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

REPLY 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, pursuant to Fed.R.Civ.P. 8(a) and 12(b)(6), and hereby file their Reply in Support of their Motion to Dismiss Plaintiffs' First Amended Complaint ("FAC"). In support thereof, Defendants state as follows:

[1] Plaintiffs name "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.

INTRODUCTION

On September 4, 2012, Plaintiffs filed a Response to Motion to Dismiss FAC (Doc. No. 29) and Response to Memorandum in Support of Motion to Dismiss FAC (Doc. No. 29-1) (hereinafter collectively "Plaintiffs' Opposition"). Like all of Plaintiffs' filings, Plaintiffs' opposition has no merit and is predicated on fundamentally incorrect legal theories.

First, Plaintiffs' Opposition fails to cure the pleading defects in their FAC. Plaintiffs merely re-allege the same legal conclusions asserted in their FAC without any factual support. Second, Plaintiffs still fail to assert sufficient facts to support a claim for violations of the FDCPA. Instead, Plaintiffs' FDCPA claim consists of the same bare recitations of law and legal conclusions lacking any factual support that are found in the FAC. Third, Plaintiffs assert that they were unaware that they needed to seek leave to amend their Complaint to add their claims for wrongful attempted foreclosure and negligence; accordingly, Plaintiffs filed a Motion for Leave to Amend. Doc. No. 29, p. 3. However, Plaintiffs' Motion to Amend is not allowed per this Court's July 17, 2012 Order, and amendment to add these claims would be futile anyway.

In sum, like all of their filings, Plaintiffs' Opposition 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.

ARGUMENT

I. PLAINTIFFS' OPPOSITION FAILS TO CURE THE PLEADING DEFECTS IN THEIR FAC, AND ACCORDINGLY, THEIR FAC MUST BE DISMISSED PURSUANT TO FED. R. CIV. P. 12(B)(6) AND 8(A) FOR FAILURE TO STATE A CLAIM.

In their Opposition, Plaintiffs baldly conclude that they met the pleading standards under Fed. R. Civ. P. 12(b)(6) and 8(a).. Doc. No. 29, pp. 3-5. However, Plaintiffs merely recite the federal rules and pleading standards and fail to offer any factual support for their legal conclusions. Further, Plaintiffs fail to address Defendants' specific arguments and examples of how Plaintiffs failed to meet the pleading standard.

Further, Plaintiffs suggest that their pleading deficiencies should be forgiven because they are filing this action *pro se.* However, the fact that Plaintiffs are *pro se* does not relieve them of their duty to adequately plead facts in their Complaint or FAC. Howell v. Styles, 221 Ga.App. 781, 783(2), 472 S.E.2d 548 (1996). Rather, as argued in Defendants' Motion to Dismiss the FAC, Plaintiffs' FAC utterly fails to meet the pleading requirements of Fed. R. Civ. P. 12(b)(6) and 8(a), and accordingly, Plaintiffs' FAC must be dismissed. See Doc. No. 29-1, pp. 8-10.

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.

In their Opposition, Plaintiffs baldly conclude that they met the requirements of the July 17, 2012 Order by sufficiently alleging an FDCPA claim. Doc. No. 29, p. 3. However, Plaintiffs still fail to sufficient allege that BANA is a debt collector under the FDCPA or that BANA violated the FDCPA as required by the July 17, 2012 Order. Specifically, Plaintiffs assert the following arguments in their Opposition:

> (A) BANA is a debt collector because (1) BANA stated that it was a debt collector in a letter notifying Plaintiffs of the merger and change in servicer from BACHLS to BANA (2) BACHLS transferred servicing of the Loan to BANA after the Loan was in default, and (3) Congress intended to have the FDCPA apply to loan servicers; and (B) BANA violated the FDCPA by (1) failing to verify the debt, and (2) initiating foreclosure proceedings without being the secured creditor.

See gen. Doc. No. 29-1. 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 the FDCPA, and their FDCPA claim must accordingly be dismissed with prejudice.

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

Plaintiffs argue that BANA is a debt collector based on the following: (i) the 2011 letter from BANA notifying Plaintiffs of a service change; (ii) the legislative intent of Congress; and (iii) BACHLS's purported transfer of the debt to BANA after Plaintiffs' default. However, all of these theories fail to establish that BANA is a debt collector, and, accordingly, Plaintiffs' FDCPA claim must be dismissed.

1. The 2011 letter from BANA does not render BANA a debt collector under the FDCPA.

First, Plaintiffs repeat their allegation that BANA is a debt collector because BANA stated in a 2011 letter notifying Plaintiffs that the servicing of their Loan would change from BACHLS to BANA effect July 1, that "Under the federal Fair Debt Collections Practices Act and certain state laws, Bank of America is considered a debt collector." Doc. No. 29-1, p. 2. This is the same argument that Plaintiffs made in their original Complaint and which this Court explicitly refuted. See Doc. No. 24, p. 15; see also Doc No. 28-1, p. 12.

Plaintiffs further admit that Reese v. Ellis, 678 F.3d 1211 (11th Cir. 2012) does not apply to this case. Doc. No. 29-1, p. 2. As this Court explained in its Order, prior to Reese, in Warren v. Countrywide Home Loans, Inc., 342 F. App'x 458, 460 (11th Cir. 2009), the Court found that "an enforcer of a security interest,

such as a [mortgage company] foreclosing on mortgages of real property . . . falls outside the ambit of the FDCPA . . . ." See also Doc. No. 24, p. 15. However, the Reese Court held that foreclosure activity could potentially fall under the FDCPA. Specifically, as this Court explained in its Order, pursuant to Reese, "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 . . . ." Doc. No. 24, p. 15.

However, here, as correctly pointed out by Plaintiffs, Reese does not apply to this case because the 2011 letter "is not a dual purpose letter." Doc. No. 29-1, p. 2. Plaintiffs even admit that the letter was not an attempt to collect a debt. Id. Plaintiffs assert that "the real purpose of this letter was to notify them that the servicing of the Promissory Note in question had been transferred, and to give the Plaintiffs the opportunity to dispute the debt as required under the FDCPA." Id. An opportunity to dispute the debt is not the same thing as an attempt to collect a debt. Accordingly, as admitted by Plaintiffs, this letter does not render BANA a debt collector under Reese or the FDCPA.

2. Congress did not intend for the FDCPA to automatically apply to loan servicers; rather, loan servicers, like BANA, generally are not debt collectors under the FDCPA.

Plaintiffs argue for the first time in their Opposition that BANA is a debt

collector because Congress intended that the FDCPA apply to loan servicers. Doc. No. 29-1, pp. 3-4. Plaintiffs fail to cite to any legislative history or case law for this proposition. As explained by this Court in its Order and contrary to Plaintiffs' assertion, the FDCPA generally does not apply to loan servicers. See Doc. No. 24, p. 14-15. As discussed throughout Defendants' Motion to Dismiss the FAC and this Reply, Plaintiffs fail to allege facts to support any viable claim that the general rule should not be applied and that BANA is a debt collector.

3. The merger of BACHLS with and into BANA after Plaintiffs defaulted on their loan does not render BANA a debt collector.

In their Opposition, Plaintiffs repeat their allegations that BANA is a debt collector because BACHLS transferred the servicing rights to BANA after the debt was in default. Doc. No. 29-1, p. 3. Plaintiffs then, without any factual support, accuse BANA of engaging "in a complicated shell game designed to transfer the assets from Countrywide . . . to BACHLS, to BANA, in a way that allowed the assets to transfer while shielding BANA from the liabilities of Countrywide, and in an attempt to avoid regulation and oversight by the Comptroller of the Currency." Id. There is absolutely no evidence of any violation of the FDCPA or any other law as a result of the merger of BACHLS with and into BANA.

As argued in Defendants' Motion to Dismiss the FAC, the fact that the Loan was in default at the time of the merger is irrelevant and does not render BANA a

debt collector under the FDCPA. See Doc. No. 28-1, pp. 12-13. 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). Because Plaintiffs fail to credibly allege that BANA is a debt collector, Plaintiffs' FDCPA claim must be dismissed with prejudice. Buckley v. Bayrock Mortg. Corp, 2010 U.S. Dist. LEXIS 10636, at *21-22 (N.D. Ga. Jan. 12, 2010).

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

Even if BANA is a debt collector, Plaintiffs' FDCPA claim still fails because Plaintiffs fail to allege sufficient facts to support any violation of the FDCPA. In their Opposition, Plaintiffs repeat their allegations that BANA violated the FDCPA by failing to verify the debt (15 U.S.C. § 1692g(b)) and by proceeding to foreclose (15 U.S.C. § 1692f(6)(A)). Doc. No. 29-1, p. 4-6. However, rather than address Defendants' substantive arguments in their Motion to Dismiss, Plaintiffs merely offer legal conclusions and irrelevant case law which wholly fails to establish that BANA violated the FDCPA.

1. Plaintiffs still fail to allege sufficient facts to show that BANA failed to verify the debt pursuant to 15 U.S.C. § 1692g(b).

Plaintiffs allege that BANA failed to verify the debt because the

documentation verifying the debt provided by BANA was insufficient under the FDCPA. Doc. No. 29-1, p. 4. However, Plaintiffs fail to explain why this documentation was insufficient. For the reasons set forth in Defendants' Motion to Dismiss the FAC, Defendants contend that BANA complied with 15 U.S.C. § 1692g(b), and accordingly, Plaintiffs FDCPA claim must be dismissed with prejudice.

2. Plaintiffs still fail to allege sufficient facts to show that BANA violated 15 U.S.C. § 1692f(6)(A) by initiated foreclosure proceedings on behalf of BONY.

Plaintiffs assert for the first time in their Opposition that the reason BANA violated 15 U.S.C. § 1692f(6)(A) is because BANA is not the secured creditor. In support, Plaintiffs rely on the recent decisions in Reese v. Provident Funding Associates, LLP, 2012 WL 2849700 (Ga. Ct. App. July 12, 2012) and Morgan v. Ocwen Loan Servicing, LLC, 795 F. Supp. 2d 1370 (2011). However, Plaintiffs' theory regarding secured creditor and reliance on this case law is misplaced and fails to establish any violations of the FDCPA.

First, the Reese and Morgan cases specifically address wrongful foreclosure claims. Here, no foreclosure has occurred, and Plaintiffs have not alleged a wrongful foreclosure claim. Thus, these cases and whether BANA is a secured

creditor are irrelevant to a determination of whether BANA violated the FDCPA.[2]

Second, Plaintiffs' contention that BANA did not have the right to foreclose on behalf of BONY and that accordingly, BANA violated 15 U.S.C. § 1692f(6)(A) is refuted by Plaintiffs' own exhibits to their original Complaint. Plaintiffs conclude that Defendants have never "provided any evidence that [BONY] is the legal holder of the Promissory Note." Doc. No. 29-1, p. 6. However, 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. Additionally, the September 19, 2011 letter from Shuping sent on behalf of BANA, enclosed a copy of the Note. Compl. Ex. 11.

As argued in Defendants' Motion to Dismiss the FAC, 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

[2] Defendants further submit that even if a foreclosure had occurred and Plaintiffs were to assert a wrongful foreclosure claim pursuant to Reese, the Notice of Sale Under Power fully complies with O.C.G.A. § 44-14-162.2. The Notice states that Security Deed was assigned to BONY, that the foreclosure is being conducted on behalf of BONY, that the entity will full authority to negotiate, amend or modify the terms of the Loan is BACHLS, and that "nothing in O.C.G.A. § 44-14-162.2 shall be construed to require [BACHLS], as servicer for [BONY] to negotiate, amend or modify the terms of the Deed to Secure Debt." Pursuant to the definition of secured creditor in Reese, BONY is the secured creditor, and BONY was clearly identified in the Notice. Moreover, contrary to Plaintiffs' assertions, BANA has never asserted that it is the secured creditor as defined in Reese.

proceedings. This initiation of foreclosure proceedings may be disappointing to Plaintiffs, but it does not violate the FDCPA. Doc. No. 28-1, pp. 13-17. Accordingly, Plaintiffs' FDCPA claim must be dismissed with prejudice.

III. 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.

Plaintiffs assert that they were unaware that they needed to seek leave to amend their Complaint to add their claims for wrongful attempted foreclosure and negligence; accordingly, Plaintiffs filed a Motion for Leave to Amend. Doc. No. 29, p. 3. However, amendment to add additional claims is not allowed per the July 17, 2012 Order, and amendment would be futile. This issue is fully briefed in Defendants' Opposition to Plaintiffs' Motion for Leave to Amend filed contemporaneously with this Reply. This issue was also briefed in Defendants' Motion to Dismiss the FAC. See Doc. No. 28-1, pp. 22-25. For the reasons stated in these filings, Plaintiffs' Motion for Leave to Amend must be denied, and Plaintiffs' FAC must be dismissed with prejudice.

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 18th day of September, 2012.

/s/ Jarrod S. Mendel

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CERTIFICATE OF SERVICE, FONT AND MARGINS

I hereby certify that on September 18, 2012, I electronically filed the foregoing *Reply 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:

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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