IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

WELLS FARGO BANK, N.A.	**)**	
	)	
Plaintiff,	**)**	
	)	
v.	**)**	**C.A. No. 09L-07-295 MJB**
	)	
EVAN O. WILLIFORD, and,	**)**	**JURY TRIAL DEMANDED**
DIONNE D. WILLIFORD,	**)**	
	)	
Defendants.	**)**	

Submitted: August 12, 2011
Decided: November 17, 2011

Upon Well Fargo's Motion for Summary Judgment to Dismiss Counterclaims, **GRANTED**.

OPINION

Sarah M. Rutigliano, Esquire, and Lisa Keil Cartwright, Esquire, Atlantic Law Group, Wilmington, Delaware, Attorneys for Plaintff.

Evan O. Williford, Esquire, Newark, Delaware, Attorney for Defendants.

BRADY, J.

INTRODUCTION & FACTS

On July 26, 2009, Wells Fargo ("Wells") filed a *scire facias sur* mortgage complaint against Evan O. Williford and Dionne D. Williford, seeking foreclosure of Wells's interest in the property known as 105 Paddock Drive, Newark, Delaware 19711.[1] The mortgage agreement between the parties provided that, upon the Willifords' failure to pay obligations when due, default would result, and Wells could accelerate payment of the entire sum secured by the mortgage and foreclose upon the property for collection of the obligation, with costs of the suit and attorney's fees, plus sums expended for preservation of the property.[2]

On August 22, 2009, Wells Fargo sent Evan Williford a Home Affordable Modification Trial Period Plan offer and agreement ("Plan agreement") informing him he may qualify for the Home Affordable Modification Trial Period Plan.[3] The Plan agreement additionally stated that Williford's participation in the Plan could lead to a loan modification, if Williford qualified, and if Wells could provide a loan modification.[4] The Plan agreement provided that if Wells decided to provide Williford a loan modification, Wells would send Williford a fully executed copy of the Plan and a modification agreement by the end of the three-month Plan period.[5] Evan Williford signed and returned the Plan agreement on August 27, 2009.[6]

[1] *See* Compl. (July 26, 2009).
[2] *See* Compl. (July 26, 2009) Ex. A.
[3] Defs.' Memo. in Opp'n Ex. C ("You may qualify for the Home Affordable Modification Trial Period Plan – a way to make your payment more affordable.").
[4] *See id.*
[5] *Id.* at Step One of Two-Step Documentation Process, ¶ 2.F.
[6] *See id.* at foot of document.

On August 28, 2009, Wells's counsel filed a letter with the Court requesting that the *scire facias* action be moved to the dormant docket.[7] The letter stated, "Please be advised our client has entered into a modification agreement with the debtor. Please have this matter placed on the dormant docket, so that, should the debtor fail to honor the terms of the agreement, we will be able to proceed with the foreclosure."[8] The letter called for a carbon copy to be sent to the Willifords.[9]

On May 7, 2010, Wells filed a Direction for Entry of Judgment and Affidavit with the Court. On May 14, 2010, Wells moved to vacate the default judgment and provide the Willifords an opportunity to answer. The Court granted that motion on June 6, 2010.

On July 1, 2010, the Willifords filed a Verified Answer to Wells's Complaint, with Counterclaims against Wells.[10] The counterclaims include claims for breach of contract, breach of the covenant of good faith and fair dealing, promissory estoppel, and declaratory judgment.[11] Each counterclaim arises from the Plan agreement.[12] The counterclaims generally stem from the Willifords' alleged reliance upon the terms of the agreement.[13] Wells filed an Amended Answer on August 20, 2010.[14]

Wells Fargo filed the instant Motion for Summary Judgment to Dismiss Counterclaims on March 24, 2011.

