

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 10-cv-02730-CMA-MEH

MATTHEW SNIDER, and  
JEANETTE SNIDER,

Plaintiffs,

v.

BAC HOME LOANS SERVICE, LP, and  
FEDERAL HOME LOAN MORTGAGE CORPORATION,

Defendants.

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**RECOMMENDATION ON DEFENDANTS' MOTION TO DISMISS**

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**Michael E. Hegarty, United States Magistrate Judge.**

Before the Court is Defendants' Motion to Dismiss Plaintiffs' Complaint [filed November 15, 2010; docket #5]. Pursuant to 28 U.S.C. § 636(b)(1)(B) and D.C. Colo. LCivR 72.1C, the motion has been referred to this Court for recommendation. The Court recommends that, for the following reasons, the motion be **denied as moot**.<sup>1</sup>

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<sup>1</sup>Be advised that all parties shall have fourteen (14) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72(b). The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. §636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within fourteen (14) days after being served with a copy may bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991); *Niehaus v. Kansas Bar Ass'n*, 793 F.2d 1159, 1164 (10th Cir. 1986).

This *pro se* action was initiated on November 8, 2010, when it was removed from Jefferson County District Court. Plaintiffs allege generally that Defendants unlawfully acquired their property through judicial foreclosure and “forcible entry.” *See* docket #1-1. In response to the Complaint, the Defendants filed the present Motion to Dismiss arguing that Plaintiff’s allegations are insufficient pursuant to Fed. R. Civ. P. 8 and fail to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). In “response” to the motion, Plaintiffs filed an Amended Complaint on November 30, 2010 [docket #12].

Federal Rules of Civil Procedure 15(a)(1) provides that a party has a right to amend the pleading one time without seeking leave of court “21 days after service of a motion under Rule 12(b).” Fed. R. Civ. P. 15(a)(1)(B) (2010). In this case, the motion was filed on November 15, 2010 and the Amended Complaint filed on November 30, 2010; thus, in accordance with Rule 15(a), Plaintiffs are entitled to amend the complaint without seeking leave of court.

Also, under Fed. R. Civ. P. 15(c)(1)(B), the Amended Complaint relates back to the filing of the original complaint. “Generally, when an amended complaint is filed, the previous complaint is wiped out and the operative complaint is the most recently filed version.” *See Robinson v. Dean Foods Co.*, 2009 WL 723329, \*4 (D. Colo. Mar. 18, 2009) (Blackburn, J.) (quoting *Snyder v. Pascack Valley Hosp.*, 303 F.3d 271, 276 (3d Cir. 2002)). Here, it appears that Plaintiffs are attempting to articulate facts and clarify their claims against the Defendants in “response” to the Defendants’ motion,<sup>2</sup> which argues primarily that Plaintiffs have stated insufficient facts in the original complaint. *See* docket #12. Consequently, this Court recommends that Defendants’ motion

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<sup>2</sup>The 2009 Amendments to Rule 15 provide that “[a] responsive amendment [to a Rule 12 motion] may avoid the need to decide the motion or reduce the numbers of issues to be decided, and will expedite determination of issues that otherwise might be raised seriatim.”

to dismiss be denied as moot, and that Defendants be ordered to file an answer or other response to the Amended Complaint in accordance with Fed. R. Civ. P. 15(a).

Based on the foregoing, the Court RECOMMENDS that the District Court **deny as moot** Defendants' Motion to Dismiss Plaintiffs' Complaint [filed November 15, 2010; docket #5], and order that Defendants file an answer or other response to the Amended Complaint in accordance with Fed. R. Civ. P. 15(a).

Dated at Denver, Colorado, this 30th day of November, 2010.

BY THE COURT:

A handwritten signature in black ink that reads "Michael E. Hegarty". The signature is written in a cursive style with a large initial 'M' and 'H'.

Michael E. Hegarty  
United States Magistrate Judge