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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
|
Signed 02/03/2020

Attorneys and Law Firms

Shimshon Wexler, S. Wexler, LLC, Atlanta, GA, for Plaintiff.

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

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

LINDA T. WALKER, UNITED STATES MAGISTRATE JUDGE

***1** This case is currently before the Court on a Motion to Dismiss filed by Defendant RAS Crane, LLC ("RAS Crane"). [Doc. 6]. For the reasons detailed below, the Court **RECOMMENDS** that Plaintiff be ordered to amend his complaint and that the Motion to Dismiss be **DENIED as moot**. [Doc. 6].

BACKGROUND

RAS Crane, a law firm representing Plaintiff's mortgage lender, attempted to conduct a non-judicial foreclosure on Plaintiff's home. [Doc. 4, p, 1, ¶¶2-4]. That non-judicial foreclosure is the subject of another suit before the Court, Cunningham v. Wells Fargo Bank, N.A., 1:19-cv-02296-SDG (N.D. Ga. filed May. 21, 2019) (Cunningham I). [Doc. 4, p. 1, ¶5]. In Cunningham I, the Court concluded Plaintiff has a substantial likelihood of showing the attempted foreclosure was wrongful. [Id. p. 2, ¶8]. Based on these allegations, Plaintiff alleges RAS Crane violated the Fair Debt Collections Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA"), by threatening to take non[-]judicial action, which it does not have the right to do, to dispossess Plaintiff of his home." [Doc. 4, p. 2, ¶¶11-12].

LEGAL STANDARD

I. Motion to Dismiss

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).

II. FDCPA

"[F]oreclosing 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). 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). Under Georgia law, a nonjudicial foreclosure effects "dispossession or disablement of property" within the meaning of this provision. Vaughn v. Johnson & Freedman, LLC, No. 1:11-CV-2051-ODE-GGB, 2012 WL 13130392, at *8 (N.D. Ga. Sept. 17, 2012).

LEGAL ANALYSIS

RAS Crane argues that it is not liable under § 1692f(6) because that provision "only forbids threats against a consumer's property if there is no enforceable security interest in the property." [Doc. 6-1, p. 8] (quoting Jenkins v. BAC Home Loan Servicing, LP, 822 F. Supp. 2d 1369, 1375 (M.D. Ga. 2011)). Because "RAS Crane represents the mortgagee in possession of the Security Deed" on Plaintiff's home, RAS Crane argues that it cannot be liable under § 1692f(6) because its client "has a right in the subject property." [Doc. 6-1, p. 9]. But as Plaintiff points out, such an interpretation "ignores the plain text" of § 1692f(6)(A). [Doc. 8, p. 7].

***2** To avoid violating § 1692f(6)(A), an enforcer of a security interest needs more than just "an enforceable security interest," it also needs a "present right to possession of the property claimed as collateral." 15 U.S.C. § 1692f(6)(A). The Jenkins case relied on by Defendant does not address this "present right to possession" element beyond simply quoting § 1692f(6). See Jenkins, 822 F. Supp. 2d at 1374-75. More directly on point is Magistrate Judge Brill's Report and Recommendation in Vaughn. 2012 WL 13130026 (N.D. Ga. May 21, 2012), report and recommendation adopted, 2012 WL 13130392 (N.D. Ga. Sept. 17, 2012).

In Vaughn, the FDCPA claim was based on the mortgagor's allegations that he "had

made all of the ... payments that he was required to make on the loan until [his lender] refused the same, and therefore, [he] was not in default on the loan." 2012 WL 13130026, at *14. As such, while the lender might have had a security interest in the property, it "lacked the present right to foreclose" because the plaintiff was not in default. Id. Judge Brill concluded such allegations supported a § 1692f(6) claim against both the lender and the law firm that represented the firm in conjunction with nonjudicial foreclosure proceedings on the subject property. See id.

Likewise, here, the fact the mortgagee "has a right in the subject property" is not sufficient to defeat a § 1692f(6) claim, as Defendant contends. See [Doc. 6-1, p. 9]. The terms of the security deed only permit the mortgagee to "invoke the power of sale"—*i.e.* begin the nonjudicial foreclosure process—if the borrower is in default under the terms of the instrument and, after notice, fails to cure the default within a set time period. [Doc. 6-3, p. 15]. [1] Absent such a default, the mortgagee has "no present right to possession of the property," and a threat to initiate nonjudicial foreclosure proceedings runs afoul of § 1692f(6)(A).

1 The Court may take judicial notice of the public records attached to Defendant's Motion to Dismiss without converting it into a motion for summary judgment. See Universal Express Inc., v. S.E.C., 177 F. App'x 52, 53 (11th Cir. 2006) ("A district court may take judicial notice of certain facts without converting a motion to dismiss into a motion for summary judgment. Public records are among the permissible facts that a district court may consider.") (citations omitted). Additionally, the Court can consider the exhibits to the Motion because they are central to Plaintiff's claims and their authenticity is not in question. Horsley v. Feldt, 304 F.3d 1125, 1134 (11th Cir. 2002).

RAS Crane also argues Plaintiff "fails to allege any acts that RAS Crane has done to take or threaten to take non-judicial action" ([Doc. 6-1, p. 9]), but the Complaint clearly alleges RAS Crane "attempted to conduct a non-judicial foreclosure." [Doc. 4, p. 1, ¶4]. To the extent RAS Crane is arguing its actions would not "effect dispossession" of the property, such an argument also fails. Under the terms of the security deed itself, and Georgia law more generally, a nonjudicial foreclosure sale would have forced Plaintiff to "immediately surrender possession of the [p]roperty." [Doc. 6-3, p. 16]; see also Vaughn, 2012 WL 13130392, at *8. Thus, if Plaintiff was current on his mortgage at the time RAS Crane allegedly attempted to conduct a non-judicial foreclosure, then he could state a claim under § 1692f(6)(A) because RAS Crane would have threatened to take a nonjudicial action to effect dispossession of Plaintiff's home without a "present right to possession of the property." 15 U.S.C. § 1692f(6)(A).

***3** Unfortunately for Plaintiff, his Amended Complaint is completely devoid of any factual allegation that he was current on his loan at the time RAS crane allegedly attempted to conduct a non-judicial foreclosure. See [Doc. 4]. Plaintiff does allege that RAS Crane "attempted to dispossess plaintiff of his home when it had no right to do so." [Id., p. 2, ¶7]. But Plaintiff cannot state a claim with the conclusory statement that RAS Crane "had no right" to possession of the property; that is nothing but "a formulaic recitation of [an] element[ ] of [the] cause of action," which "will not do." Twombly, 550 U.S. at 555. The closest Plaintiff comes is alleging that the Cunningham I Court concluded he "had a substantial likelihood of showing that [the] foreclosure attempt was wrongful." [Doc. 4, p. 2, ¶8]. But that allegation too relies on "legal conclusions masquerading as facts," namely the assertion that the attempted foreclosure was "wrongful." See Jaharis, 297 F.3d at 1188. Plaintiff cannot just mention a ruling from the Cunningham I litigation and expect the Court to glean facts alleged nowhere in the Amended Complaint.

As pled, the Amended Complaint contains no factual allegations to support Plaintiff's assertion that RAS Crane "had no right to" attempt a non-judicial foreclosure. See [Doc. 4, p. 2, ¶7]. To be sure, Plaintiff's Response to the Motion to Dismiss is replete with arguments that he "was not in default under his mortgage and was current" and finally provides the relevant order from Cunningham I. See [Doc. 8, p. 5]. But a plaintiff "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).

Because Plaintiff is represented by counsel, who has not requested leave to amend the complaint, the Court need not "grant plaintiff leave to amend his complaint sua sponte." Wagner v. Daewoo Heavy Indus. Am. Corp., 314 F.3d 541, 542 (11th Cir. 2002). But because it is not "plain that the plaintiff can prove no set of facts that would support the claims in the complaint," the Court concludes that dismissal would not be appropriate. See Jaharis, 297 F.3d at 1188. Accordingly, the Court **RECOMMENDS** that Plaintiff be ordered to replead and that Defendant's Motion to Dismiss be **DENIED as moot**.

CONCLUSION

For the reasons explained above, the Court **RECOMMENDS** Plaintiff be ordered to replead within **fourteen (14) days** from the docket entry date of the district judge's ruling on this Report and Recommendation, and that the Motion to Dismiss ([Doc. 6]) be **DENIED as moot. Plaintiff, however, is warned that**

a failure to timely amend his Complaint by correcting the deficiencies explained above could result in dismissal of this entire case with prejudice. See N.D. Ga. Loc. R. 16.5.

SO REPORTED AND RECOMMENDED, this 3rd day of February, 2020.

ORDER FOR SERVICE OF REPORT AND RECOMMENDATION

Attached is the report and recommendation of the United States Magistrate Judge made in this action in accordance with 28 U.S.C. § 636 and this Court's Local Rule 72.1C. Let the same be filed and a copy, together with a copy of this Order, be served upon counsel for the parties.

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the report and recommendation **within fourteen (14) days of the receipt of this Order**. Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the district court. If no objections are filed, the report and recommendation may be adopted as the opinion and order of the district court and any appellate review of factual findings will be limited to a plain error review. United States v. Slay, 714 F.2d 1093 (11th Cir. 1983), cert. denied, 464 U.S. 1050 (1984). A party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions. Mitchell v. United States, 612 F. App'x 542, 545 (11th Cir. 2015); 11th Cir. R. 3-1. In the absence of a proper objection, however, the appeals court may review the matter on appeal for plain error if necessary in the interest of justice. Mitchell, 612 F. App'x at 545; 11th Cir. R. 3-1.

***4** The Clerk is directed to submit the report and recommendation with objections, if any, to the district court after expiration of the above time period.

SO ORDERED, this 3rd day of February, 2020.

All Citations

Not Reported in Fed. Supp., 2020 WL 9810008

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