



SO ORDERED,

A handwritten signature in blue ink that reads "Neil P. Olack".

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: January 14, 2019

The Order of the Court is set forth below. The docket reflects the date entered.

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:

PERCY A. SEABERRY,

CASE NO. 17-04570-NPO

DEBTOR.

CHAPTER 13

PERCY A. SEABERRY

PLAINTIFF

VS.

ADV. PROC. 18-00044-NPO

**CENLAR FSB, CMG MORTGAGE, INC.,
AND SNL COMPANY**

DEFENDANTS

**ORDER: (1) CONSOLIDATING MOTIONS FOR RELIEF INTO
ADVERSARY; (2) GRANTING PLAINTIFF'S SECOND AMENDED
MOTION FOR LEAVE TO FILE AMENDED COMPLAINT; (3) SETTING
DEADLINES RELATED TO AMENDMENT OF MOTION TO DISMISS; AND
(4) SETTING EVIDENTIARY HEARING ON AMENDED MOTION TO DISMISS**

This matter came before the Court for hearing on January 9, 2019 (the "Hearing") on the Plaintiff's Motion for Leave to File First Amended Complaint (the "First Motion to Amend")

(Adv. Dkt. 35)¹ filed by Percy A. Seaberry (the “Debtor”); the Response to Plaintiff’s Motion for Leave to File First Amended Complaint (the “Response to Motion to Amend”) (Adv. Dkt. 41) filed by Cenlar FSB (“Cenlar”) and CMG Mortgage, Inc. (“CMG”); the Corrected Motion for Leave to File First Amended Complaint (the “Corrected Motion to Amend”) (Adv. Dkt. 42) filed by the Debtor; and the Plaintiff’s Second Amended Motion for Leave to File Amended Complaint (the “Second Motion to Amend”) (Adv. Dkt. 57) filed by the Debtor in the Adversary. This matter also came before the Court on the Motion to Dismiss (the “Motion to Dismiss”) (Adv. Dkt. 13) filed by Cenlar and CMG; the Memorandum in Support of Motion to Dismiss (Adv. Dkt. 14) filed by Cenlar and CMG; Plaintiff’s Response to Defendants’ Motion to Dismiss (the “Response to Motion to Dismiss”) (Adv. Dkt. 36) filed by the Debtor; the Plaintiff’s Memorandum of Authorities in Support of his Response to Motion to Dismiss (Adv. Dkt. 37) filed by the Debtor; the Reply Memorandum in Support of Motion to Dismiss (the “Reply”) (Adv. Dkt. 40) filed by Cenlar and CMG; and the Joinder in Motion to Dismiss (the “Joinder”) (Adv. Dkt. 43) filed by SNL Company, LLC (“SNL”) in the Adversary. At the Hearing, Louise Harrell represented the Debtor; Erin Saltaformaggio, Austin L. McMullen, and Elizabeth Crowell represented Cenlar and CMG; Jon Mims represented SNL.

Facts

On October 18, 2013, the Debtor signed a promissory note in the amount of \$68,732.00 in favor of CMG. (Cl. #6-1 at 11-13). The note was secured by a deed of trust (the “Deed of Trust”)

¹ Citations to the record are as follows: (1) citations to docket entries in the above-referenced adversary proceeding (the “Adversary”) are cited as “(Adv. Proc. ___)”;

(2) citations to docket entries in the above-reverenced bankruptcy case (the “Bankruptcy Case”) are cited as “(Bankr. Dkt. ___)”.

(Adv. Dkt. 57-2) on the Debtor's residence located at 258 Sun Drive, Jackson, Mississippi (the "Property").

On December 12, 2017, the Debtor commenced his Bankruptcy Case under chapter 13 of the Bankruptcy Code. (Bankr. Dkt. 1). Cenlar and CMG filed a proof of claim in the amount of \$60,261.10. (Cl #6-1). The Court² entered an order confirming the Debtor's chapter 13 plan on March 29, 2018. (Bankr. Dkt. 43). After the Debtor became delinquent in plan payments, the Court entered an order dismissing the Bankruptcy Case on April 16, 2018. (Bankr. Dkt. 47). The Debtor filed the Debtor's Motion to Reinstate (Bankr. Dkt. 49) the Bankruptcy Case on April 17, 2018.

