

**BEFORE THE BOARD OF PROFESSIONAL CONDUCT
OF THE SUPREME COURT OF OHIO**

In re:	:	Case No. 2014-106
Complaint against	:	
Bruce Martin Broyles Attorney Reg. No. 0042562	:	Findings of Fact,
Respondent	:	Conclusions of Law, and
	:	Recommendation to the
Disciplinary Counsel	:	Board of Professional Conduct of
	:	the Supreme Court of Ohio
Relator	:	

DISCIPLINE BY CONSENT

{¶1} This matter was submitted to the hearing panel pursuant to a consent to discipline agreement filed by the parties on March 30, 2015. The hearing panel consisted of Patricia A. Wise, Robert L. Gresham, and Sanford E. Watson, chair.

{¶2} The panel finds that this agreement was filed on a timely basis and conforms to the requirements of Gov. Bar R. V, Section 16. The panel recommends acceptance of the agreement including the statement of facts and the violation of Prof. Cond. R. 1.9 [Conflict of Interest: Duties to Former Clients].

{¶3} In support of the proposed sanction of a public reprimand, the parties cite *Geauga Cty. Bar Assn. v. Psenicka* (1991), 62 Ohio St.3d 35. In that case, Psenicka filed a divorce action on behalf of his client who, shortly thereafter retained new counsel. Psenicka subsequently agreed to represent the former client's husband in the divorce action, entering an appearance on his behalf, filing an affidavit relative to a pending motion, and contacting his former client's attorney. Psenicka was publicly reprimanded for violating four disciplinary rules relative to a conflict of interest and disclosing client confidences.

{¶4} The panel further considered the recent case of *Cleveland Metro. Bar Assn. v.*

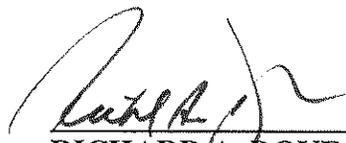
Leiken, Slip Opinion 2014-Ohio-5220. Leiken had initially represented both the driver and a passenger who were seeking to recover damages for injuries suffered in an automobile accident. After it was alleged that the driver was comparatively negligent in the accident, Leiken withdrew from representing the driver and brought suit against the driver on behalf of the passenger. The Supreme Court accepted the consent to discipline agreement submitted by the parties and publicly reprimanded Leiken for his violations of Prof. Cond. R. 1.7, Prof. Cond. R. 1.9, and Prof. Cond. 1.16(a)(1). In its opinion, the Court cited to *Toledo Bar Assn. v. Gabriel* (1991), 57 Ohio St.3d 18 and *Toledo Bar Assn. v. Tolliver* (1992), 62 Ohio St.3d 462, both cases involving lawyers who were publicly reprimanded for representing clients whose interests were adverse to each other.

{¶5} Based on the agreement submitted by the parties and the precedents cited above, the panel recommends acceptance of the consent to discipline agreement and the agreed sanction of a public reprimand.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 12, the Board of Professional Conduct of the Supreme Court of Ohio considered this matter on April 10, 2015. The Board voted to accept and adopt the agreement entered into by Relator and Respondent and recommends acceptance of the agreement and imposition of the agreed sanction of a public reprimand. The Board further recommends that Respondent be ordered to pay the costs of these proceedings.

Pursuant to the order of the Board of Professional Conduct of the Supreme Court of Ohio, I hereby certify the foregoing recommendation as that of the Board.



RICHARD A. DOVE, Director

**BEFORE THE BOARD OF PROFESSIONAL CONDUCT
OF
THE SUPREME COURT OF OHIO**

In re: :
Bruce Martin Broyles, Esq. :
Bruce M. Broyles Co. LPA :
5815 Market Street :
Boardman, OH 44512 :
0042562 :

Respondent,

Disciplinary Counsel :
250 Civic Center Drive, Suite 325 :
Columbus, Ohio 43215-7411 :

Relator.

FILED
MAR 30 2015
BOARD OF PROFESSIONAL CONDUCT

Case No. 14-106

AGREEMENT FOR CONSENT TO DISCIPLINE

INTRODUCTION

Relator and Respondent submit the following Agreement, which contains stipulations of fact, disciplinary rule violations, mitigation, aggravation, sanction and exhibits.

STIPULATED FACTS

1. Respondent, Bruce Martin Broyles, was admitted to the practice of law in the state of Ohio on November 6, 1989. Respondent is subject to the Code of Professional Responsibility, the Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.
2. On April 5, 2011, respondent attended a hearing on a motion for default judgment on behalf of the Plaintiff, The Bank of New York Mellon (hereinafter "NY Mellon"), in the

foreclosure action it filed against Felix and Barbara Aponte, which was captioned *The Bank of New York Mellon Trust Co. v. Felix R. Aponte, et al.*, and filed in the Mahoning County Common Pleas Court under case number 10CV4681.

3. NY Mellon was represented by the Lerner, Sampson & Rothfuss law firm, which hired respondent to appear at the motion hearing as local counsel.
4. During the hearing, respondent presented a proposed judgment entry of default and the trial court entered default judgment and a decree of foreclosure against the defendants, Felix and Barbara Aponte, and in favor of NY Mellon.
5. Respondent subsequently presented an invoice for his appearance at the hearing and was paid for his time.
6. Approximately nine months later, on or about January 20, 2012, respondent was retained by the Apontes to defend them in the foreclosure action filed by NY Mellon. Their home, on which NY Mellon sought to foreclose, was scheduled to be sold at a sheriff's sale on February 14, 2012.
7. Respondent agreed to represent the Apontes for a flat fee of \$4,800. The Apontes paid monthly installments of \$200 totaling at least \$4,400.
8. When respondent first met with Barbara Aponte, he was aware that Lerner Sampson & Rothfuss was the law firm that represented the Plaintiff, NY Mellon. He checked the case docket for dates on which events occurred in the case and compared those dates with the dates of his previous appearances in court as local counsel for Lerner, Sampson & Rothfus. He did not see any conflict.
9. On February 9, 2012, respondent filed, on behalf of the Apontes, a motion for relief from the judgment he had obtained on behalf of NY Mellon on April 5, 2011. He also filed a

motion to stay execution, affidavit of Mrs. Aponte, affidavit of counsel and a proposed order to stay execution. As a result, the trial court cancelled the sheriff's sale by Order filed February 13, 2012.

10. On March 13, 2012, NY Mellon filed a memorandum in opposition to the Apontes' motion for relief from judgment. On April 27, 2012, respondent filed a reply in support of the motion for relief from judgment on behalf of the Apontes.
11. NY Mellon did not give informed consent, confirmed in writing, to allow respondent to represent the Apontes. On May 7, 2012, NY Mellon filed a motion to disqualify respondent as counsel for the Apontes based on his previous representation of NY Mellon in the same case.
12. After the motion to disqualify was filed, respondent again checked the dates of events that occurred in the case and compared them to the dates that he appeared in court as local counsel for Lerner, Sampson & Rothfuss. This time, he discovered that he attended the April 5, 2011 hearing on NY Mellon's motion for default. With full knowledge of that fact, he continued to represent the Apontes.
13. Respondent opposed NY Mellon's motion to disqualify on behalf of the Apontes, arguing that he never had an attorney-client relationship with NY Mellon.
14. On May 23, 2012, the magistrate found that respondent had a conflict of interest and granted the motion to disqualify respondent. At the same time, the magistrate struck the motion for relief from judgment filed by respondent due to the conflict.
15. On June 6, 2012, respondent filed objections to the magistrate's decision on behalf of the Apontes, arguing, *inter alia*, that respondent did not advocate on behalf of NY Mellon during the April 5, 2011 hearing and that he "merely provided a service to the law firm of

Lerner, Sampson & Rothfuss;” and that there was no evidence “of the dissemination of confidential information.”

16. On June 12, 2012, the trial court adopted the magistrate’s decision and granted the Apontes 45 days to obtain new counsel and an additional 15 days to refile their motion for relief from judgment.
17. On July 6, 2012, respondent filed a notice of appeal of the trial court’s decision to the Eleventh District Court of Appeals on behalf of the Apontes.
18. On appeal, respondent claimed that he did not have a conflict of interest because he was merely providing a service to the Lerner, Sampson & Rothfuss law firm, and not to NY Mellon, as he had no authority to make any representations to the court and did not advocate for any position in the case.
19. The court of appeals found that respondent’s representation of both sides of the same lawsuit amounted to a conflict of interest and “offends the notions of trust and confidence that the public, including NY Mellon, have when retaining counsel in our legal system.”

STIPULATED EXHIBITS

1. Attorney registration
2. Affidavit of Bruce M. Boyles
3. Motion for Relief from the April 7, 2011 Judgment and Decree of Foreclosure
4. Order filed February 13, 2012
5. Correspondence from Bruce M. Broyles dated October 12, 2014
6. Correspondence from Bruce M. Broyles dated February 12, 2014
7. Motion to Stay Execution of April 7, 2011 Default Judgment and Request to Cancel Sheriff’s Sale Scheduled for February 14, 2012

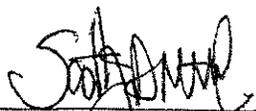
8. Affidavit of Counsel of Barbara Aponte
9. Memorandum in Opposition to Defendants' Motion for Relief from Judgment
10. Reply in Support of Motion for Relief from Judgment
11. Motion to Disqualify Counsel
12. Memorandum in Opposition to Motion to Disqualify Counsel
13. Magistrate's Decision filed May 23, 2012
14. Objections to Magistrate's Decision of May 23, 2012
15. Judgment Entry file June 12, 2012
16. Notice of Appeal
17. Brief of Appellants Felix Aponte and Barbara Aponte
18. Opinion filed September 24, 2013
19. Character letters submitted in support of respondent.

STIPULATED RULE VIOLATIONS

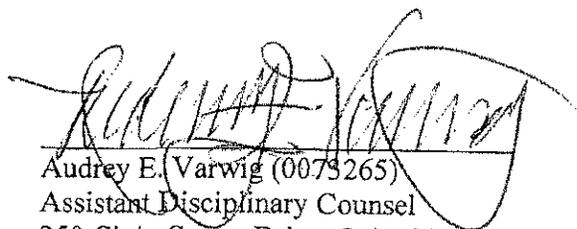
Respondent admits his conduct violated Prof. Cond. R. 1.9 [A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that persons' interest are materially adverse to the interest of the former client].

MITIGATION EVIDENCE

1. Respondent has no prior disciplinary record.
2. Respondent has made a full and free disclosure of his actions and has displayed a cooperative attitude in these proceedings.



Scott J. Drexe (0091467)
Disciplinary Counsel



Audrey E. Varwig (0079265)
Assistant Disciplinary Counsel
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Columbus, OH 43215-7411
614.461.0256
614.461.7205 (f)
A.Varwig@sc.ohio.gov

3. Respondent acknowledged that his actions set forth above were improper.

AGGRAVATION EVIDENCE

None.

STIPULATED RECOMMENDED SANCTION

The parties agree and stipulate to a recommended sanction of a public reprimand. In support of the recommended sanction, the parties have relied upon the Ohio Supreme Court's 1991 decision in a similar case. In *Geauga County Bar Association v. Psenicka*, 62 Ohio St.3d 35, 577 N.E.2d 1074, the respondent filed a complaint for divorce on behalf of a wife. After the wife terminated the representation, the respondent agreed to represent the husband. The respondent was found in violation of DR 4-101(B)(2), DR 4-101(B)(3) and DR 5-105(A). He had no prior record of discipline and neither the husband nor the wife suffered any harm. He was publicly reprimanded.

This case does not involve the use of confidential information obtained by one client against another. Further, the respondent in this case has no prior record of discipline and there exists no evidence that his clients suffered any harm. Therefore, the agreed-upon public reprimand is appropriate.

CONCLUSION

The above are stipulated to and entered into by agreement by the undersigned parties on this 30th of March, 2015.

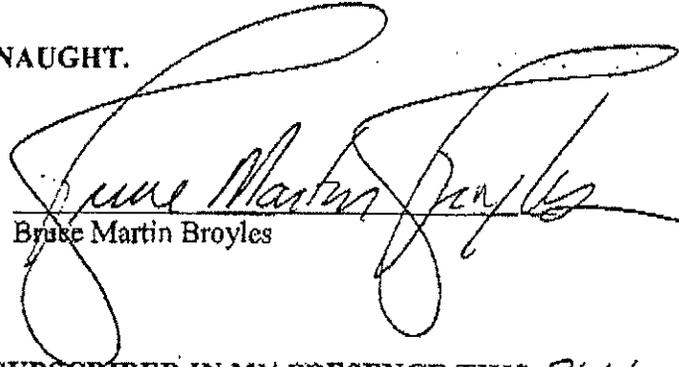
STATE OF OHIO)
) §:
COUNTY OF FRANKLIN)

AFFIDAVIT OF BRUCE MARTIN BROYLES

I, Bruce Martin Broyles, having been duly sworn according to the laws of Ohio, hereby
depose and say:

1. I was admitted to the practice of law in the State of Ohio on November 6, 1989.
2. I am subject to the Code of Professional Responsibility, the Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.
3. I admit committing the misconduct outlined in the Agreement for Consent to Discipline (“Agreement”). This admission is conditioned upon acceptance of the Agreement by the Board.
4. I acknowledge that grounds exist for the imposition of a sanction against me for the misconduct.
5. The Agreement sets forth all grounds for discipline currently pending before the Board.
6. I admit to the truth of the material facts relevant to the misconduct listed in the Agreement.
7. I agree to the sanction recommended to the Board in the Agreement.
8. These admissions and this Agreement are freely and voluntarily given, without coercion and duress. Further, I am fully aware of the implications of these admissions and the Agreement on my ability to practice law in Ohio.
9. I understand that the Supreme Court of Ohio has the final authority to determine the appropriate sanction for the misconduct I have admitted.

FURTHER AFFIANT SAYETH NAUGHT.


Bruce Martin Broyles

SWORN TO BEFORE ME AND SUBSCRIBED IN MY PRESENCE THIS 26th
DAY OF MARCH 2015.


Notary Public

My commission expires 7/28/18

Center Source

Please note that inclusion in this list does not necessarily mean that the person is in good standing with the Supreme Court or permitted to practice law in the state of Ohio. It also does not mean that the person has not been sanctioned by the Supreme Court pursuant to Gov. Bar R. VI or Gov. Bar R. X. To determine the status of a person listed in this data base, please contact the Attorney Registration and CLE Section at 614.387.9320.

Items included in the section marked Confidential may not be released to anyone.

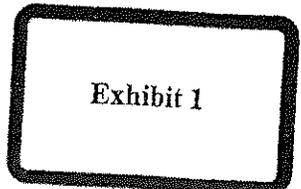
Bruce Martin Broyles

Current Registration:	Active	10/21/2013	Missing Previous Biennium:	No
Reason if NOT REQUIRED:		Last Discipline:	No Discipline	
Ohio Admission:	11/06/1989			
Registration Number:	0042562			
Attorney Title:	owner			
Employer:	Bruce M. Broyles Co. LPA			
Employer Address:	5815 Market Street Boardman, OH 44512			
Employer Phone:	330.965.1093			
County:	Mahoning	Preferred Mail To Addr:	Residence	
Date of Birth:	06/27/1964			
Law School:	Ohio State University			
How Admitted:	By Exam	Journal:	70	Page: 338
Gender:	Male			
	<u>Confidential</u>			
SSN #:	275-76-6646			
Residence Address:	164 Griswold Drive Boardman, OH 44512			
County:	Mahoning			
Email:	brucebroyles@yahoo.com			

Exams	CLE Enforce	Registration Trans	Discipline Trans	Names
New Search	Previous Search List			

Questions or Comments: [Attorney Registration and CLE Section, 614.387.9320](#)

- [My Intranet](#)
- www.SupremeCourt.Ohio.Gov



IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

MAY 16 2012

The Bank of New York Mellon Trust	)	CASE NO.: 2010 CV 4681
Company, National Association fka)	
The Bank of New York Trust Company	)	JUDGE LOU D'APOLITO
N.A. as successor to JPMorgan Chase Bank)	
N.A. as Trustee for RASC 2004KS6)	
	)	AFFIDAVIT OF
PLAINTIFF,	)	BRUCE M. BROYLES
VS.)	
)	
FELIX R. APONTE, ET AL)	
)	
DEFENDANTS,)	

Now come Defendants Felix and Barbara Aponte, by and through counsel, and file the Affidavit of Bruce M. Broyles.

State of Ohio)	
	)	SS
County of Mahoning)	

Now comes Bruce M. Broyles, being duly sworn and cautioned, deposes and says the following:

1. I make the following statements of my own personal knowledge and I am competent to testify to these matters at trial.
2. I am an attorney licensed by the State of Ohio.
3. On March 3, 2011 at 10:35 a.m. an e-mail was received from the law Firm of Lerner, Sampson & Rothfuss ("LSR").
4. The e-mail provided the name of the LSR attorney; the LSR file number and "Aponte 10cv 4681".
5. The e-mail asked to advise if I was available to attend the Default hearing on 4/5/11 at 1:45 p.m. in Mahoning County before Magistrate Dascenzo.

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Exhibit 2

6. I was available, and I received a letter from LSR dated march 8, 2011 enclosing the original and three copies of the Judgment and Decree in Foreclosure, the original and three copies of Praeceptum for Order of Sale and a check for the filing fees.

7. The letter then instructed me to present the documents to the Court at the hearing scheduled fro 4/5/11 at 1:45 p.m.

8. I attended the hearing.

9. I arrived at Judge D'Apolito's Courtroom and when the defendant failed to appear I left the documents with Magistrate Dascenzo.

10. I then sent a facsimile transmission to LSR indicating the results of the hearing.

11. On April 6, 2011, I invoiced LSR for three (3) hearings that I attended on April 5, 2011; I charged LSR 1.00 hour for my services on April 5, 2011, and billed LSR at an hourly rate that was approximately one-half of my hourly rate for legal services.

12. I did not meet with any representative of the Plaintiff, I did not receive any confidential information from the Plaintiff or from Plaintiff's representatives.

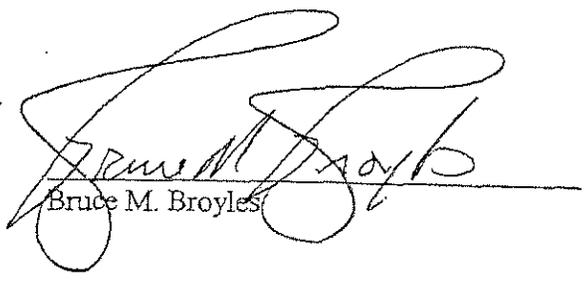
13. In my opinion I did not provide any legal service to Plaintiff, but merely provided a service to LSR.

14. I had no authority to take any action or make any statement in the case if the other party appeared.

- 15. I did not advocate on behalf of the Plaintiff.
- 16. On December 26, 2011, a local newspaper wrote an article regarding homeowners defending foreclosures and the article mentioned the name of Attorney Bruce Broyles.
- 17. On January 20, 2012, Felix and Barbara Aponte retained Attorney Bruce Broyles.
- 18. Between December 26, 2011 and January 2012, Barbara Aponte was referred to the newspaper article and contacted Attorney Bruce Broyles as a result of the newspaper article.

End of Affidavit. Further Affiant sayeth naught.

Date: 5-18-12

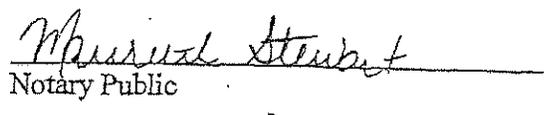

 Bruce M. Broyles

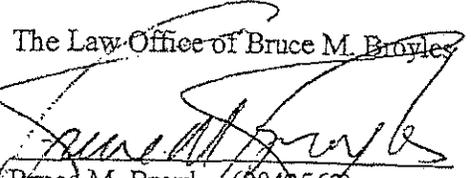
NOTARY PUBLIC

Sworn to and subscribed in my presence on the 18th day of May 2012.



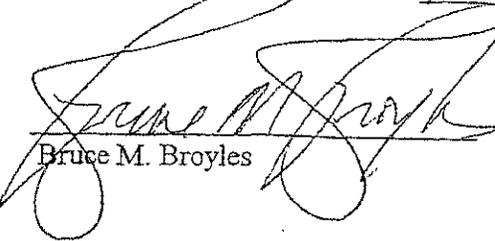
MARIRUTH STEWART
 NOTARY PUBLIC
 STATE OF OHIO
 Recorded in
 Mahoning County
 My Comm. Exp. 2/28/15


 Notary Public

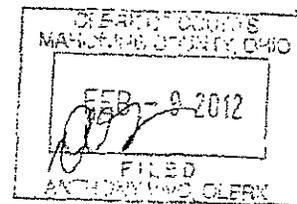
Respectfully submitted,
 The Law Office of Bruce M. Broyles

 Bruce M. Broyles (0042562)
 5815 Market Street, Suite 2
 Boardman, Ohio 44512
 (330) 965-1093
 (330) 953-0450 fax
 Attorney for Defendants

CERTIFICATE OF SERVICE

A copy of the forgoing affidavit was served upon Scott Martin, of Lerner, Sampson & Rothfuss, at P.O. Box 5480, Cincinnati, Ohio 45201-5480, by regular U.S. Mail this 18th day of May 2012.


Bruce M. Broyles

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO



The Bank of New York Mellon Trust)
Company, National Association fka)
The Bank of New York Trust Company)
N.A. as successor to JPMorgan Chase Bank)
N.A. as Trustee for RASC 2004KS6)

CASE NO.: 2010 CV 4681

JUDGE LOU D'APOLITO

MOTION FOR RELIEF FROM
THE APRIL 7, 2011 JUDGMENT
AND DECREE OF FORECLOSURE

PLAINTIFF,

VS.

FELIX R. APONTE, ET AL

DEFENDANTS,

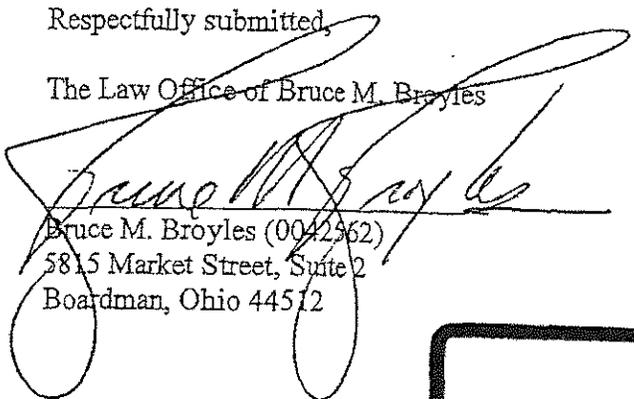
Now come Defendants Felix and Barbara Aponte, by and through counsel, pursuant to Civil Rule 60(B), and file their motion for relief from the April 7, 2011 judgment and decree of foreclosure.

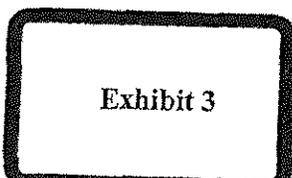
For cause, Defendants say that they have a meritorious defense to raise should relief be granted, and that they are entitled to relief from judgment pursuant to Civil Rule 60(B)(1) mistake, inadvertence, surprise or excusable neglect; and Civil Rule 60(B)(3) fraud, misrepresentation or other misconduct of an adverse party. Defendants also say that the motion has been filed within a reasonable period of time.

In support of their motion, Defendants rely upon the affidavit of Barbara Aponte and the accompanying memorandum of law.

Respectfully submitted,

The Law Office of Bruce M. Broyles


Bruce M. Broyles (0042362)
5815 Market Street, Suite 2
Boardman, Ohio 44512

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(330) 965-1093
(330) 953-0450 fax
Attorney for Defendants

MEMORANDUM IN SUPPORT OF MOTION

In the instant action, the complaint was filed on December 17, 2010, and a motion for default was granted on April 7, 2011. The motion for relief from judgment is being filed well within a year of the date of the judgment.

To prevail upon a motion for relief from judgment, the moving party must satisfy the following three-pronged test: "(1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3) not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, paragraph two of the syllabus.

Civil Rule 60(B) is remedial in nature, is to be liberally construed and any doubt is to be resolved in favor of granting relief so that cases may be decided on their merits. *Colley v. Bazell* (1980), 64 Ohio St.2d 243 at 248.

I. Defendants have a meritorious defense to raise if relief is granted.

A. Mortgage Note not an Asset of the Trust

Felix R. Aponte and Barbara Aponte have a meritorious defense to raise should this Court grant them relief from the April 7, 2011 default judgment. Plaintiff is a Trustee and may only enforce those rights attached to and emanating from the assets that that have been transferred to the trust. The Trustee acts on behalf and for the benefit of the beneficiaries of the trust, but the Trustee's actions are limited to those assets of the trust or the corpus of the trust.

The complaint was filed by The Bank of New York Mellon Trust Company, National Association fka The Bank of New York Trust Company N.A. as successor to JPMorgan Chase Bank N.A. as Trustee for RASC 2004KS6. The document which governs the Trust for which the

Plaintiff asserts that it is Trustee is the Pooling and Servicing Agreement dated as of June 1, 2004 Home Equity Mortgage Asset-Backed Pass-Through Certificates Series 2004-KS6 between Residential Asset Securities Corporation, Depositor, Residential Funding Corporation, Master Servicer, and JPMorgan Chase Bank, Trustee. (A number of pages from the Pooling and Servicing Agreement is attached to the affidavit of counsel.)

The Pooling and Servicing Agreement identifies the parties and the purpose at pages 7 and 8, as follows:

This Pooling and Servicing Agreement, effective as of June 1, 2004, among RESIDENTIAL ASSET SECURITIES CORPORATION, as the depositor (together with its permitted successors and assigns, the "Depositor"), RESIDENTIAL FUNDING CORPORATION, as master servicer (together with its permitted successors and assigns, the "Master Servicer"), and JPMORGAN CHASE BANK, a New York banking corporation, as trustee (together with its permitted successors and assigns, the "Trustee").

PRELIMINARY STATEMENT:

The Depositor intends to sell mortgage asset-backed pass-through certificates (collectively, the "Certificates") to be issued hereunder in twenty-one Classes, which in the aggregate will evidence the entire beneficial ownership interest in the Mortgage Loans (as defined herein) and certain other related assets.

The Pooling and Servicing Agreement then sets forth the manner in which Residential Asset Securities Corporation, as Depositor, shall convey to the Trustee the original mortgage note at Section 2.0 (b)(i), stating:

The original mortgage note, endorsed without recourse to the order of the Trustee and showing an unbroken chain of endorsements from the originator thereof to the Person endorsing it to the Trustee ***.

The originator was Paragon Home Lending, LLC. The Promissory Note has an endorsement from Paragon Home Lending, LLC. to Residential Funding Corporation, the Master Servicer. The Promissory Note also has an endorsement from Residential Funding Corporation, the Master Servicer, to JP Morgan Chase Bank, as Trustee. There is no

endorsement to Residential Asset Securities Corporation, the Depositor. There is no endorsement from Residential Asset Securities Corporation. The document governing the trust identifies that only the Depositor may sell mortgages to the trust. Accordingly, the mortgage note of Mr. and Mrs. Aponte was never properly transferred to the Trust, and Plaintiff The Bank of New York Mellon Trust Company, National Association fka The Bank of New York Trust Company N.A. as successor to JPMorgan Chase Bank N.A. as Trustee for RASC 2004KS6. The Trustee only has authority over the assets of the trust and therefore lacks the capacity to bring suit.

B. The Promissory Note was Endorsed in the Wrong Order

The promissory note attached to the complaint has an endorsement an endorsement from Residential Funding Corporation, the Master Servicer, to JP Morgan Chase Bank, as Trustee. This endorsement is above and therefore appears to be before Residential Funding Corporation received the promissory note from Paragon Home Lending, LLC. The endorsement from Paragon Home Lending, LLC. to Residential Funding Corporation, the Master Servicer appears below the endorsement to the Trustee and therefore would be considered to have occurred after. However, Residential Funding Corporation could not transfer any interest in the promissory note until it received the same from Paragon Home Lending LLC. See, *Federal Home Loan Mortgage Corp. v. Schwartzwald*, 194 Ohio App.3d 644 2011 -Ohio- 2681, at ¶¶42-52.

Financial institutions, noted for insisting on their customers' compliance with numerous ritualistic formalities, are not sympathetic petitioners in urging relaxation of an elementary business practice. It is a tenet of commercial law that "[h]oldership and the potential for becoming holders in due course should only be accorded to transferees that observe the historic protocol.

Schwartzwald, at ¶49.

C. The complaint was filed on behalf of a non-entity or fictitious name.

The complaint identifies the Plaintiff as The Bank of New York Mellon Trust Company, National Association fka The Bank of New York Trust Company N.A. as successor to JPMorgan Chase Bank N.A. as Trustee for RASC 2004KS6. However, there is no Trust known as RASC 2004KS6. The Trust is the Home Equity Mortgage Asset-Backed Pass-Through Certificates Series 2004-KS6 between Residential Asset Securities Corporation, Depositor, Residential Funding Corporation, Master Servicer, and JPMorgan Chase Bank, Trustee. The acronym does not properly identify the Plaintiff, and any judgment rendered in its favor should be a nullity.

In alleging a meritorious defense, a movant must allege a specific defense that would defeat the plaintiff's claims if proved. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20, 520 N.E.2d 564. A general conclusory allegation is insufficient to meet the burden. *Id.* However, the movant need not prove he will prevail on the defense. *Id.* *Fifth Third Bank v. Perry* (Ohio App. 7 Dist.), 2004 -Ohio- 1543, at paragraph 14.

Felix Aponte and Barbara Aponte have provided specific operative facts sufficient to demonstrate the existence of a meritorious defense to raise. They are not required at this stage to prove or prevail upon the defense for it to be meritorious.

II. Defendants are entitled to relief under the grounds of Civil Rule 60(B)

A. Excusable Neglect Civ. R. 60(B)(1)

Felix R. Aponte and Barbara Aponte have been involved in the foreclosure/ loan modification process since at least 2008. A complaint for foreclosure was filed in Mahoning County Court of Common Pleas Case No.: 2008 CV 4454. Mr. and Mrs. Aponte sent a letter to the Court and the Bank worked with them to complete a loan modification. A second complaint was filed, when Mr. and Mrs. Aponte fell behind on their modified agreement in the summer of 2010, in Mahoning County Court of Common Pleas Case No.: 2010 CV 57. Again, Mr. and

Mrs. Aponte sent a letter to the Court and the Bank said it would work with them to complete a loan modification. Mahoning County Court of Common Pleas Case No.: 2010 CV 57 was voluntarily dismissed in May of 2010 and the instant complaint was filed in December 2010. Mr. and Mrs. Aponte were still working with the Bank to modify their loan; the Bank was still informing Mr. and Mrs. Aponte that a loan modification would resolve everything. However, Mr. and Mrs. Aponte did not send a letter to the Court this time.

Felix R. Aponte and Barbara Aponte are be entitled to relief from judgment under 60(B)(1); excusable neglect. The Seventh District Court of Appeals has discussed at length the concept of "excusable neglect", stating:

As the Supreme Court has stated, the concept of excusable neglect is an elusive one that is difficult to apply and define. *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 20. Thus, the Court attempts to define it in the negative by saying that neglect is not excusable if it represents complete disregard for the judicial system. *Id.* The reviewing court must take into consideration all surrounding facts and circumstances.

Moreover, the Supreme Court has advised, albeit cautiously, that where a meritorious defense is presented in a timely manner, any doubt on the categorization of neglect should be resolved in favor of the motion to set aside the judgment so that cases can be decided on their merits. *GTE*, 47 Ohio St.2d at 151 (interpreted by appellant as meaning: the more merit to the defense, the more neglect that will be permitted). As aforementioned, Civ.R. 60(B) is a remedial rule to facilitate the premise that cases should be resolved on their merits where possible. The trend appears to lean toward finding that the trial court did not abuse its discretion on its decision to find excusable neglect. See, e.g., *Kay*, 76 Ohio St.3d at 20-21. There is no bright-line test for determining whether neglect is excusable or inexcusable. *WFMJ Television, Inc. v. AT&T Federal Systems-CSC*, 2002-Ohio-3013, at ¶¶ 17, 21.

The Seventh District Court of Appeals reiterated the cautious use of a balancing test in determining excusable neglect in *Fifth Third Bank v. Perry*, 2004-Ohio-1543, ¶16, stating:

The Supreme Court has advised, albeit cautiously, that where a meritorious defense is presented in a timely manner, any doubt on the categorization of neglect should be resolved in favor of the motion to set aside the judgment so that cases can be decided on their merits. *GTE*, 47 Ohio St.2d at 151, 35. This can be interpreted as meaning: the more merit to the defense, the more neglect that will be permitted. It could also be interpreted as meaning: if the court has a hard time deciding whether the neglect is excusable, the court should grant relief and thus err on the side of allowing a case to be heard on its merits.

The Seventh District Court of Appeals again discussed the concept of a balancing test in determining excusable neglect in *John Soliday Fin. Group, L.L.C. v. Moncreace*, 2011-Ohio-1471, at ¶21, discussing the case of *Wilson v. Lee*, 172 Ohio App.3d 791, 2007-Ohio-4542, and its use of the substantial amount of damages awarded in the judgment in determining whether "excusable neglect" existed. Here, Mr. and Mrs. Aponte conduct does not demonstrate a complete disregard for the legal system. They did what they had done previously. They advised the Court of their intentions and continued to work with the Bank. Their neglect was their failure to note the significance of the complaint being voluntarily dismissed and re-filed. They sent a letter to the Court in 2008; they sent a letter to the Court in 2010, but they did not send a letter to the Court for the second lawsuit filed by the same Lender in 2010, when they were still working with the Bank to obtain a loan modification. Mr. and Mrs. Aponte are entitled to relief under Civil Rule 60(B)(1); excusable neglect.

B. Fraud, Misrepresentation, or Other Misconduct Civ. R. 60(B)(3)

Mr. and Mrs. Aponte are entitled to relief under Civil Rule 60(B)(3) fraud, misrepresentation or other misconduct of an adverse party. The original lender as noted on the promissory note, attached to the complaint as Exhibit A, is Paragon Home Lending, LLC. The mortgage which is attached to the complaint as Exhibit B identifies Paragon Home Lending, LLC., as the Lender and then states the following:

"MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns.

An assignment of mortgage is attached to the complaint as Exhibit C. The assignment of mortgage was executed on November 5, 2008, by Mortgage Electronic Registration Systems, Inc. as nominee for Paragon Home Lending, LLC its successors and assigns. The assignment of

mortgage purports to transfer the mortgage from Paragon Home Lending, LLC to Plaintiff. However, Paragon Home Lending, LLC. filed Articles of Dissolution with the Wisconsin Department of Financial Institutions on January 29, 2008, with an effective date of January 28, 2008. Plaintiff asserts that it was assigned the mortgage from Paragon Home Lending, LLC. more than ten (10) months after Paragon Home Lending, LLC. was dissolved. Without further explanation this should constitute fraud, misrepresentation, or other misconduct of an adverse party.

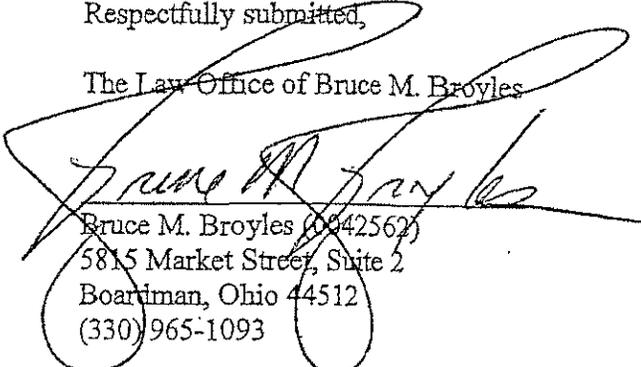
III. The Motion has been filed within a Reasonable Period of Time.

The default judgment and decree of foreclosure was filed on April 7, 2011. Just a few days beyond ten (10) months have passed since the filing of the judgment entry. This is within the one year limitation of Civil Rule 60(B) for grounds for relief (1) and (3). This Court should also find the motion to have been filed within a reasonable period of time as Felix Aponte and Barbara Aponte only recently received the January 6, 2012 correspondence denying their application for a loan modification.

Base upon the above, this Honorable Court should find that grant relief from the As such this Court should grant relief from default judgment and decree of foreclosure was filed on April 7, 2011; allow Defendants an opportunity to file an answer to the complaint, and allow this matter to proceed according to rule.

Respectfully submitted,

The Law Office of Bruce M. Broyles

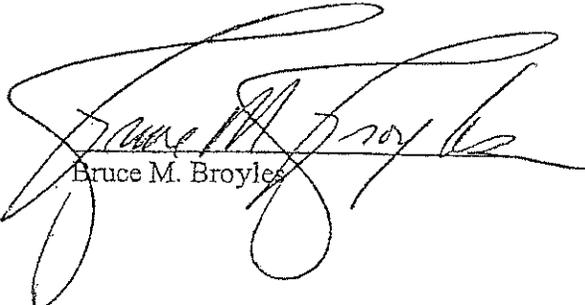


Bruce M. Broyles (0042562)
5815 Market Street, Suite 2
Boardman, Ohio 44512
(330) 965-1093

(330) 953-0450 fax
Attorney for Defendants

CERTIFICATE OF SERVICE

A copy of the forgoing motion for relief from judgment was served upon Scott Martin, of
Lerner, Sampson & Rothfuss, at P.O. Box 5480, Cincinnati, Ohio 45201-5480, by regular U.S.
Mail this 9th day of February 2011.


Bruce M. Broyles

23

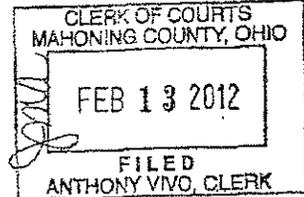
IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

The Bank of New York Mellon Trust)
Company, National Association fka)
The Bank of New York Trust Company)
N.A. as successor to JPMorgan Chase Bank)
N.A. as Trustee for RASC 2004KS6)

CASE NO.: 2010 CV 4681

JUDGE LOU D'APOLITO

ORDER



PLAINTIFF,

VS.

FELIX R. APONTE, ET AL

DEFENDANTS,

This matter came before the Court upon the motion for stay of execution filed by Defendants Felix Aponte and Barbara Aponte based upon the filing of a motion for relief from judgment. The motion for relief from judgment raises issues which will otherwise be rendered moot, and in the interests of justice it is hereby Ordered that the further execution upon the April 7, 2011 Judgment Entry issuing a decree of foreclosure to Plaintiff is stayed until further order of this Court. Consistent with this reasoning the Sheriff's sale now set for February 14, 2012 is hereby cancelled.

IT IS SO ORDERED.

Date: 2-13-12

[Handwritten Signature]
Judge Lou D'Apollito
Mag. JASLENZO

CLERK: COPY TO ALL COUNSEL
OR UNREPRESENTED PARTY.
done

Exhibit 4

2693
000033
25



2010 CV
04881
00045254012
CWORD

The Law Office of Bruce M. Broyles

BRUCE M. BROYLES, ESQ.

