

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

THE BANK OF NEW YORK, AS TRUSTEE FOR
TBW MOTGAGE-BACKED PASS-THROUGH
CERTIFICATES, SERIES 2006-2,

Plaintiff,

Case No. 10-CA-06966

v.

Division: C

MICHAEL J. LAFALCE, *et. al.*

Defendant,

_____ /

MOTION TO DISQUALIFY COUNSEL

Defendant, MICHAEL J. LAFALCE (“LAFALCE”), by and through his undersigned counsel, moves this Court for entry of an Order disqualifying Jessica Conte, Esquire, and the law firm of Shapiro & Fishman, LLP (collectively “Shapiro”) from representing Plaintiff in this case, and would show:

1. Plaintiff has initiated this lawsuit for mortgage foreclosure, yet LAFALCE never signed a Note and Mortgage with Plaintiff. The Mortgage upon which this lawsuit is based reflects that it was entered in favor of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. (“MERS”), as Nominee for Taylor, Bean & Whitaker Mortgage Corp. The Note was entered in favor of Taylor, Bean & Whitaker Mortgage Corp., not Plaintiff. As such, it is axiomatic that Plaintiff’s standing to bring this lawsuit is predicated on an alleged Assignment of Mortgage.

2. Florida’s appellate courts have, for lack of a better term, begun “cracking down” on banks *vis a vis* these Assignments of Mortgage. To illustrate, on February 12, 2010, the Second District reversed a summary judgment of foreclosure where the plaintiff bank did not

show a proper assignment of mortgage. See BAC Funding Consortium, Inc. v. Jacques, Case No. 2D08-3553 (Fla. 2d DCA 2010). This ruling comes on the heels of the Florida Supreme Court's recent rule change requiring that all mortgage foreclosure lawsuits be executed under oath. Suffice it to say that Florida courts are increasingly concerned about Assignments of Mortgage and ensuring that the correct bank has filed suit for foreclosure.

3. In the case at bar, the Plaintiff attaches to its Complaint an Assignment of Mortgage which is signed by Michelle Halyard, ostensibly as an agent of MERS. See Exhibit "A" hereto.

4. The legitimacy of the Assignment is very much in question. Quite frankly, it seems clear the Assignment was not executed by Ms. Halyard in the ordinary course of business, as required, but was fraudulently executed by Plaintiff in a fraudulent attempt to "push through" this mortgage foreclosure case.

5. LAFALCE and the undersigned realize that is a serious allegation. As such, they invite this Court to take a look at Exhibit "A" hereto. Even an initial, cursory review of the Assignment calls into question its legitimacy. First, it was executed on March 4, 2010 and recorded on March 23, 2010, long after Taylor, Bean & Whitaker Mortgage Corp. had filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code on August 24, 2009. Under black-letter law, the Assignment is a nullity given the pending bankruptcy. Second, the Assignment was "prepared by" and to be "returned to" Shapiro. Third, instead of identifying the address of MERS as required by Fla. Stat. 695.26(1)(a) and (f), the assignor, the Assignment lists Shapiro's name and address in MERS' place. Finally, but perhaps most troubling, the Assignment reflects that it was executed by Michelle Halyard, purportedly as an agent of MERS, yet Ms. Halyard also signed the verification of the Complaint on behalf of Plaintiff. See

Complaint at page 4 and Exhibit “A” hereto.

6. These facts, viewed in conjunction with one another, raise serious questions. For example, if the Assignment was a legitimate business transaction, and Plaintiff obtained a legitimate Assignment of Mortgage from MERS, then why did Shapiro, Plaintiff’s counsel in this case, prepare the Assignment? Why is Shapiro’s address listed in place of the assignor’s address? Why was it signed by the same person who signed the Complaint on Plaintiff’s behalf? Why was the Assignment entered after the original “holder” of the Note filed for Bankruptcy and in violation of the automatic stay imposed under 11 U.S.C. § 362?

7. Depending on the response interposed to this motion, more discovery on these issues may be necessary. At this point, though, the answer to these questions seems clear. It seems **Plaintiff retained Shapiro to file this foreclosure case and that, upon being retained, Shapiro realized that no Assignment of Mortgage had ever been executed or recorded. Realizing that Taylor, Bean & Whitaker Mortgage Corp. could not sign an Assignment as it had filed for bankruptcy protection and where subject to the automatic stay requirement by 11 U.S.C. § 362, Shapiro drafted the Assignment and caused Plaintiff’s own employee to sign it in an attempt to “push through” this mortgage foreclosure case.**¹ In other words, it seems that Plaintiff and Shapiro have created, executed, and recorded a fraudulent assignment and is relying on this Assignment as the basis for standing to sue LAFALCE in this case. See Motion to Strike Complaint as a Sham and for Sanctions for Fraud on the Court.

8. Plaintiff and Shapiro may not agree with these facts. At this point, though, the issue is not whether LAFALCE can unequivocally prove that the Assignment is fraudulent. Said issue is for another day, i.e. a hearing on a motion for sanctions for fraud on this Court. Rather,

¹ Shapiro’s own website reflects that it has four employees who act as “assignment processors.”

the issue at bar is whether Shapiro should be permitted to remain as Plaintiff's counsel in this case. For the reasons set forth herein, Shapiro should be disqualified.

9. Rule 4-1.7(a), R.Reg.Fla.Bar, provides:

A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and (2) each client consents after consultation.

10. Rule 4-1.7(b), R.Reg.Fla.Bar, provides:

A lawyer shall not represent a client if the lawyer's exercise of professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.

11. Shapiro's conflict of interest is obvious. As the pleadings reflect, Shapiro is acting as counsel for Plaintiff, contrary to the interests of MERS. This is clearly evident given the liability MERS may face as the result of signing an Assignment in violation of the automatic stay imposed as the result of Taylor, Bean & Whitaker Mortgage Corp.'s filing for bankruptcy protection. Incredibly, Shapiro is Plaintiff's counsel in this case even though it has already acted as counsel for MERS in this very dispute! **It is fundamental that the same law firm cannot represent a plaintiff and a defendant in the same case.**

12. While MERS may not currently be a Defendant in this case, it is clear from the facts of this case that MERS is an indispensable party to this matter and must be added to the Complaint.

13. Shapiro may dispute its representation of MERS, but there is no other explanation for why Shapiro prepared the Assignment and inserted its own name and address in place of MERS' address or why the officer of MERS listed on the Assignment would also verify

Plaintiff's Complaint as an agent of Plaintiff. In other words, if Shapiro was not representing MERS in this case, then why did it prepare the Assignment (for MERS to sign), insert its address (in place of MERS' address) on the Assignment and have Plaintiff's employees sign the Assignment? Notably, Shapiro is counsel of record for MERS in many other, active cases in this State, including, for example, Hillsborough County Case Number 2009-CA-6578. As such, Shapiro's status as counsel for Defendant, MERS is not reasonably in dispute.

14. Shapiro's conflict is not only a textbook violation of Rule 4-1.7, it calls into serious question the fair administration of justice. For example, if a foreclosure is permitted, where does that leave LAFALCE if MERS or Taylor, Bean & Whitaker Mortgage Corp. (and/or any Trustee appointed in the bankruptcy case) file legal proceedings relating to the Note and Mortgage in the future? Or the then-owner of the subject property (a bona-fide purchaser in good faith for fair value)? Or the title insurance company that writes title insurance based on the title that is derived from a foreclosure on the subject property (if a foreclosure is allowed)?

15. Under a myriad of Florida cases, the conflict of interest by which Shapiro is operating, coupled with the affect that conflict is having on the administration of justice, requires its disqualification as counsel. See State Farm Mut. Auto. Ins. Co. v. K.A.W., 575 So. 2d 630 (Fla. 1991); Koulisis v. Rivers, 730 So. 2d 289 (Fla. 4th DCA 1999); Campbell v. American Pioneer Savings Bank, 565 So. 2d 417 (Fla. 4th DCA 1990).

16. The Campbell decision is particularly apt, as it required disqualification of attorney who represented a defendant regarding her interest in property and later tried to represent the plaintiff who sued for mortgage foreclosure on that property. 565 So. 2d 417.

17. To the extent Shapiro disagrees with the facts set forth herein, this Court cannot simply accept Shapiro's version of events as true. Rather, in that event, an evidentiary hearing is

required. See School Bd. of Broward County v. Polera Building Corp., 722 So. 2d 971 (Fla. 4th DCA 1999).

18. LAFALCE has not encountered many Florida cases that evaluate a motion to disqualify counsel on facts like those herein. After all, only in recent years have banks and their lawyers begun drafting assignments in mass quantities in an attempt to “push through” foreclosure suits. Other jurisdictions, however, have begun catching on to these unseemly tactics. One New York court, for example, after discussing problems with an assignment of mortgage similar to those set forth above, ruled:

Even if [plaintiff] is able to cure the assignment defect, plaintiff’s counsel then has to address the conflict of interest that exists with his representation of both the assignor of the instant mortgage, MERS as nominee for HSBC Mortgage, and the assignee of the instant mortgage, HSBC. ...

HSBC Bank USA, N.A. v. Vazquez, 2009 N.Y. Slip. Op. 51814 (2009); see also Bank of N.Y. v. Mulligan, 2008 N.Y. Slip. Op. 31501 (2008) (“The Court is concerned that [the person who signed the assignment] may be engaged in a subterfuge, wearing various corporate hats...”); Deutsche Bank National Trust Co. v. Castellanos, 2008 N.Y. Slip. Op. 50033 (2008) (“If he is a Vice President of both the assignor and the assignee, this would create a conflict of interest and render the July 21, 2006 assignment void.”); HSBC Bank, N.A. v. Cherry, 2007 N.Y. Slip. Op. 52378 (2007) (“The Court is concerned that there may be fraud on the part of HSBC, or at least malfeasance. Before granting an application for an order of reference, the Court requires an affidavit from [the person who signed the assignment] describing his employment history for the past three years.”).

19. As if Shapiro’s conflict of interest is not bad enough, the problems do not end there. The propriety of the Assignment is a huge issue in this case. It will be a feature at trial and pre-trial discovery. The obvious problem is that testimony and discovery concerning these

Assignments is not possible without involving Shapiro. After all, Shapiro prepared the Assignment, caused Plaintiff's employees to sign the Assignment and are necessary witnesses regarding its propriety. That is unfortunate, but that is the situation that Shapiro created when it prepared the Assignment, allowed Plaintiff's employee to sign the Assignment and put its name and address in place of MERS on the Assignments. Were Shapiro to try to claim that it was unaware that Plaintiff's employee signed the Assignment, this would be disingenuous at best as the same person verified Plaintiff's Complaint.

20. The situation here is similar to that presented to the First District in Live and Let Live, Inc. v. Carlsberg Mobile Home Props., Ltd., 388 So. 2d 629 (Fla. 1st DCA 1980). In that case, plaintiff's attorney was the escrow agent for the real estate transaction upon which the lawsuit was based. What he knew or was told at closing was relevant at trial. Id. Deeming him a "central figure in the lawsuit," the First District required his disqualification. Id. In so ruling, the court cited ethical considerations promulgated by the Florida Supreme Court in In Re Integration Rule of The Florida Bar, 235 So. 2d 723 (Fla. 1970), including DR 5-102, which provides:

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial. (B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

21. The situation here is analogous. Shapiro will be a central figure at trial. There is no way to litigate this case without Shapiro's testimony regarding the circumstances in which the Assignment was entered.

22. Shapiro may not like this outcome, but it put itself in this position. This is not one

of those cases where a party wants to call opposing counsel on an immaterial issue just to generate a disqualification. Shapiro chose to represent MERS and Plaintiff in the same case, draft the Assignment, allow Plaintiff's employees to sign the Assignment and put its name/address on the Assignment in place of MERS, all before LAFALCE ever knew about this lawsuit. Shapiro chose to make itself a central figure in this case. It must now reap the consequences.

23. Notably, this case is still in its early stages. Defendant's Motion to Dismiss has yet to be heard. As such, there is no reason that Plaintiff cannot procure a different attorney (who lacks a conflict of interest and will not have to testify). Other parties should not be prejudiced by Shapiro's conflict where a different attorney can be procured.

24. In light of the foregoing, Jessica Conte, Esquire and the law firm of Shapiro & Fishman, LLP have an irreconcilable conflict of interest, having represented both Plaintiff and Defendant on the matters at issue in this case. As such, Shapiro should be disqualified. Additionally or alternatively, because Shapiro is a "central figure" in this litigation, the case cannot proceed with it acting as counsel.

WHEREFORE LAFALCE respectfully requests an Order disqualifying Shapiro & Fishman, LLP from acting as counsel for Plaintiff in this cause.

VERIFICATION

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

Michael J. LaFalce, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Jessica Conte, Esq., Shapiro & Fishman, LLP, 10004 N. Dale Mabry Highway, Suite 112, Tampa, Florida 33618 on this ____ day of May, 2010.

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