

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

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In re:

RESIDENTIAL FUNDING COMPANY LLC,

Debtor.
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Chapter 11

Case No. 12-12019 (MG)

MARION L. JENKINS AND
SHARON JENKINS,

Plaintiffs,

Adv. Proc. No. 12-01935 (MG)

v.

RESIDENTIAL FUNDING COMPANY LLC,
MORTGAGE LENDERS NETWORK, USA INC.,
SHAPIRO & SWERTFEGER, LLP,
JACK L. SWERTFEGER JR.,
GERALD M. SHAPIRO,
AMERICA'S SERVICING COMPANY,
MORTGAGE ELECTRONIC REGISTRATION
SYSTEM, US BANK NATIONAL ASSOCIATION,
AS TRUSTEE FOR RASC 2006-EMX4,
EMAX FINANCIAL GROUP LLC,
MICHELE MORALES, AND JUDY FABER,

Defendants.
-----X

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS
WELLS FARGO BANK, N.A. AND U.S. BANK, NATIONAL ASSOCIATION,
AS TRUSTEE'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

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Defendants Wells Fargo Bank, N.A. d/b/a America's Servicing Company ("Wells Fargo") and U.S. Bank, National Association ("U.S. Bank"), as Trustee for RASC 2006-EMX4 (the "Trust," along with Wells Fargo, the "Defendants"), submit this memorandum of law in support of their motion (the "Motion"), pursuant to Rule 12(b)(1), (5), (6) and Rule 12(e) of the Federal Rules of Civil Procedure (the "Federal Rules"), made applicable to this adversary proceeding by Rule 7012 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), to dismiss Plaintiffs Marion L. Jenkins and Sharon Jenkins' ("Plaintiffs") Amended Complaint, dated May 16, 2013 (the "Amended Complaint" and "Compl.").¹

PRELIMINARY STATEMENT

Plaintiffs, who are two non-debtor borrowers, commenced this adversary proceeding in an obvious attempt to delay foreclosure proceedings on their mortgage loan – which is still due for its December 2007 payment – with respect to real property located in Atlanta, Georgia. It appears that Plaintiffs brought this action in this Court because Residential Funding Company LLC ("RFC") – a chapter 11 debtor in this Court – at one point held an interest in Plaintiffs' loan as the holder of the note and mortgage. Plaintiffs are now using this Court based on that tenuous connection to proceed against Wells Fargo, the servicer, and the Trust to further delay foreclosure. This conduct should not be permitted and, as discussed below, the Amended Complaint must be dismissed for various reasons.

First, Plaintiffs failed to comply with an order of this Court requiring them to file a more definite statement of the Original Complaint.

Second, this Court lacks subject matter jurisdiction over this action as it pertains to the Defendants.

¹ The Amended Complaint purportedly amended the original complaint, which is dated October 12, 2012 and was filed on November 9, 2012 [ECF No. 1] (the "Original Complaint"); however, the allegations in the Amended Complaint and the Original Complaint are identical.

Third, Plaintiffs never served either of the Defendants with the Original Complaint or the Amended Complaint and have not filed any affidavits of service as required by this Court's Local Rules.

Fourth, even if this Court were to ignore these insurmountable threshold issues, Plaintiffs have failed to state any claim upon which the relief requested in the Amended Complaint could be granted. Further, even if Plaintiffs' claim that the mortgage should be invalidated is deemed a valid claim, such claim against the Defendants fails as a matter of law because it is premised on a written assignment document that only evidences a prior transfer of the note and mortgage from the originator to U.S. Bank as trustee for the Trust. Therefore, even if the allegations in the Amended Complaint are deemed true, all of Plaintiffs' allegations do not amount to a sustainable claim against the Defendants, and the Amended Complaint must be dismissed for failure to state a claim.

For the reasons discussed above, the Amended Complaint must be dismissed in its entirety.

