THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Warner E. & Patricia Lassiter, Bella Homes, LLC, a Delaware Limited Liability Company, Plaintiff, v. JPMorgan Chase Bank, N.A., John Doe, Attorneys for JPMorgan Chase Bank, N.A. Defendants.	)	CIVIL ACTION FILE NO. 1:11-cv-02815-JEC-GGB

JPMORGAN CHASE BANK, N.A.'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Plaintiffs' rambling, nonsensical, fifty-four (54) page Response to Defendant's Motion to Dismiss ("Response")[1], which reads more like a commentary on the mortgage lending industry in general and is rife with misrepresentations of Georgia law as well as citations to non-binding authority, does nothing to remedy the fatal pleading deficiencies present in their Complaint. The facts of this action are simple. Plaintiffs entered into a mortgage loan transaction with WaMu; upon WaMu's failure, the FDIC as Receiver for WaMu

[1] Pursuant to LR 7.1(D), "[a]bsent prior permission of the court, briefs filed in … response to a motion are limited in length to twenty-five (25) pages." Plaintiffs failed to seek this Court's permission before filing their 54-page Response.

transferred the Loan to Chase; upon Plaintiffs default on their obligations under the Loan, foreclosure proceedings were initiated. Despite their lengthy Response, Plaintiffs have not provided any additional facts upon which their claims rely. The Court should grant Chase's Motion to Dismiss, as Plaintiffs' have wholly failed to meet the requisite pleading standard of Rule 8(a) (despite outlining the requisite pleading standard for six pages in their Response). *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Moreover, the vast majority of Plaintiffs' Response focuses upon their contention that Chase is required to produce the original loan documents prior to foreclosure. Indeed, this contention is the basis upon which virtually all of Plaintiffs' claims rely. As demonstrated in Chase's Motion to Dismiss (DE 4), under Georgia law, **Chase is under no legal obligation to provide Plaintiffs with the original promissory note prior to foreclosure**. Regardless, such allegations do not give rise to the claims Plaintiffs allege. The remainder of Plaintiffs' allegations fail to state any actionable claim under state or federal law.

Accordingly, Chase requests that this Court grant its Motion to Dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(6).

A. Plaintiffs' Untimely Plea for Remand Should be Denied

Within their Response, Plaintiffs request that this Court remand this litigation to the Superior Court as this Court allegedly "lacks jurisdiction." (Resp. at 2.) Pursuant to 28 U.S.C. § 1447(c), however, a motion to remand must be made within thirty (30) days after the filing of the notice of removal. This case was removed to this Court on August 24, 2011. (DE 1.) Plaintiffs' deadline to seek remand of this case, therefore, was September 23, 2011. Plaintiffs' Response was not filed until November 7, 2011 – 75 days after the case had been removed. Any request for remand is therefore untimely and must be denied. 28 U.S.C. § 1447(c).[2]

B. Plaintiffs Are Not Entitled to Production of the Original Promissory Note

By their own admission, Plaintiffs' allegation that they are entitled to production of the original promissory note prior to foreclosure is the primary basis of Plaintiffs' Complaint. (Resp. at 30.) As fully demonstrated in Section II(B)(2) of Chase's Motion to Dismiss, Plaintiffs' assertion is entirely contrary to Georgia

[2] Regardless, because the parties are fully diverse and the amount in controversy exceeds $75,000, this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1332. (*See* Notice of Removal at DE 1.)

law, and therefore, any claim reliant upon such argument is subject to dismissal for failure to state a claim upon which relief may be granted.

