

STATE OF MICHIGAN
COURT OF APPEALS

DAMIAN JACKSON and HOLLY JACKSON,

Plaintiffs/Counter-defendants-
Appellants,

UNPUBLISHED
February 21, 2012

v

FEDERAL NATIONAL MORTGAGE
ASSOCIATION, successor of MAIN STREET
BANK,

No. 301307
Macomb Circuit Court
LC No. 2009-003296-CH

Defendant/Counter-plaintiff-
Appellee,

and

COUNTRYWIDE HOME LOANS, successor of
MAIN STREET BANK, and FREEDOM
PROPERTY SERVICES LLC,

Defendants-Appellees.

Before: GLEICHER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Damian and Holly Jackson were the owners of two homes on Wendy Drive in the city of Sterling Heights, residing in one and renting the other to tenants. They fell behind on their mortgage payments and their lenders foreclosed upon the homes. The Jacksons waited until six months after the redemption period expired to file suit. The heart of the Jacksons' complaint is that Main Street Bank extended them credit, which they could not repay, and colluded with an appraisal company, Freedom Property Services, to falsely inflate the subject properties' values. The Jacksons contend that the Federal National Mortgage Association (also known as Fannie Mae) and Countrywide Home Loans acted either as puppet masters orchestrating the lower level predatory lending scheme, or as omniscient masters allowing the misconduct of their servants.

We affirm the trial court's dismissal of the Jacksons' April 12, 2010 amended complaint and denial of their September 2010 motion to file an additional amended complaint. Contrary to the Jacksons' procedural challenges, the trial court abided by the court rules in considering the parties' arguments and rendering its judgment. The factual bases for the April 2010 complaint

were rejected by a federal district court during the pendency of this case, precluding a state court ruling to the contrary. Further, the trial court acted within its discretion in denying the Jacksons an opportunity to file a fifth amended complaint in September 2010 when they had repeatedly failed to state an actionable claim and only sought to add claims based on facts already rejected at the federal court level.

I. BACKGROUND

In August and October 2006, the Jacksons secured loans from Main Street Bank and signed promissory notes in exchange for the proceeds necessary to purchase one home and refinance another on Wendy Drive in Sterling Heights. The Jacksons own Diamond & Associates Enterprises, LLC, a corporate entity that purchases residential real estate and rents the properties. As such, they had applied for and secured mortgages on 10 to 12 prior occasions, including through Main Street Bank, and were well experienced in the home buying process.

In fact, they owned \$1,345,000 in real estate before purchasing the additional Wendy Drive property. In connection with the subject loan applications, Main Street Bank conducted a credit check of the Jacksons. The credit report described the Jacksons as a credit risk, indicating that collection actions had been instituted against them in the prior two years and their “proportion of balances to credit limits [was] too high.” Moreover, on their pre-existing real estate loans, the Jacksons had been 30 days delinquent once and 60 days delinquent on six prior occasions. Despite their rocky credit history, the Jacksons self-reported a combined monthly income of \$14,731, or \$176,772 annually. Damian Jackson averred at his deposition (which had to be rescheduled six times due to his repeated last-minute cancellations) that he was able to meet the mortgage obligations as long as the rental properties were occupied. The Wendy Drive loan notes ultimately signed by the Jacksons were secured by mortgages, which Main Street assigned to the Mortgage Electronic Registry System (MERS).¹ MERS then electronically

¹ The Ninth Circuit Court of Appeals described the role of MERS in *Cervantes v Countrywide Home Loans, Inc.*, 656 F3d 1034, 1038-1039 (CA 9, 2011), as follows:

MERS is a private electronic database, operated by MERSCORP, Inc., that tracks the transfer of the “beneficial interest” in home loans, as well as any changes in loan servicers. After a borrower takes out a home loan, the original lender may sell all or a portion of its beneficial interest in the loan and change loan servicers. The owner of the beneficial interest is entitled to repayment of the loan. For simplicity, we will refer to the owner of the beneficial interest as the “lender.” The servicer of the loan collects payments from the borrower, sends payments to the lender, and handles administrative aspects of the loan. Many of the companies that participate in the mortgage industry—by originating loans, buying or investing in the beneficial interest in loans, or servicing loans—are members of MERS and pay a fee to use the tracking system

When a mortgage interest is transferred among MERS members, MERS internally tracks the transaction, easing the parties’ various recording duties. *Id.*

transferred the beneficial and servicing rights over the mortgages to Countrywide Home Loans. Fannie Mae acted as the investor, or primary funder, on the mortgages.

The Jacksons last made a mortgage payment for the Wendy Drive properties in December 2007. When the Jacksons failed to remedy the delinquency, MERS instituted foreclosure proceedings. MERS entered the winning bids at the foreclosure auctions, which took place on June 6, 2008 and July 18, 2008, and then quit claimed its interests to Fannie Mae. The redemption periods expired on December 6, 2008 and January 18, 2009, with the Jacksons taking no action to redeem their properties. Despite that the Jacksons had no legal right to the properties after the expiration of the redemption periods, they retained possession and Fannie Mae apparently took no action to evict the holdovers.

Angry over the loss of the legal rights to their houses, the Jacksons filed in the Macomb Circuit Court a line of complaints against numerous defendants for various wrongs. The Jacksons first filed suit *in propria persona* on June 23, 2009, against Fannie Mae, Macomb County and Trott & Trott (the entity that had conducted the sheriff's sales) (Complaint No. 1). The Jacksons challenged the unskilled manner in which the foreclosure process had been handled, claimed that the promissory notes underlying the mortgages were not "authentic," asserted that Fannie Mae had been unjustly enriched by "taking" the property and challenged the validity of the creditors' actions under the federal Fair Debt Collection Practices Act (FDCPA), 15 USC 1692 *et seq.* The named defendants quickly sought summary dismissal and the trial court advised the Jacksons to secure counsel. It appears from the current record that the Jacksons' *in pro per* lawsuit was never actually dismissed.

On July 20, 2009, the Jacksons filed a new lawsuit with the assistance of counsel against Fannie Mae, Main Street Bank, and Countrywide Home Loans (Complaint No. 2). Basically, the Jacksons accused Main Street² of engaging in predatory lending techniques and of conspiring with a then-unnamed appraisal company to artificially inflate home values in order to secure larger loan accounts. The Jacksons asserted that Countrywide was liable as the assignor of the Main Street mortgages and that Fannie Mae, as the mortgage investor, should have investigated Main Street's lending practices. Fannie Mae, in turn, filed a counter-complaint against the Jacksons asserting its ownership interest in the properties following the expiration of the redemption periods and challenging the Jacksons' position as holdovers.

The parties attempted to settle their disputes and, at one point, appeared to agree that the Jacksons would relinquish their purported interest in the rental property and seek a loan modification to remain in the owner-occupied residence. At a March 8, 2010 hearing, however, the Jacksons accused Countrywide of entering the loan modification negotiations in bad faith. The court orally ordered the parties to reconvene the settlement process with a mediator. The court also commanded the Jacksons to create an escrow account into which they would pay \$1,000 rent each month for the primary residence and \$500 each month for the rental property. Fannie Mae and Countrywide filed a proposed order to memorialize the court's rulings but the

² Main Street is no longer an active business entity and has never personally participated in this lawsuit.

Jacksons objected on several grounds. Yet, the Jacksons failed to follow through and no alternate order for escrow or mediation was entered.

