APPEAL NO. 13-15558-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

VITO J. FENELLO, JR., ET AL.,
Plaintiffs/Appellants,

v.

BANK OF AMERICA, N.A., ET AL.,
Defendants/Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia
District Court Docket No. 1:11-CV-04139-WSD

BRIEF OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and the 11th Circuit Local Rule 26.1-1 and 26.1-2, Defendants/Appellees Bank of America, N.A. ("BANA") and The Bank of New York Mellon ("BONY") (together as "Appellees" or "Defendants"), through the undersigned counsel, certify that the following is a full and complete list of all parties in this action, including any parent corporation and any publicly-held corporation that owns 10% or more of the stock of a party:

Plaintiffs/Appellants:

Vito J. Fenello, Jr.

Beverly H. Fenello

Defendants/Appellees:

Bank of America, N.A.

Bank of America, N.A. is a national banking association organized under the National Bank Act. Through a series of intervening subsidiaries, Bank of America, N.A. is 100% owned by Bank of America Corporation. Bank of America Corporation is a publicly traded company (ticker symbol: "BAC") with other subsidiaries, none of which is publicly held. Bank of America Corporation has no parent company, and no publicly-held company owns more than 10% of Bank of America Corporation's shares.

The Bank of New York Mellon

BONY is a wholly owned subsidiary of The Bank of New York Mellon Corporation. In addition, the following are subsidiaries or affiliates of BONY that have issued shares or debt securities to the public: Bank of New York Institutional Capital Trust, Bank of New York Investment Holdings (Del.), Bank of New York Capital IV, Bank of New York Capital V, Mellon Funding Corporation, Mellon Capital III, and Mellon Capital IV.

The undersigned further certifies that the following is a full and complete list of all persons, associations, firms, partnerships, or corporations having either a financial interest in or other interest which could be substantially affected by the outcome of this particular case:

Bank of America, N.A. (Appellee)

Bank of New York Mellon (Appellee)

Vito J. Fenello, Jr. (Appellant)

Beverly H. Fenello (Appellant)

McGuireWoods LLP (Law firm of attorneys for Appellees)

Jarrod S. Mendel (Attorney for Appellees)

Andrew G. Phillips (Attorney for Appellees)

William S. Duffey, Jr. (District Court Judge, United States District Court for the Northern District of Georgia, Atlanta Division)

The undersigned further certifies that the following is a full and complete list of all persons serving as attorneys for the parties in this proceeding:

Attorneys for Appellees/Defendants:

Andrew G. Phillips; and

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Respectfully submitted this the 18th day of February, 2014.

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STATEMENT REGARDING ORAL ARGUMENT

Appellees do not believe that oral argument is necessary to determine the issues presented in this appeal. The factual and legal arguments are presented adequately in the briefs and record, and the decisional process would not be aided significantly by oral argument.

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I. Statement of the Case

A. Nature of the Case

This case arises from the Appellants', Vito J. Fenello, Jr. and Beverly H. Fenello, (hereinafter, the "Fenellos"), last-ditch effort to prevent a lawful foreclosure after admittedly defaulting on their mortgage. The District Court properly granted Appellees' Motions to Dismiss the original Complaint and First Amended Complaint ("FAC") and properly denied the Fenellos' Motion for Reconsideration because the Fenellos' can prove no set of facts that would entitle them to relief. Accordingly, this Court should affirm the District Court's dismissal with prejudice and denial of the Motion for Reconsideration.

B. Course of Proceedings and Disposition Below

The Fenellos filed their original Complaint on October 21, 2011 in the Superior Court of Cherokee County against Shuping, Morse, and Ross ("Shuping") and Appellees. (Doc. 1-1.) Appellees timely removed this matter to the United States District Court for the Northern District of Georgia and filed a Motion to Dismiss. (Doc. 6-1.) Shuping was dismissed from this action on December 13, 2011.

