United States District Court

EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

ALISE MALIKYAR	§	
	§	
V.	§	CASE NO. 4:11-CV-417
	§	Judge Schneider/ Judge Mazzant
BAC HOME LOANS SERVICING, LP	§	
ET AL.	§	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pending before the Court is Defendants' Motion to Dismiss (Dkt. #9). The Court, having considered the relevant pleadings, finds that Defendants' Motion to Dismiss should be granted.

BACKGROUND

Plaintiff Alise Malikyar filed this lawsuit in state court against Bank of America, N.A., as successor by merger to BAC Home Loans Servicing, LP, which in turn is alleged to be the successor to Countrywide Home Loans Servicing, LP ("BAC"), Barrett Daffin Frappier Turner & Engel ("Barrett Daffin"), Blue Star Financial, Inc. ("Blue Star"), Mortgage Electronic Registration Systems, Inc. ("MERS"), and John Doe 1-100. On July 5, 2011, Defendants[1] BAC and MERS removed this action to this Court (Dkt. #1). Defendants assert that Defendants Barrett Daffin and Blue Star were fraudulently joined. On July 8, 2011, the Court entered an Order that gave Plaintiff the opportunity to file an amended complaint (Dkt. #7). On July 28, 2011, Plaintiff filed an amended complaint (Dkt. #8).

On or about December 1, 2005, Plaintiff purchased property located at 1523 Streams Way, Allen, Texas 75002 (the "Property"), and apparently executed a Note payable to Blue Star in furtherance of a loan for the purchase of the Property. On or about the same day, a Deed of Trust

[1] The Court will collectively refer to Defendants as BAC and MERS.

to secure payment of the Note was apparently executed by Plaintiff. The Deed of Trust names MERS as the nominee for Blue Star and its successors and assigns. The Deed of Trust also names MERS as the beneficiary. The Deed of Trust grants rights to MERS to act for the lender and its assigns as follows:

> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

MERS, as nominee, assigned the Deed of Trust to BAC on September 1, 2009, and filed the assignment with Collin County, Texas. The assignment was signed by Stephen C. Porter, Assistant Secretary for MERS.

Plaintiff's Amended Complaint raises legal challenges to the foreclosure proceedings. Plaintiff contends "BAC is not the holder of the promissory note or deed of trust" and seeks to "void" the Deed of Trust. Plaintiff's allegations challenge MERS, the MERS mortgage loan registry system, that MERS cannot assign the Deed of Trust, and that MERS and any subsequent holder of the Deed of Trust does not have a right to enforce the Deed of Trust.

Based on these allegations, Plaintiff asserts the following: (1) MERS is not a mortgagee; (2) the Deed of Trust is void; (3) Plaintiff's promissory note cannot be transferred; (4) causes of action for breach of contract for unauthorized substitution of trustee; (5) causes of action for violations of the Texas Debt Collection Practices Act; (6) a cause of action for slander of credit, (7) a cause of action for infliction of emotional distress; (8) causes of action for negligent misrepresentation; and (9) fraud. Plaintiff seeks various forms of relief, including an accounting of loan transactions,

declaratory judgment, and an order quieting title to the property.

On August 17, 2011, Defendants filed their motion to dismiss (Dkt. #9). Plaintiff did not file a response, and the Court ordered a response which was filed on September 22, 2011 (Dkt. #10, #11). On September 29, 2011, Defendants filed a reply (Dkt. #12).

LEGAL STANDARD

Defendants move for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure, which authorizes certain defenses to be presented via pretrial motions. A Rule 12(b)(6) motion to dismiss argues that, irrespective of jurisdiction, the complaint fails to assert facts that give rise to legal liability of the defendant. The Federal Rules of Civil Procedure require that each claim in a complaint include "a short and plain statement . . . showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The claims must include enough factual allegations "to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570).

Rule 12(b)(6) provides that a party may move for dismissal of an action for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). The Court must accept as true all well-pleaded facts contained in the plaintiff's complaint and view them in the light most favorable to the plaintiff. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). In deciding a Rule 12(b)(6) motion, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555; *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009). "The Supreme Court recently expounded upon the *Twombly* standard, explaining that '[t]o survive a motion to

dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Gonzalez*, 577 F.3d at 603 (quoting *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. "It follows, that 'where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not 'shown' - 'that the pleader is entitled to relief.'" *Id*.

In *Iqbal*, the Supreme Court established a two-step approach for assessing the sufficiency of a complaint in the context of a Rule 12(b)(6) motion. First, the Court identifies conclusory allegations and proceeds to disregard them, for they are "not entitled to the assumption of truth." *Iqbal*, 129 S.Ct. at 1951. Second, the Court "consider[s] the factual allegations in [the complaint] to determine if they plausibly suggest an entitlement to relief." *Id*. "This standard 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary claims or elements." *Morgan v. Hubert*, 335 F. App'x 466, 470 (5th Cir. 2009). This evaluation will "be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S.Ct. at 1950.

In determining whether to grant a motion to dismiss, a district court may generally not "go outside the complaint." *Scanlan v. Tex. A&M Univ.*, 343 F.3d 533, 536 (5th Cir. 2003). When ruling on a motion to dismiss a *pro se* complaint, however, a district court is "required to look beyond the [plaintiff's] formal complaint and to consider as amendments to the complaint those materials subsequently filed." *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983); *Clark v. Huntleigh Corp.*, 119 F. App'x 666, 667 (5th Cir. 2005) (finding that because of plaintiff's *pro se*

status, "precedent compels us to examine all of his complaint, including the attachments"); Fed. R. Civ. P. 8(e) ("Pleadings must be construed so as to do justice."). Furthermore, a district court may consider documents attached to a motion to dismiss if they are referred to in the plaintiff's complaint and are central to the plaintiff's claim. *Scanlan*, 343 F.3d at 536.

DISCUSSION AND ANALYSIS

Defendants move to dismiss all claims in the Amended Complaint because they are based upon the erroneous theory that MERS could not be the beneficiary on the Deed of Trust and could not lawfully assign its interest in the loan to BAC. Defendants assert that courts have repeatedly rejected these contentions. The Court agrees.

A good explanation of MERS and Texas law can be found in *Richardson v. CitiMortgage, Inc.*, No. 6:10cv119, 2010 WL 4818556, at *5 (E.D. Tex. Nov. 22, 2010). U.S. Magistrate Judge Judith K. Guthrie explained as follows:

> Under Texas law, where a deed of trust, as here, expressly provides for MERS to have the power of sale, then MERS has the power of sale. *Athey v. MERS*, 314 S.W.3d 161, 166 (Tex. App.-Eastland 2010). MERS was the nominee for Southside Bank and its successors and assigns. MERS had the authority to transfer the rights and interests in the Deed of Trust to CitiMortgage. The Plaintiffs' complaints about the role of MERS in this matter lack merit.
>
> It is further noted that the role of MERS has been the subject of federal multidistrict litigation in *In re: Mortgage Electronic Registration Systems (MERS) Litigation*, 659 F. Supp.2d 1368 (U.S. Jud. Pan. Mult. Lit. 2009). The MERS system is merely an electronic mortgage registration system and clearinghouse that tracks beneficial ownerships in, and servicing rights to, mortgage loans. *Id*. at 1370. The system is designed to track transfers and avoid recording and other transfer fees that are otherwise associated with the sale. *Id.* at 1370 n. 6. MERS is defined in Texas Property Code § 51.0001(1) as a "book entry system," which means a "national book system for registering a beneficial interest in security instrument and its successors and assigns." As noted in *Athey*, mortgage documents provide for the use of MERS and the provisions are enforceable to the extent provided by the terms of the documents. The role of MERS in this case was consistent with the Note and Deed of

Trust.

Under the Texas Property Code, a mortgagee may authorize a mortgage servicer to service a mortgage and conduct a foreclosure sale. *See* Tex. Prop. Code. Ann. § 51.0025. MERS is a mortgagee under the Texas Property Code. *See* Tex. Prop. Code Ann. § 51.0001(4). Since the Deed of Trust identifies MERS as the beneficiary and the nominee for the original lender and its successors and assigns, this makes MERS a mortgagee under the Texas Property Code. As a mortgagee, MERS could authorize BAC to service the loan and foreclose, regardless of whether MERS was the true owner of the Note. In addition, Plaintiff points to no provision of the Texas Property Code that requires a mortgagee or mortgage servicer to produce the original note or deed of trust before conducting a non-judicial foreclosure. *See Sawyer v. Mortg. Elec. Registration Sys., Inc.*, No. 3-09-CV-2303-K, 2010 WL 996768, at *3 (N.D. Tex. Feb. 1, 2010). Moreover, Plaintiff fails to plead any facts indicating that the lender or lender's successors and assigns never held the Note, or that the Note has been lost or stolen.

A court recently addressed this issue and found as follows:

> Plaintiff has no standing to contest the various assignments as she was not a party to the assignments. Even if she has standing, her allegations are without merit because MERS was given the authority to transfer the documents in the Deed of Trust. The Restatement (3d) of Property offers no support for Plaintiff's claims. As MERS is a beneficiary and nominee for both the originating lender and its successors and assigns by the express language in the Deed of Trust, the situation falls within an exception to the general rule that a party holding only the deed of trust cannot enforce the mortgage. See Comment e to the Restatement (3d) of Property (Mortgages) § 5.4. Section 5.4 additionally notes that a "transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise." Plaintiff makes no allegations that the parties in this case agreed otherwise. Finally, while the Note may not specifically mention MERS, the Note and Deed of Trust must be read together in evaluating the terms…thus, the Note and Deed of Trust are construed

together as a single instrument.[2]

Eskridge v. Fed. Home Loan Mortg. Corp. et al., No. 6:10-CV-00285-WSS, 2011 WL 2163989, at *5 (W.D. Tex. Feb. 24, 2011).

Defendants assert that the Court should dismiss Plaintiff's Amended Complaint in its entirety because, as shown in the motion to dismiss, her challenges to MERS are entirely meritless. The Court agrees. Plaintiff's response fails to cite any authority from this jurisdiction that would support the arguments she puts forth that attack MERS. These attacks have been repeatedly rejected by this Court as well as others. *See Wigginton v. Bank of New York Mellon*, No. 3:10–CV–2128–G, 2011 WL 2669071, at *2 (N.D. Tex. July 7, 2011); *Anderson v. CitiMortgage, Inc.*, No. 4:10–CV–398, 2011 WL 1113494, at *4 (E.D. Tex. Mar. 24, 2011); *Richardson*, 2010 WL 4818556, at *5; *Eskridge*, 2011 WL 2163989, at *5; *Williams v. Bank of New York Mellon*, No. 3:09-CV-1622-BH, 2010 WL 3929007, at *1 (N.D. Tex. Oct. 7, 2010); *Santarose v. Aurora Bank FSB*, No. H–10–720, 2010 WL 2232819, at *5 (S.D. Tex. June 2, 2010); *Athey v. Mortg. Elec. Registration Sys., Inc.*, 314 S.W.3d 161, 162 (Tex. App.-Eastland 2010, pet. denied); *Hornbuckle v. Countrywide Home Loans, Inc.*, No. 02-09-00330-CV, 2011 WL 1901975, at *4 (Tex. App.-Fort Worth May 19, 2011, no pet.).

MERS was the beneficiary under the Deed of Trust as agent for Blue Star Financial, Inc. and its successors and assigns, which includes BAC. BAC was authorized to act under the Deed of Trust to enforce the indebtedness at issue. "In other words, a transfer of an obligation secured by a note also transfers the note because the deed of trust and note are read together to evaluate their provisions." *DeFranchesci v. Wells Fargo Bank, N.A.*, No. 4:10-cv-455, 2011 WL 3875338, at *4 (N.D. Tex. Aug. 31, 2011). "Because the deed of trust specifically provided that MERS would have

[2] Defendants argue, and the Court agrees, that Plaintiff does not have standing to challenge the assignment.

the power of sale, MERS had the power of sale that was passed to [BAC] upon MERS's assignment." *Id.* (quoting *Richardson*, 2010 WL 4818556, at *5). In short, there is no merit to Plaintiff's argument that the Deed of Trust and Note were 'split,' rendering any attempted foreclosure defective.

Therefore, since the Court has determined that the basis of all Plaintiff's claims are meritless, the Court finds that all of her claims are not plausible.[3] After reviewing the remaining claims asserted by Plaintiff as well as the motion to dismiss, the Court finds that there are insufficient facts asserted to support plausible claims for breach of contract, accounting, declaratory judgment, and quiet title. Plaintiff fails to address Defendants' arguments, and her Amended Complaint fails to include sufficient facts to support these claims. Conclusory statements are insufficient to state a claim and are not entitled to an assumption of truth.

RECOMMENDATION

Based upon the findings discussed above, the Court RECOMMENDS that Defendants' Motion to Dismiss (Dkt. #9) be **GRANTED**. Furthermore, since there is no basis for Plaintiff to sue Barrett Daffin Frappier Turner & Engel and Blue Star Financial, Inc., the Court finds these Defendants were fraudulently joined and be **DISMISSED**.[4] The Court further RECOMMENDS that the case should be DISMISSED with prejudice.

Within fourteen (14) days after service of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C.

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[3] In her response, she concedes she has no causes of action for slander of credit, violations of the Texas Debt Collections Act, and for intentional infliction of emotional distress.

[4] Plaintiff never challenged the removal of this case or the allegations that Barrett Daffin and Blue Star were not proper Defendants.

§ 636(b)(1)(C).

Failure to file written objections to the proposed findings and recommendations contained in this report within fourteen days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Thomas v. Arn*, 474 U.S. 140, 148 (1985); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).

SIGNED this 28th day of October, 2011.

AMOS L. MAZZANT
UNITED STATES MAGISTRATE JUDGE

United States District Court

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SHERMAN DIVISION

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	§	
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MEMORANDUM ADOPTING REPORT AND
RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Came on for consideration the report of the United States Magistrate Judge in this action, this matter having been heretofore referred to the United States Magistrate Judge pursuant to 28 U.S.C. § 636. On October 28, 2011, the report of the Magistrate Judge was entered containing proposed findings of fact and recommendations that Defendants' Motion to Dismiss (Dkt. #9) be granted.

Having received the report of the United States Magistrate Judge, and no objections thereto having been timely filed, this Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and adopts the Magistrate Judge's report as the findings and conclusions of the Court.

It is, therefore, **ORDERED** that Defendants' Motion to Dismiss (Dkt. #9) is **GRANTED**. Furthermore, since there is no basis for Plaintiff to sue Barrett Daffin Frappier Turner & Engel and Blue Star Financial, Inc., these Defendants are hereby **DISMISSED**.

It is accordingly **ORDERED** that this case is **DISMISSED** with prejudice.

It is SO ORDERED.

SIGNED this 18th day of November, 2011.

MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE