

COMMERCIAL BANK, a Tennessee
Banking Company,

Plaintiff,

vs.

JORGE IVAN VILLACRESES in his
capacity as Executor of the ESTATE
OF FAUSTO VILLACRESES, JORGE
IVAN VILLACRESES in his capacity as
Trustee of the Estate of FAUSTO
VILLACRESES, JORGE IVAN
VILLACRESES, MIRIAN CECILIA
VILLACRESES-RAMOS, SONIA
BEATRIZ VILLACRESES-RAMOS,
MILTON VICENTE VILLACRESES,
JAMIE GIOVANI VILLACRESES,
MARIETA RAMOS VILLACRESES,
STATE OF NEW JERSEY, and JOHN
DOES 1-25,

Defendants.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
SOMERSET COUNTY

DOCKET NO. F-2677-13

Civil Action

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT STRIKING THE ANSWER AND
AFFIRMATIVE DEFENSES OF JORGE IVAN VILLACRESES**

On the brief:

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INTRODUCTION

This action involves the foreclosure of residential property. Plaintiff Commercial Bank (“Plaintiff” or CB”) moves for summary judgment to strike the contesting Answer and Affirmative Defenses (“Answer”) filed by the defendant Jorge Ivan Villacreses (“Jorge”),¹ and return the case to the uncontested foreclosure unit for further prosecution. Jorge is the executor and trustee of the Estate of Fausto Villacreses. Fausto Villacreses passed away in February 2012, leaving the subject property to Jorge and other family members pursuant to a Will probated in Somerset County. Since Fausto’s death, not a single mortgage payment has been made.

In further support of the motion, CB submits the Certification of Glenn R. Reiser (“Reiser Cert.”), and Certification of Alan Gilbert (“Gilbert Cert.”).²

Jorge’s contesting Answer, a copy of which is annexed as Exhibit 4 to the Reiser Cert., asserts an abundance of affirmative defenses which are not only non-germane but disapproved by CB’s supporting Certifications; e.g., defective notice of intent to foreclose, lack of standing, no prima facie right to foreclose, failure to provide statutory notices,

¹ The Answer was not filed by Jorge in his capacity as Executor and Trustee of the Estate of Fausto Villacreses, the borrower identified in the Note and Mortgage. Rather, he filed the Answer solely on behalf of himself individually. No other defendant has answered or appeared in this matter. Although Jorge has not filed a Counterclaim, at the conclusion of his contesting Answer he includes a prayer for relief demanding the return of all payments that he allegedly made under the Note, plus interest and treble damages under the New Jersey Consumer Fraud Act. A complete copy of Jorge’s Answer is attached as Exhibit 4 to the Reiser Cert.

² Pending the outcome of this summary judgment motion, Plaintiff expressly reserves its right to seek sanctions against Jorge and his counsel for engaging in frivolous litigation in violation of R. 1:4-8. Prior to moving for summary judgment, Plaintiff provided adversary counsel with the requisite 28-day safe harbor notice required by R. 1:4-8 along with copies of the notice of intent to foreclose, underlying loan documents and assignments giving rise to the bank’s right to foreclose. R. 1:4-8 allows for the recovery of legal fees in the event the pleading is not withdrawn within this 28-day period, and the Court subsequently determines the pleading to have been filed in bad faith or for an improper purpose.

consumer fraud, entire controversy doctrine, unclean hands, and improper computation of amount due.³ Apparently, Jorge is of the belief that he and his fellow heirs should be entitled to enjoy the benefits of property ownership without the attendant burden of the mortgage debt.

For his part, in his contesting Answer Jorge admits “that no payment has been made to Plaintiff [on the Note] for at least 30 days.” In addition, the contesting Answer contains numerous inappropriate averments premised on Jorge’s lack of knowledge or information sufficient to form a belief as to the truth of the particular matter asserted. Such “smoke screen” responses are intended to manufacture a defense where none exists.

