IT IS ORDERED as set forth below:

Date: December 11, 2013

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

In Re:	:	Chapter 13
MARILU ROMAN,	:	Case No. 10-44173-MGD
Debtor.	:	Judge Mary Grace Diehl
MARILU ROMAN and JENNY ROMAN,	:	
Plaintiffs,	:	
v.	:	Adversary Proceeding No. 13-4028
J.P. MORGAN CHASE BANK, N.A., CHASE HOME FINANCE, LLC, and FEDERAL HOME LOAN MORTGAGE CORP.,	:	
Defendants.	:	

ORDER ON DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

This matter is before the Court on Defendants' Motion to Dismiss Adversary Complaint ("Motion"). Docket No. 4. Plaintiffs filed an adversary proceeding ("Complaint") seeking damages

and equitable relief relating to the promissory note ("Note") and security deed ("Deed") executed by Plaintiffs in favor of Chase Manhattan Mortgage Corporation and the subsequent alleged wrongful foreclosure on the property covered by the Deed. Docket No. 1. Defendants' Motion seeks dismissal of all claims pursuant to Fed. R. Civ. Proc. 12(b)(6), incorporated into this proceeding by Fed. R. Bankr. Proc. 7012(b)(6). Docket No. 4. Plaintiffs filed a Response and Defendants filed a Reply. Docket Nos. 6-7. Only Plaintiff, Marilu Roman, is a debtor in this Court.

I. Background

The Complaint alleges that Defendants have offered conflicting accounts as to who owns the Note and Deed. Further, Plaintiffs contend that Defendants have provided no evidence of transfer of ownership. Plaintiffs assert that JP Morgan Chase Bank, N.A. ("Chase Bank") stated in court that Plaintiffs have been delinquent on the Note since September 1, 2008. However, Plaintiffs maintain that they brought their account current by making a large payment, unspecified in amount, to Chase Bank in 2010, and that they have remained current since that time. Chase Bank allegedly accepted regular payments from them. Despite this, Plaintiffs assert that Defendant, Chase Home Finance, LLC, ("Chase Home") wrongfully foreclosed on the property on February 2, 2010 and attempted to transfer ownership to Defendant, Federal Home Loan Mortage Corp. ("Freddie Mac").

According to the Complaint, the foreclosure was defective because Chase Home did not provide notice to Plaintiffs in Spanish and because Chase Home did not have standing to foreclose. Plaintiff, Marilu Roman, filed a Chapter 13 case on October 25, 2010. Chase Bank filed Proof of Claim No. 8 in the case on July 23, 2012. Freddie Mac filed a Motion for Relief from Stay on June

25, 2013. Docket No. 40.[1] Chase Bank filed a Notice of Mortgage Payment Change on July 2, 2013.[2] Chase Bank's Proof of Claim was withdrawn on July 18, 2013. The adversary proceeding was filed on July 23, 2013.

The Complaint asserts a total of nine causes of action.[3] Count I is for breach of contract, relating to Chase Bank and/or Chase Home's handling of the mortgage. Count II requests a temporary restraining order and interlocutory injunction to prevent Freddie Mac from evicting Plaintiffs from the property. Count III is for attempted wrongful foreclosure. Count V is for judicial estoppel, wherein Plaintiffs seek to prevent Defendants from taking contrary positions than those asserted in its Proof of Claim and asserted by virtue of accepting payments from Plaintiffs. Count VI is for unnecessary trouble and expense in which Plaintiffs seek damages related to Defendants alleged negligence and/or mismanagement which resulted in this litigation. Count VII asserts a claim for fraud against Chase Bank and/or Chase Home for "[making] a false representation on the Court's docket," inducing Plaintiffs to make post-petition mortgage payments, making unspecified "statements [made] to her[4] personally" and in "statements made on the Bankruptcy Court's record."

