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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

LAURA ANN GENS and TIMOTHY GENS,

Plaintiffs,

v.

COLONIAL SAVINGS, F.A.; ASSOCIATED
BANK, N.A.; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.

Defendants.

Case No. C-11-05526-RMW

**ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT; DENYING
MOTION FOR SANCTIONS;
DENYING MOTION TO DISMISS AS
MOOT**

[Re Dkt. Nos. 130, 140, 154]

Plaintiffs Timothy and Laura Gens (collectively, “Gens” or “plaintiffs”) filed suit against defendants Colonial Savings, F.A., Associated Bank, N.A., and Mortgage Electronic Registration Systems, Inc., (collectively, “defendants”) on claims arising out of a foreclosure in Wisconsin. Plaintiffs alleged nine claims in their Third Amended Complaint. Dkt. No. 129. The court previously dismissed plaintiffs’ 1st, 2nd, 3rd, 7th, 8th, and 9th claims with prejudice. Dkt. Nos. 113, 117, 122 (prior Orders). Plaintiffs’ remaining claims are for trespass, conversion, and a civil RICO¹ violation. Following service of plaintiffs’ Third Amended Complaint, defendants MERS and Colonial moved to dismiss. Dkt. No. 130.² Defendants also filed a motion for sanctions in

¹ 18 U.S.C. § 1961(c)

² Defendant Associated Bank joined in the motion to dismiss. Dkt. No. 132.

1 connection with the Gens' failure to appear at depositions and produce documents. Dkt. No. 140.
2 After later successfully taking the Gens' depositions, and receiving some discovery from the Gens,
3 defendants filed a motion for summary judgment on all remaining claims. Dkt. No. 154. Plaintiffs
4 have not filed an opposition to the summary judgment motion. *See* Dkt. No. 169. As explained
5 below, the court grants defendants' motion for summary judgment, denies the motion for sanctions,
6 and denies as moot the motion to dismiss.

7 I. MOTION FOR SUMMARY JUDGMENT

8 As relevant to this motion, plaintiffs assert that defendants committed the torts of trespass
9 and conversion when defendants unlawfully entered plaintiffs' Wisconsin property, damaged it, and
10 stole personal possessions. TAC ¶¶ 16-19. Plaintiffs also allege a civil RICO claim based on notes
11 allegedly left by defendants that threatened retaliation. *Id.* at ¶¶ 60-61.

12 Defendants' motion for summary judgment is supported with evidence, and states that
13 agents of Colonial did in fact enter plaintiffs' property in order to inspect the property, winterize it,
14 and ensure that it was secure and undamaged. Colonial was authorized to enter the house pursuant
15 to an express provision in plaintiffs' mortgage. Dkt. No. 154 at 10-11. As Colonial was authorized
16 to enter the home, it did not commit trespass. *See* Wis. Stat. § 943.14. Plaintiffs have not come
17 forward with any evidence supporting their allegations that Colonial damaged the property or
18 converted their personal possessions. Furthermore, plaintiffs have not come forward with the notes
19 that are alleged to constitute RICO violations, despite Mr. Gens testifying at his deposition that he
20 had and could produce the notes. Dkt. No. 154-4, Exhibit N, Tim Gens Dep. at 49:1-7.

21 Having reviewed defendants' motion and supporting evidence, the court concludes that
22 summary judgment in favor of defendants is warranted. Fed. R. Civ. P. 56(c). As accurately detailed
23 in defendants' notice of no opposition, Dkt. No. 167, and reflected on the docket, plaintiffs have
24 failed to timely respond to defendants' motions at least five times in the last 12 months. The court
25 has granted plaintiffs numerous extensions, including a two-month extension following the reported
26 death of plaintiffs' son. Dkt. No. 158. Despite these extensions of time, and multiple opportunities
27 to present their case to the court, plaintiffs have still failed to come forward with evidence to support
28 their claims. The failure of a party to support an assertion of fact may be considered by the opposing

1 party as a failure of proof. Fed. R. Civ. P. 56(c)(1)(B). The court sees no reason for this litigation to
2 continue, especially in light of defendants' submission of evidence in support of their motion for
3 summary judgment. Accordingly, the court grants the motion for summary judgment.

4 **II. MOTION FOR SANCTIONS**

5 As detailed in the court's prior Order compelling document production and attendance at
6 depositions, the Gens' failed to appear for depositions and did not respond to discovery requests.
7 *See* Dkt. Nos. 134, 151. As a result of plaintiffs' noncompliance with discovery requests, defendant
8 Colonial moved for sanctions. Dkt. No. 140. The court denies the motion for sanctions because the
9 Gens complied with the Court's order to appear at their depositions, Dkt. No. 151, and produced
10 some documents (which may be all the documents they have) in response to defendants' discovery
11 requests. Furthermore, as the court is granting summary judgment, sanctions are not needed to deter
12 further delay or to compensate defendants for the costs of additional discovery based on plaintiffs'
13 actions.

14 **III. ORDER**

15 For the reasons explained above, the court grants defendants' motion for summary judgment,
16 denies the motion for sanctions, and denies as moot the motion to dismiss.

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19 Dated: February 6, 2015

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21 Ronald M. Whyte
22 United States District Judge
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