COPY OF THE ORDER SHALL BE SERVED UPON YOUR ADVERSARY WITHIN 7 DAYS

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Copy rec'd to Atty

Wells Fargo Bank, NA, Plaintiff v. Larry Lendrell Martin, et al., Defendants.	SUPERIOR COURT OF NEW JERSEY- CHANCERY DIVISION SUSSEX COUNTY CIVIL ACTION DOCKET NO. F-17240-09 **ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** IN PART AND DENYING IN PART AND GRANTING Defendant's Motion For Summary Judgment

THIS MATTER having been brought before the Court upon the Motion of Anne E. Walters, Esquire, of the firm of Shimberg & Friel, P.C., attorneys for Plaintiff, Wells Fargo Bank. NA, concerning the Contesting Answer and Counterclaim in this matter and this Court having read and considered the moving papers and such opposing and reply papers that may have been submitted, and for good cause appearing; as well as oral argument on 8/5/11

IT IS HEREBY ORDERED AND DECREED this 25 day of August, 2011, as follows:

1. The Motion for Summary Judgment of the Plaintiff is granted seeking dismissal of the Counterclaim

[redacted]

2. Plaintiff's Motion for Summary Judgment Against Defendant on its Complaint is DENIED.

(3) Defendant's Motion for Summary Judgment Seeking Dismissal of the Complaint is GRANTED. @

(4) The Contesting Answer and Defenses filed by Defendant, Larry Lendrell Martin, are dismissed as non-contesting and the Clerk of the Court is instructed to enter default against Defendant as though no answering pleading was filed;

(5) This matter shall be transferred to the Foreclosure Unit of the Superior Court in Trenton, New Jersey, to proceed as an uncontested matter; and

(6) A copy of this Order must be furnished upon all counsel of record within 7 days hereof.

DENIED

DENIED

See attached Statement of Reasons, together the Proceedings in Court on 8/5/11, incorporated herein by reference.

Hon. William J. McGovern, III, J.S.C.

Opposed [X]

Unopposed [ ]

(7). The Complaint is dismissed without prejudice.

(8) The Counterclaim is dismissed without prejudice.

(9) This Order closes this Case.

8/25/11

STATEMENT OF REASONS

Wells Fargo Bank, N.A.
v.
Larry Lendrell Martin, et al.
SSX-F-17240-09

This matter comes before the Court by way of a pair of notices of motion filed June 23, 2011. Plaintiff Wells Fargo Bank, N.A. ("Wells Fargo") filed through counsel, Anne E. Walters, Esq., a motion seeking summary judgment entered in favor of Wells Fargo and against Defendant Larry Lendrell Martin. Also on June 23, 2011, Defendant Larry Lendrell Martin filed his pro se motion seeking summary judgment in favor of Defendant and dismissal of Plaintiff's Amended Complaint with prejudice.

On July 26, 2011, Wells Fargo, now through counsel Kevin B. Golden, Esq., filed its opposition to Defendant Martin's motion. No opposition papers were specifically filed in opposition to Wells Fargo's motion for summary judgment.

On August 5, 2011, the parties appeared for oral argument. Nancy Nolan, Esq., appeared telephonically on behalf Wells Fargo, and pro se Defendant Larry Lendrell Martin appeared on his own behalf. During oral argument, this Court requested the parties to file supplemental briefing regarding the "wild" assignment of the Mortgage between two of Plaintiff's predecessors in interest.

On August 12, 2011, Plaintiff filed its supplemental brief in response to the Court's request. On August 18, 2011, Defendant filed his opposition papers to Plaintiff's supplemental brief.

I. Factual History

1994: The Note and Mortgage

By way of background, this case arises out of a residential foreclosure proceeding involving mortgaged premises located at 949 Mount Benevolence Road, Township of Stillwater, Sussex County, New Jersey. (Certification of Anne E Walters, Esq., June 22, 2011, ¶ 2). On February 7, 1994, Larry Lendrell Martin executed to Bank United of Texas FSB a Note to secure the sum of $134,640.00. (Certification of Kyle N. Campbell, June 20, 2011, ¶ 2.) That Note provided an interest rate of 6.500 % per annum, and was payable on March 1, 2024. (Id.) On February 7, 1994, Martin also executed a Mortgage on the property located at 949 Mount Benevolence Road, Township of Stillwater, Sussex County, New Jersey, in favor of Bank United of Texas FSB, to secure said Note. (Id. ¶ 4, Ex. B).

