IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

13-15558

No. 13-15558-BB

VITO J. FENELLO, JR., et al
Plaintiffs/Appellants, Pro Se

v.

BANK OF AMERICA N.A., et al
Defendants/Appellees.

Appeal from the United States District Court
for the Northern District of Georgia
Case 1:11-CV-04139-WSD

REPLY BRIEF OF APPELLANTS

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SUMMARY OF ARGUMENT

Capture. To prevent it, our Founding Fathers gave us a constitutional republic that built upon a long tradition of law that balanced the interests of the weak with those of the powerful. To further protect against capture, the founding fathers split our government into three branches, each with different terms and responsibilities.

Despite these safeguards and intentions, over the last twenty years, our government has tipped dangerously toward capture. We see it in the executive branch, whereby those who are supposed to be regulators swap roles within the industries being regulated. In what has become a revolving door, this collaboration between the executive branch and the powerful interests being regulated have combined to subjugate everyone else.

We see it in the legislative branch, whereby the powerful use lobbying as a legalized form of bribery, to pass laws drafted in smoke filled rooms, by the very financial interests backing their passage. We also see it the way congressmen cash out by "retiring" to the very lobbying firms that put coin in their election coffers.

And unfortunately, we can now see it in the court system, especially the eleventh circuit. Over the last several decades, we see a court system that has become biased by the faulty laws passed in legislatures, and faulty court decisions that have been decided by the litigant with the deepest pocket.

Then, in the ultimate attack on justice, when see it the way these biased laws and precedents are used by judges to overturn years of common law that have historically supported the concepts reflected in the U.S. Constitution.

While this lawsuit is about a mortgage, this appeal is about this loss of justice in the eleventh circuit. It's about how the judges in the case have been shown collaborating with the defendants at conventions designed to show banks how to overcome lawsuits like this one, with one judge even serving on a panel together with the defendant's counsel. It's about how, despite all of this, the judges in this case failed to recuse themselves despite these appearances of impropriety.

Finally, it's about how the judges in the case have dismissed this case ruling that "all of their claims are implausible, unfounded, without merit, and amendment would be futile," even though Bank of America has signed several consent decrees, even though Bank of America paid over $9 billion in a multi-state settlement with 49 state attorney and the U.S. attorney general, whereby BANA agreed to stop the egregious practices perpetrated upon the plaintiffs.

This case is but one example of how recent changes to this court have severely impacted the ability of pro se litigants to get a fair hearing and any chance of justice in the eleventh circuit.

ARGUMENT[1]

1.

To start, the Fenellos never admitted, at any point in the litigation, that they defaulted on their Loan. Rather, what they alleged was that they *skipped two payments* on the advice of BANA. (Doc. 1-1, ¶¶ 16-19; Doc. 26 ¶¶ 8-9, 12; Brief, p. xviii.) "Default" is a legal term of art, the definition of which is controlled by the terms of the Note and the Security Deed, as well as by Georgia law. "In general, the interpretation of contractual language is a question of law for the court, unless it is so ambiguous that the ambiguity cannot be resolved by the ordinary rules of construction. Manzi v. Cotton States Mut. Ins. Co., 243 Ga. App. 277, 279 (2000). "[W]here terms of a written agreement are ambiguous, the meaning should be left to the jury." Stinsonv. Artistic Pools, Inc., 236 Ga. App. 768, 769 (1999).

Georgia law is crystal clear that there *cannot* be a default, *as a matter of law*, when a "quasi-new agreement" has been entered into, *unless and until* the party seeking to enforce the strict terms of the agreement (1) gives notice to the other party of such intention, O.C.G.A. § 13-4-4; and (2) provides the other party with a *reasonable opportunity* to cure any deviations from the exact terms of the agreement, Curl v. Federal Sav. & Loan Asso., 241 Ga. 29, 30 (1978). Here, the

[1] The Fenellos reaffirm all arguments contained within the Brief of Appellant, and incorporate those arguments herein by this reference.

