

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ATLANTA
CIVIL ACTION NUMBER: _____**

WEKESA O. MADZIMOYO

Plaintiff,

vs.

GMAC, LLC, et al

Defendants

**PLAINTIFFS' MOTION FOR REMAND AND
INCORPORATED MEMORANDUM OF LAW**

COMES NOW, the Plaintiff, WEKESA O. MADZIMOYO (pro se), hereby files his Motion for Remand and Incorporated Memorandum of Law and as grounds therefore states as follows:

1. On July 29, 2009 WEKESA O. MADZIMOYO filed a petition against the defendants GMAC Mortgage, LLC, Mccurdy & Candler, LLC, Anthony DeMarlo, Attorney, JP Morgan Chase Bank, and The Bank of New York Mellon Trust Company, N.A.(GMAC MORTGAGE, LLC, et. Al) in the Georgia State Superior Court of DeKalb County, Case No. **09-CV-9136-10** for a Temporary Restraining Order (TRO) (**O.C.G.A. § 9-11-65(b)**) to prevent the Defendants from foreclosing on his home at 852 Brafferton PL, Stone Mountain, Georgia. Based on defendants' violation of Georgia Code **O.C.G.A.-44-14-162-2** requiring them to file real estate assignments, and/or change of ownership of security deeds in the Dekalb County, Georgia courthouse. After reviewing the Plaintiffs' 50-page documentation of our efforts to

communicate with defendants, the court issued the TRO and ordered that the defendants bring proper evidence of the chain of title to a hearing for August 28, 2009.

2. On August 27th, 2009, THE defendants GMAC MORTGAGE, LLC, et al. filed a Notice of Removal citing 28 U.S.C § 1441. The defendants claim original jurisdiction stating “Plaintiff alleges claims arising under laws of the United States, 28 U.S. C. § 1331.” (See Attachment A).

3. The DEFENDANTS emphasize the “FEDERAL QUESTION” when, in fact, the Plaintiff’s original petition filed in the Georgia State Superior Court of Dekalb County was based on Georgia **O.C.G.A.- 44-14-162-2**, prohibiting foreclosure prior to recording appropriate security deeds or assignments.

From Plaintiff’s petition (See attachment B):

- a) Above-named Defendants have unlawfully and wrongfully moved to foreclose on property located at 852 Brafferton Place, Stone Mountain, Georgia, 30083 owned by WEKESA O. MADZIMOYO (Plaintiff) scheduled to be auctioned on the courthouse steps on August 4, 2009.

- b) Plaintiff signed a security deed with FT MORTGAGE COMPANIES dba EQUIBANC MORTGAGE CORPORATION on March 23, 1999 which was recorded in the Office of the Clerk of Superior Court of DEKALB COUNTY. To date, there has not been one assignment, transfer or sale associated with the property located at 852 Brafferton Place Stone Mountain, Georgia, 30083 therefore precluding

defendants any standing to foreclose on said property. Only the documented lender/holder of the note can foreclose on said property. **OCGA-44-14-162-2** requires that the current holder of the mortgage loan record the assignment of the security deed, which shows the present owner of the mortgage loan, in the public record of the clerk of superior court of the county in which the real property is located before conducting the foreclosure sale.

Federal law did not create the cause of action (O.C.G.A. – 44-14-162-2); see *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986), nor did the plaintiff’s state law claim require the resolution of an “actually disputed and substantial” federal issue. The state action claims violations arising exclusively under Georgia law.

4. Defendants also assert (8) in their Notice of Removal that “As a result of Plaintiff defaulting on her loan payments, GMAC... initiated foreclosure proceedings on the Property.”

On the contrary, the plaintiff is not in default and never has been in default. The plaintiff was current at the time he began requesting information from the defendants that would establish them as the lawful lenders/holders. Plaintiff subsequently chose to exercise his legal right to withhold his payment pending verification.

Not one of the defendants has provided official verification of their standing as agents, attorneys, debt collector, lender, note holder, servicers, investors, trustee, attorney-in-fact or otherwise in this matter which would provide Plaintiff with evidence of the defendants’ lawful standing in this matter and determine who is the rightful lender/mortgage note holder. Defendants’ refusal to provide the proper verification has denied Plaintiff his right to lawful discovery.

Proper and lawful recording of the sales, transfers, assignments, regarding the property would aid this lawful right to discovery.

5. The Superior Court Judge's order - "The Defendants are directed to bring proper evidence of the chain of title on this property to the hearing" shows a respect for Georgia statute **O.C.G.A.-44-14-162-2** designed to protect the rights of the mortgagor and the mortgagee.

The Plaintiff attached to the petition for Emergency TRO in State Superior court all documents previously sent to and received by the Defendants including ones asserting Plaintiff's rights to the requested information under federal statutes (Fair Debt Collection Practices Act, Truth In Lending Regulation) to show the Court diligence in his effort to secure information from Defendants and their months-long refusal to do so.

6. Defendants acknowledges Plaintiff's state claims, but assert that these can be handled in the federal court via supplemental jurisdiction (28 USC § 1367). However, the State issues raised in this case, at this point, disqualifies it from supplemental jurisdiction.

