IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

C.L. BYRD JR. d/b/a BFT HOME IMPROVEMENTS, Plaintiff, v. MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS, LLC, *successor by merger to* MORGAN STANLEY MORTGAGE CAPITAL INCORPORATED, Defendant. GLYNN AND SARAH HADSKEY, *other interested parties*	Case No. 2:11-cv-02523-JTF-dkv

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS THE REVISED SECOND AMENDED COMPLAINT WITH PREJUDICE

Before the Court is Defendant's Morgan Stanley Mortgage Capital Holdings, LLC ("Defendant"), successor by merger to Morgan Stanley Capital Inc., Motion to Dismiss filed March 12, 2012. (D.E. #76). Plaintiff C.L. Byrd, Jr. d/b/a BFT Home Improvements filed his Response in opposition to Defendant's Motion to Dismiss on March 23, 2012. (D.E. #77). Defendant filed its Reply Memorandum in support of its Motion to Dismiss on April 9, 2012. (D.E. #78). For the following reasons, Defendant's Motion is GRANTED and the case is DISMISSED with prejudice.

I. FINDINGS OF FACT

On May 10, 2006, Cathleen Ross, a former involuntary Plaintiff, purchased property in Memphis, Tennessee on 7850 E. Holmes Road ("the Property") with the assistance of two

mortgages obtained from Home Funds Direct ("the Lender"). The first mortgage was for $400,000 and the second for $100,000. Ms. Ross signed six mortgage documents that held her liable for the mortgage payments. These documents outlined her rights and obligations under the mortgage contract, required her to inform the Lender of any material modifications, and demanded that she retain the Property as her primary residence. These mortgage documents included: 1) Uniform Residential Loan Application, 2) Occupancy Agreement, 3) Affidavit of Occupancy, 4) General Authorization and Borrower's Certificate, 5) Deed of Trust for First Mortgage Loan, and 6) Note for First Mortgage.

On May 17, 2006, Ms. Ross transferred her control and ownership of the Property to Plaintiff, C.L. Byrd, as the sole proprietor of BFT Home Improvements, via quitclaim deed. This transfer of the Property was specifically in violation of the sixty (60)-day primary residence requirement of the Affidavit of Occupancy[1] and the twelve-month occupancy obligation of the Occupancy Agreement.[2] Ms. Ross never informed the Lender she had transferred the Property

[1] "The Applicant(s) hereby certify and acknowledge that, upon taking title to the real property described above, their occupancy status will be as follows:

Primary Residence – Occupied by Applicant(s) within 60 days of closing.

[2] Relevant parts of the Occupancy Agreement read as follows:

"The undersigned Borrower(s) of the above captioned property understand that one of the conditions of the loan is that Borrower(s) occupy the subject property and Borrower(s) do hereby certify as follows:

1. Borrower intends to occupy the property as Borrower's primary residence.
2. Borrower intends to occupy the property during the 12 month period immediately following the loan closing as the primary residence of the Borrower (i.e. the property will be "owner occupied").
3. If Borrower's intention changes prior to the loan closing, Borrower agrees to notify Lender immediately of that fact.

* * *

THE UNDERSIGNED BORROWER(S) ACKNOWLEDGES AND AGREES THAT:

1. ANY MISREPRESENTATION OF OCCUPANCY BY BORROWER(S);
2. BORROWER(S) FAILURE TO OCCUPY THE PROPERTY AS THE PRIMARY RESIDENCE (i.e. OWNER-OCCUPIED) DURING THE 12 MONTH PERIOD FOLLOWING THE LOAN CLOSING;

SHALL CONSTITUTE A DEFAULT UNDER THE NOTE AND SECURITY INSTRUMENT EXECUTED IN CONNECTION WITH SAID LOAN AND, UPON THE OCCURRENCE OF SAID DEFAULT, THE WHOLE SUM OF PRINCIPAL AND INTEREST PAYABLE PURSUANT TO SAID NOTE PLUS COSTS AND FEES SHALL BECOME IMMEDIATELY DUE AT THE OPTION OF THE

over to Plaintiff. Plaintiff was aware of the mortgage liens on the Property, and he created an arrangement with Ms. Ross that obligated him to pay the mortgage payments. Plaintiff testified that he did not make all the necessary mortgage payments on Ms. Ross' behalf, but that he did pay approximately eight to nine payments on the first and second mortgage.

Consequently, in September 2006, Ms. Ross defaulted for non-payment on her loans and was subsequently served with a Notice of Default and Acceleration. Because the Lender did not approve the transfer of the Property interest, the Lender did not inform Plaintiff about the foreclosure. In January 2007, Philip Kleinsmith, a Colorado appointed Successor Trustee, executed the foreclosure sale. Defendant took title of the Property, and Plaintiff had to vacate the premises. Defendant sold the Property to new owners, Glynn and Sarah Hadskey.

Plaintiff concedes that Defendant had right to foreclosure on the Property. Yet, Plaintiff avers that, because he obtained the Property via quitclaim deed, he has certain rights attached to the Property. Plaintiff further argues that: 1) the appointment of successor trustee document is void pursuant to Tenn. Code Ann. §35-5-114(c);[3] 2) the substitution of trustee is void pursuant to Tenn. Code Ann. § 35-5-114(b)(3)(A);[4] and 3) Philip Kleinsmith was unqualified to serve as trustee pursuant to Tenn. Code Ann. § 66-24-123(b).[5] In the Appointment of Successor Trustee

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HOLDER THEREOF AND/OR LENDER MAY ADJUST THE INTEREST RATE TO BE EQUIVALENT TO THAT OF A NON-OWNER OCCUPIED LOAN."

[3] T.C.A. § 35-5-114(c): "A substitution of trustee shall be recorded prior to any sale, and no action may be instituted against any person, who acting in good faith without knowledge of the contrary, relies upon the validity of the substitution of trustee or written statements by the beneficiary or substitute trustee as to the authority of the substitute trustee."

[4] T.C.A. § 35-5-114(b)(3)(A): "In the event the substitution of trustee is not recorded prior to the first date of publication by the substitute trustee, the beneficiary shall include in the substitution of trustee instrument, which shall be recorded prior to the deed evidencing sale, the following statement:

Beneficiary has appointed the substitute trustee prior to the first notice of publication as required by T.C.A. § 35-5-101 and ratifies and confirms all actions taken by the substitute trustee subsequent to the date of substitution and prior to the recording of this substitution."

[5] T.C.A. § 66-24-123(b): "Except as provided in subsection (e):

(1) A person not a resident of this state or whose principal place of employment is not in this state. . . may in either case be named or act, in person or by agent or attorney, as the trustee of a security trust, either individually or as one (1) of several trustees, regardless whether one (1) or more of such trustees qualify to serve

Notice, Defendant identified Plaintiff as a "Present Owner(s) of Collateral" of the Property. However, Defendant did not identify Plaintiff as the borrower, mortgagor, grantor, or trustor. Pursuant to Fed. R. Civ. P. 12(b)(6), Defendant primarily argues that Plaintiff lacks standing to assert any rights or any claims against Defendant. Additionally, Defendant argues that: 1) Plaintiff is not entitled to the protections of the Tennessee Recording Statues;[6] and 2) Philip Kleinsmith was qualified to serve as successor trustee.

II. LEGAL STANDARD

A. Standing

A plaintiff seeking action in federal courts must first establish standing pursuant to U.S.C. Art. III, § 2, cl. 1. The plaintiff must show that the injury is 1) "concrete" and "actual or imminent, not conjectural or hypothetical;" 2) fairly traceable" to defendant's actions, *Lujan*, 504 U.S. at 560; and 3) redressable in the present action. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 539 U.S. 765, 771 (2000)(quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990), also *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). If a plaintiff cannot prove standing, then the matter must be dismissed.

The Court has clarified Article III standing requirements with three standing limitations:

> First, a plaintiff must 'assert his own legal rights or interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'[7] Second, a plaintiff's claim must be more than a 'generalized grievance' that is pervasively shared by a large class of citizens.[8] Third, in statutory cases, the plaintiff's claim must fall within the 'zone of interests' regulated by the statute in question.[9]

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pursuant to this section, when and only to the extent that the state, territory or District of Columbia in which such individual resides. . . grants equivalent authority to residents of this state, individuals whose principal place of employment is in this state. . . ."

[6] These are in reference to T.C.A. §35-5-114(c) and T.C.A. § 35-5-114(b)(3)(A) that Plaintiff argues Defendant violated.

[7] Quoting *Warth et al. v. Seldin et al*., 422 U.S. 490, 499 (1975).

[8] *See Valley Forge Christian College v. American United for Separation of Church and State, Inc. et al*, 454 U.S. 464 , 474-475(1982).

[9] *See Id*.

Coal Operators Assoc's, Inc. v. Babbitt, 291 F.3d 912, 916-917 (6th Cir. 2002). The purpose of these additional standing restrictions is to ensure the proper plaintiff is bringing the appropriate action against the proper defendant.

B. Motion to Dismiss Under 12(b)(6)

A motion to dismiss is appropriate when a complaint contains insufficient factual matter and fails to "state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The complaint must raise more than labels, conclusions, or a "formulaic recitation of a cause of action's elements." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). The threshold inquiry in determining if the moving party is entitled to dismissal is whether the plaintiff has "provided the 'grounds' of his entitle[ment] to relief." *Bell Atlantic Corp.*, 550 U.S. 555. The complaint must raise factual allegations that rise above speculation or mere suspicion. *See Id.* The court must assume the factual allegations as true and decide whether those facts raise a claim for an entitlement to relief.