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[1] Court notes indicate the Motion for Relief from Stay was marked reset on request at the hearing but was not subsequently set for hearing. The motion remains pending.

[2] The Complaint states that on July 3, 2013, Chase Bank filed a document "affirming its understanding [that] it possessed standing and ownership of the finance liability at issue." Plaintiffs do not otherwise identify to which document they are referring. The Court notes that no documents were filed in the bankruptcy case on July 3, 2013, but by the proximity in date, the Court assumes that the document to which Plaintiffs refer is the Notice of Mortgage Payment Change.

[3] Although the Counts are listed as I through X, there are no Counts IV and VIII and there are two Count VII's.

[4] The Complaint does not specify to which Plaintiff this pronoun refers.

The Second Count VII is for violations of the automatic stay ("Stay Count") alleged to have occurred by "(1) misrepresenting the status of the debt and (2) taking impermissible collection actions."[5] Count IX is for damages associated with the various other Counts, including economic and non-economic damages as well as attorney's fees. Count X is for punitive damages for willful and malicious conduct in its handling of Plaintiffs' mortgage. The Complaint also contains a demand for jury trial.

For the reasons explained below, the Court will grant the Motion as to the Stay Count and will abstain with respect to the claims raised in the remainder of the Complaint.

II. Motion to Dismiss Standard

A complaint should be dismissed under Rule 12(b)(6) only where it appears that the facts alleged fail to state a "plausible claim for relief." *Ashcroft v. Iqbal*, 129 S. Ct 1937, 1949 (2009); FED. R. CIV. P. 12(b)(6). Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). In ruling on a motion to dismiss, the court must accept factual allegations as true and construe them in the light most favorable to the plaintiff. *Ashcroft v. Iqbal*, 129 U.S. at 1949. However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. at 1949-1950.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949. The rule "does not impose a probability requirement at the pleading stage," but instead "simply calls

[5] The Stay Count is particularly sparse and does not specify upon which misrepresentations or collection actions this claim relies.

for enough fact to raise a reasonable expectation that discovery will reveal evidence of" the necessary element. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). A complaint may survive a motion to dismiss for failure to state a claim, however, even if it is "improbable" that a plaintiff would be able to prove those facts; even if the possibility of recovery is extremely "remote and unlikely." *Id.* "Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 555). Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 129 U.S. at 1950 (citation omitted).

III. Discussion of Count VII for Violation of the Automatic Stay

For reasons discussed herein, the Court will abstain from deciding all Counts except the Stay Count. Defendants argue that the filing of a proof of claim is not a stay violation as a matter of law and therefore this claim should be dismissed. Further, they assert the Proof of Claim was withdrawn and as such, it is a legal nullity and cannot serve as the basis for a stay violation. In their Reply, Plaintiffs assert that they "do not rest solely on the filing of the proof of claim as a violation of the automatic stay." However, they do not specify any other pleaded facts on which this claim relies. Further, the Court can discern no other facts in the Complaint, except for the reference to a July 3, 2013 filing of a document, which the Court believes to refer to the July 2, 2013 filing of a Notice of Mortgage Payment Change.

The Court agrees with Defendants that filing a proof of claim is not a stay violation. First, Fed. R. Bankr. Proc. 3002 and 11 U.S.C. § 501 expressly provide for the filing of a proof of claim.

Withdrawal of a proof of claim is provided for in Rule 3006 and the filing of a Notice of Payment Changes by a creditor holding an interest secured by debtor's principal residence is provided for in Rule 3002.1(b). *In re Nelson* dealt with a claim of stay violation on account of the filing of a nondischargeability complaint. 234 B.R. 528, 534 (Bank. M.D. Fla. 1999). That Court stated, "The contention that the exercise of a mandated statutory right under the Bankruptcy Code is a violation of the automatic stay is almost as absurd as a contention that any creditor who files a proof of claim in bankruptcy violated the automatic stay." *See also In re Sims*, 278 B.R. 457, 472 (Bankr. E.D. Tenn. 2002) ("[T]his Court concludes that the plaintiffs' third cause of action premised on violation of the automatic stay fails to state a claim upon which relief can be granted . . . ."). The proper mechanism for dealing with objectionable proofs of claim is to file an objection to the claim, which is provided for in Rule 3007. Applying similar reasoning, the withdrawal of a proof of claim and the filing of a notice of changes in a mortgage payment are not violations of the automatic stay.[6]

Second, "the automatic stay does not operate against the court with jurisdiction over the bankruptcy." *In re Sammon*, 253 B.R. 672, 680 (Bankr. D. S.C. 2000)(internal quotations omitted). As the Court in *In re Sammon* stated, "[T]he automatic stay serves to protect the bankruptcy estate from actions taken by creditors outside the bankruptcy court forum, not legal actions taken within the bankruptcy court." *Id.* at 681(concluding that the filing of a proof of claim was not a stay violation).

Finally, the Court notes that Plaintiffs assert that they "do not rest solely on the filing of the

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[6] The Court recognizes that Chase Bank withdrew its Proof of Claim and that Defendants alternatively argue that the Proof of Claim is therefore a legal nullity and cannot serve as the basis for the stay violation claim. Because the Court has determined that the filing of the Proof of Claim and its withdrawal were not violations of the stay, it is not necessary for the Court to discuss Defendants' alternative argument.

proof of claim as a violation of the automatic stay." However, there are no other well-plead facts in the Complaint to support a claim for stay violation. In conclusion, Plaintiffs have failed the state a plausible claim for relief as to the Stay Count.

Additionally, Plaintiffs' inclusion in their Response that they are "open to the Court's direction and are willing to provide a more definite statement at the behest of the Court" does not relieve Plaintiffs of the requirement of drafting a well-pleaded complaint. The cases to which Plaintiffs cite in support of the proposition that the Eleventh Circuit "has encouraged more definite statements or repleader unless a claim is subject to dismissal as a matter of law" do not help their case. *Ligon v. BAC Home Loan Servicing, LP*, 2012 WL 4382339 (N.D.Ga. Aug. 13, 2012) and *Bailey v. Janssen Pharmaceutica, Inc.*, 288 Fed.Appx. 597 (11th Cir. 2008) encourage courts to allow repleading when faced with shotgun pleadings. *Ligon* at *5; *Bailey* at 603. Those cases do not, however, stand for the proposition that whenever a plaintiff has failed to sufficiently plead their claims, the Court is obligated to give them a second bite at the apple.[7] If Plaintiffs desired to amend their Complaint, the proper course of action would have been to seek leave to amend the Complaint under Fed. R. Civ. Proc. 15. *Wagner v. Daewoo Heavy Industries America Corp.*, 314 F.3d 541, 542 (11th Cir. 2002)("A district court is not required to grant a plaintiff leave to amend his complaint sua sponte when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court.")

IV. Standard for Abstention

[7] *Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1191 n. 5 (11th Cir. 1999), the third case cited by Plaintiffs deals with a party's need to replead a claim following a Rule 12(b)(6) dismissal in order to preserve appellate rights. Thus, the cited footnote as well as the rest of the case are not applicable to the issues in this case.

Pursuant to 28 U.S.C. § 1334(c)(1), a court may abstain from hearing a proceeding "in the interest of justice, or in the interest of comity with State courts or respect for State law . . . ." In a recent opinion issued from this District in an adversary proceeding in which plaintiff/debtor asserted claims arising out of an alleged wrongful foreclosure, the Court *sua sponte* abstained from adjudicating the claims on the grounds that the claims were based on state law and their resolution would not impact the administration of the bankruptcy estate. *In re Queen*, 2013 WL 6116864 (Bankr. N.D.Ga. Nov. 18, 2013). In reaching this conclusion, the Court applied a non-exclusive 12-factor test also used by other courts in the 11th Circuit. Those factors are:

> (1) the effect, or lack thereof, on the efficient administration of the bankruptcy estate if the discretionary abstention is exercised, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable state law, (4) the presence of related proceedings commenced in state court or other nonbankruptcy courts, (5) the jurisdictional basis, if any, other than § 1334, (6) the degree of relatedness or remoteness of the proceedings to the main bankruptcy case, (7) the substance rather than the form of an asserted "core" proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden on the bankruptcy court's docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to jury

trial, and (12) the presence in the proceeding of non-debtor parties.

Id. (citing *Ret. Sys. of Alabama v. J.P. Morgan Chase & Co.*, 285 B.R. 519, 530-31 (M.D.Ala. 2002); *Official Unsecured Creditors' Comm. Of Hearthside Banking Co., Inc. v. Cohen (In re Hearthside Baking Co., Inc.)*, 391 B.R. 807, 817 (Bankr. N.D.Ill. 2008)).

V. Discussion of Abstention

Applying the above factors, permissive abstention is warranted.[8] The property at issue is not property of the estate because it was foreclosed on prior to the filing of the bankruptcy petition. Thus, the issues raised with regards to the foreclosure will have no bearing on the administration of the estate. State law issues predominate over bankruptcy issues, as the crux of the claims lies in foreclosure law. Despite Plaintiffs' assertion in the Complaint to the contrary, this is not a core proceeding. As in *In re Queen*, the causes of action are not of the types listed in 28 U.S.C. 157(b)(2), and further, the claims "existed prior to the filing of the bankruptcy case, . . . would continue to exist independent of the provisions of Title 11, and neither the rights nor obligations of the parties would be significantly affected as a result of the filing of the bankruptcy case." 2013 WL 6116864 at *3 (internal quotations omitted)(citing *Duncan v. Deutsche Nat'l Bank Trust Co.*, 2012 WL 4322667 (N.D. Ohio Sept. 20, 2012). The Court has no jurisdictional basis, other than § 1334, if it has subject matter jurisdiction at all. *See Skillings v. Bank of America, N.A. (In re Skillings)*, AP No. 12-5380-MGD (Bankr. N.D. GA. Nov. 6, 2012)(dismissing claims based on lack of subject matter jurisdiction where subject property was foreclosed prior to the bankruptcy). Without determining Plaintiffs' right to jury trial, the Court notes that Plaintiffs have demanded one. Although the majority of Plaintiffs' claims do not present highly difficult or unsettled legal issues, Plaintiffs do state that one

[8] The analysis in this section applies to all claims except the Stay Count.

basis for their attempted wrongful foreclosure claim is based on unsettled Georgia law. Specifically, Plaintiffs assert that although Georgia law does not require that foreclosure notices be given in Spanish to Spanish-speakers, that in order to be effective, a requirement that notice in Spanish be given to Spanish-speakers may be inferred under the current law. There are no other pending state court proceedings of which the Court is aware. Finally, hearing these claims would place a burden on this Court, while the outcome of the litigation will not bear on the administration of the estate. On the whole, these factors weigh in favor of permissive abstention and the remaining factors are either not applicable or neutral.

For the above reasons, the Court finds that it is in the interest of justice and in the interest of comity with state courts that this Court abstain from the remaining claims.[9] Accordingly, it is

ORDERED that Defendants' Motion to Dismiss is **GRANTED** as to the second Count VII for automatic stay violation, and the Court **ABSTAINS** as to all other Counts in the Complaint**.** The Clerk is directed to close this case.

The Clerk's Office is directed to serve a copy of this Order on Plaintiffs, Plaintiffs' counsel, Defendants, Defendants' counsel, and the Chapter 13 Trustee.

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[9] The Court cautions Plaintiffs that although it is abstaining from all Counts except the Stay Count, several of the Counts appear to not be legally recognized causes of action.