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2014

Defendant's Amended Answer, Affirmative Defenses, and Counterclaims, U.S. Bank, National Association v. Dunn, Docket No. 1:12-cv-01963 (Northern District of Illinois 2014)

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

U.S. BANK NATIONAL ASSOCIATION,)
AS TRUSTEE UNDER THE POOLING)
AND SERVICING AGREEMENT)
DATED AS OF APRIL 1, 2002,)
MORGAN STANLY DEAN WITTER)
CAPITAL 1 INC. TRUST 2002-NC2)

PLAINTIFF,)

V.)

CASE NUMBER 1:12-cv-1963

WILLA DUNN,)

Judge John Z. Lee

DEFENDANT.)

WILLA DUNN,)

_____)

COUNTERCLAIMANT,)

V.)

OCWEN FINANCIAL CORPORATION,)

and OCWEN LOAN SERVICING, LLC,)

COUNTER-DEFENDANT.)

**DEFENDANT’S AMENDED ANSWER, AFFIRMATIVE DEFENSES AND
COUNTERCLAIMS**

To James N. Pappas #6291873, Burke Cotstanzan & Carberry LLP,
Julia M. Bochnowski #6301499, Burke Cotstanzan & Carberry LLP,
General Counsel for Ocwen Financial Corporation,
General Counsel for Ocwen Loan Servicing LLC,

NOW COMES the Defendant, WILLA DUNN (“Dunn”), by and through her attorneys
Felix W. Caruso, Linda L. Anderson and Supreme Court Rule 711 Senior Student Interns Mark

Bernachea and Chris Cardona of the John Marshall Law School Pro Bono Program (“JMPB”), and in response states as follows:

ANSWER

1. Plaintiff files this Complaint to Foreclose the Mortgage hereinafter described.

ANSWER: Dunn admits the Plaintiff has filed a Complaint to Foreclose the Mortgage.

2. Jurisdiction of this Court is based on diversity of citizenship, 28 U.S.C. 1332. There is complete diversity and the matters in controversy, exclusive of interest and costs, exceed the sum of \$75,000.

ANSWER: Dunn has insufficient information with which to admit or deny the allegations found in paragraph 2 of the Complaint and demands strict proof thereof.

3. Plaintiff is a national association chartered under the laws of Ohio, and having its principal place of business and headquarters in the State of Ohio.

ANSWER: Dunn has insufficient information with which to admit or deny the allegations found in paragraph 3 of the Complaint and demands strict proof thereof.

4. Defendant(s) is/are a citizen(s) of the following States(s): Willa Dunn the State of IL.

ANSWER: Dunn admits the allegations of paragraph 4.

5. Venue is proper in this District because the Mortgage at issue is secured by property located in this District and because a substantial part of the events or omissions giving rise to the claim occurred here. 18 U.S.C. § 1391.

ANSWER: Dunn has insufficient information with which to admit or deny the allegations found in paragraph 5 of the Complaint and demands strict proof thereof.

6. Plaintiff, elected to accelerate the principal balance due, together with accrued interest, fees and costs, and confirms that election by the filing of this complaint.

ANSWER: Dunn denies the allegations on paragraph 6.

7. Any pre-suit notice requirements have been met, and any and all grace periods have expired or have been waived.

ANSWER: Dunn denies the allegations of paragraph 7.

8. Attached as Exhibit “A” is a copy of the Mortgage. Attached as Exhibit “B” is a true copy of the Adjustable rate note (“Note”) secured thereby. Attached as Exhibit “C” is a copy of the Assignment of Mortgage.

ANSWER: Dunn admits that Plaintiff has attached Exhibits “A”, “B”, and “C” to its complaint.

Dunn denies any further factual allegations contained in paragraph 8.

9. Information concerning mortgage:

a) Nature of instrument: mortgage

ANSWER: Dunn admits the allegations of subparagraph 9(a).

b) Date of mortgage: 02/05/2002.

