United States District Court,
S.D. Florida.
Eugenia G. HASBUN, Plaintiff,
v.
RECONTRUST COMPANY, N.A., Defendant.

No. 11–60488–CIV.
Aug. 24, 2011.

ORDER GRANTING MOTION TO DISMISS

WILLIAM P. DIMITROULEAS, District Judge.

THIS CAUSE is before the Court upon Defendant Recontrust Company, N.A.'s Motion to Dismiss Second Amended Complaint [DE 14], filed herein on July 18, 2011. The Court has carefully considered the Motion, Response [DE 17], Reply [DE 18], and is otherwise fully advised in the premises.

I. *BACKGROUND*

Plaintiff commenced the instant action on March 8, 2011 [DE 1], alleging that Defendant violated two provisions of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 ("FDCPA") by seeking to collect from Plaintiff a debt that had been discharged in bankruptcy. On May 24, 2011, the Court entered an Order Granting Motion to Dismiss [DE 8]. In its Order, the Court held that "the Complaint fails to identify any information about the alleged debt, including the form of the debt, the amount of the debt, or when debt was incurred. Without identifying any essential pieces of information regarding the alleged debt, Plaintiff has not satisfied the minimal pleading standards of Rule 8(a)." [DE 8 at 3]. Additionally, the Court explained that mortgage servicing companies are not considered debt collectors under the FDCPA. *See, e.g., Locke v. Wells Fargo Home Mortg.,* Case No. 10–60286–CIV, 2010 WL 4941456, at *2 (S.D.Fla. Nov.30, 2010) (dismissing FDCPA claim with prejudice and holding that "[s]ince Wells Fargo was the mortgage company servicing the Plaintiff's mortgage, it cannot be liable as a 'debt collector' under section 1692"). The Court held that if "it becomes apparent that the alleged debt collection violations are against a mortgage company servicing the Plaintiff's mortgage and/or pertain to a mortgage foreclosure action, the Complaint will be dismissed with prejudice." [DE 8 at 4].

On June 3, 2011, Plaintiff filed a First Amended Complaint [DE 9], which Defendant again moved to dismiss. Plaintiff again asserted one count, entitled "Collecting Discharged Debt," alleging that Defendant violated two provisions of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 ("FDCPA") by seeking to collect from Plaintiff a debt that had been discharged in bankruptcy. On June 29, 2011, the Court entered an Order Granting Motion to Dismiss [DE 12], reiterating that if the alleged debt collection violations are against a mortgage company servicing the Plaintiff's mortgage and/or pertain to a mortgage foreclosure action, the complaint would be dismissed with prejudice. [DE 12 at 5].

On July 7, 2011, Plaintiff filed a Second Amended Complaint [DE 13], which Defendant has again moved to dismiss. Plaintiff again asserts one count, entitled "Collecting Discharged Debt," alleging that Defendant violated two provisions of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 ("FDCPA") by seeking to collect from Plaintiff a debt that had been discharged in bankruptcy.

II. *DISCUSSION*

A. Motion to Dismiss Standard

Until the Supreme Court decision in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), courts routinely followed the rule that, "a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). However, pursuant to *Twombly,* to survive a motion to dismiss, a complaint must now contain factual allegations which are "enough to raise a right to relief above the speculative level ... on the assumption that all the allegations in the complaint are true (even

if doubtful in fact).” 550 U.S. at 555. “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.” *Id.* Taking the facts as true, a court may grant a motion to dismiss when, “on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action.” *Marshall Cty. Bd. of Educ. v. Marshall Cty. Gas Dist.,* 992 F.2d 1171, 1174 (11th Cir.1993). In *Ashcroft v. Iqbal,* —— U.S. ——, —— – ——, 129 S.Ct. 1937, 1949–50, 173 L.Ed.2d 868 (2009), the Supreme Court further stated that a court need not accept legal conclusions as true, but only well-pleaded factual allegations are entitled to an assumption of truth.

B. Defendants' Motion to Dismiss

Defendant filed the instant Motion on July 18, 2011, arguing that the Complaint should be dismissed on the following grounds: (1) failure to state a claim under the FDCPA since foreclosure is not debt collection under the FDCPA; (2) the March 11, 2010 correspondence did not seek to collect a debt discharged in bankruptcy.

