

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Wiley Y. Daniel

Civil Action No. 08-cv-00955-WYD-CBS

SECURITY SERVICE FEDERAL CREDIT UNION,

Plaintiff,

v.

FIRST AMERICAN MORTGAGE FUNDING, LLC, *et al.*

Defendants.

FIRST AMERICAN MORTGAGE FUNDING, LLC,

Third-Party Plaintiff,

v.

STEWART TITLE OF CALIFORNIA, INC., *et al.*

Third-Party Defendants.

FIRST AMERICAN MORTGAGE FUNDING, LLC, *et al.*

Cross-claim Plaintiffs,

v.

FIRST AMERICAN MORTGAGE, INC., *et al.*

Cross-claim Defendants.

FIRST AMERICAN MORTGAGE FUNDING, LLC, *et al.*

Counterclaim Plaintiffs,

v.

SECURITY SERVICE FEDERAL CREDIT UNION,

Counterclaim Defendant.

ORDER

THIS MATTER comes before me on Defendants', First American Mortgage Funding, LLC, First American Mortgage, Inc., Kevin B. Jordan, William Depuy, Jeffrey Jordan, Shaun Jordan, Mark Campbell, and Construction Disbursement Services, Inc., Motion to Dismiss Plaintiff's Third, Fourth, Fifth, Sixth, and Eleventh Claims for Relief and Plaintiff's Seventh Claim for Relief as to First American Mortgage Funding, LLC filed April 20, 2009 [d/e 125]. I have also reviewed Plaintiff Security Service Federal Credit Union's Response [d/e 140] to that motion as well as Defendants' Reply [d/e 151]. Pursuant to an Order dated May 20, 2009 [d/e 141], and because Plaintiff attached voluminous factual information to its Response to Defendants' Motion, I converted Defendants' motion to one for summary judgment.

Despite converting the Defendants' motion to one for summary judgment and providing Defendants with an opportunity to present evidence to counter the evidence submitted by Plaintiff, Defendants declined the opportunity to present any evidence and failed to recast their argument to reflect the new standard the Court will use to evaluate their motion. Instead, Defendants continue to cite *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) and argue that the even if the Court considers the new evidence, "the details provided in the Response and the allegations of the Complaint do not enable plaintiff's" claims to survive. (Defs.' Mot., p. 3).

Given the unusual posture of the case and the status of the pleadings, coupled with the evidence and argument submitted by Plaintiff, I believe there is an appropriate basis

to grant Plaintiff's request to deny the motion for summary judgment pursuant to Rule 56(f). (See Pl.'s Mot, p. 34; Ex. 12, Cubeta Aff.). I find merit to Plaintiff's representations concerning the difficulty in obtaining discovery and the need for obtaining additional discovery to justify its opposition to Defendants' motion. Moreover, the refusal of Defendant Kenneth North to testify at his deposition is a significant and a telling example of Plaintiff's difficulties in this case. (See Pl.'s Mot, p. 34; Ex. 12). Defendant North is alleged to be the central player in the fraudulent scheme at issue here. To arguably allow these Defendants to benefit from the Plaintiff's current inability to discover additional factual elements in support of their claim would run counter to the efficient administration of justice. See FED. R. CIV. P. 56(f)(1) and (3). In any event, Defendants, as the moving party, have failed to satisfy their initial burden of showing an absence of evidence to support their case. But even if they had, Plaintiff's evidence submitted with its response, as well as the allegations of the Complaint, construed in the light most favorable to the Plaintiff demonstrate that, at a minimum, a genuine issue of material fact exists with respect to the claims at issue in Defendants' motion. Accordingly, Defendants motion for summary judgment is denied.

Based on the foregoing, it is

ORDERED that Defendants', First American Mortgage Funding, LLC, First American Mortgage, Inc., Kevin B. Jordan, William Depuy, Jeffrey Jordan, Shaun Jordan, Mark Campbell, and Construction Disbursement Services, Inc., Motion to Dismiss Plaintiff's Third, Fourth, Fifth, Sixth, and Eleventh Claims for Relief and Plaintiff's Seventh Claim for Relief as to First American Mortgage Funding, LLC filed April 20, 2009 [d/e 125], which was

converted to a motion for summary judgement by an Order dated May 20, 2009, is hereby **DENIED** pursuant to FED. R. CIV. P. 56(f) with leave to re-file after the completion of discovery.

Dated: March 31, 2010

BY THE COURT:

s/ Wiley Y. Daniel
Wiley Y. Daniel
Chief United States District Judge