

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

**U.S. BANK NATIONAL §  
ASSOCIATION, AS TRUSTEE FOR §  
CSMC MORTGAGE-BACKED TRUST §  
2007-3, and PHH MORTGAGE §  
CORPORATION, INDIVIDUALLY §  
AND AS SUCCESSOR-IN-INTEREST §  
TO OCWEN LOAN SERVICING, LLC, §  
§  
Plaintiffs, §  
§  
v. §  
§  
JOSEF M. LAMELL aka J.M. ARPAD §  
LAMELL, §  
§  
Defendant. §**

**Civil Action No. 4:19-cv-2402**

**PLAINTIFFS’ SECOND AMENDED COMPLAINT**

Plaintiff U.S. Bank National Association, as Trustee for CSMC Mortgage-Backed Trust 2007-3 (“U.S. Bank”) and Plaintiff PHH Mortgage Corporation, Individually and as Successor-in-Interest to Ocwen Loan Servicing, LLC (“PHH” and together with U.S. Bank, “Plaintiffs”), file this their *Second Amended Complaint* against Defendant Josef M. Lamell aka J.M. Arpad Lamell (“Defendant” or “Borrower”), and respectfully show the Court as follows:

**I. PARTIES**

1. U.S. Bank is the trustee of a trust and is appearing herein in its capacity as a trustee.
2. PHH is a New Jersey Corporation with its principal place of business in New Jersey.

3. Defendant Josef M. Lamell aka J.M. Arpad Lamell is an individual and citizen of the State of Texas who has been previously served with process in this action and has appeared *pro se*.

## II. PROPERTY

4. This proceeding concerns the following real property and improvements commonly known as 5131 Glenmeadow Drive, Houston, Texas 77096 (the “Property”) and more particularly described as:

LOT SEVEN (7), IN BLOCK TWENTY-SIX (26) OF REPLAT "1" OF MEYERLAND, SECTION EIGHT (8), A SUBDIVISION IN HARRIS COUNTY, TEXAS, ACCORDING TO THE MAP OR PLAT THEREOF RECORDED IN VOLUME 84, PAGE 64, OF THE MAP RECORDS OF HARRIS COUNTY, TEXAS.

## III. JURISDICTION

5. This Court has jurisdiction over this dispute under 28 U.S.C. § 1332 because there is complete diversity between Plaintiffs and Defendant, and the amount in controversy exceeds \$75,000.00.

6. U.S. Bank is the trustee of a trust. If a trustee possesses “customary powers to hold, manage, and dispose of assets,” then it is the real party in interest to a suit. *Navarro Sav. Assoc. v. Lee*, 446 U.S. 458, 464 (1980); see *U.S. Bank N.A. v. Nesbitt Bellevue Prop. LLC*, 859 F. Supp. 2d 602, 606 (S.D.N.Y. 2012). When a trustee is the real party in interest, its citizenship—not the citizenship of the beneficiaries of the trust—controls for purposes of diversity jurisdiction. *Navarro*, 446 U.S. at 464–66. That is, when the trustee has control of assets for the benefit of another and has the power to sue or be sued in its own name (and does so), the trustee’s citizenship is “all that matters for diversity purposes.” *Americold Realty Tr. v. ConAgra Foods, Inc.*, 577 U.S. 378, 136 S. Ct. 1012 (2016) (citing *Navarro*, 446 U.S. at 462–66). A national banking association is considered a citizen of the state in which it is located. 28

U.S.C. § 1348. Its location is determined by the state of its main office, as established in the bank's articles of association. *Wachovia Bank, NA v. Schmidt*, 546 U.S. 303, 318 (2006). According to its Articles of Association, U.S. Bank has its main office in Cincinnati, Ohio. Therefore, U.S. Bank is a citizen of Ohio for diversity purposes.

7. PHH Mortgage Corporation is a New Jersey Corporation with its principal place of business in New Jersey. For diversity purposes, the citizenship of a corporation is measured by the state in which it is incorporated and the state of its principal place of business, which is the state in which the corporation's nerve center is located. *Trafigura AG v. Enter. Prods. Operating LLC*, 995 F. Supp. 2d 641, 644 (S.D. Tex. 2014) (citing 28 U.S.C. § 1332(c)(1); *Hertz Corp. v. Friend*, 559 U.S. 77, 80-81, 130 S. Ct. 1181, 175 L. Ed. 2d 1029 (2010)). Therefore, PHH is a citizen of New Jersey for purposes of diversity jurisdiction.

8. Defendant is a citizen of the state of Texas.

9. This complaint seeks a declaration regarding the parties' rights and interests related to a certain deed of trust and the real property it encumbers. When declaratory or injunctive relief is sought, the amount in controversy is measured by the value of the object of the litigation, and the value of that right is measured by the losses that will follow. *Webb v. Investacorp, Inc.*, 89 F.3d 252, 256 (5th Cir. 1996). Stated differently, "the amount in controversy, in an action for declaratory and injunctive relief, is the value of the right to be protected or the extent of the injury to be prevented." *Leininger v. Leininger*, 705 F.2d 727, 729 (5th Cir. 1983); *see also Lamarr v. Chase Home Finance, LLC*, 2008 WL 4057301 (N.D. Miss. 2008) (finding amount in controversy requirement was satisfied where plaintiff sought to set aside foreclosure sale and home appraised for \$83,000.00, plus unspecified amount of monetary damages); *Bank of America National Trust and Sav. Assoc. v. Reeves*, 1995 WL 96617, \*1 (E.D. La. 1995) (court held that the amount in controversy was met in action seeking to enjoin

foreclosure on property because the suit “puts at issue the entire value of the property on which they attempt to enjoin defendants from foreclosing.”).

10. “Reasonable bases for valuing properties include ‘purchase price, market value, or outstanding principal and interest.’ This court considers market value to be the preferred method.” *McPherson v. Bank of Am., N.A.*, No. H-16-3498, 2016 U.S. Dist. LEXIS 180115, at \*6 (S.D. Tex. Dec. 30, 2016) (citations omitted).

11. Here, Plaintiffs seek a declaration regarding whether they may still enforce their rights under the subject deed of trust or whether they are barred by the applicable Statute of Limitations. The Harris County Central Appraisal District shows a total assessed value of the Property at \$727,826.00. Thus, the amount in controversy exceeds \$75,000.00.

12. Plaintiffs seek a declaration regarding whether they may still enforce their rights under the subject deed of trust or whether they are barred by the applicable Statute of Limitations, as well as alternative rights to subrogation. Regardless of the basis used to determine the amount in controversy, the \$75,000.00 threshold has been exceeded.

#### **IV. VENUE**

13. Venue is proper in this district and division, the United States District Court for the Southern District of Texas, Houston Division, under 28 U.S.C. § 1391(b)(2) because the real property that is the subject of this action is situated in Harris County, Texas, which is with Court’s District and Division. Further, venue is proper in this Court under 28 U.S.C. § 1391(b)(1), because Defendant is a resident of Harris County, Texas.

#### **V. SUMMARY OF FACTS**

14. On or about September 25, 2006, Defendant executed that certain *InterestFirst Note* (the “Note”) in the original principal amount of \$566,000.00 payable to Home123

Corporation (“Home123”) and bearing interest at the initial rate of 6.625% per annum. The Note contains a blank indorsement.

15. Concurrently with the Note, Defendant executed that certain *Deed of Trust* (the “Deed of Trust” and together with the Note, the “Loan Agreement” or “Loan”), as grantor, granting a security interest in the Property to Home123. Mortgage Electronic Registration Systems, Inc. (“MERS”) was named the beneficiary of the Deed of Trust as nominee for the lender. The Deed of Trust was recorded on October 2, 2006 in the Official Public Records of Harris County, Texas as Instrument No. 20060088945.

16. On or about April 11, 2010, MERS, as nominee for Home123, assigned the Deed of Trust and Note to U.S. Bank via an *Assignment of Mortgage*, which was recorded on July 7, 2010 in the Official Public Records of Harris County, Texas as Instrument No. 20100286872.

