

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR INDIAN RIVER COUNTY, FLORIDA

NATIONSTAR MORTGAGE, LLC,

CASE NO. 31 2011 CA 002665

Plaintiff,

vs.

RICHARD SPATH; UNKNOWN SPOUSE OF
RICHARD SPATH; MILLSTONE ASSOCIATION,
INC.; UNKNOWN TENANT #1; UNKNOWN
TENANT #2; ALL OTHER UNKNOWN PARTIES
CLAIMING INTERESTS BY, THROUGH, UNDER,
AND AGAINST A NAMED DEFENDANT(S) WHO
ARE NOT KNOWN TO BE DEAD OR ALIVE,
WHETHER SAME UNKNOWN PARTIES MAY
CLAIM AN INTEREST AS SPOUSES, HEIRS,
DEVISEES, GRANTEES, OR OTHER CLAIMANTS,

Defendant(s),

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JEFFREY R. SMITH
CLERK OF CIRCUIT COURT
INDIAN RIVER COUNTY, FL
D.C.

FINAL JUDGMENT OF FORECLOSURE

THIS CAUSE came before the Court for non-jury trial on April 4, 2013 and after hearing testimony from the parties, receiving evidence, hearing argument of counsel and being otherwise duly advised in the premises, the Court finds as follows:

A. This foreclosure action was filed on September 26, 2011. The Defendant was served on September 27, 2011 and filed his motion to dismiss on December 14, 2011. An order denying motion to dismiss was entered on January 31, 2012 requiring Defendant to file his answer within 20 days. Nonetheless, on or about April 1, 2013, the Defendant filed his answer and affirmative defenses.

B. The Court has had the opportunity to observe the demeanor and weigh the credibility of the witnesses, i.e. Defendant Spath and Plaintiff's representative, Marquest Hughes. Mr. Hughes has worked for Nationstar for two years. The Court finds Mr. Hughes to be credible and qualified as a records custodian to authenticate the business records of Nationstar and to explain/interpret them based on the recordkeeping policies and procedures of Nationstar. He has had sufficient training and experience with respect to the applicable policies and procedures and he has firsthand, personal knowledge of their policies and procedures.

C. The Court finds that the Defendant/Borrower Richard Spath, executed the subject Note and Mortgage on July 25, 2007 and borrowed \$263,700 and agreed to pay principal and interest payments of \$1,798.90 per month (7.25% interest rate), together with insurance and tax escrows. The property used as collateral for the Note is situated in Indian River County, Florida. The originating lender is Lehman Brothers Bank, FSB, A Federal Savings Bank. The Note was endorsed to Lehman Brothers Holding, Inc., who thereafter executed an open endorsement, in blank. A recorded assignment of mortgage to Aurora Loan Services was executed on May 18, 2011.

D. The testimony demonstrated that FNMA owns the Note. Plaintiff, Aurora Loan Services, LLC, as servicer, acquired the right to enforce the Note on July 25, 2007 prior to filing of the Complaint. Nationstar assumed servicing of the loan from Aurora on July 1, 2012, when the loan was delinquent and the principal amount due was \$137,753.87. All of the records prior to that time were collected by Aurora. Since the Defendant admitted that he has made no payments since April 2011, Nationstar's payment history has no payments to reflect since they assumed servicing. The original Note was surrendered to the Court at the trial. The original Note is cancelled and shall merge into this Final Judgment of Foreclosure. Pursuant to testimony, Aurora was authorized to service the loan and to enforce the Note as servicer on behalf of FNMA.

E. The Defendant testified that in September 2010 he was offered a modification plan and that he did not enter the plan because "it did not meet the number he felt he should pay." He claims that he was making payments on the loan modification that he "thought he was going to get." His payments from January through September 2010 were in the amounts of \$982 and \$983 per month. Beginning October 1, 2010, he paid \$1707.44 and in November 1, 2010, he began paying \$1708 per month. His last payment on April 2, 2011 was in the amount of \$1,709. The Notice of Default was sent on April 7, 2011 because he was not making the full payments due under the Note and Mortgage and owed \$22,582.23.

F. The Defendant, at trial, claims that he was approved for a loan modification with a payment of \$1,800 per month. However, there is no evidence of a loan modification, a written agreement, a recorded modification agreement nor that he ever actually paid \$1800 per month. In fact, the payment history evidences a monthly payment due of \$2,297.27. He claims that he "thought" he signed acceptance of the offer but did not keep a copy for his records and that the modification was to begin in November 2010. He also claims that he was supposed to be sent a coupon statement beginning in January 2011. Once again, there was no credible evidence to support his allegations which are inconsistent with the payments he was making. Mr. Spath admitted that Aurora would not accept his May payment for less than the full amount due and that no payments have been offered since May 2011. He provided no clear explanation for his failure to pay the amounts due under the Note and Mortgage or for his failure to produce any documentation in support of this alleged modification offer. Also inconsistent is his failure to bring the note current when the Bank would not accept his May payment nor approve him for a modification.

