

2010 WL 11001943 (N.J.Super.A.D.) (Appellate Brief)
Superior Court of New Jersey, Appellate Division.

FINANCIAL FREEDOM SENIOR FUNDING, CORP., Substituted
By Financial Freedom Acquisition, LLC, Plaintiff-Appellee,

v.

Annette C. FISCHER, Defendant-Appellant,

and

FIRST AMERICAN TITLE INSURANCE COMPANY, and Heritage Abstract Company, Defendants-Appellees.

No. A-4031-09-T3.

July 20, 2010.

On Appeal from the Civil Law Division: Essex County Vicinage
for the Superior Court of New Jersey, Docket No.: L-5900-08
Sat Below: Honorable Eugene J. Codey, Jr., P.J.S.C.

Brief of Defendant-Appellant: Annette C. Fischer

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appellant.

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***1 PRELIMINARY STATEMENT**

Defendant/Appellant Annette C. Fischer (“Ms. Fischer”), brings the within appeal from the denial of her Motion to Vacate Default Judgment which was entered against her and in favor of the Plaintiff/Appellee Financial Freedom Senior Funding Corporation (“Financial Freedom”) and from the denial of her motion for reconsideration of the same. The Default Judgment, in the Essex County Law Division, is based on a false complaint by Financial Freedom which exclusively sought equitable relief. Financial Freedom sought a declaratory judgment finding that the Notice of Rescission under the Truth and Lending Act, which was provided to Ms. Fischer on the subject reverse mortgage transaction and that was defective by Financial Freedom's own admission, should be perfected. The Motion for Default Judgment was supported solely by a procedurally and evidentiary defective certification by Plaintiff's Counsel. The effect of the Default Judgment is to deny Ms. Fischer her three-year right of rescission of the reverse mortgage transaction under the Truth in Lending Act. On her Motion to Vacate the Default Judgment, Ms. Fischer provided irrefutable evidence that the complaint upon which the Default Judgment was based was both factually false and legally unsupportable, that Financial Freedom and its Agents actions throughout the entire reverse mortgage transaction were malicious, in bad faith, and fraudulent, and *2 that the Default Judgment was entered due to health reasons of excusable **neglect**.

Ms. Fischer is a woman in her eighties who suffers from several serious medical conditions. She is still suffering from complications following her **open heart surgery** and continual mini-strokes. Ms. Fischer submitted the only competent Medically Certain Opinion testimony in the case, in the form of nine (9) submissions Five of Ms. Fischer's Treating Physicians, all with very qualified and unchallenged impeccable credentials, supporting that she was medically unable to respond to the Motion for Default Judgment when it was entered.

Financial Freedom's complaint is based on two distinct factual and legal theories: 1) The libelous assertion that Ms. Fischer actually was responsible for the backdating of the closing documents in collusion with Financial Freedom's own closing agent (Defendant Heritage Abstract Company, hereinafter referred to at times as “Heritage”), despite the fact that none of the handwritten dates were in Ms. Fischer's handwriting and Financial Freedom had evidence in its possession so they were fully aware of this or 2) a new three-day Notice of Rescission that Financial Freedom provided six months after the closing should terminate Ms. Fischer's three-year right of rescission under the Truth and Lending Act. As for theory two, neither the Plaintiff nor the Court submitted any legal basis for such a finding - because none exists.

*3 Theory one was also proved to be unsupportable. The Truth in Lending Act requires that three-business days (calculating Saturday as a business day) pass from the date of the closing before monies can be released from a reverse mortgage, unless otherwise agreed to by the lender. Financial Freedom submitted to the Court that Ms. Fischer backdated the closing documents for a Wednesday even though no dates on the documents were in her handwriting, even though the closing took place on a Thursday, so that she could have monies available in time to satisfy a judgment lien before a Sheriff's Sale on that lien scheduled on a Tuesday. In fact, the monies were released to Ms. Fischer on the following Tuesday, just as they would have if the Notice or Rescission was dated properly - the Complaint failed to account for Saturday as a business day. The only effect of the backdated Notice of Rescission was that Ms. Fischer was fraudulently induced, under economic duress, to believe that she could not rescind the loan on Monday. Financial Freedom used this falsity to impose on Ms. Fischer an unfavorable escrow agreement with terms for a tax lien she was not responsible for. Financial Freedom then refused to abide by the escrow agreements and Ms. Fischer to obtain a Court Order to release the escrows.

For the aforementioned reasons it is respectfully submitted that the Default Judgment be vacated as a matter of justice.

*4 PROCEDURAL HISTORY

On July 22, 2008, Financial Freedom filed a Complaint for Declaratory Judgment in the Law Division of the Superior Court of New Jersey, Essex County Vicinage, instead of the Chancery Division where a complaint solely for Declaratory Judgment jurisdictionally belongs. The Affidavit of Service of Financial Freedom states that Ms. Fischer was served with the Complaint on July 30, 2008. On September 5, 2008, Randi Fischer, speaking on her mother Ms. Fischer's behalf asked for an extension and Financial Freedom consented to a thirty-day extension of time in which to file a responsive pleading. The Stipulation of Consent was filed with the Court on September 17, 2008.

In or about the middle of September of 2008, Ms. Fischer contacted Michael M. Rosenbaum, Esq., a member of the Budd Lerner Law Firm in Short Hills, New Jersey, where he is the chairperson of the commercial litigation department. *See Da60, Cert.* at ¶207; Certification of Michael M. Rosenbaum, Esq. ("*Rosenbaum Cert.*") Da309, at ¶¶s1-3. Ms. Fischer met with him in September 2008 in order to discuss and evaluate her rights, he told Ms. Fischer that he did not think that she would be able to appear pro se because of the complexity of the issues and because of her health. *See Da60, Def. Cert.* at ¶¶209-210; *Rosenbaum Cert.* Da309, at ¶¶s4-6. On September 23, 2008, Ms. Fischer retained Mr. Rosenbaum to represent her for the sole purpose of attempting to negotiate a settlement, because she *5 could not afford to retain him beyond negotiations. *See Def. Cert.* Da60 at ¶211; *Rosenbaum Cert.* Da309, at ¶7. One short settlement meeting did take place at Mr. Rosenbaum's office, but Ms. Fischer's personal participation took about five minutes, because the Appellee's attorneys did want to talk with parties present. *See Da60, Def. Cert.* at ¶212; *Da309, Rosenbaum Cert.* at ¶8. During the weeks of October 13 and October 20, 2008, Mr. Rosenbaum discussed settlement to no avail. *See Da60, Def. Cert.* at ¶¶s217-218; *Da309, Rosenbaum Cert.* at 511. Unable to obtain settlement, Mr. Rosenbaum advised Ms. Fischer that she would have to provide a new retainer, but Ms. Fischer's dire financial situation made her unable to. *See Da60, Def. Cert.* at ¶¶219-220; *Da309, Rosenbaum Cert.* at ¶¶s12-13. Fischer was now without counsel, and unable to appear pro se. *See Da309, Def. Cert.* at ¶223. On November 6, 2008, Financial Freedom entered Default against Ms. Fischer, and on February 4, 2009, filed a Motion for Entry of Default Judgment returnable February 20, 2010.

Because Ms. Fischer was too ill to do so on her own, Ms. Fischer's daughter wrote three letters to the Honorable Eugene J. Codey, Jr., P.J.S.C. to inform the Court of Ms. Fischer's serious medical conditions, to seek an adjournment of the Motion for Default Judgment and to inform the Court of her efforts to obtain counsel. *See Da60, Def. Cert.* at ¶228. Ms. Fischer's daughter's first two letters, dated December 4, 2008 and *6 February 13, 2009, attached letters by two of Ms. Fischer's treating physicians, and a document stating that she was having eye surgery on February 18, 2009 at New York Presbyterian Hospital/Weill Cornell Medical Center performed by Kimberly Sippel, M.D., an Assistant Professor of Ophthalmology. *See Da60, Id.* at ¶9. The November 19, 2008 letter sent William Richardson, M.D. to Judge Codey about Ms. Fischer's serious medical condition concluded with the following statement:

“The stress of the current situation is making it more difficult to control her medical condition. In consequence, Annette Fischer is not medically able at this time to participate in any legal proceedings until she is medically cleared by both Dr. Sarah Kaplan and myself. If the court would find it helpful, I am willing to provide periodic updates on Annette Fischer's medical condition”

See Id. at 510. Sarah Kaplan, M.D., an Assistant Professor of Cardiology at New York Presbyterian Hospital/Weill Cornell Medical Center wrote a letter to Judge Codey on November 14, 2008 about Ms. Fischer's serious medical condition and concluded the letter with the following statement:

“Because of her chronic symptomatic cardiac conditions have left her weak and debilitated, it would be extremely difficult for her to safely participate in legal proceedings.”

See Id. at ¶11. The third letter from Ms. Fischer's daughter to Judge Codey, dated February 17, 2009, also informed the Court about her medical condition as grounds for seeking an adjournment. *See Def. Cert.* at ¶9. The letter indicated that Ms. Fischer needed to receive medical care and prepare for surgery at New York Presbyterian Hospital/Weill Cornell Medical *7 Center, would be unable to respond to the application for default judgment, and also responded to Plaintiff's allegations that Ms. Fischer could obtain counsel. *See Da60a, Def. Cert.* at ¶229. The Honorable Eugene J. Codey, Jr., Judge for the Essex County Superior Court, however, refused to grant an adjournment and issued the decision of Default Judgment on February 20, 2009. *See Da60, Id.* at ¶230.

In or about September of 2009, Ms. Fischer retained new counsel, Kenneth Rosellini, Esq., who agreed to provide representation to her on a contingency basis in this case, something no other attorney had afforded her. *See Da60, Id.* at ¶233. Ms. Fischer attempted to obtain the consent of Financial Freedom to vacate the default judgment, but was refused. Time was now required for Ms. Fischer' new counsel (who, *inter alia*, was on trial in Superior Court at the end of September and beginning of October, and then again at the end of November and beginning of December) to become thoroughly familiar with the file, to spend time with Ms. Fischer, despite her health condition, to investigate the facts of the case, and to prepare a motion to vacate default judgment and leave to file a counterclaim.

On February 19, 2010, a Motion to Vacate Default Judgment and for Leave to File a Counterclaim was filed with the Court by Ms. Fischer's new counsel. Financial Freedom requested an extension of time to answer the motion, something which was not *8 afforded to Ms. Fischer when the Motion for Entry of Default Judgment was made, and the Court granted an extension of time over Ms. Fischer's objection. On April 1, 2010, Judge Eugene J. Codey, Jr., J.S.C. filed an Order Denying Motion to Vacate Default Judgment and for Leave to File Counterclaim. The Court made the following conclusions in its Opinion from the Bench:

- 1) Despite all the medical documentation, there was no Excusable **Neglect**.
- 2) There was No Meritorious Defense:
 - a) Ms. Fischer did not put any rescission of the loan in writing, even though she still had time to do so.
 - b) Ms. Fischer does not indicate that she has funds to refund the mortgagee, though this is not a deciding factor.
- 3) There was no Extraordinary Circumstances.
- 4) There was no fraud on the Court.

On or about April 14, 2010 Ms. Fischer filed a Motion for Reconsideration for, *inter alia*, more specific findings of law and fact in the form of a written opinion. The Motion for Reconsideration, while reserving Ms. Fischer's rights as to all issues, focused on three. The first issue was the Court's finding that Ms. Fischer was somehow “medically able” to participate in the litigation at the time that the Default Judgment was entered into, even though no medical expert evidence of any kind was submitted

by the non-movants in support of this finding. The second issue was the Court's failure to articulate any findings of a legal basis in support of the relief that Financial Freedom obtained in its Default Judgment. The third issue was the Court's apparent finding that Ms. Fischer had failed to provide a notice of rescission and that *9 this was significant in the Court's decision not to vacate the Default Judgment, even though the three-year limitation on providing such a notice had not expired, and Ms. Fischer submitted a proposed counterclaim for rescission in the motion pending before the Court. To remove any doubts on this issue, Ms. Fischer served a timely Notice of Rescission on Financial Freedom while the motion for reconsideration was pending, and it was included in the motion record.

On April 30, 2010 Judge Codey, Jr. filed an Order Denying the Motion for Reconsideration, again failing to address, with any specificity, the basis for the Court's findings on these three issues, or to expand on the opinion which the Court gave from the bench. On May 11, 2010 Ms. Fischer filed a Notice of Appeal with a Case Information Statement, and on May 13, 2010 Ms. Fischer filed a Revised Case Information Statement.

STATEMENT OF FACTS

A. Defendant Fischer's Medical Condition

In order for the Court to fully understand both the excusable **neglect** that allowed the Default Judgment to be entered against her and the course of her conduct throughout the entire transaction and relevant litigation, it is necessary to know Ms. Fischer's serious medical conditions, as they permeate her every action and decision in this case. The Appellees, three corporations with large legal teams behind them, would have the Court consider this matter as if Ms. Fischer is so *10 healthy and headstrong that they are somehow the innocent victims in this litigation. The Court must mind the fact that the Appellees failed to submit a single expert medical opinion to support their view.

The Defendant, Annette Fischer, is an Eighty-One and a Half (81 1/2) year old woman who is still suffering from serious complications following her **cardiac valve** and bypass surgery, including heart rhythm abnormalities and mini-strokes. *See Certification of Annette Fischer* (hereinafter "*Def. Cert.*") Da60, at ¶¶s1-3. She suffers from advanced **coronary artery disease**, frequent chest pain, dizziness, severe **high blood pressure**, and has also suffered from multiple **strokes** for more than one year. *See Da60, Def. Cert.* at ¶¶s3-4. Her treating physicians have advised her that the combination of these conditions put her at risk to once again suffer **acute heart failure** as well as acute **myocardial infarction**. *See Id.* at ¶3. As recently the last week before this brief was filed she had another series of mini-strokes, and in January of 2010 she was taken by ambulance to Saint Barnabas Medical Center in Livingston, New Jersey suffering from a series of small **strokes** as well as a serious infection. *See Da60, Def. Cert.* at ¶4. Ms. Fischer also has had serious problems with her vision over the last year and a half. *See Da60, Def. Cert.* at ¶5. She has had two (2) eye surgeries over the last year as well at New York Presbyterian Hospital/Weill Cornell Hospital. *See Id.* at ¶5. *11 As a result she has had great difficulty reading and writing and cannot drive. *See Id.* at ¶5. Ms. Fischer also suffers with severe hearing loss in both ears. *See Id.* at ¶5.

Annette Fischer is under the care of several physicians for her serious cardiac and neurological conditions, as well as her vision problems and post-traumatic stress as a serious domestic violence victim. *See Id.* at ¶6. William Richardson, M.D. has treated her in coordination with her cardiologists and neurologists at New York Presbyterian Hospital/Weill Cornell Medical Center. *See Certification of William T. Richardson, M.D.* Dr. Richardson stated in a letter, addressed to the Judge Codey dated February 2, 2010, that:

"Annette Fischer has been under my care for several years. Ms. Fischer is an 81-year-old woman who is still recovering from **cardiac valve** surgery and bypass surgery implicated by subsequent heart rhythm abnormalities, frequent chest pain, dizziness and severe **high blood pressure**. The combination of these conditions has put her at risk to once again suffer life threatening **acute heart failure** as well as acute **myocardial infarction**."

Ms. Fischer has also suffered from multiple minor [strokes](#) for more than one year. As recently as three weeks ago Ms. Fischer was taken by ambulance to Saint Barnabas Medical Center in Livingston, New Jersey suffering from a series of small [strokes](#) as well as a serious infection.

In consequence, Annette Fischer has not been medically able to participate in any legal proceedings for nearly the last two years. Ms. Fischer's medications are continually being adjusted to deal with these issues and we are monitoring her closely.”

See Def. Cert. at ¶7. William T. Richardson, M.D. also submitted two certifications to the Court *See id.* Dr. Richardson advised Ms. Fischer that she was not medically safe to *12 participate in any litigation, especially pro se, for fear that she would suffer a heart attack and/or stroke. *See id.* That is how serious her condition was, most particularly during the period of November 2008 through March of 2009, which is when Financial Freedom obtained its Default Judgment. *See id.* Dr. Richardson believes this lawsuit with Financial Freedom was a significant factor contributing to the stress and anxiety she was dealing with that has negatively impacted her serious cardiac and neurological conditions. *See id.* It is therefore Dr. Richardson's considered medical opinion that Ms. Fischer's medical condition made it impossible for her to safely participate in any litigation for nearly the last two years. *See id.*

Ms. Fischer's treating Physician for her neurological condition and her mini-strokes, John J. Caronna, M.D., Vice Chairman of the Department of Neurology and Neurosciences at New York Presbyterian Hospital/Weill Cornell Medical Center and a Professor of Neurology at Weill Cornell Medical College, states in his letter for submission to the Court, dated March 25, 2010, that:

Annette Fischer is under my care for recurrent ministrokes related to her [heart disease](#) and [atrial fibrillation](#). The ministrokes are manifested by episodes of confusion and unresponsiveness. Therefore, she could not have appeared in court and represented herself because of her serious medical and neurological condition.

*13 Ms. Fischer's treating Physician for her vision, Kimberly Sippel, M.D., Assistant Professor of Ophthalmology at New York Presbyterian Hospital/Weill Cornell Medical Center, states in her letter for submission to the Court, dated February 2, 2010, that:

Our patient, Mrs. Annette Fischer has been a patient for the last 18 months. During this time she has had significant problems with her vision and has 2 eye surgeries performed on her. She remains under our care at this time.

See Id. at ¶8. Kimberly C. Sippel, M.D., also submitted a certification in further support of Ms. Fischer's assertion that she has excusable [neglect](#) in connection with the Default Judgment due to her medical condition. *See Da616, Certification of Kimberly C. Sippel, M.D.* (Dated April 13, 2010). Dr. Sippel treated Annette Fischer, an 81 year old woman, and performed two eye surgeries on her, one on February 18, 2009, which was two days before the subject Default Judgment was entered, and one on March 11, 2009. *See id.* Dr. Sippel found that Ms. Fischer had significant problems with her vision, most particularly between November 2008 and February 2009. *See id.* For several months following the two surgeries, Ms. Fischer had to use medication multiple times a day to help with the healing process. *See id.* These medications affected her vision while her eyes were healing. *See id.* Dr. Sippel continues to see Ms. Fischer as a patient and has needed to adjust her medications to help with the healing process. *See id.* It is, therefore, Dr. Sippel's *14 considered medical opinion that Annette Fischer was unable to participate in any litigation at that time the Default Judgment was entered because she was having great difficulty reading and writing. *See id.*

The Non-movants response to Ms. Fischer' medical evidence that she was unable to participate in the litigation in February of 2009 was to libel Ms. Fischer and her attorneys by arguing that she was able to litigate other matters during the relevant time period and was represented by the same law firm that represented her on the Motion to Vacate Default Judgment during that time frame. In fact, Ms. Fischer has not appeared physically in Court since March 2008, when she appeared in court in a wheelchair. The non-movants, in concert, provided copies of docket sheets to the Court in response to the Motion to Vacate Default Judgment as a proffer of evidence that Ms. Fischer had been represented by Counsel, and noted that the Law Firm that

represented Ms. Fischer appeared next to docket entries from over a year ago. What a cursory review of those docket sheets revealed, however, was that there is a glitch in the Court's computer system, so that once a Law Firm makes an appearance on behalf of a party, the Law Firm is automatically listed next to all entries filed for that party going back the beginning of the case, regardless of whether the Law Firm was in the case at that time or not. In addition, the non-movants were *15 parties to the relevant dockets and would have had personal knowledge of inaccuracy of the docket sheets.

B. Application for Reverse Mortgage with Financial Freedom

In December of 2006, Ms. Fischer was solicited by a representative of Financial Freedom Senior Funding Corporation ("Financial Freedom") to apply for a reverse mortgage to finance a consolidation of existing debts resulting from medical bills and debts that had been incurred due to actions of her former husband which were encumbering her home. *See Da60, Id.* at ¶¶17-19. The property in Short Hills has been Ms. Fischer's home for forty years. *See Id.* at ¶22. Ms. Fischer had and still has no pension, no savings or means of income outside, her then only \$844.00 per month from Social Security (which is now \$1024.00). *See Id.* at ¶25. It was Ms. Fischer's expectation that the net proceeds from the reverse mortgage would be her retirement savings, her only means of support, would pay for her medical bills and would satisfy personal loans from those who lent her money to survive. *See Id.* at ¶26. Ms. Fischer decided to use Deborah Factor, Esq. as her attorney for the closing on the reverse mortgage, since Ms. Factor had negotiated settlements on outstanding liens for her.

C. Approval of Closing Documents by Financial Freedom and Scheduling of the Reverse Mortgage Closing

Shortly before the closing it was calculated by Financial Freedom and Ms. Fischer that she would receive \$217,586.27 as the net proceeds from the loan. *See Def. Cert.* at ¶124. The *16 loan was scheduled to close in April 2007. *See Id.* at ¶27. On Wednesday, April 18, 2007, Ms. Fischer was informed in the evening by a phone call at 7:30 P.M., by the closing agent for Financial Freedom (a California based mortgage company operating on Pacific Coast Time), Dennis Bivona ("Bivona") Vice President of Sales for Heritage Abstract Company ("Heritage"), that he had just received word that the reverse mortgage was approved by Financial Freedom, the closing documents had been received and the closing could be scheduled as soon as Thursday, April 19, 2007. *See Id.* at ¶29. At that time, Ms. Fischer informed Bivona that she had to contact her attorney for the closing, Deborah Factor, Esq., who was in trial at the time, before she could confirm that she would be available on April 19 for the closing. *See Id.* at ¶30. At 8:05 P.M. that night, Ms. Fischer reached her attorney on her cell phone and the attorney informed her that she would be available for the closing on April 19, in her office, at 2:30 P.M. *See Da60, Def. Cert.* at ¶31. Ms. Fischer then called Bivona to inform him of this information. *See Da60, Def. Cert.* at ¶32. Bivona confirmed that he could appear at the closing at that time, and asked that Ms. Fischer e-mail him information as to the location of Ms. Factor's office, which she did at 11:09 P.M. *See Id.* at ¶33. Because Bivona confirmed the closing schedule and that Financial Freedom had approved the terms of the mortgage, Ms. Fischer believed she *17 would closing on a reverse mortgage the next day and netting the amount of \$217,586.27.

D. Financial Freedom, through its Agent Heritage, Reveals for the First Time Immediately Before the Closing that it Discovered a Federal Tax Lien that was in Ms. Fischer's Former Husband's Social Security Number, that Financial Freedom was asserting would have to be Paid as a Condition of the Closing on the Reverse Mortgage

One hour immediately prior to the scheduled closing, at 1:30 P.M. on April 19, 2007, Dennis Bivona, Financial Freedom's Closing Agent, disclosed to Ms. Fischer's attorney over the phone for the first time that there may be a Federal Tax Lien in the amount of \$111,571.81 that was not listed on the proposed HUD that was approved by Financial Freedom for the closing. *See Id.* at 534. During the entire period of preparation for the closing, from December of 2006 through the conveyance of the closing documents to Ms. Fischer and her attorney in April of 2007, the only Tax Liens which were revealed through the title search provided were two State Tax Liens which were caused to be attached to the home by actions of Ms. Fischer's former husband. *See Id.* at 537. This Federal Tax Lien, therefore, came as a complete surprise to Ms. Fischer.

Ms. Fischer, having become alarmed, arranged for a phone call between herself, her attorney and Bivona - with her daughter on the call. Bivona indicated on this call that he did not know anything about the lien until that day, despite the earlier title searches which were performed by Financial Freedom and Heritage. *See Id.* at 538. His explanation for this material *18 lien issue being raised minutes before the scheduled closing was that he had just “found” the Federal Tax Lien, and it would be included on the loan as a required pay-off. *See Id.* at ¶39.

E. Ms. Fischer Immediately Instructed Bivona that She would not Close on the Mortgage if Paying Off the Federal Tax Lien was a Condition of the Mortgage, a Position Ms. Fischer Never Waivered from, and Bivona Agreed that the Pay-Off of the Federal Tax Lien would not be a Condition of the Mortgage

Ms. Fischer's response to Bivona was that she did not want to close on the loan if she was not going to immediately receive the amount of \$217,586.27 in net proceeds from that loan once the loan funded. *See Id.* at ¶41. Ms. Fischer further indicated that because of the new requirement to pay the Federal Tax Lien that she was never aware of, she no longer wanted to go forward with the loan. *See Id.* at 542. The closing was therefore cancelled by Ms. Fischer, and all parties to the phone call hung up. *See Id.* at ¶43. Ms. Fischer was very upset and felt deceived and tricked by Bivona. *See Id.* at ¶44. Due to her serious heart condition and severe [high blood pressure](#), she began to feel ill; had difficulty breathing and her body was shaking, she had to take medication and needed to lie down. *See Id.* at 544. The medicine had the effect of making her drowsy. *See Id.* at ¶44. Approximately fifteen minutes later, Bivona then called her back; Ms. Fischer refused to speak to him, and he ended up speaking to Ms. Fischer's daughter. *See Id.* at ¶¶45-46.

*19 Bivona then said that the Federal Tax Lien would not be included. *See Id.* at ¶47. Bivona said it did not need to be included because the lien was attached to Ms. Fischer's former husband's social security number, not hers, and it was all a big misunderstanding. *See Id.* at ¶48. He then said a pay-off for the Federal Tax Lien was not necessary, and the loan could go forward. *See Id.* at ¶49. Because of this representation, Ms. Fischer decided to continue with the loan transaction that day with the understanding from Bivona and Financial Freedom that she would receive \$217,586.27.

F. The Reverse Mortgage closed on Thursday, April 19, 2007, with No Condition that the Federal Tax Lien would have to be Paid and with all Documents Prepared by Financial Freedom and/or Heritage-Dated by Financial Freedom and/or Heritage for the Date the Day Before the Closing Actually Took Place, Wednesday, April 18, 2007

Ms. Fischer's daughter agreed to drive her to the closing because it wasn't safe for her to drive while she had just taken her medication. *See Def. Cert.* at ¶52. Ms. Fischer was provided a HUD document when she arrived at the closing on Thursday, April 19, 2007 which reflected her understanding of the distribution of the proceeds of the loan; and which did not include the alleged \$111,571.81 Federal Tax Lien. *See Id.* at ¶53. As Ms. Fischer's health was poor at the time of the closing and she was on prescription medication that impaired her ability to function, Ms. Fischer relied on Bivona and her attorney to explain to her what was in the HUD Settlement Statement and the closing documents. *See Id.* at 5154. Bivona *20 instructed her that she had to sign the closing documents quickly because he had three other closings to attend on that day. *See Id.* at ¶55.

Ms. Fischer signed these documents where she was instructed, but did not notice or know that they were dated in Bivona's handwriting for the day before the closing took place. *See Id.* at ¶56. Dating the closing documents this way, as Ms. Fischer later learned misled her into believing her Right of Rescission expired on Saturday, April 21, 2007 at Midnight, instead of Monday, April 23, 2007 at Midnight, as it should have. Ms. Fischer and her attorney never gave any instruction to anyone that the loan documents should be backdated so that she could receive the proceeds to pay the judgment-lien prior to the Sheriff's Sale. *See Id.* at ¶57.

In its application for Default Judgment, Financial Freedom relied on false self-serving hearsay statements from Heritage that Ms. Fischer somehow convinced Heritage Abstract's agent, Bivona, to conspire against Financial Freedom. In papers submitted on Ms. Fischer's Motion to Vacate Default Judgment, which Heritage Abstract joined Financial Freedom in opposing, and at oral argument, this argument is mysteriously absent. Instead, Heritage Abstract now argues, with Financial Freedom's tacit

approval, that the closing documents were created the day before the actual closing and made no mention of backdating the documents at the closing. But, in fact, Bivona, Plaintiff's *21 closing agent, did prepare and date the subject closing documents for the reverse mortgage and brought them to the closing for Ms. Fischer's signature under the authority of Financial Freedom. *See Id.* at ¶58. In fact, Bivona also signed the HUD as Plaintiff's closing agent, under the certification that:

To the best of my knowledge, the HUD-1 Settlement Statement which I have prepared is a true and accurate account of the funds which were received, and have been or will be disbursed, by the undersigned as part of the settlement of this transaction.

See Id. at ¶59. In fact, the Federal Tax Lien was not included on any of the closing documents that were prepared and/or I executed that day, including the HUD that Bivona also signed. *See Id.* at ¶60. In fact, Dennis Bivona said at the closing that Heritage decided not to include this \$111,571.81 Federal Tax Lien on the HUD because the lien was attached to the Social Security number of Ms. Fischer's former husband, Harold Fischer, whom Defendant had been divorced from in 2006 and whom had not lived in the home since January 1995, after being removed by the police for domestic violence. *See Id.* at 161. In fact, Bivona notarized the closing documents for the date of April 18, 2007, despite the fact the closing took place on April 19, 2007. *See Def. Cert.* at ¶62. Ms. Fischer signed the closing documents where she was instructed, but did not notice or know that they were dated in Bivona's handwriting for the day before the closing took place. *See Def. Cert.* at ¶63.

*22 Bivona indicated at the closing that he was going to overnight the signed closing documents to Financial Freedom via Federal Express. *See Def. Cert.* at ¶65. What is irrefutable, however, is that when Ms. Fischer left the closing it was clear from the closing documents that the Federal Tax Lien was NOT included in the loan. *See Def. Cert.* at ¶64.

G. After the Closing on the Reverse Mortgage on Thursday, April 19, 2007, with No Condition that the Federal Tax Lien would be Paid from the Closing Proceeds, Financial Freedom Refused to Honor its Closing Documents and Instead Continued to Perfect its Security Interest against Ms. Fischer's Home While Refusing to Release any of the \$217,586.27 due Ms. Fischer unless She Agreed to Pay the Federal Tax Lien

On the morning of April 20, 2007, the day after the closing, Ms. Fischer and her daughter received a disturbing call from Bivona at her home. *See Da60, Def. Cert.* at 166. Despite the fact that the loan documents she signed did not include the Federal Tax Lien, Bivona indicated that the Federal Tax Lien had to be paid as part of the loan. *See Id.* at ¶67. As stated supra, the only reason Ms. Fischer had agreed to proceed with the closing was because Bivona had assured her the Federal Tax Lien would not be included. *See id.* at 168 She then told Bivona they had already resolved the issue regarding the Federal Tax Lien and that he had agreed not to include it in the loan. *See Id.* at ¶69. She then immediately told Bivona she wanted the loan cancelled. *See Id.* at 170.

Bivona responded with, "No, don't do that, I'll call you back. Let me speak to some people here. Do not cancel the loan. *23 Wait for me to call you back." *See Id.* at ¶71. Ms. Fischer then called her attorney and told her that she had the loan cancelled because Bivona told her that there was going to be a pay-off for the Federal Tax Lien. *See Id.* at 5172. Ms. Factor expressed to Ms. Fischer that she was upset at Heritage's apparent attempt to subvert the agreement in the loan closing documents. *See Def. Cert.* at ¶73. Deborah Factor, Esq. then spoke to Bivona to find out why Heritage was again trying to put in the Federal Tax Lien pay-off as part of the loan, when Heritage had already agreed as an inducement for her to sign the closing documents that it would not be put in. *See Da60a, Def. Cert.* at ¶74. The documents Ms. Fischer signed at the closing never had the Federal Tax Lien listed or accounted for. *See Id.* at ¶74. Dennis Bivona then called Ms. Fischer back, later that day, and said she would not have to cancel the loan because she would get the \$217,586.27 she had agreed to and signed for at the closing. *See Id.* at ¶75. He further said that he could make this representation now because Heritage had received approval from their underwriter (Defendant, First American Title Insurance Company "First American"). *See Id.* at ¶76.

This was now the second time in two days (less than 24 hours) that Bivona had told Ms. Fischer's attorney, her daughter and her that the Federal Tax Lien (which she was not aware of and that he claims he had only discovered the day of the closing despite what Ms. Fischer later learned) would be included in the *24 loan documents, *and then only after she had told him*

she wanted the loan cancelled if that were a condition of the loan, did he find a reason that the Federal Tax Lien did not have to be included so that Ms. Fischer would proceed with the loan. *See Id.* at ¶77.

In order to memorialize her concerns that Financial Freedom may not be honoring the agreements made at the closing, Deborah Factor, Esq. wrote a letter, dated April 20, 2007, to Bivona indicating that Financial Freedom and Heritage were obligated to continue with the loan without a Federal Lien Escrow because that was what was agreed to at the closing. *See Def. Cert.* at ¶78. As set forth in Ms. Factor's the letter, Ms. Fischer's expectation in closing on the loan was to receive net proceeds in the amount of a \$217,586.27 payout at the closing. *See Id.* at ¶79. The letter states in pertinent part:

This letter is in response to our conversation today regarding your "new discovery" of a federal tax lien that was not listed on the HUD you prepared that my client signed yesterday. My conversations with you *before* my client signed the HUD was that you were aware of this federal lien, but you decided to ignore it since it showed Harold Fischer's social security number and information. Since it subsequently was not identified on the HUD, I concluded that you, in fact, did decide *not* to pursue it. In fact, you had my client Annette, and her daughter Randi, verify that the social security number was in fact Harold Fischer's. At no time did you attempt to include the alleged federal lien in the HUD... .

At this time, my client intends to proceed with this loan, as documented in the HUD... .

Pursuant to the HUD, my client is to receive \$217,586.27 upon the funding of this loan, and she is expecting nothing less. If you have any issue regarding the liens [the State *25 of New Jersey] and the funds to be received by my client, please contact me immediately....

See Id. at ¶79. Bivona even sent an e-mail at 4:35 P.M., in response to a request by Ms. Fischer by e-mail at 4:27 P.M., that the full \$217,586.27 would be released from the funded loan on Monday, April 23, 2007. *See Id.* at ¶80. She sent the e-mail because she felt at this point she could no longer trust the representations that Bivona was making, unless she had written confirmation. *See Id.* at ¶81. This e-mail correspondence stated in pertinent part:

Dennis:

Please confirm by return e-mail that \$217,000 will be released in full as per the closing documents I signed yesterday that you submitted to Financial Freedom.

Also please confirm that the money will be wired Monday, April 23, 2007, to arrive in the PNC Bank account I designated by 3:00 PM, the close of the banking day at PNC Bank.

I await your reply. Once I receive it, I will sign and send back via fax the Escrow Agreement.

Sincerely, Annette Fischer

Response from Bivona:

"We will be releasing the sum of 217,000 to u on Monday the 23."

Dennis Bivona *Vice President - Sales* Heritage Abstract Company

See Def. Cert. at ¶82.

It is important to note that the April 20, 2007 e-mail from Ms. Fischer to Bivona only referred to an escrow agreement for the State of New Jersey Tax Liens totaling \$141,194.91, as listed on line 211 in the HUD Settlement Statement that *26 Financial

Freedom approved and that Ms. Fischer signed on April 19, 2007. *See Def. Cert.* at ¶83. As part of the closing on the reverse mortgage, Ms. Fischer had agreed to monies being held in escrow by Heritage while the negotiations took place to resolve the State Tax Liens on her home belonging to her former husband. *See Id.* at ¶84. In fact, on April 20, 2007, Heritage sent Ms. Fischer a proposed escrow agreement for the two subject State Tax Liens, which totaled \$14,194.00. Ms. Fischer did not cancel the loan on or before Midnight of Saturday, April 21, 2007, which was the date Bivona had told her that her right of rescission expired, because she had received a representation in writing from Bivona on April 20, 2007 at 4:35 P.M. that the Federal Tax Lien was certainly not included in the loan (as the loan documents reflected that she signed at the closing and that he said he sent that same day via Federal Express to Financial Freedom). *See Id.* at ¶86.

H. On Monday, April 23, 2007, Financial Freedom Refused to Honor its Obligations under the Closing Documents unless Ms. Fischer Agreed to Sign New Escrow Agreements that Required Her to Indemnify Heritage and First American Title Insurance for all Attorneys Fees and Costs should She Contest them In Court, and Falsely Asserted to Ms. Fischer that She had No Choice but to Sign Because the Mortgage was Now a Lien on Her Property and Her Right of Rescission had Expired, when In Fact the Right of Rescission had not Expired

On Monday April 23, 2007, despite the fact that Dennis Bivona and Heritage Abstract promised Ms. Fischer in writing on Friday April 20, 2007, the day after the closing, that she would receive the \$217,586.27 from the loan on April 23, 2007 (the *27 amount stated on the HUD Settlement Statement that she had signed and that Financial Freedom approved to close the loan), Dennis Bivona called her and told her that his company, Heritage Abstract, was going to hold back \$111,571.87 for the alleged Federal Tax Lien that the Title Company found with her former husband's Social Security Number, as mentioned above. *See Id.* at ¶87. This was the very Federal Tax Lien that the Title Company told Ms. Fischer, her attorney, her accountants and her daughter, that they were not going to include and did not include in the loan documents that Ms. Fischer signed. *See Id.* at ¶88. This Federal Tax Lien was known by the Title Company before the closing, and was NOT included in the HUD Settlement Statement and/or any other documents that Financial Freedom received from this very same Title Company and gave approval for the loan to close based on those documents, which were the ones she signed. *See Id.* at ¶89. This action by Heritage was in direct contradiction to what was sent to Financial Freedom and what was included in the HUD Settlement Statement. *See Id.* at ¶90. It was a direct contradiction to what Bivona signed on the HUD as Plaintiff's closing agent, under the certification that:

To the best of my knowledge, the HUD-1 Settlement Statement which I have prepared is a true and accurate account of the funds which were received, and have been or will be disbursed, by the undersigned as part of the settlement of this transaction.

See Def. Cert. at ¶90. It is also a complete contradiction to what was stated in the e-mail Ms. Fischer received from Heritage *28 Abstract on April 20, 2007, the day after the closing. *See Id.* at ¶91.

Ms. Fischer, her attorney and her daughter responded by telling Bivona that Financial Freedom had already approved the loan documents at the closing that she had signed and agreed to, and that, as Bivona had confirmed verbally and in writing since then, there was no requirement in the closing documents that she had to pay for the Federal Tax Lien, or she never would have come to the closing. *See Id.* Ms. Fischer then told Bivona that she would not agree to this condition and that she would have the loan cancelled if paying the Federal Tax Lien were somehow a new condition of the loan funding, a lien not on any of the documents she signed at the closing. *See Id.* at ¶94.

Bivona then told Ms. Fischer that she had no right to cancel the loan now, the mortgage was already in effect and Financial Freedom had a lien on her house, and there was nothing Ms. Fischer could do to change that. *See Def. Cert.* at ¶91. Bivona went on to state that Ms. Fischer's right to rescind the loan had expired on Saturday, April 21, 2007 at Midnight, and that Ms. Fischer therefore had no choice but to go forward with the loan with an escrow for the \$111,571.81 Federal Tax Lien on Plaintiff, Financial Freedom's terms. *See Id.* at ¶92. In fact, if the rescission period had been properly calculated under the Truth and Lending Act from the date of closing, April 19, 2007, instead of from the date of April 18, 2007 that Bivona had *29 fraudulently set and notarized on the closing documents in his own handwriting, Ms. Fischer actually had until Midnight on Monday, April 24, 2007 to rescind the loan. *See Def. Cert.* at ¶98.

Then, on the afternoon of April 23, 2007, when Ms. Fischer was scheduled to receive the \$217,586.27 in proceeds from the loan, for the first time, written correspondence was sent by Heritage, from Stephen Wallace, to Deborah Factor, Esq., stating that Ms. Fischer would be “required” to place \$111,571.87 in an escrow account to cover the Federal Tax Lien and that she would not receive any proceeds from the loan unless she agreed to this requirement that was not part of the closing documents (that she signed on April 19, 2007 and that were sent to Financial Freedom that same day via Federal Express). *See Def. Cert.* at ¶98. Financial Freedom, through its agent Heritage, was now requiring an escrow agreement for the Federal Tax Lien and a new separate escrow agreement for the State Tax Liens. *See Id.* at ¶100.

On April 23, 2007 a letter was sent from Ms. Factor to Bivona demanding release of the proceeds from the loan. This letter states in pertinent part:

Even though you have indicated that your title company did not prepare the HUD, your company served as the settlement agent and approved and closed this transaction, without any reference to this Federal Tax Lien. Consequentially, satisfying this lien is not a condition to funding this loan....

As you know, after signing the HUD and the other loan papers, my client and I notified many of the lien holders to inform them that their liens would soon be satisfied. *30 The judgment lien held by Craner, Satkin & Scheer, PA is set to be sold tomorrow, April 24, 2007 at 1:00 p.m. We anticipated having the funds in time to stop the Sheriff's Sale....

See Id. at ¶99. What's more, Heritage revised the language of the escrow agreement Ms. Fischer had agreed to for the State Tax Liens which was different than the one that she had agreed to on April 20, 2007, during the rescission period. *See Id.* at ¶101. If what Heritage Abstract did by unethically and improperly holding back the \$111,571.87 (that was never included in the HUD Settlement Statement) wasn't devastating enough, they then drafted two escrow agreements that included outrageous indemnification clauses. *See Id.* at ¶102. The clauses required that Ms. Fischer give up all of her rights to sue the Title Company Heritage Abstract Company, and their underwriter, First American, and required that if she did sue she would be responsible for all of their costs, legal fees, expenses, etc. *See Id. Cert.* at ¶103. The new escrow agreements both required that Ms. Fischer would be responsible for indemnification to Heritage and First American, where the previous State Tax Lien escrow agreement had no such provision. *See Id.* at ¶104.

Ms. Fischer refused on Monday, April 23, 2007 to execute new escrow agreements, because she had already told Heritage that the loan should be cancelled if she did not receive the \$217,586.27 from the reverse mortgage loan when it funded, and she did not believe that the Federal Tax Lien was a valid lien *31 against her personally, so that no escrow was required. *See Id.* at ¶105. *Again, the Federal Tax Lien was never part of the closing documents on the loan that she signed. See Id. at ¶105. Again, this was in direct contradiction to what Dennis Bivona signed on the HUD as Plaintiff's closing agent, under the certification that:*

To the best of my knowledge, the HUD-1 Settlement Statement which I have prepared is a true and accurate account of the funds which were received, and have been or will be disbursed, by the undersigned as part of the settlement of this transaction.

See Id. at ¶105. She also refused on Monday, April 23, 2007 to execute new escrow agreements because the new agreements had new provisions requiring her to indemnify Heritage and First American Title Insurance Company that were not in the previous escrow agreement she had agreed to. *See Id.* at ¶106.

I. Ms. Fischer Signed the New Escrow Agreements, Including the One for the Federal Tax Lien, Under Duress, Because Financial Freedom's Bad Faith Refusal to Honor the Terms of the Closing Documents did not Leave Her with Enough Time to Take Alternative Action with Respect to the Pending Sheriff's Sale on the Judgment-Lien

After Ms. Fischer refused to sign the new escrow agreements, Financial Freedom then improperly refused to release the proceeds from the loan on Monday, April 23, 2007, despite the fact Financial Freedom asserted that its mortgage was now perfected. *See*

Id. at ¶107. Ms. Fischer now felt completely deceived by Heritage and Financial Freedom. *See Id.* at ¶1108. She was then told that she was obligated to proceed with the reverse mortgage agreement under terms that were not part of the *32 signed loan agreement, and that Ms. Fischer, her attorney, and her daughter had specifically instructed Heritage and Financial Freedom she would not agree to under any circumstances. *See Def. Cert.* at ¶109. She was told, by Financial Freedom through Heritage, that Financial Freedom had already funded the loan and that Financial Freedom already had a perfected mortgage on her home. *See Id.* at ¶110. While it is Ms. Fischer's understanding that Heritage has claimed in filings with the Court that it caused a check to be delivered to the judgment creditor on Monday, April 23, 2007 to satisfy the judgment lien and somehow "save" her home, in fact, the judgment creditor did not accept this check as immediately available funds and did not agree on April 23, 2007 to cancel or adjourn the foreclosure sale. *See Id.* at ¶111.

On Tuesday, April 24, 2007, Financial Freedom, through its agent Heritage, was still refusing to release any funds to Ms. Fischer under which to satisfy the judgment-lien. *See Def. Cert.* at ¶1112. Heritage and Financial Freedom both knew that the Sheriff's Sale was scheduled within approximately three hours, and Heritage and Financial Freedom both knew that. *See Id.* at ¶¶1113-114. Ms. Fischer then was not prepared to proceed with the other options she had to deal with the Sheriff's Sale due to a lack of available time (because Financial Freedom had induced her into believing she would have the funds to satisfy the judgment lien from the mortgage) to take any action to *33 adjourn or stay the Sheriff's Sale because Ms. Fischer had reasonably believed that the loan funding would pay for the Sheriff's Sale. *See Id.* at ¶115. Her only feasible option to prevent the Sheriff's Sale from occurring at that time and being told that the mortgage was already on her home, when she felt duped, terrified and confused, was to comply with Heritage's demand to sign the escrow agreements with the objectionable indemnification clauses in order to receive the funds to satisfy the judgment lien. *See Id.* at ¶116. For the aforementioned reasons, she signed the escrow agreements under economic and emotional duress. *See Id.* at 5117.

