

**IN THE CIRCUIT COURT OF THE FOURTH
JUDICIAL CIRCUIT, IN AND FOR DUVAL
COUNTY, FLORIDA**

**CASE NO.: 16-2005-CA-005092-XXXX-MA
DIVISION: CV-H**

**LASALLE BANK, N.A., F/K/A LASALLE
NATIONAL BANK, AS TRUSTEE UNDER THE
POOLING AND SERVICING AGREEMENT
DATED 6/1/1999, SERIES 1999-2, Plaintiff,
vs.**

JENNIFER SMITH, et al., Defendants.

**SEPARATE DEFENDANT JENNIFER SMITH'S ANSWER TO COUNT I
OF THE PLAINTIFF'S AMENDED COMPLAINT, AFFIRMATIVE DEFENSES,
COUNTERCLAIMS AND DEMAND FOR TRIAL BY JURY**

Comes now the separate defendant, Jennifer Smith, and for her answer to count I of the plaintiff's amended complaint, affirmative defenses, counterclaims, and demand for trial by jury, filed pursuant to and in accordance with the November 14, 2005 order of this court, states:

ANSWER TO COUNT I

1. Admit.
2. Deny that this defendant executed a promissory note to the plaintiff or plaintiff's assignor and deny that the plaintiff is the present owner or the constructive owner of the promissory note that is the subject of this foreclosure action.
3. Deny that the subject promissory note was assigned to the plaintiff; deny that exhibit B attached to the plaintiff's complaint is an assignment of the subject note to the plaintiff.
4. Deny that the subject note and mortgage were originally given to the plaintiff; deny that the plaintiff owns the subject promissory note; deny that the plaintiff is the present owner or the constructive owner of the promissory note.
5. Admit.

6. Deny.
7. Deny.
8. Deny.
9. Deny.
10. Deny.
11. Deny.
12. Deny.
13. Deny.
14. Deny.
15. Deny.
16. Deny.
17. Deny.
18. Deny.
19. Deny.
20. Deny.

21. This defendant disputes the amount of this debt and demands verification of the debt including a complete written itemized transaction history of this debt in accordance with the Federal Fair Debt Collection Practices Act.

STATEMENT OF FACTS

(for affirmative defenses and counterclaims)

1. On or about May 25, 1999, this defendant executed the note and mortgage which are the subject of this foreclosure action. This loan has been serviced and the payments thereunder collected by the plaintiff.

2. This defendant contacted the plaintiff or plaintiff's agent for servicing and collection of the subject loan and notified the plaintiff that she was having financial difficulties due to reasons beyond her control and requested a temporary forbearance, loss mitigation assistance and/or a special repayment plan to avoid acceleration of the subject debt and the loss of her home through foreclosure.

3. This defendant was not provided with the assistance or default loan

servicing by the plaintiff to assist this defendant in her efforts to avoid the default, acceleration of the subject mortgage debt and foreclosure in a manner that complied with the plaintiff's default loan servicing obligations and comported with the defendant's ability to pay.

4. The plaintiff only presented one catch-up payment option to the defendant that the defendant could not afford to pay. This plan required the plaintiff to make certain payments over a six month period.

5. The defendant, in fear of losing her home in foreclosure, attempted as best she could to meet the terms of the repayment plan insisted on by the plaintiff.

6. Nevertheless, in June, 2005, this defendant tendered her payment to the plaintiff who advised the defendant that her account was "locked" and that her payment would not be accepted by the plaintiff because the defendant had been late with her payments.

7. The defendant, still in great fear of losing her home in foreclosure, attempted to negotiate another payment plan with the plaintiff.

8. The plaintiff submitted another payment plan to the defendant which increased the monthly payment obligation to \$877.00 which the defendant could not afford.

9. The defendant called the plaintiff's agent that she had been communicating with and was forced to leave message after message with no response or reply ever received from plaintiff.

10. Instead, the plaintiff filed this foreclosure action.

AFFIRMATIVE DEFENSES

1. **ILLEGAL CHARGES ADDED TO BALANCE:** Plaintiff has charged and/or collected payments from Defendant for attorney fees, federal express charges, legal fees, foreclosure costs, assessments, appraisal fees, property inspection fees, title search charges, corporate advances, late fees, vendor invoices and other charges, and other predatory lending fees and charges that are not authorized by or in conformity with the terms of the subject note and mortgage. Plaintiff wrongfully added and

continues to unilaterally add these illegal charges to the balance Plaintiff claims is due and owing under the subject note and mortgage.

2. **FAILURE OF CONTRACTUAL CONDITION PRECEDENT: INVALID, INEFFECTIVE NOTICE OF DEFAULT:** Plaintiff failed to provide Defendant with a Notice of Default and Intent to Accelerate that complies with Paragraph 21 of the subject mortgage and the remedies section of the promissory note. As a result, Defendant has been denied a good faith opportunity pursuant to the mortgage and the servicing obligations of the Plaintiff to avoid acceleration and this foreclosure through, among other things, loss mitigation, forbearance and workout programs.

3. **PLAINTIFF FAILED TO COMPLY WITH APPLICABLE FANNIE MAE/FREDDIE MAC SINGLE FAMILY LOAN SERVICING LAWS, REGULATIONS AND ORDERS:**

A. Plaintiff failed to provide separate Defendant with legitimate and non predatory access to the debt management and relief that must be made available to borrowers, including this Defendant, facing temporary financial problems. Such relief must include, among other things, temporary indulgence, a liquidating plan, and special forbearance designed to avoid residential foreclosure of single family loans secured by and/or underwritten by Fannie Mae/Freddie Mac.

B. Plaintiff failed its obligation to Defendant to pursue effective foreclosure prevention strategies and did not evaluate the particular circumstances surrounding Defendant's claimed default; failed to evaluate this Defendant or the subject property; failed to determine the Defendant's capacity to pay the monthly payment amount or a modified payment amount; failed to ascertain the reason for the Defendant's claimed default, or the extent of the Defendant's interest in keeping the subject property.

C. Plaintiff failed to comply with the Fannie Mae/Freddie Mac loss mitigation and foreclosure prevention servicing guidelines by failing to contact this Defendant regarding the claimed mortgage delinquency to determine whether the Defendant was facing a financial crisis or hardship. The Plaintiff failed to give this Defendant the opportunity to cooperate in resolving the debt.

D. The Plaintiff failed to avoid filing this foreclosure action by not contacting Defendant by the 30th day of the claimed delinquency. The Plaintiff never asked the Defendant to provide information to determine the reason for the claimed non-payment. Plaintiff failed to inform Defendant of the existence of the Fannie Mae/Freddie Mac alternatives to foreclosure. As a result, Plaintiff has denied Defendant the required opportunity to avoid foreclosure through early intervention upon delinquency pursuant to the Fannie Mae/Freddie Mac servicing requirements and standards.

E. Plaintiff failed to comply with the controlling Fannie Mae/Freddie Mac Single Family servicing guidelines by failing to inform this Defendant in writing about the applicable foreclosure alternatives in a timely fashion, or at all.

F. Plaintiff failed its duty to Defendant to manage the subject mortgage as required by Fannie Mae's special foreclosure prevention workout programs which can include and allows for a restructuring of the loan allowing the borrower to pay out delinquent installments or advances to bring the mortgage current. Instead the plaintiff did the exact opposite of what the Fannie Mae special foreclosure prevention workout programs are designed and intended to do. The Plaintiff further denied this Defendant access to special forbearance in the form of a written agreement that reduces or suspends the Defendant's monthly mortgage payments for a specific period to allow the Defendant time to recover from a financial hardship. Such a plan can involve changing one or more terms of the subject mortgage in order to help this Defendant bring the claimed default current thereby preventing foreclosure. Plaintiff's failure to comply with the Fannie Mae/Freddie Mac repayment plan or special forbearance workout programs denied the Defendant the required access to explore alternatives to avoid foreclosure.

4. **FAILURE OF GOOD FAITH AND FAIR DEALING: UNFAIR AND UNACCEPTABLE LOAN SERVICING:** Plaintiff intentionally failed to act in good faith or to deal fairly with this Defendant by failing to follow the applicable standards of residential single family mortgage lending and servicing as described in these Affirmative Defenses thereby denying this Defendant access to the residential

mortgage servicing protocols applicable to the subject note and mortgage.

5. **UNCLEAN HANDS:** The Plaintiff comes to court with unclean hands and is prohibited by reason thereof from obtaining the equitable relief of foreclosure from this Court. The Plaintiff's unclean hands result from the Plaintiff's intentional failure to comply with material terms of the mortgage and note; the failure to comply with the default loan servicing requirements established by Fannie Mae that apply to this loan as described herein above. As a matter of equity, this Court should refuse to foreclose this mortgage because acceleration of the note would be inequitable, unjust, and the circumstances of this case render acceleration unconscionable. This court should refuse the acceleration and deny foreclosure because Plaintiff has waived the right to acceleration or is estopped from doing so because of misleading conduct and unfulfilled conditions.

6. **NO HUD COUNSELING NOTICE:** Plaintiff failed to comply with the forbearance, mortgage modification and other foreclosure prevention loan servicing requirements imposed on Plaintiff pursuant to the National Housing Act, 12 U.S.C. 1701x(c)(5) which requires the Plaintiff to advise Defendant of any home ownership counseling Plaintiff may offer together with information about counseling offered by the U.S. Department of Housing and Urban Development. U.S. Department of Housing and Urban Development has determined that 12 U.S.C. 1701x(c)(5) creates an affirmative legal duty on the part of the Plaintiff and Plaintiff's non-compliance is an actionable event that affects the Plaintiff's ability to carry out this foreclosure. Plaintiff cannot legally pursue foreclosure unless and until Plaintiff demonstrates compliance with 12 U.S.C. 1701x(c)(5).

7. **PAYMENTS/WAIVER:** Defendant made monthly payments to the Plaintiff which the Plaintiff accepted but placed in a "suspense" account without legal authority. Plaintiff still holds the defendant's funds and payments while at the same time the plaintiff is pursuing this foreclosure. As a result, the Plaintiff cannot proceed with its claims and is deemed to have waived the right to bring or pursue this action.

WHEREFORE, Defendant demands the Plaintiff's complaint be dismissed with

prejudice, and for her attorney's fees and costs and for all other relief to which this Court finds this Defendant entitled.

COUNTERCLAIMS

COUNT I: DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action for declaratory and injunctive relief against the Plaintiff.
2. Defendant reasserts and alleges, her statement of facts and paragraphs 1, 2, 3, 6 and 7 of her Affirmative Defenses stated above.
3. The Plaintiff has no right to pursue this foreclosure because the Plaintiff has failed to provide servicing of this Fannie Mae/Freddie Mac insured residential mortgage in accordance with the controlling Fannie Mae/Freddie Mac single family loan servicing guidelines, orders and regulations prior to filing this foreclosure action.
4. Defendant has a right to receive repayment plan, forbearance, loan modification, and/or other foreclosure prevention loan services from the Plaintiff pursuant to and in accordance with Fannie Mae/Freddie Mac regulations, orders and guidelines before the commencement or initiation of this foreclosure action.
5. Defendant is in doubt regarding her rights and status as a borrower under the National Housing Act and the applicable Fannie Mae/Freddie Mac single family loan servicing orders and guidelines made applicable to and incorporated in the subject mortgage because of the Plaintiff's failure to provide such loss mitigation pursuant to the federal law. Defendant is now subject to this foreclosure action by reason of the above described illegal acts and omissions of the Plaintiff.
6. Defendant is being denied and deprived by Plaintiff of her right to access the required mortgage servicing. Defendant is being illegally subjected by the Plaintiff to this foreclosure action, being forced to defend the same and she is being charged illegal predatory court costs and related fees, and attorney fees. Defendant is having her credit slandered and negatively affected, all of which constitutes irreparable harm to this Defendant for the purpose of injunctive relief.
7. As a proximate result of the Plaintiff's unlawful actions, Defendant continues to suffer the irreparable harm described above for which monetary compensation is

inadequate.

8. Defendant has a right to access the foreclosure prevention servicing prescribed by the Fannie Mae/Freddie Mac regulations, orders and guidelines which is being denied to her by the Plaintiff.

9. There is a substantial likelihood that Defendant will prevail on the merits of her counterclaims.

WHEREFORE, Defendant requests the Court dismiss the Plaintiff's complaint with prejudice, enter a judgment pursuant to Fla. Stat. 86 declaring that the Plaintiff is legally obligated to provide the Defendant with access to the special Fannie Mae/Freddie Mac single family loan servicing and enjoining the Plaintiff from charging foreclosure fees and costs and from commencing or pursuing this foreclosure until such servicing is provided to this Defendant, for attorney's fees and for all other relief to which Defendant proves herself entitled.

