

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY, FLORIDA

FILED FOR RECORD
R.B. SHORE
2010 SEP -2 AM 10:26
CLERK OF THE CIRCUIT COURT
MANATEE CO. FLORIDA

**HSBC BANK USA, NATIONAL ASSOCIATION,
As Trustee for Luminent Mortgage Trust 2006-6,
Plaintiff,**

v.

CASE NO.: 2007-CA-007993

**ANTONIO DE FREITAS, et al.,
Defendants.**

ORDER ADJUDICATING PLAINTIFF’S ATTORNEYS IN CONTEMPT OF COURT

THIS MATTER came before this Court on its Order to Show Cause Why Plaintiff and Plaintiff’s Attorneys Should Not be Held in Contempt and Sanctioned, filed on July 7, 2010, which is hereby incorporated as part of this Order.

The Order to Show Cause was served upon the Plaintiff, HSBC Bank USA, National Association, the Law Firm of Smith, Hiatt & Diaz P.A., and attorneys of the firm: Robert A. Smith, Ryan T. Cox, Patrice A. Tedesco, Michael D. Wild, Daniel S. Stein, Gavin W. MacMillan, and Gabrielle M. Strauss. Attorney Roy Diaz appeared on behalf of the Plaintiff, the Law Firm and each attorney.

On August 19, 2010, Smith, Hiatt & Diaz, P.A. filed Plaintiff’s Response to Court’s Order to Show Cause and Plaintiff’s Request for Partial Relief.

On August 20, 2010, Plaintiff filed its Notice of Voluntary Dismissal and this Court dismisses the Plaintiff from the contempt action.

On August 30, 2010, Smith, Hiatt & Diaz, P.A., through Roy Diaz, Ryan T. Cox, Patrice A. Tedesco, Gavin W. MacMillan, and Gabrielle M. Strauss, appeared before the Court. Robert A. Smith, Michael D. Wild and David S. Stein were excused because they are no longer



associated with the Law Firm. All parties acknowledged service, waived any defect in service and acknowledged jurisdiction of the Court. The Court held a hearing on the matter, whereby it heard testimony and argument from Plaintiff's attorney, Roy Diaz. His testimony and arguments were adopted by each attorney present.

This Court, having considered the Plaintiff's Response, the court file and docket, the testimony and arguments of counsel, the applicable law, and being otherwise duly advised in the premises, finds as follows:

1. The Law Firm of Smith, Hiatt & Diaz, P.A. (hereinafter referred to as "The Law Firm") conducts a high volume mortgage foreclosure practice which does not assign particular cases to particular lawyers. The Law Firm reserves hearing time on the Court's calendar prior to their receipt of all documents necessary from the client to proceed. The Law Firm does not make diligent efforts to notify other parties of cancellations of hearings because "the defendants don't usually show up". The Law Firm was aware of and had internet access to the Clerk's Dockets, Administrative Orders, Judges' requirements and foreclosure programs in the Twelfth Judicial Circuit, Manatee County, Florida. In the above styled case, the Law Firm conducted itself as follows:

- a. The Law Firm secured summary judgment hearing time for May 29, 2008 on the Court's automated calendar system and attempted to appear by telephone in violation of the Court's requirements. It further failed to comply with the Foreclosure Procedures of the Twelfth Judicial Circuit by not having all documents filed prior to the hearing.
- b. The Law Firm secured summary judgment hearing times for July 31, 2008 and December 9, 2008, but still did not comply with the Foreclosure Procedures by

not having all documents filed prior to the hearings. The Law Firm did not appear nor cancel the hearings, nor notice the Court or the other parties.

- c. The Law Firm then again secured summary judgment hearing time and cancelled same 3 days prior to the December 9, 2009 hearing. Late cancellations do not permit other litigants to utilize that time.
- d. The Law Firm then appeared through local counsel on Defendant Barrington Ridge Homeowners Association, Inc.'s motion to compel on February 4, 2010, which was granted. Plaintiff was ordered to proceed to summary judgment within 90 days.
- e. The Law Firm scheduled and rescheduled hearings on their motion for summary judgment with notice but did not proceed.
- f. On April 4, 2010, the Court called up the Motion for Summary Judgment (which had been filed February 27, 2008) for hearing, but the Law Firm failed to appear. The Court telephoned Ryan T. Cox, who had signed the Notice of Hearing. Mr. Cox did not have knowledge of the hearing scheduled nor any excuse as to why the hearing was not docketed on the Law Firm's calendars. The Court advised Mr. Cox that the Motion for Summary Judgment was denied and the Court would be preparing an Order to Show Cause as to why Mr. Cox and the Law Firm should not be held in contempt for having set the 5 previous hearings but did not appear or cancel or notify the Court or other parties.
- g. On April 13, 2010, the Law Firm noticed the Motion for Summary Judgment (which had already been denied and had not been re-filed) for hearing on June 28, 2010. On May 21, 2010 the same motion was renoticed for the same June

28, 2010 date. The Court withheld filing its Order to Show Cause to await the outcome of that hearing.

