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United States District Court,
N.D. Georgia, Atlanta Division.

Herman CUNNINGHAM, Plaintiff,
v.
RAS CRANE, LLC, Defendant.

CIVIL ACTION FILE NO.
1:19-cv-02853-TWT-LTW
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|
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Attorneys and Law Firms

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Angelo Dan Vasilescu, Ras Crane LLC, Duluth, GA, for Defendant.

MAGISTRATE JUDGE'S FINAL REPORT AND RECOMMENDATION

LINDA T. WALKER, UNITED STATES MAGISTRATE JUDGE

***1** This case is currently before the Court on a Motion to Dismiss Plaintiff's Second Amended Complaint ("SAC") filed by Defendant RAS Crane LLC ("RAS Crane"). [Doc. 18]. For the reasons detailed below, the Court **RECOMMENDS** that the Motion be **GRANTED**. [Doc. 18].

BACKGROUND

As alleged in the SAC, Plaintiff and his wife filed for bankruptcy on October 20, 2014. [Doc. 16 ¶10]. Between January 31, 2015 and February 11, 2017, Plaintiff made payments to his mortgage lender outside the bankruptcy plan totaling $12,734.75. [Id. ¶12]. Plaintiff never mentions how much was due and owing on the mortgage during this time, however, his own allegation demonstrates that he did not make any payments for more than ten months. See [id.]. Plaintiff's SAC also does not mention whether he timely made required payments *after* February 11, 2017.

On December 20, 2018, the servicer of Plaintiff's mortgage sent him a letter stating that his mortgage "was past due in the amount of $7,771.28" and that he needed to pay the full amount to cure his default. [Id. ¶¶16–18]. Plaintiff hired an attorney who "recreated the loan history" and believed the above-mentioned payments totaling $12,734.75 had not been credited to the account. [Id. ¶¶21–24]. In lieu of paying the full past-due amount as directed in the December 2018 letter, Plaintiff attempted to pay $1,087.83 in February 2019. [Id. ¶29]. The servicer returned the check, noting that the funds were "insufficient to bring [the] account current," and the servicer refused to accept any further

payments by Plaintiff. [Id. ¶¶30–31]. Plaintiff then began depositing his regular monthly payments into a separate bank account and, eventually, into the registry of the Court. [Id. ¶¶34, 43–51]. However, Plaintiff never made any payments on the past due amount identified by the servicer, instead he asserted that he "was not behind in his payments" due to the $12,734.75 in payments that allegedly had not been applied to his account. See [id. ¶¶24, 28].

Defendant RAS Crane is a law firm representing Plaintiff's mortgage lender and loan servicer. [Id. ¶3]. RAS Crane sent Plaintiff a letter in February 2019 declaring the debt secured by the lender's security deed on Plaintiff's property due and payable. [Id. ¶¶32–33]. RAS Crane then sent Plaintiff a letter notifying him of its intent to conduct a nonjudicial foreclosure sale of the property in June 2019 due to Plaintiff's failure to pay the indebtedness. [Id. ¶36]. On May 21, 2019, Plaintiff filed a lawsuit against his lender and servicer to prevent the foreclosure sale. [Id. ¶38]. The next day, Plaintiff filed the present suit against RAS Crane alleging a violation of the Fair Debt Collection Practices Act ("FDCPA"). [Doc. 1-1 at 3–5].

After Defendant removed the case to this Court and filed a Motion to Dismiss, Plaintiff amended his Complaint as a matter of right. See [Docs. 1, 3, 4]. Defendant again moved to dismiss, and the undersigned agreed that the Amended Complaint contained no factual allegations to support Plaintiff's bare legal assertions. [Doc. 12 at 6–7]. Even though Plaintiff is represented by an attorney who failed to request leave to amend the complaint, the undersigned recommended that Plaintiff be allowed to amend yet again. [Id. at 7–8]. That Report and Recommendation was adopted, the Motion to Dismiss was denied as moot, and Plaintiff filed the SAC discussed above. [Doc. 15, 16]. Defendant again moved to dismiss, and the Motion is now ripe for consideration. See [Docs. 18, 26].

