

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA
CIVIL DIVISION

THE BANK OF NEW YORK MELLON,
ET. AL.,

PLAINTIFF(S),

CASE NO.: 08015397CI-19

v.

THOMAS MCCORMICK, ET. AL.,

DEFENDANT(S).


DEFENDANTS' NOTICE OF APPEARANCE

COME NOW, the Defendants, THOMAS C. MCCORMICK AND MARY S.
MCCORMICK by and through their undersigned counsel and hereby requests that his attorney
of record be listed as

MATTHEW D. WEIDNER
Attorney for Defendants
1229 Central Avenue
St. Petersburg, Fl. 33705
(727)894-3159
Bar No.: 185957

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by
U.S. Mail on this 24th day of August, 2010 to KRISTIN L.POLK, Florida Default Law Group,
P.L., P.O. Box 25018, Tampa, FL 33622-5018.

BY: 
MATTHEW D. WEIDNER
Attorney for Defendant(s)
1229 Central Avenue
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FBN: 0185957

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DEFENDANT(S).

**DEFENDANTS' MOTION FOR RECONSIDERATION AND MOTION TO
VACATE ORDER OF SUMMARY JUDGMENT**

COMES NOW, the Defendants THOMAS C. MCCORMICK AND MARY S. MCCORMICK (hereinafter "Defendant"), by and through the undersigned counsel MATTHEW D. WEIDNER, and respectfully files this MOTION FOR RECONSIDERATION AND MOTION TO VACATE SUMMARY JUDGMENT, pursuant to precedent case law, and in support thereof states as follows:

FACTS

1. On or around October 13, 2008 Plaintiff filed a Complaint in an action to foreclosure on real property.
2. On or around October 31, 2008, the Defendants filed an Answer and Affirmative Defenses. While the Defendants' Answer and Affirmative defenses were *pro se*, they still raised a number of key issues in this case. For instance, the Defendants raised affirmative defenses that challenged the Plaintiff's violation of the Truth In Lending Action and Regulation Z.
3. On or around May 18, 2009 the Plaintiff filed a Motion for Summary Judgment. This generic motion failed to adequately address the affirmative defenses filed by Defendants in this

case. In fact, and importantly, the Plaintiff has failed in any way whatsoever to address, strike or in any way respond to the valid Affirmative Defenses raised in Defendant's pro-se Answer.

4. On August 17, 2010 a hearing was held in regards to the Plaintiff's Motion for Summary Judgment. In this hearing, the Court entered a Final Judgment of Foreclosure, a Default Judgment, and scheduled a judicial sale for November 18, 2010.

5. Immediately after summary judgment was entered against the Defendants, Defendants hired the undersigned counsel, Matthew Weidner, to represent them in this matter.

STANDARD OF REVIEW

6. Rather than constituting a motion for rehearing under *Fla. R. Civ. Pro.* 1.530, a motion directed to a nonfinal order is termed a "Motion for Reconsideration" based upon the trial court's inherent authority to reconsider and alter or retract orders prior to the entry of final judgment. *See Bettez v. City of Miami*, 510 So. 2d 1242, 1242-43 (So. 3d DCA 1987).

7. An order merely granting summary judgment is not a final judgment; rather, it is a nonfinal order. *See e.g. White Palms of Palm Beach, Inc. v. Fox*, 525 So. 2d 518, 519 (Fla. 4th DCA 1988).

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION

I. The Court incorrectly granted Summary Judgment in favor of the Plaintiff where genuine issues of material fact exist which were timely raised and objected to by the Defendant

A. Legal Standards

8. Under Florida law, summary judgment is proper if, and only if, based on an examination of evidence, no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. *See The Florida Bar v. Green*, 926 So. 2d 1195, 1200 (Fla. 2006); *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

9. Furthermore, pursuant to Rule 1.510 of the *Florida Rules of Civil Procedure*, a Court may grant summary judgment if, and only if, “the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fla. R. Civ. P. 1.510(c).

10. In summary judgment proceedings, the Court must take all the facts that the non-movant states as true and must draw all reasonable inferences in favor of the non-moving party. *See Bradford v. Bernstein*, 510 So.2d 1204 (Fla. 2d DCA 1987); *Petruska v. Smartparks-Silver Springs, Inc.*, 914 So.2d 502 (Fla. 5th DCA 2005).

