

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

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

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

vs.

MARGARET A MASSEY, ET AL,
Defendants.

**ORDER DENYING PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S AFFIRMATIVE
DEFENSES; DENYING MOTION TO DISMISS COUNTERCLAIMS and DENYING
PLAINTIFF'S MOTION TO STRIKE DEMAND FOR JURY TRIAL**

Now on this 3rd day of April, 2008, came on for hearing the above captioned cause on plaintiff's motions to strike defendant's affirmative defenses and demand for jury trial and on plaintiff's motion to dismiss counterclaims. The parties appeared through counsel and the court, being sufficiently advised, finds:

1. Rule 1.110(d) of the Florida Rules of Civil Procedure provides that in pleading to a preceding pleading a party shall set forth affirmatively any matter constituting an avoidance or affirmative defense.

2. A motion to strike a defense should not be granted where the defense presents a bona fide question of fact. KIDDER & CO. v. TURNER, 106 So. 2d 905 (Fla. 1958). Furthermore, a motion to strike an affirmative defense should be denied "if the defense is sufficient as a matter of law, or if it fairly presents a question of law or fact which the court ought to hear." TALAROWSKI v. The PENNSYLVANIA RAILROAD COMPANY, 135 F. Supp. 503 (D. Del. 1955), citing 2 Moore's Federal Practice, 2320. "For the purpose of reaching a decision on this motion, the well-pleaded allegations of the defendant's first affirmative defense must be accepted as true." Id.

3. Defendant's first affirmative defense claims that the plaintiff failed to comply with a contractual condition precedent to filing this foreclosure by allegedly failing to provide a notice of default that complies with the notice provision set out in paragraph 22 of the subject mortgage.

4. The court finds that the defendant's first affirmative defense is adequate to survive the plaintiff's motion to strike since the affirmative defense of failure to provide a notice of default under the mortgage contract fairly presents questions of law and fact which the court ought to hear. For this reason, the plaintiff's motion to strike the defendant's first affirmative defense

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should be and is hereby denied.

5. Defendant's second affirmative defense claims that the plaintiff failed to comply with a federal statute, 12 U.S.C. 1701x(c)(5), which the defendant claims is a condition precedent to filing this foreclosure.

6. 12 USC 1701x(c)(5) is a section of the National Housing Act that requires creditors who service conventional loans, (non federally-insured home loans) 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 secretary of HUD determined 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." 55 FR 2416 (01/24/1990) Additionally, the Secretary of HUD has determined that "noncompliance with the statute can be an actionable event that could affect a mortgagee's ability to carry out foreclosure in a timely manner. 54 Fed. Reg. 20964-65 (May 15, 1989)

7. 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. 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); see also, U.S. v. Trimble, 86 F.R.D. 435 (S.D. Fla. 1980) (failure to comply with the notice requirement contained in the federal regulation is a valid defense to a mortgage foreclosure action); 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")

8. The court finds that the defendant's second affirmative defense is adequate to survive the plaintiff's motion to strike since the affirmative defense of failure to provide a 12 USC 1701x(c)(5) notice fairly presents questions of law and fact which the court ought to hear. For this reason, the plaintiff's motion to strike the defendant's second affirmative defense should be and is hereby denied.

9. In her third affirmative defense, defendant alleges that the plaintiff failed to provide her with access to certain preforeclosure relief under a Pooling and Servicing Agreement or other trust agreement applicable to the subject mortgage loan. Defendant alleges that the Plaintiff's non-compliance renders this foreclosure premature and inequitable. Counsel for defendant advised that the plaintiff has exclusive possession and control of the pooling and

servicing agreement and that said agreement is being sought through discovery. On this basis, the court finds that the defendant was not able to attach the agreement to her answer.

10. The court finds that the defendant's third affirmative defense is adequate to survive the plaintiff's motion to strike as it fairly presents questions of law and fact which the court ought to hear. The plaintiff's motion to strike the defendant's third affirmative defense should be and is hereby denied.

11. Defendant's fourth affirmative defense alleges that the plaintiff intentionally failed to act in good faith or to deal fairly with the Defendant by failing to follow the mortgage servicing standards that the defendant claims applies to the subject mortgage.

12. The court finds that the defendant's fourth affirmative defense is adequate to survive the plaintiff's motion to strike; that the fourth affirmative defense fairly presents questions of law and fact which the court ought to hear and that for these reasons, the plaintiff's motion to strike the defendant's fourth affirmative defense should be and is hereby denied.

13. In her fifth affirmative defense, defendant alleges that the plaintiff comes to court with unclean hands as a result of certain acts and omissions on the part of the plaintiff dealing with the subject mortgage and that as a matter of equity this Court should refuse to foreclose this mortgage.

14. "In considering a motion to dismiss, a trial court is confined to the allegations contained within the four corners of the complaint." CREWS v. ELLIS, 531 So. 2d 1372 (Fla. 1st DCA 1988) For this reason, the court does not consider any of the documents attached to the plaintiff's motions that are outside the complaint or the documents attached thereto.

15. The court finds that the defendant's fifth affirmative defense fairly presents questions of law and fact which the court ought to hear and is adequate to survive the plaintiff's motion to strike. The plaintiff's motion to strike the defendant's fifth affirmative defense should be and is hereby denied.

16. In her sixth affirmative defense, the defendant alleges that the plaintiff charged and/or collected payments for certain fees, costs and charges not authorized by the note and mortgage. The court finds that the defendant's sixth affirmative defense is adequate to survive the plaintiff's motion to strike. The plaintiff's motion to strike the defendant's sixth affirmative defense should be and is hereby denied.

17. In her seventh affirmative defense, the defendant challenges the plaintiff's standing and alleges that the plaintiff is not the true owner of the claim sued upon and is not the real party in interest. Defendant previously raised this issue by way of motion to dismiss which the court

denied advising defendant to pursue the claims by way of affirmative defense. The court does not consider the documents attached to the plaintiff's motion for purposes of this ruling and finds that the plaintiff's motion to strike the defendant's sixth affirmative defense should be and is hereby denied.

18. Count 1 of the Defendant's counterclaim alleges a cause of action for declaratory and injunctive relief based on specific acts and omissions on the part of the plaintiff in dealing with the subject mortgage. Under F.S. 86.011 this court has the power "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."

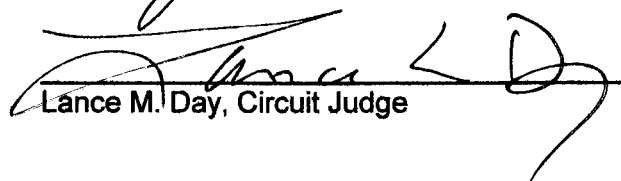
19. Under F.S. 86.021, this court may declare the rights of any person "whose rights, status or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority, or by...contract,...or other article, memorandum, or instrument in writing..."

20. In count II of her counterclaims, the defendant alleges that the plaintiff violated the Florida Consumer Collection Practices Act by asserting a right to foreclose when the plaintiff knew that such right did not exist absent compliance with certain servicing obligations. F.S. 559.72(9)

21. Taking the defendant's allegations as true, the court finds that the defendant has sufficiently pled counterclaims that fairly present questions of law and fact which the court ought to hear and that are adequate to survive the plaintiff's motion to dismiss. The plaintiff's motion to dismiss the defendant's counterclaims should be and is hereby denied.

22. As the court has denied the plaintiff's motion to dismiss defendant's counterclaims the court finds that the defendant is entitled to a trial by jury as a matter of law. For this reason, the plaintiff's motion to strike the defendant's request for trial by jury should be and is hereby denied.

IT IS SO ORDERED, nunc pro tunc, this June 13 2008.


Lance M. Day, Circuit Judge

copies provided to:

Ira Silverstein, Shapiro and Fishman, attorney for plaintiff
April Carrie Charney, attorney for defendant Margaret Massey