

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

BANK OF AMERICA, N.A.,

Plaintiff,

v.

**GARANG M. MAJOUK,
REBECCA A. MAJOUK, &
PARTIES IN POSSESSION,**

Defendants.

Equity No. EQCE073412

**RULING ON PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

On July 30, 2013, the Court held a contested, unreported hearing on Plaintiff's Motion for Summary Judgment filed on April 29, 2013. On May 3, 2013 Defendants filed a resistance. On July 8, 2013 Plaintiffs filed a reply. On July 15, 2013 Defendants filed a reply in resistance. Attorney Janelle Ewing appeared by telephone for Plaintiff. Attorney Joshua Gaul appeared for Defendants Garang M. Majouk and Rebecca A. Majouk. Also present was Defendant Garang M. Majouk. Based upon the Court's review of the court file, the motion, resistance and subsequent filings of the attorneys, hearing the arguments of counsel, the Court enters the following ruling.

I. BACKGROUND FACTS AND PROCEEDINGS

On January 23, 2013, Plaintiff filed a Foreclosure Petition seeking to foreclose on a Note and Mortgage executed by Defendants to finance the purchase of a residential plat of real estate described as "Lot 36 in EVERGREEN PLAT NO. 1, an Official Plat, now included in and forming a part of the City of Des Moines, Polk County, Iowa" (the "Property"). Pl.'s Foreclosure Pet. at 2. The Note and Mortgage include an acceleration provision that entitles the holder to collect the entire principal and interest upon foreclosure. Plaintiff alleges Defendants failed to make payments pursuant to the Note and Mortgage and seek foreclosure on the property and a judgment in the amount of \$158,333.88. On February 11, 2013 Defendants filed an answer.

On April 29, 2013 Plaintiff filed an Application for Default Judgment Entry against Defendant and moved for summary judgment. On May 13, 2013 Defendants filed a resistance contending that Plaintiff's failure to comply with the regulations of the Secretary of Housing and Urban Development ("HUD") precludes foreclosure and the granting of Plaintiff's motion. Plaintiff filed a reply on July 8, 2013 arguing that compliance with HUD regulations is not determinative in this case because the regulations were not directly incorporated into the Note or Mortgage, and that, in the alternative, if the Court finds the HUD regulations to have been incorporated into the Note and Mortgage, Plaintiff has complied with all applicable HUD regulations.

Trial is scheduled for December 18, 2013.

II. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

"A district court may enter summary judgment only when no genuine issues of material . . . fact exist and the moving party is entitled to judgment as a matter of law." *Rivera v. Woodward Resource Cntr.*, 830 N.W.2d 724, 727 (Iowa 2013); Iowa R. Civ. P. 1.981(3). A fact is "material" where it "might affect the outcome of the suit." *Kolarik v. Cory Int'l Corp.*, 721 N.W.2d 159, 162 (Iowa 2006) (internal quotation marks omitted). "The burden is on the party moving for summary judgment to prove the facts are undisputed." *Id.* (internal quotation marks omitted).

In determining whether summary judgment is appropriate, the court shall consider the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. Iowa R. Civ. P. 1.981(3). "On a motion for summary judgment, the court must: '(1) view the facts in the light most favorable to the nonmoving party, and (2) consider on behalf of the nonmoving party every legitimate inference reasonably deduced from the record.'" *Hoyt v. Gutterz Bowl &*

Lounge L.L.C., 829 N.W.2d 772, 774 (Iowa 2013) (quoting *Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 692 (Iowa 2009)).

III. MERITS

A. The HUD Regulations Were Directly Incorporated Into the Note in Question

Defendants argue that because Plaintiff was contractually obligated in the Note and Mortgage to comply with certain HUD regulations, whether Plaintiff actually complied with those regulations is relevant in determining whether the foreclosure action was proper, and that there is a genuine issue of material fact as to whether Plaintiff actually complied with those regulations. Plaintiff argues that the HUD regulations were not incorporated into the Note or Mortgage, and therefore Plaintiff may properly foreclose on the Property even if it was not in compliance with HUD regulations.

As a preliminary matter, then, this Court must determine whether Plaintiff is contractually obligated to comply with HUD regulations such that failure to do so provides Defendants with a defense to foreclosure. Plaintiff first asserts that “nowhere in [Defendants’] note and mortgage are the HUD regulations even mentioned.” Pl.’s Reply at 3. Plaintiff is mistaken. While the Mortgage in question is silent as to HUD regulations, Paragraph 6(B) of the Note in question expressly provides that, in the event of default, “Lender may, *except as limited by regulations of the [HUD] Secretary in the case of payment defaults*, require payment in full.” Promissory Note at 2 (emphasis added). The Note further acknowledges that “[i]n many circumstances *regulations issued by the [HUD] Secretary* will limit Lender’s rights to require immediate payment in full in the case of payment defaults,” and that the “Note does not authorize acceleration *when not permitted by HUD regulations*.” Promissory Note at 2 (emphasis added).

Defendants rely on *ABN AMRO Mortgage Group, Inc. v. Tullar*, 770 N.W.2d 851 (Table) (Iowa Ct. App. 2009) to support their argument. In *Tullar*, the Iowa Court of Appeals adopted a Maryland Supreme Court ruling and held that, with respect to a note and mortgage, “failure [by the lender] to comply with contractually-incorporated HUD regulations could be raised by the borrower *defensively*.” The court reasoned that, while noncompliance with HUD regulations would not necessarily provide a borrower with a cause of action for breach of contract, “HUD foresaw—and approved—the concept that failure to comply with its . . . rules could be raised as a defense in a foreclosure proceeding,” and so “[t]hat intent should be honored here.” *Id.* at *4. Therefore, it follows that where a note specifically references HUD regulations and expressly provides that it is subject to those regulations, a borrower may raise a lender’s noncompliance with those regulations as a defense to foreclosure.¹

Plaintiff’s only remaining argument is that *Tullar* is unpublished and is therefore not controlling here. Plaintiff’s assertion is unpersuasive. Recently, an Iowa district court relied on *Tullar* in denying a motion for summary judgment on similar grounds. *See Wells Fargo Bank, N.A. v. Cluff*, 2013 WL 3942966 (Iowa Dist., July 10) (basing its denial of summary judgment on the grounds that a genuine issue of material fact existed as to whether a lender complied with federal regulations contractually incorporated into a note and mortgage). The Court finds the reasoning in *Tullar* and *Cluff* persuasive. Thus, the Defendants here may properly defend against foreclosure on the ground that Plaintiff failed to comply with HUD regulations pursuant to their obligations under the note.

¹ While both *Tullar* and the Maryland Supreme Court case *Tullar* references—*Wells Fargo Home Mortgage, Inc. v. Neal*, 398 Md. 705 (2007)—involved situations where both the note *and* the mortgage incorporated the regulations, the Court finds that incorporation of the regulations in the note alone is sufficient to provide Defendants with the defense to foreclosure that Plaintiff’s failed to comply with the HUD regulations.

B. A Genuine Issue of Material Fact Exists with Respect to Whether Plaintiff Complied with All Applicable HUD Regulations

Having determined that Defendants may raise Plaintiff's noncompliance with HUD regulations as a defense to foreclosure, the Court must next determine whether there is a genuine issue of material fact as to whether Plaintiff complied with those regulations.

Defendants argue that Plaintiff failed to comply with numerous HUD provisions contained in 24 C.F.R. § 203(C). Defendants claim Plaintiff: never offered a face-to-face meeting pursuant to 24 C.F.R. § 203.604(b) and that none of the exceptions contained in 24 C.F.R. § 203.604(c) apply; never gave Defendants proper notices pursuant to 24 C.F.R. § 203.602; failed to inform Defendants of HUD officials with whom Defendant could communicate pursuant to § 203.604(e)(2)(iii); has made no showing that foreclosure would result in the smallest financial loss to HUD pursuant to 24 C.F.R. § 203.501; and failed to maintain proper documentation pursuant to 24 C.F.R. § 203.605(a).

Plaintiff provided documentation that it made a "reasonable effort" to initiate a face-to-face meeting with Defendants sufficient to satisfy the requirements of 24 C.F.R. § 203.604(b). However, the HUD Handbook on the Administration of Insured Home Mortgages defines what constitutes a "reasonable effort" to make a face-to-face interview:

2. Definition of "Reasonable Effort" (24 CFR 203.604(d)). . . . [A] "reasonable effort" to arrange a face-to-face interview is considered to include the following actions on the part of the mortgagee:

- a. at least one letter sent to the mortgagor at the property address, sent by Certificate of Mail or by Certified Mail, to which the mortgagor either refuses to accept or which he/she does not respond. . . . and
- b. at least one visit to the property . . . *for which at least one of the reasons for the visit must be to conduct an interview with the mortgagor.*

3. Interviewer's Authority. The employee representing the mortgagee at these

interviews needs to have the authority to propose and accept reasonable repayment plans and/or limit their actions to the realm of that authority.

U.S. Dep't of Hous. & Urban Dev., *Directive No. 4330. 1: Administration of Insured Home Mortgages* Ch. 7 (Rev. 5 1994), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=43301c7HSGH.pdf>. Defendant Garang Majouk claims in his affidavit that while a Bank of America representative did come to his home, the only purpose of the visit was to collect financial documents, and Plaintiff's representative did not interview Defendants.²

Plaintiff's documentation does indicate that a representative visited Defendants, but this is the only evidence Plaintiff provides to prove that a sufficient face-to-face meeting occurred. See Plaintiff's Exhibit A at 4. While the Court today makes no determination regarding the strength of the parties' conflicting evidence, there clearly exists a genuine issue of fact as to whether a sufficient face-to-face meeting occurred, the determination of which may sway the outcome of the case. The Court need not at this time evaluate the Defendants' claims that Plaintiff has failed to comply with numerous other HUD regulations, as a genuine issue exists with respect to the face-to-face meeting requirement pursuant to 24 C.F.R. § 203.604(b). Therefore, Plaintiff has failed to establish that no genuine issue of material of fact exists that entitles it to judgment as a matter of law.

ORDER

IT IS ORDERED that Plaintiff's Motion for Summary Judgment is **DENIED**.

COPIES TO:

Janelle Ewing
Klatt, Odekirk, Augustine,
Sayer, Treinen & Rastede, P.C.

² Defendant's Affidavit in Response to Reply to Resistance to Motion for Summary Judgment at 1-2.

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State of Iowa Courts

Type: OTHER ORDER

Case Number **Case Title**
EQCE073412 BANK OF AMERICA NA VS GARANG M MAJOUK ET AL

So Ordered

A handwritten signature in black ink that reads "Richard G. Blane II". The signature is written in a cursive style with a double underline at the end.

**Richard G. Blane II, District Court Judge,
Fifth Judicial District of Iowa**