

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

ELIZABETH H. COURSEN,

Plaintiff,

v.

CASE NO: 8:12-cv-690-T-26EAJ

JP MORGAN CHASE & CO., *et al.*,

Defendants.

ORDER

THIS CAUSE comes before the Court on Defendant Fidelity National Financial, Inc.'s ("FNF") Motion to Dismiss Plaintiff's First Amended Complaint and Plaintiff's Response in Opposition.¹ FNF moves to dismiss Plaintiff's First Amended Complaint, pursuant to Rule 12(b)(6), Federal Rule of Civil Procedure, on grounds that: (1) FNF is not a proper party Defendant to this action because Plaintiff failed to seek and obtain leave to add additional parties and failed to adequately allege any direct or indirect liability on the part of FNF and (2) each of the counts in Plaintiff's complaint fails to state

¹ See dockets 28 and 39.

a claim upon which relief may be granted. After careful consideration of the parties' submissions, together with the well-pleaded allegations of Plaintiff's First Amended Complaint, the Court concludes the motion is due to be denied.

Background Facts & Allegations

On or about September 27, 2001, Plaintiff, Elizabeth H. Coursen ("Plaintiff"), executed and delivered a promissory note (the "Note") and a mortgage (the "Mortgage") to North American Mortgage Company. Defendant Washington Mutual Bank ("WaMu") became the holder of the Note and Mortgage, as successor to North American Mortgage Company, and it assigned the Mortgage to Defendant Federal National Mortgage Corporation ("Fannie Mae") in 2003. Fannie Mae filed a complaint in the Twelfth Judicial Circuit Court in Sarasota County, Florida, seeking foreclosure of the Mortgage against Plaintiff on April 23, 2003, in the case of Federal National Mortgage Association v. Elizabeth H. Coursen, et. al., Case No.: 2003-CA-005846 NC ("the 2003 Foreclosure Case"), which was eventually dismissed.

On or about October 31, 2006, Fannie Mae assigned the Mortgage back to WaMu as attorney-in-fact for Fannie Mae. WaMu determined that Plaintiff had defaulted on her loan payments in 2006, and as a result, filed a foreclosure action against Plaintiff on or about September 13, 2006, in the case of Washington Mutual Bank v. Elizabeth H. Coursen, et. al., Case No.: 2006-CA-008521 NC ("the 2006 Foreclosure Case").

WaMu received a final judgment of foreclosure in the 2006 Foreclosure Case on or about November 27, 2006 (“the Final Judgment”). In the 2006 Foreclosure Case, WaMu filed the original Note, which reflected a blank endorsement. In 2008, Defendants JP Morgan Chase & Co. and JPMorgan Chase Bank, N.A. (collectively “Chase”) acquired WaMu and subsequently became holder of the Note and Mortgage. Following several failed attempts to settle the 2006 Foreclosure Case through loss mitigation efforts, and following several pleadings filed by Plaintiff in an attempt to remain in the property without making mortgage payments, the foreclosure sale was eventually rescheduled for November 14, 2011.

Plaintiff filed a Motion to Vacate Judgment on or about September 27, 2011. The state court denied the motion on October 24, 2011, for lack of jurisdiction. Plaintiff subsequently filed a Motion for Rehearing on or about November 3, 2011, which was denied. At the foreclosure sale on November 14, 2011, the subject property was sold to Chase. Plaintiff subsequently filed her Objection to Sale, not raising any irregularity in the sale or inadequacy of the sale price. In response, Chase filed a Motion to Strike the Objection to Sale, which was granted on March 6, 2012.

Plaintiff filed a Complaint solely against JP Morgan Chase & Co. in state circuit court on August 18, 2010, based upon allegations that Defendant lacked standing and committed fraud in pursuit of the foreclosure. On August 18, 2011, the Complaint was dismissed with leave to amend, for failure to state the fraud claims with particularity. On

September 27, 2011, Plaintiff filed a motion to vacate judgment in the 2006 mortgage foreclosure, which was denied on October 24, 2011. She sought rehearing on November 3, 2011, and her motion was denied. The final sale of the property took place on November 4, 2011, and a certificate of title was issued to Chase. Plaintiff filed an objection to the sale, which was struck on March 6, 2012, because the motion failed to raise any irregularity in the sale or inadequacy of the sale price.

