

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

IN RE:)	
)	
FRANK EMIL AMODIO)	Case No. 18-cv-00811
ARYANA OLSON AMODIO)	JURY DEMAND
Plaintiffs,)	
)	
v.)	
)	
OCWEN LOAN SERVICING LLC)	
WILSON & ASSOCIATES, PLLC)	
Defendant.)	

**PLAINTIFFS’ MEMORANDUM OF LAW SUPPORTING THE PLAINTIFFS’
OPPOSITION TO WILSON & ASSOCIATES, PLLC’S SUMMARY JUDGEMENT
MOTION**

Plaintiffs, by and through counsel, submit this Memorandum in support of the Plaintiffs opposition to WILSON & ASSOCIATES, PLLC’S summary judgement motion.

Introduction

The Plaintiffs have filed this action against WILSON & ASSOCIATES, PLLC (hereafter “Wilson”) for wrongful foreclosure TCA 35-5-101 and TCA 66-24-123, for violations of the FDCPA and for Abuse of process. This Court has previously ruled the claims against Wilson for wrongful foreclosure and for abuse of process are dismissed. The Court did not grant Wilson’s 12(b)(6) motion relating to the claim for violations of the FDCPA. Now, Wilson has filed for summary judgement in light of the recent Supreme Court case of *Obduskey v. McCarthy & Holthus, LLP* 203 L.Ed.2d 390 (2019).

Facts

1. On July 26, 2017, plaintiffs received a letter from Wilson, indicating that they were in default and their loan was being accelerated. The letter indicated that \$15,395.26 was the total

indebtedness, and a copy was attached to the complaint as Exhibit 1. (Complaint at ¶13).

2. Plaintiffs disputed the debt with Wilson. (Complaint at ¶14).

3. Wilson foreclosed on the property and the purchaser paid substantially more than the outstanding debt. (Complaint at ¶30).

4. The property sold at a foreclosure sale on August 30, 2017, for \$58,000.00. There were excess proceeds in the amount of \$40,024.31. (Complaint Exhibit 4).

5. As of the filing of this action, Wilson possessed the excess proceeds resulting from the foreclosure and plaintiffs alleged Wilson would not return those proceeds to the plaintiffs or provide an accurate accounting of the disposition of those proceeds. . (Complaint at ¶33).

6. Plaintiffs alleged that Wilson is a debt collector as defined in 15 U.S.C. § 1692a. . (Complaint at ¶61).

7. Plaintiffs alleged that Wilson was attempting to collect a consumer debt as defined in 15 U.S.C. § 1692a. . (Complaint at ¶62).

8. Plaintiffs alleged that Wilson violated 15 U.S.C. § 1692e generally, and 15 U.S.C. § 1692e(2) and (10) specifically, by making false and/or misleading representations to plaintiffs regarding the status of their loan account. Plaintiffs further alleged that Wilson caused writings to be recorded that contained inaccurate, incorrect and conflicting information which was misleading to plaintiffs regarding the trustee and the amount due on their mortgage loan. (Complaint at ¶64).

9. Plaintiffs alleged that Wilson's actions constitute unfair and unconscionable means to collect debts in violation of 15 U.S.C. § 1692f. (Complaint at ¶65).

Legal Standard

Rule 56 of the Federal Rules of Civil Procedure requires the court to grant a motion for summary judgment if “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). To win summary judgment on a particular claim, the moving defendant must show that, as a matter of undisputed material fact, the plaintiff cannot establish at least one essential element of that claim. Once the moving party makes its initial showing, the burden shifts to the plaintiff to provide evidence beyond the pleadings, “setting forth specific facts showing that there is a genuine issue for trial.” *Moldowan v. City of Warren*, 578 F.3d. 351, 374 (6th Cir. 2009).

Argument

Wilson argues that summary judgement is appropriate in light of the Supreme Court’s recent decision in *Obduskey v. McCarthy & Holthus, LLP* 203 L.Ed.2d 390 (2019). *Obduskey* holds that, but for 15 U.S.C. § 1692f(6), those engaged in nonjudicial foreclosure proceedings are not debt collectors within the meaning of the FDCPA.

Obduskey specifically did not decide what conduct runs afoul of 1692(f)(6). Here, the Plaintiffs submit that Wilson’s conduct when the Plaintiffs disputed the amount owed and advised that the reinstatement had been paid violates 1692(f)(6). In addition, the Plaintiffs submit that the Wilson’s conduct in holding the surplus funds in excess of ten months violates 1692(f)(6). Wilson’s argument in the memorandum simply recites the procedural history and the facts and holding in *Obduskey*.

When Wilson conducted that nonjudicial foreclosure, Wilson knew that the Plaintiffs disputed the det and understood that they had paid the reinstatement amount which would mean that there is no present right of possession. The Plaintiffs submit that this conduct violates the FDCPA. While enforcement of a security instrument through nonjudicial foreclosure is not

governed by the FDCPA, conducting a nonjudicial foreclosure on a reinstated loan that is not in default may still violate the FDCPA.

Wilson held the Plaintiffs' surplus funds for over ten months. Wilson seems to indicate that the Plaintiffs attempt to remedy what they believe to be a wrongful foreclosure allows Wilson to continue to possess the Plaintiffs' monies. The Plaintiffs disagree. Wilson did not interplead the surplus funds with any Court and did not obtain any authority to continue to possess the Plaintiffs' funds. It is both unfair and unconscionable to continue to possess the Plaintiffs' property and force the Plaintiffs to have to file suit to recover the surplus funds. Although Wilson's act of nonjudicial enforcement may fall outside the FDCPA, Wilson's resulting possession of the Plaintiffs' property falls within the meaning of the FDCPA.

Conclusion

The Plaintiffs have stated valid claims for violations of the FDCPA and ask that the Court deny Wilson's summary judgement motion.

Respectfully submitted,

Harlan, Slocum & Quillen,

/s/ Keith D Slocum _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically. Notice of this filing will be sent via operation of the Court's electronic filing system to those parties specifically requesting electronic service and also was served via first class, U.S. Mail, postage prepaid to:

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