

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND**

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TRIBECA LENDING CORPORATION,

Plaintiff,

**DECISION &
ORDER ON ORDER
TO SHOW CAUSE**

-against-

Index No. 6779/05

LINDA CRAWFORD, STEVEN DIROCCO, and
MELISSA CIROCCO,

Defendants.
-----X

HON. MARGARET GARVEY, J.S.C.

The Court has before it three pending motions: (1) a Notice of Motion and Notice to Deliver Possession filed by Plaintiff on June 10, 2011; (2) a Notice of Motion to Confirm Report of Sale and For Leave to Enter Deficiency Judgment filed by Plaintiff on June 22, 2011; and Order to Show Cause to Set Aside Default Judgment and Dismiss Complaint filed by Defendant LINDA CRAWFORD on August 1, 2011.

The Court will deal first with Defendant LINDA CRAWFORD's Order to Show Cause. The following papers, numbered 1 to 3, were considered in connection Defendant LINDA CRAWFORD's Order to Show Cause seeking to set aside the default judgment and dismiss the complaint as against her.

PAPERS

NUMBERED

ORDER TO SHOW CAUSE/AFFIRMATION/EXHIBITS	1
AFFIRMATION IN OPPOSITION TO ORDER TO SHOW CAUSE	2
MEMORANDUM OF LAW IN OPPOSITION TO ORDER TO SHOW CAUSE	3

Upon the foregoing papers, the Court now rules as follows:

By way of history, this foreclosure matter was commenced on September 7, 2005

with the filing of the summons and complaint. The complaint was served on Defendant LINDA CRAWFORD pursuant to Civil Practice Law and Rules § 308(2) (person of suitable age and discretion) at the subject premises, 40 Paradise Avenue, Piermont, New York. Defendant LINDA CRAWFORD appeared in the action, but has never filed an Answer. The Court granted Plaintiff a default Judgment of Foreclosure and Sale on July 25, 2006.

Plaintiff then scheduled a foreclosure sale for October 31, 2006, but on October 29, 2006, Defendant LINDA CRAWFORD filed for Chapter 13 bankruptcy, which stayed the foreclosure action and cancelled the first foreclosure sale. The Chapter 13 bankruptcy was later dismissed on April 12, 2007.

Plaintiff then scheduled a second foreclosure sale for June 28, 2007, but on June 24, 2007, Defendant LINDA CRAWFORD filed for Chapter 13 bankruptcy a second time, again staying the foreclosure action and cancelling the second foreclosure sale. The second bankruptcy action was later dismissed on July 9, 2008.

On July 25, 2008, Defendant LINDA CRAWFORD filed a federal action against Franklin Credit Management Corporation, Lender's First Choice Agency, Inc., and TRIBECA LENDING CORP (Plaintiff in this matter).

Plaintiff scheduled a third foreclosure sale for September 24, 2008, but on September 22, 2008, Defendant LINDA CRAWFORD filed an order to show cause which sought a temporary restraining order of the foreclosure action. The September 22, 2008 order to show cause sought to set aside and vacate the default judgment of foreclosure and sale and to dismiss the complaint or in the alternative to interpose an answer. Defendant LINDA CRAWFORD argued in the September 22, 2008 order to show cause that she was never served and only learned of her default on July 15, 2008.

In a Decision and Order dated November 20, 2008, this Court denied the application to vacate the Judgment of Foreclosure and Sale but stayed the enforcement of such Judgment of Foreclosure and Sale pending the outcome of the federal lawsuit, effectively

cancelling the third foreclosure sale.

Plaintiff appealed the portion of the November 20, 2008 order which stayed the enforcement and the Appellate Division, Second Department reversed on that point. [*Tribeca Lending Corp. v. Linda Crawford*, 79 A.D.3d 1018 (App. Div. 2nd Dept. 2010)]. The Second Department specifically stated: "...the amended complaint in the federal action was filed almost three years after the commencement of this foreclosure action, and only after the dismissal of two bankruptcy proceedings which had twice operated to stay the proceedings in this action. These facts weigh against the Supreme Court exercising its discretion to stay enforcement of the judgment of foreclosure and sale." [*Tribeca Lending Corp. v. Linda Crawford*, 79 A.D.3d 1018, 1020 (App. Div. 2nd Dept. 2010)].

Defendant LINDA CRAWFORD appealed the portion of the November 20, 2008 order which denied her application to set aside or vacate the default and the Appellate Division, Second Department affirmed this Court on those points. [*Tribeca Lending Corp. v. Linda Crawford*, 79 A.D.3d 1018 (App. Div. 2nd Dept. 2010)]. Specifically, the Second Department found that Defendant LINDA CRAWFORD was properly served and had not rebutted the presumption of validity of the affidavit of service. [*Tribeca Lending Corp. v. Linda Crawford*, 79 A.D.3d 1018, 1019 (App. Div. 2nd Dept. 2010)]. Further, the Second Department held that Defendant LINDA CRAWFORD failed to demonstrate that she had not received notice of the action in time to defend, she failed to demonstrate a reasonable excuse for her default, and she failed to establish that the Plaintiff procured the judgment of foreclosure and sale by fraud, misrepresentation, or other misconduct. [*Tribeca Lending Corp. v. Linda Crawford*, 79 A.D.3d 1018, 1019-20 (App. Div. 2nd Dept. 2010)].

Plaintiff then scheduled a fourth foreclosure sale for February 8, 2011, but Defendant LINDA CRAWFORD moved by order to show cause in the Court of Appeals for leave to appeal the Second Department's decision. The Court of Appeals granted the temporary stay of the order of the Second Department, which was in effect from January 19, 2011 to February

22, 2011, cancelling the fourth foreclosure sale. On February 22, 2011, the Court of Appeals denied Defendant LINDA CRAWFORD's order to show cause in its entirety, lifting the stay. [*Tribeca Lending Corp. v Linda Crawford*, 16 N.Y.3d 783 (2011)].

Plaintiff then scheduled a fifth foreclosure sale for March 1, 2011. Defendant LINDA CRAWFORD had notice of the date, time and location of the March 1, 2011 sale and took no action to object, stop, or stay such sale.

On March 23, 2011, the United States District Court, Southern District of New York, in *Linda Crawford v. Franklin Credit Management Corporation, Tribeca Lending Corporation, and Lender's First Choice Agency, Inc.*, granted summary judgment to defendant Franklin Credit Management Corporation as well as defendant Tribeca Lending Corporation (Plaintiff TRIBECA in this matter). [*Crawford v. Franklin Credit Mgmt.*, 2011 U.S. Dist. LEXIS 31241 (S.D.N.Y. 2011) (Lender's First Choice Agency, Inc., was named as a defendant but was never served and had never appeared so the summary judgment decision in favor of Franklin Credit and Tribeca disposed of the entire matter)].

Defendant LINDA CRAWFORD has appealed the Southern District of New York's decision of March 23, 2011 to the Second Circuit Court of Appeals and that appeal is pending.

Plaintiff filed a Notice to Deliver Possession and Notice of Motion on June 10, 2011 which Defendant LINDA CRAWFORD opposed, arguing that the motion was not properly served, that the Referee's Report had not yet been confirmed, as well as other points. However, Defendant LINDA CRAWFORD did not argue or reference the failure to file an attorney affirmation pursuant to Administrative Order 548/10.

Plaintiff filed a Notice of Motion to Confirm the Referee's Report of Sale and for Leave to Enter a Deficiency Judgment on June 22, 2011 which Defendant LINDA CRAWFORD opposed, arguing again that the motion was not properly served, that the Referee's Report was in violation of *Real Property Actions and Proceedings Law* § 1355, and that the matter should be postponed, i.e. stayed, so that Defendant LINDA CRAWFORD can seek protection from the

Court of Appeals, i.e. a stay. However, again, Defendant LINDA CRAWFORD did not argue or reference the failure to file an attorney affirmation pursuant to Administrative Order 548/10.

On August 1, 2011, Defendant LINDA CRAWFORD filed the instant Order to Show Cause seeking that the default Judgment of Foreclosure and Sale be vacated and set aside, that the Notice of Pendency be canceled, and that the complaint be dismissed with prejudice and costs to Defendant LINDA CRAWFORD. Defendant LINDA CRAWFORD argues that Plaintiff failed to file and/or serve an attorney affirmation as required pursuant to Administrative Order 548/10 and therefore, the entire matter should be dismissed with prejudice.

Administrative Order 548/10 (hereinafter "AO 548/10") was issued by Chief Administrative Judge Ann T. Pfau and was effective November 18, 2010. Chief Administrative Judge Pfau directed that plaintiff's counsel in residential mortgage foreclosure actions file with the court an affirmation "in cases where judgment of foreclosure has been entered but the property has not yet been sold as of such effective date, five business days before the scheduled auction, with a copy to be served on the referee." [Administrative Order 548/10 (only the relevant time period included as in this matter, the Judgment of Foreclosure and Sale had already been entered but the property had not yet been sold on November 18, 2010)]. AO 548/10 is silent as to the ramifications of failure to file such affirmation.

AO 548/10 was issued as a result of the following, and in fact includes the following language in the affirmation required: "During and after August 2010, numerous and widespread insufficiencies in foreclosure filings in various courts around the nation were reported by major mortgage lenders and other authorities, including failure to review documents and files to establish standing and other foreclosure requisites; filing of notarized affidavits which falsely attest to such review and to other critical facts in the foreclosure process; and 'robo-signature' of documents." Chief Judge Jonathan Lippman, as quoted in a press release dated October 10, 2010 regarding AO 548/10, stated: "We cannot allow the courts in New York State to stand idly by and be party to what we now know is a deeply flawed

process, especially when that process involves basic human needs - such as a family home - during this period of economic crisis. This new filing requirement will play a vital role in ensuring that the documents judges rely on will be thoroughly examined, accurate, and error-free before any judge is asked to take the drastic step of foreclosure." The press release is silent as to the ramifications of failure to file such affirmation.

Section 202.12-A(f) of the Uniform Rules for the New York State Trial Courts, which was added on January 19, 2011, states: "The Chief Administrator of the Courts may continue to require counsel to file affidavits or affirmations confirming the scope of inquiry and the accuracy of papers filed in residential mortgage foreclosure actions addressing both owner-occupied and (notwithstanding section (a) supra) non-owner-occupied residential properties." Section 202.12-A(f) is silent as to the ramifications of failure to file such affirmation.

As of this date, there are only three cases published and decided involving AO 548/10. Two of the matters, both decided by Supreme Court Justice Arthur M. Schack, Kings County, involved false statements made under the penalty of perjury by plaintiff's counsel in the affirmations. [HSBC Bank USA, N.A., v. Taher, 2011 NY Slip Op 51208U (Sup. Ct. Kings Cty 2011); Downey Savings and Loan Association, F.A., v. Trujillo, 2011 NY Slip Op 51517U (Sup. Ct. Kings Cty 2011)].

The third case, La Salle Bank, N.A. v. Pace, was decided February 28, 2011 by Supreme Court Justice Thomas Whelen, Suffolk County. [919 N.Y.S.2d 794 (Sup. Ct. Suffolk Cty 2011)]. In that matter, the plaintiff had moved for summary judgment and the defendant argued that plaintiff's failure to supply the 548/10 affirmation warranted denial of the motion. [La Salle Bank, N.A. v. Pace, 919 N.Y.S.2d 794, 799 (Sup. Ct. Suffolk Cty 2011)]. Justice Whelen found "that Administrative Order numbered 548-10 and the newly added subparagraph (f) to court rule 202.12-A, exceed the rule making authority of the Chief Administrative Judge, in her capacity as a chief administrator of the courts." [La Salle Bank, N.A. v. Pace, 919 N.Y.S.2d 794, 803 (Sup. Ct. Suffolk Cty 2011)].

While this Court will not rule on whether or not the Chief Administrative Judge had the authority to issue AO 548/10, it will rule on what the ramifications of failure to file the affirmation required pursuant to AO 548/10 in this matter should be.

In doing so, the Court is guided by not only the lengthy history of this case, and the related matters in the various courts, but also by Civil Practice Law and Rules § 2003, and the line of cases dealing with judicial sales.

The Court will note that there were several less-than-honest practices being used by major lenders at the time AO-548/10 was issued which were resulting in judicial reliance on documents submitted by plaintiff's counsel that were not entirely accurate. Regarding the reasoning behind AO 548/10, the Court will note that NONE of the frowned-upon practices at issue in AO 548/10 are present in this matter. Defendant LINDA CRAWFORD is not the "homeowner being railroaded by the mortgage company unfairly" that AO-548/10 was issued to protect. In fact, Defendant LINDA CRAWFORD has worked the system in every way possible, throwing any possible argument or theory up against the wall, to see what will stick, since the inception of this case, almost six years ago. Meanwhile, for the past six years, Defendant LINDA CRAWFORD has remained in the subject premises, not paying one single cent for her outstanding mortgage, all while Plaintiff is footing the bill. Defendant LINDA CRAWFORD used well-timed bankruptcy filings and appeals to stay the previous four scheduled sales, and each and every time, her filings were dismissed or denied. She now seeks to set aside the March 1, 2011 sale based on Plaintiff's failure to file the 548/10 affirmation alone.

Further, Civil Practice Law and Rules § 2003, titled "Irregularity in judicial sale," deals with motions to set aside a sale for failure to comply with rules regarding notice, time or manner of such sale, but only "if a substantial right of a party was prejudiced by the defect." [N.Y. C.P.L.R. § 2003]. In addition to the statutory authority to set aside the sales, the Supreme Court may "in the exercise of its equitable powers," set aside a judicial sale where fraud, collusion, mistake or misconduct casts suspicion on the fairness of the sale. [Mortgage

Electronic Registration Systems, Inc., v. Schotter, 50 A.D.3d 983, 984 (App. Div. 2nd Dept. 2008) (fact that notice of sale was published in New York Law Journal rather than local Richmond County newspaper was a mere irregularity and not a jurisdictional defect - sale not set aside because mortgagor failed to show that a substantial right of a party was prejudiced)].

New York courts have long held that mere irregularities are not jurisdictional defects, and absent a showing of prejudice to a substantial right of a party, a judicial sale will not be set aside. [Criterion Capital Corp. V. Valven Holding Corp., 23 A.D.2d 878 (App. Div. 2nd Dept. 1965) (referee's failure to publish the adjourn date of the sale not enough to set aside when no prejudice shown); Marine Midland Bank, N.A. v. Landsdowne Management Associates, Inc., 193 A.D.2d 1091, 1092 (App. Div. 4th Dept. 1993) (failure to give proper notice pursuant to Real Property Actions and Proceedings Law is a mere irregularity, not a jurisdictional defect - no showing of prejudice so sale not set aside); Amresco New England II, L.P., v. Denino, 283 A.D.2d 599 (App. Div. 2nd Dept. 2001) (same); Citibank, N.A., v. Schimkus, 231 A.D.2d 486 (App. Div. 2nd Dept. 1996) (printing of the incorrect index number and the listing of a bidding amount in the published notice were de minimis irregularities which should be ignored because no evidence of any prejudice).

Further, Plaintiff opposes Defendant LINDA CRAWFORD's application to dismiss the entire action under the theory of laches. Laches is an equitable doctrine by which a court denies relief to a claimant who has unreasonably delayed or been negligent in asserting the claim, when that delay or negligence has prejudiced the party against whom relief is sought. [BLACK'S LAW DICTIONARY, Abridged Seventh Edition]. Plaintiff argues that Defendant LINDA CRAWFORD, although noticed of and aware of the March 1, 2011 sale, and although she filed opposition to two motions regarding the enforcement of the Judgment of Foreclosure and Sale filed in June of 2011 and never mentioned the instant claim in either opposition, failed to raise the instant claim regarding AO 548/10 until August of 2011, five months after the property was sold. Now, five months later, because Defendant LINDA CRAWFORD failed to raise the claim

previously, and Plaintiff has suffered prejudice as a result, it argues she should be precluded from doing so. The Court is inclined to agree.

The Court will note that at the outset of this litigation, Defendant LINDA CRAWFORD made every possible allegation of misconduct by Plaintiff in the execution of the underlying mortgage that could possibly be alleged in a residential foreclosure action, and each allegation was addressed by this Court. Additionally, Defendant LINDA CRAWFORD not only made allegations of misconduct in this Court in this action, but carried those allegations through to her federal suit in the Southern District of New York. No court, including this Court, has found her allegations to have merit, and all decisions regarding the allegations of misconduct or fraud have been litigated at length, and upheld by various appellate courts. It is clear to the undersigned that there was no fraud or misconduct in the underlying mortgage on Plaintiff's part.

Considering that this is not the type of residential mortgage foreclosure action envisioned during the issuance of AO 548/10 containing documents fraught with irregularities and inconsistencies, considering that there are no prescribed ramifications for failure to file an AO 548/10 affirmation, considering Defendant LINDA CRAWFORD's failure to timely raise this claim prior to the sale or within the following five months despite filing opposition papers to two separate motions during that time, and considering Defendant LINDA CRAWFORD's failure to show, or even attempt to show, that any substantial rights of any party were prejudiced by the failure to file such affirmation, this Court will not set aside the March 1, 2011 sale of the subject property, nor will it dismiss the complaint, or cancel the notice of pendency, all incredibly drastic relief not warranted in this case.

However, the Court is requiring Plaintiff to file with the Court, and serve on the referee, the AO 548/10 affirmation by September 16, 2011, and it will be considered filed and served February 22, 2011, *nunc pro tunc*.

As an aside, Defendant LINDA CRAWFORD argues in her Order to Show Cause

that the stay of the Court of Appeals was in effect on February 18, 2011, the date which the AO 548/10 affirmation was required to have been filed as that was five (5) business days before the sale. [See, Defendant's Order to Show Cause, para 8]. However, by this Court's calculations, five business days before the March 1, 2011 sale was February 22, 2011, the date the stay was lifted when the Court of Appeals denied Defendant's Order to Show Cause in its entirety.

The two pending motions filed by Plaintiff are held in abeyance until Plaintiff files the AO 548/10 affirmation and will be addressed in a later decision upon the Court's receipt of such affirmation.

Accordingly, it is hereby

ORDERED that Defendant LINDA CRAWFORD's Order to Show Cause seeking to vacate and set aside the default Judgment of Foreclosure and Sale, to dismiss the complaint with prejudice, and to cancel the notice of pendency, is denied in its entirety; and It is further

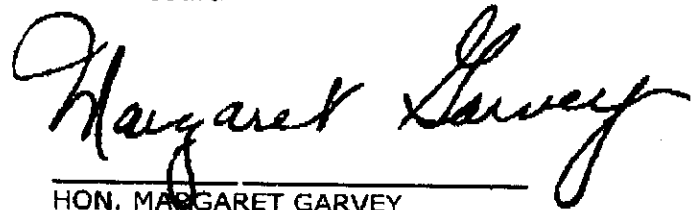
ORDERED that Plaintiff is to file with the Court, and serve on the Referee, an affirmation pursuant to AO 548/10 no later than September 16, 2011; and it is further

ORDERED that Plaintiff's Notice of Motion and Notice to Deliver Possession; and Plaintiff's Notice of Motion to Confirm Report of Sale and for Leave to Enter Deficiency Judgment are adjourned to September 16, 2011 (no appearances on that date); and it is further

ORDERED the appearance scheduled for August 18, 2011 is adjourned to October 14, 2011 at 9:15 a.m..

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York
August 17, 2011



HON. MARGARET GARVEY
* JUSTICE OF THE SUPREME COURT

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