

LOFARO & REISER, L.L.P.

COUNSELLORS AT LAW
55 HUDSON STREET
HACKENSACK, NEW JERSEY 07601
(201) 498-0400
FACSIMILE: (201) 498-0016

E-MAIL: info@new-jerseylawyers.com
WEB SITES: www.new-jerseylawyers.com
www.njlawconnect.com

MONTCLAIR OFFICE
180 GLENRIDGE AVENUE
MONTCLAIR, NEW JERSEY 07042
(973) 509-0900

Carmine LoFaro *
Glenn R. Reiser **

Stacy M. Neglio **

*Admitted in NJ
** Admitted in NJ and NY

NEW YORK OFFICE
80 ORVILLE DRIVE
BOHEMIA, NEW YORK 10038

Please Reply to Hackensack

April 21, 2005

VIA FEDERAL EXPRESS

Honorable Thomas P. Olivieri, J.S.C.
Brennan Courthouse, 2nd Floor
583 Newark Avenue
Jersey City, New Jersey 07306

**Re: Wells Fargo Bank Minnesota National Association, as
Trustee Without Recourse vs. Juan Guzman, et al.
Docket No.: F-3265-04
Defendant Guzman's Motion to Vacate Sheriff's Sale
Adjourned Return Date: April 29, 2005**

Dear Judge Olivieri

My firm represents Elite Brokers, LLC, the successful bidder at the sheriff's sale. I have received Mr. Luttrell's letter brief of April 15, 2003. Kindly accept this letter memorandum and Supplemental Certification of Glenn R. Reiser ("Supplemental Reiser Cert"). in further opposition to Mr. Guzman's motion to vacate the sheriff's sale conducted on December 2, 2004.

PRELIMINARY STATEMENT

At the conclusion of the last court hearing on April 1, 2005, it was my understanding that Mr. Luttrell was to prepare a form of Order incorporating Your Honor's rulings. I have not received a proposed order, however. The Court did

instruct counsel to brief the issue that I raised; namely, whether Mr. Guzman can redeem the mortgage without requesting and obtaining Bankruptcy Court approval. Mr. Luttrell indicated on the record that Mr. Guzman would indeed be filing such a motion in the Bankruptcy Court; however Mr. Guzman has not done so. Instead, Mr. Luttrell erroneously concludes that bankruptcy court approval is not necessary under these circumstances. Elite Brokers respectfully disagrees.

STATEMENT OF FACTS

Elite Brokers, LLC (“Elite Brokers”) was the successful bidder at a sheriff’s sale conducted by the Hudson County Sheriff on December 2, 2004 with respect to certain commercial property formerly owned by defendant Juan Guzman, and commonly known as 592 Palisade Avenue, Jersey City, New Jersey (the “Property”). The amount of Elite Brokers’ bid was \$305,000.00. Shortly after the sale, Mr. Guzman filed a motion before this Court seeking to extend the 10-day equitable redemption period. This Court denied the motion by Order entered December 13, 2004. See Exhibit A to supplemental Certification of Glenn R. Reiser (“Supplemental Reiser Cert.”). The same day Mr. Guzman filed a Chapter 13 bankruptcy petition in the United States Bankruptcy Court for the District of New Jersey under Case No.: 04-48939, thereby resulting in staying the delivery of sheriff’s deed to Elite Brokers and extending the redemption period for an additional 60 days (from December 13, 2004 to February 11, 2005) pursuant to 11 U.S.C. § 108(b).

In his Chapter 13 Plan Mr. Guzman proposes to cure his mortgage default on the Property by refinancing the existing mortgage. See Exhibit C to Supplemental Reiser Cert. On December 29, 2004, Mr. Guzman filed a motion seeking Bankruptcy Court approval permitting him to obtain refinancing. See

Exhibit E to Supplemental Reiser Cert. On January 10, 2005, Mr. Guzman filed motions in the Bankruptcy Court to extend the redemption period, and to set aside the sheriff's sale. See Exhibits F and G to Supplemental Reiser Cert.

In response to Mr. Guzman's flurry of motions, on February 18, 2005 the foreclosing plaintiff Option One Mortgage Corporation ("Option One) filed a cross-motion for relief from the automatic stay for the purposes of consummating delivery of the sheriff's deed to Elite Brokers. Bankruptcy Judge Novalyn L. Winfield set February 28, 2005 as the hearing date for the motions filed by Mr. Guzman and Option One.

On February 22, 2005 Elite Brokers filed its own relief from the automatic stay on short notice, and on the same day Judge Winfield entered an Order Shortening Time and scheduling a hearing for February 28, 2005 so as to coincide with all other pending motions. A copy of the Order Shortening Time is annexed as Exhibit I to Supplemental Reiser Cert., and copies of the relief from stay motion, supporting Certification of Counsel, and Certificate of Filing and Proof Service are collectively attached as Exhibit J to Supplemental Reiser Cert. Counsel for Elite Brokers served Mr. Guzman and all other interested parties with a complete copy of Elite Brokers' pleadings by Federal Express overnight mail sent on February 22, 2005. Thus, Mr. Guzman and his counsel had five (5) days' notice of Elite Brokers' relief from stay motion, which simply parroted the relief sought by Option One.¹

¹ In ¶¶5-7 of Mr. Guzman's Certification dated March 4, 2005, he disingenuously represents that he was given only 1 day's notice of Elite Brokers' relief from stay motion. To the contrary, the motion was served upon him and his counsel by Federal Express Overnight Mail sent on February 22, 2005, as reflected on the Certification of Filing and Proof of Service included with the motion pleadings appended as Exhibit J to Supplemental Reiser Cert. Mr. Guzman neglects to mention this fact. Also, he coincidentally omits disclosing in his Certification that on February 18, 2005 Option One filed the exact same pleadings in the form of a cross-motion for relief from the automatic stay – 13 days before his attempted tender to the Hudson County Sheriff.

On February 28, 2005 Judge Winfield conducted oral argument on all pending motions. At the conclusion of the hearing, Judge Winfield denied Mr. Guzman's motions in their entirety, see Exhibits M and N to Supplemental Reiser Cert., and granted both relief from stay motions in favor of Option One and Elite Brokers. See Exhibits O and P to Supplemental Reiser Cert. It does not appear that Judge Winfield entered an actual order denying the refinance transaction; however on the Court's docket sheet the minutes of the February 28, 2005 hearing reflect that Her Honor denied same. See document captioned under #24 on the Court's docket sheet, which is annexed as Exhibit B to Supplemental Reiser Cert.

In rejecting Mr. Guzman's motion to extend the redemption period beyond the initial 60-days afforded by Bankruptcy Code § 108(b), Judge Winfield concluded that there was no authority that she was aware of to grant this relief:

THE COURT: I know of no case authority that would permit me to extend the redemption period. So I'm certainly not granting that. In fact, among other cases although it dealt with the extension of a period in a contract I think the reasoning is the same here. There's a third circuit case In re County's Contracting that deals with extending periods and it simply doesn't work.....

(Transcript, February 28, 2005, p. 3, L 23 to p. 5, L. 4). A complete copy of this transcript is annexed as Exhibit K to Supplemental Reiser Cert.

On or about March 3, 2005, Mr. Guzman presented himself to the Hudson County Sheriff and attempted to redeem his mortgage with Option One by tendering funds that he supposedly received from some third party "straw purchaser". Upon learning of this event, on March 3, 2005 I faxed correspondence to Mr. Guzman's bankruptcy counsel and the Hudson County Sheriff objecting to Mr. Guzman's actions on the basis of Judge Winfield's

rulings. See Exhibits Q and R to Supplemental Reiser Cert. On March 4, 2005, the Hudson County Sheriff confirmed that all funds would be returned to Mr. Guzman and that the Deed would be delivered to Elite Brokers. On the same day I faxed additional correspondence to the Hudson County Sheriff confirming the above. See Exhibit S to Supplemental Reiser Cert.

On March 4, 2005, Mr. Guzman, through his current counsel Lawrence W. Luttrell, Esq., filed a motion in the Chancery Court seeking to set aside the sheriff's sale. Yet in paragraph 1 of the proposed form of order submitted by Mr. Guzman's attorney, he actually asks the Court to confirm the sheriff's sale **"on the condition that the successful bidder tender the purchase price of \$225,846.77 to the sheriff within ____ days of the date of this order."** (Emphasis supplied). As I previously disclosed in pleadings submitted for the Court's consideration at the April 1, 2005 hearing, Elite Brokers did tender the balance of the bid, obtained and recorded the sheriff's Deed. Elite Brokers maintains that paragraph 1 of Mr. Luttrell's proposed form of order is consistent with protecting its rights to the Property.

In paragraph 4 of Mr. Guzman's Certification, he apparently discloses for the first time the alleged contract to sell the Property.

During the pendency of my bankruptcy petition, I contracted to sell my home to a third party in consideration for satisfying all liens on the property and permitting me an option to repurchase the property within six months at the price of \$286,000.00.

The above statement totally contradicts Mr. Guzman's prior representations submitted in various Bankruptcy Court papers, wherein he claimed he was attempting to refinance and actually sought Bankruptcy Court

approval for same. Interestingly, Mr. Guzman never revealed the existence of this alleged contract in any Bankruptcy Court pleadings.

To the contrary, Mr. Guzman represented to Judge Winfield that he had obtained a refinancing loan that would satisfy all existing liens on his various real estate holdings. Specifically, paragraph 5 of his bankruptcy Counsel's Certification dated December 28, 2004 and filed in support of his motion seeking court approval of the refinancing, states as follows:

Attached hereto as an exhibit is the paperwork indicating that the debtor has obtained refinancing to pay the debt owed on both his property located at 592 Palisade Avenue, Jersey City, New Jersey and his property located at 594 Palisade Avenue, Jersey City, New Jersey.

See Certification of Nicholas Fitzgerald, Esq. incorporated within Exhibit E to Supplemental Reiser Cert.

The refinancing commitment, also incorporated in Exhibit E to Supplemental Reiser Cert., was deficient for a variety of reasons; to wit: a) the commitment was addressed to non-debtor borrowers, including an unnamed limited liability company; (b) the commitment referenced 4 different properties; (c) the commitment reflected that as of December 17, 2004 the purported borrowers had not made application for the loan; (d) the commitment was not signed, so there is no evidence that the borrower had accepted it; (e) the commitment referenced an expiration date of December 17, 2004 – the same date it was issued; (f) the commitment required pre-payment of a \$5,400.00 application fee, and Mr. Guzman has not presented any evidence of the payment of same; (g) the commitment assumed that the properties were valued at the fair market valuations assessed by the borrower; (h) the commitment provided for substantial fees due at closing – 4 prepaid points plus a 2% broker's fee; (i) the

commitment provided for a 15% interest rate; and (j) there was no disclosure of the monthly payment amount and length of the loan.

Judge Winfield denied Mr. Guzman's refinancing motion on February 28, 2005. Mr. Guzman now comes before this Court with unclean hands by deceptively presenting the same refinance transaction previously rejected by Judge Winfield under the "guise" of a purported sale to a third party "straw purchaser". Having been denied Bankruptcy Court approval for the refinance, Mr. Guzman cannot now come before this Court essentially asking for the same relief under the false pretense of a sale to a "straw purchaser" who is not a party to these foreclosure proceedings

LEGAL ARGUMENT

POINT I

THE DEFENDANT'S REDEMPTION RIGHTS EXPIRED UNDER BOTH STATE LAW AND FEDERAL BANKRUPTCY LAW

In *Brookshire Equities v. Montaquiza*, 346 N.J. Super. 310, 316-317 (App. Div. 2002), *certif. den.* 172 N.J. 179 (2002), the court specifically noted that under 11 U.S.C. § 108(b)(2), the mortgagor has the right to cure the default within 60 days after filing for relief **and loses the right to cure if redemption is not tendered within said period**. (Emphasis added).

In the instant case, Mr. Guzman failed to redeem within the 60-day extension of 11 U.S.C. § 108(b)(2). As dictated by *Brookshire Equities*, Mr. Guzman lost his right to cure his mortgage when the 60-day extension expired. In point of fact, in denying Mr. Guzman's motion to further extend the redemption period Judge Winfield stated on the record that she was aware of no authority that would permit her to grant such relief. Also, back on December 13, 2004

this Honorable Court denied Mr. Guzman's prior request to extend the initial 10-day redemption period.

Mr. Guzman cites R. 4:65-5 as a means to attempt an "end-around" the prior adverse decisions of this Court and the Bankruptcy Court. Mr. Luttrell conceded that his client did not file an objection to the sheriff's sale within 10 days from the sale date. In fact, the objection now before the Court was filed almost 3 months past the sheriff's sale date. In the Comment to R. 4:65-5, Judge Pressler notes that "the right to redeem is lost if either redemption is not made or an objection is not filed within the ten-day period." *Pressler, Current N.J. Court Rules*, Comment R. 4:65-5, at p. 827 (Gann). In sum, the Hudson County Sheriff rightfully returned Mr. Guzman's attempted tender on March 3, 2005 because he was without any legal basis to redeem at that time.

In evaluating a mortgagor's objection to a sheriff's sale under R. 4:65-5, the last sentence of the rule clearly states that the Court must satisfy "that the real estate was sold at its highest and best price at the time of the sale,".... *Ibid*. Other valid bases for filing an objection to a sheriff's sale under R. 4:65-5 includes fraud, accident, surprise, irregularity, or impropriety. See *Orange Land Co. v. Bender*, 96 *N.J. Super.* 158, 164, 232 *A.2d* 679 (App.Div.1967) (*quoting Penn Federal Savings and Loan Assoc. v. Joyce*, 75 *N.J. Super.* 275, 278, 183 *A.2d* 114 (App.Div.1962)).

In the absence of a valid and timely filed objection, however, Rule 4:65-5 was never intended to serve as a basis to extend the redemption period beyond the initial 10-days provided under state law,² or the additional 60-day redemption

² As the Appellate Division noted in *Brookshire Equities v. Montaquiza*, 346 *N.J. Super.* 310, 317 (App. Div. 2002):

period extended by Bankruptcy Code Section 108(b). In fact, the Appellate Division in *Brookshire Equities, LLC v. Montaquiza* confirmed that there is no right to redeem beyond the 60-day extension afforded under Bankruptcy Code Section 108(b):

Appellants also argue that the filing of a bankruptcy petition tolled the ten-day period, extending their right to redeem the property beyond the time allowed by the rules. Under 11 U.S.C.A. § 108(b)(2), a party may cure any default within sixty days of filing for relief. Since bankruptcy petitions were filed on July 15, the sixty-day period would end on September 15, 1999. During this period, no objections were filed in state court and no attempt was made to redeem the property. Rosales Corp.'s petition was dismissed on September 21, 1999; Marcelo's petition was dismissed on November 29, 1999; and Simon's petition was dismissed on March 31, 2000. Appellants' first attempt at redemption did not occur until April 17, 2000, and no motion was made until June 5, 2000. Clearly, despite the tolling effect of 11 U.S.C.A. § 108(b)(2), the appellants were out of time, and acted well beyond the period when they had the right to redeem their property.

