NOT TO BE PUBLISHED WITHOUT APPROVAL
OF THE COMMITTEE ON OPINIONS

JP MORGAN CHASE BANK, NATIONAL ASSOCIATION Plaintiff, v. CATHLEEN PEREZ; ALEJANDRO PEREZ, et al, Defendants.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: BERGEN COUNTY DOCKET No. F-013398-18 **OPINION** Argued: October 11, 2019 Decided: October 21, 2019

Appearances: Cristina Z. Sinclair, (Bertone Piccini, LLP, attorneys) for Plaintiff

Roosevelt N. Nesmith, (Law Office of Roosevelt N. Nesmith, LLC, attorneys) for Defendants

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HON. EDWARD A. JEREJIAN, P.J.Ch.

This matter comes before the court by way of a Motion to Dismiss for insufficient process (corrected to failure to state a claim at oral argument) pursuant to R. 4:6-2(e) filed by the Defendants, Cathleen Perez and Alejandro Perez (collectively, the "Perezes") on September 11, 2019. Plaintiff filed both a Cross-Motion for Summary Judgment, which was heard as a Cross-Motion to strike Defendants' Answer pursuant to R. 4:6-4 and R. 4:6-5 and a Cross-Motion to Dismiss Defendants' counterclaims pursuant to R. 4:6-2(e). On September 19, 2019, Plaintiff filed an opposition to Defendants' Motion to Dismiss. Subsequently, Defendants filed opposition to Plaintiff's Cross-Motion to Strike Defendants' answer on September 30, 2019. In response,

Plaintiff filed a reply brief in further support of Plaintiff's Cross-Motion to strike Defendants' answer and to dismiss the counterclaims. Oral arguments were heard on October 11, 2019.

BACKGROUND

On January 25, 2008, Defendants Cathleen Perez and Alejandro Perez ("Defendants") entered into a mortgage loan agreement with Plaintiff JP Morgan Chase Bank ("Plaintiff") borrowing the sum of $417,000.00, and executed a Promissory Note to secure that sum with an interest rate of 5.125% *per annum*. The note also contained a 30-year amortization that was to become fully amortized on February 1, 2038. See Complaint, Para. 1, Certification of Roosevelt N. Nesmith dated September 11, 2019 ("Nesmith Cert.," Ex. A).

To secure payment of the Note, Defendants executed a non-purchase money mortgage, in which Defendants used their primary residence, 236 Mabel Ann Avenue, Franklin Lakes, New Jersey (the "Property"), to serve as collateral for the Note. See Complaint, Para. 2. On February 25, 2008, the mortgage was recorded in the Office of the Clerk of Bergen County.

Subsequently, Plaintiff sold Defendants' loan to Federal National Mortgage Association ("Fannie Mae"), where, on January 30, 2008, Fannie Mae included the loan in its Fannie Mae Guaranteed REMIC Pass-Through Certificates Fannie Mae Remic Trust 2008-07 (the "Fannie Mae Trust"). See Nesmith Cert., Ex. B.

Plaintiff then served Notices of Intention to Foreclose on Defendants with the last Notice mailed to Defendants on October 24, 2017. See Nesmith Cert., Ex. D.

On June 27, 2018, Plaintiff filed a foreclosure complaint (the "Complaint") to foreclose the mortgage lien on Defendants' property. On July 25, 2018, Defendants filed a motion to dismiss to stay the foreclosure arguing that this was warranted because the foreclosure involved the same issues as in the currently pending federal court action under Case No.: 2:14-cv-02279-

CCC-JBC. This Court ultimately denied the motion to dismiss in an Order dated August 31, 2018. See Sinclair Cert., Ex. C.

Defendants filed another motion on July 29, 2019, which sought to dismiss the Complaint pursuant to the statute of limitations, which was denied by Order dated August 16, 2019. See Sinclair Cert., Ex. G, H.

Then, in response to the Complaint, on August 12, 2019, Defendants submitted an Answer, Affirmative Defense, and Counterclaims. See Nesmith Cert., Ex. E. Ultimately, the instant Motion to Dismiss was filed on September 11, 2019.

