

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

BAC HOME LOANS SERVICING, )	
FKA COUNTRYWIDE HOME )	C.A. No. 09L-12-117-PLA
LOANS SERVICING LP )	
)	
Plaintiff, )	
)	
v. )	
)	
ALICIA A. BROOKS, )	
)	
Defendant. )	

**ON PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT  
GRANTED**

Submitted: January 5, 2012  
Decided: February 3, 2012

This 3rd day of February, 2012, it appears to the Court that:

1. This is a mortgage foreclosure action arising out of a mortgage on residential property owned by defendant Alicia A. Brooks (“Brooks”) in New Castle, Delaware. The mortgage has been in default since March 2009 because of Brooks’ alleged failure to make monthly mortgage payments. The mortgage instrument contained an acceleration clause providing for the immediate payment of the principal debt in the event of thirty days default in the payment of principal, interest, insurance or taxes. A writ of *scire facias* was issued on December 14, 2009. Notice of foreclosure was served on Brooks on January 13, 2010.

2. Brooks, who is acting *pro se* in this matter, responded to the Complaint on February 17, 2010. Brooks denied BAC's allegation that she had failed to make monthly mortgage payments. She also raised four justifications for her alleged failure to pay the mortgage, which she termed "Affirmative Defenses." First, Brooks states that she was wrongfully terminated from her employment at the Delaware Psychiatric Center on April 21, 2009. She also asserts that she notified BAC as early as March 3, 2009 that she was having increasing difficulty meeting her mortgage payments, but that she continued to make her mortgage payments "or offers thereof." Brooks next argues that BAC was unwilling to offer loan modification or other assistance under the federal Homeowner Affordability and Stability Plan.<sup>1</sup> Finally, Brooks contends that she listed her house for sale with a real estate agent on December 28, 2009 and that BAC did not cooperate with her in her efforts to sell the house. In her conclusion, Brooks

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<sup>1</sup> In support of her arguments, Brooks submitted five letters that were written to BAC and various government agencies between March 2009 and August 2009 seeking assistance through the Homeowner Stability and Affordability Program. On March 3, 2009, Brooks wrote a letter to BAC asserting that her mortgage payment exceeded 31% of her monthly gross income and asking BAC to help her relocate to a larger house. Brooks sent a substantially identical letter on June 26, 2009, in which she acknowledged that her first request for loan modification had been denied. On April 13, 2009, Brooks sent a letter to the U.S. Department of Treasury complaining that BAC had not promptly assisted her with her request for loan modification under the Homeowner Stability and Affordability Plan. On August 10, 2009, Brooks notified BAC of her desire to short sell her house to the bank so she could relocate and pay off her mortgage. On November 18, 2009, Brooks sent a letter to the Office of the State Bank Commissioner of the State of Delaware complaining that representatives from BAC had not worked with her in her efforts to resolve the delinquency on her mortgage payments.

asserts that BAC breached its contractual obligations by refusing to allow her time to sell the house, which she further asserts was “underwater” and not worth the \$140,050 on the mortgage. Brooks asked the Court to order a negotiated settlement including time to sell the property in order to cover the outstanding balance on the mortgage.

3. Discovery in this case has been quite limited. BAC served Brooks with a first set of interrogatories, requests for production, and requests for admission on November 29, 2011. According to BAC’s Motion for Summary Judgment, the discovery requests included a request to admit that Brooks secured a loan on the property with BAC, that Brooks failed to make payments when due, and that the loan is currently in default with no payments having been made since March 2009. BAC asserts that Brooks responded with a letter dated December 30, 2011, which included a response, a counter-claim, a copy of the original answer, described above, and an eighteen-page Motion to Dismiss. BAC notes that Brooks did not respond to its request for admissions. Brooks subsequently attempted to file her Motion to Dismiss, along with a motion for extension of time to file discovery and dispositive motions, in this Court on January 11, 2012. Those filings were rejected by the Court for being untimely and for exceeding the page limitations set forth in the Superior Court Civil Case Management

Plan. Brooks then moved for Certification of an Interlocutory Appeal of the Court's order, which was denied.<sup>2</sup> Brooks has now filed a motion to have this Judge recused from considering her case.

4. BAC has filed the present Motion for Summary Judgment, arguing that the record presents no genuine issue of material fact. In response, Brooks argues that she attempted to raise the affirmative defense of unconscionability and the counterclaims of breach of contract and fraud in the rejected Motion to Dismiss. Brooks further argues that BAC failed to conduct a title search on the property. Finally, Brooks contends that this litigation belongs in the Delaware Court of Chancery or the United States District Court for the District of Delaware because of the equitable nature of the claims involved and asks this Court to exercise its authority to transfer this case to a court of equity.

5. When considering a motion for summary judgment, the Court examines the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law.<sup>3</sup> Initially, the burden is placed upon the moving party to

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<sup>2</sup> *BAC Home Loans Servicing v. Brooks*, C.A. No. 09L-12-117-PLA (Del. Super. Jan. 18, 2012) (ORDER).

