

CAUSE NO. 2012 23108

FILED
Chris Daniel
District Clerk
APR 20 2012
Time: _____
By _____
COUNTY, TEXAS
2:45pm
DL

CONRELL HADLEY
Plaintiffs

VS.

**BAC HOME LOANS SERVICINGS, L.P.
AND
BANK OF NEW YORK MELLON
*Defendants***

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS

127 JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE COURT:

Comes Now, **CONRELL HADLEY**, Plaintiffs complaining of BAC HOME LOANS
SERVICING, LP AND BANK OF NEW YORK MELLON, Defendants and for cause of action would
respectfully show unto the court the following:

I. PARTIES & SERVICE OF CITATION

1.1 Plaintiffs, CONRELL HADLEY are resident of Harris County, Texas.

1.2 Defendant, BAC HOME LOANS SERVICING, LP, hereafter referred to as "Bank of America" is a foreign corporation authorized to do business in Texas. Citation may be served on Defendant by serving its registered agent **C.T.**

CORPORATION SYSTEMS 350 N. ST. PAUL STE. 2900, DALLAS, TEXAS 75201.

1.3 Defendant, BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK As Trustee for the Certificates CWABS, Inc., hereafter referred to as Bank of New York is a foreign corporation authorized to do business in Texas. Citation may be served on Defendant by serving its registered agent **SECRETARY OF STATE,(CITATION DIVISION) 1019 BRAZOS, ROOM 220, AUSTIN,TEXAS 78701**

II. DISCOVERY CONTROL PLAN

2.1 Plaintiff intends to conduct discovery under control plan Level 2 pursuant to the Texas Rules of Civil Procedure, Rule 190.03.

III. JURISDICTION AND VENUE

3.1 This Court has subject matter jurisdiction over the controversy because the claims asserted in this Petition, arose, in whole or in part, in Harris County, Texas and the amount in controversy exceeds the minimal jurisdictional limits of the court.

3.2 This Court has personal jurisdiction over the Defendant because the acts and omissions complained of herein occurred in Texas, the Defendant does and/or did do business in the State of Texas, has committed a tort, in whole or in part in Texas , is a resident and citizen of Texas, has minimum contacts with the State of Texas during the period of time complained of herein.

3.3 Venue is properly laid in the Harris County, Texas because all or a substantial part of Plaintiffs' cause of action arose in Harris County, Texas.

IV. FACTS

4.1 On or about October 20, 2004, Plaintiff entered into a written contract with AMERICA'S WHOLESALE LENDER by the terms of which the Plaintiffs entered into a " Texas Home Equity Security Instrument" at the price of Seventy-Two and Thousand Dollars (\$72,000.00) owned by AMERICA'S WHOLESALE LENDER (hereinafter referred to as "AWL") regarding the real property located at 6908 Fox Mesa Lane, Humble, Texas 77338. Pursuant to the terms of the contract,

Plaintiffs were obligated to make monthly payments with the full debt due and payable on or by November 1, 2034.

4.2 More specifically, during the period of December 1, 2004 through December, 2008, Plaintiff made his monthly payments of \$ 535.86 to Countrywide in a timely fashion and in complete compliance with said note.

4.3 However, during 2009, when Plaintiff began to experience some unexpected changes in his income caused by personal medical problems he contacted Defendant Bank of America concerning possible loan workout alternatives.

4.4 More specifically, it was during this period, that Plaintiffs began to experience dilatory tactics in their inquiries concerning their loan and servicing issues by Defendant Bank of America in its transition from Country wide Home Loans.

4.5 Thereafter, Plaintiffs exchanged a series of correspondence with Defendant Bank of America that was now representing the Defendant Bank of New York concerning the status of Plaintiffs payments and certain escrow charges for insurance and ad valorem payments added to their mortgage balance.

4.6 Subsequently, on or about June 7, 2011, while Plaintiff was attempting to comply with all of the requirements associated with the Home Affordable Modification Program (HAMP) by the Defendant Bank of America and he received a demand and debt validation letter.

A copy of this correspondence is attached as Exhibit "A" and incorporated fully by reference.

4.7 As a result of these tactics and non responsiveness to his HAMP application, the Plaintiff retained counsel and forwarded a " Qualified Written Request ("QWR") under the Real Estate Settlement Procedures Act 12 USC§ 2605(e) R.E.S.P.A. on or about November 4, 2011.

A copy of this correspondence is attached as Exhibit "B" and incorporated fully by reference.

4.8 Further, counsel for Plaintiffs would show that to date it has never received an acknowledgement of "QWR" request and the Defendant Bank of America has continued its effort to accelerate the aforementioned note because of a discrepancy in the amount and its failure under the Texas Debt Collection Practices Act to verify all offsets and credits.

4.9 Further, as a result of Defendant's Bank of New York's conduct and that its agent, Defendant Bank of America, it has deliberately prevented the Plaintiff from moving forward and finalizing its loan modification or exploring other loan workout alternatives.

4.10 To wit, Plaintiffs would show this court that as evidenced by Defendant's conduct, it has failed to provide them with "adequate existence" of the default under the security instrument between November, 2011 and March, 2012 and as such any efforts to accelerate their "Home Equity Note" are premature and as such contests their right to foreclose.

V. STATEMENT OF CLAIMS

5.1 Therefore, it has become necessary to bring this lawsuit for breach of contract by Defendant Bank of America and Bank of New York in failing to comply with

the covenants stated in the Deed of Trust as it relates to the aforementioned " Texas Home Equity Security Instrument" on or about October 20, 2004.

B. BREACH OF CONTRACT

5.2 The elements of a breach of contract action are:(1) the existence of a valid contract; (2) performance or tendered performance by the Plaintiff; (3) breach by the defendant.

5.3 In the case at bar, one of the points of contention by the Plaintiffs in the servicing of his mortgage note and contract by Defendant Bank of New York and its agent, Defendant Bank of America has been their failure to acknowledge and respond to his request for an accounting of their loan history.

More specifically, in lieu of his inability to review his loan and payment history he has been denied his legal and statutory rights to confirm the validation of his debt with the Defendants.

5.4 Plaintiff further alleges that Defendant failed to comply with HUD regulations outlining procedures that must be followed prior to accelerating and foreclosing a loan subject to the FHA. Specifically the Note and Deed of Trust expressly provide that the acceleration and foreclosure on Plaintiffs' loan are subject to limitation through regulations promulgated by the HUD Secretary. The applicable HUD regulations require Defendant to make reasonable efforts to mediate the alleged default through a face-to-face meeting with the Plaintiffs, *See* 24 C.F.R. §203.604(b); inform Plaintiffs of any assistance option, *See* 24 C.F.R. §203.604(e)(2); and conduct a Loss Mitigation Evaluation, *See* 24 C.F.R. §203.605, 203.501, before accelerating the loan and

proceeding with foreclosure. The Defendant failed to follow the foregoing steps and thus breached the contract with Plaintiffs. See e.g., *Baker v. Countrywide Home Loans, Inc.*, 3:08-CV-0916-B, 2008 WL 1810336 (N.D.Tex. June 24, 2009) (recognizing that violation of HUD regulations, which were incorporated into contract between mortgage and mortgagor, could provide a basis for a breach of contract claim.)

5.5 As a result, Defendant has breached the written contractual agreements and covenants of the note by wrongful applying these charges over and above Plaintiffs principal loan balance.

5.6 As a result of Defendant breach, Plaintiffs have suffered harm as they have incurred additional charges to their loan balance and escrow account and are continuing to incur them to the present.

B. VIOLATION OF TEXAS PROP CODE ANN. SECTION 51.002, ET.seq

5.7 Mortgage foreclosures in the State of Texas are governed by the express terms of the Deed of Trust and by Chapter 51 of the Property Code.

More specifically, it is well established by statute that the mortgagee is required to (1) notify the mortgagor by certified mail that the Deed of Trust is in default and give him at least twenty (20) days to cure and/or protest and (2) give mortgagor at least twenty-one (21) days' notice of the sale by certified mail. See Tex. Prop. Code Ann. § 51.002(b)(3),(d).

In the case at bar, Plaintiffs' mortgage loan is a "Home Equity Extension of Credit" (Tex. Const. art. XIII § 50 (a)(b) and as such when they received the notice of acceleration, they in fact did raise issues regarding their loan and payment history and

as such until the disputes were resolved any notice to post his home for sale would be premature.

C. TEXAS DEBT COLLECTION ACT

5.8 The TDCA makes it unlawful for debt collectors to use abusive tactics while collecting debts for others. "Debt collector means any person engaging directly or indirectly in debt collection". See TEX. REV. CIV. STAT. ANN. ART. 5069-11.01(c). Plaintiffs would show that they were harassed and subjected to emotional duress while Defendant attempted to collect the debt. Specifically, Defendant failed to timely respond to Plaintiffs' attempt to cure, to obtain a loan modification and those issues discussed above.

D. NEGLIGENCE

5.9 Plaintiff alleged that, based on the loan agreement, which specifically incorporated the regulations of the Department of Housing and Urban Development ("HUD"), the Defendants had a duty to mortgagors, such as themselves, to provide notice of any transfers, assignment or sale of the note, to properly manage the loan and escrow account, to comply with the notice provisions contained in the deed of trust before accelerating the note and foreclosing on the property, and when applying for a mortgage modification to protect his rights and not mislead him. As shown above, Defendant breached the duties it owed to Plaintiff and as a result of this breach he was damaged.

VI. ACTUAL DAMAGES

6.1 Regarding the causes of action and conduct alleged above, Plaintiff sustained pecuniary losses that were proximately caused by Defendants' conduct.

Plaintiff damages exceed the minimum jurisdictional limits of this Court.

VII. ATTORNEY FEES

7.1 Plaintiffs is entitled to recover reasonable and necessary attorney fees on their counterclaim for breach of contract under Texas Civil Practice & Remedies Code Chapter 38.

VIII. JURY DEMAND

8.1 Plaintiff requests a jury trial and tenders the appropriate fee with this Pleading.

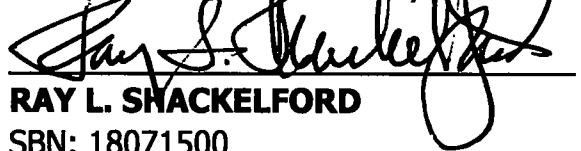
IX. PRAYER

9.1 For these reasons, Plaintiff respectfully request that this Court enter judgment that Defendant for:

- a. Plaintiffs' actual and special damages;
- b. Attorneys' fees;
- c. Cost of court;
- d. Prejudgment and post-judgment interest at the highest lawful rate; and
- e. Such other and further relief to which Plaintiffs may be justly entitled.

Respectfully submitted,

Shackelford & Associates, PLLC



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Attorney for Plaintiff

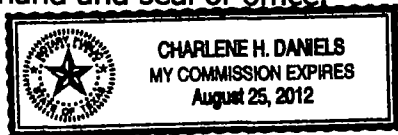
STATE OF TEXAS)(

COUNTY OF HARRIS)(

BEFORE ME, the undersigned authority, on this day personally appeared
CONRELL HADLEY, Plaintiff, who upon his oath deposed and stated that he has the
authority to make this Affidavit and the facts and allegations contained in the foregoing
pleading are true and correct and within his personal knowledge.


CONRELL HADLEY
Plaintiff

Subscribed and Sworn to before me on this 20th day of April, 2012, to which
witness my hand and seal of office.




Notary Public-State of Texas