

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2007-CA-003840-XXXX-MA
DIVISION: CV-G

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR THE REGISTERED HOLDERS
OF GSAMP TRUST 2005-SEA1, MORTGAGE PASS-
THROUGH CERTIFICATES, SERIES 2005-SEA1,
Plaintiff,



vs.

MARGARET A MASSEY, ET AL,
Defendants.

DEFENDANT'S' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO STRIKE

1. 12 USC 1701x(c)(5) PRE FORECLOSURE HOMEOWNERSHIP COUNSELING NOTICE

12 USC 1701x(c)(5) imposes a specific statutory obligation on all creditors across the United States who service conventional loans, (non federally-insured home loans) that requires the creditor to send a specific notice about access and availability of homeownership counseling to defaulting homeowners within 45 days of a home loan payment default. The creditor is obliged to advise the homeowner of any homeownership counseling offered by the servicer of the loan and/or information about how to access HUD homeownership counseling.

The issue before the court in this action on plaintiff's motion to is whether the plaintiff's alleged failure to comply with the federal statutory notice obligation before instituting this foreclosure action can be grounds for the court to equitably deny the lender the remedy of a foreclosure. Otherwise, the allegations as alleged by the defendant for purposes of the plaintiff's motion, are taken as true and besides, the facts, as alleged by the defendant, are supported by the documents submitted by plaintiff, improperly at this stage of the proceeding and on a motion to strike. The court should disregard the plaintiff's exhibits outside the pleadings upon consideration of the plaintiff's motion.

12 USC 1701x(c)(5) was enacted 21 years ago as part of the Housing and Community Development Act of 1987. This statute was recently extended to require creditors to send another very specific pre-foreclosure notice directed to homeowners in the military service of this

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country.

However, in this action, the relevant part of the federal statute provides:

12 USC 1701x. Assistance with respect to housing for low and moderate income families

(c)(5): Notification of availability of homeownership counseling

(A) Notification of availability of homeownership counseling.

(i) Requirement. Except as provided in subparagraph C, **the creditor of a loan...shall provide notice under clause (ii) to (I) any eligible homeowner who fails to pay any amount by the date the amount is due under a home loan,...**

(ii) Content. Notification under this subparagraph shall—

(I) notify the homeowner...of the **availability of any homeownership counseling offered by the creditor...**

(III) notify the homeowner...of the **availability of homeownership counseling provided by nonprofit organizations** approved by the Secretary and experienced in the provision of homeownership counseling, or provide the toll-free telephone number described in subparagraph (D)(i);...

(B) Deadline for notification. The notification required in subparagraph (A) shall be made—

(i) in a manner approved by the Secretary; and

(ii) **before the expiration of the 45-day period** beginning on the date on which the failure referred to in such subparagraph occurs.

(6) Definitions. For purposes of this subsection:

(A) The term **“creditor”** means a person or entity that is servicing a home loan on behalf of itself or another person or entity.

(B) The term **“eligible homeowner”** means a homeowner eligible for counseling under paragraph 4.

(C) The term **“home loan”** means a loan secured by a mortgage or lien on residential property.

(D) The term **“homeowner”** means a person who is obligated under a home loan.

(E) The term **“residential property”** means a 1-family residence,...

(7) Regulations. The Secretary shall issue any regulations that are necessary to carry out this subsection.

Under the terms of the statute, an “eligible homeowner” is one who is eligible for counseling as follows:

12 USC 1701x(c)(4) Eligibility for counseling. A homeowner shall be eligible for homeownership counseling under this subsection if—

- (A) the home is secured by **property that is the principal residence...** of the homeowner;
- (B) the home is ***not*** assisted under title V of the Housing Act of 1949; and (*emphasis added*)
- (C) the homeowner is, or is expected to be, unable to make payments, correct a home loan delinquency within a reasonable time, or resume full home loan payments due to a reduction in the income of the homeowner because of—
 - (i) an involuntary loss of, or reduction in, the employment of the homeowner, the selfemployment of the homeowner, or income from the pursuit of the occupation of the homeowner; or
 - (ii) any similar loss or reduction experienced by any person who contributes to the income of the homeowner.