STATEMENT OF FACTS

A. The Mortgage Loan

On or about February 28, 2006, Plaintiffs executed an adjustable rate note in favor of Mortgage Lenders Network USA, Inc. ("MLN") in the amount of \$300,000.00 (the "Note"). (Compl. ¶ 14, Ex. A.)² The Note is secured by a security deed, also executed by Plaintiffs on or about February 28, 2006, in favor of Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for MLN and its successors and assigns (the "Mortgage"), which granted a lien (the

² The Amended Complaint attaches exhibits that are also attached to the Original Complaint; however, the Original Complaint includes additional exhibits. All references to exhibits in this Motion are references to the exhibits attached to the Original Complaint.

“Lien”) on the property located at 405 Grant Park Place, Atlanta, Georgia 30315 (the “Property”). (Compl. ¶ 13, Ex. A.)

The Note includes an endorsement from MLN to Emax Financial Group, LLC (“Emax”). (Compl. Ex. A.) An allonge to the Note, dated March 30, 2006 (the “Allonge”), which specifically references the Note, was endorsed by Emax in favor of RFC.³ (Compl. ¶ 15, Ex. E.) The Allonge is further endorsed by RFC to U.S. Bank as trustee. (Compl. ¶ 15, Ex. E.)

The transfer of the Mortgage from MLN to U.S. Bank as trustee was evidenced by a written assignment, dated September 1, 2011 (the “Assignment”).⁴ (Compl. ¶ 17, Ex. D.)

As of the date of this Motion, Plaintiffs are due for their December 2007 mortgage payment. (Compl. Exs. F (Statement from Wells Fargo, dated Nov. 4, 2011) & I (Proof of Claim, dated Nov. 28, 2011, filed by Wells Fargo in Plaintiffs’ now-dismissed chapter 13 case), which indicates that Plaintiffs, at that time, were due for their September 1, 2007 payment.)

B. Procedural History

On May 14, 2012, Residential Capital, LLC and certain of its subsidiaries, including RFC (collectively, the “ResCap Debtors”), filed voluntary petitions for relief under chapter 11 of the United States Code (the “Bankruptcy Code”).

On November 9, 2012, Plaintiffs filed the Original Complaint commencing this action. [ECF No. 1.] On January 22, 2013, RFC filed a motion for a more definitive statement [ECF No. 10] (the “RFC Motion”). On March 28, 2012, the RFC Motion was granted and this Court directed Plaintiffs to file an amended complaint on or before May 20, 2013 [ECF No. 26] (the “March 28th Order”). On May 20, 2013, Plaintiffs filed the Amended Complaint. [ECF No. 32.]

³ RFC is a debtor in the jointly administered Residential Capital LLC chapter 11 cases -- Case No. 12-12020 (MG) (Jointly Administered) (the “ResCap Chapter 11 Cases”).

⁴ The Assignment, by its own terms, amended, corrected and replaced a prior assignment dated July 7, 2010 (*see* Compl. Ex. C.), which replaced a prior assignment dated September 2, 2008 (*see* Compl. Ex. B).

The Amended Complaint is identical to the Original Complaint except that the date is different and it reorganizes certain of the exhibits.

ARGUMENT

I. PLAINTIFFS FAILED TO COMPLY WITH THIS COURT’S ORDER GRANTING A PRIOR MOTION FOR A MORE DEFINITE STATEMENT

Plaintiffs failed to comply with this Court’s March 28th Order by filing the exact same complaint after this Court granted RFC’s motion for a more definitive statement of the Original Complaint. (*See* March 28th Order at 2.)

On November 9, 2012, Plaintiffs filed the Original Complaint. On January 22, 2013, RFC filed the RFC Motion, pursuant to Rule 12(e) of the Federal Rules, which sought a more definite statement of the Original Complaint as, among other things, “the [Original] Complaint contains a number of deficiencies, including its failure to identify what conduct of RFC, as opposed to the other [d]efendants, harmed [Plaintiffs], how that conduct entitles [Plaintiffs] to \$10,000,000, an injunction, and an accounting, or the legal basis for those remedies.” (RFC Motion ¶ 1.) On March 28, 2012, the RFC Motion was granted and this Court directed Plaintiffs to file an amended complaint on or before May 20, 2013. (*See* March 28th Order at 2.) On May 20, 2013, Plaintiffs filed the Amended Complaint, which is identical to the Original Complaint except that the date is different and it includes only some of the exhibits attached to the Original Complaint.

