No. COA20-160 TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

CHESTER TAYLOR III, RONDA and BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE and ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE,

Appellants,

v.

BANK OF AMERICA, N.A.,

Appellee.

From Mecklenburg County
No. 18-CVS-8266

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BRIEF OF APPELLEE BANK OF AMERICA, N.A.

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Appellants are mortgagors from around the country who defaulted on their loans and sought loan modifications from Bank of America in 2009 or 2010 under the now-defunct federal Home Affordable Modification Program (HAMP). For unstated reasons, they failed to qualify for HAMP and went through foreclosures. At any point in this process, they could have challenged the HAMP denials, as thousands of others have done in lawsuits against every participating servicer since HAMP's inception. But they did not. Instead, years after their foreclosures were resolved and the statutes of limitations had expired, their current attorneys solicited them to sue Bank of America for fraud. Appellants then claimed the statute of limitations should be tolled until they retained their attorneys.

The Superior Court was unpersuaded. After considering 175 pages of briefing and holding a 3-hour hearing, the Hon. Lisa C. Bell ruled "that all Plaintiffs' claims are barred by the applicable statutes of limitation, and further that the claims of all Plaintiffs who were parties to foreclosure proceedings are barred by the doctrines of *res judicata* and collateral estoppel." R pp. 655–56, 664–786. Both holdings were correct and consistent with the holdings of many other courts that have dismissed identical complaints filed by Appellants' counsel on behalf of other plaintiffs.

Indeed, Appellants would not be in this forum at all if their counsel's prior attempts to sue in federal court had not floundered on jurisdictional grounds, with ten different judges finding them impermissible attempts to relitigate long-resolved foreclosures. The same rationale underlies Judge Bell's correct application of *res judicata* and collateral estoppel here.

Judge Bell's limitations analysis should also be upheld as a routine application of black-letter law. All Appellants complain about being "frustrated" in their attempts to obtain HAMP modifications back to 2009 by repeated, allegedly unnecessary requests for supporting documents they say they had already submitted, and through alleged failures to render decisions on their applications within the time period allegedly promised in their trial-plan agreements. All Appellants also claim to have been injured by denials of HAMP modifications and resulting foreclosures that concluded years before they sued. The law is well-settled that the limitations clock starts to run when a plaintiff is aware of an injury or other cause for suspicion. That awareness is affirmatively pled in the complaint. Appellants even allege "repeatedly" contacting Bank of America "throughout" the application process a decade ago to "ensure proper compliance" with the law (*e.g.*, R p. 210), but claim it somehow never occurred to them—and *could* never have occurred to them—to investigate whether they should sue until their current attorneys advised them to do so.

But that is not a legally valid ground for tolling statutes of limitations. What matters is when Appellants were put on inquiry notice through the various harms they allege. At that point, the law imposed a duty to conduct a diligent investigation, and charged them with knowledge of what they would have learned. Tellingly, Appellants' complaint and briefing do not even try to suggest that they would have been unable to discover their claims sooner if they had investigated sooner—and that is fatal. This Court should uphold the carefully considered judgment of the Superior Court.

STATEMENT OF ISSUES PRESENTED

1. Whether plaintiffs can toll a statute of limitations forever with a boilerplate allegation that they could not discover their claims until hiring a lawyer, even while pleading awareness of their alleged injuries years earlier.

2. Whether *res judicata* or collateral estoppel bars claims challenging "unlawful" foreclosures pressed by plaintiffs who were concededly parties to foreclosure proceedings in which the right to foreclose was resolved with finality.

BACKGROUND

A. The Home Affordable Modification Program. The U.S. Treasury Department launched HAMP in March 2009 in an effort to mitigate foreclosures in the wake of the last financial crisis. HAMP offered qualifying mortgagors an opportunity to lower their monthly loan payments through reduced interest rates, extended payment schedules, and other accommodations.[1] The program targeted borrowers whose financial hardships were serious enough that they needed relief to avoid foreclosure, but not *so* severe that they would be likely to re-default on their loans soon after.

To accomplish this, HAMP operated by soliciting mortgagors experiencing hardships to apply for loan modifications on a trial basis, while suspending

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[1] *See generally*, *e.g.*, *In re Bank of Am. HAMP Contract Litig.*, No. 10-2193, 2013 WL 4759649, *1–2 (D. Mass. Sept 4, 2013); OFF. OF THE SPECIAL INSPECTOR GEN'L FOR THE TROUBLED ASSET RELIEF PROG., FACTORS AFFECTING IMPLEMENTATION OF THE HOME AFFORDABLE MOD. PROG. 1, 18, 20, SIGTARP-10-005 (Mar. 25, 2010), *available at* https://www.sigtarp.gov/Audit%20Reports/Factors_Affecting_Implementation_of_the_Home_Affordable_Modification_Program.pdf.

foreclosure proceedings. Once applicants had demonstrated their ability to sustain modified payments through the trial period and satisfied requests to provide financial documentation establishing their qualifications, the modifications could become permanent. But in its zeal to delay (but not necessarily avert) foreclosures, Treasury allowed applicants to obtain trial modifications based on "unverified statements about [their] financial situation," causing many unqualified applicants to receive trial plans that "will never become permanent"—and generating many lawsuits by borrowers like Appellants who believed themselves entitled to permanent relief.[2]

Despite these and other challenges, when HAMP expired in 2016, Bank of America had permanently modified over 150,000 loans under HAMP (and many more under programs for borrowers ineligible for HAMP).[3]

B. The HAMP MDL. From HAMP's inception, dockets across the country began to fill with complaints from borrowers who had failed to obtain permanent modifications—not just against Bank of America, but against every participating servicer.[4] Among these were putative class actions filed against Bank of America in 2010 and centralized into a federal Multi-District Litigation alleging "mismanagement of the HAMP modification process." R p. 207.

When the MDL plaintiffs (unsuccessfully) moved for class certification in June

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[2] *HAMP*, 2013 WL 4759649, at *1; SIGTARP-10-005, *supra* n.1, at 1, 8.

[3] See U.S. DEP'T OF TREASURY, MAKING HOME AFFORDABLE: PROG. PERFORMANCE REP.—FOURTH QUARTER 2017, *available at* https://www.treasury.gov/initiatives/financial-stability/reports/Documents/4Q17%20MHA%20Report%20Final.pdf.

[4] *E.g.*, *In re JPMorgan Chase Mortg. Mod. Litig.*, No. 11-2290 (D. Mass.); *In re CitiMortgage, Inc. HAMP Litig.*, No. 11-2274 (C.D. Cal.).

2013, they located several former bank employees and outside contractors disgruntled over having their employment terminated, and got them to sign declarations accusing the bank of a cartoonishly villainous conspiracy to defraud HAMP applicants. One asserted, for example, that the bank paid employees cash for sending borrowers entitled to HAMP modifications into wrongful foreclosures. R p. 202. None of those claims were ever substantiated. Nor were they credited by the federal court when it denied class certification. But they were filed on a public docket, provoked sensationalized media coverage, and remain in the public domain to be exploited by future litigants hoping to cast a cloud of prejudice over Bank of America—like Appellants here. R pp. 201–204.

C. Precedent HAMP Lawsuits. Appellants' complaint is a boilerplate pleading their attorneys and associated law firms have been using (again unsuccessfully) to sue Bank of America since at least 2016. The form complaint begins by quoting the conspiracy theories spun in the HAMP MDL declarations, then insinuates that the plaintiffs named in the complaint who failed to receive HAMP modifications must be victims of this alleged conspiracy. R pp. 200–07. Courts across the country, like the Superior Court here, have dismissed these complaints as time-barred, for failure to state a claim, and on other grounds.

In October 2016, one of Appellants' attorneys filed a version of the complaint in Florida on behalf of a group of 33 plaintiffs, then another on behalf of 46 more.[5]

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[5] *Paz v. Bank of Am., N.A.*, No. 16-3384 (M.D. Fla.); *Alonso v. Bank of Am., N.A.*, No. 17-0238 (M.D. Fla.).

Through a series of removals, voluntary dismissals, and re-filings, these cases metastasized into the 116-plaintiff *Torres v. Bank of Am., N.A.* Judge Richard A. Lazzara, presiding in *Torres*, found the 116 plaintiffs improperly joined and dismissed the claims of all but the first-named, without prejudice to letting them re-file as separate individual cases. *See Torres*, No. 17-1534, ECF No. 19 (M.D. Fla. Oct. 6, 2017). Then he dismissed the remaining claims as "barred by the statute of limitations." *Torres*, 2018 WL 573406, at *2 (M.D. Fla. Jan. 26, 2018). In so ruling, Judge Lazzara rejected the plaintiffs' argument—which Appellants raise again here—that they were entitled to have the statute of limitations tolled because they had no idea about the grounds for their lawsuit until their attorneys made them aware of the declarations filed in the HAMP MDL. *See id.* at *5. Those declarations, the court noted, were in the public domain "more than four years before Plaintiffs brought suit." *Id.*

The claims of the misjoined plaintiffs dismissed from *Torres* turned into 85 cases in Florida's federal courts, almost all now dismissed. Judge Lazzara dismissed "fifteen other nearly identical cases" as time-barred on the same ground as *Torres*. *E.g.*, *Clavelo v. Bank of Am., N.A.*, No. 17-2644, 2018 U.S. Dist. LEXIS 178789, *2 (M.D. Fla. Sept. 13, 2018). Judge Sheri Polster Chappell followed *Torres* in dismissing two more. *E.g.*, *Paredes v. Bank of Am., N.A.*, No. 17-0593, 2018 WL 1071922 (M.D. Fla. Feb. 27, 2018). Judge Steven Merryday dismissed 19 cases upon finding "the fraud claim … a circuitous but unmistakable attempt" to relitigate foreclosure judgments, thus barred by federal jurisdictional limitations and by *res judicata*. *E.g.*,

Peralta v. Bank of Am., N.A., No. 17-2580, 2018 WL 3548744, *4 (M.D. Fla. July 24, 2018). A cascade of dismissals by nine more judges of most of the remaining *Torres* spinoffs followed on the same ground.[6] (Just one judge ruled the other way and has cases still pending before him.)

Meanwhile, other clones of the boilerplate complaint were dismissed as time-barred and on assorted other grounds by federal courts in Arkansas, California, and Alabama—and by another court here, in *Morreale v. Bank of Am., N.A.*, No. 18-CVS-009990 (N.C. Super. Ct. Feb. 21, 2019).

Specifically, *Cantrell v. Bank of Am., N.A.*, No. 16-3122, 2017 WL 1246356, *2–3 (W.D. Ark. Apr. 3, 2017), found the complaint time-barred because the plaintiff "possessed all the facts she needed to enable her to file a lawsuit against BOA" when she went through foreclosure without obtaining a HAMP modification. *Mandosia v. Bank of Am., N.A.*, No. 17-8153, 2018 U.S. Dist. LEXIS 45237, *5–6 (C.D. Cal. Mar. 15, 2018), found the complaint time-barred because "[t]he initiation, and ultimately the completion, of foreclosure proceedings provided undisputable evidence to Plaintiff that she would not receive a loan modification" and started the clock. The Ninth

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[6] *E.g.*, *Rosselini v. Bank of Am., N.A.*, No. 17-2584, 2018 U.S. Dist. LEXIS 178792 (M.D. Fla. Oct. 4, 2018); *Colon v. Bank of Am., N.A.*, No. 17-2549, 2018 WL 5024083 (M.D. Fla. Oct. 17, 2018); *Captain v. Bank of Am., N.A.*, No. 18-60130, 2018 WL 5298538 (S.D. Fla. Oct. 25, 2018); *Navarro v. Bank of Am., N.A.*, No. 17-2643, ECF No. 25 (M.D. Fla. Oct. 26, 2018); *Dykes v. Bank of Am., N.A.*, No. 17-62412, 2018 WL 7822305 (S.D. Fla. Oct. 26, 2018); *Isola v. Bank of Am., N.A.*, No. 17-2640, ECF No. 31 (M.D. Fla. Oct. 30, 2018); *Torres v. Bank of Am., N.A.*, No. 17-2633, ECF No. 43 (M.D. Fla. Dec. 13, 2018); *Brexendorf v. Bank of Am., N.A.*, No. 17-2065, ECF No. 88 (M.D. Fla. Jan. 9, 2019); *Coles v. Bank of Am., N.A.*, No. 17-24153, ECF No. 91 (S.D. Fla. May 20, 2019).

Circuit affirmed. 794 F. App'x 623 (9th Cir. 2020). *Jones v. Bank of Am., N.A.*, No. 18-0012, 2018 WL 4095687, *8 n.5 (N.D. Ala. Aug. 28, 2018), dismissed the complaint mainly on the merits, but concluded in a footnote that it was time-barred, too. All these cases rejected the plaintiffs' argument that the statute of limitations should be tolled because they could not have been expected to be aware of the "scheme" alleged in the HAMP MDL declarations "until [they] consulted with [their] attorney[s]." *Cantrell*, 2017 WL 1246356, at *2–3; *accord Jones*, 2018 WL 4095687, at *8 n.5; *Mandosia*, 2018 U.S. Dist. LEXIS 45237, at *7.

Shopping for a new forum in hopes of achieving a different result, Appellants' counsel began aggregating their lawsuits in North Carolina, beginning with this case.

PROCEDURAL HISTORY

A. The Complaint. Appellants filed the initial complaint in this action on 1 May 2018. R p. 8. Taylor is a North Carolina resident; the rest hail from California, Michigan, Minnesota, and Arizona. R pp. 207, 216, 224, 231, 239, 247, 254, 262, 271. Their attorneys followed *Taylor* with more complaints based on the same template on behalf of dozens more plaintiffs.

Like its earlier iterations, the complaint arises from Appellants' failures to obtain HAMP modifications as far back as 2009 and their theory that these failures reflected a scheme "specifically designed" to "set [them] up for foreclosure." R pp. 209, 217, 232, 240–41, 249, 256, 263–64, 272. Which Appellants actually went through foreclosure is left ambiguous—they all allege foreclosures, *e.g.*, R pp. 212, 220–21, 227, 235, 244, 252, 259, 264, 275, but some simultaneously allege different, mutually

exclusive outcomes. R pp. 228, 268. Either way, they blame these outcomes on the "scheme" alleged in the HAMP MDL declarations, and try to plead around their failure to sue within the limitations period by alleging that they "could not have reasonably discovered these facts until they retained their attorneys." R p. 200.

B. The Rule 2.1 Designation. In November 2018, the parties jointly moved to have the entire group of cases designated exceptional under Rule 2.1 of the General Rules of Practice for the Superior and District Courts. R p. 191. Appellants expressly consented both to the designation and to assignment of the case to Judge Bell. *See id*. Chief Justice Mark Martin granted the motion on 7 December 2018.

Judge Bell convened a status hearing to address case management-logistics, and entered an order memorializing the parties' agreement that the later-filed cases would be stayed pending adjudication of a motion to dismiss in *Taylor*. *See* R p. 631. Judge Bell also granted Appellants' request to amend their complaint, with the currently operative 13 March 2019 amended complaint. R pp. 197, 632.

C. The Motion to Dismiss. Bank of America moved to dismiss the complaint on 11 April 2019 as barred by the statute of limitations and *res judicata*, and for failure to state a claim. R p. 633.

On the time bar, Bank of America relied on Appellants' allegations that they were frustrated by the bank's handling and denial of their HAMP applications as far back as 2009, and had foreclosures resolved between 2011 and 2014. *E.g.*, R pp. 213, 237, 245, 253, 260, 276. Since the limitations period "begins to run when the plaintiff first becomes aware of facts and circumstances that would enable him to discover"

his claims, *Doe v. Roman Catholic Diocese of Charlotte*, 242 N.C. App. 538, 543–44 (2015), Bank of America argued that Appellants' contention that they were not "on notice of all elements of their causes of action" until hiring their current attorneys was inadequate as a matter of law to toll the statutes of limitations.

On *res judicata*, Bank of America relied on the equally well-established principle that no foreclosure can occur without a determination that there is "a valid debt" and a "right to foreclose." *E.g.*, *In re Raynor*, 229 N.C. App. 12, 16 (2013). Thus, Appellants' claims that their debts were "fraudulent" because they were "wrongfully denied [] HAMP modification[s]" to "set [them] up for foreclosure" could have been raised in their foreclosure proceedings, and cannot be relitigated later. *See*, *e.g.*, *Espey v. SPS*, 240 N.C. App. 293, 2015 WL 1534068, *1 (2015) (prohibiting "collateral attack on an order … which authorized defendants to proceed with a foreclosure").

Seeking to shift Judge Bell's attention from these threshold issues, Appellants cross-moved for summary judgment on the purported ground that a 2012 nationwide, industry-wide consent decree involving the nation's five largest mortgage servicers, including Bank of America, "involve[d] identical issues in fact and law" as the current lawsuit, and thus warranted judgment for Appellants on *res judicata* grounds. R pp. 206, 642, 647, 649. While their claim of "identical issues" could not survive even a cursory review of the decree, even if true it would have had the opposite effect from the one Appellants intended. *Res judicata* would work *against* Appellants, not in favor of them, as the parties seeking to relitigate the matter already resolved. But there was no such matter—no *res* for *res judicata* to attach to—because the decree

expressly made no "adjudication of any issue of fact or law." R. p. 315. Regardless, Appellants couldn't square their conclusory allegations of being unable to discover their claims until 2018 with their simultaneous assertion that a nationwide settlement supposedly involving "identical" claims was public record back in 2012.

D. The Order Being Appealed. With thorough briefing on both motions at hand, Judge Bell heard three hours of argument on 29 May 2019. R pp. 664–787. On 2 October 2019, Judge Bell entered an order ruling that "all Plaintiffs' claims are barred by the applicable statutes of limitation, and further that the claims of all Plaintiffs who were parties to foreclosure proceedings are barred by the doctrines of *res judicata* and collateral estoppel." R p. 655. The Court accordingly granted Bank of America's motion to dismiss with prejudice, and denied Appellants' motion for summary judgment. R p. 656.

STANDARD OF REVIEW

"Dismissal under Rule 12(b)(6) is proper when … (1) the complaint on its face reveals that no law supports the plaintiffs' claim, (2) the complaint on its face reveals the absence of facts sufficient to make a good claim, or (3) the complaint discloses some fact that necessarily defeats the plaintiffs' claim." *Harrold v. Dowd*, 149 N.C. App. 777, 780 (2002). "A statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion" when apparent from "the face of the complaint," at which point "the burden of showing that the action was instituted within the prescribed period is on the plaintiff." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136 (1996) (citation omitted). This Court's review is *de novo*.

ARGUMENT

I.

The Superior Court's Routine Application of the Statute of Limitations Should Be Affirmed.

Appellants concede their claims are time-barred unless the statutes of limitations are tolled. *See* Appellants' Br. p. 12. Their primary argument is that because they alleged they were entitled to tolling through the "discovery rule," the Superior Court was required to treat this *legal* argument as a *factual* inference that must be drawn in Appellants' favor at the motion-to-dismiss stage. *Id.* p. 20. This argument has several fatal defects. Not only do Appellants misstate North Carolina's standard for assessing tolling allegations on a motion to dismiss, Appellants overlook N.C.G.S. § 1-21 and wrongly assume North Carolina law governs at all, when only one of the Appellants is a North Carolinian. Properly analyzed, the complaint provides no basis to invoke the discovery law under any jurisdiction's tolling laws.

A. Appellants cannot resurrect claims time-barred where they arose by suing in North Carolina.

Appellants argue their case exclusively under North Carolina law. But they neglect to account for North Carolina's door-closing statute, which provides that "where a cause of action arose outside of this State and is barred by the laws of the jurisdiction in which it arose, no action may be maintained in the courts of this State." N.C.G.S. § 1-21. Here, Appellants' claims arose in their home states, as the place where "the real estate at issue is located" and where Appellants' alleged "economic loss was felt." *Synovus Bank v. Coleman*, 887 F. Supp. 2d 659, 669 (W.D.N.C. 2012) (citing, *e.g.*, *United Va. Bank v. Air-Lift Assocs.*, 79 N.C. App. 315, 321 (1986), for the

proposition that "Virginia law applied where bank's wrongful sale of collateral occurred in Virginia").[7]

Thus, Appellants cannot invoke North Carolina's statute of limitations or discovery rule when their claims are time-barred in their home states. The door-closing statute is unequivocal: "No action barred in the state of origin may be litigated here." *Little v. Stevens*, 267 N.C. 328, 334 (1966). Hence, no analysis whether it is barred under North Carolina law is complete without analyzing whether it is barred in its "state of origin." "The purpose of this provision is to prevent a non-resident claimant from coming into this State and prosecuting a claim, whether against a resident or a non-resident, under the [North Carolina] statute of limitations, where the claim would be outlawed under the statute prevailing in the state where the cause of action arose." *Id*. at 332. But that is what Appellants attempt here.

The state of origin is not a mere formality. Appellants claim they can evade the time bar because "fraud claims are tolled by the discovery rule." Appellants' Br. p. 12. Not so under Michigan law, where one Appellant's claims arose. R p. 254; *see Boyle v. GMC*, 661 N.W.2d 557, 558, 560 (Mich. 2003) ("rejecting a discovery rule in fraud cases" and enforcing MICH. COMP. L. § 600.5827, providing that "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results").

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[7] Even if there were a basis for Appellants to argue their claims arose elsewhere—something they have never asserted—a routine conflict-of-laws analysis would still weigh decidedly in favor of their home states under nearly every criterion described in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 148.

B. Appellants' claims are time-barred under all applicable statutes of limitations.

Appellants start their limitations argument with a truncated quote from *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 547 (2003)—a case which actually *rejected* the plaintiff's attempt to invoke the discovery rule and thus serves as an early indication that something in Appellants' argument is amiss. Appellants' Br. p. 12. Appellants quote *State Farm* for the proposition that the limitations period begins to run from the "discovery … of the facts constituting the fraud or mistake"—which is simply a direct quote from the statute of limitations itself—omitting the dispositive point the case makes *after* quoting the statute, which is that, "[u]nder this provision, 'discovery' means either actual discovery or when the fraud should have been discovered in the exercise of reasonable diligence." *Id.*; *State Farm*, 161 N.C. App. at 547 (quoting N.C.G.S. § 1-52(9)). *State Farm* then applies the "long standing" rationale of *Peacock v. Barnes*, 142 N.C. 215, 218 (1906):

> A man should not be allowed to close his eyes to facts readily observable by ordinary attention, and maintain for his own advantage the position of ignorance. Such a principle would enable a careless man, and by reason of his carelessness, to extend his right to recover for an indefinite length of time, and thus defeat the very purpose the statute was designed and framed to accomplish.

Id. at 548. The discovery rule operates no differently in the other states that recognize it. The Superior Court properly applied this standard in rejecting Appellants' naked claim that they were entitled to toll the statutes of limitations when "facts readily observable" triggered their duty to investigate years earlier. *Id.*

1. The complaint alleges facts triggering the time bar.

In assessing "when the [alleged] fraud should have been discovered in the

exercise of reasonable diligence" (*id.*) the dispositive question—in North Carolina and elsewhere—is "when the plaintiff first bec[a]me[] aware of facts and circumstances" that would have aroused "suspicion" of possible wrongdoing. *Doe*, 242 N.C. App. at 543–44. That alone puts the plaintiff on inquiry notice and starts the clock. It is not necessary that the plaintiff have had "complete information of all details of the transaction." *Cascadden v. Household Realty Corp.*, 196 N.C. App. 517, 2009 WL 1054035, *2 (2009). Once such grounds for suspicion exist, "plaintiffs are charged with the knowledge" of all facts "that a reasonable inquiry would have disclosed." *Thorpe v. DeMent*, 69 N.C. App. 355, 362–63 (1984). As similarly stated under California law, which applies to a plurality of Appellants (R pp. 216, 224, 231, 262):

> A plaintiff need not be aware of the specific "facts" necessary to establish the claim; that is a process contemplated by pretrial discovery. … So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.

Jolly v. Eli Lilly & Co., 751 P.2d 923, 928 (Cal. 1988).[8]

Appellants contend that when the limitations period begins to run "is a question of fact to be resolved by a jury." Appellants' Br. p. 14. That is *sometimes* so—but not this time. "A Rule 12(b)(6) motion to dismiss is the proper vehicle for asserting a statute of limitations defense if it appears on the face of the complaint that such a

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[8] *Accord*, *e.g.*, *Richards v. Powercraft Homes, Inc.*, 678 P.2d 449, 451 (Ariz. Ct. App. 1983) ("It was not necessary, however, for [plaintiffs] to know all the facts for the statute of limitations to begin to run. All that is required is that they should have known such facts that would have prompted a reasonable person to investigate. …"); *Klehr v. A.O. Smith Corp.*, 87 F.3d 231, 237 (8th Cir. 1996) (collecting Minnesota precedents "impos[ing] an affirmative duty to investigate upon a party who is aware of facts that might constitute a possible cause of action for fraud").

statute bars the claim." *Wilson v. Pershing, LLC*, 253 N.C. App. 643, 652 (2017) (internal quotation marks, brackets, and ellipses omitted). When, as here, the motion is based on facts affirmatively alleged in the complaint, whether those facts preclude the discovery rule is *not* a "question of fact"—it is a question of law.

Taylor's allegations are representative of those made by the other Appellants, as they are all based on the same boilerplate form with minor, immaterial variances. Taylor alleges contacting Bank of America about a HAMP modification in February 2010, and promptly receiving a three-month trial plan. R pp. 208, 212. Appellants allege that under the trial plans' terms, "[i]f timely payments are made during those three months … , the homeowner must be offered a permanent modification," but Taylor alleges making "fourteen" payments "in 2010 and 2011" without receiving one. R pp. 199, 213.

Taylor claims he was in "repeated[]" contact with the bank "throughout" the "2010 through 2012" period "to ensure proper compliance with HAMP's requirements." R pp. 209–12. Yet he claims he was "frustrate[d]" by "more than thirty" "unnecessar[y]" requests to "resubmit[] his application and supporting information." R p. 211–12. He claims he ultimately "qualified for HAMP but was wrongfully denied a HAMP modification because of the false and fraudulent statements made by BOA." R p. 212. On 25 September 2012, a foreclosure "judgment in the amount of $117,130.00 was entered against" him. R p. 213.

In short—by Appellants' own accounts—they knew they were being asked for documents they say they had already submitted, knew they were being asked to make

trial payments beyond the three-month period contemplated in their trial plans, and knew they were denied relief after claiming to have fulfilled all requirements. Appellants nonetheless ask this Court to rule that they could not have suspected they might have any grounds for complaining until "retain[ing] [their] attorneys in this matter" years later—not because they were unaware of their alleged harms, not even because they were unaware of the actions they now challenge as wrongful, but solely because it hadn't occurred to them to characterize those things as a "systematic fraud" until their current attorneys advised them to on the basis of the 2013 HAMP MDL declarations. R pp. 200, 207, 214. This theory fails for the simple reason that it's the moment Appellants had cause to investigate potential claims—not the "details" they might have uncovered in the *course* of an investigation—that starts the clock. *Cascadden*, *supra*.

There is ample precedent rejecting similarly contrived attempts to evade the time bar. In *Doe*, the plaintiff alleged being a victim of clergy abuse and brought "fraud-related" claims decades later, arguing that even though he knew of his harms, "he did not discover" his claims until "other victims … came forward" and he realized his abuse was part of a "pattern" the diocese "knew about" and "hid." 242 N.C. App. at 543. This court held that the plaintiff's harms "trigger[ed] … the duty to investigate." *Id*. at 543–44. In *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 2015 NCBC 61 (N.C. Super. Ct. 2015) (Gale, C.J.), *aff'd*, 370 N.C. 1 (2017), the Supreme Court affirmed dismissal of fraud claims where the plaintiff claimed a right to royalty payments, admitted not receiving those payments, but sought to invoke the discovery

rule by arguing the details of the fraud were "uniquely within the[] knowledge" of the defendant. 2015 NCBC 61 ¶¶ 8–9, 34–35. The Supreme Court affirmed that the plaintiff "had notice of its injury" when it didn't receive the payments it said it was promised and was under a duty to "inquire" into its claims then, 370 N.C. at 6, just as Appellants here had notice of their alleged injuries when they failed to receive the HAMP modifications they claim they were promised.

As shown above, many courts faced with the same pleadings filed in this case reached the same conclusion, holding plaintiffs had no right to toll the statutes of limitations when they were concededly aware of the alleged frustrations in completing their applications, their ultimate denial of HAMP modifications, and the resulting foreclosures years before filing suit. *See Mandosia*, 2018 U.S. Dist. LEXIS 45237, at *6–8; *Cantrell*, 2017 WL 1246356, at *3; *Jones*, 2018 WL 4095687, at *8 n.5.

The Court need not resort to speculation to conclude that the facts alleged in the complaint were capable of leading Appellants to their claims—Appellants effectively admit as much. Appellants expressly describe prior lawsuits as raising "identical issues in fact and law" as Appellants' own. R p. 206. Yet the HAMP MDL's claims that the plaintiffs "made all the required trial payments, but did not receive [] a permanent loan modification," and the purportedly "identical" claims resulting in the National Mortgage Settlement, were manifestly discovered by 2010 and 2012, respectively. 2013 WL 4759649, at *1.

The Court can also take judicial notice that the lawsuits that started congesting dockets nationwide from HAMP's inception reflect numerous *other* plaintiffs

managing to spin fraud claims out of the same allegations as far back as 2010.[9] *Compare*, *e.g.*, R p. 212 (alleging Appellants "qualified for HAMP" but were "wrongfully denied a HAMP modification") *with Wigod v. Wells Fargo Bank, N.A.*, No. 10-2348, 2011 U.S. Dist. LEXIS 7314, *18 (N.D. Ill. Jan. 25, 2011) (alleging Wells Fargo "den[ied] [plaintiff] a permanent modification even though she qualified"); R p. 211 (alleging Appellants sent documents "BOA had no intention of reviewing") *with Ishler v. Chase Home Fin. LLC*, No. 10-2117, 2011 WL 744538, *4 (M.D. Pa. Feb. 23, 2011) (alleging Chase induced plaintiff to "produce various documents" when it had "no intention" of approving a modification); R p. 211 (alleging Appellants were forced to "resubmit[] ... supporting information") *with Ramos v. Bank of Am., N.A.*, No. 11-3022, 2012 WL 5928732, *2 (D. Md. Nov. 26, 2012) (alleging bank asked plaintiff "to re-produce documents [it] already possessed"). These individuals were "lay persons," too (Appellants' Br. p. 20), and if they were capable of filing timely lawsuits, so were Appellants.

2. Appellants' retention of counsel is not relevant.

Appellants claim they "could not have reasonably discovered" the grounds for their claims until they "retained their attorneys in this matter." *E.g.*, R p. 201. That theory is legally defective for the reasons already set forth above—the clock begins to

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[9] *See* N.C. R. EVID. 201(b), (d) (court must take judicial notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); *see*, *e.g.*, *Bryson v. Cooper*, No. COA03-1484, 2004 N.C. App. LEXIS 1930, *5 (Oct. 19, 2004) (taking judicial notice of prior complaint for purposes of assessing similarity of allegations); *Peel v. BrooksAmerica Mortg. Corp.*, 788 F. Supp. 2d 1149, 1157–58 (C.D. Cal. 2011) (taking judicial notice of "complaints … from other cases").

run once a plaintiff is given cause to investigate, not when an attorney supplies the specific theories to plead. It follows from the "well established" rule that "the means of knowledge is equivalent to knowledge," *Peacock*, 142 N.C. at 219, that a person under a duty to investigate is already on constructive notice of whatever advice an attorney would render.[10]

That is particularly so here, where the alleged malfeasances that put Appellants on notice of their claims are admitted throughout the complaint, and the only thing their lawyers added to the equation was to put the most malign spin imaginable on those allegations, based on material that's been public since 2013. Every Appellant knew they were denied a HAMP modification after allegedly "qualif[ying]" for HAMP, being asked to "resubmit[]" documents as many as thirty times, and making the required trial payments. *E.g.*, R pp. 211–13. All their lawyers added was to label these events part of a "calculated," "nefarious scheme." R p. 200; Appellants' Br. p. 30. But even if there were any truth to that, it is precisely the sort of thing Appellants were obliged to "find" without "wait[ing] for the facts to find [them]" (*Jolly*, *supra*), even if that meant seeking legal advice sooner.

In *United States v. Kubrick*, 444 U.S. 111, 121 (1979), the Supreme Court rejected the argument that the discovery rule applies until the plaintiff knows the defendant "was legally blameworthy." The Court differentiated between "ignorance of the fact of [the plaintiff's] injury" and "ignorance of his legal rights," because once

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[10] *Accord*, *e.g.*, *Vertex Inv. Co. v. Schwabacher*, 134 P.2d 891, 897 (Cal. Ct. App. 1943); *Howard v. Farr*, 131 N.W. 1071, 1074 (Minn. 1911).

a plaintiff knows "he has been hurt," "[t]here are others who can tell him if he has been wronged, and he need only ask"—in particular, "by seeking advice in the [] legal community." *Id.* at 122–23. And the "reasonable diligence" on the plaintiff's part required to invoke the discovery rule *includes* the duty to seek "advice … as to whether he had been legally wronged." *Id.* at 123 n.10.

Cantrell applied these principles in rejecting claims that the plaintiff "had no idea that BOA had processed her HAMP application incorrectly, negligently, or with deceitful motivation, until after her attorney advised her of such in 2016" based on "what was allegedly going on 'behind the scenes' at BOA." 2017 WL 1246356, at *2. The court held that she had enough grounds to investigate a potential claim based on what she alleged about the bank's handling of her application in 2011, and the fact that she "was merely ignorant of her rights until she consulted with an attorney" does not toll the statute of limitations. *Id.* at *3.

If the law were otherwise, "any plaintiff who requires the assistance of counsel to discover the existence of a claim, including plaintiffs who conduct virtually no diligence, would be automatically entitled to equitable tolling of the statute of limitations for an indefinite period of time until that plaintiff retains counsel." *McCarn v. HSBC USA, Inc.*, No. 12-0375, 2012 WL 5499433, *6 (E.D. Cal. Nov. 13, 2012). That "fatal flaw … readily reveals itself when one considers that if Plaintiff had not contacted an attorney, under his interpretation, the statute of limitations would still not have expired, nor would it ever." *Migliarese v. United States*, 542 F. Supp. 2d 434, 441 & n.5 (M.D.N.C. 2008)

There are two last reasons why Appellants' theory cannot hold up. The first is their artful refusal to say whether their current attorneys are their *first* attorneys, exemplified by the care they take to allege—persistently—that the statute did not begin to run until they "retained counsel *in this matter*."[11] Even if retention of counsel were relevant, tolling can't be based on the premise that Appellants' present attorneys have some oracular insight unavailable to any prior attorneys they might have had, like the one who represented Taylor in his 2012 bankruptcy. R p. 721.

Lastly, the Court can take judicial notice of the fact that among the myriad other plaintiffs who managed to bring the same claims on a timely basis are many *pro se* plaintiffs who manifestly did not need to retain counsel to assert them. *E.g.*, *Ferrerr v. U.S. Bank, N.A.*, No. 14-20741, 2014 WL 4639431, *7 (S.D. Fla. Sept. 16, 2014) (*pro se* plaintiff alleging "Defendants utilized the [HAMP trial plan] in order to defraud Plaintiffs of additional funds while having no intention of honoring such agreement"); *Mbakpuo v. Wells Fargo Bank, N.A.*, No. 13-2213, 2015 WL 4485504, *3 (D. Md. July 21, 2015) (*pro se* plaintiff alleging "Wells Fargo committed common law fraud by refusing to grant him a HAMP loan modification"); *Ramos*, *supra* (*pro se* plaintiff alleging bank "acted deceptively and in violation of HAMP by: repeatedly losing Ramos's paperwork; asking her to re-produce documents [it] already possessed," and "denying her a Permanent Modification") (brackets omitted).

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[11] R pp. 200, 209–10, 211–12, 215, 218, 220, 222–23, 224, 226–27, 229, 230, 233, 235, 237–39, 241, 243, 245–47, 249–52, 254, 256–58, 260–62, 264, 266–67, 269–70, 273, 275, 277–80 (emphasis added).

3. The complaint pleads no reasonable diligence.

Appellants argue that it "is not the standard in North Carolina" that they must "alleg[e] [their] own diligence." Appellants' Br. p. 18. In fact, it very much *is* the law, here and elsewhere, that a "plaintiff cannot rely on the discovery rule unless he has exercised reasonable diligence," *Doe*, 242 N.C. App. at 539, and "must allege" such diligence adequately to survive dismissal. *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 346 (1999); *see also*, *e.g.*, *Birtha v. Stonemor, NC, LLC*, 220 N.C. App. 286, 292–93 (2012) ("reject[ing] Plaintiffs' assertion that the discovery rule tolls the statute of limitations" because "Plaintiffs do not allege" required elements).[12]

It is demonstrably so that everything alleged in Appellants' complaint could have been discovered "upon inquiry" (*Hudson-Cole*, *supra*), because they concededly *did* discover it all when they eventually inquired—and all of it had been public since 2013 at the latest. That alone defeats tolling. *See*, *e.g.*, *Wilson*, 253 N.C. App. at 652–54 (rejecting claim that plaintiff "alleged his efforts supporting his diligence" because he "fail[ed] to allege how the exercise of due diligence would not have led [him] to discover" his claims sooner). As *Torres* ruled in rejecting the same allegations as a basis for tolling, declarations from the HAMP MDL "dated 2013" cannot support a claim that "the alleged 'scheme'" somehow remained concealed from the diligent years

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[12] *Accord*, *e.g.*, *Grisham v. Philip Morris USA, Inc.*, 151 P.3d 1151, 1159 (Cal. 2007); *Gerlach v. Uptown Plaza Assocs., LLC*, No. 14-0684, 2016 WL 359494, *2 (Ariz. Ct. App. Jan. 28, 2016); *Richard T. Sahlin Family v. JPMorgan Chase Bank*, No. 06-076164-CZ, 2007 Mich. Cir. LEXIS 394, *13–14 (Mich. Cir. Ct. Jan. 22, 2007).

later. 2018 WL 573406, at *5.[13]

As in *Wilson*, Appellants *say* they "allege[d] their diligence" (Appellants Br. p. 18), but the Court is not obliged to take such "conclusory, unwarranted deductions of fact" or "conclusions of law" at face value. *Izydore v. Tokuta*, 242 N.C. App. 434, 438 (2015). Instead, it must evaluate whether the allegations suffice to establish reasonable diligence "as a matter of law." *Wilson*, 253 N.C. App. at 655. They do not.

Appellants argue that they "pleaded their diligence in seeking the cause of their injury, as they called the Bank over and over seeking answers" while they were applying for HAMP. Appellants' Br. pp. 10, 17. Appellants conflate their diligence in seeking HAMP modifications with the requisite diligence in investigating whether they were legally wronged. But their alleged injury is the denial of HAMP modifications, so Appellants cannot carry their burden of pleading "a reasonable investigation of all potential causes of that injury" by relying on what they did beforehand. *Fox v. Ethicon Endo-Surgery, Inc.*, 110 P.3d 914, 921 (Cal. 2005). Alternatively, if Appellants are maintaining that their alleged calls "seeking answers" as far back as 2009 *were* diligent efforts to assure they weren't being wronged, that merely concedes their "suspicion" was aroused a decade ago and precludes the discovery rule altogether. *Doe*, 242 N.C. App. at 543.

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[13] *Accord*, *e.g.*, *Glue-Fold v. Slautterback Corp.*, 82 Cal. App. 4th 1018, 1030–31 (Cal. Ct. App. 2000) (discovery rule unavailable where plaintiff did not plead "information could *not* have been obtained earlier" such that "earlier efforts" at diligence "would have been fruitless").

4. The complaint pleads no fraudulent concealment.

Appellants' briefing goes back and forth between arguing the "discovery rule" and "concealment," as though the two concepts were interchangeable. They are actually two separate doctrines, albeit with some overlapping requirements. But both doctrines, Appellants admit, require an inability to have discovered their claims sooner and a showing of reasonable diligence, so the same defects that foreclose Appellants' discovery-rule arguments foreclose their concealment arguments.

A key difference is that fraudulent concealment requires a further showing that the plaintiff's inability to discover his claims was because of representations made by the defendant "to induce [the plaintiff] not to assert [his] rights," denying the plaintiff "the opportunity to investigate" or making it so "that he could not have learned the true facts by exercise of reasonable diligence." *Christenbury*, 2015 NCBC 61, ¶ 34 (citing *Oberlin Capital, LP v. Slavin*, 147 N.C. App. 52, 59 (2001)). Appellants allege this in conclusory boilerplate, but cannot substantiate *how* any representations by the bank "prevent[ed] them from discovering the fraud despite their diligence" (Appellants' Br. p. 18) given that their belated attempt at a diligent investigation led them to declarations that have been public since 2013. Appellants cannot base their concealment arguments on a supposed "secret," "covert scheme" (*id.* pp. 4, 6, 9, 30) when their own complaint is premised on the notion that the "scheme" ceased being a "secret" years earlier.

Appellants do not validly plead any fraudulent concealment *before* 2013, either. As was the case in *Torres*, they "do not point to any actual allegations of concealment, only to their general fraud claims." 2018 WL 573406, at *4. They claim they were

defrauded by a "fraudulent HAMP mortgage modification denial scheme" and that the statute of limitations was tolled because the bank did not disclose that this supposed "scheme" was the reason they were "unable to obtain HAMP mortgage modifications." R pp. 279–80. As *Torres* correctly apprehended, if that were enough to plead fraudulent concealment, "then the statute of limitations for fraud claims would be rendered a nullity—plaintiffs would simply allege that defendants 'concealed' every supposed fraud by not characterizing their own statements as fraudulent." 2018 WL 573406, at *4.

For this reason, the "alleged basis" for fraudulent concealment cannot be "the same as the[] cause of action." *Lukovsky v. City & Cnty. of S.F.*, 535 F.3d 1044, 1052 (9th Cir. 2008) (citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990) (rejecting fraudulent-concealment theory that "merges the substantive wrong with the tolling doctrine" and "implies that a defendant is guilty of fraudulent concealment unless it" affirmatively confesses to wrongdoing)).[14] Fraudulent concealment "requires active conduct by a defendant, above and beyond the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time." *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1177 (9th Cir. 2000). But here, the only basis Appellants offer for saying anything was "concealed" from them

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[14] *Accord*, *e.g.*, *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 218–19 (4th Cir. 1987) ("To permit a claim of fraudulent concealment to rest on no more than an alleged failure to own up to illegal conduct … would effectively nullify the statute of limitations. … 'Fraudulent concealment' implies conduct more affirmatively directed at deflecting litigation than that alleged here."); *Gearin v. Bailey's Nurseries, Inc.*, No. A11-595, 2012 WL 34035, *4 (Minn. Ct. App. Jan. 9, 2012) (following *Cada*).

is that they "believe[d]" the bank's representations—which is "the same as their cause of action" (*Lukovsky*, *supra*) and true of every fraud claim. Appellants' Br. p. 17.

II.

The Superior Court Also Properly Held Appellants Precluded from Relitigating Resolved Foreclosure Proceedings.

The Superior Court's ruling on *res judicata* and collateral estoppel (R p. 655) follows inexorably from the principle that a foreclosure determines "the validity of the debt" and the "right to foreclose." *Phil Mech. Constr. Co. v. Haywood*, 72 N.C. App. 318, 322 (1985). Thus, any claim that Appellants were entitled to settle their debts with loan modifications or that the foreclosure was "improper" and "unlawful" needed to be raised before the foreclosures were final. R p. 282–83, 287; *see*, *e.g.*, *Funderburk v. JPMorgan Chase Bank, N.A.*, 241 N.C. App. 415, 422–23 (2015).

A. Appellants' waived argument based on North Carolina's non-judicial process is baseless.

Appellants' primary challenge on appeal depends on grounds they admit they never raised in the Superior Court. They contend, for the first time on appeal, that "each of the Appellants who faced foreclosure were [*sic*] parties to non-judicial foreclosures," to which *res judicata* and collateral estoppel supposedly cannot apply. Appellants' Br. p. 25 & n.5.

This assertion is not rooted in anything in the Record for any Appellant, and is expressly contradicted by the Record for at least Taylor, who alleges a foreclosure "judgment" entered against him. R p. 213. In either event, it is waived. "[T]o preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party

desired the court to make." N.C. R. APP. P. 10(a)(1). Thus, "issues and theories of a case not raised below will not be considered on appeal." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309 (2001). Contrary to Appellants' claims, Judge Bell did not "assume[] that Appellants were parties to judicial foreclosures." Appellants' Br. at 27. The Court made no assumptions whatsoever about the existence or significance of non-judicial proceedings, because Appellants never raised the issue.

Not that it would have made a difference. The foreclosures to which this Court gave preclusive effect in *Phil Mechanic* and *Funderburk* were non-judicial proceedings under the process for foreclosure by contractual power of sale (N.C.G.S. § 45-21.16 *et seq.*), not judicial foreclosures (*see* N.C.G.S. § 1-339.1 *et seq.*). But just because "foreclosure by power of sale … is not a judicial proceeding" (*In re Lucks*, 369 N.C. 222, 224 (2016)) does not mean it never touches the courts or produces an adjudication. In actuality, a non-judicial foreclosure cannot occur without a hearing before the clerk of court and an "order" authorizing "the mortgagee or trustee to proceed"—and this "act of the clerk in so finding … is a judicial act." N.C.G.S. § 45-21.16(d), (d1). The clerk's order resolves the validity of the debt and the right to foreclose, and has preclusive effect because the mortgagor has the ability to assert "defenses to foreclosure … in a separate action to enjoin the foreclosure prior to the time the rights of the parties become fixed." *Funderburk*, 241 N.C. App. at 423.

Appellants' argument to the contrary is based on a misreading of *Lucks*, which they get backwards. *Lucks* authorized a creditor to proceed with judicial foreclosure

after the clerk refused authorization to proceed by power of sale. *Id.* at 223. In so ruling, the Court rejected the argument that the clerk's refusal to enter an order was a "dismissal" of the non-judicial proceeding that "implicate[d] *res judicata* or collateral estoppel in the traditional sense." *Id.* The *reason* this did not implicate these doctrines "in the traditional sense" was because an order was *not* entered—nothing in *Lucks* speaks to the reverse situation presented here, where Appellants mount collateral attacks on foreclosures that *were* authorized to proceed. *See Vicks v. Ocwen Loan Serv., LLC*, No. 16-0263, 2017 WL 2490007, *2 & n.3 (W.D.N.C. June 8, 2017) (distinguishing *Lucks*; citing *Hardin v. Bank of Am., N.A.*, No. 16-0075, 2017 WL 44709, *5 (E.D.N.C. Jan. 3, 2017) ("Any issue that the clerk decides in a foreclosure proceeding under [N.C.G.S.] § 45-21.16(d) is conclusive unless appealed and reversed and cannot be relitigated in a subsequent lawsuit.")).

Appellants do not make (and thus waive) the argument that a different standard applies for out-of-state Appellants, but similar principles have indeed been upheld elsewhere.[15] A more fundamental problem is the constitutional obstacle to Appellants' suggestion that North Carolina courts should serve as the forum for collateral attacks on foreclosures completed across the country. "[P]ublic Acts" and "Records" of other states are owed the same "Full Faith and Credit" as judicial proceedings, and the proper forum for collateral attacks on those acts are the courts

[15] *See*, *e.g.*, *Madison v. Groseth*, 279 P.3d 633, 638 (Ariz. Ct. App. 2012) ("tort claims" that "depend on [] objections to the validity of the trustee's sale … cannot survive"); *Bryan v. JPMorgan Chase Bank*, 848 N.W.2d 482, 485 (Mich. Ct. App. 2014) (no standing to challenge foreclosure after completion of sale).

in the states where they were rendered. U.S. CONST. Art. IV, § 1.

B. The Superior Court properly rejected Appellants' remaining theories.

Appellants claim they are not attacking the foreclosures because they seek "money damages," not a transfer of "title." Appellants' Br. p. 28. That is irrelevant. Foreclosures have preclusive effect even if the plaintiff "attempt[s] to proceed by asserting a new legal theory or seeking a different remedy." *Traber v. Bank of Am.*, 242 N.C. App. 523, 2015 WL 4620203, *4 (2015) (quoting *Bockweg v. Anderson*, 333 N.C. 486, 494 (1993)). "[M]oney damages" are just such a "different remedy," particularly since Appellants expressly seek them to compensate them for the same transfer of "title" they profess not to challenge. *See*, *e.g.*, R p. 213 (seeking "damages" for "the loss of his home"); *Taylor v. Fannie Mae*, 374 F.3d 529, 534 (7th Cir. 2004) (suit "bar[red]" because "[t]he fact that Taylor is claiming compensatory damages in the amount of the value of her home … demonstrates that her asserted injury is the loss of her home due to the Defendants' conspiracy to [foreclose]").

Appellants' insistence that they "do not contend that the foreclosure actions were wrongfully decided" (Appellants' Br. p. 28) contradicts their pleadings. *See* R pp. 283–84 (alleging "fraud in the discharge of [] foreclosure procedures"), p. 287 (alleging "improper" and "unlawful" foreclosures). It is also nonsensical. A court cannot "grant[] damages for the loss of Plaintiffs' home" without "suggest[ing] entry of the foreclosure judgment was wrongful." *Colon,* 2018 WL 5024083, *4.

Appellants' professed "unaware[ness]" of their claims is not relevant to the preclusion analysis. "Actual knowledge of a potential claim is not a requirement for application of the rules of merger and bar," "for it is the existence of the present claim,

not party awareness of it, that controls." *Harnett v. Billman*, 800 F.2d 1308, 1313 (4th Cir. 1986). Dicta Appellants cite from *Gaither Corp. v. Skinner*, 241 N.C. 532, 536 (1955), suggesting that a party with "no knowledge or means of knowledge" of an "item" of damages might avoid *res judicata*, does not help them: We have already seen they did not lack for "means of knowledge," and are thus "charged" with the knowledge they seek to disclaim. *Thorpe*, 69 N.C. App. at 362. Accordingly, at least two courts have repudiated attempts to profess exactly the same unawareness to avoid preclusion. *See Traber*, 2015 WL 4620203, at *5 (rejecting argument plaintiffs could relitigate fraud claims against Bank of America because they were previously "unaware" of the HAMP MDL declarations); *King v. U.S. Bank, N.A.*, No. 325927, 2016 WL 2731118, *4 (Mich. Ct. App. May 10, 2016) (rejecting attempt to raise new claims alleging "fraud with regard to plaintiff's HAMP application" because she was unaware of a "fraudulent scheme" until hearing about the HAMP MDL declarations).

CONCLUSION

Bank of America respectfully submits that the judgment of the Superior Court should be affirmed.

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CERTIFICATE OF COMPLIANCE

Under N.C. R. APP. P. 28(j)(2), the undersigned counsel hereby certifies that this brief contains exactly 8,750 words, inclusive of footnotes and citations, as calculated by the word count in Microsoft Word.

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I hereby certify that the undersigned counsel has this day served the foregoing electronically filed Brief of Appellee Bank of America, N.A. in the above-captioned action on all parties to this cause by depositing the original and/or copy hereof, postage prepaid, in the United States Mail, addressed to the following:

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No. COA20-160 TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

CHESTER TAYLOR III, RONDA and BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE and ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE,

Appellants,

v.

BANK OF AMERICA, N.A.,

Appellee.

From Mecklenburg County
No. 18-CVS-8266

****

ADDENDUM

****

2013 WL 4759649
Only the Westlaw citation is currently available.
United States District Court, D. Massachusetts.

In re BANK OF AMERICA HOME AFFORDABLE MODIFICATION PROGRAM (HAMP) CONTRACT LITIGATION.

M.D.L. No. 10–2193–RWZ.
|
Sept. 4, 2013.

MEMORANDUM OF DECISION

ZOBEL, District Judge.

***1** In this consolidated litigation, individual borrowers from around the country claim that Bank of America[1] mismanaged their requests for loan modifications under the Home Affordable Modification Program ("HAMP"). Plaintiffs now seek to resolve the issue of liability on a classwide basis. They move to certify twenty-six classes, one for each state in which named plaintiffs reside.

I. Background

HAMP is a federal government program designed to prevent mortgage foreclosures. Through HAMP, the government has encouraged mortgage lenders and servicers to provide loan modifications for eligible borrowers. The U.S. Department of the Treasury has administered HAMP by issuing regulations in the form of HAMP Guidelines and Supplemental Directives. *See* Program Guidance, *Home Affordable Modification Program,* https:// www.hmpadmin.com/portal/programs/guidance.jsp (last visited Aug. 22, 2013).

The HAMP modification process begins with a preliminary evaluation by the mortgage servicer of the borrower's eligibility. From April 2009 through early 2010, under the Treasury Department's Supplemental Directive 09–01, the servicer could use a borrower's unverified statements about her financial situation to do that preliminary evaluation. *See* U.S. Dep't of the Treasury, Supplemental Directive 09–01, at 5 (Apr. 6, 2009), *available at* https:// www.hmpadmin.com//portal/programs/docs/hamp_servicer/sd0901.pdf. If the preliminary evaluation indicated the borrower was eligible for a HAMP modification, the servicer would then offer the borrower a Trial Period Plan ("TPP"). Each TPP established a trial modification period, usually lasting three months. During that trial period, the borrower was obligated to make reduced monthly payments, provide any required financial documents, and meet other stated conditions. If the borrower complied with the required terms and remained otherwise eligible, then (according to each TPP) the servicer would provide a permanent HAMP modification. That permanent modification would become effective on the Modification Effective Date, the first day of the month after the last trial period payment was due.

Bank of America is one of many mortgage lenders and servicers that participated in HAMP and issued TPPs. Plaintiffs are a number of individual borrowers who claim that they entered into TPPs serviced by Bank of America and made all the required trial payments, but did not receive either a permanent loan modification or a written denial of eligibility by the Modification Effective Date. They assert claims for breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, and unfair and deceptive acts and practices.

The named plaintiffs include forty-three individuals and couples from twenty-six different states. They now seek to certify twenty-six different classes, one from each state they represent,[2] on the issue of liability. They propose the following class definition:

> ***2** All individuals with home mortgage loans on properties in [state] whose loans have been serviced by Bank of America and who, since April 13, 2009, have entered into a Trial Period Plan Agreement with Bank of America and made all trial payments required by their Trial Period Plan Agreement, other than borrowers to whom Bank of America tendered either:
>
> (a) A Home Affordable Mortgage Agreement sent to the borrower prior to the Modification Effective Date specified in the Trial Period Plan Agreement; or
>
> (b) A written denial of eligibility sent to the borrower prior to the Modification Effective Date

specified in the Trial Period Plan Agreement.

Docket # 208 (Mot.) at 1. The term "Trial Period Plan Agreement" is defined to include only TPPs issued under Supplemental Directive 09–01. *Id.* at 2.[3]

II. Legal Standard

Federal Rule of Civil Procedure 23 governs class certification. The district court may only certify a class after a "rigorous analysis of the prerequisites established by Rule 23." *Smilow v. Sw. Bell Mobile Tel. Sys.,* 323 F.3d 32, 38 (1st Cir.2003); *see also Wal–Mart Stores, Inc. v. Dukes,* —— U.S. ——, ——, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011). Under Rule 23(a), a party seeking class certification must show that:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). These four requirements are known as numerosity, commonality, typicality, and adequacy. *See Smilow,* 323 F.3d at 38.

In addition, the party seeking certification must show that one of the requirements of Rule 23(b) is met. Plaintiffs seek to proceed under Rule 23(b)(3), which allows a class action if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3).

"When appropriate, an action may be brought or maintained as a class action with respect to particular issues." Fed.R.Civ.P. 23(c)(4). Here, plaintiffs seek to certify their twenty-six classes only as to liability; they propose that damages should be resolved separately in subsequent proceedings. *Cf. Smilow,* 323 F.3d at 41 ("[E]ven if individualized determinations were necessary to calculate damages, Rule 23(c)(4) ... would still allow the court to maintain the class action with respect to other issues.").

III. Analysis

To achieve certification, plaintiffs must "affirmatively demonstrate" that they have met the requirements of Rule 23. *Wal–Mart,* 131 S.Ct. at 2551. "[T]hat is, [they] must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.*

A. Ascertainability

***3** Although not explicitly mentioned in Rule 23, one essential prerequisite for class certification is that any proposed class must be ascertainable. In other words, the class must be defined by objective criteria that make it "administratively feasible for the court to determine whether a particular individual is a member." 7A Charles Alan Wright et al., *Federal Practice & Procedure* § 1760 (West 2013); *Matamoros v. Starbucks Corp.,* 699 F.3d 129, 139 (1st Cir.2012); *Donovan v. Philip Morris USA, Inc.,* 268 F.R.D. 1, 9 (D.Mass.2010). Plaintiffs' proposed classes are defined by objective criteria—primarily the state where the individual's property was located, the identity of the servicer, the type of TPP the individual received, whether the individual made trial payments, and whether Bank of America sent a loan modification or a written denial by the specified date. Plaintiffs have presented expert testimony showing that individuals meeting these objective criteria can be identified by relatively efficient searches on a Bank of America internal database called "MHA Summary." *See* Docket # 240, Ex. 13 (Ayres Report), ¶¶ 69–80. The information in the MHA Summary database can apparently be supplemented by and cross-checked against other internal Bank of America databases. *See id.* ¶¶ 85–100.

Bank of America notes that plaintiffs' class definition depends on when Bank of America *sent* permanent loan modification offers, but the MHA Summary database only shows when permanent loan modifications were *implemented.* That distinction would make a difference in cases where Bank of America sent an individual borrower a permanent loan modification offer before the Modification Effective Date, but the borrower did not accept it (or Bank of America did not implement it) until after that date. *See* Docket # 224, Ex. 14 (Ayres Dep.) at 80. Plaintiffs' expert testified, however, that it appeared there were relatively few borrowers in that situation, and

that they could be identified and removed from the proposed classes by adjusting the search algorithm. *See id.* In any case, "the class does not have to be so ascertainable that every potential member can be identified at the commencement of the action." Wright et al., *supra,* § 1760; *see Donovan,* 268 F.R.D. at 9. The criteria that plaintiffs have set forth are sufficiently stable and objective that "the general outlines of the membership of the class are determinable." Wright et al., *supra,* § 1760. Plaintiffs have therefore satisfied the threshold requirement of ascertainability.

B. Rule 23(a)

As described above, Rule 23(a) sets forth four mandatory requirements for class certification. I discuss each in turn.

1. Numerosity

The numerosity requirement is met if "the class is so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). This standard "does not impose a precise numerical requirement," but classes of forty or more are generally considered sufficiently numerous. *Connor B. ex rel. Vigurs v. Patrick,* 272 F.R.D. 288, 292 (D.Mass.2011).

***4** Plaintiffs' expert examined a random sample of 3,000 loans out of approximately 375,000 that were given trial modifications by Bank of America. Within that sample, 2,264 loans (about 75%) received TPPs meeting the class definition (i.e., TPPs issued under Supplemental Directive 09–01). Out of those 2,264 loans, plaintiffs' expert found that 1,814 (about 80%) met the class definition assuming a uniform three-month trial period length. By state, the number of observed class members in the 3,000–loan sample ranged from 26 in Alaska to 298 in California, with a median value of 62 observed class members per state. Ayres Report at app. 4. Extrapolating from that sample, the smallest expected class (Alaska's) should have some 123 borrowers in it.[4] I conclude that plaintiffs' showing is sufficient to satisfy the "relatively 'low threshold' " of the numerosity requirement. *Connor B.,* 272 F.R.D. at 292 (quoting *Garcia–Rubiera v. Calderon,* 570 F.3d 443, 460 (1st Cir.2009)).

2. Commonality

Commonality asks whether there are "questions of law or fact common to the class." Fed.R.Civ.P. 23(a)(2). It requires the party seeking certification to show a "common contention" that is "capable of classwide resolution-which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal–Mart,* 131 S.Ct. at 2551. Even a single common question can be enough to satisfy Rule 23(a)(2), as long as answering that question will "drive the resolution of the litigation." *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof,* 84 N.Y.U. L.Rev. 97, 132 (2009)); *see also id.* at 2556.

The primary common question that plaintiffs advance is whether Bank of America breached the TPPs it issued to each class member by failing to send either a permanent modification offer or a written denial of eligibility by the Modification Effective Date. Plaintiffs argue that the TPPs contractually required Bank of America to send either a permanent modification or a written denial by that date; Bank of America argues they did not.

While each individual class member had a separate TPP, it appears the relevant terms of each TPP were essentially the same; only the amount of the trial payments and the timing of the trial period changed. *See* Docket # 240, Ex. 20 (named plaintiffs' TPPs). The court could therefore interpret the common terms of these form contracts on a classwide basis. *See Smilow,* 323 F.3d 32, 39 (1st Cir.2003) ("The common factual basis is found in the terms of the contract, which are identical for all class members. The common question of law is [how to interpret that contract]."); *see also Schumacher v. AK Steel Corp. Ret. Accumulation Pension Plan,* 711 F.3d 675, 684 (6th Cir.2013) ("The determination of the scope and validity of the agreements involved common questions of law that lend themselves well for class certification.").

***5** Bank of America argues there is no common question because plaintiffs cannot succeed on their breach of contract claim without prevailing on other individualized questions, such as each plaintiff's own performance and damages. But Rule 23(a)(2) "does not require that all questions of law or fact raised in the litigation be common." *George v. Nat'l Water Main Cleaning Co.,* 286 F.R.D. 168, 174 (D.Mass.2012); *see also* Wright et al., *supra,* § 1763. While plaintiffs' case certainly raises a number of individualized questions, it also raises at least one common one: how to interpret the TPPs. That is enough to satisfy Rule 23(a)(2).

Likewise, Bank of America argues that interpreting the TPPs will not "drive the resolution of the litigation," *Wal–Mart,* 131 S.Ct. at 2551 (quoting Nagareda, *supra,* at 132), because individual questions about plaintiffs' performance and damages will remain even if plaintiffs establish their interpretation of the TPPs' terms is correct. That argument fails for two reasons. First, if Bank of America's interpretation of the TPPs prevails, then the entire breach of contract claim fails, which would surely drive the resolution of the litigation. Second, and more importantly, plaintiffs need not show that answering their common question will completely end the litigation; they need only show that it will "resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* The correct interpretation of the TPPs is surely central to the validity of each class member's contract claims, and it can be resolved for each class member in a single decision. It therefore presents a sufficient common issue. *See Gaudin v. Saxon Mortg. Servs.,* Civil Action No. 11–1663–JST, 2013 WL 4029043, at *5 (N.D.Cal. Aug.5, 2013) ("By determining whether the TPP is an enforceable contract and whether the parties' performance obligations are fully contained within it, the Court can resolve an issue central to the viability of the Proposed Class Members' claims."). *But see Campusano v. BAC Home Loans Servicing LP,* 2013 WL 2302676, at *6 (C.D.Cal. Apr.29, 2013) (finding a lack of commonality in part because interpreting the contracts at issue might not completely resolve the parties' dispute).

This same issue of how the TPPs should be interpreted is also central to the validity of plaintiffs' other claims. Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing depends on their contention that the contract required Bank of America to provide either a permanent modification or a written denial by the Modification Effective Date, since the implied covenant "may not ... be invoked to create rights and duties not otherwise provided for in the existing contractual relationship." *Latson v. Plaza Home Mortg.,* 708 F.3d 324, 326 (1st Cir.2013) (omission in original) (quoting *Uno Rests. v. Bos. Kenmore Realty Corp.,* 441 Mass. 376, 805 N.E.2d 957, 964 (Mass.2004)).[5] Their alternative claim for promissory estoppel insists that Bank of America promised in each TPP to provide a permanent modification or a written denial by the Modification Effective Date—the same interpretive question raised in the breach of contract claim. As for plaintiffs' claim of unfair and deceptive acts and practices, it is not entirely clear what acts and practices form the basis for that claim; but to the extent plaintiffs claim that Bank of America acted unfairly by breaching their TPPs intentionally and in bad faith, they raise the same common interpretive issue of what Bank of America's duties were under the TPPs.[6]

***6** Bank of America also argues that differences among the laws of the twenty-six different states at issue defeat commonality. But plaintiffs seek to certify a separate class for each state, meaning that the same state law applies to all persons within each class. Of course, "a court must be careful not to certify too many groups ." *Klay v. Humana, Inc.,* 382 F.3d 1241, 1262 (11th Cir.2004). The problems that arise from certifying many different classes in a single case, however, are problems of class adjudication that are more appropriately addressed under the superiority requirement of Rule 23(b)(3). *Cf. In re Am. Med. Sys.,* 75 F.3d 1069, 1085 (6th Cir.1996) (finding plaintiffs had failed to show superiority for a nationwide class because "[i]f more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law"); 7AA Wright et al., *supra,* § 1780.1. The asserted differences in state law across the different proposed classes do not prevent commonality within each class.

I therefore conclude plaintiffs have shown their proposed classes meet Rule 23(a)(2)'s commonality requirement.

3. Typicality

The typicality requirement is satisfied if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(3). "The claims of the entire class need not be identical, but the class representatives must generally 'possess the same interests and suffer the same injury' as the unnamed class members." *Connor B.,* 272 F.R.D. at 296 (quoting *Gen. Tel. Co. of the Sw. v. Falcon,* 457 U.S. 147, 156, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)). In general, a representative plaintiff is sufficiently typical if his claims and the class members' claims (1) arise from the same event, practice, or course of conduct, and (2) are based on the same legal theory. *See Garcia–Rubiera v. Calderon,* 570 F.3d 443, 460 (1st Cir.2009).

At the broadest level, all of the named plaintiffs' claims arise from the same allegedly wrongful practice—Bank of America's failure to provide a permanent modification or a written denial by the Modification Effective Date—and are based on the same legal theories. However, Bank of America raises a number of particular issues with respect to certain named plaintiffs.

First, Bank of America argues that plaintiff Kimberley

George and plaintiffs Matthew Nelson and Angelica Huato–Nelson ("the Nelsons") are not actually members of the proposed classes. Specifically, it claims they did not make all of their trial period payments in a timely fashion. *See* Mot. at 1 (defining the classes to include only borrowers who "made all trial payments required by their Trial Plan Period Agreement"). Bank of America's argument plainly fails as to George, who timely made all three of the trial payments required by her TPP. Bank of America only tasks George with nonpayment because she fell behind after Bank of America granted her a "Trial Offer Extension," which extended her trial plan by an additional month beyond the Modification Effective Date specified in her TPP. Docket # 223 (Schoolitz Decl.), ¶ 10 & Ex. 24. But George asserts—like the other members of her proposed class—that she had fully complied with her TPP by making the three payments it specified. Any subsequent late or missed payment is not directly relevant to her claim. As for the Nelsons, the record shows a disputed issue of fact over whether they made their third trial payment in a timely fashion. *Compare* Schoolitz Decl., ¶ 31 & Exs. 127–128 (indicating the Nelsons' first three trial payments were those that posted on June 18, July 10, and September 15, 2009, making the third trial payment late), *with* Docket # 248, Ex. 65 (Ayres Decl.), ¶ 12 & n. 16 (indicating the Nelsons' first three trial payments were those that posted on May 5, June 18, and July 10, 2009, making all three payments timely). Plaintiffs' evidence on this disputed question is sufficient to show the Nelsons' typicality for present purposes. If further factual development were to demonstrate that the Nelsons did not make their third trial payment on time, the Nelsons could be replaced by a different class representative.[7]

***7** Bank of America next argues that named plaintiffs Magali and Manuel Alvarenga, Donald and Maria Hall, Marie Freeman, and Jason Volpe are not typical because they entered into TPPs with Wilshire Credit Corporation ("Wilshire"), not Bank of America. Wilshire is described in the complaint as a "subsidiary or sister company" of Bank of America. Third Am Compl., ¶ 167. Loans previously serviced by Wilshire are apparently now serviced by Bank of America, and the standard terms of the TPPs issued by Wilshire are apparently identical to those issued by Bank of America. However, the Modification Effective Date on the Alvarengas' TPP, the Halls' TPP, and Freeman's TPP had already passed before Bank of America began servicing their loans. (The Modification Effective Date on Volpe's TPP occurred about a month after Bank of America began servicing his loan.)

Although the typicality requirement "may be satisfied even though varying fact patterns support the claims or defenses of individual class members." Wright et al., *supra,* § 1764, I conclude Bank of America is correct to argue that named plaintiffs whose TPPs were issued by Wilshire are not typical of the proposed classes. In the first place, they are outside the plain meaning of the class definition, which explicitly limits the proposed classes to individuals who "have entered into a Trial Plan Period Agreement with Bank of America." Mot. at 1. The Alvarengas, the Halls, Freeman, and Volpe entered into TPPs with Wilshire, not with Bank of America. And this issue cannot be avoided by simply redefining the classes: To pursue their claims, these plaintiffs would have to explain the relationship between Wilshire and Bank of America, and show why Bank of America should be liable for the alleged breach of Wilshire's TPPs. That showing may be simple, but it may not—especially where the alleged breach was committed by Wilshire (which failed to send a permanent modification or a written denial before the Modification Effective Date) well before Bank of America began servicing the loan. These individual issues frustrate any confidence in the ability of these named plaintiffs to represent the proposed classes. *See Swanson v. Lord & Taylor LLC,* 278 F.R.D. 36, 41 (D.Mass.2011) ("[T]ypicality and adequacy may be defeated where the class representatives are subject to unique defenses which threaten to become the focus of the litigation." (quoting *In re Credit Suisse–AOL Sec. Litig.,* 253 F.R.D. 17, 23 (D.Mass.2008)). I therefore find the Alvarengas, the Halls, Freeman, and Volpe do not meet Rule 23(a)(3)'s typicality requirement.

Finally, Bank of America argues that most of the remaining named plaintiffs are unique in various ways. For instance, Bank of America asserts that many named plaintiffs themselves failed to perform as required by their TPPs: some because they made untrue representations in their TPPs, others because they failed to provide documents as required by their TPPs, and still others because they failed to complete credit counseling as required by their TPPs. Likewise, Bank of America asserts that some named plaintiffs have no damages or have failed to mitigate their damages. It also argues that some named plaintiffs have other unique circumstances: for instance, one named plaintiff filed for bankruptcy during her trial period, and another named plaintiff claims he had an oral agreement with Bank of America in addition to his TPP. Because of these individual issues, Bank of America argues, most of the named plaintiffs are not typical of the proposed classes.

***8** Bank of America's arguments do cast substantial doubt on whether class action treatment is appropriate here. Nevertheless, I conclude that the remaining named

plaintiffs have adequately shown typicality. No two individual class members in any class are exactly identical; the typicality requirement may be satisfied despite some variation in the individual situations of the named plaintiffs and the class members. Wright et al., *supra,* § 1764. At bottom, the typicality requirement seeks to illuminate "whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff[s'] claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Wal–Mart,* 131 S.Ct. at 2551 n. 5 (quoting *Falcon,* 457 U.S. at 158 n. 13). Here, the claim that the named plaintiffs seek to advance on behalf of their respective classes is that the TPPs required Bank of America to provide a permanent modification or a written denial by the Modification Effective Date, and that Bank of America is liable for damages if and when it failed to do so. As regards that claim, the remaining named plaintiffs are typical of their classes; they each received a TPP from Bank of America with terms like those of the other class members, and Bank of America failed to send them either a permanent modification or a written denial by their respective Modification Effective Dates. Beyond that, any individual differences between the remaining named plaintiffs and the class members are primarily relevant to the predominance requirement of Rule 23(b)(3) rather than the typicality requirement of Rule 23(a)(3). *See Gaudin,* 2013 WL 4029043 at *5–6 (finding typicality satisfied in a similar case).

I therefore find that the named plaintiffs other than the Alvarengas, the Halls, Freeman, and Volpe raise claims that are typical of the proposed classes.[8]

4. Adequacy

Adequacy of representation requires that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). This prerequisite has two parts: "(1) the attorneys representing the class must be qualified and competent; and (2) the class representatives must not have interests antagonistic to or in conflict with the unnamed members of the class." *Connor B.,* 272 F.R.D. at 297 (citing *Andrews v. Bechtel Power Corp.,* 780 F.2d 124, 130 (1st Cir.1985)). Plaintiffs' counsel here are experienced litigators with years of experience in class action work; I have no difficulty concluding that they can adequately represent the proposed classes. I also see no conflict of interest, and Bank of America has identified none, between the remaining named plaintiffs and the other members of the proposed classes. The adequacy requirement is thus satisfied.

C. Rule 23(b)(3)

Plaintiffs seek to certify their proposed classes under Rule 23(b)(3), which authorizes a class action where "the questions of law or fact common to class members predominate over any questions affecting only individual members, and ... a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3).[9] Certifying a class under Rule 23(b)(3) requires "a close look at the case before it is accepted as a class action." *In re New Motor Vehicles Canadian Export Antitrust Litig.,* 522 F.3d 6, 18 (1st Cir.2008) (quoting *Amchem Prods. v. Windsor,* 521 U.S. 591, 615, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997)).

1. Predominance

***9** The predominance requirement determines "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem,* 521 U.S. at 623. Common questions may predominate despite the existence of individual differences, as long as "a sufficient constellation of common issues binds class members together." *Waste Mgmt. Holdings v. Mowbray,* 208 F.3d 288, 296 (1st Cir.2000). However, the predominance standard is "far more demanding" than the commonality requirement of Rule 23(a)(2). *In re New Motor Vehicles,* 522 F.3d at 20 (quoting *Amchem,* 521 U.S. at 624). Deciding what questions predominate requires the court to "formulate some prediction as to how specific issues will play out." *Waste Mgmt.,* 208 F.3d at 298.

The predominance analysis is somewhat nuanced in this case because plaintiffs seek to certify their proposed classes only for adjudication of liability. *See* Fed.R.Civ.P. 23(c)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues."). The Second and Ninth Circuits have held that when plaintiffs seek to certify a class on a particular issue, they need only show that common questions predominate as to that issue. *See In re Nassau Cnty. Strip Search Cases,* 461 F.3d 219, 226–27 (2d Cir.2006); *Valentino v. Carter–Wallace, Inc.,* 97 F.3d 1227, 1234 (9th Cir.1996). The Fifth Circuit, on the other hand, has held that "a cause of action, as a whole, must satisfy the

predominance requirement" in order for plaintiffs to certify a class on any issue. *Castano v. Am. Tobacco Co.,* 84 F.3d 734, 745 n. 21 (5th Cir.1996). I need not decide which position is correct. Even assuming plaintiffs need only show common questions predominate on the specific issue of liability, not the entire cause of action, they have failed to make that showing.

a. Breach of Contract

Plaintiffs' primary theory of liability is that each TPP represented an enforceable contract between the individual borrower and Bank of America, and Bank of America breached those contracts by failing to send either a permanent modification or a written denial by the modification effective date. I have previously determined that plaintiffs' TPPs were enforceable contracts supported by consideration. *See* Docket # 66 (Mem. of Decision) at 8–11. That decision is supported by a number of recent circuit court cases. *See Corvello v. Wells Fargo Bank,* Nos. 11–16234 & 11–16242, 2013 WL 4017279, at *4–6 (9th Cir. Aug.8, 2013); *Young v. Wells Fargo Bank,* 717 F.3d 224, 233–36 (1st Cir.2013); *Wigod v. Wells Fargo Bank,* 673 F.3d 547, 560–66 (7th Cir.2012).

The TPPs do not explicitly state that Bank of America is required to send either a permanent modification agreement or a written denial by the Modification Effective Date. Nevertheless, plaintiffs argue that the contracts implicitly impose that obligation on Bank of America. The First Circuit recently accepted a similar argument; in *Young v. Wells Fargo Bank,* it held that another TPP could plausibly be read to require the servicer to offer a permanent modification by the Modification Effective Date if the borrower met her obligations under the agreement. *Young,* 717 F.3d at 233–36. That TPP used somewhat different language from the TPPs at issue here, *see id.* at 234–35, so *Young'* s holding is not directly applicable. Still, *Young* indicates that plaintiffs have raised a plausible common question about Bank of America's duties under the TPPs.

***10** But that common question is outweighed by the numerous individual questions affecting liability. In order to show that Bank of America is liable for a breach of contract, each plaintiff must show that a contract existed, that he performed as required by that contract, and that Bank of America breached the contract.[10] *See, e.g., Amicas, Inc. v. GMG Health Sys.,* 676 F.3d 227, 231 (1st Cir.2012).[11] The second element—plaintiffs' own performance—poses the difficulty here. The TPPs placed numerous obligations on borrowers who sought a modification. Each borrower had to "provid[e] confirmation of the reasons I cannot afford my mortgage payment and documents to permit verification of all of my income." Docket # 240, Ex. 20 ("TPP") at 1. Each borrower had to "certify, represent ... and agree" that he was "unable to afford his mortgage payments," *id.* § 1.A; that he "live[d] in the Property" and it was his "principal residence," *id.* § 1.B; that there had been no change in the ownership of the property, *id.* § 1.C; that he would "provide [ ] documentation for all income," *id.* § 1.D; that all the documents and information he had provided were true and correct, *id.* § 1.E; and that he would obtain credit counseling if required to do so, *id.* § 1.F. In addition, each borrower had to make the required trial payments on a timely basis. *Id.* § 2. The new obligations imposed on plaintiffs by their TPPs are the consideration that they provided to Bank of America. *See* Mem. of Decision at 9–10; Third Am. Compl., ¶ 520; *see also Bosque v. Wells Fargo Bank,* 762 F.Supp.2d 342, 351–52 (D.Mass.2011); *Durmic v. J.P. Morgan Chase Bank,* Civil Action No. 10–10380–RGS, 2010 WL 4825632, at *3 (D.Mass. Nov.24, 2010) (noting that similar TPPs required plaintiffs to "provide documentation of their current income, make legal representations about their personal circumstances, and agree to undergo credit counseling if requested to do so").[12]

Deciding whether each plaintiff fulfilled his obligations under his TPP depends on a nearly endless series of individual questions: "Did Plaintiff A provide accurate documents permitting verification of all his income? Did Plaintiff A live in the property as his principal residence? Did Plaintiff A obtain credit counseling if required to do so? Did Plaintiff A make his trial payments on a timely basis? Did Plaintiff B provide accurate documents permitting verification of all his income? Did Plaintiff B live in the property as his principal residence? ..." And so on, and so on, and so on, for each obligation of each member of each of the twenty-six classes.

Of course, the mere existence of these individual questions is not enough to show that they predominate. Predominance is not "determined simply by counting noses: that is, by determining whether there are more common issues or more individual issues." *Butler v. Sears, Roebuck & Co.,* Nos. 11–8029 & 12–8030, 2013 WL 4478200, at *4 (7th Cir. Aug.22, 2013). Common questions may still predominate over numerous individual questions where "individual factual determinations can be accomplished using computer records, clerical assistance, and objective criteria—thus rendering unnecessary an evidentiary hearing on each claim." *Smilow,* 323 F.3d at 40. But the present record shows that the individual questions presented in this case are not susceptible to

simple, routine resolution. They will instead require separate factual inquiries that will overwhelm any common questions.

***11** A brief survey of the named plaintiffs' claims shows how individual questions will predominate. Borrowers entering a TPP were required to make their trial payments in a timely fashion; the class definition purportedly eliminates any individual questions here, since the proposed classes include only borrowers who met that requirement. But we have already seen an individual factual question arise over whether two named plaintiffs, the Nelsons, actually met that obligation. *See supra* Part III.B.3. *Compare* Schoolitz Decl., ¶ 31 & Exs. 127–128, *with* Docket # 248, Ex. 65 (Ayres Decl.), ¶ 12 & n. 16. Borrowers were also required to certify that they were unable to afford their mortgage payments; the record shows an individual factual question over whether named plaintiff Heather Galasso could in fact afford her mortgage payments before beginning her TPP. *Compare* Docket # 224, Ex. 4 at 71–72, 76–77, 135 (indicating Galasso had the financial ability to make her full mortgage payments), *with* Docket # 248, Ex. 79 (indicating Galasso's credit card debt was excessive). Borrowers were required to certify that they lived in the mortgaged property as their principal residence. Bank of America's records indicate that named plaintiff Darren Kunsky did not live in the mortgaged property as his principal residence, *see* Docket # 223, Ex. 92; but Kunsky himself has testified that he did live in the property at the relevant time, *see* Docket # 248, Ex. 84. Borrowers were required to obtain credit counseling if Bank of America asked them to do so; named plaintiff Aissatou Balde was asked to obtain credit counseling, but never did, because (she testified) the phone number that Bank of America gave her did not work. *See* Docket # 224, Ex. 15. Finally, borrowers were required to provide documents permitting verification of all of their income. This is the individual question that arises most frequently, given the Kafkaesque bureaucracy that decided which documents were required of which borrowers. Bank of America asserts that more than a quarter of the proposed class representatives failed to return the necessary documents, and has produced some evidence in each case to back its assertions. Plaintiffs dispute Bank of America's assertions with respect to each borrower. But those disputes, like all the others discussed above, can only be decided by individual inquiries into each plaintiff's performance. Factual questions like these cannot be resolved by just "computer records, clerical assistance, and objective criteria." *Smilow,* 323 F.3d at 40. Instead, they will require separate evidentiary hearings for many if not all of the proposed class members. These individual factual disputes will predominate in determining Bank of America's liability as to each plaintiff.

Plaintiffs raise several arguments that seek to avoid these individual questions. First, they argue that Bank of America would only issue a TPP when it was satisfied that the borrower receiving the TPP already met the criteria set out in Section 1 of the agreement (financial hardship, residence in the mortgaged property, documentation of income, etc.). According to plaintiffs, the fact that each class member received a TPP is itself enough to show they had each satisfied all obligations under Section 1; the only remaining obligation was to make the trial payments. But that argument plainly fails. The TPPs explicitly contemplate that borrowers may be required to provide documentation or meet other obligations after they enter into their TPPs. *See, e.g.,* TPP, pmbl. ("If I have not already done so, I am providing confirmation of the reasons I cannot afford my mortgage payment and documents to permit verification of all my income ...."); *id.* § 1.D ("I am providing or already have provided documentation for all income that I receive ...."); *id.* § 1.F ("If Servicer requires me to obtain credit counseling, I will do so."). Moreover, the first sentence of each TPP indicates that Bank of America is only required to provide a permanent modification if the borrower's "representations in Section 1 continue to be true in all material respects." *Id.* pmbl. In other words, each borrower had ongoing obligations that continued after she entered into her TPP.[13] The mere fact that each class member received a TPP is not enough to show that they each complied with all obligations under the TPPs—especially since Bank of America has adduced some evidence indicating that many class members did not in fact comply with their obligations.

***12** Next, plaintiffs claim Bank of America has waived any objection to individual borrowers' nonperformance, thereby obviating any relevant individual questions. Plaintiffs rest largely on Section 2 .F of the TPPs, which states (as relevant): "If prior to the Modification Effective Date ... the Servicer [Bank of America] determines that [the borrower's] representations in Section 1 are no longer true and correct, the Loan Documents will not be modified and this Plan will terminate." TPP, § 2.F. Plaintiffs characterize this provision as placing a duty on Bank of America to verify the borrower's representations, and to raise any objections to those representations, before the Modification Effective Date. Another federal district court recently accepted a similar argument regarding a similar TPP, holding that under this provision the court was not required to consider whether the individual borrowers actually performed but only whether the defendant mortgage servicer determined that they performed. *See Gaudin,* 2013 WL 4029043 at *7–8.

I do not find that argument persuasive. Plaintiffs' individual performance is a necessary part of their breach of contract claim; unless plaintiffs actually performed, Bank of America is not liable under the contract. *See* TPP, pmbl. (stating Bank of America will provide a permanent modification only if the borrower is "in compliance with this [TPP]"). Section 2.F does nothing to change that. It says that if Bank of America *does* determine the borrower's representations are false before the Modification Effective Date, the borrower *will not* receive a permanent modification. But it nowhere explicitly requires Bank of America to object to a borrower's nonperformance before the Modification Effective Date or else waive that objection forever.[14]

Moreover, plaintiffs' interpretation would "render large swaths of the TPP nugatory," *Young,* 717 F.3d at 235. It would mean plaintiffs were not actually required to perform *any* of their obligations under Section 1, as long as Bank of America failed to discover the nonperformance before the Modification Effective Date. While I need not conclusively interpret this provision of the contract now, I consider plaintiffs' interpretation of Section 2.F so unlikely to succeed that it does not cause common questions to predominate. *See Waste Mgmt.,* 208 F.3d at 298 (deciding predominance requires "some prediction as to how specific issues will play out"). I reach the same conclusion with respect to plaintiffs' alternative argument that Bank of America waived plaintiffs' nonperformance by simply accepting plaintiffs' trial payments. *Cf. Bosque,* 762 F.Supp.2d at 351–52 (noting borrowers' trial payments were already required by "their undisputed pre-existing mortgage loan obligations").

In sum, whether Bank of America is liable for breach of contract depends on numerous individual questions about each class member's performance. Those individual questions predominate over the questions common to the proposed classes. Plaintiffs' breach of contract claim therefore cannot be certified under Rule 23(b) (3).[15]

b. Breach of the Implied Covenant

***13** Individual questions will likewise predominate in the adjudication of plaintiffs' claim for breach of the implied covenant of good faith and fair dealing. That implied covenant "may not ... be invoked to create rights and duties not otherwise provided for in the existing contractual relationship, as the purpose of the covenant is to guarantee that the parties remain faithful to the intended and agreed expectations of the parties in their performance." *Latson,* 708 F.3d at 326 (omission in original) (quoting *Uno Rests.,* 805 N.E.2d at 964). As discussed above, each TPP makes clear that Bank of America's duties are predicated on plaintiffs' performance of their own obligations. *See, e.g.,* TPP, pmbl. ("If I am in compliance with this [TPP] and my representations in Section 1 continue to be true in all material respects, then [Bank of America] will provide me with a [permanent modification]."). If plaintiffs did not perform, then Bank of America did not violate the intended and agreed expectations of the parties by failing to perform in turn. Moreover, insofar as plaintiffs base their implied covenant claim on other misdeeds beyond the failure to provide a permanent modification or a written denial by the Modification Effective Date, they raise further individual questions as to which of these alleged misdeeds affected which individual class members. *See supra* note 5; *cf.* Third Am. Compl., ¶ 530.

c. Promissory Estoppel

For their promissory estoppel claim (pled in the alternative), plaintiffs allege that Bank of America "by way of its TPP Agreements, made representations to Plaintiffs that if they returned the TPP Agreements executed and with supporting documentation, and made their TPP payments, they would receive permanent HAMP modifications." Third Am. Compl., ¶ 543. In other words, the alleged promise was a conditional one—that if plaintiffs complied with their obligations under their TPPs, Bank of America would provide them permanent loan modifications. Like the breach of contract claim and the implied covenant claim, then, this promissory estoppel claim raises the same individual questions as to whether each plaintiff performed under her TPP. Once again, these individual performance questions predominate over the relevant common questions.

d. Unfair and Deceptive Acts and Practices

Finally, individual questions also predominate on plaintiffs' claims regarding Bank of America's allegedly unfair and deceptive acts and practices. To the extent these claims are based on Bank of America's alleged breach of the TPPs, they raise the same individual questions of plaintiffs' performance discussed above. *See Campusano,* 2013 WL 2302676, at *7 ("Whether [Bank of America's] conduct was unfair depends on whether the

conduct breached the loan modification agreements. Because plaintiffs have not shown that there are questions capable of classwide resolution relating to the breach of the modification agreements, neither is the alleged fairness of those supposed breaches.") To the extent these claims are based on other unfair practices, there are individual factual issues as to whether each plaintiff was actually affected by the same alleged practices. *See supra* notes 5 & 6; *cf. Wal–Mart,* 131 S.Ct. at 2551 (no commonality where plaintiffs did not suffer the same injury from the same practice).

2. Superiority

***14** As well as failing the predominance requirement, plaintiffs' proposed classes also fail the superiority requirement. Superiority looks to whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3). Plaintiffs argue that liability can be more efficiently determined on a classwide basis rather than on an individual basis. *See Swack v. Credit Suisse First Boston,* 230 F.R.D. 250, 273 (D.Mass.2005) (superiority is met where "the piecemeal adjudication of numerous separate lawsuits covering the same or substantially similar issues ... would be an inefficient allocation of limited court resources"). Likewise, plaintiffs argue that many class members would lack "the financial incentives or wherewithal to seek legal redress for their injuries." *Id.; cf. Gintis v. Bouchard Transp. Co.,* 596 F.3d 64, 67–68 (noting "the very reason for Rule 23(b)(3)" is "to make room for claims that plaintiffs could never afford to press one by one"). These arguments are certainly forceful; but they are outweighed by the unmanageable difficulty that would attend plaintiffs' twenty-six proposed class actions. As described above, plaintiffs' claims depend predominantly on individual factual questions. A class action cannot sensibly adjudicate those individual questions. It would either ignore them, denying the parties a fair trial on the merits of each plaintiff's claim; or it would attempt to resolve them all, and wind up hopelessly entangled in each plaintiff's idiosyncratic facts. Neither option is acceptable. *See Wal–Mart,* 131 S.Ct. at 2560–61 (defendant is entitled to litigate its defenses to individual claims); Fed.R.Civ.P. 23(b)(3)(D) (superiority depends in part on "the likely difficulties in managing a class action"). Moreover, as the many mortgage-related cases in the federal courts attest, individual plaintiffs are normally well-motivated to bring any claims they might have in order to save their homes. This is not a case where class action treatment is required "to vindicate the claims of consumers and other groups of people whose individual claims would be too small to warrant litigation." *Smilow,* 323 F.3d at 41; *see* Fed.R.Civ.P. 23(b)(3)(B) (superiority depends in part on "the extent and nature of any litigation concerning the controversy already begun by or against class members"). Under these circumstances, separate individual actions would more fairly and efficiently resolve the liability issues that plaintiffs seek to certify for classwide adjudication.

IV. Conclusion

This case demonstrates the vast frustration that many Americans have felt over the mismanagement of the HAMP modification process. Plaintiffs have plausibly alleged that Bank of America utterly failed to administer its HAMP modifications in a timely and efficient way; that in many cases it lost documents, or pretended it had not received them, or arbitrarily denied permanent modifications. *See* Third Am. Compl., ¶¶ 135–473 (describing the different experiences of each named plaintiff). Plaintiffs' claims may well be meritorious; but they rest on so many individual factual questions that they cannot sensibly be adjudicated on a classwide basis. Because plaintiffs have failed to meet the predominance and superiority requirements of Rule 23(b)(3), their motion for class certification (Docket # 208) is DENIED.

***15** Plaintiffs' motions to compel discovery (Docket91 & 126) and their motions to strike (Docket242 & 263) are also DENIED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 4759649

Footnotes

1 I use "Bank of America" to refer collectively to defendant Bank of America, N.A. and its subsidiary, defendant BAC Home Loans Servicing, LP.

2 The states involved are Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Kentucky,

Maryland, Massachusetts, Michigan, Missouri, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Virginia, Washington, and Wisconsin. Plaintiffs seek to certify their breach of contract claim and their implied covenant claim in every state listed, either separately or as a single claim. They seek to certify their promissory estoppel claim in every state listed except for North Carolina and Virginia, and their unfair and deceptive acts and practices claim in every state listed except for Alabama, Georgia, Ohio, Texas, and Virginia. *See* Docket # 210, Ex. 10.

3 Supplemental Directive 09–01 was superseded by Supplemental Directive 10–01, which required servicers to obtain fully verified financial information to determine eligibility before issuing any TPP with an effective date after June 1, 2010. *See* U.S. Dep't of the Treasury, Supplemental Directive 10–01 (Jan. 28, 2010), *available at* https://www . hmpadmin.com/portal/programs/docs/hamp_servicer/sd1001.pdf.

4 Expanding the mathematics somewhat: Plaintiffs' expert reports that there are 241 mortgage loans in Alaska to which Bank of America provided trial modifications. The random sample produced a total of 51 such loans from Alaska, of which 35 (about 69%) received TPPs under Supplemental Directive 09–01. Out of those 35 loans, according to plaintiffs' expert, 26 (about 74%) were class loans (i.e., their borrowers did not receive either a permanent modification or a written denial before the Modification Effective Date). The best available inference, then, is that about 241 x 69% x 74% 123 Alaska loans belong to borrowers meeting the class definition.

Of course, these statistics rest on a number of questionable assumptions. For example, the sample of 3,000 loans, which the parties describe as "random," included 51 loans from Alaska (about 21% of the asserted total of 241 such loans) but only 516 loans from California (about 0.5% of the asserted total of 99,654 such loans). That distribution would be highly unlikely in a truly random sample. I nevertheless conclude plaintiffs have produced sufficient evidence to meet their burden.

5 Plaintiffs allege a number of unscrupulous practices by Bank of America that they claim are evidence of bad faith. For instance, they describe deliberate delays in reviewing borrowers' documents, lies about whether required documents had been received, lies about whether borrowers' modifications were actually under review, baseless denials intended only to reduce the TPP backlog, etc. Plaintiffs' claim for breach of the implied covenant, however, only allows them to recover insofar as they were denied their intended and expected benefits from the contract. The only such benefit that plaintiffs claim all class members were denied is the right to either a permanent modification or a written denial by the Modification Effective Date. To the extent plaintiffs claim some class members were harmed in other ways by Bank of America's unscrupulous practices, they have failed to show—indeed, they do not even attempt to show—that any one of those unscrupulous practices affected each class member individually and so raises an issue common to each proposed class. *See Wal–Mart,* 131 S.Ct. at 2551 ("Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.' This does not mean merely that they have all suffered a violation of the same provision of law." (citation omitted) (quoting *Gen. Tel. Co. of the Sw. v. Falcon,* 457 U.S. 147, 157, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)).

6 Plaintiffs' currently active complaint, the third amended complaint, refers only to Bank of America's "conduct as set forth herein and as alleged in the underlying complaints" and its "false, deceptive and misleading statements and omissions" in describing the grounds for the claim of unfair and deceptive acts and practices. Docket # 84 (Third Am. Compl.), ¶¶ 555–95. Of course, the third amended complaint describes a wide array of allegedly unfair conduct, much of which was only experienced by some plaintiffs and not by others. *See id.* at ¶¶ 135–473 (describing the different experiences of each named plaintiff). As with plaintiffs' implied covenant claim, to the extent plaintiffs' unfair and deceptive acts and practices claim rests on the different individual experiences of the named plaintiffs, it does not raise a common issue appropriate for class treatment. *See Wal–Mart,* 131 S.Ct. at 2551; *cf. Smilow,* 323 F.3d at 42 (plaintiffs relying on individual oral misrepresentations "risk losing class status").

7 The Nelsons currently represent the proposed California class, which is also represented by Magali and Manuel Alvarenga and by Jesus Carillo. Because Carillo appears to meet the typicality requirement, the proposed California class could be certified even without the Nelsons.

8 The Alvarengas intended to represent the proposed California class; Freeman intended to represent the proposed New York class; and the Halls and Volpe intended to represent the proposed Pennsylvania class. Each of these proposed state classes is represented by other named plaintiffs who meet the typicality requirement, so the disqualification of these named plaintiffs does not bar certification of any of these classes.

9 In a single footnote, plaintiffs also mention Rule 23(b)(2), which allows certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed.R.Civ.P. 23(b)(2). But plaintiffs' motion explicitly seeks to certify twenty-six classes only on the issue of liability; it does not describe any proposed injunctive relief or corresponding declaratory relief. *See* 7AA Wright et al., *supra,* § 1775 ("[A]n action seeking a declaration concerning defendant's conduct that appears designed simply to lay the basis for a damage award rather than injunctive relief would not qualify under Rule 23(b)(2) ."). In any case, classwide declaratory relief would be inappropriate here; given the individualized issues described below, plaintiffs have failed to make the required preliminary showing that Bank of America has acted or refused to act on grounds that apply generally to the proposed

classes. *See Wal–Mart,* 131 S.Ct. at 2557–61 (holding that Rule 23(b)(2) cannot be used to deprive a defendant of individualized defenses).

10 Although plaintiffs bring their contract claims under the laws of several different states, the contract principles at issue here do not vary materially.

11 If a plaintiff seeks damages, he must also show causation and the amount of damages. *See Amicas,* 676 F.3d at 231. But those elements are distinct from the issue of liability, and plaintiffs seek certification only on liability. *Cf. In re Nassau Cnty.,* 461 F.3d at 226–27; *Valentino,* 97 F.3d at 1234.

12 The parties do not discuss whether the representations in Section 1 constitute duties imposed on the borrower, conditions precedent to Bank of America's duties, or both. *See Restatement (Second) of Contracts* § 227 (West 2013); 13 *Williston on Contracts* § 38:7 (West 2013); *cf.* Mem. of Decision at 9–10 (considering both obligations and conditions precedent in the TPPs). The difference is not material here—in either case, these provisions raise factual questions that must be answered on an individual basis before plaintiffs can recover. Likewise, it does not matter whether these individual questions are parts of plaintiffs' breach of contract claim or affirmative defenses, since "affirmative defenses should be considered in making class certification decisions." *Waste Mgmt.,* 208 F.3d at 295.

13 Indeed, those ongoing obligations constitute the consideration that each borrower provided to support the contract. Obligations that have already been performed generally cannot stand as consideration. *See, e.g., Hodgkins v. New Eng. Tel. Co.,* 82 F.3d 1226, 1231–32 (1st Cir.1996).

14 As Bank of America points out, such a provision in the TPPs would raise serious practical problems. A borrower might not comply with his obligations—for example, sending a required document or obtaining required credit counseling—until the day before the Modification Effective Date. That would give Bank of America no time to determine if the borrower's obligations had been met.

15 Bank of America also argues that individual questions predominate because of the numerous individual questions involved in determining whether each plaintiff suffered actual damages. It recognizes that plaintiffs seek only to certify their classes on the issue of liability, and that the amount of damages is not relevant to that issue; but it argues that plaintiffs cannot establish liability without showing *some* actual damages. *See In re New Motor Vehicles,* 522 F.3d at 28 ("Establishing liability, however, still requires showing that class members were injured ...."). Plaintiffs disagree, claiming actual damages are not an element of liability in a breach of contract action because a defendant may be liable solely for nominal damages. *See, e.g., Flynn v. AK Peters, Ltd.,* 377 F.3d 13, 23 (1st Cir.2004); *cf. In re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig.,* 286 F.R.D. 155, 159 n. 4 (D.Mass.2012). I need not resolve this issue, because individual questions already predominate on liability even without considering the additional individual questions that would arise if each plaintiff was required to show actual damages.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CARMEN BREXENDORF,

Plaintiff,

v. Case No. 6:17-cv-2065-Orl-37GJK

BANK OF AMERICA, N.A.,

Defendant.

ORDER

On January 9, 2019, the Court held a hearing on Defendant's motion to dismiss Plaintiff's fourth amended complaint (Doc. 75). (Doc. 87 ("**Hearing**").) Having considered the parties' filings and oral arguments, the Court pronounced its ruling at the Hearing, finding that the *Rooker-Feldman* doctrine bars Plaintiff's claims for damages arising from the loss of her home and equity in her home. This Order memorializes the Court's oral pronouncement.

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant Bank of America, N.A.'s Motion to Dismiss Fourth Amended Complaint and Incorporated Memorandum of Law (Doc. 75) is **GRANTED IN PART AND DENIED IN PART:**

    a. Defendant's Motion is **GRANTED** to the extent Plaintiff's claims for damages arising from the loss of her home and equity in her home are barred by the *Rooker-Feldman* doctrine.

b. In all other respects, the Motion is **DENIED WITHOUT PREJUDICE.**

2. Plaintiff's Fourth Amended Complaint (Doc. 75) is **DISMISSED** for lack of subject matter jurisdiction.

3. On or before Wednesday, **January 23, 2019**, Plaintiff may file an amended complaint consistent with the Court's directives at the Hearing. Absent a timely amended complaint the Clerk will be directed to close the file.

DONE AND ORDERED in Chambers in Orlando, Florida, on January 9, 2019.

ROY B. DALTON JR.
United States District Judge

Copies to:
Counsel of Record

Bryson v. Cooper

Court of Appeals of North Carolina

August 31, 2004, Heard in the Court of Appeals ; October 19, 2004, Filed

NO. COA03-1484

Reporter
2004 N.C. App. LEXIS 1930 *

LESTER DANIEL BRYSON and JOHN FRANK BOWEN, Plaintiffs v. STATE ATTORNEY GENERAL ROY COOPER and STATE SUPERIOR COURT JUDGES ROBERT P. JOHNSTON and FORREST D. BRIDGES, Defendants

Subsequent History: Reported at *Bryson v. Cooper, 166 N.C. App. 759, 604 S.E.2d 367, 2004 N.C. App. LEXIS 2013 (2004)*

Motion dismissed by *Bryson v. AG, 2005 N.C. LEXIS 1068 (N.C., Oct. 6, 2005)*

Prior History: Haywood County. No. 03 CVS 552.

Bryson v. Johnston, 574 S.E.2d 676, 2002 N.C. LEXIS 1416 (N.C., 2002)

Disposition: Affirmed.

Core Terms

judicata, sentenced, lawsuit

Counsel: Lester Daniel Bryson and John Frank Bowen, plaintiff-appellants, pro se.

Attorney General Roy A. Cooper, III, by Assistant Attorney General David J. Adinolfi II, for defendant-appellees.

Judges: HUNTER, Judge. Judges TIMMONS-GOODSON and McCULLOUGH concur.

Opinion by: HUNTER

Opinion

Appeal by plaintiffs from orders entered 13 October 2003 by Judge James U. Downs in Haywood County Superior Court. Heard in the Court of Appeals 31 August 2004.

HUNTER, Judge.

Lester Daniel Bryson and John Frank Bowen ("plaintiffs") appeal from orders granting a motion to dismiss and sanctions entered on 13 October 2003 in a civil action for declaratory judgment and injunctive relief. On appeal, plaintiffs contend the trial court erred in allowing the motion to dismiss and in issuing sanctions against plaintiffs, and that plaintiffs were deprived of constitutional rights **[*2]** by application of *N.C.*

Gen. Stat. § 15A-1354. We disagree. Accordingly, we affirm the judgment of the trial court.

Plaintiffs filed a civil action for declaratory judgment and injunctive relief from sentences imposed after conviction of various crimes following jury trials. Plaintiff Bryson was convicted of two counts of indecent liberties with a child and sentenced to consecutive sentences. Plaintiff Bowen was convicted of conspiracy to commit forgery of a codicil, forgery of a codicil, conspiracy to obtain property by false pretense, ten counts of embezzlement, and three counts of obtaining property by false pretense and sentenced to consecutive sentences.

The trial court dismissed plaintiffs' suit on 13 October 2003 on the grounds of: (1) lack of subject matter jurisdiction, (2) failure to state a claim upon which relief could be granted, (3) absolute immunity of defendant, and (4) *res judicata* from a prior identical lawsuit which was dismissed on 15 March 2002. Additionally, the trial court granted sanctions which prevent plaintiffs from refiling the lawsuit or other frivolous lawsuits in North Carolina courts. Plaintiffs appeal from these rulings.

[*3] Plaintiffs first contend the trial court erred in granting the motion to dismiss, arguing that both the order in this case, and in the prior case which barred the complaint on the grounds of *res judicata*, were entered out of session and were therefore null and void. We disagree.

Written orders may be entered out of session when a trial court has made an oral ruling in open court and in session. *See* State v. Smith, 320 N.C. 404, 415-16, 358 S.E.2d 329, 335 (1987). Here, the record shows that the trial court orally entered the ruling in open court in the presence of plaintiffs on 15 September 2003, and that the ruling was later reduced to writing on 13 October 2003. The written order specifically noted that the order had been made in open court during the term and session. Therefore the trial court's grant of the motion to dismiss was validly entered and not null and void.

Further, the trial court properly dismissed the action on the grounds of *res judicata* as to defendants Johnston and Bridges. "'A final judgment, rendered on the merits by a court of competent jurisdiction, is conclusive as to the issues raised therein with respect to the parties and those **[*4]** in privity with them and constitutes a bar to all subsequent actions involving the same issues and parties.'" Stafford v. County of Bladen, 163 N.C. App. 149, 592 S.E.2d 711, ___, 163 N.C. App. 149, 592 S.E.2d 711, 713 (2004) (quoting Kabatnik v. Westminster Co., 63 N.C. App. 708, 711-12, 306 S.E.2d 513, 515 (1983)). "'A dismissal with prejudice is an adjudication on the merits and has res judicata implications[.] . . . Strict identity of issues . . . is not absolutely required and the doctrine of res judicata has been accordingly expanded to apply to those issues which could have been raised in the prior action.'" *Id.* (quoting Caswell Realty Assoc. v. Andrews Co., 128 N.C. App. 716, 720, 496 S.E.2d 607, 610 (1998)).

In the case sub judice, the trial court found plaintiffs' suit was virtually identical to a lawsuit dismissed with prejudice on 15 March 2002. *See Bryson v. Johnston*, No. COA02-1149 (N.C. App. 2002) (order entered by Judge Dennis Winner on 15 March 2002 in District Court, Haywood County, No. 01CVS1270), *appeal dismissed*, 1 October 2002 (by order of the Clerk of Court for failure to pay fees). Plaintiffs' petition for review of **[*5]** the suit dismissed on 15 March 2002 was denied by the North Carolina Supreme Court. *See Bryson v. Johnston*, ___ N.C. ___, 574 S.E.2d 676 (2002). This Court takes judicial notice of the complaint alleged in the prior dismissed suit and affirms the trial court's finding that the present action was "virtually identical" and therefore barred by the principles of *res judicata*.

Further, the trial court properly dismissed plaintiffs' declaratory judgment action as to Attorney General Roy Cooper for lack of subject matter jurisdiction. Plaintiffs requested relief in the form of reversal of their convictions. As the trial court noted, such relief, if appropriate at all, would be available under the criminal statutes in a motion for appropriate relief, rather than a civil action for declaratory judgment. *See* N.C. Gen. Stat. § 15A-1415(b)(4) (2003) (providing relief in noncapital cases on the grounds that defendant was sentenced under a statute in violation of the United States or North Carolina Constitutions). Therefore the trial court did not err in granting defendant's motion to dismiss plaintiffs' action as to all parties.

Plaintiffs **[*6]** next contend error in the imposition of sanctions by the trial court. We disagree.

Sanctions may be imposed under Rule 11 for a violation of any one of three separate and distinct issues: (1) legal sufficiency, (2) factual sufficiency, or (3) improper purpose. *See* Bryson v. Sullivan, 330 N.C. 644, 655, 412 S.E.2d 327, 332 (1992). The decision by the trial court to impose mandatory sanctions under N.C. Gen. Stat. § 1A-1, Rule 11(a) (2003) is reviewed *de novo* as a legal issue. *See* Turner v. Duke University, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989). "The appellate court [must] determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence." *Id.* A finding in the affirmative of all three factors requires the appellate court to uphold the trial court's decision

to impose sanctions under *N.C. Gen. Stat. § 1A-1, Rule 11(a)*. *Id.*

Here, the trial court found plaintiffs' **[*7]** complaint lacked legal sufficiency based on failure to state a claim and lack of jurisdiction, as well as defendants' absolute immunity. Such legal conclusions are supported by the facts of the case and therefore the trial court properly imposed sanctions.

When a sanction is properly imposed, the appropriateness of the particular sanction selected is reviewed by the appellate court under an "'abuse of discretion'" standard. *Turner, 325 N.C. at 165, 381 S.E.2d at 714*. This Court has previously noted that such a "standard is intended to give great leeway to the trial court and a clear abuse of discretion must be shown." *Central Carolina Nissan, Inc. v. Sturgis, 98 N.C. App. 253, 264, 390 S.E.2d 730, 737 (1990)*. The trial court's injunction from refiling a lawsuit on the facts of this case, or some variation thereof, and from filing other frivolous and baseless suits in North Carolina courts does not amount to an abuse of discretion.

As the trial court properly dismissed plaintiffs' action for lack of subject matter jurisdiction and *res judicata*, we do not reach plaintiffs' remaining assignment of error as to the merits of their suit.

Affirmed.

[*8] Judges TIMMONS-GOODSON and McCULLOUGH concur.

Report per Rule 30(e).

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2017 WL 1246356
Only the Westlaw citation is currently available.
United States District Court, W.D. Arkansas,
Harrison Division.

Mitzi Leigh CANTRELL, Plaintiff
v.
BANK OF AMERICA, N.A.; and John Doe Defendants 1-20, Defendants

CASE NO. 3:16-CV-03122
|
Signed 04/03/2017

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

TIMOTHY L. BROOKS, UNITED STATES DISTRICT JUDGE

***1** Now pending before the Court are Defendant Bank of America, N.A.'s ("BOA") Motion to Dismiss (Doc. 15) and Brief in Support (Doc. 16), and Plaintiff Mitzi Leigh Cantrell's Response in Opposition (Doc. 20) and Brief in Support (Doc. 21). On March 2, 2017, the Court held a hearing on the Motion, during which time counsel for both parties presented oral argument. At the conclusion of the hearing, the Court orally granted the Motion from the bench, finding that the case should be dismissed due to the expiration of the statutes of limitation that are applicable to all four causes of action in the Amended Complaint. The following Opinion and Order sets forth in greater detail the reasons for the Court's decision. To the extent anything in this Order conflicts with statements made from the bench, the Order will control.

I. BACKGROUND

Ms. Cantrell filed a lawsuit in Boone County Circuit Court on October 24, 2016, against BOA and John Doe Defendants 1-20. *See* Doc. 2. The case was removed to this Court on December 1, 2016, (Doc. 1), and an Amended Complaint was filed on December 16, 2016, (Doc. 11).

In the Amended Complaint, Ms. Cantrell alleges generally that BOA failed to live up to its end of the agreements it made to the federal government as a participating servicer in the "Home Affordable Modification Program," better known by its acronym, "HAMP." As a participating servicer for HAMP, BOA agreed to gather information on homeowners who were more than 60 days delinquent in paying their loans, and who requested HAMP-based loan modifications. After the initial information-gathering process was complete, BOA would next decide whether to offer the homeowner a Trial Period Plan ("TPP"), which is an agreement that allows the homeowner to make reduced mortgage payments for a three-month period, based on the homeowner's disclosed financial information. Under HAMP guidelines, if the homeowner lived up to his or her end of the bargain during the TPP, then BOA would offer a permanent loan modification. Ms. Cantrell asserts that BOA engaged in a company-wide practice of willfully refusing to screen HAMP applications and failing to offer loan modification agreements to worthy applicants.

In Ms. Cantrell's particular situation, she owned a home that was mortgaged with BOA. After she was divorced, she suffered a loss of income due to the lowering of her ex-husband's child support payments. She attempted to qualify for a loan modification by submitting HAMP paperwork to BOA. She claims she was asked to submit the same paperwork multiple times, and was assured it would be processed. Even after months of waiting, she never heard back from BOA as to whether or not her application would be approved for a TPP. She finally filed for bankruptcy on May 9, 2011. At around the same time she lost her home in the bankruptcy proceedings, she received written notification from BOA that she qualified for a loan modification. *See id.* at 15.

As a result of BOA's handling of her HAMP application,

Ms. Cantrell now asserts state-law causes of action for deceit, negligence, unjust enrichment, and promissory estoppel. She includes factual allegations concerning BOA's alleged "fraudulent scheme" to avoid the requirements of HAMP and increase BOA's profits by dragging their feet on processing loan-modification paperwork, intentionally "losing" such paperwork, and following through on a business strategy to deprive customers of permanent loan modifications under HAMP. The Amended Complaint also states that the Department of Justice brought a case against BOA as a result of a whistleblower report, resulting in an August 2014 settlement that required BOA to "pay $7 billion in relief to struggling homeowners, borrowers and communities affected by the bank's conduct." *Id.* at 12. This alleged conduct also fueled a multidistrict litigation ("MDL") lawsuit, styled *In re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation*, 2013 WL 475649 (D. Mass. Sept. 4, 2013). The MDL, which was opened in 2011, the same year Ms. Cantrell lost her home, asserted claims on behalf of a class of BOA customers who had entered into TPP agreements but had been denied permanent modifications. *Id.* at *2. The purported class in the MDL asserted that BOA had improperly processed their HAMP applications, and in doing so had committed breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair and deceptive acts and practices. *Id.* at *1.[1]

***2** BOA argues that Ms. Cantrell's case should be dismissed, among other reasons, because the statute of limitations on the four state-law causes of action (deceit, negligence, unjust enrichment, and promissory estoppel) is only three years.[2] As her alleged damages accrued as of the date of her bankruptcy, May 9, 2011, the statute of limitations on her claims expired on May 9, 2014; yet her lawsuit was not filed in state court until October 24, 2016. Ms. Cantrell does not dispute that a three-year limitations period applies to all her claims. She argues that the Court should toll the limitations period due to BOA's fraudulent concealment of certain material facts that she claims were necessary for her to know prior to filing suit, and that she did not learn until after she consulted with an attorney in 2016. *See* Doc. 21, p. 4.

The Court initially observes that the Amended Complaint does not clearly identify what material facts were allegedly concealed by BOA from Ms. Cantrell, so as to prevent her from filing suit prior to October of 2016. The Motion hearing was therefore an opportunity for the Court to engage with counsel in an attempt to ferret out the basis for Ms. Cantrell's fraudulent concealment argument. After an extensive period of back-and-forth questioning with counsel during the hearing, the record is clear that Ms. Cantrell's argument is as follows: she had no idea that BOA had processed her HAMP application incorrectly, negligently, or with deceitful motivation, until after her attorney advised her of such in 2016, and she blames the late filing of her lawsuit on BOA's concealment of what was allegedly going on "behind the scenes" at BOA, i.e., BOA's alleged business practice of delaying the processing and approval of its customers' HAMP applications.

II. LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, a complaint must provide "a short and plain statement of the claim that [the plaintiff] is entitled to relief." Fed. R. Civ. P. 8(a)(2). The purpose of this requirement is to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The Court must accept all of a complaint's factual allegations as true, and construe them in the light most favorable to the plaintiff, drawing all reasonable inferences in the plaintiff's favor. *See Ashley Cnty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 665 (8th Cir. 2009). However, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.' " *Id.* In other words, while "the pleading standard that Rule 8 announces does not require 'detailed factual allegations,' ... it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Id.*

III. DISCUSSION

"Under Arkansas law, once it is clear from the face of the complaint that an action is barred by an applicable statute of limitations, the burden shifts to the plaintiff to prove

that the limitation period was in fact tolled." *Summerhill v. Terminix, Inc.*, 637 F.3d 877, 880 (8th Cir. 2011). Here, Ms. Cantrell's attorney conceded in open court that he was well aware at the time he filed the Amended Complaint that all four causes of action pleaded were filed after the three-year statute of limitations had expired. Nevertheless, he argued that these statutes of limitation should be tolled due to BOA's fraudulent concealment of certain material facts, namely, that BOA had a business scheme in place to intentionally deny meritorious HAMP loan modifications, delay HAMP loan modifications unnecessarily, and deceive its financially distressed clients into thinking that their loan applications would be processed appropriately.

***3** The law is clear that "[i]n order to toll a limitation period on the basis of fraudulent concealment, there must be: (1) a positive act of fraud (2) that is actively concealed, and (3) is not discoverable by reasonable diligence." *Id.* (internal citation and quotation marks omitted). Further, the Arkansas Supreme Court, quoting from its 1896 opinion in *McKneely v. Terry*, 61 Ark. 527, has explained that with respect to the fraudulent concealment doctrine:

> No mere ignorance on the part of plaintiff of his rights, nor the mere silence of one who is under no obligation to speak, will prevent the statute bar. There must be some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself. And if the plaintiff, by reasonable diligence, might have detected the fraud, he is presumed to have had reasonable knowledge of it.

Atlanta Expl., Inc. v. Ethyl Corp., 301 Ark. 331, 340-41 (1990)

In the case at bar, Ms. Cantrell has failed to plead—and in fact could never plead—facts to support a claim of fraudulent concealment by BOA. This is because Ms. Cantrell was merely ignorant of her rights until she consulted with an attorney, and ignorance of the law does not justify a finding of fraudulent concealment. In 2011, at or around the time she simultaneously lost her home to foreclosure/bankruptcy and received written notice from BOA that she qualified for a HAMP modification, she possessed all the facts she needed to enable her to file a lawsuit against BOA alleging many of the same, if not all of the same, causes of action that she has asserted in the instant Amended Complaint. In particular, as of 2011, she would have known, or at least suspected by exerting reasonable diligence, that BOA had processed her HAMP modification paperwork in a dilatory, negligent, and perhaps even deceitful manner, and that in doing so had breached both express and implied promises to her to process the application in accordance with federal regulations and established business standards.

Counsel for Ms. Cantrell was given multiple opportunities during the Motion hearing to explain exactly what facts BOA had misrepresented or concealed from Ms. Cantrell in 2011. Each and every time, his answer was that Ms. Cantrell was ignorant of the behind-the-scenes process or business motive of BOA to save money by delaying and/or denying modification loans, or the internal communications by BOA employees and executives concerning this scheme. Counsel could not point to any fraudulent statement or omission made by BOA to Ms. Cantrell that induced her to refrain from filing her lawsuit outside the three-year limitations period. Counsel stated at one point during the hearing that BOA misrepresented to Ms. Cantrell that her application for HAMP relief would be handled properly and accurately; but even if this were true, it does not provide a basis for a fraudulent concealment argument. Ms. Cantrell cannot avoid the simple truth that she should have known or suspected wrongdoing by BOA back in 2011, when it ignored her application for months and then approved the application too late, after she had already lost her home. She also should have known or suspected the existence of this "scheme" in 2011, when the MDL was publicly filed, or when the Department of Justice publicly investigated and sued BOA in 2011 or settled in 2014—as all of those dates occurred prior to the passing of the three-year limitations period. *See* Doc. 11, p. 12.

IV. CONCLUSION

***4** For the reasons explained herein, Defendant Bank of America's N.A.'s Motion to Dismiss (Doc. 15) is **GRANTED** due to the expiration of the statute of limitations on all counts of the Amended Complaint. Because the Court has determined that permitting Plaintiff

to amend her complaint would be futile and would not cure the limitations deficiency, this case will be **DISMISSED WITH PREJUDICE**. *See Drobnak v. Andersen Corp.*, 561 F.3d 778, 782 (8th Cir. 2009) (affirming dismissal with prejudice due to the running of the statute of limitations and plaintiff's failure to adequately plead fraudulent concealment). Judgment will enter concurrently wit this Order.

IT IS SO ORDERED on this 3rd day of April, 2017.

All Citations

Not Reported in Fed. Supp., 2017 WL 1246356

Footnotes

1 The motion for class certification in the MDL was denied on September 4, 2013. Although neither party argued this point in their briefing, the Court questioned *sua sponte* whether Ms. Cantrell's claims might possibly have been tolled during the pendency of the MDL, provided that she were a member of the MDL's purported class. According to the Supreme Court in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 348-49 (1983), "[t]he filing of a class action tolls the statute of limitations 'as to asserted members of the class.' " (quoting *Am. Pipe & Const. Co. v. Utah*, 414 U.S. 538, 554 (1974)). Here, however, *American Pipe* tolling does not apply, as the MDL class was defined as those BOA customers who "entered into a Trial Period Plan Agreement with Bank of America and made all trial payments required by their Trial Period Plan Agreement...." *In re Bank of America*, 2013 WL 475649, at *2. It is undisputed that Ms. Cantrell never entered into a TPP with BOA.

2 Because the Court has determined that the Amended Complaint should be dismissed based on the expiration of the statutes of limitation alone, this Opinion will not discuss the alternate bases for dismissal that BOA offered in its Motion.

2018 WL 5298538
Only the Westlaw citation is currently available.
United States District Court, S.D. Florida.

Ronald J. CAPTAIN and
Sharon P. Captain, Plaintiffs,
v.
BANK OF AMERICA, N.A., Defendant.

CASE NO. 18-60130-CIV-ALTONAGA/Seltzer
|
Signed 10/25/2018

Attorneys and Law Firms

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ORDER

CECILIA M. ALTONAGA, UNITED STATES DISTRICT JUDGE

***1 THIS CAUSE** came before the Court on Defendant, Bank of America, N.A.'s Motion for Summary Final Judgment [ECF No. 58], submitted with its Statement of Undisputed Material Facts ("Def.'s Facts") [ECF No. 59] on September 5, 2018. On September 19, 2018, Plaintiffs, Ronald J. Captain and Sharon P. Captain, filed their Response [ECF No. 67] and a Response to Defendant's Facts ("Pls.' Resp. to Def.'s Facts") [ECF No. 68], to which Defendant filed a Reply [ECF No. 69]. The Court has carefully considered the parties' submissions, their exhibits, the record, and applicable law. For the reasons that follow, the Motion is granted.

I. BACKGROUND

This is an action for fraud against a former loan servicer of a foreclosed home. In 2004, Plaintiffs executed a $270,000 promissory note in favor of lender, Countrywide Home Loans, Inc., and secured this debt with a mortgage on their home in Broward County, Florida. (*See* Def.'s Facts ¶¶ 1–2). Defendant serviced the loan. (*See id.* ¶ 3).

Four years later, Plaintiffs informed Defendant they had fallen behind on their mortgage payments. (*See id.* ¶¶ 7–8). Plaintiffs then contacted Defendant to request a HAMP (the "Home Affordable Modification Program") loan modification. (*See* Declaration of Sharon Captain (the "Captain Decl.") [ECF No. 68-1] ¶ 4).

Defendant, as one of the nation's largest mortgage servicers, is required to use "reasonable efforts to "effectuate any modification of a mortgage loan under [HAMP]." (Complaint [ECF No. 1] ¶ 12 (quoting Servicer Participation Agreement [ECF No. 1-3] § 2(A) (alteration added))). Once approved for a HAMP loan modification, a homeowner begins a three-month trial payment period, during which the homeowner makes mortgage payments under the loan modification. (*See* Compl. ¶ 14). If the homeowner makes timely payments during this period, the homeowner is entitled to a permanent loan modification, with the terms during the trial payment period extended for five years. (*See id.*).

In early June 2009, Plaintiffs executed a HAMP Loan Workout Plan. (*See* Bank of America's Affidavit ("Def.'s Aff.") [ECF No. 59-1] ¶ 13). Shortly thereafter, Defendant told Plaintiffs they were "approved" for a HAMP loan modification. (Captain Decl. ¶ 6). Based on that representation, Plaintiffs started making trial payments. (*See id.*). While Plaintiffs were pursuing a HAMP loan modification, foreclosure proceedings were instituted against them in the Seventeenth Judicial Circuit in and for Broward County. (*See* Def.'s Facts ¶ 9; *see also* Foreclosure Action Docket [ECF No. 59-2]).

In August 2009, two months after the foreclosure action was filed, Defendant informed Plaintiffs their HAMP application documents were "not received." (Captain Decl. ¶ 5). In fact, Defendant told Plaintiffs it had not received Plaintiffs' documents numerous times, even though Plaintiffs had submitted their applications and supporting documents at least five times. (*See id.*; *see also* Pls.' Resp. to Def.'s Facts ¶ 12).

Four years later, Plaintiffs filed their Answer and Affirmative Defenses to the foreclosure action. (*See* Def.'s Facts ¶ 18). The state court eventually entered a Consent Final Judgment of

Foreclosure in February 2014. (*See id.* ¶ 21). The foreclosure sale took place a few months later. (*See* Captain Decl. ¶ 12).

***2** Plaintiffs then brought this action against Defendant (*see* Compl.) stating one claim of fraud (*see id.* ¶¶ 84–89). Plaintiffs assert Defendant falsely informed them their HAMP applications were not received or were incomplete for the "purpose of frustrating the HAMP application process to ensure a modification was ultimately declined." (*Id.* ¶¶ 43–44, 76). Plaintiffs suffered damages, including (1) the costs of and time spent sending and resending their HAMP application (*see id.* ¶ 45); (2) trial period payments made to Defendant (*see id.* ¶¶ 50–51, 53, 59); (3) damages equal to the amount in equity of their home (*see id.* ¶ 53); and (4) improperly charged property inspection fees from 2007 to 2014 (*see id.* ¶¶ 55–56). [1]

Defendant moves for summary judgment. [2] (*See generally* Mot.). Defendant contends the *Rooker-Feldman* doctrine [3] deprives the Court of subject matter jurisdiction over Plaintiffs' claim. (*See id.* 6–12). [4]

II. LEGAL STANDARD

Summary judgment is rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue of fact is "material" if it might affect the outcome of the case under the governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). It is "genuine" if the evidence could lead a reasonable jury to find for the non-moving party. *See id.*; *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

At summary judgment, the moving party bears the initial burden of identifying "those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (alterations and internal quotation marks omitted)). If "the moving party fails to demonstrate the absence of a genuine issue of material fact, the motion should be denied." *Kernel Records Oy v. Mosley*, 694 F.3d 1294, 1300 (11th Cir. 2012) (citations omitted).

III. ANALYSIS

***3** The *Rooker-Feldman* doctrine "is intended to prevent the federal courts from hearing what are essentially appeals from state court decisions, which may only be heard by the United States Supreme Court." *Target Media Partners v. Specialty Mktg. Corp.*, 881 F.3d 1279, 1284 (11th Cir. 2018). The doctrine is "confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at 1285 (quoting *Exxon Mobile Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005)).

An "important limitation" of *Rooker-Feldman* is that the doctrine applies "only where the plaintiff had a reasonable opportunity to raise his federal claim in state proceedings." *Wood v. Orange Cty.*, 715 F.2d 1543, 1547 (11th Cir. 1983) (alteration added). Certainly if "the plaintiff has had no such opportunity, he cannot fairly be said to have 'failed' to raise the issue." *Id.*

Defendant insists the Court should apply the *Rooker-Feldman* inquiry because Plaintiffs had a "reasonable opportunity" to bring their fraud claim in state court. (*See* Mot. 11–12). By doing so, Defendant asserts *Rooker-Feldman* will compel the Court to dismiss this action for lack of subject matter jurisdiction. (*See id.* 6–10). The Court first addresses whether the *Rooker-Feldman* inquiry applies to the facts of this case. Concluding that it does, the Court then addresses whether *Rooker-Feldman* bars Plaintiffs' action.

A. Whether Plaintiffs had a Reasonable Opportunity to Raise their Fraud Claim in the Foreclosure Action

Again, the Court will engage in the *Rooker-Feldman* inquiry unless Plaintiffs had "no 'reasonable opportunity to raise' " their fraud claim during the foreclosure action. *Target Media Partners*, 881 F.3d at 1286 (quoting *Powell v. Powell*, 80 F.3d 464, 467 (11th Cir. 1996)). In construing this "important limitation" on *Rooker-Feldman*, the Eleventh Circuit has instructed courts to look to whether a plaintiff actually had an opportunity during the state court proceeding to raise the claim later brought in federal court. *See Wood v. Orange Cty.*, 715 F.2d 1543, 1547–48 (11th Cir. 1983). In *Times v. Wilson*, the court made the following pertinent observation

about the limitation on the *Rooker-Feldman* doctrine, equally applicable here:

> The plaintiffs in *Wood v. Orange County* were prevented from entering a timely appeal because the court found that the plaintiffs had no actual notice of the judgment and because they could not be imputed with constructive knowledge of a judgment entered pursuant to *ex parte* proceeding of which they had no actual notice. The court thus found that the plaintiffs had no knowledge of the judgment until after the time for filing an appeal had passed, and consequently, had no reasonable opportunity to have their claims of error heard by an appropriate court.... Here, however, Plaintiff has not been faced with, for instance a judgment rendered as a result of an *ex parte* proceeding which would preclude a timely, reasonable opportunity for review by an appropriate appeals court. Rather, Plaintiff had a reasonable opportunity for her claims to be heard....

Times v. Wilson, No. 2:13-CV-564-WKW, 2014 WL 1153720, at *7 (M.D. Ala. Mar. 20, 2014) (alterations added; citing *Wood v. Orange Cty.*, 715 F.2d at 1548); *see also Goodman ex rel. Goodman v. Sipos*, 259 F.3d 1327, 1334 (11th Cir. 2001) (concluding "the plaintiffs had a reasonable opportunity to bring their ... challenges" in state court where the "plaintiffs were both parties to the state court proceeding ... and were present and participated in the state court proceedings." (alterations added)).

***4** Most recently, the Eleventh Circuit reiterated its pronouncement in *Wood* that "*Rooker-Feldman* is not a bar to jurisdiction where '[an] issue did not figure, and could not reasonably have figured, in the state court's decision.' " *Target Media Partners*, 881 F.3d at 1286 (quoting *Wood*, 715 F.2d at 1547; alteration in original) (holding that an "allegedly tortious act occurring long after the state court rendered its judgment cannot be barred by *Rooker-Feldman* because there was no opportunity to complain about the allegedly injurious act in the state court proceedings.").

Unlike the plaintiffs in *Wood* and *Target Media Partners*, Plaintiffs had the opportunity to raise their fraud claim in the foreclosure action. Plaintiffs' fraud claim, a state law claim routinely resolved in state courts, arose before the foreclosure judgment was entered. *See Cherry v. Ventures Tr. 2013-I-NH by MCM Capital Partners LLC*, No. 15-24133-CIV, 2016 WL 6538447, at *4 (S.D. Fla. Feb. 26, 2016) (applying *Rooker-Feldman* inquiry where the plaintiffs had a "reasonable opportunity" to raise their fraud claims in the state court foreclosure proceeding but chose not to). Because Plaintiffs were parties to the foreclosure, fully participated in the foreclosure action, and could have raised their theory of fraud in state court, Plaintiffs had a reasonable opportunity to raise their fraud claim. *See Merice v. Wells Fargo Bank, N.A.*, No. 15-80614-CIV, 2016 WL 1170838, at *4 n.4 (S.D. Fla. Mar. 25, 2016) (rejecting the plaintiff's argument that he was not given a reasonable opportunity to raise his claim in state court where he "was a party in the state case and did not file a motion for reconsideration, an appeal of the foreclosure, or an objection to the sale") (citations omitted); *see also Smedley v. City of Ozark*, No. 1:13-CV-304-WKW, 2013 WL 3237694, at *3 (M.D. Ala. June 25, 2013) ("Plaintiff would not have been precluded from asserting ... claims in the trial court or on appeal. Thus, Plaintiff did have a 'reasonable opportunity' to raise his federal claims in the state court proceedings.... [T]he *Rooker-Feldman* jurisdictional bar [therefore] applies...." (alterations added)).

The parties' briefing, however, touches on a nuanced construction of the *Rooker-Feldman* limitation which some district courts have adopted: whether Plaintiffs had actual or constructive notice *of the specific basis of their claim* during the state court action. *See Plevin v. U.S. Bank Nat'l Assoc.*, No. 6:15-cv-412-Orl, 2016 WL 368990, at *2 (M.D. Fla. Feb. 1, 2016) (noting that if the plaintiff "was on notice of the basis of his claims during the state court proceeding and could have legally asserted those claims as part of the previous proceeding, he had a 'reasonable opportunity' to do so." (citations omitted)).

Within this framework, Defendant contends the Court should apply *Rooker-Feldman* to the undisputed material facts of this case because Plaintiffs "had a reasonable opportunity to challenge what they now characterize as fraudulent charges and ... omissions that were added to their foreclosure judgment." (Mot. 12 (alteration added)). Defendant submits

Plaintiffs must necessarily have had an opportunity to bring their fraud claim given they "challenge[d] several of these [HAMP] charges when they moved to dismiss the foreclosure complaint" and pled a theory of fraud against the foreclosure, albeit not the same theory of fraud asserted in this action. (*Id.* (alterations added); *see also* Reply 3–4). Defendant points to Plaintiffs having challenged charges related to Plaintiffs' HAMP Loan Workout Plan in the foreclosure action. (*See* Mot. 12). Defendant also notes Plaintiffs were represented by counsel in the foreclosure action. (*See* Reply 3).

***5** Plaintiffs disagree and maintain that *Rooker-Feldman* does not apply to their fraud claim because at the time of the foreclosure, "they had no actual or constructive knowledge of fraud." (Resp. 8). As to actual knowledge, Plaintiffs assert they did not learn about Defendant's fraud in the HAMP modification process until they retained their present attorneys in December 2016. (*See id.*; *see also* Captain Decl. ¶¶ 8–11). As to constructive knowledge, Plaintiffs state they had no reason to know about the basis of the fraud claim and insist their arguments about Defendant's fraudulent behavior in the foreclosure action are different from the allegations here, where Plaintiffs specifically allege fraud in the HAMP loan modification process. (*See* Resp. 9).

The Court must again agree with Defendant. The Court accepts as true Plaintiffs' assertion they did not learn that Defendant committed fraud in the HAMP loan modification process until after they retained their present attorneys in December 2016. (*See* Resp. 8; *see also* Captain Decl. ¶¶ 8–11). That Plaintiffs did not actually know about the fraud in the HAMP loan modification process until they retained their present attorneys, however, is not dispositive. *See Zuluaga v. Bank of Am., N.A.*, No. 8:17-cv-2543-T-33TGW, 2018 WL 5014552, at *4 (M.D. Fla. Oct. 16, 2018) ("The Court would reach the same conclusion [that *Rooker-Feldman* bars the plaintiff's suit] even if Plaintiff was unaware of the fraud at the time of the foreclosure." (alteration added; citation omitted)).

Instead, the Court looks to whether Plaintiffs *should have known* of the basis of their fraud claim during the foreclosure action. Plaintiffs offer evidence that actually corroborates Defendant's assertion they were on constructive notice of the fraud claim in the foreclosure action. Defendant's misrepresentations were made in June and August 2009, years before Plaintiffs filed their Answer in the foreclosure action in December 2013. (*See* Captain Decl. ¶¶ 5–6; *see also* Def.'s Facts ¶ 18). In 2009, Defendant informed Plaintiffs they were "approved" for HAMP; two months later, and repeatedly thereafter, Defendant told Plaintiffs their application materials were "not received," even though Plaintiffs sent their application at least five times and made three timely trial payments. (Captain Decl. ¶¶ 5–6; *see also* Pls.' Resp. to Def.'s Facts ¶ 12). At a minimum, these events should have alerted Plaintiffs during the foreclosure action that there existed a fraud claim based on the irregularities with the HAMP loan modification process. *See Dale v. Moore*, 121 F.3d 624, 627 (11th Cir. 1997) (per curiam) (holding the plaintiff had a reasonable opportunity to raise his claims in the state court action because he had "notice" of the basis of the claim).

As Defendant notes, Plaintiffs' filings in the foreclosure action further illustrate Plaintiffs should have known about the basis of their fraud claim in state court. Tellingly, Plaintiffs *did* raise a theory of fraud there. (*See* Answer and Affirmative Defenses to Foreclosure Complaint [ECF No. 59-5] ¶¶ 39–58). Although Plaintiffs' theory of fraud in the foreclosure action was not identical to the fraud claim asserted here (*see id.*), Plaintiffs were certainly aware the trial payments they made in their HAMP Loan Workout Plan could serve as a basis to dismiss the foreclosure action. (*See* Motion to Dismiss Complaint [ECF No. 59–3] ¶ 3). Significantly, Plaintiffs were represented by counsel. (*See* Final Judgment of Foreclosure [ECF No. 59-7] 3).

While Plaintiffs are correct that none of these filings show Plaintiffs actually knew about the basis of their fraud claim in the HAMP loan modification process until December 2016 (*see* Resp. 9), they do bolster the conclusion that Plaintiffs should have known about the basis of their fraud claim during the foreclosure action. *See Harper v. Chase Manhattan Bank*, 138 F. App'x 130, 133 (11th Cir. 2005) (affirming dismissal of case under the *Rooker-Feldman* doctrine because the plaintiff "could have raised her ... claims in state court, and in fact, she indicate[d] she raised similar claims in opposition to the motion for summary judgment for foreclosure." (alterations added; footnote call number omitted)).

***6** Given Plaintiffs were on notice of the basis of their fraud claim in state court, they had a reasonable opportunity to raise the claim during the foreclosure action. Accordingly, the *Rooker-Feldman* inquiry applies to the facts of this case. *See Higdon v. Tusan*, No. 17-11127, 2018 WL 3868672, at *1 (11th Cir. Aug. 14, 2018) (noting "application of the *Rooker-Feldman* doctrine" is a "question[ ] of law") (alteration added; citations omitted).

B. Whether Plaintiffs' Fraud Claim is Inextricably Intertwined with the Foreclosure Action

Because the Court agrees with Defendant that a *Rooker-Feldman* inquiry is warranted, the Court next considers whether *Rooker-Feldman* bars Plaintiffs' fraud claim. To determine whether a claim is barred by *Rooker-Feldman*, the Eleventh Circuit considers whether it was either "(1) one actually adjudicated by a state court or (2) 'inextricably intertwined' with a state court judgment." *Target Media Partners*, 881 F.3d at 1286 (quoting *Casale v. Tillman*, 558 F.3d 1258, 1260 (11th Cir. 2009) (per curiam)). It is undisputed the fraud claim was not actually adjudicated by the state court. A claim is inextricably intertwined if "it asks to 'effectively nullify the state court judgment, or it succeeds only to the extent that the state court wrongly decided the issues.' " *Id.* (quoting *Casale*, 558 F.3d at 1260).

Defendant argues the fraud claim is inextricably intertwined with the foreclosure action. (*See* Mot. 8–10). According to Defendant, for Plaintiffs to prevail on the merits of their fraud claim here, they will have to show Defendant's fraudulent statements caused the foreclosure. (*See id.* 9). Defendant also notes Plaintiffs seek damages flowing from the foreclosure judgment and sale. (*See id.* 10). Plaintiffs insist this action is independent of the foreclosure action and that awarding them damages for their fraud claim would leave the state court judgment intact. (*See* Resp. 9–20).

The Court agrees with Defendant — the fraud claim is inextricably intertwined with the state court judgment. The Eleventh Circuit's decision in *Nivia v. Nation Star Mortgage, LLC* is instructive on this point. *See* 620 F. App'x 822 (11th Cir. 2015). There, the Eleventh Circuit expounded on the *Rooker-Feldman* inquiry:

> The *Rooker-Feldman* inquiry is not whether a claim for damages is based to any degree on harm resulting from a valid state court judgment.... The inquiry is whether either the damages award would annul the effect of the state court judgment or the state court's adoption of the legal theory supporting the award would have produced a different result.

Id. at 825 (alteration added; citing *Casale*, 558 F.3d at 1260). The Eleventh Circuit applied the inextricably-intertwined analysis to the plaintiffs' Florida Deceptive and Unfair Trade Practices Act (the "FDUTPA") claim, which was based on the defendant-lenders' alleged failure to help plaintiffs modify their loan, causing plaintiffs to lose their home during foreclosure. *See id.* The court held *Rooker-Feldman* barred the FDUTPA claim because the claim effectively amounted to an equitable defense to the foreclosure, and the adoption of that theory would have produced a different result in state court. *See id.* (citation omitted).

Just like the plaintiffs' FDUTPA claim in *Nivia*, Plaintiffs' fraud claim amounts to an equitable defense to the foreclosure action. Had Plaintiffs raised and the state court adopted Plaintiffs' theory that Defendant's fraudulent scheme caused Plaintiffs to default on their loan, the foreclosure would have been deemed "legally invalid." *Id.* (citation omitted); *see also Najera v. NationsBank Tr. Co., N.A.*, 707 So. 2d 1153, 1155 (Fla. 5th DCA 1998) ("If th[e] alleged course of fraudulent conduct ... is established at trial, and if it is shown was reasonably relied upon by the [plaintiff homeowners], these proofs could provide them with a defense to this foreclosure action." (alterations added)). Plaintiffs' fraud claim is thus barred by *Rooker-Feldman.* [5]

***7** Moreover, Plaintiffs' alleged damages are all intertwined with the foreclosure judgment. Plaintiffs' principal injury is "the loss of [Plaintiffs'] home and the equity in that home, as well as the loss of future equity in their home" (Compl. ¶¶ 53, 62 (alteration added)), resulting from the foreclosure. To award this remedy, the Court would "effectively nullify the state court judgment" and necessarily hold "that the state court wrongly decided the issues." *Casale*, 558 F.3d at 1260 (internal quotation marks and citations omitted). This, the Court cannot do. *See Figueroa v. MERSCORP, Inc.*, 477 F. App'x 558, 560 (11th Cir. 2012) (holding the foreclosure judgment was intertwined with the injury in the federal action — the "one-half interest in his property and home" stemming from the "improper foreclosure proceeding." (citation and footnote call number omitted)).

Plaintiffs' damages in the form of the costs of and time spent resending their HAMP application (*see* Compl. ¶ 45), Plaintiffs' trial payments (*see id.* ¶ 53), and improperly charged property inspection fees (*see id.* ¶ 55), fare no better. These damages, too, are inextricably intertwined with the foreclosure judgment. *See Williams v. Dovenmuehle Mortg.*

Inc., No. 17-60191-CIV, 2017 WL 4303841, at *5–6 (S.D. Fla. June 16, 2017) (barring the plaintiffs' claim for damages, including the costs of sending loss mitigation applications and fees assessed to mortgage loan account under *Rooker-Feldman*).

The Court is not persuaded by Plaintiffs' assertion that *Rooker-Feldman* only applies to claims for injunctive or declaratory relief, and not claims for damages. (*See* Resp. 11–12 (citing *Arthur v. JP Morgan Chase Bank, NA*, 569 F. App'x 669 (11th Cir. 2014))). In *Arthur*, the plaintiffs sought "money damages for alleged criminal and fraudulent conduct in the *generation* of foreclosure-related documents." *Id.* at 675 (emphasis in original). The Eleventh Circuit held *Rooker-Feldman* did not bar the plaintiffs' suit because the plaintiffs' "alleged injuries flow ... from the generation of the foreclosure documents and not solely from the issuance of the state court judgment" and "[i]nstead of seeking to nullify the state court judgment, the [plaintiffs] are seeking to bypass any findings in the state court judgment that would be adverse to them in this suit." *Id.* (alterations added; citations omitted).

The fraud claim here does not involve any purported misconduct by Defendant *during* the foreclosure action; rather, Plaintiffs allege Defendant's actions *before* the foreclosure action caused Plaintiffs to default on their loan, resulting in the foreclosure. (*See generally* Compl.). Unlike with the plaintiffs' injuries in *Arthur*, any damages award to Plaintiffs would thus "effectively nullify the state court judgment." *Casale*, 558 F.3d at 1260 (internal quotation marks and citation omitted).

In sum, through their fraud claim and the damages they seek, Plaintiffs "complain exclusively about a misrepresentation that preceded — and ultimately caused — the foreclosure," which is an "attempt to impugn the validity of the foreclosure judgment." *Varela-Pietri v. Bank of Am., N.A.*, No. 8:17-CV-2534, 2018 WL 4208002, at *3 (M.D. Fla. Sept. 4, 2018) (footnote call number omitted). Plaintiffs' suit is thus barred by *Rooker-Feldman.*

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED as follows:

1. Defendant, Bank of America N.A.'s Motion for Summary Final Judgment [**ECF No. 58**] is **GRANTED**.

2. Plaintiffs' Motion for Leave to Amend Complaint **[ECF No. 92]** to add claims for punitive damages and negligent misrepresentation is **DENIED**. Plaintiffs do not satisfy their burden for leave to amend under Federal Rule of Civil Procedure 15(a)(2) because "the complaint as amended would still be properly dismissed or be immediately subject to summary judgment for the defendant." *Cornelius v. Bank of Am., N.A.*, 585 F. App'x 996, 1000 (11th Cir. 2014) (per curiam) (internal quotation marks and citation omitted). Plaintiffs' new proposed claims (*see* Proposed Amended Complaint [ECF No. 92-1]), like their fraud claim, relate to Defendant's alleged conduct before the foreclosure action, which caused Plaintiffs to default on their loan and resulted in the foreclosure. Because *Rooker-Feldman* deprives the Court of subject matter jurisdiction over those claims, granting Plaintiffs' motion to file their amended complaint would be an exercise in futility. *See, e.g.*, *Fenn v. U.S. Bank Nat'l Ass'n*, No. 6:16-cv-769-Orl, 2016 WL 4942055, at *4 (M.D. Fla. Aug. 23, 2016) (denying the plaintiff's motion for leave to amend because "the [c]ourt lacks subject matter jurisdiction over this case pursuant to the *Rooker-Feldman* doctrine, and leave to file a second amended complaint would be futile." (alteration added; citation omitted)).

***8** 3. All other pending Motions **[ECF Nos. 82, 83, 101]** are **DENIED as moot.** The October 29, 2018 Hearing **[ECF No. 84]** is therefore **CANCELLED**.

4. Final judgment will be entered by separate order. The Clerk of Court is instructed to **CLOSE** the case.

DONE AND ORDERED in Miami, Florida, this 25th day of October, 2018.

All Citations

Not Reported in Fed. Supp., 2018 WL 5298538

Footnotes

1 As to the merits of Plaintiffs' fraud claim, Defendant asserts Plaintiffs failed to timely make their trial period payments and thus were not entitled to a HAMP loan modification. (*See* Def.'s Aff. ¶¶ 16–17). Plaintiffs dispute Defendant's assertion, insisting they timely made each of the trial period payments. (*See* Captain Decl. ¶ 6).

2 Plaintiffs assert the Motion should be denied as premature because there has been inadequate time for discovery. (*See* Resp. 25). The Court disagrees. First, Defendant's Motion is ripe because Plaintiffs have not shown they "cannot present facts essential to justify [their] opposition" to Defendant's Motion. Fed. R. Civ. P. 56(d) (alteration added). More importantly, the deadline to complete discovery was August 13, 2018 (*see* Order Setting Trial [ECF No. 10]), although when the Court granted in part a Joint Motion to Extend Discovery Deadlines and Trial Schedule [ECF No. 39] the parties were reminded they could take discovery beyond the deadline by agreement (*see* July 27, 2018 Order [ECF No. 40] 3).

3 *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

4 Defendant also argues Plaintiffs' claim is barred by Florida's four-year statute of limitations (*see* Mot. 12–15) and Florida's compulsory counterclaim rule (see *id.* 16–17), and that Plaintiffs failed to satisfy an express condition precedent to bringing this action (*see id.* 17–19). Because Plaintiffs' action is barred by *Rooker-Feldman*, the Court does not address Defendant's other arguments.

5 In *Nivia*, the Eleventh Circuit also held the *Rooker-Feldman* doctrine did not bar the plaintiffs' HAMP claim. *See Nivia*, 620 F. App'x at 824–25. In *Nivia*, the plaintiffs' HAMP claim arose under the HAMP and involved a lender's noncompliance with its duties under the HAMP. *See id.* The Court reasoned such procedural noncompliance could not "invalidate[ ] [the] foreclosure resulting from that failure as a matter of law." *Id.* at 825 (alterations added). In contrast, as explained in detail above, the success of Plaintiffs' fraud claim "would require a determination that the state court entered the judgment wrongly...." *Id.* (internal quotation marks and citation omitted; alteration added); *see also Martinez v. Bank of Am., N.A.*, No. 8:17-cv-2596, 2018 WL 5024178, at *3 (M.D. Fla. Oct. 17, 2018) ("*Nivia* supports the application of the *Rooker-Feldman* doctrine to this fraud case" and does "not stand for the proposition that any claims related to the issuance of HAMP modifications are not barred by the *Rooker-Feldman* doctrine.").

End of Document

196 N.C.App. 517
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Court of Appeals of North Carolina.

Robert K. CASCADDEN and Juanita A. Cascadden, Plaintiffs
v.
HOUSEHOLD REALTY CORPORATION, WCRSI, LLC and Deborah A. Shofner, Defendants.

No. COA08-805.
|
April 21, 2009.

***1** Appeal by plaintiffs from order entered 28 April 2008 by Judge Paul Jones in Onslow County Superior Court. Heard in the Court of Appeals 11 December 2008.

Attorneys and Law Firms

Donald G. Walton, Jr., for plaintiffs-appellants.

Nelson Mullins Riley & Scarborough, LLP, by Donald R. Pocock, for defendant-appellee Household Realty Corporation.

The Law Firm of Hutchens, Senter & Britton, PA, by J. Scott Flowers, for defendant-appellee WCRSI, LLC.

No brief filed for defendant-appellee Deborah Shofner.

Opinion

CALABRIA, Judge.

Robert K. Cascadden and Juanita A. Cascadden ("plaintiffs") appeal the trial court's order granting the motion to dismiss their complaint for failure to state a claim upon which relief can be granted pursuant to N.C.R. Civ. P. 12(b)(6). We affirm.

Plaintiffs allege they contracted with defendant Household Realty Corporation ("Household") for a consolidation loan secured by their residence. Plaintiffs executed closing documents for the consolidation loan in January 2001. When they received their firstbill to repay the loan, they noted inconsistencies between the billing statement and the loan they negotiated and closed. Plaintiffs requested a copy of the closing documents and continued to make payments on the loan. After receiving a copy of a Loan Repayment and Security Agreement, plaintiffs noticed their signatures were forged. Plaintiffs examined the deed of trust recorded in the Onslow County Register of Deeds and discovered their signatures on the deed of trust were also forged. Subsequently, Household assigned the loan to WCRSI, LLC ("WCRSI"), a collections agency. On 17 December 2007, WCRSI sent plaintiffs a notice of default and acceleration of mortgage.

On 5 March 2008, plaintiffs filed a complaint alleging fraud, alteration, forgery, and unfair and deceptive practices against Household and the notary public who witnessed the allegedly forged signatures, Deborah Shofner ("Shofner"). Plaintiffs also asked for an injunction against WCRSI to cease the foreclosure or collection on the loan from the plaintiffs during the pendency of the civil action. A copy of the Loan Repayment and Security Agreement was attached to the complaint. On 10 April 2008, Household filed a motion to dismiss the complaint for failure to state a claim upon which relief can be granted. On 28 April 2008, the trial court granted the motion and dismissed plaintiffs' complaint with prejudice. Plaintiffs appeal.

I. Standard of Review

"We review the trial court's dismissal of plaintiffs' suit to determine whether the allegations of the complaint, if treated astrue, are sufficient to state a claim upon which relief can be granted under some legal theory." *Coley v. State,* 360 N.C. 493, 494-95, 631 S.E.2d 121, 123 (2006) (citations and internal quotations omitted). The complaint should be construed liberally and dismissal is not proper unless "it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Block v. County of Person,* 141 N.C.App. 273, 277-78, 540 S.E.2d 415, 419 (2000) (citation omitted). However, if the face of the complaint does not reveal any law or facts to support the plaintiffs' claim or discloses a fact that defeats plaintiffs' claim, then a motion to dismiss pursuant to Rule 12(b)(6) is proper. *Harrold v. Dowd,* 149 N.C.App. 777, 780, 561 S.E.2d 914, 917 (2002). Dismissal of claims barred by the statute

of limitations are proper grounds for an order granting a Rule 12(b)(6) motion. *Kaleel Builders, Inc. v. Ashby,* 161 N.C.App. 34, 38, 587 S.E.2d 470, 473 (2003). "[W]hen ruling on a Rule 12(b)(6) motion, a court may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers...." *Oberlin Capital, L.P. v. Slavin,* 147 N.C.App. 52, 60, 554 S.E.2d 840, 847 (2001).

II. Statute of Limitations

***2** "[A] cause of action ... to set aside an instrument for fraud, accrues, and limitations begin running, when the aggrieved party discovers the facts constituting the fraud, or when, in the exercise of reasonable diligence, such facts should have been discovered." *Vail v. Vail,* 233 N.C. 109, 116, 63 S.E.2d 202, 207(1951); N.C. Gen.Stat. § 1-52(9) (2007); *State Farm Fire & Cas. Co. v. Darsie,* 161 N.C.App. 542, 547, 589 S.E.2d 391, 396 (2003) (citation omitted). The claimant asserting the cause of action has the burden of proving the statute of limitations does not apply. *State Farm Fire & Cas. Co.,* 161 N.C.App. at 547, 589 S.E.2d at 396.

Ordinarily, when fraud should be discovered in the exercise of reasonable diligence is a question of fact for the jury, particularly when the evidence is inconclusive or conflicting. However, where the evidence is clear and shows without conflict that the claimant had both the capacity and opportunity to discover the fraud but failed to do so, the absence of reasonable diligence is established as a matter of law.

Id. at 548, 589 S.E.2d at 397 (citing *Huss v. Huss,* 31 N.C.App. 463, 468, 230 S.E.2d 159, 163 (1976); *Moore v. Casualty Co.,* 207 N.C. 433, 437, 177 S.E. 406, 408 (1934); *Grubb Properties, Inc. v. Simms Investment Co.,* 101 N.C.App. 498, 501, 400 S.E.2d 85, 88 (1991)).

Plaintiffs argue their cause of action accrued upon actual notice of the fraud, which occurred when they received a copy of the Loan Repayment and Security Agreement or when they inspected the recorded copy of the deed of trust. Because the pleadings do not indicate the date plaintiffs received a copy of the agreement or inspected the recorded deed of trust, plaintiffs contend it is not clear from the face of the complaint that the claims are timebarred. We disagree. Under North Carolina law, "the notice which starts the running of the statute is not complete information of all details of the transaction. The statute starts to run when the plaintiff acquires sufficient information to give rise to a reasonable belief that a fraudulent [action] has occurred." *New Amsterdam Cas. Co. v. Waller,* 323 F.2d 20, 26 (4th Cir.1963).

As to either [fraud or negligent misrepresentation] ... when the party relying on the false or misleading representation could have discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence.

Hudson-Cole Dev. Corp. v. Beemer, 132 N.C.App. 341, 346, 511 S.E.2d 309, 313 (1999); *Oberlin Capital, L.P.,* 147 N.C.App. at 60, 554 S.E.2d at 847 (where complaint for fraud did not allege plaintiffs were denied the opportunity to investigate or that plaintiffs could not have learned true facts through reasonable diligence, it was properly dismissed).

In *Vail,* the plaintiffs moved to set aside a deed from a mother to her son on the basis of fraud. 233 N.C. at 111, 63 S.E.2d at 204. The deed was recorded on 3 October 1944. The action was filed on 15 December 1948. Defendants argued the claim was barred by the three-year statute of limitations, which accrued the date the deed was recorded. The Court held that there were no facts or circumstances on the face of the deed to excite a suspicion as to fraud and the plaintiffs' action was not time-barred. *Id.,* 233 N .C. at 117, 63 S.E.2d at 208. Here, the Loan Repayment and Security Agreement indicates the date of the loan was 22 January 2001 and the first payment was due 22 February 2001. Plaintiffs alleged that upon receiving their first billing statement, they noticed the amount of payment was inconsistent with the loan documents they had executed. Plaintiffs also alleged they discovered the forgery after examining the recorded copy of the deed of trust, which they listed as being recorded at Book 1681, Page 427 in the Onslow County Register of Deeds office. Although plaintiffs did not indicate in their complaint when they discovered the forgery, their allegations reveal plaintiffs had the capacity and opportunity through reasonable due diligence to discover the fraud before 5 March 2005, a date that would have been three years before filing the complaint. *See* N.C. Gen.Stat. § 1-52(9) (2007) (claim for fraud must be filed within three years of discovery). Plaintiffs further alleged that they noticed inconsistencies regarding the terms of their loan after receiving their first billing statement in 2001. At that point, they could have examined the deed of trust in the Onslow County Register of Deeds office. Unlike the plaintiffs in *Vail,* plaintiffs alleged the forgery was discoverable on the face of the deed of trust. Plaintiffs did not allege they were denied the opportunity

to conduct an investigation or that they could not have discovered the facts through due diligence. We hold plaintiffs have not met their burden of demonstrating the statute of limitations is not a bar to their fraud claim.

B. Unfair and Deceptive Practices Claim

***3** "Any civil action brought under [Chapter 75] to enforce the provisions thereof shall be barred unless commenced within four years after the cause of action accrues." N.C. Gen.Stat. § 75-16.2 (2007). Here, according to plaintiffs' complaint, their claim for unfair and deceptive trade practices was based on fraud. *See Nash v. Motorola Communications and Electronics, Inc.,* 96 N .C.App. 329, 332, 385 S.E.2d 537, 539 (1989) (statute of limitations for unfair and deceptive practices claim based on fraud runs from the date the plaintiffs discovered the fraud or reasonably should have discovered the fraud). We have already concluded plaintiffs did not meet their burden of demonstrating the fraud claim was not barred by the applicable statute of limitations, since the claim accrued at the time they received their first billing statement in 2001. Likewise, the unfair and deceptive trade practices claim was also barred. Although the unfair and deceptive trade practices claim has a four-year statute of limitations, over four years elapsed from the time plaintiffs received their first billing statement until the date of the filing of the complaint on 5 March 2008. This assignment of error is overruled.

III. Injunctive Relief

Plaintiffs next argue the trial court erred in dismissing their claim for injunctive relief against defendant WCRSI. We disagree.

In order to justify issuance of a preliminary injunction, plaintiff must show a likelihood of success on the merits of his case and either that he is likely to sustain irreparable loss unless the injunction is issued or that issuance is necessary for the protection of plaintiff's rights during the course of litigation.

Adams v. Beard Development Corp., 116 N.C.App. 105, 109, 446 S.E.2d 862, 865 (1994).

Plaintiffs failed to show they were likely to succeed on the merits of the fraud claim since their claim was barred by the statute of limitations. *Adams,* 116 N.C.App. at 109, 446 S.E.2d at 865 (the trial court properly denied plaintiff's motion for a preliminary injunction where plaintiff failed to establish that he was reasonably likely to succeed on the merits of his suit; the statute of limitations barred his claim).

Affirmed.

Judges STEELMAN and STROUD concur.

Report per Rule 30(e).

All Citations

196 N.C.App. 517, 675 S.E.2d 155 (Table), 2009 WL 1054035

2015 WL 3823817

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of North Carolina,
Mecklenburg County,
Business Court.

CHRISTENBURY EYE CENTER, P.A., Plaintiff,
v.
MEDFLOW, INC. and Dominic James Riggi, Defendants.

No. 14 CVS 17400.
|
June 19, 2015.

{ 1} THIS MATTER is before the Court on Defendant Medflow, Inc .'s Motion to Dismiss and Defendant Dominic James Riggi's Motion to Dismiss (collectively, "Motions") made pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure ("Rule(s)"). For the reasons stated below, the Motions are GRANTED.

Attorneys and Law Firms

Shumaker, Loop & Kendrick, LLP by Frederick M. Thurman, Jr. for Plaintiff.

Robinson Bradshaw & Hinson, P.A. by Fitz E. Barringer, Heyward H. Bouknight, III, and Kindl Detar for Defendant Medflow, Inc.

Moore & Van Allen PLLC by Benjamin P. Fryer and Nader S. Raja for Defendant Dominic James Riggi.

ORDER & OPINION

JAMES L. GALE, Chief Special Superior Court Judge for Complex Business.

I. PROCEDURAL BACKGROUND

***1** { 2} Plaintiff initiated this action on September 11, 2014, bringing claims for breach of contract, fraud, unfair and deceptive trade practices ("UDTP"), and unjust enrichment, based on a contract entered on October 20, 1999. The matter was designated a mandatory complex business case and assigned to the undersigned on October 27, 2014.

{ 3} Defendant Dominic James Riggi ("Riggi") filed his motion on November 21, 2014, moving pursuant to Rule 12(b)(6) to dismiss all claims. Defendant Medflow, Inc. ("Medflow") also filed a Rule 12(b)(6) motion on December 1, 2014. The Motions have been fully briefed and are ripe for disposition.

II. FACTUAL BACKGROUND

{ 4} The following facts are based on the allegations of the Verified Complaint and are accepted as true for purposes of the Motions.

{ 5} Plaintiff Christenbury Eye Center, P.A. ("Christenbury") is a professional association located in Charlotte, North Carolina that offers ophthalmology and ophthalmic services. Dr. Jonathan D. Christenbury ("Dr.Christenbury") founded Christenbury.

{ 6} In 1998 or 1999, Dr. Christenbury approached Riggi about finding or developing a software package to help Dr. Christenbury and other ophthalmologists manage their practice and maintain their records.

{ 7+BAround the same time, Riggi formed Medflow, which retained a software engineer to customize and enhance a general medical records management software platform. Dr. Christenbury paid Medflow in excess of $200,000 to prepare a software package.

{ 8} On October 20, 1999, Christenbury and Medflow entered into an Agreement Regarding Enhancements ("Agreement"). (Verified Compl. ¶ 15, Ex. A.) The "Enhancements" are improvements to the original software platform, including "customized screens, interfaces, forms, [and] procedures." (Verified Compl.

Ex. A.) Christenbury assigned its rights in the platform and Enhancements to Medflow and retained rights to use and display the platform and Enhancements. Christenbury did not retain a right to sublicense or distribute the platform or Enhancements. Medflow was prohibited from selling the platform or Enhancements in North Carolina or South Carolina without Christenbury's written consent. Medflow was obligated to pay Christenbury a ten percent royalty for all fees received in association with the Enhancements' resale or provision, with a minimum yearly royalty of $500 for each of the five years after October 20, 1999. Medflow was to "provide Christenbury with a written report on a monthly basis which will include a detailed description of the fees received from [Medflow's] Customers during the prior month, along with payment to Christenbury of all corresponding fees due with respect to such charges for that prior month." (Verified Compl. Ex. A.) Riggi signed the Agreement on behalf of Medflow and an acknowledgment binding him to the Agreement's terms in his individual capacity.

{ 9} Medflow never provided Christenbury with the required written report and never paid any royalties to Christenbury.

***2** { 10} In February 2001, Medflow informed Christenbury of modifications made to the original software and requested that the Agreement be modified, stating, "As you may know, MedFlow has developed a new Refractive Surgery Management Software and wants to install that at Dr. Christenbury's office. This new version contains several new components not contained in the original MedFlow Refractive Surgery software and many improvements over the original package." (Verified Compl. ¶ 16.) The parties did not ultimately amend the Agreement. Christenbury continued to use the original platform. Medflow sold the newer version without reporting sales or paying royalties to Christenbury.

{ 11} In 2002, an article concerning electronic medical records appeared in the publication, *Opthalmology Management.* Riggi was interviewed for the article, which stated that Medflow "created and customizes the EMR in use at Christenbury Eye Center and at Beach Eye Care." (Verified Compl. ¶ 18.)

{ 12} Christenbury received updates to and services for the original platform "[f]rom time to time after the execution of the Agreement" from service providers directly associated with Medflow. (Verified Compl. ¶¶ 22, 23.) In 2011, Medflow's service provider refused to provide Christenbury an update, stating that it no longer supported Christenbury's platform. Shortly thereafter, the service provider's agent demonstrated Medflow's newer product for Dr. Christenbury.

{ 13} Plaintiff alleges that, "[u]pon information and belief, since October 1999, Medflow has further developed, modified, and sold the Enhancements, and derivatives thereof, to other ophthalmologic practices, both inside and outside the restricted territory of North Carolina and South Carolina, without paying royalties to the Practice." (Verified Compl. ¶ 28.) The Verified Complaint does not clearly indicate when Plaintiff discovered the facts on which this allegation is based.

III. STANDARD OF REVIEW

{ 14} On a motion to dismiss pursuant to Rule 12(b)(6), the Court inquires "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Crouse v. Mineo,* 189 N.C.App. 232, 237, 658 S.E.2d 33, 36 (2008) (quoting *Harris v. NCNB Nat'l Bank of N.C.,* 85 N.C.App. 669, 670, 355 S.E.2d 838, 840 (1987)). The Court may grant a motion to dismiss under Rule 12(b)(6) where one of the following is true: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. *Oates v. JAG, Inc.,* 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985).

{ 15} For purposes of the Motions, the Court accepts the factual allegations of the Verified Complaint as true without assuming the veracity of Plaintiff's legal conclusions. *Walker v. Sloan,* 137 N.C.App. 387, 392, 592 S.E.2d 236, 241 (2000).

IV. ANALYSIS

***3** { 16} Plaintiff claims that it is entitled to recover for breach of contract, fraudulent concealment, UDTP, and unjust enrichment. The Court addresses the claims in that order, finding that each should be dismissed.

A. ***Breach of Contract Claim***

{ 17} Plaintiff has clearly pled that there was a contract that Defendants breached. The question is whether that claim is time-barred. North Carolina imposes a three-year statute of limitations for breach of contract claims. N.C. Gen.Stat. § 1–52(1) (2014). "[A]s soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action is complete and the limitation period begins to run. It does not matter that further damage could occur; such further damage is only an aggravation of the original injury." *Liptrap v. City of High Point,* 128 N.C.App. 353, 355, 496 S.E.2d 817, 819 (1998) (quoting *Pembee Mfg. Corp. v. Cape Fear Const. Co.,* 313 N.C. 488, 493, 329 S.E.2d 350, 354 (1985)). Defendants contend that Plaintiff's breach of contract claim accrued when Defendants first failed to make reports or make royalty payments, so that the claim is outside the limitations period. Plaintiff claims that any limitations period was tolled by Defendants' fraudulent concealment. Alternatively, Plaintiff claims that it is entitled, at a minimum, to royalty payments due within the three years prior to the filing of the Verified Complaint. Defendants counter that all claims have been waived.

i. ***Statute of Limitations***

{ 18} Typically, a contract claim begins to accrue when the breach occurs. *PharmaResearch Corp. v. Mash,* 163 N.C.App. 419, 424, 594 S.E.2d 148, 152 (2004). Occasionally, "equity will deny the right to assert [a statute of limitations] defense when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith." *Watkins v. Cent. Motor Lines, Inc.,* 279 N.C. 132, 139–40, 181 S.E.2d 588, 593 (1971) (quoting *Nowell v. Great Atl. & Pac. Tea Co.,* 250 N.C. 575, 579, 108 S.E.2d 889, 891 (1959)). This results from application of the doctrine of equitable estoppel, which "arises when an individual by his acts, representations, admissions or silence, when he has a duty to speak, intentionally or through culpable negligence," induces another to believe in and rely upon the existence of certain facts to his detriment. *Miller v. Talton,* 112 N.C.App. 484, 488, 435 S.E.2d 793, 797 (1993). To take advantage of equitable estoppel, a party asserting an otherwise stale claim must specifically allege: "(1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts." *Robinson v. Bridgestone/Firestone N.A. Tire, LLC,* 209 N.C.App. 310, 319, 703 S.E.2d 883, 889 (2011) (quoting *Bryant v. Adams,* 116 N.C.App. 448, 460, 448 S.E.2d 832, 838 (1994)). The party asserting the claim must plead the necessary facts with particularity and demonstrate that the defendant's representations delayed it from filing suit. *Duke Univ. v. St. Paul Mercury Ins. Co.,* 95 N.C.App. 663, 673, 384 S.E.2d 26, 42 (1989); *see also* N.C. R. Civ. P. 8(c). Additionally, the claimant must show that it lacked knowledge, did not have the means of ascertaining the real facts, and rightfully relied on the opposing party's conduct to its detriment. *Duke Univ.,* 95 N.C.App. at 673, 384 S.E.2d at 42; *Johnson Neurological Clinic, Inc. v. Kirkman,* 121 N.C.App. 326, 332, 465 S.E.2d 32, 35 (1996). "A party cannot rely on equitable estoppel if it 'was put on inquiry as to the truth and had available the means for ascertaining it.' " *Wade S. Dunbar Ins. Agency, Inc. v. Barber,* 147 N.C.App. 463, 470, 556 S.E.2d 331, 336 (2001) (quoting *Hawkins v. M. & J. Fin. Corp.,* 238 N.C. 174, 179, 77 S.E.2d 669, 673 (1953)).

***4** { 19} Here, the allegations on the face of the Verified Complaint reveal that Medflow did not perform its reporting and payment obligations at least as early as October 20, 2000, when the first minimum royalty payment was due and substantially more than three years prior to when the Verified Complaint was filed. Those allegations would then demonstrate that the claim for any payment is time-barred unless the Agreement is considered an installment contract, with a new claim accruing and a new limitations period beginning upon the failure to make each payment.

{ 20} "Generally, where obligations are payable in installments, the statute of limitations runs against each installment independently as it becomes due." *Martin v. Ray Lackey Enters., Inc.,* 100 N.C.App. 349, 357, 396 S.E.2d 327, 332 (1990). This principle has been applied to annual tax obligations arising out of a contract, lease payments, a computer system service contract, and improper overcharges for workers' compensation insurance. *See id.; U.S. Leasing Corp. v. Everett, Creech, Hancock & Herzig,* 88 N.C.App. 418, 363 S.E.2d 665 (1988); *Northside Pharm., Inc. v. Owens & Minor, Inc.,* No. 88–3059, 1990 N.C.App. LEXIS 2457, 1990 WL 27209 (4th Cir. Feb. 21, 1990); *Jacobs v. Cent. Transp., Inc.,* 891 F.Supp. 1120, 1124–25 (E.D.N.C.1995).

{ 21} Defendants assert that the Agreement should not be considered an installment contract because of how an "installment contract" is defined by North Carolina's version of the Uniform Commercial Code. N.C. Gen.Stat. § 25–2–612(1) (2014) ("An 'installment contract' is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the

contract contains a clause 'each delivery is a separate contract' or its equivalent."). However, authorities have treated agreements falling outside of this definition as installment contracts for statute of limitations purposes. *See, e.g., Ray Lackey Enters.,* 100 N.C.App. 349, 396 S.E.2d 327; *Northside Pharm., Inc. v. Owens & Minor, Inc.,* No. 88–3059, 1990 N.C.App. LEXIS 2457, 1990 WL 27209 (extending the principle to computer servicing contract).

