ATLANTA DIVISION

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| WEKESA 0. MADZIMOYO, Plaintiff,THE BANK OF NEW YORK MELLON TRUST COMPANY, NA., formerly known as The Bank of New York Trust Company, NA,, JP MORGAN CHASE BANK, NA, OMAC MORTGAGE, LLC, MCCURDY & CANDLER, L.L.C., and ANTHONY DEMARLO, Attorney,Defendants | CIVIL ACTION FILENO. 1 :09-CV-02355-CAP-GGB |

**OPPOSITION TO FINAL REPORT AND
RECOMMENDATION AND ORDER**

Now comes Plaintiff Wekesa Madzimoyo to oppose the final report and recommendation issued by UNITED STATES Magistrate Judge GERRILYN BRILL to grant Defendant’s MOTION FOR JUDGEMENT ON THE PLEADINGS AND Defendants’ MOTION TO STRIKE AMENDED PLAINTIFF’S AMENDED COMPLAINT

Draft:

**CONTROLLING LAW**

1. Federal Rule 56 (a) holds that:

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

**STANDARD OF REVIEW**

1. The grant or denial of summary judgment is reviewed de novo. B&G Enters., Ltd. v. United States, 220 F.3d 1318, 1322 (11th Cir. 2000); Thornton v. E.I. Du Pont de Numours & Co., 22 F.3d 284, 288 (11th Cir. 1994). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

**SUPPORT FOR OPPOSITION TO JUDGE BRILLS RECOMMENDATIONS**

1. UNITED STATES MAGISRATE Judge GERRILYN BRILL (Judge Brill)l erred in her statement and apparent understanding of key areas of dispute in this case. The evidence of this can be found in her statement of the background of this case.
2. In paragraph one of the BACKGROUND section of her recommended order, Judge Brill states:

“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 Your Mellon Trust Company, N.A. acquired JPMorgan's business, (Doc. 23-1 at 2.)”

1. Judge Brill is making or accepting conclusions about the chain of title (including servicing, assignments, etc.) based solely on the Defendants claims when:

