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1. *United States Nat'l Bank Ass'n v. Montesdeoca, 2013 N.J. Super. Unpub. LEXIS 2352*
   Client/Matter: Giordano

United States Nat'l Bank Ass'n v. Montesdeoca

Superior Court of New Jersey, Chancery Division, Bergen County

September 27, 2013, Argued; September 27, 2013, Decided

DOCKET No. BER-F-24093-12 CIVIL ACTION

Reporter
2013 N.J. Super. Unpub. LEXIS 2352 *

US NATIONAL BANK ASSOCIATION, Plaintiff v. OSCAR MONTESDEOCA, ET AL., Defendants.

Core Terms

mortgage, asserts, foreclosure, cross-motion, foreclose, certification, modification, parties, discovery, statute of limitations, interest rate, two year, refinance, summary judgment motion, requirements, third-party, default, notice, foreclosure complaint, foreclosure action, motion to strike, summary judgment, allegations, defenses, holder, issues, defense counsel, beneficiary, monthly, promise

Counsel: **[*1]** Aaron M. Bender, Esq. on behalf of the Plaintiff, US Bank National Association (Reed Smith, LLP) (Kellie A. Lavery, Esq. (Reed Smith, LLP), On the Brief).

Joseph A. Chang, Esq. on behalf of the Defendant, Oscar Montesdeoca (Joseph A. Chang & Associates, LLC) (Michael A. Cassata, Esq. (Joseph A. Chang & Associates, LLC), On the Brief).

Judges: Honorable Peter E. Doyne, A.J.S.C.

Opinion by: Peter E. Doyne

Opinion

MOTIONS FOR SUMMARY JUDGMENT AND TO STRIKE DEFENDANT'S EXPERTS; CROSS-MOTION TO DISMISS

Introduction

As chancery courts become more and more inundated with contested foreclosure matters, this case stands out from the others. Separate and apart from the polemics that "banks are bad" or "financial institutions are evil", or generic allegations of predatory lending, this case presents specified, detailed allegations of predatory lending which, if proven to be accurate, would compel a court of equity to consider the appropriate remedy.

Before the court are three motions; two filed on behalf of US Bank National Association ("US Bank" or "plaintiff") and one filed on behalf of Oscar Montesdeoca, Sr. ("Montesdeoca" or "defendant"). Plaintiff's first motion seeks summary judgment against defendant; the second seeks to **[*2]** strike defendant's experts. Defendant had a cross-motion to dismiss plaintiff's complaint filed on his behalf.

Opposition to plaintiff's motions was filed. Plaintiff filed a reply brief submitted in support of the summary judgment motion and defendant's counsel submitted an authorized sur-reply in response thereto. Additionally, plaintiff submitted a Letter Brief in opposition to defendant's cross-motion and in support of plaintiff's motion to strike defendant's experts.

Plaintiff's motions are denied; defendant's cross-motion is denied.

Facts and Procedural Posture

A. *The note and the mortgage*

On August 3, 2006, defendant executed and delivered an adjustable rate note (the "Note") in the amount of $486,160 to Wells Fargo Bank, N.A. ("Wells Fargo"). The Note obligated defendant to make monthly payments in the amount of at least $3,357.79 at the initial interest rate of 7.375% a year. The maturity date was scheduled for September 1, 2036, at which time all

unpaid principal and interest thereon would have become due. The Note provided for a late charge of 5.000% on the payment due for any payment not received within fifteen (15) calendar days from that payment's due date. The Note also provided **[*3]** that if the borrower defaulted by failing to pay a monthly payment in full, the lender may require immediate payment in full of the principal balance remaining due and all accrued interest. Defendant asserts he was provided two loans unbeknownst to him with the second loan, meant to be utilized to make the required down payment, subject to a 14.000% interest rate.

To secure payment on the Note, defendant executed, simultaneously with the Note, a purchase money mortgage (the "Mortgage") on defendant's property located at 200 East Church Street, Bergenfield, NJ 07621 (the "Property"). The Mortgage was recorded on October 26, 2006 in the Office of the Clerk of Bergen County, Book 16345, Page 477. Thereafter, the loan was modified pursuant to a Modification Agreement (the "Modification") effective October 13, 2009. The Note and Mortgage were subsequently assigned to plaintiff as trustee for Citigroup Mortgage Loan Trust ("Citigroup") on January 11, 2012, which assignment (the "Assignment") was recorded on January 26, 2012 in the Office of the Clerk of Bergen County, Book 941, Page 575.

