UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

D. PATRICK SMITHERMAN	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 4:16-cv-1927
	§	
BAYVIEW LOAN SERVICING, LLC	§	
	§	
Defendants.	§	

DEFENDANT'S SECOND RULE 12(B)(6) MOTION TO DISMISS AND RESPONSE TO PLAINTIFF'S MOTION TO REMAND

Defendant, BAYVIEW LOAN SERVICING, LLC files its Second Motion to Dismiss and Response to Motion to Remand and respectfully shows the court as follows:

RELIEF REQUESTED

1. Bayview moves this Court to dismiss Plaintiff's claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure as Plaintiff's Petition fails to state a claim on which relief can be granted. Bayview further moves for injunctive relief pursuant to the All Writs Act, an order removal Lis Pendens, and further moves the court to deny Plaintiff's motion for remand.

RECENT FILING HISTORY

2. The pro se Plaintiff recently served upon Defendant's counsel via e-mail a Motion to Remand (dated July 14, 2016) an Amended Petition (dated July 15, 2016) and Plaintiff's Response to Motion to Dismiss (dated July 18, 2016). As Plaintiff is pro se these documents were not electronically filed. At the time of filing of this pleading, only Plaintiff's Response to the Motion to Dismiss [Doc. 8] had been scanned into the court's system.

3. In the event that the court were to allow the amended petition, then Bayview's motion to dismiss [Doc. 7] would be rendered moot. Likewise, Plaintiff's Response [Doc. 8]

would also be moot. Thus, Bayview files the current motion with the court, which is substantially similar to its prior motion as Plaintiff has primarily amended to remove RESPA claims in attempt to avoid the jurisdiction of this court.

FACTUAL BACKGROUND

4. This is the fourth lawsuit (plus related appeals) in the last 5 years filed by Plaintiff D. Patrick Smitherman to frustrate and prevent an otherwise lawful foreclosure of his Property.

5. Plaintiff has failed to make any payment on his loan agreement in over 5 years while this litigation has continued. As he admitted to this court previously, no payment has been made on the loan since April 2011. Nor has Plaintiff paid the associated taxes on the property. The total amount due under the terms of the loan agreement exceeds $269,000.00.

First Lawsuit

6. In August of 2011 Plaintiff filed his first suit seeking to prevent foreclosure – Cause No. 2011-47746; *D. Patrick Smitherman v. Bank of America, NA*; In the 270th District Court of Harris County, Texas.[1] Bank of America was the prior mortgagee on the loan agreement. Faced with a September 6, 2011 pending foreclosure sale date, Plaintiff filed suit on August 12, 2011.

7. Plaintiff asserted numerous claims, including claiming that the March 2011 notice of default was not valid or otherwise improper. See, Ex. 1 which includes a copy of the original petition, judgment and Court of Appeals Order.

---

[1] Bayview asks that the court take judicial notice of the lawsuits referenced herein and the Exhibits attached hereto pursuant to FRE 201. The court may consider documents attached or incorporated in the complaint and matters of which judicial notice may be taken without converting a 12(b)(6) motion into a motion for summary judgment. *Norris v. Hearst Trust*, 500 F.3d 454, 461 (5th Cir. 2007); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2005).

8. This case was resolved on March 15, 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 hereby **DISMISSED WITH PREJUDICE**." (emphasis in original.)

9. Mr. Smitherman appealed this dismissal to the Fourteenth Court of Appeals under Cause No. 14-14-00550-CV where the judgment was affirmed by an opinion issued April 7, 2015. Quizzically, Plaintiff maintains that res judicata did not attached to this dismissal as it was allegedly to damages only. The plain wording of the Courts' order, which was affirmed as noted above, clearly stated that "all claims" were dismissed with prejudice.

Second Lawsuit

10. After the trial court dismissed the first action, and while the appeal proceeded, Mr. Smitherman 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.

11. Like his first suit, Plaintiff also asserted that he was not provided proper notice of default, claiming again that the March 2011 notice was improper. See, Ex. 2.

12. Bank of America obtained a dismissal in this case based on res judicata of the First Lawsuit, which was appealed by Mr. Smitherman again to the Fourteenth Court of Appeals under Cause No. 14-15-001480-CV. This this time the parties agree to reverse and remand the judgment on December 21, 2015.

13. Mr. Smitherman subsequently dismissed all claims *with prejudice* on May 31, 2016.

Third Lawsuit

14. On February 22, 2016 Mr. Smitherman 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 this court where it was assigned to Hon. Judge Lynn Hughes under 4:16-cv-00798.

15. Again, Plaintiff asserted that the March 2011 notice of default was improper. See, [4:16-cv-00798, Doc. 1-3.]

16. Bayview filed a motion to dismiss, which was granted by an order signed April 28, 2016, dismissing Plaintiff's claims against Bayview with prejudice.

17. As is his custom, Mr. Smitherman has also appealed this decision. It is currently before the 5th Circuit under Cause No. 16-20328.

Fourth Lawsuit

18. The current lawsuit was filed by Mr. Smitherman on June 30, 2016 to prevent a July 5, 2016 scheduled sale date. Again, Plaintiff asserts that the March 2011 notice of default was somehow improper. The property did not go to sale on that date.

STANDARD OF REVIEW

19. The Plaintiff's Complaint should be dismissed for failure to state a claim upon which relief should be granted under Rule 12(b)(6). In reviewing a Rule 12(b)(6) motion, the court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Martin K. Eby Const. Co. v. Dallas Area Rapid Transit,* 369 F.3d 464,467 (5th Cir. 2004). "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).

ARGUMENT AND AUTHORITIES

A. Res Judicata – Federal Law

20. Fifth Circuit precedent stipulates that res judicata can be raised on a motion to dismiss. See, *Clifton v. Waranco, Inc*. 53 F.3d 1280 (5th Cir. 1995).

21. Any claims against Bayview that Plaintiff had or may have had prior to the dismissal of his prior Federal lawsuit in this court on April 28, 2016 would be subject to res judicata and Plaintiff would be barred from asserting such claims at this time.

22. Pursuant to FRE 201, Defendant requests that the court take judicial notice of the prior litigation noted above and the documents attached hereto. The court may consider documents attached or incorporated in the complaint and matters of which judicial notice may be taken without converting a 12(b)(6) motion into a motion for summary judgment. *Norris v. Hearst Trust*, 500 F.3d 454, 461 (5th Cir. 2007); *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2005).

23. The preclusive effect of a prior federal court judgment is controlled by federal res judicata rules. See, *Agrilectric Power Partners, Ltd. v.. General Electric Co*., 20 F.3d 663, 664 (5th Cir. 1994). Res judicata is appropriate if 1) the parties to both actions are identical 2) the judgment in the first action is rendered by a court of competent jurisdiction 3) the first action concluded with a final judgment on the merits, and 4) the same claim or cause of action is involved in both suits.

24. Accordingly, any claims that Plaintiff may have regarding the assignment of the loan from Bank of America to Bayview or claims that Bayview was a "non-mortgagee" would

be barred by res judicata. If there were any issues that Plaintiff wished to raise in regard to the assignment, they could have and should have been brought in the prior suit. In fact, Plaintiff did assert in prior litigation that "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, Plaintiff actually raised, or had knowledge of the alleged claim in the prior suit, which was dismissed with prejudice, therefore such claims would be barred by res judicata.

25. Likewise, any claims that Plaintiff would have that he lacked notice of default would be barred by res judicata as the same notice of default that is at issue in this case was at issue in the prior case before this court. Plaintiff specifically stated in the prior complaint that he did not receive a notice of default. See, 4:16-cv-00798, Doc. 1-3, page 4, Para. 11. Again, all claims of Plaintiff, including this one, were dismissed with prejudice and would be barred by res judicata.

B. Res Judicata – State Court Law

26. When asked to give preclusive effect to state court judgments, federal courts turn to the preclusion principles of the state whose jurisdiction is invoked as a bar to further litigation. See, *Wilder Corp. of Delaware, Inc. v. Rural Community Ins. Services*, 494 Fed. Appx. 487, 489 (5th Cir. 2012). Under Texas law, res judicata requires (1) prior final judgment on the merits by a court of competent jurisdiction. (2) the same parties in the second action or their privies, and (3) claim in the second action that were or could have been raised in the first. *Igal v. Brightstar Info. Tech Grp., In*c., 250 S.W.3d 78,86 (Tex. 2008).

27. As noted above, and as shown by Ex. 1 and 2, Plaintiff previously asserted claims against the prior mortgagee/mortgage servicer Bank of America. Bayview is in privity with Bank

of America as it was assigned all interest in the Note and Deed of trust that is subject of this lawsuit. See, *Warren v. MERS, Inc*. 616 Fed.Appx. 735, 737 (5th Cir. 2015)

28. The claims asserted by Plaintiff in both cases asserted that the March 2011 notice of default was not valid or was otherwise improper. As noted, the First Lawsuit resulted in the Court granting summary judgment and dismissing all claims of Plaintiff with prejudice. Thus, there was a final judgment on the merits.

29. The second resulted in Plaintiff non-suiting his claims with prejudice. Res judicata applies to the Plaintiff's dismissal as a dismissal or non-suit with prejudice is tantamount to a judgment on the merits and thereby works a permanent inalterable change in the legal relationship to the defendant's benefit and the defendant can never be sued again by the Plaintiff or its privies out of the same subject matter. See, *Arrow Marble, LLC v. Estate of Killion*, 441 S.W.3d 702 (Tex.App –Houston [1st Dist.]

30. Accordingly, res judicata from the state court cases would bar Plaintiff from asserting that the March 2011 notice of default was invalid.

C. Wrongful Foreclosure.

31. Plaintiff's amended complaint asserts a claim for wrongful foreclosure.

32. However, as there has been no foreclosure sale, and there is no valid claim in Texas for "attempted wrongful foreclosure" this claim should be dismissed as moot.

D. Suit To Quite Title

33. Plaintiff's amended complaint asserts a claim for suit to quiet title. It is well known that a party must recover on the strength of their own claims, not the alleged weakness of the claims of others. See, *Turner v. AmeriaHomeKey, Inc*. 514 Fed. App'x. 513, 516 (5th Cir. 2013). Plaintiff has failed to sufficiently plead or otherwise show that he has title superior to the

current lienholder. Plaintiff has merely asserted that the assignment is somehow invalid or void. However, as shown above, any claims that Plaintiff would have in regard to the assignment of the note and deed of trust would be barred by res judicata as Plaintiff failed to assert these claims in the prior litigation.

34. Further, Plaintiff does not have standing to contest issues with an assignment that render the assignment voidable at the option of the assignor. Plaintiff has not plead any facts that would show the assignment is void. Plaintiff has merely asserted that there is a question because Bayview signed an assignment as attorney in fact for Bank of America. However, Plaintiff has not alleged - let alone pled facts to support – that the individual that signed the assignment lacked authority to sign the assignment or provide 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.

E. Declaratory Judgment request fails

35. The Federal Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction…any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought." 28 USCA §2201.

36. 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.

37. The declarations that Plaintiff asks the court to make are improper and are not based on any affirmative claims asserted against Movants. Since Plaintiff's only claims, a suit to quiet title and wrongful foreclosure are meritless and invalid as a matter of law, Plaintiff has no valid claims.

38. As Plaintiff has failed to allege a viable cause of action, its request for declaratory judgment must fail.

REMOVAL OF LIS PENDENS

39. On July 1, 2016 Plaintiff filed a Notice of Lis Pendens under instrument number RP-2016-287210 in the official real property records of Harris County, Texas. Plaintiff filed a second Notice of Lis Pendens on July 5, 2016 under instrument number RP-2016-289092.

40. Defendant moves the court to expunge both documents pursuant to §12.0071(c)(2) of the Texas Property code as Plaintiff has failed to establish by a preponderance of the evidence that he has a valid claim against defendant. Section 12.0071 provides that "the court shall order the notice of lis pendens expunged" if the claimant fails to show that he has a valid claim. See also, *Nguyen v. Federal National Mortgage Association* 2015 WL 8207525 (S.D.Tex 2015.) As show above, Plaintiff has no valid claims against Defendant.

REQUEST FOR INJUNCTIVE RELIEF – ALL WRITS ACT

41. Bayview requests that the court, pursuant to the All Writs Act and the inherent power of the Court, issue an order that any further suits that Plaintiff may seek to file in regard to Bayview's lien on this property not be filed unless it is filed in this court.

42. The court has in prior litigation and again in the current litigation will make rulings in regard to the property and facts controlling this case. Plaintiff is bordering on, if he is

not already, becoming a vexatious Plaintiff with three prior suits decidedly adversely against him, and likely a fourth.

43. It would be inequitable and a waste of judicial resources for Plaintiff to merely make the same claims once again in state court, under the guise of a emergency restraining order, to prevent any future foreclosure sale. Such an order would be inline with the relitigation exception of the Anti-Injunction Act.

DENIAL OF REMAND

44. Plaintiff makes the same specious arguments that he made previously when he requested remand in the Third Lawsuit. In addition, Plaintiff asserts that as he has now removed his RESPA claims with his amended complaint that this court no longer has jurisdiction.

45. However, Plaintiff may not defeat a federal court's jurisdiction over a properly removed case merely by amending his complaint to omit federal causes of action as the court has supplemental jurisdiction over the remaining claims. 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). Finally, this court has previously presided over a prior case between the parties, conducted a conference, considered evidence and pleadings and is familiar with the parties and arguments. Judicial economy, convenience and fairness require this court to retain jurisdiction.

CONCLUSION

As outlined above, Plaintiff has failed to state a claim for which relief could be granted against Bayview and all affirmative claims must be dismissed. Defendant further requests that

the court issue an order expunging the lis pendens, an injunction on further suits, deny Plaintiff's request for remand.

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully requests this Court dismiss Plaintiff's Petition with prejudice and without leave to amend and grant Defendant such additional and further relief to which it may show itself entitled.

Respectfully submitted,

BARRETT DAFFIN FRAPPIER
TURNER & ENGEL, LLP

/s/ Michael C. Maus
Michael C. Maus, *Attorney-in-charge*
State Bar No. 24008803
Federal Bar No. 23064
1900 St. James Place, Suite 500
Houston, Texas 77056
Telephone: 713-693-2065
Facsimile: 713-693-2025
michaelm@bdfgroup.com

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was sent to all counsel of record on this18th day of July 2016.

D. Patrick Smitherman
1044 W. 25th Sreet #E
Houston, Texas 77008
dpatricksmitherman@yahoo.com

/s/ Michael C. Maus
Michael C. Maus