346 N.J. Super. at 316-317.

In *Hardyston Nat'l Bank v. Tartamella*, 56 N.J. 508 (1970), the Court held that if a timely objection is filed within the ten-day period set by R. 4:65-5 the mortgagor's right to redeem is extended through the period of court confirmation and a court order confirming the sale is required. *Id.* at 513. If no such timely

A mortgagor has also been allowed to file an objection under R. 4:65-5 after the ten-day period and before conveyance of the deed. There must, however, be some valid ground for objection. Examples of valid grounds for objection include fraud, accident, surprise, irregularity, or impropriety in the sheriff's sale. *Orange Land Co. v. Bender*, 96 N.J. Super. 158, 164, 232 A.2d 679 (App.Div.1967) (quoting *Penn Federal Savings and Loan Assoc. v. Joyce*, 75 N.J. Super. 275, 278, 183 A.2d 114 (App.Div.1962)). Another objection might be that the price paid by the buyer at the sheriff's sale is below fair market value. *Citibank N.A. v. Errico*, 251 N.J. Super. 236, 597 A.2d 1091 (App.Div.1991). Filing a petition of bankruptcy under Chapter 13 does not constitute an objection to the sale. *Union County Savings Bank v. Johnson*, 210 N.J. Super. 589, 594, 510 A.2d 288 (Ch. Div. 1986)..

objection is filed within this 10-day period, then the sale is automatically confirmed without the necessity of a court order. *Id.* at 511.

In the course of oral argument before Judge Winfield on February 28, 2005, Her Honor directed the parties to review her unpublished written opinion issued in the Chapter 13 case of Janet Maricic, Case No.: 02-37500 (“*Maricic*”). A complete copy of Judge Winfield’s unpublished decision is attached as Exhibit L to Supplemental Reiser Cert. In *Maricic*, Judge Winfield reaffirmed her prior holding in *In re Simmons*, 202 B.R. 198, 203-204 (Bankr. D.N.J. 1996), wherein Her Honor held that a debtor’s right to cure a mortgage default is extinguished when the highest bidder purchases the property at a foreclosure sale that is scheduled and held in a manner required by applicable law. Interpreting New Jersey law, in particular *E. Jersey Sav. & Loan Ass’n v. Shatto*, 226 N.J. Super. 473 (Ch. Div. 1987)(hereinafter “*Shatto*”), Judge Winfield remarked:

“[t]he thrust of the *Shatto* decision is that a mortgagor may not extend the redemption period by filing a meritless objection to the sale. *Id.*, at 481....

Accordingly, *Shatto* should be read as holding that the right to redemption only extends beyond 10 days after the sale if a properly filed and served notice of objection has been decided in favor of the objector. See also, *Brookshire Equities, LLC v. Montaquiza*, 346 N.J. Super. 310, 316-17, 787 A.2d 942 (App. Div. 2002)(right to redeem can only be exercised if the requirements of R. 4:64-5 are met).

Maricic, at p. 8-9. (See Exhibit L to Supplemental Reiser Cert.).

In *Maricic*, Judge Winfield also rejected the conclusion reached by her Bankruptcy Court brethren in *In re Randall*, 263 B.R. 200 (D.N.J. 2001), and *In re Downing*, 212 B.R. 459 (Bankr. D.N.J. 1997). In *Randall* and *Downing*, the Bankruptcy Court held that a mortgagor’s right to cure a mortgage default does not expire until the sheriff conveys the deed. As to the *Randall* decision, Judge

Winfield determined that the Bankruptcy Court had misinterpreted the Supreme Court of New Jersey's decision in *Hardyston Nat'l Bank v. Tartamella, supra.*

As previously mentioned, Mr. Luttrell conceded during oral argument on April 1, 2005 that his client did not file a timely objection within 10 days of the Sheriff's sale completed on December 2, 2004. Instead, Mr. Guzman filed his objection to the Sheriff's sale in the Chancery Court on March 3, 2004 – almost 3 months from the Sheriff's sale! Further, Mr. Guzman's objection only pertains to his alleged right to redeem. In other words, Mr. Guzman has not alleged fraud, irregularity in the sale process, inadequacy of price, or any other valid reasons recognized by our courts to set aside a sheriff's sale. Accordingly, the sale was automatically confirmed 10 days from December 2, 2004, or on December 13, 2004. Mr. Guzman's only option beyond December 13, 2004 was to redeem within the 60-day extended redemption period under Bankruptcy Code § 108(b). He failed to do so, and consequently his redemption rights already were terminated when he presented himself before the Hudson County Sheriff on March 3, 2005.