Plaintiffs allege that Chase is liable for wrongful foreclosure if they cannot provide "proof of the true Promissory Notes existence and who retains its ownership." (Resp. at 18.) Plaintiffs further contend that the Note and Deed are unconscionable because Chase is not a holder in due course, and that Plaintiffs have "the right to know with certainty that the party enforcing the instrument has standing/capacity to do so." (Resp. at 24.) Similarly, Plaintiffs contend that they are entitled to quiet title to the Property because Chase "has failed to produce the Promissory Note and Security Deed necessary to prove the chain of sales, assignments or transfers." (Resp. 31.) In support of their claims for conversion, fraudulent misrepresentation and promissory estoppel, Plaintiffs assert that "defendant must prove that they have the right to foreclose," and that it purportedly constitutes fraud if "Chase is permitted to pursue claims that they have failed to verify as based upon the original Promissory Note." However, Chase is not required to produce the original promissory note. As a result, all of Plaintiffs' foregoing claims fail as a matter of law.

Indeed, as demonstrated in Chase's Motion to Dismiss, Georgia law does not require the original note to be produced prior to or as a predicate to foreclosure.

See, e.g., O.C.G.A. §§ 9-13-140, *et seq.*, §§ 9-13-160, *et seq.*, §§ 44-14-160, *et seq.*, § 23-2-114. Georgia courts have repeatedly and uniformly rejected complaints of an alleged failure to produce the original note prior to foreclosure. *See, e.g., Hill v. Saxon Mortgage Servs., Inc.*, 1:09-CV-1078, 2009 WL 2386057, *1 (N.D. Ga. May 14, 2009); *Wright v. Home Loan Servs., Inc.*, No. 2009CV164104 (Ga. Super. Ct. June 11, 2009). Accordingly, despite Plaintiffs' assertions to the contrary, Chase is not required to produce documentation to Plaintiffs proving its security interest prior to foreclosure. The originally-executed Deed and P&A Agreement are publicly- available documents and clearly evidence that Chase is the party with full right to foreclose.

Moreover, the "authority" provided by Plaintiffs in support of their misguided contention is deliberately misleading. Plaintiffs direct the Court to House Bill 237 ("HB 237"), proposed by Attorney General Sam Oleans, in support of their position that the original promissory note must be produced prior to foreclosure. HB 237 – which is not yet a binding law in the state of Georgia – does not create such a rule.[3] (*See* Ex. A.) Indeed, HB 237 proposes that "law

[3] True and correct copies of Attorney General Olens Press Advisory and HB 237 are attached hereto as Composite Exhibit A. The Court may take judicial notice of these publically available documents, as they are central to Plaintiffs' argument. *See Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1278 (11th Cir. 1999); *Brooks v. Blue Cross and Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997);

enforcement, including the Attorney General's office, sufficient authority to investigate and prosecute misconduct throughout the lending process." (*See* Ex. A at Olens Press Advisory.) Even if this bill were eventually passed into law, it does not authorize borrowers to demand of their mortgage lenders production of the original promissory note prior to foreclosure. Instead, it grants law enforcement officials more privileges in their investigation of mortgage fraud. (*See* Ex. A.) Plaintiffs' attempt to mislead this Court as to the binding nature and effect of HB 237 should not be countenanced.

Similarly, Plaintiffs assert that they are entitled to assert a claim for wrongful foreclosure based upon their "produce the note" argument, despite the fact that the property has not been foreclosed upon and that any claim resulting from a foreclosure is not yet ripe. In support of their argument, Plaintiffs cite to the Georgia Court of Appeals case of *Sears Mortg. Corp. v. Leeds Bldg. Products, Inc.*, 219 Ga. App. 349, 351, 464 S.E.2d 907, 909 (1995). (Resp. at 20.) In fact, *Sears Mortgage* has been **expressly vacated** by the Supreme Court of Georgia. *See* 225 Ga. App. 806, 488 S.E.2d 131 (1997). Plaintiffs' reference to *Sears Mortg.* is wholly inappropriate and, like their reliance on HB 237, misleading. Accordingly, because Plaintiffs' claim for wrongful foreclosure is not ripe, that

---

Hennington v. Greenpoint Mortg. Funding, Inc., Nos. 1:09cv676, 1:09cv962, 2009 WL 1372961, *4 (N.D. Ga. May 15, 2009).

claim must be dismissed. *Williams v. South Central Farm Credit, ACA*, 452 S.E.2d 148, 151 (Ga. App. 1994).[4] Plaintiffs' wrongful foreclosure claim should be dismissed as unripe pursuant to Rule 12(b)(1).

