

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

TERRY PATRICK GORMAN and §
KAREN GORMAN, §

Plaintiffs, §

v. §

Case No. 4:12-CV-98

FIRST CONSOLIDATED MORTGAGE §
COMPANY; MORTGAGE ELECTRONIC §
REGISTRATION SYSTEMS, INC.; §
DEUTSCHE BANK NATIONAL TRUST §
COMPANY, AS INDENTURE TRUSTEE §
UNDER THE INDENTURE RELATING §
TO IMH ASSETS, CORP., §
COLLATERALIZED ASSET-BACKED §
BONDS, SERIES 2005-7; §
RAY T. DEWITT, III; and §
GMAC MORTGAGE, LLC, §

Defendants. §

**MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC. & DEUTSCHE BANK
NATIONAL TRUST COMPANY’S MOTION FOR SUMMARY JUDGMENT AND
DEFENDANT GMAC MORTGAGE, LLC’S MOTION TO DISMISS**

The following are pending before the court:

1. Defendants Deutsche Bank National Trust Company (“Deutsche”), Mortgage Electronic Registration Systems, Inc. (“MERS”), and GMAC Mortgage, LLC’s (“GMAC”) motion to dismiss Plaintiffs’ first amended complaint under Rule 12(b)(6) (docket entry #12);
2. Plaintiffs’ response to second motion to dismiss (docket entry #14); and
3. Defendants’ reply to Plaintiffs’ response to second motion to dismiss (docket entry #16).

1. Defendants MERS & Deutsche's motion for summary judgment and incorporated brief in support thereof (docket entry #30);
2. Plaintiffs' response to the MERS and Deutsche motion for summary judgment and incorporated brief in support thereof (docket entry #36); and
3. Defendants MERS & Deutsche's reply to Plaintiffs' response to Defendants' motion for summary judgment (docket entry #38).

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1. Plaintiffs' motion to strike Defendants' MSJ evidence and brief in support thereof (docket entry #35); and
 2. Defendants MERS & Deutsche's response to Plaintiffs' motion to strike Defendants' MSJ evidence (docket entry #39).

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1. Plaintiffs' motion to extend time under Rule 4(m) as to Defendant DeWitt (docket entry #24);
 2. Plaintiffs' motion for substituted service as to Defendant DeWitt (docket entry #25);
 3. Plaintiffs' motion to extend time under Rule 4(m) as to Defendant First Consolidated (docket entry #26);
 4. Plaintiffs' motion for substituted service as to Defendant First Consolidated (docket entry #27); and
 5. Defendants' objection to Plaintiffs' motions to extend time for service and for substituted service upon Defendants DeWitt and First Consolidated Mortgage Co. (docket entry #29).

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1. Plaintiffs' motion to add newly involved indispensable parties in accord with Rule 35(c) and brief in support thereof (docket entry #53);
 2. Defendants Deutsche & MERS's opposition and response to Plaintiffs' motion to add newly involved indispensable parties (docket entry #56); and
 3. Plaintiffs' reply to Defendants' response to Plaintiffs' motion to add newly involved

indispensable parties (docket entry #58).

Having considered the pending motions and the responsive briefing thereto, the court finds that (1) the Plaintiffs' motions to extend time for service and for substituted service on Defendants DeWitt and First Consolidated should be denied, (2) the Plaintiffs' motion to add newly involved indispensable parties should be denied, (3) the Plaintiffs' motion to strike the Defendants' summary judgment evidence should be denied, and (4) the Defendants' motion to dismiss and motion for summary judgment should be granted.

PROCEDURAL HISTORY

On January 17, 2012, the Plaintiffs filed their original petition against the above-referenced Defendants in the 401st Judicial District Court of Collin County, Texas. On February 17, 2012, Defendants Deutsche Bank National Trust Company, Mortgage Electronic Registration Systems, Inc., and GMAC Mortgage, LLC removed this action to this court based on diversity jurisdiction. In doing so, the removing Defendants stated that the Plaintiffs fraudulently joined Texas citizens Defendants Ray T. Dewitt and First Consolidated Mortgage Company (hereafter "First Consolidated"). Accordingly, the removing Defendants argued that the court should disregard the non-removing Defendants' citizenship for purposes of determining jurisdiction. The Plaintiffs did not file a motion to remand.

On October 11, 2012, the court issued a notice of impending dismissal. In its notice, the court stated that its records indicated that more than 120 days had passed from the filing of the complaint and that Defendant Ray T. Dewitt, III had not been served. The Plaintiffs were informed that the action would be dismissed without prejudice as to Defendant Dewitt unless the Plaintiffs could show cause for the failure to timely complete service of process.

On October 23, 2012, the Plaintiffs responded to the court's notice of impending dismissal. Additionally, the Plaintiffs filed a motion to extend time to serve Defendant Dewitt as well as a motion for substituted service as to Defendant Dewitt. Thereafter, on October 25, 2012, the Plaintiffs advised the court that the court's docket sheet incorrectly reflected that Defendant First Consolidated Mortgage Company entered an appearance in this matter. The Plaintiffs advised the court that Defendant First Consolidated had not been served with process because Defendant First Consolidated's registered agent, Defendant Dewitt, was evading service of process. Accordingly, the Plaintiffs filed a motion to extend time to serve Defendant First Consolidated as well as a motion for substituted service as to Defendant First Consolidated.

In response to the Plaintiffs' motions, Defendants Deutsche Bank National Trust Company, Mortgage Electronic Registration Systems, Inc., and GMAC Mortgage, LLC filed an objection, arguing that, among other things, because the Plaintiffs fraudulently joined Defendants Dewitt and First Consolidated, the Plaintiffs have no viable causes of action against them. The Plaintiffs did not respond to the removing Defendants' argument.

On February 28, 2013, the court ordered the Plaintiffs to file a brief in response to the removing Defendants' fraudulent joinder argument raised in the notice of removal by March 29, 2013. The Plaintiffs timely filed their brief. In their brief, the Plaintiffs state that they did not initially challenge the Defendants' fraudulent joinder argument because the Plaintiffs were unable to locate DeWitt and First Consolidated.

The court notes that the Plaintiffs did not challenge the Defendants' fraudulent joinder argument until prompted to do so by the court. The court further notes that it was not necessary for the Plaintiffs to locate DeWitt and First Consolidated before challenging the Defendants' fraudulent

joinder argument. Finally, even if the Plaintiffs had timely filed a motion to remand by challenging the Defendants' fraudulent joinder argument, the motion would have been denied. As explained more fully below, the Plaintiffs have failed to demonstrate a reasonable basis for recovery against any of the Defendants. Accordingly, the Plaintiffs' motions to extend time for service and for substituted service on Defendants DeWitt and First Consolidated (docket entry #'s 24, 25, 26 and 27) are **DENIED**.

On May 16, 2013, the Plaintiffs filed a motion to "add," or actually substitute, allegedly indispensable parties Ocwen Loan Servicing, LLC ("Ocwen") and IMPACT Funding Corporation ("IMPACT") pursuant to Rule 25(c) of the Federal Rules of Civil Procedure. According to the Plaintiffs, the underlying note and mortgage were transferred from GMAC to Ocwen. Further, the Plaintiffs claim that IMPACT is the owner of the Plaintiffs' note and mortgage. The Plaintiffs seek to file a second amended complaint substituting Ocwen and IMPACT as parties for GMAC.

The court is not inclined to grant the Plaintiffs' motion to substitute parties. As noted by the Defendants, the Plaintiffs have no basis to substitute IMPACT because the transfer of the mortgage loan occurred prior to the filing of this lawsuit. *Harris v. Nat'l Seal Co. Enhanced Severance Pay Plan*, 2007 WL 1643225, at *2 (S.D. Tex. 2007) ("Rule 25(c) does not apply to transfers of interest that occur 'prior to the commencement of a lawsuit.' *ELCA Enters., Inc. v. Sisco Equip. Rental & Sales, Inc.*, 53 F.3d 186, 190 (8th Cir. 1995). Rule 25's provisions all address changes to a party that occur after a lawsuit is filed, not before."). Further, in light of the bankruptcy court's ruling, as more fully discussed below, and the fact that GMAC's interest as the loan servicer was merely transferred to Ocwen, the Plaintiffs' proposed substitution would be futile. *In re Covington Grain Co., Inc.*, 638 F.2d 1357, 1361 (5th Cir. 1981) ("Under Rule 25(c), the court may direct that the person to whom

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