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In re Application by Wells Fargo Bank, N A. to Issue Corrected Notices of Intent to foreclose on Behalf of Identified Foreclosure Plaitniffs in Uncontested Cases	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION PASSAIC COUNTY DOCKET NO.: F-009564-12 A Civil Action

HSBC BANK, AS TRUSTEE FOR WELLS FARGO ASSET SECURITIES CORPORATION MORTGAGE ASSET-BACKED PASS-THROUGH CERTIFICATES SERIES 2007-PA6 Plaintiff, Vs. HILDE B. LEZARON, et als ,	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION BERGEN COUNTY DOCKET NO.: F-10078-10 A Civil Action

BRIEF OBJECTING TO THE ORDER TO SHOW CAUSE AND PLAINTIFF'S PROPOSED CORRECTIVE NOTICE OF INTENTION TO FORECLOSE

PRELIMINARY STATEMENT

It is with great regret that the filing of this opposition is necessary. Unfortunately, the Plaintiff banks are once again preserving their longstanding modus-operandi by presenting false information to the Court in an effort to obtain relief that is not available. Worse, is the fact that by being granted the opportunity to apply for said relief in the form of a summary action, there is a great likelihood that scores of errors exist in Plaintiff's submission. It would be an injustice of great proportions if said relief were erroneously granted based upon Plaintiff's false representations and frauds upon the court.

This specific opposition deals with a foreclosure that the Plaintiff decided to stop pursuing in September of 2011. In February 2012 a formal stipulation of dismissal was filed with the Court. Despite the fact that no litigation is open on the property, Plaintiff knowingly asks this court for relief it is not entitled to. Plaintiff misleads the Court on two primary facts. 1) that there is open litigation, 2) that the matter is uncontested. Neither fact is true.

STATEMENT OF FACTS

On February 16, 2010 the law firm of Zucker, Goldberg & Ackerman, LLC filed a complaint commencing a foreclosure action on behalf of HSBC Bank USA, National Association as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Asset-Backed Pass-Through Certificates Series 2007-PA6. [**Exhibit 1**: Complaint] The docket number for the case was F-10078-10, in Bergen County. On November 22, 2010 Defendant filed an Answer contesting the right of the Plaintiff to foreclose. [**Exhibit 2**: Answer]

The parties conducted discovery and each filed motions for summary judgment which were denied by the Court. [**Exhibit 3**: March 25, 2011 Order] During the first week of September, 2011, Plaintiff advised Defense counsel that Plaintiff was prepared to withdraw its

complaint. [Certification of Adam Deutsch] Several months later, on February 29, 2012, Plaintiff filed a stipulation f dismissal with the court. [**Exhibit 4**: Stipulation of Dismissal] As of today, September 11, 2012, Defendant has not been served with a new complaint commencing a new foreclosure action. Ms. Lezaron's home is not in litigation.

On April 4, 2012, New Jersey Supreme Court Chief Justice Rabner executed an order permitting foreclosure plaintiff's to file an Order to Show Cause seeking relief to serve corrected Notices of Intention to Foreclose satisfying N.J.S.A. 2A:50-56 in open and non-contested foreclosure cases. [**Exhibit 5**: April 4 Order] In August, 2012 Defendant received notice of the within application to the Court seeking approval for a corrective NOI against Ms. Lezaron. Ms. Lezaron is identified on the fifth page of Exhibit 19 (page 15 of submission) to Plaintiff's complete list of uncontested foreclosure cases made part of this Order to Show Cause. [**Exhibit 6**: Plaintiff's Exhibit 19 to OSC page 15] Notably, there is no docket number listed with Ms. Lezaron's file since there is no open case. [Id.] Plaintiff incorrectly asserts within its Exhibit 19, that Ms. Lezaron's foreclosure is or was an uncontested matter. Ms. Lezaron has always been represented with regard to her home and foreclosure.

LEGAL ARGUMENT

1. **Plaintiff's Application Must be Denied as it Seeks Relief Far Beyond that Authorized by the April 2012 Judge Rabner Order.**

On April 4, 2012 New Jersey Supreme Court Chief Justice Rabner executed an order with the following directive:

> Hon. Paul Innes, P.J.Ch., Mercer Vicinage, and Hon. Margaret Mary McVeigh, P.J.Ch., Passaic Vicinage, are each authorized to entertain summary actions by Orders to Show Cause as to *why plaintiffs in any uncontested residential mortgage foreclosure actions* filed on or before February 27, 2012 in which final judgment has not yet been entered, who served Notices of intention to Foreclose that are deficient under the Fair Foreclosure Act, N.J.S.A. 2A:50-56, should not

> be allowed to serve corrected Notices of Intention to Foreclose on defendant mortgagors and/or parties obligated on the debt."
> [**Exhibit 5**: April 4 Order, *emphasis added*]

The scope of Judge Rabner's Order is undeniably clear. Foreclosure Plaintiffs can apply for a summary action seeking approval of corrective Notice of Intent to Foreclose ("NOI") documents for uncontested foreclosures. There is no authority for this Court to hear a summary action to approve the issuance of corrective NOI documents in contested cases and cases which have been closed by dismissal or withdrawal of the complaint.

Plaintiff has even acknowledged the narrow scope of Judge Rabner's Order. In its July17 letter to this Court, Wells Fargo' counsel Mr. Mark Melodia wrote:

> Wells Fargo seeks an Order from this Court permitting Wells Fargo to issue corrected Notices of Intent to Foreclose as set forth in the new Jersey Supreme Court Order dated April 4, 2012, that was entered following the Court's decision in U.S. Bank N.A. v. Guillaume, 209 N.J. 449 (2012)
> .....
> Following its decision in Guillaume, the Supreme Court issued an Order on April 4, 2012 which authorizes this Court to entertain summary actions by Order to Show Cause as to why Plaintiffs who caused deficient NOIs to be served should not be allowed to issue corrected NOIs to defendant/mortgagors and/or parties obligated on the debt in *pending, pre-judgment uncontested foreclosures* filed prior to February 27, 2012 in which final judgment has not yet been entered.
>
> [**Exhibit 7**: Mark Melodia July 17 letter p1 & 2; emphasis added]

Mr. Melodia's letter goes on to discuss the great pains the plaintiff's foreclosure bar has gone to "compile a list of all pending, uncontontested foreclosures in New Jersey in which final judgment has not been entered and in which Wells Fargo served technically deficient NOIs prior to February 12, 2012 that failed to identify the lender and the lender's address." [**Exhibit 7**: Mark Melodia July 17 letter p3]

Knowing about the Order to Show Cause, and Mr. Melodia's application, this law office was initially surprised to find that several of our clients were receiving correspondence relating

to the pending motion. Each article of correspondence contained a "corrective NOI." Even more alarming than clients in contesting actions receiving the notice, were the several clients who received corrective NOI notices where the complaint has been dismissed or withdrawn in its entirety.

With regard to Ms. Hilde Lezaron, the Plaintiff's misrepresentation is drastic. Despite Mr. Melodia's claim that the list of non-contested defendant's was thoroughly vetted, Ms. Lezaron remains included in the application. This is despite the fact that on February 29, 2012, Zucker, Goldberg & Ackerman, LLC filed a stipulation of dismissal with the Court, formally ending foreclosure litigation against Ms. Lezaron. [**Exhibit 4**: Stipulation of Dismissal]

a. **Plaintiff's Misrepresentation of Information to This Court is Deja-Vu.**

Upon further analysis of Plaintiff's false representations to the Court as to the "uncontested" nature of several foreclosure cases made part of this Order to Show Cause, Defense counsel has been struck with deja-vu. It is abhorrent that the foreclosure defense bar and the Courts should come to expect false representations and attempt to cut corners by foreclosing plaintiffs. Nonetheless, this is where we all find ourselves. It is as if Plaintiff's have let fade the embarrassing memory of the December 10, 2010 Order to Show Cause titled in full:

> *Order Directing the Named Foreclosure Plaintiffs to show cause why the court should not suspend the ministerial duties of the office of foreclosure and the superior court clerk's office regarding the processing of certain uncontested residential mortgage foreclosure actions, stay sheriffs' sales in those foreclosure actions, appoint a special master pursuant to Rule 4.41-1 to investigate questionable foreclosure practices, and appointing an attorney to appear in support of the proposed relief."* [**Exhibit 8**: Dec 2010 OSC]

At that time, the Order to Show Cause executed sue-sponte by the Court stated "This court, in consultation with the staff of the Office of Foreclosure, has become increasingly concerned about the accuracy and reliability of documents submitted to the Office of

Foreclosure. The court has therefore determined that **immediate action** in the form of an Order to Show Cause is **necessary to protect the integrity of the judicial foreclosure process** in New Jersey and to assure the public that the process going forward will be liable." Id. The present motion is not for altruistic purpose of judicial integrity, but rather an attempt by the plaintiff banks to supplant integrity with expediency at the risk of once again exposing the Courts to becoming a complicit partner in the banking industries continued representation of inaccurate false information as part of the judicial foreclosure process. This is unacceptable.

