Bauman et al v. Bank of America, N.A. Doc. 35

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Brian Bauman & Cynthia Bauman,	:	
Plaintiffs	:	Civil Action 2:12-cv-00933
v.	:	
Bank of America, N.A. and Hudson City Savings Bank,	:	Magistrate Judge Abel
	:	
Defendants		

ORDER

This matter is before the Court on defendants Bank of America, N.A. and Hudson City Savings Bank's ("Hudson Savings") February 14, 2014 motion for summary judgment (doc. 28) and plaintiffs Brian Bauman and Cynthia Bauman's February 14, 2014 (doc. 30).

Background. The complaint pleads claims under the Fair Debt Collection Practices Act ("FDCPA") and the Ohio Consumer Sales Practices Act ("OCSPA"). Complaint, ¶¶ 38-42 and 43-53. It makes the following allegations. Bank of America, N.A. ("BANA") is the purported servicer of a mortgage loan on the Baumans' residence. *Id.*, ¶¶ 11 and 19. BANA maintains that the loan has been in default since May 2009. In July 2010, BANA filed a foreclosure action, asserting it was the holder of the note. *Id.*, ¶ 22. It was not. *Id.*, ¶ 25. The Common Pleas Court denied BANA's motion for summary judgment, and in February 2012 the Bank dismissed the action. *Id.*, ¶ 27.

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Among other defenses, the answer pleads that there is no claim under the FDCPA because BANA is a creditor, not a debt collector. It also asserts that the Baumans did not submit a qualified written request to BANA's servicer in the manner required by 12 U.S.C. § 2605(e).

Plaintiffs' Motion for Summary Judgment. Plaintiffs maintain that the issues in this case are whether Hudson Savings and BANA are debt collectors, and if so, did their actions violated section 1692(e) of Title 15 of the United States Code. Plaintiff argues BANA is a "debt collector" as defined in the FDCPA. When an entity that did not originate the debt in question but acquired it and attempts to collect on it, whether that entity is a creditor or an debt collector under the FDCPA depends on the default status of the debt at the time it was acquired. A loan servicer can either stand in the shoes of a creditor or be a debt collector depending on whether the debt was assigned for servicing before or after the alleged default.

Plaintiffs argue that defendants should be estopped from asserting that the debt was not in default when it was acquired because, according to plaintiffs, BANA made several blatantly false factual representations. In the state foreclosure action, BANA, as successor to BAC Home Loan Servicing, LP ("BAC"), attached a false allonge to its complaint representing it was a holder with standing to sue, but BANA's records show that Hudson Savings was in possession of the Note.

Plaintiffs contend that BANA continued to falsely represent the status of ownership of the debt after BAC dismissed the foreclosure action. Because of their

questions concerning ownership of the Note, the Baumans sent a request to BANA seeking to inspect the original note. BANA denied the Bauman's request and sent them a "true and correct copy of the original note." Plaintiffs maintain that the Note did not bear the TBW or Countrywide indorsement. BANA also relies on the March 3, 2010 MERS assignment transferring interest from TBW to BAC. Plaintiff maintains that these representations were materially false and conflicted with BANA's business records showing that Hudson Savings possessed the Note with indorsements and that MERS assigned TBW's interest to Hudson Savings in 2004. Plaintiffs contend that BANA sent plaintiffs correspondence falsely notifying them that their loan was in foreclosure and requested that they submit documents to review possible alternatives. Plaintiffs maintain that they relied on this information in pursuing foreclosure alternatives and filing this lawsuit, and BANA cannot falsely hold itself out as the holder of loan for the purpose of the foreclosure action, produce a false mortgage assignment, and now, for the purposes of this lawsuit, claim that it has been the servicer since before the alleged date of default.

Plaintiff also argues that Hudson Savings is a "debt collector" under the FDCPA because in the process of collecting its own debt, it used BANA's name and BANA did not indicate it was collecting or attempting to collect a debt on behalf of Hudson Savings. Plaintiff further argues that Hudson Savings is vicariously liable for the conduct of its agents because it is a debt collector.

Plaintiff contends that the conduct of defendants violated the FDCPA. BANA's October 2, 2012 letter contained false, deceptive and misleading statements to collect a debt. The letter stated, "your home is now in foreclosure, it's not too late to get help***it is extremely important that you call use today discuss your options." Exh. 18. This was received shortly after plaintiffs received a letter from an attorney stating that he had been retained by BANA. That letter stated, "foreclosure proceedings [may] be initiated by the filing of a Complaint." Exh. 17. Plaintiff maintains that even a sophisticated consumer would believe that BANA had filed a foreclosure action based on these two letters. Plaintiffs further argue that BANA did not have authority to offer any of the alternatives to foreclosure mentioned in its letter.

Plaintiff argues that documents submitted in support of the foreclosure action were fraudulent. A mortgage foreclosure action is a debt collection practice under the FDCPA. BAC falsely asserted that it was holder of the note and mortgage. BANA also submitted an allonge[1] that directly conflicted with business records showing that Hudson Savings was in possession of the note with indorsements from TBW to Countrywide and Countrywide in blank. BANA falsely represented in its affidavit in support of summary judgment that BAC was in possession.

Plaintiff contends that BANA continued to materially misrepresent its ability to collect the alleged debt in its September 21, 2012 response letter. BANA attached the February 3, 2010 MERS assignment to BAC to its letter. But plaintiffs maintain that

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[1]An indorsement added to a note. See, fn. 2, below.

MERS could not have had the authority to transfer its interest as nominee for TBW because it already had transferred that interest to Hudson Savings in 2004.

Defendants' Response. Defendants BANA and Hudson Savings maintain that neither of them are debt collectors under the FDCPA because Section 1692A(6)(iii) of Title 15 of the United States Code specifically provides that an entity is not a debt collector if the debt is not in default at the time it was assigned. Defendants contend that plaintiffs have offered no evidence regarding when either defendant acquired their interest in the debt. According to defendants, Hudson Savings bought the loan in 2004, and BANA, through its predecessor-in-interest, has been servicing the loan since 2008. Defendants argue that plaintiffs cannot prove the elements necessary to assert equitable estoppel because they cannot show reasonable reliance on the false statements and a resulting detriment. Defendants argue that Hudson Savings is not liable under the FDCPA under the false name exception because that exception only applies to creditors that falsely represent themselves as someone else. Plaintiffs have not provided evidentiary support for any such false statements by Hudson Savings, and any conduct by BANA cannot be imputed to Hudson Savings because Hudson Savings did not control BANA's actions.

Defendants distinguish the line of cases relied upon by plaintiffs regarding the application of equitable estoppel to prevent a party from alleging that a loan was not in default at the time it was assigned. Defendants maintain that the issue in those cases was that the party claiming to be a creditor treated the loan as if it were in default at the

time it was assigned, which means that the facts established them as debt collectors under 15 U.S.C. § 1692A(6)(F)(iii). Defendants further argue that regardless of whether plaintiffs have sufficiently established that any of BANA's statements were false or misleading, they still have failed to establish that BANA's actions induced "actual reliance that was reasonable and in good faith or that they suffered any detriment as a result. Defendants argue that it is clear that the Baumans did not rely on any statements that BANA was either the holder of the note or owner of the note as they have filed this lawsuit. Where a party challenges an action in a court proceeding they cannot later claim that they relied on it.

BANA further argues that equitable estoppel cannot make it a debt collector because the allegedly false statements are not inconsistent with its current position. The statements plaintiffs challenge have nothing to do with whether BANA was either the holder or owner of the note. BANA maintains that there is no inherent contradiction between servicing the loan prior to plaintiffs' 2009 default and having possession of the note in 2010. The allegation that statements in a 2012 loss mitigation letter regarding whether the loan was in foreclosure and potential foreclosure alternatives have no bearing on BANA's status as a creditor.

Defendants further argue that Hudson Savings is not a debt collector because it bought the loan in 2006. It is uncontested that Hudson Savings had physical possession of the note indorsed in blank from 2006 through 2013. Under plaintiffs' reasoning, every investor who uses a loan servicer would automatically become a debt collector.

Plaintiffs have failed to allege how Hudson Savings engaged in any action to collect its own debt. Hudson Savings made no attempt to collect its own debt or use another party's name to do so. BANA performed all of the debt collection activities. Defendants further maintain that Hudson Savings is not vicariously liable for the conduct of BANA.

Finally, defendants argue that plaintiffs' claim arising out of the 2010 foreclosure action are barred as a matter of law based on the statute of limitations.

Defendants' Motion for Summary Judgment. Defendants argue that the FDCPA only applies to parties that are "debt collectors" as defined by the Act and that the evidence establishes that neither BANA nor Hudson Savings satisfy this definition. Both Hudson Savings and BANA acquired their interest in the loan during periods when plaintiffs were current on their loan.

For Hudson Savings to be liable under the FDCPA, plaintiffs would have to prove that the Hudson Savings had control over BANA. According to defendants, the evidence clearly establishes that Hudson Savings did not control BANA's communications with plaintiff.

Defendants further argue that one of plaintiffs' claims is entirely barred by the statute of limitations governing FDCPA claims. Plaintiffs alleged that BANA violated the FDCPA by initiating foreclosure proceedings against them when they were more than a year behind on their payments, but plaintiffs action was brought over a year after the 2010 action was filed.

