

DMS/785228

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE DIVISION**

THEODORA BRYANT, MARY L. WALKER,  
EARNEST JACK WELCH and BARBARA JEAN  
SLOCUM, individually and on behalf of all others  
similarly situated,

Plaintiffs,

CASE NO. 4:99CV317-RH

vs.

LAW OFFICES OF DAVID J STERN, P.A.,  
and DAVID J. STERN, individually

Defendants.

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**STERN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Defendants, LAW OFFICES OF DAVID J. STERN, P.A. and DAVID J. STERN, individually ("Stern"), by and through their undersigned attorneys and pursuant to Federal Rule of Civil Procedure 56(b) and Local Rule 7.1 and 56.1, respectfully request that this court enter judgment in their favor and against the plaintiffs, and in support, state as follows:

1. Plaintiffs' Second Amended Complaint attempts to allege claims against the Stern Defendants based on the Florida Consumer Collection Practices Act, §559.77(1997) (hereinafter the "State Act"), and the Federal Fair Debt Collection Practices Act, 15 U.S.C. §1692a et seq. (hereinafter the "FDCPA").

2. Each plaintiff was a defendant in a mortgage foreclosure action filed in the state court. There were final judgments entered in the Walker and Welch foreclosure actions, Bryant and

U.S. DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA  
TALLAHASSEE  
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Slocum negotiated settlements of their foreclosure cases. Upon conclusion of those actions, Plaintiffs filed these consumer act claims challenging certain of the fees and costs that the lenders charged them in the foreclosure actions. Specifically, Bryant challenges the \$400 Stern sought to collect for the title abstracting services even though she negotiated and agreed to pay a lesser sum. (2d Amd. Cplt., ¶ 16). Walker also challenges the \$400 title abstracting costs that were made part of his judgment (2d Amd. Cplt., ¶ 22). Welch challenges the \$75 title update, \$60 postage/copies/faxes, and \$1,000 attorney fees charges even though a judgment for costs and fees was entered against him (2d Amd. Cplt., ¶ 27). Slocum challenges the \$400 title abstracting charges, the \$60 postage/copies/faxes charges and \$1,350 in attorney fees she agreed to pay (2d Amd. Cplt., ¶ 32).

3. Count I is the State Act claim and is brought on behalf of each Plaintiff and a purported class. Count II is the FDCPA claim and is brought on behalf of Welch and Slocum and a purported class. As discussed in the supporting memorandum, Plaintiffs' claims fail for various reasons and judgment should be entered for the Defendants.

4. First, Plaintiffs claim that in the underlying foreclosure cases, Stern's clients were not entitled to recover the amounts expended for attorneys' fees and costs, or alternatively, that the amounts sought in the foreclosure cases were not reasonable. These issues were necessarily raised during the foreclosure proceedings, and Walker's and Welch's challenges to these amounts via these consumer acts are an attempt to re-litigate issues previously decided or settled. These Plaintiffs are barred from re-litigating matters specifically at issue and resolved in the state foreclosure proceedings pursuant to the doctrines of *res judicata* and collateral estoppel. *See Community Bank*

of *Homestead v Torcise*, 162 F.3d 1084 (11<sup>th</sup> Cir. 1998). Therefore, Defendants are entitled to judgment in their favor on all claims alleged in Counts I and II by Walker and Welch.

5. Second, Bryant's and Slocum's State Act and FDCPA claims are barred as a result of their settlement agreements, which resolved the very issues they raise in this action – entitlement to and reasonableness of "attorneys fees" and "costs." Specifically, Bryant and Slocum agreed to pay the amounts they now challenge in exchange for satisfaction and reinstatement of their loans, respectively, as well as the dismissal of their foreclosure actions. The courts view settlement agreements as "binding, final, and as conclusive of rights as a judgment." *Thomas v. State of Louisiana*, 534 F.2d 613, 615 (5<sup>th</sup> Cir. 1976). Plaintiffs, through their collection practice claims, attempt to collaterally attack their settlements because they are no longer happy with the amounts they agreed to pay. This is improper. *See, Murchison v. Grand Cypress Hotel Corp.*, 13 F.3d 1483, 1487 (11<sup>th</sup> Cir. 1994). Until such time as these Plaintiffs bring an action and establish a basis to rescind their settlements, they and this Court are bound by the issues resolved by their settlement agreements. *See, e.g., Williams v. International Assoc. of Machinists and Aerospace Workers*, 484 F.Supp. 917, 920 (S. D. Fla. 1978). Accordingly, Defendants are entitled to summary judgment on Counts I and II of Bryant's and Slocum's claims.

6. Third, Plaintiffs are barred from using the federal courts to challenge the state court judgments. *See Rooker v Fidelity Trust Co.*, 263 U.S. 413, 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v Feldman*, 460 U.S. 462, 75 L.Ed.2d 206 (1983); *Dale v. Moore*, 121 F.3d 624 (11<sup>th</sup> Cir. 1997); *Kamilewicz v Bank of Boston Corp.*, 92 F.3d 506 (7<sup>th</sup> Cir. 1996). Plaintiffs Walker and Welch were involved in foreclosures that went to final judgments. This action is an attempt by them to use the federal courts to challenge those judgments. Pursuant to the *Rooker-*

*Feldman* doctrine, the claims of Walker and Welch are barred and Defendants are entitled to judgment in their favor on Walker and Welch's State Act claims in Count I and Welch's FDCPA claims in Count II.

7. Fourth, Plaintiffs' claims allegedly arise out of Defendants' prosecution of the underlying foreclosures. Under Florida law, any communications made in connection with legal proceedings, including claims arising from alleged tortious conduct occurring during the course of litigation, are not actionable. *Levin v United States Fire Ins. Co.*, 639 So. 2d 606, 607-08 (Fla. 1994); *American National Title & Escrow of Florida, Inc. v Guarantee Title & Trust Co.*, 1999 WL 1062246 (4<sup>th</sup> Dist. Ct. App. 1999). Defendants' communications with Plaintiffs are directly related to the foreclosure proceedings and fall squarely within the privilege espoused in *Levin* and *American National Title*. Therefore, Defendants are entitled to judgment in their favor on the State Act claims, which are alleged in Count I.

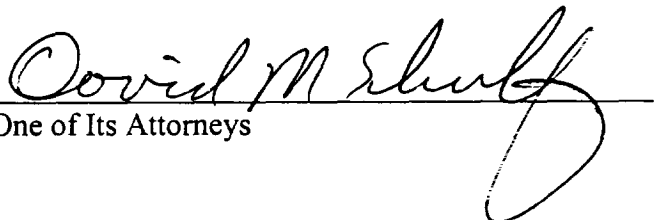
8. Fourth, Defendants' fees and costs were consistent with the federally-authorized guidelines promulgated by Fannie Mae. As used by the Plaintiffs, the FDCPA conflicts with the federal statutes establishing Fannie Mae and empowering it with the authority to make rules and enact guidelines for fees and costs in the furtherance of its "important policy" of providing housing. Simply put, the plaintiffs cannot claim that the same fees and costs which comply with one set of federally-authorized rules constitutes a violation of another federal statute. *See, Coker v Trans World Airlines, Inc.*, 165 F.3d 579 (7<sup>th</sup> Cir. 1999); *Baldwin v McCalla, Raymer*, 1999 U.S. Dist. LEXIS 6933 (N.D. Ill. April 26, 1999). Defendants thus are entitled to judgment in their favor on the claims alleged in Count II.

9. Last, under Florida law, the purchase of residential real estate is not a "consumer transaction," and therefore a mortgage given in connection with the purchase of such property is not a "consumer debt" within the meaning of the State Act. *Bryan v. Clayton*, 698 So. 2d 1236(Fla. 5th Dist. Ct. App. 1997), *rev. denied*, 707 So. 2d 1123(Fla. 1998), *cert. denied*. 118 S.Ct. 2334(1998). The State Act claims alleged in Count I fall within the Fifth District's holding in *Bryan*, and thus Defendants are entitled to judgment in their favor on all claims alleged in Count I.

WHEREFORE, Defendants, LAW OFFICES OF DAVID J. STERN, P.A. and DAVID J. STERN, individually respectfully request that this Court grant their Motion for Summary Judgment and enter judgment in favor of Defendants and against the Plaintiffs.

Respectfully submitted,

LAW OFFICES OF DAVID J. STERN, P.A.

By:   
One of Its Attorneys

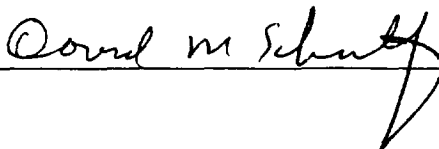
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**CERTIFICATE OF SERVICE**

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished, by prepaid United States Mail to all on the attached Service List, this 4th day of January, 2000.

  
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