COUNT II: ILLEGAL CONSUMER COLLECTION

Defendant reasserts and realleges her statement of facts and paragraph 1, 2, 3, 6 and 7 of the Affirmative Defenses as contained herein above.

10. Defendant is a consumer and the obligation between the parties which is the debt owned pursuant to the subject note and mortgage is a consumer debt as defined in F. S. Section 559.55(1).

11. Plaintiff has engaged in consumer collection conduct which amounts to a violation of F.S. Section 559.72(9) and Defendant, as a proximate result thereof, has sustained economic damages for which the Defendant is entitled to compensation from the Plaintiff, pursuant to F.S. Section 559.77.

12. Plaintiff's collection activities violated the Act in the following particulars:

A. The Plaintiff is claiming, attempting and threatening to collect and enforce this consumer mortgage debt by this foreclosure action when the Plaintiff knows that the right to pursue foreclosure does not yet exist;

B. The reason the Plaintiff does not have a legal right to pursue this foreclosure is because the Plaintiff has failed to first comply with the forbearance,

mortgage modification and other foreclosure prevention loan servicing obligations imposed on Plaintiff as the servicer of a Fannie Mae/Freddie Mac insured residential mortgage.

C. These foreclosure prevention loan servicing obligations are imposed on the Plaintiff pursuant to the National Housing Act, 12 U.S.C. Section 1710(a) and the applicable Fannie Mae/Freddie Mac orders, regulations and guidelines.

D. These special foreclosure prevention loan servicing obligations are conditions precedent of the commencement of this foreclosure action because the Plaintiff cannot state a cause of action for foreclosure of this Fannie Mae/Freddie Mac single family residential mortgage until the Plaintiff complies with the loan servicing and loss mitigation described in the affirmative defenses incorporated herein by reference.

13. As a result of the Plaintiff's failure to properly service this mortgage as provided in the Fannie Mae/Freddie Mac Regulations, orders and guidelines before filing this foreclosure action, Defendant has been damaged and Defendant seeks to recover her actual or statutory damages from the Plaintiff under F.S. 559.77.

WHEREFORE, Defendant demands the Plaintiff's complaint be dismissed with prejudice, for an award of damages against the plaintiff for her actual or statutory damages whichever is greater and for her attorney's fees and costs and for all other relief to which this Court finds this Defendant entitled.

COUNT III: ILLEGAL CONSUMER COLLECTION

Defendant reasserts and realleges her statement of facts and paragraph 1, 2, 3, 6 and 7 of the Affirmative Defenses as contained herein above.

14. Defendant is a consumer and the obligation between the parties which is the debt owned pursuant to the subject note and mortgage is a consumer debt as defined in F. S. Section 559.55(1).

15. Plaintiff has engaged in consumer collection conduct which amounts to a violation of F.S. Section 559.55(1) and Defendant, as a proximate result thereof, has sustained economic damages for which the Defendant is entitled to compensation from the Plaintiff, pursuant to F.S. Section 559.77.

16. Plaintiff's collection activities violated the Act in the following particulars:

A. The Plaintiff is claiming, attempting and threatening to collect fees and charges including, but not limited to, attorney's fees, inspection fees, late fees, federal express charges, legal fees, foreclosure costs, assessments, appraisal fees, title search charges, corporate advances, and vendor invoices that are inflated and not accurate and do not bear any relation to the amounts actually incurred by the plaintiff, and/or are not actual charges and all of which are not authorized by or in conformity with the terms of the subject note and mortgage. Plaintiff wrongfully added and continues to unilaterally add these illegal charges to the balance Plaintiff claims is due and owing under the subject note and mortgage.

17. As a result of the Plaintiff's wrongful and illegal actions in the collection of this consumer debt, Defendant has been damaged and Defendant seeks to recover her actual or statutory damages from the Plaintiff under F.S. 559.77.

WHEREFORE, Defendant demands the Plaintiff's complaint be dismissed with prejudice, for an award of damages against the plaintiff for her actual or statutory damages whichever is greater and for her attorney's fees and costs and for all other relief to which this Court finds this Defendant entitled.

DEMAND FOR TRIAL BY JURY

Defendant hereby demands trial by jury.

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of this document has been furnished to Frank Reder, Esquire, Butler & Hosch, P.A., 3185 South Conway Road, Suite E, Orlando, Florida 32812, on _____.

JACKSONVILLE AREA LEGAL AID, INC.

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