

JUN 7 2016



**DAVID A. DEMERS**  
**SENIOR CIRCUIT COURT JUDGE**

PINELLAS COUNTY JUDICIAL BUILDING  
545 FIRST AVENUE NORTH, ROOM 312  
ST. PETERSBURG FLORIDA 33701  
727 582-7734

June 03, 2016

Collie L. Nolen, Esq  
2005 Pan Am Circle, Suite 110  
Tampa, FL 33607

Collie L. Nolen, Esq  
2313 W. Violet Street  
Tampa, FL 33603-1423

Robert K. Bowen, Esq  
P.O. Box 23028  
Tampa, FL 33623

Jason M. Kral, Esq  
250 Mirror Lake Drive North  
St. Petersburg, FL 33701

Re: U S. Bank National Association v. Jeffrey Leonard, et al.,  
Pinellas County, Florida; Case No. 14-005946-CI

Counselors:

I have thoroughly considered the written arguments in the above styled and I am prepared to render my decision. The original of this letter will be placed in the court file and may be incorporated into any orders. The letter presents my reasoning in detail. There are four issues in this case and I have considered each of them carefully.

First, Defendant claims that this cause should be involuntarily dismissed without prejudice because the Plaintiff failed to properly verify the certification of the note. The Defendant is correct.

Plaintiff uses the same form for verification that it uses with the complaint –best knowledge and belief of the affiant. Plaintiff, relies on *BAC Home Loan Serving L.P. v. Startz*, 91 So.3d 235 (Fla. 2d DCA 2012). In that case, the court found such a verification proper solely because it was the language required by the Supreme Court. In contrast, the language required for the certification of the note, which must be attached to the complaint, is completely different. It requires that the oath show personal knowledge by stating that the allegations of the certification are true. See Form 1944 (a), Rules of Civil Procedure. Further, the Second District specifically recognized that unless the law specifically provides otherwise, Florida Statute §92.525 requires that the oath attest that the allegations of the affidavit are true. *Trucap Grantor Trust 2010-1 v. Pelt*, 84 So.3d 369 (Fla. 2d DCA 2012). This defense was specifically raised in the instant case. Thus, the complaint must be dismissed without prejudice.

Second, the Defendant argues that the Plaintiff cannot seek enforcement of the note and mortgage because there is no evidence of payment of documentary stamp taxes required by Florida Statute §201.08. As noted by Defendant, that statute provides, in pertinent part: "The mortgage, trust deed or other instrument shall not be enforceable in any court of this state as to any such advance unless and until the tax due thereon upon each advance that may have been made thereunder has been paid." Plaintiff argues that the defense has waived this claim by not raising it until trial. As a matter of law, that position is without merit. *Somma v. Metra Electronics Corp.*, 727 So.2d 302, 304-305 (Fla. 5<sup>th</sup> DCA 1999). See also *Nikooie v. J.P. Morgan*, 183 So.3d 424 (Fla. 3d DCA 2014). The Court is required to dismiss the claim without prejudice unless there is a proper motion to abate. *Somma*, at 305. No such motion has been filed. This provides additional grounds for dismissal without prejudice.

Based on the two grounds considered above, it is clear that this Court must dismiss this cause without prejudice and reserve jurisdiction to award fees and costs. Ordinarily, these matters would have been considered before the Court spent a great deal of time considering evidence and argument in a final hearing. In this instance, that did not happen. The parties went to final hearing. In the interest of time and with hope that it may be of some value to the parties; the Court considers the other issues raised by the Defendant that would go to final resolution.

The third matter raised by the Defendant is that the Plaintiff has failed to establish standing. The court finds that the evidence is sufficient to establish by a preponderance of the evidence that when the Plaintiff filed the complaint it had standing.

Fourth, the Defendant argues that the Plaintiff failed to comply with certain HUD regulations, which he maintains are conditions precedent. While it seems that both the note and the mortgage incorporate these provisions, Florida courts<sup>1</sup> at the appellate level hold that those regulations are not conditions precedent. *Laws v. Wells Fargo Bank, N.A.* 159 So.3d 918 (Fla. 1<sup>st</sup> DCA 2015); *Real Estate Mortgage Network, Inc. v. Knight*, 149 So.3d 121 (Fla. 4<sup>th</sup> DCA 2014); *Cross v. Federal National Mortgage Association*, 359 So.2d 464 (Fla. 4<sup>th</sup> DCA 1978). But it is equally clear that such noncompliance may be raised as equitable defenses. *Id.* The Defendant has raised these matters in his affirmative defenses. So the question then is does the evidence establish any of those defenses?

