

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION

In re:

TAYLOR, BEAN & WHITAKER  
MORTGAGE CORP.,  
REO SPECIALISTS, LLC, and  
HOME AMERICA MORTGAGE, INC.

Case No. 3:09-bk-07047-JAF  
Case No. 3:09-bk-10022-JAF  
Case No. 3:09-bk-10023-JAF

Debtors.

*Jointly Administered Under  
Case No. 3:09-bk-7047-JAF*

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TAYLOR, BEAN & WHITAKER  
MORTGAGE CORP.,

Case No. 3:09-bk-07047-JAF

Applicable Debtor.  
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**TAYLOR, BEAN & WHITAKER MORTGAGE CORP.'S  
RESPONSE IN OPPOSITION TO MOTION TO  
SET AMOUNT OF REDEMPTION FILED BY KATINA L. DURAN  
(DOCKET NO. 1658)**

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Taylor, Bean & Whitaker Mortgage Corp. (the “**Debtor**” or “**TBW**”) respectfully requests that this Court deny the Motion to Set Amount of Redemption (Docket No. 1658) (collectively, the “**Motion**”) filed by Katina L. Duran (the “**Movant**”). In support of its response, the Debtor respectfully represents as follows:

**BACKGROUND**

1. The Motion was filed after the news of the indictment of Lee Farkas, the Debtor’s former Chief Executive Officer, became public. As further discussed below, there is no dispute that the Movant borrowed monies and now is in default on her loan. With all due respect, the Movant now appears to be using the indictment of Mr. Farkas as a way to try to avoid her obligations.

2. The Movant borrowed monies secured by a mortgage on property (the “**Property**”) located at 7346 Hill Ave., Holland, Ohio 43528 (the “**Loan**”).

3. In connection with the Loan, the Movant executed a note, mortgage, and other related loan documents (the “**Loan Documents**”).

4. The Loan was service released to Bank of America. Accordingly, the Debtor has no further interest in this Loan.

5. At the time the Loan was service released, the unpaid principal balance on the Loan was approximately \$174,435.26.

6. At the time the Loan was transferred, the Movant had defaulted on her obligations under the Loan Documents; however, upon information and belief, a foreclosure judgment had not been entered.

**SUMMARY OF RELIEF REQUESTED IN THE MOTIONS**

7. In the Motion, the Movant requests that this Court declare that the Movant has a right to redeem the Property and, presumably, obtain title to it without paying anything even though she has not made payments on the Loan. The Movant alleges that the Debtor was negligent, intentionally misrepresented things, and breached the covenant of good faith and fair dealing and that these are grounds upon which the Court could declare that she can redeem the Property without paying for it.

8. This response is filed in order to comply with the Court’s September 7, 2010, Order Directing Response to Motions to Set Amount of Redemption Filed by Katina L. Duran (Docket No. 1894).

9. As set forth below, the Motion is substantively and procedurally defective.

**RESPONSE IN OPPOSITION**

**The Motion is improperly directed to the Debtor and should be denied as moot.**

Under Article III of the United States Constitution, federal courts may only hear “cases or controversies.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60, 112 S. Ct. 2130, 2135-36, 119 L. Ed. 2d 351 (1992). The doctrine of mootness, which evolved directly from Article III's case-or-controversy limitation, provides that “the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).” Tanner Adver. Group, L.L.C. v. Fayette County, Ga., 451 F.3d 777, 785 (11th Cir. 2006) (en banc) (citation omitted). “A case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief.” Ethredge v. Hail, 996 F.2d 1173, 1175 (11th Cir. 1993).

With respect to the Motion, the Court cannot give meaningful relief because it is improperly directed to the Debtor, which has no further interest in the Loan. Indeed, in the Motion, the Movant admits that the Loan was transferred. See Motion at p. 2. The Loan was service released to Bank of America on August 8, 2009. Accordingly, the Debtor does not have any interest in the Loan and the Motion should, therefore, be denied as moot.

**The Motion fails to state a cause of action.**

**The Movant has not established that she has a right of redemption.**

Generally, in Ohio, the right of redemption only arises at the time of foreclosure and expires upon confirmation of the foreclosure sale. See O.R.C. § 2329.33 (2010). The Movant has not established that the circumstances are such that she has a right of redemption. This alone is fatal to the Motion.

