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

REGIONS BANK,

CASE NO. 09-10248-CI-13

PLAINTIFF,

v.

**PATRICK J. HANKINSON
and KAREN HANKINSON**

DEFENDANT.

_____/

NOTICE OF APPEARANCE

COMES NOW, the Defendants PATRICK J. HANKINSON AND KAREN HANKINSON by and through undersigned counsel MATTHEW D. WEIDNER, and hereby requests that their attorney of record be listed as

MATTHEW D. WEIDNER
Attorney for Defendants
1229 Central Avenue
St. Petersburg, Fl. 33705
(727)894-3159
Bar No.: 185957

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 26th day of February, 2010 to PREMLATA SANCHEZ, Ben-Ezra & Katz, P.A., 2901 Stirling Road, Suite 300, Ft. Lauderdale, FL 33312.

By: _____
MATTHEW D. WEIDNER
Attorney for Defendant
1229 Central Avenue
St. Petersburg, FL 33705
(727) 894-3159
FBN: 018595

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DEFENDANT'S MOTION TO SET ASIDE AND VACATE FINAL JUDGMENT OF FORECLOSURE

COMES NOW, the Defendants PATRICK J. HANKINSON AND KAREN HANKINSON (hereinafter "Defendants"), by and through the undersigned counsel MATTHEW D. WEIDNER, and files this VERIFIED MOTION TO SET ASIDE AND VACATE FINAL JUDGMENT OF FORECLOSURE in the above entitled civil action, pursuant to Fla. R. Civ. Pro. 1.540(b), and in support states as follows:

FACTS

1. This is an action for foreclosure of real property owned by the Defendants initiated when REGIONS BANK (hereinafter "Plaintiff") initiated its Complaint on June 10, 2009.

2. The Defendants provided correspondence to the Plaintiff's attorney advising them that the Defendants were in active communication with the Plaintiff regarding this case and reasonably believed that this active communication prevented them from having to formally respond to the instant lawsuit.

3. The Defendants reasonably believed, based upon their communication with the Plaintiff or its agents, that the case would be resolved outside of a formal legal process. Although the

Plaintiff's attorney have incorrectly characterized such communication as a *Pro-Se* Answer, filed on July 30, 2009, such correspondence amounts to nothing more than a loss mitigation letter merely reflecting the communication between the Plaintiff and the Defendants outside the scope of the instant litigation.

I. THE PLAINTIFF FAILED TO PROPERLY PLEAD ANY GROUNDS FOR RELIEF BASED UPON THE DOCUMENTS AND EVIDENCE SUBMITTED

4. The Defendant, in Count II of its Complaint, plead to reestablish the alleged Promissory Note purportedly filed by the Defendants, "so that the copy filed herein will have the effect of the original document."[1] *Emphasis added.* In truth no such copy of this alleged Promissory Note was attached to the Complaint.

5. In documents subsequently filed with the Court, the Defendants improperly asserted again that they had attached a copy of the alleged Promissory Note. *See* Affidavit of Lost Promissory Note, ¶4 ("[t]he copy of said Promissory Note attached to the Complaint is a true, correct and substantial copy of the lost or destroyed Promissory Note.) *Emphasis added.*

6. Notwithstanding this, and despite the fact that the Plaintiff never voluntarily dismissed Count II of its Complaint for Reestablishment of Promissory Note, the Plaintiff subsequently filed its Notice of Filing Original Note and the accompanying Original Note on October 2, 2009.

7. The "Original Note" described above, however, was actually a Credit Agreement and Disclosure document (hereinafter "Credit Agreement"), which allowed the Defendants a credit limit of $100,000.[2] Nowhere in the Credit Agreement was there any fixed sum for which the Defendants were unconditionally obligated to repay. The document attached is not a promissory note as defined by Florida Statutes 71.011 or 673.3091 and thus the document attached is not subject to re-establishment.

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[1] *See* Complaint, pg. 2.
[2] *See* Credit Agreement and Disclosure, pg 1.

II. THE CONTRACT ATTACHED TO PLAINTIFF'S COMPLAINT PROVIDES THAT ANY DISPUTES BETWEEN THE PARTYS MUST BE RESOLVED THROUGH ARBITRATION

8. In addition to the fact that the document attached is not a promissory note subject to the cause of action plead, the Credit Agreement contract that is provide includes an Arbitration of Disputes and Waiver of Jury Trial clause which, in pertinent part, reads that "any controversy, claim, dispute or disagreement (any "Claim") arising out of, in connection with or relating to [the Credit Agreement]...will be settled by binding arbitration under the Federal Arbitration Act ("FAA")."[3] *Emphasis added.* Nevertheless, no such arbitration was ever initiated or undertaken.

9. Accordingly, the Final Judgment of Foreclosure entered by this court on January 8, 2010 should be vacated and set aside.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION

I. Final Judgment should be Set Aside as the Court Did Not Have Jurisdiction to Hear this Matter.

a. Legal Standards

Fla. R. Civ. Pro. 1.540(b)(4) provides, in pertinent part, that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons:...(4) that the judgment or decree is void." Furthermore, "[a] motion to vacate a final judgment lies under Rule 1.540(b)(4) where the judgment is void for lack of jurisdiction or proper due process notice." Quick & Reilly, Inc. v. Perlin, 411 So. 2d 978, 989 (Fla. 3d DCA 1982). *See also* Gelkop v. Gelkop, 384 So.2d 195 (Fla. 3d DCA 1980); Saharuni v. Saharuni, 343 So.2d 674 (Fla. 2d DCA 1977); Osceola Farms Co. v. Sanchez, 238 So.2d 477 (Fla. 4th DCA 1970).

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[3] *See* Credit Agreement and Disclosure, pg 5.

With respect to arbitration, "[a] court must compel arbitration where an arbitration agreement and an arbitrable issue exists, and the right to arbitrate has not been waived." Miller & Solomon General Contractors, Inc. v. Brennan's Glass Co., Inc., 824 So.2d 288, 290 (Fla. 2d DCA 2002) (quoting Gale Group v. Westinghouse Elec. Corp., 683 So.2d 661, 663 (Fla. 5th DCA 1996)). Furthermore, "[w]hether there is a '[w]aiver of the right does not necessarily depend on the timing of the motion to compel arbitration, but rather on the prior taking of an inconsistent position by the party moving therefor.'" Id at 290 (quoting Paine, Webber, Jackson & Curtis, Inc. v. Fredray, 521 So.2d 271 (Fla. 5th DCA 1988) (which in turn cites Ojus Indus. v. Mann, 221 So.2d 780 (Fla. 3d DCA 1969) and King v. Thompson & McKinnon, Auchincloss Kohlmeyer, Inc., 352 So.2d 1235 (Fla. 4th DCA 1977))). Moreover, "waiver may occur as the result of active participation in a lawsuit." Id (quoting Hill v. Ray Carter Auto Sales, Inc., 745 So.2d 1136, 1138 (Fla. 1st DCA 1999)). *Emphasis added.* "All questions about waivers [of arbitration] should be construed in favor of arbitration rather than against it." Id (quoting Rath v. Network Mktg., L.C., 790 So.2d 461, 463 (Fla. 4th DCA 2001). Finally, in order to satisfactorily waive arbitration, a party must contest the merits of a claim. *See* Id at 291 ("a party who contests the merits of a claim 'waives the right to arbitration' ") (quoting Riverfront Properties, Ltd. v. Max Factor III, 460 So.2d 948, 952 (Fla. 2d DCA 1984)).

b. Argument

The Final Judgment of Foreclosure should be set aside and vacated because the Court did not have jurisdiction where the Credit Agreement called for arbitration and arbitration was not waived by the Defendant. The Credit Agreement expressly included an arbitration clause which, in pertinent part, read that "any controversy, claim, dispute or disagreement (any "Claim") arising out of, in connection with or relating to [the Credit Agreement]...will be settled by

binding arbitration under the Federal Arbitration Act ("FAA")."[4] *Emphasis added.* Furthermore, an arbitrable issue existed (specifically, the foreclosure of the Defendants' property) and the Defendants did not waive the right to arbitration.

The Plaintiff may argue that the Defendants' so-called *Pro Se* Answer acted as waiver of arbitration and may quote Riverfront Properties, Ltd., 460 So. 2d 948 (Fla. 2d DCA 1984) in which the Second District acknowledged that the filing of an Answer without asserting the right to arbitrate acts as a waiver. However here, unlike in Riverfront Properties, Ltd., no Answer was ever filed by the Defendants. The document filed with this court was nothing more than correspondence between the Defendants and the Plaintiff's attorney advising them that the Defendants were in active communication with the Plaintiff regarding this case and reasonably believed that this active communication prevented them from having to formally respond to the instant lawsuit. The Defendants never contested the merits of the Plaintiff's case and, therefore, they never waived their right to arbitration.

WHEREFORE, because this Court did not have jurisdiction to hear this matter, the Final Judgment of Foreclosure should be set aside pursuant to Fla. R. Civ. Pro. 1.540(b)(4).

II. Final Judgment should be Set Aside because the Plaintiff Mistakenly or Fraudulently Pled that the Credit Agreement was a Promissory Note when it, in fact, was Not and that the Plaintiff Attached a Copy to the Complaint.

a. Legal Standards

Fla. R. Civ. Pro. 1.540(b)(1) and (3) provide, in pertinent part that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;...(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." Intrinsic fraud is that

[4] *See* Credit Agreement and Disclosure, pg 5.

which is "related to 'fraudulent conduct that [arose] within [the] proceeding and pertain[ed] to the issues in the case that have been tried or could have been tried.' " Geer v. Jacobsen, 910 So.2d 391, 393 (Fla. 2d DCA 2005) (quoting Cerniglia v. Cerniglia, 679 So.2d 1160, 1163 (Fla.1996)). A motion to set aside a final judgment for intrinsic fraud, like a motion to set aside a final judgment for mistake, is subject to the one-year time limit imposed by Fla. R. Civ. Pro. 1.540(b), but extrinsic fraud, also known as fraud upon the court, is not subject to this restriction. Id at 393.

With respect to mortgage promissory notes, such documents are clearly negotiable instruments within the meaning of Fla. Stat. §673 *et seq.* (2006), which governs such instruments. *See* Perry v. Fairbanks Capital Corp., 888 So.2d 725, 727 (Fla. 5th DCA 2004) ("[a] [mortgage] promissory note is clearly a negotiable instrument within the definition of section 673.1041(1)"). The definition of negotiable instruments has been codified at Fla. Stat. §673.1041(1) (2006), which defines such instruments as

> an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order if it:
>
> (1) is payable to bearer or order at the time it is issued or first comes into the possession of a holder;
> (2) is payable on demand or at a definite time; *and*
> (3) does not state any other undertaking or instruction by the person promising or order payment to do any act in addition to the payment of money, but the promise or order may contain:
>
> - an undertaking or power to give, maintain, or protect collateral to secure payment;
> - an authorization or power to the holder to confess judgment or realize on, or dispose of, collateral; *or*
> - a waiver of the benefit of any law intended for the advantage or protection or a waiver of the benefit of any law intended for the advantage or protection of an obligor. *Emphasis added.*

Finally, the Fifth District, in Nagel v. Cronebaugh, 782 So. 2d 436 (Fla. 5th DCA 2001), held that a mortgage promissory note which did not provide for a fixed principal amount was not a negotiable instrument and therefore §673 *et seq.* did not apply because in order for an instrument to be declared a negotiable instrument it must contain an unconditional promise to pay a sum certain. Id at 439 (quoting United Nat'l Bank of Miami v. Airport Plaza Ltd. P'ship, 537 So. 2d 608, 609 (Fla. 3d DCA 1988)).

b. Argument

The Final Judgment of Foreclosure should be set aside and vacated because the Plaintiff mistakenly or fraudulently pled that the Credit Agreement was a promissory note when it was, in fact, not. The Credit Agreement allowed the Defendants a credit limit of $100,000.[5] In the Credit Agreement's own words: "[t]his Agreement covers a revolving line of credit for the principal amount of One Hundred Thousand & 00/100 Dollars ($100,000), which will be your "Credit Limit" under this Agreement."[6] *Emphasis added.* Thus, nowhere in the Credit Agreement was there any fixed sum for which the Defendants were unconditionally obligated to repay. Through pleading that the Credit Agreement was a Promissory Note, the Plaintiff was alleging that the Credit Agreement was a negotiable instrument within the scope of §673 *et seq.* However, because the Credit Agreement did not contain an unconditional promise to pay a fixed sum, it was not a negotiable instrument and therefore not a Promissory Note. Pleading that the Credit Agreement was a Promissory Note when it was not was either a mistake or intrinsic fraud committed by the Plaintiff which warrants setting aside and vacating the Final Judgment of Foreclosure.

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[5] *See* Credit Agreement and Disclosure, pg 1.
[6] Id.

Furthermore, the Final Judgment of Foreclosure should be set aside and vacated because the Plaintiff plead that it attached a copy of the alleged promissory note to its Complaint when it did not. The Defendant, in Count II of its Complaint, plead the Court to reestablish the alleged Promissory Note filed by the Defendants, "so that the copy filed herein will have the effect of the original document."[7] *Emphasis added.* However, no such copy of this alleged Promissory Note was filed with the Complaint. Moreover, in documents subsequently filed with the Court, the Defendants improperly asserted that they had attached a copy of the alleged Promissory Note when no such copy was in fact attached. *See* Affidavit of Lost Promissory Note, ¶4 ("[t]he copy of said Promissory Note attached to the Complaint is a true, correct and substantial copy of the lost or destroyed Promissory Note.) *Emphasis added.* Pleading that the alleged Promissory Note was attached to the Complaint when no such note was attached was either a mistake or intrinsic fraud committed by the Plaintiff which warrants setting aside and vacating the Final Judgment of Foreclosure.

Finally, because this Motion has been timely filed within the one-year time limits reserved for Motions to Set Aside Final Judgments because of mistake or intrinsic fraud, there is no issue of untimely filing. This Court entered its Final Judgment of Foreclosure on January 8, 2010, less than two months ago.

WHEREFORE, because the Plaintiff mistakenly or fraudulently pled that the Credit Agreement was a Promissory Note when it, in fact, was not, and because the Plaintiff mistakenly of fraudulently pled that a copy of the alleged Promissory Note was attached to its Complaint when no such copy was attached, the Final Judgment of Foreclosure should be set aside pursuant to Fla. R. Civ. Pro. 1.540(b)(1) or (3).

CERTIFICATE OF SERVICE

[7] *See* Complaint, pg. 2.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 26th day of February, 2010 to PREMLATA SANCHEZ, Ben-Ezra & Katz, P.A., 2901 Stirling Road, Suite 300, Ft. Lauderdale, FL 33312.

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