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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR J.P. MORGAN ACQUISITION CORP. 2006-FRE2, ASSET BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-FRE2, *Plaintiff* v. ARTHUR SPENCER, MRS. ARTHUR SPENCER, HIS WIFE; JOHN M. ALFIS, *Defendants.*	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION BERGEN COUNTY DOCKET No. BER-F-10591-10 CIVIL ACTION AMENDED OPINION

Argued: March 18, 2011

Decided: March 22, 2011
Amended: March 28, 2011
Honorable Peter E. Doyne, A.J.S.C.

John Habermann, Esq. appearing on behalf of the plaintiff, U.S. Bank National Association, as trustee for J.P. Morgan Acquisition Corp. 2006-FRE2, asset backed pass-through certificates, series 2006-FRE2 (Phelan Hallinan & Schmieg, PC).

Gary E. Stern, Esq. appearing on behalf of the defendant, Arthur Spencer (Gary E. Stern, Esq.).

Introduction

Before the court is a motion filed on behalf of the plaintiff, U.S. Bank National Association ("U.S. Bank" or "plaintiff"), as trustee for J.P. Morgan Acquisition Corp. 2006-FRE2, asset backed pass-through certificates, series 2006-FRE2 ("JP Morgan")

seeking summary judgment and to strike the contesting answer.[1] A cross-motion for summary judgment was filed by counsel for Arthur Spencer ("Spencer" or "defendant") on February 3, 2011. A reply was filed on February 15, 2011. Oral argument was entertained on March 18, 2011.

Plaintiff's motion is denied; defendant's cross-motion is granted.

Facts and Procedural Posture

A. The note and the mortgage

On November 18, 2005, defendant executed and delivered an adjustable rate note (the "note") in the sum of $340,000 to FGC Commercial Mortgage Finance ("FGC"), doing business as ("d/b/a") Fremont Mortgage ("Fremont"). The note obligated defendant to make initial monthly installment payments of $2,377.33 on the first of each month commencing on January 1, 2006. The initial interest charged on unpaid principal was 7.500% per annum. The interest rate was scheduled to change (1) on December 1, 2007 and (2) on the first every 6 months thereafter. Before the change date, the interest rate was to be calculated by adding five and six hundred forty-three thousandths percentage points (5.6431%) to the then current index.[2] The "note holder" would then round the result of the addition to the next highest one-eighth of one percentage point

1 Although the motion was denominated as a motion to strike contesting answer, it was in substance a motion for summary judgment. R. 4:46-2(a) sets forth the requirements of a motion for summary judgment: "The motion for summary judgment shall be served with briefs, a statement of material facts and with or without supporting affidavits. The statement of material facts shall set forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine issue ." Failure to comply with these requirements may result in dismissal of the motion without prejudice. See Pressler & Verniero, Current N.J. Court Rules, comment 1.2 on R. 4:46-2 (2011). The moving papers do not satisfy these requirements as no statement of material facts was submitted. R. 4:46-2(a). However, the court will consider the merits of plaintiff's application so as not to base its decision on a procedural deficiency, solely.

2 The "index" is defined under the note as "the average interbank offered rates for six-month U.S. dollar denominated deposits in the London market ("LIBOR"), as published in the Wall Street Journal." The "current index" is the "most recent index figure available as of the date 45 days before each [c]hange [d]ate."

(0.125%). The interest rate at the first change date could not be greater than 9.500% or less than 7.5000%. Thereafter, the interest rate would never increase or decrease on any single change date by more than one and one-half percentage points (1.5000%) from the rate of interest paid for the preceding 6 months. The interest rate could never be greater than 13.5000% or less than 7.5000%. Any unpaid amounts would be due in full on December 1, 2035. The note provided for a late charge of 5.000% for any payment not received within fifteen (15) days from the due date.

To secure payment on the note, defendant simultaneously executed a mortgage (the "mortgage") to Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for FGC d/b/a Fremont. The mortgage was recorded on December 2, 2005 in Book 15231 of Mortgages on Page 44. On November 23, 2005, FGC d/b/a Fremont assigned the mortgage and note to Fremont Investment & Loan ("Fremont Investment" and the "Fremont Investment assignment"). No information regarding recordation of the Fremont Investment assignment was provided. On February 10, 2010, MERS as nominee for FGC d/b/a Fremont and its successors and/or assigns, assigned the mortgage and note to the plaintiff, as trustee for J.P. Morgan, whose address was in c/o Chase Home Finance LLC ("Chase"). The U.S. Bank assignment was recorded on April 19, 2010 in Book 00410 on Page 432.

A commitment for title insurance (the "commitment for title insurance") by Fidelity National Title Insurance Company ("Fidelity") was attached to the mortgage. The commitment for title insurance contained the following provision:

> In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance

> proceeds, whether or not the underlying insurance was required by Lender, shall be applied to the restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of the Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this security instrument, whether or not then due, with the excess, if any, paid to Borrower.[3]

As defendant's counsel correctly pointed out, although the language appears to address a situation where rebuilding occurs after an event of loss, it does not address clearly a situation where rebuilding is prohibited by operation of law, as will be detailed hereinafter.

The note contained an agreement if any installment payment should remain unpaid for 30 days after the same shall fall due, the whole principal sum, with all unpaid principal and interest, should, at the option of plaintiff become immediately due and payable.

[3] Defendant, for reasons that are unclear, has not premised his request for summary judgment on the following provision: "If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this security instrument, whether or not then due, with the excess, if any, paid to Borrower." As such, the court did not reach the issues implicated by this provision.

Defendant defaulted under the terms and conditions of the note by failing to make the payment due on April 1, 2009 and all payments which became due thereafter. It should be noted the date of the alleged default, April 1, 2009, is prior to the date of the U.S. Bank assignment, February 10, 2010.

Defendant claimed plaintiff miscalculated monthly payments and the balance due by failing to adjust the interest rate as required by the note and repeatedly acting contrary to its obligation of good faith and fair dealing. Specifically, defendant alleged on April 17, 2009, the published LIBOR rate, as published by the Wall Street Journal, was 1.64063%; and if allowable interest rate was added to 1.64063%, the chargeable interest rate should have been 7.28%. However, the floor rate was 7.5%, and, according to defendant, the interest rate charged should have been 8.375% instead of the rate charged of 9.875%. Consequently, every statement after April 17, 2009 purportedly contained a significant overcharge and any calculation of amount due was allegedly wrong.[4] Defendant further alleged the interest rate was to have been adjusted on December 1, 2009 and directed the court's attention to the LIBOR rate of October 16, 2009 as published in the Wall Street Journal: .59000%. Adding the allowable amount to .59000%, the interest rate assertedly could have been 6.233%, but the floor rate was 7.5%. Instead of charging 7.5%, the interest rate charged was apparently 8.375%. As a result, defendant claimed every statement after December 1, 2009 contained a significant overcharge and

[4] The default was asserted to have occurred prior to the April 17, 2009 statement. Not only is the relevance of the alleged overcharge of interest questionable, the allegation is not properly before this court. See First Union Nat. Bank v. Penn Salem Marina, Inc., 190 N.J. 342, 356-357 (2007) ("[T] the Office of Foreclosure is responsible for recommending the entry of judgments in uncontested foreclosure matters . . . subject to the approval of a Superior Court Judge designated by the Chief Justice.") (internal quotations omitted); Eisen v. Kostakos, 116 N.J. Super. 358 (App. Div. 1971) (The final judgment in a mortgage foreclosure action does not merely adjudicate the plaintiff's right to relief, but also fixes the amount due him.). See also Pressler, Current N.J. Court Rules, comment 1 on R. 4:64-2 (2011) (provides guidelines to Office of Foreclosure when addressing submission of proof of amount due).

any calculation due was wrong. According to defendant's counsel, this was part of a predatory lending scheme recently addressed by the Attorney General of Massachusetts.[5]

B. Spencer's predicament

Spencer's two-family home, the mortgaged premises, was consumed by a fire and burned almost in its entirety in early February 2007. Apparently, only the garage remained once the fire was extinguished. According to a letter dated February 15, 2007 from State Farm Insurance Companies ("State Farm") to Kramer, Smith, Torres & Valvano LLC ("KSTV"), a public insurance adjuster, State Farm enclosed a draft in the amount of $112,956.24 (the "insurance proceeds") which represented the "undisputed actual cash value" of the building damages less the policy deductible. The letter advised the recipient was entitled to a further claim of $6,246.32 or the actual cost to repair, whichever was less, upon the submission of final bills or a signed building contract. Interestingly, the restoration period was estimated to be eight (8) to ten (10) months from the date of loss, but over forty-nine (49) months have passed since then.[6]

Spencer demolished the remains of his home and began the process to rebuild on or about March 1, 2007. At the same time, he began requesting the insurance proceeds be released to him to enable him to rebuild. Spencer stated his plan was to build (1) offices above the existing garage, at an estimated cost of $40,000, and (2) a second building of the same design. Spencer's plan was for the rental of the initial building to cover the mortgage and with the balance of the insurance proceeds he would fund the foundation

[5] On June 9, 2009, Massachusetts Attorney General Martha Coakley ("Coakley") entered into a consent order with Fremont Reorganizing Corporation ("FRC"), formerly known as Fremont Investment and FGC; the Honorable Margaret K. Hinkle, Justice of the Superior Court, executed the order. According to defendant, the terms of the settlement were an indication plaintiff engaged in predatory lending outside of Massachusetts. Allegations of predatory lending are in no way proven in the current action by reference to the Massachusetts litigation.

