

ORIGINAL

IN THE SUPREME COURT OF OHIO

Jack Dixon, et al.,  
Appellees,  
vs.  
Residential Finance Corp. et al,  
Appellant.

: Case No.: 2012-2135  
:  
: On Appeal from the Madison County  
: Court of Appeals,  
: Twelfth Appellate District  
:  
: Court of Appeals  
: Case No.: CA2011-10-014

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APPELLANT JACOB SHUMAKER'S MEMORANDUM IN OPPOSITION TO APPELLEES'  
MOTION FOR SANCTIONS

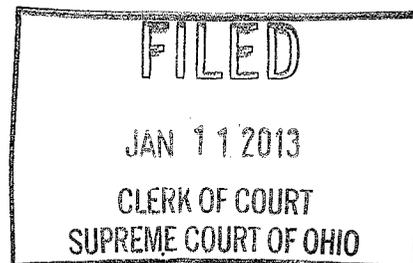
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Beth J. Nacht (0076290) (COUNSEL OF RECORD)  
Stein Chapin & Associates, LLC  
580 S. High Street, Suite 330  
Columbus, Ohio 43215  
Telephone: 614.221.9100  
Facsimile: 614.221.9272

COUNSEL FOR APPELLANT  
JACOB SHUMAKER

Douglas J. Segerman (0064779) (COUNSEL OF RECORD)  
McFadden Winner Savage & Segerman  
175 S. Third Street, Suite 350  
Columbus, Ohio 43215  
Telephone: 614.221.8868  
Facsimile: 614.221.3985

COUNSEL FOR DEFENDANT  
RESIDENTIAL FINANCE CORPORATION



Stanley L. Myers (0019281) (COUNSEL OF RECORD)  
Stanley L. Myers, LLC  
633 Eagle Ridge  
Powell, Ohio 43065  
Telephone: 614.781.0540  
Facsimile: 614.781.0545

COUNSEL FOR APPELLEES  
JACK AND CHERYL DIXON

Steven B. Ayers, Esq.  
Crabbe Brown & Jones LLP  
500 South Front Street, Suite 1200  
Columbus, Ohio 43215

CO-COUNSEL FOR APPELLEES  
JACK AND CHERYL DIXON

## MEMORANDUM

Appellees have failed offer any good grounds to entitle them to sanctions against Appellant. Contrary to Appellees' argument, the law simply does not support the trial court's order forcing a non-party to participate in a trial. The instant appeal and application for jurisdiction are warranted based on 1) the undisputed fact that Mr. Shumaker was being forced to defend himself in an action in which he was not a party and in which no claims had been asserted against him; and 2) the lack of any legal authority allowing the trial court to exercise such force.

Appellees have not provided any legal authority for an award of sanctions. Their only citation is to a non-existent Supreme Court Rule of Practice, "S. Ct. Pract. R. XIV, § 5[sic]." The applicable rule regarding Supreme Court sanction is S. Ct. Prac. R. 4.03, which allows for appropriate sanctions for frivolous appeals or other actions. A frivolous appeal or other action is one that is "not reasonably well-grounded in fact or warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law." S. Ct. Prac. R. 4.03.

Appellees' baseless speculation as to why Mr. Shumaker initially sought confirmation of his non-party status from the trial court amounts to nothing more than a self-serving distortion of the facts. While not integral to the issue of this Court's determination of jurisdiction, a glance at the facts surrounding Mr. Shumaker's request for acknowledgment as a non-party is significant to respond to Appellees pursuit of sanctions:

- Just prior to the most recently set trial date, the court, *sua sponte*, raised the issue of a potential conflict involving RFC and Mr. Shumaker's former counsel, Lance Chapin. (Appx. A).

- Upon direction of the court, Mr. Chapin addressed the matter in a thorough Response filed September 1, 2011. Mr. Chapin specifically requested that the court provide clear guidance on the matter. (Appx. B).
- In response, the trial court issued a vague entry reserving “the right to further address the issue at trial should any complications emerge.” (Appx. C).
- Based on the court’s ambiguous entry, out of an abundance of ethical caution, the decision was made to split the representation of RFC and Mr. Shumaker. Accordingly, on October 3, 2011, Douglas Segerman entered his appearance notifying the court that he would represent RFC at trial as Mr. Chapin and Ms. Nacht would no longer serve as RFC’s counsel and that Ms. Nacht would remain as counsel and trial attorney for Mr. Shumaker only. (Appx. D).
- Upon transfer of the RFC case file to Mr. Segerman and a thorough review of the numerous pleadings and motions filed in the Dixon matters over the years, it was determined that, for the purposes of the trial on October 17, 2011, Mr. Shumaker was not a party.
- Accordingly, Mr. Shumaker moved the trial court to acknowledge his non-party status with respect to the Dixons’ claims against RFC.
- The trial court issued an order acknowledging that Mr. Shumaker “was not a named defendant in the Dixons’ case against Residential Finance”, but nonetheless, without citing any authority, “denominated” him as a “co-defendant” for purposes of the trial of the Dixons’ claims against RFC. (Appx. E).

- Mr. Shumaker subsequently appealed the decision to the Twelfth District Court of Appeals<sup>1</sup>, which denied Appellees' initial motion to dismiss and motion for sanctions and then later granted Appellees' renewed motion to dismiss<sup>2</sup>.
- Mr. Shumaker's request for jurisdiction to this Court followed.

The relevant facts demonstrate that the instant appeal is certainly justified and cannot be considered frivolous. Thus, Appellees are not entitled to sanctions.

Just as Mr. Shumaker's appeal is reasonably well-grounded in fact, it is also warranted by law. There is no dispute that Mr. Shumaker was only named as a third-party defendant in a foreclosure action instituted against Appellees. Civ. R. 14, which governs third-party practice, would prohibit Appellees from prosecuting claims against Mr. Shumaker in the trial of their first party claims against RFC. Furthermore, while Appellees' action against RFC was once consolidated with the foreclosure (in which Mr. Shumaker was named as a third-party defendant), the two matters were bifurcated for purposes of trial. Even if the cases remained consolidated, Appellees still would not be able to prosecute their claims against RFC as against Mr. Shumaker as well. "[C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or *make those who are parties in one suit parties in another.*" [Emphasis added]. *Johnson v. Manhattan Ry. Co.* (1933), 289 U.S. 479, 496; see also *Momus v. Day* (June 13,

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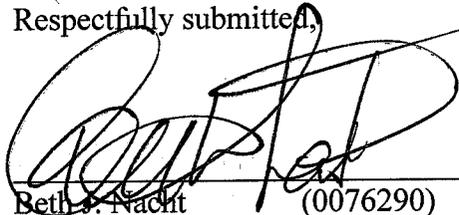
<sup>1</sup> Because of timing concerns and the novel issues involved in this matter, Mr. Shumaker was reluctant to rely solely on an appeal to protect his rights. Thus, he also filed a petition for a writ of prohibition against the trial court with the Twelfth District Court of Appeals. The court of appeals denied Mr. Shumaker's petition. Accordingly, he filed an appeal of right in this Court, which is currently pending.

<sup>2</sup> Appellees', citing the same grounds as contained in their current motion for sanctions, initially requested that the appellate court award sanctions. The court denied the motion and Appellees did not appeal that decision.

2011), Mahoning App. No. 10 MA 25, unreported. Thus, existing law undoubtedly warrants Mr. Shumaker's appeal especially given the fact that neither the trial court nor Appellees offered any relevant support for the court's decision to "denominate" a non-party as a co-defendant in an action.

Accordingly, there is no justification for awarding Appellees sanctions as they cannot establish that the instant appeal is frivolous. Appellant respectfully requests that Appellees' S. Ct. Pract. R. XIV, §5 [sic] Motion for Sanctions be denied.

Respectfully submitted,



Beth A. Nacht (0076290)  
Stein Chapin & Associates, LLC  
580 S. High Street, Suite 330  
Columbus, Ohio 43215  
Telephone: 614.221.9100  
Facsimile: 614.221.9272

Counsel for Appellant  
Jacob Shumaker

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via regular U.S. mail, postage prepaid, on this the 11<sup>th</sup> day of January, 2013, to the following:

Stan L. Myers, Esq.  
Stanley L. Myers, LLC  
633 Eagle Ridge  
Powell, Ohio

Counsel for Appellees  
Jack and Cheryl Dixon

Steven B. Ayers, Esq.  
Crabbe Brown & Jones LLP  
500 South Front Street, Suite 1200  
Columbus, Ohio 43215

Co-Counsel for Appellees  
Jack and Cheryl Dixon

Douglas J. Segerman  
McFadden Winner Savage & Segerman, LLP  
175 South Third Street, Suite 350  
Columbus, Ohio 43215-5188

Counsel for Defendant  
Residential Finance Corporation



---

Beth J. Nacht (0076290)  
Stein Chapin & Associates, LLC

Counsel for Appellant Jacob Shumaker

**APPENDIX**

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APPX.

