

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	5:17-cv-05091-LLP
)	
THE ESTATE OF BEULAH E.)	
GALLEGO, et al.,)	
)	
Defendants.)	

ANSWER AND AFFIRMATIVE DEFENSES
OF OGLALA SIOUX TRIBE

COMES NOW the Oglala Sioux Tribe (“Tribe”), by and through counsel, and for its Answer and Affirmative Defenses to the Complaint [doc. 1] states as follows:

ANSWER

1. The Tribe admits the allegations set forth in paragraph 3.
2. The Tribe is without sufficient information to admit or deny the allegations set forth in paragraphs 2, 4-15, 16 (second and third sentences), 18 (first sentence), 19, 20 (second and third sentences), 22, 24, and 25 (first sentence) and, therefore, denies the same.
3. Paragraphs 16 (first sentence), 18 (second sentence) and 23 (third sentence) are denied.
4. Paragraphs 1 (first sentence), 17, 20 (first sentence), 23 (first and second sentences), and 26 contain legal conclusions to which no answer is required, but to the extent an answer is required, the allegations in these paragraphs are denied.
5. Paragraphs 1 (second sentence), 21, 23 (last sentence), and 25 (second sentence) contain requests for relief (or allegations characterizing the requested relief) to

which no answer is required, but to the extent an answer is required, the allegations in these paragraphs are denied.

AFFIRMATIVE DEFENSES

1. This action is barred by the statute of limitations.
2. The complaint fails to state a claim upon which relief can be granted.
3. This action should be dismissed for lack of jurisdiction and failure to state a claim upon which relief can be granted because the United States, acting by and through the Secretary of Housing and Urban Development (“HUD”), has not complied with, or alleged compliance with, jurisdictional prerequisites to the commencement and maintenance of an action to foreclose a leasehold mortgage and to liquidate a leasehold interest in Indian trust land under Section 184 of the Housing and Community Development Act of 1992, Pub. L. 102-550, 106 Stat. 3672 (Oct. 28, 1992), *codified as amended at* 12 U.S.C. § 1715z-13a (hereafter “Section 184”), and because all relevant preconditions to initiation of the foreclosure proceeding, as set forth in the lease, note, leasehold mortgage or security instrument, applicable law, and administrative regulations have not been satisfied, in that:

- (a) The Secretary of HUD did not offer to transfer the leasehold mortgage and Section 184 loan to an eligible tribal member, the Tribe, or the Indian housing authority serving the Tribe before pursuing foreclosure of the leasehold mortgage or liquidation of the leasehold interest, as required by Section 184, *see* 12 U.S.C.A. § 1715z-13a(h)(2); 24 C.F.R. § 1005.107(b)(3); *see also* H.R. Rep. 102-760, 18, 1992 U.S.C.C.A.N. 3281, 3298 (July 30, 1992); and

- (b) The notice from the private lender, Wells Fargo Home Mortgage,

Inc., *see* Compl. [doc. 1] at 6 (¶ 23); Pl. Exh. 9 [doc 1-9], did not satisfy the requirements of Section 184 in that:

i. The notice was issued by the private lender, not the Secretary of HUD, notwithstanding the fact that it is the Secretary who is pursuing foreclosure of the leasehold mortgage and liquidation of the leasehold interest, not the private lender, and Section 184 expressly provides that “the Secretary shall only pursue liquidation after offering to transfer the account to an eligible tribal member, the tribe, or the Indian housing authority serving the tribe or tribes,” 12 U.S.C.A. § 1715z-13a(h)(2);

ii. The notice was sent before the private lender assigned the notice and leasehold mortgage to the United States;

iii. The notice was issued pursuant to a residential lease, *see* Pl. Exh. 6 [doc. 1-6] at 5-6 (¶ 11), not pursuant to Section 184;

iv. The notice is defective in that it did not offer to transfer the loan and leasehold mortgage “to an eligible tribal member, the Tribe, or the Indian housing authority serving the Tribe,” as required by Section 184, 12 U.S.C.A. § 1715z-13a(h)(2) (emphasis added), but instead only gave the Tribe a right of first refusal to acquire the leasehold interest pursuant to the terms of the lease;

v. The notice is defective in that it informed the Tribe that it could acquire the leasehold interest only by paying all sums in arrears and either assuming the loan or remitting the total balance due on the loan, as provided in the lease, *see* Pl. Exh. 6 [doc. 1-6] at 5-6 (¶ 11), and those

conditions and limitations are in derogation of the rights afforded in Section 184;

vi. The notice is defective in that it gave the Tribe an unreasonably short period of time to exercise its right of first refusal, and that condition and limitation is in derogation of the rights afforded in Section 184; and

vii. The notice is defective in that it informed the Tribe that its right of first refusal was subject to cancelation if borrower (lessee) cured the default, and that condition and limitation is in derogation of the rights afforded in Section 184; and

