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October 29, 2009

Honorable Kenneth S. Levy, P.J.Ch.
Superior Court of New Jersey
Wilentz Justice Complex, 8th Floor
212 Washington Street
Newark, NJ 07102

RE: US BANK NATIONAL ASSICIATION, AS TRUSTEE FOR CSAB MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-3 vs. MARYSE GUILLAUME, et al.
Docket Number: F- 26869-08
Our File No.: ASC-7044
Property: 542 PROSPECT STREET, EAST ORANGE, NEW JERSEY 07017

Dear Judge Levy:

Please accept this letter memorandum in lieu of a more formal brief, in response to Defendant's Order to Show Cause.

Plaintiff respectfully directs the court to its attorney certification, attached hereto, for a complete statement of the facts.

Simply stated, the Defendant has failed to provide this Court with any legitimate defense to the foreclosure action. Importantly, the Defendants do not dispute that they have defaulted upon their obligation to make monthly mortgage payments, and have failed to make such payments upon their $210,000.00 non-purchase money mortgage, with a fixed rate of 6.75%, since April of 2008. Defendant benefited greatly from the subject mortgage loan as they were provided the benefit of satisfying a prior mortgage, with an adjustable rate, in the amount of $123,189.93, and

received $61,719.87, in cash at the time of settlement. Plaintiff now seeks to proceed to Sheriff's sale on November 10, 2009 in order to recoup it's lost investment.

## I. PROOF SUBMITTED BY PLAINTIFF, IN SUPPORT OF IT'S MOTION FOR FINAL JUDGMENT WAS PROPER

Defendant first attempts to dispute Plaintiff's entry of final judgment, by alleging that the copy of the promissory note, certified by a New Jersey attorney, and submitted by Plaintiff, in support of it's Motion for Final Judgment, was improper. In accordance with N.J. Court Rule 4:64-2, which states in pertinent part, "in lieu of an original document, the moving party may produce a copy of the 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," a certified copy of the promissory note was submitted to the Court with Plaintiff's proofs for entry of final judgment.

Defendant argues that said copy of the promissory note was improper at it should have been certified in accordance with N.J. Court Rule 1:4-4. Specifically, Defendant claims said certification should have contained the 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."

However, Defendant acknowledges that the proofs submitted by Plaintiff, "are typical of the quality of proofs submitted in foreclosure cases throughout the State." See, Defendant's Brief in Support of Order to Show Cause, Page 9.

A certified copy of the promissory note, executed by Defendant, was properly submitted as proof in support of Plaintiff's Motion for Final Judgment. The copy of the promissory note was properly certified by a New Jersey attorney. The manner in which the copy of the promissory note was certified, was in accordance with N.J. Court Rule 4:64-2. Moreover, the manner in which the copy of the promissory note was certified, was in accordance with the Foreclosure Unit requirements, and was accepted by the Foreclosure Unit. As such, Defendant's argument is completely without merit, and final judgment was properly entered, in favor of Plaintiff. Defendant's Order to Show Cause should therefore be denied.

## II. DEFENDANT HAS NOT MET THEIR BURDEN TO VACATE FINAL JUDGMENT

Defendant argues that they are entitled to relief from the default judgment entered against them. Please note, in Defendants brief, Defendant refers to default judgment, however, relies on the standard for vacating final judgment. As such, for purposes of responding to Defendant, Plaintiff is assuming that Defendant is seeking to vacate final judgment.

In short, Defendant's argument is entirely without merit. New Jersey Court Rule 4:50-1 clearly states that a final judgment can be vacated for the following reasons: a) mistake, inadvertence, surprise, or excusable neglect; b) newly discovered evidence which would probably alter the

judgment or order and in which by due diligence could not have been discovered in time to move for a new trial under Rule 4:49; c) fraud, misrepresentation, or other misconduct of an adverse party; d) the judgment or order is void; e) the judgment or order has been satisfied, released or discharged. . .; or f) any other reason justifying relief from the operation of the judgment or order. In addition, in the context of an in rem foreclosure action, the movant must be able to provide a viable defense to the default on the subject mortgage loan. Please see Martyr v. Realty Construction Company, 84 N.J.Super. 313, 318 (App.div.1964); Ballurio v. Campanero, 30 N.J. Super. 548, 551-552 (App.Div.1954).