LEGAL STANDARD

***2** In considering a motion to dismiss, the Court must accept the well-pled factual allegations of the complaint as true, but "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." Oxford Asset Mgmt., Ltd. v. Jaharis, 297 F.3d 1182, 1188 (11th Cir. 2002). Dismissal is proper if "it is plain that the plaintiff can prove no set of facts that would support the claims in the complaint." Id. A complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). To state a claim with sufficient specificity requires that the complaint have enough factual matter, which when taken as true, suggests the required elements of the claim. Watts v. Fla. Int'l Univ., 495 F.3d 1289, 1296 (11th Cir. 2007); Hill v. White, 321 F.3d 1334, 1335 (11th Cir. 2003).

LEGAL ANALYSIS

The parties agree that "foreclosing on a security interest is not debt collection activity" within the meaning of the FDCPA except for the purposes of the provisions of 15 U.S.C. § 1692f(6). Warren v. Countrywide Home Loans, Inc., 342 F. App'x 458, 460 (11th Cir. 2009); see also [Doc. 18-1 at 16–18]; [Doc. 26 at 12]. Under § 1692f(6), a debt collector may not take or threaten "to take any nonjudicial action to effect dispossession or disablement of property" if, as relevant here, "there is no present right to possession of the property claimed as collateral through an enforceable security interest." 15 U.S.C. § 1692f(6)(A). Plaintiff does not dispute that his lender had "an enforceable security interest" in the property at issue. See [Doc. 26]. Likewise, Defendant does not dispute that a nonjudicial foreclosure action under Georgia law would effect "dispossession or disablement of property." See [Doc. 18]; see also Vaughn v. Johnson & Freedman LLC, No. 1:11-CV-2051-ODE-GGB, 2012 WL 13130392, at *8 (N.D. Ga. Sept. 17, 2012). Thus, this case hinges on whether Plaintiff's lender had a "present right to possession of the property" at the time RAS Crane threatened to conduct a nonjudicial foreclosure sale on behalf of the lender. See 15 U.S.C. § 1692f(6)(A); see also [Doc. 26 at 19] ("The only issue here is whether Defendant had a present right to possession of Plaintiff's property.").

As Plaintiff correctly points out, the question is not whether Plaintiff was "in default on his loan," *per se*. [Doc. 26 at 5–8]. Rather, because the FDCPA does not define "present right to possession," the Court "must look to state law to determine whether [Defendant] had a present right to possess the property at the time" of the challenged action. See Richards v. PAR, Inc., 954 F.3d 965, 968 (7th Cir. 2020). Under Georgia law, an assignor of a security deed has standing to institute a non-judicial foreclosure sale as provided for by the terms of the security deed. See Sparra v. Deutsche Bank Nat'l Trust Co., 785 S.E.2d 78, 336 Ga.App. 418 (Ga. App., 2016). The Security Deed at issue provides that the lender can "invoke the power of sale" if Plaintiff fails to cure a default after being provided with a notice specifying, *inter alia*, the default and the action required to cure the default. [Doc. 18-3 at 15]. [1]

1 Ordinarily, the Court cannot consider "matters outside the pleadings" without treating a motion to dismiss for failure to state a claim "as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d). However, as will be discussed more below, there are several exceptions to this rule. As relevant here, the Court can consider a document if it is central to Plaintiff's claims and its authenticity is not in question. Horsley v. Feldt, 304 F.3d 1125, 1134 (11th Cir. 2002).

Plaintiff concedes that the Court can consider the Security Deed and indeed invites the Court to consider the exact paragraph discussed above. [Doc. 26 at 13]; see also [id. at 19].

***3** Plaintiff concedes that the servicer for his lender sent him a notice on December 20, 2018, advising him that his mortgage "was past due in the amount of $7,771.28" and that he needed to pay that amount, plus any other amounts that became due, "to cure the default." [Doc. 16 ¶¶16–18]. [2] Plaintiff nowhere alleges he cured the default, as required by the December 20, 2018 letter. Plaintiff was thus sent a notice of default and failed to correct the default, presumptively entitling the lender to "invoke the power of sale" authorized by the Security Deed. [Doc. 18-3 at 15].

