



IT IS ORDERED as set forth below:

Date: December 21, 2014

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

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

| | | |
|-----------------------------------|---|--------------------------|
| In re: | : | BANKRUPTCY CASE NO: |
| | : | |
| STEVEN W. BERNSTEIN, | : | 14-65054-MGD |
| | : | |
| Debtor. | : | CHAPTER 7 |
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| STEVEN W. BERNSTEIN, | : | |
| | : | |
| Plaintiff, | : | |
| | : | |
| v. | : | ADVERSARY PROCEEDING NO: |
| | : | |
| WELLS FARGO BANK, N.A., | : | 14-05306 |
| FEDERAL HOME LOAN MORTGAGE | : | |
| CORPORATION, and | : | |
| DOES, 1-5,, | : | |
| | : | |
| Defendants. | : | |
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**ORDER DENYING PLAINTIFF'S EMERGENCY MOTION
FOR A TEMPORARY RESTRAINING ORDER**

On December 17, 2014, Plaintiff Steven Bernstein filed an Emergency Motion for Temporary Restraining Order against Wells Fargo Bank, N.A. ("Wells Fargo"), Federal Home

Loan Mortgage Corporation (“Freddie Mac”), and Does 1-5 (Docket No. 8). Mr. Bernstein seeks an injunction to stay the scheduled January 6, 2015 foreclosure sale of his residence, property commonly known as 1428 Valley View Road, Dunwoody, Georgia 30338. Mr. Bernstein also requests that no foreclosure occur until his claims for promissory estoppel and specific performance are adjudicated.¹ Mr. Bernstein seeks to enjoin the scheduled foreclosure because Wells Fargo lacks authority to foreclose under Georgia law.

Mr. Bernstein’s Motion has two procedural defects under Bankruptcy Rule 7065, which adopts Rule 65 of the Federal Rules of Civil Procedure with an exception not applicable here. First, according to the Certificate of Service, the Motion is served by first class mail on Defendant Wells Fargo’s registered agent. Such service does not satisfy Rule 7004(h). Further Wells Fargo has counsel in the main case and in the adversary proceeding that were not served with the Motion. Freddie Mac was not served properly under Rule 7004(b)(3) as no officer or general or managing agent was named. Second, although the certificate of service refers to the “verified motion,” the Motion itself is not accompanied by an affidavit and is not verified as required by Rule 65(b)(1).²

Based on the facts alleged in the Motion and the claims asserted in the pending adversary proceeding, it is inappropriate for this Court to enjoin the Defendants as to this property. This is not an action by Wells Fargo seeking to judicially foreclose on Mr. Bernstein’s property. This is an adversary proceeding, brought by Mr. Bernstein, for the purpose of alleging state law and TILA claims against Defendants. In Mr. Bernstein’s underlying Chapter 7 case, Wells Fargo

¹ It is unclear as to which action Mr. Bernstein refers since there are several pending actions. There is the pending adversary proceeding before this Court with these claims and the Motion refers to a district court action. It is unclear whether that is an existing or new district court case.

² The Complaint in this adversary proceeding was a verified complaint, yet the Motion raises additional claims and facts not included in the Complaint.

successfully moved for relief from the automatic stay and satisfied the standard under section 362(d) of the Bankruptcy Code. (Docket No. 44). Additionally, Wells Fargo successfully defended Mr. Bernstein's motion to reimpose the stay. The Order denying the motion to impose the stay as to this property noted that there was no basis to limit Wells Fargo's state law rights. (Docket No. 61). The Chapter 7 Trustee has entered a no asset report in this case and the property will not be administered on behalf of the estate. The Motion does not challenge the basis for Wells Fargo obtaining stay relief, instead Mr. Bernstein's asserts a state law defense and claims against Wells Fargo. Accordingly, such arguments can be raised and adjudicated in the proper court without this Court determining the propriety of the proposed foreclosure sale. Relief from the automatic stay "is not an adjudication of the validity or avoidability of the claim, but only a determination that the creditor's claim is sufficiently plausible to allow its prosecution elsewhere." *Grella v. Salem Five Cent Bank*, 42 F.3d 26, 34 (1st Cir.1994). Enjoining Defendants would essentially be reimposing the automatic stay, and, as set forth in prior orders, Wells Fargo has a sufficient basis for relief from stay.

However, given that a sale of the property could result in irreparable injury, the Court will also assess Mr. Bernstein's claims under the standard in Rule 65. A plaintiff seeking a temporary restraining order must establish all of the following:

- (1) a substantial likelihood of success on the merits;
- (2) that irreparable injury will be suffered if relief is not granted;
- (3) that the threatened injury outweighs any harm relief would inflict on the non-movant; and
- (4) that entry of relief would serve the public interest.

Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1225-26 (11th Cir.2005). Injunctive relief may not be granted unless the plaintiff establishes the substantial likelihood of success criterion.

Siegel v. LePore, 234 F.3d 1163, 1176 (11th Cir.2000) (en banc). Accordingly, because Mr. Bernstein cannot show a substantial likelihood of success on the merits, the court does not reach the other TRO factors.

Mr. Bernstein alleges that Wells Fargo does not have authority to foreclose for at least four reasons. First, Mr. Bernstein asserts that because Wells Fargo cannot show that they are the payee, endorsee, or person entitled to enforce of any of the promissory notes executed in connection with Mr. Bernstein's mortgage, they lack standing to foreclose.

As Mr. Bernstein recognizes, The Supreme Court of Georgia has flatly rejected these arguments. "The plain language of the non-judicial foreclosure statute nowhere specifies whether the foreclosing party must hold the note in addition to the deed." *You v. JP Morgan Chase Bank*, 743 S.E.2d 428, 431 (2013) (noting that the UCC is not implicated by a mortgagee not seeking to "enforce the note but rather [] enforcing its rights under the security deed, which is not a negotiable instrument and is therefore not governed by Article 3").

Second, Mr. Bernstein asserts that Wells Fargo is not the real party in interest because of the security deed at issue was issued in the name of MERS as nominee. This is not an action by Wells Fargo seeking to judicially foreclose on Mr. Bernstein's property. This is an adversary proceeding, brought by Mr. Bernstein, for the purpose of alleging state law and TILA claims against Defendants. Consequently, none of these arguments bear on Mr. Bernstein's success on the merits in this proceeding. To the extent these arguments address Wells Fargo's entitlement to stay relief, Mr. Bernstein has already twice had an opportunity to voice his objection to such relief.

Third, Mr. Bernstein raises for the first time assertions that Defendants have violated the Fair Debt Collection Practices Act. Such allegations were not made in Mr. Bernstein's Complaint and accordingly do not bear on his success on the merits in this proceeding.

Fourth, Mr. Bernstein complains of Defendant Wells Fargo's refusal to modify Mr. Bernstein's loan or grant him reverse mortgage. Mr. Bernstein provided no authority for the proposition that a mortgage company has a duty to modify a loan or extend further credit, and the Court is unaware of any such obligation. The mortgage company's decision to offer alternative terms or financing is wholly voluntary.

In denying granting his TRO motion, the Court only holds that Mr. Bernstein has not demonstrated a substantial likelihood of success on the merits based on the showing he made in the motion. This Order does not prejudice his rights to contest his foreclosure in the proper forum. Accordingly, it is

ORDERED that Plaintiff's Emergency Motion for a Temporary Restraining order is **DENIED**.

The Clerk is directed to serve a copy of this Order on Plaintiff, Defendants, Defendant's Counsel, and the Chapter 7 Trustee.

END OF DOCUMENT