

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DAVID MCCRAE AND BARBARA §
MCCRAE, §

Plaintiff, §

v. §

CIVIL ACTION NO. 1:14-cv-00733

PHH MORTGAGE §

Defendant. §

DEFENDANT’S RESPONSE TO PLAINTIFF’S OBJECTIONS

PHH Mortgage Corporation, incorrectly named as PHH Mortgage, (“Defendant”) demonstrated in its Motion to Dismiss Plaintiff’s First Amended Complaint (the “Motion”) (Doc. No. 14) that the Court should dismiss this lawsuit because: (1) Plaintiff David McCrae (“Plaintiff”) was judicially estopped from asserting his claims; (2) Plaintiff’s claims are the property of the bankruptcy trustee; (3) as a non-licensed attorney Plaintiff is prohibited from representing any interests other than his own in a *pro se* capacity; and (4) the Amended Petition failed to state any cognizable claim on which relief may be granted under Texas law.

On September 19, 2014, Magistrate Judge Lane issued a detailed, nineteen page Report and Recommendations (the “Report”) (Doc. No. 30) which considered the parties’ respective arguments, and recommended dismissal with prejudice, concluding that:

- (1) Plaintiff lacked capacity to bring suit on behalf of a purported class, or *qui tam* on behalf of the Consumer Financial Protection Bureau;¹
- (2) Plaintiff’s claims were barred by the doctrine of judicial estoppel;²

¹ See Report at p. 5.

² *Id.* at pps. 7-8.

- (3) Plaintiff's claims belong to the bankruptcy estate;³
- (4) Plaintiff's wrongful foreclosure claim failed because no foreclosure occurred and Plaintiff remains in possession of the property;⁴
- (5) Plaintiff's fraud claim is barred by the economic loss doctrine;⁵
- (6) Plaintiff's Fair Debt Collections Practices Act claim fails for insufficient pleading and because Defendant is not a "debt collector" under that act;⁶
- (7) Plaintiff's Texas Debt Collections Act claim fails for insufficient pleading and because the act of non-judicial foreclosure is not a prohibited activity under that act;⁷
- (8) Plaintiff's statutory fraud claim fails because the statute is not applicable to a loan transaction, even if secured by land;⁸ and
- (9) Plaintiff's request for injunctive relief should be denied because all his substantive claims fail on the merits.⁹

Plaintiff has submitted Objections to the Report (the "Objections") (Doc. No. 31), but the Objections are either irrelevant, and assert arguments which the Magistrate already considered and rejected. The Court should adopt the Report and dismiss the Amended Complaint with prejudice for the reasons articulated by Magistrate Judge Lane.

A. Plaintiff Is Judicially Estopped From Brining His Claims and In Any Event, They Belong to the Bankruptcy Estate.

1. The Magistrate Judge correctly held Plaintiff was judicially estopped from asserting his claims because the legal position he asserts in this matter, that Defendant overcharged him with fees, is plainly inconsistent with that taken by him in his prior bankruptcy

³ *Id.* at pps. 8-9.

⁴ *Id.* at pps. 9-10.

⁵ *Id.* at pps. 10-11.

⁶ *Id.* at pps. 11-12.

⁷ *Id.* at p. 12.

⁸ *Id.* at pps. 13-14.

⁹ *Id.* at pps. 14-15.

case.¹⁰ The Magistrate Judge also correctly concluded that even if Plaintiff was not judicially estopped from bringing his claims, they belong to the bankruptcy trustee, not Plaintiff.¹¹

2. Rather than providing any substantive objection to these conclusions, Plaintiff impliedly concedes the Magistrate correctly reached those conclusions by stating: “That’s a little bunny trail that has no real import in this case. Let’s not waste any more time on it.”¹² Thus, the Court must overrule Plaintiff’s Objections.

B. The Amended Complaint Failed To Allege Cognizable Claims.

3. The Magistrate Judge correctly concluded that the Amended Complaint failed to allege any cognizable claims, for a variety of reasons. Rather than address these bases for dismissal in his Objections, Plaintiff instead offers as “evidence” a consent judgment reached in a prior litigation with non-parties to this case. The consent judgment has no bearing on the outcome of this matter because it does not involve any of the parties in the case at bar. Thus, it is irrelevant and does not warrant sustaining Plaintiff’s Objections.

4. Second, Plaintiff readily admits in his Objections that as a non-licensed attorney he is no longer pursuing any class action claims, nor those on behalf of his spouse. Plaintiff, however, remains steadfast on his attempt to represent the Consumer Financial Protection Bureau *qui tam*. Unfortunately for Plaintiff, it is black letter law that a *pro se* plaintiff is

¹⁰ *Richardson v. CitiMortgage, Inc.*, No. 6:10-CV-119, 2010 WL 4818556, *5 (E.D. Tex. Nov. 22, 2010).

¹¹ *Carroll v. JPMorgan Chase Bank*, No. 13-31134, --- Fed.Appx. ---, 2014 WL 3661990, *2 (5th Cir. Jul. 10, 2014); *Vineyard v. BAC Home Loans Servicing, L.P.*, No. A-10-CV-482-Y, 2011 WL 8363481, *4 (W.D. Tex. Dec. 28, 2011)

¹² *See* Objections at p. 3.

prohibited from bringing a *qui tam* action.¹³ As such, the Court must overrule Plaintiff's objections.

For these reasons, Defendant respectfully requests that the Court overrule Plaintiff's Objections, adopted the Magistrate's Report in its entirety, issue a final judgment dismissing Plaintiff's Amended Complaint with prejudice, and for all other relief to which it may be entitled.

Respectfully submitted,

By: /s/ S. David Smith

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¹³ *Veal v. Walker*, No. 3:13-CV-155-N-BN, 2013 WL 1386666, *4, n.1 (N.D. Tex. Mar. 6, 2013); *See, e.g., U.S. ex rel. Mergent Servs. et al v. Flaherty*, 540 F.3d 89, 93 (2d Cir. 2008); *Timson v. Sampson*, 518 F.3d 870, 873-74 (11th Cir.2008); *Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1126-28 (9th Cir.2007); *U.S. ex rel. Lu v. Ou*, 368 F.3d 773, 775-76 (7th Cir. 2004); *U.S. v. Onan*, 190 F.2d 1, 6-7 (8th Cir. 1951); *Jones v. Park at Lakeside Apartments*, Civ. A. No. H-08-0001, 2008 WL 4820083, *2 (S.D. Tex. Nov. 5, 2008); *U.S. ex rel. White v. Apollo Group, Inc.*, No-EP-04-CA-452-DB, 2006 WL 487853, *3 (W.D. Tex. Jan. 6, 2006); *Manning v. Pogo Producing Co.*, H-08-2896, 2008 WL 4889032, *1 (S.D. Tex. Nov. 12, 2008).

CERTIFICATE OF SERVICE

I certify that on September 22, 2014, I filed the foregoing with the Clerk of the Court via the CM/ECF filing system who will send a copy of same to the following registered CM/ECF users:

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I further certify that a true and correct copy of the foregoing was also served upon Plaintiffs *pro se* via U.S. Certified Mail, Return Request No. 7196 9008 9111 2892 8841, on September 22, 2014.

/s/ Nathan T. Anderson
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