

IT IS ORDERED as set forth below:

Date: November 15, 2013



Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CASE NO. 13-57784-WLH
)	
FLOYD QUEEN,)	CHAPTER 7
)	
Debtor.)	JUDGE WENDY L. HAGENAU
_____)	
)	
FLOYD QUEEN,)	
)	
Plaintiff,)	
)	
v.)	ADVERSARY NO. 13-05182
)	
BANK OF AMERICA, N.A.,)	
BAC HOME LOANS SERVICING, LP)	
fka COUNTRYWIDE HOME LOANS)	
SERVICING, LP)	
)	
Defendants.)	
_____)	

ORDER ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Plaintiff, Floyd Queen, (“Plaintiff”) filed this adversary proceeding against Defendants, Bank of America, N.A. and BAC Home Loans Servicing, LP, fka Countrywide Home Loans Servicing, LP (“Defendants”) on May 15, 2013. In this Adversary Proceeding, the Plaintiff seeks to: (i) recover real property located at 5869 Fairington Farms Lane, Lithonia, Georgia 30038, (the “Property”) pursuant to a claim of wrongful foreclosure, (ii) modify the loan secured by the Property under the National Mortgage Settlement between the states Attorneys General and the U.S. Government (“National Mortgage Settlement”), and (iii) obtain other declaratory relief. The Defendants filed a Motion to Dismiss on September 3, 2013 pursuant to Federal Rules of Civil Procedure (8)(a), 12(b)(1), (b)(5), and (b)(6), made applicable to bankruptcy proceedings by Federal Rules of Bankruptcy Procedure 7008 and 7012. (Docket No. 10). Plaintiff filed a Response to the Defendant’s Motion to Dismiss. (Docket No. 11). The matter is now before the Court for ruling.

The Court has jurisdiction pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(a). Upon consideration of the pleadings and for the reasons discussed more fully below, the Court ABSTAINS from deciding the merits of this action pursuant to 28 U.S.C. § 1334(c)(1).

I. Background

The Plaintiff filed his *pro se* Chapter 7 bankruptcy case on April 8, 2013. Plaintiff’s Schedule A listed the Property and Schedule D included a “disputed” secured debt to Bank of America, N.A./BAC Home Loans in the amount of \$110,000.00. The Plaintiff received a discharge in the Chapter 7 case on August 6, 2013, and on October 18, 2013 the Chapter 7 Trustee filed a Report of No Distribution. The underlying bankruptcy case was closed on October 29, 2013.

All of the facts underlying this adversary proceeding occurred prior to the bankruptcy filing. The Plaintiff executed a Deed to Secure Debt in favor of Bank of America, N.A., on the Property on June 5, 2008. On May 26, 2011, the Plaintiff received a Notice of Foreclosure and a foreclosure sale was conducted in July of 2011, at which the Property was sold to Bank of America, N.A.

The Plaintiff argues, *inter alia*, the foreclosure is “null and void” because the notice he received did not comport with the notice requirements of O.C.G.A. § 44-14-162.2(a). Additionally, Plaintiff argues that he is entitled to a loan modification pursuant to the terms of the National Mortgage Settlement. As explained below, because the issues are wholly dependent upon matters of non-bankruptcy law and resolution of the adversary proceeding will not impact the efficient administration of the estate, abstention is warranted.

II. Permissive Abstention

Abstention of a proceeding arising under Title 11, or arising in or related to cases under Title 11, is permitted “under proper circumstances,” where “it is more appropriate to have a state court hear certain matters of state law.” 28 U.S.C. § 1334(c)(1); Hospitality Ventures/Lavista v. Heartwood 11, L.L.C., (In re Hospitality Ventures/Lavista), 314 B.R. 843, 850 (Bankr. N.D. Ga. 2004). The court has discretion to abstain under 28 U.S.C. § 1334(c)(1) “if abstention is in the interest of justice, or in the interest of comity with State courts or respect for State law.” 1-3 COLLIER ON BANKR. 3.05[1]. “Permissive abstention permits a bankruptcy court to abstain from hearing a particular proceeding ‘arising under,’ ‘arising in’ or ‘related to’ a case under Title 11.” McDaniel v. ABN Amro Mortgage Grp., 364 B.R. 644, 649 (S.D. Ohio 2007). “The court may abstain upon request of a party or *sua sponte*.” Carver v. Carver, 954 F.2d 1573, 1579 (11th Cir.

