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

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

COME NOW Defendants Bank of America, N.A., ("BANA"), and The Bank of New York Mellon, ("BONY")[1] (collectively "Defendants"), by and through their undersigned counsel, and respectfully move this Court to dismiss Plaintiffs' First Amended Complaint ("FAC") with prejudice because: (i) the FAC fails to comply with the July 17, 2012 Order of this Court; and (ii) the FAC fails to

[1] Plaintiff names "The Bank of New York Mellon (as Trustee for CWALT, Inc.)" as a Defendant. Defendants represent that the current owner of the Loan in question is The Bank of New York Mellon f/k/a/ the Bank of New York as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2007-5CB, Mortgage Pass-Through Certificates, Series 2007-5CB. Accordingly, BONY responds as Trustee.

state a claim for relief pursuant to Fed. R. Civ. P. 8(a) and 12(b)(6). In support thereof, Defendants state as follows:

INTRODUCTION

On June 17, 2012, this Court dismissed all of Plaintiffs' claims without leave to amend, except their claim for violations of the Fair Debt Collection Practices Act ("FDCPA"). Doc. No. 24. Specifically, this Court held that "with the exception of their FDCPA claim, all of their claims are implausible, unfounded, without merit, and amendment would be futile." Doc. No. 24, p. 51. While this Court granted Plaintiffs' leave to amend their FDCPA claim, this Court found that Plaintiffs' original Complaint failed to state any claim for violations of the FDCPA. Doc. No. 24, p. 16. Accordingly, this Court specifically instructed Plaintiffs to amend only their FDCPA claim to "explain how each Defendant qualifies as a 'debt collector'. . . specify which section of the FDCPA was violated, how it was violated, when it was violated, and by which Defendant; and . . . clearly state the relief requested." Doc. No. 24, p. 51. However, despite being presented with this opportunity, Plaintiffs' FAC utterly fails to comply with the July 17, 2012 Order of this Court and is merely a waste of judicial resources and a last-ditch effort to prevent a lawful foreclosure on their property after they defaulted on their mortgage.

First, Plaintiffs' FAC fails to meet minimum pleading standards under Fed. R. Civ. P. 8 and 12(b)(6) because it consists almost entirely of vague, conclusory allegations and legal buzzwords from which Defendants are forced to try and glean cognizable claims. Second, despite the fact that this Court instructed Plaintiffs on what was required to be included in their FDCPA claim, Plaintiffs' FAC still fails to allege sufficient facts to support an FDCPA claim. Instead, Plaintiffs' FDCPA claim consists of recitations of law and legal conclusions without any support.

Third, despite the fact that Plaintiffs were given leave to amend only their FDCPA claim and have not sought leave to bring any additional claims, Plaintiffs have now added two new implausible, unfounded, and meritless claims. Even if Plaintiffs had properly moved to add these claims, such amendment is futile. Specifically, 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. Rather, the fact remains that any damages sustained is the result of Plaintiffs not paying their mortgage, not any wrongdoing by Defendants. Moreover, Plaintiffs cannot challenge an attempted foreclosure without tending the amount owing on the Loan, which Plaintiffs have failed to do, or even allege.

Any amendment to add Plaintiffs' purported claim for negligence would also

be futile because, like all their other claims, their negligence claim consists solely of legal conclusions without factual support. Defendants do not owe Plaintiffs any duty "to avoid unreasonable risk of harm," and Plaintiffs do not allege facts to support a breach of this duty or damages as a result of the purported breach.

In sum, like their Complaint and all of their frivolous motions, Plaintiffs' FAC has no merit and is predicated on fundamentally incorrect legal theories. As a result, their FAC must be dismissed with prejudice and without leave to amend.

