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 TO AMEND

COME NOW Defendants Bank of America, N.A., ("BANA") and The Bank of New York Mellon, ("BONY")[1] (collectively "Defendants"), by and through their undersigned counsel, and respectfully oppose Plaintiffs' Motion for Leave to Amend (Doc. No. 30) (hereinafter, "Motion to Amend"). In support thereof, Defendants state as follows:

[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 June 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"). Plaintiffs have now also filed an untimely retroactive request for leave to amend to add these claims. However, Plaintiffs' Motion to Amend must be denied for three reasons. First, Plaintiffs' Motion to Amend violates the July 17, 2012 Order, which provided for amendment only of the FDCPA claim. Second, these new causes of action do not raise any new facts or claims that were unknown at the time Plaintiffs filed their original Complaint. Third, amendment to add these claims is futile. Specifically, Plaintiffs' wrongful attempted foreclosure claim fails because Plaintiffs fail to allege that Defendants published anything untrue about

Plaintiffs' finances, or that Plaintiffs sustained any damages as a result. Rather, the fact remains that any damages sustained are the result of Plaintiffs not paying their mortgage, not any wrongdoing by Defendants. Moreover, Plaintiffs cannot challenge an attempted foreclosure without tendering the amount owing on the Loan, which Plaintiffs have failed to do, or even allege.

Any amendment to add Plaintiffs' purported claim for negligence would also be futile because, like all their other claims, their negligence claim consists solely of legal conclusions without factual support. Defendants do not owe Plaintiffs any duty "to avoid unreasonable risk of harm," and Plaintiffs do not allege facts to support a breach of this duty or damages as a result of the purported breach.

In sum, like their Complaint, their FAC, and all of their frivolous motions, Plaintiffs' Motion to Amend has no merit and is predicated on fundamentally incorrect legal theories. This entire action is merely a waste of judicial resources and a last-ditch effort to prevent a lawful foreclosure on their property after they defaulted on their mortgage. As a result, their Motion to Amend must be denied, and the FAC must be dismissed with prejudice and without leave to amend.

APPLICABLE STANDARD OF REVIEW

Pursuant to Federal Rules of Civil Procedure 15(a)(2) and the corresponding local rule, a party must seek leave of the Court to amend a complaint after 21 days

has passed after service of the responsive pleading. In this case, that period has long passed, and Plaintiff now seeks the Court's permission to amend.

While leave to amend should be freely given, 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, 2003 U.S. Dist. LEXIS 28078 at 11 (M.D.Ga. August 11, 2003) quoting 6 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1473, at 520 (2d ed. 1990).

Additionally, the futility of an amendment is justification for a dismissal with prejudice. See Carvel v. Godley, 2010 U.S. App. LEXIS 24763, *4 (11th Cir. December 2, 2010) (citing Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962)). "An amendment is futile where the amended complaint would still be subject to dismissal." Chen V. Lester, 364 Fed. Appx. 531, 538 (11th Cir. 2010); See also Hall v. United Ins. Co. of Am., 367 F.3d 1255 (11th Cir. 2004) (confirming the district court's denial of plaintiff's motion for leave to amend because an amended complaint would contain "no potentially meritorious claims" and amendment was, therefore, futile).

Further, just like an original complaint, an amendment to a complaint also must meet the requirements of Rule 12(b)(6), which requires dismissal of a

complaint for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6).

ARGUMENT

I. PLAINTIFFS' MOTION TO AMEND MUST BE DENIED BECAUSE IT VIOLATES THE JULY 17, 2012 ORDER OF THIS COURT.

This Court's July 17, 2012 Order clearly grants Plaintiffs leave to amend their FDCPA claim only. Doc. No. 24, p. 51. The July 17, 2012 Order did not grant Plaintiffs leave to add additional causes of action. In fact, this Court specifically 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). Accordingly, Plaintiffs' Motion to Amend should be denied as a blatant violation of this Court's Order.

II. PLAINTIFFS' MOTION TO AMEND MUST BE DENIED BECAUSE THEIR PROPOSED AMANEDMENTS DO NOT RAISE ANY MATTERS THAT WERE UNKNOWN AT THE TIME THAT THEY FILED THEIR ORIGINAL COMPLAINT.

Plaintiffs allege that since filing their original Complaint on October 21, 2011, they "have learned much about the torts and actions of Bank of America." Doc. No. 30, p. 2. Plaintiffs then recount a laundry list of purported wrongdoing by BANA against other borrowers in other jurisdictions. See gen. Doc. No. 30. Plaintiffs also argue that, since filing their Complaint, they "have learned much about the law and the legal system." Doc. No. 30 p. 5. However, Plaintiffs have

not asserted any new facts related to this Loan that were not known at the time they filed their original Complaint. In fact, Plaintiffs admit that both of their new causes of action "referenc[e] the original allegations . . . ." Id.

The purpose of Fed. R. Civ. P. 15(a)(2) 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, 2003 U.S. Dist. LEXIS 28078 at 11 (M.D. Ga. August 11, 2003) quoting 6 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1473, at 520 (2d ed. 1990). Plaintiffs do not allege any matters that were overlooked or were unknown; rather, Plaintiffs assert they should be allowed to amend because (i) they are now aware of unrelated litigation involving BANA; and (ii) they are now purportedly more legally savvy. These two reasons have absolutely nothing to do with the purported wrongful attempted foreclosure or negligence claims that Plaintiffs attempt to assert here. Accordingly, Plaintiffs' Motion to Amend must be denied.

III. PLAINTIFFS' MOTION TO AMEND IS FUTILE BECAUSE PLAINTIFFS FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AS REQUIRED BY FED. R. CIV. P. 8(A) AND 12(B)(6).

Although Plaintiffs' Motion to Amend should be denied for the foregoing reason alone, Plaintiffs Motion must be denied because Plaintiffs also fail to allege sufficient facts to support their claims for wrongful attempted foreclosure or negligence.

The futility of an amendment is justification for a dismissal with prejudice. See Carvel v. Godley, 2010 U.S. App. LEXIS 24763, *4 (11th Cir. December 2, 2010) (citing Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962)). Moreover, given the paucity of facts alleged in the original complaint, and this Court's finding that amendment of the original complaint, aside from the FDCPA claim, would be futile, allowing further revisions to the Complaint in this matter would also be futile. See Chen V. Lester, 364 Fed. Appx. 531, 538 (11th Cir. 2010) ("An amendment is futile where the amended complaint would still be subject to dismissal"); and Hall v. United Ins. Co. of Am., 367 F.3d 1255 (11th Cir. 2004) (confirming the district court's denial of plaintiff's motion for leave to amend because an amended complaint would contain "no potentially meritorious claims" and amendment was, therefore, futile).

Here, Plaintiffs' Motion to Amend must be denied because: (1) Plaintiffs fail to allege sufficient facts to support their wrongful foreclosure claim, and this claim further fails for lack of tender; and (2) Plaintiffs fail to allege sufficient facts to support a claim for negligence.

A. Plaintiffs' Motion to Amend Their Complaint to Add a Wrongful Attempted Foreclosure Claim Must be Denied as Futile Because Plaintiffs Fail to Allege Sufficient Facts to Support Such a Claim and Because Plaintiffs Have Failed to Tender.

In their Motion to Amend, Plaintiffs repeat the same allegations that they made in the FAC; Defendants wrongfully attempted foreclosure because they

"advertised a foreclosure action referencing a 'secured creditor' that was knowingly in dispute, and reported disputed payments as late to the credit reporting agencies in direct contradiction to the FDCPA." Doc. No. 30, p. 6. Plaintiffs also add, for the first time, that, as a result of Defendants' actions, "Plaintiffs were turned down for a business credit line by Wells Fargo Bank." Id. However, as argued in Defendants Motion to Dismiss the FAC, amendment to add this claim would be futile because Plaintiffs' fail to allege sufficient facts to support this claim, and Plaintiffs failed to tender. See Doc. No. 28-1, pp. 19-22.

A wrongful attempted foreclosure requires: (1) a knowing and intentional publication of untrue and derogatory information concerning the debtor's financial condition, and (2) that damages were sustained as a direct result of this publication. Aetna Finance Co. v. Culpepper, 171 Ga. App. 315, 319, 320 S.E.2d 228, 232 (1984).

Here, Plaintiffs allege that Defendants wrongfully attempted foreclosure because the advertisement of the foreclosure sale (1) named BONY as the secured creditor, which Plaintiffs' disputed; and (2) BANA purportedly reported disputed payments as late to the credit reporting agencies. Doc. No. 30, p. 6. However, assuming that the advertisement that Plaintiffs reference is the Notices of Sale Under Power which Shuping, Morse & Ross, LLP ("Shuping") requested that the

Cherokee Tribune publish, the only statement in the Notices that remotely refer to Plaintiffs' financial condition is the following:

> The indebtedness secured by the Deed to Secure Debt having been declared due and payable because of default in the payment of the indebtedness secured thereby, this sale will be made for the purpose of paying the same and all expenses of sale, including attorney's fees, if applicable.

Id. This statement merely establishes that Plaintiffs defaulted on the Loan -- a fact that Plaintiffs have never denied, even in their Motion to Amend.

Furthermore, the statement that BONY is the secured creditor is true, and even if it were not true, this statement is not a derogatory statement about Plaintiffs' financial condition. See e.g. Ezuruike v. Bank of N.Y. Mellon, 2012 U.S. Dist. LEXIS 129091, *2-44 (N.D. Ga. Sept. 11, 2012) ("[P]laintiff does not allege that he had not defaulted on his mortgage obligation; instead, he seems to be alleging only that the defendant was not the right entity to call him to task for that . . . plaintiff is repeating a familiar argument that is often made by debtors who have defaulted on their mortgage, but who nonetheless seek to delay and prevent foreclosure of property on which they have ceased to make payments . . . such debtors seeks to forestall the return of their property to the creditor who is not being paid by mounting an argument that the foreclosure notice is not in technical compliance with the applicable Georgia statute . . . whether or not there is merit to

this argument by plaintiff is beside the point as to an attempted wrongful foreclosure claim. That is, plaintiff makes no plausible allegation that he was not in default and therefore a foreclosure notice suggesting that he was could not falsely impugn the plaintiff's financial condition." (citations omitted)). Therefore, Plaintiffs' wrongful attempted foreclosure claim based on these Notices fails as a matter of law.

Similarly, BANA's bare allegations about reporting of the disputed payments as late to the credit reporting agencies cannot form the basis for a wrongful attempted foreclosure claim. Doc. No. 30, p. 6. This is because Plaintiffs fail to allege when Defendants reported this information, that this information was false, that Defendants knew it was false, or that it was published. Further, like the Notices for Sale Under Power, this credit report reflects that Plaintiffs failed to pay their mortgage, which again is not in dispute. Additionally, a claim asserting a purported error on their credit report is outside the scope of the FDCPA or a wrongful attempted foreclosure claim. Accordingly, Plaintiffs' wrongful attempted foreclosure claim based on this credit report fails as a matter of law.

Additionally, although Plaintiffs allege for the first time that they did not receive a business line of credit, Plaintiffs still fail to allege that their purported

damages or their failure to obtain credit were the result of the publication of the Notices of Sale Under Power or BANA's purported report of disputed payments. Again, Plaintiffs failed to pay their mortgage, a fact that is not in dispute. Thus, any purported damages that Plaintiffs may have sustained is due to their own failure to pay their mortgage – not any of the "Defendants' actions." See Doc. No. 24, p. 31, fn. 15; see also Ezuruike, 2012 U.S. Dist. LEXIS 129091, *4 ("[P]laintiff makes no plausible allegation that he was not in default and therefore a foreclosure notice suggesting that he was could not falsely impugn the plaintiff's financial condition."); Sellers v. Bank of Am., Nat'l Ass'n, 2012 U.S. Dist. LEXIS 70343, *8 (N.D. Ga. May 21, 2012) ("Plaintiffs, while alleging that Defendants lacked authority to foreclose, have failed to sufficiently plead a cause of action for attempted wrongful disclosure . . . [because] Plaintiffs have not alleged sufficient facts to show with plausibility that . . . Plaintiffs suffered damages . . . .").

Finally, Plaintiffs' wrongful attempted foreclosure claim fails because Plaintiffs failed to tender. In their Motion to Amend, Plaintiffs assert that they should not have to tender the amount owing on the loan to bring this claim because "there is no current foreclosure action pending, the FAC does not ask to enjoin the foreclosure . . . and [tender is] not an element recognized in this cause of action." Doc. No. 30, p. 7. However, contrary to Plaintiffs' assertions, the tender

requirement applies even to attempted foreclosure claims. See Doc. No. 28-1, pp. 21-22. For these reasons, amendment to add a wrongful attempted foreclosure claim would be futile, and Plaintiffs' Motion to Amend must be denied.

B. Plaintiffs' Motion to Amend Their Complaint to Add a Negligence Claim Must be Denied as Futile Because Plaintiffs Fail to Allege Sufficient Facts to Support a Claim for Negligence.

In their Motion to Amend, Plaintiffs baldy assert that they "have shown the authoritative elements required to prevail in a Negligence action" and that Defendants breached their "duty to perform their role in a non-negligent manner." Doc. No. 30, pp. 7-8. Plaintiffs further argue, for the first time, that, pursuant to the Consent Judgment entered in U.S. v. Bank of Am., N.A., et al., 12-cv-00361-RMC (D. D.C. Apr. 4, 2012) (hereinafter the "National Mortgage Settlement"), BANA "assumed a duty to avoid unreasonable risk of harm." Doc. No. 30, p. 9. Plaintiffs then include a laundry list of purported violations by BANA of the National Mortgage Settlement. Id. However, as discussed in Defendants' Motion to Dismiss the FAC, Plaintiffs' legal conclusions and conclusory assertions are simply insufficient to state any claim for relief, let alone one for negligence. See Doc. No. 28-1, pp. 22-25.

