

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2015-013865

09/26/2016

HONORABLE JO LYNN GENTRY

CLERK OF THE COURT  
M. King/A. Quintana  
Deputy

U S BANK NATIONAL ASSOCIATION

CRAIG CARSON HOFFMAN

v.

BETH FINDSEN, et al.

BETH K FINDSEN

UNDER ADVISEMENT RULING

Plaintiff U.S. Bank National Association as Trustee for Adjustable Rate Mortgage Trust 2004-2 Adjustable Rate Mortgage-Backed Pass-Through Certificates, Series 2004-2 (“Plaintiff Trust”), acting by and through its Attorney in Fact PNC Bank, N.A. (“PNC Bank”), filed a Motion to Dismiss Defendant Beth Findsen’s and Defendant Marc J. Findsen’s (the “Findsens” or “Defendants”) Counterclaims.

In 2004, Defendants entered into a loan transaction with National City Mortgage Co. (“National City”), evidenced by an Adjustable Rate Note (“Note”) in the original principal amount of \$281,000, payable by Defendants to National City (the “Loan”). The Note was secured by a Deed of Trust (along with the Note, the “Loan Documents”) executed by the Defendants for the benefit of National City. The Loan’s originator, National City, eventually merged into PNC Bank. PNC Bank later assigned the Loan and Loan Documents to Plaintiff Adjustable Mortgage Trust 2004-2 Adjustable Rate Mortgage Backed Pass-Through Certificates Series 2004-2, but PNC remained the servicer for the Loan.

Defendants thereafter ceased paying on their Loan in June 2011. In 2015, PNC Bank notified the Findsens of their defaults under the Loan Documents and gave them 30 days to cure the default. No action was taken to cure the default. Plaintiffs filed a Complaint. In their Answer, Defendants filed a Counterclaim.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2015-013865

09/26/2016

Defendants assert two counterclaims against Plaintiff. First, Defendants claim that Plaintiff breached the covenant of good faith and fair dealing by trying to foreclose on an invalid deed of trust. Second, Defendants assert a quiet title claim/improper recording claim against Plaintiff Trust because Plaintiff Trust purportedly filed fraudulent documents to cloud Defendants' purported title to the Property.

In the Motion to Dismiss, Plaintiffs raise numerous arguments and factual disputes with the Counterclaims of Defendants. One issue raised is Defendants claim that, pursuant to the Truth in Lending Act, 15 U.S.C. §§ 1635(a), (f), they rescinded the Loan in 2009. As a result, Defendants argue that "[t]he Deed of Trust is void and does not secure the Subject Property. There can therefore be no legal foreclosure judgment because there is no security interest." Plaintiffs argue first, that the statutory provisions relied upon by Defendants in making their rescission argument contain limited time periods in which a borrower can attempt to rescind a qualifying loan. Pursuant to 15 U.S.C. § 1635(a):

the obligor shall have the right to rescind the transaction until *midnight of the third business day* following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Bureau, of his intention to do so. 15 U.S.C. § 1635(a)

Plaintiffs argue that the notice of right to cancel/rescission forms and requisite disclosures were provided to and signed by Defendants on August 9, 2004, the same day the Loan was issued. Consequently, any purported right to rescind the Loan transaction expired three business days thereafter, or at midnight on August 12, 2004. Plaintiffs further argue that even if the original lender had not provided the disclosures, there is a statutory catch-all expiration of a borrower's right to rescind a loan transaction. 15 U.S.C. § 1635(d), entitled "Time limit for exercise of right," states unequivocally that:

A obligor's right of rescission shall expire *three years* after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor . . . .  
15 U.S.C. § 1635(d) (emphasis added).

Plaintiffs argue therefor that the Defendants' purported right to rescind the Loan transaction expired on August 9, 2007, three years after the Loan was issued.

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2015-013865

09/26/2016

Plaintiffs further maintain that Defendants rely exclusively on 15 U.S.C. § 1635 but this statute is inapplicable to both “(1) a residential mortgage transaction as defined in section 1602(w) of this title; [and] (2) a transaction which constitutes a refinancing or consolidation (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the same property.” 15 U.S.C. § 1635(e); *see also Infante v. Bank of Am. Corp.*, 680 F. Supp. 2d 1298, 1306 (S.D. Fla. 2009), *aff’d*, 468 F. App’x 918 (11th Cir. 2012) (“As both parties correctly acknowledge, the TILA-based right to rescission does not apply to ‘residential mortgage transactions.’”).

The Court agrees that residential mortgages are an exception to the right of rescission and because Defendants refinanced their purchase money Deed of Trust with the underlying Loan, Defendants’ assertion that their unilateral “rescission” created a void security instrument is legally incorrect.

IT IS ORDERED dismissing this claim from the Counterclaim. Second, Defendants complain that the assignment of the Deed of Trust to Plaintiff was ineffective because the Assignment of Deed of Trust was recorded in 2012, when PNC Bank lacked any interest in the Deed of Trust capable of assignment.

Defendants assert that the assignment of the Loan to Plaintiff Trust failed because the “Assignment was void because it failed to happen on or before October 28, 2004.” Defendants’ allegation that the assignment of the Loan to Plaintiff Trust in 2004 was void because it failed to happen before October 28, 2004 is not factual, but instead is a naked and unsupported legal conclusion that need not be accepted as true. *See Jeter v. Mayo Clinic Arizona*, 211 Ariz. 386, 389, 121 P.3d 1256, 1259 (App. 2005) (a court need not accept as true allegations in complaint that are merely unsupported conclusions).

Plaintiffs maintain that there is no requirement that for a transfer or assignment of a loan to be effective, there must be a contemporaneous recordation of such a transfer or assignment. *See In re Vasquez*, 228 Ariz. 357, 359, 266 P.3d 1053, 1055 (2011).

In the *In re Vasquez* case, there was an assignment of the Note from one mortgage company to another in 2005, but the assignment itself was not recorded until November 2008. *Id.* at 358, 266 P.3d at 1054. When the borrower complained that the assignment did not occur contemporaneously with the recordation thereof, the Arizona Supreme Court, sitting *En Banc*, ruled that there was no requirement for an assignment of a note or deed of trust to be recorded in order for such an assignment to be valid. *Id.* at 359, 266 P.3d at 1055 (“Thus, while the failure to record an assignment of a deed of trust might leave an assignee unprotected against claims by some purchasers or creditors, it does not affect a deed’s validity as to the obligor.”). Implicit in

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2015-013865

09/26/2016

this holding is the notion that a transfer or assignment of a loan need not be accompanied by a contemporaneous recordation of that transfer or assignment.

Without a requirement for a contemporaneous recording of a transfer or assignment of a loan, Defendants' argument that PNC lacked any interest in the Loan to assign in 2012 is incorrect.

IT IS ORDERED dismissing this claim from the Counterclaim.

Defendants also complain that PNC Bank refused to accept payments that Defendants attempted to make on the Loan. Defendants claim that PNC, U.S. Bank's agent, directly prevented the Findsens from paying by (1) returning more than one of the Findsens' regular payments, when they were current; and by (2) refusing to identify the Note Holder, required to be notified before a prepayment could be made.

Plaintiffs argue that PNC is separate from U.S. Bank National Association as Trustee for Adjustable Rate Mortgage Trust 2004-2 Adjustable Rate Mortgage-Backed Pass Through Certificates, Series 2004-2 and therefore this claim must be asserted against PNC Bank, the servicer for the Loan. Defendants argue that PNC Bank acted as an agent for the Plaintiff Trust pursuant to the Power of Attorney attached to Plaintiff's Complaint. If Plaintiff can prove that PNC refused payments on the loan, the agency arrangement between PNC and Plaintiff may be sufficient to allow the counterclaim to stand on this issue.

IT IS ORDERED denying the Motion to Dismiss as to this one issue.

/s/ Hon. Jo Lynn Gentry

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JUDGE OF THE SUPERIOR COURT