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

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND INCORPORATED MEMORANDUM OF LAW

COMES NOW, Plaintiff VITO J. FENELLO, JR., and hereby files this RESPONSE pursuant to Defendants' Motion to Dismiss and Incorporated Memorandum of Law.

BACKGROUND

On October 21st, 2011, Plaintiffs filed a suit against the Defendants asking the Court to "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."

Originally filed in Cherokee County Superior Court, the case was removed to federal court on November 30th by the Defendants.

On December 7th, Defendants filed a Motion to Dismiss which alleges, in part, that the Plaintiffs have used a "shotgun" approach in their Complaint, and that it relied on a "hodgepodge of legal and factually insufficient claims challenging the chain of title related to the Property."

They asked this Court to dismiss Plaintiffs' case "for failing to provide a short, plain statement of the claim" and "for failing to state a claim upon which relief may be granted"

ANSWER

Instead of a shotgun approach as alleged by the Defendants, the Plaintiffs' Complaint includes 13 Causes of Action that can be organized as follows:

1. Defendants' Torts Inducing Plaintiffs toward Foreclosure (Causes of Action #1,2,3)
2. Defendants' Refusal to Prove Standing (Causes of Action #4,5,6,8,9,10,11)
3. Defective Documents and Assignment (Causes of Action #7,12)
4. Contradiction to Verbal Representations (Cause of Action #13)

1. Defendants' Torts Inducing Plaintiffs toward Foreclosure (Causes #1,2,3)

Defendants argue that the charges of Fraud, Bad Faith, and Equitable Estoppel fail for various reasons, including a lack of specificity and a lack of damages, and that these charges should be dismissed.

Plaintiffs have included these charges for the purpose of judicial economy. They are preemptive in nature, and dependent on the big issue: Does the client CWALT, Inc. have standing to pursue foreclosure against the Plaintiffs?

In light of this, Plaintiffs are agreeable to removing these three Causes of Action, without prejudice, provided they are subject to reinsertion pending the outcome of the balance of the case.

With regard to specificity, the Plaintiffs are in possession of detailed notes of the many conversations with Bank of America, including date, the person spoken to, and the details of the conversation. Further, Bank of America is presumably in possession of the original recordings of these conversations, which the Plaintiffs will pursue in discovery.

If the Court decides to leave these Causes intact, and since the Plaintiffs are appearing pro se, they ask that their complaint be liberally construed and "held to less stringent standards than formal pleadings drafted by lawyers." Erickson v.

Pardus, 551 U.S. 89, 94 (2007), and as a consequence, they be allowed to amend their Complaint to correct any deficiencies in these Causes as filed.

2. Defendants' Refusal to Prove Standing (Causes of Action #4,5,6,8,9,10,11)

Plaintiffs are seeking injunctive relief barring Bank of America from foreclosing wrongfully because their client, CWALT, Inc, is allegedly not the holder of the note, and does not have standing to pursue foreclosure. A court may enjoin a nonjudicial foreclosure sale where the authority to foreclose is in question. See Atlanta Dwellings, Inc. v. Wright, 527 S.E.2d 854, 856 (Ga. 2000); West v. Koufman, 384 S.E.2d at 666; Cotton v. First Nat'l Bank of Gwinnett Co., 220 S.E.2d 132 (Ga. 1975).

Plaintiffs have sent multiple letters (Complaint Exhibits #2,8,10,14) to the Defendants demanding that they 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." As of today, Defendants have not provided such proof.

While Georgia law authorizes the secured creditor (the holder of the promissory note) to exercise a power of sale (O.C.G.A. §§ 44-14-162) Defendants' have failed to prove such standing. "Could there be a more conclusive defense to

the foreclosure than that the party prosecuting it was not the holder of the debt or demand secured by the mortgage, which he failed to produce when called on, and offered nothing to show that he controlled it, or to explain why it was not forthcoming at the trial?" (Weems v. Coker, 70 Ga. 746, 749 (1883)).

Defendants argue that they can proceed under the authority of the Security Deed. However, "assignee of a note and security deed cannot foreclose upon the security until there has been an actual assignment" (Cummings v. Anderson, 173 B.R. 959, 963 (Bankr. N.D. Ga. 1994)). Therefore, Plaintiffs' allegations that the party attempting to foreclose is not the holder of the note would support a claim for injunctive relief, if proven. The Defendants' Motion to Dismiss should therefore be Denied.

Not only have the Defendants refused to prove that their client has standing, but they have violated numerous state and federal laws and regulations in doing so. These will be addressed individually below.

Cause of Action #4

Defendants argue that the FDCPA does not apply to them because they do not qualify as a "debt collector" under the Act. Plaintiffs dispute this conclusion, as the exemption only applies when the bank is attempting to collect a debt in their

own portfolio. Plaintiffs argue that Bank of America is not acting as bank, nor is it servicing its own loan portfolio, but it's acting purely as a debt collector for Bank of New York Mellon. This position is supported by the Defendants' own letters, which all adhere to the disclosure requirements of FDCPA, and several of which explicitly state as much. For example, Complaint Exhibit 7 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**." (emphasis added)

Additionally, the exemptions cited are invalidated if the debt collector "takes or threatens to take any nonjudicial action to effect dispossession or disablement of property if there is no present right to possession of the property claimed as collateral through an enforceable security interest." U.S.C.A. §1692f (6).

For these reasons, the Defendants' Motion to Dismiss should therefore be Denied.

Cause of Action #5

Defendants allege that they have not violated TILA, because they had sent a letter indicating that the servicing of the loan had transferred to Bank of America. However, TILA requires the Defendants to provide the same type of notification whenever the actual loan (promissory note) "is sold, transferred or assigned."

Since this has yet to occur, the Defendants' Motion to Dismiss should therefore be Denied.

Cause of Action #6

Defendants claim that this Cause of Action should be dismissed, because the Plaintiffs have failed to issue a Qualified Written Request (QWR) to the servicer. However, as included in the initial Complaint, Plaintiffs did send Bank of America (the servicer) a QWR on July 27th, 2011 (Complaint Exhibit #8).

Since the requisite elements for QWR are included in this letter, the Defendants' Motion to Dismiss should therefore be Denied.

Cause of Action #8

Plaintiffs have included this Cause of Action to support its allegation that the Defendants have repeatedly refused to prove that their client has standing to pursue foreclosure in this case, and that they have done so in violation of numerous state and federal laws and regulations. The consent decree in question documents 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. The Defendants' Motion to Dismiss should therefore be Denied.

Cause of Action #9

Defendants claim that they have satisfied their obligation to prove that their client is a "holder in due course" by virtue of the validity of the Security Deed assignment as effected through MERS.

Plaintiffs maintain that questions of holder in due course status apply to commercial paper, including promissory notes. Without knowing the path a note has traveled from origination to current holder, it is impossible to discern whether the note was subject to Fraudulent Transfers, whether the note and the security instruments have bifurcated, and whether the right to foreclose remains intact.

Since the Defendants have argued an unrelated point regarding the security instrument, the Defendants' Motion to Dismiss should therefore be Denied.

Cause of Action #10

Defendants allege that the "Plaintiffs lack standing to avoid foreclosure based on allegations related to a contract to which they are not a party or an intended beneficiary."

Plaintiffs are relying on the theories of Unjust Enrichment and the One Satisfaction Rule. One cardinal principle of law states that, in the absence of punitive damages, a plaintiff can recover no more than the loss actually suffered.

"When the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience, that the law will not permit him to recover again for the same damages." Lovejoy v. Murray, 70 U.S.(3 Wall.) 1, 17, 18 L.Ed. 129 (1865).

