

IN THE SUPREME COURT OF OHIO

Jack Dixon, et al.,

Case No.: 12-2135

Appellees,

On Appeal from the Madison County
Court of Appeals,
Twelfth Appellate District

vs.

Residential Finance Corp., et al.,

Case No.: CA 2011-10-014

Appellants.

APPELLEES' MEMORANDUM IN RESPONSE TO SHUMAKER'S REQUEST FOR
JURISDICTION AND APPELLEES' S. Ct. Pract. R. XIV, § 5 MOTION FOR SANCTIONS

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COUNSEL FOR DEFENDANT RESIDENTIAL FINANCE CORPORATION

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SUPREME COURT OF OHIO

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1. STATEMENT OF THE CASE

The Dixons' action against Residential Finance Corporation (RFC) was filed March 28, 2006. On June 15, 2006 Bank of New York filed a complaint in foreclosure against the Dixons. On August 14, 2006, the Dixons filed an Answer and third-party complaint against RFC and its employee Appellant Jacob Shumaker (Shumaker). On April 12, 2007 the trial court consolidated the cases.

Since April 12, 2007, this case has been in the 12th District Court of Appeals three times, now in this Court for the second time, the first being Case: 2010-1902, and continued multiple times due to the actions of the parties defendant. The Dixons' claims, filed almost seven years ago, have not yet come to trial.

Set out below is a copy of the Madison County Clerk of Courts case docket for Case CVE 2006-0183 only for the month of October, 2009:

10/01/2009

- o DEFENDANT RESIDENTIAL FINANCE CORPORATIONS
- o NOTICE OF o SUBSTITUTION OF WITNESS

10/08/2009

- o DEFENDANT MEMORANDUM IN OPPOSITION TO
- o PLAINTIFFS' MOTION o FOR ORDERS RELATING TO
- o DISCOVERY AND FOR A HEARING.

10/09/2009

- o DEFENDANTS NOTICE OF VIDEOTAPED DEPOSITION

10/13/2009

- o (FAXED COPY) MOTION TO RENEW PREVIOUSLY FILED MOTION FOR
- o SUMMARY JUDGMENT BASED ON NEWLY DECIDED CONTROLLING OHIO
- o SUPREME COURT AUTHORITY.
- o MOTION TO RENEW PREVIOUSLY FILED MOTION FOR SUMMARY
- o JUDGMENT BASED ON NEWLY DECIDED CONTROLLING OHIO SUPREME
- o COURT AUTHORITY
- o PLAINTIFFS MOTION FOR A PROTECTIVE ORDER AND TO QUASH
- o SUBPOENAS

10/14/2009

- o SERVED SUBPOENA TO MERCHANTS NATIONAL BANK. HAND DELIVERY
- o TO DARLENE WEST.
- o SERVED SUBPOENA TO HUNTINGTON BANK. HAND DELIVERY TO
- o STEVE LELONEK
- o DEFENDANTS MOTION TO QUASH SUBPOENA
- o DEFENDANTS MEMORANDUM IN OPPOSITION TO PLAINTIFFS MOTION

- o FOR PROTECTIVE ORDER AND TO QUASH SUBPOENAS
- o PLAINTIFFS' SUPPLEMENTAL MOTION FOR A PROTECTIVE ORDER AND TO QUASH SUBPOENAS.
- o DEFENDANT'S AMENDED NOTICE OF VIDEOTAPED DEPOSITION

10/15/2009

- o DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' SUPPLEMENTAL MOTION FOR A PROTECTIVE ORDER AND TO QUASH SUBPEONAS
- o PLAINTIFFS MEMORANDUM CONTRA RFC'S MOTION TO QUAQSH SUSPOENA

10/16/2009

- o DEFENDANTS MEMORANDUM IN OPPOSITION TO PLAINTIFFS SUPPLEMENTAL MOTION FOR A PROTECTIVE ORDER AND TO QUASH SUBPOENAS
- o PLAINTIFFS SUPPLEMENTAL MOTION FOR A PROTECTIVE ORDER AND TO QUASH SUBPOENAS
- o PLAINTIFFS SUPPLEMENTAL RESPONSE TO RFC REGARDING SUBPOENAS

10/19/2009

- o PLAINTIFFS MEMORANDUM CONTRA RFC'S MOTION FOR THE COURT TO RECONSIDER ITS DECISION DENYING RFC SUMMARY JUDGMENT
- o DEFENDANT RESIDENTIAL FINANCES REPLY TO PLAINTIFFS MEMORANDUM CONTRA TO RESIDENTIAL FINANCES MOTION TO QUASH SUBPOENA

10/20/2009

- o DEFENDANT COUNTRYWIDE HOME LOANS, INC. MOTION FOR o PROTECTIVE ORDER AND MOTION TO QUASH SUBPOENA

10/21/2009

- o JUDGE'S ENTRY AND CERTIFICATION/ MOTION FOR DEFENDANT COUNSEL TO WITHDRAW IS OVERRULED. DEFENDANT'S MOTION FOR PROTECTIVE ORDER IS OVERRULED. DEFENDANT TO PROVIDE PLAINTIFF WITH INFORMATION SOUGHT RELEVANT TO EMPLOYMENT STATUS WITHIN 7 DAYS..ALL DISCOVERY HAS BEEN STAYED WITH TERMS & CONDITIONS. THE PARTIES & COUNSEL ARE PUT ON NOTICE THAT THE TONE OF RECENT FILINGS HAS BEEN NOTED BY THE COURT WHICH SUGGEST THAT SUCH BE MODERATED IN THE FUTURE. TRAIL TO GO FORTH ON 11/10/09. COURT NOTES DEFENDANT'S UNTIMELY FILED MOTION TO RENEW MOTION FOR SUMMARY JUDGMENT BASED ON NEWLY CASE LAW. COURT OVERRULES THE MOTION WHILE RESERVING THE RIGHT TO RULE UPON ISSUE SHOULD IT BE RENEWED BY MOTION IN LIMINE
- o PLAINTIFFS MOTION FOR A PROTECTIVE ORDER AND TO QUASH SUBPOENAS
- o REPLY IN SUPPORT OF DEFENDANTS MOTION TO RENEW PREVIOUSLY FILED MOTION FOR SUMMARY JUDGMENT BASED ON NEWLY DECIDED CONTROLLING OHIO SUPREME COURT AUTHORITY/FAX

10/22/2009

- o DEFENDANT RESIDENTIAL FINANCE'S CONSOLIDATED RESPONSE TO THE DIXONS' SUBPOENA-RELATED FILINGS.
- o REPLY IN SUPPORT OF MOTION TO RENEW PREVIOUSLY FILED MOTION FOR SUMMARY JUDGMENT BASED ON NEWLY DECIDED CONTROLLING OHIO SUPREME COURT AUTHORITY
- o FAX - MOTION TO RECONSIDER DECISION OF 10-21-09 OVERRULING DEFENDANTS MOTION TO RENEW PREVIOUSLEY FILED MOTION FOR

o SUMMARY JUDGMENT

10/23/2009

- o HARD COPY - MOTION TO RECONSIDER DECISION OF 10-21-09

10/28/2009

- o RESIDENTIAL FINANCES MOTION TO STAY PROCEEDINGS PENDING
o ARBITRATION
o JUDGE'S ENTRY AND CERTIFICATION: DEFENDANT RFC'S RENEWED
o MOTION FOR SUMMARY JUDGMENT AND MOTION IN LIMINE ARE
o OVERRULED.
o LAUREN COURT STENO

10/29/2009

- o RESIDENTIAL FINANCES REPLY IN SUPPORT OF ITS
o MOTION TO MOTION TO STAY PROCEEDINGS
o PENDING ARBITRATION/FAX

10/30/2009

- o HARD COPY/RESIDENTIAL FINANCE'S REPLY IN SUPPORT OF ITS MOTION TO
o STAY PENDING ARBITRATION

On October 28, 2009, 13 days before a scheduled trial, RFC filed a Motion to enforce an arbitration agreement to which it was not a party. The court ruled RFC had no standing to enforce arbitration, stating:

The court finds that with regard to the April 2004 transaction, Defendant RFC was neither the lender nor an assignee of the lender and therefore has no standing to invoke the protections of the Arbitration Agreement to which it was not a party. It is undisputed that there is no Arbitration Agreement pertaining to the July 2004 transaction wherein RFC was the lender (11/04/09).

On November 5, 2010, the decision was appealed. The 12th District of Appeals, Case No. CA 2009-0024, finding for the Dixons' stated:

{¶7} On October 28, 2009, over three-and-a-half years later, and after Residential Finance had already filed an answer, a motion to dismiss, a motion for judgment on the pleadings, a motion for summary judgment, a renewed motion for summary judgment, a motion to reconsider the denial of its renewed motion for summary judgment, a motion for protective order, a motion to bifurcate, four motions in limine, numerous trial briefs, which included its proposed jury instructions and interrogatories, a variety of discovery requests, and well after it deposed the Dixons and their expert witness, Deborah DuPilka, Residential Finance filed a motion to stay proceedings pending arbitration. At that time, a jury trial was scheduled to begin on November 10, 2009, a mere 13 days later.

{¶8} On November 4, 2009, the trial court, which had already set the matter for jury trial on seven separate occasions, denied Residential Finance's motion. Residential Finance

now appeals from the trial court's decision denying its motion to stay proceedings, raising one assignment of error.

On remand, the trial court's August 16, 2011 entry stated:

Upon receiving this case returned from the Court of Appeals, counsel for Defendants RFC and Jacob Shumaker have renewed their motion to withdraw as counsel for Jacob Shumaker, previously asserted on September 22, 2009. This previous motion was denied on October 21, 2009. This matter is currently set for trial on October 17, 2011.

This case was initiated over five years ago, based upon Plaintiffs Dixon having retained Mr. Shumaker, an agent of RFC, to provide mortgage brokerage services for them in the year 2004. Mr. Shumaker has already been deposed. The facts that give rise to this litigation have not been altered by events that have occurred in the years since his deposition. Mr. Shumaker was properly served in this action and, along with RFC, was vigorously represented by the firm Stein Chapin & Associates, LLC, for three years before the initial motion to withdraw was filed. The fact that Mr. Shumaker has allegedly moved out of state and counsel claims he does not want to be involved in the present litigation does not change the fact that he is so involved, that he was an agent of RFC, that he has been deposed with regards thereto, and that the matter is proceeding to trial in a matter of weeks. Nothing has occurred since the court last considered counsel's request to change these facts.

Set out below is a copy of the Madison County Clerk of Courts case docket for Case CVE 2006-0183 for the months of August-October, 2011:

08/31/2011

- o DEFENDANTS' COUNSEL'S RESPONSE TO COURT ORDER &
- o ENTRY FILED 8-16-2011

09/01/2011

- o DEFENDANTS RESIDENTIAL FINANCE CORP & JACOB
- o SHUMAKER'S o MOTION TO ENGAGE IN ADDITIONAL
- o DISCOVERY TO PLAINTIFF BANK o OF NEW YORK

09/02/2011

- o DIXON'S MEMORANDUM RESPONDING TO THE COURT'S
- o AUG 16, 2011 ENTRY

10/05/2011

- o ENTRY/DEFENDANT SHUMAKERS MOTION COUCHED AS
- o ACKNOWLEDGMENT o WILL BE DECIDED ON THE FILINGS 10-12-11

10/07/2011

- o DIXONS MEMORANDUM CONTRA MOTION OF JACOB SHUMAKER TO
- o ACKNOWLEDGE HIM AS A NON-PARTY AND THE DIXONS MOTION IN
- o THE ALTERNATIVE TO REALIGN PARTIES
- o DEFENDANTS RESIDENTIAL FINANCE CORPORATIONS PROPOSED JURY
- o INSTRUCTIONS AND INTERROGATORIES
- o DEFENDANT, RESIDENTIAL FINANCE CORPORATIONS MOTION TO
- o BURFICATE THE TRIAL INTO TWO STAGES - COMPENSATORY AND
- o PUNITIVE DAMAGES
- o DEFENDANTS RESIDENTIAL FINANCE CORPORATION AND JACOB

- o SHUMAKERS SUPPLEMENTAL TRIAL BRIEF
- o MOTION IN LIMINE OF DEFENDANT RESIDENTIAL FINANCE CORP.
- o FOR AN ORDER IN LIMINE BARRING OTHER ACTS EVIDENCE

10/11/2011

- o JACOB SHUMAKERS REPLY IN SUPPORT OF HIS MOTION FOR
- o ACKNOWLEDGMENT OF NON-PARTY STATUS
- o PLAINTIFFS MEMORANDUM CONTRA DEFENDANT RESIDENTIAL FINANCE
- o CORPORATIONS MOTION TO BIFURCATE

10/12/2011

- o ENTRY/COURT NOTES THAT SHUMAKER'S INTERESTS
- o COVERAGE WITH RESIDENTIAL FINANCE'S & THEREFORE
- o THEY WILL SHARE CHALLENGES IN JURY SELECTION
- o AGREED ENTRY, DECREED THAT JACOB SHUMAKER
- o DISPOSITION OF TRANSCRIPT FILED ON 4-30-09 BE UNSEALED

10/13/2011

- o NOTICE OF APPEAL FILED -CA20110014
- o REPLY OF DEFENDANT RESIDENTIAL FINANCE CORPORATIONS IN
- o SUPPORT OF ITS MOTION TO BIFURCATE THE TRIAL INTO TWO
- o STAGES
- o REPLY OF DEFENDANT, RESIDENTIAL FINANCE CORPORATION IN
- o SUPPORT OF ITS MOTION IN LIMINE FOR AN ORDER IN LIMINE
- o BARRING OTHER ACTS EVIDENCE
- o PRAECIPE FOR SERVICE

10/14/2011

- o ENTRY/FURTHER PROCEEDINGS ARE STAYED PENDING APPEAL

10/18/2011

- o DIXONS RESPONSE TYO RESIDENTIAL FINANCE CORPORATIONS MOTION
- o IN LIMINE
- o PLAINTIFFS MEMORANDUM CONTRA DEFENDANT RESIDENTIAL FINANCE
- o CORPORATIONS MOTION TO BIFURCATE
- o PLAINTIFFS MEMORANDUM CONTRA DEFENDANT RESIDENTIAL
- o FINANCE CORPORATIONS MOTION TO BIFURCATE
- o PLAINTIFFS MEMORANDUM CONTRA DEFENDANT RESIDENTIAL
- o FINANCE CORPORATIONS MOTION TO BIFURCATE

10/25/2011

- o TRANSCRIPT OF DOCKET AND JOURNAL ENTRIES

On October 5, 2011, 12 days before the scheduled October 17, 2011 trial, Shumaker's counsel filed a Motion to declare him a non-party. The trial court stated:

On a previous day, the Court consolidated case 2006-03-110, Dixon v. Residential Finance Corp., a case involving breach of duties, and case 2006-06-183, Bank of New York v. Dixon, a residential mortgage foreclosure. As trial approached, the Court separated the Bank's foreclosure claims from trial on Dixon's claims against Residential Finance. Third party defendant Shumaker was brought into the foreclosure case; He was not a named defendant in Dixons' case against Residential Finance.

Schumaker now moves the Court to acknowledge him as a non-party. Said motion is Overruled,

In the totality of the circumstances drawn from the filings, Dixons claim that Schumaker, as an agent of Residential Finance, engaged in the acts and omissions giving rise to Dixons' claims. So that there is no contusion at trial, Schumaker will be denominated as a co-defendant to Residential Finance in the breach claims (10/12/11).

The court also stated:

There have been significant filings since October 5th that attempt to resurrect previous issues ruled upon and, in some instances claim that, new precedent has been asserted. The Court will rule orally on such matters prior to the commencement of trial.

Counsel are advised that there are presently seven jury trials set on October 24, civil and criminal, that will make it impossible to recess a jury from next Wednesday until the following Monday. Mr. Segerman entered an appearance on behalf of Residential Finance on October 3, 2011, with the representation that, "This entry is not interposed for delay and Residential Finance Corporation and its counsel will be prepared to try the case beginning October 17, 2011." Counsel should be prepared to try the within cause in three days.

When the trial court denied the law firm's (Stein Chapin) Motion to withdraw as counsel for Shumaker, which if granted, would have necessitated a continuance, the law firm and its client RFC (the Stein of Stein Chapin is one of the two shareholders of RFC and an officer) brought Mr. Segerman into the case to represent RFC. RFC apparently did not want to go to trial with Shumaker as a defendant. The meritless Motion for non-status was filed to take Shumaker out of the case and leave RFC as the defendant against whom the trial would proceed. (On October 14, 2011 the court stayed the proceedings as to both Shumaker and RFC).

On October 13, 2011, Shumaker appealed to the 12th District Court of Appeals, Case No. CA 2011-10-014, and also filed an Action in Prohibition against Judge Nichols, Case No. CA 2011-10-015. In dismissing the Action in Prohibition, the Court stated:

Realtor's petition does not establish any right to relief. Respondent had proper subject-matter jurisdiction over the underlying case. Any alleged error in respondent's decisions was at best an error in the exercise of jurisdiction rather than an error establishing the lack of subject-matter jurisdiction; such errors are remediable by appeal, not by a writ of prohibition. *See State ex ret. CNG Financial Corp. v. Nadel*, 111 Ohio St.3d 149, 2006-Ohio-5344; *State ex rel. Haussler v. Walker*, 12th Dist. No. CA2002-01-004, 2002-Ohio-3882. In addition, relator has an adequate legal remedy by way of appeal.

On November 15, 2012, the 12th District Court of Appeals when granting the Dixons' Renewed Motion to dismiss Appellant's appeal, in part stated:

The entry denying Shumaker's motion to acknowledge him as a non-party does not determine the underlying action or prevent a judgment. It arguably does not affect a substantial right.

The trial court's denial of appellant's acknowledgment of non-party status does not meet the definition of a special proceeding.

The trial court's decision denying appellant's motion or acknowledgment of non-party status does not fit the definition of ancillary proceeding.

Not only is this appeal and Appellant's Motion in Support of Jurisdiction taken from a non-final order, it is not a "case of public or great general interest." However, this Court can and should view the actions causing many the years of denying the Dixons their day in court (See S. Ct. Prac. R. XIV, § 5).

2. WHY THIS COURT CAN NOT CONSIDER THIS CASE AND WHY IT IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST

This Court can not consider Shumaker's request for jurisdiction. The 12th District Court of Appeals was correct--Shumaker's appeal was not from a final appealable order. This Court, as to its jurisdiction, stated:

Under Section 3(B), Article IV of the Ohio Constitution, this court has jurisdiction to hear appeals from judgments or "final orders." As relevant to the present case, R.C. 2505.02 defines "final orders" as (1) "[a]n order that affects a substantial right in an action that in effect determines the action and prevents a judgment" or (2) "an order that affects a substantial right made in a special proceeding[.]" In this case, the order from which appellant attempted to appeal did not determine the action because it did not adjudicate the issue raised in appellant's motion.

... To qualify as a special proceeding, the action must be one that was not recognized at common law or in equity and the purported special proceeding must statutorily specify the "step-by-step procedures to be utilized." *Polikoff v. Adam* (1993), 67 Ohio St.3d 100.

In *Celebrezze v. Netzley*, 51 Ohio St.3d 89, 92 (Ohio 1990), this Court stated:

"The critical question, following Mitchell, is whether 'the essence' of the claimed right is a right not to stand trial. * * * This question is difficult because in some sense, all

litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial. But the final-judgment rule requires that except in certain narrow circumstances in which the right would be 'irretrievably lost' absent an immediate appeal, *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431, 105 S.Ct. 2757, 2761, 86 L.Ed.2d 340 (1985), litigants must abide by the district court's judgments, and suffer the concomitant burden of a trial, until the end of proceedings Before gaining appellate review."

Shumaker argues the trial court's denial of his "*motion undeniably determined the action and prevented judgment in favor of Shumaker with respect to the motion,*" citing *State v. Whaley*, 2006-Ohio-490 (2006), a reported case appealed to and not accepted by this Court (Reported at 109 Ohio St.3d 1496, 2006-Ohio-2762, 848 N.E.2d 859). *Whaley* supports the appellate court's decision but Shumaker cites it for a proportion apposite to the case holding. *Whaley*, in part, states:

...we must decide if appellant would be precluded from a meaningful or effective remedy on appeal following a final judgment as to the entire action. R.C. 2505.02(B)(4)(b). If appellant will not be denied a meaningful or effective remedy by waiting to appeal the pretrial order granting disqualification, then the order may not be appealed now.

{¶ 23} Here, based on the Supreme Court precedent in *Keenan*, it is our position that appellant will not be denied meaningful and effective review by waiting to appeal the grant of disqualification until the criminal case is concluded.

{¶ 24} Based upon the foregoing analysis, appellee's motion to dismiss is granted since the motion to disqualify appellant's defense counsel is not a final appealable order.

The 12th District Court of Appeals in *Haynes v. Franklin*, 135 Ohio App.3d 82, 86-87, 1999-Ohio-886 (Ohio App. 12 Dist. 1999) earlier stated:

To be final, an order must fit into at least one of the five categories set forth in R.C. 2505.02. *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 540 N.E.2d 1381. The trial court's order from which this appeal has been taken did not set aside a judgment or grant a new trial. R.C. 2505.02(B)(3). Nor did it determine that an action may or may not be maintained as a class action. R.C. 2505.02(B)(5).

In *Haynes*, following R.C. 2505.02(B)(4), the court also stated an order that may be provisional must be found not to afford the appealing party a meaningful or effective remedy on appeal to be a final order from which an appeal can be taken. *Id.* at 88. In its decision denying Shumaker's

request for a Writ of Prohibition, the 12th District stated...relator has an adequate legal remedy by way of appeal. The right to be free from *liability* * * * can certainly be vindicated on appeal. *Id.* at 88.

Shumaker's argument, in part, must be based upon the unstated improper premise that the trial court did not have personal jurisdiction over him. Lack of subject matter and/or *in personam* jurisdiction are not case issues. With jurisdiction, the court was empowered to determine how the cases would go forward. The court had the power to realign the parties. When jurisdiction exists and realigning the parties leads to judicial economy and effectiveness, courts are empowered to realign. "Although realignment questions typically arise in the diversity of citizenship context, the need to realign a party whose interests are not adverse to those of his opponent(s) exists regardless of the basis for federal jurisdiction." *Larios v. Perdue*, 306 F. Supp. 2d 1190, 1195 (N.D. Ga. 2003). The federal courts have employed two different tests in determining the propriety of realignment; the Sixth Circuit has employed what has been labeled the "primary purpose test." *Id.* (citing *United States Fid. & Guar. Co. v. A & S Mfg. Co., Inc.*, 48 F.3d 131, 132-33 (4th Cir. 1995)). Under the primary purpose test "if the interests of a party named as a defendant coincide with those of the plaintiff in relation to the [primary] purpose of the lawsuit, the named defendant must be realigned as a plaintiff. . . ." *United States Fid. and Guar. Co. v. Thomas Solvent Co.*, 955 F.2d 1085, 1089 (6th Cir. 1992) (citing *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1523 (9th Cir. 1987)). The logic of realignment exists between cases as it does in one case. However, even without realignment the trial court could have ordered the Dixons' third-party complaint against Shumaker and RFC be tried first. That error, if it is one, is both harmless and not one "public or great general interest."

The court had the inherent and statutory authority to rule as it did. See *Cramer v. Petrie* (1994), 70 Ohio St.3d 131, 133, 637 N.E.2d 882 ("courts have inherent authority-authority that has existed since the very beginning of the common law-to compel obedience of their lawfully issued orders"); *State ex rel Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 73, 573 N.E.2d 62. *State ex rel. Skyway Investment Corp. v. Ashtabula County Court of Common Pleas*, 2011-Ohio-5452, 2011-0320 (OHSC).

The court also had the power to consolidate, bifurcate and order the claims be tried consistent with Civ. R. 42:

(A) **Consolidation.** When actions involving a common question of law or fact are pending before a court, that court after a hearing may order a joint hearing or trial of any or all matters in issue in the actions; it may order some or all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(B). **Separate trials.** The court, after a hearing, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claims, cross-claims, counterclaims, or third-party claim, or of any separate issues, always preserving inviolate the right to trial by jury.

What the court ordered was legal and logical; what Shumaker seeks is neither. He wants the Dixons' damage claims first tried solely against RFC. The Court's October 12, 2011 Entry states:

In the totality of the circumstances drawn from the filings, Dixons claim that Schumaker, as an agent of Residential Finance, engaged in the acts and omissions giving rise to Dixons' claims. So that there is no confusion at trial, Schumaker will be denominated as a co-defendant to Residential Finance in the breach claims.

Once the cases were consolidated, the court properly aligned the parties and set the Dixons' claims for trial. Shumaker would get his day in court and the Dixons would try their action against both RFC and Shumaker. "Whether cases involving the same factual and legal questions should be consolidated for trial is a matter within the discretion of the trial court" * *Cantrell v. GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993).

The 6th Circuit stated that a trial court determining whether to consolidate must consider "whether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives." *Id.* at 1011 (quoting *Hendrix v. Raybestos-Manhattan, Inc.*, 116 F.2d 1492 (11th Cir. 1985)); *see also State of Ohio ex rel. Montgomery v. Louis Trauth Dairy, Inc.*, 163 F.R.D. 500, 503 (S.D. Ohio 1995) (in determining whether consolidation is appropriate, "the court balances the value of time and effort saved by consolidation against the inconvenience, delay, or expense increased by it"); *Blasko v. Washington Metro. Area Transit Authority*, 243 F.R.D. 13, 15 (D.D.C. 2007) ("Actions that involve the same parties are apt candidates for consolidation . . . [and] consolidation is particularly appropriate when the actions are likely to involve substantially the same witnesses and arise from the same series of events or facts."); *Vasquez Rivera v. Congar Int'l Corp.*, 241 F.R.D. 94, 95 (D.P.R. 2007) (explaining that consolidation is intended to avoid overlapping trials containing duplicative proof, excess cost incurred by all parties and the government, and the waste of valuable court time in the trial of repetitive claims, among other considerations).

The Dixons claims against RFC in Case No. 2006 CV-03-110 are identical to those against Shumaker and RFC in their third-party complaint in Case No. 2006 CV-06-18. In each case, the claims, witnesses and damages are the same. Civ. R. 42(A) affords a court authority to order multiple actions consolidated "[w]hen actions involving a common question of law or fact are pending before the court." *Id.* The 11th Circuit has explained that consolidation pursuant to Rule 42(a) "is permissive and vests a purely discretionary power in the district court." *Young v. City of*

Augusta, 59 F.3d 1160, 1168 (11th Cir. 1995) (quoting *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006, 1013 (5th Cir. 1977)).

Shumaker's Motion, filed 12 days before the scheduled trial, contending he was a non-party to the action in which he actively participated from April 12, 2007 to October 5, 2011 was disingenuous; a Civ. R. 11 violation. When it became evident the case would go to trial October 17, 2011, Shumaker filed a legally unsupportable Motion, knowing it would be overruled; thereby creating a basis, once again, to prevent the action from moving forward. Such conduct should not be countenanced by this Court.

The trial and appellate courts' decisions were consistent with law and the decisions do not rise to the level of import required by this Court to grant jurisdiction. The 12th District Court of Appeals, in the Action in Prohibition, held that "(a)ny alleged error in respondent's decisions was at best an error in the exercise of jurisdiction rather than an error establishing the lack of subject-matter jurisdiction; such errors are remediable by appeal, not by a writ of prohibition." The decision was not appealed. The 12th District Court of Appeals also determined the trial court's refusal to consider Shumaker a non-party was a non-final appealable order. With no case law support, Shumaker filed an appeal to this Court from a non-final decision and argues no credible basis how legally the Motion denial is a final appealable order.

3. CONCLUSION

Before October 2011 when Mr. Segerman became counsel for RFC, RFC and Shumaker were represented by the same law firm. In 2009, 13 days before a scheduled trial, RFC requested that an arbitration agreement to which it was not a party be enforced and appealed the denial of its Motion. In 2011, 12 days before a scheduled trial, Shumaker, represented by the same law

firm, requested that he be declared a non-party to an action in which he that actively participated. Both Motions were without merit and filed to delay scheduled trials.

This case will be reset for trial. Will a delaying Recusal Motion be filed against Judge Nichols based on a claim of prejudice resulting from the Action in Prohibition? What more will delay this case? Likely, after a trial on the merits, another appeal will be taken to the Court of Appeals and to this Court. Although the party defendants will have that right, additional years will be added to the Dixons' search for justice. Although the future additional time resulting from appeals is beyond the province of this Court, what transpired in the past is not. The Dixons should be compensated for the unreasonable and unjustified delays and their counsel's attorney time compensated. Hundreds of hours have been spent preparing for trials that did not go forward. The docket entries for short periods prior to just two scheduled trials evidence the voluminous work necessitated. Significant hours have been spent responding to unnecessary appeals.

This Court should not exercise jurisdiction over this case with the exception of considering whether the Civil Rules, Ohio statutes and the Rules of this Court have been violated.

Respectfully submitted,

Stanley L. Myers, LLC

A handwritten signature in black ink, appearing to read 'Stanley L. Myers', written over a horizontal line.

Stanley L. Myers (0019281)

Attorney for the Dixons

CERTIFICATE OF SERVICE

I certify that on January 3, 2013 I mailed by regular mail and sent by email a copy of the

Dixons' Memorandum and Motion to:

Beth J. Nacht (0076290)
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Counsel for appellant Jacob Shumaker

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A handwritten signature in black ink, appearing to read 'Stanley L. Myers', written over a horizontal line.

Stanley L. Myers (0019281)
Attorney for the Dixons