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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

CITIMORTGAGE, INC. and
NATIONSTAR MORTGAGE LLC,

Plaintiff,

v.

Case No.: 09-004260-CI-19

RONALD J. POWNALL, *et al.*

Defendants.

_____ /

ORDER GRANTING SUMMARY JUDGMENT

THIS CAUSE, having come before the Court on July 31, 2012 on Defendant's Motion for Summary Judgment, and the Court, being duly advised in the premises, it is hereby;

ORDERED AND ADJUDGED as follows:

1. Defendant's Motion for Summary Judgment is granted, for two reasons, which this Court explains under the portions of this Order labeled "Conditions Precedent" and "Standing at Inception," respectively.

Conditions Precedent

2. Paragraph 22 of the Mortgage upon which this lawsuit is based required Plaintiff to give Defendants 20 days' notice of the alleged default and an opportunity to cure that default prior to filing this lawsuit. In his Motion for Summary Judgment, Defendant asserted the requisite default letter was not sent.

3. Plaintiff, Citimortgage, Inc., filed an affidavit in July of 2011 attaching such a letter and asserting it had been sent. Defendant objected to the affidavit and the default letter attached thereto because (i) it was not served upon his counsel, Mark P. Stopa, Esq., even though Mr. Stopa was counsel of record at the time it was filed; and (ii) that affidavit was not identified

by Defendant as evidence it would use to oppose summary judgment, as required by Rule 1.510.

4. The Court is not sure that it can ignore an affidavit that was filed in the court file simply because the party opposing summary judgment did not identify that affidavit as something it would use in opposition to summary judgment. However, even taking into account the affidavit and the default letter attached, there are no genuine issues of material fact. The letter provides, on its face, that Defendant had “the right to bring a court action or to assert in any foreclosure proceeding, the non-existence of a default or any other defense [he] may have to acceleration and sale of the property.” However, the letter did not apprise Defendant that failure to cure the default could result in “foreclosure by judicial proceeding,” as required by paragraph 22 of the subject mortgage.

5. There are no disputed issues of fact *vis a vis* Plaintiff’s failure to comply with a condition precedent to this lawsuit. Although this does not justify a summary judgment on the merits, this case is dismissed without prejudice and without leave to amend.

Standing at Inception

6. Plaintiff filed this lawsuit in 2009, seeking mortgage foreclosure and to re-establish a lost note. The Note attached to the unverified Complaint did not have an endorsement.

7. After the suit was filed, an assignment of mortgage was filed and recorded. However, as Defendant’s affidavit establishes, that assignment is dated after Plaintiff filed this lawsuit. Additionally, although Plaintiff has filed a copy of the original Note, with a blank endorsement, Plaintiff has not: (i) filed a valid Complaint based on that Note, see Feltus v. U.S. Bank, N.A., 80 So. 3d 375 (Fla. 2d DCA 2012)¹; or (iii) in any way indicated when the undated

¹ Plaintiff filed an Amended Complaint shortly before this Order, but that Amended Complaint

endorsement was executed.

8. On these facts, Defendant moved for summary judgment, arguing the undisputed evidence shows Plaintiff lacked standing at the inception of this case. This Court agrees. See Rigby v. Wells Fargo Bank, N.A., 84 So. 3d 1195 (Fla. 4th DCA 2012); McLean v. J.P. Morgan Chase Bank, N.A., 79 So. 2d 170 (Fla. 4th DCA 2012). The pleadings, affidavits, interrogatory answers, admissions, and depositions reveal no disputed issues of material fact, and Defendant is entitled to judgment as a matter of law.

9. Plaintiff pointed to its July, 2011 affidavit in opposition, and that affidavit asserts “Plaintiff acquired the Note on October 2, 2006.” However, Plaintiff did not introduce anything in response to Defendant’s evidence showing that it had an endorsement as of that date or an Assignment of Mortgage. Confining Plaintiff to its operative Complaint, i.e. the initial Complaint, as this Court must, see Feltus, supra, the undisputed evidence shows that Plaintiff was not the “holder” at the time it filed this lawsuit as a matter of law.

10. McLean and its progeny make it clear that a final judgment on the merits would not be proper, but that dismissal without prejudice is the proper outcome. As such, this case is dismissed without prejudice and without leave to amend.

DONE AND ORDERED in Chambers in St. Petersburg, Pinellas County, Florida on this _____ day of August, 2012.

TRUE COPY
AUG 08 2012
AMY M. WILLIAMS
Circuit Judge

Hon. Amy Williams
Circuit Court Judge

cc: Mark P. Stopa, Esq.
Shapiro, Fishman & Gache

was filed without leave of this Court or written consent of Defendant, so it is a nullity. See Fla.R.Civ.P. 1.190.