UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

TAYLOR, BEAN & WHITAKER MORTGAGE CORPORATION,

Debtors.
_____/

CASE NO.: 3:09-bk-7047-JAF
Chapter 11

JONI COX-TANNER, CHARLES TANNER, SANDY SMITH, MICHAEL ELLIOTT, DIANNA L. ELLIOTT, JAY D. OYLER, LARRY WESLEY, TAM STOUT, LINDA BACON, MARK ARMOUR, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

Adversary No.: 3:11-ap-326-JAF

TAYLOR, BEAN & WHITAKER MORTGAGE CORPORATION,

Defendant,

_____/

ORDER GRANTING IN PART MOTION TO DISMISS CLASS ACTION COMPLAINT

This proceeding is before the Court on Defendant Taylor, Bean, & Whitaker Corporation's ("TBW") Motion to Dismiss Plaintiffs' *Pro Se* Class Action Complaint (Doc. 8; *see also* Doc. 1) and Plaintiffs' responses in opposition thereto (collectively, the "Responses") (Docs. 10, 11, 14, 15, 16).[1] For the reasons that follow, the Motion (Doc. 8) will be granted to the extent set forth herein.

[1] *Pro se* Plaintiffs, Linda Bacon and Mark Armour, did not file a response in opposition to the Motion to Dismiss. Therefore, as to them, the Court will treat the Motion as unopposed. Nevertheless, in accordance with this Order, the Court will permit Ms. Bacon and Mr. Armour, along with the other Plaintiffs, to file an amended complaint. Should Ms. Bacon and Mr. Armour file an amended complaint, they are reminded that they must timely respond to the motions filed by other parties in this proceeding, for if they do not timely respond to any such motion(s), the Court may assume they do not oppose the motion(s) and any relief requested therein. Motions that a plaintiff must respond to include, but are not limited to, motions to dismiss and motions for summary judgment.

Background

On August 24, 2009, TBW filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, thereby commencing Case No. 3:09-bk-7047-JAF. On June 15, 2010, Lee B. Farkas, TBW's former Chairman, was indicted by the federal government for conspiracy, bank fraud, wire fraud, and securities fraud (Doc. 184-8 at 2-31). *See also United States v. Farkas*, Case. No. 1:10-CR-200-LMB (E.D. Va. June 15, 2010). On April 19, 2011, Mr. Farkas was found guilty of fourteen (14) counts related to conspiracy, bank fraud, wire fraud, and securities fraud (Doc. 184-8 at 72-76). Mr. Farkas is presently incarcerated.

Plaintiffs initiated this Adversary Proceeding on June 21, 2011 by filing the instant Class Action Complaint ("Complaint") (Doc. 1) on behalf of themselves and others similarly situated. Although it is difficult to unravel the precise factual assertions in Plaintiffs' Complaint, the gravamen of their claim(s) appear to relate to TBW's selling and/or servicing of Plaintiffs' residential mortgages (*see* Doc. 1 at 4-5, 8, 13-19).

Plaintiffs delineate the following five counts in the Complaint: (I) violation of the federal Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1962; (II) "Abuse of Process and Funds"; (III) violation of the Unfair and Deceptive Trade Practices Act, 15 U.S.C. § 45(a); "Unclean Hands"; (IV) "Common Law Fraud – Deceit"; and (V) "Wrongful Tort" (Doc. 1 at 16-19).

Motion to Dismiss Standard

A motion to dismiss pursuant to Rule 12(b) tests the sufficiency of a complaint and asks the court to determine whether the complaint sets forth sufficient factual allegations to establish a claim for relief. To survive a Rule 12(b) motion, the complaint must contain enough factual matter (taken

as true) to "raise [the] right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[N]aked assertions devoid of further factual enhancement" will not satisfy Rule 8(a)(2)'s requirement of a short plain statement of the claim showing the pleader is entitled to relief. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (*citing Twombly*, 550 U.S. at 557) (*internal quotations omitted*). A "formulaic recitation of the elements of a cause of action will not do." *Id*.

Thus, a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the conduct alleged." *Twombly*, 550 U.S. at 555. A mere possibility that the defendant acted in contravention to the law will not suffice. *Id.* Although a court must accept all well pleaded facts as true, it is not required to accept legal conclusions. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009). A complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Iqbal*, 129 S. Ct. at 1949.

Pro se complaints, however, are to be held to a less stringent standard than those drafted by an attorney. *Wright v. Newsome*, 795 F.2d 964, 967 (11th Cir. 1986). Nonetheless, while *pro se* pleadings are to be "liberally construed," *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998), the Court is not obligated to re-write a deficient complaint. *See Peterson v. Atlanta Hous. Auth.*, 998 F.2d 904, 912 (11th Cir. 1993); *see also Olsen v. Lane*, 832 F. Supp. 1525, 1527 (M.D. Fla. 1993) ("*pro se* litigant must still meet minimal pleading standards").