In the instant matter, the Defendant has not shown any evidence of excusable neglect for failing to previously answer the foreclosure complaint. Here, the foreclosure complaint was filed on July 15, 2008 based on the Defendant's failure to make her April 1, 2008 payment. Thereafter, Defendant was personally served with a copy of the foreclosure summons and complaint on July 21, 2008 at the subject property. Defendant then failed to file any responsive pleading and as a result, default was properly entered by the Court on August 26, 2008. On September 5, 2008, Plaintiff sent the Defendant via certified mail, return receipt requested, and regular first class mail a notice of the entry of default along with a formal notice pursuant to Section 6 of the New Jersey Fair Foreclosure Act. After Defendant failed to respond or cure the default, Plaintiff sent the Defendant a notice of motion for the entry of final judgment and thereafter, final judgment was properly entered by the Court on May 6, 2009. Plaintiff forwarded a copy of the entered final judgment to the Defendant. The Sheriff of Essex County thereafter scheduled the Public Auction of the subject property for August 11, 2009. On July 20, 2009, Plaintiff forwarded the Defendant via certified mail, return receipt requested, and regular first class mail a notice of the August 11, 2009 Sheriff's Sale. Plaintiff adjourned the August 11, 2009 sale to September 15, 2009 then Defendant subsequently exercised a statutory adjournment adjourning the Sheriff's sale from September 15, 2009 to September 29, 2009. On September 21, 2009, more than one year after being personally served with foreclosure summons and complaint, Defendant then filed the instant motion seeking to vacate final judgment.

Clearly, the record reflects that Plaintiff has complied with all service and notice requirements and Defendant has been well aware of the foreclosure action at all times. Based on the foregoing, the legal principle of laches applies. The Court in Fox v. Haddon Township, 137 N.J. Eq. 394 (1945) held that "great delay is a great bar in equity, that the law assists those who are vigilant, not those who sleep on their rights", Id. at 399, and "one who might otherwise be relieved in equity of forfeiture, may by his own conduct forfeit his right to be heard, and so it is said that in applications for relief from forfeiture the rule of laches ought to be rigidly applied." Id. at 394. (See also: Norfolk and N.B. Hosiery Company v. Arnold, 49, N.J.Eq. 390 (1892)). Here, Defendant has clearly slept on her rights and cannot demonstrate excusable neglect for failing to previously answer and has filed the instant motion merely in an attempt to delay the foreclosure. Therefore, on this basis alone, Defendant's instant motion should be denied.

## III. DEFENDANT HAS FAILED TO PROVE A MERITORIOUS DEFENSE TO THE FORECLOSURE ACTION

### A. Loss mitigation efforts are not a defense to the foreclosure action.

Defendant has failed to provide any evidence of a meritorious defense to the foreclosure action as required by New Jersey Court Rule 4:50-1. Defenses to a foreclosure action are narrow and limited. The only material issues in a foreclosure proceeding are the validity of the mortgage, the amount of the indebtedness, and the right of the mortgagee to resort to the mortgage premises. Great Falls Bank v. Pardo, 263 N.J. Super 388, 394 (Chancery Division Ch. Div. 1993) Aff'd 273 N.J. Super 542 (1994). Here, the Defendants' alleged defense is that Defendants were diligent in attempting to contact Plaintiff for a loan modification. However, as this Court is aware, efforts towards loss mitigation are not a defense to the foreclose action. Moreover, as is evident from Plaintiff's collection notes, See, **Exhibit S**, Plaintiff diligently responded to Defendants request for a loan modification. On several occasions, Plaintiff attempted to contact Defendant in order to request the documents needed to accurately review Defendant for a loan modification. The necessary documents, sufficient to review Defendants, were unfortunately, never provided to Plaintiff.