[6] The letter from State Farm to KSTV listed the date of loss as February 7, 2007. A document, dated February 15, 2010 and apparently created by State Farm, listed the date of loss as February 2, 2007.

and framing of the second building. Spencer apparently planned to refinance the mortgage once the initial building was complete; alternatively, defendant's counsel informed, Spencer planned to sell the property or convert it to condominiums and then sell it. Spencer indicated $35,000 of the insurance proceeds was released to him, but this amount was insufficient to reimburse him for amounts he had already expended. Since the fire, Spencer assertedly spent $167,000 to protect and preserve plaintiff's security. According to the Spencer Cert., the $167,000 consisted of the following: (1) $500, fence; (2) $14,000, demolition and carting; (3) $1,800, fill in basement; (4) $5,500, blueprints for two-family home; (5) $6,000, shore up existing foundation; (6) $1,000, borough attorney; (7) $2,800, borough engineer; (8) $2,000, preliminary blueprints; (9) $200, mailouts; (10) $3,000, attorney; (11) $6,000, engineer; (12) $10,000, lawsuit to prevent prescriptive easement; (13) $115,000, mortgage payments from February 2007 to August 2009 at $3,200 per month.[7] Spencer also noted he lost over $100,000 in rental income. Apparently, plaintiff is holding over $75,000 insurance proceeds against a remaining arrearage of $56,000.

In addition to spending out-of-pocket, Spencer apparently made other efforts to "preserve the mortgage security." Spencer stated on September 20, 2007 he telephoned the "servicer" of the loan to inform of his "predicament": (1) the property burned down in February 2007; (2) the insurance company sent the insurance proceeds to the bank; (3) a town building inspector permitted rebuilding a two-family home; (4) Spencer obtained blueprints for the new home and permission to demolish the remainder of the former home; (5) when Spencer attempted to obtain a building permit, a subsequent building inspector informed him he could not rebuild as the land was then zoned as commercial

[7] It is unclear whether all the expenses were paid by Spencer and whether they were all paid fully.

and "grandfather rights" were lost when the building was demolished; and (6) Spencer needed the bank to release to him the insurance proceeds to obtain the necessary variance.[8] A letter dated December 24, 2008 from Harry Hillenius ("Hillenius"), "zoning enforcement officer" for the Borough of Bergenfield, corroborated Spencer's proposal to rebuild a two-family home was denied. The reasons given in the letter were the zone in which Spencer wanted to build was "Industrial and Automotive," the prior home had completely been destroyed and removed, and the nonconforming use had been abandoned for over one year. Spencer was advised of his right to appeal to the zoning board.

Defendant attached Verizon Wireless telephone bills to evidence over thirty (30) phone calls purportedly made to and from the "mortgage servicer" during which he purportedly attempted to convey his "predicament." The telephone bills attached to the Spencer Cert. relayed the (1) date, (2) time, (3) phone number, (4) rate, (5) usage type, (6) geographic origination, (7) destination, (8) minutes, (9) airtime charges, and (10) long distance/other charges. The Spencer Cert. set forth Spencer's summaries of the conversations. According to defendant, various bank representatives called him on multiple occasions to determine when he was planning to make a payment, to which Spencer responded by relaying his "predicament." Spencer inquired of the bank representatives with whom he spoke whether the bank would release to him funds to enable him to obtain a variance and help him address the issues resulting from his "predicament;" each time, the representative purportedly advised Spencer he/she would note his inquiry/request, but the "predicament" remained unresolved as the

[8] Multiple telephone conferences were referenced. All were violative of N.J.R.E. 802. Plaintiff did not contravene the assertions of what was purportedly said during their various conversations. The conversations are referenced herein without a finding of reliability or admissibility but rather to provide context, at least as asserted by defendant.

representatives with whom Spencer spoke apparently all lacked decision making authority, and no representative seemed to bring the "predicament" to the attention of a banker who possessed the requisite authority.