This Court is urged not to fall victim to the outcome of a famous saying: Fool me once, shame on you, fool me twice, shame on me. The banks have been given just enough rope to hang themselves before the Courts of New Jersey. It would be inappropriate to revive the banks by offering a relaxing of the judicial process in foreclosure matters. On February 2, 2012 The Honorable Glenn A. Grant, J.A.D. entered an order closing the December 2010 Order to Show Cause investigation. The February 2 directive stated that the appointed special master found "as to each respondent that the submitted documents are sufficient to establish that the institution has not engaged in irregular practices." [**Exhibit 9**: Feb 2 2012 Order] It is clear that the banks are once again submitting false misleading information to the Courts.

2. **Each Homeowner Deserves Their Day in Court and Must Not Have Substantial Rights Adjudicated through an Ad-hoc Watered Down Version of Due Process.**

Previously, the Plaintiff Banks supported the proposition that a summary action is inappropriate. In opposition to the December 2010 Order to Show Cause, Wells Fargo wrote "Wells Fargo understands that the existence of multiple notices and cure opportunities does not guarantee a perfect process or the absence of all error. New Jersey's existing foreclosure process and case law already contemplate such imperfection and consequently allow errors to be

corrected in the context of actual, ongoing foreclosure proceedings involving the actual parties-in-interest, and the judge best informed about the individual facts and circumstances of that particular case." [**Exhibit 10**: Wells Fargo Opp Dec 2010 OSC p17]

Plaintiff's prior admission must be once again considered in the present context. The above quote illustrates the need for individual attentiveness to each file brought under the Order to Show Cause before the Court. Defendant Hilde Lezaron is certainly not the only person wrongly identified in the within request for relief. Had Defendant not been extremely attentive to her home, this application would have been uncontested. If uncontested, the application would be granted, despite the fact that Ms. Lezaron is represented and has no pending foreclosure action against her home.

3. **If the Court Allows this OSC Petition to be Heard a Special Master Should Be Appointed.**

In 2010, when the Supreme Court of New Jersey issued its Order to Show Cause regarding document irregularities in foreclosure matters, retired Superior Court Judge Walter R. Barisonek was appointed as a Special Master. Once again, the Courts should appoint a special master to review all of Plaintiff's submissions in connection with the motion before the Court. By appointing a special master, the Court can continue its goal of expediency while at the same time balancing due process and notions of substantial justice.

Defendant Lezaron is only one homeowner wrongly identified in this action. Counsel for Defendant has identified additional homeowners wrongly made part of this action. [Certification of Adam Deutsch] Unfortunately, the Plaintiff banks simply cannot be trusted to submit reliable information to the Courts. This is likely not a product of poor legal representation as much disorganization within the banks and their servicers. It is within this Court's power to appoint a

special master, and once again the power must be utilized as it was during 2010. [**Exhibit 11**: Special Master Appointment]

The Court previously noted that "94 percent of foreclosure cases proceed in the absence of any meaningful adversarial proceeding. The significance of this disparity is even more striking because many of the contested proceedings are defended pro se. Because these actions frequently lack an aggressive defense, the Office of Foreclosure and our General Equity judges are tasked with the responsibility f ensuring that justice is done for absent and pro se parties." [**Exhibit 11**: Special Master Appointment p3]

Ms. Lezaron is a perfect example of the present danger. The Court previously identified uncontested actions as being subject to heightened risk of fraud from the banks. In this matter, the defendant is known to be represented by counsel. Litigation was active for approximately a year with regular correspondence between the Defendant's firm Denbeaux & Denbeaux and Plaintiff's firm Zucker Goldberg & Ackerman. Despite the immense record, the bank has now falsely represented this as being an uncontested action for which no representation exists. Accordingly, Plaintiff misrepresented that Ms. Lezaron is among the 94% of foreclosures that are reportedly uncontested. The Court has acknowledged that said cases are given less attention due to the absence of advocacy. It would be prudent to appoint a special master to ensure that Plaintiff banks do not misrepresent to the Court when advocacy is absent from the proceeding.

4. **Plaintiff's Application Highlights the Problem With the Bifurcated Foreclosure Process and the Definition of Uncontested Action.**

A significant dilemma faced by this Court is to determine what exactly is an uncontested foreclosure action. Even in Ms. Lezaron's case where the Plaintiff knows she is represented, there is confusion on the issue. Plaintiff's errors are likely to be exacerbated by the uncertainty

as to whether a defendant homeowner is represented by counsel, whether the action is contested, and whether counsel the homeowner or both are to be served with court documents. Defense counsel notes that in this instance, Ms. Lezaron was served the Plaintiff's application, but counsel did not receive the motion papers. [Certification of Adam Deutsch]

There is a disconnect in the court rule definition of "uncontested" whereby a homeowner defendant may be precluded from waging meaningful opposition to material issues and be inappropriately categorized as uncontested. The rules are clear as written but confusing as implemented. Foreclosure proceedings have their own dedicated section of codified laws and court rules found under N.J.S.A. 2A:50 et al, and R. 4:64-1 respectively. The legislative and judicial rules work in unison to promote a common process for the enforcement of mortgages and their underlying debt, the promissory note.