ANSWER: Dunn admits the allegations of subparagraph 9(b).

c) Mortgage information:

ANSWER: Dunn admits the allegations of subparagraph 9(c).

d) Mortgage Information:

i. Name of Original Mortgagee: New Century Mortgage Corporation

ANSWER: Dunn admits the allegations of subparagraph 9(d)i.

ii. Name of Current Mortgagee:

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE UNDER
THE POOLING AND SERVICING AGREEMENT DATED AS OF
APRIL 1, 2002, MORGAN STANLEY DEAN WITTER CAPITAL I
INC. TRUST 2002-NC2.

ANSWER: Dunn has insufficient information with which to admit or deny of subparagraph

9(d)ii, and therefore demands strict proof therein.

iii. Name of Current Loan Servicer: Ocwen Loan Servicing, LLC

ANSWER: Dunn has insufficient information with which to admit or deny of subparagraph

9(d)iii, and therefore demands strict proof therein.

- e) Date and place of recording: Recorded on 02/21/2002, in the Office of the Will County Recorder's Office.

ANSWER: Dunn admits the allegations of subparagraph 9(e).

- f) Identification of recording: Document/Instrument No. R2002029834

ANSWER: Dunn admits the allegations of subparagraph 9(f).

- g) Interest Subject to Mortgage: Fee Simple

ANSWER: Dunn admits the allegations of subparagraph 9(g).

- h) Amount of Original Indebtedness:, including subsequent advances made under the mortgage: \$171,000.00

ANSWER: Dunn admits the allegations of subparagraph 9(h).

- i) Both the legal description of the mortgaged real estate and the common address or other information sufficient to identify it with reasonable certainty: LOT 4 IN STONE RIDGE UNIT NO.1, BEING A SUBDIVISION OF PART OF THE EAST ½ OF LOT 8, IN THE ASSESSOR'S SUBDIVISION OF THE SOUTHWEST ¼ OF SECTION 7, IN TOWNSHIP 34 NORTH AND IN RAGE 15, EAST OF THE THIRD PRINCIPAL MERIDIAN, AS PER PLAT THEREOF RECORDED AUGUST 3, 1859, IN BOOK 63, ON AN UNNUMBERED SHEET BETWEEN PAGES 160-161 AND A RE-SURVEY RECORDED JUNE 15, 1939 AS DOCUMENT NUMBERS 519211, ACCORDING TO THE PLAT THEREOF RECORDED JUNE 3, 1977 AS DOCUMENT NUMBER R77-18645, IN WILL COUNTY, ILLINOIS.

More Commonly Known As: 2744 Poplar Court

Crete, IL, 60417

Permanent Index No. 16-07-303-004 and 23-16-07-303-004-0000

ANSWER: Dunn admits the allegations of subparagraph 9(i).

- j) Statement as to defaults: The Mortgage is in default due to the failure of the mortgagor(s) to pay the monthly installments of principal, interest, and taxes, from 10/01/2009 through present. There remains an outstanding principal balance of \$229,431.07 with interest accruing on the unpaid principal balance at \$46.27 per day, plus attorney's fees, foreclosure costs, late charges, advances, and expenses incurred by the Plaintiff as a result of the default.

ANSWER: Dunn admits that the mortgage is in default, but denies the reason listed for default.

Dunn further has insufficient information with which to admit or deny any further factual allegations contained in subparagraph 9(j), and demands strict proof thereof.

k) Name of present owner of the real estate: Willa Dunn

ANSWER: Dunn admits the allegations of subparagraph 9(k).

l) Names of other persons who are joined as defendants and whose interest in or lien on the mortgaged real estate is sought to be terminated: None

ANSWER: Dunn has insufficient information with which to admit or deny of subparagraph 9(l).

m) Names of defendants claimed to be personally liable for deficiency, if any:

Willa Dunn

ANSWER: Dunn has insufficient information with which to admit or deny of subparagraph 9(m), and therefore demands strict proof therein.

n) Capacity in which Plaintiff brings this foreclosure: Plaintiff is the legal holder of the indebtedness and the owner of the mortgage given as security given as security therefore.

ANSWER: Dunn has insufficient information with which to admit or deny of subparagraph 9(n) of the Complaint, and therefore, neither admits nor denies said paragraph but demands strict proof thereof.

o) The redemption period terminates on one of the following dates, whichever is later: if the Property is Residential Real Estate:

- i. 7 months from the date the mortgagor [or, if more than one, all the mortgagors]
 1. Have been served with summons or by publication or
 2. Have otherwise submitted to the jurisdiction of the court; or

- ii. Months from the entry of the judgment of foreclosure.
If the Property is Non-Residential Real Estate (i) 6 months from the date the mortgagor [or, if more than one, all the mortgagors]
 1. Have been served with summons or by publication, or

2. Have otherwise submitted to the jurisdiction of the Court, if the commercial real estate; or

iii. 3 months from the entry of the judgment of foreclosure, Pursuant to the terms of the 735 ILCS 5/15-1603, the Court will determine the length of the redemption period upon making a finding, based on the facts and circumstances available to the Court at the time of judgment, that the property is either residential, non-residential, abandoned, or real estate of value less than 90 percent of amount owed.

ANSWER: Dunn admits the allegations of subparagraph 9(o).

p) Facts in support of request for attorney's fee and costs and expenses, if applicable: Pursuant to the terms of the Note and Mortgage, the mortgagee is entitled to recover attorney's fees, court costs, title costs, and other expenses, which Plaintiff has been and will be required to expend in the prosecution of this foreclosure.

ANSWER: Dunn has insufficient information with which to admit or deny of subparagraph 9(p), and therefore demands strict proof thereof.

q) Facts in support of a request for appointment of mortgage in possession or for appointment of receiver, and identity of such receiver, if sought: Plaintiff reserves the right to file a separate Petition for Appointment of Mortgagee in Possession or Receiver, if applicable.

ANSWER: Dunn has insufficient information with which to admit or deny of subparagraph 9(q), and therefore demands strict proof therein.

r) Plaintiff reserves the right to offer, in accordance with Section 15-1402 [735 ILCS 5/15-1402] to accept title to the real estate in satisfaction of all indebtedness and obligations secured by the mortgage without judicial sale.

ANSWER: Dunn has insufficient information with which to admit or deny of subparagraph 9(r), and therefore demands strict proof thereof.

s) Names or names of defendants whose right to possess the mortgaged real estate, after the confirmation of a foreclosure sale, is sought to be terminated and, if not elsewhere stated, the facts in support thereof: Willa Dunn by virtue of being the Mortgagor(s) and/or Owners of record.

ANSWER: Dunn has insufficient information with which to admit or deny of subparagraph 9(s), and therefore demands strict proof thereof.

WHEREFORE, Defendant WILLA DUNN respectfully requests that this Court dismiss this action with prejudice with Plaintiff to bear costs of all parties, and any other just and equitable relief this Court deems appropriate.

FACTUAL ALLEGATIONS COMMON TO ALL AFFIRMATIVE DEFENSES

AND COUNTERCLAIMS

1. Defendant Willa Dunn (“Dunn”) and her husband Maurice Dunn have lived in the single family home located at 2744 Poplar Court, Crete, Illinois, 60417 (“Home”) since 2002.
2. On February 5, 2002, Dunn borrowed \$171,000 and signed a Note (the “Note”) and thirty-year Mortgage (the “Mortgage”) with New Century Mortgage Corporation (“New City”) to purchase a Home in Crete, Illinois.
3. On January 29, 2007, the Note and Mortgage were assigned to Plaintiff, U.S. Bank National Association, as Trustee under the Pooling and Servicing Agreement dated as of April 1, 2002, Morgan Stanley Dean Witter Capital I Inc., Trust 2002-NC2 (“US Bank”).
4. Dunn’s payments under the note, including principle and interest, were originally \$1314.85.
5. In 2009, Dunn suffered a substantial hardship when she lost her job and fell behind on her mortgage payments. Coupled with this hardship, Dunn’s husband Maurice Dunn was falsely convicted of Rape. Mr. Dunn has been excluded in two parts of the DNA testing and continues to await the final test results. This waiting has placed additional emotional strain on the Dunn household, as well as extreme financial hardship.
6. Dunn applied for a mortgage modification through the Home Affordable Modification Program (“HAMP”) with Plaintiff in 2009.

7. Plaintiff is a participant in HAMP.
8. One of the goals of HAMP is to aid homeowners who are in danger of losing their homes because of loss of employment and/or other income by reducing their monthly mortgage payment to a sustainable level, i.e. 31% of the homeowner's gross income.
9. Upon signing a HAMP contract, Plaintiff is procedurally required to review all mortgage loans that are in default or in imminent risk of default.
10. Dunn received a letter in November of 2009 indicating that she had been accepted for a trial HAMP modification from Litton Loan Servicing ("Litton"). The letter stated that Dunn was placed in a Trial Period Plan ("TPP"), with monthly payments of \$1240.11. The plan required three payments to be made on 12/1/2009, 1/1/2010, and 2/1/2010. See Exhibit 1 attached.

11. The TPP states:

"If I am in compliance with this Trial Period Plan (the "Plan") and my representations in Section 1 continue to be true in all material respects, then the Lender will provide me with a Home Affordable Modification Agreement as set forth in Section 3 that would amend and supplement (1) the Mortgage on the Property, and (2) the Note secured by the Mortgage."

It further states:

"This plan shall terminate the day before the Modification Effective Date and the Loan Documents, as modified by the fully executed Modification Agreement, shall govern the terms between the Lender and me for the remaining term of the loan. Provided I make timely payments during the Trial Period and both the Lender and I execute the Modification Agreement, I understand that my first modified payment will be due on Agreement, I understand that my first modified payment will be due on the Modification Effective Date (i.e., on the first day of the month following the month in which the last Trial Period Payment is due).

12. Dunn sent her first payment by check to Litton, along with the documents requested by the TPP, in November 2009. That payment was received and cashed by Litton on 12/2/2009. See Exhibit 2.

13. Dunn sent her second payment by check to Litton, along with the documents requested by the TPP, in December 2009. That payment was received and cashed by Litton on 12/30/2009.
See Exhibit 2.
14. Dunn sent her third payment by check to Litton, along with the documents requested by the TPP, in January 2010. That payment was received and cashed by Litton on 02/02/2010. See Exhibit 2.
15. During the trial modification period, Dunn received a letter dated 01/27/2010 from the Plaintiff requiring Dunn to provide numerous documents. See Exhibit 3. Despite having previously submitted the requested documents, Dunn complied with all of the requests and timely re-sent all required documentation to Plaintiff via fax. Additionally, Dunn followed up with a phone call to Litton to ensure receipt of the documents.
16. Dunn received an additional letter from Litton on May 17, 2010 giving her until June 1, 2010 to provide additional documentation or face termination of her TPP.
17. In a letter dated May 24, 2010, only 7 days after the May 17, 2010 letter, Litton informed Dunn that she had been denied a HAMP modification because she did not send the requested documents within 30 days. The letter also stated that she would be reviewed by Litton for a non-HAMP modification. See Exhibit 2.
18. Dunn attempted to call Litton various times to inquire why she was denied a loan modification and whether Litton was attempting to modify her loan through non-HAMP modifications.
19. Dunn received no other modification or short sale options from Litton.
20. Ocwen Corp. is a publicly traded Florida corporation headquartered in Atlanta, Georgia and Ocwen, LLC is a limited liability company, wholly owned subsidiary servicing company of

Ocwen Corp. located in Palm Beach, Florida (sometimes collectively referred to as, “Ocwen”).