STATEMENT OF FACTS

I. JUDICIALLY NOTICABLE FACTS

On January 30, 2007, Plaintiffs purchased the property located at 289 Balaban Circle, Woodstock, Georgia 30188 (the "Property") with a loan in the amount of $181,352.00 (the "Loan") in favor of Pulte Mortgage LLC. FAC ¶ 7. As security for this Loan, Plaintiffs contemporaneously executed a Security Deed to Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for the lender, Pulte Mortgage LLC, and the lender's successors and assigns.[2] The

[2] The Security Deed was recorded on February 6, 2007 in Deed Book 9379, Page 468 in the Cherokee County, Georgia land records. A copy of the Security Deed is attached as Exhibit A. This Court may take judicial notice of public records not attached to a complaint when considering a motion to dismiss. See Bryant v. Avado Brands, Inc., 187 F.3d 1272, 1280 (11th Cir. 1999). Further, the Security Deed is central to Plaintiffs' claims and may be considered without converting Defendants' Motion to Dismiss to one for summary judgment. See Maxcess, Inc. v. Lucent Techs., Inc. 433 F.3d 1337, 1340 n.3 (11th Cir. 2005).

Security Deed includes a power of sale which states that, in the event of default of the obligations owed by Plaintiffs, the lender and the lenders' successors and assigns are entitled to institute foreclosure proceedings against the Property and collect all costs incurred to foreclose. See Exhibit A. Plaintiffs do not deny that they initialed and signed each page of the Security Deed.

On April 13, 2011, MERS executed an Assignment transferring all beneficial interest in the Security Deed to BONY (the "Assignment").[3] Although Plaintiffs admittedly defaulted on the Loan, to date no foreclosure has occurred, and no foreclosure sale date is currently set.

II. ALLEGATIONS IN THE FAC[4]

Plaintiffs allege that their income fell in 2007 and that they defaulted on the Loan in early 2008. FAC ¶¶ 8-9. At that time, Plaintiffs purportedly notified BANA and requested information about loss mitigation options. FAC ¶ 9. Plaintiffs contend that BANA informed them that they would need to go into default and miss two payments in order to be eligible for a Making Homes Affordable Program ("HAMP") modification. FAC ¶¶ 10-11. Plaintiffs

[3] Id. The April 13, 2011 Assignment was recorded on March 3, 2011 in Deed Book 11383, Page 276 in the Cherokee County, Georgia land records. A copy of the Assignment is attached as Exhibit B.

[4] The allegations in the Complaint are treated as true for the purposes of this motion only.

purportedly missed the next two payments and then applied for a HAMP modification. FAC ¶ 12. Plaintiffs allege that for over a year they tried to obtain a loan modification but that BANA did not offer them a modification until June 13, 2011. FAC ¶¶ 19. Plaintiffs contend that BANA purportedly told them to accept the modification or re-apply in thirty days. FAC ¶ 20.

Plaintiffs purportedly chose to reapply in thirty days. FAC ¶ 24. Plaintiffs allege that when they attempted to re-apply, they were allegedly told that they could only apply for a modification verbally, which they did. FAC ¶ 25. Plaintiffs allege that they were approved pending the "note holder's approve," and that they would receive a formal offer in ten days. FAC ¶¶ 26-17.

On September 8, 2011, Plaintiffs allege they were assigned a "Dedicated Customer Relationship Manager" named Latecia Salters. FAC ¶ 28, 31. Plaintiffs assert that they made numerous attempts to contact Ms. Salters, her assistant "Jackie," and BANA but that they did not receive a response or modification offer. FAC ¶¶ 31, 34, 35, 36, 37. Plaintiffs then allege that "Julie Grippa" called them, and allegedly told them that they needed to submit additional documents for the loan modification review. FAC ¶ 41-42. Plaintiffs contend that they provided this documentation. FAC ¶ 42.

Based on these disjointed factual allegations, Plaintiffs assert three claims

for (1) violations of the FDCPA; (2) attempted wrongful foreclosure; and (3) negligence. Plaintiffs seek a jury trial and an award of actual and statutory damages, as well as attorney fees and costs. See FAC ¶¶ 77-78.

III. PROCEDURAL HISTORY

Plaintiffs filed their original Complaint on October 21, 2011 in the Superior Court of Cherokee County against Shuping and Defendants. Defendants timely removed this matter to this Court and filed a Motion to Dismiss. See Doc. Nos. 1, 6. Shuping was dismissed from this action on December 13, 2011. Doc. No. 8.

