IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

THE BANK OF NEW YORK MELLON TRUST COMPANY, NATIONAL ASSOCIATION FKA THE BANK OF NEW YORK TRUST COMPANY, N.A. AS SUCCESSOR TO JPMORGAN CHASE BANK, N.A. AS TRUSTEE FOR RAMP 2004RS12,

Plaintiff,

v. Case No. 09-15764-CI-15

RICHARD DECOURSY, *et. al.*

Defendants.
_____/

MOTION TO DISQUALIFY TRIAL JUDGE

Defendants, RICHARD DECOURSY and LILLIANA DECOURSY, by and through their undersigned counsel and pursuant to Fla.R.Jud.Admin. 2.330, move this Court for entry of an Order disqualifying the Honorable W. Douglas Baird ("the Judge"), and would show:

BACKGROUND

1. This is a mortgage foreclosure case.

2. On or about March 12, 2010, Defendants served their Motion to Dismiss Complaint ("Motion to Dismiss") along with a Verified Motion to Quash Substitute Service and Abate for Lack of Personal Jurisdiction ("Motion to Quash Service").

3. On or about March 24, 2010, Plaintiff served its written Response to Motion to Dismiss. This response was not unlike a lot of responses filed by Plaintiff's firms in mortgage foreclosure cases such as this (so, candidly, Defendants' undersigned counsel did not think much of it).

4. In the ensuing months, Plaintiff made no attempt to set the Motion to Dismiss or the Motion to Quash Service for hearing. Instead, unbeknownst to Defendants or their

undersigned counsel at the time, Plaintiff's counsel submitted some sort of correspondence to this Court, *ex parte* (either in writing or via telephone) without providing a copy to Defendants' counsel and without informing Defendants' counsel. Via this correspondence, Plaintiff's counsel requested that the Judge deny the Motion to Dismiss, *ex parte*, without notice, and without a hearing.

5. On August 19, 2010, Defendants' counsel received a written Order denying the Motion to Dismiss in the mail. The Order was contained in an envelope with a return address label of Plaintiff's counsel. Prior to this time, Defendants and their counsel had no idea that the Judge had been given any correspondence or would even be entertaining the possibility of ruling on the Motion to Dismiss without a hearing. The Order came, quite simply, completely out of the blue.

6. Notably, the Judge denied the Motion to Dismiss without a hearing, and directed Defendants to file an Answer, yet the Judge completely ignored the Motion to Quash Service, acting as if it did not exist.

I. THE JUDGE'S *EX PARTE* COMMUNICATIONS WITH PLAINTIFF'S COUNSEL REQUIRE HIS DISQUALIFICATION.

7. Under a well-established line of Florida cases, where a judge participates in *ex parte* communications with opposing counsel, his disqualification is required. As the Florida Supreme Court has explained:

> Canon 3B(7) of the Code of Judicial Conduct provides that "[a] judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding." Based on this principle, this Court has repeatedly stated that there is nothing "more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant." …
> We are not concerned with whether an *ex parte* communication actually prejudices one party at the expense of the other. The most insidious result of *ex*

> *parte* communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question.

State v. Riechmann, 777 So. 2d 342 (Fla. 2000); see also Smith v. State, 708 So. 2d 253 (Fla. 1998); Pearson v. Pearson, 870 So. 2d 248 (Fla. 2d DCA 2004) ("Petitioner's allegation of an ex parte communication alone established a reasonable basis to fear she would not receive a fair hearing in subsequent proceedings.").

8. Here, the Judge communicated with Plaintiff's counsel, *ex parte*, regarding the Motion to Dismiss and the Order denying said motion. To illustrate, Defendants' undersigned counsel did not even know the Order had been submitted to the Court, or that such an Order was even a possibility (without a hearing or otherwise) until after the Judge signed it. The fact that service copies of the Order were provided in envelopes of Plaintiff's counsel proves the Judge did not do this on his own – there absolutely was an *ex parte* communication.

9. The issue here is not just that the Judge denied the Motion to Dismiss without a hearing. The issue is that the Judge communicated with Plaintiff's counsel about the Motion to Dismiss and the Order thereon *ex parte*. Respectfully, even if he thought the Order could be entered without a hearing, the Judge was prohibited from communicating with Plaintiff's counsel *ex parte*. These *ex parte* communications require the Judge's disqualification. See cases, supra.