On some later undetermined date, JPMorgan Chase Bank, N.A., became the successor in interest to Bank United of Texas FSB. (Id. ¶ 6).

On some later undetermined date, JPMorgan Chase Bank, N.A., assigned the Note and Mortgage to GE Mortgage Services, LLC, however that assignment was not formally memorialized and was not recorded at that time. (Id. ¶ 6).

On September 11, 2000, Plaintiff Wells Fargo Bank, N.A. acquired the Note and Mortgage from GE Mortgage Services, LLC. (Id. ¶ 5). The formal Assignment of the Note and Mortgage, however, was not executed at that time.[1] After Wells Fargo obtained possession of the Note, it was allegedly lost, misfiled, misplaced, or destroyed. (Campbell Cert., ¶ 3; Ex. A (Affidavit of Lost Note or Bond)).

[1] At about the same time, the Defendant filed for and obtained a Bankruptcy discharge. On March 5, 1999, Martin applied for relief under Chapter 7 of the Bankruptcy Code. (Id. ¶ 7, Ex. E, at 5). On June 30, 2001, Martin obtained a Bankruptcy discharge. (See Campbell Ex. E, page 5-6).

2004: Loan Modification

On October 25, 2004, Martin entered into a Loan Modification Agreement with Wells Fargo. (Id. ¶ 8, Ex. E). Under the terms of the Modification Agreement, Martin was permitted to retain the property at issue. (Id.)

On September 14, 2005, the Assignment of the Note and Mortgage from GE Mortgage Services, LLC, to Plaintiff Wells Fargo Bank, N.A. was formally executed. (Ibid.) On October 6, 2005, the Sussex County Clerk recorded the Assignment in Book 1786 Page 184. (Ibid.; see also Ex. C).

2008: Default, NOI, and Foreclosure Complaint

In November 2008, Martin defaulted on the Loan, and the Loan was still in default as of June 20, 2011. (Id. ¶¶ 10, 11). Approximately one month later, on December 7, 2008, Wells Fargo Home Mortgage sent to Martin via certified mail a Notice of Intention To Foreclose ("NOI"). (Certification of Kyle N. Campbell, July 25, 2011, Exhibit A). The NOI indicated "Wells Fargo Bank, N.A." as the holder of the Mortgage on the property located at 949 Mt. Benevolence, Stillwater, New Jersey. The NOI also informed Martin that the "[t]otal due to cure default and bring the loan current as of January 6, 2009" is "$5,857.68." (Ibid.)

On April 1, 2009, Plaintiff filed a Foreclosure Complaint. (Walters Cert. Ex. A). On April 24, 2009, the assignment of the Note and Mortgage from JPMorgan Chase Bank, N.A., to GE Mortgage Services LLC was memorialized.

On June 19, 2009, the Sussex County Clerk recorded the Assignment of the Note and Mortgage from JPMorgan Chase Bank, N.A., to GE Mortgage Services, LLC, in Book 8615 Page 979. (Id. ¶ 6, Ex. D).

Accordingly, on February 19, 2010, Wells Fargo filed an Amended Complaint. (Walters Cert. Ex. B). The Amended Complaint was filed "to recite date of intervening Assignment of Mortgage." (Ibid.)

On October 25, 2010, Martin filed, pro se, an Answer, Defenses, and Counterclaims which was marked "Contested" by the Foreclosure Unit of the Superior Court, Trenton, New Jersey. (Walters Cert. Ex. C). Martin specifically denied Paragraph 14 of the First Count Wells Fargo's Complaint, which alleges that "Plaintiff has complied with the Fair Foreclosure Act N.J.S.A. 2A:50-53 et seq., by serving the required Notice of Intention to Foreclose at least 30 days in advance of filing this complaint." Martin did not deny any of the allegations of the Second Count of Plaintiff's Amended Complaint.

Martin brought two Counterclaims against Wells Fargo: Consumer Fraud as alleged in the First Count; and violations of the Truth In Lending Act as alleged in the Second Count. With respect to "Specificity" as alleged in his Consumer Fraud claim, Martin alleged that "Wells Fargo Bank, NA lacks standing in this matter due to the fact that they failed to provide a clear chain of title from inception to present." (Walters Cert. Ex. C, Answer, Defenses and Counterclaims). No other specific allegations as to Consumer Fraud were alleged by Martin.

II. Discussion

A. Plaintiff Wells Fargo's Motion for Summary Judgment

Plaintiff Wells Fargo's motion for summary judgment seeks a judgment in its favor on the issue of liability only and an order dismissing Martin's Counterclaims with prejudice. Wells Fargo argues that the Answer fails to allege any challenge to the essential elements of a mortgagee's right to foreclose nor does it pose a recognized, valid defense, and thus Wells Fargo is entitled to a final judgment of foreclosure as a matter of law.

Regarding Martin's Counterclaims, Wells Fargo argues that Martin's claim under the Consumer Fraud Act should be dismissed because Martin failed to plead fraud with specificity under Rule 4:5-8(a). Wells Fargo argues additionally that it, as an Assignee of the Mortgage and Note, is not liable for any alleged violation of the Consumer Fraud Act.

Next, Wells Fargo argues that Martin's claims filed under the Truth In Lending Act ("TILA") fail because it is not the originator of the Loan.

Finally, Wells Fargo argues that Martin's Answer does not, under Rule 4:64-1(c)(1), constitute a contesting Answer and thus should be stricken.

No opposition to Plaintiff Wells Fargo's motion for summary judgment was filed on behalf of Defendant.

In its supplemental brief, Wells Fargo repeats most of its arguments made in its initial motion brief, but adds that "[a]ssignments of Mortgage are done for purposes of public recordation. The subject Assignment wherein the note and mortgage were assigned from JP Morgan Chase Bank to GEM Mortgage Services, LLC, was done only to correct the chain of title." (Pl.'s Supp. Br. at 2).

B. Defendant Martin's Motion To Dismiss

Defendant Martin argues that his motion to dismiss the Amended Complaint should be granted for two reasons. First, Martin contends that Wells Fargo failed to comply with the Fair Foreclosure Act by failing to serve him with a Notice of Intention to Foreclose by "registered letter or certified mail, return receipt requested" within thirty days in advance of filing its Foreclosure Complaint. (Def.'s Br. at 1).

Second, Defendant argues that Wells Fargo lacks standing to enforce the Note because it is unable to produce the original Note. Defendant argues that the Affidavit of Lost Note

provided by Wells Fargo does not provide a legally sufficient substitute for the "'original' note which must be provided." (Def.'s Br. at 2). Defendant argues that because there is no proof that Wells Fargo ever held the Note or took possession of the Note, it lacks standing to enforce the Note. Specifically, Martin points out and argues that a "plaintiff has no foundation in law or fact to foreclose upon a mortgage in which the plaintiff has no legal or equitable interest and where an assignment of the mortgage post-dates the filing of the complaint . . . ." (Def.'s Br. at 4).

In opposition to Martin's motion to dismiss, Wells Fargo first argues that it did in fact send by certified mail a Notice of Intention to Foreclose to Martin in December 2008, and that its Notice advised Martin of "everything required under the Fair Foreclosure Act . . . ."

Next, Wells Fargo argues that pursuant to the Uniform Commercial Code, N.J.S.A. § 12A:3-309, that it is entitled to enforce the Note so long as it was "in possession of the instrument and entitled to enforce it when loss of possession occurred, [and] the loss of possession was not the result of a transfer by the person or a lawful seizure, and the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined . . . ." (Pl.'s Brief in Opposition, July 25, 2011, at 2). Wells Fargo argues that it lost the Note, as per the Affidavit of Lost Note provided with its Motion papers. Wells Fargo argues that the Affidavit of Lost Note satisfies N.J.S.A. § 12A:3-309.

