S U P E R I O R C O U R T O F N E W J E R S E Y

ESSEX COUNTY - CHANCERY DIVISION

US BANK NATIONAL ASSICIATION, AS TRUSTEE FOR CSAB MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-3 Plaintiff vs. MARYSE GUILLAUME, ET AL Defendants	:SUPERIOR COURT OF NEW JERSEY :CHANCERY DIVISION-ESSEX COUNTY : :Docket No: F-26869-08 : : Civil Action

DEFENDANTS BRIEF IN SUPPORT OF ORDER TO SHOW CAUSE

BRODERICK, NEWMARK & GRATHER
20 SOUTH STREET, SUITE 3
MORRISTOWN, NJ 07960
973-538-0084
ON REFERRAL FROM LEGAL SERVICES OF NEW JERSEY
Attorneys for Defendants,
Maryse Guillaume and Emilio Guillaume

On the Brief: Alan J. Baldwin, Esq.

PRELIMINARY STATEMENT

This brief is submitted on behalf of defendants, Maryse and Emilio Guillaume, in support of their Order to Show Cause brought under R.4:50-1(a) and (f) and R.4:52-1 and 2 seeking relief from a Default Judgment entered against them in this mortgage foreclosure case.

As soon as the defendants fell behind in their mortgage payments they began to aggressively seek help in renegotiating their loan terms. They contacted three different non-profit corporations engaged in this type of practice and contacted their lender on their own behalf on numerous occasions. These efforts were unsuccessful.

When the Foreclosure Complaint was filed the defendants' efforts described above were ongoing. Not believing that they had any legal defense to the Foreclosure Complaint they continued their unsuccessful efforts to renegotiate their loan. It was not until they contacted counsel that they learned that they had several valid legal defenses to the Complaint.

As will be demonstrated, *infra*, the lender in this case violated the Truth in Lending Act, 15 U.S.C.A. 1601-1666, the Consumer Fraud Act, N.J.S.A. 46:8-1 et seq. and the Fair Foreclosure Act, N.J.S.A. 2A:50-56 et seq. prior to the entry of a final Default Judgment against the defendants. That Judgment

was entered in violation of the Rules of Court and in violation of the defendants' rights to procedural due process under both the State and Unites States Constitutions.

Since the defendants' failure to timely file an Answer was based on excusable neglect and because they have a meritorious defense, it is requested that this court grant them relief from the Default Judgment in Foreclosure entered against them and permit them to serve and file a responsive pleading out of time.

A Sheriff's sale of the defendants' home is presently scheduled for September 29, 2009. Therefore, the defendants seek a temporary stay of that sale so that their application for relief can be considered before the loss of their home by way of sale occurs.

PROCEDURAL HISTORY/FACTS

The circumstances surrounding the defendants' loan and the nature of the documents that they were provided by their lender are detailed in the Certification of Maryse Guillaume, the contents of which are hereby incorporated herein by reference. Those documents are legally inadequate and entitle the defendants to rescind their mortgage, a right that they have availed themselves of.

The efforts by the defendants to renegotiate their loan are also detailed in the Certification of Maryse Guillaume. What is critical is that the defendants did not sit idly by or ignore the claims of the plaintiff. Rather, they did what they could to satisfy those claims by trying to modify their mortgage, not realizing that they had a legal defense to the Foreclosure Complaint.

They did not become aware of this possibility until they finally consulted counsel after which this application was filed.

The court is also asked to take judicial notice, under E.R. 201(b)(4), of a document filed in this case by the plaintiff in support of its motion to enter a Default Judgment. A copy of this document is attached to the letter of transmittal of this brief, and the original is available in the court's file.

That document is a copy of a note which bears the stamp in the upper right hand corner "Certified to be a true and correct copy [signed] Brian Yoder Esquire". It will be argued, *infra*, that this document is legally deficient and is not an adequate basis upon which to enter judgment against the defendants.

The defendants have asked for and received two adjournments of the Sheriff's sale of their home and now need a preliminary injunction to preserve the *status quo* until the important issues surrounding their loan and the entry of judgment against them can be considered and ruled on by this court.

LEGAL ARGUMENT

POINT I

DEFENDANTS ARE ENTITLED TO A PRELIMINARY INJUNCTION PREVENTING THE SALE OF THEIR HOME.

When the purpose of a preliminary injunction is to preserve the status quo the normal standards governing the issuance of injunctive relief are relaxed. Waste Management v. Union County Utilities, 399 N.J. Super. 508, 534-535 (App. Div. 2008).

> So long as there is some merit to the claim, a court may consider the extent to which the movant will be irreparably injured in the absence of pendent elite relief, and compare that potential harm to the relative hardship to be suffered by the opponent if an injunction preserving the status quo were to be entered. Id.

The sale of the defendants' home by the Sheriff is scheduled for September 29, 2009. An Order enjoining the sale until this court has a chance to consider the defendants' application for relief from the judgment of foreclosure is essential.

A delay of only a few weeks so that the merits of the defendants' position can be considered will not cause meaningful harm to the plaintiff. The plaintiff's security, i.e., the house, remains secure and interest continues to run. Should the sale not be delayed, and the sale permitted to go forward on September 29, 2009 as now scheduled, the defendants will be irreparably harmed.

POINT II

PLAINTIFF'S PROOFS ARE INADEQUATE TO SUSTAIN THE ENTRY OF A DEFAULT JUDGMENT.

R.4:50-1(f) permits a court to provide relief to a party from a Final Judgment "for...any...reason justifying relief from the operation of a judgment or order". The Supreme Court has addressed the parameters covering relief under R.4:50-1(f). In Court Investment Co. v. Perillo, 48 N.J. 334, 331 (1966) the court wrote

> [n]o categorization can be made of the situations which would warrant redress under §(f)... [T]he very essence of (f) is its capacity for relief in exceptional situations. And in such exceptional cases its boundaries are as expansive as the need to achieve equity and justice.

It is grounds for relief under R.4:50-1(f) that the proofs submitted in support of a Default Judgment are legally insufficient to support the Judgment. Monmouth County Division of Social Services on behalf of Hall v. PAQ, 317 N.J. Super. 187 (App. Div. 1998).

R.4:64-2(a) states the requirements that a plaintiff must meet by way of proof in order to enter a Default Judgment in a mortgage foreclosure case. That rule provides, in part, that

> [t]he moving party shall produce the original mortgage, evidence of indebtedness, assignments, claim of lien...and any other original document upon which the claim is based. In lieu of an original document, the moving party may produce a legible copy of a recorded or filed document, certified as a true copy by the recording or filing officer or by a New Jersey

> attorney, or a copy of an original document, if unfiled or unrecorded, certified as a true copy by a New Jersey attorney. (Emphasis added).

The court's file, which this court can take judicial notice of under E.R. 201 (b)(4), will reveal that in support of its application for entry of a Default Judgment the plaintiff submitted to the court a document entitled "Note". A copy of this document is attached to the enclosed letter of transmittal to the court. That document contains the following notation in the upper right hand corner "Certified to be a true and correct copy [signed] Brian J. Yoder, Esquire".

This Certification by Mr. Yoder on the Note does not satisfy the requirements of either R.1:6-6 or R.1:4-4 and, thus, cannot be used to support entry of a Default Judgment under R.4:64-2(a).

R.1:6-6 states that

> [i]f a motion is based on facts not occurring of record...the court may hear it on affidavits made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify and which may have annexed thereto certified copies of all papers or parts thereof referred to therein.

In order to certify that a copy is "a true copy" as required by R.4:64-2, it should be self-evident that the person so swearing had to have had an opportunity to compare the copy with the original. On that basis only can an affiant certify that one document is "a true copy". "Sworn copies are copies

which are produced by a witness who swears that he has compared the original, word for word, or has examined the copy while another person read it." State v. Black, 31 N.J. Super. 418, 423 (App. Div. 1954). The notation by Mr. Yoder on the document does not comply with those standards. He has not laid the proper foundation for his statement because he does not state that he has seen the original document and compared it to the copy.

Nor has Mr. Yoder complied with R.1:4-4. That rule permits the use of a Certification in lieu of an Affidavit only if the Certification contains the following language:

> 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 willfully false, I am subject to punishment.

The statement on the document does not contain this required language. It is thus not in compliance with the rules and cannot serve as the basis for a Default Judgment.

A violation of court rules denies the defendants their due process rights. Sherman v. Sherman, 330 N.J. Super 638 (Ch. Div. 1999). The Fourteenth Amendment to the United States Constitution provides in part that no state "shall deprive any person of life, liberty or property without due process of law". The Judgment against the defendants undisturbed will result in the loss of their home at a Sheriff's sale. Final Judgment was entered in error and maintenance of that Judgment is a violation

of the defendants' due process rights under the New Jersey and United States Constitutions.

We must acknowledge, however, that the proofs submitted in this case may be typical of the quality of proofs submitted in foreclosure cases throughout the State. This, however, should not color the court's analysis. The failure of plaintiffs in mortgage foreclosure proceedings to follow the Rules of Court by which all litigants and their attorneys are bound should not go unchecked just because they may have always done it this way. Defendants, the courts and even plaintiffs have an interest in the uniform application of the rules both as a matter of good practice and constitutional mandate.

Because the proofs submitted by the plaintiff in support of its motion for entry of a Default Judgment are insufficient as a matter of law, it is respectfully requested that this court vacate the Default Judgment and permit the defendants to serve and file a responsive pleading.

POINT III

THE DEFENDANTS ARE ENTITLED TO RELIEF FROM THE DEFAULT JUDGMENT ENTERED AGAINST THEM.

R.4:50-1(a) permits the reopening of default judgments for "mistake, inadvertence, surprise, or excusable neglect". "Courts have applied [R.4:50-1(a)] adaptively when advanced as the basis for setting aside a default judgment." Housing Authority of the Town of Morristown v. Little, 135 N.J. 274, 283 (1994). "[T]he opening of default judgments should be 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, 318-319 (App. Div. 1964) aff'd 43 N.J. 508 (1964).

> Generally, a defendant seeking to reopen a default judgment because of excusable neglect must show the failure to answer was excusable under the circumstances and that a meritorious defense is available. Housing Authority of the Town of Morristown at 283.

(a). Defendants' failure to answer the Complaint was excusable under the circumstances.

Mr. and Mrs. Guillaume fell behind in their mortgage payments in late 2007 and early 2008. (Guillaume Certification, Paragraph 12). Mrs. Guillaume then began what would become a year and a half (so far) effort to save her home.

She first contacted Tri City Peoples Corporation to speak to a housing counselor. Tri City contacted the servicer of her

loan on her behalf, but the effort was unsuccessful. (Guillaume Certification, Paragraph 13 and Exhibit I).

Things then went from bad to worse for the Guillaumes. They received a Notice of Intention to Foreclose from their loan servicer. (Guillaume Certification, Paragraph 14 and Exhibit J). Though legally flawed, receipt of such a notice could not help but to have increased the Guillaumes' anxiety.

Mrs. Guillaume then contacted her loan servicer directly to try to take advantage of a borrower counseling program. (Guillaume Certification, Paragraph 15). The servicer sent her an application which she completed and submitted. (Guillaume Certification, Paragraph 16 and Exhibit K).

Her efforts aimed at renegotiating her loan continued. She contacted another housing counselor and authorized the servicer to contact the counselor directly. (Guillaume Certification, Paragraph 17 and Exhibit L). She continued her own efforts to renegotiate directly with the servicer. (Guillaume Certification, Paragraphs 18 through 22 and Exhibits M, N, O, P, Q, R, S and T).

When her efforts proved unavailing the Guillaumes contacted Legal Services. (Guillaume Certification, Paragraph 23). They were referred for mediation to Brand New Day, Inc. No progress was made towards resolving the Guillaumes' problems. (Guillaume Certification, Paragraph 26).

It was not until the Guillaumes contacted Legal Services and were referred to the undersigned, who has taken over her representation on referral from Legal Services, that they learned that they had a legal defense to the Complaint. (Guillaume Certification, Paragraphs 26 through 32).

The Guillaumes were diligent in their efforts to resolve their mortgage troubles, directly or indirectly contacting their loan servicer at least eleven (11) times for that purpose. "Excusable neglect has been defined as that neglect which might have been the act of a reasonably prudent person under the circumstances." Tradesmen's Nat. Bank and Trust Co. v. Cummings, 38 N.J. Super. 1, 5 (App. Div. 1955). The defendants' failure to timely answer can be attributed to a lack of understanding of their rights under the law, but not to a lack of diligence, which they exhibited in their efforts to renegotiate their loan. A reasonably prudent person in these circumstances, not believing that she had a defense, would likely respond the same way.