For all of the foregoing reasons, as well as those contained in Chase's Motion to Dismiss, Chase is not required to produce the original loan documents prior to foreclosure. Accordingly, all of Plaintiffs' claims based upon this erroneous contention fail as a matter of law and must be dismissed with prejudice pursuant to Rule 12(b)(6). Specifically, Plaintiffs' claims for wrongful foreclosure, unconscionability, quiet title, conversion, promissory estoppel, fraudulent misrepresentation and fraud are all subject to dismissal as a result.

---

[4] Plaintiff's discussion of their wrongful foreclosure claim is contained under the "Breach of Good Faith and Fair Dealing" subsection of Plaintiffs' Response. (Resp. at 19-20.) Therein, for the first time Plaintiffs also attempt (for the first time in their Response) to assert that the contract purportedly breached between the parties was the Deed. (Resp. at 21.) It is this alleged breach that Plaintiffs attempt to rely upon in support of their claim for Breach of Good Faith and Fair Dealing. To assert a claim for breach of contract in their Response is wholly improper and such should be disregarded by the Court. *See Bickley v. Caremark RX, Inc.*, 461 F.3d 1325, 1330 (11th Cir. 2006) (holding court is limited to "reviewing what is within the four corners of the complaint on a motion to dismiss.") Moreover, because the Property has not been foreclosed upon, such a claim is unripe. Finally, because Chase has full power and authority to foreclose on the Property due to Plaintiffs' default under the Note and the Deed, there has been no breach of contract, and accordingly, no breach of good faith and fair dealing.

C. Chase Has Standing to Foreclose

Throughout their Response, Plaintiffs repeatedly allege that Chase lacks standing to foreclose upon the Property. Specifically, Plaintiffs assert that there "has been no assignment to indicate who is the "holder in due course," and that "Chase has failed to provide any evidence of any legal, recorded, Assignments, or documentation entitling them to service the loan, and/or entitling them to pursue foreclosure." (Resp. at 4, 31.)

As shown in Chase's Motion to Dismiss, this contention is without merit. Indeed, the FDIC as receiver for Wamu has the express authority under federal law to transfer property without an assignment of record. 12 U.S.C. § 1821 (d)(2)(G)(i)(II) (FDIC – Receiver has authority to transfer and, at its discretion, may "transfer any asset or liability of the institution in default. . . without any approval, assignment, or consent with respect to such transfer."); *see also Haynes v. JPMorgan Chase Bank, N.A.*, 3:10-CV-11 CDL, 2011 WL 2581956 (M.D. Ga. June 29, 2011) (pursuant to the terms of P&A Agreement as well as 12 U.S.C. § 1821(d)(2)(G)(i), no written assignment of WaMu note and security deed to Chase is required). Accordingly, Plaintiffs' contention that Chase lacks standing to foreclose based upon a missing Assignment is false. The real property records and

the P&A Agreement grant Chase the express authority to foreclose in the event of Plaintiffs' default.[5]

Plaintiffs additionally assert that Chase is merely the servicer on the Loan, and therefore lacks authority to initiate foreclosure proceedings pursuant to O.C.G.A. § 44-14-162. (Resp. at 32.) First and foremost, Chase is the secured creditor on this Loan and Plaintiffs' argument is therefore irrelevant. Moreover, even assuming Chase was only the servicer on the Loan, this Court has expressly held that a loan servicer is permitted to conduct, through licensed counsel, the legal affairs of the investor whose debt it services. *See LaCosta v. McCalla Raymer, LLC*, 110-CV-1171-RWS, 2011 WL 166902 (N.D. Ga. Jan. 18, 2011); *see also Martinez v. McCalla Raymer*, No. 1:11-cv-01513-TCB, DE 19, p. 4 of 9 (N.D. Ga. Sept. 29, 2011) (report and recommendation adopted at Doc. 20 (Oct. 31, 2011)).

In *LaCosta*, as here, plaintiff argued that a Ginnie Mae-owned loan could not be foreclosed upon in the name of the loan servicer pursuant to

[5] Plaintiffs allude to "robo-signing" throughout their Response, however, fail to explain this conclusory statement. (*See, e.g.,* Resp. at 21.) Regardless, an assignment of an interest in real property is simply a business record. Unlike an affidavit, the authorized signers on an assignment, or other real property record, are not required to have, nor do they attest to having, personal knowledge of the accuracy of the information contained in the business record they are signing. To the extent "robo-signing" could even be an issue, it would only be relevant with respect to documents requiring the signee to have personal knowledge of the accuracy of the document's contents. Consequently, any claim by Plaintiff that the assignment to was "robo-signed" fails as a matter of law.

O.C.G.A.§ 44-14-162.2. *LaCosta,* 2011 WL 166902. There, the Court – in dismissing plaintiff's wrongful foreclosure claim as a matter of law – refused to find that the foreclosure statute allowed only the owner of a loan (as opposed to the servicer) to foreclose. *Id.* In fact, the Court indicated that to hold to the contrary would "defeat the underlying premise of agency law: that a principal has the power to appoint someone to act on his behalf." *Id.* (quoting *Stallings v. Sylvania Ford–Mercury, Inc.,* 533 S.E.2d 731, 733 (Ga.App.2000) ("The distinguishing characteristic of an agent is that he is vested with authority, real or ostensible, to create obligations on behalf of his principal ....")).

Accordingly, Chase is the entity with full power and authority to foreclose on the Property, and Chase acted in full compliance with O.C.G.A. § 44-14-162 when it initiated foreclosure proceedings.[6]

[6] Despite Plaintiffs' contention that the title to the Property has been transferred from the Lassiters to Bella Homes, LLC, such does not divest Chase of its security interest in the Property, as the Loan remains unsatisfied. (*See* Deed at Ex. A to Chase's Motion to Dismiss, at 3.) Moreover, this transfer is expressly prohibited under the terms of the Deed, as the Lassiters did not obtain the prior written consent of the lender prior to the transfer. (*Id.* at ¶18.)

D. Plaintiffs Have Not Been A Victim of Predatory Lending, And Plaintiffs' TILA "Claim" Is Time-Barred

In their Response, Plaintiffs assert that their "claim of Predatory Lending on the part of Defendants is based upon violations of the Truth in Lending Act ("TILA")." (Resp. at 29.) Assuming the truth of this statement, Plaintiffs' predatory lending claim is time-barred and therefore must be dismissed with prejudice. First, because Plaintiffs' Loan was a purchase money mortgage, they are not entitled to rescission of the loan under TILA as a matter of law. 15 U.S.C. § 1601 *et. seq*. Indeed, TILA clearly delineates that rescission of a mortgage loan is not available to "residential mortgage transactions," defined as a "transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract, or equivalent consensual security interest is created or retained against the consumer's dwelling ***to finance the acquisition or initial construction*** of such dwelling." 15 U.S.C. § 1635(e) and § 1602(w) (emphasis added). The loan transaction which Plaintiffs allege violated TILA is a "residential mortgage transaction," as it was attained to finance Plaintiffs' acquisition of the Property. Indeed, as evidenced by the Administrator Deed[7] and Security Deed

[7] A true and correct copy of the Warranty Deed is attached hereto as Exhibit B. The Court may take judicial notice of this document. *See* note 1 *supra.*

attached hereto, the loan at issue is not a refinance transaction.[8] (*See* Ex. B.) For that reason alone, Plaintiffs cannot rescind this loan as a matter of law and any purported claim for rescission under TILA should be dismissed with prejudice.