In addition, the aforementioned federal court action was filed by Defendants on May 7, 2010. In this action, Defendants filed a Chapter 13 Bankruptcy petition, which was then transferred to the District Court of New Jersey by Order dated March 17, 2015. See Sinclair Cert., Ex. I at ¶13-14. In this federal action, Defendants argued that Plaintiff violated the Fair Debt Collection Practice Act ("FDCPA") and thus the foreclosure was improper. See Sinclair Cert., Ex. B. On October 11, 2018, Plaintiff filed a motion for abstention seeking to dismiss the federal action without prejudice or to stay the proceedings until this foreclosure action was resolved. See Sinclair Cert. at ¶17. In response, Magistrate Judge James B. Clark, III, U.S.M.J. submitted a report and recommendation on April 22, 2019, that suggested the federal action should be dismissed without prejudice. See Sinclair Cert. at ¶18. Subsequently, Defendants filed opposition to Judge Clark's report. Currently, the federal action has yet to be decided by the District Court.

ANALYSIS

First, Defendants argue the complaint should be dismissed pursuant to R. 4:6-2(e).

Under R. 4:6-2(e), a court must grant a party's motion to dismiss if the claims failed to articulate a legal basis entitling the non-moving party to relief. Sickles v. Cabot Corp, 379 N.J. Super. 100, 106 (Ap. Div. 2005). Moreover, in reviewing a motion to dismiss under R. 4:6-2(e), our inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. Reider v. Department of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). R. 4:5-2 states that a pleading, "shall contain a statement of the facts on which the claim is based." A complaint is entitled to liberal reading in determining its adequacy. Van Dam Egg Co. v. Allendale Farms, Inc., 199 N.J. Super. 452 (App. Div. 1985). The pleader is entitled to every reasonable inference of fact. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). Nevertheless, a pleading must allege sufficient facts to give rise to a cause of action. As "New Jersey is a 'fact' rather than a 'notice' pleading jurisdiction, . . . a plaintiff must allege facts to support his or her claim rather than merely reciting the elements of a cause of action." Nostrame v. Santiago, 420 N.J. Super. 427, 436 (App. Div. 2011), aff'd., 213 N.J. 109 (2013). Mere conclusions *and an intention to rely on discovery are inadequate*. Glass v. Suburban Restoration Co., 317 N.J. Super. 574, 582 (App. Div. 1998). Thus, "dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted." Reider, 221 N.J. Super. at 552.

Specifically, Defendants claim: (1) that Plaintiff violated the Fair Foreclosure Act ("FFA") by failing to serve a Notice of Intention ("NOI") that included the name and address of the lender; (2) that Plaintiff does not have standing to foreclose; and (3) that Plaintiff should be equitably estopped from foreclosing on the grounds that Plaintiff engaged in unconscionable conduct that caused the loan default.

Defendants allege that the NOI to foreclose was defective in violation of the FFA. The purpose of the FFA is to give homeowners "every opportunity to pay their home mortgages, and thus keep their homes." N.J.S.A. 2A:50-54. Further, "lenders will be benefited when residential mortgage debtors cure their defaults and return defaulted residential mortgage loans to performing status." "Accordingly, a trial court . . . should consider the impact of the defect in the notice of intention upon the homeowner's information about the status of the loan, and on his or her opportunity to cure the default." U.S. Bank Nat'l Ass'n v. Guillaume, 209 N.J. 449, 467 (2012). In Guillaume, the Supreme Court noted that courts of equity may, depending on the circumstances of a given case, fashion remedies that appropriately balance the interests of lenders and homeowners facing foreclosure. Id. at 477-78. Moreover, the New Jersey Supreme Court has held that when a lender fails to comply with the FFA's requirement of a NOI, the Court may exercise its discretion in determining the appropriate remedy.

However, in the instant case, it appears that there is no deficiency in the NOI. As to the construction of the NOI, to be in satisfaction with the FFA, the Supreme Court in Guillaume defined a lender as "any person, corporation, or other entity which makes or holds a residential mortgage, and any person, corporation or other entity to which such residential mortgage is assigned." Id. at 472 (quoting N.J.S.A. 2A:50-55). Here, it is Plaintiff who possesses the Note and who is also the entity stated as the lender on the mortgage. Although Fannie Mae is an investor to this loan, and has included the loan in the Fannie Mae Trust, it is Plaintiff who served as the primary, and appropriate, point of contact for Defendants regarding the loan; and it is Plaintiff who was properly included on the NOI.

Therefore, given that the NOI proffered by Plaintiff was adequate and did not consist of a deficiency under the FFA, and in balancing the interests of both the Plaintiff lender and Defendant homeowners, it is in the interests of justice that the NOI be deemed sufficient under the FFA.

Furthermore, Plaintiff not only satisfied the FFA requirements for the NOI, but also fulfilled the requirements for standing which will be discussed in the analysis of the Cross-Motion for Summary Judgment.

Finally, Defendants argue that the foreclosure should be equitably estopped because of "unconscionable conduct" by Plaintiff; moreover, that Plaintiff's alleged unconscionable conduct was the cause of the default on the mortgage. However, this claim by Defendants is not supported by facts that would allow Defendants to have sufficiently plead this allegation, nonetheless some of these claims will be discussed in greater length addressing Plaintiff's Motion to Dismiss Defendants' cross-claims.

Therefore, Defendants Motion to Dismiss is hereby denied.

Next, Plaintiff filed a Cross-Motion for Summary Judgment, which was heard as a Cross-Motion to strike Defendants' Answer pursuant to R. 4:6-4 and R. 4:6-5.

First, the Court shall grant a summary judgment motion "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." N.J.S.A. 4:46-2(c). In determining whether the existence of a genuine issue of material fact precludes summary judgment, the Court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

When a motion for summary judgment is made and supported as provided in this rule, the nonmoving party "may not rest upon the mere allegations or denials of the pleading, but must respond by affidavits meeting the requirements of R. 1:6-6 or as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific facts showing that there is a genuine issue for trial." R. 4:46-5. Therefore, the nonmoving party may not solely rely on denials or allegations made in an answer to defeat a motion for summary judgment, but must produce evidence that demonstrates a genuine issue of material fact. See Cortez v. Gindhart, 435 N.J. Super. 589, 606 (App. Div. 2014).

The only material issues in a foreclosure proceeding are the validity of the mortgage, the amount of indebtedness, and the right of the mortgagee to foreclose on the mortgaged property. Great Falls Bank v. Pardo, 263 N.J. Super. 388, 394 (Ch. Div. 1993). In Thorpe v. Floremoore Corp., 20 N.J. Super. 34 (App. Div. 1952), the court set forth the elements for a prima facie right to foreclose:

> Since the execution, recording, and non-payment of the mortgage was conceded, a *prima facie* right to foreclose was made out. Defendants argue since the mortgage was in their counsels' possession and produced by him at the request of plaintiff, delivery thereof after execution was not established and consequently no case appeared. However, proof of the recording creates a presumption of delivery. Id. at 37.

Generally, a party seeking to foreclose a mortgage must "own or control" the underlying debt. Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 597 (App. Div. 2011). In the absence of such a showing, the plaintiff lacks standing to bring the foreclosure. Id. Possession of the note at the filing of the foreclosure complaint provides the plaintiff with standing to foreclose. Deutsche Bank Trust Co. Americas v. Angeles, 428 N.J. Super. 315, 319-20 (App. Div. 2012). Furthermore,

a mortgagee can establish ownership or control of the mortgage by presenting an authenticated assignment indicating that the mortgagee was assigned to the mortgage before it filed the original complaint. N.J.S.A. 46:9-9; Deutsche Bank Nat'l Trust Co. v. Mitchell, 422 N.J. Super. 214, 225 (App. Div. 2011). Here, Plaintiff certifies it was in possession of the original Note before filing the Complaint on June 27, 2018. Therefore, Plaintiff had the right to bring this foreclosure action at the time it filed the Complaint.

Thus, if Defendants fail to challenge the essential elements of the foreclosure action, Plaintiff is entitled to strike Defendants' answer as a non-contesting answer. See Old Republic Ins. Co. v. Currie, 284 N.J. Super. 571, 574 (Ch. Div. 1995); Somerset Trust Co. v. Sternberg, 238 N.J. Super. 279, 283 (Ch. Div. 1989).

Moreover, conclusory claims without explanation and "bald assertions are not capable of … defeating summary judgment," Ridge at Back Brook, LLC v. Klenert, 427 N.J. Super. 90, 97-98 (App. Div. 2014).

When a party alleges he or she is without knowledge or information sufficient to form a belief as to the truth of an aspect of the complaint, the answer shall be deemed non-contesting to the allegation of the complaint to which it responds. R. 4:64-1(a)(3). Pursuant to R. 4:64-1(c)(2) an answer to a foreclosure complaint is deemed to be non-contesting if none of the pleadings responsive to the complaint either contest the validity or priority of the mortgage or lien being foreclosed, or create an issue with respect to the plaintiff's right to foreclose. Consequently, a plaintiff may move to strike such an answer pursuant to R. 4:6-5 on the grounds it presents "no question of fact or law which should be heard by a plenary trial." Old Republic Ins. Co., 284 N.J. Super. at 574-575. When a foreclosure action is deemed uncontested, R. 4:46-1(d) dictates the procedure. At the conclusion of a successful motion for summary judgment or to strike the

defendant's answer, the matter shall be referred to the Office of Foreclosure to proceed as uncontested.

Here, Defendants oppose the instant Motion to Strike, alleging that Plaintiff has failed to meet its burden of proof showing Defendants were unable to state a claim against Plaintiff.

Plaintiff argues that Defendants' answer and affirmative defenses should be determined non-contesting, and thus stricken, because Defendants fail to specifically challenge Plaintiff's right to foreclose. Plaintiff highlights that Defendants were in fact in default given that they did not make their monthly payment due on April 1, 2012, and the payments due from that point forward. Moreover, Plaintiff contends that despite this claim of default alleged in the complaint, Defendants' answer fails to provide any factual basis to buttress their denial that they were in default.

Therefore, Plaintiff's Cross-Motion to strike Defendants' answer and affirmative defenses is hereby granted.

Next, Plaintiff Cross-Moves to Dismiss Defendants' counterclaims.

Defendants allege in their counterclaim that the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 to -20 ("CFA") was violated by Plaintiff by engaging in deceptive acts and unconscionable commercial business practice. More specifically, Defendants claim that Plaintiff led Defendants to believe they would receive a HAMP permanent modification of their mortgage once Defendants completed the Trial Plan Contract, although this modification was never offered. However, Defendants first counterclaim falls short because the HAMP loan modification was not guaranteed. Moreover, failure to approve an alleged modification would not give rise to foreclosure defenses and it is unclear how Defendants' inability to receive a HAMP loan modification would be tied to an inability to make one's payments on a mortgage.

Defendants also contend that Plaintiff misrepresented to Defendants that they were both eligible and approved for a HAMP loan modification.

Under R. 4:5-8(a), a party who brings a claim for fraud must allege the "particulars of the wrong, with dates and items if necessary . . ." in order to survive a motion to dismiss. See also Rebish v. Great Gorge, 224 N.J. Super. 619 (App. Div. 1988). In New Jersey, a successful fraud claim requires (1) a knowing falsehood or misrepresentation made with (2) the intention that the other person relies thereon and (3) that person's reliance and (4) subsequent damage. See generally Banco Popular No. America v. Gandi, 184 N.J. 161, 172-73 (2005). In addition to stating claims with all practical specificity, to state a claim under the CFA, "a private litigant must allege specific facts that, if proven, would establish the following: (1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendant's unlawful conduct and the plaintiff's ascertainable loss." Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 113, (App. Div. 2009). The party pleading fraud must show that fraud is unconscionable, deliberate, and knowing. Zaro Licensing, Inc. v. Cinmar, Inc., 1991, 779 F.Supp. 276 (citing De Simone v. Nationwide Mut. Ins. Co., 149 N.J. Super. 376, 380 (Law Div. 1977) overruled on other grounds by Clendaniel v. New Jersey Mfrs. Ins. Co., 190 N.J. Super. 286 (App. Div. 1982).

Here, Defendants fail to satisfy the heightened pleading standard required for these counterclaims. Defendants only note that these alleged misrepresentations were made between November 2009 and April 2010. Accordingly, Defendants' pleadings contain vague conclusions and fail to identify specific instances of wrongdoing or an ascertainable loss to any degree of certainty. See Cox v. Sear Roebuck & Co., 138 N.J. at 22.

In addition, Defendants broadly claim that they performed the obligations in the Trial Plan Contract and thus Plaintiff's breached their contract by failing to provide either a permanent loan modification or a written denial of the application for a permanent HAMP modification. However, the Trial Plan Contract is clear in that it expressly states a loan modification was contingent on Defendants meeting all of the requirements under the plan. As such, Defendants do not plead any facts that demonstrate their eligibility for a loan modification, and thus, Plaintiff could not have breached the contract.

Moreover, Defendants contend that Plaintiff breached its implied duty of good faith and fair dealing by neglecting to provide Defendants with either a HAMP loan modification or a written explanation of the reason for denial of the HAMP loan modification, despite Defendants allegedly satisfying all of the conditions to the Trial Plan Contract. However, Defendants fail to plead how they satisfied all of the conditions of the Trial Plan Contract, and thus no implied duty of good faith and fair dealing was breached.

Defendants also argue that they reasonably relied on Plaintiff's promise that they were eligible for and were in the process of attaining a loan modification. However, the Trial Plan Contract clearly mentions that a HAMP loan modification is not guaranteed, and is contingent upon the satisfaction of certain conditions. In addition, Defendants make conclusory and broad assertions as to how they believe the conditions were satisfied; they only mention that they made the three monthly payments required under the contract "and performed all other material conditions required or requested of them during the three-month trial period." Defendants leave their pleadings at that level of specificity, or lack thereof, and offer no specific facts as to what conditions were satisfied. Therefore, Defendants have not effectively plead promissory estoppel.

Defendants also argue that Plaintiff violated the Real Estate Settlement Procedures Act, 12 U.S.C. §§2601-2617 ("RESPA"), and the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §5301 ("Dodd-Frank") because Plaintiff did not respond to Defendants' "Qualified Written Requests" ("QWR") dated September 19, 2018. However, Plaintiff responded to these requests on October 12, 2018, November 1, 2018, and July 30, 2019. See Grageda Cert., Ex. D and E; Sinclair Cert., Ex. N.

As part of Defendants' sixth counterclaim, they also contend that Plaintiff violated the Truth in Lending Act, 15 U.S.C. §1601 through 1667f, specifically the Fair Credit Billing Act, 15 U.S.C. §1666 ("FCBA"), which is enforced by the Truth in Lending Act. However, Defendants fail to plead that the mortgage loan here was an "open-end credit plan," as required by the FCBA, and thus the Truth in Landing Act and FCBA were not violated by Plaintiff.

In the seventh and final counterclaim, Defendants contend that Plaintiff violated the Fair Debt Collection Practices Act ("FDCPA") by making false and misleading representations regarding the amount of Defendants' mortgage debt, the fees chargeable to the mortgage loan, the application of payments, and the commencement of the foreclosure action. However, as the Court ruled on this claim in Defendants prior July 25, 2018, motion to dismiss, Plaintiff responded to Defendants' request regarding a verification of the debt in an appropriate amount of time.

Therefore, Defendants' counterclaims have no merit and should be dismissed.

CONCLUSION

Therefore, Defendants' Motion to Dismiss for insufficient process under R. 4:6-2(c) (corrected to failure to state a claim at oral argument under R. 4:6-2(e)) is hereby denied; Plaintiff's Cross-Motion for Summary Judgment, which was heard as a Cross-Motion to Strike Defendants'

Answer pursuant to R. 4:6-4 and R. 4:6-5 is hereby granted; and Plaintiff's Cross-Motion to Dismiss Defendants' counterclaims pursuant to R. 4:6-2(e) is hereby granted. An order accompanies this decision.