The secretary of HUD, in a question and answer supplement “ published in order to respond to creditor inquiries and to clarify creditor responsibilities” under the statute. 55 FR 2416 (01/24/1990) states: “We note that if a creditor’s compliance...is challenged in court, the ultimate determination of the adequacy of the creditor’s notification and ***the legal consequences of any noncompliance will be made by the court.***”(emphasis added)

The question and answer supplement advises creditors that:

1. The “notification requirement applies to all homeloans ***except*** those assisted by the Farmers Home Administration... Thus, both conventional mortgages and loans, and those insured by HUD or guaranteed by the Department of Veterans Affairs, are subject to section 169.” (Section 169 is a reference to the section of the Housing and Community Development Act that enacted 12 USC 1701x(c)(5))

2. “[S]ince the purpose of the notice is to help the homeowner avert foreclosure, it should be sent soon enough to enable the homeowner to benefit from the counseling. HUD recommends that the notice be included in the creditor’s first communication with the homeowner regarding the delinquency.”

3. “***A notice must be sent to every homeowner every time*** the homeowner becomes delinquent. If the homeowner brings the loan current and becomes delinquent again, another notice must be sent.”

4. “***The notice must contain*** information on any counseling provided by the creditor and either the name, address and telephone number of the HUD-approved counseling agencies

near the homeowner or a cost-free telephone number at the creditor's office where the homeowner can obtain this information..."

5. HUD does not supply a form. "It is HUD's view that sufficient information has been provided on the section 169 notice requirement to enable creditors to prepare the notice.

6. "Creditors may prefer to send the notice to all delinquent homeowners, rather than attempt to determine the cause of each delinquency."

7. "The notice is not required (on) property sold under a land sales contract...until the contract is completed..."

8. "The statute does not require any creditor to provide counseling."

9. If a creditor does provide homeownership counseling, the creditor still has to "notify the delinquent homeowner of the availability of homeownership counseling by HUD-approved counselors or by the Department of Veterans Affairs..."

A copy of 12 USC 1701x has been provided to the court together with the FDIC Compliance Handbook (June 2006) section on the Homeownership Counseling Act. A copy of 55 FR 2416 is accessible online.

HUD published an advisory on the notice requirement of the statute which states: 54 "[T]he notice requirements ... apply virtually to all mortgagees..." and that "noncompliance with the law's requirements could be an actionable event that could affect a mortgagee's ability to carry out foreclosure in a timely manner... HUD regards the obligations imposed on creditors by the new law as self-executing: that is, the law speaks directly to creditors, imposing an obligation upon any and all creditors to notify any eligible homeowner counseling, whenever a home loan is "delinquent". 54 Fed. Reg. 20964-65 (May 15, 1989)

Great caution should be exercised when a court is considering denying a litigant the opportunity to demonstrate that he is entitled to the benefit of a trial. *Hance*, supra, citing *Stephens v. Dichtenmueller*, 216 So.2d 448 (Fla. 1968) This is especially the case in a mortgage foreclosure which is an equitable proceeding. *Cross v. Federal National Mortgage Association*, 359 So.2d 464,465 (Fla. 4th D.C.A. 1978).

Whether the Plaintiff gave given the required pre-foreclosure counseling notice to Mrs. Massey within the required 45 days from the failure to pay as required by 12 USC 1701x(c)(5) presents a legitimate equitable affirmative defense and the basis for consumer debt collection and unfair practice counterclaims.

In a Florida mortgage foreclosure action in which a borrower similarly argued that the Plaintiff failed to comply with a federally-mandated notice provision, the court denied the

Plaintiff's motion for judgment of foreclosure based on Plaintiff's failure to provide the required notice to borrower. In U.S. v. Trimble, 86 F.R.D. 435 (S.D. Fla. 1980), the court held that the failure of the mortgagee to comply with the notice requirement contained in the federal regulation is a valid defense to a mortgage foreclosure action. Trimble dealt with a Farmers Home Administration loan, but the holding of that case is premised on the same principle-- compliance with applicable federal laws can be upheld as equitable defense to deny a creditor the judicial remedy of foreclosure. Defendant has properly raised an equitable defense to the plaintiff's claim in this action.

Mortgage foreclosure is an equitable action and the Court must consider equitable defenses in ruling on a complaint for foreclosure. Cross, supra (genuine issues of material fact precluded summary judgment). See also: Family Bank v. Able Realty of America Corp., 702 So.2d 1322 (Fla. 4th DCA 1998) ("court in its discretion may refuse to grant prayer for foreclosure of mortgage for equitable reasons..."mortgage foreclosure is an equitable action and thus equitable defenses are appropriate") and LaSalle Bank NA v. Williams, 13 Fla. L. Weekly 462 (Fla. 4th Cir. 2006) (circuit court opinion of the Honorable Charles Arnold, Jr., denying plaintiff's motion to strike 12 USC 1701x(c)(5) affirmative defense and Order Denying Summary Judgment entered by Judge Nachman in DEUTSCHE BANK, NATIONAL TRUST COMPANY, AS TRUSTEE FOR MORGAN STANLEY ABS CAPITAL 1 INC., TRUST 2005-HE2 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-HE2 vs. YOLANDA RAY, CASE NO.: 16 2005 CA 0004237, 4th Judicial Circuit Court (copy provided to the court).

This defendant has also raised and preserved issues that the plaintiff's complaint is fatally defective and leaves the plaintiff without standing or real party in interest status to pursue this foreclosure and also leaves this court without subject matter jurisdiction.

2. The defendant has stated a claim for declaratory relief

Count 1 of the Defendant's counterclaim states a cause of action for declaratory and injunctive relief based on the plaintiff's failure to provide legitimate and non predatory access to debt management relief that the defendant claims the plaintiff must make available before filing a foreclosure action. Defendant claims that the forbearance relief the plaintiff is obligated to provide must include special default loan servicing designed to avoid foreclosure of this loan.

Compliance with default loan servicing obligations owed to a borrower pursuant to a pooling and servicing agreement can be held to be a contractual condition precedent to instituting a foreclosure action and the failure of the plaintiff to implement foreclosure avoidance servicing is an appropriate subject for a counterclaim for declaratory and injunctive relief. See: U.S. v. Trimble, 86 F.R.D. 435 (S.D. Fla. 1980) and Cross v. Federal National Mortgage Association, 359 So. 2d 464, 465 (Fla. 4th DCA 1978): "A mortgage foreclosure is an equitable action and thus equitable defenses are most appropriate. [I]t appears to us that given the purpose of ...the recommended efforts to obviate the necessity of foreclosure, any substantial deviation from the recommended norm might be construed by the trial court under the heading of an equitable defense." Id., 359 So. 2d at 465.

Whether and to what extent the plaintiff's obligation to provide specialized default loan servicing are issues of fact in dispute between the parties to be determined by the court upon review of the evidence to be produced and the mortgage and note attached to the plaintiff's complaint.

This court has jurisdiction pursuant to F.S. 86.011 "to declare rights, status, and other equitable or legal relations of "(a)ny person claiming to be interested or who may be in doubt about his or her rights under a...contract, or other article...or instrument in writing." The court also has the power to declare the rights of any person "whose rights, status or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority, or by...contract,...or other article, memorandum, or instrument in writing..." F.S. 86.021

"No action or procedure is open to objection on the ground that a declaratory judgment is demanded." F.S. 86.011

"The court's declaration may be either affirmative or negative in form and effect and such declaration has the force and effect of a final judgment. F.S. 86.011

The court has the power to render a declaratory judgment on the existence, or nonexistence of any right or of any fact upon which the existence or nonexistence of such right does or may depend, whether such right exists or will arise in the future. F.S. 86.011

"Any person seeking a declaratory judgment may also demand additional, alternative, coercive, subsequent or supplemental relief in the same action." F.S.86.011(2)

"The existence of another adequate remedy does not preclude a judgment for declaratory relief...The court has power to give as full and complete equitable relief as it would have had if such proceeding had been instituted as an action in chancery." F.S.86.111 and 86.021

A contract may be construed either before or after there has been a breach. F.S. 86.031

"Further relief based on a declaratory judgment may be granted when necessary or proper..." F.S.86.061

The statute is declared to be "substantive and remedial. Its purpose is to settle and to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations and is to be liberally administered and construed." F.S.86.101

The defendant in this residential foreclosure has sufficiently stated a counterclaim for declaratory relief and this court should declare whether and to what extent the default loan servicing procedures apply and also whether and to what extent the default servicing obligations control the plaintiff's conduct in the servicing of the defendant's mortgage in default.

The court should also declare whether and to what extent the pooling and servicing default loan servicing requirements and procedures are incorporated into the mortgage and whether the defendant has a right, as she asserts, to access the special loan servicing prior to facing a foreclosure on her home.

The Declaratory Judgment statute grants the defendant the right to ask the court to enjoin the plaintiff from foreclosing and to further compel the plaintiff to comply with the default servicing procedures before instituting a foreclosure action against this defendant.

The court has the power to award such declaratory and other appropriate relief to the defendant.

