

STATE OF INDIANA	)	IN THE SUPERIOR COURT OF RUSH COUNTY
	) SS:	
COUNTY OF RUSH	)	CAUSE NO. 70D01-0802-MF-017
 COUNTRYWIDE HOME LOANS, INC.	)	
	)	
Plaintiff,	)	<b>FILED</b>
	)	
v.	)	JUN 03 2010
	)	
DWAYNE RANSON DAVIS; MELISA	)	RUSH COUNTY CLERK
DAVIS,	)	OF COURTS
	)	<i>Heborah A. Richardson</i>
Defendants.	)	

EMERGENCY MOTION TO VACATE SHERIFF'S SALE,  
MOTION FOR RELIEF FROM JUDGMENT AND  
MOTION TO DISMISS

Defendants Dwayne Ranson Davis (“Dwayne”) and Melisa Davis (“Melisa”) (Dwayne and Melisa collectively referred to as “Defendants”), by counsel and for their Emergency Motion to Vacate Sheriff’s Sale, Motion for Relief from Judgment and Motion to Dismiss (“Motion”), move this (i) for an order vacating the Sheriff’s Sale currently scheduled for June 9, 2010 at 2:00 p.m., (ii) for relief from and to vacate the Judgment of Foreclosure entered on September 15, 2010. and (iii) for an order dismissing this case. In support thereof, Defendants state as follows:

PROCEDURAL HISTORY

1. The Complaint to Foreclose Mortgage (“Complaint”) was filed with this Court on January 30, 2008.
2. The Plaintiff in this action is Countrywide Home Loans, Inc. (“Countrywide”).
3. The Complaint seeks to foreclose a mortgage (“Mortgage”) on property located at 1906 West 1000 North, Knightstown, IN 46148 (“Property”) titled in the name of Defendants. The Mortgage allegedly secures a promissory note in the original principal amount of \$83,965.00 (“Note”).
4. The Defendants filed a Chapter 13 bankruptcy petition on May 8, 2008.

5. On May 14, 2009 the Bankruptcy Court ordered that the Property be abandoned from the bankruptcy estate and Countrywide was allowed to proceed with this action.

6. On May 29, 2009 Countrywide filed a motion to reset the hearing date on Countrywide's motion for summary judgment.

7. On September 14, 2009 Countrywide and the Defendants held a Settlement Conference to try to resolve this matter but no agreement was reached at the Settlement Conference.

8. On September 14, 2009 Countrywide was granted a Judgment of Foreclosure ("Judgment").

9. Since the date of the Judgment Sheriff's Sales have been scheduled on at least three different dates, the most recent setting is for June 9, 2010 at 2:00 p.m.

10. Since February 2009 Defendants have been attempting to work with Countrywide or Bank of America ("BAC") or BAC Home Loans Servicing, LP ("BAC Servicing") on a loan modification or other agreement to remain at the Property, however Countrywide has completely failed to comply with all forbearance, mortgage modification and other foreclosure prevention loan servicing requirements imposed on it by the Housing and Urban Development agency ("HUD") and/or the Home Affordable Modification Program ("HAMP") and/or any other programs for foreclosure prevention.

#### MOTION TO DISMISS

11. "Under Trial Rule 12(B)(6) a complaint will be dismissed for failure to state a claim upon which relief could be granted if plaintiff could not recover under any set of facts." Clement v. State, 524 N.E.2d 36, 38 (Ind. App. 1988) (citing Obremski v. Henderson, 497 N.E.2d 909, 910 (Ind. 1986).

6. Countrywide asserts in paragraph 1 of the Complaint that it is the "real party in interest".

7. However the Mortgage states that "[t]his Security Instrument is given to Mortgage Electronic Registration Systems, Inc. ("MERS"), ... as mortgagee." There is no assignment of mortgage from MERS to Countrywide in any document filed with the Court.

8. Paragraph 2 of the Complaint confirms this by stating Defendants "mortgaged and conveyed to [MERS the Property]."

9. "The grant of a motion to dismiss is proper if it is apparent the facts alleged in the complaint are incapable of supporting relief under any set of circumstances." Curtis v. Roob, 891, N.E.2d 577, 579 (Ind.Ct.App. 2008). In determining whether the facts support the claim, the court may only look to the complaint and may not resort to any other evidence. K.M.K. v. A.K., 908 N.E.2d 658, 662 (Ind.Ct.App. 2009) (emphasis added).

12. Therefore the Court may only look to the Complaint and pursuant to the Complaint MERS is the holder of the Mortgage and not Countrywide.

13. In addition, paragraph 3 of the Complaint states that the Note was given to MERS. The Note attached to the Complaint as Exhibit B is made payable to Countrywide, not MERS.

14. Without an assignment from MERS to Countrywide, Countrywide is not the real party in interest, is not the proper party to bring this foreclosure action and fails to state a claim upon which relief can be granted.

15. Additionally, upon information and belief, this matter is not being brought by Countywide but in reality is being brought by BAC Servicing, the servicing agent of the holder of the Note.

#### MOTION FOR RELIEF FROM JUDGMENT

16. In order to acquire relief from judgment under Ind. T.R. 60(B), the moving party must first demonstrate his entitlement to relief under one of the eight provisions for relief under T.R. 60(B) and then demonstrate that he has a meritorious defense to the action. Graham v. Schreifer, 467 N.E.2d 800,802 (Ind.Ct.App. 1984). The motion must be filed within a reasonable time for reasons (5), (6), (7) and (8) and not more than one year after the judgment, order or proceeding is entered or taken for reasons (1), (2), (3), and (4). Id. Due to the unique

factual circumstances presenting in such cases, the trial court is afforded broad discretion in determining whether to set aside a judgment. Security Bank & Trust Co. v. Citizens National Bank of Linton, 533 N.E.2d 1245, 1247 (Ind.Ct.App. 1989), transfer denied.

17. A party may obtain relief under Ind. T.R. 60(B) for among other things: (a) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party (Ind. T.R. 60(B)(3)), or any reason justifying relief from the operation of the judgment, other than those reasons set forth in subparagraphs (1), (2), (3), and (4) (Ind. T.R. 60(B)(8)). In addition the movant in a Ind. T.R. 60(B) motion must establish a meritorious claim or defense to the judgment. Chelovich v. Ruff & Silvian Agency, 551 N.E.2d 890, 892 (Ind.Ct.App. 1990).

18. In ruling on a T.R. 60(B) motion, the trial court is required to “balance the alleged injustice suffered by the party moving for relief against the interests of the winning party and society in general in the finality of litigation.” V.C. Tank Lines, Inc. v. Faison, 754 N.E.2d 1061, 1064 (Ind.Ct.App. 2001).

19. In this action the injustice that will be suffered by the Defendants is that they will lose the Property in the Sheriff’s Sale. There is finality to this process. The interests of Countrywide will not be substantially affected because Countrywide will maintain its first mortgage lien on the Property and the value of the Property will not be diminished by any delay. Society in general advocates for home ownership and the judgment against the Defendants affects all of society because the Judgment adds to the already alarming rate of foreclosures and loss of property rights.

20. Upon information and belief, Countrywide’s Affidavit of Mortgagee and Non-Military Affidavit, dated March 17, 2008 and executed by Keri Selman as Assistant Vice

President of "Plaintiff-Mortgagee" and Countrywide's Updated Affidavit of Mortgagee and Non-Military Affidavit, dated July 2, 2009 and executed by Melissa Viveros as Vice President of "Plaintiff-Mortgagee" both contain misrepresentations that warrant relief from judgment.

21. In the first instance, as stated in paragraphs 7 – 15 above, the Complaint misidentifies the "Plaintiff-Mortgagee" and neither of the Affidavits identifies the employer of either Selman or Viveros. Are they officers of Countrywide? MERS? BAC Servicing? or BAC? As a result the Affidavits are subject to scrutiny and dismissal as there is no proof the Affidavits are admissible evidence and therefore not the proper basis for the award of summary judgment.

22. Upon information and belief (and prior experience in similar cases) both Selman or Viveros are employees of BAC Servicing and as such are not proper officers of Countrywide, if Countrywide is the real party in interest. Discovery of this information from Countrywide is essential to the administration of justice and to prevent the finality of the foreclosure judgment and Sheriff's Sale.

23. Also justifying relief under T.R. 60(B)(8) are the unique factual circumstances relating the Countrywide's continued failure to deal with Defendants in good faith in foreclosure prevention and mortgage loan modification since February 2009.

24. As described in the affidavit of Melisa Davis, attached hereto as Exhibit A, Defendants were entitled to submit their situation to Countrywide for a loan modification under one of the government's foreclosure prevention programs, including but not limited to HAMP.

25. Defendants initially contacted Countrywide in February 2009 and submitted all the required information for the process of a loan modification. Defendants also made payments into their Chapter 13 Bankruptcy escrow for their mortgage payments.

26. After receiving no adequate response in their first application, Defendants were requested to and did send in a second application for loan modification. After getting no response for a period of time, Defendants contacted Countrywide/BAC Servicing and were told Defendants did not send in all of the required information. This was not true.

27. Defendants continued to try to contact Countrywide/BAC Servicing to resolve this matter and to show Countrywide/BAC Servicing that Defendants had fully complied with all the requirements of loan modification program, however Countrywide/BAC Servicing has not responded to any of Defendants' inquiries.

28. Foreclosure is an equitable relief. As a result of Countrywide's failure to deal with Defendants in good faith, Countrywide comes to this Court with unclean hands. Countrywide's unclean hands result from its intentional and/or reckless failure to properly service and modify Defendants' mortgage pursuant to federal guidelines – specifically by filing and pursuing this foreclosure before offering Defendants any of the federally required foreclosure avoidance options. As a matter of equity this Court should refuse to foreclose this mortgage because acceleration of the note would be inequitable, unjust, and the circumstances of this case render acceleration unconscionable.

29. To prevail on a T.R. 60(B) motion for relief from judgment, the petitioner is not only required to show a reason justifying relief, but also must show that he has a good and meritorious claim or defense to the cause of action. Burke V. DeLarosa, 661 N.E.2d 43, 45 (Ind.Ct.App. 1996) transfer denied. A meritorious claim or defense is one showing if the case was retried on the merits, a different result would be reached. Bennett v. Andry, 647 N.E.2d 28, 35 (Ind.Ct.App. 1995). Some admissible evidence must be presented to the trial court showing that the party would suffer an injustice if the judgment is allowed to stand. Whelchel v.