

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MASSACHUSETTS

IN RE KATHLEEN A. THOMAS )	
Debtor )	CASE NO. 10-40549-MSH
_____ )	Chapter 13
)	
KATHLEEN A. THOMAS, )	
Plaintiff )	
)	
v. )	Adversary Proceeding No. 10-04086
)	
CITIMORTGAGE, INC., )	
FLAGSTAR BANK, FSB, )	
ALLIED HOME MORTGAGE )	
CAPITAL CORPORATION, )	
Defendants )	

**SUPPLEMENTAL MEMORANDUM OF FLAGSTAR BANK, FSB IN SUPPORT  
OF ITS MOTION TO DISMISS**

Pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure, Defendant Flagstar Bank, FSB (“Flagstar”), hereby submits this supplemental memorandum in support of its motion to dismiss (Doc #8). In support of this memorandum, Flagstar states the following:

1. Flagstar Bank has no interest in the note or mortgage at issue in the pending bankruptcy proceeding. Flagstar acquired the loan in question on May 8, 2006 and transferred the loan to its co-defendant, CitiMortgage, Inc. on September 16, 2006. It has had no interest in this loan since then. See Supporting Affidavit of Sharon Morgan dated October 28, 2010.
2. The plaintiff cites to Nosek v. Ameriquest (In re: Nosek, 386 B.R. 374 (BKRPTCY D. Mass. 2008) in support of her contention that there is some type of skullduggery at issue here. Whether a bank in a different case admitted or denied that it

owned a note and mortgage or not is totally irrelevant to this specific case. Here, Flagstar has admitted in pleadings that it has no interest in the note or mortgage and has not attempted to collect on the note or mortgage.

3. Plaintiff next cites to the Massachusetts Predatory Home Loan Protection Act, M.G.L. c. 183C. Specifically, plaintiff claims that Flagstar is liable for a violation of c. 183C because a purportedly violative mortgage loan was transferred to it as an assignee. Plaintiff dismisses out of hand the fact that Flagstar has transferred the loan to CitiMortgage. Here, there is no allegation that Flagstar had anything to do with the origination of this loan. There is no allegation that Flagstar did anything wrong while it held the note and mortgage. Moreover, if there is indeed successor liability, it would lie with CitiMortgage. Flagstar cannot provide the relief sought by the debtor, either rescission or avoidance of the mortgage. There is no claim that CitiMortgage would not be answerable in damages should the court ultimately find that there was a violation of c. 183A.

4. Plaintiff specifically points to M.G.L. c. 183C §15 regarding assignments. That section does apply successor liability to an assignee of a high priced loan, providing that there is no such liability if an assignee has policies and procedures in place to prevent assignments to it of predatory loans. Moreover, it makes sense that the predatory nature of the loan must be apparent on the face of the loan documents. M.G.L. c. 183C §15(a)(3) specifies that the assignee need only “sample” loans as part of its reasonable due diligence; it need not review every loan.

5. Plaintiff cites to Thomas v. U.S. Bank National Association, et al., 575 F.3d 794 (8<sup>th</sup> Cir., 2009) for the unremarkable proposition that a mortgage lender ought not be able

to “cleanse” a violative loan simply by transferring it to someone else. The purpose is to ensure that the borrower has a remedy against someone, and indeed she does;

CitiMortgage is the holder of the note and mortgage, and is the only entity against whom she could get relief relating to the mortgage.

6. Neither debtor nor defendant Flagstar has been able to locate any case law about whether an assignee of a high-priced loan who no longer holds any interest in the loan is answerable in damages to the borrower.

7. Frankly, Flagstar Bank is puzzled that plaintiff keeps trying to establish that Flagstar has some liability here where Flagstar did not originate the loan and received no benefit from any of whatever purportedly excessive costs and fees were incurred by plaintiff. Nor could Flagstar be liable in any type of recoupment theory because it no longer holds the note or mortgage, nor is there any allegation that Flagstar did anything wrong while it was the holder of the note and mortgage. Consequently, Flagstar should be dismissed from this action.

FLAGSTAR BANK, FSB,  
By its Attorneys,

/s/ Donn A. Randall

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Dated: October 28, 2010

CERTIFICATE OF SERVICE

I, Donn A. Randall, hereby certify that a true and correct copy of the foregoing document was served on all parties or counsel of record via this Court's CM/ECF electronic filing system or, if not registered on this Court's CM/ECF system, then via first class mail, postage prepaid, on this 28<sup>th</sup> day of October, 2010.

*/s/ Donn A. Randall*  
Donn A. Randall