No. _____

In The
Supreme Court of the United States

LEANDER BACON AND IRIS I. DICK BACON,
Petitioners,

v.

UNITED STATES OF AMERICA;
NAVY FEDERAL CREDIT UNION ("NAVY FCU);
COMMONWEALTH ASSET SERVICES, LLC,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1774

LEANDER BACON; IRIS I. DICK BACON,
Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA; NAVY FEDERAL CREDIT UNION, ("Navy FCU");
COMMONWEALTH ASSET SERVICES, LLC,
Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Rossie David Alston, Jr., District Judge. (1:19-cv-01641-RDA-MSN)

Submitted: November 22, 2021
Decided: December 13, 2021

Before QUATTLEBAUM and RUSHING, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Henry Woods McLaughlin, III, LAW OFFICE OF HENRY MCLAUGHLIN, P.C., Richmond, Virginia, for Appellants. G. Zachary Terwilliger, United States Attorney, Robert K. Coulter, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia; Caitlin M. Kasmar, BUCKLEY LLP, Washington, D.C.; David M. Zobel, SYKES, BOURDON, AHERN & LEVY, PC, Virginia Beach, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Leander Bacon and Iris I. Dick Bacon appeal the district court's order dismissing their complaint for lack of subject matter jurisdiction in part based on the *Rooker-Feldman* doctrine.* We have reviewed the record and conclude that the court correctly determined that it lacked jurisdiction over the complaint on this ground. Accordingly, we affirm the district court's order. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: December 13, 2021

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1774
(1:19-cv-01641-RDA-MSN)

LEANDER BACON; IRIS I. DICK BACON,
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v.

UNITED STATES OF AMERICA; NAVY FEDERAL CREDIT UNION, ("Navy FCU");
COMMONWEALTH ASSET SERVICES, LLC,
Defendants - Appellees.

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Case No. 1:19-cv-01641 (RDA/MSN)

LEANDER BACON, *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA, *et al.*,
Defendants.

ORDER

This matter comes before the Court on Defendant Navy Federal Credit Union's ("Defendant Navy FCU") Motion to Dismiss (Dkt. 12), Defendant United States of America's ("Defendant USA") Motion to Dismiss (Dkt. 14), and Defendant Commonwealth Asset Services, LLC's ("Defendant CAS") Motion to Dismiss (Dkt. 18). Considering the Complaint (Dkt. 1); Defendant Navy FCU's Motion to Dismiss and the Memorandum in Support (Dkt. 13); Defendant USA's Motion to Dismiss and the Memorandum in Support (Dkt. 15); Defendant CAS' Motion to Dismiss and the Memorandum in Support (Dkt. 19); Plaintiffs Leander Bacon's and Iris I. Dick Bacon's ("Plaintiffs") Memorandum in Opposition to Defendant USA's Motion to Dismiss and Defendant Navy FCU's Motion to Dismiss (Dkt. 22); Plaintiffs' Memorandum in Opposition to Defendant CAS' Motion to Dismiss (Dkt. 21); Defendant Navy FCU's Reply in Support of its Motion to Dismiss (Dkt. 23);

and Defendant USA's Reply in Support of its Motion to Dismiss (Dkt. 24); for the reasons that follow, it is hereby ORDERED that Defendant Navy FCU's Motion to Dismiss (Dkt. 12) is GRANTED;

IT IS FURTHER ORDERED that Defendant USA's Motion to Dismiss (Dkt. 14) is GRANTED;

IT IS FURTHER ORDERED that Defendant CAS' Motion to Dismiss (Dkt. 18) is GRANTED; and

IT IS FURTHER ORDERED that Plaintiffs' Complaint (Dkt. 1) is DISMISSED.

I. BACKGROUND

A. Factual Background

On March 28, 2014, Plaintiffs entered into a VA Home Loan evidenced by a note secured by a deed of trust to purchase the property located at 14 Wagoneer Lane, Stafford, Virginia 22554 ("the Property"). Dkt. Nos. 1, 4; 1-2, 1; 1-3. Defendant Navy FCU was the lender and the servicer of the loan. Dkt. Nos. 1-2, 1; 1-3. The note was guaranteed by the United States Veterans Administration ("VA"). Dkt. 1, ¶ 11. The Plaintiffs became delinquent on their mortgage payments. Dkt. 1-4, 1. "A total of four foreclosure sales [were] [ ] postponed in an attempt for [ ] [Plaintiff Leander] Bacon to gain employment . . . ." *Id*.

On November 9, 2015, Defendant Navy FCU appointed Defendant CAS as substitute trustee to begin the foreclosure proceedings. Dkt. 1, ¶¶ 12-13. The VA acknowledged that it "c[ould not] force [Defendant Navy]FCU to postpone or rescind" foreclosure, but the VA again attempted to stall the foreclosure sale a fifth time. Dkt. 1-4, 1. However, on

March 20, 2017, the Property was ultimately sold in foreclosure. *Id*. at ¶ 22; Dkt. 1-4, 1. At the foreclosure sale, Defendant Navy FCU was the highest bidder. Dkt. 1, ¶ 22. Defendant Navy FCU then assigned its bid to the VA. *Id*. at ¶ 23. Accordingly, Defendant CAS executed a trustee's deed conveying the title of the home to the VA. *Id*.

Then, on January 18, 2018, the VA filed an unlawful detainer action against Plaintiffs in the Stafford County General District Court located in Stafford, Virginia. Dkt. 1, ¶ 28. That court entered a Judgement of Possession in the VA's favor, which awarded the VA possession of the Property. Dkt. 1, ¶ 28.

Plaintiff Leander Bacon then appealed the decision of the Stafford County General District Court to the Circuit Court for Stafford County. In that appeal, Plaintiff Leander Bacon moved to dismiss the action. Dkt. 1, ¶ 28. After the Circuit Court for Stafford County denied the motion, that court entered a "Final Order" awarding possession of the home to the VA. Dkt. 1, ¶ 25.

Subsequently, Plaintiff Leander Bacon appealed the decision of the Circuity Court for Stafford County to the Virginia Supreme Court. Dkt. 1, ¶ 26. On September 6, 2019, the Supreme Court of Virginia denied Plaintiff Leander Bacon's petition for appeal opining that "there [was] no reversible error in the judgment complained of." Dkt. 1, ¶ 27; Dkt. 13-4.

To this Court's knowledge, to date, the Plaintiffs continue to reside on the Property. Dkt. 1, 29.

B. Procedural Background

On December 20, 2019, Plaintiffs filed their Complaint in this Court. Dkt. 1. On March 16, 2020, Defendants each filed separate motions to dismiss Plaintiffs' claims, each raising arguments pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Dkt. Nos. 12; 14; 18. On March 30, 2020, Plaintiffs opposed the motions to dismiss. Dkt. Nos. 21; 22. On April 20, 2020, Defendants Navy FCU and USA filed their reply briefs. Dkt. Nos. 23; 24. Defendant CAS did not file a reply brief.

This Court dispenses with oral argument as to each motion to dismiss because the Court finds that it would not aid in the decisional process. The matter is now ripe for disposition.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) allows a defendant to move for dismissal when the court lacks jurisdiction over the subject matter of the action. Fed. R. Civ. P. 12(b)(1). A district court must dismiss an action over which it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1), (h)(3). In considering a 12(b)(1) motion to dismiss, the burden is on the plaintiff to prove that the federal subject matter jurisdiction is proper. *See United States v. Hays*, 515 U.S. 737, 743 (1995) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). There are two ways in which a defendant may present at 12(b)(1) motion. First, as appear to be the case in the instant matter, a defendant may attack the complaint on its face when the complaint

"fails to allege facts upon which subject matter jurisdiction may be based." *Adams*, 697 F.2d at 1219. In such a case, all facts as alleged by the plaintiff are assumed to be true. *Id*.

