

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 13
)	
ALICE FAYE ONEBO,)	CASE NO. 11-85473 - MHM
)	
Debtor.)	
)	
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ALICE ANDERSON,)	
)	
Plaintiff,)	
v.)	ADVERSARY PROCEEDING
)	NO. 12-5068
CITIMORTGAGE, INC.,)	
McCURDY & CANDLER, LLC,)	
DANIEL BARBAGELATA,)	
)	
Defendants.)	

DISMISSAL ORDER

This adversary proceeding is before the Court on a Motion to Dismiss from Defendant Citimortgage, and a Motion to Dismiss from Defendants McCurdy & Candler, LLC, ("McCurdy") and Daniel Barbagelata (collectively the "Motions to Dismiss"). Plaintiff filed an extensive Complaint seeking to set aside an alleged fraudulent foreclosure against her residence, alongside claims for emergency temporary and permanent injunctive relief, declaratory relief, damages for fraud, violations of the Fair Debt Collection Practices Act, slander of title, interference with contract and business relationships, and quiet title to her residence. The Complaint makes all its allegations generally against all three Defendants. For the reasons set forth below, the Motions to Dismiss are granted.

I. STATEMENT OF FACTS

Plaintiff resides in real property on Eagles Nest Circle, Decatur, Georgia (the "Property"). On July 17, 2002, a promissory note (the "Note") and security deed ("Security Deed") – which Plaintiff contends are invalid – were executed, granting a security interest in the Property to Mortgage Electronic Registration Systems ("MERS"), as a nominee for SouthTrust Mortgage Corporation. On November 10, 2010, MERS assigned the Security Deed to Citimortgage. Citimortgage states that they also currently hold the Note, endorsed in blank on its face. Plaintiff questions the validity of this assignment and also contends that Citimortgage does not currently possess the Note.

Citimortgage conducted a foreclosure sale of the Property December 7, 2010, at which Citimortgage purchased the Property. Plaintiff contends that this foreclosure was fraudulent, is invalid, and asks the Court to set it aside. Following the foreclosure, Citimortgage began dispossession proceedings.

Plaintiff filed her current Chapter 13 bankruptcy petition December 8, 2011, which created an automatic stay that halted Citimortgage's dispossession proceedings. On January 4, 2012, McCurdy & Candler, LLC, acting for Defendant Citimortgage, filed a Motion for Relief of Stay seeking permission for Citimortgage to continue the proceedings in Rockdale County to recover possession of the Property on the basis that the Property was no longer property of the estate (the "Motion"). On January 26, 2012, Plaintiff filed this adversary proceeding together with a response to the Motion. The Motion was granted by order entered February 8, 2012, because Plaintiff failed to appear at the hearing. Defendants filed the Motions to Dismiss February 27, 2012. Those Motions are unopposed.

On February 2, 2012, Plaintiff filed a complaint in the United States District Court for the Northern District of Georgia (the “District Court”). This Complaint was filed against Mr. Barbagelata individually, and as an attorney with McCurdy & Candler LLC, and against Mr. Sanjiv Das, the CEO of Citimortgage, both individually and in his official capacity. Plaintiff sought an emergency temporary restraining order and preliminary injunction against Mr. Barbagelata, McCurdy, and Citimortgage preventing them from proceeding with dispossessory proceedings. Plaintiff asked the District Court to extinguish the Security Deed as part of a “mandatory interagency review of foreclosure policies and practices to quiet title” reviewing Citimortgage’s foreclosure practices. She contended then, as she does in this proceeding, that the Security Deed and Note had been split and that this fact rendered Citimortgage’s actions unlawful. On February 8, 2012, the District Court denied Plaintiff’s demand for a temporary restraining order and permanent injunction and on March 30, 2012, dismissed Plaintiff’s Complaint for failure to state a claim.

II. CONCLUSIONS OF LAW

A motion to dismiss tests the sufficiency of a complaint. *Milburn v. United States*, 734 F.2d 762, 765 (11th Cir. 1984); Bankr. Rule 7008; Fed. R. Civ. Pro. 8(a)(2). A complaint is read in the light most favorable to the plaintiff. *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003). A complaint will not, however, survive a motion to dismiss unless it states a claim for relief which is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Generally, only the complaint, and any attachments thereto, are considered in deciding a motion to dismiss. *Brooks v. Blue Cross and Blue Shield of Florida, Inc.*, 116 F.3d 1364, 1368 (11th Cir. 1997). A court may however take judicial notice of some facts when considering a motion to dismiss. *Horne v. Potter*, 392 Fed. Appx. 800, 802 (11th Cir. 2010). Documents from prior cases involving parties are “public records not subject to reasonable dispute because they [are] capable of accurate and ready determination by resort to sources whose accuracy could not reasonably be questioned.” *Id.* (internal citations and quotations omitted); *see also Universal Express, Inc. v. U.S. SEC*, 177 Fed. Appx. 52, 53 (11th Cir. 2006). No surprise results from a court considering court documents from earlier cases between the same parties. *See Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1279 (11th Cir. 1999).

Res judicata, or claim preclusion, bars a plaintiff from bringing before the court claims that were or could have been resolved in an earlier proceeding. *Ragsdale v. Rubbermaid*, 193 F.3d 1235, 1238 (11th Cir. 1999). Claim preclusion applies as between two cases if: (1) a final judgment is entered on the merits in the first case; (2) the judgment is rendered by a court of competent jurisdiction; (3) the cases’ parties are identical (or privies of those parties); and (4) the claim for relief (f/k/a cause of action) is the same in both cases. *Griswold v. County of Hillsborough*, 598 F.3d 1289, 1292 (11th Cir. 2010). A cause of action is the same if it involves “the same nucleus of operative facts, or is based on the same factual predicate, as a former action.” *Ragsdale*, 193 F.3d at 1239. Where claim preclusion applies, it bars all claims that were or could have been raised in the prior litigation. *Griswold*, 598 F.3d at 1293.

III. DISCUSSION

Plaintiff's Complaint in the District Court was dismissed for failure to state a claim. That dismissal is a public document, known to both parties, and not subject to reasonable dispute. *See Horne*, 392 Fed. Appx. at 802; *Bryant v. Avado Brands, Inc.*, 187 F.3d at 1279. It may be considered when deciding these Motions to Dismiss.

A dismissal for failure to state a claim pursuant to Fed. R. Civ. Pro. 12(b)(6) is a final judgment on the merits of a case. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981). The District Court was a court of competent jurisdiction with the power to dismiss Plaintiff's Complaint. Therefore, the first two elements of claim preclusion have been established.

Plaintiff's Complaint in the District Court is oddly captioned. Plaintiff sued "Daniel Barbagelata and/or his successor, individually, and in his official capacity as Attorney, Daniel Barbagelata with McCurdy and Candler, et al, and Sanjiv Das, and/or his successor, individually, and in his official capacity as Sanjiv Das, President/CEO of Citimortgage, Inc." It appears clear, however, that Plaintiff intended in that case to sue all of the Defendants she sued in this case. Plaintiff's District Court Complaint levels all of its allegations in exactly the same form as her Complaint in this adversary proceeding, naming Defendants Barbagelata, McCurdy, and Citimortgage in each and every one of her allegations. The parties in the two cases are the same for the purposes of claim preclusion.

Plaintiff asserts more Counts and makes more factual allegations in this adversary proceeding than in the Complaint filed in the District Court. In this Court, Plaintiff seeks:

damages under the Fair Debt Collection Practices Act; a judgment for fraud; slander of title; and interference with contract and business relationships; as well as declaratory relief, alongside the injunctive relief she requested in the District Court. To determine if these claims involve the same cause of action, “a court must...examine all factual issues that must be resolved in the second suit and compare them with the issues explored in the first suit.” *Horne*, 392 Fed. Appx. at 803. In both complaints, Plaintiff alleges that foreclosure was invalid, and dispossessory proceedings unlawful, because of the “splitting of the Note” theory. In both Complaints, Plaintiff contends that Defendants will not provide or do not hold documents that would establish Citimortgage’s right to foreclosure and possession, and challenges the validity of the assignment of the Security Deed and Note to Citimortgage. In both Complaints, Plaintiff alleges that the foreclosure was “fraudulent.” The two cases share a common nucleus of operative fact. This is so notwithstanding the fact that Plaintiff’s allegations before this Court are more extensive. Plaintiff alleges in this case, for example, that Citimortgage willfully misapplied her mortgage payments and violated the Fair Debt Collection Practices Act by continuing to foreclose notwithstanding her dispute of their claim. The same “transaction or series of transactions” remain at issue. *See Ragsdale*, 193 F.3d at 1239. Claim preclusion bars the litigation of any claims that were or *might have been* brought in the original litigation. *Griswold*, 598 F.3d at 1293. Plaintiff elected not to assert these claims that arise from the same facts that were before the District Court; the final judgment entered against her in that court bars her from asserting those claims in this Court.

IV. CONCLUSION

The orders entered by the District Court preclude litigation of Plaintiff's claims in this adversary proceeding because Plaintiff is barred from litigating her claims, or presenting new ones arising out of the same set of facts, in a second forum. Accordingly, it is hereby

ORDERED that Defendants' Motions to Dismiss are *granted*. This adversary proceeding is *dismissed*.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Plaintiff's attorney, Defendants' attorney, and the Chapter 13 Trustee.

IT IS SO ORDERED, this the 16th day of August, 2012.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE