

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-000589

03/25/2009

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

FLAGSTAR BANK F S B

JANICE LYNN CELOTTI

v.

AMERICAN DISCOUNT MORTGAGE INC, et al. JOSEPH JAMES GLENN

REX A CHRISTENSEN

UNDER ADVISEMENT RULING

(Plaintiff's Motion For Summary Judgment and Defendant/Third-Party Plaintiff's Cross-Motion For Summary Judgment)

Plaintiff Flagstar Bank purchased the Price loan from Defendant ADM based on the terms of a contract. It then sold it as part of a package to Fannie Mae; however, Fannie Mae, based on its own appraisal, rejected the Price loan as inadequately secured and in July 2003 required Flagstar to repurchase it. Instead of immediately turning to ADM, Flagstar held onto the property for some fourteen months, eventually selling it in September 2004. Finally, in August 2007 Flagstar notified ADM of the repurchase and demanded that ADM repurchase the loan and/or indemnify it.

A review of the Complaint reveals no claim for indemnification. Paragraph 16 says, "Paragraph 5.1 of the Contract provides that ADM shall tender to Flagstar the 'repurchase price' for any loan which ADM sold to Plaintiff which Plaintiff was required to repurchase from its investor for any reason involving the origination or closing of the loan." Nowhere is Paragraph 4.1, the indemnification article, mentioned. Paragraph 17 continues, "Flagstar received a repurchase demand from its investor due to the appraisal misrepresentations. Flagstar made written demand upon Defendant, however Defendant refuses to comply with the Contract." The

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relief sought in the “written demand” is not identified, and it was not attached; again, the only contractual provision to which the Complaint refers is that requiring repurchase, so the claim that ADM “refuses to comply with the Contract” can only be taken to mean it refuses to repurchase the loan. (Paragraph 15, to which Plaintiff’s counsel referred at oral argument, merely says, “In May, 2001, Defendant, through its President entered into a Correspondent Purchase Agreement (the ‘Contract’) with Plaintiff. A copy of the Contract is attached hereto.” This does not allege any breach of the Contract, much less a breach of Paragraph 4.1.) In addition, Flagstar’s Motion for Summary Judgment concludes that, “[s]imply stated, ADM has breached the Agreement by failing to repurchase the Subject Loan.” The only mention of indemnity in the Motion (as opposed to the Reply, which sharply changes direction) is ADM’s duty to indemnify for losses “sustained by Flagstar as a result of the breach of their repurchase obligation.” Thus, only breach of the repurchase obligation, not breach of the duty to indemnify relating to other contractual duties such as providing an accurate appraisal, is in the case. Therefore, the Court does not address whether a claim for indemnification under Paragraph 4.1 would be meritorious.

As both parties acknowledge, Paragraph 5.1 requires that ADM repurchase the mortgage loan. “Mortgage loan” is defined in Article 1 as “a loan secured by a first lien on a one to four family dwelling which is the subject of this Agreement, evidenced by a Note and secured by a Mortgage, and including the Mortgage Loan Documents and all other instruments evidencing a borrower’s indebtedness.” By this language, the Mortgage Loan Documents – “the Closing Package and any and all other documents creating, evidencing, or securing a mortgage loan” – are an integral part of the loan. In requiring the “repurchase” of the loan, then, the contractual language necessarily requires the tendering in return of everything that constitutes the loan, including the securing documents. (This language distinguishes the present case from that discussed in *Biltmore Bank of Arizona, Inc. v. First Natl. Mortgage Sources, L.L.C.*, 2008 WL 564833 (D.Ariz. 2008) at *9, in which the contractual language did not expressly or by necessary implication require the tendering of the deed of trust.) By the time Flagstar made demand on ADM, this was impossible: Flagstar had sold the property free and clear. It was therefore unable to tender the “mortgage loan” as defined in the contract, and so could not require ADM to purchase it.

Neither party briefs in any detail the equitable claim for unjust enrichment made in the Complaint.

Therefore, IT IS ORDERED:

1. As to both Plaintiff’s and Defendant’s unjust enrichment claims, their Motions For Summary Judgment are denied.
2. Defendant’s Motion For Summary Judgment as to laches is denied.

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3. As to the claim for breach of the repurchase agreement, Plaintiff's motion is denied and Defendant's cross-motion granted. Plaintiff's Motion For Summary Judgment is denied in all respects. Defendant's Cross-Motion For Summary Judgment is granted only as to breach of the repurchase agreement.