IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20560

United States Court of Appeals
Fifth Circuit
FILED
March 6, 2018
Lyle W. Cayce
Clerk

D. PATRICK SMITHERMAN,

Plaintiff-Appellant,

v.

BAYVIEW LOAN SERVICING, LLC,

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:16-CV-1927

Before STEWART, Chief Judge, and HAYNES and WILLETT, Circuit Judges.
PER CURIAM:*

D. Patrick Smitherman ("Smitherman"), proceeding pro se, appeals the district court's dismissal of his lawsuit relating to the foreclosure of his property in Houston, Texas. The district court dismissed Smitherman's complaint that included Texas state law quiet title and wrongful foreclosure claims, and requests for declaratory and injunctive relief. This is the fourth lawsuit filed by Smitherman that relates to his mortgage dispute with

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appellee, Bayview, LLC ("Bayview"), or its predecessor in interest, Bank of America, N.A. ("Bank of America"). For the following reasons, we AFFIRM.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

In 2005, Smitherman obtained a mortgage loan to purchase a property in Houston, Texas.[1] The note on the mortgage and deed of trust to secure the mortgage were also executed in 2005. In 2011, Smitherman defaulted on the loan causing Bank of America, the note holder on the mortgage at that time, to initiate foreclosure proceedings by sending Smitherman a notice of default and its intent to accelerate the maturity date on the mortgage.

When Bank of America initiated foreclosure proceedings in August 2011, Smitherman sued Bank of America in Texas state court to prevent the foreclosure. Smitherman's claims relating to this first suit were dismissed by the district court, and the dismissal was later affirmed on appeal. Smitherman again sued Bank of America in state court in July 2014 to prevent its second attempt at foreclosing on the property. Smitherman nonsuited this second suit in May 2016 after he brought a third suit against Bayview, who had then been assigned Bank of America's loan servicing rights and its interest relating to the property. After Bayview removed the third suit to federal court based on diversity jurisdiction, the district court dismissed Smitherman's claims based on res judicata, and Smitherman's failure to state a claim for relief.[2]

In June 2016, Smitherman filed his fourth lawsuit in state court relating to this mortgage dispute to prevent a fourth foreclosure attempt. This fourth lawsuit filed by Smitherman is the subject of this appeal. Smitherman's

[1] We take the allegations in Smitherman's amended complaint as true. *See Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC,* 594 F.3d 383, 387 (5th Cir. 2010).

[2] After the district court entered judgment for this case and Smitherman appealed, this court remanded this suit because diversity jurisdiction had not been established. *See Smitherman v. Bayview Loan Servicing, L.L.C.*, 675 F. App'x 428, 429 (5th Cir. 2017) (per curiam) (unpublished). The district court then remanded this suit back to state court.

original petition in state court alleged claims under the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601, *et seq.*, state law claims for quiet title and wrongful foreclosure, and sought declaratory and injunctive relief. Bayview subsequently removed this suit to federal court based on both federal question and diversity jurisdiction.

After Bayview filed a motion to dismiss, Smitherman filed an amended complaint and a motion to remand the action to state court. The amended complaint omitted the federal RESPA claims but retained the wrongful foreclosure and quiet title state law claims, as well as the requests for injunctive and declaratory relief. Bayview responded to Smitherman's amended complaint with a second motion to dismiss, which incorporated a motion to expunge two lis pendens notices that Smitherman filed against the mortgaged property, and a response to Smitherman's motion to remand the case back to state court. Smitherman subsequently filed a response to Bayview's second motion to dismiss.

The district court conducted a hearing where it heard arguments on the outstanding motions. After the hearing, the district court entered written orders denying Smitherman's motion to remand, dismissing Smitherman's claims based on res judicata, and because of Smitherman's failure to state a claim upon which relief could be granted. The district court additionally granted Bayview's motion to expunge lis pendens notices Smitherman filed and Bayview's request for an injunction prohibiting Smitherman from interfering with the upcoming foreclosure sale scheduled to take place on August 2, 2016. Smitherman resided at the property the entire time during the foregoing events.[3] Smitherman timely appealed.

[3] After the district court entered judgment, Bayview foreclosed and sold the property to a third party at a non-judicial foreclosure sale.

II. DISCUSSION

Smitherman asserted two state law claims of wrongful foreclosure and quiet title in his amended complaint that were dismissed by the district court due to Smitherman's failure to state a claim upon which relief could be granted under Federal Rule of Civil Procedure 12(b)(6).[4] *See* Fed. R. Civ. P. 12(b)(6).

a. Standard of Review

We review de novo a district court's dismissal for failure to state a claim under Rule 12(b)(6). *Ruiz v. Brennan*, 851 F.3d 464, 468 (5th Cir. 2017) (citing *Taylor v. City of Shreveport*, 798 F.3d 276, 279 (5th Cir. 2015)). We may affirm a district court's Rule 12(b)(6) dismissal on any grounds raised below and supported by the record. *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007). To avoid dismissal under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (quotation marks omitted)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "[R]egardless of whether the plaintiff is proceeding pro se or is represented by counsel, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Taylor v. Books-A-Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002) (quotation marks omitted).

b. Wrongful Foreclosure Claim

Smitherman's wrongful foreclosure claim was properly dismissed. Ordinarily, Texas law recognizes three elements for a wrongful foreclosure

[4] Because this court holds that the district court properly dismissed Smitherman's claims based on Smitherman's failure to state a claim for relief, this court will not address the possible res judicata issues presented by this case.

claim: (1) "a defect in the foreclosure sale proceedings;" (2) "a grossly inadequate selling price;" and (3) "a causal connection between the defect and the grossly inadequate selling price." *Sauceda v. GMAC Mortg. Corp.*, 268 S.W.3d 135, 139 (Tex. App.—Corpus Christi 2008, no pet.). "A claim of wrongful foreclosure cannot succeed . . . when no foreclosure has occurred." *Foster v. Deutsche Nat'l Trust Co.*, 848 F.3d 403, 406 (5th Cir. 2017) (per curiam). Additionally, "a party cannot state a viable claim for wrongful foreclosure if the party never lost possession of the Property." *See id.* (quoting *James v. Wells Fargo Bank, N.A.*, 533 F. App'x 444, 446 (5th Cir. 2013) (per curiam) (unpublished) (quotation marks omitted)); *see also Filgueira v. U.S. Bank Nat'l Ass'n*, 734 F.3d 420, 423 (5th Cir. 2013) (per curiam).

It is undisputed that no foreclosure sale had taken place and Smitherman still resided at the property when the district court entered judgment denying his claim of wrongful foreclosure. Smitherman even represented on appeal that he still resides at the property. Because the foreclosure sale had not occurred and Smitherman never lost possession of the property, Smitherman's wrongful foreclosure claim was premature and properly dismissed. *See Foster*, 848 F.3d at 406–07 ("Texas does not recognize an action for attempted wrongful foreclosure.").

c. Request to Quiet Title

Smitherman's claim to quiet title was also properly dismissed. Smitherman sought to avoid a threatened foreclosure sale on his home by contending that a transfer of interest between Bayview and the third party purchaser at the foreclosure sale was invalid due to an improper assignment of the deed of trust on the property. Smitherman specifically alleged that Bank of America's assignment of the note and deed of trust was invalid because (1) it was not signed by Bank of America, (2) Bayview signed as "attorney in fact"

for Bank of America without showing that it possessed a valid power of attorney, and (3) Bank of America did not have authority to assign the note and deed of trust to Bayview because the note and deed of trust were owned by the Federal Home Loan Mortgage Corporation.

A suit to quiet title is a request to invoke the court's powers of equity in removing a "cloud" on the plaintiff's title to the property. *Ellis v. Waldrop*, 656 S.W.2d 902, 905 (Tex. 1983). To quiet title in his favor, a plaintiff "must allege right, title, or ownership in himself . . . with sufficient certainty to enable the court to see he . . . has a right of ownership that will warrant judicial interference." *Turner v. AmericaHomeKey Inc.*, 514 F. App'x 513, 516 (5th Cir. 2013) (per curiam) (unpublished) (citing *Wright v. Matthews*, 26 S.W.3d 575, 578 (Tex. App.—Beaumont 2000, pet. denied)). Importantly, the plaintiff in a quiet title action must recover on the strength of his title, not on the alleged weakness of the defendant's title. *Fricks v. Hancock*, 45 S.W.3d 322, 327 (Tex. App.—Corpus Christi 2001, no pet.).

Notably, Smitherman seeks to support his claim to quiet title with a series of conclusory assertions that he is the alleged rightful owner of the property, and primarily focuses his argument on alleged weaknesses in Bayview's title. Smitherman's approach is insufficient to amount to a viable claim to quiet title. *See id.* Smitherman acknowledges in his amended complaint that the note and deed of trust on the mortgage were validly executed, and that he has not made a mortgage payment since 2011. These concessions alone show that he has no sound title to the property. *See Smallwood v. Bank of Am. Nat'l Ass'n*, 670 F. App'x 333, 334 (5th Cir. 2016) (per curiam) (unpublished). Smitherman "must allege right, title, or ownership in himself . . . with sufficient certainty to enable the court to see he . . . has a right of ownership that will warrant judicial interference." *See Turner*, 514 F.

App'x at 516 (quotation marks omitted). The amended complaint "contained no assertions regarding the strength of [his] own title" but rather only discussed the weaknesses of Bayview's interest in the property. *See id.*; *see also Morlock, L.L.C. v. JP Morgan Chase Bank, N.A.*, 586 F. App'x 631, 633 (5th Cir. 2013) (per curiam) (unpublished) ("[T]he plaintiff has the burden of supplying the proof necessary to establish *superior equity and right to relief*.") (emphasis in original).

Moreover, in *Reinagel v. Deutsche Bank National Trust Co.*, this court held that the plaintiffs' challenge to the validity of the assignment failed because they did not plead facts to support allegations that an unauthorized individual executed an assignment as an "authorized agent" and an "attorney in fact" for a corporation. *See* 735 F.3d 220, 226 (5th Cir. 2013). This court additionally held that the plaintiffs could not challenge an assignment for being void that was alleged to be fraudulently executed on behalf of a corporation. *Id.* The alleged unauthorized assignment was deemed to be "not void, but merely voidable" at the election of the defrauded principal. *Id.*

Similar to the plaintiffs in *Reinagel*, Smitherman failed to plead facts that proved that the individual who executed the assignment on behalf of Bayview as an "attorney in fact" lacked authority to execute the assignment. *See id.* Even if it was accepted as true that Bayview fraudulently misrepresented the scope of its authority, Smitherman cannot challenge the assignment as void. *See id.*

In sum, the district court was correct to dismiss Smitherman's claim to quiet title.

d. Injunctive and Declaratory Relief

The issues relating to the injunctive relief in this appeal are moot because Bayview has already foreclosed upon the home and sold the property

to a third party. *See Pollett v. Aurora Loan Servs.*, 455 F. App'x 413, 415 (5th Cir. 2011) (per curiam) (unpublished) (citing *Marilyn T., Inc. v. Evans*, 803 F.2d 1383, 1384–85 (5th Cir. 1986)). Smitherman's argument that the district court erred in issuing the injunction prohibiting him from interfering with Bayview's foreclosure sale is also rendered moot because the foreclosure sale has taken place. "Ordinarily, an appeal will be moot when the property underlying the dispute has been sold at a foreclosure sale because this court cannot fashion adequate relief, i.e., cannot reverse the transaction." *Dick v. Colorado Hous. Enters., L.L.C.*, 872 F.3d 709, 711 (5th Cir. 2017) (per curiam) (quoting *Christopher Village, Ltd. P'ship v. Retsinas,* 190 F.3d 310, 314 (5th Cir. 1999)). "No order of this court could affect the parties' rights with respect to the injunction[s] we are called upon to review." *NCNB Tex. Nat'l Bank v. Southwold Assoc.*, 909 F.2d 128, 129 (5th Cir. 1990). Accordingly, we dismiss all issues relating to injunctive relief as moot.

Smitherman additionally sought over ten declarations relating to Bayview's foreclosure on the property. Because Smitherman's wrongful foreclosure and quiet title claims fail, he is not entitled to declaratory relief. Although Smitherman's amended complaint stated two independent causes of action along with his requests for declaratory judgments, "the latter ground is merely a theory of recovery for the former." *See Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., Ltd.*, 99 F.3d 746, 752 n.3 (5th Cir. 1996) (citing the Texas Uniform Declaratory Judgments Act). The Declaratory Judgment Act, which authorizes a federal court to "declare the rights and other legal relations of any interested party seeking such declaration," is merely a procedural device and does not create any substantive rights or causes of action. *See* 28 U.S.C. § 2201(a); *Harris Cty., Tex. v. MERSCORP Inc.*, 791 F.3d 545, 552 (5th Cir. 2015); *Okpalobi v. Foster*, 244 F.3d 405, 423 n.31 (5th Cir.

2001) (en banc) ("[A]lthough the Declaratory Judgment Act provides a remedy different from an injunction—it does not provide an additional cause of action with respect to the underlying claim."). Accordingly, because Smitherman asserted no viable cause of action against Bayview, the district court properly dismissed his requests for declaratory relief. *See Harris Cty.*, 791 F.3d at 552; *see also Smallwood*, 670 F. App'x at 334 (affirming for reasons given by the magistrate judge, which included that the plaintiffs' requests for declaratory relief should be dismissed because of there not being any relief under the Declaratory Judgment Act).

e. Motion to Remand

Smitherman additionally argues that the district court erred in failing to grant his motion to remand. In addition to asserting there is no diversity jurisdiction, Smitherman contends there is no basis for federal question jurisdiction because he dropped his federal RESPA claims in his amended complaint after the suit's removal to federal court. Smitherman's arguments as to the lack of subject matter jurisdiction are unavailing.

We review the denial of a motion to remand to state court de novo. *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1336 (5th Cir. 1995). "Jurisdictional facts are determined at the time of removal, and consequently post-removal events do not affect that properly established jurisdiction." *Spear Mktg., Inc. v. BancorpSouth Bank*, 791 F.3d 586, 592 (5th Cir. 2015) (alterations and quotation marks omitted). "It is this court's established precedent that once a case is properly removed, the district court retains jurisdiction *even if* the federal claims are later dropped or dismissed." *Id.* (emphasis in original). Because this lawsuit was properly removed to federal court based on federal question jurisdiction being established from Smitherman's RESPA claims,

Smitherman's subsequent deletion of his RESPA claims in his amended complaint was immaterial.

In light of the foregoing, the judgment of the district court is AFFIRMED. All pending motions are denied.