IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VITO J. FENELLO, JR. and BEVERLY H. FENELLO, Plaintiffs, v. BANK OF AMERICA, N.A., and THE BANK OF NEW YORK MELLON (as Trustee for CWALT, Inc.), Defendants.	)	CIVIL ACTION FILE NO. 1:11-cv-04139-WSD-AJB

REPLY IN SUPPORT OF MOTION TO DISMISS

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COME NOW, Defendants Bank of America, N.A. ("BANA") and The Bank of New York Mellon, as Trustee for CWALT, Inc. ("BNYM") (collectively, "Defendants"), by and through their undersigned counsel, pursuant to Fed.R.Civ.P. 8(a) and 12(b)(6), and hereby file their Reply in Support of their Motion to Dismiss ("Reply").

INTRODUCTION

Plaintiffs Vito J. Fenello, Jr. and Beverly H. Fenello ("Plaintiffs") filed their response in opposition ("Response") to Defendants' Motion to Dismiss ("Motion") on December 19, 2011. Rather than respond to the majority of the substantive arguments in Defendants' Motion (Doc. 6), Plaintiffs simply regurgitate conclusory facts from their Complaint and make unsupported statements without any foundation in requirements set out by Georgia law. Other than casting broad aspersions against Defendants, Plaintiffs offer little to rescue their bald allegation that the attempted foreclosure was wrongful and their insufficient pleading which fails to meet the requirements of Rules 8 and 12. Despite the additional legal citations and arguments asserted in Plaintiffs' Response, Plaintiffs still fail to sufficiently plead their claims in order to withstand dismissal under Rules 8(a) and 12(b)(6). Accordingly, Defendants' Motion must be granted.

ARGUMENT

I. Plaintiffs' First Cause of Action for Fraud, Second Cause of Action for Bad Faith and Third Cause of Action for Equitable Estoppel Still Fail.

Plaintiffs contend that they have asserted the First, Second and Third Causes of Action for the "purpose of judicial economy" as they are "preemptive in nature, and dependant on the big issue" of whether Defendants have standing to pursue foreclosure against the Plaintiffs. (Response, p. 3.) However, as discussed in Section II. 4, *infra*, the documents Plaintiffs attach to their Complaint demonstrate that Defendants have standing to pursue foreclosure.

Nonetheless, Plaintiffs still fail to plead the elements of fraud, "bad faith," and equitable estoppel, and appear to concede that these claims are improperly pled, making them ripe for dismissal. In fact, Plaintiffs state that they are "agreeable to removing these three Causes of Action" provided they are subject to "reinsertion pending the outcome of the balance of the case." (Response, p. 3.) Plaintiffs' request is unsupported by law or fact.

Despite Plaintiffs' opportunity to allege and identify a valid framework for fraud and to elucidate the person making the statements, the dates and times of the misrepresentations, and that the alleged misrepresentations were intentionally made to benefit Defendants, Plaintiffs refuse to cure their Complaint. In Plaintiffs' attempt to survive Defendants' Motion, Plaintiffs contend that "[i]f the Court

decides to leave these Causes intact" Plaintiffs, appearing *pro se*, should be held to less stringent standards than formal pleadings drafted by lawyers. (Response, p. 3.) However, while complaints filed by *pro se* litigants must be liberally construed, the Court may not "serve as *de facto* counsel…or…rewrite an otherwise deficient pleading in order to sustain an action." Appleton v. Intergraph Corp., 627 F.Supp.2d 1342, 1348 (M.D. Ga. 2008) (quoting GJR Invs., Inc. v. County of Escambia, Fla., 132 D.3d 1359, 1370 (11th Cir. 1998).

In sum, Defendants have been forced to guess at Plaintiffs' plausible allegations of misconduct, if any. Plaintiffs have not alleged sufficient facts to nudge their claims … "across the line from conceivable to plausible." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1951 (2009).

Furthermore, Plaintiffs incorrectly assert that Defendants argue their "bad faith" claim fails for lack of specificity. (Response, p. 3.) However, as explained in Defendants' Motion, Defendants were unable to locate a federal or Georgia law by that name remotely applicable to the claims at bar, and surmise Plaintiffs' intention to assert a claim for breach of good faith and fair dealing. (Motion, p. 14.) As such, Defendants contend that Plaintiffs have failed to state a claim for breach of contract. As explained in Defendants' Motion, "[t]he law is clear that there exists no independent cause of action for breach of good faith and fair

dealing *outside of a claim for breach of contract*." Cone Fin. Group, Inc. v. Emplrs Ins. Co., 2010 U.S. Dist. LEXIS 82820 at *4-5 (M.D. Ga. 2010) (emphasis added). Plaintiffs' fail to allege a breach of contract and no such claim can be gleaned from Plaintiffs' Complaint.

Accordingly, Plaintiffs' First, Second and Third Causes of Action must be dismissed for failure to state a claim upon which relief can be granted.

II. Plaintiffs Still Fail to State a Claim for Violation of the FDCPA (Fourth Cause of Action), Violation of TILA (Fifth Cause of Action), violation of RESPA (Sixth Cause of Action), Failure to Prove Holder in Due Course (Ninth Cause of Action), Failure to Prove Damages (Tenth Cause of Action), and Failure to Prove Standing (Eleventh Cause of Action).

In Plaintiffs' Response, Plaintiffs summarily lump the Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Causes of Action together and baldly contend that "CWALT, Inc[.], is allegedly not the holder of the note, and does not have standing to pursue foreclosure." (Response, p. 4.) However, Plaintiffs' claims are meritless and must be dismissed for a number of reasons, which will be discussed in turn.

1. Plaintiffs' Fourth Cause of Action for Violation of the FDCPA Still Fails.

Plaintiffs baldly contend that BANA is a "debt collector" for purposes of the FDCPA, because the bank is not attempting to collect a debt in its portfolio. (Response, p. 6.) However, such conclusory allegations are not entitled to any

presumption of correctness under Iqbal, 129 S. Ct. 1937, 1949 (2009). Nonetheless, Plaintiffs contend that their "position is supported" by "Defendants' own letters." (Response, p. 6.) Plaintiffs direct this Court to correspondence from BANA which states, in part: "Under the federal Fair Debt Collection Practices Act and certain state laws, Bank of America N.A[.] is considered a debt collector." (Response, p. 6; Compl., Exh. 7.) However, as the Georgia Federal court has recently noted in Comer v. J.P. Morgan Chase Bank, N.A., simply sending a letter stating that one is a "debt collector" does not change one's status to that of a "debt collector." 2011 U.S. Dist. LEXIS 135215, at *10 (M.D. Ga. Nov. 23, 2011) (observing that a statement in a party's letters indicating that the party was a debt collector does not change that party's status); see also Nwoke v. Countrywide Home Loans, Inc., 251 Fed. Appx. 363, 365 (7th Cir. 2007) (same).

Furthermore, to the extent that Plaintiffs now allege that Defendants violated § 1692f(6) because BNYM did not have a present right to possession of the Property, this claim fails. See Section II. 4, *infra*. Thus, Defendants did not violate § 1692f(6) or any other part of the FDCPA by conducting the non-judicial foreclosure proceeding. Accordingly, Plaintiffs still fail to state a claim for violation of the FDCPA.

2. Plaintiffs' Fifth Cause of Action for Violation of TILA Still Fails.

Plaintiffs only generally allege that "TILA requires the Defendants to provide … notification whenever the actual loan (promissory note) 'is sold transferred or assigned.'" (Response, p. 6.) Plaintiffs, in conclusory fashion, contend that "[s]ince this has yet to occur, the Defendants' Motion to Dismiss should therefore be denied." (Response, p. 7.) However, Plaintiffs still fail to state a claim for violation of TILA. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

As a threshold matter, 15 U.S.C. § 1641(g)[1] only applies to "creditors." Plaintiffs fail to allege that either Defendant is a "creditor" for purposes of 15 U.S.C. § 1641(g), fail to identify which Defendant purportedly violated the statute, and fail to allege that their loan was sold to a "third party." Moreover, a creditor that fails to comply with any requirement imposed under Section 1641(g)(1) only faces liability for "any actual damage sustained by such person as a result of the failure." See 15 U.S.C. § 1640(a)(1). Plaintiffs have not alleged any actual

[1] In the Complaint, Plaintiffs baldly assert that Defendants violated "TILA, Sec. 404. (g)." To the best of Defendants' understanding, Plaintiffs are asserting a claim under 15 U.S.C. § 1641(g).

damages related to "Defendants'" purported failure to provide the notice of assignment required under Section 1641(g)(1). As such, this claim must be dismissed. See, e.g., Borowiec v. Deutsche Bank Nat'l Trust Co., No. 11-00094, 2011 U.S. Dist. LEXIS 78809, at *8-9 (D. Haw. July 19, 2011) (dismissing claim under § 1641(g) for failure to allege actual damages); Beall v. Quality Loan Service Corp., 211 US. Dist. LEXIS 76785, at * 9 (S.D. Cal. March 21, 2011).

3. Plaintiffs' Sixth Cause of Action for Violation of RESPA Still Fails.

In their Response, Plaintiffs contend that they sent BANA a QWR on July 27, 2011. (Response, p. 7; Compl., Exh. 8.) Plaintiffs again, in conclusory fashion, state that Defendants' Motion to Dismiss should be denied because the "requisite elements for a QWR are included in this letter." (Response, p. 7.) However, a QWR necessarily requires "a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower." 12 U.S.C. § 2605 (e)(1)(B)(ii). Plaintiffs' purported "QWR" unreasonably requests "any and all documentation that shows that Bank of NY is the legal holder in due course, and with proof of each and every transfer in the chain of assignments that resulted in Bank of NY attaining this status." (Compl., Exh. 8.)

Even assuming, *arguendo*, that Plaintiffs' letter constitutes a valid QWR, their Complaint is completely devoid of any showing of actual damages. It is well established that a plaintiff must show actual damage in order to recover under RESPA. 12 U.S.C. § 2605 provides that "[w]hoever fails to comply with this section shall be liable to the borrower …[for] any actual damages to the borrower as a result of the failure …." 12 U.S.C. § 2605(f)(1)(A). However, "to recover damages, the borrower has the responsibility to present 'specific evidence to establish a causal link between the financing institution's violation and their injuries.'" Jenkins v. BAC Home Loan Servicing, LP, Case No. 7:11-cv-73 (HL), 2011 U.S. Dist. LEXIS 111235, at *11-12 (M.D. Ga. Sept. 29, 2011) (quoting McLean v. GMAC Mortg. Corp., 398 Fed. Appx. 467, 471 (11th Cir. 2010)). Moreover, without a proper allegation of the injury and damages resulting from the alleged RESPA violation, the claim will fail. Frazile v. EMC Mortg. Corp., 382 Fed. Appx. 833, 836 (11th Cir. 2010) (finding that plaintiff's failure to allege facts relevant to the necessary element of damages supported dismissal for failure to state a claim under § 2605). Here, Plaintiffs' Complaint is completely devoid of any supporting facts that they suffered damages actually and proximately caused by Defendants' violation. Consequently, Plaintiff's cause of action for RESPA violations should be dismissed with prejudice.

4. BANA Was Authorized to Pursue Foreclosure as the Servicing Agent and Plaintiffs' Ninth Cause of Action for Failure to Prove Holder in Due Course and Eleventh Cause of Action for Lack of Standing to Foreclose Still Fail.

Plaintiffs "maintain that questions of holder in due course status apply to commercial paper, including promissory notes." (Response, p. 8.) However, this statement by Plaintiffs' has nothing to do with whether Defendants have standing to pursue foreclosure under the Security Deed. In addition, Plaintiffs appear to allege a "split the note" argument, questioning "whether the note and the security instruments have been bifurcated, and whether the right to foreclose remains intact." (Response, p. 8, 11.) Plaintiffs' assertions are unsupported conclusions which are in large part premised on incorrect legal theories.

First, in Georgia, the holder of a security deed is the entity that is entitled to foreclose on real property in the event of the borrower's default – regardless of whether it also holds the promissory note. See LaCosta v. McCalla Raymer, LLC, No. 1:10-CV-1171-RWS, 2011 U.S. Dist. LEXIS 5168, at *16 (N.D. Ga. Jan. 18, 2011) (finding no "Georgia statute or decision interpreting Georgia law that precludes the holder of the security deed from proceeding with a foreclosure sale simply because it does not also possess the promissory note"). Second, the Georgia Code explicitly states that an assignee of a security deed may exercise the power of sale contained therein. See O.C.G.A. § 23-2-114. The very documents

Plaintiffs attach to their Complaint demonstrate that Plaintiffs' Security Deed was assigned to The Bank of New York Mellon FKA The Bank of New York, as Trustee, for the CertificateHolders of CWALT, Inc., Alternative Loan Trust 2007-5CB, Mortgage Pass-Through Certificates, Series 2007-5CB. (Compl., Exh. 17.)

