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By: *JWH* Deputy Clerk

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

1st AMENDED COMPLAINT

COMES NOW Plaintiffs Vito J. Fenello, Jr. and Beverly H. Fenello, and file this Complaint against Defendants Bank of America, N.A. and The Bank of New York Mellon (as Trustee for CWALT, Inc.) for violating the Fair Debt Collection Practices Act, Attempted Wrongful Foreclosure, and Negligence, showing the Court as follows:

JURISDICTIONAL ALLEGATIONS

1. Plaintiffs are individuals residing at the Residence in Cherokee County, Georgia, located at 289 Balaban Circle, Woodstock, GA 30188
2. Bank of America, N.A. (fka BAC Home Loan Servicing, LP) has corporate headquarters located at 100 North Tryon Street, Charlotte, NC 28202, and a registered agent located at CT Corporation System, 1201 Peachtree St NE, Atlanta GA 30361
3. The Bank of New York Mellon (fka The Bank of New York, aka BNY Mellon) has corporate headquarters located at One Wall Street, New York, NY 10286, and a registered agent located at CT Corporation System, 1201 Peachtree St NE, Atlanta GA 30361
4. CWALT, Inc. is a Trust represented by The Bank of New York Mellon.
5. The wrongful acts alleged, occurred in Cherokee County, Georgia.
6. The Court has jurisdiction over the Parties.

GENERAL ALLEGATIONS OF FACT AND LAW

7. On January 30, 2007, Plaintiffs purchased a new home financed in part by an Interest Only Fixed Rate Note issued by Pulte Mortgage, LLC. (Exhibit #13)
8. In late 2007, Plaintiffs experienced a precipitous drop in income due to the financial collapse, and their respective careers as real estate professionals wholly compensated through commissions on real estate transactions.

9. In early 2008, Plaintiffs contacted Bank of America, the apparent loan servicer at the time, informing them that they were experiencing financial distress, and inquiring about options available to them including a mortgage modification, a short sale, and a deed in lieu of foreclosure.
10. Bank of America responded that no options or relief would be available until Plaintiffs had missed at least two monthly payments.
11. The bank suggested that the Plaintiffs skip the next two payments, then contact them again to apply for relief under the new Home Affordable Modification Program (HAMP).
12. Relying upon representations by Bank of America, Plaintiffs skipped the next two monthly payments, then promptly applied for relief on April 24, 2010, under HAMP as instructed by the Bank.
13. Relying upon representations by Bank of America that time was of the essence, Plaintiffs anxiously awaited a prompt decision from the Bank.
14. Instead of a prompt decision, and despite calling the Bank multiple times a month, no decision was forthcoming.
15. Notice of Payment Due was sent by Shuping, Morse and Ross on April 5, 2011 (Exhibit #1)
16. Demand for Proof of Standing was sent by Plaintiffs on April 25, 2011 (Exhibit #2)

17. Notice of Pending Foreclosure was sent by Shuping, Morse and Ross on April 25, 2011 (Exhibit #3)
18. Notice of Foreclosure was sent by Shuping, Morse and Ross on May 5, 2011 (Exhibit #4)
19. On June 13, 2011, after more than 15 months of attempting to work with Bank of America, after skipping contractual obligations on the advice of the Bank, after submitting no less than 4 complete applications, after submitting many more supplementary documents, after calling the Bank weekly/monthly, after being subjected to misinformation, harassment, and other forms of abuse, after coming within 24 hours of foreclosure, after asking for options including deed in lieu of foreclosure, a short sale, or a modification, Plaintiffs finally received a modification offer that provided no relief (an offer that would have more than doubled their original monthly payment). (Exhibit #6)
20. According to Bank of America, at this point, the Plaintiffs had two options: accept the modification as is, or refuse the modification and re-apply in 30 days.
21. On or about July 7, 2011, the Plaintiffs received a letter from Bank of America, N.A. indicating that the servicing of their loan had been transferred from BAC Home Loan Servicing, LP, to Bank of America, N.A. (Exhibit #7)