A

**IN THE COURT OF COMMON PLEAS, MADISON COUNTY, OHIO**

Jack and Cheryl Dixon,	:	
	:	
Plaintiffs,	:	Case Nos. 2006CV-03-110 &
	:	2006CV-06-183
-vs-	:	
	:	
Residential Finance Corporation, et al.,	:	ENTRY
	:	
Defendants.	:	

FILED  
 COMMON PLEAS COURT  
 2011 AUG 16 P 3 36  
 MARIE PARKS  
 CLERK OF COURTS  
 MADISON COUNTY, OHIO

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.

As an initial matter, the Court notes that this renewed motion is apparently based upon counsel for RFC having obtained a private investigator to contact Mr. Shumaker, and that investigator's affidavit stating that Mr. Shumaker no longer wishes to be involved in the instant case. The affidavit also quotes Mr. Shumaker as stating: "One of the attorneys in this firm is my ex-partner \* \* \*."

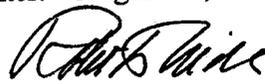
This case was initiated over five years ago, based upon Plaintiffs Dixon having retained Mr. Shumaker, an agent of RFC, to provide mortgage brokerage services for them in the year 2004. Mr. Shumaker has already been deposed. The facts that give rise to this litigation have not been altered by events 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 of 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.

Nevertheless, the court reserves judgment on counsel's motion to withdraw so that it may, sua sponte, raise a related issue. The court has of necessity carefully reviewed the extensive mortgage documents that underlie this present action. In so doing, the court takes notice that some of the mortgage documents are signed by counsel for defendants, in what appears to be the capacity of title agent. If this is the case, and if counsel for defendants was involved in and profited from the mortgage refinancing at issue, the court sua sponte raises the issue of whether counsel for defendants may in fact be called upon to testify in the present action. Therefore, the issue becomes whether counsel for defendants may continue to represent Defendant RFC as well as Defendant Shumaker. Counsel is directed to address this issue within 14 days. Thereafter, the court will rule on counsel's motion to withdraw.

It is so ordered.

Enter: August 11, 2011



JUDGE

Entry cc:     Jacob Shumaker  
                  Stanley Myers  
                  ✓ Lance Chapin  
                  Thomas Henderson  
                  Court Administrator

I HEREBY CERTIFY THAT THIS  
IS A TRUE COPY OF THE  
ORIGINAL ON FILE  
MARIE PARKS  
CLERK OF COURTS  
BY 

APPX.

B

IN THE COURT OF COMMON PLEAS FOR MADISON COUNTY, OHIO

JACK DIXON, *et al.*

Plaintiffs,

- vs. -

RESIDENTIAL FINANCE CORPORATION

Defendant.

Case No. 2006-CV-06-183

2006-CV-06-183

Judge Nichols

FILED  
COMMON PLEAS COURT  
2011 SEP -1 P 12:16  
MARIE PARKS  
&  
CLERK OF COURTS  
H. J. ...

**DEFENDANTS' COUNSEL'S RESPONSE TO COURT ORDER AND ENTRY**  
**FILED AUGUST 16, 2011**

**I. DEFENDANTS' COUNSEL'S MOTION TO WITHDRAW**

On August 16, 2011, this Court entered an Order regarding Defendants' counsel's Motion for Leave to Withdraw as Counsel for Defendant Jacob Shumaker. This Motion is now moot because on August 19, 2011, Defendants' counsel filed a Notice of Withdrawal of the Motion for Leave to Withdraw as Counsel for Defendant Jacob Shumaker. Counsel sought to withdraw the earlier Motion because some time after it was filed, Mr. Shumaker finally contacted counsel and recommitted himself to participate in the defense of this matter and expressed his intention to cooperate with counsel to aid in his legal defense.<sup>1</sup> Accordingly, Defendants' counsel no longer seeks permission to withdraw as counsel for Defendant Shumaker.