Clearly, Plaintiffs failed to comply with this Court’s March 28th Order. Rule 12(e) of the Federal Rules states that “[if] the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets [*i.e.*, May 20, 2013], the court may strike the pleading or issue any other appropriate order.” Fed. R. Civ. P. 12(e). Thus, pursuant to Rule 12(e) of the Federal Rules, made applicable by Rule 7012 of the

Bankruptcy Rules, the Defendants request that this Court enter an order dismissing the Amended Complaint for failure to comply with the March 28th Order.

II. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER THIS ACTION AGAINST THE DEFENDANTS

Rule 12(b)(1) of the Federal Rules, made applicable by Rule 7012 of the Bankruptcy Rules, provides that this Court may dismiss an action for lack of subject matter jurisdiction.

This Court only has jurisdiction over adversary proceedings (i) arising under the Bankruptcy Code, (ii) arising in or (ii) related to a case brought under the Bankruptcy Code. *See* 28 U.S.C. § 1334(b).

This Court has already ruled that “[t]he Amended Complaint alleges only prepetition state law claims that do not arise under the Bankruptcy Code or arise in the bankruptcy case; thus, at most, the Court would have ‘related to’ jurisdiction.” (Mem. Op., ECF No. 40 at 6.)

This Court has “related to” jurisdiction to hear any civil matter “where the outcome might have any conceivable effect on [a bankruptcy] estate.” *Bayerische Landesbank v. Deutsche Bank AG (In re Residential Capital, LLC)*, 488 B.R. 565, 572 (Bankr. S.D.N.Y. 2013) (*quoting In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 114 (2d Cir. 1992) (internal quotation marks omitted)). An action will have a “conceivable effect . . . [on a bankruptcy estate where it could alter a] debtor’s rights, liabilities, options, or freedom of action . . . or . . . impact[] . . . the handling and administration of the bankrupt estate.” *Id.* at 573 (*quoting In re WorldCom, Inc. Sec. Litig.*, 293 B.R. 308, 322 (S.D.N.Y. 2003) (citations omitted)).

Neither of the Defendants are debtors in the ResCap Debtors’ chapter 11 cases, and a favorable ruling against either of the Defendants would have no conceivable effect on the ResCap Debtors or their estates. Thus, this Court lacks subject matter jurisdiction over this action with respect to the Defendants, and the Amended Complaint must be dismissed.

III. PLAINTIFFS FAILED TO PROPERLY SERVE THE DEFENDANTS

Rule 12(b)(5) of the Federal Rules, made applicable by Rule 7012 of the Bankruptcy Rules, provides that this Court may dismiss an action for insufficient service of process.

“[W]hen a defendant moves to dismiss under Rule 12(b)(5), the plaintiff bears the burden of proving adequate service.” *Dickerson v. Napolitano*, 604 F.3d 732, 752 (2d Cir. 2010) (quoting *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 298 (2d Cir. 2005)).

Plaintiffs did not serve either Wells Fargo or the Trust with a copy of the summons or complaint (neither the Original Complaint nor the Amended Complaint). In addition, Plaintiffs have failed to file a certificate of service as required by Rule 9078-1 of this Court’s Local Rules.

As the Defendants were not properly served, the Amended Complaint must be dismissed as against the Defendants.

IV. PLAINTIFFS FAIL TO STATE ANY CLAIM AGAINST THE DEFENDANTS IN THE AMENDED COMPLAINT

Even if this Court were to ignore the threshold issues discussed above, Plaintiffs’ Amended Complaint fails to state any claim for which relief can be granted.

A. Legal Standard on Motion to Dismiss

To survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules, made applicable to this proceeding by Rule 7012 of the Bankruptcy Rules, plaintiffs must plead enough facts “to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A court must accept all well-pleaded facts as true and must draw all reasonable inferences in favor of the plaintiff. *Twombly*, 550 U.S. at 570. But the court is not bound to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678. “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (citing *Twombly*, 550 U.S. at 557). If

there are insufficient factual allegations to raise a right to relief above the speculative level, the complaint must be dismissed. *Twombly*, 550 U.S. at 555.

“Complaints drafted by pro se plaintiffs are to be construed liberally, [] they must nonetheless be supported by specific and detailed factual allegations sufficient to provide the court and the defendant with” a fair understanding of the conduct at issue and the basis for recovery. *Kimber v. GMAC Mortg., LLC (In re Residential Capital, LLC)*, 489 B.R. 489, 494 (Bankr. S.D.N.Y. 2013).

As explained below, because the Amended Complaint fails to provide any basis for the relief Plaintiffs are seeking, the Amended Complaint must be dismissed.

B. Plaintiffs Fail to State any Claim

Even accounting for the liberal construction granted to *pro se* complaints, the Amended Complaint fails to state any claim upon which relief can be granted. Through the Amended Complaint, Plaintiffs seek (i) a stay over any foreclosure action with respect to the Property, (ii) a declaratory judgment that the Mortgage is null and void, (iii) an accounting to be provided by the Defendants, (iv) specific performance requiring Wells Fargo to enter into a modification with Plaintiffs and (v) monetary damages in an amount of \$10,000,000. However, none of Plaintiffs’ allegations in the Amended Complaint are sufficient to state a claim as against the Defendants upon which any of this relief could be granted.

More specifically, with respect to the Defendants directly, the Amended Complaint alleges that (i) the Assignment and the prior assignment documents were executed by “robo” signers (Compl. ¶¶ 16-18, 26), (ii) Wells Fargo provided Plaintiffs with “conflicting information” (Compl. ¶ 21), (iii) Plaintiffs mailed qualified written requests to Wells Fargo (Compl. ¶ 20), (iv) Wells Fargo “never provided Plaintiff[s] with any information validating the amount claimed as due” (Compl. ¶ 24), and (v) Wells Fargo “is the recipient of federal funds

intending to benefit Plaintiff[s], and individuals like them, who need to modify their mortgages in order to remain in their home” (Compl. ¶ 25).

However, even if all of these allegations were deemed true (which they are not⁵), Plaintiffs have not articulated any cause of action supported by such allegations. Thus, even after accepting the factual allegations as true and drawing all reasonable inferences in favor of Plaintiffs, the Defendants’ alleged conduct does not support a cause of action.

C. All Claims by Plaintiffs Related to the Assignment of Mortgage Must be Dismissed

To the extent this Court deems Plaintiffs’ request for a declaratory judgment that the Mortgage is null and void (*see* Compl. ¶ 31) to be a properly pled claim, this Court must dismiss such claim as failing as a matter of law.

In seeking this extraordinary relief, Plaintiffs appear to focus on the existence of written assignment documents. (Compl. ¶¶ 16-18, 26, 29.) However, as discussed below, all of these claims fail as a matter of law because any such assignment document only evidences a prior transfer of the Note and Mortgage.

Specifically, Plaintiffs’ only allegations in the Amended Complaint as against the Defendants with respect to the Lien are that: (i) the Assignment and the prior assignment documents were executed by “robo” signers (Compl. ¶¶ 16-18, 26), (ii) the Defendants “continue their alleged securitization through a fraudulent scheme by way of presenting a prima facie appearance before the court with propertied fraudulent Assignments recorded at the Fulton County registrars office” (Compl. ¶ 26), and (iii) the assignments “are conflicting in that they do