2 Defendant attached the December 20, 2018 letter to its Motion to Dismiss, and the document contains all the information required by the Security Deed. See [Doc. 18-13 at 4–6]. Plaintiff argues the notice should not be considered because it is "not referenced in the Complaint or central to it." See [Doc. 26 at 19]. That is flatly untrue because the SAC explicitly discusses the December 20, 2018 letter. [Doc. 16 ¶¶16–18]. While Plaintiff nakedly claims the document's "genuineness is not indisputable" he fails to present any evidence calling the document's authenticity into question. See [Doc. 26 at 19–21]. Nevertheless, Plaintiff's SAC nowhere alleges that the December 20, 2018 letter failed to include all the information required by the Security Deed. See [Doc. 16].

Instead of alleging he cured the default identified in the December 20, 2018 letter, Plaintiff asserts that he "did not believe the letter was correct because[,] by his calculations, his loan was current." [Doc. 16 ¶19]. Specifically, Plaintiff's counsel analyzed the loan history and believed that the payments made between November 12, 2015 and February 11, 2017, resulted in a $12,734.75 surplus because "they had not been credited to Plaintiff's account." [Id. ¶23]. If, as Plaintiff alleges, his account was not in default because it in fact contained a surplus, then RAS Crane's subsequent threat to conduct a nonjudicial foreclosure would violate § 1692f(6)(A). See [Doc. 18]; see also Vaughn, 2012 WL 13130392, at *8. But unfortunately for Plaintiff, the evidence in this case does not support Plaintiff's allegations.

As explained in the SAC, Plaintiff filed bankruptcy in October 20, 2014. [Doc. 16 ¶10]. Between January 31, 2015 and February 11, 2017, Plaintiff made payments to his mortgage lender totaling $12,734.75, but he also failed to make any payments for over ten months during that time. [Id. ¶12]. Plaintiff does not mention whether he timely made any required payments *after* February 11, 2017. But regardless, the Bankruptcy

Court entered an order holding that, "as of August 18, 2017," Plaintiff was past due on his mortgage "in the amount of $4,091.85." [Doc. 18-9 at 3]. Thus, notwithstanding any payments Plaintiff made between January 31, 2015 and February 11, 2017, Plaintiff's mortgage account did not contain a surplus in August 2017 but rather was behind by $4,091.85.

In his response to the Motion to Dismiss, Plaintiff fails to mention the Bankruptcy Court order or to dispute its contents, yet he argues the document is (1) "not relevant to Plaintiff's claims," (2) is "hearsay," (3) its "genuineness is not indisputable," and (4) it is "subject to varying interpretation." [Doc. 26 at 19–21]. All of Plaintiff's arguments are without merit.

As discussed above, Plaintiff's entire case hinges on whether his payments between January 31, 2015 and February 11, 2017, resulted in a surplus, as he argues, or whether Plaintiff was in default, as alleged in the December 20, 2018 letter. Despite Plaintiff's contention to the contrary, a legally binding document holding he was in default "as of August 18, 2017," is central to Plaintiff's claim. See [Doc. 18-9 at 3]. The fact that the Bankruptcy Court's Order is hearsay is meaningless—Plaintiff cites no authority holding that a Court cannot consider a document attached to a Motion to Dismiss just because it is "hearsay." See [Doc. 26 at 19–21]. Rather, the only remaining question is whether the documents its authenticity is in question. See Horsley, 304 F.3d at 1134.

***4** Although Plaintiff contends that the "unauthenticated letters from [his loan] servicer" are "subject to reasonable dispute," Plaintiff never makes any argument that the authenticity of the Bankruptcy Court's Order is subject to any reasonable dispute. See [Doc. 26 at 19–21]. As the Eleventh Circuit has explained, "a court may take notice of another court's order ... for the limited purpose of recognizing the 'judicial act' that the order represents." United States v. Jones, 29 F.3d 1549, 1553 (11th Cir. 1994). Thus, because the Bankruptcy Court's Order is central to Plaintiff's claims and its authenticity is not reasonably in question, the Court can take notice of the "judicial act" that the Order represents. See id.; see also Horsley, 304 F.3d at 1134.

By holding that Plaintiff owed a post-petition arrearage to his lender, the Bankruptcy Court made a legally binding ruling that Plaintiff needed to pay "the amount of $4,091.85," *in addition to* his "regular monthly mortgage payment," for the account to be current. [Doc. 18-9 at 2–3]. Whether the Bankruptcy Court calculated the figure correctly or not, this was the holding of the Order—a fact "that only an unreasonable person would insist on disputing." See Jones, 29 F.3d at 1553. Although Plaintiff seems to suggest that the Bankruptcy Court Order is "subject to varying interpretation," he fails to explain any possible alternative

explanation for the Order. See [Doc. 26 at 19–21]. To the extent Plaintiff contends that payments prior to March 2017 resulted in a $12,734.75 surplus that was never applied to his account, that allegation need not be accepted as true in light of the Bankruptcy Court's holding that Plaintiff's account was delinquent in August 2017. [3]

3 Even if the Bankruptcy Court Order were not subject to judicial notice, the undersigned would simply recommend that the Motion to Dismiss be converted to a motion for summary judgment. See Fed. R. Civ. P. 12(d); see also Griffith v. Wainwright, 772 F.2d 822, 825–26 (11th Cir. 1985).

Looking to both the SAC and Plaintiff's response to the Motion to Dismiss, Plaintiff never contends he cured the deficiency found by the Bankruptcy Court. See [Docs. 16, 26]. Plaintiff does attach a declaration from his bankruptcy counsel in response to the Motion to Dismiss, but even if the Court were to consider the declaration, it too fails to allege Plaintiff paid the post-petition arrearage as ordered by the Bankruptcy Court. See [Doc. 26 at 23–39]. Instead, Plaintiff's bankruptcy counsel argues the arrearage "would not have been an issue had [the lender] filed its amended proof of claim by September 1, 2017." [Id. at 36 ¶44]. The declaration then goes on to discuss a dispute over an alleged escrow surplus that is not mentioned in the SAC. See [id. at 15 ¶47]; see also [Doc. 16]. As the Court has already explained to Plaintiff's counsel, he "cannot amend a complaint by attaching documents to a response to a motion to dismiss, or by asserting new facts or theories in the response." Clark v. Ocwen Loan Servicing, LLC, No. 1:17-CV-03027-TCB-AJB, 2018 WL 1804349, at *3 n.6 (N.D. Ga. Jan. 18, 2018) (collecting cases), report and recommendation adopted, 2018 WL 4471936 (N.D. Ga. Aug. 15, 2018).

Plaintiff's case hinges on his argument that he "was not credited for $12,734.75 in payments that he made" prior to March 2017, and that he thus was not in default under the mortgage in February 2019 when Defendant threatened a nonjudicial foreclosure. [Doc. 26 at 16]. [4] As discussed above, the Court need not accept Plaintiff's allegation regarding payments made prior to March 2017. Regardless of what payments he made and what amounts he owed, the Bankruptcy Court issued a legally binding Order holding that his mortgage was past due "in the amount of $4,091.85" as of August 18, 2017. [Doc. 18-9 at 3]. Plaintiff makes no allegation he ever cured that default. See [Doc. 16]. Nor does Plaintiff contend he cured the default identified in the December 20, 2018 letter, except to the extent he relies on his assertion that his payments prior to March 2017 resulted in a never-applied surplus. See [id.]. As such, Plaintiff's Complaint does not contain sufficient factual allegations to plausibly support his claim that RAS Crane violated §

1692f(6)(A) by threatening a nonjudicial foreclosure at a time when the lender lacked a "present right to possession of the property." See Vaughn, 2012 WL 13130392, at *8.

4 The Court notes that Plaintiff is likely collaterally estopped from arguing that he was not in default as of August 2017. But collateral estoppel is an affirmative defense, and because it is not raised by Defendant it is not considered by the Court under the circumstances of this case. See Richards v. Sen, 825 F. Supp. 2d 1259, 1262 (S.D. Fla. 2010) (explaining when a "court may raise the issue of collateral estoppel *sua sponte*").

CONCLUSION

***5** For the reasons explained above, the Court **RECOMMENDS** that the Motion to Dismiss ([Doc. 18]) be **GRANTED**. As this is a final Report and Recommendation and there are no other matters pending before the Court, the Clerk is directed to terminate the reference to the undersigned.

SO ORDERED AND REPORTED AND RECOMMENDED, this 29th day of September, 2020.

All Citations

Not Reported in Fed. Supp., 2020 WL 9595381

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