

IN THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT, IN AND
FOR LAKE COUNTY, FLORIDA

CASE NO.: 2012 CA 003633

JPMORGAN CHASE BANK, NATIONAL
ASSOCIATION
PLAINTIFF

vs.

BOBBY G. GARNER, JR, et al
DEFENDANT(S)

CIRCUIT CIVIL DIVISION

COMMISSION
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PLAINTIFF'S REPLY AND MOTION TO STRIKE AFFIRMATIVE DEFENSES

Plaintiff, JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, by and through its undersigned counsel, pursuant to Florida Rules of Civil Procedure Rule 1.140 and all other applicable rules, files this, its Reply to and Motion to Strike the Affirmative Defenses of Defendants, CITY ELECTRIC COMPANY ("Defendant(s)"), and states as follows:

1. This is an action to foreclose a residential mortgage based upon a failure to pay the sums due under the note and mortgage executed by the Defendants.

2. In defense of this action, Defendants have asserted 4 defenses which is founded upon speculation or legal conclusions and none of which is supported by facts or law necessary to constitute a defense to this action.

3. Affirmative defenses must not merely allege legal conclusions; they must allege facts in support of their conclusions. *L.B. McLeod Const. Co. v. Cooper*, 134 So. 224, 225 (Fla. 1931); *Zito v. Washington Fed'l Sav. & Loan Assoc. of Miami Beach*, 318 So. 2d 175, 176 (Fla.

3d DCA 1975).

4. Allegations in an Answer that purport to be affirmative defenses, but which are nothing more than denials or conclusions of law, must be stricken. *Wiggins v. Protmay*, 430 So.

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2d 541 (Fla. 1st DCA 1983). Certainty is required when pleading affirmative defenses and pleading conclusions of law unsupported by allegations of ultimate fact is legally insufficient. *Bliss v. Caramona*, 418 So. 2d 1017 (Fla. 3d DCA 1982) (citing *Chris Craft Industries, Inc. v. Van Valkenberg*, 267 So. 2d 642 (Fla. 1972)). “[T]he requirement of certainty will be insisted upon in the pleading of a defense; and the certainty required is that the pleader must set forth the facts in such a manner as to reasonably inform his adversary of what is proposed to be proved in order to provide the latter with a fair opportunity to meet it and prepare his evidence.” See *Zito v. Washington Fed’l Savings & Loan Ass’n*, 318 So. 2d 175, 176 (Fla. 3rd DCA 1975).

5. A “defense” under Florida law is any allegation raised that, if true, would defend the Plaintiff’s cause of action. *Martin County v. Edenfield*, 609 So. 2d 27 (Fla. 1992). The defendant must prove the factual existence of defenses and their legal sufficiency. *Id.* In pleading a defense, a party “must set forth the facts in such a manner as to reasonably inform his adversary of what is proposed to be proved in order to provide the latter with a fair opportunity to meet it and prepare his evidence. “ *Zito*, 318 So. 2d at 176. Moreover, in pleading affirmative defenses “[t]he grounds on which any of the enumerated defenses are based and the substantial matters of law intended to be argued *shall be stated specifically and with particularity* in the responsive pleading or motion.” Fla. R. Civ. P. 1.150(b) (emphasis added).

6. Plaintiff hereby replies to Defendant(s) Affirmative Defenses as follows:

7. Certainty is required when pleading affirmative defenses and pleading conclusions of law unsupported by allegations of ultimate fact is legally insufficient. *Bliss v. Carmona*, 418 So.2d 1017 (Fla. 3rd DCA 1982) citing *Chris Craft Industries, Inc. v. Van Valkenberg*, 267 So.2d 642 (Fla. 1972); *Ellison v. City of Fort Lauderdale*, 175 So.2d 198 (Fla. 1965).

8. Defendant, CITY ELECTRIC SUPPLY COMPANY, has failed to plead any facts with certainty concerning to the above styled action. No facts were pled, by Defendant, about when a lien on the property was granted, where it was recorded, and to whom the lien is granted in favor of.

9. Furthermore, Defendant, CITY ELECTRIC SUPPLY COMPANY, has failed to affirmatively state whether they possess a lien against the property listed in the above styled action.

10. Plaintiff has adequately stated a cause of action in accordance with Florida Statute 702.10 and with Florida Rules of Civil Procedure Form 1.944 which requires no more than the inclusion of the following allegations in a foreclosure complaint:

- A. It is an action to foreclose a mortgage.
- B. The defendant executed the note and mortgage; the mortgage was recorded; and that copies are attached of those instruments.
- C. The identity of the property owner.
- D. There has been a default.
- E. The loan has been accelerated.
- F. The amount owed.
- G. The plaintiff's entitlement to recover attorney's fees.

11. Plaintiff has successfully alleged the above requirements of Florida Law in its Complaint. In its complaint, Plaintiff states, "Plaintiff is the servicer of the loan and is the holder of the note and mortgage. Plaintiff is entitled to enforce Mortgage and Note pursuant to Florida Statutes § 673.3011." (*See* Complaint, at ¶ 5). Furthermore, Plaintiff asserts that all conditions precedent to the institution of this foreclosure action by the Plaintiff have been fulfilled or have occurred. (*See* Complaint, at ¶ 19).

12. For purpose of ruling on a motion to dismiss, a court must assume that all facts alleged in the complaint are true. *Hammonds, supra, p 11; H.E. Temples v. Florida Industrial*

Construction Co., 310 So.2d 326 (Fla. 2d DCA 1975). Within the four corners of the Complaint, Plaintiff has alleged all that Florida Law requires to successfully state a cause of action for foreclosure upon property.

13. Finally, Purchase Money Mortgages have priority over all prior claims or liens that attach to the property through the mortgagor, even if latter be prior in time. *BancFlorida v. Hayward*, 689 So.2d 1052, 1054 (Fla. 1997); *Sarmiento v. Stockton, Whatley, Davin & Co.*, 399 So.2d 1057, 1058 (Fla. 3d DCA 1981).

WHEREFORE, Plaintiff hereby requests that the Court find Defendant's Affirmative Defenses legally insufficient to prevent the entry of judgment and grant Plaintiff the relief sought herein, and for other relief the court deems just and proper.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY AND MOTION TO STRIKE was sent via U.S. Mail and/or Email to all parties pursuant to the attached Service List this 10 day of January 2013

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