- h. On June 28, 2010, the Law Firm failed to appear or cancel the hearing. The Court took testimony from the Defendant, Antonio De Freitas, regarding his lost wages and costs because he had appeared for the previously set hearings and had never been noticed of any cancellations. The Court reiterated that the Motion for Summary Judgment had been denied and Ordered Sanctions to reimburse the Defendant.
- i. All Court appearance records are available on line and the Law Firm could have determined the Court's prior ruling by simply reviewing the Clerk's on line docket.
- j. The Law Firm failed to comply with the Court's Order to proceed within 90 days.

2. The Law Firm operates its procedures in the above styled case and in the representation of Plaintiffs in mortgage foreclosures in deliberate and contumacious disregard for the authority of the Court, the efficient administration of justice, and in utter disregard for the consequences to other litigants. Their disobedience of Court Orders is constant and flagrant, and, therefore, justifies this Court's imposition of sanctions for contempt.

3. The Law Firm failed to adhere to the standards of the Florida Bar's Creed of Professionalism, in that they failed to conduct themselves in a manner "to assure the just, speedy and inexpensive determination of every action and resolution of every controversy." They failed to "respect the time and commitments of others," and they failed to "be diligent and punctual in communicating with others and in fulfilling commitments." The Law Firm further failed to

adhere to the Oath of Admission to the Florida Bar, in that they failed to “maintain the respect due to courts of justice and judicial officers.”

4. The Law Firm scheduled seven hearings in this case, to which they only appeared at one, which was by telephone in violation of the Twelfth Circuit rules prohibiting telephone hearings. The Law Firm did not provide proper notice of cancellation to this Court or to Defendants regarding the six other scheduled hearings. Securing time on a Court calendar without being properly prepared precludes other litigants the opportunity to obtain hearing time. This Court reviewed the file prior to each hearing and waited in the courtroom the allotted time because the hearing was not cancelled. The Defendants appeared pursuant to the notices. The failure to be prepared for, appear at, or properly cancel scheduled hearings in accordance with local rules constitutes a direct and willful disregard for the Court’s calendar and the administration of justice.

5. The Law Firm was under an Order Compelling Plaintiff to proceed and failed to proceed or dismiss within the mandated time frame. No explanation was ever submitted to explain why the hearings were scheduled but either rescheduled or ignored.

6. The Law Firm’s noncompliance and disobedience was either intentional and deliberate or so grossly negligent that it rises to the level of willful misconduct. The Law Firm has repeatedly failed to be prepared for, appear at, or properly cancel hearings in accordance with local rules. Local rules are easily located on the Twelfth Judicial Circuit’s website and the court appearance records are available online through the Manatee Clerk’s website. The Law Firm was specifically advised of their noncompliance at the first hearing over 2 years ago. Their willful misconduct by failing to correct docketing errors is most illustrative as this Court personally warned Mr. Cox via telephone after the firm failed to appear on behalf of its client at

a hearing scheduled in this case on April 5, 2010. During that conversation, this Court apprised Mr. Cox of the firm's misconduct, of the Court's intention to file an Order to Show Cause, and specifically warned Mr. Cox that the firm's practices violated the code of ethics. Thereafter, Plaintiff's attorneys committed the same misconduct by failing to appear at or properly cancel the very next scheduled hearing.

7. The Law Firm's lack of consideration for the Court's calendars, their disobedience for this Court's local rules and orders, and their misconduct in handling mortgage foreclosure cases is deliberate, willful and flagrant in nature, and as such, is evidence of contempt. The Law Firm's misconduct was not a single incident—instead their deliberate, willful and flagrant misconduct derives from a combination of their repeated failure to appear at or to notify the Court or the other parties of a cancellation of scheduled hearings, and the same continued misconduct after this Court specifically warned the firm of such misconduct.

8. Moreover, this Court notes that Plaintiff's attorneys have been previously warned in Hillsborough County concerning the filing of sham pleadings. The Court considers the repeated filing of notices for scheduled hearings when they failed to appear, failed to provide proper notice of cancellation, or failed to be adequately prepared for scheduled hearings establishes that they were woefully unprepared to proceed or had no intention of actually proceeding in the case. Further, the continued noticing of hearings on a motion that had been previously denied amounts to the filing of sham pleadings.

9. The Law Firm has no reasonable justification or adequate excuse for their noncompliance of local rules and court orders. Mr. Diaz's excuse is insufficient to justify a finding of good cause to preclude sanctions for contempt. The Law Firm's inadequate policies and procedures or ability to manage multiple local rules of the circuits of this state in which they

choose to practice is an internal business decision and does not require the Court to allow them a lesser standard than any other lawyer licensed to practice in the State of Florida, nor should the Law Firm's business model be allowed to impede the administration of justice. The fact that Mr. Diaz advises this Court that the firm has implemented policies and procedures to cure their misconduct is not sufficient to lull this Court into accepting that the Law Firm will adhere to this Court's future orders or to the current local rules. The Law Firm has already committed the same misconduct after those claimed policies and procedures to cure the problem were implemented. Such continued misconduct shows their deliberate, willful and flagrant disregard for this Court's authority and it is indicative of the firm's disrespect for this Court.

