

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

MARK BRANNAN and
KELLY BRANNAN

Case No. 02-16647-MAM-13

Debtors

MARK BRANNAN and
KELLY BRANNAN

Plaintiffs

v.

Adv. No. 04-01037

WELLS FARGO HOME MORTGAGE, INC.

Defendant

**ORDER DENYING MOTION TO DISMISS AND DENYING
MOTION TO STAY DISCOVERY**

Henry A. Callaway, III, Hand Arendall, L.L.C., Attorneys for the Defendant, Mobile, AL
Steve Olen, Steven L. Nicholas, Royce A. Ray, III, Olen, Nicholas & Copeland, P.C.,
Attorneys for the Plaintiffs, Mobile, AL
Donald J. Stewart, Cabaniss, Johnston, Gardner, Dumas & O'Neal, Attorneys for the
Plaintiffs, Mobile, AL

This case is before the court on the motion of the defendant, Wells Fargo Home Mortgage, Inc. to dismiss the complaint pursuant to Fed. R. Bankr. P. 7012. This court has jurisdiction to hear this matter pursuant to 28 U.S.C. § 157 and 1334 and the Order of Reference of the District Court. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the court has the authority to enter a final order. For the reasons indicated below, the court is denying the motion to dismiss the complaint and is also denying the motion to stay discovery.

FACTS

This case was commenced by Mark and Kelly Brannan on February 27, 2004. Their suit alleges that Wells Fargo filed “an improper and false affidavit in support of the motion for relief from stay” in their bankruptcy case. The reason the affidavit was improper and false was that “the signature page was executed separate and apart from the other pages of the affidavit.” The debtors assert that the affidavit, as filed, constitutes a fraud on the court and/or an abuse of the bankruptcy process. The complaint also alleges that improper and false affidavits were filed in numerous other cases and a class of plaintiffs should be certified by the court. The Brannans seek, on behalf of themselves and a class they wish to have certified, a variety of remedies: injunctive relief to prevent continuation of the conduct, disgorgement of benefits obtained from the conduct, damages, and/or sanctions.

LAW

Wells Fargo asserts that the Brannans’ complaint should be dismissed because (1) there is no civil cause of action for filing a false affidavit; (2) the complaint fails to state a cause of action; (3) the complaint fails to allege that the plaintiffs have been damaged by the actions of Wells Fargo; (4) the complaint fails to state a grounds for punitive damages to be awarded; (5) the request for injunctive relief exceeds the authority of the court under § 105; (6) the court lacks jurisdiction over the claims; (7) the plaintiffs have waived their rights to object to the affidavit; and (8) the complaint fails to state a “fraud” cause of action. The Brannans assert that the complaint should not be dismissed.

A.

The defendant seeks dismissal of this complaint pursuant to Fed. R. Bankr. P. 7012(b) which incorporates Fed. R. Civ. P. 12(b)(6) and (7). Wells Fargo bears the burden of proving that,

based upon the facts stated in the complaint, it is entitled to a dismissal. Under Fed. R.Civ. P. 12(b)(6), dismissal of a complaint is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Blackston v. Alabama*, 30 F. 3d 117, 120 (11th Cir. 1994) (quoting *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984)). "On a motion to dismiss the court must accept as true all facts alleged and draw all inferences therefrom in the light most favorable to the plaintiffs." *Hornfield v. City of North Miami Beach*, 29 F. Supp. 2d 1357, 1361 (S.D. Fla. 1998). A very low threshold must be reached for a complaint to survive a motion to dismiss. *Id.* at 1361 (citing to *Ancata v. Prison Health Servs., Inc.*, 769 F. 2d 700, 703 (11th Cir. 1985)). The court will discuss below each of Wells Fargo's assertions in turn.

B.

As to issues 1-5 and 7 and 8, the court has issued an opinion that responds to these issues in *Monica Thigpen v. Matrix Financial Services Corporation*, Case No. 02-14280-MAM-13, Adv. No. 04-01035. That opinion is incorporated by reference and is attached to this opinion. ¹

C.

¹ Unlike the Thigpen case that involved an Arizona notary, this case involves a South Carolina notary. The court found no South Carolina case holding a person civilly liable for improper notarization. In *In re McGuinn*, 272 S.C. 366, 252 S.E.2d 122 (S.C. 1979), the South Carolina Supreme Court disciplined an attorney who violated the state statutes as to notarization. It stated: "This Court is shocked by respondent's abuse of the office of notary public. A notary is a public officer, who, by his hand and seal, authenticates certain classes of documents. See Code ss 26-1-10 et seq. (1976) . . .The credibility of notarized documents is essential to the viability of our legal system." *Id.* Section 26-3-60 of the South Carolina statutes states: "The words '*acknowledged before me*' mean: (1) That the person acknowledging appeared before the person taking the acknowledgment; (2) That he acknowledged he executed the instrument." (Italics in original) The statute makes it clear that an instrument and signature must be one document at the time of signing and acknowledgment. This court concludes that South Carolina courts would find improper notarization to be an abuse of the judicial process or sanctionable conduct based upon the case law and statute.


Wells Fargo alleges that the court has no jurisdiction over the claims asserted in this case. This court has previously ruled in a similar case that it does have jurisdiction. The reasoning of that ruling is incorporated by reference. *Noletto v. Nationsbank Mortgage Corp. (In re Noletto)*, 244 B.R. 845 (Bankr. S.D. Ala. 2000).

D.

Wells Fargo has requested a stay of all discovery in this case pending resolution of this motion. The court granted a stay of all discovery except discovery relating to the named plaintiffs on the premise that the limited discovery as to the Brannans' claim only was not overly burdensome or intrusive. Since the court is denying the motion to dismiss, it is appropriate now to completely deny the motion for a stay of discovery. Discovery should proceed as expeditiously as possible to put this case in a posture for a hearing on the motion for class certification.

IT IS ORDERED that the motion of Wells Fargo Home Mortgage, Inc. to dismiss the plaintiffs' complaint is DENIED and the motion of Wells Fargo Home Mortgage, Inc. to stay plaintiffs' discovery is DENIED.

Dated: May 25, 2004


MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE