IN THE CIRCUIT COURT OF THE 4TH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

WELLS FARGO BANK, N.A., as Trustee for the Certificateholders, MASTR Asset-Backed Securities Trust 2007-NCW Mortgage Pass-Through Certificates, Series 2007-NCW,

Plaintiff,

v.

Case No. 2010-CA-1551
Division CV-H

LAWRENCE JORDAN, *et. al.*,

Defendants,

_____/

EMERGENCY, VERIFIED MOTION TO QUASH SERVICE, VACATE FORECLOSURE JUDGMENT, AND CANCEL FORECLOSURE SALE

Defendant, LAWRENCE JORDAN, by and through his undersigned counsel, moves this Court for entry of an Order vacating the Final Judgment of Foreclosure in this cause, quashing the Certificate of Sale and Certificate of Title issued by this Court, and quashing service of process upon Defendant, and would show:

OVERVIEW AND NATURE OF EMERGENCY

1. This is a mortgage foreclosure case on the property located at 1348 West 13th Street, Jacksonville, FL 32209 ("the Florida Property"). Plaintiff obtained a Final Judgment of Foreclosure, without opposition, after purporting to effectuate service upon Defendant via publication. As described herein, this purported service was and is ineffectual as a matter of law. As such, the Final Judgment of Foreclosure is void and should be vacated and the Certificate of Sale and Certificate of Title should be quashed, as should service of process.

2. On the facts herein, it would be a travesty of justice for Defendant to be dispossessed via a Writ of Possession or for the property to be sold to an innocent third-party purchaser (whose title would be quashed given the insufficient service). This Court should

adjudicate the instant motion on an emergency basis, without making any other rulings and without issuing a Writ of Possession.

ANALYSIS

3. Under a well-established line of cases:

> A judgment entered without service of process on the defendant is void and may be attacked at any time. ... A judgment entered without service of process is void and will be set aside and stricken from the record on motion at any time.

H & F Tires, L.P. v. D. Gladis Co., Inc., 981 So. 2d 647, 651 (Fla. 4th DCA 2008) (quoting M.L. Builders, Inc. v. Reserve Developers, LLP, 769 So. 2d 1079 (Fla. 4th DCA 2000)); see also Falkner v. Amerifirst Fed. Savings and Loan Ass'n, 489 So. 2d 758, 759 (Fla. 3d DCA 1986).

4. Florida's appellate courts have applied this line of cases in mortgage foreclosure suits. For instance, in Gans v. Heathgate-Sunflower Homeowners Ass'n, Inc., the Fourth District held:

> [W]e hold that the face of this record reveals that the Association's service by publication was void. Where the service by publication is void on its face a reversal of the order of sale will defeat the title of the non-party who purchases the property in good faith at the judicial sale.

593 So. 2d 549, 552-53 (Fla. 4th DCA 1992); see also Montero v. Duval Fed. Savings and Loan Ass'n of Jacksonville, 581 So. 2d 938 (Fla. 4th DCA 1991).

5. Plaintiff may want this Court to believe that the passage of time since the entry of the Final Judgment somehow bars the relief requested herein. That is simply not so. To illustrate, in H & F Tires, supra, the Fourth District required that service be quashed, ruling:

> [I]n the instant case, H & F's nineteen-month delay in moving to vacate the default judgment is of no consequence in light of the fact that proper service of process on H & F was never effected.

981 So. 2d at 651; see also M.L. Builders ("the passage of time cannot make valid that which has always been void"); Del Conte ("the fact that appellant moved to vacate over one year after the

entry of judgment is irrelevant").

6. In light of these authorities, the initial inquiry before this Court is whether service upon Defendant was proper.

7. It is undisputed that Defendant was not personally served. As such, Plaintiff's attempts to legitimize service of process hinge on the validity (or lack thereof) of its service via publication.

8. Service by publication is strongly disfavored. Its requirements are technical, and, because it is disfavored, such service is strictly construed. See cases, infra. Here, Plaintiff failed to effectuate valid service for a myriad of reasons, any one of which would be sufficient to quash service.

9. First, Plaintiff failed to engage in a diligent search and inquiry of Defendant prior to resorting to service by publication.

10. In its Affidavit of Diligent Search, Plaintiff takes the position that it tried to serve Defendant but did not know where he resided. This assertion is patently false. On February 1, 2010 and again on July 30, 2010, Plaintiff sent Defendant overnight mail (as part of the ongoing dialogue between the parties about the alleged arrearages and a potential loan modification). Plaintiff sent these packages to 68 W 120th St. #2, New York City, New York, 10027 ("the New York Property"). See Exhibits "A" and "B" hereto. Moreover, as a matter of routine, Plaintiff sent the monthly payment coupons for the Mortgage to Defendant at the New York Property! Hence, when it wanted to communicate with Defendant, Plaintiff knew exactly what to do – it sent mail to his residence at the New York Property. Respectfully, it is patently ridiculous for Plaintiff to take the position that it did not know where Defendant resided for purposes of service of process when Plaintiff did not even try to serve Defendant at the address where it sent the

monthly mortgage payment coupons and correspondence regarding a loan reinstatement. Additionally, throughout this period of time, agents of the Plaintiff spoke with Defendant via phone on many occasions. At no time was the address of Defendant's residence ever an issue. At no time did Plaintiff indicate it was having trouble serving Defendant. Plaintiff and Defendant have communicated just fine.

