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

KENNETH D. CHESTER, Plaintiff, v. BANK OF AMERICA, N.A., BAC HOME LOANS SERVICING, LP, F/K/A COUNTRYWIDE HOME LOANS SERVICING, LP, Defendants.	CIVIL ACTION FILE 1:11-CV-01562-MHS-GGB

FINAL REPORT AND RECOMMENDATION

This action is before the Court on Defendants Bank of America, N.A.'s ("BANA's") and BAC Home Loan Services, L.P.'s ("BACHLS's")(collectively "Defendants'") motion to dismiss Plaintiff's Complaint. (Doc. 7.) For the reasons stated below, I recommend that Defendants' motion to dismiss be **GRANTED**.

I. Background

On or about September 10, 2009, Plaintiff Kenneth D. Chester ("Plaintiff") obtained a home mortgage loan (the "Loan") in the amount of $232,653.00 for the purchase of real property located at 8085 Tristan Way, Whitesburg, Georgia 30185 (the "Property"). In connection with the Loan, Plaintiff executed a promissory note (the "Note") and Security Deed (the "Security Deed") secured by the Property in favor

of WR Starkey Mortgage, L.L.P. ("WR Starkey") with Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for WR Starkey. Plaintiff defaulted on the Loan.

On November 1, 2009, BANA became the servicer of the Loan. On December 9, 2010, MERS assigned all of its interest in the Note and Security Deed (the "Assignment") to BANA. The Assignment was filed on December 15, 2010, in Douglas County, Georgia, and was recorded on December 30, 2010.

Plaintiff received a letter on or about December 19, 2010, informing him that the Note had been transferred to BANA through an assignment. Plaintiff received a letter from BACHLS on or about December 20, 2010, informing him of default on the Loan. Plaintiff states that, according to the notice sent to him by Defendants, the Property was sold at a public auction on February 1, 2010.

On March 31, 2011, Plaintiff filed the underlying Complaint in the Superior Court of Douglas County. Plaintiff's Complaint alleges claims for: (1) declaratory relief, (2) violation of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq*., (3) wrongful foreclosure, (4) punitive damages, and (5) attorney's fees. Defendants removed the case to this Court on May 13, 2011. (Doc. 1.) Removal was based upon diversity and federal question jurisdiction.

II. Standard for Motion to Dismiss

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may move to dismiss a complaint on the ground that the plaintiff has failed to state a claim upon which relief can be granted. In order to survive a motion to dismiss, a complaint need not contain "detailed factual allegations," but must "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007),quoting Conley v. Gibson, 355 U.S. 41, 47 (1957); Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950-51 (2009). While a court must accept all factual allegations in a complaint as true, it need not accept as true legal conclusions recited in a complaint. Iqbal, 129 S. Ct. at 1949. All reasonable inferences are to be made in favor of the plaintiff. Duke v. Cleland, 5 F.3d 1399, 1402 (11th Cir. 1993).

III. Discussion

Defendants move to dismiss Plaintiff's Complaint for failure to allege facts that could be a legitimate basis for a claim for relief. (Doc. 7.) In his response to Defendants' motion, Plaintiff abandoned the FDCPA claim. (Doc. 12 n.1.) Accordingly, I will discuss Plaintiff's remaining claims.

The thrust of Plaintiff's Complaint is twofold: (1) that MERS acted as an illegal trust company under the security deed, making all contracts arising out of the relationship, including the security deed and the assignment, void; and (2) that MERS lacked authority as merely a "nominee" to assign the security deed, invalidating the assignment to BANA and rendering BANA's subsequent enforcement of its rights under the security deed unlawful.

A. MERS is Not an Illegal Corporate Fiduciary

Plaintiff argues that "MERS is acting in a fiduciary capacity in the case at bar for the note holder that has contracted with MERS to hold the security for its loan." Compl. ¶ 15. Plaintiff claims that "Plaintiff 'settlor' conveyed legal title to the 'trust property' to MERS as 'trustee' for WR Starkey and its successors and assigns, the trust 'beneficiaries.'" Compl. ¶ 20. Plaintiff claims that this relationship is illegal, because Georgia law requires prior authorization for a corporation to act as a fiduciary. Compl. ¶¶ 15, 18–22. Plaintiff points to O.C.G.A § 7-1-242(b) which, in relevant part, includes "[a]ccepting or executing trusts or otherwise acting as a trustee" and "[a]dministering[, possessing, purchasing, selling, leasing, insuring, safekeeping, managing, or otherwise overseeing] real or tangible personal property located in Georgia or elsewhere" as conduct constituting acts of a fiduciary. Compl. ¶ 17.

