



IT IS ORDERED as set forth below:

Date: December 11, 2009

A handwritten signature in black ink, appearing to read "W. H. Drake", is written over a horizontal line.

W. H. Drake
U.S. Bankruptcy Court Judge

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN THE MATTER OF:

KEVIN GRANT
KENYA GRANT,

Debtors.

KEVIN GRANT
KENYA GRANT,

Plaintiffs,

v.

HOME LOAN SERVICING, INC.
LASALLE BANK NATIONAL
ASSOCIATION,

Defendants.

CASE NUMBERS

BANKRUPTCY CASE
NO. 09-10326-WHD

ADVERSARY PROCEEDING
NO. 09-1020

IN PROCEEDINGS UNDER
CHAPTER 7 OF THE
BANKRUPTCY CODE

ORDER

This matter comes before the Court on the "Motion for Summary Judgment"

(hereinafter the “Motion”) filed by Home Loan Servicing, Inc. and LaSalle Bank National Association, as Trustee for First Franklin Mortgage Loan Asset-Back Securities (hereinafter the “Defendants”). The Motion arises in connection with an adversary proceeding initiated by Kevin and Kenya Grant (hereinafter the "Plaintiffs") seeking damages for breach of contract and violations of the Truth in Lending Act. The Plaintiffs failed to file a response to the Motion and, therefore, the Motion is deemed to be unopposed. *See* BLR 7007-1(c).

Because this is a non-core proceeding, the Court’s duty is to hear the matter and submit proposed findings of fact and conclusions of law to the District Court for *de novo* review. *See* 28 U.S.C. § 157(c)(1); FED. R. BANKR. P. 9033. Based on the proposed findings and conclusions set forth below, the undersigned recommends that the District Court enter judgment in favor of the Defendants.

PROPOSED FINDINGS OF FACT AND PROCEDURAL HISTORY

On November 29, 2006, the Plaintiffs obtained a purchase-money loan from First Franklin, a division of National City Bank, in the original principal amount of \$292,274. Defendants' Statement of Material Facts, ¶ 2. As consideration for the loan, the Plaintiffs executed a promissory note, dated November 29, 2006, in favor of First Franklin (hereinafter the "Note"). *See id.* The Plaintiffs used the borrowed funds to purchase real property known as 230 Hedgerow Trail, Fayetteville, Georgia (hereinafter the "Property"). *See id.*, ¶ 1. The Plaintiffs executed a security deed conveying an interest in the Property to First Franklin.

See id., ¶ 6. According to the terms of the Note, the Plaintiffs' loan had a fixed interest rate of 10.85%, with a maturity date of December 1, 2036. *See id.*, ¶ 10. The final payment on the Note was to be a "balloon" payment. *See id.*

The Plaintiffs' complaint asserts that the Defendants breached the contract between the Defendants and the Plaintiffs and induced the Plaintiffs to borrow money through fraud by failing to notify the Plaintiffs of the fact that the Note had a "balloon" payment. Further, the Plaintiffs contend that the Defendants violated the Truth in Lending Act by failing to correctly state the terms of the loan and to notify the Plaintiffs that their loan was a "high-cost loan." The Plaintiffs seek damages for all of these violations, as well as attorney's fees and costs for litigating these matters, and a right to rescind the Note.

The Plaintiffs filed a voluntary petition under Chapter 13 of the Bankruptcy Code on February 1, 2009. On March 25, 2009, the Plaintiffs filed the instant complaint against the Defendants. On April 1, 2009, the Plaintiffs converted their case to one under Chapter 7. Theo Mann (hereinafter the "Trustee") was appointed as the Chapter 7 Trustee. The Trustee filed reports on June 8, 2009 and July 15, 2009 indicating that the Trustee was investigating the possibility of assets. The Trustee has not indicated an intent to abandon any property of the estate. The Plaintiffs did not schedule any claims against the Defendants on Schedule B (personal property) or attempt to exempt such claims on Schedule C.

The Defendants contend that the evidence in this case shows that the Plaintiffs cannot establish that the Defendants have breached the contract between the parties or that the

Defendants have violated the Truth in Lending Act. As the Court finds, as discussed below, that the Plaintiffs lack standing to prosecute these claims, the Court will recommend that the District Court dismiss the complaint on that basis, without the need to determine whether the Plaintiffs' claims have any merit.

PROPOSED CONCLUSIONS OF LAW

A. Summary Judgment

In accordance with Federal Rule of Civil Procedure 56 (applicable to bankruptcy under FED. R. BANKR. P. 7056), this Court will grant summary judgment only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A fact is material if it might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The moving party has the burden of establishing the right of summary judgment, *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Clark v. Union Mut. Life Ins. Co.*, 692 F.2d 1370, 1372 (11th Cir. 1982), and the Court will read the opposing party's pleadings liberally. *Anderson*, 477 U.S. at 249.

In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress &*

Co., 398 U.S. 144, 157 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 (11th Cir. 1985). The moving party must identify those evidentiary materials listed in Rule 56(c) that establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *see also* FED. R. CIV. P. 56(e). Once the moving party makes a prima facie showing that it is entitled to judgment as a matter of law, the nonmoving party must go beyond the pleadings and demonstrate that there is a material issue of fact which precludes summary judgment. *Celotex*, 477 U.S. at 324; *Martin v. Commercial Union Ins. Co.*, 935 F.2d 235, 238 (11th Cir. 1991).

B. The Plaintiffs Lack Standing to Prosecute this Case

Any claims held by the Plaintiffs against the Defendants arose at the time of the financing transaction, which occurred prior to the filing of their bankruptcy petition. *See Augustin v. Danvers Bank*, 486 F.Supp.2d 99 (D. Mass. 2007). Accordingly, these claims became property of the Plaintiffs' bankruptcy estate. *See* 11 U.S.C. § 541; *Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268 (11th Cir. 2004). A cause of action remains property of the estate unless abandoned by the Trustee, *see Parker*, 365 F.3d at 1272, or exempted by the debtor.

The Trustee has not abandoned the causes of action against the Defendants, and the Plaintiffs have not exempted these claims. Therefore, the claims against the Defendants remain property of the Plaintiffs' Chapter 7 bankruptcy estate, and the Trustee is the only party with standing to pursue such a claim. *See* 11 U.S.C. § 323 (the trustee is the

representative of the estate with the capacity to sue and be sued); *Augustin*, 486 F.Supp2d at 104; *In re Baltrosky*, 2004 WL 2937537 (D. Md. Dec. 20, 2004); *Ball v. Nationscredit Financial Services Corp.*, 207 B.R. 869 (N.D. Ill. 1997).

In this case, there is no indication that the Trustee intends to intervene in this matter or to abandon the claims. Accordingly, the Plaintiffs' lack of standing is an appropriate basis for dismissal. *See Allston-Wilson v. Philadelphia Newspapers, Inc.*, 2006 WL 1050281 (E.D. Pa. Apr. 20 2006).

CONCLUSION

The Court has considered the record in this case as appropriate in connection with the determination of jurisdictional issues and the Defendants' motion for summary judgment. Based thereon, the Court submits the above-stated proposed findings of fact and conclusions of law for the District Court's consideration and de novo review in accordance with 28 U.S.C. §157(c)(1) and Federal Rule of Bankruptcy Procedure 9033. It is the recommendation of this Court that the Plaintiffs' complaint be dismissed for lack of standing.

Pursuant to Rule 9033, the Clerk of this Court is DIRECTED to serve a copy of this Order on all parties by mail and note the date of the mailing on the docket.

END OF DOCUMENT