IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

JOE O. RODRIGUEZ, JR.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO. 2:13-cv-133**
	§	
COUNTRYWIDE HOME LOANS SERVICING, LP. OR BANK OF AMERICA, N.A., AS SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICNG, LP., RECONTRUST COMPANY, N.A.	§	
	§	
Defendants.	§	

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT

Defendants Bank of America N.A., as successor by merger to BAC Home Loan Servicing, LP fka Countrywide Home Loans Servicing, LP incorrectly named as Countrywide Home Loans Servicing, LP ("Bank of America") and ReconTrust Company, N.A. ("ReconTrust") file this Response to Plaintiff Joe O. Rodriguez, Jr.'s ("Plaintiff") Motion for Relief from Judgment (the "Motion" or "Motion for Relief")[1] and respectfully state:

I. INTRODUCTION

1. Plaintiff's untimely Motion for Relief is based entirely on an unfiled assignment of a deed of trust which Plaintiff lacks standing to challenge. Plaintiff's arguments regarding Defendants' counsel's alleged failure to comply with the United States District Court for the Southern District of Texas' Rules of Discipline and the Texas Disciplinary Rules of Professional Conduct are derivative of his legally unfounded assignment argument.

[1] Plaintiff filed two identical Motions for Relief from Judgment at Docket Nos. 57 and 59. Defendant respectfully requests the Court construe this Response as a Response to both pending motions.

2. Because Plaintiff's Motion is untimely and because his position on the effect of the unfiled assignment is unsupported by the law Plaintiff's Motion for Relief must be denied.

II. ARGUMENT AND AUTHORITY

A. Plaintiff's Motion Relief from Judgment Under Rule 60(b) is Untimely.

3. Rule 60(b) allows a party to seek relief from a final judgment, order or proceeding by asking the court to set aside the judgment, order, or proceeding and reopen the case.[2] This exception to the finality of a judgment is permitted in certain specific circumstances such as newly discovered evidence, fraud, or mistake.[3]

4. Plaintiff claims he is entitled to relief under subsections (2), (3), (4) and (6) of Rule 60(b) and (3) of Rule 60(d).[4] These subsections allow courts to grant relief in the following circumstances: "(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; ... [and] (6) any other reason that justifies relief."[5] Subsection (3) of Rule 60(d) provides that Rule 60 "does not limit a court's power to: … (3) set aside a judgment for fraud on the court."[6]

5. Rule 60(b) motions must be made within a "reasonable time," and a Rule 60(b) relating, specifically, to subsections (1) through (3) must be made within a "reasonable time" and "no more than a year after the entry of the judgment or order or the date of the proceeding.[7]

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[2] *United Student Aid Funds, Inc. v. Espinosa*, _U.S._, 130 S.Ct. 1367, 1376-77 (2010).

[3] *Id.*

[4] *See* Plaintiff's Motion, p. 3 at ¶8 note 5 and ¶9.

[5] Fed.R.Civ.P. 60(b).

[6] Fed.R.Civ.P. 60(d)(3). To the extent that the Court declines to find that a Rule 60(d)(3) claim can be time-barred, it is inapplicable in this matter because no fraud on the Court was perpetrated by Defendants, as set out in the latter sections of this Response.

[7] Fed.R.Civ.P. 60(c)(1).

6. The order of this Court granting Defendant's motion for summary judgment was entered on January 28, 2014 (Doc. No. 45) and Plaintiff's Motion for Relief[8] was filed on November 3, 2015, far more than the one year deadline permitted by Rule 60(c).[9] Even assuming Plaintiff's allegations regarding the concealment of the assignment (and its effect) were true, he cannot obtain relief under subsections (2) or (3) of Rule 60(b) because the one year deadline is an absolute even when delay by the movant was reasonable.[10] Plaintiff's request for relief under subsections (4) and (6) are also untimely because a claim under those subsections "must be made within a reasonable time…"[11]

7. "What constitutes 'reasonable time' depends upon the facts of each case, taking into consideration the interest in finality, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and [the consideration of] prejudice [if any] to other parties."[12]

8. Plaintiff asserts that he discovered the existence of the assignment on March 5, 2015 when counsel for Defendant Bank of America (not the undersigned), provided him with a copy in response to a Consumer Financial Protection Bureau ("CFPB") complaint.[13] Again assuming Plaintiff's assertion of the date he discovered the existence of the assignment is correct, he waited nearly eight months before bringing his Motion for Relief. Plaintiff has

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[8] Plaintiff's Motion for Relief filed at Docket No. 59 was filed on November 3, 2015 and the Motion for Relief filed at Docket No. 57 was filed on November 4, 2015, under either filing date Plaintiff cannot obtain relief.

[9] *See Kagan v. Caterpillar Tractor Co.,* 795 F.2d 601, 610 (7th Cir.1986) (quoting Wright & Miller, Federal Practice and Procedure, Civil § 2866, p. 232). (" '[T]he one-year period [enunciated in Rule 60(c)] represents an extreme limit, and the motion will be rejected as untimely if not made within a "reasonable time," even though the one-year period has not expired.' ").

[10] *See* Fed.R.Civ.P. 60(c)(1); see also *Kagan,* 795 F.2d at 610 (Holding that the one-year deadline for motions filed under Rule 60(b)(2) is an "extreme limit," after which, *no matter how reasonable the delay*, relief cannot be obtained.) (emphasis added).

[11] *Id.*

[12] *Kagan,* 795 F.2d at 610.

[13] *See* Plaintiff's Motion, p. 9, ¶36; *see also* Rodriguez Affidavit (Doc. No. 57-1), pgs. 5-8, 23-24.

provided no reason for this delay and other courts have found that a delay of significantly less time—as little as four months—was unreasonable.[14]

9. Therefore, Plaintiff's Motion must be denied because even if his argument regarding the newly discovered assignment had merit (it does not), he waited an unreasonable time to bring his motion and Defendants are entitled to rely upon the finality of the prior judgment.[15]

B. Plaintiff Lacks Standing to Challenge Either Assignment of the Deed of Trust.

10. Plaintiff is clearly under the misapprehension that the existence of an unfiled assignment executed on October 21, 1998 (the "1998 Assignment") in which Countrywide Home Loans, Inc. ("CHL") purports to assign the deed of trust to Plaintiff's property at 1211 Washington Street, Alice, Texas 78332 (the "Property") to the Government National Mortgage Association ("GNMA") means that the May 1, 2012 assignment (the "2012 Assignment") is somehow fraudulent or invalid. Though this is not the case, as an initial threshold matter, Plaintiff lacks standing to challenge either assignment at all.

11. The Fifth Circuit clarified in *Reinagel v. Deutsche Bank National Trust Co.* that in circumstances such as these, a plaintiff lacks standing the challenge the assignment of a deed of trust.[16] In *Reinagel*, the Fifth Circuit recognized that "[Texas] law is settled that the obligors of a claim . . . may not defend [against an assignee's effort to enforce the obligation] on any ground which renders the assignment voidable only."[17] The Fifth Circuit further held that "under Texas

[14] *Limon v. Double Eagle Marine, L.L.C.*, 771 F. Supp. 2d 672, 678 (S.D. Tex. 2011) ("The delay between the discovery of the new information and Plaintiffs' filing of the Rule 60(b) motion was almost four months. This delay was unreasonable.").

[15] *Id*. at 677.

[16] *Reinagel v. Deutsche Bank Nat'l Trust Co.*, 735 F.3d 220, 226-27 (5th Cir. 2013, reh'g. denied).

[17] *Id.* at 226 (internal citations omitted).

law, facially valid assignments cannot be challenged for want of authority except by the defrauded assignor."[18]

12. The 1998 Assignment is, at best, *some* evidence that the deed of trust to the Property was transferred to GNMA in 1998 however that fact, without more, is insufficient to prove that either of the two assignments is void—and therefore subject to challenge by Plaintiff.

13. The date of preparation or recording of an assignment is not dispositive of the date of the transfer of ownership of a given loan—nor is it dispositive on a mortgagee's or mortgage servicer's ability to foreclose.[19]

14. Plaintiff has not demonstrated that the 1998 Assignment was actually delivered or acted upon, nor has he provided any additional evidence or details on why its existence necessitates a finding that the 2012 Assignment is fraudulent. It is possible that the mortgage loan was conveyed to GNMA in 1998 and that it was re-conveyed to CHL prior to the 2012 Assignment from CHL to Bank of America. It is possible that seven other unidentified entities owned the loan or were assigned the mortgage prior to the 2012 Assignment, but there is no evidence or even allegation by Plaintiff that this was the case.[20]

15. Plaintiff's allegations that the existence of the 1998 Assignment makes the 2012 Assignment fraudulent are conclusory, and in any event, Plaintiff lacks standing to challenge the

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[18] *Id.* at 228; *see also Epstein v. US Bank Nat'l Ass'n*, --- F. App'x ----, 2013 WL 5340766, at *3 (5th Cir. Sept. 25, 2013) ("only MERS has standing to challenge the authority of its purported officer to make an assignment from it to" a servicer).

[19] *Bittinger v. Wells Fargo Bank NA*, 744 F. Supp. 2d 619, 625 (S.D. Tex. 2010) citing *JWD, Inc. v. Fed. Ins. Co.*, 806 S.W.2d 327, 329–30 (Tex.App.-Austin 1991, no writ) ("Under Texas law, there is no requirement that the deed of trust assignment be recorded. And under Texas law, the ability to foreclose on a deed of trust is transferred when the note is transferred, not when an assignment of deed of trust is either prepared or recorded.").

[20] Plaintiff also fails to assert that GNMA, or any other entity for that matter, has pursued him for the debt associated with the Property or that anyone other than Defendants have attempted to, or actually did, foreclose on the Property. *Kramer v. Fed. Nat. Mortgage Ass'n*, No. A-12-CA-276-SS, 2012 WL 3027990, at *5 (W.D. Tex. May 15, 2012) ("The Court thus concludes that, if an error was indeed committed, and the wrong entity received the foreclosure sale proceeds, that is a matter properly resolved between the various parties who have a legitimate claim to the property; and that Kramer, whose legal interest in the property was forfeited when he defaulted on his loan obligations and failed to make timely cure, cannot challenge those transactions here.").

validity of the assignments because he has not provided evidence or even alleged a basis for finding either assignment is void. Accordingly, because the 1998 Assignment argument is the only substantive argument raised by Plaintiff's Motion for Relief, the motion must be dismissed in its entirety.

C. Plaintiff's Allegations Regarding Defendants' Counsel.

16. The latter half of Plaintiff's Motion is a recitation of numerous portions of the United States District Court for the Southern District of Texas' Rules of Discipline and the Texas Disciplinary Rules of Professional Conduct and conclusory assertions that Defendants' counsel violated those rules.[21] Plaintiff's claim that the undersigned counsel committed misconduct relies solely on the allegation that counsel intentionally withheld a copy of the 1998 Assignment during discovery.[22]

17. However Plaintiff never properly propounded a request for production on Defendants during the pendency of the litigation.[23] And, as this Court previously recognized, Defendants are under no duty to provide any discovery responses to Plaintiff in the event Plaintiff fails to first make the proper requests.[24]

18. Plaintiff makes serious allegations against Defendants' counsel, however those allegations are completely without merit. It was Plaintiff's failure to properly utilize the procedures available to him during the discovery period that prevented him from raising his concerns about the existence of the 1998 Assignment, not the actions or omissions of Defendants

[21] *See* Plaintiff's Motion, pgs. 15-20.

[22] *Id.* at ¶¶69, 71.

[23] *See* Court's January 2, 2014 Order (Doc. No. 40) ("Each of these requests for relief is predicated on the false premise that Defendants are required to produce discovery responses without necessity of Plaintiff propounding discovery requests. With the exception of initial disclosures prescribed by Fed. R. Civ. P. 26, no such action is required of Defendants by virtue of the Order for Conference and Disclosure of Interested Parties (D.E. 4). Plaintiff has failed to allege that he propounded discovery, that responses were inadequate, or that an order of this Court compelling responses has been disobeyed.").

[24] *Id.*

or Defendants' counsel.

III. CONCLUSION

19. Plaintiff's failure to properly prosecute his lawsuit cost him the ability to make the argument that he belatedly makes now. Likewise, Plaintiff has engaged in an entirely unreasonable delay in filing this Motion for Relief, meaning that he is now time-barred from the relief he seeks. And even had Plaintiff previously obtained the assignment at issue it would not have prevented the entry of the order granting summary judgment because Plaintiff lacks standing to challenge facially valid assignments.[25]

Accordingly, for the reasons set forth herein, Defendants Bank of America N.A., as successor by merger to BAC Home Loan Servicing, LP fka Countrywide Home Loans Servicing, LP incorrectly named as Countrywide Home Loans Servicing, LP and ReconTrust Company, N.A. requests that Plaintiffs' Motion for Relief be denied, and for such other relief as they may be entitled.

Respectfully submitted,

By: */s/ Matt D. Manning*

JEFFREY R. SEEWALD
State Bar No. 17986640
MATT D. MANNING
State Bar No. 24070210
McGlinchey Stafford, PLLC
1001 McKinney, Suite 1500
Houston, TX 77002
(713) 520-1900
(713) 520-1025 (Fax)
jseewald@mcglinchey.com
mmanning@mcglinchey.com

ATTORNEYS FOR DEFENDANTS

[25] *Reinagel*, 735 F.3d at 226-27.

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of November, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system and a true and correct copy of the foregoing has been served via Certified Mail Return Receipt Requested to the *pro se* Plaintiff as follows:

CMRRR#71969008911195649885
Joe O. Rodriguez, Jr.
13730 F.M. 620 N., Apt. #810
Austin, Texas 78717

/s/ Matt D. Manning
Matt D. Manning

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ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT

On this day the Court considered Plaintiff Joe O. Rodriguez, Jr.'s ("Plaintiff") Motion for Relief from Judgment and Defendants Bank of America N.A., as successor by merger to BAC Home Loan Servicing, LP fka Countrywide Home Loans Servicing, LP incorrectly named as Countrywide Home Loans Servicing, LP ("Bank of America") and ReconTrust Company, N.A. ("ReconTrust") Response to the Motion for Relief from Judgment. After considering the Motion for Relief from Judgment, the Response, the evidence presented, and the arguments of counsel, the Court is of the opinion that the Motion for Relief from Judgment is without merit and should be **DENIED**. It is, therefore,

ORDERED that Plaintiff's Motion for Relief from Judgment should be and hereby is **DENIED**.

Signed this ____ day of _____, 2015.

_____
UNITED STATES DISTRICT JUDGE

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