Third, Georgia courts have consistently held that "a security deed which includes a power of sale is a contract and its provisions are controlling as to the rights of the parties thereto and their privies." Gordon v. S. Cent. Farm Credit, ACA, 213 Ga. App. 816, 446 S.E. 2d 514, 515 (Ga. Ct. App. 1994). Plaintiffs executed and delivered to MERS as nominee for Pulte Mortgage, LLC, a Security Deed granting a lien on the Property. (Motion, Exh. A.) The Security Deed Plaintiffs granted to MERS states that if necessary to comply with law or custom, MERS – as well as the successors and assigns of MERS – have the right to exercise any or all of the interests granted to MERS by the Borrower, including but not limited to, the right to foreclose and sell the Property. (Motion, Exh. A, p. 3.)

Moreover, it is clear that under Georgia law, a secured creditor may appoint an agent to enforce its rights under the note and security deed. Lacosta, 2011 U.S. Dist. LEXIS 5168 at *10. Georgia courts have held that a loan servicer, as agent of a lender, may act as a real party in interest on behalf of a lender. Id. Plaintiffs concede that BANA is the servicer. (Response, p. 7.) The correspondence

Plaintiffs attach to their Complaint further illustrate that BANA was acting as servicer for BNYM. (See Compl., Exh. 3, 9, 11, 15.) Defendant BANA, as servicer of Plaintiffs' loan, is entitled to enforce the lender's rights under the Note and Security Deed.

Similarly, Plaintiffs' suggestion that the attempted foreclosure was wrongful because neither BANA nor BNYM was the "holder of the note" or the "Holder in Due Course" fails as a matter of law. (Response, p. 4, 5.) The failure to be considered a holder in due course does not make the loan obligation automatically disappear, or bar the note-holder from enforcing the note. O.C.G.A § 11-3-302. Indeed, Plaintiffs' argument that the foreclosing entity must demonstrate that it is a holder in due course of a note before carrying out a non-judicial foreclosure has been rejected by Georgia courts. See, e.g., Webb v. Suntrust Mortg., Inc., No. 1:10-cv-0307-TWT-CCH, 2010 WL 2950353, at *2 n.5 (N.D. Ga. July 1, 2010) (demand that defendants "produce the note" in order to show holder in due course status rejected under Rule 12(b)(6)).

Finally, Plaintiffs' "split the note argument" fails as a matter of law. This Court has stated that it "is unaware of any Georgia statute or decision interpreting Georgia law that precludes the holder of the security deed from proceeding with a foreclosure sale simply because it does not also possess the promissory note."

Brown v. Federal National Mortgage Association, 2011 U.S. Dist. LEXIS 31478, at *18 (N.D. Ga. Feb. 28, 2011). In fact, "[v]ariations of this 'split the note' argument have been repeatedly rejected" by this Court. Id.; see Lacosta, 2011 U.S. Dist. LEXIS 5168, at *14 ("[There is no requirement] that an entity or individual in possession of the security deed, must also possess the note before bringing a foreclosure action."); Nicholson v. OneWest Bank, 2010 U.S. Dist. LEXIS 45993, at *4 (N.D. Ga. Apr. 20, 2010) ("[T]he nominee of the lender has the ability to foreclose on a debtor's property even if such nominee does not a have a beneficial interest in the note secured by the mortgage.")

In short, the Assignment is a valid transfer of the security instrument from MERS, as the nominee of the lender, Pulte Mortgage, LLC, to The Bank of New York Mellon Trustee. The Bank of New York Mellon Trustee, as the holder of the security instrument, is authorized to conduct the foreclosure of the Property, and the Georgia real estate records clearly demonstrate that it has standing to do so. (Compl., Exh. 17.) Moreover, BANA, as the servicing agent, is entitled to initiate foreclosure proceedings on behalf of the holder of the security instrument. Lacosta, 2011 U.S. Dist. LEXIS 5168, at *10. Accordingly, Plaintiffs' argument that Bank Defendants do not have standing to foreclose is simply without merit and must be dismissed with prejudice.

