

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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Nanya-nashut, ex rel KEVIN HAND and	:	
Nanya-Adhiym, ex rel MILTON HAND,	:	
	:	
	:	CIVIL ACTION
	:	
Plaintiffs,	:	
	:	
v.	:	NO. 03-4022
	:	
BANKONE, NATIONAL ASSOCIATION	:	
TRUSTEE; HOMECOMINGS FINANCIAL;	:	
and PURCELL, KRUG & HALLER,	:	
	:	
Defendants.	:	

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**MEMORANDUM**

ROBERT F. KELLY, Sr. J.

September 9, 2003

**I. FACTUAL SUMMARY**

On July 8, 2003, Plaintiffs filed their Complaint *pro se* against BankOne, National Association Trustee, Homecomings Financial and Purcell, Krug & Haller (“Purcell”)(collectively the “Defendants”).<sup>1</sup> Plaintiffs’ Complaint arises from a foreclosure of real property. The Defendants are the foreclosing mortgage lenders and their respective counsel.<sup>2</sup>

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<sup>1</sup> In their original Complaint, Plaintiffs included the Sheriff of Philadelphia County as a Defendant. However, in their Amended Complaint, the Plaintiffs no longer include the Sheriff as a named Defendant. Therefore, the Sheriff of Philadelphia County is no longer a party in the case.

<sup>2</sup> On February 6, 2003, The Honorable John R. Padova dismissed a complaint filed by these same Plaintiffs against Homecomings Financial, Purcell, Krug & Holler, as well as various other law firms and mortgage companies. In that case, Judge Padova dismissed Plaintiffs’ alleged claims of fraud and constructive fraud, alleged violations of the Fourth Amendment, alleged conspiracy, as well as alleged violations the Fair Debt Collection Act and 18 U.S.C. § 641. Hand v. Centex Home Equity, No. 02-8625 (E.D. Pa. Feb. 6, 2003)(Dkt. No. 8)(order dismissing Plaintiffs’ complaint). However, the properties in Judge Padova’s case appear to be

Defendant Homecomings Financial is the servicing agent of BankOne, National Association, Trustee. They commenced a foreclosure action in April of 2002 against the property at issue in this case. Apparently, Defendant Homecomings Financial also was the purchaser of the property at the sheriff's sale in May, 2003. Reading Plaintiffs' Complaint liberally, the Court finds that Plaintiffs assert numerous claims against the Defendants arising from the property foreclosure. Specifically, the Court finds that the Plaintiffs assert claims of fraud, violations of the Fourth and Fifth Amendments, violations of 42 U.S.C. § 1983, 42 U.S.C. § 1985, 42 U.S.C. § 1986, along with a claim of attorney malpractice. Additionally, they assert the Defendants slandered Plaintiffs' title to the property. Finally, Plaintiffs assert they are entitled to remedies under 18 U.S.C. § 1964. Defendants have moved pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the entire case against them, alleging that the Plaintiffs have failed to state a claim. For the foregoing reasons, this Court will dismiss Plaintiffs' Complaint.

## **II. STANDARD OF REVIEW**

A motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), tests the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A court must determine whether the party making the claim would be entitled to relief under any set of facts that could be established in support of his or her claim. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)(citing Conley, 355 U.S. at 45-46); see also Wisniewski v. Johns-Manville

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different than the property in the current action. The property in the current action arises from a foreclosure of property located at 1908 Point Breeze Avenue in Philadelphia, Pennsylvania. This property apparently was not part of the action in front of Judge Padova, as Plaintiffs in that case alleged their claims based on the foreclosure of properties located at 533 S. 60th St., Philadelphia, Pennsylvania and 211 S. 61st St., also in Philadelphia, Pennsylvania.

Corp., 759 F.2d 271, 273 (3d Cir. 1985). Pertaining to *pro se* complaints, courts must hold them “to less stringent standards than those drafted by attorneys.” Bieros v. Nicola, 839 F. Supp. 332, 334 (E.D. Pa. 1993). A *pro se* plaintiff’s claims can be dismissed under Rule 12(b)(6) only “if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” McDowell v. Del. State Police, 88 F.3d 188, 189 (3d Cir. 1996)(quotations omitted). In considering a motion to dismiss, all allegations in the complaint must be accepted as true and viewed in the light most favorable to the non-moving party. Rocks v. City of Phila., 868 F.2d 644, 645 (3d Cir. 1989)(citations omitted). “On the other hand, a judge may not become a surrogate attorney for the party, even one who is proceeding *pro se*. Taylor v. Diznoff, 633 F. Supp. 640, 641 (W.D. Pa. 1986)(quoting Mazur v. Pa. Dept. of Transp., 507 F. Supp. 3, 4 (E.D. Pa. 1980), aff’d 649 F.2d 860 (3d Cir. 1981)). “A *pro se* plaintiff must abide by the Federal Rules of Civil Procedure and when confronted by motions to dismiss must articulate reasons why the motions should not be granted.” Id. (quoting Mazur, 507 F. Supp. at 4).

### **III. DISCUSSION**

#### **A. FRAUD**

The first claim the Court will examine is Plaintiffs’ claim of fraud. Pursuant to Federal Rule of Civil Procedure 9(b), a claim for fraud must be plead with particularity. FED. R. CIV. P. 9(b). According to Rule 9(b), a plaintiff must plead “(1) a specific false representation of material fact; (2) knowledge by the person who made it of its falsity; (3) ignorance of its falsity by the person to whom it was made; (4) the intention that it should be acted upon; and (5) that the plaintiff acted upon it to his damage.” Stevens v. Citigroup, Inc., No. CIV.A. 00-3815, 2000 WL

1848593 (E.D. Pa. Dec. 15, 2000)(citations omitted). In examining Plaintiffs' Complaint, the Court sees no allegations of any specific false representation of material fact on the part of the Defendants to the Plaintiffs. Rather, it appears that Defendants merely foreclosed on the property. Therefore, a claim for fraud has not been pled with particularity and cannot stand.

#### **B. FOURTH AMENDMENT**

The Plaintiffs allege the Defendants violated their Fourth Amendment rights. The Fourth Amendment provides the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. Plaintiffs' do not affirmatively state what alleged actions by Defendants violated the Fourth Amendment, but it appears that the Plaintiffs are asserting that the Defendants unlawfully seized their property by foreclosing on it. The Fourth Amendment protections however, only protect against government action, not private action. See United States v. Jacobsen, 466 U.S. 109, 114-15 (1984)(citations omitted). Merely because Defendants engaged in an alleged unlawful state foreclosure proceeding does not make these Defendants state actors. See Buzzanco v. Lord Corp., 173 F. Supp.2d 376, 383 (W.D. Pa. 2001)(stating plaintiffs' claims that defendants misused state replevin procedure is not enough to establish defendants were state actors). Therefore, since no state action took place as to these Defendants, Plaintiffs' Fourth Amendment claim must also be dismissed.

#### **C. FIFTH AMENDMENT**

Plaintiffs next claim is that Defendants violated their Fifth Amendment rights. "The Fifth Amendment prohibits, in part, deprivations of property accomplished without due process of law." Mason v. Abington Township Police Dept., No. CIV.A. 01-1799, 2002 WL

31053827, at \*5 (E.D. Pa. Sept. 12, 2002)(citing U.S. CONST. amend. V). However, “[t]he limitations of the [F]ifth [A]mendment restrict only federal governmental action and not the actions of private entities.” Nguyen v. United States Catholic Conference, 719 F.2d 52, 54 (3d Cir. 1983)(citing Pub. Utils. Comm’n v. Pollak, 343 U.S. 451, 461 (1952)). Therefore, since the Fifth Amendment only restricts federal governmental action, Plaintiffs do not have a viable Fifth Amendment claim against the private Defendants.

