

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

FILED
CENTRAL DIVISION
U.S. DISTRICT COURT

2011 DEC 21 A 10:26

GARRY FRANKLIN GARRETT,

) DISTRICT OF UTAH Case No. 2:11CV00763 DS

Plaintiff,

BY: _____
) DEPUTY CLERK

vs.

) ORDER

RECONTRUST COMPANY, N.A.,

)

Defendant.

)

I. INTRODUCTION

The motion before the court is Defendant ReconTrust Company, N.A.'s (ReconTrust) motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6). Defendant claims Plaintiff Garrett fails to state a claim against ReconTrust as a matter of law.

Plaintiff Garry Garrett brought claims against Defendants concerning a \$271,100.00 loan Mr. Garrett obtained that was secured by a deed of trust recorded on September 12, 2007 in Utah County against the property. Garrett defaulted on this loan in August 2010. Upon default, ReconTrust, as substitute trustee on the deed of trust, recorded a notice of default and election to sell in the Utah County recorder's office on November 4, 2010 indicating Garrett had failed to make his payment on the underlying note from August 2010 through November 2010. On June 2, 2011, ReconTrust sold the property at a foreclosure sale to Federal National Mortgage

Association (Fannie Mae) and subsequently recorded a Trustee's Deed and a corporate assignment of deed of trust to Fannie Mae.

Plaintiff's claim is that ReconTrust is unauthorized to conduct foreclosure sales in the State of Utah as they are not a qualified trustee pursuant to UTAH CODE ANN. § 57-1-21(3). Plaintiff's second claim is that ReconTrust slandered title to the property by conducting the non-judicial foreclosure sale without being qualified to do so, again pursuant to UTAH CODE ANN. § 57-1-21(3). The Court finds that all of Plaintiff's arguments are without merit and therefore grants the Motion to Dismiss.

II. STANDARD OF REVIEW

In considering a motion to dismiss under Rule 12(b)(6), all well-pleaded factual allegations, as distinguished from conclusory allegations, are accepted as true and viewed in the light most favorable to Plaintiffs as the nonmoving party.¹ Plaintiffs' complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"² However, the court "need not accept . . . conclusory allegations without supporting factual averments."³

¹ *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997).

² *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (U.S. 2009).

³ *S. Disposal, Inc., v. Tex. Waste*, 161 F.3d 1259, 1262 (10th Cir. 1998).

III. ANALYSIS

Plaintiff's claim that ReconTrust conducted an unauthorized sale because it is not a qualified trustee under UTAH CODE ANN. § 57-1-21(3) fails because ReconTrust is a national banking association operating under the federal National Bank Act (NBA) and is regulated by the Office of the Comptroller of the Currency (OCC). NBA specifies under 12 U.S.C. § 92a(a) that the state law applicable to ReconTrust's authority to act as trustee is the state law where the bank is "located," which in this case is Texas, rather than Utah, rendering UTAH CODE ANN. § 57-1-21(3) inapplicable.

Section 92a of the NBA ties the state law at issue in this case to where the national bank is "located." Additionally, the OCC has interpreted that phrase to mean a national bank is "located" only where it "acts in a fiduciary capacity." 12 C.F.R. §§ 9.7(b) and (e)(1). ReconTrust performs all fiduciary duties at issue in this case in Texas. The OCC regulations define acting in a fiduciary capacity as "the state in which it accepts the fiduciary appointment, executes the documents that create the fiduciary relationship, and makes discretionary decisions regarding the investment or distribution of fiduciary assets." 12 C.F.R. § 9.7(d).

Here, ReconTrust performs the functions specified in this regulation for Utah properties in Texas. Therefore, the state laws that apply to ReconTrust by virtue of Section 92a are those of Texas, rather than Utah. Since Texas law permits national banks to act as trustee under the deeds of trust and to exercise the power of sale with regard to such deeds of trust (*See* TEX. FIN. CODE ANN. §§ 32.001, 182.001; TEX. PROP. CODE ANN. §§ 51.0001, 51.0074.), ReconTrust is not

“acting in contravention of State Law” of the state in which it is “located” for purposes of 12 U.S.C. § 92a and 12 C.F.R. § 9.7 when it performs trustee sales with respect to Utah properties.

Therefore, because all Plaintiff’s claims rely on the theory that ReconTrust was unauthorized to conduct foreclosure sales in the State of Utah and this court finds this argument has no merit as a matter of law, Defendants’ Motion to Dismiss is granted with prejudice.

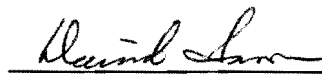
VI. CONCLUSION

For the foregoing reasons, the court GRANTS Defendants’ Motion to Dismiss with prejudice.

SO ORDERED.

DATED this 21st day of December, 2011.

BY THE COURT:



DAVID SAM
SENIOR JUDGE
U.S. DISTRICT COURT