rules of Civil Procedure provides: “Averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication. A general denial or a demand for proof, except as provided by subdivisions (c) and (e) of this rule, shall have the effect of an admission.” Pa.R.C.P. 1029(b); See First Wis. Trust Co. v. Strausser, 439 Pa. Super. 192, 199, 653 A.2d 688, 692 (1995) (mortgagor’s general denial of allegation regarding total amount due on mortgage was deemed an admission); Swift v. Milner, 371 Pa. Super. 302, 309, 538 A.2d 28, 30 (1988) (general denials on an issue deemed admissions, allowing summary judgment on that issue). To determine whether a denial has been made with sufficient specificity, a court must review the responsive pleading as a whole. Commonwealth by Preate v. Rainbow Associates, Inc., 138 Pa. Commw. 56, 61, 587 A.2d 357, 360 (1991) (citation omitted); Cercone v. Cercone, 254 Pa. Super. 381, 390, 386 A.2d 1, 5 (1978).

Rule 1029 requires, therefore, that SMF specifically deny or admit whether Exhibit C to the Amended Complaint was the Mortgage it executed.<sup>6</sup> Although SMF's pleading should have been more precise, SMF has never specifically denied that Exhibit C is the Mortgage it executed. Therefore, this court deems SMF's response as an admission that Exhibit C to the Amended Complaint is a copy of the Mortgage it executed. Pa. R. C. P. 1029(b).

Next, the Mortgage itself establishes the specified amount for which it serves as security. Amended Compl., Ex. C. The Mortgage provides:

WHEREAS, Mortgagor is indebted to Mortgagee in the principal sum of FOUR MILLION FIVE HUNDRED THOUSAND Dollars (\$4,500,000.00) (the "Loan"), together with interest thereon, as evidenced by a certain Promissory Note of even date herewith (the "Note"); and

WHEREAS, Mortgagor is the equitable owner of fee simple title to those certain tracts of land located in the City of Philadelphia, County of Philadelphia, Commonwealth of Pennsylvania, as more particularly described in Schedule "A" attached hereto and made a part hereof (the "Real Estate"); and

WHEREAS, to induce Mortgagee to make the Loan and to secure payment of the Note and the other obligations described below, Mortgagor has agreed to execute and deliver this Mortgage.

Amended Compl., Ex. C., p. 1.

Based on SMF's admission that Exhibit C to the Amended Complaint is a copy of the Mortgage it executed, this court relies on the Mortgage for evidence of its specified amount. Pa. R. C. P. 1029(b). Furthermore, SMF has never disputed plaintiff's allegation that the amount of the Mortgage is \$4,500,000. SMF did not file a New Matter and did not raise defenses in its Answer to the Amended Complaint. In addition, SMF did not file a counterclaim to the Amended Complaint. In short, nothing in the record

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<sup>6</sup> SMF does not argue that either of the two exceptions found in Pa. R. C. P. 1029(c) or (e) apply.



indicates SMF's specific denial of plaintiff's averment regarding the amount of the Mortgage.

Plaintiff further contends that SMF also has admitted its default of the Mortgage. Pltf's Memo of Law, p. 4. With regard to what constitutes a default, the Mortgage states that "[n]on-payment when due of any sum required to be paid to Mortgagee under any of the Loan Documents, including without limitation, principal and interest" qualifies as an "event of default." Amended Compl., Ex. C, ¶¶ 7, 7.1. Plaintiff contends that SMF has defaulted on the Mortgage by virtue of nonpayment. Motion, ¶ 12. The Amended Complaint avers as follows:

SMF's obligation under the Note and Mortgage matured on October 31, 2000 due to the failure of SMF to effect a conversion of the Loan from a construction loan to a permanent loan. SMF is in default of its obligations pursuant to the Note and Mortgage (collectively, the "Documents") for reasons including the failure to repay the full amount of the Loan on or before October 31, 2000 as set forth in paragraph 2.3 of the Note. PIDC is in default of its obligations as a result of, among other things, the failure of SMF to make payments when due pursuant to the terms of the Documents.

Amended Compl., ¶ 9.<sup>7</sup>

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<sup>7</sup> The Note, attached to the Amended Complaint as Exhibit A, explains the construction loan and permanent loan phases of the agreement between SMF and the Bank. During the initial construction loan phase, "[i]nterest only for the first twelve (12) months on the outstanding principal balance at the Interest Rate shall be due and payable monthly in arrears commencing on the first day of January, 2000 and continuing on the first day of each month thereafter until the Conversion Date (the "Construction Phase")." Amended Compl., Ex. A, ¶ 2.1.

Then, SMF was to obtain a permanent loan from the Pennsylvania Industrial Development Authority in an amount up to \$1,750,000 which would allow SMF to pay down its indebtedness on the Note. Amended Compl., Ex. C (Joinder of Mortgage and Agreement), p. 1. This would convert the construction phase to the permanent phase of the loan. The Note defines the Conversion Date as "the date on which the Construction Loan is converted to the Permanent Loan, pursuant to the terms and conditions of the Loan Agreement." Amended Compl., Ex. A, ¶ 1.3.

During the permanent loan phase, "[f]rom the Conversion Date until the full amount of principal due hereunder has been paid (the "Permanent Phase"), principal and interest shall be due and payable on the first day of each month . . . commencing on the first calendar month following the Conversion Date and continuing on the first day of each month thereafter, in consecutive monthly installments in an

SMF responded to these allegations by stating:

Denied. The averments in ¶ 9 which pertain to the contents of the Note are denied, since the Note is a writing which speaks for itself, and any characterization of the Note are specifically denied. The remaining averments in ¶ 9 are denied as conclusions of law, to which no response is required.

Answer to Amended Compl., ¶ 9.

Plaintiff contends that SMF's response regarding the issue of default is another general denial which should be deemed an admission pursuant to Pa. R. C. P. 1029(b). Pltf's Memo of Law, pp. 3-4. SMF's position is that it has not admitted the plaintiff's averments in paragraph 9 of the Amended Complaint because "[t]he Note is a written document . . . and therefore the Defendant need not provide its interpretation of the Document in its Answer." Def's Memo of Law, p. 5. This argument fails because whether or not SMF defaulted on the Mortgage is a factual allegation which SMF had to specifically deny or admit pursuant to Pa. R. C. P. 1029. First Wis. Trust Co., 439 Pa. Super. at 199, 653 A.2d at 692.

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Footnote 7 - continued

amount equal to the sum of (i) all then accrued and unpaid interest at the Interest Rate, plus (ii) a principal payment based on a hypothetical fifteen (15) year amortization period at the Interest Rate. If the Conversion Date is other than the first day of the month, interest only, at the Interest Rate on the unpaid principal balance of the Loan from the Conversion Date to the first Payment Date shall be due and payable on the first Payment Date and the first payment of principal and interest shall be due and payable on the second Payment Date." Amended Compl., Ex. A, ¶ 2.2.

The Note further states that "[t]he entire unpaid principal amount hereof, together with accrued and unpaid interest thereon and all other amounts payable hereunder shall be due and payable on October 1, 2014 (the "Maturity Date"). Notwithstanding the foregoing, if the conditions to conversion set forth in the Loan Agreement are not satisfied on or before October 31, 2000 (the "Scheduled Conversion Date"), the Construction Loan shall not convert to the Permanent Loan and the outstanding principal balance of the Construction Loan, together with all accrued and unpaid interest thereon and all other amounts payable under the Loan Documents, shall immediately be due and payable on the Scheduled Conversion Date." Amended Compl., Ex. A, ¶ 2.3. Plaintiff contends that by October 31, 2000, the construction loan never converted to the permanent loan, and that therefore, the principal, interest and all other amounts became immediately due and payable in full. Amended Compl., ¶ 9.

SMF's mere statement that "the Note is a writing which speaks for itself" is unresponsive to whether SMF defaulted on the Mortgage. In fact, SMF's blanket denial is particularly elusive considering that SMF should have specific knowledge of its obligations and whether or not it satisfied those obligations.

Although SMF generally denies that any amounts are due and owing, SMF nowhere disputes that it failed to make required payments pursuant to the Mortgage. Answer to Amended Compl., ¶¶ 9, 11. Instead, SMF's response to the Motion impliedly admits that the Note never converted from the construction loan phase to the permanent loan phase where it stated that "SMF made every effort to obtain a loan to pay down the indebtedness, but that despite such efforts, SMF was unable to procure such a loan." Answer, ¶ 7. Therefore, based on the terms of the Mortgage, Note, Pa. R. C. P. 1029(b) and plaintiff's pleading, SMF's general denial of whether it defaulted on the Mortgage is deemed an admission.

Similarly, SMF's general denial of its failure to pay interest on the Mortgage is deemed an admission. In the Amended Complaint, plaintiff averred that:

SMF and PIDC are indebted to the Bank as follows:

|                                |                |
|--------------------------------|----------------|
| Principal                      | \$4,231,685.06 |
| Interest as of August 16, 2001 | \$26,498.06    |
| Late Fees                      | \$7,748.72     |
| Legal Fees & Costs to 7/31/01  | \$30,606.29    |
| TOTAL                          | \$4,296,538.13 |

Interest continues to accrue from and after August 16, 2001 at the per diem rate of \$849.86.

