IN THE CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: CACE12003317

BANK OF AMERICA, N.A.,

JUDGE: WILLIAM W. HAURY, JR.

Plaintiffs,

VS.

TYRON CASEY, MARGARITA CASEY, et. al.,

Defendant,
_____/

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants TYRON CASEY and MARGARITA CASEY's Motion for Summary Judgment and Attorney Fees was heard on January 10, 2013. The court also considered Plaintiff's Notice of Filing Supplemental Affidavit which authenticated the Notice of Intent to Accelerate which is at issue. Plaintiff did not file any opposition but did argue it substantially complied with the notice requirements of the mortgage.

There is no factual dispute. Defendants' Motion is predicated upon Plaintiff's alleged failure to comply with section 22 of the mortgage. Among other things, section 22 requires the lender to provide certain information to the homeowner in the event of a default. Specifically,

> [t]he notice shall further inform the Borrower of the right to reinstate after acceleration and the right to **assert in the foreclosure proceeding** the non-existence of a default or any other defense of Borrower to acceleration and foreclosure (emphasis added).

In this case Plaintiff's acceleration notice states "**you may have the right to bring a court action** to assert the non-existence of a default or any other defense you may have to acceleration and foreclosure (emphasis added)." Plaintiff argues that this language substantially complies with section 22 of the mortgage. The parties know of no appellate decision on point.

In the most fundamental sense there is a world of difference between having to bring a court action to assert the non existence of a default or any other defense to acceleration and the right to assert in the foreclosure proceeding the non existence of a default or any other defense to acceleration. The former requires affirmative action on the part of the borrower to file a complaint, which almost all are ill equipped to do, or pay an attorney to do so. It also requires the payment of a filing fee at a time when the borrower is least capable of doing so. It is significantly different from taking no action, waiting until the foreclosure proceeding is filed and then asserting why acceleration is not correct or specifying other defenses. To equate the two is to ignore both the terms of plaintiff's mortgage and the economic burden of the substituted language.

Also, equation of the two requires one to ignore the Supreme Court pronouncements in this area. This is one of the few times in the history of Florida jurisprudence where the Florida Supreme Court has deemed it necessary to subject an entire industry to special rule due to the industry's documented illegal behavior. The amendment of *Fla. R. Civ. P.* 1.110 (b) was a direct result of the robosigning scandal. The comments to the rule amendment, *In re Amendments To The Florida Rules Of Civil Procedure*, 44 So.3d 555, 556 (Fla. 2010) indicate the depth of the court's concern with

this industry. To suggest now that a non-party, to whom the owner of the note has delegated its obligations, has "substantially" complied with the notice provision by wrongly telling the borrowers they have to file a separate law suit to assert their defenses turns logic on its head.

It is the opinion of the court that the Plaintiff has failed to comply with the requirement of notifying the Borrower of the right to "assert in the foreclosure proceeding" the non-existence of a default or other defense. The court does not believe that it should rewrite the parties' agreement to permit or to accept the notice that was provided. Accordingly, it is

ORDERED and ADJUDGED that Defendants' Motion for Summary Judgment is GRANTED.

DONE at Fort Lauderdale, Florida on January 22, 2013.

/s/ William W. Haury, Jr.
WILLIAM W. HAURY, JR.
CIRCUIT JUDGE

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