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			<input checked="" type="checkbox"/> Appeal <input type="checkbox"/> Non-Appeal
LOWER COURT DOCKET TYPE ___ Indictment ___ Accusation ___ Complaint		LOWER COURT NUMBER f2686908	
			Transcript Request Date: 1/14/2010
DOCKET NUMBER A-		COUNTY Essex County	COURT Klein
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1 SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
2 GENERAL EQUITY PART
ESSEX COUNTY
3 DOCKET NO.: F-26869-08
A.D. NO. _____

4 US BANK NATIONAL ASSOC.,)
)
5 Plaintiff,) TRANSCRIPT
) OF
6 V) ORDER TO SHOW CAUSE
)
7 MARYSE GUILLAUME, et al,)
)
8 Defendant.)

9 Place: County Courts Building
50 W. Market Street
Newark, NJ 07102

10 Date: November 10, 2009

11 BEFORE:

12 THE HONORABLE HARRIET FARBER KLEIN, J.S.C.

13 TRANSCRIPT ORDERED BY:

14 REBECCA SCHORE, ESQUIRE
Legal Services of New Jersey
100 Metroplex Drive @ Plainfield Avenue
15 Suite 402, Box 1053
Edson, New Jersey 08818

16 APPEARANCES:

17 SHARON MCMANN, (phonetic) ESQUIRE
Attorney on behalf of the Plaintiff

18 ALAN K. BALDWIN, ESQUIRE (Broderick Newmark &
19 Grather)
Attorney on behalf of the Defendant

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DEFENDANT'S APPLICATION
TO VACATE JUDGMENT

Mr. Wadwin

04

Miss McMann

18

THE COURT

Motion carried to 1/15/10

34

1 THE COURT: This case is US BANK NATIONAL
2 ASSOCIATION VS GUILLAUME. And it is Docket Number
3 F-20869-08. I'll take appearances of counsel for the
4 record.

5 MR. BALDWIN: Alan Baldwin from Broderick
6 Newmark & Grather on referral from Legal Services.

7 MISS MCMANN: Sharon McMann of Fallon
8 Palamene and Schmede (phonetic) for Plaintiff.

9 THE COURT: Thank you. This is a return date
10 of an order to show cause filed on behalf of the
11 Defendant that seeks to vacate the default judgment
12 that has been entered in this matter. And a Sheriff's
13 sale that has been pending has been consequently
14 adjourned so that the Court could hear this motion.

15 I think that today was the latest Sheriff's
16 sale date. And pursuant to my instructions,
17 Plaintiff's counsel advised the Sheriff that if the
18 property was sold this afternoon it would be only with
19 a stipulation or a condition, caveat, whatever you want
20 to call it placed upon the sale that it was subject to
21 being vacated and in all respect dependent on what the
22 Court would rule this afternoon.

23 So with that I'll hear oral argument in
24 support of your requested relief Mr. Baldwin.

25 MR. BALDWIN: Yes Your Honor. I would like

1 to focus my time on the part of my application brought
2 under Rule 4:51(f), which is the catchall that entitles
3 a moving party to relief under circumstances which are
4 necessary fit into the other categories of the rule.

5 And specifically I'd like to address the
6 issue of the appearance of the Plaintiff to the Court
7 rules in entering judgment in this case because I
8 believe that in this Court the issue is not the
9 existence or non-existence of a debt. We're not in the
10 Law Division. Nobody's being sued under a note.

11 The issue in this case in this Court is does
12 the Plaintiff have the right to foreclose a security
13 interest in my client's home. And I suggest Your Honor
14 that the answer to that question depends on the
15 adherence by the plaintiff to the Court rules. As I
16 reviewed the opposition to the motion submitted by
17 Plaintiff's counsel, it struck me that what counsel has
18 argued to the Court is that there are two sets of
19 rules.

20 And that one set of rules, Rule 144, Rule 166
21 which establish the way litigants bring proofs before
22 the Court in the context of motions applies to all the
23 litigants in the universe of litigants, but not to
24 foreclosure Plaintiffs who believe that Rule 464:2
25 creates an exception because it authorizes lawyers to

1 certify to the authenticity of certain documents.

2 And Your Honor it doesn't seem to me
3 reasonable to suggest to argue that there are two sets
4 of rules. There's one set of rules. And Rule 464
5 could be read and should be read in conjunction with
6 144, 166. If a moving party in a foreclosure case
7 wants to put before the Court a document other than an
8 original, that can be done by a lawyer under 464.

9 But under 144 and 166 that lawyer has got to
10 comply with the same standards that every other affiant
11 complies with when they submit certifications to the
12 Court. Under 166 the certification has got to create a
13 foundation because only statements in a certification
14 are only admissible to the extent that they would be
15 admissible when they're made in open Court.

16 So under the facts in this case Your Honor
17 the affiant who is intending to put before the Court a
18 promissory note has got to say I saw the note. I saw
19 the copy of the note and I can certify that the one is
20 an exact copy of the latter. In order to comply with
21 144 that affiant must say in writing that he or she is
22 aware that if the statements in the certification are
23 wilfully false, the affiant is subject to punishment
24 because without that protection, the procedural
25 protections the rules provide for all litigants are

1 eviscerated in the foreclosure context.

2 I believe this goes beyond just adherence to
3 the Court rules. I believe there is a constitutional
4 issue here in that the rules provide the procedural due
5 process that litigants are entitled to in the Court
6 system. And when those rules are short circuited and a
7 litigant runs the risk of losing their home because the
8 rules are short circuited to me that goes directly to
9 the rights of the litigant, the constitutional rights
10 of the litigant to expect due process.

11 Now, I'd also like to touch very briefly on
12 an aspect of Plaintiff's argument which just out of
13 rebuttal I just can't let it go unsaid. And that is in
14 response to the argument that I made under part little
15 a of the rule which requires me to submit before the
16 Court a "meritorious defense".

17 The Plaintiff has argued that the Plaintiff
18 is a holder in due course and therefore defenses such
19 as the Truth in Lending Act defense do not apply
20 because they're a holder in due course. For a holder
21 of a note to be a holder in due course, the holder of
22 the note had to have taken the note without knowledge
23 of the default.

24 And I'd ask the Court to look at Exhibit F
25 attached to the certification of Plaintiff's counsel

1 which consists of the two assignments of the note filed
2 in this case and to Exhibit I which is a copy of the
3 complaint and Your Honor will note that the earlier of
4 the two assignments is dated July 14th, 2008. It was
5 filed on the 31st, but it's dated the 14th. The
6 complaint is dated the 15th.

7 The idea that this Plaintiff did not know
8 there was a default when it took ownership of the debt
9 is to me incredible and I simply don't buy it. And I
10 would suggest that the barest amount of discovery would
11 reveal the contrary, that being that this Plaintiff is
12 not a holder in due course and took the debt at a time
13 when it had full knowledge of a default. And was in
14 fact at the time in the process of drafting a
15 foreclosure complaint.

16 THE COURT: But remember something --

17 MR. BALDWIN: Yes ma'am.

18 THE COURT: -- that was the formal
19 assignment.

20 MR. BALDWIN: Right.

21 THE COURT: This was part of a pooling and
22 servicing agreement under which they took this loan as
23 well as others on or about October 1, 2006. So at that
24 point there had been no default.

25 MR. BALDWIN: I don't know that. That's

1 possible.

2 THE COURT: Well, they say so.

3 MR. BALDWIN: Okay.

4 THE COURT: And they furnish versions of that
5 pooling and servicing agreement. So I think at least
6 based on that, your argument as the holder in due
7 course looks to have merit.

8 MR. BALDWIN: It would certainly create a
9 factual issue that would require a little delving into
10 when the -- and my client certified if I may that they
11 fell behind on the loan. And I guess it was '07. So
12 based on that you're right.

13 THE COURT: All right. But you have other
14 issues I'm aware of --

15 MR. BALDWIN: Yes.

16 THE COURT: -- that you're trying to further.

17 MR. BALDWIN: Well, I don't want to reinvent
18 the wheel, I just wanted to hit what I believe are the
19 central high points. I want to address the issue of
20 the holder in due course because I didn't really
21 address it in my reply brief. But I want to focus the
22 Court's attention if I could on the question of whether
23 or not Plaintiff's in foreclosure cases are bound by
24 the same rules that the rest of us are bound by.

25 I know when I submit a certification for my

1 client's signature or over my own, I've got to comply
2 with the rules. I can't make stuff up. I can't tell
3 the Court I've seen a document when I haven't. And if
4 I'm going to tell the Court that I have a document,
5 I've got to say this is a copy of the original and I've
6 got to say that I'm aware that if I'm misstating the
7 facts I'm subject to punishment.

8 And that simply was not done here. And under
9 these facts this plaintiff should not be allowed to
10 enter a foreclosure Judgment at this time. Thank you
11 judge.

12 THE COURT: Well, they have a judgment.

13 MR. BALDWIN: I'm sorry. You're right. They
14 should not have been allowed to and it should be
15 vacated because of -- intents.

16 THE COURT: See I guess you know an
17 overriding policy question which comes to my mind is
18 even taking account of all of the allowances that we
19 are giving to mortgage debtors these days and the
20 mediation program being one of them to afford
21 sufficient time for people to try to stay in their
22 homes, keep their homes.

23 Is it appropriate to allow a case to go all
24 the way through judgment and up to the eve of Sheriff's
25 sale and then assert something like that --

1 I mean it's going to call something a
2 technicality. Now, I know when you start putting in
3 the specter of due process consideration assuming
4 that's what we have here, I know it sounds very
5 belittling to say technicality but it's truly what
6 we're working with here. Because the basic elements of
7 their case are not denied.

8 MR. BALDWIN: Well, Your Honor -- I'm sorry.

9 THE COURT: Well, go ahead. No, no I'd like
10 you to respond to that. I mean basically the execution
11 or delivery of the mortgage, the default on the
12 mortgage.

13 MR. BALDWIN: Here's --

14 THE COURT: No one's raising standing issues.
15 I mean really where are we going here with this.

16 MR. BALDWIN: Well, in terms of the defense,
17 if the Guillaume's had come to me before the due date
18 of their answer and I was able to file an answer for
19 them, I would have asserted at that time a failure of
20 the Plaintiffs to comply with the Fair Foreclosure Act
21 because the notice was defective. And under the EMC
22 Chibery (phonetic) case alone is fatal to a mortgage
23 foreclosure case proceeding.

24 THE COURT: Well, not necessarily. Chibery
25 was a failure of service, --

1 MR. BALDWIN: Right.

2 THE COURT: -- a complete failure of service

3 --

4 MR. BALDWIN: Yes.

5 THE COURT: -- of the N.O.I. So the Court
6 directed that the action be dismissed. It's a case
7 content issue, which I think is what you're raising and
8 that it named the servicer and not the true lender. I
9 think the worst that the Plaintiff would suffer would
10 be to serve a new N.O.I. setting forth the lender's
11 name. That's how I read Chibery. And then there's
12 another case involving a bank. It skips my mind right
13 now.

14 MR. BALDWIN: I'm aware of that case as well.

15 THE COURT: See those two cases are in
16 conflict. One has a dismissal and the other doesn't.
17 And the way I reconcile them is the bank case I think
18 it was was a content issue whereas Chibery was a
19 service issue, much more serious.

20 MR. BALDWIN: I representing a Plaintiff Your
21 Honor would look at Chibery a little more narrowly and
22 focus on the language which says that the Fair
23 Foreclosure Act must be strictly adhered to and that
24 the penalty for non strict adherence would be
25 dismissal. And also observed that the earlier the bank

1 case you alluded to I think it was four or five years
2 old or older than the Chibery case which is relatively
3 recent.

4 So if a more recent opportunity that the
5 Appellate Division has had to speak to the subject,
6 they've told us in Chibery that the issues must be --
7 the Statute must be strictly complied with and that the
8 penalty for non strict compliance was dismissal.

9 Your Honor, to the question you posed to me
10 about the defenses, the Plaintiff in this case has
11 provided the Court with not one but two assignments of
12 the mortgages. Now, there's obviously something going
13 on there.

14 THE COURT: There was a problem with the
15 notarization on the first one. And so there was a
16 corrected assignment.

17 MR. BALDWIN: Right. After my papers were
18 submitted I did read the deposition of Mr. Strahan
19 (phonetic) who took the notary of the first assignment.
20 So I'm aware of what those issues are. They're not
21 before the Court on this record but I'm aware of it.
22 But what is before the Court on this record is the
23 promissory note attached to the Plaintiff's
24 certification.

25 That note has an allonge attached to it which

1 for whatever reason is not endorsed. And to me where I
2 again were I in this case at the very beginning I would
3 inquire where is this note that is apparently floating
4 around the ozone some place with a blank spot on the
5 back of endorsement which nobody -- it's not filled in.
6 And instead we have these two assignments executed
7 within a few months of each other.

8 THE COURT: It was a little more than that.
9 I think it's more than that. --

10 MR. BALDWIN: Okay. Right. Right.

11 THE COURT: I don't think there's anything
12 sinister there really but. I think the more definitive
13 date is the 2006 -- service agreement date. And those
14 agreements bespeak the fact that the loan of the
15 mortgage and the note was transferred together with a
16 whole lot of other ones.

17 So I didn't see a standing issue in this case
18 at all. And that's why I dazed to call it a pure
19 technicality. And you know we have a couple of them
20 here because I certainly appreciate the importance of
21 the notice of intent. And I know the language of
22 Chibery. We are not free to deviate from the
23 unambiguous Statute.

24 But it just seemed ironic in this case that
25 they use the designation America Servicing Company

1 which is the entity that your client was dealing with
2 on a monthly basis. And they had put the lender's name
3 in there. I certainly think that that could have been
4 more confusing to these particular debtors.

5 MR. BALDWIN: I think the Statute requires
6 both because the Statute requires that the notice
7 intent should identify the owner of the loan and phone
8 number and address of someone for the borrower to
9 contact to try to resolve issues. So I would suggest
10 to the Court that that calls for both dealer of the
11 loan and the servicing company if the servicing company
12 is the one that's going handle that kind of
13 investigation.

14 What this notice did was to not only not
15 describe the owner of the loan, it falsely identified
16 the servicer as the loan. So it was this not only
17 incomplete, it was incorrect. It was just plain wrong.
18 They provided half the information required by that --
19 Statute but not all the information.

20 THE COURT: But the goal of that notice is
21 -- I want to know if you agree -- is to enable the
22 debtor to be able to contact somebody to cure the
23 default within a certain period of time to say -- and I
24 mean oh your client certainly would be the contact.
25 She was doing the right -- and the letter said so.

1 MR. BALDWIN: She was trying. She was
2 trying.

3 THE COURT: Yes, correct. So I mean it just
4 strikes me as ironic. Now, I understand if -- to the
5 stip letter of the Statute but it just doesn't seem
6 like the policies of the Fair Foreclosure Act are
7 furthered here by what you say the Statute required
8 them to do. That's where I'm having a problem.

9 MR. BALDWIN: But the policy of the act is as
10 you say among other things to permit borrowers or give
11 borrowers information they need to contact someone on
12 behalf in order to work things out. But the act
13 requires that that be done in a very specific way
14 including very specific information which just simply
15 wasn't done.

16 So again were I defending this case at the
17 beginning within 35 days of the filing of the
18 complaint, I think I would have had frankly a slam dunk
19 on that issue or for nothing else if Your Honor chose
20 to not dismiss the case. It would have to stayed under
21 the bank case where it can get stayed for a month or
22 two to allow compliance. If I remember that's what
23 happened in that case.

24 So there are a number of ways that it could
25 have played out. But Your Honor we're dealt with the

1 cards we're dealt with. And I got into this case when
2 my clients contacted me and I immediately did what I
3 could do to get the issues before the Court.

4 THE COURT: You're not saying it's your
5 fault, absolutely not. That wasn't the import of my
6 statement but I would think that you have the -- job
7 you know what you're given. All right. I mean I think
8 I have your argument. Well, I did want to ask one more
9 question though. During this period of time that
10 you've been involved to your knowledge has there been
11 any effort to actually engage in the formal mediation
12 program on your client?

13 MR. BALDWIN: Well, interestingly enough when
14 we were in the hallway just a few minutes ago I was
15 informed by my client a Brand New Day --

16 THE COURT: Yes.

17 MR. BALDWIN: -- had contacted my client.

18 THE COURT: Right.

19 MR. BALDWIN: That's one of the companies
20 they contacted asking if they had heard from the lender
21 regarding a mediation. And they haven't heard
22 anything, nor have I.

23 THE COURT: Wait a minute, I don't understand
24 that. I mean did they file for mediation?

25 MR. BALDWIN: Yes.

1 THE COURT: They have to initiate with an
2 application with financial documents.

3 MR. BALDWIN: I believe that along the way
4 they threw this Brand New Day company. They did apply.
5 It wasn't through me so I don't know what was
6 submitted. I will say that this lender has been
7 similarly unresponsive in that I sent in a qualified
8 request for information. I didn't get that. I sent
9 them a request for some other documents. I haven't
10 gotten that. So you know I don't know what's going on
11 behind the scenes Judge.

12 THE COURT: There's always two sides to a
13 story.

14 MR. BALDWIN: There are.

15 THE COURT: You know I read their papers and
16 they say your clients didn't say all the information
17 they were supposed to. And that's a major reason why
18 they weren't successful thus far in negotiating with
19 them. I don't know where the truth lies there. But
20 you could always have some hope I suppose. All right.
21 Miss McMann I'll hear you in opposition.

22 MISS MCMANN: Yes, Judge. Thank you. In no
23 way is Plaintiff attempting to ignore the Court Rules
24 but pursuant to New Jersey Court Rule 4:64-2, in lieu
25 of an original document, a certified document may be

1 produced. The manner in which the note was submitted
2 as proofs for final judgment is always accepted by the
3 foreclosure unit. Invalidating that would invalidate
4 thousands of foreclosures in New Jersey.

5 So it's our position that the note and the
6 manner in which it was submitted was proper. In
7 regards to Defendant's argument as to the notice of the
8 intent to foreclose, the purpose of the notice as Your
9 Honor has stated is to clearly and conspicuously state
10 in a manner calculated to make the debtor aware of the
11 situation.

12 Not only were the Defendants making payments
13 to American Servicing Company for two years, but they
14 had continued to work with them. In this matter, it
15 was absolutely proper especially considering that they
16 are natives of another country. It clearly put them on
17 notice as to the default.

18 As Your Honor has stated if it had come from
19 U.S. Bank National Association as trustee for CFA being
20 mortgaged back passed through certificate series
21 2006-3, there's a good chance that the Defendants might
22 have not had any idea as to what that was in regards
23 to.

24 But considering that this was a non-purchase
25 money mortgage executed in September of '06, that is

1 currently due for April 1st of 2008 with an upset to my
2 client as of today in the amount of \$258,645. I see no
3 reason for any further delaying on a foreclosure
4 action.

5 And then in regards to Defendant's
6 allegations that they have not heard from us in regards
7 to the mediation program, as the Court is aware that
8 would have come directly from the Court that notice.
9 We would not be involved at all in the scheduling of
10 the actual mediation.

11 THE COURT: I don't know whether the
12 application was sent in through Brand New Day. But I
13 do know from the coordinator who I've heard up to the
14 minute through today that they are scheduling it to
15 March.

16 MISS MCMANN: Yes I was -- this morning.

17 THE COURT: So I don't really know whether
18 it's, you know, optimistic, overly optimistic to think
19 that we're going to get a mediation in as much before
20 -- the winter, you know the late winter which of course
21 is a considerable time away.

22 Let me go back McManan just for a moment
23 because this whole issue they're raising about the
24 certification of a true copy because I mean I
25 understand the rule and the practice. But there is

1 always I guess a bit of a difference in how a Court
2 scrutinizes it when the issue is raised as opposed when
3 something goes through unopposed or uncontested.

4 I think what they're challenging is the basis
5 upon which the attorney in their office or any attorney
6 for that matter certifies that it's a true copy. I
7 think they assert that it says credulity to believe
8 that he actually went to US Bank and examined the
9 original note that is in their vault or wherever it is.

10 So I guess the real question is on what basis
11 does the attorney purport to be able to certify that
12 this is a true copy if you go through the process that
13 the rules of Court normally do require putting aside
14 right now magic language. Okay. But had they actually
15 made an examination from a computer screen even.

16 I don't know how it's done but I think a lot
17 of times it is from a computer screen that they see the
18 document and say this is identical. I've compared it
19 line for line. Do you happen to know I mean what the
20 procedure is when that's done?

21 MISS MCMANN: Judge, as you stated the notes
22 are kept in a secured location. The lender is very
23 unwilling to just send out the original note. We
24 request a copy of the original note from our client.
25 They sent to us what is advised to us to be an actual

1 and true original copy of the note.

2 THE COURT: So how come because it would be
3 an easy thing, would it not, for the client to certify
4 that this is a true copy of what's in our fault. And I
5 think that would basically undercut their whole
6 argument. So it just is curious to me that you kind of
7 run the risk of this type of challenge when if that's
8 how it's done if a client is sending you a copy of what
9 it has, why don't you have them do a certification
10 saying I've examined the original here's a true copy.
11 Right.

12 MISS MCMANN: That is true as well Judge.

13 THE COURT: Right.

14 MISS MCMANN: Yes.

15 THE COURT: So I suppose one possibility
16 today is I could carry this motion and likewise adjourn
17 the Sheriff's sales officially for you to cure that.
18 And probably the Guillaume's don't mind that at all
19 because they're waiting for a mediation anyway. And
20 time is very important to them to try to be able to
21 extricate themselves from their predicament.

22 I mean that's the Holy Grail as far as I see
23 it time in all of these cases. So I'm just throwing
24 that out for your consideration. I mean if that's
25 really what Defendants now are going to be saying that

1 we have to tighten this up a little bit. And make the
2 client certify that that's really a copy of what we
3 have in our secret storage place. I'm being fictitious
4 but I mean you know wherever these things are under
5 lock and key somebody has custody of them. Okay.

6 Now, this issue also about the notice of
7 intent that's easily curable too I would think, right,
8 by sending out a new one, amending it to put in the
9 true lender.

10 MISS MCMANN: Yes, Judge but as stated it
11 would be our position that our Notice of Intent to
12 foreclose met the standard by making the Defendants
13 aware of the default. I mean once received the
14 Defendants attempted to work with America Servicing
15 Company. There were numerous letters sent from the
16 Defendant to American Servicing. They're reflected in
17 phone conversations.

18 And there's really no paper that I'm aware of
19 to this point that says that the Notice of Intent can't
20 come from the Plaintiff's servicing company.

21 THE COURT: Well, it's just the language of
22 the Statute. I think that's really the underpinning
23 because it uses the term lender. And there is a
24 difference between a lender and a servicer. I think
25 that's really all they've got to go on plus the

1 language of the Chibery case which I think is
2 distinguishable.

3 But it does have that famous phrase in there
4 no denying it how the statutory language is
5 unambiguous. We can't deviate from it. I'm very
6 troubled about this issue. I really am because the
7 over arching purpose of that Statute is so the
8 mortgagor just like I said before knows what to do to
9 cure that default and avoid a foreclosure.

10 And Courts have you know come down on the
11 Plaintiffs when they do it in such a way that it's
12 confusing, that it's misleading, that they don't give a
13 phone number or a contact person. And those things I
14 think are really substantive. So you know the question
15 here are we elevating form over substance. And it's
16 hard for me to imagine that the legislature ever
17 intended that or the Court that decided Chibery
18 intended that.

19 But at the same time I guess if we're going
20 to be super careful and dot our eyes and cross our t's
21 this is something curable. It's a matter of sending
22 out a new one. And waiting that 30 plus days which
23 actually would I suppose dovetail with a new
24 certification, a true copy certification. Maybe that's
25 the answer here.

1 MISS MCMANN: But Judge would that just start
2 our foreclosure action all over again. I mean --

3 THE COURT: No, no. I think there is a
4 difference. I know look obviously Mr. Baldwin wants me
5 to dismiss this. But he hasn't made a motion for that
6 actually. He wants to vacate the default judgment.
7 But he would probably ideally say it should be
8 dismissed. That's what Chibery requires.