**II. DISQUALIFICATION OF DEFENSE COUNSEL AS POTENTIAL WITNESS**

With respect to the issue raised *sua sponte* by the Court regarding Defendants' counsel's ability to continue to represent both Defendants RFC and Shumaker, counsel respectfully submits that there are no appropriate grounds to disqualify Defendants' counsel from representation.

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1. Defendants' counsel had no knowledge of this Court's August 16, 2011 order at the time they filed their Notice of Withdrawal.

Disqualification of a party's chosen lawyer is a drastic measure that courts should hesitate to impose except when absolutely necessary. *Akron v. Carter* (2010), 190 Ohio App.3d 420, 942 N.E.2d 409. Disqualification of a party's attorney is absolutely necessary only if real harm is likely to result from failing to disqualify.<sup>2</sup> *Id. Akron v. Carter*.

The applicable sections of Rule 3.7 of the Ohio Rules of Professional Conduct state as follows:

**Lawyer as witness**

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless one or more of the following applies:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case;
- (3) the disqualification of the lawyer would work *substantial* hardship on the client.

(b) A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's *firm* is likely to be called as a witness unless precluded from doing so by Rule 1.7 or 1.9.<sup>3</sup>

When analyzing the issue of the possible disqualification of an attorney pursuant to this rule “the court shall first determine the admissibility of the attorney's testimony without reference to [the

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2. Defendants RFC and Shumaker are aware of Mr. Chapin's role as the title agent in the transaction at issue and want him to continue to represent them in this matter as his minor role as the title agent does not produce any conflict of interests with their positions in this case.

3. Although we are using Rule 3.7 to guide the analysis of this issue of Mr. Chapin's possible disqualification, in deciding whether Mr. Chapin can continue to represent his clients, the court is not determining whether an ethical violation would have occurred. *Morrison v. Gugle* (2001), 142 Ohio App.3d 244, 755 N.E.2d 404, appeal not allowed 92 Ohio St.3d 1451, 751 N.E.2d 487.

applicable ethical rule]<sup>4</sup>. If the court finds that the testimony is admissible, then that attorney, opposing counsel, or the court *sua sponte*, may make a motion requesting the attorney to withdraw voluntarily or be disqualified by the court from further representation in the case.” *Menter Lagoons, Inc. v. Rugin* (1987), 31 Ohio St.3d 256, 510 N.E.2d 379. Accordingly, this Court must first determine if Mr. Chapin has any admissible testimony to offer.

Evid R 402 states in pertinent part that “all relevant testimony is admissible” while “[e]vidence which is not relevant is not admissible”. Accordingly, the more exact question is - Does Mr. Chapin have any relevant testimony to offer? And the answer is No.

While it is true that Lance Chapin is an owner and Managing Member of the title agency involved in the Dixon transactions, it does not follow that his involvement in this capacity provided him with any admissible/relevant testimony. Mr. Chapin is not in possession of any knowledge regarding the events giving rise to Plaintiffs’ claims. Mr. Chapin’s role as signatory for the title agency is not remotely related to any of Plaintiffs’ allegations or claims against RFC or Mr. Shumaker. This position is clearly demonstrated by the fact that Plaintiffs’ counsel has never once in the five years this case has been pending attempted to depose Mr. Chapin as a witness or even list his name on a witness disclosure or any other pleading before this Court. This Court’s *sua sponte* order is the first time the question of Mr. Chapin’s role as a potential witness has been raised. It is abundantly clear that Mr. Chapin could not offer any relevant/admissible witness testimony with respect to any of the claims or defenses in this matter and would never anticipate being called as a witness at trial.<sup>5</sup>

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4. Rule 3.7 of the Ohio Rules of Professional Conduct superseded DR 5-105 of the Code of Professional Responsibility and cases cited in this response reference both depending on the time frame of the decision.

5. By the same token, Mr. Chapin cannot be considered a “necessary” witness for purposes of Rule 3.7 of the Ohio Rules of Professional Conduct because he has no admissible testimony to offer.

