

FIRST JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

IN THE MATTER OF THE ESTATE OF
MIRIAM LYNETTE GISH, DECEASED,

No. D-101-PB-2015-00006

and

WELLS FARGO BANK, NA,

Plaintiff,

v.

DIANA NIKKEL AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF MIRIAM LYNETTE GISH,

Defendant.

THE PERSONAL REPRESENTATIVE'S ANSWER
TO AMENDED COMPLAINT FOR FORECLOSURE IN REM
AND COUNTERCLAIMS

Defendant, DIANA NIKKEL, as Personal Representative of the Estate of Miriam LynetteGish (hereinafter "Defendant"), by and through its counsel undersigned, for its Amended Answer alleges as follows:

1. Defendant denies the allegations contained in Paragraph 1 of Plaintiff's Amended Complaint.
2. Defendant admits the allegations contained in Paragraphs 2 and 3 of the Amended Complaint.
3. Defendant has insufficient knowledge or information with which to admit or deny the allegations contained in Paragraph 4 of the Amended Complaint, and therefore denies the same.

4. Defendant admits that Plaintiff is a national banking association. Defendant denies that the events that gave rise to this Amended Complaint occurred in Santa Fe County, New Mexico.

5. Defendant admits that Miriam Lynette Gish, (hereinafter “Borrower” or “Decedent”), resided in Santa Fe County, New Mexico. Defendant denies the remaining allegations contained in Paragraphs 6 of the Amended Complaint.

6. Defendant admits the allegations contained in Paragraph 7 of the Amended Complaint, with the exception that the probate proceeding is in District Court.

7. Defendant admits the allegation contained in Paragraph 8 of the Amended Complaint.

8. Defendant denies that the Defendants, Diana Nikkel aka Diana Lynn Nikkel and Carol Gish Schrader, may have an interest in the property by way of Transfer on Death Deed, recorded on August 27, 2008, as Instrument Number 1536498, of the Official Records of Santa Fe County, New Mexico, and states in the affirmative that any Transfer on Death Deed granted has been revoked by the Decedent prior to her date of death. Defendant Nikkel has insufficient knowledge to either admit or deny the remaining allegations in Paragraph 9 of the Amended Complaint, and therefore denies the same. In the affirmative, Defendant states that the mortgage and note are non-recourse instruments that do not give rise to any monetary liability for any Defendant.

9. Defendant has insufficient knowledge to either admit or deny the allegations contained in Paragraph 10 of the Amended Complaint, and therefore denies the same. On information and belief, the United States filed a Disclaimer of interest on behalf of the Secretary

of House and Urban Development on April 28, 2015, in case number D-101-CV-2015-00623. It filed a second Disclaimer of interest on December 11, 2015, in case number D-101-CV-02345. The allegations of Paragraphs 11 and 12 state a legal conclusion for which no response is required and which Defendant does not admit.

10. Defendant admits the allegations contained in Paragraph 13 of the Amended Complaint.

11. Defendant denies the allegations in Paragraphs 14 and 15 of the Amended Complaint and affirmatively states that any Mortgage, Note, and Loan Agreement to which the Amended Complaint refers speak for themselves and denies all allegations in Paragraphs 14 and 15 that are inconsistent with, different in substance from or an incomplete restatement of the entirety of such Mortgage, Note and Loan Agreement. In the affirmative, Defendant further states that pursuant to the terms of the Note and Mortgage, Plaintiff is not entitled to charge unreasonable or unnecessary fees pursuant to the Note and Mortgage and denies that the documents attached as Exhibit A to the Amended Complaint give rise to any liability for any of the alleged amounts.

12. Defendant denies the allegations of Paragraph 15.

13. The allegations of Paragraph 16 of the Amended Complaint state a legal conclusion for which no response is required and which Defendant denies. Defendant has insufficient knowledge or information with which to admit or deny the allegations about Plaintiff's possession of the note or Plaintiff's agents, and therefore denies the same.

14. Defendant admits that Miriam Lynette Gish died on March 21, 2014, states affirmatively that the terms of the Loan and Note to which Paragraph 17 refers speak for

themselves, and denies all allegations in Paragraph 17 that are inconsistent with, different in substance from or an incomplete restatement of the entirety of such Loan and Note. The remaining allegations in Paragraph 17 state legal conclusions for which no response is required and which Defendant does not admit. In the affirmative, Defendant states that Plaintiff has failed to satisfy conditions precedent to accelerating the note.

15. The allegations in Paragraph 18 of the Amended Complaint state legal conclusions for which no response is required and which Defendant does not admit, and in the affirmative states that Plaintiff has not alleged facts sufficient to establish a prima facie interest in the Property.

16. Defendant denies the allegations of Paragraph 19 of the Amended Complaint.

17. The Note and Mortgage to which the allegations in Paragraphs 19, 20, and 21 of the Amended Complaint refers speak for themselves, and Defendant denies all allegations in Paragraphs 19, 20 and 21 that are inconsistent with, different in substance from or an incomplete restatement of the entirety of such Mortgage and Note or are otherwise inconsistent with the law. In the affirmative, Defendant states that the Mortgage and Note are non-recourse instruments that do not give rise to any monetary liability for any Defendant, including for costs, fees, post judgment interest, taxes or insurance, or property preservation, and that to the extent that they can be charged to Defendant at all, they must be reasonable and must be added to the loan balance. Defendant states further that claims for reimbursement for attorney's fees pursuant to the Insurance contract, Note, and Mortgage, are prorated and capped.

18. Defendant denies the allegations of Paragraphs 22, 23, 24, 25, and 26 of the Amended Complaint, and in the affirmative states that Plaintiff's rights and obligations regarding

preservation and sale of the property, as well as the rights of the estate and heirs to purchase or sell the property, are explicitly set forth in the Note, Mortgage, and regulations governing the HECM program.

19. Defendant affirmatively states that the Mortgage to which Paragraph 27 of the Amended Complaint refers, speaks for itself and denies all allegations in Paragraph 27 that are inconsistent with, different in substance from or an incomplete restatement of the entirety of such Mortgage.

Affirmative Defenses

1. Plaintiff's Amended Complaint fails due to lack of standing. Plaintiff has not, nor could it allege facts sufficient to establish that the Note is a negotiable instrument. Thus possession alone is inadequate to establish the right to enforce on behalf of another who may have an enforceable ownership interest and standing to enforce the note.

2. Plaintiff's Amended Complaint fails because the Defendant has the right to and hereby does rescind the transaction under Federal Law. (15 U.S.C. §1635(b)). The Note is not a purchase money obligation that is exempt from the rescission requirements.

3. Plaintiff's Amended Complaint fails due to violations of the Federal Truth in Lending Act (TILA) and Regulation (Reg.) Z, 12 C.F.R. § 226. Wells Fargo is a "creditor" and Defendants are "consumers", as defined by 15 U.S.C. § 1602 (f) and (h), respectively. The HECM Loan is covered by The Truth-In-Lending Act, 15 U.S.C. § 1601 et. seq. ("TILA"). Although these disclosures were required to be given to the borrower not less than three days prior to the closing of the transaction (15 U.S.C. § 1639 (b)(1)), they were not provided.

4. TILA disclosures provided by Plaintiff were materially inaccurate. Failing to affirmatively and timely correct the inaccuracy constitutes an unfair and deceptive practice and gives rise to a right to rescind the note defensively.

5. Plaintiff's Amended Complaint fails because it actively concealed the origination and disclosure documents that would have permitted Defendants to timely rescind the loan. The personal representative for the Estate attempted to cancel the HECM loan upon learning about it, but was lied to about the scope of Wells Fargo's Authority.

6. Plaintiff's Amended Complaint fails because the loan was originated based upon falsified, altered, and forged documents, in violation of federal, state, and common laws, including TILA, RESPA, The National Housing Act and its implementing regulations and HUD guidance, New Mexico's Unfair Trade Practices Act, the Home Ownership Protection Act, unconscionability, and common law fraud, conspiracy to commit fraud, and fraud on the court. Plaintiffs additionally affirmatively concealed its actions in an attempt to prevent Defendants from protecting the statutory and equitable rights and seeking a remedy. It used its position as custodian of the loan file to prevent Defendants from discovering its violations of law and fraud.

7. Plaintiff's Amended Complaint fails because its actions and inactions prevented Defendants from succeeding in their efforts to effectively exercise their right of rescission, including falsely claiming to have a power of attorney on behalf of the decedent.

8. Plaintiff is entitled to and hereby does rescind the note. Wells Fargo should be estopped from asserting any statute of limitations defense with respect to any remedy, counterclaim and affirmative defense that Defendants may have pursuant to equitable principles

including unclean hands, unconscionability, the lack of good faith and fair dealing, breach of fiduciary duty, fraud on the court, and forgery.

9. Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted because the note is hereby rescinded and void and does not give rise to any of the remedies claimed.

10. Plaintiff's Amended Complaint fails because, on information and belief, the note has been securitized contrary to plaintiff's counsel and affiant's statements to the contrary.

11. Plaintiff's Amended Complaint fails because the persons purporting to authenticate the underlying documents do not have personal knowledge of the facts to which they attest. On information and belief, Plaintiff's affiants knowingly signed affidavits that they know to be materially false.

12. Plaintiff's Amended Complaint fails because Plaintiff has failed to mitigate its damages.

13. Plaintiff's Amended Complaint fails because at the time this agreement was signed by Miriam Lynette Gish lacked the mental capacity to enter into this agreement and lacked the mental capacity after it was signed to rescind it.

14. Defendant may be entitled to recoupment of all interests, fees, and costs since the inception of the loan due to violations of TILA, RESPA, and the UPA.

15. Plaintiff violated the New Mexico Home Loan Protection Act.

16. Defendant asserts the non-existence of a default, pursuant to NMSA (1978) 56-21A-6 (E), which Wells Fargo's violated by failing to provide notice that complies with

NMSA 56-21A-6 prior to service of the foreclosure complaint. Defendant sent Wells Fargo a Notice to Known Creditors on April 23, 2014. See Attached Exhibit.

WHEREFORE, Defendant respectfully requests that the Court dismiss Plaintiff's Amended Complaint with prejudice, award Defendant costs and attorneys' fees, and award such further and additional relief as the Court deems just and proper.

Counterclaims of Defendant/Counter-Plaintiff

The foregoing paragraphs are hereby realleged and incorporated herein by reference.

1. To the extent that Plaintiff/Counter-Defendant's Amended Complaint seeks any interest amounts and costs claimed to be due, these amounts should be disallowed because "Plaintiff committed material violations of the Truth in Lending Act, including" that it provided inaccurate Total Annual Loan Cost (TALC) amounts in violation of Federal Laws 15 U.S.C. §1648 and Reg. Z, §226.33. Defendants/Counter-Plaintiffs are therefore entitled to statutory and equitable remedies and damages in an amount to be proved at trial.

2. Defendant asserts the non-existence of a default, pursuant to NMSA (1978) 56-21A-6 (E), which Wells Fargo's violated by failing to provide notice that complies with NMSA 56-21A-6 prior to service of the foreclosure complaint. Defendant sent Wells Fargo a Notice to Known Creditors on April 23, 2014. See Attached Exhibit.

3. Defendants/Counter-Plaintiffs are entitled to an award of recoupment for violations of the Real Estate Settlement Procedures Act ("RESPA") (12 U.S.C. §2601 et seq.) and the New Mexico UPA.

4. At the time this agreement was signed by Miriam Lynette Gish lacked the mental capacity to enter into this agreement and lacked the mental capacity after it was signed to rescind it.

5. Plaintiff/Counter-Defendant's actions violated the New Mexico Home Loan Protection Act. (NMSA 1978, § 58-21A-1 et. seq.). Defendants/Counter-Plaintiffs are therefore entitled to an award of statutory and equitable remedies, actual, compensatory, statutory and punitive damages in an amount to be proved at trial, in addition to attorney's fees, costs and expenses.

6. Plaintiff/Counter-Defendant engaged in unfair, deceptive, and unconscionable trade practices in violation of the New Mexico Unfair Practices Act. (NMSA 1978 §57-12-1 et seq.). Defendants/Counter-Plaintiffs are therefore entitled to an award of statutory and equitable remedies, actual, compensatory, statutory and punitive damages in an amount to be proved at trial, in addition to attorney's fees, costs and expenses.

7. Plaintiff/Counter-Defendant engaged in deceptive trade practices and violated Federal Law, 12 U.S. Code § 1715z-20; section 255(d) of the National Housing Act, and regulations at 24 CFR section 206.41. Defendants/Counter-Plaintiffs are therefore entitled to an award of statutory and equitable remedies, actual, compensatory, statutory and punitive damages in an amount to be proved at trial, in addition to attorney's fees, costs and expenses.

8. The loan was originated based upon falsified, altered, and forged documents, in violation of federal, state, and common laws, including TILA, RESPA, The National Housing Act and its implementing regulations and HUD guidance, New Mexico's Unfair Practices Act,

the Home Ownership Protection Act, unconscionability, breach of fiduciary duty, and common law fraud, conspiracy to commit fraud, and fraud on the court.

Wherefore, Defendants/Counter-Plaintiffs hereby pray that the court declare that the note is rescinded, order the Plaintiffs-Counter-Defendants to release the lien, and that they and their successors and assigns be enjoined from seeking to enforce the note or security interest or pursuing claims based thereon against Ms. Nikkel, the Estate, or the property, *in rem* or otherwise, enter an award of equitable and monetary relief including but not limited to recoupment in an amount to be proved at trial, and award attorney's fees, costs, and expenses in favor of Counter Plaintiff.

Respectfully submitted,

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Attorneys for Defendant and Counter-Plaintiff

Diana Nikkel as personal representative of the

Estate of Miriam Lynette Gish

Certificate of Service

I certify that a true and correct copy of this pleading was submitted to Odyssey for electronic filing on December 11, 2017, and was thereby served on all parties and their counsel of record.

/s/ Mary Lou Boelcke

Mary Lou Boelcke