

**U.S. BANKRUPTCY COURT
District of South Carolina**

Case Number: **13-04227-jw**

Adversary Proceeding Number: **17-80037-jw**

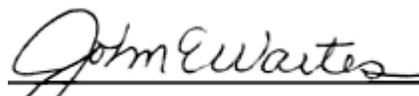
**ORDER GRANTING MOTIONS OF SPECIALIZED LOAN SERVICING, LLC,
SHELLPOINT MORTGAGE SERVICING, AND BANK OF NEW YORK MELLON TO
DISMISS COMPLAINT**

The relief set forth on the following pages, for a total of 12 pages including this page, is hereby ORDERED.

**FILED BY THE COURT
07/11/2017**



Entered: 07/11/2017



US Bankruptcy Judge
District of South Carolina

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

In re:

Frank Scott Dabney and Kathryn Harrelle
Dabney,

Debtors.

Frank Scott Dabney and Kathryn Harrelle
Dabney,

Plaintiffs,

v.

Bank of America, Specialized Loan Servicing,
LLC, Shellpoint Mortgage Servicing, Bank of
New York Mellon c/o Shellpoint Mortgage
Servicing,

Defendants.

C/A No. 13-04227-JW

Adv. Pro. No. 17-80037-JW

Chapter 13

**ORDER GRANTING MOTIONS OF SPECIALIZED LOAN SERVICING, LLC,
SHELLPOINT MORTGAGE SERVICING, AND BANK OF NEW YORK MELLON TO
DISMISS COMPLAINT**

This matter comes before the Court on the Motions to Dismiss the complaint (collectively “Motions”), filed by defendants Specialized Loan Servicing, LLC, (“SLS”), Shellpoint Mortgage Servicing, (“Shellpoint”), and Bank of New York Mellon (individually “BoNY,” together with SLS and Shellpoint, “Movants”).¹ Plaintiffs Frank Scott Dabney and Kathryn Harrelle Dabney (collectively “Plaintiffs”) filed responses to both Motions.

¹ Defendants Shellpoint and BoNY, represented by the same counsel, filed a joint motion to dismiss, while SLS filed its own motion. Because the Motions seek the same relief and advance many of the same arguments, they will be considered together.

After considering the arguments advanced by the parties in their pleadings and at the hearing, together with the docket in the main case, the Court grants the Motions, making the following findings of fact and conclusions of law:²

FINDINGS OF FACT

1. Plaintiffs filed a petition under Chapter 13 of the Bankruptcy Code on July 25, 2013. Plaintiffs filed the above-captioned adversary proceeding on March 30, 2017.

2. In the adversary complaint (“Complaint”), Plaintiffs attempt to state three (3) causes of action against the above-captioned defendants (collectively “Defendants”) for claims arising out of certain loan transactions. Specifically, the Complaint alleges that prepetition, Plaintiffs granted Lendmark Financial Services, Inc. (“Lendmark”) a first and second mortgage on a parcel of real estate and the improvements thereon located at 1844 Chelwood Circle, Charleston, SC 29407 (“Property”). This Property is owned by Plaintiffs and serves as their primary residence. The Complaint states that the first mortgage secures an “Adjustable Rate Note,” which contains certain interest rate provisions that govern the amount of interest Plaintiffs are to be charged.

3. In their first cause of action (“First Cause of Action”), Plaintiffs allege that Defendants failed to comply with the interest provisions in the Adjustable Rate Note and overcharged Plaintiffs. As a result of these actions, Plaintiffs contend that they have paid more than what was due under the Adjustable Rate Note. Plaintiffs assert that Defendants’ failure to comply with the interest rate provisions resulted in Defendants overcharging Plaintiffs, and

² To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such, and to the extent any of the following conclusions of law constitute findings of fact, they are so adopted.

collecting payments in excess of sums actually due. This, Plaintiffs allege, is a willful violation of the automatic stay of 11 U.S.C. § 362.³

4. In the second cause of action, Plaintiffs allege that Defendants have failed to establish that they have any legal right to collect money from Plaintiffs, but have nonetheless charged and collected monthly payments from Plaintiffs, thereby intentionally violating the automatic stay (“Second Cause of Action”).

