IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
January 30, 2018
Lyle W. Cayce
Clerk

No. 16-11596
Summary Calendar

D.C. Docket No. 3:16-CV-2452

LOU TYLER,

Plaintiff - Appellant

v.

OCWEN LOAN SERVICING, L.L.C.; DEUTSCHE BANK,

Defendants - Appellees

Appeal from the United States District Court for the
Northern District of Texas

Before PRADO, ELROD, and GRAVES, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the appeal is dismissed as frivolous.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

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LOU TYLER,

Plaintiff-Appellant

v.

OCWEN LOAN SERVICING, L.L.C.; DEUTSCHE BANK,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CV-2452

Before PRADO, ELROD, and GRAVES, Circuit Judges.

PER CURIAM:*

Lou Tyler moves this court for leave to proceed in forma pauperis (IFP) in her appeal of the district court's dismissal of her civil action against Ocwen Loan Servicing, L.L.C., and Deutsche Bank. Tyler's motion is a challenge to the district court's determination that her appeal is not taken in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997).

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Before this court, Tyler asserts that foreclosure on her property would be improper because the defendants are barred from enforcing their interest by the statute of limitations and that the defendants have engaged in a variety of wrongdoings. By merely asserting claims, Tyler fails to address the district court's certification that her appeal was not taken in good faith and the district court's reasons for its certification decision. *See Baugh*, 117 F.3d at 202. In particular, Tyler does not factually or legally challenge the district court's determination that Tyler's civil action that is based on the "show-me-the-note" theory is meritless.

Pro se briefs are afforded liberal construction. *See Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993). Nevertheless, when an appellant fails to identify any error in the district court's analysis, it is the same as if the appellant had not appealed that issue. *See Brinkmann v. Dallas Cty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987). Because Tyler has failed to challenge the certification that her appeal is not taken in good faith and the reasons for such a certification, she has abandoned the critical issue of her appeal. *Id.* Thus, the appeal lacks arguable merit and is frivolous. *See Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983). Accordingly, Tyler's motion for leave to proceed IFP is DENIED, and her appeal is DISMISSED as frivolous. *See Baugh*, 117 F.3d at 202 n.24; 5TH CIR. R. 42.2. Further, Tyler is CAUTIONED that future frivolous or repetitive filings in this court will result in the imposition of sanctions, including dismissal, monetary sanctions, and restrictions on her ability to file pleadings in this court or any court subject to this court's jurisdiction.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LOU TYLER, Plaintiff, VS. OCWEN LOAN SERVICING LLC, ET AL., Defendants.	)	CIVIL ACTION NO. 3:16-CV-2452-G (BK)

JUDGMENT

The court has entered its order accepting the findings, conclusions and recommendation of the United States Magistrate Judge in this case. It is therefore **ORDERED, ADJUDGED** and **DECREED** that this case is summarily **DISMISSED** with prejudice as frivolous. *See* 28 U.S.C. § 1915(e)(2)(B).

The clerk of the court is **DIRECTED** to **CLOSE** this case.

October 5, 2016.

A. Joe Fish

A. JOE FISH
Senior United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LOU TYLER, Plaintiff, VS. OCWEN LOAN SERVICING LLC, ET AL., Defendants.	)	CIVIL ACTION NO. 3:16-CV-2452-G (BK)

ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

The United States Magistrate Judge made findings, conclusions and a recommendation in this case. No objections were filed. The court reviewed the proposed findings, conclusions and recommendation for plain error. Finding none, the court **ACCEPTS** the findings, conclusions and recommendation of the United States Magistrate Judge.

It is therefore **ORDERED** that the complaint is summarily **DISMISSED** with prejudice as frivolous. *See* 28 U.S.C. § 1915(e)(2)(B).

The court prospectively **CERTIFIES** that any appeal of this action would not be taken in good faith. *See* 28 U.S.C. § 1915(a)(3); FED. R. APP. P. 24(a)(3). In support of this certification, the court adopts and incorporates by reference the magistrate judge's findings, conclusions and recommendation. See *Baugh v. Taylor*, 117 F.3d 197, 202 and n.21 (5th Cir. 1997). Based on the findings and recommendation, the court finds that any appeal of this action would present no legal point of arguable merit and would, therefore, be frivolous. *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983).* In the event of an appeal, plaintiff may challenge this certification by filing a separate motion to proceed *in forma pauperis* on appeal with the Clerk of the Court, U.S. Court of Appeals for the Fifth Circuit. See *Baugh*, 117 F.3d at 202; FED. R. APP. P. 24(a)(5).

October 5, 2016.

A. Joe Fish

A. JOE FISH
Senior United States District Judge

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* Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order. A timely notice of appeal must be filed even if the district court certifies an appeal as not taken in good faith.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LOU TYLER,	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL CAUSE NO. 3:16-CV-2452-G-BK**
	§	
OCWEN LOAN SERVICING LLC, et al.,	§	
Defendants.	§	

FINDINGS, CONCLUSIONS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636(b) and *Special Order 3*, this *pro se* civil case was automatically referred to the United States Magistrate Judge for judicial screening. The Court granted Plaintiff's motion to proceed *in forma pauperis*, but did not order the issuance of process pending preliminary screening. For the reasons that follow, this case should be summarily dismissed.

I. BACKGROUND

On August 23, 2016, Plaintiff filed a complaint against Defendants Ocwen Loan Servicing LLC and Deutsche Bank. Plaintiff claims that Defendants "do not legally own my title or Deed of Trust," and requests that "the Courts or Judge . . . require them to 'show me the Original note, AND NOT A ZEROX COPY, AND TO PROVE THIS ORIGINAL IS NOT A MANUFACTURED FRAUDULENT DOCUMENT!" Doc. 3 at 1. Plaintiff further asserts that "[i]f the bank or Ocwen, a collection agency, can't produce my original mortgage note, title or deed, then, . . . they don't have right to demand payment . . . [and] foreclose." Doc. 4 at 1.

Previously, in 2015, Plaintiff unsuccessfully disputed Defendants' ability to foreclose on her home, arguing that the action was barred by the statute of limitations and that Defendants fraudulently breached the parties' contract and Defendants' duty of good

faith and fair dealing. *See Tyler v. Ocwen Loan Servicing, LLC, et al.*, 3:15-CV-1117-N-BK, 2015 WL 5326195 (N.D. Tex. 2015), recommendation accepted, 2015 WL 5398478 (N.D. Tex. 2015) (granting defendants' motion to dismiss). And earlier this year, she brought two nearly identical actions, which were dismissed with prejudice as barred by res judicata. *See Tyler v. Ocwen Loan Servicing, LLC, et al.*, 3:16-CV-1836-G-BF (N.D. Tex. 2016); *Tyler v. Ocwen Loan Servicing, LLC, et al.*, 3:16-CV-1698-L-BF (N.D. Tex. 2016).

II. ANALYSIS

Because Plaintiff is proceeding *in forma pauperis*, the complaint is subject to screening under 28 U.S.C. § 1915(e)(2)(B). That statute provides for the *sua sponte* dismissal of a complaint if the Court finds that it (1) is frivolous or malicious, (2) fails to state a claim upon which relief may be granted, or (3) seeks monetary relief against a defendant who is immune from such relief. A complaint is frivolous when it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). A claim lacks an arguable basis in law when it is "based on an indisputably meritless legal theory." *Id.* at 327

The Court liberally construes Plaintiff's filings with all possible deference due a *pro se* litigant. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (*pro se* pleadings are "to be liberally construed," and "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers."); *cf.* FED. R. CIV. P. 8(e) ("Pleadings must be construed so as to do justice"). Even under this most liberal construction, however, Plaintiff's claims are frivolous.

Plaintiff's assertion that the Defendants were required to produce the original loan documents to prove they could foreclose on her property implicate the widely debunked "show-

me-the-note" theory. Advocates of that theory claim that "only the holder of the original wet-ink signature note has the lawful power to initiate a non-judicial foreclosure." *Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 253 (5th Cir. 2013). In *Martins*, however, the United States Court of Appeals for the Fifth Circuit rejected the "show-me-the-note" theory as having no merit. *Id.* Recognizing that in Texas, the "existence of a note may be established by a 'photocopy of the promissory note, attached to an affidavit in which the affiant swears that the photocopy is a true and correct copy of the original note,'" and finding "no contrary Texas authority requiring production of the 'original' note," the Fifth Circuit held that an "original, signed note need not be produced in order to foreclose." *Id.* Consequently, Plaintiff's claims in this case lack merit and should be dismissed *sua sponte* as frivolous.

III. LEAVE TO AMEND

Ordinarily, a *pro se* plaintiff should be granted leave to amend her complaint prior to *sua sponte* dismissal with prejudice. *See Brewster v. Dretke,* 587 F.3d 764, 767-768 (5th Cir. 2009) (while generally, "a *pro se* litigant should be offered an opportunity to amend his complaint before it is dismissed," leave to amend is not required where plaintiff "has already pleaded his 'best case.'"). Here, based on the legal theory and facts Plaintiff posits, she cannot, as a matter of law, state a colorable legal claim. Thus, the Court concludes that granting leave to amend would be futile and cause needless delay.

That notwithstanding, Petitioner will have adequate notice of the inadequacy of the complaint upon entry of this recommendation and the opportunity to respond or seek leave to amend during the 14-day objection period. *See Brown v. Taylor*, ___ F.3d ___, 2016 WL 374s3037, *4 (5th Cir. 2016) (*sua sponte* dismissal with prejudice "is cabined by the requirements of basic fairness," and thus, unless dismissal is without prejudice or the plaintiff

has alleged his best case, the district court must give "the plaintiff notice of the perceived inadequacy of the complaint and an opportunity for the plaintiff to respond"); *cf. Magouirk v. Phillips,* 144 F.3d 348, 359 (5th Cir. 1998) (magistrate judge's recommendation provided adequate notice and reasonable opportunity to oppose *sua sponte* invocation of defense).

IV. RECOMMENDATION

For the foregoing reasons, barring a curative amendment, Plaintiff's complaint should be summarily **DISMISSED WITH PREJUDICE**. *See* 28 U.S.C. § 1915(e)(2)(B).

SIGNED September 13, 2016.

RENÉE HARRIS TOLIVER
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of this report and recommendation will be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n,* 79 F.3d 1415, 1417 (5th Cir. 1996).

RENÉE HARRIS TOLIVER
UNITED STATES MAGISTRATE JUDGE

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