

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

Wekesa O. Madzimoyo,
Plaintiff,

v.

THE BANK OF NEW YORK
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

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CIVIL ACTION FILE
No. 1:09-CV-02355-CAP-GGB

Defendants

PLAINTIFF’S RESPONSE TO
MOTION FOR JUDGMENT ON THE PLEADINGS

Come now the Plaintiff, WEKESA O. MADZIMOYO AND move the Court to deny defendant ANTHONY DEMARLO AND MCCURDY & CANDLER LLC’s MOTION FOR SUMMARY JUDGEMENT, and in support thereof show the Court as follows:

Plaintiff's Response and Statement of Facts

1. On July 29, 2009, Plaintiff petitioned the DeKalb County Superior Court for an EMERGENCY TEMPORARY RESTRAINING ORDER against the named defendants for injunctive relief to prohibit any further foreclosure action by the Defendants.

Contrary to defendant ANTHONY DEMARLO AND MCCURDY & CANDLER LLC's version of the facts, Plaintiff claims (See Petition Page 2, Paragraph 3; See Attachments A, B and C) that the Defendants failed to provide verification of their standing as agent, attorney, debt collector, lender, note holder, servicer, investor, trustee, or otherwise in the matter, which would provide Plaintiff with evidence of the Defendant's lawful standing in this matter and determine who is the rightful lender/mortgage holder in due course.

2. Plaintiff is deserving of injunctive relief because:
 - a) He presented evidence that he had been trying to get Defendants to verify their standing for months prior to the petition for court-ordered injunctive relief. The Defendants steadfastly refused to do so. One response on Homecomings Financial's letterhead 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 letterhead, the letter was unsigned. (**See Petition, Attachment E: Copies of Defendants Letters June 22, 2009.**)

- b) Contrary to defendant ANTHONY DEMARLO AND MCCURDY & CANDLER LLC's version of the facts, the Plaintiff did not seek injunctive relief because Defendants simply failed to "produce the note." More egregious than simply failing to "produce the note" the Defendants commenced foreclosure without having filed the security instrument or assignment vesting the secured creditor with title to the security instrument as required by Georgia Law. (**See Petition Pages 1-3.**)
- c) The Defendant's action to move to foreclosure without establishing the above, and without proper recording of assignments is unlawful, according to OCGA § 44-14-162

Defendant ANTHONY DEMARLO AND MCCURDY & CANDLER LLC by their own admission in the July 3rd Notice of Foreclosure Sale assert that:

"THIS LAW FIRM IS ACTING AS A DEBT COLLECTOR AND IS ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION

OBTAINED WILL BE USED FOR THAT PURPOSE.” And therefore are subject to the rules of THE FAIR DEBT COLLECTION PRACTICES ACT (FDCPA), 15 U.S.C. §§ 1692-1692p.

Plaintiff’s Response to Arguments Section B: Fails to State a Claim

Defendant ANTHONY DEMARLO AND MCCURDY & CANDLER LLC’s contention that “The Complaint fails to state a claim against these Defendants” is false.

1. Plaintiff did not “allege” that he sent an affidavit, he provided proof that he sent the affidavit and that it was received by Defendants asking them to verify their legal standing in this matter, and demanding that they stop foreclosure as required by OCGA § 44-14-162 until they have done so. **(See Petition Attachment D Copies of Return Receipts)**
2. Defendant ANTHONY DEMARLO AND MCCURDY & CANDLER LLC’s concern for the Plaintiff having been taken in by a “Produce the Note” Internet scam is touching, but categorically false, pejorative, and shows disregard for the Plaintiff’s constitutional right to represent himself.

3. Such a deflection is interesting, since the Plaintiff has been trying to make sure that he is not a victim of a predatory lending scam perpetuated by the Defendants or anyone else. **(See Petition Letter of Request Attachment A April 13th, 2009).**

4. The Defendant consistently and erroneously attempts to restate the Plaintiff's claims to read that Defendant's failure to "Produce The Note" gives rise to the petition for injunctive relief.

The Defendant ignores 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 was.

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."

5. 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.

- a. Contrary to Defendant’s claim that frivolous “produce the note” lawsuits are causing the Courts to be inundated, Plaintiff questions whether it is the Defendant’s blatant disregard for Georgia law and time-honored mortgage lending/collecting practices that is the reason for the inundation. Defendant ANTHONY DEMARLO AND MCCURDY & CANDLER LLC returns to his straw-man claim to assert that “other federal courts outside Georgia have concluded that possession of the note is not required to conduct a non-judicial foreclosure sale of a security deed/trust.” Again, the Plaintiff’s claims assert

Defendant's failure to follow Georgia statues OCGA § 44-14-162.2 and failure to provide requested information not only validating the amount of the debt, but verifying the secured creditor to whom the debt is owed as provided for under FDCPA (See **Petition Attachment C, Affidavit of Notice, Pages 1-2**).

The Defendant looks to federal cases outside of Georgia to substantiate his straw-man defense, but he ignores the fact that other federal courts outside of Georgia have held that:

a. "The blank mortgage assignments they possessed transferred nothing... in Massachusetts; a mortgage is a conveyance of land. Nothing is conveyed unless it is validly conveyed. The various agreements between the securitization entities stating that each had a right to an assignment of the mortgage are not themselves an assignment and they are certainly not in recordable form" (**U.S. Bank National Association v. Ibanez, Massachusetts Land Court Msc. Case No. 384283, consolidated with two other cases, Oct, 2009**)

b. According to the NY Daily News Wednesday, Oct. 20, 2010: "New York has become the first state in the nation to implement a new filing requirement for residential foreclosures. Lenders' counsel are now going to be required to file an affirmation with the NY courts certifying they have reviewed and

verified the accuracy of the papers being filed for the foreclosure actions. The goal of the New York courts is to prevent wrongful foreclosures. New York is one of the judicial foreclosure states.

Chief Judge Jonathan Lippman introduced the new filing requirement in response to the robo-signers scandal by major mortgage lenders and servicers such as Bank of America, **GMAC Mortgage** and **JPMorgan Chase**. This scandal that many are calling ForeclosureGate, is having new details come to light on a daily basis that proper procedures may not have been followed.

This new requirement will be effective immediately and was done with the approval of the presiding justices of all four judicial departments.

Said Chief Judge Lippman in a statement, “We cannot allow the courts in New York State to stand by idly and be party to what we now know is a deeply flawed process, especially when that process involves basic human needs – such as a family home – during this period of economic crisis. This new filing requirement will play a vital role in ensuring that the documents judges rely on will be thoroughly examined, accurate, and error-free before any judge is asked

to take the drastic step of foreclosure.”

- c. Defendant ANTHONY DEMARLO AND MCCURDY & CANDLER LLC by their own admission were acting as debt collectors, and as such violated the FDCPA by commencing a foreclosure proceeding before the requisite assignments had been filed according to Georgia law, and ignoring Plaintiff’s request for substantiation of legal standing of the parties for whom they were acting as Debt Collector. Not only are the New York Courts making a firm requirement for attorneys making sure that they are foreclosing legally, and acting in good faith, the **US Supreme Court’s 7-2 ruling in Jerman v. Carlisle, McNeelie, RINI, Dramer & Ulrich LPA (No. 08-1200 Argued January 13th, 2010 – Decided April 21, 2010)** is 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.

d. While Georgia is a non-judicial foreclosure state, federal courts in other non-judicial foreclosure states still look unfavorably on violations of state and federal law. Such was affirmed in the case of Paul and Laura Nguyen (pro se

litigants) vs. Chase Bank USA, et al in the United States District Court Central District of California when the Honorable Judge Howard Matz concluded:

- i. “As a result of the failure of Chase to provide all of the disclosures required by state and federal law, and as a result of the false, fraudulent, and/or deceitful representations made to the Plaintiffs concerning the terms of the Mortgage Loan, Plaintiffs are entitled to rescind the Mortgage Loan.” (Complaint 19-22, at page 4)

Plaintiff’s Response to Arguments Section C: Lack of Standing

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

1. The Plaintiff didn’t execute a security deed with any of the Defendants and doesn’t owe them any money at all.
2. 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.
3. 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, and he is still not in default 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 ordered 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 Judge's Order, Petition, Summons, Page 2.**)

CONCLUSION

Defendant's statement of the facts to support a move to summary judgment 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's based on the Defendants' violation of Georgia State and Federal law. Further, Plaintiff doesn't owe Defendants any money on my mortgage, so his challenge to Plaintiff's standing fails.

WHEREFORE, Plaintiff prays that the Court deny Defendant ANTHONY DEMARLO AND MCCURDY & CANDLER LLC's motion for Judgment on the Pleadings.

Submitted this _____ day of _____, 2010

Wekesa O. Madzimoyo
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FONT VERIFICATION

Pro se Litigant, Wekesa Madzimoyo, certifies that this document has been prepared with one of the font and point selections approved by the Court in Local Rule 5.1C, namely Times New Roman (14 point).

Wekesa O. Madzimoyo
Pro se Litigant

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing on the following by electronic mail or by placing a copy of the same in the United States mail, postage prepaid and properly addressed, this the 26th day of October, 2010 to:

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