Thereafter, the Jacksons sought to file an amended complaint to add fraud, misrepresentation and conspiracy claims against Freedom Property Services, the company that appraised the properties during the loan application process (Complaint No. 3). The Jacksons accused Freedom of using nonexistent and inaccurate addresses to find comparables for their properties during the appraisal process. The Jacksons also sought to add claims under the federal Truth in Lending Act (TILA), 15 USC 1601 *et seq.*, and to restate claims under the FDCPA. Before the court could rule on the Jacksons' request to file an amended complaint, the Jacksons requested to file a revised version of their amended complaint (Complaint No. 4). In Complaint No. 4, the Jacksons asserted that they could prove specific examples of fraudulent information used by Freedom in preparing the appraisal reports for the Wendy Drive properties. The Jacksons accused Main Street of conspiring to commit this fraud in a manner "calculated to induce a mortgage loan that the [Jacksons] were clearly not qualified for"

The Jacksons also accused Main Street and Freedom of negligence. In relation to Main Street, the Jacksons claimed that the bank "knew or should have known upon reviewing the loan application signed by the [Jacksons] that they clearly did not qualify" based on their ratio of assets to debt. The Jacksons accused Freedom of negligently inflating the value of the smaller Wendy Drive home to \$90,000 more than the larger property. According to the Jacksons, these breaches in the standard of care led to the improper extension of credit and damaged them through the subsequent wrongful foreclosures. The Jacksons accused Main Street of violating the TILA by deliberately ignoring negative information in their credit reports and extending credit in bad faith.

The Jacksons accused defendants collectively of violating the FDCPA by failing "to cease collection activities" despite their "advance" knowledge that the Jacksons "would be unable to remain current on either of the two outstanding mortgages." Finally, the Jacksons accused the collective defendants of acting "with full knowledge that [their actions] were wrongful and had a substantial probability to cause serious harm," leading "to the wrongful approval of [the] mortgage loans that [the Jacksons] could not afford" and ultimately to "the wrongful foreclosures." The Jacksons sought monetary damages, to set aside the mortgage loan contracts, and to invalidate the foreclosure sales. Interestingly, the Jacksons made no connection between Main Street and Freedom's alleged wrongful conduct and Fannie Mae or Countrywide's potential liability in Complaint No. 4. The court allowed the revised amended complaint, but Fannie Mae and Countrywide removed the matter to federal court days later. In the interim, the Jacksons did not serve process on the newly added defendant, Freedom Property Services.

The case remained in federal court for only three months. The federal district court granted summary judgment of the federal TILA and FDCPA claims based on the statutes of limitations included in the acts. Specifically, TILA claims must be raised within one year of closing the loan. Claims under the FDCPA must be raised within one year of the violation, which the court deemed to have occurred no later than the date of the last foreclosure sale. The latest foreclosure auction occurred more than a year before the Jacksons filed suit, thereby time barring their claim.

Although dismissed on timeliness grounds, the federal district court commented on the substance of the Jacksons' predatory lending claim:

[The Jacksons] allege that *Main Street's knowledge of their precarious financial situation constituted predatory lending and resulted in the foreclosure of their properties. However[,] the record does not support these allegations.* [The Jacksons'] total liability for [the Wendy Drive mortgages] was approximately \$5,200 per month, but [the Jacksons] listed their income as \$14,731 per month on their loan application. This figure was reviewed and confirmed by [the Jacksons] before signing the loan documents. . . . Further, Mr. Jackson acknowledged at his deposition that he and his wife could afford both loans

[The Jacksons] have not made any showing that Main Street or Countrywide engaged in any conduct affirmatively directed at concealing charges or other TILA violations. [The Jacksons] allege only that Main Street "violated the [TILA] by approving said mortgages for the [Jacksons'] home . . . which revealed credit information that should have resulted in a denial of [the Jacksons'] application for their mortgages, since their monthly indebtedness was considered high in comparison with the amount requested to purchase the subject properties." . . . Further, [the Jacksons] do not allege that they could not have discovered the alleged TILA violations despite the exercise of due diligence. *The record indicates [the Jacksons] were well-aware of their financial situation and had ample opportunity to discover their cause of action.* Therefore, the one-year TILA statute of limitations does not toll, but rather began to accrue with respect to [the Jacksons'] mortgage loans on the respective dates of the loan closings [Emphasis added.]

The federal court then remanded the remaining state law claims to the Macomb Circuit Court.

Approximately a month after returning to state court, Fannie Mae and Countrywide sought summary dismissal of the state law fraud and negligence claims. They noted that the Jacksons' fraud, conspiracy and negligence claims in Complaint No. 4 centered on the allegedly fraudulent appraisal and yet the Jacksons had not served their complaint on Freedom. Fannie Mae and Countrywide further noted that the Jacksons omitted any reference to them in their fraud and conspiracy claims. Fannie Mae and Countrywide noted that the federal court had rejected the factual basis of the Jacksons' negligence claims and that neither defendant was implicated in the complaint. Substantively, Fannie Mae and Countrywide noted that the Jacksons' claims arose from the loan origination process in which they played no role. As they had no interactions with the borrowers, it was a "legal and factual impossibility that either Countrywide or Fannie Mae could be liable for specific acts, statements, or occurrences that took place" at that time. Predicting claims that the Jacksons would soon raise in their proposed Complaint No. 5, Fannie Mae and Countrywide asserted that there was no agency relationship between them and Main Street or Freedom. They contended that Fannie Mae's role as mortgage investor and Countrywide's role as mortgage servicer did not create an agency relationship with the originator of the mortgage, and that Countrywide could not be held liable for any wrongdoing on Main Street's part simply because it was the assignee of the mortgage. Fannie Mae and Countrywide further noted that the Jacksons' tort claims appeared to be premised on a breach of

a contractual duty and therefore could not be sustained. Fannie Mae and Countrywide asserted that the Jacksons' claims were precluded by the doctrine of laches as they waited to file suit until nearly three years after the loans were closed and months after the foreclosure redemption periods had expired. Fannie Mae and Countrywide again noted that the Jacksons had not served process on Freedom or the then-defunct Main Street, service which could have been accomplished had the Jacksons filed suit in a timely manner. They further asserted that the Jacksons lacked standing to assert claims related to the properties because their beneficial interest was severed at the expiration of the foreclosure redemption periods.

The Jacksons, on the other hand, filed a motion to present their "Fifth Amended Complaint" (Complaint No. 5). In addition to the more generalized claims raised in Complaint No. 4, the Jacksons attempted to tie Fannie Mae and Countrywide into the equation. The Jacksons intended to assert that Main Street and Countrywide acted as Fannie Mae's agents when they engaged in predatory lending practices. They claimed that Fannie Mae had the ability to review the loan application and related documents before investing in the mortgages but failed to do so. For the first time, the Jacksons related the alleged predatory lending scheme to eight pre-existing mortgages they had secured through Main Street with Fannie Mae as the investor. The Jacksons accused Fannie Mae of approving the current two loans knowing they were unqualified to repay the debt. The Jacksons challenged the lenders' practice of granting loans on a "stated income" basis without conducting independent research of the borrower's ability to repay. Based on the collective defendants' unclean hands, the Jacksons argued that it would be just to rescind the mortgage contracts.

The Jacksons also alleged for the first time that they had attempted to avoid the foreclosure process when they first realized their economic distress. They claimed to have contacted Countrywide in search of a loan modification, but the lender instructed the Jacksons that it would not engage in loan modification discussions until they were 90 days delinquent on their payments. The Jacksons then withheld payment for 90 days on eight mortgage loans before recontacting Countrywide. At that point, Countrywide indicated that it was no longer able to discuss loan modifications with any client. The Jacksons asserted claims for detrimental reliance and promissory estoppel, arguing that they had reasonably relied on the promises made by Countrywide to their detriment.

The trial court denied the Jacksons' motion to file a new amended complaint and granted summary dismissal in all defendants' favors. In doing so, the court ruled:

This Court has indicated I have read all of the briefs and scanned the response that [the Jacksons' counsel] just filed.

This Court has been very lenient with this case, starting with the first time the first Complaint was before the Court on a Motion for Summary and Mr. Jackson came to court without an attorney as indicated in the pleadings, the Court advised Mr. Jackson to seek legal counsel, and we adjourned that summary disposition motion.

As counsel has indicated, after that a second Complaint was filed, then a third, then a fourth. The court rule 2.118 states: The Court shall freely be given

when justice so requires to allow amendment of pleadings. I think I've been more than freely allowing Complaints. I do agree with counsel that allowing this Complaint would be futile, therefore, that is denied.

In addition, after reviewing the complete history of this case, the fact that at one time I verbally ordered the payment into it [sic] an escrow account and for some technical reason that order was never entered, but to this date the [Jacksons] have seen fit not to pay anything regarding these two homes. Taking everything into account, and after thoroughly reviewing the entire matter, I honestly believe based upon the Supreme Court cases that the [Jacksons] are barred because the redemption period has long passed, Motion for Summary Disposition is respectfully granted.

Thereafter, the Jacksons requested the court to reconsider its judgment based on the procedural issues raised before this Court. The trial court declined.

II. ANALYSIS

On appeal, the Jacksons raise various procedural and substantive challenges to the trial court's summary dismissal of Complaint No. 4. Basically, the Jacksons assert that the trial court ignored the effect on the overall flow of the case caused by Fannie Mae and Countrywide's removal of the matter to federal court for a three-month period, allowed pre-removal orders to fall by the wayside, and therefore prematurely dismissed their claims. The Jacksons also challenge the trial court's ruling that the summary disposition order was a final and complete resolution of the case and argue that their claims against Freedom remain pending. Finally, the Jacksons challenge the trial court's denial of their motion to file Complaint No. 5.

A. Timing of Response to Motion to File Complaint No. 5

First and foremost, we reject the Jacksons' challenge to the "belated" filing of Fannie Mae and Countrywide's response to their motion to file Complaint No. 5. The Jacksons complain that these defendants' tardiness prevented them from rebutting the defendants' averments. MCR 2.119(2)(b) provides that when service is accomplished through personal delivery, an opposing party must file a response to a motion "at least three days before the hearing." When a period of time is measured in days, all days are counted, not just business days. A time period prescribed by statute or court rule is only extended when the "last day of the period" falls on a weekend or holiday. See MCR 1.108(1). The interruption of the weekend does not affect the timing in this case. The hearing on the Jacksons' motion to file Complaint No. 5 was scheduled for Monday, October 18, 2010. Three days prior to the hearing was Friday, October 15, 2010. As October 15 was a weekday and the court was open, Fannie Mae and Countrywide were able to file a response that day. Accordingly, contrary to the Jacksons' assertion, Fannie Mae and Countrywide timely filed their response and the court properly considered it.

B. Timing of September 2010 Summary Disposition Motion

The Jacksons' challenge to Fannie Mae and Countrywide's "belated" September 1, 2010 motion for summary disposition is also without merit. Pursuant to court order issued early in this

case, the parties were to file any motions for summary disposition by April 8, 2010. However, MCR 2.116(D)(4) specifically grants the trial court discretion to consider a summary disposition motion filed under (C)(8) or (10) beyond the date established in the court's scheduling order. The Jacksons filed two amended complaints following the summary disposition cut-off date. The trial court certainly acted within its discretion in permitting Fannie Mae and Countrywide the opportunity to react to the Jacksons' ever-evolving claims beyond the date set forth in the scheduling order.

C. No Written Order for Escrow or Continued Settlement

The Jacksons complain that, in dismissing their suit, the trial court improperly relied upon their failure to make escrow payments as no order was actually entered in that regard. The Jacksons are correct on this point. Following the court's March 8, 2010 oral command, Fannie Mae and Countrywide prepared and filed a proposed order for the court's signature. See MCR 2.602(B)(3) (governing "seven-day" orders). The order described the court's stated parameters for both case mediation and the creation of and payment into an escrow account. The Jacksons timely objected to the proposed order, but failed to include "a notice of hearing and an alternate proposed . . . order" as required by MCR 2.602(B)(3)(c). The issue was not revisited at the court's subsequent hearing on the Jacksons' motion to file Complaint No. 4 and Fannie Mae and Countrywide removed the case to federal court without seeking entry of their proposed order.

"[A]ll judgments and orders" of the court "must be in writing." MCR 2.602(A)(1). Regardless of any fault on the Jacksons' part, the escrow order was never reduced to writing. Therefore, the court never actually required the Jacksons to create an escrow account or make \$1,500 monthly payments. Accordingly, the trial court should not have relied on the Jacksons' lack of payment in ruling on the motion for summary disposition.

But this razor cuts both ways. The Jacksons complain that the trial court prematurely dismissed the action without following through on its earlier oral command for the parties to proceed to case mediation. That command was also never reduced to a written order and therefore was not binding on the court or the parties. The absence of further case mediation did not preclude summary dismissal.

D. Summary Dismissal of Complaint No. 4

The Jacksons imply that the trial court was biased against them and that Fannie Mae and Countrywide removed the case to federal court as a delay and diversionary tactic. As a result, the Jacksons complain that the trial court's summary dismissal of their claims was not actually based on the merits. To the contrary, the dismissal by the federal district court of the Jacksons' TILA and FDCPA claims doomed their state law claims.

We review a trial court's order of summary dismissal de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

“A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” In evaluating such a motion, a court considers the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004) (internal citations omitted).]

Fannie Mae and Countrywide sought summary dismissal of Complaint No. 4, the last approved amended complaint placed before the court. Aside from the fraud claims levied against Freedom in relation to the appraisal process, the Jacksons accused Main Street of fraud and negligence for failing to adequately and accurately assess the Jacksons’ qualifications to repay the mortgage debt. The Jacksons more generally accused Fannie Mae and Countrywide of knowingly undertaking wrongful acts culminating in the wrongful extension of credit and ultimate foreclosure on the properties. The federal court ruling precludes these allegations. The federal court specifically ruled that the Jacksons “were well-aware of their financial situation” and yet claimed an income that was more than adequate to repay the indebtedness. This issue was an essential question of fact to both the federal TILA and the state law fraud and negligence claims. The parties fully argued their positions before the federal district court, which entered a final judgment in Fannie Mae and Countrywide’s favor. As any state law liability on the part of Fannie Mae and Countrywide would be based on the same, already-resolved facts, those claims are precluded. See *Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493 (2008) (discussing doctrine of collateral estoppel).

The Jacksons’ challenge to the dismissal of their fraud claims against Freedom is mere smoke and mirrors. The court dismissed the fraud claims against Freedom because the Jacksons had never served process on that defendant. “On the filing of a complaint, the court clerk shall issue a summons to be served” on the named defendant. MCR 2.102(A). The “summons expires 91 days after the date the complaint is filed.” MCR 2.102(D). “[W]ithin those 91 days,” a plaintiff may request an extension for a period not to exceed a year if he can show due diligence in attempting to serve the original summons. *Id.* If the plaintiff does not accomplish service before the expiration of the summons, the court must dismiss the claims against the named defendant, but without prejudice. MCR 2.102(E)(1). The court may only set aside the dismissal on stipulation of the parties or if service had in fact been made within 91 days, the failure to file a proof of service “is excused on good cause shown,” and the plaintiff files his motion to set aside the dismissal within 28 days of the order’s entry. MCR 2.102(F).

The Jacksons’ summons to serve process upon Freedom expired on July 12, 2010. We acknowledge that the case had been removed to the federal court for all but seven days of the summons’ viability and the summons actually expired while the case was still pending in the federal court. However, the Jacksons never sought to remedy the situation. Pursuant to MCR 2.102(F)(1), the Jacksons could have served the original summons on Freedom while the matter was pending in the federal court to protect their later interest in reinstating their claims against that defendant. Or when the case returned to state court on July 26, 2010, the Jacksons could have filed a motion seeking to belatedly extend the summons. Instead, the Jacksons did nothing. They did not attempt to serve process upon Freedom between April 12 and 19, 2010, while the

case remained pending in the state court. The Jacksons did nothing to protect their rights from April 19 through July 26, 2010, while the case proceeded in federal court. They made no steps to serve Freedom after July 26 until Fannie Mae and Countrywide filed their motion for summary disposition on September 1, 2010. The Jacksons did not even make a belated attempt to avoid summary dismissal by seeking an extended summons between September 1 and the October 18, 2010 dismissal of their suit. No court rule or published authority permits tolling of the 91-day time for service of process based on removal to federal court and, even if it did, the Jacksons allowed 94 days of state court proceedings to elapse without attempting to serve process on Freedom.