Parties had entered into a "quasi-new agreement"; and the Fenellos were never given the notice required under O.C.G.A. § 13-4-4 and a reasonable opportunity to cure *before* BANA sent them a notice of default.[2] Thus, because there has not been a legal default, BANA has never had the legal or contractual right to foreclose. See (Doc. 6-1 at p. 14, ¶ 22); Brown v. Freedman, 222 Ga. App. 213, 214 (1996) (stating that "[a] claim for wrongful exercise of a power of sale under O.C.G.A. § 23-2-114 can arise when the creditor has no legal right to foreclose").

2.

Assuming *arguendo* that the Fenellos did default on the Loan, Appellees' Statement of Facts belies the fact that any purported default was precipitated by the actions of BANA. BANA states that "[t]he 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.)" (Appellees' Brief p.3). Paragraph 12 of the FAC reads as follows: "Relying upon representations by Bank of America, Plaintiffs skipped the next two monthly payments, then promptly applied for relief on April 24, 2010, under HAMP as instructed by the Bank." (Doc. 26 ¶ 12.) In other words, BANA impliedly admits that its own representations precipitated the Fenellos' default (assuming *arguendo* that a default did, in fact, occur), but smugly claims that it is

2 "Questions of reasonableness are [] issues for jury determination." (Internal citation and punctuation omitted.) Durham v. State, 295 Ga. App. 734, 736 (2009).

in no way liable for putting the Fenellos in danger of losing their home. Such an assertion flies in the face of Georgia law, which clearly indicates that a breach of contract caused by the bad-faith acts of a party to the contract gives rise to a claim in tort against the party committing the bad-faith act. See Brown, 222 Ga. App. at 216 (quoting Ihesiaba v. Pelletier, 214 Ga. App. 721, 724 (2) (1994)).[3] A default under the Note and the Security Deed constitutes a breach of contract. Thus, if the Fenellos did in fact default on their Loan, and that default was caused by the bad-faith acts of BANA, then BANA is liable in tort to the Fenellos. Consequently, the Fenellos should have been allowed to re-plead their tort claims against BANA.

3.

BANA asserts that "[t]he Fenellos fail to offer any legitimate reason that *Larose* and *Montgomery* do not apply or should be overturned." (Appellees' Brief at 23.) In actuality, the Fenellos *did* state why Larose and Montgomery do not apply or should not be followed: because (1) they are "privies in estate" pursuant

[3] The Brown and Ihesiaba line of caselaw is slightly different from the caselaw cited by the District Court in the Order Granting Defendants' first motion to dismiss. (Doc. 24 at 33.) For example, the District Court cites ServiceMaster Co., L.P. v. Martin, 556 S.E.2d 517, 521 (Ga. Ct. App. 2001), for the proposition that "[a] plaintiff in a breach of contract case has a tort claim only where, in addition to breaching the contract, the defendant also breaches an independent duty imposed by law." In slight contrast, the Brown and Ihesiaba line of caselaw indicates that a plaintiff can state a viable claim in tort for "bad faith"/"breach of the duty of good faith and fair dealing" when the *plaintiff* is the party that breaches the contract, so long as the plaintiff can prove that its breach was caused by the defendant's bad-faith acts.

to O.C.G.A. § 23-2-34, which by consequence means that they have standing to attack assignments in their chain of title in the context of a claim in equity (e.g., in a petition to enjoin a future wrongful foreclosure or to cancel an assignment); and because (2) "statutes trump cases," Couch v. Red Roof Inns, Inc.,291 Ga. 359, 364 (2012). (The Fenellos also have standing to attack assignments in order to establish breach of duty in the context of a tort claim. In Georgia, no contractual privity is necessary to bring a claim in tort unless the duty being breached arose from the terms of a contract. O.C.G.A. § 51-1-11. In a tort claim for wrongful foreclosure, any attack on an assignment would be made for the purpose of establishing breach of the duty to exercise the power of sale fairly and in good faith. This is a duty that arises from the terms of the security deed —a contract to which the borrower and the grantee (along with each assignee of the security deed) are parties.) BANA fails to even address O.C.G.A. § 23-2-34 in its Brief because it knows that its application could bring every one of its bogus assignments related to land in Georgia—many of which are improperly attested and signed by individuals with sham titles or with no written authorization to transfer security deeds on behalf of the assignor—under intense judicial scrutiny.

4.

