

Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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HSBC BANK, USA, AS TRUSTEE FOR ACE  
SECURITIES CORP. HOME EQUITY LOAN TRUST,  
SERIES 2006-OP1 ASSET BACKED PASS THROUGH  
CERTIFICATES,

Index No: 24507/06  
Motion Date: 2/11/09  
Motion Cal. No: 12  
Motion Seq. No: 6

Plaintiff,

-against- \_\_\_\_\_

NAFEESAH HINES; WARREN DIGGS,

Defendants.

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The following papers numbered 1 to 7 read on this motion by defendant Nafeesah Hines, pro se, for an order (i) dismissing the complaint for lack of standing or lack of capacity to sue since it appears that there was an assignment of mortgage and plaintiff is not the proper party to bring this action; (ii) that plaintiff's deficiency in filings and its unverified complaint along with the cancellation of the notice of pendency upon the ground that plaintiff's failure to provide a certificate pursuant to 22NYCRR 130.1-1; (iii) the judgment of foreclosure and sale was premised upon several affidavits by persons outside of the State of New York absent a certificate of conformity; (iv) that plaintiff has failed to state a cause of action; (v) that the record fails to show that a power of attorney exist for the execution of the assignment of mortgage and the establishment of a trust by plaintiff; and (vi) the lack of a corporate resolution and other necessary documentation which would tend to show a legitimate transfer of real property.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition-Exhibits.....	5 - 9
Reply Affidavit-Exhibits.....	10 - 13

Upon the foregoing papers, it is hereby order that the motion is decided as follows:

This is an action for foreclosure commenced on November 8, 2006, to foreclose on a mortgage given by defendant Nafeesah Hines, pro se (“defendant”), upon her default in August 2006. By Memorandum Decision of this Court dated May 7, 2007, plaintiff’s motion for summary judgment was granted, and a referee to compute was appointed. The cross motion by defendant seeking dismissal of the complaint was denied upon this Court’s finding that none of the claims asserted therein were supported by competent evidence. By subsequent decision dated August 7, 2007, plaintiff’s motion for an order granting a judgment of foreclosure and sale was granted without opposition. Thereafter, defendant moved for an order vacating the summary judgment granted to plaintiff and reinstating the case on the grounds “that plaintiff has not produced any evidence to prove its claims, and that the plaintiff has not proven that it is the holder in due course of the original note, and that the production of the original note is hereby demanded as evidence sufficient to justify a new trial.” By order dated August 13, 2007, the motion, which was denominated as a motion to vacate but deemed by this Court as a motion to reargue the May 7, 2007 decision and order of this Court, was denied. Thereafter, defendant moved for an order vacating the Judgment of Foreclosure and Sale on the ground that plaintiff violated Banking Law and Real Property Actions and Proceedings Law. In denying that motion based upon issue preclusion by order dated February 19, 2008, this Court stated, inter alia, the following:

Here, a review of the relevant record reveals that this is the third request by defendant seeking vacatur and dismissal of this foreclosure action, each of which, as here, this Court denied as lacking in probative value and merit. Accordingly, as defendant’s relief is barred by res judicata, the motion for dismissal is hereby denied and defendant is barred from making any additional motions arising from or related to the claims asserted in this action. Any further motions based upon the same transaction or series of transactions shall be deemed vexatious litigation and will merit appropriate sanctions by this Court.

Notwithstanding the aforementioned order, defendant sought to vacate the foreclosure sale scheduled for January 9, 2009, by order to show cause presented to this Court, of which signature was declined.<sup>1</sup> Defendant, despite this Court’s February 18, 2008 order, which defendant annexes to her moving papers as Exhibit “A,” and the subsequent denial of the order to show cause presented for signature and declined, defendant moves for the following relief: “(i) dismissing the complaint for lack of standing or lack of capacity to sue since it appears that there was an assignment of mortgage and plaintiff is not the proper party to bring this action; (ii) that plaintiff’s deficiency in filings and its unverified complaint along with the cancellation of the notice of pendency upon the ground that plaintiff’s failure to provide a certificate pursuant to 22NYCRR 130.1-1; (iii) the judgment of foreclosure and sale was premised upon several affidavits by persons outside of the State of New

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<sup>1</sup> It is of note that defendant also filed two Bankruptcy petitions, which were respectively dismissed on April 10 and November 10, 2008. Thereafter, co-defendant Warren Diggs filed for bankruptcy on January 9, 2009, the day on which the foreclosure sale was scheduled.

York absent a certificate of conformity; (iv) that plaintiff has failed to state a cause of action; (v) that the record fails to show that a power of attorney exist for the execution of the assignment of mortgage and the establishment of a trust by plaintiff; and (vi) the lack of a corporate resolution and other necessary documentation which would tend to show a legitimate transfer of real property.”

By conference on the record on February 11, 2009, the return date of this motion, this Court inquired of defendant regarding the bar against her bringing “any further motions based upon the same transaction or series of transactions” and the determination that any further motion practice would “be deemed vexatious litigation and will merit appropriate sanctions by this Court,” as set forth in the February 18, 2008 order. In response, defendant acknowledge that she was aware of the bar and proceeded to attempt to argue that plaintiff’s action should be dismissed based upon the various additional assertions that she has set forth in the instant motion. When admonished by this Court and questioned regarding the import of a vexatious litigation finding if defendant proceeds on the course that she has charted, rather than seeking to withdraw the motion, defendant maintained her position and asked the Court if she would be given a period of time to remit payment of any sanctions. In light of this futile attempt to fashion a resolution which would allow defendant the opportunity to ameliorate this matter, this Court sua sponte struck defendant’s motion from the calendar for the violation of the aforementioned bar in the subject order. In response to this Court’s determination to strike defendant’s motion from the calendar for the violation of the bar, plaintiff asked this Court to consider that portion of its opposition which sought to enforce sanctions against defendant for such violation. As a result, this Court reserved plaintiff’s request for sanctions for decision.

Part 130.1 of the Uniform Rules for the New York State Trial Courts authorizes and empowers this Court to award costs and/or impose sanctions against a party and/or his attorney for engaging in frivolous conduct, and states, in pertinent part, the following:

(a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart. []

(b) The court, as appropriate, may make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both. Where the award or sanction is against an attorney, it may be against the attorney personally or upon a partnership, firm, corporation, government agency, prosecutor's office, legal aid society or public defender's office with which the

attorney is associated and that has appeared as attorney of record. The award or sanctions may be imposed upon any attorney appearing in the action or upon a partnership, firm or corporation with which the attorney is associated.

(c) For purposes of this Part, conduct is frivolous if:

(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false.

The “intent of [Part 130.1] is to prevent the waste of judicial resources and to deter vexatious litigation and dilatory or malicious litigation tactics.” Kernisan v. Taylor, 171 A.D.2d 869 (2<sup>nd</sup> Dept.1999); Minister, Elders and Deacons of Reformed Protestant Minister, Elders and Deacons of Reformed Protestant Dutch Church of City of New York v. 198 Broadway, Inc., 76 N.Y.2d 411 (1990); Wesche v. Wesche, 51 A.D.3d 909 (2<sup>nd</sup> Dept. 2008); RCN Const. Corp. v. Fleet Bank, N.A., 34 A.D.3d 776 (2<sup>nd</sup> Dept. 2006). The Rule further provides that “[i]n determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.”

Furthermore, in evaluating whether sanctions are appropriate, this Court will look at a “broad pattern of the [defendant’s] conduct in this regard and not just the question [of] whether a strand of merit (citations omitted), illusory at that, might be parsed from the overwhelming pattern of delay, harassment and obfuscation [.]” Levy v. Carol Management Corp., 260 A.D.2d 27, 33 (1<sup>st</sup> Dept.1999); see, Wecker v. D’Ambrosio, 6 A.D.3d 452 (2<sup>nd</sup> Dept. 2004). “Sanctions are retributive, in that they punish past conduct. They also are goal oriented, in that they are useful in deterring future frivolous conduct not only by the particular parties, but also by the bar at large. The goals include preventing the waste of judicial resources, and deterring vexatious litigation and dilatory or malicious litigation tactics (citation omitted).” Id. at 34 (1<sup>st</sup> Dept.1999).

Here, defendant has asserted a plethora of spurious claims in support of her efforts to dismiss this foreclosure action. In addition to unnecessarily expended the judicial resources of the Bankruptcy Court, defendant has wasted the judicial resources of this Court by bringing five motions, two in violation of court order mandate, all seeking dismissal of this action. Indeed, notwithstanding this Court’s determination that defendant’s allegations could not be sustained at law,

and its subsequent recommendation on the record after two violations of its order, for defendant to discontinue her course of action, she refused to withdraw the instant motion. Thus, it is this Court's determination that pursuant to Part 130.1, defendant has engaged in frivolous conduct by engaging in vexatious litigation undertaken to delay or prolong the resolution of this litigation, and sanctions are appropriate. Accordingly, based upon the underlying facts and circumstances before this Court, and the conference of the record on February 11, 2009, it is

**ORDERED**, that hereby stricken and marked off from this Court's February 11, 2009 motion calendar is the motion by defendant Nafeesah Hines, pro se, made in violation of the February 19, 2008 order of this Court, and which sought an order: (i) dismissing the complaint for lack of standing or lack of capacity to sue since it appears that there was an assignment of mortgage and plaintiff is not the proper party to bring this action; (ii) that plaintiff's deficiency in filings and its unverified complaint along with the cancellation of the notice of pendency upon the ground that plaintiff's failure to provide a certificate pursuant to 22NYCRR 130.1-1; (iii) the judgment of foreclosure and sale was premised upon several affidavits by persons outside of the State of New York absent a certificate of conformity; (iv) that plaintiff has failed to state a cause of action; (v) that the record fails to show that a power of attorney exist for the execution of the assignment of mortgage and the establishment of a trust by plaintiff; and (vi) the lack of a corporate resolution and other necessary documentation which would tend to show a legitimate transfer of real property; and it is further

**ORDERED**, that pursuant to 22 NYCRR § 130-1.1, sanctions in the amount of \$1,500.00 hereby is imposed upon defendant Nafeesah Hines, pro se, for continually engaging in frivolous conduct by engaging in vexatious litigation undertaken to prolong the resolution of this litigation; and it is further

**ORDERED**, that such sanctions in the amount of \$1,500.00, shall be payable by defendant Nafeesah Hines, pro se, to counsel for plaintiff to Fein, Such and Crane, LLP, 28 East Main Street, Suite 1800, Rochester, New York, 14614, within thirty (30) days of service of a copy of this order with notice of entry upon said defendant; and it is further

**ORDERED**, that upon the failure of defendant Nafeesah Hines, pro se, to remit payment within the specified time frame, plaintiff may enter judgment in accordance with 22 NYCRR 130-1.2, against defendant in the aforementioned amount; and it is further

**ORDERED**, that the Clerk of the Court shall mark its records to reflect that the instant defendants Hines and Diggs are hereby barred from making any additional motions arising from or relating to the claims asserted in this action.

Dated: March 30, 2009

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J.S.C.