In support of the above is a letter from Defendant to Plaintiff dated October 6, 2008, See, **Exhibit R**, in which Defendant writes to Plaintiff's servicing agent, America's Servicing Company ("ASC"),

> "Because of your patience with me, I have a profound gratitude towards you. I apologize for any inconvenience I may be causing. Now I realize more than ever how much you try to help me by sending me many letters about places to go for help with my difficulties with paying the mortgage."

It is evident that based on Defendants statement, Plaintiff made efforts to work with Defendant to help her save her home. It is apparent that such efforts were unsuccessful. Defendant however, cannot argue that Plaintiff did not respond to Defendants request when in fact, Defendants own statement disputes said allegation. As such, Defendant has failed to raise a meritorious defense to the foreclosure action and therefore, final judgment should not be vacated.

**B. Defendants allegations of a violation of the Truth in Lending Act are improper.**

Secondly, Defendant attempts to raise allegations of Truth in Lending Act ("TILA") violations, but ignores the fact that Plaintiff is a holder in due course. In general, a person taking an instrument, other than a person having rights of a holder in due course, is subject to a claim of a property or possessory right in the instrument or its proceeds, including a claim to rescind a negotiation and to recover the instrument or its proceeds. A person having rights of a holder in due course takes free of the claim to the instrument. See N.J. Stat. Section 3-306. A "holder in due course" is one who takes a negotiable instrument for value, in good faith and without any notice of any claim or defense against it. See, e.g., Carnegie Bank v. Shallack, 256 N.J. Super 23, 32 (App. Div. 1992); N.J. Stat. 12A:3-302. Although the holder in due course doctrine has an ancient lineage in the common law, the doctrine has been codified within New Jersey's Uniform Commercial Code. The holder in due course doctrine insulates a good faith holder of a negotiable instrument from almost all claims and defenses that the debtor could assert against the original creditor. See Scott v. Mayflower Home Improvement Corp., 363 N.J. Super. 145, 153 (Law Div., Camden 2001).

Under generally accepted commercial law, it is the burden of the obligor to raise a meritorious defense to an instrument, which may in turn be defeated if the holder can establish the elements of the holder in due course defense noted above. In re Pinnace Mortg. Inv. Corp., No. 98-0489, 1998 U.S. Dist LEXIS 23289 at *27 (D.N.J. 1998). The Appellate Division, in Shallack analyzed the requirements necessary for a holder to establish good faith, explaining:

> Ordinarily, where the note appears to be in negotiable form and regular on its face, the holder is under no duty to inquire as to possible defenses, such as failure of consideration, unless the circumstances of which he has knowledge rise to the level that the failure to inquire reveals a deliberate desire on his part to evade knowledge because of a belief or fear that investigation would disclose a defense arising from the transaction. And, in this connection, once it appears that a defense exists against a payee, the person claiming the rights of a holder in due course has the burden of establishing that he is a holder in due course.

Shallack, 256 N.J. Super. at 35.

Here, Defendant has failed to raise any issue as to the negotiability or regularity of the subject instrument. Further, Defendant has failed to raise any legitimate issue of fraud on the part of the originator of the loan, as shown by the annexed documents. See, **Exhibit C**. Even if Defendant could prove the existence of fraud in the origination of the loan, the Plaintiff has established that the underlying instrument was transferred long before the default upon the instrument, while the Defendant has provided no proof that there were any circumstances known to the Plaintiff at that time which should have prompted any investigation of potential fraud.