Under the statutory code the legislature established a process whereby enforceability of a mortgage is determined apart from liability under the corresponding promissory note. The legislature specifically resolved that any alleged defaulted debt obligation secured by a mortgage must first be collected by enforcement of the mortgage. If a mortgagor successfully obtains a foreclosure judgment, sells the home, and still has a deficiency claim on the promissory note, a second action can be filed setting the mortgagee's liability on the promissory note. The statute reads clearly:

> Except as otherwise provided, all proceedings to collect any debt secured by a mortgage on real property shall be as follows:
>
> First, a foreclosure of the mortgage; and
>
> Second, an action on the bond or note for any deficiency, if, at the sale in the foreclosure proceeding, the mortgaged premises do not bring an amount sufficient to satisfy the debt, interest and costs.

N.J.S.A. 2A:50-2[1]

The only issue in question and the only relief that may be afforded in foreclosure matters cannot exceed the scope of the mortgage. N.J.S.A. 2A:50-1; see Asher v. Hart, 128 N.J. Eq. 1 (N.J. Super. Ct. 1940) (explaining that a mortgage holder was not entitled to a lien on the premises for the amount of a deficiency arising upon the sale by sheriff of a mortgage premises, because foreclosure proceedings did not constitute an adjudication of the amount of the deficiency nor liability for the deficiency).

When viewed with the applicable court rules, it is clear that the judiciary and legislature have created an alternative set of rules and laws intended to streamline the foreclosure process. The best evidence of this intention is the establishment of a bifurcated process whereby the Chancery Division's jurisdiction in foreclosure actions is greatly limited and shared with the quasi-judicial Administrative Office of Foreclosure. Under R. 4:64-1, the Chancery Division is directed only to determine whether the execution of a mortgage occurred and whether Plaintiff is the mortgagee. Once these two determinations are made, the same rule directs that the action be transferred to the Administrative Office of Foreclosure as an "uncontested" foreclosure.

The judiciary has provided a remarkably narrow definition of what constitutes a contested foreclosure. Foreclosures are uncontested when:

> (c) **Definition of Uncontested Action.** An action to foreclosure a mortgage or to foreclose a condominium lien for unpaid assessments pursuant to N.J.S.A. 46:8B-21 shall be deemed uncontested if, as to all defendants,
>
> (1) a default has been entered as the result of **failure to plead** or otherwise defend; or
>
> (2) **none of the pleadings** responsive to the complaint either **contest the validity or priority of the mortgage** or lien being

[1] "Otherwise provided" provisions are within N.J.S.A. 2A:50-2.3

> foreclosed or create an issue with respect to plaintiff's right to foreclose it;
>
> (3) all the **contesting pleadings have been stricken** or otherwise rendered noncontesting
>
> An allegation in an answer that a party is without knowledge or information sufficient to form a belief as to the truth of an allegation in the complaint shall not have the effect of a denial but rather of leaving the plaintiff to its proofs, and such an allegation in an answer shall be deemed noncontesting to the allegation of the complaint to which it is responsive.

R. 4:64-1(c) (emphasis added)

Subsection 2 is the only portion of the rule unique to foreclosure actions. And it is subsection 2 that Defendant believes to be the best case scenario for foreclosure plaintiffs continued false representations to the courts. The judiciary's view of foreclosure proceedings limits the issues of dispute to the execution of the mortgage and the enforceability of that document. Bolstering this interpretation of the rule is further supported by Comment 3.1 to the 2012 publication of R. 4:64-1 stating "A challenge by the mortgagor to the asserted amount due does **not** constitute a contesting answer for the purposes of R. 4:64-1(c)." See Metlife v. Washington Ave. Assoc., 159 N.J. 484 (1999) (discussing that disputes as to the valuation of fees, penalties, and terms of the debt instrument do not constitute a contesting matter as to foreclosure and enforcement of the mortgage). The judiciary has enforced R. 4:64 to ask only whether a mortgage was executed. Thus, it is clear from the rule that if a homeowner acknowledges execution of a note and mortgage, and contests the terms of the note but not the mortgage, the homeowner may be precluded from raising the issue in contest to a foreclosure action.

The key problem with the narrow view of the rule is that it fails to consider that foreclosure litigation by necessity results in adjudication of issues not limited to the mortgage.

An obvious example in this matter would be the determination of whether Plaintiff complied with the Fair Foreclosure Act. Additionally is the relevant question of whether Plaintiff can enforce the promissory note, and what the value of the promissory note is. In following the Court rules, litigants and county vicinages may be confused as to where the proper judicial fact finding should occur.

In an attempt to clarify the role of the judiciary and The Office of Foreclosure to foreclosure litigants, the judiciary has provided the following guideline on its website:

> The foreclosure process in New Jersey is a two tiered system involving both Superior court General Equity judges and the staff of the Office of Foreclosure. The Office of Foreclosure is a unit in the Administrative Office of the Courts, Civil Practice Division.
>
> .....
>
> The office's attorneys review complaints for compliance with statutory, case law and court rule requirements; review filed answers to determine whether an answer is uncontesting or contesting; review service of process and recommend entry of default; process routine motions and orders; review final uncontested judgment packages for completeness and confirm the computation of the amount due on the underlying debt.
>
> If a pleading creates a dispute requiring a judicial decision, the foreclosure file is sent to the General Equity judge in the county of venue... After the dispute is resolved by the General Equity judge, the case file is returned to the Office of Foreclosure for handling as an uncontested foreclosure action.
>
> An answer is considered **uncontesting when it does not dispute the validity of the mortgage**, the priority of the mortgage or create an issue with respect to the plaintiff's right to foreclose. An uncontesting answer also may recite that the party is without knowledge or information sufficient to form a belief as to the allegations and to leave the plaintiff to its proofs.

http://www.judiciary.state.nj.us/civil/foreclosure/overview.html [emphasis added]

A foreclosing Plaintiff obtains final judgment by making an application to the Administrative office of Foreclosure per R. 4:64-1(d). Under that rule, the foreclosing entity

submits proof of the amount due on the note, however the Defendant has no right to a judicial hearing to dispute the facts presented by the bank. R. 4:64-1(d)(2) Pursuant to According to R. 4:64-2(c)

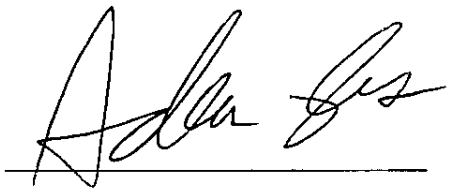
Throughout foreclosure litigation there is an inherent bias against affording due process to the homeowner. Even where the final judgment application contains false information as to the amount due on the note, there is no right to a hearing. The parallel to this action is uncanny. Each Defendant homeowner is having integral rights adjudicated without the right to a hearing. This is problematic where Plaintiff is acting under authority of Judge Rabner's Order. However, the problem is grossly exacerbated in light of Plaintiff's misrepresentations. In part because of the uncertainty of what constitutes an "uncontested action" Plaintiff may obtain relief it is not entitled to before this Court.

Defendant respectfully asks this Court to fully address the issue so that other homeowners are not subject to inappropriate adjudication of rights.

CONCLUSION

Plaintiff's relief must be denied in its entirety as there is no open docket number relating to Ms. Lezaron's home. Furthermore, this Court should take action to appoint a special master and/or impose sanctions upon Plaintiff for seeking relief it is not entitled to in a special summary action.

Dated: September 17, 2012



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September 17, 2012

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Superior Court Clerk's Office
Foreclosure Processing Services
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PO Box 971
Trenton, New Jersey 08625

Re: In re: Application by Wells Fargo Bank, N.A. to Issue Corrected Notices of Intent to foreclose on Behalf of Identified Foreclosure Plaintiffs in Uncontested Cases
Docket No.: 009564-12

HSBC Bank as TTEE v. Lezaron
Docket No.: F-10078-10

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Dear Sir/Madam:

This firm represents the defendants in the above-referenced litigation.

Enclosed for filing please find Brief Objecting to the Order to Show Cause and Plaintiff's Proposed Corrective Notice of Intention to Foreclose. Kindly file the enclosed, returning the copy marked "Filed" to this office in the envelope provided.

Thank you.

Very truly yours,

DENBEAUX & DENBEAUX

Adam Deutsch, Esq.
AD am

cc: Hon. Margaret Mary McVeigh, JSC *(Via NJLS)*
Mark S. Melodia, Esq. *(Via NJLS)*
Jenee Ciccarelli, Esq. *(Via NJLS)*
Hilde Lezaron

Enclosures