It is important to emphasize that Mr. Guzman has not actually attempted to "redeem" his property within the spirit of New Jersey foreclosure law. Instead, he tried selling the property to a "straw purchaser", obtained funds from this "straw purchaser" and then tried delivering those funds to the Hudson County Sheriff under the false pretense of a redemption. "Redemption in our State has always meant repurchase, which means buying back, receiving back by paying off the existing obligation." *First Nat'l Bank and Trust Co. v. MacGarvie*, 41 N.J. 151, 157 (Ch. Div. 1956), *modified*, 22 N.J. Super. 539 (1956). Redemption does not mean sale to a third party. Had the Hudson County Sheriff accepted

Mr. Guzman's attempted tender, Mr. Guzman would have relinquished title to the Property and thus would not have been "buying back" the Property.

POINT II

THE DEFENDANT, A CHAPTER 13 DEBTOR IN THE UNITED STATES BANKRUPTCY COURT, IS SUBJECT TO COMPLY WITH ALL FIDUCIARY REQUIREMENTS DICTATED BY THE BANKRUPTCY CODE, INCLUDING REQUESTING AND OBTAINING COURT APPROVAL TO TRANSACTION BUSINESS OUTSIDE THE ORDINARY COURSE

A proper analysis of relevant Bankruptcy Code sections further supports a denial of Mr. Guzman's motion. Section 363 of the Bankruptcy Code governs the sale of property belonging to a debtor. Section 363(b)(1) of the Bankruptcy Code obligates Mr. Guzman to request and obtain Bankruptcy Court approval as a condition precedent to selling his assets outside the ordinary course of business:

(b) (1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

11 U.S.C. § 363(b)(1).

Bankruptcy Code Section 363(c)(1) does permit a debtor engaged in business within the meaning of Section 1304 of the Bankruptcy Code,³ such as Mr. Guzman, to sell property of the bankruptcy estate in the ordinary course of business without the necessity of obtaining court approval:

(c) (1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the

³ Section 1304 of the Bankruptcy Code defines a debtor as being "engaged in business" if the debtor "is self-employed and incurs trade credit in the production of income from such employment is engaged in business." 11 U.S. C. 1304(a). A debtor "engaged in business" within the meaning of the statute "shall perform the duties of the trustee specified in section 704 (8) of this title." 11 U.S.C. 1304(c).

ordinary course of business without notice or a hearing.

11 U.S.C. § 363(c)(1).

It should be noted, however, that a debtor in Mr. Guzman's position cannot sell property under Section 363(d) because such a sale would be outside the ordinary course of his business operations and inconsistent with the automatic stay relief previously granted to Elite Brokers and Option One under section 362(d) of the Bankruptcy Code:

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section only to the extent not inconsistent with any relief granted under section 362 (c), 362 (d), 362 (e), or 362 (f) of this title.

11 U.S.C. § 363((d).

Mr. Guzman discloses in Schedule I of his bankruptcy petition that he is "self-employed", and indicates in paragraph 12 of his Certification before this Court that he operates a business adjacent to the subject Property. As such, Mr. Guzman is a "debtor engaged in business" within the meaning of Section 1304(a) of the Bankruptcy Code thereby subjecting him to abide by the fiduciary obligations as a trustee. Section 363(b)(1) of the Bankruptcy Code is abundantly clear that a trustee cannot sell property outside the ordinary course of business without there being a "notice and hearing" in the Bankruptcy Court.

Further, in no unambiguous terms Section 363(c)(1) prohibits a debtor from selling property to the extent that such actions would be inconsistent with any relief granted under Section 362(d) of the Bankruptcy Code. In the present case, vacating the Sheriff's sale to permit Mr. Guzman to sell his property to a third party "straw purchaser" would most definitely be inconsistent with the stay relief that Judge Winfield granted to Elite Brokers and Option One pursuant to

Section 362(d) of the Bankruptcy Code. Assuming arguendo that Mr. Guzman actually filed a motion on “notice and hearing” for Bankruptcy Court approval to sell his property pursuant Section 363 of the Bankruptcy Code, the motion would most certainly be denied because granting such relief would be totally inconsistent with the stay relief remedy granted to Elite Brokers and Option One to consummate the sheriff’s sale.