Again, to directly answer the inquiry posed by the Court in its August 16<sup>th</sup> Entry – Mr. Chapin did have a nominal role in the transaction at issue as a title agent issuing the title insurance policy required in the refinancing transaction and did indirectly profit from the premium paid on that policy. Mr. Chapin also executed a corporate assignment of mortgage on behalf of RFC. Mr. Chapin did not attend the closing. He was not privy to any conversations between the Dixons and either RFC or Shumaker or anyone else for that matter. Mr. Chapin never met the Dixons until their depositions on June 5, 2007.<sup>6</sup> In his capacity as title agent, Mr. Chapin did not obtain any information which he believes in any way touches on the claims being made by Mr. and Mrs. Dixon. Ohio law is clear that an order disqualifying counsel is without any basis in law where the subject information is irrelevant to the case. *Sneary v. Baty* (Ohio App. 3 Dist., Allen, 08-14-1996) No. 1-96-13, 1996 WL 479579, unreported. Accordingly, Mr. Chapin should not be disqualified.

Furthermore, any information Mr. Chapin may have in his possession as a result of his minor role in the transactions (for instance, what forms he executed or how much the agency profited from the Dixon transactions) would not be exclusive to him and could be obtained from a number of other sources, such as the title agency's manager or one of the department managers. Under Ohio law, the Court should not issue an order disqualifying counsel where the subject information is available through testimony of other witnesses. *Sneary v. Baty* (Ohio App. 3 Dist., Allen, 08-14-1996) No. 1-96-13, 1996 WL 479579, unreported. Accordingly, the Court should not disqualify Mr. Chapin as trial counsel in this matter.

Defendants understand that the Court has broad discretion on the issue of disqualification and may well disagree with Defendants' position and disqualify Mr. Chapin. In that event,

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6. All of these facts are not in dispute in the case *sub judice*. Therefore, Mr. Chapin should not be disqualified because Rule 3.7(a)(1) prohibits his disqualification if he can only offer testimony which relates to "an uncontested issue".

Defendants request permission to allow Beth Nacht to serve as trial counsel in this matter. Beth Nacht is a long time associate of Mr. Chapin's firm and has been actively involved in the case throughout its pendency. Importantly, she has absolutely no involvement in the title company, is not a title agent and had no involvement whatsoever in the Dixon transactions. There should be no reason why Ms. Nacht could not take over the case at this point. In fact, the clear language of Rule 3.7(b) provides for this very solution when it states: "A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's *firm* is likely to be called as a witness unless precluded from doing so by Rule 1.7 or 1.9"<sup>7</sup>

If Mr. Chapin is disqualified and Ms. Nacht is allowed to proceed as trial counsel, the interests of all the parties, and the Court, would be protected. On the other hand, should the Court disqualify Mr. Chapin and not allow Ms. Nacht to try the case, Defendants respectfully submit that this would work a "substantial hardship" on them as contemplated in the language of Rule 3.7(a)(3) because they would be forced to find an entirely new law firm to represent them at substantial expense of both time and money. With this case almost 5 years old and trial less than 2 months away, this would be an untenable position in which to put these clients.

### **III. CONCLUSION**

In sum, Mr. Chapin should not be disqualified for all of the following reasons:

1. Mr. Chapin is not in possession of any information remotely admissible or relevant to the claims being made by Plaintiffs against RFC and Mr. Shumaker;
2. No real harm will result by failing to disqualify Mr. Chapin, thereby making his disqualification "absolutely [not] necessary" pursuant to *Akron v. Carter* (2010), 190 Ohio App.3d 420, 942 N.E.2d 409;

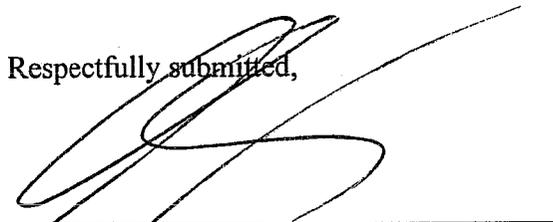
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7. Nothing in Rule 1.7 or 1.9 prohibits Ms. Nacht from acting as trial counsel.

3. Pursuant to Rule 3.7(a), Mr. Chapin is not a “necessary” witness as that term relates to any of the claims being made by Plaintiffs;
4. Pursuant to Rule 3.7(a)(1), any testimony Mr. Chapin could offer would relate to only uncontested matters;
5. Any testimony Mr. Chapin could offer would be redundant and certainly obtainable from a number of other sources; and
6. Pursuant to Rule 3.7(a), Mr. Chapin’s disqualification will work a “substantial hardship” on his clients if Ms. Nacht is not granted permission to take his place as trial counsel.

Accordingly, counsel respectfully requests clear guidance on this matter, and in the event the court disqualifies Mr. Chapin, whether or not the court will allow Ms. Nacht to continue to represent both RFC and Mr. Shumaker.

