UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 13
	)	
MARY KAY PULLEN,	)	CASE NO. **11-81588** - MHM
	)	
Debtor.	)	

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	)	
MARY KAY PULLEN and MARK E. PULLEN,	)	
	)	
Plaintiffs,	)	
v.	)	**ADVERSARY PROCEEDING NO. 11-5615**
	)	
GARY C. HARRIS and CAIN V. HARRIS,	)	
	)	
Defendants.	)	

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND RULING ON OTHER MOTIONS

Plaintiffs' complaint[1] seeks judgment against Defendants[2] in connection with a foreclosure action on Plaintiffs' real property (the "Property") undertaken prepetition because of outstanding unpaid *ad valorem* taxes (the "Taxes") on the Property, which

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[1] Plaintiffs' complaint makes reference to a copy of an order from the main bankruptcy case and to Exhibits A through M, none of which were actually attached to the complaint.

[2] Defendant Gary C. Harris is attorney for Cain V. Harris. The complaint does not allege any specific acts taken by Gary C. Harris except in his capacity as attorney for Cain V. Harris, and does not allege any specific acts taken by Cain V. Harris except through his attorney Gary C. Harris. Therefore, both Defendants will be referred to in this order collectively as "Defendant."

foreclosure sale was stayed by the filing of the main Chapter 13 bankruptcy case of Plaintiff Mary Kay Pullen. The complaint alleges that Defendant breached paragraphs 4 and 19 of the parties' security agreement (the "Deed"); that Defendant did not act in good faith in proceeding with the attempted foreclosure; that Defendant waived or was estopped from the right to proceed with foreclosure because Plaintiffs made a partial payment of the unpaid *ad valorem* taxes; and that Defendant's conduct constitutes the tort of attempted wrongful foreclosure. Defendant timely filed an answer and a jury demand.

This adversary proceeding is currently before the court on Defendant's *Motion to Dismiss in the Nature of a Motion for Summary Judgment* (the "Summary Judgment Motion"); Plaintiffs' *Motion to File Supplemental Complaint* (the "Motion to Amend"); Defendant's *Motion to Strike from the Record Exhibit "K" and §29 of Plaintiff's* (sic) *Response to Defendant's* (sic) *Motion to Dismiss* (the "First Motion to Strike"); *and Defendants' Motion to Strike Plaintiffs' Statement of Disputed Facts* (the "Second Motion to Strike"). Each of these motions is opposed by the other party.

The Motion to Amend

Plaintiffs filed their complaint one day after the main bankruptcy case was filed. Plaintiffs seek to amend their complaint to recite facts that occurred in the main bankruptcy case after this adversary proceeding was filed. Although those additional factual allegations are set out as a Count Two of the complaint, Plaintiff appears to seek relief based upon only one set of operative facts, which have now been supplemented with allegations regarding events that occurred postpetition. The amendment of the complaint does not appear to be prejudicial to Defendant nor to have been filed in bad

faith or for any improper motion. In the absence of bad faith, dilatory motive, undue prejudice, or futility of amendment, leave to amend should be granted. *Jameson v. Arrow Co.*, 75 F. 3d 1528 (11th Cir. 1996); *Forbus v. Sears Roebuck & Co.*, 30 F. 3d 1402 (11th Cir. 1994); *Hester v. International Union of Operating Engineers,* 941 F. 2d 1574 (11th Cir. 1991). Therefore, Plaintiffs' Motion to Amend will be granted.

The First Motion to Strike

With their response to the Summary Judgment Motion, Plaintiffs attached Exhibit K, which is a letter dated September 13, 2011, from Defendant to Plaintiffs' attorney, containing a settlement offer from Defendant. Defendant proposed a global settlement of all the issues between the parties. Defendant filed the First Motion to Strike asserting that Exhibit K and Plaintiffs' argument based on Exhibit K should be stricken under O.C.G.A. § 24-3-37,[3] which provides that settlement proposals are "not proper evidence." As this adversary proceeding is in a federal bankruptcy court, however, not a state court, the Federal Rules of Evidence ("FRE") apply. *See* FRE 1101. FRE 408 states the general rule that settlement offers as to disputed claims are inadmissible to prove liability for or invalidity of a claim or its amount. That rule does recognize, however, that settlement or compromise evidence may be admissible if offered for another purpose.[4] Plaintiffs assert

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[3] Section 24-3-37 provides:

> Admissions obtained by constraint, by fraud, or by drunkenness induced for the purpose or admissions or propositions made with a view to a compromise are not proper evidence.

[4] The same is true of the Georgia evidence rule. *Christie v. Rainmaster Irrigation, Inc.*, 299 Ga. App. 383, 682 S.E. 2d 687 (2009). As with any exclusion under the hearsay rule, the evidence is excluded only if asserted to prove the truth of the matter asserted. If offered, as in this instance, simply to show that the offer was made, the document is admissible.

the evidence of Defendant's settlement offer is presented not to prove any fact included in the settlement offer but instead to simply support Plaintiffs' argument of the retaliatory purpose of Defendant's attempted foreclosure. Review of Plaintiffs' arguments in opposition to Defendant's motion for summary judgment shows that to be the case. Therefore, Defendant's First Motion to Strike will be denied.

The Second Motion to Strike

Defendant asserts that Plaintiffs' *Statement of Disputed Facts* violates the local rules. Defendant incorrectly references LR 56, which is a local rule applicable in U.S. District Court for the Northern District of Georgia. The local rule applicable in this adversary proceeding is BLR 7056,[5] which provides, in relevant part:

> (1) The movant for summary judgment shall attach to the motion a separate and concise statement of the material facts, numbered separately, as to which the movant contends no genuine issue exists to be tried. Statements in the form of issues or legal conclusions (rather than material facts) will not be considered by the Bankruptcy Court. Affidavits and the introductory portions of briefs do not constitute a statement of material facts.
>
> (2) The respondent to a motion for summary judgment shall attach to the response a separate and concise statement of material facts, numbered separately, as to which the respondent contends a genuine issue exists to be tried. Response should be made to each of the movant's numbered material facts. All material facts contained in the moving party's statement that are not specifically controverted in respondent's statement shall be deemed admitted. The response that a party has insufficient knowledge to admit or deny is not an acceptable response unless the party has complied with the provisions of Rule 56(f) of the Federal Rules of Civil Procedure.

[5] Those local rules are available at *www.ganb.uscourts.gov*.

When responding to the Motion for Summary Judgment, Plaintiffs included their specific responses to Defendant's statement of undisputed facts and also included a list of five facts that Plaintiffs described as disputed facts. Typically, statements of disputed facts begin with or include "whether" to emphasize that the parties dispute either that the specific fact is true, or that the specific fact supports the reasonable inference one of the parties espouses, such as whether particular conduct by a party constitutes a waiver or estoppel. Plaintiffs' five statements are simple declaratory sentences that appear to include legal conclusions or conclusory factual allegations about Defendant's state of mind but when read in light of the title of the document are seen to be the types of statements described above, i.e. *whether* Defendant's acceptance of partial payment of the Taxes constituted a waiver or estoppel. Plaintiffs have substantially complied with BLR 7056; accordingly, the Second Motion to Strike will be denied.

The Motion for Summary Judgment - Facts

The relevant facts are set forth primarily in the undisputed documents:

- **Defendant's H-1:** July 30, 2011 letter from Defendant to Plaintiffs, which states in pertinent part:

  > Your Fulton County and City of Roswell property taxes for the years 2006-2010 remain unpaid....As you are aware, the Fulton County tax execution for 2006-2009 were (sic) sold to VACH Corp and the tax execution for 2010 in the amount of $2,832.22 has been sold to Vesta Holdings VIII, LLV....

- **Defendant's H-2:** August 2, 2011 letter from Defendant to Plaintiffs, which refers to H-1, declares a default under the Deed and informs Plaintiffs of their right to reinstate under paragraph 19 of the Deed.

- **Defendant's H-3:** Email[6] dated August 27, 2011, from Plaintiffs' attorney to Defendant:

  > your August 2, 2011 letter does not give an amount of the taxes you claim are in default. my client is prepared to make a lump sum payment in certified funds to pay this amount. please advise.

- **Defendant's H-4:** Email dated August 28, 2011, from Defendant to Plaintiffs' attorney, providing a "breakdown on the payoff on your clients 2006-2009 property taxes owed to VACH Corp...." The total owed to VACH, Corp. ("VACH") was shown as $16,110.65. H-4 does not mention the City of Roswell taxes or the 2010 Fulton County taxes, neither of which was owed to VACH. VACH is an entity owned by Cain V. Harris and his wife.
- **Plaintiffs' F:** September 1, 2011 letter from Defendant to Plaintiffs, stating in pertinent part,

  > This letter constitutes formal notice to you that you are in default ...by failing to pay your 2010 Fulton County ad valorem taxes as well as your City of Roswell [taxes] for the years 2006-2011.

  That letter also announced an acceleration of the mortgage debt under the Deed and set forth the amount necessary to pay that debt in full.
- **Defendant's H-6:** September 8, 2011 letter from Plaintiffs' attorney to Defendant, which states, in part,

  > My clients paid the taxes to Cain Harris on September 1, 2011, after you failed to have the check picked up on August 30, 2011. My clients are not in default....

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[6] The numerous punctuation, capitalization and other errors in the parties' email communication will not be noted with "(sic)."

- **Defendant's H-7:** September 10, 2011 email from Defendant to Plaintiffs' attorney, the first paragraph of which states,

  > Unless [Plaintiffs] have paid their delinquent City of Roswell taxes for 2006-2011 and their Fulton County taxes for 2010-2011, they are in default of paragraph 4 of the [Deed]. I so advised them in my 9-1-11 letter. Send me proof that they paid their delinquent taxes within the 30 day time frame of paragraph 19 and I will withdraw the foreclosure ad; otherwise I will proceed.

- **Defendant's H-8:** Email from Plaintiffs' attorney to Defendant:

  > gary, my client paid you the taxes, what exactly are you trying to do.

- **Defendant's H-9:** Email dated September 12, 2011, from Defendant to Plaintiffs' attorney:

  > The City of Roswell taxes for the years 2006-2011 and the Fulton County taxes for 2010 have not been paid...Note that I listed these taxes in my September 1, 2011 letter to [Plaintiffs]....

- **Defendant's H-10 through H-13:** More exchanges of emails September 12, 2011, between Defendant and Plaintiffs's attorney in which Plaintiffs' attorney continued to assert the taxes had been paid and Defendant continued to assert that not *all* the taxes had been paid.

- **Plaintiffs' Exhibit K:**[7] Letter dated September 13, 2011, from Defendant to Plaintiffs' attorney, containing a settlement offer. Defendant proposed a global settlement of all the issues between the parties, including the payment of the unpaid 2010 Fulton County and 2006-2010 City of Roswell *ad valorem* taxes.

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[7] Exhibit K is subject of the First Motion to Strike discussed above. Although Defendant asserts it is inadmissible, Defendant does not appear to deny its authenticity.

- **Defendant's H-14**: September 14, 2011 letter from Defendant to Plaintiffs, which states,

> The foreclosure sale which had been scheduled for October 4, 2011 has been cancelled and the foreclosure ad which has been running during September 2011 has been withdraw (sic). VACH Corp. is sending you a quit-claim deed which will release the Fulton County tax liens for the years 2006-2009 which you recently paid.

- **Defendant's H-15**: September 28, 2011 acceleration letter from Defendant to Plaintiffs, which expressly relied upon Plaintiffs' failure to pay the 2010 Fulton County and 2006-2010 City of Roswell *ad valorem* taxes. In that letter, Defendant set forth the total amount of the outstanding debt under the Deed but did not set forth the amount of the unpaid taxes.

It also appears to be undisputed that, as of the date of the September 28, 2011 letter, Debtors were substantially current on the monthly mortgage payments owed to Defendant; and that as of the same date, the 2010 Fulton County and 2006-2010 City of Roswell *ad valorem* taxes had not been paid. Additionally, the contents of paragraphs 4 and 19 of the Deed are undisputed.

The Summary Judgment Motion - Conclusions of Law

The tort of wrongful foreclosure under Georgia law requires a showing of a legal duty by the foreclosing party, that the duty was breached, a causal connection between that breach and the injury sustained, and damages. *Peterson v. MERSCorp Holdings, Inc.*, 2012 WL 3961211 (N.D. Ga. 2012) (J. Carnes). In this proceeding, however, no

foreclosure sale actually occurred[8]; therefore, Plaintiffs' claim must be (and is) one for *attempted* wrongful foreclosure ("AWF"). *Mayrant v. Deutsche Bank Trust Company Americas*, 2011 WL 1897674 (N.D. Ga. 2011) (J. Thrash) (not reported in F. Supp. 2d).

AWF is consistently described as a tort requiring a showing of "a knowing and intentional publication of untrue and derogatory information concerning the debtor's financial condition, and that damages were sustained as a direct result of this publication." *Aetna Finance Co. V. Culpepper*, 171 Ga. App. 315, 319, 320 S.E. 2d 228, 232 (1984). Recognizing this definition of AWF, *see Ezurike v. Bank of New York Mellon*, 2012 WL 3989961 (N.D. Ga. 2010) (J. Carnes); *Mayrant*, 2011 WL 1897674; *Bates v. JPMorganChase Bank, NA*, 2012 WL 3727534 (M.D. Ga. 2012) (J. Land); *Hauf v. HomEq Servicing Corp.*, 2007 WL 486699 (M.D. Ga. 2007) (J. Land) (not reported in F. Supp. 2d); *Petersoni,* 2012 WL 3961211; *Gass v. CitiMortgage, Inc.*, 2012 WL 3201400 (N.D. Ga. 2012) (M.J. Anand).

Plaintiffs have attempted to argue that Georgia law regarding AWF is broader than stated above, but the cases Plaintiffs cited are either inapposite or so factually distinguishable from the instant proceeding as to be inapplicable. In the face of so much recent case law on similar facts, departure from the legal standards set forth in *Culpepper* to rely on case law where the facts are so easily distinguishable is unjustified.

As part of their claim for AWF, Plaintiffs present an equitable estoppel argument. Specifically, Plaintiffs assert that Defendant's acceptance September 1, 2011, of funds

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[8] Technically, a foreclosure sale occurred but it was held to be void as in violation of the automatic stay that arose upon the filing of Plaintiff Mary Kay Pullen's Chapter 13 bankruptcy case.

equal to the amount set forth in the August 28, 2011 email response of Defendant to Plaintiff's attorney equitably estopped Defendant from proceeding with foreclosure on the Property.

The Georgia law of equitable estoppel is set forth in O.C.G.A § 24-4-27:

> In order for an equitable estoppel to arise, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence as to amount to constructive fraud, by which another has been misled to his injury.

Therefore, although Plaintiffs' argument is not cogently made, they appear to argue that, because Defendant accepted the partial payment of the Taxes, Defendant is estopped to assert that Plaintiffs owe any more Taxes that would constitute a default sufficient to support acceleration and foreclosure; and that when Defendant *did* so assert in the foreclosure notice that Plaintiffs were in default for nonpayment of the Taxes, Defendant had therefore intentionally published untrue and derogatory information concerning Plaintiffs' financial condition, as required in *Culpepper* to show AWF. In connection with this argument, Plaintiffs assert that Defendant had a contractual and/or statutory duty to furnish to Plaintiffs the specific amounts of all the Taxes due and owing that Plaintiffs needed to pay to cure the default.

Plaintiffs also appear to assert that Defendant had a duty to set forth or notify Plaintiffs of the specific amounts necessary to cure the defaults. A review of the provisions in the Deed and in Georgia law show no obligation to set forth specific amounts. To do so when the default arises from a failure to make the monthly mortgage

payments is customary and the total of outstanding payments, plus accrued interest, fees and expenses is an amount almost uniquely within the knowledge of the creditor, as is the amount of the payoff after acceleration. Almost the reverse is true with respect to unpaid taxes, especially where, as in this case, the creditor does not maintain an escrow for payment of taxes and insurance, so that the tax bills are sent directly to and should be paid directly by the property owners, in this case, Plaintiffs. Although requesting Defendant to provide the specific payoff information with respect to VACH would not be burdensome because VACH is co-owned by Defendant Cain V. Harris, to require Defendant to search out and calculate the precise amounts due and owing the other taxing authorities would be unreasonable, and is not required by the Deed or Georgia law. Nevertheless, even if providing the specific amounts were required, failure of Defendant to do so would provide an actionable claim for relief under a theory of wrongful foreclosure but not under attempted wrongful foreclosure. As noted above, Plaintiffs do not present an actionable claim for wrongful foreclosure because no actual foreclosure sale occurred.

The Summary Judgment Motion - Discussion

The undisputed facts fail to support a claim for AWF. The events on which Plaintiffs' claim for relief is based began with the letter from Defendant dated July 30, 2011 (H-1), in which Defendant described three subsets of unpaid Taxes:

- The Fulton County tax execution for 2006-2009, held by VACH;
- The Fulton County tax execution for 2010, held by Vesta; and
- The City of Roswell ad valorem taxes for 2006-2010.

In the letter dated August 2, 2011 (H-2), Defendant refers to the Taxes as described in H-1. In the August 28, 2011 email (H-4), Defendant provides a breakdown and total amount due to VACH for the 2006-2009 Taxes. In the letter dated September 1, 2011 (Plaintiffs' F), Defendant states Plaintiffs are in default in payment of their 2010 Fulton County Taxes and the 2006-2010 City of Roswell Taxes, *sub silencio* acknowledging Plaintiffs' payment to VACH for the 2006-2009 Fulton County Taxes. In several emails from September 10-12, 2011, Defendant consistently responded to Plaintiffs' attorney's assertions that Plaintiffs were not in default with statements that Plaintiffs' failure to pay the 2010 Fulton County Taxes and the 2006-2010 City of Roswell Taxes constituted a default under the Deed.

Then on September 14, 2011 (H-14), Defendant sent a letter to Plaintiffs, which stated, in whole:

> The foreclosure sale which had been scheduled for October 4, 2011 has been cancelled and the foreclosure ad which has been running during September 2011 has been withdraw (sic). VACH Corp. is sending you a quit-claim deed which will release the Fulton County tax liens for the years 2006-2009 which you recently paid.

This letter contains two sentences, which do not appear to have a causal connection, especially in light of Defendant's subsequent conduct. Defendant's brief explains that the October 4, 2011 foreclosure sale was cancelled because Defendant realized the United States, Internal Revenue Service, had not been properly served with notice of the pending foreclosure sale. The verbiage in the letter does not demonstrate a retreat from Defendant's position that Plaintiffs' payment to VACH did not cure the default in payment of the Taxes, because other of the Taxes remained unpaid.

Additionally, H-14 followed hard on the heels of Defendant's September 13, 2011 settlement offer letter (Plaintiff's K). Defendant's offer of settlement expired at 5:00 p.m. September 13, 2011. It would, therefore, seem illogical for Defendant to react to Plaintiffs' failure to accept the settlement offer by, the very next day, canceling the pending foreclosure sale. Finally, Defendant sent Plaintiffs the acceleration letter dated September 28, 2011, which again expressly stated Plaintiff were in default due to the unpaid 2010 Fulton County Taxes and the 2006-2010 City of Roswell Taxes.

Plaintiffs assert Defendant failed to comply with paragraphs 4 and 19 of the Deed because Defendant failed to specify the default and failed to specify the actions required to cure the default. As illustrated above, however, Defendant repeatedly specified the default, specifically identifying by tax year and jurisdiction the Taxes that were unpaid, and that paying **all** those taxes would cure the default. Plaintiffs presented no evidence that Defendant agreed to accept partial payment of the Taxes as a cure of the default. Additionally, the evidence shows no representations by Defendant that could be characterized as deceptive or misleading. The opposite, in fact, is true. In response to the repeated assertions by Plaintiffs' attorney that the default in payment of Taxes had been cured, Defendant repeatedly responded that Plaintiffs had failed to pay 2010 Fulton County Taxes and the 2006-2010 City of Roswell Taxes. From the date of the first letter from Defendant July 30, 2011, through the date of the letter dated September 28, 2011, Plaintiffs had 60 days to ascertain and pay the unpaid Taxes and failed to do so. Accordingly, it is hereby

ORDERED that Plaintiffs' *Motion to File Supplemental Complaint* is ***granted.*** It is further

ORDERED that Defendant's First Motion to Strike and Defendant's Second Motion to Strike are ***denied.*** It is further

ORDERED that Defendant's *Motion to Dismiss in the Nature of a Motion for Summary Judgment* is ***granted.***

IT IS SO ORDERED, this the 27th day of September, 2012.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE