

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

BRIAN T. SMITH, and
JONATHAN C. CALIANOS

Plaintiffs,

vs.

CASE NO.: 2:11-CV-676-FtM-T-29DNF

BANK OF AMERICA, N.A., successor by
Merger to BAC HOME LOANS
SERVICING, L.P., and MORTGAGE
ELECTRONIC REGISTRATION
SYSTEMS, INC.,

Defendants.

BANK OF AMERICA, N.A.,

Third-Party Plaintiff,

vs.

BRIAN T. SMITH and
JONATHAN C. CALIANOS,
in their representative capacity as trustees
for the SMITHCAL REALTY TRUST,

Third-Party Defendant.

**DEFENDANTS' MOTION FOR FINAL DISMISSAL WITH PREJUDICE,
OR IN THE ALTERNATIVE, FOR THE ENTRY OF AN APPROPRIATE
SPOILIATION REMEDY AND INCORPORATED MEMORANDUM OF LAW**

Defendants Bank of America, N.A. ("BANA") and Mortgage Electronic Registration Systems, Inc. ("MERS") hereby file this Motion for Final Dismissal with Prejudice, or in the Alternative, For the Entry of an Appropriate Spoliation Remedy. Plaintiffs have admitted

during discovery that they intentionally destroyed relevant evidence concerning their allegation that their loan with BANA has been paid in full. Therefore, Defendants request that the Court dismiss the Third Amended Complaint with prejudice as a sanction for Plaintiffs' intentional destruction of key evidence, or in the alternative, impose an appropriate spoliation remedy.

MEMORANDUM OF LAW

Spoliation is the intentional destruction of evidence or the significant and meaningful alteration of a document or instrument. *See Mech. Servs., Inc. v. Brody*, 657 F. Supp. 2d 1293, 1299 (M.D. Fla. 2009). Spoliation is established "when the party seeking sanctions proves that: (1) the evidence existed at one time, (2) the alleged spoliator had a duty to preserve the evidence, and (3) the evidence was crucial to the movant's prima facie case or defense." *Id.* A sanction for spoliation is appropriate when the spoliator acted in bad faith. *Victor v. Makita U.S.A., Inc.*, 3:06-CV-479-J-33TEM, 2007 WL 3334260 (M.D. Fla. Nov. 9, 2007). To address spoliation, "a court may impose sanctions ranging from dismissal of the spoliator's case to an inference that the missing evidence would have been unfavorable to the spoliator." *Id.*

Here, in response to Fannie Mae's Interrogatory #7, Smith and Calianos both responded that they "do[] not have any memory of the specific payments made and ha[ve] no documents regarding the same in [their] custody, control or possession with regard to the Void Note." (*See* Answers to Defendant Fannie Mae's First Set of Interrogatories [D.E. 109-2] at 5, 10.) Similarly, in response to a deposition question concerning whether BANA's loan payment history accurately reflected all payments made by Plaintiffs on the loan,

Calianos admitted under oath that he does not know whether he made any payments to BANA that were not properly credited:

22 Q ... [A]re there any
23 payments on there that are listed on there that you
24 believe either you didn't make or payments that were
25 credited wrongly according to your memory of payments on
1 this account?

2 A I never kept track of any payments. I never
3 do it in my personal life for anything. I wrongly
4 assume that creditors will be honest and do what they
5 say they're supposed to do, and it's a wrong assumption
6 on my part. I do it -- I pay a bill and I throw it
7 away. That's what I do. I never balance my checkbook,
8 so I'm a disaster maybe, but my life seems to be working
9 out fine without any issues until now.

10 **So I honestly don't know whether these -- I**
11 **paid more or less to Bank of America** because I think
12 this only reflects payments that were made to Bank of
13 America from what I can tell, but I'm not sure.

...
8 If they're saying these are the
9 payments I made, **I have nothing to refute or deny that**
10 **these are not or are the payments I made.**

(Calianos Dep. 25:20-25, 26:1-13, 27:8-10 (emphasis added).)^{1,2}

However, despite his statement that he does “not have any memory of the specific payments made,” Calianos then testified that it was his “belief” that the loan was paid in full using a third-party check, but stated that **he “can't prove it one way or the other” because he had *destroyed* the relevant payment records:**

¹ The relevant portions of the Calianos deposition transcript are attached hereto as **Exhibit A**.

² Smith has also testified that he does not know whether the loan was ever paid in full because he has “left all of that up to Jonathan” and does not “get involved in the finances or any legal matters, thank God.” (Smith Dep. 21:4-13, 57:15-17.) The relevant portion of the Smith deposition transcript is attached hereto as **Exhibit B**.

8 Q Why do you believe that you had the original
9 marked void? Why do you think it came to your
10 possession?

11 A **I honestly think it was paid.**

12 Q **You do think it was paid?**

13 A **I honestly think it was paid.**

14 Q **By whom?**

15 A **By me.**

16 Q Did you have -- have you looked back through
17 your bank accounts and stuff to see if it was paid by
18 you?

19 A The way this would have been paid, and the way
20 I do things is, if I receive a large check from
21 somebody, I don't deposit it. I endorse it over and I
22 pay debt that I have, so I would never have a paper
23 trail. The check wouldn't originate from me. I do it
24 all the time. I just did it two weeks ago. I got a
25 \$98,000 check from somebody I just paid down debt with.

1 It wasn't my own check. **It's a third party check, so I
2 don't have paper trails for these things. I can't prove
3 it one way or the other.**

4 That's when I started this whole thing I said
5 to you, "You know, I'm pretty" -- you know what, nobody
6 should ever be put in this position. Nobody should.
7 Whether you have the paper trail or not. That's why the
8 law is the way it is, requiring lenders to show the
9 original. You have to have the note. That's why the
10 laws are written the way they are. **Not for me to say
11 whether I paid or not, because, you know what? I damn
12 well probably did pay this note.** I had hundreds of
13 thousands of dollars going through accounts at this time
14 on other properties, on other things, and it wasn't
15 uncommon. We would get into a deal and take out a note
16 for maybe a month and pay it off. It was not uncommon.
17 We did it on more properties in this very same
18 timeframe.

...

25 Q Okay. Your best memory of when you first got
1 the void note, though, was at least a year or couple
2 years after the note was originally signed?

3 A I would say a one or two year timeframe.

4 Q One or two year timeframe? Okay. So is there
5 any way for you to go back and look and see what deals
6 had closed with you personally during that time that

7 might have given you the money to pay this off?
8 A **I'm certain that -- I don't know how I would**
9 **begin to do that, honestly, because it's not a paper**
10 **trail I would have. There's no way I would be able to**
11 **do this.**

12 Q Would you be able to know what properties you
13 owned and what dates they were purchased, et cetera?

14 A It could have been -- I gave personal loans
15 out to people sometimes. Some people have passed away.
16 I mean, so much has happened in seven, eight years, I
17 **don't know that I could accurately do that. Honestly,**
18 **do I have the records even? I don't even know that --**
19 **after seven years -- I know I don't have the records**
20 **after seven years. I destroy them.**

...

2 Q But you -- your best -- your belief is that
3 you paid off this note?

4 A **That is my belief that this note is paid,**
5 that's why I got it back, and that's why I was so
6 outraged from day one and still today that this is still
7 carrying on.

(Calianos Dep. 39:8-25, 40:1-18, 41:1-20, 42:2-7 (emphasis added).) Furthermore, Calianos also admits that he failed to preserve copies of correspondence sent to BANA that support Plaintiffs' claim of an alleged RESPA violation:

12 Q And how many times do you think that you
13 actually wrote to Bank of America to ask about the loan
14 or the note?

15 A I can't put a number on it. I put the number
16 six somewhere in one of these documents, I know.

17 Q Yeah, I think it says at least six somewhere.

18 A That was probably relating to the RESPA
19 violations or the inquiries I was pressing on. I didn't
20 save all of them. Quite candidly whatever I have that I
21 saved I produced, and **I know in your production you**
22 **produced some that I didn't save, so I didn't save every**
23 **writing, I know I didn't.**

(Calianos Dep. 57:12-23 (emphasis added).) Even though this Court has dismissed the RESPA claim, this testimony establishes that *although documents relating to Plaintiffs'*

allegation that they paid the loan in full once existed, Plaintiffs have intentionally destroyed these documents.

Crucially, Plaintiffs' allegations and testimony establish that they had a duty to preserve these now-destroyed records long before this lawsuit was actually filed. The subject loan in this lawsuit was closed on August 4, 2005. (*See* Third Am. Compl. ("TAC") [D.E. 98] ¶ 11.) Calianos testified that he received the Original Note stamped "void" within "a one or two year timeframe" after the loan closing, *i.e.*, in approximately 2007. (*See* Calianos Dep. 41:3.) Calianos contends that the Original Note was stamped "void" and returned to Plaintiffs because they allegedly had paid the loan in full. (*Id.* 42:2-7.) Despite the fact that Calianos contends that Plaintiffs paid the loan in full sometime around 2007, Plaintiffs continued to make regular payments on the loan every month from 2005 until November 2011. (*See* Aff. of M. Sjolander Ex. B (Loan Payment History) [D.E. 44-2].) Plaintiffs allege that they began to make such payments "under protest" within a few months of receiving the Original Note stamped "void." (*See* TAC [D.E. 98] ¶ 76; Calianos Dep. 56:22-25, 57:3-11.) If, in fact, Plaintiffs made their mortgage payments "under protest" every month from 2007 to 2011, Plaintiffs were put on notice to preserve relevant payment records—particularly those records relating to the alleged payment in full—as soon as they began to make their payments "under protest." Therefore, the evidence clearly establishes that Plaintiffs had a duty to preserve all evidence relating to their alleged payment in full of the loan.

Finally, by intentionally destroying evidence that was obviously critical in this lawsuit, Plaintiffs have clearly engaged in bad faith and are subject to significant sanctions.

Although Plaintiffs have appeared in this lawsuit *pro se*, Plaintiff Calianos has been licensed to practice law in the Commonwealth of Massachusetts for twenty one years (since 1992) and has been a Federal Administrative Law Judge for the United States Department of Labor in Boston, Massachusetts since May 9, 2008. (Calianos Dep. 5:1-8.) As such, there can be no doubt that Calianos was aware of his duty to preserve evidence relevant to his claims in this lawsuit but deliberately destroyed key documents concerning his alleged payment of the loan in full. Such evidence is crucial to Plaintiffs' claims and BANA's counterclaims/third-party claims in this lawsuit, in which Plaintiffs seek in excess of \$2 million in punitive damages based on their allegation that BANA has engaged in "intentional and fraudulent conduct in collecting on a promissory note that it knows is void." (See TAC [DE 98] ¶ 125.) This evidence strongly supports a finding Plaintiffs engaged in bad faith in destroying documents relating to their loan payments.

For these reasons, and as a sanction for the intentional destruction and spoliation of evidence relating to this lawsuit, Defendants request that the Court dismiss the Third Amended Complaint with prejudice. In the alternative, Defendants request that the Court impose an appropriate spoliation remedy, including but not limited to a ruling that Plaintiffs are excluded from introducing any testimony or other evidence at trial to dispute BANA's loan payment history, which shall be taken as conclusive proof of all payments made by Plaintiffs on the loan. Notwithstanding whether sanctions should be awarded, at the very least Plaintiffs should be precluded from introducing any evidence at trial that they paid off the loan, because they have never produced any such evidence in discovery.

WHEREFORE, Defendants respectfully request an order dismissing the TAC with prejudice, or in the alternative, preventing Plaintiffs from introducing evidence at trial to dispute BANA's payment history and preventing Plaintiffs from introducing evidence that they paid off the loans, and for such other and further relief as this Court deems just and proper.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 3.01(g)

The undersigned counsel for Defendants certifies that, pursuant to Local Rule 3.01(g), they have conferred with *pro se* Plaintiffs in a good faith effort to resolve the issues raised by this Motion and Plaintiffs do not consent to the relief requested in this Motion.

McGUIREWOODS LLP

By: /s/ J. Curtis Griner
Sara F. Holladay-Tobias (FL Bar No. 026225)
Emily Y. Rottmann (FL Bar No. 0093154)
50 N. Laura Street, Suite 3300
Jacksonville, FL 32202
(904) 798-3200
(904) 798-3207 (fax)
sfhollad@mcguirewoods.com
erottmann@mcguirewoods.com

Kathleen H. Dooley (*Admitted pro hac vice*)
J. Curtis Griner (*Admitted pro hac vice*)
201 North Tryon Street
Charlotte, NC 28202
(704) 343-2347
(704) 444-8755 (fax)
kdooley@mcguirewoods.com
cgriner@mcguirewoods.com

*Attorneys and Trial Counsel for Defendants
Bank of America, N.A. and Mortgage Electronic
Registration Systems, Inc.*

MORGAN LEWIS & BOCKIUS LLP

Robert M. Brochin (FL Bar No. 319661)
John B. Rosenquest IV (FL Bar No. 048431)
200 S. Biscayne Blvd., Suite 5300
Miami, Florida 33131
(305) 415-3423
(305) 415-3001 (fax)
rbrochin@morganlewis.com
jrosenquest@morganlewis.com

*Attorneys and Co-Trial Counsel for Defendant
Mortgage Electronic Registration Systems, Inc.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF on December 12, 2013. I also certify that the foregoing document is being served this day on the following counsel of record via transmission of Electronic Filing generated by CM/ECF and via Email to *pro se* Plaintiffs:

Janet R. Varnell, Esq.
jvarnell@varnellandwarwick.com
Brian W. Warwick, Esq.
bwarwick@varnellandwarwick.com
Steven T. Simmons, Jr., Esq.
ssimmons@varnellandwarwick.com
Varnell & Warwick, P.A.
20 La Grande Boulevard
The Villages, FL 32159
(352) 753-8600
(352) 753-8606 (fax)
*Attorneys and Trial Counsel for
Third Party Defendant SmithCal
Realty Trust*

VIA EMAIL

Jonathan C. Calianos
jcalianos@usa.net
Brian T. Smith
btsmith1@charter.net
116 South Street
Upton, MA 01568
Pro Se Plaintiffs

/s/ Emily Y. Rottmann
Emily Y. Rottmann