

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

Case No. 3:13-bk-5079-PMG

Julie Brigman,

Debtor.

Chapter 13

Julie Brigman,

Plaintiff,

vs.

Adv. No. 3:14-ap-28

Bank of America, N.A.,
successor by merger to
BAC Home Loans Servicing, L.P.,

Defendant.

ORDER ON MOTION TO DISMISS FIRST AMENDED COMPLAINT

THIS CASE came before the Court for hearing to consider the Motion of Bank of America, N.A. (the Bank) to Dismiss First Amended Complaint for Equitable Subordination, Declaratory Judgment, Injunctive Relief and Damages filed by the Debtor, Julie Brigman.

The Debtor filed a five-Count Amended Complaint related to the Bank's enforcement of a mortgage on the Debtor's home, and the Bank filed a Motion to Dismiss the Amended Complaint. The Motion to Dismiss should be granted as to Count II of the Amended Complaint, because the

Debtor has not sufficiently alleged a claim for damages for a willful violation of the automatic stay. The Motion to Dismiss should be denied as to the remaining Counts of the Amended Complaint, however, because the Court maintains subject matter jurisdiction of the claims, and because the Debtor has stated a plausible claim that the Bank engaged in improper collection practices and inequitable conduct.

Background

The Debtor filed a petition under Chapter 13 of the Bankruptcy Code on August 21, 2013. On her schedule of assets filed in the bankruptcy case, the Debtor listed certain real property located at 2781 Treasure Cove Lane, Jacksonville, Florida (the Property). The Property was listed as the Debtor's home, and was claimed as exempt entireties property.

On January 23, 2014, the Debtor filed the Complaint that commenced this adversary proceeding. Her Amended Complaint includes the following allegations:

1. In 2007, the Debtor obtained a loan that was secured by the Property. (§ 6).
2. On January 30, 2009, Countrywide Home Loans, LLC, as servicer, agreed to modify the loan. (§ 8).
3. The Debtor made payments in the modified amounts in April, May, June, July, and August of 2009. (§ 11).
4. The Bank did not provide notice that it had received an assignment of the right to collect the Debtor's mortgage payments. (§ 13).
5. On August 17, 2009, the Bank demanded payment of a past-due amount. (§ 14).
6. On February 2, 2010, the Bank filed a foreclosure complaint in the Circuit Court for Duval County, Florida, which falsely alleged that the Debtor was in default as of July of 2009. (§§ 17, 18).
7. The Bank was notified of the filing of the Debtor's bankruptcy case on August 21, 2013. (§ 29).

8. After receiving notice of the bankruptcy case, the Bank continued its foreclosure efforts by (1) appearing at a hearing in the foreclosure action on August 22, 2013; (2) filing a Notice of Appearance in the foreclosure action on September 4, 2013; and (3) filing a second Notice of Appearance in the foreclosure action on December 19, 2013. (¶ 31).

The Amended Complaint contains five Counts: (1) Count I is an action for a declaratory judgment that the Bank may not enforce the loan against the Debtor or, alternatively, that the Bank is bound by the modification agreement; (2) Count II is an action for damages for violation of the stay; (3) Count III is an action for damages for improper collection practices; (4) Count IV is an action for equitable subordination; and (5) Count 5 is an action to enjoin the Bank from violating the Florida Consumer Collection Practices Act.

The Bank filed a Motion to Dismiss the Amended Complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. (Doc. 9).

A. Count I

In Count I, the Debtor seeks a declaration that the Bank “lacks the right to collect payment from her or enforce its alleged lien on Ms. Brigman’s home, or that such right is subject to the terms of the Modification Agreement.” (Doc. 8, ¶ 27).

In its Motion to Dismiss, the Bank asserts that this Court lacks subject matter jurisdiction to determine Count I, because the Bank’s right to enforce its lien is before the state court in the foreclosure action, and “Florida state circuit courts have exclusive jurisdiction over all actions for foreclosure of real property.” (Doc. 9, p. 7).

The Bank’s Motion to Dismiss Count I should be denied.

The statute that confers jurisdiction over bankruptcy matters is 28 U.S.C. §1334. Section 1334 provides in part:

28 U.S.C. §1334. Bankruptcy cases and proceedings

...

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. §1334(b)(Emphasis supplied). The jurisdiction provided by §1334 may be referred to Bankruptcy Courts pursuant to 28 U.S.C. §157(a).

The section refers to “civil proceedings arising under title 11, or arising in or related to cases under title 11.” With respect to such proceedings, §1334(b) provides “three types of bankruptcy jurisdiction, commonly called ‘arising under,’ ‘arising in,’ and ‘related to’ jurisdiction.” In re Union Trust Philadelphia, LLC, 460 B.R. 644, 653 (E.D. Penn. 2011)(quoting In re W.R. Grace & Co., 591 F.3d 164, 171 (3d Cir. 2009)).

In the Eleventh Circuit, the test for determining whether a proceeding is “related to” a bankruptcy case is “whether the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy. . . . An action is related to bankruptcy if the outcome could alter the debtor’s rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate.” In re Lemco Gypsum, Inc., 910 F.2d 784, 788 (11th Cir. 1990)(quoting Pacor Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)(and quoted in Lawrence v. Goldberg, 573 F.3d 1265, 1270-71 (11th Cir. 2009)).

In this case, Count I of the Debtor's Amended Complaint is based primarily on the following allegation:

23. BAC claims that it is entitled to payments due under Ms. Brigman's original mortgage and to foreclose on her home in default of such payments, notwithstanding (a) BAC's failure to provide notice of assignment of the right to bill and collect the alleged debt, and (b) the Modification Agreement and Ms. Brigman's compliance therewith.

(Doc. 8, Amended Complaint, ¶ 23). The allegations relate to the mortgage on the Debtor's Property. The Property was scheduled as an asset, and the Bank was scheduled as a secured creditor, in the Debtor's bankruptcy case. The Debtor filed a Chapter 13 Plan which proposes to pay the Bank the sum of \$1,031.32 per month for the plan period of 36 months. (Main Case, Doc. 13). Confirmation of the Plan remains pending before the Court.

For these reasons, the Court maintains subject matter jurisdiction over this proceeding under the "related to" provision of §1334(b). Specifically, the outcome of the proceeding will have an effect on the case because it affects the Debtor's proposed Chapter 13 Plan to repay her creditors. See In re Blaylock, 394 B.R. 359, 367 (Bankr. E.D. Penn. 2008)(A state court tax foreclosure proceeding was "related to" a Chapter 13 case where it affected the debtor's ability to complete the purpose of her plan, which was to pay off the liens and save her home, and where it altered the proposed distribution to creditors under the plan.). For the same reasons, the Court declines to abstain under the permissive abstention provision set forth in 28 U.S.C. §1334(c).

B. Count II

In Count II of her Amended Complaint, the Debtor seeks an award of actual and punitive damages against the Bank for violating the automatic stay of §362(a) of the Bankruptcy Code. (Doc. 8, pp. 5-7).

In its Motion to Dismiss, the Bank asserts that the acts alleged in the Amended Complaint do not constitute attempts to continue the foreclosure action, and that Count II therefore does not state a claim for violation of the stay. (Doc. 9, pp. 9-11).

The Bank's Motion to Dismiss Count II should be granted.

To state an actionable claim for damages based on a stay violation, an individual debtor must allege that she suffered an injury from a willful violation of the stay. For a violation to be "willful," the creditor must have engaged in a deliberate act to violate the stay with knowledge of the debtor's bankruptcy case. In re Everette, 2014 WL 4385741, at 3, 5 (Bankr. S.D. Ga.). Statements or actions that are purely informational, however, are not violations of the stay. In re Everette, 2014 WL 4385741, at 5 (quoting In re Zotow, 432 B.R. 252, 258 (9th Cir. BAP 2010)).

In her Amended Complaint, the Debtor alleges that the Bank violated the automatic stay in three respects:

1. The Bank's attorney appeared at a hearing in the foreclosure action on August 22, 2013, the day after the bankruptcy petition was filed.
2. The Bank's attorney filed a Notice of Appearance in the foreclosure action on September 4, 2013.
3. The Bank's attorney filed a Notice of Appearance in the foreclosure action on December 19, 2013.

(Doc. 8, ¶ 31). All three of the alleged violations occurred in connection with the foreclosure action. The Bank asserts, and the Debtor does not dispute, that the hearing attended by its attorney on August 22, 2013, was scheduled by the foreclosure Court before the bankruptcy petition was filed, and that the purpose of the hearing was to consider the Debtor's Motion to amend her affirmative defenses. (Doc. 9, p. 10; Transcript, pp. 8-9).

Further, the docket in the foreclosure action reflects three entries after the Debtor's Suggestion of Bankruptcy was filed on August 21, 2013: (1) the Bank's Motion to "strike" or continue the trial; (2) the Bank's Notice of Appearance of Counsel; and (3) the Bank's Notice of Change of Address of Plaintiff's Counsel. (Doc. 9, Exhibit C).

Under these circumstances, the Court finds that the Amended Complaint does not sufficiently allege a claim for damages for a willful violation of the stay. The hearing on August 22 was not scheduled by or for the Bank, and the record does not show that the Bank pursued the foreclosure action at the hearing. The foreclosure docket does not reflect that any order was entered as a result of the hearing.

Additionally, the Notices filed by the Bank in the foreclosure action do not constitute steps taken by the Bank to collect the debt or enforce a lien. Instead, the post-bankruptcy papers were filed only to continue the foreclosure trial, which is not a violation of the stay, or for notice purposes only. In re Henson, 477 B.R. 786, 789 (Bankr. D. Colo. 2012)(The creditor did not willfully violate the stay, where it simply maintained the status quo, and did not harass, interfere, or gain any advantage in a pending foreclosure action.).

Accordingly, the Bank's Motion to Dismiss is granted as to Count II, and Count II of the Debtor's Amended Complaint is dismissed.

C. Counts III, IV, and V

Count III of the Amended Complaint is an action for damages for improper collection practices; Count IV is an action for equitable subordination; and Count V is an action to enjoin the Bank from violating the Florida Consumer Collection Practices Act. At the hearing on the Bank's Motion to Dismiss, the Debtor withdrew any claim based on §559.72(7) of the Florida Statutes. Generally, that

section prohibits any collection practice involving an abusive or harassing communication with a debtor, and the Debtor does not allege that the Bank communicated with her. (Transcript, p. 25).

The remainder of the claims in Counts III, IV, and V of the Amended Complaint are centered on the allegation that the Bank's predecessor had agreed to modify the Debtor's loan, and that the Bank refused to honor the modification. At the hearing, for example, the Debtor asserted that the "gestalt" of her Amended Complaint is that the Bank had caused her bankruptcy by refusing to honor the loan modification, and that the Bank's conduct in refusing to honor the modification was inequitable. (Transcript, pp. 19-20, 25-26). "What we're asking for the Court to do in every single count of this complaint is to require the Bank of America to honor the commitment of its predecessor, Countrywide, and to modify Ms. Brigman's loan." (Transcript, p. 28).

The Bank filed a Motion to Dismiss the Debtor's Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Doc. 9, p. 1).

To survive a motion to dismiss under Rule 12(b)(6), a claimant "must allege facts to make his or her claim for relief 'plausible on its face.'" In re Fundamental Long Term Care, Inc., 494 B.R. 548, 554 (Bankr. M.D. Fla. 2013)(citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 868 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009).

In this case, the Debtor alleges in the Amended Complaint that she obtained a home mortgage in 2007, and that Countrywide agreed to modify the mortgage in January of 2009. (Doc. 8, ¶¶ 6-8). A copy of the alleged Modification Agreement is attached to the Amended Complaint, even though the alleged Agreement attached to the Complaint does not include any documents signed by the Debtor, as

required by the Notice. (Doc. 8, Exhibit A). In any event, the Debtor alleges that the Bank subsequently filed a foreclosure complaint, and falsely alleged in the foreclosure action that she was in default as of July of 2009. (Doc. 8, ¶¶ 17-18).

Based on these factual allegations, the Debtor asserts that the Bank has engaged in improper collection practices and inequitable conduct. The Debtor's claims are plausible on their face. In other words, the Court can draw the reasonable inference from the Amended Complaint that the Debtor had entered into a prepetition mortgage modification agreement with her lender, that the Bank has not recognized the terms of the modification, and that its failure to recognize the modification resulted in improper attempts to enforce its lien. The improper enforcement attempts relate to the state court foreclosure action that precipitated the Debtor's Chapter 13 bankruptcy case.

Consequently, the Bank's Motion to Dismiss should be denied as to Counts III, IV, and V of the Debtor's Amended Complaint.

Conclusion

The Debtor filed a five-Count Amended Complaint related to the Bank's enforcement of a mortgage on the Debtor's home, and the Bank filed a Motion to Dismiss the Amended Complaint. The Motion to Dismiss should be granted as to Count II of the Amended Complaint, because the Debtor has not sufficiently alleged a claim for damages for a willful violation of the automatic stay. The Motion to Dismiss should be denied as to the remaining Counts of the Amended Complaint, however, because the Court maintains subject matter jurisdiction of the claims, and because the Debtor has stated a plausible claim that the Bank engaged in improper collection practices and inequitable conduct.

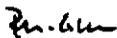
Accordingly:

IT IS ORDERED that:

1. The Motion of Bank of America, N.A. to Dismiss First Amended Complaint for Equitable Subordination, Declaratory Judgment, Injunctive Relief and Damages is granted as to Count II of the Amended Complaint, and Count II is dismissed.
2. The Motion is denied as to the remaining Counts of the First Amended Complaint.

DATED this 17 day of November, 2014.

BY THE COURT



PAUL M. GLENN
United States Bankruptcy Judge