To state a claim for negligence in Georgia, a plaintiff must establish the following elements: "(1) A duty, or obligation, recognized by law, requiring the

actor to conform to a certain standard of conduct . . . (2) A failure on his part to conform to the standard required[;] (3) A reasonable close causal connection between the conduct and the resulting injury[;] (4) Actual loss or damage resulting to the interests of the other." Brookview Holdings, LLC v. Suarez, 285 Ga. App. 90, 91 (2007) (citations omitted).

Here, Plaintiffs fail to assert an enforceable or recognized legal duty of Defendants that was breached. Defendants do not owe Plaintiffs a general duty "to avoid unreasonable risk of harm," nor do Plaintiffs cite to any statute or case law, or provisions in the Security Deed providing for such a duty. In fact, the law in Georgia is clear that "in order to maintain an action [in tort] because of a breach of duty growing out of a contractual relation[,] the breach must be shown to have been a breach of a duty imposed by law and not merely the breach of a duty imposed by the contract itself." Med South Health Plans LLC v. Life of the South Ins. Co., 2008 U.S. Dist. LEXIS 40223, at *21 (N.D. Ga. May 19, 2008).

Furthermore, Plaintiffs' reliance on the National Mortgage Settlement to support their negligence claim is misplaced. First, the National Mortgage Settlement was not even entered, much less effective, when the alleged wrongdoing occurred and the original Complaint was filed. The National Mortgage Settlement became effective April 5, 2012, and is being implemented in

forward-looking stages, some of which are not complete even now. Second, Plaintiffs are not parties to the National Mortgage Settlement, and there is no private right of action under the National Mortgage Settlement. Indeed, the terms of the National Mortgage Settlement specifically provide for its comprehensive enforcement only by "any Party to this [agreement] or the Monitoring Committee." Moreover, Defendants' obligations under the National Mortgage Settlement are enforceable "solely in the U.S. District Court for the District of Columbia." National Mortgage Settlement, Exh. E at 14-15 (§§ J.1-2).

Further, even if Defendants owed Plaintiffs a duty of care, Plaintiffs fail to allege sufficient facts to support a breach by Defendants, or any wrongdoing. As discussed in Section A, *supra,* the credit report and Notices of Sale Under Power do not include any false information, and Plaintiffs' attempted wrongful foreclosure claim fails. Additionally, Plaintiffs fail to specify which federal or state laws it is that Defendants purportedly violated or allege any facts to support claims for slander of title or defamation of character.

Finally, Plaintiffs have failed to establish a causal connection between Defendants' alleged conduct and the resulting injury. As argued in Defendants' Motion to Dismiss the FAC, any purported damages that Plaintiffs may have suffered are due to their failure to pay their mortgage – not any wrongdoing by

Defendants. See Doc. No. 28-1, pp. 22-25; Doc. No. 24, p. 31, 33, fn. 15.

In sum, Plaintiffs' negligence claim is wholly comprised of legal conclusions and is completely devoid of any facts to support such assertions. As a result, Plaintiffs have failed to state a claim for negligence, and, accordingly, amendment to add this claim would be futile. Therefore, Plaintiffs' Motion to Amend must be denied.

CONCLUSION

WHEREFORE, for the above and foregoing reasons, this Court should deny Plaintiffs' Motion to Amend, grant Defendants' Motion to Dismiss pursuant to the July 17, 2012 Order of this Court and Fed. R. Civ. P. 8(a) and 12(b)(6), and grant Defendants such other and further relief as the Court deems equitable and appropriate under the circumstances.

This 18th day of September, 2012.

/s/ Jarrod S. Mendel
Jarrod S. Mendel (GA Bar No. 435188)
McGuireWoods LLP
1230 Peachtree Street, N.E.
Promenade II, Suite 2100
Atlanta, Georgia 30309-3534
(404) 443-5713 (telephone)
(404) 443-5687 (facsimile)
jmendel@mcguirewoods.com
Attorneys for Defendants Bank of America, N.A. and The Bank of New York Mellon

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CERTIFICATE OF SERVICE, FONT AND MARGINS

I hereby certify that on September 18, 2012, I electronically filed the foregoing *Defendants' Opposition to Plaintiffs' Motion to Amend* 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