5. Plaintiffs' Tenth Cause of Action for Failure to Prove Damages Still Fails.

In their Response, Plaintiffs now appear to rely on the theories of unjust enrichment and the one satisfaction rule to support the proposition that Defendants fail to prove they have sustained damages and thus, lack standing to foreclose. (Response, p. 8.) Plaintiffs cherry pick non-binding case law interpreting other statutes, in a misguided effort to challenge Defendants' "failure to prove damages," as a result of CWALT, Inc.'s "credit default swaps." (Response, p. 9.)

However, as this Court has eloquently stated, "[w]hile 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." Searcy v. EMC Mortgage Corp., No. 1:10-cv-0965-WBH, 2010 U.S. Dist. LEXIS 119975 (N.D. Ga. Sept. 30, 2010). The simple fact of the matter is that Plaintiffs borrowed money and are legally obligated to pay that money back. Id. Accordingly, Plaintiffs still fail to state a claim that Defendants lacked damages to foreclose and Plaintiffs' Tenth Cause of Action must be dismissed.

III. Plaintiffs' Seventh Cause of Action for Defective Documents Still Fails to State a Claim.

Rather than specifically allege facts to establish their defective document claim, Plaintiffs attempt to distract the Court by baldly alluding to various reports of "over 100,000 fraudulent assignments perpetrated by banks, including Bank of America." (Response, p. 10.) Despite Plaintiffs' misguided attempt to somehow impute liability on the Defendants in this action by making references to reports of fraudulent assignments purportedly concerning the mortgage industry as a whole, these "reports" are entirely irrelevant to the case at bar, and fail to identify how there is an actual dispute between Plaintiffs and Bank Defendants. This argument does absolutely nothing to repair the gaping holes in Plaintiffs' claim. In addition, for reasons addressed in Section II. 4, *supra*, Plaintiffs' "split the note claim" is without bite. Accordingly, Plaintiffs' Seventh Cause of Action still fails.

IV. Plaintiffs' Eighth Cause of Action for Failure to Comply With the Consent Order Between BANA and the Comptroller of the Currency, Twelfth Cause of Action for Defective Foreclosure, and Thirteenth Cause of Action for Contradiction to Verbal Representation Still Fail.

Plaintiffs do not state any new arguments to support Counts 8, 12 or 13. Rather than specifically allege facts to establish how BANA's purported failure to comply with the consent order gives Plaintiffs a private right of action (Count 8), Plaintiffs summarily assert that "Bank of America has engaged in a pattern of

foreclosing on its clients, without following minimal standards that are required under law and their own agreements." (Response, p. 7.) Similarly, Defendants contend that Plaintiffs have failed to allege how Defendants allegedly violated O.C.G.A. § 7-1-1014 (3). (Motion, p. 28.) However, Plaintiffs again fail to plead facts to support their argument, asserting instead that "the Statute applies to foreclosures in general, and this one in particular." (Response, p. 11.) These arguments do absolutely nothing to repair the gaping holes in Plaintiffs' claims. Furthermore, Plaintiffs concede that Count 13 is moot and subject to dismissal. (Response, p. 12.) Accordingly, Counts 8, 12 and 13 of Plaintiffs' Complaint must be dismissed for failure to state a claim.

CONCLUSION

For the reasons stated herein, Defendants' Motion to Dismiss should be granted.

This 5th day of January, 2012.

/s/ Andrew G. Phillips

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CERTIFICATE OF SERVICE, FONT AND MARGINS

I hereby certify that on January 5, 2012, I electronically filed the foregoing *Reply in Support of Defendants' Motion to Dismiss* with the Clerk of the Court using the CM/ECF System and served a true and correct copy of same on *Pro Se* Plaintiffs via First-Class Mail, postage prepaid, addressed to:

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I further certify that I prepared this document in 14 point Times New Roman font and complied with the margin and type requirements of this Court.

/s/ Andrew G. Phillips
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