BANA's argument regarding why the Fenellos were not entitled to injunctive relief is not only legally incorrect, but blatantly deceptive. BANA cites

to law regarding temporary injunctions, which does not apply when a petitioner is seeking a *permanent* injunction. The Fenellos explicitly address the different standards in footnote 18 of their initial brief. (Brief of Appellant at 39, n. 18.) That footnote clearly indicates that (1) a petition for a permanent injunction is governed by the substantive law of the State, not by Federal law, and (2) that O.C.G.A. §§ 9-5-1, 9-5-10 set forth the only requirements for a petitioner to state a claim for permanent injunctive relief.

5.

BANA cites to You v. JP Morgan Chase Bank, 293 Ga. 67, 74 (2013) in support of its proposition that "the Georgia Supreme Court rejected the borrowers' theory that only the owner of the Note could foreclose." (Appellees' Brief at 24-25). This argument is a complete red herring. The Fenellos acknowledge that You is controlling law, and did *not* argue in their Brief that "only the owner of the Note [can] foreclose." Rather, what they argued was that, (1) pursuant to the terms of the Security Deed and Georgia law, only the "Lender" or its agent can invoke the power of sale; (2) the owner of the Note (i.e., the party with the beneficial interest in the Note) is the "Lender"; and (3) if the "Lender" is a trustee and did not take title to the Note or to the Security Deed in compliance with the terms of its trust instrument, then said Lender may lack legal capacity to foreclose depending on the state law governing the trust. (Also, the Lender's agents would lack capacity to

foreclose as well, because an agent cannot do more than what its principal could have done.) Georgia law is clear that, "[b]roadly speaking, the terms of a trust are whatever the settlor intended them to be at the time of the creation of the trust, so long as those terms are permitted by law." (Internal footnote omitted.) Rose v. Waldrip, 316 Ga. App. 812, 815 (2012). Thus, a restriction placed on the trustee by the trust instrument would determine the contours of the trustee's legal capacity to act.

Here, BONY is purporting to hold the Note and the Security Deed as trustee for a REMIC trust. However, depending on the law of the state by which the REMIC trust is governed, if BONY did not take title to either document in compliance with the terms of its trust instrument, it (and its agents) may not have the legal capacity to non-judicially foreclose. For this reason, the District Court erred when it held that ownership of the Note has no bearing on non-judicial foreclosure.

6.

With regard to the Fenellos' "one satisfaction rule" argument, BANA's assertion that "[t]he Fenellos suggest that because the Note has been paid off, BONY has been satisfied and no longer has the right to enforce the Note," (Apellees' Brief at 26), is also a red herring. The Fenellos have not asserted that securitization or the "paying off" of the Note "through insurance or

overcollateralization" obviates their payment obligations. Rather, what they have asserted is that the payor is subrogated to the rights of BONY as a matter of law, and that the Fenellos are now indebted to that payor, *not* to BONY. As the Fenellos set forth in their initial brief, this position is supported by Georgia law. Thus, it was error for the District Court to hold that the Fenellos could not state a claim as to BONY and BANA based on the "one satisfaction" rule.

7.

Appellees state that the Fenellos have no fraud claim because "the Fenellos cannot allege any set of facts to show that their damages were proximately caused by purported misrepresentations by BANA." (Appellees' Brief at 27.) This fraud argument relies entirely on the rationale of the District Court. (Appellees' Brief at 27-28.) However, the District Court's rationale consists of precisely the kind of unauthorized "fact-weighing" that judges in the Northern District of Georgia are notorious for when ruling on foreclosure cases brought by *pro se* plaintiffs. See Sanctuary Surgical Ctr., Inc. v. UnitedHealthcare, Inc., 2012 U.S. Dist. LEXIS 151404, *19 (S.D.Fla. 2012) ("factual determination and careful weighing of evidence [] is inappropriate on a motion to dismiss").

First, the District Court wrongly characterized the Fenellos' failure to pay "beyond the initial two months" as a "default" (see ¶ 1, supra). Second, the Court wrongly held that the Fenellos' failure to commence repaying beyond the initial

two months was not in any way attributable to the acts and omissions of BANA. This was a causation issue that was *not* "palpably clear and indisputable," Crankshaw v. Piedmont Driving Club, Inc., 115 Ga. App. 820, 821 (1967), and consequently should have been left for determination by a jury. Thus, it was error for the Court to dismiss the Fenellos' fraud claim on the ground that they could not prove causation.

8.

Appellees' equitable estoppel argument also fails, because it is entirely predicated on the erroneous notion that the Fenellos' own inaction proximately caused their injury. As causation should have been a jury question, it was error for the District Court to dismiss the Fenellos' equitable estoppel claim on this basis.

9.

Appellees' argument regarding why it was not error for the court to dismiss the Fenellos' FDCPA claim also fails. First, pursuant to the very principles of "equitable estoppel" that Appellees cite to in pgs. 28-29 of their Brief and that Appellants cited (Appellants Brief at p. 54, n. 32), BANA should not be allowed to claim one thing outside of court and claim another in court. Second, whether BONY does, in fact, have a "present right to possession" is a question that has not yet been determined. See ¶ 5, supra. Thus, it was error for the Court to dismiss the Fenellos' FDCPA claims on these two grounds.

10.

Given that the District Court's holdings were premised on both plain legal error and on impermissible "fact-weighing," and given that amendment would *not* have been futile for the reasons set forth supra and in Appellants' Initial Brief, the District Court erred by not reconsidering its dismissal order and by never giving the Fenellos a *sincere* opportunity to amend their Complaint. (See Appellants' Brief at 56.)

11.

Contrary to Appellees' assertions, the Fenellos never attempted to "avoid paying their mortgage." (Appellees' Brief p. 6). Rather, as the affidavits from the Massachusetts HAMP litigation clearly indicate,[4] *BANA* wanted to foreclose on the Fenellos, and consequently lured them into delinquency with no intention of ever granting a loan modification. (This is inceptive fraud. Cone Mills Corp. v. A. G. Estes, Inc., 399 F. Supp. 938, 944 (N.D. Ga. 1975) (quoting Hinson v. Hinson, 221 Ga. 291, 292 (144 S.E.2d 381, 383) (1965).) The Fenellos were current on their loan at the time they skipped the first two payments on the advice of BANA; and they were never instructed to recommence payment on the Loan. Without explicit instruction from BANA to recommence paying, the Fenellos' decision to not recommence paying was entirely logical. If inability to pay the normal monthly

[4] See Appellants' Initial Brief at p. 28, n. 5 for citation.

payment was one of the criteria for being approved for a loan mod, then it strains logic to think BANA would modify a loan if the borrower recommenced making the regular monthly payment. The bottom line is that BANA gave deceptive instructions on purpose. No sane person could possibly believe that a bank controlled by the second-largest financial holding company on earth[5] could have such a shoddy process for handling loan mods simply due to bad management and incompetent employees. As the HAMP litigation affidavits indicate, BANA's loan servicing division operates under a system of *designed chaos*; and it was this purposely deceptive conduct that has put the Fenellos in danger of losing their home.

12.

Finally, as this case abundantly indicates, the Northern District has used *Twombly* and *Iqbal* as justifications for engaging in impermissible "fact weighing" and factual determination at the motion to dismiss stage. In the context of foreclosure litigation, this exercise almost always favors the banks, as the banks are given the "benefit of the doubt" on virtually every issue. By consequence, the mandatory principles regarding *pro se* leniency are being actively undermined in the Northern District on a regular basis. *Pro se* foreclosure plaintiffs will not be able to obtain justice in the Northern District until this unlawful practice is put to an end.

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[5] See <http://www.ffiec.gov/nicpubweb/nicweb/Top50Form.aspx> (accessed on 03/07/2014 at 09:05 AM EST).

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in their Initial Brief, Appellants renew the prayers for relief enumerate in their Initial Brief, and respectfully request that this Court grant said relief.

Respectfully submitted this 7th day of March, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I have sent an original signed copy of this REPLY BRIEF OF APPELLANTS, along with six copies, via the U.S. Postal Service Certified Priority Mail to: 7012 3460 0003 0469 0757

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 3,374 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii)

This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 pt Times New Roman style.

Respectfully submitted this 8th day of March, 2014.

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