

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT IN AND
FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2008-CA-3989
DIVISION: CV-D

JP MORGAN CHASE BANK,
NATIONAL ASSOCIATION,

Plaintiff,

vs.

HANK J. POCOPANNI; MARILYN
G. POCOPANNI, ET AL.,

Defendant(s).

**ORDER ON REHEARING OF DEFENDANT'S
MOTION TO DISMISS COMPLAINT WITH PREJUDICE**

THIS CAUSE came before the Court for rehearing on June 16, 2010 on Defendant's Motion to Dismiss the Complaint with Prejudice. Michele M. Stocker, Esquire of Greenburg Traurig, P.A. appeared on behalf of the Plaintiff. Chip Parker, Esquire and Patricia Parker, Esquire of Parker & DuFresne, P.A. appeared on behalf of Defendants, Hank J. Pocopanni and Marilyn G. Pocopanni. The plaintiff's representative provided live, sworn testimony at the hearing. Based upon the evidence presented by the parties at this hearing and the previous hearing in Defendants' motion on October 12, 2009 ("previous hearing")¹, and having heard argument of counsel for the parties, and having been otherwise fully advised in the premises, the Court finds:

¹ At the previous hearing, the plaintiff was represented by Greenspoon Marder, P.A., who had replaced Shapiro & Fishman on July 9, 2009 as plaintiff's counsel. On November 27, 2009, after the previous hearing, Shapiro & Fishman replaced Greenspoon Marder, P.A. as plaintiff's counsel. Greenburg Traurig, P.A. filed a Notice of Appearance on February 22, 2010, and was the only counsel of record to appear at the rehearing.

1. On March 27, 2008 Washington Mutual Bank, N.A. (“WAMU”), through its counsel, the Law Firm of Shapiro & Fishman LLP (“Shapiro & Fishman”) filed the instant action to foreclose upon the home belonging to defendants, Hank J. Pocopanni and Marilyn G. Pocopanni (the “Defendants”), and located at 3440 Turkey Oaks Drive West, Jacksonville, FL 32211 (the “Home”). In its complaint filed March 27, 2008 and its amended complaint filed January 29, 2009 (the “Complaint”), WAMU alleges it is the owner and holder of the note and mortgage purporting to encumber the Home.

2. As evidence of its ownership of the note and mortgage, WAMU submitted an Assignment of Mortgage dated April 11, 2008 prepared by Shapiro & Fishman. This assignment represented to the Court that the Mortgage was assigned *from CTX directly to WAMU* (the “Assignment”).

3. Again, on February 5, 2009, in its Exparte Motion to Substitute Party Plaintiff, the plaintiff alleged, “The real party in interest in the proceeding is JPMorgan Chase Bank, National Association, as purchaser of the loans and other assets of Washington Mutual Bank, FA (the “Savings Bank”) from the Federal Deposit Insurance Corporation, acting as receiver for the Savings Bank and pursuant to its authority under the Federal Deposit Insurance Act, 12 U.S.C. § 1821(d).”

4. However, it is now undisputed that the plaintiff² is not, nor has ever been, the owner and holder of the Defendants’ note and mortgage that is the subject matter of this case. Specifically, the uncontroverted evidence presented at the previous hearing is:

² “Plaintiff” refers to both JP Morgan Chase Bank, NA (“Chase”) and its predecessor, WAMU.

- a. On March 31, 1992, CTX assigned the Mortgage to Fleet Real Estate Funding Corporation (“Fleet”) without recourse. This assignment was recorded at Book # 7304 Page #0242 in the public records of Duval County, Florida on April 6, 1992.
- b. Also on March 31, 1992, Fleet assigned Mortgage to Federal National Mortgage Association (“Fannie Mae”). Fleet reserved no rights in the Mortgage. This assignment was recorded at Book #8407, Page # 927 of the public records of Duval County, Florida on August 5, 1996.
- c. On July 5, 1996, Fannie Mae, also represented by Shapiro & Fishman, filed a *Lis Pendens* against the Defendants and other parties in interest as a prequel to commencing a previous foreclosure action (the “Previous Foreclosure Action”).³
- d. Then on August 20, 1996 (after the Previous Foreclosure Action was commenced), another assignment of the Mortgage was recorded at Book #8418, Page #1504 of the public records of Duval County, Florida evidencing an assignment from “Fleet Mortgage Corporation, formerly known as Fleet Real Estate Funding Corporation” to Fannie Mae (the “Previous Assignment”). This Previous Assignment was prepared by the Shapiro & Fishman and recorded at Book # 8418, Page #1504 of the public records of Duval County Public Records on August 20, 1996. The Court notes that the Previous Assignment was notarized but not dated.
- e. The Lookup Tool of the Fannie Mae Website, www.fnma.com, lists Fannie Mae as the current owner and holder of the note and Mortgage that was filed in this

³ *Federal National Mortgage Corporation v. Pocatanni, et. al.*, case number 96-13429 CA, which was pending before the Circuit Court for the Fourth Judicial Circuit in and for Duval County, Florida

instant action to evidence WAMU's lack of entitlement to judgment of foreclosure.