Amended Compl., ¶ 11.<sup>8</sup>

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<sup>8</sup> The Bordelon affidavit states that "[a]s of March 25, 2002, Defendant owes \$4,120,510.38 to Beal Bank, broken down as follows:

In its Answer, SMF's responded as follows:

Denied. It is specifically denied that the sums set forth in ¶ 11 are due and owing. It is specifically denied that the dollar amounts for late fees and legal fees and costs are due and owing, and strict proof thereof is demanded. By way of further answer, the applicable loan documents provide for payment, in limited circumstances, of reasonable legal fees. SMF specifically denies that the legal fees and costs set forth in ¶ 11 are reasonable. To the contrary, said fees and costs are completely unreasonable and not owing by SMF.

Answer to Amended Compl., ¶ 11. Despite SMF's use of the words "specifically denied," its response to whether or not it is indebted to the Bank for failure to pay interest constitutes a general denial. SMF's denial "that the sums set forth in ¶ 11 are due and owing," fails to respond to whether it has paid any interest on the Mortgage. Therefore, SMF's general denial is deemed an admission that it has failed to pay interest on the Mortgage. Pa. R. C. P. 1029(b).

In sum, SMF has admitted that the Mortgage is in a specified amount, it is in default of the Mortgage and that it has failed to pay interest on the Mortgage. Absent a disputed issue of material fact, these admissions justify the grant of summary judgment in a mortgage foreclosure action. Cunningham, 714 A.2d at 1057, citing Landau, 445 Pa. at 225-26, 282 A.2d at 340. SMF argues, however, that genuine issues of material fact exist with regard to "the maturity date of the Note and the conditions upon which a default would result." Def's Memo of Law, p. 5. SMF's rationale is that although plaintiff generally refers

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Footnote 8 - continued

|                                  |                |
|----------------------------------|----------------|
| Principal                        | \$4,035,462.34 |
| Interest                         | \$ 15,236.70   |
| Attorneys' fees                  | \$ 69,811.34   |
| Total                            | \$4,120,510.38 |
| -----                            |                |
| Per Diem after<br>March 25, 2002 | \$ 602.29      |

in its Amended Complaint to paragraph 2.3 of the Note as being the basis for the default<sup>9</sup>, paragraph 2.3 of the Note refers to conditions set forth in a Loan Agreement which plaintiff failed to include in its pleadings. Def's Memo of Law, pp. 5-6. Paragraph 2.3 of the Note states:

**Maturity Date:** The entire unpaid principal amount hereof, together with accrued and unpaid interest thereon and all other amounts payable hereunder shall be due and payable on October 1, 2014 (the "Maturity Date"). Notwithstanding the foregoing, **if the conditions to conversion set forth in the Loan Agreement** are not satisfied on or before October 31, 2000 (the "Scheduled Conversion Date"), the Construction Loan shall not convert to the permanent loan and the outstanding principal balance of the Construction Loan, together with all accrued and unpaid interest thereon, and all other amounts payable under the Loan Documents, shall immediately be due and payable on the Scheduled Conversion Date.

Amended Compl., Ex. A, ¶ 2.3 (emphasis added). SMF argues that the absence of the Loan Agreement gives rise to material issues of fact regarding the Note's maturity date and the conditions upon which a default would result. Def's Memo of Law, p. 5.

Initially, although it is true that the record does not contain the Loan Agreement, the Note, attached as an exhibit to the Amended Complaint, incorporates the Loan Agreement by reference. Amended Compl., Ex. A, first paragraph on p. 1. More significantly, the record does not contain any evidence whatever that a genuine issue of fact exists regarding the Note's maturity date and the conditions upon which a default would result. SMF makes these allegations in its memorandum of law in opposition to the Motion, without any reference to the record, such as deposition testimony, answers to interrogatories, admissions or affidavits, to establish SMF's position regarding the Note's maturity date (and how it differs

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<sup>9</sup> Plaintiff avers: "SMF is in default of its obligations pursuant to the Note and Mortgage (collectively, the "Documents") for reasons including the failure to repay the full amount of the Loan on or before October 31, 2000 as set forth in paragraph 2.3 of the Note." Amended Compl., ¶ 9.

from plaintiff's position) and the conditions of default (and how it differs from plaintiff's position).<sup>10</sup> The record itself simply does not indicate an issue of fact to be determined at trial.

