

**NOT PRECEDENTIAL**

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

No. 20-1712

JOSEPH A. CUNNINGHAM, JR., Trustee;  
EL CUNNINGHAM BUTLER BOZEMAN HEIRS FAM TRUST

v.

JP MORGAN CHASE BANK NATIONAL ASSOCIATION,  
organized and existing under the laws of the U.S.A.

Joseph A. Cunningham, Jr.,  
Appellant

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On Appeal from the United States District Court  
for the District of Delaware  
(D. Del. Civil Action No. 1:18-cv-00596)  
District Judge: Honorable Leonard P. Stark

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Submitted Pursuant to Third Circuit LAR 34.1(a)

— August 11, 2020 —

Before: SHWARTZ, RESTREPO and GREENBERG, Circuit Judges

(Opinion filed: August 13, 2020)

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**OPINION\***

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\* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

PER CURIAM

Pro se appellant Joseph A. Cunningham, Jr., proceeding in forma pauperis (“IFP”), appeals from the District Court’s dismissal of his claims after screening his complaint pursuant to 28 U.S.C. § 1915(e)(2)(B). For the reasons that follow, we will affirm the District Court’s judgment.

In 2018, Cunningham filed a complaint in the District Court alleging claims stemming from a foreclosure action. Cunningham’s deceased father had owned the property at issue, and Cunningham is the executor of his father’s estate. After lengthy legal proceedings in state court, the property appears to have been sold at a sheriff’s sale in November 2019, but the sale has not yet been confirmed. Cunningham’s vague, rambling complaint appeared to allege that his rights were violated because documents were somehow illegally amended during the foreclosure proceedings and because his father was never served with process “due to his death.” Compl. at p. 6.

After granting Cunningham’s application to proceed IFP, the District Court screened his complaint and dismissed it. The District Court determined that because Cunningham had repeatedly and unsuccessfully brought similar claims regarding the foreclosure action in prior cases before the District Court and this Court, his complaint should be dismissed pursuant to § 1915(e)(2)(B)(i) as malicious.<sup>1</sup> See Cunningham v.

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<sup>1</sup> The District Court also concluded that abstention was appropriate pursuant to the Younger abstention doctrine. As discussed further below, because the District Court did

Mortg. Contracting Servs. LLC, 634 F. App'x 361 (3d Cir. 2016); Cunningham v. JP Morgan Chase Bank, 537 F. App'x 44 (3d Cir. 2013). The District Court determined that amendment would be futile. Cunningham timely appealed.<sup>2</sup>

“A court that considers whether an action is malicious must . . . engage in a subjective inquiry into the litigant’s motivations at the time of the filing of the lawsuit to determine whether the action is an attempt to vex, injure or harass the defendant.”

Deutsch v. United States, 67 F.3d 1080, 1086 (3d Cir. 1995). The District Court did not err in dismissing Cunningham’s complaint as malicious because Cunningham’s vague allegations, to the extent that they can be deciphered, essentially duplicate his numerous prior lawsuits about events that occurred years ago in this same foreclosure action.<sup>3</sup> See Pittman v. Moore, 980 F.2d 994, 995 (5th Cir. 1993). Under these circumstances, the District Court did not abuse its discretion in concluding that it would be futile to grant Cunningham leave to amend his complaint. See Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir. 2002).

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not err in dismissing Cunningham’s complaint under § 1915(e)(2)(B)(i), we need not address the District Court’s alternative ground for dismissal.

<sup>2</sup> We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. In Deutsch v. United States, 67 F.3d 1080, 1086 (3d Cir. 1995), decided before a major revision of § 1915 in 1996, we held that significant deference should be given to a district court’s order dismissing a complaint as malicious. Even if the statutory revision suggests that we should review the determination de novo, see McGore v. Wrigglesworth, 114 F.3d 601, 604 (6th Cir. 1997), overruled on other grounds by Jones v. Bock, 549 U.S. 199, 203 (2007), we would still agree with the District Court’s conclusion.

<sup>3</sup> Cunningham does not address this issue in his appellate brief.

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UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

No. 20-1712

JOSEPH A. CUNNINGHAM, JR., Trustee,  
EL CUNNINGHAM BUTLER BOZEMAN HEIRS FAM TRUST

v.

JP MORGAN CHASE BANK NATIONAL ASSOCIATION,  
organized and existing under the laws of the U.S.A.

Joseph A. Cunningham, Jr.,  
Appellant

(D. Del. Civil Action No. 1:18-cv-00596)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, SHWARTZ,  
KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, and \*GREENBERG,  
Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having  
been submitted to the judges who participated in the decision of this Court and to all the  
other available circuit judges of the circuit in regular active service, and no judge who

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\*The Honorable Morton I. Greenberg was a member of the merits panel. Judge  
Greenberg died on January 28, 2021 and did not participate in the consideration of this  
petition. His vote was limited to panel rehearing.

concurred in the decision having asked for rehearing, and a majority of the judges of the panel and the Court en banc, is denied.

BY THE COURT,

s/Patty Shwartz  
Circuit Judge

Dated: March 26, 2021  
SLC/cc: Joseph Cunningham

# MANDATE

S.D.N.Y. - N.Y.C.  
19-cv-5480  
Nathan, J.

United States Court of Appeals  
FOR THE  
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29<sup>th</sup> day of May, two thousand twenty.

Present:

Rosemary S. Pooler,  
Reena Raggi,  
Raymond J. Lohier, Jr.,  
*Circuit Judges.*

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In re Joseph A. Cunningham, Jr.,

*Debtor.*

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Joseph A. Cunningham, Jr.,

*Debtor-Appellant,*

v.

19-4287

Gregory Funding,

*Appellee.*

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Appellee moves to dismiss the appeal as moot. Upon due consideration, it is hereby ORDERED that the motion to dismiss is GRANTED because the appeal is moot.

FOR THE COURT:

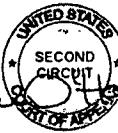
Catherine O'Hagan Wolfe, Clerk of Court

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

*Catherine O'Hagan Wolfe*



MANDATE ISSUED ON 06/19/2020

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

JOSEPH A. CUNNINGHAM, JR., et al. :  
:  
Plaintiffs, :  
:  
v. : Civ. No. 18-596-LPS  
:  
JP MORGAN CHASE BANK NATIONAL :  
ASSOCIATION, :  
:  
Defendant. :  
:  
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Joseph A. Cunningham, Jr., Bronx, New York, Pro Se Plaintiff.

MEMORANDUM OPINION

March 10, 2020  
Wilmington, Delaware



STARK, U.S. District Judge:

## I. INTRODUCTION

Plaintiff Joseph A. Cunningham, Jr. ("Cunningham") appears *pro se* and has been granted leave to proceed *in forma pauperis*. (D.I. 4) Plaintiff El Cunningham Butler, Bozeman Heirs Fam Trust (the "Trust") appears without counsel and without paying the filing fee, as ordered by the Court. (*See id.*) Because an attorney has not entered an appearance on behalf of the Trust, it will be dismissed from this action. *See Cunningham v. JP Mortgage Chase Bank Nat'l Assoc.*, No. 18-2107 (3d Cir. Dec. 12, 2018). The Court proceeds to review and screen the Complaint pursuant to 28 U.S.C. § 1915(e)(2)(b).

## II. BACKGROUND

As he has done before, Cunningham attempts to raise claims related to the foreclosure of real property located in Newark, Delaware. *See* Civ. Nos. 13-756-SLR, 15-356-LPS, 17-035-LPS, 18-1792-LPS. As discussed in *Cunningham v. JP Morgan Chase Bank*, Civ. No. 13-756-SLR, Cunningham is the executor of the estate of his father, Joseph Cunningham, Sr. The property at issue was owned by the decedent. The decedent received a loan from Weichert Financial and the loan was sold or transferred to Defendant J.P. Morgan Chase Bank National Association ("JP Morgan").

The Court takes judicial notice that on November 26, 2012, JP Morgan filed a *scire faciasur mortgage* complaint against Cunningham and the heirs of his father in the Superior Court of the State of Delaware in and for New Castle County, C.A. No. N12L-11-093 CLS at BL-1 ("C.A. No. N12L-11-093 CLS").<sup>1</sup> *See JP Morgan Chase Bank Nat'l Ass'n v. Cunningham*, 2018 WL 501500 (Del. Super. Jan. 19, 2018). On June 5, 2018, the Superior Court entered an order and granted JP Morgan's motion to substitute parties, retroactive to December 31, 2016, removing JP Morgan as Plaintiff and

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<sup>1</sup> "BL" is the designation used by Bloomberg Law for court docket entries.

substituting PROF-2013-S3 Legal Title Trust II, by U.S. Bank National Association, as Legal Title Trustee, as Plaintiff. *Id.* at BL-139. On January 19, 2018, summary judgment was granted in favor of JP Morgan. *Cunningham*, 2018 WL 501500, *aff'd*, 2018 WL 4959040 (Del. Oct. 12, 2018). The property was scheduled for a Sheriff's sale on January 8, 2019. C.A. No. N12L-11-093 CLS at BL-151. On December 28, 2018, the sale was stayed due to Plaintiff's Bankruptcy Case No. 18-14133.<sup>2</sup> *Id.* On November 12, 2019, the property was sold at Sheriff's Sale and the Sheriff's Return was docketed on January 14, 2020. *Id.* at BL-160. To date, the sale has neither been confirmed, nor set aside.

In the instant Complaint, Plaintiff alleges that his deceased father never received a writ from the Sheriff, the Court, or the bank's lawyer "due to the fact that he was deceased." (D.I. 2 at 4-5) Cunningham alleges that the process from November 26, 2012 to April 2018 "has been a violation of due process by the bank lawyers," the judge, and the Prothonotary Clerk's Office, because documents were illegally served and illegally amended, because the Superior Court rubber-stamped the process, and because the mediation process was illegal "due to the illegal service of the writ." (*Id.* at 5-6) For relief, Cunningham seeks one million dollars in damages as well as the right to file a counterclaim or cross claim in the Superior Court action, the right to rescind his father's signature, and the right to recoup process from investments. (D.I. 5)

### III. LEGAL STANDARDS

A federal court may properly dismiss an action *sua sponte* under the screening provisions of 28 U.S.C. § 1915(e)(2)(B) if "the action is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief."<sup>2</sup>

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<sup>2</sup> Plaintiff's bankruptcy is currently on appeal in the United States Court of Appeals for the Second Circuit, *In re Cunningham*, No. 19-4287 (2d Cir. Dec. 20, 2019).

*Ball v. Famiglio*, 726 F.3d 448, 452 (3d Cir. 2013); see also 28 U.S.C. § 1915(e)(2) (*in forma pauperis* actions). The Court must accept all factual allegations in a complaint as true and take them in the light most favorable to a *pro se* plaintiff. *See Phillips v. County of Allegheny*, 515 F.3d 224, 229 (3d Cir. 2008); *Erickson v. Pardus*, 551 U.S. 89, 93 (2007). Because Plaintiff proceeds *pro se*, his pleading is liberally construed and his Complaint, “however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.” *Erickson*, 551 U.S. at 94 (citations omitted).

An action is frivolous if it “lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Under 28 U.S.C. § 1915(e)(2)(B)(i), a court may dismiss a complaint as frivolous if it is “based on an indisputably meritless legal theory” or a “clearly baseless” or “fantastic or delusional” factual scenario. *Neitzke*, 490 at 327-28; *Wilson v. Rackmill*, 878 F.2d 772, 774 (3d Cir. 1989). A court considering whether an action is malicious must determine whether the action is an attempt to vex, injure, or harass the defendant. *See Deutsch v. United States*, 67 F.3d 1080, 1086 (3d Cir. 1995). Repetitive litigation is some evidence of a litigant’s motivation to vex or harass a defendant where it serves no legitimate purpose. *See Fiorani v. Hewlett Packard Corp.*, 547 F. App’x 103, 105 (3d Cir. Sept. 26, 2013).

The legal standard for dismissing a complaint for failure to state a claim pursuant to § 1915(e)(2)(B)(ii) is identical to the legal standard used when ruling on Rule 12(b)(6) motions. *See Tourscher v. McCullough*, 184 F.3d 236, 240 (3d Cir. 1999) (applying Fed. R. Civ. P. 12(b)(6) standard to dismissal for failure to state a claim under § 1915(e)(2)(B)). However, before dismissing a complaint or claims for failure to state a claim upon which relief may be granted pursuant to the screening provisions of 28 U.S.C. § 1915, the Court must grant Plaintiff leave to amend his complaint unless amendment would be inequitable or futile. *See Grayson v. Mayview State Hosp.*, 293 F.3d 103, 114 (3d Cir. 2002).

A complaint may be dismissed only if, accepting the well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court concludes that those allegations “could not raise a claim of entitlement to relief.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007). Though “detailed factual allegations” are not required, a complaint must do more than simply provide “labels and conclusions” or “a formulaic recitation of the elements of a cause of action.” *Davis v. Abington Mem’l Hosp.*, 765 F.3d 236, 241 (3d Cir. 2014) (quoting *Twombly*, 550 U.S. at 555). In addition, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *See Williams v. BASF Catalysts LLC*, 765 F.3d 306, 315 (3d Cir. 2014) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Twombly*, 550 U.S. at 570).

To determine whether a complaint meets the pleading standard as set forth in *Twombly* and *Iqbal*, the Court must: (1) outline the elements a plaintiff must plead to a state a claim for relief; (2) peel away those allegations that are no more than conclusions and thus not entitled to the assumption of truth; and (3) look for well-pled factual allegations, assume their veracity, and then “determine whether they plausibly give rise to an entitlement to relief.” *Bistrian v. Levi*, 696 F.3d 352, 365 (3d Cir. 2012) (internal citations omitted) (citing *Iqbal*, 556 U.S. at 679; *Argueta v. United States Immigration and Customs Enforcement*, 643 F.3d 60, 73 (3d Cir. 2011)). The last step is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679.

#### **IV. DISCUSSION**

##### **A. Malicious**

A court considering whether an action is malicious must determine whether the action is an attempt to vex, injure, or harass the defendant. *See Deutsch*, 67 F.3d at 1086. Repetitive litigation is some evidence of a litigant’s motivation to vex or harass a defendant where it serves no legitimate

purpose. *See Fiorani*, 547 F. App'x at 105; *Kennedy v. Getz*, 757 F. App'x 205, 207-08 (3d Cir. Dec. 19, 2018) (Plaintiff offered no argument on appeal challenging District Court's determination that his motivation in filing third lawsuit was to vex, injure, or harass defendants). "Repetitious litigation of virtually identical causes of action may be dismissed under § 1915 as frivolous or malicious." *McWilliams v. Colorado*, 121 F.3d 573, 574 (10th Cir. 1997) (internal quotation marks and alteration omitted); *see also Rosier v. United States*, 736 F. App'x 313, 315 (3d Cir. June 7, 2018) (District Court did not err in dismissing case as malicious as circumstances support finding that when Plaintiff initiated complaint his intent was to harass government); *Daley v. U.S. Attorneys Office*, 538 F. App'x 142, 144 (3d Cir. Oct. 31, 2013) (Plaintiff's complaint is malicious as it repeats claims that Plaintiff unsuccessfully previously litigated twice before in District Court); *Pittman v. Moore*, 980 F.2d 994, 995 (5th Cir. 1993) (complaint is malicious when it "Duplicates allegations of another [ ] federal lawsuit by the same plaintiff"); *Bailey v. Johnson*, 846 F.2d 1019 (5th Cir. 1988) (an *in forma pauperis* complaint that merely repeats pending or previously litigated claims may be considered abusive and dismissed under authority of § 1915); *McGill v. Juanita Kraft Postal Serv.*, 2003 WL 21355439, at \*2 (N.D. Tx. June 6, 2003) (complaint is malicious when it "Duplicates allegations of another pending federal lawsuit by the same plaintiff or when it raises claims arising out of a common nucleus of operative facts that could have been brought in the prior litigation").