21. On or about September 1, 2011, Ocwen acquired Litton, assuming all liability for claims against Litton, and becoming the servicer for Litton’s loans.
22. Ocwen Corp. became the servicer of record for loans previously serviced by Litton. Ocwen Corp., through its subsidiaries, including Ocwen, LLC, is the servicer for the Pooling & Servicing Agreement, which purportedly governs assets, securities, and/or ownership interests inclusive of Dunn’s subject mortgage, and is liable for the conduct and violations of law described in Dunn’s Answer, Affirmative Defenses and Counterclaims. Ocwen regularly conducts business in the State of Illinois.
23. U.S. Bank filed for foreclosure on March 17, 2012. Dunn was served with foreclosure summons on April 14, 2012 requiring her to file a response to U.S. Bank’s complaint within 21 days. Dunn did not respond to the complaint. Plaintiff motioned for default judgment on May 14, 2012 and it was granted on May 21, 2012.
24. On August 23, 2012, the court recognized Plaintiff’s default judgment and entered a judgment of foreclosure against Dunn.
25. On January 8, 2013 Dunn moved to vacate the judgment of foreclosure and stay the sale of the house. On February 22, 2013, Dunn appeared in the case and motioned for an extension to file a response to Plaintiff’s motion and to stay the sale of the property.
26. On March 5, 2013, the judge granted the extension but denied Dunn’s motion to stay the sale, which was scheduled for March 27, 2013.
27. On March 25, 2013, Judge John Z. Lee denied Dunn’s motion to vacate the judgment and stay the sale of their home.

28. The house was sold on March 27, 2013 for \$138,000.

AFFIRMATIVE DEFENSES

As for her affirmative defenses, Dunn asserts and states as follows:

**First Affirmative Defense
(Unclean Hands)**

29. Dunn re-pleads those allegations set forth above in paragraphs 10-15.
30. Ocwen has unclean hands in this matter after wrongfully denying Dunn a permanent HAMP modification as described in the breach of contract counter claim.
31. The wrongful denial of a permanent HAMP modification is a cause of the alleged default in the subject Note and Mortgage.
32. Ocwen's unclean hands act as a bar to Plaintiff seeking the equitable remedy of foreclosure.

**Second Affirmative Defense
(Breach of Illinois Consumer Fraud Act through Unfairness)**

33. Dunn re-pleads those allegations set forth above in 6-19.
34. Dunn is a "person" and "consumer" as defined by the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 ILCS §§ 505/1(c) and 505/1(e).
35. At all times relevant to this case, U.S. Bank was engaged in commerce and trade in Illinois.
36. U.S. Bank employed unfair and deceptive practices, including but not limited to the following:
- A. Participating in the HAMP program and failing to honestly or effectively implement it;
 - B. Offering to modify Dunn's existing Note under the HAMP program;
 - C. Offering Dunn a permanent modification under the HAMP program in the TPP upon making three payments of \$1240.11 by December 1, 2009, January 1, 2010 and February 1, 2010.

- D. Refusing to honor the November 2009 TPP promise to permanently modify Dunn's mortgage despite its acceptance of Dunn's aforementioned payments;
 - E. Coercing Dunn to re-produce documents that she already presented in order to secure the TPP, and denying her a permanent modification;
 - F. Foreclosing on Dunn's Home, despite the promise to permanently modify her Note under the HAMP program.
37. U.S. Bank's acts and practices were unfair, deceptive and contrary to public policy and generally recognized standards of business.
38. As a direct and proximate cause of U.S. Bank's actions, Dunn has suffered substantial economic harm including but not limited to sale and potential loss of her home, the loss of any equity in the home and damage to her credit.

Additional Defenses Reserved

39. Dunn hereby gives notice that she may rely on other defenses if and when such defenses become known during the course of litigation, and hereby reserves the right to amend her answer to assert any other defenses as become known or available.

COUNTERCLAIMS

NOW COMES Plaintiff WILLA DUNN ("Dunn"), by and through her attorneys F. Willis Caruso, Linda L. Anderson and Supreme Court Rule 711 Senior Student Interns Mark Bernachea and Chris Cardona of the John Marshall law School Pro Bono Program ("JMPB"), to state the following claims against Defendant U.S. Bank National Association as Trustee under the Pooling and Servicing Agreement dated as of April 1, 2002, Morgan Stanley Dean Witter Capital I Inc., Trust 2002-NC2 and Defendants Ocwen Financial Corporation and Ocwen Loan Servicing LLC as follows (sometimes collectively "Defendants"):

Nature of Action:

40. Dunn challenges Defendants' intentional failure to offer a permanent loan modification to Dunn, a qualified borrower. In doing so, Defendants failed to honor their express and implied contractual obligations under the TPP Agreement, and have engaged in business practices that are deceptive, immoral, unscrupulous, unfair and oppressive under Illinois law.

Count I (Breach of Contract)

41. Dunn re-pleads those allegations set forth above in paragraphs 6-19.
42. The November 2009 TPP was an offer by Ocwen to modify Dunn's 2002 Note and Mortgage, forming the basis for this action.
43. The offer was deemed accepted and its terms effective "If I am in compliance with this Trial Period Plan." See Exhibit 1.
44. Dunn's sole obligation was to timely make three trial period plan payments of \$1240.11 due December 1, 2009, January 1, 2010, and February 1, 2010.
45. Dunn complied with all the requirements necessary to accept Ocwen's offer to modify the terms of the 2002 Note and Mortgage.
46. Dunn accepted the offer by making her first payment on December 1, 2009, which Ocwen accepted.
47. Dunn made the second payment on December 30, 2009, which Ocwen accepted.
48. Dunn made the third payment on January 30, 2010, which Ocwen accepted on February 2, 2010.
49. Ocwen subsequently refused to honor their agreement to give Dunn a permanent modification after the trial period payments were made.

WHEREFORE, the Plaintiff WILLA DUNN respectfully requests the following relief:

- A. That this Court enter a judgment declaring Ocwen's acts and practicing complained of herein to constitute breach of contract,
- B. Award Dunn monetary damages resulting from said breach; costs, and any other relief this Honorable Court deems just and appropriate.

Count II (Promissory Estoppel)

- 50. Dunn repeats and re-alleges the allegations set forth in paragraphs 6-19 above, as if fully set forth herein.
- 51. Ocwen unambiguously promised to provide Dunn with a permanent HAMP loan modification if she, in return, executed the Trial Period Plan agreement and satisfied the following two conditions precedent:
 - A. The information she provided regarding her income and eligibility for the loan modification remained accurate during the time period governed by the Trial Period Plan; and
 - B. The Trial Period Plan payments were made timely
- 52. In reliance on that promise, Dunn made three trial period plan payments of \$1240.11 on December 1, 2009, January 1, 2010, and February 1, 2010.
- 53. Dunn's reliance upon the promise of a permanent modification was reasonably foreseeable by Ocwen.
- 54. Dunn relied upon Ocwen's representations to her detriment and has lost money and the opportunity to engage in other remedies, solution or strategies to effectuate a resolution to her mortgage payment difficulties.

WHEREFORE, the Counterclaimant, WILLA DUNN, respectfully requests the following relief:

- A. A judgment declaring the acts and practices of Defendants, complained of herein, to constitute promissory estoppel, together with an award of monetary damages and other available relief, and
- B. Award Dunn the costs of this action, together with reasonable attorney's fees.

Count III (Specific Performance)

- 55. Dunn re-pleads those allegations set forth above in paragraphs 6-19.
- 56. The November TPP is a binding contract between Ocwen and Dunn.
- 57. Ocwen refused to honor the November 2010 TPP.
- 58. Dunn is able and willing to perform her obligations as required by the November 2012 TPP.

WHEREFORE, Counterclaimant, WILLA DUNN, requests that the Court enter a judgment in her favor and against U.S. Bank National Association as Trustee under the Pooling and Servicing Agreement dated as of April 1, 2002, Morgan Stanley Dean Witter Capital I Inc., Trust 2002-NC2, Ocwen Financial Corporation, and Ocwen Loan Servicing LLC for:

- A. Specific performance of the November 2010 TPP;
- B. Finding that the November 2010 TPP modified the 2/5/2002 Note and Mortgage;
- C. Such other or further relief as the court deems appropriate.

Respectfully Submitted,

/S/ Felix W. Caruso
/S/ Linda L. Anderson
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