UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE:

BRENT ALAN TUBBS AND DEBRA CARD TUBBS,	**CASE NO. 10-10710-NPO**
DEBTORS.	**CHAPTER 13**
BRENT ALAN TUBBS AND DEBRA CARD TUBBS	**PLAINTIFFS**
VS.	**ADV. PROC. NO. 10-01158-NPO**
WELLS FARGO BANK, N.A. AND FEDERAL HOME LOAN MORTGAGE CORPORATION	**DEFENDANTS**

MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING IN PART WELLS FARGO'S AND FREDDIE MAC'S MOTION FOR SUMMARY JUDGMENT

There came on for consideration Wells Fargo's and Freddie Mac's Motion for Summary Judgment (the "Motion") (Adv. Dkt. 88)[1] and Memorandum of Law in Support of Wells Fargo's and Freddie Mac's Motion for Summary Judgment (the "Memorandum") (Adv. Dkt. 91) filed by Wells Fargo Bank, N.A. ("Wells Fargo") and Federal Home Loan Mortgage Corporation ("Freddie Mac") (together with Wells Fargo, the "Defendants"), Plaintiffs' Response to Defendants' Motion for Summary Judgment (Docket No. 88) (the "Response") (Adv. Dkt. 96) and Memorandum of Law in Support of Plaintiffs' Response to Defendants' Motion for Summary Judgment (the "Response Brief") (Adv. Dkt. 97) filed by the Debtors, Brent Alan Tubbs ("Mr. Tubbs") and Debra Card Tubbs ("Mrs. Tubbs") (together with Mr. Tubbs, the "Tubbs"), and the Reply in Support of Wells Fargo's and Freddie Mac's Motion for Summary

[1] Citations to the record are as follows: (1) citations to docket entries in this adversary proceeding, Adv. Proc. No. 10-01158-NPO, are cited as "(Adv. Dkt. ___)" and (2) citations to docket entries in the main bankruptcy case, Case No. 10-10710-NPO, are cited as "(Dkt. ___)".

Judgment (the "Reply") (Adv. Dkt. 99) filed by the Defendants in the above-styled adversary proceeding (the "Adversary"). In the Adversary, R. Spencer Clift, III and Jay A. Ebelhar represent the Defendants, and John M. Sherman represents the Tubbs. Having reviewed the pleadings and the exhibits attached to the Memorandum, the Court finds that the Motion should be granted in part and denied in part.

Jurisdiction

This Court has jurisdiction over the subject matter of and the parties to this proceeding pursuant to 28 U.S.C. § 1334. This matter is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(B).[2] Notice of the Motion was proper under the circumstances.

Facts

When deciding whether summary judgment is proper, the Court must view the evidence submitted by the parties in the light most favorable to the Tubbs. *McPherson v. Rankin*, 736 F.2d 175, 178 (5th Cir. 1984). With this standard in mind, the Court finds that the following facts are undisputed unless otherwise indicated.

Deed of Trust

1. On July 23, 2004, the Tubbs obtained a loan in the amount of $123,500.00 from Wells Fargo, which was secured by a deed of trust (the "Deed of Trust") on their residence

[2] This finding of core jurisdiction is undisputed. The United States Supreme Court in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), held that bankruptcy courts lack constitutional authority to enter a final judgment on a debtor's state-law, compulsory counterclaim that did not stem from the bankruptcy itself or that would not necessarily be resolved in the claims allowance process. *See Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, 673 F.3d 399 (5th Cir. 2012) (suggesting a narrow interpretation of *Stern*). In the event that a higher court disagrees that the Adversary involves a "core" matter, the Court recommends that this Opinion be regarded as its proposed findings of fact and conclusions of law and further recommends that the District Court enter this Opinion as its own after due consideration, in accordance with 28 U.S.C. § 157(c)(1).

located at 5389 Highway 35 South in Holcomb, Mississippi (the "Subject Property"). (Def. Ex. 1).[3]

2. The Deed of Trust "irrevocably grant[ed] and convey[ed] to Trustee [Wells Fargo], in trust, with the power of sale" the Subject Property. (Def. Ex. 1 at 4).

3. Under the terms of the Deed of Trust, Wells Fargo was entitled, upon default, to accelerate repayment of the loan, and if the default was not cured, initiate a sale of the Subject Property. The Deed of Trust further provided that:

> 22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument . . . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.
>
> If Lender invokes the power of sale, Lender shall give Borrower, in the manner provided in Section 15, notice of Lender's election to sell the Property. Trustee shall give notice of sale by public advertisement for the time and in the manner prescribed by Applicable Law. Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder for cash at such time and place in [sic] County as Trustee designates in the notice of sale in one or more parcels and in any order Trustee determines. Lender or its designee may purchase the Property at any sale.

(Def. Ex. 1 at ¶ 22).

[3] The Defendants attached nine (9) exhibits to the Memorandum. These exhibits are cited as "(Def. Ex. ___)". Citations to page numbers refer to the page number of the exhibit as it appears in the record, and not as it appears in the document itself. The Tubbs did not attach any exhibits to the Response or the Response Brief.

4. The Deed of Trust clarified that any notice, including a notice of foreclosure, "given by Borrower or Lender in connection with this Security Instrument must be in writing." (Def. Ex. 1 at ¶ 15).

Loan Modification/Foreclosure

5. In her deposition testimony, excerpts of which were attached as an exhibit to the Memorandum, Mrs. Tubbs testified that in January, 2009, she and her husband, Mr. Tubbs, entered into a loan modification agreement with Wells Fargo. (Def. Ex. 4 at 11). She further testified that shortly thereafter "we had some other things come up" and, as a result, the Tubbs applied for another loan modification in June, 2009. (*Id.* at 11-12).

6. The Tubbs alleged in the First Amended Complaint (the "Amended Complaint") that they received a written notice of foreclosure from Wells Fargo on November 24, 2009. (Adv. Dkt. 68 at 5).

7. Mrs. Tubbs testified that from this point forward she routinely communicated by telephone with representatives from Wells Fargo concerning the status of their loan modification. (Def. Ex. 4 at 10). Mrs. Tubbs also testified that several Wells Fargo representatives assured her that while their loan modification was under review, no foreclosure would occur. (*Id.* at 8).

8. Despite these assurances, the Subject Property was sold at a nonjudicial foreclosure sale on January 5, 2010. (Def. Ex. 7).

Substitute Deed

9. On January 13, 2010, the Substitute Trustee's Deed (the "Substitute Deed"), reflecting that a foreclosure sale of the Subject Property had occurred on January 5, 2010, was filed in the office of the Chancery Clerk of Grenada County. (Def. Ex. 7).

10. According to the Substitute Deed, Emily Kaye Courteau ("Courteau"), as the substitute trustee for Wells Fargo, conducted the nonjudicial foreclosure sale of the Subject Property. (Def. Ex. 2). The Substitute Deed provided that prior to the foreclosure sale, notice of the foreclosure sale was posted in the Grenada County courthouse and was published for three consecutive weeks in *The Daily Star*. (*Id.*).

11. The Substitute Deed indicated that the Subject Property was sold at the foreclosure sale to Wells Fargo for $115,000.00. (Def. Ex. 2).

12. Thereafter, Wells Fargo conveyed its interest in the Subject Property to Freddie Mac. (Def. Ex. 2).

Bankruptcy Case

13. On February 14, 2010, the Tubbs filed a joint, voluntary petition for relief pursuant to chapter 13 of the Bankruptcy Code (the "Bankruptcy Case").[4] (Dkt. 1).

14. On March 21, 2010, the Tubbs filed their bankruptcy schedules. (Dkt. 14). In Schedule D - Creditors Holding Secured Claims, the Debtors listed Wells Fargo and Wells Fargo Home Mortgage as secured creditors. (*Id.* at 10). Schedule D listed their claims as secured by first and second mortgages on the Subject Property. (*Id.*).

15. On March 21, 2010, the Tubbs also filed their Chapter 13 Plan (the "Plan") (Dkt. 15). In the Plan, the Tubbs proposed to make monthly payments on the loan to Wells Fargo Home Mortgage directly, rather than through the Plan. (*Id.* at 1). The Plan further provided that

[4] Originally, the Bankruptcy Case and the Adversary were assigned to The Honorable David W. Houston, III, United States Bankruptcy Judge. Judge Houston retired from the bench on January 15, 2013. The Honorable Jason D. Woodard, United States Bankruptcy Judge, was sworn in on January 16, 2013. Thereafter, the Bankruptcy Case and the Adversary were reassigned to Judge Woodard. On March 13, 2013, Orders of Recusal and Reassignment (Dkt. 94; Adv. Dkt. 73) were entered in both the Bankruptcy Case and the Adversary recusing Judge Woodard and reassigning the Bankruptcy Case and the Adversary to the undersigned judge.

the Tubbs intended to file an adversary proceeding to set aside the sale and a motion to avoid a judicial lien on the Subject Property. (*Id.* at 1-2).

16. On March 21, 2010, the Tubbs filed Debtor's Motion to Avoid Judicial Lien (the "Motion to Avoid Lien") (Dkt. 18). By filing the Motion to Avoid Lien, the Tubbs sought to avoid a judgment obtained by Wells Fargo in the Circuit Court of Grenada County prior to the filing of the Bankruptcy Case that impaired their exemption on the Subject Property. (*Id.*).

17. No response was filed to the Motion to Avoid Lien, and, as a result, an Order Avoiding Judicial Lien (Dkt. 30) to the extent it impaired the Tubbs exemption on the Subject Property was entered on April 20, 2010.[5]

18. Thereafter, on April 30, 2010, Freddie Mac filed a Motion for Relief from Automatic Stay (the "Motion for Relief from Stay") (Dkt. 34). According to the Motion for Relief from Stay, Wells Fargo conveyed and assigned the Subject Property to Freddie Mac after the foreclosure sale. (*Id.* at 1). Although Freddie Mac maintained that it is the rightful owner of the Subject Property, the Tubbs, according to the Motion for Relief from Stay, still occupy the Subject Property. (*Id.* at 1-2). As a result, Freddie Mac requested relief from the automatic stay *nunc pro tunc* in order to evict the Tubbs from the Subject Property. (*Id.* at 2).

19. On May 1, 2010, the Tubbs filed the Debtor's Response to Creditor's Motion for Relief from Automatic Stay and for Abandonment (the "Response to Motion for Relief from Stay") (Dkt. 36). In the Response to Motion for Relief from Stay, the Tubbs alleged that the foreclosure of the Subject Property "was procured by negligence, gross negligence, misrepresentation, or fraud on the part of the previous mortgage holder." (*Id.* at 1). Due to

[5] The Statement of Financial Affairs indicates that the judgment entered against the Tubbs in the Circuit Court of Grenada County in favor of Wells Fargo was the result of a collection proceeding. (Dkt. 14 at 25). Neither Wells Fargo nor the Tubbs have suggested that this judgment in any way affects the Adversary.

Wells Fargo's alleged misconduct, the Tubbs stated that they intended to file an adversary proceeding to set aside the sale and subsequent assignment of the Subject Property to Freddie Mac. (*Id.*).

20. On June 14, 2010, an Order Confirming the Debtor's Plan, Awarding a Fee to the Debtor's Attorney and Related Orders was entered. (Dkt. 49).

21. On August 25, 2010, a hearing was held on the Motion for Relief from Stay and the Response to Motion for Relief from Stay.

22. Thereafter, on September 29, 2010, an Order (the "Order Holding Motion for Relief from Stay in Abeyance") (Dkt. 71) was entered finding that the Motion for Relief from Stay and the Response to Motion for Relief from Stay should be held in abeyance pending the resolution of the Adversary. In the interim, the Order Holding Motion for Relief from Stay in Abeyance ordered that the Tubbs make adequate protection payments of $1,010.53 each month to Freddie Mac through the chapter 13 trustee (the "Trustee"). (*Id.* at 1).

23. On December 19, 2011, the Trustee filed the Trustee's Motion to Dismiss (the "Trustee's Motion to Dismiss") (Dkt. 74) alleging that the Tubbs were delinquent in making their adequate protection payments to the Trustee as ordered by the Order Holding Motion for Relief from Stay in Abeyance.

24. On December 20, 2011, the Tubbs filed the Debtor(s) Response to Trustee's Motion to Dismiss (Dkt. 75) in which the Tubbs acknowledged that they were delinquent in making adequate protection payments to the Trustee, but insisted that they "intend[ed] to catch up the . . . payments immediately and pay all future . . . payments in a timely manner."

25. On January 23, 2012, an Order Re: Motion to Dismiss (Dkt. #74) (Dkt. 79) was entered withdrawing the Trustee's Motion to Dismiss.

26. On June 29, 2012, the Trustee filed another Trustee's Motion to Dismiss (the "Trustee's Second Motion to Dismiss") (Dkt. 83) alleging that the Tubbs again were delinquent in making adequate protection payments to the Trustee. In the Trustee's Second Motion to Dismiss, the Trustee asked that the Bankruptcy Case be dismissed unless the Tubbs brought their adequate protection payments current. (*Id.* at 2).

27. On June 29, 2012, the Tubbs filed the Debtor(s) Response to Trustee's Motion to Dismiss (Dkt. 84) stating again that they intended to bring current their adequate protection payments and to pay all future payments in a timely manner.

28. A hearing was held on the Trustee's Second Motion to Dismiss and the Debtor(s) Response to Trustee's Motion to Dismiss on September 25, 2012. Thereafter, an Agreed Order Re: Motion to Dismiss (Dkt. #83) (Dkt. 91) was entered finding that the Trustee's Second Motion to Dismiss should be held in abeyance pending the outcome of the Adversary.

Adversary

29. On September 7, 2010, the Tubbs filed the original Complaint (Adv. Dkt. 1) against the Defendants. The Complaint alleged that Wells Fargo procured the foreclosure of the Subject Property "by a pattern of conduct that amounts to fraud, intentional misrepresentation, gross negligence and/or negligence in that Wells Fargo . . . repeatedly communicated to the [Tubbs] that the subject foreclosure was cancelled but nonetheless held the foreclosure against the information and communicat[ions] to the [Tubbs]." (*Id.* ¶ VII). As a result of Wells Fargo's conduct, the Tubbs asked the Court to set aside the foreclosure sale and the subsequent assignment to Freddie Mac. (*Id*. ¶ IX). In addition, the Tubbs requested an award of attorney's fees, the costs of filing and pursuing the Adversary, and punitive damages in the amount of $1 million. (*Id.* ¶¶ XIII-X & at 4).

30. In response to the Complaint, on November 8, 2010, Wells Fargo filed Wells Fargo's Motion to Dismiss Complaint and Memorandum of Law in Support of Wells Fargo's Motion to Dismiss Complaint (the "Motion to Dismiss") (Adv. Dkt. 9) asserting that the Tubbs failed to state a claim for fraud or negligence in the Complaint and that they are not entitled to an order setting aside the foreclosure sale. Freddie Mac was not listed as a moving party in the Motion to Dismiss. (*Id.*).

31. On December 15, 2010, the Defendants filed an Amended Motion to Dismiss Complaint to Add Federal Home Loan Mortgage as a Moving Party (the "Amended Motion to Dismiss") (Adv. Dkt. 12).

32. That same day, on December 15, 2010, the Tubbs filed an Application to Clerk for Entry of Default Against Defendant Federal Home Loan Mortgage Corporation Only and Supporting Affidavit (the "Application for Entry of Default"). (Adv. Dkt. 13).

33. On December 16, 2010, the Defendants filed a Motion to Prohibit Clerk's Entry of Default (the "Motion to Prohibit Entry of Default") (Adv. Dkt. 14) against Freddie Mac.

34. On December 16, 2010, the Tubbs filed Plaintiff's Response to Motion to Prohibit Clerk's Entry of Default Against Defendant Federal Home Loan Mortgage Corporation Only (the "Response to Motion to Prohibit Entry of Default") (Adv. Dkt. 15) requesting that the Clerk of the Court enter a default against Freddie Mac pursuant to Federal Rule of Bankruptcy Procedure 7055.

35. Prior to the hearing on the Motion to Prohibit Entry of Default and the Response to Motion to Prohibit Entry of Default, on December 22, 2010, an Agreed Order as to Motion to Prohibit Clerk's Entry of Default Filed by Federal Home Loan Mortgage Corporation & the Plaintiffs' Response to the Motion to Prohibit Clerk's Entry of Default (Adv. Dkt. 18) was

entered finding that no default should be entered by the Clerk against Freddie Mac until the Court held a hearing on the matter.

36. On January 28, 2011, an Agreed Order Resetting Hearing on Motion to Dismiss and Amended Motion Dismiss & Extending Time to Respond to Motion to Dismiss and Amended Motion to Dismiss (Adv. Dkt. 25) was entered extending the deadline to file a response to the Motion to Dismiss and the Amended Motion to Dismiss until March 16, 2011, and resetting the hearing on the Motion to Dismiss, the Amended Motion to Dismiss, the Application for Entry of Default, and the Motion to Prohibit Entry of Default for March 18, 2011.