Cenlar and CMG held a foreclosure sale of the Property on May 30, 2018. (Adv. Dkt. 1 ¶ 3). SNL was the highest and best bidder, and a deed conveying the Property to SNL was filed in the land records. (Bankr. Dkt. 64 at 22-23). The Debtor continues to live on the Property after the foreclosure sale.

Harold J. Barkley, Jr., the duly-appointed chapter 13 (the "Trustee"), filed the Trustee's Response to Debtor's Motion to Reinstate (Bankr. Dkt. 54) on April 23, 2018. The Trustee and Debtor reached an agreement, and the Court entered an Agreed Order (Bankr. Dkt. 58) reinstating the Bankruptcy Case on June 4, 2018.

On July 5, 2018, Cenlar and CMG filed the Motion for Relief from Automatic Stay and for Abandonment or Alternatively, for Adequate Protection (the "Cenlar/CMG Motion for Relief") (Bankr. Dkt. 64) in the Bankruptcy Case. They asked the Court to terminate the automatic stay provided by 11 U.S.C. § 362(a) and order the Property abandoned from the estate pursuant to 11

² The Bankruptcy Case originally was assigned to Bankruptcy Judge Edward Ellington. On December 1, 2018, the Bankruptcy Case and all related proceedings were transferred to the over-signed.

U.S.C. § 554(b). They sought this relief to pursue state court remedies against the Debtor to obtain possession of the Property. In the Response to Motion for Relief from Automatic Stay and for Abandonment or Alternatively, for Adequate Protection (the “Response to Cenlar/CMG Motion for Relief”) (Bankr. Dkt. 68) filed on July 19, 2018, the Debtor denied that Cenlar and CMG were entitled to any relief and alleged that the foreclosure is void and should be canceled.

On July 20, 2018, the Debtor initiated the Adversary by filing the Complaint Seeking to Set Aside Foreclosure (the “Original Complaint”) (Adv. Dkt. 1) alleging that the foreclosure is invalid and asserting the following causes of action against Cenlar, CMG, SNL, and John Does 1-5: wrongful foreclosure; 11 U.S.C. §§ 547(b) and 548(a) actions; negligence; and fraud. The Debtor seeks damages and attorneys’ fees in an unspecified amount and a temporary restraining order prohibiting the defendants from taking possession of the Property.

On August 20, 2018, Cenlar and CMG filed the Motion to Dismiss, alleging that the Original Complaint failed to state a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure (“Rule 12(b)(6)”).³ As to the Debtor’s claims for wrongful foreclosure, negligence, and fraud, they alleged that the Original Complaint contained only conclusory statements deemed insufficient by the U.S. Supreme Court to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). They also challenged the Debtor’s claims under 11 U.S.C. § 547(b) and § 548(a), alleging that the foreclosure sale is not subject to avoidance since it complied with Mississippi law. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 (1994).

³ Rule 12(b)(6) is made applicable to adversary proceedings by Rule 7012 of the Federal Rules of Bankruptcy Procedure.

To address the Motion to Dismiss, the Debtor filed both the Response to the Motion to Dismiss and the First Motion to Amend on November 5, 2018. In the Response to Motion to Dismiss, the Debtor explained that the essence of his Original Complaint was Cenlar's and CMG's failure to provide him proper notice of the foreclosure sale as required by the Deed of Trust. The Debtor admitted that his Original Complaint "was not very detailed." (Adv. Dkt. 37 at 5). He filed the contemporaneous First Motion to Amend the Complaint "to more clearly and specifically enumerate" his causes of action for breach of contract, negligence, and wrongful foreclosure. (*Id.* at 2). The Debtor attached to the First Motion to Amend a copy of the proposed First Amended Complaint Seeking to Set Aside Foreclosure (the "First Proposed Amended Complaint") (Adv. Dkt. 35-1).

In the Bankruptcy Case, SNL filed the Motion to Lift Stay (the "SNL Motion for Relief") (Bankr. Dkt. 86) on November 15, 2018. SNL asked the Court to terminate the stay to allow it to proceed with an eviction action against the Debtor. On November 23, 2018, the Debtor filed the Response to Motion for Relief from Stay (the "Response to SNL Motion for Relief") (Bankr. Dkt. 90), asking the Court to deny the relief requested by SNL. On November 29, 2018, the Court entered Orders Extending Automatic Stay (the "Orders Extending Automatic Stay") (Bankr. Dkt. 94-95), pending resolution of the Cenlar/CMG Motion for Relief and the SNL Motion for Relief.

In the Adversary, Cenlar and CMG filed the Reply on November 19, 2018. They argued that the Debtor's "threadbear [*sic*] recital that notice did not comply with the Deed of Trust" in the First Proposed Amended Complaint did not cross the line to plausibility. They attached to the Reply copies of letters that they contend satisfied the notice provisions of the Deed of Trust, including a letter dated December 13, 2017, sent to Debtor's counsel during the pendency of the Bankruptcy Case. (Adv. Dkt. 40-4). In the Response to Motion to Amend filed on November 19,

2018, Cenlar and CMG ask the Court to deny the First Motion to Amend on the ground any amendment would be futile. On November 26, 2018, the Debtor filed the Corrected Motion to Amend to attach a copy of the Deed of Trust, which was omitted by mistake as an exhibit to the First Proposed Amended Complaint. SNL filed the Joinder on November 28, 2018.

On January 8, 2019, the day before the Hearing, the Debtor filed the Second Motion to Amend to assert an additional cause of action for violation of the automatic stay arising out of the letter dated December 13, 2017. The Debtor attached to the Second Motion to Amend the proposed Second Amended Complaint Seeking to Set Aside Foreclosure (the “Second Proposed Amended Complaint”) (Adv. Dkt. 57-1). Because of its late filing, Cenlar and CMG were unable to file a response to the Second Motion to Amend prior to the Hearing.

Discussion

The Debtor filed the First Motion to Amend seventy-seven (77) days after Cenlar and CMG filed the Motion to Dismiss, which is well outside the twenty-one (21) day period allowed by Rule 15 of the Federal Rules of Civil Procedure (“Rule 15”)⁴ for amendment as a matter of course. The Debtor, therefore, may amend his Original Complaint under Rule 15 only with the Court’s leave. In that regard, Rule 15 provides that “the court should freely give leave when justice so requires.” FED. R. CIV. P. 15(a)(2). This standard permits some discretion but in the absence of a “substantial reason to deny leave to amend, the discretion of the [bankruptcy] court is not broad enough to permit denial.” *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (5th Cir. 1981).

The Fifth Circuit Court of Appeals has recognized that it is within a court’s discretion to deny leave based on the futility of the amendment. *Martin’s Herend Imports, Inc. v. Diamond &*

⁴ Rule 15 is made applicable to adversary proceedings by Rule 7015 of the Federal Rules of Bankruptcy Procedure.

Gem Trading U.S. of Am. Co., 195 F.3d 765, 771 (5th Cir. 1999); *see Foman v. Davis*, 371 U.S. 178, 182 (1962) (listing futility as a consideration in determining whether to grant a party leave to amend a complaint). “Futility” means that the amended complaint would fail to state a claim upon which relief could be granted using the same standard of legal sufficiency as set forth in Rule 12(b)(6). *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863 (5th Cir. 2000).

After resolving any doubt in favor of the Debtor, the Court finds that the allegations in the Second Proposed Amended Complaint are sufficient to support a plausible claim against Cenlar, CMG, and SNL regarding procedural shortcomings in the foreclosure process. *See Teeuwissen v. JP Morgan Chase Bank, N.A.*, 902 F. Supp. 2d 826 (S.D. Miss. 2011). The Debtor explains why he contends the foreclosure was invalid and cites the specific notice provisions in the Deed of Trust that he alleges were breached by Cenlar and CMG. Accordingly, the Court finds that the Debtor should be granted leave to amend the Original Complaint within fourteen (14) days of this Order. The Second Proposed Amended Complaint, however, contains certain typographical errors and inconsistencies in the prayer for relief and includes “John Does 1-5” as defendants, who the Debtor apparently no longer intends to sue. Accordingly, the Debtor should file an amended complaint that corrects these mistakes and otherwise conforms to the remarks of the Court at the Hearing.

