UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ESELL RAINEY and DEIDRENNE RAINEY, Plaintiff, v. FMF CAPITAL, LLC, et al., Defendants.	CIVIL ACTION NO. 1:11-CV-0364-CAP

ORDER

This matter came before the court for a bench trial on January 16, 2013. All parties were represented by counsel. After considering the evidence introduced at trial and the arguments of counsel, the court makes the following findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

I. Findings of Fact

1. On November 30, 2005, plaintiffs Esell and Deidrenne Rainey executed an Adjustable Rate Note in favor of FMF Capital LLC ("FMF Capital") in the amount of $168,150 to refinance the loan secured by the real property located at 2470 Sherrie Lane, SW, Conyers, Rockdale County, Georgia 30094 (the "Property").

2. To secure the indebtedness, the plaintiffs executed a security deed in favor of FMF Capital and its successors and assigns and in favor of MERS, as nominee for FMF Capital, and the successors and assigns of MERS (the "Security Deed").

3. The Security Deed states that "MERS is the grantee under this Security Instrument" and expressly grants the Property to MERS as nominee with power of sale.

4. On January 12, 2006, Homecomings started servicing the plaintiffs' loan.

5. On July 1, 2009, GMAC took over for Homecomings and started servicing the plaintiffs' loan.

6. The plaintiffs defaulted on the loan by failing to make payments when due.

7. GMAC offered a series of repayment plans and loan modifications to the plaintiffs, but the plaintiffs were unable to cure their default. The plaintiffs admit they could not afford to make the required loan payments or reinstate the loan after their default.

8. On July 30, 2010, as a result of the plaintiffs' default, the Property was referred to the law firm of McCurdy & Candler, LLC ("McCurdy & Candler") for foreclosure. At that time, the loan was past due for the June 1, 2009

payment. The last payment that the plaintiffs had made was on April 1, 2010, which was applied to the May 1, 2009 payment.

9. On August 6, 2010, McCurdy & Candler sent two letters to the plaintiffs at the Property address. In the letters, attorney Anthony DeMarlo stated that his firm "represent[ed] MERS and he was "Attorney for" MERS.

10. The first letter (the "Initial Communication Letter") was sent pursuant to the Fair Debt Collection Practices Act to notify the plaintiffs that McCurdy & Candler had been retained to collect on the debt, which was in default.

11. The second letter was a notice of foreclosure sale sent pursuant to O.C.G.A. § 44-14-162.2 (the "Notice of Sale Letter"). The Notice of Sale Letter stated that the plaintiffs' loan had been accelerated as a result of their default and that the Property was scheduled for a nonjudicial foreclosure sale to be held on September 7, 2010 at the Rockdale County courthouse.

12. The Notice of Sale Letter identified GMAC as the servicer and MERS as the creditor of the plaintiffs' loan, and provided GMAC's name, address, and telephone number as the entity with the full authority to negotiate, amend, and modify the terms of the plaintiffs' loan.

13. The Notice of Sale Letter was sent to the plaintiffs via first-class mail and via certified mail, return receipt requested. According to McCurdy &

Candler's records, the notice of foreclosure sale letter was delivered to the Property address.

14. Enclosed with the Notice of Sale Letter was a proposed advertisement to be published in the Rockdale Citizen, the legal organ for Rockdale County. The Notice of Sale Letter stated, "The enclosed 'Notice of Sale Under Power' is a copy of the advertisement sent to the Rockdale Citizen for publication."

15. Advertisements for sale of the Property ran in the Rockdale Citizen on August 12, 2010, August 19, 2010, August 26, 2010, and September 2, 2010.

16. The advertisements published on August 12 and August 19 (the "original advertisements") contained language identical to the proposed advertisement that was enclosed with the Notice of Sale Letter sent to the plaintiffs.

17. The original advertisements (and the proposed advertisement enclosed with the Notice of Sale Letter) stated that the Security Deed was executed by the plaintiffs to MERS. They did not directly mention FMF Capital as the original creditor.

18. The original advertisements also identified the plaintiffs as the grantors of the Security Deed, the book and page number of the Rockdale County records at which the Security Deed was recorded, the Property

address, the legal description of the Property, and the time, date, and place of the foreclosure sale.

19. The advertisements published on August 26 and September 2 (the "updated advertisements") stated that the Security Deed was executed by the plaintiffs "to [MERS] for FMF Capital, LLC, its successors and assigns[.]"

20. The updated advertisement, like the original advertisement, also identified the plaintiffs as the grantors of the Security Deed, the book and page number of the Rockdale County records at which the Security Deed was recorded, the Property address, the legal description of the Property, and the time, date, and place of the foreclosure sale.

21. The only difference between the (1) the original advertisements and the identical proposed advertisement on the one hand, and (2) the updated advertisements was the addition of the language, "for FMF Capital, LLC, its successors and assigns."[1]

22. The foreclosure sale occurred on September 7, 2010 at the Rockdale County courthouse.

---

[1] At trial, a representative from McCurdy & Candler testified that his firm had instructed the Rockdale Citizen to update the advertisement halfway through the four-week publication cycle in light of an instruction given to them by MERS and to comply with MERS's internal guidelines. In the conclusions of law below, the court does not rely on the testimony supposedly explaining the reason for the change.

23. The Property was sold to U.S. Bank for $117,750.

24. The plaintiffs had advance notice of the scheduled foreclosure sale.

25. The plaintiffs did not appear or bid at the sale, and no one appeared or bid on their behalf.

26. The plaintiffs have no evidence that the foreclosure sale bid in the amount of $117,750 was not the fair market value of the property.

27. The plaintiffs have no evidence that the advertisements chilled the bid price at the foreclosure sale.

28. The foreclosure deed was recorded in the Rockdale County records on November 30, 2010.

29. As of January 13, 2013, the plaintiffs still resided in the Property. The loan remains past due for June 1, 2009, and the plaintiffs have neither offered nor paid any part of the amounts past due.

30. GMAC continues to service the loan on behalf of U.S. Bank and is therefore responsible for paying the taxes and insurance on the Property. As of the date of trial, GMAC had paid more than $10,000 for taxes and insurance on the Property due to the plaintiffs' default and the foreclosure.

31. As of the date of trial, the unpaid principal balance on the loan was more than $168,000, and more than $32,000 had accrued in past-due interest payments. The total loan payoff, which includes negative escrow of more than

$10,000 as well as various late charges and fees, was approximately $216,000.

II. Conclusions of Law

The plaintiffs contend the foreclosure notice was defective under Georgia's nonjudicial foreclosure statutes. Where a foreclosure fails to comply with the statutory duty to provide notice of sale to the debtor in accordance with O.C.G.A. § 44-14-162 et seq., the debtor may seek to set aside the foreclosure. *Roylston v. Bank of Am., N.A.*, 660 S.E.2d 412, 417 (Ga. Ct. App. 2008) (citing *Calhoun First Nat'l Bank v. Dickens*, 443 S.E.2d 837, 838 (Ga. 1994)). The main notice provision provides:

> No sale of real estate under powers contained in mortgages, deeds, or other lien contracts shall be valid unless the sale shall be advertised and conducted at the time and place and in the usual manner of the sheriff's sales in the county in which such real estate or a part thereof is located and unless notice of the sale shall have been given as required by Code Section 44-14-162.2.

O.C.G.A. § 44-14-162(a). Section 162.2 then describes the procedure for and contents of the notice and provides in pertinent part:

> (a) . . . Such notice shall be in writing, shall include the name, address, and telephone number of the individual or entity who shall have full authority to negotiate, amend, and modify all terms of the mortgage with the debtor, and shall be sent by registered or certified mail or statutory overnight delivery, return receipt requested, to the property address or to such other

> address as the debtor may designate by written notice to the secured creditor. . . .
> (b) The notice required by subsection (a) of this Code section shall be given by mailing or delivering to the debtor a copy of the notice of sale to be submitted to the publisher [of the advertisement].

O.C.G.A. § 44-14-162.2.

First, the plaintiffs argue the notice was defective under § 162.2(a) because it failed provide the "true identity of the secured creditor."[2] The Georgia Supreme Court recently clarified the meaning of the requirement that the notice identify the party with "full authority to negotiate, amend, and modify" the mortgage:

> If that individual or entity is the holder of the security deed, then the deed holder must be identified in the notice; if that individual or entity is the note holder, then the note holder must be identified. If that individual or entity is someone other than the deed holder or the note holder, such as an attorney or servicing agent, then that person or entity must be identified. The statute requires no more and no less.

You v. JP Morgan Chase Bank, No. S13Q0040, 2013 WL 2152562, at *6, 2013 Ga. LEXIS 454, at *16–17 (Ga. May 20, 2013), *available at* http://www.gasupreme.us/sc-op/pdf/s13q0040.pdf. Here, the loan servicer, GMAC, was identified in the notice letter as the entity with authority to

[2] The plaintiffs presented this theory for the first time at trial and in their proposed conclusions of law. *See* Pl.'s Proposed Findings of Fact and Conclusions of Law 4–6 [Doc. No. 43] (citing *Stubbs v. Bank of Am.*, 844 F. Supp. 2d 1267 (N.D. Ga. 2012)).

negotiate, amend, or modify the terms of the mortgage. Thus, the notice letter complied with O.C.G.A. § 44-14-162.2(a) in that respect.

Second, the plaintiffs contend the notice failed to include a "copy" of the advertisement sent to the newspaper publisher as required by § 162.2(b). As discussed in the findings of fact, the first two newspaper advertisements were identical to the proposed advertisement enclosed with the notice letter sent to the plaintiffs. Thus, the plaintiff received a "copy" of the notice of sale submitted to the publisher, which then ran in the newspaper for the first two of the four weeks that are required by law.

The only question then is whether the subsequent and subtle change to the two notices that appeared in the newspaper in the third and fourth week still constituted a "copy" of the original proposed advertisement, or whether a revised "copy" was required to be sent to the plaintiffs. The court concludes the answer to both questions is "no." The addition of the language stating that the security deed was executed by the plaintiffs to MERS "for FMF Capital, LLC, its successors and assigns" had no bearing on the plaintiffs' notice of the impending foreclosure sale. Thus, the notice was not defective, and the foreclosure sale should not be set aside.

III. Conclusion

For the foregoing reasons, the court concludes that the foreclosure should not be set aside. The clerk is DIRECTED to enter judgment in favor of the defendants.

SO ORDERED this 6th day of June, 2013.

/s/Charles A. Pannell, Jr.
CHARLES A. PANNELL, JR.
United States District Judge