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6 *Self-Represented Litigant*

FILED

SEP 27 2010

UNITED STATES
BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

7 **IN THE UNITED STATES BANKRUPTCY COURT**
8 **FOR THE DISTRICT OF ARIZONA**

9 **ANDREW C. BAILEY**
10 **Plaintiff.**

11 Vs

12 THE BANK OF NEW YORK MELLON, as
13 trustee of the CWALT, INC.
14 ALTERNATIVE LOAN TRUST 2007-HY4
15 MORTGAGE PASS-THROUGH
16 CERTIFICATES, SERIES 2007-HY4; BAC
17 HOME LOANS SERVICING, LP F/K/A
18 COUNTRYWIDE HOME LOANS
SERVICING, LP; COUNTRYWIDE
BANK, FSB; MORTGAGE ELECTRONIC
REGISTRATIONS SYSTEMS INC; AND
JOHN DOES 1-10 inclusive,
Defendant/s.

Chapter 11

BK Case #: 2:09-bk-06979-PHX-RTBP
AP Case #: 2:09-ap-01728-SSC

**PLAINTIFF'S OPPOSITION AND
RESPONSE TO DEFENDANTS'
MOTION TO DISMISS PLAINTIFF'S
FOURTH AMENDED COMPLAINT**

**Re: Real Property located at:
2560 N. Page Springs Rd,
Cornville, AZ 86325**

19 COMES NOW the Debtor/Plaintiff, Andrew C. Bailey, and hereby Opposes and Responds
20 to the Defendants' Motion to Dismiss the Plaintiff's Fourth Amended Complaint as set
21 forth below. Plaintiff re-alleges each paragraph in his 4th amended complaint.
22

23 **INTRODUCTION**

24 Once again the Defendants set out to distract the Court from the genuine issues of material
25 fact alleged in the 4th Amended Complaint, which the Defendants steadfastly avoid and

1 never address or answer. There are material issues of fact concerning who owns the
2 mortgage, i.e. the identity of the real party in interest. The Defendants refuse to comply
3 with discovery: the QWR, Request to Produce Documents, and Interrogatories. The
4 disputed matters could have been clarified many months ago. Instead the Defendants seek
5 and obtain dismissal and other relief without ever answering the complaint or complying
6 with the statutes.

7
8 The Defendants hope that the Court will fail to notice the merit in the Plaintiff's allegations
9 and the impropriety in the Defendants' filings. The Defendants have obtained favorable
10 decisions from this Court on the basis of improper and deceptive filings and falsified
11 documents. Should the Court grant the instant Motion to Dismiss, the Defendants will have
12 succeeded in deceiving and defrauding the Plaintiff and the Court without ever being
13 required to produce documents for analysis or answer the charges against them.

14 15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 1. The Defendants have made at least four improper and deceptive filings with this Court
17 during the course of Plaintiff's Ch 11 bankruptcy proceedings, as summarized below and as
18 alleged in detail in the 4th Amended Complaint. They have obtained favorable decisions
19 from this Court based on evidence that is at best, misrepresentation, and at worst, outright
20 fraud. These improper filings appear to constitute fraud and constructive fraud upon the
21 Plaintiff and fraud upon the Court.

22
23 2. It is fundamental to the operation of law that genuine, valid, un-doctored documents be
24 filed in support of pleadings, and that attorneys verify and be held responsible for the
25 documents filed with those pleadings. The Defendants and their attorneys have repeatedly

1 failed to do so in the instant proceedings. There is a pattern of behavior here. These
2 improper actions, if proven, are cause to impose sanctions on the Defendants and their
3 attorneys pursuant to Fed. R. Bankr. P. 9011, 3001, Local Bankruptcy Rules 4001(e) and
4 9011-1 and 11 U.S.C. § 105. See for example In Re: *Julia V. Vasquez*. August 6, 2010.
5 Order to Show Cause why Sanctions Should not be Imposed, Arizona Bankruptcy Judge
6 Eileen W. Hollowell.

7
8 3. The Defendants have made the following four improper and deceptive filings:

9
10 i. Sept 2, 2009: Improper filing of Proof of Claim (“POC”) by Defendant BAC Home
11 Loans Servicing, LP. The POC was filed by attorney Dean Prober of the California
12 law firm Polk, Prober and Rafael. The copy of the Note attached to the POC carried no
13 assignment or endorsement to BAC Home Loans Servicing, LP or to anyone else.
14 The copy of the note carried no assignment, endorsement or allonge whatsoever.

15
16 ii. Nov 12, 2009: Improper filing of Motion for Relief from Stay (“MRS”) by
17 Defendant BONY Mellon on. The MRS was filed by attorney Gerard O’Meara of the
18 law firm Gust Rosenfeld, P.L.C. Movant filed the identical copy of the note as in (i)
19 above. The copy of the Note filed as Exhibit “A” carried no assignment or
20 endorsement to Defendant BONY Mellon or to anyone else. The copy of the note
21 carried no assignment, endorsement or allonge whatsoever. No evidence was offered
22 as to how BONY Mellon claimed to be a party in interest. The Court denied the MRS
23 on February 2, 2010.

