

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT, IN AND FOR
BROWARD COUNTY, FLORIDA

COMERICA BANK,

Plaintiff,

GENERAL JURISDICTION DIVISION

CASE NO.: CACE11028447 (03)

vs.

OCEAN 4660, LLC, et. al.,

Defendants.

ANSWER & AFFIRMATIVE DEFENSES

Defendant, OCEAN 4660, LLC, by and through its undersigned attorneys, hereby files its Answer, & Affirmative Defenses to Plaintiff's Amended Complaint, stating as follows:

I. ANSWER

1. Defendant admits Paragraphs 3 and 37 of Plaintiff's Amended Complaint
2. Defendant denies Paragraphs 28 (a-g), 30, 31 and 33 of Plaintiff's Amended Complaint, and demands strict proof thereof.
3. Defendant is without knowledge to sufficiently answer Paragraphs 1, 2, 4 through 15, 20, 21, 22, 24, 26, 32, 34, 35, 36 and 38 through 48 of Plaintiff's Amended Complaint, and therefore denies same and demand strict proof thereof.
4. As to Paragraphs 49 and 50 of Plaintiff's Amended Complaint, Defendant re-asserts and re-alleges its responses to the allegations contained in Paragraphs 1 through 48, as though fully set forth herein.
5. As to Paragraphs 16 through 19, 23, 25, 27 and 29 of Plaintiff's Amended Complaint, Defendant states that the exhibits referenced therein speak for themselves.

II. AFFIRMATIVE DEFENSES

1. Contribution. Pursuant to the Swap Agreement attached to Plaintiff's Amended Complaint as Composite Exhibit "C," if Defendant is found liable, Defendant is entitled to contribution from those who share a common liability as to any of the loss allegedly suffered by Plaintiff. *See Am. Jur. 2d, Contribution § 1.*

2. Failure to Mitigate. Plaintiff has failed to mitigate its losses by thwarting Defendant's loss mitigation efforts with regard to the subject loan, and refusing to negotiate reinstatement with Defendant in good faith.

3. Failure to Post Non-Resident Cost Bond. Florida Statutes §57.011 provides:

Costs; security by nonresidents.--When a nonresident plaintiff begins an action or when a plaintiff after beginning an action removes himself or herself or his or her effects from the state, he or she shall file a bond with surety to be approved by the clerk of \$100, conditioned to pay all costs which may be adjudged against him or her in said action in the court in which the action is brought. On failure to file such bond within 30 days after such commencement or such removal, the defendant may, after 20 days' notice to plaintiff (during which the plaintiff may file such bond), move to dismiss the action or may hold the attorney bringing or prosecuting the action liable for said costs and if they are adjudged against plaintiff, an execution shall issue against said attorney.

Plaintiff has not posted a nonresident cost bond in the instant case, notwithstanding the fact that its main office/headquarters is located at, 1717 Main Street, Dallas, Texas 75201. A banking association is deemed to be a citizen of the state in which its main office is located (as designated in its articles of association). *See Wachovia Bank, N.A. v. Schmidt*, 126 S.Ct. 941 (U.S.2006); *RDC Funding Corp. v. Wachovia Bank, N.A.*, 2004 WL 717111 (D. Conn. March 31, 2004). Since Plaintiff has not posted the statutorily-mandated nonresident cost bond, alleged that it posted said bond, or alleged that it is a resident of the state of Florida, it cannot maintain the instant cause of action.

4. Right to Surplus Proceeds. In the event that the Court grants Plaintiff the relief requested in its Amended Complaint, Defendants respective interests in the subject property entitle them to a priority distribution of surplus proceeds from the foreclosure sale of the subject property.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail this 18 day of April, 2012 to: Brian K. Hole, Esq., Holland & Knight LLP, 515 E. Las Olas Blvd., Suite 1200, Fort Lauderdale, FL 33301-4249; E-Mail: brian.hole@hklaw.com.

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By: 

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