ORIGINAL

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 MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FAC

Fair Debt Collection Practices Act (FDCPA)

1. According to the Judge's Opinion and Order[1] (at 13), The FDCPA "**sought 'to eliminate abusive debt collection practices by debt collectors**, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.'" (emphasis added)

2. Plaintiffs allege that Bank of America, N.A. (BANA), acting as a debt collector and servicer for Bank of New York Mellon (BONY), has abused the collection process by attempting to collect a debt that is in dispute, without providing any evidence that the purported creditor, CWALT, Inc, actually owns the debt.
3. In response, Bank of America has argued that they are not a debt collect under the act, even though they have sent out a legal notice admitting as such.
4. Plaintiffs have shown that the legal notice in question (Exhibit 7 of the Original Complaint), explicitly states that **"Under the federal Fair Debt Collections Practices Act and certain state laws, Bank of America is considered a debt collector."** (emphasis added)
5. This letter also states: **"Bank of America, N.A. is required by law to inform you that this communication is from a debt collector attempting to collect a debt, and any information obtained will be used for that purpose.**" (Exhibit 7d) (emphasis added)
6. Unlike Reese v. Ellis, Painter, Ratterree & Adams, LLP, this letter is not a dual purpose letter.
7. Plaintiffs have shown 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.

8. Bank of America has argued that BAC Home Loan Servicing, LP (BACHLS) is the same entity as Bank of America, N.A., that the letter was simply a notice of merger, and that any claims under the FDCPA do not apply to them and are "irrelevant."

9. Plaintiffs hereby allege, consistent with the public record, that Bank of America has engaged in a complicated shell game designed to transfer the assets from Countrywide, through a non-bank holding company, 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.

10. While the question of merger versus transfer are complicated, Plaintiffs contend that BANA, through its superior knowledge and the advice of its corporate counsel, felt compelled to send out the FDCPA notice (Ex. 7), thereby admitting that this transfer was an event covered by the FDCPA.

11. Plaintiffs have shown that the legislative intent of Congress in drafting the FDCPA explicitly intended to include loan servicers that take on the collection of debts that are in default when transferred under the Act. (Plaintiff's FAC, ¶ 53)

12. Defendants did not address the legislative intentions of Congress in their reply.
13. Bank of America further contends that, even if it is considered a debt collector under the Act, it has fulfilled its obligation to verify the debt by providing a copy of the Security Deed, a copy of a Promissory Note purported to be owned CWALT, Inc., and a payoff statement.
14. Plaintiffs allege that the documentation provided to date by BANA is insufficient to verify the debt (Promissory Note) purportedly owned by CWALT, Inc.
15. Bank of America contends that, even if it is considered a debt collector under the Act, it is entitled to take non-judicial action to dispossess the property, due to BONY's right to possession of the Property "As the assignee of the Security Deed and the holder of the Note." (Memo in Support of Motion to Dismiss FAC, page 16)
16. Under Georgia law (OCGA ¶44-14-162.2), only a "secured creditor" may initiate a foreclosure under power of sale proceedings.
17. This position has recently been upheld in Reese v. Provident Funding Assocs., LLP. (Ga. App., 2012), which found: "The inquiry is whether the provisions of OCGA § 44-14-162.2 (a) require that a notice of foreclosure disclose the identity of the secured creditor. Upon considering the statute in its entirety, as well as the legislative intent, we conclude that the statute does require that the

notice properly identify the secured creditor and reflect that the notice is being sent by the secured creditor or by an entity with authority on behalf of the secured creditor."

18. This position has also been upheld in Morgan v. Ocwen Loan Servicing Llc, 795 F.Supp.2d 1370 (N.D. Ga., 2011): The Georgia Supreme Court has clearly indicated that the right to foreclose lies with the party that holds the indebtedness: "Could there be a more conclusive defense to the foreclosure than that the party prosecuting it was not the holder of the debt or demand secured by the mortgage, which he failed to produce when called on, and offered nothing to show that he controlled it, or to explain why it was not forthcoming at the trial? Weems v. Coker, 70 Ga. 746, 749 (1883), cited by In re Truitt, 1,1 B.R. 15 (Bankr.N.D.Ga.1981); see also Bowen, 438 S.E.2d at 122; Boaz, 580 S.E.2d at 578; Cummings v. Anderson, 173 B.R. 959, 963 (Bankr.N.D.Ga.1994) (foreclosure was null and void where the entity foreclosing did not have an actual assignment of the note and security deed), aff'd, 112 F.3d 1172 (11th Cir.1997); Weston v. Towson, No. 5:04–CV–416, 2006 WL 2246206, at *6 (M.D.Ga. Aug. 4, 2006)"

19. To be considered a "secured creditor" as required in Georgia, and consistent with Reese v. Ellis, Painter, Ratterree & Adams, LLP, the entity attempting to

foreclose has to hold: 1) a properly assigned Promissory Note (proof of the debt), and 2) a properly assigned Security Deed (proof of the security).

20. Contrary to Defendant's assertion, neither BANA, nor BONY, nor CWALT, Inc. have ever provided any evidence that BONY or CWALT, Inc. is the legal holder of the Promissory Note ("creditor").

21. When considering a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, a federal court is to accept as true "all facts set forth in the plaintiff's complaint." Grossman v. Nationsbank, N.A., 225 F.3d 1228, 1231 (11th Cir. 2000).

22. Further, the court must draw all reasonable inferences in the light most favorable to the plaintiff. Bryant v. Avado Brands, Inc., 187 Page 8 F.3d 1271, 1273 n.1 (11th Cir. 1999); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56 (2007)

23. Because plaintiffs are acting pro se, "pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998).

24. Plaintiffs' evidence has clearly passed the "plausibility standard," having put forward enough facts at the pleading stage to raise a reasonable expectation

that discovery will reveal evidence supporting their claims. (Jones v. Washington Mut. Bank (N.D. Ga., 2011))

25. Defendants' Motion to Dismiss therefore FAILS under all stated theories.

26. Plaintiffs fully intend to show all of this evidence at trial, and allege that the Defendants' motion to dismiss this case with prejudice is a blatant attempt to try this case in pre-trial motions, as a way to circumvent plaintiffs' constitutional rights to discovery, due process, and a fair trial.

WHEREFORE, as indicated above, the Defendants' Motion to Dismiss is without merit, and Plaintiffs pray that this Court will DENY this Motion to Dismiss, and allow this case to move forward to resolve these issues at controversy.

DATED this 4th day of September, 2012.

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

Beverly H. Fenello
289 Balaban Circle
Woodstock, GA 30188