STATEMENT OF MATERIAL FACTS

1. Fausto Villacreses (“Fausto” or “Borrower”) acquired title to property commonly known as 15-17 Summit Avenue, North Plainfield New Jersey 07060 (the “Property”) via Deed dated March 27, 2002, recorded April 8, 2002, in the Somerset County Clerk/Register Office, Deed Book 5133, Page 3111, et seq. Said deed was corrected and re-recorded on August 15, 2002, in Deed Book 5190, Page 816, et seq. (Complaint at ¶1, annexed as Exhibit 3 to Reiser Cert.; Answer at ¶1, annexed as Exhibit 4 to Reiser Cert.).

2. Fausto died on February 7, 2012. (Complaint at ¶2, annexed as Exhibit 3 to Reiser Cert.; Answer at ¶2, annexed as Exhibit 4 to Reiser Cert.).

3. Prior to his death, Fausto executed a Last Will and Testament (“Will”). The Will revoked all prior wills and codicils and appointed Jorge as the Executor and Trustee of Fausto’s Estate. (Complaint at ¶¶3-4, annexed as Exhibit 3 to Reiser Cert.; Answer at ¶¶3-4, annexed as Exhibit 4 to Reiser Cert.).

³ This foreclosure proceeding is in its infancy. Plaintiff has not applied for the entry of a final judgment, so it is premature for the answering defendant to be contesting the amount due on the Note and Mortgage.

4. Fausto's Will devised the Property to Jorge, Mirian Cecilia Villacreses Ramos ("Mirian"), Sonia Beatriz Villacreses Ramos ("Sonia"), Milton Vicente Villacreses ("Milton"), and Jaime Giovani Villacreses ("Jaime"). (Complaint at ¶5, annexed as Exhibit 3 to Reiser Cert.; Answer at ¶5, annexed as Exhibit 4 to Reiser Cert.).

5. The Will was probated on February 21, 2012 with the Somerset County Surrogate and was assigned a probate docket number 12-00243. (Complaint at ¶6, annexed as Exhibit 3 to Reiser Cert.; Answer at ¶6, annexed as Exhibit 4 to Reiser Cert.).

6. On or about April 19, 2007, Lydian Mortgage, a Division of Lydian Private Bank ("Lydian Mortgage"), extended a loan in the amount of Three Hundred Eighty-Nine Thousand Six Hundred Dollars (\$389,600.00) (hereinafter Loan") to Fausto. (Complaint, First Count at ¶6, annexed as Exhibit 3 to Reiser Cert.).

7. To evidence its indebtedness under the Loan, on or about April 19, 2007, Fausto executed and delivered to Lydian Mortgage a note (the "Note"). The Note provides for an initial interest rate of 7.375%. The Note further provides for the payment of a late fee in the amount of 5% of the overdue payment of principal and interest. (Exhibit 1 to Gilbert Cert.).

8. To secure payment of the Note, on or about April 19, 2007, Fausto and his wife, Marieta Ramos Villacreses ("Marieta"), executed and delivered a mortgage to Mortgage Electronic Registration Systems, Inc. ("MERS") as Nominee for Lydian Mortgage, a division of Lydian Private Bank, in the amount of Three Hundred Eighty-Nine Thousand Six Hundred Dollars (\$389,600.00) (hereinafter "Mortgage"). The Mortgage is not a purchase money mortgage. (Exhibit 2 to Gilbert Cert.).

9. The Mortgage was recorded on May 7, 2007, in the Somerset County Clerk/Register's Office in Mortgage Book 6022, Page 913, et seq. (Id.).

10. The Mortgage encumbers the Property, also known as Lot 16 in Block 77 on the Tax Map of the Borough of North Plainfield, Somerset County, New Jersey, including all improvements thereon. (Id.).

11. On or about December 18, 2008, MERS executed and delivered to MCMCAP Homeowners Advantage Trust III, Partners, LLC (“MCMCAP Trust III”) an Assignment and Assumption of Rights Agreement with respect to the Mortgage (“Assignment 1”). (Exhibit 3 to Gilbert Cert.). On January 26, 2009, MCMCAP Trust III recorded and filed Assignment 1 in the Somerset County Clerks/Register’s Office, Assignment Book 6187, Page 1126, et seq. (Id.).

12. On or about January 5, 2010, MCMCAP Partners, LLC as Administrator for MCMCAP Trust III, executed and delivered to Plaintiff an Assignment and Assumption of Rights with respect to the Mortgage (“Assignment 2”). (Exhibit 4 to Gilbert Cert.).

13. On August 2, 2012, CB recorded and filed Assignment 2 in the Somerset County Clerk/Register’s Office in Assignment Book 6544, Page 1147, et seq. (Id.).

14. By virtue of the aforementioned Assignments, CB is the holder of the original Note and Mortgage. In fact, CB possesses the original Note in its loan file. (Gilbert Cert. at ¶3, and Exhibit 1 annexed thereto).

15. Under the terms of the Note, CB has the right to declare Fausto in default if Fausto fails to meet the repayment obligations of the Note. (Gilbert Cert. at ¶10, and Exhibit 1 annexed thereto).

16. The Note further provides that upon Fausto’s default, CB may accelerate indebtedness on Fausto. (Exhibit 1 to Gilbert Cert.).

17. CB declared Fausto in default of the Note and Mortgage by virtue of Fausto’s failure to pay the monthly installment due for March 2012. At that time CB was unaware of Fausto’s death. (Gilbert Cert. at ¶10).

18. Since Fausto's death, neither his Estate nor its beneficiaries have paid a monthly mortgage payment to CB under the Note. (Id.).

19. Fausto's Estate remains in default of the Note and Mortgage.

20. Marieta also signed and executed the Mortgage to MERS. (Answer at ¶15).

21. Pursuant to Fausto's Will, Jorge is named as both Executor and Trustee of Fausto's Estate. (Exhibit 3 to Reiser Cert; Answer at ¶4). Under the Will, all of Fausto's interests in the Property has been devised to Jorge and the other beneficiaries named therein. (Exhibit 2 to Reiser Cert; Answer at ¶5)/

22. Pursuant to Fausto's Will, all of his rights and obligations under the Note and Mortgage have passed to Jorge as Executor of Fausto's Estate. (Complaint at ¶16; Answer at ¶16).

23. Miriam is named as beneficiary under Fausto's Will with respect to the subject Property. (Exhibit 2 to Reiser Cert; Answer ¶18).

24. Sonia is named as a beneficiary under Fausto's Will with respect to the subject Property. (Exhibit 2 to Reiser Cert; Answer ¶19).

25. Milton is named as a beneficiary under Fausto's Will with respect to the subject Property. (Exhibit 2 to Reiser Cert; Answer ¶20).

26. Jorge is named as a beneficiary under Fausto's Will with respect to the subject Property. (Exhibit 2 to Reiser Cert; Answer ¶21).

27. On September 27, 2012, which is prior to CB commencing this foreclosure action, and unaware of Fausto's death at the time, CB issued a notice of intent to foreclose and served the same by certified mail and regular mail addressed to Fausto and Marieta at the subject Property. (Exhibit 1 to Reiser Cert.). The certified mailings were not claimed, however the regular mailings were not returned. (Reiser Cert. at ¶2).

LEGAL ARGUMENT

PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT STRIKING THE AFFIRMATIVE ANSWER AND DEFENSES RAISED BY THE OBJECTING DEFENDANT JORGE VILLACRESES

A. Foreclosure Generally

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 (Ch. Div. 1993).⁴ In Thorpe v. Floremoore Corp., 20 N.J. Super. 34 (App. Div. 1952), the court recited 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.

⁴ R. 4:64-5 prohibits the joinder of non-germane claims against the mortgagor or other persons liable on the debt. "Only germane counterclaims and cross-claims may be pleaded in foreclosure actions without leave of the court. Non-germane claims shall include, but not be limited to, claims on the instrument of obligation evidencing the mortgage debt, assumption agreements and guarantees." Id.

As Bergen County Superior Court Judge Peter E. Doyne recently explained in an unpublished decision, Wells Fargo Bank, N.A. v. Harrison, Superior Court of New Jersey, Chancery Division, Bergen County, Docket No.: F-1033-13:

Germane claims, then, fall into two categories. In addition to the claim for foreclosure itself, the first category of germane claims includes those that challenge the right of the plaintiff to foreclose or otherwise dispute the amount of the defendant's indebtedness, and as such are permitted as equitable defenses to foreclosure. The second category of germane claims incorporates cross-claims that challenge the priority or amount of a prior encumbrance. See R. 4:64-5 ("A defendant who chooses to challenge the validity, priority or amount of any alleged prior encumbrance shall do so by filing a cross-claim against that encumbrancer . . .").

Id. at pp. 7-8. See Exhibit 7 to Reiser Cert.

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 (Ch. Div. 1995); Somerset Trust Co. v. Sternberg, 238 N.J. Super. 279, 283 (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 the mortgage or lien being foreclosed, or create an issue with respect to plaintiff's right to foreclose.⁵ 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.

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 (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 (App. Div.

⁵ Notably, the comments to R. 4:64-1(c) make clear that "a challenge by the mortgagor to the asserted amount due does not constitute a contesting answer for purposes of this rule. See Metlife v. Washington Ave. Assoc., 159 N.J. 484 (1999)." The Court in Metlife, dealing with a commercial loan, held that a default interest rate higher than the contract rate was reasonable given the uncertain circumstances that arise out of default. See also Mony Life Ins. Co. v. Paramus Pkwy. Bldg., Ltd., 364 N.J. Super. 92, 103- 104 (App. Div. 2003). Accordingly, defendants' argument as to the current amount due, presumably as a result of accrued interest and late fees, are non-germane and insufficient cause to deny summary judgment.

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.”).

Pursuant to N.J.S.A. § 3-301, an instrument may be enforced by “the holder of the instrument, a nonholder in possession of the instrument who has the rights of a holder, or a person not in possession of the instrument who is entitled to enforce the instrument pursuant to § 12A:3-309 or subsection d. of 12A:3-418.” See also Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 597-98 (App. Div. 2011). In Ford, plaintiff was determined not to be a nonholder in possession of the instrument as it could not properly establish, through “personal knowledge,” that plaintiff properly obtained possession of the note. Id. at 599-600 (citing R. 1:6-6 and Claypotch v. Heller, Inc., 360 N.J. Super. 472, 489 (App. Div. 2003)). Plaintiff in that case had also not properly authenticated the assignments of the note and mortgage, as required pursuant to N.J.S.A. § 46:9-9.

When a foreclosure action is deemed uncontested, 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.

B. Summary Judgment Standard

In order to satisfy its burden of proof on a summary judgment motion, CB must show that no genuine issue of material facts exists. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995). Once the moving party satisfies its burden, the burden then shifts to the non-moving party to present evidence that there is a genuine issue for trial. Ibid.

In satisfying his burden, the defendant Jorge may not rest upon mere allegations or denials in his pleading, but must produce sufficient evidence to reasonably support a verdict in its favor. See Triffin v. Am. Int'l Group, Inc., 372 N.J. Super. 517, 523 (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 by R. 4:46-2(b), setting forth specific facts showing that 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, 142 N.J. at 535.

As is demonstrated herein, there are no genuine issues of material fact that would preclude this Court from granting summary judgment dismissing Jorge’s contesting Answer and returning this case to the uncontested foreclosure unit. CB has demonstrated a *prima facie* right to foreclose, that it is a holder in due course of the underlying Note and Mortgage and this is the proper party with legal standing to foreclose, and that it complied with the pre-filing notice requirements dictated by the New Jersey Fair Foreclosure Act. None of the affirmative defenses plead by Jorge create a genuine issue of material fact. To the contrary, the majority of the affirmative defenses plead are non-germane and should be stricken as a matter of law.

C. Assignments

Mortgage assignments must be in writing. EMC Mortgage Corp. v. Chaudri, 400 N.J. Super. 126, 141 (App. Div. 2008). However, an agreement to transfer an interest in land may be enforceable without writing if the existence of the agreement is proved by clear and convincing evidence. N.J.S.A. § 25:1-13. An express oral assignment accompanied by the delivery of the note and mortgagee to the assignee is sufficient to

transfer the mortgagee's interest "in equity," but not "in law." 29 New Jersey Practice, Law of Mortgages § 11.2 (2d ed. 2009). An equitable assignee may bring a foreclosure action. Ibid.

Mortgage assignments need not be recorded in order to be effective. EMC Mortgage Corp., supra, 400 N.J. Super. at 141. An assignee of a mortgage on real estate may file a foreclosure action. N.J.S.A. § 46:9-9. Further, the Uniform Commercial Code provides that the transfer of an instrument vests in the transferee the right to enforce it. U.C.C. § 3-203 (2002). Therefore, the transfer of interest through assignment, not the recordation of that assignment, is relevant to whether a plaintiff has the legal interest required to bring a foreclosure action.