Respectfully submitted,



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Lance Chapin (0069473)  
Beth J. Nacht (0076290)  
Richard F. Chambers, II (0081139)  
Stein Chapin & Associates, LLC  
32 West Hoster Street, Suite 200  
Columbus, Ohio 43215  
Telephone: 614.221.9100  
Facsimile: 614.221.9272

Attorneys for Defendants  
Residential Finance Corporation & Jacob Shumaker

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was furnished via regular U.S. Mail, postage prepaid, on this the 31st day of August, 2011, to the following:

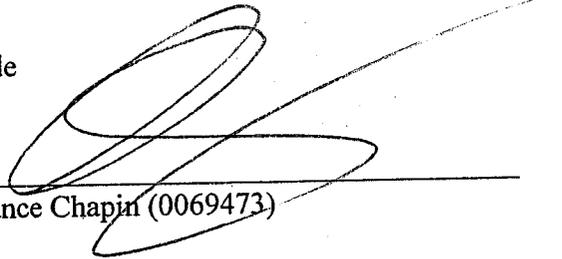
Stan L. Myers, Esq.  
Stanley L. Myers, LLC  
633 Eagle Ridge  
Powell, Ohio

Steven B. Ayers, Esq.  
Crabbe Brown & Jones LLP  
500 South Front Street, Suite 1200  
Columbus, Ohio 43215

Attorneys for Defendant / Third-Party Plaintiff  
Jack and Cheryl Dixon

Thomas L. Henderson, Esq.  
Lerner, Sampson & Rothfuss  
120 East Fourth Street, 8<sup>th</sup> Floor  
Cincinnati, Ohio 45202

Attorney for Plaintiff  
Bank of New York / Countrywide

  
Lance Chapin (0069473)

**APPX.**

**C**

IN THE COURT OF COMMON PLEAS, MADISON COUNTY, OHIO

Jack and Cheryl Dixon,

Plaintiffs,

-vs-

Residential Finance Corporation, et al.,

Defendants.

Case Nos. 2006CV-03-110 &  
2006CV-06-183

ENTRY

FILED  
COMMON PLEAS COURT  
2011 SEP - 8 P 1:19  
MARIE PARKS  
CLERK OF COURTS

The Court notes that counsel have withdrawn their motion to withdraw as counsel for

Jacob Shumaker in this matter.

On September 1, 2011, Defendants RFC and Jacob Shumaker filed a motion to engage in additional discovery to Plaintiff Bank of N.Y. on the issue of whether it possesses the right to foreclose on the Dixons' property. Such motion is hereby overruled.

As to the issue of possible conflicts of interest should counsel be called as witness at trial, the Court is satisfied with the responses of both counsel for Defendants RFC and Shumaker and the responses of the Dixons. The Court reserves the right to further address the issue at trial should any complications emerge.

It is so ordered.

Enter: September 8, 2011



JUDGE

Entry cc: Stanley Myers  
Lance Chapin  
Thomas Henderson  
Court Administrator

I HEREBY CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL ON FILE  
MARIE PARKS  
CLERK OF COURTS

BY 

**APPX.**

**D**

**IN THE COURT OF COMMON PLEAS  
MADISON COUNTY, OHIO**

**BANK OF NEW YORK,**

**Plaintiff,**

**Case No. 2006CV-06-183**

**vs.**

**JUDGE NICHOLS**

**CHERYL L. DIXON, et al.,**

**Defendant.**

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**JACK DIXON, et al.,**

**Plaintiffs,**

**Case No. 2006CV-03-110**

**vs.**

**JUDGE NICHOLS**

**RESIDENTIAL FINANCE CORPORATION,**

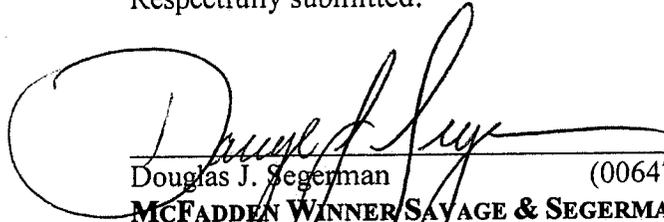
**Defendants.**

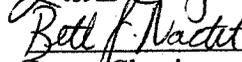
**ENTRY OF APPEARANCE OF**  
**ATTORNEY DOUGLAS J. SEGERMAN AS COUNSEL FOR**  
**DEFENDANT, RESIDENTIAL FINANCE CORPORATION**

**PLEASE TAKE NOTICE THAT** Douglas J. Segerman enters his appearance as counsel for defendant Residential Finance Corporation, **ONLY**, and does not represent any other defendant in this action. Attorneys Lance Chapin (#0069473) and Beth J. Nacht (#0076290) will no longer serve as counsel for defendant Residential Finance Corporation, but Ms. Nacht remains as counsel and trial attorney for defendant Jacob Shumaker.

