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

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER OF DISMISSAL

COME NOW Defendants Bank of America, N.A., ("BANA") and The Bank of New York Mellon, ("BONY")[1] (collectively "Defendants"), by and through counsel, and file this Opposition to Plaintiffs' Motion for Reconsideration (Doc. No. 36) of the Court's February 15, 2013 Opinion and Order dismissing this action with prejudice (Doc. No. 34).

[1] Plaintiffs name "The Bank of New York Mellon (as Trustee for CWALT, Inc.)" as a Defendant. Defendants represent that the current owner of the Loan in question is The Bank of New York Mellon f/k/a/ 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. Accordingly, BONY responds as Trustee.

INTRODUCTION

On July 17, 2012, this Court dismissed all of Plaintiffs' claims without leave to amend, except their claim for violations of the Fair Debt Collection Practices Act ("FDCPA"). Doc. No. 24. Specifically, this 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. No. 24, p. 51 (emphasis added). This Court specifically instructed Plaintiffs to amend *only* their FDCPA claim. Doc. No. 24, p. 51.

Despite the Court's clear instructions and without first requesting leave to amend, Plaintiffs added two new implausible, unfounded, and meritless claims for wrongful attempted foreclosure and negligence to their First Amended Complaint ("FAC"). Doc. No. 26. Plaintiffs also filed an untimely retroactive request for leave to amend to add these claims. Doc. No. 30.

On February 15, 2013, this Court denied Plaintiffs' request to amend and dismissed Plaintiffs' case in its entirety with prejudice. Doc. No. 34. On March 15, 2013, Plaintiffs filed their Motion for Reconsideration. Doc. No. 36.

Defendants hereby file their Opposition to Plaintiff's Motion for Reconsideration. As Plaintiffs have failed to cite to any authority or underlying factual allegations to demonstrate that the July 17, 2012 or February 15, 2013

Opinion and Order was in error, their Motion for Reconsideration must be denied and the dismissal with prejudice affirmed.

ARGUMENT

Plaintiffs' Motion for Reconsideration repeats the same meritless theories that they have asserted throughout this litigation – now spanning over a year and half. As such, it contains the exact same arguments which were rejected by this Court in its July 17, 2012 and February 15, 2013 Opinions. For the same reasons, these arguments are insufficient here to salvage Plaintiffs' deficient causes of action.

In its July 17, 2012 Opinion, this Court dismissed all of Plaintiffs' causes of action with prejudice, except for the FDCPA claim, stating that "all of [Plaintiffs'] claims are implausible, unfounded, without merit, and amendment would be futile." Doc. No. 24, p. 51. The July 17, 2012 Opinion was 52 pages in which this Court addressed every meritless argument made by Plaintiffs in detail.

Plaintiffs were given an opportunity to amend their FDCPA claim only. Doc. No. 24, p. 51. Of course, Plaintiffs failed to follow the instructions of the Court and added two new implausible, unfounded, and meritless claims for wrongful attempted foreclosure and negligence. Doc. No. 26. As this Court found, Plaintiffs' untimely retroactive request for leave to amend (Doc. No. 30) could not

save these meritless claims. Specifically, in its February 15, 2013 Opinion, this Court again addressed all of Plaintiffs' meritless arguments in detail, rejecting each one. (Doc. No. 34).

Specifically, the Court found that Plaintiffs failed to state a claim for relief under Sections 1692g(b) or 1692f(6) of the FDCPA. Doc. No. 34, pp. 14-19. The Court specifically rejected Plaintiffs' claims that BANA was a debt collector based on the July 7 letter (Doc. No. 34, fn. 9) and that BANA lacked standing to foreclose because it was not the "secured creditor" (Doc. No. 34, fn. 11). Both of these arguments are repeated again in the Motion for Reconsideration, and fail for the same reasons.

The Court also denied Plaintiffs' retroactive motion to amend, again holding that amendment would be futile. Specifically, the Court noted that:

> 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.

Both the July 17, 2012 and February 15, 2013 Opinions are fully supported

by applicable state and federal jurisprudence. Plaintiffs' Motion for Reconsideration fails to cite to any underlying factual allegations of the Complaint or any legal authority to demonstrate that any of the Court's findings were in error. Likewise, Plaintiffs fail to present any arguments that should cause the Court to depart from its earlier rulings.

To the extent that Plaintiffs' Motion for Reconsideration is construed as a motion under Fed. R. Civ. P. 60 for relief from these Opinions, Plaintiffs do not demonstrate that any of the applicable grounds for relief under any subsection of Rule 60 is present here. In addition, a motion for reconsideration is improper where it simply replicates or rehashes the exact arguments advanced by the movant in connection with entry of the subject order.

Indeed, the law in this jurisdiction is that "[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.*, 2006 U.S. Dist. LEXIS 2730, * 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).

Here, there is no 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, * 2. Plaintiffs do not proffer any new legal theory or evidence which they were prevented from presenting during the briefing on the Motion to Dismiss or the Motion to Dismiss the First Amended Complaint. *Bryan*, 246 F. Supp. 2d at 1259. In fact, Plaintiffs repeatedly cite to their prior filings. *See gen.* Doc. No. 36.

In sum, the July 17, 2012 and February 15, 2013 Opinions properly dismissed Plaintiffs' lawsuit with prejudice, and Plaintiffs fail to offer any grounds upon which relief would be appropriate. Accordingly, Plaintiffs' Motion for Reconsideration must be denied, and the dismissal of this lawsuit against both BANA and BONY must be affirmed.[2]

[2] Defendants would also request that this Court make it clear in its Order denying Plaintiffs' Motion for Reconsideration, that filing another lawsuit against Select Portfolio Servicing, Inc. ("SPS") regarding the same allegations set forth in this lawsuit would be barred by *res judicata* and *collateral estoppel.* Contrary to Plaintiffs' assertions and despite the fact that Plaintiffs have been informed of SPS' role as it relates to their loan on numerous occasions, SPS is not the "new servicer" that could qualify as a debt collector under the FDCPA by nature of procuring the loan when it was in default. SPS is merely a sub-servicer, a vendor retained by BANA to service the

CONCLUSION

WHEREFORE, for the above and foregoing reasons, Defendants respectfully request that this Court deny Plaintiffs' Motion for Reconsideration of the July 17, 2013 and February 15, 2013 Opinions dismissing this action with prejudice.

This 29th day of March, 2013.

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loan. BANA remains the master servicer. Accordingly, just as Plaintiffs' arguments against BANA fail, so to would their arguments against SPS.

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CERTIFICATE OF SERVICE, FONT AND MARGINS

I hereby certify that on March 29, 2013, I electronically filed the foregoing *Defendants' Opposition to Plaintiffs' Motion for Reconsideration* 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:

Vito J. Fenello, Jr.
Beverly H. Fenello
289 Balaban Circle
Woodstock, Georgia 30188

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/ Jarrod S. Mendel
Jarrod S. Mendel