

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

CIVIL ACTION FILE

**Wekesa O. Madzimoyo,
Plaintiff,**

}

v.

}

THE BANK OF NEW YORK

}

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

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, McCurdy

And Candler, LLC

Defendants.

}

AMENDED COMPLAINT

**FOR PLAINTIFF'S EMERGENCY TEMPORARY AND PERMANENT
INJUNCTIVE RELIEF, DECLARATORY RELIEF AND JUDGEMENT,
FRAUD, ASSIGNMENT AND TITLE FRAUD/SLANDER OF TITLE,
VIOLATIONS OF FAIR DEBT COLLECTIONS ACT, VIOLATION OF
DUTY OF GOOD FAITH AND FAIR DEALING, CLAIM FOR
LITIGATION FEES AND COSTS**

Plaintiff Wekesa O. Madzimoyo (Plaintiff, Plaintiff Madzimoyo) brings this action against the above-named Defendants for emergency temporary and permanent

injunctive relief, declaratory relief and judgment, fraud, assignment and title fraud/slander of title, violations of fair debt collections act, violation of duty of good faith and fair dealing and claim for litigation fees and costs.

INTRODUCTORY STATEMENT

Plaintiff re-alleges and restates the Chronology of Events and claims of his initial Petition filed in DeKalb County, GA on July 29, 2009. Plaintiff further denies all of McCurdy and Candler's Affirmative Defenses dated August 12, 2010 and also denies all of GMAC Mortgage LLC, et al. Defendants' Affirmative Defenses dated March 8, 2010.

CLAIMS CONTINUED

Violations of Georgia Mortgage Laws

5. Plaintiff re-affirms and re-alleges paragraph 1. of the initial Petition filed in DeKalb County, GA on July 29th, 2009 through the paragraph directly above and those below and herein as if set forth more fully herein below.

6. Defendants violated **O.C.G.A 44-14-162.2** (a-c) by moving to foreclose on 852 Brafferton PL Stone Mountain, GA 30083 (subject property). According to **O.C.G. A. 44-14-64 (a-c)** only the documented secured creditor/holder in due

course can foreclose on subject property. Neither of the Defendants are documented assignees, creditors, secured creditors, servicers, etc.

8. Defendants also violated the Georgia law requirements for mailing notice to a debtor.

OCGA§44-14-162.2. states in “Sales Made On Foreclosure Under Power Of Sale -- Mailing Of Notice To Debtor -- Procedure For Mailing Notice.

(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. Such notice shall be in writing, shall include the name, address, and telephone number of the individual or entity who shall have full authority to negotiate, amend, and modify all terms of the mortgage with the debtor, and shall be sent by registered or certified mail or statutory overnight delivery, return receipt requested, to the property address or to such other address as the debtor may designate by written notice to the **secured creditor**. The notice required by this Code section shall be deemed given on the official postmark day or day on

which it is received for delivery by a commercial delivery firm.

Nothing in this subsection shall be construed to require a **secured creditor** to negotiate, amend, or modify the terms of a mortgage instrument.[emphasis added]

7. Neither of the Defendants has legally proven that they are the creditor, secured creditor/note holder in due course and thereby advertised the sale and auction of Plaintiff's home illegally.

8. While **O.C.G. A. § 44-14-64 (d)** provides an exception to “recording” each assignment, it does not provide an exception for executing “valid” assignments for each transfer and creating a **valid chain of title** in writing as the statute of frauds would require.

9. Neither by proper assignment or legal documentation have the Defendants provided verification of their standing as agent, attorney, debt collector, lender, note holder, holder in due course, servicer, investor, trustee, or otherwise in the matter.

(a) Before the days of Securitization of Mortgages this was a simpler matter. Traditionally, in “legacy mortgage transactions,” when borrowers executed a promissory note and a problem came up, they could easily deal

with a local banker or someone from their community who could address their problems or issues. Their lender was someone they could see face-to-face and talk to.

(b) Today when problems arise in a loan transaction, a borrower typically only gets to speak to someone on the phone who may be across the country or overseas – like India or Mexico. The “contact person” is often a contractor or vendor (sub-servicer) for a servicer who is yet another contracted payment collector for a trust or other entity that is a contractor for the eventual owner or holder of a debt that could be a Wall St. firm, a hedge fund, foreign government, intelligence agency and even a terrorist organization.

10. Clarifying Defendant’s roles in the current mortgage transaction processes are difficult or impossible. Not only have defendants refused to provide information, they swap the alleged servicing rights and note ownership between them quickly without proper written recording.

11. In the three months before Defendants attempted the unlawful foreclosure, the servicers and alleged lenders change hands three times.

i) On April 22, 2009 Homecomings Financial (servicer) reported that JPMC “currently owns the loan.”

- ii) However, on June 10th, GMAC Mortgage (new servicer) said that
“RESIDENTIAL FUNDING CORP “currently owns the interest in your
account.”
- iii) According to Defendant DEMARLO’s July foreclosure letter “BNYMT
had succeeded JPMC as creditor.”
- iv) That means the note for the subject property will have had to have been
sold by RESIDENTIAL FUNDING CORP back to JPMC and acquired
by BNYMT within a two week period! Whew. **(See Attachments –
Defendants Letters – Foreclosing Attorney’s Letters.)**

12. Today a lender, tomorrow a servicer, the next day -who knows? The
Defendant’s true role at any given point in the mortgage transaction process is a
mystery. For example, Defendant McCurdy and Candler alternately and
simultaneously identify themselves as attorneys for both the Plaintiffs and
Defendants, and debt collectors. **(See DEMARLO Notice of Sale Under Power
Letter where he signs as Attorney-In-Fact for Wekesa O. Madzimoyo)**

13. When the Defendants block access to the governing master agreements
between buyers and sellers, properly executed and dated per the pooling and
servicing agreement (PSA) offering and documents, the complete chain of
assignments, etc. the Plaintiff is unlawfully robbed of his right to know the secured

creditor/holder in due course with whom he can negotiate, re-negotiate, or otherwise modify the terms of the Plaintiff's note as needed or desired.

Mortgage Fraud Via - Securitization

14. Plaintiff re-affirms and re-alleges paragraph 1. through the paragraph directly above and those below and herein as if set forth more fully herein below.

15. The Defendants admitted that Plaintiff- Madzimoyo's loan had been securitized via **RAMP 2006RP2 (Residential Asset Mortgage Products) with JPMorgan Chase Trust, NA (JPMC). According to Defendants' Notice of Foreclosure, Bank of New York Mellon Trust, NA (BNYMT)** succeeded JPMC as Trustee.

16. The Plaintiff was never told this mortgage would be securitized; nor did he have any knowledge of it; nor did he give his consent. Plaintiff's note was part of an elaborate securitization and securities fraud scheme wherein Plaintiff's note was reported to the SEC to be allegedly transferred to the **RAMP 20062RP** trust with the conditions precedent in the offering document and pooling and servicing agreements (PSA).

17. BNYMT as trustee is attempting to foreclose illegally, because the underlying promissory note and deed to secure debt was never lawfully negotiated, transferred

to, or possessed by either **JPMorgan Chase Bank, NA as Trustee for RAMP 2006RP2 (Residential Asset Mortgage Products)** or **Bank of New York Mellon Trust Company, N.A. fka The Bank of New York Trust Company**, and the trust is an empty shell.

18. In fact, the investors in **RAMP (Residential Capital, LLC: Residential Asset Mortgage Products, Inc., RAMP TRUSTS)** are suing the Wall Street financiers and banks that defrauded them and claim in their own N.J. class action suit (File No. 333-131211) that they as well as borrowers were defrauded by the fraudulent appraisals and incomes used in the loan origination, approval, and underwriting process.

19. While the Plaintiff's 18 questions in the initial request to Defendants to verify their standing might at first glance seem excessive, the illusive and sometime fraudulent nature of mortgage-backed securities made them necessary. (**See Petition, Attachments A – C**)

20. When Defendants refuse to provide information to help borrowers like the Plaintiff-Madzimoyo ascertain the true holder(s) in due course, even though they helped to create and benefit from the securitized mortgage labyrinth, at the very least, they are operating in bad faith.

GOOD FAITH AND FAIR DEALING

21. Plaintiff re-affirms and re-alleges paragraph 1. of the initial Petition filed in DeKalb County, GA on July 29th, 2009 through the paragraph directly above and those below and herein as if set forth more fully herein below.

22. O.C.G.A. 23-2-114 states in part that “Powers of Sale in deeds of trust, mortgages, and other instruments *shall be strictly construed and shall be fairly exercised.*” [emphasis added]

23. The Defendants, in **bad faith**, have refused to provide Plaintiff Madzimoyo with requested documents claiming “proprietary and confidential” business and trade practices.

24. It seems that some of those industry business and trade practices are becoming increasingly less confidential. Reputable newspapers like the New York Times feature articles that show a pattern of wide-spread fraud and abuse in the mortgage industry. The **New York Times on Oct. 15th** reported:

(a) “The documents from the lender, GMAC Mortgage, were approved by an employee whose title was "limited signing officer,"

an indication to the lawyer that his knowledge of the case was effectively nonexistent.

(b) Mr. Cox eventually won the right to depose the employee, who casually acknowledged that he had prepared 400 foreclosures a day for GMAC and that contrary to his sworn statements, they had not been reviewed by him or anyone else.”

25. Defendants are currently being investigated by Georgia and other state Attorney Generals to investigate their use of “ro-bo signers” and determine, among other things, if they:

1. Destroyed and concealed assignments and;
2. Fabricated and even forged assignments in order to:
 - a) Create standing or authority to foreclose;
 - b) Conceal the fact that the note was pledged and assigned to multiple parties;
 - c) Fix known broken chains in title;
 - d) Unlawfully transfer assets out of the estates and property of bankrupt mortgage companies

e) Conceal other parties to prevent suits upon investors due to assignee liability

(See Georgia To Investigate Foreclosures, Atlanta Journal and Constitution, Wednesday, October 13, 2010)

26. Plaintiff alleges that at all times herein mentioned, the Servicer, Securitization, and Trustee Defendants have disguised the transaction to create the appearance of the lender being a properly chartered and registered financial institution authorized to do business and to enter into the subject transaction, when in fact the real party in interest was not disclosed to the Plaintiff, and neither were the various fees, rebates, refunds, kickbacks, profits, and gains of the various parties who participated in the unlawful securitization scheme

27. The Defendants' refusal or inability to provide evidence of the complete chain of title as ordered by Georgia DeKalb County Superior Court Judge Tangela Barrie, and subsequent rush to removal to federal Court supports the Plaintiff's contention that they did not because they cannot, and leaves the Plaintiff in adversary proceedings with ghosts.

28. Any grant of a certificate of title to an entity other than the Plaintiff creates an incurable defect in title. There is no recording of any document in the DeKalb

county records relative to the subject property by the Defendants that predates BNYMT's attempt to initiate foreclosure which would authorize them to proceed.

FAIR DEBT CREDIT PROTECTION ACT (FDCPA) VIOLATIONS

29. Plaintiff re-affirms and re-alleges paragraph 1. through the paragraph directly above and those below and herein as if set forth more fully herein below.

30. 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.” They are therefore subject to the rules of **THE FAIR DEBT COLLECTION PRACTICES ACT (FDCPA), 15 U.S.C. §§ 1692-1692p.**

31. The text of Defendant ANTHONY DEMARLO AND MCCURDY & CANDLER LLC letters to the Plaintiff indicate they were sent to induce the homeowner to settle the alleged mortgage-loan debt in order to avoid foreclosure. They were admittedly “sent in connection with an attempt to collect a debt,” **Ruth v. Triumph P'ships, 577 F.3d 790, 798 (7th Cir. 2009)**, and were in violation of the **FDCPA**.

32. Defendant ANTHONY DEMARLO AND MCCURDY & CANDLER LLC also threatened legal action on behalf of Co- Defendants that it could not execute because said Co-Defendants were in violation of GA mortgage requirements nor had they provided legal documentation to establish that they were indeed the secured creditors, authorized servicers, holders in due course. This was in direct violation of **FDCPA Sections § 1692 (e and f)**.

33. Typically, lawyers argue that they are shielded from liability by the FDCPA's "bona fide error defense," which provides that debt collectors are not liable for FDCPA violations that were "not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." **15 U.S.C. § 1692k(c)**

34. However, the **US Supreme Court on April 21, 2010 ruled 7-2** otherwise. The ruling in **Jerman v. Carlisle, McNeelie, RINI, Dramer & Ulrich LPA (No. 08-1200)** makes sure that debt collectors – including lawyers -- are treated like everyone else when violating a federal statute. It makes clear that unlawful behavior will not be excused, and will be punished to the fullest extent of the law. Specifically, the Supreme Court held that:

- i. “the 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.”

35. One of the basic tenets of FDCPA is that collectors must validate the debt and creditors must verify (not validate) their standing as “creditors.” The Defendants

steadfastly refused to verify their standing as “creditors,” and as such forfeit their standing as “creditors” to any alleged debt owed by the Plaintiff.

36. For months prior to the attempted illegal foreclosure, Plaintiff sent **letters (See Petition, Attachments A – C)** to Defendants including an Affidavit for them to Cease and Desist asking for validation of both the alleged debt and to verify their standing as secure creditors by providing documents governing the myriad of buyer-seller-assignee agreements that would clarify their standing. They refused to provide the requisite documents. In direct violation of FDCPA, most Defendants just ignored Plaintiff’s request, but one response on Homecomings Financial’s letterhead went further -stating:

(a) “the information requested is subject to business and trade practices which are proprietary and confidential and will not be provided.”

While that letter was printed on Homecomings company letterhead, the letter was unsigned. **(See Petition - Attachment E Copies of Defendants Letters June 22, 2009)**

37. Plaintiff Madzimoyo maintains that he does not owe any of the Defendants any money whatsoever, and that debt on the subject property has been satisfied.

Therefore their continued communication with him was as debt collector and their refusal to verify themselves as “creditor” violates FDCPA section § 1692 g.

QUIET TITLE/SLANDER TITLE

38. Plaintiff re-affirms and re-alleges paragraph 1. of the initial Petition filed in DeKalb County, GA on July 29th, 2009 through the paragraph directly above and those below and herein as if set forth more fully herein below.

39. In addition to seeking compensatory, consequential, punitive and other damages, Plaintiff seeks declaratory relief as to what (if any) party, entity or individual or group thereof is the owner of the promissory note executed at the time of the loan closing by Plaintiff Madzimoyo, and whether the purported Deed to Secure Debt (“Deed”) secures any obligation of the Plaintiff to any Defendant, and if not, a Final Judgment granting Defendant Quiet Title in the subject property and an unsecured note payable to its true owners.

40. While purporting to have standing, the Defendants by initiating foreclosure proceedings, actually slandered the Plaintiff’s title, and in violation of O.C.G.A 44-14-162.2 (A-C), the Defendants routinely refused and failed to show in any way how any one of them have the capacity, standing, and or authority to:

- a. Accelerate the Plaintiff Madzimoyo's Note;
 - b. Exercise a valid Power of Attorney to conduct a non-judicial foreclosure sale of the property;
 - c. Advertise and notice a non-judicial foreclosure action;
 - d. Modify any terms or conditions of the Plaintiffs' Note;
 - e. Collect any fees owed to the note's defined "Note Holder;"
 - f. Release and satisfy the Plaintiff's Deed;
 - g. Cancel and return the Plaintiff's Note.
-

41. There is a genuine issue of material fact as to whether the Plaintiff Madzimoyo's note was ever equitably and lawfully assigned to any party, let alone the Defendants, and the invisible intervening owners and holders in the alleged securitization chain.

Wherefore, Plaintiff requests

1. That the Court order a Temporary and Permanent Injunction precluding the foreclosure sale of the property or any other disposition of the subject property;
2. That the Court grant Declaratory Judgment which states Defendants JPMC, GMAC, BNYMT had and have no legal standing or the proper legal or

equitable interest in either the Note AND Security Deed to institute or maintain a foreclosure;

3. That the Court determine and rule on the lawful chain of title to the Plaintiff's note so as to determine each lawful transfer and who the current holder in due course of the Plaintiff's note is, If any;
4. That the Court , finding none of the Defendants to be holders in due course, issue a Final Judgment granting Defendant Quiet Title in the subject property and an unsecured note payable to its true owners.
5. That the Defendants be required to pay damages to the Plaintiff for the slander of Plaintiff's title to land;
6. That the Defendants be required to pay damages to the Plaintiff for the violations of the Fair Debt Collection Act;
7. That the Defendants be required to pay damages including punitive damages to the Plaintiff for bad faith and fraudulent acts against the Plaintiff;
8. That the Court void and further declare the Plaintiff's property free and clear from all claims and encumbrances; and
9. That the Court includes relief for the Plaintiff that takes into account the financial burden caused by this Defendant's actions, litigation as well as the infliction of emotional distress and that the court includes relief as it may deem necessary and just.

Submitted this _____ day of _____, 2010

Wekesa O. Madzimoyo
Pro See Litigant

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FONT VERIFICATION

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

/s/ _____
Wekesa O. Madzimoyo
Pro See Litigant

CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended

Complaint has been serviced to:

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