

Wekesa O Madzimoyo
852 Brafferton Place
Stone Mountain, GA 30083

***** ATTENTION *****

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IN THE 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,
N.A., formerly known as The Bank of
New York Trust Company, N.A., JP
MORGAN CHASE BANK, NA,
GMAC MORTGAGE, LLC,
MCCURDY & CANDLER, L.L.C.,
and ANTHONY DEMARLO,
Attorney,

Defendants.

CIVIL ACTION FILE

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

FINAL REPORT AND RECOMMENDATION AND ORDER

This case is before the Court on Defendants McCurdy & Candler, L.L.C., and Anthony DeMarlo's (collectively "DeMarlo's") Motion for Judgment on the Pleadings (Doc. 16); Defendants GMAC Mortgage, LLC; JP Morgan Chase Bank, NA; and the Bank of New York Mellon Trust Company, N.A.'s (collectively "GMAC's") Motion for Judgment on the Pleadings (Doc. 23); and GMAC's Motion to Strike Plaintiff's Amended Complaint (Doc. 31), to which DeMarlo joins (Doc. 32). Having reviewed the pleadings and arguments of the parties, and for the reasons discussed below, I **RECOMMEND** that Defendants' Motions for Judgment on Pleadings (Docs. 16 and

23) be **GRANTED**. I further **ORDER** that Defendants' Motion to Strike Plaintiff's Amended Complaint (Doc. 31) be **GRANTED**.

I. Background

On March 23, 1999, Plaintiff Wekesa Madzimoyo ("Plaintiff") obtained a mortgage loan from FT Mortgage Companies d/b/a Equibanc Mortgage Corporation in the principal amount of \$140,600, which was secured by real property at 852 Brafferton Place, Stone Mountain, Georgia, 30083 (the "Property"). (Doc. 1-1.) On July 6, 1999, servicing rights for the loan were transferred to Homecomings Financial Network. The servicing rights were subsequently transferred to GMAC Mortgage, LLC ("GMAC"). The loan and deed were subsequently assigned to JPMorgan Chase Bank, and on April 7, 2006, The Bank of New York Mellon Trust Company, N.A. acquired JPMorgan's business. (Doc. 23-1 at 2.)

On July 3, 2009, the law firm McCurdy & Candler, L.L.C. sent Plaintiff an initial communication letter pursuant to the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et seq. ("FDCPA"). (Doc. 1-1 at 39.) On the same date, Anthony DeMarlo with the law firm McCurdy & Candler, L.L.C. sent Plaintiff a Notice of Foreclosure Sale. (Id. at 40.)

On July 17, 2009, Plaintiff filed in the Superior Court of DeKalb County,

Georgia a document titled “Affidavit of Notice of Demand for Cease and Desist of Foreclosure Procedures.” (Id. at 20.) In this document Plaintiff demanded that the defendants cease and desist all foreclosure procedures set for the Property. (Id. at 21.) Plaintiff also demanded that “all parties and associates named and unnamed . . . provide verification of their authority as agent, attorney, debt collector, lender, note holder, servicers, investor, trustee, attorney in fact, etc.” (Id.) Plaintiff stated that this information was requested pursuant to the Fair Debt Collection Practices Act (“FDCPA”) and the Truth in Lending Act (“TILA”). (Id.) Plaintiff also stated that failure to respond to his demand would constitute the defendants’ agreement that they waive all claims against him. (Id. at 24.)

On July 29, 2009, Plaintiff filed an Emergency Petition for Temporary Restraining Order to Stop Foreclosure. (Id. at 3.) Plaintiff noted that none of the defendants had provided the verification he sought. (Id. at 4.) That same day, a DeKalb County Superior Court judge granted Plaintiff’s petition for a temporary restraining order and restrained the defendants from proceeding with the scheduled foreclosure on the Property on August 4, 2009. (Id. at 50.)

On August 27, 2009, the defendants removed the case to this Court on the basis of federal question jurisdiction. (Doc. 1.) Plaintiff filed a motion to remand (Doc. 9),

which I denied (Doc. 13). Subsequently, I denied Plaintiff's Motion for Reconsideration of Order on Motion to Remand to State Court (Doc. 15) and granted GMAC's Motion for Leave to File Dispositive Motion (Doc. 20). (See Order, Doc. 21.)

