

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR MARION COUNTY, FLORIDA

SUNTRUST MORTGAGE, INC.,

Plaintiff,

Case No. 10-4843-CA-N

v.

ANGELA M. HAMILTON and ROGER A. HAMILTON, *et. al.*

Defendants,

**MOTION TO VACATE ORDER DENYING DEFENDANTS' MOTION TO
DISMISS AND MOTION TO DISQUALIFY TRIAL JUDGE**

Defendants, ANGELA HAMILTON and ROGER A. HAMILTON, 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 Robert W. Hodges (“the Judge”) and vacating the February 14, 2011 Order Denying Defendants’ Motion to Dismiss, and would show:

BACKGROUND

1. This is a mortgage foreclosure case.
2. On or about January 17, 2011, Defendants served their Motion to Dismiss Complaint (“Motion to Dismiss”).
3. Plaintiff did not file a response to the Motion to Dismiss nor did Plaintiff make any attempt to set the Motion to Dismiss for hearing. Quite simply, for whatever reason, Plaintiff chose not to prosecute this lawsuit.
4. On February 14, 2011, the Judge issued an Order, out of the blue, *sua sponte*, denying the Motion to Dismiss.
5. With all due respect, this Court’s procedure is way out of whack, unduly prejudicial, and shows the Judge to be hopelessly biased.

6. First off, the fact that the Judge has done anything at all *vis a vis* the Motion to Dismiss reflects his bias against Defendants. After all, since the filing of Defendant's Motion to Dismiss, Plaintiff has not prosecuted this lawsuit, as is Plaintiff's right and Plaintiff's decision. Respectfully, **when a Plaintiff chooses not to prosecute a lawsuit, it is not the Judge's role, as neutral arbiter, to file an Order, *sua sponte*, to advance the case towards judgment.** When a Plaintiff chooses not to prosecute a lawsuit, it is not the Judge's role to pick up with the prosecution of that lawsuit (where the Plaintiff left off). By entering the Order, and advancing this case towards judgment, the Judge has essentially taken it upon himself to prosecute Plaintiff's lawsuit. It's as if the Judge is saying "if the Plaintiff won't prosecute its lawsuit, I will. And I'll rule on the Motion to Dismiss quickly, without a hearing." Worse yet, it seems clear the Judge is doing so based on a personal agenda, i.e. his perceived backlog of foreclosure cases and the "goal" of removing such cases from his docket.

7. The Judge's conduct in prosecuting this case is particularly disturbing because of the nature of the case. Plaintiff is the party seeking relief. Defendant is seeking no relief. Where the Judge is advancing a case towards judgment, *sua sponte*, and the Plaintiff is seeking relief and the Defendant is not, it's clear the Judge is acting for the benefit of Plaintiff and the detriment of Defendant. Respectfully, these are not the actions of a neutral arbiter.

8. Compounding these concerns, the Judge did not even require that Plaintiff respond in any way to the Motion to Dismiss, therefore, the Motion to Dismiss was undisputed. For the Judge to rule against an undisputed Motion, without hearing and without Plaintiff being required to argue its position, shows the Judge's bias and strips Defendants of their rights to due process.

9. Notably, the Florida Supreme Court has the exclusive authority to create rules of

practice and procedure in all courts, a power expressly granted to it by Article V, Section II of the Florida Constitution. If the Florida Supreme Court's wanted to require or allow rulings on motions to dismiss without a hearing, that would be the Court's prerogative. The Court has not so acted, so this Court cannot, either, particularly in the absence of an Administrative Order.

WHEREFORE Defendants respectfully request that this Court enter an Order disqualifying the Honorable Robert W. Hodges from presiding over this cause and vacating the February 14, 2011 Order Denying Defendants' Motion to Dismiss.

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.

Angela M. Hamilton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Galina Boytchev, Esq., Ben-Ezra & Katz, P.A., 2901 Stirling Road, Suite 300, Fort Lauderdale, FL 33312 on this 2nd day of March, 2011.

Mark P. Stopa, Esquire

FBN: 550507

Philip J. Healy, Esquire

FBN: 0071953

STOPA LAW FIRM

2202 N. Westshore Blvd.

Suite 200

Tampa, FL 33607

Telephone: (727) 667-3413

ATTORNEYS FOR DEFENDANTS