17. U.S. Bank is the current owner and holder of the Note and beneficiary of the Deed of Trust. PHH is the current servicer of the Loan Agreement.

18. Under the terms of the Loan Agreement, Defendant is required to pay when due the principal and interest on the debt evidenced by the Note.

19. In particular, Defendant has breached Section 3 of the Note and Section 1 of the Deed of Trust, both of which obligate Defendant to make monthly payments to his mortgagee.

20. Defendant previously filed a lawsuit bearing Cause No. 2010-11491 in the 127<sup>th</sup> Judicial District Court of Harris County, Texas (the “State Court Action”) wherein he named the then-servicer of the Loan Agreement, CIT Bank, N.A. f/k/a OneWest Bank, N.A. f/k/a OneWest Bank, FSB (“CIT”) as a defendant. The dispute involved, *inter alia*, the advancement of property taxes by CIT, the establishment of an escrow account and the chain of title related to enforcement of the Loan Agreement. The State Court Action was settled, Defendant released all of his claims, and Defendant’s claims were dismissed with prejudice.

21. Prior to the close of the State Court Action, Defendant filed a pleading therein contending that owner and servicer of the Loan Agreement are unable to pursue any enforcement of the Loan Agreement due to the alleged application of the Statute of Limitations.

22. On July 2, 2019, PHH sent a new notice of default and intent to accelerate, which demanded less than the full accelerated amount due on the loan. The July 2, 2019 Notice of Intention to Foreclose was mailed to Defendant via certified mail to Defendant at the Property address and his last known address on file, 5131 Glenmeadow Drive, Houston, Texas 77096. The Notice of Intention to Foreclose stated the amount due to cure the default as of August 6, 2019 was \$644,361.39.

23. Defendant failed to cure the default. On August 20, 2019, a Notice of Acceleration of Loan Maturity was mailed to Defendant via certified mail to Defendant at the Property address and his last known address on file, 5131 Glenmeadow Drive, Houston, Texas 77096.

24. The acceleration of the maturity date of the Note has made all unpaid principal and accrued interest immediately due and payable.

25. Through this Second Amended Complaint, Plaintiffs bring this suit for declaratory judgment to confirm that the Statute of Limitations does not prevent them from enforcing the Loan Agreement, that Defendant released any claims he may have had to bar the enforcement of the Loan Agreement, and for foreclosure so it may enforce its security interest in the Property. Alternatively, Plaintiffs are entitled to equitable/contractual subrogation for the advancement of unpaid taxes.

## **VI. CAUSE OF ACTION – DECLARATORY JUDGMENT ON LIMITATIONS**

26. The foregoing paragraphs are incorporated by reference for all purposes.

27. This Court has the power and authority, pursuant to 28 U.S.C. §§2201-2202, to declare the rights of Plaintiffs and Defendant as to the Note and Deed of Trust.

28. Plaintiffs seek declarations from this Court that the applicable Statute of Limitations does not bar Plaintiffs from foreclosing on the Property or collecting on the Note.

29. Under Texas law, a secured lender must foreclose on its “real property lien not later than four years after . . . the cause of action accrues.” Tex. Civ. Prac. & Rem. Code § 16.035(a). If the “deed of trust secured by real property contains an optional acceleration clause, default does not [of itself] start limitations running on the note. Rather, the action accrues only when the holder actually exercises its option to accelerate.” *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001). Defendant asserted in the State Court Action that Plaintiffs’ rights to enforce the Loan Agreement expired on June 4, 2014, which was four years after all payments due on the Note were allegedly accelerated on June 4, 2010.

30. Assuming that the Note was accelerated on June 4, 2010, any such acceleration was abandoned when Ocwen, as the servicer of the Loan Agreement at the time, allowed Defendant to reinstate the Loan by paying only the amounts in arrears on the loan as opposed to the whole, accelerated debt. *See Boren v. U.S. National Bank*, 807 F.3d 99, 105 (5th Cir. 2015) (holding that acceleration is abandoned when lender indicates to the borrower it is no longer seeking the full balance of the loan and will allow the borrower to reinstate). Ocwen, consistent with this decision, sent to Defendant monthly statements on January 20, 2014, February 17, 2014, and March 17, 2014, showing that Defendant could pay only the amount then in arrears to reinstate the loan. *See Leonard v. Ocwen Loan Servicing, L.L.C.*, 616 F. App’x. 677, 679 (5th Cir. 2015) (holding that monthly statements showing that the borrower can pay less than the full accelerated balance evidences abandonment of acceleration).

31. Secondly, any limitations period that may have been running on Plaintiffs' obligations to enforce the Note was tolled during the pendency of the State Court Action. Defendant filed his claims in that suit against CIT on May 3, 2010, and that suit was not dismissed until May 16, 2019. Accordingly, with respect to the alleged June 24, 2010 notice of acceleration, any limitations period was tolled for approximately nine years during the pendency of that suit, meaning that any deadline for Plaintiffs to foreclose non-judicially or file a suit for foreclosure would not expire until 2023. *See Jorrie v. Bank of New York Mellon Tr. Co., N.A.*, 740 F. App'x 809, 813 (5th Cir. 2018). The July 2, 2019 notice of default was sent within the limitations period from the alleged acceleration as tolled, and as such was effective to abandon the acceleration. *See Devdara L.L.C. v. Wells Fargo Bank, N.A.*, No. 4:16-CV-00140, 2017 U.S. Dist. LEXIS 88790, \*13 (S.D. Tex. 2017) (citing *Meachum v. Bank of N.Y. Mellon Trust Co.*, No. 3:13-cv-2322-N, 2015 U.S. Dist. LEXIS 21046, 2015 WL 765982 \*3 (N.D. Tex. Feb. 20, 2015)); *Boren v. U.S. Nat. Bank Ass'n*, 807 F.3d 99, 106 (5<sup>th</sup> Cir. 2015).

32. Thirdly, when Defendant voluntarily entered into a settlement agreement in the State Court Action, he released any claims he had at that time. At the time of the settlement, Defendant had asserted a claim that the Loan Agreement was no longer enforceable pursuant to the Statute of Limitations. While Plaintiffs were not signatories to that settlement agreement, the express language of the agreement stated that it would inure to the benefit of the parties' successors and assigns. *See Griffin v. BAC Home Loans Servicing, L.P.*, No. H-09-03842, 2011 U.S. Dist. LEXIS 15297, 2011 WL 675285, at \*2 (S.D. Tex. Feb. 16, 2011) (holding that borrower released contention that foreclosure was time-barred when he sign a repayment plan agreement that included a provision for the release of claims). Plaintiffs ask the Court to construe the provisions of the settlement agreement and determine whether, under the plain



language of the agreement, Plaintiffs are “successors and assigns” who were released of claims by Defendant.

33. Finally, Defendant’s claim regarding the Statute of Limitations is barred by *res judicata* or collateral estoppel. Pursuant to the settlement agreement in the State Court Suit, Defendant voluntarily dismissed his claims with prejudice. The State Court granted Defendant his requested relief and entered a final Agreed Order Dismissing All Claims with Prejudice on May 16, 2019, including Defendant’s then-pending claim that the Loan Agreement was no longer enforceable pursuant to the Statute of Limitations. *Energy Dev. Corp. v. St. Martin*, 112 F. App’x 952, 957 (5th Cir. 2004) (holding that a party’s successors may assert *res judicata*).

34. For the foregoing reasons, Plaintiffs’ rights to enforce the Loan Agreement are not barred by the Statute of Limitations, and Plaintiffs are entitled to their request for a declaratory judgment.

## **VII. CAUSE OF ACTION – DECLARATORY JUDGMENT ON TAXES**

35. The foregoing paragraphs are incorporated by reference for all purposes.

36. This Court has the power and authority, pursuant to 28 U.S.C. §§2201-2202, to declare the rights of Plaintiffs and Defendant as to the Note and Deed of Trust.

37. Plaintiffs seek declarations from this Court that Plaintiffs had and have the right to pay taxes on the Property and that Defendant is not entitled to deferral of payment of his property taxes under the terms of the Note and Deed of Trust.

38. At the initiation of the Loan, Defendant signed a Waiver of Escrow agreement for payment of taxes and insurance. The Waiver of Escrow specifically provides that “Lender shall have the right to establish or reestablish an escrow account...” if Defendant fails to pay escrow items in a prompt and timely manner, fails to provide proof of timely payments, or is otherwise in default under the terms of the Note or Security Instrument. As noted earlier, Defendant

previously disputed the prior advancement of delinquent property taxes and establishment of an escrow account in the State Court Action and has not paid property taxes on the Property since that time, which have been paid and advanced by the mortgage servicer(s). Defendant applied for a tax deferral pursuant to Texas Tax Code section 33.06 as to the 2018 and subsequent property taxes and has not paid any such taxes.

39. Defendant ostensibly contends that he is not obligated to pay such property taxes and that Plaintiffs should not pay such property taxes because he elected to defer payment of taxes due to his age under Texas Tax Code section 33.06. However, such agreement or right to defer payment of taxes does not excuse Defendant's obligations under the Deed of Trust and Waiver of Escrow. "Even where a borrower has a statutory right to defer payment of property taxes such a deferment does not excuse a borrower-mortgagor's obligations under the deed of trust." *Pachecano v. Jpmorgan Chase Bank Nat'l Ass'n*, No. SA-11-CV-00805-DAE, 2013 U.S. Dist. LEXIS 121139, at \*23 (W.D. Tex. Aug. 23, 2016) (collecting cases). Plaintiffs never approved a request for tax deferral for Defendant and the taxes, with attendant interest thereon, continue to accrue.

40. Plaintiffs had and have the right to establish an escrow account and pay taxes when due each year to protect the security interest in the Property pursuant to the Note and Deed of Trust even if Defendant attempted to defer payment of the taxes because he is over 65. Plaintiffs are entitled to their request for a declaratory judgment on payment of such taxes.

41. On March 24, 2021, the Court entered a Final Judgment declaring that Plaintiffs are entitled to pay taxes on the Property. Defendant did not appeal the Final Judgment on this ground. (ECF No. 100.)

### **VIII. CAUSE OF ACTION – FORECLOSURE**

42. The foregoing paragraphs are incorporated by reference for all purposes.

43. Plaintiffs asserts a cause of action for foreclosure against Defendant. U.S. Bank has fully performed its obligations under the Loan Agreement, however, Defendant has failed to make the payments required under the Note, which constitutes an event of default.

44. The Deed of Trust permits Plaintiffs to foreclose on the Property should there be an event of default on the Note. Accordingly, Plaintiffs seek judgment in its favor and an order confirming they may foreclose in accordance with the Deed of Trust and Texas Property Code section 51.002, or alternatively, a judgment for judicial foreclosure with an order instructing a marshal or sheriff to seize and sell the Property in satisfaction of the judgment.

45. Plaintiffs have been forced to hire the undersigned attorneys to pursue this claim; Plaintiffs are therefore entitled to and seeks judgment against Defendant for their reasonable attorney fees in this action, both through trial and in the event of a subsequent appeal, as provided by the Loan Agreement and by statute. TEX. CIV. PRAC. & REM. ANN. § 38.001(8).

### **IX. ALTERNATIVE CAUSE OF ACTION – CONTRACTUAL SUBROGATION**

46. The foregoing paragraphs are incorporated by reference for all purposes.

47. Under Texas law, contractual subrogation arises when "a person advances money to take up and extend indebtedness secured by a vendor's lien on land under an agreement that such person shall stand in the place of the original holder of the indebtedness." *Vogel v. Veneman*, 276 F.3d 729, 735 (5th Cir. 2002). A valid deed of trust executed by both the borrower and lender generally establishes contractual subrogation. *Id.*

48. The Deed of Trust contains a provision that allows Plaintiffs to recover any amounts disbursed by lender and for those to become additional debt under the Loan Agreement secured against the Property.

