

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

FILED
FIRST JUDICIAL
DISTRICT COURT
2016 APR 11 AM 9:52



NO. D-101-CV-2015-02177

U.S. BANK, NATIONAL ASSOCIATION, AS
TRUSTEE FOR C-BASS 2007-SPI TRUST,
MORTGAGE LOAN ASSET –BACKED
CERTIFICATES, SERIES 2007-SP1,

Plaintiff,

v.

MUKHTIAR S. KHALSA, GURNAM K. KHALSA,
JPMORGAN CHASE BANK, N.A. AND UNKNOWN
TENANTS, REAL NAMES UNKNOWN,

Defendants.

**MEMORANDUM IN SUPPORT OF THE MOTION TO DISMISS
UNDER AN UNCONSCIONABLE CONTRACT AS A
MOTION FOR SUMMARY JUDGMENT UNDER RULE 12(B)(6)**

COMES NOW, Defendant, Mukhtiar S. Khalsa, by and through his own counsel, and for this Memorandum in Support of the Motion to Dismiss under an Unconscionable Contract as a Motion for Summary Judgment under Rule 12(B)(6) states;

INTRODUCTION

In Section I of Plaintiff's Response to Defendant, Mukhtiar S. Khalsa's Motion to Dismiss under an Unconscionable Contract ("Response to MTD") Defendant, Mukhtiar S. Khalsa's Motion to Dismiss under an Unconscionable Contract ("MTD") is described as a Rule 12(B)(6) motion¹. Rule 12(B) requires a Rule 12(B)(6) motion to "*be treated as one for summary judgment and disposed of as provided in Rule 1-056 NMRA*". Pursuant to Rule 12(B) this memorandum in support of summary judgment constitutes "*a short, concise statement of all of the material facts as to which the moving party contends no genuine issue exists*" as required under Rule 1-056(D)(2).

¹ Response to the MTD Section I at page 2 first line in the first paragraph

MATERIAL FACTS TO WHICH NO GENUINE ISSUE EXISTS

FACT 1; The allegations in both the Complaint and the Amended complaint depend on the entire terms of the contract of the mortgage loan, which, are in some part expressed by the subject mortgage (herein aka “Mortgage”)

FACT 2; “Uniform Covenant 16” of the Mortgage states: *“All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law.”*

FACT 3; “Definition (H)” of the Mortgage states: *“Applicable Law” means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.”*

FACT 4; “Uniform Covenant 20” of the Mortgage states: *“Sale of Note; The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower.”*

ARGUMENTS AND AUTHORITIES

Under Rule 1-056(C) judgment sought shall be rendered forthwith if the pleadings, and admissions on file, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FACTS 1 thru 4 show this Mortgage is defined as an unconscionable contract

Within the four corners of the MTD it is argued that four conditions exist that make this Mortgage an unconscionable contract. These conditions are;

1. The contractual terms of this Mortgage do not comport to law².
2. The contractual terms of this Mortgage are self contradictory.
3. The contractual terms of this Mortgage are meant to allow the mortgagee the right to prosecute, but not meant to allow the mortgagor an effective means to challenge the mortgagee's right to prosecute.³
4. This Mortgage has all three elements that define an adhesion contract⁴;

Plaintiff raises no genuine issue to oppose FACT 1

A mortgage loan is an entire bundle of rights which must remain complete for enforcement to remain available. The NMSC has very recently taken judicial notice that; liberalization of the rules involving those rights creates an unearned windfall for mortgagees⁵.

Section III⁶ of Plaintiff's Response to the MTD agrees with the MTD and builds a strong case that splitting, or bifurcation, of rights is not allowable under New Mexico Law. It is undisputed by Plaintiff that all rights must be held by one possessor⁷.

² See *Guthmann*, 103 N.M. at 511, 709 P.2d at 680 ¶ 22 Substantive unconscionability concerns the legality and fairness of the contract terms themselves. *Cordova v. World Finance Corp. of NM*, 208 P. 3d 901 ¶ 22- NM: Supreme Court (2009)

³ Contract provisions that unreasonably benefit one party over another are substantively unconscionable. *Cordova v. World Finance Corp. of NM*, 208 P. 3d 901)¶ 25- NM: Supreme Court (2009).

⁴ Three elements must be satisfied before an adhesion contract may be found. First, the agreement must occur in the form of a standardized contract prepared or adopted by one party for the acceptance of the other. Second, the party proffering the standardized contract must enjoy a superior bargaining position because the weaker party virtually cannot avoid doing business under the particular contract terms. Finally, the contract must be offered to the weaker party on a take-it-or-leave-it basis, without opportunity for bargaining. *Cordova v. World Finance Corp. of NM*, 208 P. 3d 901) ¶ 33- NM: Supreme Court (2009)

⁵ See *Levitin*, supra, at 650-51 ("A mortgage loan involves a bundle of rights, including procedural rights. These procedural rights are not merely notional; they are explicitly priced by the market. Mortgage finance availability and pricing is statistically correlated with variations in procedural protections for borrowers. Retroactively liberalizing the rules for mortgage enforcement creates an unearned windfall for mortgagees." (footnote omitted)). *Deutsche Bank v Johnston* NMSC No. S-1-SC-34726 (March 3, 2016) Pg 20 line 02-07

⁶ Response to the MTD Section III pages 4 & 5

⁷ possession clarifies title because there can be only one possessor at a time," *Deutsche Bank v Johnston* NMSC No. S-1-SC-34726 (March 3, 2016) Pg 18 line 09-10

Plaintiff raises no genuine issue to oppose that FACT 4 shows the terms of the Mortgage do not comport to law

Plaintiff does tentatively admit that “*the terms of the Note may provide for a partial assignment*”⁸. Because as explained above, Plaintiff’s Response and the MTD both make the case that splitting, or bifurcation, of rights is not allowable under New Mexico Law, and FACT 4 shows the terms of the Mortgage allow, through “partial sale”, splitting or bifurcation of rights. FACT 4 shows the terms of the Mortgage do not comport to law and Plaintiff raises no genuine issue to oppose that is true.

Plaintiff raises no genuine issue to oppose that FACTS 2 thru 4 show the terms of the Mortgage are self contradictory

Because under the FACT 4, the option for bifurcation is obligatory, and under FACT 2 & 3 the submission to applicable law is mandatory, the terms of the Mortgage contract are self-contradictory. The Mortgage contract is incongruous and unconscionable and Plaintiff raises no genuine issue to oppose that is true.

Plaintiff raises no genuine issue to oppose that FACT 4 shows the terms of the Mortgage create an advantage for the mortgagee

FACT 4 shows the contractual terms of the Mortgage mandate that any sale of the Note can occur without prior notice to borrower. This means, of course that the real owner of the Note will not be known to Mr. Khalsa until the real owner chooses to reveal itself. Plaintiff postulates

⁸ Response to the MTD Section III at page 4 third line in the first paragraph

“The right of an assignee to enforce the mortgage is dependent upon the right to enforce the note, Romero, ¶ 35.”⁹

Therefore FACT 4 shows the contractual terms of this Mortgage are meant to allow the mortgagee the right to prosecute, but not meant to allow the mortgagor an effective means to challenge the mortgagee’s right to prosecute, creating an unfair advantage for the lender and rendering the Mortgage an unconscionable contract¹⁰. Plaintiff raises no genuine issue to oppose that is true.

Plaintiff raises no genuine issue to oppose that FACT 4 shows the terms of the Mortgage create an adhesion contract

Plaintiff raises no genuine issue to oppose that this Mortgage has all three elements that define of an adhesion contract;

- a. The Mortgage occurred in the form of a standardized contract prepared or adopted by New Century Bank for the acceptance of the Mr. Khalsa,
- b. When New Century Bank proffering the Mortgage it enjoyed a superior bargaining position because Mr. Khalsa virtually could not avoid doing business under the particular contract terms,
- c. New Century Bank offered the Mortgage to Mr. Khalsa on a take-it-or-leave-it basis, without opportunity for bargaining

Plaintiff raises no genuine issue to oppose that its improperly attempted collection under an unconscionable contract is a violation of the Unfair Practices Act

Plaintiff strongly agrees in the Introduction¹¹ of the Response to the MTD that unearned windfalls cannot have a place in equity¹². The intent of the Unfair Practices Act is to prevent

⁹ Response to the MTD Section II at page 3 second line from the bottom

¹⁰ Contract provisions that unreasonably benefit one party over another are substantively unconscionable. *Cordova v. World Finance Corp. of NM*, 208 P. 3d 901)¶ 25- NM: Supreme Court (2009).

¹¹ Response to the MTD Introduction first paragraph page 2

¹² MTD page 4 paragraph 14 last line

unearned windfalls for businesses that attempt to collect what is not due to them, irregardless whether it due to someone else. Plaintiff raises no genuine issue to oppose that is true

CONCLUSION

Within the four corners of the MTD it is argued that four conditions exist that make this Mortgage an unconscionable contract. Plaintiff raises no genuine issue to oppose that FACTS 1 thru 4 show that those four conditions exist

The pleadings, and admissions on file, show that there is no genuine issue to oppose any material fact and Defendant as the moving party is entitled to a judgment as a matter of law, the judgment sought should be rendered forthwith.

Respectfully submitted:



Mukhtiar S. Khalsa
P.O. Box 593
Santa Cruz, NM 87567
505-450-2802

I hereby certify that a true and correct copy of the foregoing pleading was mailed on this 11th day of April, 2016 to opposing counsel.



Mukhtiar S. Khalsa

Attorneys for Plaintiff:

Andrew Yarrington, Esq.
ROSE L. BRAND & ASSOCIATES, P.C.
7430 Washington Street, NE
Albuquerque, NM 87109
Telephone: (505) 833-3036

Thomas L. Johnson, Esq.
JOHNSON LAW FIRM, LC
111 Lomas Blvd. NW, Suite 205
Albuquerque, NM 87102
Tel (505) 243-4549

Kerri L. Allensworth, Esq.
HOUSER & ALLISON, APC
111 Lomas Blvd. NW, Suite 205
Albuquerque, NM 87102
(949) 679-1111