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

_____)	
In re:)	Case No. 12-12020 (MG)
)	
RESIDENTIAL CAPITAL, LLC, <u>et al.</u> ,)	Chapter 11
)	
Debtors.)	Jointly Administered
_____)	
Shelley von Brincken,)	Adv. Case No. 13-01436 (MG)
)	
Plaintiff,)	
)	
v.)	
)	
GMAC Mortgage, LLC, or assignee,)	
ETS Services, LLC, Ocwen Loan)	
Servicing, LLC, and Does 1-20,)	
)	
Defendants.)	
_____)	

**REPLY IN SUPPORT OF JOINT MOTION OF RESCAP LIQUIDATING TRUST
AND RESCAP BORROWER CLAIMS TRUST FOR (I) DISMISSAL OF
ADVERSARY PROCEEDING PURSUANT TO BANKRUPTCY RULE 7012(b) AND
FRCP 12(b)(6) AND (II) DISALLOWANCE OF PROOF OF CLAIM NUMBER 441
FILED BY PLAINTIFF**



TO THE HONORABLE MARTIN GLENN,
UNITED STATES BANKRUPTCY JUDGE:

The ResCap Liquidating Trust (the “Liquidating Trust”), as successor in interest to Defendants GMAC Mortgage, LLC (“GMACM”) and Executive Trustee Services, LLC (“ETS” and, together with GMACM, the “Debtor Defendants”), each a debtor and debtor-in-possession in the above-captioned chapter 11 cases (collectively with all affiliated debtors and debtors in possession, the “Debtors”) and the ResCap Borrower Claims Trust (the “Borrower Trust” and, together with the Liquidating Trust, the “ResCap Trusts”), submit this reply in further support of the *Joint Motion of ResCap Liquidating Trust And ResCap Borrower Claims Trust For (I) Dismissal of Adversary Proceeding Pursuant to Bankruptcy Rule 7012(b) and FRCP 12(b)(6) and (II) Disallowance of Proof of Claim Number 441 Filed by Plaintiff* [Docket No. 9547; A.P. Docket No. 24] (the “Motion”).¹ In support of the Reply, the ResCap Trusts respectfully represent as follows:

REPLY

1. By the Motion, the ResCap Trusts seek to (i) dismiss the above-referenced adversary proceeding (the “Adversary Proceeding”) commenced by *pro se* plaintiff Shelley von Brincken (“Plaintiff”) for failure to state a claim upon which relief can be granted and to (ii) disallow proof of claim number 441 (the “Proof of Claim”) filed by Plaintiff. On or about February 24, 2016, Plaintiff mailed *Plaintiff’s Opposition to Defendants Motion to Dismiss Complaint and Plaintiff’s Objection to Defendant’s Request for Judicial Notice* to the Court [A.P. Docket No. 26], which was docketed on March 29, 2016 (the “Objection”).

¹ Defined terms used and not otherwise defined herein have the meanings ascribed to them in the Motion.

2. The Objection fails to respond to or rebut the arguments set forth in the Motion, and instead contends that the Adversary Proceeding is not subject to dismissal because the Adversary Complaint raises disputed issues of fact. See Obj. at 3. Plaintiff is correct that, in evaluating a motion to dismiss, the plaintiff's allegations are to be taken as true and the Court must construe the complaint in the light most favorable to the plaintiff. Obj. at 2 (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969)). However, bald assertions, subjective characterizations and legal conclusions are not entitled to the assumption of truth. Hirsch, 72 F.3d at 1088, 1092. 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) (stating that, on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation").

3. As set forth in the Motion (Mot. at ¶ 39), Plaintiff has failed to state a claim because (1) she lacks standing to enforce the FRB Consent Order, and (2) she is barred from relitigating GMACM's foreclosure on the Property securing Plaintiff's mortgage loan because the U.S. District Court for the Eastern District of California (the "California District Court") has already conclusively determined that the foreclosure was not improper. Neither the Adversary Complaint nor the Objection raises a valid factual dispute regarding either of those arguments. Accordingly, there is no factual dispute that would prevent the Court from determining that the Adversary Complaint is subject to dismissal (and the related Proof of Claim subject to disallowance) pursuant to Fed. R. Bankr. P. 7012(b)(6).

4. Plaintiff also argues that the Court cannot take judicial notice of public records in considering the Motion, because Plaintiff disputes the validity of the documents relied

on by GMACM in connection with the foreclosure, and therefore those documents are California land title records, and therefore are not “generally known within the trial court’s territorial jurisdiction” and cannot be “accurately and readily determined from sources whose accuracy cannot reasonably be questioned. . . .”. See Obj. at 6; Fed. R. Evid. 201(b) (“The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. . . .”). This argument misapprehends the request for judicial notice set forth in the Motion, which is not directed at the validity of Plaintiff’s loan documents.

5. By the Motion, the ResCap Trusts request that the Court take judicial notice of the FRB Consent Order, as well as the District Court’s prior orders dismissing both Plaintiff’s 2010 Action and FDCPA Action with prejudice based upon a determination that GMACM, in its capacity as servicer, had not improperly foreclosed on Plaintiff’s mortgage loan. See Mot. at ¶ 45. Plaintiff has not, and cannot, dispute that such orders were entered or that accurate copies of those orders were appended to the declaration of Kathy Priore submitted in support of the Motion. Therefore, it is appropriate for the Court to take judicial notice of them. Norris v. Hearst Trust, 500 F.3d 454, 461 n.9 (5th Cir. 2007), (“[I]t is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record.”); Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1088, 1092 (2d Cir. 1995) (noting that, in connection with a motion to dismiss, a court may consider all papers appended as well as matters of judicial notice).

6. The Objection also asserts that this Court lacks subject matter jurisdiction over the Proof of Claim and/or Adversary Proceeding. See Obj. at 3. If true, those assertions would require that the Adversary Complaint be dismissed. See Fed. R. Bankr. P. 7012(b)(3), (c).

Plaintiff's assertions are incorrect, however. This Court has core jurisdiction over proceedings involving Plaintiff's Proof of Claim and the Adversary Complaint pursuant to 28 U.S.C.

§ 157(b)(2)(B). Moreover, Plaintiff cannot subject herself to this Court's jurisdiction by filing the Proof of Claim and Adversary Complaint, and then argue that the Court lacks personal jurisdiction to rule on those matters. See, e.g., Adam v. Saenger, 303 U.S. 59, 67-68 (1938) ("A party who files a complaint is viewed as having submitted to personal jurisdiction in that forum."); Gardner v. New Jersey, 329 U.S. 565, 573 (1947) ("[H]e who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide by the consequences of that procedure.").

7. Finally, the Objection appears to contend that the ResCap Trusts lack standing to file the Motion. See Obj. at 3. As successors in interest to the Debtors, the Plan specifically confers standing on the ResCap Trusts to prosecute objections to claims and, with respect to the Liquidating Trust, defend adversary proceedings filed against the Debtors. See Plan, Art. VI.A-F; see also Confirmation Order ¶¶ 26, 30, 48.

8. Accordingly, for the reasons set forth herein and in the Motion, the ResCap Trusts respectfully request that the Court (i) overrule the Objection, (ii) enter an order dismissing the Adversary Proceeding with prejudice, substantially in the form attached to the Motion as Exhibit 2; (iii) enter an order disallowing and expunging the Proof of Claim substantially in the form attached to the Motion as Exhibit 3; and (iii) grant such other and further relief as it deems just and proper.

Dated: March 15, 2016
New York, New York

/s/ Norman S. Rosenbaum

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