5. In the third cause of action, Plaintiffs allege that the Defendants are in contempt of both “the order of this Court represented by the automatic stay,” and orders entered by other courts. The Complaint does not specify which of this Court’s orders Plaintiffs believe Movants violated, but it specifically alleges that Defendants violated the South Carolina Supreme Court’s Administrative Order 2011-05-02-01 (“Administrative Order”). Plaintiffs ask this Court to use § 105 to punish Defendants for their contempt of the various court orders (“Third Cause of Action”).

3. Defendant Bank of America filed its answer to the Complaint on May 15, 2017. The remaining defendants (*i.e.* Movants), filed motions to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) (“Rule 12(b)(6)”). In their Motions, Movants also argue that various affirmative defenses bar Plaintiffs from maintaining the claims against Movants. Movant SLS further asserts that the Complaint fails to comply with Federal Rule of Civil Procedure 8 (“Rule 8”), because it fails to set forth specific allegations against each defendant and instead, lumps all defendants together.

³ Hereinafter, all references to provisions under the United States Bankruptcy Code, 11 U.S.C. §§ 101, *et seq.*, shall be by section number only.

CONCLUSIONS OF LAW

I. Legal Standard

Rule 12(b)(6) is available to a defendant seeking dismissal of a complaint based on its failure to state facts sufficient to constitute a cause of action. When considering a Rule 12(b)(6) motion, “the relevant question [for the Court] is whether, assuming the factual allegations are true, the plaintiff has stated a ground for relief that is plausible.” *Ashcroft v. Iqbal*, 556 U.S. 662, 696 (2009). The Court “must take the allegations as true, no matter how skeptical the court may be,” and proceed “on the assumption that all the allegations in the complaint are true (even if doubtful in fact)” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 556 (2007) (internal citations omitted); *see also Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (“What Rule 12(b)(6) does not countenance are dismissals based on a judge’s disbelief of a complaint’s factual allegations.”). Importantly, “[t]he purpose of Rule 12(b)(6) is to test the sufficiency of a complaint’ and not to ‘resolve contests surrounding the facts, merits of a claim, or the applicability of defenses.’” *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999)).

While the Court must accept as true all of the factual allegations contained in a complaint, a plaintiff must do more than “plead [] facts that are ‘merely consistent with’ a defendant’s liability,” as “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” will not suffice. *Ashcroft*, 556 U.S. at 663 and 678 (quoting *Twombly*, 550 U.S. at 556). Instead, the facts alleged must “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*, 556 U.S. at 678.

Only a complaint that states a plausible claim for relief will survive a motion to dismiss. “Determining whether a complaint states a plausible claim [is] . . . a context-specific task that

requires the reviewing court to draw on its judicial experience and common sense.” *Ashcroft*, 556 U.S. at 679. If “the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.* (citing Fed. R. Civ. P. 8(a)(2)).

In addition to the allegations contained in the body of the Complaint, the Court may consider any documents attached to the Complaint or Movants’ Motions, “so long as they are integral to the complaint and [are] authentic.” *Phillips v. Pitt Cty. Mem’l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). The Court may also take judicial notice of matters of public record, and in limited circumstances, may consider any affirmative defenses raised by a movant if the factual requirements of the defense appear on the face of the plaintiff’s complaint. *See Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) (en banc) (holding that affirmative defenses raised by way of a Rule 12(b)(6) motion may be reached if all the facts necessary to rule and prove the affirmative defense appear on the face of the complaint).