Affirmative Defense VI claims that Plaintiff failed to give Defendants notice of delinquency as required by 24 C.F.R. §203.602. This provision provides: "The mortgagee shall give notice to each mortgagor in default on a form supplied by the Secretary or, if the mortgagee wishes to use its own form, on a form approved by the Secretary, no later than the end of the second month of any delinquency in payments under the mortgage." There is no doubt that the Plaintiff did not comply with the regulations as to form or time.

Plaintiff argues that it substantially complied with the regulation by sending two breach letters outside of the sixty day period. Those two letters are in evidence and show that notice was provided of the default by failure to pay monthly installments, opportunity to cure and that acceleration and foreclosure would take place. The notice also advises the Defendant of the

---

<sup>1</sup> Florida law on the subject seems clear. But it should be noted that other jurisdictions dealing directly with this issue have ruled that compliance with the regulations is a condition precedent. *Wells Fargo Bank, N.A. v. Cook*, 87 Mass.App.Ct. 382, 31 N.E.3d 1125 (2015); *HSBC Bank USA, N.A. v. Teed*, 48 Misc.3d 194, 4 N.Y.S.3d 826 (2014) *Mathews v. PHH Mortg. Corp.*, 283 Va. 723, 724 S.E.2d 196 (Va, 2012). Contra *Wells Fargo Bank, N.A. v. Goebel*, 6 N.E.3d 1220 (Ohio 2d Dist. 2014)(non-compliance with regulations was an affirmative defense not a condition precedent).

right to reinstate the mortgage and to assert the non-existence of the default and any other defense in the foreclosure action. Further, the notice provides a phone number for the default counseling department. A second letter tells the Defendant that since the default has not been cured, the account has been referred to an attorney for foreclosure and it urges the Defendant to contact a counseling agency.

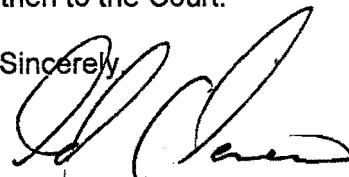
"Substantial compliance or performance is 'that performance of a contract which, while not full performance, is so nearly equivalent to what was bargained for that it would be unreasonable to deny' the other party the benefit of the bargain." *Green Tree Servicing, LLC v. Milam*, 177 So.3d 7, 14 (Fla. 2d DCA 2015). While the language of the notice may substantially comply with the regulation, the timing isn't even close. But for a noncompliance to be material there must be prejudice. See e.g. *Caraccia v. U.S. Bank, Nat. Ass'n*, 185 So.3d 1277 (Fla. 4<sup>th</sup> DCA 2016); *Gorel v. Bank of New York Mellon*, 165 So.3d 44, 47 (Fla. 5<sup>th</sup> DCA 2015). As to this regulation, the Defendant claims no harm nor is the Court able to discern any from this breach of the regulation. In short, it is clear that there is no prejudice from Plaintiff's non-compliance with this provision.

Defendant also claims that Plaintiff failed to comply with 24 CFR §203.604(b), which requires: "The mortgagee must have a face-to-face interview with the mortgagor or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid." Plaintiff admits that it did not comply with this provision, but argues that it was not required to do so because it fell into an exception: "The mortgaged property is not within 200 miles of the mortgagee, its servicer, or a branch office of either."

Defendant argues that the Plaintiff has waived this argument by failure to file a reply to the affirmative defense. This position is well taken. *Reno v. Adventist Health Systems/Sunbelt, Inc.* 516 So.2d 63 (Fla. 2d DCA 1987). But even if the Plaintiff had not waived the argument, it could not prevail because it is clear that Plaintiff did have "a branch office" within 200 miles of the mortgaged property. Plaintiff says that the involved offices do not meet the definition of "branch office" because they don't do mortgage business. This Court finds that the regulation is not as limited as Plaintiff maintains. The office does not have to be specifically designed for transacting mortgage business. *HSBC Bank USA, Natl. Trust Co. v. Teagarden*, 6 N.E.3d 678 (Ohio 11<sup>th</sup> Dist 2013); *Mathews v. PHH Mortgage Corporation*, 724 S.E.2d 196 (Va. 2012); *Wells Fargo v. Phillabaum*; 192 Ohio App.3d 712, 950 N.E.2d 245 (2011). The evidence establishes that the Plaintiff failed to comply with this regulation. And the Court finds that there was prejudice from this failure to comply in that it is obvious that it denied the Defendant an additional mandatory opportunity to learn about his options and to work something out.

Based on the foregoing reasoning, the Court finds that this cause must be dismissed without prejudice and that jurisdiction should be reserved to award fees and costs. Alternatively, but for the dismissal the Court would have entered judgment for the Defendant based solely on noncompliance with 24 CFR §203.604(b). Accordingly, the Court directs counsel for the Defendant to prepare an order dismissing this cause without prejudice and reserving jurisdiction to award fees and costs, submit it to opposing counsel and then to the Court.

Sincerely



David A. Demers  
Senior Circuit Judge

cc: Court file