

STATE OF MAINE
CUMBERLAND, ss.

BRIDGTON DISTRICT COURT
DOCKET NO. BRI-RE-09-65

FEDERAL NATIONAL MORTGAGE ASSOC.)
)
Plaintiff)
)
)
v.)
)
)
NICOLLE BRADBURY)
)
Defendant)
and)
)
GMAC MORTGAGE, LLC d/b/a DiTech, LLC)
.com and BANK OF AMERICA, NA)
)
Parties-in-Interest)

ORDER ON FOUR
PENDING MOTIONS

STATE OF MAINE
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The Court has reviewed each of the four pending motions before it, as well as all supporting materials, including supporting affidavits and statements of material fact. The Court held oral argument on September 1, 2010. Those present were attorneys Tom Cox, Esq. and Geoffrey Lewis, Esq. for Defendant, and attorney John Aromando, Esq. for Plaintiff and Party-in-Interest GMAC. Attorneys Cox and Aromando argued capably for their positions.

On the question of summary judgment, before the Court is Plaintiff's Renewed Motion for Summary Judgment, as well as Defendant's Motion for Revision and Reversal of the Partial Summary Judgment Order. By its motion, Plaintiff asks that the Court affirm its previously issued order of January 27, 2010 granting summary judgment in its favor on the issue of liability, and further seeks summary judgment in its favor on the issue of the amounts owed. The Defendant's motion seeks to set aside this Court's previous order granting partial summary judgment for Plaintiff.

Defendant urges that this Court set aside its order on the ground that in so ruling, the Court relied upon the affidavit of Jeffrey Stephan, which was deficient under M. R. Civ. P. 56(e) because Mr. Stephan had signed the affidavit outside the presence of a notary and without reading its contents. The Plaintiff contends that the order can stand even putting aside the Stephan affidavit, and in any event has sought to cure the irregularities in its filing by submitting a properly sworn affidavit to support its motion.

There are, however, deficiencies in Plaintiff's filing which are not cured by the newly-submitted affidavit, namely deficiencies in its statement of material facts (SMF). The Law Court has made clear that in ruling on a summary judgment motion, Maine courts are "neither required *nor permitted* to search outside the facts properly referenced in the statements of material facts" See, e.g. *Camden Nat'l Bank v. Peterson*, 2008 ME 85 ¶ 26, 948 A.2d 1251, 1258 (emphasis added). In *Chase Home Finance LLC v. Higgins*, 2009 ME 136, 985 A.2d 508, the Law Court set forth a list of those facts which "must be included in the mortgage holder's statement of material facts." *Id.* at ¶ 11, 985 A.2d at 511. Plaintiff was bound to abide by this mandate, because both its initial and renewed summary judgment motions were filed after the June 15, 2009 effective date noted in *Chase*. See *id.* at ¶ 11 n.2, 985 A.2d at 510 n. 2 (explaining that new statutes and rules will apply to summary judgment motions filed after their effective dates, regardless of when the foreclosure action was commenced, and adding: "We include the new requirements here for future reference of parties moving for summary judgment in residential foreclosure actions").

Neither Defendant's initially-filed statement of material facts nor its revised statement of material facts comports with *Chase*. For example, the mortgage holder's statement of facts must include "the existence of the mortgage, including the book and page number of the mortgage, and an adequate description of the mortgaged premises, including the street number, if any." *Id.* at ¶ 11, 985 A.2d at 511 (citing P.L. 2009, ch. 402 §§ 9, 17, effective June 15, 2009). Plaintiff's initial and subsequently filed statement of facts provide the book and page number, but fail to include the street address. See Plaintiff's SMFs at ¶ 2. Failure to include the street address is enough in itself to preclude the granting of summary judgment. See *Mortgage Elec. Registration Sys. v. Saunders*, 2010 ME 79 ¶ 25 (explaining that "While the book and page number – but not the mortgaged property's address – were included in the affidavit supporting one of MERS's original statements of material fact, facts not set forth in the parties' statements of material facts are not part of the summary judgment record").

Plaintiff's SMFs contain other omissions as well. It is not enough to state, as Plaintiff does, that "Demand has been made upon Defendant for payment of all amounts due" Plaintiff's SMFs at ¶ 5. 14 M.R.S.A. § 6111 requires that a mortgagee's default notice set forth the mortgagor's right to cure, and specifies the requisite content of such notices as well as the procedures which must be followed. As the Law Court stated in discussing compliance with the statutory written notice requirements of foreclosure, "For a mortgagee to legally foreclose, all steps mandated by statute must be strictly enforced." *Camden Nat'l Bank*, 2008 ME at ¶ 21, 948 A.2d at 1257. Plaintiff's statements of fact fail to set forth facts showing compliance with § 6111. Granting summary judgment despite such an omission would contravene the Law Court's clear pronouncements on this issue.

Accordingly, this Court's Partial Summary Judgment Order dated January 27, 2010 is hereby vacated per the request in the Defendant's Motion for Revision and Reversal, and Plaintiff's Renewed Motion for Summary Judgment is denied. No further summary judgment motions will be heard, as the deadline for filing dispositive motions

has long passed and Plaintiff has already been given a second bite of the apple. The parties have twenty days to file an agreed pre-trial order so that this matter may promptly be placed on the trial list in Portland. This file is now transferred to the Portland District Court for further filings and trial.

In addition to renewing its Motion for Summary Judgment, Plaintiff has also filed a Motion for Entry of Protective Order pursuant to M.R. Civ. P. 26(c). This motion is likewise denied.

Rule 26(c) provides that “for good cause shown” a court may enter a protective order “which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” M.R.Civ. P. 26(c). Plaintiff seeks a protective order “prohibiting the dissemination of discovery materials obtained in this case.” Plaintiff’s Motion for Entry of Protective Order at 7. As grounds for its motion, Plaintiff points to the embarrassment GMAC and its employees have suffered, and will continue to suffer, from the posting of excerpts from Stephan’s deposition transcript on an Internet blog. The Court is not persuaded that the Plaintiff has shown the requisite “good cause” to justify entry of a protective order in this case. *See, e.g., Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 789 (1st Cir. 1988) (agreeing with Second Circuit in noting that “the party seeking a protective order has the burden of showing that good cause exists for issuance of that order.... [and] the obverse is also true, i.e. if good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public for inspection”) (citation omitted).

Stephan’s deposition was taken to advance a legitimate purpose, and the testimony elicited has direct probative value to this dispute. Attorney Cox did not himself take action other than to share the deposition transcript with an attorney in Florida. That the testimony reveals corporate practices that GMAC finds embarrassing is not enough to justify issuance of a protective order. Further, Plaintiff has failed to establish that GMAC has been harmed specifically as a result of the dissemination of the June 7, 2010 deposition transcript, given that similarly embarrassing deposition testimony from Stephan’s December 10, 2009 Florida deposition also appears on the Internet, and will remain even were this Court to grant Plaintiff’s motion. Accordingly, because Plaintiff has failed to satisfy its burden of persuasion under Rule 26(c), its Motion for Entry of Protective Order is denied.

In addition to seeking the reversal of this Court’s previously granted Order for Partial Summary Judgment, the Defendant has moved for sanctions pursuant to M.R. Civ. P. 56(g). This motion is granted in part, as explained below.

The facts underlying Defendant’s motion are for the most part undisputed. Plaintiff does not dispute that its affiant, Jeffery Stephan, in his role as limited signing officer for GMAC, Plaintiff’s servicing agent, signed the affidavit which Plaintiff submitted in support of its Motion for Summary Judgment without even reading it and without signing in the presence of a notary. These facts came into the record because the

Defendant went to the time and expense of traveling to Pennsylvania to take Stephan's deposition. In that deposition, which took place on June 7, 2010, Stephan testified that he signs some 400 documents per day, and that the process he follows in signing summary judgment affidavits is consistent with GMAC's policies and procedures.

The Court is particularly troubled by the fact that Stephan's deposition in this case is not the first time that GMAC's high-volume and careless approach to affidavit signing has been exposed. Stephan himself was deposed six months earlier, on December 10, 2009, in Florida. His Florida testimony is consistent with the testimony given in this case: except for some limited checking of figures, he signs summary judgment affidavits without first reading them and without appearing before a notary. Even more troubling, in addition to that Florida action, in May, 2006 another Florida court not only admonished GMAC, it sanctioned the Plaintiff lender for GMAC's affidavit signing practices. As part of its order, the Florida court required GMAC to file a Notice of Compliance, indicating its commitment to modify its affidavit signing procedures to conform to proper practices. The experience of this case reveals that, despite the Florida Court's order, GMAC's flagrant disregard apparently persists. It is well past the time for such practices to end.

Accordingly, Defendant asks that this Court impose sanctions pursuant to M.R. Civ. P. 56(g), which provides:

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Although there are no Maine Law Court cases applying it, the plain language of Rule 56(g) makes clear that the Court must determine, first, whether it appears "to the satisfaction of the court" that an affidavit submitted for summary judgment purposes was presented "in bad faith or solely for the purpose of delay." The Law Court has defined "bad faith", albeit in a different context: "Bad faith 'imports a dishonest purpose and implies wrongdoing or some motive of self-interest.' Bad faith means 'dishonesty of belief or purpose'" *Seacoast Hangar Condo. II Ass'n. v. Martel*, 2001 ME 112 ¶ 21, 775 A.2d 1166, 1171-72 (citing a Utah case and Black's Law Dictionary).¹ It is left to the Court's discretion to determine whether offending conduct rises to the level of "bad faith" such that Rule 56(g) sanctions are warranted. *See, e.g., Cobell v. Norton*, 214 F.R.D. 13, 20 (D.D.C. 2003) (noting that "as a practical matter a court has wide discretion in deciding what constitutes 'bad faith'" (citing *Wright & Miller, Federal Practice and Procedure* § 2742 (3d ed. 1998)). If a Court is satisfied that the affidavit was

¹ *Seacoast Hangar's* definition of "bad faith" occurred in the context of discussing the business judgment rule, which "does not insulate directors from liability for breach of their fiduciary duties if they 'acted primarily through bad faith or fraud'" *Id.* at ¶ 20 n. 1, 775 A.2d at 1171 n.1 (citation omitted).

submitted in bad faith, then the mandatory language of Rule 56(g) requires that the Court forthwith order “the party employing [the affidavit] to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney’s fees.” M.R.Civ. P. 56(g).

Both parties cite *Fort Hill Builders, Inc. v. National Grange Mut. Ins. Co.*, 866 F.2d 11 (1st Cir. 1989), in which the First Circuit analyzed the cases applying the Federal Rule 56(g) to conclude that the matters in which sanctions were imposed involved “particularly egregious” conduct. Characterizing its misconduct as a mere “procedural deficiency,” Plaintiff urges the Court to find no bad faith; Defendant, on the other hand, argues that, on the spectrum of egregiousness, the conduct at issue more than meets the standard for bad faith under the rule.

The Court agrees with Defendant, and finds to its satisfaction that the Stephan affidavit was submitted in bad faith. Rather than being an isolated or inadvertent instance of misconduct, the Court finds that GMAC has persisted in its unlawful document signing practices long after and even in the face of the Florida Court’s order, and that such conduct constitutes “bad faith” under Rule 56(g). These documents are submitted to a court with the intent that the court find a homeowner liable to the Plaintiff for thousands of dollars and subject to foreclosure on the debtor’s residence. Filing such a document without significant regard for its accuracy, which the court in ordinary circumstances may never be able to investigate or otherwise verify, is a serious and troubling matter. Accordingly, the Court orders Plaintiff² to compensate Defendant’s counsel for his attorney’s fees and costs “which the filing of the Affidavit caused [him] to incur” – in other words, that Plaintiff pay Defendant’s counsel for his time and expenses in preparing for and taking Stephan’s deposition, as well as for his time and expenses in preparing for, filing, and prosecuting Defendant’s Rule 56(g) motion.³

² As the Florida court imposed sanctions on the Plaintiff lender for GMAC’s conduct, the Court likewise finds it appropriate to hold Plaintiff responsible for the conduct of its servicing agent, GMAC. Requiring Plaintiff to pay Defendant counsel’s attorney’s fees comports both with the language of Rule 56(g) (award of expenses should be ordered against party “employing” affidavits) as well as with principles of agency law. *See, e.g., Dupuis v. Federal Home Loan Mortgage Corp.*, 879 F. Supp. 139, 144 (D. Me. 1995) (holding that “[a]s a matter of agency law, it would be unfair for [the note and mortgage holder] to have the benefit of [the servicing agent’s] servicing of the note and mortgage without also making [the note and mortgage holder] responsible for [the servicing agent’s] excesses and failures”).


³ The Court declines to award fees for opposing Plaintiff’s summary judgment or protective order motions, because those tasks were not “caused” by the bad faith affidavit. Because the Court finds its award of attorney’s fees and costs to be a sufficient sanction for Plaintiff’s bad faith conduct, the Court declines to explore the issue of contempt in this case as requested by Defendant.

Defendant has ten days from the date of this order to file an affidavit setting forth his time spent, usual hourly rate,⁴ and expenses incurred in taking Stephan's deposition and filing and pursuing Defendant's Rule 56(g) motion. Plaintiff's written objection to Defendant's counsel's claimed expenses, if any, must be filed within seven days thereafter, and shall only address the sums claimed. The Court will thereupon issue an order setting forth the reasonable sum Plaintiff owes to Defendant's counsel.

The clerk shall docket this order by reference under Rule 79(a).

DATED: _____

9/29/10



Hon. Keith A. Powers, Judge
Maine District Court

⁴ That Defendant's counsel is entitled to an award of attorney's fees is not affected by the fact that he has labored in this case on a pro bono basis. *Cf., Foster v. Mydas Assoc., Inc.*, 943 F.2d 139, 144 n.7 (1st Cir. 1991) (noting that civil rights attorneys who work pro bono and prevail are usually awarded attorney's fees under civil rights statutes).