"Unlike other actions, a motion to strike a petition for declaratory judgment does not go to the merits but goes only to the question of whether or not the plaintiff is entitled to a declaration of rights not to whether or not he is entitled to a declaration in his favor." Effort

Enterprises of Florida, Inc. v. Lexington Insurance Company, 666 So.2d 930, 932 (Fla. 4th DCA 1995)

“A ruling on the merits should not be made until after final hearing where the parties have full opportunity to present evidence in support of their respective positions. Id., citing Government Employees Ins. Co. v. Anta, 379 So.2d 1038, 1039 (Fla. 3d DCA 1980)

“Where a suit has been filed by one party and claims asserted by the others, it cannot be said conclusively that there is not a ‘real and present dispute’ nor that there is not ‘a bona fide, actual, present, and practical need for a declaration’.” Strachan Shipping Company v. Spigner, 573 So.2d 926, 928 (Fla. 1st DCA 1991) citing Stonewall Ins. Co.v. W.W. Gay Mechanical Contractor, Inc., 351 So.2d 403 (Fla. 1st DCA 1977) “Under these circumstances, the entry of a dismissal...was in error.” Id.

The Honorable Bernard Nachman, in denying an almost identical motion to dismiss a declaratory judgment counterclaim in a foreclosure action involving an FHA-insured mortgage, cited Mills v. Ball, 344 So.2d 635,638 (Fla. 1st DCA 1977) and found that:

“A ruling on the merits should not be made until after final hearing where the parties have full opportunity to present evidence in support of their respective positions.” See: Order On Plaintiff’s Motion To Strike Amended Affirmative Defenses, Dismiss Amended Counterclaim, And Strike Demand For Jury Trial entered in Washington Mutual Bank, F.A. v. McCampbell, Case No. 02-7356, a copy of which will be provided.

II: The Defendant has stated a claim under the Florida Consumer Collection Practices Act

Defendant claims that the plaintiff has an obligation to comply with the forbearance, mortgage modification and other foreclosure prevention loan servicing requirements of the pooling and servicing agreement.

The Florida Consumer Collection Practices Act (FCCPA) provides stronger protection for consumers than the protection afforded consumers under the Federal Fair Debt Collection Practices Act (FDCPA). F.S. 559.552

For purposes of the plaintiff’s motion to strike, the defendant’s factual claims are taken as true. The FCCPA prohibits the plaintiff from collecting the underlying consumer mortgage debt involved in this action by asserting its right to foreclose when the plaintiff knows that such right does not exist because the plaintiff did not comply with the applicable default

servicing obligations and guidelines prior to filing this foreclosure action.

F.S. 559.72(9) provides (in pertinent part):

Prohibited practices generally.-In collecting consumer debts, no person shall:

(9) Claim, attempt, or threaten to enforce a debt when such person...assert(s) the existence of some other legal right when such person knows that the right does not exist.

The FCCPA applies to anyone attempting to collect a consumer debt unlawfully and F.S. 559.72 "includes all allegedly unlawful attempts at collecting consumer claims." *Seaton Jackson v. Wells Fargo Homemortgage, Inc.*, 12 Fla. L. Weekly Supp. 188 (Fla. 6th Circuit 2004) citing *Williams v. Streeps Music Co., Inc.*, 333 So.2d 65 (Fla. 4th DCA 1976) See also, *Hart v. GMAC Mortgage Corporation*, 246 B.R. 709 (D. MASS. 2000) (Debtor stated a cause of action under the FDCPA where continuation of foreclosure proceedings amounted to conduct "the natural consequence of which was to harass, oppress, or abuse")

The Honorable Bernard Nachman, in denying an almost identical motion to dismiss a FCCPA counterclaim in the above-referenced foreclosure involving an FHA-insured mortgage, found that:

"Defendant's allegation that the Plaintiff has pursued a foreclosure when it knew that it did not have the right to foreclosure and is therefore in violation of the FCCPA is sufficient to survive the Plaintiff's motion to dismiss as it does state a cause of action under the FCCPA

The defendant has also adequately stated a breach of fiduciary duty, breach of good faith and fair dealing and breach of contract claims based on the plaintiff's breach by failing to service the loan as required by the pooling and servicing agreement that control the defendant's mortgage and that also control the plaintiff's course of conduct in servicing this mortgage in that pool and by illegally adding predatory servicing fees and costs into the balance of the loan.

CONCLUSION

The Defendant has sufficiently stated valid and legitimate claims for declaratory relief and for violations of the Florida Consumer Collection Practices Act and for breach of contract and fiduciary duty.. The court should deny the plaintiff's motion to strike/dismiss.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this document has been mailed to Ira Silverstein, Shapiro & Fishman, 2424 N. Federal Highway, Suite 360, Boca Raton, Florida 33431, Attorney for Plaintiff this 3, 2008.

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