(b). Defendants have a meritorious defense.

(1). Plaintiff violated the Truth in Lending Act and the defendants are entitled to rescind the Mortgage.

The Truth in Lending Act, (TILA), 15 U.S.C.A. 1601 et seq. was enacted, in part, "to assure a meaningful disclosure of credit terms so that consumers would not be misled as to the

costs of financing". Cooper v. First Government Mortgage and Investors Corp., 238 F. Supp. 2d 50, 54 (DDC 2002). As a "remedial statute which was designed to balance the scales thought to be weighed in favor of lenders" TILA is liberally construed" by the courts "in favor of borrowers". Smith v. Fidelity Consumer Disc. Co., 898 F. 2d 896, 898 (3rd Cir. 1990) citing Bizier v. Globe Financial Services, 654 F. 2d 1, 3 (1st Cir. 1981)

> A creditor who fails to comply with TILA in any respect is liable to the consumer under the statute regardless of the nature of the violation or the creditor's intent. Once the court finds the violation, no matter how technical, it has no discretion with respect to liability. Smith, *supra*, at 898.

One of the remedies granted under TILA §1635 is the rescission of the offending lender's loan contract and a discharge of the security interest on the borrower's property.

> In the case of any consumer credit transaction in which a security interest...is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction. 15 U.S.C.A. 1635(b).

However, when "a material [TILA] disclosure is not correctly made...the rescission period is extended for three years". Associates Home Equity Services, Inc. v. Troup, 343 N.J. Super. 254, 281 (App. Div. 2001) citing 15 U.S.C.A.

§1635(f); 12 C.F.R. §226.23(a)(3). In Brodo v. Banker's Trust Co., 847 F.Supp. 353 (1994) a discrepancy of $10.00 between the disclosed and actual amount financed was found to be a sufficient basis for rescinding a loan of more than $40,000.00. In Cooper v. First Government Mortgage and Investors Corp., 238 F. Supp. 2d 50 (D.D.C. 2002) the question of whether to rescind a $60,000.00 mortgage was submitted to a jury because of an allocation that the lender provided the borrower only one copy of a required form instead of two.

The question then becomes, was a "material" disclosure required under TILA incorrectly made? This is so because, if such a violation occurred, the rescission period would be extended for three years from the date of closing, i.e., until September 7, 2009.

According to Exhibit F the defendants were charged $260.00 for the recording of the mortgage. See Exhibit F, line 1201 to the Certification of Maryse Guillaume. We also know from the actually recorded document obtained by Ms. Guillaume from the Essex County Recorder's Office that the mortgage consists of eleven pages. See Exhibit W to the Certification of Maryse Guillaume.

The charges that can be made in this state for the recording of instruments are established by statute, N.J.S.A. 2A:4-4.1. According to that statute for the recording of any

instrument the charge for the first page is $30.00 and for each additional page, another $10.00. Thus, to record a twelve page mortgage it costs, by statute, $140.00. Plaintiffs were overcharged for the recording $120.00.

In connection with the closing the defendants were provided with a Truth in Lending Disclosure Form, a copy of which is attached to the Certification of Maryse Guillaume as Exhibit A. This states that the total amount financed was $199,862.53. The basis for this calculation is found on Exhibit D to her Certification, a document entitled "Itemization of Prepaid Finance Charge". Missing from the itemization, however, is an accounting for the $120.00 overcharge for the recording fees. If this charge should have been included in the finance charge, the TILA Disclosure Form is in error.

12 C.F.R. §226.4(a)(2) classifies "Closing Agent Charges" as a part of the finance charge if the creditor

> (i) requires the particular services for which the consumer is charged; (ii) requires the imposition of the charge; or (iii) retains a portion of the third party charge, to the extent of the portion retained.

Here, the lender required the mortgage to be recorded as a first lien. See Closing Instructions, paragraph 3, second page of Exhibit B to the Certification of Maryse Guillaume. Thus, recording the mortgage was necessary to insure that result. The entire amount of the reported recording fees over the clerk's

fee of $140.00 formed a part of the finance charge. The regulation is indifferent as to the identity of the closing agent's overall principal.

Since $120.00 collected by the closer in excess of the amount required to actually record the mortgage was not disclosed on the Truth in Lending Statement, that statement is in error by at least $120.00.

Following the initiation of foreclosure proceedings, an error of $35.00 or more entitles the consumer to rescind the transaction.

> After the initiation of foreclosure on the consumer's principal dwelling that secures the credit obligation, the consumer shall have the right to rescind the transaction if: (i) a mortgage broker fee that should have been included in the finance charge was not included...after the initiation of foreclosure on consumer's principal dwelling that secures the credit obligation the finance charge and other disclosures affected by the finance charge shall be considered accurate for purposes of this section if the disclosed finance charge...is understated by no more than $35.00. 12 C.F.R. §226.23(g)(h).

The defendant herein has exercised her right to rescind the mortgage. See Exhibit Y to the Certification of Maryse Guillaume. The three year tolling period runs from the date of "consummation" of the loan transaction 12 C.F.R. §226.23(a)(3). The loan transaction was consummated on September 7, 2006. See Guillaume Certification, paragraph 7 and Exhibit F.

(2). The plaintiff failed to comply with the Fair Foreclosure Act (FFA), N.J.S.A. 2A:50-53 et seq.

Before initiating foreclosure proceedings in this state a plaintiff must comply with the notice requirements of N.J.S.A 2A:50-56, a section of the FFA.

That section requires that the defendant be provided with a written notice at least thirty (30) days before the filing of the Foreclosure Complaint containing, in addition to other information required by the statute "the name and address of the lender and the telephone number of a representative of the lender whom the debtor may contact".

Attached to the Certification of Maryse Guillaume as Exhibit J is a document received by her purporting to be a "Notice of Intention to Foreclose". That document states, in its opening paragraph that "America's Servicing Co. holds a conventional mortgage...on the residential property commonly known as 542 Prospect Street, East Orange, New Jersey which mortgage was made on September 7, 2006". This statement is false.

America's Servicing Co. has never held the defendant's loan and has never been a "lender". Rather, America's Servicing Co. is and was the servicer of the loan as demonstrated by Exhibits G and H attached to the Certification of Maryse Guillaume. Moreover, the actual owner of the loan at the present time is

the plaintiff, U.S. Bank National Assiciation, etc. which took title from the original mortgagee, Credit Suisse Financial Corporation, by an Assignment dated April 10, 2009 which, apparently, corrected an earlier Assignment dated July 31, 2008. See Exhibit X to the Certification of Maryse Guillaume.

The Notice of Intention to Foreclose is defective in that it does not identify the lender, rather, it identifies the servicer. Strict compliance with the FFA is required, and the relief available to a defendant for a plaintiff's violation is dismissal of the Complaint. EMC Mortgage v. Chaudri, 400 N.J. Super. 126 (App. Div. 2008).

(3) Plaintiff has violated the Consumer Fraud Act (CFA) N.J.S.A 56:8-1 et seq.

The Consumer Fraud Act (CFA). N.J.S.A. 56:8-2 prohibits the use of "any unconscionable commercial practice... misrepresentation...or the knowing concealment ...of any material fact" in connection with the sale of goods, services or real estate. The CFA applies to mortgage lenders and the sale of credit. Lemelldo v. Beneficial Management Corp., 150 N.J. 255 (1997). The CFA is to be "applied broadly in order to accomplish its remedial purpose, namely, to root out consumer fraud". Lemelldo at 264.

The plaintiff approved the use of a closing statement that contained a false statement of material fact, i.e., the charge

for "Government Recording and Transfer Charges" on line 1201 of the HUD-1 labeled as "Recording Fees" overstated the actual charge for recording the mortgage. This misrepresentation was used by the plaintiff in connection with the sale of credit to the defendants.

A party who suffers an ascertainable loss as a result of a violation of the CFA is entitled to both equitable and legal relief, including an award of attorneys fees. N.J.S.A. 56:8-19.

CONCLUSION

For the reasons set forth above it is respectfully requested that this court issue an immediate Order staying the Sheriff's sale of defendants' property, vacating the Default Judgment entered against them and permitting them to serve and file a responsive pleading to the Complaint.

Respectfully submitted,

BRODERICK, NEWMARK & GRATHER
Attorneys for Defendants,
Maryse Guillaume and Emilio Guillaume

BY: ALAN J. BALDWIN

Dated: September 21, 2009