

CASE NO. 09-009463-19
UCN: 522009CA009463XXCICI

HSBC BANK, N.A., AS TRUSTEE FOR THE
HOLDERS OF DEUTSCHE ALT-A SECURITIES
MORTGAGE LOAN TRUST, SERIES 2007-AR2
MORTGAGE PASS-THROUGH CERTIFICATES,

Plaintiff,

vs.

CALVIN D. JOHNSON; JACQUELEINE JOHNSON;
FIRST HOME BANK; UNKNOWN TENANT NO. 1;
UNKNOWN TENANT NO. 2; and ALL UNKNOWN
PARTIES CLAIMING INTERESTS BY, THROUGH,
UNDER OR AGAINST A NAMED DEFENDANT TO
THIS ACTION, OR HAVING OR CLAIMING TO
HAVE ANY RIGHT, TITLE OR INTEREST IN THE
PROPERTY HEREIN DESCRIBED,

Defendants.

**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT CALVIN D. JOHNSON'S
MOTION TO DISMISS**

Plaintiff, by and through its undersigned counsel, files this Memorandum of Law in Opposition to Defendant's Motion to Dismiss and states:

1. Defendant CALVIN D. JOHNSON's Motion to Dismiss is improper as it goes beyond the allegations of the Complaint, attempting to raise affirmative defenses, more appropriately raised in a responsive pleading. *Nelson v. Ward*, 190 So.2d 622, (Fla. 2d DCA 1966).
2. A Complaint need only state facts sufficient to indicate that a cause of action exists and need not anticipate affirmative defenses. *Hammonds v. Buckeye Cellulose Corporation*, 285 So.2d 7 (1973).
3. Pursuant to the Florida Rules of Civil Procedure Form 1.944, the required allegations in a Complaint to foreclose a mortgage include the following:

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- b. that the defendant executed the note and mortgage, it was recorded and that a copy is attached.
- c. who owns the property.
 - d. that there has been a default.
 - e. that the loan has been accelerated.
 - f. the amount owed.
 - g. that the borrowers are liable for attorneys fees.

4. The Complaint also contains an allegation that the Plaintiff has performed all conditions precedent as required. Florida Rule of Civil Procedure 1.120(c) says that it is sufficient to aver generally that all conditions precedent have been performed or have occurred. Plaintiff's Complaint contains all the necessary allegations to state a good cause of action to foreclose.

5. For the purposes of passing on a motion to dismiss the Court must assume that all facts alleged in the Complaint are true. *Hammonds, at 11; H.E. Temples v. Florida Industrial Construction Co., 310 So.2d 326 (Fla. 2d DCA 1975).*

6. In analyzing a motion to dismiss, the Court must confine itself strictly to the allegations within the four corners of the Complaint. *Kest v. Nathanson, 216 So.2d 233 (1968); Holland v. Anheuser Busch, Inc., 643 So.2d 621 (Fla. 2d DCA 1994).*

7. The Florida Supreme Court has ruled that lack of standing should be raised as an affirmative defense. "The issue of standing should have been raised as an affirmative defense before the trial court, and Krivanek's failure to do so constitutes a waiver of that defense, precluding her from raising that issue now." *Krivanek v. Take Back Tampa Political Comm., 625 So. 2d 840, 842 (Fla. 1993).*

8. "There is no question that lack of standing is an affirmative defense that must be raised by the defendant and that the failure to raise it generally results in waiver." *Kissman v. Panizzi, 891 So. 2d 1147, 1150 (Fla. 4th DCA 2005).* See also, *Glynn v. First Union Nat'l Bank, 912 So. 2d 357, 358 (Fla. Dist. Ct. App. 4th Dist. 2005).*

9. Therefore, lack of standing may not be raised on a Motion to Dismiss, which must be reviewed within the four corners of the Complaint.

and a Summary Judgment Motion: “Counsel appear to have misconstrued or misunderstood the rules and decisions applicable to the situation presented by the record in this case. To the end that further unnecessary appeals may be avoided we state briefly the following principles applicable to cases of this nature.” *Connolly v. Sebeco, Inc.*, 89 So. 2d 482, 484 (Fla. 1956).

11. As the Court explained: “The purpose of a complaint is to advise the Court and the defendant of the nature of a cause of action asserted by the plaintiff. The function of a motion to dismiss a complaint is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. For the purpose of passing upon a motion to dismiss the Court must assume all facts alleged in the complaint to be true. Consequently a motion to dismiss a complaint must be decided on questions of law and questions of law only. On the other hand a motion for summary judgment, in a case of this sort, raises only questions of fact and must be decided upon evidence and not pleadings.”

12. “The purpose of a motion to dismiss is to ascertain if the plaintiff has alleged a good cause of action. The purpose of a motion for summary judgment is to determine if there be sufficient evidence to justify a trial upon the issues made by the pleadings. They thus serve entirely different functions.” *Connolly v. Sebeco, Inc.*, 89 So. 2d 482, 484 (Fla. 1956).

13. This distinction is maintained today. “It is well settled that a motion to dismiss is utilized to determine whether the complaint has alleged a cause of action upon which relief can be granted. *Alexander Hamilton Corp. v. Leeson*, 508 So. 2d 513 (Fla. 4th DCA 1987). The trial court must look only to the four corners of the complaint and the allegations contained therein should be taken as true without regard to the pleader's ability to prove the same. *Id.*; *Gamma Dev. Corp. v. Steinberg*, 621 So. 2d 718 (Fla. 4th DCA 1993). Generally, one has standing to sue when he or she has a sufficient interest at stake in the controversy which will be affected by the outcome of the litigation. *Gieger v. Sun First Nat'l Bank of Orlando*, 427 So. 2d 815 (Fla. 5th DCA 1983).” *Provence v. Palm Beach Taverns*, 676 So. 2d 1022, 1024 (Fla. Dist. Ct. App. 4th Dist. 1996).

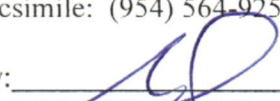
14. Since a promissory note is a negotiable instrument, in order to foreclose a mortgage as security for a promissory note, the Plaintiff must be the "holder" in order to be the real party in interest. *Troupe v. Redner*, 652 So2d 394 (Fla 2d DCA 1995), citing *Withers v. Sandlin*, 36 Fla. 619, 18 So. 856 (1896); *Laing v. Gainey Builders, Inc.*, 184 So. 2d 897 (Fla 1st DCA 1966). The "holder", with respect to a negotiable instrument, means the person in possession of the instrument, if the instrument is payable to bearer, or in the case of an instrument payable to an identified person, if the identified person is in possession. §671.201(20), Fla. Stat. "Bearer" means the person in possession of an instrument, document of title, or certificated security payable to bearer or indorsed in blank. §671.201(5), Fla. Stat.

15. The Plaintiff is in possession of the original note that contains a blank endorsement. A copy is attached hereto as Exhibit "A". The Plaintiff will produce the original at the final hearing in this matter.

WHEREFORE Plaintiff requests that this Court Deny the Defendant's Motion to Dismiss and such other relief as this Court deems just, including the award of attorneys' fees and costs pursuant to Florida Statutes, Section 57.105.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to all parties on the attached service list on this 17 day of August, 2009.

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By: 
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