Plaintiff then filed her First Amended Complaint on or about March 6, 2012, in which she seeks relief through five counts for violations of FDUTPA (Count I); violations of the FDCPA and the FCCPA (Count II); for civil conspiracy (Count III); for abuse of legal process (Count IV); for damages and declaratory relief under 18 U.S.C. § 1961, 18 U.S.C. § 1962(b), and 18 U.S.C. § 1964 (Count V). (Dkt. 2.) She added Defendants FNF, JPMorgan Chase Bank, N.A., WaMu, Fannie Mae, Shapiro & Fishman, GP, Fidelity National Default Solutions (“FNDS”), Fidelity National Information Services (“FNIS”), Inc., Lender Processing Services, Inc. (“LPS”), Lender Processing Services Default Solutions, Inc. (“LPSDS”), DocX, and Dory Goebel (“Goebel”), as Defendants. Defendants Chase, WaMu, and Fannie Mae removed the case to this Court on March 30, 2012. (Dkt. 1.)

Standard for Dismissal

In determining whether to grant a Rule 12(b)(6) motion, the Court shall not dismiss a complaint if it includes “enough facts to state a claim for relief that is plausible

on its face.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L.Ed.2d 929 (2007) (dismissing complaint because plaintiffs had not “nudged their claims across the line from conceivable to plausible”). The Court “must view the complaint in the light most favorable to the plaintiff and accept all of the plaintiff’s well-pleaded facts as true.” American United Life Ins. Co. v. Martinez, 480 F.3d 1043, 1057 (11th Cir. 2007). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, (citations omitted), a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” Twombly, 550 U.S. at 555, 127 S. Ct. at 1964-65. To survive a motion to dismiss under Twombly, a complaint’s factual allegations, if assumed to be true, “must be enough to raise the right to relief above the speculative level.” Id. Plaintiff meets her burden under Twombly.

Discussion

FNF argues that it is not a proper party to this action. At the outset, FNF asserts that Plaintiff failed to seek and obtain leave to add FNF as a party Defendant. However, under Rule 1.190(a), Florida Rules of Civil Procedure, leave of court or the consent of the opposing party prior to adding additional parties is not required when a responsive pleading has not been filed in the case. At the time that Plaintiff amended the complaint, no responsive pleading had yet been filed. The sole Defendant had only filed a motion to dismiss. A motion to dismiss is not considered a “responsive pleading” because it is not a

“pleading” under Rule 1.100(a) of the Florida Rules of Civil Procedure and, therefore, Plaintiff’s absolute right to amend the complaint “once as a matter of course” had not terminated. Boca Burger, Inc. v. Forum, 912 So. 2d 561 (Fla. 2005).

FNF next asserts that Plaintiff fails to sufficiently allege FNF’s liability. Plaintiff does, however, allege that FNF, as well as FNDS, LPS, FNIS, LPSDS, and DocX, employed the individuals whose illegal acts proximately caused her to suffer the loss of her homestead through a wrongful foreclosure. (Dkt. 2, ¶¶ 16-18.) Further, Plaintiff sets out the following allegations of FNF’s vicarious liability:

- FNF is the parent company of FNDS at all times material. (Dkt. 2, ¶11.)
- FNF acquired LPS a/k/a FNIS in 2003, and was its parent until 2008. (Id. at ¶13.)
- LPSDS is an alter ego of LPS. (Id. at ¶14.)
- DocX is/was a wholly owned a subsidiary of LPS and/or LPSDS. (Id. at ¶15.)
- Defendant Dory Goebel (“Goebel”) is an employee of all, or some, of the aforesaid entities. (Id. at ¶16.)
- Goebel violated Fla. Stat. § 817.54 and § 831.06 by executing an Affidavit of Indebtedness as “AVP Washington Mutual Bank” on October 23, 2006, in the 2006 foreclosure action. (Id. at ¶18(a).)
- At all times material hereto FNF and/or FNDS and/or FNIS/LPS and/or LPSDS and/or DocX were instrumentalities of each other and they engaged in improper conduct by failing to:

- a. Observe corporate formalities;
- b. By commingling funds;
- c. By commingling assets;
- d. By failing to adequately capitalize;
- e. By using either corporate form to avoid liability for the other;
- f. By actively conspiring to defraud Plaintiff of her homestead real property in violation of her constitutional rights.