5815 MARKET STREET, SUITE 2, BOARDMAN, OHIO 44512
PHONE: (330) 965-1093 FAX: (330) 953-0450

RECEIVED

OCT 23 2014

Disciplinary Counsel
Supreme Court of Ohio

October 12, 2014

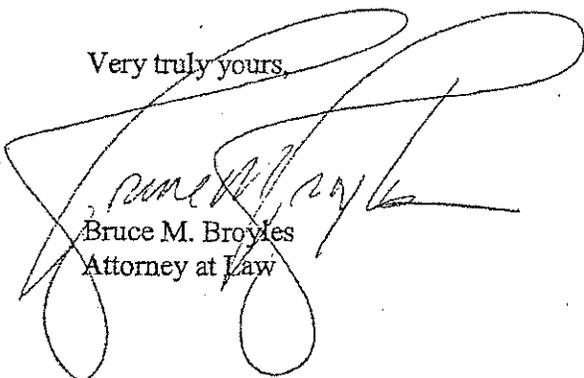
Audrey E. Varwig
Assistant Disciplinary Counsel
The Supreme Court of Ohio
250 Civic Center Drive
Suite 325
Columbus, Ohio 43215-7411

Re: File No. B3-2756
Response to Letter of Inquiry
Dated May 30, 2014

Dear Ms. Varwig:

I enclose my response to your recent letter of October 9, 2014.

Very truly yours,



Bruce M. Broyles
Attorney at Law

Exhibit 5

IN THE OHIO SUPREME COURT
DISCIPLINARY COUNSEL

IN RE: BRUCE MARTIN BROYLES (0042562)

FILE NO.: B3-2756

In response to the letter dated October 9, 2014, I reviewed my records and I do not have a written fee agreement with Mr. and Mrs. Aponte. I thought that I had such an agreement signed by Mr. and Mrs. Aponte, but I do not have a copy in my computer nor do I have a physical copy of any agreement. I normally have the clients sign an attorney fee agreement with regards to representing them in defending foreclosures. In defending foreclosures, I charge a flat rate of \$4,800.00 and allow my clients to pay that amount over a two year period at two hundred dollars (\$200.00) a month.

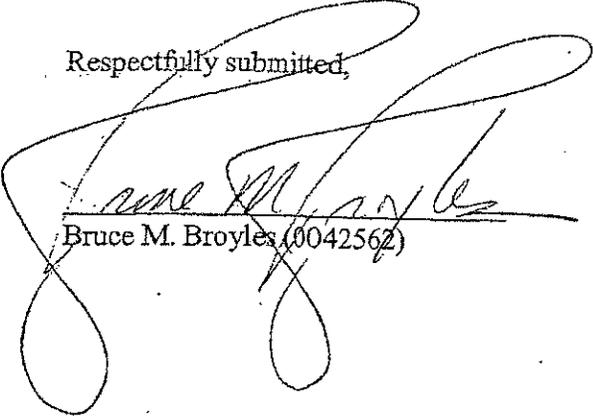
With Mr. and Mrs. Aponte, I do have monthly invoices that show that they were being charged a flat fee of \$4,800.00, with a beginning balance of \$4,800.00 reduced by each payment made by them. I have all of the monthly invoices with a copy of either the cash receipt or the check used to pay the invoice. The last two invoices were not paid, and there was a remaining balance of \$400. The last time I spoke to Mrs. Aponte regarding the balance, I told her not to worry about the remaining balance. I enclose the first and last of the invoices. Please let me know if you want all of the invoices.

Mr. and Mrs. Aponte never raised an issue regarding their attorney fee with me. Your letter in May 2014 was the first time that the issue of my attorney fee was ever raised. I was hired on or about January 20, 2012. I prepared a motion for relief from judgment, affidavit of Mrs. Aponte, affidavit of counsel, and a proposed order staying execution. In order to file the motion for relief from judgment I had to locate the pooling and servicing agreement on the Securities and Exchange Commission website, and review the document to find the pertinent

provisions. I filed these documents with the Court and walked a copy through to the Magistrate; I monitored the matter with the Court to be certain that the Sheriff's sale was cancelled; I walked a copy of the Magistrate's order through the Sheriff's Office to make certain that the sale was cancelled. Thereafter, opposing counsel served his response directly upon Mr. and Mrs. Aponte causing great concern, and I filed a motion to strike the pleading. Opposing counsel then filed a memorandum in opposition to the motion for relief from judgment and I filed a reply in support of the motion for relief from judgment. I then attended a hearing on the motion for relief from judgment on May 8, 2012, and at that hearing I was handed a copy of the motion to disqualify.

I charged a flat fee of \$4,800.00. As it was a flat fee it was earned at the time I began representing Mr. and Mrs. Aponte. If there is a question as to whether the amount of \$4,800.00 was reasonable, I believe that the services I provided from January 20, 2012 to May 8, 2012, could by themselves justify my fee of \$4,800.00, on which I allowed Mr. and Mrs. Aponte to make payments over two years. (Especially in light of how little time I had to prepare the pleadings from the date I was hired prior to the Sheriff's Sale.). I did not file an appeal in order to continue collecting fees from Mr. and Mrs. Aponte as suggested in your letter in May of 2014.

Respectfully submitted,



Bruce M. Broyles (0042562)

THE LAW OFFICE OF BRUCE M. BROYLES

58.15 Market Street, Suite 2, Youngstown, Ohio 44512

PHONE: (330) 965-1093 FAX: (330) 953-0450

INVOICE

January 24, 2012

Matter: Felix & Barbara Aponte
3374 Swallow Hollow Drive
Poland, Ohio 44514

Reference#: 12420

Billing rate: Flat Fee: \$4,800.00

Felix & Barbara, for your convenience I have prepared a list of dates, along with the amount owed on that date. It is imperative that your payments reach our office on the dates listed below. As Attorney Broyles discussed with you, failure to make payments on time will result in our office withdrawing from your case.

01/20/12 Account Bal.	(-\$4,800.00)	
January 20, 2012	\$200.00	received payment (cash)
February 15, 2012	\$200.00	
March 15, 2012	\$200.00	
April, 15, 2012	\$200.00	
May 15, 2012	\$200.00	
June 15, 2012	\$200.00	
July 15, 2012	\$200.00	
August 15, 2012	\$200.00	
September 15, 2012	\$200.00	
October 15, 2012	\$200.00	
November 15, 2012	\$200.00	
December 15, 2012	\$200.00	
January 15, 2013	\$200.00	
February 15, 2013	\$200.00	
March 15, 2013	\$200.00	
April 15, 2013	\$200.00	
May 15, 2013	\$200.00	
June 15, 2013	\$200.00	
July 15, 2013	\$200.00	
August 15, 2013	\$200.00	
September 15, 2013	\$200.00	
October 15, 2013	\$200.00	
November 15, 2013	\$200.00	
December 15, 2013	\$200.00	

THE LAW OFFICE OF BRUCE M. BROYLES

5815 Market Street, Suite 2, Youngstown, Ohio 44512

PHONE: (330) 965-1093 FAX: (330) 953-0450

INVOICE

January 20, 2014

Matter: Felix & Barbara Aponte
3374 Swallow Hollow Drive
Poland, Ohio 44514

Reference#:12420

Billing rate: Flat Fee: \$4,800.00

Felix & Barbara, for your convenience I have prepared a list of dates, along with the amount owed on that date. It is imperative that your payments reach our office on the dates listed below. As Attorney Broyles discussed with you, failure to make payments on time will result in our office withdrawing from your case.

01/20/12 Account Bal.	(-\$4,800.00)	
January 20, 2012	\$200.00	received payment (cash)
February 15, 2012	\$200.00	received payment (cash)
March 15, 2012	\$200.00	received payment (cash) receipt issued
April, 15, 2012	\$200.00	received payment (ck1533)
May 15, 2012	\$200.00	received payment (ck1546)
June 15, 2012	\$200.00	received payment (ck1573)
July 15, 2012	\$200.00	received payment (ck1611)
August 15, 2012	\$200.00	received payment (ck1617)
September 15, 2012	\$200.00	received payment (ck1618)
October 15, 2012	\$200.00	received payment (cash) hand delivered receipt
November 15, 2012	\$200.00	received partial pmt (ck1601)\$100.00; Cash \$100.00(PD)
December 15, 2012	\$200.00	received payment (cash) \$150.00 Cash \$50.00
January 15, 2013	\$200.00	received payment (cash) \$50.00 (ck1652) partial \$150.00
February 15, 2013	\$200.00	received partial pmt (ck1652) \$50.00 (ck1665) \$150.00
March 15, 2013	\$200.00	received partial pmt (ck1666) \$150.00 ck1667 50.00
April 15, 2013	\$200.00	received partial pmt. ck1667 50.00, ck1668 \$150.00
May 15, 2013	\$200.00	received partial pmt. ck 1669 75.00 ck1670 125.00
June 15, 2013	\$200.00	received partial pmt. ck1670 75.00 ck1671 125.00
July 15, 2013	\$200.00	received payment ck1672 200.00
August 15, 2013	\$200.00	received payment ck 1709
September 15, 2013	\$200.00	received payment ck 1729
October 15, 2013	\$200.00	received payment ck 1730
November 15, 2013	\$200.00	
December 15, 2013	\$200.00	

The Law Office of Bruce M. Broyles

BRUCE M. BROYLES, ESQ.

5815 MARKET STREET, SUITE 2, BOARDMAN, OHIO 44512
PHONE: (330) 965-1093 FAX: (330) 953-0450

RECEIVED

AV
FEB 18 2014

B3-2756
Disciplinary Counsel
Supreme Court of Ohio

February 12, 2014

Audrey E. Varwig
Assistant Disciplinary Counsel
The Supreme Court of Ohio
250 Civic Center Drive
Suite 325
Columbus, Ohio 43215-7411

Re: File No. B3-2756
Response to Letter of Inquiry

Dear Ms. Varwig:

I enclose my response to the letter of inquiry.

Very truly yours,

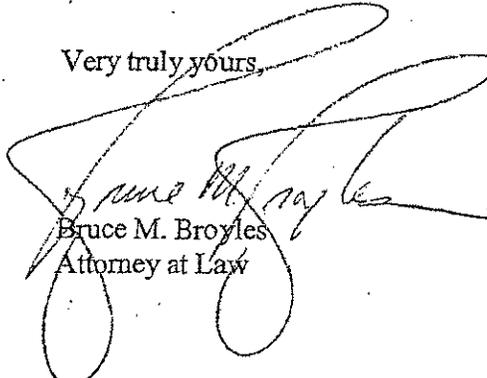

Bruce M. Broyles
Attorney at Law

Exhibit 6

IN THE OHIO SUPREME COURT
DISCIPLINARY COUNSEL

IN RE: BRUCE MARTIN BROYLES (0042562)

FILE NO.: B3-2756

In response to the letter of inquiry, I have attached copies of the memorandum in opposition to motion to disqualify, the affidavit filed in support of the memorandum in opposition, and the appellate brief filed in the Court of Appeals.

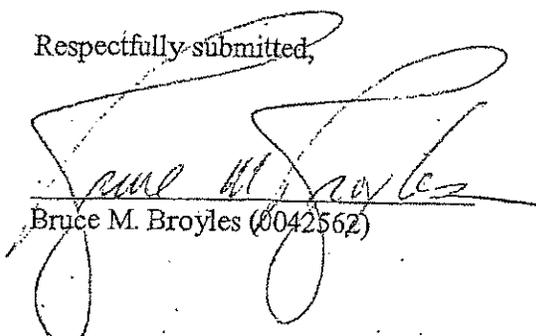
Those pleadings do not provide the details of my conflict check upon meeting with Barbara Aponte. From January 2007 through December 2010, I previously acted as appearance counsel for Lerner Sampson & Rothfuss in Mahoning County, and sometimes in other counties in Northeastern Ohio. Each time I appeared on behalf of Lerner, Sampson & Rothfuss, I would send a facsimile providing the results of the hearing. When someone would contact the office to represent them in a foreclosure that had been pending during the time frame of January 2007 through December 2010, and that had Lerner, Sampson & Rothfuss as the law firm, I would take the following steps: (1) review the Court's Docket for any events, (2) compare the date of any events with dates of my Lerner, Sampson & Rothfuss hearing dates, and (3) if a date matched I would review to see if I attended any matter in that case.

When Mrs. Aponte came into the office, I saw that Lerner Sampson & Rothfuss was the law firm that represented Plaintiff. I checked the Court's docket for any events, and compared the event dates with my previous attendance on behalf of Lerner, Sampson & Rothfuss. I did not see any conflict. However, opposing counsel filed a motion to disqualify and I checked again, only to find that I did attend a hearing on behalf of Lerner Sampson Rothfuss in the Felix and Barbara Aponte case. My previous review of the facsimiles missed my appearance on the Aponte case.

At that point, I should have acknowledged that a conflict of interest existed. Instead, I argued that acting as appearance counsel did not establish an attorney client relationship. I also argued that, if a conflict of interest existed, the trial court should not take any action against Felix and Barbara Aponte by disqualifying counsel or striking pleadings filed on their behalf. When the trial court disagreed and granted the motion to disqualify, I filed an appeal again asserting that an attorney client relationship was not established and that any conflict of interest should not be used "offensively" against Mr. and Mrs. Aponte.

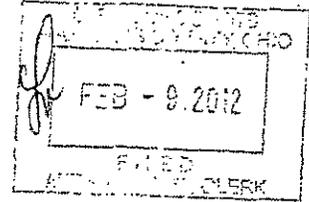
In preparing for the oral argument, I realized that I should have taken steps to avoid even the appearance of impropriety. This epiphany occurred too late. I had taken what should have remained an academic discussion of the role of appearance counsel, and presented it to the Court. What the Magistrate had found to be an inadvertent mistake was compounded when I argued against the motion for disqualification and the subsequent appeal.

Respectfully submitted,



Bruce M. Broyles (0042562)

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO



The Bank of New York Mellon Trust)
Company, National Association fka)
The Bank of New York Trust Company)
N.A. as successor to JPMorgan Chase Bank)
N.A. as Trustee for RASC 2004KS6)

CASE NO.: 2010 CV 4681

JUDGE LOU D'APOLITO

PLAINTIFF,)

VS.)

FELIX R. APONTE, ET AL)

DEFENDANTS,)

MOTION TO STAY EXECUTION OF
APRIL 7, 2011 DEFAULT JUDGMENT
AND
REQUEST TO CANCEL SHERIFF'S
SALE SCHEDULED FOR
FEBRUARY 14, 2012

Now come Defendants Felix and Barbara Aponte, by and through counsel, pursuant to Civil Rule 62(A) and moves this Honorable Court to issue an Order staying execution of the April 7, 2011 Judgment Entry issuing a decree of foreclosure to Plaintiff. Defendant further requests that the Court issue an Order cancelling the Sheriff's sale now scheduled for February 14, 2012.

For cause, Defendants Felix and Barbara Aponte say that they have recently filed a motion for relief from judgment pursuant to Civil Rule 60(B)(5). Defendant further says that the motion sets for the grounds that the mortgage note was transferred from the original lender by MERS 10 months after the original lender was dissolved, that the promissory note was not properly conveyed to the Trust, and that Plaintiff lacks capacity to file the lawsuit.

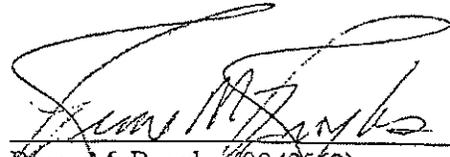
WHEREFORE, this Honorable Court should issue an Order granting a stay of execution of the April 7, 2011 Judgment Entry and cancelling the Sheriff's sale now set for February 14, 2012.

Respectfully submitted,

The Law Office of Bruce M. Broyles

24

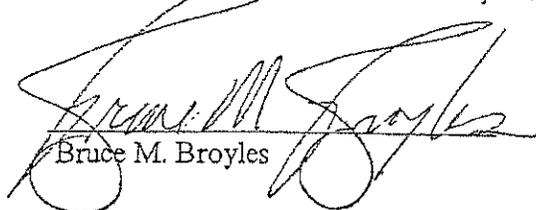
Exhibit 7



Bruce M. Broyles (0042562)
5815 Market Street, Suite 2
Boardman, Ohio 44512
(330) 965-1093
(330) 953-0450 fax
Attorney for Defendants

CERTIFICATE OF SERVICE

A copy of the forgoing motion to stay was served upon Scott Martin, of Lerner, Sampson & Rothfuss, at P.O. Box 5480, Cincinnati, Ohio 45201-5480, by regular U.S. Mail this 9th day of February 2012.



Bruce M. Broyles

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

FEB - 8 2012
FEB 23
MAHONING COUNTY, OHIO

The Bank of New York Mellon Trust)
Company, National Association fka)
The Bank of New York Trust Company)
N.A. as successor to JPMorgan Chase Bank)
N.A. as Trustee for RASC 2004KS6)

CASE NO.: 2010 CV 4681

JUDGE LOU D'APOLITO

PLAINTIFF,)

AFFIDAVIT OF COUNSEL of
BARBARA APONTE

VS.)

FELIX R. APONTE, ET AL)

DEFENDANTS,)

Now come Defendants Felix and Barbara Aponte, by and through counsel, and file the affidavit of Attorney Bruce M. Broyles in support of the motion for relief from judgment filed this same day.

State of Ohio)
) SS:
County of Mahoning)

Now comes Bruce M. Broyles, being duly cautioned and sworn, deposes and says the following:

1. I have been retained by the defendants in the above captioned action to represent their interests.
2. I make these statements of my own personal knowledge and I am competent to testify at the trial of this matter.
3. Attached hereto are true and accurate copies of pages 1, 7, 8, 24, 62, 63, and 64 of the Pooling and Servicing Agreement dated as of June 1, 2004 Home Equity Mortgage Asset-Backed Pass-Through Certificates Series 2004-KS6 between Residential Asset Securities Corporation, Depositor, Residential Funding Corporation, Master Servicer, and JPMorgan Chase

23

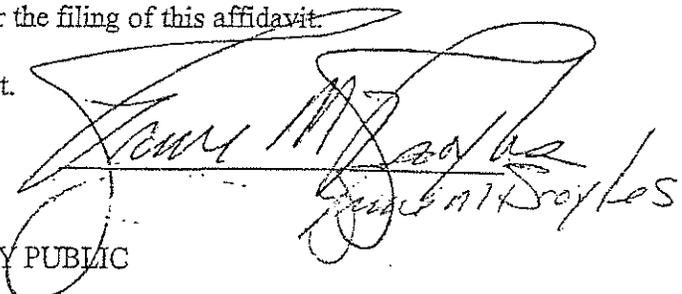
Exhibit 8

Bank, Trustee, which was located on the website of the SEC. The entire document was not attached due to its voluminous nature, but a copy is available at counsel's office.

4. Attached hereto is a true and accurate copy of the print out obtained from the website of the Wisconsin Department of Financial Institutions. A certified copy of the Articles of Dissolution could not be obtained in time for the filing of this affidavit.

Further Affiant sayeth naught. End of Affidavit.

Date: 2-9-12



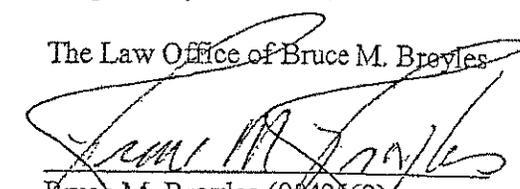
NOTARY PUBLIC

Sworn to and subscribed in my presence on this 9th day of February 2012.