Three accounts summarized in the Spencer Cert. provided insight into the purported tone of the communications between Spencer and the bank representatives. On March 14, 2009, Spencer, as appeared to be typical of the conversations between Spencer and bank representative calling to determine when he would pay, apparently explained to a representative his predicament and asked the representative for help. After the representative advised Spencer there was nothing the representative could do, Spencer asked to speak to a supervisor. After a few minutes, a person claiming to be a supervisor apparently picked up and asked where was Spencer's payment. Again, Spencer explained his predicament. In response, the supervisor purportedly informed Spencer the supervisor did not care, the only concern was how Spencer was going to pay, and failure to pay would result in Spencer being out "in the street." Spencer claimed the supervisor proceeded to inform him whether he would end up "in the street" depended upon how the supervisor drafted his notes of the conversation, and the supervisor would go home that night and sleep well as he/she dealt with Spencer's "kind" every day. Spencer claimed the conversation ended by the supervisor hanging up on him.

Spencer alleged during a conversation on April 27, 2009, a bank representative advised him to stop paying as only then would the bank be willing to help him. Assertedly, Spencer was given the same advice on multiple occasions.

A resolution seemed close when a bank representative informed him on August 7, 2009 someone "must have dropped the ball," the representative would "take care of it,"

and Spencer was speaking to the "right person." A few hours later, the phone calls to determine when Spencer was making his payment resumed and continued about once a week through at least September 9, 2009.

The Spencer Cert. included as exhibits copies of letters Spencer authored to Chase: (1) On September 20, 2007, Spencer wrote to Chase advising he needed funds Chase was holding in escrow to rebuild; (2) On April 7, 2009, Spencer wrote to Chase, with copy to the NJ Department of Consumer Affairs, the Federal Trade Commission, and the Attorney General's office in Ohio, stating he had paid to Chase over $13,536 subsequent to the home burning down and conveying he was extremely frustrated with the Bank's inaction toward working out a resolution; (3) On May 15, 2009, Spencer wrote to Chase asking the bank to apply the insurance proceeds to his account; and (4) on December 11, 2009, Spencer wrote to Chase advising the Bergenfield Zoning Board of Adjustment (the "zoning board") approved the construction of two buildings on the land with a total of 5,700 square feet, asking for a reimbursement of the cost of the variance (approximately $32,000) and asking for funds to begin building.[9]

Spencer indicated the bank has provided him with forms to seek reimbursement for construction; however, obtaining reimbursement required an inspection of the finished work, and Spencer's "predicament" precluded finishing the work.

Spencer's "predicament" was further exacerbated when plaintiff purchased a fire insurance policy on the property on April 15, 2010 for an annual premium of $3,678.00. The policy set forth the insurance was for a "[d]welling [p]roperty;" and, as Spencer stated, a two-family home no longer existed. Furthermore, the "mortgagee" purportedly

[9] On or about October 20, 2009, the zoning board approved Spencer's application to build a 2-story office building and a second floor addition to the existing garage.

allowed its agents to break into the remaining garage in August 2010 and again in October 2010; and, over defendant's objection and in violation of this court's order dated September 9, 2010, barred defendant from access to his personal property and prevented the garage from being shown to prospective buyers.

C. The NOI

Pursuant to the Fair Foreclosure Act, Chase mailed notice of intention to foreclose to defendant on October 15, 2009, via certified mail, return receipt requested, and regular mail to two addresses.[10] One notice ("NOI 1") was mailed to 15 Foster St., Bergenfield, New Jersey 07621, the address of the mortgaged property. NOI 1 was apparently delivered on November 9, 2009 in Dallas, Texas 75261. Another notice ("NOI 2") was mailed to P.O. Box 4245, Brick, NJ 08723-1445. NOI 2 was apparently delivered on October 21, 2009 in Brick, N.J. 08723. Although defendant claimed he did not receive the notice, the FFA does not require receipt. See N.J.S.A. 2A:50-56.[11]

D. Pleadings

On February 17, 2010, a complaint for foreclosure was initiated against the defendant listing plaintiff as the party in interest. On May 14, 2010, defendant filed a pro se answer.[12] The answer admitted execution of the note.[13] Defendant left plaintiff to its proofs concerning the execution and recordation of the mortgage; however, defendant provided no documentation or support refuting the information present by plaintiff.

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[10] N.J.S.A. 2A:50-53 to :50-68 is hereinafter referred to as the "FFA."

[11] "Notice of intention to take action [to foreclose] shall be in writing, sent to the debtor by registered or certified mail, return receipt requested, at the debtor's last known address, and, if different, to the address of the property which is the subject of the residential mortgage. The notice is deemed to have been effectuated on the date the notice is delivered in person or mailed to the party." N.J.S.A. 2A:50-56(b).

[12] An order executed on December 23, 2010 substituted Gary E. Stern, Esq., for defendant as counsel.

