

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

WILMINGTON SAVINGS FUND SOCIETY, FSB,
D/B/A CHRISTIANA TRUST, NOT INDIVIDUALLY
BUT AS TRUSTEE FOR PRETIUM MORTGAGE
ACQUISITION TRUST,

Case No. 482019-CA-XXXX

Plaintiff,

vs.

ROBERTO Doe; HILDEGARD STAINGER;
et. al.,

Defendants.

_____ /

ANSWER AND AFFIRMATIVE DEFENSES

Defendants Roberto Doe and Hildegard Doe, files this, their answer and affirmative defenses and in support thereof states,

1. The first sentence of paragraph 1 is admitted for jurisdictional purposes only. The second paragraph is denied for lack of knowledge.
2. Paragraph 2 is denied for lack of knowledge.
3. Paragraph 3 is denied for lack of knowledge.
4. Paragraph 4 is denied for lack of knowledge.
5. Paragraph 5 is denied.
6. Paragraph 6 is denied. The Notice of Default is fatally defective as it included illegal sums in the amount due which the Plaintiff was not entitled to collect. Defendants were able to cure but could not cure due to the fact that Plaintiff was seeking a substantial amount of sums it was not entitled to collect, resulting in prejudice to Defendants.
7. Paragraph 7 is denied. Plaintiff sought substantial sums to which it was not entitled to collect under the note and mortgage.

8. Paragraph 8 is denied. Paragraph 19 of the mortgage grants the Defendants the right to reinstate by payment of legitimate sums only, paragraphs 20 and 22 of the mortgage require an accurate notice of default as a condition precedent to the institution of this action. Defendant's notice of default included illegal sums in the amount due which the Plaintiff was not entitled to collect. Defendants were able to cure but could not cure due to the fact that Plaintiff was seeking a substantial amount of sums it was not entitled to collect, resulting in prejudice to Defendants. Further, the notice of default was sent to the wrong address for Defendants who had changed their official address to an address in California.
9. Paragraph 9 is denied.
10. Paragraph 10 is denied for lack of knowledge.
11. Paragraph 11 is admitted.
12. Paragraph 12 is denied for lack of knowledge.
13. Paragraph 13 is denied for lack of knowledge.
14. Paragraph 14 is denied for lack of knowledge.
15. Paragraph 15 is denied for lack of knowledge.
16. Paragraphs 1 - 15, inclusive, are realleged as above.
17. Paragraph 17 is admitted that Plaintiff is not in possession of the original note, but denied as to entitlement to enforce the lost note. Plaintiff is unable to prove the chain of title to the note.
18. Paragraph 18 is admitted that Plaintiff is not in possession of the original note, but denied for lack of knowledge as to whether that note is lost.
19. Paragraph 19 is is denied.
20. Paragraph 20 is denied for lack of knowledge.
21. Paragraph 21 is denied. The reestablishment of the note will affect the interests of Hildegard Doe.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

Failure to state a claim

Florida Statutes section 673.3091 provides:

Enforcement of lost, destroyed, or stolen instrument

(1) A person not in possession of an instrument is entitled to enforce the instrument if:

(a) The person seeking to enforce the instrument was entitled to enforce the instrument when loss of possession occurred, or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;

(b) The loss of possession was not the result of a transfer by the person or a lawful seizure; and

(c) 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.

(2) A person seeking enforcement of an instrument under subsection (1) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, s. 673.3081 [proof of signatures and status as holder adequate protection.

Plaintiff's complaint states a claim for re-establishment of lost note. If the note is lost, it can be enforced by the holder who lost it or the owner of the note. *Sosa. V. US Bank Natl Assn*, 39 FLW D2554 (Fla. 4th DCA 2014). Neither Plaintiff or its alleged predecessor, Ditech, have held an ownership interest in the note. Instead, the most that was held by Ditech is an ownership of servicing rights. Plaintiff's complaint has attached thereto an affidavit of lost note which states in relevant part:

The note was lost by the prior owner who was entitled to enforce the note when loss of possession occurred. A previously executed lost note affidavit was signed and executed by Ditech Financial LLC on 07/14/2016 as Exhibit "A". The time and manner of the loss

is some unknown time from the date of the transfer of the Note from Ditech Financial LLC to RUSHMORE LOAN MANAGEMENT SERVICES, LLC. (Complaint, Composite Exhibit “A”, paragraph 5c).

The Affidavit of Lost Note of Ditech Financial LLC is dated July 14, 2016 and states that Ditech holds servicing rights while ownership of the note is with Fannie Mae. That document states in relevant part:

1. I am an employee of Ditech Financial LLC (“Ditech”) and am authorized to sign this affidavit on its behalf. Ditech is the servicing agent for the owner of the subject loan (“Loan”). The owner of the Loan is Fannie Mae and has authority to enforce the Note as more fully identified herein on behalf of Fannie Mae.

Plaintiff failed to provide any evidence that Fannie Mae transferred ownership to Ditech or to any other party related to this action. Plaintiff’s complaint has attached an assignment of mortgage and note dated August 27, 2018 whereby Ditech attempted to transfer ownership of the note to Plaintiff. There is no document offered which supports a claim that Fannie Mae authorized Ditech to transfer ownership of the note.

SECOND AFFIRMATIVE DEFENSE
Lack of Standing

Plaintiff failed to possess standing as it can not show a clear chain of title to the note from Fannie Mae, the prior owner of the note. Florida Statutes section 673.3091 provides:

Enforcement of lost, destroyed, or stolen instrument

(1) A person not in possession of an instrument is entitled to enforce the instrument if:

(a) The person seeking to enforce the instrument was entitled to enforce the instrument when loss of possession occurred, or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;

(b) The loss of possession was not the result of a transfer by the person or a lawful seizure; and

(c) 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.

(2) A person seeking enforcement of an instrument under subsection (1) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, s. 673.3081 [proof of signatures and status as holder adequate protection.

Neither Plaintiff or its alleged predecessor, Ditech, have held an ownership interest in the note. Instead, the most that was held by Ditech is an ownership of servicing rights. Plaintiff's complaint has attached thereto an affidavit of lost note which states in relevant part:

The note was lost by the prior owner who was entitled to enforce the note when loss of possession occurred. A previously executed lost note affidavit was signed and executed by Ditech Financial LLC on 07/14/2016 as Exhibit "A". The time and manner of the loss is some unknown time from the date of the transfer of the Note from Ditech Financial LLC to RUSHMORE LOAN MANAGEMENT SERVICES, LLC. (Complaint, Composite Exhibit "A", paragraph 5c).

The Affidavit of Lost Note of Ditech Financial LLC is dated July 14, 2016 and states that Ditech holds servicing rights while ownership of the note is with Fannie Mae. That document states in relevant part:

1. I am an employee of Ditech Financial LLC ("Ditech") and am authorized to sign this affidavit on its behalf. Ditech is the servicing agent for the owner of the subject loan ("Loan"). The owner of the Loan is Fannie Mae and has authority to enforce the Note as more fully identified herein on behalf of Fannie Mae.

Plaintiff failed to provide any evidence that Fannie Mae transferred ownership to Ditech or to any other party related to this action. Plaintiff's complaint has attached an assignment of mortgage and note dated August 27, 2018 whereby Ditech attempted to transfer ownership of the note to Plaintiff. There is no document offered which supports a claim that Fannie Mae authorized Ditech to transfer ownership of the note.

THIRD AFFIRMATIVE DEFENSE
Failure to state a claim

Florida Statutes section 673.3091 provides:

Enforcement of lost, destroyed, or stolen instrument

(1) A person not in possession of an instrument is entitled to enforce the instrument if:

(a) The person seeking to enforce the instrument was entitled to enforce the instrument when loss of possession occurred, or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;

(b) The loss of possession was not the result of a transfer by the person or a lawful seizure; and

(c) 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.

(2) A person seeking enforcement of an instrument under subsection (1) must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, s. 673.3081 [proof of signatures and status as holder adequate protection.

Plaintiff has failed to produce evidence in support of: 1) Florida Statutes section 673.3091(1); 2) Florida Statutes section 673.3091(2); and, 3) Count 1 is remedially insufficient.

FOURTH AFFIRMATIVE DEFENSE
Failure of Condition Precedent

Paragraph 19 of the mortgage grants the Defendants the right to reinstate by payment of legitimate sums only, paragraphs 20 and 22 of the mortgage require an accurate notice of default as a condition precedent to the institution of this action. The notice of default included illegal sums in the amount due which the Plaintiff was not entitled to collect. Those sums included amounts for attorneys' fees and costs, taxes and insurance (escrow), as well as other charges which plaintiff is not entitled to collect due to: 1) prior settlement agreement(s) between the

servicer and Defendants; 2) Florida Statutes 57.105(7) which converted the unilateral contractual attorneys' fee provision into a bilateral attorney fee provision whereby the prevailing party in the prior foreclosure is entitled to fees and costs; 3) Res judicator, estoppel by judgment and waiver based on the prior foreclosure action; 4) Fla. R. Civ. Pro. 1.525 because the prior servicer did not file a motion for fees and costs in the prior foreclosure case and is barred from attempting to collect same; 5) Fla. R. Civ. Pro. 1.420(d) as attorney's fees sought in a prior lawsuit that was dismissed, must be sought in that prior lawsuit, or it is procedurally barred in a subsequent lawsuit; 6) lack of default; 7) it is illegal to split a cause of action/joiner; and, 8) this court lacks subject matter jurisdiction to award attorneys' fees and costs from a prior action.

Defendants were able to cure but could not cure due to the fact that Plaintiff was seeking a substantial amount of sums it was not entitled to collect, resulting in prejudice to Defendants. Further, the notice of default was sent to the wrong address for Defendants who had changed their official address to an address in California.

FIFTH AFFIRMATIVE DEFENSE Overcharging Debt

Plaintiff has included illegal sums in the amount due which the Plaintiff was not entitled to collect. Those sums included amounts for attorneys' fees and costs, taxes and insurance (escrow), as well as other charges which plaintiff is not entitled to collect due to: 1) prior settlement agreement(s) between the servicer and Defendants; 2) Florida Statutes 57.105(7) which converted the unilateral contractual attorneys' fee provision into a bilateral attorney fee provision whereby the prevailing party in the prior foreclosure is entitled to fees and costs; 3) Res judicator, estoppel by judgment and waiver based on the prior foreclosure action; 4) Fla. R. Civ. Pro. 1.525 because the prior servicer did not file a motion for fees and costs in the prior foreclosure case and is barred from attempting to collect same; 5) Fla. R. Civ. Pro. 1.420(d) as attorney's fees sought in a prior lawsuit that was dismissed, must be sought in that prior lawsuit, or it is procedurally barred in a subsequent lawsuit; 6) lack of default; 7) it is illegal to split a cause of action/joiner; and, 8) this court lacks subject matter jurisdiction to award attorneys' fees and costs from a prior action.

SIXTH AFFIRMATIVE DEFENSE
Statute of Repose

The statute of repose has run on components of the debt, including but not limited to principal, interest, attorneys' fees, costs of collection, escrow, property preservation and other charged costs. 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, attorneys' fees, costs, or any other servicing related fees prior to October 31, 2014.

SEVENTH AFFIRMATIVE DEFENSE
Statute of Limitations

The Defendant asserts that the Statute of Limitations, Fla. Stat. 95.11(2)(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 October 31, 2014.

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)
gingo.george@gmail.com

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing is being furnished this 30th day of October, 2020 pursuant to Rule 2.516 of the Rules of Judicial Administration to:

Padgett Law Group, 6267 Old Water Oak Road, Suite 203, Tallahassee, Florida. 32312
attorney@padgettlawgroup.com

/s/ George Gingo
George Gingo FBN 875933