37. On March 25, 2011, another Agreed Order Resetting Hearing On Motion to Dismiss and Amended Motion Dismiss & Extending Time to Respond to Motion to Dismiss and Amended Motion to Dismiss (Adv. Dkt. 28) was entered extending the deadline to file a response to the Motion to Dismiss and the Amended Motion to Dismiss until April 12, 2011, and resetting the hearing on the Motion to Dismiss, the Amended Motion to Dismiss, the Application for Entry of Default, and the Motion to Prohibit Entry of Default for April 14, 2011.

38. On April 26, 2011, another Agreed Order Resetting Hearing on Motion to Dismiss and Amended Motion Dismiss & Extending Time to Respond to Motion to Dismiss and Amended Motion to Dismiss (Adv. Dkt. 31) was entered extending the deadline to file a response to the Motion to Dismiss and the Amended Motion to Dismiss for June 13, 2011, and resetting the hearing on the Motion to Dismiss, the Amended Motion to Dismiss, the Application for Entry of Default, and the Motion to Prohibit Entry of Default for June 15, 2011.

39. On June 9, 2011, the Defendants filed the Supplemental Memorandum of Law in Support of Defendants' Motion to Dismiss Complaint (the "Supplement to Motion to Dismiss")

(Adv. Dkt. 33) asserting, based upon a prior decision rendered by Judge Houston in *Martin v. USDA Rural Housing Service* (*In re Martin*), 276 B.R. 552 (Bankr. N.D. Miss. 2001), that the Tubbs are not entitled to an order setting aside the foreclosure sale because at the time the Bankruptcy Case was filed, the Tubbs already had been divested of their interest in the Subject Property, and, as a result, the Subject Property is not property of their bankruptcy estate.

40. The hearing scheduled to take place on June 15, 2011, on the Motion to Dismiss, the Amended Motion to Dismiss, the Application for Entry of Default, the Motion to Prohibit Entry of Default, and the Supplement to Motion to Dismiss was not held but was rescheduled for December 13, 2011. (Adv. Dkts. 34, 35).

41. On December 4, 2011, the Tubbs filed Plaintiffs' Motion to Continue Hearings (Docket No. 9, 12, 13 and 14) (Adv. Dkt. 38) requesting that the Court reset the hearings on the Motion to Prohibit Entry of Default, the Response to Motion to Prohibit Entry of Default, the Motion to Dismiss, and the Amended Motion to Dismiss for January 18, 2012.

42. On December 9, 2011, the Order Continuing Hearings (Docket # 9, 12, 13 and #14) (Adv. Dkt. 39) was entered resetting the hearings on the Motion to Dismiss, the Amended Motion to Dismiss, the Application for Entry of Default, and the Motion to Prohibit Entry of Default, for January 18, 2012.

43. On January 17, 2012, the Tubbs filed the Plaintiff's Response to Defendant's Motion to Dismiss Adversary Proceeding (Adv. Dkt. 42).

44. On January 18, 2012, a hearing was held on the Application for Entry of Default, the Motion to Prohibit Entry of Default, the Response to Motion to Prohibit Entry of Default, the Motion to Dismiss, and the Amended Motion to Dismiss. Thereafter, on February 9, 2012, the

Order Denying Defendants' Motion to Dismiss (Adv. Dkt. 55) and the Order Granting Motion to Prohibit Clerk's Entry of Default (Adv. Dkt. 57) were entered.

45. On January 18, 2012, the Tubbs filed Plaintiffs' Motion for Leave to Amend Complaint (the "Motion to Amend Complaint") (Adv. Dkt. 43). A hearing was set on the Motion to Amend Complaint for February 29, 2012. (Adv. Dkt. 44).

46. On February 1, 2012, the Defendants filed Wells Fargo and Freddie Mac's Answer to Complaint. (Adv. Dkt. 52).

47. On March 29, 2012, an Agreed Order (Adv. Dkt. 65) was entered on the Motion to Amend Complaint allowing the Tubbs thirty (30) days to file an amended complaint, and the Defendants an additional thirty (30) days thereafter to file an amended answer.

48. On May 5, 2012, the Tubbs filed the Amended Complaint against the Defendants. In the Amended Complaint, the Tubbs described the pattern of conduct by Wells Fargo that they alleged amounted to "fraud, intentional misrepresentation, gross negligence and/or negligence." (Adv. Dkt. 68, ¶ VII). According to the Amended Complaint, on January 6, 2009, the Tubbs received a modification of their loan, and their monthly payments were increased effective March 1, 2009. (*Id.* ¶ XI). In June, 2009, the Tubbs again began the process of attempting to modify their loan with Wells Fargo. (*Id.*). During this process, the Tubbs regularly contacted Wells Fargo by telephone to determine the status of their loan modification. (*Id.*). On September 8, 2009, the Tubbs received written notification from Wells Fargo that their loan modification request had been denied. (*Id.*). Thereafter, the Tubbs contacted Wells Fargo, and yet again began the process of attempting to modify their loan. (*Id.*). On October 5, 2009, the Tubbs sent Wells Fargo $1,741.00 with the understanding that this money was to be held by Wells Fargo until the Tubbs' loan modification was approved. (*Id.*). In November, 2009, Wells

