US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CSAB MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-3,

Plaintiff/Respondent,

v.

MARYSE GUILLAUME, MR. GUILLAUME, HUSBAND OF MARYSE GUILLAUME, EMILIO GUILLAUME, MRS. EMILIO GUILLAUME, HIS WIFE, CITY OF EAST ORANGE,

Defendants/Appellants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-000376-10T3

Civil Action

On Appeal From:
Superior Court Of New Jersey Chancery Division, Essex County, General Equity Part
Docket No. F-26869-08

Sat Below:
The Honorable Harriet Farber Klein, J.S.C.

BRIEF AND APPENDIX OF RESPONDENT

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PRELIMINARY STATEMENT

This Court should affirm. The lower court did not abuse the discretion granted it under R. 4:50-1 in refusing to relieve Defendants Maryse and Emilio Guillaume ("Defendants") from the default judgment entered in their foreclosure case. Defendants failed to meet their burden of showing both excusable neglect and a meritorious defense under R. 4:50-1(a) – or the truly exceptional circumstances required by R. 4:50-1(f).

As a threshold matter, it is important to recognize what this foreclosure case is and what it is not. This is ***not*** a case involving a challenge to "standing to foreclose" or allegations of "predatory lending." This ***is***, however, a case where the borrowers defaulted on their mortgage loan and have nonetheless remained in possession of the mortgaged property – "rent free" – for almost three years. And this ***is*** a case where the borrowers ignored instructions to seek an attorney's advice, intentionally made no effort to respond to the foreclosure complaint, and did absolutely nothing to prevent the entry of a default judgment.

Having waited over a year from the filing of the foreclosure proceedings – and only on the eve of a Sheriff's Sale – Defendants finally appeared in court and proceeded to apply for relief under R. 4:50-1(a). But in doing so, Defendants tried to justify their neglect on the ground that they believed they had no defense and merely hoped they might receive a loan modification that was neither promised nor forthcoming. The trial court simply did not commit a clear abuse of discretion in rejecting Defendants' excuse for failing to act.

Further, the defenses offered by Defendants had no real merit. Defendants first argued that there they were entitled to rescind and unwind their $210,000 fixed rate mortgage loan because they allegedly had been overcharged $120 in recording fees when the loan closed. However, without an ability to return the loan proceeds – or even an offer to do so – Defendants

could not perform their corresponding tender obligation. Perhaps recognizing this fatal problem with their rescission claim, Defendants also tried to argue that a foreclosure complaint cannot be based on a Notice of Intention to Foreclose that provides a loan's servicer name and address for contact purposes – even though a servicer is an agent of the lender and responsible for dealing with borrower loan servicing and modification issues. However, because the servicer was the appropriate party for Defendants to contact to cure their default or dispute the amount due, the notice complied with the purposes of the Fair Foreclosure Act. In short, the trial court did not commit a clear abuse of discretion in finding that the proffered defenses were not of sufficient merit to support relief from the judgment.

In their filing below, Defendants also claimed they were entitled to relief under R. 4:50-1(f). Defendants maintained that foreclosure counsel should have certified on the copy of the note submitted to the court not only that it was "a true copy" of Defendants' note – as required by R. 4:64-2(a) (the specific Rule governing proofs in mortgage foreclosure actions) and as in fact certified by foreclosure counsel – but also that counsel had personally compared the original note to the copy and specifically acknowledge that counsel was subject to punishment if the representation was willfully false. As the lower court recognized, however, Defendants' argument was – and remains – in conflict not only with the Rules, but also with what has long been required and accepted by the Office of Foreclosure and Chancery Division. Finally, Defendants resorted to the argument that the lower court had deprived them of "due process," but the record shows that the trial court gave them all the process they were due and more. The trial court properly concluded that Defendants had not established the truly exception circumstances necessary to support relief under R. 4:50-1(f).

Against this backdrop, the trial court's decision should be left undisturbed.

PROCEDURAL HISTORY

Plaintiff U.S. Bank, N.A., in its capacity as Trustee for CSAB Mortgage-Backed Pass-Through Certificates, Series 2006-3 ("Plaintiff"), filed its Foreclosure Complaint in the Superior Court of New Jersey, Chancery Division, Essex County, on July 15, 2008. [Da1-15]. Defendants were served on July 21, 2008. [Da127-131]. They did nothing. Plaintiff accordingly requested and secured an entry of default for failure to plead or otherwise defend on August 26, 2008. [Da132-133]. On September 5, 2008, Plaintiff served Defendants with a Notice of Entry of Default and a Notice Pursuant to Section 6 of the New Jersey Fair Foreclosure Act, N.J.S.A. 2A:50-56 et seq. ("Fair Foreclosure Act"). [Da134-137]. Defendants again did nothing. The lower court then entered a final judgment on May 6, 2009, some nine months later. [Da138-140].

A Sheriff's Sale was scheduled for August 11, 2009, and Defendants received notice of the pending sale on July 20, 2009. [Da141-142]. Defendants were stirred to action and, on July 23, 2009, sought relief under R. 4:50-1(a) and (f). Plaintiff adjourned the sale to September 15, 2009, and provided Defendants with a notice of the new sale date. [Da143]. Subsequently, Defendants exercised their statutory right and adjourned the sale until September 29, 2009. [Da144].

The lower court entered an Order to Show Cause on September 23, 2009, stayed the sale, and scheduled the matter for hearing. [Da71-73]. The lower court heard oral argument on November 10, 2009. [11/10/09 Transcript ("1T")]. On August 30, 2010, the lower court heard additional argument from the parties. [08/30/10 Transcript ("2T")]. On that same day, the lower court entered an order denying Defendants' application to vacate the default and default judgment. [Da235-36]. This appeal followed.

STATEMENT OF FACTS

Credit Suisse Financial Corporation ("Credit Suisse") extended a $210,000 mortgage loan (the "Loan") to Defendant Maryse Guillaume on September 7, 2006, which loan was evidenced by a promissory note (the "Note"). [Da74-78]. A portion of the proceeds of the Loan were used to satisfy a prior mortgage in the amount of $123,189.93; the borrower also received $61,719.87 in cash. [Da101-102].

In order to secure payment of the Note, Defendants executed a mortgage dated September 7, 2006 (the "Mortgage"), naming Mortgage Electronic Registration Systems Inc. ("MERS"), as mortgagee but solely as a nominee for Credit Suisse. [Da89-100]. On November 1, 2006, the Mortgage was duly recorded in the Office of the Clerk of Essex County. [Da89-100].

The Loan was securitized[1] and transferred by Credit Suisse to Plaintiff. [Da82]. An allonge to the Note was endorsed in blank. [Da78]. A formal written assignment of the Mortgage was executed on July 14, 2008, and recorded on July 31, 2008; in response to a court inquiry, a corrective assignment was executed on April 10, 2009, and recorded on April 15, 2009. [Da83-84; Da113-118].

America's Servicing Company ("ASC") became the servicer for the Loan on December 1, 2006, and Defendants immediately received notification of that fact and were specifically

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1 This transaction (and the rights and obligations of the various parties to the various transferred loans) are governed by the October 1, 2006 Pooling and Servicing Agreement (the "PSA"). [Da109]. As noted in the Attorney Certification in Response to Defendants' Order to Show Cause below [Da82-83], due to the voluminous nature of the PSA, only the cover and relevant pages were submitted to the lower court. [Da109-111]. However, as proffered to the lower court, the complete PSA is a public record that can be found on the U.S. Securities and Exchange Commission website: http://www.sec.gov/Archives/edgar/data/1378535/000116231806001517/m1166psa41.htm. [Da82-83].

advised that ASC's name "will appear on your monthly statements and other communications regarding your mortgage loan." [Da34; Da35; Da112; Da119]. Subsequently, when Defendants made monthly mortgage loan payments, they made them to ASC. [1T14:1-2; 1T18:12-14]. However, on April 1, 2008, Defendants failed to make their mortgage loan payment and defaulted under the terms of the Note and Mortgage. [Db5]. Defendants have not made any further loan payments and have been living in the mortgaged property rent free for almost three years. [2T19:6-7].

A Notice of Intent to Foreclose ("NOI") was sent to Defendants on May 18, 2009, that included ASC's name and address as the party to be contacted in regard to that communication and the Loan generally. [Da121]. The May 18, 2008 NOI also "urged" Defendants to immediately seek the advice of an attorney and provided a number of options to assist Defendants in doing so:

> We urge you to immediately seek the advice of an attorney(s) of your own choosing concerning this residential mortgage default. If you are unable to obtain an attorney(s), you may communicate with the New Jersey Bar Association or the Lawyers Referral Service of the county where the property is located. If you are unable to afford an attorney(s), you may communicate with the Legal Services Office in the county where the property is located. These Telephone numbers are listed on the attached sheet; they can also be found in the local telephone directory.

[Da124]. Defendants did not seek advice from an attorney despite having this information.

On July 15, 2008, Plaintiff initiated foreclosure proceedings by filing a Foreclosure Complaint. [Da1-8]. The accompanying Summons again directed Defendants to contact an attorney and promptly file an answer or risk a judgment by default:

> You are required to serve ... an answer to the annexed Foreclosure Complaint within 35 days .... If you fail to answer, judgment by default may be rendered against you .... If you cannot afford to pay an attorney call a Legal Services Office. An individual not

> eligible for free legal assistance may obtain a referral to an attorney by calling a county Lawyer Referral Service.

[Da127]. Despite being personally served with the Foreclosure Complaint, Defendants failed to file a responsive pleading: they did not believe they had any defense. [Db26; Da20-21].

On August 26, 2008, Plaintiff filed its Request and Certification of Default. [Da132-133]. Pursuant to R. 1:4-4(b), the Certification of Default of Brian J. Yoder, Esquire ("Attorney Yoder") provided:

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

[Da133]. The Office of Foreclosure and the lower court approved and accepted the Request and Certification of Default and entered Default on August 26, 2008. [Da132]. Subsequently, Plaintiff forwarded a Notice of Entry of Default along with formal Notice Pursuant to the Fair Foreclosure Act to Defendants. [Da134-137]. However, Defendants failed to act.

While Defendants did ask for a loan modification through ASC, no modification was promised or forthcoming. [Da36; Da146-162]. Nor is there any allegation that Defendants were told that the foreclosure would not be pursued or were otherwise discouraged from seeking out an attorney to advise them as to their rights. Defendants say they knew no repayment plan would be offered by February 5, 2009. [Da51]. Defendants still took no steps to defend the foreclosure proceedings despite this knowledge.

As part of its proofs for the entry of final judgment, Plaintiff provided a copy of the Note to the Court. [Da74-78]. Pursuant to R. 4:64-2(a), Attorney Yoder[2] stamped the document

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2 Attorney Yoder is a member of the bar of the State of New Jersey. [Da133].

"Certified to be a True and Correct Copy" and executed the certification. [Da74]. The Office of Foreclosure and the lower court accepted the proofs, including the copy of the Note, and entered final judgment on May 6, 2009. [Da134-140].

It was not until June 2009, i.e., more than one year after Defendants received the May 18, 2008 NOI, that Defendants sought legal counsel to delay the impending Sheriff's sale and to prolong their possession of the mortgaged property. [Db6]. First, on August 31, 2009, Defendants sent a letter to ASC purportedly rescinding the Loan pursuant to the federal Truth-in-Lending Act, 15 U.S.C. § 1601 et seq. ("TILA"), the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq., the New Jersey Homeownership Security Act of 2002, N.J.S.A. § 46:10B-22, and "any common law rights," based on alleged overcharges in closing fees.[3] [Da68-69]. Second, Defendants sought an Order to Show Cause with respect to their application for relief under Rule 4:50-1. [Da71-73].

In addition to a rescission defense, Defendants argued that the NOI did not comply with the Fair Foreclosure Act because it contained ASC's name and address and not Plaintiff's. During the course of the proceedings below, a second Notice of Intent to Foreclose was sent on November 20, 2009, and it identified Plaintiff as the holder of the Loan and ASC as the Loan's servicer, and directed that any communications with respect to the Loan be sent to ASC. [Da168-184]. The lower court directed on July 20, 2010, that a third Notice of Intention to

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3 Defendants have since abandoned their theories related to the New Jersey Consumer Fraud Act, the New Jersey Homeownership Security Act of 2002, and "any common law rights," and now claim they were overcharged by $120 in recording fees and that they are therefore entitled them to unwind the loan transaction under TILA.

Foreclose be sent. [Da186-187]. This Notice of Intention to Foreclose included language explaining that ASC had been delegated authority under the PSA. [Da196-198].

On August 30, 2010, the lower court entered an order denying Defendants' application to vacate the default and default judgment. In rejecting Defendants' arguments, the lower court held that the Note submitted as proof complied with R. 4:64-2(a). [1T27:6-23]. The lower court reasoned that to rule any other way would be to "totally change over the foreclosure practice and the industry." [1T27:13-14]. Moreover, the lower court held Defendants failed to show excusable neglect, [1T29:7-31:10; 2T11:3-15], or a meritorious defense. [2T16:3-17:16]. Accordingly, the lower court declined to vacate the default and default judgment. [Da235].

ARGUMENT

A motion under Rule 4:50-1 is addressed to the sound discretion of the trial court. Del Vecchio v. Hemberger, 388 N.J. Super. 179, 186-87 (App. Div. 2006). "The decision whether to vacate a judgment ... must be left undisturbed unless a clear abuse of discretion appears." Id. (citation omitted).

POINT I. The Trial Court Did Not Abuse Its Discretion In Finding That Relief Was Not Warranted Under Rule 4:50-1(a)

Rule 4:50-1(a) permits a court to relieve a party from a final judgment or order for "mistake, inadvertence, surprise, or excusable neglect." A default judgment will not be disturbed unless the moving party shows "that the neglect to answer was excusable under the circumstances and that [the moving party] has a meritorious defense." Dynasty Bldg. Corp. v. Ackerman, 376 N.J. Super. 280, 285 (App. Div. 2005). Both excusable neglect **and** a meritorious defense must be shown by a defendant before a court can exercise its discretion to grant relief. Id.

A. Failing To Act Because One Believes – Without Bothering To Consult An Attorney When Urged To Do So – That There Is No Legal Defense, Or Because One Wishes For A Loan Modification, Is Not Excusable Neglect Under Any Stretch Of The Imagination

Excusable neglect is defined as excusable carelessness attributable to an honest mistake that is compatible with due diligence or reasonable prudence. Baumann v. Marinaro, 95 N.J. 380, 335 (1993). The reasons proffered by Defendants for their failure to answer the Foreclosure Complaint do not constitute excusable neglect. For this reason alone, the lower court's denial of Defendants' request under R. 4:50-1(a) should be affirmed.

Here, Defendants admit they were properly served with the Foreclosure Complaint and were fully aware of the foreclosure action at each and every stage. There is no dispute they were urged to seek counsel at key points both before and at the time the proceedings were commenced. They were aware of that right but chose not to exercise it because they knew they were in default and believed they had no legal defense to foreclosure. Defendants instead hoped they would be successful in seeking a modification of the terms of the Loan. According to Defendants, these facts excuse their failure to respond to the Foreclosure Complaint when required to do so. As the lower court found, these facts demonstrate the opposite of excusable neglect.

The lower court recognized that Defendants' conduct amounted to "sticking your head in the sand" and was not compatible with due diligence or reasonable prudence:

> I have a lot of problems with saying that with all that's going, with all this evidence of Court process for over a year, to just rely on trying to negotiate something with the bank was like sticking your head in the sand.
>
> This wasn't going to go away and they didn't get any assurance from the bank that they were succeeding in their negotiation efforts or that an answer to the complaint was not required. I mean they just focused on one path. And they ignored

> the negotiation path and they ignored the litigation side of things. You can't do that.
>
> And I have to say that I think that these – Jurors were more astute than most. I mean the fact that Mrs. Guillaume was being so aggressive and so persistent in trying to negotiate and going to all these different places to get help, but the one place she wasn't going was a member of the bar, a lawyer which is usually what you do when you get Court papers.
>
> Or if you absolutely can't afford a lawyer and that's the case of many foreclosures, a very heavy self-represented area of the law to at least contact the Court yourself and you send in some rudimentary answer. And it doesn't have to be fancy. I mean you write a letter to the foreclosure unit, they'll stamp contested on it.
>
> Because I've seen so many of them long hand. But nothing was done. And I don't regard that as excusable neglect. So that prong is lacking.

[1T30:7-25].

Defendants have not cited one case that supports the argument that a belief that one does not have a viable defense and attempting to negotiate a work out somehow relieves one of the duty and obligation to respond to a foreclosure complaint. Indeed, this Court has previously affirmed a trial court decision rejecting similar arguments. In HSBC Bank USA, Nat'l Ass'n v. Sylvester, 2010 WL 668753, *1-2 (N.J. Super. A.D. Feb. 25, 2010) (unpublished and included in Respondent's Appendix bound with this brief at Pa1-3), certif. denied, 203 N.J. 92, 999 A.2d 461 (2010), the mortgagee defendant claimed excusable neglect in failing to respond to the foreclosure complaint where she mistakenly believed that she did not have a viable defense and could not afford counsel. Id. The lower court rejected the argument and held that such claims were not sufficient to show excusable neglect. Id. On appeal, this Court affirmed the decision finding no clear abuse of discretion. Id. See also U.S. Bank, N.A. v. Mallory, 982 A.2d 986, 996 (Pa. Super. 2009) ("The fact Appellant may be unsophisticated in legal and financial matters is all the more reason she should have heeded the notices to secure legal counsel at once, and her

deliberate decision not to defend does not provide a reasonable explanation or excuse necessary to open the default judgment.").

Nor does the fact that Defendants had asked for a loan modification provide an acceptable excuse. BAC Home Loans Servicing, LP v. Torres, No. F-32715-09 (N.J. Super. Ct. Ch. Div. June 22, 2010) (unpublished) (finding no excusable neglect where borrower, instead of answering complaint, requested a forbearance agreement) [Pa4-10]; Mortgage Electronic Registration Systems, Inc. v. Ronghi, 2008 WL 4092824, *2-4 (N.J. Super. Ct. App. Div. Sep. 5, 2008) (unpublished) (denying motion to vacate default judgment where borrower had no evidence of an actual agreement to modify the loan). [Pa11-15]. Cf. Llanfair House Nursing Home v. Estate of Litchult ex rel. Campagna, 2008 WL 5272958, *3 (N.J. Super. A.D. Dec. 2008) (unpublished) (no excusable neglect where defendants mistakenly believed that cooperating with plaintiff by providing informal discovery would satisfy plaintiff) [Pa16-19]; McEvilly v. Tucci, 239 Pa. Super. 474, 362 A.2d 259, 263 (1976) (finding no reasonable excuse where a party sent a letter to opposing counsel expressing the assumption that opposing counsel would not require a responsive pleading, and then "unjustifiably relied" on opposing counsel's lack of response). In short, the case law confirms only that the lower court's decision here was no abuse of discretion.

For these reasons, the lower court's decision denying relief under 4:50-1(a) should be affirmed.

B. Defendants Have No Meritorious Defense

Even were one to assume that Defendants could demonstrate excusable neglect, the trial court also properly found that they have no meritorious defense.

Defendants claimed two defenses in support of their attempt to vacate the final judgment and both failed. First, Defendants claimed that Plaintiff violated the Fair Foreclosure Act, by submitting an allegedly deficient NOI. However, this argument fails because, as the lower court correctly found, the NOI sent to Defendants comported with the purpose of the statute by making Defendants aware of the situation and who to contact to cure their default. Second, Defendants argued that their original lender violated TILA such that they were entitled to rescind the Mortgage. This defense is similarly without merit because Defendants have failed to tender, or even offer to tender, the loan principal to Plaintiff. Thus, Defendants had no meritorious defense and the lower court properly exercised its discretion in denying relief under R. 4:50-1(a).

1. Defendants Did Not Establish A Violation Of The Fair Foreclosure Act

Defendants claim that the NOI did not comply with the Fair Foreclosure Act because, although it listed Plaintiff as the holder of the Note, and listed the address and telephone number of ASC, the loan servicer, it allegedly should have also included the address of the holder. However, as the lower court correctly held, because ASC was the appropriate party for Defendants to contact to cure their default or dispute the amount due, the notice complied with the purpose of the Fair Foreclosure Act.

N.J.S.A. § 2A:50-56(c) sets forth the content requirements of a NOI by providing that: "the written notice shall clearly and conspicuously state in a manner calculated to make the debtor aware of the situation." Moreover, the statute goes on to provide:

> the name and address of the lender and the telephone number of a representative of the lender whom the debtor may contact if the debtor disagrees with the lender's assertion that a default has occurred or the correctness of the mortgage lender's calculation of the amount required to cure the default.

N.J.S.A. § 2A:50-56(c)(11). As is evident from these provisions, and as the lower court held, the intention of the Fair Foreclosure Act was to ensure that a defendant be provided with notice that would reasonably make the defendant aware of the situation, i.e., that he or she is in default, how to cure the default, and that foreclosure procedures may begin if he or she does not cure the default. [2T16:3-11].

It is the lender's agent, the servicer, with whom borrowers will have had all contact and familiarity and with whom borrowers would negotiate any alternative to foreclosure such as a loan modification or a forbearance agreement. Directing borrowers to contact the servicer by providing the servicer's name and contact information serves the very purpose of the notice provisions of the Fair Foreclosure Act: it makes debtors aware of the situation, and how and whom to contact in order to cure the default or raise any potential disputes.

ASC was the party with whom Defendants dealt since December 1, 2006 regarding their mortgage loan. Moreover, ASC was the party with whom Defendants tried to negotiate a work out of the mortgage loan after they defaulted. [2T16:3-17:4]. Indeed, ASC was the party that Defendant contacted immediately after receiving the first NOI. [Da36]. As the lower court found, it would have been more confusing to list Plaintiff's address when ASC would be the party that Defendants needed to contact in order to try to prevent foreclosure. [1T13:24-14:4]. Tellingly, Defendants have not alleged, nor can they claim, that the NOI failed to make them aware of the situation regarding their mortgage. It is most ironic that notwithstanding the fact that Defendants were actually negotiating a modification with the servicer, they now argue that the holder's address should have been included in order to make them sufficiently aware of the situation. Simply put, the NOI comported with the Fair Foreclosure Act, and the lower court properly rejected Defendant's defense.

A New Jersey court has recently dealt with facts very similar to the case at bar in Torres, No. F-32715-09 (N.J. Super. Ct. Ch. Div. June 22, 2010). [Pa4-10]. There, the defendants in a foreclosure action sought to set aside a default judgment under R. 4:43-3,[4] arguing that, contrary to the requirements of the Fair Foreclosure Act, the NOI was sent by the servicer instead of the lender and that the NOI only provided the name of the lender and a telephone contact number. Id. at 3-4. The court rejected the defendants' argument and held that, notwithstanding the strict language of the Fair Foreclosure Act, an agent of the lender could issue the NOI on the lender's behalf and that the NOI did not necessarily have to include all of the contact information listed by the Fair Foreclosure Act. Id. at 6. The court reasoned that because the contact information provided would enable a person in default to know how to proceed to cure the default, "the NOI substantially complie[d] with the notice requirement of the Fair Foreclosure Act." Id.; see also Fed. Nat'l Mortg. Assoc. v. Bracero, 297 N.J. Super. 105, 107 (Ch. Div. 1996) (holding that the technical requirements of the Fair Foreclosure Act may be relaxed where principles of agency and efficiency so mandate).

Indeed, courts in other states with similar foreclosure notice provisions as the Fair Foreclosure Act do not apply a hyper-technical construction of the statute to determine whether parties have complied; rather, they look to whether the purpose and goals of the statute have been satisfied. See, e.g., TKW Partners, LLC v. Archer Capital Fund, L.P., 302 Ga. App. 443, 691 S.E.2d 300 (2010) (finding that notice to borrower substantially complied with statutory requirements and thus was legally sufficient under the notice provision of the state's foreclosure statute); Northwestern Nat. Life Ins. Co. v. Delzer, 425 N.W.2d 365 (N.D. 1988) (upholding

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4 Like R. 4:50-1(a), R. 4:43-3 requires a showing of both excusable neglect and a meritorious defense. See id. at 3-4.

lower court's default judgment and finding that strict compliance with foreclosure notice provisions was not required and any defect in the notice must be raised in an responsive pleading and not in a motion to vacate).

Defendants cite to EMC Mortg. Corp. v. Chaudri, 400 N.J. Super. 126 (App. Div. 2008), arguing that strict compliance with the notice provisions of the Fair Foreclosure Act is required. However, as the lower court noted, Chaudri is distinguishable because in that case there was a complete failure to serve a notice. See id. at 138-41. The issue was not whether the content of the notice itself was sufficient. Id.; [1T10:24-11:2]. Thus, the defects the Chaudri court highlighted and its rationale do not apply here, where Plaintiff did serve a notice.

As the lower court correctly held, "the purpose of the statute as indicated by its history and language ... [is] to make the debtor aware of the situation so that they have a reasonable opportunity to cure the defects and to know who to deal with." [2T16:3-8]. The lower court also correctly held that the NOI satisfied this purpose as evidenced by the fact that Defendants appropriately contacted ASC to attempt to modify their loan. Since the lower court did not clearly abuse its discretion in coming to this conclusion, its decision should be affirmed.

2. Defendants' Inability To Tender Back The Loan Proceeds Exposes The Lack Of Merit In Their TILA Rescission Defense

The United States Court of Appeals for the Third Circuit has held that, in order for a borrower to obtain rescission under TILA, the borrower must be able to tender a return of the loan proceeds. See Jobe v. Argent Mortg. Co., 373 Fed. Appx. 260, 262 (3d Cir. Apr. 2, 2010) (unpublished) (affirming the district court's holding that rescission was inappropriate where plaintiffs were unable to repay the loan advanced to them). [Pa20-23].

The majority of federal courts have long held this view. See, e.g., Am. Mortg. Network, Inc. v. Shelton, 486 F.3d 815, 820 (4th Cir. 2007) (holding that TILA rescission is only available if the borrower is able to tender the loan proceeds); Valdez v. America's Wholesale Lender, 2009 WL 5114305, *5 (N.D. Cal. Dec. 18, 2009) (unpublished) (holding that plaintiffs would not be entitled to rescission absent a showing that they were able to tender the principal balance of the loan) [Pa24-33]; Egipciaco v. R&G Fin. Corp., 383 F. Supp. 2d 318, 321-22 (D.P.R. 2005) (conditioning rescission upon tender of the amount of the loan); Manfield v. Vanguard Sav. & Loan Ass'n, 710 F. Supp. 143, 147-48 (E.D. Pa. 1989) (plaintiff had a duty to return the loan proceeds in order to be granted rescission); Mitchell v. Sec. Inv. Corp., of the Palm Beaches, 464 F. Supp. 650, 652 (S.D. Fla. 1979) (plaintiff was required to tender loan principal in order to be granted rescission); Clemmer v. Liberty Fin. Planning, Inc., 467 F. Supp. 272, 276 (W.D.N.C. 1979) ("Effective rescission under the Truth-in-Lending Act requires the borrower to make restitution of the amounts expended by the lender.").

Further, the Federal Reserve Board has recently published a proposal to amend the provision in Regulation Z which endorses the approach adopted by the majority of courts, including the Third Circuit, should govern the TILA rescission process in a court proceeding. See 75 Fed. Reg. 58539 (September 24, 2010). This amendment recognizes that "[t]he majority of courts that have considered this issue condition the creditor's release of the security interest on the consumer's proof of tender," states that "t]he Board does not believe that Congress intended for the creditor to lose its status as a secured creditor if the consumer does not return the loan balance," and "provides that when the parties are in a court proceeding, the creditor is not required to release its security interest until the consumer tenders the principal balance less

interest and fees, and any damages and costs, as determined by the court." 75 Fed. Reg. at 58547-58548.

Here, Defendants have not even tried to show that they are willing and able to tender the monies required to rescind the mortgage loan and return the parties to the status quo. As such, the lower court was correct in finding that Defendants failed to show a meritorious defense. Accordingly, the lower court did not abuse its discretion in holding that Defendants were not entitled to relief under R. 4:50-1(a), and this Court should be affirm.

POINT II. The Trial Court Did Not Abuse Its Discretion In Holding That Defendants Failed To Meet Their Burden Of Showing An Exceptional Circumstance Under R. 4:50-1(f)

There is no basis for reversing the lower court's refusal to grant relief under R. 4:50-1(f). Relief under R. 4:50-1(f) is available only when "truly exceptional circumstances are present." Baumann, 95 N.J. at 395. Even in the case of a default judgment, where relief is sought under R. 4:50-1(f), courts should grant relief "sparingly and only in situations in which, were it not applied, a *grave injustice* would occur." First Morris Bank & Tr. v. Roland Offset Serv., Inc., 357 N.J. Super. 68, 71 (App. Div. 2003) (emphasis in original) certif. denied, 176 N.J. 429, 824 A.2d 157 (2003). As set forth below, there was no "exceptional circumstance" or "grave injustice" before the lower court, and there is none here on appeal.

A. The Proofs Submitted By Plaintiff Were Properly Accepted By The Office Of Foreclosure And The Lower Court

Defendants attempted to manufacture an exceptional circumstance as required by R:4.50-1(f) by conflating the general Rules governing motions with the specific Rules governing proofs in mortgage foreclosure cases. Defendants argued below that the Note filed in support of the final judgment should have included not only the certification required by R. 4:64-2, but also the certification language purportedly required by R. 1:4-4 and R. 1:6-6. This claim is contrary to

the foreclosure Rules, the long-standing practices in New Jersey, and the Supreme Court of New Jersey's recent amendment to the Rules. Moreover, the cases Defendants cite are not only factually distinguishable, they do even support Defendants' theory. Simply put, the lower court properly found that Defendants did not prove any facts that amounted to an exceptional circumstance necessary to vacate a final judgment under R. 4:50-1(f).

Rule 4:64-2 provides that a copy of a document may be submitted if certified as a "true copy" by a New Jersey attorney. Rule 4:64-2 requires no other certifications. Here, the Note filed with the lower court in support of final judgment contained Attorney Yoder's signed statement that the Note was a "true copy." As such, Plaintiff complied with the requirement of R. 4:64-2 and the lower court properly rejected Defendants' claim that the proofs were insufficient.

Ignoring this reality, Defendants erroneously posit that the Note filed in support of the final foreclosure judgment should have also expressly included a certification as purportedly required by R. 1:4-4 and R. 1:6-6, i.e., that Plaintiff's counsel should have also certified that he personally compared the original Note to the copy filed with the court and that he was aware he was subject to punishment if that statement was willfully false. In addition to the fact that these R. 1:4-4 and R. 1:6-6 on their face do not apply to the proofs submitted in foreclosure actions, no court has ever applied those Rules as Defendants propose. Indeed, as Defendants admitted, "the proofs submitted in this case may be typical of the quality of proofs submitted in foreclosure cases throughout the State." That being the case, the Office of Foreclosure accepted and

approved the certification under R.4:64-2, without requiring additional certifications under R. 1:4-4 and R. 1:6-6. There is simply no support for Defendants' argument.[5]

Defendants' attempt to import general Rules into specific Rules also contradicts well-accepted concepts of statutory construction. In particular, R. 4:64-2 specifically controls the required proofs in foreclosure actions; while R. 1:4-4 and R. 1:6-6 are general Rules of application governing the filing of affidavits and motions. When one statute deals specifically with a subject and another statute deals with that subject only generally or inferentially, the specific statute is controlling. City of East Orange v. Essex County Register of Deeds & Mortgages, 362 N.J. Super. 440, 444 (App. Div. 2003). Thus, R. 4:64 alone controls the required proofs in a mortgage foreclosure case.

Further, the Supreme Court of New Jersey's December 20, 2010 amendments to R. 4:64 make clear that prior to the amendments, a plaintiff in a foreclosure action was not required to include the certifications under R. 1:4-4 and R. 1:6-6 with their proofs. Indeed, even the requirements under new amendments do not go as far as Defendants propose the Rules did when final judgment was entered on May 6, 2009. In particular, the new amendments only require that foreclosure counsel certify that he or she communicated with an employee of the plaintiff who reviewed the proofs. In comparison, Defendants argue that even before (and after) these amendments, a plaintiff's counsel was required to personally review the original documents and

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5 Moreover, contrary to Defendants' suggestion, only Plaintiff's Request and Certification for Default Judgment was required to contain a certification in accordance with R. 1:4-4 – which it undeniably did as Attorney Yoder provided:

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

[Da133].

only then certify them as true copies. If Defendants' theory is correct, the new amendments would have reflected Defendants' proposed requirements. Indeed, if Defendants' theory was correct, the Supreme Court of New Jersey would not have had to amend the Rules at all.

The cases cited by Defendants are readily distinguishable. For instance, Defendants cite to Monmouth County Div. of Soc. Serv. on behalf of Hall v. PAQ, 317 N.J. Super. 187 (App. Div. 1998), for the proposition that it is ground for relief under R. 4:50-1(f) that the proof submitted in support of a default judgment was legally insufficient. However, Defendants' reading of Monmouth misses the mark. That case involved a default judgment in a paternity suit in which the complaint failed to allege any facts relating to paternity and no proof was submitted in support of the default judgment. Moreover, the defendant was later determined not to be the father of the child through a subsequent paternity test. Finally, the plaintiff "indicated that it was not truly opposed to setting aside the default judgment so long as the arrears were not excused." Id. at 197-98. Based on all of these facts, the Court held that sufficient exceptional circumstances existed to open the default judgment. Id.

Here, however, there is no dispute that the Foreclosure Complaint contained all of the necessary allegations under the Rules. Moreover, there is no dispute that a true copy of the Note was submitted in support of final judgment. There is also no question that Plaintiff opposed vacating the final judgment. Finally, there is nothing in this case that is even remotely similar to the subsequent negative paternity test that contradicted the default judgment in a paternity suit. Instead, the attack on the proof in this case relates to whether or not the magic language under R. 1:4-4 and R. 1:6-6 should have been included on the Note. As such, the Monmouth case is readily distinguishable.

Next, Defendants cite to Ehrlich v. Mulligan, 104 N.J.L. 375 (E&A 1928), in support of their attempt to create a new standard for certifying true copies under R. 4:64-2. However, Defendants' citation to Ehrlich is particularly curious since it so clearly cuts against their argument. Indeed, even Defendants' own brief reveals that this non-mortgage foreclosure case from 1928 is distinguishable. [Db12]. In Ehrlich, one of the questions before the Court of Errors and Appeals of New Jersey was whether a copy of a bankruptcy petition which was marked as a "true copy" was properly excluded during the trial below notwithstanding the statute that allowed the admission of "certified public records." Id. at 379-80. As noted in Defendants' brief, the court held that a "true copy" of a public record is different from a "certified copy" of a public record in that, unlike "true copies," "certified copies" of public records required that "there must be established an identity of subject matter between the copy offered and the original on file with the clerk." Id.; [Db12]. Here, R. 4:64-2 requires only a "true copy" and not a "certified copy" and, therefore, these additional steps were not required. Thus, Defendants' argument that Plaintiffs' counsel was required to "compare[] the original document to the copy and determine[] that the latter is an accurate copy of the former" before verifying it as a "true copy," [Db13], is directly contradicted by the case on which they rely.

At the end of the day, Plaintiff complied with all applicable Rules and Defendants' attempt to create their own standard by combining the general motion Rules with the specific foreclosure Rules should not be given credence by this Court. Defendants cannot show that the lower court abused its discretion when it determined that Defendants failed to show any recognized violation of the Rules or anything to suggest an exceptional circumstance that would warrant relief under R. 4:50-1(f). Accordingly, the lower court's decision should be affirmed.

B. Defendants Failed To Establish An Equal Protection Or Due Process Claim.

Defendants claim that the lower court's grant of a final judgment in favor of Plaintiff somehow constituted a deprivation of their constitutional rights. However, this claim is entirely without merit. Although it is unclear on what grounds Defendants are claiming a constitutional violation (and, for that matter, that Defendants preserved any such argument), they appear to invoke the Fourteenth Amendment to assert both equal protection and procedural due process violations. However, Defendants' attempts fail because they did not preserve any equal protection claim and, in any event, their brief does not state a basis for finding a violation of the Equal Protection Clause nor does it satisfy the elements for asserting a procedural due process violation.

As a threshold matter, it is a well-settled principle that appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available. Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973). Here, despite having the opportunity to do so, Defendants did not raise any equal protection claim before the lower court. Accordingly, their newly raised equal protection claim should not be considered on appeal.

In any event, Defendants' effort to assert an equal protection claim against Plaintiff falls far short of the mark. To state a claim for violation of the Equal Protection Clause, a plaintiff must assert that the defendant treated the plaintiff differently because he is a member of a protected class or because he exercised a fundamental right. Renchenski v. Williams, 622 F.3d 315, 337 (3d Cir. 2010). Mere conclusory allegations are insufficient to state such a claim. Id. at 338.

Here, Defendants base their purported equal protection claim on the misconception that the lower court applied the Rules to Plaintiff differently than it did to Defendants. In support of this argument, Defendants posit that they complied with R. 1:6-6 and R. 1:4-4 while Plaintiff was not required to do so. As explained in greater detail above, this claim lacks merit because Plaintiff followed both the general Rules regarding motions and the specific Rules governing foreclosure actions. Accordingly, Defendants have not stated any grounds for asserting an equal protection violation and this Court should reject their claim.

Defendants' procedural due process claim similarly fails. To state a claim for a violation of procedural due process, a party must show that it has an interest protected by the Fourteenth Amendment and that the procedures provided did not provide him with due process of law. Renchenski, 622 F.3d at 325. In order to determine whether an individual has been deprived of his property without due process, the court looks at what process the state provided, and whether it was constitutionally adequate. Revell v. Port Auth. of New York, 598 F.3d 128, 138 (3d Cir. 2010). This inquiry examines the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations. Id.

Defendants' baseless due process claim is premised on the argument that the lower court failed to follow Court Rules by accepting the proofs submitted by Plaintiff. As explained above, Plaintiff complied with all Rules, both the general motion Rules and the specific foreclosure Rules. Since the requirements of these Rules were satisfied, the lower court acted properly and well within its discretion when it accepted the proofs in support of final judgment. Furthermore, Defendants fail to recognize that they were afforded the full protection of the law when they were given the opportunity to contest the default judgment entered against them and, as the lower court noted, enjoyed over a year of court process. [1T30:7-9]. Defendants' inability to present

an acceptable excuse for their default cannot subsequently be used as a basis to claim that the lower court violated their due process rights. As such, any argument by Defendants regarding a due process violation should be rejected.[6]

CONCLUSION

The lower court correctly held that Defendants fell short of their burden of showing either an exceptional circumstance or excusable neglect along with a meritorious defense required to vacate the final judgment entered against them. In this appeal, Defendants have not shown that the lower court abused its discretion in coming to this conclusion. That being the case, the lower court should be affirmed.

Respectfully submitted,

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U.S. Bank National Association
as Trustee for CSAB Mortgage-Backed Pass-Through Certificates, Series 2006-3

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6 Defendants' reliance on Celino v. General Accident Ins., 211 N.J. Super. 538 (App. Div. 1986), is misplaced. Celino did not even involve a due process claim. Instead, Defendants simply cited to dicta at the very end of the court's opinion in an attempt to implicate constitutional claims here.

US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CSAB MORTGAGE-BACKED PASS-THROUGH CERTIFICATES, SERIES 2006-3,

Plaintiff/Respondent,

v.

MARYSE GUILLAUME, MR. GUILLAUME, HUSBAND OF MARYSE GUILLAUME, EMILIO GUILLAUME, MRS. EMILIO GUILLAUME, HIS WIFE, CITY OF EAST ORANGE,

Defendants/Appellants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-000376-10T3

Civil Action

On Appeal From:
Superior Court Of New Jersey Chancery Division, Essex County, General Equity Part
Docket No. F-26869-08

Sat Below:
The Honorable Harriet Farber Klein, J.S.C.

APPENDIX OF RESPONDENT

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On the Brief: Henry F. Reichner, Esquire

Not Reported in A.2d, 2010 WL 668753 (N.J.Super.A.D.)
(Cite as: 2010 WL 668753 (N.J.Super.A.D.))

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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
HSBC BANK USA, NATIONAL ASSOCIATION, as Trustee for Nomura Asset Acceptance Corporation Mortgage Pass-Through Certificates, Series 2006-AF2, Plaintiff-Respondent,
v.
Marianne SYLVESTER, Defendant-Appellant.

Submitted Jan. 21, 2010.
Decided Feb. 25, 2010.

West KeySummary**Judgment 228 ⇐143(3)**

228 Judgment
228IV By Default
228IV(B) Opening or Setting Aside Default
228k143 Excuses for Default
228k143(3) k. Mistake, Surprise, or Excusable Neglect in General. Most Cited Cases
A property owner was not entitled to vacate a default judgment in a mortgage foreclosure action because there was no excusable neglect. The property owner claimed in part that she was indigent at the time service of process was effected. However, the lack of resources to retain counsel is not a basis upon which to excuse the neglect to file a timely answer.

On appeal from the Superior Court of New Jersey, Chancery Division, Morris County, Docket No. F-12141-07.
Algeier Woodruff, attorneys for appellant (Gary C. Algeier, of counsel and on the brief).

Phelan Hallinan & Schmieg, attorneys for respondent (Vladimir Palma, of counsel and on the brief).

Before Judges FISHER and SAPP-PETERSON.

PER CURIAM.

***1** In this appeal, we consider whether the trial judge erred in denying defendant's motion to vacate a default judgment in this mortgage foreclosure action. We conclude the judge correctly found the absence of excusable neglect and, therefore, affirm.

The record reveals that, in 1989, defendant Marianne Sylvester (defendant), together with her son and daughter-in-law, Gary and Valerie Sylvester, purchased a home in Mendham. In 2002, defendant transferred her interest in the property to Gary and Valerie. Four years later, because of their poor credit, Gary and Valerie failed in their attempts to refinance the mortgage on the property. As a result, Gary and Valerie transferred the property back to defendant. Because of her good credit rating, defendant was able to obtain two loans in the total principal amount of $759,949. Defendant's loan application stated that she earned $13,000 per month as an employee of Gary's contracting business; in truth, defendant was then seventy-seven years old and living on a fixed income of approximately $2000 per month. Defendant defaulted on the mortgage payments due on February 1, 2007.

Plaintiff filed its complaint in foreclosure on May 10, 2007. Defendant was served on July 16, 2007, but did not timely answer the complaint. Instead, through her attorney, defendant entered into a forbearance agreement with plaintiff on June 2, 2007. However, defendant apparently failed to make the second payment requirement by that agreement and plaintiff resumed its pursuit of foreclosure. Defendant's default was entered on September 4, 2007. A final judgment was entered and a writ of execution issued on December 19, 2007.

On September 9, 2008, nine months after entry of the default judgment, defendant moved for relief

pursuant to *Rule* 4:50-1. Defendant asserted that her failure to answer the complaint was due to her mistaken belief that she lacked a viable defense. In seeking relief, defendant maintained that she possessed a meritorious defense, claiming that the lenders violated the Consumer Fraud Act, *N.J.S.A.* 56:8-1 to -184, and engaged in predatory practice by granting her a loan on terms the lenders knew she could not meet. The trial judge denied the motion.

Defendant later moved for reconsideration, arguing for the first time that her loan application, which listed an inflated income, was a forgery. In her decision, the judge held that the record demonstrated defendant was aware of the circumstances upon which this purported defense was based. As a result, the judge denied the motion for reconsideration and defendant appealed.

Rule 4:50 is "designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case." *Manning Eng'g, Inc. v. Hudson County Park Comm'n,* 74 *N.J.* 113, 120, 376 A.2d 1194 (1977). With these principles in mind, trial courts are to "view 'the opening of default judgments ... with great liberality,' and should tolerate 'every reasonable ground for indulgence ... to the end that a just result is reached.' " *Mancini v. EDS,* 132 *N.J.* 330, 334, 625 A.2d 484 (1993) (quoting *Marder v. Realty Constr. Co.,* 84 *N.J.Super.* 313, 319, 202 A.2d 175 (App.Div.), *aff'd,* 43 *N.J.* 508, 205 A.2d 744 (1964)). A trial judge's ruling on such a motion "will be left undisturbed unless it represents a clear abuse of discretion." *Morristown Hous. Auth. v. Little,* 135 *N.J.* 274, 283, 639 A.2d 286 (1994).

***2** Although motions for relief from default judgments should be treated indulgently, the moving party must nevertheless show "that the neglect to answer was excusable under the circumstances and that [the moving party] has a meritorious defense." *Marder, supra,* 84 *N.J.Super.* at 318, 202 A.2d 175. Excusable neglect is defined as that "which might have been the act of a reasonably prudent person under the same circumstances." *Tradesmens Nat'l Bank & Trust Co. v. Cummings,* 38 *N.J.Super.* 1, 5, 118 A.2d 80 (App.Div.1955).

We agree with the trial judge that defendant failed to demonstrate that her failure to file a timely answer was the product of excusable neglect. She claimed in part that she was indigent at the time service of process was effected. The lack of resources to retain counsel, however, is not viewed as a basis upon which to excuse the neglect to file a timely answer. *See In re Estate of Schiffiner,* 385 *N.J.Super.* 37, 44, 895 A.2d 1202 (App.Div.), *certif. denied,* 188 *N.J.* 356, 907 A.2d 1015 (2006). Moreover, as the record clearly demonstrates, defendant had the assistance of counsel when the forbearance agreement was negotiated. It was not until defendant failed to comply with the terms of that agreement that plaintiff requested default and then, two months later, secured a default judgment. Defendant certainly had the assistance of counsel well before default was entered and had the opportunity to file an answer and allege her defenses at that time. The trial judge correctly determined that defendant's inaction was not "an honest mistake that is compatible with due diligence or reasonable prudence." *Mancini, supra,* 132 *N.J.* at 335, 625 A.2d 484.

Finding no cause to second guess the trial judge's determination that defendant's failure to file a timely answer was not the product of excusable neglect, we need not reach the issue of whether she presented sufficient evidence of a meritorious defense either at the time of her original motion for relief or by way of her motion for reconsideration. *See Marder, supra,* 84 *N.J.Super.* at 318, 202 A.2d 175 (holding that a movant in this situation must demonstrate both excusable neglect *and* a meritorious defense).[FN1]

> FN1. We also reject the contention that *Rule* 4:50-1(f), which permits relief from judgments "for any other reason justifying relief from the operation of the judgment

> or order," may apply where the movant fails to meet the requirements of *Rule* 4:50-1(a). As held in *Hodgson v. Applegate,* 31 *N.J.* 29, 35, 155 A.2d 97 (1959), *Rule* 4:50-1 contains "six separate and mutually exclusive grounds" for relief from a judgment or order. *Rule* 4:50-1(a), as we have discussed, sets forth the court's authority to grant relief when the moving party has committed *excusable* neglect; *Rule* 4:50-1(f), despite its expansive parameters, does not provide the court with the authority to grant relief when the moving party has been guilty of *inexcusable* neglect. Were it otherwise, *Rule* 4:50-1(f) would swallow up the *Rule's* five other subsections and render *Rule* 4:50-1(a) meaningless. For these reasons, we reject the apparent holding of another panel in *Nowosleska v. Steele,* 400 *N.J.Super.* 297, 946 A.2d 1097 (App.Div.2008), which suggests that a movant, who seeks relief from a default judgment, may obtain relief pursuant to *Rule* 4:50-1(f) even when unable to show excusable neglect in failing to timely file an answer.

Affirmed.

N.J.Super.A.D.,2010.
HSBC Bank USA, Nat. Ass'n v. Sylvester
Not Reported in A.2d, 2010 WL 668753 (N.J.Super.A.D.)

END OF DOCUMENT

PREPARED BY THE COURT

BAC HOME LOANS SERVICING, L.P. FKA COUNTRYWIDE HOME LOANS SERVICING, L.P., Plaintiff, v. ANADINA TORRES, ET AL., Defendant.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION – GENERAL EQUITY PART MERCER COUNTY DOCKET NO. F-32715-09 CIVIL ACTION STATEMENT OF REASONS

The following motion is presently before the court:

1. The motion of Defendant, Anadina Torres, to vacate the default entered in this foreclosure action.

FACTS OF THE CASE

On June 25, 2008, Anadina Torres executed a note (the "Note") in favor of Plaintiff's assignor, Hogar Mortgage and Financial Services, Inc. ("Hogar"), for the sum of $191,337.00. The Note is specifically endorsed to Countrywide Bank, FSB and defines the "lender" as Hogar and its successors and assigns. See Plaintiff's Exh. A. Plaintiff is the successor by merger to Countrywide Bank, FSB. To secure the payment of the Note, Ms. Torres executed a Non Purchase Money mortgage on the property located at 214 Bergen Avenue, Hamilton, New Jersey 08610 (the "Property"), to Mortgage Electronic Registration Systems, Inc. as a Nominee for Hogar Mortgage and Financial Services, Inc., Its Successors and Assigns ("MERS"). This mortgage was recorded on August 12, 2008. The $191,337.00 mortgage (the "Mortgage") was subsequently assigned from MERS to Plaintiff on June 19, 2009. See Assignment of Mortgage, Plaintiff's Exh. C. The Mortgage has been in default since January 1, 2009. Plaintiff's servicer, Countrywide Bank, issued a Notice of Intention to Foreclose on

February 11, 2009. Consequently, at the time Plaintiff filed its mortgage foreclosure complaint on June 23, 2009, the loan had been in default for more than 30 days from the date the Notice of Intention to Foreclose was sent to Defendant. See Complaint, Plaintiff's Exh. D. Defendant does not deny the default, according to her motion.

Service of the complaint was effectuated on August 1, 2009. Before the answer period expired, Defendant's counsel requested a forbearance of the foreclosure action pursuant to the Mortgage Stabilization and Relief Act, N.J.S.A. 55:14K-82 et seq., on September 2, 2009. See Plaintiff's Exh. E. On October 5, 2009, Defendant's counsel served interrogatories on Plaintiff. By letter dated October 21, 2009, Plaintiff's counsel informed Defendant's counsel that he had to file an entry of appearance and a responsive pleading to the complaint before Plaintiff would respond to his discovery requests. Defendant claims that no Notice of Intent to Foreclose ("NOI") was issued to her. However, in its opposition to Defendant's motion, Plaintiff provides proof of certified mailing to Ms. Torres at 214 Bergen Avenue, Hamilton, NJ 08610. Plaintiff's Exh. K. The post office record shows that the mailing was delivered but unclaimed by Ms. Torres. On November 30, 2009, Defendant filed a cross-motion to file an answer out of time. No proposed answer was included with the motion. Judge Sypek entered an order on January 22, 2010 allowing Defendant two additional weeks to file an appropriate motion asserting a meritorious defense and to include the proposed answer with the motion. Defendant waited until April 28, 2010, to file this motion to vacate the default entered on November 11, 2009.

DISCUSSION

Generally, the standard for determining whether a default should be vacated is less stringent than that used for vacating a default judgment. PRESSLER, Current N.J. COURT RULES, Comment R. 4:43-3, (GANN) (citing Bernhardt v. Alden Café, 374 N.J. Super. 271, 276 (App. Div. 2005). A court may set aside a default upon a showing of good cause. R. 4:43-3. Good cause may be demonstrated by showing a meritorious defense regarding the cause of action or the amount of damages assessed and that the failure to answer was excusable under the circumstances. Marder v. Realty Construction Co., 84 N.J. Super. 313, 319 (App. Div. 1964), aff'd 43 N.J. 508 (1964). Additionally, a party's motion to vacate a default must be accompanied by either an answer to the complaint and Case Information Statement or a dispositive motion pursuant to R. 4:6-2. R. 4:43-3.

To vacate the default entered against her, Defendant argues that Plaintiff's failure to comply with the Fair Foreclosure Act in issuing its NOI constitutes a meritorious defense. Additionally, Defendant argues that the confusion and trauma she experienced from the foreclosure action's initiation excuses her failure to respond to the complaint in a timely fashion.

Good Cause

1. Excusable Neglect

To vacate a default, a defendant must show a lack of willfully egregious conduct in failing to respond to the complaint. O'Connor v. Altus, 67 N.J. 106, 129 (1975) (finding no willfully egregious conduct where neither defendant nor his agent was served with complaint). Here, instead of answering the complaint, Defendant requested a

forbearance agreement from Plaintiff pursuant to N.J.S.A. 55:14K-82 et seq., before the answer period expired. While the Court is sympathetic to Defendant's fear of potentially losing her home, her distress was not so pronounced as to hinder her from successfully employing counsel. That fact undermines her claim of trauma preventing her from answering the complaint in a timely fashion. Further, Defendant provided no affidavit of personal knowledge, as required by R. 1:6-6, to certify the facts not contained in the record to establish personal reasons constituting excusable neglect.

Moreover, by waiting to file her motion until April 28, 2010, Defendant failed to comply with Judge Sypek's Order of January 22, 2010, which granted her a two-week extension to file a motion to vacate the default and assert a meritorious defense. There is simply no explanation provided by Defendant to justify her dilatory conduct once Judge Sypek directed her to file the motion by February 5, 2010. Consequently, Defendant's strategic decision not to file a timely answer, and to wait almost eight months before seeking to vacate the default, does not constitute excusable neglect.

2. Meritorious Defense

To support her motion to vacate the default, Defendant relies primarily on what she asserts is a meritorious defense to the foreclosure action. Defendant argues that the NOI was never issued and, even if it were issued 30 days prior to the filing of the complaint, such notice was invalid since Plaintiff was assigned the Mortgage just four days before Plaintiff filed its foreclosure complaint. In response, Plaintiff argues that the NOI it issued was not defective because the assignment of the Mortgage was executed prior to the entry of final judgment, and cites an unpublished opinion from the Appellate Division to support its claim. Under R. 1:36-3, an unpublished opinion is not binding on

any court and no court may cite an unpublished opinion as even secondary support for its decision. Newark Ins. v. Acupac Packaging, 328 N.J. Super 385, 394 n.4 (App. Div. 2000). Consequently, the court does not rely on the decision provided by Plaintiff.

The purpose of the Fair Foreclosure Act is to afford homeowners every opportunity to pay their home mortgages. N.J.S.A. 2A:50-54. When a Notice of Intent to Foreclose does not sufficiently notify a mortgagor of his or her available rights and remedies, a meritorious defense to the foreclosure may be asserted, which could result in relief from a default judgment. See, e.g. Cho Hung Bank v. Kim, 361 N.J. Super. 331, 345, 346, 347 (App. Div. 2003) (finding wholesale deviation from the unambiguous statutory mandates of the Fair Foreclosure Act constituted a violation of the Act). In Cho Hung Bank, the Appellate Division held that the notices at issue lacked essential information such as the amount of the default, the lender's contact information, and a remittance address, and therefore did not afford the mortgagors the opportunity to cure. Cho Hung Bank , supra, 361 N.J. Super. at 344-45. The Cho Hung Bank court did indicate, however, that substantial compliance with the Act could be found when only technical deviations occurred.

Here, Plaintiff's servicer, Countrywide Bank, sent an NOI to Defendant, as indicated by the Certified Mailing Slip provided in its opposition to the motion. Plaintiff's Exh. K. Mailing of the NOI by certified or registered mail is sufficient under the Fair Foreclosure Act. N.J.S.A. 2A:50-56 (a)-(b). However, the Fair Foreclosure Act requires the lender to send the NOI. N.J.S.A. 2A:50-56(a). New Jersey courts have not specifically decided whether an agent of the lender may issue the NOI. However, one court has held that although N.J.S.A. 2A:50-58(a) required that a lender give a debtor a

fourteen-day notice to of entry of judgment, a notice provided by the lender's attorney was not deficient in light of principles of agency and efficiency. Federal National Mortgage Ass'n v. Bracero, 297 N.J.Super 105, 107 (Ch. Div. 1996). Here, the court interprets the Act to allow an agent of the lender to issue the NOI on the lender's behalf. Ibid.

Additionally, the NOI issued by Plaintiff does not provide the name and number of the representative of the lender that the defendant may contact to dispute the default or the amount owed, as required by the Fair Foreclosure Act. N.J.S.A. 2A:50-56(c)(11). Rather, Plaintiff only provides the name of the lender and a telephone contact number. The information provided, however, would enable a person in default to know how to proceed to cure the default. Since information essential to curing Defendant's default was provided, substantial compliance with the Act was found here. Additionally, in a large mortgage company such as the Plaintiff's, where representatives of the company are continually replaced, including the name of a representative in the NOI would not likely facilitate Defendant's communication with the lender. Unlike the very substantial violations of the Fair Foreclosure Act in Cho Hung Bank, Plaintiff sufficiently notified Defendant of her right to cure her default and provided contact information to guide her on how to either contest the validity of the default or request further information about its amount. The Court finds that the NOI substantially complies with the notice requirement of the Fair Foreclosure Act. Further, the assignment of the Mortgage to Plaintiff after the NOI was issued does not affect Plaintiff's right to foreclose upon Defendant's default and presents no issue of equitable assignment. See N.J.S.A. 25:1-13.

Answer and Case Information Sheet or Dispositive Motion

Under R. 4:43-3, a party's motion for vacation of an entry of default must be accompanied by either an answer to the complaint and Case Information Statement or a dispositive motion pursuant to R. 4:6-2. Claiming insufficiency of process is a dispositive motion under R. 4:6-2. Here, Defendant did not file an answer to Plaintiff's complaint or a proposed answer, so the court does not have any defenses before it to review. However, Defendant did file a motion to dismiss the complaint based on insufficiency of process. As noted above, however, Defendant's arguments are unavailing in light of the validity of the NOI Plaintiff issued, the proof of service provided by Plaintiff, and Defendant's inexcusable inattention to this matter.

CONCLUSION

For the above-stated reasons, Defendant's motion to vacate the default entered and to dismiss Plaintiff's complaint is **DENIED.**

Not Reported in A.2d, 2008 WL 4092824 (N.J.Super.A.D.)
(Cite as: 2008 WL 4092824 (N.J.Super.A.D.))

Superior Court of New Jersey,
Appellate Division.
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as nominee for Countrywide Homes Loans, Inc., Plaintiff-Respondent,
v.
Giovanni RONGHI and Miriam Ronghi, his wife, Defendants-Appellants.

Argued April 14, 2008.
Decided Sept. 5, 2008.

On appeal from Superior Court of New Jersey, Chancery Division, Hudson County, Docket No. F-13808-03.
Robert M. Mayerovic argued the cause for appellant.

Mark S. Winter argued the cause for respondent (Stern, Lavinthal, Frankenberg & Norgaard, LLC, attorneys; Mr. Winter, on the brief).

Before Judges GRAVES and SABATINO.

PER CURIAM.

***1** Defendants Giovanni and Miriam Ronghi [FN1] appeal from orders entered March 15, 2005, and March 19, 2007, denying their motion to vacate a default judgment and sheriff's sale. On appeal, defendants present the following arguments:

> FN1. When in the singular, defendant refers to Giovanni Ronghi.

POINT I

THE TRIAL COURT ERRED IN WAIVING THE REQUIREMENTS OF THE FAIR FORECLOSURE ACT.

POINT II

A MISCARRIAGE OF JUSTICE WILL RESULT BY HAVING THE RONGHI'S UNKNOWINGLY CHARGED WITH FORFEITING THEIR REDEMPTION RIGHTS AND RIGHTS TO STATUTORY ADJOURNMENTS OF THE SHERIFF SALE.

After reviewing these arguments in light of the record and the applicable law, we conclude they do not warrant extended discussion in a written opinion. *R.* 2:11-3(e)(1)(E). We affirm substantially for the reasons stated by Judge Olivieri in his oral decisions on March 1, 2005, and February 22, 2007, with only the following comments.

In December 2002, defendants purchased a house located at 2813 Central Avenue in Union City (the property, or the subject property) for $225,000. Defendants financed the purchase of the property by entering into a loan agreement with plaintiff Countrywide Home Loans (Countrywide) [FN2] on December 2, 2002. The amount of the loan was $189,000, and it was secured by a mortgage on the property. Countrywide also insured the property.

> FN2. Mortgage Electronics Systems, Inc., is the named plaintiff in this action as nominee for Countrywide.

On March 1, 2003, a fire caused $180,236.27 in damage to the property. Following the fire, defendants rented a house at 504 28th Street in Union City, and, at an evidentiary hearing preceding the trial court's order dated March 17, 2007, defendant testified all mail was forwarded to that address.

Although defendant made two mortgage payments to Countrywide in February and March 2003, he admittedly ceased making payments after the fire in March 2003. According to defendant's testimony, he stopped making payments on the mortgage because he believed "the insurance would be paying for the mortgage payments."

On July 31, 2003, plaintiff filed a complaint for foreclosure. On August 29, 2003, Miguel Niubo, defendant's brother-in-law who resided with defendants,

was personally served with the summons and complaint at 504 28th Street in Union City, however, defendants never filed an answered. On October 7, 2003, plaintiff requested default be entered against defendants, and on October 30, 2003, plaintiff's law firm filed a certification stating: "On October 13, 2003, this firm did mail by certified mail, return receipt requested, with required postage thereon, a Notice to Cure in accordance with Section 6 of the New Jersey Fair Foreclosure Act" to defendant at both 504 28th Street and 2813 Central Avenue in Union City. On October 30, 2003, the trial court entered a final judgment finding defendants in default and awarding plaintiff "the sum of $203,669.63 together with lawful interest thereon to be computed from October 1, 2003 together with costs of this suit to be taxed, including a counsel fee of $2186.20 raised and paid in the first place out of the mortgaged premises." The court also ordered "that the mortgaged premises be sold to raise and satisfy the several sums of money due."

*2 In a letter dated November 10, 2003, sent to 504 28th Street in Union City, plaintiff informed defendants of the final judgment entered on October 30, 2003. Defendant testified, however, that he never received plaintiff's letter dated November 10, 2003. Furthermore, in a letter dated January 30, 2004, plaintiff notified defendants "that a Sheriff's Foreclosure Sale has been scheduled for February 19, 2004." Although defendant admitted he received the letter dated January 30, 2004, he claimed it was not faxed to him until February 18, 2004, the day before the scheduled Sheriff's sale. Defendant testified he immediately contacted Christina Hogue, a **loan modification** technician employed by Countrywide, and Hogue told him "the foreclosure had been put off, and not to worry." Although he knew he was $30,000 in arrears on his mortgage, defendant testified he had negotiated a **loan modification** agreement with Countrywide employees whereby the arrearage "would be put at the end of the mortgage." Defendant admitted, however, he never possessed any documentation regarding the alleged **loan modification** agreement.

After two adjournments, a Sheriff's sale was held on April 1, 2004, and Jose Acosta successfully purchased the property for $197,000. After acquiring title to the property, Acosta filed an application with Union City to convert the property from a one-family house to a three-family house. The application was approved in September or October of 2004, and Acosta expended between $120,000 and $125,000 to "fix up the property due to fire damage," to hire a contractor and architect to convert the property to a three-family house, and for counsel fees.

On April 19, 2004, defendants became aware the Sheriff's sale was final, but they did not file a motion to vacate the default judgment entered on October 30, 2003, until August 13, 2004. In a certification in support of defendants' motion, their counsel stated "[defendants have] demonstrated a meritorious defense and excusable neglect in connection with [their] application to vacate the underlying [j]udgment." An amended motion to vacate the final judgment was filed on September 21, 2004, to notify Acosta of defendants' application. The court bifurcated the motion into two parts: first, to determine whether plaintiff's complied with the notice requirements of Fair Foreclosure Act (FFA), *N.J.S.A.* 2A:50-53 to -68, and, second, to consider defendants' claim that the default judgment should be vacated because of material misrepresentations by the plaintiff and defendants excusable neglect for failing to answer the foreclosure complaint.

On March 1, 2005, the trial court held a hearing to determine whether plaintiff provided defendants with notice to cure as required under the FFA, *N.J.S.A.* 2A:50-58(a)(1). The court's findings and conclusions included the following:

> I don't know whether or not Mr. Ronghi received the notice to cure [as required under the FFA], because there is no green card that he signed for, the Post Office said they have no history or any documents that would say that these two particular pieces of mail to the two specific addresses were sent. But I do know that not every defect in service qualifies a defendant for relief from a default judgment. The requirements of due process will be considered as satisfied when a defendant has actual notice of an action, even though the service may have violated some technical aspect of the Court Rules. That's [*Rosa v. Araujo*, 260 *N.J.Super.* 458, 462 (App.Div.1992), *certif. denied*, 133 *N.J.* 434 (1993)].

*3 In this case, although Mr. Ronghi may not have received the notice to cure, there's been noth-

ing brought before me that he did not receive the summons and complaint, that he did not receive the default judgment, that he did not receive any of the other notices that were required to be sent to him under our Court Rules and the Fair Foreclosure Act. So, although Mr. Ronghi may not have received the notice to cure, as the [*Araujo*] case says, not every defect qualifies a defendant for relief from a default judgment. You still have to be concerned with due process.

I have to infer that Mr. Ronghi received the summons and complaint that was filed in this matter, there's been nothing presented to me that he didn't. I will also infer that Mr. Ronghi received the default judgment. There's been nothing brought to me that he didn't.... Mr. Ronghi knew of this foreclosure action even if he were not provided with the notice to cure, once the summons and complaint were filed, he could have ... taken appropriate action to attack the fact that he had not received the notice to cure, that wasn't done, no action was taken until he received the default judgment in this matter....

The court chooses to look at this as a due process analysis.... [B]ecause I don't honestly know whether or not Mr. Ronghi received the notice to cure, and I will infer he didn't for the purpose of this decision ... but even if he did not, I do not find that the failure to serve the notice to cure, given the [undisputed] fact that he received ... the other filings in this matter, requires this court ... [to grant] the remedy that he seeks, now that this matter has gone to ... Sheriff's sale and beyond....

The trial court's decision was memorialized in an order dated March 15, 2005, which (1) stated "the [c]ourt is satisfied that [d]efendants were fully aware that a foreclosure was in process and ... complete and due process was satisfied given the facts presented," and (2) scheduled a case management conference regarding "issues and discovery concerning the remaining unresolved issues in [d]efendants' Motion to Vacate Order of Final Judgment."

On March 16, 2005, defendants filed a motion for reconsideration of the order dated March 15, 2005. Following a hearing on April 1, 2005, defendants' motion was denied.

Next, the court held an evidentiary hearing on July 19, July 25, August 17, and September 6, 2006, for the purpose of considering the remaining contentions raised by defendants in their motion to vacate the final judgment of default. On February 22, 2007, the trial court issued an oral decision denying defendants' motion. The court's decision included the following:

One of the allegations of the defendant is that the plaintiff entered into a modification agreement with him and that the plaintiff reneged or breached the agreement by selling the property at Sheriff's sale without giving him proper notice....

***4** ....

I think the more troubling aspect for Mr. Ronghi is the fact that he claimed that he had a **loan modification** agreement with the plaintiff, yet no document ever existed. And certainly, even though no **loan modification** agreement may exist, if I'm convinced by clear and convincing evidence that a **loan modification** agreement did exist of some kind ... I would hold the plaintiff to this modification agreement that Mr. Ronghi claimed existed, that would have had the arrearages put on the back end of the mortgage.

The problem with that, as with any oral agreement between the parties, is that to determine whether or not it exists, it really does come back to credibility, as to whether or not Mr. Ronghi ... had this agreement with the plaintiff ... and I don't find that ... because again, I have a problem ... with Mr. Ronghi's credibility, his evasiveness, his vagueness, the inconsistencies.

....

Certainly, since no [**loan modification**] document exists, I have to look at the testimony of Mr. Ronghi, with which I have a problem. Since the court finds that there was no **loan modification** agreement that exists, because of Mr. Ronghi's credibility, the court finds there was not an agreement orally between the plaintiff and the defendant for this **loan modification** agreement [.] ... [I]nferentially ... the notices that were sent regarding the Sheriff's sale, they were eventually faxed to him in Mexico by a relative ... the logical inference

> is that these documents and all of the documents were sent properly by this plaintiff to the subject property, forwarded to the apartment where Mr. Ronghi was living, and then to Mr. Ronghi, wherever he was, in Mexico at [times], Panama, wherever he was.
>
> ... I am not convinced, under the Court Rules and the case law as I understand [it] to be, that the judgment should be vacated. So for all of those reasons, then, the motion to vacate the judgment is denied.

The court's oral decision was memorialized in an order dated March 19, 2007.

On appeal, defendants first contend the trial court erred in denying their motion to vacate the default judgment because of plaintiff's alleged failure to comply with the notice requirement under N.J.S.A. 2A:50-58(a)(1), which states:

> If a plaintiff's action to foreclose a residential mortgage is uncontested ... a lender shall apply for entry of final judgment and provide the debtor with a notice, mailed at least 14 calendar days prior to the submission of proper proofs for entry of a foreclosure judgment, providing the debtor with the name and address of the lender and the telephone number of a representative of the lender whom the debtor may contact to obtain the amount required to cure the default....

Assuming, as did the trial court, that defendants did not receive notice of their right to cure as required under N.J.S.A. 2A:50-58(a)(1),[FN3] we nevertheless conclude defendants' motion to vacate default judgment was correctly denied. Defendants were properly served with the summons and complaint, as well as the final judgment of default dated October 30, 2003. Moreover, defendant admitted he stopped making payments on the mortgage in March 2003, and he acknowledged being $30,000 in arrears by January 2004. Defendant also testified that on April 19, 2004, he was aware the Sheriff's sale of the property had been completed. Nonetheless, defendants did not file their motion to vacate the default judgment until August 15, 2004-after Acosta purchased the property and began investing substantial sums of money and time into its renovation.

FN3. The trial court found no indication that defendants "did not receive any of the other notices that were required to be sent to [them] under our Court Rules and the Fair Foreclosure Act." Presumably then, defendants did receive a "notice of intention to foreclose" prior to the filing of the foreclosure complaint as mandated by N.J.S.A. 2A:50-56. This notice would have included "the right of the debtor to cure the default," and "what performance, including what sum of money, if any, and interest, shall be tendered to cure the default." N.J.S.A. 2A:50-56.

***5** The trial court found defendants were well apprised of the foreclosure proceedings, including the amount of their monthly mortgage payments and arrears, yet they waited approximately ten months to move to vacate the default judgment. Therefore, any alleged deficiencies in the notice of right to cure requirements under N.J.S.A. 2A:50-58(a)(1) do not warrant the relief defendants now request. *See* Berger v. Paterson Veterans Taxi Serv., 244 N.J.Super. 200, 203 (App.Div.1990) (holding that movant who knew of judgment, but did not move to vacate it for two years, was barred from relief); Garza v. Paone, 44 N.J.Super. 553, 557 (App.Div.1957) (noting that even a void judgment may not be vacated unless the motion to vacate is made within a reasonable time after defendant learns of the judgment).

Similarly, defendants' motion to vacate the default judgment based upon an alleged **loan modification** agreement and/or plaintiff's alleged misrepresentations is without merit. *Rule* **4:50-1** provides that "[o]n motion, with briefs, and upon such terms as are just, the court may relieve a party ... from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; ... (f) any other reason justifying relief from the operation of the judgment or order." Regarding motions to vacate default judgments, a "defendant seeking to reopen a default judgment must show that the *neglect to answer was excusable* under the circumstances and that he has *a meritorious defense.*" Marder v. Realty Constr. Co., 84 N.J.Super. 313, 318 (App.Div.), *aff'd*, 43 N.J. 508 (1964) (emphasis added). Moreover, it is also "well established that the decision granting or denying an application to open a judgment rests within the sound discretion of the trial court, exer-

cised with equitable principles in mind, and will not be overturned in the absence of an abuse of that discretion." *Ibid.; see also Reg'l Const. Corp. v. Ray, 364 N.J.Super. 534, 541 (App.Div.2003)* ("[T]rial courts are to exercise their sound discretion and their decisions [not to vacate default judgments] will not be disturbed absent an abuse of discretion.").

In the present appeal, it is not disputed that service of plaintiff's summons and complaint was properly made upon defendant's brother-in-law at defendants' principal dwelling place. *See R.* 4:4-4(a)(1) (Proper service is effectuated "by delivering a copy of the summons and complaint to the individual personally, or by leaving a copy thereof at the individual's dwelling place or usual place of abode with a competent member of the household of the age of 14 or over then residing therein."). Moreover, the court determined defendant's testimony was evasive, vague, and inconsistent, and it concluded "no **loan modification** agreement ... exist[ed]." Given the trial court's credibility assessment and factual findings, which are fully supported by the record, we find no abuse of discretion or reversible error.

***6** Affirmed.

N.J.Super.A.D.,2008.
Mortgage Electronic Registration Systems, Inc. v. Ronghi
Not Reported in A.2d, 2008 WL 4092824 (N.J.Super.A.D.)

END OF DOCUMENT

Not Reported in A.2d, 2008 WL 5272958 (N.J.Super.A.D.)
(Cite as: 2008 WL 5272958 (N.J.Super.A.D.))

Superior Court of New Jersey,
Appellate Division.
LLANFAIR HOUSE NURSING HOME, a Corporation of the State of New Jersey, Plaintiff-Respondent,
v.
ESTATE OF Ethel LITCHULT by its Executrix, Janis CAMPAGNA, and Janis Campagna, Individually, Defendants-Appellants.

Argued Sept. 8, 2008.
Decided Dec. 22, 2008.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-2236-06.
Kenneth Rosellini argued the cause for appellants (Hallock & Cammarota, attorneys; Mr. Rosellini, on the brief).

Madelyn Iulo argued the cause for respondent (Pehlivanian Braaten & Pascarella, attorneys; Ms. Iulo, on the brief).

Before Judges CARCHMAN, R.B. COLEMAN and SIMONELLI.

PER CURIAM.

*1 Defendants Estate of Ethel Litchult by its Executrix, Janis Campagna and Janis Campagna (Campagna), individually, appeal from a September 7, 2007 order of the Law Division denying defendants' motion to set aside a default judgment. We affirm.

The essential facts are not in dispute. In June 2003, Ethel Litchult, Campagna's mother, was admitted to plaintiff Llanfair House Nursing Home (Home) as a resident. At that time, Campagna executed an admission agreement on behalf of her mother wherein Campagna agreed to act as the resident's representative. She represented that she would be filing a Medicaid application on her mother's behalf. The Private Admission Agreement further provided that the "[r]esident and/or resident's representative accept full responsibility for and agree to pay the full amount charged by the Home in the event that any third party payor shall deny coverage of or responsibility for resident's claim or any part thereof." [FN1]

FN1. An earlier provision in the agreement states that reference to "monies" shall relate solely to the "resident's funds." The applicability of this provision to the resident's representative responsibility for the outstanding obligations is not clear.

Eventually, Litchult's assets were exhausted, and in April 2005, Campagna represented to plaintiff that she would file the application. Despite plaintiff not receiving payment for defendant's care, Litchult remained at plaintiff's facility as the Medicaid application presumably moved forward. Ultimately, the application was denied in August 2005 because certain requested information had not been provided.[FN2] Mrs. Litchult died on October 24, 2005, and her Medicaid application was never approved. At the time of Litchult's death, $48,882.77 was due to plaintiff for her care.

FN2. The record indicates that in June 2003, the deceased and her late husband "gifted $40,000 to their two daughters."

In May 2006, plaintiff filed an action against defendants in the Law Division to recover the amount due, alleging breach of contract, *quantum meruit,* detrimental reliance and equitable estoppel. After service of the summons and complaint on June 12, 2006, defendants requested and were granted a thirty-day extension to file an answer. No answer was filed within that time, and another thirty-day extension was requested and granted on August 17, 2006. Again, no answer was filed. On September 15, defendants requested yet another extension to file an answer; this extension was to expire on October 2, 2006. No answer was filed within that time period.

Finally, on October 23, 2006, plaintiff requested the entry of a default and default judgment. Four days later, on October 27, 2006, defendants requested an-

other extension but were informed that a request to enter default and default judgment had been filed. At this point, defendant Campagna submitted a copy of the Medicaid documentation for plaintiff's review and requested that no further action be taken. Although, plaintiff took no further affirmative action, the previously requested default judgment was entered by the clerk on November 13, 2006.

On December 15, 2006, defendants forwarded a consent order to plaintiff to both set aside the judgment and file an answer within fourteen days. Plaintiff returned the executed consent order to defendants' attorney on December 21, 2006, but no answer was forthcoming. According to defendants' attorney, he never received the returned consent order nor the follow-up phone call on January 18, 2007. Defendants made no inquiry nor took any further action until six-months later when in July 2007, defendants requested consent to vacate the default judgment. Plaintiff refused to consent.

***2** In August 2007, defendants moved to vacate the default judgment, seeking relief under *R.* 4:50-1(a)(c) and (f). The motion judge denied the application and endorsed the order indicating:

> This application is denied. Despite 3 extensions to answer the complaint, despite the fact that Plaintiff signed a consent order allowing for the defendant to vacate default judgment and file an answer to this on 12/26/06 and despite plaintiff's follow-up regarding the consent order, defendant still has not filed an answer. Defendants were originally served on 6/12/06. Excusable neglect clearly not demonstrated.

This appeal followed.

The thrust of defendants' arguments on appeal focus on *R.* 4:50-1(a), (c) and (f). The applicable rules provide:

> On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect; ... (c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; ... (f) any other reason justifying relief from the operation of the judgment or order.

In considering such applications, certain basic principles apply. A motion to vacate a Default Judgment is "viewed with great liberality, and every reasonable ground for indulgence is tolerated to the end that a just result is reached." *Goldhaber v. Kohlenberg*, 395 *N.J.Super.* 380, 392 (App.Div.2007) (*citing Morristown v. Little*, 135 *N.J.* 274, 283-84 (1994) (*quoting Marder v. Realty Constr. Co.*, 84 *N.J.Super.* 313, 318-19 (App.Div.1964), *aff'd*, 43 *N.J.* 508 (1964))). *See also Nowosleska v. Steele*, 400 *N.J.Super.* 297, 303 (App.Div.2008). Further, default judgment will not be disturbed unless the failure to answer or otherwise appear and defend was "excusable under the circumstances and [defendant] has a meritorious defense." *Dynasty Bldg. Corp. v. Ackerman*, 376 *N.J.Super.* 280, 285 (App.Div.2005) (*citing Marder, supra*, 84 *N.J.Super.* at 318-19). The excusable neglect standard under *Tradesmens Nat'l Bank and Trust Co. v. Cummings*, 38 *N.J.Super.* 1, 5 (App.Div.1955), refers to neglect, "which might have been the act of a reasonably prudent person under the same circumstances." *See also Mancini v. Eds ex rel. N.J. Auto. Full Ins. Underwriting Ass'n*, 132 *N.J.* 330, 335 (1993); *Baumann v. Marinaro*, 95 *N.J.* 380, 394 (1984); *Shannon v. Academy Lines, Inc.*, 346 *N.J.Super.* 191, 197 (App.Div.2001). However, of critical importance here, carelessness or a lack of due diligence alone do not amount to excusable neglect. *See Mancini, supra*, 132 *N.J.* at 335 ("Carelessness may be excusable when attributable to an honest mistake that is compatible with due diligence or reasonable prudence."); *Baumann, supra*, 95 *N.J.* at 394("[M]ere carelessness or lack of proper diligence on the part of an attorney is ordinarily not sufficient to entitled his clients to relief from an adverse judgment in a civil action.") (*citing In re T.*, 95 *N.J.Super.* 228, 235 (App.Div.1967)); *SWH Funding Corp. v. Walden Printing Co.*, 399 *N.J.Super.* 1, 10 (App.Div.2008) ("Rule 4:50-1(a) relief is not available, because inadvertence of counsel alone is insufficient, as a matter of law, to establish 'excusable neglect.' "); *Shannon, supra*, 346 *N.J.Super.* at 197 (noting that excusable neglect is "an honest mistake compatible with due diligence or reasonable prudence."); *Burns v. Belafsky*, 326 *N.J.Super.* 462, 469 (App.Div.1999) *aff'd* 166 *N.J.* 466 (2001) ("Failure on the part of an attorney through mere inadvertence or lack of proper diligence is insufficient.") It is with these standards in mind that we consider the issues raised by defendants.

*3 The thrust of defendants' argument under *R.* 4:50-1(a), is that defendants failed to file an answer "on the belief that the informal discovery would satisfy the Plaintiff [and] that they used their best efforts to qualify the Decedent for Medicaid, and in reliance of Plaintiff's agreement not to proceed with the entry of default or default judgment." Plaintiff counters by observing that it agreed to three extensions of time to answer, made no representations regarding default and its accommodations to defendants are now being used against it. We agree.

While attempts to resolve disputes by negotiation and settlement are encouraged, plaintiff's willingness to accommodate that end by acquiescing in three extensions of time to answer, executing a consent order to vacate the default judgment and then receiving nothing by way of answer cannot be perceived as contributing to establish mistake or excusable neglect.

Plaintiff did not execute on the judgment; it simply protected its interests. The time frames involved here negate defendants' arguments. The complaint was filed in June 2006, the first extension was granted in July 2006, the second extension was granted in August 2006 and the third was granted to October 2006. Only after the third extension did plaintiff act and then in December, *defendants* submitted to plaintiff the consent order to set aside the default and *default judgment* together with an additional fourteen days to file an answer. Even though defendants claim they never received the signed order (which plaintiff claims it signed and returned forthwith) or the follow-up phone call, no action was taken for an additional nine months until September 2007 when the motion was considered to set aside the default judgment. The time of the filing of the complaint to the filing of that motion extended over a period of one year. We conclude that there was no excusable neglect here that warrants setting aside the default judgment.

These facts further preclude relief under *R.* 4:50-1(c). Although the alleged misrepresentations focus on the entry of a default judgment, that judgment was entered in October 2006, and defendants had full knowledge of its entry. Defendants' December correspondence seeking a consent order to set aside the judgment negates any suggestion of misrepresentation or misconduct warranting relief under subsection (c). A plaintiff should not be required to "chase" defendants to file an answer and move a case forward. Plaintiff's willingness to cooperate with defendants' attempts to resolve the matter short of full litigation are readily apparent from the record. We perceive of no basis for relief under this subsection.

Finally, we reach the same result as it applies to *R.* 4:50-1(f). We need not restate the cogent facts that support our view that no relief is warranted under *R.* 4:50-1(a) and (c). Nothing presented by defendants support the view that exceptional circumstances or overarching equities require our intervention. This is simply a case where, for reasons not fully explained, an answer was not filed when plaintiff's counsel willingly indulged opportunities to respond. We must consider our review to be governed by the totality of the circumstances, *In re Guardianship of J.N.H.*, 172 *N.J.* 440, 476 (2002), and circumstances that are exceptional. *Nowosleska, supra*, 400 *N.J.Super.* at 304-05. There are no such circumstances here. The facts demonstrate defendants who for reasons not fully articulated, failed to respond in a timely manner to the various implicit entreaties to file an answer or other responsive pleading. None was forthcoming.

*4 We also recognize that in general, defendants seeking to vacate a default judgment based upon excusable neglect, must show "that the failure to answer was excusable under the circumstances and that a meritorious defense is available." *Little, supra*, 135 *N.J.* at 285. *See also Goldhaber*, 395 *N.J.Super.* at 391. Here, defendants failed to show excusable neglect, and it is unnecessary to examine the issue of meritorious defense. *Woodrick v. Jack J. Burke Real Estate, Inc.*, 306 *N.J.Super.* 61, 78 (App.Div.1997), *appeal dismissed*, 157 *N.J.* 537 (1998) (noting that even if defendant did have a plausible meritorious defense, it did not show excusable neglect and therefore the judgment should not be vacated); *Morales v. Santiago*, 217 *N.J.Super.* 496, 505 (App.Div.1987) ("Without more ... having a meritorious defense is ordinarily not a ground for setting aside a default judgment."); *Mancini, supra*, 132 *N.J.* at 334 ("A defendant seeking to reopen a default judgment because of excusable neglect must show that the neglect to answer was excusable under the circumstances and that he has a meritorious defense.")

In sum, "[t]he decision whether to vacate a

judgment on one of the six specified grounds is a determination left to the sound discretion of the trial court, guided by principles of equity." *F.B. v. A.L.G.*, 176 *N.J.* 201, 207 (2003) (*citing Little, supra*, 135 *N.J.* at 283). "Relief from judgment is not to be granted lightly" however, "[r]elief is more liberally granted ... when the application is to vacate a default judgment." *Bank v. Kim*, 361 *N.J.Super.* 331, 336 (App.Div.2003) (*citing Marder, supra*, 84 *N.J.Super.* at 318). The standard of review on a motion to vacate a default judgment is abuse of discretion. *See F.B., supra*, 176 *N.J.* at 207; *J.N.H., supra*, 172 *N.J.* at 473; *Little, supra*, 135 *N.J.* at 283; *Del Vecchio v. Hemberger*, 388 *N.J.Super.* 179, 186-87 (App.Div.2006); *Bank, supra*, 361 *N.J.Super.* at 336. We perceive no abuse of discretion here.

The denial of motions to vacate a default judgment are difficult. They represent the denial to a defendant to have a matter adjudicated and resolved in a full and considered way. Nevertheless, a plaintiff is entitled to have a matter proceed forward to ultimate resolution. On balance, we indulge defendants who are dilatory, yet at some point in time, that indulgence ceases and plaintiff is entitled to relief. That is what happened here and we find no basis for our intervention.

Affirmed.

N.J.Super.A.D.,2008.
Llanfair House Nursing Home v. Estate of Litchult ex rel. Campagna
Not Reported in A.2d, 2008 WL 5272958 (N.J.Super.A.D.)

END OF DOCUMENT

373 Fed.Appx. 260, 2010 WL 1255683 (C.A.3 (Pa.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 373 Fed.Appx. 260, 2010 WL 1255683 (C.A.3 (Pa.)))

H

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Third Circuit LAR, App. I, IOP 5.7. (Find CTA3 App. I, IOP 5.7)

United States Court of Appeals,
Third Circuit.
Ian JOBE, Husband; Catherine Jobe, Wife, Appellants
v.
ARGENT MORTGAGE COMPANY, LLC.

No. 09-3677.
Submitted Pursuant to Third Circuit LAR 34.1(a)
March 22, 2010.
Filed: April 2, 2010.

Background: Mortgagors brought pro se action seeking declaratory judgment affirming withdrawal from contract and to quiet title to property. Following bench trial, the United States District Court for the Middle District of Pennsylvania, Thomas I. Vanaskie, J., 2009 WL 2461168, entered judgment in favor of mortgagee. Mortgagors appealed.

Holdings: The Court of Appeals held that:
(1) mortgagors failed to rebut presumption that they received requisite copies of notice of right to rescind;
(2) mortgagors were not entitled to rescind mortgage obligation; and
(3) mortgagors lacked basis to quiet title under Pennsylvania law.

Affirmed.

West Headnotes

[1] Consumer Credit 92B ⇐66

92B Consumer Credit
92BII Federal Regulation
92BII(C) Effect of Violation of Regulations
92Bk64 Actions for Violations
92Bk66 k. Pleading and evidence. Most Cited Cases

Mortgagors' testimony that mortgagee failed to provide them with two copies each of notice of right to rescind, in violation of Truth In Lending Act (TILA), was insufficient to rebut presumption that mortgagors received requisite copies, where mortgagors had compelling motive to claim that they did not receive two copies, and mortgagors stopped making payments on loan six months before they attempted to rescind mortgage obligation. 12 C.F.R. § 226.23(b)(1); Truth in Lending Act, § 125(c), 15 U.S.C.A. § 1635(c).

[2] Consumer Credit 92B ⇐60

92B Consumer Credit
92BII Federal Regulation
92BII(C) Effect of Violation of Regulations
92Bk60 k. In general; validity of transactions. Most Cited Cases

Even if mortgagors' testimony regarding notice of right to rescind was credible, mortgagors were not entitled to rescind mortgage obligation, where they were unable to return money mortgagee advanced to them in reliance on their performance under contract. Truth in Lending Act, § 125(b), 15 U.S.C.A. § 1635(b); 12 C.F.R. § 226.23(a)(3).

[3] Quieting Title 318 ⇐10.5

318 Quieting Title
318I Right of Action and Defenses
318k9 Title of Plaintiff
318k10.5 k. Mortgagors and mortgagees. Most Cited Cases

Mortgagors could not validly rescind mortgage, and thus lacked basis to quiet title under Pennsylvania law. Rules Civ.Proc., Rule 1061(b)(3), 42 Pa.C.S.A.

373 Fed.Appx. 260, 2010 WL 1255683 (C.A.3 (Pa.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 373 Fed.Appx. 260, 2010 WL 1255683 (C.A.3 (Pa.)))

[4] Federal Courts 170B ⟹615

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)1 Issues and Questions in Lower Court
170Bk615 k. Grounds of action. Most Cited Cases

Mortgagors raised argument for first time on appeal, that mortgagee failed to correctly disclose interest rate on loan at closing, and that they first learned of rate when they received first monthly statement, and thus Court of Appeals would not consider argument.

***260** On Appeal from the United States District Court for the Middle District of Pennsylvania, D.C. Civial Action No. 06-cv-00697 (Honorable Thomas I. Vanaskie).Ian Jobe, Mount Pocono, PA, pro se.

Catherine Jobe, Mount Pocono, PA, pro se.

Sandhya M. Feltes, Esq., Kaplin, Stewart, Meloff, Reiter & Stein, Blue Bell, PA, for Argent Mortgage Company, LLC.

***261** Before: SCIRICA, Chief Judge, JORDAN and STAPLETON, Circuit Judges.

OPINION OF THE COURT

PER CURIAM.

****1** Plaintiffs husband and wife Ian and Catherine Jobe, proceeding *pro se*, appeal the order of the District Court entering judgment in favor of defendant Argent Mortgage Company, LLC. For the following reasons, we will affirm.

I.

This action arises out of the plaintiffs' attempt to rescind a mortgage obligation incurred when they refinanced their home in 2005. They allege that they did not receive two copies of the "Notice of Right to Cancel" ("Notice") at the closing, as the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, requires. They seek a declaratory judgment affirming their withdrawal from the contract and to quiet title to their property. They also seek statutory damages in the amount of $300,000.

At the March 25, 2005 closing on the loan, plaintiffs signed numerous documents, including the Notice, which provided them the right to cancel the transaction until March 30, 2005, and an "Importance Notice to Borrower(s)," in which they expressly acknowledged receiving a full and complete set of loan documents. Plaintiffs stopped making any payments in July 2005. In February 2006, plaintiffs wrote to defendant stating that were rescinding the mortgage; defendant denied the attempted rescission. Plaintiffs filed suit in April 2006. Both parties moved for summary judgment. The District Court partially granted defendant's motion, finding that plaintiffs' statutory claim for damages was untimely. Following a bench trial, the District Court denied plaintiffs' remaining claims. Plaintiffs timely appealed.

II.

We have jurisdiction under 28 U.S.C. § 1291. Following a bench trial, we review a District Court's findings of fact for clear error and exercise plenary review over its conclusions of law. *Am. Soc'y for Testing and Materials v. Corrpro Cos.*, 478 F.3d 557, 566 (3d Cir.2007).

In reviewing a District Court's grant of summary judgment, we apply the same test the District Court applied. *Saldana v. Kmart Corp.*, 260 F.3d 228, 231 (3d Cir.2001). Summary judgment is proper when, viewing the evidence in the light most favorable to the non-moving party and drawing all inferences in that party's favor, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 232; Fed.R.Civ.P. 56(c). The party opposing summary judgment "may not rest upon the mere allegations or denials of the ... pleading," but "must set forth specific facts showing that there is a genuine issue

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for trial." *Saldana,* 260 F.3d at 232 (citing Fed.R.Civ.P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

III.

A. *Compliance with TILA*

[1] A creditor is required to provide two copies of the notice of the right to rescind to each consumer entitled to rescind. 12 C.F.R. § 226.23(b)(1) (2009). Plaintiffs contend that defendant's failure to comply with this regulation triggered their right to rescind. See 12 C.F.R. § 226.23(a). Plaintiffs acknowledge, however, that they each signed the Notice, which creates a rebuttable presumption of delivery of the two copies. ***26**15 U.S.C. § 1635(c) ("written acknowledgment of receipt of any disclosures under [TILA] ... create(s) a rebuttable presumption of delivery thereof"). Plaintiffs offered their testimony that defendant failed to provide them with two copies each of the Notice as rebuttal evidence, but did acknowledge receiving at least one copy each.[FN1] The closing agent testified that he always followed all applicable procedures and provided the relevant number of copies to borrowers at closings.

> FN1. At their depositions, plaintiffs testified that they could not remember what was given to them at the closing, and they refused to acknowledge that their signatures appeared on the Notice.

****2** Where a borrower's testimony is self-serving and unreliable, such testimony has been found insufficient to rebut a presumption of delivery. *See, e.g., Williams v. First Gov't Mortgage & Investors Corp.*, 225 F.3d 738, 751 (D.C.Cir.2000). The District Court noted that plaintiffs have a compelling motive to claim that they did not receive the two copies, and that they stopped making payments on the loan six months before they attempted to rescind the mortgage obligation. The court found their deposition testimony "plainly obstructive," and found the closing agent's testimony credible. We find no clear error in the District Court's conclusions and agree that plaintiffs failed to rebut the presumption that they received the requisite copies.

B. *Rescission Inappropriate*

[2] Plaintiffs claim that they had three years to rescind their obligation. See 12 C.F.R. § 226.23(a)(3) (the right to rescind expires three years after consummation where the required notice or material disclosures are not delivered). Pursuant to 15 U.S.C. § 1635(b), courts have the "discretion to condition rescission on tender by the borrower of the property he has received from the lender." *Ljepava v. M.L.S.C. Props., Inc.*, 511 F.2d 935, 944 (9th Cir.1975). Other courts have denied rescission where the borrowers were unable to tender payment of the loan amount. *See American Mortgage Network, Inc. v. Shelton*, 486 F.3d 815, 819 (4th Cir.2007); *Yamamoto v. Bank of New York*, 329 F.3d 1167, 1173 (9th Cir.2003); *Williams v. Homestake Mortgage Co.*, 968 F.2d 1137, 1140 (11th Cir.1992).

Here, plaintiffs testified that they are unable to repay the loan advanced to them, and they have not made any payments for more than four years. Accordingly, the District Court properly found that, even assuming plaintiffs' testimony regarding the Notice was credible, they would not be able to rescind the mortgage obligation because they are unable to return the money defendant advanced to them in reliance on their performance under the contract.

C. *Quiet Title*

[3] The District Court properly denied plaintiffs' claim to quiet title. An action to quiet title may be brought "to compel an adverse party to file, record, cancel, surrender or satisfy of record, or admit the validity, invalidity or discharge of, any document, obligation or deed affecting any right, lien, title or interest in land." Pa.R.C.P. 1061(b)(3). Because they cannot validly rescind their mortgage, there is no basis for the quiet title claim.

D. *Statutory Damages*

[4] Finally, plaintiffs argue that their complaint

was timely filed and that the District Court erred in granting defendant's motion for summary judgment on their claim for statutory damages. They ***263** argue for the first time on appeal that defendant failed to correctly disclose the interest rate on the loan at the closing, and that they first learned of the rate when they received the first monthly statement. This argument need not be considered here because plaintiffs did not assert it in the District Court. *See Brown v. Philip Morris, Inc.*, 250 F.3d 789, 799 (3d Cir.2001) ("arguments asserted for the first time on appeal are deemed waived and consequently are not susceptible of review in this Court absent exceptional circumstances"). A claim for statutory damages under TILA must be brought "within one year from the occurrence of the violation." 15 U.S.C. § 1640(3). The alleged violation in the complaint-defendant's failure to provide two copies to each plaintiff at the March 25, 2005 closing-occurred more than one year prior to the April 6, 2006 filing. Accordingly, the District Court properly concluded that defendant was entitled to judgment in its favor on this claim.

IV.

****3** For the foregoing reasons, we will affirm the District Court's judgment.

C.A.3 (Pa.),2010.
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END OF DOCUMENT

Not Reported in F.Supp.2d, 2009 WL 5114305 (N.D.Cal.)
(Cite as: 2009 WL 5114305 (N.D.Cal.))

United States District Court, N.D. California, San Jose Division.
Nestor VALDEZ, an Individual, and Adela Valdez, an Individual, Plaintiffs,
v.
AMERICA'S WHOLESALE LENDER, a New York Corporation; Countrywide Home Loans, Inc., a New York Corporation; and Does 1 through 10, inclusive, Defendants.

No. C 09-02778 JF (RS).
Dec. 18, 2009.

West KeySummary**Consumer Credit 92B 60**

92B Consumer Credit
92BII Federal Regulation
92BII(C) Effect of Violation of Regulations
92Bk60 k. In General; Validity of Transactions. Most Cited Cases

Mortgagors failed to state a cause of action against mortgagees for rescission of the mortgage agreement under the Truth in Lending Act (TILA) as mortgagors did not demonstrate the ability to tender the loan proceeds. Although mortgagors sent mortgagees a notice of rescission including an offer to tender, mortgagors failed to allege either the present ability to tender loan proceeds or the expectation that they would be able to tender within a reasonable time. 12 C.F.R. § 226.23(d)(3); Truth in Lending Act, § 102(a), 15 U.S.C.A. § 1601(a).

Carlo Ocampo Reyes, Law Office of Carlo Reyes, Canoga Park, CA, for Plaintiffs.

John W. Amberg, Laju Motunrayo Obasaju, Bryan Cave LLP, Santa Monica, CA, for Defendants.

ORDER GRANTING MOTIONS TO DISMISS AND EXPUNGE *LIS PENDENS*
JEREMY FOGEL, District Judge.

I. BACKGROUND

*1 This action arises out of a residential mortgage transaction between Plaintiffs Nestor and Adela Valdez ("Plaintiffs") and Defendant Countrywide Home Loans, Inc., doing business as America's Wholesale Lender ("Defendant"). The transaction closed on or about December 15, 2006.[FN1] First Amended Complaint ("FAC") ¶ 14. Plaintiffs allege that Defendant failed to provide them with all required documents related to the mortgage transaction, including the following: HUD-1 settlement statement; escrow statements; adjustable rate rider(s); a handbook on adjustable rate mortgages; HUD Brochures; variable rate disclosures; private mortgage insurance disclosure; broker's arrangements; disbursal disclosures; Equal Credit Opportunity Act disclosure; privacy disclosure; Patriot Act disclosure; appraisal disclosure; consumer credit score disclosure; hazard insurance disclosure; California per diem interest disclosure; and loan origination agreement. *Id.* ¶ 29.

FN1. Defendant claims that the loan closed on December 19, 2006. *See* Defendant's Request for Judicial Notice ("D.RJN"), Ex. F (Notice of Right to Cancel allegedly signed and dated by Plaintiffs on December 19, 2006). The Court need not resolve this inconsistency as the difference of four days does not impact the disposition of the instant motions.

On March 12, 2009, Plaintiffs sent Defendant a demand letter seeking production of the original promissory note and certification that Defendant had the note in its possession. *Id.* ¶ 35. The FAC alleges that Defendant did not respond to this request. On December 13, 2008, Plaintiffs allegedly sent a notice of rescission to Defendant including an offer to tender, as well as a Real Estate Settlement Procedures Act Qualified Written Request ("QWR") and a Truth in Lending Act ("TILA") Request. *Id.* ¶¶ 37, 39, Exs. 8-10. Plaintiffs have attached the alleged notice of rescission and QWR to the FAC,

and the Court properly may consider them on a motion to dismiss. See Fed.R.Civ.P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."); *see also Outdoor Media Group, Inc. v. City of Beaumont,* 506 F.3d 895, 899 (9th Cir.2007) ("When ruling on a motion to dismiss, we may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.") (internal quotation marks omitted). The FAC alleges that Defendant did not respond to this communication. FAC ¶¶ 38, 40.

Plaintiffs filed their original complaint on June 23, 2009, asserting claims for relief under TILA, the Fair Debt Collection Practices Act ("FDCPA"), and California's Unfair Competition Law ("UCL"), Bus. & Prof.Code § 17200 *et seq.*, and to quiet title. They filed the operative FAC on October 1, 2009, alleging TILA violations, violations of RESPA, violations of the FDCPA, violations of the UCL, and seeking to quiet title as of December 16, 2008. Plaintiffs also recorded a *lis pendens* on the subject property. Defendant moves to dismiss the FAC for failure to state a claim upon which relief may be granted and to expunge the *lis pendens.*

II. LEGAL STANDARD

A. Motion to Dismiss pursuant to Rule 12(b)(6)

Dismissal under Fed.R.Civ.P. 12(b)(6) "is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Medical Center,* 521 F.3d 1097, 1104 (9th Cir.2008). For purposes of a motion to dismiss, the plaintiff's allegations are taken as true, and the court must construe the complaint in the light most favorable to the plaintiff. *Jenkins v. McKeithen,* 395 U.S. 411, 421, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969). At the same time, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (internal citations omitted). Thus, a court need not accept as true conclusory allegations, unreasonable inferences, legal characterizations, or unwarranted deductions of fact contained in the complaint. *Clegg v. Cult Awareness Network,* 18 F.3d 752, 754-755 (9th Cir.1994). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief.' " *Ashcroft v. Iqbal,* --- U.S. ----, 129 S.Ct. 1949, 1590 (2009), quoting Fed.R.Civ.P. 8(a)(2). In addition, a "court may disregard allegations in the complaint if contradicted by facts established by exhibits attached to the complaint." *Sumner Peck Ranch v. Bureau of Reclamation,* 823 F.Supp. 715, 720 (E.D.Cal.1993), citing *Durning v. First Boston Corp.,* 815 F.2d 1265, 1267 (9th Cir.1987))

***2** Leave to amend must be granted unless it is clear that the complaint's deficiencies cannot be cured by amendment. *Lucas v. Department of Corrections,* 66 F.3d 245, 248 (9th Cir.1995). When amendment would be futile, however, dismissal may be ordered with prejudice. *Dumas v. Kipp,* 90 F.3d 386, 393 (9th Cir.1996).

B. Motion to Expunge *Lis Pendens*

A *lis pendens* is a "recorded document giving constructive notice that an action has been filed affecting title or right to possession of the real property described in the notice." *Urez Corp. v. Superior Court,* 190 Cal.App.3rd 1141, 1144, 235 Cal.Rptr. 837 (1987). The practical effect of a *lis pendens* is to cloud the property's title and prevent its transfer until the litigation is resolved or the *lis pendens* is expunged or released. *Malcom v. Superior Court,* 29 Cal.3d 518, 523-24, 174 Cal.Rptr. 694, 629 P.2d 495 (1981). "The court shall order that the notice be expunged if the court finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim." Cal. Civ.Code § 405.32. "The court

shall direct that the party prevailing on any motion [regarding *lis pendens*] be awarded the reasonable attorney's fees and costs of making or opposing the motion unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust." Cal. Civ.Code § 405.38.

III. DISCUSSION

A. Procedural Objection

"Any opposition to a motion must be served and filed not less than 21 days before the hearing date." Civil Local Rule 7-3. The hearing on both of the instant motions was properly noticed for December 11, 2009. Accordingly, any opposition papers should have been filed on or before Friday, November 20. Opposition to Defendant's motions was not filed until November 23. In addition, because Plaintiffs' counsel misspelled the email address of Defendant's lead counsel, John W. Amberg, Defendant did not receive the opposition papers until November 24, only one day before Defendant's reply papers were due. Declaration of John W. Amberg ¶ 2. Plaintiffs have offered no reasonable excuse for this delay. However, because it appears that Defendant is entitled to prevail on the merits in any event, the Court has considered Plaintiffs' opposition papers. The Court cautions counsel that all future filings in this action must be timely.

B. Motion to Dismiss Pursuant to Rule 12(b)(6)

1. TILA Claims

TILA is a consumer protection statute that seeks to "avoid the uninformed use of credit." 15 U.S.C. § 1601(a). The statute is designed "to protect consumers' choice through full disclosure and to guard against the divergent and at times fraudulent practices stemming from uninformed use of credit." *King v. California,* 784 F.2d 910, 915 (9th Cir.1986); *see also Semar v. Platte Valley Fed. Sav. & Loan Ass'n,* 791 F.2d 699, 705 (9th Cir.1986) ("Congress designed [TILA] to apply to all consumers, who are inherently at a disadvantage in loan and credit transactions."). Because the statute is remedial in nature, it is to be applied broadly in favor of the consumer. *Jackson v. Grant,* 890 F.2d 118, 120 (9th Cir.1989); *see also Plascencia v. Lending 1st Mortgage,* No. C 07-4485 CW, 2008 WL 1902698, *3 (N.D.Cal. Apr.28, 2008) ("TILA has been liberally construed in the Ninth Circuit.") (internal quotations and citation omitted). Thus, even "[t]echnical or minor violations" of TILA or its implementing regulations may impose liability on the creditor. *Semar,* 791 F.2d at 704 (noting also that "[t]o insure that the consumer is protected ... [TILA and its implementing regulations must] be absolutely complied with and strictly enforced").

***3** TILA focuses not only on the form of a disclosure but also on its accuracy. *See Rossman v. Fleet Bank (R.I.) Nat'l Ass'n,* 280 F.3d 384, 390-91 (3d Cir.2002) ("[T]he issuer must not only disclose the required terms, it must do so accurately."). "The accuracy demanded excludes not only literal falsities, but also misleading statements." *Id.* (citation omitted). In that respect, the adequacy of TILA disclosures is to be assessed "from the standpoint of an ordinary consumer, not the perspective of a Federal Reserve Board member, federal judge, or English professor." *Smith v. Cash Store Mgmt.,* 195 F.3d 325, 327-28 (7th Cir.1999) (citation omitted).

TILA is implemented by the Federal Reserve Board of Governors ("FRB") through regulations found in 12 C.F.R. § 226 ("Regulation Z") and through the FRB's Official Staff Commentary ("Commentary"). The Commentary is binding on all lenders, and compliance with it shields an issuer from civil liability pursuant to TILA's safe-harbor provision. See 15 § U.S.C. 1640(f); *see also* 12 C.F.R. § 226, Supp. I-1 ("Good faith compliance with this commentary affords protection from liability under 130(f) of the Truth in Lending Act").

A. Plaintiffs' TILA Rescission Claim

Defendant contends that Plaintiffs' TILA rescission claim must be dismissed because the request for rescission was made outside the three-day statutory period and Plaintiffs' allegation of an offer to

tender is insufficient. The right of a borrower to rescind the loan transaction expires three business days after the date of the transaction. 15 U.S.C § 1635(a). Defendant contends that because the loan transaction closed in December 2006, Plaintiffs' right to respond has expired. Reply at 3, citing D. RJN, Ex. F. It is undisputed that the right to rescind may be extended, "[i]f the required notice or material disclosures are not delivered." 12 C.F.R. § 226.23(a)(3). Plaintiffs contend that they are entitled to an extension because material disclosures were not delivered to them. FAC ¶ 43-44 (stating in a conclusory fashion that Plaintiffs have a continuing right to rescind the transaction until the third business day after receiving both the proper Notice of Right to Cancel and delivery of all *material* disclosures). However, legal conclusions without sufficient supporting factual allegations are insufficient to state a claim. *Clegg*, 18 F.3d at 754-755.

While this allegation is the only basis for an extension found within Plaintiffs' rescission claim under TILA, Plaintiffs do attempt to incorporate previous paragraphs within the FAC. The FAC recites a list of seventeen [FN2] documents that Defendant failed to disclose. FAC ¶ 29 (listing the following: HUD-1 settlement statement; escrow statements; adjustable rate rider(s); a handbook on adjustable rate mortgages; HUD Brochures; variable rate disclosures; private mortgage insurance disclosure; broker's arrangements; disbursal disclosures; Equal Credit Opportunity Act disclosure; privacy disclosure; Patriot Act disclosure; appraisal disclosure; consumer credit score disclosure; hazard insurance disclosure; California per diem interest disclosure; and loan origination agreement). Defendant contends that, even considering the allegations found in the general "Statement of Facts" section of the FAC, the pleadings are insufficient because TILA does not require lenders to provide all of these documents to borrowers and Plaintiffs do not allege that the listed documents are "material disclosures" under TILA. This argument is persuasive, as TILA's disclosure requirements do not extend to many of the documents included in Plaintiffs' list, *see* 15 U.S.C. § 1637(a)(1)-(8), and Plaintiffs fail to allege the materiality of these disclosures. FAC ¶ 29.

> FN2. Plaintiffs' list of undisclosed documents actually numbers eighteen, but that is because Plaintiffs list "California Per Diem Interest Disclosure" twice. FAC ¶ 29(p)-(q).

*4 While Plaintiffs' list of documents does not sufficiently plead an extension of the three-day right to rescind, Plaintiffs also allege that they "would be misled and confused when to exercise their right to cancel the mortgage contract" because they only received one copy of the unsigned and undated Notice of Right to Cancel. *Id.* ¶¶ 30-31, Plaintiffs' Ex. 5. This allegation, if proved true, would extend the three-day period. *Garcia v. Wachovia Mortg. Corp.*, No. 2:09-cv-03925-FMC-FOMx, 2009 WL 3837621 (C.D.Cal. Oct.14, 2009), citing *Semar v. Platte Valley Federal Sav. & Loan Ass'n*, 791 F.2d 699, 701 (9th Cir.1986); 15 U.S.C. § 1635(a); 12 C.F.R. § 226.23(b)(1)(v) (mandating a creditor to "deliver two copies of the notice of the right to rescind to each consumer entitled to rescind ... the notice shall clearly disclose ... the date the rescission period expires.")

Defendant argues, however, that Plaintiffs admitted that they had received all of the required disclosures, together with the Notice of the Right to Cancel, when they signed their loan documents. *See* D. RJN, Ex. F (copy of Plaintiffs' Notice of Right to Cancel indicating that "the undersigned each acknowledge receipt of two copies of notice of right to cancel, and one copy of the Federal Truth in Lending Disclosure Statement," allegedly signed and dated by Plaintiffs). While Plaintiffs do not object to any of Defendant's requests for judicial notice or dispute the authenticity of the signed and dated Notice of Right to Cancel, this specific document is not referred to in the FAC, nor are its existence or contents proper for judicial notice pursuant to Fed.R.Evid. 201(b). Moreover, even if the Court

were to take judicial notice of the document, such written acknowledgment "does no more than create a rebuttable presumption of delivery thereof." 15 U.S.C. § 1635(c). While Defendant may and likely will raise this issue in a subsequent dispositive motion, written acknowledgment of the disclosure does not require dismissal of the claim.

Defendant also contends that Plaintiffs' TILA rescission claim fails because they do not plead tender adequately. 12 C.F.R. 226.23(d)(3). Although the Ninth Circuit has not addressed the issue directly, it has held that a court *may* require a borrower seeking rescission of a mortgage transaction under TILA to demonstrate the ability to tender the loan proceeds. *Yamamoto v. Bank of New York,* 329 F.3d 1167, 1168 (9th Cir.2003) (holding that it is within a district court's "discretion to condition rescission on tender by the borrower of the property he had received from the lender") (internal quotation marks and citation omitted).

District courts within the circuit are split. A number of them have extended *Yamamoto* to hold that a claim for rescission under TILA is subject to dismissal at the pleading stage if the borrower fails to allege a present ability to tender the loan proceeds. *See, e.g., Del Valle v. Mortg. Bank of California,* No. CV-F-09-1316 OWW/DLB, 2009 WL 3786061, at *8 (E.D.Cal. Nov.10, 2009); *Garcia v. Wachovia Mortg. Corp.,* No. 2:09-cv-03925-FMC-FMOx, 2009 WL 3837621, at *3 (C.D.Cal. Oct.14, 2009); *ING Bank v. Korn,* No. C09-124Z, 2009 WL 1455488 * 1 (W.D.Wash., May 22, 2009); *Garza v. American Home Mortg.,* No. CV F 08-1477 LJO GSA, 2009 WL 188604, at *5 (E.D.Cal. Jan.27, 2009) (granting motion to dismiss TILA rescission claim in light of complaint's failure to allege ability to tender, since "[r]escission is an empty remedy without [plaintiff]'s ability to pay back what she has received"). However, other courts have held that failure to allege ability to tender is not fatal to a TILA rescission claim. *See, e.g., Singh v. Washington Mut. Bank,* No. C-09-2771 MMC, 2009 WL 2588885, at *4 (N.D.Cal. Aug.19, 2009) ("Notably, *Yamamoto* does not hold that a *claim* for rescission cannot survive a motion to dismiss until the right to rescind is adjudicated in the plaintiff's favor."); *ING Bank v. Ahn,* No. C 09-995 THE, 2009 WL 2083965, at *2 (N.D.Cal. July 13, 2009) (noting that " *Yamamoto* did not hold that a district court must, as a matter of law, dismiss a case if the ability to tender is not pleaded. Rather, all of these cases indicate that it is within the trial court's discretion to choose to dismiss where the court concludes that the party seeking rescission is incapable of performance."); *Pelayo v. Home Capital Funding,* No. 08-CV-2030 IEG (POR), 2009 WL 1459419, at *7 (S.D.Cal. May 22, 2009) (rejecting argument that, under *Yamamoto,* claim for rescission was subject to dismissal where plaintiff "failed to offer tender in the complaint of the funds she borrowed"); *Harrington v. Home Capital Funding, Inc.,* No. 08cv1579 BTM (RBB), 2009 WL 514254, at *3 (S.D.Cal. Mar. 2, 2009) (holding "[t]ender by the borrower is not always a precondition to rescission and does not have to be pled to state a claim for rescission"); *Burrows v. Orchid Island TRS, LLC,* No. 07CV1567-BEN (WMC), 2008 WL 744735, at *6 (C.D.Cal. Mar.18, 2008) (rejecting, on motion to dismiss, defendant's argument that "there [was] no evidence" that plaintiff could return loan proceeds).

***5** This Court finds the second line of cases more persuasive in that they appear to be more consistent with the liberal pleading standard of Fed.R.Civ.P. 8. However, the Court agrees with the reasoning of the first line of cases that "it was not the intent of Congress to reduce the mortgage company to an unsecured creditor," *Del Valle,* 2009 WL at *8, and that "[r]escission is an empty remedy without [plaintiff]'s ability to pay back what she has received," *Garza,* 2009 WL at *5. Accordingly, the Court will exercise the discretion conferred upon it by *Yamamoto* to require that Plaintiffs allege either the present ability to tender the loan proceeds or the expectation that they will be able to tender within a reasonable time.[FN3] At the end of the day, Plaintiffs "will not be entitled to rescission" unless

they can tender the principal balance of the loan. *See Clemens v. J.P. Morgan Chase Nat. Corporate Services, Inc.*, No. 09-3365 EMC, 2009 WL 4507742. It makes little sense to let the instant rescission claim proceed absent some indication that the claim will not simply be dismissed at the summary judgment stage after needless depletion of the parties' and the Court's resources. [FN4]

FN3. For example, a TILA plaintiff might be able to allege that while she lacks the liquidity to tender the loan proceeds at the time she files the rescission claim, she has sufficient equity in the home and a willingness to sell that would render it likely that she could tender the loan proceeds if given a reasonable period of time.

FN4. Plaintiffs allege that they offered tender to Defendant within their request for rescission of the contract on December 13, 2008. FAC ¶ 46; P. RJN, Ex.8 (letter from Plaintiffs' counsel to Defendant stating that Plaintiffs "would like to discuss tender arrangements for the amount due" and that Plaintiffs "are prepared to discuss a tender obligation.") However, Plaintiffs do not allege that they are able to tender presently or "cite [any] authority that their tender can be 'on reasonable terms over a period of time." *Del Valle*, 2009 WL 3786061, at *8, citing *American Mortg. Network, Inc. v. Shelton*, 486 F.3d 815, 821 (4th Cir.2007).

B. Plaintiffs' TILA Damages Claim

Plaintiffs seek money damages for which the applicable limitations period is one year. *See* 15 U.S.C. § 1640(e). The FAC alleges that the loan transaction at issue in this action closed on December 15, 2006. FAC ¶ 14. Plaintiffs did not file their original complaint until June 23, 2009, two and half years after the loan transaction was consummated. It is undisputed that the one-year time limit of § 1640(e) has expired. Plaintiffs claim, however, that "the doctrine of equitable tolling may suspend the limitations period 'until the borrower discovers or had reasonable opportunity to discover the fraud or non-disclosures that form the basis of the TILA action.' " Opp. Mot. at 7-8, citing *King v. California*, 784 F.2d 910, 915 (9th Cir.1986). The Ninth Circuit has held that equitable tolling of the TILA limitations period is authorized in appropriate circumstances. *King*, 784 F.2d at 914-15. Such circumstances exist where "a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period." *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1178 (9th Cir.2000). In such a case, the limitations period may be extended "until the borrower discovers or had reasonable opportunity to discover the fraud or nondisclosures that form the basis of the TILA action." *King*, 784 F.2d at 915. A motion to dismiss on statute of limitations grounds should be granted "only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled." *Plascencia v. Lending 1st*, 583 F.Supp.2d 1090, 1097 (N.D.Cal.2008), quoting *Durning v. First Boston Corp.*, 815 F.2d 1265, 1278 (9th Cir.1987).

*6 The FAC fails to satisfy even this liberal standard. Plaintiffs' sole assertion regarding when they actually discovered Defendants' alleged fraud or non-disclosures is that "all these violations came only to the attention to the Plaintiff after she came to consult with her counsel." FAC ¶ 66. This allegation fails to plead equitable tolling for two reasons. First, Plaintiffs fail to allege when they "came to consult with [their] counsel." *Id.* The Court thus cannot determine if Plaintiffs filed their original complaint within one year of their discovery of their claim. Second, as the court concluded with respect to a nearly identical allegation in *Garcia v. Wachovia Mortg. Corp.*, No. 2:09-cv-03925-FMC-FOMx, 2009 WL 3837621 (C.D.Cal. Oct.14, 2009):

> the entirety of Plaintiff's explicit allegations in the FAC in support of an equitable tolling argument are that "a[ll] these [TILA disclosure] viola-

> tions came only to the attention of the Plaintiff after she came to consult with her counsel and who subsequently sent demand letter containing rescission notice and offer to tender to Defendant Wachovia which failed to respond"... That is not enough. Under *Hubbard,* "nothing prevented [plaintiff] from comparing the loan contract, [the lender's] initial disclosures, and TILA's statutory and regulatory requirements." *Hubbard [v. Fidelity Federal Bank,* 91 F.3d 75, 79 (9th Cir.1996)]. To be sure, there are numerous allegations of serious TILA disclosure violations ... However, the mere allegation of TILA disclosure violations does itself not toll the statute ... For these reasons, the FAC has not stated facts plausibly indicating any basis for tolling the statute of limitations.

Id. at *7-8. If the Court were to accept the FAC's allegations of ignorance of the law until informed by counsel as sufficient for a pleading of equitable tolling, every plaintiff could assert the same allegation, and TILA's statute of limitations provision would have no real meaning.

2. RESPA Claim

In Count Three of the FAC, Plaintiffs allege that Defendant's RESPA violations involved "splitting fees for referral, kickbacks, illegal fees, unearned and duplication fees" and failure to respond to their QWR. Defendant contends that Plaintiffs' RESPA claim should be dismissed because it is time-barred, simply recites legal conclusions threadbare of supporting facts, and rests on false allegations.

Plaintiffs' allegation that Defendant's "RESPA violations involved splitting fees for referral, kickbacks, illegal fees, unearned and duplication fees" is insufficient standing alone to plead a RESPA violation pursuant to 12 U.S.C. § 2607(a). Plaintiffs do not allege a single fact in support of this legal conclusion. In their opposition papers, Plaintiffs claim that they were forced to pay fees that were "unearned, duplicative, unreasonable and unconnected to any actual services performed and without the Defendants providing them with proper opportunity to evaluate the costs and implications thereof in violation of RESPA." Opp. Mot. at 8-9 (identifying specific payments including, but not limited to a "broker processing fee to Casa Real Estate & Mortgage of $518.00; broker administration fee to Casa Real Estate & Mortgage of $400.00; broker application fee to Casa Real Estate & Mortgage of $500.00; broker discount fee to Casa Real Estate & Mortgage of $5,960.00.") However, these allegations appear nowhere in Count Three. "While legal conclusions can provide the complaint's framework, they must be supported by factual allegations." *Iqbal,* --- U.S. ----, ----, 129 S.Ct. 1937, 1940, 173 L.Ed.2d 868 (2009). Moreover, the FAC fails to allege a claim pursuant to 12 U.S.C. § 2607(a) because Plaintiffs filed their original complaint two and a half years after closing and "do not plead any facts concerning equitable tolling that are specific to this claim." *Abdollahi v. Washington Mut. FA,* No. C09-00743 HRL, 2009 WL 3878437, at *3 (N.D.Cal. Nov.17, 2009), citing 12 U.S.C. § 2614.

*7 Plaintiffs also allege that Defendant violated RESPA by failing to respond to their QWR. FAC ¶ 72. However, Plaintiffs' sole factual allegation with respect to this claim is the following:

> Damages may be also awarded to the borrower for failure to respond to the RESPA QWR (12 U.S.C. § 2605). In this case, QWR was sent by the Plaintiffs to the Defendant Countrywide but it failed to respond. The failure to respond to the QWR sets forth 'enough fact to raise a reasonable expectation that discovery will reveal evidence' of a pattern or practice of non compliance with the requirements of Sec 2605 (See *Bell A tlantic Corporation v. Twombly 550* U.S. 555) which would entitle Plaintiff's claim for statutory damages under RESPA.

FAC ¶ 72. This allegation, on its own, does not state a violation of 12 U.S.C. § 2605(e). Plaintiffs do not allege when they sent the QWR, or its contents, or the method by which it was sent.[FN5]

FN5. These pleading failures conceivably can be cured by amendment.

Defendant contends that Plaintiffs' allegation that it did not respond to the QWR is false. Reply at 5-6, citing D. RJN Exs. G, H & I (letters dated January 13, 2009, February 6, 2009, and March 10, 2009 responding to a letter dated December 12, 2008 and facsimile dated January 19, 2009). While Plaintiffs do not object to Defendant's request for judicial notice, the letters are not properly incorporated by reference, as their contents are not alleged in the complaint, *See contra In re Stac Elcs. Sec. Litig.*, 89 F.3d 1399, 1405 n. 4 (9th Cir.1996) (noting that complete copies of documents whose contents are alleged in the complaint may be considered in connection with a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6)); nor are they proper for judicial notice pursuant to Fed.R.Evid. 201(b). *Compare* D. RJN Exs. G, H & I (Defendant's purported responses to Plaintiffs' QWR with no evidence that the letters were sent by certified mail or any other proof of delivery), *with* Fed.R.Evid. 201(b) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.")

3. Fair Debt Collection Practices Act Claim

"To be held liable for violation of the FDCPA, a defendant must-as a threshold requirement-fall within the Act's definition of 'debt collector.' " *Izenberg v. ETS Services, LLC*, 589 F.Supp.2d 1193, 1198 (C.D.Cal.2008); citing *Heintz v. Jenkins*, 514 U.S. 291, 294, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995); *see a lso, e. g., Romine v. Diversified Collection Servs.*, 155 F.3d 1142, 1146 (9th Cir.1998). Defendant contends that the FDCPA claim must be dismissed because it is not a "debt collector." MTD at 8, citing *Tina v. Countrywide Home Loans, Inc.*, No. 08 CV 1233 JM (NLS), 2008 WL 4790906, at *7, n. 2 (S.D.Cal. Oct.30, 2008) (holding that "FDCPA defines 'debt collector' as one who collects consumer debts owed to another. 15 U.S.C. § 1692(a)(6)(A). Countrywide's conduct was directed to colleting its own debts") and *Ines v. Countrywide Home Loans, Inc.*, No. 08cv1267 WQH (NLS), 2008 WL 2795875 (S.D.Cal. Jul. 18, 2008) ("lenders and mortgage companies are not 'debt collectors' within the meaning of the FDCPA ... Mortgage companies collecting debts are not 'debt collectors.' ") (internal citations omitted.)

***8** Plaintiffs claim that Defendant is liable under the FDCPA pursuant to the "exception found in 15 U.S.C. § 1692(a)(6)(F) (iii) [FN6]." FAC ¶ 77 (alleging that Defendant is a debt collector under the FDCPA because "it concerns collection of debt of the Plaintiff already in default.") This purported exception states that "the term [debt collector] does not include-any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(iii). However, this "exception" does nothing more than explain that persons who collect debts of *another* that are not in default are not debt collectors within the meaning of the statute. It has no bearing on the efforts of Defendant to collect its *own* debt regardless of whether the debt is in default. *Garcia*, 2009 WL 3837621, at *10-11. Because Plaintiffs cannot cure the defect by amending their pleading, this claim will be dismissed without leave to amend. *Dumas*, 90 F.3d at 393.

FN6. The Court notes that 15 U.S.C. § 1692(a)(6)(F)(iii) does not exist. The Court assumes that Plaintiffs intended to plead an exception pursuant to 15 U.S.C. § 1692a(6)(F)(iii) and will proceed with its analysis accordingly.

4. UCL claim

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Civ.Code § 17200. Accordingly, "[a]n act can be

alleged to violate any or all of the three prongs of the UCL-unlawful, unfair, or fraudulent." *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal.App.4th 1544, 1554, 62 Cal.Rptr.3d 177 (2007). For an action based upon an allegedly unlawful business practice, the UCL " 'borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548, 973 P.2d 527 (1999) (internal citations omitted); *see also Farmers Ins. Exchange v. Superior Court*, 2 Cal.4th 377, 383, 6 Cal.Rptr.2d 487, 826 P.2d 730 (1992). However, such allegations "must state with reasonable particularity the facts supporting the statutory elements of the [alleged] violation." *Silicon Knights, Inc. v. Crystal Dynamics, Inc.*, 983 F.Supp. 1303, 1316 (N.D.Cal.1997), quoting *Khoury v. Maly's of Cal., Inc.*, 14 Cal.App.4th 612, 619, 17 Cal.Rptr.2d 708 (1993). Plaintiffs allege that Defendant's acts and practices violate the UCL "unlawful" prong because they violate TILA, Regulation Z, and the FDCPA. Given the Court's conclusion that Plaintiffs' TILA, Regulation Z, and FDCPA claims cannot survive the instant motion to dismiss, *see supra* III.B.1-3, their UCL claim premised upon a violation of these laws necessarily fails as well.[FN7]

> FN7. The FAC also asserts allegations of unlawful business practices pursuant to California Civil Code Section 1918.5-1921.1920, FAC ¶ 88 (for failing to "notify Plaintiffs of any changes in the interest rate and monthly payment of loan) and California Civil Code Section 1916.710(c), FAC ¶ 89 (for failing to provide Plaintiffs with the "adjustable rate mortgage disclosure notice"), as well as violations of the UCL pursuant to the unfair and fraudulent prongs. *Id.* ¶ 97 (stating in conclusory fashion that Defendant's "business acts and practices ... constitute 'unfair' business practices under the UCL in that said acts and practices offend *public policy* and are substantially injurious to Plaintiff and all consumers"); *Id.* ¶ 105 (asserting only that Defendant's business acts and practices "constitute 'fraudulent' business practices under UCL in that said acts and practices are likely to deceive the public and affected consumers as to their legal rights and obligations, and by use of such deception, falsifying documents, failure to deliver *material* documents, and concealment may preclude consumer from exercising legal rights to which they are entitled.") Should Plaintiffs choose to amend their UCL claim, they must plead specifically which acts of Defendant are the source of these alleged violations.

5. Quiet Title

"The purpose of a quiet title action is to establish one's title against adverse claims to real property. A basic requirement of an action to quiet title is an allegation that plaintiffs 'are the rightful owners of the property, i.e., that they have satisfied their obligations under the Deed of Trust.' " *Santos v. Countrywide Home Loans*, No. Civ. 2:09-02642 WBS DAD, 2009 WL 3756337, at *4 (E.D.Cal. Nov.6, 2009), quoting *Kelley v. Mortgage Elec. Reg. Sys., Inc.*, 642 F.Supp.2d 1048, 1057 (N.D.Cal.2009). "[A] mortgagor cannot quiet his title against the mortgagee without paying the debt secured." *Watson v. MTC Financial, Inc.*, No. 2:09-CV-01012 JAM-KJM, 2009 WL 2151782, at *4 (E.D.Cal. Jul.17, 2009), quoting *Shimpones v. Stickney*, 219 Cal. 637, 649, 28 P.2d 673 (1934). As discussed above, *see supra* III.B.1A, Plaintiffs have not paid the debt secured by the mortgage, nor have they shown an ability to tender.

D. Motion to Expunge the *Lis Pendens*

***9** In light of the foregoing, Defendant's motion to expunge the *lis pendens* will be granted. Defendant does not seek an award of attorneys' fees, but in light of the totality of the circumstances and Plaintiffs' apparent financial hardship, the Court would decline to award attorneys' fees to Defendant

in any event.

IV. ORDER

Good cause therefor appearing, the motion to dismiss pursuant to Rule 12(b)(6) is GRANTED, with leave to amend only with respect to Plaintiffs' claims for violation of TILA, RESPA, and the UCL and to quiet title. The motion to expunge the *lis pendens* is GRANTED. Any amended complaint shall be filed within thirty (30) days of the date of this order.

IT IS SO ORDERED.

N.D.Cal.,2009.
Valdez v. America's Wholesale Lender
Not Reported in F.Supp.2d, 2009 WL 5114305 (N.D.Cal.)

END OF DOCUMENT

CERTIFICATION OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief and Appendix of Respondent were served via overnight mail this 10th day of January, 2011 to the last known address of the following:

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