<sup>3</sup> Super. Ct. Civ. R. 56(c).

demonstrate that his legal claims are supported by the undisputed facts.<sup>4</sup> If the proponent properly supports his claims, the burden “shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder.”<sup>5</sup> Summary judgment will only be granted if, after viewing the evidence in the light most favorable to the non-moving party, there are no material facts in dispute and judgment as a matter of law is appropriate.<sup>6</sup> Furthermore, summary judgment is inappropriate “if, upon an examination of all the facts, it seems desirable to inquire thoroughly into them in order to clarify the application of the law to the circumstances.”<sup>7</sup>

6. This motion for summary judgment presents two questions: (1) whether Brooks defaulted on her mortgage payments, thereby entitling BAC, as the lender, to foreclose on the property pursuant to the mortgage instrument; and if so, (2) whether Brooks has any legal defense to nonpayment that would protect her from foreclosure. On the record before the Court, the Court finds that the answer to both questions is no.

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<sup>4</sup> *E.g.*, *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879 (Del. Super. 2005).

<sup>5</sup> *Id.* at 880.

<sup>6</sup> *Id.* at 879-80.

<sup>7</sup> *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

7. “A lender may accelerate a mortgage for a default in payments on principal, interest or taxes if provided for in the mortgage contract.”<sup>8</sup> BAC has asserted that Brooks stopped making mortgage payments after March 2009 and has shown that the mortgage contained an acceleration clause. BAC also contends that Brooks’ failure to respond to its requests for admission constitutes an admission by default that she stopped making her mortgage payments. However, it is not appropriate to use requests for admission to establish ultimate facts in issue or to deprive the other party of a decision on the merits.<sup>9</sup> Regardless, the Court is satisfied that there is no genuine issue of material fact over whether Brooks made her mortgage payments. Here, Brooks has failed to carry her burden of showing that disputed facts remain for resolution by this Court. Although she denied in her Answer that she had defaulted on the mortgage, she has not presented any evidence in support of her claim. At best, the letters submitted by Brooks show that she made efforts to inform BAC of her financial difficulties and unsuccessfully attempted to negotiate a deal that would relieve her of her obligations under the mortgage. The Court has no basis for finding that there is a dispute as to whether Brooks had continued to make her mortgage payments.

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<sup>8</sup> *Jeffrey v. Seven Seventeen Corp.*, 461 A.2d 1009, 1010 (Del. 1983).

<sup>9</sup> *Bryant ex rel. Perry v. Bayhealth Medical Center, Inc.*, 937 A.2d 118, 126 (Del. 2007).

8. Similarly, Brooks has not presented any valid *legal* defense to this foreclosure action. In her Answer to the Complaint, Brooks provides a number of reasons why she could not pay her mortgage, including her unemployment and BAC's unwillingness to provide assistance with her payments or with selling her house. These are not legally cognizable defenses to foreclosure. While the Court is sympathetic to Brooks' financial difficulties, the law does not permit the Court to stop a foreclosure action on the grounds that the defendant could no longer afford the mortgage.

9. Brooks' arguments in her response to BAC's motion to summary judgment fail to establish that there is a genuine issue of material fact in this case. Brooks' assertion that a genuine issue of material fact exists because she has the affirmative defenses of fraud and unconscionability and the counterclaim of breach of contract must fail because Brooks has not sufficiently pled any of these claims.<sup>10</sup> Nor does Brooks' conclusory allegation that BAC failed to conduct a title search on

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<sup>10</sup> Super. Ct. Civ. R. 8(c) requires a party to assert any affirmative defenses, including fraud and unconscionability "[i]n pleading to a preceding pleading." Unconscionability, along with other affirmative defenses, must be raised in an answer to a complaint. *Jeffrey v. Seven Seventeen Corp.*, 461 A.2d 1009, 1011 (Del. 1983). Similarly, Brooks' claim of breach of contract was required to be asserted in the answer by Super. Ct. Civ. R. 13(a). Though Brooks does use the phrase "breach of contract" in her answer to the complaint, she sets forth no explanation for how such breach occurred. Similarly, Brooks offers nothing to support her claims of unconscionability or fraud other than the fact that this foreclosure is occurring. Even under the relaxed pleading standards normally afforded to *pro se* litigants, these conclusory allegations of harm are insufficient to show that a genuine issue of material fact exists.

the property show the existence of a genuine issue of material fact for the purposes of this summary judgment motion. It is not clear why Brooks is making this argument. However, the information Brooks is seeking is part of the public record, and Brooks could have presented it to the Court herself if she were so inclined. Finally, Brooks' suggestion that BAC has brought this action in the Superior Court as a means of gaining tactical advantage and that the case should be transferred to the Court of Chancery or to the United States District Court for the District of Delaware because of the equitable nature of her claims is entirely without merit.<sup>11</sup>

11. After having reviewed the record in this case, the Court is satisfied that no genuine issue of material fact exists. Accordingly, Plaintiff BAC's motion for summary judgment is GRANTED.

**IT IS SO ORDERED.**

*/s/ Peggy L. Ableman*  
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**PEGGY L. ABLEMAN, JUDGE**

Original to Prothonotary

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<sup>11</sup> 10 *Del. C.* §5061(a) (2012) provides, “[U]pon breach of the condition of a mortgage of real estate by nonpayment of the mortgage money [...] the mortgagee’s heirs, executors, administrators, successors, or assigns may, at any time after the last day whereon the mortgage money ought to have been paid or other conditions performed, sue out of the Superior Court of the county wherein the mortgage premises are situated a writ of scire facias upon such mortgage....” Brooks’ argument that this case should be heard in the Court of Chancery or the District Court because of the equitable nature of her claims is conclusory and unsupported by law or fact.