IN THE SUPERIOR COURT OF CHEROKEE COUNTY
STATE OF GEORGIA

VITO J. FENELLO, JR., Pro Se and BEVERLY H. FENELLO, Pro Se Plaintiffs, v. SHUPING, MORSE & ROSS, LLP; and BANK OF AMERICA, N.A.; and THE BANK OF NEW YORK MELLON (as Trustee for CWALT, INC.) Defendants.	**CIVIL ACTION** **FILE NO.**

COMPLAINT

COMES NOW Plaintiffs Vito J. Fenello, Jr. and Beverly H. Fenello, and file this Complaint against Defendants Shuping, Morse & Ross, LLP, Bank of America, N.A., The Bank of New York Mellon (as Trustee for CWALT, Inc.).

Introduction

1. The Plaintiffs bring this lawsuit against the Defendants to prevent the wrongful foreclosure and sale of the Plaintiffs' Residence at 289 Balaban Circle, Woodstock, Cherokee County, Georgia, 30188, as provide for in O.C.G.A § 44-14-184

2. The Plaintiffs allege that Bank of America has shown Fraud, Bad Faith, and Equitable Estoppel by inducing the Plaintiffs to default on their contractual obligations.

3. The Defendants have failed to show standing to pursue foreclosure in this matter, despite repeated demands from Plaintiffs.

4. The Defendants have violated multiple federal and state laws and a consent decree in pursing this illegal action.

5. Plaintiffs request that the Court enjoin the Defendants from foreclosing on their Residence through a Temporary Restraining Order and/or a Preliminary Injunction, and a Permanent Injunction, until such time that lawful standing of the Defendants are shown.

Parties

6. Plaintiffs are individuals residing at the Residence in Cherokee County, Georgia, located at:

289 Balaban Circle
Woodstock, GA 30188

7. Defendant Shuping, Morse and Ross, LLP is a law firm conducting business in Georgia, located in Rockdale County, Georgia with offices at:

6259 Riverdale Road, Ste 100
Riverdale, GA 30274

8. Bank of America, N.A. (fka BAC Home Loan Servicing, LP) is one of the world's largest financial institutions, conducting business in Georgia, with corporate headquarters located at:

100 North Tryon Street,
Charlotte, NC 28202

And a registered agent located at:

CT Corporation System
1201 Peachtree St NE
Atlanta GA 30361

9. The Bank of New York Mellon (fka The Bank of New York, aka BNY Mellon) is a leading investment management and investment services company conducting business in Georgia, with corporate headquarters located at:

One Wall Street
New York, NY 10286

And a registered agent located at:

CT Corporation System
1201 Peachtree St NE
Atlanta GA 30361

10. CWALT, Inc. is a trust represented by The Bank of New York Mellon.

Jurisdiction and Venue

11. The wrongful foreclosure at issue, and the wrongful acts alleged, occurred in Cherokee County, Georgia.

12. The Court has jurisdiction over the Parties.

13. Venue is proper in this Court pursuant to Ga. Const. 1983, Art. VI, Sect. II, Pars. II & III.

Facts

14. On January 30, 2007, Plaintiffs purchased a new home financed in part by an Interest Only Fixed Rate Note issued by Pulte Mortgage, LLC. (exhibit #13)
15. In late 2007, Plaintiffs experienced a precipitous drop in income due to the financial collapse, and their respective careers as real estate professionals wholly compensated through commissions on real estate transactions.
16. In early 2008, Plaintiffs contacted Bank of America, the apparent loan servicer at the time, informing them that they were experiencing financial distress, and inquiring about options available to them including a mortgage modification, a short sale, and a deed in lieu of foreclosure.
17. Bank of America responded that no options or relief would be available until Plaintiffs had missed at least two monthly payments. The bank suggested that the Plaintiffs skip the next two payments, then contact them again to apply for relief under the new Home Affordable Modification Program (HAMP).
18. 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.
19. Relying upon representations by Bank of America that time was of the essence, Plaintiffs anxiously awaited a prompt decision from the bank.

20. Instead of a prompt decision, and despite calling the bank multiple times a month, no decision was forthcoming.

21. On June 13, 2011, after more than 15 months of attempting to work with Bank of America, after skipping contractual obligations on the advice of the bank, after submitting no less than 4 complete applications, after submitting many more supplementary documents, after calling the bank weekly/monthly, after being subjected to misinformation, harassment, and other forms of abuse, after coming within 24 hours of foreclosure, after asking for options including deed in lieu of foreclosure, a short sale, or a modification, Plaintiffs finally received a modification offer that provided no relief (an offer that would have more than doubled their original monthly payment). (exhibit #6)

22. According to Bank of America, at this point, the Plaintiffs had two options: accept the modification as is, or refuse the modification and re-apply in 30 days. On August 4, 2011, Plaintiffs turned down the bank's "Special Forbearance Agreement," indicating they would re-apply in 30 days.

23. On September 7, 2011, Plaintiffs called the bank to re-apply, and were told that they could only do so verbally. They proceeded to complete the lengthy application over the phone, after which they were told they were preliminarily approved for a modification, pending the note holder's approval. Plaintiffs were told they would receive a formal, written offer within 10 days.

24. On September 8, 2011, Plaintiffs received a letter from Bank of America indicating that they had been assigned a "Dedicated Customer Relationship

Manager." From this date forward, the bank's automated attendant would automatically route all calls to this person, with no other options available.

25. On September 12, 2011, Plaintiffs called Latecia Salters (the bank's dedicated contact), but were unable to reach her directly. Her voice mail said she would return all calls with 24 hours. Plaintiffs left her a message.

26. On September 21, 2011, having not received the formal, written modification offer within 10 days as promised, having not received a return phone call from the bank's designated contact within 24 hours as promised, Plaintiff's called in again. This time, they were routed to "Jackie," Latecia's apparent assistant. After verifying some of the contact information on the account, the phone call was disconnected. Plaintiffs immediately called back, but again, the only option available to them was to leave a message for Latecia (which they did), who again promised a 24 hour response.

27. On September 26, 2011, Plaintiffs called in again, and again, the only option available to them was to leave a message for Latecia (which they did), who again promised a 24 hour response.

28. On October 3, 2011, completely fed up with the run-around by Bank of America, Plaintiffs wrote a letter to the State Attorney General, and copied several members of the press. (exhibit #16). Within hours, Plaintiffs received a phone call from Julie Grippa, apologizing for the multiple, unreturned phone calls, indicating that Latecia had a death in the family.

29. According to Julie, Plaintiffs did have an open file in modification, but several additional documents were needed. When asked about the phone application,

the preliminary approval, and the missing formal offer, Julie had no explanation. Plaintiffs promptly provided all requested documents.

30. As of today, with a mortgage modification still in process, the Plaintiffs continue to wait, with a foreclosure pending on November 1, 2011.

Cause of Action #1 – Fraud by Bank of America, N.A.

31. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth herein.

32. Bank of America materially misrepresented facts by asserting:

    a. The only options available to Plaintiffs required missing two payments

    b. That any decision would be timely

    c. That the bank had the authority to negotiate a modification, when in fact, all negotiations were subject to approval by the purported note holder.

33. Bank of America made these misrepresentations knowingly.

34. Bank of America made these misrepresentations with intent to defraud, as evidenced by their stringing the Plaintiffs along for 15 months, with repeated assurances that a decision was just around the corner.

35. Plaintiffs justifiably relied upon Bank of America, both in its original instructions, and ongoing requests for additional documentation, due to the superior knowledge the bank had as to its own policies and procedures.

36. Plaintiffs were harmed due to the ongoing delays, resulting in over $100,000 in combined late fees, missed payments, and the corresponding deprecation of the value of the Residence over the 15 month period.

Cause of Action #2 –Bad Faith by Bank of America, N.A.

37. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth herein.

38. Bank of America exhibited Bad Faith on multiple occasions, as evidenced as follows:

a. Numerous verbal instructions and assurances that turned out not to be true, that led the Plaintiffs down the path to foreclosure.

b. Bank of America's refusal to document any and all comments and assurances given verbally. Even when demanded by Plaintiffs, the bank would only respond with a generic, written acknowledgement that a request had been received, and would be replied to within 20 days. Despite receiving dozens of these notices, no other responses were ever forthcoming. (exhibit #19)

c. Bank of America's phone system, which would automatically route calls from the Plaintiffs to random, changing contacts and departments, resulting in a lack of continuity of advice, and providing no way for the Plaintiffs to follow up in a cohesive manner.

d. Bank of America harassment, as their automated attendant would call the Plaintiffs up to three times a day, instructing them to wait on the line for a representative. When they did, they would be asked to verify all of their contact information, only to find out that their system called in error, and that no notices or requests were pending on their account.

Cause of Action #3 –Equitable Estoppel by Bank of America, N.A.

39. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth herein.

40. Bank of America, through its false representations and concealment of material facts, could reasonably expect the Plaintiffs to act as induced, with full knowledge of the implications of the Plaintiffs' actions.

41. Plaintiffs, with their inferior knowledge as to the internal policies and procedures of the bank, reasonably relied upon the banks' representations, and suffered injury as a result.

42. The requisite elements being present, the bank has engaged in Equitable Estoppel (see Horne v Exum, 204 Ga App. 337,338 (1992)).

Cause of Action #4 -- Failure to Comply with Federal Law
(Fair Debt Collection Practices Act - FDCPA)

43. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth herein.

44. On or about July 7, 2011, the Plaintiffs received a letter from Bank of America, N.A. indicating that the servicing of Loan #147963149 had been transferred from BAC Home Loan Servicing, LP, to Bank of America, N.A. (exhibit #7)

45. This letter clearly states that Bank of America was acting as a debt collector under the federal Fair Debt Collection Practices Act, that the creditor was

BANK OF NY (CWALT 2007-5CB) G1, and gave the Plaintiffs 30 days to dispute the validity of the debt, or any portion of the debt.

46. On July 27, 2011, the Plaintiffs sent a certified letter disputing the debt, indicating that the purported creditor was unknown to the Plaintiffs, and demanding that Bank of America provide "documentation that BANK of NY is the legal holder in due course, along with proof of each and every transfer in the chain of assignments that resulted in BANK of NY attaining this status." (exhibit #8)

47. Despite representations in the July 7 letter that if "the debt or any portion of thereof is disputed, Bank of America, N.A. will obtain verification of the debt and mail it to you," no verification has ever been received from Bank of America.

48. According to the Fair Debt Collection Practices Act, § 809 (b) If the consumer notifies the debt collector in writing within the thirty-day period … that the debt, or any portion thereof, is disputed …, the debt collector shall cease collection of the debt …, until the debt collector obtains verification of the debt. In violation of this federal law, Bank of America, N.A. continues to pursue this debt as evidence by the letter sent on September 8, 2011 from Shuping, Morse & Ross, LLP (exhibit #9)

49. This letter from Shuping, Morse & Ross, LLP states that they are acting as a debt collector under the federal Fair Debt Collection Practices Act, on behalf of Bank of America, N.A., servicer for Bank of New York Mellon, trustee for CWALT, Inc., Alternative Loan Trust 2007-5CB, Mortgage Pass-Through

Certificates, Series 2007-5CB, Loan No. 147963149. This letter also gave the Plaintiffs 30 days to dispute the validity of the debt, or any portion of the debt.

50. Again on September 14, 2011, Plaintiffs sent a certified letter disputing the debt, indicating that the purported creditor was unknown to the Plaintiffs, and demanding that Shuping, Morse & Ross provide "written documentation that CWALT, Inc. is indeed the current creditor/beneficiary, that it is indeed the Holder in Due Course, and that it has Standing to pursue collections and/or foreclosure in this matter." (exhibit #10)

51. On September 19, 2011, Shuping, Morse and Ross responded to Plaintiffs' demand with a "Payoff Demand Statement" from Bank of America, and a Promissory Note from Pulte Mortgage, LLC. No explanation was given how a debt formally owed to Pulte Mortgage, entitles CWALT, Inc to pursue collections in this matter. (exhibits #11,12,13)

52. On September 26, 2011, the Plaintiffs sent a certified letter disputing the documentation provided, indicating that it "in no way satisfies our DEMAND for you to provide written documentation that CWALT, Inc. is indeed the current creditor/beneficiary, that it is indeed the Holder in Due Course, and that it has Standing to pursue collections and/or foreclosure in this matter." (exhibit #14)

53. In continuing violation of federal law (FDCPA), defendants continue to pursue collections/foreclosure in this matter, as evidenced by the "Notice of Sale Under Power" notice sent on September 29, 2011, scheduled to occur on November 1, 2011. (exhibit #15)

Cause of Action #5 – Failure to Comply with Federal Law
(Truth In Lending Act - TILA)

54. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth herein.

55. Defendants have failed to adhere to TILA, SEC. 404. (g) "In addition to other disclosures required by this title, not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer"

Cause of Action #6 – Failure to Comply with Federal Law
(Real Estate Settlements Procedure Act - RESPA)

56. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth herein.

57. Defendants have failed to adhere to RESPA, SEC. 3500.21e. "A financial institution servicer must respond to a borrower's qualified written inquiry and must take appropriate action within established time frames after receiving the inquiry. Generally, the institution must provide written acknowledgment within twenty business days and must take certain specified actions within sixty business days after receiving the inquiry. The inquiry must include the name and account number of the borrower and the reasons the borrower believes the account is in error. During the sixty-business-day period

following receipt of a qualified written request from a borrower relating to a disputed payment, a financial institution may not provide information to any consumer reporting agency regarding any overdue payment relating to this period or to the qualified written request."

