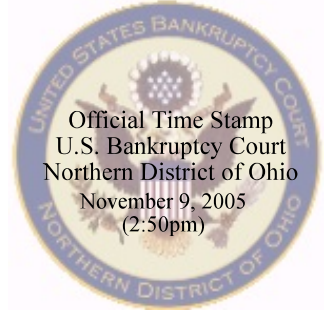


THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:)	Case No. 05-15896
)	
GLORIA GRISCHKAN,)	Chapter 13
)	
Debtor.)	Judge Pat E. Morgenstern-Clarren
)	
_____)	
)	
MORTGAGE ELECTRONIC)	Adversary Proceeding No. 05-1222
REGISTRATION SYSTEMS, INC.,)	
)	
Plaintiff,)	
)	
v.)	<u>MEMORANDUM OF OPINION</u>
)	<u>AND ORDER</u>
GLORIA GRISCHKAN and)	
MICHAEL GRISCHKAN,)	
)	
Defendants.)	

The plaintiff Mortgage Electronic Registration Systems, Inc. (MERS) moves to dismiss the defendants' counterclaim for failure to state a claim upon which relief can be granted. The defendants Gloria and Michael Grischkan oppose that request. For the reasons stated below, the motion to dismiss is denied.¹

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. While Gloria Grischkan's

¹ Docket 23, 32, 34, 36.

underlying chapter 13 case has been dismissed with sanctions, the court retained jurisdiction to adjudicate this adversary proceeding.² This is a core proceeding under 28 U.S.C. § 157(b)(2)(O).

DISCUSSION

The Grischkans and MERS have a long history of dealings with respect to property located at 28575 Settlers Lane, Pepper Pike, Ohio (the property). Gloria Grischkan purchased the property in 1999 and has lived there ever since with her husband, Michael Grischkan. Gloria Grischkan borrowed \$265,000.00 to purchase the property; MERS holds the note which is secured by a mortgage from both Grischkans on the property. Michael Grischkan has a dower interest, only, in the property. Gloria Grischkan has never made a payment under the note. MERS filed a state court complaint on the note and to foreclose the mortgage in 1999. A sheriff's sale of the house was first set for September 10, 2001.

To stop MERS's efforts to foreclose on the property, Michael Grischkan filed four bankruptcy cases. *See* memorandum of opinion and order, case no. 04-22330 (docket 30, 31). On April 13, 2004, the court entered an order in his third case granting MERS *in rem* relief against the property (the *in rem* order). *See* case no. 03-18733, docket 46. The *in rem* order provides that "any stay under § 362(a) of the Bankruptcy Code as to future bankruptcy filings will not be imposed upon the . . . property for a period of 180 days following the entry of [the] Order." The property was sold at foreclosure (apparently to MERS) on September 27, 2004 and the state court confirmed the sale on October 7, 2004. MERS then attempted to obtain possession by evicting the Grischkans, who at that point had lived in the house "rent free" for more than four years.

² Case no. 05-15896, docket 30.

On April 28, 2005, Gloria Grischkan filed her chapter 13 case to stop the eviction proceeding. On September 20, 2005, the court dismissed her case with sanctions (a 180-day bar against refiling), retaining jurisdiction to adjudicate this adversary proceeding.³ In the adversary, MERS requests injunctive and other equitable relief with respect to the property to prevent the Grischkans from abusing the bankruptcy process. The Grischkans answered and asserted a counterclaim. MERS moves to dismiss the counterclaim.

The Grischkans' Counterclaim

The Grischkans' counterclaim states three counts. The first two counts are based on the Grischkans' assertion that the *in rem* order is void. Count 1 seeks to avoid the state court property transfer to MERS as an unauthorized postpetition transfer under bankruptcy code §§ 549 and 522(h). Count 2 requests damages for an alleged violation of the automatic stay based on the foreclosure activity. Count 3 requests injunctive relief to prevent MERS from evicting the Grischkans from the property while the adversary proceeding is pending.

The Motion to Dismiss

MERS moves to dismiss the counterclaim under federal rule of civil procedure 12(b)(6), made applicable by federal rule of bankruptcy procedure 7012.

A. Rule 12(b)(6)

Federal rule of civil procedure 12(b)(6) provides that a pleading, including a counterclaim, may be dismissed if it fails to state a claim upon which relief may be granted. *See* FED. R. CIV. P. 12(b)(6). In considering MERS's motion, "[t]he court must construe the [counterclaim] in the light most favorable to the [Grischkans], accept all the factual allegations as

³ Case 05-15896, docket 30.

true, and determine whether the [Grischkans] can prove a set of facts in support of [their] claims that would entitle [them] to relief.” *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 360 (6th Cir. 2001). For dismissal of the counterclaim to be proper, it must appear beyond doubt that the Grischkans “would not be able to recover under any set of facts that could be presented consistent with the allegations of the [counterclaim].” *Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 346 (6th Cir. 2000). To survive a rule 12(b)(6) motion, the counterclaim “must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory’.” *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 406 (6th Cir. 1998) (quoting *Sogevalor v. Penn Cent. Corp.*, 771 F. Supp. 890, 893 (S.D. Ohio 1991)).

B. Counts 1 and 2

Count 1 of the counterclaim sets forth a claim to avoid the property transfer to MERS to the extent the property could have been exempted from the estate. Bankruptcy code §§ 549 and 522(h) permit such relief under appropriate circumstances. *See* 11 U.S.C. §§ 549, 522(h). Count 2 of the counterclaim sets forth a claim for relief based on willful violation of the automatic stay. Bankruptcy code § 362(h) provides for this type of relief, again under appropriate circumstances. *See* 11 U.S.C. § 362(h). Therefore, without considering either the legal and factual merits of these counts, they clearly state claims for relief.

MERS raises two arguments in support of its motion to dismiss. First, MERS contends that the property never became property of the estate in Michael Grischkan’s fourth bankruptcy case as a consequence of the *in rem* order entered in his third bankruptcy case. This argument

goes to the legal and factual merits of counts 1 and 2 rather than to the sufficiency of the counterclaim, however, and cannot be resolved on a 12(b)(6) motion.

Second, MERS argues that the counts are barred by res judicata. A claim in a second action is barred under res judicata if: “(1) the first action resulted in a final judgment on the merits; (2) both actions are between the same parties; (3) the issue in the second action should have been litigated in the first action; and (4) the claim is identical in both actions.” *Hatchett v. United States*, 330 F.3d 875, 886 (6th Cir. 2003). MERS argues that this court previously decided the issue of whether the *in rem* order is void by (1) the bench ruling denying Mr. Grischkan’s request for relief from the *in rem* order, and (2) the order granting MERS’s motion to dismiss Mr. Grischkan’s fourth case. This argument fails because neither determination was a final judgment on the issue of whether the *in rem* order is void. The bench ruling denying Mr. Grischkan’s motion for relief from the order was not memorialized in an order and the court did not address the validity of the *in rem* order in the memorandum of opinion and order dismissing Mr. Grischkan’s fourth case for lack of good faith. Moreover, at the time the motion to dismiss for lack of good faith was pending, Mr. Grischkan had made another request for relief from the *in rem* order.⁴ The earlier events do not, therefore, support the res judicata argument.

3. Count 3

The Grischkans’ third count requests injunctive relief (including a temporary injunction) to prohibit MERS from evicting them from the property during the pendency of the adversary proceeding. Count 3 clearly states a claim for relief. MERS argues that the count should be

⁴ The court ultimately denied the motion for relief from the *in rem* judgment as moot under the circumstances. *See* case no. 03-18733, docket 68, 69.

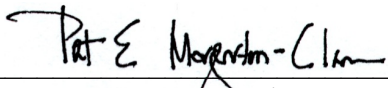
dismissed because to obtain temporary or preliminary injunctive relief the Grischkans must show, among other things, a likelihood of success on the merits and they cannot meet this burden. This cannot, however, be determined through a 12(b)(6) motion, where the court must construe the counterclaim in a light most favorable to the Grischkans.

CONCLUSION

For the reasons stated, the motion of Mortgage Electronic Registration Systems, Inc. to dismiss the Grischkans' counterclaim for failure to state a claim upon which relief can be granted is denied.

IT IS SO ORDERED.

Date: 9 November 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center