Elite Brokers has now obtained the Sheriff’s Deed and has recorded same with the Hudson County Sheriff. Mr. Guzman presents no valid basis upon which this Court should disturb the sheriff’s sale process, let alone why this Court should undo the entire transaction so that he can get away with a fraud on the Court (by labeling his refinance as a purchase).

POINT III

THE DOCTRINES OF JUDICIAL ESTOPPEL AND COLLATERAL ESTOPPEL PRECLUDE THIS COURT FROM SETTING ASIDE THE SHERIFF’S SALE

A. JUDICIAL ESTOPPEL

“[J]udicial estoppel may be invoked by a court at its discretion to preserve the integrity of the judicial system by preventing parties from playing fast and loose with the courts in assuming inconsistent positions, and . . . with a recognition that *each case must be decided upon its own particular facts and circumstances.*” *Motley v. New Jersey State Police*, 196 F.3d 160, 163 (3d Cir. 1999) (emphasis and ellipsis in original)(citations and quotations omitted). Before applying judicial estoppel, a court should assess whether the present position is inconsistent with a prior position, and if so, whether the inconsistent positions were offered in bad faith. *Id.* at 163-64. Judicial estoppel “is an ‘extraordinary remedy’” that should be employed only “when a party’s inconsistent behavior would otherwise result in a miscarriage of justice.” *Ryan Operations G.P. v.*

Santiam-Midwest Lumber Co., 81 F.3d 355, 365 (3d Cir.1996) (quoting *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3d Cir.1988)(Stapleton, J., dissenting)).

In the present case, there is ample evidence that supports application of the doctrine of judicial estoppel as a basis for refusing to vacate the sheriff's sale. Mr. Guzman most certainly is playing fast and loose with the Court by arguing inconsistent positions in bad faith. For example, in one instance he represented to the Bankruptcy Court and his creditors, through his Chapter 13 Plan and in motion papers, that he would redeem Option One's mortgage through a refinance transaction. There are no bankruptcy court pleadings that evidence Mr. Guzman's disclosure of any contract to sell his property to a third party. Judge Winfield denied the refinance motion. In an attempt to obtain an "end-around" this adverse ruling, Mr. Guzman now conveniently represents to the Chancery Division that he sold the Property to a third party and should be allowed to redeem even though he would no longer own the Property.

Further, Mr. Guzman now argues before the Chancery Division that expiration of the redemption period, as extended 60-days by Section 108 of the Bankruptcy Code, is irrelevant because he tried redeeming before the sheriff's Deed was delivered. The obvious inconsistency with this "new" position is revealed by Mr. Guzman's own actions in previously filing several applications in state & federal court seeking to extend the redemption period. Accordingly, this Court should find that Mr. Guzman's motion is precluded by the doctrine of judicial estoppel.

B. COLLATERAL ESTOPPEL

Collateral estoppel “bars relitigation of issues in suits that arise from different causes of action.” *Selective Ins. Co. v. McAllister*, 327 N.J. Super. 168, 173 (App. Div. 2000) (citing *United Rental Equip. Co. v. Aetna Life and Cas. Ins. Co.*, 74 N.J. 92, 101 (1977)). Collateral estoppel is an issue of law which should be determined by the judge in the second proceeding. *Id.* (citing *Colucci v. Thomas Nicol Asphalt Co.*, 194 N.J. Super. 510, 518 (App. Div. 1984)). To apply collateral estoppel the party asserting the doctrine must show:

- (1) the issue to be precluded is identical to the issue decided in the prior proceeding;
- (2) the issue was actually litigated in the prior proceeding;
- (3) the court in the prior proceeding issued a final judgment on the merits;
- 4) the determination of the issue was essential to the prior judgment; and
- (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.