“In order to prevail on an FDCPA claim, a plaintiff must prove that: ‘(1) the plaintiff has been the object of collection activity arising from consumer debt, (2) the defendant is a debt collector as defined by the FDCPA, and (3) the defendant has engaged in an act or omission prohibited by the FDCPA.’ “ *Kaplan v. Assetcare, Inc.,* 88 F.Supp.2d 1355, 1360–61 (S.D.Fla.2000) (internal citations omitted).

In *Warren v. Countrywide Home Loans, Inc.,* 342 Fed.Appx. 458, 460 (11th Cir.2009), the Eleventh Circuit held that foreclosing on a security interest is not a “debt collection activity” for purpose of the FDCPA). *See also Acosta v. Campbell,* 2006 WL 3804729, *4 (M.D.Fla. Dec.22, 2006) (“Nearly every court that has addressed the question has held that foreclosing on a mortgage is not debt collection activity for purposes of the FDCPA.”) (string citing cases); *Trent v. Mortgage Electronic Registration Systems, Inc.,* 618 F.Supp.2d 1356, 1360 (M.D.Fla.2007) (“[F]oreclosing on a mortgage ‘is distinct from the collection of the obligation to pay money. The FDCPA is intended to curtail objectionable acts occurring in the process of collecting funds from a debtor. But, foreclosing ... is an entirely different path. Payment of funds is not the object of the foreclosure action. Rather, the lender is foreclosing its interest in the property.’ ”) (internal citations omitted).

The only allegation in the Second Amended Complaint relating to a communication from Defendant to Plaintiff is a letter dated March 11, 2010. [DE 13–1 at 5–14].[FN1] Plaintiff claims that the March 11, 2010 letter was sent to her after she defaulted on her mortgage loan payments and declared bankruptcy.

> This letter is to advise you that we have been asked to institute foreclosure proceedings against the referenced property based upon a default in the terms of the above referenced security instrument. A Notice of Sale will be submitted for publication in the legal newspaper in the county where the property is located and a foreclosure sale will be scheduled. Enclosed is a copy of said Notice of Sale.

(*See* DE 13–1 at 5, ¶ 1). The Court finds that it is unambiguous that the purpose of the March 11, 2010 is to institute the foreclosure of a mortgage loan and, as such, does not constitute debt collection activity for purposes of the FDCPA.

In her Response, Plaintiff relies on two non-binding circuit decisions holding that foreclosure can constitute debt collection. *See Wilson v. Draper & Goldberg, P.L.L.C.,* 443 F.3d 373 (4th Cir.2006); *Kaltenbach v. Richards,* 464 F.3d 524 (5th Cir.2006). However, there is a circuit split on the issue of whether foreclosure activities constitute debt collection under the FDCPA, and the holdings of *Wilson* and *Kaltenbach* are contradicted by the Eleventh Circuit's *Warren* holding that lien foreclosure activities do not constitute debt collection activities. As this Court recently held in *Birster v. American Home Mortg. Servicing, Inc.,* 2011 WL 2678927 (S.D.Fla. July 07, 2011), “whether the conduct at issue is the act of filing a foreclosure action or communications and conduct subsequent to the filing of the foreclosure, so long as the purpose of the conduct is the enforcement of a security interest the only section of the FDCPA available to such claims is section 1692f(6).”

Here, Plaintiffs' allegations relate to efforts by Defendant to enforce a security interest and Plaintiff has not asserted a claim for violation of 1692f(6) in her Second Amended Complaint. Accordingly, Plaintiff's FDCPA claim fails as a matter of law. It appearing that further amendment would be futile, this case will be dismissed with prejudice.

III. *CONCLUSION*

Based upon the foregoing, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant Recontrust Company, N.A.'s Motion to Dismiss Second Amended Complaint [DE 14] is hereby **GRANTED** [FN2]**;**

FN2. Because the Court is granting Defendant's motion to dismiss, the Court need not address the remaining arguments raised in Defendant's motion in support of dismissal.

2. The Second Amended Complaint [DE 13] is hereby **DISMISSED with prejudice;**

3. The Clerk shall **CLOSE** this case and **DENY** all pending motions as moot.

DONE AND ORDERED.

FN1. The Court declines to convert the Motion into one for summary judgment, but recognizes that it may properly consider documents in ruling on a motion to dismiss that are referred to in the Complaint and are central to the claims. *See Brooks v. Blue Cross and Blue Shield of Fla.,* 116 F.3d 1364, 1369 (11th Cir.1997) (holding that "where the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal, and the defendant's attaching such documents to the motion to dismiss will not require conversion of the motion into one for summary judgment.").