

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

WEKEZA O. MADZIMOYO,)
)
Plaintiff,)
) CIVIL ACTION FILE NO.
V.) 1:09-CV-02355-CAP-GGB
)
GMAC MORTGAGE, LLC *et al.*,) REMOVED FROM DEKALB COUNTY
) SUPERIOR COURT, CIVIL ACTION
Defendants.) FILE NO. 09CV9136-10

DEFENDANT ANTHONY DEMARLO AND MCCURDY & CANDLER LLC'S MOTION FOR
JUDGMENT ON THE PLEADINGS AND BRIEF IN SUPPORT

COMES NOW the Defendants ANTHONY DEMARLO and MCCURDY & CANDLER LLC, subject to and without waiving any defenses to this action, and hereby move the Court for judgment on the pleadings pursuant to *inter alia* Fed.R.Civ.P. 12(c), and in support thereof show the Court as follows:

INTRODUCTION AND STATEMENT OF FACTS

On July 29, 2009, in an admitted effort to halt a nonjudicial foreclosure of his property, Plaintiff filed a Complaint in the Superior Court of DeKalb County against all named Defendants. In this Complaint, Plaintiff claims that Defendants have failed to produce the original Note for him prior to attempting a foreclosure, and consequently he is deserving of injunctive and other relief to prevent the foreclosure sale of his property. Complaint, pp. 1-3.

ARGUMENT AND CITATION OF AUTHORITIES

A. Legal Standard Governing This Motion for Judgment on the Pleadings.

After the pleadings are closed, but early enough not to delay trial, a party may move for judgment on the pleadings under Fed.R.Civ.P. 12(c). Rule 12(c) effectively allows a litigant to assert a Rule 12(b)(6) motion for an opponent's failure to state a claim upon which relief may be granted. Federal courts, therefore, apply the same standards to the Rule 12(c) motion as if it were brought directly under Rule 12(b)(6). *Bivens v. Robert*, 2009 WL 891869, at *1 n.3 (S.D.Ga.2009).

In considering a Rule 12(b)(6) (and, thus, a Rule 12(c)) motion, all facts in the plaintiff's complaint "are to be accepted as true, and the court limits its consideration to the pleadings and exhibits attached thereto." *GSW, Inc. v. Long County*, 999 F.2d 1508, 1510 (11th Cir.1993). However, this is inapplicable if the allegations are merely "threadbare recitals of a cause of action's elements, supported by mere conclusory statements..." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009).

A complaint will not be dismissed so long as it contains factual allegations sufficient "to raise a right to relief above the speculative level...". *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 at 545, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (citations

omitted). If it does not, the complaint should be dismissed. *Id.* Thus, while Fed.R.Civ.P. 8(a)(2) requires only a "short plain statement of the claim showing that the pleader is entitled to relief," allegations in the complaint must "possess enough heft to show entitlement to relief." *Twombly*, 550 U.S. at 557 (quotes, cite, and alterations omitted). Furthermore, there remains the longstanding rule that "conclusory allegations and unwarranted deductions of fact are not admitted as true in a motion to dismiss." *S. Fla. Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402, 408 n.10 (11th Cir.1996). Further, the Supreme Court's decision in *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1941, 173 L.Ed.2d 868 (2009) cited *supra* makes clear that the stricter pleading standard announced in *Twombly* applied to all civil actions in the federal district courts.

B. The Complaint As a Whole Fails to State a Claim Against These Defendants.

This Complaint fails to state a claim against these Defendants. Specifically, Plaintiff alleges that he sent these Defendants an "affidavit" demanding that they stop the foreclosure sale of his property, and they refused, thus giving him a cause of action. Complaint, p. 7. Essentially, Plaintiff's complaint is yet another of the innumerable "Produce the Note!" lawsuits that state and federal courts both within and outside Georgia are currently being inundated with. See

<http://www.consumerwarningnetwork.com/2009/03/05/how-to-use-produce-the-note-in-non-judicial-foreclosure-states/> to glean just how this insidiousness is currently being perpetrated on the Internet, by scam artists seeking to take advantage of persons just like the Plaintiff herein.

More to the point, however, nothing in Georgia law requires either a lender, or its attorney conducting the foreclosure sale, to "Produce the Note!" or be in possession of same prior to the foreclosure, and Plaintiff cites to no such law (because he cannot). All that is required of a foreclosing party is that it (a) send certified mail notice of the sale to the borrower, (b) advertise the property for sale in the 4 weeks prior to the sale date, and (c) sell the property at the county courthouse steps between 10am and 4pm on the first Tuesday of the month. See, e.g., O.C.G.A. §§ 9-13-140 et seq. 9-13-160 et seq. 44-14-160 et seq.

Other federal courts outside Georgia, confronted with similar frivolous "produce the note" allegations contesting the validity of a party's ability to foreclose, have concluded that possession of the note is not required to conduct a nonjudicial foreclosure sale of a security deed/deed of trust. See, e.g., *Candelo v. NDEX West, LLC*, No. CV F 08-1916, 2008 WL 5382259, at *4 (E.D.Cal. Dec.23, 2008) ("No requirement exists under statutory framework to produce the original note to initiate

non-judicial foreclosure."); *Putkkuri v. Recontrust Co.*, No. 08cv1919, 2009 WL 32567, at *2 (S.D.Cal. Jan.5, 2009) ("Production of the original note is not required to proceed with a non-judicial foreclosure."). This allegation wholly fails to state a claim.

C. Without a Tender of Arrearages, Plaintiff Lacks Standing to Contest the Lender's Ability to Foreclose.

In *Taylor v. Wachovia*, 2009 WL 249353 (N.D.Ga. 2009), this Court held that a plaintiff has no standing to contest or prevent a foreclosure sale unless he first tenders to his Lender the amount necessary to bring the account current:

Wachovia argues that plaintiff has no standing to prevent the foreclosure, since under Georgia law, a borrower who executes a security deed and defaults on a loan cannot enjoin a foreclosure sale unless he has first paid the full amount due. *Mickel v. Pickett*, 241 Ga. 528, 247 S.E.2d 82 (Ga.Ct.App.1978). Because plaintiff has not shown that he made any attempt to cure his default by paying the remainder of his debt, he cannot bring an action to stop the foreclosure sale of his property. See *Smith Citizens & S. Fin. Corp.*, 245 Ga. 850, 268 S.E.2d 157, 159 (Ga.1980); *Mickel*, 247 S.E.2d at 87 ("A borrower who has executed a [security deed] is not entitled to enjoin a foreclosure sale unless he first pays or tenders to the lender the amount admittedly due.") (citations omitted). The undisputed facts demonstrate that plaintiff agreed to the terms of the ...mortgage loan made by Wachovia when he signed the Note and Security Deed ... Plaintiff has not provided any evidence showing that he tendered the full amount of the loan or any portion thereof. Thus, under Georgia law, plaintiff

has no standing to bring an action to enjoin the foreclosure sale.

(emphasis added). This is of course entirely consistent with Rule 65's mandate that Plaintiff must give security for any injunctive relief sought. Plaintiff makes no allegation of tender in his Complaint and certainly he has made no tender into this Court's registry of any arrearages on his loan. He therefore, like the Plaintiff in *Taylor*, lacks standing to prosecute this case.

CONCLUSION

Plaintiff's "Produce the Note" lawsuit wholly fails to state a claim against these Defendants, and he lacks standing to contest the foreclosure without tendering in the amount he owes on his mortgage first.

WHEREFORE, Defendants pray that the Court GRANT this Motion for Judgment on the Pleadings.

Respectfully submitted this 15 day of April, 2010.

MCCURDY AND CANDLER, L.L.C.

By: /s/ Frank R. Olson
Georgia Bar No. 553077
Attorneys for Defendants Anthony
DeMarlo and McCurdy & Candler LLC

P.O. Box 57
Decatur, Georgia 30031
Telephone: 404-373-1612

CERTIFICATION

I HEREBY CERTIFY pursuant to LR 7.1D, NDGa, that I have prepared this document using the Microsoft Word 2003 word processing program, in Courier New 12 point font, in compliance with LR 5.1C, NDGa, and I have filed same electronically via ECF with the Court this day, which will automatically send e-mail notification of said filing to the following ECF participants:

D. Brian O'Dell
Bradley Arant Boult Cummings, LLP
One Federal Place
1819 Fifth Avenue North
Birmingham , AL 35203-2104
205-521-8000
Fax: 205-458-5400
Email: bodell@babbc.com

I FURTHER CERTIFY that I have this day served the within and foregoing pleading upon the following non-ECF participants by regular mail:

Wekeza O. Madzimoyo
852 Brafferton Place
Stone Mountain, GA 30083

This 15th day of April, 2010.

MCCURDY AND CANDLER, L.L.C.

By: /s/Frank R. Olson
Georgia Bar No. 553077
Attorneys for Defendants Anthony
DeMarlo and McCurdy & Candler LLC

P.O. Box 57
Decatur, Georgia 30031
Telephone: 404-373-1612