#### **D. SECTIONS 1983, 1985 AND 1986**

##### **1. Section 1983**

Next, Plaintiffs allege the Defendants violated 42 U.S.C. § 1983. “In order to state a claim under Section 1983, a plaintiff must allege two things: 1) the violation of a right secured by the Constitution and laws of the United States; and 2) the commission of the deprivation by a person acting under color of state law.” Buzzanco, 173 F. Supp.2d at 381 (citing West v. Atkins, 487 U.S. 42, 48 (1988)). “Under color of state law” has the same meaning as state action. Id. (citing United States v. Price, 383 U.S. 787, 794 n.7 (1966)). In examining Plaintiffs’ Complaint, the Court cannot find any alleged action by the Defendants that rise to the level of state action. Even where a bank and an attorney utilize state foreclosure procedures, that will not constitute state action. See Shipley v. First Fed. Sav. & Loan Ass’n of Del., 703 F. Supp. 1122, 1129-31 (D. Del. 1988), aff’d 877 F. 2d 57 (3d Cir. 1989)(holding Bank and attorney who filed foreclosure action against real property did not engage in state action for purposes of Section 1983). Since the Plaintiffs have failed to assert the Defendants are state actors, Plaintiffs’ Section 1983 claim against Defendants is dismissed.

## 2. Section 1985

Next, the Court will examine Plaintiffs' Section 1985 claim. In order to state a claim under Section 1985, a plaintiff must allege the following four elements:

(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Moles v. Griffy, No. 00-2147, 2001 WL 1152984, at \*4 (E.D. Pa. Sept. 18, 2001)(citing United Bhd. of Carpenters & Joiners of Am., Local 610, AFL-CIO v. Scott, 463 U.S. 825, 828-29 (1983)). “Moreover, there must be some racial or other invidiously discriminatory animus behind the conspirators’ actions.” Id. (citing Scott, 463 U.S. at 829). Furthermore, “[i]t is well established that § 1985(3) does not itself create any substantive rights; rather, it serves only as a vehicle for vindicating federal rights and privileges which have been defined elsewhere.” Brown v. Philip Morris Inc., 250 F.3d 789, 805 (3d Cir. 2001)(citing Great Am. Fed. Sav. & Loan Ass’n v. Novotny, 442 U.S. 366 (1979)). Since Plaintiffs’ Section 1983 claim is dismissed, it therefore follows that their Section 1985 claim must also be dismissed.<sup>3</sup> See Moles, 2001 WL 1152984, at \*4 (stating plaintiff’s inability to sustain claim under Section 1983 necessarily causes his Section

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<sup>3</sup> As has been previously stated, the Plaintiffs have failed to state a Section 1983 claim since the Defendants are not state actors. The Court recognizes that in limited circumstances, “the conspiracy provision of § 1985(3) provides a cause of action . . . against both private and state actors.” Brown, 250 F.3d at 805. However, where, as in this case, the action is being brought against private conspirators, “the Supreme Court has thus far recognized only two rights protected under § 1985(3), the right to be free from involuntary servitude and the right to interstate travel.” Id. Since neither of these two rights is alleged in the present action, and Plaintiffs’ Section 1983 claims have also been dismissed, it follows that their Section 1985 claims must also be dismissed for failure to state a claim.

1985 conspiracy claim grounded in same underlying action to fail as well).

### **3. Section 1986**

Plaintiffs' also assert a Section 1986 claim. "Without a properly pled claim under § 1985, a plaintiff cannot bring a § 1986 claim." Toth v. Bristol Township, 215 F. Supp.2d 595, 599 (E.D. Pa. 2002)(citing Clark v. Clabaugh, 20 F.3d 1290, 1295 (3d Cir. 1994)). For the reasons previously stated, the Court has dismissed Plaintiffs' Section 1985 claim, therefore, it follows that their Section 1986 claim must also be dismissed since "transgressions of § 1986 by definition depend upon a preexisting violation of § 1985." Clark, 20 F. 3d at 1295 (quoting Rogin v. Bensalem Township, 616 F.2d 680, 696 (3d Cir. 1980)).

### **E. ATTORNEY MALPRACTICE**

The Plaintiffs' also assert that Purcell committed attorney malpractice in its handling of the foreclosure. While Plaintiffs do not assert any alleged connection to Purcell, in light of the fact that Plaintiffs' are *pro se*, the Court will hold Plaintiffs Complaint to a lesser standard. The only possible connection that the Plaintiffs' had to Purcell is that the law firm's client was the party who foreclosed on the property. This is not enough of a connection to assert a claim of attorney malpractice. "The law of legal malpractice in Pennsylvania . . . does not support the proposition that when an attorney owes a fiduciary duty to his client he does, 'by extension,' owe a fiduciary duty to those with whom his client deals." Oliver v. Sid Bernstein, Ltd., No. CIV.A. 96-4471, 1996 WL 741889, at \*4 (E.D. Pa. Dec. 10, 1996). Therefore, the Court will dismiss Plaintiffs' attorney malpractice claim against Defendant Purcell.

### **F. SLANDER OF TITLE**

The next claim the Court will examine is Plaintiffs' slander of title claim. "This

tort involves the ‘false and malicious representation of the title and quality of another’s interest in goods or property.’” Stevens v. Meaut, 264 F. Supp.2d 226, 234 (E.D. Pa. 2003)(quoting Pro Golf Mfg. v. Tribune Review Newspaper Co., 570 Pa. 242, 809 A.2d 243, 246 (2002)).

The Restatement (Second) of Torts § 623 A labels this tort “injurious falsehood,” which is actionable where: 1) the statement is false; 2) the publisher intends the statement to cause pecuniary loss or reasonably should recognize that publication will result in pecuniary loss; 3) pecuniary loss results; and 4) the publisher either knows the statement is false or acts in reckless disregard of its truth or falsity.

Id. (citations omitted). Defendant Homecomings Financial purchased the property at a sheriff’s sale. It follows that any slander of title against Plaintiffs cannot stand since any publication on the part of Defendants as to owning the property would not be construed as being false.

Therefore, Plaintiffs’ slander of title claim is also dismissed.

## **G. RICO**

Finally, the Court will examine Plaintiffs’ claims that they are entitled to relief under 18 U.S.C. § 1964.<sup>4</sup> Section 1964 is a RICO provision allowing for civil remedies, and states as follows:

[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter [setting out the elements of a RICO violation] may sue therefor in any appropriate United States district court. 18 U.S.C. § 1964. The RICO statute thus only allows its remedies to be applied where the injury stems from the RICO violation, and not some other violation of state or federal law.

Wasilewski v. Eastman Kodak Co., Civ. A. No. 86-1066, 1986 WL 7571, at \*2 (E.D. Pa. June 30, 1986). Therefore, to assert a claim under Section 1964, Plaintiffs “must plead (1) a Section

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<sup>4</sup> Plaintiffs have also asserted a claim under 18 U.S.C. § 2201, however, there is no such provision within the United States Code.

1962 violation and (2) an injury to business or property by reason of such violation.” Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1187 (3d Cir. 1993)(citing Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1164 (3d Cir. 1989)). Plaintiffs assert that they have suffered an injury through the foreclosure, therefore, the Court will examine whether the *pro se* Plaintiffs have properly asserted a Section 1962 violation. Plaintiffs do not specifically point to any Section 1962 subsection, however, since Plaintiffs are *pro se*, the Court will examine Plaintiffs’ Complaint under all four subsections of Section 1962.