GMAC filed its Motion for Judgment on the Pleadings (Doc. 22) on October 12, 2010, while DeMarlo filed its Motion for Judgment on the Pleadings (Doc. 16) earlier in the litigation on April 15, 2010. Plaintiff filed his opposition to GMAC's motion on October 25, 2010 (Doc. 25), and simultaneously filed an Amended Complaint (Doc. 26). Two days later, Plaintiff filed his untimely opposition to DeMarlo's motion. (Doc. 28.) On November 24, 2010, GMAC filed its Motion to Strike Plaintiff's Amended Complaint (Doc. 31), to which DeMarlo filed a Notice of Joinder (Doc. 32) on December 9, 2010. Plaintiff filed a response that objects to DeMarlo's Notice of Joinder as untimely. (Doc. 36.)

II. Motions for Judgment on the Pleadings

Judgment on the pleadings is proper when no issues of material fact exist, and the moving party is entitled to judgment as a matter of law based on the substance of the pleadings and any judicially noticed facts. Andrx Pharms., Inc. v. Elan Corp., PLC, 421 F.3d 1227, 1232-33 (11th Cir. 2005). In ruling on a motion for judgment on

the pleadings, courts must accept all facts in the complaint as true and view them in the light most favorable to the plaintiff. Hardy v. Regions Mortg., Inc., 449 F.3d 1357, 1359 (11th Cir. 2006).

Plaintiff's original complaint filed in state court brings claims under the FDCPA, the TILA, and Georgia law. (Doc. 1-1.) Defendants move for judgment on the pleadings against Plaintiff on the basis that he fails to state a claim against them. Specifically, the defendants argue that Plaintiff is not entitled to injunctive relief related to a foreclosure under Georgia law because he has not tendered the arrearages to the creditor, and there is no cause of action that exists for the defendants' alleged failure to produce an original copy of the promissory note prior to foreclosure. (Docs. 16 and 23.) GMAC also argues that Plaintiff's FDCPA and TILA claims fail because Plaintiff fails to specifically allege any violations of those statutes in his complaint, and any TILA claims are barred by the one-year statute of limitations. (Doc. 23.)

Plaintiff has filed what can be deemed, at best, a "shotgun complaint." As the Eleventh Circuit has stated, shotgun pleadings "invariably begin with a long list of general allegations, most of which are immaterial to most of the claims for relief." Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290, 1333 (11th Cir. 1998). "Shotgun pleadings, if tolerated, harm the court by impeding its ability to

administer justice.” Byrne v. Nezhaf, 261 F.3d 1075, 1131 (11th Cir. 2001). Plaintiff’s complaint appears to be a form complaint, similar, if not identical, to others previously filed by borrowers against their lenders in this court (and in a number of other federal district courts across the country) in an admitted effort to forestall the foreclosure process.

While I have attempted to interpret Plaintiff’s complaint leniently, I conclude that the complaint is utterly frivolous and lacks any legal foundation whatsoever. It would be a waste of limited judicial resources to delve into the voluminous (and nonsensical) allegations contained in Plaintiff’s complaint. Plaintiff’s formulaic and often incomprehensible allegations are replete with legal conclusions, non-sequiturs, and descriptions of alleged unlawful activities taken by unidentified parties (and non-parties).

To the extent Plaintiff’s factual allegations can be discerned, they are far from sufficient to support any of the federal or state claims that Plaintiff has asserted against the defendants with regard to the loan transaction at issue in this case. Plaintiff’s complaint fails to satisfy the rudimentary pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure and, with respect to Plaintiff’s fraud claims, the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure.

Consequently, I **RECOMMEND** that Defendants' motions for judgment on the pleadings be **GRANTED**.

III. Motion to Strike Amended Complaint

Defendants move to strike Plaintiff's Amended Complaint because he filed it after the 21-day period allowed under Rule 15 of the Federal Rules of Civil Procedure and without either the defendants' consent or leave of the Court. (Doc. 31.) Additionally, the defendants urge the Court to deny Plaintiff leave to amend because (1) Plaintiff's late filing is unduly prejudicial, having come after all defendants have filed dispositive motions and after the close of discovery, and (2) the amended complaint is futile, as it is another shotgun complaint that fails to state a claim. (Id.) Plaintiff opposes the motion to strike and urges the Court to grant him leave to file his Amended Complaint. He asserts that there is no harm to the defendants and it includes FDCPA and TILA claims that were not part of his original complaint. (Doc. 33.)

Rule 15 of the Federal Rules of Civil Procedure states in pertinent part:

- (1) **Amending as a Matter of Course.** A party may amend its pleading once as a matter of course within:
 - (A) 21 days after serving it, or
 - (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.
- (2) **Other Amendments.** In all other cases, a party may amend its

pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Fed. R. Civ. P. 15(a).

Plaintiff failed to comply with the requirements of Rule 15(a) in filing his Amended Complaint. Plaintiff filed his Amended Complaint (Doc. 26) more than fourteen (14) months after he filed his original complaint, long after dispositive motions have been filed, and over two months past the close of discovery. Plaintiff did not obtain Defendants' consent or leave of Court to file the Amended Complaint. Additionally, Plaintiff has not shown good cause to excuse his delay in filing the Amended Complaint or that justice requires leave to amend be given. Plaintiff's Amended Complaint alleges claims for violations of Georgia law, FDCPA, TILA, mortgage fraud, bad faith, and quiet title/slander title. (Doc. 26.) Although Plaintiff has recast some of his allegations from his original complaint, the substance of the complaint is largely the same and again amounts to a "shotgun complaint" that would be futile. Accordingly, I **GRANT** GMAC's Motion to Strike Plaintiff's Amended Complaint.

IV. Conclusion

For the reasons discussed above, I **RECOMMEND** that Defendants' Motions

for Judgment on Pleadings (Docs. 16 and 23) be **GRANTED**. I further **ORDER** that Defendants' Motion to Strike Plaintiff's Amended Complaint (Doc. 31) be **GRANTED**.

IT IS SO ORDERED AND RECOMMENDED this 3rd day of January, 2011.



GERRILYN G. BRILL
UNITED STATES MAGISTRATE JUDGE

IN THE 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, N.A.,
formerly known as The Bank of New
York Trust Company, N.A., JP
MORGAN CHASE BANK, NA,
GMAC MORTGAGE, LLC,
MCCURDY & CANDLER, L.L.C., and
ANTHONY DEMARLO, Attorney,

Defendants.

CIVIL ACTION FILE

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

ORDER FOR SERVICE OF REPORT AND RECOMMENDATION

Attached is the report and recommendation of the United States Magistrate Judge made in accordance with 28 U.S.C. § 636(b)(1) and this Court's LR 72. Let the same be filed and a copy, with a copy of this order, be served upon Plaintiff.

The parties may file written objections, if any, to the report and recommendation within fourteen days of receipt of this order. 28 U.S.C. § 636(b)(1). Should objections be filed, they shall specify with particularity the alleged error(s) made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing

the transcript of any evidentiary hearing for review by the district court. If no objections are filed, the report and recommendation may be adopted as the opinion and order of the district court and any appellate review of factual findings will be limited to a plain error review. United States v. Slay, 714 F.2d 1093 (11th Cir. 1983), cert. denied, 464 U.S. 1050 (1984):

The Clerk is **DIRECTED** to submit the report and recommendation with objections, if any, to the district court after expiration of the above time period.

SO ORDERED this 3rd day of January, 2011.



GERRILYN G. BRILL
UNITED STATES MAGISTRATE JUDGE

Other Orders/Judgments

1:09-cv-02355-CAP-GGB Madzimoyo v. The Bank of New York Mellon Trust Company, N.A. et al

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U.S. District Court

Northern District of Georgia

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Docket Text:

FINAL REPORT AND RECOMMENDATION Recommending that the [16] MOTION for Judgment on the Pleadings and [23] MOTION for Judgment on the Pleadings be GRANTED. Signed by Magistrate Judge Gerriyn G. Brill on 1/3/2011. (Attachments: # (1) Order for Service)(mdy)

1:09-cv-02355-CAP Notice has been electronically mailed to:

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