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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT _

No. 18-11716 Non-Argument Calendar

D.C. Docket No. 8:11-cv-02511-VMC-TBM

ANDRZEJ MADURA, ANNA DOLINSKA-
MADURA,

Plaintiffs - Counter Defendants -
Counter Claimants - Appellants,

versus BAC HOME LOANS SERVICING, L.P.,
f.k.a. Countrywide Home Loans Servicing, LP,
Defendant-Appellee,

BANK OF AMERICA, N.A.,
Defendant -Counter Claimant -
Third Party Plaintiff-Counter Defendant-
Appellee,
COUNTRYWIDE HOME LOANS INC.,
Counter Defendant,

UNKNOWN TENANT 2, et al.,
Third Party Defendants.

Case: 18-11716 Date Filed: 05/15/2019 Page: 2 of 10
Appeal from the United States District Court for the
Middle District of Florida

(May 15, 2019)

Before TJOFLAT, JORDAN and FAY, Circuit Judges
PER CURIAM: Andrzej Madura and Anna
Dolinska-Madura (collectively, "the Maduras"),
proceeding pro se, appeal the denial of their Federal
Rule of Civil Procedure 60(b)(4) motion for relief
from the district court's 2013 final judgment in their

action against Bank of America, N.A., and BAC Home Loans Servicing, L.P. (collectively, “the Banks”). We affirm in part and dismiss in part.

I. BACKGROUND

In 2000, Madura obtained a residential home loan from Full Spectrum Lending, Inc. (“Full Spectrum”), and signed a promissory note; he and his wife, Dolinska-Madura, signed the mortgage. Countrywide Home Loans, Inc. (“Countrywide”), then purchased the loan from Full Spectrum on July 31, 2000. In 2001, the Maduras contacted Countrywide and requested to repay the loan in full. Countrywide notified them that a prepayment penalty would apply and provided a payoff statement reflecting the penalty. The Maduras responded with a letter demanding an immediate rescission of the loan, asserting that Countrywide had destroyed
 Case:18-11716 Date Filed: 05/15/2019 Page:3 of 10

the original loan records and fabricated new ones that included the prepayment penalty. Countrywide refused to rescind the loan, but it agreed to waive the prepayment fee. The Maduras did not repay the loan in full; instead, they continued making monthly loan payments until November 2006, when they stopped. In 2007, Countrywide sent a notice of default and acceleration. In 2009, changed its name to BAC Home Loans Servicing, L.P. (“BAC”); in 2011, BAC merged with Bank of America, N.A. (“BOA”). BOA sent Madura a re-notice of default and acceleration in February 2012; Madura did not cure the default. Following the 2001 rescission demand, the Maduras initiated several lawsuits against BAC, Countrywide, Full Spectrum, and BOA. See *Madura v. BAC Home Loans Servicing, LP*, 593 F. App’x 834, 837-39 (11th Cir. 2014)

(describing the history of litigation, including: Madura 1, a 2002 action in Florida state court; Madura 2, a 2006 action in federal court; Madura 3, a 2010 state court complaint that was removed to federal court; Madura 4 and Madura 6, 2011 and 2012 actions, respectively, in Florida small claims court; and Madura 5, the present action, which was filed in state court and removed to district court by the Banks). All of these actions were resolved in favor of the defendants. *Id.* The Maduras sought rescission of their loan in several of their lawsuits, based on their argument that they had effectively rescinded the loan when they sent the letter

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detailing the alleged fraud and forgery of the loan documents. In Madura 2, the district court dismissed Madura's claims and ordered arbitration under a provision in the loan agreement, and it granted summary judgment in favor of BOA on Dolinska-Madura's claims. *Madura v. Countrywide Home Loans, Inc.*, F. App'x 509, 513 (11th Cir. 2009). On appeal, we concluded that Dolinska Madura's fraud-related claims and arguments that the Maduras had rescinded their loan were barred by the doctrines of res judicata and collateral estoppel, because they had already pursued them in Madura 1, their first action in Florida state court. *Id.* at 517-18.

In 2011, the Maduras filed Madura 5, the action underlying this appeal, in Florida state court; the Banks removed the action to federal district court. In an amended complaint, the Maduras claimed, in relevant part, that their loan documents had been

forged and that the Banks had violated the Real Estate Settlement Procedures Act and the Truth in Lending Act ("TILA"). BOA, on its own and as successor by merger to BAC, filed an answer and raised numerous affirmative defenses to the amended complaint. In 2012, BOA filed a counterclaim for foreclosure against the Maduras, asserting that it held a valid mortgage on their property and that it was entitled to foreclose based on the Maduras' default on the terms of the underlying loan. The Maduras filed a 140 page answer to BOA's counterclaim for foreclosure, denying the allegations and raising dozens of

