

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

MARK BRANNAN and
KELLY BRANNAN

Case No. 03-16647-MAM-13

Debtors

MARK BRANNAN and
KELLY BRANNAN

Plaintiffs

vs.

Adv. No. 04-01037

WELLS FARGO HOME MORTGAGE, INC.

Defendant

**ORDER DENYING DEFENDANT'S MOTION FOR LEAVE TO
APPEAL AND TO WITHDRAW REFERENCE AND GRANTING
PLAINTIFFS' MOTION TO STRIKE JURY DEMAND**

Henry A. Callaway, III, Attorney for Defendant, Mobile, AL
Steve Olen, Steven L. Nicholas, Royce A Ray, Attorneys for the Plaintiffs, Mobile, AL
Donald J. Stewart, Attorney for the Plaintiffs, Mobile, AL

This case is before the Court on the motion of the defendant, Wells Fargo Home Mortgage, Inc., for leave to appeal and for withdrawal of reference and on the motion of the plaintiffs, Mark and Kelly Brannan, to strike the defendant's jury demand. This court has jurisdiction to hear the motion for leave to appeal and the motion to strike jury demand pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. These matters are core proceedings pursuant to 28 U.S.C. § 157(b)(2) and the court has the authority to enter

final orders. As to the motion to withdraw the reference, the District Court has the authority to enter an order in that matter and this court will forward the motion to District Court along with this order as its report and recommendation. 28 U.S.C. § 157(d). For the reasons indicated below, this court is denying the motion for leave to appeal, recommending that the District Court deny the motion to withdraw the reference, and granting the motion of the plaintiffs to strike the defendant's jury demand.

FACTS

The court stated most of the facts underlying these motions in the order denying defendant's motion to dismiss this case. The facts will not be restated here and those stated in the order denying the motion to dismiss are incorporated by reference. The only "new" fact is that, in their Memorandum of support of their motion to strike defendant's jury demand, the Brannans clarified that it was their intent to pursue only any recovery due to them, or the potential class they seek to have certified, under § 105 of the Bankruptcy Code for "civil contempt. . . for sanctions for the defendant's abuse of the bankruptcy process." Plaintiffs' Memorandum in Opposition to Motion of Wells Fargo Home Mortgage to Withdraw Reference, p. 9-10.

LAW

As stated above, there are three motions to be dealt with in the order: (1) the Brannans' motion to strike Wells Fargo's jury demand; (2) Wells Fargo's motion to withdraw the reference; and (3) Wells Fargo's motion for leave to appeal the May 25, 2004 order of this court denying its motion to dismiss the case. The court will deal with the motions separately below.

1.

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The court has issued an order granting the plaintiff's motion to strike the defendant's jury demand in a very similar case. *Thigpen v. Matrix Financial Services Corporation (In re Thigpen)*, Case No. 02-14280-MAM-13, Adv. No. 04-01035, Order denying defendant's motion to reconsider, alter or amend and denying defendant's renewed motion to dismiss and granting plaintiff's motion to strike jury demand (Bankr. S.D.Ala., July , 2004). The court will not restate all of its findings and conclusions in this order. The Thigpen order is incorporated by reference and a copy is attached to this order.

2.

The motion for leave to appeal and the motion for withdrawal of the reference raise similar issues. The court will address the motions together. Both are due to be denied.

The Court entered an order in the Thigpen case denying a stay of discovery pending resolution of the question of withdrawal of the reference by the District Court in that case. Based upon the court's understanding of the causes of action that Ms. Thigpen wished to pursue in that case, the court indicated that the District Court might find the motion to withdraw the reference to be well taken. As stated in the Thigpen order attached, the plaintiff in Thigpen and the plaintiffs in this case state that the court misunderstood the breadth of the relief they were seeking. Based upon the debtors' statements in the memorandum accompanying their motion to strike jury demand, the Brannans only seek civil contempt relief under § 105. That being the case, the action is not one that requires a jury trial. Thigpen, Order granting motion to strike jury demand, pgs 4-6. Therefore, this court reports and recommends to the District Court that withdrawal of the reference is not warranted. The case can be tried without a jury in bankruptcy court and the District Court can hear the case if appealed.

The reasons that the reference should not be withdrawn are nearly the same as why the motion for leave to appeal should be denied. In ruling on motions for leave to appeal interlocutory bankruptcy orders pursuant to 28 U.S.C. § 158(a)(3), courts consider the standards used when circuit courts consider interlocutory appeals of district court cases. 28 U.S.C. § 1292(b). Judge Hand, in dealing with a similar motion in another class action case, used the same § 1292(b) standards. *Powe v. Chrysler Financial Corp. (In re Powe)*, 2000 WL 726902 *1 (S.D. Ala. 2000). A court should grant a motion seeking leave to appeal if (1) the order involves a controlling question of law; (2) there is a substantial ground for difference of opinion; and (3) an immediate appeal would materially advance the ultimate termination of the litigation. *In re Lykes Brothers S.S. Co., Inc.*, 200 B.R. 933, 938 (M.D. Fla. 1996); *Ichinose v. Homer National Bank (In re Ichinose)*, 946 F.2d 1169, 1177 (5th Cir. 1991).