After numerous responses, motions, and surreplies filed by the Fenellos, on July 17, 2012, the Court dismissed all of the Fenellos' claims without leave to amend, except the Fenellos' claim under the Fair Debt Collection Practices Act

("FDCPA"). (Doc. 24.) Specifically, the Court held that "with the exception of their FDCPA claim, all of their claims are implausible, unfounded, without merit, and *amendment would be futile*." (Doc. 24, p. 51) (emphasis added). The July 17, 2012 Opinion was 52 pages in which the Court addressed every meritless argument made by the Fenellos in detail. The Court specifically instructed the Fenellos to amend *only* their FDCPA claim. (Doc. 24, p. 51.)

Despite the Court's clear instructions and without first requesting leave to amend, the Fenellos filed their FAC with two new implausible, unfounded, and meritless claims for wrongful attempted foreclosure and negligence. (Doc. 26.) The Fenellos also filed an untimely, retroactive request for leave to amend to add these claims. (Doc. 30.)

On February 15, 2013, the Court denied the Fenellos' request to amend and dismissed the Fenellos' case in its entirety with prejudice. (Doc. 34.) This Opinion again addressed all of the Fenellos' meritless arguments in detail, rejecting each one. Specifically, the Court found that Plaintiffs failed to state a claim for relief under Sections 1692g(b) and 1692f(6) of the FDCPA. (Doc. 34, pp. 14-19.) The Court rejected Fenellos' claims that BANA was a debt collector based on the July 7th letter (Doc. 34, fn. 9) and that BANA lacked standing to foreclose because it was not the secured creditor (Doc. 34, fn. 11).

On March 15, 2013, the Fenellos filed their Motion for Reconsideration.

(Doc. 36.) This Motion repeated the same meritless theories that they have asserted – and that the Court has repeatedly rejected – throughout this litigation, which now spans over two years. Again, the Court rejected these arguments and denied the Motion for Reconsideration on November 8, 2013. (Doc. 39.) The Fenellos now appeal the July 17, 2012, February 15, 2013, and November 8, 2013 Orders.

II. Statement of the Facts

On January 30, 2007, the Fenellos, who are real-estate professionals, purchased the property located at 289 Balaban Circle, Woodstock, Georgia 30188 (the "Property") with a loan in the amount of $181,352.00 (the "Loan") in favor of Pulte Mortgage LLC. (Doc. 26 ¶ 7.) As security for this Loan, the Fenellos contemporaneously executed a Security Deed to Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for the lender, Pulte Mortgage LLC, and the lender's successors and assigns. (Doc. 28-2.) On April 13, 2011, MERS executed an Assignment transferring all beneficial interest in the Security Deed to BONY (the "Assignment"). (Doc. 28-3.)

The Fenellos allege that their income fell in 2007, and that they defaulted on the Loan in early 2008. (Doc. 26 ¶¶ 8-9, 12; Brief, p. xviii.)[1] At that time, the

[1] Appellees have summarized the allegations as set for in the FAC, as it is the operative complaint. Additionally, the Fenellos assert essentially the same allegations in both their original complaint and the FAC.

Fenellos purportedly notified BANA and requested information about loss mitigation options. (Doc. 26 ¶ 9.) The Fenellos contend that BANA informed them that they would need to go into default and miss two payments in order to be eligible for a Making Homes Affordable Program ("HAMP") modification. (Doc. 26 ¶¶ 10-11.) The Fenellos purportedly missed the next two payments and then applied for a HAMP modification. (Doc. 26 ¶ 12.)

The Fenellos allege that for over a year they tried to obtain a loan modification but that BANA did not offer them a modification until June 13, 2011. (Doc. 26 ¶¶ 19.) The Fenellos contend that BANA purportedly told them to accept the modification or re-apply in thirty days. (Doc. 26 ¶ 20.) The Fenellos purportedly chose to reapply in thirty days. (Doc. 26 ¶ 24.) The Fenellos allege that when they attempted to re-apply, they were allegedly told that they could only apply for a modification verbally, which they did. (Doc. 26 ¶ 25.) The Fenellos allege that they were approved pending the "note holder's approval," and that they would receive a formal offer in ten days. (Doc. 26 ¶¶ 26-17.)

