

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORIGIA
ATLANTA DIVISION

CIVIL ACTION FILE

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

Wekesa O. Madzimoyo,
-Plaintiff

}

v.

}

THE BANK OF NEW YORK
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
-Defendants

}

Motion For Reconsideration

}

}

}

}

}

}

Wekesa O. Madzimoyo, (plaintiff) in the above-named case, hereby moves for reconsideration of denial of Plaintiff's motion for remand to state court from an order by Judge Gerrilyn G. Brill, United States Magistrate Judge, entered in this action on the 18th day of March, 2010

(s) _____

Wekesa O. Madzimoyo

Pro Se Litigant

Address:

852 Brafferton PL,

Stone Mountain, GA 30083

404-201-2356 FAX: 815-366-8133

MOTION FOR RECONSIDERATION

Plaintiff seeks reconsideration of Remand Motion and a reversal of Judge's previous order because all claims in Plaintiff's Petition for Emergency Temporary Restraining Order presented in DeKalb County, GA superior court on July 29, 2009 (ruled upon by State Judge Tangela Barrie, and subsequently removed by the Defendants) were state law claims.

STANDARD OF REVIEW:

As in **Dial v. HealthSpring of Alabama, Inc (Eleventh Circuit 2007)** the standard of review for federal question jurisdiction is *de novo*.

FACTS:

1. Plaintiff signed a security deed with FT Mortgage Companies in 1999 for 852 Brafferton PL, Stone Mountain, GA 30083, as recorded in the office of superior court of Dekalb County, GA. Plaintiff had been paying a mortgage note ever since.
2. Given the rise of predatory lending and other mortgage and lending irregularities nationally, and particularly in DeKalb County, GA, on

April 13, 2009 Plaintiff inquired, via certified mail, of known servicers/ lenders - asking them to provide proof of their standing as rightful lenders and servicers, debt collectors, note holders, investors, trustees, attorneys in fact, etc.

Plaintiff stressed his willingness to continue paying pursuant to their providing the aforementioned verification of authority.

3. Defendants failed to provide such verification.
4. Plaintiff repeated requests via certified mail.
5. Defendants moved to foreclose.
6. Plaintiff sent Defendants a demand that they cease and desist all foreclosure procedures set for the property at 852 Brafferton Place, Stone Mountain, GA, and repeated demand that Defendants provide verification of their authority as rightful lenders and servicers, debt collectors, note holders, investors, trustees, attorneys in fact, etc.

7. Defendants failed to respond to the Cease and Desist Demand, and continued foreclosure procedures.
8. Plaintiff recorded a *lis pendens* (Affidavit of Notice of Demand for Cease and Desist) against the property to alert a potential purchaser or lender that the property's title is in question.
9. After still getting no response, Plaintiff went to the clerk of Superior Court Real Estate Division to see who was listed as the legal assignee or owner of the mortgage loan. Upon finding no assignment, transfer or sales associated with the property located at 852 Brafferton PL, Stone Mountain, GA 30083, Plaintiff filed an Emergency Petition for Temporary Restraining Order (TRO) to Stop Foreclosure pursuant to **OCGA-44-14-162.2** which 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 in the office of the clerk of superior court of the county in which the real property is located before conducting the foreclosure sale.
10. Dekalb County Superior Court Judge, Tangela Barrie:

- a. Granted plaintiff's petition for a TRO;
- b. Restrained Defendants from proceeding with the scheduled foreclosure on the property on August 4, 2009;
- c. Superior Court Judge Barrie ordered: "THE DEFENDANTS ARE DIRECTED TO BRING PROPER EVIDENCE OF THE CHAIN OF TITLE ON THIS PROPERTY TO THE HEARING" scheduled for 1.00 PM on August 28st, 2009.

11. On August 27th, 2009, Defendants removed the case to Federal Court.

12. Plaintiffs filed their motion for remand on September 25, 2009.

13. Judge Gerrilyn G. Brill denied Plaintiff's motion for remand on the basis of federal question jurisdiction on March 18, 2010.

ARGUMENTS:

Plaintiff request that Judge Brill's denial be reversed, and that the case be remanded back to State Court, and as grounds for said request states:

- a. Judge Brill erred in her finding that "Here Plaintiff brings two claims that arise under federal laws, specifically his claims under FDCPA and TILA." Plaintiff made four claims in the original petition for TRO granted by State Superior Judge, Tangela Barrie, and removed by the Defendants. Plaintiff alleged all four of these claims under state law. There is no federal question raised in any of the four claims.

Here are the claims:

Claim 1: Above named Defendants have unlawfully and wrongfully [in contradiction to GA law] moved to foreclose on the 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.

Claim 2: 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 the

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 from 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 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 in the office of the clerk of the superior court of the county in which the real property is located before conducting the foreclosure sale.

Claim 3: Not one of the Defendants have provided official verification of their standing as agent, attorney, debt collector, lender, note holder, servicer, investor, 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. Defendant's refusal to provide the proper verification has denied Plaintiff his right to lawful discovery and caused Plaintiff to hold his payments pending verification. Plaintiff wants to pay the proper party(s).

Claim 4: Defendants are unlawfully [in contradiction to GA law] foreclosing on the above named property and Plaintiff is asking the court to stop the foreclosure proceedings before August 4, 2009.

b. In both the accounts of the Procedural History and Discussion, Judge Brill erroneously included items that were not a part of the Plaintiff's claims, but information provided in the "**Chronology of Events and attached documents**" section included in the Emergency Petition for Temporary Restraining Order to Stop Foreclosure filed with the state superior court judge.

c. According to Judge Brill's "**Procedural History:**"

1. "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." (Doc. 1-2 at 20). In this document Plaintiff demanded that Defendants cease and desist all foreclosure procedures set for the property at 852 Brafferton Place, Stone Mountain, Georgia 30083. (Id. At 21). Plaintiff also demanded that "all parties and associates named and unnamed... provide verification of their authority as agents, attorneys, debt collector, lender, note holder, services, investor, trustee, attorney in fact, etc." (Id.) Plaintiff stated that this information was requested pursuant to the Fair Debt Collection Practices Act, 15 U.S.C. §1692, et seq. ("FDCPA) and the Truth in Lending Act, 15 U.S.C. § 1601 et. Seq. ("TILA"). (Id.). ..."

From Judge Brill's remand denial "**Discussion Section:**"

2. "...Accordingly, for removal to be proper, one or more of the plaintiff's state claims must have arisen under federal law. Here Plaintiff brings two

claims that arise under federal laws, specifically his claims under the FDCPA and TILA.”

The recount of the procedural history is inaccurate (see Facts, see original state petition including attachments), and more importantly completely ignores Plaintiff’s claims as presented in the Emergency Petition for a TRO.

Most incredibly, Judge Brill reached into the “chronology of events” and documents attached, but not pleaded, to find items to justify federal question jurisdiction requirements.

- d. As in the case of **Dial v. HealthSpring of Ala, Inc, 2007** mere mention or involvement with federal programs doesn’t automatically establish federal question jurisdiction. In **Dial v. HealthSpring of Ala., Inc.** the 11th Circuit Court of Appeals state:

This appeal presents the question whether a complaint about conduct regulated by the Medicare Act filed in a state court may be removed to a federal court. Seven individual beneficiaries of the federal Medicare program filed a complaint against HealthSpring of Alabama, Inc., the administrator of a Medicare Advantage health-insurance plan.

Ordinarily, “[t]o determine whether [a] claim arises under federal law, we examine the ‘well pleaded’ allegations of the complaint and ignore potential defenses.” *Anderson*, 539 U.S. at 6, 123 S. Ct. at 2062. The

complaint expressly alleges only state-law claims, but HealthSpring argues that the complaint contains claims that fall within an exception to the well-pleaded complaint rule that applies “when a federal statute wholly displaces the state-law cause of action through complete pre-emption.” *Id.* at 9, 123 S. Ct. at 2063.