Alternatively, a 12(b)(1) motion to dismiss may attack the existence of subject matter jurisdiction over the case apart from the pleadings. *See Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995) (citing *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)); *White v. CMA Contr. Co.*, 947 F. Supp. 231, 233 (E.D. Va. 1996). In such a case, the trial court's "very power to hear the case" is at issue. *Mortensen*, 549 F.2d at 891. The district court is then free to weigh the evidence to determine the existence of jurisdiction. *Adams*, 697 F.2d at 1219. "No presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Mortensen*, 549 F.2d at 891.

III. ANALYSIS

In the case at bar, each of the Defendants move to dismiss Plaintiffs' Complaint pursuant to both Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Thus, the threshold issue is whether this Court lacks subject matter jurisdiction. *See Adkins v. Rumsfeld*, 370 F. Supp. 2d 426, 429 (E.D. Va. 2004) (finding one of "[t]he threshold issues [were] [ ] whether this Court ha[d] subject matter jurisdiction over the case" where the defendants challenged the Court's jurisdiction pursuant to both Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6)); *see also* Fed. R. Civ. P. 12(b)(1), (h)(3) (a district court *must*

dismiss an action over which it lacks subject matter jurisdiction). Because this Court lacks subject matter jurisdiction, this Court will not address whether Plaintiffs, in their Complaint, state a plausible claim from which relief can be granted, as Defendants argue they do. *See Adkins*, 370 F. Supp. 2d at 429 ("Because the Court does not have subject matter jurisdiction and the [p]laintiffs lack standing . . . the Court does not address whether the Complaint has stated a claim upon which relief can be granted.").

In support of its position that the Court lacks subject matter jurisdiction, Defendant USA raises three arguments. Dkt. 15; 4-5, 12-15, 18-20. First, Defendant USA sets forth that this Court lacks subject matter jurisdiction under the *Rooker-Feldman* doctrine. *Id*. at 18-20 (citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983) and *Rooker v. Fidelity Tr. Co.*, 263 U.S. 413, (1923)).[1] Second, Defendant USA argues that this Court lacks subject matter jurisdiction because "Plaintiff [sic.] has failed to allege a waiver of sovereign immunity by the United States for this action." *Id*. at 4-5. Third, Defendant USA maintains that this Court is without subject matter jurisdiction over Plaintiffs' claims because Plaintiffs have failed "to meet the requirements for Article III standing." *Id*. at 12-15.

This Court will address each of Defendants' arguments concerning this Court's subject matter jurisdiction in turn.

---

[1] Defendants Navy FCU and CAS raise this same argument. Dkt. 13, 7-10; 19, 13-16.

A. The *Rooker-Feldman* Doctrine

The United States Court of Appeals for the Fourth Circuit has held that "[u]nder the *Rooker-Feldman* doctrine, a 'party losing in state court is barred from seeking what in substance would be appellate review of state judgment in a United States district court.'" *American Reliable Ins. Co. v. Stillwell*, 336 F.3d 311, 316 (4th Cir. 2003) (citing *Johnson v. De Grandy*, 512 U.S. 997, 1005-06 (1994)). The *Rooker-Feldman* doctrine creates a jurisdictional bar such that district courts do not have subject matter jurisdiction over actions that implicate the doctrine. *See American Reliable Ins. Co.*, 336 F.3d at 316 (citing *Friedman's Inc. v. Dunlap*, 290 F.3d 191, 196 (4th Cir. 2002)). This is so because (1) "Congress . . . vested the authority to review state court judgments in the United States Supreme Court alone" and (2) "Congress has empowered the federal district courts to exercise only original jurisdiction." *American Reliable Ins. Co.*, 336 F.3d at 316 (citations omitted). Accordingly, with the exception of circumstances, which are patently inapplicable to the case at hand, "appellate review of state court decisions occurs first within the state appellate system and then in the United States Supreme Court." *Id.* (citation omitted).

"'[I]f in order to grant the federal plaintiff the relief sought, the federal court must determine that the state court judgment was erroneously entered or must take action that would render the judgment ineffectual, *Rooker-Feldman* is implicated.'" *Smalley v. Shapiro & Burson, LLP*, No. 12-1266, 2013 WL 1613219 (4th Cir. Apr. 16, 2013) (quoting *Jordahl v.*

Democratic Party of Virginia, 122 F.3d 192, 202 (1997) (quotations and citations omitted)).

Moreover, "[a] litigant may not circumvent these jurisdictional mandates by instituting a federal action which, although not styled as an appeal, amounts to nothing more than an attempt to seek review of the state court's decision by" a federal district court." *Id*. (citations and internal quotations omitted). As such, "*Rooker-Feldman* bars not only direct review of issues actually decided by the state court, but also consideration of those claims which are 'inextricably intertwined' with state court decisions." *Brown & Root, Inc. v. Breckenridge*, 211 F.3d 194, 198 (4th Cir. 2000) (citing *Feldman*, 460 U.S. 462 486-87 (4th Cir. 2000)). Thus, litigants may not raise claims in the federal court where the "success on the federal claim depends upon a determination that the state court wrongly decided the issue before it[,]" even if such claims were not expressly decided by the state court. *Brown & Root, Inc.*, 211 F.3d at 198.

In the case at bar, according to Plaintiffs' Complaint, the Stafford County General District Court, a Virginia state court, "entered an order awarding possession of the [Property]" to the VA. Dkt. 1, ¶ 28. Plaintiff Leander Bacon then appealed the Stafford County General District Court's decision to the Circuit Court for Stafford County, and that court ultimately "entered a final order" awarding possession of the property in question to the VA. *Id*. at ¶¶ 28, 25. According to his Complaint, Plaintiff Leander Bacon then appealed the Circuit Court for Stafford County's judgment to the Virginia Supreme Court, who denied Plaintiff Leander Bacon's petition. *Id*. at ¶ 27.

Now, in Count One of their Complaint, Plaintiffs ask this Court to "enter an order rescinding the purported foreclosure and the purported trustee's deed to enjoin the VA from conducting a lock-out of the [Plaintiffs] from [their home] by means of a writ of possession based on the eviction order entered by the Circuit Court [for] Stafford County." Dkt. 1, ¶ 30. However, this Court may not do so, pursuant to the *Rooker-Feldman* doctrine. This is so because Plaintiffs' request, as indicated by Count One of their Complaint, asks this Court to determine that the Circuit Court for Stafford County's judgment was erroneously entered and it would require the Court to "take action that would render the judgment ineffectual[.]" *Jordahl*, 122 F.3d at 202. As such, the *Rooker-Feldman* doctrine is implicated, *Jordahl*, 122 F.3d at 202, and the Court must dismiss Count One of Plaintiffs' Complaint.

In Count Two of their Complaint, Plaintiffs request that this Court "enter an order with the effect of recession of the purported foreclosure and the purported trustees' deed and for restoration to the [Plaintiffs] of the record ownership of the[ir] home . . . ." Dkt. 1, 38. Though this request does not explicitly ask this Court to invalidate the judgments of the Virginia state courts, in order for this Court to provide Plaintiffs the relief they request, this Court would have to "take action that would render the [Virginia state courts'] judgment[s] ineffectual[.]" *See Smalley*, 2013 WL 1613219 at *5.

The Fourth Circuit's decision in *Smalley v. Shapiro & Burson, LLP*, instructive on this issue. No. 12-1266, 2013 WL 1613219, at * 5 (4th Cir. Apr. 16, 2013). In *Smalley*, the Fourth Circuit determined that the appellants' claims were barred in the

federal courts pursuant to the *Rooker-Feldman* doctrine. 2013 WL 1613219, at *5. The Fourth Circuit concluded that "[a]lthough [the] [a]ppellants d[id] not seek to 'undo' the state court judgment foreclosing on their homes, permitting the case to go forward would, in essence, hold that the state court judgments which held the allegedly false affidavits sufficient to warrant foreclosure was in error." *Smalley v. Schapiro & Burson, LLP*, No. 12-1266, 2013 WL 1613219, at *5 (4th Cir. Apr. 16, 2013). The *Smalley* court then went on to hold that "[t]his was not proper under *Rooker-Feldman* because th[e appellants'] federal causes of action [were] 'inextricably intertwined' with the state court foreclosure actions." *Id.* The court found that to hold otherwise would do violence to the prong of the *Rooker-Feldman* doctrine which "'bars a claim that was not actually decided by the state court but where 'success on the federal claim depends upon a determination that the state court wrongly decided the issues before it.'" *Smalley*, 2013 WL 1613219, at *5 (citing *Brown & Root, Inc.*, 211 F.3d at 198). The *Smalley* court concluded that "the alleged source of [the a]ppellants' harm is shielded by state court judgments that necessarily rested on a decision about which [a]ppellants now complain; therefore, [a]ppellants are limited to whatever relief they are afforded in the state court system." *Id.*

As the Fourth Circuit determined in *Smalley*, this Court concludes that the issues Plaintiffs raise in Count Two are "inextricably intertwined" with the Virginia state courts' judgments on the foreclosure of the property in question. Therefore this Court does not have jurisdiction over Count Two of Plaintiffs'

Complaint. *Id*. As such, this Court must dismiss Count Two.

B. Sovereign Immunity

Defendant USA contends that "Plaintiff [sic] has [sic] failed to allege a waiver of sovereign immunity by the United States for this action." Dkt. 15, 5.

The Supreme Court of the United States has opined that "[i]t is elementary that '[t]he United States, as a sovereign, is immune from suit save as it consents to be sued . . ., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). Waiver "cannot be implied but must be unequivocally expressed." *United States v. King*, 395 U.S. 1, 4 (1969). District courts do not have subject matter jurisdiction to "'entertain suits against the United States'" where there is no "clear congressional consent" to waive sovereign immunity. *Mitchell*, 445 U.S. at 538 (1980) (quoting *Sherwood*, 312 U.S. at 586). The Supreme Court has further established "the traditional principle that the Government's consent to be sued must be construed strictly in favor of the sovereign[.]'" *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992) (quoting *McMahon v. United States*, 342 U.S. 25, 27 (1951) (internal quotations omitted)). Waivers of immunity must not be "enlarge[d] . . . beyond what the language requires[.]" *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983) (quoting *E. Transp. Co. v. United States*, 272 US. 675, 686 (1927)).

Plaintiffs raise a singular argument in opposition to Defendant USA's position. Dkt. 22, 5. Plaintiffs oppose this argument by asserting that if it were correct that the United States has not waived sovereign immunity, then "the federal government could take anyone's land and the property owner deprived of ownership would have no recourse." *Id.* Plaintiffs urge that, "[a]n improper taking of land is subject to recourse and a lawsuit seeking such recourse is not barred by sovereign immunity." *Id.* (citation omitted). In support of this position, Plaintiffs cite to *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304 (1987).

Plaintiffs' reliance on *First English Evangelical Lutheran Church*, is misplaced for several reasons. *First Evangelical Lutheran Church*, concerned a different issue than that presented in the case at bar. The Supreme Court in *First Evangelical Lutheran Church*, considered whether "a landowner who claims that his property has been 'taken' by a land-use regulation may [ ] recover damages for the time before it is finally determined that the regulation constitutes a 'taking' of his property." 482 U.S. at 306-07. The Court ultimately held that "in th[o]se circumstances[,] the Fifth and Fourteenth Amendments to the United States Constitution would require compensation for that period." *First Evangelical Lutheran Church*, 482 U.S. at 307. In the instant matter, Plaintiffs have raised two claims neither of which contemplate a "taking" within the meaning of the word as discussed in the *First Evangelical Lutheran Church*, matter. *Compare* Dkt. 1, *with First English Evangelical* Lutheran *Church*, 482 U.S. at 310-311 (discussing the question

presented in that case). To be sure, *First English Evangelical Lutheran Church*, concerned a taking under the Fifth Amendment which provides that "nor shall private property be taken for public use, without just compensation[.]" 482 U.S. at 310 n. 4 (quoting U.S. CONST. amend. V). This matter does not concern the government's taking of a private property for public use, nor do Plaintiffs request that they "recover damages." Further, this action does not appear to implicate the Fifth Amendment at all.

Rather, it appears that Plaintiffs are attempting to extend the holding of *First Evangelical Lutheran Church*, to include the circumstances of a foreclosure of a deed of trust, as is at issue in the case at bar. However, this Court is not permitted to take such a leap to find that sovereign immunity exists because waivers of immunity must be made "unequivocally," *United States v. King*, 395 U.S. 1, 4 (1969), and may not be "enlarged" *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983), beyond any language that indicates any such waiver. *First Evangelical Lutheran Church*, plainly does not contemplate the question of sovereign immunity, and accordingly, this Court will not interpret that case as doing so.

Thus, recognizing (1) that the burden is upon Plaintiffs to demonstrate that the Court has subject matter jurisdiction, *see Hays*, 515 U.S. at 743 (citing *McNutt*, 298 U.S. at 189); and (2) that "the Government's consent to be sued must be construed strictly in favor of the sovereign[,]'" *Nordic Vill., Inc.*, 503 U.S. at 34, this Court finds that in this context, the Plaintiffs have not met their burden of establishing that the United States has waived sovereign immunity, and accordingly, Plaintiffs have

failed to establish that this Court has subject matter jurisdiction.

C. Standing

Additionally, this Court finds that Plaintiffs have not met their burden of establishing standing.

Defendant USA contends that Plaintiffs lack standing. Dkt. 15, 12-15. Defendant USA's position is that Plaintiffs have failed to satisfy the causation and redressability requirements of Article III standing. *Id*. at 15. Plaintiffs oppose Defendant USA's motion on this point by arguing that they have standing "because they seek restoration rights to their home." Dkt. 22, 5.

It is fundamental that "Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'" *Allen v. Wright*, 486 U.S. 737, 749 (1984). "To establish Article III standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 596 (1992).

Turning to the element of causation, "[i]n order to prove causation, a plaintiff must demonstrate that the injury 'fairly can be traced to the challenged action of the defendant . . . .'" *Bishop v. Bartlett*, 575 F.3d 419, 425 (4th Cir. 2009) (quoting *Simon v. E.*

Kentucky Welfare Rights Org., 426 U.S. 26, 41-41 (4th Cir. 2009)). Defendant USA's maintains that Plaintiffs have failed to establish causation because "Plaintiffs have not alleged that they were current on their mortgage, which is the obvious cause of the foreclosure sale. The existence or non-existence of an email requesting a stay for foreclosure does not change the fact that their default was the cause of the foreclosure." Dkt. 15, 13 (citing *Greene v. LNV Corp.*, No. 3:12-cv-780, 2013 WL 1652232, at *5 (E.D. Va. Apr. 16, 2013).

In *Greene v. LNV Corp.*, this Court considered whether plaintiffs had sufficiently satisfied the element of causation required to establish Article III standing in a situation in which the plaintiffs had defaulted on their mortgage payments. No. 3:12-cv-780, 2013 WL 1652232, at *5 (E.D. Va. Apr. 16, 2013). Although the plaintiffs in *Greene* pleaded that the cause of the improper foreclosure was that the defendant invalidly appointed a trustee, this Court determined that such a circumstance did not "undermine the causal event of the [plaintiffs'] default: their failure to make payment." *Id.* In determining that the plaintiffs failed to establish causation, this Court reasoned that

> The [plaintiffs] admit that they defaulted on the Note. In accordance with paragraph 15 of the Deed of Trust, [the defendant] acted within its rights in proceeding with foreclosure. Thus, if taken as true, the allegation that [the defendant] invalidly appointed Glasser as trustee does not undermine the causal event of the [plaintiffs'] default: their failure to make

> payment. To make the case that the Substitution of Trustee was the causal force behind their alleged injuries rather than their own default, the [plaintiffs] would have to plead that the Substitution of Trustee occurred before the default. In fact, the pleadings are unclear as to which occurred first. In any event, the date on which the alleged injuries became practically inevitable was the date on which the [the plaintiffs] fell into arrears, not the date on which [the defendant] executed the Substitution of Trustee.

Id.

Plaintiffs, who bear the burden of establishing that they have standing to bring these claims, *Warth*, 422 U.S. at 518, do not contest the point that Defendant USA raises, which is that Plaintiffs defaulted on their mortgage. In fact, Plaintiffs have submitted as an attachment to their Complaint, evidence that tends to support Defendant USA's position that Plaintiffs defaulted on their mortgage payments. *See* Dkt. 1-4, 1 ("Our office has worked with [Plaintiff Leander] Bacon and his servicer . . . *to resolve his delinquency and help bring his mortgage current . . . . Unfortunately, [Plaintiff Leander] Bacon has not been able to provide definitive proof or date that he would be able to financially afford the mortgage in question*.") (emphasis added). Pursuant to paragraph 22 of the Deed of Trust, and in the absence of any argument to the contrary, it appears that Defendant Navy FCU acted within its rights in foreclosing on Plaintiffs' property. Considering this, this Court is constrained to find that Plaintiffs have

not met their burden in establishing the element of causation because they have not demonstrated that the injury they allege – foreclosure on the Property – may be fairly traced to any action taken by Defendant USA, rather, the fact that the Property was foreclosed on it attributable to their failure to make timely payments on the mortgage.

With respect to the element of redressability, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561. Defendant USA's argument on this point also rests on the notion that Plaintiffs have defaulted on their mortgage. Dkt 15, 15. Specifically, Defendant USA maintains that "Plaintiffs' [sic.] have not alleged that [sic.] are not in default, and their allegations regarding whether or not a request for stay [sic.] the foreclosure was sent by the VA to [Defendant] Navy FCU does not affect whether [Plaintiffs] were in default in their mortgage payments at the time of the foreclosure." *Id*. Further, Defendant USA contends that "[s]ince Plaintiffs do not deny that they were in default there is nothing to be gained from the Court entering an order reversing the foreclosure sale." *Id*.

Defendant USA, in support of its position on redressability, cites to two opinions issued by this Court. *See* Dkt. 15, 14-15 (citing *Harrell v. Caliber Home Loans, Inc.*, 995 F. Supp. 2d 548, 554 (E.D. Va. 2014) (holding that "[t]he [c]omplaint [did] not allege facts that [met] the redressability requirement of Article III standing. Even if the [C]ourt were to issue an order with everything the [p]laintiffs ask[ed] for, unless the [p]laintiffs are able to meet the requirements of their loan or have already done so, they will find themselves in foreclosure again . . . .");

and *Greene v. LNV Corp.*, 3:12-cv-780, 2013 WL 1652232, at *5 (E.D. Va. Apr. 16, 2013) (finding that the plaintiffs failed to establish redressability where the plaintiffs admitted that they defaulted on their note, and therefore "[i]t [was] indeed unlikely that by . . . reversing the foreclosure [on plaintiffs' home] this Court [would] prevent or even delay the inevitable, namely, that [the defendant would] immediately foreclose on the [plaintiffs' property] a second time with any paperwork deficiencies easily resolved.")).