Additionally, even if the Court were to entertain Defendants allegations, Plaintiff has already responded to Defendants request to rescind the mortgage loan by denying said request. See, **Exhibit T**. Defendant however, is still asserting their right to rescind claiming TILA violations. The Superior Court of New Jersey, Chancery Division, of Essex County, is not the proper venue in which Defendant should be bringing this claim. If Defendant wishes to pursue a TILA violation, Defendant should file the proper claim, against the originator of the subject mortgage loan, and Plaintiff if Defendant feels it is proper, in Federal Court.

Furthermore, pursuant 12 C.F.R. § 226.23(d), upon rescission, "the consumer shall tender the money or property to the creditor..." At settlement of the subject mortgage loan, Defendant greatly benefited by receiving a mortgage for $210,000.00, satisfying a prior mortgage in the amount of $123,189.93, and receiving $61,719.87 in cash. Defendant then made payments for only two years before defaulting. If Defendant wishes to properly pursue a TILA violation and the right to rescind in Federal Court, Defendant should place in escrow with the Court, the funds Defendant received from Plaintiff's mortgage, less the payments made by Defendant, as would be required to be returned to Plaintiff if the mortgage was properly rescinded.

If this Court were to consider whether or not a TILA violation does exist, it is clear from Defendants papers that they have misinterpreted 15 U.S.C.A. 1601. Defendant alleges that the recording fees charged to Defendant on the HUD-1 settlement statement were overstated by $120.00. Pursuant 12 C.F.R. § 226.23(h)(2)tolerance of disclosures, after the initiation of

foreclosure on the consumer's principal dwelling, that secures the credit obligation, the finance charge and other disclosures affected by the finance charge shall be considered ***accurate*** (emphasis added) for purposes of this section if the disclosed finance charge: (i) is ***understated*** (emphasis added) by no more than $35.00; or (ii) is ***greater*** (emphasis added) than the amount required to be disclosed. If Defendants allegations were correct and the recording charges to Defendant were overstated, the charges would be considered over stated and not understated, and tolerated pursuant to 12 C.F.R. § 226.23(h)(2).

Additionally, if the overstatement of the recording fees caused a hardship to Defendant. Defendant has the remedy of contacting the closing agent who charged the additional $120.00 as such funds would not have been returned to Plaintiff, but would have rather been retained by the closing agent. If the $120.00 had not been over charged, Defendant would have simply received an additional $120.00 at the closing table on top of the $61,719.87 in cash that she had already received. Therefore, Defendants TILA violation claim is completely without merit.

## IV. PLAINTIFF'S NOTICE OF INTENT TO FORECLOSE WAS IN COMPLAINCE WITH THE FAIR FORECLOSURE ACT (FFA), N.J.S.A. 2A:50-53 et seq.

Simply stated, Defendant's allegation that the Notice of Intent to Foreclose sent to Defendant was not in compliance with the Fair Foreclosure Act (FFA) N.J.S.A. 2A:50-53, et seq. is unsupported by the Act. Pursuant to the Act and as a result of Defendants default on the subject mortgage loan, Plaintiff sent Defendant notice of it's intent to foreclose on May 18, 2008. The notice was sent via regular and certified mail. The certified mail was accepted on May 28, 2008 at 2:09 pm. See, **Exhibit H**. Furthermore, Defendants do not dispute receiving the notice and have even attached a copy to their moving papers. Pursuant to N.J.S.A. 2A:50-56(a) of the act, said notice must be sent thirty days prior to the commencement of the foreclosure action. Plaintiff did not file it's complaint for foreclosure until July 15, 2008. Therefore, Plaintiff properly sent the required notice to Defendant well in advance of the filing of the complaint.

Instead of disputing receipt of the Notice of Intent to Foreclose, Defendant claims that the Notice of Intent to Foreclose was ineffective because it identified Plaintiff's loan servicer, rather than the Plaintiff itself, as the holder of the mortgage. This argument is nothing but an attempt to force further delay of the Plaintiff's attempt to collect its valid debt, and has no basis in law or equity.

The Fair Foreclosure Act contains eleven specific items that must be contained within a valid Notice of Intent to Foreclose. They include such items as identifying the obligation or real estate security interest, the nature of the default claimed, details as to the debtors right to cure the default, the amount necessary to cure that default, and several other pieces of required information. Nowhere within the Fair Foreclosure Act is there any requirement that the Notice of Intention to Foreclose specifically identify the name of the current holder of the Note and Mortgage. See N.J.S.A. 2A:50-56(c)(containing requirements for a valid Notice of Intention to Foreclose). All that is required under the Fair Foreclosure Act is that the lender actually send a notice that contains the eleven pieces of specified information, and that the notice ***"clearly and conspicuously state in a manner calculated to make the debtor aware of the situation"*** (emphasis added).

Here, Plaintiff, the holder of the Note, See, **Plaintiff's Certification**, caused a Notice of Intent to Foreclose to be sent, providing all of the necessary information for the Defendant to cure the default. The fact that it did so through the loan servicer, the Plaintiff's agent, who identified itself as the holder of the Note is of no relevance to this action. The characterization of the servicer had no effect upon the purpose of the Notice of Intent to Foreclose, which is to advise the Defendant of her rights to reinstate the mortgage prior to the filing of a foreclosure. See N.J.S.A. 2A:50-56; 2A:50-54. A review of the Notice of Intent to Foreclose will show that it clearly provides sufficient information to make the Defendant "aware of the situation" as is required by the statute.

The purpose of the Notice of the Intent to Foreclose is to make Defendant aware of the situation. Since December 28, 2006, Defendant was aware that ASC was servicing her loan. Defendant has acknowledged this and attached the welcome letter from ASC that she received when ASC began servicing her loan, to her moving papers. See, **Exhibit I of Defendant's Order to Show Cause**. Additionally, Defendant made payments to ASC for nearly two years before defaulting. If the identification of ASC, Plaintiff's agent, as the holder of the note was such a problem for the Defendant so as to impair her effort to reinstate, it is curious that the Defendant has in fact been working with ASC for several months in order to apply for a loan modification to reinstate the mortgage. Since the Defendant's have been attempting to reinstate their loan through ASC, it is a fair supposition that the Notice provided sufficient information to advise the Defendant's about the foreclosure situation. See, **Exhibits R and S**, letters from Defendant to ASC and Plaintiff's collection notes.

In fact, it is more than likely that if Defendant had received a Notice of Intent to foreclose from US Bank National Association, as Trustee for CSAB Mortgage-Backed Pass-Through Certificates, Series 2006-3, the holder of the note and mortgage, Defendant would be before this Court arguing that the Notice of Intent to Foreclose was not proper as Defendant has been dealing with ASC since December of 2006. Also considering the fact that both Defendant and her husband are natives of Haiti it seems even more appropriate that the Notice came from the company in which she was accustom to dealing with. See, **Defendants Certification, Page 3**. If the Notice of Intent to Foreclose had been sent pursuant to Defendants position, it would not have served it's purpose. Therefore, Defendants Order to Show Cause should be denied as Plaintiff's Notice of Intent to Foreclose was proper pursuant to the FFA.

## V. CONCLUSION

In summary, Defendant's Order to Show Cause is merely a delay tactic in which the Defendant seeks to avoid the consequences of failing to make timely payments on the subject loan, as originally agreed. Moreover, Defendant has failed to raise a meritorious defense to the foreclosure action which would warrant such a remedy especially considering Plaintiff complied with all regulations, and is simply seeking to resort to the property in satisfaction of the mortgage debt. It is evident from Defendants papers that their sole desire is to keep their home. As such, Defendants efforts would be better applied in pursuing the New Jersey Foreclosure Mediation Program, rather than filing unnecessary litigation.

For the foregoing reasons, Plaintiff respectfully requests that Defendant's Order to Show Cause be denied and that the subject property proceed to sale on November 6, 2009.

Respectfully Submitted,

Sharon McMahon, Esquire
SM/azf
CC: Alan J. Baldwin, Esquire