

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

TAYLOR, BEAN & WHITAKER
MORTGAGE CORP.,
REO SPECIALISTS, LLC, and
HOME AMERICA MORTGAGE, INC.

Case No. 3:09-bk-07047-JAF
Case No. 3:09-bk-10022-JAF
Case No. 3:09-bk-10023-JAF

Debtors.

*Jointly Administered Under
Case No. 3:09-bk-7047-JAF*

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TAYLOR, BEAN & WHITAKER
MORTGAGE CORP.,

Case No. 3:09-bk-07047-JAF

Applicable Debtor.

**TAYLOR, BEAN & WHITAKER MORTGAGE CORP.'S
RESPONSE IN OPPOSITION TO MOTION TO SET AMOUNT
OF REDEMPTION FILED BY SUEANN AND SANDY SMITH
(DOCKET NO. 1541)**

Taylor, Bean & Whitaker Mortgage Corp. (the “**Debtor**” or “**TBW**”) respectfully requests that this Court deny the Motion to Set Amount of Redemption (Docket No. 1541) (the “**Motion**”) filed by Sueann Smith and Sandy Smith (the “**Movants**”). In support of its response, the Debtor respectfully represents as follows:

BACKGROUND

1. The Motion was filed after the news of the indictment of Lee Farkas, the Debtor’s former Chief Executive Officer, became public. As further discussed below, there is no dispute that the Movants borrowed monies and are in default on their loan. With all due respect, the Movants appear to be using the indictment of Mr. Farkas as a mechanism to try to avoid their obligations.

2. The Movants borrowed monies secured by a mortgage on property (the “**Property**”) located at 1427 Wild Horses Ln., Stephenville, TX (the “**Loan**”).

3. In connection with the Loan, the Movants executed a note, mortgage, and other related loan documents (the “**Loan Documents**”).

4. The Loan was service released to Bank of America. Accordingly, the Debtor has no further interest in this Loan.

5. At the time the Loan was service released, the unpaid principal balance on the Loan was approximately \$135,948.40.

6. At the time the Loan was service released, the Movants had defaulted on their obligations under the Loan Documents, however, upon information and belief, a foreclosure judgment had not been entered.

SUMMARY OF RELIEF REQUESTED IN THE MOTION

7. In the Motion, the Movants request that this Court declare that the Movants have a right to redeem the Property and, presumably, obtain title to it without paying anything even though they have not made the required payments on the Loan. The Movants allege that the Debtor was negligent, intentionally misrepresented things, and breached the covenant of good faith and fair dealing and that these are grounds upon which the Court could declare that they can redeem the Property without paying for it.

8. This response is filed in order to comply with the Court’s September 7, 2010, Order Directing Response to Motion to Set Amount of Redemption Filed by Sueann Smith and Sandy Smith (Docket No. 1897).

9. As set forth below, the Motion is substantively and procedurally defective.

RESPONSE IN OPPOSITION

The Motion is improperly directed to the Debtor and should be denied as moot.

Under Article III of the United States Constitution, federal courts may only hear “cases or controversies.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60, 112 S. Ct. 2130, 2135-36, 119 L. Ed. 2d 351 (1992). The doctrine of mootness, which evolved directly from Article III’s case-or-controversy limitation, provides that “the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).” Tanner Adver. Group, L.L.C. v. Fayette County, Ga., 451 F.3d 777, 785 (11th Cir. 2006) (en banc) (citation omitted). “A case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief.” Ethredge v. Hail, 996 F.2d 1173, 1175 (11th Cir. 1993).

With respect to the Motion, the Court cannot grant meaningful relief because it is improperly directed to the Debtor, which has no further interest in the Loan. Indeed, in the Motion, the Movants admit that the Loan was transferred. See Motion at p. 2. The Loan was service released to Bank of America on August 8, 2009. Accordingly, the Debtor does not have any interest in the Loan and the Motion should, therefore, be denied as moot.

The Motion fails to state a cause of action.

The Movants have not established that they have a right of redemption.

The right of redemption is generally a right of the mortgagor to reclaim his interest in foreclosed property after it has been forfeited, at law, by paying the amount of the debt, interest, and costs. Whether a mortgagor has a right of redemption with respect to an interest in property is determined by state law. The Property at issue here is located in Texas, therefore, Texas law applies. There does not appear to be a statutory right of redemption for mortgagors under Texas law. Although the Movants may have a right under the Loan Documents to cure defaults under

the Loan, they do not have a statutory right to redeem the Property. The Movants have not established that they have a right of redemption. This alone is fatal to the Motion.

Assuming *arguendo* that Texas had a statutory right of redemption, there are no grounds upon which the redemption amount should be zero.

Assuming *arguendo* that Texas had a statutory right of redemption, the Movants have failed to state any cognizable theory pursuant to which they should have the right to redeem the Property for nothing. The theories upon which the Movants rely for such a novel concept are: negligence, intentional misrepresentation, and breach of the covenant of good faith and fair dealing. Notably, the Movants do not allege that they did not borrow the money; that they did not sign the Loan Documents; or that they did not default on the Loan.

In support of the negligence theory, the Movants assert that the Debtor “owed a duty to Defendants/Creditors to perform their professional services in a manner which placed Plaintiff/Debtors interests above the Defendants/Creditors and to deal honestly, directly, and accurately with the Defendants/Creditors, the documents, and each other.” See Motion at p. 1. In order to establish a cause of action for negligence under Texas law, a party must prove “the existence of a legal duty, a breach of that duty, and damages proximately caused by the breach. The two elements of proximate cause are cause in fact (or substantial factor) and foreseeability. These elements cannot be satisfied by mere conjecture, guess, or speculation.” HIS Cedars Treatment Ctr. of Desoto, Texas, Inc. v. Mason, 143 S.W.3d 794, 798-99 (Tex. 2004). The only facts that the Movants allege to support their negligence theory relate to the Debtor’s transfer of the Loan to a servicer for the original investor. The facts as alleged are simply insufficient to establish any cause of action for negligence. Transfers of servicing rights are customary in the mortgage industry, were authorized by the applicable agreements with the

investors, and have no effect upon borrowers other than to change the location of their payments.

Similarly, the facts alleged in support of the intentional misrepresentation theory relate solely to the Debtor's transfer of the Loan to a servicer for the original investor. Intentional misrepresentation is akin to fraud and allegations of fraud must be pled with particularity. Rule 9(b) of the Federal Rules of Civil Procedure provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed.R.Civ.P. 9(b). Pursuant to this requirement, "[i]n addition to specifying the time, place and content of the alleged false representations, plaintiffs are required to plead a factual basis that would make it reasonable to determine that a statement was materially false or misleading." Greenstone v. Cambex Corp., 975 F.2d 22, 25 (1st Cir.1992). In the case at bar, it is unclear what the alleged false representation was. Further, there is no specification of the time, place, and content of the alleged false representation. In short, the facts as alleged are simply insufficient to establish any cause of action for fraud.

In support of their theory of breach of the covenant of good faith and fair dealing, the Movants assert without any evidentiary support that they "had various written agreements and each agreement required that the Plaintiff/Debtor deal fairly and in good faith with Defendants/Creditors and not seek to take an undue advantage of Defendants/Creditors in their weakened bargaining position and with their lesser knowledge, skill, education and ability regarding the loan transactions." See Motion at p. 2. Texas courts have rejected the notion that every contract has an implied duty of good faith and fair dealing. As the Texas Supreme Court has explained

[t]o adopt the laudatory –sounding theory of "good faith and fair dealing" would place a party under the onerous threat of treble damages should he seek to

compel his adversary to perform according to the contract terms as agreed upon by the parties. The novel concept advocated by the court below would abolish our system of government according to several rules of law and let each case be decided upon what might seem 'fair and in good faith', by each fact finder. This we are unwilling to do.

English v. Fischer, 660 S.W.2d 521, 522 (Tex. 1983).

Accordingly, the Movants have not and cannot establish a cause of action for breach of the implied covenant of good faith and fair dealing.

Assuming *arguendo* that the Movants could establish facts to support their allegations of negligence, intentional misrepresentation, and/or breach of the covenant of good faith and fair dealing, no such set of facts would establish a statutory right of redemption where none exists or permit this or any other court to declare that the Movants have a right, in the absence of a statute, to redeem the Property without paying the current balance due on the Loan. Accordingly, the Motion should be denied.

The Motion is procedurally defective.

Finally, if the Court does not dismiss the Motion based on its substance, it should be dismissed because it is procedurally defective. The Motion is procedurally defective because the relief that the Movants are requesting is that this Court enter a declaratory judgment determining that the Movants have a right to redeem the Property without paying the current balance due on the Loan. Such an action for declaratory judgment must be brought as an adversary proceeding. Rule 7001 of the Federal Rules of Bankruptcy Procedure provides in pertinent part that

An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

(9) a proceeding to obtain a declaratory judgment relating to any of the foregoing. -

See F.R.B.P. 7001(9).

Accordingly, the Motion should be denied because it must be brought as an adversary proceeding with the attendant procedural protections.

CONCLUSION

There is no question that the Movants executed the Loan Documents and borrowed monies secured by the Property. By this Motion, they seek to redeem the Property without paying for it. The Movants' allegations of wrongdoing are unfounded and do not provide a basis for allowing them to redeem the Property without paying for it.

WHEREFORE, the Debtor respectfully requests that this Court enter an order denying the Motion and providing such other and further relief as is just and proper.

Dated this 22nd day of September, 2010.

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