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affirmative defenses. The Maduras asserted, among other things, that BOA lacked standing to foreclose because it had rescinded the loan in May 2001 and the loan documents had been forged and fraudulently altered. Later in 2012, BOA moved for summary judgment on the Maduras' claims and on its counterclaim for foreclosure. The Maduras responded in opposition to summary judgment and simultaneously filed their own motion for partial summary judgment on the foreclosure counterclaim. They reasserted the same arguments with regards to standing, namely, that they had rescinded the loan and that the loan documents had been forged and altered. The Maduras also filed a report from Thomas Vastrick, whom they asserted was a forensic expert. They asserted that Vastrick had provided expert assessments showing that their signatures and initials on the loan documents were not authentic. In July 2013, the district court granted BOA's motion for summary judgment and motion in limine to strike Vastrick's forensic reports. The

Maduras appealed this ruling; we affirmed. See *Madura*, 593 F.App'x at 841-50 (the "final judgment affirmance"). We affirmed the district court's conclusion that the Maduras' fraud and forgery and rescission arguments were barred by res judicata and collateral estoppel. *Id.* at 843-44. We also held that, in any event, the Maduras ratified the loan by continuing to make monthly payments through

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November 2006. *Id.* at 844. We also affirmed the district court's decision to strike Vastrick's forensic reports. *Id.* at 847-48. On March 23, 2015, following our final judgment affirmance, the Maduras moved this Court to vacate its panel opinion and rehear the matter en banc, based on the Supreme Court's January 2015 opinion in *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790 (2015). They argued that our conclusion in the final judgment affirmance as to their rescission claims was flawed because *Jesinoski* made clear that a borrower need not file a lawsuit in order to effectuate rescission. We denied that motion in April 2015; the mandate issued in June of that year. The Supreme Court denied the Maduras' certiorari petition in October 2015 and denied their request for rehearing shortly thereafter. The Maduras later sought to recall our mandate; we denied that request. Meanwhile, following our judgment affirmance, the Maduras filed numerous motions in the district court and subsequent appeals in this Court, all without success. In several of these motions the Maduras again pursued their arguments that they had rescinded the loan and that the district court therefore erred in foreclosing the loan. See, e.g. *Madura v. BAC Home Loans Servicing, L.P.*, 721 F. App'x 838, 842 (11th Cir. 2017); *Madura v. BAC*

Home Loans Servicing, LP, 655 F. App'x 717, 725 (11th Cir. 2016). In March 2018, the Maduras filed Case:18-11716 Date Filed: 05/15/2019 Page:7 of 10

the present motion under Fed. R. of Civil Pr.60(b)(4) for relief from the final judgment in Madura 5. They argued that the judgment was void because the district court lacked subject matter jurisdiction to proceed on BOA's foreclosure counterclaim. In an endorsed order, the district court denied the motion. The Maduras appealed, designating only that ruling for review.

II. DISCUSSION

On appeal, the Maduras argue that the final judgment, which included a foreclosure judgment in favor of the Banks, was void because they rescinded the underlying residential mortgage loan prior to the filing of the action. A district court's ruling on a Rule 60(b)(4) motion to set aside a judgment as void is reviewed de novo, because the validity of the judgment involves a legal question. *Burke v. Smith*, 252 F.3d 1260, 1263 (11th Cir. 2001). An appeal of a grant or denial of a Rule 60(b) motion is narrow in scope, addressing only the propriety of the denial or grant of relief, but not addressing issues in the underlying judgment for review. *Maradiaga v. United*; 679 F.3d 1286, 1291 (11th Cir. 2012). A "significantly higher" standard is generally used to decide whether a movant is entitled to relief under Rule 60(b), as opposed to a motion filed under Federal Rule of Civil Procedure 59(e). *Vanderberg v. Donaldson*, 259 F.3d 1321, 1326 (11th Cir. 2001) (holding that the movant could not even satisfy Rule Case: 18-11716 Date Filed: 05/15/2019 Page: 8 of 10

59(e)'s more lenient standard, much less the more stringent Rule 60(b) standard). Rule 60(b)(4) provides that a court may relieve a party from a final judgment or order if it finds that the judgment is void. Fed. R. Civ. P. 60(b)(4). "Generally, a judgment is void under Rule 60(b)(4) 'if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law.'" *Burke*, 252 F.3d at 1263 (quoting *In re Edwards*, 962 F.2d 641, 644 (7th Cir. 1992)). "A judgment also is void for Rule 60(b)(4) purposes if the rendering court was powerless to enter it." *Id.* TILA provides that, under certain circumstances, consumer borrowers may rescind certain loan transactions by timely notifying the lender that they intend to do so. 15 U.S.C. § 1635(a). The notice must comply with applicable regulations. *Id.* Within 20 days of receiving such notice, a creditor must, inter alia, "return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction." *Id.* § 1635(b).

In *Jesinoski*, the Supreme Court addressed the issue of whether a borrower may exercise his right of rescission under TILA by only providing written notice to his lender, or whether the borrower must also file a lawsuit before the three-year limitations period elapses. *Jesinoski*, 135 S. Ct. at 791. Although the borrowers in *Jesinoski* exercised their right to

rescission within the three-year period of their loan origination, the district court granted the lender's motion for a judgment on the pleadings because the borrowers did not file a lawsuit within the three-year period. *Id.* The Supreme Court reversed, holding that written notice of rescission within three years of a loan's origination is all that is required for a borrower to exercise his right of rescission under TILA. *Id.* at 792-93. Despite the Maduras' arguments, *Jesinoski* has no bearing on this case. The district court found that the Maduras' notice was not a proper rescission and that the Maduras nullified any rescission by continuing to make payments through 2006; it did not rule that the Maduras failed to rescind because they did not file a lawsuit seeking rescission. See *id.* at 791-92. Further, although the Maduras argue that they have provided additional evidence showing that the loan documents were fraudulent, they have not raised any evidence that was not considered at the time of the final judgment, which expressly addressed their fraud and forgery arguments. Therefore, the Maduras have failed to show that the judgment was void, making Rule 60(b)(4) relief unwarranted. See *Burke*, 252 F.3d at 1263. While the Maduras also raise arguments that challenge the district court's 2013 final judgment, we lack jurisdiction to review these arguments because the Maduras' 2018 notice of appeal was untimely as to that ruling and it only designated the denial of their Rule 60(b)(4) motion for relief. Fed. R. App. P.3 (c)(1)(B), 4 (a)(1)(A);

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Green v. DEA, 606 F.3d 1296, 1300-02 (11th Cir. 2010)
Similarly, the Maduras challenge our 2014 opinion affirming the district court's 2013 final judgment,

affirming the district court's 2013 final judgment, Madura, 593 F. App'x 834; however, the law-of-the-case doctrine prohibits us from reviewing that ruling. See *Heathcoat v. Potts*, 905 F.2d 367 370 (11th Cir. 1990). Accordingly, to the extent the Maduras' appeal raises these arguments, it is dismissed.FN1

AFFIRMED IN PART, DISMISSED IN PART

FN 1 We note that a single judge of this Court directed the parties to address whether the Maduras were entitled to proceed in forma pauperis because they received such status in the district court. Having concluded that this appeal is meritless, we decline to further address this question; we instead affirm in part and dismiss in part as further detailed in this opinion. Additionally, although the Banks have requested sanctions in their brief, our internal operating procedures provide that such a request must be contained in a separate motion. 11th Cir. R. 38-1, I.O.P. Because the Banks did not file a separate motion for sanctions, their request is DENIED.

U.S. District Court Middle District of Florida
The following entered filed on 3/26/2018 at 3:35 PM
Case: *Madura et al v. BAC Home Loans Serv. L.P.*
No: 8:11-cv-02511-VMC-TBM
Warning case closed on 08/13/2013
Document No: 754 (No document attached)

ENDORSED ORDER denying (753) Motion for relief from judgment. All of the many orders entered by this Court as well as the Eleventh Circuit explain why it is time for the Maduras to accept the judgment of the Court and move forward. There is no basis to grant relief sought. It is denied. Signed by Judge Virginia M. Hernandez Covington on 03/26/18

Case: 15-12925 Date Filed: 11/23/2015 Page:1 of 4

IN THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

No. 15-12925-G

ANDRZEJ MADURA,
ANNA DOLINSKA-MADURA,
Plaintiffs Counter Defendants
Counter Claimants-Appellants,
versus

BAC HOME LOANS SERVICING, L.P., f.k.a.
Countrywide Home Loans Servicing, LP,
Defendant-Appellee,

BANK OF AMERICA, NA,
Defendant Counter Claimant Counter
Defendant Third Party Plaintiff Appellee,
COUNTRYWIDE HOME LOANS, INC.,
Counter Defendant

UNKNOWN TENANT 2, et al.,
Third Party Defendants,
Appeal from the United States District
Court for the Middle District of Florida

ORDER:

Case: 15-12925 Date Filed:11/23/2015 Page: 2 of 4
Andrzej Madura and Anna Dolinska-Madura ("the
Maduras") seek to appeal the denial of their motions
for: (1) an indicative ruling under Fed. R. Civ. Pr.
62.1 and Fed. R. App. P. 12.1; and (2) relief from
judgment of foreclosure under Fed.R.Civ, P.60 (b)(6).

After defaulting on a loan from BAC Home Loans
Servicing, which later merged with and into Bank of
America, N.A. ("BOA"), the Maduras sued BOA in
five separate lawsuits, in state and federal court,
asserting numerous claims. Each of those claims was
denied. In the present action, the district court

granted summary judgment in favor of BOA's counterclaim, and this Court affirmed.

The Maduras' filed a motion for reconsideration in this Court. In a letter of supplemental authority, the Maduras argued that this Court's order affirming the district court's grant of summary judgment conflicted with the Supreme Court's decision in *Jesinoski v Countrywide Home Loans, Inc.*, 135 S. Ct. 790 (2015). This Court denied the motion for reconsideration. The Maduras then filed a motion to vacate this Court's opinion based on *Jesinoski*, and this Court denied the motion. The Maduras then filed in the district court a motion for indicative ruling pursuant to Fed. R. Civ. P. 62.1 and Fed. R. App. P. 12.1, requesting that the district court issue an order stating either that (1) it would grant their motion for reconsideration if this Court remanded for that purpose, or (2) their motion raised a substantial issue. The Maduras also filed a motion for reconsideration pursuant to R. Civ. P. 60(b)(6) arguing, again that the district court's grant of summary judgment in favor of BOA conflicted with *Jesinoski*. The district court denied the motion for an indicative ruling because this Court had already denied the Maduras' *Jesinoski* claim. The district court also denied the motion for reconsideration because this Court had already affirmed its grant of summary judgment in favor of BOA. The Maduras filed a notice of appeal, and the district court denied them leave to proceed in forma pauper's ("IFP") on appeal. They now seek IFP status.

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DISCUSSION:

Because the Maduras seek leave to proceed On appeal IPF, the appeal is subject to a frivolity the \$6,000.00 penalty for which was never able to

determination, See 28 U.S.C, § 1915(e)(2)(B). An appeal is frivolous when it is without arguable merit either in law or fact. *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002).

The district court did not err in denying the Maduras' motion for an indicative ruling. Under Fed. R. App. P. 12.1(a), when a party submits a timely motion for relief that the district court lacks authority to grant because an appeal is pending, the party must notify the circuit clerk if the district court states either that it would grant the motion for relief or that the motion raises a substantial issue. The Maduras' direct appeal was no longer pending by the time the district court issued its order denying their motion. Accordingly, their appeal as to this issue is frivolous. The district also correctly denied the Maduras' motion for reconsideration because this Court twice rejected their argument that the district court's grant of summary judgment conflicted with *Jesinoski*. Moreover, *Jesinoski* is inapposite to their case. In *Jesinoski*, the Supreme Court held that a borrower need not file a lawsuit to rescind a loan. 135 S. Ct. at 792. However, the issue involved in the Maduras' rescission claim was not whether they needed to file a lawsuit to rescind their loan, but rather, whether they notified BOA that they intended to rescind. *Jesinoski* would not have

Case:15-12925 Date Filed: 11/23/2015 Page: 4 of 4
affected this issue, nor any of the other issues involved in their case.

Because the Maduras' appeal is without arguable merit, their motion for IFP status is DENIED. See *Napier*, 314, F.3d at 531; 28 U.S.C, § 1915(e)(2)(B).

“s/”

(unreadable Judge Jill Pryor's signature)
UNITED STATES CIRCUIT JUDGE

Case: 13-13953 Date Filed: 11/07/2014 Page: 1 of 2
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT No. 13-13953-AA
ANDRZEJ MADURA, ANNA DOLINSKA-
MADURA, Appellants Plaintiffs-Counter
Defendants- Counter Claimants, **versus**
BANK OF AMERICA, NA, Defendant-Counter
Claimant-Appellee,

Appeal from the United States District Court
for the Middle District of Florida

Before: WILSON, ROSENBAUM and FAY, Circuit
Judges. BY THE COURT:

The appellants' "Motion to Direct the District Court [to] Allow the Appellants [to] Inspect and Preserve on Appeal Undisclosed Loan Documents .." is **DENIED**. In the motion, the appellants request an opportunity and additional time to inspect the ink-signed loan documents at issue, which are currently being held in the district court clerk's office, in order to convince us that the documents had been forged.

The appellants already have been given an opportunity to inspect the inksigned loan documents in question and, more importantly, the Case:13-13953 Date Filed: 11/07/2014 Page: 2 of 2 doctrines of collateral estoppel and res judicata preclude the appellants from challenging the authenticity of the promissory note. The appellants' "Request to Certify Questions to the Florida Supreme Court" is also **DENIED**. The proposed questions do not concern unsettled questions of Florida law. Finally, we **GRANT** the appellants' "Motion to Accept Corrections [to] Their Reply Brief." We have considered the appellants' arguments, as amended in their reply brief, in our resolution of this appeal Brief." We have considered the appellants' arguments, as amended in their reply brief, in our resolution of this appeal.

Case 8:11-cv-2511-VMC-TBM Document 496
Filed 07/13/2103 Page 1/67 Page ID 5939
UNITED STATES DISTRICT COURT MD FLA.
TAMPA DIV. ANDRZEJ MADURA and ANNA
DOLINSKA-MADURA, Plaintiffs v. BAC HOME
LOANS SERV.L.P., ET AL., Defendants. BANK OF
AMERICA, N.A. Counter Plaintiff, v. ANDRZEJ.
MADURA and ANNA DOLINSKA-MADURA,
Counter-Defendants BANK OF AMERICA, N.A.,
Third Party Plaintiff, v. CIT LOAN
CORPORATION, ET AL., Third Party Defendants.

ORDER

This matter comes before the Court pursuant to Bank of America, N.A.'s Motion for Summary Judgment (Doc. # 359) and Statement of Undisputed Facts (Doc. # 360), both filed on December 31, 2012, and Bank of America's Supplement (Doc.#385)

Case 8:11-cv-2511-VMC-TBM Document 496
Filed 07/17/13 Page 5/67 Page ID 5944

Full Spectrum Lending made a \$87,750.00 loan to Mr. Madura on July 26, 2000 (the "Loan").(Siriwan Aff.Doc.360-1 at ¶4). On that same day, Mr. Madura signed a promissory note (the "Note")(Doc.360-2) and both Mr.Madura and Mrs.Madura signed a mortgage in favor of FullSpectrum Lending which encumbered their real property located at 3614 57Av Dr.West, Bradenton, Fla.34210 (the"Mortgage") (Doc 360-3). Mr. Madura also signed an arbitration agreement at the loan closing.(Doc. # 360-4). Upon request of the Court, Bank of America has furnished the original loan documents, including the Note, to the Court. The Court has directed that the documents be filed the Clerk's Office in a secure location. As of April 27, 2009, Countrywide Home Loans, Inc. changed its name to BAC Home Loans Serv.,L.P.(Doc. 360-18).

On April 30, 2009, BAC Home Loans Servicing, L.P. purchased the Madura loan. (Siriwan Aff. Doc. # 360-1 at ¶ 7; Doc. # 360-6). On July 1, 2011, BAC Home Loans Servicing, L.P. merged with and into Bank of America, N.A. (Siriwan Aff. Doc. # 360-1 at ¶ 8; Doc. # 360-19). Bank of America, N.A. notified Mr. Madura when the ownership and servicer rights of the loan were transferred from BAC Home Loans Servicing, L.P. to Bank of America, N.A. (Doc #360-7).

Case 8:11-cv-02511-VMC-TBM Document 496

Filed 07/17/13 Page 7 of 67 PageID 5945

“Excerpt”

On July 15, 2003, Mrs. Madura filed an amended complaint against Countrywide (notwithstanding the fact that the Maduras did not arbitrate, despite being ordered to do).

Case 8:11-cv-2511-VMC-TBM Document 496

Filed 07/17/13 Page 15/67 Page ID 5953

“Excerpt”

Court accordingly takes judicial notice of the state & federal court documents pursuant to Fed.R.Evid.201. The Court also takes judicial notice of the official documents from the Office of the Secretary of State bearing the seal of the State of Texas, reflecting that Countrywide Home Loans, Inc. changed its name to BAC Home Loans Servicing, L.P. (Doc. # 360-18)

Case 8:11-cv-2511-VMC-TBM Document 496

Filed 07/17/13 Page 17/67 Page ID 5955

The Courthas located “Forensic Document Examination Reports” from Vastrick dated Nov. 25, 2001 (Doc. # 71 at 4); Dec 28, 2007 (Id. at 33); Feb. 16, 2008 (Doc. # 171 at 36); July 9, 2012 (Id. at 44); and Sept.4,2012 (Doc. # 365-1 at 3334). The Court determines that the reports, which contain *ipse dixit* reasoning devoid of any substantive analysis, are insufficient as a matter of law. The end of the excerpt

Bana authenticated the Note and Allonge by filing the Affidavit of Brienne Siriwan, "AVP Operations Team Lead" in which she attests that Bank of America "directly or through an agent has possession of the Note and held the Note indorsed in blank prior to filing the foreclosure [counterclaim] on May 2, 2012." (Doc. # 360-1 at ¶ 6). Siriwan also states facts that establish that the Note and Allonge are "kept in the course of [Bank of America's] regularly conducted business activities." (Id. at ¶ 30). Although the Maduras seek an order striking Siriwan's Affidavit, the Court denies the Motions. (Doc. ## 393, 437). Siriwan's Affidavit satisfies the requirements of Rule 56 because such Affidavit is made on personal knowledge, sets out facts that would be admissible in evidence, and shows that Siriwan is competent to testify as to the matters

FN5 The Court acknowledges that the Maduras argue that Bank of America failed to disclose Siriwan's identity during discovery. However, the Court declines to employ the draconian sanction of striking Siriwan's Affidavit on this basis alone. Furthermore, even if the Court were to strike her Affidavit, the result would not change. Bank of America has tendered the Note to the Court and has established its entitlement to foreclosure.

3. Rescission

The Maduras contend that they rescinded their loan in defense 7. The Court has entered a number of Orders finding that the Maduras have not rescinded their loan and it is not necessary to repeat that ruling once again. (See, e.g., Doc. # 213 at 4). The rescission defense is patently frivolous and Bank of America is entitled to summary judgment on this defense. *(underlined is from Pg 37's end in the Order)*

4. Securitization/Pooling and Servicing Agreement
In defenses 11, 17, 24, 27, 28, 29, 32, 38, and 42, the Maduras contend that their mortgage is unenforceable because Bank of America failed to comply with a securitization or pooling and servicing agreement. However, the Maduras have not identified such an agreement at the summary judgment stage or explain why the Foreclosure Counterclaim should fail due to the application of any such agreement. The Court determines that these defenses are unsupported by record evidence. As such, summary judgment in favor of Bank of America is warranted on these defenses.

5. Default Letters and Evidence of Default

In defenses 18 and 40, the Maduras incorrectly assert that Bank of America failed to give proper notice of default and acceleration. This Court has previously determined that: "the Bank sent the Maduras a default letter dated April 23, 2007, giving the Maduras until May 23, 2007, to cure the default or face acceleration." (Doc. #165 at 6). *(underlined is from the beginning of the Page 40 in the Order).*

UNITED STATES DISTRICT COURT MIDDLE
DISTRICT OF FLORIDA TAMPA DIVISION

ANDRZE J. MADURA and ANNA DOLINSKA-
MADURA, Plaintiffs, Case No.: 8:11-cv-2511-T-33TB

v.

BAC HOME LOANS SERVICING L.P., ET AL.,
Defendants

BANK OF AMERICA, N.A., Counter-Plaintiff,

v.

ANDRZE J. MADURA and ANNA DOLINSKA-
MADURA, Counter-Defendants.

BANK OF AMERICA, N.A., Third Party Plaintiff,

v.

CIT LOAN CORPORATION, ET AL.,
Third Party Defendants.

ORDER

This matter comes before the Court pursuant to the Maduras' Motion to Dismiss the Bank's Foreclosure Counterclaim for Lack of Subject Matter Jurisdiction (Doc. # 203), which was filed on August 27, 2012.

Bank of America, NA (the "Bank") filed a Response in
Case 8:11-cv-02511-VMC-TBM Document 213
Filed 09/01/12 Page 2 of 5 Page ID 2089

Opposition to the Motion (Doc. # 209) on August 31, 2012. For the reasons that follow, the Court denies the Motion to Dismiss.

I. Background

The Maduras' response to the Bank's Foreclosure Counterclaim is due on September 6, 2012, pursuant

to the Court's Order dated August 23,2012(Doc.#193)

Rather than responding as ordered by the Court the Maduras have filed yet another Motion to Dismiss such Counterclaim. The present Motion to Dismiss is the Maduras' fourth successive Motion to Dismiss the Bank's Counterclaim.(Doc. # 193). This Court has denied the three previously-filed Motions to Dismiss, and the present Motion to Dismiss fares no better. The basis of the Motion to Dismiss is that the Court lacks subject matter jurisdiction over the Counterclaim because the Maduras rescinded their Mortgage pursuant to the Truth in Lending Act. *The Maduras state that the Motion is brought pursuant to Rule 12(b)(f) of the Fed. Rules of Civ. Pr. Being that such rule does not exist, and being that the Motion seeks dismissal based on lack of subject matter jurisdiction, the Court will construe the Motion as asserted pursuant to Rule 12(b)(1).1*

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II. Legal Standard

Federal courts are courts of limited jurisdiction. “[B]ecause a federal court is powerless to act beyond its statutory grant of subject matter jurisdiction, a court must zealously insure that jurisdiction exists over a case, and should itself raise the question of subject matter jurisdiction at any point in the litigation where a doubt about jurisdiction arises.” *Smith v. GTE Corp.*,236 F.3d 1292,1299 (11th Cir. 2001). Motions to dismiss for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P.12(b)(1) may attack jurisdiction facially or factually. *Morrison v. Amway Corp.*,323 F.3d 920, 924 n.5 (11th Cir. 2003). The Court may look outside the four corners of the

complaint to determine if jurisdiction exists. *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 73(11th Cir. 1982). In a factual attack, the presumption of truthfulness afforded to a plaintiff under Fed. R. Civ. P.12(b)(6) does not attach. *Scarfo v. Ginsberg*, 175 F.3d 957,960 (11th Cir. 1999) (citing *Lawrence v.Dunbar*, 919 F.2d1525, 29(11th Cir.1990) Because the very power of the Court to hear the case is at issue in a Rule 12(b)(1) motion, the Court is free to weigh evidence outside the complaint. *Eaton*, 692F.2d at 732.

1.The Maduras' Motion to Dismiss is not amenable to disposition pursuant to Rule 12(b)(6) Fed.R.Civ.P.because such Motion is based upon documents external to the pleadings.

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III. Analysis

The Maduras attach to their Motion to Dismiss a scathing letter, dated May 23, 2001, authored by the Maduras and addressed to Countrywide Homeloans Customer Service. (Doc. # 203 at 5-11). The letter accuses Countrywide of fraud, forgery, and of“taking advantage of poor people by giving them loans with very high percentage rates.”Id.at 7. The letter threatens Countrywide with a lawsuit and blames Countrywide for Mrs.Madura’s hospitalization; however, whatthe letter does not do is mention TILA or accomplish rescission of the Maduras’ mortgage. In addition, the letter makes no mention of Bank of America, the Counterclaimant, and the Maduras fail to explain why the letter to Countrywide would affect the rights of Bank of America in this action. Futhermore, as stated by the Bank, “ not only did

the Maduras not rescind their loan, they continued to make payments on their mortgage loan for more than five years after sending the letter”(Doc.209 at3)

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The Maduras’ missive, even construed broadly, does not mandate the dismissal of the Counterclaim and is no bar to the Court’s exercise of subject matter jurisdiction over the Bank’s Counterclaim. Rather than filing Motions to Dismiss seriatim, the Court suggests that the Maduras timely respond to the Counterclaim, which was filed on May 2, 2012, so that this case can move forward toward its final resolution. Accordingly, it is

ORDERED, ADJUDGED, and DECREED:

The Maduras’ Motion to Dismiss the Bank’s Foreclosure Counterclaim for Lack of Subject Matter Jurisdiction (Doc. # 203) is **DENIED**.

DONE and ORDERED in Chambers, in Tampa, Florida, this 31st day of August 2012.

“s/”

VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

Copies: All Counsel and Parties of the Record

2. This Court’s basis for exercising subject matter jurisdiction is the Maduras’ claim that the Bank violated the RESPA

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Filed 03/29/13 Page 3 of 7 Page ID 5202
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IN THE CIRCUIT COURT OF THE TWELFTH
JUDICIAL CIRCUIT IN AND FOR MANATEE
COUNTY, FLORIDA

ANDRZEJ MADURA and ANNA DOLINSKA-
MADURA, Counterdefendants / Plaintiffs,

v. CASE NO. 2002 CA 2358 Div.D
FULL-SPECTRUM LENDING, INC. and
COUNTRYWIDE HOME LOANS, INC.,

ORDER ON CROSS MOTIONS FOR SJ

THIS CAUSE comes before the Court upon Defendants', Full Spectrum Lending, Inc. and Countrywide Home Loans, Inc. ("Defendants"), and Plaintiff Anna Dolinska-Maduras Motions for Summary Judgment filed pursuant to Florida Rule of Civil Procedure 1.510. Hearings on the above referenced motions were held in April 20, 2004; the Plaintiff and Defendants were both present and represented by counsel.

The Court, having reviewed the motions and case law, having heard argument, and being otherwise duly advised in premises, makes the following findings of fact and conclusions of law:

Background :

On May 1, 2002, the original Plaintiffs to this lawsuit, Andrzej Madura and his wife, Anna Dolinska Madura, filed an initial Complaint against Full-Spectrum Lending, Inc. and Countrywide Home Loans, Inc., with allegations against the Defendants of usury, forgery and conspiracy related to a loan closing on July 26, 2000. On Aug. 5, 2002. this Court

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granted the Defendants motion to compel Mr. Madura to arbitrate and ordered Mr. Madura to bring his claims before the National Arbitration Forum should he continue to pursue them. On July 15, 2003, the remaining Plaintiff, Anna Dolinska Madura, filed an Amended Complaint containing additional allegations that the Defendants violated federal Truth in Lending Act provisions. Throughout the protracted course of this litigation, Mr. and Mrs. Madura have filed copious motions, posing a significant challenge for this Court to efficiently guide this case through the judicial process.

Counts I and II

In Counts I and II of the Plaintiff's Amended Complaint, the Plaintiff makes allegations that the Defendants forged a Truth in Lending Act ("TILA") document subsequent to the July 26, 2000 closing to change the terms of the loan and add a prepayment penalty without the Plaintiff's knowledge. The Defendants argue in their Motion for Summary Judgment that Plaintiff's TILA claims are time-barred due to a one-year statute of limitations pursuant to 15 U.S.C.A. § 1640(e).

According to the Defendants, the Plaintiff claims to have discovered the alleged forgery in March 2001; the Plaintiff disputes this claim. The record discloses that the Plaintiff first had knowledge of the alleged TILA forgery in November 2001.^{FN1}

^{FN1} In the Plaintiff's Notice of Correction of an Error in the Plaintiff's Motion for Partial Summary Judgment. Plaintiff seek to clarify the record by stating: "Plaintiff did not know until November 25, 2001, that Truth in Lending was forged"

Accepting the nonmoving party's facts as true for purposes of this summary judgment motion, this

Court finds the TILA claims raised by Plaintiff in Counts I and II are still barred by the one-year statute of limitations. See 15 U.S.C.A. § 1640(e).

Fraudulent concealment can toll the statute of limitations, as long as the fraud is concealed, or as long as the Defendant is under on duty to disclose certain facts and fails to do so.

