

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT IN AND
FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2005-CA-4237
DIVISION: CV-E

**DEUTSCHE BANK, NATIONAL TRUST
COMPANY, AS TRUSTEE FOR MORGAN
STANLEY ABS CAPITAL 1 INC., TRUST
2005-HE2 MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2005-HE2,**

Plaintiff(s),

vs.

YOLANDA RAY, et al.,

Defendant(s).

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Plaintiff's motion for summary judgment of foreclosure. The Court finds that the pleadings and affidavits filed herein as to Defendant Yolanda Ray's affirmative defense create genuine issues of material fact which preclude the granting of Plaintiff's motion.

Defendant Ray has alleged as an affirmative defense the failure of Plaintiff to comply with the federal statutory requirement that it provide notice of specific homeownership counseling within 45 days after any default in payment. See 12 USC 1701x(c)(5). After originally arguing argued that the provisions of that statute did not apply to this case because the mortgage sought to be foreclosed is not federally insured, Plaintiff has conceded that the application of 12 USC 1701x(c) was not limited to federally insured mortgages. Nevertheless, Plaintiff contends that compliance with the requirements of that statute is not a condition precedent to commencing foreclosure proceedings and that a failure to comply does not create an affirmative defense.

While such a noncompliance with the statutory requirement may not be a condition precedent to foreclosure, it does create an equitable affirmative defense. The circumstances here are similar to those described in Cross v. Federal National Mortgage Association, 359 So.2d 464 (Fla. 4th DCA 1978), in which the defendant in a foreclosure action alleged as an affirmative defense that the mortgagee failed to comply with HUD regulations requiring lenders to make substantial efforts to try to rectify borrower defaults by assisting them in various ways. The court stated:

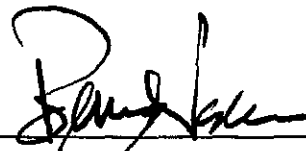
However, a mortgage foreclosure is an equitable action and thus equitable defenses are most appropriate. Thus, it appears to us, as suggested in Federal National Mortgage Association v. Ricks, 83 Misc.2d 814, 372 N.Y.S.2d 485 (S.Ct.1975), that given the purpose of this federal Act and the recommended efforts to obviate the necessity of foreclosure, any substantial deviation from the recommended norm might be considered by the trial court under the heading of an equitable defense. Appellants here pleaded such a defense and Mrs. Cross' Affidavit indicated evidentiary support therefor. Thus, there was a genuine issue of fact existing which precluded summary judgment.

Id. at 465

As there is evidentiary support of Plaintiff's noncompliance with the federal notice requirement, a genuine issue of acts exists, precluding summary judgment.

It is, therefore, **ORDERED AND ADJUDGED** Plaintiff's motion for summary judgment is **DENIED**.

DONE AND ORDERED at Jacksonville, Duval County, Florida on September 21, 2006.



BERNARD NACHMAN, Circuit Judge

Copies furnished to:

Wm. David Newman, Jr., Esq.

April Carrie Charney, Esq.