[13] Defendant used the term "affirmed."

Defendant denied nonpayment but at that time provided no documentation or support payment was made and accepted. No other defendant filed an answer.

E. Summary judgment motions

Counsel on behalf of plaintiff filed the instant motion for summary judgment and to strike contesting answer on January 18, 2011. In support of the motion plaintiff submitted a memorandum of law and a certification of Brian Yoder, Esq. ("Yoder" and the "Yoder Cert.").[14] The Yoder Cert. contained the following exhibits: (1) the note, (2) the mortgage (3) the Fremont Investment assignment, (4) the U.S. Bank assignment, (5) a history of payments by or on behalf of defendant, (6) and the NOI. Defendant disputes the competence of Yoder as a witness to submit these documents for consideration as Yoder is not a keeper of his client's business records.

On the same day, defendant's counsel submitted the following settlement proposal (the "settlement proposal"), in writing, to plaintiff's counsel:

> A) The mortgage shall be recast to a principal amount of $300,000, payable with interest at the rate of 5% per annum, commencing in 18 months.
> B) All monies presently being held by the bank shall be turned over to the defendant within 14 days.
> C) The defendant agrees to use his best effort to complete the project in accordance with the architect's plans as previously provided.
> D) All funds generated from the project, including the insurance proceeds and any rental income, are to be considered trust funds and may only be used for the purpose of completion of the project. Proof of all expenditures will be provided to the bank. If the project is finished, paid for and tenanted before 18 months, payments will commence 30 days after occupancy.
> E) The mortgagor will execute a deed in lieu of foreclosure to the bank or its nominees in the event it does not recommence payment of the mortgage

[14] As noted above, plaintiff failed to submit a statement of facts as required by R. 4:46-2(a).

> on the new date or breaches the terms of the trust agreement to the proceeds and any income generated to the reconstruction of the project.

Counsel added the settlement proposal would allow the mortgagor to reconstruct the property at his own cost, expense and energy, and in 18 months the bank would have a fully performing asset.[15]

On January 25, 2011, the court ordered plaintiff to advise defendant, within 3 days, if it had the original note and mortgage and/or the location thereof and the person/entity in possession of the same. According to defendant's counsel, as of the date of the cross motion, plaintiff has not provided the original note and mortgage or advised of their location(s).[16]

Counsel on behalf of defendant filed a cross-motion for summary judgment on February 3, 2011. The cross-motion consisted of a statement of material facts, a brief, and a certification of Arthur Spencer (the "Spencer Cert.").

Counsel on behalf of plaintiff submitted a reply on February 15, 2011. The reply consisted of a letter brief and a reply certification by Yoder in response to defendant's statement of material facts (the "Yoder Reply Cert.").

Law

A. Standing

[15] It appears even plaintiff's counsel had difficulty causing plaintiff to take action. On February 7, 2011, the court authored a letter to plaintiff's counsel asking counsel to advise whether plaintiff expected to make a good faith counter-proposal to the settlement proposal. On February 15, 2011, plaintiff's counsel responded defendant's settlement proposal was forwarded to plaintiff and plaintiff had not yet responded. On February 16, 2011, two days before the first scheduled return date of this application, plaintiff's counsel again wrote to the court indicating plaintiff had not yet conveyed a decision to counsel regarding the settlement proposal.

[16] Although the court's January 25, 2011 order did not specifically direct plaintiff to produce the original note and mortgage in the same provision in which plaintiff was ordered to advise defendant if it had the original note and mortgage and/or the location thereof and the person/entity in possession of the same, plaintiff was directed to provide to defendant proof of authority to proceed with the foreclosure action within three (3) days of the date of the order.

As the Honorable Stephen Skillman, P.J.A.D., recently highlighted in Wells Fargo Bank, N.A. v. Ford, ___ N.J. Super. ___, ___ (App. Div. 2011) (slip op. at 8), in New Jersey, "[a]s a general proposition, a party seeking to foreclose a mortgage must own or control the underlying debt." Also see Bank of N.Y. v. Raftogianis, 417 N.J. Super. 467, *3 (Ch. Div. 2010).[17] However, when a debt is evidenced by a negotiable instrument, "Article III of the Uniform Commercial Code (UCC), N.J.S.A. 12A:3-101 -605, in particular N.J.S.A. 12A:3-301," governs. Wells Fargo Bank, N.A., supra, at *8. The applicable statute sets forth:

> "Person entitled to enforce" an instrument means [1] the holder of the instrument, [2] a nonholder in possession of the instrument who has the rights of the holder, or [3] a person not in possession of the instrument who is entitled to enforce the instrument pursuant to [N.J.S.A.] 12A:3-309 or subsection d. of [N.J.S.A.] 12A:3-418.