10. Mr. Diaz's explanation of the firm's newly implemented policies and procedures to cure their inadequacies regarding scheduled hearings were vague. Most importantly, those policies and procedures, which were claimed to have been implemented weeks prior to the date of this hearing, failed to cure the firm's scheduling inadequacies. On the very morning of the hearing on this matter, a plaintiff and an attorney from The Law Firm did not appear at or properly cancel a scheduled hearing in case number Manatee County Circuit Court Case No. 2007-CA-4470. The Law Firm's alleged newly implemented policies and procedures, therefore, do not provide this Court with assurance of future compliance.

11. The conduct is not an act of neglect or inexperience on the part of the lawyers specifically named. The lawyers willfully and with knowledge of the inadequacy of the internal calendaring system, continue to abide by the methods of the Law Firm.

12. In addition, Plaintiff's failure to appear at or provide proper notice of cancellation regarding scheduled hearings has prejudiced and injured Defendants by depriving them of lost wages and costing them legal related fees. Compensatory fines to Defendants are justified

because Plaintiff's attorneys failed to appear at or provide Defendants with notice of cancellation for the scheduled hearing on June 28, 2010. Defendant appeared and testified that as a result of appearing that date and for prior hearings as scheduled, they lost wages in the amount of four hundred dollars (\$400.00) and paid an interpreter fifty dollars (\$50.00). Plaintiff's attorneys waived the right to cross-examine Defendant regarding those expenses due to their failure to appear at the hearing.

13. Compensatory fines to the Barrington Ridge Homeowners Association, Inc. are justified for its expended attorney's fees. Defendant's attorney's appearance at hearings and expenses after the granting of the Motion to Compel were injury to the Defendant homeowner association. Plaintiff's attorneys, individually, and/or the Law Firm shall be required to pay such fees within 30 days upon the filing of an affidavit thereto.

14. The cost to the Law Firm for their required appearance before the Court to answer the Order to Show Cause is approximately seven thousand dollars (\$7,000.00). Roy Diaz is a partner and accepts responsibility for the conduct of the Law Firm's lawyers.

Accordingly, based on the above findings, it is hereby **ORDERED AND ADJUDGED** that:

15. The Law Firm of Smith, Hiatt & Diaz, P. A. is in contempt of court.

16. The Law Firm shall create effective, internal policies and procedures which will assure that its attorneys will attend scheduled hearings and be adequately prepared for all future hearings. Said policies and procedures shall be in writing and a copy forwarded to this Court within 30 days from the date of this Order.

17. The Law Firm shall submit to this Court an instrument of certification from each individual attorney and support staff, who are presently employed and become employed in the

future during the pendency of this action who will practice in Manatee County, Florida attesting under oath that such policies and procedures are in fact implemented at the firm and that each has read and understood the Administrative Orders, Local Rules of the Twelfth Judicial Circuit, and the particular judge's requirements in the handling of mortgage foreclosure cases. Each attorney shall also acknowledge that they have read the Guidelines for Professional Conduct as provided by the Florida Bar.

18. The Law Firm will not schedule future hearings with this Court until their clients have provided the appropriate documents, instruments and affidavits in support of their motions and same are in the possession of the Law Firm.

19. The firm shall provide to this Court, within five (5) days of the filing of this Order, a receipt to the effect that all pending cases the firm represents in Manatee County have been reviewed and that all hearings which are presently scheduled by the firm have been docketed on its respective attorney's calendar, and such receipt shall be signed by the attorney assigned to handle the disposition of the particular case.

20. This Court shall impose a daily fine of seven thousand dollar (\$7,000.00) for each day the firm is not in compliance with submitting said certified instruments from each attorney and staff member. Said fine shall begin accruing September 30, 2010 and shall continue daily until the Court has received compliance herewith. Compliance, when accepted by the Court, shall purge this fine.

21. Coercive fines are imposed upon the Law Firm in the amount of forty-nine thousand dollars (\$49,000.00). The Court considered the cost of seven thousand (\$7,000.00) for the Law Firm to appear in Court to answer a contempt charge for each hearing that the Law

Firm failed to appear at or properly cancel. Plaintiff's attorneys have thirty days (30) days from the date of this Order to purge the coercive fine.

22. The firm shall pay Defendants four hundred and fifty dollars (\$450.00) within ten (10) days, commencing August 30, 2010.

23. The firm shall pay the appropriate compensatory fine to Barrington Ridge Homeowners Association, Inc. following a determination of the appropriate attorney's fees and the Court reserves jurisdiction to order same.

24. Fines shall be paid to the Clerk of Circuit Court, Manatee County, Florida.

24. The Court reserves jurisdiction for a period of 60 days from the date of this judgment to notice The Law Firm, Roy Diaz, Ryan T. Cox and Gavin MacMillan on charges of indirect criminal contempt. All other attorneys are dismissed from this action.

DONE AND ORDERED in Chambers, at Bradenton, Manatee County, Florida, this 2nd day of September 2010.


JANETTE DUNNIGAN
CIRCUIT COURT JUDGE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Order has been furnished to the above addressees by United States mail this 2 day of September 2010.



Judicial Assistant