IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
CEFERINO A. MARTINEZ and PATRICIA A. MARTINEZ	:	NO. 04-1254
	:	

O'NEILL, J. DECEMBER 9, 2004

MEMORANDUM

Plaintiff, the United States of America, on behalf of its agency, the United States Department of Agriculture, Rural Housing Service (formerly Farmers Home Administration), filed a complaint on March 22, 2004 seeking to foreclose on property held by defendants, Ceferino and Patricia Martinez, claiming that defendants defaulted on a loan secured by a mortgage on the defendants' property. Defendant, Patricia Martinez, filed an answer denying that they have defaulted on the mortgage loan.[1] Before me now is plaintiff's motion for summary judgment, defendant Patricia Martinez's response thereto, and plaintiff's reply.

BACKGROUND

On June 12, 1984, defendants obtained a Rural Housing Loan from the Rural Housing Service in the sum of $44,000 pursuant to the provisions of Title V of the Housing Act of 1949,

[1]Plaintiff has been unable to serve Ceferino Martinez personally. I issued an order requiring that the summons and complaint be served on Ceferino Martinez via certified mail and by posting a copy of the summons and complaint on the property at issue in accordance with Federal Rule of Civil Procedure 4(e)(1) and Pennsylvania Rules of Civil Procedure 430(a) & 410(c)(2).

42 U.S.C. § 1471, et seq.[2] To secure this loan, defendants executed and delivered a mortgage covering the real property at 161 Elenora Drive, Maytown, Lancaster County, Pennsylvania.[3] The mortgage was properly recorded on June 13, 1984 with the Office of the Recorder of Deeds in Lancaster County, Pennsylvania. According to RHS, it "subsidized" defendants' monthly loan

---

[2]The promissory note provides for interest on the unpaid principal of 11.875% per annum with monthly payments of $445 over the course of 396 months, or 33 years. The promissory note also provides, in the penultimate paragraph:

> Failure to pay when due any debt evidenced hereby or perform any covenant or agreement hereunder shall constitute default under any other instrument evidencing a debt of borrower owing to, insured or Guaranteed by the Government or securing or otherwise relating to such a debt; and default under any such other instrument shall constitute default hereunder. UPON ANY SUCH DEFAULT, the Government at its option may declare all or any party of any such indebtedness immediately due and payable.

The loan was refinanced pursuant to a reamortization agreement, on July 8, 1996, by which point the unpaid principal balance was $33,801.49, the accrued interest to date was $285.92, equaling a total debt of $34,087.41. Under the reamortization agreement, the Martinez's monthly payments decreased to $369.00. The loan was refinanced again pursuant to a second reamortization agreement, on September 12, 1999, by which point the total debt was $44,206.18. Under this agreement, the Martinez's monthly payments increased to $498.68. Both of these reamortization agreements provided:

> Upon default in the payment of any one of the above installments or in case of a failure to comply with any of the conditions and agreements contained in the above-described note or assumption agreement or the instruments securing it, the Government at its option may declare the entire debt immediately due and payable and may take any other action authorized therein.

[3]The mortgage provides, in paragraph 17:

> SHOULD DEFAULT occur in the performance of discharge of any obligation in this instrument or secured by this instrument . . . the Government, at its option, with or without notice, may: (a) declare the entire amount unpaid under the note and any indebtedness to the Government hereby secured immediately due and payable, (b) for the account of Borrower incur and pay reasonable expenses for repair or maintenance of and take possession of, operate or rent the property, . . . (d) foreclose this instrument as provided herein or by law, and (e) enforce any and all other rights and remedies provided herein or by present or future laws.

payments during the course of the mortgage loan.

RHS claims that the note and mortgage are in default because defendants failed to comply with the provisions of the note and mortgage in that they failed to pay the installments of principal and interest as they came due. RHS has now elected to declare the entire amount of the loan to be immediately due and payable. By letter, dated January 23, 2002, RHS notified defendants of RHS's intention to foreclose on the mortgage loan.[4] RHS supports these claims with a copy of the promissory note, mortgage, property description, and notice of acceleration.

Ms. Martinez admits that she did not pay certain installments on time, but denies that she failed to comply with the provisions of the note and mortgage. Ms. Martinez claims that soon after she lost her job and began experiencing financial difficulty she notified the Department of Agriculture of her situation. According to Ms. Martinez, she made several attempts to request mortgage moratorium relief, but was thwarted by various individuals in the government bureaucracy. Ms. Martinez telephoned the Lancaster office of the Department of Agriculture to request the mortgage moratorium packet, where she was told that the staff in Lancaster could not help her and was referred to the Centralized Servicing Center. In June of 2000, Ms. Martinez applied for moratorium relief by sending the completed materials to CSC. About a week later, she called CSC to confirm that they had received her mortgage moratorium materials. Ms. Martinez was told that her mortgage moratorium materials were not yet at CSC and that they

[4]According to the notice of acceleration, the balance on the loan reflects unpaid principal of $43,103.45, unpaid interest of $9,129.23, and additional interest accruing at the rate of $14.0234 per day. The notice of acceleration also indicates that defendants can cure their default by paying the current delinquency of $14,369.35, any additional foreclosure costs, and any delinquent real estate taxes. The notice further alerts defendants to their right to an informal discussion with RHS plus an administrative appeal hearing.

would contact her as soon as they received them. After two more weeks, when no one from CSC had contacted her, Ms. Martinez called again. Ms. Martinez was unable to speak with anyone from the mortgage moratorium department; she was only able to leave messages with the agent who answered the phone.

Ms. Martinez asserts that in mid-July 2000 she called CSC every other day for approximately two weeks. Eventually, Ms. Martinez was connected with an agent in the mortgage moratorium department. At this time, the agent told her that her mortgage moratorium materials were incomplete because her 1999 tax return was missing. This agent informed her that the 1999 tax return was not at CSC and that Ms. Martinez would need to send another copy. When Ms. Martinez asked the agent what she should do about payments for the house, the agent told her not to send any money until the moratorium was in place, even though Ms. Martinez had sent $500 to CSC prior to this telephone conversation. When she hung up the phone, Ms. Martinez was under the impression that she should not make any more payments until the mortgage moratorium materials had been processed.

Ms. Martinez avers that following the conversation with the agent, she went to her tax preparer, obtained a copy of her 1999 tax form, and mailed it to the address indicated by the agent in the mortgage moratorium department. At this time, Ms. Martinez also sent the other materials in the packet again to CSC. Shortly thereafter, Ms. Martinez began calling CSC every other day because she was unable to reach anyone there and was worried about the status of her mortgage moratorium application and it had been mishandled in the past. In early August 2000, Ms. Martinez eventually reached an agent in the mortgage moratorium department. The agent told her that neither the materials from her first mailing nor that from her second mailing were at

CSC. Ms. Martinez was upset and questioned the agent as to how this could have happened again. The agent responded that it was a large office that received numerous requests for mortgage moratorium relief every day.

Ms. Martinez asserts that shortly after that conversation she sent her entire application for a third time, this time by certified mail. Ms. Martinez followed up on this mailing in similar fashion to the two previous mailings. Finally, in September 2000, Ms. Martinez reached an agent in CSC who told her that they had received her mortgage moratorium materials but that she had been denied mortgage moratorium relief because she had not sent in her materials within the proper time limit. Ms. Martinez explained to no avail that she had sent her mortgage moratorium materials three times since June 2000. Ms. Martinez does not support these claims with any evidence.

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides, in relevant part, that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions . . . which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). After the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

I must determine whether any genuine issue of material fact exists. An issue is genuine if the fact finder could reasonably return a verdict in favor of the non-moving party with respect to that issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is material only if the dispute over the facts "might affect the outcome of the suit under the governing law." Id. In making this determination, I must view the facts in the light most favorable to the non-moving party, and the non-moving party is entitled to all reasonable inferences drawn from those facts. Id. However, the nonmoving party may not rest upon the mere allegations or denials of the party's pleading. See Celotex, 477 U.S. at 324. The non-moving party must raise "more than a mere scintilla of evidence in its favor" in order to overcome a summary judgment motion and cannot survive by relying on unsupported assertions, conclusory allegations, or mere suspicions. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989). If the evidence for the nonmoving party is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249-50 (citations omitted).

DISCUSSION

After consideration of all of the issues, viewing the facts in the light most favorable to defendants, I conclude that a fact finder could reasonably return a verdict in favor of defendants. Accordingly, plaintiff's motion for summary judgment will be denied.

42 U.S.C. § 1475(a) authorizes the Secretary of Agriculture to grant payment moratoria under regulations promulgated by the Secretary, "upon a showing by the borrower that due to circumstances beyond his control, he is unable to continue making payments of such principal and interest when due without unduly impairing his standard of living." See 42 U.S.C. § 1475(a)

(2004).[5] Pursuant to this authorization, the Secretary promulgated regulations regarding payment moratoria, which provide for a time period in which a borrower may file for moratorium relief. The regulations provide that a borrower's "account may be accelerated without further servicing when at least 3 scheduled payments are past due or an amount equal to at least 2 scheduled payments are past due for at least 3 consecutive months." 7 C.F.R. § 3550.202(b). Since the Martinez pay monthly installments, they had a maximum of three months from the date of their last payment to file for moratorium relief. Neither RHS nor Ms. Martinez has provided evidence to indicate when the Martinez made their last payment.

RHS did not discuss the applicability of this law in its pleadings; rather, it argues in its motion for summary judgment that it has met its burden simply because it has demonstrated the existence of a loan obligation secured by a mortgage, the Martinez's default on that obligation, and RHS's notification of that fact to Mr. and Ms. Martinez. See United States v. Asken, No. 01-0026, 2002 WL 32175416, *2 (E.D. Pa. October 28, 2002) quoting Chemical Bank v. Dippolito, 897 F. Supp. 221, 224 (E.D. Pa. 1995). RHS further argues in its motion that defendants' moratorium application was denied because they failed to submit the necessary application forms in timely manner. Ms. Martinez argues--without evidentiary support--in her response that she made numerous attempts to seek moratorium relief from RHS during the proper time period, but was thwarted by bureaucratic mishandling of her moratorium application, which caused her to miss the filing deadline.

---

[5] 42 U.S.C. § 1475(b) requires the Secretary to "follow the foreclosure procedures of the State in which the property involved is located to the extent such procedures are more favorable to the borrower than the foreclosure procedures that would otherwise be followed by the Secretary." 42 U.S.C. § 1475(b). However, neither plaintiff nor Ms. Martinez has raised the issue of more favorable foreclosure procedures under state law.

Interestingly, RHS advances a new set of unsupported facts in its reply that support Ms. Martinez's allegations and contradict its previous allegations in its motion for summary judgment. RHS argues--without evidentiary support--that during the time period when Ms. Martinez was applying for moratorium relief, the moratorium was under consideration and was eventually denied. Pl. Reply, ¶ 6 ("In fact, during the period when the moratorium was under consideration, Plaintiff forestalled in instituting foreclosure proceedings. . . The fact that Defendant was eventually denied the requested moratorium relief . . . "). RHS further argues--without evidentiary support--that the moratorium denial was appealed and the denial was upheld. Id. at ¶ 7 ("In fact, upon information and belief, the moratorium denial was appealed and the denial was upheld."). These arguments contradict RHS's claim that Ms. Martinez was denied relief because she failed to file her application in a timely fashion. Rather, these arguments suggest that RHS had received Ms. Martinez's completed moratorium application during the proper period and was in the process of reviewing it. Ironically, RHS argues in its reply that Ms. Martinez did not produce any documentary or testimonial evidence in support of her allegations; yet, plaintiff's arguments support Ms. Martinez allegation in her response that she made repeated attempts to secure mortgage moratorium relief during the proper time period, by sending three applications and making frequent phone calls to RHS during the Summer of 2000. Therefore, there is a genuine issue of material fact as to whether Ms. Martinez actually filed for moratorium relief during the proper time period and whether RHS ever reviewed Ms. Martinez's moratorium application.

RHS also argues--without legal authority--that Ms. Martinez's thwarted attempts to secure mortgage moratorium relief and her eventual denial for such relief does not provide a

defense to the failure to pay. RHS also argues--without legal authority:

> As the grant of a moratorium is a loss mitigation remedy for which Defendant [sic] must qualify, and which is not guaranteed, Plaintiff respectfully recommends consideration for a moratorium inured to Defendant's [sic] benefit, in that it permitted her to remain in the house without making mortgage payments. The fact that Defendant [sic] was eventually denied the requested moratorium relief is unfortunate, but does not obviate Defendant's [sic] duty to make payments on the mortgage account, pursuant to the terms of the note and mortgage.

I agree that Section 1475(a) does not guarantee the right to moratorium relief. However, a recent Ohio state court decision has noted that "[t]he statutory language [of Section 1475(a)] requiring a borrower to demonstrate his or her eligibility for moratorium relief presupposes that a borrower who requests such relief will be given the *opportunity* to make the required demonstration." United States v. Childers, 789 N.E.2d 691, 695 (Ohio Ct. App. 2003) (emphasis added) (holding that there was a genuine issue of material fact precluding summary judgment--under the Ohio state standard--in favor of the government in a foreclosure action where the Rural Housing Service ignored a borrower's repeated requests for information about a payment moratorium). I agree with the Ohio court in holding that a borrower seeking moratorium relief within the proper time period "must be given an opportunity to demonstrate his or her eligibility for such relief." Id. Thus, to the extent that Ms. Martinez filed her application for moratorium relief during the proper time period, she had a right to have her application reviewed by RHS before it accelerated her mortgage loan.

Plaintiff next argues that "Defendant offers no evidence to support the contention that she had any reason to believe that a moratorium had been granted." I find this argument confusing, since Ms. Martinez never made the allegation that her moratorium application had been granted. Rather, Ms. Martinez claims that she made numerous attempts to secure moratorium relief during

the proper time period and that she was prevented from receiving such relief because of bureaucratic mishandling of her paperwork which caused her to miss the filing deadline.