II. The Complaint

A. First and Second Causes of Action – Willful Violation of the Automatic Stay

To state a claim for a willful stay violation, a plaintiff has the burden of pleading and ultimately proving five (5) elements: “(1) that a bankruptcy petition was filed,⁴ (2) that the debtors are ‘individuals’ under the automatic stay provision, (3) that the creditors received notice of the petition, (4) that the creditors’ actions were in willful violation of the stay, and (5) that the debtor suffered damages.” *In re Weatherford*, 413 B.R. 273, 284 (Bankr. D.S.C. 2009) (internal citations

⁴ Implicit in this first factor is the assumption that upon the filing of the bankruptcy petition, the automatic stay came into effect and remained in effect as to the debtors and their property. Under certain circumstances, this cannot always be presumed. *See, e.g.*, 11 U.S.C. § 362(c).

omitted). The Court has reviewed the First and Second Causes of Action, and finds that each contains defects that preclude the Court from finding that either states a plausible claim for relief.

One of the purposes of the automatic stay is to “protect[] all property of the estate . . . whether or not notice has been given of the pendency of the case.” *McGuffin v. Barman (In re BHB Enter., LLC)*, 1997 WL 33344249, *4 (Bankr. D.S.C. August 27, 1997). The “estate,” which comes into existence on the petition date, is comprised of “property of the estate,” defined as all legal and equitable interests of a debtor in property. *See* 11 U.S.C. § 541. If, as of the petition date, a debtor does not hold a legal or equitable interest in certain property, then that property cannot be property of the estate. *See In re Brittain*, 435 B.R. 318 (Bankr. D.S.C. 2010) (the automatic stay does not stay actions against property that is not property of the estate). In addition, if, post-petition, a debtor voluntarily conveys title and possession of property of the estate to a third party, the conveyed property no longer is property of the estate and is no longer subject to the automatic stay. *See In re Reynard*, 250 B.R. 241, 247 (Bankr. E.D. Va. 2000) (“Property ceases to be property of the estate if it is abandoned, exempted or sold or used.”) (internal citations omitted); *see also* 11 U.S.C. § 362(c)(1) (“the stay of an act against property of the estate . . . continues until such property is no longer property of the estate”).

While it purports to set forth the legal elements required to state a claim for a stay violation, the First Cause of Action fails to explain the factual or legal basis for Plaintiffs’ conclusion that the automatic stay attached to voluntary prepetition payments Plaintiffs made to Defendants. Nor does the First Cause of Action contain any factual allegations to support Plaintiffs’ legal conclusion that post-petition payments voluntarily made to Movants remained property of the estate after their transfer to Movants. *See* 11 U.S.C. § 362(c)(1). The case *In re Weatherford*, 413

B.R. 273 (Bankr. D.S.C. 2009), relied on by Plaintiffs as legal support for their position, does not alter this pleading defect.

Weatherford stands for the proposition that a creditor's wrongful retention of estate property may form the basis of a claim for a stay violation. However, the facts in *Weatherford* are easily distinguishable from this case. First, *Weatherford* involved payments made by a debtor in direct response to a creditor's ongoing efforts to collect a judgment obtained in contravention of the automatic stay. The creditor's act of obtaining the judgment violated the automatic stay, as did its efforts to collect the void judgment. In contrast, this case involves voluntary payments made by Plaintiffs prepetition, pursuant to the Adjustable Rate Note, and post-petition, pursuant to the terms of Plaintiffs' confirmed Chapter 13 plan.

Next, the payments made by Ms. Weatherford were made in reaction to the creditor's collection efforts, and to stop the collection efforts. In this case, while the Complaint alleges that Plaintiffs made the overpayments "under threat of foreclosure," this allegation is belied by the prepetition Foreclosure Complaint (attached as Exhibit A to the Complaint) which states that it was filed because of Plaintiffs' failure to make prepetition mortgage payments.⁵ Significantly, there is no allegation that any defendant continued to prosecute the foreclosure action after the petition date, nor any allegation that, in an effort to stop the foreclosure action, Plaintiffs were forced to resume the overpayments. Instead, the record reflects that Plaintiffs dealt with the foreclosure action not by resuming payments, but by filing for bankruptcy.