N.J.S.A. 12A:3-301.

Under the first circumstance provided by N.J.S.A. 12A:3-301, a person who qualifies as "the holder of the instrument" is entitled to foreclose on a negotiated debt. A holder is defined as "the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession." N.J.S.A. 12A:1-201. See also N.J.S.A. 12A:3-201(a) (A "holder" is the person who has physical possession of the negotiated instrument). In order to transfer "holder" status to a third party, a negotiation must take place whereby the transferring holder indorses the instrument and then physically transfers possession of the instrument to the transferee. N.J.S.A. 12A:3-201(b). Only after the negotiation and transfer has

[17] At the time this rider was issued, the Ford case was approved for publication as 417 N.J. Super. 467, but had not yet been published, and, as a result, only the electronic version pincites were available.

occurred, will the third party become the new "holder" and be entitled to foreclose upon the debt. Ibid.

Second, a person has standing to foreclose on a negotiated debt when they are "a nonholder in possession of the instrument who has the rights of a holder." See N.J.S.A. 12A:3-301(2). In this scenario, the instrument is physically transferred without the indorsement of the issuer. See N.J.S.A. 12A:3-203(c). While the lack of the indorsement prevents the person with possession of the instrument from becoming a holder, the transfer "vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course."[18] See N.J.S.A. 12A:3-203(b). Under N.J.S.A. 12:A3-301:

> A nonholder in possession of an instrument includes a person that acquired rights of a holder by subrogation or under Section 3-203(a). It also includes both a remitter that has received an instrument from the issuer but has not yet transferred or negotiated the instrument to another person and also any other person under the applicable law is a successor to the holder or otherwise acquires the holder's rights.

[18] Under N.J.S.A. 12A:3-302, "holder in due course" means the holder of an instrument if:

> (1) the instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and (2) the holder took the instrument for value, in good faith, without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, without notice that the instrument contains an unauthorized signature or has been altered, without notice of any claim to the instrument . . . and without notice that any party has a defense or claim in recoupment.

In essence, to be a holder in due course, one must take a negotiable instrument for value, in good faith, and without notice of any default or defect. Ibid.

Once the instrument's transfer has been completed, the ability to enforce the unindorsed instrument can only be denied if, "if the transferee engaged in fraud or illegality affecting the instrument." See N.J.S.A. 12A:3-203(b).

Finally, standing to foreclose on a debt is obtained when a holder, who is entitled to enforce the instrument, subsequently looses physical possession of the instrument "because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amendable to service of process." See N.J.S.A. 12A:3-309(a). However, "the loss of possession [must] not [be] the result of a transfer by the person or a lawful seizure." See N.J.S.A. 12A:3-309(a). Aside from physical loss, if the instrument was "paid or accepted by mistake and the payor or acceptor recovers payment or revokes acceptance, . . . it is treated as dishonored, and the person from whom payment is recovered has rights as a person entitled to enforce the dishonored instrument." See N.J.S.A. 12A:3-418(d).

B. Admissibility of evidence

"Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.J.R.E. 801(c). "Hearsay is not admissible except as provided by [the New Jersey rules of evidence] or by other law." N.J.R.E. 802.

N.J.R.E. 803(c)(6) sets forth the business records exception to the hearsay rule:

> A statement contained in a writing or other record of acts, events, conditions, and subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make it, unless the sources of

> information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

N.J.R.E. 803(c)(6). The business records rule does require the declarant to be available as a witness. N.J.R.E. 803(c).

R. 1:6-6 sets forth how to place evidence before a court. "If a motion is based on facts not appearing of record or not judicially noticeable, the court may hear it on affidavits made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify and which may have annexed thereto certified copies of all papers or parts thereof referred to therein." Personal knowledge, the mandate of the rule, clearly excludes facts based merely on "information and belief." See, e.g., Wang v. Allstate Ins. Co., 125 N.J., 2, 16 (1991). Affidavits by attorneys of facts not based on their personal knowledge but related to them by and within the primary knowledge of their clients constitute objectionable hearsay. See Murray v. Allstate Ins. Co., 209 N.J. Super. 163, 169 (App. Div. 1986). The requirements of the rule also are not met by affidavits containing argument, other forms of hearsay and general factual or legal conclusion. Pressler & Verniero, Current N.J. Court Rules, comment on R. 1:6-6 (2011). Where hearsay is admissible under an exception to the hearsay rule which requires that specific conditions have been satisfied, hearsay evidence cannot be deemed competent unless it is first determined that those conditions have been satisfied. Jeter v. Stevenson, 284 N.J. Super. 229 (App. Div. 1995). Merely appending relevant documents to the motion brief does not constitute compliance with R. 1:6-6; such documents must be incorporated by reference in an appropriate affidavit or certification, which properly authenticates material which is otherwise admissible. See Celino v. General Acc. Ins., 211 N.J. Super. 538 (App. Div. 1986).