Moreover, the absence of the Loan Agreement does not preclude summary judgment because plaintiff has established the existence and terms of the Note and Mortgage by including with the Amended Complaint, a copy of the Note, a copy of the Mortgage, and a copy of the metes and bounds description of the mortgaged property which is the subject of the Mortgage. Amended Compl., Exs. A, B, C. Plaintiff has established SMF's default on the Mortgage through its averments in the Amended Complaint, which have been admitted by SMF pursuant to Pa. R. C. P. 1029, and by David Bordelon's verified statements in his affidavit. Amended Compl., ¶¶ 9-11; Bordelon Affidavit, ¶¶ 8-9, 11-12.

SMF also argues that the Nanty-Glo rule prohibits this court's consideration of the affidavit by Donald Bordelon offered by plaintiff for its motion. Def's Memo of Law, p. 2; Nanty-Glo v. American Surety Co., 309 Pa. 236, 163 A. 523 (1932). Our Commonwealth Court has summarized the Nanty-Glo rule by stating:

The general substance of the Nanty-Glo rule is that summary judgment may not be had where the moving party relies exclusively upon oral testimony, through affidavits or depositions, to establish the absence of a genuine issue of material fact; no matter how clear and indisputable such proof may appear, it is the province of the jury to decide the credibility of the witnesses.

Kee v. Pennsylvania Turnpike Commission, 743 A.2d 546, 550 (Pa. Commw. 1999), citing O'Rourke

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<sup>10</sup> SMF's argument that plaintiff failed to include the Loan Agreement in its pleadings could have served as the basis for a preliminary objection for failure to attach a writing. SMF, however, did not file preliminary objections to the Amended Complaint. In addition, SMF did not plead a new matter or a counterclaim arguing that a necessary writing was missing, or that no default existed because of a contingency found in the Loan Agreement.

v. Dep't of Corrections, 730 A.2d 1039 (Pa. Commw. 1999). The Superior Court has employed a three-step analysis to determine whether the Nanty-Glo rule should apply:

Initially, it must be determined whether the plaintiff has alleged facts sufficient to establish a *prima facie* case. If so, the second step is to determine whether there is any discrepancy as to any facts material to the case. Finally, it must be determined whether, in granting summary judgment, the trial court has usurped improperly the role of the jury by resolving any material issues of fact.

Kirby v. Kirby, 455 Pa. Super. 96, 103, 687 A.2d 385, 388 (1997), citing Dudley v. USX Corp., 414 Pa. Super. 160, 169-70, 606 A.2d 916, 920 (1992).<sup>11</sup>

Applying the three-step analysis to this case, the plaintiff has presented a *prima facie* case in that plaintiff has shown through the pleadings and Pa. R. C. P. 1029, that SMF is in default of the Mortgage, that SMF has failed to pay interest on the obligation, and that the Mortgage is in the specified amount of \$4,500,000. See Cunningham, 714 A.2d at 1057, citing Landau, 445 Pa. at 225-26, 282 A.2d at 340.

Next, the affidavit at issue does not present a discrepancy among the material facts of the case. Bordelon's affidavit states, in relevant part, that the Note became due and payable in full on October 31, 2000 (¶ 8), that the Note was not paid off (¶ 9), that the Note is secured by the Mortgage on property at 2722 Commerce Way, Philadelphia, Pennsylvania, which is owned by the defendant (¶ 12), and that the plaintiff paid attorneys' fees in this matter, and the copies of the bills are attached to the Motion as Ex. A

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<sup>11</sup> Two trial courts have opined that the Nanty-Glo rule has been limited as it applies to motions for summary judgment by our Supreme Court's opinion in Ertel v. Patriot-News, Co., 544 Pa. 93, 674 A.2d 1038 (1996), which held that a non-moving party defending against a summary judgment motion must establish evidence on issues for which it bears the burden of proof as would permit the jury to find in its favor. Renk v. HealthAmerica Corp., 50 Pa. D. & C.4th 103, 108 n.3 (C.C.P. Allegheny County, December 19, 2000) aff'd, 792 A.2d 626 (Pa. Super. 2001) app. denied, 2002 W L 1827618 (Pa. Aug. 9, 2002); Butterfield v. Meadville Medical Center, 32 Pa. D. & C.4th 289, 296 n.7 (C.C.P. Crawford County, September 23, 1996).