Uncontroverted Facts. On August 13, 2004, plaintiffs executed a note in favor of Taylor, Bean, and Whittaker Mortgage Corp. in the amount of $539,250.00 to obtain a loan. Alison Krivansky's February 11, 2014 Affidavit, ¶ 3a and Ex. A-1, Doc. 28-1, PageID 460 and 462. The note was secured by a mortgage on property located at 1094 Forsythe Lane, Galena, Ohio. *Id.*, ¶ 3b and Ex. A-2, PageID 460 and 465.

The loan was sold to Countrywide Home Loans, Inc. *Id.*, Ex. A-1, PageID 464.[2] In October 2004, Countrywide Home Loans, Inc. sold the loan to Hudson City Savings Bank, but Countrywide Home Loans, Inc. retained the servicing rights. *Id.*, ¶ 4, PageID 461; February 11, 2014 Affidavit of Brian McClenahan, ¶ 3, PageID 495.[3] In November 2008, Countrywide Home Loans Servicing, LP took over servicing the loan. *Id.* In April 2009, Countrywide Home Loans Servicing, LP changed its name to BAC Home Loans Servicing, LP. *Id.*, ¶ 3c and Ex. A-3, PageID 460 and 478-79. On July 1, 2011, BAC Home Loans Servicing, LP subsequently merged with BANA. *Id.*, ¶ 3d and A-4, PageID 460 and 480-85. BANA is currently servicing the loan. *Id.*, ¶ 4.

Plaintiffs were current on their loan from November 2005 to May 2009. *Id.*, ¶ 5 and Ex. A-5, PageID 461 and 486-94. On July 20, 2010, BAC Home Loans Servicing, LP filed a foreclosure action. On October 11, 2012, plaintiffs filed this action alleging violations of the FDCPA challenging BAC Home Loans Servicing, LP's standing to

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[2]The note contains an indorsement by the loan originator Taylor, Bean & Whitaker Mortgage Corp. that it is payable to Countrwide Home Loans, Inc.

[3]The note itself has an indorsement by Countrywide Home Loans Inc. to pay to the order of blank. Krivansky Aff., *Id.*, Ex. A-1, PageID 464.

bring the 2010 foreclosure action and language in a October 2, 2012 loss mitigation letter sent to plaintiffs.

Summary Judgment. Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party asserting the absence or presence of a genuine dispute must support that assertion by either "(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials"; or "(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

A party may object that the cited material "cannot be presented in a form that would be admissible in evidence," and "[t]he burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated." Fed. R. Civ. P. 56(c)(2); Fed. R. Civ. P. 56 advisory committee's note. If a party uses an affidavit or declaration to support or oppose a motion, such affidavit or declaration "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

While the court must consider the cited materials, it may also consider other materials in the record. Fed. R. Civ. P. 56(c)(3). However, "[i]n considering a motion for summary judgment, the district court must construe the evidence and draw all reasonable inferences in favor of the nonmoving party." *Revis v. Meldrum*, 489 F.3d 273, 279 (6th Cir. 2007) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). "The central issue is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Id.*, 489 F.3d at 279–80 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986)).

Discussion. The purpose of the Fair Debt Collection Practices Act is

> to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. § 1692(e). A "debt collector" is defined as

> any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

15 U.S.C. § 1692a(6). The FDCPA does not apply to a party to whom the debt is due. The FDCPA "refers only to persons attempting to collect debts due 'another.'" *MacDermid v. Discover Fin. Servs.*, 488 F.3d 721, 735 (6th Cir. 2007). The statute further provides that the definition of a debt collector does not include "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such

activity . . . concerns a debt which was not in default at the time it was obtained by such person . . . ." 15 U.S.C. § 1692a(6)(F). Creditors and mortgage servicers are excluded from the definition of "debt collector," if the creditor or servicer did not acquire the debt when it was in default or treat the debt as if it were in default at the time of acquisition. *Bridge v. Ocwen Fed. Bank.*, 681 F.3d 355, 362 (6th Cir. 2012) ("For an entity that did not originate the debt in question but acquired it and attempts to collect on it, that entity is either a creditor or a debt collector depending on the default status of the debt at the time it was acquired.").

On July 20, 2010, BAC Home Loan Servicing, L.P. filed a complaint against the Baumans in the Delaware Court of Common Pleas. The complaint alleged that plaintiff BAC Home Loan Servicing was the holder of the promissory note and mortgage deed securing the payment of the note. Pls.' Exh 10 at ¶¶ 1-2; Doc. 30-10 at PageID 600. BAC Home Loan Servicing attached an "Allonge[4] to Promissory Note for Endorsement" that added a purported indorsement to pay the note to the Order of BAC Home Loan Servicing, L.P., fka Countrywide Home Loans Servicing, L.P. Doc. 30-10 at PageID 606.

On September 30, 2011, BAC Home Loan Servicing filed a motion for summary judgment. Doc. 30-11. In its motion, BAC Home Loan Servicing asserted that it had possession of the note. *Id.* Plaintiffs filed a memorandum in opposition to BAC Home

[4]An allonge is a piece of paper attached to a promissory note containing an indorsement. *See, Wagner v. Loan Corp.*, 2014 WL 114688, *2, n. 4 (11th Cir. Jan. 4, 2014); *Deutsche Bank v. Edington*, 2014 @L 1691646 (Ohio Ct. App. 4th Dist. April 24, 2014); *U.S. Bank, N.A. v. Shipp*, 2013 WL 3019436, *2 (Ohio Ct. App. 2nd Dist. June 14, 2013).

Loan Servicing's motion for summary judgment and argued that there was no evidence that the allonge was at anytime attached to the original promissory note. Plaintiffs argue that there was no evidence demonstrating that the property was ever assigned from Taylor, Bean & Whitaker to BAC Home Loan Servicing or any other entity.

It is uncontroverted in this lawsuit that Hudson Savings is the holder of the note.[5] As the holder of the note, Hudson Savings is not a debt collector under the FDCPA. Plaintiffs' assertion that Hudson Savings used a name other than its own which would indicate a third person was attempting to collect the debt is has no evidentiary support in the record. All efforts to collect on the debt were through either BAC Home Loan Servicing or BANA, not Hudson Savings. Plaintiffs also have not demonstrated that Hudson Savings acquired its interest in the loan after the default. Because Hudson Savings is not a debt collector, it cannot be liable for the actions of BANA:

> We do not think it would accord with the intent of Congress, as manifested in the terms of the Act, for a company that is not a debt collector to be held vicariously liable for a collection suit filing that violates the Act only because the filing attorney is a "debt collector." Section 1692k imposes liability only on a " debt collector who fails to comply with [a] provision of this subchapter...." 15 U.S.C. § 1692k(a) (emphasis supplied). The plaintiffs would have us impose liability on non-debt collectors too. This we decline to do.

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[5]No explanation has been given for BAC Home Loan Servicing's false assertion in the Deleware County Common Pleas Court foreclosure action that it was the owner of the note. Plaintiffs' remedy, if any, for that misrepresentation lay in that lawsuit, in which they ultimately prevailed. The false assertion does not change the uncontroverted fact that Hudson Savings was then the owner of the note and mortgage.

Wadlington v. Credit Acceptance Corp., 76 F.3d 103, 108 (6th Cir. 1996). *But see Huy Thanh Vo v. Nelson & Kennard*, 931 F. Supp. 2d 1080, 1090 (E.D. Cal. 2013)("[H]olding non-'debt collector' creditors vicariously liable for their attorneys' actions creates needed incentives for creditors to monitor their attorneys' compliance with fair debt collection laws.").

Plaintiffs contend that BANA made several false representations and that it should be estopped from denying its status as a debt collector. None of the false statements allegedly made by BANA demonstrate that BANA is a debt collector under the statute. BANA incorrectly identified itself as a holder of the note with standing to sue. At the time of the foreclosure action, however, Hudson Savings was in fact the holder of the note. At the time of the foreclosure action, BANA was, according to uncontested evidence before the Court, the mortgage servicer, and a mortgage servicer is not considered a debt collector if the debt was not in default at the time of acquisition. As a successor in interest, BANA began servicing the mortgage prior to the default.

Plaintiffs maintain that the allonge to the note was fabricated. Plaintiffs do not challenge, however, that BANA is and had been the servicer prior to the default. Plaintiffs seek to hold BANA to the fact that it identified itself as the holder of the note rather than servicer. Under either scenario, BANA is still not a debt collector under the statute, and its position in the state foreclosure action is not necessarily inconsistent with its assertion that it is a servicer and not subject to the FDCPA in this action.

Had BANA not serviced the debt until after the default, its alleged conduct or misrepresentations could possibly violate the FDCPA. But, because BANA is not a debt collector as defined by the FDCPA, it is not subject to the FDCPA.

Conclusion. For the reasons stated above, defendants Bank of America, N.A. and Hudson City Savings Bank's ("Hudson Savings") February 14, 2014 motion for summary judgment (doc. 28) is GRANTED, and plaintiffs Brian Bauman and Cynthia Bauman's February 14, 2014 (doc. 30) is DENIED.

The Clerk of Court is DIRECTED to enter JUDGMENT for defendants Bank of America, N.A. and Hudson City Savings Bank.

s/Mark R. Abel
United States Magistrate Judge