{ 22} Arguably, if the Agreement is an "installment contract," Plaintiff would have an action for payments and reporting obligations due after September 11, 2011. However, the Court need not address this issue because the facts disclosed on the face of the Verified Complaint demonstrate either that Plaintiff waived its rights under the Agreement by its consistent failure to enforce it or that Defendants clearly repudiated their obligations to report and make royalty payments pursuant to the Agreement.

ii. *Waiver and Repudiation*

{ 23} "The essential elements of waiver are (1) the existence, at the time of the alleged waiver, of a right, advantage or benefit; (2) the knowledge, actual or constructive, of the existence thereof; and (3) an intention to relinquish such right, advantage or benefit." *Demeritt v. Springsteed,* 204 N.C.App. 325, 328–29, 693 S.E.2d 719, 721 (2010) (quoting *Fetner v. Granite Works,* 251 N.C. 296, 302, 111 S.E.2d 324, 328 (1959)). "The intention to waive may be expressed or implied from acts or conduct that naturally lead the other party to believe that the right has been intentionally given up." *Klein v. Avemco Ins. Co.,* 289 N.C. 63, 68, 220 S.E.2d 595, 599 (1975) *quoted in Demeritt,* 204 N.C.App. at 329, 693 S.E.2d at 721. An individual may express an intention to relinquish a contractual right when he "does or forbears to do something inconsistent with the existence of the right or of his intention to rely upon that right." *Hardin v. Liverpool & London & Globe Ins. Co.,* 189 N.C. 423, 127 S.E. 353, 354 (1925). This may include, for example, a failure to insist on closing on a contract that has a "time is of the essence" clause. *Phoenix Ltd. P'ship of Raleigh v. Simpson,* 201 N.C.App. 493, 501–02, 688 S.E.2d 717, 723 (2009).

***5** { 24} Christenbury was on notice of its rights to receive written reports and minimum annual royalty payments, but it neither complained of nor insisted on either, even though it had the right and opportunity to do so when Riggi requested contractual amendments in 2001, at which time Christenbury had received no report and no minimum royalty payments. Throughout the period, Christenbury continued to affirm the Agreement by using and updating the software installed pursuant to it.

{ 25} The Court finds that the facts disclosed on the face of the Verified Complaint demonstrate that, by declining to take action in regard to Defendants' failure to submit reports or make royalty payments, Christenbury waived any right to future payments to the extent that the Agreement could appropriately be considered an installment contract. Alternatively, if Christenbury did not waive its rights, Defendants clearly repudiated the contract by their consistent and repeated failure to perform, placing Plaintiff on notice that future reports and payments would not be made.

{ 26} A breach of contract may occur by repudiation, which is "a positive statement by one party to the other party indicating that he will not or cannot substantially perform his contractual duties." *Profile Invs. No. 25, LLC v. Ammons E. Corp.,* 207 N.C.App. 232, 236, 700 S.E.2d 232, 235 (2010) (quoting *Millis Constr. Co. v. Fairfield Saphhire Valley,* 86 N.C.App. 506, 510, 358 S.E.2d 566, 569 (1987)). To result in a breach of contract, "the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute." *Profile Invs.,* 207 N.C.App. at 237, 700 S.E.2d at 235 (quoting *Edwards v. Proctor,* 137 N.C. 41, 44, 91 S.E. 584, 585 (1917)). Even a distinct, unequivocal, and absolute refusal is not a breach unless the adverse party treats it as such. *Id.* Where an individual repudiates his obligations under a contract by clear or unequivocal acts and the adverse party is on notice of the repudiation "in such manner that he is called upon to assert his rights," the statute of limitations begins to run from the time the adverse party learned of the repudiation. *Teachey v. Gurley,* 214 N.C. 288, 199 S.E. 83, 87 (1938).

{ 27} Here, Defendants clearly repudiated their obligations to report and to pay royalties under the Agreement. They advised Christenbury of their intent to market a newer product. They requested an amendment to the Agreement that Christenbury refused. Christenbury was on notice of this repudiation shortly after October 20, 2000, when the first minimum royalty payment was due. Having failed to assert its rights pursuant to the Agreement for approximately fourteen years, a breach of contract claim is now time-barred.

{ 28} The Court further finds that the allegations on the face of the Verified Complaint demonstrate that Plaintiff cannot defeat the application of the statute of limitations by invoking the doctrine of equitable estoppel. Plaintiff did not rightfully rely on Defendants' conduct to forebear

from filing suit, as the Agreement, at a minimum, gave rise to annual royalty obligations that were never paid.

B. *Fraudulent Concealment Claim*

***6** { 29} Fraudulent concealment is a form of misrepresentation entitling a claimant to damages or rescission of a contract. *Friedland v. Gales,* 131 N.C.App. 802, 807, 509 S.E.2d 793, 797 (1998). The elements of fraudulent concealment are (1) concealment of a "[past or existing] material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Hardin v. KCS Int'l., Inc.* 199 N.C.App. 687, 696, 682 S.E.2d 726, 733 (2009) (alteration in original). Where the misrepresentation claim is based on a failure to disclose a material fact, the plaintiff must show the defendant owed him a duty to disclose, "as silence is fraudulent only when there is a duty to speak." *Lawrence v. UMLIC–Five Corp.,* 2007 NCBC LEXIS 20, at *8, 2007 WL 2570256 (N.C.Super. Ct. June 18, 2007).

{ 30} This Court has previously ruled that to specifically plead an omission-based claim, a litigant must allege

> (1) the relationship between plaintiff and defendant giving rise to the duty to speak; (2) the event that triggered the duty to speak or the general time period over which the relationship arose and the fraud occurred; (3) the general content of the information that was withheld and the reason for its materiality; (4) the identity of those under a duty who failed to make such disclosures; (5) what the defendant gained from withholding the information; (6) why the plaintiff's reliance on the omission was reasonable and detrimental; and (7) the damages the fraud caused the plaintiff.

Island Beyond, LLC v. Prime Capital Grp., LLC, 2013 NCBC LEXIS 48, at *19, 2013 WL 5885383 (N.C.Super.Ct. Oct. 30, 2013) (quotations and alterations omitted) (citing Lawrence, 2007 NCBC LEXIS 20, at *9, 2007 WL 2570256 (adopting requirements set out in *Breeden v. Richmond Cmty. Coll.,* 171 F.R.D. 189, 195 (M.D.N.C.1997))).

{ 31} In order to impose a duty to disclose, a plaintiff must demonstrate either that: (1) there is a fiduciary relationship between the parties to the transaction; (2) "a party has taken affirmative steps to conceal material facts from the other;" or (3) "one party has knowledge of a latent defect in the subject matter of the negotiations about which the other party is both ignorant and unable to discover through reasonable diligence." *Harton v. Harton,* 81 N.C.App. 295, 297, 298, 344 S.E.2d 117, 119 (1986).

{ 32} Plaintiff contends that Defendants had a duty to speak because Christenbury "did not have an equal ability to ascertain that Medflow had further developed, modified and sold the Enhancements, and derivatives thereof, and received fees therefrom—all information [was] uniquely within the knowledge of Mr. Riggi and Medflow." (Verified Compl. ¶ 38.) Christenbury further argues that a duty to speak can arise from contract, citing *Oberlin Capital.* 147 N.C.App. at 59, 554 S.E.2d at 846 ("A person's obligation or duty to act may flow from explicit requirements, *i.e.* [sic], statutory or contractual, or may be implied from attendant circumstances." (internal quotation and citation omitted)). But here, if there was a duty to speak imposed by contract, it was clear to Christenbury that the duty had been breached when the first report and minimum payment was due.

***7** c3} The Court then need not decide whether the Agreement imposed a duty to speak, as the failure to adhere to any such duty was clear to Christenbury outside the limitations period.

{ 34} Further, the Verified Complaint contains no allegations supporting any potential finding that Defendants made representations to induce Christenbury not to assert rights under the Agreement or on which Christenbury relied when refraining from taking action. "[W]hen the party relying on the false or misleading representation could have discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence." *Id.* at 60, 554 S.E.2d at 847 (quoting *Hudson–Cole Dev. Corp. v. Beemer,* 132 N.C.App. 341, 346, 511 S.E.2d 309, 313 (1998)).

{ 35} Seeking to satisfy this requirement, Christenbury contends that the relevant information was "uniquely within the knowledge of Mr. Riggi and Medflow" (Verified Compl. ¶ 38), supporting the conclusion that

Christenbury did not have the ability to discover the truth, excusing any further requirement to investigate, to allege that it was denied an opportunity to investigate, or to allege that reasonable diligence would not have revealed the true facts. Essentially, the argument is that Defendants' failure to make royalty payments was equivalent to a representation that no sales had been made. However, that argument is defeated by the fact that the Agreement required a report and minimum annual royalty payments whether or not sales had occurred. Moreover, Plaintiff took no action upon Defendants' failure to make a report or to pay minimum royalties. These facts do not excuse Christenbury's failure to make an inquiry merely because Defendants might have additional information that was uniquely within their knowledge.

{ 36} The Court need not rely on the fact that the information concerning actual sales of the platform and Enhancements was published in a May 2002 *Ophthalmology Management* article. (Verified Compl. ¶ 18.) Indeed, Christenbury indicated that it had no knowledge of this article at the time it was published. The article's existence would, however, suggest that there was independent public information available to Christenbury had it chosen to make an inquiry when it did not receive reports or royalty payments pursuant to the Agreement. The publication of at least some of this information also undermines Plaintiff's allegation that it was "uniquely within the knowledge of Mr. Riggi and Medflow." (Verified Compl. ¶ 38.)

{ 37} In sum, the Verified Complaint fails to state a claim for fraudulent concealment. *Eastway Wrecker Serv. v. City of Charlotte,* 165 N.C.App. 639, 645, 599 S.E.2d 410, 414 (2004) ("If the complaint fails to allege that the plaintiff was denied the opportunity to investigate or that the plaintiff could not have learned the true facts by exercise of reasonable diligence, the complaint fails to state causes of action for fraudulent concealment and negligent misrepresentation.") (internal quotation and alteration marks omitted).

***8** { 38} Even if the Verified Complaint were adequate to state a claim, it would be time-barred. The statute of limitations governing a fraud claim is three years and begins to run from the time the claimant should have discovered the facts constituting the fraud. N.C. Gen.Stat. § 1–52(9). Plaintiff was on inquiry notice by no later than November 2000 that Defendants were not performing any of their obligations under the Agreement.

C. *UDTP Claim*

{ 39} Christenbury reiterates its breach of contract claim and fraudulent concealment claim as a UDTP claim. The Verified Complaint demonstrates no aggravating circumstances adequate to raise the breach of contract claim to a UDTP violation. *See Gray v. N.C. Ins. Underwriting Ass'n,* 352 N.C. 61, 75, 529 S.E.2d 676, 685 (2000) (noting that a party must show "substantial aggravating circumstances attendant to the breach") (citing *Branch Banking & Trust,* 107 N.C.App. at 62, 418 S.E.2d at 700 (1992) ("[A] mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain [a UDTP action].")).

{ 40} Further, any UDTP claim is also time-barred by the four-year statute of limitations governing such claims. N.C. Gen.Stat. § 75–16.2 (2014). The limitations period for UDTP claims based on fraud and contract accrue when the claimant had notice of the breach or fraud. *Pembee Mfg. Corp.,* 313 N.C. at 493 S.E.2d at 354 (holding UDTP claim based on breach of contract accrues when claimant "becomes aware or should reasonably have become aware of the existence of the injury"); *Nash v. Motorola Comm'cns & Elecs., Inc.,* 96 N.C.App. 329, 331, 385 S.E.2d 537, 538 (1989) (holding UDTP claims based on fraud accrue "at the time the fraud is discovered or *should have been discovered* with the exercise of reasonable diligence.").

{ 41} As discussed above, Plaintiff should have reasonably become aware of the existence of its injury or the alleged misrepresentation shortly after October 20, 2000, when the first minimum royalty payment was due. Plaintiff did not file suit until almost fourteen years later. Accordingly, the UDTP claim is time-barred.

D. *Unjust Enrichment*

{ 42} Where a party has entered into an express contract concerning the subject matter of the dispute, the party is precluded from equitable recovery in quantum meruit. *Ron Medlin Constr. v. Harris,* 364 N.C. 577, 585–86, 704 S.E.2d 486, 492 (2010). Here, Plaintiff's own allegations demonstrate that the claim arises from an express contract concerning the platform and Enhancements. (Verified Compl. ¶ 31). Further, this claim, even if otherwise valid, is likely time-barred for the same reason the statute of limitations has run on the breach of contract claim. *See* N.C. Gen.Stat. § 1–52(1).

V. CONCLUSION

{ 43} For the foregoing reasons, the Motions are granted. Plaintiff's Verified Complaint is DISMISSED.

IT IS SO ORDERED.

All Citations

Not Reported in S.E.2d, 2015 WL 3823817, 2015 NCBC 61

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Clavelo v. Bank of Am., N.A.

United States District Court for the Middle District of Florida, Tampa Division

September 13, 2018, Decided; September 13, 2018, Filed

CASE NO. 8:17-cv-2644-T-26TGW

Reporter
2018 U.S. Dist. LEXIS 178789 *

JAVIER CLAVELO, Plaintiff, v. BANK OF AMERICA, N.A., Defendant.

Prior History: *Torres v. Bank of Am., N.A., 2017 U.S. Dist. LEXIS 220955 (M.D. Fla., Aug. 4, 2017)*

Core Terms

foreclosure, Modification, inextricably, intertwined

Counsel: **[*1]** For Javier Clavelo, Plaintiff: Caitlyn Corrine Prichard, LEAD ATTORNEY, Aylstock, Witkin, Kreis & Overholtz, PLLC, Pensacola, FL USA; John W. Adams, Jr., LEAD ATTORNEY, Adams Law Association, P. A., Valrico, FL USA.

For Bank of America, N.A., Defendant: Ira Scot Silverstein, James Randolph Liebler, II, LEAD ATTORNEYS, Liebler, Gonzalez & Portuondo, PA, Miami, FL USA.

Judges: RICHARD A. LAZZARA, UNITED STATES DISTRICT JUDGE.

Opinion by: RICHARD A. LAZZARA

Opinion

ORDER

UPON DUE AND CAREFUL CONSIDERATION of Defendant's Motion to Dismiss Plaintiff's Amended Complaint (Dkt. 25), the allegations of the amended complaint (Dkt. 16), and the entire file,[1] the Court finds the motion is due to be granted and the amended complaint dismissed without prejudice for lack of subject matter jurisdiction as will be more fully explained below.[2]

Defendant Bank of America, N.A. (Bank of America) seeks a dismissal of the one-count amended complaint for fraud on several grounds, one of which is the Rooker-Feldman doctrine.[3] Under that doctrine, federal courts, other than the Supreme Court, do not have jurisdiction to review final state court decisions. See *Target Media Partners v. Specialty Mktg. Corp., 881 F.3d 1279, 1285-86 (11th Cir. 2018)* (explaining Rooker-Feldman doctrine and recognizing its limited scope **[*2]** "to bar only those claims asserted by the parties who have lost in state court and then ask the district court,

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[1] The Court notes that Plaintiff's counsel failed to provide the Court a response to the motion which was due no later than September 11, 2018. See docket 28 (endorsed order granting motion for extension of time to file response and directing that response be filed no later than September 11, 2018).

[2] In light of this determination, the Court need not address Bank of America's other grounds for dismissal. See *Boda v. United States, 698 F. 2d 1174, 1177 n.4 (11th Cir. 1983)* (noting that "[w]here dismissal can be based on lack of subject matter jurisdiction and failure to state a claim, the court should dismiss on only the jurisdictional grounds. This dismissal is without prejudice."); accord *Dimaio v. Democratic Nat'l Comm., 520 F. 3d 1299, 1303 (11th Cir. 2008)* (citing and quoting Boda).

[3] The doctrine evolved from the two United States Supreme Court cases from which its name is derived, *Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923)* and *D.C. Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983)*.

ultimately, to review and reject a state court's judgments."). If a claim is one "inextricably intertwined" with a state court judgment and would "effectively nullify the state court judgment," then Rooker-Feldman bars the claim if there was reasonable opportunity to raise the particular claim in the state court proceeding. Id.

For the reasons set forth and the authority cited in fifteen other nearly identical cases involving alleged fraud perpetrated by Bank of America in facilitating illegal and fraudulent property foreclosures,[4] this Court finds that the Plaintiff's claim for fraud is barred here.[5] Plaintiff alleges that Bank of America tricked him into defaulting on the loan, instructed him to make "trial payments" to Bank of America which it never refunded, induced him to incur unnecessary costs for sending multiple applications for loan modification under the Home Affordable Modification Program (HAMP) and related financial documents to Bank of America, damaged his credit, and caused the loss of his home and equity in the home. The issues of the fraud in this case could **[*3]** have been raised in the state court foreclosure before final judgment was entered. It does not change the result that the Plaintiff alleges he did not know or could not have reasonably discovered the facts he now knows until he retained his attorney in this case. The fraud alleged here is inextricably intertwined with the state foreclosure judgment.

Finally, Plaintiff's request to amend the complaint embodied in the response to the motion to dismiss is denied for two reasons. First, such a request buried in a response to a motion is not a proper procedural mechanism for seeking the filing of an amended complaint. See *Long v. Satz, 181 F. 3d 1275, 1279-80 (11th Cir. 1999)*. Second, Plaintiff has failed to submit a proposed amended complaint or otherwise explain the substance of a proposed amended complaint. Id.

DONE AND ORDERED at Tampa, Florida, on September 13, 2018.

/s/ *Richard A. Lazzara*

RICHARD A. LAZZARA

UNITED STATES DISTRICT JUDGE

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[4] These case are cited at footnotes 1 and 8 of Bank of America's motion to dismiss. The Court notes that Plaintiff's primary counsel in those cases is Plaintiff's primary counsel in this case. The Court further notes that he did not appeal those orders of dismissals, the time for appealing has expired, and he failed to even attempt to distinguish them in his response to Bank of America's motion to dismiss.

[5] See, e.g., *Ocampo v. Bank of America, N.A., 2018 U.S. Dist. LEXIS 137052, 2018 WL 3862560 (M.D. Fla. Aug. 14, 2018)* (citing *Figueroa v. Merscorp, Inc., 766 F.Supp.2d 1305 (S.D. Fla. 2011)*, aff'd, *477 F. App'x 558 (11th Cir. 2012)* (unpublished) and *Nivia v. Nation Star Mortg., LLC, 620 F. App'x 822 (11th Cir. 2015)* (unpublished)); *Carmenates v. Bank of America, N.A., 2018 U.S. Dist. LEXIS 123094, 2018 WL 3548727 (M.D. Fla. July 24, 2018)* (same). As in footnote 3 to this order, Plaintiff's primary counsel in that case is the same as Plaintiff's primary counsel in this case, and he did not appeal the order of dismissal in Carmenates and the time for appealing has expired.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 17-24153-CIV-GAYLES

MARIE COLES,
Plaintiff,

v.

BANK OF AMERICA, N.A.,
Defendant.
_____/

ORDER

THIS CAUSE comes before the Court on Defendant Bank of America, N.A.'s Motion and Memorandum in Support by Defendant Bank of America, N.A., to Dismiss Plaintiff's Third Amended Complaint ("Motion") [ECF No. 61]. Defendant argues, *inter alia*, that the Third Amended Complaint [ECF No. 57] should be dismissed because this Court has no subject matter jurisdiction over Plaintiff Marie Coles's claims under the *Rooker-Feldman* doctrine. The Court has reviewed the Motion, the parties' submissions, the record, and the applicable law. For the reasons that follow, Defendant's Motion is granted.

I. BACKGROUND[1]

A. The Home Affordable Modification Program

This case revolves around Defendant's alleged scheme to defraud millions of homeowners in the wake of the 2008 financial crisis. Following the stock market crash, Congress allocated billions of taxpayer dollars to newly-created programs in exchange for the recipients' agreement

[1] For purposes of Defendant's Motion, the Court accepts as true all facts in the Third Amended Complaint, save for the jurisdictional facts, which Plaintiff is required to prove as the Supreme Court explained in *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). *See infra* pp. 4–5.

to implement certain congressionally-specified mechanisms designed to lessen the impact of the financial crisis on every-day Americans.

The Home Affordable Modification Program ("HAMP") was intended to help borrowers keep their homes. To receive federal funds from HAMP, Defendant agreed to use "reasonable efforts" to help homeowners refinance their mortgages. The program worked as follows: a borrower would contact Defendant and request to refinance her loan. Defendant would screen her file and determine if she qualified. After receiving pre-approval (known as a HAMP Loan Workout Plan), the borrower entered a three-month trial phase during which she would make lower monthly mortgage payments and simultaneously submit financial paperwork to obtain a permanent modification. If payments were timely made and the paperwork was approved, the borrower's mortgage would be permanently modified. After a few years of compliance with the modified mortgage rate, Defendant could slowly increase the interest rate in anticipation of the economy's revival. Defendant received "incentive payments" from the federal government for every homeowner who received a HAMP modification.

Over the past few years, several lawsuits have been filed claiming that Defendant fraudulently operated its HAMP program in order to retain the incentive payments and profit off the borrower's losses. These lawsuits are bolstered by numerous whistleblower affidavits. In one such case, Defendant paid back one billion dollars of taxpayer money. *See United States v. Bank of America, N.A., et al.*, No. 1:11-cv-03270 (E.D.N.Y. 2014).

B. Factual History

In 2002, Plaintiff executed a mortgage and note for her home in Miami in the amount of approximately $80,000.00. Plaintiff's loan was refinanced in 2004 and then again in 2006. By that point, Defendant serviced her mortgage. In March 2009, Plaintiff reached out to Defendant and

requested a HAMP modification. In June or July of the same year, Defendant's loan representative advised her to stop making her regular mortgage payments because HAMP eligibility required that a borrower be in default. Plaintiff accordingly stopped making her payments and defaulted. Plaintiff received a letter from Defendant stating that she was "approved" for the modification in August 2009 and began making trial payments that month.

Plaintiff then submitted financial documents in pursuit of a permanent modification. She received a letter from Defendant confirming their receipt on November 30, 2009. Shortly thereafter, Defendant told Plaintiff that some of the documents were "missing or incorrect." Plaintiff resubmitted them less than a month later. Defendant found another issue with them. Plaintiff ultimately resubmitted her documents at least six different times in response to Defendant's enquiries about lost, missing, or incorrect documents. During this time, Defendant's representatives continued to advise her to stay in default.

Because of how long it took to process her paperwork, Plaintiff's application was never approved for a permanent modification. Despite this, she made six trial payments of $967.50 on Defendant's instruction. Plaintiff also alleges that during this time Defendant conducted illegal "property inspections" on her house and charged her fees for each one. Plaintiff alleges that Defendant knowingly deposited her trial payments into a separate account, one not tied to her mortgage, so that Defendant could keep those funds for its own profit. And because Defendant did not apply those payments to her account, Plaintiff remained in default.

Defendant ultimately foreclosed on Plaintiff's home on February 10, 2014. As part of the foreclosure, a judgment in the amount of $329,000.05 was entered against Plaintiff in state court. Plaintiff now contends that Defendant's loan officer lied to her in the initial conversations about her HAMP eligibility, application process, and foreclosure period, and that Defendant intentionally

lost her documents and delayed her application so that she would lose her home. Plaintiff claims that Defendant profited from her losses by keeping the trial payments and inspection fees and foreclosing on her home. Finally, Plaintiff asserts that she had no way of knowing about Defendant's scheme before her lawyers described the lawsuits against Defendant.

C. Procedural History

Plaintiff's Third Amended Complaint, filed on August 22, 2018, asserts claims of (1) common law fraud – Count I and (2) violations of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.01, *et seq.* – Count II. [ECF No. 57]. Plaintiff seeks damages for (1) loss of funds paid to Defendant in the form of unapplied trial payments, (2) fraudulent inspections, (3) costs incurred for repeated attempts to send in her HAMP application, and (4) loss of equity and future equity in the home. [*Id.* ¶ 105]. Defendant filed its Motion to Dismiss on September 5, 2018. [ECF No. 61]. The Motion is now ripe for review.

II. LEGAL STANDARD

A motion to dismiss for lack of subject matter jurisdiction brought pursuant to Federal Rule of Civil Procedure 12(b)(1) may present either a facial or a factual challenge to the complaint. [2] *See McElmurray v. Consol. Gov't*, 501 F.3d 1244, 1251 (11th Cir. 2007). In a facial challenge, a court is required only to determine if the plaintiff has "sufficiently alleged a basis for subject matter jurisdiction." *Id.* at 1251. Furthermore, "the court must consider the allegations in the plaintiff's complaint as true." *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981).[3] By contrast, a factual attack "challenge[s] 'the existence of subject matter jurisdiction in fact, irrespective of the pleadings,

[2] Defendant raises several arguments in its Motion. Because the Court agrees that it lacks subject matter jurisdiction over this case pursuant to the *Rooker-Feldman* doctrine, it will not address the remaining arguments.

[3] The Eleventh Circuit has adopted as binding precedent all decisions of the former Fifth Circuit rendered before October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

and matters outside the pleadings . . . are considered.'" *McElmurray*, 501 F.3d at 1251 (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)). In a factual attack, "no presumptive truthfulness attaches to [a] plaintiff's allegations," *Lawrence*, 919 F.2d at 1529 (citation and internal quotation marks omitted), and the plaintiff bears the burden to prove the facts sufficient to establish subject matter jurisdiction. *See OSI, Inc. v. United States*, 285 F.3d 947, 951 (11th Cir. 2002).

Here, Defendant has advanced a factual attack on Plaintiff's Third Amended Complaint because it contends that this Court lacks subject matter jurisdiction under the *Rooker-Feldman* doctrine. *See, e.g., Christophe v. Morris*, 198 F. App'x 818 (11th Cir. 2006) (per curiam) (affirming a district court's decision to dismiss the plaintiff's complaint where the district court had considered *Rooker-Feldman* as a factual attack on its subject matter jurisdiction). Accordingly, this Court may properly consider evidence outside the pleadings in determining whether the Third Amended Complaint should be dismissed.

III. DISCUSSION

"The *Rooker-Feldman* doctrine makes clear that federal district courts cannot review state court final judgments because that task is reserved for state appellate courts or, as a last resort, the United States Supreme Court." *Casale v. Tillman*, 558 F.3d 1258, 1260 (11th Cir. 2009) (per curiam).[4] The doctrine, named for *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), "is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic*

[4] There is no procedural bar to the application of the *Rooker-Feldman* doctrine here. The state foreclosure judgment was entered on February 10, 2014; Plaintiff did not appeal; and the present federal action was not filed until November 13, 2017. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 208, 284 (2005); *Nicholson v. Shafe*, 558 F.3d 1266, 1276 (11th Cir. 2009).

Indus. Corp., 544 U.S. 280, 284 (2005). "*Rooker* and *Feldman* exhibit the limited circumstances in which [the Supreme Court's] appellate jurisdiction over state-court judgments precludes a United States district court from exercising subject-matter jurisdiction in an action it would otherwise be empowered to adjudicate under a congressional grant of authority." *Id.* at 291 (internal citation omitted). The doctrine bars federal claims raised in the state court and claims "inextricably intertwined" with the state court's judgment. *See Feldman*, 460 U.S. at 482 n.16. "A claim is 'inextricably intertwined' if it would 'effectively nullify' the state court judgment, or [if] it 'succeeds only to the extent that the state court wrongly decided the issues.'" *Casale*, 558 F.3d at 1260 (quoting *Goodman ex rel. Goodman v. Sipos*, 259 F.3d 1327, 1332 (11th Cir. 2001)) (internal quotation marks omitted); *see also Springer v. Perryman*, 401 F. App'x 457, 458 (11th Cir. 2010) (per curiam).

A. Count I – Common Law Fraud

The Court finds instructive the reasoned analysis of Judge Altonaga in a virtually identical case. In *Captain v. Bank of America, N.A.*, plaintiffs executed a HAMP Loan Workout Plan after falling behind in their mortgage payments. No. 18-60130-CIV, 2018 WL 5298538, at *1 (S.D. Fla. Oct. 25, 2018). They were then "approved" and began making trial payments. *Id.* Plaintiffs were repeatedly told, though, that their HAMP application documents and payments were "not received." *Id.* Ultimately, their home was foreclosed upon. *Id.*

Judge Altonaga held that the court lacked jurisdiction under *Rooker-Feldman* for two reasons.[5] First, she found that plaintiffs had constructive notice of fraud before the foreclosure judgment was entered. *Id.* at *5. Underlying her decision was that plaintiffs were aware of the

[5] The case before Judge Altonaga was decided at summary judgment. Although the instant case proceeds on a Motion to Dismiss, the legal issue and analysis presented is the same because *Rooker-Feldman* is a jurisdictional bar. *See Rance v. D.R. Horton, Inc.*, No. 07-80402-CIV, 2009 WL 10668926, at *3 (S.D. Fla. Aug. 11, 2009), *aff'd*, 392 F. App'x 749 (11th Cir. 2010).

"irregularities" in the process: they were "approved" for a HAMP modification and had repeatedly submitted HAMP documents—and payments—but were told that nothing was received. *Id.* As such, "[p]laintiffs had a reasonable opportunity to raise their fraud claim" in the state court proceedings and were barred from doing so in federal court. *Id.* at *6. Second, Judge Altonaga held that plaintiffs' fraud claim was inextricably intertwined with the foreclosure action. *Id.* at *7. Judge Altonaga found that fraud was an equitable defense to foreclosure, which if raised before the state court would have likely changed its result. *Id.* Judge Altonaga also found that the damages, which sought compensation for the lost house and the costs spent pursuing HAMP modifications, were intertwined with the state court judgment because they "would effectively nullify the state court judgment and necessarily hold that the state court wrongly decided the issues." *Id.* at *7 (citing *Casale*, 558 F.3d at 1260) (internal quotations omitted).

The parties here have raised identical arguments. Defendant cites a litany of federal cases—each of which "dismiss[es] actions where plaintiffs were, in reality, challenging state-foreclosure judgments"—and argues that Plaintiff's claims are similarly inextricably intertwined with the state court judgment. *Figueroa v. Merscorp, Inc.*, 766 F. Supp. 2d 1305, 1320 (S.D. Fla. 2011). Plaintiff counters that *Rooker-Feldman* does not apply because (1) she was unaware of the fraud at the time of the state court proceedings and judgment and (2) her requested damages would not disturb the state court judgment.

First, the Court finds that Plaintiff had constructive notice of her fraud claim because she was aware of the irregular events prior to the state court judgment. Specifically, Plaintiff was aware of her own six modification payments and her repeated attempts to send Defendant her financial paperwork in response to its enquiries about lost, missing, and/or incorrect documents. *Casale*, 558 F.3d at 1260; *Figueroa*, 766 F. Supp. 2d at 1325–26. Thus, like the plaintiffs in *Captain*, she

"should have known of the basis of [her] fraud claim" at the time of the state court judgment. 2018 WL 5298538, at *5.

Second, the Court finds that Plaintiff's suit is inextricably intertwined with the state court judgment. Plaintiff's fraud claim would have constituted an equitable defense to foreclosure before the state court. *See id.* at *6 (citing *Najera v. NationsBank Tr. Co., N.A.*, 707 So. 2d 1153, 1155 (Fla. 5th DCA 1998)). Had she raised it at that time, she may not have lost her home. *Id.* This Court cannot retroactively provide relief for her failure to do so.

Plaintiff also seeks damages that would "effectively nullify the state court judgment and necessarily hold that the state court wrongly decided the issues." *Id.* at *7 (citing *Casale*, 558 F.3d at 1260); *see also Nivia v. Nation Star Mortg., LLC*, 620 F. App'x 822, 825 (11th Cir. 2015) (per curiam) ("The inquiry is whether either the damages award would annul the effect of the state court judgment or the state court's adoption of the legal theory supporting the award would have produced a different result."), *cert. denied Nivia v. Aurora Loan Servs., LLC*, 136 S. Ct. 909 (2016). Plaintiff seeks compensation for lost equity and future equity in the house, HAMP payments, and inspection fees. These are identical to the damages sought and rejected in *Captain*. 2018 WL 5298538, at *7. Here, as there, success on the merits would financially restore her loss—which, for practical purposes, would void the result that the state court reached.

Plaintiff tries to dodge this bullet by arguing that *Rooker-Feldman* does not bar a federal claim simply because it may yield findings inconsistent with a state court judgment. *See Exxon*, 544 U.S. at 293 (noting that jurisdiction exists "[i]f a federal plaintiff present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which [s]he was a party" (internal quotations omitted)). Plaintiff's claims do not fit into this exception because such cases are factually distinguishable. In *Arthur v. JP Morgan Chase Bank*, for example,

plaintiff sought money damages "for alleged criminal and fraudulent conduct in the *generation* of foreclosure-related documents"—the physical creation of fraudulent documents used to foreclose on the home. 569 F. App'x 669, 675 (11th Cir. 2014) (emphasis in original). No such allegation exists here. Plaintiff also does not seek damages based on Defendant's wrongful conduct during the state court proceedings, *see Kohler v. Garlets*, 578 F. App'x 862, 864 (11th Cir. 2014), or claim a broader injury emanating from the state court judgment, *see Nero v. Mayan Mainstreet INV 1 LLC, et al.*, No. 6:14-cv-1363-Orl-40TBS, 2014 WL 12610668 at *11–12 (M.D. Fla. Nov. 13, 2014) (asserting RICO claims based on fraudulent mortgage assignments).

As Plaintiff seeks solely to restore her financial losses, the Court concludes that a judgment in her favor would necessarily annul the state court judgment. The suits are therefore inextricably intertwined.

B. Count II – Florida Deceptive and Unfair Trade Practices Act

The Court further finds that *Rooker-Feldman* bars Count II, Plaintiff's claim for violation of Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.01, *et seq.* ("FDUTPA"). The Eleventh Circuit squarely addressed this issue in *Nivia v. Nation Star Mortgage, LLC*, holding that a FDUTPA challenge to deceptive trade practices of failing to modify a loan and denying fair opportunities to cure a default "effectively amounted to an equitable defense to the foreclosure[] and the adoption of that theory would have produced a different result in state court." *Captain*, 2018 WL 5298538, at *6 (citing *Nivia*, 620 F. App'x at 825). Had Plaintiff raised her allegations of fraudulent lending practices—of which she had constructive notice at the time of the state court judgment—she may not have lost her home. But "[b]y failing to raise [her] claim in state court[,] [she] forfeit[ed] [her] right to obtain review of the state court decision in any federal court." *Nivia*, 620 F. App'x at 825 (citing *Feldman*, 460 U.S. at 482 n.16). And now, any review of her argument

on the merits could end with a result that the state court entered a legally invalid judgment, which the Court cannot allow. *Id.*

* * *

Accordingly, the Court finds that Plaintiff's claims are barred by the *Rooker-Feldman* doctrine and must be dismissed for lack of subject matter jurisdiction. *See generally Flournoy v. Gov't Nat'l Mortg. Ass'n*, 156 F. Supp. 3d 1375, 1380 (S.D. Fla. 2016).

IV. CONCLUSION

Based on the foregoing, it is **ORDERED AND ADJUDGED** that the Motion and Memorandum in Support by Defendant Bank of America, N.A., to Dismiss Plaintiff's Third Amended Complaint [ECF No. 61] is **GRANTED**. Plaintiff's Third Amended Complaint [ECF No. 57] is **DISMISSED WITH PREJUDICE** for lack of subject matter jurisdiction.

All pending motions are **DENIED AS MOOT**.

The Clerk is directed to mark this case **CLOSED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 20th day of May, 2019.

DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE

2018 WL 5024083
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Tampa Division.

Gaspar COLON and Guadalupe Celi, Plaintiffs,
v.
BANK OF AMERICA, N.A., Defendant.

Case No. 8:17-cv-2549-T-33JSS
|
Signed 10/17/2018

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ORDER

VIRGINIA M. HERNANDEZ COVINGTON, UNITED STATES DISTRICT JUDGE

***1** This matter comes before the Court upon consideration of Defendant Bank of America, N.A.'s Motion for Summary Judgment (Doc. # 41), filed on August 31, 2018. Plaintiffs Gaspar Colon and Guadalupe Celi responded on October 4, 2018, (Doc. # 54), and Bank of America has replied, (Doc. # 58). For the reasons that follow, the Motion is granted, and the case is dismissed without prejudice for lack of subject matter jurisdiction.

I. Background

On June 27, 2017, over seventy Plaintiffs sued Bank of America in one action in the Middle District of Florida. Torres et al. v. Bank of Am., N.A., No. 8:17-cv-1534-T-26TBM, (M.D. Fla. June 27, 2017)(Doc. # 1). Plaintiffs Colon and Celi were two of the many Plaintiffs in the original lawsuit. Plaintiffs alleged Bank of America ("BOA") committed common law fraud in its administration of the Home Affordable Modification Program ("HAMP"). HAMP was implemented by the federal government in March of 2009, to help homeowners facing foreclosure. (Doc. # 21 at ¶ 9). BOA entered into a Servicer Participation Agreement with the federal government in which BOA was required to use reasonable efforts to effectuate any modification of a mortgage loan under HAMP. (Id. at ¶ 10). The federal government, in exchange for BOA's participation in HAMP, agreed to compensate BOA for part of the loss attributable to each modification. (Id. at ¶ 11). Plaintiffs' claims were all based on their attempts to secure loan modifications with BOA under HAMP.

In the original lawsuit, BOA filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), (Torres Doc. # 12), and Plaintiffs amended their complaint, (Torres Doc. # 16). Following BOA's second motion to dismiss, (Torres Doc. # 17), the presiding judge severed the claims and required Plaintiffs to sue separately, (Torres Doc. # 19). Plaintiffs Colon and Celi filed a separate complaint on October 30, 2017. (Doc. # 1). Three months later, on March 7, 2018, Plaintiffs filed an Amended Complaint. (Doc. # 21).

The Amended Complaint alleges BOA committed four fraudulent acts: (1) falsely telling Plaintiffs that "they can't be current on their mortgage to qualify for a HAMP loan modification" and failing to tell Plaintiffs that they could qualify for HAMP if default was reasonably foreseeable ("HAMP Eligibility Claim"); (2) falsely telling Plaintiffs the requested supporting financial documents Plaintiffs had submitted to BOA were incomplete ("Supporting Documents Claim"); (3) falsely telling Plaintiffs that they were approved for a HAMP modification and needed to start making trial payments ("HAMP Approval Claim"); and (4) fraudulently omitting how inspection fees charged to Plaintiffs' account would be applied ("Inspection Fee Claim"). (Id. at ¶¶ 38, 41, 48, 55).

BOA moved to dismiss (Doc. # 30), and the Court granted that motion in part and denied it in part, (Doc. # 36). The Court dismissed the Supporting Documents Claim, HAMP Approval Claim, and Inspection Fee Claim with prejudice, but allowed the HAMP Eligibility Claim to survive. (Id.).

***2** Regarding the HAMP Eligibility Claim, Plaintiffs allege that on November 4, 2009, a BOA representative

told Plaintiffs that a modification requires a default. (Doc. # 21 at ¶ 38). According to Plaintiffs, a modification in fact requires either a default or that default be "reasonably foreseeable." (Id.). Allegedly, BOA's misrepresentation was "specifically designed by BOA to set Plaintiffs up for foreclosure." (Id. at ¶ 39). Plaintiffs allegedly relied on BOA's misrepresentation, stopped paying their mortgage, and "fell into default status." (Id. at ¶ 40). They ascribe "the loss of their home and the equity in that home" to BOA's alleged misrepresentation. (Id. at ¶¶ 40, 53).

BOA moved for summary judgment on August 31, 2018, arguing, among other things, that Plaintiffs' claim is barred by the Rooker-Feldman doctrine. (Doc. # 41). Plaintiffs have responded, (Doc. # 54), and BOA has replied, (Doc. # 58). The Motion is now ripe for review.

II. Discussion

Bank of America contends that Plaintiffs are trying to " 'effectively nullify' the state court foreclosure judgment" in violation of the Rooker-Feldman doctrine. (Doc. # 41 at 16). As other judges in this District have determined in nearly identical cases,[1] the Court finds that Plaintiffs' claim is barred by the Rooker-Feldman doctrine.

"Under the Rooker–Feldman doctrine, a district court lacks jurisdiction over claims 'brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.' " Valentine v. BAC Home Loans Servicing, L.P., 635 F. App'x 753, 756 (11th Cir. 2015)(quoting Exxon Mobil Corp.v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005)). "The doctrine extends to claims involving issues that are 'inextricably intertwined with the state court judgment,' i.e., claims that would 'effectively nullify' the state court judgment or that would 'succee[d] only to the extent that the state court wrongly decided the issues.' " Id. at 756–57 (quoting Casale v. Tillman, 558 F.3d 1258, 1260 (11th Cir. 2009)).

"In deciding this relationship, the court focuses on the federal claim's relationship to the issues involved in the state court proceeding, instead of on the type of relief sought by the plaintiff." Velardo v. Fremont Inv. & Loan, 298 F. App'x 890, 892 (11th Cir. 2008). "Notably, the Eleventh Circuit and many district courts have applied the Rooker-Feldman doctrine to dismiss actions where a plaintiff was seeking, in reality, to challenge state-court foreclosure judgments." Goldman v. HSBC Bank USA, No. 9:15-CV-80956, 2015 WL 5269809, at *1 (S.D. Fla. Sept. 10, 2015).

***3** Plaintiffs argue that Nivia v. Nation Star Mortgage, LLC, 620 F. App'x 822 (11th Cir. 2015), establishes that the Rooker-Feldman doctrine is inapplicable to this case. (Doc. # 54 at 6-7). Plaintiffs cite Nivia for the proposition that "claims under...HAMP are not barred by the Rooker-Feldman doctrine." (Id. at 7).

On the contrary, Nivia supports the application of the Rooker-Feldman doctrine to this fraud case. While the Eleventh Circuit held that the HAMP claim was not barred by the Rooker-Feldman doctrine, that was largely due to the timeline of that case. In Nivia, the plaintiff applied for a HAMP modification *after* the state-court foreclosure judgment was entered. As the Eleventh Circuit explained, "[t]he homeowners alleged only that the lenders failed to respond adequately to their September 2012 request for a loan modification, which could not have been at issue in the foreclosure proceeding that concluded in December 2011." Nivia, 620 F. App'x at 825. Thus, Nivia does not stand for the proposition that any claims related to the issuance of HAMP modifications are not barred by the Rooker-Feldman doctrine.

And, importantly, the Nivia court held that the claim under Florida's Deceptive and Unfair Trade Practices Act (FDUTPA) was barred. For the FDUTPA claim, the plaintiff homeowners alleged the defendant lender "failed to help [them]...modify their loan[,] denying them any possibility to cure their default, which constitute[d] a deceptive practice to the public in...light of the lenders' public representations that loan modifications were generally available." Id. (internal quotation marks omitted).

The Eleventh Circuit "construe[d] this allegation to extend beyond the lenders' denial of the September 2012 loan modification request and to include conduct before the foreclosure judgment." Id. So, the Eleventh Circuit concluded that, "[i]n effect, the homeowners' claim amounts to an equitable defense to foreclosure that they failed to raise before the state court," and that "success on the merits of the FDUTPA claim would require a determination that the state court entered the forfeiture judgment 'wrongly,' i.e., that the judgment was legally invalid." Id.

Another Eleventh Circuit case supports that the Rooker-Feldman doctrine bars Plaintiffs' claim. In the district court, a plaintiff mortgagor asserted a RICO claim against the defendant bank that had earlier procured a foreclosure judgment against the mortgagor in state court. Figueroa v.

Merscorp, Inc., 766 F. Supp. 2d 1305, 1308-25 (S.D. Fla. 2011), aff'd, 477 F. App'x 558 (11th Cir. 2012). The mortgagor sought "damages arising out of the loss of his home" and alleged that the bank had committed mail and wire fraud in its prosecution of the state foreclosure action as part of a "scheme" to wrongfully obtain foreclosure judgments. Id. at 1311-23.

The district court dismissed the RICO claim under the Rooker-Feldman doctrine because that claim was "inextricably intertwined" with the foreclosure judgment. Id. at 1323-24. The Eleventh Circuit affirmed, writing: "Figueroa was a state-court loser in his state court foreclosure proceeding. The state court judgment formed the basis of or was intertwined with the injury complained of in Figueroa's instant compliant: that 'he lost his one-half interest in his property and home' because of an improper foreclosure proceeding." Figueroa, 477 F. App'x at 560.

***4** And, as the Figueroa decision suggested, the type of damages sought in a subsequent federal court action are significant to the Rooker-Feldman analysis. A district court in the Southern District of Florida explained it this way:

> Plaintiffs essentially seek damages that stemmed from the loss of their home. The only way Plaintiffs could have been damaged was if the loss of their home was wrongful. By entering judgment in favor of foreclosure, the state court has determined that foreclosure was proper. Were judgment to be entered in this case in favor of Plaintiffs, it would necessarily follow that the state court foreclosure was in error and, as a result, this Court cannot grant Plaintiffs their requested relief without disturbing the Florida foreclosure judgment.

Goldman, 2015 WL 5269809, at *2. Indeed, "[t]he only way Plaintiff...could have been 'damaged' by the loss or 'illegal divestment' of [his] home[ ] is if [the] foreclosure[ ] [was] wrongful." Figueroa, 766 F. Supp. 2d at 1323.

Here, like in Figueroa, Plaintiffs allege a scheme designed to facilitate BOA acquiring a foreclosure judgment. (Doc. # 21 at ¶ 39). And that scheme, consisting of a misrepresentation concerning HAMP eligibility requirements, caused Plaintiffs to fall into default and allowed BOA to then obtain a foreclosure judgment. (Id. at ¶¶ 38-40). As a result of that misrepresentation and the subsequent foreclosure judgment, Plaintiffs suffered "the loss of their home and the equity in that home" — a loss that only occurred once the foreclosure judgment was entered. (Id. at ¶¶ 40, 53). Because the state court found that the foreclosure leading to the loss of Plaintiffs' home was proper, granting damages for the loss of Plaintiffs' home suggests entry of the foreclosure judgment was wrongful.

"In sum, the fraud claim in this action appears a circuitous but unmistakable attempt to impugn the validity of the foreclosure judgment." Varela-Pietri v. Bank of Am., N.A., No. 8:17-cv-2534-T-23TGW, 2018 WL 4208002, at *3 (M.D. Fla. Sept. 4, 2018). The Court would reach the same conclusion even if Plaintiffs were unaware of the fraud at the time of the foreclosure. See Rosselini v. Bank of Am., N.A., 8:17-cv-2584-T-24CPT (M.D. Fla. Oct. 4, 2018)(Doc. # 29 at 4)("The issues of the fraud in this case could have been raised in the state court foreclosure before final judgment was entered. It would not change the result that Plaintiff alleges he did not know or could not have reasonably discovered the facts he now knows until he retained his attorney in this case."). Therefore, the fraud claim is barred by the Rooker- Feldman doctrine and the case is dismissed without prejudice for lack of subject matter jurisdiction. See Varela-Pietri, 2018 WL 4208002, at *4 n.6 ("Because of the disposition of the Rooker-Feldman argument (a subject-matter jurisdiction defect), the dismissal is without prejudice.").

Accordingly, it is

ORDERED, ADJUDGED and **DECREED:**

(1) Defendant Bank of America, N.A.'s Motion for Summary Judgment (Doc. # 41) is **GRANTED**.

(2) The Clerk is directed to enter a judgment of dismissal without prejudice because the Court lacks jurisdiction under the Rooker-Feldman doctrine.

(3) After entering judgment, the Clerk is directed to terminate all pending deadlines and motions and, thereafter, **CLOSE** the case.

***5 DONE** and **ORDERED** in Chambers in Tampa, Florida, this 17th day of October, 2018.

All Citations

Not Reported in Fed. Supp., 2018 WL 5024083

Footnotes

1 Carmenates v. Bank of America, N.A., 8:17-cv-2635-T-23JSS (Doc. # 50); Perez v. Bank of America, N.A., 8:17-cv-2623-T-23JSS (Doc. # 50); Acosta v. Bank of America, N.A., 8:17-cv- 2592-T-23AAS (Doc. # 55); Santos v. Bank of America, N.A., 8:17-cv-2588-T-23MAP (Doc. # 47); Rodriguez v. Bank of America, N.A., 8:17-cv-2583-T-23TGW (Doc. # 51); Peralta v. Bank of America, N.A., 8:17-cv-2580-T-23MAP (Doc. # 56); Mosquea v. Bank of America, N.A., 8:17-cv-2551-T-23TGW (Doc. # 46); Rostgaard v. Bank of America, N.A., 8:17-cv-2538-T- 23CPT (Doc. # 57); Diaz v. Bank of America, N.A., 8:17-cv-2537-T-23MAP (Doc. # 51); Salazar v. Bank of America, N.A., 8:17-cv-2535-T-23AEP, (Doc. # 50); Blanco v. Bank of America, N.A., 8:17-cv-2593-T-23JSS (Doc. # 48); Moncada v. Bank of America, N.A., 8:17-cv-2625-T-23AEP (Doc. # 45); Ruiz v. Bank of America, N.A., 8:17-cv-2586-T-23TGW (Doc. # 42); Zalazar v. Bank of America, N.A., 8:17-cv-2603-T-23CPT (Doc. # 48); Espinel v. Bank of America, N.A., 8:17-cv-2628-T-23JSS (Doc. # 44); Garcia v. Bank of America, N.A., 8:17-cv-2602-T-23AAS (Doc. # 46); Gonzalez v. Bank of America, N.A., 5:17-cv-519- T-23PRL (Doc. # 44); Varela-Pietri v. Bank of Am., N.A., 8:17-cv-2534-T-23TGW (Doc. # 50); Colon v. Bank of Am., N.A., 8:17- cv-2548-T-26AAS (Doc. # 30); Clavelo v. Bank of Am., N.A., 8:17-cv-2644-T-26TGW (Doc. # 29); Guevara v. Bank of Am., N.A., 8:17-cv-2550-T-24JSS (Doc. # 36); Rosselini v. Bank of America, N.A., 8:17-cv-2584-T-24CPT (Doc. # 29).

2018 WL 7822305
Only the Westlaw citation is currently available.
United States District Court, S.D. Florida.

Tiaundra DYKES, Plaintiff,
v.
BANK OF AMERICA, N.A., Defendants.

CASE NO.: 17-CV-62412-WPD
|
Signed 10/26/2018

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ORDER GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS

WILLIAM P. DIMITROULEAS, United States District Judge

***1** THIS CAUSE came before the Court on Defendant Bank of America, N.A. ("Defendant" or "BOA")'s Motion for Judgment on the Pleadings [DE 45]. The Court has carefully considered the Motion, Plaintiff Tiundra Dykes ("Plaintiff" or "Dykes")'s Response [DE 46], Defendant's Reply [DE 47], and is otherwise fully advised in the premises. For the reasons below, the Court GRANTS Defendant's Motion.

I. Background

Plaintiff brings this action against Defendant Bank of America for common-law fraud over certain misrepresentations it made to Plaintiff while servicing her mortgage.[1] In summary, Plaintiff alleges that, "[a]fter experiencing financial hardship, due in part to the economy, [she] contacted BOA by phone in 2009 [to] request[ ] a HAMP modification" of her mortgage. [DE 33 (SAC ¶ 39)].[2] She was then "advised" by one of Defendant's loan representatives "to refrain from making her regular mortgage payments," explaining that "being 'past due and in default' on her mortgage was a prerequisite for [sic] HAMP modification eligibility." (*Id.* ¶ 41). And so, "[r]elying on th[ose] statement[s] ..., Plaintiff remained in default and/or stopped making regular monthly mortgage payments." (*Id.*) What Defendant "omitted," however, was "the fact that eligibility was available for HAMP to borrowers if default was [merely] reasonably foreseeable," leaving out that actual "default was not required for HAMP eligibility." (*Id.*) Plaintiff alleges that Defendant "knew [that] statement was false," but made it to "induce" her into default and, ultimately, "set Plaintiff up for foreclosure[.]" (*Id.* ¶ 42).

In addition to misleading Plaintiff about HAMP requirements, Plaintiff alleges Defendant misled her in several other respects too. For one, Plaintiff alleges Defendant "intentionally lost" or "destroyed" her HAMP applications "in order to prevent Plaintiff from receiving a HAMP modification," forcing her to submit her application "more than ten (10) times." (*Id.* ¶¶ 49–50). She alleges that it was not until August 2010 that Defendant formally acknowledged Plaintiff's application, yet did so by sending her a letter that falsely "stat[ed] that her application was approved and requested she make 'trial payments' of more than $1,630.36 pursuant to the Federal Government's Home Affordable Modification Program." (*Id.* ¶ 53). In reality, however, "the application wasn't approved," and Defendant kept the three trial payments Plaintiff eventually submitted for profit instead of using them to help her qualify for HAMP. (*Id.* ¶¶ 53–56). Lastly, Plaintiff alleges that Defendant charged her 32 "unnecessary" and "impermissible" inspection fees that Defendant simply used to "add[ ] to the foreclosure judgment amount." (*Id.* ¶ 60-61).

***2** In the end, "Plaintiff's home was foreclosed by BOA" as Defendant misled her into remaining in default for several years. (*Id.* ¶ 56). And although most of Defendant's misrepresentations pre-dated the October 2014 foreclosure, Plaintiff alleges she "did not know and could not have reasonably discovered that the statements [it made to her] were false and/or that her trial payments

were not applied to her account until she retained her attorneys in this matter in March 2017." (*Id.* ¶ 59). Plaintiff thus brings action seeking to recover damages for the HAMP trial payments she made, the foreclosure of her home, the loss of future equity in her home, costs associated in a bankruptcy she filed in an attempt to keep her home, the inspection fees she was impermissibly charged, and the damage all of this did to her credit. (*Id.* ¶ 67).

Defendant's Motion does not challenge Plaintiff's allegations. Instead, it contends that because Plaintiff's claim essentially seeks to overturn the state court's foreclosure judgment, the Court lacks subject-matter jurisdiction under the *Rooker-Feldman* doctrine. As discussed below, the Court agrees with Defendant.

II. Standard Of Review

"Judgment on the pleadings is proper when no issues of material fact exist, and the moving party is entitled to judgment as a matter of law based on the substance of the pleadings and any judicially noticed facts." *Cunningham v. Dist. Attorney's Office for Escambia Cty.*, 592 F.3d 1237, 1255 (11th Cir. 2010). In reviewing such a motion, the Court must "accept all the facts in the complaint as true and view them in the light most favorable to the nonmoving party." *Id.* (*Cannon v. City of W. Palm Beach,* 250 F.3d 1299, 1301 (11th Cir. 2001)). "At the same time, however," the Court can "also take judicial notice of the state ... proceedings" relevant to resolving the matter. *Id.*

III. Discussion

A. The *Rooker-Feldman* Doctrine Applies

The *Rooker-Feldman* doctrine keeps federal courts from adjudicating claims that would, in essence, function as an appeal from a state court judgment. *Target Media Partners v. Specialty Mktg. Corp.*, 881 F.3d 1279, 1285 (11th Cir. 2018). It thus prevents federal courts from adjudicating any "claim [that] was either (1) one actually adjudicated by a state court or (2) 'inextricably intertwined' with a state court judgment." *Id.* at 1286. As for what makes a claim *inextricably intertwined* with a state court judgment, courts consider whether the claim "would 'effectively nullify' the state court judgment, ... or ... 'succeed[ ] only to the extent that the state court wrongly decided the issues.' " *Casale v. Tillman*, 558 F.3d 1258, 1260 (11th Cir. 2009) (internal citations omitted). Also, where (like here) the claimant seeks damages rather than to undo the state-court judgment, "The [inextricably intertwined] inquiry [becomes] whether either [1] the damages award would annul the effect of the state court judgment or [2] the state court's adoption of the legal theory supporting the award [for the post-judgment claim] would have produced a different result." *Nivia v. Nation Star Mortg., LLC*, 620 F. App'x 822, 825 (11th Cir. 2015) (emphasis and bracketed text added) (citing *Casale*, 558 F.3d at 1260). Here, both would occur.

To start, Plaintiff's damages are based on what led to and the effects of the foreclosure of her home. [DE 33 (SAC ¶ 67)]. As such, if Plaintiff were to prevail on her fraud claim, a "damages award would annul the effect of the state court judgment" given it would pull back, or otherwise compensate plaintiff for, the damage caused by the state court's foreclosure judgment. That alone satisfies the inextricably-intertwined inquiry. But in addition to that, if Plaintiff had shown in the prior proceeding that Defendant fraudulently set her up for foreclosure (as she claims here), the foreclosure proceeding would have "produced a different result": no foreclosure judgment would have been entered. Accordingly, the Court holds that Plaintiff's fraud claim is inextricably intertwined with the prior foreclosure judgment, barring its jurisdiction under the *Rooker-Feldman* doctrine.

***3** To be sure, several cases support the Court's holding. For example, in *Figueroa v. Merscorp, Inc.*, the court dismissed the plaintiff's post-foreclosure fraud claims against the defendant-mortgagee under the *Rooker-Feldman* doctrine. 766 F. Supp. 2d 1305, 1310–11 (S.D. Fla. 2011), *aff'd,* 477 F. App'x 558 (11th Cir. 2012). Specifically, like here, the plaintiff's alleged that the defendant-mortgagee obtained a foreclosure judgment through fraudulent conduct. And also like here, rather than trying to undo the foreclosure, the plaintiff sought only damages. *Id.* at 1323.

That said, the *Figueroa* court explained that because the post-foreclosure "claims c[ould] only succeed to the extent the Florida court erred [in granting the foreclosure]," it could not "grant [the plaintiff's] requested relief without disturbing the Florida foreclosure judgment." *Id.* at 1324. As a result, the court considered

plaintiff's claims "inextricably intertwined" with the foreclosure judgment, barring its jurisdiction under *Rooker-Feldman. Id.* Additionally, the *Figueroa* court noted that "Plaintiff['s] seek[ing] money damages and not an explicit overturning of the state-court judgment, ... does not change the Court's conclusion, as damages would only be available where there was a wrongful foreclosure." *Id.* The Court finds *Figueroa* instructive.

Along with *Figueroa*, the Court also finds the Eleventh Circuit's dismissal of a post-foreclosure FDUTPA claim in *Nivia* instructive. 620 F. App'x 822. Similar to this case, the plaintiffs there had alleged that the defendant-mortgagee misrepresented that HAMP "loan modifications were generally available"; yet, when plaintiffs sought modifications, the defendant allegedly "failed to 'help [them] to modify their loan [,] denying them any possibility to cure their default, which constitutes a deceptive practice [under FDUPTA]....' " *Id.* For the *Nivia* court, however, the plaintiffs' claim, "[i]n effect, ... amount[ed] to an equitable defense to the foreclosure that they failed to raise before the state court." *Id.* It therefore "agree[d] with the district court that success on the merits of the FDUTPA claim would require a determination that the state court entered the forfeiture judgment 'wrongly,' *i.e.*, that the judgment was legally invalid." *Id.* The Eleventh Circuit thus dismissed the claim for lack of jurisdiction.

In addition to *Figueroa* and *Nivia*, other similar cases—many against Defendant—have been dismissed under the *Rooker-Feldman* doctrine as well. For example, in *Carmenates v. Bank of Am., N.A.*, the Middle District of Florida—relying on *Figueroa* and *Nivia*—dismissed, under *Rooker-Feldman*, essentially the same claim that Plaintiff brought here. 2018 WL 3548727, at *4 (M.D. Fla. July 24, 2018) ("In sum, the fraud claim in this action appears a circuitous but unmistakable attempt to impugn the validity of the foreclosure judgment."). *Id.* at *4. Other courts have reached the same conclusion,[3] and this Court sees no reason why it should go in a different direction.

***4** Yet, despite the clear trend of the case law, Plaintiff contends that *Rooker-Feldman* does not apply here. As detailed below, Plaintiff's reasoning is not persuasive.

B. Plaintiff's counter-arguments are not compelling

In its Response, Plaintiff gave three reasons for why the *Rooker-Feldman* doctrine should not apply to its fraud claim. First, Plaintiff contends that because she did not discover Defendant's fraud until 2017, this Circuit's "reasonable opportunity" exception to the *Rooker-Feldman* doctrine should apply. Second, Plaintiff's contends that because she seeks only damages, her fraud claim would not affect the foreclosure judgment. Third, Plaintiff contends that prevailing on its claim here would "cast no aspersions" on the foreclosure judgment. The Court disagrees with Plaintiff on all three fronts.

1. The "reasonable opportunity" exception does not apply

Plaintiff contends that *Rooker-Feldman* cannot bar her claim because she learned about Defendant's fraud after the foreclosure proceeding and only once she retained counsel. Plaintiff relies on *Powell v. Powell*, which indeed recognized a "reasonable opportunity" exception to the *Rooker-Feldman* doctrine, for support. 80 F.3d 464, 467 (11th Cir. 1996). That exception, however, does not apply here because—as in the *Powell* case itself—Plaintiff "could have raised [her] claim in the state trial court," rendering the reasonable-opportunity exception inapplicable. *Id.*; *see also Figueroa*, 477 F. App'x at 561 (holding that despite failing to raise his RICO claims in state court, the plaintiff had a reasonable opportunity to do so because "[f]ederal RICO claims may be raised in Florida Courts."); *Flournoy v. Gov't Nat'l Mortg. Ass'n*, 156 F. Supp. 3d 1375, 1381 (S.D. Fla. 2016). Indeed, Defendant's alleged misrepresentations began in 2009—a half-decade before the 2014 foreclosure. Nothing stopped Plaintiff from bringing this claim before, and she certainly could have raised it at foreclosure proceeding. Moreover, while Plaintiff alleges she "did not know and could not have reasonably discovered [Defendant's fraud] ... until she retained her attorneys in this matter in March 2017" [DE 33 (SAC ¶ 59)], the reasonable-opportunity exception does not hinge on when and whether Plaintiff retained counsel. *See Valencia v. Bank of Am., N.A.*, No. 8:17-cv-2645 (ECF No. 33) (M.D. Fla. Oct. 4, 2018) ("It would not change the result that Plaintiffs allege they did not know or could not have reasonably discovered the facts they now know[ ] until they retained their attorneys in this case."); *see also Urtiaga v. Bank of Am., N.A.*, No. 8:17-cv-2590 (ECF No. 30) (M.D. Fla. Oct. 4, 2018) (same). And in any event, Plaintiff was represented by counsel in the foreclosure proceeding.

All that aside, the fact that Plaintiff raised affirmative defenses seeking to prevent the foreclosure "because of [Defendant's] misleading conduct" [DE 47-3 at 3], and for having "charged and/or collected ... illegal charges"

(including "inspection fees") [DE 47-3 at 2], shows that Plaintiff not only had a reasonable opportunity to litigate this issue before—she, in fact, already did. *See Velardo v. Fremont Inv. & Loan*, 298 F. App'x 890, 892 (11th Cir. 2008) (Under the *Rooker-Feldman* doctrine, "the court focuses on the [pending] claim's relationship to the issues involved in the state court proceeding, instead of on the type of relief sought by the plaintiff."). Plaintiff's claim is thus squarely barred as whether Defendant's pre-foreclosure misconduct wrongfully caused the foreclosure has previously been litigated. *See Goodman ex rel. Goodman v. Sipos,* 259 F.3d 1327, 1332 (11th Cir. 2001) ("The *Rooker–Feldman* doctrine is broad enough to bar all federal claims that were, or should have been, central to the state court decision, even if those claims seek a form of relief that might not have been available from the state court."); *see also Nivia*, 620 F. App'x 822, 825 ("In effect, the homeowners' claim amounts to an equitable defense to foreclosure that they failed to raise before the state court.... The district court [thus] correctly concluded that it lacked jurisdiction over the FDUTPA claim.") ("internal citations and quotations omitted.").

2. The Court's jurisdiction does not depend on what type of relief Plaintiff seeks

***5** Plaintiff contends that prevailing on her fraud claim would not affect the state court's judgment because she seeks only damages. Therefore, *Rooker-Feldman* does not apply. However, the Eleventh Circuit has rejected that exact argument before. *See Goodman*, 259 F.3d at 1333 (rejecting "the plaintiffs argu[ment] ... [that] the fact that they seek damages, instead of injunctive relief, take[s] their claims beyond the reach of the *Rooker–Feldman* doctrine," as the "focus [is] on the federal claim's relationship to the issues involved in the state court proceeding, instead of on the type of relief sought by the plaintiff."); *see also Perdomo v. HSBC Bank USA*, 2014 WL 1278132, at *4 (S.D. Fla. Jan. 13, 2014) ("Where plaintiffs 'seek money damages instead of an outright overturning of the state-rendered [ ] judgments,' it does not change the applicability of the [*Rooker-Feldman*] doctrine....") (quoting *O'Neal v. Bank of Am., N.A.*, 2012 WL 629817, at *6 (M.D. Fla. Feb. 28, 2012)); *see also Figueroa*, 766 F. Supp. 2d at 1324 ("seek[ing] money damages and not an explicit overturning of the state-court judgment, ... does not change the Court's conclusion, as damages would only be available where there was a wrongful foreclosure."). This argument has no merit.

Even so, Plaintiff purports to rely on *Arthur v. JP Morgan Chase Bank, NA*, for support. 569 Fed. Appx. 669 (11th Cir. 2014). The court in *Arthur*, however, never expressed that "claims for money alone do not implicate *Rooker-Feldman*," as Plaintiff suggests. [DE 47 at 14]. Instead, the *Arthur* court merely explained that the doctrine may not apply to a claim that does not arise "solely from the issuance of the state court judgment." So, given that the claims there centered on "fraudulent conduct in the *generation* of foreclosure-related documents," rather than the foreclosure judgment itself, the court held that adjudicating those "claims would not effectively nullify the Wisconsin state court [foreclosure] judgment." *Id.* at 675 (emphasis added). By contrast, Plaintiff complains about injuries that stem from the foreclosure judgment itself, making Plaintiff's claim markedly different to the one in *Arthur*. And the same is true about the other cases Plaintiff string-cites for support, as they each involved injuries that arose *independent* of prior state-court judgments.[4]

***6** At bottom, Plaintiff's position has been flatly rejected in this Circuit, and every case Plaintiff cites involves facts markedly different from those here.

3. Plaintiff's claim seeks to impugn the validity of the foreclosure judgement

Lastly, Plaintiff appears to contend that its claim, if successful, would not require the Court to find that the state court wrongly decided the foreclosure. [DE 46 at 17-18]. The Court disagrees. As recently put in the *Carmenates* opinion, which involved a nearly identical fraud claim against Defendant:

> The plaintiff complains exclusively about a misrepresentation that preceded–and ultimately caused–the foreclosure. And the plaintiff alleges principally that the misrepresentation resulted in the "loss of home equity," a loss occasioned by the state-court action, which foreclosed the plaintiff's right of redemption and resulted in a deficiency judgment that included not just principal and interest owing but also the inspection fees owing under the lending agreement.... In sum, the fraud claim in this action appears [to be] a circuitous but

> unmistakable attempt to impugn the validity of the foreclosure judgment.

2018 WL 3548727, at *4 (M.D. Fla. July 24, 2018) (citations to the record omitted); *see also Nivia*, 620 F. App'x at 825 (because the plaintiff-homeowners' claim faults the defendant-mortgagee for their foreclosures, "we agree with the district court that success on the merits of the FDUTPA claim would require a determination that the state court entered the forfeiture judgment 'wrongly,' that the judgment was legally invalid."); *Figueroa*, 766 F. Supp. 2d 1305, 1324 ("[T]he Court cannot grant [the] requested relief without disturbing the Florida foreclosure judgment.").

Here too, Plaintiff's fraud claim seeks to impugn the validity of the 2014 foreclosure judgment. Accordingly, the Court lacks jurisdiction over it.

IV. Conclusion

For the reasons above, the Court holds that it lacks jurisdiction over Plaintiff's fraud claim. It is thus **ORDERED AND ADJUDGED** as follows:

1. Defendant Bank of America N.A.'s Motion for Judgment on the Pleadings [DE 45] is **GRANTED**.

2. Pursuant to Fed. R. Civ. P. 58(a), final judgment will be entered by separate order.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 26th day of October, 2018.

All Citations

Slip Copy, 2018 WL 7822305

Footnotes

1 For context, Plaintiff executed her mortgage on March 22, 2006, with Pinnacle Financial Corporation, the lender. [DE 33 (SAC ¶ 37)]. Defendant BOA was the loan servicer for her mortgage. *Id.*

2 "HAMP" refers to the federal government's Home Affordable Modification Program, in which the "Federal Government require[ed] [participants] to use 'reasonable efforts' to 'effectuate any modification of a mortgage under the loan Program.' " [DE 33 (SAC ¶ 12)].

3 *See, e.g., Nancy Valencia and Nelson Ocampo v. Bank of Am., N.A.*, No. 8:17-cv-2645-T-24JSS ECF No. 33 (M.D. Fla. October 4, 2018) (dismissing common-law fraud claim without prejudice for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine); *Jose Zuluaga v. Bank of Am., N.A.*, No. 8:17-cv-02543-VMC-TGW ECF No. 56 (M.D. Fla. October 16, 2018) (same); *Hosmert Vergara v. Bank of Am., N.A.*, No. 8:17-cv-2642-T-33SPF ECF No. 61 (M.D. Fla. October 17, 2018).

4 *Compare, Nero, Sr. v. Mayan Mainstreet Inv 1 LLC*, 2014 WL 12610668, at *10 (M.D. Fla. Nov. 13, 2014), *report and recommendation adopted sub nom. Nero v. Mayan Mainstreet Inv 1 LLC*, No. 614CV1363ORL40TBS, 2014 WL 12610670 (M.D. Fla. Dec. 10, 2014), *aff'd*, 645 F. App'x 864 (11th Cir. 2016) ("because here, Nero complaints of injuries *independent* of the loss of his home" through the foreclosure judgment, the court had jurisdiction) (emphasis added); *Kohler v. Garlets*, 578 F. App'x 862, 864 (11th Cir. 2014) (dismissing "claims that [the plaintiff] was injured by the state court's foreclosure order" under *Rooker-Feldman*, but allowing an "independent damages claim ... based on allegations of misconduct during the state foreclosure proceeding."); *McCormick v. Braverman*, 451 F.3d 382, 392 (6th Cir. 2006) ("None of these claims assert an injury *caused by the state court judgments*; Plaintiff does not claim that the state court judgments themselves are unconstitutional or in violation of federal law. Instead, Plaintiff asserts *independent claims* that those state court judgments were procured by certain Defendants through fraud, misrepresentation, or other improper means, and that a state statute is vague and overbroad.") (emphasis added); *Noel v. Hall*, 341 F.3d 1148, 1163 (9th Cir. 2003) ("where the federal plaintiff does not complain of a legal injury caused by a state court judgment, but rather of a legal injury caused by an adverse party, *Rooker–Feldman* does not bar jurisdiction."). Unlike those cases, Plaintiff specifically seeks to recover for injuries caused by the foreclosure judgment itself. They are thus distinguishable.

240 N.C.App. 293
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
Court of Appeals of North Carolina.

Michael and Cathy ESPEY, Plaintiffs,
v.
SELECT PORTFOLIO SERVICES, INC., U.S. Bank National Association, Inc., Credit Suisse First Boston Mortgage Securities Group, Inc. a/k/a Credit Suisse First Boston, LLC; and Substitute Trustee Services, Inc., Substitute Trustee, Defendants.

No. COA14–961.
|
April 7, 2015.

***1** Appeal by plaintiffs from order entered 26 March 2014 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 3 February 2015.

Attorneys and Law Firms

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Rogers Townsend & Thomas, P.C., by Matthew T. McKee, for defendant-appellees.

Opinion

BRYANT, Judge.

Where plaintiffs' complaint amounts to a collateral attack on an order of a Clerk of Court which authorized defendants to proceed with a foreclosure by power of sale, we affirm the trial court's dismissal of plaintiffs' complaint and dismiss plaintiffs' appeal.

On 21 September 2012, the Clerk of Superior Court for Buncombe County entered an order "In the Matter of the foreclosure of a Deed of Trust executed by Michael Espey and Cathy Espey in the original amount of $106,845.00 dated January 21, 2003, recorded in Book 3074, Page 249, Buncombe County Registry Substitute Trustee Services, Inc., Substitute Trustee." The Clerk made the following findings of fact: that U.S. Bank National Association, as trustee, in trust for the Holders of Credit Suisse First Boston Mortgage Securities Corp., Home Equity Asset Trust 2003–3, Home Equity Pass–Through Certificates, Series 2003–3, was the holder of the note sought to be foreclosed and the note evidenced a valid debt owed by Michael Espey and Cathy Espey; that the note was in default and the instrument securing the debt gave the note holder the right to foreclosure under power of sale; that notice of the hearing had been served on the record owners of the real estate and all others against whom the note holder intended to assert liability for the debt; that the "debtors have shown no valid legal reason why foreclosure should not commence"; that the underlying mortgage debt was not a home loan as defined in N.C. Gen.Stat. 45–101(1b) or, in the alternative, was a home loan defined under section 45–101(1b) and that "the pre-foreclosure notice under G.S. 45–102 was provided in all material aspects, and the periods of time established by Article 11 of [that] [C]hapter [45] had elapsed"; and that the sale was not barred by N.C. Gen.Stat. § 45–21.12A (2013). The Clerk then ordered "that the Substitute Trustee [could] proceed to foreclose under the terms of the above described Deed of Trust and give notice of and conduct a foreclosure sale...." Plaintiffs Michael Espey and Cathy Espey failed to timely appeal this order and, on 12 October 2012, the property was sold at a foreclosure sale. Plaintiffs did not attempt to enjoin the foreclosure sale prior to the end of the upset bidding period, nor did they take any other action before the foreclosure became final and the rights of the parties to the foreclosure sale became fixed.

On 6 May 2013, in a separate action, plaintiffs filed a complaint against defendants Select Portfolio Services, Inc.; U.S. Bank National Association, Inc.; Credit Suisse First Boston Mortgage Securities Group, Inc. a/k/a Credit Suisse First Boston, LLC; and Substitute Trustee Services, Inc., in Buncombe County Superior Court challenging the foreclosure and sale of their property. Plaintiffs sought a temporary restraining order and a permanent injunction prohibiting eviction from their home, and damages.

***2** In their complaint, plaintiffs brought forth four causes of action: a claim to set aside the foreclosure sale on the basis that signatures on any mortgage assignment, endorsement, or *allonge* were not those of persons authorized to engage in such acts or were not authentic in violation of N.C. Gen.Stat. § 45–21.16, and were the product of "robo-signing"; a claim for conversion; a claim

for unfair and deceptive trade practices; and a claim for injunctive relief.

Defendants moved to dismiss plaintiffs' claims based on insufficiency of service, insufficiency of service of process, and failure to state a claim upon which relief can be granted, pursuant to Civil Procedure Rules 12(b)(4), (5), and (6), respectively.

A hearing was held on defendants' motion to dismiss during the 26 August 2013 Civil Session of Buncombe County Superior Court, the Honorable Alan Z. Thornburg, Judge presiding. On 26 February 2014, Judge Thornburg entered an order granting defendants' motion to dismiss with prejudice. Plaintiffs appeal.

On appeal, plaintiffs argue that their complaint should be reinstated because evidence of robo-signing in the chain-of-title justifies equitable claims for relief and supports the claim that defendants engaged in unfair and deceptive trade practices.

I.

Defendants contend, and we agree, that plaintiffs' action to set aside the Clerk of Court's order of foreclosure on the property was an impermissible collateral attack. Plaintiffs' failure to timely appeal from the order of forfeiture and their failure to act within the time required after the sale of the property was fatal to their ability to assert further rights to the property.

We find an earlier opinion of this Court, *Phil Mechanic Construction Co. v. Haywood,* to be instructive in the instant case. 72 N.C.App. 318, 325 S.E.2d 1 (1985). In *Phil Mechanic,* the plaintiffs appealed the dismissal of their foreclosure action which had been dismissed on grounds of *res judicata.* We affirmed the trial court's dismissal of the plaintiffs' foreclosure action, noting that the plaintiffs had previously brought a separate foreclosure action wherein the Clerk of Court denied the request to proceed with the foreclosure under power of sale as contained in the deed of trust, and the plaintiffs had failed to perfect an appeal of that order within the applicable time period. This Court reasoned that the findings in the Clerk's order were binding and the plaintiffs were, thus, estopped from arguing those same issues in a subsequent action. *Id.* at 322, 325 S.E.2d at 3. On this basis, this Court affirmed the trial court's dismissal of the plaintiffs' foreclosure action.

In the instant case, as in *Phil Mechanic,* plaintiffs failed to appeal the 21 September 2012 foreclosure order of the Clerk of Court, and failed to take any action as to the property within the ten day period subsequent to the property's sale. In its order, the Clerk made specific findings regarding the existence of a valid debt and defendants' right to foreclose under the deed of trust, that plaintiffs had defaulted under the terms of the promissory note and had sufficient notice of the hearing, as well as other findings required by statute. *See* N.C. Gen.Stat. § 45–21.16(d) (2013). After making the required findings, the Clerk was authorized to proceed with ordering a foreclosure by power of sale. Plaintiffs never appealed the Clerk's order.

***3** In their complaint filed months later in the Superior Court, plaintiffs sought, among other claims, to set aside the Clerk's order on the basis that the signatures on the mortgage assignments, endorsements, or *allonges* were not those of persons authorized to engage in such acts, or the signatures were not authentic, in violation of N.C.G.S. § 45–21.16, and were the product of robo-signing. Plaintiffs argue before this Court that robo-signing creates issues regarding the enforceability of instruments and defendants' authority to foreclose; that North Carolina law should discourage robo-signing as a matter of public policy; and that their allegations of robo-signing and wrongful foreclosure were sufficient to support a claim of unfair and deceptive trade practices.[1] However, as noted earlier herein, plaintiffs' complaint before the trial court was an impermissible collateral attack on the Clerk's order. Likewise, plaintiffs' appeal from the trial court's dismissal of that complaint is merely another attempt to collaterally attack the Clerk's order of forfeiture and sale. For these reasons, we affirm the trial court's dismissal of plaintiffs' complaint. *See Phil Mech. Constr. Co.,* 72 N.C.App. 318, 325 S.E .2d 1; *see also In re Foreclosure of Real Prop. under Deed of Trust from Young,* —— N.C.App. ——, ——, 744 S.E.2d 476, 479 (2013) ("The superior court has no equitable jurisdiction and cannot enjoin foreclosure upon any ground other than the ones stated in [our General Statutes]." (citation and quotations omitted)). Accordingly, plaintiffs' appeal is dismissed.

DISMISSED.

Judges STROUD and HUNTER, Jr., concur.

Report per Rule 30(e).

All Citations

240 N.C.App. 293, 772 S.E.2d 264 (Table), 2015 WL 1534068

Footnotes

1 The collateral issues raised by plaintiffs both before the trial court and on appeal to this Court, while not appropriate for review in this case, should at some point be addressed by our courts and/or by our legislature. The practice of robo-signing seems antithetical to our practice of allowing a presumption of validity and authenticity of a signature upon a note, and thereby requiring the property owner (of a home facing foreclosure) to disprove the validity of an endorsement per N.C. Gen.Stat. § 25–3–308.

2014 WL 4639431
Only the Westlaw citation is currently available.
United States District Court,
S.D. Florida.

Maria DIAZ (Nee Ferrerr), and Enrique Diaz, Plaintiffs,
v.
U.S. BANK, N.A., as trustee for Mlmi Surf Trust Series 2007–AB1, Wilshire Credit Corporation, and Bank of America, N.A., Defendants.

No. 14–CIV–20741.
|
Signed Sept. 15, 2014.
|
Filed Sept. 16, 2014.

Attorneys and Law Firms

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Sahily Serradet, Marc Thomas Parrino, Liebler Gonzalez & Portuondo, P.A., Miami, FL, for Defendants.

ORDER ON DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT[1]

BETH BLOOM, District Judge.

***1** This matter is before the Court upon Defendants, U.S. Bank, N.A., as trustee for the MLMI Surf Trust Series 2007–AB1 ("U.S.Bank"), Wilshire Credit Corporation ("Wilshire"), and Bank of America N.A.'s ("BANA") (collectively, "Defendants") Motion to Dismiss Plaintiffs' First Amended Complaint, ECF No. [33]. The Court has reviewed the motion, all supporting and opposing filings, and the record in this case, and is otherwise fully advised in the premises. For the reasons that follow, Defendants' Motion is granted in part and denied in part.

I. INTRODUCTION

The instant litigation stems from a foreclosure action initiated against Plaintiffs, Maria Diaz (Nee Ferrer) and Enrique Diaz ("Plaintiffs"), and relates to BANA's involvement in the Troubled Asset Relief Program ("TARP"), and, more specifically, the United States Treasury's Home Affordable Modification Program ("HAMP").[2] According to the First Amended Complaint, U.S. Bank initiated foreclosure proceedings on Plaintiffs' home in 2007. ECF No. [24] at ¶ 4. During this litigation, Wilshire allegedly entered into a stipulation agreement with Plaintiffs pursuant to the aforementioned federal programs, permitting Plaintiffs to pay installments in exchange for the dismissal of the foreclosure proceedings and a loan modification. *Id.* at ¶¶ 5–8. Then, in 2009, Wilshire offered Plaintiffs a Trial Period Plan ("TPP"), wherein Plaintiffs would make three monthly payments and the mortgage would be modified in order to avoid any future foreclosure. *Id.* at ¶ 7. Rather than comply with the terms of the TPP, Wilshire purportedly transferred Plaintiffs' loan to BANA, as one of its agents. *Id.* at ¶¶ 9, 11–12. At some point after the transfer, BANA allegedly attempted to accelerate Plaintiffs' loan. *Id.* at ¶ 13. According to Plaintiffs, they began communicating extensively with BANA; however, despite attempts to comply with BANA's multitude of requests, Plaintiffs contend that BANA utilized pernicious tactics in order to violate the terms of the TPP and to bully Plaintiffs into making unnecessary payments. *Id.* at ¶¶ 14–20, 25–29.

As a result of these allegedly deceptive and deceitful practices, Plaintiffs initiated this action on February 28, 2014, asserting counts for breach of contract and breach of the duty of good faith and fair dealing, as well as a violation of Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 *et seq.* ("FDUTPA"). *See* ECF No. [1]. On June 3, 2014, Plaintiffs filed an Amended Complaint[3] setting forth substantially similar claims, but further delineating their causes of action, as well as adding various state law claims. *See* ECF No. [24]. Presently, Plaintiffs assert claims for breach of contract (Count I), violation of FDUTPA (Count II), civil theft (Count III), fraud (Count IV), breach of fiduciary duty (Count V), and negligence (Count VI). *See id.* at ¶¶ 33–38.

II. LEGAL STANDARD

***2** A pleading in a civil action must contain "a short and plain statement of the claim showing that the pleader is

entitled to relief." Fed.R.Civ.P. 8(a)(2). While a complaint "does not need detailed factual allegations," it must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *see Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (explaining that Rule 8(a)(2)'s pleading standard "demands more than an unadorned, the-defendantunlawfully-harmed-me accusation"). Nor can a complaint rest on " 'naked assertion[s]' devoid of 'further factual enhancement.' " *Iqbal,* 556 U.S. at 678 (quoting *Twombly,* 550 U.S. at 557 (alteration in original)). The Supreme Court has emphasized "[t]o survive a motion to dismiss a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Id.* (quoting *Twombly,* 550 U.S. at 570). When reviewing a motion to dismiss, a court, as a general rule, must accept the plaintiff's allegations as true and evaluate all plausible inferences derived from those facts in favor of the plaintiff. *See Chaparro v. Carnival Corp.,* 693 F.3d 1333, 1337 (11th Cir.2012); *Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration Alliance,* 304 F.3d 1076, 1084 (11th Cir.2002). While the Court is required to accept all of the allegations contained in the complaint and exhibits attached to the pleadings as true, this tenet is inapplicable to legal conclusions. *Iqbal,* 556 U.S. at 678; *Thaeter v. Palm Beach Cnty. Sheriff's Office,* 449 F.3d 1342, 1352 (11th Cir.2006). The Supreme Court was clear that courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly,* 550 U.S. at 555.

III. DISCUSSION

Defendants assert that Plaintiffs' First Amended Complaint must be dismissed for several reasons. *See* ECF No. [33]. Defendants first claim that Plaintiffs' First Amended Complaint constitutes an impermissible "shotgun pleading." *Id.* at 5–6. Second, Defendants contend that even when ignoring the manner in which the First Amended Complaint is pled, the pleading nonetheless fails to state a claim upon which relief can be granted. *Id.* at 6–13. The Court addresses these arguments in turn.

A. "Shotgun Pleading"

This Court and the Eleventh Circuit has warned litigants that shotgun pleadings tend to "impede the orderly, efficient and economic disposition of disputes as well as the court's overall ability to administer justice." *Degirmenci v. Sapphire–Fort Lauderdale, LLLP,* 693 F.Supp.2d 1325, 1336 (S.D.Fla.2010) (citing *Byrne v. Nezhat,* 261 F.3d 1075, 1128–31 (11th Cir.2001)); *see also Strategic Income Fund, L.L.C. v. Spear, Leeds & Kellogg Corp.,* 305 F.3d 1293, 1296 n. 10 (11th Cir.2002) (expounding the various ways in which shotgun pleadings harm the courts and other litigants). By definition, a shotgun pleading does not comport with Rule 8's requirement of a short and plain statement of the claim. *See Magluta v. Samples,* 256 F.3d 1282, 1284 (11th Cir.2001). Generally, this type of pleading "contains several counts, each one incorporating by reference the allegations of its predecessors, leading to a situation where most of the counts (i.e., all but the first) contain irrelevant factual allegations and legal conclusions." *Strategic Income Fund,* 305 F.3d at 1295. At first glance, Plaintiffs' First Amended Complaint may seem to "fit the bill"; however, further examination reveals that this pleading suffices in light of the circumstances.

***3** Relying on *S.E.C. v. City of Miami, Fla.,* 988 F.Supp.2d 1343 (S.D.Fla.2013), Plaintiffs contend that their First Amended Complaint is adequately crafted. In *S.E.C.,* this Court held that a complaint was not a shotgun pleading because it did not incorporate every preceding allegation into each individual count, but rather, only incorporated the plaintiff's general allegations into the individual claims. *Id.* at 1354–55. Noting that all the background allegations were intended to be applicable to each count, the Court stressed that there was no other way for the plaintiff to re-plead, short of allowing the plaintiff to repeat the incorporated paragraphs into each count. *Id.* This Court finds this reasoning applicable and persuasive. Although Plaintiffs' First Amended Complaint merely sets forth thirty-one factual allegations seemingly applicable to all five counts, see ECF No. [34], the pleading is not incomprehensible. *See Pelletier v. Zweifel,* 921 F.2d 1465, 1517 (11th Cir.1991), *abrogated on other grounds by Douglas Asphalt Co. v. QORE, Inc.,* 657 F.3d 1146 (11th Cir.2011) (describing a shotgun pleading as containing "rambling recitations" of fact). Like the complaint in *S.E.C.,* Plaintiffs' factual allegations are succinct, reasonably formatted, and describe the factual circumstances and general course of dealing applicable to each individual count. Amendment in this matter would simply require Plaintiffs to include nearly every factual allegation, almost verbatim, in the individual claims. *See generally Anderson v. Dist. Bd. of Trustees of Cent. Florida Cmty. Coll.,* 77 F.3d 364, 366 (11th Cir.1996)

(noting that the proper procedural move when presented with a shotgun pleading is to move the court to require the plaintiff to file a more definite statement). Moreover, and most notably, Plaintiffs are proceeding *pro se.* This Court is required to afford *pro se* litigants a leniency "not enjoyed by those with the benefits of a legal education." *See Houman v. Lewis,* 2010 WL 2331089, at *1 (S.D.Fla. June 10, 2010) (citing *GJR Investments, Inc. v. Cnty. of Escambia, Fla.,* 132 F.3d 1359 (11th Cir.1998), *overruled on other grounds by Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)). Thus, pleadings submitted by a *pro se* litigant "are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." *Trawinski v. United Technologies,* 313 F.3d 1295, 1297 (11th Cir.2002) (citation omitted). Accordingly, the Court declines to find that Plaintiffs' Amended Complaint constitutes a shotgun pleading. *See Jones v. Florida Power & Light Co.,* 2010 WL 1740713, at *2 (S.D.Fla. Apr.29, 2010) (finding that a complaint was not a shotgun pleading where the general allegations were incorporated into each count).

B. The Merits of Plaintiffs' Individual Claims

Plaintiffs' first count is for breach of contract, presumably for breach of the TPP. *See* ECF No. [37] at 5–7. Defendants correctly assert that HAMP does not provide borrowers with a private right of action. *Nelson v. Bank of Am., N.A.,* 446 F. App'x 158, 159 (11th Cir.2011) (per curiam) (citation omitted); *see also Zoher v. Chase Home Fin.,* 2010 WL 4064798, at *3–4 (S.D.Fla. Oct.15, 2010) (determining that an implied private cause of action in HAMP is not in line with the legislative intent or scheme). In response, Plaintiffs claim that their claim is not brought under HAMP, but rather, a breach of the TPP, which constitutes a distinct contract. ECF No. [37] at 5–7. Under Defendants' interpretation, the TPP and HAMP are intertwined in such a manner that asserting a right under the TPP necessarily implicates the HAMP; because the HAMP precludes a private cause of action, no such action can be brought pursuant to the TPP. While the Eleventh Circuit has yet to address this exact issue, several other districts have taken the opportunity to discuss the implication of the HAMP on TPPs.

***4** In *Bosque v. Wells Fargo Bank,* the District of Massachusetts summarily rejected the argument that a TPP could not be enforced solely by reason of its relationship with the federal statute and regulations. *Bosque v. Wells Fargo Bank, N.A.,* 762 F.Supp.2d 342, 350–51 (D.Mass.2011). Plaintiff's claim in *Bosque,* like the Plaintiffs' claim here, was premised upon state contract law, and neither the HAMP nor its applicable guidelines preempt such actions. *Id.* Following the reasoning of *Bosque,* the District of Maryland held that even though a private right of action does not exist under HAMP, a plaintiff may still assert a breach of contract claim stemming from a TPP. *Allen v. CitiMortgage, Inc.,* 2011 WL 3425665, at *4–5 (D.Md. Aug.4, 2011). Other districts throughout the country have similarly found that the HAMP will not obviate a cause of action purely because the cause of action is in some manner related to the HAMP. *See Vida v. One West Bank, F.S.B.,* 2010 WL 5148473 (D.Or. Dec.13, 2010) (finding that defendants were not necessarily immunized for their conduct even though the alleged transaction was associated with the HAMP); *Darcy v. CitiFinancial, Inc.,* 2011 WL 3758805, at *4 (W.D.Mich. Aug.25, 2011) (holding that plaintiff's contract action "[was] not preempted or otherwise precluded by HAMP"); *see also Corvello v. Wells Fargo Bank, NA,* 728 F.3d 878, 884 (9th Cir.2013) ("Where, as here, borrowers allege, and we must assume, that they have fulfilled all of their obligations under the TPP, and the loan servicer has failed to offer a permanent modification, the borrowers have valid claims for breach of the TPP agreement.").[4] The Court finds the analysis in *Bosque* compelling-Plaintiffs' claim for breach of contract is not precluded by the fact that the HAMP does not confer an individual with a private right of action.

In fact, the case cited by Defendants for the proposition that the HAMP does not provide a private cause of action bolsters Plaintiffs' argument. In *Nelson,* a plaintiff sought declaratory judgment requesting the district court to determine the rights and obligations under a temporary mortgage modification agreement entered into pursuant to the HAMP. *See Nelson,* 446 F. App'x at 158–59. The Eleventh Circuit found that the district court properly dismissed the declaratory judgment claim because the HAMP did not provide borrowers a private right of action, and, as a result, it lacked subject matter jurisdiction. *Id.* In making this finding, the Eleventh Circuit cited several cases that appear to indicate that a district court lacks subject matter jurisdiction over a state law claim which merely implicates the HAMP. *Id.* at 159. For instance, two of these cited cases have held that a federal court does not have subject matter jurisdiction "over an ordinary state law claim merely because HAMP is an element of the dispute." *Melton v. Suntrust Bank,* 780 F.Supp.2d 458, 460 (E.D.Va.2011); *see also Mosley v. Wells Fargo Bank, N.A.,* 802 F.Supp.2d 695, 699 (E.D.Va.2011) (finding no subject matter jurisdiction because the complaint only alleged a state-law contract claim and not a violation of the HAMP). The fact that district courts have found a lack of federal question jurisdiction where state-law causes of action are merely

incidental to the HAMP implies that a breach of contract claim is separate and distinct from a cause of action specifically asserted pursuant to the HAMP; a district court may not exercise federal question jurisdiction simply because the contract stems from the lender's involvement in the HAMP. Accordingly, Plaintiffs' state-law breach of contract claim is appropriately considered to be ancillary to any potential claim brought with regard to Defendants' obligations under the HAMP. *See Picini v. Chase Home Fin. LLC,* 854 F.Supp.2d 266, 273–74 (E.D.N.Y.2012) (holding that breach of contract claim asserted pursuant to a TPP was not precluded by the HAMP); *see also Dean v. BAC Home Loans Servicing,* 2012 WL 353766, at *3–4 (M.D.Ala. Feb.3, 2012) (holding that the court did not have jurisdiction because the resolution of the plaintiff's claims would rest on an interpretation of the nature of the contract and not the HAMP guidelines). Plaintiffs allege state-law causes of action and jurisdiction is founded upon diversity. Absent a clear directive to the contrary, the HAMP will not preclude Plaintiffs' state-law breach of contract claim.[5]

***5** Next, Defendants assert that Count II of the First Amended Complaint fails to state a claim under FDUTPA. ECF No. [33] at 7–8. As an initial matter, it must be noted that FDUTPA does not apply to "[a]ny person or activity regulated under laws administered by ... [b]anks and savings and loan associations regulated by the Office of Financial Regulation of the Financial Services Commission ... and loan associations regulated by federal agencies." Fla. Stat. § 501.212(4)(b)-(c). Because BANA is a national banking association regulated by federal agencies, Defendants contend that it is not subject to the Act. In Response, Plaintiffs assert that BANA was acting as a loan servicer, not a bank. The First Amended Complaint alleges that BANA was acting through its subsidiary, BAC Home Loan Servicing. *See* ECF No. [24] at ¶¶ 3, 9. Thus, to hold BANA liable would require an exercise of vicarious liability. Florida's Fifth District Court of Appeal has summarily rejected this theory of liability in interpreting FDUTPA:

> Here, the statute unambiguously excludes banks. There is nothing in the statute to suggest that a bank comes within the ambit of FDUTPA when its liability is purely vicarious. To hold otherwise would lead to an illogical result. Accepting [defendant's] theory, a bank acting directly would be exempt from FDUTPA liability. However, if the same act was done by a bank agent, the bank could be vicariously liable under FDUTPA. We do not believe this is a result intended by the Legislature.

Bankers Trust Co. v. Basciano, 960 So.2d 773, 779 (Fla. 5th DCA2007). However, in *Larach v. Standard Chartered Bank International,* this Court held that "[i]t would be premature at the motion to dismiss stage to determine whether Defendants were acting as banks or brokers." *Larach v. Standard Chartered Bank Int'l (Americas) Ltd.,* 724 F.Supp.2d 1228, 1238 (S.D.Fla.2010). While Plaintiffs allege that BANA was acting through its subsidiary, they also aver that various interactions occurred between them and BANA, and that BANA engaged in deceptive practices with respect to the servicing of the loan. *See* ECF No. [24] at ¶¶ 13–23. Furthermore, Plaintiffs aver that Defendants' were acting through an agent engaged in loan servicing, not necessarily national banking. *See id.* at ¶ 11 (stating that the loan was transferred to "BAC Home Loans Servicing, L.P. (an entity of [BANA])"). Accordingly, a factual determination of the capacity in which BANA was acting would be hasty at this juncture. *See Larach,* 724 F.Supp.2d at 1238; *see also Renfrow v. First Mortgage Am., Inc.,* 2011 WL 2416247, at *3 (S.D.Fla. June 13, 2011) ("Plaintiffs are correct that the Court cannot make a factual determination at this time as to whether the Chase entity named as a defendant in the SAC is actually a national bank that falls within the statutory exceptions."). Thus, the Court declines to dismiss this claim.

***6** Count III of the First Amended Complaint asserts a claim for civil theft. In order to state a claim for civil theft, Plaintiff must allege an injury resulting from a violation of § 812.014, Florida Statutes, the criminal theft statute. *United Technologies Corp. v. Mazer,* 556 F.3d 1260, 1270 (11th Cir.2009). A defendant commits civil theft when it "(1) knowingly (2) obtained or used, or endeavored to obtain or use, [a plaintiff's] property with (3) 'felonious intent' (4) either temporarily or permanently to (a) deprive [the plaintiff] of its right to or a benefit from the property or (b) appropriate the property to [the defendant's] own use or to the use of any person not entitled to the property." *Id.* (citing Fla. Stat. §§ 772.11 and 812.014(1)). "In order to establish an action for civil theft, the claimant must prove the statutory elements of theft, as well as criminal intent." *Pearson v. Wachovia Bank, N.A.,* 2011 WL 9505, at *6 (S.D.Fla. Jan.3, 2011) (quoting *Gersh v. Cofman,* 769 So.2d 407, 409 (Fla. 4th DCA 2000)). The principal allegation with respect to Plaintiffs' theft claim appears to be that Defendants, in bad faith, induced Plaintiffs "to accept the

TPP which they never intended to honor, with the sole purpose of inducing [Plaintiffs] to make more payments on a loan she had decided to walk away from." ECF No. [24] at ¶ 29. Plaintiffs do not dispute the fact that they are currently unable to demonstrate felonious intent, see ECF No. [37] at 10, and it is patently obvious that the First Amended Complaint does not contain any material facts establishing criminal intent. Accordingly, even when drawing all reasonable inferences in Plaintiffs' favor, the First Amended Complaint fails to state a claim for civil theft under § 812.014, Florida Statutes.

Plaintiffs' fourth count is for fraud. Rule 9(b) of the Federal Rules of Civil Procedure requires a plaintiff to "state with particularity the circumstances constituting fraud or mistake." Fed.R.Civ.P. 9(b). This requirement is intended to alert defendants to the "precise misconduct with which they are charged." *Durham v. Bus. Mgmt. Associates,* 847 F.2d 1505, 1511 (11th Cir.1988) (quoting *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.,* 742 F.2d 786, 791 (3d Cir.1984)). The Eleventh Circuit has held that a party satisfies the particularity requirement when the pleading sets forth: (1) precisely what statements were made; (2) the time and place of each statement and the person responsible for making (or in the case of omissions, not making) it; (3) the content of such statements and the manner in which they caused the plaintiff to be misled; (4) what the defendants obtained as a result of the fraud. *See Zarrella v. Pac. Life Ins. Co.,* 755 F.Supp.2d 1231, 1236 (S.D.Fla.2011) (quoting *Ziemba v. Cascade Int'l, Inc.,* 256 F.3d 1194, 1202 (11th Cir.2001)). Defendants assert that the First Amended Complaint fails to allege any of the aforementioned particulars.

***7** However, the Eleventh Circuit has also noted that alternative means are also available to a plaintiff attempting to plead fraud. *Durham,* 847 F.2d 1505. Indeed, this Court has found a plaintiff to satisfy the particularity requirement where the complaint identified who made the fraudulent representations and set forth the general time frame in which the misrepresentations were made, the reasons why the representations amounted to fraud, and the alleged scheme in "considerable detail." *Colonial Penn Ins. Co. v. Value Rent–A–Car Inc.,* 814 F.Supp. 1084, 1092–93 (S.D.Fla.1992). Viewing the Plaintiffs' First Amended Complaint in the lenient light afforded to *pro se* litigants, Plaintiffs have pled fraud through such alternative means. The First Amended Complaint advances an alleged pattern of deceitful conduct, informing Defendants of the "precise misconduct with which they are charged." While not necessarily the most articulate and fastidious example under Rule 9(b), the pleading generally alleges a course of dealing where Defendants utilized the TPP in order to defraud Plaintiffs of additional funds while having no intention of honoring such agreement. *See* ECF No. [24] at ¶¶ 14–20, 25, 27–29. Here, "each allegation of fraud adequately describes the nature and subject of the alleged misrepresentation." *Colonial Penn,* 814 F.Supp. at 1092 (quoting *Seville,* 742 F.2d at 791).

In Count V, Plaintiffs assert a claim for breach of fiduciary duty. ECF No. [24] at ¶ 37. Under Florida law, a lender generally does not owe a fiduciary duty to its debtor. *See Breig v. Wells Fargo Bank, N.A.,* 2014 WL 806854, at *2 (S.D.Fla. Feb.28, 2014); *Keys Jeep Eagle, Inc. v. Chrysler Corp.,* 897 F.Supp. 1437, 1443 (S.D.Fla.1995) *aff'd sub nom. Keys Jeep Eagle v. Chrysler Corp.,* 102 F.3d 554 (11th Cir.1996); *see also Metcalf v. Leedy, Wheeler & Co.,* 140 Fla. 149, 191 So. 690 (Fla.1939) (holding that no fiduciary relationship exists between parties in an arm's-length transaction); *Capital Bank v. MVB, Inc.,* 644 So.2d 515, 518 (Fla. 3d DCA 1994) ("Generally, the relationship between a bank and its borrower is that of creditor to debtor, in which parties engage in arms-length transactions, and the bank owes no fiduciary responsibilities."). In order to overcome this general principle, the party seeking to establish this relationship must allege "some degree of dependency on one side and some degree of undertaking on the other side to advise, counsel, and protect." *Bankest Imports, Inc. v. ISCA Corp.,* 717 F.Supp. 1537, 1541 (S.D.Fla.1989) (citing *Barnett Bank of West Florida v. Hooper,* 498 So.2d 923 (Fla.1986)). Alternatively, special circumstances may create a fiduciary duty on the part of the bank, such as where the bank takes on extra services, receives a greater economic benefit than a typical transaction, or exercises extensive control. *Breig,* 2014 WL 806854, at *2.

Plaintiffs have not alleged any of these "special circumstances" in their claim for breach of fiduciary duty, nor have they asserted any other facts from which the Court may infer the creation of a fiduciary obligation. To counter Defendants contention that a fiduciary relationship does not exist, Plaintiffs assert that Defendants were acting as servicers, not lenders. ECF No. [37] at 11. However, the fact that Defendants may have been acting as loan servicers does negate the fact that Plaintiffs entered into an arms-length transaction in executing the TPP, an alleged contract. A fiduciary duty does not arise under such circumstances. *See Breig,* 2014 WL 806854, at *2 (citing *Bankest Imports,* 717 F.Supp. at 1541). Further, the First Amended Complaint does not contain any allegations where a duty could be implied by Defendants "undertaking to advise and protect" the Plaintiff. *See id.* Consequently, Plaintiffs' claim for

breach of fiduciary duty is insufficient to survive a motion to dismiss.

***8** Lastly, Plaintiffs assert a claim for negligence and negligent servicing of their loan. A claim for negligence requires three elements: a duty, breach of that duty, causation, and damages. *Virgilio v. Ryland Grp., Inc.,* 680 F.3d 1329, 1339 (11th Cir.2012). Thus, the threshold requirement is the existence of a duty. *Id.* This determination is ultimately a question of law for the Court. *See id.* Although Plaintiffs do not explicitly note the particular duty they attempt to impart upon Defendants, this claim presumably stems from Defendants' purported fiduciary obligations. As noted, Plaintiffs cannot establish the existence of a fiduciary duty. Therefore, to the extent Plaintiffs premise their negligence claim on Defendants' purported breach of fiduciary duty, such accusations also merit dismissal.

IV. CONCLUSION

Accepting Plaintiffs' allegations as true, drawing all reasonable inferences in their favor, and granting them the leniency generally afforded to *pro se* litigants, Counts I, II, and IV of Plaintiffs' First Amended Complaint are sufficient to survive a motion to dismiss. Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Defendants, U.S. Bank, N.A., Wilshire Credit Corporation, and Bank of America N.A.'s Motion to Dismiss Plaintiffs' First Amended Complaint, **ECF No. [33],** is **GRANTED IN PART and DENIED IN PART .**

2. The Motion is **DENIED** with respect to Counts I, II, and IV.

3. The Motion is **GRANTED** with respect to Counts III, V, and VI.

a. Count III is **DISMISSED WITHOUT PREJUDICE.**

b. Counts V and VI are **DISMISSED WITH PREJUDICE.**

DONE AND ORDERED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 4639431

Footnotes

1 Plaintiffs' Response was filed on August 22, 2014. ECF No. [37]. Accordingly, Defendants' Reply was due September 2, 2014. Although Defendants have seemingly opted not to reply, the Motion is nonetheless ripe for adjudication.

2 In short, the HAMP program may require a mortgage servicer to execute a loan modifications for eligible individuals suffering from financial hardship or various other reasons. *See generally* Home Affordable Modification Program, makinghomeaffordable.gov,/programs/lower-payments/pages/hamp.aspx (last visited Sept. 11, 2014).

3 Although Plaintiffs' Amended Complaint was impermissibly filed without leave of Court, subsequent to filing, the Court granted Plaintiff leave to amend. *See* ECF Nos. [26] and [29].

4 However, some courts have found the opposite, that is, that a state-law claim connected to the HAMP must be dismissed because the HAMP does not grant a plaintiff a private cause of action. *See, e .g., Reitz v. Nationstar Mortgage, LLC,* 954 F.Supp.2d 870, 881 (E.D.Mo.2013) (citing *Cox v. Mortgage Electronic Registration Systems, Inc.,* 685 F.3d 663 (8th Cir.2012)).

5 Although the HAMP will not prohibit a private right of action, there remains a question as to whether TPP's are valid contracts. *Senter v. JPMorgan Chase Bank, N.A.,* 810 F.Supp.2d 1339, 1351 (S.D.Fla.2011) ("Since the TPP Agreements are indefinite and uncertain as to material terms of the permanent loan modifications, such agreements represent, at best, unenforceable agreements to agree that do not rise to the level of a valid contract."); *see also Sutcliffe v. Wells Fargo Bank, N.A.,* 283 F.R.D. 533, 549–50 (N.D.Cal.2012) (collecting cases from throughout the nation and summarizing the dispute). However, because the parties have not argued this point, and there appears to be insufficient facts to make such a determination at this stage, the Court respectfully declines to opine on this matter.

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2012 WL 34035
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

Patricia GEARIN, Appellant,
v.
BAILEY'S NURSERIES, INC., Respondent,
John Roe Companies 1–3, et al., Defendants and Third Party Plaintiffs,
Ramsey–Washington Metro Watershed District, defendant and third party plaintiff, Respondent,
v.
F.F. Jedlicki, Inc., third party defendant and fourth party plaintiff, Respondent,
v.
Sunram Construction, Inc., fourth party defendant, Respondent.

No. A11–595.
|
Jan. 9, 2012.

Ramsey County District Court, File No. 62–CV–09–8417.

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Considered and decided by HALBROOKS, Presiding Judge; STONEBURNER, Judge; and WORKE, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge.

***1** Appellant challenges the district court's dismissal of her negligence claim based on the statute of limitations. Appellant urges this court to hold that her claim was not ripe until she knew that her personal injuries were caused by the respondents' negligent act, or alternatively, that the doctrines of equitable tolling, fraudulent concealment, equitable estoppel, or continued activity tolled the statute of limitations. We affirm.

FACTS

In early 2001, respondent Ramsey–Washington Metro Watershed District determined that Carver Pond had "filled up to a degree with sediment" and that "it was necessary to remove the sediment to restore the pond's function to its original design." The Watershed District contracted with respondent F.F. Jedlicki, Inc., who in turn hired respondent Sunram Construction, Inc., to excavate the pond. Sunram excavated the pond on March 19, 2001, and in doing so, dumped large amounts of soil on or near the property owned by appellant Patricia Gearin.

On March 10, 2003, Gearin appeared at the Maplewood City Council meeting, where she stated:

> [T]hey tossed close to over a million pounds of dirt in my backyard and crushed my septic tank, and then they were supposed to take care of it and I haven't addressed it. And my chickens have died and now they move the chicken house a little bit. Now I am down to just a few chickens. They keep on getting disease. You know, I can't—I just can't deal with this.

Gearin also stated that she was suffering from a number of medical problems.

On April 22, 2009, Gearin sued Bailey's and the Watershed District, alleging that the negligent dumping of the soil caused her health problems. The Watershed District brought a third-party claim against its contractor, Jedlicki, who asserted a fourth-party claim against Sunram.

In October 2009, Bailey's, the Watershed District, Jedlicki, and Sunram (hereinafter respondents) moved for summary judgment on statute-of-limitations grounds. The district court initially denied the motions without prejudice to allow Gearin time for discovery on the issue of whether alleged fraudulent concealment by respondents suspended the running of the statute of limitations. Following additional discovery, respondents renewed their motions for summary judgment. The district court granted the motions, concluding that Gearin's negligence action against respondents was barred because it accrued more than six years before April 22, 2009, and that she failed to prove that the respondents fraudulently prevented her from realizing that she had a cause of action or that the doctrines of equitable tolling or equitable estoppel tolled the statute of limitations. This appeal follows.

DECISION

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal from summary judgment, this court reviews de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *Antone v. Mirviss,* 720 N.W .2d 331, 334 (Minn.2006). In doing so, we "view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo,* 504 N.W.2d 758, 761 (Minn.1993).

I.

***2** We first address whether Gearin's claim is barred by the applicable statute of limitations. "The construction and application of a statute of limitations, including the law governing the accrual of a cause of action, is a question of law and is reviewed de novo." *MacRae v. Grp. Health Plan, Inc.,* 753 N.W.2d 711, 716 (Minn.2008). The party asserting the affirmative statute-of-limitations defense has the burden of establishing the elements. *Id.*

The statutory limitations period for a negligence cause of action is six years. Minn.Stat. § 541.05, subd. 1(5) (2010). The statute does not address when a negligence cause of action accrues, so the question of when Gearin's claim accrued must be answered by looking to case law.

In *Antone,* the supreme court held that "a cause of action accrues, and the statute of limitations begins to run, on the occurrence of any compensable damage, whether specifically identified in the complaint or not." 720 N.W.2d at 336; *see also Park Nicollet Clinic v. Hamann,* —— N.W.2d ——, ——, 2011 WL 6057981, at *3 (Minn. Dec. 7, 2011) (reaffirming that the ability to ascertain exact amount of damages is not required); *Dalton v. Dow Chem. Co.,* 280 Minn. 147, 153, 158 N.W.2d 580, 584 (1968) ("[T]he alleged negligence ... coupled with the alleged resulting damage is the gravamen in deciding the date upon which the cause of action at law herein accrues."). This rule strikes a balance between the "occurrence" rule, which assumes that the cause of action accrues simultaneously with the negligent act, and the "discovery" rule, under which the cause of action accrues only when a "plaintiff knows or should know of the injury." *Antone,* 720 N.W.2d at 335.

Based on the principles articulated by the supreme court in *Antone,* we conclude that Gearin's claim accrued more than six years before she brought her lawsuit. The transcript from the city council meeting on March 10, 2003, evidences that Gearin knew that respondents' dumping of the soil (the negligent act) had caused her septic tank to break (some compensable damage). While Gearin urges this court to hold that the accrual date for personal-injury negligence actions is the date on which a plaintiff knows of her physical injury, the supreme court has explicitly rejected a discovery accrual date.

Gearin argues alternatively that the six-year statute of limitations does not apply to her because her claim is not based on a "single act," but rather two separate acts (the initial dumping and the subsequent moving of the soil to her neighbor's yard) or continuing violations. We disagree. The district court correctly concluded that this argument lacks merit because the negligent act was the

dumping. The other "acts" that Gearin alleges are related to mitigating that damage (moving the soil) or the progression of damages related to that initial act (the alleged toxins seeping into the well). The negligent act occurred when the soil was dumped on Gearin's property.

II.

***3** Having concluded that respondents established a valid statute-of-limitations defense, we next examine whether Gearin has established a case of fraudulent concealment, equitable estoppel, or equitable tolling that is sufficient to toll the statute of limitations. We review de novo whether a party established an equitable-tolling claim. *See Williamson v. Prasciunas,* 661 N.W.2d 645, 650 (Minn.App.2003) (analyzing whether the undisputed facts sufficiently meet the elements of fraudulent concealment to toll the statute of limitations).

Fraudulent Concealment

Fraudulent concealment shifts the inquiry in a statute-of-limitations case "to include not only an examination of the plaintiff's knowledge, but also an examination of the defendant's conduct." *Williamson,* 661 N.W.2d at 650. "To establish fraudulent concealment, a plaintiff must prove there was an affirmative act or statement which concealed a potential cause of action, that the statement was known to be false, and that the concealment could not have been discovered by reasonable diligence." *Id.* (quotation omitted).

Gearin's fraudulent-concealment claim rests on her version of events, part of which is supported by the record, part of which is not, and most of which occurred after March 10, 2003. She essentially alleges that respondents, in collaboration with the city of Maplewood (which she plans to join as a defendant if the action survives), actively thwarted her ability to bring her claim within six years by failing to provide her with relevant documentation, by actively misleading her into thinking that her health problems were unrelated, and by targeting her for code violations, thereby distracting her (and financially draining her) so that she could not timely bring her claim. Whether or not these allegations are true, none of these acts *concealed* Gearin's claim. *See Hydra–Mac, Inc. v. Onan Corp.,* 450 N.W.2d 913, 919 (Minn.1990) (holding that a claim of fraudulent concealment requires the party to show that the cause of action was actually concealed). As of March 10, 2003, Gearin knew that she had a claim against respondents. Fraudulent concealment therefore does not apply.

Equitable Estoppel

Gearin cites no Minnesota cases recognizing equitable estoppel as a doctrine that is distinct from fraudulent concealment, and the district court, citing *Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 450–51 (7th Cir.1990), concluded that equitable estoppel and fraudulent concealment are the same. Equitable estoppel, like fraudulent concealment, "comes into play if the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not to plead the statute of limitations." *Cada,* 920 F .2d at 450–51 (citing *Holmberg v. Armbrecht,* 327 U.S. 392, 396–97, 66 S.Ct. 582, 584–85 (1946)). Because Gearin offers no basis on which to treat these two doctrines differently, and we see none, we conclude that the district court properly treated them as the same. Because Gearin does not have a viable fraudulent-concealment claim, she does not have one based on equitable estoppel either.

Equitable Tolling

***4** Equitable tolling "permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence [she] is unable to obtain vital information bearing on the existence of [her] claim." *Id.* at 451 (citing *Holmberg,* 327 U.S. at 397, 66 S.Ct. at 585). Equitable tolling differs from fraudulent concealment "in that it does not assume a wrongful—or any—effort by the defendant to prevent the plaintiff from suing." *Id.* There are two reasons why Gearin's equitable-tolling argument fails. First, she has not shown that her cause of action was concealed. Second, the *Cada* court emphasized that in equitable-tolling cases, the statute of limitations typically has run before the plaintiff knew of her claim. *Id.* at 453. But when "the necessary information is gathered after the claim arose *but before the statute of limitations has run,* the presumption should be that the plaintiff could bring suit within the statutory period and should have done so ." *Id.* (emphasis added). Gearin offers no explanation for why she did not bring her claim immediately upon suspecting that her personal injuries could be caused by the alleged toxins in the soil.

Affirmed.

All Citations

Not Reported in N.W.2d, 2012 WL 34035

2016 WL 359494
Only the Westlaw citation is currently available.
NOTICE: NOT FOR OFFICIAL PUBLICATION. UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.
Court of Appeals of Arizona,
Division 1.

James W. GERLACH, Plaintiff/Appellant,
v.
UPTOWN PLAZA ASSOCIATES, LLC, a foreign limited liability company, Defendant/Appellee.

No. 1 CA–CV 14–0684.
|
Jan. 28, 2016.

Appeal from the Superior Court in Maricopa County; No. CV 2013–015795; The Honorable J. Richard Gama, Judge. AFFIRMED.

Attorneys and Law Firms

Platt and Westby, PC by R. Andrew Rahtz, Phoenix, Counsel for Plaintiff/Appellant.

Greenberg Traurig, LLP by Peter W. Sorensen, Nedda R. Gales, Phoenix, Counsel for Defendant/Appellee.

Judge MARGARET H. DOWNIE delivered the decision of the Court, in which Presiding Judge ANDREW W. GOULD and Judge JOHN C. GEMMILL joined.

MEMORANDUM DECISION

DOWNIE, Judge.

***1** ¶ 1 James W. Gerlach appeals from a judgment dismissing his civil complaint and awarding attorneys' fees to Uptown Plaza Associates, LLC ("Uptown"). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶ 2 Gerlach and Uptown entered into a commercial lease agreement ("Lease") in January 1999 for property located at a Phoenix strip mall. Under the Lease, Gerlach's minimum monthly rent was a per-square-foot variable rate based on a square footage figure Uptown provided. The Lease stated that the "[a]pproximate" square footage of the leased space was "1,825 gross square feet of floor area" and further provided:

> The Minimum Monthly Rent has been calculated on the basis of the rental rate per square foot of gross floor area specified in Section 1.5. Upon substantial completion of construction of the Premises, Landlord shall determine the actual gross leasable floor area within the Premises ... and, if necessary, the Minimum Monthly Rent will be recalculated and either increased or decreased, as the case may be.

¶ 3 After the buildout of the leased premises was completed, Uptown did not advise Gerlach of any change in rent or square footage. Gerlach paid rent based on the 1825 square foot figure set forth in the Lease for almost 13 years.

¶ 4 Gerlach sold his business in 2012 to an individual who questioned the square footage. Uptown arranged for a survey, which reportedly revealed that Gerlach had paid rent for 271 square feet that should not have been included in the rent base, resulting in an alleged overcharge of more than $200,000 over the Lease term.

¶ 5 Gerlach filed suit against Uptown in November 2013 for breach of contract and unjust enrichment. Uptown moved to dismiss pursuant to Arizona Rule of Civil Procedure 12(b)(6). The superior court granted the motion, concluding Gerlach's claims accrued in 1999 and were barred by the applicable statutes of limitation. The court also ruled that Gerlach had not alleged facts that would warrant tolling of the limitations period and made "no allegations of concealment by Uptown or allegations that the discovery of the underlying claim was difficult to detect." In addition to expiration of the limitations period, the court concluded the unjust enrichment claim was subject to dismissal because a contract governed the

parties' relationship.

¶ 6 Uptown requested attorneys' fees of $36,905.50 and costs totaling $590.04. Over Gerlach's objection, the court awarded the requested sums and entered final judgment. Gerlach timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12–2101(A)(1).

DISCUSSION

¶ 7 This Court reviews the grant of a motion to dismiss under Rule 12(b)(6) *de novo*. *See Coleman v. City of Mesa,* 230 Ariz. 352, 355, ¶ 7 (2012). We will uphold such a dismissal only if the plaintiff would not be entitled to relief under "any facts susceptible of proof in the statement of the claim." *Sw. Non–Profit Hons. Corp. v. Nowak,* 234 Ariz. 387, 391, ¶ 10 (App.2014).

I. Breach of Contract

***2** ¶ 8 The parties agree that a six-year statute of limitations applies to the breach of contract claim. *See* A.R.S. § 12–548(A)(1) (statute of limitations for breach of written contract). Gerlach contends, though, that his claims did not accrue in 1999 as the superior court determined. Alternatively, he argues the doctrines of equitable tolling and equitable estoppel should apply, making his complaint timely.

¶ 9 "As a matter of public policy, our legislature has determined that claims must be brought within an identifiable period of time, and claims brought thereafter are, absent certain circumstances, too stale to be enforceable." *Porter v. Spader,* 225 Ariz. 424, 427, ¶ 7 (App.2010). Courts examine four factors in determining whether a claim is time-barred: (1) when the cause of action accrued; (2) the applicable limitations period; (3) when the claim was filed; and (4) whether the limitations period was tolled or suspended. *Id.* at ¶ 8. A statute of limitations defense is properly raised in a motion to dismiss "where it appears from the face of the complaint that the claim is barred." *McCloud v. State, Ariz. Dep't of Pub. Safety,* 217 Ariz. 82, 85, ¶ 8 (App.2007).

A. Accrual

¶ 10 "As a general matter, a cause of action accrues, and the statute of limitations commences, when one party is able to sue another." *Gust, Rosenfeld & Hen derson v. Prudential Ins. Co. of Am.,* 182 Ariz. 586, 588 (1995). Arizona, though, applies the "discovery rule" to breach of contract claims. *Id.* A plaintiff relying on the discovery rule has the burden of establishing its application. *See Logerquist v. Danforth,* 188 Ariz. 16, 19 (App.1996).

¶ 11 Under the discovery rule, a "cause of action does not accrue until the plaintiff knows or, in the exercise of reasonable diligence, should know the facts underlying the cause." *Gust,* 182 Ariz. at 588. The rule, however, "does not permit a party to hide behind its ignorance when reasonable investigation would have alerted it to the claim." *ELM Ret. Ctr., LP v. Callaway,* 226 Ariz. 287, 290, ¶ 12 (App.2010). "[T]he important inquiry in applying the discovery rule is whether the plaintiff's injury or the conduct causing the injury is difficult for plaintiff to detect." *Gust,* 182 Ariz. at 590.

¶ 12 Gerlach alleges he "did not discover the fact that he had been charged rent for the additional 271 square feet until he sold his business" in 2012. He contends his failure to discover the true square footage earlier was reasonable because he was "reassured by the Lease" that Uptown would verify square footage after the buildout and make necessary adjustments to the rent amount. *Gust,* however, makes clear that a party is required to "exercise [ ] reasonable diligence in monitoring the performance of another under the contract" in order for the discovery rule to apply. 182 Ariz. at 591.

¶ 13 Gerlach was in possession of the property, and the actual square footage was easily discoverable through minimal effort. Uptown's obligation to re-assess square footage after the buildout did not absolve Gerlach of the duty to exercise reasonable diligence in monitoring Uptown's contractual performance. *See Doe v. Roe,* 191 Ariz. 313, 324, ¶ 37 (1998) (a plaintiff "is charged with a duty to investigate with due diligence to discover the necessary facts"). Nor does the complaint allege facts suggesting that, after the buildout, Gerlach exercised reasonable diligence by, for example, attempting to determine the true square footage or inquiring about Uptown's efforts to verify the figure set forth in the Lease. *See, e.g., ELM Ret. Ctr.,* 226 Ariz. at 290, ¶ 13 ("[Plaintiff's] complaint does not allege facts establishing that after [plaintiff] purchased the home, it exercised reasonable diligence in discovering the true square footage, nor does the complaint offer an adequate explanation for [plaintiff's] failure to do so.").

***3** ¶ 14 Even viewing the well-pled facts and reasonable inferences therefrom in the light most favorable to Gerlach, the superior court properly determined that his breach of contract claim accrued in 1999.

B. Continuing Breach

¶ 15 Gerlach alternatively argues that each monthly rent payment he made constitutes a separate breach, permitting him to recover overpayments made less than six years before the complaint was filed. Gerlach relies on *Builders Supply Corp. v. Marshall,* which held that where a contract calls for a series of payments, each *underpayment* constitutes a separate breach. 88 Ariz. 89, 95 (1960). The court stated that a cause of action accrues for statute of limitations purposes "each time defendant fails to perform as required under the contract." *Id.*

¶ 16 According to Gerlach, "Logic suggests that, if a continuing underpayment constitutes a recurring breach, that a monthly overpayment would trigger the same exception to the statute of limitation." We disagree. Gerlach's ongoing rent payments did not transform Uptown's one-time performance obligation under the Lease to verify square footage into a monthly duty.

C. Equitable Tolling

¶ 17 "The equitable tolling doctrine is rooted in a number of common law exceptions to statutes of limitations, including: defendant's fraudulent concealment of a cause of action; defendant's inducement of plaintiff not to sue; disability of the suing party; and delays due to war." *Hosogai v. Kadota,* 145 Ariz. 227, 231 (1985). Equitable tolling is applied sparingly and only under extraordinary circumstances. *See McCloud,* 217 Ariz. at 87–88, ¶¶ 13, 16. "In instances involving equitable tolling, courts have recognized that, as a matter of equity, a defendant whose affirmative acts of fraud or concealment have misled a person from either recognizing a legal wrong or seeking timely legal redress may not be entitled to assert the protection of a statute of limitations ." *Porter,* 225 Ariz. at 428, ¶ 11.

¶ 18 Gerlach has not alleged facts suggesting that Uptown prevented him from discovering the true square footage of the premises he occupied or affirmatively induced him not to file suit. The allegations of his breach of contract claim fall short of the "extraordinary circumstances" necessary to trigger equitable tolling. *See, e.g., McCloud,* 217 Ariz. at 85, 89, ¶¶ 4, 20 (attorney's need to care for disabled brother, the death of family members, and series of surgeries immediately before limitations period expired did not constitute extraordinary circumstances to justify equitable tolling). Nor are the facts of this case analogous to *Hosogai,* where the plaintiff timely filed suit, received a favorable jury verdict, but had the judgment reversed on appeal based on defective service of process. *Hosogai* recognized a "narrow equitable exception to the statute of limitations" for cases where a timely lawsuit was filed, the defendant had notice thereof, and the plaintiff demonstrated "reasonable and good faith conduct ... in prosecuting the first claim and diligence in filing the second claim." 145 Ariz. at 230.

D. Estoppel

***4** ¶ 19 The elements of equitable estoppel are: (1) the defendant engaged in conduct inconsistent with a position it later adopts; (2) plaintiff reasonably relied on such conduct; and (3) plaintiff was injured by defendant's repudiation of its prior conduct. *See Valencia Energy Co. v. Ariz. Dep't of Revenue,* 191 Ariz. 565, 576–77, ¶ 35 (1998). When a plaintiff relies on a defendant's conduct to estop a limitations defense, courts look to see whether the defendant induced the plaintiff's delay in filing. *See, e.g., Nolde v. Frankie,* 192 Ariz. 276, 281, ¶ 20 (1998); *McBride v. Kieckhefer Assocs.,* 228 Ariz. 262, 267, ¶ 23 (App.2011). In *Nolde,* 192 Ariz. at 281, ¶ 20, our supreme court articulated the following standard:

> [I]n determining whether a defendant is estopped from asserting the limitations defense based on inducement to forbear filing suit, a trial court must determine: (1) whether the defendant engaged in affirmative conduct intended to cause the plaintiff's forbearance; (2) whether the defendant's conduct actually caused the plaintiff's failure to file a timely action; (3) whether the defendant's conduct reasonably could be expected to induce forbearance; and (4) whether the plaintiff brought the action within a reasonable time after termination of the objectionable conduct.

¶ 20 As noted *supra* in our discussion of the equitable tolling doctrine, Gerlach has not alleged conduct by Uptown that might give rise to estoppel. Uptown's silence about the square footage and continued collection of rent based on the original figure in the Lease is not "affirmative conduct intended to cause the plaintiff's forbearance." *Id.*

II. Unjust Enrichment

¶ 21 Our analysis regarding accrual of the breach of contract claim applies equally to the unjust enrichment claim. Additionally, we agree with the superior court that the unjust enrichment claim was subject to dismissal on a separate, independent ground. The doctrine of unjust enrichment does not apply "where there is a specific contract which governs the relationship of the parties." *Brooks v. Valley Nat'l Bank,* 113 Ariz. 169, 174 (1976). This well-established tenet is unsurprising, as an essential element of an unjust enrichment claim is the absence of a legal remedy. *See Trustmark Ins. Co. v. Bank One, Ariz., NA,* 202 Ariz. 535, 541, ¶ 31 (App.2002).

¶ 22 There is a contract here—the Lease—that governs the parties' relationship in relevant respects. And there is no dispute that the Lease is valid and enforceable—obviating the necessity to plead unjust enrichment in the alternative. Gerlach's assertion that the unjust enrichment claim exists "independent of the contractual relationship between the parties" is simply not supported by the record. Whether—and to what extent—Uptown was unjustly enriched through the receipt of "excess rent" is wholly dependent on the terms of the Lease.

III. Attorneys' Lees Award

***5** ¶ 23 The Lease includes a provision that states, in pertinent part: "In any dispute between the parties, the prevailing party shall be entitled to recover from the other party ... all costs and attorneys' fees." Gerlach argues Uptown's filings in the superior court did not justify the hours its attorneys ("GT") billed, and he challenges the "extremely high" hourly rates. Gerlach also stresses that Uptown's fee request for $36,905.50 included an admittedly erroneous $133 charge. Thus, he contends, the award "is excessive on its face and the Trial Court's refusal to even reduce the award when Uptown acknowledges that part of the bill was done in error just solidifies the fact that the lower court abused its discretion in making this award."

¶ 24 A trial court has broad discretion in awarding attorneys' fees, and we will not disturb a fee award absent an abuse of discretion. *Robert E. Mann Constr. Co. v. Liebert Corp.,* 204 Ariz. 129, 133, ¶ 13 (App.2003). Courts generally enforce a contract provision for attorneys' fees according to its terms. *Geller v. Lesk,* 230 Ariz. 624, 627, ¶ 10 (App.2012).

> When the parties contractually agree that a party may recover all of its attorneys' fees, the court's discretion is more limited than when awarding "reasonable" fees. Once the prevailing party makes a prima facie case that the fees requested are reasonable, the burden shifts to the party opposing the fee request to establish that the amount requested is clearly excessive. If that party fails to make such a showing of unreasonableness, the prevailing party is entitled to full payment of the fees. If, however, the party opposing the award shows that the otherwise prima facie reasonable fee request is excessive, the court has discretion to reduce the fees to a reasonable level.

Id. at 628, ¶ 11.

¶ 25 We discern no abuse of discretion. The $550 and $625 hourly rates that Gerlach challenges were for two senior attorneys who billed a relatively small portion of the total hours. An associate with a substantially lower billing rate performed the majority of work. Gerlach's argument that GT billed for an unreasonable amount of time is similarly unpersuasive. GT filed an affidavit "based on contemporaneous billing logs" to support its fee request, which created a presumption of reasonableness. *See Geller,* 230 Ariz. at 629, ¶ 15 (court may base assumption of reasonableness on detailed affidavit). Uptown was entitled to recover fees for "every item of service which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest." *Schweiger v..*

China Doll Rest., Inc., 138 Ariz. 183, 188 (App.1983). Other than the admittedly erroneous $133 charge, Gerlach has not argued that any of GT's services were beyond what a prudent lawyer would have undertaken.

¶ 26 The court's decision not to reduce the fee award, even after Uptown admitted unintentionally including an erroneous $133 charge in its initial application, does not establish the award's unreasonableness. A reasonable trier of fact could take into account Uptown's avowal in its reply that it had "incurred fees beyond that $133" after filing the initial application.

CONCLUSION

***6** ¶ 27 We affirm the judgment of the superior court. We deny Gerlach's request for attorneys' fees incurred on appeal because he is not the prevailing party. Pursuant to the parties' contract, we award Uptown its appellate fees as the prevailing party, as well as taxable costs, upon compliance with Arizona Rule of Civil Appellate Procedure 21.

All Citations

Not Reported in P.3d, 2016 WL 359494

Footnotes

1 Because Gerlach's complaint was dismissed pursuant to Rule 12(b)(6), we assume the truth of all well-pled factual allegations and draw all reasonable inferences in Gerlach's favor. *See Coleman v. City of Mesa,* 230 Ariz. 352, 356, ¶ 9 (2012); *Cullen v. Auto–Owners Ins. Co.,* 218 Ariz. 417, 419, ¶ 7 (2008).

2017 WL 44709
Only the Westlaw citation is currently available.
United States District Court, E.D. North Carolina, Southern Division.

Rebecca HARDIN, Plaintiff,
v.
BANK OF AMERICA, N.A., Pennymac Loan Services, LLC, Mass Mutual Life Ins. Co. c/o Cornerstone R.E. Adv, Brock & Scott PLLC, and Benjamin A. Barco, Defendants.

No. 7:16-CV-75-D
|
Signed 01/03/2017

Attorneys and Law Firms

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Nathan J. Taylor, McGuireWoods, LLP, Baxter Chad Ewing, W. Clark Goodman, Womble Carlyle Sandridge & Rice, LLP, Jolee M. Wortham, Brock & Scott, PLLC, Charlotte, NC, for Defendants.

ORDER

JAMES C. DEVER III, Chief United States District Judge

***1** On April 20, 2016, Rebecca Hardin ("Hardin" or "plaintiff") filed a pro se complaint against Countrywide Home Loans, Inc., PennyMac Loan Services, LLC, Mass Mutual Life Insurance Company, Brock & Scott PLLC, and Benjamin A. Barco (collectively, "defendants") [D.E. 1]. On June 24, 2016, Hardin filed an amended complaint [D.E. 18]. Hardin's claims concern a foreclosure sale that occurred after Hardin defaulted on her mortgage loan. Defendants moved to dismiss Hardin's amended complaint [D.E. 22, 37, 40, 50] and filed memoranda in support [D.E. 23, 38, 41, 51]. Hardin responded in opposition [D.E. 32, 55, 57, 59]. As explained below, the court grants defendants' motions to dismiss.

I.

On March 30, 2005, Hardin—then called Rebecca Bush—executed a Deed of Trust and Note in favor of Countrywide Home Loans, Inc., ("Countrywide") to secure a mortgage loan to purchase real property in Hubert, North Carolina. Am. Compl. [D.E. 18] ¶ 16; Compl. Ex. A [D.E. 1-1]. Under the Deed of Trust, Hardin granted Countrywide, its successors, and its assigns a power of sale. See [D.E. 1-1] 2. On November 29, 2012, Countrywide assigned the Deed of Trust to Bank of America, N.A. Am. Compl. ¶ 17; Compl. Ex. B [D.E. 1-2]. On March 28, 2014, Bank of America assigned the Deed of Trust to PennyMac Loan Services, LLC ("PennyMac"). Am. Compl. ¶ 18; Compl. Ex. C. [D.E. 1-3]. PennyMac is the loan's servicer. See Am. Compl. ¶¶ 24, 33-42.

After Hardin defaulted under the terms of the Note, PennyMac initiated foreclosure proceedings in Onslow County, North Carolina. On December 16, 2015, the Clerk of Court for Onslow County, North Carolina entered an order allowing the foreclosure sale. [D.E. 8-1] 2.[1] Hardin appealed the Clerk's order to the Onslow County Superior Court, which on February 15, 2016, affirmed the Clerk's findings and entered its own order allowing the foreclosure sale. [D.E. 8-2] 2. On April 20, 2016, PennyMac held a public auction for the subject property, at which PennyMac cast the highest bid. See [D.E. 8-3] 3. PennyMac then assigned its winning bid to the Secretary of Veterans Affairs, its successors, and its assigns. See id. On May 24, 2016, the property was transferred to the Secretary of Veterans Affairs via a Trustee's Deed that defendant Brock & Scott PLLC prepared. See [D.E. 8-3].

On April 20, 2016, Hardin filed suit. She asserts four claims: (1) lack of standing to foreclose against all defendants, Am. Compl. ¶¶ 26-30; (2) violation of the Fair Debt Collection Practices Act ("FDCPA") against PennyMac, id. ¶¶ 31-42; (3) slander of title against all defendants, id. ¶¶ 43-50; and (4) declaratory relief against all defendants concerning the validity of the various assignments and defendants' authority to foreclose. Id. ¶¶ 51-61. Defendants moved to dismiss the amended complaint for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and failure to state a claim under Rule 12(b)(6). See [D.E. 22, 37, 40, 50].

II.

A.

***2** A motion to dismiss under Rule 12(b)(1) tests subject-matter jurisdiction, which is the court's "statutory or constitutional power to adjudicate the case." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998) (emphasis omitted): see Holloway v. Pagan River Dockside Seafood, Inc., 669 F.3d 448, 453 (4th Cir. 2012); Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 479-80 (4th Cir. 2005). As the party asserting that this court has subject-matter jurisdiction, Hardin must prove that subject-matter jurisdiction exists. See, e.g., Steel Co., 523 U.S. at 104; Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999); Richmond, Fredericksburg & Potomac R.R. v. United States, 945 F.2d 765, 768 (4th Cir. 1991). In considering a motion to dismiss for lack of subject-matter jurisdiction, the court may consider evidence outside the pleadings without converting the motion into one for summary judgment. See, e.g., Evans, 166 F.3d at 647.

The court has subject-matter jurisdiction over Hardin's federal claim under 28 U.S.C. § 1331 and has supplemental jurisdiction over her state-law claims under 28U.S.C. § 1367. Hardin's failure to cite either statute in her amended complaint does not affect subject-matter jurisdiction. See, e.g., Johnson v. City of Shelby, 135 S. Ct. 346, 347 (2014) (per curiam); Carmichael v. Irwin Mortg. Corp., No. 5:14-CV-122-D, 2015 U.S. Dist. LEXIS 66815, at *3 (E.D.N.C. May 20, 2015) (unpublished); Carmichael v. Irwin Mort. Corp., No. 5:14-CV-122-D, 2014 WL 7205099, at *2 (E.D.N.C. Dec. 17, 2014) (unpublished).

Notwithstanding 28 U.S.C. § 1331, defendants contend that the Rooker-Feldman doctrine bars Hardin's claims. The Rooker-Feldman doctrine prohibits a "party losing in state court ... from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." Johnson v. De Grandy, 512 U.S. 997, 1005-06 (1994); see D.C. Court of Appeals v. Feldman, 460 U.S. 462,476 (1983); Thana v. Bd. of License Comm'rs for Charles Cty., 827 F.3d 3314, 318-20 (4th Cir. 2016); Washington v. Wilmore, 407 F.3d 274, 279 (4th Cir. 2005). The Rooker-Feldman doctrine encompasses "not only review of adjudications of the state's highest court, but also the decisions of its lower courts." Brown & Root, Inc. v. Breckenridge, 211 F.3d 194, 199 (4th Cir. 2000) (quotation omitted). Rooker-Feldman "reinforces the important principle that review of state court decisions must be made to the state appellate courts, and eventually to the Supreme Court, not by federal district courts or courts of appeal." Id. (quotation omitted). "The doctrine [also] preserves federalism by ensuring respect for the finality of state court judgments." Washington, 407 F.3d at 279.

Rooker-Feldman is a "narrow doctrine." Lance v. Dennis, 546 U.S. 459, 464 (2006); Thana, 827 F.3d at 318-20. It applies only to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon Mobil Corp. v. Saudi Basic Indus., 544 U.S. 280, 284 (2005); see Skinner v. Switzer, 562 U.S. 521, 531-33 (2011); Thana, 827 F.3d at 318-20. For the doctrine to apply, the party seeking relief in federal court must be asking the federal court to "reverse or modify the state court decree." Adkins v. Rumsfeld, 464 F.3d 456, 464 (4th Cir. 2006) (quotation omitted); Thana, 827 F.3d at 318-20. Accordingly, the court "examine[s] whether the state-court loser who files suit in federal district court seeks redress for an injury caused by the state-court decision itself. If [the state-court loser] is not challenging the state-court decision, the Rooker-Feldman doctrine does not apply." Davani v. Va. Dep't of Transp, 434 F.3d 712, 718 (4th Cir. 2006) (footnote omitted); see Thana, 827 F.3d at 318-20.

***3** At least with respect to Hardin's first, third, and fourth claims, Hardin impermissibly "seeks to take an appeal of an unfavorable state-court decision to a lower federal court." Lance, 546 U.S. at 466. She bases counts one, three, and four on assertions that her debt was illegally or improperly assigned, that no valid debt exists, that she was not in default, and that no defendant had standing to foreclose. Thus, Hardin asks this court to declare that no defendant has any enforceable right in the property and that title instead resides in Hardin in fee simple. See Am. Compl. 12-14 (Prayer for Relief). In order to grant this relief, this court would have to reverse the final judgment of the Onslow County Superior Court. This court, however, lacks subject-matter jurisdiction to sit in direct review of a North Carolina state foreclosure action. See Thana, 827 F.3d at 318-20; Brown & Root, Inc., 211 F.3d at 199-202; Jordahl v. Democratic Party of Va., 122 F.3d 192, 202-03 (4th Cir. 1997).[2] Permitting Hardin's first, third, and fourth claims to proceed would, in essence,

require this court to hold that the state-court judgment was erroneous. Her "success on the merits would necessitate a finding that the state court 'wrongly decided the issues before it.' " Smalley v. Shapiro & Burson, LLP, 526 Fed.Appx. 231, 236 (4th Cir. 2013) (unpublished) (quoting Brown & Root Inc., 211 F.3d at 198). Thus, the court lacks subject-matter jurisdiction over Hardin's first, third, and fourth claims. See Thana, 827 F.3d at 318-20.

B.

Alternatively, even if the Rooker-Feldman doctrine does not apply to any of the claims, Hardin fails to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) for "failure to state a claim upon which relief can be granted" tests whether the complaint is legally and factually sufficient. See Fed. R. Civ. P. 12(b)(6); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); Coleman v. Md. Court of Appeals, 626 F.3d 187, 190 (4th Cir. 2010), aff'd, 132 S. Ct. 1327 (2012); Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008); accord Erickson v. Pardus, 551 U.S. 89, 93-94 (2007) (per curiam). A court need not accept a complaint's "legal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement." Nemet Chevrolet, Ltd. v. Consumeraffairs.com. Inc., 591 F.3d 250, 255 (4th Cir. 2009). However, the court "accepts all well-pled facts as true and construes these facts in the light most favorable to the plaintiff in weighing the legal sufficiency of the complaint." Id. Construing the facts in this manner, a complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Id. (quotation omitted).

The standard used to evaluate the sufficiency of a pleading is flexible, "and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Erickson, 551 U.S. at 94 (quotation omitted). Erickson, however, does not "undermine [the] requirement that a pleading contain 'more than labels and conclusions.' " Giarratano, 521 F.3d at 304 n.5 (quoting Twombly, 550 U.S. at 555); see Ashcroft v. Iqbal, 556 U.S. 662, 677-83 (2009): Coleman, 626 F.3d at 190: Nemet Chevrolet, Ltd., 591 F.3d at 255-56: Francis v. Giacomelli, 588 F.3d 186, 193 (4th Cir. 2009).

***4** To state a claim under the FDCPA, Hardin must plausibly allege that (1) she was the object of collection activity arising from a "consumer debt" as defined by the FDCPA, (2) PennyMac is a "debt collector" as defined by the FDCPA, and (3) PennyMac engaged in an act or omission prohibited by the FDCPA. Boosahda v. Providence Dane LLC, 462 Fed.Appx. 331, 333 n.3 (4th Cir. 2012) (per curiam) (unpublished); Campbell v. Wells Fargo Bank, N.A., 73 F. Supp. 3d 644, 648 (E.D.N.C. 2104); Johnson v. BAC Home Loans Servicing, LP, 867 F. Supp. 2d 766, 776 (E.D.N.C. 2011). Hardin fails to do so.[3]

Hardin fails to plausibly allege that PennyMac meets the FDCPA's definition of a "debt collector." The FDCPA "defines a debt collector as (1) a person whose principal purpose is to collect debts; (2) a person who regularly collects debts owed to another; or (3) a person who collects its own debts, using a name other than its own as if it were a debt collector." Henson v. Santander Consumer USA, Inc., 817 F.3d 131, 136 (4th Cir. 2016) (emphasis omitted). Instead of well-pled facts plausibly alleging that PennyMac meets any of these definitions, Hardin offers the legal conclusion that PennyMac is a " 'debt collector[ ] ' as defined by the FDCPA." See Am. Compl. ¶ 33. Her only other relevant allegation is that PennyMac fits the definition of "debt collector" because Bank of America assigned the debt to PennyMac while the debt was in default (although elsewhere Hardin argues that she had not defaulted). See id. ¶ 37. Yet "the default status of a debt has no bearing on whether a person qualifies as a debt collector under the threshold definition set forth in" the FDCPA. Henson, 817 F.3d at 135, 138-39. Hardin's failure to plausibly allege that PennyMac is or was acting as a "debt collector" dooms her FDCPA claim against PennyMac. See, e.g., id. at 133-34, 137-40; Wiggins, 2015 WL 3952332, at *6; Roseborough v. Firstsource Advantage, LLC, No. 1:15CV54, 2015 WL 401765, at *2 (M.D.N.C. Jan. 28, 2015) (unpublished).

Hardin also fails to plausibly allege that PennyMac engaged in any acts or omissions that the FDCPA prohibits. In her amended complaint, Hardin contends that PennyMac took certain actions to collect a debt that Hardin asserts she does not owe and that PennyMac has no right to collect. See Am. Compl. ¶¶ 38-42. But the state-court proceedings conclusively established Hardin's default on the debt and PennyMac's right to collect it. See [D.E. 8-2] 2. Collateral estoppel bars her from arguing otherwise. See Thomas M. McInnis & Assocs., Inc. v. Hall, 318 N.C. 421, 428, 349 S.E.2d 552, 557 (1986) (holding that under the doctrine of collateral estoppel, "a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of

action between the parties or their privies"); see also Dorsey v. Clarke, No. WMN-15-3506, 2016 WL 4205769, at *2 (D. Md. Aug. 10, 2016) (unpublished); Wiggins, 2015 WL 3952332, at *3, *8; Boyter v. Moynihan, No. 3:12-CV-00586-MOC, 2013 WL 1349283, at *7 (W.D.N.C. Apr. 3, 2013) (unpublished); Brumby, 2010 WL 617368, at *5. Thus, Hardin fails to state an FDCPA claim.

***5** Having "dismissed [the one claim] over which it has original jurisdiction," the court has discretion to decline to exercise supplemental jurisdiction over Hardin's remaining state-law claims. See 28 U.S.C. § 1367(c)(3); Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1998); United Mine Workers of AM. v. Gibbs, 383 U.S. 715, 726 (1966); ESAB Grp., Inc. v. Zurich Ins. PLC, 685 F.3d 376, 394 (4th Cir. 2012); Shanaghan v. Cahill, 58 F.3d 106, 110 (4th Cir. 1995). The court chooses to exercise supplemental jurisdiction over the remaining state-law claims because Hardin's state-law claims are easily resolved.

In North Carolina, the Clerk of Superior Court presides over power-of-sale foreclosure actions. See N.C. Gen. Stat. § 45-21.16(d). To find that a foreclosure initiated under a power of sale is valid, the clerk of court must determine that a valid debt exists, the debtor is in default, the trustee has the right to foreclose, and sufficient notice was given. See N.C. Gen. Stat. § 45-21.16(d)-(d1); Phil Mech. Const. Co. v. Haywood, 72 N.C. App. 318, 322, 325 S.E.2d 1, 3 (1985). Any issue that the clerk decides in a foreclosure proceeding under N.C. Gen. Stat. § 45-21.16(d) is conclusive unless appealed and reversed and cannot be relitigated in a subsequent lawsuit. See In re Atkinson-Clark Canal Co., 234 N.C. 374, 377, 67 S.E.2d 276, 278 (1951); Haughton v. HSBC Bank USA, N.A., 737 S.E.2d 191, 2013 WL 432575, at *3 (N.C. Ct. App. 2013) (unpublished table decision); Douglas v. Pennamco, Inc., 75 N.C. App. 644, 646, 331 S.E.2d 298, 300 (1985); Phil Mech. Constr. Co., 72 N.C. App. at 320-23, 325 S.E.2d at 1-3.[4] A party may appeal a decision of the clerk of court to the superior court, which reviews de novo the same four issues that the clerk resolved. See N.C. Gen. Stat. § 45-21.16(d1); In re Five Oaks Recreational Ass'n, Inc., 219 N.C. App. 320, 325, 724 S.E.2d 98, 101 (2012); Phil Mech. Contr. Co., 72 N.C. App. at 322, 325 S.E.2d at 3. In conducting its review, the superior court also may consider evidence of legal defenses tending to negate any of the clerk's findings required under N.C. Gen. Stat. § 45-21.16. See In re Foreclosure of Deed of Trust, 334 N.C. 369, 374-75, 432 S.E.2d 855, 859 (1993). The superior court's review is limited to these findings, and the superior court has no equitable jurisdiction to enjoin foreclosure on any ground other than those stated in N.C. Gen. Stat. § 45-21.16. See id. 334 N.C. at 374, 432 S.E.2d at 859; In re Helms, 55 N.C. App. 68, 71-72, 284 S.E.2d 553, 555 (1981).

Hardin's claims rest upon the premise that the debt was improperly or illegally assigned, that no valid debt exists, that Hardin was not in default, or that no defendant had standing to foreclose. The Onslow County Superior Court, however, resolved these issues against Hardin in the foreclosure proceeding. Thus, collateral estoppel bars Hardin from relitigating these issues, and her state-law claims fail. Thomas M. McInnis & Assocs., Inc, 318 N.C. at 428, 349 S.E.2d at 557.[5] Moreover, to the extent that Hardin failed to raise any of these issues as a defense in the underlying foreclosure proceeding, the doctrine of res judicata bars Hardin from raising them here. See Goins v. Cone Mills Corp., 90 N.C. App. 90, 93, 367 S.E.2d 335, 336-37 (1988) (noting that res judicata bars "every ground of recovery or defense which was actually presented or which could have been presented in the previous action"); see also Wiggins, 2015 WL 3952332, at *3 n.3; Newton, 2015 WL 3413256, at *3 n.2.

III.

***6** In sum, the court GRANTS defendants' motions to dismiss [D.E. 22, 37, 40, 50], and DISMISSES plaintiff's amended complaint. The court DISMISSES defendants' motions to dismiss the complaint [D.E. 7, 14] as moot.

SO ORDERED. This 3 day of January 2017.

All Citations

Not Reported in Fed. Supp., 2017 WL 44709

Footnotes

1 The court takes judicial notice of the foreclosure proceedings. Fed. R. Evid. 201: Papasan v. Allain, 478 U.S. 265, 268 n.1 (1986); Philips v. Pitt Cty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009); Sec'y of State for Defence v. Trimble Navigation Ltd., 484 F.3d 700, 705 (4th Cir. 2007); Hall v. Virginia, 385 F.3d 421, 424 n.3 (4th Cir. 2004); Colonial Penn. Ins. Co. v. Coil, 887 F.2d 1236, 1239 (4th Cir. 1989).

2 See also Wiggins v. Planet Home Lending, LLC, No. 5:14-CV-862-D, 2015 WL 3952332, at *4 (E.D.N.C. June 26, 2015) (unpublished); Carmichael, 2015 U.S. Dist. LEXIS 66815, at *3-6; Carmichael, 2014 WL 7205099, at *2-3; Pitts v. U.S. Hous. & Urban Dev., No. 5:12-CV-72-D, 2013 WL 214693, at *3 (E.D.N.C. Jan. 18, 2013) (unpublished), aff'd, 546 Fed.Appx. 118 (4th Cir. 2013) (per curiam) (unpublished); Adolphe v. Option One Mortg., Corp., No. 3:11-CV-418-RJC, 2012 WL 5873308, at *4 (W.D.N.C. Nov. 20, 2012) (unpublished); Watkins v. Clerk of Superior Court for Gaston Cty., No. 3:12-CV-033-RJC-DCK, 2012 WL 5872751, at *5-6 (W.D.N.C. July 10, 2012) (unpublished), R&R adopted, 2012 WL 5872750, at *4-6 (W.D.N.C. Nov. 20, 2012) (unpublished); Brumby v. Deutsche Bank Nat'l Trust Co., No. 1:09CV144, 2010 WL 617368, at *4-6 (M.D.N.C. Feb. 7, 2010) (unpublished), R&R adopted, 2010 WL 3219353 (M.D.N.C. Aug. 13, 2010) (unpublished).

3 Hardin asserts that defendants Brock & Scott PLLC and Benjamin A. Barco are "debt collectors" but makes no allegations that either engaged in conduct that violates the FDCPA. See Am. Compl. ¶¶ 32-42. Thus, Hardin fails to plausibly allege an FDCPA claim against them.

4 See also Newton v. Nationstar Mortg. LLC., No. 7:14-CV-16-D, 2015 WL 3413256, at *2 (E.D.N.C. May 26, 2015) (unpublished); Carmichael, 2014 WL 7205099, at *4; Oketch v. JPMorgan Chase & Co., Inc., No. 3:12-CV-00102, 2012 WL 2155049, at *4 (W.D.N.C. June 13, 2012) (unpublished); Merrill Lynch Bus. Fin. Servs., Inc. v. Cobb, No. 5:07-CV-129-D, 2008 WL 6155804, at *3 (E.D.N.C. Mar. 18, 2008) (unpublished).

5 See also, Wiggins, 2015 WL 3952332, at *3; Newton, 2015 WL 3413256, at *2-3; Carmichael, 2014 WL 7205099, at *4; Boyter, 2013 WL 1349283, at *3-6; Le v. Bank of Am., N.A., No. 3:12CV678-RJC-DSC, 2013 WL 139763, at *2 (W.D.N.C. Jan. 10, 2013) (unpublished), R&R adopted, 2013 WL 632298 (W.D.N.C. Feb. 20, 2013) (unpublished); Adolphe, 2012 WL 5873308, at *9; Mixon v. Wells Fargo Home Mortg., No. 3:12-CV-77-RJC-DLH, 2012 WL 1247202, at *1-3 (W.D.N.C. Apr. 13, 2012) (unpublished); Friscia v. Bank of Am., N.A., 775 S.E.2d 36, 2015 WL 3490083, at *3-5 (N.C. Ct. App. 2015) (unpublished table opinion).

2011 WL 744538
Only the Westlaw citation is currently available.
United States District Court,
M.D. Pennsylvania.

Allison ISHLER, Plaintiff
v.
CHASE HOME FINANCE LLC, J.P. Morgan Chase, NA, Defendants.

Civil No. 1:CV–10–2117.
|
Feb. 23, 2011.

West KeySummary

1 **Mortgages and Deeds of Trust** Verdict, findings, and conclusions

Mortgages and Deeds of Trust Particular cases, contexts, and questions in general

Written material provided to mortgagor by mortgagee describing eligibility requirements to participate in the federal government's Home Affordable Modification Program (HAMP), a loan modification program, could not have misled mortgagor into falsely believing that she would be put in the loan modification program, and thus mortgagor failed to state a claim for common law fraud against mortgagee under Pennsylvania law. The material made no guarantees and said her loan would be modified only if she qualified for the program.

3 Cases that cite this headnote

Attorneys and Law Firms

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MEMORANDUM

WILLIAM W. CALDWELL, District Judge.

I. *Introduction*

***1** Plaintiff, Allison Ishler, filed a complaint against the defendants, Chase Home Finance LLC (Chase) and JP Morgan Chase, N.A. (JPMC), arising from her unsuccessful attempt to participate in the federal government's Home Affordable Modification Program, known as HAMP. She sets forth three claims. The first two are for fraud under Pennsylvania law, fraud in the written HAMP material sent to Plaintiff and then fraud in subsequent telephone conversations. The third claim is for a violation of the Fair Debt Collection Practices Act, alleging that the defendants violated that statute in their dealings with Plaintiff. Plaintiff invokes federal-question and diversity jurisdiction. *See* 28 U.S.C. §§ 1331 and 1332(a)(1).

We are considering Defendants' motion to dismiss the complaint under Fed.R.Civ.P. 12(b)(6). For the reasons discussed below, we will grant Defendants' motion.

II. *Standard of Review*

Fed.R.Civ.P. 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted." On a motion to dismiss, "[w]e 'accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.' " *Byers v. Intuit, Inc.,* 600 F.3d 286, 291 (3d Cir.2010) (quoted case omitted). While a complaint need only contain "a short and plain statement of the claim," Fed.R.Civ.P. 8(a)(2), and detailed factual allegations are not required, *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007), a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570, 550 U.S. 544, 127 S.Ct. 1955 at 1974, 167 L.Ed.2d 929. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal,* 556 U.S. 662, ——, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Twombly,* 550 U.S. at 556, 127 S.Ct. at 1965).

The court is not limited to evaluating the complaint alone; it can also consider documents attached to the complaint, matters of public record, and indisputably

authentic documents. *Delaware Nation v. Pennsylvania,* 446 F.3d 410, 413 n. 2 (3d Cir.2006). This includes court filings. *See Churchill v. Star Enterprises,* 183 F.3d 184, 190 n. 5 (3d Cir.1999) (citing *Pension Benefit Guaranty Corp. v. White Consol. Indus., Inc.,* 998 F.2d 1192, 1196 (3d Cir.1993)).

In addition, under Fed.R.Civ.P. 9(b), fraud allegations must be pled with particularity. *Lum v. Bank of America,* 361 F.3d 217, 223 (3d Cir.2004). *See also In re Ins. Brokerage Antitrust Litig.,* 618 F.3d 300, 347 (3d Cir.2010). A plaintiff satisfies this requirement by pleading the "date, place or time of the fraud, or through alternative means of injecting precision and some measure of substantiation into [her] allegations of fraud." *Lum,* 361 F.3d at 224 (citations omitted).

III. *Background*

***2** Plaintiff alleges as follows. On October 1, 2007, she mortgaged her house to JPMC, which assigned the mortgage to Chase. (Compl.¶ 9). [1] On May 29, 2009, Chase obtained a default judgment for $206,336.18 against Plaintiff in state-court mortgage-foreclosure proceedings. (Doc. 6–1, state-court docket CM/ECF p. 2). On September 4, 2009, Plaintiff filed a Chapter 13 voluntary petition in bankruptcy. (Doc. 6–1 CM/ECF p. 4). On February 22, 2010, the bankruptcy case was dismissed "for material default." (Doc. 6–1, CM/ECF p. 8).

On March 24, 2010, Plaintiff received from Chase a packet of documents. (Compl.Ex. A). The first of these documents was a one-page letter informing her that she was "approved to enter into a trial period plan under" HAMP. (Doc. 1–3, CM/ECF p. 1). "To accept this offer," Plaintiff had to "make new monthly 'trial period payments' in place of [her] normal monthly mortgage payment." (*Id.*). She was instructed to send Chase three monthly payments of $1,312.55 each, beginning on May 1, 2010, then on June 1, 2010, and July 1, 2010. (*Id.*). The letter also required Plaintiff to send Defendant Chase copies of various financial documents by April 23, 2010, noting that her loan would not be modified if she either: (1) failed to make each trial period payment in the month in which it was due; or (2) failed to submit the required financial documents. (*Id.*). The letter concluded by informing Plaintiff that, if she submitted her documents and made her payments correctly, her mortgage would be permanently modified "if [she] qualified]." (*Id.*). In the meantime, her "existing loan and loan requirements remain[ed] in effect and unchanged during the trial period." (*Id.*). And during the trial period, Chase could post trial period payments to her mortgage account. (*Id.,* CM/ECF p. 5).

Plaintiff submitted the financial information and made all three payments in a timely fashion. (Compl.¶ 12). On July 1, 2010, the date of the final payment, she called Chase to ask what the next step was to obtain a permanent modification. (*Id.* ¶ 13). A Chase employee responded by asking for certain financial information, including Plaintiff's monthly income, bills, and any other assets or loans Plaintiff had. (*Id.*). The employee said "the next step would be to fill out the 'final loan modification documents,' " which Plaintiff should receive by July 6, 2010. (*Id* .).

On July 2 and 3, 2010, Plaintiff received several phone calls from Chase, which Plaintiff did not answer. (*Id.* ¶ 14). On July 3, 2010, Plaintiff called Chase. She told a Chase employee that she was expecting documents in the mail and asked why she was receiving so many phone calls. (*Id.*). The employee told her "the calls were computer generated" and that the employee would have the calls "pushed back" two weeks so that Plaintiff would have time to submit the documents she was expecting on July 6. (*Id* .).

***3** However, the phone calls never stopped, and Plaintiff did not receive the documents by July 6. (*Id.* ¶ 15). On July 12, 2010, Plaintiff called Chase again. Plaintiff explained her situation to another Chase employee, and the employee told her that the "documents had not been sent for some reason" and that he would send them to her. (*Id.*). The employee also said that he would have the phone calls "pushed back," but Plaintiff continued to receive the calls. (*Id.*).

On August 3, 2010, Plaintiff still had not received the documents. (*Id.* ¶ 16). On that date, her attorney called Chase. A Chase employee, the third one, told him that the documentation Plaintiff had been promised was merely the same checklist of documents that she had already submitted and that the attorney could access it on Chase's website. (*Id.*). The employee said that a sheriff's sale had been scheduled for Plaintiff's property on August 12, and that Plaintiff could prevent the sale by sending in the requested materials. (*Id.*). Counsel was given a phone number to call but this number led to a dead end. (*Id.*). When the attorney called the Sheriff's office about the sale, he was told no sheriff's sale was scheduled for Plaintiff's property, on August 12, or any other date. (*Id.*).

On August 8, 2010, Plaintiff received a letter from Chase stating "that plaintiff had elected not to proceed with the loan modification either because plaintiff notified them that she wished to cancel her request, or that she failed to accept the offer materials." (*Id.* ¶ 17).

On August 20, 2010, Plaintiff called Chase and explained her situation. A Chase employee told Plaintiff that: (1) "her account was closed and that her home was going into foreclosure"; (2) this "was happening because her 'short sale was not accepted' "; and (3) Plaintiff's " 'records' indicated that [Plaintiff] had not done a trial loan modification." (*Id.*).

Ten days later, on August 30, 2010, a Chase employee called Plaintiff and, contrary to the representations made to her on August 20, she was told "that there was in fact a record of plaintiff in the trial loan modification program." (*Id.* ¶ 18). However, by September 22, 2010, Plaintiff had "still not received any consistent information as to the status of her loan modification application." (*Id.* ¶ 19).

Plaintiff further alleges:

> 20. The defendant intentionally misled the plaintiff by inducing her to make three trial payments of $1312.55, as part of the initial process of a loan modification, without any intention of actually accepting her into the loan modification program.
>
> 21. The defendant repeatedly lied to plaintiff in ... inducing her to make the monthly payments and submit paperwork which she has already submitted several times.
>
> 22. The defendant harassed plaintiff with dozens of phone calls on her cell phone while she was at work and home. These calls also occurred during periods of time when plaintiff was explicitly told would not occur. These phone calls were a nuisance and caused frequent interruptions with her work.
>
> ***4** 23. Plaintiff has experienced anxiety, depression, embarrassment, and endless frustration, from her phone calls with defendant, as they have left plaintiff with feelings of uncertainty with regard to the future of her home which she has lived in for approximately three years.

(Compl.¶¶ 2–23).

In Count I of her complaint, Plaintiff makes a claim for fraud based on the representations in the one-page letter and in the "packet of materials" that accompanied it. She alleges:

> 26. The statements and representations made in the above referenced packet by defendant were false and, in fact, the purpose of the materials was to induce the plaintiff into making monthly payments for an indefinite amount of time with no intention of permanently putting plaintiff into a loan modification program.
>
> 27. The representations made in the packet were known by defendant to be false when made and were made with intent to deceive and defraud plaintiff and any other prospective borrower of the defendant to make payments with no intention of putting plaintiff into [a] loan modification program.
>
> 28. Plaintiff read the packet and at that time did not know the truth, reasonably believed that the representations were true, relied upon them, and was thereby induced ... to make three payments of $1312.55.

(*Id.* ¶¶ 26–28).

In Count II, Plaintiff makes a claim for fraud based on the representations made in the telephone calls. She alleges:

> 30. On numerous occasions, as listed above, plaintiff and plaintiff's attorney had telephone conversations with various employees of defendant.
>
> 31. The statements and representations made by the employees of the defendant were made with the intention of inducing the plaintiff to expend various sums of money and produce various documents for the purpose of wrongfully convincing plaintiff that she was heading on the track to receiving a permanent loan modification.
>
> 32. The statements and representations made by the employees of the defendant were known by defendants to be false and misleading and their purpose was only to defraud plaintiff or others similarly situated to make payments for an indefinite amount of time for no actual purpose other than to falsely give the plaintiff a sense of comfort.
>
> 33. Plaintiff listened to the defendant[']s employees and attempted to comply with all requests and statements made by employees. In reliance [on] defendant's employees['] statements made in telephone conversations, Plaintiff believed she was in the trial period of the loan modification, and planned and acted accordingly.

34. Plaintiff was humiliated and embarrassed upon being told by defendant's employee that there was no record of her even being in the trial period.

35. Defendants were recklessly indifferent to their obligation in dealing in good-faith with the plaintiff.

(*Id.* ¶¶ 30–35).

In Count III, Plaintiff alleges a violation of the Fair Debt Collection Practices Act (FDCPA), alleging that the defendants used "false, deceptive and misleading representations or means," in connection with the collection of a debt, in violation of 15 U.S.C. § 1692e.

***5** As relief, Plaintiff requests: (1) an injunction against the defendants' "collection practices until their practice is reviewed and determined to be equitable"; (2) statutory damages of $1,000, (3) punitive damages, (4) a permanent modification of Plaintiff's loan to a payment of $800 per month on a principal of $120,000; and (5) attorney's fees.

IV. *Discussion*

A. *Plaintiff Fails to State a Claim Under the FDCPA*

We will deal first with Count III. Plaintiff alleges in that count a violation of the Fair Debt Collection Practices Act (FDCPA), claiming that the defendants used "false, deceptive and misleading representations or means," in connection with the collection of a debt, in violation of 15 U.S.C. § 1692e. In moving to dismiss this claim, Defendants argue that the FDCPA applies only to debt collectors, rather than to creditors seeking to collect their own debts, citing in part *Messett v. Home Consultants, Inc.,* No. 07–2208, 2010 WL 1643606 at *4 (M.D.Pa. Apr.22, 2010). Defendant Chase explains that, as Plaintiff obtained the loan from defendant JPMC, which then assigned the loan to defendant Chase, both defendants are creditors, rather than debt collectors, and as such, are not subject to the FDCPA. In opposing Defendants' motion, Plaintiff does not address the merits of her FDCPA claim or Defendants' argument. We will therefore dismiss this claim. *See FTC v. Check Investors, Inc.,* 502 F.3d 159, 171–72 (3d Cir.2007) ("Creditors—as opposed to debt collectors—generally are not subject to the FDCPA.") (quoted case omitted).

B. *Plaintiff Fails to State Claims for Fraud*

Plaintiff alleges two counts of fraud against the defendants. In Count I, she alleges fraud based upon the representations in the written HAMP materials. In Count II, she alleges fraud based on the oral representations Chase employees made in the telephone conversations with her and her attorney after she made the third and final trial payment on July 1.

To establish common law fraud under Pennsylvania law, a plaintiff must prove: "(1) misrepresentation of a material fact; (2) scienter; (3) intention by the declarant to induce action; (4) justifiable reliance by the party defrauded upon the misrepresentation; and (5) damage to the party defrauded as a proximate result." *Hunt v. United States Tobacco Co.,* 538 F.3d 217, 225 n. 13 (3d Cir.2008) (*quoting Colaizzi v. Beck,* 895 A.2d 36, 39 (Pa.Super.2006)).

Defendants argue that the fraud claim in Count I based on the written HAMP material fails because Plaintiff's allegations of fraud in that count federal pleading requirements as being conclusory and without sufficient factual support. They point to the allegations in paragraphs 26 and 27 of count I. In paragraph 26, Plaintiff alleges that "the statements and representations made" in the HAMP material "were false and, in fact," made "to induce the plaintiff into making monthly payments for an indefinite amount of time with no intention of permanently putting plaintiff into a loan modification program." In paragraph 27, she alleges that the "representations ... were known by defendant to be false when made and were made with intent to deceive and defraud plaintiff ... to make payments with no intention of putting plaintiff into [a] loan modification program."

***6** Defendants go further and contend that the actual written material could not in any event have misled Plaintiff into falsely believing that she would be put in the loan modification program. The material made no guarantees and said her loan would be modified only if she qualified for the program. *See Shurtliff v. Wells Fargo Bank, N.A.,* No. 10–165, 2010 WL 4609307, at *4 (D.Utah Nov.5, 2010) (no viable fraud claim when HAMP documents showed that modification was contingent on the defendant bank's approval, and the bank only did what it was permitted to do when it determined the plaintiff did not qualify for a loan modification).

Defendants next argue that the fraud claim in Count II based on the oral statements Chase employees made during the telephone conversations fails because she cannot show reasonable reliance on these statements. Reasonable reliance

is absent because these statements were made after Plaintiff made the third and final trial payment so Plaintiff could not have reasonably relied on them in deciding to make the trial payments, the actions she said were induced by the representations.

Finally, in regard to both fraud claims, Defendants present two reasons why Plaintiff has failed to allege any damages resulting from the alleged fraudulent conduct. First, Plaintiff alleges she was induced to make her three trial payments in reliance on the representations, but Plaintiff was obligated to make those payments anyway as part of her still existing mortgage obligation, even under HAMP. *See Adams v. U.S. Bank,* No. 10–10567, 2010 WL 2670702, at *4 (E.D.Mich. July 1, 2010) (fraud claim based on the plaintiffs' unsuccessful HAMP application fails in part when the plaintiff could show no injury since she was already obligated to make the mortgage payments); *Singh v. Wells Fargo Bank,* No. 10–1659, 2011 WL 66167, at *8 (E.D.Cal. Jan.7, 2011) (fraud claim based on the plaintiffs' unsuccessful HAMP application fails when the plaintiffs did not state how their reliance resulted in damages). Second, Plaintiff does not allege she qualified for the program, even if Chase should have allowed her a permanent modification of her mortgage. *See Adams, supra,* 2010 WL 2670702, at *4 (fraud claim based on the plaintiff's unsuccessful HAMP application fails in part when the plaintiff does not allege she would have qualified for a loan modification); *Sankey v. Aurora Loan Services, LLC.,* No. 10–11815, 2010 WL 4450404, at *2 (D.Mass. Nov.4, 2010) (fraud claim based on the plaintiff's unsuccessful HAMP application fails when she does not allege she would have qualified for the program).

We agree with this analysis and will dismiss the complaint for the reasons set forth by the defendants. We have considered Plaintiff's opposition arguments but reject them. In pertinent part, Plaintiff contends the no-damages argument lacks merit because she is contending that a contract was made: Plaintiff's consideration was to make trial payments and in return Chase was to process her application. Next, unlike in the cases Defendants cite, Plaintiff's fraud claim is that she was falsely told she would be considered for a loan modification when Chase never considered her application. Plaintiff also argues she is entitled to discovery to determine if she was in fact considered for a modification under HAMP.

***7** Plaintiff's contract argument lacks merit because Plaintiff made no contract claim in her complaint. Her second argument fails because it does not address the injury argument fatal to her fraud claims. Plaintiff's third argument fails because a plaintiff is not entitled to discovery to determine if she has a cause of action. *See Ranke v. Sanofi–Synthelabo Inc.,* 436 F.3d 197, 204 (3d Cir.2006).

Having decided that the complaint fails to state a claim, we must decide whether we should allow amendment. *Chemtech Int'l, Inc. v. Chem. Injection Technologies, Inc.,* 170 F. App'x 805, 811 (3d Cir.2006) (non precede ntial). Generally, amendment should be allowed, unless it would be futile. *Id.* We believe it would be futile here, based on Plaintiff's failure to allege that she would have qualified for a loan modification. Defendants pointed this out in their brief, and Plaintiff did not respond to it. In the absence of an allegation that she would have qualified, there does not appear to be any cause of action Plaintiff could make that would satisfy a showing of injury.

We will issue an appropriate order.

ORDER

AND NOW, this 23rd day of February, 2011, it si ordered that:

1. Defendant's motion (doc. 4) to dismiss Plaintiff's complaint is hereby granted.

2. The Clerk of Court shall close this file.

All Citations

Not Reported in F.Supp.2d, 2011 WL 744538

Footnotes

1 Plaintiff sometimes treats the defendants as one entity, (see Compl. ¶ 5), but we will treat them separately.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ALBERTO ISOLA,

Plaintiff,

v. **Case No: 8:17-cv-2640-T-35AEP**

BANK OF AMERICA, N.A.,

Defendant.

ORDER

THIS CAUSE comes before the Court for consideration of Plaintiff's Response to Court's Order to Show Cause Entered on October 24, 2018. (Dkt. 29) Having reviewed Plaintiff's Response to the Court's Order to Show Cause, the allegations of the Amended Complaint, all relevant filings, case law, and being otherwise fully advised, the Court finds that this action is due to be dismissed without prejudice for lack of subject matter jurisdiction.[1]

I. BACKGROUND

On June 27, 2017, Plaintiff and 117 others sued Bank of America in the Middle District of Florida in a single action, Torres et al v. Bank of America, N.A., 8:17-cv-1534-RAL-TBM. The 292-page complaint in that action alleged fraud and the violation of

1 Defendant Bank of America does not raise the issue of subject matter jurisdiction in its pending Motion to Dismiss. However, the Court is required to consider its subject matter jurisdiction at any point during the proceedings *sua sponte* when it becomes concerned that jurisdiction is lacking. Ellenburg v. Spartan Motors Chassis, Inc., 519 F.3d 192, 197 (11th Cir. 2008). Further, the Court need not address Bank of America's alternate grounds for dismissal raised in the pending motion to dismiss if the Court concludes that it lacks jurisdiction. See Boda v. United States, 698 F. 2d 1174, 1177 n.4 (11th Cir. 1983) (noting that "[w]here dismissal can be based on lack of subject matter jurisdiction and failure to state a claim, the court should dismiss on only the jurisdictional grounds. This dismissal is without prejudice."); accord Dimaio v. Democratic Nat'l Comm., 520 F. 3d 1299, 1303 (11th Cir. 2008) (citing and quoting Boda).

Florida's Deceptive and Unfair Trade Practices Act. Bank of America moved to dismiss, arguing misjoinder of the plaintiffs' claims, failure to plead fraud with particularity, failure to state a claim, expiration of the four-year limitation, and the absence of a private right to sue a bank for violating the requirements of the Home Affordable Modification Program ("HAMP"). Before resolving the motion to dismiss, the presiding judge observed that the complaint failed to invoke diversity jurisdiction and ordered the plaintiffs to amend. The plaintiffs then filed a 403-page amended complaint. Bank of America again moved to dismiss, repeating the arguments from its earlier motion. The presiding judge found misjoinder, severed the plaintiffs' claims, and ordered the plaintiffs to sue separately.

Then, between October 30, 2017 and November 3, 2017, more than 100 plaintiffs sued Bank of America in the Middle District of Florida in 80 nearly identical actions, all alleging one-count of fraud under Florida common law. The actions are distributed among eight district judges in the Middle District. The instant case is one of these actions.

II. DISCUSSION

In its Show Cause Order, the Court observed that four other judges in the Middle District of Florida have now dismissed their nearly identical cases involving alleged fraud perpetrated by Bank of America in facilitating illegal and fraudulent property foreclosures for lack of subject matter jurisdiction under the Rooker-Feldman[2] doctrine.[3]

2 The doctrine evolved from the two United States Supreme Court cases from which its name is derived, Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983).

3 Gonzalez v. Bank of America, N.A., 5:17-cv-00519-SDM-PRL (Dkt. 44); Varela-Pietri et al v. Bank of America, N.A., 8:17-cv-02534-SDM-TGW (Dkt. 50); Salazar v. Bank of America, N.A., 8:17-cv-02535-SDM-AEP (Dkt. 50); Diaz v. Bank of America, N.A., 8:17-cv-02537-SDM-MAP (Dkt. 51); Rostgaard v. Bank of America, N.A., 8:17-cv-02538-SDM-CPT (Dkt. 57); Collazo v. Bank of America, N.A., 8:17-cv-02539-RAL-AAS (Dkt. 35); Gonzalez v. Bank of America, N.A., 8:17-cv-2546-RAL-CPT (Dkt. 32); Alonso et al v. Bank of America, N.A., 8:17-cv-02547-VMC-SPF (Dkt. 62); Colon v. Bank of America, N.A., 8:17-cv-2548-RAL-AAS (Dkt. 30); Colon et al v. Bank of America, N.A., 8:17-cv-02549-VMC-JSS (Dkt. 60); Guevara v. Bank

Under the Rooker-Feldman doctrine, federal courts, other than the Supreme Court, do not have jurisdiction to review final state court decisions. See Target Media Partners v. Specialty Mktg. Corp., 881 F.3d 1279, 1285–86 (11th Cir. 2018) (explaining the Rooker-Feldman doctrine and recognizing its limited scope "to bar only those claims asserted by the parties who have lost in state court and then ask the district court, ultimately, to review and reject a state court's judgments"). If a claim is one "inextricably intertwined" with a state court judgment and would "effectively nullify the state court judgment," then Rooker-Feldman bars the claim if there was reasonable opportunity to raise the particular claim in the state court proceeding. Id. Claims that have been found to be "inextricably intertwined" with state court judgments are "limited to those raising a question that was or should have been properly before the state court." Id. at 1286.

Plaintiff's Response to the Show Cause Order argues, in sum, that the Rooker-Feldman doctrine does not apply in this instance because his fraud claim is not an indirect attack on the foreclosure judgment, but rather, is a distinct claim that Bank of America's fraudulent actions resulted in a wrongful denial of a HAMP modification. This is the same

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of America, N.A., 8:17-cv-02550-SCB-JSS (Dkt. 36); Mosquea v. Bank of America, N.A., 8:17-cv-02551-SDM-TGW (Dkt. 46); Peralta v. Bank of America, N.A., 8:17-cv-2580-SDM-MAP (Dkt. 56); Gonzalez v. Bank of America, N.A., 8:17-cv-2581-RAL-AAS; (Dkt. 29); Restrepo v. Bank of America, N.A., 8:17-cv-2582-RAL-CPT (Dkt. 30); Rodriguez v. Bank of America, N.A., 8:17-cv-02583-SDM-TGW (Dkt. 51); Santos v. Bank of America, N.A., 8:17-cv-02585-VMC-AEP (Dkt. 63); Ruiz v. Bank of America, N.A., 8:17-cv-02586-SDM-TGW (Dkt. 41); Rosselini v. Bank of America, N.A., 8:17-cv-02584-SCB-CPT (Dkt. 29); Santos v. Bank of America, N.A., 8:17-cv-02587-SCB-SPF (Dkt. 29); Santos v. Bank of America, N.A., 8:17-cv-2588-SDM-MAP (Dkt. 47); Urtiaga et al v. Bank of America, N.A., 8:17-cv-02590-SCB-CPT (Dkt. 30); Acosta v. Bank of America, N.A., 8:17-cv-2592-SDM-AAS (Dkt. 55); Blanco v. Bank of America, N.A., 8:17-cv-02593-SDM-JSS (Dkt. 48); Cedeno v. Bank of America, N.A., 8:17-cv-2594-RAL-AAS (Dkt. 33); Penaranda v. Bank of America, N.A., 8:17-cv-2599-RAL-SPF (Dkt. 31); Garcia v. Bank of America, N.A., 8:17-cv-02602-SDM-AAS (Dkt. 46); Zalazar v. Bank of America, N.A., 8:17-cv-02603-SDM-CPT (Dkt. 48); Perez v. Bank of America, N.A., 8:17- cv-02623-SDM-JSS (Dkt. 50); Moncada et al v. Bank of America, N.A., 8:17-cv-02625-SDM-AEP (Dkt. 45); Espinel v. Bank of America, N.A., 8:17-cv-02628-SDM-JSS (Dkt. 44); Ocampo v. Bank of America, N.A., 8:17-cv-2631-SDM-JSS (Dkt. 42); Carmenates v. Bank of America, N.A., 8:17-cv-2635-SDM-JSS (Dkt. 50); Clavelo v. Bank of America, N.A., 8:17-cv-2644-RAL-TGW (Dkt. 29); Valencia et al v. Bank of America, N.A., 8:17-cv-02645-SCB-JSS (Dkt. 33). The Parties' primary counsel in all of these cases is the same as in the instant case.

argument that was thoroughly considered and rejected by the other four judges of the Middle District in the above-listed cases, whose reasoning the Court adopts here. Thus, Plaintiff's response fails to show satisfactory cause why this case should not be dismissed for lack of subject matter jurisdiction.

In the Amended Complaint, Plaintiff alleges that Bank of America tricked him into defaulting on his loan by telling him that it was a prerequisite for HAMP modification eligibility, instructed him to make "trial payments" to Bank of America that it never applied to his account or refunded, charged fraudulent inspection fees that added to the foreclosure judgment, induced him to incur unnecessary costs for sending multiple applications for a HAMP loan modification and related financial documents to Bank of America, damaged his credit, and caused the loss of his home and equity in that home. The issues of alleged fraud in this case are alleged to have preceded the foreclosure. As such, these issues could have been raised in the state court foreclosure action before final judgment was entered. See Nivia v. Nation Star Mortg., LLC, 620 F. App'x 822, 825 (11th Cir. 2015); Shahar v. Green Tree Servicing LLC, 125 So.3d 251, 252–54 (Fla. 4th DCA 2013) (finding unclean hands to be a sufficiently pled affirmative defense to foreclosure where a lender made material misrepresentations in connection with the mortgage).

Further, granting Plaintiff's damages, which principally stem from the loss of Plaintiff's home and the equity in that home—a loss occasioned by the foreclosure judgment itself, would effectively nullify the entry of that judgment. See Santos v. Bank of America, N.A., Defendant., No. 8:17-CV-2585-T-33AEP, 2018 WL 5024335 (M.D. Fla. Oct. 17, 2018) ("Because the state court found that the foreclosure leading to the loss of

Plaintiff's home was proper, granting damages for the loss of Plaintiff's home suggests entry of the foreclosure judgment was wrongful."). It would not change the result that Plaintiff alleges he was unaware of the facts he now knows until he retained his attorney in this case.[4]

Therefore, for the reasons set forth, and authority cited, by the four other judges of the Middle District in the over thirty aforementioned virtually identical cases, the Court finds the fraud alleged here is inextricably intertwined with the state foreclosure judgment, and Plaintiff's claims are barred by the Rooker-Feldman doctrine.[5]

III. CONCLUSION

Upon consideration of the foregoing, the Court hereby **ORDERS** as follows:

1. Plaintiff's Amended Complaint, (Dkt. 16), is **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction under the Rooker-Feldman doctrine.
2. The Clerk is directed to **TERMINATE** all pending motions and **CLOSE** this case.

DONE and **ORDERED** in Tampa, Florida, this 30th day of October, 2018.

MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

4 The Court notes that the conduct that Plaintiff claims was hidden from him could have been discovered by Plaintiff during the state foreclosure action. As Plaintiff recognizes in his Amended Complaint, (Dkt. 16 at 9–10), the issues concerning Bank of America's mismanagement of the HAMP modification process were being litigated by other plaintiffs nationally, such that in 2010, the judicial panel on multidistrict litigation transferred several cases to the United States District Court for the District of Massachusetts for consolidated pretrial proceedings. See In re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation, M.D.L. No. 1:10-md-02193-RWZ.

5 See, e.g., Ocampo v. Bank of America, N.A., No. 8:17-CV-2631-T-23JSS, 2018 WL 3862560 (M.D. Fla. Aug. 14, 2018) (citing Figueroa v. Merscorp, Inc., 766 F. Supp. 2d 1305 (S.D. Fla. 2011), aff'd, 477 F. App'x 558 (11th Cir. 2012) (unpublished) and Nivia v. Nation Star Mortg., LLC, 620 F. App'x 822 (11th Cir. 2015) (unpublished)); Carmenates v. Bank of America, N.A., No. 8:17-CV-2635-T-23JSS, 2018 WL 3548727 (M.D. Fla. July 24, 2018) (same).

Copies furnished to:
Counsel of Record
Any pro se party

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Only the Westlaw citation is currently available.
United States District Court, N.D. Alabama,
Southern Division.

Dorothy JONES, Plaintiff,
v.
BANK OF AMERICA, N.A., Defendant.

Case No. 2:18-cv-0012-JEO
|
Signed 08/28/2018

Attorneys and Law Firms

Jay Aughtman, The Aughtman Law Firm, Montgomery, AL, for Plaintiff.

Graham W. Gerhardt, Bradley Arant Boult Cummings LLP, Birmingham, AL, for Defendant.

MEMORANDUM OPINION

John E. Ott, Chief United States Magistrate Judge

***1** On December 1, 2017, Plaintiff Dorothy Jones filed this action in the Circuit Court of Jefferson County, Alabama, Birmingham Division, asserting fraud claims under Alabama law against Defendant Bank of America, N.A. ("BOA"). (Doc.[1] 1-1 at 3-21 ("Complaint" or "Compl.")). BOA removed the action pursuant to 28 U.S.C. §§ 1441 and 1446, invoking this court's diversity jurisdiction.[2] (Doc. 1). The cause now comes to be heard on BOA's motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). (Doc. 4). Because that motion and Plaintiff's response in opposition (Doc. 9) included documentary evidence beyond the original complaint, the court entered an order giving notice that it intended to treat BOA's pending motion as one for a Fed. R. Civ. P. 12(b)(6) dismissal or, in the alternative, for summary judgement under Fed. R. Civ. P. Rule 56. (Doc. 15). Both Plaintiff and Defendant have responded. (Doc. 16, 18). For the reasons explained below, the court[3] concludes that BOA's dispositive motion is due to be granted and that this action is due to be dismissed with prejudice.

I. REVIEW STANDARDS

Although this action was originally filed in state court, since it has been removed, procedural matters are now governed by the Federal Rules of Civil Procedure, including as they relate to pleading standards and dismissal for failing to meet them. *See* Rule 81(c)(1), Fed. R. Civ. P.; *Willy v. Costal Corp.*, 503 U.S. 131, 134 (1992); *Duncan v. Citimortgage, Inc.*, 617 F. App'x 958, 960 (11th Cir. 2015). In particular, Rule 12(b)(6), Fed. R. Civ. P., authorizes a motion to dismiss a plaintiff's complaint in whole or in part on the ground that its allegations fail to state a claim upon which relief can be granted. That provision, in turn, is read in light of Rule 8(a)(2), Fed. R. Civ. P., which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U.S. 41, 47 (1957). The court is required to accept the well-pled factual allegations of the complaint as true and give the plaintiff the benefit of all reasonable factual inferences. *See Hazewood v. Foundation Financial Group, LLC*, 551 F.3d 1223, 1224 (11th Cir. 2008) (per curiam). However, "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.' " *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) ("Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."). Nor is it proper to assume that the plaintiff can prove facts he or she has not alleged or that the defendants have violated the law in ways that have not been alleged. *Twombly*, 550 U.S. at 563 n.8 (*citing Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 526 (1983)).

***2** "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.*, 550 U.S. at 555 (citations, brackets, and internal quotation marks omitted). "Factual allegations must be enough to raise a right to relief above the speculative level...." *Id.* Thus, "a complaint must contain sufficient factual matter, accepted

as true, to 'state a claim to relief that is plausible on its face,' " *i.e.*, its "factual content ... allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citations omitted).

Further, because Plaintiff's Complaint seeks to recover for fraud, it implicates Rule 9(b), Fed. R. Civ. P., which imposes heightened pleading standards by requiring a party to "state with particularity the circumstances constituting fraud." Generally, this occurs where the pleading alleges

> (1) precisely what statements were made in what documents or oral representations or what omissions were made, and
>
> (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and
>
> (3) the content of such statements and the manner in which they misled the plaintiff, and
>
> (4) what the defendants obtained as a consequence of the fraud.

Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1371 (11th Cir. 1997) (internal quotations omitted). However, allegations relating to "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Id.*

In analyzing a motion to dismiss under Rule 12(b)(6), the court is generally limited to examining the allegations of the complaint itself, but it may also look to documents attached or referred to the complaint that are central to the plaintiff's claims and whose authenticity is unchallenged. *See SFM Holdings, Ltd. v. Banc of Amer. Securities, LLC*, 600 F.3d 1334, 1337 (11th Cir. 2010); *Day v. Taylor*, 400 F.3d 1272, 1275-76 (11th Cir. 2005); *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002). To the extent that such documents are considered and they contradict the allegations of the complaint, the documents control. *Friedman v. Market Street Mortg. Corp.*, 520 F.3d 1289, 1295 n. 6 (11th Cir. 2008); *Griffin Indust., Inc. v. Irvin*, 496 F.3d 1189, 1206 (11th Cir. 2007). If a district court considers materials beyond the above scope, however, it is required to treat the motion as one for summary judgment under Fed. R. Civ. P. 56. *See* Fed. R. Civ. P. Rule 12(d); *SFM Holdings*, 600 F.3d at 1337; *Harper v. Lawrence County, Ala.*, 592 F.3d 1227, 1232 (11th Cir. 2010).

Pursuant to Rule 56, the "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(a). The party moving for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion," relying on submissions "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see also Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). Once the moving party has met its burden, the nonmoving party must "go beyond the pleadings" and show there is a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 324.

Both the party "asserting that a fact cannot be," and a party asserting that a fact is genuinely disputed, must support their assertions by "citing to particular parts of materials in the record," or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. Proc. 56(c)(1)(A), (B). In its review of the evidence, a court must credit the evidence of the non-movant and draw all justifiable inferences in the non-movant's favor. *Stewart v. Booker T. Washington Ins.*, 232 F.3d 844, 848 (11th Cir. 2000). At summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

II. BACKGROUND

***3** Plaintiff's cause of action relates to BOA's participation in the Home Affordable Modification Program ("HAMP"), which was created by the United States Department of the Treasury pursuant to authority granted by the Emergency Economic Stabilization Act of 2008, 12 U.S.C. §§ 5201-5261. *See Miller v. Chase Home Finance, LLC*, 677 F.3d 1113, 1116 (11th Cir. 2012). HAMP is a federal program "designed to prevent avoidable home foreclosures by incentivizing loan servicers to reduce the required monthly mortgage payments for certain struggling homeowners." *Id.* Plaintiff alleges that, in April 2009, BOA, the nation's largest mortgage servicer, entered into a Servicer Participation Agreement with the federal government to participate in HAMP (*see* Doc. 1-1 at 22-50) in exchange for a commitment by the government to infuse BOA with hundreds of millions of dollars. (Compl. ¶¶ 11, 12). Plaintiff says that, despite the federal funds it would

receive under the Servicer Participation Agreement, BOA knew that conforming to its obligations, "in providing screening for HAMP applications and accepting homeowners who meet the requirements," would cost BOA millions of dollars. (Compl. ¶ 16). As such, Plaintiff claims, BOA

> made a calculated decision ... to permit just enough HAMP modifications to create a defense ... against Federal Government agencies ... [and to convince] Congressional skeptics and the public that BOA was making best efforts to comply with [the] Agreement. Simultaneously, however, BOA chose to develop methodical business practices designed to intentionally prevent scores of [qualified] homeowners from become eligible or staying eligible for a permanent HAMP modification.

(*Id.* ¶ 17). To that end, Plaintiff says, BOA "developed systems and procedures that deliberately obfuscated, misled, and otherwise deceived ... homeowners and regulators, resulting in ineligibility through no fault of the homeowner." (*Id.* ¶ 18).

In this vein, Plaintiff has attached to her Complaint unsworn declarations, *see* 28 U.S.C. § 1746, of five former BOA employees who have outlined their alleged experiences with BOA's purported scheme to defraud applicants for HAMP loan modifications. (*See* Doc. 1-2 at 1-23). Those declarations are dated between May 2013 and February 2017, and four of them contain court file stamps indicating they were filed as evidence in June 2013 in a multi-district litigation action then pending in the United States District Court for the District of Massachusetts styled, *In re Bank of America Home Affordable Modification (HAMP) Contract Litigation. See* No. 1:10-md-2193-RWZ, Doc. 210-4 (D. Mass. June 7, 2013). Plaintiff has also included a copy of a memorandum opinion dated September 4, 2013, in which that district court recognized that those plaintiffs had plausibly alleged that BOA "utterly failed to administer its HAMP modifications in a timely and efficient way; that in many cases it lost documents, or pretended it had not received them, or arbitrarily denied permanent modifications," though the court denied the plaintiff's motion for class certification. (Doc. 1-2 at 32-42, 2013 WL 4759649). Finally, Plaintiff also attached a report to Congress from the Office of the Inspector General for the Troubled Asset Relief Program dated January 27, 2017, that was critical of BOA's administration of its HAMP loan medication program. (Doc. 1-2 at 25-31).

***4** Plaintiff's claims in this action arise from how BOA purportedly carried out its alleged fraudulent scheme in dealing with her as she attempted to obtain a HAMP modification on her home mortgage loan. Her salient allegations are as follows: In January 2000, Plaintiff executed a mortgage on her home in Birmingham, along with a promissory note to obtain a loan from New South Federal Savings Bank. (*Id.* ¶ 35; *see also* Doc. 4 at 4-13, Exhibit A to BOA's Motion to Dismiss). The following month, her mortgage loan was assigned to BOA, which serviced it thereafter. (Compl. ¶ 35). On or about February 4, 2010, Plaintiff contacted BOA to request a modification of her loan pursuant to HAMP. (*Id.* ¶ 37). In March 2010, BOA provided her with an application, which she completed and returned to BOA with requested financial documentation. (*Id.* ¶ 41). Plaintiff claims, however, that, on several subsequent phone calls, she was informed by BOA loan representative Regina Mayes "and others" that the application documents Plaintiff had sent were "not received," were "incomplete," or were "not current." (*Id.* ¶¶ 42, 43). Those statements, Plaintiff says, were false, made pursuant to a BOA practice designed to "induc[e] Plaintiff to resend her modification application over and over" (Compl. ¶¶ 42, 43), and "frustrat[e] the HAMP application process to ensure a modification was ultimately declined, resulting in foreclosure." (*Id.* ¶ 44). Plaintiff asserts that she relied on these false statements by "unnecessarily resubmitt[ing] her application and supporting information via US Mail or Federal Express more than two (2) times" (*id.* ¶ 45), thereby causing her to lose "costs" and "time" spent preparing and mailing the additional applications. (*Id.* ¶ 70).

While Plaintiff alleges that "BOA had no intention of reviewing" her application (*Id.* ¶¶ 45, 70), she also acknowledges that, in or about March 2011, she received a letter from BOA advising that she had been approved for a trial period HAMP modification and requesting that she make "trial payments" of $496.15 per month. (Compl. ¶ 47). In her Complaint, Plaintiff explains that once a homeowner's application for a HAMP modification is approved, the homeowner typically begins a three-month trial payment period. (*Id.* ¶ 13). If timely payments are made during that period, the homeowner must be offered a permanent modification, whereby the terms in effect during the trial payment period are extended for five years. (*Id.*) After the homeowner completes five years

under the terms of the modification, the lender may increase the interest rate on the loan by 1% annually up to the prevailing Freddie Mac interest rate in effect at the time the modification was made. (*Id.* ¶ 14).

On this score, BOA has attached to its motion to dismiss a copy of what it claims, and that Plaintiff does not dispute, is that approval letter, dated February 18, 2011. (Doc. 4 at 15). In the letter, BOA states that it had determined Plaintiff's mortgage loan was HAMP-eligible, and BOA enclosed "Trial Period Plan" documents and coupons to make three monthly payments of $496.15, due on the first of the month in March, April, and May 2011. (*Id.* at 16-22). The letter further advised Plaintiff that she had to sign and return the enclosed "Trial Period Pack" by March 20, 2011, which Plaintiff did, executing and dating the paperwork on February 21, 2011. (*Id.* at 15, 22). Finally, the letter stated that, after Plaintiff had completed the Trial Period Plan by timely making the three payments, BOA would send her "additional documents" that she would need to sign and return "before [her] loan will be permanently modified." (*Id.* at 15).

The HAMP Trial Period Pack enclosed with the approval letter made further statements and disclosures. Included in these was a statement that Plaintiff's eligibility for a HAMP modification required her to certify, among other things, that "[she is] unable to afford [her] mortgage payments for the reasons indicated in her [HAMP modification application] and as a result, (i) [she is] either in default or, (ii) [she does] not have sufficient income or access to sufficient liquid assets to make the monthly mortgage payments." (*Id.* at 19). The documents also advised Plaintiff expressly that "[i]f [she has] not made the Trial Period Payments required under ... [the Trial Period] Plan, ... [her existing mortgage agreement] Loan Documents will not be modified and [the] Plan will terminate" and, in which case, if Plaintiff was "not eligible for any other loss mitigation option," BOA might pursue foreclosure. (Doc. 4 at 20, ¶¶ 2(B), (E)). The documents further explained that "payments received by [BOA] under [the] Plan shall be held by [BOA] in a suspense account until [Plaintiff] successfully makes" the payments required under the Plan, whereupon the payments previously sent would "be applied, at [BOA]'s option, first to the oldest payments due, or to any advances or fees due, unless applicable law requires a different application method." (*Id.*, ¶ 2(C)). However, they stated, if the "Plan is canceled and/or terminated for any reason, any funds in this suspense account shall be credited to [her] loan pursuant to the terms of [her] Loan Documents and shall not be refunded to [her]." (*Id.*) Finally, the documents recognized that the Trial Period Plan itself "[was] not a modification of [her existing mortgage agreement] Loan Documents and that the Loan Documents will not be modified unless and until [she] meet[s] all of the conditions required for modification" and that BOA "will not be obligated or bound to make any modification of the Loan Documents if [she] fail[s] to meet any one of the requirements under [the] Plan." (*Id.* at 20-21, ¶¶ 2(F), (G)).

***5** In spite of the Trial Period Plan approval correspondence, Plaintiff insists that her HAMP modification "application wasn't [actually] approved" and that BOA "had no intention of approving [her] application." (Compl. ¶ 47). Instead, Plaintiff claims that the letter's statement that her application had been "approved" was false, made as part of a broader pattern and practice on BOA's part to induce borrowers like her to make "trial payments" that BOA would keep in "an unapplied account until [BOA] made a decision on the borrower['s] HAMP application." (*Id.* ¶ 48 (emphasis omitted)). According to Plaintiff, instead of "applying" those funds, presumably to the loan balance, BOA would retain them "for profit after foreclosure or apply [them] to fraudulent inspection and other fees the bank charged." (*Id.*) On the latter point, Plaintiff explains that BOA regularly charged borrowers for "property inspection" fees that are "impermissible under the HUD [United States Department of Housing and Urban Development] Servicing Guidelines." (*Id.* ¶ 53; *see also id.* ¶¶ 48, 73-75).

Plaintiff suggests she was personally victimized by such tactics. In particular, she says that, she "rel[ied]" on the February 2011 letter approving her for a trial period plan by making 17 payments of $496.15 each "between 2011 and 2012, hoping to save her home." (*Id.* ¶ 50). Likewise, Plaintiff contends that, between 2004 and 2015, BOA conducted twelve "unnecessary and improper inspections on her home and charging her account inspection fees" on each occasion, with some of the funds from her trial payments in 2011 and 2012 being applied to pay such fees. (Compl. ¶¶ 53-55).

Plaintiff also claims that, shortly after she received the letter stating she was approved for a trial period plan, she was misled by BOA loan representative Mayes about the eligibility requirements for a HAMP modification. Specifically, Plaintiff maintains that, on or about April 18, 2011, Mayes "advised Plaintiff by phone to refrain from making her regular mortgage payments." (*Id.* ¶ 38). Plaintiff says Mayes further told her to do so because being "past due" and in "default" on her loan, according to Mayes, "was a prerequisite for ... HAMP modification eligibility." (*Id.*) Plaintiff claims that such statement was false because neither an actual default nor delinquency is,

in fact, required to be eligible under HAMP; rather, Plaintiff says, a homeowner can be eligible so long as a "default" is merely "eminent [sic]" (*id.* ¶ 39) or is otherwise "reasonably foreseeable." (*Id.* ¶ 38).

Although Plaintiff alleges that, "between 2011 and 2012," she made 17 mortgage payments of $496.15 each, purportedly in "rel[iance]" on the February 2011 trial period plan letter (Compl. ¶ 50), Plaintiff simultaneously claims that she "rel[ied]" on Mayes's statement on the April 2011 phone call by "refrain[ing] from making her regular mortgage payment," thereby causing her loan to fall into "default status." (*Id.* ¶ 40). Plaintiff does not specifically allege when she so refrained or when any default was declared or otherwise occurred. Plaintiff does plead, however, that BOA ultimately foreclosed on her home on December 14, 2014, and that, as a result, a judgment in the amount of $24,000.00 was later entered against her. (*Id.* ¶ 50).

As previously noted, Plaintiff's Complaint makes repeated allegations to the effect that BOA developed "methodical business practices designed to intentionally prevent scores of eligible homeowners from becoming eligible or staying eligible for a permanent HAMP modification." (Compl. ¶ 17; *see also, e.g., id.* ¶ 27(a)) ("BOA was trying to prevent as many homeowners as possible from obtaining permanent HAMP loan modifications ..." (internal quotation marks and citation omitted)); *id.* ¶ 27(b) ("Bank of America's deliberate practice was to string homeowners along with no intention of providing permanent modifications."); *id.* ¶ 29 ("BOA's fraudulent scheme worked as intended. A January 27, 2017 Inspector General Report to Congress found BOA "[w]rongfully denying homeowners admission into HAMP" and "denied 79% of all who applied for HAMP" ....). And while Plaintiff does not expressly and unambiguously claim that BOA adhered to that pattern in her particular case by, in fact, actually denying or *never* granting her a permanent HAMP loan modification, at the very least, as Defendants say, "that appears to be the insinuation." (Doc. 5 at 5; *see also* Compl. ¶ 45) ("BOA had no intention of reviewing" her HAMP application); *id.* ¶ 47 (stating that the statement in the February 2011 trial period plan letter that she had been "approved" was "false as the application wasn't approved. Instead, BOA had no intention of approving the application ..."); *id.* ¶ 55 ("BOA committed common law fraud upon Plaintiff when the bank ... omitted the fact that it had no intention of approving the application...."). Indeed, in her brief, Plaintiff comes right out and says it: "Eventually BOA denie[d] her loan modification...." (Doc. 9 at 2).

***6** BOA, however, has attached to its motion to dismiss a copy of what purports to be just such a permanent "Loan Modification Agreement." (Doc. 4 at 23-32, Exhibit C to BOA's Motion to Dismiss). Plaintiff signed and dated that document on October 23, 2012 (*id.* at 30), and BOA recorded it in the probate court public records on December 9, 2013. (*Id.* at 32). Under the terms of the instrument, Plaintiff's loan was deemed modified as of June 1, 2011, *i.e.*, the first month after the third and final payment under her trial period plan referenced in the February 2011 approval letter, which served as the commencement of a new 30-year maturity period. (*Id.* at 27). The document further provides that Plaintiff was due to make monthly payments of $511.39 (comprised of $273.79 in principal and interest, plus $237.60 in escrow payments) on the first of each month, beginning on November 1, 2012. (*Id.*)

Plaintiff's response in opposition to BOA's motion to dismiss does not challenge the authenticity of the "Loan Modification Agreement" document. Rather, she seeks only to impugn its legal import, characterizing it as merely a "supposed permanent modification." (Doc. 9 at 2). Plaintiff has also sought to counter it by attaching two letters she subsequently received from BOA but which are not referenced in her Complaint.[4] (*See* Doc. 9-1). The first is dated January 10, 2014. (*Id.* at 4-5). It starts by thanking Plaintiff "for contacting [BOA] to discuss available foreclosure prevention alternatives." (*Id.* at 4). The letter then goes on to state, however, "[W]e regret to inform you that based on careful review of the information provided, you do not meet the eligibility requirements to qualify for a loan assistance program, such as a modification, or a short sale." (*Id.*) The second letter is dated July 10, 2014. (*Id.* at 1-3). It similarly thanks Plaintiff for contacting BOA "to discuss loan assistance options," but it too states that BOA has deemed her "not eligible for any loan mortgage assistance program, including loan modification [or] short sale...." (Doc. 9-1 at 1). That letter than goes on to explain further why BOA deemed Plaintiff not to meet the eligibility requirements for certain "loan modification programs," including three types of modification under HAMP specifically. (*Id.* at 1-2).

Plaintiff's Complaint pleads a cause of action for fraud under Alabama state law, divided into two counts. Count I raises claims for "Fraudulent Misrepresentation" based on three ostensibly false statements allegedly made by BOA or its employees. First, Plaintiff asserts a misrepresentation claim based on statements by Mayes "and others" advising Plaintiff that her application documents for a HAMP modification were "not received," "incomplete," or "not current." (See Compl. ¶¶

42, 63). Second, Plaintiff cites BOA's statement in the trial period plan letter to the effect that she had been "approved" for a loan modification. (*Id.* ¶¶ 64). And third and finally, Plaintiff points to statements on the April 2011 phone call whereupon Mayes allegedly advised Plaintiff to refrain from making mortgage payments because eligibility for a HAMP modification required the Plaintiff to be "past due" and in "default" on her loan. (*Id.* ¶¶ 44).

Count II, in turn, is captioned, "Fraudulent Omission." With respect to that theory, Plaintiff alleges that BOA committed "fraud upon the Plaintiff" when throughout the HAMP application process, BOA communications "omitted the fact that the bank was conducting unnecessary and improper inspections on her home and charging her account inspection fees" that were, she claims, "impermissible" under HUD servicing guidelines. (Compl. ¶¶ 53, 54; *see also id.* ¶¶ 71-76). Plaintiff similarly claims that BOA committed "fraud ... when the bank requested she make trial payments during the [pendency of her] HAMP application and omitted the fact that [BOA] had no intention of approving the application and intended to apply some of the funds sent by Plaintiff for trial payments to fraudulent inspections fees." (*Id.* ¶ 55; *see also id.* ¶¶ 47, 64, 71-78). The court notes, however, that Plaintiff has elsewhere in the Complaint leveled allegations that BOA committed "fraud" through three other "omissions" related to claims already described. First, she claims that BOA "fraudulently omitted" that it "had no intention of approving [her] application" for a HAMP modification. (*Id.* ¶¶ 47, 55; *see also id.* ¶ 45 ("BOA had no intention of reviewing [her HAMP application]")). Second, Plaintiff contends that when BOA requested that she make trial payments, it "fraudulently omitted [the] fact" that "[i]t was and is BOA's practice to place trial period payments into an unapplied account until BOA made a decision on the borrowers' HAMP application" (*id.* ¶ 49 (internal quotation marks, emphasis, and ellipses all omitted)). Third, in reference to her April 2011 phone call with Mayes, Plaintiff alleges that she "omitted the fact that eligibility for HAMP was available to borrowers if default was reasonably foreseeable" (*id.* ¶ 38), *i.e.*, "that only eminent [sic] default was required." (Compl. ¶ 39).

***7** BOA has filed a motion to dismiss the Complaint pursuant to Rule 12(b)(6) (Doc. 4), along with a brief. (Doc. 5). BOA raises the following theories in support of dismissal:

> (1) that there is no private cause of action under HAMP;
>
> (2) that Plaintiff's claims are barred by Alabama's statute of frauds because the alleged misrepresentations concerning Plaintiff's credit agreement were never reduced to writing;
>
> (3) that Plaintiff's claims are not viable as ones for fraud because they are not independent from a breach of contract, but, rather, relate directly to the performance of the terms of Plaintiff's note, mortgage, and loan modification;
>
> (4) that Plaintiff's claims are barred by Alabama's two-year statute of limitations on fraud claims;
>
> (5) that the allegations of the Complaint are deficient under Fed. R. Civ. P. 8(a) and 9(b), as interpreted in *Twombly* and *Iqbal*; and
>
> (6) that some or all of Plaintiff's claims are groundless because she was, in fact, granted a permanent modification of her loan pursuant to HAMP.

(Doc. 5 at 2). Plaintiff has opposed the motion. (Doc. 9). Because both parties filed documents that are neither referenced in the Complaint nor necessarily central to the Plaintiff's claims, the court advised that it intended to consider those additional documents and treat BOA's motion as one to dismiss or, alternatively, one for summary judgment. (Doc. 15). The court also afforded Plaintiff an opportunity to submit additional evidence or argument as she might see fit. (*Id.*) Plaintiff responded that she is content to rely on the evidentiary materials already before the court (Doc. 16), although she later filed copies of four judicial orders and opinions from federal and state trial courts in Florida as persuasive authority for her legal arguments. (Docs. 17, 19). BOA has filed a reply brief in support of its motion as well. (Doc. 18).

III. DISCUSSION

BOA argues that it is entitled to a dismissal of all of Plaintiff's claims. BOA contends that is so on the basis that the allegations of Plaintiff's Complaint fail to state affirmatively any claim upon which relief can be granted, particularly in light of Rule 9(b)'s heightened pleading standard for fraud claims. Alternatively, BOA's motion effectively argues that Plaintiff's claims fail because evidence submitted by BOA establishes as a matter of law that certain of Plaintiff's material allegations in the Complaint are simply false. The court considers these arguments first as they relate to Plaintiff's fraudulent misrepresentation claims in Count I and then as they relate to her fraudulent suppression claims in Count II.

1. Fraudulent Misrepresentation

To recover for fraudulent misrepresentation, Plaintiff would have the burden to establish the following elements: "(1) a false representation (2) of a material existing fact (3) reasonably relied upon by the plaintiff (4) who suffered damage as a proximate consequence of the misrepresentation." *Padgett v. Hughes*, 535 So. 2d 140, 142 (Ala. 1988).

Plaintiff's misrepresentation claims are based on three kinds of statements: (1) BOA loan representative Mayes and other, unspecified BOA "employees" falsely represented to Plaintiff on phone calls that her application documents "were 'not received,' were 'incomplete,' or were 'not current' " (Compl. ¶ 42; *see also id.* ¶¶ 43-46, 60-61, 63, 65-66, 68, 70); (2) BOA falsely told Plaintiff on or about March 20, 2011, that she had been approved for a trial period HAMP modification plan (*id.* ¶¶ 47-52, 60-61, 64-66, 69-70); and (3) on or about April 18, 2011, Mayes falsely told Plaintiff that being "past due" and in "default" on her mortgage was required to be eligible for a HAMP modification. (*Id.* ¶¶ 38-40, 60-62, 65-67, 70). As explained below, the court agrees with BOA that it is entitled to prevail on each of these claims as a matter of law, either because the allegations themselves fail to state a claim or because evidence submitted by BOA shows that Plaintiff cannot make out one or more essential elements of claim that might have otherwise been stated.

***8** First, the court agrees that Plaintiff has not alleged with the particularity required under Fed. R. Civ. P. 9(b) the circumstances underlying her claim based on alleged misrepresentations by Mayes and other, unspecified BOA employees on telephone calls to the effect that Plaintiff's application paperwork had not been received or was deficient in some respect. Plaintiff does not say when these statements were allegedly made; which documents were allegedly not received, were incomplete, or were not current; nor exactly how the documents were incomplete or not current or how the statements made to Plaintiff were, in fact, false. Accordingly, this claim is due to be dismissed.[5]

The court concludes that BOA is entitled to summary judgment on Plaintiff's second misrepresentation claim, alleging that, on or about March 20, 2011, BOA falsely told her that she had been approved for a HAMP modification. That is so because the evidence submitted by BOA establishes that it did, in fact, approve Plaintiff both for a HAMP trial period plan and then later for a permanent HAMP modification. In other words, the record shows as a matter of law that BOA's representation in question was not false. First, BOA has furnished a letter it sent to Plaintiff, dated February 18, 2011, stating that her mortgage loan was HAMP-eligible and enclosing "Trial Period Plan" documents and coupons to make three monthly payments of $496.15, due on the first of the month in March, April, and May 2011. (Doc. 4 at 15-22). The letter further advised Plaintiff that she had to sign and return the enclosed "Trial Period Pack" by March 20, 2011, which Plaintiff appears to have done, signing and dating the paperwork on February 21, 2011. The letter stated that, after Plaintiff had completed the Trial Period Plan by timely making the three payments, BOA would send her "additional documents" that she would need to sign and return "before [her] loan will be permanently modified." The gist of Plaintiff's claim seems to be that this letter was fraudulent on the theory that, although the letter states that Plaintiff had been approved for a trial period modification plan, BOA never actually approved her for any kind of modification. However, that letter itself establishes prima face that BOA approved Plaintiff for at least a Trial Period Plan; any bald insistence to the contrary by Plaintiff is insufficient to create an issue of fact. Indeed, Plaintiff unambiguously admits that she made numerous payments throughout 2011 and 2012 under the auspices of her having been approved for that trial period plan. And insofar as Plaintiff seems to claim that she relied on BOA's representation that she had been approved for a trial period plan by making trial period payments, she fails to explain how such was detrimental given that she would have otherwise been obligated to make her regular mortgage payments instead.

***9** To the extent Plaintiff is asserting that the trial period plan approval letter is fraudulent on the theory that it states or suggests she was approved for a *permanent* HAMP modification of her mortgage loan when she actually was not, the claim also fails. For starters, the letter simply does not state that Plaintiff had been given or would necessarily be given a permanent modification. Rather, the letter clearly states that the approval was for a trial period plan and that any permanent modification that might be forthcoming was conditioned upon Plaintiff's compliance with further requirements. As such, the letter does not contain the false representation Plaintiff seems to claim it does. Equally to the point, BOA has also presented evidence establishing that it did, in fact, grant Plaintiff a permanent HAMP modification. That is, BOA has attached to its motion to dismiss a copy of a "Loan Modification Agreement" that Plaintiff signed and dated

on October 23, 2012, and that BOA recorded on December 9, 2013. (Doc. 4 at 23-32). Under the terms of the instrument, Plaintiff's loan was deemed modified as of June 1, 2011, *i.e.*, the first month after the third and final payment under her trial period plan referenced in the February 2011 approval letter, which served as the commencement of a new 30-year maturity period. The document further provides that Plaintiff was due to make monthly payments of $511.39 on the first of each month, beginning on November 1, 2012.

Plaintiff would cast that document as showing merely a "supposed permanent modification" (Doc. 9 at 2), and she continues to argue that BOA did not actually grant her a permanent loan modification. But, again, the "Loan Modification Agreement" document, the authenticity of which Plaintiff does not contest, establishes on its face that Plaintiff's BOA mortgage loan was, in fact, permanently modified by agreement of the parties in late 2012. Plaintiff gains nothing by pooh-poohing the parties' agreement as but a "supposed" one. Plaintiff also contends that the two letters BOA sent to Plaintiff in January 2014 and July 2014 (Doc. 9-1), call into question BOA's claim that it granted her a permanent loan modification. They do no such thing, however. It is true that, in both letters, BOA advised Plaintiff that she had been deemed ineligible "for a loan assistance program, such as a modification, or a short sale," and the July letter stated that she was ineligible for three types of modification programs under HAMP specifically. But all that means is that BOA declined to grant Plaintiff *another* HAMP modification *in 2014*, not that the "Loan Modification Agreement" executed *in 2012* did not work a permanent HAMP modification of Plaintiff's original mortgage loan obligations, as BOA claims.[6]

The court also concludes that BOA is entitled to summary judgment on Plaintiff's third misrepresentation claim, in which she alleges that BOA loan representative Mayes advised her on a phone call, on or about April 18, 2011, that she had to be actually in "default" to be eligible for a HAMP modification. Plaintiff emphasizes that such statement was false because, under applicable federal guidelines, a "default" need only be "imminent" or "reasonably foreseeable" for a homeowner to be eligible for a HAMP modification. Plaintiff further asserts that, in reliance on Mayes's false statement, she "refrained from making her regular mortgage payment and fell into default status." (Compl. ¶ 40). However, such reliance would have to be reasonable for liability to attach. *See AmerUs Life Ins. Co. v. Smith*, 5 So. 3d 1200, 1207-08 (Ala. 2008). And, as explained below, any alleged intentional failure by Plaintiff's to make her monthly mortgage payments in an affirmative effort to go into default would be plainly unreasonable, on several fronts.

To begin with, by the time Plaintiff says she spoke with Mayes in April 2011, Plaintiff had already received and executed the correspondence dated February 18, 2011, in which BOA advised her she was deemed eligible for a HAMP medication and approved for a trial period modification plan, as discussed above. Given that, Plaintiff could not have reasonably believed that she would have to go into default thereafter to be eligible for a HAMP modification. In fact, while Plaintiff says that she relied on Mayes's statement by refraining making her regular monthly mortgage payments, she simultaneously asserts that, after being approved for the trial period plan, she made seventeen trial payments in 2011 and 2012, "hoping to save her home." (Compl. ¶ 50). Plaintiff makes no effort whatever to explain that discrepancy. Moreover, Plaintiff never says when she missed the mortgage payments or when she actually went into default, and she acknowledges that BOA did not foreclose on her home until December 2014, more than *three-and-a-half years* after the phone call in question. As such, it is doubtful whether her allegations are sufficient to support a plausible inference that she actually acted in reliance on what Mayes supposedly said on the phone call. Finally, by executing the Trial Period Plan documents in the February 2011 correspondence, Plaintiff acknowledged that HAMP modification eligibility did not require her to be actually in default. (*See* Doc. 4 at 19) (whereby the homeowner must certify that "(i) I am *either* in default *or*, (ii) *I do not have sufficient income or access to sufficient liquid assets to make monthly mortgage payments.*" (emphasis added)). Under Alabama law, Plaintiff is charged with knowledge of the contents of those documents. *See Alfa Life Ins. Co. v. Colza*, 159 So.3d 1240, 1249-50 (Ala. 2014). That same correspondence also made clear that Plaintiff had to make Trial Period Plan payments to obtain a permanent HAMP modification. Because the record belies Plaintiff's assertion of reasonable reliance, BOA is entitled to summary judgment on this claim as well.

2. Fraudulent Suppression

***10** Where Plaintiff contends that BOA is liable for concealing or failing to disclose some fact, such a claim sounds in "fraudulent suppression," the elements of which are: (1) the "defendant had a duty to duty to disclose an existing material fact; (2) the defendant concealed or suppressed that material fact; (3) the defendant's

suppression induced the plaintiff to act or refrain from acting; and (4) the plaintiff suffered actual damage as a proximate result." *Cockrell v. Pruitt*, 214 So. 3d 324, 338 (Ala. 2016) (*quoting Coilplus-Alabama, Inc. v. Vann*, 53 So. 3d 898, 909 (Ala. 2010), *citing Freightliner, LLC v. Whatley Contract Carriers, LLC*, 932 So. 2d 883, 891 (Ala. 2005)).

The court discerns Plaintiff's fraudulent suppression claims to be founded on the following allegations: (1) that BOA failed to disclose that it never intended to approve Plaintiff for a HAMP modification (Compl. ¶¶ 47, 55); (2) that Mayes omitted, in her April 18, 2011, phone call, the fact that a homeowner could be eligible for a HAMP modification so long as a default was merely "imminent" or "reasonably foreseeable," not just if a default had already occurred (*id.* ¶¶ 38-40); (3) that BOA failed to disclose that it would retain Trial Period Plan payments in an unapplied account rather than apply them to her loan balance while BOA made a decision on whether to grant a permanent modification (*id.* ¶ 48, 49, 50, 51, 52); and (4) that BOA failed to disclose that it was "conducting unnecessary and improper inspections" and charging her account "impermissible" inspection fees from out of her Trial Period Plan payments. (Compl. ¶¶ 53-58, 72-78).

Taking those theories in order, the court first concludes that BOA is entitled to summary judgment on the claim alleging that BOA fraudulently suppressed that it never intended to review Plaintiff's HAMP modification application in good faith or never intended to grant her a HAMP modification of her mortgage loan. As previously explained, the Trial Period Plan correspondence Plaintiff received and executed in February 2011 and the Loan Modification Agreement she signed in October 2012 establish as a matter of law that BOA did, in fact, review and approve her HAMP modification application and later grant her a permanent modification. As such, these fraud claims are factually groundless.

BOA is likewise entitled to summary judgment on Plaintiff's claim that, when Mayes spoke to Plaintiff on a phone call in April 2011, Mayes fraudulently failed to disclose that a homeowner may be eligible for a HAMP modification if a default is merely "imminent" or "reasonably foreseeable," not just when a default has already occurred. This claim fails for the same reasons as did Plaintiff's related claim alleging that Mayes fraudulently misrepresented affirmatively that eligibility requires an actual default. That is, like the misrepresentation claim, Plaintiff's suppression claim also requires a showing both that BOA's non-disclosure caused Plaintiff to act to her detriment and that such reliance was reasonable under the circumstances. *See Johnson v. Sorensen*, 914 So. 2d 830, 837 (Ala. 2005). Plaintiff claims she relied on Mayes's putative misrepresentation (that an actual default was required) and omission (that an imminent default could suffice) by intentionally failing to make monthly mortgage payments after the phone call in a deliberate effort to go into default, so that BOA might deem her eligible for a HAMP modification. But, again, Plaintiff does not allege when she missed the mortgage payments, and she acknowledges that BOA did not foreclose until December 2014, seriously undercutting the notion that she acted in reliance on what Mayes said or didn't say in April 2011. Moreover, Plaintiff has *simultaneously* claimed that she "relied" on BOA's representation in the February 2011 correspondence that she was approved for a Trial Period Plan by *making* 17 payments "in 2011 and 2012" "in an effort to save her home." Again, Plaintiff makes no attempt to explain that contradiction. And in any event, any intentional failure by Plaintiff to pay her mortgage would be unreasonable reliance as a matter of law given that, by the time of the April 2011 phone call, (1) Plaintiff had already received the February 2011 letter from BOA deeming her eligible for a HAMP modification and approving her for a Trial Period Plan, belying that she need to go into default thereafter to be eligible; (2) the Trial Period Plan enclosed with that approval letter fairly states that Plaintiff could be eligible for a modification if she was "*either* in default" "*or*" that she did "not have sufficient income or ... liquid assets to make [her] monthly mortgage payments" (Doc. 4 at 19) (emphasis added), *i.e.*, that a default was reasonably foreseeable; and (3) that same enclosure makes clear that, to obtain a HAMP modification, Plaintiff had to make her Trial Period Plan payments. This claim is due to be dismissed.

***11** Next, Plaintiff claims that, when BOA asked her to make payments under a Trial Period Plan, BOA fraudulently failed to disclose that such amounts would be kept in an unapplied account rather than be applied to her loan balance while BOA made a decision on whether to grant her a permanent modification. The allegation underlying that claim, however, has also been proven false by the Trial Period Plan documents Plaintiff received and executed in February 2011. That is, those documents explain that payments received by BOA under the Trial Period Plan would be held by BOA "in a suspense account" until the homeowner "successfully complete[s] the Plan," whereupon the funds would then be credited to the homeowner's regular account balance. (Doc. 4 at 20, ¶ C). The Trial Period Plan payment funds would also be so applied, the document says, if the Trial Period "Plan is canceled and/or terminated for any reason." (*Id.*) Thus, the record shows BOA did not fail to disclose the fact at issue. In addition, while Plaintiff

claims that she relied on this alleged suppression by making 17 payments under the Trial Period Plan in 2011 and 2012, she does not specifically and plausibly allege how such reliance was to her detriment given she would have otherwise been obligated to make her regular monthly mortgage payments. BOA is entitled to summary judgment on this claim as well.

In her final claim, Plaintiff contends BOA is liable because, when it asked her to make Trial Period Plan payments, it failed to disclose that it was "conducting unnecessary and improper inspections" and would charge her account "impermissible" inspection fees from out of those payments. This claim is due to be dismissed for failure to state a claim. At the outset, the court would note that the Trial Period Plan documents do, in fact, alert Plaintiff generally to the fact that portions of those payments might eventually be used to pay unspecified "fees due" on her BOA mortgage account. (*See* Doc. 4 at 20, ¶ 2(C)). But more to the point, while Plaintiff alleges that BOA charged fees on her account from 2004 to 2015 for twelve inspections that occurred while she was living in the home, she does not sufficiently identify how those inspections or fees were actually *unlawful.* Merely labeling them as "impermissible," "unnecessary," "improper," and "fraudulent," as Plaintiff repeatedly does, is to do no more than assert legal conclusions entitled to no credit. It is true that Count II quotes from three HUD Servicing Guidelines related to property inspections (Compl. ¶¶ 73-75), with the apparent implication being that such provision were violated by BOA's inspections of Plaintiff's property. The problem for Plaintiff is that she wholly fails to allege *facts* sufficient from which to infer that any BOA inspection or fee charged was, in fact, inconsistent with the terms of any of those HUD Guidelines. On top of that, Plaintiff fails to allege facts plausibly showing how any reliance on her part, was *detrimental.* That is Plaintiff again conceives her reliance as her having agreed to the Trial Period Plan and then making 17 payments thereunder in 2011 and 2012. However, if Plaintiff did not agree to the Trial Period Plan, she would have still been legally obligated to make her monthly mortgage payments in any event, and she makes no claim to the effect that the inspection fees were not chargeable out of her regular monthly payments just the same. BOA's motion to dismiss is thus due to be granted on this claim.

IV. CONCLUSION

BOA's motion to dismiss (Doc. 4), treated as a motion to dismiss or, in the alternative, for summary judgment is due to be granted, as set forth herein. Accordingly, this action is due to be dismissed with prejudice. A separate final order will be entered.

All Citations

Not Reported in Fed. Supp., 2018 WL 4095687

Footnotes

1 References to "Doc(s) ___" are to the document number of the pleadings, motions, and other materials in the court file, as compiled and designated on the docket sheet by the clerk of the court. Pinpoint citations to the complaint are to the applicable paragraph(s) and count(s), where applicable. Other pinpoint citations are to the page of the electronically filed document in the court's CM/ECF filing system, which may not correspond to the pagination on the original "hard copy" of the document presented for filing.

2 Under the diversity statute, federal district courts have original jurisdiction over civil actions between citizens of different states and the amount in controversy exceeds $75,000, exclusive of interest and costs. 28 U.S.C. § 1332(a)(1). The allegations of the Complaint support that Plaintiff is a citizen of Alabama (Compl. ¶ 1), and that BOA is a citizen of both Delaware and North Carolina. (*Id.* ¶ 2); *see also* 28 U.S.C. § 1332(c)(1). Although Plaintiff originally filed this action in state court, her Complaint expressly alleges that her claim exceeds $75,000. (*Id.* ¶ 59). Accordingly, diversity jurisdiction is present.

3 This action was originally assigned to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b) and the court's general order of reference dated January 2, 2015. The parties have since consented to an exercise of plenary jurisdiction by a magistrate judge pursuant to 28 U.S.C. § 636(c) and Rule 73, Fed. R. Civ. P. (Doc. 10).

4 For reasons that escape the court, Plaintiff's opposition to the motion to dismiss also attached duplicate copies of the same five declarations from former BOA employees that Plaintiff attached to her complaint. (Doc. 9-2).

5 The court additionally concludes that at least this fraud claim is barred by Alabama's applicable two-year statute of limitations. *See* Ala. Code § 6-2-38(l); *Kinsey v. CenturyTel*, 490 F. App'x 278, 278-79 (11th Cir. 2012); *Bryant Bank v. Talmage Kirkland & Co.*, 155 So. 3d 231, 235-36 (Ala. 2014). This claim is based on alleged misrepresentations that would have occurred between March

2010, when Plaintiff says she first applied for a HAMP modification, and February 2011, when Plaintiff received a letter from BOA advising that, based on her application, she had been deemed eligible for a HAMP modification and approved for a Trial Period Plan. (*See* Doc. 4 at 15). Plaintiff would have necessarily relied and suffered all alleged damage, *i.e.*, having to prepare and mail additional application materials, by no later than the latter date as well, February 2011. Plaintiff did not file this action in state court, however, until December 2017, well over five years later. Despite that, Plaintiff argues that all of her claims are timely under Alabama's "discovery rule," whereby the statute of limitations does not begin to run on a fraud claim until the plaintiff actually discovered the fact constituting the fraud or until such time as the plaintiff should have discovered such fact in the exercise of reasonable diligence, whichever is earlier. *See* Ala. Code § 6-2-3; *Kinsey*, 490 F. App'x at 279; *Grant v. Preferred Research, Inc.*, 885 F.2d 795, 798 (11th Cir. 1989); *Miller v. City of Birmingham*, 235 So. 3d 220, 233 (Ala. 2017). The court disagrees. It is unclear how or when Plaintiff actually became aware that statements or omissions forming the basis of her claims were ostensibly false or otherwise fraudulent. Even so, for purposes of § 6-2-3 "discovery is made when facts become known which provoke inquiry in the mind of a man of reasonable prudence, and which, if followed up, would have led to a discovery of the fraud[.]" *Kinsey*, 490 F. App'x at 279 (*quoting Ryan v. Charles Townsend Ford, Inc.*, 409 So. 2d 784, 786 (Ala. 1981) (quotations and citations omitted)). Plaintiff insists that, even with due diligence, she could not have become aware until less than two years before she filed this action of BOA's broad "scheme" to mislead consumers and the federal government as it relates to BOA's alleged failure to comply with HAMP. But it is not necessary that Plaintiff have perfect knowledge of the fraudulent scheme in its entirety to trigger the running of the limitations period. Rather, Plaintiff certainly knew what HAMP application materials she had herself provided to BOA. As such, she was in a position to know whether BOA's statements to her asserting that those materials were deficient in some particular regard was materially false such that an investigation the matter was warranted.

6 The court notes that Plaintiff has not made any claim based on the letters BOA sent her in January and July 2014. Indeed, the Complaint makes no reference to those letters.

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2016 WL 2731118
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Olivia KING, Plaintiff–Appellant,
v.
U.S. BANK NATIONAL ASSOCIATION,
Defendant–Appellee.

Docket No. 325927.
|
May 10, 2016.

Kalamazoo Circuit Court; LC No.2014–000470–CH.

Before: RIORDAN, P.J., and SAAD and MARKEY, JJ.

Opinion

PER CURIAM.

***1** Plaintiff appeals by right the trial court's order granting defendant U.S. Bank National Association's motion for summary disposition pursuant to MCR 2.116(C)(7). We affirm.

Plaintiff executed a mortgage on September 23, 2005, in favor of Mortgage Electronic Registration Systems, Inc. (MERS), with regard to residential real property located in Portage, Michigan. In April 2008, Countrywide Home Loans, the loan servicer, notified plaintiff that the loan was in "serious default." In July 2009, plaintiff attempted to modify her loan through the Home Affordable Mortgage Program (HAMP). On January 25, 2010, MERS assigned its interest in the mortgage to defendant. In February and March 2010, notice was published in the local newspaper and posted on the real property at issue that plaintiff defaulted on the mortgage and that a foreclosure sale would occur on April 1, 2010. On March 8, 2010, plaintiff received a letter from Bank of America (BOA), who apparently replaced Countrywide as the servicer of the loan. The March 8, 2010 letter stated that plaintiff might be eligible for a loan modification through the HAMP and that the foreclosure sale would not occur while plaintiff's HAMP eligibility was being determined. Plaintiff received letters from BOA in May and June 2011 stating that she failed to submit certain documents that were required to process her HAMP application. She received letters in July and September 29, 2011, stating that she was ineligible for a modification under the HAMP because she failed to submit required documents. On November 3, 2011, the property was foreclosed and sold to defendant.

Defendant commenced summary proceedings on May 15, 2012, in case no. 12–01233–LT to evict plaintiff from the property. Plaintiff filed a counterclaim against defendant. In count one of plaintiff's counterclaim, plaintiff alleged that, contrary to BOA's letters, she did in fact submit all of the required documents with regard to her HAMP application; consequently, defendant violated statutory provisions with regard to the foreclosure sale, and the foreclosure sale should be set aside. Defendant moved for summary disposition with regard to plaintiff's counterclaim. The district court granted defendant's motion, concluding that plaintiff provided no evidence that she submitted the required documents. The district court ordered that defendant was entitled to possess the property. Plaintiff appealed to the circuit court on June 24, 2013. The circuit court affirmed the district court's grant of summary disposition to defendant regarding plaintiff's counterclaim. We denied plaintiff's application for leave to appeal that decision. *US Bank Nat'l. Ass'n. v. King,* unpublished order of the Court of Appeals, entered June 25, 2014 (Docket No. 320436).

On September 2, 2014, plaintiff filed a complaint against defendant alleging that defendant misrepresented to plaintiff that she failed to submit required documents for her HAMP application when, in fact, she had submitted the documents.[1] Plaintiff alleged that this misrepresentation violated various statutory provisions and constituted grounds to set aside the foreclosure sale and bar defendant's taking title to the property. Defendant moved for summary disposition under MCR 2.116(C)(7), arguing that because plaintiff's claims were argued in case No. 12–01233–LT, res judicata and collateral estoppel barred her current action. The trial court agreed that plaintiff's claims were barred by res judicata and collateral estoppel and granted defendant's motion for summary disposition. Plaintiff now appeals by right.

***2** "The applicability of legal doctrines such as res judicata and collateral estoppel are questions of law to be reviewed de novo." *Husted v. Auto–Owners Ins. Co.,* 213 Mich.App 547, 555; 540 NW2d 743 (1995). Summary disposition is proper under MCR 2.116(C)(7) if entry of judgment is appropriate because of a prior judgment. "We

review summary dispositions de novo." *Nuculovic v. Hill,* 287 Mich.App 58, 61; 783 NW2d 124 (2010).

Res judicata "bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair v. Michigan,* 470 Mich. 105, 121; 680 NW2d 386 (2004). With regard to the first element, we note that unless otherwise specified in the order, a dismissal "operates as an adjudication on the merits." MCR 2.504(B)(3); see also *Washington v. Sinai Hosp. of Greater Detroit,* 478 Mich. 412, 419; 733 NW2d 755 (2007). With regard to the second element, it is sufficient that both actions involved the same parties regardless whether one party was a plaintiff in the first action and that same party was a defendant in the second action. See *Bd. of Co. Road Comm'rs. for Co. of Eaton v. Schultz,* 205 Mich.App 371, 376; 521 NW2d 847 (1994). With regard to the third element and summary proceedings, MCL 600.5750 states in relevant part: "The remedy provided by summary proceedings is in addition to, and not exclusive of, other remedies, either legal, equitable or statutory. A judgment for possession under this chapter does not merge or bar any other claim for relief, except" with regard to enumerated exceptions inapplicable in this case. Our Supreme Court has stated that "in light of the first sentence of" MCL 600.5750 "it is evident that judgment in these summary proceedings, no matter who prevails, does not bar other claims for relief." *JAM Corp. v. AARO Disposal, Inc.,* 461 Mich. 161, 170; 600 NW2d 617 (1999) (footnote omitted). Claims "actually litigated in the summary proceedings" are barred by res judicata in subsequent proceedings, MCL 600.5750 notwithstanding. *Sewell v. Clean Cut Mgt., Inc.,* 463 Mich. 569, 576–577; 621 NW2d 222 (2001).

Similar to res judicata, "[t]he doctrine of collateral estoppel precludes relitigation of an issue in a different, subsequent action between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding." *Dearborn Hts. Sch. Dist. No. 7 v. Wayne Co. MEA/NEA,* 233 Mich.App 120, 124; 592 NW2d 408 (1998). For collateral estoppel to apply, the following three elements must be satisfied: "(1) 'a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment'; (2) 'the same parties must have had a full [and fair] opportunity to litigate the issue'; and (3) 'there must be mutuality of estoppel.' " *Monat v. State Farm Ins. Co.,* 469 Mich. 679, 682–684; 677 NW2d 843 (2004), quoting *Storey v. Meijer, Inc.,* 431 Mich. 368, 373 n. 3; 429 NW2d 169 (1988) (footnote omitted).

***3** With regard to the first requirement, "[a] final judgment or order in a civil case means 'the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order.' " *Baitinger v. Brisson,* 230 Mich.App 112, 116; 583 NW2d 481 (1998), quoting MCR 7.202(8)(a)(i). With regard to the second requirement, our Supreme Court has held that collateral estoppel does not preclude relitigation in circumstances such as where "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action...." *Monat,* 469 Mich. at 683 n. 2, quoting 1 Restatement Judgments, 2d, ch 3, § 29, p 273. With regard to the third requirement, "[m]utuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privy to a party, in the previous action." *Id.* at 684 (citations and quotation marks omitted).

Here, the first element of res judicata—the prior action was decided on the merits—was satisfied because the district court in case No. 12–01233–LT granted defendant's motion for summary disposition with regard to count one in plaintiff's counterclaim. See MCR 2.504(B)(3); *Washington,* 478 Mich. at 419. There is no dispute that the second element of res judicata was satisfied because the action in case No. 12–01233–LT and this action "involve the same parties"—plaintiff and defendant. *Adair,* 470 Mich. at 121. And, the third element was satisfied because plaintiff's claims in this case were in fact litigated and disposed of in case No. 12–01233–LT. In this case, plaintiff alleged in count one that defendant violated numerous statutory provisions regarding the foreclosure sale because defendant's internal documents showed that plaintiff complied with the document requests in connection with plaintiff's HAMP application, yet defendant misrepresented that plaintiff did not submit the required documents and foreclosed on the property. In count two, plaintiff again alleged violations of various statutory provisions, presumably relying on defendant's allegedly fraudulently misleading plaintiff with regard to the HAMP application process.[2] Plaintiff alleged that this was grounds to set aside the foreclosure sale. This is precisely what was litigated in count one of plaintiff's counterclaim in case No. 12–01233–LT. Specifically, in count one of plaintiff's counterclaim in case No. 12–01233–LT, plaintiff argued that defendant engaged in statutory violations because plaintiff submitted the documents required as part of her HAMP application, contrary to the

numerous letters from BOA stating otherwise. Plaintiff argued that this was grounds for setting aside the foreclosure sale. Therefore, the matter asserted in this action was resolved in the first case, and the third element of res judicata was satisfied. *Id.* Because plaintiff's claims were "actually litigated in the summary proceedings" in case No. 12–01233–LT, MCL 600.5750 does not bar the application of res judicata. *Sewell,* 463 Mich. at 576. Therefore, the trial court properly concluded that res judicata barred plaintiff's action. *Adair,* 470 Mich. at 121.

***4** With regard to collateral estoppel, we find that the first requirement was satisfied because, as discussed above, plaintiff alleged in case No. 12–01233–LT that defendant violated statutory provisions because despite the fact that plaintiff submitted the required HAMP documents, defendant stated that she did not. Plaintiff asserted the same allegations in this case. The question of whether defendant actually engaged in such conduct was determined in case No. 12–01233–LT when the district court concluded that plaintiff submitted no evidence of such conduct and granted summary disposition in favor of defendant. Therefore, the question of whether defendant engaged in fraudulent misconduct with regard to plaintiff's HAMP application was litigated and determined by a valid and final judgment. *Monat,* 469 Mich. at 682. The second element of collateral estoppel was satisfied because there is no indication that plaintiff was denied a full and fair opportunity to litigate the issue of defendant's alleged fraudulent misconduct in case No. 12–01233–LT. *Id.* at 682–683. And, because the parties in case No. 12–01233–LT and in this case were the same, the third requirement for collateral estoppel—mutuality—is satisfied. *Id.* at 683–684.

Plaintiff nevertheless argues that neither res judicata nor collateral estoppel applies because in case No. 12–01233–LT she alleged misrepresentations with regard to the assignment of the mortgage and defendant's alleged incapacity to accept assets into the trust, whereas in this case she alleged fraud with regard to plaintiff's HAMP application. Although it is true that plaintiff alleged misrepresentation with regard to the mortgage assignment and defendant's alleged incapacity in counts four and five of her counterclaim in case No. 12–01233–LT, count one of that counterclaim alleged that defendant engaged in statutory violations with regard to plaintiff's HAMP application, as discussed above.

Plaintiff also argues in this appeal that in case No. 12–01233–LT, she was unable to obtain evidence of defendant's fraudulent scheme because seven affidavits which she submitted to the trial court in this case after the trial court granted defendant's motion for summary disposition were unavailable in case No. 12–01233–LT, even through the exercise of reasonable diligence. Because these affidavits were submitted to the trial court after the trial court granted defendant's motion, we will not consider them. *Wormsbacher v. Seaver Title Co.,* 284 Mich.App 1, 4–5; 772 NW2d 827 (2009). Moreover, this argument misapprehends the doctrine of res judicata. "Res judicata bars every *claim* arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Adair,* 470 Mich. 123 (emphasis added). As discussed above, plaintiff raised the claim in case No. 12–01233–LT that defendant engaged in fraud with regard to plaintiff's HAMP application, which was grounds to set aside the foreclosure sale. On appeal, plaintiff appears to argue that because she lacked evidence to support her claim in case No. 12–01233–LT, res judicata and collateral estoppel did not apply. Plaintiff cites no authority to support her argument, thus abandoning it. *Spires v. Bergman,* 276 Mich.App 432, 444; 741 NW2d 523 (2007).

***5** Plaintiff further argues that in case No. 12–01233–LT, defendant prevented her from obtaining evidence with regard to the alleged scheme concerning HAMP applications. As with plaintiff's argument regarding the seven affidavits discussed *supra,* we find this argument lacks merit because a lack of evidence supporting plaintiff's allegations was not at issue when the trial court dismissed plaintiff's claims in this case under MCR 2.116(C)(7). Rather, as discussed, the trial court granted defendant's motion for summary disposition because plaintiff's claim that defendant engaged in misconduct regarding the HAMP application had already been litigated.

Next, plaintiff argues that the trial court prematurely granted defendant's motion for summary disposition. This argument lacks merit because there was not a fair likelihood that further factual development would have supported plaintiff's position that her claims were not previously litigated, which was the basis of granting defendant summary disposition. See *Liparoto Constr., Inc. v. Gen. Shale Brick, Inc.,* 284 Mich.App 25, 33–34; 772 NW2d 801 (2009).

Finally, plaintiff makes the unpreserved argument that the trial court improperly granted defendant's motion for summary disposition because plaintiff alleged extrinsic rather than intrinsic fraud. Indeed, extrinsic fraud is an exception to res judicata. *Sprague v. Buhagiar,* 213 Mich.App 310, 313; 539 NW2d 587 (1995). "Extrinsic fraud is fraud outside the facts of the case: 'fraud which actually prevents the losing party from having an adversarial trial on a significant issue.' " *Id.,* quoting

Rogoski v. Muskegon, 107 Mich.App 730, 736; 309 NW2d 718 (1981). There is absolutely no indication that the fraud that plaintiff alleged in this case falls "outside the facts of the case." *Id.* at 313. Plaintiff's attempt to characterize the fraud alleged in this case as extrinsic fails, and plaintiff has not established plain error in that regard. *Richard v. Schneiderman & Sherman, PC (On Remand),* 297 Mich.App 271, 273; 824 NW2d 573 (2012).

We affirm.

All Citations

Not Reported in N.W.2d, 2016 WL 2731118

Footnotes

1 We note that plaintiff never attempted to explain how defendant could be responsible for alleged misrepresentations that—if such misrepresentations existed—were apparently perpetrated by BOA, not defendant. This matter was never addressed in the trial court, and the parties do not address it on appeal.

2 Plaintiff also brought a third count, which was essentially a motion to stay the district court's eviction order. This count is not at issue on appeal.

Mandosia v. Bank of Am., N.A.

United States District Court for the Central District of California, Western Division

March 15, 2018, Decided; March 15, 2018, Filed

CASE NO. 2:17-cv-08153

Reporter
2018 U.S. Dist. LEXIS 45237 *

GWENDOLYN MANDOSIA, Plaintiff, vs. BANK OF AMERICA, N.A., Defendant.

Subsequent History: Affirmed by *Mandosia v. Bank of Am., NA, 2020 U.S. App. LEXIS 1003 (9th Cir. Cal., Jan. 9, 2020)*

Core Terms

discovery, modification, default, notice, tolled

Counsel: **[*1]** For Gwendolyn E. Mandosia, Plaintiff: Caitlyn Prichard, LEAD ATTORNEY, PRO HAC VICE, Aylstock Witkin Kreis and Overholtz PLLC, Pensacola, FL USA; Sin-Ting Mary Liu, LEAD ATTORNEY, Aylstock Witkin Kreis and Overholtz PLLC, Alameda, CA USA; Levi M Plesset, Milstein Jackson Fairchild and Wade LLP, Los Angeles, CA USA.

For Bank of America, N.A., Defendant: Adam F Summerfield, McGuireWoods LLP, Los Angeles, CA USA.

Judges: HON. JOHN F. WALTER, UNITED STATES DISTRICT JUDGE.

Opinion by: JOHN F. WALTER

Opinion

STATEMENT OF DECISION GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

The Court, having read the Motion to Dismiss Plaintiff's First Amended Complaint (Dkt. No. 23 ("FAC")) filed by Defendant Bank of America, N.A. ("BANA") (Dkt. No. 27 ("Motion" or "Mtn.")), along with all opposing and supporting papers, hereby GRANTS the Motion without leave to amend for the reasons set forth below:

I. BACKGROUND

Plaintiff asserts a single claim for fraud against BANA. On August 19, 2005, Plaintiff obtained a mortgage loan of $300,000.00 from Bankers Express Mortgage, Inc., secured by a deed of trust on real property located at 11544 Vanport Avenue, Lakeview Terrace, California 91342 (the "Property"). Deft's **[*2]** Req. for Judicial Notice (Dkt. No. 27-1 ("RJN")), ¶ 1, Ex. A.[1] Plaintiff alleges that in May of 2009 after experiencing financial hardship, she contacted BANA, which had taken over the servicing of her loan, to request a loan modification under the federal government's HAMP program. FAC, ¶ 38.

Plaintiff alleges that on May 10, 2009, BANA advised her to refrain from making her regular payments because a default on her loan was a prerequisite for HAMP eligibility. FAC, ¶ 40. On August 12, 2009, Plaintiff alleges that she received a HAMP application, which she claims she completed and returned to BANA. *Id.*, ¶ 43. However, BANA purportedly informed Plaintiff between August 22, 2009 and December

[1] The Court grants BANA's Request for Judicial Notice, and takes judicial notice of the various recorded documents attached to the RJN.

17, 2010 that her documents were either not received, incomplete, or outdated, and, thus, she submitted various documentation on more than ten occasions. *Id.*, ¶¶ 44-48.

Plaintiff claims that in October of 2009, she received a letter from BANA indicating that she had been "approved" for a HAMP modification and was to make trial payments. FAC, ¶ 51. Plaintiff contends that this was false, and her application was not approved. *Id.* However, in reliance on this letter, Plaintiff purportedly sent in eight **[*3]** monthly payments of less than what she contractually owed in 2009. *Id.*, ¶ 55. Plaintiff claims that instead of applying her trial payments to her loan, BANA applied the payments to an "unapplied" account and used some of these funds for inspection costs between 2008 and 2010. *Id.*, ¶¶ 53, 58, 62.

A notice of default was recorded on September 1, 2010, indicating that Plaintiff had failed to make her October 2008 mortgage payment, along with all subsequent payments, resulting in an arrearage of $54,578.77. RJN, ¶ 2, Ex. B. This notice of default was rescinded on January 8, 2013. *Id.*, ¶ 3, Ex. C. However, a subsequent notice of default was recorded on March 20, 2013, indicating that Plaintiff had failed to make her November 2008 mortgage payment, along with all subsequent payments, resulting in an outstanding arrearage of $116,124.61. RJN, ¶ 4, Ex. D.

Plaintiff failed to cure her outstanding arrearage, and a notice of trustee's sale was recorded on September 2, 2014, indicating that her total outstanding indebtedness was $422,179.13. RJN, ¶ 5, Ex. E. Plaintiff failed to remedy her default, and as a result, her property was sold at a trustee's sale on September 30, 2014, with a trustee's **[*4]** deed upon sale being recorded on October 10, 2014. *Id.*, ¶ 6, Ex. F.

II. STANDARD ON MOTIONS TO DISMISS

A *Rule 12(b)(6)* motion tests the legal sufficiency of the claims asserted in the complaint. A *Rule 12(b)(6)* dismissal is proper only where there is either a "lack of a cognizable legal theory," or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988)*. The court must accept all factual allegations pleaded in the complaint as true, and construe them and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. However, the court need not accept as true unreasonable inferences or conclusory legal allegations couched in the form of factual allegations. *See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

III. PLAINTIFF'S FRAUD CLAIM IS TIME-BARRED.

To state a claim for fraud, a plaintiff must allege: (1) a misrepresentation; (2) knowledge of falsity; (3) intent to defraud; (4) justifiable reliance; and (5) resulting damages. In addition, under *Rule 9(b)*, fraud allegations are subject to a higher pleading standard and must be specifically pleaded. *Glen Holly Entertainment, Inc. v. Tektronix, Inc., 100 F. Supp. 2d 1086, 1093-94 (C.D. Cal. 1999)*. *Rule 9(b)* requires plaintiffs alleging fraud against a corporate entity to specifically allege: (1) the misrepresentation, (2) the speaker and his or her authority to speak, (3) when and where **[*5]** the statements were made, (4) whether the statements were oral or written, (5) if statements were written, the specific documents containing the representations, and (6) the manner in which the representations were allegedly false or misleading. *Moore v. Kayport Package Express, Inc., 885 F.2d 531, 537 (9th Cir. 1989)*. Further, fraud claims are governed by a three-year statute of limitations. *See Johnson v. Bank of Am., N.A., 2015 U.S. Dist. LEXIS 161800, at *6 (C.D. Cal. 2015)* (citing *Cal. Code Civ. Proc. § 338(d)*).

In this case, Plaintiff's claim is predicated upon the following alleged statements by BANA: (i) in May of 2009, BANA advised Plaintiff that she was required to be in default prior to being eligible for a HAMP modification (FAC, ¶¶ 40, 81); (ii) between August 22, 2009 and December 17, 2010, BANA informed Plaintiff that her loan modification applications were incomplete (*id.*, ¶¶ 44, 46, 56, 82); and (iii) on August 16, 2009, BANA informed Plaintiff that she had been approved for a modification and that she needed to make trial payments on her loan. *Id.*, ¶¶ 51, 83.

The initiation, and ultimately the completion, of foreclosure proceedings provided undisputable evidence to Plaintiff that she would not receive a loan modification. The notice of default was recorded on March 20, 2013 (RJN, Ex. D), with the notice of trustee's sale being recorded on September **[*6]** 2, 2014. *Id.*, Ex. E. Finally, the Property was sold at a trustee's sale on September 30, 2014. *Id.*, Ex. F. Once the Property was foreclosed upon, Plaintiff had clear and undisputed evidence that she would not receive a loan modification.

Thus, Plaintiff was required to bring her fraud claim no later than three years after her property was sold at foreclosure, or September 30, 2017. *Cal. Code Civ. Proc. § 338(d)*. However, Plaintiff did not file this action until November 8, 2017, over one month after the expiration of the statute of limitations. Accordingly, Plaintiff's fraud claim is barred by the statute of limitations, and because no amendment could cure the instant defect, Plaintiff's First Amended Complaint is dismissed without leave to amend.

IV. PLAINTIFF CANNOT AVAIL HERSELF OF THE DELAYED DISCOVERY RULE.

To rescue her claim, Plaintiff asserts that the delayed discovery doctrine relieves her from the statute of limitations bar, alleging that BANA somehow "concealed" its fraudulent behavior such that Plaintiff had no knowledge of it until she retained an attorney and, therefore, the statute of limitations should have been tolled. FAC, ¶¶ 68-78. The discovery rule is an exception to the general rule for defining **[*7]** the accrual of a cause of action and it "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." *E-Fab, Inc. v. Accountants, Inc. Services (2007)153 Cal. App. 4th 1308, 1319, 64 Cal. Rptr. 3d 9* (quotation omitted). The discovery rule applies to fraud actions. *See Code Civ. Proc. § 338(d)*. A plaintiff whose complaint shows on its face "that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." *Id. at 1319*. Further, "[t]he burden is on the plaintiff to show diligence, and conclusory allegations will not withstand demurrer." *Id.* The first prong requires plaintiffs to allege "facts showing the time and surrounding circumstances of the discovery of the cause of action upon which they rely." *Id. at 1324*.

In this case, Plaintiff cannot benefit from the discovery rule. Plaintiff's entire argument related to the discovery rule regards testimony in an unrelated matter and, thus, involves testimony about unrelated loans. FAC, ¶¶ 68-78. Therefore, Plaintiff has failed to show how, for this particular loan, BANA concealed any actions or inactions from her. In addition, as it regards the **[*8]** first two allegations of fraud stated above, Plaintiff could have discovered the requirements for a HAMP modification to determine the truth of BANA's statement and because Plaintiff was one completing the application, she clearly knew whether it contained all the information requested by BANA. Finally, as it relates to the third allegation of fraud, Plaintiff clearly knew she did not obtained any trial modification as of September 30, 2014, when the Property was sold at a foreclosure sale. RJN, Ex. F. For these reasons, at the very latest, Plaintiff would have been aware of her fraud claim by the date of the foreclosure sale, September 30, 2014.

Furthermore, California law recognizes "a general, rebuttable presumption that plaintiffs have knowledge of the wrongful cause of an injury." Thus, it is the plaintiff's burden to allege and establish facts showing the time and manner of discovery of defendant's wrongdoing and inability to discover it earlier. *Grisham v. Philip Morris U.S.A., Inc., 40 Cal. 4th 623, 638, 54 Cal. Rptr. 3d 735, 151 P.3d 1151 (2007)*. In this case, Plaintiff has failed to satisfy her burden.

V. PLAINTIFF CANNOT RELY ON *AMERICAN PIPE* TOLLING.

Plaintiff also claims that her cause of action for fraud is tolled because of a pending class action in Colorado District Court. **[*9]** Opposition to Motion (Dkt. No. 33) at 8:17-9:4. Plaintiff cites *American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)* for the proposition that the commencement of a class action suspends the applicable statute of limitations "as to all asserted members of the class who would have been parties." Opp., at 8:20-25. However, the case Plaintiff asserts should toll the instant action, *George v. Urban Settlement Servs.*, et al. 1:13-cv-01819 ("*George*"), was initiated on July 10, 2013, and the various class members in *George* only assert claims for: (i) violation of *Racketeer Influenced and Corrupt Organizations Act, 18 U.S. C. § 1962(c)* ("RICO") and (ii) promissory estoppel. In addition, the sub-class of plaintiffs asserting the promissory estoppel claims is limited to eighteen states,[2] but ***not*** California.

None of the classes of plaintiffs in *George* asserts a claim under California state law, and none of the classes of plaintiffs assert a claim for fraud. Therefore, Plaintiff's claims in this case would not render her a party to *George*, and because her claims do not fall under the scope of the *George* action, the statute of limitations cannot be tolled under *American Pipe*.

VI. CONCLUSION

For all the foregoing reasons, BANA's Motion is **GRANTED**. Plaintiff's First Amended **[*10]** Complaint is **DISMISSED WITHOUT LEAVE TO AMEND**, and this action is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

DATED: March 15, 2018

/s/ John F. Walter

HON. JOHN F. WALTER

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[2] This sub-class includes plaintiffs from: Alabama, Arizona, Arkansas, Colorado, Idaho, Kansas, Kentucky, Louisiana, Maine, Nebraska, Nevada, New Hampshire, New Mexico, Oregon, Pennsylvania, South Dakota, Washington, and Wisconsin.

UNITED STATES DISTRICT JUDGE

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2015 WL 4485504
Only the Westlaw citation is currently available.
United States District Court, D. Maryland.