On July 7, 2011, the Fenellos contend that they received a letter (the "July 7th Letter") from BANA that provided that "[u]nder the federal Fair Debt Collections Practices Act and certain state laws, [BANA] is considered a debt collector" and "that this communication is from a debt collector attempting to collect a debt . . . ." (Doc. 26 ¶ 21; Doc. 1-1 pp. 48-51.)

On September 8, 2011, the Fenellos allege they were assigned a "Dedicated Customer Relationship Manager" named Latecia Salters. (Doc. 26 ¶ 28, 31.) The Fenellos assert that they made numerous attempts to contact Ms. Salters, her assistant "Jackie," and BANA but that they did not receive a response or modification offer. (Doc. 26 ¶¶ 31, 34, 35, 36, 37.) The Fenellos then allege that "Julie Grippa" called them, and allegedly told them that they needed to submit additional documents for the loan modification review. (Doc. 26 ¶ 41-42). The Fenellos contend that they provided this documentation. (Doc. 26 ¶ 42.)

In their original Complaint, the Fenellos asserted the following purported causes of action: (1) fraud; (2) bad faith; (3) equitable estoppel; (4) failure to comply with the FDCPA; (5) failure to comply with the Truth–in-Lending Act ("TILA"); (6) failure to comply with the Real Estate Settlement Procedures Act ("RESPA"); (7) defective/fraudulent assignment; (8) failure to comply with the Consent Order between BANA and the Comptroller of the Currency, Department of the Treasury (the "OCC"), signed April 13, 2011; (9) failure to prove holder in due course status; (10) failure to prove damages; (11) failure to prove standing; (12) defective foreclosure closing disclosure; and (13) direct contradiction to verbal representations by BANA. (Doc 1-1.) In their FAC, the Fenellos asserted three claims for (1) violations of the FDCPA; (2) attempted wrongful foreclosure; and (3) negligence. (Doc. 26.)

III. Summary of the Argument

This appeal is merely the latest attempt by the Fenellos to avoid paying their mortgage. This is readily apparent as the Fenellos fail to articulate any viable theory to support their contention that the District Court erred in dismissing the original Complaint and the FAC with prejudice, and denying their Motion for Reconsideration. This appeal has no merit and is predicated on fundamentally incorrect legal theories. The District Court's dismissal of the original Complaint in its July 17, 2012 Order, dismissal of the FAC with prejudice in tis February 15, 2013 Order, and denial of the Motion for Reconsideration in its November 8, 2013 Order were proper and should be affirmed.

IV. Standard of Review

The District Court's dismissal of a case pursuant to Fed. R. Civ. P. 12(b)(6) is reviewed *de novo,* applying the same standards the District Court used. *Tiara Condo. Ass'n v. Marsh & McLennan Cos.,* 607 F.3d 742, 745 (11th Cir. 2010); *Fanin v. U.S. Dep't of Veterans Affairs,* 572 F.3d 868, 871 (11th Cir. 2009). The denial of a motion for reconsideration is reviewed "for an abuse of discretion." *Cliff v. Payco Gen. Am. Credits, Inc.,* 363 F.3d 1113, 1121 (11th Cir. 2004). "[T]he abuse of discretion standard allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment." *Macklin v. Singletary*, 24 F.3d 1307, 1311 (11th Cir. 1994) (citations and quotations omitted).

If there is no clear error of judgment by the district court, the decision should be affirmed. *Id.*

V. Argument & Citation to Authority

A. The Fenellos Abandoned Their Claims for: (1) Violations of TILA; (2) Violations of RESPA; (3) Violations of the Consent Order; (4) Bad Faith; (5) Defective Foreclosure Closing Disclosure; (6) Negligence; and (7) Wrongful Attempted Foreclosure.

In their brief, the Fenellos fail to address the dismissal of their claims for violations of TILA, violations of RESPA, violations of the Consent Order, bad faith, and defective foreclosure closing disclosure asserted in the original Complaint or their claims for negligence and attempted wrongful foreclosure asserted in their FAC. The failure to raise an argument or address the dismissal of a claim on appeal means the matter is deemed abandoned. *Goodman v. Kimbrough*, 718 F.3d 1325, 1336 n.5 (11th Cir. 2013) ("[The plaintiff] also brought a claim against [the defendant] for negligent hiring, supervision, and retention. The district court granted summary judgment as to this claim, and [the plaintiff] does not raise it in his briefs. We deem it abandoned.").