	1. Plaintiff’s certified letters to the Defendants starting as far back as April 13, 2009 question both validity of the debt to the Defendants and the validity of their standing:
		1. “demanding all parties and associates named and unnamed provide verification of their authority as agent, attorney, debt collector, lender, now holder, services, investor, trustee, attorney in fact, etc." (See EXHIBITS A-F OF ORIGINAL COMPLAINT as filed in the DeKalb County Superior Court July 29, 2009)
	2. The Plaintiff’s EMERGENCY PETITION FOR A TEMPORARY RESTRAINING ORDER AND INJUCTION to DeKalb County Superior Court July 29, 2009 (Here after called EMERGENCY PETITION) was the last of many attempts starting April 13, 2009 to get the Defendants to provide lender documentation and servicing authority including the validated chain of title. (See claims and attached exhibits ORIGINAL COMPLAINT as filed in the DeKalb County Superior Court July 29, 2009)
	3. Upon hearing Plaintiff’s ORIGINAL COMPLAINT (EMERGENCY PETITION ) and reviewing attached documentation, DeKalb County Superior Court Judge Tangela M. Barrie on July 29th, 2009 ORDERED the Defendants to appear in court with **“proper evidence of chain of title”** on subject property (852 Brafferton Place, Stone Mountain, GA) in an apparent attempt to resolve the dispute. (See Chronology of Events and Exhibits A-F)
	4. Choosing not to appear in DeKalb County Superior Court Judge Tangela Barrie’s Court with “evidence of proper chain of title as ordered, Defendants exercised their right to remove the case to Federal Court claiming Federal Jurisdiction.
	5. The claims, causes of action, request for relief, and the DeKalb County Superior Court Judge’s order contained in and pursuant to the Plaintiff’s EMERGENCY PETITION followed the Defendants to this Court.
	6. The Defendants have provided no “evidence of chain of title” to the Plaintiff or this Court what-so-ever.
	7. However, the Defendants have filed with the DeKalb County Real Estate Records Division an Assignment of the subject property to DEFENDANTS executed 8 months after they commenced foreclosure action on the Plaintiff. (See Plaintiff’s MOTION FOR SUMMARY JUDGEMENT (DOC 37))
2. Curiously, yet consistently, and in error Judge Brill only focuses on the TRO issued by Judge Barrie, and omits the part of the DeKalb Superior Court Judge’s Order that the Defendants bring **“proper evidence of the chain of title.”**
	1. Note paragraph four of her recommendation:
		1. “On July 29, 2009, Plaintiff filed an Emergency Petition for Temporary Restraining Order to Stop Foreclosure, (Ed. at 3.) Plaintiff noted that tone of the defendants had provided the verification he sought. Uçj, at 4.) That same day, a DeKaIb County Superior Court judge granted Plaintiff's petition for a temporary restraining order and remained the defendants from proceeding with the scheduled foreclosure on the Property on August 4, 2009, (Id. at 50.)”
3. The harm of Judge Brill oversight or erroneous acceptance of the validity of the chain of title cannot be overstated; doing so actually removes the Plaintiff’s State claim that the Defendants moved to foreclosure against (O.C.G.A. 44-14-162.2 (b)) without establishing themselves or actually being the secured creditors at the time the foreclosure commenced; and cancels the State Judge’s order to the Defendants.
4. If the Defendants are allowed to ignore the Plaintiff’s State Claims and State Judges orders, it will be easy for them to conclude as did Judge Brill in her Report and Recommendations “he (Plaintiff) fails to state a claim against them.” (See page 5, paragraph 2)
5. Judge Brill has consistently erred in referring to the Plaintiff’s Lis Pendens as his “original complaint.”
6. While this fits the Defendants’ narrative, it is not true.
7. When recorded, a Lis Pendens or Notice of Pending Action, is a notice of warning to all prospective buyers or encumbrancers that title or possession of the real estate is in dispute.
8. Judge Brill’s conclusion that the Plaintiff’s Lis Pendens is the “original complaint” is reflected in her denial of Plaintiff’s MOTION FOR REMAND TO STATE COURT (Doc 12) and Plantiff’s MOTION FOR RECONSIDERATION (Doc 21)
9. Although Plaintiff has repeatedly pointed the COURT to the ORIGINAL COMPLAINT – the EMERGENY PETITION FOR A TEMPORARY RESTRAINING ORDER TO STOP FORECLOSURE - filed and heard by DeKalb Superior Court Judge Tangela Barrie, US Magistrate Judge, Brill has continued to refer to Plaintiff’s Lis Pendens as the “original complaint.”
10. Judge Brill’s error not only obscures the genuine dispute, it allows for her to conclude that the Plaintiff filed a “shot gun complaint.”
11. An actual reading of the EMERGENCY PETITION FOR A TEMPORARY RESTRAINING ORDER (Original Complaint) consists only of four (4) claims plus the causes of action stated succinctly over two (2) pages. This is followed by a four (4) page chronology of events, and ends with a one page (4 items) statement of the relief requested.
12. When the DeKalb Superior Court Judge Barrie asked the Plaintiff why he waited so late to come to Court, he responded by showing how he’d been trying to resolve this matter prior to coming for relief. He pointed her to the Exhibits A-F attached to the EMERGENCY PETITION which included over 3 months of certified return request correspondence to and from the Plaintiff and Defendants. Included as one of the exhibits was the Cease and Desist Affidavit that we had mailed to each Defendant, and subsequently filed in DeKalb Superior Court as a Lis Pendens.
13. DeKalb County Superior Court Judge, Tangela Barrie seemed satisfied that the Plaintiff had done due diligence, and wasn’t trying to waste the Courts time.
14. The Plaintiff was surprised when US Magistrate Judge Brill started referring to Plaintiff EMERGENCY PETITION’s Exhibits, including his Lis Pendens as his “original complaint” while ignoring the with its simple claims, causes of action, and request for relief found in his EMERGENCY PETITION.
15. The Plaintiff attempted to clarify what he considered an error in his MOTION TO REMAND and MOTION FOR RECONSIDERATION (Doc 15).
16. Plaintiff also denied that TILA or FDCPA claims where in his ORIGINAL COMPLAINT (EMERGENCY PETITION).
17. This tactic of discounting the Plaintiff’s EMERGENCY PETITION claims and accompanying State Judges order in favor Plaintiff’s Lis Pendens was first introduced in the Defendant’s removal narrative.
18. US Magistrate Judge Brill’s acceptance and continuation of The Defendants’ view of the case created yet another dispute:
	1. What was the “ORIGINAL COMPLAINT?
19. Even if the Plaintiff, who is a pro se litigant, were to lose the – “which is the original complaint” dispute, it still doesn’t relieve the Defendants of their obligations to address - with evidence - the State claims articulated in his July 29th, 2009 EMERGENCY PETITION to and DeKalb County Superior Court Judge Tangela Barrie, and her subsequent order for the Defendants to “bring evidence of the proper chain of title.”

