

Hearing Date and Time: April 11, 2013 at 10:00 a.m. (Prevailing Eastern Time)
Objection Deadline: April 1, 2013 at 4:00 p.m. (Prevailing Eastern Time)

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Debtors in Possession*

**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

-----X	
Princess Dixon,	:
	:
Plaintiff,	:
	:
v.	:
	:
GMAC Mortgage Corporation, aka GMAC	:
Mortgage LLC, et al.	:
	:
Defendants.	:
-----X	
In re	:
	:
RESIDENTIAL CAPITAL, LLC, <i>et al.</i> ,	:
	:
Debtors	:
-----X	

Adv. Proc. 12-02088 (MG)

Case No. 12-12032 (MG)

Chapter 11

Jointly Administered

**NOTICE OF DEBTORS' MOTION FOR DISMISSAL OF
ADVERSARY PROCEEDING PURSUANT TO BANKRUPTCY
RULE 7012(b), FRCP 12(b)(5), FRCP 12(b)(6) AND FRCP 9(b)**



PLEASE TAKE NOTICE that the undersigned have filed the attached Motion for Dismissal of Adversary Proceeding Pursuant to Bankruptcy Rule 7012(b), FRCP 12(b)(5) and FRCP 9(b) (the “**Motion**”).

PLEASE TAKE FURTHER NOTICE that a hearing on the Motion will take place on **April 11, 2013 at 10:00 a.m. (prevailing Eastern time)** before the Honorable Martin Glenn, at the United States Bankruptcy Court for the Southern District of New York, Alexander Hamilton Custom House, One Bowling Green, New York, New York 10004-1408, Room 501.

PLEASE TAKE FURTHER NOTICE that objections, if any, to the Motion must be made in writing, conform to the Federal Rules of Bankruptcy Procedure, the Local Bankruptcy Rules for the Southern District of New York, and the Notice, Case Management, and Administrative Procedures approved by the Bankruptcy Court [Docket No. 141], be filed electronically by registered users of the Bankruptcy Court’s electronic case filing system, and be served, so as to be received no later than **April 1, 2013 at 4:00 p.m. (Prevailing Eastern Time)**, upon (a) counsel for the Debtors, Morrison & Foerster LLP, 1290 Avenue of the Americas, New York, NY 10104 (Attn: Gary S. Lee, Lorenzo Marinuzzi, Norman S. Rosenbaum and James Newton); (b) the Office of the United States Trustee for the Southern District of New York, 33 Whitehall Street, 21st Floor, New York, NY 10004 (Attn: Tracy Hope Davis, Linda A. Riffkin, and Brian S. Masumoto); (c) the Office of the United States Attorney General, U.S. Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530-0001 (Attn: US Attorney General, Eric H. Holder, Jr.); (d) Office of the New York State Attorney General, The Capitol, Albany, NY 12224-0341 (Attn: Nancy Lord, Esq. and Enid N. Stuart, Esq.);

(e) Office of the U.S. Attorney for the Southern District of New York, One St. Andrews Plaza, New York, NY 10007 (Attn: Joseph N. Cordaro, Esq.); (f) counsel for Ally Financial Inc., Kirkland & Ellis LLP, 153 East 53rd Street, New York, NY 10022 (Attn: Richard M. Cieri); (g) counsel to Barclays Bank PLC, as administrative agent for the DIP lenders, Skadden, Arps, Slate, Meagher & Flom LLP, Four Times Square, New York, NY 10036 (Attn: Ken Ziman & Jonathan H. Hofer); (h) counsel for the committee of unsecured creditors, Kramer Levin Naftalis & Frankel LLP, 1177 Avenue of the Americas, New York, NY 10036 (Attn: Kenneth Eckstein & Greg Horowitz); (i) counsel for Ocwen Loan Servicing, LLC, Clifford Chance US LLP, 31 West 52nd Street, New York, NY 10019 (Attn: Jennifer C. DeMarco and Adam Lesman); (j) counsel for Berkshire Hathaway Inc., Munger, Tolles & Olson LLP, 355 South Grand Avenue, Los Angeles, CA 90071 (Attention: Thomas Walper and Seth Goldman); (k) Internal Revenue Service, P.O. Box 7346, Philadelphia, PA 19101-7346 (if by overnight mail, to 2970 Market Street, Mail Stop 5-Q30.133, Philadelphia, PA 19104-5016); (l) Securities and Exchange Commission, New York Regional Office, 3 World Financial Center, Suite 400, New York, NY 10281-1022 (Attn: George S. Canellos, Regional Director); and (m) Princess Dixon, 1299 Knotts St., East Point, GA 30344.

PLEASE TAKE FURTHER NOTICE that if you do not timely file and serve a written objection to the relief requested in the Motion, the Bankruptcy Court may deem any opposition waived, treat the Motion as conceded, and enter an order granting the relief requested in the Motion without further notice or hearing.

Dated: February 7, 2012
New York, New York

/s/ Norman S. Rosenbaum
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Princess Dixon,	:	
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Plaintiff,	:	
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GMAC Mortgage Corporation, aka GMAC	:	
Mortgage LLC, et al.	:	
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Defendants.	:	
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In re	:	
	:	Case No. 12-12032 (MG)
RESIDENTIAL CAPITAL, LLC, <i>et al.</i> ,	:	
	:	Chapter 11
	:	
Debtors	:	Jointly Administered
-----X	:	

**DEBTORS' MOTION FOR DISMISSAL OF ADVERSARY PROCEEDING PURSUANT
TO BANKRUPTCY RULE 7012(b), FRCP 12(b)(5), FRCP 12(b)(6) AND FRCP 9(b)**

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Article III of the United States Constitution1

Defendant GMAC Mortgage, LLC (“GMACM”)¹, a debtor and debtor in possession in the above-captioned chapter 11 cases (collectively with all affiliated debtors and debtors in possession, the “Debtors”), submits this motion (the “Motion”) to dismiss the above-referenced adversary proceeding (the “Adversary Proceeding”) commenced by *pro se* plaintiff Princess Dixon (“Plaintiff”) for insufficient service of process and failure to state a claim upon which relief can be granted.

I. JURISDICTION AND VENUE

1. The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 (a) and 1334(b). Venue is proper under 28 U.S.C. § 1409. This is a non-core proceeding pursuant to 28 U.S.C. §§ 157(b)(1) and (b)(2). Nonetheless, pursuant to Local Bankruptcy Rule 7012-1, GMACM or Debtor consents to entry of a final order or judgment by this Court if it is determined that the Court, absent consent of the parties, cannot enter final orders or judgment consistent with Article III of the United States Constitution.

II. BACKGROUND

A. General Bankruptcy Case Background

2. On May 14, 2012 (the “Petition Date”), each of the Debtors filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in this Court.

3. The Debtors are a leading residential real estate finance company indirectly owned by Ally Financial Inc., which is not a Debtor. As of the Petition Date, the

¹ Named erroneously in Plaintiff’s Complaint as “GMAC Mortgage Corporation, aka GMAC Mortgage LLC.”

Debtors and their non-debtor affiliates operated the fifth largest mortgage servicing business and the tenth largest mortgage origination business in the United States.

4. The Debtors are managing and operating their businesses as debtors in possession pursuant to Bankruptcy Code sections 1107(a) and 1108. Their chapter 11 cases (collectively, the “Bankruptcy Case”) are being jointly administered pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”). No trustee has been appointed in the Bankruptcy Case.

5. On May 16, 2012, the United States Trustee for the Southern District of New York (the “U.S. Trustee”) appointed a nine member official committee of unsecured creditors.

6. On July 3, 2012, the U.S. Trustee appointed the Honorable Arthur T. Gonzalez, former Chief Judge of this Court, as examiner (the “Examiner”).

B. Events Giving Rise to the Adversary Proceeding

(i) Origination of Plaintiff’s Loan²

7. Plaintiff was a borrower under a mortgage loan (the “Loan”) that was originated by Home America Mortgage on May 23, 2001. The Loan was evidenced by a note in the amount of \$84,333.00 (the “Note”), which was secured by real property located at 1299 Knotts Street, Atlanta Georgia 30344 (the “Property”) pursuant to a security deed (the “Security Deed”) executed contemporaneously with the Note. Home America Mortgage assigned the Security Deed to Taylor, Bean & Whitaker Corp. Taylor Bean & Whitaker Corp. transferred the

² The facts described below are based on counsel’s investigation of the loan history and Plaintiff’s prior bankruptcy proceedings. If the Court desires we can provide the Court with the loan documents and pleadings filed in Ms. Dixon’s personal bankruptcy cases.

servicing to GMACM and assigned the Security Deed to Mortgage Electronic Registration Systems, Inc. (“MERS”), its successors and assigns. On February 7, 2011, MERS assigned the Security Deed to GMACM. The note was endorsed from Home America Mortgage to Taylor, Bean & Whitaker Corp., from Taylor, Bean & Whitaker to GMAC Mortgage Corporation, and ultimately endorsed in blank by GMAC Mortgage Corporation.

(ii) Plaintiff’s Bankruptcy Cases

8. On January 12, 2005, Plaintiff filed a petition for chapter 13 protection (“Petition”) in the Bankruptcy Court for the Northern District of Georgia (the “Plaintiff’s First Bankruptcy Case”) -- Case No. 05-90295-crm.

9. According to Plaintiff’s Petition, at the time of her bankruptcy filing, she was in \$1,000 arrears under the Loan. On September 22, 2005, MERS as nominee for Lehman Brothers, by GMAC Mortgage Corporation filed a motion for relief from the automatic stay to foreclose on the Property.

10. On December 5, 2005, the Georgia Bankruptcy Court entered a consent order on the Motion for Relief from the Automatic Stay, denying the automatic stay based on certain payment conditions (the “Consent Order”).

11. Plaintiff’s First Bankruptcy Case was voluntarily dismissed on October 18, 2006.

12. On January 28, 2011, Plaintiff again filed a petition for chapter 13 protection in the Bankruptcy Court for the Northern District of Georgia. (“Plaintiff’s Second Voluntary Petition”) -- Case No. 11-52497-crm.

13. According to Plaintiff’s Second Voluntary Petition, at the time of her bankruptcy filing, she was \$3,000 in arrears under the Loan. On March 31, 2011, GMAC Mortgage, LLC filed a motion for relief from the automatic stay to foreclose on the property.

14. On August 16, 2012, the Georgia Bankruptcy Court entered an order granting the GMACM Stay Relief Motion. Plaintiff did not assert any claims against GMACM regarding the Property at that time. Instead, Plaintiff Voluntarily Dismissed the bankruptcy proceeding.

(iii) The Adversary Proceeding

15. On December 18, 2012, Plaintiff filed the instant complaint (the "Complaint") initiating the Adversary Proceeding. A summons and notice of pretrial conference (the "Summons") was issued with respect to the Adversary Proceeding on January 8, 2013.

16. Plaintiffs have yet to file an affidavit of service of the Complaint and Summons. Also as of the date hereof, the Debtor Defendants have no record of being served by any other legally sufficient means, either directly upon an officer or through their registered agent.

17. The Debtor Defendants learned of this case through their monitoring of the Bankruptcy Case docket.

18. Plaintiffs' only cause of action, entitled "Avoid Assignment and Mortgage of GMAC Mortgage," appears to assert that the assignment of the Security Deed to GMACM was "fraudulent." By the Complaint, Plaintiff asks this Court "declar[e] and determine the mortgage lien held by GMAC Mortgage encumbering Plaintiff's/Creditor's principal residence to be an unsecured claim and cancelled of record . . . and further declaring that the claim shall be paid only as unsecured through a new loan modification[.]" (Complaint at 3.)

19. Plaintiff further suggests that "11 USC 506(a) and the decision rendered by the Sixth Circuit Court of Appeals in *In re Lane*" mandate that the "mortgage of GMAC Mortgage is an unsecured claim." (Complaint at 3.)

20. In support of these claims, Plaintiff offers no facts beyond alleging the fair market value of the property, the balance owed to GMACM, and a single sentence that states “Plaintiff Assignments are fraudulent and null and void.” (Id.)

III. ARGUMENT

A. **The Adversary Proceeding Should Be Dismissed Pursuant to Bankruptcy Rule 7012(b), FRCP 12(b)(5), FRCP 12(b)(6) and FRCP 9(b)**

21. Bankruptcy Rule 7012 incorporates by reference Rule 12(b)-12(i) of the Federal Rules of Civil Procedure (“FRCP”). FRCP 12(b) provides that a party may assert specified defenses by motion, including lack of subject matter jurisdiction, insufficient service of process, and failure to state a claim upon which relief can be granted, and that a motion asserting any of these defenses may be made before pleading. The Adversary Proceeding should be dismissed pursuant to Bankruptcy Rule 7012(b)(6) and FRCP 9(b) because Plaintiff has failed to state a claim upon which relief can be granted. The Adversary Proceeding should be dismissed pursuant to Bankruptcy Rule 7012(b) and FRCP 12(b)(5) because Plaintiff failed to provide sufficient service of process.

(i) **Failure to State a Claim**

(a) **Legal Standard**

22. Plaintiff’s Complaint should be dismissed on the ground that Plaintiff has failed to plead sufficient facts to establish her claims against the Debtor Defendants. FRCP 12(b)(6), made applicable to this adversary proceeding by Bankruptcy Rule 7012, permits dismissal of an action for failure to state a claim upon which relief can be granted. For FRCP 12(b)(6) purposes, a court must accept the plaintiff’s factual allegations as true, drawing all reasonable inferences in the plaintiff’s favor. Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir. 1996).

23. The Court's review on a motion to dismiss pursuant to FRCP 12(b)(6) is generally limited to "the facts as asserted within the four corners of the complaint, the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference." McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 191 (2d Cir. 2007).

(b) Plaintiff's Claims Are Supported By Insufficient Facts To Be Plausible

24. To survive a motion to dismiss pursuant to FRCP 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). The sole issue raised by a motion to dismiss pursuant to FRCP 12(b)(6) is whether the facts pleaded, if established, would support a claim for relief. Neitzke v. Williams, 490 U.S. 319, 326-27 (1989). If as a matter of law "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," a claim must be dismissed. Id. at 327.

25. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp., 550 U.S. at 555 (citations omitted). A plaintiff must allege a factual predicate concrete enough to warrant further proceedings. See, e.g., DM Research v. College of Am. Pathologists, 170 F.3d 53, 55-56 (1st Cir. 1999). See also Conley v. Gibson, 355 U.S. 41, 47 (U.S. 1957) (plaintiffs are required to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests").

26. Moreover, while facts must be accepted as alleged, this does not automatically extend to bald assertions, subjective characterizations, or legal conclusions, which are not entitled to the assumption of truth. Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1088,

1092 (2d Cir. 1995). A court considering a motion to dismiss can disregard conclusory allegations and judge the complaint only on well-pleaded factual allegations. Starr v. Sony BMG Music Entm't, 592 F.3d 314, 321 (2d Cir. 2010). See also Papasan v. Allain, 478 U.S. 265, 286 (1986) (on a motion to dismiss, courts “are not bound to accept as true a legal conclusion couched as a factual allegation”).

27. Although complaints drafted by *pro se* plaintiffs are to be “construed liberally,” claims asserted by *pro se* plaintiffs must nonetheless be supported by specific and detailed factual allegations sufficient to provide the court and the defendant with “a fair understanding of what the plaintiff is complaining about and . . . whether there is a legal basis for recovery.” Iwachiw v. N.Y. City Bd. of Elections, 126 Fed. Appx. 27, 29 (2d Cir. 2005) (citations omitted). Plaintiff’s Complaint fails to satisfy this *de minimus* standard.

(1) Plaintiff Fails to State a Fraud Claim

28. There are five elements required to plead fraud in Georgia: (1) a false representation by a defendant; (2) scienter; (3) intention to induce the plaintiff to act or refrain from acting; (4) justifiable reliance by plaintiff; and (5) damage to plaintiff. Kabir v. Statebridge Co., LLC, No. 1:11-cv-2747-WSD, 2011 WL 4500050, *6 (N.D. Ga. Sept. 27, 2011) (citations omitted). Plaintiff’s two-page complaint fails to allege any facts whatsoever to show that the above elements are satisfied.

29. Moreover, under FRCP 9(b), which is applicable to these proceedings pursuant to Bankruptcy Rule 7009, to the extent Plaintiff seeks to assert claims of fraud or mistake she must “state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Indeed, to adequately plead a fraud claim, “Plaintiff must allege (1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible

for the statement; (3) the content and manner in which these statements misled the Plaintiff; and (4) what the defendants gained by the alleged fraud.” Joseph v. Federal Home Loan Mortg. Corp., No. 1:12-CV-01022-RWS, 2012 WL 5429639, *3 (Nov. 6, 2012 N.D. Ga.) (citations omitted). Plaintiff, however, does not allege even a single fact to explain the basis for the supposed “fraudulent” assignments. Accordingly, Plaintiff has failed to plead fraud with the requisite specificity under Rule 9(b) and her claim should be dismissed.

30. Plaintiff also lacks standing to challenge the validity of any assignment of her security deed because she was not a party to the assignment. “[T]he only interest or right which an obligor of a claim has in the instrument of assignment is to insure him or herself that he or she will not have to pay the same claim twice.” 6A C.J.S. Assignments § 132 (2012). Plaintiff’s only claim rests on what she describes as “fraudulent,” assignments, and as such it must be dismissed under Georgia law. See id.; see also Rosenhaft v. BAC Home Loans Servicing, LP, No. 1:11-cv-2519-TWT, 2012 WL 484842, at *2 (N.D. Ga. Feb. 14, 2012) (“Plaintiff does not have standing to challenge the assignment from MERS to BAC because she was not a party to the assignment.”); Breus v. McGriff, 202 Ga. App. 216, 216 (1991) (“Appellants are strangers to the assignment contract . . . and thus have no standing to challenge its validity.”); Joseph v. Federal Home Loan Mortg. Corp., 2012 WL 5429639, *4 (“Plaintiff lacks standing to challenge the assignment of the Security Deed because she was not a party to that contract.”).

31. For the reasons set forth above, the Adversary Proceeding should be dismissed in its entirety for failure to state a claim upon which relief can be granted pursuant to Bankruptcy Rule 7012(b), FRCP 12(b)(6) and FRCP 9(b).

(2) 11 USC 506(a) Does Not Provide A Basis For The Relief Requested

32. Plaintiff's suggestion that the Court should declare GMACM's mortgage to be an unsecured claim under 11 USC 506(a) and In re Lane, 280 F.3d 663 (6th Cir, 2002), lacks merit. That statute only applies to "[a]n allowed claim of a creditor." 11 USC 506(a)(1). GMACM, however, is not a creditor in this proceeding. Indeed, the only Court that could have deemed GMACM's mortgage unsecured pursuant to 11 USC 506(a) was the Georgia Bankruptcy Court that presided over Ms. Dixon's personal bankruptcy cases since GMAC was a creditor in those actions.³ Accordingly, the relief requested by Ms. Dixon pursuant to 11 USC 506(a) should be denied.

(ii) Insufficient Service of Process

33. Bankruptcy Rule 7004 incorporates by reference FRCP 4(c)(1), 4(h) and 4(l). FRCP 4(c)(1) in turn provides that the plaintiff is responsible for having the summons and complaint served within the time allowed, and FRCP 4(h) requires that a corporation must be served in the manner prescribed by FRCP 4(e)(1) for serving an individual, or by delivering a copy of the summons and complaint to an authorized agent and by mailing a copy of each to the defendant. Under Bankruptcy Rule 7004(b)(3), service may also be effectuated by mailing a copy of the summons and complaint to "an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process . . ." and under Bankruptcy Rule 7004(b)(9) service may also be effectuated on the debtor to the address shown in the petition. Fed. R. Bankr. P. 7004(b)(3) & (9). Bankruptcy Rule 7004(e) further requires

³ Plaintiff also cites In re Lane, 280 F.3d 663, in support of her request to have the GMACM mortgage declared an unsecured claim. (Complaint at 3.) In re Lane, however, simply holds that 11 USC 1332(b)(2) permits the modification of a totally unsecured homestead mortgage. The case does not hold that a bankruptcy court can modify the status of claims asserted by the debtor in other bankruptcy proceedings initiated by the plaintiff.

that service of the summons and complaint be delivered or deposited in the mail within 14 days after the summons is issued, and FRCP 4(l) requires that proof of service must be made to the court by the server's affidavit. Rule 9078-1 of the Local Bankruptcy Rules provides that, unless the Court orders otherwise, "any party serving a pleading or other document shall file proof of service by the earlier of (i) three days following the date of service, and (ii) the hearing date.

34. The Debtor Defendants have not been served with the Complaint and Summons by any means prescribed by Bankruptcy Rule 7004 and no proof of service has been filed with the Court. Accordingly, the Debtor Defendants request that the Adversary Proceeding be dismissed for insufficient service of process pursuant to Bankruptcy Rule 7012(b) and FRCP 12(b)(5).⁴

⁴ The complaint alleges that "GMAC Mortgage Corporation ... can be served with process via their agent MCCALLA, RAYMER, LLC 1544 OLD ALABAMA ROAD ROSWELL GEORGIA 3007." (Complaint at 2.) Even assuming that statement were true, which it is not, Plaintiff has not alleged that she actually served the complaint on such entity or filed a proof of service showing service on McCalla Raymer.

IV. CONCLUSION

For the reasons set forth herein, the Debtor Defendants respectfully requests that the Court dismiss the Adversary Proceeding with prejudice and grant such other and further relief as it deems just and proper.

Dated: February 7, 2012
New York, New York

/s/ Norman S. Rosenbaum

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