

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

VITO J. FENELLO, JR.)
and BEVERLY H. FENELLO,)

Plaintiffs,)

CIVIL ACTION FILE
NO.

v.)

SHUPING, MORSE & ROSS, LLP;)
BANK OF AMERICA, N.A., and)
THE BANK OF NEW YORK MELLON)
(as Trustee for CWALT, Inc.),)

Defendants.)

_____)

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1331, 1367, 1441, and 1446, Bank of America, N.A. (“BANA”), and The Bank of New York Mellon, as Trustee for CWALT, Inc. (“BNYM”) (collectively “Defendants”), by and through their undersigned counsel, hereby remove this action from the Superior Court of Cherokee County, Georgia, to the United States District Court for the Northern District of Georgia, Atlanta Division.

Removal is based on federal question jurisdiction because a federal question appears on the face of the initial pleading filed by Vito J. Fenello, Jr. and Beverly H. Fenello (“Plaintiffs”). In support of its notice, Defendants state as follows:

I. Background

1. This case was originally filed by *pro se* Plaintiffs in the Superior Court of Cherokee County, Georgia, on October 21, 2011, relating to the real property located at 289 Balaban Circle, Woodstock, Georgia 30188 (the “Property”). (Compl. ¶ 1.) In accordance with 28 U.S.C. § 1446(a), a copy of all process, pleadings and orders received by Defendants are attached as **Exhibit A**.

2. In the Complaint, Plaintiffs allege that, after encountering financial difficulties, they contacted Defendant BANA regarding a modification of their mortgage loan or other available options. (Compl. ¶¶ 14, 15.) According to Plaintiffs, they were informed that no options or relief would be available to them until they were two months behind on their mortgage loan payments. (Compl. ¶ 17.) Plaintiffs thereafter fell behind on their mortgage loan, and in June 2011, Plaintiffs received a loan modification offer that allegedly provided no relief. (Compl. ¶¶ 18, 21.) Plaintiffs allege that as of the filing of the Complaint, they continue to seek relief and have an open case pending in the loan modification department. (Compl. ¶ 86.) Plaintiffs further allege that BANA represented to

them that the Property would not be foreclosed if they have “an open case pending within two weeks of the scheduled foreclosure sale.” (Compl. ¶ 87.) Nonetheless, Plaintiffs allege that BANA continues to pursue foreclosure in direct contradiction to BANA’s verbal assurances and historical actions to the contrary. (Compl. ¶ 88.)

3. On these allegations, the Complaint alleges, among other things, that Defendants failed to comply with the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et. seq.* (“FDCPA”); the Truth in Lending Act, 15 USC § 1601 *et seq.* (“TILA”); and the Real Estate Settlement Procedures Act, 15 U.S.C. § 1692 *et. seq.* (“RESPA”). (Compl. ¶¶ 43-57.)

II. This Notice of Removal is Timely Filed

4. This lawsuit is a civil action within the meaning of the Acts of Congress relating to removal of causes.

5. Defendant Bank of America, N.A. received a copy of the initial pleading captioned “Complaint” by process server on October 31, 2011. Defendant Bank of New York Mellon also received a copy of the initial pleading captioned “Complaint” by process server on October 31, 2011. Defendant Shuping, Morse & Ross, LLP received a copy of the initial pleading captioned “Complaint” by process server on November 2, 2011.

6. The removal of this action to this Court is timely under 28 U.S.C. § 1446(b) because this Notice of Removal is filed within thirty (30) days after October 31, 2011, which is the date Defendants first received the summons and complaint in this action.

7. The United States District Court for the Northern District of Georgia is the proper place to file this Notice of Removal under 28 U.S.C. § 1441(a) because it is the federal district court that embraces the place where the original action was filed and is pending.

III. This Court Has Federal Question Jurisdiction

8. Plaintiffs allege claims under FDCPA, TILA and RESPA. (Compl. ¶¶ 43-57.) Therefore, federal question jurisdiction exists over Plaintiffs' claims under 28 U.S.C. § 1331 because the resolution of Plaintiffs' claims will require adjudication of disputed questions of federal law.

9. To the extent the Complaint alleges statutory, state common law or other nonfederal claims, this Court has supplemental jurisdiction over any such claims under 28 U.S.C. § 1367 because those claims arise out of the same operative facts as Plaintiffs' claims under FDCPA, TILA and RESPA and "form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a).

10. Because Plaintiffs' FDCPA, TILA and RESPA claims arise under the laws of the United States, removal of this entire cause of action is therefore appropriate under 28 U.S.C. § 1441(a)-(c).

IV. Consent of Defendants

11. This Notice of Removal is filed on behalf of Defendants BNYM and BANA.

12. Defendant Shuping, Morse & Ross, LLP received a copy of the initial pleading captioned "Complaint" by process server on November 2, 2011. Without waiving any defenses, Defendant Shuping, Morse & Ross, LLP hereby consents to the removal of this case to Federal Court. See Joinder in Removal, attached hereto as **Exhibit B**.

V. Notice of Removal to the Superior Court of Cherokee County, Georgia

13. Concurrently with this Notice of Removal, Defendants will file a copy of this Notice with the Superior Court of Cherokee County, Georgia. A copy of the written notice of the Notice of Removal to Federal Court is attached hereto as **Exhibit C**. In accordance with 28 U.S.C. § 1446(d), Defendants will give written notice to Plaintiffs by contemporaneously serving this Notice of Removal on Plaintiffs.

14. If any question arises as to the propriety of the removal of this action, Defendants respectfully request the opportunity to present a brief and oral argument in support of its position that this case is removable. See Sierminski v. Transouth Fin. Corp., 216 F.3d 945, 949 (11th Cir. 2000) (announcing general rule that post-removal evidence in assessing removal jurisdiction may be considered by the Court).

VI. Conclusion

For the foregoing reasons, Defendants respectfully request that this civil action be, and is hereby, removed to the United State District Court for the Northern District of Georgia, Atlanta Division, that this Court assume jurisdiction of this civil action, and that this Court enter such other and further orders as may be necessary to accomplish the requested removal and promote the ends of justice.

This 30th day of November 2011.

/s/ Andrew G. Phillips

Andrew G. Phillips
Georgia Bar No. 575627
McGuireWoods LLP
1230 Peachtree Street, NE
Promenade II, Suite 2100
Atlanta, Georgia 30309-3534
404-443-5724 (phone); 404-443-5773 (fax)
aphillips@mcguirewoods.com
*Attorneys for Defendants Bank of America,
N.A and The Bank of New York Mellon, as
Trustee for CWALT, Inc.*

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2011, I electronically filed the foregoing *Notice of Removal* 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/ Andrew G. Phillips
Andrew G. Phillips