After numerous responses, motions, and surreplies filed by Plaintiffs (See Doc. Nos. 9, 10, 11, 18, 20, 23), this Court dismissed all of Plaintiffs' claims without leave to amend, except Plaintiffs' FDCPA claim. Plaintiffs filed their FAC on August 3, 2012. Defendants now move to dismiss the FAC in its entirety.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) permits dismissal of a complaint for "failure to state a claim upon which relief can be granted." In ruling on the pending motion to dismiss, all of the well-pled factual allegations in plaintiff's Complaint must be accepted as true and construed in the light most favorable to Plaintiff. See Young Apartments, Inc. v. Town of Jupiter, 529 F.3d 1027, 1037 (11th Cir. 2008). However, "unsupported conclusions of law or of mixed fact and

law have long been recognized not to prevent a Rule 12(b)(6) dismissal." Marsh v. Butler County, Ala., 268 F.3d 1014, 1036 n.16 (11th Cir. 2001).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U, S. 544, 555 (2007) (citations and quotations omitted). More specifically, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility 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) (quotation omitted).

ARGUMENT[5]

I. PLAINTIFFS' FAC MUST BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(B)(6) AND 8(A) FOR FAILURE TO STATE A CLAIM.

Plaintiffs' FAC consists almost entirely of vague, conclusory statements and legal buzzwords which fail to provide sufficient facts to state any claim against Defendants. As a result, the FAC must be dismissed in its entirety with prejudice

[5] All unpublished cases are attached as Exhibit C.

pursuant to Fed. R. Civ. P. 12(b)(6) and 8(a).

In order to survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a). "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." Iqbal, 129 S. Ct. at 1950 (emphasis added); see also Twombly, 550 U.S. at 555. Under Twombly and Iqbal, a plaintiff must plead facts to support a reasonable inference that there has been some wrongdoing. Iqbal, 129 S. Ct. at 1949; Twombly, 550 U.S. at 570. Simply concluding that Defendants harmed Plaintiffs, as Plaintiffs have asserted here, completely fails to meet minimum pleading standards. Id. Rather, to properly state a claim, the plaintiff must allege a factual basis for each element of each claim, setting forth "enough factual matter (taken as true) to suggest [each] required element." See Watts v. Fla. Intern. Univ., 495 F.3d 1289, 1295 (11th Cir. 2007).

Here, Plaintiffs' Complaint is entirely deficient. For each count, rather than identify factual matter that supports each claim, Plaintiffs merely incorporate by reference all the prior allegations of the FAC. FAC ¶¶ 47, 64, 72. Furthermore, the "prior allegations of the FAC" -- all apparently related to a loan modification --

are irrelevant and unrelated to the causes of action, and Plaintiffs fail to explain how they could possibly be connected. It is also unclear why Plaintiffs recount a litany of correspondence that they received and/or sent. See FAC ¶¶ 15-18, 21-22, 30, 32-33, 37, 39, 40; FAC Ex. 21, 22. Plaintiffs further fail to attach the majority of these documents or allege what the contents of these documents are. More importantly, Plaintiffs fail to explain how these documents are related to or support any of their purported causes of action. These deficiencies alone warrant dismissal. See Poblete v. Goldberg, 680 F.Supp.2d 18 (D.D.C. Dec. 29, 2009).

Additionally, as recited in the Introduction Section, *supra*, and as more fully discussed in Sections II and III, *infra*, the FAC fails to state any claim upon which relief could be granted, as all of Plaintiffs' causes of action fail. Plaintiffs merely recite the legal buzzwords and conclusions associated with each count, but wholly fail to allege sufficient facts to meet each element of each count. See gen. FAC. Accordingly, Plaintiffs' Complaint fails to even set out the most bare and general assertions of fact from which a cause of action could possibly arise. As such, Plaintiffs' claims must be dismissed with prejudice.

II. PLAINTIFFS' STILL FAIL TO ALLEGE SUFFICIENT FACTS TO SUPPORT A CLAIM FOR VIOLATIONS OF THE FDCPA IN DIRECT VIOLATION OF THE JULY 17, 2012 ORDER OF THIS COURT.

This Court specifically instructed Plaintiffs to amend their FDCPA claim to

"explain how each Defendant qualifies as a 'debt collector' within the meaning of the Act . . . specify which section of the FDCPA was violated, how it was violated, when it was violated, and by which Defendant; and . . . clearly state the relief requested." Doc. No. 24, p. 51. However, Plaintiffs once again fail to allege sufficient facts to support a claim for violations of the FDCPA, let alone comply with the July 17, 2012 Order.

Per the FAC, Plaintiffs are now only asserting the FDCPA claim against BANA. Specifically, Plaintiffs purportedly allege that BANA is a debt collector because: (i) per Exhibit 7 (which is not even attached to the FAC) BANA stated that it was a debt collector, and (ii) BACHLS transferred servicing of the Loan to BANA after the Loan was in default. FAC ¶¶ 50, 54. Plaintiffs then allege that BANA violated the FDCPA as follows: (i) BANA violated 15 U.S.C. 1692g(b) by failing to verify the debt and continuing to attempt to collect the debt; (ii) BANA violated 15 U.S.C. § 1692f(6)(A) by initiating foreclosure proceedings without a right to possession. FAC ¶¶ 56-62. These theories are based on Plaintiffs' misunderstanding of the FDCPA, the facts in this case, and this Court's July 17, 2012 Order. As a result, Plaintiffs fail to allege sufficient facts to show that BANA is a debt collector or that BANA violated 15 U.S.C. §§ 1692g(b) or 1692f(6)(A).

A. Plaintiffs Fail to Allege Sufficient Facts to Show that BANA is a Debt Collector.

Plaintiffs first assert that BANA is a debt collector because BANA stated in correspondence to Plaintiff that "Under the federal Fair Debt Collections Practices Act and certain state laws, Bank of America is considered a debt collector." FAC ¶ 50. Plaintiffs do not attach this letter, but presumably Plaintiffs are referring to the letter sent by BANA in 2011 notifying Plaintiffs that the servicing of their Loan would transfer from BACHLS to BANA effect July 1, 2011. See Compl. Ex. 7. This is the same argument that Plaintiffs made in their original Complaint, which this Court refuted. Specifically, this Court held that BANA's statement that it was a debt collector "does not establish that BANA is a 'debt collector' within the meaning of the FDCPA or suffice for satisfying Plaintiffs' procedural pleading requirements." Doc. No. 24, p. 15.

Plaintiffs next assert that BANA is a debt collector because BACHLS transferred the servicing rights to BANA after the debt was in default. FAC ¶ 54. However, BACHLS merged with and into BANA effect July 1, 2011; thus, BANA and BACHLS are the same entity, and there was no transfer. See O.C.G.A. § 14–2–1106. Because BACHLS serviced the Loan prior to default, the fact that the Loan was in default when BANA began servicing the Loan is irrelevant, and this certainly does not render BANA a debt collector.

Furthermore, Plaintiffs' reliance on Perry v. Stewart Title Co., 756 F.2d

1197, 1208 (5th Cir. 1985), for the proposition that a mortgage servicing company is not a debt collector "as long as the debt was not in default at the time it was assigned" is misplaced. The phrase "as long as the debt was not in default at the time it was assigned" applies only to assignees of a debt. It does not apply to the transfer of servicing. BANA is not the assignee of the debt in this case; the debt was assigned to BONY – not BANA. BANA is the bona fide mortgage servicer, and accordingly, not a debt collector. See 15 U.S.C. § 1692a(6); Warren v. Countrywide Home Loans, Inc., 342 Fed. App'x 458, 460 (11th Cir. 2009).

Therefore, Plaintiffs fail to allege sufficient facts to show that BANA is a debt collector under the FDCPA. In order to prevail, Plaintiffs must allege that the defendant attempting to collect the debt qualifies as a "debt collector" under the Act. Buckley v. Bayrock Mortg. Corp, 2010 U.S. Dist. LEXIS 10636, at *21-22 (N.D. Ga. Jan. 12, 2010). As Plaintiffs fail to credibly allege that BANA is a debt collector, the FDCPA claim must be dismissed with prejudice.

B. Plaintiffs Fail to Allege Sufficient Facts to Show that BANA violated 15 U.S.C. §§ 1692g(b).

Even if BANA was a debt collector, Plaintiffs' FDCPA claim fails because Plaintiffs fail to allege sufficient facts to support their claim that BANA violated 15 U.S.C. § 1692g(b). This section of the FDCPA provides as follows:

> If the consumer notifies the debt collector in writing

> within the thirty-day period . . . that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt . . . until the debt collector obtains verification of the debt . . . .

15 U.S.C. 1692g(b). All that is required to verify the debt is that "the debt collector confirm[] in writing that the amount being demanded is what the creditor is claiming is owed." Anderson v. Frederick J. Hanna & Assoc., 361 F.Supp. 2d 1379, 1383 (N.D. Ga. Mar. 21, 2005) (quoting Chaudhry v. Gallerizzo, 174 F.3d 394, 406 (4th Cir. 1999)).

Here, Plaintiffs allege that they disputed the debt on July 27, 2011 by sending correspondence to BANA, and multiple letters to Shuping. FAC ¶¶ 57, 58. Plaintiffs contend that BANA never responded to these disputes and never ceased collection activity. FAC ¶¶ 59-62. As evidence that BANA did not cease collection activity, Plaintiffs rely on the September 29, 2011 letter from Shuping notifying Plaintiffs that foreclosure proceedings had started. FAC ¶ 62; Compl. Ex. 15. However, Plaintiffs own exhibits show that, even though BANA was not a debt collector, BANA repeatedly complied with 15 U.S.C. 1692g(b).

On or about July 1, 2011, BANA sent a letter to Plaintiffs notifying them of the change in servicer from BACHLS to BANA. Compl. Ex. 7. This correspondence stated that "[a]s of July 7, 2011 you owe $198,432.72." Id. The

letter went on to state that BONY was the creditor to whom the debt is owed. Id.

On July 27, 2011, Plaintiffs sent correspondence to BANA disputing the validity of the debt and the fact that BONY was the creditor.[6] Compl. Ex. 8. Plaintiffs sent a second dispute of the debt on September 14, 2011 to Shuping. Compl. Ex. 10. Shuping, on behalf of BANA, responded on September 19, 2011, specifically stating that "[t]his letter is for the purpose of verifying your indebtedness." Compl. Ex. 11. This letter enclosed a copy of the Note and the payoff statement. Id. At this point, BANA through its attorney, had verified the debt as required by the FDCPA. See Anderson, 361 F.Supp. at 1383. Thus, BANA was within its rights to pursue collection activity as of September 19, 2011.

Further, Plaintiffs fail to allege or provide any documentation of specific attempts by BANA to collect on the debt between July 27, 2011 and September 19, 2011. Plaintiffs also fail to allege that they sent any further disputes of the debt to BANA after September 19, 2011.[7] Thus, even had the September 29, 2011 correspondence been sent directly by BANA, and not Shuping, this correspondence did not violate the FDCPA.

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[6] On September 8, 2011, Shuping sent Plaintiffs a Notice pursuant to the FDCPA, which again provided the amount of the debt and that BONY was the creditor. Compl. Ex. 9.

[7] Plaintiffs purportedly sent a third dispute letter on September 26, 2011. Compl. Ex. 14. However, this letter was sent to Shuping, not BANA.

The bottom line is that Plaintiffs were repeatedly notified that BONY was the creditor on their Loan and of the amount due. Plaintiffs may not have liked the response, but that does not mean that they have a claim under the FDCPA.

C. Plaintiffs Fail to Allege Sufficient Facts to Show that BANA violated 15 U.S.C. § 1692f(6)(A).

Even if BANA is a debt collector, Plaintiffs fail to allege sufficient facts to support any violation by BANA of 15 U.S.C. § 1692f(6)(A). This section of the FDCPA prohibits a debt collector from "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if--(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest." 15 U.S.C. § 1692f(6)(A). Plaintiffs allege that the September 29, 2011 correspondence from Shuping violates this section of the FDCPA. FAC ¶ 62. However, this claim is refuted by Plaintiffs own exhibits.