Defendants counter by pointing out that transferring the rights and interests in a security deed by way of assignment does not fall within the range of activities of a fiduciary contemplated by O.C.G.A. § 7-1-242. Additionally, MERS does not hold real or personal property for its members, nor does MERS "possess, purchase, sell, lease, insure, safekeep, manage or otherwise oversee" real or personal property of the lender. (Doc. 7 at 9, citing O.C.G.A. § 7-1-242.) Defendants also note that Plaintiff does not cite to any state or federal authority where a Georgia court has upheld his interpretation of § 7-1-242.

The Court agrees with Defendants and finds that Plaintiff's argument that MERS formed an illegal trust is unfounded. The security deed clearly identifies MERS as the "nominee" and expressly anticipates that MERS may assign the security deed to another party, stating that "Borrower does hereby grant and convey to MERS (solely as nominee for Lender and Lender's successors and assigns) *and the successor and assigns of MERS*, with power of sale, the following described property located in the County of Douglas . . . ." *See* Security Deed, Doc. 16-1, Ex. A. at 3 (emphasis added). In addition, several courts, including the Supreme Court of Georgia, have approvingly noted the efficiencies created by allowing MERS to act as a conduit for electronic transfers of mortgage loans. See Taylor, Bean & Whitaker Mortg. Corp. v. Brown,

583 S.E.2d 844, 845 n.1 (Ga. 2003); Mortg. Elec. Registration Sys., Inc. v. Revoredo, 955 So.2d 33, 34 (Fla. Dist. Ct. App. 2007). Moreover, Plaintiff's statutory argument that MERS acted as an illegal trust company is unavailing, since the statute cited by Plaintiffs does not purport to define any corporation that "administer[s] real or tangible property" as a fiduciary, but merely includes those actions within the range of activities that a corporate fiduciary may undertake. Further, Plaintiff has not pointed to any authority which says that MERS "administer[ed] real or tangible property" merely by transferring the rights and interests in a promissory note and security deed to BANA. Accordingly, Plaintiff's allegation that MERS was an illegal fiduciary fails to state an actionable claim for relief.

B. The Assignment from MERS to BANA

Plaintiff argues that the assignment of the rights and interests in the security deed by MERS to BANA is void and invalid. Plaintiff contends that because MERS is an illegal trust, the security deed and the assignment are void *ab initio*. Compl. ¶¶ 24, 59, 60. Plaintiff also claims that because MERS is only a "nominee," it had no authority to assign the security deed to BANA. Compl. ¶ 24.

Defendants argue that Plaintiff lacks standing to challenge the assignment, since he is not a party to the assignment between MERS and BANA. Defendants further

assert that the security deed itself acknowledges that it is freely assignable, and that Georgia law recognizes the free assignability of contracts, including promissory notes and security deeds. See O.C.G.A. § 44-14-64.

The Court finds Defendants' arguments convincing and Plaintiff's claims unsupportable. As discussed above, MERS' assignment of the security deed to BANA was not void due to any illegal activity as a fiduciary by MERS. In addition, Plaintiff lacks standing to challenge the Assignment between MERS and BANA. Plaintiff does not dispute that he is not a party to the Assignment contract. Georgia law provides that "an action on a contract . . . shall be brought in the name of the party in whom the legal interest in the contract is vested, and against the party who made it in person or by agent." O.C.G.A. § 9-2-20(a). Thus, Plaintiff is a "stranger[] to the assignment contract" and accordingly has "no standing to challenge its validity." Breus v. McGriff, 202 Ga. App. 216, 216 (1991). See also Haldi v. Piedmont Nephrology Assoc., P.C., 283 Ga. App. 321, 322 (2007)(Because Plaintiff was not a party to the contract at issue, he "has no standing to challenge the contract as a party to the contract."). Indeed, "[c]ourts have routinely found that a debtor may not challenge an assignment between an assignor and assignee" as a non-party to those documents. Bridge v. Aames Capital Corp., No. 1:09CV2947, 2010 WL 3834059, at *5 (N.D.

Ohio Sept. 29, 2010)(holding that Plaintiff did not have standing to assert claim to set aside foreclosure based on invalidity of assignment where "Plaintiff was not a party to the assignment of the Mortgage between Aames and Deutsche Bank, neither of which dispute the validity of the assignment, and has not and will not suffer any new injury nor face any obligation different from what was owed when Aames held the note"); Livonia Prop. Holdings, L.L.C. v. 12840-12976 Farmington Road Holdings, L.L.C., 717 F. Supp. 2d. 724, 735-36 (E.D. Mich.), aff'd, No. 10-1782, 2010 WL 4275305 (6th Cir. Oct. 28, 2010), cert. denied, 131 S. Ct. 1696 (2011)(examining multiple state and federal court cases and holding that a "[b]orrower may not challenge the validity of assignments to which it was not a party or third-party beneficiary, where it has not been prejudiced, and the parties to the assignments do not dispute (and in fact affirm) their validity"). Therefore, Plaintiff's challenge of the Assignment fails.

C. BANA as Servicer of the Loan

Plaintiff asserts that BANA, as servicer of the Loan, is not a secured creditor with standing to foreclose upon the property. Compl. ¶ 25. However, the Eleventh Circuit has determined that a loan servicer may conduct a foreclosure on behalf of a lender. For example, the Court held in Greer v. O'Dell, 305 F.3d 1297, 1302 (11th Cir. 2002), that a loan servicer "is a party in interest in proceedings involving loans

which it services." See also LaCosta v. McCalla Raymer, LLC, No. 1-10-cv-1171-RWS, 2011 WL 166902, at *3 (N.D. Ga. Jan. 18, 2011)("There is nothing in [O.C.G.A. § 44-14-162.2] to indicate that a secured creditor may not utilize an agent to serve notice on a debtor of the initiation of foreclosure proceedings."). The provision of notice of foreclosure by a loan servicer, rather than a secured creditor, is not a violation of O.C.G.A. § 44-14-162.2. See LaCosta, 2011 WL 166902, at *4 ("The goal of Section 162 is to give the debtor notice of the foreclosure sale. Whether that notice is provided by the secured creditor directly, or by its agent, is of no consequence."). Because Defendants could properly foreclose on the Property as BANA was the servicer of the Loan, Plaintiff fails to state a claim upon which relief can be granted.

D. Declaratory and Equitable Relief

Plaintiff seeks declaratory relief and requests that the Court: (1) declare MERS a corporate fiduciary; (2) declare the foreclosure deed void and of no force or effect; (3) declare the security deed and assignment thereof void and the foreclosure invalid and void; and (4) declare the Plaintiff the legal and equitable owner of the Property. Compl. ¶ 72. However, this claim must also fail. First, the Court has rejected all of the arguments underlying the declarations that Plaintiff seeks the Court issue.

Additionally, declaratory relief is only appropriate as a prospective measure. As the Georgia Court of Appeals has noted,

> Declaratory judgment relief looks to the future. 'The object of the declaratory judgment is to permit determination of a controversy before obligations are repudiated or rights are violated.' 'To proceed under a declaratory judgment a party must establish that it is necessary to relieve himself of the risk of taking some future action that, without direction, would jeopardize his interests.

A & H Sod, Inc. v. Johnson, 630 S.E.2d 851, 852 (Ga. Ct. App. 2006). In this case, Plaintiff's allegations are clear that the Property has already been foreclosed upon and sold. Plaintiff's rights and interests in the property have already been terminated. Thus, a declaratory judgment in this instance would not provide any prospective relief nor determine any future controversy before rights are violated.

Instead of declaratory relief, Plaintiff may actually be seeking rescission of his original mortgage and reversal of the foreclosure process that has already been carried out. That remedy would be one in equity, yet Plaintiff fails to demonstrate that he is entitled to equitable relief. "A plaintiff may not use equity to obtain the cancellation of a security deed or promissory note if the plaintiff has not paid the note or tendered payment of the note." Taylor, Bean, Whitaker Mortg. Corp., 276 Ga. at 850, citing O.C.G.A. § 21-1-10. Plaintiff admits that he defaulted in repayment of the Loan and

fails to allege that he paid or tendered payment of his mortgage note. As such, Plaintiff is not entitled to equitable relief, and his claims for such relief must be dismissed.

IV. Conclusion

For the reasons stated above, I **RECOMMEND** that Defendants' Motion to Dismiss (Doc. 7) be **GRANTED**, and that Plaintiff's Complaint be dismissed in its entirety.

IT IS SO RECOMMENDED this 13th day of January, 2012.

Gerrilyn G. Brill

GERRILYN G. BRILL
UNITED STATES MAGISTRATE JUDGE