IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, LAKELAND, FLORIDA

VELTON CORBETT,

Petitioner, L.T. Case No. 09-CA-061778

v. Case No.: 2D10-

WELLS FARGO BANK, N.A., as Trustee
For Soundview Home Loan Trust 2007-OPT1,
Asset-Backed Certificates, Series 2007-OPT1,

Respondent.
_____/

PETITION FOR WRIT OF PROHIBITION

Petitioner, Velton Corbett, by and through his undersigned counsel, petitions this Court for a Writ of Prohibition, precluding the Honorable R. Thomas Corbin ("the Judge") from presiding over Case No. 09-CA-061778, currently pending in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida ("the Case" or "Petitioner's lawsuit"), and as grounds would show:

BASIS FOR THIS COURT'S JURISDICTION

1. Petitioner moved to disqualify the Judge under Fla.R.Jud.Admin. 2.330. The Judge denied that motion. This Court has original jurisdiction under Fla.R.App.P. 9.030(b)(3) to enter a Writ of Prohibition.

NATURE OF THE RELIEF SOUGHT

2. Petitioner seeks a Writ of Prohibition from this Court, precluding the

Judge from presiding over the Case and directing that the case be re-assigned to a randomly-assigned judge.

BACKGROUND

3. On August 26, 2010, Petitioner served his Motion to Dismiss Respondent's Complaint for mortgage foreclosure. That motion remains pending, and Petitioner has yet to file an Answer. Appendix to Petition 1, 2.

4. On October 4, 2010, the Judge, acting *sua sponte*, entered an Order Setting Case for Docket Sounding, to take place on December 8, 2010. In this Order, the Judge directed that all attorneys be personally present (in person, not via phone). The Judge also ruled:

> THE COURT ON ITS OWN MOTION DETERMINES THIS CAUSE IS AT ISSUE AND READY TO BE SET FOR TRIAL. …
>
> **If this case is appropriate for a Motion for Summary Judgment, either party may Notice the Summary Judgment to be heard at the Docket Sounding.** Otherwise, the day and time certain for the start of trial will be determined at docket sounding. …
>
> All discovery shall be completed prior to the docket sounding. The conduct of discovery subsequent to the docket sounding shall be permitted only on the order of the Court for good cause shown and which will not delay the trial of this cause.

Appendix to Petition, 3 (capitalization and boldface in original).

5. The contents of this Order, and the circumstances in which it was entered, gave Petitioner a well-reasoned fear the Judge is not neutral and detached

and would not provide a fair hearing or trial. As such, Petitioner timely filed a Motion to Disqualify Trial Judge ("Motion" or "DQ Motion"). Appendix to Petition, 4.

6. The DQ Motion contains numerous legally sufficient grounds to disqualify the Judge, see Analysis, infra, yet the Judge denied the Motion as legally insufficient.[1] Appendix to Petition, 5. This timely Petition ensued.

PROCEDURAL REQUIREMENTS

7. Fla.R.Jud.Admin. 2.330 imparts several obligations on a litigant who seeks disqualification of a judge. Petitioner complied with all such requirements. First, Petitioner satisfied the timeliness requirement of Fla.R.Jud.Admin. 2.330(e) by filing the Motion on October 14, 2010, just three days after October 11, 2010 (when she learned of the facts that gave rise to the Motion). See Appendix to Petition 4, n.1. Second, the Motion complied with Fla.R.Jud.Admin. 2.330(c), as it alleged, in writing and under oath, the reasons the Judge should be disqualified, was mailed to the Judge, and included the undersigned's certification that the Motion was made in good faith. See Appendix to Petition 4. Hence, there was plainly no basis to deny the Motion on procedural grounds.

STANDARD OF REVIEW

[1] Apparently, this is the Judge's standard practice. See Case 2D09-1278 (granting a Petition for Writ of Prohibition where the Judge denied a Motion to Disqualify as legally insufficient in an unrelated case).

8. The issue before this Court is whether the DQ Motion presented legally sufficient grounds to disqualify the Judge. In other words, the issue is whether the Motion showed Petitioner's fear that he would not receive a fair trial or hearing because of specifically described prejudice or bias of the Judge. See Fla.R.Jud.Admin. 2.330(d). In adjudicating this issue, this Court should give no deference to the lower court's ruling, but should apply a *de novo* standard of review. See Chamberlain v. State, 881 So. 2d 1087 (Fla. 2004); Frengel v. Frengel, 880 So. 2d 763 (Fla. 2d DCA 2004).

ANALYSIS

9. The Motion presented numerous legally sufficient grounds for disqualification. For all of the following reasons, both individually and collectively, the Judge's Order to the contrary mandates this Court's issuance of a Writ of Prohibition.

10. First off, the underlying case was clearly not "at issue," as defined by Fla.R.Civ.P. 1.440, as the Motion to Dismiss was pending and Petitioner had not filed an Answer. See Bennett v. Continental Chemicals, Inc., 492 So. 2d 724 (Fla. 1st DCA 1986); Precision Constructors, Inc. v. Valtec Constr. Corp., 825 So. 2d 1062 (Fla. 3d DCA 2002) ("Failure to adhere strictly to the mandates of Rule 1.440 is reversible error. Accordingly, the judgment is vacated and the cause is remanded for a new trial.").

11. Nonetheless, the Judge set the underlying case for docket sounding, right after it was filed (as is his standard procedure in foreclosure cases), with an Order that says summary judgment will be entered or trial "will" be set. The Judge entered this Order even though the case was not "at issue," not ready for trial, and the Motion to Dismiss had yet to be adjudicated. Worse yet, the Judge did so *sua sponte*, without allowing the parties to be heard, and either without looking at the file or with complete disregard for the fact that the case was not "at issue."[2] Appendix to Petition, 4 ¶ 5.

12. Predetermining a legal ruling without letting the parties be heard is the epitome of unfairness and requires 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, 699 So. 2d 1123 (Fla. 4th DCA 1996). Here, the Judge predetermined that he "will" set a trial date at docket sounding, even without

[2] The DQ motion reflects that the Judge knew when a case is "at issue" under Fla.R.Civ.P. 1.440 because the undersigned has had hearings with the Judge about this issue in other cases. Hence, the Judge's conduct in entering the Order was not a mistake of law – it was an intentional disregard for the law or, alternatively, entry of an Order without having looked at the file. Appendix to Petition, 4. That sounds harsh, but, respectfully, there is no other explanation. Quite simply, if the Judge looked at the file, he would have seen the case was not "at issue," so his entry of the Order was either a result of (i) his not looking at the file; or (ii) his finding the case to be "at issue" when he knew it was not. This Court may think an honest mistake was also possible, but, respectfully, this has happened too many times for it to be an innocent mistake. The Judge is entering these Orders in all foreclosure cases, either without looking at the files or without caring that the case is not actually "at issue."

letting Petitioner be heard. Appendix to Petition, 3, 4. This was grossly unfair and reflected his obvious bias.

13. As Petitioner's Motion to Dismiss is pending, it was (and still is) entirely plausible that the Complaint does not state a cause of action and that Respondent cannot state a cause of action even upon amendment. By saying he "will" set trial at the docket sounding on December 8, the Judge was obviously disregarding this possibility, proving his obvious predetermination to deny the Motion to Dismiss. This may sound harsh, but if the Judge were open-minded about the possibility of granting the Motion to Dismiss, there is no way he would have set a trial at a docket sounding on December 8, 2010 (or imposing a discovery cutoff of that same date). After all, trials do not take place (and are not set) on cases where the complaint does not state a cause of action.

14. Similarly, it seems difficult to envision how the Judge was open-minded about the possibility of granting the Motion to Dismiss without prejudice, and with leave to amend, when he imposed such a quick discovery cut-off. To illustrate, how was Petitioner supposed to obtain discovery prior to December 8, 2010 on an Amended Complaint that has yet to be filed? Unfortunately, the Judge did not envision an Amended Complaint as a plausible outcome, as he clearly intended to deny the Motion to Dismiss, require a grossly abbreviated discovery schedule, and either grant summary judgment or set trial. Appendix to Petition, 4.

Again, the Judge had prejudged that summary judgment would be granted or trial would be set, obviously foregoing the possibility of a dismissal.

15. Another significant aspect of the Order that troubled Petitioner was how the Judge bent over backwards to provide a hearing date on a motion for summary judgment for Respondent even when Respondent had not filed a motion for summary judgment and had not requested a hearing. Respectfully, if Respondent wants to prosecute the underlying case, that is its obligation, not the Judge's.[3] In other words, prosecuting a lawsuit is the plaintiff's obligation, not the judge's role. See Chillingworth v. State, 846 So. 2d 647 (Fla. 4th DCA 2003) ("When … the court transforms itself into one of the litigants, it creates a well-rounded fear that a party will not be dealt with in a fair and impartial manner."). By putting his own desires to prosecute this case above all else, essentially injecting himself as a participant in the proceedings by causing the case to be prosecuted, the Judge has shown he is not neutral and detached. Disqualification was required.

16. Third, Petitioner found it grossly prejudicial that the Judge set a hearing to adjudicate a summary judgment motion even though Respondent had

[3] This is why, for instance, the Florida Supreme Court has a rule about lack of prosecution. In fact, taking the Judge's conduct to its logical extreme, no foreclosure defendant can ever get a dismissal for lack of prosecution because the Judge is so intent on prosecuting foreclosure cases for plaintiffs.

not even filed such a motion. From Petitioner's perspective, it seemed the Judge was suggesting to Respondent's counsel to file such a motion in this case (and have it heard at the docket sounding). Respectfully, that should not happen.[4]

17. Perhaps Respondent did not believe this to be a case where summary judgment was appropriate or permissible. By suggesting otherwise, and setting a hearing on a yet-to-be-filed dispositive motion, the Judge gave "tips" or "suggestions" to Respondent which are legally impermissible and mandate disqualification. See Shore Mariner Condo. Ass'n, Inc. v. Antonious, 722 So. 2d 247 (Fla. 2d DCA 1988) ("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) ("we conclude the trial judge's suggestions to Respondent's counsel caused Petitioners to have a well-rounded fear that they would not receive a fair trial"); Chastine v. Broome, 629 So.

[4] To illustrate, imagine if judges started *sua sponte* setting docket soundings and summary judgment hearings in every personal injury case – insurance defense attorneys and the insurance defense industry as a whole would be up in arms! Foreclosure cases should be no different.

2d 293 (Fla. 4th DCA 1993).

18. Fourth, Fla.R.Jud.Admin. 2.530 requires that phone appearances be granted for hearings of 15 minutes or less absent "good cause." Here, Petitioner and the undersigned were not even permitted to request a phone appearance (an option they wanted to avail themselves of, if they so chose, 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. Clearly, the Judge has prejudged the merits of this issue, without giving Petitioner a chance to be heard, in an attempt to "push through" this foreclosure case. This predisposition, and the absence of due process, required that the DQ Motion be granted. See cases, supra.

19. To the extent it is the Judge's procedure to not allow phone appearances in foreclosure cases, that does not fix the problem; in fact, it compounds it. Almost every other judge in Florida permits phone appearances, which are required for hearings of 15 minutes or less under Fla.R.Jud.Admin. 2.530 absent "good cause." To systematically conclude there is always "good cause" to prevent phone appearances in foreclosure cases, or to simply ignore the Rule altogether, reflects the bias of which Petitioner complains.[5] Quite simply, the

[5] The ability of the undersigned to appear by phone in appropriate circumstances is important in foreclosure cases, as it helps curb expenses and makes representation

Judge should not be permitted to systematically deny telephone appearances in foreclosure cases merely because they are foreclosure cases.[6]

20. Fifth, the Judge set a discovery cutoff of December 8, 2010, giving Petitioner grossly inadequate time to conduct discovery (without giving Petitioner a chance to be heard on the issue). Viewing this ruling in the context of the Order and the case as a whole, it seems clear the Judge is not permitting Defendant to conduct discovery because he believes there is no discovery that could change the outcome, i.e. a foreclosure judgment. Respectfully, Petitioner should entitled to a fair chance to conduct discovery. At minimum, Petitioner should be afforded an opportunity to be heard on the length of time necessary to complete discovery (before the Judge requires such a brief discovery schedule). Giving Petitioner less than two months to complete discovery, via a *sua sponte* ruling entered without notice or hearing, reflects the extent of the Judge's bias. It's as if the Judge is saying "this is just another foreclosure case – there's nothing Petitioner can say that will matter; there's nothing Petitioner can find in discovery that will matter."

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possible for homeowners who may not otherwise be able to afford it. It seems the Judge knows this and is going out of his way to make it harder for homeowners such as Petitioner to retain counsel.

[6] The undersigned has participated in phone hearings in foreclosure cases in numerous counties in Florida, including Hillsborough, Pinellas, Manatee, Sarasota, Highlands, Hernando, Pasco, Broward, Dade, Volusia, and Broward. There is no "good cause" for Lee County to systematically preclude phone appearances in foreclosure cases.

Respectfully, Petitioner is facing a foreclosure on his home. He deserves better. He is entitled to a fair chance to defend, just like any other litigant. He is entitled to a fair chance to obtain discovery, just like any other party.[7]

21. The foregoing reasons, individually and collectively, show that the Judge would not afford Petitioner a fair hearing or trial. Disqualification was required.

ANALYSIS: THE BIG PICTURE

22. The undersigned represents hundreds of Florida homeowners throughout various counties in Florida and has been a litigator for nearly a decade. Appendix to Petition, 4. With all due respect, the undersigned has never seen anything like the procedures utilized in this case. The Judge *sua sponte* set a docket sounding in a case that Respondent was not prosecuting, did not clear the date yet refused to let out-of-town counsel appear by phone, gave two months for Petitioner to complete discovery, and announced summary judgment would be entered or trial set, even though the Motion to Dismiss was outstanding, without giving Petitioner a chance to be heard. On these facts, it is clear the Judge has an agenda, presumably pushing through the perceived backlog of foreclosure cases.

[7] Obtaining discovery in foreclosure cases tends to be brutally difficult. Banks systematically stonewall the undersigned in his discovery requests, even as they push for summary judgment. The difficulty in obtaining discovery makes the Judge's two-month period to complete discovery all the more unfair.

Whatever the reason, where a judge's personal agenda is such that he engages in these actions, he is no longer acting as a neutral and detached judge. Disqualification was required, and the Judge erred in ruling otherwise.

23. The situation here, though, is far bigger than just this case. As the DQ Motion reflects, the procedures employed by the Judge in this case are employed systematically by all judges in Lee County in all foreclosure cases. In other words, the issues presented herein are present in thousands of foreclosure cases in the Twentieth Judicial Circuit. Appendix to Petition, 4. Respectfully, that must change.

24. The undersigned is not oblivious to the volume of cases before circuit court judges and the unprecedented procedural steps being invoked to timely adjudicate those cases. That said, the procedures used in Lee County are, respectfully, over the line. To set docket soundings at the inception of a case, regardless of whether the case is at issue, and say that summary judgment will be granted or trial "will" be set is, respectfully, extremely inappropriate. The fact that these procedures are being employed on a systematic basis in foreclosure cases makes it even more troubling. What is the message the judges are sending to litigants and the public at large in Lee County? "We'll bend the rules and ignore the law because these are *just* foreclosure cases." "No big deal – they're just foreclosure cases."

25. Other Florida counties are dealing with a similar volume of foreclosure cases, yet the Twentieth Judicial Circuit is the only circuit in Florida, to the best of the undersigned's knowledge, that applies these procedures.[8] To wit, no other circuit *sua sponte* sets a docket sounding right after a case is filed, with a two-month discovery cut-off, for the purpose of granting summary judgment or setting trial, all without letting the parties be heard. This Court should not only grant the Petition, it should issue a written opinion explaining that these procedures are inappropriate and should be changed in all foreclosure cases. To the extent this Court believes such a ruling would be outside the scope of the instant Petition, this Court should, at minimum, give a written opinion explaining that the Twentieth Judicial Circuit's use of such procedures gives homeowners a well-rounded fear that the judge is not neutral and detached (and, to the extent the procedure is not changed, could prompt well-taken motions to disqualify on a widespread basis).

CONCLUSION

Petitioner alleged numerous grounds to disqualify the Judge, any one of which should have been sufficient to require that the Motion be granted. Applying a *de novo* standard of review, this Court should issue a Petition for Writ of

[8] The undersigned has represented homeowners in foreclosure cases in Hillsborough, Pinellas, Manatee, Sarasota, Polk, Orange, Osecola, Brevard, Volusia, Seminole, Hernando, Broward, Palm Beach, Dade, Duval, Highlands, Charlotte, and Collier (and perhaps others). None of these counties utilize a procedure anything like the docket-sounding Orders being entered in Lee.

Prohibition and direct that the Case be re-assigned to a randomly-assigned judge. In so ruling, this Court should issue a written opinion explaining that the Twentieth Judicial Circuit's procedure of issuing an Order setting a docket sounding in all foreclosure cases, right after they are filed and regardless of whether the case is actually "at issue," is inappropriate.

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 R. Thomas Corbin, Lee County Justice Center, 1700 Monroe Street, Fort Myers, FL 33901 and Craig T. Smith, Esq., Shapiro & Fishman, LLP, 10004 N. Dale Mabry Highway, Suite 112, Tampa, FL 33618 on this 24th day of November, 2010.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the instant Petition complies with the font requirements of Fla.R.App.P. 9.100(l).

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Mark P. Stopa, Esquire