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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Case No. 12-12020 (MG)
RESIDENTIAL CAPITAL, LLC, et al.,	Chapter 11
Debtors.	Jointly Administered
YVONNE D. LEWIS, et al.,	Adv. Case No. 12-01731 (MG)
Plaintiffs,	
v.	
GMAC, MORTGAGE CO., LLC,[1] Defendant.	

DEBTORS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT BY PLAINTIFFS; GROUNDED ON (1) FEDERAL PREEMPTIONS FOR FEDERAL PROGRAMS UNDER HUD (42 U.S.C. § 3535(I)(1)) AND US DOT (49 U.S.C. § 47502); AND "SEPARATION OF POWERS" OF FEDERAL AGENCIES ON 09/08/2011 IN STATE COURT CASE NO. 05-CV-4555, FR. CNTY., OHIO

[1] It is unclear whether the Plaintiffs intended to name only "GMAC, Mortgage Co., LLC" or multiple Debtors as defendants. The Debtors are also uncertain as to which Debtor the Plaintiffs are referring. Out of an abundance of caution, this Motion is filed on behalf of all of the Debtors.

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The debtors and debtors in possession, (collectively, the "Debtors"), by and through their undersigned counsel, hereby file this Opposition (the "Opposition"), pursuant to Rule 56 of the Federal Rules of Civil Procedure (the "Federal Rules"), made applicable to this adversary proceeding under Rule 7056 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rule 7056-1 of the Local Bankruptcy Rules of the Southern District of New York (the "Local Rules"), to the *Motion for Summary Judgment by Plaintiffs; Grounded on (1) Federal Preemptions for Federal Programs Under HUD (42 U.S.C. § 3535(i)(1)) and US DOT (49 U.S.C. § 47502); and "Separation of Powers" of Federal Agencies on 09/08/2011 in State Court Case No. 05-CV-4555, Fr. Cnty., Ohio* [Docket No. 12] (the "Motion").

In support of this Opposition, the Debtors, by and through their undersigned counsel, represent as follows:

PRELIMINARY STATEMENT

1. The Plaintiffs' Motion is both procedurally and legally deficient. On the procedural front, the Plaintiffs: (i) failed to seek a pre-motion conference in advance of filing the Motion, and (ii) failed to submit the required statement of material facts as to which the Plaintiffs contend there is no genuine issue to be tried. Thus, the Plaintiffs have failed to follow the prescriptions set forth in Local Rule 7056-1, and such failure is sufficient grounds for denying the Motion.

2. The Motion also is legally deficient. As the Debtors have noted in their pending *Motion for Judgment on the Pleadings in Response to Yvonne D. Lewis, et al.'s Adversary Complaint by Surplus Creditors for False Claims and RICO, 31 U.S.C.A. §§ 3729 to 3733; 18 U.S.C. §§ 666, 1962; BR Rule 7008* [Docket No. 14], the Plaintiffs have filed an incomprehensible complaint and various related documents, which name numerous legal theories

but do not clearly state a request for relief supported by these theories or any facts that support such theories. The Plaintiffs' Motion provides scant further clarity to the claims advanced and the relief sought by the Plaintiffs, and the Motion asserts no cognizable legal theory in support of whatever those claims may be. Accordingly, the Court should deny the Motion.

BACKGROUND

A. Chapter 11 Case Background

3. On May 14, 2012 (the "Petition Date"), each of the Debtors filed a voluntary petition in this Court for relief under Chapter 11 of the Bankruptcy Code. The Debtors are managing and operating their businesses as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108. No trustee has been appointed in these Chapter 11 cases.

4. On May 16, 2012, the United States Trustee for the Southern District of New York appointed a nine member official committee of unsecured creditors.

5. On June 20, 2012, the Court directed that an examiner be appointed, and on July 3, 2012, the Court approved Arthur J. Gonzalez as the examiner [Docket Nos. 454, 674]. The Debtors are a leading residential real estate finance company indirectly owned by Ally Financial, Inc. ("AFI"), which is not a Debtor. The Debtors and their non-debtor affiliates operate the fifth largest servicing business and the tenth largest mortgage origination business in the United States. A more detailed description of the Debtors, including their business operations, their capital and debt structure, and the events leading to the filing of these bankruptcy cases, is set forth in the Whitlinger Affidavit [Docket No. 6].

B. Adversary Proceeding Background

6. On June 22, 2012, the Plaintiffs filed a complaint commencing this adversary proceeding (the "Complaint") [Docket No. 1].

7. On July 30, 2012, the Debtors filed their Answer and Affirmative Defenses to Yvonne D. Lewis, et al.'s Adversary Complaint by Surplus Creditors for False Claims and RICO, 31 U.S.C.A. §§ 3729 to 3733; 18 U.S.C. §§ 666, 1962; BR Rule 7008 (the "Answer") [Docket No. 7].

8. On August 8, 2012, the Court held a status conference on this matter.[2]

9. On August 10, 2012, the Plaintiffs filed a Settlement Conference Report [Docket No. 11].[3]

10. On August 23, 2012, the Plaintiffs filed a Motion for Summary Judgment Grounded on (1) Federal Preemptions for Federal Programs Under HUD (*42 U.S.C. § 3535 (i)(1)*) and US DOT (*49 U.S.C. § 47502*); and "Separation of Powers" of Federal Agencies on 09/08/2011 in State Court Case No. 05-CV-4555, FR. CNTY., Ohio [Docket No. 12].

11. On September 12, 2012 the Debtors filed a motion for judgment on the pleadings [Docket No. 14].

ARGUMENT

A. The Motion Should Be Denied Because the Plaintiffs Failed to Meet the Requirements of Local Rule 7056-1.

12. The Court should deny the Motion because the Plaintiffs have failed to meet each of the requirements of Local Rule 7056-1.

[2] At the status conference on August 8, 2012, the Court made several inquiries regarding the Plaintiffs' bankruptcy cases. The Debtors have determined that the Plaintiffs' bankruptcy cases were dismissed. Because the Debtors have been unable to determine the nature of the Plaintiffs' claims in this adversary proceeding, the Debtors are unable to determine whether any of the claims asserted here are (i) claims that were resolved in the Plaintiffs' bankruptcy cases, (ii) mandatory counterclaims in the Plaintiffs' foreclosure proceedings, or (iii) claims that can only be asserted by the Plaintiffs' bankruptcy estates. The Debtors' counsel here has conferred with the Debtors' counsel in the Plaintiffs' bankruptcy cases, which were Chapter 7 proceedings. The Debtors' Lewis bankruptcy counsel confirmed that certain defenses, such as standing to bring these claims, res judicata, and whether the Plaintiffs' claims here were mandatory counterclaims in the Plaintiffs' foreclosure proceedings, may be available to the Debtors here. However, because both sets of Debtors' counsel have been unable to discern the nature of the claims advanced in this adversary proceeding, counsel has been unable to determine with finality the availability of the defenses. The Debtors reserve their rights to raise these defenses.

[3] The Settlement Conference Report contains several inaccuracies. In particular, the Debtors dispute the allegedly "settled" issues and the agreement to mediate. No settlement was ever reached between the parties.

13. First, the Plaintiffs did not request a pre-motion conference as required by Local Rule 7056-1(a). See S.D.N.Y. Local Bankr. R. 7056-1(a) (prohibiting a party from filing a motion for summary judgment "without first seeking a pre-motion conference," which request must be "made by letter, filed on the CM/ECF system, setting forth the issues to be presented in the motion and the grounds for relief.").

14. Second, the Plaintiffs failed to include the requisite statement containing, in numbered paragraphs, the material facts as to which the Plaintiffs assert there is no genuine issue to be tried, along with a citation to evidence that would be admissible. See S.D.N.Y. Local Bankr. R. 7056-1(b) ("there shall be annexed to the motion a separate, short, and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried."); S.D.N.Y. Local Bankr. R. 7056-1(e) ("Each statement by the movant or opponent pursuant to subdivisions (b) or (c) of this rule, including each statement controverting any statement of material fact by a movant or opponent, shall be followed by citation to evidence which would be admissible."). See also Novartis Corp. v. Luppino (In re Luppino), 221 B.R. 693, 696 (Bankr. S.D.N.Y. 1998) (Local Rule 7056-1 "requires the moving party to present a 'short, and concise' statement of the facts on which the movant relies in seeking judgment.").