G. The law is clear where the loan agreement provides that any agreement waiving or modifying the loan terms is to be in writing, the oral modification of the loan agreement is not enforceable where there is no consideration for the alleged modification. The Defendant failed to assert the modification as an affirmative defense but also provided no evidence in support of any type of loan modification. See also Section 687.0304, Florida Statutes and *Vargas v. Deutsche Bank*, 104 So. 3d 1156 (Fla. 3rd DCA 2012).

H. The Defendant claims that he did not receive the default notice. In support, he provided evidence that he had \$16,000 in the bank that would have allowed him to bring the loan current if he had received the default letter. However, he has made no attempts to bring the loan current since this action was filed in September 2011. Furthermore, as of April 7, 2011, his default was \$22,582.23 and not the \$15,272.75 balance in his account on that date. The Court finds that the Plaintiff satisfied all conditions precedent to the filing of the foreclosure action. On April 7, 2011, the Plaintiff sent a Notice of Intent to Accelerate to the Defendant at the Defendant's proper mailing address. The Notice advised the Defendant that the loan was in default, and identified the date of default as well as the amount past due. The Notice also provided cure instructions and an adequate deadline for compliance. Notwithstanding, the Defendant was aware that the Bank would not accept

his May 2011 payment. The Defendant offered no credible testimony or evidence that he was not provided notice of default.

I. The Defendant has offered no evidence that the amounts due and owing were incorrect or inaccurate. Although the Defendant has made payments since July 1, 2010 in the total amount of \$14,904.44, he has not paid the full amount due under the Note nor enough to cover the taxes and insurance due on the property as required by the Mortgage. The loan is presently in default and the Plaintiff is entitled to the entry of a Final Judgment of Foreclosure.

J. The Plaintiff hired the law firm of Elizabeth R. Wellborn, P.A. to represent it in this matter and is entitled pursuant to the Mortgage to recover its legal fees and costs for litigating this matter. Plaintiff's Attorney Fee Affidavit was filed in open court. The Court will retain jurisdiction to determine the amount of the reasonable attorney's fees and costs.

IT IS ORDERED AND ADJUDGED as follows:

1. That Plaintiff's Final Judgment is **GRANTED** against all Defendants.
2. **Amounts Due.** Plaintiff, NATIONSTAR MORTGAGE, LLC, whose address is 350 Highland Drive, Lewisville, Texas 75067, is due:

Principal	\$137,753.87
Interest on the note and mortgage from 06/01/2010 to 04/20/2013 (1054 days/Per diem interest at 7.250% at \$27.36)	\$28,839.62
Taxes for year 2010	\$2,724.27
Taxes for year 2011	\$2,766.49
Taxes for year 2012	\$2,745.13
Hazard for year 2010	\$1,720.81
Hazard for year 2011	\$2,558.21
Hazard for year 2012	\$2,933.92
Flood for year 2011	\$456.00
Flood for year 2012	\$456.00
Attorneys' fees	RESERVED
<u>Court costs</u>	
Filing fee	\$950.00
Service of Process	\$220.00
Title insurance	RESERVED
Additional Costs	RESERVED
Late Charges	RESERVED
Property Inspections	RESERVED
Unknown advances	RESERVED
LESS: Escrow/Suspense Credit	(\$640.09)
LESS: Credit for Payments Made since 7/1/10	(\$14,904.44)
TOTAL	\$166,579.79

3. **Interest.** The total amount in paragraph 2 shall bear interest from this date forward at the prevailing rate.

4. **Lien on Property.** Plaintiff holds a lien for the total sum superior to all claims or estates

of defendant(s), on the following described property in Indian River County, Florida:

LOT 302 OF MILLSTONE LANDING P.D., PHASE 1, ACCORDING TO THE PLAT THEREOF RECORDED IN PLAT BOOK 22, PAGE 79, OF THE PUBLIC RECORDS OF INDIAN RIVER COUNTY, FLORIDA.

Property address: **2057 PLAINFIELD DRIVE SOUTHWEST, VERO BEACH, FL 32968.**

5. Sale of Property. If the total sum with interest at the rate described in paragraph 2 and all costs accrued subsequent to this judgment are not paid, the clerk of this court shall sell the property at public sale on **JUNE 3, 2013** to the highest bidder for cash, except as prescribed in paragraph 6,; by electronic sale at www.indian-river.realforeclose.com beginning at 10:00 a.m. in accordance with section 45.031, Florida Statutes. **The public sale shall not be postponed or canceled without a court order, and shall proceed regardless of whether plaintiff, a plaintiff's representative, or plaintiff's counsel is present. All orders postponing or canceling the sale must be filed with the clerk of court no later than 5:00 p.m. two business days before the sale date. Counsel for plaintiff must be certain that the clerk has the original proof of publication of the notice of sale on file no less than three business days before the sale date. Failure to file the original proof of publication of the notice of sale will not stop the sale, however the certificate of sale will not issue until the original proof of publication of notice of sale is filed. The failure of plaintiff's counsel to properly and timely publish the notice of sale may result in sanctions against the plaintiff, plaintiff's counsel individually, and the law firm representing the plaintiff.** If the original proof of publication of the notice of sale is not filed with the clerk within ten calendar days after the sale, an order will be entered directing the plaintiff to show cause why the sale should not be vacated and the case dismissed with or without prejudice. The fact that an attorney has a high volume practice will not be a showing of good cause. Any electronic sale by the clerk shall be in accordance with the written administrative policy for electronic sales published by the clerk at the official website for the clerk and posted in the public areas of the clerk's offices.

6. Costs. Plaintiff shall advance all subsequent costs of this action and shall be reimbursed for them by the clerk if plaintiff is not the purchaser of the property for sale, provided, however, that the purchaser of the property for sale shall be responsible for the documentary stamps payable on the certificate of title. If plaintiff is the purchaser, the clerk shall credit plaintiff's bid with the total sum with interest and costs accruing subsequent to this judgment, or such part of it, as is necessary to pay the bid in full. The clerk shall receive the service charge imposed in Section 45.031, Florida Statutes.

7. Distribution of Proceeds. On filing the certificate of title, the clerk shall distribute the proceeds of the sale, so far as they are sufficient, by paying: first, all of plaintiff's costs; second, documentary stamps affixed to the certificate; third, plaintiff's attorneys' fees; fourth, the total sum due to plaintiff, less the items paid, plus interest at the rate prescribed in paragraph 2 from this date to the date of the sale; and by retaining any remaining amount pending the further order of this court.

8. Right of Redemption. On filing the certificate of sale, defendant(s) and all persons claiming under or against defendant(s) since the filing of the notice of lis pendens shall be foreclosed of all estate or claim in the property, except as to claims or rights under chapter 718 or chapter 720, Florida Statutes, if any.

9. Right of Possession. Upon the filing of the certificate of title, the person named on the certificate of title shall be let into possession of the property, subject to the provisions of the "Protecting Tenant At Foreclosure Act of 2009".

10. **Jurisdiction Retained.** Jurisdiction of this action is retained to enter further orders that are proper including, without limitation, a deficiency judgment against Richard Spath.

IF THIS PROPERTY IS SOLD AT PUBLIC AUCTION, THERE MAY BE ADDITIONAL MONEY FROM THE SALE AFTER PAYMENT OF PERSONS WHO ARE ENTITLED TO BE PAID FROM THE SALE PROCEEDS PURSUANT TO THE FINAL JUDGMENT. IF YOU ARE A SUBORDINATE LIENHOLDER CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY REMAINING FUNDS. IF YOU ARE THE PROPERTY OWNER, YOU MAY CLAIM THESE FUNDS YOURSELF. YOU ARE NOT REQUIRED TO HAVE A LAWYER OR ANY OTHER REPRESENTATION AND YOU DO NOT HAVE TO ASSIGN YOUR RIGHTS TO ANYONE ELSE IN ORDER FOR YOU TO CLAIM ANY MONEY TO WHICH YOU ARE ENTITLED. PLEASE CHECK WITH THE CLERK OF THE COURT, 2000 16th Ave. VERO BEACH, FLORIDA 32960 TELEPHONE: 772-770-5185, CIRCUIT CIVIL DIVISION) WITHIN TEN (10) DAYS AFTER THE SALE TO SEE IF THERE IS ADDITIONAL MONEY FROM THE FORECLOSURE SALE THAT THE CLERK HAS IN THE REGISTRY OF THE COURT. IF YOU DECIDE TO SELL YOUR HOME OR HIRE SOMEONE TO HELP YOU CLAIM THE ADDITIONAL MONEY, YOU SHOULD READ VERY CAREFULLY ALL PAPERS YOU ARE REQUIRED TO SIGN, ASK SOMEONE ELSE, PREFERABLY AN ATTORNEY WHO IS NOT RELATED TO THE PERSON OFFERING TO HELP YOU, TO MAKE SURE THAT YOU UNDERSTAND WHAT YOU ARE SIGNING AND THAT YOU ARE NOT TRANSFERRING YOUR PROPERTY OR THE EQUITY IN YOUR PROPERTY WITHOUT THE PROPER INFORMATION. IF YOU CANNOT AFFORD TO PAY AN ATTORNEY, YOU MAY CONTACT FLORIDA RURAL LEGAL SERVICES, 510 SOUTH US HWY 1, SUITE 1, FORT PIERCE, FLORIDA 34948 (TELEPHONE: 772-466-4766) TO SEE IF YOU QUALIFY FINANCIALLY FOR THEIR SERVICES. IF THEY CANNOT ASSIST YOU, THEY MAY BE ABLE TO REFER YOU TO A LOCAL BAR REFERRAL AGENCY OR SUGGEST OTHER OPTIONS. IF YOU CHOOSE TO CONTACT FLORIDA RURAL LEGAL SERVICES, YOU SHOULD DO SO AS SOON AS POSSIBLE AFTER RECEIPT OF THIS NOTICE.

DONE AND ORDERED on April 20, 2013 at Vero Beach, Florida.

CYNTHIA L. COX, Circuit Judge

Copies Furnished by U.S. Mail to:

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