22. On July 27, 2011, the Plaintiffs sent a certified letter disputing the debt, indicating that the purported creditor was unknown to the Plaintiffs, and demanding that Bank of America provide “documentation that BANK of NY is the legal holder in due course, along with proof of each and every transfer in the chain of assignments that resulted in BANK of NY attaining this status.” (Exhibit #8)
23. Despite representations in the July 7 letter that if “the debt or any portion of thereof is disputed, Bank of America, N.A. will obtain verification of the debt and mail it to you,” the demanded verification has never been received from Bank of America.
24. On August 4, 2011, Plaintiffs turned down the bank’s “Special Forbearance Agreement,” indicating they would re-apply in 30 days.
25. On September 7, 2011, Plaintiffs called the bank to re-apply, and were told that they could only do so verbally. Plaintiffs proceeded to complete the lengthy application over the phone.
26. The Plaintiffs were told they were preliminarily approved for a modification, pending the note holder’s approval.
27. Plaintiffs were told they would receive a formal, written offer within 10 days.

28. On September 8, 2011, Plaintiffs received a letter from Bank of America indicating that they had been assigned a “Dedicated Customer Relationship Manager.” (Exhibit #20)
29. From this date forward, the Bank’s automated attendant would automatically route all calls to this person, with no other options available.
30. Notice of Pending Foreclosure was sent by Shuping, Morse and Ross on September 8, 2011 (Exhibit #9)
31. On September 12, 2011, Plaintiffs called Latecia Salters (the Bank’s dedicated contact), but were unable to reach her directly. Her voice mail said she would return all calls with 24 hours. Plaintiffs left her a message.
32. Demand for Proof of Standing was sent by Plaintiffs on September 14, 2011 (Exhibit #10)
33. Response to Demand for Proof of Standing was sent by Shuping, Morse and Ross on September 19, 2011 (Exhibit #11,12,13)
34. On September 21, 2011, having not received the formal, written modification offer within 10 days as promised, having not received a return phone call from the Bank’s designated contact for 9 days (when a 24 hour response time was promised), Plaintiff’s called in again.

35. This time, they were routed to “Jackie,” Latecia’s apparent assistant. After verifying some of the contact information on the account, the phone call was disconnected.
36. Plaintiffs immediately called back, but again, the only option available to them was to leave a message for Latecia (which they did), who again promised a 24 hour response.
37. On September 26, 2011, Plaintiffs called in again, and again, the only option available to them was to leave a message for Latecia (which they did), who again promised a 24 hour response.
38. Repeat Demand for Proof of Standing sent by Plaintiffs on September 26, 2011 (Exhibit #14)
39. Notice of Foreclosure was sent by Shuping, Morse and Ross on September 29, 2011 (Exhibit #15)
40. On October 3, 2011, completely fed up with the run-around by Bank of America, Plaintiffs wrote a letter to the State Attorney General, and copied several members of the press. (Exhibit #16).
41. Within hours, Plaintiffs received a phone call from Julie Grippa, apologizing for the multiple, unreturned phone calls, indicating that Latecia had a death in the family.

42. According to Julie, Plaintiffs did have an open file in modification, but several additional documents were needed.
43. Plaintiffs promptly provided all requested documents.
44. When asked about the phone application, the preliminary approval, and the missing formal offer, Julie had no explanation.
45. On October 21, 2011, Plaintiffs filed this suit and a corresponding Lis Pendens with the Cherokee County Superior Court.
46. On October 31, 2011, Plaintiffs file a Certified Warranty Deed, a Certificate of Acknowledgement and Acceptance, and an Affidavit of Notice of Revocation of Power of Attorney with the Cherokee County Clerk (Exhibits #A,B,C)

Cause of Action #1 – Fair Debt Collection Practices Act (FDCPA)
(as to Defendant Bank of America)

47. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth herein.
48. To prevail on a FDCPA claim, a plaintiff must establish that:
 - (1) [he][has] been the object of collection activity arising from a consumer debt; (2) the defendant attempting to collect the debt qualifies as a “debt collector” under the Act; and (3) the defendant has engaged in a prohibited act or has failed to perform a requirement imposed by the FDCPA. (Judge’s Opinion and Order¹ at 13-14)

49. As detailed in Exhibits #1,3,4,6,7,9,11,12,15,20, Plaintiffs have been the object of collection activity arising from an alleged consumer debt.
50. As detailed in Exhibit #7, Bank of America has explicitly admitted “**Under the federal Fair Debt Collections Practices Act and certain state laws, Bank of America is considered a debt collector.**” (emphasis added)
51. Defendant contends that, despite written admissions to the contrary, they are not “debt collectors” as indicated in Comer v. J.P. Morgan Chase Bank, N.A. (M.D. Ga., 2011), et al.
52. Quoting Comer v. J.P. Morgan Chase: “The legislative history of section 1692a(6) indicates conclusively that a debt collector does not include the consumer's creditors, a mortgage servicing company, or an assignee of a debt, **as long as the debt was not in default at the time it was assigned.**” Perry v. Stewart Title Co., 756 F.2d 1197, 1208 (5th Cir. 1985). (emphasis added)
53. See also S. Rep. 95-382, 95th Cong. 1st Session 4, reprinted in 1977 U.S.C.C.A.N. 1695, 1698 (1977) (“[T]he committee does not intend the definition [of debt collector] to cover . . . mortgage service companies and others who service outstanding debts for others, **so long as the debts were not in default when taken for servicing[.]**”). (emphasis added)

54. As evidenced in Exhibit #7, BAC Home Loan Servicing, LP transferred the servicing of said note to Bank of America, NA well after the note was in default (defaulted in April, 2010, transferred in July, 2011).
55. According to the FDCPA 15 USC 1692a(7), Bank of America is a “debt collector” under the Act.
56. According to the FDCPA 15 USC 1692g(b) “If the consumer notifies the debt collector in writing within the thirty-day period ... that the debt, or any portion thereof, is disputed ..., the debt collector shall cease collection of the debt ..., until the debt collector obtains verification of the debt.”
57. Plaintiffs’ notified the Bank in writing within the requisite 30 days that they disputed the debt on July 27, 2011 (Exhibit #8).
58. Plaintiffs’ notified the Bank’s law firm, while it was acting as a debt collector under the FDCPA, in writing within the requisite 30 days that they disputed the debt (Exhibits #10,14).
59. Bank of America has failed to verify the debt, a requirement imposed by the FDCPA.
60. Bank of America continued its attempts to collect the debt, after it was disputed but not verified, a prohibited act under the FDCPA.

61. The FDCPA provides that a debt collector may not take non-judicial action to dispossess property without a present right to possession of the property claimed as collateral. 15 U.S.C. § 1692f(6)(A).
62. Bank of America, while acting as a debt collector under the FDCPA, instigated a non-judicial foreclosure by and through their law firm on September 29, 2011 (Exhibit #15), a prohibited act under the FDCPA.
63. A debt collector who has violated any provision of the FDCPA may be held liable for any mental and emotional stress, embarrassment, and humiliation. The consumer is entitled to actual damages, statutory damages, and attorney's fees (15 U.S.C. §1692k).

WHEREFORE, Plaintiffs pray for relief in the manner as set forth below.

CAUSE OF ACTION #2 – ATTEMPTED WRONGFUL FORECLOSURE
(as to all Defendants)

64. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth herein.
65. Courts have recognized a cause of action for wrongful attempted foreclosure when a foreclosure action was commenced, but not completed, where plaintiffs have shown that a defendant “knowingly published an untrue and derogatory statement concerning the plaintiffs' financial conditions and that damages were sustained as a direct result.” Sale City Peanut & Milling Co. v.

Planters & Citizens Bank, 107 Ga.App. 463, 130 S.E.2d 518, 520 (1963),
Morgan v. Ocwen Loan Servicing Llc, 795 F.Supp.2d 1370 (N.D. Ga., 2011).

66. Bank of America, by and through its law firm, on behalf of Mellon Bank, Trustee for CWALT, Inc, initiated foreclosure proceedings against Plaintiffs on May 5, 2011 (Exhibit #4).
67. Bank of America, by and through its law firm, on behalf of Mellon Bank, Trustee for CWALT, Inc, initiated foreclosure proceedings against Plaintiffs on September 29, 2011 (Exhibit #15).
68. Bank of America, by and through its law firm, on behalf of Mellon Bank, Trustee for CWALT, Inc, knowingly published an untrue and derogatory statement concerning the plaintiffs' financial conditions in the Cherokee Tribune on May 5, 2011 (Exhibit #21).
69. Bank of America, by and through its law firm, on behalf of Mellon Bank, Trustee for CWALT, Inc, knowingly published an untrue and derogatory statement concerning the plaintiffs' financial conditions in the Cherokee Tribune on September 29, 2011 (Exhibit #22).
70. Bank of America, on behalf of Mellon Bank, Trustee for CWALT, Inc, knowingly published untrue and derogatory statements concerning the Plaintiffs' financial conditions with the credit reporting agencies as evidenced by Exhibit #23.

71. As a direct, proximate, and casual effect of the Defendants' actions, Plaintiffs have damages including but not limited to losing credit, inability to obtain credit, emotional distress, and other damages in the amount to be proven at trial.

WHEREFORE, Plaintiffs pray for relief in the manner as set forth below.

CAUSE OF ACTION #3 – NEGLIGENCE
(as to all Defendants)

72. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth herein.

73. To state a cause of action for negligence in Georgia, the following elements are essential: (1) A legal duty to conform to a standard of conduct raised by the law for the protection of others against unreasonable risks of harm; (2) a breach of this standard; (3) a legally attributable causal connection between the conduct and the resulting injury; and, (4) some loss or damage flowing to the plaintiff's legally protected interest as a result of the alleged breach of the legal duty. Lee Street Auto Sales v. Warren, 102 Ga.App. 345(1), 116 S.E.2d 243 (1960).

74. The Defendants, Bank of America and Bank of New York Mellon, have a duty imposed by statute and by contract as bankers, lenders, debt holders, servicers, trustees, agents and debt collectors, to avoid unreasonable risk of harm.

75. 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.

76. As a direct, proximate, and casual effect of the Defendants' actions, Plaintiffs have damages including but not limited to losing credit, inability to obtain credit, emotional distress and other damages in the amount to be proven at trial.

WHEREFORE, Plaintiffs pray for relief in the manner as set forth below.

DEMAND FOR JURY TRIAL

77. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs, as if fully set forth herein.

78. Pursuant to the Seventh Amendment to the U.S. Constitution, Plaintiffs are entitled to, and hereby demand, a trial by jury.

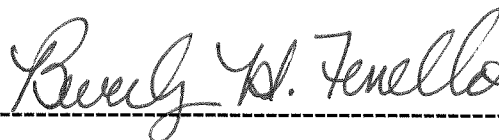
WHEREFORE, as a result of the actions of the Defendants and the Defendants' attorneys and agents, Plaintiffs pray that the Court grants relief as follows:

- a. Grant Plaintiffs a trial by jury.
- b. Find for the Plaintiffs on Causes of Action 1 through 3.
- c. Award the Plaintiffs actual damages and statutory damages.
- d. Award the Plaintiffs attorney fees, litigation expenses and cost of suit.
- e. Such other and further relief as the Court deems just and proper.

DATED this 2nd day of August, 2012.



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