As indicated above, Plaintiffs bear the burden of establishing that they have standing. Plaintiffs have left uncontested that they are, in fact, in default on their mortgage. Plaintiffs merely assert that they have standing "because they seek restoration of rights to their home," and that in the instant matter, it is not apparent that recession would be futile because "[t]here has been no [ ] finding in this case" that Plaintiffs have a "practical way to avoid a second foreclosure." Dkt. 22, 5-6.

However, to be sure, it remains undisputed that Plaintiffs have defaulted on their mortgage, and as such, even if this Court could overcome the other jurisdictional bars (*supra*, p. 13) to hear Plaintiffs' claims, and if this Court granted the relief that Plaintiffs request, based on the pleadings and the arguments presented to the Court, it does not appear that likely that Plaintiffs' injuries would be redressed. This is so because ultimately, it appears that Plaintiffs defaulted on their mortgage payments, giving Defendant Navy FCU the right to foreclosure.

Moreover, to the extent that Plaintiffs argue that there would be some circumstance under which they

could avoid a second foreclosure, as this Court found in *Green*, even if there were such a "hypothetical scenario," the Plaintiffs "have not alleged it in their pleadings, and it is within neither the province nor expertise of this Court to allege it for them." *Green*, 2013 WL 1652232, at *5. In fact, Plaintiffs has submitted to the Court evidence that indicates that even after the foreclosure sale took place Plaintiff Leander Bacon remained unable "to provide the definitive proof or date that he would be able to financially afford the mortgage in question." Dkt. 1-4, 1. Thus, the evidence put forth by Plaintiffs themselves tends to suggest that there is not a circumstance under which they would be able to avoid a second foreclosure in the event that the other jurisdictional hurdles were overcome and the Court found for Plaintiffs on the merits.

Plaintiffs do contend that had the March 20, 2017, foreclosure been postponed, Plaintiffs "would have continued to pursue a loan modification application." Dkt. 1, ¶ 21. Plaintiffs suggest that this application would have been approved, but the Plaintiffs fail to plead any facts that would tend to suggest that would be the case. And, what is more, Plaintiffs have failed to indicate how they would satisfy the requisite payments under this hypothetically approved loan modification application. Thus, Plaintiffs' proposition on this point is insufficient to show that redressability would be "likely." This attenuated circumstance posed by Plaintiffs is at best speculative.

As such, this Court finds that Plaintiffs have not met their burden in establishing the element of redressability because they have not demonstrated that the injury they allege – foreclosure on their

property – would likely be redressed by the remedy they request.

IV. CONCLUSION

Accordingly, because Plaintiffs have failed to meet their burden of establishing that this Court has subject matter jurisdiction, it is hereby ORDERED that Defendant Navy FCU's Motion to Dismiss (Dkt. 12) is GRANTED;

IT IS FURTHER ORDERED that Defendant USA's Motion to Dismiss (Dkt. 14) is GRANTED;

IT IS FURTHER ORDERED that Defendant CAS' Motion to Dismiss (Dkt. 18) is GRANTED; and

IT IS FURTHER ORDERED that Plaintiffs' Complaint (Dkt. 1) is DISMISSED.

Alexandria, Virginia
June 12, 2020

/s/
Rossie D. Alston, Jr.
United States District Judge

FILED: February 22, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1774
(1:19-cv-01641-RDA-MSN)

LEANDER BACON; IRIS I. DICK BACON,
Plaintiffs - Appellants,

v.

UNITED STATES OF AMERICA; NAVY FEDERAL CREDIT UNION, ("Navy FCU");
COMMONWEALTH ASSET SERVICES, LLC,
Defendants - Appellees.

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court
/s/ Patricia S. Connor, Clerk