Fargo requested additional loan modification paperwork from the Tubbs, and the Tubbs sent Wells Fargo the requested information. (*Id.*). On November 24, 2009, the Tubbs received written notice from Wells Fargo of its intent to initiate foreclosure proceedings under the Deed of Trust. (*Id.*). The Tubbs, however, continued to speak with representatives at Wells Fargo who assured them that as long as they were attempting to modify their loan, a foreclosure sale would not occur. (*Id.*). On January 4, 2010, a day prior to the foreclosure sale, the Tubbs contacted Wells Fargo twice by telephone and were told by representatives Myiesha Nelson and Amy Brod that a foreclosure sale of the Subject Property would not occur the following day. (*Id.*). In connection with the foreclosure sale on January 5, 2010, the Tubbs allege that Wells Fargo "participated in [a] pattern of conduct commonly known as 'robo' signing of certain documentation and affidavits in violation of the law." (*Id.* ¶ X). After the foreclosure sale occurred, the Tubbs continued to contact Wells Fargo and "received misinformation about the foreclosure." (*Id.* ¶ XII). On April 1, 2010, the Tubbs received a telephone call from Wells Fargo representative Danielle Gaddy stating that their loan modification had been approved. (*Id.* ¶ *XIII*). As a result of the aforementioned conduct, the Tubbs believe they are entitled to damages for mental and emotional grief, pain and suffering, reasonable attorney's fees, costs for filing and pursuing the Adversary, and punitive damages in the amount of $1 million. (*Id.* ¶ VIII & at 9). In addition, the Tubbs ask that this Court "enter an [o]rder voiding the [Substitute Deed], determining the subject foreclosure invalid and consequently void." (*Id.* at 9).

49. On June 8, 2012, the Defendants filed Wells Fargo and Freddie Mac's Answer to the First Amended Complaint. (Adv. Dkt. 69).

50. As previously mentioned, on March 13, 2013, Orders of Recusal and Reassignment were entered reassigning the Adversary and the Bankruptcy Case to the undersigned judge. (Adv. Dkt. 73, Dkt. 94).

51. On June 5 and June 7, 2013, the Defendants filed the Motion and the Memorandum, respectively. As exhibits to the Memorandum, the Defendants attached the following: (1) the Deed of Trust (Def. Ex. 1); (2) the Substitute Deed (Def. Ex. 2); (3) the Amended Complaint (Def. Ex. 3); (4) excerpts from the deposition of Mrs. Tubbs taken on May 13, 2013 (Def. Ex. 4); (5) excerpts from the deposition of Mr. Tubbs taken on May 13, 2013 (Def. Ex. 5); (6) the Plan (Def. Ex. 6); (7) the Affidavit of Emily Kaye Couteau (the "Courteau Affidavit") (Def. Ex. 7); (8) the Affidavit of Michael Jedynak (the "Jedynak Affidavit") (Def. Ex. 8), and (9) a copy of the unpublished decision of the Mississippi district court in *Harmon v. IBM Lender Business Process Servs., Inc.*, No. 1:11CV206, 2012 WL 4588017 (N.D. Miss. Oct. 2, 2012).

52. In the Courteau Affidavit, Courteau testified that she personally executed the Substitute Deed on January 12, 2010. (Def. Ex. 7). Courteau further testified that her signature on the Substitute Deed is her true and authentic signature and that "[n]o other person executed the document on [her] behalf." (*Id.*).

53. In the Jedynak Affidavit, Michael Jedynak ("Jedynak") testified that on January 12, 2010, he notarized the Substitute Deed. (Def. Ex. 8). Jedynak testified that he personally witnessed Courteau execute the Substitute Deed and that his signature in the notarization of the Substitute Deed is his true and authentic signature. (*Id.*).

54. On June 28, 2013, an Agreed Order Granting Extension to File Response to Motion for Summary Judgment and Brief (Adv. Dkt. 94) was entered extending the deadline to file a response to the Motion and the Memorandum to July 5, 2013.

55. On July 5, 2013, the Tubbs filed the Response and the Response Brief. The Tubbs did not attach any new exhibits to the Response or the Response Brief, but referred to the exhibits attached to the Memorandum by the Defendants.

56. On June 18, 2013, the Defendants filed the Reply.

Discussion

The Defendants seek summary judgment on all claims asserted by the Tubbs in the Amended Complaint (Adv. Dkt. 91 at 7). As to the nature of these claims, the Amended Complaint is unclear. This lack of clarity is due in large part to the absence of distinct "counts" in the Amended Complaint. In the Response and the Response Brief, the Tubbs appear to allege four causes of action: (1) fraud/intentional misrepresentation; (2) negligence/gross negligence, (3) robo-signing, and (4) invalid foreclosure. The Court will address each of these causes of action in turn after a brief discussion of the summary judgment standard.

A. Summary Judgment Standard

Under Rule 56 of the Federal Rules of Civil Procedure ("Rule 56"), made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056, summary judgment is appropriate when viewing the evidence in the light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, show that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Once the moving party has made

its required showing, Rule 56(c)(1) further provides, in relevant part:

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record . . . ; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

FED. R. CIV. P. 56(c)(1). "[W]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . . [w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Scott v. Harris*, 550 U.S. 372, 380 (2007). "Where the nonmoving party 'will bear the burden of proof at trial on a dispositive issue,' the nonmoving party bears the burden of production under Rule 56 to 'designate specific facts showing that there is a genuine issue for trial.'" *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009).

"Summary judgment . . . serves, among other ways, to root out, narrow, and focus the issues, if not resolve them completely." *Calpetco 1981 v. Marshall Exploration, Inc.*, 989 F.2d 1408, 1415 (5th Cir. 1993). Ultimately, the role of this Court is "not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249; *see Hamilton v. Segue Software Inc.*, 232 F.3d 473, 477 (5th Cir. 2000).

