

William M.E. Powers, Jr
William M.E. Powers, III
Sarah E. Powers
Edward W. Kirm, III
III Manuel-Coughlin

November 10, 2009

Honorable Frank A. Buczynski, Jr.
Superior Court of New Jersey
Chancery Division
120 Hooper Avenue
PO Box 2191
Toms River, NJ 08754

Re: The Bank of New York, as Trustee v. William P. Wolf, et al.
Docket No. F-12418-08

Dear Judge Buczynski:

Enclosed please find the original and one copy Plaintiff's Reply Brief in opposition to the defendant's motion to vacate the default judgment in the above referenced matter. The motion is returnable on Friday, November 20, 2009.

Kindly file the Plaintiff's opposition and return a file stamped copy in the business reply envelope enclosed for your convenience.

By copy of this letter I am serving my adversary with copies of the enclosures.

Very truly yours,


Edward W. Kim III

EWK:tmj
#2008-0462
Enclosures
cc: Rebecca Schore, Esquire
BAC Home Loans Servicing, L.P., Loan #143884876
Attn: Maria Elena Duran, Foreclosure Dept.



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Docket No. F-12418-08

Dear Judge Buczynski:

Please accept this letter brief in lieu of a more formal brief in opposition to the defendant's motion to vacate the final judgment which was entered on February 13, 2009 in the above referenced matter. The motion is returnable on Friday, November 20, 2009.

The relevant facts in this matter are as follows. On September 7, 2006, the defendant, William P. Wolf and Donna J. Raney, executed and delivered to Countrywide Bank, N.A., a note in the principal amount of \$240,000.00. The note was payable over a period of 30 years and provided for an adjustable rate of interest.

In order to secure payment of the note, on even date, the defendant executed and delivered to Mortgage Electronic Registration Systems, Inc. as nominee for Countrywide Bank, N.A., a mortgage against the residence located at 2340 Woodland Road, Manchester, New Jersey. The mortgage was duly recorded in the Ocean County Clerk's Office on September 26, 2006 in Mortgage Book 13344 at Page 1682&c.

Mortgage Electronic Registration Systems, Inc. as nominee for Countrywide Bank, N.A. subsequently assigned the note and mortgage The Bank of New York, as Trustee. The Assignment of Mortgage was recorded on May 13, 2008 in Assignment Book 14009 at page 242.

The defendants defaulted under the terms of the note and mortgage by failing to make the September 1, 2007 payment and all payments due thereafter. As a result, the plaintiff elected to accelerate the loan.

On March 28, 2008 the plaintiff filed its complaint in the Foreclosure Unit of the Superior Court

HONORABLE FRANK A. BUCZYNSKI, JR., P.J.Ch.

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of New Jersey seeking to foreclose the first mortgage it held on the defendants property.

On April 8, 2008, the defendant, William Wolf, was personally served with the Summons and Complaint in this matter.

On July 16, 2008, the Superior Court of New Jersey entered default against William Wolf as he failed to appear or file an answer contesting the foreclosure action.

On February 13, 2009, the Superior Court of New Jersey entered Final Judgment in favor of the Plaintiff in this matter.

After a brief delay occasioned by the defendant's filing a Chapter 7 Bankruptcy, the Sheriff of Ocean County scheduled the sheriff sale of the mortgaged premises for November 10, 2009. The sale has been carried to November 24, 2009 to allow this motion to be heard.

The defendant now files a motion seeking to vacate the default judgment in this matter so that he may file an answer contesting the foreclosure action. He also seeks to file a third party complaint and counterclaims against the Plaintiff alleging that the lender violated various state and federal statutes in originating the loan.

A motion to vacate a final judgment is a matter which lies within the sound discretion of the trial court. Resolution Trust Corporation v. Associated Gulf Contractors, Inc., 263 N.J.Super. 332, 340 (App.Div.1993), citing, Hodgson v. Applegate, 31 N.J. 29 (1959). It is further held that the Court should view a motion to vacate a default judgment "with great liberality, and every reasonable ground for indulgences [to be] tolerated to the end that a just result is reached." Marder v. Realty Construction Co., 84 N.J.Super. 313, 319 (App.Div.1964), aff'd 43 N.J. 508 (1964). However, "a defendant seeking to reopen a default judgment must show that the neglect to answer was excusable under the circumstances and that he has a meritorious defense." Id., at 318. citing Tradesmens Nat. Bank & Trust Co. v. Cummings, 38 N.J.Super. 1, 4-5 (App.Div.1955); Ballurio v. Campanaro, 30 N.J. Super 548, 551-552 (App.Div.1954).