C. Victor MBAKPUO Plaintiff,
v.
WELLS FARGO BANK, N.A. Defendant.

Civil Case No. RWT–13–2213.
|
Signed July 20, 2015.
|
Filed July 21, 2015.

Attorneys and Law Firms

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MEMORANDUM OPINION

ROGER W. TITUS, District Judge.

***1** Like many Americans, Plaintiff C. Victor Mbakpuo experienced financial difficulties while the country was in the throes of the Great Recession, which resulted in his defaulting on his mortgage loan. Also like many Americans, Mbakpuo lays the blame for his financial woes at the feet of his mortgage lender, Defendant Wells Fargo Bank, N.A., and sues it for $39 million in damages, as well as equitable relief in the form of reformation of his mortgage contract. While mortgage lenders may bear some, most, or all of the blame for many of the mortgages gone bad during the recent economic crisis, that is not the case here. In order to survive summary judgment, Mbakpuo needed to produce some evidence that would allow a reasonable jury to conclude that Defendant Wells Fargo violated his legal rights. Mbakpuo has produced pages of vitriolic rhetoric directed at the mortgage lending industry in general, and Wells Fargo in particular, but has produced no evidence that Wells Fargo violated any of his legal rights. Accordingly, Wells Fargo's motion for summary judgment will be granted, Mbakpuo's will be denied, and judgment will be entered in favor of Wells Fargo.[1]

BACKGROUND

I. Facts

On December 13, 1999, Plaintiff C. Victor Mbakpuo executed an adjustable rate note secured by a deed of trust (the note and deed of trust, collectively, the "Mortgage") to purchase a home in Bowie, Maryland, from World Savings Bank, F.S.B. ("World Savings"). ECF No. 2–1. The Mortgage provided that, beginning on January 31, 2000, and every other Monday thereafter, World Savings would adjust the interest rate of the Mortgage. *Id.* at 1. The adjustment was tied to the Golden West Index, a proprietary index which reflected the weighted average of the interest rates in effect on the last day of each month on the deposit accounts of the depositary subsidiaries of Golden West Financial Corporation, the holding company of World Savings. *Id.* at 2. The interest rate on the loan at each adjustment was determined by taking the Golden West Index rate and adding a 3.4 percentage point margin. *Id.* The maximum interest rate World Savings could charge Mbakpuo was 11.95%. *Id.* The Mortgage provided that, if the Golden West Index became unavailable, World Savings could choose another national, regional, or other index approved by World Savings' regulator as a substitute index. *Id.* The Mortgage required World Savings to give notice to Mbakpuo in the event of a substitution. *Id.*

In connection with Wachovia's acquisition of Golden West, the Golden West Index ceased to exist in 2007, and Wachovia's own proprietary index, the Wachovia COSI, was substituted as the index used to determine Mbakpuo's rate. ECF No. 39–3 at 4. In 2009, Defendant Wells Fargo acquired Wachovia, and when the Wachovia COSI ceased to exist, the Wells Fargo COSI was substituted. *Id.* at 5–6. Wells Fargo submits evidence that it sent notice of each of these substitutions to Mbakpuo. ECF No. 39–3 at 48; ECF No. 39–3 at 55–56. Mbakpuo claims never to have received the notices. ECF No. 2 at 4.

***2** Due to a series of misfortunes and financial difficulties, Mbakpuo defaulted on the Mortgage on February 19, 2008. ECF No. 2–1 at 8. Mbakpuo applied

for multiple loan modifications from 2008–2013. He was initially offered a loan modification, but rejected its terms. ECF No. 39–4 at 30. Thereafter, he continued to apply for modifications under the federal Home Affordable Modification Program ("HAMP"),[2] but Wells Fargo determined that he was ineligible each time. Without rehashing the details of the back and forth between Mbakpuo and Wells Fargo over these applications, Wells Fargo at each turn explained in depth the reasoning for its determination that Mbakpuo was not eligible for a HAMP modification, and at each turn Mbakpuo disagreed vehemently with Wells Fargo's explanations. ECF No. 2–1 at 8–80. Based on the correspondence between Mbakpuo and Wells Fargo, it is apparent that he never believed any of the representations made by Wells Fargo regarding his eligibility for a HAMP modification.

The Mortgage required that Mbakpuo purchase and maintain hazard insurance on the home. ECF No. 39–3 at 31–32. It also gave Wells Fargo the right to take any steps necessary to protect its interest in the home. *Id.* at 32. In 2013, Mbakpuo realized that insurance had been placed on the property by Wells Fargo pursuant to this provision. ECF No. 2 at 18–19. Mbakpuo made this realization several years after Wells Fargo had sent him multiple letters requesting that he provide proof of insurance and warning that if he did not, insurance would be purchased on his behalf. ECF No. 52–2 at 24. Upon making this discovery, Mbakpuo purchased his own insurance at a lower rate, at which time Wells Fargo cancelled the policy it had purchased. *Id.* at 105.

II. Mbakpuo's Claims

On the basis of these facts, Mbakpuo has asserted 11 counts against Wells Fargo. Counts I, II, III and IV are fraud claims; in Counts I and II, Mbakpuo claims that Wells Fargo fraudulently calculated his interest rate, and in Counts III and IV, Mbakpuo claims that Wells Fargo fraudulently denied his request for a HAMP modification by misrepresenting his income and expenses. ECF No. 2 at 4–13. Count V is a breach of contract claim, alleging that Wells Fargo failed to provide Mbakpuo with notice of the index used to calculate his interest rate. *Id.* at 13–15. Count VI alleges various statutory violations due to Wells Fargo's alleged failure to respond adequately to written requests regarding the servicing of his mortgage. *Id.* at 15–16. Counts VII and VIII allege negligent hiring, training, and retention on Wells Fargo's part based on a myriad of failures by its employees to deal with Mbakpuo's demands. *Id.* at 16–18. Count IX alleges "Forced Insurance/Dodd–Frank" and challenges Wells Fargo's placement of insurance on Mbakpuo's home. *Id.* at 18–19. Count X alleges "Negative Amortization/Dodd Frank," and claims that Wells Fargo "added the delinquencies and recapitalized at the balance at $344,742.16" in violation of the Dodd–Frank Act's proscription on negative amortization. *Id.* at 19–21. Count XI seeks reformation of the mortgage. *Id.* at 21.

III. Procedural History

***3** Mbakpuo filed the Complaint *pro se* in the Circuit Court for Prince George's County, Maryland.[3] ECF No. 1. Wells Fargo timely removed the case to this Court on July 30, 2013. *Id.* Following discovery, the parties filed cross-motions for summary judgment.[4] ECF Nos. 39 and 41. Oppositions and replies have been filed, and the motions are now ripe for decision.

STANDARD OF REVIEW

Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P 56(a); *see Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "A material fact is one 'that might affect the outcome of the suit under the governing law.' " *Spriggs v. Diamond Auto Glass,* 242 F.3d 179, 183 (4th Cir.2001) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). Disputes of material fact are genuine if, based on the evidence, "a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248.

In order to avoid summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 256. While the court must view the evidence in the light most favorable to the nonmoving party, *Francis v. Booz, Allen & Hamilton, Inc.,* 452 F.3d 299, 302 (4th Cir.2006), it must also "prevent factually unsupported claims and defenses from proceeding to trial," *Drewitt v. Pratt,* 999 F.2d 774, 778–79 (4th Cir.1993) (quoting *Felty v.* Graves–Humphreys Co., 818 F.2d 1126, 1128 (4th Cir.1987)) (internal quotation marks omitted).

ANALYSIS

I. Wells Fargo is Entitled to Summary Judgment on Mbakpuo's Fraud Claims

Counts I, II, III, and IV of Mbakpuo's Complaint contain allegations of fraud against Wells Fargo. Specifically, Mbakpuo claims in Counts I and II that Wells Fargo committed common law fraud by miscalculating Mbakpuo's interest rate, in Count III that Wells Fargo committed common law fraud by refusing to grant him a HAMP loan modification, and in Count IV that Wells Fargo committed fraudulent misrepresentation under the Maryland Consumer Protection Act[5] (the "MCPA") by refusing to grant him a HAMP loan modification. In Maryland, to prevail on a common law fraud claim, a plaintiff must establish:

> (1) that the defendant made a false representation to the plaintiff; (2) that its falsity was either known to the defendant or that the representation was made with reckless indifference as to its truth; (3) that the misrepresentation was made for the purpose of defrauding the plaintiff; (4) that the plaintiff relied on the misrepresentation and had the right to rely on it, and (5) that the plaintiff suffered compensable injury resulting from the misrepresentation.
> *Nails v. S & R,* 334 Md. 398, 639 A.2d 660, 668–69 (Md.1994). Similar to a common law fraud claim, to prevail on a fraudulent misrepresentation claim under the MCPA, a plaintiff must establish (1) an unfair or deceptive practice or misrepresentation that (2) is relied upon, and (3) causes an identifiable loss as a result of his or her reliance on the purported misrepresentations. *Bank of Am., N.A. v. Jill P. Mitchell Living Trust,* 822 F.Supp.2d 505, 531–32 (D.Md.2011). Mbakpuo has failed to establish any facts that would allow a reasonable jury to conclude that Wells Fargo committed any fraud as alleged.[6]

A. Wells Fargo did not Commit Fraud with Respect to Mbakpuo's Interest Rate

***4** Mbakpuo claims, in Counts I and II, that Wells Fargo committed fraud with respect to the calculation of his interest rate. He alleges that Wells Fargo did not use any index for a period of time, did not use an index approved by its regulator, "calculated the mortgage with a base interest rate significantly higher than that on the national or regional index, even above 2%," improperly used 8.13% as an interest rate without a downward adjustment when interest rates in general went down, and failed to notify him when it changed indices. ECF No. 2 at 4–8. At best, there is no evidentiary basis to support these allegations. At worst, the allegations are confused nonsense on their face.

i. At all times there was an index in place approved by regulators

Mbakpuo alleges that at times Wells Fargo was calculating his interest rate using an index not approved by regulators. ECF No. 2 at 4–5. Although difficult to understand, this allegation appears to have two elements. First, that there were times when Wells Fargo was not using *any* index at all. ECF No. 45–1 at 18. Second, that Wells Fargo had failed to gain its regulator's approval for its substitute indices.[7] ECF No. 2 at 7.

Wells Fargo produced evidence that regulators had approved its substitute indices. ECF No. 40 at 52, 107. Mbakpuo has not produced any evidence to the contrary. Mbakpuo has also not produced any evidence that there was a "gap" in the use of an index to calculate his interest rate, beyond his own idle, confused speculation. Summary judgment cannot be defeated by speculation alone.[8]

ii. Wells Fargo properly calculated Mbakpuo's interest rate

Mbakpuo alleges that Wells Fargo improperly and fraudulently calculated his interest rate. Again, these allegations are confused and difficult to follow, but the crux of them appears to be that Wells Fargo used an interest rate that was higher than any other prevailing interest rate. ECF No. 41 at 7–12.

These allegations only demonstrate Mbakpuo's own confusion about how adjustable rate mortgages work in general, and how his worked in particular. Mbakpuo's adjustable rate mortgage, of course, did not entitle him to any particular interest rate. Nor did it entitle him to have any particular index used to calculate his interest rate, at least once the Golden West Index ceased to exist. Finally, it certainly did not entitle him to pay only the same interest that was being paid on deposit accounts, as

Mbakpuo seems to imply. ECF No. 41 at 8 (arguing that Wells Fargo improperly charged an interest rate above 2%).

As relates to the interest rate Wells Fargo charged Mbakpuo, Mbakpuo was only entitled (i) to have his rate calculated by reference to the Golden West Index up until the point that index was no longer available, at which point Wells Fargo had the option to substitute any national, regional, or regulator-approved index of its choice, (ii) to have the margin added to the index rate to determine his interest rate be no more than 3.4%, and (iii) to be charged no more than an interest rate of 11.95%. ECF No. 2–1 at 1–2.

***5** There is no evidence that Wells Fargo violated any of these provisions. Most of Mbakpuo's complaints about the interest rate he was charged are sound and fury signifying nothing. Mbakpuo complains that the index that governed his loan produced a higher interest rate than alternate indices that could have been used. ECF No. 2 at 7 ("the interest margin on the adjustable rate mortgage index during 2007 through 2013 was below 2%, sometimes below .4%, but Defendant Wells Fargo used a higher margin than what obtained on the national or regional index to calculate Plaintiff's monthly and/or yearly mortgage."). This may be so, but it is not fraud. Rather, given the absence of evidence that any of the index rates were calculated in a fraudulent manner, it is exactly what Mbakpuo bargained for.

Mbakpuo also claims that his interest rate remained at 8.13%, even as interest rates fell. ECF No. 41 at 9 ("As the foregoing items of evidence show, 8.13% was used in calculating the alleged delinquent interest and was applied to defraud, and did defraud, Plaintiff"). This is plainly contradicted from evidence in the record that Mbakpuo himself submits.[9] ECF No. 41–11 (showing that interest rate used to calculate interest due fell from 8.13% in February 2008 to 4.9% in August 2013).

iii. Wells Fargo provided adequate notice of the change in indices

Finally, with respect to Wells Fargo's actions regarding Mbakpuo's interest rate, there is no evidence in the record that Wells Fargo ever failed to provide notice to Mbakpuo when it changed indices. The Mortgage required Wells Fargo to give notice to Mbakpuo if it used a substitute index. ECF No. 2–1 at 2. The Mortgage provided that notice to Mbakpuo was effected by delivering it via first class mail to Mbakpuo at his home address. ECF No. 2–1 at 4. Wells Fargo has presented evidence, in the form of business records as well as one of Mbakpuo's statements, that it did mail notice to Mbakpuo of the index substitutions. ECF No. 39–3 at 4, 48, 50, 55–56.

In the face of this evidence, Mbakpuo submits a sworn affidavit in which he asserts that "I did not receive any notice in 2006, 2007, 2008, 2009, 2010, or at anytime whatsoever advising [sic] me that Wells Fargo Bank, N.A., or its predecessors advising me of a change to an alternative index." ECF No. 45–4. This may be so, and arguably creates a genuine dispute of fact as to whether Mbakpuo did, indeed, receive the notice that was mailed to him. Unfortunately for Mbakpuo, this dispute of fact is immaterial. As noted above, the Mortgage required only that Wells Fargo mail Mbakpuo the notice. It did not obligate Wells Fargo to ensure that Mbakpuo actually received the notice. Whether Mbakpuo actually received the notice is a matter between him and his postal carrier, not between him and Wells Fargo.

Moreover, even if it were the case that Wells Fargo had failed to notify Mbakpuo of its substitution of indices, Mbakpuo does not connect the dots between that and the elements of fraud. For example, he fails to present any evidence that the failure to provide notice was a "false representation" or that it was done to intentionally defraud him. Also, Mbakpuo does not show how a failure to notify caused him compensable damage. Without a doubt, the Mortgage gave Wells Fargo the right to use a substitute index of its choice in these circumstances. It did *not* give Mbakpuo the right to choose from multiple indices, so he could have sustained no damage simply by failing to receive notice of a substitute index. And although Wells Fargo voluntarily gave Mbakpuo a choice between two of its proprietary indices, Mbakpuo does not submit any evidence that he would have been better off choosing the other index.[10]

***6** Because Mbakpuo has failed to produce evidence sufficient to allow a reasonable jury to determine that Wells Fargo committed fraud in any way with respect to his interest rate, Wells Fargo is entitled to summary judgment on Counts I and II.

B. Wells Fargo Did Not Commit Fraud With Respect to Mbakpuo's Requests for Modification

Mbakpuo claims, in Counts III and IV, that Wells Fargo fraudulently denied his frequent requests for a HAMP loan modification. The factual predicate for these claims is that various financial figures Wells Fargo used to

determine Mbakpuo's eligibility for the HAMP program were inaccurate, and that this inaccuracy was intentional so as to ensure that he would not qualify. ECF No. 2 at 7–13.

As evidence that Wells Fargo fraudulently determined Mbakpuo was ineligible for the HAMP program, he has provided only the correspondence from Wells Fargo to him, in which Wells Fargo explains its determination that he is ineligible for a HAMP modification, and his bombastic responses in which he insists that he is eligible and accuses Wells Fargo of fraud. *E.g.* ECF No. 41–17 (Wells Fargo determination of ineligibility for HAMP), ECF No. 41–18 (Mbakpuo's response). Mbakpuo apparently believes that simply producing this correspondence, which includes his claims that the figures used are false, is enough to defeat summary judgment or, bafflingly, to entitle him to summary judgment. ECF No. 48 at 9 ("Wells Fargo's letter of February 21, 2013, admitted that it used $11,016.55 instead of $4,211.25 as Plaintiff's gross income ... If Wells Fargo's letter admitting its fraud does not constitute a competent evidence, what else would?").

If Mbakpuo is trying to prove that Wells Fargo used certain figures in determining his eligibility for HAMP, he has succeeded. After reviewing the record, the Court has no doubt what figures Wells Fargo used to determine Mbakpuo's eligibility for a HAMP modification, or how it arrived at its conclusions. If, however, Mbakpuo is trying to prove that those figures were fraudulent, he has utterly failed to do so. Not only has Mbakpuo submitted no evidence showing that Wells Fargo's figures were a misrepresentation or constituted an unfair or deceptive practice, he has not even submitted any evidence that the figures were inaccurate. Where Mbakpuo claims Wells Fargo misrepresents his gross income, he provides no paystub, tax return, or other evidence to show what his correct gross income was.[11] Where Mbakpuo claims Wells Fargo overstated the mortgage payment on one of his properties, he provides no statement showing what the actual mortgage payment was. The only evidence in the record that Wells Fargo's figures were wrong is Mbakpuo's conclusory correspondence claiming they were wrong, which is no more than a "scintilla of evidence" and cannot defeat summary judgment.

Even if a scintilla of evidence *could* defeat summary judgment on its own, it fails to do so here because Wells Fargo conclusively demonstrates that its figures were, in fact, reasonably accurate. For example, Mbakpuo claims that Wells Fargo overstated his mortgage payment on several rental properties. ECF No. 41 at 15–16. What Mbakpuo fails to recognize is that the mortgage payment figures included the entire monthly expenses paid into those properties. Mbakpuo argues that a property in Adelphi, MD, had only a $131 monthly mortgage payment, instead of a $582.17 payment as Wells Fargo claimed. *Id.* at 16. However, a document submitted by Mbakpuo to Wells Fargo in connection with his HAMP modification application shows monthly expenses for that property of: (1) $183.33 in principal and interest payments[12]; (2) $53.38 in taxes; and (3) $346 in condo fees. ECF No. 43–3. Those figures result in a total monthly payment of $582.71, only $0.54 more than what Mbakpuo claims was an incorrect figure,[13] but $451.71 more than what Mbakpuo claims is the "correct" figure. In other words, it is Mbakpuo's figures that are wildly inaccurate, rather than the allegedly fraudulent figures Wells Fargo produced.

***7** While Mbakpuo's correspondence disputing Wells Fargo's figures does not create a dispute of material fact as to whether Wells Fargo used accurate figures in determining Mbakpuo's HAMP eligibility, that correspondence does show beyond dispute that Mbakpuo did not rely on any statement by Wells Fargo regarding his ineligibility for a modification. Mbakpuo did not believe anything Wells Fargo said, and disputed its conclusions at every turn. Mbakpuo cannot have relied on that which he did not believe, and thus cannot have been defrauded. *See Sav. Banks Ret. Sys. v. Clarke,* 258 Md. 501, 265 A.2d 921, 925 (Md.1970) (affirming dismissal of fraud claim where purchasers did not believe representations of sellers, but instead hired lawyers to investigate those representations).

Finally, Mbakpuo has failed to show damages. At most, any inaccuracy in Wells Fargo's figures affected his eligibility for a HAMP modification. However, Mbakpuo has not submitted any evidence that would show that, even if his figures had been used, he would have qualified for a modification under the HAMP program.

Mbakpuo has not presented any evidence that Wells Fargo used inaccurate figures, much less intentionally misleading or deceptive figures, in calculating his eligibility for a HAMP modification. He has produced conclusive evidence that he did *not* rely on Wells Fargo's statements regarding his HAMP applications. And he has not shown any damages from Wells Fargo's allegedly wrongful conduct. Mbakpuo has not produced evidence of fraud, and therefore Wells Fargo is entitled to summary judgment on Counts III and IV.[14]

II. Wells Fargo is Entitled to Summary Judgment on Mbakpuo's Breach of Contract Claim

Mbakpuo's breach of contract claim is based on his allegation that Wells Fargo failed to send him notice of a substitute index, did not use an appropriate index, and did not send notice of regulator approval of any substitute index. ECF No. 2 at 13–15. For reasons already explained in Sections I.A.i. and I.A.iii., *supra,* there is no evidence that any of Mbakpuo's allegations are true, and Wells Fargo is entitled to summary judgment on Count V.

III. Wells Fargo is Entitled to Summary Judgment on Mbakpuo's RESPA/Dodd–Frank Act Claim

Mbakpuo claims in Count VI that Wells Fargo violated the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2601–2617, and § 1482 of the Dodd–Frank Wall Street Reform and Consumer Protection Act (the "Dodd–Frank Act"), Pub.L. 11–203, 124 Stat. 1376.

As to RESPA, Mbakpuo claims that Wells Fargo failed to respond to his correspondence regarding the denial of his modification requests, each of which he asserts was a qualified written request ("QWR") as defined by RESPA, within the time frame required by RESPA. The problem with Mbakpuo's argument is that none of the correspondence he points to was a QWR.

RESPA requires a servicer, upon receipt of a QWR from a borrower "for information relating to the servicing of such loan," to acknowledge receipt of the QWR within 5 business days, and to respond within 30 days. 12 U.S.C. § 2605(e)(1)-(2). RESPA defines a QWR as written correspondence that enables the servicer to identify the account of the borrower, and that includes the reasons the borrower believes "that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower." *Id.* § 2605(e)(1)(B). The statute further defines "servicing" as "receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan, including amounts for escrow accounts ... and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan." *Id.* § 2605(i)(3).

***8** Mbakpuo's RESPA claim fails because none of his letters concerned the servicing of the Mortgage. Each was simply a contention that Wells Fargo improperly denied his request for a HAMP modification. *E.g.* ECF No. 2–1 at 65 ("I hereby dispute the decision on my loan modification application, for the following reasons."). This does not relate to the servicing of a loan, as defined by RESPA.[15] It is clear from the statute that the types of servicing inquiries it is directed at are those arising in the ordinary course of a borrower making, and a servicer applying, regularly scheduled mortgage payments. *See* 12 U.S.C. 2605(i)(3) (" 'servicing' means receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan"). Further, this provision of RESPA is primarily aimed at ensuring the prompt resolution of errors regarding payments and mortgage accounts, and ensuring that borrowers have access to sufficient information regarding their mortgage accounts.[16] *Id.* § 2605(e)(1)(B) (ii) (defining QWR as written correspondence that "includes a statement of the reasons for the belief of the borrower ... that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower"), § 2605(e)(2)(A)-(C) (requiring servicer to either "make appropriate corrections in the account of the borrower" or "provide the borrower with a written explanation ... that includes ... a statement of the reasons for which the servicer believes the account of the borrower is correct" or provides "the information requested by the borrower or an explanation of why the information requested is unavailable").

Mbakpuo's requests for a loan modification did not relate to the servicing of a loan because they did not relate to Wells Fargo "receiving any scheduled periodic payments from a borrower pursuant to the terms of a loan." *Id.* § 2605(i)(3). By definition, a loan modification is a request to *alter* the terms of a loan; a request for modification is a request to no longer make payments pursuant to the existing terms of a loan. Mbakpuo has cited no authority for the proposition that a request for a loan modification, or the approval or denial thereof, relates to the servicing of a loan, and in the face of the plain language of RESPA, the Court will not so hold here.

As to Mbakpuo's allegation that Wells Fargo violated § 1482 of the Dodd–Frank Act by failing to provide him with the information required by that provision when denying his application for a HAMP modification, there is no private cause of action for a violation of HAMP. *See Bowers v. Bank of America, N.A.,* 905 F.Supp.2d 697, 701–02 (D.Md.2012). Accordingly, even if Wells Fargo did fail to provide the information required by the Dodd–Frank Act in denying his HAMP application, Mbakpuo has no remedy. Accordingly, Wells Fargo is entitled to summary judgment on Count VI.

IV. Wells Fargo is Entitled to Summary Judgment on Mbakpuo's "Forced Insurance" Claim

***9** Mbakpuo claims in Count IX that Wells Fargo improperly placed hazard insurance on his property. ECF No. 2 at 18–19. There is no dispute that Mbakpuo was required by contract to maintain hazard insurance on his property, and there is no dispute that Wells Fargo had the right to protect its interest in the property. ECF No. 39–3 at 31–32. Mbakpuo's argument that Wells Fargo's conduct was unlawful is based on his contention that he did have insurance on his home, and that Wells Fargo purchased insurance that was more expensive than what he eventually obtained. ECF No. 45–1 at 38 ("Count IX says that Wells Fargo for no reason went and replaced the existing policy with a very costly one that had a monthly premium of $374.61."). As to Mbakpuo's contention that he had hazard insurance, Mbakpuo produces no evidence that he actually had a current insurance policy when Wells Fargo obtained it on his behalf. Mbakpuo also does not point to any provision in the contract, or any provision of law, that required Wells Fargo to obtain insurance at the best possible rate if Mbakpuo breached his obligation to maintain insurance.

Mbakpuo cites § 1463 of the Dodd–Frank Act, codified at 12 U.S.C. § 2605, as standing for the proposition that Wells Fargo was prohibited "from force-placing this insurance on the Plaintiff." ECF No. 45–1 at 40. This is a blatant misrepresentation of the law. The Dodd–Frank Act does not prohibit a lender from force-placing insurance. Rather, it requires a lender to have a "reasonable basis to believe the borrower has failed to comply with the loan contract's requirement to maintain property insurance," and to send adequate notice to the borrower before force-placing insurance. 12 U.S.C. § 2605(k)-(l). Wells Fargo has attached documentation showing that it communicated extensively with Mbakpuo regarding the insurance being purchased on his behalf. ECF No. 52–2. In any event, Wells Fargo placed that insurance before the Dodd–Frank Act was enacted. *Id.* at 24. Wells Fargo is entitled to summary judgment on Count IX.

V. Wells Fargo Did Not Create a "Negative Amortization" on Mbakpuo's Loan

Mbakpuo claims in Count X that Wells Fargo improperly "recapitalized" his loan by adding the delinquent interest, late fees, and other charges accrued as a result of Mbakpuo's default, back to his principal, causing a "negative amortization" in violation of the Dodd–Frank Act. ECF No. 2 at 19–21. This confused claim is without merit.

Mbakpuo does not appear to understand what negative amortization actually is. Negative amortization occurs when a borrower makes a regularly scheduled minimum payment on a loan and the principal balance of the loan increases. *See* 12 C.F.R. § 1026.32(d)(2) (defining negative amortization as a "payment schedule with regular periodic payments that cause the principal balance to increase"). Mbakpuo's principal balance did not increase because he made only the regularly scheduled minimum payment. Rather, the amount he owed increased because he stopped making any payments at all. That is not negative amortization. If it were, every loan could potentially be a negatively amortizing loan simply because, if the borrower stopped making payments, accrued unpaid interest and other charges would increase the total amount owed. There is no evidence that Mbakpuo has actually experienced a negative amortization on his mortgage. Fairly read, Mbakpuo's "negative amortization" claim has nothing to do with negative amortization, but is simply an argument that Wells Fargo should not have allowed his loan to continue to accrue interest and other charges when he defaulted. However, Mbakpuo cites no legal authority to this effect.

***10** To the extent Mbakpuo is attempting to argue that any disclosure of the possibility of a negative amortization was inadequate under the provisions of the Dodd–Frank Act, this argument fails as well. The Dodd–Frank Act does not apply retroactively to the mortgage Mbakpuo entered into in 1999. *McCauley v. Home Loan Inv. Bank, F.S.B.,* 710 F.3d 551, 554n.2 (4th Cir.2013). Wells Fargo is entitled to summary judgment on Count X.

VI. Mbakpuo is not Entitled to Reformation

In Count XI Mbakpuo seeks the equitable remedy of reformation of the Mortgage. ECF No. 2 at 21. The grounds asserted in the Complaint for reformation are that "the interest rate index upon which the loan was underwritten no longer exists" and that the loan violates the Dodd–Frank Act. ECF No. 2 at 21. In his briefs, Mbakpuo provides additional grounds for reformation, including various hardships he suffered subsequent to signing the Mortgage, that "the toxic loan product Wells Fargo sold to Plaintiff and other borrowers caused the subprime mortgage to implode, causing the worst housing crises [sic] in the history of America," that the loan is causing negative amortization, that Wells Fargo committed fraud, and that Mbakpuo did not have time to read the Truth in Lending Act disclosures. ECF No. 41 at

25; ECF No. 45–1 at 42–43.

As a factual matter, many of the grounds Mbakpuo cites as supporting reformation have already been addressed in this Opinion and there is no evidence of them actually existing.[17] As a legal matter, none of these grounds (with the exception of fraud, which has already been addressed) can support a claim for reformation. Reformation is an equitable remedy that serves a narrow purpose and applies only in two cases: where a mutual mistake by the parties results in a written agreement that differs from their intent, or where through fraud or duress a written agreement differs from the intent of the innocent party. *See, e.g., Jaguar Land Rover N. Am., LLC v. Manhattan Imp. Cars, Inc.,* 738 F.Supp.2d 640, 650 (D.Md.2010). Reformation is limited to those circumstances where it is necessary to capture the actual intent of a party whose intent, through no fault of their own, is not properly captured by the written agreement.

Reformation is not available simply to relieve a party of unforeseen hardships encountered subsequent to the formation of a contract. *Id.* at 651 ("Reformation is not a vehicle for rewriting contracts to reflect changed circumstances since the time of contract formation."). Nor is it available simply because a party neglected to read the contract he signed. *Cf. Julian v. Buonassissi,* 414 Md. 641, 997 A.2d 104, 119n.15 (Md.2010) ("Our jurisprudence is clear that when a competent person signs a contract ... in the absence of fraud, misrepresentation, mistake, undue influence, or fiduciary relations, the contract will be enforced."). Finally, it is not available simply because a party decides, after signing the contract, that it should be characterized as a "toxic" contract. Simply put, to be entitled to reformation, Mbakpuo must put forth some evidence that there was a mutual mistake, fraud, or duress. He has put forth nothing. Wells Fargo is entitled to summary judgment on Count XI.

VII. Wells Fargo is not Liable for Negligent Hiring, Training, and Supervision

***11** Mbakpuo claims, in Counts VII and VIII, that Wells Fargo committed the torts of negligent hiring, training, and supervision. ECF No. 2 at 18. The bases for this claim are that Wells Fargo employees used incorrect figures in determining his eligibility for a loan modification, and did not respond adequately to his QWR's. ECF No. 2 at 17–18. Even assuming Wells Fargo owed Mbakpuo a duty giving rise to tort liability, which it did not,[18] Wells Fargo did not breach any such duty. The Court has already explained elsewhere in this Opinion why none of the conduct Mbakpuo complains of in these counts was illegal or otherwise wrongful, and need not repeat itself. *See supra,* Section I.B. (no evidence Wells Fargo used incorrect figures in determining modification eligibility), Section III (Mbakpuo did not submit any QWR implicating RESPA). Wells Fargo is entitled to summary judgment on Counts VII and VIII.

CONCLUSION

For the foregoing reasons, Wells Fargo is entitled to summary judgment on all of Mbakpuo's claims.[19] Judgment will be entered in favor of Wells Fargo. A separate order follows.

All Citations

Not Reported in F.Supp.3d, 2015 WL 4485504

Footnotes

1 Mbakpuo argues that summary judgment cannot be granted where there are cross-motions for summary judgment. ECF No. 45–1 at 43. In support of this extraordinary argument, Mbakpuo cites *Sparks State Bank v. Martin,* 81 Md.App. 539, 568 A.2d 1140 (Ct.Spec.App.Md.1990). To the extent this state court case could govern a procedural question in federal court, it does not stand for such a broad proposition. *Martin* does not state a categorical rule that where there are cross-motions for summary judgment, a court may not grant any motion for summary judgment, because such a rule would be absurd. Rather, *Martin* simply stands for the common sense proposition that if cross-motions for summary judgment reveal a genuine dispute of material fact, each should be denied. *Id.* at 1142–44.

2 HAMP was established pursuant to the Emergency Economic Stabilization Act, P.L. 110–343, 122 Stat. 3765.

3 Although proceeding *pro se,* Mbakpuo did graduate from law school and obtain a law license, although it does not appear that he is currently licensed to practice law in any court. *See Office of Disciplinary Counsel v. Mbakpuo,* 98 Ohio St.3d 177, 781 N.E.2d 208

(Ohio 2002) (disbarring Mbakpuo from practice of law in Ohio); *In re Mbakpuo,* 829 A.2d 217 (D.C.2003) (denying admission to D.C. Bar based on Mbakpuo's Ohio disbarment); *In re Mbakpuo,* Case No. 1:94–mc–00051 (D.Md.1994), ECF No. 5 (disbarring Mbakpuo in this District).

4 At the request of Wells Fargo, the Court extended the deadline for filing dispositive motions to await the resolution of a case presenting similar issues in the U.S. District Court for the Western District of Washington. ECF Nos. 27, 37.

5 Md.CodeAnn. Com. Law §§ 13–101 *et seq.*

6 Mbakpuo spends much of his argument on the fraud claims attempting to establish that they are alleged with sufficient particularity to satisfy Federal Rule of Civil Procedure 9(b). This may well be true, and Wells Fargo has not contested as much. Unfortunately for Mbakpuo, this is a wasted argument. This case is at the summary judgment stage, not the motion to dismiss stage. He must do more than show that he has drafted an adequate complaint, he must show that there are facts in the record sufficient to allow a reasonable jury to rule in his favor. *See Anderson,* 477 U.S. at 256 (stating that a nonmoving party "may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.").

7 Mbakpuo also appears to allege that it was somehow fraudulent for Wells Fargo not to provide him with proof that its regulators had approved an alternate index. ECF No. 2 at 7 ("Defendant Wells Fargo never produced any proof of approval by its primary regulator, as required by the loan contract."). Mbakpuo does not point to any provision in the Mortgage that would require Wells Fargo to provide proof of regulatory approval of an index, beyond the simple notice that an alternate index was being substituted. Nor does he explain how failure to provide such proof could have constituted fraud.

8 For its part, Wells Fargo conclusively explains the "gap" in indices purportedly identified by Mbakpuo. ECF No. 51 at 5–7. Mbakpuo's argument that there is a gap is based on his own confusion regarding the difference between the public announcement of a merger, the consummation of a merger, and the conversion of the subsidiary assets of a merger. Each of the Golden West Index, Wachovia COSI, and Wells Fargo COSI, were calculated based on prevailing interest rates on the parent company's subsidiary deposit accounts. After consummation of a particular merger, the preceding index did not cease to exist until the subsidiary deposit accounts were converted to accounts of the new parent company, notwithstanding that the merger had been publicly announced and consummated. ECF No. 39–3 at 4–5; ECF No. 51 at 5–7.

9 Mbakpuo's argument here, like many of his other arguments, is at best confused, and at worst, a deliberate attempt to mislead the Court. For example, on the same page in which Mbakpuo claims Wells Fargo had been improperly using an 8.13% interest rate throughout the period of his default, ECF No. 41 at 9, he also argues that Wells Fargo improperly used a 5.54% interest rate during a portion of this time period. *Id.*

10 Wells Fargo gave borrowers the choice of opting into an alternate index, which Mbakpuo references when he argues that that "notice of the substitution was critical because of the 'permanent reduction of their margin' " if he chose the alternate index offered by Wells Fargo." ECF No. 45–1 at 19. What Mbakpuo ignores is that it was because he did *not* opt into that alternate index, Wells Fargo reduced his margin permanently from 3.4% to 3.34%. ECF No. 39–3 at 50.

11 Mbakpuo's claims regarding Wells Fargo's representation of his income are hopelessly confused. For example, he complains that Wells Fargo used his monthly gross income of $11,016.55 instead of his monthly net income to determine his eligibility for a modification. ECF No. 2 at 9. At the same time, he complains about the opposite: that Wells Fargo used his monthly net income to determine his eligibility, improperly included his mortgage payment in determining his monthly net income and determined his monthly net income (Mbakpuo erroneously uses the term "gross income" to describe the result when he subtracts expenses from his actual gross income) "to be $2,132.98 by deducting the gross monthly household expenses of $9,320.14 ... on the loan modification form from the total or gross monthly income of $11,661.25 ($11,661.25–9,320.14 = 2,132.98)." *Id.* at 10. First, the $2,132.98 figure does not represent Mbakpuo's net income, because 11,661.25 minus 9,320.14 equals 2,341.11, not 2,132.98. $2,132.98 represents a different monthly gross income figure for Mbakpuo. Apparently Mbakpuo is self-employed, and provided profit and loss statements covering two separate periods to Wells Fargo, which Wells Fargo used to derive monthly gross income figures. ECF No. 43–5 at 3–7. Second, HAMP required a lender to use monthly gross income, not monthly net income, to determine eligibility. *See* Home Affordable Modification Program Supplemental Directive 09–01 at 11 (April 6, 2009) ("The borrower's total monthly debt ratio ... is the ratio of the borrower's monthly gross expenses divided by the borrower's *monthly gross income*) (emphasis added). Therefore, any claim that Wells Fargo improperly used monthly gross income fails as a matter of law.

12 Incidentally, this is more than the $171 Mbakpuo claims is his mortgage payment on that property.

13 There does not appear to be any evidence that Wells Fargo actually ever used $582.17, instead of $582.71.

14 Mbakpuo relies heavily on *Wigod v. Wells Fargo Bank, N.A.,* 673 F.3d 547 (7th Cir.2012) for the proposition that he can sustain his state law claims due to Wells Fargo's denial of a HAMP modification. ECF No. 41 at 12–17. *Wigod* provides no support to Mbakpuo. In *Wigod,* the plaintiff alleged that the lender promised her a HAMP modification if she met certain criteria during a trial modification period, and then failed to deliver on that promise despite the fact that she had met the relevant criteria. *Wigod,* 673 F.3d at 557–59. The lender moved to dismiss the complaint, arguing that there was no private cause of action for violations of the HAMP program. *Id.* at 559. The Seventh Circuit held that the plaintiff's state law claims for breach of contract, promissory estoppel, and fraud survived dismissal because, although HAMP contains no private cause of action, the plaintiff had stated those claims under state law based on the lender's promises or misrepresentations connected to its HAMP modification offer, and that those state law claims were not preempted by federal law. *Id* . at 559. *Wigod* is easily distinguishable, because Wells Fargo never offered or promised to offer Mbakpuo a HAMP modification. Moreover, Mbakpuo's claim fails not because he lacks a private cause of action under HAMP, but rather because he lacks any evidence showing that Wells Fargo defrauded him or breached any contract.

15 Mbakpuo argues that it is a "voodoo theory" to frame the inquiry with reference to the definition of "servicing" instead of the definition of a QWR. ECF No. 48 at 15. This argument defies common sense. 12 U.S.C. § 2605 is titled "Servicing of mortgage loans and administration of escrow accounts." Even more obviously, RESPA only requires servicers to respond to written requests "for information relating to the *servicing* of such a loan." 12 U.S.C. § 2605(e)(1)(A). The meaning of this provision, by its plain language, is that written correspondence *must* relate to servicing as defined by RESPA if it is to be considered a QWR, and thus implicate the requirements of RESPA. *See Medrano v. Flagstar Bank, FSB,* 704 F.3d 661, 666 (9th Cir.2012) (statutory requirement that QWR relate to servicing "ensures that the statutory duty to respond does not arise with respect to *all* inquiries or complaints from borrowers to servicers.") (emphasis in original).

16 Mbakpuo argues that in a letter dated July 20, 2012, he challenged the principal amount Wells Fargo determined was due. ECF No. 45–1 at 34; *see also* ECF No. 2–1 at 69. However, to the extent this transforms the letter into a QWR regarding servicing, Wells Fargo responded to that specific contention by a letter dated July 24, 2012, well within the RESPA-imposed deadline. *Id.* at 70–71.

17 *See supra* Section V (Negative Amortization), Section I (Fraud).

18 "It is pellucid that, in Maryland, the relationship of a bank to its customer in a loan transaction is ordinarily a contractual relationship between a debtor and creditor." *Yousef v. Trustbank Sav., F.S.B.,* 81 Md.App. 527, 568 A.2d 1134, 1138 (Ct.Spec.App.Md.1990). Mbakpuo has presented no legal authority or factual evidence that would cause any other rule to apply.

19 Mbakpuo also submitted a Motion for Settlement Conference. ECF No. 33. Because all of Mbakpuo's claims are being disposed of, this motion will be denied.

End of Document

2012 WL 5499433
Only the Westlaw citation is currently available.
United States District Court,
E.D. California.

Lucas E. McCARN, individually and on behalf of all others similarly situated, Plaintiff,
v.
HSBC USA, INC., HSBC Bank USA, N.A., HSBC Mortgage Corporation, HSBC Reinsurance (USA) Inc., United Guaranty Residential Insurance Co., Genworth Mortgage Insurance Corp., Republic Mortgage Insurance Co., Mortgage Guaranty Insurance Corp., and Radian Guaranty Inc., Defendants.

No. 1:12–CV–00375–LJO–SKO.
|
Nov. 13, 2012.

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ORDER ON MOTIONS TO DISMISS (Doc. 94, 106, 111, 117)

LAWRENCE J. O'NEILL, District Judge.

INTRODUCTION

***1** On July 30, 2012, Plaintiff Lucas E. McCarn ("Plaintiff") filed his first amended putative class-action complaint ("FAC") asserting violations of the Real Estate Settlement Procedures Act of 1974 ("RESPA") and common law unjust enrichment claims against defendants HSBC USA, Inc.; HSBC Bank USA, N.A.; HSBC Mortgage Corp.; HSBC Reinsurance (USA), Inc. ("HSBC RE") (collectively, "HSBC Defendants"); United Guaranty Residential Insurance Co. ("United Guaranty"), Genworth Mortgage Insurance Corp. ("Genworth"); Republic Mortgage Insurance Co. ("Republic"); Mortgage Guaranty Insurance Corp. ("MGIC"); and Radian Guaranty, Inc. ("Radian") (collectively, "PMI Defendants"). Defendants filed motions to dismiss both causes of action in the FAC between August and October 2012. For the reasons discussed below, this Court GRANTS Defendants' motions to dismiss.

BACKGROUND

A. Facts

Plaintiff Lucas E. McCarn obtained a mortgage loan from HSBC Mortgage Corp. on or about November 21, 2006. Doc. 88, ¶ 19. In connection with the loan, Plaintiff was required to and did pay for private mortgage insurance ("PMI") in the amount of $154.40 per month. *Id.* Borrowers do not generally have any opportunity to comparison-shop for mortgage insurance, which is arranged by the lender. *Id.* at ¶ 41. United Guaranty was selected by HSBC to provide PMI to Plaintiff. *Id.* at ¶ 19.

United Guaranty was a PMI provider with whom HSBC had a "captive reinsurance arrangement," whereby HSBC required the provider, as a condition of doing business with HSBC, to purchase reinsurance from HSBC RE, an HSBC subsidiary. *See id.* at ¶ 1. Plaintiff alleges that this type of arrangement was widespread throughout the mortgage lending marketplace and that it essentially amounted to the lender "coercing [PMI] insurers into cutting [the lender] in on ... [lucrative] insurance premiums in exchange for assuming little or no risk." *Id.* at ¶ 3. HSBC had the same or substantially similar captive reinsurance arrangements not only with United Guaranty, the provider of PMI to Plaintiff, but also with the other PMI Defendants. Plaintiff alleges all Defendants "acted in concert" to "effectuate a captive reinsurance scheme." *Id.* at ¶ 1. Plaintiff alleges that Defendants' "coordinated actions resulted in a reduction of competition in the

mortgage insurance market and resulted in increased premiums for Plaintiff and the [putative] class." *Id.* at ¶ 15.

These captive reinsurance arrangements were the subject of regulatory attention in light of anti-kickback provisions contained within RESPA. *Id.* at ¶ 84–88. According to a 1997 letter issued by the United States Department of Housing and Urban Development ("HUD"), the agency charged with enforcing RESPA during most of the class period, captive PMI reinsurance arrangements were permissible under RESPA only if "the payments to the affiliated reinsurer: (1) are for reinsurance services 'actually furnished or for services performed' and (2) are bona fide compensation that does not exceed the value of such services[.]" *Id.* at ¶ 85. The HUD letter stated: "The reinsurance transaction cannot be a sham under which premium payments ... are given to the reinsurer even though there is no reasonable expectation that the reinsurer will ever have to pay claims." *Id* . Plaintiff alleges that the type of reinsurance agreement utilized by HSBC with its PMI providers violated RESPA. *See id.* at 84–88. Plaintiff further alleges that HSBC Defendants received unjust enrichment from the amounts ceded to HSBC RE as reinsurance premiums and that PMI Defendants received unjust enrichment from the steady stream of business they received in return for ceding those portions of the borrowers' premiums to HSBC Defendants. *Id.* at ¶¶ 178–183.

B. Procedural History

***2** Plaintiff Lucas E. McCarn filed a putative class action complaint on March 12, 2012. On May 29, 2012, this Court granted Defendants MGIC, PMI, Radian, and Republic's motion to dismiss with leave to amend the complaint.[1] This Court lifted a partial stay of the action pending the outcome of the United States Supreme Court's decision in *First American Financial Corporation, et al. v. Edwards,* —— U.S. ——, 132 S.Ct. 2536, 183 L.Ed.2d 611 (2012) on July 9, 2012, and Plaintiff filed the FAC on July 30, 2012. The instant motions to dismiss the FAC were filed by Defendants MGIC, Radian, and Republic on August 16, 2012, by Defendant United Guaranty on August 30, 2012, by Defendant Genworth on August 30, 2012, and by HSBC Defendants on October 5, 2012. Plaintiff filed oppositions to the motions to dismiss on October 26, 2012 and Defendants filed replies on November 5, 2012.

DISCUSSION

Motion to Dismiss

A. Dismissal under Fed.R.Civ.P. 12(b)(1)

HSBC Defendants, MGIC, Republic, Radian, and Genworth challenge Plaintiff's standing to sue the non-contracting Defendants, MGIC, Republic, Radian, and Genworth, pursuant to Fed. R. Civ. Pro 12(b) (1), which provides for dismissal of an action for "lack of subject-matter jurisdiction."[2] Faced with a Rule 12(b)(1) motion, a plaintiff bears the burden of proving the existence of the court's subject matter jurisdiction. *Thompson v. McCombe,* 99 F.3d 352, 353 (9th Cir.1996). A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears. *Gen. Atomic Co. v. United Nuclear Corp.,* 655 F.2d 968, 968–69 (9th C ir.1981).

A challenge to subject matter jurisdiction may be facial or factual. *White v. Lee,* 227 F.3d 1214, 1242 (9th Cir.2000). As explained in *Safe Air for Everyone v. Meyer,* 373 F.3d 1035, 1038 (9th Cir.2004):

> In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.

In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. *Savage v. Glendale Union High School,* 343 F.3d 1036, 1039 n. 2 (9th Cir.2003); *McCarthy v. United States,* 850 F.2d 558, 560 (9th Cir.1988).

HSBC Defendants, MGIC, Republic, Radian, and Genworth make a facial attack on the sufficiency of the allegations in the FAC. The standards used to resolve motions to dismiss under Rule 12(b)(6) are relevant to

disposition of a facial attack under 12(b)(1). *See Cassirer v. Kingdom of Spain,* 580 F.3d 1048, 1052 n. 2 (9th Cir.2009) (applying *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) to a motion to dismiss for lack of subject matter jurisdiction). As discussed further below, to sufficiently state a claim to relief and survive a 12(b)(6) motion, the pleading "does not need detailed factual allegations" but the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Mere "labels and conclusions" or a "formulaic recitation of the elements of a cause of action will not do." *Id.*

***3** The "irreducible constitutional minimum of standing" requires (1) the plaintiff to have suffered an "injury in fact"; (2) a causal connection between the injury and conduct complained of; and (3) that it must be likely that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1991). The Ninth Circuit requires "[t]he party seeking to invoke the jurisdiction of the federal Courts" to allege at the pleading stage "specific facts sufficient to satisfy" all of the elements of standing for each claim he seeks to press. *Schmier v. U.S. Court of Appeals for Ninth Circuit,* 279 F.3d 817, 821 (9th Cir.2002). "A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas,* 495 U.S. 149, 155–56, 110 S.Ct. 1717, 109 L.Ed.2d 135, (1990). "It is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings." *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). "The facts to show standing must be clearly apparent on the face of the complaint." *Baker v. United States,* 722 F.2d 517, 518 (9th Cir.1983). However, the factual allegations need not be made with particularity beyond that required by *Twombly/Iqbal.* Applying *Moss,* 572 F.3d at 969, standing may be based on "non-conclusory factual content, and reasonable inferences from that content," in the complaint that are "plausibly suggestive" of the existence of standing.

This Court previously granted non-contracting Defendants' motion to dismiss Plaintiff's complaint for lack of standing under Fed. R. Civ. Pro. 12(b)(1) and allowed Plaintiff one chance to amend his complaint to cure the deficiencies stated in the Order.[3] Doc. 72. Plaintiff then filed his First Amended Complaint. Doc. 88. However, Plaintiffs again fail to make sufficient allegations to establish standing with regard to the non-contracting Defendants MGIC, Republic, Radian, and Genworth.

This Court previously found that Plaintiff failed to allege that any injury he suffered is fairly traceable to the non-contracting Defendants. Doc. 72. In his original complaint, Plaintiff attempted to allege a single over-arching wheel conspiracy but failed to allege sufficiently a "rim," or connection, between the "spokes," or PMI Defendants. *Id.* (internal citations and quotation omitted). Significantly, Plaintiff failed to allege that collective action by the PMI Defendants was necessary to maintain the scheme or that failure to act in concert would be economically self-defeating. *Id.* In his FAC, Plaintiff again suggests a single, over-arching "rimmed" conspiracy but again fails to allege the requisite connection between the PMI Defendants. Plaintiff quotes an excerpt from Genworth's 10–K showing that Genworth suffered a "significant reduction in business" from lenders when it "sought to exit or restructure a portion of [its] excess-of-loss risk sharing arrangements," and that Genworth "reinstated or restructured some of these arrangements." Doc. 88 ¶ 78. Based on this, Plaintiff argues that PMI Defendants "knew they had to participate and perpetuate this hidden scheme," that "[t]he single industry-wide scheme relied upon the cooperation of the Private Mortgage Insurers," and that "[i]f any one of the Private Mortgage Insurers failed to act collectively or reported the scheme, then the conspiracy would have failed." Doc. 88 at ¶¶ 79, 81. However, this shows, at most, that an individual PMI provider pulling out of the arrangement would result in economic harm to that individual PMI provider. It does not show or allow any reasonable inference that individual PMI providers failing to participate in the scheme would result in the unraveling of the scheme itself or harm to other PMI providers. In fact, it still does nothing to diminish the possibility that each PMI contracting with HSBC actually would "prefer that fewer of its competitors participate in the scheme, as it would then enjoy that much more of the [ ] steered business." *In re Ins. Brokerage Antitrust Litig.,* 618 F.3d 300, 332 (3rd Cir.2010). Plaintiff emphasizes that PMI Defendants "acceded to and willingly participated in HSBC's captive reinsurance arrangements," and "chose [not] to do anything to upset the operation of the scheme," because "[t]he benefit of having a guaranteed stream of referrals (from all sources) was too great to risk by blowing the whistle on just one scheme." But, as this Court previously explained, the fact that an industry is insular does not automatically transform multiple, parallel schemes into one unitary scheme. Doc. 72, p. 10. In fact, Plaintiff seems to admit that the alleged arrangements constitute multiple parallel schemes and that each PMI provider's arrangement with HSBC is "just one scheme" among those multiple schemes. Doc. 88, ¶ 80.

***4** For these reasons, Plaintiff once again fails to include sufficient allegations to establish his standing to bring suit against Defendants MGIC, Republic, Radian, and Genworth. Because Plaintiff had one chance to amend his complaint to cure the deficiencies and failed to do so, Plaintiff's claims against Defendants MGIC, Republic, Radian, and Genworth are DISMISSED WITH PREJUDICE.

B. Dismissal under Fed.R.Civ.P. 12(b)(6)

Defendants also challenge the timeliness of Plaintiff's first cause of action under RESPSA and argue that Plaintiff failed to state a claim upon which relief can be granted in his second cause of action for common law unjust enrichment.

"When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheurer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Gilligan v. Jamco Development Corp.,* 108 F.3d 246, 249 (9th Cir.1997). A Fed.R.Civ.P. 12(b)(6) dismissal is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balisteri v. Pacifica Police Dept.,* 901 F.2d 696, 699 (9th Cir.1990); *Graehling v. Village of Lombard,* 58 F.3d 295,297 (7th Cir.1995). A Fed.R.Civ.P. 12(b)(6) motion "tests the legal sufficiency of a claim." *Navarro v. Block,* 250 F.3d 729, 732 (9th Cir.2001).

In addressing dismissal, a court must: (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty Mut. Ins. Co.,* 80 F.3d 336, 337–338 (9th Cir.1996). Nonetheless, a court is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Sciences Securities Litig.,* 536 F.3d 1049, 1055 (9th Cir.2008) (citation omitted). A court "need not assume the truth of legal conclusions cast in the form of factual allegations," *U.S. ex rel. Chunie v. Ringrose,* 788 F.2d 638, 643, n. 2 (9th Cir.1986), and must not "assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated ... laws in ways that have not been alleged." *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 526, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983).

"[A] plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly,* 550 U.S. 554,550 U.S. 544, 127 S.Ct. 1955, 1964–65, 167 L.Ed.2d 929 (2007) (internal citations omitted). Moreover, a court "will dismiss any claim that, even when construed in the light most favorable to plaintiff, fails to plead sufficiently all required elements of a cause of action." *Student Loan Marketing Ass'n v. Hanes,* 181 F.R.D. 629, 634 (S.D.Cal.1998). In practice, a complaint "must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Twombly,* 550 U.S. at 562, 127 S.Ct. at 1969 (quoting *Car Carriers, Inc. v. Ford Motor Co.,* 745 F.2d 1101, 1106 (7th Cir.1984)). In *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937,1949, 173 L.Ed.2d 868 (2009), the U.S. Supreme Court explained:

> ***5** ... a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." ... A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.... The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. (Citations omitted.)

After discussing *Iqbal,* the Ninth Circuit Court of Appeals summarized: "In sum, for a complaint to survive [dismissal], the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Service,* 572 F.3d 962, 989 (9th Cir.2009) (quoting *Iqbal,* 556 U.S. 662, 129 S.Ct. at 1949, 173 L.Ed.2d 868).

Moreover, "a complaint may be dismissed under Rule 12(b)(6) when its own allegations indicate the existence of an affirmative defense." *Quiller v. Barclays American/Credit, Inc.,* 727 F.2d 1067, 1069 (11th Cir.1984). For instance, a limitations defense may be raised by a Fed.R.Civ.P. 12(b)(6) motion to dismiss. *Jablon v. Dean Witter & Co.,* 614 F.2d 677, 682 (9th Cir.1980); *see Avco Corp. v. Precision Air Parts, Inc.,* 676 F.2d 494, 495 (11th Cir.1982), cert. denied, 459 U.S. 1037, 103 S.Ct. 450, 74 L.Ed.2d 604 (1982). A Fed.R.Civ.P. 12(b)(6) motion to dismiss may raise the limitations defense when the statute's running is apparent

on the complaint's face. *Jablon,* 614 F.2d at 682. If the limitations defense does not appear on the complaint's face and the trial court accepts matters outside the pleadings' scope, the defense may be raised by a motion to dismiss accompanied by affidavits. *Jablon,* 614 F.2d at 682; *Rauch v. Day and Night Mfg. Corp.,* 576 F.2d 697 (6th Cir.1978). With these standards in mind, this Court turns to HSBC Defendants' challenges to the claims in the FAC.

1. RESPA Claim and Statute of Limitations

As the parties recognize, the applicable statute of limitations for Plaintiff's first cause of action under RESPA is one year from the date of the occurrence of the violation. *Edwards v. First American Corp.,* 517 F.Supp.2d 1199, 1204 (C.D.Cal.2007) (quoting 12 U.S.C. § 2614). Plaintiff originally filed this action on March 12, 2012. Plaintiff also does not contest that his claim accrued on or around November 21, 2006, when he closed his loan. Therefore, Plaintiff's RESPA claim is time-barred unless the limitations period has been tolled. To that end, Plaintiff alleges that his RESPA claim was equitably tolled, that Defendants engaged in fraudulent concealment, and that the delayed discovery rule applies to toll the limitations period. Defendants argue that none of these apply to Plaintiff's RESPA claim, and that it should be dismissed as untimely.

i. Equitable Tolling

***6** "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo,* 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005). "Equitable tolling may be applied if, despite all due diligence, a plaintiff is unable to obtain vital information bearing on the existence of his claim." *Santa Maria v. Pacific Bell,* 202 F.3d 1170, 1178 (9th Cir.2000). The Ninth Circuit has explained:

> Unlike equitable estoppel, equitable tolling does not depend on any wrongful conduct by the defendant to prevent the plaintiff from suing. Instead it focuses on whether there was excusable delay by the plaintiff. If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing until the plaintiff can gather what information he needs.... However, equitable tolling does not postpone the statute of limitations until the existence of a claim is a virtual certainty.

Santa Maria, 202 F.3d at 1178 (citation omitted).

Courts are reluctant to invoke equitable tolling:

> A statute of limitations is subject to the doctrine of equitable tolling; therefore, relief from strict construction of a statute of limitations is readily available in extreme cases and gives the court latitude in a case-by-case analysis.... The equitable tolling doctrine has been applied by the Supreme Court in certain circumstances, but it has been applied sparingly; for example, the Supreme Court has allowed equitable tolling when the statute of limitations was not complied with because of defective pleadings, when a claimant was tricked by an adversary into letting a deadline expire ... Courts have been generally unforgiving, however, when a late filing is due to claimant's failure "to exercise due diligence in preserving his legal rights." ...

Scholar v. Pac. Bell, 963 F.2d 264, 267–268 (9th Cir.1992) (citations omitted).

Here, Plaintiff alleges no facts showing the exercise of any diligence on his part other than one telephone conversation with an HSBC customer service representative named "Marlen" on March 5, 2012. Doc. 88, ¶ 150. This lone telephone conversation, which is apparently the only attempt Plaintiff ever made at any sort of diligence over the course of five years after the accrual of Plaintiff's claim, does not constitute Plaintiff "pursuing his rights diligently." *Pace v. DiGuglielmo,* 544 U.S. at 418.

Plaintiff then attempts to get around his clear lack of diligence by arguing that reasonable diligence on his part would have been futile because the "complex, undisclosed and self-concealing nature of Defendants' scheme" would have prevented him from discovering the existence of a

possible RESPA claim, and that he was only able to discover the basis of his claim with the assistance of counsel. Doc. 88, ¶¶ 145–163. However, Plaintiff fails to mention what "extraordinary circumstance" prevented him from obtaining assistance from counsel earlier, or how not retaining counsel earlier constitutes an "extraordinary circumstance" that prevented him from filing his claim within the limitations period. *Pace v. DiGuglielmo,* 544 U.S. at 418; *see, Ramirez v. Yates,* 571 F.3d 993, 997 (9th Cir.2009) (Party claiming equitable tolling must show "that the extraordinary circumstances were the cause of his untimeliness and that the extraordinary circumstances made it impossible to file a petition on time" despite the exercise of reasonable diligence.). Further, to follow Plaintiff's line of reasoning, any plaintiff who requires the assistance of counsel to discover the existence of a claim, including plaintiffs who conduct virtually no diligence, would be automatically entitled to equitable tolling of the statute of limitations for an indefinite period of time until that plaintiff retains counsel. As the Ninth Circuit has recognized, equitable tolling is not available in most cases because the threshold to trigger equitable tolling is very high, "lest the exception swallow the rule." *Porter v. Ollison,* 620 F.3d 952, 959 (9th Cir.2010). For these reasons, Plaintiff has failed to meet his burden of showing that he exercised reasonable diligence and that he was impeded by some extraordinary circumstance to qualify for equitable tolling of the statute of limitations on his RESPA cause of action.

ii. Fraudulent Concealment

***7** While "equitable tolling focuses on whether there was excusable delay by the plaintiff," "[e]quitable estoppel, on the other hand, focuses primarily on actions taken by the defendant to prevent a plaintiff from filing suit, sometimes referred to as fraudulent concealment." *Lukovsky v. City and County of San Francisco,* 5 F.3d 1044, 1051 (9th Cir.2008) (citing *Johnson v. Henderson,* 314 F.3d 409 (9th Cir.2002)).

The Ninth Circuit recently explained:

> A statute of limitations may be tolled if the defendant fraudulently concealed the existence of a cause of action in such a way that the plaintiff, acting as a reasonable person, did not know of its existence. [The plaintiff] carries the burden of pleading and proving fraudulent concealment; it must plead facts showing that [the defendant] affirmatively misled it, and that [the plaintiff] had neither actual nor constructive knowledge of the facts giving rise to its claim despite its diligence in trying to uncover those facts. A fraudulent concealment defense requires a showing both that the defendant used fraudulent means to keep the plaintiff unaware of his cause of action, and also that the plaintiff was, in fact, ignorant of the existence of his cause of action.

Hexcel Corp. v. Ineos Polymers, Inc., 681 F.3d 1055, 1060 (9th Cir.2012) (internal quotations and citations omitted).

"Fraudulent concealment necessarily requires active conduct by a defendant, above and beyond the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time." *Santa Maria v. Pacific Bell,* 202 F.3d at 1177. "Where the basis of equitable tolling is fraudulent concealment, it must be pled with particularity under Rule 9(b) of the Federal Rules of Civil Procedure." *Marzan v. Bank of America,* 779 F.Supp.2d 1140, 1149 (D.Haw.2011) (citing *389 Orange St. Partners v. Arnold,* 179 F.3d 656, 662 (9th Cir.1999)).

Plaintiff argues that the statute of limitations for his RESPA claim should be tolled because Defendants "knowingly and actively concealed the basis for Plaintiff's claims by engaging in a scheme that was, by its very nature and purposeful design, self-concealing." Doc. 88, ¶ 145. Plaintiff also alleges that Defendants "engaged in affirmative acts and/or purposeful nondisclosure to conceal the facts and circumstances giving rise to" Plaintiff's RESPA claim. Doc. 88, ¶ 151. The affirm of fraudulent concealment by the Defendants that Plaintiff alleges are HSBC Defendants' use of form mortgage documents and disclosures that do not sufficiently put Plaintiff "on notice of the true nature of HSBC's captive reinsurance arrangements" and Defendants' faulty disclosures to state regulators. Doc. 88, ¶¶ 152, 155. However, the Ninth Circuit has repeatedly rejected claims of fraudulent concealment where the plaintiffs fail to allege misrepresentation beyond the actual basis for the lawsuit. *See, Coppinger–Martin v. Solis,* 627 F.3d 745, 751–52 (9th Cir.2010), *Lukovsky v. City and County of*

San Francisco, 5 F.3d at 1049–52. Such arguments are untenable because they "merge[ ] the substantive wrong with the tolling doctrine" and "would eliminate the statute of limitations [.]" *Coppinger–Martin v. Solis,* 627 F.3d at 751–52, *Lukovsky v. City and County of San Francisco,* 5 F.3d at 1052. Likewise, Plaintiff's argument that t he nature o f Defendants' "self-concealing" scheme and the form documents and disclosures used in that scheme constitute affirmative acts of fraudulent concealment must fail. In addition, even if Plaintiff's allegation that Defendants "actively concealed their conduct" by making defective disclosures to state regulators is accepted as true, it does not meet the heightened pleading standard required by Fed.R.Civ.P. 9(b). *Marzan v. Bank of America,* 779 F.Supp.2d at 1149. Plaintiff fails to allege what "conduct" the Defendants concealed from the regulators, what disclosures Defendants made that were incomplete or inaccurate, or how these defective disclosures prevented Plaintiff from obtaining information about his claim in spite of exercising due diligence. As such, Plaintiff failed to "state with particularity the circumstances constituting fraud[.]" Fed.R.Civ.P. 9(b). For these reasons, Plaintiff failed to meet his burden in order to toll the statute of limitations on the basis of fraudulent concealment.

iii. Delayed Discovery

***8** Under California's delayed discovery doctrine, "the limitations period does not accrue until the aggrieved party has notice of the facts constituting the injury." *E–Fab, Inc. v. Accountants, Inc. Services,* 153 Cal.App.4th 1308, 1318, 64 Cal.Rptr.3d 9 (2007). "The 'discovery rule' ... assumes that the elements of accrual including harm exist, but tolls the ruling of the statute until the plaintiff is on inquiry notice of its injury (and its wrongful cause)." *California Sansome Co. v. U.S. Gypsum,* 55 F.3d 1402, 1406 (9th Cir.1995). To rely on delayed discovery of a claim, "[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." *Fox v. Ethicon Endo–Surgery, Inc.,* 35 Cal.4th 797, 808, 27 Cal.Rptr.3d 661, 110 P.3d 914 (2005) (quoting *McKelvey v. Boeing North American, Inc.,* 74 Cal.App.4th 151, 160, 86 Cal.Rptr.2d 645 (1999)).

To satisfy the time and manner of discovery requirement, a plaintiff must allege "facts showing the time and surrounding circumstances of the discovery of the cause of action upon which they rely." *Bennett v. Hibernia Bank,* 47 Cal.2d 540, 563, 305 P.2d 20 (1956). "The purpose of this requirement is to afford the court a means of determining whether or not the discovery of the asserted invasion was made within the time alleged, that is, whether plaintiffs actually learned something they did not know before." *Bennett,* 47 Cal.2d at 563, 305 P.2d 20.

Moreover, "to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period." *Fox,* 35 Cal.4th at 809, 27, 24 Cal.Rptr.3d 179, 105 P.3d 544. The doctrine of delayed discovery requires a plaintiff to plead facts showing an excuse for late discovery of the facts underlying his cause of action. *Prudential Home Mortgage Co. v. Superior Court,* 66 Cal.App.4th 1236, 1247, 78 Cal.Rptr.2d 566 (1998). The plaintiff must show that it was not at fault for failing to discover or had no actual or presumptive knowledge of facts sufficient to put it on inquiry. *Prudential Home,* 66 Cal.App.4th at 1247, 78 Cal.Rptr.2d 566. As to sufficiency of delayed discovery allegations, a plaintiff bears the burden to "show diligence" and "conclusory allegations" will not withstand dismissal. *Fox,* 35 Cal.4th 797, 808, 27 Cal.Rptr.3d 661, 110 P.3d 914.

Plaintiff's only allegations in support of his claim of delayed discovery are that he was only able to discover the basis of his RESPA claim with the assistance of counsel and that he contacted HSBC in March 2012 after he discovered the underlying basis of his claim. Doc. 88, ¶¶ 149–150. Plaintiff fails to allege the time or manner of discovery at all other than that it was made with the assistance of counsel. The FAC therefore contains no "facts showing the time and surrounding circumstances of the discovery of the cause of action" as required for the application of delayed discovery. *Bennett v. Hibernia Bank,* 47 Cal.2d at 563, 305 P.2d 20. Plaintiff also fails to allege any facts showing that he exercised any diligence at all prior to discovery. Plaintiff is thus unable to plead that "despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period." *Fox,* 35 Cal.4th at 809, 27 Cal.Rptr.2d 661. Therefore, Plaintiff fails to adequately plead delayed discovery for his RESPA claim.

***9** Because Plaintiff fails to meet the requirements of equitable tolling, fraudulent concealment, and delayed discovery, the statute of limitations for his RESPA claim was not tolled and his first cause of action under RESPA

against all Defendants is DISMISSED as time-barred.

2. Unjust Enrichment

In his second cause of action, Plaintiff claims that HSBC Defendants received unjust enrichment from the amounts ceded to HSBC RE by PMI Defendants as reinsurance premiums from the private mortgage premiums paid by Plaintiff and the putative class members. Doc 88, ¶¶ 178–183. Plaintiff further alleges that PMI Defendants received unjust enrichment from the steady stream of business they received in return for ceding those portions of the borrowers' premiums to HSBC Defendants. *Id.* at ¶¶ 178–183, 27 Cal.Rptr.3d 661, 110 P.3d 914. Defendants argue and Plaintiff does not contest that the statute of limitations applicable to a claim of unjust enrichment under California law is three years. *See, Keilholtz v. Lennox Hearth Products Inc.,* 268 F.R.D. 330, 336 (N.D.Cal.2010), *Fed. Deposit Ins. Corp. v. Dintino,* 167 Cal.App.4th 333, 347, 84 Cal.Rptr.3d 38 (2008), *First Nationwide Savings v. Perry,* 11 Cal.App.4th 1657, 1670, 15 Cal.Rptr.2d 173 (1992). Therefore, Plaintiff's second cause of action, like his first cause of action, is also time-barred unless that statute of limitations has been tolled. Plaintiff argues that the delayed discovery rule should apply to toll the limitations period for his unjust enrichment claim based on "[t]he same allegations, discussed above, that warrant application of the discovery rule to delay accrual of RESPA's one-year statute of limitation[.]" Doc. 119, p. 13. However, Plaintiff's allegations upon which he attempts to claim delayed discovery for this RESPA claim fall far short of meeting the pleading requirement for delayed discovery. *Bennett v. Hibernia Bank,* 47 Cal.2d at 563, 305 P.2d 20, *Fox,* 35 Cal.4th at 809, 27 Cal.Rptr.2d 661. Likewise, because Plaintiff offers no additional allegations, he also fails to invoke the delayed discovery doctrine for his unjust enrichment claim. *Id.*

For these reasons, Plaintiff's second cause of action for common law unjust enrichment against all Defendants is DISMISSED as time-barred by the statute of limitations.

CONCLUSION AND ORDER

For the reasons discussed above, the Court

1. DISMISSES WITH PREJUDICE this action against Defendants Mortgage Guaranty Insurance Corp., Republic Mortgage Insurance Co., Radian Guaranty, Inc., and Genworth Mortgage Insurance Corp.;

2. DISMISSES WITH LEAVE TO AMEND Plaintiff's first cause of action for violations of the Real Estate Settlement Procedures Act of 1974 and second cause of action for common law unjust enrichment against Defendants HSBC USA, Inc., HSBC Bank USA, N.A., HSBC Mortgage Corp., HSBC Reinsurance (USA), Inc, and United Guaranty Residential Insurance Co.; and

3. DIRECTS the Clerk of Court to enter judgment in favor of Defendants Mortgage Guaranty Insurance Corp., Republic Mortgage Insurance Co., Radian Guaranty, Inc., and Genworth Mortgage Insurance Corp. and against Plaintiff Lucas E. McCarn in that there is no just reason to delay to enter such judgment given that Plaintiff's claims against these Defendants and their alleged liability are clear and distinct from claims against and liability of other Defendants. *See* F.R.Civ.P. 54(b).

***10** Plaintiff shall have one opportunity to file and serve a further amended complaint in an attempt to cure the deficiencies described herein. Any such further amended complaint shall be filed and served within 20 days of electronic service of this order. Plaintiff is not afforded leave to alter any other aspect of his First Amended Complaint. Defendants HSBC USA, Inc., HSBC Bank USA, N.A., HSBC Mortgage Corp., HSBC Reinsurance (USA), Inc, and United Guaranty Residential Insurance Co. no later than 20 days after service of the further amended complaint shall file a response thereto.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 5499433

Footnotes

1 PMI Mortgage Insurance was later dismissed as a defendant on June 7, 2012. Doc. 77.

2 Defendants MGIC, Republic, Radian, and Genworth also challenge the merits of Plaintiff's economic theory of injury as well as

the availability of conspiracy and aiding and abetting liability claims against non-contracting parties under RESPA. Because this Court finds the standing and timeliness issues to be dispositive of Plaintiff's claims, it declines to address these other issues at this time.

3 The Court notes that Genworth was not one of the non-contracting Defendants who had moved to dismiss the original complaint for lack of standing. Because the same deficiencies in the FAC that prevent Plaintiff from establishing standing with regard to MGIC, Republic, and Radian also apply to destroy standing with regard to Genworth for the same reasons, and because Plaintiff specifically addressed Genworth in his FAC in an attempt to establish standing, the Court finds no reason to treat Plaintiff's claims against Genworth differently from Plaintiff's claims against the other non-contracting Defendants MGIC, Republic, and Radian.

End of Document

STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 18-CVS-009990
JOHN MORREALE, Plaintiff, v. BANK OF AMERICA, N.A., Defendant.	**ORDER GRANTING DEFENDANT'S AMENDED MOTION TO DISMISS**

This matter came before the undersigned Superior Court Judge on the amended motion of Defendant Bank of America, N.A. ("Defendant") to dismiss Plaintiff John Morreale's Complaint with prejudice pursuant to North Carolina Rule of Civil Procedure 12(b)(6).

The Court, having reviewed the pleadings and pertinent legal authority, and having heard oral argument, hereby finds that:

(1) Plaintiff fails to state a claim for Common Law fraud and this claim should be dismissed with prejudice;

(2) Plaintiff fails to state a claim for Unfair and Deceptive Trade Practices this claim should be dismissed with prejudice;

(3) Plaintiff fails to state a claim for Unjust Enrichment and this claims should be dismissed with prejudice; and

(4) Plaintiff fails to state a claim for Punitive Damages and this claim should be dismissed with prejudice.

Having made these findings, the Court holds that Plaintiff fails to state any claim against Defendant upon which relief may be granted and that Defendant's Amended Motion to Dismiss should be granted.

It is hereby ORDERED, ADJUDGED, AND DECREED that the Defendant's Amended Motion to Dismiss is GRANTED and all claims against Defendant are hereby DISMISSED WITH PREJUDICE.

This the 21st day of February, 2019.

Stephan R. Futrell

The Honorable Stephan R. Futrell
Superior Court Judge Presiding

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

YURISAN NAVARRO,

Plaintiff,

v. **Case No: 8:17-cv-2643-T-27SPF**

BANK OF AMERICA, N.A,

Defendant.
_____/

ORDER

BEFORE THE COURT is Plaintiff's Response to Court's Order to Show Cause (Dkt. 22) and Defendant's Reply (Dkt. 23). On October 2, 2018, Plaintiff was ordered to show cause why this case should not be dismissed for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine.[1] Upon consideration, the Complaint is due to be dismissed for lack of subject matter jurisdiction.

Background

Plaintiff and more than seventy others brought nearly identical actions against Bank of America, alleging fraud. Plaintiff alleges that in 2009 he began experiencing financial hardship and contacted Bank of America to request a HAMP [Home Affordable Modification Program] loan modification. (Dkt. 1, Complaint, ¶ 36). On or around January 6, 2010, a Bank of America representative advised him to refrain from making regular mortgage payments in order to get a HAMP loan modification. (Id. at ¶ 37). Based on this conversation, Plaintiff refrained from making

[1] Federal courts are courts of limited jurisdiction. *Russell Corp. v. American Home Assur. Co.*, 264 F.3d 1040, 1050 (11th Cir. 2001). Accordingly, a federal court is "obligated to inquire into subject-matter jurisdiction *sua sponte* whenever it may be lacking." *Cadet v. Bulger*, 377 F.3d 1173, 1179 (11th Cir. 2004) (citation omitted).

his regular mortgage payments and defaulted. (Id. at ¶ 39).

During this time frame, Plaintiff submitted a HAMP loan modification application with supporting financial documents. (Id. at ¶¶ 40, 44). He alleges that on or about January 27, 2010, a representative of Defendant verbally informed him that he was finally approved for a trial loan modification. (Id. at ¶ 46). He made three "trial payments." (Id. at ¶ 49). On or about April 16, 2010, and on at least three other occasions, he was told the documents he had submitted to qualify for a HAMP modification were "incomplete." (Id. at ¶¶ 41, 44). On June 19, 2012, his home was foreclosed and a judgment entered against him. (Id. at ¶ 49). Essentially, Plaintiff alleges that Bank of America "misled" him into defaulting on his mortgage at each stage of the HAMP loan modification process, which resulted in the foreclosure of his property. (Id. at ¶¶ 38-39).

Discussion

Under the *Rooker-Feldman* doctrine,[2] federal district courts may not review state court judgments. *See Green v. Jefferson County Com'n*, 563 F.3d 1243, 1249 (11th Cir. 2009). "The *Rooker-Feldman* doctrine is 'confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.'" *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1331 (11th Cir. 2010) (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 (2005)) (emphasis in original). The doctrine bars federal review where the issue before the federal court is "'inextricably intertwined' with the state court judgment so that (1) the success of the federal claim would 'effectively nullify' the state court judgment, or that (2) the federal claim would succeed 'only

[2] This doctrine derives from *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923), and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

to the extent that the state court wrongly decided the issues.'" *Alvarez v. Attorney Gen. for Fla.*, 679 F.3d 1257, 1262-63 (11th Cir. 2012) (quoting *Casale v. Tillman*, 558 F.3d 1258, 1260 (11th Cir. 2009) (per curiam)); *Target Media Partners v. Specialty Mktg. Corp.*, 881 F.3d 1279, 1286 (11th Cir. 2018) ("The class of federal claims that we have found to be 'inextricably intertwined' with state court judgments is limited to those raising a question that was or should have been properly before the state court.").

Plaintiff contends that *Rooker-Feldman* does not apply because he "does not argue that the foreclosure judgment was improperly granted nor that the foreclosure judgment is void." (Dkt. 22, p. 3). He maintains that "[n]othing in Plaintiff's claims indicates a desire to undo or nullify the foreclosure judgment" and contends that his Complaint alleges that Defendant's fraudulent conduct resulted in a wrongful denial of his HAMP loan modification. (Id.). To support his position that *Rooker-Feldman* does not apply to claims under HAMP, Plaintiff relies on *Nivia v. Nation Star Mortg., LLC*, 620 F. App'x 822 (11th Cir. 2015). However, his reliance on *Nivia* is misplaced.

The plaintiff in *Nivia* sought a HAMP loan modification nine months *after* a foreclosure judgment was entered. *Id.* at 823. After the loan modification was denied, the plaintiff sued the bank in federal court for violations of HAMP and the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). *Id.* The court held that *Rooker-Feldman* did not bar review of the HAMP modification claim because it "could not have been at issue in the foreclosure proceeding" that occurred nine-months *before*. *Id.* at 825. Pertinent here, however, the court found that *Rooker-Feldman* barred the FDUTPA claim: "We construe the homeowners' allegation to extend beyond the lenders' denial of the September 2012 loan modification request and to include conduct *before* the foreclosure judgment. In effect, the homeowners' claim amounts to an equitable defense to foreclosure that [the homeowners] failed to raise before the state court." *Id.* The court in *Nivia*, as in *Target Media*,

focused on the temporal sequence of events when analyzing whether *Rooker-Feldman* applied. It did not, as Plaintiff urges, find that the *Rooker-Feldman* doctrine is inapplicable to all HAMP claims. (Dkt. 22, p. 2).

Plaintiff also contends that his claim is not inextricably intertwined with the prior state court judgment because it "do[es] not require a determination that the state court erroneously entered the foreclosure judgment." (Id. at p. 3). However, similar to the FDUPTA claim in *Nivia*, Plaintiff's claim of fraud can only succeed if "the state court wrongly decided the issue", *i.e.* the foreclosure. *See Nivia*, 620 F. App'x at 824.

Following *Target Media*, 881 F.3d at 1289, the inquiry therefore focuses on whether Plaintiff's fraud claim is "inextricably intertwined" with the state court foreclosure judgment. Without question, it is. Plaintiff alleges that Defendant "misled" him into defaulting on his mortgage (Dkt. 1, ¶ 38), instructed him to "make trial payments," which Defendant retained as profit (Id. at ¶¶ 39, 47), induced him to spend time and incur unnecessary costs associated with loan modification applications that it knew would not be reviewed (Id. at ¶¶ 40-44, 69), caused "damage to his credit" (Id. at ¶¶ 50, 69), and as a result, he suffered "*the loss of his home*" and his equity. (Id. at ¶¶ 50, 58, 69) (emphasis added). In other words, the Complaint alleges that Defendant misrepresented the eligibility requirements for a HAMP modification "to set Plaintiff up for foreclosure." (Id. at ¶ 38). These allegations essentially attack the state court foreclosure judgment and could have been raised in that case. *See Varela-Pietri v. Bank of America, N.A.*, No. 17-cv-2534, 2018 WL 4208002, at *3 (M.D. Fla. Sept. 4, 2018) ("the fraud claim in this action appears a circuitous but unmistakable attempt to impugn the validity of the foreclosure judgment").

Conclusion

Federal review of Plaintiff's fraud claim is barred under the *Rooker-Feldman* doctrine as it

is inextricably intertwined with the state court foreclosure judgment.[3] Accordingly, this case is **DISMISSED** for lack of subject matter jurisdiction. Any pending motions are denied as moot. The CLERK is directed to **CLOSE** the file.

DONE AND ORDERED this 26th day of October, 2018.

/s/ James D. Whittemore

JAMES D. WHITTEMORE
United States District Judge

Copies to: Counsel of Record

[3] At least three other district courts have found nearly identical claims were barred by *Rooker-Feldman*. See *Spitaleri v. Bank of America, N.A.*, No. 17-cv-518, 2018 WL 5024336 (M.D. Fla. Oct. 17, 2018); *Restrepo v. Bank of America, N.A.*, No. 8:17-cv-2582 (Dkt. 30) (M.D. Fla. Sept. 13, 2018); *Ocampo v. Bank of America, N.A.*, No. 17-cv-2631, 2018 WL 3862560 (M.D. Fla. Aug. 14, 2018) (holding that the claims were barred by *Rooker-Feldman*, and if not, still barred by *res judicata*).

2018 WL 1071922
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Fort Myers Division.

Simon PAREDES and Rita Paredes, Plaintiffs,
v.
BANK OF AMERICA, N.A., Defendant.

Case No: 2:17-cv-593-FtM-38MRM
|
Signed 02/27/2018

Attorneys and Law Firms

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Andrew Kemp-Gerstel, James Randolph Liebler, II, Liebler, Gonzalez & Portuondo, PA, Miami, FL, for Defendant.

OPINION AND ORDER[1]

SHERI POLSTER CHAPPELL, UNITED STATES DISTRICT JUDGE

***1** This matter comes before the Court on Defendant Bank of America's Motion to Dismiss (Doc. 14). Plaintiffs Simon Parades and Rita Parades filed a Response in Opposition. (Doc. 15). The matter is ripe for review.

BACKGROUND

This case concerns Bank of America's allegedly fraudulent loan modification practices when administering a government program designed to alleviate financial hardship after the Great Recession. In March 2004, Plaintiffs executed a mortgage and note for a home at 923 SE 18th St., Cape Coral, FL 33990. (Doc. 1 at ¶ 34). Bank of America eventually became the loan servicer on the account. (Doc. 1 at ¶ 35). In 2009, Plaintiffs experienced financial hardship and contacted Bank of America requesting a loan modification under the Home Affordable Modification Program ("HAMP"). (Doc. 1 at ¶ 36). After Bank of America supplied an application, Plaintiffs returned it with supporting financial documents. (Doc. 1 at ¶ 40).

On January 21, 2010, Plaintiffs contacted Bank of America again and a representative named "Maria" advised them to stop making mortgage payments or "they could not be eligible for a HAMP modification." (Doc. 1 at ¶ 37). They allege this statement was false because default was not required for HAMP eligibility. (Doc. 1 at ¶ 37). However, Plaintiffs relied on this statement, did not make their regular mortgage payments, and fell into default. (Doc. 1 at ¶ 39).

Then, on March 3, 2010, Plaintiffs spoke to a Bank of America representative named "Ramiro" and "others," who stated that Plaintiffs' HAMP application was incomplete and that they needed to "resubmit another application." (Doc. 1 at ¶ 41). Plaintiffs received the same or similar directives in later phone calls. (Doc. 1 at ¶ 41). They allege these statements were false and this was an intentional act by Bank of America to frustrate their application process. (Doc. 1 at ¶¶ 41, 43). But Plaintiffs relied on these statements and resubmitted their modification application. (Doc. 1 at ¶ 43).

On June 21, 2010, a Bank of America representative named "Maria" verbally informed Plaintiffs that their HAMP application was approved for a trial loan modification. (Doc. 1 at ¶ 46). She then requested Plaintiffs make "trial payments" of more than $1,300.00. (Doc. 1 at ¶ 46). Plaintiffs allege this statement was false because the HAMP application had not been approved. (Doc. 1 at ¶ 46). But Plaintiffs made three trial payments of more than $1,300.00. (Doc. 1 at ¶ 49). They claim they were damaged because Bank of America "placed those payments in an unapplied account and refused to credit the account," because they ultimately lost their home, and because their credit rating suffered. (Doc. 1 at 50).

Finally, Plaintiffs allege Bank of America charged them for thirty-eight property inspections between 2008 and 2012, even though they "were living in the home". (Doc. 1 at ¶ 52). They claim that Bank of America applied trial payments submitted for the HAMP modification to pay for inspection fees, and that it "omitted the fact that the bank was conducting unnecessary and improper inspections on their home and charging their account inspections fees." (Doc. 1 at ¶ 53).

***2** Plaintiffs' home was foreclosed upon in September

2010, and a judgment was entered. (Doc. 1 at ¶ 49). Plaintiffs vacated the home sometime between 2010 and 2012.[2] (Doc. 1 at ¶ 49). Based on these facts, Plaintiffs filed this Complaint on October 31, 2017, alleging a single fraud count. (Doc. 1). Now, Bank of America moves to Dismiss. (Doc. 14).

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a pleading for failure to state a claim upon which relief can be granted. The propriety of such a dismissal is guided by the *Twombly–Iqbal* plausibility standard, which requires a plaintiff to allege sufficient facts "to raise a reasonable expectation that discovery will reveal evidence" to support a claim. *Twombly*, 550 U.S. at 556; *see also Randall v. Scott*, 610 F.3d 701, 708 n. 2 (11th Cir. 2010). The Court must accept all factual allegations in a plaintiff's complaint as true and take them in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008). This acceptance is limited to well-pleaded factual allegations. *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004). A "the-defendant-unlawfully harmed me accusation" is insufficient. *Iqbal*, 556 U.S. at 677. "Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement." *Id.* (internal modifications omitted).

Fraud allegations are subject to heightened pleading standards under Federal Rule of Civil Procedure 9(b), which requires a party to "state with particularity the circumstances constituting fraud." Generally, this occurs where the pleading alleges

> (1) precisely what statements were made in what documents or oral representations or what omissions were made, and
>
> (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and
>
> (3) the content of such statements and the manner in which they misled the plaintiff, and
>
> (4) what the defendants obtained as a consequence of the fraud.

Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1371 (11th Cir. 1997) (internal quotations omitted). But allegations relating to "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Id.*

Rule 9(b) "serves an important purpose in fraud actions by alerting defendants to the precise misconduct with which they are charged and protecting defendants against spurious charges of immoral and fraudulent behavior." *Id.* at 1370-71 (internal quotations omitted). Though it imposes a heightened pleading standard, the Eleventh Circuit has cautioned that "Rule 9(b) must not be read to abrogate [R]ule 8 ... and a court considering a motion to dismiss for failure to plead fraud with particularity should always be careful to harmonize the directives of [R]ule 9(b) with the broader policy of notice pleading." *Friedlander v. Nims*, 755 F.2d 810, 813 (11th Cir. 1985). Requisite particularity has been found in a pleading that lacked specifics but still presented enough description to sufficiently apprise defendants of allegations lodged against it. *See Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984) (list containing fraud allegations and nature of statements found to meet the Rule 9(b) threshold, even though precise words were not alleged); *see also Brooks*, 116 F.3d at 1371 ("alternative means are also available to satisfy the rule."). Though "[i]t is certainly true that allegations of date, place or time [are traditional indicia of particularity] ... nothing in the rule requires them." *Seville Indus. Mach. Corp.*, 742 F.2d at 791.

DISCUSSION

***3** Bank of America argues the Complaint should be dismissed for a multitude of reasons. When confronted with the same claims, arguments, and defenses, a court in the Middle District of Florida has found that only one of Bank of America's arguments need be addressed because Plaintiffs' claims are time-barred. *Eddie v. Bank of Am.*, N.A., No. 8:17-CV-1534-T-26TBM, 2018 WL 573406, at *2 (M.D. Fla. Jan. 26, 2018). The Court agrees with that decision and will apply the same logic here.

In Florida, fraud allegations are subject to a four-year statute of limitations. Fla. Stat. 95.11(3)(j). Florida's delayed discovery doctrine states that actions founded on fraud accrue "from the time the facts giving rise to a cause of action were discovered or should have been discovered with the exercise of due diligence. Fla. Stat. § 95.031(2)(a); *see also Hearndon v. Graham,* 767 So. 2d 1179, 1184 (Fla. 2000); *Thomas v. Lopez*, 982 So. 2d 64,

67 (Fla. 5th DCA 2008). Here, all of Bank of America's allegedly fraudulent activity took place between 2009 and 2012, which is approximately five years before the Complaint in this case was filed and therefore outside of Florida's four-year statute of limitations. (Doc. 1 at ¶¶ 34, 36-41, 46, 49, 52). Their claims must fail because the Complaint does not adequately plead the elements necessary under the delayed discovery doctrine.

Though the Complaint states that Plaintiffs discovered five declarations from another case regarding Bank of America's fraudulent practices (Docs. 1-2; 1-3; 1-4; 1-5; 1-6), it does not specifically detail when or how that information was discovered. It seems this was for a good reason. Though the declarations all detail the same or similar practices undertaken by Bank of America, four were formed in May or June 2013, which still lies outside of the four year statute of limitations for this case. (Docs. 1-3; 1-4; 1-5; 1-6). Though one declaration was made in February 2017 (Doc. 1-2), it offers no new information from the four 2013 declarations, and nothing that could not have been gleaned because of due diligence at an earlier date.

Moreover, Plaintiffs fail to allege why they could not have discovered the allegedly fraudulent acts at or near the time of commission through exercising reasonable due diligence. First, Plaintiffs allege that in a 2009 telephone conversation, a Bank of America representative misrepresented that default or delinquency on their Mortgage was required to be eligible for HAMP. But Florida law is clear that simple reliance on a misrepresentation is not enough to delay the accrual of fraud claims because a party has a duty of reasonable due diligence. *See Thomas,* 982 So. 2d at 67. Had they checked, Plaintiffs would have discovered that HAMP directives were publicly available online. U.S. Dep't of Treasury, HAMP Supplemental Directive (SD) 09–01 ("SD 09–01") (Apr. 6, 2009). They would have also discovered what they were told was incorrect, and that a mortgage could be HAMP eligible if it was delinquent *or* if default was reasonably foreseeable. *Id.* at 2. Failing to verify the statements with publicly available information does not qualify as due diligence.

Second, Plaintiffs allege they were falsely informed that Bank of America did not receive their documents, or that their documents were incomplete or out of date, which resulted in the submission of repeated HAMP applications. Still, had Plaintiffs exercised reasonable due diligence they would have known of the completeness of their documents, and the potentially faulty processing of their HAMP application, when their home was foreclosed upon in 2010. Instead, they waited seven years to bring the claim. This again fails to satisfy the due diligence threshold.

***4** Third, Plaintiffs allege Bank of America made false statements of fact when it stated that Plaintiffs were "approved" for a HAMP modification and requested "trial payments." (Doc. 1 at ¶ 46). But as the Court found above, if those statements were false, Plaintiffs could have reached the conclusion when their home was foreclosed upon in 2010, giving them until 2014 to sue. Plaintiffs waited until October of 2017 to seek redress. Their conscious decision not to pursue a remedy cannot be the basis to delay the accrual of the statute of limitations.

Fourth, to the extent that Plaintiffs argue that Bank of America "fraudulently omitted" its practice of placing trial period payments into "unapplied accounts," Plaintiffs' claims also fail. As found in *Eddie*, "this is exactly how the Treasury Department requires servicers to handle trial payments." *Eddie*, 2018 WL 573406, at *3 (citing Making Home Affordable Program Handbook for Servicers of Non–GSE Mortgages, v5.1 129 (May 26, 2016)). Even if the activity was fraudulent, Plaintiffs would have been aware they made unapplied payments when their home was foreclosed upon in 2010. Claims stemming from those matters thus began to accrue then.

Finally, Plaintiffs claim they were defrauded by Bank of America because it did not communicate it was conducting "unnecessary and improper inspections on their home and charging their account inspection fees" between 2008 and 2012. (Doc. 1 at ¶¶ 52-53). This position fails. Plaintiffs allege they lived in the home until sometime between 2010 to 2012,[3] but do not allege they were unaware of property inspections going on during this time, or at any other time after that. (Doc. 1 at ¶¶ 49, 52). Even if they were unaware, the Complaint does not specifically allege that they could not have discovered this information through exercising reasonable due diligence.

Plaintiffs attempt to avoid the inexorable reality of dismissal by arguing that dismissing the Complaint as time-barred at this stage would be procedurally unwarranted. The Court disagrees. The Eleventh Circuit has specifically held that dismissal on statute of limitations grounds is appropriate where it is "apparent from the face of the complaint" that the claim is time-barred. *La Grasta*, 358 F.3d at 845 (internal punctuation omitted). This is precisely the case here. As the Court has outlined, it is apparent from the face of the Complaint that the misrepresentations and actions occurred from 2009 through 2012. At best, Plaintiffs waited five years to sue. Because the Complaint does not

plead the specific facts necessary to delay the accrual of Florida's four-year statute of limitations, the court finds as a matter of law that the claims are due to be dismissed.[4]

Accordingly, it is now

ORDERED:

1. Defendant Bank of America's Motion to Dismiss (Doc. 14) is **GRANTED** and this case is **DISMISSED WITH PREJUDICE**.

2. The clerk is directed to enter judgment in favor of the Defendant, to terminate any pending motions, and to close this case.

DONE and **ORDERED** in Fort Myers, Florida this 27th day of February, 2018.

All Citations

Not Reported in Fed. Supp., 2018 WL 1071922

Footnotes

1 Disclaimer: Documents filed in CM/ECF may contain hyperlinks to other documents or websites. These hyperlinks are provided only for users' convenience. Users are cautioned that hyperlinked documents in CM/ECF are subject to PACER fees. By allowing hyperlinks to other websites, this Court does not endorse, recommend, approve, or guarantee any third parties or the services or products they provide on their websites. Likewise, the Court has no agreements with any of these third parties or their websites. The Court accepts no responsibility for the availability or functionality of any hyperlink. Thus, the fact that a hyperlink ceases to work or directs the user to some other site does not affect the opinion of the Court.

2 The Complaint is unclear about when Plaintiffs left their home. Paragraph 52 of the Complaint alleges that Plaintiffs were "living in their home until 2010," but also states that thirty-eight inspections occurred "from 2008 to 2012, all while they were living in the home." (Doc. 1 ¶ 52). Elsewhere, in paragraph 49, the Complaint alleges that "Plaintiffs moved out of their home in 2011." (Doc. 1 ¶ 49).

3 Because the Complaint lists multiple dates upon which Plaintiffs' terminated their residency at the home, the Court also observes that the Complaint fails to meet the heightened pleading threshold of Rule 9(b).

4 Plaintiffs neither seek leave to file an amended complaint, nor suggest to the Court the substance of any proposed amendment. Thus, dismissal with prejudice is proper. *Cita Tr. Co. AG v. Fifth Third Bank*, 879 F.3d 1151, 1157 (11th Cir. 2018).

2018 WL 3548744
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Tampa Division.

Gabino C. PERALTA and Arely M. Ramirez,
Plaintiffs,
v.
BANK OF AMERICA, N.A., Defendant.

Case No. 8:17-cv-2580-T-23MAP
|
Signed 07/24/2018

Attorneys and Law Firms

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Ira Scot Silverstein, James Randolph Liebler, II, Liebler, Gonzalez & Portuondo, PA, Miami, FL, for Defendant.

ORDER

STEVEN D. MERRYDAY UNITED STATES DISTRICT JUDGE

***1** A decade ago, the Treasury Department introduced the Home Affordable Modification Program, which allegedly requires a participating bank to use "reasonable efforts" to modify the mortgage of a person in default or reasonably likely to default.[1] After an eligible mortgagor applies for a modification, the program requires several "trial payments" before the bank approves the modification.

THE PROCEDURAL HISTORY

In June 2017, Gabino Peralta and Arely Ramirez and 117 other plaintiffs sued Bank of America in a single action.[2] *Case no.* 8:17-cv-1534-RAL (M.D. Fla. June 27, 2017). The 292-page "shotgun" complaint, which copied swaths from a *qui tam* complaint in the Eastern District of New York,[3] alleged fraud and the violation of Florida's Deceptive and Unfair Trade Practices Act. In the part of the complaint specific to them, Peralta and Ramirez alleged that in January 2011 a Bank of America employee, "Angela," told them that a modification requires a default. (Doc. 1 at ¶ 521 in case no. 17-cv-1534) Bank of America allegedly omitted to mention that a reasonably foreseeable likelihood of default might qualify a mortgagor for a modification. Moving to dismiss the complaint, Bank of America argued misjoinder of the plaintiffs' claims, failure to plead fraud with particularity, failure to state a claim, expiration of the four-year limitation, and the absence of a private right to sue a bank for violating the requirements of the Home Affordable Modification Program.

Before resolving the motion to dismiss, the presiding judge observed that the complaint, which alleged neither each plaintiff's citizenship nor the amount in controversy between each plaintiff and Bank of America, failed to invoke diversity jurisdiction. (Doc. 15 in case no. 17-cv-1534) Ordered to amend the complaint to invoke diversity jurisdiction, the plaintiffs submitted a 403-page complaint. (Doc. 16 in case no. 17-cv-1534) For the second time, Bank of America moved to dismiss the complaint and repeated the arguments from the earlier motion. The presiding judge in that action found misjoinder, severed the plaintiffs' claims, and ordered the plaintiffs to sue separately.

***2** The plaintiffs heeded the presiding judge's command. Between October 30, 2017, and November 3, 2017, more than a hundred plaintiffs sued Bank of America in the Middle District of Florida in eighty actions and alleged fraud under Florida common law. Excepting names, dates, addresses, and the like, the complaints are identical. The actions are distributed among eight district judges in the Middle District of Florida. In two actions, the presiding judges found the claims barred by the four-year limitation.[4]

In Peralta and Ramirez's third complaint (but the first complaint in this case), Peralta and Ramirez alleged (Doc. 1) four misrepresentations by Bank of America. First, Bank of America allegedly failed to mention that a reasonably foreseeable danger of default might qualify a mortgagor for a modification; second, Bank of America stated that the mortgagors failed to provide Bank of America with the documents necessary to complete the

modification; third, Bank of America orally notified the mortgagors that the bank approved the requested modification; and fourth, Bank of America charged a "fraudulent" inspection fee. For the third time, Bank of America moved to dismiss the complaint. Peralta and Ramirez have not moved at any moment in this action for leave to amend the complaint.

A February 1, 2018 order (Doc. 17) dismisses each fraud claim except the claim that Bank of America omitted to mention that a reasonably foreseeable likelihood of default might qualify a mortgagor for a modification. In this claim, Peralta and Ramirez allege that Bank of America instructed them on January 5, 2011, to "refrain from making their regular mortgage payments" in order to qualify for a modification. (Doc. 1 at ¶ 37) Bank of America allegedly omitted to mention that a reasonably foreseeable likelihood of default can qualify a mortgagor for a modification. (Doc. 1 at ¶ 37) Unaware of their option not to default, Peralta and Ramirez allegedly "refrained from" paying their mortgage and, as a result, "fell into default status." (Doc. 1 at ¶ 39) As a "direct result" of Bank of America's alleged omission, Peralta and Ramirez allegedly suffered the loss of both their home and the equity in their home. (Doc. 1 at ¶ 39)

Moving (Doc. 30) for summary judgment, Bank of America observed that the plaintiffs defaulted in October 2007, more than three years before Bank of America's alleged omission. In response to the motion for summary judgment, the Mosqueas tacitly conceded defaulting before the alleged misrepresentation, affirmed that Bank of America advised them not to cure the default, and argued that they suffered a foreclosure after relying on Bank of America's advice. Bank of America objected to the plaintiffs' maintaining two putatively irreconcilable sets of factual assertions (that is, "I was not in default" and "I was in default") and argued that the plaintiffs cannot in effect amend their complaint by responding to a motion for summary judgment with facts that conflict with the allegations in the complaint.

Identifying the discrepancy between the allegations in the complaint and the argument in the response, a May 18, 2018 order (Doc. 38) permits the plaintiffs a final opportunity to amend the complaint to clarify the facts that substantiate the fraud claim. Although nothing in the May 18 order permits the plaintiffs to assert a new claim, the plaintiffs attempted (Doc. 39) to allege a new claim under Florida's Deceptive and Unfair Trade Practices Act. Because the plaintiffs never received leave to assert a FDUTPA claim, a June 5, 2018 order (Doc. 41) strikes the third amended complaint and permits the plaintiffs a final chance to clarify the fraud claim.

THE OPERATIVE COMPLAINT

***3** In the fourth amended complaint (Doc. 42), the plaintiffs tacitly concede defaulting before the misrepresentation. For the fourth time, Bank of America moves (Doc. 44) to dismiss the complaint. This order will not repeat or resolve all of the arguments in the motion to dismiss, but several arguments merit discussion.

First, Bank of America argues persuasively that *Rooker-Feldman* bars the fraud claim.[5] Responding that Bank of America "gross[ly] misappl[ies]" *Rooker-Feldman*, the plaintiffs argue that the fraud claim "do[es] not require a determination that the state court erroneously entered the foreclosure judgment." (Doc. 52 at 4) According to the plaintiffs, the fraud claim amounts not to an indirect attack on the foreclosure judgment but rather a claim that Bank of America's "fraudulent actions resulted in a wrongful denial of a HAMP modification."[6] The plaintiffs conclude, "It is because of this denial that Plaintiff faced foreclosure."

The weight of authority strongly supports Bank of America's argument that *Rooker-Feldman* bars the fraud claim. In *Figueroa v. Merscorp, Inc.*, 766 F.Supp.2d 1305 (S.D. Fla. 2011) (Altonaga, J.), *aff'd*, 477 Fed.Appx. 558 (11th Cir. May 11, 2012), a bank sued in state court to foreclose a mortgagor's property, and the state court entered judgment for the bank and ordered a foreclosure sale. Moving in state court to vacate the judgment, the mortgagor argued that the bank secured the foreclosure judgment through fraud. After the state court denied the motion, the mortgagor sued the bank in federal court under RICO and "[sought] damages arising out of the loss of his home." After thoroughly surveying the authority, Judge Altonaga found the claim "inextricably intertwined" with the foreclosure judgment. 766 F.Supp.2d at 1315–25. Affirming the dismissal under *Rooker-Feldman*, the Eleventh Circuit concluded, "The state court judgment formed the basis of or was intertwined with the injury complained of in Figueroa's instant complaint: that [Figureroa] lost his one half-interest in his property and home because of an improper foreclosure proceeding." 477 Fed.Appx. at 560.

Similarly, *Nivia v. Nation Star Mortg., LLC*, 620 Fed.Appx. 822 (11th Cir. Aug. 19, 2015), strongly suggests a bar by *Rooker-Feldman*. In *Nivia*, a bank won a foreclosure judgment in December 2011. Nine months

after the judgment and a month before the foreclosure sale, the mortgagor requested a HAMP modification, which the bank denied. After the sale, the mortgagor sued in federal court for violations of HAMP and Florida's Deceptive and Unfair Trade Practices Act.

Finding the HAMP claim not barred by *Rooker-Feldman*, *Nivia* explains, "The homeowners alleged only that the lenders failed to respond adequately to their September 2012 request for a loan modification, which could not have been at issue in the foreclosure proceeding that concluded in December 2011."[7] 620 Fed.Appx. at 824. In contrast, *Nivia* finds the FDUTPA claim barred by *Rooker-Feldman*: "We construe the homeowners' allegation to extend beyond the lenders' denial of the September 2012 loan modification request and to include conduct before the foreclosure judgment. In effect, the homeowners' claim amounts to an equitable defense to foreclosure that [the homeowners] failed to raise before the state court." 620 Fed.Appx. at 825. Because success on the FDUTPA claim suggested error in the foreclosure judgment, *Nivia* finds the FDUTPA claim barred by *Rooker-Feldman*.

***4** Little or nothing appears to distinguish the fraud claim in this action from the RICO claim in *Figueroa* or the FDUTPA claim in *Nivia*. The plaintiffs allege that Bank of America misrepresented the eligibility requirement for a modification and that this purported misrepresentation was "specifically designed by BOA to set Plaintiffs up for foreclosure." (Doc. 42 at ¶ 42) The majority of the complaint chronicles a scheme in which Bank of America allegedly tricked the plaintiffs into not paying the mortgage so that Bank of America could foreclose.[8] The plaintiffs complain exclusively about a misrepresentation that preceded − and ultimately caused − the foreclosure. And the plaintiffs allege principally that the misrepresentation resulted in the "loss of home equity," a loss occasioned by the state-court action, which foreclosed the plaintiffs' right of redemption and resulted in a deficiency judgment that included not just principal and interest owing but also the inspection fees owing under the lending agreement. Several times in the response, the plaintiffs identify the foreclosure as the injury over which the plaintiffs sue. (Doc. 52 at 2, 3–4, 10–11) In sum, the fraud claim in this action appears a circuitous but unmistakable attempt to impugn the validity of the foreclosure judgment.[9]

Second, even if not barred by *Rooker-Feldman*, the fraud claim warrants dismissal for failure to state a claim. As explained elsewhere in this order, the November 1, 2017 complaint stated a claim based on Bank of America's alleged misrepresentation of the eligibility requirement for a modification. The plaintiffs allegedly defaulted after Bank of America both instructed them to default and stated that a modification requires a default. Bank of America moved for summary judgment and observed that the plaintiffs defaulted in October 2007, more than three years before the alleged misrepresentation. Of course, a mortgagor cannot reasonably rely in 2007 on a 2011 misrepresentation.

Perhaps recognizing the merit in Bank of America's motion for summary judgment, the plaintiffs asserted a new and different fraud theory in response to the motion for summary judgment. In the most recent complaint (Doc. 42), the plaintiffs persist in alleging that Bank of America omitted to mention that a "reasonably foreseeable/imminent" default might qualify a mortgagor for a modification. Rather than assert that the misrepresentation induced the default, the plaintiffs tacitly concede a prior default and allege that the misrepresentation caused the plaintiffs to "remain[ ] in default." (Doc. 42 at 11) As Bank of America correctly argues (Doc. 44 at 18–19), the bank's omitting to mention a circumstance not pertinent to the defaulted mortgagor is immaterial.

In the penultimate paragraph of the response to the motion to dismiss, the plaintiffs request leave to submit a fifth amended complaint. (Doc. 52 at 11) The request warrants denial for at least three reasons. First, Rule 7(b), Federal Rules of Civil Procedure, requires a party to move for relief, and a request buried in a response is not a motion. *Long v. Satz*, 181 F.3d 1275, 1279–80 (11th Cir. 1999). The plaintiffs submit no proposed amendment and fail to explain what the prospective amendment might accomplish. *See Long*, 181 F.3d at 1280 (affirming the denial of leave to amend where the plaintiff failed to explain the substance of a prospective amendment). Second, a fifth amended complaint unduly prejudices Bank of America. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). Five complaints and four motions to dismiss in two years of litigation are enough. Third, the plaintiffs' conduct in this litigation reveals a "dilatory" intent. *See Foman*, 371 U.S. at 182. As described in this order and in the May 18 order, the plaintiffs have repeatedly and tactically attempted to prolong this litigation.

CONCLUSION

***5** Bank of America allegedly told the plaintiffs that a mortgage modification requires a default but omitted to

mention that a "reasonably foreseeable/imminent" default might qualify a mortgagor for a modification. The complaint alleges that Bank of America intentionally misrepresented the requirement in an effort to trick the plaintiffs into a foreclosure, which Bank of America successfully secured after suing in state court. Because the fraud claim is "inextricably intertwined" with the state-court foreclosure, *Rooker-Feldman* bars the claim. In any event, the fraud claim fails to state a claim. The bank's omitting to mention a circumstance not pertinent to the defaulted mortgagor (that is, that a "reasonably foreseeable/imminent" default might qualify for a modification) is immaterial. The motion (Doc. 44) to dismiss is **GRANTED**, and the action is **DISMISSED**.[10] The clerk is directed to terminate the pending motions and to close the case.

ORDERED in Tampa, Florida, on July 24, 2018.

All Citations

Not Reported in Fed. Supp., 2018 WL 3548744

Footnotes

1 Bank of America disputes that a "reasonably foreseeable" likelihood of default qualifies a mortgagor for a modification and contends that a modification requires either delinquency or an "imminent default."

2 In October 2016, several dozen plaintiffs (but not the Peralta and Ramirez) sued Bank of America in a single action in the Circuit Court for Hillsborough County, and the bank invoked diversity jurisdiction and removed the action. *Case no.* 8:16-cv-3384-SCB (M.D. Fla. Dec. 12, 2016). Moving to dismiss the action, Bank of America argued misjoinder of the plaintiffs' claims, failure to plead fraud with particularity, failure to state a claim, expiration of the four-year limitation, and the absence of a private right to sue a bank for violating the requirements of the Home Affordable Modification Program. Before the presiding judge resolved the motion to dismiss, the plaintiffs voluntarily dismissed the action.

3 *United States ex rel. Gregory Mackler v. Bank of America, N.A.*, Case no. 1:11-cv-3270-SLT (E.D.N.Y. July 7, 2011).

4 *Torres v. Bank of America, N.A.*, 2018 WL 573406 (M.D. Fla. Jan. 26, 2018) (Lazzara, J.), *appeal filed* (Case no. 18-10698); *Paredes v. Bank of America, N.A.*, 2018 WL 1071922 (M.D. Fla. Feb. 27, 2018) (Chappell, J), *appeal filed* (Case no. 18-11337). Additionally, a district judge in California found an identical claim barred by a limitation. *Mandiosa v. Bank of America, N.A.*, 2:17-cv-8153 (C.D. Cal. Mar. 15, 2018) (Walter, J.).

5 Also, Bank of America contends that the four-year limitation bars the claim. The plaintiffs incorrectly state that "[t]his court previously ruled that [ ] Plaintiff's claims are not barred by the applicable statute of limitations." (Doc. 52 at 4) On the contrary, the February 1 order (which observes that the circumstances of this action suggest tardiness in suing) holds only that the expiration of the limitation is not apparent from the face of the complaint.

6 As explained in the February 1, 2018 order, HAMP confers no private right of action on a borrower denied (rightfully or wrongfully) a mortgage modification. *Miller v. Chase Home Fin., LLC*, 677 F.3d 1113 (11th Cir. 2012).

7 Although finding the HAMP claim not barred by *Rooker-Feldman*, *Nivia* affirms the dismissal of the HAMP claim because HAMP confers no private right of action. 620 Fed.Appx. at 825 (citing *Miller v. Chase Home Fin., LLC*, 677 F.3d 1113 (11th Cir. 2012)).

8 As Bank of America correctly recognizes in the motion (Doc. 48) in limine, the remainder of the complaint appears copied from complaints and affidavits in unrelated civil actions.

9 If not barred by *Rooker-Feldman*, the fraud claim is barred by *res judicata* (which some decisions occasionally describe in this circumstance as "merger-and-bar"). Under Florida law, a compulsory counterclaim includes a counterclaim "logically related" to the claim. *Neil v. South Fla. Auto Painters, Inc.*, 397 So. 2d 1160 (Fla. 3d DCA 1981). The Florida decisions construe this "logical-relation" test broadly. *Montgomery Ward Dev. Corp. v. Juster*, 932 F.2d 1378, 1381 & n.1 (11th Cir. 1991). The fraud claim in this action relates logically to Bank of America's claims in the foreclosure action: Bank of America alleged in state court that the plaintiffs defaulted on the
mortgage, and the plaintiffs allege in this action that the default resulted from Bank of America's misrepresentation of the eligibility requirement for a modification. Because the plaintiffs must have counterclaimed but failed to counterclaim in state court, *res judicata* prevents the plaintiffs' litigating the claim now. (Viewed somewhat differently, the fraud claim constitutes an affirmative and equitable defense that the plaintiffs waived by failing to assert the defense in the state-court foreclosure action. Whatever the label, the same result obtains.)

10 Because of the disposition of the *Rooker-Feldman* argument (a subject-matter jurisdiction defect), the dismissal is without prejudice.

End of Document

2012 WL 5928732
Only the Westlaw citation is currently available.
United States District Court, D. Maryland.

Carmen RAMOS
v.
BANK OF AMERICA, N.A., et al.

Civil Action No. DKC 11–3022.
|
Nov. 26, 2012.

Attorneys and Law Firms

Carmen Ramos, Silver Spring, MD, pro se.

Jessica Dorothy Fegan, Washington, DC, for Bank of America, N.A., et al.

MEMORANDUM OPINION

DEBORAH K. CHASANOW, District Judge.

***1** Presently pending and ready for review in this diversity action is the motion to dismiss filed by Defendants Bank of America, N.A., and BAC Home Loan Servicing, LP. (ECF No. 33). The issues have been fully briefed, and the court now rules, no hearing deemed necessary. Local Rule 105.6. For the following reasons, the motion to dismiss will be granted.

I. Background[1]

This action arises from Plaintiff Carmen Ramos's unsuccessful attempts to obtain a permanent modification of her mortgage loan pursuant to the United States Treasury Department's Home Affordable Modification Program ("HAMP"). HAMP is a national program designed to stem the home foreclosure crisis by providing affordable mortgage loan modifications to eligible borrowers. In January 2011, Ramos suffered a reduction in her income as a result of a change in her employment. To remedy her economic situation, Ramos sought a HAMP loan modification from Defendants, who serviced Ramos's home mortgage. Despite allegedly qualifying for modification and completing all of the required application materials, Plaintiff never received a permanent modification of her loan.

On September 14, 2011, Ramos filed a *pro se* complaint against Defendants in the Circuit Court for Montgomery County, Maryland, alleging eleven counts based on Defendants' purported misconduct in connection with her attempts to procure a loan modification. (ECF No. 2). After service, Defendants timely removed to this court. (ECF No. 1). Ramos unsuccessfully moved to remand the case back to state court. (ECF Nos. 19, 20).

On October 31, 2011, Defendants moved to dismiss. (ECF No. 12). By memorandum opinion and order issued on June 4, 2012, that motion was granted. (ECF Nos. 30, 31). In its ruling, the court first explained the distinction between claims that seek to enforce HAMP's guidelines and claims that seek to enforce the terms of a Trial Period Plan ("TPP") agreement, a standardized contract between lenders and borrowers that establishes a three-month trial modification of a borrower's existing mortgage and promises a permanent modification if certain conditions are met. (ECF No. 30, at 6–7). Although there is no private cause of action under HAMP, the court observed that a plaintiff seeking to enforce the terms of a TPP, "if one exists," may have a cognizable cause of action that is "separate and apart from HAMP." (*Id.* (citing *Allen v. CitiMortgage, Inc.,* No. CCB–10–2740, 2011 WL 3425665, at *8 (D.Md. Aug.4, 2011); *Stovall v. Sun Trust Mortg., Inc.,* No. RDG–10–2836, 2011 WL 4402680, at *11 (D.Md. Sept.20, 2011)).

Applying this distinction, four of Plaintiff's counts were dismissed because they relied on factual assertions that Defendants had improperly rejected Plaintiff's application for a preliminary loan modification and thus, at bottom, sought to enforce HAMP's guidelines rather than the terms of a TPP. (*Id.* at 7). Although the original complaint contained factual inconsistencies regarding whether Plaintiff ever entered into a TPP with Defendants, Ramos's remaining counts were nonetheless liberally construed as "seeking to enforce the TPP itself or some other right independent of HAMP." (*Id.*). Due to pleading inadequacies, however, each of these counts was still dismissed under Rule 12(b)(6). (*Id.* at 8–18).

***2** Notably, the memorandum opinion dismissed Plaintiff's claims for unjust enrichment and violation of the Maryland Consumer Protection Act ("MCPA") without prejudice and provided Ramos with specific,

detailed instructions regarding amendment. First, in order for her fraud-based MCPA claim to meet the heightened pleading requirement set forth in Fed.R.Civ.P. 9(b), Ramos was advised that "[i]t is not enough to aver the general nature of Defendants' compliance, or lack thereof, with HAMP; every factual allegation in support of a potential MCPA claim must be grounded in Defendants' actual conduct *pursuant to the TPP."* (ECF No. 30, at 12) (emphasis added).[2] As to unjust enrichment, Plaintiff was instructed that any amendment must set forth "non-conclusory facts ... suggesting that Defendants obtained an unfair benefit *by entering into the TPP* with Ms. Ramos." (*Id.* at 15) (emphasis added). The memorandum opinion thus unequivocally put Ramos on notice that the success of any future amended complaint depended on her ability to allege specific facts regarding the existence of a TPP and Defendants' conduct in connection thereto.

On June 12, Plaintiff timely amended her complaint to assert claims for unjust enrichment and violations of the MCPA. (ECF No. 32).[3] As in the original complaint, the amended complaint alleges that since Ramos submitted a completed "FHA–HAMP" application packet to Defendants on February 3, 2011, numerous delays have prevented her from obtaining a permanent loan modification. Throughout this time period, Defendants allegedly acted deceptively and in violation of HAMP by: repeatedly losing Ramos's paperwork; asking her to re-produce documents they already possessed; maintaining inadequate staff to assist Plaintiff with the HAMP process; "filter[ing]" borrowers, including Plaintiff, through "endless phone calls reroute[d] to various representatives who g[a]ve conflicting answers" about HAMP; and "attempt[ing] to bully Plaintiff into making decisions which [were] not in her best interests" and were contrary to HAMP guidelines. (*Id.* ¶¶ 28–29). Defendants took "other steps to thwart, delay or prevent Plaintiff the extension of offers for a permanent modification" of her loan, which purportedly allowed them to "charg[e] her improper fees and penalties." (*Id.* ¶ 28).

Importantly, Plaintiff's newly added factual allegations did not resolve whether Ramos ever entered into a TPP with Defendants. In an early section of the amended complaint titled "Defendants['] Course of Conduct," Plaintiff generally alleges that Defendants "entered into a standardized contract with Plaintiff and thousands of homeowners for a temporary trial modification of their existing note and mortgage." (ECF No. 32 ¶ 14). Later, however, Plaintiff avers that Defendants violated HAMP by "[d]enying [her] a Permanent Modification *or Trial Plan* pursuant to her numerous requests for such" (*id.* ¶ 28a) (emphasis added) and further alleges that Defendants denied her "the opportunity to secure any ... permanent modifications [of her loan] through the completion of the Trial Plans which she was never given" (*id.* ¶ 42).[4]

***3** Defendants filed the pending motion to dismiss the amended complaint (ECF No. 33), which Ramos opposed (ECF No. 35). Defendants filed a reply (ECF No. 36) and a "Notice of Supplemental Authority" (ECF No. 37) in support of their motion.

II. Standard of Review

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint. *Presley v. City of Charlottesville,* 464 F.3d 480, 483 (4th Cir.2006). A plaintiff's complaint need only satisfy the standard of Rule 8(a), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). "Rule 8(a) (2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 n. 3, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). That showing must consist of more than "a formulaic recitation of the elements of a cause of action" or "naked assertion[s] devoid of further factual enhancement." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (internal citations omitted).

At this stage, the court must consider all well-pleaded allegations in a complaint as true, *Albright v. Oliver,* 510 U.S. 266, 268, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994), and must construe all factual allegations in the light most favorable to the plaintiff, *see Harrison v. Westinghouse Savannah River Co.,* 176 F.3d 776, 783 (4th Cir.1999) (citing *Mylan Labs., Inc. v. Matkari,* 7 F.3d 1130, 1134 (4th Cir.1993)). In evaluating the complaint, the court need not accept unsupported legal allegations. *Revene v. Charles Cnty. Comm'rs,* 882 F.2d 870, 873 (4th Cir.1989). Nor must it agree with legal conclusions couched as factual allegations, *Iqbal,* 556 U.S. at 678, or conclusory factual allegations devoid of any reference to actual events, *United Black Firefighters v. Hirst,* 604 F.2d 844, 847 (4th Cir.1979); *see also Francis v. Giacomelli,* 588 F.3d 186, 193 (4th Cir.2009). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged, but it has not 'show[n] ... that the pleader is entitled to relief.' " *Igbal,* 556 U .S. at 679 (quoting Fed.R.Civ.P. 8(a)(2)). Thus, "[d]etermining whether a complaint states a plausible claim for relief will ... be a

context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

III. Analysis

Defendants principally contend that Plaintiff failed to amend her complaint in any meaningful way, such that dismissal is warranted under Rule 12(b)(6) for the same reasons set forth in the court's prior memorandum opinion and order. (ECF No. 33, at 2–3). Specifically, Defendants argue that the only reasonable conclusion that can be drawn from the factual inconsistencies that persist in Plaintiff's amended complaint is that Defendants never offered her a TPP agreement. Accordingly, Defendants argue that the remaining counts must be dismissed because they seek to enforce HAMP rather than any TPP. Defendants alternatively contend that Plaintiff's amended complaint must be dismissed because of pleading inadequacies. Plaintiff does not directly respond to Defendants' arguments but instead submits an opposition brief that is virtually identical to the one she filed in response to Defendants' first motion to dismiss. (*Compare* ECF Nos. 27 and 35). Defendants' arguments are well-taken.

***4** "[W]hen a complaint contains inconsistent and selfcontradictory statements, it fails to state a claim." *Hosack v. Utopian Wireless Corp.,* No. DKC 11–0420, 2011 WL 1743297, at *5 (D.Md.2011) (citing *In re Livent Inc. Noteholders Sec. Litig.,* 151 F.Supp.2d 371, 406 (S.D.N.Y.2001)). Here, despite clear instructions about the need to allege specific facts regarding the existence of a TPP, Plaintiff's amended complaint again makes self-contradictory statements regarding this critical question. Indeed, Ramos's newly added factual allegations all explicitly aver the *non*-existence of such a contract (*see* ECF No. 32 ¶¶ 28, 45), directly contradicting her conclusory allegation that she, along with millions of other homeowners, entered into a TPP agreement with Defendants (*id.* ¶ 15). In light of these inconsistencies, it cannot be said that this latter averment constitutes a well-pleaded allegation that must be taken as true in ruling on Defendants' motion to dismiss.

When the inconsistent TPP allegations are disregarded, the only remaining facts asserted in the amended complaint relate Defendants' purported actions or inactions under HAMP. For example, in support of her MCPA claim, Plaintiff alleges that Defendants violated HAMP by denying her a loan modification; failing to maintain adequate staff to help Plaintiff with her application; and generally preventing Plaintiff from obtaining a loan modification—all for the purpose of charging Ramos additional fees and penalties. (ECF No. 32 ¶¶ 27–33). Plaintiff alleges similar conduct in support of her unjust enrichment claim, averring that it would be unjust for Defendants to retain the benefits they received from Plaintiff while they executed their "multi-phase plan of not giving her a FHA–HAMP loan." (*Id.* ¶¶ 34–40). In essence, all of Plaintiff's factual allegations assert that Defendants acted improperly pursuant to the HAMP guidelines. As set in the court's prior memorandum opinion, however, Congress did not create a private right of action to enforce HAMP. A plaintiff cannot circumvent the intent of the legislature by recasting alleged HAMP violations as alternative causes of action. *See, e.g., Parks v. BAC Home Loan Servicing, LP,* 825 F.Supp.2d 713, 716 (E.D.Va.2011) (dismissing a claim for breach of the implied duty of good faith and fair dealing "as it is merely another attempt to recast the HAMP claim"). Because they rely exclusively on Defendants' alleged HAMP violations, Plaintiff's unjust enrichment and MCPA claims are not cognizable and will be dismissed with prejudice.

In any event, the amended complaint fails to remedy the pleading deficiencies identified in the court's previous memorandum opinion. The newly added allegations in support of Ramos's fraud-based MCPA claim do not specify the time, place, or content of Defendants' allegedly deceptive actions. (*See* ECF No. 32 ¶¶ 27–33, 41–45). Accordingly, Plaintiff's amended MCPA claim fails to comply with Rule 9(b)'s heightened pleading standard. Likewise, the conclusory allegations in support of Plaintiff's unjust enrichment claim—*i.e.,* that Defendants unjustly received a benefit at Plaintiff's expense by engaging in deceptive conduct (*id.* ¶¶ 34–40)—are insufficient to state a plausible claim for relief under *Twombly* and *Igbal.* Hence, the amended complaint is also subject to dismissal for failing to meet the applicable pleading standards.

IV. Conclusion

***5** For the foregoing reasons, the motion to dismiss filed by Defendants will be granted. A separate order will follow.

All Citations

Not Reported in F.Supp.2d, 2012 WL 5928732

Footnotes

1 As two opinions in this case have come before this one, some familiarity with the facts is assumed. *See Ramos v. Bank of America, N.A., et al.,* No. DKC 11–3022, 2011 WL 5574023 (D.Md. Nov.15, 2011); *Ramos v. Bank of America, N.A., et al.,* No. DKC 11–3022, 2012 WL 1999867 (D.Md. June 4, 2012).

2 Although the original complaint asserted separate counts for violations of the MCPA and for "unfair and deceptive trade practices," the claims were construed together as asserting a single cause of action under the MCPA. (ECF No. 30, at 8–9).

3 Plaintiff again pleads two separate counts for "unfair and deceptive trade practices" and violations of the MCPA. (ECF No. 32 at 7–8, 9–10). Consistent with the court's prior memorandum opinion, these two counts will be construed together as a single claim brought under the MCPA.

4 Presumably in an attempt to destroy diversity jurisdiction under 28 U.S.C. § 1332 and to obtain a remand back to state court, Plaintiff's amended complaint also prays for damages in the amount of $74,950.00 (ECF No. 32 ¶ 46)—an amount that is significantly less than the $1 million prayed for in the original complaint (ECF No. 2 ¶ 70). It is well-established, however, that diversity jurisdiction is not affected where a plaintiff amends her complaint after removal to "reduce[ ] the claim below the requisite amount [in controversy]." *Gardner v. AMF Bowling Ctrs., Inc.,* 271 F.Supp.2d 732, 733 (D.Md.2003) (citing *St. Paul Mercury Indem. Co. v. Red Cab Co.,* 303 U.S. 283, 292, 58 S.Ct. 586, 82 L.Ed. 845 (1938)); *see also Hernandez v. Carlson Holdings, Inc.,* No. 10–00539–RDG, 2010 WL 4181455, at *1–2 (D.Md. Oct.22, 2010) (post-removal amendment of a diversity complaint to seek less than $75,000 does not provide a basis for remanding to state court).

Richard T. Sahlin Family v. Jp Morgan Chase Bank

Sixth Judicial Circuit Court of Michigan, Oakland County

January 22, 2007, Decided

Case No. 06-076164-CZ

Reporter
2007 Mich. Cir. LEXIS 394 *

RICHARD T. SAHLIN FAMILY LIMITED PARTNERSHIP, a Michigan Limited Partnership, GLENN R. SAHLIN, ERIC SAHLIN, BRIDGET S. VAN ARNEM, CHRISTINE A. SAHLIN and BRUCE SAHLIN, Plaintiffs, v. JP MORGAN CHASE BANK f/k/a BANK ONE, f/k/a NBD f/k/a NATIONAL BANK of DETROIT, and BODMAN, L.L.P., a Michigan Limited Liability Professional Company, Defendants.

Core Terms

Settlement, Partnership, subordination, fiduciary, concealment, conspiracy, fraudulent, silent, misrepresentation, judicata, indemnification, genuine

Judges: [*1] HON. MICHAEL WARREN, CIRCUIT COURT JUDGE.

Opinion by: MICHAEL WARREN

Opinion

PRESENT: HON. MICHAEL WARREN

OPINION

I

Before the Court are a series of motions filed by the Defendant JP Morgan Chase Bank f/k/a National Bank of Detroit ("Chase") and Bodman LLP ("Bodman"). Two of the Motions seek summary disposition of the Plaintiffs Complaint. Chase argues that the Complaint is barred by the statute of limitations and/or res judicata and, therefore must be dismissed pursuant to *MCR 2.116(C)(7)*, *(8)* and *(10)*. Chase further argues that the individual Plaintiffs must indemnify Chase and Bodman for the fees and costs incurred in defending this action pursuant to an indemnification provision in a Settlement Agreement executed by each of the individual Plaintiffs. Bodman argues that it is entitled to summary disposition pursuant to *MCR 2.116(C)(7)* and *(8)* for the reasons stated in the Motion filed by Chase. In addition, the Defendants also have filed a motion to strike the Plaintiff's Amended Complaint - a **[*2]** pleading adding a fraud claim which was filed without leave during the pendency of the instant motions for summary disposition. The Defendants, in essence, argue that any fraud claim is futile and does not salvage the Plaintiffs' case. Extensive oral argument regarding the Motions was conducted on January 18, 2007.

II

A

A motion for summary disposition pursuant to *MCR 2.116(C)(7)* is proper if the cause of action is barred, *inter alia*, because of the expiration of the applicable statute of

OPINION & ORDER REGARDING DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION AND DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S FIRST AMENDED COMPLAINT (filed without leave)

At a session of said Court, held in the County of Oakland, State of Michigan January 22, 2007.

limitation before commencement of the action or by res judicata. In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.117(C)(7), a court must accept as true a plaintiff's well pleaded factual allegations and construe them in favor of the plaintiff's favor, unless contradicted by submitted documentary evidence. Terrace Land Development Corp v Seeligson & Jordan, 250 Mich App 452, 455 (2002). A party may, but is not obligated, to support a (C)(7) motion by affidavits, depositions, or other documentary evidence. If such material is submitted, it must be considered. Maiden v Rozwood, 461 Mich 109, 119 (1999); MCR 2.116(G)(5).

If the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by a statute of limitation or res judicata is a question for the court **[*3]** to decide as a matter of law. Jackson Co Hog Producers v Consumers Power Co, 234 Mich App 72, 77 (1999). However, if a material factual dispute exists, summary disposition is inappropriate. *Id.*

B

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true. Maiden, supra at 120. Thus, a motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.*, quoting Wade v Dep't of Corrections, 439 Mich 158, 163 (1992). When deciding a motion brought under this court rule, a court considers only the pleadings. MCR 2.116(G)(5); Maiden, supra.

C

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the sufficiency of the factual basis underlying a claim. See, e.g., Radtke v Everett, 442 Mich 368, 374 (1993); Quinto v Cross & Peters, Co, 451 Mich 358, 362 (1996). Accordingly, "[i]n evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." Maiden v Rozwood, 461 Mich 109, 119-120 (1999), citing MCR Z116(C)(10) and (G)(4); Quinto, supra. [1] Substantively admissible documentary evidence "must" be submitted by both the **[*4]** moving and non-moving parties. MCR 2.116 (G)(3) - (G)(6); Smith v Globe Life Ins Co, 460 Mich 446, 454 (1999). The moving party "has the initial burden of supporting its position by affidavits, depositions, admissions or other documentary evidence. The burden then shifts to the opposing party to establish a genuine issue of disputed fact." Quinto, supra at 362. In so doing, the non-moving party must go *beyond* the pleadings to "set forth *specific* facts *at the time of the motion* showing that a genuine issue of material fact" exists. *Id.* (emphasis supplied). The Supreme Court has elaborated:

> A litigant's mere pledge to establish a fact at trial cannot survive summary disposition under MCR 2.116(C)(10). The Court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial [Maiden, supra at 121 (emphasis added).]

Accord MCR 2.116(G)(4) ("When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of his or her pleading, but must by affidavits or as otherwise provided in this rule, set forth *specific* facts showing that there is a genuine issue for trial").

Thus, the reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence **[*5]** actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that a claim may be supported by evidence produced at trial. A mere promise is insufficient under the Rules of Court. *Maiden, supra at 21*.

III

In the instant case, the Plaintiffs filed their original Complaint on July 24, 2006 asserting breach of fiduciary duty and conspiracy claims against Chase f/k/a Bank One (hereinafter "Chase") in its capacity as co-Trustee of the now dissolved Richard T. Sahlin Trust (the "Trust") and Bodman, in its capacity as attorney to the Trust.[2] Count I alleges that on July 24, 2000, Chase breached its obligations as co-Trustee by subordinating the Trust's security interest in the assets of

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[1] Thus, it is within this context of analysis that a court must be satisfied that it is impossible for the claim to be supported at trial because of some deficiency which cannot be overcome.

[2] Chase was represented in its fiduciary capacity by Bodman. Complaint at ¶ 33. Greenhalgh, a Bodman partner, was the other co-trustee and co-personal representative.

Sahlin International, Inc. ("SII"), a Michigan corporation, "which compromised the secured position of the Trust"[3] and that Bodman breached its obligations as attorney to the Trust in providing advice to the Trustee (Chase) regarding the effect of executing the related Subordination Agreement. Complaint dated 7/24/06, ¶¶ 26, 33, 40-44.[4] Count II, entitled Conspiracy, alleges that the Defendants conspired together to accomplish the fiduciary duty breaches. **[*6]** In particular, Count II alleges that Chase and Bodman "knew and understood that subordinating the secured interest in the assets of [SII] to a different entity would place in jeopardy the ability of the Trust and its successors in interest to collect the remaining amounts of principal and accrued interest due to the Trust under the Promissory Note," that the Defendants "also knew that Chase was owed substantial sums by SII that were at risk of non-payment;" that the Defendants "conspired together to cause the subordination of the security interests of the Trust in the assets of SII so that SII could achieve a new loan that would enable it discharge its outstanding obligation owed to Defendant Chase;" and that the Defendants took "action in furtherance of this conspiracy by execution of the subordination agreement." (Complaint dated 7/14/06 at ¶¶ 48-51.)

There is no factual dispute that the Complaint was filed nearly six years after the alleged breaches of fiduciary duty and conspiracy at issue in this litigation occurred. The Complaint also was filed despite the execution of a Settlement Agreement on August 9, 2001 - more than one year *after* the alleged fiduciary duty **[*7]** breach and conspiracy. (Chase Ex D.) The Settlement Agreement was executed by each of the individual Plaintiffs as beneficiaries of the Trust and the Estate of Richard T. Sahlin (the "Estate") and by Chase and Bodman attorney, Stephen I. Greenhalgh, as co-Trustees of the Trust. (Chase Ex D.) The Settlement Agreement provides, in relevant part:

Disputes and Controversies

> 7. Disputes have arisen between and among the Beneficiaries [i.e., the individual plaintiffs] and the co-fiduciaries [Chase and Greenhalgh], which disputes concern the interpretation and administration of the Trust, the respective entitlement of the Beneficiaries to various estate and trust assets, the amount of trust assets to be set aside for the Beneficiaries, apportionment of estate taxes, allocation of expenses, alleged breaches of fiduciary duty, wrongful withholding of discretionary distributions of principal, the existence of claims for malpractice, and other matters, and objections to accountings previously filed. Some but not all of those disputes are more fully documented in records and files of the Probate Courts for Oakland County, and the Michigan Court of Appeals. Some but not all of the disputes and objections **[*8]** have been fully resolved by said courts.
>
> 8. In addition to the disputes concerning the Estate and Trust, certain of the Beneficiaries . . . have asserted separate claims for individual damages against Bank One [Chase] for fraud, negligent misrepresentation, and other wrongdoing. ...
>
> 9. Legal fees and expenses in connection with the disputes are large and growing, and are anticipated to continue in view of unresolved issues still before various courts and other issues that may be raised in the future.

* * *

The Parties' Desire for Settlement, Mutual Releases and Discharge

> 17. The Beneficiaries and co-fiduciaries mutually desire to settle all present and future disputes concerning the

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[3] SII was one of the Trust's assets. The Plaintiffs' Response acknowledges that the trustees authorized Trust assets to be loaned to SII during the time the Trust managed SII. In 1998, the Trust executed an agreement to sell SII. (Response Ex A.) The purchase price was to be paid in part by a promissory note. (Plaintiff's Ex B.) The Note was to be secured by the grant of a first priority perfected security interest granted by SII in its machinery and equipment. (Plaintiff's Ex A, ¶ 5; Plaintiff's Ex C reflecting that security interests had already been granted). While serving as trustee, Chase, in its capacity as a bank made loans to SII.

[4] In particular, the Complaint alleges that" [o]n or about July 24, 2000 the trustee caused the Trust to execute a subordination agreement to North Oakland Bank which compromised the secured position of the Trust upon the assets of SII by subordinating the security interest of the Trust in favor of North Oakland Bank" (*Id.* at ¶26); that "[a]s a result of the failure of SII and the subordination of its security interest, the Trust never received an additional payment pursuant to the promissory note and never received any payment based on its subordinated security interest in the assets of SII [and] suffered a complete loss of the remaining principal balance and all accrued interest under the Promissory Note" (*Id.* at ¶ 32); that "the action of the trustee [Chase] in seeking the satisfaction of its own obligations from SII to be satisfied by causing the Trust to subordinate its own security interest in SII assets was taken without notice to the Sahlins [Plaintiffs], the beneficiaries of the Trust" (*Id.* at ¶ 34); that "Chase received direct benefit from this 'new' banking relationship and the execution of the subordination agreement in that SII paid in full all of its then existing obligations to Chase" (*Id.* at ¶ 35); that "the Sahlins were not informed of the payoff of the obligations of SII to Defendant Chase" (*Id.* at ¶ 36); and that the foregoing allegations which are incorporated into Count I provide the factual basis for the breaches of fiduciary duties alleged in Count I (*Id.* at ¶¶ 40,41-44.)

> Estate and Trust, avoid further litigation and eliminate *any* uncertainty that may exist regarding the validity, interpretation or administration of the Trust, including matters related to the accountings or other matters which were or *could have been raised* in the Estate or Trust proceedings, and avoid the continued expenses of litigation and the potential filing further lawsuits and claims.
>
> 18. Bank One [Chase] and all other parties further desire to compromise and forever terminate and release all claims by **[*9]** any of the Hoops clients concerning their individual claims.

* * *

NOW, THEREFORE, in consideration of their mutual promises, the parties agree as follows:

> * * *
> 2. Upon the Effective Date, the following shall occur:
>
> * * *
>
> c. Each of the beneficiaries shall deliver to counsel for the co-fiduciaries five fully executed releases in the forma attached. The Christine Sahlin release is at Exhibit B; the Bruce Sahlin release is at Exhibit C; the Eric Sahlin release is at Exhibit D; the Glenn Sahlin release is at Exhibit E; and the Bridget Sahlin Van Arnem release is at Exhibit F.
>
> d. Counsel for each Beneficiary shall approve for entry, in the form attached as Exhibit G, a dismissal with prejudice of all objections, challenges, petitions, claims, or other proceedings of any nature filed on behalf of the Beneficiary with respect to the Trust and/or Estate or in any manner pertaining to Grennhalgh or Bank One [Chase].
>
> 3. From and after the Effective Date, the Beneficiaries and SFLP shall jointly and severally protect, indemnify, and hold harmless each of Greenhalgh and Bank One [Chase], and each of their present and former agents, employees, officers, shareholders, and attorneys, from and against all **[*10]** loss, damage or expense (including legal fees and expenses) which any of them may pay, sustain or incur as a result of any action, proceeding, claim or demand (i) arising out of or in any manner related to the Estate or Trust or this Agreement; or (ii) by reason of any action or proceeding brought to set aside or invalidate this Agreement for any reason whatsoever....
> 4. Each signatory of this Agreement hereby waives his, her or its right to appeal any order or decree of any court approving this Agreement or any action contemplated hereby, and all orders contemplated by this Agreement shall contains such provisions.
>
> * * *
> 6. Each Beneficiary hereby acknowledges that he or she has consulted with legal counsel prior to executing this Agreement and understands his or her rights under the Trust and Michigan law.
> 7. Each person's consent to this Agreement shall be binding upon his, her or its heirs, personal representatives, successors in interest and assigns to the maximum extent allowed by Michigan law, including MCL 700.143.
>
> * * *
>
> 9. This Agreement supercedes all prior agreements and understandings between the parties with respect to all matters relating to the Estate and/or Trust... [Chase Ex D (emphasis **[*11]** supplied).]

Attached as Chase Exhibit E are the Releases required by Paragraph 2(c) of the Settlement Agreement which were executed by all of the Beneficiaries but Eric Sahlin. Except for claims arising under the Settlement Agreement, those Releases discharge Chase and Bodman from "any and all claims, actions, causes of action, liabilities demands, rights, payment obligations, damages and costs of every kind, *known or unknown, accrued or unaccrued* . . . and including any claims or demands which could be asserted by or in the name of Sahlin International, Inc." (Chase Ex E, ¶E [emphasis supplied].)

Additionally, in accordance with their Settlement Agreement obligations, counsel for all of the individual Plaintiffs stipulated to the Order Approving Settlement Agreement under *MCL 700.7207*, Terminating Trust and Discharging Successor Trustees. (Chase Exs F-G.) The Order was entered on August 10, 2001. (*Id.*)

IV

Count I [Breach of Fiduciary Duty] - Both Versions of the Complaint

Regardless of the Settlement Agreement or which version of the Complaint *is* reviewed, Count I (breach of fiduciary duties) is time-barred.

There is no dispute that a breach of fiduciary claim, which sounds in tort, is subject to the **[*12]** three-year general statute of limitations contained in *MCL 600.5805(10)*. *Miller v Magline, 76 Mich App 284, 313 (1977)* (construing precursor statute but holding that three limitations period contained in the general statute of limitations provision applies to breach of fiduciary duty claims). Similarly, a conspiracy claim also is subject to a three year limitations period. *Mays v Three Rivers Rubber Corp, 135 Mich App 42, 47 (1984)*; *Romero v Paragon Steel Div Portec Inc, 116 Mich App 261, 265 (1982)*.

A tort claim generally accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." *MCL 600.5827*. Where a claim is fraudulently concealed by a person who is or may be liable for it, the "action may be commenced at any time within 2 years after the person who is entitled to bring the action, discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claims, although the action would otherwise be barred by the period of limitations." *MCL 600.5855* [fraudulent concealment of claim, discovery]. However, in order to invoke the two year discovery rule of *MCL 600.5855*, a plaintiff must expressly plead in the complaint that (i) defendant fraudulently concealed the existence of the claim; (ii) plaintiff failed to discover the operative facts within the limitations period that are the basis for the cause of **[*13]** action; and (iii) plaintiff exercised due diligence to discover these facts. *Sills v Oakland General Hosp, 200 Mich App 303, 310 (1996)*. In any event, the discovery rule period begins to run when the plaintiff becomes aware of the existence of a "possible cause of action . . .. The plaintiff need not know for certain that he had a claim, or even know of a likely claim before the . . . period would begin. Rather, the discovery rule period begins to run when, on the basis of objective facts, the plaintiff should have known of a possible cause of action . . ." *Soloway v Oakwood General Hosp, 454 Mich 214, 221-222 (1997)*.

Applying these principles to the instant case, both versions of Count I are time barred. The Plaintiffs' Response effectively concedes that their breach of fiduciary duty and conspiracy claims are time-barred unless the applicable three year statute of limitations was extended under *MCL 600.5855* for fraudulent concealment as this is the Plaintiffs' exclusive argument in opposition to dismissal of Count I on the basis that it is time-barred. Response at 11-13. However, contrary to the Plaintiffs' arguments, neither version of the Complaint pleads the fraudulent concealment elements articulated in *Sills, supra.* For example, nowhere does either version of the Complaint allege that the Plaintiffs exercised due diligence **[*14]** to discover the operative facts or that they were unable to do so within the limitations period. Additionally, neither version of the Complaint cites *MCL 600.5855* or uses the terms "fraudulent concealment" or "fraudulently concealed."

Furthermore, although both versions of the Complaint allege that the subordination of the Trust's security interest in SII and related subordination agreement was done without notice to the Sahlin Plaintiffs or that Chase directly benefited from the subordination transaction, the Plaintiffs nevertheless concede that "after the turn of the year 2001" the "Beneficiaries" - i.e., the individual Plaintiffs - were, in fact, notified that "the trustee had subordinated the trust interest." (Response at 4 citing Exhibit K.) Thus, because the Plaintiffs admit that they learned of the subordination in 2001 and because nothing in their pleadings or Response suggests or infers that their present claims are based on additional facts gleaned after 2001, there can be no doubt that the Plaintiffs were on notice of a "possible" cause of action against the Defendants in 2001, and any two year extension of the statute of limitations for fraudulent concealment expired in 2003.

The Plaintiff **[*15]** Partnership was not even legally created until January 2002, after the alleged wrongs occurred. (Plaintiffs' Response at 15; Chase Ex A.)[5] As such, no duties were owed to the non-existent Partnership when the alleged wrongdoing occurred. Accordingly, the Plaintiff Partnership has failed to demonstrate that it has standing even to assert a breach of fiduciary obligation claim. *Howe v Detroit Free Press, 219 Mich App 150, 155 (1996)* ("if no duty exists, a court may properly grant summary disposition to the defendant"); *National Wildlife Fed'n v Cleveland Cliffs Iron Co, 471 Mich 608, 628-629 (2004)* (where a party lacks standing, their claim must be dismissed).

In any event, the Plaintiff Partnership signed the Settlement Agreement (even though the Plaintiffs assert and concede that the Partnership was not legally created until January 2002 as confirmed by Chase Ex A). Accordingly, to the extent the Plaintiff Partnership existed in 2001, it too was on notice of a "possible" cause of action. After all, the Plaintiff Partnership is comprised of and controlled by the individual Plaintiffs who were on notice of a "possible" cause of action in early 2001.

V

[5] There is no dispute that the Partnership was created to purchase, hold, develop, lease and/or resell the property acquired from the Trust (and Estate). (Chase Ex A.)

Count II

A

Original Complaint

Because an allegation of conspiracy must be coupled with a substantive theory of liability in order to sustain a cause of action, Count II in the **[*16]** original Complaint, entitled conspiracy, must also fall. See e.g., *Mable Cleary Trust v Edward-Marlah Muzyl Trust, 262 Mich App 485, 507 (2004)*.

B

Amended Complaint

Count II in the "Amended" Complaint adds the term "Fraud" to its label. First Amended Complaint ("COUNT II - FRAUD AND CONSPIRACY"). Although the Amended Complaint was filed after the filing of the instant Motion, this is the only Count which contains new or additional allegations, either in the form of cursory tags to pre-existing paragraphs (see and compare Paragraphs 51 and 53) or new paragraphs (i.e., paragraphs 54-58 in the "Amended" Complaint are new).[6]

1

Under *MCR 2.112(B)*, claims of fraud must be pled with specificity. *MCR 2.112(B)*. Further, courts are required to look beyond the captions and titles chosen by a plaintiff to see exactly what a party's complaint is before deciding what theory is actually pled and which applicable limitations period controls. *Stringer v Board of Trustees, 62 Mich App 696, 699 (1975)*; *Simmons v Apex Drug Stores, Inc, 201 Mich App 250, 253 (1993)*; *Wilkerson v Carlo, 101 Mich App 629, 631-632 (1980)*.

To prove fraud, a plaintiff must show that (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff **[*17]** would act on it; (5) the plaintiff acted in reasonable reliance upon it; and (6) the plaintiff suffered damage. *M & D, Inc v WB McConkey, 231 Mich App 22, 27 (1998)*; *Novak v Nationwide Mut Ins Co, 235 Mich App 675, 690-691 (1991)* (holding that fraud must be reasonable).

In the instant case, the Plaintiffs assert that their Amended Complaint alleges "silent fraud." The elements of "silent fraud" or fraud by nondisclosure are identical to that of common law fraud except that the misrepresentation supporting the fraud claim (the first factor) is based on the suppression of a material fact within the defendant's knowledge, which the defendant is duty-bound to disclose. *M & D, Inc v WB McConkey, 231 Mich App 22, 28-29 (1998)*. In other words, "Michigan courts have recognized that silence cannot constitute actionable fraud *unless* it occurred under circumstances where there was a legal duty to disclose it." *M & D, Inc supra* at 29 (citations omitted [emphasis in original]). As the Court observed in *M & D, Inc:*

> [T]he touchstone of liability for misdirection or "silent fraud" is that *some* form of representation has been made and that it was proved to be false. In other words, we believe that, at least as applied to fraud cases, there is no general inchoate duty to disclose all hidden defects.

In *Wolfe v A E Kursterer & Co, 269 Mich 424 (1934)*, the Supreme Court explained the distinction between nondisclosure **[*18]** generally and nondisclosure that is equivalent to an affirmative fraudulent misrepresentation:

> "In an action for deceit, it is true that silence as to a material fact is not necessarily, as a matter of law, equivalent to a false representation. But mere silence is quite different from concealment . . . a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth. *The gist of the action is fraudulently producing a false impression upon the mind of the other party."*

Our review of Michigan Supreme Court precedent regarding the issue reveals that, in every case, the fraud by nondisclosure was based upon statements by the vendor that were made in response to a specific inquiry

[6] For ease, the First Amended Complaint will be referenced as "Amended Complaint" Count I in the Amended Complaint remains solely a breach of fiduciary duty claim. The allegations remain unchanged.

by the purchaser, which statement were in some way incomplete or misleading.

* * *

Thus, Supreme Court precedent clearly indicates that, in order to prove a claim of silent fraud, a plaintiff **[*19]** must show that some type of representation that was false or misleading was made and that there was a legal or equitable duty of disclosure.

* * *

. . . We emphasize that there must be some type of misrepresentation, whether by words or action, in order to establish a claim of silent fraud. [*M & D, Inc, supra* at 29, 30-31, 36 (emphasis in original).]

2

In the instant case, and as previously noted and conceded by the Plaintiffs, the Plaintiff Partnership did not exist at the time of the alleged wrongdoing. As such, the Plaintiff Partnership has failed to reasonably infer any legal or equitable duty owed to it by the Defendants. Additionally, by its very non-existence during the relevant time period, the Plaintiff Partnership cannot assert any actionable misrepresentation by the Defendants' actions which can establish a claim of silent fraud. *Id.* See also authorities cited in Section IV, *supra* (finding that the Plaintiff Partnership lacks standing). In fact, no version of the Complaint - original or amended - alleges the element of reasonable reliance by the Plaintiff Partnership. As such, no silent fraud claim has been stated against this particular Plaintiff.

3

Even if the amended pleadings **[*20]** do sufficiently plead a silent fraud claim by some or all of the individual Plaintiffs or the Plaintiff Partnership, the claim is fatally defective. The purported silent fraud or misrepresentation (element one) is the failure to disclose to the Plaintiffs the subordination agreement and self interest of Chase. (Amended Complaint at ¶¶ 50-56.) The purported reasonable reliance is that the Plaintiffs, "except Plaintiff Eric Sahlin . . . agreed to and consented to the Trust being dissolved and executed releases" and that "[h]ad the Individual Plaintiffs been aware of the actions of [Chase] including the execution of the subordination and the payment by SII to [Chase] the Plaintiffs would not have executed the dissolution of the Trust or the release of the Trustees." (*Id.* at ¶ 57-58.) However, as even the individual Plaintiffs concede, they were aware of the subordination "at the turn of 2001" (Response at 4 and related Exhibits) - i.e., 7 months *prior* to their agreement to dissolve the Trust or execute releases. *Webb v First of Michigan Corp, 195 Mich App 470, 475 (1992)* (there can be no reliance where the plaintiff has the means to discover the truthfulness of the representation).

Furthermore, each of the individual Plaintiffs (including Eric **[*21]** Sahlin and Sahlin's counsel) as well as the Plaintiff Partnership signed the Settlement Agreement. (Chase Ex D.) Counsel for all individual Plaintiffs (including Sahlin) also Stipulated to entry of two Orders: (1) the Order Approving Settlement Agreement under *MCL 700.7207*, Termmating Trust and Discharging Trustees (Stipulated Order Approving Settlement Agreement") (Chase Ex F); and (2) the Order Dismissing with Prejudice all Objections and Claims for Surcharge against the Co-Fiduciaries and All Claims By or Among Beneficiaries ("Stipulated Order Dismissing All Claims By or Among Beneficiaries") (Chase Ex G).

As noted *supra*, the Settlement Agreement specifically expresses a desire to settle all present and *future* disputes concerning the Trust which were or *could have been* raised and contains express agreements by each of the individual Plaintiffs to deliver fully executed releases in the form attached to the Settlement Agreement. (Chase Ex D, Recital 17 and Agreement 2[c].) The Settlement Agreement also contains a merger clause. (*Id.* at 9.) The Stipulated Order Approving Settlement Agreement not only finds that the Settlement Agreement was in the best interest of all interested parties but also **[*22]** approved the terms of the Settlement Agreement, terminated the Trust, and specifically orders " [a]ll parties to the Settlement Agreement to take all actions and to deliver all documents as required by the Settlement Agreement." (Chase Exs F-G [emphasis supplied].) This directive therefore included the signing and delivery of the Releases which, *inter alia*, discharge Chase and Bodman "from every kind or nature, known or unknown, accrued or unaccrued. ... including but not limited to any claims... objections . . . which were asserted or could have been asserted in the Trust or Estate proceedings, and including any claims or demands which could be asserted by or in the name of Sahlin International, Inc." by the Beneficiaries (individual Plaintiffs) and their "heirs, personal representatives, successors and assigns." Chase Ex E, ¶ 2. Additionally, the Stipulated Order Dismissing All Claims By or Among Beneficiaries Stipulated clearly and unambiguously "dismissed with prejudice "any and all actions, suits, claims, challenges, petitions, objections defenses, or other proceedings of any nature filed by or on behalf of any [of the

individual Plaintiffs] with respect to or against...(2) [Chase]...(individually **[*23]** or in any capacity including as Co-Personal Representative of the Estate...or as Co-Successor Trustee of the [Trust]);. ...(4) any law firms which provided services to or on behalf of [Chase] or Stephen I. Greenhalgh in connection with the Estate or Trust. . . (including Bodman, Longley & Dahling LLLP ...)." (Chase Ex G [emphasis supplied].)

In short, the clear and unambiguous provisions in the Settlement Agreement and each Stipulated Order dispel the notion that reliance was reasonable. For example, by promising in the Settlement Agreement to discharge all "future" claims that "could have been raised" and to execute a Release in the form attached to the Settlement Agreement, and by specifically stipulating to Orders directing each of them to deliver all documents required by the Settlement Agreement including the *attached* Releases discharging Chase and Bodman from all known and unknown claims against them relating to the Trust, none of the Plaintiffs, including Eric Sahlin (and the Plaintiff Partnership assuming its signature is binding on it), can credibly argue that they agreed to release future or unknown claims only because they did not know that they had any future or unknown **[*24]** claims. See *UAW GM v KSL Rec Corp, 228 Mich App 486, 501-502 (1998)* (reliance on representations that are contrary to a written settlement agreement are unreasonable).[7]

There is no dispute that the Plaintiffs had previously accused Chase and Bodman of fraud and misrepresentation and had instituted litigation against them on that basis long before signing the Settlement Agreement and/or Stipulated Orders. (Chase Ex D at ¶¶ 7-8.) This adversarial posture also makes any alleged reliance by the Plaintiffs on conduct by the Defendants unreasonable - at the time the Plaintiffs executed the Settlement Agreement (and stipulated to the Order Approving Settlement Agreement et al.), the Defendants were adverse parties; the Plaintiffs were represented by their own counsel; the Plaintiffs had pursued multiple claims against Chase and Bodman (Chase Ex B); and the Plaintiffs already knew or should have known of a "possible cause of action" predicated upon the subordination of the Trust's security in SII (Discussion *supra* and Plaintiffs' Exs K-L). These circumstances dispel any notion that reliance was reasonable. See *DeLorean v Corl Gully, 118 BR 932, 943 (1990)* (reliance on the representation of a party or its counsel that is adverse to one in litigation is unreasonable); *Webb, supra* (there can be no reliance **[*25]** where the plaintiff has the means to discover the truthfulness of the representation).

The Plaintiffs' self dealing allegations do not salvage their claim. The claim is predicated on the fact that Chase (then Bank One) acted as both lender and co-Trustee. However, nowhere do the Plaintiffs cite authority or present any evidence to substantiate their position that such conduct constitutes actionable self dealing in violation of a fiduciary duty. A statement of position without supporting citation is insufficient to bring an issue before this Court. See, e.g., *Mitcham v City of Detroit, 355 Mich 182, 203 (1953)* ("It is not enough . . . to simply announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and rationalize the basis for his arguments, and then search for authority either to sustain or reject his position"); *Wilson v Taylor, 457 Mich 232, 243 (1998)* ("A mere statement without authority is insufficient to bring an issue before this Court"); *Houghton v Keller, 256 Mich App 336, 339-340 (2003)* ("[A party] may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . nor may he give issues cursory treatment with little or no citation of supporting authority"); *People v Jones (On Rehearing), 201 Mich App 449, 456-457 (1993)* (failure to provide **[*26]** cogent argument or supporting authority constitutes abandonment of the issue on appeal); *Settles v Detroit City Clerk, 169 Mich App 797, 807 (1988)* ("A statement of position without supporting citation is insufficient to bring an issue before this Court").

In fact, the Court of Appeals, in an unpublished but persuasive opinion, has ruled that loans by a trustee/bank to a trust are not prohibited under the Probate Code. *In re John F. Ervin Testamentary Trust*, unpublished per curiam opinion of the Court of Appeals, decided 2/24/05 (Docket Nos. 249974, 253745 and 253824) (Chase Reply, Ex L). Therefore, a trustee/bank who makes a loan to the trust or an asset of the trust is entitled to repayment without violating its fiduciary duty as trustee against self dealing.

In any event, the parties were adverse and represented by separate counsel at the time the Settlement Agreement and Stipulated Order were negotiated. The Plaintiffs had already accused the Defendants of breaches of fiduciary obligations and misrepresentations, yet promised and agreed to discharge those claims as well as "all" other "future" claim "which could have been raised" whether "known or unknown" relating to

[7] Because Erie Sahlin executed the Settlement Agreement and stipulated (through counsel) to the Order directing him to deliver documents contemplated by the Settlement Agreement, it does not matter that Eric Sahlin never executed a separate release. Furthermore, the Amended Complaint is silent on any allegation of reasonable reliance by Eric Sahlin and, therefore, the pleading fails to state a claim of fraud by this Plaintiff for this reason alone. For identical reasons, and as noted supra, the Partnership Plaintiff has failed to state a claim of fraud because no version of the Complaint alleges the element of reasonable reliance by it.

the Trust. Settlement Agreement, Recital 17 & Agreement 2c; Releases. **[*27]** Under these circumstances, reliance cannot be reasonable in terms of arguing that the Settlement Agreement was induced by (silent) fraud. *UAW-GM, supra; DeLorean, supra.*

VI

The Settlement Agreement & Releases Bar the Plaintiffs' Action

The Plaintiffs' claims also are barred by the Settlement Agreement and/or Releases. Michigan jurisprudence is well settled that, while a settlement agreement or release may be challenged on the ground that it was procured by fraud, the challenging parties must *first* or *simultaneously* with the filing of suit tender back the consideration received in exchange for the agreement or release. *Stefanac v Cranbrook Ed Community (After Remand), 435 Mich 155, 176 (1990)*; *Collucci v Eklund, 240 Mich App 654, 659 (2000)*. In fact, a plaintiff must tender before he may even attempt to repudiate the agreement or release. *Stefanac, supra at 165*. A plaintiff is only excused from this "tender back" requirement only if the defendant waives the duty or the plaintiff demonstrates fraud in the execution. *Id. at 165*; *Collucci, supra at 659*, citing *Stefanac.*

In the instant case, the Plaintiffs do not claim that the Defendants waived the Plaintiffs' tender back duty. Nor have the Plaintiffs adduced facts to establish fraud in the execution (the evidence before the Court negates the element of reasonable reliance). See Discussion *supra*. Accordingly, the Plaintiffs are not excused **[*28]** from application of the tender back rule. *Id.; Collucci, supra at 659*.

The Plaintiffs' additional arguments against application of the tender back rule are meritless. As made clear in *Collucci*, so long as consideration was received it must be tendered back, regardless of who paid or provided it to the plaintiff. *Collucci, supra at 658, 659*. See also *Stefanac, supra at 177* ("the plaintiff must tender back the recited consideration"). Accordingly, the fact that Chase and Bodman did not own the assets that were paid to the Plaintiffs is of no consequential moment. *Id.* The individual Plaintiffs also cite no authority for the proposition that because the consideration received was paid to the Plaintiff Partnership and not them individually, they owe no obligation to return it. Thus, the argument is deemed abandoned. See, e.g., *Mitcham, supra at 203*; *Wilson, supra at 243*; *Houghton, supra at 339-340*; *Jones, supra at 456-457*; *Settles, supra at 807*. The Court also notes that the individual Plaintiffs directed that the consideration be paid to the Partnership, a party they selected and controlled/control. (Chase Ex A, Certificate of Limited Partnership.)

Thus, because the Plaintiffs are not excused from the tender back rule and failed to tender back the consideration received for the execution of the Settlement Agreement and/or Releases before, or simultaneously with, the **[*29]** filing of their Complaint(s), the Settlement Agreement and/ or Releases effectively bar their claims.[8]

VII

Res Judicata

Res judicata bars a second, subsequent action when (1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) both actions involve the same parties or their privies, and (4) the matter in the second case was or could have been resolved in the first. *Sewell v Clean Cut Mgt, Inc, 463 Mich 569, 575 (2001)*; *Baraga County v State Tax Comm'n, 466 Mich 264, 269 (2002)*. As even the Plaintiffs concede, Michigan jurisprudence takes "a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." Response at 16-17, citing *Dart v Dart, 460 Mich 573, 586 (1999)*.

Despite their acknowledgement of the foregoing principles, the Plaintiffs claim that res judicata does not apply because their cause of action has not actually been litigated. (Response at 17.) However, this assertion is specious in light of the foregoing authorities. See, e.g., *Dart, supra.* Further, for the reasons discussed *supra*, had the individual Plaintiffs exercised reasonable diligence they could have raised their instant (viable) claims but did not. **[*30]** The Plaintiff Partnership did not exist and, therefore, has no viable claim. In any event, because the Plaintiff Partnership is controlled by the individual Plaintiffs, the knowledge they possessed must be imputed to the partnership. The Plaintiff Partnership also signed the Settlement Agreement and received settlement funds - thus the partnership is bound by settlement agreement.

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[8] The Settlement Agreement and Releases specifically state that the Agreement is binding upon all "heirs, personal representatives, successors in interest and assigns." (Settlement Agreement, ¶ 7 following the "NOW THEREFORE" language; Release at ¶ 2.)

VII

Indemnification

Pursuant to Agreement No. 3 in the Settlement Agreement, the Plaintiffs expressly agreed to indemnify Chase and Greenhalgh, as well as their "agents" and "attorneys," from all damage or expense, including attorney fees, incurred "as a result of any action, proceeding, claim or demand (i) arising out of or in any manner related to . . . the Trust. . .; or (ii) by reason of any action or proceeding brought to set aside or invalidate this Agreement for any reason whatsoever."

Although the Defendants argue that the indemnity agreement prohibits the instant cause of action, it actually only requires the Plaintiffs to pay for the Defendants' damages, expenses, and costs incurred in defending the action. Moreover, this obligation was not ripe until the issuance of this Opinion and Order, the Defendants **[*31]** have not filed a counterclaim asking for such indemnification, the Defendants have not submitted a bill of costs, and the Defendants cite no law requiring this Court to order such indemnification under these circumstances. Furthermore, unlike sanctions awarded by a court pursuant to Rules of Court or statute, the indemnification agreement is grounded in a contractual obligation and separate cause of action appears in order. Thus, this issue is not properly before the Court.

VII

Defendant's Motion to Strike First Amended Complaint

In light of the foregoing, the Plaintiffs' Amended Complaint which was improperly filed without leave should be stricken because it was filed without leave and is futile. Accordingly, the Defendants' Motion to Strike should be granted.

The Court also incorporates the additional arguments and authorities cited in the Defendants' brief supporting their Motion to Strike as a further basis for striking the pleading to the extent they are not inconsistent with this Opinion.

ORDER

Based on the foregoing Opinion, the Court:

1. GRANTS the Defendants' Motions for Summary Disposition pursuant to *MCR 2.116(C)(7)* and *(10)* (but does not rule on the issue of indemnification as it is not properly **[*32]** before the Court - such claim is preserved without prejudice).
2. GRANTS the Defendants' Motion to Strike the Plaintiff's Amended Complaint.

THIS ORDER RESOLVES THE LAST PENDING CLAIM AND CLOSES THE CASE.

/s/ Michael Warren

HON. MICHAEL WARREN

CIRCUIT COURT JUDGE

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Rosselini v. Bank of Am., N.A.

United States District Court for the Middle District of Florida, Tampa Division

October 4, 2018, Decided; October 4, 2018, Filed

Case No. 8:17-cv-2584-T-24CPT

Reporter
2018 U.S. Dist. LEXIS 178792 *

RICARDO ROSSELINI, Plaintiff, v. BANK OF AMERICA, N.A., Defendant.

Prior History: *Torres v. Bank of Am., N.A., 2017 U.S. Dist. LEXIS 220955 (M.D. Fla., Aug. 4, 2017)*

Core Terms

foreclosure, modification, inextricably, intertwined, fraudulent, misjoinder

Counsel: [*1] For Ricardo Rosselini, Plaintiff: Caitlyn Corrine Prichard, LEAD ATTORNEY, Aylstock, Witkin, Kreis & Overholtz, PLLC, Pensacola, FL USA; John W. Adams, Jr., LEAD ATTORNEY, Adams Law Association, P. A., Valrico, FL USA.

For Bank of America, N.A. Defendant: Ira Scot Silverstein, James Randolph Liebler, II, LEAD ATTORNEYS, Liebler, Gonzalez & Portuondo, PA, Miami, FL USA.

Judges: SUSAN C. BUCKLEW, United States District Judge.

Opinion by: SUSAN C. BUCKLEW

Opinion

ORDER

On September 17, 2018, the Court directed Plaintiff Ricardo Rosselini to respond and show cause why this case should not be dismissed without prejudice for lack of subject matter jurisdiction. (Doc. 27). The Court observed that two other judges of the Middle District of Florida had dismissed all of their nearly identical cases involving alleged fraud perpetrated by Bank of America in facilitating illegal and fraudulent property foreclosures for lack of subject matter jurisdiction under the *Rooker-Feldman*[1] doctrine.[2] Having now carefully

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[1] The doctrine evolved from the two United States Supreme Court cases from which its name is derived, *Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923)* and *D.C. Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983)*.

[2] *Gonzalez v. Bank of America, N.A.*, 5:17-cv-00519-SDM-PRL (Doc. 44) *Salazar v. Bank of America, N.A.*, 8:17-cv-02535-SDM-AEP (Doc. 50); *Diaz v. Bank of America, N.A.*, 8:17-cv-02537-SDM-MAP (Doc. 51) *Rostgaard v. Bank of America, N.A.*, 8:17-cv-02538-SDM-CPT (Doc. 57); *Gonzalez v. Bank of America, N.A.*, 8:17-cv-2546-RAL-CPT (Doc. 32);*Colon v. Bank of America, N.A.*, 8:17-cv-2548-RALAAS (Doc. 30) *Mosquea v. Bank of America, N.A.*, 8:17-cv-02551-SDM-TGW (Doc. 46); *Peralta v. Bank of America, N.A.*, 8:17-cv-2580-SDM-MAP (Doc. 56); *Gonzalez v. Bank of America, N.A.*, 8:17-cv-2581-RAL-AAS; (Doc. 29); *Restrepo v. Bank of America, N.A.*, 8:17-cv-2582-RAL-CPT (Doc. 30); *Rodriguez v. Bank of America, N.A.*, 8:17-cv-02583-SDM-TGW (Doc. 51); *Santos v. Bank of America, N.A.*, 8:17-cv-2588-SDM-MAP (Doc. 47); *Acosta v. Bank of America, N.A.*, 8:17-cv-2592-SDM-AAS (Doc. 55); *Blanco v. Bank of America, N.A.*, 8:17-cv-02593-SDM-JSS (Doc. 48); *Cedeno v. Bank of America, N.A.*, 8:17-cv-2594-RAL-AAS (Doc. 33); *Penaranda v. Bank of America, N.A.*, 8:17-cv-2599-RAL-SPF (Doc. 31); *Garcia v. Bank of America, N.A.*, 8:17-cv-02602-SDM-AAS (Doc. 46); *Zalazar v. Bank of America, N.A.*, 8:17-cv-02603-SDM-CPT (Doc. 48); *Perez v. Bank of*

reviewed Plaintiff's Response to the Court's Order to Show Cause (Doc. 28), as well as the allegations of the amended complaint and the entire case file, the Court finds that this action is also due to be dismissed without **[*2]** prejudice for lack of subject matter jurisdiction.[3]

PROCEDURAL HISTORY

On June 27, 2017, Plaintiff Ricardo Rosselini and 117 other plaintiffs sued Bank of America in the Middle District in a single action, *Case No*. 8:17-cv-1534-RAL-TBM. The 292-page complaint in that action alleged fraud and the violation of Florida's Deceptive and Unfair Trade Practices Act. Bank of America moved to dismiss the action, arguing misjoinder of the plaintiffs' **[*3]** claims, failure to plead fraud with particularity, failure to state a claim, expiration of the four-year limitation, and the absence of a private right to sue a bank for violating the requirements of the Home Affordable Modification Program ("HAMP").