**1. Section 1962(a)**

In order to state a claim under Section 1962(a), Plaintiffs must allege that (1) Defendants received money from a pattern of racketeering activity; (2) Defendants invested that money in an enterprise; (3) that the enterprise affected interstate commerce; and (4) that Plaintiffs sustained an injury resulting from the investment of racketeering income distinct from an injury caused by the predicate acts themselves. Lightning Lube, 4 F.3d at 1188 (citations omitted). Plaintiffs apparently are asserting that Defendants are adjudicating over the property after receiving payment. Such a claim should have been filed in the state foreclosure proceeding. Furthermore, the Court fails to see how such allegations rise to the level of a 1962(a) violation.

**2. Section 1962(b)**

In order to recover under Section 1962(b), “a plaintiff must show injury from the defendant’s acquisition or control of an interest in a RICO enterprise, in addition to injury from the predicate acts.” Lightning Lube, 4 F.3d at 1190 (citations omitted). “In addition, the plaintiff must establish that the interest or control of the RICO enterprise by the person is as a result of racketeering.” Id. (citing Banks v. Wolk, 918 F.2d 418, 421 (3d Cir. 1990)). The Court fails to

recognize any allegations by Plaintiffs that satisfy the elements of a Section 1962(b) violation. Again, Plaintiffs assert that the Defendants are adjudicating over their property after receiving payment, such an allegation should be asserted in the state foreclosure proceeding. The Court fails to see how such an allegation encompasses a Section 1962(b) violation.

### **3. Sections 1962(c) and 1962(d)**

To assert a claim under Section 1962(c), the plaintiff must assert 5 elements:

1) the existence of an enterprise that affects interstate commerce and is separate and distinct from the defendant; 2) that the defendant was associated with the enterprise; 3) that the defendant conducted or participated in the affairs of the enterprise; 4) that each defendant engaged in a pattern of racketeering activity; and 5) the racketeering was the proximate cause of injury to the plaintiff.

City of Rome v. Glanton, 958 F. Supp. 1026, 1043 (E.D. Pa. 1997)(citing Shearin, 885 F.2d at 1165), aff'd 133 F.3d 909 (3d Cir. 1997). Again, the Court does not see any allegations within Plaintiffs' Complaint that could satisfy the elements of a Section 1962(c) violation. Rather, it appears that Plaintiffs' allegations are defenses to the state foreclosure proceedings.

Finally, to satisfy a claim under Section 1962(d), the plaintiff must assert a pattern of racketeering in violation of Section 1962(a), (b) or (c). See id. For the reasons previously stated, the Court concludes that Plaintiffs' have failed to state a claim under Section 1962(a), (b) or (c), and therefore, it follows that a Section 1962(d) claim must also fail. Thus, since Plaintiffs' have failed to assert a claim under Section 1962, their claim for civil damages under Section 1964 must also be dismissed.

## **IV. CONCLUSION**

The Court has examined Plaintiffs' Complaint with as much deference as it

possibly is allowed to do because Plaintiffs' are asserting their claims *pro se*. However, Plaintiffs' have failed to state any claims against the Defendants. Therefore, the Court will dismiss Plaintiffs' Complaint with prejudice and the case will be closed.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

Nanya-nashut, ex rel KEVIN HAND and	:	
Nanya-Adhiym, ex rel MILTON HAND,	:	
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Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	NO. 03-4022
	:	
BANKONE, NATIONAL ASSOCIATION	:	
TRUSTEE; HOMECOMINGS FINANCIAL;	:	
and PURCELL, KRUG & HALLER,	:	
	:	
Defendants.	:	
	:	

**ORDER**

AND NOW, this 9th day of September, 2003, upon consideration of the Defendants' Motion to Dismiss (Dkt. No. 5), and the Plaintiffs' Response thereto, it is hereby ORDERED that the Motion is GRANTED and the case is dismissed with prejudice. The Clerk of Court is hereby directed to mark this case as closed.

BY THE COURT:

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Robert F. Kelly,

Sr. J.