A complaint can survive a motion to dismiss if it contains "a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim has "facial plausibility" if the plaintiff provides enough factual allegations for the court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. If the complaint merely pleads facts that are parallel to the defendant's liability, then the complaint "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id* (quoting *Bell Atlantic Corp.*, at 557).

III. ANALYSIS

Notwithstanding the factual allegations raised by Plaintiff, the Court cannot reach the merits of Plaintiff's complaint because Plaintiff lacks standing to bring the claims. A plaintiff

not in privity of contract with a defendant has no standing to assert claims of injuries. *See Burke v. Litton Loan Servicing LP,* No. 2:10-cv-02553, D.E. #30 at 12 (W.D. Tenn. Mar. 30, 2012)(citing *Owner-Operator Indep. Drivers Assn'n, Inc. v. Concord EFS Inc*., 59 S.W.3d 63, 68 (Tenn. 2001)) (finding that plaintiff, who assumed a quitclaim deed from defaulted mortgagors to the property, lacked standing for claims against the lender). Under Tennessee law, when there is no clear intent that the contract was entered into for his direct benefit, a plaintiff has no grounds to bring any contract-based claims. See *Harriet & Henderson Yarns, Inc. v. Castle,* 75 F.Supp.2d 818, 829 (W.D. Tenn. 1999).

Defendant cites *Burke v. Litton Loan Servicing, LP* as authority to support his motion to dismiss. *Burke* involved a plaintiff, who was quitclaimed a mortgaged property from the original owners in violation of express terms of the Deed of Trust. The Deed of Trust had a "Due on Sale Clause," which specified that the property could only be sold by the approval of the mortgage lender. If the property was sold without the lender's approval, the lender could demand the full payment of the loan. The original owners did not request approval for the sale of the property to the plaintiff, and the plaintiff was never a party to the Deed of Trust or the Note for the Mortgage. The original owners defaulted for non-payment on their mortgage loan, and their property was foreclosed. The plaintiff brought claims seeking to halt foreclosure proceedings and seeking damages for violations of various Tennessee laws governing foreclosure proceedings.

In the case at hand, Ms. Ross transferred her ownership and control of the Property without the approval of the Lender. She transferred the Property to the Plaintiff in direct violation of all the signed mortgage documents. Consequently, the rights and obligations that Ms. Ross had in the Property could not have been legally conveyed to the Plaintiff.

Plaintiff argues that, "he is not asserting any rights to any contract but is staking his claim to legal title of the subject property based on a deed given to him. He has no interest in any deed of trust signed by anyone, whatsoever." (D.E. #77, at 2). Plaintiff cannot concede on one hand that he is not asserting a contractually based claim and on the other hand demand legal title to the Property. Asserting a right to legal claim to the Property is synonymous to asserting a contractual interest in the deed of trust. However, it is clear that Plaintiff lacks standing because he concedes he has *no* rights under the contract.

Furthermore, a plaintiff must be classified as a "consumer" under applicable state or federal statutes to prove standing in foreclosure actions. The Tennessee Consumer Protection Act defines a "consumer" as:

> any natural person who seeks or acquires by purchase, rent, lease, assignment, award by chance, or other disposition, any goods, services, or property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated…

Tenn. Code Ann. § 47-18-103(2). To bring an action against a defendant as a consumer, plaintiff must have an interest in the property and an "*obligation to pay the debt*." *King v. IB Property Holdings Acquisition*, 635 F.Supp.2d 651, 658 (E.D. Mich. 2009)(emphasis added) (finding plaintiff, who made mortgage payments on behalf of his father, lacked standing because he had no legal interest in the property quitclaimed to him and no legal obligation to pay the debt on the property). Essentially, a plaintiff cannot assert rights he does not have.

Here, Plaintiff asserts that he has standing to bring claims against Defendant for noncompliance with applicable state laws. Yet, Plaintiff admits he has no interest in the deed of trust. Plaintiff looks to the Appointment of Successor Trustee Notice and the assessment of BFT Home Improvements as "Present Owner(s) of Collateral" to prove his ownership in the Property. Despite Plaintiff's collateral ownership in the Property, Plaintiff owns no legal interest in the title

of the Property and is not a consumer within the zone of interest protected by the Tennessee Consumer Protection Act. Evidenced from the various mortgage documents Ms. Ross signed, Plaintiff could have only obtained legal rights to the Property if the Lender had been aware of and had approved the transfer. However, that did not occur. Although Plaintiff was obligated under his agreement with Ms. Ross to make payments for the mortgage loan, he was never *legally* obligated to do so. Accordingly, Plaintiff has no standing under applicable Tennessee law to bring claims against the Defendant.

IV. Conclusion

Because Plaintiff lacks standing to bring all claims and has failed to state a claim upon which relief can be granted, this Court GRANTS Defendant's Motion to Dismiss.

IT IS SO ORDERED this 31st day of October, 2012.

BY THE COURT:

s/ John T. Fowlkes, Jr.
JOHN T. FOWLKES, JR.
United States District Judge