

Miles and Susan Svikhart

38 Winding Brook Way
Shrewsbury, NJ 07702

October 9, 2012

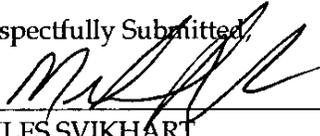
Superior Court Clerk's Office, Foreclosure Processing Services
Attention: Objection to Notice of Intention to Foreclose
P.O. Box 971
Trenton, NJ 08625

**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. F-009564-12**

Dear Sir or Madam:

Enclosed please find Defendants' opposition brief in reply to Plaintiff's Order to Show Cause.

Respectfully Submitted,



MILES SVIKHART
Defendant

cc: Judge McVeigh, J.S.C. (via regular mail)
Mark S. Melodia, Esq. (via regular mail)

RECEIVED

OCT 12 2012

**SUPERIOR COURT
CLERK'S OFFICE**

Miles and Susan Svihart
38 Winding Brook Way
Shrewsbury, NJ 07702
Defendants

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	: SUPERIOR COURT : OF NEW JERSEY : CHANCERY DIVISION : PASSAIC COUNTY : : <u>Civil Action</u> : : Docket NO. F-009564-12 : : BRIEF IN OPPOSITION TO : PLAINTIFF'S APPLICATION :
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Defendants Miles Svihart (hereinafter referred to as "Miles") and Susan Svihart (hereinafter referred to as "Susan") through his attorneys of record Whiteman Law Group, LLC, submit the following brief in opposition to Wells Fargo Bank, N.A. (hereinafter referred to as "Wells Fargo")'s application to continue a foreclosure action despite not having served a proper Notice of Intent to Foreclose:

STATEMENT OF MATERIAL FACTS

1. Prior to filing a Complaint in this matter, Miles and Susan were not served with a proper Notice of Intent to Foreclose as is required by the Fair Foreclosure Act.
2. Wells Fargo has now attempted to file an Amended Complaint which does not include the certifications required under the New Jersey Rules of Court for a foreclosure Complaint.
3. On March 23, 2012, Miles and Susan filed a Complaint against Wells Fargo Bank, N.A. in the Superior Court of New Jersey, Law Division, Monmouth Vicinage Docket No. L-1369-12 related to the alleged mortgage. This litigation is ongoing.

DISCUSSION

I. Court Should In Its Discretion Require Wells Fargo to File a New Complaint

Under Rule 4:43:3, the Court may set aside the entry of default for good cause shown. R.4:43-3. The New Jersey Supreme Court has stated that the good cause standard is met by a showing of a meritorious defense together with a lack of contumacious

behavior. Under New Jersey law, a foreclosing lender is required to strictly comply with the terms of the FFA. EMC Mortgage Corp. v. Chaudhri, 400 N.J. Super. 126, 137-38 (App. Div. 2008). Substantial compliance with the FFA by a foreclosing lender is not sufficient to allow foreclosure. Ibid. “[C]ourts are not free to deviate from the unambiguous statute.” Ibid.

The Fair Foreclosure Act states that the notice of intent to foreclose must state “the date by which the debtor shall cure the default to avoid initiation of foreclosure proceedings, which date shall not be less than 30 days after the date the notice is effective.” N.J.S.A. 2A:50-56(c)(5). The Notice of Intent to Foreclosure must also be sent by either registered or certified mail. N.J.S.A. 2A:50-56(b). The notice is deemed to have been effectuated on the date that the notice is delivered in person or mailed to the party. Ibid.

Here, Plaintiff did not fully and strictly comply with the Fair Foreclosure Act. Plaintiff admits as much in their notification to me regarding the Order to Show Cause. Because Plaintiff did not issue a proper Notice of Intent to Foreclose, it is within the Court’s discretion for the Court to dismiss the Complaint against Miles and Susan, send the proper Notice of Intent to Foreclose by certified or registered mail, return receipt requested, and, if default is not cured within thirty days of the effective date, Plaintiff may re-file a foreclosure Complaint.

It is the intention of Miles and Susan to file an Answer to the Complaint and contest the validity of the same. However, as there is already a default entered against Miles and Susan in this matter, it is difficult for Miles and Susan to contest at this point. If a new Complaint is filed however, Miles and Susan would have the opportunity to file a prompt response.

II. Wells Fargo’s Amended Complaint Does Not Comply with the Court Rules

Plaintiff’s Amended Complaint fails to comport with the Requirements of New Jersey Court Rule 4:64-1. Rule 4:64-1 requires “[p]rior to filing an action to foreclose a mortgage, a condominium lien, or a tax lien to which R. 4:64-7 does not apply, the plaintiff shall receive and review a title search of the public record for the purpose of identifying any lienholder or other persons and entities with an interest in the property that is subject to foreclosure and shall annex to the complaint a certification of compliance with the title search requirements of this rule.” R. 4:64-1(a)(1). Further, the Rule requires “[i]n all residential foreclosure actions, plaintiff’s attorney shall annex to the complaint a certification of diligent inquiry: (A) that the attorney has communicated with an employee or employees of the plaintiff who (i) personally reviewed the

documents being submitted and (ii) confirmed their accuracy; and (B) the name(s), title(s) and responsibilities in those titles of the plaintiff's employee(s) with whom the attorney communicated pursuant to paragraph (2)(A) of this rule.”

Because Wells Fargo's Amended Complaint fails to contain the above-referenced certifications, Wells Fargo's Complaint is deficient under the Court Rules. Therefore, the Court should dismiss this action without prejudice and require Wells Fargo to refile the foreclosure Complaint with the required certifications.

III. Wells Fargo Should Not Be Allowed to Proceed With This Foreclosure Action Due to Pending Litigation in the Superior Court of Jersey, Law Division.

In March 2012, Miles and Susan filed litigation in the Superior Court of New Jersey, Law Division, Monmouth Vicinage against Wells Fargo related to Wells Fargo's failure to honor promises from Wells Fargo to grant Miles and Susan a loan modification. One of the forms of relief requested by Miles and Susan is an order preventing Wells Fargo from proceeding with a foreclosure action against Miles and Susan. Because granting Wells Fargo's requested relief in this foreclosure action would frustrate the potential relief that Miles and Susan could obtain in the pending litigation in the Superior Court of New Jersey, Law Division, Monmouth Vicinage, the Court should in its discretion deny Wells Fargo's requested relief until the pending action in the law division is resolved.

CONCLUSION

For the foregoing reasons, Miles and Susan respectfully request that the Court deny Wells Fargo's instant application.

Respectfully Submitted,

Dated: 10/10/12

By: _____
MILES SVIKART
Defendant