This entry is not interposed for delay and Residential Finance Corporation and its counsel will be prepared to try this case beginning on October 17, 2011.

Respectfully submitted:

  
\_\_\_\_\_  
Douglas J. Segerman (0064779)  
**McFADDEN WINNER SAVAGE & SEGERMAN, LLP**  
175 South Third Street, Suite 350  
Columbus, Ohio 43215-5188  
Telephone: (614) 221-8868  
Fax: (614) 221-3985  
Email: djsegerman@earthlink.net  
Attorney for Defendant,  
Residential Finance Corporation

  
 (Douglas J. Segerman per  
written auth.)  
\_\_\_\_\_  
Lance Chapin (0069473)  
Beth J. Nacht (0076290)  
**Stein Chapin & Associates**  
32 West Hoster Street, Suite 200  
Columbus, Ohio 43215  
Telephone: (614) 221-9100  
Fax: (614) 221-9272  
Email: bnacht@steinchapin.com

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing has been served by ordinary U.S. mail, first class postage pre-paid, this 3rd day of October, 2011 upon the following:

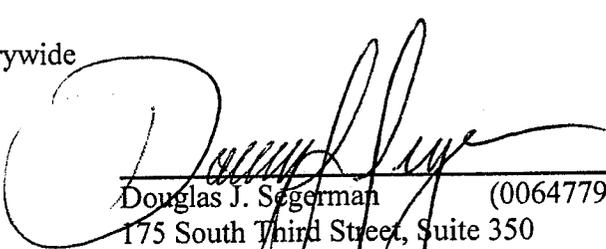
Beth J. Nacht, Esq.  
Stein Chapin & Associates  
32 West Hoster Street, Suite 200  
Columbus, Ohio 43215  
Attorney for Defendant,  
Joshua Shumaker

Stan L. Myers, Esq.  
Stanley L. Myers, LLC  
633 Eagle Ridge  
Powell, Ohio 43065-9274

Steven B. Ayers, Esq.  
Crabbe Brown & James, LLP  
500 South Front Street, Suite 1200  
Columbus, Ohio 43215

Attorneys for Defendant / Third-Party Plaintiffs,  
Jack and Cheryl Dixon

Thomas L. Henderson, Esq.  
Lerner, Sampson & Rothfuss  
120 East Fourth Street, 8<sup>th</sup> Floor  
Cincinnati, Ohio 45202  
Attorney for Plaintiff,  
Bank of New York / Countrywide



Douglas J. Segerman (0064779)  
175 South Third Street, Suite 350  
Columbus, Ohio 43215-5188  
Telephone: (614) 221-8868  
Attorney for Defendant,  
Residential Finance Corporation

APPX.

E

IN THE COURT OF COMMON PLEAS, MADISON COUNTY, OHIO

Jack and Cheryl Dixon,

Plaintiff(s)

-vs-

Residential Finance Corporation,

Defendant(s)

Case No. 2006CV-03-110  
2006CV-06-183

ENTRY

CLERK OF COURTS  
JULIE PARKS

2011 OCT 12 A 11: 20

FILED  
COMMON PLEAS COURT

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 confusion at trial, Schumaker will be denominated as a co-defendant to Residential Finance in the breach claims.

There have been significant filings since October 5<sup>th</sup> 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.

The Court notes that Shumaker's interests converge with Residential Finance's and therefore they will share challenges in jury selection.

Judgment is entered accordingly.

ENTER: October 12, 2011

JUDGE

cc: Beth Nacht via fax 614.221.9272  
Stan L. Myers via fax 614.781.0545  
Steven B. Ayers via fax 614.229.4559  
Thomas L. Henderson via fax 513.354.6816  
Douglas J. Segerman via fax 614.221.3985  
Court Administrator

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