**MOTION FOR JUDEMENT ON THE PLEADINGS ERRORS**

**DEFAULT DISPUTE**

1. Judge Brill also erred when she ignored the dispute about the Plaintiff’s defaulting on his mortgage.
2. The Defendants move for judgment claimed that the Plaintiff’s defaulting on his mortgage obligation triggered:
	1. a Notice of Intent to Foreclose , and
	2. barred the Plaintiff from relief under GA Law because he hadn’t tendered the arrearages (See Doc 38 - Final Report and Recommendations Page 5 paragraph 2)
3. The Plaintiff Madzimoyo has two submitted two sworn affidavits (See: Doc. 25 - OPPOSITION TO MOTION ON JUDGEMENT ON THE PLEADINGS) by He and his Wife – Afiya Madzimoyo attest to the fact that they were **not** in default on their mortgage on subject property, and owed the Defendants nothing.
4. The Defendants have submitted **no** records, payment statements, or other accounting to prove to the Court otherwise.
5. This is a classic “he-said, she-said” dispute; the resolution of which could mean Breach of Contract on the part of the Defendants, or could alternatively bar the Plaintiff from injunctive relief.
6. Judge Brill errs in her apparent agreement with the Defendants that the Plaintiff was in default on his mortgage without a shred of evidence having been entered into the Court Record.
7. Judge Brill also errs in concluding that there is no dispute about who is and or was the **secured creditor** at the time the Defendants commenced foreclosure, again without requiring the Defendants putting forth a shred of evidence.
8. This is true especially in light of the Defendant’s executing (not just recording) as Assignment of the subject property to the foreclosing parties 8 months after foreclosure commenced. (See Doc 37)
9. This is dispute rages on in light of the above because questions about the validity of the late Assignment are raised. (See Doc 37)

**MOTION FOR JUDGEMENT ON THE PLEADINGS ERROR**

**NO STATE CAUSE OF ACTION FOR DEFENDANTS
TO PRODUCE THE PROMISSARY NOTE (Error)**

1. The Plaintiff wonders if the Defendants have cast a spell over UNITED STATES MAGISTRATE JUDGE – Gerrilyn Brill.
2. Even a cursory review of the Plaintiff’s ORIGINAL COMPLAINT (EMERGENCY PETITION) and his MOTION FOR REMOVAL, and almost all filings with this Court, shows that the Plaintiff’s clearly articulated his cause of action as (O.C.G.A 44-14.162.2) which has nothing to do with “produce the note,” and everything to do with both recording and validating the Defendant’s standing as “secured creditor(s)” prior to the commencing foreclosure on subject property and prior to the actual foreclosure sale.
3. The Defendants set up a “produce the note” straw man here:
	1. “The basis of the Plaintiff’s Complaint appears to be the Defendants’ alleged failure to produce an original copy of the Note prior to foreclosure, However Plaintiff has cited no authority suggesting that production of a note is a condition to lawful foreclosure or that failure to produce a note gives rise to a cause of action. In fact, there is no such requirement under Georgia law.” (Doc 23 Section B of their MOTION FOR JUDGMENT ON THE PLEADINGS)
4. The Defendants ignore Plaintiff’s actual claims and cited Georgia law (OCGA 44-14-162.2) (See ORIGINAL COMPLAINT-EMERGENCY PETITION)
5. The Defendants ignore the laws which mandate compliance with Judge Tangela Barrie’s order directing them “to bring proper evidence of the chain to title” on subject property.
6. The Defendants proceeded to attack it what they say “appears” to be the Plaintiff’s claim and cause of action.
7. Incredibly, Judge Brill seems to have been caught in the snare, for nowhere in her nine page FINAL REPORT AND RECOMMENDATIONS (DOC 38) does she even mentioned the Plaintiff’s articulated cause of action – that the Defendants violated (O.C.G.A 44-14.162.2) by commencing foreclosure without proper validation of their status as secured creditors, and in doing so has caused and will cause him considerable and irrevocable harm.

**“SHOTGUN COMPLAINT” ERROR**

1. Judge Brill refers to the Plaintiff “shotgun complaints” in two places in her report. First she repeats the Defendant’s conclusions about what they call the “original complaint.” Paragraph 3 page 5 of Judge Brill’s REPORT AND RECOMMENATION one for the rouge claims and DeKalb Superior Court Judge Barrie’s order for

**ERROR IN REFUSAL TO ACCEPT AMENDED
COMPLAINT OUT OF TIME AND ACCEPTING DEFENDANT RULING FOR DEFENDANTS MOTION TO STRIKE AMENDED COMPLAINT**

1. (FAILED TIME REQUIREMENT – FILED 14 MONTHS AFTER ORIGINAL COMPLAINT
2. AFTER DISPOSITIVE MOTIONS HAVE BEEN FILED
3. TWO MONTHS AFTER CLOSE OF DISCOVERY
4. DID OBTAIN CONSENT FROM OPPOSITION OR COURT
5. PLAINTIF HASN’T SHOW GOOD CAUSE TO EXCUSE HIS DELAY OR THAT JUSTICE REQUIRES LEAVE TO AMEND
6. RECASTED ALLEGATIONS ARE SUBSTANTIALLY THE SAME
7. ALLEGATIONS AMOUNT TO SHOT GUN AND WOULD BE FUTILE