On August 11, 2011, the Willifords filed a Complaint against Wells for a merits action, alleging, among other claims, the counterclaims set forth in their Verified Answer

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[7] Letter from Kathryn E. Burritt, Paralegal to Michelle Berkeley-Ayres, Esqure, Atlantic Law Group, LLC, to Judicial Case Manager to the Hon. M. Jane Brady (Aug. 28, 2009).
[8] *Id.*
[9] *Id.*
[10] *See* Verified Answer (July 1, 2010).
[11] *Id.* 24-27.
[12] *Id.*
[13] *Id.*
[14] *See* Am. Answer (Aug. 20, 2010).

to the *scire facias* action.[15] On September 22, 2011, the Court granted the Willifords' motion to consolidate the *scire facias* and merits actions.[16] Wells filed an Answer and Counterclaim on October 5, 2011.[17]

PARTIES' CONTENTIONS

Wells argues that, because none of the Willifords' four counterclaims arise from the initial mortgage transaction, they are not permissible counterclaims to a *scire facias* mortgage action.[18] Wells maintains that the Willifords' counterclaims all stem from the Plan agreement, which the parties entered after the Willifords' default on their payments, and not from the underlying loan transaction.[19] The Willifords contend their counterclaims are proper because they fall within the scope of counterclaims properly brought in a *scire facias* action.[20] The Willifords argue that the parties settled the *scire facias* action by creating a loan modification agreement pursuant to the Plan agreement, and that Wells ignored the agreement.[21] The Willifords allege that, under the agreement, "the parties discharged, replaced, and paid all obligations set forth in the mortgage and any promissory note, which were satisfied, in return for a modified mortgage."[22]

Wells concedes that the Willifords "made each of the payments contemplated under the Trial Period Plan in the amount of $1,739.50, and Plaintiff accepted those payments and applied them to Defendants' account according to the standards set out in

[15] *See* Compl. (Aug. 11, 2011) 13-19.
[16] Order of Sept. 22, 2011. Also on September 22, 2011, the Court declined to grant the Willifords' motion to stay the *scire facias* action pending resolution of the merits action. *Id*.
[17] *See* Answer, Affirmative Defenses, and Countercls. (Oct. 5, 2011).
[18] Pl.'s Mot. for Summ. J. to Dismiss Countercls. ¶¶ 11-12.
[19] Resp. to Defs.' Memo. in Opp'n 8.
[20] Def.'s Opp'n to Pls.' Mot. ¶ 3.
[21] *Id.* ¶ 2.
[22] *Id.* ¶ 3.

the HAMP guidelines."[23] Wells contends that its offer to the Willifords was for a trial period and not a permanent modification of the loan, and that the Willifords ultimately did not qualify for a loan modification. Wells further argues that the Plan agreement was not a conditional offer to modify the loan, and therefore, it cannot be characterized as relating back to the original mortgage transaction.[24] Wells contends that at the end of the Plan (three months), Wells "had no further duty to accept payments from Defendants. The loan was accelerated, and Defendant's three month participation in the Trial Period Plan did not cure the default or end the acceleration of the loan."[25]

The Willifords oppose Wells's Motion for Summary Judgment on the ground that Wells did not assert the defense that the Willifords' counterclaims are not properly asserted in its Amended Answer.[26] Wells maintains the motion is procedurally proper because challenges to subject matter jurisdiction may be raised at any time.[27]

The Willifords argued in their June 6, 2011 memorandum that the present Motion should be denied as moot, because the Willifords anticipated filing a new action against Wells asserting the counterclaims at issue here.[28] Wells argued in response that anticipation of filing a new action is not grounds for denying the motion, and that the counterclaims should be barred, even if the Willifords were to file a second action and join the two.[29] Wells argued the counterclaims would not be moot, based on precedent set forth in *LaSalle National Bank v. Ingram*.[30]

[23] Pl.'s Sur-Reply Br. 5.
[24] Resp. to Defs.' Memo. in Opp'n 14.
[25] Pl.'s Sur-Reply Br. 6.
[26] Def.'s Opp'n to Pls.' Mot. ¶ 6.
[27] Pl.'s Resp. to Def.'s Memo in Opp'n 6; *see infra* Discussion.
[28] Def.'s Memo. in Opp'n 6.
[29] Pl.'s Resp. to Def.'s Memo in Opp'n 7-8.
[30] *LaSalle Nat'l Bank v. Ingram*, 2005 Del. Super. Lexis 185 (Del. Super. 2005); *see infra* Part II.

STANDARD OF REVIEW

Summary judgment is only appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[31] Summary judgment will not be granted when, with the evidence produced, there is reasonable indication a material fact is in dispute.[32] If the moving party shows that no material factual dispute exists, the burden shifts to the non-moving party to demonstrate the existence of a genuine issue of material fact.[33] Mere denials asserted in pleadings are insufficient to oppose a motion for summary judgment and cannot be relied upon to raise a genuine issue of material fact.[34]

DISCUSSION

I. Wells properly filed its motion for summary judgment, as a lack of subject matter jurisdiction can be raised at any time.

Wells properly filed this motion. A motion to dismiss based on lack of subject matter jurisdiction may be filed at any time.[35] In arguing that the Willifords' counterclaims are permissive counterclaims, which may not be asserted in a *scire facias* action, Wells asserts that this Court cannot grant the relief the Willifords request in asserting their counterclaims. Therefore, this motion is based on a lack of subject matter jurisdiction and can be brought at any point.

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[31] Super. Ct. Civ. R. 56(c).
[32] *Ebersole v. Lowengrub*, 180 A.2d 467, 469 (1962); *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[33] *Moore*, 405 A.2d at 680.
[34] *Kennedy v. Giannone*, 527 A.2d 732 (Del. 1987).
[35] Super. Ct. Civ. R. 12(b)(1).

II. The present motion for summary judgment is not moot.

In *LaSalle National Bank v. Ingram*,[36] a bank filed a *scire facias* action against the defendant homeowners after the defendants defaulted on their mortgage payments. The defendants filed counterclaims asserting the bank failed to adhere to an oral agreement to fund two additional loans in connection with the original mortgage and failed to comply with a 30-day notice provision in the original mortgage agreement.[37] The Superior Court determined the counterclaims were permissive and not properly brought in a *scire facias* action, because they were not within the limited scope of acceptable counterclaims for a *scire facias* action and did not arise out of the original mortgage transaction.[38] The Court was concerned the defendants would file a separate action if the counterclaims were dismissed for the *scire facias* action. The Court stated that if the defendants did bring a separate action and a motion to consolidate was granted, "practical considerations must be put aside in order to keep in step with the line of settled and consistent cases in the Superior Court and Delaware Supreme Court beginning with *Gordy*[[39]] holding that all counterclaims and defenses must relate directly to the underlying mortgage transaction."[40] The Court went on to dismiss the defendants' counterclaims, other than the lack of notice claim, because "[t]o hold otherwise would improperly infuse *in personam* action into an *in rem* action based on the original mortgage transaction."[41]

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[36] 2005 Del. Super. Lexis 185, at *1 (Del. Super. 2005).
[37] *Id.* at *1.
[38] *Id.* at*3. Those acceptable counterclaims are limited to: payment, satisfaction, absence of seal, or plea of avoidance. *Id.* at *3; *see infra*, Part II.
[39] *Gordy v. Preform Bldg. Components, Inc.*, 310 A.2d 893, 894 (Del. Super. 1973); *see infra*, Part III.
[40] *LaSalle*, 2005 Del. Super. Lexis 185, at *8-9.
[41] *Id.* at *9.

In the time since the parties filed their briefs, the Wilifords filed a merits action asserting, among other claims, the counterclaims at issue here. On September 22, 2011, the Court consolidated the *scire facias* action and the merits action. In light of *LaSalle* and Delaware's strong precedent limiting counterclaims that may be asserted in a *scire facias* action, the present motion for summary judgment cannot be considered moot, as the Willifords assert. The Court must determine whether Wells is entitled to summary judgment to dismiss the Willifords' counterclaims in the *scire facias* action.