⁵ For example, Exhibit F (Statement from Wells Fargo, dated Nov. 4, 2011), Exhibit H (Letter to Pls. dated Feb. 28, 2012) and Exhibit I (Proof of Claim, dated Nov. 28, 2011, filed by Wells Fargo in Plaintiffs’ now-dismissed chapter 13 case) to the Original Complaint demonstrate that Wells Fargo provided Plaintiffs information regarding the amounts owed and that Wells Fargo was the servicer of the mortgage loan at issue. As these documents are attached to the Original Complaint, this Court may consider them on a motion to dismiss. *See Webster v. Wells Fargo Bank, N.A.*, No. 08 Civ. 10145, 2009 WL 5178654, at *1 n.2 (S.D.N.Y. Dec. 23, 2009) (a court “may consider all documents attached to or incorporated by reference into the Complaint, documents Plaintiff[] possessed or knew of when bringing suit, and matters of which judicial notice may be taken”).

not disclose a clear and unambiguous title to the mortgage in [RFC] to [Wells Fargo] or any other entity.” (Compl. ¶ 29).

Here, even if the allegations in the Amended Complaint with respect to the Lien are deemed true and this Court deems it a valid claim, as the documents attached to Plaintiffs’ filings demonstrate, the Mortgage was properly transferred to U.S. Bank as trustee for the Trust, and the Assignment only memorialized that prior transfer of the Mortgage along with the Note.⁶

Based on the allegations in the Amended Complaint, on February 28, 2006, Plaintiffs executed the Note in favor of MLN and executed the Mortgage in favor of MERS as nominee for MLN and its successors and assigns. (Compl. ¶ 13, Ex. A.) The Note was endorsed from MLN to Emax. (Compl. Ex. A.) The Allonge, which is dated March 30, 2006, transferred the Note from Emax to RFC, and then from RFC to U.S. Bank as trustee for the Trust. (Compl. ¶ 15, Ex. E.)

Thus, there is no question that based on the allegations in the Amended Complaint, the Note was transferred from MLN to U.S. Bank as trustee for the Trust. *See* Ga. Code Ann. §§ 11-3-201, 204 & 205. The corresponding Mortgage was transferred along with the Note as, under well-settled law, when a note is transferred, the mortgage securing that note follows automatically, with the result that the holder of the note has the right to enforce the mortgage as an incident of the note. *See You v. JP Morgan Chase Bank, N.A.*, 743 S.E.2d 428, 433 (Ga. 2013) (“our law has long held that one who holds a secured note necessarily holds an equitable interest in the security itself” (citations omitted)); Ga. Code Ann. § 10-3-1 (“[t]he transfer of notes secured by a mortgage or otherwise conveys to the transferee the benefit of the security”); *Chapman v. McPherson*, 192 S.E. 423 (1937) (valid transfer of note necessarily transferred

⁶ As discussed above, this Court may consider documents attached to a complaint on a motion to dismiss. *See Webster*, 2009 WL 5178654, at *1 n.2.

equitable title to security, even if transferee did not hold legal title); *see also Mortg. Elec. Registration Sys., Inc. v. Coakley*, 41 A.D.3d. 674, 674, 838 N.Y.S.2d 622, 623 (2d Dep’t 2007) (under New York law, the holder of a negotiable promissory note also held the mortgage as the mortgage “passed as an incident to the promissory note” (citations omitted)); *In re Escobar*, 457 B.R. 229, 239 (Bankr. E.D.N.Y. 2011) (when a promissory note is transferred, “the mortgage passes as an incident to the note” (citation omitted)).

Therefore, when U.S. Bank as trustee received the Note, the Mortgage passed to U.S. Bank as trustee for the Trust as an incident of the Note. Thus, because the Assignment -- and the prior assignments that were replaced -- were not the operative documents to transfer the Mortgage and only memorialized the prior transfer of the Mortgage along with the Note, Plaintiffs’ request to avoid the Mortgage based on those assignments fails as a matter of law.

Accordingly, since the Amended Complaint fails to set forth any claims on which relief can be granted, the Amended Complaint must be dismissed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should dismiss Plaintiffs’ Amended Complaint pursuant to Rule 12(b)(1), (5) and (6) of the Federal Rules and Rule 7012 of the Bankruptcy Rules, with prejudice, and grant such other and further relief as it deems appropriate.

Dated: New York, New York
November 12, 2013

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