IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

NATIONSTAR MORTGAGE LLC,

Plaintiff,

Case No. 10 CA 12191

v.

TAWNY PRENTICE, *et. al.*

Defendant.
_____/

MOTION TO DISQUALIFY SENIOR JUDGE

Defendant, TAWNY PRENTICE, by and through her undersigned counsel and pursuant to Fla.R.Jud.Admin. 2.330, moves this Court for entry of an Order disqualifying the Honorable Charles M. Holcomb ("the Senior Judge"), and would show:

BACKGROUND

1. On or about June 22, 2010, Defendant served her Motion to Dismiss Complaint ("Motion to Dismiss").

2. Plaintiff has not served or filed a response to the Motion to Dismiss, nor has Plaintiff made any attempt to set the Motion to Dismiss for hearing. Nonetheless, on September 30, 2010, the Senior Judge, acting *sua sponte*, noticed the Motion to Dismiss for hearing on November 5, 2010. A copy of this Notice of Hearing is attached as Exhibit "A."

3. The conduct of the Senior Judge, as set forth herein, gives Defendant a well-reasoned fear that he is not neutral and detached and will not provide Defendant a fair hearing, precipitating the instant motion.

4. First off, the content and tone of the Notice of Hearing is highly inappropriate. It is clear the Senior Judge has prejudged the merits of the Motion to Dismiss without giving

Defendant a chance to be heard and without even reviewing the Motion to Dismiss or the court file. Essentially, the Senior Judge is saying "don't bother attending the hearing – I'm going to deny your Motion to Dismiss." This is undoubtedly why the Senior Judge listed out several "standard" arguments on motions to dismiss in foreclosure cases and, essentially, said that he would be rejecting all such arguments. The Senior Judge's announced predisposition to rule against Defendant, without giving Defendant a chance to be heard and without reviewing the Motion to Dismiss or the Court file, mandates his disqualification. See Marvin v. State, 804 So. 2d 360 (Fla. 4th DCA 2001); Barnett v. Barnett, 727 So. 2d 311 (Fla. 2d DCA 1999); Wargo v. Wargo, 669 So. 2d 1123 (Fla. 4th DCA 1996). To rule otherwise would compel the appellate court to issue a Writ of Mandamus. See id.

5. Compounding this problem, the Senior Judge has announced his express intention to consider facts outside the four corners of the Complaint, and, worse yet, is doing so on a systematic basis. To illustrate, the Senior Judge notes:

> …the fact that an endorsement is not shown on the copy of the note does not create a standing issue as the note copy is usually taken from the closing file before it is transferred to another lender, etc.

6. Respectfully, the Judge's statement in this regard, in a Notice of Hearing, is way out of line. There is nothing in the Complaint that in any way supports this factual assertion (in this case or any other), and only the facts in the Complaint should be considered in a Motion to Dismiss. Given his experience as a judge, the Senior Judge knows this very well, but is obviously willing to disregard the law on a systematic basis so as to "push through" foreclosure cases and deny well-taken motions to dismiss. That may sound harsh, but if there is some legitimate reason why the Note attached to the Complaint does not contain the requisite indorsement, then Plaintiff should be required to plead that fact (with some explanation such as

that set forth by the Senior Judge in the Notice of Hearing). Absent such an explanation, the absence of an indorsement means Plaintiff is not the "holder" as a matter of law.

7. Respectfully, even if the Senior Judge disagrees, for him to automatically assume the copy of the Note in this case is from the origination file, apparently based on his experience with other cases, shows the Senior Judge has prejudged this case. Respectfully, just because the Senior Judge apparently has a lot of foreclosure cases does not mean this Defendant should have her case prejudged (before she ever has a chance to be heard).[1] These facts require disqualification.

8. By inserting a factual argument into the Notice of Hearing, the Senior Judge has given advice to Plaintiff's counsel, which is entirely impermissible. Essentially, the Senior Judge told Plaintiff's counsel "if Defendant argues for dismissal based on the lack of an indorsement on the note attached to the Complaint, then make sure you argue that the Note attached to the Complaint is not the original Note and was from the origination file and the original Note contains an indorsement." It is axiomatic that where a judge gives "tips" of this type to one side that his disqualification is required. See Shore Mariner Condo. Ass'n, Inc. v. Antonious, 722 So. 2d 247 (Fla. 2d DCA 1998) ("Trial judges must studiously avoid the appearance of favoring one party in a lawsuit, and suggesting to counsel or a party how to proceed strategically constitutes a breach of this principle."); Blackpool Associates, Ltd. v. SM-106, Ltd., 839 So. 2d 837 (Fla. 4th DCA 2003) ("We grant relief in connection with the trial court's order that denied disqualification as the trial court provided Blackpool/Kevin Murphy with legal advice and suggestions."); Cammarata v. Jones, 763 So. 2d 552 (Fla. 4th DCA 2000)

[1] The undersigned has had this argument for dismissal granted on numerous occasions before various judges in Florida. However, the issue here is not the content of the Senior Judge's ruling – it's that he has so obviously predetermined his ruling, in a way he knows to be contrary to law, without giving Defendant a chance to be heard.

("we conclude the trial judge's suggestions to Respondent's counsel caused the Petitioners to have a well-rounded fear that they would not receive a fair trial"); Chastine v. Broome, 629 So. 2d 293 (Fla. 4th DCA 1993).

9. Compounding these concerns, the Senior Judge set the Motion to Dismiss *sua sponte*, without making any attempt to coordinate the hearing date with the undersigned. This is highly irregular and unduly prejudicial, particularly since: (i) the hearing was set just 30 days out and (ii) the undersigned practices out of town. Accentuating these problems, the Senior Judge expressly refuses to permit a telephone appearance.

10. Fla.R.Jud.Admin. 2.530 requires that phone appearances be granted for hearings of 15 minutes or less absent "good cause." Here, Defendant and the undersigned were not even permitted to request a phone appearance (an option they would like to avail themselves of, if they so choose, because the undersigned practices out of town). At minimum, the undersigned should have been permitted to argue the absence of "good cause" to preclude a phone appearance, a basic violation of due process. Again, the Senior Judge has prejudged the merits in an attempt to "push through" this foreclosure case.

11. There is no good cause to preclude a phone appearance in this case. After all, hearings of this type are regularly conducted by phone in other counties. The Senior Judge seems to suggest otherwise based on his assertion that the "telephone system will not accommodate the volume of cases scheduled." However, it is clear that the Senior Judge is the one who scheduled this (unspecified) number of cases, all at once. Respectfully, where the Senior Judge is the person who creates the alleged "good cause" by scheduling numerous hearings all at once, *sua sponte*, without any legitimate reason to do so, it is clear that he is not neutral and detached. In fact, the fact that the Senior Judge scheduled so many hearings, all at

once, shows that he does not intend to evaluate Defendant's position on the merits but wants to deny numerous motions to dismiss, all at once, as if he is sitting in front of a conveyor belt at a factory. Respectfully, Defendant deserves better. Defendant is facing foreclosure on her home. She does not deserve to be crammed into court with numerous other parties before a judge who has so obviously prejudged her case.

12. The totality of the statements set forth in the Notice of Hearing shows the Senior Judge is trying to create a situation where it is so difficult and/or so uncomfortable for the undersigned to argue the Motion to Dismiss that it would be easier for Defendant and her counsel to withdraw it. In other words, the Senior Judge is trying to get Defendant to withdraw her motion so the Senior Judge can prosecute this case to conclusion and/or so he does not have to rule on the motion. To illustrate, the Senior Judge encourages Defendant to withdraw the Motion to Dismiss at least 7 days before the hearing, failing which counsel must appear in person. In essence, the Senior Judge is penalizing Defendant and her undersigned counsel if they do not withdraw a well-taken Motion to Dismiss. Defendant and her counsel should not be penalized for asserting well-taken arguments.

13. The Florida Supreme Court has created a rule of civil procedure wherein cases must be dismissed for lack of prosecution if there is no record activity for a period of one year. Here, this case may have reached that point, but the Senior Judge has taken it upon himself to prosecute this case for Plaintiff. Essentially, the Senior Judge is saying "Plaintiff hasn't prosecuted this case; I will. Plaintiff hasn't set the Motion to Dismiss for hearing; I will. And I'll make it clear that I'm going to deny it." Respectfully, this is highly inappropriate. It is the Plaintiff's obligation to prosecute a lawsuit. If the Plaintiff chooses not to prosecute a case, then the Senior Judge cannot inject himself into the lawsuit and prosecute the case for the Plaintiff.

The Senior Judge's conduct otherwise shows him to be hopelessly biased. Dismissal is required.

14. In nearly ten years of practice, the undersigned has never seen anything like this – the judge *sua sponte* setting a motion for hearing in a case that the plaintiff was not prosecuting, setting it on a "rocket docket," refusing to let out-of-town counsel appear by phone, arguing facts for the Plaintiff that are outside the four corners of the Complaint, and essentially announcing the motion would be denied without giving Defendant a chance to be heard. Under the circumstances, it seems clear the Senior Judge has an agenda (perhaps the perceived backlog of foreclosure cases). Whatever the reason, where a judge's personal agenda regarding a case is such that he is prosecuting a case that the plaintiff decided to leave dormant, he is no longer a neutral and detached judge. Disqualification is required.

15. Defendant learned of the facts set forth herein on October 11, 2010 when she received a copy of the Notice of Hearing in the mail from her undersigned counsel.

WHEREFORE Defendant respectfully requests that this Court enter an Order disqualifying the Honorable Charles W. Holcomb from presiding over this cause.

CERTIFICATE OF GOOD FAITH

Defendant's counsel, Mark P. Stopa, Esquire, hereby certifies that the instant motion and the statements set forth herein are made in good faith.

_____
Mark P. Stopa

VERIFICATION

Under penalty of perjury, I declare that I have read the foregoing document and that the facts stated in it are true.

_____
Tawny Prentice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to the Honorable Charles M. Holcomb, 2825 Fran Jamieson Way, Viera, Florida 32940 and Giselle Hugues, Law Offices of Marshall C. Watson, P.A., 1800 N.W. 49th Street, Suite 120, Fort Lauderdale, FL 33309 on this ___ day of October, 2010.

Mark P. Stopa
FBN: 550507
STOPA LAW FIRM
2202 N. Westshore Blvd., Suite 200
Tampa, FL 33607
Telephone: (727) 667-3413
ATTORNEY FOR DEFENDANT