(¶14). In addition, SMF’s Answer and memorandum of law fail to point to any discrepancies between the statements made in the Bordelon affidavit and the material facts. The affidavit itself does not reveal any material discrepancies with either plaintiff’s or defendant’s pleadings, and since SMF has failed to present any affidavits, deposition testimony, or discovery, the affidavit does not reveal discrepancies with other evidence.<sup>12</sup>

However, the affidavit does suggest a different per diem interest rate from that rate set forth in the Amended Complaint.<sup>13</sup> Accordingly, the court concludes that a hearing is necessary to determine the amount of interest due on the indebtedness, as of the date of this Order.

As to the third element of the analysis, this court does not believe it would be usurping the role of the jury as fact finder because, as discussed above in this Opinion, no disputed issues of material fact have been established. Therefore, the Nanty-Glo rule does not apply to preclude consideration of the Bordelon affidavit.<sup>14</sup>

Finally, SMF argues that material issues of fact exist regarding the reasonableness of attorneys’ fees claimed by plaintiff. Def’s Memo of Law, pp. 6-7. Generally, “[t]he parties to litigation are responsible for their own fees unless otherwise provided by statutory authority, agreement of the parties or some other recognized exception.” Equibank v. Miller, 422 Pa. Super. 240, 619 A.2d 336, 338 (1993), app. denied,

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<sup>12</sup> Bordelon’s affidavit also authenticates Exhibit A attached to the Motion. Bordelon Aff., ¶ 14.

<sup>13</sup> See page 9, and footnote 8, supra.

<sup>14</sup> SMF argues that this court should treat the Motion like a motion for judgment on the pleadings. Def’s Memo of Law, p. 4. Because the Nanty-Glo rule does not preclude consideration of the Bordelon affidavit, however, this court has considered all of the evidence presented and has analyzed the Motion as it has been filed, i.e., as a motion for summary judgment.



535 Pa. 647, 633 A.2d 151 (1993). Significantly, SMF does not argue in its memorandum of law that plaintiff is not entitled to attorneys' fees<sup>15</sup>; rather, SMF argues that the reasonableness of the fees demanded is an issue of material fact which precludes the grant of summary judgment. Def's Memo of Law, pp. 6-7.

The reasonableness of the requested attorneys' fees is an issue of damages which does not affect whether plaintiff has satisfied the standard for summary judgment. In this mortgage foreclosure action, summary judgment is properly granted where "the mortgagors admit that the mortgage is in default, that they have failed to pay interest on the obligation, and that the recorded mortgage is in the specified amount." Cunningham, 714 A.2d at 1057, citing Landau, 445 Pa. at 225-26, 282 A.2d at 340. "This is so even if the mortgagors have not admitted the total amount of the indebtedness in their pleadings." Id. This court agrees with SMF that a hearing would be appropriate to hear testimony regarding the reasonableness of attorneys' fees. However, such a hearing does not preclude summary judgment.

It is significant to recall the standard for summary judgment in this case. On a motion for summary judgment, a non-moving party may not rest on denials of the pleading, but rather, must present evidence regarding existing issues of fact. Pa. R. C. P. 1035.3; Ertel, 544 Pa. at 101-02, 674 A.2d at 1042. Here, SMF has failed to present any theory to defend against plaintiff's allegations and any evidence to support a defense to plaintiff's *prima facie* case. In fact, SMF failed to cite any depositions, responses to discovery or affidavits in its Answer or supporting memorandum of law to defend against this Motion.

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<sup>15</sup> Regarding attorneys' fees, the Note provides: "If Bank retains the services of counsel by reason of a claim of default or an Event of Default hereunder or under any of the other Loan Documents, or on account of any matter involving this Note, or for examination of matters subject to Bank's approval under the Loan Documents, all costs of suit and all reasonable attorneys' fees and such other reasonable expenses so incurred by Bank shall be paid by Borrower, on demand, and shall be deemed part of the obligations evidenced hereby." Amended Compl., Ex. A, ¶ 13.5.

Indeed, SMF has failed to present any evidence whatsoever. “Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Ertel, 544 Pa. at 102, 674 A.2d at 1042. Therefore, in reviewing the record in a light most favorable to SMF, summary judgment is appropriate because the record does not demonstrate any genuine issue of material fact.

### **CONCLUSION**

For the reasons discussed, summary judgment in favor of the plaintiff and against SMF is granted, except as to (a) plaintiff’s request for attorneys’ fees which is held under advisement pending a hearing regarding the reasonableness of those fees, and (b) the amount of interest due on the indebtedness, also held under advisement pending a hearing.

The court will enter a contemporaneous Order consistent with this Opinion.

**BY THE COURT,**

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**ALBERT W. SHEPPARD, JR., J.**