9 And I think I've already indicated that I
10 think that's draconian. And I think that it's not
11 appropriate on this set of circumstances. That the
12 most I would do is say serve a new Notice of Intent.
13 And you have to wait the requisite amount of time
14 before going forward with the judgment.

15 Now, I'm not sure what stage that time that
16 you know where you could have a Sheriff's sale and
17 that's all. That's all that the server can be offered.
18 So if I just like say I delay a Sheriff's sale you
19 can't continue to proceed with the foreclosure. That's
20 the worse thing to happen. Fine.

21 MISS MCMANN: Right.

22 THE COURT: Anything else you wanted to say?

23 MISS MCMANN: Just that in this case as
24 everything -- Your Honor has mentioned there are as
25 reported there are three main issues for a foreclosure

1 action that must be proven as undisputed: -- the
2 mortgage, the amount of the debt. And there --
3 mortgage benefit which have all been proven in this
4 case. Thank you Judge.

5 THE COURT: I think it's the last one that's
6 mostly in dispute. So let's hear again so you can have
7 a little bit of reply Mr. Baldwin.

8 MR. BALDWIN: I just would like to direct the
9 Court's attention and counsel's attention the language
10 in 46:2 -- I'm sorry 464:2(a) which says that in lieu
11 of an original document the moving party may produce a
12 legible copy of a recorded or filed document.

13 That would apply to the mortgage and arguable
14 an assignment because those are recorded and filed
15 certified as a true copy by the recording or filing
16 officer or by a New Jersey attorney, or a copy of an
17 original document if unfiled or unrecorded certified as
18 a true copy by a New Jersey attorney.

19 The rule requires that the note be examined
20 by a New Jersey attorney who certifies to the Court
21 this is the note. And with all due respect my
22 adversary if in fact we got a certification from
23 somebody I'll make light of this in Ohio who says I'm
24 the records keeper and here's a copy of the note.

25 I would be in front of Your Honor in a month

1 and I'd say Your Honor with all due respect this person
2 is not a New Jersey attorney and that's where this
3 element of proof is still missing.

4 THE COURT: Well, you know if that be the
5 position I would have to concur with what Plaintiff's
6 counsel is saying that this would literally turn the
7 mortgage industry on its head. And I think that rule
8 was written that way for a reason, especially in this
9 day and age when the industry and society in general
10 operates very much electronically.

11 I mean may be back in the anti -- period it
12 would be possible for a New Jersey attorney to emulate
13 over to the local bank and go in and see an officer and
14 ask to see the actual note, the original note. Today
15 it's almost ludicrous to think that could happen
16 because these entities are all over the country. And
17 as we know these things are transacted often in bundles
18 as part of these pooling and servicing agreements.

19 And I think under the rule it's designed to
20 recognize that and accommodate to the extent practical.
21 So as not to put too great an obstacle on a forecloser
22 lender. I mean this shouldn't be a game. This
23 shouldn't be a situation where we make the hurdles so
24 high. Normally, the issues that we have comes up in
25 the standing context where it's argued that they don't

1 have the note Judge. They can't produce it. It's a
2 show me argument.

3 But here when you have a client servicing
4 agreement, when you have a situation as what happened
5 here that argument really is pretty much cut off. And
6 I think that the foreclosure unit and most Courts would
7 accept the type of certification that we have here when
8 they do look on computer screens. A know that for a
9 fact that's how a lot of it happens.

10 They squirrel and they see what's is there.
11 And then they get a copy from the client saying this is
12 a copy of what we have. And I frankly think that's
13 reasonable. And I just I'm not about to totally change
14 over the foreclosure practice and the industry. If the
15 Civil Practice Committee wants to impose that kind of a
16 hurdle, then I think it's up to them to do so and
17 revise foreclosure rules accordingly.

18 But I know of no such suggestion within the
19 counsel of General Equity Judges who recommends
20 anything like that I think for the reasons that I just
21 stated. -- so I understand what you're saying Mr.
22 Baldwin, a rule is the rule right now. And it's a
23 matter of interpretation.

24 Alrighty. Well, let me try to take this from
25 the top and just go through the various arguments that

1 have been advanced and see where we come out here with
2 this motion today which was brought under Rule 4:43-3
3 and Rule 4:50-1, specifically subsection F. And I
4 think subsection has been proceeded as well.

5 A motion for relief from the Judgement under
6 any of the six grounds in the rule should be granted
7 sparingly. It is addressed to the sound discretion of
8 the Trial Court which has to balance a lot of
9 conflicting policies and issues. Among them is the
10 finality that usually you accord to judgment.

11 But of course it would be an injustice to
12 enforce a judgment just because the finality a Court
13 has the discretion to set it aside. Marder vs Realty
14 Construction Company 84 N.J. Super at 313 at 319, App.
15 Div. (1964). I'm going to deal first with the
16 subsection A of the rule. I'm going to take them in
17 the order in which they're stated.

18 And as conceded by counsel they have to make
19 a showing of meritorious defense as well as what is
20 called excusable neglect. The latter is usually
21 defined as being "attributable to an honest mistake
22 that is compatible with due diligence or reasonable
23 prudence."

24 Mancini ex Rel. New Jersey Auto Full
25 Insurance Underwriting Association 132 N.J. 334 at 335

1 Supreme Court (1993). The excusable neglect that is
2 proper here is that Defendant's were diligently working
3 to try to reach an accommodation to get a modification
4 of their loan to try to refinance, to do something that
5 they could find affordable that was amenable to the
6 lender.

7 The facts themselves show that they contacted
8 Tri-City for a housing counselor in April of 2008.
9 They got the Notice of Intent in May 2008. They were
10 personally served, no dispute about it, with summons
11 and complaint in foreclosure on or about July 21, 2008.
12 That whole month they contacted America Servicing
13 Company to try to benefit from what they called their
14 borrowers counseling program.

15 The next month they sought the help of New
16 Jersey Citizen Action. That brings us to August of
17 2008. They engaged in these modification efforts with
18 America Servicing Company somewhere from in or about it
19 looks like November or December of 2008 all the way to
20 April '09 when there was a letter, I think the second
21 such letter rejecting them.

22 Now, despite that -- oh I don't want to
23 forget this. Excuse me. May 6th, '09 they were served
24 with a motion for final judgment. And they got a copy
25 of the judgment on or about that time. So at that

1 point in May '09 they still hadn't sought legal advice.
2 And they didn't call legal services until June '09 and
3 got their present attorney. They were referred to him
4 I think late August. He took it from there.

5 And somewhere also in the last two months
6 Brand New Day was involved to try to get them engaged
7 in a mediation. I have a lot of problems with saying
8 that with all that's going, with all this evidence of
9 Court process for over a year, to just rely on trying
10 to negotiate something with the bank was like sticking
11 your head in the sand.

12 This wasn't going to go away and they didn't
13 get any assurance from the bank that they were
14 succeeding in their negotiation efforts or that an
15 answer to the complaint was not required. I mean they
16 just basically focused on one path. And they ignored
17 the negotiation path and they ignored the litigation
18 side of things. You can't do that.

19 And I have to say that I think that these --
20 Jurors were more astute than most. I mean the fact
21 that Mrs. Guillaume was being so aggressive and so
22 persistent in trying to negotiate and going to all
23 these different places to get help, but the one place
24 she wasn't going was a member of the bar, a lawyer
25 which is usually what you do when you get Court papers.

1 Or if you absolutely can't afford a lawyer
2 and that's the case of many foreclosures, a very heavy
3 self-represented area of the law to at least contact
4 the Court yourself and you send in some rudimentary
5 answer. And it doesn't have to be fancy. I mean you
6 write a letter to the foreclosure Unit, they'll stamp
7 contested on it.

8 Because I've seen so many of them longhand.
9 But nothing was done. And I don't regard that as
10 excusable neglect. So that prong is lacking. But you
11 know to look at the meritorious defenses which I think
12 to make a complete record I should do. The one that is
13 asserted is the Truth in Lending Act. And we haven't
14 spent much time on the record today talking about it,
15 but it comes down to I think \$120 error.

16 -- spending this afternoon talking about
17 things that are fairly minuscule. But I mean it is
18 what it is. The Plaintiff argues in response that it
19 is a holder in due course. Something I've already
20 talked about. And I think that that has merit in this
21 context. But interestingly enough in other states
22 Courts have held that such status is not a defense
23 against appeal recession. Thomas vs Leja, L-e-j-a 187
24 Michigan Appeals 418 at 423 Michigan Court of Appeals
25 (1991).

1 And there is also an unpublished opinion from
2 the Northern District of Illinois which I recognize I
3 really shouldn't rely on but it goes back to 2004. I
4 think the approach the Court took there is very
5 interesting in this case of Murry vs Americas Mortgage
6 Banking (2004) U.S. District Lexus 12818. Northern
7 District Illinois (2004).

8 They said that -- "recession provision
9 effectively abrogates the holder in due course rule,
10 making any assignee subject to all claims or defenses
11 that the consumer could assert against a predator
12 unless the assignee demonstrates by a preponderance of
13 the evidence that a reasonable person exercising
14 ordinary due diligence could not determine based on the
15 documentation required by the subchapter the
16 itemization of the amount financed."

17 And as I said before I'm not really relying
18 on that case for my handling of this motion today. NO
19 one was really prepared to deal with that kind of
20 approach. I'm not going to hold anybody to it. But I
21 think looking at the Teeler (phonetic) statement here
22 it certainly wouldn't be apparent. Nobody would look
23 at that on its face and know that there was an error of
24 the type that Defendants the have pointed out.

25 I couldn't really hold that against thsi

1 Plaintiff and say that they took good notice or
2 anything like that. So I mean that approach kind of
3 makes sense. It's very logical. It's very rational.
4 Another thing that I note in this case I mean we're not
5 talking about an amount that was financed per se.

6 According to the HUD-1 I mean this charge,
7 this alleged overcharge for recording was something
8 that was paid at closing. It doesn't really seem to
9 fit the rubric of these Teeler cases. And even though
10 it's over the \$35 I mean I think it is so diminimus
11 that I would allow them to assert that holder in due
12 course status in this situation.

13 Next we move to this Fair Foreclosure Act
14 issue. It does appear that the Plaintiff failed to
15 comply with the exact requirement of the Statute. They
16 did adhere for the most part. They did have all the
17 statutorily required information except for the exact
18 name of the lender. What they did was they -- ASC as a
19 holder of the mortgage. And it was not. It is the
20 servicer of the mortgage.

21 It would have been nice if they had both in
22 there. And again I think that would have -- particular
23 issue if they set forth the exact status of each of
24 those entities. So although I am of the view that the
25 NOI looking at it in its totality as "clearly and

1 conspicuously made the debtor aware of the situation"
2 pursuant to NJSA2(a):50-56(d).

3 I will require sending of a new Notice of
4 Intent to correct this one problem. In all other
5 respects I think it passes muster. And that should be
6 done as soon as is reasonable feasible. Now, I don't
7 really think that once it's done assuming that the cure
8 is not forthcoming, we would need a further motion
9 argument. But I'm willing to carry my decision. I'm
10 going to carry the motion essentially for a sufficient
11 period of time to allow for the service of a proper
12 NOI. I'll just give the motion a new date.

13 And unless you have an issue with the new NOI
14 Mr. Baldwin I think that I would -- at that point make
15 my decision on the motion if they satisfy what they're
16 supposed to, the motion would likely be denied. But I
17 would give you an opportunity to furnish me with any
18 additional briefing or papers if you thought there was
19 still something that the Court should take note of,
20 factor into its' decision.

21 And if necessary Miss McMann if you want to
22 be heard on that and either of you wish to come back
23 for oral argument I certainly would not preclude it.
24 But I think I probably should carry this to a motion
25 day in January. That's what I believe would most likely

1 be necessary. Let me see. I think it's January 15th.
2 And by that time your client -- you should be able to
3 get out the new notice Miss McMann and then there will
4 be sufficient time under it for the Defendants to cure.
5 Mr. Baldwin.

6 MR. BALDWIN: Your Honor, just procedurally
7 instructing, I hope you're instructing Plaintiff's
8 counsel to serve a copy of the new notice on me and on
9 the Court.

10 THE COURT: Oh I certainly think that that's
11 absolutely required, yes.

12 MR. BALDWIN: Thank you Judge.

13 THE COURT: Yes, so that we're aware that it
14 has gone out and we have an opportunity to examine it,
15 sure. No question about that. So that is as much as I
16 believe I can rule upon today. So I want to -- said
17 something about the Consumer Fraud Act issue, which
18 again factors into the \$120 overstatement of the
19 charge.

20 I would not regard this as a sufficient issue
21 set aside for judgment. I just wanted to really hone
22 in on what I think is the real issues that are on the
23 table. There was no intent that the Statute is
24 directed at. There's nothing in my view unconscionable
25 about the \$120 differential. -- may have been a

1 mistake in calculation. I would not regard this as
2 such magnitude to invoke the Consumer Fraud Act to be
3 regarded as a sufficient meritorious defense to vacate
4 the judgment.

5 So it really does come down in my mind to the
6 issue of the Fair Foreclosure Act. And for the reasons
7 I've already stated on the record, I regard the
8 complaint as being sufficiently supported in accordance
9 with the rules of Court for a foreclosure action. I
10 think that tells you what you need for the record in
11 the event that you ultimately do want to take it to a
12 higher Court let you know all of my findings based on
13 all of the issues that the Defendant has raised.

14 MR. BALDWIN: And I do appreciate it. And
15 just to have other clarification. I understand Your
16 Honor has carried the motion until January 15th.

17 THE COURT: Yes I am.

18 MR. BALDWIN: Is there a date by which the
19 Plaintiff should complete the reservice of the
20 corrected NOI hopefully in advance of that date so the
21 Court and I will have an opportunity to review it
22 before the 15th.

23 THE COURT: Well, it has to go out in enough
24 time for there to be the period of 30 days from its
25 effective date. So would you think that by two weeks

1 from now that that would be enough that it could be
2 served within two weeks Miss McMann.

3 MISS MCMANN: Yes, Judge that's fine.

4 THE COURT: Very good. So the order can so
5 state. And this is the order that I would ask you to
6 send in. You're going to do that Mr. Baldwin.

7 MR. BALDWIN: If Your Honor directs.

8 THE COURT: Why don't you do that. And then
9 you can provide that the motion is carried.

10 Disposition of the motion is carried to January 15th.
11 And if no one needs oral I'm not going to make you come
12 back. I would just do that on the papers -- what
13 occurs between now and then. You had a question?

14 MISS MCMANN: Judge, how far should we take
15 the sale out then to, the Sheriff's sale.

16 THE COURT: I guess the Tuesday after that.

17 MISS MCMANN: Okay.

18 THE COURT: It would be the 19th actually.
19 Now, that's the day before Martin Luther King, the
20 Court holiday.

21 MISS MAMANON: The following Tuesday.

22 THE COURT: Yes, why not. Let's say January
23 26th.

24 MISS MCMANN: Okay.

25 THE COURT: It will be the next Sheriff's

1 sale date. So I don't know what happened this
2 afternoon. I don't know if you do.

3 MISS MCMANN: I'll notify my office
4 immediately.

5 THE COURT: All right.

6 MISS MCMANN: Contact the Sheriff.

7 THE COURT: I mean they have gone back to
8 your client. That's what usually is what happens when
9 it --

10 MISS MCMANN: Right.

11 THE COURT: But if in the event it was sold
12 to a third party I'm obviously vacating that. So I
13 think you could let counsel know that if in fact that
14 has to be included in the order it should be put in the
15 order.

16 MISS MCMANN: Yes Judge.

17 MR. BALDWIN: Your Honor, -- that any sale
18 which may have taken place as of now is vacated?

19 THE COURT: That's right.

20 MR. FIELDS: Okay.

21 THE COURT: That's right. Exactly. Okay.
22 Any other questions? Anything else that we need to go
23 over.

24 MR. BALDWIN: Well, Your Honor I thought you
25 made a ruling. You suggested you were going to make a

1 ruling on my due process argument relating to the 451F
2 part of the motion.

3 THE COURT: Well, I think that is the issue
4 is it not of the true copy?

5 MR. BALDWIN: Yes.

6 THE COURT: That's saying the same thing.
7 The subsection F is the true copy issue. And I'm
8 denying the motion under subsection F for the reason
9 that I have found that Plaintiff had complied with the
10 intent and the spirit and the language of Rule 4:54-2
11 as it is presently interpreted by Courts and by the
12 foreclosure --

13 In other words I'm not going to require
14 anybody from -- Ohio in order to certify that it's a
15 true copy. That's the same holding of the Court.

16 MR. BALDWIN: I would hope though that the
17 Court could require the Plaintiff to simply provide
18 counsel with the original which would obviate the
19 problem. The letter is ready to go to Ohio but why not
20 bring the mountain to Mohammad instead of vice versa.

21 THE COURT: I don't think it's good practice
22 to have these originals of these documents floating
23 around the country. I really don't.

24 MR. BALDWIN: Your Honor, if an original was
25 lost there's a provision in the evidence rules on how

1 the original can be proven. And how a copy can be used
2 in lieu of the original if the original lost. I mean
3 the rules cover all these eventualities. They're not
4 impossibilities. It would be very straightforward I
5 believe for the lawyers to comply with the rule.

6 THE COURT: I can foresee nightmarish
7 results. I am not going to require that again. I
8 think that is for policymakers and not for myself to
9 issue that kind of a finding under the language of the
10 rule. It doesn't say that. It says for a reason an
11 attorney can make a certification. Now, a lot of the
12 way things are done today as I said before are
13 electronic.

14 Just the way our society functions, transfers
15 are done electronically. You don't have someone
16 walking in with an original note all the time now. And
17 it's just the way it is. And I just think it would
18 create a horrible log jam if I did otherwise. So I'm
19 not going to require that type of suggestion.

20 MR. BALDWIN: But you did suggest earlier in
21 our argument that you were considering requiring the
22 Plaintiff to provide a certified copy, certified by
23 somebody somewhere who had seen the original.

24 THE COURT: Sure we could do that but then
25 you said you would be back in a month or two saying

1 that not enough so why should I make them do it. I
2 would be willing to do that. If that would basically
3 alleviate your client's concern, sure. I would say
4 they have to get a custodian or some kind of records
5 person at US Bank or one of their -- entities, right.

6 MISS MCMANN: Correct Your Honor, yes.

7 THE COURT: To say we are holding the
8 original and this is a true copy. We can so certify an
9 exact true copy of what we are holding. But you
10 pointed out that the rule doesn't really make provision
11 for that. So I don't see any point of having them go
12 through that effort.

13 MR. BALDWIN: I'm was just going to run
14 through my notes with the Court and counsel to make
15 sure that I've got all the points that have to be
16 incorporated in the order.

17 THE COURT: Absolutely.

18 MR. BALDWIN: The motion is carried until the
19 15th of January.

20 THE COURT: Yes.

21 MR. BALDWIN: On plaintiff's application for
22 a leave under 4:51(a) I guess, it's denied under
23 4:51(f). A new NOI has got to be served within two
24 weeks I'm assuming from today's date. The Sheriff's
25 sale is carried Your Honor said until January 26th.

1 Could I ask that that aspect of the order be couched in
2 the negative so that the Sheriff's sale shall be
3 carried them until further order of the Court.

4 THE COURT: Well, I think what you could say
5 is no Sheriff's sale may take place until January 26th
6 at the earliest.

7 MR. BALDWIN: Okay. And any sale which may
8 have taken place up to now is vacated.

9 THE COURT: Yes. Today actually. Today --
10 is a sale day. So any sale that has taken place on
11 this date is vacated by the Court.

12 MR. BALDWIN: So Your Honor just for logical
13 consistency. I don't want to shoot myself in the foot,
14 but it seems to me that Your Honor has already ruled
15 against me on 4:51(a) on the basis that my client did
16 not show excusable neglect in attempting to rectify
17 their problem. I can see by the expression on your
18 face you know where I'm going here.

19 THE COURT: I do.

20 MR. BALDWIN: At the same time you're giving
21 me relief under 4:51(a) by requiring the Plaintiff to
22 comply with the Fair Foreclosure Act within two weeks.
23 If they don't do that would that be grounds for me to
24 come back under 4:51(a) and ask for relief. I'm just a
25 little at a loss.

1 THE COURT: I think I would have to say yes.

2 MR. BALDWIN: Okay.

3 THE COURT: I think I would have to say yes.

4 MR. BALDWIN: Okay. Thank you Judge.

5 THE COURT: And if there is any other
6 evidence you would want to present that at the time of
7 the excusable neglect -- just do it on notice to
8 adversary and she can respond accordingly. And if I
9 have to have more oral argument I will.

10 But I think that I'm doing this because of
11 the importance of the Fair Foreclosure Act in all
12 respects in all of these foreclosure cases. I'm trying
13 to do what the, you know, the legislature wants to
14 enable people to stay in their homes. That's the whole
15 goal of it. And that coupled with the fact that you
16 have a mediation application pending. And we know that
17 once a Sheriff's sale takes place that -- is of no use.

18 And your clients are getting the benefit
19 therefore of the policy today in New Jersey, given more
20 time that they need to solve their problems if possible
21 wants them to realize they're getting the full benefit
22 of what the judiciary's policy is right now. And I
23 have a legal reason to do it.

24 So it's just for the reasons stated on the
25 record you don't even have to go into any of that.

1 I've made a complete record so that anybody who wants
2 to can examine it --

3 MR. BALDWIN: And I appreciate it. Can I ask
4 the Court for consideration on one very narrow issue.

5 THE COURT: yes.

6 MR. BALDWIN: This case is going to be over
7 January 15th one way or the other because either on the
8 15th the corrected Notice of Intent will have been
9 served in which case my motion is going to be denied in
10 its entirety or the NOI will not have been re-served
11 and Your Honor will entertain my application renewed
12 under 4:51(a) to vacate the default judgment.

13 THE COURT: Fair enough.

14 MR. BALDWIN: If the case is not -- if I'm
15 dismissed -- if my motion is denied in its entirety on
16 the 15th.

17 THE COURT: Yes.

18 MR. BALDWIN: I would seriously be
19 considering an appeal. And between the 15th and the
20 16th is 11 days. And I'd ask that the Court make the
21 Sheriff's sale date perhaps two weeks after that so
22 that I would have a window of time within which to
23 process an application for a stay with the Appellate
24 Division so that I could deal with those issues because
25 again if the sale takes place while I'm in the

1 Appellate Division some place that would afford no one
2 any relief whatsoever.

3 But if I have another period of ten days in
4 addition to the in other words some time in February,
5 the first week of February, second week of February I
6 would then have enough time to get that done without
7 having my clients lose their property and therefore
8 lose the remedy while it was waiting in line at the
9 Appellate Division.

10 THE COURT: All right. -- I am going to
11 handle it this way. I think that application is to
12 immature at this point in time. There's no need for me
13 to consider it. It is something that you can -- in the
14 January 15th -- that motion is denied right now we
15 don't know all 100 percent certain that is going to
16 happen. I would consider what you're saying when it's
17 ripe.

18 But remember also that even if you are denied
19 the vacating of the judgment and they are left to their
20 Sheriff's sale remedy and if you have a mediation
21 pending scheduled by next -- which I hope you will to
22 be had within a month or so, oh I would absolutely
23 definitely put off that Sheriff's sale -- I think that
24 our rules require it.

25 So you wouldn't be in jeopardy of a Sheriff's

1 sale at that point in time for a couple of reasons that
2 may affect whether you take an appeal or not. Just
3 something keep your thoughts.

4 MR. BALDWIN: Right. Thank you very much. I
5 appreciate it.

6 THE COURT: You're very welcome. Anybody
7 else.

8 MISS MCMANN: Nothing Judge. Thank you.

9 THE COURT: Okay. You're very welcome. Good
10 luck.

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(Hearing Concludes)

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Certification

I, Cynthia Dyson-Colon, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tape no. 1, index no. from 0906 to 5902 is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings as recorded.

Cynthia Dyson-Colon

Date: 02/15/10

Cynthia Dyson-Colon AOC #560

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