N.J.R.E. 901 sets forth the rule for authentication of evidence. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims." N.J.R.E. 901.

C. Material issues in foreclosure proceeding

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). In Thorpe v. Floremoore Corp., 20 N.J. Super. 34 (App. Div. 1952), the court set forth 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.

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. 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.

In order to satisfy its burden of proof on a summary judgment motion, plaintiff 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 – here, the defendant – to present evidence there is a genuine issue for trial. Ibid. In satisfying its burden, the defendant may not rest upon mere allegations or denials in its pleading, but must produce sufficient evidence to reasonably support a verdict in its favor. 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.

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. 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.").

When a foreclosure action is deemed uncontested, the procedure is dictated by R. 4:46-1(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.

Analysis

A. Standing

Defendant's counsel argued plaintiff did not have standing to sue as there was a break in the chain of title by the U.S. Bank assignment. Counsel specified the Fremont Investment assignment was by Fremont to Fremont Investment; the U.S. Bank assignment was by Fremont to U.S. Bank. The break was said to occur when Fremont, and not Fremont Investment, assigned the note and mortgage to U.S. Bank. Defendant's counsel contended no explanation or turnover of documentation justified plaintiff's right to prosecute the current foreclosure proceeding.[19] However, the U.S. Bank assignment was from MERS as nominee for FGC d/b/a Fremont and its successors and/or assigns. As Fremont Investment was an assignee of Fremont pursuant to the Fremont Investment assignment, there appears to be no break in title when the mortgage and note were

[19] At oral argument defendant's counsel argued there is a hole in the chain of title "big enough to drive a truck through." Counsel alleged there was no documentation or support indicating the note was assigned by Fremont Investment. This was the same argument counsel made on the papers.

transferred pursuant to the U.S. Bank assignment. Nevertheless, plaintiff has provided no documentation or support for its position it is the trustee for J.P. Morgan, and therefore has not established its right to sue on behalf of JP Morgan.

Of greater import was defendant's counsel's argument plaintiff did not have standing as there was no proof the named plaintiff ever took physical possession of the note. Plaintiff's counsel countered the original note was forwarded to him upon request for the location of the note but was inadvertently returned by counsel to plaintiff. It is though surprising the reply did not set forth, competently, plaintiff possessed the note on filing of the complaint.[20]

Without establishing physical possession of the note, plaintiff may not be an entity which may foreclose pursuant to the first and second categories in section 301, namely, as a (1) holder of the instrument or (2) a nonholder in possession of the instrument who has the rights of the holder.[21] N.J.S.A. 12A:3-301. As plaintiff has not alleged, let alone established, the loss of possession of the instrument or the instrument was paid or accepted by mistake and the payor or acceptor recovered payment or revoked acceptance, plaintiff may not be a party who may foreclose pursuant to the third category in section 301, namely, a person not in possession of the instrument who is entitled to enforce the instrument. N.J.S.A. 12A:3-301; 12A:3-309(a); 12A:3-418(d). Therefore, plaintiff failed to establish standing as it is not a person entitled to enforce the note. N.J.S.A. 12A:3-301.

[20] Plaintiff's counsel noted the execution and recordation of the assignment was merely a formalization of the transfer of the note and mortgage which had already occurred. However, this provides no support for the assertion physical transfer of the note occurred.

[21] Plaintiff also did not provide any evidence the note was indorsed, further precluding a finding plaintiff was a holder.

Plaintiff has failed to establish standing as its relationship as trustee to JP Morgan was not set forth; more importantly, though, plaintiff has failed to establish it had or has physical possession of the note and/or failed to demonstrate the note was indorsed. As such, summary judgment for plaintiff is denied and the cross-motion for summary judgment is granted. Although both motions may have been decided on the basis of lack of standing alone, for purposes of completeness, the court also shall analyze whether the evidence presented in support of plaintiff's motion was competent and thereafter whether plaintiff has set forth a prima facie case in foreclosure.

B. Admissibility of evidence

Defendant's counsel correctly asserted no competent witness has brought forth admissible evidence. Yoder does not claim to be a person with personal knowledge. R. 1:6-6. Furthermore, the exhibits attached to the Yoder Cert. do not fall within the business records exception as Yoder does not claim be a person with actual knowledge or to have produced the exhibits by obtaining information from such a person.[22] N.J.R.E. 803(c)(6). Therefore, the exhibits submitted on plaintiff's behalf were inadmissible hearsay and the court may not consider them. This is particularly perplexing as this issue was squarely put forth in defendant's opposition and cross-motion, was not addressed in plaintiff's reply, and follows shortly after the publication of Ford, supra.

As plaintiff has failed to justify the relief sought by competent, admissible evidence, plaintiff's motion for summary judgment is denied. Lastly, the court shall analyze whether plaintiff has set forth a prima facie case in foreclosure.

C. Material issues in foreclosure proceeding

[22] As stated above, the Yoder Cert. contained the following exhibits: (1) the note, (2) the mortgage (3) the Fremont Investment assignment, (4) the U.S. Bank assignment, (5) a history of payments by or on behalf of defendant, (6) and the NOI.

While plaintiff's counsel conceded the circumstances surrounding the alleged default were "unfortunate," he asserted it "did not create the fire to the premises nor . . . change the zoning of the subject property." Plaintiff's counsel set forth defendant failed to make payments pursuant to the executed note, and the mortgage was executed and recorded. However, as issues of fact remain concerning the fact-sensitive allegations of (1) unclean hands (2) breach of the duty of good faith and fair dealing,[23] and, (3) as restoration was not "feasible," why the proceeds were not applied to the sums secured, plaintiff's motion for summary judgment is further denied.[24] Had defendant's cross-motion for summary judgment been brought solely upon the allegations of unclean hands and breach of the duty of good-faith and fair dealing, the court would have denied the cross-motion and the matter would have proceeded in the normal course to further explore the facts underlying the defenses; however, summary judgment for defendant is appropriate on the basis of lack of standing.

Conclusion

Some are more empathetic than others to mortgagors who are no longer paying their contractual committed amount in a manner consistent with their obligations. Motions for summary judgment or oppositions to motions for summary judgment based on technical deficiencies or defenses are coming before the chancery courts at an ever increasing rate. This case, though, is distinct from the "run of the mill" motion where defendant's attorney raises "technical objections" in an effort to delay the seemingly

[23] Unclean hands in an affirmative defense, while breach of duty good faith and fair dealing is a counterclaim. See R. 4:5-4; Glenfed Financial v. Penick Corp., 276 N.J. Super. 163, 171 (App. Div. 1994). Although plaintiff's counsel argued defendant waived the affirmative defense and counterclaim by failing to raise them in a timely manner, the court need not reach this issue in light of its decision.

[24] As noted above, the commitment for title insurance stated if restoration or repair was not economically feasible, or the lender's security would be lessened, the insurance proceeds were to be applied to the sums secured by the security instrument, with any excess payable to the borrower. Although defendant did not raise this provision as a defense to nonpayment, the issues pertaining to it remain unresolved.

inevitable in an attempt to garner for clients as much time in the home as the law will permit without paying outstanding obligations.

Here, not only has plaintiff failed to establish standing to bring the instant foreclosure action or present admissible evidence by a competent witness, defendant's competent assertions have also given rise to fact-sensitive defenses. Defendant's cross-motion is granted as plaintiff has failed to establish standing and has failed to comply with the court's January 25, 2011 order.[25] Plaintiff's motion for summary judgment is denied on three grounds: (1) lack of standing, (2) failure to present a prima facie case by presenting admissible evidence by a competent witness, (3) and defenses raised would be in need of further exploration.

The action is dismissed without prejudice.[26] The court's order shall be sent under separate cover.

[25] As noted above, on January 25, 2011, the court ordered plaintiff to advise defendant, within 3 days, if it had the original note and mortgage and/or the location thereof and the person/entity in possession of the same. Although the court's order did not specifically direct plaintiff to produce the original note and mortgage in the same provision in which plaintiff was ordered to advise defendant if it had the original note and mortgage and/or the location thereof and the person/entity in possession of the same, plaintiff was directed to provide to defendant proof of authority to proceed with the foreclosure action within three (3) days of the date of the order. According to defendant's counsel, as of the date of the cross motion, plaintiff has not provided the original note and mortgage or advised of their location(s).

[26] Dismissal of a case is, of course, a serious "sanction." Were failure to comply with an order the only reason to grant the cross-motion for summary judgment, the court might have had reason to pause. As, though, the explanation for the failure to comply with the court's January 25, 2011 order is ambiguous at best, as the dismissal of the plaintiff's complaint is without prejudice, and as the complaint is to be dismissed for lack of proper showing standing exists, the "sanction" appears to be appropriate.