Furthermore, "an appellant's simply stating that an issue exists, without further argument or discussion, constitutes abandonment of that issue and precludes our considering the issue on appeal." *Singh v. U.S. Atty. Gen.,* 561 F.3d 1275, 1278 (11th Cir. 2009). "A passing reference to an issue in a brief is not

enough, and the failure to make arguments and cite authorities in support of an issue waives it." *Hamilton v. Southland Christian Sch., Inc.,* 680 F.3d 1316, 1319 (11th Cir. 2012). The Fenellos' Brief does not address these claims other than a general argument that the Court erred in finding that they did not allege plausible facts in their original complaint and in not allowing them to amend. (Brief, p. 32-33.) This general assertion is insufficient to maintain an appeal on these claims. The Fenellos do not provide any specific arguments regarding these claims, and accordingly, these claims should be deemed abandoned and their dismissal affirmed.

B. The Fenellos Admittedly Defaulted on Their Loan.

The Fenellos assert for the first time on appeal that they did not default on their Loan. (Brief, pp. 2-7.) First, the Fenellos cannot raise new arguments on appeal. *See, e.g.*, *Access Now, Inc. v. S.W. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) (If this Court "were to regularly address questions . . . that district courts never had a chance to examine, we would not only waste our resources, but also deviate from the essential nature, purpose, and competence of an appellate court."); *Stewart v. Dept. of Health & Human Servs.*, 26 F.3d 115, 115 (11th Cir. 1994) ("Judicial economy is served and prejudice is avoided by binding the parties to the facts presented and the theories argued below.") (internal quotations and citations omitted).

Moreover, this new argument has no basis in fact. The Fenellos admit that they defaulted in their original Complaint, their FAC, and their Brief. (Doc. 1-1, ¶¶ 16-19; Doc. 26 ¶¶ 8-9, 12; Brief, p. xviii.) In fact, the Fenellos have not made a payment since 2008, and they have been living in their home essentially rent free for almost six years. This Court should not consider their assertions to the contrary.[2]

C. The Court Did Not Err in Holding that the Fenellos Do Not Have Standing to Challenge the Assignment to BONY.

Despite admitting that Georgia Courts have repeatedly held that borrowers do not have standing to challenge an assignment of a security deed, the Fenellos contend that the Court erred in making this same finding and rejecting the Fenellos attempts to invalidate the assignment to BONY. (Brief, pp. 7-12.) In support of their contention, the Fenellos cite to numerous statutes and case law. However, the Fenellos misunderstand Georgia law and the District Court's holding.

As the Court explained, the Fenellos "were not parties to the assignment and therefore do not have standing to challenge its validity." (Doc. 24, p. 37); *see also Larose v. Bank of Am., N.A.,* 321 Ga. App. 465, 468, 740 S.E.2d 882, 884 (2013), reconsideration denied (Apr. 11, 2013) ("[The plaintiff's] argument that the

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[2] The Fenellos also argue that the District Court also held that they were barred from contesting the validity of future foreclosures due to their default. The Fenellos fail to cite to any specific order of the District Court reflecting this holding, and Appellees are unaware of such a holding.

assignment was invalid is without merit."); *Montgomery v. Bank of Am.,* 321 Ga. App. 343, 346, 740 S.E.2d 434, 438 (2013), reconsideration denied (Apr. 11, 2013) ("[The plaintiff] has no basis to contest the validity of the assignment."). The Fenellos fail to offer any legitimate reason that *Larose* and *Montgomery* do not apply or should be overturned. Accordingly, the District Court's dismissal should be affirmed.

D. The Court Did Not Err in Holding that the Fenellos Are Not Entitled to Injunctive Relief.

The Fenellos argue that the District Court erred in denying them injunctive relief because: (1) they were not in default; (2) they did not need to tender because they sought to cancel the assignment; (3) they had alleged BONY was not the creditor or owner of the Note. (Brief, pp. 12-15.) As discussed supra, the Fenellos did default, and the Fenellos lack standing to challenge the assignment.

