

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

BERNICE BATTLE and WILLIE
BATTLE,

Plaintiffs,

v.

Case No: 2:15-cv-563-FtM-38CM

AMERICAN HOME MORTGAGE
SERVICING INC.,

Defendant.

ORDER

Before the Court is Plaintiff's Amended Motion for Leave to Add Additional Counts to Amended Complaint ("Amended Motion," Doc. 53) and Plaintiff's Second Amended Motion for Leave to Add Additional Counts to Second Amended Complaint ("Second Amended Motion," Doc. 57). For the reasons set for below, Plaintiff's Amended Motion is denied as moot and Plaintiff's Second Amended Motion is denied without prejudice.

When Plaintiffs initially filed this matter, they did so *pro se*, without the assistance of counsel. Plaintiffs filed an Amended Complaint against Defendant on November 18, 2015 alleging negligence and fraud. Doc. 30. Defendant moved to dismiss the Amended Complaint. Doc. 40. The Honorable Sheri Polster Chappell dismissed both counts of the amended complaint without prejudice and allowed Plaintiffs leave to amend the complaint. Doc. 44 at 7.

Plaintiffs subsequently retained counsel who filed a Notice of Appearance in this action. Doc. 42. Plaintiffs' counsel filed a Motion for Leave to Add Additional Counts to the Amended Complaint ("Motion for Leave"). Doc. 51. Plaintiffs sought to add counts for breach of fiduciary duty, common law aiding and abetting fraud, unjust enrichment, and violations of the Florida Deceptive and Unfair Trade Practices Act. *Id.* at 2. The undersigned denied the Motion for Leave without prejudice for failure to comply with local rules 3.01(g) and 4.01 because Plaintiff failed to confer with opposing counsel and certify whether opposing counsel objects to the requested relief, and Plaintiffs' counsel failed to attach a copy of the proposed amendment. Doc. 52.

Plaintiffs' counsel filed Second Amended Complaint as a separate docket entry prior to the Court granting leave to add the additional counts. Doc. 50. Plaintiffs then filed the present Amended Motion seeking leave to add additional counts. Doc. 53. While this motion complied with local rule 3.01(g), it failed to attach a copy of the Second Amended Complaint as required by local rule 4.01. Defendant responded to both the Second Amended Complaint and the Amended Motion by moving to dismiss the Second Amended Complaint and responding in opposition to the Amended Motion. *See* Docs. 54, 55. Because the Second Amended Complaint was improperly filed without leave of Court, it is hereby stricken. Therefore, Defendants' Motion to Dismiss (Doc. 54) and Plaintiffs' Motion for Extension of Time to Respond to the Motion to Dismiss (Doc. 55) now are moot.

The Amended Motion also is moot because Plaintiffs' have filed the Second Amended Motion. Doc. 57. While this motion complies with local rule 4.01, and Plaintiffs have attached a copy of the Second Amended Complaint, the motion still is defective because Plaintiffs have not included the 3.01(g) certification. Local Rule 3.01(g) requires that each motion filed in a civil case, with certain enumerated exceptions not at issue here, contain a statement "stating whether counsel agree on the resolution of the motion." Here, Plaintiffs fail to include a certification in their motion that they have conferred with opposing counsel and whether opposing counsel agrees to the requested relief. Accordingly, the Court will deny without prejudice Plaintiffs' Second Amended Motion for failure to comply with the local rules.

Additionally, Plaintiffs filed a Reply to Defendant's Response in Opposition to Plaintiffs' Amended Motion for Leave to Add Additional Counts to Amended Complaint. Doc. 58. This reply is improper for a couple of reasons. First, while Defendant responded in opposition to the Amended Motion, Defendant has not had the opportunity to respond to the Second Amended Motion. This Second Amended Motion now supersedes the Amended Motion and any responses to that motion. Second, Plaintiffs' reply fails to comply with the local rules. Local Rule 3.01(c) states, "[n]o party shall file any reply or further memorandum directed to the motion or response allowed in (a) and (b) unless the Court grants leave." M.D. Fla. 3.01(c). Moreover, a motion requesting leave to file a reply shall not exceed three pages, shall specify the length of the proposed filing, and shall not include as an attachment or

otherwise, the proposed response, reply or other paper. M.D. Fla. 3.01(d). Accordingly, Plaintiffs' reply is stricken for failure to comply with the local rules.

It is apparent to the Court that Plaintiffs' counsel is not familiar with the local rules of this Court based on the numerous filings that are not in compliance. Thus, the Court directs Plaintiffs' counsel to review the Federal Rules of Civil Procedure and the local rules of this Court before making any additional filings.

ACCORDINGLY, it is hereby

ORDERED:

1. Plaintiff's Amended Motion for Leave to Add Additional Counts to Amended Complaint (Doc. 53) is **DENIED as moot**.

2. Plaintiff's Second Amended Motion for Leave to Add Additional Counts to Second Amended Complaint (Doc. 57) is **DENIED without prejudice** to be refiled in accordance with the local rules.

3. Plaintiff's Second Amended Complaint (Doc. 50) is **STRICKEN**.

4. Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint with Prejudice with Memorandum of Law and Motion to Strike with Prejudice (Doc. 54) is **DENIED as moot**.

5. Plaintiff's Motion for Extension of Time to Respond to Defendants' Motion to Dismiss Plaintiffs' Amended Complaint (Doc. 56) is **DENIED as moot**.

6. Plaintiffs' Reply to Defendant's Response in Opposition to Plaintiffs' Amended Motion for Leave to Add Additional Counts to Amended Complaint (Doc. 58) is **STRICKEN**.

DONE and **ORDERED** in Fort Myers, Florida on this 29th day of April, 2016.


CAROL MIRANDO
United States Magistrate Judge

Copies:
Counsel of record