Further, “Payments made by any person in compensation of a claim for a harm for which others are liable as tort-feasors diminish the claim against them, whether or not the person making the payment is liable to the injured person, and whether or not it is so agreed at the time of payment, or the payment is made before or after judgment. The extent of the diminution is the amount of the payment made, or a greater amount if so agreed. MacKethan v. Burrus, Cootes and Burrus, 545 F.2d 1388 (C.A.4 (Va.), 1976)”

Given that CWALT, Inc. has credit default swaps insuring the performance of tranches within their portfolio, given that excess returns within a tranche will be shared with the next tranche, and given that CWALT, Inc. is the likely beneficiary of a negotiated settlement between Bank of America and The Bank of New York Mellon, the theories of Unjust Enrichment and the One Satisfaction Rule apply.

For these reasons, the Defendants’ Motion to Dismiss should therefore be Denied.

Cause of Action #11

Based on the discussions above, Defendants have failed to prove standing of their client, and violated numerous state and federal laws and regulations in the process. For these reasons, the Defendants' Motion to Dismiss should therefore be Denied.

3. Defective Documents and Assignment (Causes of Action #7,12)

Cause of Action #7

Defendants allege that the faulty assignment claimed by the Plaintiffs in some way impugns the viability of the MERS assignment process for security instruments. This is not the case. Instead, Plaintiffs allege that the assignment is faulty for two reasons:

First, the signature of the Assistant Secretary for MERS' name has three parts, whereas the notarized allonge attached to the assignment only has two. Normally, when presented with a signature materially different from the name printed on the allonge, it would be expected that the notary would correct the defect. While this defect might be attributed to an oversight by the notary, given the recent reports of over 100,000 fraudulent assignments perpetrated by banks including Bank of America, Plaintiffs believe that this discrepancy should be

investigated through discovery. Should this assignment be found defective, the *Gordon* case would apply.

Second, while the Security Deed can be assigned by Pulte Mortgage, its successors and assigns, the question is whether they can do so when the Security Deed and the Promissory Note have bifurcated. It is known that Pulte Mortgage sold their interest in the Promissory Note in 2007. It is known that Pulte Mortgage assigned their interest in the Security Deed in April, 2011. The question this court must decide is whether Pulte Mortgage could do this assignment when they no longer had any interest in the underlying Promissory Note, and when they had no direct knowledge or ties to the latest purported beneficiary.

For these reasons, the Defendants' Motion to Dismiss should therefore be Denied.

Cause of Action #12

Defendants allege that this Cause of Action fails because neither BANA or BNYM originated the loan, and the Statute is entirely inapplicable. Plaintiffs respond that it doesn't matter who originated the loan, and the Statute applies to foreclosures in general, and this one in particular. For this reason the Defendants' Motion to Dismiss should therefore be Denied.

4. Contradiction to Verbal Representations (Cause of Action #13)

On October 31st, 2011, Bank of America cancelled the foreclosure action scheduled for November 1st, as they had represented they would. For this reason, this Cause of Action is currently moot, and may be dismissed without prejudice.

CONCLUSION

"In ruling on a motion to dismiss, the court must accept the facts pleaded in the complaint as true and construe them in the light most favorable to the plaintiff." CBT Flint Partners, LLC v. Goodmail Systems, Inc., 529 F.Supp.2d 1376, 1378 (N.D.Ga. 2007). A motion to dismiss should only be granted where the complaint does "not contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" American Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1289 (11th Cir. 2010) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974 (2007)), and does not contain "'enough fact to raise a reasonable expectation that discovery will reveal evidence' of the claim." American Dental at 1289 (quoting Twombly at 556, 127 S.Ct. at 1965). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable

for the misconduct alleged." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009). "Motions to dismiss are disfavored and are rarely granted." DirecTV, Inc. v. Wright, 350 F.Supp.2d 1048, 1051 (N.D.Ga. 2004).

Plaintiffs submit that their Complaint goes far beyond a speculative level in raising a right to relief under Twombly. Plaintiffs' highly detailed averments, as briefed above, provide this Court with the means to draw reasonable inferences that Defendants are liable for the claims asserted as is noted under American Dental. And lastly, that Plaintiffs have provided more than enough facts to raise a reasonable expectation that discovery will reveal evidence of the claims asserted as also required under American Dental.

WHEREFORE, for the above and foregoing reasons, the Defendants' Motion to Dismiss should therefore be Denied.

Respectfully submitted,

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