Moreover, the Fenellos are not entitled to an injunction simply because they allege that BONY does not have standing. It is well settled law in this Circuit that a temporary restraining order is an "extraordinary and drastic remedy[.]" *Zardui-Quintana v. Richard*, 768 F.2d 1213, 1216 (11th Cir. 1985). To obtain such relief, a movant must demonstrate:

> (1) a substantial likelihood of success on the merits of the underlying case, (2) the movant will suffer irreparable harm in the absence of an injunction, (3) the harm suffered by the movant in the absence of an injunction would exceed the harm suffered by the opposing party if

> the injunction issued, and (4) an injunction would not disserve the public interest.

Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc., 299 F.3d 1242, 1246-47 (11th Cir. 2002). As argued throughout this brief, and as the District Court found, the Fenellos are not entitled to an injunction because they "failed to allege any claim in their Complaint upon which relief can be granted or a substantial likelihood of success on the merits." (Doc. 24, p. 48.) Accordingly, dismissal of their claim for injunctive relief should be affirmed.

E. The Court Did Not Err in Holding that BONY Has Standing to Foreclose.

The Fenellos spend the vast majority of their Brief arguing that only the owner of the Note can foreclose, and that a borrower has standing to challenge the ownership of the Note.[3] (Brief, pp. 16-26.) Although convoluted, it appears that the Fenellos main contention is that BONY is not the owner of the Note, and accordingly, BONY does not have standing to foreclose. This assertion, however, has been rejected by the Supreme Court of Georgia.

Specifically, in *You v. JP Morgan Chase Bank,* 293 Ga. 67, 74 (2013), the Georgia Supreme Court rejected the borrowers' theory that only the owner of the

[3] Appellees note that the Fenellos did not assert a wrongful foreclosure claim in their original complaint or their FAC. To the extent the Fenellos are attempting to assert a wrongful foreclosure claim for the first time on appeal, such a claim should not be considered by this Court. *See, e.g.*, *Access Now, Inc.*, 385 F.3d at 1331; *Stewart*, 26 F.3d at 115.

Note could foreclose, holding that:

> Under current Georgia law, the holder of a deed to secure debt is authorized to exercise the power of sale in accordance with the terms of the deed *even if it does not also hold the note* or otherwise have any beneficial interest in the debt obligation underlying the deed.

(emphasis added). The Court further explained that:

> The plain language of the non-judicial foreclosure statute nowhere specifies whether the foreclosing party must hold the note in addition to the deed . . . while the phenomenon of "splitting" ownership of the note from ownership of the deed may not have been prevalent until relatively recently, this practice was not expressly prohibited prior to the enactment of the modern non-judicial foreclosure statute in 1981 . . . [and] subsequent to the 1981 enactment, this Court has continued to recognize the stand-alone enforceability of the deed, apart from the note, thus reinforcing the ability of a deed holder to exercise its rights under the deed, independent of the note . . . [furthermore,] the [2008] amendments [to the non-judicial foreclosure statutes] made no express reference to this practice of splitting note from deed, and there is no other evidence of any intent to change this common practice.

Id. at 71-73.

Accordingly, in order to foreclose under Georgia law, BONY need only show that it is the assignee of the Security Deed. Here, on April 13, 2011, MERS executed an Assignment transferring all beneficial interest in the Security Deed to BONY (the "Assignment"). (Doc. 28-3.) Therefore, BONY has standing to foreclose as the assignee of the Security Deed, and dismissal of the Fenellos' lawsuit should be affirmed.

F. The Court Did Not Err in Rejecting the Fenello's "One Satisfaction Rule" Argument.

The Fenellos contend that the debt owed pursuant to the Note and Deed of Trust has "been paid of[f] through some form of insurance or over collateralization." (Brief, pp. 27-28.) The Fenellos suggest that because the Note has been paid off, BONY has been satisfied and no longer has the right to enforce the Note. *Id.* Even if the Fenellos contention is true and a third party has compensated BONY as it relates to this Note, the Fenellos fail to explain or offer any viable legal authority to support that a third party agreement to which they are not a party some how absolves their responsibilities under the Note. *See Searcy v. EMC Mortgage Corp.*, No. 1:10-cv-0965-WBH, 2010 U.S. Dist. LEXIS 119975, at *2 (N.D. Ga. Sept. 30, 2010) ("While it may well be that Plaintiff's mortgage was pooled with other loans into a securitized trust that then issued bonds to investors, that fact would not have any effect on Plaintiff's rights and obligations with respect to the mortgage loan, and it certainly would not absolve Plaintiff from having to make loan payments or somehow shield Plaintiff's property from foreclosure.").

The simple fact of the matter is that Fenellos borrowed money and are legally obligated to pay that money back. Accordingly, the District Court did not err in rejecting the Fenellos' "one satisfaction rule" argument.

G. The Court Did Not Err in Dismissing the Fenello's Fraud Claim with Prejudice.

The Fenellos argue that the Court erred in dismissing their fraud claim because whether their damages were proximately caused by purported misrepresentations of BANA is a jury issue and because affidavits in an unrelated case purportedly show that BANA had no intention of modifying loans. (Brief, pp. 28-29.) Once again, the Fenellos misunderstand the law, and their arguments fail to meaningfully address the District Court's reasoning and opinion.

In Georgia, the common law tort of fraud requires five elements: (1) false representation by defendant; (2) with scienter, or knowledge of falsity; (3) with intent to deceive plaintiff or to induce plaintiff into acting or refraining from acting; (4) on which plaintiff justifiably relied; (5) with proximate cause of damages to plaintiff. *Worsham v. Provident Cos.*, 249 F. Supp. 2d 1325, 1331 (N.D. Ga. 2002). Here, the Fenellos cannot allege any set of facts to show that their damages were proximately caused by purported misrepresentations by BANA. Accordingly, their claim is ripe for dismissal – not for a jury.

As the District Court explained:

> While the Court understands that Plaintiffs may have been confused about the proper course of action to take after not making the two payments, applying for a modification, and still not hearing back from BANA for a lengthy period, Plaintiffs alleged that BANA advised them to skip two payments, not to stop paying on the mortgage loan altogether . . . Under these circumstances, the proximate cause of any damages was not BANA's alleged misrepresentations. Rather,

> Plaintiffs' default beyond the initial two months of missed payments caused their alleged damages and thus their fraud claim fails.

(Doc. 24, pp. 30-31.) Any purported damages are due to the Fenellos' failure to pay their mortgage, not any actions by the Appellees. Accordingly, the dismissal of their fraud claim with prejudice should be affirmed.

H. The Court Did Not Err in Dismissing the Fenello's Equitable Estoppel Claim with Prejudice.

The Fenellos assert that the issue of whether they are entitled to equitable estoppel should have been left to a jury. (Brief, p. 30-31.) The Fenellos, however, again, misunderstand the law.

Federal courts have the power to fashion equitable relief, such as applying the doctrine of estoppel but only when facts warranting such relief are pled and proved. *Xanadu of Cocoa Beach, Inc. v. Zetley*, No. 86-3346, 1987 U.S. App. Lexis 986, at *987 (11th Cir. 1987). The doctrine of equitable estoppel may apply "to prevent a party from denying at the time of litigation a representation that was made by that party and accepted and reasonably acted upon by another party with detrimental results to the party that acted thereon." *Diamond Crystal Sales, LLC v. Food Movers International, Inc.*, No. CV407-42, 2008 U.S. Dist. LEXIS 55279, at *15 (S.D. Ga. July 21, 2008). Here, as the District Court explained, "Plaintiffs cannot be said to have detrimentally relied on any alleged misrepresentation because any detriment they suffered was caused by Plaintiffs' failure to make

payments on their loan." (Doc. 24, p. 35.) The Fenellos cannot allege any set of facts to get around the fact that they defaulted, and accordingly, the Court properly dismissed this claim with prejudice.