11. Moreover, Florida Courts clearly disallow summary judgment when plaintiff fails to refute affirmative defenses. In *Lazuran v. Citimortgage, Inc.*, 4D09-1340 (Fla. 4th DCA 2010), the court held the trial court’s grant of summary judgment improper where the plaintiff failed to refute an affirmative defense. *See also, Frost v. Regions Bank*, 5 So.3d 905 (Fla. 4th DCA 2009) (Because the bank did not meet its burden to refute the Frost lack of notice and opportunity to cure defense, the bank is not entitled to final summary judgment of foreclosure).

12. Further, a mortgage foreclosure is an equitable action for which equitable defenses are most appropriate. Thus, a genuine issue of fact existed which precluded summary judgment when the mortgagors pleaded that the mortgagee failed to follow federal Housing and Urban Development guidelines that directed the mortgagee to make substantial efforts to assist the parties and to prevent foreclosure. *Cross v. Federal Nat. Mortg. Assoc.*, 259 So.2d 484 (Fla. 4th DCA 1978).

B. Argument

13. Here, a multitude of conflicts in material facts exist that should have precluded a ruling of summary judgment in favor of the Plaintiff.

14. The first issue of material fact is that the Defendants filed an Answer and Affirmative Defenses. The Plaintiff did not adequately respond to the affirmative defenses in its Motion for Summary Judgment. Specifically, the Plaintiff's Motion for summary judgment was formulaic and did not properly address each individual affirmative defense that the Defendant raised.

15. The Court in Lazuran held that where, as is the case here, a defendant raises affirmative defenses and the Plaintiff fails to respond to those defenses, summary judgment is not proper. Therefore, the Defendants respectfully request that it this motion for reconsideration of summary judgment, that summary judgment be denied based on this issue of material fact.

16. The second issue of material fact which precludes a ruling in favor of summary judgment is that the Plaintiff did not comply with the Truth in Lending Action and Regulation Z, 15 U.S.C. Section 1632. This statute protects consumers against deceptive trade practices in the lending industry. The Defendants' Answer and Affirmative Defenses, which were artfully drafted in a *pro se* fashion, did raise issues as to the Plaintiff's failure to comply with the Truth in Lending Action and Regulation Z. Additionally, Defendants denied paragraph 4 of the complaint which states, "[p]laintiff is now the holder of the Mortgage note and Mortgage and/or is entitled to enforce the Mortgage Note and Mortgage." In their Answer and Affirmative Defenses, the Defendants spelled out to the court that Plaintiff participated in deceptive practices and the Defendants do not believe that the Plaintiff in this action is entitled to enforce the Mortgage and Note.

17. The Court in Cross stands for the proposition that a court of equity, such as this one, should not grant summary judgment when the facts clearly show there is an issue of whether

HUD Guidelines are followed. Here, the Defendants pointed out issues that are more substantial than those addressed in Cross, they pointed out failures to obey laws protecting homeowners from deceptive lending practices (failure to obey laws are more serious violations than failure to obey guidelines). This alone is enough to deny Plaintiff's Motion for Summary Judgment, because the Defendants have adequately raised an issue of material fact.

18. There are further issues of material fact supported by the records attached to the Complaint and supplemental documents filed by the Plaintiff.

19. For instance, the Complaint which was filed on or around October 13, 2008 alleges in paragraph five that "[p]laintiff is **now** the holder of the Mortgage note and Mortgage and/or is entitled to enforce the Mortgage Note and Mortgage." *Emphasis Added*. However, the Plaintiff filed a conflicting "Assignment of Mortgage" which states in relevant part the "Assignor has executed and delivered this Instrument on February 2, 2009. This Assignment of Mortgage materially conflicts with the allegations in the Complaint, case law that says a party must be a party in interest at the time the case was filed, and the Plaintiff's theory of the case.

20. There also is a material difference between the purported allonge to original note filed by the Plaintiff and the Plaintiff's Complaint. Specifically, the purported allonge attached to the original note filed by the Plaintiff contains only one Endorsement that is "Pay to the order of: Union Federal Bank of Indianapolis." The complaint alleges that the Plaintiff is the holder of the Note and/or entitled to enforce the note but provides direct evidence which shows that Union Federal Bank of Indianapolis is entitled to enforce the note.

21. When you compare the Mortgage and the Note, it appears that there are genuine issues of material fact as to who owns and is entitled to enforce the Note and Mortgage.

WHEREFORE, based upon the foregoing, the Defendant respectfully request this Court grant its Motion for Reconsideration, vacate its Motion for Summary Judgment in favor of the Plaintiff, enter an Order denying Summary Judgment, and any other relief the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 24th day of August, 2010 to MEAGHAN DUNNE, Florida Default Law Group, P.L., PO Box 25018, Tampa, FL 33622-5018.

By: 

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