49. Plaintiffs assert that they advanced funds for unpaid property taxes pursuant to Paragraphs 3 and 9 of the Deed of Trust at least in the amount of \$92,582.06 for unpaid taxes. This amount continues to increase as property taxes come due on the Property every year. Accordingly, Plaintiffs are entitled to contractual subrogation for the funds advanced in property taxes.

#### **X. ALTERNATIVE CAUSE OF ACTION – EQUITABLE SUBROGATION**

50. The foregoing paragraphs are incorporated by reference for all purposes.

51. "Equitable subrogation 'is a legal fiction' whereby an obligation, extinguished by a payment made by a third person, is treated as still subsisting for the benefit of this third person, so that by means of it one creditor is substituted to the rights, remedies, and securities of another." *Bank of Am. v. Babu*, 340 S.W.3d 917, 925 (Tex. App.—Dallas 2011, no pet.); *Premium Plastics v. Seattle Specialty Ins. Servs., Inc.*, No. CIV.A. H-10-3960, 2012 U.S. Dist. LEXIS 40784, 2012 WL 1029528, at \*4 (S.D. Tex. Mar. 26, 2012), *aff'd*, 544 Fed. Appx. 287 (5th Cir. 2013). The general purpose of equitable subrogation is to prevent unjust enrichment of the debtor. *First Nat'l Bank of Kerrville v. O'Dell*, 856 S.W.2d 410, 415 (Tex. 1993).

52. Plaintiffs assert that they advanced funds for unpaid property taxes at least in the amount of \$92,582.06. This amount continues to increase as property taxes come due on the Property every year. Accordingly, Plaintiffs are entitled to equitable subrogation.

53. Due to the default on the Note, Plaintiffs seek a judgment declaring the Note to be in default and permitting foreclosure on the Property so that it may recoup the funds expended to pay taxes on the Property.

#### **XI. CONDITIONS PRECEDENT**

54. The foregoing paragraphs are incorporated by reference for all purposes.

55. All conditions precedent have been performed or have occurred.

## PRAYER

**WHEREFORE, PREMISES CONSIDERED,** Plaintiffs pray that the Defendant be cited to appear and the Court enter an Order containing:

- a. a declaration that the Statute of Limitations does not act as a bar to Plaintiffs' right to foreclose on the Property or collect on the Note;
- b. a declaration that the Defendant's waivers and releases contained in the Settlement Agreement prevent him from asserting against Plaintiffs any affirmative defenses to foreclosure or collection of the Note;
- c. a declaration that *res judicata* bars Defendant from contending that Plaintiffs are barred by the Statute of Limitations from enforcing the Loan Agreement;
- d. the Court declare that the following are secured by the Deed of Trust on the Property: (i) the outstanding balance of the Note; (ii) prejudgment interest; (iii) post-judgment interest from the date of judgment until paid; and (iv) costs of court; and enter a declaration that U.S. Bank's lien against the Property shall be enforced by a judgment confirming Plaintiffs may proceed with foreclosure under the Deed of Trust's power-of-sale provision and Texas Property Code Section 51.002 or, alternatively, by judicial foreclosure with an order instructing a marshal or sheriff to seize and sell the Property in satisfaction of the judgment;
- e. a declaration that, in the alternative, Plaintiffs are entitled to equitable/contractual subrogation and are therefore permitted to foreclose on the Property and other appropriate relief;
- f. Plaintiffs be awarded their attorney fees and costs of suit as provided herein; and
- g. all other relief, in law and in equity, to which Plaintiffs are entitled.

Respectfully submitted,

By: /s/ Mark D. Cronenwett  
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**CERTIFICATE OF SERVICE**

The undersigned certifies that on April 9, 2024, a true and correct copy of the foregoing document was delivered via ECF notification to the following:

Josef M. Lamell aka J.M. Arpad Lamell  
5131 Glenmeadow Drive  
Houston, Texas 77096  
[jmalamell@gmail.com](mailto:jmalamell@gmail.com)

/s/ Mark D. Cronenwett  
**MARK D. CRONENWETT**