The September 29, 2011 letter indicates that BANA is the servicer for BONY, and that BONY is the current holder of the Note and the Security Deed. Compl. Ex. 15. As the assignee of the Security Deed and the holder of the Note and due to Plaintiffs default, BONY had the right to possession of the Property at the time this letter was sent. Accordingly, this letter did not violate the FDCPA.

Moreover, the Eleventh Circuit has held that "foreclosing on a security interest is not a debt collection activity for purposes of 15 U.S.C. 1 § 1692g."

Warren v. Countrywide Home Loans, Inc., 342 Fed. App'x 458, 460 (11th Cir. 2009).

Plaintiffs failed to pay their mortgage, BONY is the holder of the Note and the Assignee of the Security Deed, and, due to Plaintiffs' default, BONY has the right to foreclose. Shuping and BANA on behalf of BONY instituted non-judicial foreclosure proceedings. This initiation of foreclosure proceedings may be disappointing to Plaintiffs, but it does not violate the FDCPA.

II. PLAINTIFFS' REMAINING CLAIMS MUST BE STRICKEN BECAUSE THEY VIOLATE THE JULY 17, 2012 ORDER, FAIL TO COMPLY WITH FED. R. CIV. P. 15, AND ANY AMENDMENT TO ADD THESE CLAIMS IS FUTILE.

First, this Court's July 17, 2012 Order clearly grants Plaintiffs leave to amend their FDCPA claim only. Doc. No. 24, p. 51. The July 17, 2012 Order did not grant Plaintiffs leave to add additional causes of action. Accordingly, Plaintiffs' claims for wrongful attempted foreclosure and negligence should be stricken as a blatant violation of this Court's Order.

Second, these new claims also violate Fed. R. Civ. P. 15. Pursuant to Fed. R. Civ. P. 15(a)(2), a party must seek leave of the Court to amend the complaint after 21 days has passed after service of the responsive pleading. In this case, that period has passed, and Plaintiffs have not sought leave to amend to add new causes of action. Furthermore, the purpose of the 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 fail to assert any new facts or provide any new information that was not available to them at the time they filed their original Complaint. Accordingly, these new causes of action should be stricken.

Third, even if Plaintiffs had sought leave to amend, such leave must be denied because amendment to add causes of action for wrongful attempted foreclosure and negligence would be futile. While leave to amend should be freely given, the futility of an amendment is justification for a dismissal with prejudice. See Carvel v. Godley, 2010 U.S. App. LEXIS 24763, *4 (11th Cir. December 2, 2010) (citing Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962)). Further, just like an original complaint, an amendment to a complaint also must meet the requirements of Rule 12(b)(6), which requires dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). Here, Plaintiffs' claims for wrongful attempted foreclosure and negligence both fail as a matter of law pursuant to Fed. R. Civ. P. 12(b)(6) as further detailed in the sections below.

A. Plaintiffs' Wrongful Attempted Foreclosure Claim Fails Because Plaintiffs Fail to Allege Sufficient Facts to Support a Claim for Wrongful Attempted Foreclosure, and Plaintiffs Have Failed to Tender.

Plaintiffs allege that BANA "through its law firm" and on behalf of BONY "knowingly published an untrue and derogatory statement concerning the plaintiffs' financial conditions in the Cherokee Tribune" on May 5, 2011 and September 29, 2011. FAC ¶¶ 68-69; Ex. 21 and 22. Plaintiffs further allege that BANA, again on behalf of BONY, "knowingly published untrue and derogatory statements concerning the Plaintiffs' financial conditions with the credit reporting agencies." FAC ¶ 70; FAC Ex. 23. As a result of "Defendants' actions," Plaintiffs assert damages for loss of credit, emotional distress, and "other damages." FAC ¶ 71. However, these bald conclusions are insufficient to support a claim for wrongful attempted foreclosure, and such claim further fails because Plaintiffs failed to tender.

A wrongful attempted foreclosure requires: (1) a knowing and intentional publication of untrue and derogatory information concerning the debtor's financial condition, and (2) that damages were sustained as a direct result of this publication. Aetna Finance Co. v. Culpepper, 171 Ga. App. 315, 319, 320 S.E.2d 228, 232 (1984). Here, Plaintiffs do not allege any facts to support a knowing and

intentional publication of untrue information concerning Plaintiffs' financial conditions.

Plaintiffs fail to allege specifically what was published in the Cherokee Tribune, what was untrue, or any facts to support that Defendants knew it was untrue. Assuming Plaintiffs are referring to the Notices of Sale Under Power, which Shuping requested that the Cherokee Tribune publish, the only statement in the Notices that remotely refer to Plaintiffs' financial condition is the following:

> The indebtedness secured by the Deed to Secure Debt having been declared due and payable because of default in the payment of the indebtedness secured thereby, this sale will be made for the purpose of paying the same and all expenses of sale, including attorney's fees, if applicable.

Id. This statement merely establishes that Plaintiffs defaulted on the Loan, a fact that Plaintiffs have never denied. Thus, because these Notices of Sale Under Power do not contain any untrue statements regarding Plaintiffs' financial conduction, Plaintiffs' wrongful attempted foreclosure claim based on these Notices fails as a matter of law.

Similarly, Plaintiffs fail to allege what Defendants reported to the credit agencies, that this information was published, or that this information was untrue. Assuming Plaintiffs are relying on the copy of Plaintiff Fenello's credit report attached to the FAC, there is no indication that this credit report was shared with

anyone other than Plaintiff Fenello. FAC Ex. 23. This report also does not include any financial information related to Beverly Fenello. Moreover, like the Notices for Sale Under Power, this credit report reflects that Plaintiffs failed to pay their mortgage, which again is not in dispute. Accordingly, this credit report cannot support Plaintiffs' wrongful attempted foreclosure claim.

Additionally, Plaintiffs fail to allege that their purported damages are the result of the publication of the Notices of Sale Under Power or the credit report. Again, Plaintiffs failed to pay their mortgage, a fact that is not in dispute. Any purported damages that Plaintiffs may have sustained is due to their own failure to pay their mortgage – not any of the "Defendants' actions." See Doc. No. 24, p. 31, fn. 15.

Furthermore, even if Plaintiffs had sufficiently alleged a knowing publication of untrue financial information, this claim fails because Plaintiffs failed to tender the amount owing on the Loan. See e.g., Morton v. Suntrust Mortg., Inc., 1:10-CV-2594-TWT-RGV (N.D. Ga. Nov. 5, 2010) ("To seek any relief regarding a *pending* or past foreclosure sale, plaintiff must tender the amount owed under the loan." (emphasis added)) (Report and Recommendation adopted on Dec. 6, 2010); Michel v. Pickett, 241 Ga. 528, 535, 247 S.E.2d 82, 87 ("A borrower who has executed a [security deed] is not entitled to enjoin a foreclosure sale unless he first

pays or tenders to the lender the amount admittedly due."); Nicholson v. OneWest Bank, 2010 U.S. Dist. LEXIS 45993, * 17 (N.D. Ga., Apr. 20, 2010) ("Plaintiff cannot enjoin the upcoming May foreclosure sale because she has not paid the full amount due to bring the Note current."). Here, Plaintiffs have made no showing that they have tendered the full amount due or even that they are willing to tender the full amount. Accordingly, Plaintiffs' second cause of action for wrongful attempted foreclosure must be dismissed with prejudice.

B. Plaintiffs Fail to Allege Sufficient Facts to Support a Claim for Negligence.

Plaintiffs baldly, and without any factual support, conclude that Defendants "have a duty by statute and by contract as bankers, lenders, debt holders, servicers, trustees, agents and debt collectors, to avoid unreasonable risk of harm." FAC ¶ 74. Plaintiffs further conclude that "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 ¶ 75. These legal conclusions are insufficient to state any claim for relief, let alone one for negligence.

To state a claim for negligence in Georgia, a plaintiff must establish the following elements: "(1) A duty, or obligation, recognized by law, requiring the actor to conform to a certain standard of conduct . . . (2) A failure on his part to

conform to the standard required[;] (3) A reasonable close causal connection between the conduct and the resulting injury[;] (4) Actual loss or damage resulting to the interests of the other." Brookview Holdings, LLC v. Suarez, 285 Ga. App. 90, 91 (2007) (citations omitted).

First, Plaintiffs fail to assert an enforceable or recognized legal duty of Defendants that was breached. Defendants do not owe Plaintiffs a general duty "to avoid unreasonable risk of harm," nor do Plaintiffs cite to any statute or case law, or provisions in the Security Deed providing for such a duty. In fact, the law in Georgia is clear that "in order to maintain an action [in tort] because of a breach of duty growing out of a contractual relation[,] the breach must be shown to have been a breach of a duty imposed by law and not merely the breach of a duty imposed by the contract itself." Med South Health Plans LLC v. Life of the South Ins. Co., 2008 U.S. Dist. LEXIS 40223, at *21 (N.D. Ga. May 19, 2008); see also USF Corp. v. Securitas Sec. Servs. USA Inc., 305 Ga. App. 404, 408 (2010) (affirming dismissal of negligence claim because "mere failure to perform a contract does not constitute a tort."). Plaintiffs fail to allege any breach of any duty or term of the Security Deed by Defendants, and, accordingly, their negligence claim fails.

Second, Plaintiffs also fail to allege sufficient facts to support a breach by Defendants, or any wrongdoing. As discussed in Section A, *supra*, the credit report and Notices of Sale Under Power do not include any false information, and Plaintiffs' attempted wrongful foreclosure claim fails. Plaintiffs fail to specify which federal or state laws Defendants purportedly violated or allege any facts to support claims for slander of title or defamation of character.

Third, Plaintiffs have failed to establish a causal connection between Defendants' alleged conduct and the resulting injury. Plaintiffs merely state that due to "Defendants' actions," Plaintiffs suffered damages including "losing credit, inability to obtain credit, emotional distress, and other damages . . . ." FAC ¶ 76. The Property has not been foreclosed on, nor is a sale scheduled. Further, Defendants are not preventing Plaintiffs from selling the Property. Moreover, any purported damages that Plaintiffs may have suffered are due to their failure to pay their mortgage – not any wrongdoing by Defendants. See Doc. No. 24, p. 31, 33, fn. 15. Thus, Plaintiffs can prove no set of facts to establish the fourth element needed to sufficiently plead a claim for negligence – actual loss or damage as a result of the breach.

Plaintiffs' negligence claim is wholly comprised of legal conclusions and is completely devoid of any facts to support such assertions. As a result, Plaintiffs

have failed to state a claim for negligence, and, accordingly, Plaintiff's FAC must be dismissed with prejudice.

In sum, Plaintiffs' claims for wrongful attempted foreclosure and negligence must be stricken because these claims violate the July 12, 2012 Order, Fed. R. Civ. P. 15, and amendment to add these claim would be futile. Moreover, as Plaintiffs' FDCPA claim also fails, Plaintiffs' FAC must be dismissed with prejudice in its entirety.

CONCLUSION

WHEREFORE, for the above and foregoing reasons, this Court should grant Defendants' Motion to Dismiss pursuant to the July 17, 2012 Order of this Court and Fed. R. Civ. P. 8(a) and 12(b)(6), and grant Defendants such other and further relief as the Court deems equitable and appropriate under the circumstances.

This 20th day of August, 2012.

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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. SHUPING, MORSE & ROSS, LLP; 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

CERTIFICATE OF SERVICE, FONT AND MARGINS

I hereby certify that on August 20, 2012, I electronically filed the foregoing *Memorandum of Law in Support of Motion to Dismiss Plaintiffs' First Amended Complaint* 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/ Jarrod S. Mendel
Jarrod S. Mendel