**Even if the Movant has a right of redemption, there are no grounds upon which the redemption amount should be zero.**

Even if she has a right of redemption, the Movant has failed to state any cognizable theory pursuant to which she should have the right to redeem the Property for nothing. The theories upon which the Movant relies for such a novel concept are: negligence, intentional misrepresentation, and breach of the covenant of good faith and fair dealing. Notably, the Movant does not allege that she did not borrow the money; that she did not sign the Loan Documents; or that she did not default on the Loan. In support of the negligence theory, the Movant asserts that the Debtor “owed a duty to Defendants/Creditors to perform their professional services in a manner which placed Plaintiff/Debtors interests above the Defendants/Creditors and to deal honestly, directly, and accurately with the Defendants/Creditors, the documents, and each other.” See Motion at p. 1. However, under Ohio law, “to establish actionable negligence, one seeking recovery must show the existence of a duty, the breach of the duty, and injury resulting proximately therefrom.” Strother v. Hutchinson, 423 N.E.2d 467, 469 (Ohio 1981) (per curiam).

The only facts that the Movant alleges to support the negligence theory relate to the Debtor’s transfer of the Loan to a servicer for the original investor in the Loan. The facts as alleged are simply insufficient to establish any cause of action for negligence. Such transfers of servicing are customary in the mortgage industry, were authorized by the applicable agreements with the investors, and have no effect upon borrowers other than to change the location of their payments.

Further, the facts alleged in support of the intentional misrepresentation theory relate solely to the Debtor’s transfer of the Loan to a servicer for the original investor. Allegations of

fraud must be pled with particularity. Rule 9(b) of the Federal Rules of Civil Procedure provides that “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Pursuant to this requirement, “[i]n addition to specifying the time, place and content of the alleged false representations, plaintiffs are required to plead a factual basis that would make it reasonable to determine that a statement was materially false or misleading.” Greenstone v. Cambex Corp., 975 F.2d 22, 25 (1st Cir.1992). In the case at bar, it is unclear what the alleged false representation was. Further, there is no specification of the time, place, and content of the alleged false representations. In short, the facts as alleged are simply insufficient to establish any cause of action for fraud.

Finally, in support of the theory of the breach of the covenant of good faith and fair dealing, without any evidentiary support, the Movant asserts that she “had various written agreements and each agreement required that the Plaintiff/Debtor deal fairly and in good faith with Defendants/Creditors and not seek to take an undue advantage of Defendants/Creditors in their weakened bargaining position and with their lesser knowledge, skill, education and ability regarding the loan transactions.” See Motion at p. 2. Ohio law “only recognizes an implied covenant of good faith and fair dealing in insurance contracts and in limited circumstances where the duty arises from the language of the contract.” Pappas v. Ippolito, 895 N.E. 2d 610, 622 (Ohio App. 2008). The Movant has not alleged any set of facts that would support a violation of the implied covenant of good faith and fair dealing.

Importantly, even if the Movant could establish the above causes of action (which she cannot), the applicable statute does not appear to provide for discretion for a court to adjust the redemption amount, in the absence of a compromise with the creditor. See O.R.C. § 2329.33.

Generally, redemption requires payment of the underlying debt, with interest and incidental expenses. Id. Assuming *arguendo* that the Movant could establish facts to support her allegations of negligence, intentional misrepresentation, and/or breach of the covenant of good faith and fair dealing, no such set of facts would establish a cause of action under Ohio's redemption statute to permit this or any other court to declare that the Movant has a right to redeem the Property without paying the current balance due on the Loan. Accordingly, the Motion should be denied.

**The Motion is procedurally defective.**

Finally, if the Court does not dismiss the Motion based on its substance, the Court should dismiss it because it is procedurally defective. The Motion is procedurally defective because the relief that the Movant is requesting is that this Court enter a declaratory judgment determining that the Movant has a right to redeem the Property without paying the current balance due on the Loan. Such an action for declaratory judgment must be brought as an adversary proceeding. Rule 7001 of the Federal Rules of Bankruptcy Procedure provides in pertinent part that

An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

- (9) a proceeding to obtain a declaratory judgment relating to any of the foregoing. -

See F.R.B.P. 7001(9).

Accordingly, the Motion should be denied because it must be brought as an adversary proceeding with the attendant procedural protections.

**CONCLUSION**

There is no question that the Movant executed the Loan Documents and borrowed monies secured by the Property. By this Motion, she seeks to redeem the Property without paying for it. The Movant's allegations of wrongdoing are unfounded and do not provide a basis for allowing her to redeem the Property without paying for it. In any event, the Debtor no longer has an interest in the Loan Documents and, therefore, the Motion should be denied as moot.

WHEREFORE, the Debtor respectfully requests that this Court enter an order denying the Motion and providing such other and further relief as is just and proper.

Dated this 22<sup>nd</sup> day of September, 2010.

/s/ Edward J. Peterson, III

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