Discussion

TBW moves to dismiss the Complaint arguing, *inter alia*, that Plaintiffs have failed to meet the pleading standards and failed to state a claim for relief (Doc. 8). The Court agrees. For the reasons stated below, Plaintiffs' Complaint will be dismissed without prejudice.

I. Putative Class Action

As an initial matter, *pro se* litigants may not represent a class. *See Wallace v. Smith*, 145 F. App'x 300, 302 (11th Cir. 2005).[2] One of the rationales behind this rule is the requirement that the representative party fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). "The ability to protect the interests of the class depends, in part, on the quality of counsel, and the competence of a layperson representing himself is considered too limited to allow him to risk the rights of others." *Wesley v. U.S. Dist. Ct. for the S. Dist. of Fla.*, No. 09-23090-CIV, 2009 WL 3617814, *1 (S.D. Fla. Oct. 29, 2009) (*citing Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973)).[3] Furthermore, federal courts allow a party to plead and conduct their own cases personally or by way of counsel. 28 U.S.C. § 1654. As discussed more comprehensively below, Plaintiffs will be permitted to file an amended complaint; however, they will only be permitted to bring claim(s) on behalf of themselves. While Plaintiffs may join together in this proceeding, they shall not purport to represent a putative class.[4]

[2] Unpublished opinions are not considered binding authority; however, they may be cited as persuasive authority pursuant to the Eleventh Circuit Rules. 11th Cir. R. 36-2.

[3] Decisions of the Fifth Circuit rendered on or before September 30, 1981 are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

[4] Plaintiffs maintain they desire to bring this proceeding as a class action because the putative members of the proposed class "would be unable to afford counsel to litigate the issues raised in this Complaint" (Doc. 1 at 15). While this may be true, the Court would note that many attorneys are willing to prosecute class action law suits on a continency basis, if they believe the claim(s) have merit. If Plaintiffs desire to pursue a class action, they should obtain legal

II. Sufficiency of the Pleadings

Irrespective of the fact Plaintiffs may not represent a class, the Complaint (Doc. 1) is due to be dismissed for failure to satisfy the pleading requirements of both the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure. To be more precise, despite the liberal pleading standards and the leniency granted to *pro se* litigants, Plaintiffs' Complaint has failed to provide sufficient, coherent factual allegations to survive the motion to dismiss stage of the proceeding. The assertions in Plaintiffs' Complaint are neither short nor plain, and the allegations are not simple, concise, and direct. *See* Fed. R. Civ. P 8. Plaintiffs' Complaint is convoluted and repetitious, and difficult to understand at times.

Although Plaintiffs are proceeding *pro se*, they remain "subject to the relevant law and rules of this Court, including the Federal Rules of Civil Procedure. *Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir. 1989). Fed. R. Civ. P. 10(b) requires that "a party must state their claims . . . in separately numbered paragraphs, each limited as far as practicable to a single set of circumstances," and that "[i]f doing so would promote clarity, each claim founded on a separate transaction or occurrence . . . must be stated in a separate count . . . ."

Here, the paragraphs of the Complaint are not numbered, the Complaint contains run-on sentences (*see, e.g.*, Doc. 1 at 19), and the factual allegations contain lengthy quotations from portions of hearings that have taken place in the underlying bankruptcy case (Doc. 1 at 9-13). One such quotation is presented in a single-spaced paragraph that continues for a full page and a half

---

counsel.

(Doc. 1 at 11-13). Plaintiffs also failed to delineate clearly the facts which support each cause of action they intended to pursue against TBW. *See* Fed R. Civ. P. 10(b).

While some of the claims Plaintiffs attempt to raise—like their RICO Act count and their common law fraud count—are apparent from the face of the Complaint, Plaintiffs referenced legal claims that were unrelated to their delineated counts. For instance, Plaintiffs mention "Florida unfair and deceptive trade practices" and constitutional violations; however, it is difficult to discern facts that support the plausibility of these assertions. To illustrate, Plaintiffs claim a "violation of their constitutional rights under color of state law"; however, they neither assert a constitutional law count, nor do they allege state action (*see generally* Doc. 1). While, on one occasion, Plaintiffs mention "Florida unfair and deceptive trade practices," Count III of the Complaint is brought solely under the Federal Trade Commission Act, 15 U.S.C. § 45(a) (Doc. 1 at 18), which does not provide for a private cause of action.[5]

Count IV of Plaintiffs' Complaint is based on "Unclean Hands," but this doctrine is in the nature of an affirmative defense. Plaintiffs have failed to provide the Court with any authority wherein this doctrine has been implemented as a positive claim, and the Court is aware of none. In support of their claim in this regard, Plaintiffs state that the Court, in the underlying bankruptcy case, "should have refused any relief under the automatic stay because of the conduct of [TBW's] predecessors—Lee Farkas [and others]" (Doc. 1 at 18). If Plaintiffs desire relief from the automatic stay provisions of 11 U.S.C. § 362, they may file an appropriate motion in the underlying bankruptcy case.

[5] Florida's Deceptive and Unfair Trade Practices Act creates a private cause of action where none exists under federal law. *Nieman v. Dryclean U.S.A. Franchise Co.*, 178 F.3d 1126, 1128-29 (11th Cir 1999); Fla. Stat. § 501.211.

Count II is entitled "Abuse of Process and Funds"; however, Plaintiffs' assertions in this regard appear to be based on TBW's alleged failure to provide relevant discovery in the underlying bankruptcy case (*see* Doc. 1 at 17). Again, the Court would emphasize that the factual assertions as to this count are not entirely clear.[6]

A cause of action for abuse of process requires proof that: (1) the defendant made an illegal or improper use of process; (2) the defendant had an ulterior motive or purpose in exercising the illegal or improper process; and (3) the plaintiff was injured as a result of the defendant's action(s). *Thomson McKinnon Sec., Inc. v. Light*, 534 So.2d 757, 760 (Fla. Dist. Ct. App. 1988). "There is no abuse of process, however, when the process is used to accomplish the result for which it was created, regardless of an incidental or concurrent motive of spite or ulterior purpose." *Scozari v. Barone*, 546 So.2d 750, 751 (Fla. Dist. Ct. App. 1989). Moreover, if there is "a reasonable basis in law and fact to initiate the judicial proceedings, then [such] processes [are] justified even though they may have served some other collateral purpose." *Id*. at 752. Merely participating in a proceeding is not abuse of process. *See Light*, 534 So.2d at 759-60.

[6] The Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure provide mechanisms by which Plaintiffs may seek to obtain any wrongfully withheld discovery materials. These procedural rules are available for review in the law libraries of the state and in federal courthouses. The Local Rules for this Court are available for review on the public website for the United States Bankruptcy Court for the Middle District of Florida at www.flmb.uscourts.gov and from the Clerk's Office. In addition, any such motion in this regard should be filed in the underlying bankruptcy case.

In addition, the Complaint fails to assert what harm Plaintiffs have suffered in relation to TBW's alleged abuse of process. *See Peer v. Lewis*, No. 08-13465, 2009 WL 323104, slip op. at *2 (11th Cir. Feb. 10, 2009) (recognizing that a cognizable injury for abuse of process is limited to actual harm caused by the misuse of process).[7]

With respect to Count I, Plaintiffs' RICO Act claim(s), the Court would note that Rule 9(b) of the Federal Rules of Civil Procedure (made applicable by Rule 7009 of the Federal Rules of Bankruptcy Procedure) requires a party alleging fraud to "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b); Fed. R. Bankr. P. 7009; *see also Ambrosia Coal & Construction Co. v. Pages Morales*, 482 F.3d 1309, 1316-17 (11th Cir. 2007) (applying heightened pleading standard to alleged RICO Act violations). The particularity requirement alerts defendants of "the precise misconduct with which they are charged and protect[s] defendants against spurious charges of immoral and fraudulent behavior." *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (*quotations omitted*). Under Rule 9(b), a 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 plaintiffs; and (4) what the defendants gained by the alleged fraud." *Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1291 (11th Cir. 2010).

While publically known facts regarding certain instances of fraud occurring at TBW abound, Plaintiffs must nonetheless set forth facts that state a plausible RICO Act cause of action as to them.

[7] While Count II also references "funds" in its title, the Court is unable to discern the funds to which Plaintiffs refer (*see* Doc. 1 at 17).

Here, Plaintiffs' allegations are simply overly-broad and conclusory in nature (*see* Doc. 1 at 16-17). More particularly, the Complaint asserts that TBW's relationship with Mortgage Electronic Registration System ("MERS") allowed it to obtain "fraudulent realms of modifications as well as foreclosures" (Doc. 1 at 16). The Complaint, however, fails to identify a particular instance where a document concerning Plaintiffs was fraudulently signed or recorded (*see* Doc. 1 at 16-17). Moreover, Plaintiffs did not identify which of their respective properties, if any, was wrongfully foreclosed upon by TBW (Doc. 1 at 16-17).

Instead, the Complaint relies on the conclusory assertion that "in all instances, an employee from Taylor Bean and Whitaker [TBW] signed off on legal instruments as the 'President' or 'Vice President' of MERS and filed these documents fraudulently in the respective County Courthouses of the [Plaintiffs]." (Doc. 1 at 17). Without explaining the circumstances that surround the alleged fraud, TBW and the Court is left to guess. A complaint will not suffice if it offers no more than "labels and conclusions," or "an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S. Ct. at 1949.

As to Count V, Plaintiffs common law fraud claim(s), again the Court would note that such assertions were not made with particularity. *See* Fed. R. Civ. P. 9(b). Here, Plaintiffs neither provide any particular instances of fraud, nor the circumstances that surround the alleged fraud (*see* Doc. 1 at 19). Plaintiffs state TBW engaged in "illegal transfers of [Plaintiffs'] loans, illegal modifications, and illegal foreclosures" (Doc. 1 at 19); however, they do not provide any specific instances of such occurrences as to them. To be precise, to survive a motion to dismiss, Plaintiffs must assert the who, what, when, and where of the purported fraud. *Sampson v. Washington Mutual Bank*, No. 11-11400, 2011 WL 4584780, *3 (11th Cir. Oct. 5, 2011). In addition, Plaintiffs must

specify what damages they suffered as a result of the purported instances of fraud. Again, mere "labels and conclusions," or "an unadorned, the defendant-unlawfully-harmed-me accusation" will not suffice. *Iqbal*, 129 S. Ct. at 1949.

In order to show traditional common law fraud, a plaintiff must show: (1) a material false representation was made; (2) the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (3) that the speaker made the representation with the intent that the other party should act upon it; (4) the party acted in reliance on the representation; and (5) the party suffered injury thereby. *See Lance v. Wade*, 457 So.2d 1008, 1011 (Fla. 1984) (common law fraud requires a showing that the defendant deliberately and knowingly made false representation(s), which actually caused detrimental reliance by the plaintiff); *see also Palmas Y Bambu, S.A. v. E.I. DuPont de Nemours & Co.*, 881 So.2d 565, 573 (Fla. Dist. Ct. App. 2004) (noting that, when fraudulent misrepresentation is alleged, direct causation can be proved only by establishing detrimental reliance).

Similarly, Count VI, Plaintiffs' "Wrongful Tort" claim, fails to meet the pleading standards. As an initial matter, Plaintiffs have not asserted this count pursuant to any particular tort. Although Plaintiffs mention "numerous acts" of wrongful conduct by way of "loss of payment," "irregular instruments," and/or "foreclosures," they have failed to identify any particular lost payment, irregular instrument, or foreclosure proceeding that relates to them (*see* Doc. 1 at 19). A claim for wrongful foreclosure requires that the property in question be sold at a foreclosure sale. *Raines v. GMAC Mortgage Co.*, No. 3:09-cv-477, 2009 WL 4715969, *2 (M.D. Fla. Dec. 10, 2009) (finding no action for attempted foreclosure exists in Florida); *see also, Marsh v. Wells Fargo Bank, N.A.*,

760 F. Supp. 2d 701, 708 (N.D. Tex. 2011) (concluding there is no cause of action for attempted wrongful foreclosure).

Additionally, Plaintiffs allege generally that they suffered damages and severe emotional and physical distress; however, they do not assert any facts in relation to such damages (*see* Doc. 1 at 19).

The Court would also note that interspersed with Plaintiffs' factual allegations and legal citations are negative characterizations and inflammatory statements regarding defense counsel (*see*, *e.g.*, Doc. 1 at 17). Such unsupported statements are inappropriate, and make it difficult to separate the factual allegations supporting Plaintiffs' claims. These statements amount to impermissible "labels and conclusions." *See Iqbal*, 129 S. Ct. at 1949.

Conclusion

In sum, Plaintiffs claims are ill-defined due to their failure to comply with Rules 8, 9, and 10 of the Federal Rules of Civil Procedure; thus, their claims cannot be adequately evaluated under the standards enunciated under *Twombly, supra*, and its progeny. Plaintiffs' failure to isolate the factual basis pertinent to each particular claim makes it impossible to determine whether Plaintiffs have adequately asserted plausible claim(s). It is not the Court's obligation to parse through the pleading and piece together sufficient allegations to state a cause of action. Since, however, it is possible that the Complaint might be amended to state viable causes of action, it will be dismissed without prejudice. To that end, Plaintiffs will be granted an opportunity to plead cognizable causes of action that comport with the standards of pleading set forth above.

Accordingly, it is **ORDERED**:

1. Defendant Taylor, Bean, & Whitaker Corporation's Motion to Dismiss Plaintiffs' *Pro Se* Class Action Complaint (Doc. 8) is granted to the extent that the Complaint (Doc. 1) is dismissed without prejudice.

2. Plaintiffs shall have until **November 23, 2011** within which to file an amended complaint in accordance with the pleading standards set forth herein.

DONE AND ORDERED this 24th day of October, 2011 in Jacksonville, Florida.

/s/ Jerry A. Funk

JERRY A. FUNK
United States Bankruptcy Judge

Copies to:

Pro Se Plaintiffs and
Jeffrey W. Kelley, Attorney for Defendant