Case No. 16-20560

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

D. PATRICK SMITHERMAN,
Plaintiff-Appellant,
V.
BAYVIEW LOAN SERVICING, LLC
Defendant – Appellee.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division
Cause Number: 4:16-cv-1927

BRIEF OF APPELLEE BAYVIEW LOAN SERVICING, LLC

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Cause No. 16-20560 - *Smitherman v. Bayview*

CERTIFICATE OF INTERESTED PARTES

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

(1)	D. Patrick Smitherman	Pro Se Plaintiff-Appellant
(2)	Bayview Loan Servicing, LLC	Defendant – Appellee
(3)	Michael C. Maus Barrett Daffin Frappier Turner & Engel, LLP	Counsel for Defendant-Appellee
(4)	Hon. Lynn N. Hughes	United States District Judge Southern District of Texas

/s/ Michael C. Maus
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STATEMENT REGARDING ORAL ARGUMENT

Appellee suggests that the issues presented can be determined upon the record and that oral argument would not benefit the panel. The parties' positions are clear and the record uncomplicated. See, Fed. R. App. P. 34(a)(3). If however the court determines that oral argument would assist the Court, Appellee requests the opportunity to present oral argument.

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STATEMENT OF ISSUES

Issue 1: Whether the district court erred in granting the Defendant-Appellee's Rule 12(b)(6) motion based on an affirmative defense of *res judicata*.

Issue 2: Whether the district court erred in granting the Defendant-Appellee's Rule 12(b)(6) motion for failure to state a claim.

Issue 3: Whether the district court erred in denying the Motion for Remand.

Issue 4: Whether the district court erred in the Order Expunging *Lis Pendens*.

Issue 5: Whether the district court erred in entering the injunction.

Issue 6: Whether the August 2, 2016 foreclosure was barred by limitations.

STATEMENT OF THE CASE

A. Procedural History

Appellant was provided with statutory notice dated May 26, 2016 (ROA. 41-44) that the Property subject of this case would be struck off at a non-judicial foreclosure sale to be conducted on July 5, 2016. With more than a months worth of notice Appellant failed to take any action until June 30, 2016 when he filed his Petition seeking emergency relief to restrain the sale. (ROA. 15).

Upon said filing, Appellee filed its Notice of Removal to the District Court. (ROA. 5). On July 7, the District Court set an Order Setting Conference to decide pending and future motions, narrow issues and inquire about possible motions and discovery. (ROA. 167).

Appellee filed its motion to dismiss on July 8, 2016. (ROA. 168).

On July 15, 2016 Appellant served counsel via email with his Amended Petition (ROA. 286). (As this was not electronically filed it was not file marked until July 19, 2016.)

Appellant filed a Response to the Motion to Dismiss on July 18, 2016. (ROA. 190) and a Motion to Remand (ROA. 254).

Due to the amended pleading, Appellee filed its Second Motion to Dismiss on July 18, 2016. (ROA. 211). This motion also included a request to remove improper *lis pendens* filed by Appellant, a request for injunctive relief to prevent

Appellant from merely re-filing yet another lawsuit to prevent the next foreclosure sale, and a request to deny remand.

Appellant filed his response to the second motion on July 19, 2016. (ROA. 269).

The District Court conducted its Conference on July 19, 2016. At this conference the Court considered the pending motions noted above. The Court subsequently entered an Order Denying Remand (ROA. 346), an Order Expunging *Lis Pendens* (ROA. 347), an Injunction (ROA. 407) and an Order of Dismissal (ROA. 410).

This appeal followed.

B. Statement of Facts

This appeal is the latest, but perhaps not last, of a string of legal maneuvering by Appellant (4 lawsuits and 3 appeals) in State and Federal Court over the last 5 years in attempt to avoid foreclosure of his property. The Property is located at and commonly referred to as 1044 W. 25th Street #E, Houston, Texas 77008.

After the underlying judgment was entered, the property was finally sold to a third party on August 2, 2016 via a non-judicial foreclosure sale. At the time of sale Appellee was the mortgagee and mortgage servicer on the Note.

FIRST LAWSUIT (2011 Lawsuit)

In August of 2011 Appellant filed his first suit seeking to prevent foreclosure – Cause No. 2011-47746; *D. Patrick Smitherman v. Bank of America, N.A.*; In the 270th District Court of Harris County, Texas. Bank of America was the prior mortgagee on the loan agreement. Faced with a September 6, 2011 pending foreclosure sale date, Appellant filed suit on August 12, 2011. One of the issues in 2011 Lawsuit was whether a proper notice of default was provided to Appellant pursuant to a March 2011 Notice of Default. See, copy of Plaintiff's 2011 Lawsuit at (ROA. 223, specifically first sentence of ROA. 226)

This case was resolved on March 5, 2014 by the Hon. Judge Brent Gamble when he signed an Order that ended with the words "all claims asserted by plaintiff in the above entitled action is [sic] hereby **DISMISSED WITH PREJUDICE**." (emphasis in original.) See (ROA. 230-231).

Appellant appealed this dismissal to the Fourteenth Court of Appeals under Cause No. 14-14-00550-CV where the judgment was affirmed. See Mandate issued April 7, 2015. (ROA. 232). Appellant maintains that *res judicata* did not attach to this dismissal. However, the plain wording of the order, which was affirmed as noted above, clearly stated that "all claims" were dismissed with prejudice. (ROA.230-231).

SECOND LAWSUIT (2014 Lawsuit)

After the trial court dismissed the first action, and while the appeal of the First Lawsuit proceeded, Appellant filed a second lawsuit against Bank of America in Harris County under Cause No. 2014-42122. This time he filed suit on July 23, 2014 to prevent a scheduled an August 5, 2014 sale date. Again, whether a proper notice of default was provided to Plaintiff was a central issue in this case. See, 2014 Lawsuit (ROA. 245).

Bank of America initially obtained a dismissal on *res judicata* basis. This was appealed by Appellant again to the Fourteenth Court of Appeals under Cause No. 14-15-001480-CV. The parties agreed to reverse and remand the judgment on December 21, 2015 and the case was sent back to the trial court.

Appellant subsequently dismissed all claims *with prejudice* on May 31, 2016. See (ROA. 244). Appellee requests that the Court take judicial notice of Harris County Cause No. 2014-42122 and the final order signed by Plaintiff dismissing all claims with prejudice. This final order is fatal to Plaintiff's claims herein.

THIRD LAWSUIT (February 2016 Lawsuit)

On February 22, 2016 Appellant filed his third lawsuit, this time to prevent a sale scheduled for March 1, 2016. This was filed against the current mortgagee Bayview in Harris County under Cause No. 2016-10910. This was subsequently

removed to Federal Court where it was assigned Case 4:16-cv-00798. Again, one issue was whether there was a proper notice of default provided to Appellant.

Bayview filed a motion to dismiss, which was granted by an order signed April 28, 2016, dismissing Appellant's claims against Bayview with prejudice. See, 4:16-cv-00798, (Doc. 12). As is his custom, Appellant has appealed that decision to this court where it remains pending as of the date of this filing.

FOURTH LAWSUIT (July 2016 Lawsuit)

Appellee then sought once again to sell the property via non-judicial sale. The sale was scheduled for July 5, 2016. Once again Appellant filed a fourth lawsuit on June 30, 2016 to prevent this sale. This action was again removed to Federal Court where it was issued cause No. 4:16-cv-1927. Again, one issue raised by Appellant was whether he was provided with proper notice of default based on the same March 2011 letter as the prior four suits.

Upon removal the case was assigned again to Judge Lynn N. Hughes who conducted a conference on July 19, 2016. After a lengthy hearing on all pending matters before the court, Judge Hughes issued orders on July 25, 2016 1) Denying Remand (ROA. 346), 2) Expunging *Lis Pendens* (ROA. 347), 3) Providing Injunctive Relief (ROA. 407), and 4) Order of Dismissal (ROA. 410)

SALE OF PROPERTY

On August 2, 2016, the property was sold to a third party at public auction via a substitute trustee's sale.

STANDARD OF REVIEW

The Court is to review a district court's dismissal under Rule 12(b)(6) *de novo*, accepting the well pleaded facts as true and viewing those facts in the light most favorable to the plaintiffs. *Dorsey v. Portfolio Equities, Inc*. 540 F.3d 333, 338 (5th Cir. 2008). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Aschroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 555, 570 (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." *Id*. (citing *Twombly*, at 556). "However, conclusory allegations, unwarranted deductions of fact, or legal conclusions masquerading as factual allegations will not suffice to prevent the granting of a motion to dismiss." *Percival v. American Home Mortgage Corp.*, 469 F.Supp.2d 409,412 (N.D. Tex. 2007). A plaintiff "must plead specific facts, not mere conclusional allegations, to avoid dismissal for failure to state a claim." *Kane Enter. v. MacGregor (USA), Inc.*, 322 F.3d 371, 374 (5th Cir. 2003).

SUMMARY OF THE ARGUMENT

Upon the filing of his Amended Original Petition (ROA. 286), Appellant's complaint included only two causes of action after having dropped the federal claims asserted in his original complaint. Those claims were 1) Wrongful Foreclosure and 2) Suit to Quiet Title. Appellant also sought declaratory judgment that by the nature of the pleading was not properly pled. (ROA. 470, ln. 3-80).

First, there was no foreclosure at the time Appellant's petition was filed, nor prior to entry of judgment. Therefore, Appellant had no valid wrongful foreclosure claims. Second, the basis of Appellant's suit to quiet title, that an assignment was void, is incorrect and contrary to prevailing authority.

The court did not err in determining that *res judicata* barred Appellant's claims based on the procedural history of this case and prior claims asserted by Appellant. Even if there were error, the Court also found that Plaintiff's claims, as noted above, lacked merit and should properly be dismissed.

Remand was properly denied as this case was removed on federal question jurisdiction due to Appellant asserting RESPA violations in the removed complaint.

Issues related to the order expunging *lis pendens* and injunction order are moot as the property has since been sold.

As found by the District Court, the statute of limitations did not expire as the original acceleration was rescinded.

The District Court was within its inherent authority, after looking at the prior lawsuits filed by Appellant and upon conference with the parties, that the dismissal of the prior cases operated as *res judicata* in part and that Plaintiff failed to state any viable claims to prevent foreclosure.

ARGUMENT AND AUTHORITIES

This appeal is Moot

"A case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *McClelland v. Gronwald*, 155 F.3d 507, 514 (5th Cir. 1998). A claim is moot when a case or controversy no longer exists between the parties. *Brinsdon v. McAllen Indep. Sch. Dist.*, No. 15-40160, 2016 WL 4204797, at 3 (5th Cir. Aug. 9, 2016) (citing *Board of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 129, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975)). "Mootness is a jurisdictional matter which can be raised for the first time on appeal." *Id.* (citing *Texas Midstream Gas Servs., LLC v. City of Grand Prairie*, 608 F.3d 200, 204 (5th Cir. 2010)).

"A controversy becomes moot where, as a result of intervening circumstances, there are no longer adverse parties with sufficient legal interest to maintain the litigation.... A controversy can also become moot when the parties

lack a legally cognizable interest in the outcome." *In re Scruggs*, 392 F.3d 124, 128 (5th Cir. 2004). "A moot case presents no Article III case or controversy, and a court has no constitutional jurisdiction to resolve the issues it presents." *Goldin v. Bartholow*, 166 F.3d 710, 717 (5th Cir.1999).

The Property in question that is the subject matter of this case was sold to a third party at a foreclosure sale on August 2, 2016. "If the debtor fails to obtain a stay, and if the property is sold in the interim, the district court will ordinarily be unable to grant any relief. Accordingly, the appeal will be moot." See, *Matter of Sullivan Cent. Plaza I, Ltd*. 914 F2d 731 (5th Cir. 1990).

Appellant petitioned this court for a stay - which was denied. Appellant did not seek any monetary damages in the underlying case. Appellant sought both temporary and permanent injunctive relief to prevent the sale of the property. As the property was already sold the injunctive relief Appellant seeks is unavailable and there is no effective relief which this court can grant Appellant even if he were to prevail.

Accordingly, this appeal is moot and must be dismissed.

Issue 1: Whether the district court erred in granting the Defendant-Appellee's Rule 12(b)(6) motion based on an affirmative defense of *res judicata*.

A. Inherent Authority to Dismiss

Appellant complains that it was improper for the court to dismiss his claims based on *res judicata*. First, district courts have the inherent authority to dismiss a pro se litigant's frivolous or malicious complaint *sua sponte*. *Odeh v. Fish*, 2011 WL 4424400 (N.D. Tex., 2011) citing authority from sister circuits. The Supreme Court has also stated, in dicta, that federal courts have the inherent authority to dismiss such lawsuits. See, *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 307-308, 109 S.Ct. 1814, 104 L.Ed2d 318 (1989). ("Statutory provisions may simply codify existing rights or powers. (28 U.S.C. §) 1915(d), for example authorizes courts to dismiss a 'frivolous or malicious action,' but there is little doubt they would have power to do so even in the absence of this statutory provision.")

Appellant further complains that such a *sua sponte* dismissal is improper because he was not provided with an opportunity to be heard. "When all relevant facts are shown by the court's own records, of which the court takes notice, the defense may be upheld on a Rule 12(b)(6) motion without requiring an answer." *Day v. Moscow*, 955 F.2d 807, 811 (2nd Cir. 1992). "Dismissal by the court *sua sponte* on *res judicata* grounds…is permissible in the interest of judicial economy

where both actions were brought before the same court." *Boone v. Kurtz*, 617 F.2d 435, 436 (5th Cir. 1980.)

The same parties were previously before the same Judge in a similar lawsuit filed by Appellant in Case 4:16-cv-00798. During the pendency of that case, the parties conducted a conference to discuss similar issues on April 20, 2016. A short three months later, the Parties were back in front of the same judge on July 19, 2016 in this case for another conference concerning all pending motions before the court. (ROA. 345).

During this conference the Court discussed with counsel the pending motion to dismiss, (including Appellee's request for injunctive relief and denial of remand) Appellant's motion to remand and in general all relief sought by Appellee and Appellant. The District Court could easily discern from the pleadings on file, public records available to the Court, and discussion with counsel regarding prior cases that this was the fourth lawsuit filed by Appellant to prevent foreclosure from proceeding.

Accordingly, with knowledge of the history of the pleadings, and the vexatious nature of Appellant, the court was well within its inherent authority to dismiss Plaintiff's claims.

B. Federal *Res Judicata*

As noted in Appellee's motion to dismiss, Fifth Circuit precedent stipulates that *res judicata* can be raised on a motion to dismiss. See, *Clifton v. Warnaco, Inc*. 53 F.3d 1280 (5th Cir. 1995). (ROA. 215).

Appellee specifically pled and argued that any claims that Appellant may have had regarding the assignment of the loan from Bank of America to Bayview or any claims that Bayview was not the current mortgagee would be barred by *res judicata* as such claims could have been brought in the Third Lawsuit. (ROA. 215-216.) Appellee likewise argued that any argument of Appellant that he did not receive proper notice of default was barred as the same notice of default, the March 2011 notice which was subject of the Third Lawsuit, would also be barred by *res judicata*. (ROA. 216)

Appellant argues that he had a new cause of action in the Fourth Lawsuit for failure to provide notice of acceleration. That issue was raised as part of Appellant's wrongful foreclosure claim.

Appellant argues that he also had new arguments on standing, which in fact were related to whether or not Bayview was a proper assignee as in the Third Lawsuit. Those issues were addressed in response to Plaintiff's Suit to Quiet Title claim.

The only claims that Appellee sought to bar by *res judicata* were claims regarding any assignment issues and issues related to the prior notice of default. Appellant asserts that *res judicata* is improper under Federal Rules as the Third and Fourth lawsuits did not involve the same claim or cause of action. See, *Agrilectric Power Partners, Ltd. v. General Electric Co*., 20 F.3d 663, 664 (5th Cir. 1994). (citing elements of federal *res judicata*.) Under the Fifth Circuit's transactional test, "the critical issue is not the relief requested for the theory asserted, but whether Plaintiff bases the two actions on the same nucleus of operative facts." *Matter of Howe*, 913 F.2d 1138, 1144 (5th Cir. 1990). *Res judicata* bars "all claims that were or could have been advanced in support of the cause of action on the occasion of its former adjudication...not merely those that were adjudicated." *Nilsen v. City of Moss Point, Miss*., 701 F.2d 556, 560 (5th Cir. 1983).

Both lawsuits were premised on the same operative facts – a defaulted loan and pending foreclosure proceedings related to the same Note and Deed of Trust. Both lawsuits, as shown above, made the same claims regarding lack of notice of default and alleged assignment issues. Any claims that Appellant may have had regarding the assignment of the loan from Bank of America to Bayview or claims that Bayview was a "non-mortgagee" or that he did not receive proper notice of default would be barred by *res judicata*. If there were any further issues that

Appellant wished to raise in regard to the assignment or notices, they could have and should have been brought in the prior suit. In fact, Appellant did assert in prior litigation that "Bayview…has provided no proof to Appellant that it actually holds the Note and Deed of Trust." See, 4:16-cv-00798, Doc. 1-3, page 4, Para. 9. Appellant has consistently, since the First Lawsuit, argued that the exact same notice of default was improper. Therefore, Plaintiff actually raised or had knowledge of the alleged claim in the prior suit, which was dismissed with prejudice 3 times, therefore such claims would be barred by *res judicata*.

C. State Court *res judicata*

Appellant argues that *res judicata* under state law fails as there is no "pre-existing relationship" between Bayview and Bank of America, N.A. Appellee Bayview was in privity with Bank of America, N.A. who was the prior mortgagee. Bayview was assigned all interest in the Note and Deed of trust that is subject of this lawsuit. (ROA. 65). For *res judicata* purposes, "[Q]ualifying relationships include, but are not limited to, preceding and succeeding owners of property…and assignee and assignor." See, *Warren v. MERS, Inc*. 616 Fed.Appx. 735, 737 (5th Cir. 2015)

In the First and Second Lawsuits, Appellant argued that the notice of default was defective or that he received no notice of default. See, First Lawsuit, page 4 (ROA. 226 first paragraph) and Second Lawsuit (ROA. 247, para. 7).

The final order in the First Lawsuit, which was later affirmed as noted above, ordered that "all claims asserted by plaintiff" were dismissed with prejudice. (ROA. 230-231). That would include any argument involving the notice of default. In the Second Lawsuit Appellee caused an order to be entered that non-suited his claims with prejudice. Again, that would include any claims as to whether or not he received the notice of default.

Accordingly, *res judicata* from the state court cases would bar Plaintiff from asserting that the March 2011 notice of default was invalid or any arguments that he never received it.

Issue 2: Whether the district court erred in granting the Defendant-Appellee's Rule 12(b)(6) motion for failure to state a claim.

A. Declaratory Judgment

Appellant complains that his request for declaratory judgment was denied or not properly considered. However, the Federal Declaratory Judgment Act is an enabling act which is procedural only. See, *Hockessin Holdings, Inc. v. Ocwen Loan Servicing, LLC* 2016 WL 247727, at *5 (W.D. Tex, 2016). To invoke relief under the Act a party must have an underlying and viable cause of action. *Id.* See also, *Reid v. Aransas Cnty.* 805 F.Supp.2nd 322, 339 (S.D.Tex. 2011) holding that a party cannot use the Act upon failure to state the existence of a judicially remediable right. As the District Court found that his underlying claims lacked

merit, there were no viable causes of action and Appellant was not entitled to declaratory relief. (ROA. 470, ln. 3-8)

B. Suit to Quiet Title

Appellant claims that he has a valid claim for suit to quiet title because, he alleges, the assignment from Bank of America, N.A. to Bayview was invalid.

First, as noted above, Appellant made these same allegations in the Third Lawsuit. "Bayview…has provided no proof to Plaintiff that it actually holds the Note and Deed of Trust." See, 4:16-cv-00798, Doc. 1-3, page 4, Para. 9. Therefore, any such claims regarding the assignment are barred by *res judicata*.

The crux of Appellant's argument is that the assignment is void because Bayview signed it as attorney in fact for Bank of America.

However, Appellant has still not pled any facts that would show the assignment is void. As he did in the District Court, Appellant has merely asserted that there is a question because Bayview signed an assignment as attorney in fact for Bank of America. Appellant has still not alleged on appeal, nor pled facts to support any claim that the individual that signed the assignment lacked authority to sign the assignment, nor has he provided any basis for this allegation. See, also *Reinagel v. Deutsche Bank Nat. Trust Co*., 735 F.3d 220, 226 (5th Cir. 2013) holding that under similar pleadings, the allegation failed to state a claim by its own terms. "As the Reinagels conspicuously fail to allege either that Ms.

Reynolds lacked authority to act on behalf of Citi, or that Citi lacked authority to act on behalf of Argent – let alone plead facts to support such allegations – there is no record basis for concluding that Ms. Reynolds misrepresented the scope of her authority in executing the assignment." *Reinagel* at 226.

Further any issue with the assignment between Bank of America, N.A. and Bayview would render the document *voidable* at the election of the grantor, not void. "The Texas Supreme Court clarified that a contract executed on behalf of a corporation by a person fraudulently purporting to be a corporate officer is, like any other unauthorized contract, not void, but merely voidable at the election of the defrauded principal." *Reinagel* at 226. As noted by Judge Hughes, Bank of America may have the ability to assert a claim against Bayview if it found Bayview to have exceeded its authority, but Appellant does not. (ROA. 466 ln. 10-25 to 467 ln. 1-15).

Appellant's quite title claim was properly dismissed.

C. Wrongful Foreclosure

Appellant's complaint asserted a claim for wrongful foreclosure. However, as no sale had occurred at the time he filed his complaint, this claim was moot, and the court correctly dismissed that claim.

After the case was dismissed, the property proceeded to sale on August 2, 2016. Appellant now seeks to litigate that new claim before this court. If

Appellant seeks to bring a separate lawsuit for wrongful foreclosure due to the August 2, 2016 sale, he can do so in a separately filed suit, but it is improper for this court to consider whether or not the August 2, 2016 sale was improper in this appeal as the claim was not ripe at the time judgment was entered.

Appellant's wrongful foreclosure claim was properly dismissed.

Issue 3: Whether the district court erred in denying the Motion for Remand.

Appellant argues that the case should have been remanded for three reasons 1) no federal question, 2) no diversity of citizenship and 3) amount in controversy less than $75,000.00. Appellant ignores the fact that a case can be removed on the basis of either a federal question under 28 U.S.C. 1331 or diversity of citizenship under 28 U.S.C. 1332. Either one is a proper basis for removal. As this case was removed on the basis of federal question jurisdiction, the court did not err in denying remand.

This case was removed on the basis of federal question jurisdiction as Appellant's original complaint asserted violations of a federal statute, specifically RESPA. Appellant subsequently amended his complaint to strike his RESPA claims. However, "[j]urisdictional facts are determined at the time of removal, and consequently post-removal events do not affect that properly established jurisdiction." *Spear Marketing, Inc. v. BancorpSouth Bank*, 791 F.3d 586 (5th Circuit 2015).

This fact was also explained to Appellant by the court. (ROA. 456 ln. 6-18). The Court in *Spear* also went on to state "[i]t is this court's precedent that once a case is properly removed, the district court retains jurisdiction even if the federal claims are later dropped or dismissed." *Spear* at 592

Further, the court can consider whether the Plaintiff has attempted to manipulate the forum by simply deleting federal claims from the complaint and requesting remand and should safeguard against such manipulation. *Carnegie Mellon Univ. v. Cohill* 484 U.S. 343, 357, 108 S.Ct 614, 98 L.Ed2d 720 (1988).

As removal was proper on the basis of federal question jurisdiction there is no necessity to consider removal on the basis of diversity of citizenship.

The court did not err in denying remand.

Issue 4: Whether the district court erred in the Order Expunging *Lis Pendens*.

Appellant argues that the District Court erred in expunging the two *lis pendens* that Appellant filed in an attempt to hinder the sale. Appellee's amended motion to dismiss included a request that the court remove the *lis pendens* filed by Appellant and identified each by their recordation number. (ROA. 219). As explained above the court found that Appellant had no valid claims and ordered the *lis pendens* be expunged. As noted by USDC Judge Hughes in his injunction order, "All of the judges who have heard Mr. Smitherman's claims on the merits have rejected them." (ROA. 407-408, page 2).

Even if the removal of the *lis pendens* were improper as argued by Appellant, the issue is now moot as the property has been sold to a third party at a non-judicial foreclosure sale conducted on August 2, 2016. Of what consequence would it be to "reinstate" the *lis pendens* at this time? Plaintiff could have sought an expedited appeal or even mandamus. He did not. However, Plaintiff did seek to stay the sale pending his appeal. This court rejected Appellant's motion to stay pending appeal. See, 4:16-cv-00798 (Doc. 18).

Whether or not the removal of the *lis pendens* was proper is moot.

Issue 5: Whether the district court erred in entering the injunction.

Appellant argues that the District Court erred in entering an injunction that prevented Appellant from interfering with the August 2, 2016 sale.

Similar to his complaint about the *lis pendens*, whether or not the injunction was properly entered is of no consequence at this point. The injunction sought to prevent Appellant from disturbing the August 2016 sale date, and if Bayview were to have purchased the property at sale, prevent Appellant from contesting eviction proceedings. The property was sold to a third party. Bayview is not, as it cannot, seeking to evict Appellant. There no longer remains any injunction. Remanding the case on this issue as Appellant requests would be of no value to either party as the injunction expired upon the sale of the Property to a third party. This issue is moot.

Issue 6: Whether the August 2, 2016 foreclosure was barred by limitations.

Appellant did not properly raise a claim that the foreclosure was barred by statute of limitations. While Appellant's amended petition asserted numerous theories for why declaratory judgment should be rendered in his favor, he had only two identifiable causes of action as discussed above 1) wrongful foreclosure, and 2) suit to quiet title. "The court will not allow a party to raise an issue for the first time on appeal merely because a party believes that he might prevail if given the opportunity to try a case again on a different theory." *Leverette v. Louisville Ladder Co*., 183 F.3d 339, 342 (5th Cir. 1999).

In any event, there is no dispute between the Parties that the original acceleration occurred on July 19, 2011. There is no dispute that Texas Civil Practice & Remedies Code §16.035 describes a four year statute of limitations in which to sell the property or bring suit for judicial foreclosure.

Appellant avers that the statute of limitations ran when there was no rescission or abandonment prior to July 19, 2015.

However, as noted by Appellant a rescission of acceleration was sent to Appellant on July 17, 2015. The rescission of acceleration is not on file with this case, but is on file in a contemporaneous appeal of the Third Lawsuit (ROA. 16-20328.36) and was reviewed by the District Court at the July 19, 2016 hearing as shown by the transcript (ROA. 471, ln. 25 to 472 ln. 1-16.) (actually two notice of

rescission were sent to Appellant as discussed on the record, one with "Unit E" and one without "Unit E". (ROA. 472 ln. 25 – 473 ln. 1-7.)

As shown by that document, the rescission letter was sent on behalf of the mortgagee and lienholder at the time, Bank of America, N.A. Pursuant to Texas Civil Practice & Remedies Code §16.038(b), a unilateral rescission such as this is effective when written notice is provided by the lienholder. See also, *Boren v. U.S. Nat. Bank Ass'n*, 807 F.3d 99 (5th Cir. 2015) (discussing §16.038).

Appellant while admitting to the existence of the rescission letter argues that it was impossible for Bank of America to rescind the acceleration via the July 17, 2015 letter, as it had transferred servicing rights to Bayview on July 16, 2015. Appellant is not recognizing that while Bayview may have been the *servicer* on July 17, 2015, Bank of America was still the *lienholder* on that date, and remained so until the loan was assigned to Bayview in December of 2015. (ROA. 65). See also, discussion on the record that the notice of rescission were sent on July 17 (2016) and the assignment did not occur until December 2015. (ROA. 471 ln. 25 to 472 ln. 1-6.)

Therefore Appellant's argument that Bank of America was no longer the *servicer* at the time the rescission letter was sent is of no importance. Bank of America was still the mortgagee and lienholder, and the rescission letter was proper and effective to rescind acceleration.

In addition, Appellant attached to his own original complaint a Reinstatement letter that was sent to him on May 1, 2015. (ROA. 120). This letter operates as an abandonment of the prior acceleration. The letter advises Appellant with what is required to reinstate his loan, and provides him with an amount to pay to reinstate the loan ($103,680.41) which is less than the full amount due and owing. "A lender…put[s] the debtor on notice of its abandonment of acceleration by requesting payment on less than the full amount of the loan." See, *Leonard v. Ocwen Loan Servicing, LLC* 616 Fed.Appx 677, 680 (5th Cir. 2015). (holding that the lender properly abandoned acceleration, in part, by sending a new notice of default demanding payment not for the full amount, but for the past due sums.

By its actions in offering Appellant the opportunity to reinstate his note, rather than demanding the full balance due, Bank of America effectively abandoned acceleration on May 1, 2015, more than a year before the statute of limitations would have run.

In either event the original acceleration was properly rescinded, and this issue, even if the court were to consider it properly raised, is moot.

CONCLUSION

The Property that Appellant sought to enjoin from sale was sold at a public Auction on August 2, 2016. Accordingly, Appellant's appeal is moot and the court is without the ability to provide Appellant with the relief he seeks. Further, the Court did not err in entering its orders or dismissing Appellant's case.

For these reasons, Appellant should be denied the relief he seeks and the underlying judgment affirmed.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the Appellee's Brief was sent to Appellant via the court's ECF on December 1, 2016.

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Certificate of Compliance

Pursuant to 5th Cir. R. 32 and Fed. R. App. P. 32(a)(7)(c), the undersigned certifies this brief complies with the type-volume limitations.

1. Exclusive of the exempted portions in 5th Cir. R. 32.3, per Fed. R. App. P. 32(a)(7), the brief contains 5,365 words.

2. Pursuant to Fed. R. App. P. 32(a)(5) the Brief has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman font, with 14 point font for text and 12 point font for footnotes.

3. If the Court requests, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.

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/s/ Michael C. Maus
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No. 16-20560 D. Smitherman v. Bayview Loan Servicing, L.L.C.
USDC No. 4:16-CV-1927

Dear Mr. Maus,

We filed your brief but you must make the following correction(s) within the next 14 days. Opposing counsel's briefing time continues to run.

Record excerpts are filed in lieu of the appendix prescribed by FED. R. APP. P. 30.
*Please exclude the Exhibits included at the end of the electronically filed brief, as they are a part of the electronic record on appeal.

Once you have prepared your sufficient brief, you must select from the Briefs category the event, Proposed Sufficient Brief, via the electronic filing system. Please do not send paper copies of the brief until requested to do so by the clerk's office. The brief is not sufficient until final review by the clerk's office. If the brief is in compliance, paper copies will be requested and you will receive a notice of docket activity advising you that the sufficient brief filing has been accepted and no further corrections are necessary.

Sincerely,

LYLE W. CAYCE, Clerk

By: /s/ Christina Gardner
Christina Gardner, Deputy Clerk
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cc: Mr. D. Patrick Smitherman

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Dear Mr. Maus,

We have reviewed your electronically filed appellee's brief and it is sufficient.

You must submit the 7 paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

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