The Court reversed the lower court ruling.

Judge Brill’s Denial of Plaintiff’s Remand motion doesn’t claim exception at all. The Judge simply ignores the state claims. A review of which shows that neither FDCPA nor TILA claims were alleged.

The “Affidavit for Notice of Demand for Cease and Desist of Foreclosure Procedure” noted by Judge Brill was filed by the Plaintiff 12 days prior to the Plaintiff’s Petition for a TRO as a *lis pendens*, and was included in the part of the “Chronology of Events and attached historical documents - not a part of the claims set forth in the Plaintiff’s state petition for a TRO.

While the Defendants and Judge Brill may anticipate a TILA or FDCPA filing based on the Plaintiff’s chronology of events or other documents attached, that isn’t sufficient to establish federal jurisdiction. In **AETNA HEALTH INC. vs. JUAN DAVILA (United States Supreme Court 2004)**, Justice Thomas delivered the opinion of the court which held that “Ordinarily, determining whether a particular case arises under federal law turns on the “well-pleaded complaint” rule. *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 9-10 (1983).

1. "Whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute[,] ... must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Taylor v. Anderson*, [234 U. S. 74, 75-76](#) (1914). *Taylor v. Anderson* [234 U. S. 74, 75-76](#) (1914) continues: “Apparently, their purpose was to anticipate and avoid a

defense which it was supposed the defendants would interpose, but, of course, it rested with the defendants to select their ground of defense, and it well might be that this one would not be interposed.”

- e. Just as it rests with the defense to select the grounds for their defense, in *Taylor v. Anderson* [234 U. S. 74, 75-76](#), it rests with the Plaintiff to select the ground for his claims, and it well “might be that the anticipated ones would not be interposed.”
- f. While the Plaintiff studied filing procedures for the State prior to filing, and while he wrote the petition based on the four state-based claims listed above, and while he assumed that the heading “**Chronological History**” was sufficient to demark the end of his claims and beginning of background history, Plaintiff requests that any confusion be attributed to his pro se filing status (**See: Haines v. Kerner, 404 U.S. 519, 520 (1972) , Conley v. Gibson, 355 U.S. 41, 45-46, 1957)** and allow this document to make it crystal clear – There is no federal claim or federal question as presented in the original Emergency Petition for The TRO.
- g. Judge Brill’s denial of our Remand Motion effectively bars Plaintiff from state protection heard in state court. **OCGA-44-14-162.2**

provides protection for its citizens as buyers in land/mortgage transactions by requiring proper and timely recording of purchases, security deeds, and assignments- noting the mortgage loan holder. It protects, among other things, Georgia citizens from wrongful foreclosure and fraud. Failure to remand this back to state superior court strips the Plaintiff of the right to be heard in state court and to be protected by Georgia law duly enacted for his protection.

Conclusion:

Judge Brill erred in the findings by:

- 1) Relying on the chronology of events/ public notice filing versus the claims presented by the Plaintiff;
- 2) By anticipating federal claims when there were none;
- 3) By finding a federal question when there was none;
- 4) By denying Plaintiff protection of GA state law

Therefore, the Plaintiff requests that Judge Brill reconsider and reverse her denial of the Plaintiff's remand motion and that Plaintiff's motion for remand be granted immediately.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Reconsideration has been served via U.S. Mail, postage prepaid and properly addressed on this 14th day of April, 2010 to:

D. Brian O'Dell
D. Brian O'Dell (Georgia Bar No. 549399)
Bradley Arant Boult Cummings LLP
1819 Fifth Avenue North
Birmingham, AL 35203
205-521-8000; 205-521-8800 (fax)
Attorney for GMAC Mortgage, LLC
JP Morgan Chase Bank and the Bank of New York Mellon Trust
Company, N.A.

Frank R. Olson, Esq.
John D. Andrle, Esq.
McCurdy & Candler, LLC
P.O. Box 57
Decatur, GA 30031