Finally, Wells Fargo appears to argue that Martin is equitably estopped from denying that Wells Fargo is the holder of the Note because he entered into a Loan Modification Agreement with Wells Fargo Bank on October 25, 2004.

III. Analysis

In deciding Wells Fargo's motion for summary judgment, this court applies the standard as set forth in New Jersey Court Rule 4:46-2(c) and as applied in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). Pursuant to Rule 4:46-2(c), summary judgment should only be granted when there is no genuine issue as to any material fact alleged, such that the movant is entitled to judgment as a matter of law.

Brill requires that the court consider whether the evidence "viewed in a light most favorable to the non-moving party, is sufficient to permit a rational factfinder to resolve the disputed issue in favor of the non-moving party." 142 N.J. at 540. Accordingly, in this case, the court considers the evidence in a light most favorable to Defendant Larry Lendrell Martin.

In determining a summary judgment motion, the judge's role is not to weigh the evidence, but rather to determine whether there exists a genuine issue of material fact for trial. Brill, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52 (1986). The trial judge should determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533 (citing Liberty Lobby, supra, 477 U.S. at 251–52).

An opponent to a summary judgment motion cannot defeat the motion by raising a "misguided subjective belief . . . to create the existence of a genuine issue of material fact." Optopics Labs. Corp. v. Sherman Labs, Inc., 261 N.J. Super. 536, 544 (App. Div. 1993) (quoting Swarts v. Sherwin-Williams Co., 244 N.J. Super. 170, 178 (App. Div.1990)).

Fair Foreclosure Act Notice of Intent to Foreclose

At least thirty days prior to filing a Foreclosure Complaint, a lender is required to give notice if its intentions. N.J.S.A. § 2A:50-56(a). That notice must be in writing and sent to the

debtor at his last known address (and also to the property address, if different from the debtor's address) by registered or certified mail, return receipt requested. N.J.S.A. § 2A:50-56(b). The Notice must include, among other things, the particular obligation or real estate security interest; the nature of the default claimed; the right of the debtor to cure the default, and what sum of money and interest, must be tendered to cure the default, and by what date the debtor must cure the default to avoid initiation of foreclosure proceedings. N.J.S.A. § 2A:50-56(c). The NOI must also include the name and address of the lender and the telephone number of a representative of the lender whom the debtor may contact if the debtor disagrees with the lender's assertion that a default has occurred or the correctness of the mortgage lender's calculation of the amount required to cure the default. N.J.S.A. § 2A:50-56(c). The simultaneous use of certified mail and first class mail satisfies the statutory requirements of N.J.S.A. § 2A:50-56. EMC Mortg. Corp. v. Chaudhri, 400 N.J. Super. 126, 140 (App .Div. 2008).

The Plaintiff asserts, through the July 25, 2011 Certification of Kyle Campbell (Vice President of Loan Documentation of Wells Fargo Bank, N.A.), that its Notice of Intention to Foreclose was mailed to Defendant on December 7, 2008, by certified mail. (Campbell Cert. ¶¶ 1-2). The NOI indicated "Wells Fargo Bank, N.A." as the holder of the Mortgage on the property located at 949 Mt. Benevolence, Stillwater, New Jersey. The NOI also informed Martin of the total amount required to cure default. The NOI was sent to Martin more than thirty days prior to the date that Wells Fargo filed its Foreclosure Complaint, which was April 1, 2009. (See Exhibit A to Supplemental Certification of Kyle Campbell, July 25, 2011). However, the NOI was mailed to the Defendant at the following address: "949 MT BENVOLENC, STILLWATER, NJ 07860."

Mr. Martin alleges, which is not disputed by Plaintiff, that his true and accurate mailing address is: 949 Mt. Benevolence Road, Newton, NJ 07860, acknowledging that Stillwater Township is served by the Newton, New Jersey postal district of the United States Postal Service. Mr. Martin consistently contends that he never received the NOI under the Fair Foreclosure Act. And while Mr. Campbell certified that a NOI "was sent via certified mail via Wells Fargo Bank to Defendant Martin on December 7, 2008," no proof has been provided that the certified mail has been received. Given the clearly inaccurate address used by the lender, in the absence of proof of actual receipt of certified mail notice, the Court must defer to the Defendant's position that he did not receive the NOI. The burden is on the Plaintiff to establish the statutory compliance with regard to the Fair Foreclosure Act in this regard.