Plaintiff next argues that RHS "reviews applications for moratoria according to its own properly promulgated rules setting forth criteria for eligibility." United States v. Asken, No. 01-0026, 2002 WL 32175416, *3 (E.D. Pa. October 28, 2002) citing 42 U.S.C. § 1475(a) and 7 C.F.R. § 3550.207(a)(1)(i). These promulgated rules provide that "RHS may defer a borrowers [sic] scheduled payments for up to 2 years" provided that the borrower meet three criteria: "(1) Due to circumstances beyond the borrower's control, the borrower is temporarily unable to continue making scheduled payments"; "(2) The borrower occupies the dwelling, unless RHS determines that it is uninhabitable"; and "(3) The borrower's account is not currently accelerated." 7 C.F.R. § 3550.207(a) (2004). The borrower can satisfy the first criterion by showing one of three circumstances:

> (i) The borrower's repayment income fell by at least 20 percent within the past 12 months;
> (ii) The borrower must pay unexpected and unreimbursed expenses resulting from the illness, injury, or death of the borrower or a family member; or
> (iii) The borrower must pay unexpected and unreimbursed expenses resulting from damage to the security property in cases where adequate hazard insurance was not available or was prohibitively expensive.

7 C.F.R. § 3550.207(a)(1). Plaintiff claims in its complaint that has complied with these regulations and asserts that "so long as the agency's factual finding that Defendants were ineligible for a moratorium was supported by substantial evidence, this Court may not disturb it." Id. citing Monsour Med. Ctr. v. Heckler, 806 F.2d 1185, 1190-1191 (3d Cir. 1986). Plaintiff's cited authority further stated that "[s]ubstantial evidence does not mean a large or considerable amount of evidence, but rather such relevant evidence as a reasonable mind might accept as

adequate to support a conclusion." Id. citing Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999) quoting Pierce v. Underwood, 487 U.S. 552, 565 (1988) (internal quotations omitted); see also Plummer v. Apfel, 186 F.3d 422, 427 (3d Cir. 1999) (noting that "substantial evidence" has been defined as "more than a mere scintilla"). In contrast, Ms. Martinez denies that RHS complied with 7 C.F.R. § 3550.207. RHS has produced no evidence to indicate that it reviewed the Martinez application or that its denial was supported by any evidence. Thus, RHS fails to meet its initial summary judgment burden on this issue and summary judgment is inappropriate.

RHS also claims--without evidentiary support--in its motion for summary judgment that it "subsidized" the Martinez's monthly mortgage payments. RHS asserts that these subsidies are subject to recapture pursuant to 42 U.S.C. § 1490a and the mortgage. The mortgage provides that "this instrument also secures the recapture of any interest credit or subsidy which may be granted to the Borrower by the Government pursuant to 42 U.S.C. § 1490a." Section 1490a provides, in relevant part:

> the Secretary [of Agriculture] shall provide for the recapture of all or a portion of such assistance rendered upon the disposition or nonoccupancy of the property by the borrower. . . [A]ny such assistance whenever rendered shall constitute a debt secured by the security instruments given by the borrower to the Secretary to the extent that the Secretary may provide for recapture of such assistance.

42 U.S.C. § 1490a(a)(1)(D) (2004). However, RHS fails to meet its initial summary judgment burden on this issue because it has produced no evidence to support the claim that it subsidized the Martinez loan payments. Thus, summary judgment on this issue must be denied.

RHS ultimately claims in its complaint that the amount due and owing from defendants on the loan is as follows:

Principal Balance	43,103.45
Interest from 03/12/2000 to 03/31/2002 at 11.8750%	10,068.00
Attorney's Fee at 5.0% of Principal Balance	2,155.17
Interest Recapture	53,165.52
Monthly late charge	0.00
Costs of suit and Title Search	750.00
Subtotal	109,242.14
Taxes and Insurance	1,568.42
Total	110,810.56

Again, RHS fails to meet its initial summary judgment burden on this issue because it has not addressed the relevance of these figures or produced any evidence to suggest that it is entitled to these amounts. The only monetary figure that is supported by the submitted evidence is the balance of unpaid principal at $43,103.45 listed on the notice of acceleration. Thus, summary judgment will be denied.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
CEFERINO A. MARTINEZ and PATRICIA A. MARTINEZ	:	NO. 04-1254
	:	

ORDER

AND NOW, this 9th day of December, 2004 upon consideration of plaintiff's motion for summary judgment, defendant Patricia Martinez's response, and plaintiff's reply thereto, and for the reasons set forth in the accompanying memorandum, it is ORDERED that plaintiff's motion for summary judgment is DENIED.

Defendant Patricia Martinez may wish to contact the following organization to determine whether she qualifies for legal representation to be provided by such organization:

Legal Services Office
MidPenn Legal Services
10 South Prince Street
Lancaster, PA 17603
(717) 299-0971

s/Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.