

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CALVERT M. WILSON, an individual, *
*
Plaintiff, *
*
v. *
*

Case No.: 1:05-CV-00108 (JDB)

ABN AMRO MORTGAGE GROUP, INC., *
a foreign corporation (fka Atlantic Mortgage *
Investment Corp.); FRIEDMAN & *
MACFAYDEN, PA, a Maryland *
professional association; ALVIN E. *
FRIEDMAN, an individual; KENNETH J. *
MACFAYDEN, an individual and as *
Trustee for ABN AMRO; and MICHAEL *
CANTRELL, an individual, *

**PLAINTIFF'S COMBINED REPLY IN SUPPORT
OF MOTION TO CONSOLIDATE RELATED
ACTIONS**

Defendants.

***** *

Nothing contained in Defendants' respective Opposing Briefs provides a basis for this Court to reject consolidation of two related actions under Fed. R. Civ. P. 42 in favor of adjudicating these cases as two separate actions involving the same facts, the same parties and the same Court. If anything, Defendants' Opposing Briefs underscore the need to consolidate these related actions promptly so that this entire predatory mortgage servicing dispute can be resolved once and for all. *Accord Starks v. Sandberg, Phoenix and Von Gontard*, 381 F.3d 793 (8th Cir. 2004), *cert. denied*, ___ U.S. ___ (U.S. May 2, 2005) (*EMC Mortgage Corp. v. Starks*, No. 04-1056) (upholding a \$6.0 million punitive damages award to claimants based on proof of \$2,000 actual damages under the FDCPA

and state deceptive practices act);¹ *Maxwell v. Fairbanks Capital Corp. (In re Maxwell)*, 281 B.R. 101, 117 (Bankr. D. Mass. 2002) ("Fairbanks in a shocking display of corporate irresponsibility repeatedly fabricated the amount of the debtor's obligation to it out of thin air. There is no other explanation for the wildly divergent figures it concocted in correspondence with the Debtor and her agents and in pleadings and documents filed with the bankruptcy court"); *see also* Power Point Presentation on the Anatomy of Predatory Mortgage Servicing, attached hereto as Exhibit No. "A".

A. Defendants have not opposed consolidation in good faith

There are several reasons for this Court to reject defense challenges to consolidation of these related actions:

First, the Friedman Law Firm Defendants² startling, albeit untimely and convenient, revelation that they never had anything to do with the Case No. 05-42 more than justifies consolidation in its own right. Among other things, this curiously timed confession confirms that no one, **including this Court**, knew ABN AMRO Mortgage Group, Inc. ("ABN AMRO") lacked counsel in Case No. 05-42 until **Friday, April 29, 2005**, when Goodwin Procter, LLP entered its appearance for ABN AMRO in that action. Notwithstanding the Friedman Law Firm Defendants naked attempt to obtain "distance" or "cover" from Defendants' underlying transgressions, the Friedman Law Firm Defendants' new position should be seen for what it really is: a misguided "AWOL defense" to liability and accountability in this matter.

¹ *See* May 2, 2005 U.S. Supreme Court Certiorari Summary Disposition Report at p. 6, attached hereto as Exhibit "B".

² The Friedman Law Firm Defendants include co-defendants Friedman & MacFayden, PA, Alvin Friedman, Kenneth MacFayden and Michael Cantrell.

Unfortunately for the Friedman Law Firm Defendants', this post-litigation attempt at cover, much like its defense to the underlying action, fails because there are numerous undisputed facts that show the contrary. For example: (a) ABN AMRO's opposing brief does not concur that it was unrepresented in Case No. 05-42 until April 29, 2005 (note: it is the client's perception, and not the lawyer's after-the-fact characterization of the relationship, that guides whether or not a litigant is or reasonably believes it was represented by counsel in the action); (b) it is well-settled that a corporate litigant, like ABN AMRO, cannot appear and participate in federal court *in propria persona*. Thus, assuming the Friedman Law Firm Defendants advised ABN AMRO of Case No. 05-42 before this litigation was filed, it certainly would have engaged new/substitute counsel before April 29, 2005; (c) Goodwin Procter's notice of appearance in Case No. 05-42 does not indicate it entered that proceeding as "substitute counsel" or words to that effect; and (d) to date, none of the Friedman Law Firm Defendants have taken any action to withdraw their appearance from the record in Case No. 05-42. If the Friedman Law Firm Defendants really had nothing to do with Case No. 05-42, as they now contend, there is no *legitimate* reason for their failure to notice or seek leave to withdraw from that action.³

Second, ABN AMRO's Opposing Brief similarly is flawed because it attempts to "cover up" Defendants' *on-going* misconduct (including the wildly divergent figures they cooked up and provided to Wilson at a critical stage in the foreclosure process) under the plainly inapplicable collateral attack doctrine. *See Celotex Corp. v. Edwards*, 514 U.S. 300 (1995). Although not mentioned in either of the opposing briefs, it is axiomatic that

