COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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MASTER IN CHANCERY

CHANCERY COURTHOUSE
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GEORGETOWN, DELAWARE 19947
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NEW CASTLE COUNTY COURTHOUSE
500 NORTH KING STREET, SUITE 11400
WILMINGTON, DELAWARE 19980-3734

February 12, 2014

Daniel T. Conway, Esquire
Atlantic Law Group
512 East Market Street
Georgetown, DE 19947

Earl Strong
PO Box 471
11 Gooseneck Lane
Smyrna, DE 19977

RE: Wells Fargo Bank, NA v. Earl Strong
C.A. No. 8538-MA

Dear Counsel and Mr. Strong:

Pending before me are Plaintiff Wells Fargo's "Motion in Opposition to the Order Dismissing Plaintiff's Exception" and "Motion to Reopen the Briefing Schedule." On August 29, 2013, I issued a draft report recommending approval of Defendant Earl Strong's motion to dismiss Wells Fargo's complaint for an equitable lien on Defendant's real property as untimely. On September 5, 2013, Plaintiff filed its Notice of Exception to my draft report. The Court issued a briefing schedule on September 6, 2013, setting October 7, 2013 as the deadline

for Plaintiff's opening brief. This deadline passed without an opening brief being filed. On October 18, 2013, Defendant moved to dismiss Plaintiff's notice of exception for Plaintiff's failure to comply with the Court's briefing schedule. After waiting more than 20 days for a response to the motion that never came, I granted Defendant's request and dismissed Plaintiff's notice of exception on November 8, 2013. Thereafter, on November 18, 2013, Plaintiff filed its pending motions to vacate and to reissue a briefing schedule. For the reasons that follow, I recommend that Plaintiff's motions be granted.

The following factual background is derived from the parties' various motions and responses, the underlying complaint, and attached exhibits. Defendant's real property is located at 11 Gooseneck Lane, Smyrna, Delaware 19977, and was the subject of a foreclosure action by Mortgage Electronic Registrations Systems, Inc. (hereinafter "MERS") in the Superior Court. In a decision and Order dated October 19, 2011, the Superior Court determined that the mortgage and note at issue were inadequate to form a sealed instrument and, therefore, could only be enforced at equity.[1] *Mortgage Electronic Registration Systems, Inc. v. Earl Strong*, 2011 WL 5316766 (Del. Super. Oct. 19, 2011). Since the Superior Court lacked subject matter jurisdiction, it dismissed the foreclosure

[1] In its decision, the Superior Court noted the existence of an outstanding issue regarding the mortgage/loan assignment. The note was assigned to Wells Fargo on November 15, 2010. Wells Fargo had been the servicer of the MERS mortgage up until that point, but the original

action, without prejudice, to be filed in this Court within 60 days of its Order under Superior Court Civil Rule 12(h)(3) and 10 *Del. C.* § 1902. *Id.* at *2.

Plaintiff filed its election to transfer its case on November 17, 2011, and that election was approved by the Superior Court on November 18, 2011. Plaintiff's verified complaint was filed in this Court on May 8, 2013, nearly 18 months later. Defendant then filed a motion to dismiss the complaint as untimely, among other reasons. I found the delay of nearly 18 months to have been inexcusable and concluded that Wells Fargo had failed to perfect the transfer of its case under 10 *Del. C.* § 1902 by making "the usual deposit for costs" in this Court within 60 days after the order denying jurisdiction of the first court has become final.[2] Therefore, I issued a draft report on in which I recommended that Mr. Strong's motion to dismiss the complaint as time-barred should be granted. Although Wells Fargo timely filed its notice of exceptions to my draft report, it failed to abide by the Court's briefing schedule and, therefore, I granted Strong's motion to dismiss the notice of exception.

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complaint and default judgment was in the name of MERS. *Mortgage Electronic Registration Systems, Inc. v. Strong*, 2011 WL 5316766, at n.1 (Del. Super. Oct. 19, 2011).

[2] 10 *Del. C.* § 1902 provides in relevant part: "No civil action, suit or other proceeding brought in any court of this State shall be dismissed solely on the ground that such court is without jurisdiction of the subject matter, either in the original proceeding or on appeal. Such proceeding may be transferred to an appropriate court for hearing and determination, provided that the party otherwise adversely affected, within 60 days after the order denying the jurisdiction of the first court has become final, files in that court a written election of transfer, discharges all costs accrued in the first court, and makes the usual deposit for costs in the second court."

Plaintiff contends that its law firm did not realize that a briefing schedule had been filed until Defendant filed his motion to dismiss in October 18, 2013. The problem arose when a paralegal failed to upload the electronic filing of the briefing schedule into the firm's case management system. As soon as the firm realized its error, on October 18th, the attorney assigned to the case was informed of the briefing schedule. However, on October 27th, this attorney became ill and was admitted to the hospital where he developed a serious infection. On November 4th, his active litigation files were reassigned to another attorney. This attorney was in the process of preparing a response to Defendant's motion to dismiss when he received the Court's order dismissing Plaintiff's notice of exception on November 12th.

Plaintiff argues that dismissal of its complaint would adversely and materially affect its security interest in Defendant's home and result in Defendant's unjust enrichment because Defendant defaulted on his contractual promise to pay back the money he borrowed in 2004 to purchase that home. Plaintiff argues that it has done nothing wrong, but has been placed in this situation because of counsel error. Defendant opposes the two motions, arguing that the mortgage documents are false and that Wells Fargo repeatedly and inexcusably has failed to comply with court orders.

Delaware has a strong public policy to decide cases on the merits. *See Green Tree Servicing LLC v. Hawkins*, 2013 WL 5314996, at *2 (Del. Super. Sept. 6, 2013). As a Master in Chancery, I issue draft and final reports recommending judicial action. *See* Court of Chancery Rule 144. Vacating my November 12th Order and issuing a new briefing schedule for Plaintiff's exception to my draft report dated August 29, 2013, would allow me to consider this matter more thoroughly. Therefore, in the interests of justice and of conserving judicial resources, I am waiving a draft report and issuing a final report in which I recommend that Plaintiff's motions to vacate and to reopen the briefing schedule be granted. A new briefing schedule will be issued when this report becomes final. The parties are referred to Rule 144 for taking exception to a Master's Final Report.

Sincerely,

/s/ Kim E. Ayvazian

Kim E. Ayvazian
Master in Chancery

KEA/kekz