B. Fraud/Intentional Misrepresentation Claim

In the Memorandum, the Defendants argue that they are entitled to summary judgment on the Tubbs' fraud/intentional misrepresentation claim because the Defendants have failed to show: (1) that they reasonably relied on the alleged misrepresentations made by representatives of Wells Fargo, (2) that they suffered any damage as a result of relying on the alleged

misrepresentations, (3) that it was reasonable to rely on the alleged misrepresentations, or (4) that Wells Fargo acted with fraudulent intent in making the alleged misrepresentations. (Adv. Dkt. 91 at 8). According to the Defendants, it was unreasonable for the Tubbs to rely on the oral representations made by Wells Fargo representatives because, under the terms of the Deed of Trust, the parties agreed that "[a]ll notices given by Borrower or Lender in connection with this Security Instrument must be in writing." (*Id.* at 9). In her deposition testimony, Mrs. Tubbs admits that they did not receive anything in writing from Wells Fargo that the foreclosure sale of the Subject Property was canceled. (*Id.* at 10). Therefore, the Defendants insist it was unreasonable for the Tubbs to rely on oral representations that the foreclosure sale would not occur. (*Id.*).

In addition, the Defendants argue that the Tubbs were not injured by the alleged misrepresentations because Mrs. Tubbs testified that she would not have taken any other action to stop the foreclosure had she known it was going to occur as scheduled. (*Id.* at 9). According to the Defendants, under the terms of the Deed of Trust, the only way to cancel a foreclosure sale is to bring the loan current. (*Id.*). At her deposition, however, Mrs. Tubbs testified that at the time of the foreclosure sale, she and Mr. Tubbs did not have enough money in savings to bring the loan current. (*Id.*). Finally, the Defendants argue that there is no evidence that the Wells Fargo representatives who assured the Tubbs that the foreclosure sale would not occur intended to induce the Tubbs to rely on their representations. (*Id.* at 10).

In the Response Brief, the Tubbs argue that there are genuine issues of material fact as to whether the representations made by Wells Fargo representatives amounted to fraud/intentional misrepresentation. (Adv. Dkt. 97 at 4). The Tubbs rely on the allegations contained in the Amended Complaint that Wells Fargo's actions "constitute[d] a pattern of conduct that is so

egregious that would amount to fraud or intentional misrepresentation." (*Id.*). According to the Response Brief, the Tubbs relied upon the false representations made by Wells Fargo representatives that "[they] did not need anything in writing that the foreclosure was cancelled." (*Id.*). Finally, the Tubbs argue that the Defendants should have produced affidavits from the representatives at Wells Fargo who communicated with them. (*Id.*).

In the Reply, the Defendants maintain that the Tubbs have failed to raise a genuine issue of material fact for trial, and, as a result, they are entitled to summary judgment on the Tubbs' fraud/intentional misrepresentation claim. (Adv. Dkt. 99 at 2). The Defendants argue that the Tubbs may not rest on mere allegations in the Amended Complaint at the summary judgment stage, but they must "by affidavits or as otherwise provided [by Rule 56], . . . set forth specific facts showing that there is a genuine issue for trial." (*Id. citing McKenzie v. U.S. Home Corp*., 704 F.2d 778 (5th Cir. 1983)). Further, the Defendants allege that the Tubbs failed to demonstrate how they relied on the alleged misrepresentations made by Wells Fargo. (Adv. Dkt. 99 at 2-3). Finally, the Defendants argue that the Tubbs failed to show there was a genuine issue of material fact as to whether the alleged misrepresentations made by Wells Fargo were made with fraudulent intent. (*Id.* at 3). Instead, the Defendants point out that the Tubbs state only that the Defendants should have produced affidavits from the Wells Fargo representatives. (*Id.*). The Defendants argue that this assertion by the Tubbs "incorrectly attempt[s] to shift the burden of proof" as to whether the alleged misrepresentations were made with fraudulent intent from the Tubbs to the Defendants. (*Id.*).

Under Mississippi law, the elements of fraud are: (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity, (5) his intent that it should be acted on by the hearer and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity,

(7) his reliance on its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury. *O.W.O. Invs., Inc. v. Stone Inv. Co.,* 32 So. 3d 439, 446 (Miss. 2010). The party asserting a claim of fraud must prove his claim by clear and convincing evidence. *Price v. Price*, 5 So. 3d 1151, 1156 (Miss. Ct. App. 2009). The elements necessary to prove a claim of intentional misrepresentation are identical to those necessary to prove fraud. *Se. Med. Supply, Inc. v. Boyles, Moak & Brickell Ins., Inc.,* 822 So. 2d 323, 331 (Miss. Ct. App. 2002).

As previously mentioned, the Tubbs bear the burden of proof at trial on dispositive issues, and they also bear the burden at the summary judgment stage of designating specific facts that show there is a genuine issue for trial. The Tubbs relied on the allegations contained within the Amended Complaint that Wells Fargo's actions "constitute[d] a pattern of conduct that [was] so egregious that would amount to fraud or intentional misrepresentation." They also relied, however, on excerpts from the deposition testimony of Mrs. Tubbs, which the Defendants attached as an exhibit to the Memorandum. (Def. Ex. 4). In the deposition excerpts, Mrs. Tubbs testified that representatives from Wells Fargo told her that as long as her loan was in "loss mitigation" the foreclosure sale would not occur. (*Id*. at 8). Mrs. Tubbs also testified that she believed "[b]ased on the information that [she] was given in the phone conversations with Wells Fargo, that . . . foreclosure would [not] go through." (*Id.* at 9). Additionally, Mrs. Tubbs testified that representatives from Wells Fargo told her that "they didn't send anything out in writing. They just told me to call weekly, and I did, and to submit my documents monthly." (*Id.* at 10).

For the purposes of the Motion, the Defendants do not dispute the allegation that representatives from Wells Fargo repeatedly and falsely told the Tubbs that the foreclosure sale would not occur. Instead, they contend that there is no genuine issue as to whether the Tubbs

reasonably relied on the oral representations, suffered any damages as a result of their reliance, or that the Wells Fargo representatives acted with fraudulent intent in making the misrepresentations. The Court finds that Mrs. Tubbs' testimony, which was attached as an exhibit to the Memorandum by the Defendants, raises genuine issues of material fact as to whether the Tubbs reasonably relied on the oral representations under the circumstances and suffered any damages as a result. Therefore, the Court finds that the Defendants are not entitled to summary judgment on the Tubbs' fraud/intentional misrepresentation claim.

C. Negligence/Gross Negligence Claim

The Defendants, in the Memorandum, also argue that there is no genuine issue of material fact as to the Tubbs' claim for negligence/gross negligence. (Adv. Dkt. 91 at 10). According to the Defendants, the Tubbs cannot show that Wells Fargo breached a duty to the Tubbs or that they suffered any injury as a result of the breach of that duty. (*Id.*). The Defendants maintain that any oral representations made by Wells Fargo representatives to the Tubbs could not give rise to a legal duty because, as previously mentioned, under the terms of the Deed of Trust, all notices, including a notice of the cancelation of a foreclosure sale, had to be provided to the Tubbs in writing. (*Id.* at 10-11). Further, the Defendants insist that the Tubbs cannot show they were damaged by the representatives' alleged misrepresentations. (*Id.* at 11). The Defendants suggest that even if the Tubbs had known that the foreclosure was going forward as scheduled, they did not have sufficient funds to bring the loan current and stop the foreclosure sale from occurring. (*Id.*). Thus, the Defendants argue, even if the Debtors were damaged by the foreclosure sale, the Defendants were not the proximate cause of those damages. (*Id.* at 11-12).

In the Response Brief, the Tubbs insist that there are genuine issues of material fact as to whether the oral representations made by Wells Fargo representatives constituted

negligence/gross negligence. (Adv. Dkt. 97 at 5). Again, the Tubbs argue that Defendants should have produced affidavits by Wells Fargo representatives concerning their communications. (*Id.*). The Tubbs further argue that Wells Fargo breached their duty of good faith and fair dealing "by orally communicating that the foreclosure had been stopped repeatedly." (*Id.*).

In the Reply, the Defendants contend that the Tubbs cannot establish a claim for negligence/gross negligence because Wells Fargo did not breach a duty owed to the Tubbs, and even if Wells Fargo did breach a duty, there is no evidence that the alleged breach caused the Tubbs any damages. (Adv. Dkt. 99 at 4). First, the Defendants argue that the duty of good faith and fair dealing under Mississippi law may not be used to establish a negligence claim. (*Id.*). The Defendants maintain that "there are no facts demonstrating that Wells Fargo failed to comply with its obligations as outlined in the Deed of Trust when it accelerated [the Tubbs'] loan and initiated foreclosure proceedings, nor are there any facts demonstrating that the foreclosure sale was procedurally defective under the terms of the Deed of Trust, [therefore, the Tubbs] cannot establish breach of a legal duty." (*Id.* at 5). Second, the Defendants argue that the Tubbs cannot show how they were damaged by the alleged misrepresentations that the foreclosure sale had been canceled. (*Id.* at 6).

In Mississippi, to prove a claim of negligence, the moving party must show the existence of a duty, breach of duty, causation, and damages by a preponderance of the evidence. *Huynh v. Phillips*, 95 So. 2d 1259, 1262 (Miss. 2012). A claim of gross negligence has the same elements of proof as an ordinary negligence claim and differs from an ordinary negligence claim only in degree. *Harmon*, 2012 WL 458801, at *3. A plaintiff's first obligation in proving a claim of either ordinary negligence or gross negligence is to prove that a legal duty exists. *Henderson v.*

Comty. Bank of Miss. (*In re Evans*), 464 B.R. 272, 288 (Bankr. S.D. Miss. 2011). The nature of the Tubbs' negligence claim in the Amended Complaint is unclear. In the Response Brief, the Tubbs attempt to support their negligence claim by arguing that Wells Fargo breached its duty of good faith and fair dealing when it misrepresented that the foreclosure sale of the Subject Property had been canceled. Under Mississippi law, all contracts contain an implied covenant of good faith and fair dealing. The Tubbs, however, do not point to a specific provision in the Deed of Trust that the Defendants allegedly breached. *Limber v. Miss. Univ. for Woman Alumnae Ass'n*, 998 So. 2d 993 (Miss. 2008). Moreover, the Tubbs have not alleged any duty imposed by statute or by common law that the Defendants allegedly owed them. As a result, the Court finds that the Tubbs failed to raise a genuine issue of material fact, and that the Defendants are entitled to summary judgment on the Tubbs' negligence/gross negligence claim.

D. Robo-Signing Claim

In the Memorandum, the Defendants argue that the Tubbs' robo-signing claim cannot survive summary judgment because the Tubbs do not have any familiarity with Courteau's signature outside of the Adversary. (Adv. Dkt. 91 at 12). The Defendants cite Federal Rule of Evidence 901(b)(2),[6] which provides that a non-expert opinion as to handwriting must be "based upon familiarity not acquired for purposes of the litigation." FED. R. EVID. 901(b)(2). According to the Defendants, the Tubbs' allegation that Courteau's signature is not her true signature on the Substitute Deed is mere speculation. (*Id.* at 13).

In the Response Brief, the Tubbs allege that the "signature of [Courteau] as substitute trustee on the substitute trustee's deed appears not to be the signature of [Courteau]." (Adv. Dkt. 97 at 6). Instead, the Tubbs argue that "[t]here is an obvious and striking similarity in the

[6] The Federal Rules of Evidence apply to adversary proceedings. *See* FED. R. BANKR. P. 9017.

notary's signature, the month of the notary signature, the month the substitute trustee's deed is dated, and the signature of [Courteau]." (*Id.*). These similarities, the Tubbs contend, establish a genuine issue of material fact as to the validity of the Substitute Deed. (*Id.*).

In the Reply, the Defendants again reiterate their position that Mrs. Tubbs may not offer her opinion as to the authenticity of Courteau's signature because her testimony is not based on a familiarity acquired apart from the current litigation. For this reason, the Defendants contend that summary judgment is proper.

As previously stated, Federal Rule of Evidence 910(b)(2) provides that nonexpert testimony concerning the genuineness of handwriting is permitted only when the familiarity with the handwriting is "based upon familiarity not acquired for the purposes of the litigation." FED. R. EVID. 910(b)(2). In her deposition testimony, Mrs. Tubbs testified that she believed that Jedynak signed Courteau's name in the Substitute Deed. (Def. Ex. 4 at 2-3). Mrs. Tubbs testified that she reached this conclusion based upon research conducted on the Internet. (*Id.*). "Such one-shot comparisons made for the purposes of litigation lack the extent of familiarity contemplated by 901(b)(2)," and, as a result, the Court agrees with the Defendants that the Tubbs have failed to present any evidence to raise a genuine issue of material fact as to their robo-signing claim for trial. *United States v. Pitts*, 569 F.2d 343, 348 (5th Cir. 1978).

In addition, the Court finds that the Defendants rebutted any inference raised by Mrs. Tubbs' testimony as to the authenticity of Courteau's signature by producing the Courteau Affidavit and the Jedynak Affidavit as exhibits to the Memorandum. In the Courteau Affidavit, Courteau testified that it was in fact her true and authentic signature on the Substitute Deed and that "no other person executed the document on [her] behalf." (Def. Ex. 7). In addition, in the Jedynak Affidavit, Jedynak testified that he notarized the Substitute Deed on January 12, 2010.

(Def. Ex. 8). Jedynak further testified that he personally witnessed Courteau execute the Substitute Deed and that his signature in the notarization is his true and authentic signature. (Def. Ex. 8). As a result, the Court finds that the Defendants are entitled to summary judgment on the Tubbs' robo-signing claim.

E. Invalid Foreclosure Claim

In the Response Brief, the Tubbs raise a separate claim for "invalid foreclosure" based upon oral representations made by Wells Fargo representatives to the Tubbs that the foreclosure sale of the Subject Property would not occur as scheduled. The Defendants did not address the Tubbs' invalid foreclosure claim in the Motion and the Memorandum. In the Reply, however, the Defendants insist they are entitled to summary judgment on the Tubbs' invalid foreclosure claim because: (1) the claim was not included in the Amended Complaint but was raised for the first time in the Response Brief, (2) Mississippi law does not recognize a cause of action for "invalid foreclosure," and (3) "the arguments in support of this 'claim' do not demonstrate that the foreclosure was invalid." (Adv. Dkt. 99 at 7). The Defendants allege that there is no dispute that the foreclosure sale was conducted in accordance with the terms of the Deed of Trust and Mississippi law. (*Id.* at 8).

In the Amended Complaint, the Tubbs allege that Wells Fargo "conducted an invalid and unlawful foreclosure sale on or about January 5, 2010, therefore creating [an] avoidable conveyance to Freddie Mac." (Adv. Dkt. 68 at ¶ VI). As a result of Wells Fargo's conduct, the Amended Complaint requests that Freddie Mac's interest in the Subject Property "should be voided and held for naught." (*Id.* ¶ IX). The Tubbs, however, do not give any reason, other than

the fraudulent and/or negligent conduct of Wells Fargo's representatives, why the foreclosure sale should be held "invalid" and the assignment to Freddie Mac "avoidable."[7]

The Court agrees with the Defendants that the Tubbs separate "invalid foreclosure" claim was not properly stated in the Amended Complaint but was raised by the Tubbs for the first time in the Response Brief. The Fifth Circuit previously has held that "[a] claim which is not raised in the complaint but, rather is raised only in response to a motion for summary judgment is not properly before the Court." *Cutrera v. Bd. of Supervisors of LSU,* 429 F.3d 108 (5th Cir. 2005); *see also Whalen v. Carter,* 954 F.2d 1087, 1098 (5th Cir. 1992) (holding that "the failure to state a claim is the 'functional equivalent' of the failure to raise a genuine issue of material fact"). Accordingly, to the extent the Amended Complaint may be construed as raising a claim for "invalid foreclosure," the Court finds that the claim should be dismissed. *See Landavazov v. Toro Co.*, 301 F. App'x 333, 335-36 (5th Cir. 2008) (unpublished) (on summary judgment motion, trial court may consider deficiency argument and dismiss a claim under federal pleading requirements).

Conclusion

Accordingly, for the reasons set forth herein, the Court finds that the Motion should be granted in part and denied in part. Specifically, the Court finds that the Defendants are entitled to summary judgment on the negligence/gross negligence claim and the robo-signing claim. The Court further finds that the Defendants are not entitled to summary judgment on the fraud/intentional misrepresentation claim. Finally, the Court dismisses the "invalid foreclosure"

[7] In Mississippi, a wrongful foreclosure claim exists when a foreclosure is attempted solely for a malicious desire to injure the mortgagor or the foreclosure is conducted negligently or in bad faith to the mortgagor's detriment. *Nat'l Mortg. Co. v. Williams*, 357 So. 2d 934, 935-36 (Miss. 1978). The Tubbs do not allege that Wells Fargo failed to comply with the procedural provisions of Mississippi law or of the Deed of Trust, except for the allegations made in support of the robo-signing claim, which the Court has already addressed.

claim for failure to state a claim for relief. All other relief not expressly granted to the Defendants is denied. A final judgment will not be entered until final disposition of the Adversary.

SO ORDERED.

Neil P. Olack
United States Bankruptcy Judge
Dated: July 29, 2013