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Thus, even if Plaintiffs allegations are true and the Defendants fraudulently concealed the alleged forgery, the Plaintiffs were nonetheless on notice as of November 2001, giving them one year to file pursuant to 15 U.S.C.A. § 1640. In the May 2002 Complaint, the Plaintiffs raise allegations of forgery; however, they do not set forth any claims alleging violations of the federal TILA statutes. Therefore, as of May 2002, the Defendants are not yet on notice of a TILA claim. The Plaintiff first raises the TILA claim in the Amended Complaint filed in July 2003.

Allegations made in an amended complaint are not barred by statute of limitations if they relate back to the original pleading that put the Defendant on adequate notice of a TILA claim. See *Ecenrode v. Household Finance Corp.*, 422 F. Supp 1327 (O. Del. 1976). The Plaintiff's Amended Complaint sets forth the TILA claim; however, unlike tn *Ecenrode*, supra, the Defendant did not have notice of a count alleging TILA violations in the original Complaint.

Therefore, the allegations of federal statutory violations cannot properly relate back; they are beyond the time limit and are barred by the one-year statute of limitations.

Counts III and IV

In Counts III and IV of the Amended Complaint, the Plaintiff makes allegations that the contract entered into with the Defendants is usurious on its face and in violation of Sections 687.03 (Unlawful rates of interest") and 687.071 ("Criminal usury, loan sharking; shylocking"), Florida Statutes. The Defendants argue in their motion that Mrs. Madura does not have standing (FN2) because she did not apply for the loan and, therefore, she is not a "borrower" within the definition of Section 687.14(2), Florida Statutes (FN3). Mrs. Madura disputes the Defendants' claim that she is not "borrower" and

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states that her signature on several of the loan documents proves she is entitled to such a designation. Upon review of the record, this Court finds that, as a matter of law, Mrs. Madura does not qualify as a "borrower" under Section 687.14(2), Florida Statutes, and thus lacks standing to bring claims of usury as set forth in this Complaint. While the Plaintiff argues that she does qualify as a "borrower" because her name appears on several of

¹ Section 687.147, Florida Statutes, states in pertinent part. "Any borrower injured by a violation of this act may bring an action for recovery of damages " (emphasis added). ³ According to Section 687.14(2), Florida Statutes, a "borrower" is defined as "a person obtaining or desiring to obtain a loan of money, a credit card. or a line or credit."

While the Plaintiff argues that she does qualify as a "borrower" because her name appears on several of the loan documents, the Court finds that the record fails to demonstrate that Mrs. Madura's signature on these documents constitutes borrower status. Mr. Madura is listed as the sole borrower on the Uniform Residential Loan Application ("URLA"). Defendant Full Spectrum Lending lists Mr. Madura as the sole borrower/applicant on the loan documents. Mrs. Madura's signature does not appear on the same documents. Furthermore, Mrs. Madura has admitted in court proceedings that she did not sign the arbitration agreement signed by Mr. Madura as a condition of the loan. (FN4).

Counts V and VI

In Counts V and VI, Plaintiff claims the Defendants forged loan documents and fraudulently charged a prepayment penalty of \$5,036.84 that the Plaintiff never agreed to on closing. It is undisputed that the Defendants waived the prepayment penalty. Even though there remains a factual dispute with respect to the allegations in Counts V and VI, an exhaustive review of the review of the record fails to show any evidence of damages. Actual damages and the measure of such damages are essential as a matter of law in establishing a claim of fraud. See *Casey v. Welch*, 50 So. 2d 124 (Fla. 1951); *Sussex Mutual Ins. Co. v. Gabor*, 568 So.2d 1004 (Fla. 3d DCA 1990).

FN 4 See transcript, page 17, of January 20, 2004 proceedings before Judge Robert Bennett on Plaintiff's Motion for Leave to Amend the complaint to add punitive damages claim.

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Therefore, based on the foregoing, it is
ORDERED AND ADJUDGED that:

1. Defendants' Motion for Summary Judgment is
GRANTED as to all counts.
2. Plaintiffs Motion for Partial Summary Judgment
is DENIED.
3. This Court reserves jurisdiction for the award of
attorney's fees and costs.

DONE AND ORDERED in Bradenton, Manatee
County, Florida, this day 22 of June 2005.

“s/”

Marc B. Gilner, Circuit Judge

CERTIFICATE OF SERVICE I HEREBY CERTIFY
that a true and correct copy of the above has been
furnished by U.S. Mail to: Wiliaam P. Heller, Esq.,
Akerman Senterfitt, Las Olas Centre II, Suite 1600,
350 East Las Olas Blvd., Ft. Lauderdale, FL 33301;
Wilhelm Randolph Klein, Esq., 1900 Main Street,
Suite 11310, Sarasota, FL 34236; Anna Dolinska-
Madura, 3614 57th Avenue Drive West, Bradenton,
Florida 34210 on this 22 day of June 2005

“s/”

JUDICIAL ASSISTANT

**Additional material
from this filing is
available in the
Clerk's Office.**