Cause of Action #7 – Defective/Fraudulent Assignment

58. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth herein.

59. According to a recent Georgia Supreme Court ruling (U.S. Bank National Assoc. v. Gordon, No S10Q1564 -- Ga. March 25, 2011), OCGA § 44-14-39 provides that "[a] mortgage which is recorded . . . without due attestation . . . shall not be held to be notice to subsequent bona fide purchasers."

60. On May 3, 2011, MERS, as a nominee for Pulte Mortgage LLC, filed an assignment of the Deed to Secure Debt to CWALT, Inc., even though Pulte Mortgage was no longer a party to the note in question. (exhibit #17)

61. Since the name of the officer of MERS authorizing the assignment does not match the name acknowledge by the Notary, the validity of the assignment is highly suspect, and fails to meet the due attestation standard under Georgia law.

62. Given the recent "robo-signing" scandal which is currently under investigation by the attorney generals of all 50 states, and given that any

MERS member can obtain a corporate seal for a $25 fee, it is highly likely that this is another fraudulent assignment. (exhibit #16)

63. According to Georgia law O.C.G.A. § 44-14-160 - § 44-14-164, without proper recording of the security deed, foreclosure on this property would be illegal.

Cause of Action #8 -- Failure to Comply with the Consent Order between Bank of America, N.A. and the Comptroller of the Currency, Department of the Treasury, signed April 13, 2011. (AA-EC-11-12)

64. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth herein.

65. In response to the reported "robo-signing" scandal, whereby over 100,000 falsified and fraudulent affidavits were filed by large banks in support of their illegal foreclosure proceedings, the Comptroller of the Currency issued a Consent Decree that read in part:

- "as part of an interagency horizontal review of major residential mortgage servicers, [the OCC] has conducted an examination of the residential real estate mortgage foreclosure processes of Bank of America, N.A., Charlotte, NC ("Bank"). The OCC has identified certain deficiencies and unsafe or unsound practices in residential mortgage servicing and in the Bank's initiation and handling of foreclosure proceedings."
- "(2) In connection with certain foreclosures of loans in its residential mortgage servicing portfolio, the Bank: (a) filed or caused to be filed in state and federal courts affidavits executed by its employees or employees of third-party service providers making various assertions, such as

ownership of the mortgage note and mortgage, the amount of the principal and interest due, and the fees and expenses chargeable to the borrower, in which the affiant represented that the assertions in the affidavit were made based on personal knowledge or based on a review by the affiant of the relevant books and records, when, in many cases, they were not based on such personal knowledge or review of the relevant books and records; (b) filed or caused to be filed in state and federal courts, or in local land records offices, numerous affidavits or other mortgage-related documents that were not properly notarized, including those not signed or affirmed in the presence of a notary; (c) litigated foreclosure proceedings and initiated non-judicial foreclosure proceedings without always ensuring that either the promissory note or the mortgage document were properly endorsed or assigned and, if necessary, in the possession of the appropriate party at the appropriate time;"

- (3) By reason of the conduct set forth above, the Bank engaged in unsafe or unsound banking practices.
- "By this Stipulation and Consent … the Bank has consented to the issuance of this Consent Cease and Desist Order by the Comptroller. The Bank has committed to taking all necessary and appropriate steps to remedy the deficiencies and unsafe or unsound practices identified by the OCC"

66. Plaintiffs are a third party beneficiary of this Cease and Desist Order.

67. Despite the OCC's findings that Bank of America has engaged in unsafe and unsound banking practices, despite Bank of America agreeing to Cease and

Desist with these practices, Bank of America continues to pursue foreclosure on the Plaintiffs' Residence in direct violation of clauses 2a, 2b, and 2c.

Cause of Action #9 – Failure to Prove Holder in Due Course Status

68. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth herein.

69. According to Georgia Law, O.C.G.A. § 11-3-308 (a) In an action with respect to an instrument, the authenticity of and authority to make each signature on the instrument is admitted unless specifically denied in the pleadings. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity.

70. Despite repeated demands by Plaintiffs, Defendants have continued to pursue foreclosure without establishing the validity of the assignment of the note.

Cause of Action #10 – Failure to Prove Damages

71. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth herein.

72. With the advent of "securitization," "mortgage backed securities," "credit default swaps," and other forms of unregulated derivatives, many laws established over hundreds of years of legal precedent are now being challenged at a fundamental level.

73. Historically, only a party at interest could insure that interest, only through a regulated insurance company, and only to the extent of the value at risk. Today, none of these precedents apply to derivatives. Today it is common for a party to purchase a credit default swap from a non-insurance company, to insure an asset or event for an amount that exceeds the value at risk, sometimes by many multiples of that value.