15. According to the Local Rules, the Plaintiffs' failure to submit this statement "constitute[s] grounds for denial of the motion." S.D.N.Y. Local Bankr. R. 7056-1(b); Ross v. Tognetti (In re Tognetti), No. 03-37171, 2006 Bankr. LEXIS 2216, at *55 (Bankr. S.D.N.Y. June 21, 2006) (denying plaintiffs' motion for summary judgment for failure to submit a statement under Local Rule 7056-1). Such a denial is warranted here.

B. The Motion Should Be Denied Because the Plaintiffs Failed to Meet the Requirements of Federal Rule 56 and Bankruptcy Rule 7056.

16. The Court should deny the Motion because the Plaintiffs also failed to satisfy the requisite standard for summary judgment under Federal Rule 56 and Bankruptcy Rule 7056. Federal Rule 56, made applicable to this adversary proceeding by Bankruptcy Rule 7056, provides that "[t]he 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." Fed. R. Civ. P. § 56(a). No such showing has been made by the Plaintiffs.

17. To successfully assert that a fact is not in dispute or cannot be disputed, a movant must "cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or show[] that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. § 56(c)(1). See also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Gallo v. Prudential Residential Servs., 22 F.3d 1219, 1223 (2d Cir. 1994).

18. The Motion ostensibly sets forth two "facts" that appear in the Affidavit in Support of Motion for Summary Judgment (the "Lewis Aff."). First, the Plaintiffs allege that "Mortgagee-Assignee, Citi Mortgage" and "Mortgagee-Assignor, Chase Mortgage Company" assigned a certain "mortgage deed" to "GNMA," "without the consent of HUD Mortgagor" in January 2011. Lewis Aff. ¶ 3. Second, the Plaintiffs allege that "GMAC, as Assignee re-assigned [the "mortgage deed"] to Investor-Assignee… without the consent of HUD Mortgagor…." Lewis Aff. ¶ 4.

19. These are the only two facts that the Plaintiffs allege in support of their two causes of action (as discernible from the Motion) for: (i) "Federal preemption of state laws under National Housing Program 12 USC §§ 1710-1723" (see Motion at pp. 5-6 of Docket No. 12); and (ii) "Federal 'stated' preemption of state laws under Av-Ea Program 42 USC §§ 4903, 7573" (see Motion at pp. 6 of Docket No. 12). Notably, these causes of action as referenced in the Motion are entirely different from those alleged in the Complaint. The Complaint states that it is an "Adversary Complaint … for False Claims and RICO." The Plaintiffs apparently are moving for summary judgment on causes of action that do not even appear in their Complaint. Such a tactic is patently improper. See Brown v. Raimondo, 2009 U.S. Dist. LEXIS 129840 (N.D.N.Y Feb. 25, 2009) (holding that the plaintiff's summary judgment motion papers are "not the proper vehicle to instill new causes of action or add new defendants" and noting further that "[i]f Plaintiff wishes to supplement or amend his Complaint, he must follow the proper procedural mechanisms set forth in the [federal and local rules].").

20. The Motion advances no further facts in support of the relief being sought, is unclear as to the nature of the relief being sought, does not advance any rationale as to why the alleged "facts" support an award of summary judgment, and provides no explanation as to why the Plaintiffs are moving for summary judgment on claims that do not appear in the Complaint. There are not, moreover, any facts set forth demonstrating that any assignment of the referenced "mortgage deed" was in any way improper. Given this wholesale failure to allege facts demonstrating any entitlement to summary judgment and the attendant failure to demonstrate why these facts legally support such an award, summary judgment is unwarranted. See Rodriguez v. City of New York, 72 F.3d 1051, 1060-61 (2d Cir. 1995) ("The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists

and that the undisputed facts establish [the movant's] right to judgment as a matter of law."); McHale v. Boulder Capital LLC (In re The 1031 Tax Group, LLC), 439 B.R. 47, 58 (Bankr. S.D.N.Y. 2010) ("On a motion for summary judgment the movant bears an initial burden to come forward with evidence that satisfies 'each material element of his claim or defense, demonstrating that he is entitled to relief.'") (quoting Isaac v. City of New York, 701 F. Supp. 2d 477, 485 (S.D.N.Y. Mar. 22, 2010)).

CONCLUSION

For the reasons set forth above, the Court should deny the Motion, and grant such other relief as is just and proper.

Dated: New York, NY
September 20, 2012

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