I. The Court Did Not Err in Dismissing the Fenello's FDCPA Claim with Prejudice.

The Fenellos fail to address their arugments in the FAC that (1) BANA is a debt collector because BAC Home Loans Servicing, LP transferred the loan to BANA after the loan was in default; and (2) BANA violated 15 U.S.C. §1692g(b) by failing to verify the debt and continuing to attempt to collect the debt. Accordingly, these claims are deemed abandoned, and their dismissal should be affirmed. *See Goodman*, 718 F.3d at 1336 n.5.

In their Brief, the Fenellos allege that the Court erred in dismissing their FDCPA claim because (1) BANA is a debt collector based on the July 7th letter; and (2) whether BANA lacked the right to possession and therefore violated 15 U.S.C. § 1692f(6)(A) is a question of fact for the jury. (Brief, pp. 31-32.) These theories are again based on the Fenellos' misunderstanding of the FDCPA, the facts in this case, and the Court's July 17, 2012 and February 15, 2013 Orders.

1. The July 7th letter does not establish that BANA is a debt collector.

The Fenellos maintain that BANA is a debt collector because BANA stated in correspondence to them that, "Under the federal Fair Debt Collections Practices

Act and certain state laws, Bank of America is considered a debt collector." (Doc. 26 ¶ 50; Brief, p. 31-32.) This letter, however, is insufficient to establish that BANA is a debt collector pursuant to the FDCPA.

As this Court explained in its July 17, 2012 decision, in *Warren v. Countrywide Home Loans, Inc.,* 342 F. App'x 458, 460 (11th Cir. 2009), "an enforcer of a security interest, such as a [mortgage company] foreclosing on mortgages of real property . . . falls outside the ambit of the FDCPA." (Doc. 24, p. 15.) In *Reese v. Ellis,* 678 F.3d 1211 (11th Cir. 2012), however, the Court held that foreclosure activity could potentially fall under the FDCPA. Specifically, pursuant to *Reese*, "a dual-purpose communication designed to give the borrower notice of foreclosure and demand payment on the underlying debt may also relate to the collection of a debt." (Doc. 24, p. 15.)

As the Court explained, "a statement like [that in the July 7th letter], without more, is not sufficient to establish that BANA is a debt collector under the FDCPA." (Doc. 34, p. 17, fn.9.) As correctly pointed out by the Fenellos, *Reese* does not apply to this case because the July 7th letter "is not a dual purpose letter." (Doc. 29-1, p. 2.) As the Fenellos admit, this letter was not an attempt to collect a debt. *Id.* Rather, "the real purpose of this letter was to notify them that the servicing of the Promissory Note in question had been transferred, and to give the Plaintiffs the opportunity to dispute the debt as required under the FDCPA." *Id.*

An opportunity to dispute the debt is not the same thing as an attempt to collect a debt. Accordingly, as admitted by Fenellos, this letter does not render BANA a debt collector under *Reese* or the FDCPA. Therefore, the dismissal of the Fenellos' FDCPA claim was proper and should be affirmed.

2. Even if BANA was a debt collector, BANA did not violate 15 U.S.C. § 1692f(6)(A).

Even if BANA is a debt collector, the Fenellos fail to allege sufficient facts to support any violation by BANA of 15 U.S.C. § 1692f(6)(A). This section of the FDCPA prohibits a debt collector from "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if--(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest." 15 U.S.C. § 1692f(6)(A). Here, BONY as the assignee of the Security Deed has right of possession of the property due to the Fenellos' default. As servicer and agent of BONY, BANA in turn has right to possession. Accordingly, BANA initiation of foreclosure proceedings on behalf of BONY does not violate the FDCPA. The Fenellos cannot allege any facts to support a violation of the FDCA, and accordingly, dismissal of this claim should be affirmed.

J. The Court Did Not Err in Denying the Fenello's Leave to Amend.

As the Court explained, Fed. R. Civ. P. 15(a)(2), "provides that a court shall freely give leave to amend a pleading when justice so requires." (Doc. 34, p. 19.)

Furthermore, the purpose of the rule is "to enable a party to assert matters that were overlooked or were unknown at the time he interposed the original complaint." *Cameron v. Peach County,* No. 5:02-cv-41-1-CAR, 2003 U.S. Dist. LEXIS 28078, at *11 (M.D. Ga. August 11, 2003). Contrary to the Fenellos' assertions, they do not have an absolute right to amendment as *pro se* litigants. Rather, the futility of an amendment is justification for a dismissal with prejudice. *See Carvel v. Godley,* No. 10-10766, 2010 U.S. App. LEXIS 24763, at *4 (11th Cir. December 2, 2010) (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962)).

Here, the Fenellos fail to assert any new facts or provide any new information that was not available to them at the time they filed their original Complaint. Furthermore, an amendment would be futile because the Fenellos cannot allege any set of facts upon which relief could be granted. As the District Court held:

> Even if it were timely, the claims Plaintiffs now want to assert would be futile. "[T]he denial of leave to amend is justified by futility when the complaint as amended is still subject to dismissal." *Burger King Corp. v. Weaver,* 169 F.3d 1310, 1320 (11th Cir. 1999). "Because justice does not require district courts to waste their time on hopeless cases, leave may be denied if a proposed amendment fails to correct the deficiencies in the original complaint or otherwise fails to state a claim." *Mizzaro v. Home Depot, Inc.,* 544 F.3d 1230, 1255 (11th Cir. 2008).

(Doc. No. 34, p. 21.) The Fenellos have articulated no viable claims or reason that

they should be given leave to amend. Accordingly, the dismissal with prejudice should be affirmed.

K. The Court Did Not Abuse its Discretion in Denying the Fenello's Motion for Reconsideration.

"A motion for reconsideration is appropriate only where there is: (1) newly discovered evidence; (2) an intervening development or change in controlling law; or (3) a need to correct a clear error of law or fact." *See U.S. Faucets, Inc. v. Home Depot USA, Inc.,* No. 1:03-cv-1572-WSD, 2006 U.S. Dist. LEXIS 2730, at *2 (N.D. Ga. Jan. 13, 2006) (additionally noting that such motions shall not be filed as a matter of routine practice and are not "an opportunity for the moving party to instruct the court on how the court could have done it better the first time") (internal citations omitted). Moreover, a motion for reconsideration should not be used "to offer new legal theories or evidence that could have been presented in conjunction with the previously filed motion or response, unless a reason is given for failing to raise the issue at an earlier stage in the litigation." *See Bryan v. Murphy*, 246 F. Supp. 2d 1256, 1259 (N.D. Ga. Feb. 12, 2003).

The Fenellos' Motion for Reconsideration repeats the same meritless theories that they have asserted throughout this litigation – now spanning over a year and half. The Fenellos fail to assert any newly discovered evidence, intervening development or change in controlling law, or clear error of law or fact. *U.S. Faucets, Inc.,* 2006 U.S. Dist. LEXIS 2730, at *2. The Fenellos do not proffer

any new legal theory or evidence which they were prevented from presenting during the briefing on the Motion to Dismiss the original Complaint or the Motion to Dismiss the FAC. *Bryan*, 246 F. Supp. 2d at 1259. In fact, the Fenellos repeatedly cite to their prior filings. (*see gen.* Doc. 36.)

The July 17, 2012 and February 15, 2013 Opinions properly dismissed the Fenellos' lawsuit with prejudice, and the Fenellos' fail to offer any grounds upon which relief would be appropriate. Accordingly, the Court properly denied the Fenellos' Motion for Reconsideration.

VI. Conclusion

For the foregoing reasons, this Court should affirm dismissal of this matter.

Respectfully submitted this 18th day of February, 2014.

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CERTIFICATE OF COMPLIANCE WITH VOLUME-TYPE LIMITATION

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies this brief complies with Fed. R. App. 32(a)(7)(B). The brief contains 6,456 words. The type-face is 14-point, and the type is plain, times new roman style.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing ***Brief of Appellees*** was sent to the U.S. Court of Appeals for the Eleventh Circuit via Federal Express next-day delivery, and a copy served on *Pro Se* Plaintiffs/Appellants by placing a copy of the same in the U.S. Mail, properly addressed with adequate postage thereon upon:

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This 18th day of February, 2014.

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