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

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

PLAINTIFFS' MOTION FOR LEAVE TO AMEND

Background

Plaintiffs originally filed this lawsuit to stop Bank of America from taking away their home in an illegal fashion. They believed that, at a minimum, the bank should follow the law before taking away something as important as someone's homestead. Unable to afford the high cost of traditional representation, plaintiffs sought justice by proceeding pro se.

In the original Complaint, plaintiffs detailed the many ways they had been treated unfairly by the Bank, alleging 13 causes of actions, and asking for an injunction to stop the foreclosure proceedings.

Since that time, plaintiffs have learned much about the torts and actions of Bank of America. They have learned that they were not alone, and that thousands of people in Nevada have experienced almost identical unethical and illegal acts by the Bank (State of Nevada v. Bank of America, Case 3:11-cv-00135-RCJ):

- advising consumers that they must miss payments in order to be considered for loan modifications, despite federal rules to the contrary.
- promising to act upon requests for mortgage modifications within a specific period of time, usually one or two months, but instead stranding consumers without answers for more than six months or even a year;
- falsely assuring them that their homes would not be foreclosed while their requests for modifications were pending, but sending foreclosure notices, scheduling auction dates, and even selling consumers' homes while they waited for decisions;
- misrepresenting the eligibility criteria for modifications and providing consumers with inaccurate and deceptive reasons for denying their requests for modifications;
- offering modifications on one set of terms, but then providing them with agreements on different terms, or misrepresenting that consumers have been approved for modifications.

Since that time, plaintiffs have learned that the actions of Bank of America were apparently deliberate, and part of a wider pattern of behavior:

> In a case filed in July 2011 and unsealed March 7, former BoA subcontractor employee Gregory Mackler alleges that BoA misled borrowers to keep them from participating in the taxpayer subsidized Home Affordable Modification Program (HAMP), because mortgage modifications cost BoA money.
>
> Among the tactics allegedly used were stalling the review of applications by assigning them to employees who were on vacation or who had actually already been fired. Concerned borrowers were also told that their complaints were still being reviewed when in fact they had secretly been labeled as "incomplete." (as reported in allgov.com, EDNY Case 1:11-cv-03270-SLT-RLM)

Since that time, Bank of America has agreed to a settlement with the U.S. Government and 49 state attorney generals (including Georgia), whereby they have agreed to stop these abusive practices, and to pay nearly $9 billion in restitution to the victims of their prior actions (DC Case 1:12-cv-00361-RMC).

Despite subjecting the plaintiffs to multiple unethical and illegal collection practices as described in their complaints, practices which have been mirrored in other states, practices which have been perpetrated deliberately and with unclean hands, practices which the Bank has agreed to stop perpetrating, Bank of America continues to attempt to take away the plaintiffs' home using these same practices, in violation of the consent decree sign by the Bank.

Instead of offering Plaintiffs any type of settlement or restitution for their unethical and illegal practices, Bank of America continues to justify their actions in an unlawful attempt to take away the plaintiffs' home, as evidenced by the continuation of this lawsuit.

Discussion

While the plaintiffs' original case may have had some deficiencies, the actions of the Defendants remain real, with plenty of evidence provided in the exhibits and in the public domain that suggests that a legitimate claim exists.

Plaintiffs' evidence has clearly passed the "plausibility standard," having put forward enough facts at the pleading stage to raise a reasonable expectation that discovery will reveal evidence supporting their claims. (Jones v. Washington Mut. Bank (N.D. Ga., 2011))

Plaintiffs hereby move the Court to allow plaintiffs to amend their Complaint under Federal Rules of Civil Procedure (FRCP) Rule 15 (a)(2)), which "The court should freely give leave when justice so requires.".

According to the Defendants' Memo in Support of the their motion (bottom of page 17), the purpose of this 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).

Plaintiffs respond that they now know much more about the unethical and often illegal servicing and debt collection practices of Bank of America, as outlined above in the Nevada lawsuit, the whistle-blower case in New York, and the settlement with the U.S. Government and the 49 state attorney generals.

Plaintiffs also respond that have learned much about the law and the legal system. Plaintiffs have learned how to more properly state a cause of action, and how to cite authorities for the appropriate jurisdiction. Proceeding pro se, plaintiffs argue that have been diligent, acting in good faith in attempting to meet all of the rules of evidence, procedure, and the court, and that justice warrants an opportunity to amend their complaint, despite their lack of legal counsel.

In this case, plaintiffs have focused their complaint on two new causes of action, both referencing the original allegations, both properly plead, both with ample supporting evidence exceeding the "plausibility standard."

Attempted Wrongful Foreclosure

Plaintiffs have shown the authoritative elements required to prevail in an Attempted Wrongful Foreclosure action (FAC ¶ 65), and how the Defendants have "knowingly published an untrue and derogatory statement concerning the plaintiffs' financial conditions and that damages were sustained as a direct result." (FAC ¶'s 66-70).

Defendants argue that "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." (Defendants' Memo in Support, page 3, ¶ 2)

Plaintiffs respond that the Defendants 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. Collectively, these actions were a part of a pattern of abuse that the Bank uses to steam-roller homeowners in foreclosure.

Further, plaintiffs respond that as a direct result of these actions, Plaintiffs were turned down for a business credit line by Wells Fargo Bank in late May,

2012, and that the credit report submitted as evidence (Exhibit 23) was provided to the plaintiffs due to being declined for that credit.

Plaintiffs fully intend to show all of this evidence at trial, and allege that the Defendants are attempting to try this case in pre-trial motions as a way to circumvent plaintiffs' constitutional rights to discovery, due process, and a fair trial.

Defendants' argument regarding tendering the amount owed on the loan is spurious, as there is no current foreclosure action pending, the FAC does not ask to enjoin the foreclosure sale, and it's not an element recognized in this cause of action.

Negligence

Plaintiffs have shown the authoritative elements required to prevail in a Negligence action (FAC ¶ 73), and how the "Defendants breached this duty by violating federal and state law, filing false credit reports, filing false Notices of Sale, wrongfully initiating foreclosure proceedings, slander of title, and defamation of character." (FAC ¶'s 10,11,13,14,17,18,19,23,26,27,30,31,34-37,39,44,68-70).

Defendant's argue that "Defendants do not owe Plaintiffs any duty 'to avoid unreasonable risk of harm'" (Defendants' Memo in Support, page 4, ¶ 1), and that only a contractual obligation can expose the defendants to the claim.

According to Arthur Pew Const. Co., Inc. v. First Nat. Bank of Atlanta, 827 F.2d 1488 (C.A.11 (Ga.), 1987) "A duty may arise in professional relationships independent of a contract. See Flintkote Co. v. Dravo Corp., 678 F.2d 942, 949 (11th Cir.1982). As this court has acknowledged, "[o]ne who undertakes to perform a task must perform it in a non-negligent manner." Crockett v. Uniroyal, Inc., 772 F.2d 1524, 1531 (11th Cir.1985).

Georgia law (O.C.G.A. § 23-2-58) states that: "[a]ny relationship shall be deemed confidential, whether arising from nature, created by law, or resulting from contracts, where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc."

Plaintiffs respond that the Defendants, in attempting to service and foreclose on something as important as someone's homestead, do have a duty to perform their role in a non-negligent manner.

Further, plaintiffs argue that Bank of America, by agreeing to a settlement with multiple branches of the U.S. Government and the State of Georgia, has "assumed a duty to avoid unreasonable risk of harm," and has blatantly violated the terms of the settlement in a negligent fashion. See the Bank of America's Consent Decree (DC Case 1:12-cv-00361-RMC), page 3:

> II. 2. Bank of America, N.A. shall comply with the Servicing Standards, attached hereto as Exhibit A, in accordance with their terms and Section A of Exhibit E, attached hereto.

Note: While Exhibit A of the Consent Decree is over 40 pages long, in the interest of judicial economy, plaintiffs are referencing the violations to the consent decree instead of including the entire document as an exhibit. Plaintiffs will supply the entire exhibit, if so desired by the court. Violations include:

- Item I.A: Standards for Documents Used in Foreclosure and Bankruptcy Proceedings.
- Item I.B: Requirements for Accuracy and Verification of Borrower's Account Information.
- Item I.C: Documentation of Note, Holder Status and Chain of Assignment.
- Item IV.B: Dual Track Restricted.
- Item IV.C: Single Point of Contact.
- Item IV.D: Loss Mitigation Communications with Borrowers.
- Item IV.F: Loan Modification Timelines.

Plaintiffs fully intend to show all of this evidence at trial, and allege that the Defendants are attempting to try this case in pre-trial motions as a way to circumvent plaintiffs' constitutional rights to discovery, due process, and a fair trial.

Exhibits to the FAC

Defendants argue in their Memorandum of Law in Support of their Motion to Dismiss, that the "Plaintiffs further fail to attach the majority of these documents or allege what the contents of these documents are." This is in apparent reference to the FAC's referencing Exhibits of the Original Complaint in the FAC.

Plaintiffs apologize to the Court if the entire docket of prior exhibits needed to be resubmitted with the FAC. Given the Courts preference for discretion in the amount of paper filings, and in the interest of judicial economy, plaintiffs referenced the original Exhibits instead of resubmitting them as new.

Plaintiffs hereby ask the Court to clarify their preferences in this matter by 1) accepting the FAC as is, with the understanding that the Exhibits referenced are to include the original exhibits; 2) allowing the plaintiffs to amend their FAC,

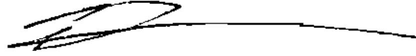
using the more descriptive "Complaint Exhibit #" notation; or 3) allowing the plaintiffs to resubmit previous exhibits as new exhibits as part of the FAC.

Conclusion

In the absence of undue delay, bad faith, dilatory motive or undue prejudice, leave to amend is routinely granted." Forbus v. Sears Roebuck & Co., 30 F.3d 1402, 1405 (11th Cir. 1994) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).

WHEREFORE, plaintiffs hereby ask this court for leave to amend their complaint to include applicable causes of action that more accurate reflect the torts as alleged.

DATED this 4th day of September, 2012.



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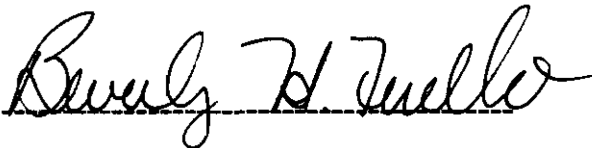

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