Additionally, under TILA, the right to rescind expires, at most, three years after the loan closing.[9] 15 U.S.C. § 1635(f). Additionally, an action for damages under TILA is subject to a one-year statute of limitations. 15 U.S.C. § 1640(e) and (f); *In re Smith*, 737 F.2d 1549, 1552 (11th Cir. 1984). These limitations periods run from the date of the loan execution. *Smith v. Am. Fin. Sys.*, 737 F.2d 1549, 1552 (11th Cir. 1984). Plaintiffs admits they entered into the Loan with WaMu on February 5, 2003. (*See* Compl. ¶ 6; *see also* Ex. A to Chase's Motion to Dismiss.) Plaintiffs' Complaint was filed with the Superior Court of Fulton County on July 25, 2011 – more than eight years after the loan closing. For that reason alone, Plaintiffs' assertion that TILA has purportedly been violated is time-barred. As a result, Plaintiffs' predatory lending claim fails and should be dismissed with prejudice.

---

[8] A search of the real property records of Gwinnett County indicates that there is no other security deed of record on the Property.

[9] Regardless, Plaintiffs' Loan is not one to which the right of rescission is extended under TILA. 15 U.S.C. § 1635(e) and § 1602(w).

Conclusion

In denying Plaintiffs' plea for injunctive relief, this Court has already determined that "[p]laintiffs [have not] carried their burden of showing that they have a substantial likelihood of success on the merits of their claims." (DE 8 at 6.) As Plaintiffs' Response does not provided any additional facts in support of their claims, each of their claims fail as a matter of law and Plaintiffs are not entitled to any of the relief they request. Accordingly, for the foregoing reasons as well as those stated in Chase's Motion to Dismiss, Chase respectfully requests that this Court grant Chase's Motion to Dismiss and dismiss Plaintiffs' Complaint with prejudice in its entirety.[10]

[10] Additionally, Chase hereby moves the Court for an award of attorneys' fees incurred in the defense of this action pursuant to O.C.G.A. § 9-15-14. As demonstrated *supra,* as well as in Chase's Motion to Dismiss, Plaintiffs' claims are wholly frivolous, having no basis in law or fact. There exists "such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim," and Chase is entitled to an award of attorneys' fees incurred in defense of this frivolous litigation. O.C.G.A § 9-15-14(a).

Respectfully submitted this 22nd day of November, 2011.

WARGO & FRENCH LLP

/s/ Lindsay A. Warren
JULIE C. JARED
Georgia Bar No. 801699
jjared@wargofrench.com
LINDSAY A. WARREN
Georgia Bar No. 164735
lwarren@wargofrench.com
999 Peachtree Street, N.E.
26th Floor
Atlanta, Georgia 30309
(404) 853-1500
(404) 853-1501 (facsimile)

Counsel for Defendant
JPMorgan Chase Bank, N.A.

RULE 7.1(D) CERTIFICATE

The undersigned counsel certifies that this document has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1(B).

Respectfully submitted this 22nd day of November, 2011.

/s/ Lindsay A. Warren
LINDSAY A. WARREN

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Warner E. & Patricia Lassiter, Bella Homes, LLC, a Delaware Limited Liability Company, Plaintiff, v. JPMorgan Chase Bank, N.A., John Doe, Attorneys for JPMorgan Chase Bank, N.A. Defendants.	)	CIVIL ACTION FILE NO. 1:11-cv-02815-JEC-GGB

CERTIFICATE OF SERVICE

I hereby certify that I have on this day filed electronically via CM/ECF a true copy of the foregoing **JPMORGAN CHASE BANK, N.A.'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT** in the United States District Court for the Northern District of Georgia, with notice of same being electronically served by the CM/ECF system, addressed to the following:

Stephen M. Maurillo, Esq.
Stephen M. Maurillo & Associates, LLC
1400 Market Place Blvd, Suite 133
Cumming, GA 30041

This 22nd day of November, 2011.

/s/ Lindsay A. Warren
Lindsay A. Warren