

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

CITIMORTGAGE, INC.,

Plaintiff,

Case No.: 09-25391

v.

Division: B

DEAN A. HORNER, *et al.*,

Defendants.

MOTION TO DISQUALIFY COUNSEL

Defendants, DEAN HORNER and NANCY HORNER (collectively, the "Horners"), by and through their undersigned counsel, move this Court for entry of an Order disqualifying Brandon Mullis, 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 the Horners never signed a Note and Mortgage with Plaintiff. The Note and Mortgage upon which this lawsuit is based reflect that they were entered in favor of Defendant, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as Nominee for First Security Mortgage Services, Inc. ("MERS"), not Plaintiff. As such, it is axiomatic that Plaintiff's standing to bring this lawsuit is predicated on an alleged Assignment of Mortgage from MERS to it.

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 Official Records of Hillsborough County, Florida reflect entry of two Assignments of Mortgage (hereinafter "the First Assignment" and "the Second Assignment"). The First Assignment, which reflects that it was executed on October 7, 2009 and recorded on October 20, 2009, purports to assign the mortgage from Plaintiff to Federal National Mortgage Association. See Exhibit "A." The Second Assignment, which reflects that it was executed on October 13, 2009 and recorded on October 23, 2009, purports to assign the mortgage from MERS, as Nominee for Federal National Mortgage Association, to Plaintiff. See Exhibit "B."

4. Ostensibly, Plaintiff predicates its claim to standing in this case on the Second Assignment. However, the legitimacy of that assignment is very much in question. Quite frankly, it seems clear the Assignment was not executed by MERS in the ordinary course of business, as required, but was fraudulently executed by Plaintiff and/or Shapiro in a fraudulent attempt to "push through" this mortgage foreclosure case.

5. The Horners and the undersigned realize that is a serious allegation. As such, they invite this Court to take a look at Exhibit "B" hereto. Even an initial, cursory review of the Assignment calls into question its legitimacy. First, it was not executed until October 13, 2009 or recorded until October 23, 2009 (after Shapiro had already filed this lawsuit). Second, the Assignment was "prepared by" and to be "returned to" Shapiro. Third, instead of identifying the address of MERS, the assignor, the Assignment lists Shapiro's name and address in MERS' place. Fourth, the Second Assignment was recorded just days after the First Assignment, which

had Plaintiff as the Assignor, not the Assignee. Finally, but perhaps most troubling, the Assignment reflects that it was executed by Jaime Hardcastle and Nate Blackstun, purportedly as Assistant Vice Presidents of MERS, yet a simple internet search reveals that Jaime Hardcastle is actually a Litigation Representative of CitiMortgage, Inc., the assignee and Plaintiff in this case, and Nate Blackstun is the FC Manager at CitiGroup, Inc..

6. These facts, viewed in conjunction with one another, raise serious questions. For example, if the Second Assignment was a legitimate business transaction, and Plaintiff actually obtained an assignment of the instant Note and Mortgage from MERS, then why did Shapiro, Plaintiff's counsel in this case, prepare the Second Assignment? Shortly after this suit was filed? Within days after the First Assignment? Why is Shapiro's address listed in place of the assignor's address? And why was it signed by Jaime Hardcastle and Nate Blackston, agent of the assignee, and not an agent of the assignor?

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. As such, Shapiro drafted the Assignment and caused Jaime Hardcastle and Nate Blackstun, Plaintiff's own agents, to sign it (purportedly as Vice President of MERS), 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 are relying on that Assignment as the basis for standing to sue the Horners in this case.

8. Plaintiff and Shapiro may not agree with these facts. At this point, though, the

¹ Shapiro's own website reflects that it has four employees who act as "assignment processors."

issue is not whether the Horners 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, 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 consults 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. Shapiro is acting as counsel for Plaintiff against other Defendants, including JP Morgan Chase Bank, National Association and MERS, as Nominee for First Security Mortgage Services, Inc. Nonetheless, Shapiro is Plaintiff's counsel in this case even though it has already acted as Counsel for these other banks in this very dispute!

It is fundamental that the same law firm cannot represent a plaintiff and a defendant in the same case.

12. Shapiro may dispute its representation of MERS, as Nominee for First Security Mortgage Services, Inc., but there is no other explanation for why Shapiro prepared the Assignment and inserted its own name and address in place of MERS' address. In other words, if Shapiro was not representing MERS in this case, then why did it prepare the Second Assignment (for MERS to sign) and insert its address (in place of MERS' address) on the Second

Assignment? Notably, Shapiro is counsel of record for MERS in many other, active cases before this Court, including, for example, Case Number 2009-CA-6578. As such, Shapiro's status as counsel for Defendant, MERS is not reasonably in dispute.

13. Shapiro's conflict is not only a textbook violation of Rule 4-1.7, it calls into serious question the fair administration of justice. To illustrate, the Horners fear that MERS may institute legal proceedings against them in the future. After all, what is to stop MERS, as Nominee for First Security Mortgage Services, Inc. from taking the position, at some point in the future, that it is the owner and holder of the Note and Mortgage? Where would that leave the Horners? Or the then-owner of the subject property? 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)?

14. 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).

15. 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.

16. 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).

17. The Horners have 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.”).

18. 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 this Assignment is not possible without involving Shapiro. After all, Shapiro prepared the Assignment and is a necessary witness regarding its propriety. That is unfortunate, but that is

the situation that Shapiro created when it prepared the Assignment and puts its name and address in place of MERS on the Assignment.

19. 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.

20. 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.

21. 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 First Assignment and the Second Assignment, and put its name/address on the First Assignment and the Second Assignment in place of MERS, all before the Horners ever knew about this lawsuit. Shapiro chose to make itself a central figure in this case. It must now reap

the consequences.

22. Notably, this case is still in its early stages. Defendants' 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.

23. In light of the foregoing, Brandon Mullis, Esquire and the law firm of Shapiro & Fishman, LLP have an irreconcilable conflict of interest, having represented both Plaintiff and MERS 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 the Horners respectfully request an Order disqualifying Shapiro & Fishman, LLP from acting as counsel for Plaintiff in this cause.

VERIFICATION

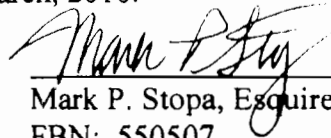
Under penalty of perjury, I declare that I have read the foregoing document and that the facts stated in it are true.

Dean Horner 3/10/10
Dean A. Horner

Nancy A. Horner 3/10/10
Nancy A. Horner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Brandon K. Mullis, Shapiro & Fishman, LLP, 2424 N. Federal Highway, Suite 360, Boca Raton, FL 33431 on this 6th day of March, 2010.



Mark P. Stopa, Esquire
FBN: 550507

STOPA LAW FIRM
2202 N. Westshore Blvd.
Suite 200
Tampa, FL 33607
Telephone: (813) 639-7634
ATTORNEY FOR DEFENDANTS

THIS IS NOT A
CERTIFIED COPY

Prepared by and return to:
Shapiro & Fishman, LLP/Brandon K. Mullis
2424 North Federal Highway, Suite 360
Boca Raton, Florida 33431
S&F No.: 09-153148

This area above this line is for the use of recording official

ASSIGNMENT OF MORTGAGE

CitiMortgage, Inc., ("Assignor"), C/O Shapiro & Fishman, LLP, 2424 North Federal Highway, Suite 360, Boca Raton, Florida 33431, in consideration from Federal National Mortgage Association, ("Assignee"), C/O Shapiro & Fishman, LLP, 2424 North Federal Highway, Suite 360, Boca Raton, Florida 33431, has granted, bargained, sold, assigned, transferred and set over, and by these presents does grant, bargain, sell, transfer and set over unto Assignee the following described Mortgage(s) recorded in the Public Records of Hillsborough County, State of Florida, together with the note of obligation described in said Mortgage(s), and the money due and to become, due thereon, with interest as therein provided.

Date of Mortgage: May 21, 2003
Mortgage Recording Date: June 4, 2003
Clerk's File Number: 2003221721
Book Number: 12711
Page Number: 0243

Legal Description:

THE NORTH 348.5 FEET OF THE WEST 137.5 FEET OF THE EAST 1050 FEET OF THE NE 1/4 OF THE NW 1/4 OF SECTION 31, TOWNSHIP 29 SOUTH, RANGE 21 EAST, LESS THE NORTH 30 FEET FOR ROAD RIGHT-OF-WAY, LYING AND BEING IN HILLSBOROUGH COUNTY, FLORIDA.

Original Mortgagors: Dean A. Horner and Nancy A. Horner, Husband and Wife.

Assignor hereby acknowledges that this assignment is being recorded as a formality pursuant to requirements set forth under § 701.02, but that such be the intention of the parties herein that delivery of the subject note and mortgage be established as evidenced by electronic or physical delivery, of the note and mortgage and related documents that

A

THIS IS NOT A

such delivery occurred on occurred prior to date of any litigation, hereto for, and that date be the delivery date has been established by the expressed intention of the parties, herein.

CERTIFIED COPY

This Assignment of Mortgage is made without recourse against Assignor.

IN WITNESS WHEREOF, Assignor has caused these presents to be executed this 7th day of October, 2009.

CitiMortgage, Inc.

By: Kim Krakoviak
Kim Krakoviak, Vice President

By: Steve Berra
Steve Berra, Assistant Vice President

(CORPORATE SEAL)



STATE OF MISSOURI]
COUNTY OF ST. CHARLES]SS.

I HEREBY CERTIFY, That on this day personally appeared before me, an officer duly authorized to administer oaths and take acknowledgements of the above referenced duly authorized signatories of Kim Krakoviak, Vice President and Steve Berra, Assistant Vice President, who are personally known to me and did take an oath and who are to me well known to be the persons described herein and who executed the foregoing Assignment of Mortgage and duly acknowledged before me and executed the same for the purposes therein expressed as the act and deed of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, said County and State, this 7th day of October, 2009

Alex D. Crossman

*NOTARY PUBLIC

Name of Notary: _____

Commission NO. _____

My Commission Expires: _____

ALEX D CROSSMAN
Notary Public - Notary Seal
State of Missouri
St. Charles County
Commission #08672776
My Commission Expires 11/04/2012

(SEAL)

THIS IS NOT A
CERTIFIED COPY

Prepared by and return to:
Shapiro & Fishman, LLP/Brandon K. Mullis
2424 North Federal Highway, Suite 360
Boca Raton, Florida 33431
S&F No.: 09-153148

This area above this line is for the use of recording official

ASSIGNMENT OF MORTGAGE

Mortgage Electronic Registration Systems, Inc., solely as Nominee for First Security Mortgage Services, Inc, ("Assignor"), C/O Shapiro & Fishman, LLP, 2424 North Federal Highway, Suite 360, Boca Raton, Florida 33431, in consideration from CitiMortgage, Inc., ("Assignee"), C/O Shapiro & Fishman, LLP, 2424 North Federal Highway, Suite 360, Boca Raton, Florida 33431, has granted, bargained, sold, assigned, transferred and set over, and by these presents does grant, bargain, sell, transfer and set over unto Assignee the following described Mortgage(s) recorded in the Public Records of Hillsborough County, State of Florida, together with the note of obligation described in said Mortgage(s), and the money due and to become, due thereon, with interest as therein provided.

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Original Mortgagors: Dean A. Horner and Nancy A. Horner, Husband and Wife.

Assignor hereby acknowledges that this assignment is being recorded as a formality pursuant to requirements set forth under § 701.02, but that such be the intention of the parties herein that delivery of the subject note and mortgage be established as evidenced

B

THIS IS NOT A

by electronic or physical delivery, of the note and mortgage and related documents that such delivery occurred on or prior to date of any litigation, hereto for, and that date be the delivery date has been established by the expressed intention of the parties, herein.

This Assignment of Mortgage is made without recourse against Assignor.

IN WITNESS WHEREOF, Assignor has caused these presents to be executed this 13th day of October, 2009.

Mortgage Electronic Registration Systems, Inc., solely as Nominee for First Security Mortgage Services, Inc

By: Jaime Hardcastle
Jaime Hardcastle, Vice President

By: Nate Blackstun
Nate Blackstun, Vice President

(CORPORATE SEAL)

STATE OF Missouri]
COUNTY OF St. Charles]SS.

I HEREBY CERTIFY, That on this day personally appeared before me, an officer duly authorized to administer oaths and take acknowledgements of the above referenced duly authorized signatories of Jaime Hardcastle and Nate Blackstun, who are personally known to me and did take an oath and who are to me well known to be the persons described herein and who executed the foregoing Assignment of Mortgage and duly acknowledged before me and executed the same for the purposes therein expressed as the act and deed of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, said County and State, this 13th day of October, 2009

Celeste Jones
*NOTARY PUBLIC
Name of Notary: _____
Commission NO. _____
My Commission Expires: _____

(SEAL)

