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IN THE COURT OF COMMON PLEAS
GENERAL DIVISION
BUTLER COUNTY, OHIO

BUTLER COUNTY
COMMON PLEAS COURTS

US BANK NA, as trustee

Plaintiff,

-v-

STEVEN A MCLAUGHLIN, et al

Defendant.

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Case Number: CV 2014 09 2595

JUDGE Michael J. Sage

DECISION AND ENTRY

PROCEDURAL POSTURE

This matter came before the Court on Defendants' (The McLaughlins) Motion to Dismiss. The Defendants argue the Court lacks jurisdiction to hear this matter and a failure to state a claim upon which relief may be granted as their loan modification was not recorded.

Plaintiff counters the modification need not be recorded and the issue is moot as the Defendants defaulted under the modification as agreed upon by the parties.

For the reasons which follow, the motion is granted.

DECISION

Plaintiff brought its complaint as the holder of "pass through" certificates claiming to be the "assignee" of an account owed by The McLaughlins, and attached to the complaint, pursuant to Civ. R. 10(D), are documents purporting to be the account statement; original mortgage; and modification agreement, all between the McLaughlins and CitiBank.

Notably absent from the filings is any documentation of the filing of the amended mortgage.

Defendants' argument this Court may not hear foreclosure matters is without merit and requires no discussion.

According to the Ohio Rules of Civil Procedure, there are certain defenses that may be made by motion. Civil Rule 12(B)(6) allows a motion to dismiss based on the defense of failure to state a claim upon which relief can be granted. A motion to dismiss pursuant to Civ.R. 12(B)(6) carries a heavy burden. This motion will only be granted when it appears "beyond doubt from the complaint that the Plaintiff can prove no set of facts entitling him to recovery." *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77 at 80. The court must also "presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." *Mitchell v. Lawson Milk Company* (1988), 40 Ohio St.3d 190, at 192.

In resolving a Civ.R. 12(B)(6) motion to dismiss, the trial court may consider only the statements and facts contained in the pleadings and may not consider or rely on evidence outside the complaint. *Estate of Sherman v. Milhon* (1995), 104 Ohio App.3d 614, 617, 662 N.E.2d 1098, 1100. When a motion to dismiss presents matters outside the pleadings, the trial court may either exclude the extraneous matter from its consideration or treat the motion as one for summary judgment and dispose of it pursuant to Civ.R.56. *Powell v. Vorys, Sater, Seymour & Pease* (1998), 131 Ohio App.3d 681, 723 N.E.2d 596.

The Court declines to treat the present motion as a move for summary judgment, noting some Defendants' arguments are arbitrary and capricious, without merit and seek to avoid answering allegations against them through mystical assertions of technical deficiencies.

Nonetheless, this Court believes a strict reading of R.C. §5301.23 favors the Defendants, holding in the relevant part, “. . . [a]ll amendments or supplements of mortgages, or **modifications**, or extensions of mortgages or of the debts secured by mortgages **shall** be recorded in the office of the county recorder of the county in which the mortgaged premises are situated and **shall take effect at the time they are delivered to the recorded for record. . . .”** *emphasis added*

Here, Plaintiff failed to fulfill all the requirements enunciated and expanded by the Ohio Supreme Court in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, (2012), 134 Ohio St. 3d 13, 2012-Ohio-5017 The recording statute is not as Plaintiff would have the Court believe, only to serve as notice to junior lien holders, but a system of legal recordings necessary to advance claims against defendants while protecting the innocent.

This Court prefers to follow the precepts of *Svoboda v. Brunswick*, 6 Ohio St. 3d 348, 351, 453 N.E. 648 (1983) that courts should seek to “. . . adjudicate cases on the merits. . . .” however, in this matter, Plaintiffs rushed to the bar and failed to fully execute all the requisite steps prior to presenting their claim.

The Court finds Plaintiff lacks standing and failed to state a claim upon which relief may be granted through its failure to properly record the modification and protect its

interest.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED Defendants'

Motions to Dismiss is **GRANTED**.

SO ORDERED.

ENTER,



MICHAEL J. SAGE, Judge

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Judge Michael J. Sage
Common Pleas Court
Butler County, Ohio