³ Given the Friedman Law Firm Defendants' blithe assertion, despite all evidence to the contrary, that they had nothing to do with Case No. 05-42 when their own client's rights were at stake, it is no quantum leap to recognize that Wilson never stood a chance of preserving his property rights against Defendants' callous

the collateral attack doctrine involves an attack *on a judgment* is an attempt to avoid, defeat, or evade it, or deny its force and effect, *in some incidental proceeding, not provided for by law*, for the express purpose of attacking it. 514 U.S. 306, 313. Unlike the *Celotex* line of cases, however, this dispute does not involve: (a) some incidental legal proceeding, not contemplated by law, which was initiated in direct response to an adverse ruling by another court; (b) the issuance of conflicting *orders* by two separate courts under which compliance with one triggers contempt of the other; or (c) an attempt by a litigant to accomplish either result.

Here, Wilson, a property owner, is lawfully pursuing his legal rights under Case Nos. 05-42 and 05-108 in this Court in the precise manner authorized and contemplated by Title 28 of the United States Code. Furthermore, all the misconduct described in this case occurred while Plaintiff was a Debtor in a Chapter 13 case. There is no chance that this Court's review of Defendants' misconduct during the pendency of the Bankruptcy Court proceeding (before and after the October 7th Bankruptcy Hearing) will result in an occurrence where any party to this action will violate the Bankruptcy Court's Order simply by litigating in this Court. On the other hand, a challenge to the Bankruptcy Court's Order by way of a separate legal proceeding (i.e., the manner recommended by Defendants' Opposing Briefs), is outside the context of the well-established statutory framework for review of bankruptcy court orders by this Court, and Defendants know it. *See* 28 U.S.C. §§ 158, 1331. Indeed, this would result in the very kind of collateral attack rejected by the U.S. Supreme Court in *Celotex*, and of which ABN AMRO's opposing brief complains.

(Continued Fn. 3) indifference to his plight both when a threatened foreclosure sale loomed ominously over his head, and now as he continues to make monthly mortgage payments to ABN AMRO.

Third, Defendants have made admissions or representations in opposing consolidation that signal that Wilson is being subjected to *on-going* harm, including the continuing unlawful manipulation of his mortgage account and his escrow account. Specifically, even though Defendants have been active participants in Wilson's Chapter 13 case bankruptcy case, the Opposing Briefs now suggest that the 2nd Street Property and related residential mortgage loan somehow are not a part of that *consumer* bankruptcy proceeding in which they are active participants (*contra* Bankr. Docket Sheet, attached as Exhibit "3" to Pltfs. Rule 42 Motion). Defendants also contend, for the first time, that Plaintiff allegedly refinanced his mortgage before it was transferred to ABN AMRO. These "new" contentions are false and outrageous. *See* Wilson Declaration, at ¶¶7-8, 18, 22-36, and 40-49; *and In re Maxwell*, 281 B.R. at 117.

Consequently, Plaintiff hereby gives notice of his intention to seek a preliminary injunction to preserve the status quo in this matter, including an order prohibiting any further attempts to transfer or otherwise discard the residential real property or related evidence in this litigation. *See, e.g., Perpetual Bldg. v. District of Columbia*, 618 F. Supp. 603, 618 (D.D.C. 1985) (concluding that the prospect of owner's loss of real property constitutes irreparable harm); *1010 Potomac Associates v. Grocery Manufacturer's of America, Inc.*, 485 A.2d 199, 212 (D.C. 1985) (when real property is the subject matter of the dispute, money damages are inadequate).

B. Consolidation is warranted by the Commonality of Parties, Facts and Events

This dispute seeks to remedy on-going violations of Plaintiff's real property rights and consumer protection rights under D.C. and federal law. Plaintiff filed for Chapter 13 bankruptcy protection on January 16, 2001 (the "Petition Date") in the United States

Bankruptcy Court for the District of Columbia (the "Bankruptcy Court"). The 2nd Street Property and the residential mortgage are a part of Plaintiff's consumer bankruptcy case, and this litigation. Plaintiff was a Chapter 13 Debtor, and the mortgage was in default when ABN AMRO took over collection responsibility for the Note. *See* Verified First Amended Complaint ("FAC"), ¶¶ 49-52. The F&M Defendants are serving as collection counsel to ABN AMRO in Wilson's consumer bankruptcy case. In other words, the litigants in this action all are very familiar with one another as a result of their post-bankruptcy dealings--which spans the entire relationship between the parties.

Beginning in mid-2004, ABN AMRO artificially increased the amounts allegedly due under Wilson's mortgage account for his home in Northeast D.C., declared a default when he could not pay the artificially inflated sums, and then hired the Friedman Law Firm to pursue foreclosure of his home. Wilson was not the only homeowner with a mortgage being improperly serviced by ABN AMRO and its agents across the country at around the same time. *See, e.g.*, Exhibit Nos. "2" (Wilson), "3" (Chivers), "4" (Johnson), "5" (Smith) to Pltf's. Rule 42 Motion (Victim Impact Evidence arising from ABN AMRO's on-going predatory servicing activities). Wilson and his agents promptly made verbal and written to validate the debt, including requests for back up information on the source of the mortgage payment increases and related charges, which wildly fluctuated from a purported ranged of over \$9,000 to more than \$30,000 in less four (4) months. In response, ABN AMRO and the Friedman Law Firm either feigned ignorance about the matter or refused to provide actual details concerning Wilson's mortgage account and the debt when requested to do so- - all while Plaintiff was under an improper cloud of foreclosure. *Contra Williams v. First Government Mortgage and Investors Corp.*, 225

F.3d 738 (D.C. Cir. 2000) (construing CPPA, as codified at D.C. Code Ann. §§ 28-3904(r), and 28-3905 (k)), in favor of mortgagor); *see also In re Maxwell*, 281 B.R. at 117 (Bankr. D. Mass. 2002) (construing FDCPA and applicable state law); FTC Press Release on \$750,000 civil settlement in *FTC v. Capital City Mortgage Corp. et al.*, No. 98-CV-237 GK (D.D.C. Feb. 24, 2005), attached hereto as Exhibit "C".

In their rush to consummate their illicit foreclosure scheme on the 2nd Street Property, Defendants prepared false or materially misleading affidavits and mortgage account information to Plaintiff or exhibited a reckless indifference as to whether the scant account information provided to Plaintiff was accurate. *See* FAC, ¶¶ 75-103.⁴ The Friedman Law Firm added further fuel to the fire by representations from defendant Cantrell of the Friedman Law Firm, on and off the record concerning the administration of Plaintiff's mortgage and escrow accounts, that an updated escrow analysis certainly would lead to an increase in the monthly mortgage payment. This was a veiled threat that Defendants honored in the days leading up to the mid-November foreclosure sale. *See, e.g.*, 10/07/04 Bankruptcy Hearing Tr. at 15:14-18:6, attached as Exhibit "7" to the Verified First Amended Complaint (summarizing the dire mortgage servicing problem at that time); *see also* Exhibit "A" hereto, PPT Slide Nos. 12-21 (chronicling mortgage services abuses against Wilson).

To date, Defendants have never provided a specific cure amount, or explained the numerous discrepancies in Plaintiff's mortgage account. As such, Defendants were obligated to cancel the foreclosure voluntarily, and reconcile Wilson's account, and

⁴ It is noteworthy that on January 5, 2005, the Bankruptcy Court granted the Chapter 13 Trustee's motion to *reduce* ABN AMRO's claim against Plaintiff's Chapter 13 estate, thus confirming evidence of certain improper fees and charges during the pendency of that bankruptcy case. *See* Exhibit Nos. 6 and 10, attached to Pltfs. Rule 42 Motion.

further, to discontinue any on-going mismanagement of his account. *See Bank-Fund Staff Federal Credit Union v. Cuellar*, 639 A.2d 561 (D.C. 1994) (finding foreclosure notice defective when cure amount not stated as a sum certain even though borrower knew actual cure amount); *Independence Federal Savings Bank v. Huntley*, 573 A.2d 787, 788 (D.C. 1990) (foreclosure notice defective because insufficient time provided to cure default despite borrower's timely appeared at the forced sale). To date, Plaintiff has never received any debt validation or account reconciliation from Defendants.

As a result of these servicing and collection abuses, Wilson was forced to obtain a short term, sub-prime loan from a third party finance company to cure the default. Under the terms of the HOEPA loan, Wilson borrowed \$30,535 at 20% interest plus 50% of the equity in his house. The house in is now worth \$379,000. *See* Excerpt of 11/23/04 Residential Real Estate Appraisal, attached hereto as Exhibit "D". The outstanding balance on the HOEPA loan presently exceeds \$122,000 and is growing every day; all because Defendants' refuse to validate Wilson's debt and reconcile his account. To add insult to injury, when Wilson attempted to reinstate the mortgage loan at Defendants' inflated \$30,535 price, the Friedman Law Firm Defendants (including Defendant Kenneth MacFayden as foreclosure trustee for ABN AMRO) initially refused to take his money for reinstatement, apparently on prior instructions from ABN AMRO. *See* FAC, ¶¶ 170-182; Wilson Decl., ¶¶ 40-49.

WHEREFORE, Plaintiff Calvert M. Wilson respectfully requests that this Court enter an Order consolidating related Case No. 05-CV-42 (JDB) with the above captioned matter, and that Case No. 05-CV-0108 (JDB) be designated as the lead case, together

with such other relief favoring Wilson as this Court deems proper under the circumstances.

Respectfully submitted,

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Dated: May 5, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this the 5th day of May, 2005, I caused a copy of the foregoing **“PLAINTIFF'S COMBINED REPLY IN SUPPORT OF MOTION TO CONSOLIDATE RELATED ACTIONS”** that was filed electronically with this Court and all counsel of record in this case, to be filed via electronic mail to all counsel of record in Related Case No. 05-CV-0042 (JDB) as identified below:

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