

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

RALPH BOWMAN and
BRENDA BOWMAN

Case No. 03-10016-MAM-13

Debtors

RALPH BOWMAN and
BRENDA BOWMAN

Plaintiffs

v.

Adv. No. 04-01038

BANK ONE, NATIONAL ASSOCIATION

Defendant

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS COMPLAINT
AND DENYING MOTION FOR PROTECTIVE ORDER**

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Plaintiffs, Mobile, AL

This case is before the court on the motion of the defendant, Bank One, N.A., to dismiss the plaintiffs' 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 case 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 pending resolution of the motion.

FACTS

This case was commenced by Ralph and Brenda Bowman on February 27, 2004. Their suit alleges that Bank One 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 Bowmans seek, on behalf of themselves and the class, a variety of remedies: injunctive relief to prevent continuation of the conduct, disgorgement of benefits obtained from the conduct, damages, and/or sanctions.

LAW

Bank One asserts that its motion for dismissal of the complaint pursuant to Fed. R. Bankr. P. 7012 should be granted on several grounds: (1) the complaint fails to state a claim upon which relief can be granted; (2) the complaint does not show how a signature page of an affidavit executed separate and apart from the rest of an affidavit is fraudulent or an abuse of process; (3) the Bowmans’ claims are barred by waiver or collateral estoppel or res judicata; (4) the complaint fails to allege that the debtors’ damages, if any, were caused by Bank One’s

conduct; (5) the complaint for declaratory and injunctive relief fails; and (6) the complaint fails to plead fraud with particularity.

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).¹ Bank One 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 each of Bank One's assertions in turn.

¹ Bank One asks this court to review the actual affidavit filed in the Bowman bankruptcy case and draw conclusions from it when ruling on the Fed. R. Bankr. P. 7012(b) relief. The court will not do so. Rule 12(b) requires the court to look only at the complaint itself.

B.

As to issues 1-5, 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.²

C.

Bank One asserts that the complaint does not allege fraud with particularity as required by Fed. R. Bankr. P. 7009(b). The court in the attached *Thigpen* opinion sets forth case law that the court concludes allows the Bowmans to raise the issue of the improper or fraudulent execution of the affidavit filed in the Bowmans' case. The allegation that the signature page was executed "separate and apart" from the affidavit is sufficient to describe the fraud or impropriety alleged. The motion for relief pursuant to Fed. R. Bankr. P. 7009(b) is due to be denied.

D.


Bank One 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 Bowmans' 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 protective order. Discovery should proceed

²Unlike the *Thigpen* case involving an Arizona notary, the notarization of the affidavit was done by a Minnesota notary. Minnesota case law also recognizes that a notary public can be held liable for negligence due to notarization practices. *Barnard v. Schuler*, 100 Minn. 289, 110 N.W. 966 (Minn. 1907). It states that "a notary cannot legally or honestly certify to the acknowledgment of a party unless he personally knows him or has satisfactory evidence of the fact that he is the identical person described in and who executed the instrument. . . If a notary public certifies to an acknowledgment of an instrument without such personal knowledge and investigation, he is guilty of negligence." *Id.* at 100 Minn. 291-92, 110 N.W. 967-68.

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 Bank One, National Association to dismiss the plaintiffs' complaint is DENIED and the motion of Bank One, National Association for a protective order is DENIED.

Dated: May 25, 2004


MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE