

**UNITED STATES DISTRICT COURT FOR THE
FOR NORTHERN DISTRICT OF GEORIGIA
ATLANTA DIVISION**

CIVIL ACTION FILE

Wekesa O. Madzimoyo,
Plaintiff, }

v. }

THE BANK OF NEW YORK }

No. 1:09-CV-02355-CAP-GGB

MELLON TRUST COMPANY, NA., }
formerly known as The Bank of New }

York Trust Company, N.A., JP MORGAN }

CHASE BANK, NA, GMAC MORTGAGE, LLC }

and ANTHONY DEMARLO, Attorney

Defendants. }

RESPONSE TO MOTION FOR JUDGEMENT ON THE PLEADINGS

Come now the Plaintiff, WEKESA O. MADZIMOYO AND move the Court to deny **GMAC MORTGAGE, LLC et al, Defendants** ‘

Motion for Judgment on the Pleadings, and in support thereof show the Court as follows:

STATEMENT OF FACTS

1. On March 23, 1999, Plaintiff did obtain a mortgage loan from FT Mortgage Companies d/b/a Equibanc Mortgage Corporation in the principal amount of \$140, 6000, which was secured by Plaintiff's residence at 852 Brafferton Place, Stone Mountain, Georgia, 30083 (the Subject Property) [Petition Pg. 16.]

2. Plaintiff disputes the Defendants' claims that:
 - a. "The servicing rights for the loan were transferred to Homecomings Financial Network on July 6, 1999." Plaintiff has refused to provide the documents that governed such transfer, and this statement contradicts information previously provided by the Defendants (**See Petition, Copies of Defendant's Letters -Attachment B, April 22, 2009.**)
 - b. "The servicing rights were subsequently transferred to GMAC Mortgage, LLC ("GMAC"). Plaintiffs have refused to provide the documents that governed such a transfer and the legal paper trail from the original, and/or legal secured creditor.
 - c. "The loan and deed were subsequently assigned to JPMorgan Chase Bank and on April 7, 2006, The Bank of New York Mellon Trust

Company, National Association Acquired JP Morgan's business. See the contradiction in GMAC letter dated June 10th stating that RESIDENTIAL FUNDING CORP "currently owns interest in your account. " (See Attachment E for Copies of Defendants' Letters.) To date, Plaintiff has received no proof that his loan and deed for the Subject Property executed with FT Mortgage Companies d/b/a Equibanc Mortgage Corporation was indeed legally assigned to JPMorgan Chase Bank. Since April 13, 2009, the Plaintiff has repeatedly requested, and the Defendants have staunchly refused to provide such documentation.

- a) Defendant claims the Plaintiff filed the instant action on July 29, 2009 due to the Defendants failure to produce the original note. Contrary to the Defendant's version, the Plaintiff filed in an attempt to halt the impending non-judicial foreclosure as required by OCGA § 44-14-162 as the Defendants move to foreclosure without a proper recording of assignments is unlawful according to OCGA § 44-14-162.

ARGUMENT AND CITATION OF AUTHORITY

Plaintiff opposes Defendants claim that Plaintiff lacks standing without a tender of arrearages based on the following:

1. The Plaintiff did not execute a security deed with any of the Defendants and does not owe them any money at all. On the contrary, Plaintiff believes that any money paid to the Defendants was obtained fraudulently, and that said Defendants should be ordered to place all such monies with the court pending the outcome of this litigation.

Even if it were to be proven at some future time that the Plaintiff did owe the Defendants, at the time the Plaintiff exercised his right to require the debt collectors, the Defendants, to validate the debt amount and true and secured creditor, the Plaintiff was not behind on his mortgage payments at all.

According to FDCPA section §809 (b) “If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and addresses of the original creditor, the debt collector **shall cease collection of the debt, or any disputed portion thereof**, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or

judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.”

Since the Defendants have refused to provide the requisite information to legally validate the debt amount and secured creditor, the collection of the debt, or any disputed portion thereof ceased. The Plaintiff is not in arrears, and the move to foreclosure by the debt collector Defendants is unlawful. Just which one of the Defendants are-were debt collectors is difficult to determine precisely because the Defendants have refused to provide the clear chain of title as order by Dekalb County Superior Court Judge Tangela Barry along with the governing agreements that would help determine their legal roles (servicer, lender, trustee, creditor, secured creditor, holder in due course, etc.) (See Petition Summons, Page 2.)

2. The Defendants consistently and erroneously attempt to restate the Plaintiff's claims to read that Defendants' failure to "Produce The Note" gives rise to the petition for injunctive relief. The Defendants ignore the other requirements to establish legal standing and the initial questions asked by the Plaintiff in his attempt to determine who the true secure creditor/holder in due course is.

After having set up a straw man, the Defendants attack swiftly asserting "that Plaintiff cannot produce a Georgia law requiring "either a lender or its

attorney conducting the foreclosure sale” to “Produce The Note.”

3. Plaintiff holds that OCGA § 44-14-162.2 states that

“(a) Notice of the initiation of proceedings to exercise a power of sale in a mortgage, security deed, or other lien contract shall be given to the debtor by the **secured creditor** no later than 30 days before the date of the proposed foreclosure.”

Given that no sale or assignment of Plaintiff’s property in question had been recorded in the DeKalb County Court House since 1999, and since not one of the Defendants were named on the assignment, and since not one of the Defendants have provided documentation or governing master agreements to establish the legal chain of title or other evidence showing them as “creditor,” “secured creditor,” lender or holder in due course, etc, Plaintiff claims that Defendants are attempting to foreclose illegally and seeks protection from the Court.

In *U.S. Bank National Association v. Ibanez*, Massachusetts Land Court Msc. Case No. 384283 held that the foreclosure in *Ibanez* was invalid because the Assignment was both dated and recorded after the sale and the

notices, therefore, "failed to name the mortgage holder as required by G.L. c. 244, §14.

4. Defendants claim that Creditors who collect on their own accounts under their own names are not "debt collectors" for purposes of the Fair Debt Collection Practices Act (FDCPA). The FDC PA (§ 803. Definitions- 4) defines "creditor" to mean any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

It is clear to the Plaintiff that HOMECOMINGS FINANCIAL LLC and GMAC collected monies and intended to collect monies from the Plaintiff.

It is not clear as to on whose behalf they were collecting.

Typically creditors argued that they were shielded from liability by the FDCPA's "bona fide error defense," which provides that debt collectors are not liable for FDCPA violations that were "not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1692k(c)

However, the **US Supreme Court on April 21, 2010 ruled 7-2 in Jerman v. Carlisle, McNeelie, RINI, Dramer & Ulrich LPA (No. 08-1200)** otherwise to making sure that debt collectors are treated like everyone else when violating a federal statute and that unlawful behavior will not be excused, and will be punished to the fullest extent of the law. Specifically, the Supreme Court held that the

i. “bona fide error defense in §1692k(c) does not apply to a violation of the FDCPA resulting from a debt collector’s incorrect interpretation of the requirements of that statute.”

ii. Given the absence of similar language in §1692k(c), it is fair to infer that Congress permitted injured consumers to recover damages for “intentional” conduct, including violations resulting from a mistaken interpretation of the FDCPA, while reserving the more onerous administrative penalties for debt collectors whose intentional actions reflected knowledge that the conduct was prohibited. Congress also did not confine FDCPA liability to “willful” violations, a term more often understood in the civil context to exclude mistakes of law. See, e.g., *Trans World Airlines, Inc. v. Thurston*, 469 U. S. 111, 125–126. Section 1692k(c)’s requirement that a debt collector maintain “procedures reasonably adapted to avoid any such error” also more naturally evokes procedures to avoid mistakes like clerical or factual errors. Pp. 6–12.

One of the basic tenets of FDCPA is that creditors must validate the debt and their standing to collect it. Defendants steadfastly refused to do this and in doing so violated FDCPA section § 1692 g.

For months prior to the attempted illegal foreclosure, Plaintiff sent letters to Defendants (including an Affidavit for them to Cease and Desist) asking for validation of both the alleged debt and their standing to collect by providing documents governing the myriad of agreements that would clarify their standing.

They refused to provide the requisite documents. (See Petition Attachments A, B, C.) Most just ignored the request, but one response on Homecomings Financial’s letter-head stated:

“The information requested is subject to business and trade practices which are proprietary and confidential and will not be provided.”

While the letter was printed on company letter-head, the letter was unsigned. (See **Petition - Attachment E Copies of Defendants Letters June 22, 2009**)

CONCLUSION

Defendants statement of the facts to support a move to Judgment on the Pleadings is flawed. The Plaintiff claims based on the July 29th 2009 filing is not based on a “produce the note” requirement prohibiting foreclosure, instead it is based on the Defendants’ violation of Georgia State and Federal law, and he continues to seek relief. Further, Plaintiff does not owe Defendants any money on my mortgage, so his challenge to Plaintiff’s standing fails.

WHEREFORE, Plaintiff prays that the Court deny Defendant GMAC MORTGAGE LLC et al, Defendant’s Motion for Judgment on the Pleadings. Plaintiff’s answer to DEMARLO Motion for Judgment has been answered separately.

Submitted this _____ day of _____, 2010

Wekesa O. Madzimoyo