

IN THE CIRCUIT COURT OF THE 11TH
JUDICIAL CIRCUIT, IN AND FOR
MIAMI-DADE COUNTY, FLORIDA
CASE NO: 2016-8579-CA-01

LIBERTY HOME EQUITY SOLUTIONS
INC. FORMERLY KNOWN AS GENWORTH
FINANCIAL HOME EQUITY ACCESS INC.,

Plaintiff,

vs.

FELICIA EL HASSAN, et al.,

Defendant.

ORDER GRANTING DEFENDANT’S MOTION FOR ATTORNEY’S FEES AND

COSTS

THIS MATTER came before the Court upon Defendant’s Motion for Attorney’s Fees and Costs pursuant to Fla. Stat. 57.105(7); the Court having reviewed the court file, the motion, response, memoranda, case law, and, having heard argument of counsel during the hearings held on November 30, 2016 and December 21, 2016, 2016, the Court finds as follows:

Background

1. LIBERTY HOME EQUITY SOLUTIONS INC., filed the instant action to foreclose a Reverse Mortgage regarding Real Property at 1315 Jann Ave, Opa Locka, FL 33054 (“Subject Property”) against Ms. El Hassan on April 5, 2016.
2. The Complaint alleged that Defendant had breached the terms of the mortgage as follows:

FELICIA EL HASSAN ceased occupying the subject property for reasons other than death and the subject property is not the principal residence of any surviving borrower. The Secretary of Housing and Urban Development approved this

occurrence as grounds for acceleration of the debt on or about the September 28, 2015.

3. On April 26, 2016, Plaintiff filed a Return of Service showing Ms. El Hassan was served with process at the Subject property on April 19, 2016.
4. On April 28, 2016, this Court entered an “Agreed Order” allowing the Defendant 20 days to respond to the complaint.
5. Notwithstanding the Agreed Order extending the time to respond to the Complaint, the Plaintiff sought a Final Judgment of foreclosure via an Order to Show Cause on May 11, 2016, the Plaintiff further provided the Court with a proposed Final Judgment of Foreclosure which included *inter alia* Plaintiff’s Attorneys’ Fees in the amount of \$2,800.00.
6. On May 17, 2016, Ms. El Hassan, through her Counsel, filed a Motion to Dismiss.
7. On August 25, 2016, the Plaintiff filed its Notice of Voluntary Dismissal.
8. On September 14, 2016, Defendant timely filed a Motion for Attorneys’ Fees.

Findings of Fact

This Plaintiff and its counsel commenced the instant litigation against the Defendant, alleging Ms. El Hassan ceased living in the subject property. The Court finds that the Defendant never ceased occupying the subject property and that Defendant did not breach any provision of the Mortgage which was alleged in Plaintiff’s Complaint.

The Plaintiff insists that the dismissal was the result of a “cure of default by the defendant and not as a result of being a prevailing party.” Plaintiff then asserts that the case was “settled” and the fact of the settlement meant that no party was a prevailing party. The Defendant denies that the parties entered into a stipulation. The Plaintiff was given an opportunity to present any evidence which would suggest a settlement or stipulation, yet Plaintiff provided no evidence to

this Court of any such agreement. Accordingly, the Court hereby finds that there was no agreement or stipulation whereby Defendant waived her right to pursue attorneys' fees.

Additionally, The Plaintiff's alleges that it was forced to bring the foreclosure action because of "Defendant's failure to occupy the subject property which resulted from the Defendant's failure to certify her occupancy using the annual certification". However, as stated above, the Defendant never failed to occupy the subject property and there is no clause in either the promissory note or the Mortgage that requires Defendant to provide an annual certification of occupancy. Quite the opposite, Paragraph 9(b) of the Mortgage states that "Borrower shall notify the Lender whenever any of the events listed in Paragraph 9(a)(ii)-(v) occur." Mortgage at 4.¹ places an affirmative duty on Defendant to notify Plaintiff if one of the occurrences listed in Paragraph 9(a)(i)-(iv) happens.

The Defendant's alleged failure to provide the Plaintiff with a certificate of occupancy is not an allegation in the Complaint and is not a bargained for agreement pursuant to the terms of the note or Mortgage.

Paragraph 20 of the Mortgage, which was attached to the Complaint as an Exhibit, provides:

20. Foreclosure Procedure... Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Paragraph 20, including, but not limited to, reasonable attorneys' fees and costs of title insurance.

Paragraph 20 of the Mortgage speaks only of the right of Liberty Home to collect attorneys' fees. However, section 57.105(7) provides a basis for the award of fees to all parties to a contract with such a provision.

¹ Only in the case of the death of the Borrower is the Borrower relieved of personally notifying the Lender that that particular ground for acceleration has occurred.

When Liberty Home voluntarily dismissed its case on August 25, 2016, the Defendant became the prevailing party. Florida courts have been clear that a voluntary dismissal of a foreclosure case means that a defendant is a prevailing party who is entitled to an award of attorneys' fees. *See Nudel v. Flagstar Bank, FSB*, 60 So.3d 1163 (Fla. 4th DCA 2011)(mortgagor who succeeded in having foreclosure action dismissed without prejudice was entitled to recover her attorney fees; mortgage provision that entitled mortgagee to reasonable attorney fees and costs in foreclosure proceedings was made reciprocal by operation of statute, and involuntary dismissal made mortgagor the prevailing party); *Raza v. Deutsche Bank Nat. Trust Co.*, 100 So.3d 121 (Fla. 2d DCA 2012)(mortgagor who was the prevailing party in bank's action to foreclose a mortgage and to recover monies due under related promissory note was entitled to award of attorney fees, where mortgage and promissory note contained attorney fee provisions in favor of bank); *Landry v. Countrywide Home Loans, Inc.*, 731 So.2d 137 (Fla. 1st DCA 1999)(mortgagors were entitled to attorney fees after mortgagee voluntarily dismissed foreclosure action; pursuant to statute, contractual attorney fee provisions included in underlying mortgage note were reciprocal obligations).

CONCLUSION

The facts of this case demonstrate that Defendant is the prevailing party and is entitled under the terms of the Mortgage to a fee award. Pursuant to the language in the Mortgage coupled with the clear provisions of section 57.105(7) regarding the reciprocity of attorney fee contractual language means that Defendant's motion for fees is both supported by the facts *and* by the law.

Therefore, pursuant to section 57.105(7), Florida Statutes, the Defendant, Felicia El Hassan is entitled to recover their reasonable attorneys' fees, to be paid by the Plaintiff Liberty Home Equity Solutions Inc. Formerly Known as Genworth Financial Home Equity Access Inc.

The matter shall be scheduled for an evidentiary hearing to determine the amount of attorneys fees assessed.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on 01/10/17.



JORGE E. CUETO
CIRCUIT COURT JUDGE

**No Further Judicial Action Required on THIS MOTION
CLERK TO RECLOSE CASE IF POST JUDGMENT**

The parties served with this Order are indicated in the accompanying 11th Circuit email confirmation which includes all emails provided by the submitter. The movant shall IMMEDIATELY serve a true and correct copy of this Order, by mail, facsimile, email or hand-delivery, to all parties/counsel of record for whom service is not indicated by the accompanying 11th Circuit confirmation, and file proof of service with the Clerk of Court.

Signed original order sent electronically to the Clerk of Courts for filing in the Court file.

Copies furnished to:

Ricardo Corona, Esq. of Corona Law Firm, *Counsel for El Hassan*, via email to Ricky@coronapa.com

Evan Rosenberg Esq. of Robertson, Anschutz and Schneid, P.L. *Counsel for Plaintiff* via email to Erosenberg@rasflaw.com