Id. at 174 (quoting *In re Estate of Dawson*, 136 N.J. 1, 20 (1994)).

Moreover, in *Pivnick v. Beck*, 326 N.J. Super. 474 (App. Div. 1999) it was determined that the doctrine should be applied equitably and only applied where fairness requires. *Id.* at 484. See also *McAllister*, *supra*, 327 N.J. Super. at 174. When equitably determining if collateral estoppel should apply the court in *Pivnick* established the factors which should be taken into consideration:

Some of the factors favoring application of issue preclusion are: conservation of judicial resources; avoidance of repetitious litigation; and prevention of waste, harassment, uncertainty and inconsistency. *Gonzalez*, *supra*, 75 N.J. at 190, 193, 380 A. 2d 1128. In contrast, factors disfavoring application of collateral estoppel include: the party against whom preclusion was sought could not have obtained review of the judgment in the initial action; the quality or extensiveness of the procedures in the two actions

were different; it was not foreseeable at the time of the initial action that the issue would arise in subsequent litigation; and the party sought to be precluded did not have an adequate opportunity to obtain a full and fair adjudication in the first action. *Restatement (Second) of Judgments* § 278 (1980).

Pivnick, 326 N.J. at 475.

Application of the above standards to the facts of the case at bar demonstrate that the elements of collateral estoppel are satisfied with respect to the issues before this Court. In the Bankruptcy Court Mr. Guzman was given a full and fair opportunity to litigate the issues of redemption, validity of the sheriff's sale, and refinancing his mortgage debt. The parties before the Bankruptcy Court are the same parties that are now appearing in this foreclosure action, and the issues before this Court were essential to Judge Winfield's rulings rendered on February 28, 2005. Further, Judge Winfield's orders denying Mr. Guzman's motions are now final orders, as Mr. Guzman did not appeal same to the District Court. Accordingly, this Court should find that Mr. Guzman's motion to vacate the sheriff's sale is precluded by the doctrine of collateral estoppel.

CONCLUSION

For the foregoing reasons and authorities, Mr. Guzman's motion should be denied. All permissible redemption periods provided under state and federal law have expired, Mr. Guzman does not allege any irregularities in the sheriff's sale process, and he otherwise failed to file a timely objection to the sale in accordance with the requirements of R. 4:65-5. The motion before this Court was filed after the Bankruptcy Court issued unfavorable rulings against Mr. Guzman, and almost 3 months beyond the 10-day period provided by R. 4:65-5.

Further, Mr. Guzman is not truly attempting to exercise a right of "redemption" within the definition of this term, because by his own admission the

funds that he tried to tender to the Hudson County Sheriff were the result of a purported sale of his property outside the ordinary course of his business operations. Mr. Guzman, as a Chapter 13 debtor in the United States Bankruptcy Court, is required to first seek and obtain Bankruptcy Court approval for the sale of his real estate pursuant to Section 363 of the Bankruptcy Code.

Despite representations from his present counsel Mr. Luttrell, Mr. Guzman has not sought Bankruptcy Court approval for this sale and for good reason – because Judge Winfield would deny same based on her previous rulings which included denying Mr. Guzman’s refinance motion. Having previously failed to persuade the Bankruptcy Court to approve his purported refinance transaction, Mr. Guzman now comes before the Chancery Division with unclean hands by strategically attempting to re-cast the same refinance transaction under the pretext of a sale to some third party “straw purchaser”. The Court should not countenance such conduct, especially considering that Elite Brokers obtained and recorded the sheriff’s Deed with the Hudson County Clerk.

Lastly, the doctrines of judicial estoppel and collateral estoppel preclude the relief sought by Mr. Guzman. Accordingly, the Court should deny the motion to vacate the sale.

Respectfully,

Glenn R. Reiser

Glenn R. Reiser

Cc: Lawrence W. Luttrell, Esq. (w/encl.(via FedEx)
Jennifer Novick, Esq.(w/encl.)(via FedEx)
Elite Brokers (w/encl.)(via FedEx)