(Id. at ¶17.)

Under Florida law, the corporate veil will only be pierced to prevent fraud or injustice. Eckhardt v. U.S., 463 F.App'x 852, 855 (11th Cir. 2012) (unpublished) (citing Dania Jai-Alai Palace, Inc. v. Sykes, 450 So. 2d 1114, 1121 (Fla. 1984)). Piercing the corporate veil is proper if the corporation "is a mere device or sham to accomplish some ulterior purpose, or is a mere instrumentality or agent of another corporation or individual owning all or most of its stock, or where the purpose is to evade some statute or to accomplish some fraud or illegal purpose." Eckhardt 463 F.App'x at 855 (quoting Aztec Motel, Inc. v. Faircloth, 251 So. 2d 849, 852 (Fla. 1971)). To pierce the corporate veil in Florida, a claimant must establish: (1) the shareholder dominated and controlled the corporation to such an extent that the corporation's independent existence was in fact non-existent and the shareholders were in fact alter egos of the corporation; (2) the corporate form must have been used fraudulently or for an improper purpose; and (3) the fraudulent or improper use of the corporate form caused injury to the claimant. Eckhardt, 463 F.App'x at 855-56 (quoting Gasparini v. Pordomingo, 972 So. 2d 1053, 1055 (Fla. Dist. Ct. App. 2008)).

Plaintiff's allegations sufficiently plead these factors for vicarious liability on the part of FNF. The Court also takes judicial notice of the Securities and Exchange Commission filings that Plaintiff provided to support her allegations that the LPS Defendants are instrumentalities of each other and to devise her flow chart demonstrating the corporate hierarchy of the LPS Defendants. (See Dkt. 40; Dkt. 39, p. 6.) Therefore, the First Amended Complaint, taken as true, sufficiently establishes FNF as a proper Defendant for purposes of this Rule 12(b)(6) dismissal proceeding. Whether Plaintiff's allegations can be proven is a question of fact that must be determined after discovery.

FNF also challenges Plaintiff's claim against it for violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fla. Stat. § 501.204(1)(2001), for failure to state a claim upon which relief may be granted. A claim for damages under FDUTPA has three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. Virgilio v. Ryland Group, Inc., 680 F.3d 1329, 1338 n.25 (11th Cir. 2012) (quoting Rollins, Inc. v. Butland, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006)). Here, Plaintiff alleges that Defendants, including FNF, violated FDUTPA by using fake identities and manufactured documents to deprive her of her homestead through foreclosure of a debt that was not in default² prior to inception of the foreclosure cases. (Dkt. 2, pp. 16-19.) The First Amended Complaint identifies FNF as the parent company of the other LPS Defendants and alleges that FNF is liable for the alleged fraudulent acts

² Plaintiff disputes defaulting on the note and mortgage and contends that the default was manufactured by WaMu.

that caused her to lose her homestead. Plaintiff's allegations are sufficient to withstand a Rule 12(b)(6) dismissal. She must be afforded the opportunity to prove the allegations through the discovery process.

FNF further argues that Plaintiff fails to state a claim under the Fair Debt Collection Practices Act ("FDCPA") because FNF was neither owed any part of the loan debt nor did it attempt to collect any money from Plaintiff on the loan in question. Notwithstanding, 15 U.S.C. §1692(a)(6) defines the term "debt collector" to include any person who uses an instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. Plaintiff alleges that FNF, through its alleged alter ego, FNDS, "supplies record-keeping and litigation support for actions brought to foreclose mortgages in Florida, including the preparation and verification of multitudinous affidavits which are filed with various court clerks in Florida." (Dkt. 2, ¶11.) She also alleges that Goebel oversees a section of individuals who produce thousands of sworn affidavits a day for filing in state and federal litigation brought by FNF clients and several boilerplate documents used in the foreclosure of Plaintiff's home. (Id. at ¶16.) Furthermore, under 15 U.S.C. § 1692f, "[a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Subparagraph (6) of that section specifically prohibits taking or threatening to take any nonjudicial action to effect dispossession or disablement of property ... if there is no present right to possession of the property claimed as collateral through an enforceable

security interest. As previously discussed, Plaintiff alleges that Defendants fabricated documents in furtherance of a conspiracy to unlawfully divest Plaintiff of her homestead. Consequently, this Court must find that Plaintiff's allegations present a question of fact as to whether FNF's activities violated the FDCPA, and she must be allowed the opportunity to establish those facts through the course of discovery.

Questions of fact preclude dismissal of Plaintiff's claim under the Florida Consumer Collection Practices Act ("FCCPA"), Chapter 559, Florida Statutes, as well, because she plainly alleges that Defendants, including FNF, knew they did not have the legal right to collect the alleged debt and created manufactured evidence and sham pleadings to do so. (Dkt. 2, ¶¶18-19.) Section 559.72, Florida Statutes, provides that "no person shall" do any of the 19 enumerated items, including collecting a debt which is not owed or is the result of a "manufactured default." Section 559.72(9) requires that Plaintiff must show that FNF asserted a legal right that did not exist, with actual knowledge that the right did not exist. For these reasons, Plaintiff's allegations in support of her FCCPA claim are sufficient to overcome a Rule 12(b)(6) dismissal.

Plaintiff's civil conspiracy claim requires that she prove: (a) the existence of an agreement between two or more parties; (b) to do an unlawful act or to do a lawful act by unlawful means; (c) the doing of some overt act in pursuance of the conspiracy; and (d) damage to Plaintiff as a result of the acts done under the conspiracy. Olson v. Johnson, 961 So. 2d 356, 359 (Fla. Dist. Ct. App. 2007). A cause of action for abuse of process

requires a showing of willful or intentional misuse of process for some wrongful or unlawful object, or ulterior purpose not intended by law. Peckins v. Kaye, 443 So. 2d 1025, 1026 (Fla. Dist. Ct. App. 1983) (citing Cline v. Flagler Sales Corp., 207 So. 2d 709 (Fla. Dist. Ct. App. 1968)). Plaintiff is able to overcome dismissal of her common law claims for civil conspiracy and abuse of process at this stage of the proceedings through her factual allegations that Defendants acted unlawfully, and in agreement, with the intent to defraud her through the use of sham documents and fabricated evidence, and that their actions caused her damages. (Dkt. 2, ¶¶6-13, 18(e), 23.)

Finally, Plaintiff's civil RICO claim under 18 U.S.C. § 1962 alleges facts that, at least for purposes of a Rule 12(b)(6) dismissal, are adequate to support each of the statutory elements for the predicate acts that allegedly divested her of her homestead. See Republic of Panama v. BCCI Holdings (Luxembourg) S.A., 119 F.3d 935, 949 (11th Cir. 1997) (holding that in order to survive a motion to dismiss, a plaintiff must allege facts sufficient to support each of the statutory elements for at least two of the pleaded predicate acts) (citing Central Distribs. of Beer, Inc. v. Conn., 5 F.3d 181, 183-84 (6th Cir. 1993)). Plaintiff alleges that Defendants unlawfully employed the United States mail, Florida state courts, and perjured and fabricated evidence to divest her of her homestead. (Dkt. 2, ¶¶1-16.) She alleges that Defendants were the principals of, or participated in, the operation or management of the enterprise itself and that the pattern of racketeering included at least two acts, transmission through the use of the mail of fake Assignments

of Mortgage and fictitious corporate signatures. (Id. at ¶¶6-12.) Furthermore, Plaintiff's civil RICO claim is not time-barred inasmuch as Plaintiff asserts that she was prevented from discovering that she was the victim of fraud by Defendants' concealment of the alleged fraud.

ACCORDINGLY, it is **ORDERED AND ADJUDGED**:

Defendant Fidelity National Financial, Inc.'s Motion to Dismiss Plaintiff's First Amended Complaint (Dkt. 28) is denied. Defendant shall file its answer and any defenses to the First Amended Complaint within ten (10) days of this Order.

DONE AND ORDERED at Tampa, Florida, on July 25, 2012.

s/Richard A. Lazzara

RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

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Counsel of Record