Wells Fargo seeks to appeal this court's order denying Wells Fargo's motion to dismiss this case. The court denied the motion because the debtor stated a cause of action for negligent or reckless notarization and stated a cause of action for damages or sanctions for abuse of the bankruptcy process under 11 U.S.C. § 105. Wells Fargo has the burden of persuading this court and the District Court that leave to appeal should be granted. *Clark-Dietz and Associates v. Basic Constr. Co.*, 702 F.2d 67, 69 (5th Cir. 1983) (stating that "[s]ection 1292(b) appeals are exceptional").

As to the first standard, whether the order involves an issue of controlling law, the court concludes that Wells Fargo is correct. The issues that Wells Fargo intends to raise if an appeal is allowed are controlling ones in this case.

As to the second standard, whether there is substantial ground for disagreement, the court concludes that the standard is not met. Although Wells Fargo asserts that other courts have ruled differently as to some of the issues, this court does not believe that the basic issue is one that is even questionable. If Wells Fargo filed an improperly notarized document with this court in the Brannan case in order to obtain relief from this court, this court has the right to sanction the impropriety or award damages under § 105 of the Bankruptcy Code. Section 105 allows the court to “issue any order. . . necessary or appropriate to carry out the provisions of this title.” The court may also “tak[e] any action or mak[e] any determination necessary or appropriate to enforce or implement court orders. . . or to prevent an abuse of process.”

Wells Fargo states that there has been no case in which an affidavit with a separately executed signature page has been found actionable. It is true that the bankruptcy court found no case directly on all fours with the fact pattern in this case. The court did cite to numerous cases that found affidavits that had been improperly handled that resulted in damage awards or sanctions against the notary. The court also cited to cases in which improper actions of parties to lawsuits were sanctioned as contempt or abuse of process.

Wells Fargo argues that affidavits are not required by statute to be submitted as apart of a motion for relief from the stay. This is true. However, this court allows creditors who submit the evidence necessary to prove their case in chief to do so by affidavit, rather than having a witness appear to verify the facts. The convenience requires an affidavit. Therefore, to say that affidavits are not generally required is not the issue. When a party files an affidavit, the filer must comply with the rules for preparing, executing and notarizing an affidavit. Otherwise, the court would not allow the use.

Wells Fargo asserts that § 105 does not give the court authority to sanction parties or award damages for an abuse of process. The court will not reiterate what was already stated in the order denying the motion to dismiss and incorporates it by reference.

Finally, Wells Fargo asserts that this court does not have jurisdiction to hear and decide this nationwide class action case. If a creditor in a case in this court and hundreds or thousands of other cases throughout the country is knowingly submitting improper affidavits to courts, this case is appropriate for class action relief. This court has ruled it has jurisdiction to handle such cases. *Noletto v. Nationsbanc Mortgage Corp. (In re Noletto)*, 244 B.R. 845 (Bankr. S.D. Ala. 2000). Other courts have ruled similarly. *Bank United v. Manley*, 273 B.R. 229 (N.D. Ala. 2001).

As to the third standard, whether an immediate appeal would materially advance the ultimate termination of the litigation, the court concludes that the standard is not met. This case is already in the discovery stage of the case. A hearing on class certification will be held shortly. A trial on the merits of the issue will be able to be held as soon as the parties are able to proceed. The district and circuit court would be better served by waiting to hear the issues in this case when the trial is concluded. Efficiency and economy of effort will be served.

Judge Hand has previously considered four motions for leave to appeal in four other similar cases. Judge Hand, in considering some of the same issues raised in this case¹, denied the motions for leave to appeal. *Sheffield v. Homeside Lending (In re Sheffield)*, 2000 WL 726902 (S.D. Ala. 2000); *Powe v. Chrysler Financial Corp. (In re Powe)*, 2000 WL 726903 (S. D. Ala. 2000); *Noletto v. Nationsbanc Mortgage Corp. (In re Noletto)*, 2000 WL 726904 (S.D. Ala.

¹ This case, as the prior cases did, raises the issue of a bankruptcy court's jurisdiction to hear a nationwide class action case involving bankruptcy issues.

2000); *Neal v. Chase Manhattan Bank (In re Neal)*, Civil Action No. 03-0821-BH, Order dated December 9, 2003). Of the nine prior cases filed with this court with some similar issues, four are pending, four settled and one was tried and the final order was not appealed.² No withdrawal of the reference was necessary to achieve these results.

CONCLUSION

Wells Fargo moves the court to grant it leave to appeal the order denying its motion to dismiss the case. This court concludes that Wells Fargo's request does not meet the criteria of 28 U.S.C. § 1292(b). Therefore, the motion should be denied.

Wells Fargo also seeks to have the district court withdraw the reference of this case to the bankruptcy court. Since the Brannans seek to limit their adversary case solely to relief available under § 105 of the Bankruptcy Code, Wells Fargo has no right to a jury trial. This court concludes that it has jurisdiction to hear a nationwide class action involving these bankruptcy issues. Therefore, there is no need for the District Court to withdraw the reference and this court reports and recommends to the District Court that it deny the motion.

The Brannans seek to strike the jury trial demand of Wells Fargo. Since the action is one based solely on § 105 and Wells Fargo's alleged abuse of the bankruptcy process, there is no jury trial right and the motion should be granted.


IT IS ORDERED that :

1. The plaintiffs' motion to strike defendant's jury demand is GRANTED;
2. The defendant's motion for leave to appeal is DENIED; and

² This count is based upon the judge's own recollection and not an exact tally. The exact number may vary slightly from this count.

3. This order is to be considered as a report and recommendation to the District Court as to the defendant's motion to withdraw the reference and the court recommends that the motion be denied.

Dated: August 2, 2004


MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE