

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 5th day of July, 2012.

P R E S E N T:

HON. RICHARD VELASQUEZ

Justice.

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BANK OF NEW YORK AS INDENTURE TRUSTEE  
FOR ENCORE CREDIT RECEIVABLE TRUST,

Plaintiff,

-against-

Index No. 0403/09

JOYCE HALLS, AMERIQUEST MORTGAGE CO.,  
FIRST TRUST OF CA., NATIONAL ASSOCIATION  
AS TRUSTEE UNDER THE POOLING & SERVICING  
AGREEMENT DATED AS OF 6/1/1995, REGARDING  
REMODELERS HOME IMPROVEMENT LOAN ASSET  
'BACKED CERTIFICATES SERIES 1995-2, KEYSpan  
ENERGY DELIVERY, NYC ECB, NYC PVB, NYC TAB,  
NYS DEPT. OF TAXATION & FINANCE, NYC, NYC  
DEPT. OF HOUSING PRESERVATION & DEVELOPMENT.  
PORTFOLIO ACCEPTANCE CORP., US BANK NATIONAL  
ASSOCIATION, AS TRUSTEE BACKED SECURITIES  
TRUST 2006-FRE1, JONI WHITE, JOHN DOES & JANE  
DOES,

Defendants.

-----X  
US BANK NATIONAL, ASSOCIATION, as Trustee for MASTR  
ASSET BACKED SECURITIES TRUST 2006-FRE1,

Third-Party Plaintiff,

Third-Party Index No. 73963/10

-against-

RALPH PECORALE, CHERYL FILKOWSKI, IRA WALTUCH  
and LEGAND ABSTRACT, LLC, d/b/a LEGEND LAND  
SERVICES, JOYCE HALLS, DONNA DANIELS a/k/a JOYCE  
HALLS and JONI WHITE,

Third-Party Defendants.

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The following papers numbered 1 to 6+ read on this motion:

	<u>Papers Numbered</u>
Notice of Motion and Cross-Motion Affidavits (Affirmations) Annexed _____	1-2, 3,4
Opposing Affidavits (Affirmations) _____	5
Reply Affidavits (Affirmations) _____	6

After oral argument and a hearing on the record, and upon review of the papers in this matter, the Court finds as follows:

The issue the Court is called upon to decide is whether Third-Party defendant Ralph Pecorale and his counsel should be sanctioned for frivolous motion practice, and for an unreasonable delay in providing his former client, U.S. Bank, with documentation obtained during Pecorale's representation of U.S. Bank in a real estate transaction which is now the subject of a foreclosure action.

### **Brief Background**

On December 16, 2004 Joyce Halls granted a \$600,000. Mortgage to Encore Credit Corp. that encumbers 410 Hancock Street, Brooklyn, NY. Encore Credit Corp. then assigned the Halls Mortgage to plaintiff Bank of New York, as Trustee. On October 25, 2005, Halls conveyed the 410 Hancock Street, Brooklyn, NY to Joni White who granted a \$516,000.00 mortgage to Fremont Investment & Loan. Fremont thereafter assigned the Joni White mortgage to Defendant/Third-Party plaintiff, U.S.Bank.

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Third-Party defendant, Frank Pecorale was Fremont Investment and Loan's attorney and settlement agent at the October 25, 2005 closing. U.S.Bank, as Fremont's successor, steps into the shoes of Fremont Investment & Loan. As Fremont's attorney, Ralph Pecorale owed a fiduciary duty to Fremont to insure that Fremont's mortgage proceeds were applied as Fremont directed and insuring that Fremont was obtaining a first mortgage lien interest in 410 Hancock Street, Brooklyn, NY.

The Bank of New York commenced foreclosure proceedings on the "Halls mortgage" against defendants in the main action on February 19, 2009, after Joyce Halls failed to make any more mortgage payments after May 1, 2007. Bank of New York has alleged in its complaint that Frank Pecorale as attorney for Freemont did not carry out his responsibilities to ensure that the Freemont mortgage proceeds were applied as Freemont directed and insuring that Freemont was obtaining a first mortgage lien interest in the property know as 410 Hancock Street, Brooklyn New York.

The Bank of New York has further alleged one or all of the third-party defendants converted the proceeds of the loan secured by the Joni White mortgage. US Bank then commenced a third-party action seeking indemnification in the event it is determined that US Bank's interest in 410 Hancock Street, Brooklyn, NY is subject to and subordinate to the lien of the mortgage the Bank of New York is foreclosing.

US Bank has alleged that approximately \$500,000.00 of the loan proceeds was wired into Frank Pecorale's mortgage IOLA account to be applied to pay off the Joyce Halls mortgage at closing. The Bank of New York alleges that its mortgage to Joyce Halls was never satisfied by the loan proceeds. Thereafter, US Bank demanded that Frank Pecorale produce the records of his IOLA account to demonstrate how the \$500,000.00 in funds were distributed and to whom.

### **Motion Practice**

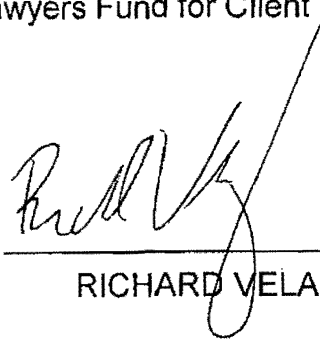
Rather than turn over his IOLA account records to US Bank to whom he owed a fiduciary duty, Frank Pecorale engaged in a three month delay by motion practice before producing the documentation demanded by US Bank. Mr. Pecorale's law office received the document demand on August 25, 2011. This Court will not attempt to set forth the time line involved and the motions made by the time US Bank finally received the documents demanded on November 22, 2011. Suffice it to say that the time line offered by Third-party defendant Pecorale and his reasons for filing motion after motion for documents that should have readily been available and produced are unavailing.

### **Conclusion**

This Court finds that third-party defendant Pecorale's conduct in filing five motions ~~before a single document that had been demanded was provided, was frivolous and~~ sanctionable. The IOLA documents requested were easily obtained by providing the correct necessary information to Bank of American which held Pecorale's IOLA account. Mr. Pecorale had a fiduciary duty to provide the demanded documents to U.S. Bank. Thus, his continual delays were sanctionable and a burden on Third-party plaintiff's counsel as well as the Court. See, *22 NYCRR §130-1.1*; see also, *Miller v. Cruise Fantasies, Ltd.*, 74 A.D. 3d 919, 903 N.Y.S. 2d 481 (2<sup>nd</sup> Dept. 2010). Third-party defendant Pecorale has been afforded a hearing on the record in addition to oral argument on the date Third-Party

plaintiff's motion was first heard. Accordingly, this Court Orders that sanctions in the amount of \$5,000.00 are to be paid to the Lawyers Fund for Client Protection no later than September 15, 2012.

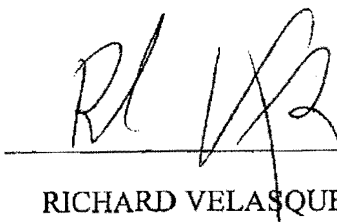
ENTER:



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RICHARD VELASQUEZ, J.S.C.

ENTER:



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RICHARD VELASQUEZ, J.S.C.

JUL 05 2012

SO ORDERED

Hon. Richard Velasquez

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