IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

U.S. BANK NATIONAL ASSOCIATION, as Trustee for the Holders of the EQCC HOME EQUITY LOAN ASSET BACKED CERTIFICATES, SERIES 1998-3 and SELECT PORTFOLIO SERVICING, INC., Plaintiff,	)	
v.	)	C.A. No.: 12C-04-149 FSS **E-FILED and U.S. MAIL**
LA MAR GUNN, Defendant.	)	

ORDER

Upon Defendant's Second Emergency Motion For Recusal Of Judge And Request For Reassignment – *DENIED*.

Upon Plaintiff's Motion For Default Judgment – *GRANTED*.

1. On April 16, 2012, Plaintiff filed its Complaint to Cancel *Lis Pendens*. Defendant filed a Motion to Dismiss on May 22, 2012, which the court denied May 25, 2012.[1] The May 25, 2012 order recaps this controversy's long, unpleasant history concerning a mortgage foreclosure and sheriff's sale.

[1] *U.S. Bank Nat. Ass'n v. Gunn,* 2012 WL 2553404 (Del. Super. May 25, 2012) (Silverman, J.).

2. The May 25, 2012 order denying dismissal started a clock running for Defendant to file an answer to the complaint. Under Superior Court Civil Rule 12(a)(1), Defendant was required to answer the complaint on June 5, 2012. Because Defendant did not file the required answer, on June 27, 2012, Plaintiff filed a motion for default, noticing the hearing for July 20, 2012, at 9:30 a.m. The motion called attention to Rule 12(a)(1)'s time requirement.

3. On July 10, 2012, Defendant filed a response to the motion for default and his demand for a jury trial. The demand is out of order.

4. The response did not include the required answer. Instead, accusing Plaintiff of "unclean hands," Defendant reiterates the core-claim litigated in the underlying foreclosure: "Plaintiffs have grossly misled the Court into entering a decade of not voidable, but void orders absent any and all jurisdiction."

5. "Unclean hands," however, is only an affirmative defense to an equitable claim.[2] *Lis pendens* is a statutory proceeding, at law.[3] Even if this court could consider the equitable defense in a *lis pendens*, posing an affirmative defense is not a substitute for a required answer to a complaint's allegations.

6. Most importantly, in his response Defendant alleged that he

[2] *See, e.g., Nakahara v. NS 1991 Am. Trust*, 718 A.2d 518, 522 (Del. Ch. 1998) ("The unclean hands doctrine is aimed at providing courts of equity with a shield.").

[3] 25 *Del. C.* ch. 16.

answered the complaint on May 22, 2012. Further, he claims he has not received any correspondence from the court or Plaintiff until he received the July motion for default. As discussed below, it seems Defendant confused his dispositive motion with the answer.

7. Finally, Defendant's July response included his statement, without elaboration or justification, that he was unavailable on July 20, 2012. Although Defendant did not attempt to justify rescheduling the hearing noticed for July 20, 2012, as a courtesy, the court rescheduled the hearing one week until July 27, 2012. On July 26, 2012, Defendant called the Prothonotary and told the clerk that he was not available for the hearing on July 27, 2012.

8. Taking into account the court's familiarity with the underlying litigation, the record in this case, and Defendant's repeated unavailability, the court does not view oral argument as necessary or potentially helpful. Accordingly, there will be no oral argument.[4]

9. Meanwhile, on July 25, 2012, Defendant filed his "Second Emergency Motion For Recusal Of Judge And Request For Reassignment." Presumably, Defendant captioned the motion as a "second" request because he had

[4] Super. Ct. Civ. R. 78(c) ("There will be no oral argument except as scheduled by the Court.").

moved for recusal in the underlying litigation.[5] Now, as further grounds for recusal, Defendant refers, without citation, to litigation he says he has filed in the United States District Court for the District of Delaware.

10. While lawsuits and other proceedings by disappointed litigants against judges are uncommon, they are far from unheard of. A disappointed litigant's filing a lawsuit or other personal action against a presiding judge does not, however, automatically justify that judge's recusal or require disqualification.[6] Just as the court had no personal interest in what happened in the underlying litigation, the court continues to have no personal interest, direct or indirect, in this case's outcome. There remains no good-faith basis for recusal. And, the court will not encourage the notion that merely by filing a claim against a judge, a disappointed litigant can unilaterally force a judge-change.[7]

11. Substantively, as mentioned, it appears Defendant views his motion to dismiss as his answer to the complaint. In reality, the motion to dismiss was merely Defendant's initial response in lieu of an answer. Once the motion was denied, as the June 27, 2012 motion for default clearly indicated, Superior Court Civil

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[5] *Gunn v. Ambac Assur.,* 2012 WL 1415791 (Del. Super. Jan. 6, 2012) (Silverman, J.).

[6] *Los v. Los,* 595 A.2d 381, 385 (Del. 1991) ("The mere fact that a judge is an adverse party in another proceeding will not, by itself, result in automatic disqualification.").

[7] *Id.* ("In the absence of genuine bias, a litigant should not be permitted to 'judge shop' through the disqualification process.").

Rule 12(a)(1) called for Defendant to answer the complaint within ten days after notice of the denial.[8] Because the order denying Defendant's motion to dismiss and request for oral argument was uploaded on May 25, 2012, Defendant's answer was due on or before June 5, 2012. Again, any confusion or communication problem about the May denial should have been cleared-up at the latest by the June motion for default.

12. Assuming Defendant did not learn of his dismissal motion's denial until he received the motion for default, he has been aware of the May 25, 2012 denial and the June 27, 2012 motion to dismiss since as least July 10, 2012. That is when he responded to the motion for default. Nevertheless, Defendant still has not answered the complaint. Thus, Plaintiff is now entitled to judgment by default.

13. In deciding that Plaintiff is entitled to judgment, the court has considered the pending complaint, the underlying litigation that led to Defendant's filing *lis pendens* and Defendant's responses. The underlying litigation conclusively ended Defendant's claim to the property against which he has filed liens. Although Defendant adamantly disagrees with the courts' decisions and he categorically rejects them, the Supreme Court of Delaware upheld the property's sale and, in the process,

[8] Super. Ct. Civ. R. 12(a)(1) ("If the Court denies the motion . . . the responsive pleading shall be served within 10 days after the notice of the Court's action.").

terminated any interest Defendant has in that property.[9] Accordingly, as a matter of settled Delaware law, Defendant has no claim and, at this point, further litigation concerning ownership of that properly is baseless and vexatious. Moreover, there is no claim pending against Plaintiff justifying a lien under the *lis pendens* statute. In light of the above, judgment is in order and further opposition to the complaint will only increase Plaintiff's potential claims for attorneys fees.[10]

For the foregoing reasons, Defendant's Second Emergency Motion For Recusal Of Judge And Request For Reassignment is **DENIED**. Plaintiff's Motion for Default Judgment is **GRANTED**. Plaintiff shall submit a proposed final order, pursuant to 25 *Del. C.* §1606 and 1608, which Plaintiff shall serve on Defendant along with a copy of this decision. The Prothonotary **SHALL** upload this order and send copies of it to Defendant by certified and regular mail.

IT IS SO ORDERED.

Date: July 30, 2012

/s/ Fred S. Silverman
Judge

cc: Prothonotary (Civil)
Francis G.X. Pileggi, Esquire
Jill Agro, Esquire

[9] *Gunn v. U.S. Bank Nat. Ass'n,* 998 A.2d 850 (Del. 2011) (TABLE).

[10] 25 *Del. C.* § 1611.