IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA

COUNTRYWIDE BANK, FSB

Plaintiff,

v.

GEORGE WIDUNAS, *et. al.*

Defendants.
____/

Case No. 41 2009 CA 002314

Division: D

MOTION TO DISQUALIFY TRIAL JUDGE

Defendant, GEORGE WIDUNAS, by and through his undersigned counsel and pursuant to Fla.R.Jud.Admin. 2.330, moves this Court for an Order disqualifying the Honorable Peter Dubensky (õthe Judgeö) from presiding as judge in this cause, and would show:

FACTS

1. This is a mortgage foreclosure case. Plaintiff filed it in March of 2009.

2. On February 14, 2012, the Judge issued an Order, *sua sponte*, setting Plaintifføs Motion for Summary Judgment for hearing on April 3, 2012. Prior thereto, Plaintiff had made no attempt to set this motion for hearing and, frankly, made very little attempt to prosecute this case.

3. Unfortunately, where the Plaintiff was lax in prosecuting its case, the Judge took it upon himself to do so, choosing to *sua sponte* set Plaintifføs dispositive motion for hearing.

4. Disturbingly, at the time he issued this *sua sponte* Order, Defendant had multiple motions pending as well, to include a dispositive motion for sanctions for fraud on the Court. However, the Judge chose not to set any of Defendantøs motions for hearing, choosing only to set Plaintifføs Motion for Summary Judgment. Unfortunately, this has become the Judgeøs pattern in

foreclosure cases, i.e. to set dispositive motions for plaintiffs, *sua sponte*, while ignoring motions by homeowners.

5. As the April 3, 2012 hearing began, Plaintiffø counsel asked for a continuance because he was unprepared to argue summary judgment. The Judge appropriately denied that motion and, without any argument from the undersigned, denied the motion for summary judgment.

6. Immediately upon doing so, however, the Judge asked Defendantø undersigned counsel how much time was needed for trial. The undersigned responded that the case was not yet at issue and could not be set for trial. The Judge again asked how much time was needed for trial. This time, the undersigned responded with a little more specificity, saying there was controlling case law showing the case could not be set for trial, including an *en banc* decision from the First District, because the case was not at issue. The Judge responded by saying he õdid not care about that,ö or words to that effect, that he wanted an answer to his question, i.e. how much time was needed for trial, and that if the undersigned did not answer, he could leave the courtroom.

7. The undersigned was incredibly taken aback at the Judgeø refusal to even listen to a well-taken argument with case law. Quite simply, the Judge was not even allowing the undersigned to be heard (on whether the case could be set for trial). As such, the undersigned responded that he did not know how much time was needed for trial because the pleadings were not closed and the case was not at issue.

8. As soon as the undersigned said this, the Judge set the trial for June 22, 2012.

9. The undersigned interjected, asking for an opportunity to be heard on why the case could not be set for trial. The Judge refused, forcing the undersigned to stop talking.

10. The undersigned asked for an opportunity to present controlling case law on why the case could not be set for trial. Again, the Judge refused.

11. The undersigned then made an *ore tenus* motion to disqualify the Judge, expressing his concern that the Judge was not allowing him to be heard. The Judge responded, without giving the undersigned a chance to articulate his clientøs position at all, by saying õIøve heard enough from you, I donøt want to hear anything else from you,ö or words to that effect. Incredibly, the Judge pointed to the door, then indicated the undersigned should leave the courtroom if he did not like it. That was the second time, during that hearing, the Judge told the undersigned to leave the courtroom merely because he was asking to be heard.

12. In response to the *ore tenus* motion to disqualify, the Judge indicated his denial of a motion was not grounds to disqualify him. Defendantøs undersigned counsel responded that the issue was not that the Judge denied a motion, but that he did not even allow the undersigned to be heard.

13. The Judge retorted õyou come in here every couple of weeks and assert a motion to disqualify, it has no merit.ö

14. On the foregoing facts, Defendant has a well-reasoned fear the Judge is not and cannot be neutral and detached and will not provide a fair trial. To wit, the Judge prosecuted a dormant case for the benefit of Plaintiff, setting a dispositive motion by Plaintiff for hearing while refusing to set any of Defendantøs motions for hearing. Then, the Judge refused to listen to any argument or look at any case law why this case should not be set for trial.

15. It is clear to Defendant and his undersigned counsel that the Judge is, with all due respect, a õrobo-judgeö when it comes to foreclosures. That sounds pejorative, but it is clear the Judge predetermined (in this case and many others) that he was going to grant summary

judgment or set trial.

16. Nothing was going to stop the Judge from following this procedure, *<u>regardless of the facts of a case</u>*. To wit, the Judge made it obvious he didnøt care about the particular circumstances in a given case or any reason the case should not or could not be set for trial ó he was going to either grant summary judgment for the plaintiff (after he set the hearing on that motion) or he was going to issue a trial date.

<u>LAW</u>

17. Predetermining a legal ruling without letting the parties be heard is the epitome of unfairness and requires disqualification. <u>See</u> <u>Marvin v. State</u>, 804 So. 2d 360 (Fla. 4th DCA 2001); <u>Barnett v. Barnett</u>, 727 So. 2d 311 (Fla. 2d DCA 1999); <u>Wargo v. Wargo</u>, 669 So. 2d 1123 (Fla. 4th DCA 1996).

18. Here, there is black-letter law about the circumstances in which a case can (and cannot) be set for trial. For instance, in <u>Bennett v. Continental Chemicals, Inc.</u>, an *en banc* First District held:

> A notice for trial is properly filed when the action is ready for trial. Rule 1.440 is very clear as to when the action is ready for trial. Leaving little room for improvisation, it provides: (a) An action is at issue after any motions directed to the last pleading served have been disposed of or, if no such motions are served, 20 days after service of the last pleading. í (b) Thereafter, any party may file and serve a notice that the action is at issue and ready to be set for trial. í [In this case,] at the time of the hearing, there were pending at least appellantøs motion to dissolve the temporary injunction, if not his original motion to dismiss the complaint, as well as appelleeøs motion to dismiss the counterclaim. With those motions pending, we hold that the action was not at issue as contemplated by rule 1.440(a). í [S]trict compliance with rule 1.440 is mandatory. í In our concluding that failure to conform with rule 1.440 is reversible error í we are adopting the bright line approach so as to avoid appeals, such as this, that would not or should not have materialized if the rule had been strictly observed.

492 So. 2d 724 (Fla. 1st DCA 1986); <u>see also</u> <u>Precision Constructors, Inc. v. Valtec Construction Corp.</u>, 825 So. 2d 1062 (Fla. 3d DCA 2002) (õFailure 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.ö).

19. The point, of course, is not whether the case was ready for trial, but that the Judge refused to let Defendantøs counsel be heard.

ANALYSIS

20. The issue here, and the problems with the Judge that require his disqualification, are two-fold.

21. First, the Judge took it upon himself to prosecute the case for the Plaintiff, setting a dispositive motion for the Plaintiff, *sua sponte*, yet did not set any of Defendantøs motions.

22. This was a dormant case. It was and is Plaintifføs obligation to prosecute the case. If Plaintiff chose not to do so, it is not this Courtøs prerogative to prosecute the case for the Plaintiff, acting essentially as a second plaintifføs counsel. The Judge is supposed to be neutral and detached, not a second prosecutor.

23. Even if this Court disagrees, and thinks it is within this Courtøs discretion to advance a slow-moving case towards judgment, there can be no doubt that the Court cannot favor one side over the other in the process of doing so. Here, for instance, the Judge showed an obvious bias in favor of Plaintiff by setting Plaintifføs Motion for Summary Judgment, *sua sponte*, without also setting Defendantøs motions (including a dispositive motion) for hearing.

24. It is eminently reasonable for Defendant to question the Judgeøs neutrality when he takes it upon himself to set a dispositive plaintifføs motion for hearing but refuses to set a dispositive defense motion.

25. What compounds this gross exhibition of bias is that the Judge routinely criticizes defendants who donøt set their motions for hearing (including a defense counsel in an unrelated

case at the same hearing as the April 3, 2012 hearing in this case). With all due respect, it is a gross exhibition of bias for the Court to *sua sponte* set hearings on motions by plaintiffs, refuse to set motions by homeowners, and chastise homeowners for not setting such motions for hearing.

26. Tellingly, the undersigned has other cases before the Judge where he is counsel for plaintiffs, but not in foreclosure cases. Never in such a case has the Judge done anything to advance such a case towards judgment, *sua sponte*. That is always the undersignedøs obligation. In foreclosure cases, however, the Judge takes on a different tact, acting as a second plaintifføs counsel. Clearly, the Judge is biased against homeowners in foreclosure cases.

27. Second, this case cannot properly be set for trial because there are outstanding motions directed to the pleadings, to include a Motion to Strike Reply. That said, the point here is not (merely) to say that this case should not have been set for trial. The point is that this Court has showed such little regard for Defendant, the undersigned, and homeowners in general that he was not even willing to let them be heard on this issue before ruling against them. This obvious display of bias, on the heels of the extraordinary bias exhibited by setting Plaintifføs motion for hearing without setting any defense motions, shows the Judge is hopelessly biased in favor of plaintiff and against this Defendant and homeowners in general.

28. Marvin, Bennett, and Wargo make it clear that disqualification is required where a judge has predetermined a legal ruling without letting parties be heard. Here, it is patently clear the Judge predetermined, *sua sponte*, that he would grant summary judgment or set trial regardless of what Defendant or his undersigned counsel had to say (and regardless of whether the case was at issue, ready for trial, or could be properly set for trial). Disagreeing with a defendantøs argument is one thing ó not even letting a defendant be heard, then treating a

defendantøs counsel with open hostility (telling him to leave the courtroom and not to speak any more) is quite another.[1]

29. In light of the foregoing, there is no way the Judge will provide Defendant a fair hearing or trial. His bias towards Defendant, the undersigned, and homeowners in general oozes from every fiber of his being. The Judge must grant the instant motion and disqualify himself from this case. In doing so, this Court should vacate its Order setting trial, allowing the parties a chance to be heard on the propriety of a trial date before a neutral and detached judge.

WHEREFORE Defendant respectfully request that the Honorable Peter Dubensky enter an Order disqualifying himself as judge in this cause.

CERTIFICATE OF GOOD FAITH

Defendantøs counsel, Mark P. Stopa, Esquire, hereby certifies that the instant motion and the statements set forth herein are made in good faith.

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Mark P. Stopa

VERIFICATION

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

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George Widunas

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[1] It is worth noting that the Judge exhibited similar conduct on April 2, 2012 towards the undersigned in a different case. There, the Judge granted opposing partyøs motion to appoint magistrate in the face of the undersignedøs objections and well-established case law that a magistrate cannot be appointed without the consent of both parties. This issue is so clear that the opposing party has already relented (in the face of an appellate brief), agreeing to withdraw its request for a magistrate (as opposed to facing an adverse appellate decision and attorneysø fees). Nonetheless, even though the law is THIS clear, the Judge wouldnøt even let the undersigned be heard and refused to read the case law on the issue before ruling adversely. Respectfully, ruling against a party is one thing ó doing so without giving that party a chance to be heard and while refusing to read case law is quite another. It is past time that the Judge realize that a judge must ó MUST ó allow parties to be heard, and ruling against them without allowing them to be heard is the epitome of judicial bias.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Honorable Peter Dubensky, 1051 Manatee Ave. W. Bradenton, FL 34206 and Robertson, Anschutz & Schneid, PL, 3010 N. Military Trail, Suite 300, Boca Raton, FL 33431 on this ____ day of April, 2012.

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