Moreover, prior to filing the amended complaint, the Debtor, Cenlar, CMG, and SNL should meet and determine whether the injunctive relief first sought by the Debtor in the Original Complaint (approximately six (6) months ago) may be resolved by agreement of the parties. If so, the parties shall submit an agreed order within fourteen (14) days of this Order, and the Debtor shall omit from the amended complaint any request for a temporary restraining order. The Court understands that well before the Adversary was reassigned to the over-signed bankruptcy judge, the parties may have reached such an agreement but failed to submit an agreed order or otherwise

commit their agreement to writing. *See Hyperion Found., Inc. v. Academy Health Center, Inc. (In re Hyperion Found., Inc.)*, Adv. 09-05043-NPO, 2009 WL 3633878 (Bankr. S.D. Miss. Oct. 27, 2009) (enforcing settlement pursuant to Mississippi contract law). The Court will not address at this time whether a binding settlement agreement may exist.

To promote judicial economy and in the interests of justice, the Court finds that the issues regarding the validity of the foreclosure sale in the Bankruptcy Case and in the Adversary should be consolidated into one proceeding. Accordingly, the Court finds that the Cenlar/CMG Motion for Relief, the Response to Cenlar/CMG Motion for Relief, the SNL Motion for Relief, and the Response to SNL Motion for Relief filed in the Bankruptcy Case should be consolidated into the Adversary for all purposes pursuant to Rule 42 of the Federal Rules of Civil Procedure.⁵ The consolidation, however, shall not supersede the Orders Extending Automatic Stay entered in the Bankruptcy Case.

The Court finds that the filing of an amended complaint may not render the Motion to Dismiss moot as to all the Debtor's claims. After the amended complaint is filed, Cenlar, CMG, and SNL should be allowed an opportunity to file an amended motion to dismiss and memorandum brief within fourteen (14) days. The Debtor then may file a response and memorandum brief within fourteen (14) days of service of any amended motion to dismiss. Cenlar, CMG, and SNL may file a reply within seven (7) days of service of the response. These deadlines will expire no later than March 1, 2019. A hearing will be held on the amended motion to dismiss on March 6, 2019. After disposition of the amended motion to dismiss, the Court will enter a scheduling order,

⁵ Rule 42 of the Federal Rules of Civil Procedure is made applicable to adversary proceedings by Rule 7042 of the Federal Rules of Bankruptcy Procedure and to contested matters by Rule 9019 of the Federal Rules of Bankruptcy Procedure.

if necessary, setting a date certain for Cenlar, CMG, and SNL to answer the amended complaint and setting deadlines for discovery and other related matters.

IT IS, THEREFORE, ORDERED that the Debtor shall amend the Original Complaint within fourteen (14) days of this Order. The amended complaint shall conform to the remarks of the Court at the Hearing.

IT IS FURTHER ORDERED that the parties shall meet and determine whether the injunctive relief sought by the Debtor in the Original Complaint may be resolved by agreement. If so, the parties shall submit an agreed order within fourteen (14) days of this Order, and the Debtor shall omit from the amended complaint any request for a temporary restraining order.

IT IS FURTHER ORDERED that Cenlar, CMG, and SNL may file an amended motion to dismiss accompanied by a memorandum brief within fourteen (14) days after service of the amended complaint. The Debtor may file a response and memorandum brief within fourteen (14) days after service of the amended motion to dismiss. Cenlar, CMG, and SNL then may file a reply within seven (7) days after service of any response.

IT IS FURTHER ORDERED that an evidentiary hearing on the amended motion to dismiss, responses, and replies is set for March 6, 2019, at 10:00 a.m. at the Thad Cochran United States Courthouse, Bankruptcy Courtroom 4C, 501 East Court Street, Jackson, Mississippi.

##END OF ORDER##