Wells Fargo's Standing To Enforce the Note

To establish standing to enforce a mortgage, a plaintiff must "have had ownership or control of the underlying debt as of the date of the filing of the complaint." Wells Fargo Bank v. Ford, 418 N.J. Super. 592, 595 n.1 (App. Div. 2011). To establish ownership or control of a negotiable instrument, the party must be either the (1) the holder of the instrument, (2) a nonholder in possession of the instrument who has the rights of the holder, or (3) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to N.J.S.A. § 12A:3-309. N.J.S.A. §12A:3-301.

Under N.J.S.A. § 12A:3-309, a person not in possession of an instrument is entitled to enforce the instrument "if the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, the loss of possession was not the result of a transfer by the person or a lawful seizure, and the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the

wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process." N.J.S.A. § 12A:3-309.

Here, Wells Fargo has provided an Affidavit of Lost Note in support of its arguments that it has standing to enforce the Note. The Affidavit of Lost Note or Bond was signed by one "Yolanda T. Williams" and is dated November 9, 2010. (See Campbell Cert., Ex. A, Affidavit of Lost Note or Bond). In her Affidavit, Williams states that she is a Vice President of Loan Documentation of Wells Fargo Bank N.A. and that she has "personal knowledge of the facts contained" in her affidavit. (Id. ¶ 1). Williams states that Wells Fargo Bank, NA "services the Mortgage and Note for plaintiff, the successor in interest to the original holder of the Note." (Id. ¶ 4). Nowhere in her affidavit does Williams indicate how she has personal knowledge of this fact. Williams states that although Wells Fargo Bank N.A. "has conducted a diligent search of the records and files maintained in connection with the Mortgage, Wells Fargo Bank N.A. has been unable to locate the Note and believes that the Note has been lost, misfiled, misplaced[,] or destroyed." (Id. ¶ 5). Williams also states that the records of Wells Fargo Bank N.A. do not show that the Note was ever released, paid off, satisfied, assigned, transferred, pledged, hypothecated, or that the Note was otherwise disposed of by Wells Fargo. (Id. ¶ 6).

Nowhere in her affidavit does Williams indicate how she has personal knowledge of these facts, and clearly, this statement is a conclusion that relies for its vitality on underlying facts that are not disclosed or provided. Williams does not assert that she personally conducted a search for the Note, nor does she inform the Court as to how it is that she knows, or how she learned, or how she was informed, that the Note was lost, misfiled, misplaced, or destroyed. To borrow from the toolbox of journalists in the past, there is no "who, what, where, when, why, or how" provided anywhere in Ms. Williams' affidavit. Accordingly, Ms. Williams' affidavit is so

vague as to be unreliable. This Court will not rely upon such affidavits. Therefore, the proofs provided by Wells Fargo as to the current status of the Note are woefully insufficient and inadequate. Currently, Wells Fargo then does not have possession of the Note and cannot explain where the Note is or who has it.

The next issue, compounding Wells Fargo's difficulties in this case, is the undisputed fact that the Mortgage and Note were assigned to Wells Fargo Bank, N.A., by GE Mortgage Services, LLC, pursuant to an assignment of mortgage dated September 14, 2005, and recorded in the Sussex County Clerk's Office on October 6, 2005.

Wells Fargo's next hurdle is this fact: GE Mortgage Services LLC is not documented to have received the Mortgage and Note by "prior assignment" until April 24, 2009. See Campbell Cert., June 20, 2011, Ex. D. At oral argument on August 5, 2011, the Court expressed its concern to Plaintiff's counsel that the 2009 Assignment from JP Mortgage Chase Bank to GE Mortgage Services LLC may be a "wild" document, outside of the chain of title. The Court continues to be concerned that the assignment to GE Mortgage was not executed and recorded until some four years after GE Mortgage purportedly assigned the Note and Mortgage to the Plaintiff in this case.

Parenthetically, the Court notes that over the last several years, court cases nationwide, together with national media reports, have thoroughly documented the incompetence and negligence of the major lending institutions in their failure to adhere to basic business practices and bookkeeping and record keeping. This case appears to be another example of the thundering herd of such out of control cases.

But it is not immediately necessary to address the "wild assignment" issue because there lurks behind the curtain a more sinister problem: for, upon close inspection, the 2009 assignment

of mortgage from JP Morgan Chase Bank to GE Mortgage Services, LLC, appears to be the functional equivalent of a boat without sales or a bird without wings. The assignment of mortgage (Campbell Cert, Ex. D), purports to be executed by Herman John Kennerty, Vice President of Loan Documentation, on behalf of "Wells Fargo Bank, N.A., Attorney-in-Fact for JP Morgan Chase Bank, National Association." Assuming for the sake of discussion that Mr. Kennerty is in fact one of the legion of Vice Presidents of Loan Documentation for Wells Fargo Bank, NA, no proof or documentation is provided whatsoever to prove that Wells Fargo Bank NA is or was the Attorney-In-Fact for JP Morgan Chase, N.A. Ordinarily, when a party executes a document for recording purposes, the document so executed is preceded in the recording chain of title by a duly executed and appropriate Power of Attorney or similar document. Nowhere is there any basis to conclude, on the proofs before the Court, that Wells Fargo Bank NA enjoys or enjoyed the status of Attorney-in-Fact for JP Morgan Chase Bank, which are two separate and independent financial institutions. This leads the Court to express its concern as to whether this document was prepared (noting that the foreclosure Complaint was filed on April 1, 2009), as a "quick fix" or band-aid to hide or cover the "wound" that exists by virtue of this recording snafu.

The Court also notes that, following oral argument on August 5, 2011, the Court provided Plaintiff's counsel with a one-week extension of time to provide the Court with additional information or proofs to satisfy and address the Court's concern regarding the "wild assignment" issue. The Court received correspondence from Kevin B. Golden on behalf of Plaintiffs in that regard, however that submission failed to address the Court's concern in any meaningful way.

Wells Fargo has failed established that it is entitled to summary judgment as a matter of law. To obtain relief in a mortgage foreclosure action, the mortgagee must establish that (1) the mortgage and loan documents are valid; (2) the mortgage loan is in default; and (3) it has a

mortgage and loan documents are valid; (2) the mortgage loan is in default; and (3) it has a contractual right to foreclose upon the mortgaged premises in light of the default. Great Falls Bank v. Pardo, 263 N.J. Super. 388, 394 (Ch. Div. 1993), aff'd, 273 N.J. Super. 542 (App. Div. 1994). In addition, the Plaintiff must comply with the requirements of the Fair Foreclosure Act.

Wells Fargo has failed to established that it possesses the Mortgage Note and has failed to establish that the Mortgage Note has been lost, destroyed or misplaced. Wells Fargo has failed to establish that it is entitled to proceed as the Plaintiff in this action by virtue of prior assignments. Wells Fargo has failed to comply with the Notice of Intention to Foreclose provision of the Fair Foreclosure Act. For these reasons, Wells Fargo's complaint for Foreclosure must be dismissed without prejudice.

Defendant's counterclaims must also be dismissed, and those counterclaims are likewise dismissed without prejudice.

IV. Conclusion

For the above stated reasons and for the reasons put forth on the record, Defendant Larry Lendrell Martin's motion to dismiss Plaintiff's Amended Complaint is granted, and the dismissal is without prejudice.

Plaintiff's motion for summary judgment is denied in part, except that Plaintiff's Motion to dismiss the counterclaims of Mr. Martin is granted, and the Counterclaims are dismissed without prejudice.

The Court was informed at oral argument that there was a pending loan modification application transmitted to the Defendant by the Plaintiff, which the Defendant had not yet acted upon. The Defendant has now informed the Court that he has completed and transmitted the loan modification paperwork to the Plaintiff's representatives for review and processing. Not

withstanding the decision by the Court on these motions, the Court encourages the parties herein to work furiously and diligently to accomplish a mutually acceptable loan modification agreement.

Dated: August 25, 2011

WILLIAM J. MCGOVERN, III, J.S.C.