

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

In the Matter of:	:	Chapter 7
	:	
THOMAS J. DUDLEY and	:	
GRETA B. DUDLEY,	:	
	:	
Debtors	:	Case No. 02-51225 RFH
	:	
THOMAS J. DUDLEY and	:	
GRETA B. DUDLEY,	:	
	:	
Plaintiffs	:	
	:	
vs.	:	
	:	
CITICORP MORTGAGE, INC.,	:	
	:	
Defendant	:	Adversary Proceeding No. 02-5087

BEFORE

ROBERT F. HERSHNER, JR.
CHIEF UNITED STATES BANKRUPTCY JUDGE

COUNSEL:

For CitiMortgage, Inc.:	Scott H. Michalove 1544 Old Alabama Road Roswell, GA 30076-2102
For Thomas J. Dudley and Greta B. Dudley:	John K. James 1109 Russell Parkway, Suite #2 Warner Robins, GA 31088

**MEMORANDUM OPINION IN RESPONSE
TO REMAND FROM DISTRICT COURT**

The United States District Court for the Middle District of Georgia entered an order of remand on October 2, 2002.¹ The United States Bankruptcy Court for the Middle District of Georgia (the “Court”) held a hearing on October 29, 2002. The Court, having considered the record and the arguments of counsel, now publishes this memorandum opinion.

Plaintiffs filed a petition under Chapter 7 of the Bankruptcy Code on March 20, 2002. Plaintiffs filed on May 8, 2002, a Complaint to Determine Secured Status and Dischargeability of Debt. CitiMortgage, Inc. filed on June 7, 2002, a motion to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Bankr. P. 7012(b); Fed. R. Civ. P. 12(b)(6).

In Beck v. Deloitte & Touche² the Eleventh Circuit Court of Appeals stated:

In evaluating the sufficiency of a complaint, a court “must accept the well pleaded facts as true and resolve them in the light most favorable to the plaintiff.” *St. Joseph’s Hosp.*, 795 F.2d at 954. A court should not dismiss a suit on the pleadings alone “unless it appears

¹ Dudley v. Citicorp Mortgage, Inc., 5:02-MC-42-2 (WDO) (M.D. Ga. Oct. 2, 2002).

² 144 F.3d 732 (11th Cir. 1998).

beyond doubt that the plaintiff can prove no set of facts in support of his claim.” *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957). In seeking dismissal for failure to state a viable claim, a defendant thus bears the “very high burden” of showing that the plaintiff cannot conceivably prove any set of facts that would entitle him to relief. *See Jackam v. Hospital Corp. of Am. Mideast, Ltd.*, 800 F.2d 1577, 1579 (11th Cir. 1986).

144 F.3d at 735-36.

Moore’s Manuel on federal practice states, in part:

[3]—Court’s Decision on Motion to Dismiss

[a]—Matters Considered By Court

In making the determination of whether to dismiss for failure to state a claim, the court may consider only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters of which the judge may take judicial notice. For example, courts may consider the following:

1. Documents attached to the complaint.
2. Undisputed documents alleged or referenced in the complaint.
3. Public records.

A court may not, for example, take into account additional facts asserted in a memorandum opposing the motion to dismiss, because such memoranda do not constitute pleadings under Rule 7(a).

**[b]—Consideration of Other Matters Converts
Motion to Dismiss into Motion for Summary
Judgment**

Rule 12(b)(6) specifically gives the court discretion to accept and consider extrinsic materials offered in conjunction with a Rule 12(b)(6) motion. However, once the court decides to accept matters outside the pleadings, the motion must be treated as one for summary judgment and disposed of as provided in Rule 56. . . .

When considering a converted Rule 12(b)(6) motion to dismiss as a motion for summary judgment, the court must give all parties notice and a reasonable opportunity to present all material then made pertinent by Rule 56.

1 Moore's Manual: Federal Practice and Procedure § 11.24[3] (2002).

Counsel for CitiMortgage, Inc. requests that the Court rule upon its motion to dismiss. The Court's decision, therefore, is based upon the facts alleged in the complaint.

The complaint's style shows Citicorp Mortgage, Inc. to be the defendant in this adversary proceeding. The relief sought in the complaint is against Citicorp Mortgage, Inc. The complaint makes no mention of CitiMortgage, Inc. and seeks no relief against CitiMortgage, Inc.

Since no relief is sought against CitiMortgage, Inc., the Court is persuaded that CitiMortgage, Inc. is not a party that may file a motion to dismiss. Accordingly, the motion to dismiss filed by CitiMortgage, Inc. must be denied.

An order in accordance with this memorandum opinion will be entered
this date.

DATED the 10th day of January, 2003.

ROBERT F. HERSHNER, JR.
Chief Judge
United States Bankruptcy Court