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UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Marion L. Jenkins and Sharon Jenkins, Plaintiffs, *v.* Residential Funding Company, LLC, et al. Defendants.	Adv. Proc. 12-01935 (MG)
In re RESIDENTIAL CAPITAL, LLC, *et al.*, Debtors	Case No. 12-12020 (MG) Chapter 11 Jointly Administered

DEFENDANT JUDY FABER'S MOTION FOR DISMISSAL OF ADVERSARY PROCEEDING PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

Defendant Judy Faber ("Ms. Faber") moves the Court to dismiss the above-referenced adversary proceeding (the "Adversary Proceeding") commenced by Marion L. Jenkins and Sharon Jenkins ("Plaintiffs") pursuant to Rule 12(b)(6) of the Federal Rule of Civil Procedure (the "Rules"), as made applicable by Rule 7012 of the Federal Rules of Bankruptcy Procedure, as follows:

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Procedural History

1. On May 14, 2012, Residential Capital, LLC and certain of its direct and indirect subsidiaries (collectively, the "ResCap Debtors") filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code in this Court. Pursuant to the *Order Under Bankruptcy Rule 1015 Authorizing Joint Administration of Debtors' Chapter 11 Cases* entered by this Court on May 14, 2012 [Docket No. 59], the ResCap Debtors' Chapter 11 cases are being jointly administered and under Case No. 12-12020 (MG).

2. On November 9, 2012, Plaintiffs filed a complaint [Docket No. 1] (the "Complaint") initiating this adversary proceeding against Ms. Faber and other defendants.

3. According to the Court's records, the deadline to respond to the Complaint was extended by this Court's Order [Docket No. 8] to January 21, 2013.

Facts as Alleged in the Complaint

4. On or about February 28, 2006, Plaintiffs executed a note in favor of Mortgage Lenders Network USA, Inc. ("MLN USA") in the amount of $300,000.00 (the "Note"). (*See* Complaint, Exhibit A).

5. The Note is secured by the real property known as 405 Grant Park Place, Atlanta, Georgia 30315, pursuant to a *Security Deed* (the "Security Deed") executed contemporaneously with the Note. (*See* Complaint, Exhibit A).

6. Mortgage Electronic Registration Systems, Inc. ("MERS") is named as (a) a nominee of MLN USA and MLN USA's successors and assigns and (b) a beneficiary, solely as nominee for MLN USA and MLN USA's successors and assigns. (*See* Complaint, Exhibit A).

7. The Security Deed was recorded in the land records of Fulton County, Georgia on March 29, 2006, at 10:24 a.m., in Deed Book 42244, Pg 433, Instrument No. 2006-0095865. (*See* Complaint, Exhibit A).

8. Ms. Faber, in her capacity as Vice President of Residential Funding Corporation, endorsed the Note to U.S. Bank National Association as Trustee on that certain *Allonge to Note* (the "Allonge").[1] (*See* Complaint, Exhibit E).

Standard For Rule 12(b)(6) Motions

9. Rule 12(b)(6) provides that an action may dismissed for failure to state a claim upon which relief can be granted. The 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). The Court's review is 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).

10. To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 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). If, as a matter of law, "the complaint cannot state any set of facts that would entitle the plaintiff to relief," a claim should be dismissed. *See Cal. Pub. Emps.' Ret. Sys. v. N.Y. Stock Exchange, Inc. (In re NYSE Specialists Sec. Litig.)*, 503 F.3d 89, 95 (2d Cir. 2007).

11. "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." *Twombly*, 550 U.S. at 555 (citations omitted). A plaintiff must

[1] The Allonge was also endorsed by Michele Morales, as Manager of Sales and Acquisitions for Emax Financial Group, LLC, to pay to the order of Residential Funding Corporation, n/k/a Residential Funding Company, LLC.

allege a factual predicate concrete enough to warrant further proceedings. *See, e.g., DM Research v. Coll. of Am. Pathologists,* 170 F.3d 53, 55-56 (1st Cir. 1999). The mere "possibility that a plaintiff might later establish some set of undisclosed facts to support recovery" is insufficient to survive a Rule 12(b)(6) challenge. *Twombly*, 550 U.S. at 562 (internal quotation marks and brackets omitted).

12. Bald assertions, subjective characterizations, and legal conclusions 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 may 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."). As noted by the United States Supreme Court:

> Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions . . . . [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss . . . . Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires a reviewing court to draw on its judicial experience and common sense . . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]" – "that the pleader is entitled to relief."

Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (citations omitted).

13. 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).

Argument

14. The Complaint fails to state a claim against Ms. Faber upon which relief may be granted, and pursuant to Federal Rule of Civil Procedure 12(b)(6), the Complaint is due to be dismissed in its entirety as to Ms. Faber.

I. Plaintiffs Have Failed to Plead Any Claims Whatsoever Against Ms. Faber.

15. Plaintiffs do not make any specific allegations against Ms. Faber. The Complaint makes no mention of Ms. Faber other than naming her as a defendant. There certainly are no allegations regarding Ms. Faber's conduct, although an exhibit contains her signature on an endorsement of the Note. (*See* Complaint, ¶ 15 and Exhibit E.).

16. Plaintiffs generally reference "Defendants" in Paragraphs 26 and 27 of the Complaint. However, such generalized assertions are insufficient under the *Iqbal/Twombly* standard because Ms. Faber and other defendants cannot reasonably know which of the eleven named defendants the Plaintiffs are referring to.

17. The Plaintiffs have not pled any set of facts that would support a claim against Ms. Faber. Accordingly, the Complaint is due to be dismissed with respect to Ms. Faber.

Conclusion

For the foregoing reasons, Ms. Faber respectfully moves to dismiss Plaintiffs' Complaint against her in its entirety and with prejudice.

Respectfully submitted this the 21st day of January, 2013.

/s/ Christopher L. Hawkins
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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of this motion upon:

Marion L. Jenkins
405 Grant Park Place
Atlanta, Georgia 30315

Sharon Jenkins
405 Grant Park Place
Atlanta, Georgia 30315

by placing a copy of same in the United States Mail via certified mail, return receipt requested, and addressed to their regular mailing addresses on this 21st day of January, 2013.

/s/ James P. Watkins
James P. Watkins