In the instant case, CB has demonstrated the proper chain of title of the Note and Mortgage via assignments that were duly recorded with the Somerset County Clerk's Office prior to the commencement of this foreclosure suit, and that it is a holder in due course of the original Note and Mortgage. See Gilbert Cert. at ¶¶2-9. Accordingly, CB has legal standing (infra) to bring this foreclosure action. By virtue of CB's status as a holder in due course of the Note and Mortgage, Jorge is prohibited from asserting any personal defenses that Fausto may have had against CB's assignor. See Carnegie Bank v. Shalleck, supra, 256 N.J. Super. at 45.

D. Standing

Standing requires a "sufficient stake and real adverseness with respect to the subject matter of the litigation [and a] substantial likelihood of some harm visited upon the plaintiff in the event of an unfavorable decision." Jen Elec., Inc. v. County of Essex, 197 N.J. 627, 645 (2009). It is a general rule of equity that real parties in interest must be joined as parties and an assignee of a debt is a real party in interest. Zurcher v. Modern Plastic Machinery Corp., 24 N.J. Super. 158, 163 (App. Div. 1952). With respect to possession of the note, "the holder of the instrument" is entitled to enforce the instrument

in a court of law. N.J.S.A. § 12A:3-301. If the note is endorsed in blank, an effective physical transfer of the note confers authority to enforce because “a nonholder in possession of the instrument who has the rights of a holder” may enforce an instrument. See N.J.S.A. § 12A:3-301 and N.J.S.A. 12A:3-203(a).

For a foreclosure plaintiff to have standing to sue, it must demonstrate that it possessed the note at the time the complaint was filed. See Deutsche Bank Trust Co. Americas v. Angeles, 428 N.J. Super. 315, 319-20 (App. Div. 2012); Deutsche Bank Nat’l Trust Co. v. Mitchell, 422 N.J. Super. 214, 224-25 (App. Div. 2011).

CB has sufficiently established its *prima facie* right to foreclose and has demonstrated that no genuine issue of material fact exists that would preclude summary judgment and the striking of defendant’s Answer and Affirmative Defenses. On the basis of the Gilbert Cert., CB has proven that a valid mortgage exists, a debt is owed, and defendants’ defaulted on the mortgage dating back to March 2012, the month immediately following the death of the principal borrower Fausto who passed in February 2012. Further, the Gilbert Cert. establishes that CB possessed the original Note and Mortgage when this foreclosure action was filed on January 22, 2013.

E. Consumer Fraud Act

The contesting Answer pleads a violation of the New Jersey Consumer Fraud Act (“CFA”) as one of the many bogus non-germane affirmative defenses put forth by Jorge. Under the 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 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 term “advertisement”, as defined in N.J.S.A. 56:8-1, has been deemed to include loans. See Associates Home Equity Services, Inc. v. Troup, 343 N.J. Super. 254, 278 (App. Div. 2001).

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 (2006). Under the CFA, a claimant need not prove intent to commit an unconscionable commercial practice. Wozniak v. Penella, 373 N.J. Super. 445, 456 (App. Div. 2004).

N.J.S.A. 56:8-19 provides that “[a]ny person who suffers any ascertainable loss of moneys or property . . . as a result of the use . . . by another person of any . . . practice declared unlawful under this act . . . may bring an action . . . in any court of competent jurisdiction.” Id. (emphasis added). A private plaintiff pursuing a claim under the Consumer Fraud Act must provide proof of “any ascertainable loss” for recovery. Meshinsky v. Nichols Yacht Sales, Inc., 110 N.J. 464, 473 (1988) (quoting Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 271 (1978)). See generally, Miller v. American Family Publishers, 284 N.J. Super. 67 (Ch. Div. 19885)(“Ascertainable loss,” is defined as loss that is definite, certain and measurable, rather than a loss that is merely theoretical.”); Bosland v. Warnock, 197 N.J. 543, 558 (2009). In other words, it must be a loss that is quantifiable or measurable with a degree of certainty, rather than merely theoretical or vague losses. Id. Finally, the CFA requires the consumer to prove that the loss is attributable to the conduct that the CFA seeks to punish by including a limitation expressed as a causal link, or a “causal nexus.” Id. at 555 (citations omitted).

In the absence of Jorge producing proofs that he has in fact sustained an ascertainable loss, the Court should strike this frivolous defense. Such proofs do not exist, as there can be no ascertainable loss under these circumstances. The only parties who

could possibly accuse the original holder of the Note and Mortgage as having committed unconscionable acts - Fausto and his wife Marieta - are deceased. Furthermore, but even more significant, is that a CFA claim can be asserted only as an affirmative claim, not as a defense. Additionally, N.J.S.A. 56:8-20 requires that “any party to an action asserting a claim . . . based upon violation of this act . . . shall mail a copy of the initial or responsive pleading . . . to the Attorney General.” Jorge’s contesting Answer omits the required certification of compliance regarding service of the pleading upon the New Jersey Attorney General. Regardless, the CFA claim is non-germane and cannot be baldly asserted to defeat CB’s *prima facie right* to foreclose.

F. Failure to Comply with Fair Foreclosure Act and Other Statutory Notices

In paragraph 49 of his Answer, Jorge alleges “upon information and belief” that CB failed to comply with various statutory notice requirements, some of which have no application in a foreclosure case; e.g., N.J.S.A. 2A:50-6 “Notice of Proposed Judgment by Confession or Action on a Note;” and N.J.S.A. 2A:50-7 “Record of Notice of Proposed Judgment.”

Through the Reiser Cert. CB has proven that it complied with the pre-foreclosure notice requirements found in N.J.S.A. 2A:50-56 and N.J.S.A. 2A:50-57 of the New Jersey Fair Foreclosure Act by sending the named borrowers a notice of intent to foreclose and providing the amount necessary to cure the Mortgage default. See Exhibit 1 to Reiser Cert.⁶ Accordingly, the affirmative defenses raised by Jorge predicated on the lack of compliance with the New Jersey Fair Foreclosure Act must

⁶ In the Notice of Intent to Foreclose, CB informed the Borrower that the Mortgage default could be cured by paying the sum of \$27,209.89 plus applicable per diem interest of \$70.20 to CB on or prior to October 26, 2012, and provided the mailing address where the payment should be delivered. See Exhibit 1 to Reiser Cert.

be stricken as a matter of law.⁷ The same is true as to the nonsensical claim that CB did not comply with N.J.S.A. 2A:15-9 requiring the filing of a *lis pendens*. CB filed a Notice of Lis Pendens with the Somerset County Clerk's Office on March 13, 2013, two months before Jorge filed his Answer. See Exhibit 6 to Reiser Cert.

None of the other affirmative defenses plead by Jorge are germane to CB's *prima facie* right to foreclose, and therefore do not preclude summary judgment in favor of CB; e.g., CFA, Entire Controversy Doctrine, and unclean hands. As to Jorge's Eighth Affirmative Defense alleging improper computation of the amount due, this objection is premature as this foreclosure case is in its infancy and CB is not moving for entry of final judgment at this time.

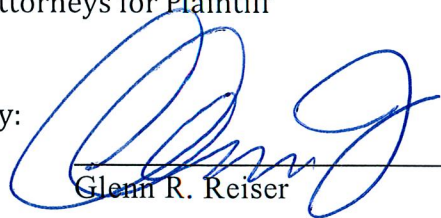
CONCLUSION

For the foregoing reasons and authorities cited, the Court should grant Plaintiff's motion to dismiss the contesting Answer and Affirmative Defenses filed by the defendant Jorge Villacreses, and return the matter to the uncontested foreclosure unit. Plaintiff has proven a *prima facie* right to foreclose, and the objecting defendant cannot establish the existence of a genuine issue of material fact that would preclude the granting of summary judgment.

Respectfully submitted,

LOFARO & REISER, LLP
Attorneys for Plaintiff

By:



Glenn R. Reiser

Dated: June 20, 2013

⁷ Neither Jorge nor his attorney requested CB's counsel to provide proof of compliance with the New Jersey Fair Foreclosure Act before filing his contesting Answer.