

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

HENRY JAMES REINHEIMER,
Plaintiff

v.

ABBY K. MOYNIHAN, et al.,
Defendants.

Case No. 5:14cv00049

**REPORT AND
RECOMMENDATION**

By: Hon. James G. Welsh
U.S. Magistrate Judge

Henry James Reinheimer filed his complaint, *pro se*, on September 26, 2014 against defendants Mortgage Electronic Registration Systems, Inc. (“MERS”); Ocwen Financial Corporation d/b/a Ocwen Loan Servicing, LLC (“Ocwen”); Surety Trustees, LLC (“Surety”); McCabe, Weisburg & Conway, LLC (“McCabe”); various employees and former employees of the above organizations, and John/Mary Doe(s) numbered 1-10 (docket #1). On February 23, 2015 the plaintiff, appearing *pro se*, and counsel for the defendants came before the Court for a hearing on various dispositive and non-dispositive motions (docket #24).

I. FACTUAL BACKGROUND

The plaintiff and his late wife executed a deed of trust in 2006 on a piece of property known by current house numbering as 105 Atoka Drive, Winchester, Virginia 22602 (docket #5-1 pg. 3). The status of the secured note for the above property is the focus of this action.

The plaintiff’s claims relate to the foreclosure upon the above property and the defendants’ actions leading up to, and involvement with, the foreclosure. The plaintiff

summarized the “crux of the Claim” by stating that “[a]ny obligation to a note has been satisfied;” “the account is settled and is zero” (docket #7, pg. 1). Allegedly, to settle the account, the plaintiff explained that on April 29, 2013 he sent via Certified Mail an instrument he alleges was tendered “in good faith, [and was] a valid consideration (Instrument), [in] full accord and satisfaction” to Ocwen, the loan servicer (docket #1, pg. 5). At the hearing, he stated the instrument he sent is an unsecured promissory note in the approximate amount of \$309,000.00. *See* Transcript pgs. 62, 71. After mailing Ocwen the instrument, he recorded notices in the land records disputing the amount owed on the promissory note for the above property. *See* Transcript pg. 65. Shortly thereafter, MERS (the named beneficiary) conveyed the deed of trust and underlying indebtedness to U.S. Bank (the current note owner). *See* Transcript pg. 68.

The plaintiff asserts that his unsecured promissory note described above settled the outstanding balance on the original secured note to zero dollars due, thereby entitling him to ownership of the property. Not surprisingly, the defendants claim that the account was never settled, is not current and that the plaintiff has no legal or factual basis for his claims in this lawsuit.

II. PLAINTIFF’S CLAIMS

Liberally interpreting the plaintiff’s *pro se* complaint, he attacks the defendants’ foreclosure activities, arguing that these activities were for one reason or another void or otherwise fatally defective. First, he contends these foreclosure activities violated the Fair Debt Collections Practices Act (“FDCPA”). *See* Transcript pgs. 16, 29.¹ Second, he makes a “show

¹ It is clear that the plaintiff is claiming a violation of the Fair Debt Collections Practices Act, § 807 et seq., 15 U.S.C. § 1692e et seq., even though the Court mistakenly made a reference to the Fair Credit Reporting Act.

me the note” argument² to defend against foreclosure of the above property. He also formally asserts six numbered causes of action, in three he seeks to invoke the court’ jurisdiction under federal law and in three he seeks to invoke the court’s pendant jurisdiction. Under federal law, the plaintiff formally asserts claims of “trespass on the case” (claiming in Count III that the defendants’ negligence interfered with his Constitutional rights); “conspiracy against [his] rights” (contending in Count IV that the defendants acted together to conspire against his rights); and “conspiracy to interfere with [his] civil rights” (alleging in Count V that the defendants violated 18 U.S.C. §1985). Invoking the court’s pendant jurisdiction he also asserts claims of “special assumpsit” (in essence, arguing in Count I that an implied contract governs the parties’ relationship rather than the executed deed of trust); “misprision of felony” (contending in Count II that the defendants did not fulfill their obligations set forth in the note),³ and “knowledge and neglect” in failing to prevent foreclosure (claiming in Count VI the defendants failed to fulfill their fiduciary duties to him) (docket #1).

In response, the defendants argue that the plaintiff’s complaint should be dismissed for three fundamental reasons: (1) the complaint’s failure to satisfy Fed. R. Civ. P. 8(a); (2) the “show me the note” argument’s failure as a matter of law, and (3) each claim’s failure as a matter of law to state a cognizable cause of action.

III. PROCEDURAL BACKGROUND

Defendants filed several Motions to Dismiss for Failure to State a Claim (dockets #5, 11,

² “[S]how me the note” arguments, in which plaintiff demands a defendant produce the note for a property in question before a foreclosure, are “widely rejected as contrary to Virginia’s non-judicial foreclosure laws.” *See Grenadier v. BWW Law Group, et. al.*, 2015 U.S. Dist. LEXIS 11418, *14-15 (EDVa. Jan. 30, 2015) (internal quotations omitted).

³ While the plaintiff conclusory alleges a violation of 18 U.S.C. §4, this count is considered a pendent state-law claim based upon the substantive assertions made.

15). A Roseboro Notice was sent to the *pro se* plaintiff (docket #6). In response, the plaintiff filed motions in opposition (docket #7, #26).⁴ Additionally, he filed a motion to withdraw his claims against several defendants (docket #29).

All non-dispositive pretrial motions in this case having been previously referred pursuant to 28 U.S.C. § 636(b)(1)(A), and all dispositive motions in this case having been referred pursuant to 28 U.S.C. § 636(b)(1)(B), this matter is now before the undersigned for submission of proposed findings of fact, conclusions of law, and a recommended disposition of all pending dispositive motions (docket #4).

IV. RECOMMENDED DISPOSITION

After a careful and mature consideration of the entire record, including the views of the parties, and for the reasons that follow: it is **RECOMMENDED** that the plaintiff's motion to withdraw claims against certain of the named defendants be **GRANTED** and they be dismissed without prejudice pursuant to Rule 4(m); that the "John/Mary Doe" defendants also be **DISMISSED** without prejudice pursuant to Rule 4(m); that the defendants' motions to dismiss be **GRANTED** in favor of all remaining defendants, that plaintiff's motions to strike and motion for entry of default be **DENIED AS MOOT**; that this case be **DISMISSED** with prejudice, and that it be **STRICKEN** from the court's active docket.

V. STANDARD OF REVIEW

Under a Rule 12(b)(6) motion to dismiss, the Court must accept the plaintiff's factual allegations and should view the complaint in a light most favorable to the plaintiff. *See De Sole v. United States*, 947 F.2d 1169, 1174 (4th Cir. 1991). A 12(b)(6) motion to dismiss "should

⁴ The motions are entitled "Motion for Order to Strike Motion to Dismiss for Failure to State a Claim" with Roseboro Notice and "Motion to Strike Motion to Dismiss for Failure to State a Claim," respectively.

only be granted if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). Plaintiff's claims will be examined under this standard.

The plaintiff is proceeding *pro se*, and the Supreme Court has stated that such litigants are to be held to a lesser pleading standard than litigants represented by counsel. *See Fed. Express Corp. v. Holowecki*, 52 U.S. 389, 402 (2008). Thus, *pro se* pleadings are liberally construed and held to a less stringent standard than pleadings drafted by lawyers. *See Erickson v. Pardus*, 551 U.S. 89, 94 (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)); accord *Brown v. N.C. Dep't of Corr.*, 612 F.3d 720, 724 (4th Cir. 2010). Such complaints are entitled to special care to determine whether any possible set of facts would entitle the plaintiff to relief. *See Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980). Nevertheless, *pro se* complaints must be dismissed if they do not allege "a plausible claim for relief." *Forquer v. Schlee*, 2012 U.S. Dist. LEXIS 172330 at *7. (DMd. Dec. 4, 2012) (citations and internal quotation marks omitted). Therefore, "[w]hile *pro se* complaints may represent the work of an untutored hand requiring special judicial solicitude, a district court is not required to recognize obscure or extravagant claims defying the most concerted efforts to unravel them." *Weller v. Dep't of Soc. Servs. for the City of Baltimore*, 901 F.2d 387, 391 (4th Cir. 1990) (citation omitted).

VI. DISCUSSION

A. Withdrawing Defendants

Absent a showing of good cause, Rule 4(m)⁵ requires the court to dismiss an action without prejudice against a defendant if the plaintiff fails to serve such defendant within one hundred and twenty (120) days from the filing of the complaint. Good cause to extend the 120-day time period exists when the plaintiff has made a “reasonable [and] diligent effort[] to effect service on the defendant.” *Jones v. Newby*, 2013 U.S. Dist. LEXIS 34231, *2-3 (EDVa. Mar. 12, 2013) (quoting *Venable v. Dep’t of Corr.*, 2007 U.S. Dist. LEXIS 76919 (EDVa. Feb. 7, 2007) (quoting *Hammond v. Tate Access Floors, Inc.*, 31F.Supp, 2d 524, 528 (DMd. 1999)).

The plaintiff filed a motion to withdraw defendants Antoinette Moore, Daniel Fanasselle, David Crannick, and Lee Lisa Vangl (docket #29). As to these defendants, the plaintiff’s motion is well-taken and should be granted without objection. They were not properly served, and the plaintiff concedes there was no reasonable effort as required by Rule 4(m) of the Federal Rules of Civil Procedure. *See* Transcript pgs. 2-4.

The John/Mary Doe(s) numbered 1-10 that Mr. Reinheimer included in his complaint also have not been served. He has shown no good cause for the failure to serve these unnamed defendants. Further, he did not object at the hearing to a dismissing these defendants. *See* Transcript pg. 67. Having failed to meet, or even attempt to meet, the service-of-process requirements of the Federal Rules, the “Doe defendants numbered 1-10” should also be dismissed without prejudice pursuant to Rule 4(m).

B. The Plaintiff’s Federal Causes of Action

The plaintiff asserts several questions of federal law. His primary claim is a violation of

⁵ Rule 4(m) of the Federal Rules of Civil Procedure provides, in pertinent part: If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

the Fair Debt Collection Practices Act. He also formally asserts three other federal causes of action: trespass on the case (claiming in Count III that the defendants' negligence interfered with his constitutional rights—in particular the Fourth, Fifth, Sixth, and Seventh Amendments); conspiracy against his rights (claiming in Count IV that the defendants conspired against his rights in violation of 18 U.S.C. §241), and conspiracy to interfere with civil rights (alleging in Count V that the defendants violated 18 U.S.C. §1985).

Fair Debt Collection Practices Act Claim

(“Common to all Counts”)

The plaintiff was asked in open court how he alleges the defendants wronged him and why he was bringing the action. *See* Transcript pgs. 4, 7. The plaintiff claimed that the defendants violated his rights under the Fair Debt Collection Practices Act (“FDCPA”).⁶

The plaintiff did not indicate how his rights under the FDCPA were violated and did not plead or state at the hearing a scintilla of fact to support such a claim, even affording a liberal interpretation of his *pro se* complaint. Rather, he only made a conclusory statement that his rights were violated.

To establish successfully an FDCPA violation, three requirements must be satisfied: “ (1) the target of the alleged collection activity is a ‘consumer’ as defined in §1692a(3); (2) the defendant collecting the debt is a ‘debt collector’ as defined in §1692a(6); and (3) that the defendant engaged in an act or omission in violation of the FDCPA.” *Withers v. Eveland*, 988 F. Supp. 942, 945 (EDVa. 1997) (quoted with approval in *O’Connor v. Sand Canyon Corp, et.al.*,

⁶ § 807 et seq., 15 U.S.C.A. § 1692e et seq.

2015 U.S. Dist. LEXIS 5316, *16 (WDVa. Jan. 16, 2015)). The plaintiff has failed to allege facts necessary to establish any of these requirements.

Under the FDCPA, a loan servicer is not a “debt collector.” *See* *Blick v. Wells Fargo Bank, N.A.*, 2012 WL 1030137, at *7 (WDVa. Mar. 27, 2012) *aff’d*, 474 F. App’x 932 (4th Cir. 2012). In the instant case, Ocwen was the loan servicer. Additionally, creditors, mortgagers, and mortgage servicing companies are exempt from liability under the Act. *See* *Scott v. Wells Fargo Home Mortg. Inc.*, 326 F. Supp. 2d 709, 718 (EDVa. 2003), *aff’d*, 67 F. App’x 238, 238 (4th Cir. 2003) (“it is well-settled that provisions of the FDCPA generally apply only to debt collectors’); *see also* *Ruggia v. Washington Mut.*, 719 F. Supp. 2d 642, 648 (E.D. Va. 2010) *aff’d*, 442 F. App’x 816 (4th Cir. 2011) (noting that the Eastern District of Virginia found “[m]ortgage servicing companies and trustees exercising their fiduciary duties enjoy broad statutory exemptions from liability under the FDCPA.”(internal citations omitted)).

The employees of these entities are also exempt. By the clear words of the statute itself, the term “debt collector” does not include “any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor.” § 1692(a)(6)(A). Thus, the individual employees named in the complaint are clearly not liable under the statute, and the plaintiff has failed to allege any cognizable facts which would allow the court to find that the defendants should be considered debt collectors within the meaning of the FDCPA.

In addition to his failure to meet the second element of a cognizable claim under the FDCPA, the plaintiff does not meet the third element, that of being a victim of illegal debt collection activity. A foreclosure proceeding pursuant to a deed of trust is not the collection of debt under the FDCPA. *See* *Bittinger v. Wells Fargo Bank NA*, 744 F. Supp. 2d 619, 626 (S.D.

Tex. 2010) (“foreclosing on a property pursuant to a deed of trust is not the collection of debt within the meaning of the FDCPA.”); *see also* Hulse v. Ocwen Fed. Bank, FSB, 195 F. Supp. 2d 1188, 1204 (D.Oreg. 2002) (noting that “foreclosing on a trust deed is distinct from the collection of the obligation to pay money” from a debtor under the FDCPA). The instant case presents the same circumstances. In each, the defendants foreclosed on property pursuant to the terms of an executed deed of trust.

Therefore, even if the plaintiff is assumed to be a “consumer” within the meaning of the FDCPA, his claim of entitlement to its protections in the case now before the court is misplaced. There exists no set of facts pursuant to which the plaintiff's claims under an FDCPA theory of liability can stand, and all such claims against the defendants, or any of them, must fail as a matter of law.

Trespass on the case⁷ (Count III)

(Whether Plaintiff's Constitutional Rights were Violated)

As his third numbered cause of action, the plaintiff pleads “trespass on the case.” Although this allegation is a quaint reference to legal history, it no longer alleges a cognizable wrong. *See* Ali Zarabi v. MSH Constr., Inc., 2011 Va. Cir. LEXIS 94, at *5. (Fauquier. Jan. 11, 2011). A liberal interpretation of the plaintiff's claim, however, indicates he is attempting to allege that the defendants violated his Fourth, Fifth, Sixth, and Seventh Amendment rights.

If this is the case, the Supreme Court has held that a private individual acting in furtherance of non-governmental interests cannot violate the Fourth Amendment. *See* United

⁷ “At common law, a lawsuit to recover damages that are not the immediate result of a wrongful act but rather a later consequence. The lawsuit was instituted by a writ of trespass on the case. It was the precursor to a variety of modern-day tort claims, including negligence, nuisance, and business torts.” TRESPASS, Black's Law Dictionary (10th ed. 2014).

States v. Jacobsen, 466 U.S. 109, 113 (1984). All of the defendants in this action are private actors acting in furtherance of a non-governmental interest. This court, just last year, similarly held that the Fifth Amendment “is applicable only to state action and [that] a non-judicial foreclosure proceeding . . . does not constitute state action.” *Muncy v. Centex Home Equity Co., LLC*, 2014 U.S. Dist. LEXIS 92896, at *12 (WDVa. July 9, 2014). Equally inapposite are the plaintiff’s efforts to assert Sixth and Seventh Amendment claims. The Sixth Amendment applies only to criminal prosecutions and the Seventh Amendment right to a jury trial does not apply to non-judicial foreclosures. *See Shamberger v. Wells Fargo Bank, N.A.*, 2013 U.S. Dist. LEXIS 161952, at *5 (EDVa. Nov. 13, 2013).⁸ The Seventh Amendment right to jury trial does not apply to non-judicial foreclosure proceedings as they are matters of equity rather than suits at law. The plaintiff’s third cause of action, therefore, fails as a matter of law. *Bellinger v. Wells Fargo Bank, N.A.*, 2014 U.S. Dist. LEXIS 160551, *9 (EDCal. Nov. 14, 2014). “[N]on-judicial foreclosure [on an individual’s residence] is not a judicial proceeding to which the Seventh Amendment applies; [it] is a purely private remedy, and its constitutionality has been [so] upheld.” *Id.* (citing *Apao v. Bank of N.Y.*, 324 F.3d 1091, 1092 (9th Cir. 2003))

Conspiracy against Rights (Count IV)

Relying on the civil rights criminal conspiracy statute, 18 U.S.C. § 241 as the jurisdictional basis for this claim, the plaintiff alleges the defendants conspired to deprive him of his “unalienable rights.” Here too, the plaintiff has no private right of action under this criminal

⁸ “The Seventh Amendment says that, ‘[i]n [s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.’ U.S. Const. amend. VII. The phrase ‘suits at common law’ refers to suits at ‘law,’ ‘in contradistinction to equity.’ *Curtis v. Loether*, 415 U.S. 189, 193, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974). Because mortgage foreclosure issues are equitable in nature, *United States v. Lariscy*, 16 F.3d 413 (4th Cir. 1994) (internal citations omitted), ‘foreclosure [actions] . . . do not afford the right to a jury trial.’ ”

statute. *See* *Fromal v. Lake Monticello Owners' Ass'n*, 2006 U.S. Dist. LEXIS 4877, *4 (WDVa. Jan. 23, 2006) (indicating that 18 U.S.C. §§ 241 and 242 are criminal statutes, which provide for no private right of action). With neither a legal nor a factual basis for this claim, the defendants' motion to dismiss this claim is patently well-taken and should be granted.

Conspiracy to Interfere with Civil Rights (Count V)

Plaintiff also pleads that as a result of the wrongdoer'(s) conspiracy in violation of 18 U.S.C. § 1985, he suffered significant damages. A legal or evidentiary basis for a cognizable § 1985 conspiracy claim is also utterly lacking. There is no allegation in the plaintiff's pleadings and no evidence in the record to suggest that at any relevant time he acted in the capacity of an officer, witness, juror or other protected individual and was prevented from performing his duties under § 1985(1). Equally, the pleadings fail to suggest, let alone state, a claim implying the requisite "race- or other class-based invidiously discriminatory animus." pursuant to § 1985(2). *See* *Glass v. Anne Arundel Cnty.*, 2013 U.S. Dist. LEXIS 36427, at *34 (DMd. Mar. 14, 2013) (quoting *Sellner v. Panagoulis*, 565 F.Supp. 238, 246 (DMd. 1982)). The same specific motivational animus is also fatal to a claim under § 1985(3). *See* *Caudle v. Colandene*, 2015 U.S. Dist. LEXIS 23670,*23 (WDVa. Feb. 27, 2015). Any contention by the plaintiff that he has stated a claim under § 1985(3) also fails due because it does not contain facts sufficient to suggest any conspiracy (that is, some "agreement" or "meeting of minds") between the defendants or any of them, any resulting overt act, or any proximately resulting injury to the plaintiff. *See* *Simmons v. Poe*, 47 F.3d 1370, 1376 (4th Cir. 1995).

While some individual defendants may have worked together, there is no allegation or evidence of the requisite meeting of the minds, no discriminatory animus, no deprivation of

rights secured by law to all, no injury, and no overt act committed by the defendants in connection with a conspiracy. Further, the complaint utterly lacks any information to indicate that there was at any relevant time some cognizable class-based or trait-based discriminatory animus against the plaintiff. The plaintiff did not even indicate a protected class of which he is a member. On multiple bases, therefore, the plaintiff's § 1985 claim is fatally defective and the defendants' motion on this cause of action should be granted in their favor.

C. The Plaintiff's Pendent State-Law Causes of Action

In addition to various questions of federal law, the plaintiff also asserts several pendent state-law causes of action. He makes a "Show me the Note" argument. Additionally, he pleads claims based on: "special assumpsit" (in essence, arguing in Count I that an implied contract governs the parties' relationship rather than the executed Deed of Trust); "misprision of felony" (contending in Count II that the defendants did not fulfill their obligations set forth in the note),⁹ and "knowledge [and] neglect" by failing to prevent foreclosure (claiming in Count VI the defendants failed to fulfill their fiduciary duties to him). Each of these allegations will be discussed in turn.

The "Show Me the Note" Argument

(Lack of Authority to Initiate Foreclosure)

Defendants liberally interpret the complaint to include generally a challenge to their standing to initiate a foreclosure on the secured property (docket #5-1 pg. 9). In response to this interpretation, the plaintiff stated that "the 'Show Me the Note' argument is not mentioned in the verified claim" (docket #7, pg. 2). He is, however, arguing that defendants do not have standing

⁹ While the plaintiff conclusory alleges a violation of 18 U.S.C. §4, this count is considered a pendent state-law claim in light of the substantive assertions made.

to initiate a foreclosure proceeding on the aforementioned property.

It is clearly established under Virginia law that these standing arguments are not valid as they are contrary to Virginia's non-judicial foreclosure laws. *See Fedewa v. J.P. Morgan Chase Bank, N.A.*, 921 F. Supp. 2d 504, 509 (EDVa. 2013) (rejecting the claim that a secured party is required to come to a court and prove its authority to initiate a foreclosure); *see also Tapia v. U.S. Bank, N.A.*, 718 F. Supp. 2d 689, 698 (EDVa. 2010) *aff'd*, 441 F. App'x 166 (4th Cir. 2011) (noting the Va. Code sets forth the non-judicial foreclosure laws which do not require a secured party to prove standing in court before imitating a foreclosure). The plaintiff, therefore, fails to demonstrate successfully any factual or legal basis to support such a contention, and the "Show me the Note" argument must fail as a matter of law.

Special Assumpsit¹⁰ (Count I)

(Whether an Implied Contract Governs the Parties' Relationship)

Couched in these terms, the plaintiff argues that certain defendants failed to perform the terms of an alleged implied contract he claims was effective on or about June 18, 2013 and September 6, 2013. These dates correspond to a "contract" that plaintiff allegedly mailed to defendants.¹¹ Defendants argued that no implied contract ever existed between the parties.

The elements of an implied contract include the necessary elements of any contract. *See LandAmerica Fin. Grp., Inc. v. S. California Edison Co.*, 525 B.R. 308, 317 (EDVa. 2015)

¹⁰ An action based on the defendant's breach of an express contract. SPECIAL ASSUMPSIT, Black's Law Dictionary (10th ed. 2014).

¹¹ It stated, in relevant part: "If Respondent, such as by commission, omission, and otherwise" fails to respond within 15 days, then it "will be construed to be Respondent's tacit acceptance of the terms and condition stated herein." (Docket #1, Ex. 1, pg. 2).

(noting that a “contract implied in fact is a true contract containing all necessary elements for a binding agreement except that it has not been committed to writing or stated orally in express terms, but rather is inferred from the conduct of the parties in the circumstances.” (internal citations omitted)). An implied contract includes three necessary elements:

- (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge of the benefit by the defendant; and (3) the acceptance or retention of the benefit by the defendant in circumstances which make it inequitable for the defendant to retain the benefit without paying for its value.

In re Brookfield Ctr. Ltd. P’ship, 135 B.R. 23, 29 (BankrEDVa. 1991). In the instant case, no valid implied contract exists. First, there was no benefit conferred upon any of the defendants by the plaintiff’s letter. Second, there is no fact indicating, even in the slightest, that any defendant accepted the alleged contract. The plaintiff himself admitted that there was no response to the alleged valid “contract” he mailed. *See* Transcript at pg. 4. Lastly, there was no consideration such as acceptance or retention of a benefit by any defendant.

The elements of a valid implied contact are not pled and the facts presented, taken most favorably to the *pro se* plaintiff, do not demonstrate that his letter created contractual obligations between the parties or that even a single element of an implied contract was met. For this reason alone, this count must fail.

Moreover, a court should not impose a “contractual relationship upon parties in contravention of an express contract.” *Nedrich v. Jones*, 245 Va. 465, 477, 429 S.E.2d. 201, 207 (1993) (internal citations omitted). The written Deed of Trust is an express contract that governs the contractual relationship between the parties rather than any implied “contract” plaintiff mailed to select defendants. Thus, for multiple reasons this allegation is also fatally deficient.

Misprision of Felony¹² (Count II)

(Whether the Obligations Contained in the Note were Fulfilled)

Essentially the Plaintiff is claiming in Count II of the complaint that the defendants committed misprision of felony ion violation of 18 U.S.C. § 4 by wrongfully concealing his expressed demand for a foreclosure-related jury trial demand in state court. Irrespective of any other reason, this count of the plaintiff's complaint should be dismissed because he does not have a private right of action under 18 U.S.C. § 4.

Since the misprision statute is beyond criminal in nature, "a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). A private right of action to enforce a federal law can only be established by Congress, and the judicial duty is only to interpret the statute. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979). Therefore, absent clear Supreme Court guidance, the plaintiff does not have the authority to bring an individual criminal claim against any of the defendants in this court. *See Cannon v. University of Chicago*, 441 U.S. 677, 668 (1979)

Regardless of the plaintiff's assertions of "misprision of felony,"... of "fraud and deceit," and other wrongdoing by the defendants, these claims are rendered meaningless by his bazaar unilateral effort in this case to have the federal court confirm his cancellation of a note fully secured by a first lien deed of trust simply as a consequence of him having mailed a substitute note that would be colloquially described as "one not worth the paper it's written-on " This whole contention by the plaintiff is absurd in the extreme.

¹² While the plaintiff titles this count as "misprision of felony" and cites the relevant federal criminal statute, he is making a separate pendent state law claim based on a Virginia common law offense by the same name. *See Smith v. Commonwealth*, 51 Va. 734, 746 , 1853 Va. LEXIS 78; 10 Gratt. 734 (1853).

Knowledge and Neglect to Prevent (Count VI)

(Whether the Defendants Failed to Fulfill a Fiduciary Duty)

Plaintiff's sixth and final formal count alleges that the defendant wrongdoers "failed to fulfill their duty," citing this as a violation of 18 U.S.C. §1986. This claim is also fatally deficient as it is reliant upon a cognizable claim under §1985, something the plaintiff fails to establish. As other courts have stated, "the failure of a Section 1985 claim also defeats the Section 1986 claim." *Patterson v. McCormick*, 2014 U.S. Dist. LEXIS 67846, *25 (EDVa. May 15, 2014). For this reason alone, this allegation is fatally defective and must fail.

Read liberally, in this count of his complaint the plaintiff attempts to assert a pendent state law claim for breach of some fiduciary duty owed to him. Under applicable Virginia law, however, there is no fiduciary duty in a banking relationship that relates to a home loan contract. *See Rossmann v. Lazarus*, 2009 U.S. Dist. 68408, *26 (EDVa. Jan. 9, 2009) (noting that the banker-borrower relationship does not, by itself, establish a fiduciary relationship); *see also Wynn v. Wachovia Bank, N.A.*, 2009 U.S. Dist. LEXIS 38250,*12 (EDVa. May 6, 2009) (finding "no fiduciary duty is created based on the banking relationship").

The elements of a successful breach of fiduciary duty claim include: (1) the existence of a duty; (2) a breach of that duty, and (3) a loss or damage caused by the breach of that duty. *See Grenadier v. BWW Law Group, et al.*, 2015 U.S. Dist. LEXIS 11418, at *22-23 (EDVa. Jan. 30, 2015). The plaintiff's claim fails under the first element as there was no duty owed to the plaintiff. *See id.* ("A party may only bring a claim for breach of fiduciary duty where the duty breached is a common law duty and 'not one existing between the parties solely by virtue of contract.'"). In short, the only duties were those existing under the executed deed of trust.

Some courts in Virginia have recognized a limited duty of impartiality in such a context. *See Mayo v. Wells Fargo Bank, N.A.*, 30 F. Supp. 3d 485, 496 (EDVa. 2014) (finding that the only common law duty consistently recognized by the Virginia Supreme Court with respect to the trustee under a Deed of Trust securing real property is a duty of impartiality). There is no allegation or any facts to indicate there was even the slightest concern over impartiality. By the time the property was foreclosed, plaintiff stopped making payments on the property as a result of mailing his unsecured promissory note which he believes settled the account. *See generally* Transcript p. 68. He does not allege that the trustee violated any duty of impartiality and no facts presented could possibly support such a contention. Therefore, the plaintiff's sixth cause of action should also be dismissed and defendants' motion should be granted.

Individual Defendants Acted within the Scope of their Employment

Under Virginia law, an attorney or other employee acting within the scope of his employment is immune from liability to third parties in regards to actions arising from the professional or employment relationship as long as the employees or agents did not exceed the scope of their employment. *See DuBrueler v. Hartford Fire Ins. Co.*, 4 Va. Cir. 135, 1983 Va. Cir. LEXIS 39 (Warren. 1983). In determining whether an act is within the scope of employment, a federal court must apply the law of the state where the conduct occurred, in this case Virginia. *See Gutierrez de Martinez v. Drug Enforcement Admin.*, 111 F.3d 1148, 1156 (4th Cir. 1997). The Fourth Circuit has noted that Virginia courts have taken a broad view of the scope of employment. *See id.* An employee acts within the scope of his or her employment under Virginia law when:

(1)[The act] was expressly or impliedly directed by the employer, or is naturally incident to the business, and (2) it was performed,

although mistakenly or ill-advisedly, with the intent to further the employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business, "and did not arise wholly from some external, independent, and personal motive on the part of the [employee] to do the act upon his own account."

Gutierrez, 111 F.3d at 1156. *See also* Fed. Ins. Co. v. Ward, 166 F. App'x 24, 27 (4th Cir. 2006).¹³ There is no allegation that the individual defendants, or any of them, acted outside the scope of their employment, whereas their foreclosure-related activities about which the plaintiff complains were naturally and appropriately incident to their employers' businesses and performed in furtherance of their employers' interests. Moreover, there is no allegation that the defendant-employees ever acted for their personal and independent reasons. The law does not hold employees in their individual capacity liable when acting within the scope of their employment.

The Court heard the parties regarding whether there was a basis to sue the remaining individuals listed in the complaint in their individual capacity. Those individuals include several McCabe employees (Abby Moynihan, Laura O'Sullivan, and Diana Theologou); a MERS employee (Bill Beckmann), and an Ocwen employee (John Britti). The plaintiff conceded that he was not alleging that any of these individuals acted outside of their employment capacity and is just suing the individuals "from the responsibility of them in their formal work they did." *See* Transcript pg. 59; *see also* Docket #1, ¶ 42. Therefore, these individual defendant-employees are entitled to their dismissal pursuant to Rule 12(b)(6).

D. Dismissal with Prejudice

¹³ "Under Virginia law, an act is within the "course of employment," where it occurs during the period of employment, at a place where the employee is reasonably expected to be, and while the employee is reasonably fulfilling the duties of his employment or an act reasonably incidental thereto"

Dismissing a case without leave to amend is proper when a court is “able to determine conclusively on the face of a defective pleading whether plaintiff actually can state a claim.” *See Green v. CitiMortgage, Inc.*, 2011 U.S. Dist. LEXIS 134476 ,* (WDVa. Nov. 21, 2011) (“An amendment is futile where it would fail to withstand a motion to dismiss for failure to state a claim pursuant to ... [Rule] 2(b)(6)). As the plaintiff concedes, the “crux of [his] complaint” is his contention that by “an act of forbearance” he paid the indebtedness on his home in Winchester by tendering an “instrument” (“or note”) to the defendants, or some of them, which has been neither “dishonor[ed]” nor disputed, but by the passage of time has been accepted and is now fully disputed (*E.g.*, dkt. #1, pp 1, 5-6; #7, p 1; #1-1, pp 1-27)).

Based on these and various complementary facts pleaded, there is simply no possible way that an amended complaint would be fruitful. Acceptance of the plaintiff’s contention that an unsecured instrument of any type can either pay-off or render unenforceable a purchase money note secured by a recorded first lien deed of trust requires a complete suspension of all disbelief and becoming one of the truly gullible. The facts simply suggest no possible basis upon which the plaintiff could possibly seek to recover from any of the defendants.

VII. PROPOSED FINDINGS OF FACT

1. Special care was afforded in consideration of the plaintiff’s *pro se* complaint, motion for default judgment and all other pleadings and papers filed by him in making the determination as to whether any possible set of facts would entitle the plaintiff to relief;
2. All evidence has been viewed in the light most favorable to the plaintiff, and all reasonable inferences made in his favor without weighting the evidence or assessing credibility;
3. Plaintiff failed to make a reasonable effort to serve defendants Antoinette Moore, Daniel Fanasselle, David Crannick, and Lee Lisa Vangl; plaintiff’s motion to dismiss these defendants should be granted without prejudice;
4. Having failed to effect service of process, or undertaken any reasonable action in an

effort to have that service made, within the specified time and having failed to show good cause for the failure, as to the “Doe” defendants numbered 1-10, with the plaintiff’s agreement, this action should be dismissed without prejudice pursuant to Rule 4(m);

5. At all times herein relevant, the named individual employees of Defendant companies: Abby Moynihan, Laura O’Sullivan, and Diana Theologou (McCabe employees); Bill Beckmann (MERS employee), and John Britti (Ocwen employee) were acting within the scope of their employment and should be dismissed from this action in their individual capacity;
6. The Deed of Trust dated August 16, 2006 governs the contractual relationship between the parties in this action rather than any implied “contract” plaintiff mailed to select defendants, which was not effective, and, thus the plaintiff’s claim of special assumpsit must fail;
7. Misprision of felony is not a cognizable private right of action;
8. The plaintiff’s Fourth, Fifth, Sixth, and Seventh Amendment rights were not violated by the defendants, all of whom are private-actors proceeding with a non-judicial foreclosure;
9. Although the plaintiff alleged that the defendants conspired to oppress his rights in violation of 18 U.S.C. § 241, there is no private cognizable right of action under this federal statute;
10. The plaintiff presented no evidentiary basis for a § 1985 conspiracy to interfere with his civil rights claim;
11. The plaintiff alleges defendants violated 18 U.S.C. § 1986; however, his § 1986 claim is dependent on a cognizable § 1985 claim which the plaintiff has not pleaded;
12. Liberally construing the plaintiff’s pleadings and statements at the hearing of February 23, 2015, he completely and utterly failed to plead a plausible claim for relief against the defendants or any of them;
13. Based on a careful review of the entire record, viewing it in a light most favorable to the plaintiff, the court is able to determine conclusively on the face of the plaintiff’s defective pleading that he cannot state a cognizable claim, and it would be futile to grant him leave to amend;
14. Dismissal of the plaintiff’s case without leave to amend is proper; and
15. The defendants’ motions to dismiss (dockets # 5, 11, 15) should be granted and the plaintiff’s motions to strike (dockets # 7, 26) and “Motion for Entry of Default” (docket #30) should be denied on the basis of mootness.

VIII. DIRECTIONS TO THE CLERK

The clerk is directed to transmit the record in this case immediately to the presiding district judge and to transmit a copy of this Report and Recommendation to the *pro se* plaintiff and all counsel of record.

IX. NOTICE TO THE PARTIES

NOTICE is hereby given to the provisions of 28 U.S.C. § 636(b)(1)(c): Within fourteen (14) days after being served with a copy of this Report and Recommendation, any party may serve and file written objections to such proposed findings and recommendations as provided by the rules of court. The presiding district judge shall make a *de novo* determination of those portions of the report or specified findings or recommendations to which an objection is made. The presiding district judge may accept, reject, or modify, in whole or in part, the findings or recommendations made by the undersigned. The presiding district judge may also receive further evidence or recommit the matter to the undersigned with instructions. **A failure to file timely written objections to these proposed findings and recommendations within fourteen (14) days could waive appellate review.**

DATED: This 1st day of May 2015.

s/ James G. Welsh
United States Magistrate Judge