Further, the issue of whether the default of a defendant and a default judgement entered in a foreclosure action was addressed by the New Jersey Appellate Division in Trustees Of Local 478 Trucking and Allied Industries Pension Fund v. Baron Holding Corporation, 224 N.J.Super. 485 (App.Div.1988). This case involved an action by the Union to foreclose two mortgages which it held against the property on which the defendant conducted it's business. In affirming the lower Court's decision to deny the defendant's motion to vacate the entry of default and the default judgment, the Appellate Division stated:

If service was proper, then to successfully move to set aside an entry of default, defendant is required to show good cause. R. 4:43-3. Although the requisite good cause does not appear to be readily quantifiable, it should be noted that even an

application to set aside a default judgment, which requires a more stringent showing of cause under R. 4:50-1 than the setting aside of a default, is "viewed with great liberality, and every reasonable ground for indulgence is tolerated to the end that a just result is reached." Marder v. Realty Construction Co., 84 N.J.Super. 313, 319, 202 A.2d 175 (App.Div.), *aff'd* 43 N.J. 508, 205 A.2d 744 (1964). Nevertheless, before a default is set aside, defendant must at the very least show the presence of a meritorious defense worthy of a judicial determination. O'Connor v. Abraham Altus, 67 N.J. 106, 128-129, 335 A.2d 545, (1975); Bank of New Jersey v. Pulini, 194 N.J.Super. 163, 165-166, 476 A.2d 797 (App.Div.1984). This is especially so in a foreclosure case where the mere denominating of the matter as a contested case moves it from the expeditious disposition by the Office of Foreclosure in the Administrative Office of the Courts, R.1:34-6 and R. 4:64-1(a), to a more protracted treatment by the Chancery Division providing discovery and raising other problems associated with trial calendars. If there is no bona fide contest, a secured creditor should have prompt recourse to its collateral.

Trustees of Local 478, 224 N.J.Super. at 488.

In the case at bar, the Plaintiff asserts that the defendant has failed to demonstrate excusable neglect in failing to file an timely answer, and has failed to demonstrate a meritorious defense to the foreclosure action.

First, the defendant has failed to demonstrate excusable neglect in failing to file an answer in this matter. Specifically, despite the defendant's financial distress, he was personally served with the summons and complaint over 18 months ago. Moreover, in that period of time, he sought and obtained the assistance of counsel, who was more than capable of assisting the defendant in filing an answer to the foreclosure. Despite this, the defendant failed to file any responsive pleading to the foreclosure and waited until the sheriff had scheduled a sale in this matter, all at great expense to the Plaintiff, until he finally asserted a defense. Clearly, the defendant sat upon his rights in this matter and failed to act in a prudent and responsible manner.

Furthermore, the defendant's motion fails to set forth a valid defense to the foreclosure action. In fact, the defendant readily admits that he has defaulted under the terms of the note and mortgage and has failed to make the payments required thereunder since September 1, 2007. Instead, the defendant now asserts that the loan violates the New Jersey Home Owner Security Act and that the Plaintiff has failed to demonstrate standing sufficient to bring the within foreclosure action.

The law regarding mortgage foreclosure is equally settled. The right to foreclose the equity of redemption arises whenever there is a default which is derived from contract between the grantor-mortgagor and grantee-mortgagee with all of the privileges and rights that contract law

provides. 29 N.J. Practice, Law of Mortgages, Cunningham & Tischler, (1975) Section 171 at 764. A prima facie right to foreclose is made upon proof of execution, recording and non-payment of the note and mortgage. Thorpe v. Floremore Corp., 20 N.J.Super. 34 (App.Div.1952).

In the case at bar, it is clear that the Plaintiff has made a prima facie case that it is entitled to foreclose on its mortgage. Moreover, none of the issues raised by the defendant's motion address the material issues of the foreclosure. In fact, the defendant's readily admit that the Plaintiff's have raised a prima facie case entitling it to foreclose.

Further, the Plaintiff asserts that the within loan is not covered by the provisions of New Jersey's Home Ownership Security Act, N.J.S.A. 46:10B-22. In fact, the lender conducted an audit prior to acquiring the loan from the defendant's broker. A copy of the audit is attached hereto as an exhibit. The audit reflected that the loan was a "high-cost" loan, as defined by the statute, as the fees and points charge exceeded the allowable threshold by \$507.94. As a result, the broker lowered its origination fee from \$2,400.00 or 1% of the loan amount, to \$1,892.00, as indicated on the HUD-1 Settlement Statement executed by the defendant.

Additionally, the defendant's assertion that the prepayment penalty must be added into the fees and points calculation is incorrect. Pursuant to the provisions of the Act, N.J.S.A. 46:10B-24:

"Threshold" means any one of the following two items, as defined:

- (2) "Total points and fees threshold" means that the total points and fees payable by the borrower at or before the loan closing, excluding either a conventional prepayment penalty or up to two bona fide discount points, exceed:
 - (a) 4.5% of the total loan amount if the total loan amount is \$40,000 or more;

The Act further defines a conventional prepayment penalty as follows:

"Conventional prepayment penalty" means any prepayment penalty or fee that may be collected or charged in a home loan, and that is authorized by law other than by this act, provided the home loan (1) does not have an annual percentage rate that exceeds the conventional mortgage rate by more than two percentage points; and (2) does not permit any prepayment fees or penalties that exceed two percent of the amount prepaid.

As the Court can see from the audit form, the maximum amount of any prepayment penalty due under the loan would be \$5,251.54 which also equals 2% of the maximum principal due under

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the loan. As a result, the prepayment penalty in this case is considered to be a conventional prepayment penalty under the provisions of the statute and should be excluded from the points and fees threshold.

Thus, the subject loan is not a "high-cost" loan as defined by the Act. Therefore, the originating lender was not required to provide the defendant with the notices provided by the Act, nor were they required to ensure that the borrower submitted to loan counseling prior to closing.

Plaintiff asserts that the defendant has failed to demonstrate either excusable neglect or a meritorious defense to the foreclosure action. Therefore, based upon the foregoing, the Plaintiff respectfully requests that the Court deny the defendant's motion to vacate the final judgment and allow this matter to proceed to sale.

Respectfully submitted,



Edward W. Kim III

EWK:tmj

#2008-0462

cc: Rebecca Schore, Esquire

BAC Home Loans Servicing, L.P., Loan #143884876

Attn: Maria Elena Duran, Foreclosure Dept.

NEW JERSEY HIGH COST WORKSHEET
HREG 044

Borrower Last Name: WOLF
Actual Loan Amount: \$240,000.00
Interest Rate: 2.500%

Loan Number: 143884876
Loan Phase: Preclosing
Application Date: 2006-08-08

RESULT SUMMARY

CONCLUSION:

This loan violates NEW JERSEY HIGH COST due to FEES.
Fees are over the limit by \$507.94.

THRESHOLDS:

(PASS) HOEPA APR Threshold (First Lien)
(FAIL) NJ Fee Pct Threshold (Total Loan Amt >= \$40,000)

ERROR MESSAGES:

* Invalid PAR RATE

APR TEST

1. Calculate APR BENCHMARK

| | |
|---|---------|
| a. Loan APR | 8.310% |
| b. Subtract Comparable Constant Maturities Daily Index Rate | -5.110% |
| APR BENCHMARK = | 3.200% |

Does the APR BENCHMARK exceed 8.000%?

NO

If YES, this loan violates NEW JERSEY HIGH COST due to APR.

NJ DISCOUNT/PPP EXCLUSION

1. Calculate BONA FIDE DISCOUNT AMOUNT

No discount may be excluded because the borrower is not paying discount.

BONA FIDE DISCOUNT AMOUNT = 0.00

2. Calculate CONVENTIONAL PREPAYMENT PENALTY EXCLUSION AMOUNT

DETERMINE IF THE NEW LOAN HAS A CONVENTIONAL PREPAYMENT PENALTY:

| | |
|---|--------|
| A. Comparable Conventional Mortgages Index Rate | 6.740% |
| B. Add 2% | 2.000% |
| C. Benchmark Rate | 8.740% |
| D. Loan APR | 8.310% |

Loan APR [D] does not exceed Benchmark Rate [C].

| | |
|-------------------------------|----------|
| E. Maximum Prepayment Penalty | 5,251.54 |
| F. 2% of Maximum Principal | 5,251.54 |

DETERMINE AMOUNT OF CONVENTIONAL PREPAYMENT PENALTY EXCLUSION:
If [E] is LESS THAN OR EQUAL TO [F], the loan has a Conventional Prepayment Penalty, and [E] may be excluded from Points and Fees.

If [E] is GREATER THAN [F], the loan does not have a Conventional Prepayment Penalty, and [E] may NOT be excluded from Points and Fees.

[E] is LESS THAN OR EQUAL TO [F].
[E] may be excluded from Points and Fees.

CONVENTIONAL PREPAYMENT PENALTY EXCLUSION AMOUNT = 5,251.54

Exclude the GREATER of the BONA FIDE DISCOUNT AMOUNT or the CONVENTIONAL PREPAYMENT PENALTY EXCLUSION AMOUNT.

NJ DISCOUNT/PPP EXCLUSION = 5,251.54

FEE TEST

1. Calculate TOTAL POINTS AND FEES

| | |
|--|----------|
| a. Prepaid Finance Charges (see Itemization) | 5,880.98 |
|--|----------|

| | | |
|--|-----------|-----------|
| b. Add Non Finance Charge Fee Adjustments | | |
| ** Includes points and fees paid by seller on behalf of borrower | | |
| None | 0.00 | |
| NET NON FINANCE CHARGE FEE ADJUSTMENTS = | 0.00 | 0.00 |
| c. Subtract Finance Charge Fee Adjustments | | |
| Attorney/Settlement Agent | 945.00 | |
| Prepaid Interest | 1,014.98 | |
| NET FINANCE CHARGE ADJUSTMENTS = | 1,959.98 | -1,959.98 |
| d. Other Adjustments | | |
| Add Premium Paid To Broker By Lender (YSP) | 6,900.00 | |
| JV to CHL Origination Fee | 0.00 | |
| Add Maximum New Loan Prepayment Penalty | 5,251.54 | |
| Subtract NJ DISCOUNT/PPP EXCLUSION | -5,251.54 | |
| NET OTHER ADJUSTMENTS = | 6,900.00 | 6,900.00 |
| TOTAL POINTS AND FEES = | | 10,821.00 |

2. Calculate TOTAL LOAN AMOUNT

| | | |
|---|-----------|------------|
| a. TOTAL POINTS AND FEES | 10,821.00 | |
| b. Subtract Borrower Cash to Closing | 0.00 | |
| c. Difference = | 10,821.00 | |
| d. Actual Loan Amount | | 240,000.00 |
| e. Subtract Difference (c) if greater than zero | | 10,821.00 |
| TOTAL LOAN AMOUNT = | | 229,179.00 |

3. Calculate FEE PERCENTAGE

| | | |
|---------------------------------|------------|----------|
| a. TOTAL POINTS AND FEES | 10,821.00 | |
| b. Divided by TOTAL LOAN AMOUNT | 229,179.00 | = 4.722% |
| FEE PERCENTAGE = | | 4.722% |

TOTAL LOAN AMOUNT is greater than or equal to \$40,000:
Does FEE PERCENTAGE exceed 4.500% of TOTAL LOAN AMOUNT?

YES

If YES, this loan violates NEW JERSEY HIGH COST due to FEES.

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LOS: EDGE User: lmcavoy

2006-09-07 09:32:11

#2008-0462

POWERS KIRN, LLC

728 Marne Highway, Suite 200

Moorestown, NJ 08057

(856) 802-1000

Attorneys for Plaintiff

The Bank of New York, as Trustee for the
Holders of Structured Asset Mortgage
Investments II Trust 2006-AR8, Mortgage
Pass-Through Certificates, Series 2006-AR8

Plaintiff

v.

William P. Wolf, et al.

Defendant(s)

:SUPERIOR COURT OF NEW JERSEY
:CHANCERY DIVISION
:OCEAN COUNTY
:

: Docket No.F-12418-08
:

: CIVIL ACTION
:

: **ORDER DENYING MOTION TO
: VACATE FINAL JUDGMENT**
:

THIS MATTER being opened to the Court by Rebecca Schore, Esquire, of New Jersey Legal Services, Attorneys for defendant, William Wolf, on motion to vacate final judgment, and in the presence of Edward W. Kim, III, Esquire, of Powers Kim, LLC, Attorneys for Plaintiff, and the Court having considered the briefs and certifications submitted by the parties, as well as oral argument of counsel, and for good cause shown;

IT IS on this day of November, 2009, ORDERED AS FOLLOWS:

1. Defendant's motion to vacate the final judgment and permit defendant to file an answer out of time, be and same is, hereby denied.

FRANK A. BUCZYNSKI, JR., P.J.Ch.

#2008-0462

POWERS KIRN, LLC

728 Marne Highway, Suite 200

Moorestown, NJ 08057

(856) 802-1000

Attorneys for Plaintiff

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Holders of Structured Asset Mortgage
Investments II Trust 2006-AR8, Mortgage
Pass-Through Certificates, Series 2006-AR8

Plaintiff

v.

William P. Wolf, et al.

Defendant(s)

:SUPERIOR COURT OF NEW JERSEY
:CHANCERY DIVISION
:OCEAN COUNTY

: Docket No.F-12418-08

: CIVIL ACTION

: **PROOF OF MAILING**

1. I, the undersigned, am a legal assistant with POWERS KIRN, LLC, attorneys for Plaintiff in the above entitled matter.


2. On November 10, 2009, I mailed a sealed envelope with postage prepaid thereon, by overnight courier, addressed to:

Rebecca Schore, Esquire
Legal Services of New Jersey
100 Metroplex Drive at Plainfield Avenue
Suite 402
Edison, New Jersey 08818

containing a copy Plaintiff's Reply Brief.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: November 10, 2009


Theresa M. Jurgelewicz