Ms. Fischer signed the escrow agreement under duress on Tuesday, April 24, 2007, so that Financial Freedom would finally release the monies from the loan to her by way of a wire transfer and she would be able to satisfy the judgment-lien that was scheduled for a Sheriff's Sale. *See Def. Cert.* at ¶118. The result was that she received \$106,014.40 instead of the \$217,586.27. The \$217,586.27 is what she agreed to, was the only number specified on the loan closing documents and which, till this day, is the only figure which appears on the HUD. *See Id.* at ¶119. Till this day, no Federal Tax Lien is listed on the HUD statement she signed and that Financial Freedom, upon information and belief, has in their files. *See Id.* at ¶119. Because her attorney, Ms. Factor, represented to the judgment-creditor that the funds to satisfy the lien had been transferred *34 into her trust account by way of a wire transfer on April 24, 2007, the judgment creditor agreed to adjourn the foreclosure sale until the funds cleared into their account. *See Id.* at ¶120. The judgment creditor adjourned the foreclosure sale and then canceled the sale once it had actually received the funds. *See Id.* at ¶121.

J. After Ms. Fischer Signed the Escrow Agreements Under Duress, Financial Freedom and Heritage Continued to Maliciously Deny Ms. Fischer Her Rights Under the Closing Documents of April 19, 2010 and Refused to Release the Funds from the Escrow Agreements in Accordance with their Express Terms - Inflicting Distress Upon Ms. Fischer, Denying Her Rights Under the Truth and Lending Act, and Causing Her to Incur Substantial Attorneys Fees and Costs

1). Ms. Fischer Attempted to Obtain Redress through Communications with Heritage and Financial Freedom, to No Avail

On May 15, 2007, Ms. Fischer's daughter, Randi Fischer, called Dennis Bivona at Heritage Abstract on her mother's behalf requesting a copy of the loan documents including the HUD Settlement Statement that he submitted to Financial Freedom showing that, after the closing, she did not receive the \$217,586.27 that she was promised by Heritage and Financial Freedom and that she signed for at the closing. *See Id.* at 5143. Ms. Fischer asked her daughter to call because she has a serious heart condition, and every time she has spoken with Dennis Bivona she gets very upset because he has repeatedly made fraudulent statements inducing her to take actions she would not have taken otherwise. *See Id.* at 5143. Mr. Bivona indicated to her that, in fact, no amended HUD Settlement Statement had been *35 created or submitted to Financial Freedom. *See Id.* at ¶144.

Bivona said that the only HUD Settlement Statement that he had in their files is the one that Financial Freedom approved and that Ms. Fischer had signed. *See Id.* at ¶144. Ms. Fischer's daughter then told him that the HUD Settlement Statement is not accurate, as her mother never received \$217,586.27 when the loan funded as Financial Freedom approved. *See Id.* at ¶145. In fact, when the loan was funded, the Title Company withheld \$111,571.81 and Ms. Fischer only received \$106,014.40 instead of the \$217,586.27 that she expected to receive as per the loan documents that she signed and that Bivona notarized. *See Id.* at ¶145.

Dennis Bivona then told Ms. Fischer's daughter in that same May 15, 2007 phone call that he could “make up” an amended HUD Settlement Statement if that is what her mother wanted for her files and e-mail it to her. *See Id.* at ¶1146. Ms. Fischer's daughter then asked what about Financial Freedom's files, and Dennis Bivona said that Financial Freedom did not need one and he was not going to give Financial Freedom one. *See Def. Cert.* at ¶146. Dennis Bivona then manually changed the HUD Settlement Report on May 15, 2007, twenty six (26) days after Ms. Fischer signed the HUD Settlement Statement approved by Financial Freedom, stating that she was to receive \$217,586.27 and changed the numbers using a felt tip pen. *See Id.* at ¶147. The handwritten changes on the HUD Statement are Dennis Bivona's and *36 the initials “DB” are his. *See Id.* at ¶147. It is clear that Bivona crossed out the \$217,586.17 payout amount to me on the HUD Statement that Financial Freedom approved for the closing and manually changed it to \$106,014.40. *See Id.* at ¶148. He then further changed the HUD Statement by manually adding in the words “Federal Taxes” and a corresponding amount of \$111,571.81 on a blank line in the area where the other items are listed that were to be paid out. *See Id.* at ¶148. As stated above, the Federal Tax Lien was never on the HUD Statement or any other part of the loan documents Ms. Fischer signed at the closing and that Bivona notarized. *See Id.* at ¶148.

In fact, this Federal Lien never appeared on any fully executed HUD Settlement Statement with respect to the subject reverse mortgage. *See Id.* at ¶149. Ms. Fischer would have never signed the loan documents if the Federal Tax Lien was included and was only going to receive a payout of \$106,014.40 when the loan funded. *See Id.* at ¶150. Ms. Fischer and her daughter were truly shocked and disturbed following her May 15, 2007 conversation with Bivona, and then receiving the manually “doctored” HUD Statement from Bivona following that call. *See Id.* at ¶151. Ms. Fischer and her daughter felt that Bivona, Financial Freedom's agent was not honorable and not trustworthy based upon all of his actions. *See Id.* at ¶152. After learning from Bivona on May 15, 2007, twenty six days (26) days after the closing took place, that neither Heritage nor Financial Freedom *37 had corrected the loan documents to reflect the actual funding of the loan, what liens were paid and the amount of money that was paid to Ms. Fischer was startling. *See Id.* at ¶152. Bivona said the loan documents did not have to be changed despite the fact that the signed loan documents falsely showed that Ms. Fischer received \$217,586.17 when the loan funded. *See Id.* at ¶153. Bivona said that it was not necessary for Heritage and Financial Freedom to redo/correct the loan documents after the loan funded despite the fact that they withheld \$111,571.81 for a Federal Tax Lien that was not included on any of the loan documents that Ms. Fischer signed at the closing and that Bivona notarized on behalf of Financial Freedom. *See Id.* at ¶154.

On May 22, 2007, one week following the call Ms. Fischer's daughter had with Bivona, her daughter then called Heritage and spoke with the owner Michael Harris, Esq. for nearly two hours. *See Def. Cert.* at ¶155. Ms. Fischer was on the call for a period of time as well. *See Id.* at ¶155. They taped the call because they no longer believed they could trust what anyone at Heritage said and did. *See Id.* at ¶155. Ms. Fischer's daughter told Michael Harris that they were shocked that Heritage and Financial Freedom falsely backdated the loan documents and denied Ms. Fischer's Right of Rescission. *See Id.* at ¶156. They also told him that the \$111,571.81 must be released to Ms. Fischer because she was tricked and deceived. *See Id.* at ¶157. *38 There was no Federal Tax Lien on the loan documents Ms. Fischer signed. *See Id.* at ¶157.

Ms. Fischer's daughter explained to him that they could not understand why the loan documents were not redone showing the Federal Tax Lien for \$111,571.81 that Heritage and Financial Freedom withheld in direct contradiction to the loan documents Ms. Fischer signed and the fact that she never received \$217,586.17 when the loan funded, but instead only received \$106,014.40. *See Id.* at ¶158. Michael Harris, Esq., the owner and CEO of Heritage Abstract, Financial Freedom's agent made some truly disturbing statements during this taped phone call including:

- that Financial Freedom was “fully aware of the Federal Tax Lien during the entire recession period.”

• that Financial Freedom said that they did not need to include and list the Federal Tax Lien that you were fully aware of because “they [Financial Freedom] did not want to redo their documents.”

See Def. Cert. at ¶159. Michael Harris refused to release the funds for the Federal Tax Lien being held in escrow. *See Id.* at ¶160. On May 24, 2007, two days after speaking with Michael Harris, Ms. Fischer's daughter called Financial Freedom in California and asked to speak with Ms. Michele Minier, the CEO of Financial Freedom. *See Id.* at ¶161. She wanted Ms. Minier to know what happened to her mother and her loan with Financial Freedom. *See Id.* at ¶161. Ms. Fischer's daughter spoke with her assistant and she told her what had happened, and she said *39 that someone would call them back. *See Id.* at ¶161. A short time later, Michelle Delorier from IndyMac Bank (the then parent Company of Financial Freedom) and Kelly Kessman from Financial Freedom called. *See Id.* at ¶162. Ms. Fischer and her daughter spoke with them and explained what happened with regard to the loan documents being falsely backdated by their agent, that the loan documents were not accurate and Ms. Fischer did not get the amount of money she signed for at the closing. *See Id.* at ¶162. They recorded this call because they no longer trusted what anyone at Financial Freedom and Heritage. *See Id.* at ¶162.

On May 24, 2007 and May 25, 2007, Ms. Fischer's daughter sent them an e-mail and several faxes which contained more than 45 pages further explaining how her mother had been misled and deceived with regard to this loan. *See Def. Cert.* at ¶1163. She also attached documents to show them what occurred. *See Id.* at ¶163. In the May 24, 2007 e-mail, Ms. Fischer specifically stated to Financial Freedom that any representation that the closing took place on April 18, 2007 (as was indicated on the HUD Settlement Statement) was fraud. *See Id.* at ¶164. On May 25, 2007, another call took place with Financial Freedom which was also recorded. *See Id.* at ¶165. On May 29, 2007, Ms. Fischer's daughter sent Financial Freedom another fax which was 20 pages and contained additional documentation. In her May 29, 2007 Letter, she only refers to an April 19, 2007 closing; at no time did Ms. Fischer instruct anyone or attempt to mislead *40 anyone into believing that the closing took place on April 18, 2007. On June 4, 2007, June 8, 2007 and June 26, 2007 Ms. Fischer's daughter sent additional letters and more documentation to Financial Freedom. *See Id.* at 5166. This correspondence was addressed to Sandy Thomas, The Vice President of Compliance for Financial Freedom, who Ms. Fischer and her daughter spoke with numerous times, and recorded because they did not trust her. *See Id.* at ¶167. Also copied on the correspondence was Michael W. Perry - Chairman and CEO of IndyMac Bank, Jim Mahoney - Chairman of Financial Freedom and Michele Minier - CEO of Financial Freedom. *See Def. Cert.* at ¶167. *As the evidence, including letter correspondence and numerous taped phone conversations show, it was Ms. Fischer who notified Financial Freedom about the fact that Bivona had backdated the closing documents. See Def. Cert. at ¶168.* Financial Freedom has since falsely asserted that it had no knowledge about the closing issues until it learned of them in June. *See Def. Cert.* at ¶169.

*In fact, Michael Harris, the owner of Heritage Abstract, clearly stated (in a conversation which Ms. Fischer has on tape) that Financial Freedom was “fully aware of the Federal Tax Lien during the entire recession period.” See Def. Cert. at ¶170. He also stated, that Financial Freedom said that it did not need to include and list the Federal Tax Lien on the HUD because “they [Financial Freedom] did not want to redo their documents.” *41 See Id. at ¶170. Harris also confirmed that that the loan documents weren't accurate, and that Financial Freedom didn't care that the loan documents weren't accurate when the loan was funded. See Id. at ¶155. Financial freedom, therefore, not only knew about the issues concerning the closing before June from correspondence initiated by me, but, according to its agent Heritage, knew about the Federal Tax Lien issue during the entire rescission period back in April of 2007. See Def. Cert. at ¶171. In June 2007 Ms. Fischer, through her daughter, continued to write to Financial Freedom concerning the closing including and the revelation that Heritage knew about the Federal Tax Lien during the entire rescission period, and still received no redress. See Id. at ¶172.*

2). Ms. Fischer Attempted to Obtain Redress through Communications with Heritage and Financial Freedom, to No Avail

Instead of resolving the issues regarding Heritage's and Financial Freedom's improper conduct, in a letter dated October 8, 2007, Financial Freedom attempted to have Ms. Fischer give up her Right of Rescission under the Truth and Lending Act for no consideration. *See Id.* at ¶173. At the time Ms. Fischer was completely unable to read and respond to the letter, or even personally consult an attorney at that time. *See Id.* at ¶174. Ms. Fischer had just had [open-heart surgery](#), which lasted 7 1/2

hours and included having her aortic heart valve replaced and a bypass operation. *See Id.* at ¶175. She was 79 years old at *42 time. *See Id.* at ¶176. She suffered serious complications as a result of the surgery including but not limited to [pneumonia](#) and arterial fibrillation, which remains a serious complication. *See Id.* at ¶177. She was heavily medicated and in a very weakened state. *See Id.* at ¶178. In fact, Ms. Fischer's physician believes, as she does, that her health took a turn for the worse that past spring/summer as a result of the emotional distress from the lies and deceit surrounding this transaction. *See Id.* at ¶179.

*The October 8, 2007 letter from Financial Freedom to Ms. Fischer regarding the rescission period states that, "With this letter and the enclosed document, we are reopening the Right of Rescission period on your loan." See Id. at ¶180. New "Right of Rescission" documents, including a "Notice of Right to Cancel" were provided to Ms. Fischer which again attempted to improperly date the material events of the reverse mortgage loan transaction by indicating that: "The opening date of your account is October 15, 2007." See Id. at ¶181. Financial Freedom did not provide then, nor has it ever provided, any legal basis under which it could require that Ms. Fischer execute a new Right of Rescission in connection with the loan, particularly when the new Right of Rescission document contains a false opening date for the reverse mortgage account. As set forth supra, Ms. Fischer signed the closing documents on April 19, 2007 and the loan funded on April 23, 2007. See *43 Id. at 182. Because Financial Freedom was demanding that Ms. Fischer sign a false statement, and to allow further alteration of her rights under the loan documents without providing any compensation, Ms. Fischer did not sign the new Notice of Right to Cancel. See Id. at ¶183. In an October 18, 2007 letter Ms. Fischer's daughter responded to Financial Freedom's October 8, 2007 letter, stating that her mother had just had [open heart surgery](#) and was unable to respond to them. Ms. Fischer included in her letter questions about the October Notice of Rescission in order to obtain further explanation, and Financial Freedom never responded. See Id. at 189. In fact, Financial Freedom itself, in its motion papers for default judgment to deprive Ms. Fischer of her Right of Rescission admitted that:*

because there is no properly executed notice of right to recession, Annette Fischer may now technically rescind the loan at any time within the three-year period following the closing. *See 15 U.S.C.A 1635;12 C.F.R. 226.15(a)(3).*"

See Def. Cert. at ¶187.

3). Ms. Fischer was then Forced to Incur Additional Attorneys Fees Costs, and Distress, Because Financial Freedom and Heritage Refused to Provide Ms. Fischer with the Proceeds from the Loan as Agreed to, and then Refused to Release the Funds from the Escrow in Accordance with the Very Terms that They had Drawn Up and Forced Ms. Fischer to Sign Under Duress

Because Ms. Fischer received no redress by contacting Financial Freedom and Heritage on her own, and through her daughter, and at great hardship to her, Ms. Fischer retained a law firm, Poe and Freireich, P.A., to negotiate a reduction of *44 the Federal Tax Lien. *See Def. Cert. at ¶190.* Ms. Fischer was able to resolve the state tax lien by way of a settlement for \$28,142.50 on December 13, 2007. However, Financial Freedom, through Heritage, refused to release the monies she was entitled to from the escrow - as was express provided that it was obligated to do under the terms of the escrow agreement that it drafted and compelled Ms. Fischer to sign under duress. *See Id. at ¶191.*

On December 14, 2007, Michael Harris, Esq., the CEO & owner of Heritage Abstract Company refused to release the money that it was holding in escrow to Ms. in complete violation of the terms of the escrow agreement. Heritage alleged that it was acting at the direction of their underwriter, First American Title Insurance Company, despite the fact the escrow agreement was only between Heritage and Ms. Fischer, and despite the fact that Heritage was the only party in possession of the funds. *See Id. at ¶193.* Ms. Fischer had no relationship with First American Title Insurance Company and it had no right of decision under the escrow agreement to instruct anyone to withhold the funds. *See Id. at ¶194.* The escrow agreement, between Heritage and Ms. Fischer, addressing the holding of monies from the reverse mortgage to cover only subject State of New Jersey tax liens, contains these exact words:

“Once a settlement has been reached as to the State of New Jersey, all monies due the State will be released to them within 72 hours. All monies left after paying the State *45 will be returned to Annette Fischer within 72 hours.” (emphasis added).

See Id. at ¶195. A December 13, 2007 letter (by a Mr. Gross) sent to Michael Harris at Heritage Abstract Company on behalf of the New Jersey Division of Taxation, made clear that a settlement between the State of New Jersey, Division of Taxation and Ms. Fischer had been reached. *See Id.* at ¶196. The aforementioned letter stated in pertinent part:

“By this letter, the Division of Taxation authorizes you to forward a Certified Check in the amount of \$28,142.50 to this office and release the remaining balance to Mrs. Annette Fischer.”

See Id. at ¶197. This clearly satisfied the requirement for the funds to be released to me within 72 hours as it is plainly stated in the escrow agreement. *See Id.* at ¶198. Still Heritage, as the agent for Financial Freedom, refused to release the funds. *See Id.* at ¶199. As a result, Ms. Fischer was compelled to retain an attorney to proceed with an action in Morris County Superior Court against Heritage for the release of the escrow. *See Id.* at ¶200. As a result, Ms. Fischer was caused great harm by compelling her to incur further litigation to recover the escrow amounts due to her. *See Id.* at ¶201.

The Honorable W. Hunt Dumont, Judge of the Morris County Superior Court, in March of 2008, found that Financial Freedom, by and through its agent Heritage, had no right to hold the escrow and ordered those monies released to Ms. Fischer. *See Id.* at ¶203.

*46 As set forth *supra*, Ms. Fischer has meritorious defenses to the allegations against her in the complaint in this matter. In fact, Ms. Fischer has numerous tape recorded conversations of her daughter, and also her, with the owner of Heritage Abstract, officers at Financial Freedom and then its parent company, IndyMac, regarding the material issues of this case. *See Id.* at ¶¶s232-233. Ms. Fischer has tape recordings of conversations of conversations with the following:

- Michelle Delorier, Vice President of Compliance, IndyMac Bank
- Kelly Kessman, Executive, Financial Freedom
- Sandy Thomas, Vice-President of Compliance, Financial Freedom
- Bob Enerling, First Vice President of Financial Freedom/Compliance Officer
- Joel Schiffman, Esq., General Counsel for Financial Freedom
- Susan Anderson, First American Title Insurance
- Michael Harris, Esq., CEO and Owner of Heritage, Financial Freedom's Agent

See Id. at ¶233. For example, Ms. Sandy Thomas, Vice President of Compliance for Financial Freedom, made admissions that Heritage had in Ms. Fischer's case acted unethically, improperly and had violated its agreements with Financial Freedom which had caused her damage. *See Id.* at ¶234. In fact, Ms. Fischer's daughter in a conversation with Ms. Thomas, explained her belief that the HUD had been “doctored” by Heritage, and Ms. Thomas agreed that “doctored” was an appropriate term to describe Heritage's actions, as the agent for Financial Freedom, with respect to the HUD on the subject reverse mortgage. *See Id.* at ¶235. For further example, Ms. Michelle Delorier, of IndyMac, *47 made strong statements on two occasions about Ms. Fischer's rights being denied and that she was not properly, ethically or fairly treated. *See Id.* at ¶236.

LEGAL ARGUMENT

POINT I

APPELLATE JURISDICTION AND STANDARD OF REVIEW

Defendant/Appellant appeals from the Order Denying Motion to Vacate Default Judgment, and Motion for the Reconsideration thereof, as a final judgment of the Superior Court trial division which is appealable as of right pursuant to R. 2:2-. Where, as in the within matter, the Trial Court has failed to make “findings to explain the reasons why he denied the motion” the “usual deference that [the appellate court] must pay to a trial judge’s determination of an R. 4:50-1 motion is less compelling.” See *Morales v. Santiago*, 217 N.J. Super. 496, 504 (A.D. 1987). Furthermore, “if the trial judge misconceives the applicable law, or misapplies it to the factual complex, in total effect the exercise of the legal discretion lacks a foundation and becomes an arbitrary act.” See *Kavanaugh v. Quigley*, 63 N.J. Super. 153, 158 (A.D. 1960). Because the Trial Court’s ruling was devoid of a complete factual finding and legal analysis of the legal and factual assertions made by the Defendant in the motion to vacate, “it is the duty of the reviewing court to adjudicate the controversy in the light of the applicable law in order that a manifest denial be avoided.” See *Kavanaugh*, 63 N.J. Super. at 158.

*48 POINT II

THE TRIAL COURT ERRED IN FAILING TO VACATE DEFAULT JUDGMENT PURSUANT TO R. 4:50-1 WHERE DEFENDANT'S FAILURE TO FILE AN ANSWER TO PLAINTIFF'S COMPLAINT WAS EXCUSABLE DUE TO HER HEALTH CONDITION AND DEFENDANT HAS A MERITORIOUS DEFENSE

The opening of a default judgment is governed by *New Jersey Court Rule 4:50-1*, which provides:

On motion, with briefs, and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment or order for the following reasons: (a) **mistake, inadvertence, surprise, or excusable neglect**; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49; (c) **fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party**; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) **any other reason justifying relief from the operation of the judgment or order**. (emphasis added).

Furthermore, “the opening of default judgments should be viewed with great liberality, and every reasonable ground for indulgence is tolerated to the end that a just result is reached.” *Marder v. Realty Construction Co.*, 84 N.J. Super. 313, 319 (App. Div. 1964), aff’d. 43 N.J. 508 (1964). All doubts should be resolved in favor of the party seeking relief. *Mancini v. EDS*, 132 N.J. 330, 334 (1993), (citing *Arrow Mfg. Co. v. Levinson*, 231 N.J. Super. 527, 534 (App. Div. 1989).

A. The Default Judgment Should be Vacated as a Matter of Justice Pursuant to R. 4:50(f) Because to Allow the Judgment to Stand Will Reward the Fraudulent Actions of the Plaintiff and Co-Defendants, Which Amount to Fraud, Consumer Fraud and Violations of the Truth in Lending *49 Act, and Financial Freedom and Its Agents, Particularly Heritage Abstract, Continue to Use Unethical Means to Intimidate Ms. Fischer When She Asserts Her Rights

“New Jersey courts have always had the inherent equitable power to vacate judgments and, with respect to default judgments, have exercised great liberality in doing so in order that cases may be decided on the merits.” See *Nowoslesa v. Steele*, 400 N.J. Super. 297, 303 (App. Div. 2008) (cited in this Court’s Opinion). On “a motion to vacate default judgment, ‘all doubts ...

should be resolved in favor of the parties seeking relief”. *Nowoslesa*, 400 N.J.Super. at 303. While R. 4:50(f) is “applied sparingly, in exceptional situations’ to prevent injustice... [w]hen the application is to vacate a default judgment, subsection (f) is applied more liberally” and even “indulgently”. *Id.* [citing *Mancini v. EDS*, 132 N.J. 330, 336 (1993)]. The “very essence of (f) is its capacity for relief in exceptional situations. And in such exceptional cases its boundaries are as expansive as the need to achieve equity and justice.” See *Housing Authority of the Town of Morristown v. Little*, 135 N.J. 274 (1994). Because the rule “deals with exceptional circumstances, each case must be resolved on its own particular facts.” See *Housing Authority of the Town of Morristown*, 135 N.J. at 286. In *Nowoslesa*, the Court found that “[a]llowing the default judgment to stand in this case may result in a grave injustice” because the judgment debtors “may have been the victims of predatory lending practices”.

*50 *Id.* at 304. In the within matter, the Defendant Fischer is precisely that, the victim of predatory lending practices. She was manipulated into terms and conditions on a Reverse Mortgage under duress because Financial Freedom purposefully and deliberately made false representations about when her Right of Rescission expired and false representations that they would not fund the loan without an escrow for a Federal Tax Lien that was in dispute, when in fact Financial Freedom would not fund the loan. When Ms. Fischer met the terms of the Escrow Agreements for the release of the funds, Financial Freedom and its agents refused and Ms. Fischer was forced to obtain a Court Order to get them to do what they were contractually obligated to do.

The abhorrent conduct continued during the Motion to Vacate Default Judgment. Heritage, in a not-so-veiled threat, indicated that Ms. Fischer's tape recording of conversations involving herself and Financial Freedom subjected her to criminal penalties under California law. It is clear from the tapes that Financial Freedom discussed with the Fischers the serious improper conduct of Heritage (Financial Freedom's agent) including the “doctoring” of the HUD and the denial of rights to Ms. Fischer. It also clear that Michael Harris (CEO and the owner of Heritage) who has submitted a certification in the within motion, is on tape stating that Financial Freedom knew about the Federal Tax Lien during the rescission period, but did not want to redo their documents. Heritage stated in its *51 arguments before the Court that “Ms. Fischer may shortly be embroiled in yet another litigation with an attorney, this time with her present counsel” because the “Fischers brazenly proclaim that they secretly taped conversations with various representatives of the plaintiff located in California” and attorneys for Heritage “imagine that Mr. Rosellini may have failed to advise his clients that California is a “two-party consent” state and that they have admitted to criminal conduct under California law”, is such a brazenly unethical representation to the Court that it shocks the conscience.

The case which is cited for this proposition by Heritage, however, *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 137 P.3d 914 (CA 2006) does not state that the taping of a conversation by a citizen in a “one-party consent” state commits “criminal conduct under California law” as the attorneys for Heritage represent to the Court. In fact, the Supreme Court of California specifically addressed this issue in footnote in that decision and found that “there is no need to determine whether penal sanctions properly could or should be imposed under these circumstances.” See *Kearney*, 39 Cal. 4th at 116 fn. 6, 137 P.3d at 928 fn.6. It is therefore clear that the attorneys for Heritage cannot make the assertion that the Fischers “have admitted to criminal conduct under California law” when there is no case in which conduct in which a resident of a “one-party” consent state has been found criminal culpable for tape *52 recording a conversation in which one party is in California. The California court acknowledged that determination of conflict of law issues concerning one-party and two-party states is very fact sensitive to determine which “state's interest would be more impaired if its policy were subordinated to the policy of the other state ...” See *Kearney*, 39 Cal. 4th at 123, 125, 137 P.3d at 933, 935. In fact, where a Court sitting in New Jersey has addressed the issue, it has found against a movant seeking to suppress evidence in a civil case where a tape recording was made by a party in Florida (a “two-party consent” state) on a conversation with a party in New Jersey without the consent of the party in New Jersey. See *Leff v. First Horizon Home Loan*, 2007 WL 2572362 (D.N.J. 2007); see also *Conflict of Law and Surreptitious Taping of Telephone Conversations*, 54 N.Y.L. Sch. L. Rev. 147, 159, 54 NYLSLR 147, 159 (2010). It is clear that Financial Freedom's and Heritage Abstract's interest opposing vacation of the Default Judgment in this matter is to avoid discovery and hide their wrongful conduct.

B. The Default Judgment Should be Vacated Pursuant to R. 4:50-1(c) Because the Plaintiff Obtained the Default Judgment By Fraudulent Representations and a Misrepresentation of the Applicable Law Regarding the Truth and Lending Act to the Court

To cover their fraudulent actions, Financial Freedom made up a story that Ms. Fischer, an **elderly** woman in her eighties, somehow manipulated Financial Freedom's closing agent, Heritage, into backdating the closing date on the loan documents for a *53 Wednesday, April 18, 2007, when the closing in fact took place on a Thursday, April 19, 2007, so that the loan could fund in time to satisfy a judgment lien which was going to a foreclosure sale on the following Tuesday, April 24, 2007, in the afternoon.

The material basis of allegations for Plaintiff, Financial Freedom's suit against Ms. Fischer, upon which the Default Judgment was entered, is found in paragraph numbers seven through eleven (7-11) of Plaintiff's Complaint:

7. Although the closing took place on April 19, 2007, all of the closing documents reflect a closing date of April 18, 2007. On information and belief, the closing documents were back-dated by the closing agent with Fischer's knowledge, acquiescence and consent because her former law firm, Craner, Satkin, & Scheer, P.C., was a judgment creditor of Fischer and would be conducting a sheriff's sale on April 24, 2007 on the Property and Fischer required the closing proceeds to prevent the sheriff's sale.

8. Fischer's goal in obtaining the reverse mortgage was to prevent the imminent sheriff's sale of the Property by obtaining the proceeds from the closing of the reverse mortgage prior to April 24, 2007. As such, Fischer required that the three-day rescission period on the reverse mortgage conclude on or before April 23, 2007. Without Financial Freedom's consent or knowledge, the closing agent, Heritage Abstract, agreed to backdate the closing documents to accommodate Fischer. Fischer knowingly, willingly and deliberately executed a backdated Notice of three day right of rescission so as to receive the proceeds of the closing before the actual three business day timeframe expired.

9. The disbursement of the reverse mortgage funds occurred after the three day rescission period provided by the backdated notice expired on April 23, 2007. The disbursement occurred in time to provide Fischer with sufficient proceeds to satisfy the judgment creditor holding the sheriff's sale.

10. The post-dating of the closing documents failed to perfect the statutorily mandated three-day rescission period required by Financial Freedom and violated Financial Freedom's Closing Instructions. Although the defect in the *54 notice period was created to accommodate Fischer, because there is no properly executed notice of right to rescission, Fischer may now technically rescind the loan at any time within the three-year period following closing. *See 15 U.S.C.A. §1635; 12 C.F.R. §226.15(a)(3).*

11. When Financial Freedom learned of the imperfect right of rescission that had been obtained by Fischer to prevent the impending sheriff's sale of her home, it immediately contacted her and attempted to obtain properly executed right of rescission documents and afford her a new three-day rescission period in connection with that new right of rescission.

12. Without Financial Freedom's consent or knowledge, the closing agent, Heritage Abstract, agreed to backdate the closing documents to accommodate Fischer. Fischer knowingly, willingly and deliberately executed a backdated Notice of three day right of rescission so as to receive the proceeds of the closing before the actual three business day timeframe expired.

In her hearsay Certification in support of the Default Judgment, Maeve E. Cannon, Esq. states the following at paragraph 18, "The three day period for an April 19, 2007 closing did not expire until April 24, 2007". She uses further support for this statement by relying on the answer of the closing/title agent Heritage to the Complaint in paragraph 19 of her Certification, "Fischer required that the three day rescission period on the reverse mortgage conclude on or before April 23, 2007, that Fischer knowingly, willingly and deliberately executed a notice of three days right of rescission dated April 19, 2007 so as to receive the proceeds of the closing in time to stop the sheriff's sale; and Heritage states affirmatively that Fischer received the proceeds from the closing on April 24, 2007. (Heritage Answer to Complaint ¶8, *55 Exhibit R)." Well Financial Freedom's story has one major hole in it. Under the Truth in Lending Act the three day rescission period for an April 19, 2007 closing would have expired on midnight of April 23, 2007, not April 24, 2007, and the funds would have been available from a fully funded loan

on the same day and time there were in fact released - April 24, 2007. Regulation Z of the Truth and Lending Act, [12 C.F.R. § 226.23\(a\)\(3\)](#) states in pertinent part the following:

The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures, whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation. (footnotes omitted).

Regulation Z of the Truth and Lending Act, [12 C.F.R. § 226.2\(a\)\(6\)](#) further defines business days under the act as follows:

Business day means a day on which the creditor's offices are open to the public for carrying on substantially all of its business functions. However, for purposes of rescission under §§ [226.15](#) and [225.23](#), and for purposes of §§ [226.19\(a\)\(1\)\(ii\)](#) and [226.31](#), the term means all calendar days except Sundays and the legal public holidays specified in [5 U.S.C. 6103\(a\)](#)....

Therefore, the Right of Rescission for a closing on Thursday, April 19, 2007 would expire after three business days calculated as follows: Business Day 1, Friday, April 20, Business Day 2, Saturday, April 21, and Business Day 3, Monday, April 23, expiring at midnight of Business Day 3, or Monday, April 23, 2007. By Financial Freedom's own admission, the loan did not *56 fund until April 24, 2007, therefore Financial Freedom's story is, at best just a story, and a worst a deliberate misleading of the Court as to what occurred in this transaction in order to hide its fraudulent conduct. As set forth above, Default Judgments should be vacated when there is "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party" in obtaining the Default Judgment. *See* [R. 4:50-1\(c\)](#).

As is set forth in Ms. Fischer's Certification in Support of Vacating the Default Judgment, the only effect that backdating the closing documents had was an adverse one to the Defendant. She was led to believe that her Right of Rescission had expired at Midnight on Saturday, April 21, 2007, and this time and date appears on the Notice of Right to Cancel provided by Financial Freedom. It is clear that providing an incorrect date does not satisfy the "clear and conspicuous" notice requirement which the Truth in Lending Act mandates on Notices of Right of Rescission. *See In re Bell*, [309 B.R. 139 \(E.D.Pa. 2004\)](#) (citing [15 U.S.C.A. §1635\(a\)](#); [12 C.F.R. § 226.23\(a\)\(3\)](#), [\(b\)\(1\)](#)). It is also clear from the record that prior to Midnight on Saturday, April 21, 2007, there was no indication from Financial Freedom that they would not fund the loan on April 23, 2007, or that they would only fund the loan if Ms. Fischer agreed to place monies in escrow to cover the disputed Federal Tax Lien. In fact all the closing documents, including the HUD *57 Financial Settlement Statement, gave no indication that an escrow would be required for the Federal Tax Lien. It was not until April 23, 2007, that Financial Freedom asserted, via its agent Heritage, that the loan would not be funded unless Ms. Fischer agreed to escrow agreements that she had specifically stated earlier to Financial Freedom she would not agree to.

Only now, Financial Freedom was not only representing that she had to sign these agreements as a condition of the loan funding, but that it was too late to the rescind the loan as well. Still Ms. Fischer refused to sign the escrow agreements, until she did so under duress on Tuesday, April 24, 2007, because she had been fraudulently induced by Financial Freedom into believing she need to make any alternative arrangements to address the foreclosure sale on the judgment lien within approximately three hours of her signing. The loan does fund on the same day it would have had the closing documents, all of which were prepared and dated by Financial Freedom's closing agent, been dated correctly. The only benefit of the backdating of the closing documents was to prevent Ms. Fischer from exercising her Right of Rescission on Monday, April 23, 2007, and Financial Freedom and Heritage losing out on their fees from the mortgage.

The penalty under Regulation Z of the Truth and Lending Act ([15 U.S.C.A. §1635](#)), [12 C.F.R. § 226.23\(a\)\(3\)](#) for failure to provide a proper Notice of Right of Rescission is clear and *58 includes the following, "If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation." This is consistent with the purpose of the Truth and Lending Act.

The purpose of the three-day waiting period under §1635(a) is to give the consumer the opportunity to reconsider any transaction which would have the serious consequence of encumbering title to his or her home. If a lender's notice of the right to rescind is deficient, a mortgagor's rescission rights are extended to three years. 15 U.S.C.A. §1635(f). If the creditor fails to comply with the written requirements of the notice to rescind, or if a "material" disclosure is not correctly made, the rescission period is extended for three years. [citing, *inter alia*, 12 C.F.R. §226.23(a)(3)].

See Associates Home Equity Services, Inc. v. Troup, 343 N.J.Super. 280-281 (A.D. 2001). Clearly, Ms. Fischer was not given the required opportunity to reconsider the loan in accordance with the Truth in Lending Act. In fact, Financial Freedom not only failed to give her the required opportunity, it materially altered the terms of the loan transaction to Ms. Fischer's detriment after it had falsely indicated to Ms. Fischer her Right of Rescission had expired. Justice and equity must persuade the Court to vacate the default judgment in the within matter so that Ms. Fischer can assert her right of rescission. Defendant submits the foregoing in support of the Rule 4:50-1(f) grounds for vacating the Default Judgment.

First American Title argues that "Ms. Fischer's failure to offer repayment of the funds demonstrates she is not serious in pursuing her claim." "However, no language in the statute or *59 regulations requires the consumer to tender or make an offer to tender the loan proceeds in his notice of rescission to the creditor." See [citing U.S.C. §1635(b); 12 C.F.R. §226.23(a)(2)]. *See Hernandez v. Hilltop Financial Mortg., Inc.*, 622 F.Supp.2d 842, 848 (N.D.Cal. 2007). Furthermore, "TILA's Regulation Z, which tracks §1635, states only that '[t]o exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram or other means of communication.'" See *Hernandez*, 622 F.Supp.2d at 848.

Finally, the Court mischaracterized Ms. Fischer's argument at oral argument, finding that Ms. Fischer "has not and will not sign a notice of rescission" and put "it in writing". While Ms. Fischer argued that this was not the case, and asserted that Ms. Fischer's assertion of a counterclaim in the motion satisfies this requirement, the Court did not consider it. In order to remove this as an issue, and to satisfy the writing requirement should the Appellate Division also find that the assertion of a counterclaim does not satisfy the Truth in Lending writing requirement for rescission within the Three Year Period from the actual date of the closing, Ms. Fischer asserted her right of rescission to Financial Freedom in the letter which is attached as Exhibit A to Maeve Cannon, Esq.'s Certification on Reconsideration, before the three-year period has expired - her right to Rescind is hence not in doubt.

***60 C. The Default Judgment Should be Vacated Pursuant to R. 4:50-1(a) Because the Defendant's Neglect Was Excusable due to Her Serious Medical Conditions and the Lack of Resources to Hire an Attorney, a Result of the Tortious Actions of the Plaintiff, and She has a Meritorious Defense**

R. 4:50-1(a) permits the vacating of a default judgment for excusable neglect. Where a defendant seeks to vacate a default judgment on the basis of excusable neglect, the defendant must show that the failure "to answer was excusable under the circumstances and that he has a meritorious defense." *Id.* at 334-335 (citing *Morales v. Santiago*, 217 N.J. Super. 496, 501 (App. Div. 1987)). "excusable neglect" has been defined as that neglect which might have been the act of a reasonably prudent person under the same circumstances....Necessarily each case must be decided on its particular facts." *Tradesmens National Bank and Trust Company v. Cummings*, 38 N.J. Super. 1 (App. Div. 1955). While carelessness or a lack of due diligence would not be excusable, apparent carelessness that can be attributed to an honest mistake that is compatible with reasonable prudence may be excusable. *Housing Authority of the Town of Morristown v. Little*, 135 N.J. 274, 284 (1994); *Baumann v. Marinaro*, 95 N.J. 380, 394 (1984).

The second element necessary to establish excusable neglect is the existence of a meritorious defense. *Tradesmens National Bank and Trust Company*, 38 N.J. Super. at 5; *Marder* 84 N.J. Super. at 318; *Morales v. Santiago*, 217 N.J. Super. 496, 501 (App. Div. 1987). In the within matter, the Defendant is an *61 elderly woman with numerous serious medical conditions that have been well documented, for which she is under treatment. Under such circumstances, Ms. Fischer, as a *pro se* defendant was

unable to pursue her defenses and counterclaims in this action due to her excusable **neglect**. She retained an attorney, and due to her failing health, and the complex issues in the case, was unable to submit a proper motion to vacate the default judgment until Motion at issue on this appeal. As stated above, the standard for the Court to determine whether to vacate a default judgment should be liberally applied, “Generally, the opening of default judgments should be viewed with great liberality and every reasonable ground for indulgence is tolerated to the end that a just result is reached.” *Morales*, 217 N.J. Super. at 501 (citing *Marder*, 84 N.J. Super. at 319). Following are several cases where the court determined there was excusable **neglect**.

In *Tradesman National Bank and Trust Company*, 38 N.J. Super. 1, 5 (A.D.1955) the Appellate Division affirmed the trial court's vacating of default judgment where the defendant was upset about a death and illness in his family. This case is relevant to the within matter because it illustrates the level of liberality afforded defendants in vacating default judgments. In *Mancini*, the plaintiff was injured in a motor vehicle accident and filed a complaint against her own insurance company for underinsured motorist benefits, but the defendant failed to answer the complaint as well as other orders and notices. *62 *Mancini*, 132 N.J. at 332-334. The defendant did not respond until plaintiff moved to levy the defendant's bank accounts. *Id.* at 333. In vacating the default judgment, the Supreme Court took into consideration that the defendant's **neglect** was neither willful nor calculated. *Id.* at 336. In the within matter, the Defendant's actions in failing to file an answer were similarly neither willful nor calculated in that Defendant's intent was to defend this action and assert her rights under, *inter alia*, the Truth in Lending Act, but was unable to do so due to her health.

Defendant, for reasons set forth above, has certain rights under the Truth in Lending Act including a Three Year Right of Rescission if the Lender, Financial Freedom, failed to comply with that Act. In its application for Default Judgment, Financial Freedom admitted that Ms. Fischer was in possession of a Three Year Right of Rescission. Plaintiff, without citing to any precedence, pursued a declaratory judgment action to terminate Defendant's Right to Rescind. However, as already outlined, Plaintiff's allegations are false as a matter of law because it incorrectly representing how the original three day right of rescission was calculated. Therefore, in addition to having a defense, Defendant has affirmative counterclaims against the Plaintiff under the Truth and Lending Act to Rescind the Loan and for damages, and under both the Consumer Fraud Act and Common Law Fraud. The Truth and Lending Act is not an exclusive remedy, and other affirmative claims against Financial *63 Freedom, including under the New Jersey Consumer Fraud Act, may be pursued. See *Associates Home Equity Services, Inc. v. Troup*, 343 N.J. Super. 254, 278-279 (A.D. 2001).

D. The Default Judgment Should be Vacated Pursuant to R. 4:50-1(d) Because the Defendant is a Particularly Worthy Candidate for Vacating the Default Judgment as the Plaintiff Failed to Submit Adequate Proofs to the Court in Support of Its Default Judgment Motion

If “a judgment is void and, therefore, unenforceable, it is a particularly worthy candidate for relief (R. 4:50-1 provided that the time lapse is not unreasonable and an innocent third party's rights have not intervened.” See *Bank v. Kim*, 361 N.J. Super. 331, 336 (A.D. 2003). In *Bank v. Kim*, the Court found the Default Judgment in a foreclosure action voidable in part because the plaintiff's attorney had made the affidavit of proof, and the “affidavit of proof is to be] made by the plaintiff or an authorized officer or agent of the plaintiff, setting forth facts admissible in evidence and to which deponent is competent to testify. Plaintiff's attorney should not normally sign the proof of amount due on behalf of the foreclosing mortgage unless the attorney has personal knowledge of the lender's finances.” See *Bank v. Kim*, 361 N.J. Super. at 342; see also *Cafferata v. Peyser*, 251 N.J. Super 256, 263-264 (A.D. 1991) (Court ruled that submission of Certification of Defendant's attorney in support of summary judgment was “gross hearsay and a clear violation of R. 1:6-6” and therefore could not support a finding of summary judgment). R. 1:6-6 requires *64 that, “If a motion is based on facts not appearing of record, or not judicially noticeable, the court may hear it on affidavits made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify and which may have annexed thereto certified copies of all papers or parts thereof referred to therein.” The attorney for Financial Freedom, does not have personal knowledge of the transactions which are the subject of the action in this matter according to her certification, particularly with respect to Financial Freedom and Heritage's actions as to the Right of Rescission. Financial Freedom's evidentiary support for the Default Judgment, therefore, is gross hearsay and unsupportable

as evidence on a motion for default judgment where more than facts of a book account are required. The Default Judgment, therefore, is voidable.

POINT III

THE TRIAL COURT ERRED IN RULING THAT DEFENDANT ANNETTE FISCHER'S COUNTER-CLAIMS ARE BARRED BY THE ENTIRE CONTROVERSY DOCTRINE AND HER AFFIRMATIVE DEFENSES ARE NOT BARRED

Finally, the Court ruled that the Entire Controversy Doctrine would bar Ms. Fischer from asserting affirmative claims in the within case. But nothing in the Court's Opinion supports a bar on Ms. Fischer from asserting a counterclaim or an affirmative defense. Somewhat contradictorily, the Court did not find that Financial Freedom was barred from asserting claims against Ms. Fischer by the Entire Controversy Doctrine, even *65 though Financial Freedom had notice of the same proceedings in Morris County.

CONCLUSION

For all the foregoing reasons, the Order of the Superior Court of New Jersey, Essex County Vicinage, denying Defendant/Appellant's motion to vacate Default Judgment should be reversed and the Default Judgment vacated.