According to the Certification of Amanda Weatherly ("Weatherly"), Vice President of Loan Documentation **[*4]** for Wells Fargo, the forgoing information regarding the Note and Mortgage is accurate. Weatherly also avers defendant defaulted under the terms and conditions of the Note by failing to make a monthly installment payment on October 1, 2011 and all payments due thereafter.

B. *Pleadings*

On October 22, 2012, plaintiff filed a complaint against defendant for foreclosure. Defendant's answer was filed on February 7, 2013 setting forth various affirmative defenses and asserting counterclaims.

C. *Motion for Summary Judgment*

The instant motion for summary judgment submitted on plaintiff's behalf was filed on August 7, 2013. Plaintiff's motion is supported by a Memorandum of Law, a Statement of Undisputed Facts, the Weatherly Certification, and copies of the following: the Note, the Mortgage, the Assignment, the Modification, the Notice of Intention to Foreclose and the Pooling and Servicing Agreement (the "PSA"). Defendant's opposition was filed on September 4, 2013 consisting of a Memorandum of Law, Defendant's Certification, the Certification of Michael A. Cassata, Esq. ("Cassata"), defendant's counsel, and opposition to plaintiff's Statement of Undisputed Facts. Plaintiff's reply was filed on **[*5]** September 16, 2013. Defendant, given this court's permission, had filed on his behalf a sur-reply in opposition to plaintiff's motion.

D. *Motion to Strike Experts/ Cross-Motion to Dismiss*

On September 7, 2013, plaintiff filed a motion seeking to strike defendant's experts supported by the Certification of plaintiff's counsel, Kellie A. Lavery, Esq. ("Lavery"). Defendant had opposition to the motion filed on his behalf on September 16, 2013.

Also on September 16, 2013, defendant had filed on his behalf a cross-motion to dismiss plaintiff's complaint. On September 20, 2013, plaintiff had filed on its behalf a Letter Brief in opposition to defendant's cross-motion and in support of plaintiff's motion to strike defendant's experts.

Law and Analysis

A. *Foreclosure*

The defenses to foreclosure actions are narrow and limited. 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, 622 A.2d 1353 (Ch. Div. 1993)*. In *Thorpe v. Floremoore Corp., 20 N.J. Super. 34, 89 A.2d 275 (App. Div. 1952)*, the Appellate Division set forth the elements for a prima **[*6]** 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*]

If the defendant's answer fails to challenge the essential elements of the foreclosure action, plaintiff is entitled to strike defendant's answer as a noncontesting answer. *Old Republic Ins. Co. v. Currie, 284 N.J. Super. 571,*

574, 665 A.2d 1153 (Ch. Div. 1995); Somerset Trust Co. v. Sternberg, 238 N.J. Super. 279, 283, 569 A.2d 849 (Ch. Div. 1989).

When a party alleges he/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 noncontesting 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 noncontesting if none of the pleadings responsive to the complaint either contest the validity or priority of **[*7]** the mortgage or lien being foreclosed, or create an issue with respect to 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., supra, at 574-575.

B. *Summary Judgment Motions*

In order to satisfy its burden of proof on a summary judgment motion, the moving party must show that no genuine issue of material facts exists. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29, 666 A.2d 146 (1995). Once the moving party satisfies its burden, the burden then shifts to the non-moving party to present evidence there is a genuine issue for trial. *Ibid.* In satisfying its burden, the non-moving party may not rest upon mere allegations or denials in its pleading, but must produce sufficient evidence to reasonably support a verdict in its favor. Triffin v. Am. Int'l Group, Inc., 372 N.J. Super. 517, 523, 859 A.2d 751 (App. Div. 2004); R. 4:46-5(a). Moreover, R. 4:5-4 requires all affirmative defenses be supported by specific facts. Parties must respond with affidavits meeting the requirements of R. 1:6-6 as otherwise provided in this rule and **[*8]** by R. 4:46-2(b), setting forth specific facts showing there is a genuine issue for trial. An "issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c); *see also* Brill, supra, at 535.

A defendant in foreclosure is not permitted to raise personal defenses against a holder in due course. Carnegie Bank v. Shalleck, 256 N.J. Super. 23, 45, 606 A.2d 389 (App. Div. 1992) ("When a mortgage secures a negotiable instrument . . . a transfer of the negotiable instrument to a holder in due course to whom the mortgage is also assigned will enable the assignee to enforce the mortgage (as well as the negotiable instrument) according to its terms, free and clear of any personal defenses the mortgagor may have against the assignor."); *see also* Bancredit, Inc. v. Bethea, 65 N.J. Super. 538, 544, 168 A.2d 250 (App. Div. 1961) (A holder in due course is "immune to all personal defenses of the maker against the payee, including that of fraud in the inducement.").

When a foreclosure action is deemed uncontested, **[*9]** the procedure is dictated by R. 4:64-1(d). 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. R. 1:34-6 further provides the Office of Foreclosure is responsible for recommending entry of default in uncontested foreclosure matters pursuant to R. 4:64-1 and R. 4:64-7.

C. *Enforcement of the Note*

A creditor holding a commercial paper as collateral security, such as a note, may, upon default, bring an action to collect the debt. Polhemus v. Prudential Realty Corp., 74 N.J.L. 570, 577, 67 A. 303 (E. & A. 1907). To establish a prima facie case on a note, a plaintiff need only provide the note at issue and establish a default. Trustees System Co. v. Lisena, 106 N.J.L. 549, 150 A. 373 (E. & A. 1930); Lodi Trust Co. v. Himadi, 13 N.J. Misc. 169, 170, 176 A. 691 (Sup. Ct. 1935).

Where a mortgage is given as a guaranty or security for a commercial loan, evidenced by a note, an action on the note generally can occur before or after the related foreclosure action, or the lender can bring an action on the note alone. First Union Nat. Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 350, 921 A.2d 417 (2007); Summit Trust Co. v. Willow Business Park, L.P., 269 N.J. Super. 439, 446, 635 A.2d 992 (App. Div. 1994) **[*10]** ("where mortgage loans involve the financing of business or commercial properties, the lenders are not required to foreclose on the mortgage before seeking entry of judgment on the notes or on a guaranty"); *see also* N.J.S.A. 2A:50-2.3(a).

N.J.S.A. § 2A:50-1 et seq. prohibits judgments from being "rendered in any action to foreclose a mortgage for any balance which may be due plaintiff over and above the proceeds of the sale of the mortgaged property, and no execution shall issue therein for the collection of any such balance." N.J.S.A. § 2A:50-1. Pursuant to N.J.S.A. § 2A:50-2, a party seeking to collect a debt secured by a mortgage on real property must first foreclose on the mortgage and then proceed

with "an action on the bond or note for any deficiency, if, at the sale in the foreclosure proceeding, the mortgaged premises do not bring an amount sufficient to satisfy the debt, interest and costs." *Ibid.*

However, N.J.S.A. § 2A:50-1 does "not apply to proceedings to collect a debt evidenced by a note and secured by a mortgage on real property" in certain instances including commercial loans. N.J.S.A. § 2A:50-2.3. In contrast, N.J.S.A. § 2A:50-1 does apply to residential mortgages. Accordingly, **[*11]** a party seeking to collect a debt against a residential mortgagor must first foreclose on the mortgage before proceeding with an action on a note.

D. *The Notice of Intention to Foreclose*

Rule 4:64-1(b) lists the required contents of a foreclosure complaint. Pursuant to subsection (b)(13), "in all residential foreclosure actions plaintiff's attorney shall annex to the complaint a certification of diligent inquiry if applicable, whether the plaintiff has complied with the pre-filing notice requirements of the Fair Foreclosure Act or other notices required by law."

The Fair Foreclosure Act requires that a mortgagee notify a residential mortgagor of an intention to accelerate a mortgage loan and to commence a mortgage foreclosure action at least 30 days before doing so. *See* N.J.S.A. 2A:50-56(a). The Fair Foreclosure Act requires a Notice of Intent to Foreclose ("NOI") be sent by the party seeking foreclosure before the foreclosure complaint is submitted. *See* N.J.S.A. 2A:50-56(b).

The NOI is a mandatory notice under the FFA that must precede the filing of the foreclosure complaint. Spencer Sav. Bank, SLA v. Shaw, 401 N.J. Super. 1, 7, 949 A.2d 218 (App. Div. 2008). The NOI must be "in writing, sent to the **[*12]** debtor by registered or certified mail, return receipt requested, at the debtor's last known address, and, if different, to the address of the property which is the subject of the residential mortgage." N.J.S.A. § 2A:50-56(b). The mortgagor need not actually receive the NOI, as the mortgagee can show compliance with service under the Fair Foreclosure Act by producing "(1) a Postal Service certified mail receipt indicating that plaintiff has sent the NOI via certified mail to the defendants; (2) a Postal Service return receipt verifying that the defendants received the NOI; or (3) a certification of mailing signed by the bank employee who mailed the NOI, contemporaneously memorializing that fact." GE Capital Mortg. Services, Inc. v. Weisman, 339 N.J. Super. 590, 592, 595, 773 A.2d 122 (Ch. Div. 2000).

The purpose of a Notice of Intent to Foreclose is to protect homeowners at risk of foreclosure by providing them with "timely and clear notice . . . that immediate action is necessary to forestall foreclosure." US Bank National Association v. Guillaume, 209 N.J. 449, 469, 38 A.3d 570 (2012). The Fair Foreclosure Act does not address what remedy is appropriate when there is a violation of the notice of intent requirement. **[*13]** However, the New Jersey Supreme Court has addressed the issue and held that when a lender fails to comply with the Fair Foreclosure Act's requirement of a Notice of Intent to Foreclose, the court may exercise its discretion in determining the appropriate remedy and whether to dismiss the foreclosure action. *See* US Bank v. Guillaume, supra, at 449. In *Guillaume*, the issue was whether a defective notice of intent may be remedied by a revised notice. The Court found that when a defective notice has been sent the lower court may "dismiss the action without prejudice, permit a cure or impose such other remedy as may be appropriate to the specific case." Id. at 458.

E. *New Jersey Consumer Fraud Act*

Under The New Jersey Consumer Fraud Act ("CFA"),

> [t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether **[*14]** or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.
>
> [N.J.S.A. § 56:8-2]

The purpose of the CFA is to protect consumers by eliminating sharp practices and dealings in the marketing of merchandise and real estate. Perez v. Rent-A-Center, Inc., 186 N.J. 188, 219, 892 A.2d 1255 (2006). Under the CFA, a claimant need not prove intent to commit an unconscionable commercial practice. Wozniak v. Pennella, 373 N.J. Super. 445, 456, 862 A.2d 539 (App. Div. 2004).

The Appellate Division in Mirra v. Holland America Line,

331 N.J. Super. 86, 751 A.2d 138 (App. Div. 2000) held, "the statute of limitations that applies to consumer fraud claims is the same six-year general limitation contained in N.J.S.A. 2A:14-1."[1] Id. at 90.

"[T]o state a claim under the CFA, a plaintiff must allege each of three elements: (1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss." New Jersey Citizen Action v. Schering-Plough Corp., 367 N.J. Super. 8, 12-13, 842 A.2d 174 (App. Div. 2003).

F. *Common-law fraud*

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, 541 A.2d 237 (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, 876 A.2d 253 (2005).

Analysis

A. *Prima Facie* ***[*16]*** *Foreclosure*

Plaintiff has established a prima facie case for foreclosure having provided evidence of execution of the Note and Mortgage, recordation of the Mortgage and its Assignment to plaintiff, and a default. The Note is endorsed in blank and plaintiff has physical possession. Moreover, Weatherly certifies plaintiff was in possession of the Note at and prior to the filing of the foreclosure complaint. The Assignment is dated January 11, 2012 which predates the filing of the foreclosure complaint on October 22, 2012.

Therefore, an indebtedness has been shown as well as the fact that plaintiff is the holder of a valid mortgage.[2] Accordingly, the defendant must present evidence that there is a genuine issue of material fact to defeat the motion and allow the matter to proceed to trial.

B. *Fraud*

In opposition to summary judgment, defendant relies on several arguments. The one of paramount concern is defendant's assertion of fraud. The gravamen of defendant's assertion is derived from his Certification which compellingly suggests genuine issues which militate **[*17]** against granting summary judgment.

Specifically, defendant offers the following narrative regarding the loan. Defendant, born in Ecuador in 1950, arrived in the United States in or around September 2002 with his wife and four adult sons. Having unsuccessfully run a flower shop in the United States, defendant assumed a position with a cleaning company earning $600 a week. In addition to this income, defendant asserts he earned approximately $5,000 annually by importing and selling flowers. Defendant later took a position as a driver earning $500 a week while his wife worked in a pharmacy earning $7.00 an hour. These facts are incorporated in this opinion not for any sentimental consideration but for their material significance to the loan instruments which underlie this litigation.

Prior to obtaining a loan, defendant asserts his family was paying $1,200 a month in rent to live in an apartment in a two-family house. Eventually, defendant sought to purchase a home to house his family. Defendant intended to take the mortgage in his name only as his wife had no credit history. Through a broker, defendant arranged to meet with Donald F. Mellay ("Mellay"), a branch manager of Wells Fargo. **[*18]** During this meeting, defendant's sons translated the conversation into Spanish as defendant was and is not fluent in English. Defendant asserts Mellay assured him a loan would be made available. Moreover, defendant asserts Mellay explained to him that Wells

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[1] N.J.S.A. § 2A:14-1 sets forth the following:

> Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this Title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than **[*15]** one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, *shall be commenced within 6 years next after the cause of any such action shall have accrued*.
>
> [*Ibid.* (emphasis added)]

[2] The same is set forth with recognition defendant contests whether the plaintiff is the rightful "holder" of the note as set forth infra.

Fargo would finance the down payment. Eventually, defendant was preapproved for a $607,000 loan though, apparently to defendant's surprise, there were two loans. Defendant asserts it was explained to him by Mellay the second loan was in place of a down payment. The interest rates were discrepant with the first loan subject to a 7.375% rate and the second subject to a 14.000% rate. Defendant asserts Mellay said the rates "were only temporary".

Throughout his communications with Mellay, defendant asserts he was told "that if [defendant] paid on time for two years Wells Fargo would refinance the loan at a lower interest rate and [defendant's] payments would be reduced." (Def. Cert. at ¶ 36). At the closing on August 3, 2006, defendant asserts he was presented a "big pile" of mortgage documents all of which were in English. Defendant could not read them and he had not been provided copies prior to the closing which could have been translated. **[*19]** Present at the closing was a lawyer defendant had never met before who did not speak Spanish. The lawyer directed defendant to sign the papers though, defendant asserts, he neither read nor explained the contents of the papers to defendant.

Only upon reviewing a copy of the loan application with his present counsel did defendant come to learn his income had been listed at $10,150 a month.[3] Defendant denies filling out the application and denies providing any such information, much less having earned a monthly income even close to $10,150. Defendant's current attorneys explained this is a "stated income" loan. Crucially, defendant asserts Wells Fargo "falsified my income and gave me a stated income loan". (Def. Cert. at ¶ 50). In addition to the monthly income term, defendant learned only by way of his current counsel of the "high closing costs" and a prepayment penalty.

Defendant asserts, operating on the belief after two years the interest rates and payments would decrease, he successfully made the mortgage payments during those first two years. Making timely and complete payments during those two years entailed struggle and sacrifice **[*20]** for defendant and his family. Defendant's certification describes the extent of this struggle including his family's contribution to the payments. His sons had to drop out of college because their tuition could no longer be afforded. Defendant's sons also acquired short term loans at high interest rates so they could lend defendant money. Additionally, defendant borrowed from credit cards in order to make payments. After 18 months, defendant asserts his son Oscar communicated with Mellay requesting the promised refinance. Mellay said he would inquire into the matter but never responded. Defendant attempted to refinance with Wells Fargo but was eventually and purportedly told he could not refinance because property values had declined. Defendant contends if not for the expected reduction in interest rate and payments, he would never have taken the loan. Thereafter, in 2008, defendant sought a loan modification submitting applications to Wells Fargo though never receiving a response. In 2009, falling behind on the mortgage payments, defendant again requested a loan modification which Wells Fargo granted in or around October 2009.

Upon consultation with current counsel, defendant was advised **[*21]** he should have been considered for a Housing Affordable Modification Program ("HAMP") loan modification under which his interest rate could be reduced to as little as 2.000%. However, he asserts the loan modification obtained was unaffordable. Defendant made payments pursuant to the modification until 2011. Defendant asserts Wells Fargo sent letters and called inviting him to apply for another loan modification. Throughout the process, defendant asserts he consistently provided documents to Wells Fargo which were repeatedly lost or which Wells Fargo claimed never to have received. Upon calling Wells Fargo for updates regarding the second loan modification, defendant or someone on his behalf was told the file was closed or in review. The present status of the second loan modification is unknown to defendant.

The forgoing information asserted by defendant provides a foundation for defendant's claim plaintiff violated the CFA and committed acts of actionable fraud. Specifically, defendant asserts plaintiff violated the CFA in misrepresenting that defendant could refinance the loan after two years. Moreover, in allegedly falsifying defendant's income, defendant asserts the loan was secured **[*22]** without regard to defendant's ability to repay. Lastly, he asserts he never requested nor knew the second loan, with its high interest rates, would be utilized to provide the required down payment and to pay "exorbitant" closing fees. Accordingly, defendant invokes the stigma of predatory lending ascribing insidiousness to plaintiff's behavior. Although defendant presents compelling information suggestive of possible fraudulent practices on the part of plaintiff, generalizations about the lending industry are not competently, nor persuasively, presented. Nonetheless, for the purpose of addressing plaintiff's

[3] *See* Def. Ex. A attached to defendant's certification.

motion, there is sufficient basis in defendant's position to deny summary judgment. This does not, however, address the substantive merit of the parties' positions.

C. *Statute of Limitations/Discovery Rule*

In response to defendant's invocation of the CFA, plaintiff argues its application is barred by a six-year statute of limitations. N.J.S.A. § 2A:14-1. Crucial to this contention is when to fix the point at which the cause of action is deemed to have accrued. Precisely when this point is fixed depends on whether the discovery rule will need to be applied or whether the allegations **[*23]** are barred. Principally, the discovery rule provides a cause of action does not accrue "until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action." O'Keeffe v. Snyder, 83 N.J. 478, 491, 416 A.2d 862 (1980) (citing Burd v. New Jersey Tel. Co., 76 N.J. 284, 386 A.2d 1310 (1978)).

Plaintiff argues the six-year statute of limitations attendant to CFA claims began running on August 3, 2006, the date of execution of the Mortgage and the Note. Moreover, plaintiff argues the discovery rule does not apply to contract actions where the parties know the terms of their contract and "a breach is generally obvious and detectible with any reasonable diligences." (Pl. Reply at 10) (citing County of Morris v. Fauver, 153 N.J. 80, 110, 707 A.2d 958 (1998)).

Plaintiff's position the statute of limitations is always triggered the day the Mortgage and Note are executed is too broad. Setting the trigger at that time may be inappropriate if defendant's assertions are true. However, plaintiff's counsel at oral argument conceded the two year period during which defendant made monthly payments can be considered for the purpose of applying the statute **[*24]** of limitations in light of defendant's allegation a refinance was promised conditioned upon payment for the first two years.[4] Whether by application of equitable tolling or the discovery rule, it would be grossly inequitable not to allow defendant to go forward in light of the allegations he has specifically and comprehensively put forth. In refuting the untimeliness argument, defendant's sur-reply asserts the fraud alleged by defendant arose, at least in part, from conduct which occurred after the loan documents were signed. To the extent it is claimed defendant was promised the opportunity to refinance after two years of payment, there is an arguable position that the fraud did not occur until such time as plaintiff failed to allow defendant to refinance. Accordingly, the statute of limitations would not apply to bar the assertion of defendant's claims of fraud.

While the court cannot now determine the **[*25]** merit of these claims, if there was a promise to refinance in two years, plaintiff's failure to comply might well constitute a breach of promise and a possible fraud. The court need not determine at this stage the likelihood of defendant successfully challenging the foreclosure under the CFA or whether such a challenge is precluded by the statute of limitations. It suffices that whatever the merit of the parties' claims as they concern alleged fraud, there is sufficient information presented to determine genuine issues for trial abound.

D. *Pooling and Servicing Agreement/Third-Party Beneficiary*

Having determined defendant survives plaintiff's motion for summary judgment, this court's attention turns to one of the other interesting aspects of this case, the Pooling and Service Agreement (the "PSA"). Defendant's Memorandum of Law provides a useful explanation of how PSAs work.[5] The precise mechanics of securitization and the bundling of mortgages need not be detailed herein. However, defendant's concern that "the method and timing of the various transfers and assignments within the PSA framework is critical to establishing the ownership of a note and proving a chain of title" is noted. **[*26]** (Def. Mem. of Law at 10). Specifically, it is argued in opposition to plaintiff's motion for summary judgment, technical and procedural compliance with the PSA is not merely a formality but rather of substantive and critical importance. The threshold questions which then arise are: (1) if the fund received the Mortgage subsequent to the cutoff date, can plaintiff prosecute this action?; (2) does the defendant have standing to raise this issue?; and (3) if

[4] Plaintiff's counsel, at oral argument and for the first time, asserted the statute of limitations applies differently with regard to affirmative claims and defenses. As this position was not presented in the voluminous papers before the court, the court makes no ruling on this issue.

[5] Def. Mem. of Law at 8:

> A PSA sets forth the precise steps and manner necessary for a trust to be created, for the bundled mortgages to be transferred into the trust, for securities to be issued by the trust to the depositor or on the open market — generally to institutional investors — and to maintain the trust once created to maintain favorable tax status.

the defendant does not have standing, is defendant a third-party beneficiary to the PSA? While the court need not express an opinion as to how these questions ought to be answered, given plaintiff's status as the "holder" of a valid note is the linchpin of a foreclosure matter, if the matter proceeds to trial these questions will have to be addressed.

These issues are all the more **[*27]** troubling as there is a dearth of case law in New Jersey regarding these issues and only one unpublished Appellate Division case addresses these questions, which unfortunately holds no precedential value.[6] *See* HSBC Bank U.S. v. Gomez, No. A-4194-11T4, 2013 N.J. Super. Unpub. LEXIS 62, 2013 WL 105303 (App. Div. Jan. 10, 2013); *but see* R. 1:36-3.[7]

The Appellate Division in *Gomez* determined the defendants lacked standing **[*28]** to challenge a violation of a PSA as they were not parties to the trust. Moreover, it was determined the defendants were not third-party beneficiaries. In challenging the validity of the transfer, defendant asserts he does have standing and is a third-party beneficiary to a PSA instrument. Alternatively, even if defendant is not a third-party beneficiary, it is argued he can nonetheless challenge a void transfer, although how is not clear.

Among the challenges to plaintiff's motion for summary judgment, defendant argues plaintiff is not the "owner" or "holder" of the Note because plaintiff's Assignment of Mortgage did not satisfy the delivery requirements of a PSA. However, at oral argument, defendant's counsel was not prepared to assert which entity would be entitled to foreclose. Defendant notes, in distinguishing the instant matter from the facts of *Gomez*, the defendants in *Gomez* did not challenge the plaintiff's ownership or right to foreclose as they neither filed an answer nor responded to the foreclosure complaint brought against them. Moreover, they did not actively involve themselves in the litigation for years. In contrast, defendant has supplied a thorough response and demonstrated **[*29]** an active participation in this litigation. The most significant difference between *Gomez* and the instant matter is that the defendants in *Gomez* "never certified that the loan was "predatory" or in any way unfair, that they were told they need not defend the case or that they were lulled into inaction by Wells Fargo or plaintiff, or that the default was anything other than their fault." *Gomez, supra*, 2013 N.J. Super. Unpub. LEXIS 62, [WL] at 18-19. The same cannot be said for defendant in this matter who asserts a myriad of allegations which, if proven, might well challenge the transaction and pose intriguing issues concerning remedies.[8]

Ultimately, however, *Gomez* allows plaintiff to bring this action and plaintiff correctly asserts it does present with a valid Assignment. Defendant, though, directs the court to decisions in other **[*30]** jurisdictions which evince a possible trend in support of defendant's position. States which have upheld the status of a foreclosure defendant as a third-party beneficiary to a PSA have done so on the basis that these mortgagors might not otherwise secure financing. This court is not obligated to consider these decisions as they have no precedential authority. Nonetheless, as this remains an undecided issue in New Jersey, it is worth acknowledging these decisions and allowing a full record to be developed.

E. *Cross-Motion, Motion to Strike Experts and Discovery Issues*

Plaintiff's motion to dismiss defendant's experts and defendant's cross-motion to dismiss plaintiff's complaint rest on substantially similar ground. Among the varied contentions asserted in their motions is a reciprocal accusation their adversary has unsatisfactorily performed its duties pursuant to the rules of discovery and this court's case management order. The

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[6] The issue of standing and third-party beneficiaries has been extensively reviewed in other jurisdictions and federal courts and, at first blush, there appears to be a split with regard thereto.

[7] R. 1:36-3 states:

> No unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in an authorized administrative law reporter, and except to the extent required by res judicata, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court. No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all contrary unpublished opinions known to counsel.

[8] Additionally, the defendants in *Gomez* appealed the trial court's denial of their motion to vacate a default judgment against them. Accordingly, their action was brought under R. 4:50-1 which is not invoked in the instant matter. It is noted defendant's counsel at oral argument was not prepared to answer what remedy would be appropriate if defendant was able to competently prove the assertions made.

admonition of either party concerning their adversary's failure to comply with discovery is viewed with a jaundiced eye as both sides have apparently avoided their responsibilities in this regard. Both parties have exhibited less than punctilious compliance **[*31]** with discovery obligations and it is not the best utilization of the court's or counsel's time to hold a hearing to determine who violated the order first. This is a court of equity and counsel are expected to comply with the court's orders regarding discovery or promptly bring such difficulties to the court's attention.

Plaintiff's motion to strike defendant's experts is premised solely on the issue of timeliness. Similarly, defendant's cross-motion is premised on assertions of plaintiff's failure to comply with discovery. Suffice it to say, the prosecution of these motions is disappointing.

This court enters orders and responds to all requests for a telephone conference either the same day or the next. Counsel for plaintiff could have sought the court's intervention to address purported deficiencies and/or to ensure additional time to retain rebuttal experts or depose defendant's experts. Given the court is not prepared to hold it was not plaintiff's delay in producing the required discovery which caused defendant's delay, the motion to strike defendant's experts is denied.

The court notes defendant's cross-motion to dismiss the complaint is procedurally infirm as it contains no certification **[*32]** that defendant's counsel conferred with plaintiff's counsel prior to filing the cross-motion. Moreover, the cross-motion was not filed until months after the discovery period in this matter ended on June 28, 2013 and, thus, it contravenes the court rules. *R. 4:24-2*. Additionally, it is not clear that the cross-motion pertains to the motion to strike defendant's experts. *R. 1:6-3*. As to the merits of defendant's cross-motion, it appears both sides failed their discovery obligations with apparent impunity. In light of the mutual shortcomings of the parties in satisfying the requirements of discovery, defendant's cross-motion is denied.

Under cover of September 20, 2013, this court authored a Letter Order to both parties providing, without prejudice to either party's position, that plaintiff shall have the right to depose defendant's experts by no later than October 11, 2013 and the right to serve rebuttal experts if they so choose by no later than October 25, 2013. In turn, defendant's counsel was given the right to depose plaintiff's experts by no later than November 1, 2013.

Conclusion

Conspicuously, plaintiff did not include a certification from Mellay in its reply. While plaintiff is **[*33]** under no obligation to provide such, its omission is curious as Mellay was specifically identified by defendant in his certification with regard to precisely articulated accusations concerning the underlying instrument. It is not assumed that by failing to provide a certification from Mellay plaintiff is conceding the accuracy of defendant's certification, but there has been no refutation of the defendant's allegation for the purpose of this motion.

Plaintiff has satisfied its burden of showing a prima facie case for foreclosure. However, defendant has presented sufficient proofs to suggest there are genuine issues yet to be decided. The court notes the panoply of other issues which have been argued by the parties including the sufficiency of the NOI, the construct of the PSA and defendant's potential standing as a third-party beneficiary. While interesting, there is no need to decide these issues at this time as they would be better served on a full record. However, it is sufficient premised on the forgoing consideration of defendant's assertion of fraud that summary judgment would be inappropriate.[9]

Plaintiff's counsel shall prepare and submit an order in conformity with this decision.

End of Document

[9] There is an intriguing question left unanswered; if defendant's proofs are found credible, **[*34]** what is the appropriate remedy? Surely, forgiveness of the entire loan seems not only draconian but without support in New Jersey case law. That issue, as with many others, shall be left for future consideration.