II. THE JUDGE'S ORDER, ENTERED WITHOUT NOTICE, WITHOUT A HEARING, AND WITHOUT REGARD FOR DEFENDANTS' MOTION TO QUASH SERVICE, REQUIRES HIS DISQUALIFICATION.

10. Defendants' undersigned counsel recognizes that it is theoretically possible for a judge to adjudicate a motion to dismiss without a hearing. Federal court judges do this all of the time. The fundamental difference, though, and the fatal problem with the Judge's actions in this case, is that, in those courts, there is a system in place for the adjudication of such a motion without a hearing, so the parties are aware of the possibility and can draft their motion

accordingly.

11. Here, Defendants and their counsel had no idea that this Court was considering the entry of an Order on the Motion to Dismiss without a hearing. There is no procedure in place for this Court to engage in such an act. There is no Administrative Order or rule of procedure authorizing this conduct. Had there been, Defendants' counsel would have taken more time in the drafting of the motion, to include more legal citations. Defendants' counsel did not include such citations because he thought Defendants would be afforded a hearing, as has always happened on motions to dismiss in Pinellas County cases. Quite simply, there is an enormous difference in how an attorney drafts a motion when he/she believes he will have oral argument on the motion and how an attorney drafts a motion when the Court is going to rule on the motion without oral argument. To ignore this distinction, and enter an *ex parte* Order without a hearing and without notice that there would be no hearing, is a denial of due process and is patently unfair. This causes Defendants to harbor a well-reasoned fear that the Judge is not neutral and detached. 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).

12. Accentuating Defendants' concerns is the fact that the Judge directed Defendants to file an Answer within 20 days even though the Motion to Quash Service is pending. Respectfully, this is why hearings should be conducted and both sides given a chance to be heard. After all, under well-established law, Defendants cannot be made to answer when their Motion to Quash Service has yet to be adjudicated.

13. The fact that the Judge has directed Defendants to answer, without giving Defendants a chance to be heard and without considering Defendants' Motion to Quash Service, gives Defendants a well-reasoned fear that the Judge is not neutral and detached. To illustrate, is

the Judge really going to give Defendants a fair hearing on the Motion to Quash Service when he has ignored that motion and, proceeding *ex parte* and without notice or hearing, directed them to file an Answer? Defendants' belief that he would not be fair is eminently reasonable.

14. Of course, to the extent the Judge knew the Motion to Quash Service was pending but entered the Order anyway, his bias against these Defendants is even more apparent. Either way, disqualification is required. See cases, supra.

III. IT APPEARS THE JUDGE DID NOT EVEN EVALUATE THE MOTION TO DISMISS, AS HIS ORDER DENYING IT WAS MERELY A FORM ORDER.

15. The Order denying the Motion to Dismiss is a form, drafted, apparently, by Plaintiff's counsel. Significantly, it is exactly the same, verbatim, as Orders entered in other cases by this same judge. Respectfully, where the Judge is signing form Orders in a myriad of cases, with the same language, even though the Motions to Dismiss in these cases are not the same, Defendants have a well-reasoned fear that the Judge did not evaluate the Motion to Dismiss on the merits. This may sound harsh, but if the judge was truly evaluating each motion on its merits, on a case-by-case basis, then the Orders should not be the same (in different cases).

16. To illustrate, the Motion to Dismiss in this case contains arguments that Plaintiff lacks capacity to sue and Plaintiff failed to attach the promissory note upon which this lawsuit is based. This latter argument requires dismissal under the Florida Supreme Court's approved form for mortgage foreclosure cases, yet the Judge completely disregarded this issue in the Order (just as he ignored the issue of capacity). Failing to attach a Note to the Complaint in a foreclosure case requires dismissal, yet in his haste to deny the motion, *ex parte* and without a hearing, the Judge completely ignored this bona fide argument.

17. The foregoing facts, individually and collectively, cause Defendants to harbor well-reasoned fears that the Judge is not neutral and detached. Disqualification is required.

WHEREFORE Defendants respectfully request that this Court enter an Order disqualifying the Honorable W. Douglas Baird from presiding over this cause.

CERTIFICATE OF GOOD FAITH

Defendants' 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.

_____
Lilliana Decoursy

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Honorable W. Douglas Baird, 315 Court Street, Room and Nikolay Kolev, Esq., P.O. Box 25018, Tampa, FL 33622-5018 on this ____ day of August, 2010.

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