Catherine A. Buch
Notary Public
My commission expires 7/28/13

Respectfully submitted,

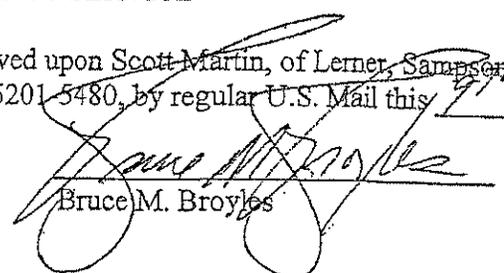
The Law Office of Bruce M. Broyles



Bruce M. Broyles (0042562)
5815 Market Street, Suite 2
Boardman, Ohio 44512
(330) 965-1093
(330) 953-0450 fax
Attorney for Defendants

CERTIFICATE OF SERVICE

A copy of the forgoing affidavit was served upon Scott Martin, of Lerner, Sampson & Rothfuss, at P.O. Box 5480, Cincinnati, Ohio 45201-5480, by regular U.S. Mail this 7th day of February 2011.



Bruce M. Broyles

ks6psa

<DOCUMENT>
<TYPE>EX-10
<SEQUENCE>2
<FILENAME>ks6psa.txt
<DESCRIPTION>EX 10.1 POOLING AND SERVICING
<TEXT>

EXECUTION COPY

RESIDENTIAL ASSET SECURITIES CORPORATION,

Depositor,

RESIDENTIAL FUNDING CORPORATION,

Master Servicer,

and

JPMORGAN CHASE BANK

Trustee

POOLING AND SERVICING AGREEMENT

Dated as of June 1, 2004

Home Equity Mortgage Asset-Backed Pass-Through Certificates
Series 2004-KS6

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ks6psa

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This Pooling and Servicing Agreement, effective as of June 1, 2004, among RESIDENTIAL ASSET SECURITIES CORPORATION, as the depositor (together with its permitted successors and assigns, the "Depositor"), RESIDENTIAL FUNDING

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CORPORATION, as master servicer (together with its permitted successors and assigns, the "Master Servicer"), and JPMORGAN CHASE BANK, a New York banking corporation, as trustee (together with its permitted successors and assigns, the "Trustee").

PRELIMINARY STATEMENT:

The Depositor intends to sell mortgage asset-backed pass-through certificates (collectively, the "Certificates"), to be issued hereunder in twenty-one Classes, which in the aggregate will evidence the entire beneficial ownership interest in the Mortgage Loans (as defined herein) and certain other related assets.

REMIC I

As provided herein, the REMIC Administrator will make an election to treat the segregated pool of assets consisting of the Group I Loans and certain other related assets (exclusive of the Mortgage Insurance Premium Taxes Reserve Fund) subject to this Agreement as a real estate mortgage investment conduit (a "REMIC") for federal income tax purposes, and such segregated pool of assets will be designated as "REMIC I." The Class R-I Certificates will represent the sole Class of "residual interests" in REMIC I for purposes of the REMIC Provisions (as defined herein) under federal income tax law. The following table irrevocably sets forth the designation, remittance rate (the "Uncertificated REMIC I Pass-Through Rate") and initial Uncertificated Principal Balance for each of the "regular interests" in REMIC I (the "REMIC I Regular Interests"). The "latest possible maturity date" (determined solely for purposes of satisfying Treasury regulation Section 1.860G-1(a)(4)(iii)) for each REMIC I Regular Interest shall be the Maturity Date. None of the REMIC I Regular Interests will be certificated.

<TABLE>
<CAPTION>

DESIGNATION MATURITY DATE	UNCERTIFICATED REMIC I PASS-THROUGH RATE	REMIC I INITIAL UNCERTIFICATED LATEST POSSIBLE PRINCIPAL BALANCE	
<S> <C>	<C>	<C>	
LT1 25, 2034	Variable(1)	\$199,966,069.07	July
LT2 25, 2034	Variable(1)	\$ 5,922.82	July
LT3 25, 2034	0.00%	\$ 14,077.20	July
LT4 25, 2034	Variable(1)	\$ 14,077.20	July

</TABLE>

(1) calculated as provided in the definition of Uncertificated REMIC I Pass-Through Rate.

REMIC II

As provided herein, the REMIC Administrator will make an election to treat the segregated pool of assets consisting of the Group II Loans and certain other related assets (exclusive of the Mortgage Insurance Premium Taxes Reserve Fund) subject to this Agreement as a real estate mortgage investment conduit (a "REMIC") for federal income tax purposes, and such segregated pool of assets

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Closing Date: June 29, 2004.

Code: The Internal Revenue Code of 1986.

Commission: The Securities and Exchange Commission.

Compensating Interest: With respect to any Distribution Date, any amount paid by the Master Servicer in accordance with Section 3.16(f).

Corporate Trust Office: The principal office of the Trustee at which at any particular time its corporate trust business with respect to this Agreement shall be administered, which office at the date of the execution of this instrument is located at JPMorgan Chase Bank, 4 New York Plaza, 6th Floor, New York, New York 10004, Attn: Institutional Trust Services/Global Debt, RASC 2004-KS6. For purposes of Section 3.21 of this Agreement, however, such term shall mean the office of the Mortgage Insurance Co-Trustee, located at 101 California Street, Suite 3800, San Francisco, CA 94111, or such other office as the Mortgage Insurance Co-Trustee shall designate.

Credit Repository: Equifax, Transunion and Experian, or their successors in interest.

Curtailment: Any Principal Prepayment made by a Mortgagor which is not a Principal Prepayment in Full.

Custodial Account: The custodial account or accounts created and maintained pursuant to Section 3.07 in the name of a depository institution, as custodian for the holders of the Certificates, for the holders of certain other interests in mortgage loans serviced or sold by the Master Servicer and for the Master Servicer, into which the amounts set forth in section 3.07 shall be deposited directly. Any such account or accounts shall be an Eligible Account.

Custodial Agreement: An agreement that may be entered into among the Depositor, the Master Servicer, the Trustee and a Custodian in substantially the form of Exhibit E hereto.

Custodian: Wells Fargo Bank, N.A., or any successor custodian appointed pursuant to a Custodial Agreement.

Cut-off Date: June 1, 2004.

Cut-off Date Principal Balance: With respect to any Mortgage Loan, the unpaid principal balance thereof at the Cut-off Date after giving effect to all installments of principal due on or prior thereto (or due in the month of the Cut-off Date), whether or not received.

Debt Service Reduction: With respect to any Mortgage Loan, a reduction in the scheduled Monthly Payment for such Mortgage Loan by a court of competent jurisdiction in a proceeding under the Bankruptcy Code, except such a reduction constituting a Deficient Valuation or any reduction that results in a permanent forgiveness of principal.

Deficient Valuation: With respect to any Mortgage Loan, a valuation by a court of competent jurisdiction of the Mortgaged Property in an amount less than the then outstanding indebtedness under the Mortgage Loan, or any reduction in the amount of principal to be paid in connection with any scheduled Monthly Payment that constitutes a permanent forgiveness of principal, which valuation or reduction results from a proceeding under the Bankruptcy Code.

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mean of the quotations rounded up to the next multiple of 1/16%. If on such date fewer than two quotations are provided as requested, the rate will be the arithmetic mean of the rates quoted by one or more major banks in New York City, selected by the Trustee after consultation with the Master Servicer, as of 11:00 a.m., New York City time, on such date for loans in U.S. Dollars to leading European banks for a period of one month in amounts approximately equal to the aggregate Certificate Principal Balance of the LIBOR Certificates then outstanding. If no such quotations can be obtained, the rate will be LIBOR for the prior Distribution Date; provided however, if, under the priorities

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described above, LIBOR for a Distribution Date would be based on LIBOR for the previous Distribution Date for the third consecutive Distribution Date, the Trustee, shall select an alternative comparable index (over which the Trustee has no control), used for determining one-month Eurodollar lending rates that is calculated and published (or otherwise made available) by an independent party. The establishment of LIBOR by the Trustee on any LIBOR Rate Adjustment Date and the Trustee's subsequent calculation of the Pass-Through Rate applicable to the LIBOR Certificates for the relevant Interest Accrual Period, in the absence of manifest error, will be final and binding. Promptly following each LIBOR Rate Adjustment Date the Trustee shall supply the Master Servicer with the results of its determination of LIBOR on such date. Furthermore, the Trustee will supply to any Certificateholder so requesting by calling the Bondholder Inquiry Line at 1-800-275-2048 the Pass-Through Rate on the LIBOR Certificates for the current and the immediately preceding Interest Accrual Period.

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ARTICLE II

CONVEYANCE OF MORTGAGE LOANS; ORIGINAL ISSUANCE OF CERTIFICATES

Section 2.01. Conveyance of Mortgage Loans.

(a) The Depositor, concurrently with the execution and delivery hereof, does hereby assign to the Trustee in respect of the Trust Fund without recourse all the right, title and interest of the Depositor in and to (i) the Mortgage Loans, including all interest and principal on or with respect to the Mortgage Loans due on or after the Cut-off Date (other than Monthly Payments due in the month of the Cut-off Date); (ii) the Mortgage Insurance Premium Taxes Reserve Fund Deposit; and (iii) all proceeds of the foregoing.

(b) In connection with such assignment, and contemporaneously with the delivery of this Agreement, the Depositor delivered or caused to be delivered hereunder to the Trustee, the Hedge Agreement (the delivery of which shall evidence that the fixed payment for the Hedge Agreement has been paid and the Trustee and the Trust Fund shall have no further payment obligation thereunder and that such fixed payment has been authorized hereby) and the MI Policy, and except as set forth in Section 2.01(c) below and subject to Section 2.01(d) below, the Depositor does hereby deliver to, and deposit with, the Trustee, or to and with one or more Custodians, as the duly appointed agent or agents of the Trustee for such purpose, the following documents or instruments (or copies thereof as permitted by this Section) with respect to each Mortgage Loan so assigned:

(i) The original Mortgage Note, endorsed without recourse to the order of the Trustee and showing an unbroken chain of endorsements from the originator thereof to the Person endorsing it to the Trustee, or with respect to any

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destroyed Mortgage Note, an original lost note affidavit from the related Seller or Residential Funding stating that the original Mortgage Note was lost, misplaced or destroyed, together with a copy of the related Mortgage Note;

(ii) The original Mortgage, noting the presence of the MIN of the Mortgage Loan and language indicating that the Mortgage Loan is a MOM Loan if the Mortgage Loan is a MOM Loan, with evidence of recording indicated thereon or, if the original Mortgage has not yet been returned from the public recording office, a copy of the original Mortgage with evidence of recording indicated thereon;

(iii) Unless the Mortgage Loan is registered on the MERS(R) System, the assignment (which may be included in one or more blanket assignments if permitted by applicable law) of the Mortgage to the Trustee with evidence of recording indicated thereon or a copy of such assignment with evidence of recording indicated thereon;

(iv) The original recorded assignment or assignments of the Mortgage showing an unbroken chain of title from the originator to the person assigning it to the Trustee (or to MERS, if the Mortgage Loan is registered on the MERS(R) System and noting the presence of a MIN) with evidence of recordation noted thereon or attached thereto, or a copy of such assignment or assignments of the Mortgage with evidence of recording indicated thereon; and

(v) The original of each modification, assumption agreement or preferred loan agreement, if any, relating to such Mortgage Loan, or a copy of each modification, assumption agreement or preferred loan agreement.

The Depositor may, in lieu of delivering the original of the documents set forth in Section 2.01(b)(ii), (iii), (iv) and (v) (or copies thereof as permitted by Section 2.01(b)) to the Trustee or the Custodian or Custodians, deliver such documents to the Master Servicer, and the Master Servicer shall hold such documents in trust for the use and benefit of all present and future

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Certificateholders until such time as is set forth in the next sentence, within thirty Business Days following the earlier of (i) the receipt of the original of all of the documents or instruments set forth in Section 2.01(b)(ii), (iii), (iv) and (v) (or copies thereof as permitted by such Section) for any Mortgage Loan and (ii) a written request by the Trustee to deliver those documents with respect to any or all of the Mortgage Loans then being held by the Master Servicer, the Master Servicer shall deliver a complete set of such documents to the Trustee or the Custodian or Custodians that are the duly appointed agent or agents of the Trustee.

The Depositor, the Master Servicer and the Trustee agree that it is not intended that any mortgage loan be included in the Trust Fund that is either (i) a "High-Cost Home Loan" as defined in the New Jersey Home Ownership Act effective November 27, 2003 or (ii) a "High-Cost Home Loan" as defined in the New Mexico Home Loan Protection Act effective January 1, 2004.

(c) Notwithstanding the provisions of Section 2.01(b), in the event that in connection with any Mortgage Loan, if the Depositor cannot deliver the original of the Mortgage, any assignment, modification, assumption agreement or preferred loan agreement (or copy thereof as permitted by Section 2.01(b)) with evidence of recording thereon concurrently with the execution and delivery of this Agreement because of (i) a delay caused by the public recording office where such Mortgage, assignment, modification, assumption agreement or preferred loan agreement as the case may be, has been delivered for recordation, or (ii) a delay in the receipt of certain information necessary to prepare the related assignments, the Depositor shall deliver or cause to be delivered to the Trustee

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or the respective Custodian a copy of such Mortgage, assignment, modification, assumption agreement or preferred Loan agreement.

The Depositor shall promptly cause to be recorded in the appropriate public office for real property records the Assignment referred to in clause (iii) of section 2.01(b), except (a) in states where, in the opinion of counsel acceptable to the Trustee and the Master Servicer, such recording is not required to protect the Trustee's interests in the Mortgage Loan or (b) if MERS is identified on the Mortgage or on a properly recorded assignment of the Mortgage, as applicable, as the mortgagee of record solely as nominee for Residential Funding and its successors and assigns. If any Assignment is lost or returned unrecorded to the Depositor because of any defect therein, the Depositor shall prepare a substitute Assignment or cure such defect, as the case may be, and cause such Assignment to be recorded in accordance with this paragraph. The Depositor shall promptly deliver or cause to be delivered to the Trustee or the respective Custodian such Mortgage or Assignment, as applicable (or copy thereof as permitted by section 2.01(b)), with evidence of recording indicated thereon upon receipt thereof from the public recording office or from the related Subservicer or Seller.

If the Depositor delivers to the Trustee or Custodian any Mortgage Note or Assignment of Mortgage in blank, the Depositor shall, or shall cause the Custodian to, complete the endorsement of the Mortgage Note and the Assignment of Mortgage in the name of the Trustee in conjunction with the Interim Certification issued by the Custodian, as contemplated by Section 2.02.

Any of the items set forth in sections 2.01(b)(ii), (iii), (iv) and (v) and that may be delivered as a copy rather than the original may be delivered to the Trustee or the Custodian.

In connection with the assignment of any Mortgage Loan registered on the MERS(R) System, the Depositor further agrees that it will cause, at the Depositor's own expense, within 30 Business Days after the Closing Date, the MERS(R) system to indicate that such Mortgage Loans have been assigned by the Depositor to the Trustee in accordance with this Agreement for the benefit of the Certificateholders by including (or deleting, in the case of Mortgage Loans which are repurchased in accordance with this Agreement) in such computer files (a) the code in the field which identifies the specific Trustee and (b) the code

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in the field "Pool Field" which identifies the series of the Certificates issued in connection with such Mortgage Loans. The Depositor further agrees that it will not, and will not permit the Master Servicer to, and the Master Servicer agrees that it will not, alter the codes referenced in this paragraph with respect to any Mortgage Loan during the term of this Agreement unless and until such Mortgage Loan is repurchased in accordance with the terms of this Agreement.

(d) It is intended that the conveyances by the Depositor to the Trustee of the Mortgage Loans as provided for in this Section 2.01 and the Uncertificated Regular Interests be construed as a sale by the Depositor to the Trustee of the Mortgage Loans and the Uncertificated Regular Interests for the benefit of the Certificateholders. Further, it is not intended that any such conveyance be deemed to be a pledge of the Mortgage Loans and the Uncertificated Regular Interests by the Depositor to the Trustee to secure a debt or other obligation of the Depositor. Nonetheless, (a) this Agreement is intended to be and hereby is a security agreement within the meaning of Articles 8 and 9 of the New York Uniform Commercial Code and the Uniform Commercial Code of any other applicable jurisdiction; (b) the conveyances provided for in this Section 2.01 shall be deemed to be (1) a grant by the Depositor to the Trustee of a security interest

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Corporate Records

Result of lookup for P032618 (at 2/7/2012 9:58 AM)

PARAGON HOME LENDING, LLC

You can: [File an Annual Report](#) - [Request a Certificate of Status](#) - [File a Registered Agent/Office Update Form](#)

Vital Statistics

Entity ID P032618

Registered Effective Date 12/16/1996

Period of Existence PER

Status Dissolved [Request a Certificate of Status](#)

Status Date 01/28/2008

Entity Type Domestic Limited Liability Company

Annual Report Requirements Limited Liability Companies are required to file an Annual Report under s. 183.0120, WI Statutes.

Addresses

Registered Agent Office MARIE KELLER
19435 WEST CAPITOL DRIVE
SUITE 201
BROOKFIELD, WI 53045

[File a Registered Agent/Office Update Form](#)

Principal Office 19435 W CAPITOL DR #201
BROOKFIELD, WI 53045
UNITED STATES OF AMERICA

Historical Information

Annual Reports

Year	Reel	Image	Filed By	Stored On
2006	000	0000	online	database
2004	111	1111	paper	image

[File an Annual Report](#) - [Order a Document Copy](#)

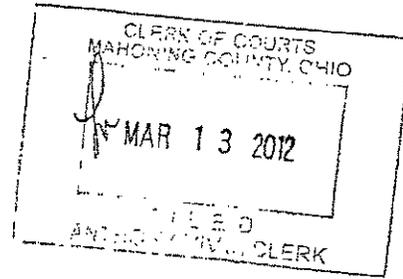
Certificates of Newly-elected Officers/Directors None

Old Names None

Chronology

Effective Date	Transaction	Filed Date	Description
12/16/1996	Organized	12/19/1996	
04/15/2005	Change of Registered Agent	04/15/2005	FM 516 2004
10/01/2006	Delinquent	10/01/2006	
11/03/2006	Restored to Good Standing	11/03/2006	E-Form
11/03/2006	Change of Registered Agent	11/03/2006	FM516-E-Form
04/19/2007	Change of Registered Agent	04/24/2007	FM13-E-Form
01/28/2008	Articles of Dissolution	01/29/2008	

Order a Document Copy



201051560
(ajr)

COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

The Bank of New York Mellon Trust Company,
National Association fka The Bank of New York
Trust Company, N.A. as successor to JPMorgan
Chase Bank N.A. as Trustee for RASC 2004KS6

Plaintiff,

-vs-

Felix R. Aponte aka Felix Aponte, et al.

Defendants.

Case No. 10CV 4681

Judge Lou A. D'Apolito

MEMORANDUM IN OPPOSITION TO DEFENDANTS'
MOTION FOR RELIEF FROM JUDGMENT

This foreclosure case, brought by The Bank of New York Mellon Trust Company, National Association fka The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank N.A. as Trustee for RASC 2004KS6 ("Plaintiff") against Felix R. Aponte and Barbara Aponte ("Defendants"), stems from a promissory Note and Mortgage executed by Defendants to Paragon Home Lending, LLC ("PHL"), and upon the Defendants defaulted. The Defendants failed to Answer and thus, a Default Judgment and Decree in Foreclosure was granted in favor of Plaintiff on April 7, 2011. An Order of Sale was issued and subsequent Sheriff's Sale was set for February 14, 2012. Defendants then filed a 60(B) Motion for Relief from Judgment only 5 days prior to the date of sale. Upon further motion from the Defendants, the court stayed further execution for the April 7, 2011 judgment. Plaintiff hereby opposes Defendants' 60(B) Motion for Relief from Judgment. A legal analysis is more fully explained in the following.

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Exhibit 9

I. LAW AND ANALYSIS

a. LEGAL STANDARD FOR RULE 60(B)

Civ.R. 60(B) provides in pertinent part as follows:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B);
- (3) fraud..., misrepresentation, or other misconduct of an adverse party;
- (4) the judgment has been satisfied, released, or discharged; a prior judgment upon which it is based has been reversed or otherwise vacated or; it is no longer equitable that the judgment should have prospective application; or
- (5) any other reason justifying relief from the judgment.

In order to prevail on such a motion, the movant must demonstrate the following:

- (1) that he has a meritorious claim or defense;
- (2) that he is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1)-(5); and
- (3) that his motion for relief is made within a reasonable time.

GTE Automatic Electric, Inc. v. ARC Industries (1976), 47 Ohio St.2d 146, ¶2 of the syllabus.

The three elements entitling a movant to Civ.R. 60(B) relief “are independent and in the conjunctive; thus, the test is not fulfilled if any one of the requirements is not met.” *Strack v. Pelton* (1994), 70 Ohio St.3d 172, 174. If any of these three requirements is not met, the motion should be overruled. *Svoboda v. Brunswick* (1983), 6 Ohio St.3d 348, 351.

b. DEFENDANTS HAVE NOT STATED A MERITORIOUS CLAIM OR DEFENSE

Defendants’ arguments regarding a defect in the Note indorsements and issues concerning the trust name or fictitious entity, are essentially a claim regarding Plaintiff’s status as the real party to bring the claim. Defendants improperly assume that Plaintiff cannot be the real party in interest. With its Complaint, Plaintiff attached the Note and its allonges, and as such, Plaintiff has already shown that it can enforce the note as its holder. The sale of negotiable

instruments is governed under Title 13 of the Ohio Revised Code, not Title 53, which solely relates to real estate.

The instant Note is specially indorsed to Plaintiff. *Complaint, Ex. A, Note*. The possessor of a note that is specially indorsed to it is the note's holder. R.C. 1301.01(21)(a). Plaintiff is entitled to enforce the Note as its holder under R.C. 1303.31. Plaintiff's copy, produced with the Complaint demonstrates possession. *Complaint, Ex. A, Note*. A successful chain of title is shown in the indorsements from the original lender to Plaintiff. Thus, as Plaintiff is both in possession and is the payee of the Note, Plaintiff is entitled to enforce it. The Defendants cite to no law to support the contention that a Trust Name or Fictitious Name is insufficient nor do they cite to any law that requires an indorsement appearing on the face of the Note to be at a specific placement. Therefore, as Plaintiff is rightfully allowed to enforce the Note, the Defendants have failed to establish a meritorious defense. As such, the Motion for Relief must be denied.

c. DEFENDANTS ARE NOT ENTITLED TO RELIEF UNDER CIV.R. 60(B)

i. Defendants Fail to Show Excusable Neglect

Under Civ.R. 60(B)(1), the concept of excusable neglect is amorphous and generally defined in the negative. *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 20, 665 N.E.2d 1102. Neglect is not excusable where it equates to a "complete disregard for the legal system." *Id.* quoting *GTE Automatic Elec v. ARC Industries, Inc.* (1976), 47 Ohio St.2d at 153, 351 N.E.2d 113, and *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 21, fn. 4, 520 N.E.2d 564. Ohio courts rule that excusable neglect does not exist when "a party or his attorney could have controlled or guarded against the happening of the special or unusual circumstance." *McHenry v. McHenry*, 2nd Dist. No. 20222, 2004-Ohio-2191; citing to *Vanest v. Pillsbury Co.* (1997), 124 Ohio App.3d 525, 536, 706 N.E.2d 825.

Here, the Defendants claim that they "did what they had done previously." *Def.'s Memorandum* at p.7. The Defendants further claim that "they advised the Court of their

intentions and continued to work with the Bank.” *Id.* Defendants suggest that their neglect in opposing Plaintiff’s Motion is excusable because Defendants’ “did not send a letter to the Court for the second lawsuit filed by the same Lender in 2010, when they were still working with the Bank to obtain a loan modification.” *Id.*

A loan modification, as a form of loss mitigation, is not a defense to foreclosure. Such a blanket rule would discourage any lender from attempting to assist the borrower through loss mitigation options if they forfeited their remedies by doing so. Here, no loss mitigation agreement was obtained. While Plaintiff is sympathetic to the Defendants’ situation, a bank such as Plaintiff is permitted to advance its own interests and is not obligated to satisfy the desires of customers such as Defendants. On this issue, the Ohio Supreme Court has stated:

Although [the] Bank’s decision left Debtor scratching for other courses of credit, [the] Bank did not create Debtor’s need for funds, and it was not contractually obliged to satisfy its customer’s desires. The Bank was entitled to advance its own interests, and it did not need to put the interests of Debtor * * * first * * * It need not throw good money after bad ***.

Ed Schory & Sons, Inc. v. Soc. Natl. Bank (1996), 75 Ohio St.3d 433, 444.

Plaintiff should neither be reprimanded for exercising its contractual rights. In filing the instant foreclosure, Plaintiff merely enforced its contractual rights under the Note and Mortgage. In *Needham v. The Provident Bank*, the court stated “that a lender does not act in ‘bad faith’ when it decides to enforce its contract rights.” *Needham v. The Provident Bank* (1996), 110 Ohio App.3d 817, 832. It is axiomatic that a party may enforce its contractual rights to the “great discomfort” of the other party. *Salem v. Central Trust Co., N.A.* (1995), 102 Ohio App.3d 672, 678. Therefore, Defendants cannot rely on their attempts to achieve a loan modification to show their failure to file an Answer, to file any type of motion, or to act in anyway, constitutes excusable neglect. The Defendants or their counsel could have clearly guarded against a default judgment by filing an Answer, a motion, or even by filing this Motion for relief anytime during the preceding 10 months.

As a matter of law, Defendants' cannot claim excusable neglect because the circumstances surrounding the entry of Judgment were well within the control of Defendants and their attorney. There is no entitlement to relief exists under this claim.

ii. Defendants Have Failed to Show Fraud or Misrepresentation

Defendants evoke Civ.R. 60(B)(3) to establish relief and allude to the instant action, but ultimately have failed to state how the relief under this rule is applicable. This rule deals with fraud, misrepresentation and misconduct. In its most general sense, "fraud" embraces all acts, omissions or concealments which involve a breach of legal and equitable duty, trust or confidence justly reposed, which are injurious to another, or by which an undue and unconscientious advantage is taken of another. *Hanes v. Giambrone*, 471 N.E.2d 801 (Ohio App. 2 Dist. 1984). Fraud is the same whether it is actual fraud or constructive fraud, the distinction being in the nature of the relief rather than in the character of the fraud. *Id.*

In order to prevail upon a claim of fraud a plaintiff must show all of the following elements:

- (a) a representation or, where there is a duty to disclose, concealment of a fact,
- (b) which is material to the transaction at hand,
- (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,
- (d) with the intent of misleading another into relying upon it,
- (e) justifiable reliance upon the representation or concealment, and
- (f) a resulting injury proximately caused by the reliance.

Doyle v. Fairfield Machine Co., Inc., 120 Ohio App.3d 192, 206, 697 N.E.2d 667, 676 (Ohio App. 11 Dist.,1997).

Defendant states that MERS could not have assigned the Mortgage for PHL and therefore the Assignment is not valid. *Defendant's Motion*. However, other courts have recognize MERS' authority to assign mortgages. *Deutsche Bank National Trust Co. v. Traxler*, 9th Dist. No. 09CA009739, 2010-Ohio-3940.

The *Traxler* court goes on to cite *BAC Home Loans Servicing, L.P. v. Hall*, where it was concluded that BAC was entitled to judgment as the real party in interest where MERS,

as a nominee, assigned the mortgage at issue to BAC. Id., 12th Dist. No. CA2009-10-135, 2010 Ohio 3472, at P5-25. Further, in *Countrywide Home Loans Servicing, L.P. v. Shifflet*, the court concluded that Countrywide was entitled to judgment as the real party in interest where MERS, as a nominee, assigned the mortgage to Countrywide. Id., 3d Dist. No. 9-09-31, 2010 Ohio 1266, at P9-17. In *Deutsche Bank Natl. Trust Co. v. Ingle*, the court concluded Deutsche was entitled to judgment as the real party in interest where MERS, as a nominee, assigned a mortgage deed to Deutsche. Id., 8th Dist. No. 92487, 2009 Ohio 3886, P4-18.

In the instant case, as the Defendants point out, the Mortgage states that “ ‘MERS’ is Mortgage Electric Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and *Lender’s successor and assigns.*” (emphasis added) *Defendants’ Memorandum*, at p.7. The Defendants’ focus on the perceived issue of PHL’s dissolution is misplaced. As nominee for the “Lender and Lender’s successor and assigns”, MERS can rightfully assign the mortgage. The Mortgage further continues:

“[b]orrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender’s successors and assigns) has the right to exercise *any or all of those interests*, including, but not limited to the right to foreclose and sell the Property; and to take any action required of lender including but not limited to releasing or cancelling this Security Agreement.”

Id. at p.2 (emphasis added). Therein, MERS has the expressed authority to exercise *any of the lender’s rights*, including assignment, on behalf of the lender and had the authority to execute the Assignment of Mortgage and, thus, executed a valid Assignment of Mortgage. PHL’s dissolution is immaterial as MERS also served as nominee for any successor and/or assign. The Defendants’ Mortgage did not disappear into thin air upon PHL’s dissolving. Therefore, as provided within the provisions of the mortgage and in accordance with recognized court decisions, the Assignment of Mortgage from MERS, as nominee, to Plaintiff is valid.

Defendants have failed to plead any of the elements necessary to establish a claim for fraud. First, Defendant has failed to plead a representation or concealment of fact on the part of Plaintiff, and therefore, there cannot be a misrepresentation that is material. Consequently, without any misrepresentation, there can be no false statement, no intent to mislead, and no justifiable reliance. Therefore, there is no injury. Accordingly, Defendant has failed to prove an entitlement to relief under Civ.R. 60(B)(3), and as such, their Motion for Relief must fail.

d. DEFENDANTS' MOTION WAS UNTIMELY FILED

Defendants' motion has not been filed within a reasonable time. While a party may have a possible right to file a motion to vacate a judgment up to one year after the entry of judgment, the motion is also subject to the 'reasonable time' provision. *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 106, 316 N.E.2d 469. In this regard, the movant has the burden of proof, and must submit factual material which on its face demonstrates the timeliness of the motion. *Id.* at 103. "Under the rule, one year is an outside time limitation and the motion must still be filed within a reasonable time. A reasonable time must be determined under the facts of each case." *Martinko v. Strongsville High School*, 8th Dist. No. 80068, 2002-Ohio-1404.

It is the movant's burden of proof to present factual material that on its face establishes the timeliness or justifies delays in filing the motion to vacate. *Wolfe v. Cahill*, 8th Dist. No. 88368, 2007-Ohio-638, ¶ 18; *Haley v. Helay*, 9th Dist. No. 20720, 2002-Ohio-1976, at *2-3; *Quality Synthetic Rubber v. Horner* (September 8, 1995), 11th Dist. No. 94-P-0093, at * 5. "In the absence of any explanation for the delay in filing the Civ.R. 60(B) motion, the movant has failed to meet his burden of establishing the timeliness of his motion and the motion to vacate should be denied." *Dunn v. Marthers*, 9th Dist. No. 05CA008838, 2006-Ohio-4923, at ¶ 18; see also, *Wolfe v. Cahill*, 8th Dist. No. 88368, 2007-Ohio-638, ¶ 18; *Fouts v. Weiss-Carson* (1991), 77 Ohio App. 3d 563, 567, 602 N.E.2d 1231.

The Defendants have failed to show that the 10 month delay was reasonable in the given circumstances. “[U]justified delays of less than a year can be untimely for Civ.R. 60(B) purposes. See e.g., *Hall v. K.V.V. Enterprises* (1984), 15 Ohio App.3d 137, 473 N.E.2d 833 (the court did not abuse its discretion in denying relief from the judgment, since the motion for relief was not filed until over three months after judgment was entered); *Larson v. Umoh* (1986), 33 Ohio App. 3d 14, 17, 514 N.E.2d 145 (seventy-two day delay renders Civ.R. 60(B) motion untimely); *Zerovnik v. E.F. Hutton & Co.* (June 7, 1984), 8th Dist. No. 47460 (unjustified delay for two and one-half months is unreasonable as a matter of law); *Mount Olive Baptist Church v. Pipkins Paints* (1979), 64 Ohio App.2d 285, 289, 413 N.E.2d 850 (unjustified four-month delay necessarily precluded relief from a money judgment).

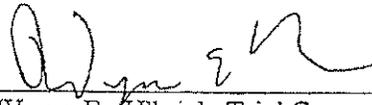
Judgment and Decree in Foreclosure was entered in this matter on April 7, 2011. *Docket*. As the Defendants pointed out, the Motion for Relief from Judgment was 10 months later. Not only does the 10-month delay give reason for suspicion, but by filing on February 9, 2012, less than a week prior to the scheduled Sheriff’s sale, the Defendants’ have unreasonably delayed the execution of the Plaintiff’s judgment by forcing a stay of the Sheriff’s sale. Though Defendants’ filed in compliance with the one-year provision of Civ.R. 60(B), the Defendants were capable of filing the Motion at any time prior to the Sheriff’s sale. It seems as though Defendants’ filing at this time seeks merely to suspend execution of Plaintiff’s judgment. Doing so, Defendants unnecessary cause time delays and costs to be imposed on both the Plaintiff and the court. Thus, the Defendants have failed to show that the timeliness of the motion was reasonable and as such, the Motion for Relief from Judgment must be denied.

III. CONCLUSION

Based upon the foregoing, the Defendants cannot establish (1) a meritorious defense, (2) an entitlement to relief under rule 60(B)(1) through (5), and (3) that it was timely filed. Failure to fulfill any one of the three requirements prevents the Defendants from succeeding on a claim

under Civ.R. 60(B). Here, they cannot establish any. As such, Defendant's Motion for Relief from Judgment is without merit and therefore, the Motion must be DENIED.

Respectfully submitted,



Wayne E. Ulbrich, Trial Counsel
Ohio Supreme Court Reg. #0071910
LERNER, SAMPSON & ROTHFUSS
P.O. Box 5480
Cincinnati, OH 45201-5480
(513) 241-3100
attyemail@lsrlaw.com

CERTIFICATE OF SERVICE

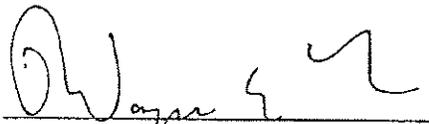
This is to certify that a true and exact copy of the foregoing **OPPOSITION TO DEFENDANTS' MOTION FOR RELIEF FROM JUDGMENT** has been duly served upon the following by ordinary U.S. mail, postage prepaid, this 12th day of March, 2012:

Felix R. Aponte aka Felix Aponte
3374 Swallow Hollow Drive
Poland, OH 44514

Barbara Aponte
3374 Swallow Hollow Drive
Poland, OH 44514

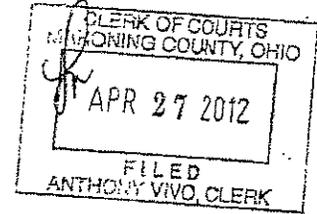
Mahoning County Treasurer
120 Market Street
Youngstown, OH 44503-1726

Mortgage Electronic Registration Systems, Inc.
1901 E Voorhees Street, Suite C
Danville, IL 61834



Wayne E. Ulbrich

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO



The Bank of New York Mellon Trust Company, National Association fka The Bank of New York Trust Company N.A. as successor to JPMorgan Chase Bank N.A. as Trustee for RASC 2004KS6	)	CASE NO.: 2010 CV 4681
	)	JUDGE LOU D'APOLITO
	)	REPLY IN SUPPORT OF
PLAINTIFF,	)	MOTION FOR RELIEF FROM
VS.	)	JUDGMENT
)	
FELIX R. APONTE, ET AL)	
)	
DEFENDANTS,)	

Now come Defendants Felix and Barbara Aponte, by and through counsel, and file their reply to the memorandum in opposition to Defendants' motion for relief from judgment.

On April 7, 2011, this Court issued a Decree in Foreclosure; on February 9, 2012, Defendants filed a motion for relief from judgment supported by the Affidavit of Barbara Aponte and the Affidavit of Counsel. On March 13, 2012, Plaintiff filed its memorandum in opposition to the motion for relief from judgment.

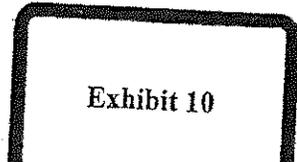
I. A Meritorious Defense Exists.

A. The Trustee has no Authority to Act.

Plaintiff attempts to characterize Defendants' argument as merely stating a "real party in interest" argument which with Plaintiff can summarily dismiss based upon the production of a copy of the promissory note. Plaintiff is clearly wrong.

The complaint was filed by a Trustee. (The Bank of New York Mellon Trust Company, National Association fka The Bank of New York Trust Company N.A. as successor to JPMorgan Chase Bank N.A. as Trustee for RASC 2004KS6.) The document which governs the Trust is the Pooling and Servicing Agreement. (The Pooling and Servicing Agreement dated as of June 1,

30



2004 Home Equity Mortgage Asset-Backed Pass-Through Certificates Series 2004-KS6 between Residential Asset Securities Corporation, Depositor, Residential Funding Corporation, Master Servicer, and JPMorgan Chase Bank, Trustee.).

Section 11.04 of the Pooling and Servicing Agreement provides the "Governing Law".

This agreement and the Certificates shall be governed by and construed in accordance with the laws of the State of New York and the obligations, rights and remedies of the parties hereunder shall be determined in accordance with such laws.

The New York Law of Estates, Powers and Trusts, N.Y. EPT. LAW § 7-2.4, states:

If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, is void.

Defendants' motion for relief from judgment then identifies exactly which entity can transfer assets to the Trust, pursuant to the terms of the Trust (the Pooling and Servicing Agreement). Defendants' motion for relief from judgment then identifies the manner in which the specific entity can transfer assets to the Trust, pursuant to the pooling and servicing agreement. Finally, Defendants' motion for relief from judgment demonstrates that the wrong party transferred the asset to the Trust and that the asset was transferred to the Trust in the wrong manner. Accordingly, the transfer to the trust of the promissory note and mortgage were void, and the Trustee has no authority to act upon these assets.

The March 30, 2011 decision in *Horace vs. LaSalle Bank National Association* Alabama Circuit Court of Russell County Case No.: 57-CV-2008-000362.00, also supports Defendants' argument that Plaintiff Trustee did not have authority to bring the foreclosure complaint when the promissory note and mortgage were not transferred to the Trust according to the Pooling and Servicing Agreement. A copy of the *Horace vs. LaSalle Bank National Association* is attached hereto.

In *Hendricks vs. US Bank National Association*, State of Michigan, Washtenaw County Trial Court Case No. 10-849-CH, the trial court granted injunctive relief preventing and precluding Defendant acting as a purported Trustee from foreclosing upon a mortgage, based upon the failure to transfer the promissory note and mortgage pursuant to the Pooling and Servicing Agreement. A copy of *Hendricks vs. US Bank National Association* is attached hereto.

It is anticipated that Plaintiff will cite general contract law for the proposition that a third-party cannot challenge the propriety of an assignment. This simply mis-construes Defendants' position, Defendants are not challenging the correctness of the assignment, but rather the Trustee's authority to act. The same argument asserted by the Plaintiff in the instant case, was rejected by the US District Court for the District of Hawaii in *Deutsche Bank National Trust Co. vs. Williams* (March 29, 2012), Case No.: 1:11-cv-00682, a copy of which is attached hereto.

In this action, the proverbial shoe is on the other foot -- Deutsche Bank asserts affirmative claims against the Williamses seeking to enforce the Mortgage and Note, and therefore must establish its legal right (*i.e.*, standing) to do so. *See, e.g., IndyMac Bank v. Miguel*, 117 Haw. 506, 513, 184 P.3d 821, 828 (Haw. App. 2008) (explaining that for standing, a mortgagee must have "a sufficient interest in the Mortgage to have suffered an injury from [the mortgagor's] default"). As explained above, Deutsche Bank has failed to do so. The court therefore GRANTS the Williamses' Motion to Dismiss. *Deutsche Bank National Trust Co. vs. Williams*, at p. 12 of the opinion.

The *Williams* court granted a motion to dismiss which demonstrated that the Pooling and Servicing Agreement was not followed by the Plaintiff Trustee.

B. The Endorsements are not in the Proper Order.

Again, Plaintiff attempts to minimize this argument, but the only authority in the State of Ohio on the issue treats the order of endorsement and the location of the endorsements as a critical issue. *Federal Home Loan Mortgage Corp. v. Schwartzwald*, 194 Ohio App.3d 644, 2011-Ohio-2681, at ¶¶42-52.

C. The Complaint was brought on behalf of a fictitious party.

While Plaintiff contends that there is no law to support Defendants' argument, in *Patterson v. V. & M Auto Body* (1992), 63 Ohio St.3d 573, the Ohio Supreme Court found that a judgment rendered against a non-entity was a nullity, stating:

In this case we are asked to decide whether a lawsuit may be knowingly maintained against a defendant solely under the fictitious name in which the defendant does business. For the following reasons, we hold that it may not.

It is well established that both plaintiff and defendant in a lawsuit must be legal entities with the capacity to be sued. Cf. Civ.R. 17(B); *Barnhart v. Schultz* (1978), 53 Ohio St.2d 59, 61, 7 O.O.3d 142, 143, 372 N.E.2d 589, 591, overruled on other grounds, *Baker v. McKnight* (1983), 4 Ohio St.3d 125, 4 OBR 371, 447 N.E.2d 104. A sole proprietorship has no legal identity separate *575 from that of the individual who owns it. It may do business under a fictitious name if it chooses, but “ * * * [d]oing business under another name does not create an entity distinct from the person operating the business. The individual who does business as a sole proprietor under one or several names remains one person, personally liable for all his obligations. * * * ” *Duval v. Midwest Auto City, Inc.* (D.Neb.1977), 425 F.Supp. 1381, 1387. The proper defendant in this case was Victor Searfoss, doing business as V & M Auto Body.

The same is true of the Plaintiff.

II. Defendants are entitled to Relief under Civil Rule 60(B)

A. Defendants are entitled to relief under 60(B)(1).

Again Plaintiff attempts to minimize and mis-characterize Defendants' conduct in this matter. This is the third time that Plaintiff has filed a foreclosure complaint against Defendants. In the first case, Defendants filed a letter with the Court and worked with the Bank to achieve a loan modification. The case was dismissed when the parties worked out a payment arrangement. A second lawsuit was filed; and Defendants filed a letter with the Court and began working with the Bank. However, unbeknownst to Defendants the second lawsuit was voluntarily dismissed and the instant action was filed.

While Defendants assumed that they had properly filed an answer, i.e. their letter, Defendants had not done so. This is not a complete lack of respect or disregard of the legal system.

B. Defendants are entitled to Relief under 60(B)(3)

The lender was Paragon Home Lending, LLC. The mortgage identifies MERS as following:

“MERS” is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender’s successors and assigns.

MERS, acting as the nominee of Paragon Home Lending, LLC has attempted to assign the mortgage more than ten (10) months after Paragon Home Lending, LLC was dissolved. Plaintiff argues MERS can act on behalf of Paragon Home Lending, LLC’s successor and assigns, and therefore it can assign the mortgage even after Paragon Home Lending, LLC ceased to exist. It is inconceivable how an agent’s authority can exist when the principal ceases to exist.

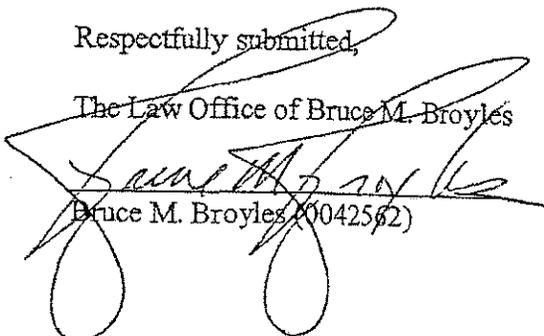
III. The motion was timely filed.

The affidavit of Barbara Aponte states that Defendants were repeatedly told that they could resolve the matter by modifying their loan. However, after working with the Bank for nearly 18 months, Defendants were told that their loan could not be modified. Defendants were informed that they could not modify their loan on January 6, 2012, and the motion for relief from judgment was filed on February 9, 2012. Certainly, this Court should find that time period to be reasonable.

Based upon the above, as well as, the arguments set forth in Defendants’ motion for relief from judgment this Court should grant Defendants Felix and Barbara Aponte relief from the April 7, 2011 Decree in Foreclosure.

Respectfully submitted,

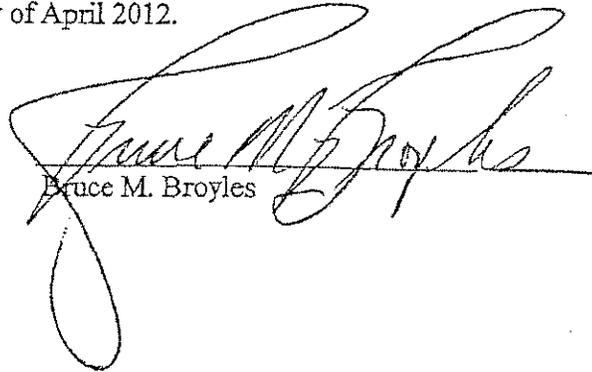
The Law Office of Bruce M. Broyles


Bruce M. Broyles (0042562)

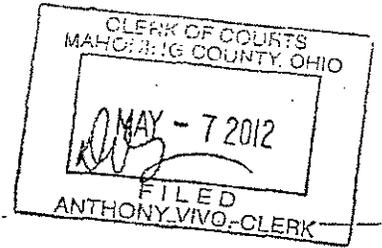
5815 Market Street, Suite 2
Boardman, Ohio 44512
(330) 965-1093
(330) 953-0450 fax
Attorney for Defendants

CERTIFICATE OF SERVICE

A copy of the forgoing reply in support of motion for relief from judgment was served upon Wayne Ulbrich, of Lerner, Sampson & Rothfuss, at P.O. Box 5480, Cincinnati, Ohio 45201-5480, by regular U.S. Mail this 27th day of April 2012.



Bruce M. Broyles



201051560
(dmj)

COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

The Bank of New York Mellon Trust Company,
National Association fka The Bank of New York
Trust Company, N.A. as successor to JPMorgan
Chase Bank N.A. as Trustee for RASC 2004KS6

Case No. 10CV 4681

Judge Lou A. D'Apolito

Plaintiff, MOTION TO DISQUALIFY COUNSEL

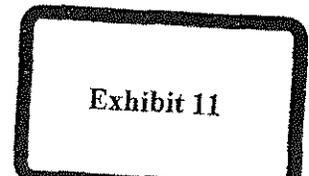
-vs-

Felix R. Aponte aka Felix Aponte, et al.

Defendants.

Now comes the Plaintiff, The Bank of New York Mellon Trust Company, National Association fka The Bank of New York Trust Company, N.A. as successor to JPMorgan Chase Bank N.A. as Trustee for RASC 2004KS6 , by and through counsel, and moves this Court to disqualify Bruce Broyles, from acting as counsel for Defendants' Aponte. Plaintiff states that Attorney Broyles previously represented Plaintiff at the default judgment hearing held before this Court on April 5, 2011 and advocated for judgment against said Defendants at that time. On February 9, 2012, Attorney Broyles filed the pending 60(B) Motion which is currently before the

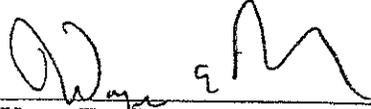
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Court advocating that the Default Judgment previously rendered should be vacated due to,
among other allegations, defective pleadings.

Attorney Broyles has an apparent conflict of interest and should therefore be disqualified.

Respectfully submitted,



Wayne E. Ulbrich, Trial Counsel
Ohio Supreme Court Reg. #0071910
LERNER, SAMPSON & ROTHFUSS
P.O. Box 5480
Cincinnati, OH 45201-5480
(513) 241-3100
attymail@lsrlaw.com

CERTIFICATE OF SERVICE

This is to certify that a true and exact copy of the foregoing Motion has been duly served upon the following by ordinary U.S. mail, postage prepaid, this 12th day of May, 2012:

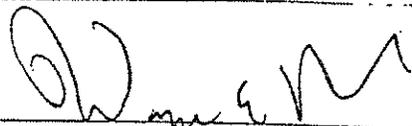
Felix R. Aponte aka Felix Aponte
3374 Swallow Hollow Drive
Poland, OH 44514

Barbara Aponte
3374 Swallow Hollow Drive
Poland, OH 44514

Mahoning County Treasurer
120 Market Street
Youngstown, OH 44503-1726

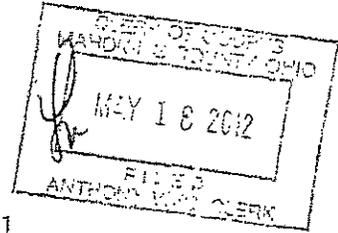
Mortgage Electronic Registration Systems, Inc.
1901 E Voorhees Street, Suite C
Danville, IL 61834

Bruce M. Broyles, Esq.
5815 Market Street, Ste. 2
Boardman, OH 44512



Wayne E. Ulbrich

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO



The Bank of New York Mellon Trust	)	CASE NO.: 2010 CV 4681
Company, National Association fka)	
The Bank of New York Trust Company	)	JUDGE LOU D'APOLITO
N.A. as successor to JPMorgan Chase Bank)	
N.A. as Trustee for RASC 2004KS6	)	MEMORANDUM IN OPPOSITION
	)	TO MOTION TO DISQUALIFY
PLAINTIFF,	)	COUNSEL
VS.)	
)	
FELIX R. APONTE, ET AL)	
)	
DEFENDANTS,)	

Now come Defendants Felix Aponte and Barbara Aponte, by and through counsel, and file their memorandum in opposition to the motion to disqualify counsel.

Plaintiff has filed a motion to disqualify counsel based upon the alleged violation of Prof. Cond. Rule 19(a), which states:

Unless the former client gives *informed consent, confirmed in writing*, a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a *substantially related matter* in which that person's interests are materially adverse to the interests of the former client.

The motion to disqualify immediately assumes that Attorney Broyles represented the Plaintiff in this matter. This is based upon Attorney Broyles attending the hearing on the motion for default on April 5, 2011. Of course, if at that hearing Attorney Broyles represented either party it would be the Plaintiff that he represented. However, Attorney Broyles believes that he did not provide a legal service to a client, while attending the April 5, 2011 default hearing. Instead, he provided a service to the law firm of Lerner, Sampson & Rothfuss. The law firm represented Plaintiff and was required to appear at the default hearing. As a result, the law firm obtained the services of Attorney Broyles, who on April 5, 2011 attended three (3) hearings on behalf of the law firm, invoiced the law firm for one hour at approximately one-half of his

35

Exhibit 12

normal billable rate for legal services. Attorney Broyles had no authority to make any representation to the Court and did not advocate for any position in the case. Instead, Attorney Broyles announced his presence, and delivered a proposed judgment entry to the Court when defendant failed to appear. See, the affidavit of Attorney Bruce M. Broyles filed of even date.

While all would assume to know the definition of a "client", there is a dearth of case law in the State of Ohio defining a client. There is a statutory definition of client, which provides:

"Client" means a person, firm, partnership, corporation, or other association that, directly or through any representative, consults an attorney for the purpose of retaining the attorney or securing legal service or advice from the attorney in the attorney's professional capacity, or consults an attorney employee for legal service or advice, and who communicates, either directly or through an agent, employee, or other representative, with such attorney ***. R.C. 2317.021.

The Rules of Professional Conduct do not define "client", but instead state in the preamble:

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

The motion to disqualify counsel assumes that Attorney Broyles represented the Plaintiff and as a result a conflict of interest exists. Not only was there no attorney-client relationship between Attorney Broyles and Plaintiff, but, assuming for the purposes of argument only, that such a conflict of interest existed and a violation of Prof. Cond. Rule 19(a) was established, it would not be sufficient to warrant the disqualification of counsel.

In support of the motion to disqualify, Plaintiff sets forth authority that interprets and applies the Code of Professional Responsibility. The Rules from which Plaintiff quotes, state in the Preamble:

The Supreme Court of Ohio adopted the Ohio Rules of Professional Conduct, effective February 1, 2007. These rules supersede and replace the Ohio Code of Professional Responsibility to govern the conduct of Ohio lawyers occurring on or after February 1, 2007.

The Preamble to the Rules of Professional Conduct then provide as follows:

[20] Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. **In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation.** The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of breach of the applicable standard of conduct. **(Emphasis Added.)**

Even the motion to disqualification nearly concedes the point that there was no confidential information disclosed. Accordingly, there is no possibility that the instant litigation may be tainted.

Similarly, Plaintiff's motion to strike the pleadings filed by Attorney Broyles have no authority to support the request. In fact, the only authority on the subject speaks against such "nondisciplinary remedies". In addition, Plaintiff asserts that Attorney Broyles has violated Civil Rule 11 by signing and filing the pleadings on behalf of Defendants Felix Aponte and Barbara Aponte. Civil Rule 11 states:

Every pleading, motion, or other document of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address, attorney registration number, telephone number, telefax number, if any, and business e-mail address, if any, shall be stated. A party who is not represented by an attorney shall sign the pleading, motion, or other document and state the party's address. Except when otherwise specifically provided by these rules, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or *pro se* party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been

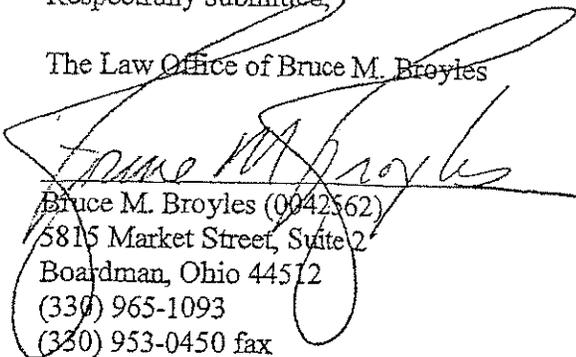
served. For a willful violation of this rule, an attorney or *pro se* party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule. Similar action may be taken if scandalous or indecent matter is inserted.

There is no violation of Civil Rule 11. The pleading was signed; there were good grounds to support the motion, and the pleading was not interposed for the purpose of delay.

Based upon the above, this Court should find the motion to disqualify counsel to be without merit and deny the same.

Respectfully submitted,

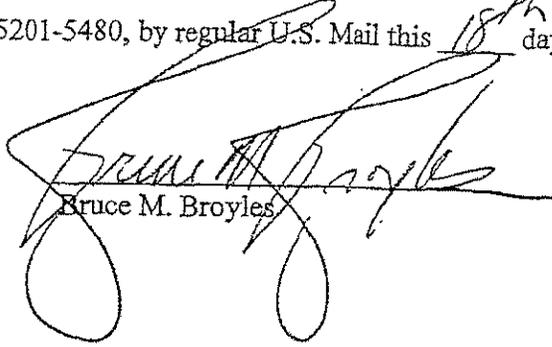
The Law Office of Bruce M. Broyles



Bruce M. Broyles (0042562)
5815 Market Street, Suite 2
Boardman, Ohio 44512
(330) 965-1093
(330) 953-0450 fax
Attorney for Defendants

CERTIFICATE OF SERVICE

A copy of the forgoing affidavit was served upon Wayne Ulbrich, of Lerner, Sampson & Rothfuss, at P.O. Box 5480, Cincinnati, Ohio 45201-5480, by regular U.S. Mail this 18th day of May 2012.



Bruce M. Broyles

RJK

STATE OF OHIO
MAHONING COUNTY,

SS.

IN THE COURT OF COMMON PLEAS

CLERK OF COURTS
MAHONING COUNTY, OHIO
MAY 23 2012
FILED
ANTHONY VIVO, CLERK

CASE NO. 10CV4681

DATE 5-21-2012

Bank of New York

PLAINTIFF

VS.

Felix R. Aponte, et al

DEFENDANT

MAGISTRATE'S DECISION

Upon consideration, review, and the arguments of counsel, the motions to disqualify and strike due to an apparent conflict of interest is sustained.

Due to the apparent inadvertence of counsel's conflict, Defendant Aponte shall have 45 days to obtain new counsel and an additional 15 days to re-file his motion for relief from judgment, per Civ.R. 60(B). Plaintiff shall have 15 days to file any response to said motion(s) of Defendant.

Exhibit 13

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2010 CV
04881
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CVDOM

APPROVED:

37

Magistrate Daniel P. Dascenzo



NOTICE TO ATTORNEYS AND PARTIES

Pursuant to Civil Rule 53(D)(3), the parties shall have fourteen (14) days from the date of the filing of this Decision to file written Objection with the Clerk of Court's Office. The Objections shall be specific and state with particularity all grounds of objection. Any objection to a factual finding shall supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. Any such Objections must be served upon all parties to this action, and a copy must be provided to the Common Pleas Court. A party shall not assign as error on appeal the Court's adoption of any finding of fact or conclusion of law in that Decision unless the party has timely and specifically objected to that finding or conclusion as required by Civil Rule 53(E)(3).

The Clerk of Courts shall serve notice of this Decision upon all parties within three (3) days per Civil.R.5.

Jone

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CLERK OF COURTS
MAHONING COUNTY, OHIO
JUN - 6 2012
FILED
ANTHONY VIVO, CLERK

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

The Bank of New York Mellon Trust)
Company, National Association fka)
The Bank of New York Trust Company)
N.A. as successor to JPMorgan Chase Bank)
N.A. as Trustee for RASC 2004KS6)
PLAINTIFF,)
VS.)
FELIX R. APONTE, ET AL)
DEFENDANTS,)

CASE NO.: 2010 CV 4681
JUDGE LOU D'APOLITO
OBJECTIONS TO MAGISTRATE'S
DECISION OF MAY 23, 2012

Now come Defendants Felix Aponte and Barbara Aponte, by and through counsel, and file their objections to the Magistrate's decision dated May 23, 2012, a copy of which is attached hereto.

Defendants object to the Magistrate's decision and say that it errs as a matter of law in that it disqualifies counsel based upon a conflict of interest, without any evidence that Defendant's counsel previously represented the Plaintiff. Defendant's counsel previously attended a default hearing in the above referenced matter on April 5, 2011, but did not advocate on behalf of the Plaintiff; and merely provided a service to the law firm of Lerner, Sampson & Rothfuss. Under the circumstances Plaintiff does not meet the statutory definition of "client".

Defendants object to the Magistrate's decision and say that it errs as a matter of law in that it allows Plaintiff to use a claimed violation of a disciplinary rule offensively to deprive Defendants of their counsel of choice, when the Preamble to the Rules of Professional Conduct Preamble expressly provides that a "violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation." Here, the

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Exhibit 14

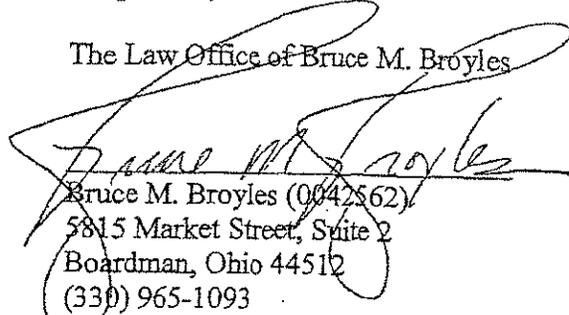
Magistrate's decision not only deprives Defendants of their counsel of choice, but takes additional action to strike the pleadings filed by Defendants' counsel.

Defendants object to the Magistrate's decision and say that it errs as a matter of law in that it disqualifies counsel based solely upon a possible violation of the ethical aspiration to "avoid even the appearance of impropriety", and without any evidence of the dissemination of any confidential information passed from the client to Defendants' counsel, or from the law firm of Lerner, Sampson & Rothfuss to Defendants' counsel.

Based upon the above objections and the pleadings in the case, this Court should sustain Defendants' objections to the Magistrate's decision and deny the motion to disqualify counsel.

Respectfully submitted,

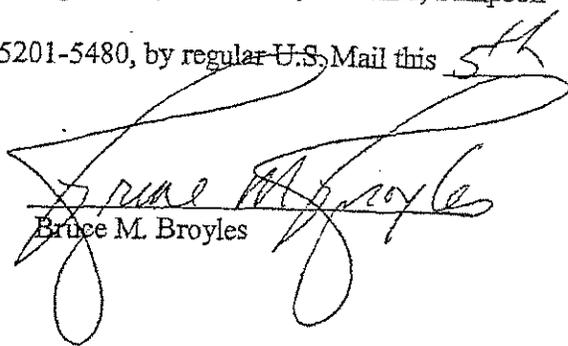
The Law Office of Bruce M. Broyles



Bruce M. Broyles (0042562)
5815 Market Street, Suite 2
Boardman, Ohio 44512
(330) 965-1093
(330) 953-0450 fax
Attorney for Defendants

CERTIFICATE OF SERVICE

A copy of the forgoing objections was served upon Wayne Ulbrich, of Lerner, Sampson & Rothfuss, at P.O. Box 5480, Cincinnati, Ohio 45201-5480, by regular U.S. Mail this 5th day of June 2012.



Bruce M. Broyles

dy

CLERK OF COURTS
MAHONING COUNTY, OHIO
JUN 12 2012
FILED
ANTHONY VIVO, CLERK

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

THE BANK OF NEW YORK	)	CASE NO. 10 CV 4681
)	
PLAINTIFF	)	JUDGE LOU A. D'APOLITO
)	
VS.	)	JUDGMENT ENTRY
)	
FELIX R. APONTE, et al.)	
)	
DEFENDANTS)	
)	

This cause came on to be heard on the Magistrate's Decision filed on the 23rd day of May, 2012, and the objections filed June 6, 2012.

Upon consideration, review, and the arguments of counsel, the motion to disqualify and strike dues to an apparent conflict of interest is sustained.

Due to the apparent inadvertence of counsel's conflict, Defendant Aponte shall have 45 days to obtain new counsel and an additional 15 days to re-file his motion for relief from judgment, per Civ.R. 60(B). Plaintiff shall have 15 days to file any response to said motion(s) of Defendant.

After independent review and consideration of the facts in evidence, as well as a review of the Magistrate's Decision, the Court finds no error of law or fact or other defect, overrules the objections, and adopts the Magistrate's Decision as the Court's Judgment Entry pursuant to Civ. R. 53.

Judgment is entered as above specified.

IT IS SO ORDERED.

6/7/12
DATE


JUDGE LOU A. D'APOLITO

CLERK : COPY TO ALL COUNSEL
OR UNREPRESENTED PARTY.

39 J.2730
P 000445
Done

Exhibit 15



2010 CV
04681

12 MA 125

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

12 MA 125

The Bank of New York Mellon Trust)
Company, National Association fka)
The Bank of New York Trust Company)
N.A. as successor to JPMorgan Chase Bank)
N.A. as Trustee for RASC 2004KS6)

CASE NO.: 2010 CV 4681

JUDGE LOU D'APOLITO

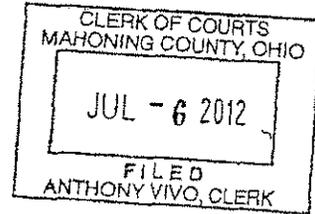
NOTICE OF APPEAL

PLAINTIFF,

VS.

FELIX R. APONTE, ET AL

DEFENDANTS,



Now come Defendants Felix Aponte and Barbara Aponte, by and through counsel, and give notice to the Court and the parties that they appeal to the Seventh District Court of Appeals of Ohio from the Magistrate's decision dated May 23, 2012, and the June 12, 2012 Judgment Entry overruling objections and adopting the Magistrate's Decision.

Copies of the Magistrate's decision dated May 23, 2012, and the June 12, 2012 Judgment Entry overruling objections and adopting the Magistrate's Decision are attached hereto.

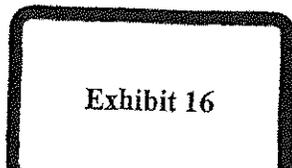
Pursuant to Local Rules of Court the Civil Docketing Statement and Praecipe are being filed of even date.

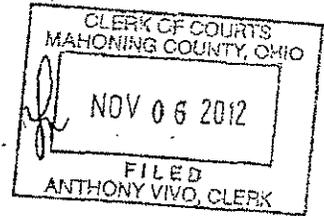
Respectfully submitted,

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(330) 965-1093
(330) 953-0450 fax
Attorney for Defendants

4h





IN THE COURT OF APPEALS
SEVENTH APPELLATE DISTRICT
MAHONING COUNTY, OHIO

The Bank of New York Mellon Trust)
Company, National Association fka)
The Bank of New York Trust Company)
N.A. as successor to JPMorgan Chase Bank)
N.A. as Trustee for RASC 2004KS6)

CASE NO.: 2012 MA 125

APPELLEE,

VS.

FELIX R. APONTE, ET AL

APPELLANTS,

BRIEF OF APPELLANTS FELIX APONTE AND BARBARA APONTE

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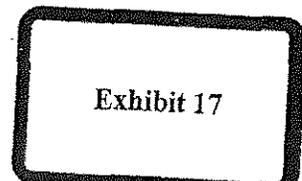


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 The trial court erred in disqualifying counsel based solely upon
 an alleged conflict of interest pursuant to Prof. Cond. Rule 19(a).

 Issue Presented for Review No. 1P.3
 Did Appellee establish that it was the client of Appellants' counsel?

 Authorities Cited in Support

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 The trial court abused its discretion in disqualifying counsel
 based upon the "apparent conflict of interest"

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 May 23, 2012 Magistrate's Decision

 June 12, 2012 Judgment entry adopting Magistrate's Decision

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES CITED

<i>Campbell v. Independent Outlook, Inc.</i> , (Ohio App. 10 th Dist.) 2004-Ohio-6716P.3
R.C. 2317.021P.4
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Statement of Case

On December 17, 2010, Appellee The Bank of New York Mellon Trust Company, National Association fka The Bank of New York Trust Company N.A. as successor to JPMorgan Chase Bank N.A. as Trustee for RASC 2004KS6 filed its complaint for foreclosure. (T.d.1.). On February 24, 2010, Appellee filed a motion for default. (T.d.4.). A hearing was conducted and on April 7, 2010, the trial court issued a decree in foreclosure. (T.d.8.).

On February 9, 2012, Appellants Felix Aponte and Barbara Aponte filed the affidavit of Barbara Aponte, a motion for relief from judgment, the affidavit of counsel, and a motion to stay execution. (T.d.12, 13,14, and 15.). On February 13, 2012, the Magistrate issued an order cancelling the Sheriff's Sale and staying any further execution pending the determination of the motion for relief from judgment. (T.d.16.).

On March 13, 2012, Appellee filed a memorandum in opposition to the motion for relief. (T.d.18.). On May 7, 2012, Appellee filed a motion to disqualify counsel. (T.d.21.). On May 16, 2012, Appellee filed a motion to strike the pleadings filed by counsel. (T.d.22.). On May 18, 2012, Appellants filed a memorandum in opposition to the motion to disqualify and the affidavit of counsel in support of the memorandum in opposition. (T.d. 25 and 26.). On May 23, 2012, the Magistrate filed a decision granting the motion to disqualify and striking the pleadings filed by counsel. (T.d.27.). On June 6, 2012, Appellants filed their objection to the Magistrate's decision. (T.d.28.). On June 12, 2012, the trial court overruled Appellants' objections and adopted the Magistrate's Decision. (T.d.29.). On July 6, 2012, Appellants filed their notice of appeal. (T.d.30.).

Statement of Facts

On April 5, 2011, a hearing on the motion for default was held. (T.d.26.). Attorney Broyles appeared at the hearing as a result of an e-mail from the Law Firm representing Plaintiff. Attorney Broyles appeared at the hearing and presented the proposed decree of foreclosure to the trial court when the Defendant failed to appear. (T.d.26.). The affidavit of Attorney Broyles further stated that he attended three hearings that day at the request of the law firm Lerner Sampson & Rothfuss; that he had no authority to take any action or make any statement in the case if the other party appeared. The affidavit of Attorney Broyles further averred that he had no contact with plaintiff, received no confidential information from Plaintiff and believed that he provided a service to the law Firm rather than providing legal services to the Plaintiff. (T.d.26.).

On February 9, 2012, Attorney Broyles on behalf of Appellants Felix Aponte and Barbara Aponte filed the affidavit of Barbara Aponte, a motion for relief from judgment, the affidavit of counsel, and a motion to stay execution. (T.d.12, 13, 14, and 15.). On March 13, 2012, Appellee filed a memorandum in opposition to the motion for relief. (T.d.18.). The memorandum in opposition does not raise any issue with the representation of Appellants by Attorney Broyles.

On May 7, 2012, Appellee filed a motion to disqualify counsel. (T.d.21.). On May 16, 2012, Appellee filed a motion to strike Appellants' motion for relief from judgment, and an amended motion to strike Appellants' motion for relief from judgment. (T.d.22.). The motion makes the following assertions: Bruce Broyles previously represented Appellee at the default judgment hearing and advocated on behalf of Appellee. The motion then concludes that Attorney Broyles has "an apparent conflict of interest and should therefore be disqualified." (T.d.21.). The amended motion to strike the motion for relief from judgment asserts that under Ohio Case law and code of ethics current counsel is disqualified from representing Appellants.

However, the motion to disqualify and the motion to strike rely solely upon the alleged violation of Prof. Cond. Rule 19(a).

Counsel for Appellants asserted that Appellee was not his client and that he merely provided a service to the Law Firm. Appellants further asserted that an ethical violation, even if established, does not constitute grounds to disqualify counsel or to strike the pleadings filed by counsel. The Magistrate's Decision held that due to an apparent conflict of interest Appellants' counsel was disqualified and the motion for relief from judgment was stricken. (T.d.27.). The trial court overruled the objections to the Magistrate's Decision and adopted the same. It is from this decision that Appellants now appeal.

Law and Argument

Standard of Review

Disqualification of an attorney is a drastic measure that should not be imposed unless absolutely necessary. *Musa v. Gillette Comm. of Ohio, Inc.* (1994), 94 Ohio App.3d 529. In reviewing a decision of the trial court, we must determine whether the court abused its discretion in granting the motion to disqualify. In order to find that the trial court abused its discretion, we must find more than an error of law or judgment, an abuse of discretion implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Most instances of an abuse discretion result in decisions that are unreasonable as opposed to arbitrary and capricious. *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157. A decision that is unreasonable is one that has no sound reasoning process to support it. *Campbell v. Independent Outlook, Inc.*, (Ohio App. 10th Dist.) 2004-Ohio-6716, at ¶8.

Assignment of Error

The trial court erred in disqualifying counsel based solely upon an alleged conflict of interest pursuant to Prof. Cond. Rule 19(a).

Issue Presented for Review No. 1

Did Appellee establish that it was the client of Appellants' counsel?

The underlying complaint that was filed in this case was a foreclosure. Throughout recent cases there has been numerous criticisms of "Appearance counsel", Attorneys who appear

for local hearings without any authority or knowledge of the case. The use of "appearance counsel" appears to be accepted in the Mahoning County Court of Common Pleas. However, if the "appearance counsel" has not met with the party, has no authority to take any action on behalf of the party, has not obtained any information, let alone confidential information, from the party, then has an attorney-client relationship been established? In this case, the affidavit of counsel states that he did not believe that an attorney-client relationship existed. There was no evidence presented to contradict this belief.

In the affidavit of counsel, it is stated that counsel "attended the hearing, waited until the defendant did not appear, and left documents with the Magistrate." The motion to disqualify states, without any supporting evidence, that Attorney Broyles advocated on behalf of Appellee. If this is true then the trial court must presume that the Attorney cannot provide a service without a client. This may be true, but the trial court disqualified counsel without determining or stating that presumption.

There is a statutory definition of client, which provides:

"Client" means a person, firm, partnership, corporation, or other association that, directly or through any representative, consults an attorney for the purpose of retaining the attorney or securing legal service or advice from the attorney in the attorney's professional capacity, or consults an attorney employee for legal service or advice, and who communicates, either directly or through an agent, employee, or other representative, with such attorney ***. R.C. 2317.021.

The Rules of Professional Conduct do not define "client", but instead state in the preamble:

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

If the existence of an attorney client relationship is a question of fact, then the trial court determined this fact based solely upon the appearance of counsel at the default hearing.

Appellants contend that acting as an "appearance counsel" is providing a service to the law firm rather than creating an attorney client relationship with the party.

Issue Presented for Review No.2:

The trial court abused its discretion in disqualifying counsel based upon the "apparent conflict of interest"

The motion to disqualify counsel and the motion to strike the pleadings filed by counsel made no attempt to discuss whether confidential information was disclosed to Appellants' counsel. In fact, Appellee's motions all but concede that no confidential information was provided to or obtained by Appellants' counsel. In support of the motion to disqualify, Appellee relied upon authority that interprets and applies the Code of Professional Responsibility. The Rules from which Appellee quoted in support of the "conflict of interest", state in the Preamble:

The Supreme Court of Ohio adopted the Ohio Rules of Professional Conduct, effective February 1, 2007. These rules supersede and replace the Ohio Code of Professional Responsibility to govern the conduct of Ohio lawyers occurring on or after February 1, 2007.

The Preamble to the Rules of Professional Conduct then provide as follows:

[20] Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. **In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation.** The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of breach of the applicable standard of conduct. **(Emphasis Added.)**

The trial court abused its discretion by disqualifying counsel and striking the pleadings filed by counsel based upon an alleged violation of Prof. Cond. Rule 19(a) when the Rules of Professional Conduct expressly provide that such a violation does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer.

Based upon the above this Court should find that Appellants Felix Aponte and Barbara Aponte's assignment of error is with merit and that the trial court abused its discretion in disqualifying counsel. This Court should reverse the trial court's decision and remand the matter to the trial court for further proceedings consistent with this ruling.

Conclusion

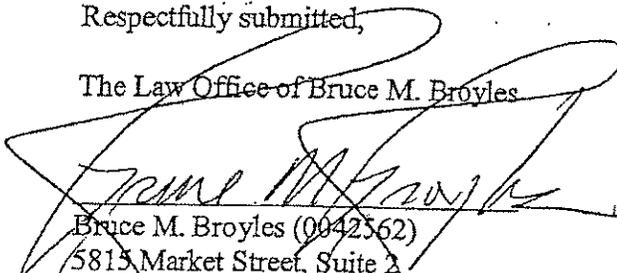
Disqualification of counsel is a drastic process which denies a party the use of its chosen counsel. Given the facts as set forth in the affidavit of Appellant's counsel, this Court should find that Appellants' counsel did not represent Appellee. There was no attorney-client relationship established. Appellants' counsel merely provided a service to the law Firm as "appearance counsel". Appellants' counsel had no authority to argue and was there only in the event that the other side failed to appear. Once the other side failed to appear, counsel left documents for the magistrate to consider.

The trial court further abused its discretion by disqualifying counsel and striking the pleadings filed by counsel based solely upon an alleged ethical violation. This is an abuse of discretion when the Rules of Professional Conduct expressly provide that such a violation does not necessarily warrant the disqualification of a lawyer.

Based upon the above this Court should reverse the decision of the trial and remand the case for further proceedings consistent with this decision.

Respectfully submitted,

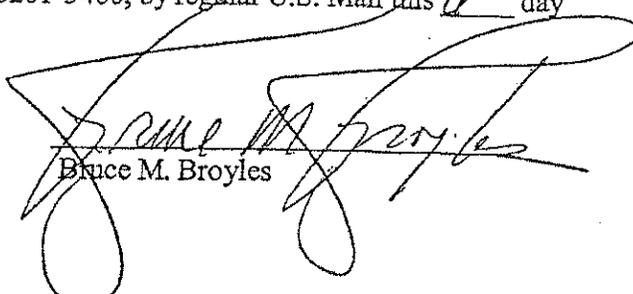
The Law Office of Bruce M. Broyles



Bruce M. Broyles (0042562)
5815 Market Street, Suite 2
Boardman, Ohio 44512
(330) 965-1093
(330) 953-0450 fax
Attorney for Appellants

CERTIFICATE OF SERVICE

A copy of the appellate brief was served upon Wayne Ulbrich, of Lerner, Sampson & Rothfuss, at P.O. Box 5480, Cincinnati, Ohio 45201-5480, by regular U.S. Mail this 10 day of November 2012.



Bruce M. Broyles

Rm

STATE OF OHIO

IN THE COURT OF COMMON PLEAS

MAHONING COUNTY, OHIO

SS.

CLERK OF COURTS
MAHONING COUNTY, OHIO
MAY 23 2012
FILED
ANTHONY VIVO, CLERK

CASE NO. 10CV4681

DATE 5-21-2012

Bank of New York

PLAINTIFF

VS.

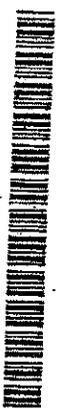
Felix R. Aponte, et al

DEFENDANT

MAGISTRATE'S DECISION

Upon consideration, review, and the arguments of counsel, the motions to disqualify and strike due to an apparent conflict of interest is sustained.

Due to the apparent inadvertence of counsel's conduct, Defendant Aponte shall have 45 days to obtain new counsel and an additional 15 days to re-file his motions for relief from judgment, per Civ.R. 60(B). Plaintiff shall have 15 days to file any response to said motion(s) of Defendant.



2010 CV
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P 000332

APPROVED:

Magistrate David P. Dascenzo

NOTICE TO ATTORNEYS AND PARTIES

Pursuant to Civil Rule 53(D)(3), the parties shall have fourteen (14) days from the date of the filing of this Decision to file written Objection with the Clerk of Court's Office. The Objections shall be specific and state with particularity all grounds of objection. Any objection to a factual finding shall supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. Any such Objections must be served upon all parties to this action, and a copy must be provided to the Common Pleas Court. A party shall not assign as error on appeal the Court's adoption of any finding of fact or conclusion of law in that Decision unless the party has timely and specifically objected to that finding or conclusion as required by Civil Rule 53(E)(3).

The Clerk of Courts shall serve notice of this Decision upon all parties within three (3) days per Civil.R.5.

Jone

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CLERK OF COURTS
MAHONING COUNTY, OHIO
JUN 12 2012
FILED
ANTHONY VIVO, CLERK

IN THE COURT OF COMMON PLEAS
MAHONING COUNTY, OHIO

THE BANK OF NEW YORK	)	CASE NO. 10 CV 4681
)	
PLAINTIFF	)	JUDGE LOU A. D'APOLITO
)	
VS.	)	JUDGMENT ENTRY
)	
FELIX R. APONTE, et al.)	
)	
DEFENDANTS)	
)	

This cause came on to be heard on the Magistrate's Decision filed on the 23rd day of May, 2012, and the objections filed June 6, 2012.

Upon consideration, review, and the arguments of counsel, the motion to disqualify and strike dues to an apparent conflict of interest is sustained.

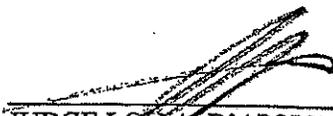
Due to the apparent inadvertence of counsel's conflict, Defendant Aponte shall have 45 days to obtain new counsel and an additional 15 days to re-file his motion for relief from judgment, per Civ.R. 60(B). Plaintiff shall have 15 days to file any response to said motion(s) of Defendant.

After independent review and consideration of the facts in evidence, as well as a review of the Magistrate's Decision, the Court finds no error of law or fact or other defect, overrules the objections, and adopts the Magistrate's Decision as the Court's Judgment Entry pursuant to Civ. R. 53.

Judgment is entered as above specified.

IT IS SO ORDERED.

6/7/12
DATE


JUDGE LOU A. D'APOLITO

CLERK : COPY TO ALL COUNSEL
OR UNREPRESENTED PARTY.

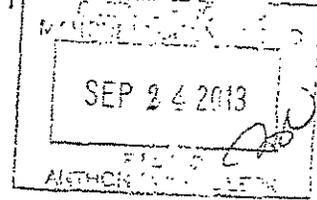
J. 2730
P 000445



STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT



THE BANK OF NEW YORK,)
)
 PLAINTIFF-APPELLEE,)
)
 - VS -)
)
 FELIX R. APONTE, et al.,)
)
 DEFENDANTS-APPELLANTS.)

CASE NO. 12 MA 125

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeal from Common Pleas Court, Case No. 10 CV 4681.

JUDGMENT:

Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Attorney Wayne Ulbrich
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P.O. Box 5480
Cincinnati, OH 45201-5480

Attorney David A. Wallace
Attorney Karen M. Cadieux
Carpenter, Lipps & Leland LLP
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280 North High Street
Columbus, OH 43215

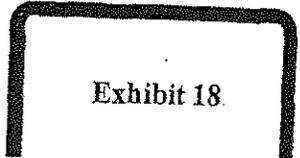
For Defendants-Appellants:

Attorney Bruce Broyles
5815 Market Street, Suite 2
Youngstown, OH 44512

JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: September 24, 2013



DeGenaro, P.J.

{¶1} Defendants-Appellants, Felix R. and Barbara Aponte, appeal the decision of the Mahoning County Court of Common Pleas granting Plaintiff-Appellee, The Bank of New York Mellon Trust Company's motion to disqualify the Apontes' counsel on the basis of a conflict of interest. On appeal, the Apontes argue that the trial court erred in disqualifying their counsel based upon an alleged conflict of interest pursuant to the rules of professional conduct and upon an apparent conflict of interest.

{¶2} Upon review, the Apontes' arguments are meritless. Broyles representing both sides in the same lawsuit constitutes a conflict of interest which NY Mellon did not waive and creates the appearance of impropriety. The trial court did not err in disqualifying Broyles from continuing to represent the Apontes based upon his representation of NY Mellon at the default judgment hearing. Accordingly, the judgment of the trial court is affirmed.

Facts and Procedural History

{¶3} On December 17, 2010, NY Mellon filed a complaint in foreclosure against the Apontes, who did not file an answer. On February 24, 2011, NY Mellon filed a motion for default judgment.

{¶4} At the April 5, 2011 hearing for default judgment, Attorney Bruce Broyles appeared on behalf of NY Mellon, and the Apontes did not appear. Broyles presented a judgment entry and the trial court entered default judgment and a decree of foreclosure on that date against the Apontes in favor of NY Mellon.

{¶5} Ten months later, the property was scheduled to be sold on February 14, 2012, and Broyles was retained by the Apontes to represent them in the foreclosure proceedings. On February 9, 2012, Broyles filed on their behalf a motion for relief from judgment and a stay of execution seeking, inter alia, cancellation of the sheriff's sale. The trial court cancelled the sheriff's sale on February 13, 2012, and one month later NY Mellon filed a memorandum in opposition to the Apontes's motion for relief from judgment.

{¶6} On May 7, 2012, NY Mellon filed a motion to disqualify Broyles as counsel

for the Apontes based on his previous representation of NY Mellon, and Broyles filed an opposition brief on the Apontes' behalf. On May 23, 2012, the magistrate sustained NY Mellon's motions to disqualify Broyles and striking the Civ.R. 60(B) motion he had filed on the Apontes' behalf, finding that there was an apparent conflict of interest.

{¶17} On June 6, 2012, Broyles filed objections to the magistrate's decision on behalf of the Apontes alleging his disqualification from representing the Apontes was an error of law. In its June 12, 2012 judgment entry the trial court overruled the objections and adopted the magistrate's decision in whole:

"Due to the apparent inadvertence of counsel's conflict, Defendant Aponte shall have 45 days to obtain new counsel and an additional 15 days to re-file his motion for relief from judgment, per Civ.R. 60(B). Plaintiff shall have 15 days to file any response to said motion(s) of Defendant."

Disqualification of Counsel

{¶18} On appeal the Apontes assert two assignments of error which are interrelated and will be discussed together:

{¶19} "The trial court erred in disqualifying counsel based solely upon an alleged conflict of interest pursuant to Prof. Cond. Rule 19(a) [sic]."

{¶10} "The trial court abused its discretion in disqualifying counsel based upon the apparent conflict of interest."

{¶11} The trial court has wide latitude when considering a motion to disqualify counsel. *Spivey v. Bender*, 77 Ohio App.3d 17, 22, 601 N.E.2d 56 (7th Dist.1991). The order to disqualify an attorney from representing a client in a civil case is a final appealable order pursuant to R.C. 2505.02(B)(4), *Westfall v. Cross*, 144 Ohio App.3d 211, 218-219, 2001-Ohio-3299, 759 N.E.2d 881 (7th Dist.2001) subject to an abuse of discretion standard of review. *155 N. High Ltd. v. Cincinnati Ins. Co.*, 72 Ohio St.3d 423, 426, 1995-Ohio-85, 650 N.E.2d 869. "The term 'abuse of discretion' means an error in judgment involving a decision that is unreasonable based upon the record; that the appellate court merely may have reached a different result is not enough." In re S.S.L.S.,

7th Dist. Columbiana No. 12 CO 8, 2013-Ohio-3026, ¶22. Any doubts as to the existence of an asserted conflict of interest must be resolved in favor of disqualification in order to dispel any appearance of impropriety. *Kala v. Aluminum Smelting & Refining Co., Inc.*, 81 Ohio St.3d 1, 11, 1998-Ohio-439, 688 N.E.2d 258.

{¶12} Broyles alternatively argues on behalf of the Apontes that the limited scope of his prior representation of NY Mellon in this matter, covering a default hearing for NY Mellon's counsel of record, creates neither a conflict of interest, nor constitutes a violation of Prof. Cond. Rule 1.9(a). NY Mellon argues that disqualification was proper because representing both sides in the same lawsuit is a clear conflict of interest which NY Mellon did not waive and which also has the appearance of impropriety.

{¶13} Ohio Rule of Professional Conduct Rule 1.9(a) discusses an attorney's duties to former clients: "Unless the former client gives informed consent, confirmed in writing, a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client." *Id.* It is undisputed that NY Mellon did not give consent to Broyles to represent the Apontes in this matter.

{¶14} This court has applied a three-part test for disqualification of counsel due to a conflict of interest: "1) a past attorney-client relationship must have existed between the party seeking disqualification and the attorney he or she wishes to disqualify; 2) the subject matter of the past relationship must have been substantially related to the present case; and 3) the attorney must have acquired confidential information from the party seeking disqualification." *City of Youngstown v. Joenub, Inc.*, 7th Dist. Mahoning No. 01-CA-01, 2001-Ohio-3401, ¶15, citing *Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio*, 900 F.2d 882, 889 (6th Cir.1990).

{¶15} Turning to the first prong, Broyles argues that there was no prior attorney-client relationship between him and NY Mellon. Broyles admits to attending the default judgment hearing and two other hearings unrelated to this appeal, at the request of the law firm of Lerner, Sampson and Rothfuss who represented NY Mellon. Broyles attended

the hearing, waited until the Apontes did not appear and left documents, including the judgment entry and decree in foreclosure, with the magistrate. Broyles then invoiced the firm for his services. Broyles contends that he was providing a service to the law firm and not to NY Mellon as he had no authority to make any representations to the court and did not advocate for any position in the case. He provides no case law to support this proposition.

{¶16} Contrary to Broyles assertion, an attorney-client relationship may be created by implication based upon the conduct of the parties and the reasonable expectations of the person seeking representation. See *Cuyahoga County Bar Association v. Hardiman*, 100 Ohio St.3d 260, 2003-Ohio-5596, 798 N.E.2d 369, syllabus. Broyles appeared at the default judgment hearing on behalf of NY Mellon. He invoiced for this service and received payment for same. Based on these facts, it is reasonable that NY Mellon believed an attorney-client relationship had been formed. This prong has been met.

{¶17} As to the second prong, the subject matter of the past relationship must have been substantially related to the present case. Under Prof. Cond.R. 1.0(n), "substantially related matter" "involves the same transaction or legal dispute or one in which there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation of a client would materially advance the position of another client in a subsequent matter." This prong has been met. Disqualification is based upon Broyles' representation of both parties within the same transaction: first, appearing on behalf of NY Mellon at the default judgment hearing and obtaining judgment in the foreclosure action initiated by NY Mellon *against* the Apontes; and then seven months later filing for relief from judgment and successfully having the sheriff's sale of the home cancelled *on behalf of* the Apontes.

{¶18} Regarding the third prong, the attorney must have acquired confidential information from the party seeking disqualification. Broyles maintains that he never acquired confidential information as he was merely appearance counsel and had no ability to take action on behalf of NY Mellon.

"Where an attorney himself represented a client in matters substantially related to those embraced by a subsequent case he wishes to bring against the former client, he is irrebuttably presumed to have benefitted from confidential information relevant to the current case. In such limited situations there is no necessity to demonstrate actual exposure to specific confidences which would benefit the present client." *Carr v. Acacia Country Club Co.*, 8th Dist. Cuyahoga No. 91292, 2009-Ohio-628, ¶ 26, citing *Cleveland v. Cleveland Elec. Illuminating Co.*, 440 F.Supp. 193, 210 (1976).

{¶19} We are persuaded by the analysis of our sister district. It logically follows this presumption applies to an attorney who represents a client in the *same case* against a former client, a situation fraught with more, rather than less, confidentiality concerns on the part of the former client. As Broyles represented NY Mellon in the same case it is not necessary to demonstrate he was actually exposed to specific confidences; Broyles is irrebuttably presumed to have benefitted from confidential information. Thus, all three prongs of the disqualification test articulated in *Joenub* and *Dana* have been met.

Appearance of Impropriety

{¶20} Although the conflict in this case is clear, even in a close case disqualification is favored to dispel any appearance of impropriety that an asserted conflict of interest presents. In *Kala, supra*, the Ohio Supreme Court affirmed the appellate court's decision disqualifying a law firm from continuing to represent their client in an appellate proceeding due to the appearance of impropriety. *Id.* at 14, 688 N.E.2d 258. The law firm represented the employer-defendant in a wrongful termination action at the trial court level and, after appellate proceedings commenced, the law firm employed the attorney that had been representing the employee-plaintiff at trial. *Id.* at 2, 688 N.E.2d 258. The Ohio Supreme Court recognized that the employee's former attorney possessed the plaintiff's confidences and secrets, and imposed a presumption that the former attorney for the employee revealed the confidences and secrets to the law firm representing the employer given that the former attorney and the law firm had been

involved in the wrongful termination litigation at the trial court level as opposing counsel. *Id.* at 13, 688 N.E.2d 258.

{¶21} The Ohio Supreme Court then concluded that, despite the law firm's claims that it took steps to ensure that the employee-plaintiff's former attorney did not reveal confidences and secrets to the law firm which was still representing the employer-defendant on appeal, "[t]he appearance of impropriety is so strong that nothing that [the law firm representing the employer] could have done would have had any effect on [the employee-plaintiff's] perception that his personal attorney had abandoned him with all of his shared confidences[.]" *Id.* at 14, 688 N.E.2d 258. "No steps of any kind could possibly replace the trust and confidence that [the employee-plaintiff] had in his attorney or in the legal system" if the appellate court had allowed the law firm to continue to represent the employer-defendant. *Id.*

{¶22} The same rationale applies to the present case. Permitting Broyles to represent the Apontes and attempt to vacate the very judgment he obtained on behalf of NY Mellon offends the notions of trust and confidence that the public, including NY Mellon, have when retaining counsel and in our legal system. Disqualification was necessary and proper to dispel the appearance of impropriety in this case.

{¶23} In sum, the Apontes's arguments are meritless. Broyles representing both sides in the same lawsuit constitutes a conflict of interest which NY Mellon did not waive and creates the appearance of impropriety. The trial court did not err in disqualifying Broyles from continuing to represent the Apontes based upon his representation of NY Mellon at the default judgment hearing. Accordingly, the judgment of the trial court is affirmed.

Donofrio, J. , concurs.

Waite, J. , concurs.

APPROVED:



JUDGE MARY DeGENARO

Mahoning County Court of Common Pleas

R. Scott Krichbaum, Judge

120 Market Street • Youngstown, Ohio 44503

Phone: 330-740-2156

March 18, 2015

Board of Professional Conduct
Supreme Court of Ohio
Ohio Judicial Center
65 South Front Street
Columbus, Ohio 43215

RE: Case No. 2014-106
Disciplinary Counsel v. Bruce Martin Broyles

Dear Board Members:

I have been subpoenaed to provide testimony on behalf of Bruce Martin Broyles in a matter pending before you in Case No. 14-106. I understand that I am permitted to submit this letter in lieu of live testimony and I thank you for that courtesy.

I am a Judge of the Mahoning County Common Pleas Court and have been in office for 24 years. I have known Bruce Broyles for approximately 12 to 15 years as a lawyer who practices regularly before my Court, and socially, as a fellow attorney in our community. I am familiar with the case before you because the court pleadings and rulings, and the complaint to your board, have been submitted to me for review before writing this letter.

In my opinion, Mr. Broyles is a competent, efficient, dedicated and ethical lawyer. He timely appears for each and every one of the numerous hearings he is involved in and is always properly prepared, and properly presents himself and the interests of his clients. I know of no issues regarding his professionalism with any of the other Judges or any of the members of our bar. He is a man of good character and good reputation in our community, and I am sure he is someone who can learn from this situation and never allow it to occur again.

This is not a situation where Mr. Broyles acted in a clandestine or deliberately unethical manner. Indeed, it appears that he took the position that he had no conflict and then argued it before the Magistrate, the Judge (on objections), and on appeal to the Court of Appeals, so he was not hiding anything, or misrepresenting anything, or acting in deliberate violation of our Code of Professional Responsibility.

Exhibit
19

I believe Mr. Broyles now understands that he was wrong from the start regarding the position he took in the underlying case, but he did advocate that position in every proper forum available because he believed such position was correct.

On behalf of Mr. Broyles, if I may, I would urge the Board to consider a reprimand only for this otherwise dutiful and respectable lawyer. I thank you for your consideration of my thoughts. If there are any questions or if there is anything I can do to assist the Board in this matter, please feel free to contact me.

Very truly yours,

A handwritten signature in cursive script that reads "R. Scott Krichbaum". The signature is written in black ink and is positioned above the printed name.

R. Scott Krichbaum
Judge, Court of Common Pleas



LOU A. D'APOLITO, JUDGE

March 19, 2015

Board of Professional Conduct
Supreme Court of Ohio
65 South Front Street, 5th Floor
Columbus, Ohio 43215-3431

Re: Case No. 2014 -106
Disciplinary Counsel v. Bruce M. Broyles,

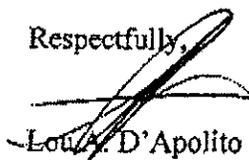
Dear Sir or Madam:

I am writing in response to a subpoena received in the above reference matter currently before the board.

I am aware of the facts relating to the matter before the board.

I have served as a Judge of the Mahoning County Common Pleas Court since December of 2008. Since that time Attorney Bruce Broyles has appeared in my Court on numerous occasions. To my knowledge, Attorney Broyles has always been well prepared and has never failed to conduct himself in a professional and courteous manner. Moreover, Attorney Broyles has consistently been a competent and efficient advocate for all of his clients. It has been a pleasure having him appear on matters in my Court. Based on my professional experiences with Attorney Broyles, I do not hesitate to assert my favorable opinion of him as an attorney. I hope that this information will be helpful to you as you undertake your responsibilities in this matter.

Respectfully,



Lou A. D'Apollito

LAD:rjm



JOHN M. DURKIN, JUDGE

March 18, 2015

Board of Professional Conduct
The Supreme Court of Ohio
65 South Front Street
Columbus, Ohio 43215

In Re: Bruce Martin Broyles No. 2014-106

To Whom It May Concern:

This letter is being sent pursuant to a subpoena that I received regarding the above captioned matter. I am familiar with the facts giving rise to this disciplinary proceeding. I have known Attorney Broyles for over fifteen years, both professionally and personally.

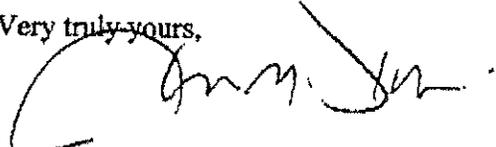
During that time I have had an opportunity to form an opinion as to both Bruce's ability as an attorney, as well as his reputation in the community.

Since I have taken the bench in 1997, Bruce has appeared before me in the Common Pleas Court on many occasions. I have always found Bruce to be prepared, courteous and a zealous advocate for his client. Unfortunately, in this case, he was probably too zealous an advocate. I am not certain why Bruce did not withdraw as counsel once he realized there was a conflict.

It is my understanding that the parties suffered no harm, that this was an isolated incident, and something not likely to reoccur.

If you have any further questions, please do not hesitate to contact me.

Very truly yours,



HON. JOHN M. DURKIN
Mahoning County Court of Common Pleas

JMD:lc

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Writer's Voice Mail:
Extension 109

March 17, 2015

Board of Professional Conduct
Supreme Court of Ohio
65 South Front Street, 5th Floor
Columbus, Ohio 43215-3431

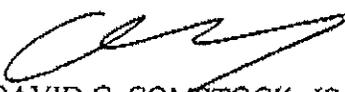
Dear Sir/Madam:

I am writing this letter as a character witness with respect to the matter of *Disciplinary Counsel v. Bruce Martin Broyles*, being Case No. 2014-106 on the docket of the Board of Professional Conduct. I have known Mr. Broyles for more than one decade. I was surprised to learn that he has been charged with violating the Code of Professional Conduct. Mr. Broyles has reviewed the facts with me and has admitted to his errors. He now fully understands both the error of his original conduct, as well as the subsequent errors by continuing to assert a position that was in violation of the Professional Code. Mr. Broyles has expressed remorse to me and has indicated his willingness to cooperate with the disciplinary process.

Mr. Broyles does not have any prior disciplinary offenses. He has an excellent reputation within the community of providing quality legal services to those who might not otherwise afford legal services at larger firms and I do not believe, based upon my own knowledge and experience, that Mr. Broyles is likely to appear before the Board again. While Mr. Broyles has admitted his conduct and is agreeing to be sanctioned, I do not believe that an actual suspension would be the community's best interest based upon his service to those clients truly in need.

If you have any questions or concerns, please do not hesitate to call me.

Very truly yours,



DAVID C. COMSTOCK, JR.

DCJ/trp