(c) Before invoking the remedies provided under the leasehold mortgage or law, neither the United States nor the private lender sent a notice to the Tribe of its right to exercise its right of first refusal “at any time within thirty (30) days of the date of the lender’s written notice to the Tribe” of the lessee’s default and failure to cure, as required by the lease, Pl. Exh. 6 [doc. 1-6] at 5-6 (¶ 11), in that:

i. The United States sent no such notice; and

ii. The notice from the private lender, dated June 16, 2011, *see* Pl. Exh. 9 [doc 1-9], was confusing, ambiguous, unclear, and defective and only gave the Tribe until July 1, 2011 – fifteen (15) days – to exercise its right of first refusal.

4. This action should be dismissed for lack of jurisdiction and failure to state a claim upon which relief can be granted because the United States, acting by and through

the Secretary of HUD, has not complied with, or alleged compliance with, a jurisdictional prerequisite to the commencement and maintenance of this action in that, on information and belief, neither the United States nor the private lender, Wells Fargo Home Mortgage, gave written notice to the Bureau of Indian Affairs prior to initiation of foreclosure proceedings, as required by the Certificate of Approval of Leasehold Mortgage. *See* Pl. Exh. 4 [doc. 1-4] at 1.

5. This action should be dismissed if and to the extent the alleged lease assignment set forth in the Complaint, *see* Pl. Compl. [doc. 1] at ¶ 12, and attached thereto, *see* Pl. Exh. 6 [doc. 1-6]:

(a) Was from Ernabelle Skye to herself, as it appears on the face of the assignment, *see* Pl. Exh. 6 [doc. 1-6] at 1; or

(b) Was not approved by the Tribe or the United States, as it appears on the face of the assignment, *see* Pl. Exh. 6 [doc. 1-6] at 2, since no conveyance of an interest in Tribal lands is valid without the approval of the Tribe and the United States. *See, e.g.*, 25 U.S.C. § 177.

6. The relief sought in paragraph 4 of the Request for Relief is not authorized under Section 184, and should be denied, in that “[a]ll Defendants,” including the Tribe, cannot “be barred and foreclosed of and from all rights, title, or interest in and to said property,” because the Tribe has rights in and to the property under Section 184 and the leasehold mortgage that cannot be foreclosed. A foreclosure sale to anyone other than “an eligible tribal member, the Tribe, or the Indian housing authority serving the Tribe” is strictly prohibited under Section 184, *see* 12 U.S.C.A. § 1715z-13a(h)(2), and the leasehold mortgage provides that the Tribe has the right to reject any purchaser at a foreclosure sale

other than the Secretary of HUD. *See* Pl. Exh. 3 [doc. 1-3] at 16 (¶ C).

7. The relief sought in paragraph 21 of the Complaint and paragraph 6 of the Request for Relief is not authorized under Section 184, in that the United States seeks an order from this Court authorizing it to bid on the property at any foreclosure sale, but Section 184 prohibits the sale, transfer, disposition, or alienation of the property to anyone other than “an eligible tribal member, the Tribe, or the Indian housing authority serving the Tribe.” *See* 12 U.S.C.A. § 1715z-13a(h)(2).

Dated: February 5, 2018

Respectfully submitted,

/s/ Steven J. Gunn

STEVEN J. GUNN

1301 Hollins Street

St. Louis, MO 63135

Telephone: (314) 920-9129

Facsimile: (800) 520-8341

Email: sjgunn@wulaw.wustl.edu

Attorney for Oglala Sioux Tribe

CERTIFICATE OF SERVICE

I certify that on February 5, 2018, I caused a true and accurate copy of the foregoing to be served on the following by filing the same with the Court's Case Management/Electronic Case Filing system:

Meghan K. Roche
U.S. Attorney's Office (Sioux Falls, SD)
P.O. Box 2638
Sioux Falls, SD 57101-2638
Email: meghan.roche@usdoj.gov

/s/ Steven J. Gunn

STEVEN J. GUNN