

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR OKALOOSA COUNTY, FLORIDA
CIVIL DIVISION

HSBC BANK USA, NATIONAL ASSOCIATION,
AS TRUSTEE FOR CERIFICATEHOLDERS OF
STRUCTURED MORTGAGE INVESTMENTS II
INC., ASSET BACKED CERTIFICATES, SERIES 2006-3,

Plaintiff,

v.

CASE NO.: 2008 CA 2076 S
DIVISION: BROWN

THEODORE FOREMAN, et al.

Defendants,

**ORDER GRANTING DEFENDANT THEODORE FOREMAN'S
MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT**

THIS CAUSE came onto be heard on this sixteenth day of June, 2010 at 4:15 p.m. in chambers, on the Defendant Theodore Foreman's Motion to Dismiss Plaintiff's Amended Complaint, and the Court, after having reviewed the Court file, considered the arguments of counsel and otherwise having been fully advised in the premises, makes the following conclusions of fact and law:

1. The Court has jurisdiction of the parties and of the subject-matter in this action.
2. The Plaintiff, or corporate designee, was not present for said hearing, but Plaintiff was represented by local counsel Mr. Wayne Williamson, Esq. for

purposes of said hearing. Mr. Williamson is not attorney of record for the Plaintiff in the matter and is not bound for further appearances in the cause.

3. The Defendant, Mr. Theodore Foreman, was not present for said hearing but was represented by counsel, Mr. Steven Copus Esq., who argued said Motion to Dismiss.

4. All parties to the case either received copies of said Motion to Dismiss and Notice of Hearing thereon, or have been defaulted by the Clerk of Court for failing to file a paper or pleading in the matter.

5. The Defendant raises two issues in his Motion to Dismiss. First the Defendant alleges the Plaintiff has failed to demonstrate payment of the proper amount of Documentary Stamp Tax, pursuant to Fla. Stat. 201.08, and pursuant to *Somma v. Metra Electronics Corp.* 727 So.2d 302 (Fla. 5th DCA 1999). The Defendant also alleges that the Plaintiff does not have standing to sue the defendant in this Court due to the lack of a proper assignment of mortgage. The Court makes its holding based upon the first issue raised in Defendant' s Motion to Dismiss and therefore there is no need for the Court to adjudicate the issue of lack of standing raised by the Defendant.

6. The Defendant has alleged that, under *Somma*, the Court has no jurisdiction to act in this matter as the requisite amount of Documentary Stamp Taxes have not been remitted by the Plaintiff. In support of this proposition, the Defendant

alleges that the mortgage, attached to Plaintiff's Amended Complaint, contains a negative amortization ("neg. am.") feature. According to the Defendant, this negative amortization feature allows for the principal balance of the loan to *increase* if the Mortgagor elects to pay a monthly payment amount that did not: a) amortize the loan, or b) at least pay the accruing interest. The Defendant indicated that the industry term for this type of loan product is known as a "pay-option" adjustable rate mortgage or "pay-option" a.r.m. or "pick-a-payment" loan. Counsel for the Defendant noted that under this type of loan, a mortgagor was given three monthly payment options. A mortgagor could pay a monthly amount that would fully amortize the loan (interest and principal payment), or a mortgagor could pay a monthly amount that would only pay the accrued interest (interest only payment). Finally, a mortgagor could pay an amount that was less than interest only (negative amortization feature). Under the negative amortization feature, if Mr. Foreman, or any other mortgagor, ever elected to make a monthly payment that was "less than interest only", then the difference between the "less than interest only" payment and the payment option that would fully amortize the loan would be recapitalized back into the original loan amount.

7. Page 2 of 4 of the "Adjustable Rate Note" attached to Plaintiff's Amended Complaint clearly indicates that "...unpaid principal can never exceed the

Maximum Limit equal to ONE HUNDRED AND FIFTEEN (115.00%) of the Principal amount I originally borrowed." See page 2 of 4 of Adjustable Rate Note attached to Plaintiff's Amended Complaint. Clearly the loan, promissory note and mortgage contemplate and permit an increase in the principal amount of the original loan balance, so long as that principal amount increase does not exceed 115% of the original loan amount, or \$216,200.00 in this case ($\$188,000.00 \times 115\% = \$216,200.00$).

8. The Defendant noted, and the Court recognizes, that an amount of Documentary Stamp Taxes was paid by Plaintiff's successor upon recordation of the mortgage in the Official Records of Okaloosa County. The loan, promissory note and mortgage, upon their origination, reference a debt with a principal amount of \$188,000.00 secured by said mortgage. It appears that the Plaintiff, or the Plaintiff's successor, has paid Documentary Stamp Taxes on the original principal amount of \$188,000.00 when Plaintiff's successor recorded the mortgage.
9. The Plaintiff, through Count I of its own Amended Complaint, is now seeking to enforce and collect a debt under the same promissory note and secured by the same mortgage, but with an increased *principal* amount. The principal amount of said debt is \$201,150.57, according to paragraph 10 of Plaintiff's Amended Complaint.

10. Plaintiff was unable to show the Court that it has paid additional Documentary Stamp Taxes on \$13,150.57, the alleged increase in the principal balance of the loan as of the date Plaintiff filed his Amended Complaint. (\$201,150.57 - \$188,000.00 = \$13,150.57)
11. The Court finds that the principal amount of the loan has increased from \$188,000.00 to \$201,150.57, by Plaintiff's own admission.
12. The Court finds the Plaintiff has not remitted the full Documentary Stamp Tax on the increased principal amount it seeks to enforce.

THEREFORE, the Court, pursuant to *Somma*, is without jurisdiction to proceed in the matter until such time as the Plaintiff has remitted the full amount of Documentary Stamp Taxes that are owed under the alleged promissory note and mortgage.

THE REMAINDER of Defendant's Motion to Dismiss is not discussed herein as the Court grants the dismissal based upon the insufficiency of Documentary Stamp Tax remitted, and other grounds discussed herein.

13. The Plaintiff previously filed an Ex-Parte Motion to Amend Complaint and received an Ex-Parte Order Granting Plaintiff Leave to Amend his Complaint for the sole purpose of omitting a copy of a promissory note that Plaintiff alleged that he mistakenly filed in the original Complaint.

14. Plaintiff's Amended Complaint failed to omit the mistakenly filed promissory note.

THEREFORE IT IS ORDERED AND ADJUDGED that for the reasons above stated the Plaintiff's Amended Complaint is hereby **DISMISSED WITHOUT PREJUDICE TO RE-FILE** in a Court of competent jurisdiction.

FUTHERMORE Plaintiff **SHALL NOT BE GRANTED** further leave to amend the Complaint in this action.

15. Defendant Theodore Foreman is hereby deemed a prevailing party in the matter and pursuant to the alleged promissory note, mortgage, and 57.105 Fl. Stat. Defendant Foreman shall be entitled to payment of his reasonable attorney's fees and costs in the matter. Said attorney's fees and costs shall be taxed to the Plaintiff. The Court shall retain jurisdiction to determine a reasonable fee amount if the parties are unable to agree upon a reasonable amount.

SO DONE AND ORDERED on this 16th day of June and this Order was executed by the Court on this 28th day of July, 2010 by the Honorable

JOHN T. BROWN

JOHN BROWN
CIRCUIT JUDGE

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, via U.S. Mail, to the following on this 3 day of Aug 2010.

Law Office of David J. Stern, 900 S. Pine Island Rd., Ste. 400, Plantation, FL 33324.

Steven Copus 1817 Lewis Turner Blvd., Suite E, Ft. Walton Bch, FL 32547

Wayne Williamson, The Madison Building, 1020 S. Ferdon Blvd., Crestview, FL 32536 (courtesy)

DON W. HOWARD
CLERK OF COURT


Deputy Clerk 