III. The Willifords' counterclaims are not permissible in the *scire facias sur* mortgage action.

A *scire facias sur* mortgage action is an *in rem* proceeding used to foreclose a mortgage.[42] It is "in essence . . . a rule to show cause that requires the mortgagor to appear and establish why the mortgagee should not be allowed to foreclose."[43] *Gordy v. Preform Building Components, Inc.*[44] is Delaware's landmark case on *scire facias* actions. *Gordy* and the cases that follow it set forth that only claims that arise under the mortgage agreement subject to foreclosure may be asserted in a *scire facias sur* mortgage action.[45] A defendant may only plead payment, satisfaction, or a plea in avoidance against a *scire facias* action.[46] Permissive counterclaims[47] may not be asserted in a *scire*

[42] *Gordy*, 310 A.2d at 894. "The writ requires the mortgagor to "show cause why judgment should not be given against him or her for the amount of the mortgage debt with a special execution for the sale of the mortgaged premises." *Id.*
[43] *American Nat. Ins. Co. v. G-Wilmington Assoc., L.P.*, C.A. 02L-05-114, 2002 WL 31383924, at *2 (Del. Super. 2002).
[44] 310 A.2d 893, 894 (Del. Super. 1973).
[45] *Gordy*, 310 A.2d 893; *Christiana Falls, L.P. v. First Fed. Sav. & Loan Ass'n of Norwalk*, 520 A.2d 669, 1986 WL 314, at *2 (Del. 1986); *Amer. Nat. Ins. Co*, 2002 WL 31383924, at *2; *Harmon v. Wilmington Trust Co.*, 663 A.2d 487 (Del. Super. 1995).
[46] An avoidance defense is an assertion that the plaintiff has no right to payment. *Id.* Traditional avoidance defenses are: "act of God, assignment, conditional liability, duress, exception, forfeiture, fraud, illegality, justification, non-performance of condition precedents, and waiver." *Wilmington Trust Co. v. The Bethany Group Ltd. P'ship*, 1999 WL 288686, at *7 (Del. Super. June 3, 1993); *LaSalle*, 2005 WL 1284049, at *2.

facias sur mortgage action.[48] Permitting the assertion of a permissive counterclaim in a *scire facias* action "would serve to infuse an *in personam* action involving different parties into an *in rem* action on the mortgages,"[49] by virtue of its "nonassociation with the mortgage transaction in issue."[50] "[P]ost-default negotiations may not be maintained in avoidance because they do not relate to the validity or legality of the mortgage documents."[51]

In order to assess whether granting summary judgment is proper, the Court must first determine whether the parties' Plan agreement is a post-default negotiation or a modification to the original loan agreement. For reasons stated herein, the Court finds the Plan agreement is a post-default negotiation, and the Willifords' counterclaims are impermissible.

A determination of whether the Willifords' counterclaims relate to the mortgage agreement or post-default negotiations requires an analysis of the terms of the parties' Plan agreement. In interpreting contracts Delaware courts effectuate parties' intent by assigning plain meaning to the words of the contract.[52] "Clear and unambiguous language" is given its "ordinary and usual meaning."[53] A party is bound by the plain meaning of a contract.[54] A contract is ambiguous if "the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more

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[47] Claims which are permissive by virtue of their nonassociation with the mortgage transaction at issue. *Wilmington Trust Co.*, 1999 WL 288686, at *5.
[48] *Gordy*, 310 A.2d at 896.
[49] *Wilmington Trust Co.*, 1999 WL 288686, at *5 (citing *Gordy v. Preform Bldg. Components, Inc.*, 310 A.2d 893, 896 (Del. Super. 1973)).
[50] *Id.*
[51] *Christiana Falls, L.P. v. First Fed. Sav. & Loan Ass'n of Norwalk*, 520 A.2d 669, 1986 WL 314, at *2 (Del. 1986) (citing *Gordy v. Preform Bldg. Components, Inc.*, 310 A.2d 893 (Del. Super. 1973)).
[52] *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006).
[53] *Id.*
[54] *Id.*

different meanings."[55] Delaware courts expect that if parties contemplate a condition precedent to an agreement, the condition precedent is included in the agreement.[56]