24
25 iii. Nov 12, 2009: The copy of the Deed of Trust filed with the MRS as Exhibit “B” by

1 attorney Gerard O'Meara in support of the MRS had been materially altered. The MIN
2 # and Doc ID # had been erased or whited out. The Court denied the MRS on
3 February 2, 2010.
4

5 iv. May 14, 2010: Improper filing of Renewed Motion for Relief from Stay (and
6 accompanying Whitney Declaration) filed by attorney Kyle Hirsch of law firm Bryan
7 Cave LLP. The Motion and Declaration were supported by a materially altered version
8 of the Note, which the Court accepted at face value and upon which it specifically
9 relied in reaching its decision to grant the lift of stay. The Court granted the MRS on
10 July 29, 2010.
11

12 4. The Court's July 30, 2010 Memorandum Decision states: "Defendant BONY Mellon
13 provided a series of endorsements on the Note, reflecting that Countrywide Bank, FSB, as
14 the initial payee, transferred its interest to Countrywide home Loans, Inc, which transferred
15 its interest, by blank endorsement, to any holder in due course." (Page 3, lines 1-3) and
16 "The (Whitney) Declaration has a series of endorsements set forth on the last page of the
17 Note, which is Exhibit A to the Declaration." (Page 3, lines 19-20).
18

19 5. The newly-produced, altered Note has an undated endorsement and assignment,
20 purporting to assign the Note from Countrywide Bank FSB to Countrywide Home Loans,
21 Inc. However, neither Countrywide Bank FSB nor Countrywide Home Loans, Inc. was in
22 existence as of November 12, 2009, the earliest date the alteration could possibly have been
23 made. The newly-produced Note has clearly been doctored in an attempt to give the
24 appearance of propriety.
25

1 6. The unaltered Note has been filed with the Court on several previous occasions and
2 avowed to be a true and correct copy each time. It is incontrovertible that two materially
3 different copies of the Note have been submitted to this Court.
4

5 7. It is clear that this Court's specific reliance upon the fraudulent endorsements and
6 assignment on the altered Note was pivotal to this Court's decision to lift the Automatic
7 Stay.
8

9 8. Additionally, this Court's specific reliance upon the fraudulent endorsement and
10 assignment on the altered Note was pivotal to this Court's decision to dismiss the Plaintiff's
11 Third Amended Complaint.
12

13 9. This Court has not yet reached a final judgment in these matters. Plaintiff opposes
14 Defendants' statement that it is too late to consider or re-consider the issues before the
15 Court, including the validity of documents filed. New evidence allows for reconsideration.
16 Neither the Court nor the Plaintiff previously questioned the discrepancies noted above.
17

18 10. The Court's July 30, 2010 Order states "the Plaintiff shall have 21 days from the date of
19 this Order to file a Fourth Amended Complaint which shall set forth cognizable claims that
20 this Court may consider." No mention is made of "one final opportunity to amend his
21 complaint to properly plead allegations relating specifically to the narrow issue of federal
22 borrower protection laws". Defendant is putting words into the Court's mouth. Plaintiff has
23 adequately stated a number of cognizable claims, including the allegation that Defendants
24 failed to provide disclosures pursuant to the federal FDCPA.
25

1 11. This Court's July 30, 2010 Order states at Page 7, lines 14-15 "[t]he Defendants should
2 produce a copy of the disclosures given to the Plaintiff so that the Court may ensure that
3 any such issue has been resolved on the merits." The Defendants never provided the
4 mandatory FDCPA disclosures to the Plaintiff, and have yet to provide copies of any such
5 disclosures, if they exist, to the Court.
6

7 12. The Plaintiff objects to the fact that this case involves three or four Defendants, each of
8 them different legal entities, each claiming rights as parties in interest. One of them and one
9 only should be compelled to prove its legal status and standing as "the real party in
10 interest". Defendant BONY Mellon has improperly attempted to take that role by filing
11 fraudulently altered documents to establish its standing.
12

13 13. The simple fact is, the chain of title is broken. No amount of post-dated, after-the-fact
14 doctoring can lawfully fix it.
15

16 14. Additionally, the Notice of Default and Notice of Trustee's Sale filed and recorded by
17 Recontrust are ineffective because Recontrust is not a properly substituted Trustee as set
18 forth in the 4th Amended Complaint.
19

20 **CONCLUSION**

21 The Defendant has engaged in inequitable conduct. They have obtained favorable decisions
22 from this Court based on evidence that is, at best, misrepresentation, and at worst, outright
23 fraud. A Temporary Restraining Order is critical to maintaining the status quo and
24 preventing a Trustee's Sale until discovery and an evidentiary hearing can be conducted.
25 The 4th Amended Complaint should not be dismissed.

1
2 **WHEREFORE**, the Plaintiff respectfully reiterates his prayers to this Court as set forth in
3 his 4th Amended Complaint.
4

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6
7 **RESPECTFULLY SUBMITTED** this 24th day of September, 2010.
8

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10
11
12 By 
13 **Andrew C. Bailey, Plaintiff in Pro Per**
14

15
16
17 Served via email this 24th day of September, 2010 upon:

18
19 Kyle S. Hirsch, Esq.
20 Robert J. Miller, Esq.
21 Bryan Cave LLP,
22 Two North Central Avenue, Suite 2200,
23 Phoenix, AZ 85004.

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25
26 **Attorneys for Defendants**