The instant Complaint contains claims that arise out of a common nucleus operative facts and are related to *Cunningham v. JP Morgan Chase Bank*, Civ. No. 13-756-SLR, wherein Plaintiff raised claims related to the foreclosure of the real property described above. On July 2, 2013, this Court dismissed Civ. No. 13-756-SLR as frivolous and by reason of abstention. (See Civ. No. 13-756-SLR at D.I. 14) Plaintiff appealed, and the United States Court of Appeals for the Third Circuit affirmed,

agreeing that *Younger* abstention was appropriate in Plaintiff's case. *See Cunningham v. JP Morgan Chase Bank*, 537 F. App'x 44 (3d Cir. Oct. 21, 2013).

The instant Complaint also contains claims that arise out of a common nucleus of operative facts and are related to *Cunningham v. Mortgage Contracting Services*, Civ. No. 15-356-LPS, wherein Plaintiff raised claims related to the foreclosure of the real property described above. This Court dismissed Civ. No. 15-356-LPS as malicious and by reason of abstention on July 30, 2015. (*See* Civ. No. 15-356-LPS at D.I. 6) Plaintiff appealed, and the United States Court of Appeals for the Third Circuit affirmed, agreeing that *Younger* abstention was appropriate in Plaintiff's case. *See Cunningham v. Mortgage Contracting Services*, 634 F. App'x 361 (3d Cir. Feb. 22, 2016).

The filing of this Complaint falls squarely in the category of malicious litigation. Based upon the foregoing, the Court concludes that Plaintiff's complaint is malicious within the meaning of Section 1915(e)(2)(B).

**B. *Younger* Abstention**

In Civ. No. 13-756-SLR, Defendant indicated that, on November 26, 2012, it initiated a foreclosure action for the real property in question in the Superior Court of the State of Delaware, *JP Morgan Chase Bank, National Association v. Cunningham*, C.A. No. N12L-11-093 JRJ. (*See* Civ. No. 13-756-SLR D.I. 9 at Wiggins aff. ¶ 10; Ex. H) Plaintiff is participating in the action on behalf of his father's estate. (*Id.* at ¶ 11; Ex. I) The Court takes judicial notice that the Superior Court action remains pending. While there has been a Sheriff's sale, there is no indication on the Superior Court docket that the Superior Court has confirmed the sale. *See* 10 Del. C. §§ 4976, 5065; Superior Court Civil Rule 69(d).

Inasmuch as the foreclosure action remains pending, the Court must abstain pursuant to the *Younger* abstention doctrine. *See Younger v. Harris*, 401 U.S. 37 (1971) (federal district court must

abstain from hearing a federal case which interferes with certain state proceedings). Abstention is appropriate when: (1) there are ongoing state proceedings that are judicial in nature; (2) the state proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise the federal claims. *See Lazaridis v. Wehmer*, 591 F.3d 666, 670 (3d Cir. 2010). The doctrine applies to proceedings until all appellate remedies have been exhausted, unless the matter falls within one of the *Younger* exceptions. *See Huffman v. Pursue Ltd.*, 420 U.S. 592, 608 (1975).

Once again, the Court finds that the *Younger* elements have been met and none of its exceptions apply. There are ongoing state proceedings for the foreclosure of real property. *See Cunningham v. JP Morgan Chase Bank*, 537 F. App'x at 45. Delaware has an important interest in resolving real estate issues, which implicates the important interest of preserving the authority of the state's judicial system. *Id.* Plaintiff has an adequate opportunity to raise any potential claims in State court. Further, Plaintiff "has not demonstrated 'bad, faith, harassment or some other extraordinary circumstance, which might make abstention inappropriate.'" *Id.* (quoting *Anthony v. Council*, 316 F.3d 412, 418 (3d Cir. 2003)). Therefore, pursuant to *Younger* and its progeny, the Court must abstain. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987) (stating that *Younger* abstention is favored even after plaintiffs failed to raise their federal claims in ongoing state proceedings).

## **V. CONCLUSION**

For the above reasons, the Court will: (1) dismiss El Cunningham Butler, Bozeman Heirs Fam Trust as a Plaintiff; and (2) dismiss the Complaint as malicious pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) and by reason of abstention. The Court finds amendment futile.

An appropriate order will be entered.

**E Appendix**

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 9/27/20

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

Joseph Allan Cunningham

Debtor,

19-cv-5480 (AJN) (SN)

Joseph Allan Cunningham,

Appellant,

-v-

OPINION & ORDER

Gregory Funding,

Appellee.

ALISON J. NATHAN, District Judge:

Before the Court is Judge Netburn's Report & Recommendation (R&R) recommending that the Court grant the Defendant's motion to dismiss this bankruptcy appeal. *See* Dkt. No. 26.

When considering the findings and recommendations of a Magistrate Judge, the Court may "accept, reject, or modify [them], in whole or in part." 28 U.S.C. § 636(b)(1). The Court must make a de novo determination of any portions of a magistrate's report or findings to which a party raises an objection, and reviews only for "clear error on the face of the record" when there are no objections to the R&R. *Brennan v. Colvin*, No. 13-cv-6338 (AJN), 2015 WL 1402204, at \*1 (S.D.N.Y. Mar. 25, 2015); *see also Hicks v. Ercole*, No. 09-cv-2531 (AJN) (MHD), 2015 WL 1266800, at \*1 (S.D.N.Y. Mar. 18, 2015); *Gomez v. Brown*, 655 F.Supp.2d 332, 341 (S.D.N.Y. 2009). Clear error is found only when, upon review of the entire record, the

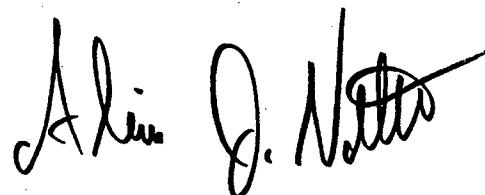
Court is left with “the definite and firm conviction that a mistake has been committed.” *Laster v. Mancini*, No. 07-cv-8265 (DAB) (MHD), 2013 WL 5405468, at \*2 (S.D.N.Y. Sept. 25, 2013) (quoting *United States v. Snow*, 462 F.3d 55, 72 (2d Cir. 2006)).

Objections to Judge Netburn’s R & R were due by December 24, 2019. *See* Dkt. No. 26 at 6. As of September 27, 2020, no objections have been filed. The Court thus reviews the R&R for clear error, and finds none. The Court therefore adopts the R&R in its entirety and GRANTS Appellee’s motion to dismiss this appeal for the reasons provided in Judge Netburn’s well-reasoned and thorough Report and Recommendation.

The Clerk of Court is respectfully ordered to close this case and enter judgment. The Clerk of Court is further directed to mail a copy of this Opinion to the *pro se* Appellant and to note that mailing on the public docket.

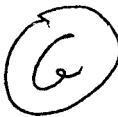
SO ORDERED.

Dated: September 27, 2020  
New York, New York



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ALISON J. NATHAN  
United States District Judge



UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

In re:

JOSEPH ALLAN CUNNINGHAM, JR.,

Chapter 13  
Case No. 18-14133 (CGM)

Debtor.

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**ORDER DENYING MOTION FOR STAY PENDING APPEAL**

**WHEREAS**, Debtor filed a motion on June 13, 2019 requesting a stay pending appeal of the Court's Order Granting the Chapter 13 Trustee's Motion to Dismiss Case for Failure to Make Plan Payments [ECF No. 25];

**WHEREAS**, Debtor failed to file a memorandum of law with the instant motion;  
**AND NOW, THEREFORE, IT IS HEREBY,**

**ORDERED**, that Debtor's motion for stay pending appeal is denied.

Dated: July 1, 2019  
Poughkeepsie, New York



/s/ Cecelia G. Morris

**Hon. Cecelia G. Morris  
Chief U.S. Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**  
**One Bowling Green  
New York, NY 10004-1408**

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IN RE: Joseph Allan Cunningham, Jr.

CASE NO.: 18-14133-cgm

Social Security/Taxpayer ID/Employer ID/Other Nos.:  
xxx-xx-3027

CHAPTER: 13

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**ORDER DISCHARGING TRUSTEE**

The petition of the above named debtor has been dismissed and the chapter 13 trustee has submitted the final report.

IT IS ORDERED THAT:

Krista M. Preuss is discharged as trustee of the estate of the above named debtor(s) and this chapter 13 case is closed.

Dated: October 21, 2020

Cecelia G. Morris, Bankruptcy Judge

# APPENDIX A

EFiled: Jan 25 2018 03:23PM  
Filing ID 61611732  
Case Number 49,2018



## IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

JPMorgan Chase Bank, National Association, a national banking association organized and existing under the laws of the United States of America; Assignee of Mortgage Electronic Registrations Systems, Inc., as a nominee, a corporation organized and existing under the laws of the State of Delaware ) C.A. No. N12L-11-093 CLS

Plaintiff, )

v. )

JOSEPH A. CUNNINGHAM, Jr. )  
Personal Representative and Heir, )  
HOWARD S. CUNNINGHAM, Heir, )  
PAULETTE CUNNINGHAM, Heir, )  
and YASMEEN CUNNINGHAM, )  
Heir, )

Defendants.

## ORDER

Decided: January 19, 2018

On this 19th day of January, 2018, and upon consideration Plaintiff JPMorgan Chase Bank's ("Plaintiff") Motion for Summary Judgment and Defendant Joseph Cunningham's ("Defendant") Response thereto, the Court finds as follows:

1. On November 26, 2012 Plaintiff filed a *scire facias sur mortgage* complaint against Defendants seeking foreclosure of Plaintiff's interests in 247 Auckland Drive, Newark DE 19702 under the mortgage.
2. Defendant elected to participate in mediation, but he did not appear at the mediation conference on April 17, 2013. Plaintiff's Motion to Dismiss Defendant's counterclaims was granted on June 9, 2014. Plaintiff filed a Motion to Amend the Complaint on September 6, 2016. The Court granted Plaintiff's Motion. Plaintiff filed its Amended Complaint on January 17, 2017. Subsequently Plaintiff filed this Motion for Summary Judgment. Plaintiff contends that Defendants have not plead any of the allowable defenses in a mortgage action under Delaware law.
3. Defendant Joseph Cunningham filed a Response on August 24, 2017 and a document filed as "Notice from Defendant" on October 11, 2017.
4. "The defenses available in a *scire facias sur mortgage* foreclosure action are limited and only those claims or counterclaims arising under the mortgage may be raised. Delaware courts recognize the defenses of payment, satisfaction or avoidance."<sup>1</sup>

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<sup>1</sup> *CitiMortgage, Inc. v. Bishop*, 2013 WL 1143670, at \*5 (Del. Super. Mar. 4, 2013).

5. The Court may grant summary judgment if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.<sup>2</sup> All facts are viewed in a light most favorable to the non-moving party.<sup>3</sup> When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.<sup>4</sup> If the non-moving party bears the burden of proof at trial, yet “fails to make a showing sufficient to establish the existence of an element essential to that party’s case,” then summary judgment may be granted against that party.<sup>5</sup>

6. To the extent that Defendants raised any defense in their filings, this Court may only recognize the defense of payment, satisfaction or avoidance. The Answer to Plaintiff’s Complaint is void of Delaware’s recognized defenses. Additionally, the Response to Plaintiff’s Motion, and subsequent filing, fails to demonstrate that there are any genuine issues of material fact.

7. For the foregoing reasons, Plaintiff JPMorgan Bank’s Motion for Summary Judgment is **GRANTED** as to all Defendants. **IT IS SO ORDERED.**

/s/ Calvin L. Scott

Judge Calvin L. Scott, Jr.

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<sup>2</sup> Super. Ct. Civ. R. 56(c).

<sup>3</sup> *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

<sup>4</sup> *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

<sup>5</sup> *Kennedy v. Encompass Indem. Co.*, 2012 WL 4754162, at \*2 (Del. Super. Sept. 28, 2012) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

APPENDIX

B

EFILED: Oct 12 2018 11:19AM EDT

Filing ID 62553921

Case Number 49,2018



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSEPH A. CUNNINGHAM, JR.,  
Personal Representative and Heir,

§  
§ No. 49, 2018

Defendant Below,  
Appellant,

§  
§ Court Below—Superior Court  
§ of the State of Delaware

v.

§

PROF-2013-S3 LEGAL TITLE  
TRUST II, by U.S. BANK  
NATIONAL ASSOCIATION, as  
Legal Title Trustee,

§  
§ C.A. No. N12L-11-093

Plaintiff Below,  
Appellee.

§  
§  
§

Submitted: August 10, 2018  
Decided: October 12, 2018

Before **STRINE**, Chief Justice; **VALIHURA** and **VAUGHN**, Justices.

**ORDER**

After careful consideration of the parties' briefs and the record on appeal, we conclude that the judgment below should be affirmed on the basis of the Superior Court order, dated January 19, 2018, granting summary judgment. The defendant below-appellant failed to assert any of the defenses available in a *scire facias sur* mortgage action and failed to raise any genuine issue of material fact.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Karen L. Valihura  
Justice

~~AD~~ APPendix D

OFFICE OF THE CLERK

**PATRICIA S. DODSZUWEIT**  
**CLERK**



**UNITED STATES COURT OF APPEALS**

FOR THE THIRD CIRCUIT  
21400 UNITED STATES COURTHOUSE  
601 MARKET STREET  
PHILADELPHIA, PA 19106-1790

Website: [www.ca3.uscourts.gov](http://www.ca3.uscourts.gov)

TELEPHONE  
215-597-2995

March 30, 2021

Joseph A. Cunningham, Jr.  
Apartment 1B  
3038 Matthews Avenue  
Bronx, NY 10467

Re: Cunningham v. JP Morgan Chase Bank NA  
No.: 20-1712

Dear Mr. Cunningham,

This will serve as response to your submission received on March 30, 2021.

With the issuance of this Court's mandate, the Court's decision became final and the Court lost any authority to alter or change its decision. It is noted that your petition for rehearing was denied on March 26, 2021. Any further review must be sought in the United States Supreme Court. The address for the Supreme Court is:

Office of the Clerk  
Supreme Court of the United States  
One First Street, N.E.  
Washington, D.C. 20543-0001

Very truly yours,

s/ Patricia S. Dodszuweit  
Clerk

By: s/ Shannon, Case Manager  
267-299-4959

**Additional material  
from this filing is  
available in the  
Clerk's Office.**