74. What is true about derivatives in general, is true about the purported holder of the Plaintiffs' promissory note. According to the Freewriting Prospectus filed with the SEC for CWALT, Inc., Alternative Loan Trust, Mortgage Pass-Through Certificates, Series 2007-5CB, this mortgage is insured by 6 corridor contracts (credit default swaps).

75. According to the Pooling and Servicing Agreement filed with the SEC for CWALT, Inc., Alternative Loan Trust, Mortgage Pass-Through Certificates, Series 2007-5CB, there exists clause titled "Cross-Collateralization; Adjustments to Available Funds" (SECTION 4.05) which describes how funds from an "Overcollateralized Group" will be used to supplement an "Undercollateralized Group." This is evidence that, in the event of default, some loans will be made whole through the credit default swap, and some loans will be made partially whole through the excess reimbursements.

76. On August 4, 2011, it was publicly announced that Bank of America had reached an $8.5 Billion settlement with Bank of New York Mellon over defects in their loan portfolios. While these negotiations continue, it is very likely that additional relief will be granted to CWALT, Inc.

77. Given that the Plaintiffs' loan was underwritten using a "stated" loan process, it is highly likely that any default would have been covered by at least one of the credit default swaps in place on this portfolio, either directly or through cross collateralization, or through negotiated settlement with Bank of America.

78. Without a complete accounting of the portfolio of notes included in CWALT, Inc., and any reimbursements received through corridor agreements, credit default swaps and/or negotiated settlements, it is impossible to know what residual claims the purported note holder is entitled to, if any.

79. As a result, it is not clear that any damages have been incurred by CWALT, Inc.

Cause of Action #11 – Failure to Prove Standing

80. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth herein.

81. Since the Defendants have failed prove that their client is the current creditor/beneficiary, failed to prove that their client is the Holder in Due course, and failed to prove that their client has incurred damages, therefore they have failed to prove that their client has standing to pursue collections and/or foreclosure in this matter.

Cause of Action #12 – Defective Foreclosure Closing Disclosure

82. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth herein.

83. According to Georgia Law O.C.G.A. § 7-1-1014 (3) Any mortgage lender required to be licensed or registered under this article shall disclose to each borrower of a mortgage loan that failure to meet every condition of the mortgage loan may result in the loss of the borrower's property through foreclosure. The borrower shall be required to sign the disclosure at or before the time of the closing of the mortgage loan.

84. As evidenced in Cherokee County Records, Deed Bk 9379 Pg 485, this did not occur. (exhibit #18)

Cause of Action #13 – Direct Contradiction to Verbal Representations by Bank of America

85. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth herein.

86. As of this date, Plaintiffs continue to seek relief from Bank of America, and have an open case pending in their modifications department.

87. Based upon verbal representations by Bank of America, as well as prior experience with a previously scheduled foreclosure sale, foreclosure will not be pursued by the bank if they have an open case pending within two weeks of the scheduled foreclosure date. (exhibit #5)

88. Bank of America continues to pursue foreclosure, in direct contradiction to their verbal assurances and historical actions to the contrary.

Conclusion and Prayer for Relief

According to the Georgia Constitution, Article 1, Section 1, Paragraphs 1 and 2, "No person shall be deprived of life, liberty, or property except by due process of law. Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."

Not only have the illegal foreclosure actions of the large money-center banks impacted the Plaintiffs in this case, they have also impacted all homeowners in the state through depressed housing prices, they have resulted in declining tax receipts at the city, county and state level, and they have contributed to the financial malaise that continues to impact this state and nation.

Wherefore, Plaintiffs' motion having satisfied the requisite elements, Plaintiffs pray that this Court grants the following relief:

1. GRANTS a Temporary Restraining Order and/or Preliminary Injunction to prevent the foreclosure on Plaintiffs' Residence
2. GRANTS a Permanent Injunction, until such time that standing of the Defendants can be verified.

3. COMPELS the production of the Original Promissory note, with all “wet letter” assignments and allonges.
4. COMPELS proof of any assignments, liens or any other instruments that prove any claims by any alleged Holders in Due Course.
5. COMPELS validation of the alleged Debt, including a full accounting of any payments made against that Debt due to Corridor Agreements, Credit Default Swaps, and/or negotiated settlements.
6. GRANTS Plaintiff all court costs and court related fees.
7. GRANTS Plaintiff any and all other and/or further relief allowed by law and/or which this court deems just and proper.

Respectfully submitted:

This 21st day of October, 2011

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