1992); accord Bricker v. Martin, 348 B.R. 28, 33 (W.D. Pa. 2006) aff'd, 265 F. App'x 141 (3d Cir. 2008).

Courts employ a multifactor test to determine whether abstention is appropriate. The factors used by the 11th Circuit 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 non-bankruptcy 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.

Ret. Sys. of Alabama v. J.P. Morgan Chase & Co., 285 B.R. 519, 530–31 (M.D. Ala. 2002) (citing Cassidy v. Wyeth-Ayerst Labs. Div. of Am. Home Products Corp., 42 F. Supp. 2d 1260, 1263 (M.D. Ala. 1999)); see also Official Unsecured Creditors’ Comm. of Hearthside Baking Co., Inc. v. Cohen (In re Hearthside Baking Co., Inc.), 391 B.R. 807, 817 (Bankr. N.D. Ill. 2008). These factors are non-exclusive, and “what these factors seek to do is implement the function and purpose served by abstention under § 1334(c)(1): in deference to federalism, ensure that the jurisdiction of the bankruptcy court is exercised only when appropriate to the expeditious disposition of bankruptcy cases.” Graham v. Yoder Machinery Sales (In re Weldon F. Stump & Co.), 373 B.R. 823, 828 (Bankr. N.D. Ohio 2007) (citation omitted).

Applying the factors to the current case permissive abstention is warranted. This proceeding is at most “related to” a case under Title 11 and is not a core proceeding under 28 U.S.C. § 157(b)(2). The outcome of this adversary proceeding will have no effect on the administration of the bankruptcy estate. The subject Property was never property of the estate as the foreclosure occurred in July 2011, nearly two years prior to the April 8, 2013 bankruptcy filing. Likewise, the Chapter 7 Trustee did not elect to pursue this claim on behalf of the estate and has abandoned it to the Debtor. The Plaintiff has already received a discharge, the Chapter 7 Trustee has determined there are no assets to be liquidated and distributed, and the case has been closed. Consequently, were the Plaintiff to prevail in this action there would be no recovery for creditors. The final disposition of this adversary proceeding will have no bearing on the “expeditious disposition” of the underlying bankruptcy case. In re Weldon F. Stump & Co., 373 B.R. at 828 (citation omitted).

There are no bankruptcy law issues in this adversary proceeding. The proceeding is primarily based on the state foreclosure law. The only cause of action potentially grounded in federal law is based upon the National Mortgage Settlement. There is no third-party right of enforcement under the National Mortgage Settlement, however. See, e.g., Winders v. CitiMortgage, Inc., 3:13-CV-56 CDL, 2013 WL 4039399, at *2 (M.D. Ga. Aug. 7, 2013). Only parties to the national mortgage litigation and subsequent settlement agreement have standing to enforce the National Mortgage Settlement. Id. Individual borrowers are not entitled to sue to enforce the terms of the settlement. Rehbein v. CitiMortgage, Inc., 937 F. Supp. 2d 753 (E.D. Va. 2013) (“The language of the Consent Judgment indicates that the parties to the agreement did *not* intend the individual borrowers to be able to sue to protect the benefits the consent judgment confers.”). Thus, the remaining claims are all based upon state law. While the

Bankruptcy Court can construe the state's foreclosure law, given that it is the only issue in the case, it is best for a state court to construe its law.

This action does not fall within any of the enumerated core procedures. 28 U.S.C. § 157(b)(2)(A)–(P); see also Duncan v. Deutsche Nat. Bank Trust Co., 1:11-CV-2006, 2012 WL 4322667, at *3 (N.D. Ohio Sept. 20, 2012). The Plaintiff's claims "existed prior to the filing of the bankruptcy case," the claims "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." Duncan 2012 WL 4322667, at *3. This is the case because all of the operative facts occurred outside of the bankruptcy case and the claims exist independently under state law.

Failing to abstain would place an additional burden on the bankruptcy court's docket without impacting the Chapter 7 case. The parties may be entitled to a jury trial were the action to proceed in state court. See 3A GA. JUR. PROPERTY § 32:104. Lastly, the Defendants did not file a Proof of Claim, or otherwise appear in the bankruptcy proceeding.

The remaining factors are largely neutral. The Court is unaware of any related proceedings pending in another court. There is no issue of severance because the bankruptcy case is closed. There is also no indication of forum shopping. Thus, taken together, the majority of factors weigh in favor of abstention.

Given the foregoing, the Court hereby **ABSTAINS**. The Clerk is directed to close this case.

END OF ORDER

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