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 JURY TRIAL DEMANDED

PLAINTIFFS' RESPONSE TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION

COMES NOW Plaintiffs' Vito J. Fenello, Jr. and Beverly H. Fenello, and files this Response to the Defendants' Opposition To Plaintiffs' Motion for Reconsideration Of Order Of Dismissal.

In their Opposition, Defendants state that "Plaintiffs have failed to cite to any authority or underlying factual allegations to demonstrate that the July 17, 2012 or February 15, 2013 Opinion and Order was in error" (Doc. 37, pg 2-3).

Defendants further state "the law in this jurisdiction is that "[a] motion for reconsideration is appropriate only where there is: (1) newly discovered evidence; (2) an intervening development or change in controlling law; or (3) a need to correct a clear error of law or fact."" (Doc. 37, pg 5)

Plaintiffs respond that this is demonstrably incorrect. In their Motion to Reconsider, Plaintiffs cite multiple authorities, at least one change in controlling law, and several clear errors of law.

For example, see the references to Reese v. Provident Funding Assocs., LLP (317 Ga. App. 353 (2012)). (Doc 36-1, pg 9-12) This authoritative ruling affirmed Plaintiffs' claim (Doc 9, pg 4-5) that Defendants must have a properly endorsed note in order to pursue foreclosure on Plaintiffs' home. That is what this lawsuit is all about.

Another example is how BANA claimed it was "considered a Debt Collector under the Fair Debt Collection Practices Act"" in all of their communications with Plaintiffs.

In the Court's first ruling, they said not necessarily, and quoted "the Eleventh Circuit has since held that a dual-purpose communication designed to give the borrower notice of foreclosure and demand payment on the underlying debt may also relate to the collection of a debt within the meaning of § 1692e. See Reese v. Ellis, Painter, Ratterree & Adams, LLP" (Doc 24. pg 15)

In the Court's second ruling, they incorrectly apply Reese to a single purpose communication (Doc. 34, pg 17, f. 9). Since the Court apparently agrees with Plaintiffs (that this was indeed a single purpose communication), then BANA either is a Debt Collector under the FDCPA, or BANA is misrepresenting itself in its dealings with its clients. (Doc 36-1, pg 18-20) [1]

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[1] Since BANA first attempted to claim that they are not a Debt Collector under the FDCPA, Plaintiffs have argued that the exemption they are quoting was written at a time when banks serviced their own loan portfolios. As a result of the drastic changes in the mortgage market since the law was written, the distinctions between a debt collector and a servicer have been blurred, and is no longer applicable. (Doc 9, pg 5-6) Affirming Plaintiffs' position is this recent decision (Glazer v. Chase Home Fin. LLC (6th Cir., 2013) by the 6th Circuit Court of Appeals. While not binding on this Court, it should be persuasive.

Select Portfolio Servicing (SPS) as Servicer

In their October 26th, 2012 letter (Exhibit #29), BANA notified Plaintiffs that "the servicing of your mortgage loan, that is, the right to collect payments from you, will be assigned, sold or transferred from Bank of America, N.A. to Select Portfolio Servicing, Inc., effective December 01, 2012."

Now in their Opposition, BANA claims that "SPS is not the "new servicer" that could qualify as a debt collector under the FDCPA by nature of procuring the loan when it was in default. SPS is merely a sub-servicer, a vendor retained by BANA to service the loan. BANA remains the master servicer. Accordingly, just as Plaintiffs' arguments against BANA fail, so to would their arguments against SPS."

Plaintiffs contend that this is another example of BANA playing a "shell game" designed to transfer rights and assets, in an attempt to shield itself from legal liabilities (the first example being the transfer of assets from Countrywide to BANA through multiple shell transfers – see Doc 29-1, par. 9).

Given BANA's public admissions that it is getting rid of its servicing business (i.e. their CEO on Charlie Rose Show), Plaintiffs find it highly unlikely

that any such "sub-servicer" agreement exists, and hereby moves the Court to compel BANA to verify their claim by submitting a copy of any such agreement.

Even if such an agreement exists, the point is moot. In addition to BANA admitting in their notice to Plaintiffs that the servicing was transferring, SPS is clearly the new servicer as defined by RESPA 12 USC 2065(i)(2),(3):

> (2) Servicer. The term "servicer" means the person responsible for servicing of a loan (including the person who makes or holds a loan if such person also services the loan)...
> (3) Servicing. The term "servicing" means receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts described in section 10 [**12 USCS § 2609**], and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan.

Additionally, 12 USC 2602(5) states as follows:

> For purposes of this Act...
> (5) the term "person" includes individuals, corporations, associations, partnerships, and trusts;

In other words, regardless of who retained SPS to service Plaintiffs' loan, they are a "new servicer" per the plain language of the RESPA statute. Thus, if SPS falls within the FDCPA's definition of the term 'debt collector', then they are a debt collector even if BANA is not. Additionally, because BANA (as master servicer) was presumably acting as an agent of the note owner principal when it purportedly retained SPS, the retention of SPS was an act of the note owner

principal as a matter of law. The fact that an intermediary agent got the deal done is immaterial.

Summary

Despite Defendants claims to the contrary, the Plaintiffs' Motion to Reconsider does cite multiple authorities, at least one change in controlling law, and several clear errors of law.

In this Response, Plaintiffs have shown Reese v. Provident Funding, and how this change in controlling law affirmed Plaintiffs' claim that Defendants must have a properly endorsed note in order to pursue foreclosure on Plaintiffs' home.

In this Response, Plaintiffs have shown Reese v. Ellis, Painter, Ratterree & Adams, and how this Court incorrectly applied this decision to a single purpose communication.

In this Response, Plaintiffs have shown that, under RESPA, SPS is a servicer, confirming that, under FDCPA, SPS is a Debt Collector.

Likewise, Plaintiffs' Motion to Reconsider has shown multiple other errors of law, including the misapplication of the One Satisfaction Rule, misapplication

of the obligation for good faith in all commercial transactions (GA. Code 11-1-203), and the numerous ways that Plaintiffs have been unconstitutionally disadvantaged by proceeding pro se.

For these reasons, Plaintiffs hereby move the Court to vacate and set aside its Order granting Defendants' Motion to Dismiss; to reinstate Plaintiff's case and direct the Clerk to re-open the case; and to grant Plaintiffs' request for leave to amend their Complaint.

In the event the Court grants none of the above, the Plaintiffs further move the court to grant Judicial Notice that Select Portfolio Services is to be considered a "Debt Collector" under the FDCPA; to clarify whether the Judgment as entered by the Clerk means that this case is dismissed with or without prejudice, against one or both parties, and whether attorney fees are to be included; and for such other and further relief as this Honorable Court deems just and proper.

Respectfully submitted this 12th day of April, 2013.

Vito J. Fenello, Jr.
289 Balaban Circle
Woodstock, GA 30188
770-516-6922

Beverly H. Fenello
289 Balaban Circle
Woodstock, GA 30188

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CERTIFICATE OF SERVICE, FONT AND MARGINS

I hereby certify that I have filed the following documents:

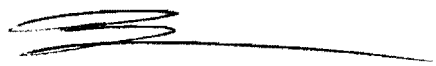
- PLAINTIFFS' RESPONSE TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION

with the Clerk of the Court, and served a true and correct copy of same on Defendants' Attorneys via First-Class Mail, postage prepaid, addressed to:

Jarrod S. Mendel &
Andrew G. Phillips
McGuireWoods LLP
1230 Peachtree Street, N.E.
Promenade II, Suite 2100
Atlanta, Georgia 30309-3534

I further certify that I prepared these documents in 14 point Times New Roman font and complied with the margin and type requirements of this Court.

DATED this 12th day of April, 2013.



Vito J. Fenello, Jr.
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Woodstock, GA 30188
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