Section 1367 of Title 28, United States Code, provides in relevant part:

Except as provided in subsections (b) and (c)

- (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if-
 - a. (1) the claim raises a novel or complex issue of State law;
 - b. (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction;

The issues in this case raise "a complex issue" of state law. Kansas' state supreme court provides an example in *Landmark National Bank v. Kesler* . The unique national and state

climates of predatory lending, mortgage fraud, record foreclosure rates, default swaps, mortgage securitization, mortgage banking utilities like MERS, and the subsequent refusal of lenders/servicers/note holders to adhere to customary and statutory state mortgage and real estate recording practices are forcing state courts and legislators to decide if or how they will enforce the state real estate recording laws which have existed to establish priorities and rights of individuals who are affected by the chain of title or encumbrances on the real estate. Typically, the laws have been applied to resolve issues in the “mortgagee’s world.” Issues of the “mortgagor’s world” like who is the real lender, and the subsequent fear of paying twice because the borrower didn’t pay the right lender were rare or non-existent. Such is not the case today. Now, Georgia and other state courts and legislators have to decide if and how they will now protect the discovery and due process rights of the states’ home buyers and borrowers in the face of unprecedented mortgage-to-securities challenges.

6. WEKESA O. MADZIMOYO has filed his Motion for Remand within thirty (30) days of Defendants’ filing of its Notice of Removal. Therefore, this Motion for Remand is timely.

7. WEKESA O. MADZIMOYO has incurred counsel fees and costs in conjunction with the filing of this Motion for Remand. If Plaintiff’s Motion for Remand is granted, he respectfully request this Court enter an Order requiring Defendants to pay “just costs and any actual expenses including counsel fees incurred as a result of the removal.” *See* 28 U.S.C. §1447(c).

8. For all of the above reasons and for those stated within the following memorandum of law, WEKESA O. MADZIMOYO Complaint should be remanded to the State Superior Court of Dekalb County, Georgia.

WHEREFORE, the Plaintiffs, WEKESA O. MADZIMOYO, respectfully request this Court to:

1. Remand this case back to the State Superior Court of Dekalb County, Georgia;
2. Award WEKESA O. MADZIMOYO reasonable counsel fees and costs incurred in conjunction with preparing this Motion for Remand; and
3. Grant any other relief this Court deems just and proper.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR REMAND

I. APPLICABLE FEDERAL STATUTES AND RULE

* * *

28 U.S.C. §1332(a) (2008).

United States Code §1447 (2008) entitled, "Procedure After Removal Generally," provides in pertinent part:

(c) A motion to remand a case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction of the jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney's fees, incurred as the result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

28 U.S.C. §1447(c) (2008).

II. FEDERAL JURISDICTION

A. Burden

"The burden of establishing federal jurisdiction falls on the party attempting to remove a case from state court." *Golden v. Dodge-Markham Co., Inc.*, 1 F.Supp.1360,

The court's removal jurisdiction must be strictly construed. *Burns v. Windsor Insurance Company*, 31 F.3d 1092, 1095 (11th Cir. 1994). "[W]here a plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand." *Burns v. Windsor Insurance Company*, 31 F.3d 1092, 1095 (11th Cir. 1994), citing *Boyer v. Snap On Tools Corp.*, 913 F.2d 108 (3rd Cir. 1990); *Coker v. Amoco Oil Company*, 709 F.2d 1433 (11th Cir. 1983).

B. Doubt As to Federal Jurisdiction.

Where there is any doubt concerning the jurisdiction of the federal court on removal, the case should be remanded. *Woods v. Firestone*, 560 F. Supp. 588 (S.D. Fla. 1983). Jurisdiction should be retained only where jurisdiction is clear. *Id.* The federal district court must remand to the state court any case that was removed improvidently or without necessary jurisdiction. *Glaziers, Glassworkers, Inc. v. Florida Glass & Mirror*, 409 F. Supp. 225, 226 (M.D. Fla. 1996).

IV. ENTITLEMENT TO ATTORNEYS' FEES AND COSTS

WEKESA O. MADZIMOYO incurred council fees and costs in conjunction with the preparation of this Motion for Remand. 28 U.S.C. §1447(c), as amended in 1998, provides in relevant part that “[a]n order remanding the case may require payment of just costs and any actual expenses, including council fees, incurred as a result of the removal.” The intent of the statute is to reimburse a party, like WEKESA O. MADZIMOYO, who has incurred expenses in attacking an insufficient removal.

V. CONCLUSION

The burden of establishing federal jurisdiction rests upon the party seeking removal. This Court lacks jurisdiction because GMAC MORTGAGE LLC, et al. has failed to meet its burden in proving that the jurisdictional threshold has been met for federal jurisdiction. Therefore, this case should be remanded to the State Superior Court of Dekalb County, Georgia.

WEKESA O. MADZIMOYO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a copy of the foregoing document upon the following by placing the same in the U.S. Mail, postage prepaid and properly addressed on this the _____ day of September, 2009

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