11. Defendant lived at the New York Property as of February 1, 2010 (when this suit was filed) and all times thereafter.[1] Undoubtedly, given their ongoing communication and correspondence, Defendant knew as much. The assertion in the process server's affidavit that Defendant's address was unknown was patently false, as was the contention that Defendant's last known address was the Florida Property. In fact, Plaintiff knew the Florida Property was a rental property because it named unknown parties in possession at the Florida Property as Defendants in this case. Similarly, Plaintiff knew the Florida Property was vacant, and the affidavit says as much. There was plainly no basis for Plaintiff to resort to service by publication.

12. Plaintiff's own affidavit shows that the process server spoke with Defendant on his cellphone (917-439-4177) and "confirmed address" as the New York Property. In fact, Defendant was willing to set an appointment to meet with the process server and accept service, but, for reasons unknown to Defendant, the process server never followed up and never tried to personally serve Defendant. Quite simply, Plaintiff never attempted service on Defendant at the New York Property despite Defendant's willingness to accept service.[2] As a result, Defendant believed the lawsuit was on hold, dismissed, or not going forward, particularly since he was communicating with Plaintiff on a regular basis in an attempt to resolve the dispute. To wit,

[1] Defendant has lived at the New York Property for a number of years.

[2] It appears the process server called Defendant at his above-listed cellphone and reached a different person. However, he/she must have misdialed, because that number is and has been Defendant's phone number.

Defendant was trying to reinstate the mortgage, and given Plaintiff's representations, he believed he would be able to do so.

13. As Plaintiff knew where Defendant resided, Plaintiff was not permitted to resort to service by publication. As the Fifth District explained earlier this year:

> The unrebutted sworn statements indicate that the appellees knew precisely where Mr. Garnett lived because they had visited with him in his house and because he had twice previously been served at the same address listed for him in the summons. The attorney for the appellees (who, incidentally is not the appellate counsel for the appellees), knew that Mr. Garnett was in Florida because he spoke to him by phone and sent him correspondence. Reliance on the single return of process under the facts of this case could not possibly support the diligent search requirement.

Miller v. Partin, 31 So. 3d 224 (Fla. 5th DCA 2010); Redfield Investments, A.V.V. v. Village of Pinecrest, 990 So. 2d 1135 (Fla. 3d DCA 2008); Godsell v. United Guar. Residential Ins., 923 So. 2d 1209 (Fla. 5th DCA 2006); M.C. v. A.H., 745 So. 2d 396 (Fla. 4th DCA 1999); Gans, supra.

14. Plaintiff may want this Court to believe that service is valid because Defendant knew Plaintiff was attempting to effectuate service. Factually, that is simply not true, but even if it were, such an argument lacks merit. See Bedford Computer Corp. v. Graphic Press, Inc., 484 So. 2d 1225 (Fla. 1986).

15. The Affidavit of Diligent Search does not contain the address of the New York Property. As such, for that reason alone, the Final Judgment is void and service by publication should be quashed. See Gans, surpa.

16. The Notice of Action was never mailed to Defendant at his New York Property, but was instead mailed to the Florida Property, an address everyone knew the Defendant did not reside. As a result, Defendant never received the Notice of Action and never had notice that this lawsuit was proceeding. Absent compliance with Fla. Stat. 49.12, service of process should be

quashed. See Tindal v. Varner, 667 So. 2d 890 (Fla. 2d DCA 1996).

17. In Count One of the Complaint, Plaintiff seeks a deficiency judgment against Defendant, in his personal capacity (as opposed to merely an *in rem* claim for relief). It is axiomatic that service by publication cannot be used when such relief is sought. See Fla. Stat. 49.011; see also Ake v. Chancey, 13 So. 2d 6 (Fla. 1943). This is yet another reason why service must be quashed and the Final Judgment vacated.

18. Additionally, Defendant never received notice of the hearing at which the Final Judgment was entered or the Final Judgment itself. In fact, Defendant received none of the filings in this case whatsoever, as they were all mailed to the Florida Property, where he did not reside. Defendant was plainly entitled to service copies of these documents, absent which the Final Judgment is void. See Polani v. Payne, 654 So. 2d 202 (Fla. 4th DCA 1995).

19. Moreover, by not receiving notice, Defendant lost his right to pay the arrearages prior to the foreclosure sale as well as his right of redemption post-foreclosure. This requires reversal. See Deluxe Motel, Inc. v. Patel, 770 So. 2d 283 (Fla. 5th DCA 2000).

20. The Complaint fails to state a cause of action. See Defendant's Motion to Dismiss Complaint. Under well-established law, a Final Judgment may not be entered, even via default, based on a Complaint that does not state a cause of action. See Magnificent Twelve, Inc. v. Walker, 522 So. 2d 1031 (Fla. 3d DCA 1988).

21. Plaintiff seeks relief against unknown parties but makes no attempt to comply with Fla. Stat. 49.071. This failure alone requires the relief requested herein.

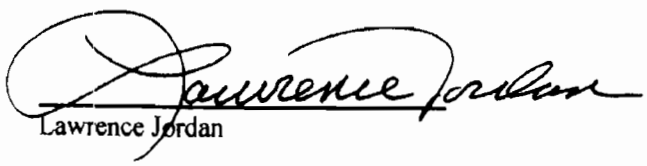
22. Even if this Court somehow concludes that service of process was not insufficient, it should vacate the default and Final Judgment against Defendant and allow him a chance to defend on the merits. After all, Florida law overwhelmingly prefers the adjudication

of lawsuits on their merits. Here, Defendant did not know this case was being prosecuted (excusable neglect), and he has meritorious defenses to the Complaint, including lack of standing, unclean hands, failure to state a cause of action, waiver, estoppel, failure to satisfy conditions precedent.

WHEREFORE Defendant respectfully requests that this Court quash service on him, vacate the Final Judgment of Foreclosure, quash the Certificate of Sale and Certificate of Title, and grant such other and further relief that this Court deems proper.

VERIFICATION

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



Lawrence Jordan

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Vivian J. Elliott, Shapiro & Fishman, 10004 N. Dale Mabry Highway, Suite 112, Tampa, FL 33618 on this 12th day of November, 2010.

for Mark P. Stopa, Esquire
FBN: 550507
STOPA LAW FIRM
2202 N. Westshore Blvd.
Suite 200
Tampa, Florida 33607
Telephone: (727) 667-3413
ATTORNEY FOR DEFENDANT
Philip Healy
Bar # 0071953

ORIGIN ID: JGQA 18774221761
HOME RETENTION GROUP
CHLGENFDR
9700 BISSONNET STREET
SUITE 1500
HOUSTON, TX 77036
UNITED STATES US

SHIP DATE: 30JUN10
ACTWGT: 0.1 LB
CAD: 5757449/WSXI2250

BILL THIRD PARTY

TO LAWRENCE JORDAN

68 W 120TH ST # 2

NEW YORK NY 10027
(917) 439-4177 REF: ORDERID: 2698278
INV:
PO: DEPT:

FedEx. Express

THU - 01 JUL A2
STANDARD OVERNIGHT

TRK# 0201 7936 8420 7624

10027
NY-US
EWR

XA JREA

508G1/9807/9A24

CHLGENFDR_06242010A

IF UNDELIVERABLE : RTSS04

Home Loans

Bank of America

"A"

Bank of America

Home Loans
Special Loan Servicing, CA6-914-01-4
P.O. Box 10227
Van Nuys, CA 91410-0227

Notice Date: February 1, 2010

Account No.: 074326968

LAWRENCE JORDAN
68 W 120th St # 2
New York NY 10027-6308

Property Address:
1348 WEST 13TH STREET
JACKSONVILLE, FL 32209-0000

ADJUSTABLE RATE MORTGAGE (ARM) INTEREST RATE ADJUSTMENT NOTICE

IMPORTANT MESSAGE ABOUT YOUR LOAN

According to the terms of your Adjustable Rate Mortgage (ARM), your interest rate is scheduled for an adjustment on March 1, 2010. This is commonly referred to as the Change Date. This is the date that your new interest rate will become effective. This differs from the date that your payment will change (Payment Change Date) which is on the first monthly payment date after the Change Date.

HOW WE CALCULATE YOUR NEW MONTHLY PAYMENT:

Step 1: Determine your new interest rate

	Current	New
Loan Index	9250 %	3843 %
Margin	6.300 %	6.300 %
Total	7.2250 %	6.6843 %
Rounding	7.250 %	6.625 %
Actual Rate	8.450 %	8.450 %

Step 2: Determine new payment amount

We calculate the new monthly payment amount using the figures below:

New Interest Rate	8.450%
Anticipated Principal Balance *	$97,502.74
Remaining Term as of March 1, 2010	324 months
New Payment Amount:	$765.38
Payment Change Date: April 1, 2010	$765.38

If you have an escrow account, this notice does not address any changes to your escrow payment. Please refer to your monthly statement for information regarding your current escrow payment.

* Anticipated principal balance is the unpaid Principal that you are expected to owe at the Payment Change Date and is calculated based on the assumption that Principal and Interest payments will be remitted on payments due prior to the new payment effective date.

ADDITIONAL INFORMATION

- Changes in your interest rate are based on the 6 MONTH LIBOR INDEX

"B"