Even if the Jacksons had served process upon Freedom, their claims would fail. From the record, it appears that Freedom may have engaged in negligence or active fraud in preparing the property appraisals for the Wendy Drive homes. As noted by the Jacksons, the comparable properties relied upon in the reports do not exist at the cited addresses. The resultant mortgage loans were therefore extended based on some faulty information. This faulty information, however, did not cause the Jacksons to default on their mortgage loans. Rather, as noted by the federal district court, the Jacksons likely self-reported an inflated income to convince the lenders of their ability to pay. The ultimate damage (foreclosure of the properties) was not caused by Freedom's actions, but the Jacksons' pursuit of extensive credit in the face of economic distress. Accordingly, the trial court properly concluded that the Jacksons' claims against that named defendant should be dismissed.

E. Denial of Motion to File Amended Complaint No. 5

Finally, we reject the Jacksons' challenge to the trial court's denial of their motion to file an amended complaint after remand from the federal court—Complaint No. 5. Pursuant to MCR 2.118(A)(2), a plaintiff may amend his or her complaint by leave of court and “[l]eave shall be freely given when justice so requires.” Moreover, the court must allow a plaintiff the opportunity to amend his or her complaint following a summary dismissal under MCR 2.116(C)(8) or (10) “unless the evidence then before the court shows that amendment would not be justified.” MCR 2.116(I)(5). An amendment is not “justified” or required to promote justice when the plaintiff has shown “undue delay,” acted in “bad faith” or with a “dilatatory motive,” or repeatedly failed “to cure deficiencies by amendments previously allowed,” or when the amendment would cause “undue prejudice to the opposing party” or would be futile. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). We review the court's ruling for an abuse of discretion. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004).

The trial court did not abuse its discretion in denying the Jacksons' attempt to file Complaint No. 5 where they had multiple, previous opportunities to cure the deficiencies in their complaint but seemed incapable of doing so. As noted, the only “new” allegations in Complaint No. 5 were specific attempts to tie Fannie Mae and Countrywide to the loan origination process and thereby impose either vicarious or direct liability. It should have been abundantly clear to the Jacksons from the date of their original complaint filed in June 2009 that Fannie Mae was the mortgage investor and Countrywide held the beneficial and servicing rights over the loan. Despite that, the Jacksons waited until September 2010 to try to define how these remote entities could have had an impact on the challenged loan origination process. The lapse of more than a year without defining its cause of action amounts to undue delay. The fact that the Jacksons filed

four separate complaints before finally making defendant-specific allegations is ample evidence of their inability to state a claim despite repeated opportunities to do so.

Ultimately, the Jacksons' additional claims in Complaint No. 5 would be futile. "An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face." *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). Amended claims are also futile when the plaintiff seeks to add theories "that had essentially already been dismissed by the trial court." *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 401; 729 NW2d 277 (2006). Stated another way, "[a]n amendment is futile if it merely restates the allegations already made or adds allegations that still fail to state a claim." *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

The additional allegations lodged against Fannie Mae and Countrywide revolve around the factual issues resolved in the federal court proceeding—that the banking industry defendants had knowledge of the Jacksons' assets and debts superior to the Jacksons' own knowledge. The federal court had already rejected that premise and any additional claims in that regard would be futile. Accordingly, the trial court did not abuse its discretion in denying the Jacksons' request to file a fifth amended complaint.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Patrick M. Meter

/s/ Pat M. Donofrio