The Plan agreement Wells sent to the Willifords includes a paragraph that states "I understand that the Plan is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (i) I meet all conditions required for the modification, (ii) I receive a fully executed copy of a Modification Agreement . . . ."[57] The document further states "all terms and provisions of the Loan Documents remain in full force and effect; nothing in this Plan shall be understood or construed to be a satisfaction or release in whole or in part of the obligations contained in the Loan Documents."[58] The first page of the document states, "Please let us know no later than 10/01/09 that you accept the Trial Period Plan,"[59] and goes on to explain that Wells would finalize a loan modification agreement once it could confirm the Willifords' eligibility.[60]

On August 28, 2009, Wells's counsel sent a letter to the Court requesting that the *scire facias* matter be moved to the dormant docket. The letter states, "Please be advised that our client has entered into a modification agreement with the debtor."[61] The letter is marked "cc: Mr. & Mrs. Williford."[62] The Willifords claim "until this litigation, Wells

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[55] *Id.*
[56] *Id.*
[57] Defs.' Memo. in Opp'n Ex. C, at Step One of Two-Step Documentation Process, ¶ 2.G.
[58] *Id.* at Step One of Two-Step Documentation Process, ¶ 4.D.
[59] *Id.* at 1.
[60] *Id.*
[61] Letter from Kathryn E. Burritt, Paralegal to Michelle Berkeley-Ayres, Esqure, Atlantic Law Group, LLC, to Judicial Case Manager to the Hon. M. Jane Brady (Aug. 28, 2009).
[62] *Id.*

Fargo never stated to Defendants that they did not qualify for a HAMP loan modification at the end of the Trial Period Plan."[63]

The Plan agreement made exceedingly clear that Wells did not intend for the Plan agreement to be a finalized modification of the Willifords' original mortgage and did not ensure a modification of the original mortgage. When Evan Williford signed the Plan agreement, he agreed to Wells's terms. The Plan agreement does not promise an outright modification of the original mortgage agreement, either outright or pursuant to conditions precedent. The Plan agreement specifies:

> If prior to the Modification Effective Date,[[64]] (i) the Lender does not provide me a fully executed copy of this Plan and the Modification Agreement; (ii) I have not made the Trial Period payments required under Section 2 of this Plan; or (iii) the Lender determines that my representations in Section 1 are no longer true and correct, the Loan Documents will not be modified and this Plan will terminate. In this event, the Lender will have all of the rights and remedies provided by the Loan Documents, and any payment I make under this Plan shall be applied to the amount I owe under the Loan Documents and shall not be refunded to me; and . . . I understand that the Plan is not a modification of the Loan Documents . . . .[65]

The agreement, by a reading of its ordinary language, demonstrates Wells's intent that the payments the Willifords made pursuant to the Plan agreement apply toward the amount the Willifords owed Wells under their original mortgage agreement without immediately modifying the original mortgage agreement.

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[63] Defs.' Reply in Opp'n to Pl's. Mot. 10, n. 6.

[64] Pursuant to the Plan agreement, the effective date was the date of the Plan, and the trial period ended on the earlier of "(i) the first day of the month following the month in which the last Trial Period Payment is due on 01/09/13, or (ii) termination of [the] Plan." Defs.' Memo. in Opp'n Ex. C, at Step One of Two-Step Documentation Process, ¶ 2.

[65] Defs.' Memo. in Opp'n Ex. C, at Step One of Two-Step Documentation Process, ¶ 2.F. The Plan agreement repeats throughout that the Willifords "may" qualify for a modification, and "if" the Willifords qualified, and "if" Wells could modify the loan, Wells would modify the loan. *See generally id.*

In *Harmon v. Wilmington Trust Co.*,[66] a mortgagor, Harmon, defaulted on payments to the mortgagee, Wilmington Trust, in July 1994.[67] Wilmington Trust initiated a *scire facias sur* mortgage action against Harmon in October 1994.[68] Harmon conceded he defaulted on the mortgage by failing to make payments when they were due, but he argued Wilmington Trust's collection of rents from the mortgaged properties after Harmon's default resulted in credit or setoff against the mortgage debt, pursuant to a clause in the mortgage agreement providing Wilmington Trust could take possession of the property, assume control of transactions having to do with rents and revenues, and apply them to installment payments due.[69] The Supreme Court affirmed the Superior Court's grant of summary judgment in favor of Wilmington Trust.[70] The Court found that Wilmington Trust's post-default collection of rent had "no bearing upon Harmon's pre-default obligations under the mortgage. In fact, the payments which Harmon claims as the basis of his setoff did not arise until well *after* Harmon defaulted."[71] The Court added, "any post-default credits, or additional charges such as accruing interest, may modify the debt actually due . . . but will not alter the fact of the default."[72]

Similar to the circumstances of *Harmon*, the Willifords made payments to Wells and provided Wells information pursuant to the Plan agreement well after the Willifords defaulted on their mortgage obligations. Those payments modified the debt due; they did not alter the fact of the Willifords' default of their mortgage obligations. The Plan agreement makes clear that, in the event the Willifords did not qualify for a modification,

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[66] 663 A.2d 487 (Del. 1995).
[67] *Id.* at *1.
[68] *Id.*
[69] *Id.* at *1-*2.
[70] *Id.* at *3.
[71] *Id.*
[72] *Id.*

the payments they made under the Plan would apply to the debt they owed under the original mortgage documents.[73]

The Willifords' counterclaims are permissive and are barred in this *scire facias sur* mortgage action for three main reasons. First, because the Plan agreement was not a modification of the parties' original mortgage agreement, the Willifords' counterclaims, which arise out the Plan agreement, do not arise out of the original mortgage agreement. Therefore, they are permissive and are barred by the law, as set forth in *Gordy* and its progeny.

Second, because the Plan agreement was not a modification of the parties' original mortgage agreement, the Plan did not discharge, replace, pay, or satisfy the Willifords' obligations under the mortgage in exchange for a modified mortgage.[74] In fact, the Plan agreement explicitly disclaims that payments made under the Plan agreement amount to a cure of default or a waiver of the acceleration of the loan or the foreclosure action, unless "the payments are sufficient to cure the entire default."[75] The Willifords do not allege they made payments sufficient to pay off the balance of their mortgage with Wells during the trial period under the Plan agreement. Therefore, the Willifords' counterclaims do not properly fit within the category of satisfaction and payment.

Third, the Willifords' counterclaims are outside the scope of a plea of avoidance because they arise within the scope of post-default negotiations and do not relate to the

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[73] Defs.' Memo. in Opp'n Ex. C, at Step One of Two-Step Documentation Process, ¶ 2.
[74] *See* Def.'s Opp'n to Pls.' Mot. ¶ 3.
[75] Defs.' Memo. in Opp'n Ex. C, at Step One of Two-Step Documentation Process, ¶ 2.E ("When the Lender accepts and posts a payment during the Trial Period it will be without prejudice to, and will not be deemed a waiver of, the acceleration of the loan or foreclosure action and related activities and shall not constitute a cure of my default under the Loan Documents unless such payments are sufficient to completely cure my entire default under the Loan Documents[.]").

validity or legality of the mortgage documents.[76] The parties entered the Plan agreement on August 22, 2009, nearly one month after Wells initiated the *scire facias sur* mortgage action because the Willifords had defaulted on their obligations under the mortgage agreement.[77] Therefore, the Willifords' counterclaims relate only to the validity or legality of the Plan agreement.

CONCLUSION

The Court finds that the Willifords' counterclaims arise out of post-default negotiations, and not the original mortgage documents. Therefore, those counterclaims cannot be properly asserted in a *scire facias sur* mortgage action, and summary judgment in favor of Wells Fargo dismissing the Willifords' counterclaims as to the *scire facias sur* mortgage action is **GRANTED**.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge

[76] *See Christiana Falls, L.P. v. First Fed. Sav. & Loan Ass'n of Norwalk*, 520 A.2d 669, 1986 WL 314, at *2 (Del. 1986) (citing *Gordy v. Preform Bldg. Components, Inc.*, 310 A.2d 893 (Del. Super. 1973)).
[77] *See* Defs.' Memo. in Opp'n Ex. C, at 1; Compl. (July 26, 2009). Wells alleges in its Complaint that the Willifords defaulted on their mortgage obligations on March 1, 2009. Compl. (July 26, 2009).