Finally, in *Weatherford*, the presence of the automatic stay was clear. In this case, there is no allegation that, having voluntarily made payments to Defendants, Plaintiffs notified Defendants

⁵ The Foreclosure Complaint, filed in September 2012, alleges that Plaintiffs were due for the monthly payments of principal and interest "due from and after December 1, 2011." Assuming, for the sake of argument, that Plaintiffs made payments from July 1, 2009 to November 1, 2011 "under threat of foreclosure," this period of time was well before the petition date, and before the automatic stay was in effect.

of their belief that they had overpaid and that as a result of the overpayment, Plaintiffs' believed Defendants were on possession of property of the estate.

Likewise, the Second Cause of Action does not contain sufficient allegations to support Plaintiffs' legal conclusion that Movants' lack standing.

To challenge Movants' standing as creditors, Plaintiffs must set forth facts that call into question the grounds upon which a creditor purports to maintain its claim against the bankruptcy estate. This can be accomplished by filing an objection to the creditor's proof of claim,⁶ listing the creditor's claim as "disputed" or "contingent" in the schedules, or making affirmative factual allegations that call into question the creditor's ownership of the debt instrument. *See generally Bank of America, N.A. v. Draper*, 746 S.E.2d 478, 480-83 (S.C. Ct. App. 2013) (discussion of requirements to establish standing in connection with collection of note and mortgage). At a bare minimum, Plaintiffs must allege facts to inform the Court and Defendants of the factual basis for Plaintiffs' conclusory statement that "[Movants'] filings do not establish that they have the legal right to collect money from plaintiffs." *See Ashcroft*, 556 U.S. at 663. There are no such factual allegations in the Complaint.

Having failed to set forth the required factual allegations in the First and Second Causes of Action, the Motions to dismiss are granted as to these two claims.

B. Third Cause of Action - Contempt

To state a claim for civil contempt, a plaintiff must plead: "(1) the existence of a valid decree of which the alleged contemnor had actual or constructive knowledge; (2) . . . that the decree was in [Plaintiffs'] "favor"; (3) . . . that the alleged contemnor by its conduct violated the terms of the decree, and had knowledge (at least constructive knowledge) of such violation; and (4) . . . that

⁶ *See generally* 11 U.S.C. § 502.

[Plaintiffs] suffered harm as a result.” *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 301 (4th Cir. 2000) (internal citations omitted); *Palmetto Conservation Found. v. Smith*, 2009 WL 2588482, at *2 (D.S.C. 2009) (same). The Third Cause of Action fails to satisfy the minimum pleading requirements.

As a threshold matter, with the exception of the Administrative Order, the Complaint fails to identify the orders Movants allegedly violated.⁷ The Complaint fails to allege that any of the violated orders were entered in Plaintiffs’ favor. The Complaint fails to allege Movants’ knowledge of the violated orders, and also fails to describe how each Movant violated the orders.⁸ Nor does the Complaint allege that each Movant had knowledge of their alleged respective violations. In short, the Complaint falls far short of the minimum of allegations required to state a valid claim for contempt against Movants. The Motions are granted as to the Third Cause of Action.

V. Movants’ Affirmative Defenses

The Court will now consider Movants’ request for dismissal of the Complaint pursuant to several affirmative defenses⁹ discussed by Movants in the Motions (collectively “Affirmative Defenses”). Specifically, Movants argue that by virtue of either this Court’s Order confirming Plaintiffs’ Chapter 13 plan or the consent order resolving SLS’s motion for stay relief, one or more of the Affirmative Defenses acts as a bar to the Complaint.

⁷ The Complaint states that Defendants are in contempt of this Court’s order “represented by the automatic stay.” The automatic stay is creature of statute; it does not arise or exist by virtue of an Order of this Court.

⁸ While, with respect to the Administrative Order, the Complaint alleges that Movants “have not attempted to reach an agreement for foreclosure intervention in good faith,” this presupposes that Movants were required to engage in foreclosure intervention, and/or that foreclosure intervention took place and failed due to Movants’ actions. However, none of these factors is alleged in the Complaint, nor can these factors be implied from the body of the Complaint.

⁹ Movants raised the Affirmative Defenses of judicial estoppel, equitable estoppel, *res judicata*, and law of the case.

In the context of a Rule 12(b)(6) motion, an affirmative defense may be considered in limited circumstances if the factual requirements of the defense appear on the face of the plaintiff's complaint. *See Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) (en banc) (“[I]n the relatively rare circumstance where facts sufficient to rule on an affirmative defense are alleged in the complaint, the defense may be reached by a motion to dismiss filed under Rule 12(b)(6) . . . if all facts necessary to the affirmative defense ‘clearly appear[] on the face of the complaint.’” (quoting *Richmond, Fredericksburg & Potomac R.R. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993))). This limitation arises from the fact that the burden of establishing an affirmative defense rests on the defendant asserting the defense; it does not rest on the plaintiff. *See Goodman v. Praxair, Inc.*, 494 F.3d at 464. Thus, “[i]t follows, therefore, that a motion to dismiss filed under Federal Rule of Procedure 12(b)(6), which tests the sufficiency of the complaint, generally cannot reach the merits of an affirmative defense” *Id.*

The Court has reviewed the Complaint with an eye towards Movants' defenses, and the Complaint makes no reference to either the order confirming Plaintiffs' Chapter 13 plan or the § 362 settlement order. Therefore, the Court finds that there are insufficient facts on the face of the Complaint to enable the Court to consider the Affirmative Defenses at this time, and denies so much of the Motions as seeks dismissal of the Complaint based on the Affirmative Defenses. However, this denial is without prejudice to Movants to raise and pursue the Affirmative Defenses at a later date should it be necessary to do so.

V. Dismissal Under Rule 8

Defendant SLS also seeks dismissal of the Complaint due to Plaintiffs' failure to comply with the pleadings requirements of Rule 8.

Rule 8 requires, “[a] pleading that states a claim for relief [to] contain: . . . a short and plain statement of the claim showing that the pleader is entitled to relief;” Fed. R. Civ. P. 8(a). Furthermore, “[e]ach allegation must be simple, concise, and direct,” and “[p]leadings must be construed so as to do justice.” *Id.* at (d)(1) and (e). “Rule 8(a) does not require ‘detailed factual allegations,’ but ‘more than an unadorned, the-defendant-unlawfully-harmed-me accusation,’ to ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” *Cantrell v. New Penn Fin., LLC.*, 2017 WL 2645740 at * 2 (D.S.C. June 20, 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atl. Corp v. Twombly*, 550 U.S. 554, 555 (2007)).

The Court has reviewed the Complaint and agrees with SLS that the Complaint fails to give each defendant fair notice of the grounds upon which Plaintiffs’ claims against each particular defendant rest. *See Russo–Chestnut v. Wells Fargo Home Mortgage (In re Russo-Chestnut)*, 522 B.R. 148 (Bankr. D.S.C. 2014) (holding that complaint that only contained conclusory allegations did not give defendants fair notice, and therefore did not meet the minimum pleading requirements of Rule 8). It is not permissible, as Plaintiffs have done, to make generic allegations of liability against “the Defendants.” Each defendant is entitled to know which allegations are being made against it, and for which it must answer. *Id.* Because it fails to provide sufficient detail to SLS on notice of the claim(s) that Plaintiffs are asserting against that it, the Complaint should be dismissed.

CONCLUSION

For the foregoing reasons, Movants’ Motions to Dismiss are granted. It is ORDERED that the Complaint be and is dismissed without prejudice as to defendants Specialized Loan Servicing, LLC, (“SLS”), Shellpoint Mortgage Servicing, (“Shellpoint”), and Bank of New York Mellon.

AND IT IS SO ORDERED.