5. At the rehearing, plaintiff's new counsel argues that plaintiff's predecessor counsel, Shapiro & Fishman, made "clerical errors" when it represented to the Court that the plaintiff was the *owner* and holder of the note and mortgage rather than the *servicer for the owner*. To support this argument, the plaintiff's corporate representative testified at the rehearing that there were no notes in its servicing file that instructed Shapiro & Fishman to allege plaintiff was the owner of the note and mortgage. However, plaintiff's representative testified that he had no personal knowledge of any event transpiring in the instant case including any alleged clerical error being committed by Shapiro & Fishman or CTX Mortgage Company.

6. The Court finds WAMU, with the assistance of its previous counsel, Shapiro & Fishman, submitted the Assignment when WAMU and Shapiro & Fishman actually knew that only Fannie Mae was entitled to foreclose on the Mortgage, and that WAMU never owned or held the note and Mortgage.

7. The Court also finds that WAMU and Shapiro & Fishman knew, when they submitted the Assignment, that the Assignment did not accurately depict the proper party-in-interest *inasmuch* as Shapiro & Fishman had itself prepared a false assignment of mortgage on July 1996 naming Fleet Mortgage Corp. as assignor and Fannie Mae as assignee as support for foreclosure judgment in the Previous Foreclosure Action and *inasmuch* Shapiro & Fishman had also represented Fannie Mae in the Previous Foreclosure Action.

8. The record also reflects that, after the Motion to Dismiss was filed, Shapiro & Fishman filed what is tantamount to an *ex-parte* motion requesting that the Court enter an order substituting Chase for WAMU as the party plaintiff in the instant action, but failed to provide

notice to Defendants' counsel or otherwise without Defendants' counsel's consent (the Motion for Substitution").

9. Based upon the representations of Shapiro & Fishman, the Court entered the order substituting Chase as the party plaintiff in place of WAMU (the "Order Substituting Party Plaintiff").

10. The Court finds Chase, WAMU, and CTX are without standing to pursue this foreclosure action. The Court further finds that Shapiro & Fishman, at all times material, filed the Complaint, the Assignment, and the Motion for Substitution with actual knowledge that the averments and representations made in those papers were false.

11. The Court finds by clear and convincing evidence that WAMU, Chase and Shapiro & Fishman committed fraud on this Court.

12. The Court finds that WAMU and Chase made representations to this Court during the course of the instant action that are known to be false. The Court also finds that Shapiro & Fishman had actual knowledge of the falsity of any averments and representations made on behalf of the current servicer of the Mortgage. Throughout the litigation, WAMU and Chase and Shapiro & Fishman have represented to this Court that plaintiff owns and holds the note and mortgage. It did so in its original complaint on March 27, 2008; in its First Amended Complaint filed on January 29, 2009 and in its Exparte Motion to Substitute Party Plaintiff on February 5, 2009. Moreover, WAMU and Shapiro & Fishman created a false Assignment of Mortgage dated April 11, 2008 as evidence of these assertions.

13. The Court finds by clear and convincing evidence that these acts committed by WAMU, Chase and Shapiro & Fishman amount to a "knowing deception intended to prevent the defendants from discovery essential to defending the claim" and are therefore fraud. *Gerhmann*

v. *City of Orlando*, 962 So. 2d. 1059, 1061 (Fla. 5th DCA 2007). “Dismissal for fraud is appropriate where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system’s ability impartially to adjudicate a matter improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party’s claim or defense.” *Id.*

It is therefore:

ORDERED and ADJUDGED:

1. The Defendant’s Motion to Dismiss with Prejudice is granted for fraud on the Court;
2. The Order Dismissing Complaint with Prejudice dated February 10, 2010 is incorporated herein;
3. Defendant’s counsel shall have thirty (30) days within which to amend their motion for attorney’s fees and costs;
4. The Plaintiff(s) are ordered to go forth without day.

DONE and ORDERED in Chambers at Jacksonville, Duval County, Florida this _____ day of _____ 2010.

Jean Johnson
Circuit Judge

ORDER ENTERED

AUG 09 2010

/s/ Jean M. Johnson

Cc:
Chip Parker, Esquire
Michele L. Stocker, Esquire
Shapiro & Fishman, LLP