

**IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA**

DITECH FINANCIAL LLC, F/K/A GREEN
TREE SERVICING, LLC,

Case No. 2019-CA-00XXXX-O

Plaintiff,

vs.

DENNIS DOE, et. al.,

Defendants.

_____ /

ANSWER AND AFFIRMATIVE DEFENSES

The Defendant, DENNIS DOE, files his answer, affirmative defenses and counterclaim and in support thereof states,

1. Paragraph 1 is admitted for jurisdictional purposes only.
2. Paragraph 2 is admitted for jurisdictional purposes only.
3. Paragraph 3 is denied.
4. Paragraph 4 is denied.
5. Paragraph 5 is denied.
6. Paragraph 6 is denied.
7. Paragraph 7 is denied.
8. Paragraph 8 is denied.
9. Paragraph 9 is denied.
10. Paragraph 10 is admitted.
11. Paragraph 11 is denied. Notice of default failed to contain true and accurate content.

12. Paragraph 12 is denied.
13. Paragraph 13 is denied.
14. Paragraph 14 is denied.
15. Paragraph 15 is denied.
16. Paragraph 16 is re-alleged as set forth above.
17. Paragraph 17 is denied for lack of knowledge.
18. Paragraph 18 is denied.
19. Paragraph 19 is is denied.
20. Paragraph 20 is denied.
21. Paragraph 21 is denied.
22. Paragraph 22 is denied.
23. Paragraph 23 is denied.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE Failure of Condition Precedent

Defendant DOE asserts the Plaintiff failed to comply with the breach notice requirement as set forth in paragraphs 20 and 22 of the Mortgage. Specifically, the June 21, 2019 Notice of Default (herein “NOD”) is substantially erroneous, depriving Defendant DOE of the right to reinstate at the correct amount necessary for reinstatement.

A. THE NOD IS MISSING CONTENT

The NOD is defective for several reasons. The first reason is that it is missing information concerning the dates that monthly payments are due and the amounts due for those

dates. When the information provided is considered, it demonstrates that escrow is substantially misrepresented.

The note provides that monthly amounts owed for principal are \$237.24 and monthly amounts owed for interest are \$1,073.61, for a total monthly charge of principal and interest of \$1,310.85¹.

Defendant DOE received a NOD dated June 21, 2019, a copy of which is attached hereto as Exhibit “A”. Plaintiff’s corporate representative, Janet Gioello, testified at Plaintiffs deposition on November 8, 2019. Ms. Gioello produced a NOD identified as Exhibit 1 to her deposition, a copy of which is attached hereto as Exhibit “B”. Both NOD’s are exactly the same in content and both are missing content information represented below by question marks “?”. Ms. Gioello also testified that monthly sums due which are greater than \$1,310.85 are due to escrow charges.² From the information in the NOD and Ms. Gioello’s testimony, the following information is derived:

Date	Monthly Payment	Monthly Escrow	Total Escrow	Months Billed
08/01/2012 - 07/01/2013	\$ 1,446.12	\$ 135.27	\$ 1,623.24	(12 months)
08/01/2013 - 05/01/2014	??????	??????	??????	(10 months)
06/01/2014 - 06/01/2016	\$ 1,446.12	\$ 135.27	\$ 3,381.75	(25 months)
07/01/2016 - 12/01/2016	\$ 2,791.41	\$ 1,480.56	\$ 8,883.36	(6 months)
01/01/2017 - 06/01/2017	\$ 2,567.47	\$ 1,256.62	\$ 7,539.72	(6 months)
07/01/2017 - 01/01/2018	\$ 2,769.06	\$ 1,458.21	\$10,207.47	(7 months)
02/01/2018 - 05/01/2018	\$ 4,035.48	\$ 2,724.63	\$10,898.52	(4 months)
06/01/2018 - 03/01/2019	??????	??????	??????	(10 months)
04/01/2019 - 06/01/2019	\$ 2,302.80	\$ 991.95	\$ 2,975.70	(3 months)
			TOTAL ESCROW DUE.....	\$45,509.76

¹ See Note; also see deposition of Plaintiff’s representative Janet Gioello, page 16, ln. 15 - 17.

² See deposition of Plaintiff’s representative Janet Gioello, page 18, ln. 14 - 22.

On December 5, 2019, Defendant’s counsel contacted Plaintiff’s counsel and advised that he did not have a complete copy of the payoff letter. Plaintiff’s counsel emailed a complete copy of the NOD, a copy of which is attached hereto as Exhibit “C”. From this document the following information is derived:

Date	Monthly Payment	Monthly Escrow	Total Escrow	Months Billed
08/01/2012 - 06/01/2016	\$ 1,446.12	\$ 135.27	\$6,357.69	(47 months)
07/01/2016 - 12/01/2016	\$ 2,791.41	\$ 1,480.56	\$ 8,883.36	(6 months)
01/01/2017 - 06/01/2017	\$ 2,567.47	\$ 1,256.62	\$ 7,539.72	(6 months)
07/01/2017 - 01/01/2018	\$ 2,769.06	\$ 1,458.21	\$10,207.47	(7 months)
02/01/2018 - 08/01/2018	\$ 4,035.48	\$ 2,724.63	\$19,072.41	(7 months)
09/01/2018 - 02/01/2019	\$ 2,727.77	\$ 1,416.92	\$ 8,501.52	(6 months)
03/01/2019 - 06/01/2019	\$ 2,302.80	\$ 991.95	\$ 3,967.80	(4 months)
TOTAL ESCROW DUE.....			\$64,529.97	

The NOD sent to Defendant DOE is substantially defective because it was lacking important content.

B. THE NOD SUBSTANTIALLY OVERSTATES ESCROW.

(i) The NOD overstates escrow in the missed payments

Ms. Gioello, testified that escrow is composed of insurance and taxes.³ The mortgage provides that Escrow Items are those identified in the Mortgage at section 3, which provides that escrow items are taxes and assessments and other items which can attain priority over the Mortgage, leases and rents, insurance premiums and Mortgage Insurance premiums. The Mortgage, at definition “L” states ““Escrow Items” means those items that are described in Section 3.” Section 3 of the Mortgage states in relevant part:

Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the “Funds”) to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain

³ See deposition of Janet Gioello, page 19, ln. 1 - 4.

priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for Any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in Lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called “Escrow Items.”

Paragraph 6 of the complaint alleges default occurred on August 1, 2012. Taxes and insurance on the Property are as follows⁴:

	<u>Taxes</u>	<u>Insurance</u>
8/1/2012 - 12/31/2012	\$ 2,500.61	\$ 2,709.00**
1/1/2013 - 12/31/2013	\$ 2,501.92	\$ 2,459.19
1/1/2014 - 12/31/2014	\$ 2,886.60	\$ 2,709.00**
1/1/2015 - 12/31/2015	\$ 3,468.31	\$ 2,479.75
1/1/2016 - 12/31/2016	\$ 3,746.59	\$ 2,403.00
1/1/2016 - 12/31/2017	\$ 3,330.05	\$ 2,464.08
1/1/2018 - 12/31/2018	<u>\$ 3,378.47</u>	<u>\$ 2,709.00</u>
TOTAL:	\$21,812.55	\$17,933.02
GRAND TOTAL ESCROW ITEMS:		\$39,745.57 (Taxes plus Insurance)

The NOD indicates that escrow is \$65,421.84. Because escrow is actually \$39,745.57, escrow was overstated by \$25,676.00 on the NOD. However, the overstatement is even greater than this sum. The NOD states “Total you must pay to cure default: \$241,205.15”. Pursuant to the NOD, that sum is composed of \$173,330.52 in missed 82 payments from 8/1/2012 to 6/1/2019, plus \$255.79 for late fees, \$2,197.00 for “Corporate Advance Balance”, plus the erroneous amount stated for “Escrow Advance Balance” of \$65,421.84. Because monthly payments only include sums for principal, interest and escrow (taxes and insurance), the

⁴ Tax information is from the Orange County Tax Collector. [Exhibit “D”]. **Plaintiff was unable to provide proof of sums paid for insurance for 2012 or 2014. The most amount of money Plaintiff paid for insurance in any given year was \$2,709.00 for the year 2018. Giving Plaintiff the benefit of the doubt, DOE uses \$2,709.00 as the amount of insurance paid by Plaintiff for 2012 and 2014. The remaining insurance information herein is derived from the deposition of Janet Gioello, Exhibits 2 and 4.

\$173,330.52 figure of 82 missed payments consists of \$107,489.70 in principal and interest (82 months times \$1,310.85 = \$107,489.70). A computation reveals the following about the NOD:

- \$ 241,205.15 Grand Total Due
- \$ 107,489.70 Principal and Interest
- \$ 255.79 Late fees
- \$ 2,197.00 Corporate Advance Balance
- \$131,262.66 Escrow and/or other mysterious charges

The NOD is overstated by \$91,517.09 ($\$131,262.66 - \$39,745.57 = \$91,517.09$). By way of example, in 2018 the monthly amount for taxes was \$281.78 and the monthly amount for hazard insurance was \$205.34.

The mortgage specifically identifies Escrow Items as those items that can take priority over the mortgage, such as taxes and assessments, rents, hazard insurance and mortgage insurance. Plaintiff has necessarily included some other charges in the category of escrow. Those other charges are attorneys' fees and costs incurred in prior litigation between the parties, all of said litigation resulted in DOE being the prevailing party.

(ii) The NOD double billed escrow.

The NOD provides "Total Monthly Payments Due: \$173,330.52, but it fails to identify how much of that sum is for principal and interest. However, Ms. Gioello testified that monthly principal and interest is \$1,310.85, which is confirmed by the terms of the Note.

The NOD provides that defaulted payments are from the period 08/01/2012 through 06/01/2019, which is a total of 83 months. Therefore, missed principal and interest total \$108,800.55 (83 months times \$1,310.85).

Subtracting missed principal and interest of \$108,800.55 from \$173,330.52 leaves \$64,529.97 for sums other than principal and interest. The NOD indicates two additional charges other than escrow - \$255.79 for late fees and \$2,197.00 for Corporate Advance Balance. Subtracting these two additional charges from \$64,529.97 leaves escrow for taxes and insurance as \$62,077.18. Although escrow is already computed in each missed payment on the NOD, the

NOD also includes an additional sum of \$65,421.84 for “Escrow Advance Balance”, which indicates escrow has been double billed.

When the late fee of \$255.79 and the Corporate Advance Balance of \$2,197.00 are added into the Total Monthly Payments Due of \$173,330.52, the total amount due becomes \$175,783.31. However, the NOD stated “TOTAL YOU MUST PAY TO CURE DEFAULT: \$241,205.15”. That is an overstatement by \$65,421.84, rendering the NOD substantially defective.

(iii) Escrow includes illegal fees and costs

Ms. Gioello, testified that the escrow amount due in the NOD included a sum for an escrow shortage deficiency.⁵ She testified that the deficiency component included foreclosure attorneys’ fees.⁶ Paragraph 3 of the Mortgage identifies escrow as being composed solely of taxes and assessments that can attain priority status over the Mortgage, leasehold/rent payments, insurance premiums and mortgage insurance premiums. Escrow cannot be anything other than these items. Plaintiff has deceptively breached the mortgage contract by including attorneys’ fees in Escrow.

Ms. Gioello testified that there was a computer system conversion on April 5, 2016, and that there were attorneys’ fees included in the amount due that were incurred on or prior to April 5, 2016.⁷ Ms. Gioello testified that the total amount of attorneys’ fees added to the debt on or prior to April 5, 2016 total \$18,685.57.⁸ Ms. Gioello provided an account history for the subject debt, which was attached to her deposition as Defendants Exhibit 2. This document shows that subsequent to April 5, 2016, \$1,792.00 in attorneys’ fees and court costs were added to the account even though no foreclosure action was pending, as follows:

⁵ See Deposition of Janet Gioello, page 22, ln 25 through page 23, ln. 25.

⁶ See Deposition of Janet Gioello, page 24, ln. 10 - page 25, ln. 9.

⁷ See Deposition of Janet Gioello, page 28, ln. 4 - 19.

⁸ See Deposition of Janet Gioello, page 29, ln. 2 - page 40, ln. 25.

08/14/2018	Foreclosure Attorney's Fees.	\$ 250.00
09/28/2018	Foreclosure Attorney's Fees.	\$ 1,035.00
10/03/2018	Foreclosure Attorney's Fees.	\$ 107.50
10/03/2018	Foreclosure Attorney's Fees.	\$ 107.50
10/12/2018	Foreclosure Attorney's Fees.	\$ 215.00
10/18/2018	Court Costs.	<u>\$ 77.00</u>
	Total.\$ 1,792.00

The total amount of attorneys' fees and court costs wrongly included in escrow and added to the NOD total \$20,477.57.

On November 24, 2015, in *GMAC Mortgage v. DOE*, 2006-CA-8644-O, Defendant DOE was the prevailing party at trial and Plaintiff is not entitled its attorneys' fees and costs. DOE sued Green Tree Servicing, LLC (now Ditech Financial, LLC "Ditech", herein) in small claims court (State Court Filing) and Ditech removed that action to the Middle District of Florida case number 6:15-cv-84. On July 16, 2015, a confidential written settlement agreement was reached which states in relevant part:

2. Settlement. DOE agrees to file a Notice of Dismissal with Prejudice of the Federal Litigation and in return Green Tree agrees to waive any right to seek attorneys' fees and costs against DOE for filing the State Court Filing or the Federal Litigation.

On January 6, 2009, a foreclosure action was filed captioned *GMAC Mortgage, LLC, vs. DOE*, case no. 2009-CA-000405-O. On April 16, 2010, that action was voluntarily dismissed and Plaintiff is therefore not the prevailing party and not entitled to recover its attorney's fees and costs.

DOE sued Ditech again in *DOE v. Green Tree Servicing, LLC*, case no. 2014-SC-012808-O. On February 23, 2016, another confidential written settlement agreement was reached between DOE and Ditech where Ditech agreed to pay attorneys fees to DOE.

DOE sued Ditech again in federal court in *DOE v. Ditech Financial, LLC*, case no. 6:16-cv-01901. The parties entered into a third confidential written settlement agreement whereby

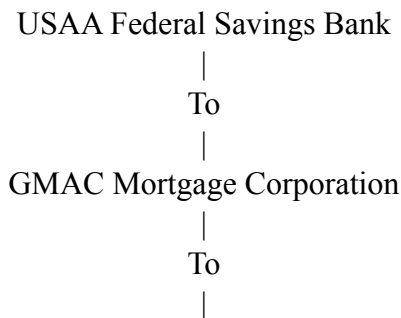
Ditech agreed to pay attorneys' fees to DOE, and specified a covenant not to sue in the broadest terms possible for anything relating to that settlement agreement.

The instant action violates these settlement agreements because Ditech hid attorneys' fees and costs incurred in these actions and has used the instant action to collect its attorneys' fees and costs incurred in these prior actions.

SECOND AFFIRMATIVE DEFENSE
Lack of Standing

Plaintiff lacks standing. Ms. Gioello testified at her deposition that the loan is owned by Fannie Mae and that Plaintiff ("Ditech") is the servicer of the loan.⁹ Ms. Gioello had no evidence that the Lender, USAA Federal Savings Bank had transferred the loan to Fannie Mae.¹⁰ Ms. Gioello did not have any evidence of the date Fannie Mae took ownership of the loan.¹¹

Ms. Gioello testified that MERS did not transfer ownership of the loan to GMAC Mortgage Corporation, instead, it only transferred the servicing rights.¹² Ms. Gioello testified that GMAC Mortgage Corporation, LLC only transferred servicing rights to GMAC Mortgage LLC.¹³ Ms. Gioello testified that the chain of title to the note which is set forth in the complaint and which was admitted to by Plaintiff in Defendants Request for Admissions as follows:



⁹ See deposition of Janet Gioello, page 48, ln. 24 - 25; also see page 50, ln. 1 - 2.

¹⁰ See Deposition of Janet Gioello, page 50, ln. 14 - page 51, ln. 13.

¹¹ See Deposition of Janet Gioello, page 52, ln. 1 - 3.

¹² See Deposition of Janet Gioello, page 52, ln. 10 - 15.

¹³ See Deposition of Janet Gioello, page 52, ln. 16 - 23; also see page 53, ln. 23 - page 54, ln. 2.

GMAC Mortgage, LLC
|
To
|
RESCAP Liquidating Trust
|
To
|
Ditech Financial, LLC

is actually incorrect, as each transfer was not as to title but rather was solely as to servicing rights.¹⁴

Ms. Gioello could not confirm that Fannie Mae owned the note.¹⁵ Ms. Gioello testified that Plaintiff does not own the Note.¹⁶

Ms. Gioello testified that she did not know which entity possessed the note when it was lost.¹⁷ Ms. Gioello testified that she heard that the original note was destroyed in David Stern's office, but that there are no records that show whether David Stern possessed the original note.¹⁸ Ms. Gioello testified that she had no evidence with her that Fannie Mae actually took possession of the note; nor did she have evidence that USAA Federal Savings Bank transferred possession of the note to Fannie Mae.¹⁹ Ms. Gioello testified that MERS does not take actual physical possession of notes.²⁰

THIRD AFFIRMATIVE DEFENSE
Illegal Charges Added to Debt

¹⁴ See Deposition of Janet Gioello, page 54, ln. 3 - page 56, ln. 6.

¹⁵ See Deposition of Janet Gioello, page 57, ln. 22 - page 58, ln. 13.

¹⁶ See Deposition of Janet Gioello, page 62, ln. 4 -10.

¹⁷ See Deposition of Janet Gioello, page 65, ln. 8 - 21.

¹⁸ See Deposition of Janet Gioello, page 65, ln. 15 - page 66, ln. 10.

¹⁹ See Deposition of Janet Gioello, page 68, ln. 15 - 24; also see page 70, ln. 4 - 7; also see page 71, ln. 25 - page 72, ln. 9.

²⁰ See Deposition of Janet Gioello, page 74, ln. 19 - 21.

The Defendant asserts the Plaintiff has added illegal charges to the debt including but not limited to attorneys fees and costs is incurred in the following actions:

- 1) *GMAC Mortgage, LLC, v. DOE*, 2006-CA-8644-O.
- 2) *GMAC Mortgage, LLC, vs. DOE*, 2009-CA-000405-O.
- 3) *DOE v. Green Tree Servicing, LLC*, 2014-SC-012808-O.
- 4) *DOE v. Ditech Financial, LLC*, 6:16-cv-01901-GAP-DCI (Middle District of Florida).

The Plaintiff's addition and continued attempts to collect these uncollectible attorneys fees and costs prevented the Defendant from exercising the right to reinstate the loan.

FOURTH AFFIRMATIVE DEFENSE Statute of Repose Overcharging Debt

The statute of repose has run on components of the debt, including but not limited to principal, interest, costs of collection, escrow and property preservation. Florida Statute 95.281(1)(c) provides in relevant part:

- (1) The lien of a mortgage or other instrument encumbering real property, herein called mortgage, except those specified in subsection (5), shall terminate after the expiration of the following periods of time:

...

- (c) For all obligations, including taxes, paid by the mortgagee, 5 years from the date of payment. A mortgagee shall have no right of subrogation to the lien of the state for taxes paid by the mortgagee to protect the security of his or her mortgage unless he or she obtains an assignment from the state of the tax certificate. Redemption of the tax certificate shall be insufficient for subrogation.

The Defendant asserts that the Statute of Repose, Fla. Stat. 95.281(1)(c), precludes the Plaintiff from asserting any amounts are due or collectible for any taxes, property inspections, insurance, or any other servicing related fees prior to June 21, 2014.

FIFTH AFFIRMATIVE DEFENSE Breach of Contract

Ditech has breached the settlement agreements by bringing this action to attempt to recoup attorneys' fees and costs incurred in prior litigation.

Ditech has wrongly hidden attorneys' fees and costs in the category of Escrow Items.

SIXTH AFFIRMATIVE DEFENSE
Violation of 701.04 Fla. Stat.

Florida Statute 701.04 provides in relevant part:

“Within 14 days after receipt of the written request of a mortgagor, a record title owner of the property, a fiduciary or trustee lawfully acting on behalf of a record title owner, or any other person lawfully authorized to act on behalf of a mortgagor or record title owner of the property, the holder of a mortgage shall deliver or cause the servicer of the mortgage to deliver to the person making the request at a place designated in the written request an estoppel letter setting forth the unpaid balance of the loan secured by the mortgage.

...

(a) If the mortgagor, or any person lawfully authorized to act on behalf of the mortgagor, makes the request, the estoppel letter must include an itemization of the principal, interest, and any other charges properly due under or secured by the mortgage and interest on a per-day basis for the unpaid balance. 701.04 Fla. Stat.

Ditech violated 701.04(1)(a) when it delivered the June 21, 2019 Notice of Default which was a payoff statement which improperly included attorneys' fees and costs from prior litigation.

SEVENTH AFFIRMATIVE DEFENSE
Payment

Defendant made payment. Plaintiff failed to account for the payments and declared Defendant in default when in fact he was not in default.

DEMAND FOR ATTORNEYS FEES

Defendant seeks fees under the Note and Mortgage Note, pursuant to Fla. Stat. 57.105(1) and Fla. Stat. 57.105(7), pursuant to the Wrongful Act Doctrine and in obtaining discharge of the Lis Pendens under Florida Statutes § 48.23(3).

CONCLUSION

The Defendant respectfully pray this court deny the Plaintiff's request for equitable relief, dismiss this action, and award the Defendant his attorneys fees and costs for defending this action.

Respectfully

/s/ George Gingo
George Gingo FBN 875933
400 Orange Street
Titusville, FL 32796
(321) 223-1831 (Office)
georgegingo@gmail.com

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing is being furnished this 10th day of December, 2019 pursuant to Rule 2.516 of the Rules of Judicial Administration to:

Alecia Daniel, c/o Robertson, Anschutz & Schneider, 6409 Congress Avenue, Suite 100, Boca Raton, FL 33487 mail@rasflaw.com adaniel@rasflaw.com

/s/ George Gingo
George Gingo FBN 875933