The presiding judge, however, observed that the complaint did not allege each plaintiff's citizenship or the amount in controversy between each plaintiff and Bank of America and, consequently, it failed to invoke diversity jurisdiction. Therefore, the judge, *sua sponte*, ordered plaintiffs to amend the complaint to cure the pleading deficiencies. The plaintiffs then filed a 403-page amended complaint. Bank of America moved to dismiss the amended complaint, repeating the arguments from its earlier motion. The presiding judge then found misjoinder, severed the plaintiffs' claims, and ordered the plaintiffs to sue separately.

Then, between October 30, 2017, and November 3, 2017, more than 100 plaintiffs sued Bank of America in the Middle District in 80 actions and alleged fraud under Florida common law. The nearly identical actions were distributed among eight district judges in the Middle District. The instant case is one of those actions

DISCUSSION [*4]

Under the *Rooker-Feldman* doctrine, federal courts, other than the Supreme Court, do not have jurisdiction to review final state court decisions. *See* *Target Media Partners v. Specialty Mktg. Corp., 881 F.3d 1279, 1285-86 (11th Cir. 2018)* (explaining the *Rooker-Feldman* doctrine and recognizing its limited scope "to bar only those claims asserted by the parties who have lost in state court and then ask the district court, ultimately, to review and reject a state court's judgments."). If a claim is one "inextricably intertwined" with a state court judgment and would "effectively nullify the state court judgment," then the *Rooker-Feldman* doctrine bars the claim if there was reasonable opportunity to raise the particular claim in the state court proceeding. *Id.*

Plaintiff's Response to this Court's Order to Show Cause argues, in sum, that the *Rooker-Feldman* doctrine does not apply in this instance because his fraud claim amounts not to an indirect attack on the foreclosure judgment, but rather, a claim that Bank of America's fraudulent actions resulted in a wrongful denial of a HAMP modification. This is the same argument that was thoroughly considered, and then rejected, by the other two judges of the Middle District in the 23 above-listed cases.

Plaintiff alleges that Bank of **[*5]** America tricked him into defaulting on the loan, instructed him to make "trial payments" to Bank of America which it never refunded, induced him to incur unnecessary costs for sending multiple applications for loan modification under the HAMP and related financial documents to Bank of America, damaged his credit, and caused the loss of his home and equity in the home. The issues of the fraud in this case could have been raised in the state court foreclosure before final judgment was entered. It would not change the result that Plaintiff alleges he did not know or could not have reasonably discovered the facts he now knows until he retained his attorney in this case. The fraud alleged here is inextricably intertwined with the state foreclosure judgment. Therefore, for the reasons set forth, and the authority cited, by these other judges, this Court finds that Plaintiff's fraud claim is barred under the *Rooker-Feldman* doctrine.[4]

America, N.A., 8:17-cv-02623-SDM-JSS (Doc. 50); *Espinel v. Bank of America, N.A.*, 8:17-cv-02628-SDM-JSS (Doc. 44); *Ocampo v. Bank of America, N.A.*, 8:17-cv-2631-SDM-JSS (Doc. 42); *Carmenates v. Bank of America, N.A.*, 8:17-cv-2635-SDM-JSS (Doc. 50); *Clavelo v. Bank of America, N.A.*, 8:17-cv-2644-RAL-TGW (Doc. 29).

[3] Defendant Bank of America's pending motion to dismiss does not raise the issue of subject matter jurisdiction (*see* Doc. 21); however, the Court may raise the question of subject matter jurisdiction at any point during the proceedings *sua sponte*. *Ellenburg v. Spartan Motors Chassis, Inc., 519 F.3d 192, 197 (11th Cir. 2008)*. Further, "[w]here dismissal can be based on lack of subject matter jurisdiction and failure to state a claim, the court should dismiss on only the jurisdictional grounds. This dismissal is without prejudice." *See* *Boda v. United States, 698 F. 2d 1174, 1177 n.4 (11th Cir. 1983)*; *accord* *Dimaio v. Democratic Nat'l Comm., 520 F. 3d 1299, 1303 (11th Cir. 2008)* (citing and quoting *Boda*).

[4] *See, e.g.*, *Ocampo v. Bank of Am., N.A., 2018 U.S. Dist. LEXIS 137052, 2018 WL 3862560 (M.D. Fla. Aug. 14, 2018)* (citing

ACCORDINGLY, it is **ORDERED AND ADJUDGED**:

This action is **DISMISSED WITHOUT PREJUDICE**. The Clerk is directed to terminate any pending motions and close the case.

DONE AND ORDERED at Tampa, Florida, this 4th day of October, 2018.

/s/ Susan C. Bucklew

[*6] SUSAN C. BUCKLEW

United States District Judge

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Figueroa v. Merscorp, Inc., 766 F.Supp.2d 1305 (S.D. Fla. 2011), *aff'd*, *477 F. App'x 558 (11th Cir. 2012)* (unpublished) and *Nivia v. Nation Star Mortg., LLC, 620 F. App'x 822 (11th Cir. 2015)* (unpublished)); *Carmenates v. Bank of Am., N.A., 2018 U.S. Dist. LEXIS 123094, 2018 WL 3548727 (M.D. Fla. July 24, 2018)* (same). The Court notes that Plaintiff's primary counsel in those cases is the same as Plaintiff's primary counsel in the instant case. The Court further notes that counsel did not appeal the dispositive orders in those cases and that the time for appealing has now expired. Because those cases were dismissed for lack of subject-matter jurisdiction without the Court giving some clear signal that it intended the actions to continue, the orders ended the district court actions, and were, thus, final and appealable within 30 days after entry. *Attias v. Carefirst, Inc., 865 F.3d 620, 625 (11th Cir. 2017)*.

2018 WL 573406
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Tampa Division.

EDDIE and Awilda Torres, Plaintiffs,
v.
BANK OF AMERICA, N.A., Defendant.

Case No. 8:17–cv–1534–T–26TBM
|
Signed 01/26/2018

Attorneys and Law Firms

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ORDER

RICHARD A. LAZZARA, UNITED STATES DISTRICT JUDGE

***1 THIS CAUSE** comes before the Court on Defendant Bank of America, N.A.'s Motion to Dismiss the Second Amended Complaint (Dkt. 21), Plaintiffs' Response in Opposition (Dkt. 28), and Defendant's Reply in Support of Motion to Dismiss (Dkt. 31). Having carefully considered the parties's submissions, together with the allegations of Plaintiffs' Second Amended Complaint, the Court finds that Defendant's Motion to Dismiss is due to be granted.

The Second Amended Complaint is based on a single fraud claim brought on behalf of Plaintiffs Eddie and Awilda Torres for alleged misrepresentations made by Defendant Bank of America's representatives in connection with Plaintiffs' defaulted mortgage loan and their efforts to obtain a mortgage loan modification.[1] More specifically, Plaintiffs allege that they began "experiencing financial hardship" in 2009 and contacted Defendant, their mortgage servicer, "requesting a HAMP [Home Affordable Modification Program] modification." (Dkt. 20, Second Amended Complaint ("SAC"), ¶ 36).[2] They allege that "[o]n or about July 15, 2011," they were told "to refrain from making their regular mortgage payment" because "being 'past due' on their mortgage loan was a prerequisite for a HAMP modification." (Id. at ¶ 37). Plaintiffs allege that they relied on the statements and omissions and then fell into default status. (Id. at ¶ 39).

Plaintiffs allege that on or about August 5, 2011, a representative of Defendant named "George" "verbally informed" them that they were approved for a trial loan modification. (Id. at ¶ 46). They allege that "[t]his statement was false" because "the application wasn't approved." (Id.). Plaintiffs allege that they made three trial payments on unspecified dates in 2011—at $472.58 each, less than they were obligated to pay under the terms of their loan. (Id. at ¶ 49). They claim that making the trial payments damaged them because "BOA placed those payments in an unapplied account" instead of crediting them to their loan. (Id. at ¶ 50).

Plaintiffs allege that they had conversations with "BOA employees[ ] George, Maria and others" "on or about December 28, 2011." (Id., at ¶ 41). They allege that they were told on multiple occasions around this time that the documents they had submitted to qualify for a loan modification were "not current." (Id.). Plaintiffs allege that the statements made to them by Defendant's representatives were made "not for the purpose of processing Plaintiffs' application in good faith, but instead for the specific purpose of frustrating the HAMP application process to ensure a modification was ultimately declined, resulting in foreclosure." (Id. at ¶ 43). Plaintiffs do not state outright that their modification was ultimately declined, but they allege that their "home was foreclosed by Bank of New York Mellon" on May 18, 2016. (Id. at ¶ 49).

***2** Defendant seeks dismissal of the Second Amended Complaint, pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, for failure to state a claim on which relief can be granted. A complaint must be dismissed under Rule 12(b)(6) if it fails to "contain sufficient factual matter...to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). To meet this standard, Plaintiffs must make "allegations plausibly suggesting (not merely consistent with)" a valid claim. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007). Because

Plaintiffs' claims sound in fraud, Rule 9(b), Federal Rules of Civil Procedure, requires them to allege "(1) the precise statements, documents, or misrepresentations made; (2) the time and place of and person responsible for the statement; (3) the content and manner in which the statements misled the Plaintiffs; and (4) what the Defendants gained by the alleged fraud." Miccosukee Tribe of Indians of Fla. v. Cypress, 814 F.3d 1202, 1212 (11th Cir. 2015) (citation omitted).

Defendant urges that the Second Amended Complaint should be dismissed as time-barred and because Plaintiffs once again have failed to plead their fraud allegations with the requisite particularity. Although the Court agrees that Plaintiffs have done very little to cure the defects that led to the dismissal of their prior complaint on Rule 9(b) grounds, allowing Plaintiffs yet another opportunity to plead their fraud claim would be an exercise in futility given that the claim is, in fact, barred by the statute of limitations.

Florida law imposes a four-year limitations period for any "legal or equitable action founded on fraud." Fla. Stat. § 95.11(3)(j). On its face, Plaintiffs' fraud claim stems from misrepresentations that occurred in the 2009 to 2011 period, more than four years before they filed this lawsuit in June 2017. (See Dkt. 20, SAC, ¶ 36 (2009 HAMP inquiry), ¶ 37 (July 2011 conversation), ¶ 41 (December 2011 conversations), ¶ 46 (August 2011 conversation), ¶ 52 (allegedly improper "property inspections" "from 2010 to 2011")). The four-year limitations period begins to run when "the fraud is discovered, or when by the exercise of reasonable diligence it might have been discovered." Westchester Corp. v. Peat, Marwick, Mitchell & Co., 626 F.2d 1212, 1217 (5th Cir. 1980);[3] accord Jeunesse, LLC v. Lifewave, Inc., 2015 WL 4911349, at *3 (M.D. Fla. Aug. 17, 2015). Because each of the alleged fraudulent misrepresentations concerns a matter of public knowledge, there is no reason why Plaintiffs could not have discovered the basis for their fraud claim when the relevant statements were made.

Plaintiffs' first alleged "misrepresentation" is a statement that "being 'past due' on their mortgage loan was a prerequisite for a HAMP modification eligibility." (Dkt. 20, SAC, ¶ 37). As Defendant argues, if that statement was false, Plaintiffs could have discovered such through the exercise of reasonable diligence back when the statement was made. HAMP's requirements are posted on the Treasury Department website and they state clearly (on the first page) that HAMP modifications are available to "at-risk homeowners...in default and those who are at imminent risk of default." U.S. Dep't of Treasury, HAMP Supplemental Directive (SD) 09–01 ("SD 09–01"), at 1 (Apr. 6, 2009); see also, id. at 2 (servicer must verify that "[t]he mortgage loan is delinquent or default is reasonably foreseeable"), id. at 3–4 (borrowers not in default "must be screened for imminent default" and "[t]he servicer must make a determination as to whether a payment default is imminent based on the servicer's standards for imminent default").[4]

***3** Plaintiffs also allege that "BOA employees fraudulently omitted th[e] fact" that HAMP trial payments are posted to "an unapplied account." (Dkt. 20, SAC, ¶ 48). Plaintiffs easily could have discovered this information in August 2011 when the offending "omission" was allegedly made. (See SD 09–01 at 18 (providing for trial payments to be held as "unapplied funds" until "equal to a full PITI payment")). As Defendant asserts, this is exactly how the Treasury Department requires servicers to handle trial payments. See, e.g., Making Home Affordable Program Handbook for Servicers of Non–GSE Mortgages, v5.1 129 (May 26, 2016) (requiring servicers to hold HAMP trial period payments in a "custodial account" until "the total of the reduced payments held as 'unapplied funds' is equal to a full PITI [principal, interest, tax and insurance] payment"); SD 09–01, at 18 (providing for trial payments to be held "as 'unapplied funds' " until "equal to a full PITI payment").

Plaintiffs next allege being "falsely informed" in December 2011 that their documents were "not current." (Dkt. 20, SAC, ¶ 41). If this information was false, Plaintiffs were in a position to know that in December 2011. Finally, Plaintiffs point to "property inspection" fees supposedly charged "from 2010 to 2011" and allege that "BOA employees omitted the fact that the bank was conducting...inspections on their home and charging their account inspection fees." (Id., ¶ 53). Even if Defendant had omitted this fact, Plaintiffs failed to allege that they were not aware of property inspections going on while they "lived in their home." (Id., ¶ 52). If Plaintiffs had somehow been prevented from discovering this information until much later, it was incumbent on them to allege this in their Second Amended Complaint. Plaintiffs' ability to discover the basis for their claims as soon as the relevant statements were made necessarily defeats any attempt to get around the statute of limitations. Plaintiffs even admit that other borrowers had managed to file lawsuits against Defendant challenging its handling of HAMP modifications all the way back in 2010. (Id., ¶ 31). Plaintiffs could have done likewise.

In their response to the Motion to Dismiss, Plaintiffs make a belated attempt to raise the discovery rule in order to circumvent the statute of limitations.[5] However,

because Plaintiffs failed to make any allegations in the Second Amended Complaint that the four-year limitations period should be tolled or that their claims should be deemed to have accrued at some later date on "discovery rule" grounds or otherwise, this belated attempt to avoid the time bar of their fraud claim is too little too late. "[I]t is axiomatic that a plaintiff cannot amend the complaint by arguments of counsel made in opposition to a motion to dismiss." Eiras v. State Dep't of Bus. & Prof'l Regulation, Div. of Alcoholic Bevs. & Tobacco, 239 F. Supp. 3d 1331, 1342 (M.D. Fla. 2017) (citation omitted). The importance of this rule becomes all the more evident in cases like this one, where Plaintiffs are already on their Second Amended Complaint and have, therefore, had *three* separate opportunities to allege the facts that entitle them to relief.

Plaintiffs argue in their opposition to the Motion to Dismiss that they are not required to negate an affirmative defense in their complaint, but as Defendant correctly asserts, the argument is misplaced. Although the statute of limitations is an affirmative defense, Plaintiffs are the ones who carry the burden of proof at trial to establish that they are entitled to the benefit of the discovery rule. See Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115–17 (11th Cir. 1993). Therefore, it is Plaintiffs' burden to "plead such facts" in their complaint. See Ross v. Mickle, 194 Fed.Appx. 742, 744 (11th Cir. 2006) (affirming dismissal where "[i]t was clear on the face of [the] complaint that it was filed out-of-time and there were no facts in the complaint indicating that [plaintiff] could avoid the statute-of-limitations bar" or "that could have alerted the court to the possibility of a tolling argument") (unpublished). Plaintiffs even concede that dismissal on the basis of an affirmative defense such as the statute of limitations is appropriate where the defense is apparent from "the face of the complaint." (Dkt. 28, p. 5).

***4** In order to invoke the discovery rule, Plaintiffs "must have [pled] facts to show: (1) the time and manner of discovery; and (2) the inability to have made earlier discovery despite reasonable diligence." In re Trasylol Prods. Liab. Litig., 2010 WL 6098571, at *11 (S.D. Fla. Mar. 17, 2010) (citation omitted). As Defendant asserts, neither the complaint nor Plaintiffs' opposition brief offers a single word about any act of "diligence" by the Plaintiffs prior to their purported discovery of their claims. See, e.g., Bedtow Grp. II, LLC v. Ungerleider, 684 Fed.Appx. 839, 842 (11th Cir. 2017) ("Florida's delayed discovery rule does not act to postpone the accrual of [plaintiff's] causes of action" because plaintiff's "reliance" on statements made by the defendant does not "excuse [plaintiff's] failure to exercise due diligence") (unpublished); Varner v. Domestic Corp., 2017 WL 3730618, at *9 (S.D. Fla. Feb. 7, 2017) ("To support equitable tolling under the discovery rule,...a plaintiff must plead sufficient facts to show the time of the discovery and to support his diligence in delayed discovery.").

Here, it is apparent from the Second Amended Complaint that Plaintiffs brought suit in 2017 based only on representations allegedly made to them between 2009 and 2011. Therefore, their claims are subject to a four-year limitations period. See Horsley v. Univ. of Ala., 564 Fed.Appx. 1006, 1009 (11th Cir. 2014) ("[O]ur case law makes clear that dismissal under Rule 12(b)(6) on statute of limitation grounds depends only on 'the face of the complaint.' Thus, the district court properly limited its consideration [of the plaintiff's equitable tolling claim] to the face of [the] complaint and ignored any arguments in [the plaintiff's] subsequent pleadings.") (citation omitted) (unpublished); see also, Licul v. Volkswagen Grp. of Am., Inc., 2013 WL 6328734, at *6 (S.D. Fla. Dec. 5, 2013) ("Plaintiffs' FDUTPA claim also appears time-barred....Plaintiffs have also failed to plead facts to support tolling under the doctrine of fraudulent concealment[.]"). Plaintiffs, here, are in an even *worse* position than the plaintiffs in Licul, who at least mentioned the tolling theory in their complaint, but had their case dismissed anyway because they alleged equitable tolling only with "labels and conclusions." Licul, 2013 WL 6328734, at *7.

Plaintiffs attempt to argue that they did, in fact, plead the facts supporting their discovery rule argument in the Second Amended Complaint insofar as they alleged "concealment" of a "fraud." (Dkt. 28, p. 6). However, Plaintiffs do not point to any actual allegations of concealment, only to their general fraud claims. The Eleventh Circuit has specifically rejected this tactic as a means of evading the time bar. See Raie v. Cheminova, Inc., 336 F.3d 1278, 1282 n.1 (11th Cir. 2003) (rejecting plaintiffs' "attempt to argue fraudulent concealment" because "the plaintiffs' complaint in this case does not allege any specific acts of misrepresentation or concealment that could support a claim of fraudulent concealment[,]" only "a cause of action for fraud"). The Court must agree with Defendant that if the law were otherwise, then the statute of limitations for fraud claims would be rendered a nullity—plaintiffs would simply allege that defendants "concealed" every supposed fraud by not characterizing their own statements as fraudulent. See, e.g., Stewart v. Bureaus Inv. Grp. #1, LLC, 24 F. Supp. 3d 1142, 1160 (M.D. Ala. 2014) ("silence and unwillingness to divulge one's allegedly wrongful activities" are "not the sort of active concealment for which the equitable tolling remedy was created") (internal

quotation marks omitted).

***5** Plaintiffs also failed to plead an "inability to have made earlier discovery despite reasonable diligence." They merely argue, in conclusory fashion in their Response in Opposition to the Motion to Dismiss that they "would not have been capable of uncovering the scheme" even if they had exercised the requisite reasonable diligence because the alleged "scheme" was only revealed in two declarations that were prepared in 2017. (Dkt. 28, p. 6). However, the "Declaration of Steven Cupples dated May 13, 2017" cited by Plaintiff is actually dated "May 13, 2013," more than four years before Plaintiffs brought suit. (Dkt. 20, SAC, ¶ 27; Ex. 6). The additional Declarations that Plaintiffs attach to their Second Amended Complaint, except for one, are also dated 2013. (See Dkt. 20, Exs. 2–5). The exception is the 2017 "Rodrigo Heinle" Declaration, but this Declaration does not offer any new information—it merely makes the same claims as the 2013 declarations. (Dkt. 20, SAC, Ex. 2, ¶¶ 23–27). Plaintiffs will not be permitted to keep the statute of limitations suspended by finding new people to repeat the same information that has been available for more than four years.

In light of all the foregoing, the Court finds that the Second Amended Complaint must be dismissed as time-barred under the four-year limitations period in section 95.11(3)(j), Florida Statutes, for actions founded on fraud.

ACCORDINGLY, it is **ORDERED AND ADJUDGED** as follows:

Defendant's Motion to Dismiss the Second Amended Complaint (Dkt. 21) is **GRANTED**. This case is dismissed with prejudice.[6] The Clerk is directed to enter judgment in favor of Defendant, terminate any pending motions, and close this case.

DONE AND ORDERED at Tampa, Florida, on this 26th day of January, 2018.

All Citations

Not Reported in Fed. Supp., 2018 WL 573406

Footnotes

1 The Court dismissed Plaintiffs' two prior complaints because the first one constituted a "shotgun" pleading, see docket 15, and because the second one failed to plead fraud with the specificity required by Rule 9(b) of the Federal Rules of Civil Procedure. See docket 19. The most recent dismissal order also severed the claims of over 100 other plaintiffs the Court determined were improperly joined and directed the severed Plaintiffs to file amended complaints in separate, individual cases.

2 As explained by the Eleventh Circuit, this program was created by the Department of the Treasury under the auspices of the Emergency Economic Stabilization Act of 2008, 12 U.S.C. §§ 5201–5261, as a consequence of the economic crisis of 2008 and "is designed to prevent avoidable home foreclosures by incentivizing loan servicers to reduce the required monthly mortgage payments for certain struggling homeowners." Miller v. Chase Home Fin., LLC, 677 F. 3d 1113, 1115–16 (11th Cir. 2012).

3 In Bonner v. City of Prichard, 661 F. 2d 1206, 1209 (11th Cir.) (*en banc*), the Eleventh Circuit adopted as binding precedents all decisions of the former Fifth Circuit issued prior to October 1, 1981.

4 Available at https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd0901.pdf.

5 Plaintiffs use the term "discovery rule," but the argument reads more like the doctrine of equitable tolling, which is an altogether different legal doctrine. See generally, Butler Univ. v. Bahssin, 892 So. 2d 1087, 1091 n.3 (Fla. Dist. Ct. App. 2004) (explaining that "[t]he delayed discovery doctrine should not be confused with fraudulent concealment of a cause of action.").

6 The Court notes that Plaintiffs have failed to seek leave to file another amended complaint, with the proposed amended complaint attached, nor suggested to the Court the substance of any proposed amendment. Cf. Cita Trust Co. v. Fifth Third Bank, —— F. 3d ——, 2018 WL 416253, at *5 (11th Cir. Jan. 16, 2018).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EDDIE and AWILDA TORRES, *et al.*,

Plaintiffs,

v. CASE NO. 8:17-cv-1534-T-26TBM

BANK OF AMERICA, N.A.,

Defendants.

_____/

O R D E R

THIS CAUSE comes before the Court on Defendant Bank of America, N.A.'s Motion to Dismiss the Amended Complaint, or in the Alternative, to Sever Misjoined Claims (Dkt. 17) and Plaintiffs' Response in Opposition (Dkt. 18). Having carefully considered the parties's submissions, together with the well-pleaded allegations of Plaintiffs' complaint, the Court finds that Defendant's motion is due to be granted to the extent that all claims, other than those alleged by the first-named Plaintiffs, Eddie and Awilda Torres ("the Torreses"), will be severed and dismissed without prejudice to being refiled in separate individual actions and that the Torres' claim will be dismissed without prejudice to being refiled in an amended complaint.

Under Rule 20(a)(1) of the Federal Rules of Civil Procedure, claims are properly joined only if they "aris[e] out of the same transaction, occurrence, or series of

transactions or occurrences" and share a common "question of law or fact." As one court has observed, "Rule 20 refers to the *same* transaction or occurrence not to *similar* transactions or occurrences." Hartley v. Clark, 2010 WL 1187880, at *3 (N.D. Fla. Feb. 12, 2010) (emphasis added), Report and Recommendation adopted at 2010 WL 1187879 (N.D. Fla. March 23, 2010). When claims are not permissibly joined, a court may drop misjoined parties or sever any claim against a party pursuant to Rule 21 of the Federal Rules of Civil Procedure. Additionally, a court enjoys considerable discretion to do so in the interests of judicial economy even if the technical requirements of Rule 20 are met. See, e.g., Barber v. America's Wholesale Lender, 289 F.R.D. 364, 368 (M.D. Fla. 2013).

The 116 Plaintiffs here (75 if counting co-borrowers as a single Plaintiff) allege that they defaulted on their mortgage loans and sought help from Defendant Bank of America N.A. in the form of loan modifications under the federal Home Affordable Modification Program ("HAMP"). HAMP operated by giving borrowers a trial period to prove they can make sustainable loan payments while the servicer evaluates whether they qualify for permanent relief. Plaintiffs claim that this was an elaborate fraud, the design of which entailed first tricking Plaintiffs into *not* making loan payments, and then tricking them into making loan payments by pretending they were approved for trial modifications. (Dkt. 16, Amended Complaint ("Amd. Cmp."), ¶¶ 37, 44). Plaintiffs failed to qualify for permanent modifications, failed to cure their defaults, and went through foreclosure, and now claim to be the victims of fraud as a result. The facts of

each Plaintiff's dealings with Defendant are alleged in general, boilerplate terms, virtually identical from one Plaintiff to the next so as to justify joining 116 Plaintiffs in any number of different factual circumstances into one omnibus lawsuit. The Court must agree with Defendant that this is not a permissible joinder under Rule 20.

Plaintiffs claims in this case (except for the Torres' claim) are due to be severed based on the reasoning applied by the court in Green v. Citimortgage, Inc., 2013 WL 6712482, at *5 (E.D.N.Y. Dec. 18, 2013), in which the court severed claims of fraudulent misrepresentation stemming from HAMP applications because the case involved at least twenty-six distinct loans attached to twenty-six separate properties and separate applications for HAMP modifications over a five and a half year period. Green involved claims pursuing exactly the same theories pursued by Plaintiffs here (see Dkt. 16, Amd. Cmp., ¶ 37), that the defendants had "a fraudulent loan modification program, purporting to offer the possibility of a loan modification agreement to the Plaintiffs and other homeowners, while driving [them] into default to enable Defendants to pursue foreclosure against those same homeowners[.]" 2013 WL 6712482, at *3. The court found that these transactions did not "arise out of the same 'transaction' or 'occurrence'" because, among other reasons, each plaintiff "separately applied for loan modifications" and the terms of the trial modifications differed from plaintiff to plaintiff. Green, 2013 WL 6712482, at *5. The court concluded, by adopting the rationale of Kalie v. Bank of America Corp., 2013 WL 4044951, at *6 (S.D. New York 2013) in support of its

determination, that allowing joinder of Plaintiffs' claims did not promote the interest of judicial economy:

> Inasmuch as each plaintiff's claims appear to arise out of a mortgage-related transaction that is distinct from the transactions on which the other plaintiffs' claims are based, and as each plaintiffs claims implicate distinct loans, locations, dates and personnel, there is no meaningful economy of scale gained by trying the [ ] cases together. There will be little, if any, overlapping discovery and each plaintiff's claims will require distinct witnesses and documentary proof. The interest in economy is affirmatively disserved by forcing these many parties to attend a common trial at which these separate, unrelated claims would be resolved. Furthermore, settlement of the claims is likely to be facilitated if the claims relating to discrete loan transactions are litigated separately.

Green, 2013 WL 6712482, at *6 (internal brackets, quotation marks, and citations omitted). This Court must likewise find that Plaintiffs' claims did not arise of the same transaction or occurrence. Rather, the claims arise from different borrowers' loans or loan-modification attempts and necessarily involve different sets of operative facts, even if the claims are pled similarly and present similar legal issues.

As Defendant asserts, under these circumstances, even if Plaintiffs had satisfied the joinder requirements of Rule 20, severance would still be proper. Under Rule 21 of the Federal Rules of Civil Procedure, courts look to four factors to determine if claims should be severed: "(1) the interest of avoiding prejudice and delay; (2) ensuring judicial economy; (3) safeguarding principles of fundamental fairness; and (4) whether different witnesses and documentary proof would be required for plaintiffs' claims." Hofmann v. EMI Resorts, Inc., 2010 WL 9034908, at *1 (S.D. Fla. July 21, 2010) (internal quotation

marks and citation omitted). Some of the Plaintiffs have already implicitly indicated in an earlier related case, now dismissed, that there will be no gains in judicial economy from their joinder. The case management report they filed in that case proposed an "Estimated Length of Trial" of "3 Days Per Plaintiff." This would amount to a total of 225 trial days in the current case with 75 Plaintiffs. See Alonso et al. v. Bank of America, N.A., No. 8:17-cv-238-VMC-MAP, Dkt. 20, pg. 2 (M.D. Fla. 2017).

The fact that Plaintiffs' complaint has grown to 332 pages and 1,521 paragraphs only bolsters the Court's conclusion that mass joinder is inappropriate in this case. A complaint of such length is incapable of satisfying the "short and plain statement" requirement of Rule 8(a) of the Federal Rules of Civil Procedure; however, severed individual claims could easily be pled in compliance with this requirement. Therefore, the Court will grant the Alternative Motion to Sever Misjoined Claims with regard to all of the Plaintiffs, except the first-named Plaintiffs, Eddie and Awilda Torres, who shall remain as Plaintiffs in this case.

With regard to the allegations advanced by the Torreses, the Court is not convinced that they have pled their fraud claim with the "particularity" required by Rule 9(b) of the Federal Rules of Civil Procedure. Generally, but with specific focus on paragraphs 39, 40, 41, 42, 44, 50, and 51 of the allegations of the Amended Complaint, the Court concludes that the Torreses have not specified: "(1) precisely what statements were made in what documents or oral representations or what omissions were made, and

(2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making same, and (3) the content of such statements and the manner in which they misled the plaintiff[.]" Brooks v. Blue Cross and Blue Shield of Fla., 116 F. 3d 1364, 1371 (11th Cir. 1997) (citations omitted); accord Azar v. American Home Mtge. Serv., Inc., 2110 WL 5648880, at *4 (M.D. Fla. July 16, 2010) (citing Brooks). They will, however, be afforded an opportunity to replead their claim of fraud against Defendant.

ACCORDINGLY, it is **ORDERED AND ADJUDGED** as follows:

1) Defendant's Motion to Sever Misjoined Claims (Dkt. 17) is **GRANTED.** All claims, other than the claim of the Torreses, are severed pursuant to Rule 21 and dismissed without prejudice to commencing separate individual actions. The statute of limitations for any claim asserted in this case is deemed tolled during the pendency of this action and for a period of thirty (30) days from the date of this order.

2) Defendant's Alternative Motion to Dismiss the Amended Complaint (Dkt. 17) is **GRANTED** as to the Torres' claim but without prejudice to filing an amended complaint within fourteen (14) days of this order. Defendant shall file a response to the amended complaint within fourteen (14) days of service of the amended complaint.

DONE AND ORDERED at Tampa, Florida, on October 6, 2017.

s/*Richard A. Lazzara*
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

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Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FRANKLIN TORRES and LUISA TORRES,

Plaintiffs,

v. Case No: 8:17-cv-2633-T-36CPT

BANK OF AMERICA, N.A.,

Defendant.
_____/

ORDER

This cause comes before the Court upon the parties' responses to the Court's inquiry as to subject matter jurisdiction. Docs. 38-42. After a review of its jurisdiction, the Court *sua sponte* directed Plaintiffs to show cause why this case should not be dismissed pursuant to the *Rooker-Feldman* doctrine for lack of subject matter jurisdiction and permitted Defendant the opportunity to reply. Docs. 38, 41. The Court, having considered the matter and being fully advised in the premises, will dismiss this case for lack of subject matter jurisdiction.

I. BACKGROUND

Plaintiffs are the borrowers on a mortgage loan that was foreclosed in state court after they defaulted by failing to make payments on the loan. Doc. 23 ¶¶ 37, 42, 54. Plaintiffs allege that they first began experiencing financial hardship and contacted Defendant, Bank of America, which was the servicer of the loan, in 2010 to request a modification under the Home Affordable Modification Program ("HAMP"). *Id.* ¶¶ 39-40. They submitted a HAMP application in 2010. *Id.* ¶ 43. On July 7, 2010, Bank of America incorrectly advised them that they should refrain from making their regular mortgage payments because default was required for HAMP eligibility. *Id.* ¶ 40. However, a person could be eligible for HAMP if default was reasonably foreseeable and

Plaintiffs allege that Bank of America intentionally provided false information to set Plaintiffs up for foreclosure. *Id.* ¶¶ 40-41. Plaintiffs relied on Bank of America's representation and stopped making their regular mortgage payments. *Id.* ¶ 42.

Bank of America later advised Plaintiffs on October 20, 2010 that they were approved for a HAMP modification and they should make temporary trial payments. *Id.* ¶ 50. Plaintiffs, however, had not been approved and Bank of America did not apply the trial payments to Plaintiffs' mortgage, but kept the funds in an unapplied account while deciding on Plaintiffs' HAMP application. *Id.* ¶¶ 50-52.

On December 3, 2013, Plaintiffs' mortgage was foreclosed and a judgment was entered against them in state court. *Id.* ¶ 54. Plaintiffs filed this action on November 3, 2017, alleging a single count for common law fraud against Bank of America in connection with its representations to them during the HAMP application process. *Id.* ¶¶ 76-92.

II. LEGAL STANDARD

Under the *Rooker-Feldman* doctrine, federal courts do not have jurisdiction to "exercise appellate authority 'to reverse or modify' a state court judgment," meaning that "state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced" may not obtain rejection of the state-court judgment through review by the district court. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284-85 (2005) (citing *Rooker v. Fidelity Tr. Co.*, 263 U.S. 413, 416 (1923); *D.C. Ct. App. v. Feldman*, 460 U.S. 462 (1983)). The *Rooker-Feldman* doctrine applies where a claim is "inextricably intertwined" with a state court judgment such that a decision by the district court would "effectively nullify the state court judgment," or the claim could "succeed[] only to the extent that the state court wrongly decided the issues." *Target Media Partners v. Specialty Mktg. Corp.*, 881 F.3d 1279, 1286 (11th

Cir. 2018) (citation omitted). In determining whether the *Rooker-Feldman* doctrine applies, courts look to "the federal claim's relationship to the issues involved in the state court proceeding, instead of . . . the type of relief sought by the plaintiff." *Velardo v. Fremont Inv. & Loan*, 298 F. App'x 890, 892 (11th Cir. 2008). "The doctrine is rooted in an understanding that Congress has given only the United States Supreme Court the ability to hear an appeal from a state court decision," whereas district courts "have been given original, not appellate, jurisdiction." *Id.* at 1284 (citing 28 U.S.C. §§ 1257(a), 1331, 1332).

III. DISCUSSION

The case at hand is one of several filed in the United States District Court for the Middle District of Florida against Bank of America that involves the same alleged fraud. Several of these cases have been dismissed for lack of subject matter jurisdiction based on the *Rooker-Feldman* doctrine because the plaintiffs' cases in federal court were inextricably intertwined with a state court foreclosure action. *Machado v. Bank of Am.*, No. 8:17-cv-2531-T-33AAS, 2018 WL 5024177 (M.D. Fla. Oct. 17, 2018); *Ocampo v. Bank of Am.*, No. 8:17-cv-2631-T-23JSS, 2018 WL 3862560 (M.D. Fla. Aug. 14, 2018); *Colon v. Bank of Am.*, No. 8:17-cv-2548-T-26AAS (Sept. 13, 2018), ECF No. 30.

In a recent case, like the one at hand, the plaintiff filed a complaint in this Court alleging one count of common law fraud against Bank of America based on allegations that it schemed to, and did, make misrepresentations concerning the HAMP program to send the plaintiff into default and obtain a foreclosure judgment. *Machado*, 2018 WL 5024177, at *4. The complaint alleged that the plaintiffs lost their home and the equity in their home after the state court foreclosure judgment was entered, and these losses were the alleged damages in the federal action. *Id.* However, "[b]ecause the state court found that the foreclosure leading to the loss of Plaintiffs'

home was proper," this Court reasoned that "granting damages for the loss of Plaintiffs' home suggests entry of the foreclosure judgment was wrongful." *Id.* Thus, the Court found that the federal action was an attempt to impugn the validity of the foreclosure judgment and dismissed the action for lack of subject matter jurisdiction based on the *Rooker-Feldman* doctrine. *Id.*

Likewise, in *Varela-Pietri v. Bank of America, N.A.*, No. 8:17-cv-2534-T-23TGW, 2018 WL 4208002, at *3 (M.D. Fla. Sept. 4, 2018), another fraud case against Bank of America alleging a scheme to obtain foreclosure through misrepresentations regarding the HAMP program, the Court noted that, the plaintiffs "complain[ed] exclusively about misrepresentation that preceded—and ultimately caused—the foreclosure." As in *Machado* and the instant case, the plaintiffs alleged that the misrepresentations resulted in the loss of their home and the equity in their home, and that such loss was "occasioned by the state court action, which foreclosed [the plaintiffs'] right of redemption and resulted in a deficiency judgment . . . ." *Id.* Accordingly, the Court found that the federal action was an "unmistakable attempt to impugn the validity of the foreclosure judgment." *Id.*

Similar to those cases, Plaintiffs' claim in this case is based on purported misrepresentations by Bank of America that led to default on their loan and entry of a state court foreclosure judgment against them. Accordingly, the Court directed Plaintiffs to show cause why this case should not be dismissed for lack of subject matter jurisdiction. Doc. 38. Plaintiffs argue that this case does not seek to undo the foreclosure judgment or render it void, but instead alleges that Bank of America's fraudulent actions resulted in the wrongful denial of their HAMP application. Doc. 39 at 3.

Plaintiffs rely on *Nivia v. Nation Star Mortgage, LLC*, 620 F. App'x 822, 824 (11th Cir. 2015), to argue that claims under HAMP are not barred by the *Rooker-Feldman* doctrine. Doc. 39

at 2. In *Nivia*, the borrowers defaulted on their loan and a foreclosure judgment was entered by the state court. 620 F. App'x at 823. Shortly before the sale of the property, the borrowers filed an action against the lenders arguing that the lenders should have granted a loan modification request made by the borrower after the state court entered the final judgment of foreclosure, and that the failure to do so violated the lenders' duties under the Troubled Asset Relief Program ("TARP") and HAMP. *Id.* The borrowers also alleged that the lenders violated the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). *Id.* The lenders removed the action to federal court and moved to dismiss based on the *Rooker-Feldman* doctrine. *Id.*

The Eleventh Circuit held that the borrowers' claims under TARP and HAMP were not barred by the *Rooker-Feldman* doctrine because the borrowers did not "seek to undo the effect of the foreclosure judgment" and did not "make arguments that would have undermined its validity." *Id.* In reaching this conclusion, the Eleventh Circuit explained that the borrowers sought damages that would not nullify the foreclosure judgment because the damages would not "challenge the transfer of the real property effectuated by the foreclosure." *Id.* Additionally, the Court stated that "the success of putative claims under TARP or HAMP would not require a determination that the state court erroneously entered the foreclosure judgment." *Id.* Notably, the borrowers alleged "that the lenders failed to respond adequately to their September 2012 request for a loan modification, which could not have been at issue in the foreclosure proceeding that concluded in December 2011." *Id.* at 825. Additionally, the Court concluded that there was "no authority for the proposition that a lender's failure to fulfill any duties under TARP or HAMP invalidates a foreclosure resulting from that failure as a matter of law." *Id.* Accordingly, the Court held that "the putative claims under TARP and HAMP [were] not barred under the *Rooker-Feldman*

doctrine." *Id.* Nonetheless, the Eleventh Circuit affirmed dismissal of these claims because no private right of action existed under TARP or HAMP. *Id.* at 825.

The *Nivia* Court reached a different conclusion under *Rooker-Feldman* with respect to the borrowers' FDUTPA claim. In that claim, the borrowers alleged that the lenders' representations that modifications were generally available were deceptive because the lenders failed to help the borrowers modify their loan, which denied the borrowers the possibility to cure their default. *Id.* The Eleventh Circuit read these allegations as extending to conduct before the foreclosure judgment was entered, so that the claim was essentially "an equitable defense to foreclosure that [the borrowers] failed to raise before the state court." *Id.* Accordingly, success on the merits of the FDUTPA claim would require the federal court to determine that the state court judgment was wrongly entered and legally invalid and, therefore, no subject matter jurisdiction existed over the claim based on the *Rooker-Feldman* doctrine. *Id.*

The facts here are more comparable to the FDUTPA claim in *Nivia* than the TARP and HAMP claims. Whereas the modification communications in *Nivia* occurred after the state court entered judgment, rendering it impossible for such communications to have been at issue in the foreclosure proceedings, the communications in this case occurred before the state court entered judgment. As the Court in *Nivia* explained, where the allegations implicate pre-foreclosure actions that could constitute a defense in that action, the *Rooker-Feldman* doctrine applies and deprives the federal court of subject matter jurisdiction.

Likewise, *Ye Ho v. Wells Fargo Bank, N.A.*, 738 F. App'x 525 (11th Cir. 2018), relied on by Bank of America, also indicates that dismissal based on *Rooker-Feldman* is appropriate in this case. In *Ye Ho*, after a foreclosure case was filed in state court, the borrower received an unsolicited loan modification offer from the servicer of her loan. *Id.* at 526. "The offer required

her to continue residing in the home, make three trial payments, continue to make timely payments thereafter, and sign relevant final modification documents." *Id.* The borrower made the payments and completed and returned the modification agreement. *Id.* The servicer never communicated its receipt of the modification documents to the borrower. *Id.* at 527. After the modification documents were completed by the borrower, the foreclosure action proceeded to a final judgment of foreclosure, and the property was sold at a foreclosure sale. *Id.* Subsequently, the borrower received a response from the servicer explaining that the loan modification agreement was rejected as incomplete because it was not signed by the borrower's husband. *Id.* Throughout this process, the borrower sought relief from the foreclosure judgment and sale based on fraud. *Id.*

After the borrower's state court actions were concluded, the borrower filed an action in federal court alleging numerous causes of actions, including wrongful foreclosure. *Id.* The wrongful foreclosure claim was based on arguments that the servicer lacked standing to enforce the mortgage and fraudulently secured the foreclosure. *Id.* The Eleventh Circuit held that this claim was barred by the *Rooker-Feldman* doctrine because the borrower raised the standing and fraud issues in the state court proceedings. *Id.* at 531. Thus, if the federal action was successful, it would " 'effectively nullify the state court judgment' and necessarily hold 'that the state court wrongly decided the issues.' " *Id.* (quoting *Casale v. Tillman*, 558 F.3d 1258, 1260 (11th Cir. 2009)).

Here, Plaintiffs complain about pre-foreclosure conduct that relates to whether foreclosure was proper. Indeed, Plaintiffs' allegations tell the story of a scheme devised by Bank of America to allow it to foreclose and financially benefit in the process. Accordingly, Plaintiffs' claim is inextricably intertwined with the foreclosure action and success by the Plaintiffs in this case would

necessitate a finding by this Court that the foreclosure judgment was not valid. As a result, this Court is without subject matter jurisdiction.

Accordingly, it is **ORDERED AND ADJUDGED**:

1. This action is **DISMISSED** without prejudice for lack of subject matter jurisdiction.

2. The Clerk is directed to terminate any pending motions and close this case.

DONE AND ORDERED in Tampa, Florida on December 13, 2018.

Charlene Edwards Honeywell
Charlene Edwards Honeywell
United States District Judge

Copies to:
Counsel of Record and Unrepresented Parties, if any

242 N.C.App. 523
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
Court of Appeals of North Carolina.

Lawrence J. TRABER and Elge L. Traber, Plaintiffs,
v.
BANK OF AMERICA and Bank of America Home Loans, Defendants.

No. COA14–1028.
|
Aug. 4, 2015.

Synopsis
Background: After dismissal of their first action alleging violations of federal Home Affordable Modification Program (HAMP) rules, mortgagors brought a second action against mortgage servicer, alleging HAMP violations resulting in wrongful denial of a HAMP loan modification package. The Superior Court, Polk County, Marvin P. Pope, J., dismissed. Mortgagors appealed.

The Court of Appeals, Geer, J., held that identity of causes of action existed between first and second actions, as required for application of the res judicata bar.

Affirmed.

***1** Appeal by plaintiffs from order entered 9 July 2014 by Judge Marvin P. Pope in Polk County Superior Court. Heard in the Court of Appeals 22 January 2015.

Attorneys and Law Firms

Lawrence J. Traber and Elge L. Traber, pro se, plaintiffs-appellants.

McGuireWoods, LLP, Charlotte, by R. Locke Beatty, for defendants-appellees.

Opinion

GEER, Judge.

Plaintiffs Lawrence J. Traber and Elge L. Traber appeal from an order granting judgment on the pleadings pursuant to Rule 12(c) of the Rules of Civil Procedure and from an order denying their motion for rehearing pursuant to Rule 59 of the Rules of Civil Procedure. Because the trial court considered exhibits in addition to the pleadings, the motion filed by defendants Bank of America ("BANA") and Bank of America Home Loans ("BAHL") was converted into a motion for summary judgment. We agree with defendants that the trial court properly entered judgment on plaintiffs' claims based on the doctrine of res judicata. Plaintiffs' claims in this case allege violations of the federal Home Affordable Modification Program ("HAMP") rules. However, plaintiffs had, in a prior lawsuit, similarly alleged that defendants committed HAMP violations, and those claims were dismissed with prejudice. We hold that res judicata applies, and the trial court properly entered judgment dismissing this action.

Facts

In 2006, plaintiffs took out a $417,000.00 mortgage with Mid–Atlantic Financial Services, Inc. that was secured by property at 3521 Howard Gap Road in Saluda, North Carolina. Plaintiffs stopped making payments on their mortgage in 2009 and received a letter of default from BANA. On 17 December 2010, plaintiffs filed a complaint ("the 2010 complaint") in Polk County Superior Court, alleging claims against the following defendants: Bank of America Corporation Home Loans Servicing LP, BANA, BAC/Countrywide Home Loans ("BACHLS"), Mortgage Electronic Registration Services ("MERS"), and Fannie Mae.

In the 2010 complaint as amended, plaintiffs made the following allegations. Plaintiffs asserted that they signed the loan documents in 2006 under duress, and sometime thereafter the defendants denied plaintiffs a rescission of their loan. According to the complaint, the defendants did not properly register the mortgage in accordance with federal laws and also did not pay real property transfer taxes on the property. Plaintiffs acknowledged that they stopped making payments on their mortgage after 3 August 2009 and that they received a letter from the defendants notifying them of their default under the terms

of the mortgage. Plaintiffs claimed that they assumed from the default letter that foreclosure was impending. After receiving the default letter, plaintiffs "submitted at least four loan modification packages with no satisfaction (a violation of HAMP guidelines)." They alleged further that they requested, but never received, documentation regarding the ownership of their mortgage from the defendants. The complaint asserted that plaintiffs filed the 2010 complaint because of the HAMP violations and the refusal to provide them with the requested documentation. The complaint also alleged violations of other federal and state law.

***2** Finally, plaintiffs claimed that the defendants had presented no evidence of ownership of the loan and, therefore, had no standing to foreclose on the property. Based on that allegation, plaintiffs asserted a claim to quiet title and requested that the trial court prohibit the defendants from demanding mortgage payments from plaintiffs.

The defendants named in the 2010 complaint filed a motion to dismiss. At the hearing on the motion to dismiss, counsel for the defendants pointed out that plaintiffs were not actually in foreclosure and that any claim for alleged HAMP violations should, therefore, be dismissed. On 18 April 2011, the trial court ordered that "Defendants' Motion to Dismiss is GRANTED as to Plaintiffs' Complaint and Amended Complaint and that this action is hereby DISMISSED pursuant to Rule 12(b)(6)."

On 23 May 2011, plaintiffs filed a second lawsuit, although this time in federal court ("the 2011 complaint"). The 2011 complaint again included BACHLS as a defendant, as well as other defendants. In that complaint, plaintiffs asserted causes of action against the defendants based on their allegations that plaintiffs had "made numerous inquiries [to the defendants] but were stonewalled when they asked who now owned the[ir] note." Plaintiffs alleged, based on this behavior, that the holder of their mortgage had "bifurcated the loan by retaining the security interest while the note was sold, and ... caused the mortgage to become unsecured." Plaintiffs sought a declaration that their note had become unsecured "because it was bifurcated."

In order to establish diversity jurisdiction, plaintiffs amended their complaint to drop their claims against BACHLS. Ultimately, the federal district court dismissed the lawsuit as barred by res judicata. *Traber v. Mortg. Elec. Registration Sys., Inc.,* 2012 WL 4089282, 2012 U.S. Dist. LEXIS 131907 (W.D.N.C., Sept. 17, 2012), *aff'd,* 510 Fed.Appx. 307 (4th Cir.), *cert. denied,* —— U.S. ——, 134 S.Ct. 518, 187 L.Ed.2d 366 (2013).

On 23 May 2013, plaintiffs filed suit again in Polk County Superior Court ("the 2013 complaint") against BANA and BAHL.[1] Plaintiffs alleged that when they applied for a HAMP home loan modification in 2009, pursuant to 12 U.S.C. § 1701(c)(5), defendants placed them on a "merry-go-round in which [plaintiffs] repeatedly provided documentation to Bank of America and were told that their submission had not been received, or that forms were wrong or incomplete, and making them wait months for a response only to be told that because of the delay, the window for them to apply for a HAMP modification had closed, and finally that they were ineligible for a HAMP loan modified [sic] because they were not 'actually in foreclosure.' " Plaintiffs alleged that this drawn out process led to the denial of their loan modification application and that, but for defendants' actions, they would be entitled to receive a HAMP loan modification. Plaintiffs further alleged that defendants' actions were part of a broader scheme to engage in HAMP violations for a profit. Based on defendants' alleged HAMP violations, plaintiffs asserted claims for "Breach of Warranty of Good Faith," "Failure to Comply with 12 USC 1701," fraud, and conversion.

***3** In support of their contention that they were wrongly denied a loan modification package due to defendants' HAMP violations, plaintiffs alleged they received a check from a company called Rust Consulting, Inc. ("Rust Consulting check") that was accompanied by a letter informing them that they were part of a class of homeowners who were being compensated as part of a settlement between BANA and multiple state attorneys general over BANA's alleged " 'deficient mortgage servicing and foreclosure process.' " Plaintiffs also referred to a whistleblower lawsuit brought by a former BANA employee, Gregory Mackler, *United States ex rel. Gregory Mackler v. Bank of Am., N.A. & BAC Home Loan Servicing, L.P.,* No. 1:11–CV–113270 (E.D.N.Y., June 1, 2012), alleging that BANA committed HAMP violations. Plaintiffs noted that this lawsuit ultimately settled. Although plaintiffs did not make the *Mackler* complaint part of the record, they asserted that the complaint contained allegations that BANA violated HAMP guidelines by subjecting mortgage customers to tactics similar to those that plaintiffs contend caused them to be denied a HAMP loan modification.

BANA gave notice of removal to federal court. Plaintiffs moved to remand the case back to Polk County Superior Court. On 7 March 2014, the district court entered an order dismissing plaintiffs' claim of "Failure to Comply with 12 USC 1701," declining to exercise jurisdiction

over the remaining state law claims, and remanding the 2013 action to state court.

On or about 3 April 2014, BANA filed an answer and affirmative defenses. BANA also filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the Rules of Civil Procedure, arguing that the 2013 complaint was "barred by the doctrine of res judicata" and that plaintiffs had failed to state a claim for relief. BANA filed a memorandum in support of this motion, to which was attached several exhibits, including copies of plaintiffs' deed of trust, the 2010 complaint, the order dismissing the 2010 complaint, the amended 2011 complaint, the order dismissing the 2011 complaint, and the Fourth Circuit's decision affirming that dismissal.

On 25 April 2014, plaintiffs sought a 30–day extension of their time to answer the motion for judgment on the pleadings. On or about 3 May 2014, the trial court denied plaintiffs' motion and granted BANA's motion for judgment on the pleadings, dismissing plaintiffs' 2013 complaint "in its entirety with prejudice." On 9 May 2014, plaintiffs filed a motion for reconsideration of the dismissal of the 2013 complaint pursuant to Rule 59(a)(1), (3), and (8) of the Rules of Civil Procedure. The trial court denied the Rule 59 motion on 9 July 2014.

Plaintiffs gave timely notice of appeal from the order denying reconsideration on 10 July 2014. On 15 July 2014, plaintiffs amended their notice of appeal to also timely appeal the order entering judgment dismissing the 2013 complaint.

Discussion

***4** Plaintiffs first argue that the trial court should not have granted defendants' motion for judgment on the pleadings regarding the 2013 complaint because the alleged HAMP violations in the 2013 complaint were not barred by the doctrine of res judicata. We note that after BANA submitted its memorandum in support of its Rule 12(c) motion with attached exhibits, plaintiffs did not object to consideration of the exhibits. Thus, "matters outside the pleadings [were] received and not excluded by the trial court," and therefore the "motion for judgment on the pleadings should be treated as a motion for summary judgment and disposed of in the manner and under the conditions set forth in Rule 56 of the North Carolina Rules of Civil Procedure." *Helms v. Holland,* 124 N.C.App. 629, 633, 478 S.E.2d 513, 516 (1996) (holding that motion for judgment on pleadings under Rule 12(c) had been converted to motion for summary judgment because trial court considered materials outside pleadings).

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones,* 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal,* 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). Summary judgment is appropriate

> when the pleadings, together with depositions, interrogatories, admissions on file, and supporting affidavits show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law.

Stafford v. Cnty. of Bladen, 163 N.C.App. 149, 151, 592 S.E.2d 711, 713 (2004).

This Court has explained with respect to the doctrine of res judicata:

> The party seeking to assert *res judicata* has the burden of establishing its elements. A party must show (1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits in order to prevail on a theory of *res judicata.*

Auto. Grp., LLC v. A–1 Auto Charlotte, LLC, ––– N.C.App. ––––, ––––, 750 S.E.2d 562, 565 (2013) (internal citations and quotation marks omitted).

There is no dispute that the first and third elements of the res judicata doctrine have been satisfied. Plaintiffs, however, dispute whether there is an identity in causes of action between the 2010 and 2013 complaints. Res

judicata bars " 'matters actually litigated and determined, [or] matters which could properly have been litigated and determined in the former action....' " *Moody v. Able Outdoor, Inc.,* 169 N.C.App. 80, 87, 609 S.E.2d 259, 263 (2005) (quoting *Fickley v. Greystone Enters.,* 140 N.C.App. 258, 260, 536 S.E.2d 331, 333 (2000)). Where, in a subsequent action, a party "attempt[s] to proceed by asserting a new legal theory or by seeking a different remedy" than in a prior action, yet does not "seek[ ] a remedy for a separate and distinct ... act leading to a separate and distinct injury [,]" then the subsequent action is barred by res judicata. *Bockweg v. Anderson,* 333 N.C. 486, 494, 428 S.E.2d 157, 163 (1993).

***5** Because plaintiffs alleged precisely the same HAMP violations in the 2010 complaint as they did in the 2013 complaint and that they suffered the same injury (that they were denied a HAMP loan modification package as a result of the alleged violations), we hold that defendants have met their burden of showing that the claims asserted in the 2013 complaint are barred by res judicata. *See In re Raynor,* —— N.C.App. ——, ——, 748 S.E.2d 579, 584 (2013) (holding homeowners estopped from raising issue of HAMP violations as defense against bank in foreclosure proceeding when homeowners' separate suit against bank asserting HAMP violations was previously dismissed with prejudice).

Plaintiffs nonetheless cite *Gaither Corp. v. Skinner,* 241 N.C. 532, 536, 85 S.E.2d 909, 912 (1955), for the proposition that "where the omission of an item from a single cause of action is caused by fraud or deception of the opposing party, or where the owner of the cause of action had no knowledge or means of knowledge of the item, the judgment in the first action does not ordinarily bar a subsequent action for the omitted item." Plaintiffs do not, however, argue that they were fraudulently misled or deceived as to the existence of the alleged HAMP violations. Instead, plaintiffs merely assert that they lacked knowledge of the *Mackler* complaint and settlement, as well as the Rust Consulting check, which provided evidence in support of their eligibility for a HAMP modification and defendants' alleged HAMP violations.

In contrast to *Gaither,* plaintiffs do not contend they were unaware of any claim, but rather that *Mackler* and the Rust Consulting check provided evidence in support of their existing claims of which they were unaware at the time of the 2010 complaint. The uncovering of additional evidence is not sufficient to avoid the res judicata doctrine. *See Scarvey v. First Fed. Sav. & Loan Ass'n of Charlotte,* 146 N.C.App. 33, 40, 552 S.E.2d 655, 659 (2001) (holding appellants could not avoid collateral estoppel bar by asserting "additional evidence about the original facts").

Plaintiffs further argue that in the 2013 complaint, they pled a claim not previously asserted for violation of the duty of good faith and fair dealing. In addition, they argue that their allegations amounted to a claim for unfair or deceptive trade practices in violation of N.C. Gen.Stat. § 75–1.1 (2013), even though the complaint did not specifically assert such a claim. Because, however, these claims are still based on the HAMP violations that were the subject of the 2010 complaint and amount to a "mere[ ] change [in] legal theory" with respect to the same injury that was the subject of the 2010 complaint, these claims are likewise barred by res judicata. *Bockweg,* 333 N.C. at 494, 428 S.E.2d at 163.

Additionally, for the first time in their reply brief, plaintiffs contend *First Fed. Bank v. Aldridge,* —— N.C.App. ——, 749 S.E.2d 289 (2013), supports their contention that defendants failed to properly demonstrate ownership of their mortgage. Since plaintiffs raised the issue of the ownership of their mortgage in the 2010 complaint, their arguments based on *First Federal Bank* are also barred by res judicata. Consequently, we hold that the trial court did not err in granting judgment in favor of defendants. *See Stafford,* 163 N.C.App. at 155, 592 S.E.2d at 715 (affirming grant of summary judgment in favor of defendant because plaintiffs' claims barred by res judicata).

***6** Finally, plaintiffs argue that the trial court erred in denying their motion for reconsideration made pursuant to Rule 59(a)(1), (3), and (8) of the Rules of Civil Procedure. " '[W]here [a] [Rule 59] motion involves a question of law or legal inference, our standard of review is *de novo.*' " *Bodie Island Beach Club Ass'n v. Wray,* 215 N.C.App. 283, 294, 716 S.E.2d 67, 77 (2011) (quoting *Batlle v. Sabates,* 198 N.C.App. 407, 423, 681 S.E.2d 788, 799 (2009)). Because we have determined that the trial court did not err in dismissing the 2013 complaint based on res judicata, the trial court likewise did not err in denying plaintiffs' Rule 59 motion.

AFFIRMED.

Judges STEPHENS and DILLON concur.

Report per Rule 30(e).

All Citations

242 N.C.App. 523, 776 S.E.2d 898 (Table), 2015 WL 4620203

Footnotes

1 Plaintiffs have named BAHL as a defendant in this action, although this entity does not appear to actually exist. To the extent plaintiffs intended to name BACHLS as a party, BANA asserts that BACHLS merged with BANA prior to the filing of the 2013 complaint.

End of Document

2017 WL 2490007
Only the Westlaw citation is currently available.
United States District Court, W.D. North Carolina, Charlotte Division.

Jason VICKS and Mekeisha Vicks, Plaintiffs,
v.
OCWEN LOAN SERVICING, LLC and John Doe 1-5, Defendants.

DOCKET NO. 3:16-cv-00263-FDW
|
Signed 06/08/2017

Attorneys and Law Firms

Jason Vicks, Indian Trail, NC, pro se.

Mekeisha Vicks, Indian Trail, NC, pro se.

Dennis Kyle Deak, Troutman Sanders, LLP, Raleigh, NC, for Defendants.

ORDER

Frank D. Whitney, Chief United States District Judge

***1** THIS MATTER is before the Court upon the mandate of the Fourth Circuit, which affirmed in part, vacated in part, and remanded for further proceedings this Court's Order dismissing Plaintiffs' Complaint. See Vicks v. Ocwen Loan Servicing, LLC, No. 16-1909, 2017 WL 360546 (4th Cir. Jan. 25, 2017). Upon remand, Defendant filed an Amended and Renewed Motion to Dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. No. 20). The matter is fully briefed and is ripe for review. For the reasons stated herein, Defendant's motion is GRANTED, and Plaintiffs' Complaint is DISMISSED.

On May 25, 2016, Plaintiffs filed the instant action invoking diversity jurisdiction. (Doc. No. 1). While Plaintiffs' pleadings are often difficult to follow, their position is perhaps most succinctly summarized as "trying to get a loan servicer to stop attempting to complete a foreclosure action." (Id. at ¶ 1). The foreclosure at issue in this case is, apparently, the same as that presented in a separate case already remanded to North Carolina State Court. See Vicks v. Wells Fargo, No. 3:16-cv-269-FDW.

The foreclosure at issue originates from an action brought in the Superior Court of Union County, North Carolina. (Doc. No. 3). In the state foreclosure action, the Clerk of Union County Superior Court entered an Order allowing Wells Fargo to proceed with foreclosure under a Deed of Trust in May 2011. (Id.). Since that time, Plaintiffs have filed six separate lawsuits (three in state court, three in this district) and nine separate motions in various attempts to collaterally attack the Union County Clerk of Court's May 2011 Order. (Id. at 5). When these attempts proved unsuccessful, Plaintiffs allegedly proceeded to file fourteen complaints with the Consumer Financial Protection Bureau ("CFPB"). (Id. at 6). Plaintiffs' attempts to disrupt or prevent the foreclosure have now culminated in removing a pending state court case to this Court—that matter has been remanded[1]—and the instant suit.

Though not entirely clear, Plaintiff's Complaint seeks relief under a number of theories, including four claims for relief: (1) a Declaration that "any rights to the loan before April 19, 2011, simply did not exist"; (2) violations of N.C. Gen. Stat. § 45-102; (3) violations of RESPA Regulation X, 12 C.F.R. § 1024.35; (4) violations of the North Carolina Debt Collection Act, N.C. Gen. Stat. § 75-50-56; and (5) Intentional Infliction of Emotional Distress ("IIED"). (Doc. No. 1). Plaintiffs' prayer for relief seeks monetary damages—actual, general, and punitive—but omits any reference to the declaratory relief sought in Plaintiffs' first cause of action. The Court, nonetheless, liberally construes Plaintiffs' Complaint to seek both legal and equitable remedies.

On July 14, 2017, this Court entered an Order (1) dismissing Plaintiffs' first four claims based on the Rooker-Feldman doctrine and (2) dismissing the fifth claim for IIED under Fed. R. Civ. P. 12(b)(6). (Doc. No. 11). The Fourth Circuit vacated and remanded this Court's dismissal of Plaintiffs' first four claims, concluding that the Rooker-Feldman doctrine did not apply in this case. Vicks, No. 16-1909, 2017 WL 360546, at *2. The Fourth Circuit further stated, however, that it "express[es] no opinion as to the legal sufficiency of [Plaintiffs'] reinstated claims or to the application of the doctrines of issue preclusion and claim preclusion to those claims." Id. Upon remand to this Court, Defendant filed the instant Amended and Renewed Motion to Dismiss

(Doc. No. 20) requesting that the Court dismiss the first four claims in Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(6).[2]

***2** In order to survive a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, Plaintiffs' "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads sufficient factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (citing Twombly, 550 U.S. at 556). While the Court accepts plausible factual allegations in the complaint as true and considers those facts in the light most favorable to a plaintiff in ruling on a motion to dismiss, a court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." Eastern Shore Mkt.'s Inc. v. J.D. Assoc.'s, LLP, 213 F. 3d 175, 180 (4th Cir. 2000).

Plaintiff's first two claims are barred by the doctrine of collateral estoppel. Under that doctrine, "a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies." Thomas M. McInnis & Assocs., Inc. v. Hall, 349 S.E.2d 552, 557 (1986). In North Carolina, before authorizing a foreclosure to proceed, the clerk must determine that a valid debt exists, the debtor is in default, the trustee has the right to foreclose, and sufficient notice was given. See N.C. Gen. Stat. § 45-21.16(d). A party may appeal the foreclosure action to the superior court for a *de novo* hearing that is limited to the same issues. Funderburk v. JPMorgan Chase Bank, N.A., 775 S.E.2d 1, 6 (N.C. Ct. App. 2015). "Any issue that the clerk decides in a foreclosure proceeding under N.C. Gen. Stat. § 45-21.16(d) is conclusive unless appealed and reversed and cannot be relitigated in a subsequent lawsuit." Hardin v. Bank of Am., N.A., No. 7:16-CV-75-D, 2017 WL 44709, at *5 (E.D.N.C. Jan. 3, 2017).

Plaintiffs' first two claims rests upon the premise that no valid debt existed and that Defendant failed to provide the required pre-foreclosure notice. (Doc. No. 1, ¶¶ 35, 40). The North Carolina clerk, however, resolved these issues against Plaintiffs in the foreclosure proceeding, which is binding and conclusive on those issues. Plaintiffs fail to allege a legitimate reason why this Court should disregard the valid and binding state court determinations, and those determinations are fatal to Plaintiffs' first two claims.

Plaintiff's third and fourth claims allege that Defendant violated state law by proceeding with the foreclosure without providing the required pre-foreclosure notice and by unfairly collecting the debt. (Doc. No. 1, ¶¶ 41, 48). Plaintiffs, however, cannot prosecute claims based upon errors that run contrary to the final and binding Order of Foreclosure in which the clerk found that Wells Fargo was allowed to proceed with foreclosure under the Deed of Trust. See Funderburk, 775 S.E.2d at 7 ("Where the foreclosures were conducted pursuant to orders by the clerk and superior court judge, we hold plaintiffs cannot recover damages resulting from the foreclosures."). Accordingly, these claims also fail.

"Moreover, to the extent that [Plaintiffs] failed to raise any of these issues as a defense in the underlying foreclosure proceeding, the doctrine of res judicata bars [Plaintiffs] from raising them here." Hardin, No. 7:16-CV-75-D, 2017 WL 44709, at *5; see Goins v. Cone Mills Corp., 367 S.E.2d 335, 336-37 (N.C. Ct. App. 1988) (noting that res judicata bars "every ground of recovery or defense which was actually presented or which could have been presented in the previous action").[3] Plaintiffs were a party to and addressed their concerns with the foreclosure through all levels of the state court judicial system, including the Clerk, Superior Court, and the Court of Appeals. Not only were Plaintiffs consistently denied the relief they sought, but the foreclosure was consistently upheld.

***3** In sum, Plaintiffs essentially seek to attack and undermine the legitimacy of the state foreclosure proceedings that found a valid debt, in default, subject to foreclosure, and the validity of the foreclosure has been previously litigated in various state court actions. Plaintiffs may not now challenge collection and foreclosure efforts predicated upon a valid Order of Foreclosure. Accordingly, Plaintiffs' claims are barred by the doctrines of collateral estoppel and res judicata, and Plaintiffs' Complaint fails to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6).

IT IS, THEREFORE, ORDERED that Defendant's Amended and Renewed Motion to Dismiss (Doc. No. 20) is GRANTED, and Plaintiffs' Complaint (Doc. No. 1) is DISMISSED.

The Clerk of Court is respectfully directed to close this case.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 2490007

Footnotes

1 Vicks v. Wells Fargo, et al., No. 3:16-cv-269-FDW.

2 The Fourth Circuit affirmed this Court's dismissal of Plaintiff's IIED claim. Therefore, that issue is not before this Court upon remand.

3 Plaintiffs cite to In re Lucks, 794 S.E.2d 501 (N.C. 2016), for the proposition that the doctrines of collateral estoppel and res judicata do not apply to non-judicial foreclosure actions. In that case, however, the North Carolina Supreme Court held that the doctrines do not apply in their "traditional" sense in that once the clerk or trial court denies authorization for a foreclosure sale, a creditor may not seek a non-judicial foreclosure based on the *same default.* Id. at 506-07. The creditor "may nonetheless proceed with foreclosure by judicial action" or "proceed with foreclosure based upon a *different default.*" Id. at 507. Accordingly, contrary to Plaintiff's assertion, In re Lucks did not hold that res judicata and collateral estoppel do not apply to the circumstances presented in this case.

Wigod v. Wells Fargo Bank, N.A.

United States District Court for the Northern District of Illinois, Eastern Division

January 25, 2011, Decided; January 25, 2011, Filed

No. 10 CV 2348

Reporter
2011 U.S. Dist. LEXIS 7314 *; 2011 WL 250501

LORI WIGOD, on her own behalf and on the behalf of others similarly-situated, Plaintiff, v. WELLS FARGO BANK, N.A. d/b/a WELLS FARGO HOME MORTGAGE, f/k/a WACHOVIA MORTGAGE, FSB, Defendant.

Subsequent History: Affirmed in part and reversed in part by, Remanded by *Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 2012 U.S. App. LEXIS 4714 (7th Cir. Ill., 2012)*

Class certification granted by, Settled by *Wigod v. Wells Fargo Bank, N.A., 2014 U.S. Dist. LEXIS 172520 (N.D. Ill., June 27, 2014)*

Core Terms

modification, mortgage, borrower, permanently, misrepresentation, modify, concealment, deceptive, fraudulent, eligible, lender, monthly, Consumer, hiring, unfair, default, third-party, guidelines, promissory, estoppel, omission

Counsel: **[*1]** For Lori Wigod, on her own behalf and on behalf of all others similarly situated, Plaintiff: Irina Slavina, Steven L Lezell, Rafey S. Balabanian, Edelson McGuire, LLC, Chicago, IL.

For Wells Fargo Bank, NA, doing business as Wells Fargo Home Mortgage, formerly known as Wachovia Mortgage, FSB, Defendant: Irene C. Freidel, LEAD ATTORNEY, Kirkpatrick & Lockhart Preston Gates Ellis LLP., Boston, MA; David D. Christensen, Kirkpatrick & Lockhart Preston Gates Ellis LLP - MA, Boston, MA; Jessica Ann Baer, K&l Gates, Chicago, IL; Kristin Ann Davis, K&l Gates Llp, Boston, MA; Michael Joseph Hayes, K&L Gates LLP, Chicago, IL.

Judges: Blanche M. Manning, United States District Judge.

Opinion by: Blanche M. Manning

Opinion

MEMORANDUM AND ORDER

In the midst of an unprecedented financial crisis, the U.S. government made nearly $700 billion in funds available to the country's largest financial institutions to stop the crisis from worsening. A key feature of the $700 billion bank bailout was the Home Affordable Modification Program, under which banks, including defendant Wells Fargo, received incentive payments from the government to provide mortgage loan modifications to homeowners, including plaintiff Lori Wigod.

At first, Wigod **[*2]** received a four-month modification, but has now filed suit against Wells Fargo alleging that it denied her a permanent modification in violation of its contractual obligations. Wigod contends that she is also a victim of Wells Fargo's alleged misrepresentations, its "immoral, unscrupulous, unfair, and oppressive" business practices, and its failure to properly hire and supervise its employees. She seeks damages and an order from the court directing Wells Fargo to permanently modify her mortgage loan.

Before the court is Wells Fargo's motion to dismiss Wigod's complaint in its entirety. For the reasons given below, the motion to dismiss is granted.

BACKGROUND

For purposes of the motion to dismiss, the court deems the following facts to be true, which are taken from Wigod's first amended complaint, or the various documents attached or referred to in the complaint and central to her claims. *See Marshall-Mosby v. Corporate Receivables, Inc., 205 F.3d 323, 326 (7th Cir. 2000)*.

In September 2007, Wigod obtained mortgage financing from Wells Fargo's predecessor in the amount of $728,500 for a condominium in Chicago. Wigod made payments as due for about the first two years of the mortgage. Although **[*3]** she had not missed a payment, on April 3, 2009, Wigod reached out to Wells Fargo's loss mitigation department and made a written request for a loan modification under the Home Affordable Modification Program, or HAMP.

The HAMP program had been announced on February 18, 2009, and was intended to stave off a tidal wave of foreclosures by restructuring or refinancing the mortgage loans of homeowners already in default, or who were in imminent risk of default, by reducing monthly payments to a sustainable level of not more than 31% of their gross monthly income. All servicers of loans owned, securitized, or guaranteed by Fannie Mae or Freddie Mac were required to participate in HAMP as to those loans. Participation by servicers was voluntary as to loans not owned, securitized, or guaranteed by Fannie Mae or Freddie Mac, such as Wigod's loan.

Wells Fargo's participation in the HAMP program was governed by the Servicer Participation Agreement that it entered into with the Federal National Mortgage Association, or Fannie Mae, in its role as a financial agent of the United States. Under the Servicer Participation Agreement, Wells Fargo was required to evaluate all mortgage loans that had been **[*4]** delinquent for 60 days or more to determine whether they were eligible for modification under HAMP, and were also required to evaluate the mortgage loans of any of their borrowers who contacted them about a HAMP modification.

Under the terms of HAMP, a borrower is eligible for modification only if: (1) the mortgage involves the borrower's primary residence, (2) the amount owed does not exceed $729,750, (3) the borrower has a financial hardship, (4) the mortgage was originated before 2009, and (5) the monthly mortgage payments exceed 31% of the borrower's monthly income. *See* Supplemental Directive 09-01 [1] (attached as Exhibit A to the Declaration of Steven Lezell) at 2-3. In addition, servicers are required to perform various evaluations of borrowers in order to determine whether the borrower is eligible for a permanent modification. Among the tests servicers perform is Net Present Value test, which evaluates a borrower's financial position to determine whether a modification would be profitable. Servicers also use a "waterfall" process to determine whether any combination of capitalizing unpaid interest and escrow fees, waiving late fees, reducing the interest rate to as low as 2%, **[*5]** and/or extending the term of the loan would reduce the borrower's monthly payment to no more than 31% of her monthly income. *See* Response [42-1] at 4 (citing various portions of Supplemental Directive 09-01).

A HAMP modification is carried out in two stages. First, an eligible borrower who has represented to her lender that she cannot afford the payments required **[*6]** under her mortgage loan receives a Trial Period Plan, or TPP, from her lender. The TPP requires the borrower to make reduced monthly mortgage payments during the trial period (Wigod's trial period was 4 months), while the lender suspends any scheduled foreclosure sale. The borrower also agrees to document her inability to pay under the terms of the mortgage loan if she has not already done so, and to obtain credit counseling if required by the lender.

The second stage consists of the borrower and lender entering into a Modification Agreement, under which the terms of the original mortgage loan are permanently modified. However, no permanent modification will occur if the borrower fails to make a required payment during the trial period, or if the lender determines that the borrower's representations about her financial condition are no longer true.

The parties dispute whether HAMP requires a lender to permanently modify a mortgage if the borrower makes all required payments and their financial representations remain true. Wigod alleges that because she satisfied both of those conditions, Wells Fargo was required to permanently modify her loan, citing in support the following language **[*7]** from

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[1] Wigod refers to Supplemental Directive 09-01 in her brief in opposition to the motion to dismiss, and provided a copy to the court. In her brief, she describes it as setting out Wells Fargo's obligations when evaluating borrowers for a HAMP modification, and states that it is referenced in the Servicer Participation Agreement Wells Fargo signed, which is attached to the first amended complaint. In addition, Supplemental Directive 09-01 is published by Fannie Mae and publicly available on its website at *https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/sd090* .pdf. Because it is both a public document of which the court can take judicial notice and Wigod incorporated it by reference into the allegations of her complaint, the court is free to take into account the Supplemental Directive when deciding the motion to dismiss.

the Trial Period Plan:

> If I am in compliance with this Loan Trial Period and my representations in Section 1 continue to be true in all material respects, then the Lender will provide me with a Loan Modification Agreement, as set forth in Section 3, that would amend and supplement (1) the Mortgage on the Property, and (2) the Note secured by the Mortgage.

TPP (Exhibit A to the First Amended Complaint [23-1]) at 1. But Wells Fargo contends that it was not required to permanently modify a mortgage loan if it determined during the trial period that the borrower did not meet the requirements under HAMP for a modification, citing in support the following language from the Trial Period Plan:

> I understand that the Plan is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (I) I meet all of the conditions required for modification, (ii) I receive a fully executed copy of a Modification Agreement, and (iii) the Modification Effective Date has passed. I further understand and agree that the Lender will not be obligated or bound to make any modification of the Loan Documents if I fail to meet any one of the requirements under this Plan.

Id. **[*8]** ¶ 2(G).

After receiving Wigod's request for a loan modification under HAMP and financial disclosures she had also forwarded, Wells Fargo notified Wigod in mid-May 2009 that she qualified for a temporary loan modification. On May 28, 2009, Wigod received a Trial Period Plan from Wells Fargo, which she signed and returned "along with any final documents Defendant deemed were necessary to determine her eligibility." Am. Compl. [23-1] ¶ 33.

Beginning in July 2009, Wigod made each of the payments required during the four-month period covered by the Trial Period Plan. Wigod alleges that she also fully complied with all of the other terms of the Trial Period Plan, "such as keeping her information accurate and submitting all necessary paperwork." However, in a letter dated November 13, 2009, Wells Fargo notified Wigod that she was not eligible for a permanent modification of her mortgage loan:

> Unfortunately, after carefully reviewing the information you've provided, we are unable to adjust the terms of your mortgage. You have not been approved for a mortgage loan modification because we were unable to get you to a modified payment amount that you could afford per the investor guidelines on your **[*9]** mortgage.

Letter of November 13, 2009 (attached as Exhibit C to the Amended Complaint [23-1]).

Although the four-month term of her Trial Period Plan ended in October 2009, Wigod has continued making mortgage payments in the reduced amount due under the Trial Period Plan rather than the full amount due under her original mortgage loan. She has also attempted to convince Wells Fargo that its calculations of her eligibility for a HAMP modification were flawed, but those attempts have been unsuccessful. In the meantime, Wells Fargo has sent Wigod monthly notices threatening to foreclose on her home if she does not pay the delinquency between her monthly payment amount due under her original home mortgage, and the reduced amount she has been paying since July 2009.

Wigod has now sued Wells Fargo based upon its decision not to permanently modify her mortgage loan. Specifically, she alleges claims of: (1) breach of the Trial Period Plan (Count I); (2) promissory estoppel, based upon promises Wells Fargo allegedly made in the Trial Period Plan (Count II); (3) breach of the Servicer Participation Agreement (Count III); (4) negligent hiring and supervision (Count IV); (5) fraudulent misrepresentation **[*10]** or concealment (Count V); (6) negligent misrepresentation or concealment (Count VI); and (7) violation of Illinois' Consumer Fraud and Deceptive Business Practices Act (Count VII). Wigod also sues on behalf of a class of similarly situated homeowners across the country. Although Wigod alleges jurisdiction only under the Class Action Fairness Act, *see* *28 U.S.C. § 1332(d)(2)*, the court notes that she is a citizen of Illinois while Wells Fargo is chartered in South Dakotah and its principal place of business is in California. Because the court therefore has diversity jurisdiction over Wigod's claims under *28 U.S.C. § 1332(a)*, it need not delve into the issue of whether it also has jurisdiction under *§ 1332(d)(2)*.

Wells Fargo has filed a motion to dismiss each of Wigod's claims. For the reasons stated, the motion to dismiss is granted.

ANALYSIS

I. Standard of Review

A complaint need only contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. However, a complaint must contain "enough facts to state a claim to relief that is plausible on its face" and also must state sufficient facts to raise a plaintiff's right to relief above **[*11]** the speculative level. *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In *Iqbal*, the Supreme Court stated that a

claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*.

The court is neither bound by the plaintiff's legal characterization of the facts, nor required to ignore facts set forth in the complaint that undermine the plaintiff's claims. *Scott v. O'Grady, 975 F. 2d 366, 368 (7th Cir. 1992)*. However, "in examining the facts and matching them up with the stated legal claims, we give 'the plaintiff the benefit of imagination, so long as the hypotheses are consistent with the complaint.'" *Bissessur v. Ind. Univ. Board of Trustees, 581 F. 3d 599, 603 (7th Cir. 2009)*.

II. Breach of Contract (Count I) and Promissory Estoppel (Count II)

In these counts, Wigod alleges that Wells Fargo promised to permanently modify the terms of her original mortgage loan, as long as she met all of the requirements set out in the Trial Period Plan. In Count I, she alleges that the Trial Period Plan was a contract, and **[*12]** that Wells Fargo breached the contract by failing to permanently modify her mortgage loan even though she had fully complied with the terms of the Trial Period Plan. Alternatively, she alleges that Wells Fargo failed to honor its promise to permanently modify Wigod's mortgage loan, a promise on which she relied to her detriment.

Wells Fargo argues that the allegations in Counts I and II are nothing more than claims that Wells Fargo failed to comply with the terms of HAMP, under which Wigod alleges she was entitled to a permanent modification. The vast majority of courts that have considered the issue have agreed that HAMP provides no private right of action. *See, e.g., Vida v. OneWest Bank, F.S.B., No. 10-987, 2010 U.S. Dist. LEXIS 132000, 2010 WL 5148473, **3-4 (D. Or. Dec. 13, 2010)* (collecting cases). Wigod contends that the lack of any private right of action under HAMP is irrelevant because her claims are grounded not in HAMP, but rather Wells Fargo's promises in the Trial Period Plan. The plaintiff in *Vida* made a similar attempt to distinguish her claims for breach of contract based upon statements in the Trial Period Plan from a claim under HAMP itself. The district court concluded that even though the plaintiff **[*13]** had couched her claim as one for breach of the Trial Period Plan, "the facts and allegations as pleaded in this case are premised chiefly on the terms and procedures set forth via HAMP and are not sufficiently independent to state a separate state law cause of action for breach of contract." *2010 U.S. Dist. LEXIS 132000, [WL] at *5*.

As with the plaintiff in *Vida*, Wigod has alleged claims that rely "primarily on representations made in uniform HAMP documents," including the statement in the Trial Period Plan that as long as she complied with the requirements of that Plan, "'then the Lender will provide me with a Home Affordable Modification Agreement . . . that would amend and supplement (1) the Mortgage on the Property, and (2) the Note secured by the Mortgage.'" *Id.* (quoting plaintiff's Trial Period Plan). Because "the alleged offer to modify came about and was made wholly under the rubric of HAMP, as were [the plaintiff]'s alleged actions in acceptance of the offer, *i.e.*, submitting the required documentation, and the alleged consideration, *i.e.* remitting reduced loan payments, [the plaintiff] fails to state a cause of action independent of HAMP, for which there is no private right of action." *Id.*

Consequently, **[*14]** the motion to dismiss Wigod's claims of breach of contract (Count I) is granted and the claim is dismissed with prejudice. The court also grants the motion to dismiss with prejudice Wigod's claim of promissory estoppel (Count II) which, like her claim of breach of contract, is premised primarily on representations made in uniform HAMP documents.

III. Breach of Servicer Participation Agreement (Count III)

In Count III, Wigod alleges that Wells Fargo breached the terms of the Servicer Participation Agreement that it entered into with Fannie Mae, and that she has standing to sue as an intended beneficiary. Because one of the parties to the Servicer Participation Agreement is Fannie Mae as an agent of the United States, the agreement is governed by federal common law. *Speleos v. BAC Home Loans Servicing, L.P., No. 10-11503, 755 F. Supp. 2d 304, 2010 U.S. Dist. LEXIS 132111, 2010 WL 5174510, *3 (D. Mass. Dec. 14, 2010)*. Under federal law, federal courts apply the Restatement (Second) of Contracts to determine whether a third-party is an intended beneficiary to a government contract. *Id.* Under *§ 313 of the Restatement*, a third-party is an intended beneficiary only if (a) the contract explicitly gives the third party the right to enforce the **[*15]** contract, or (b) the third party was intended to benefit from the contract *and* third-party claims are consistent with the terms of the contract. *See* *RESTATEMENT (SECOND) OF CONTRACTS § 313*.

Wigod has cited several portions of the Servicer Participation Agreement to show that the Agreement was intended to benefit borrowers like her. However, she has failed to acknowledge the significance of ¶ 11(E):

> The Agreement shall inure to the benefit of and be binding upon the parties to the Agreement and their

permitted successors-in-interest.

Servicer Participation Agreement (attached as Exhibit B to the Amended Complaint [23-1]) ¶ 11(E). A similarly-worded clause appeared in the Servicer Participation Agreement at issue in *Speleos*:

> These rights and remedies are for our benefit and that of our successors and assigns.

*Speleos, 2010 U.S. Dist. LEXIS 132111, 2010 WL 5174510 at *5*. In *Speleos*, the court concluded that such language is inconsistent with allowing third-party claims to enforce the Servicer Participation Agreement and, therefore, held that the borrower was not an intended beneficiary. The decision reached in *Speleos* that a borrower is not an intended beneficiary of a Servicer Participation Agreement is consistent with **[*16]** the decisions reached by most of the courts that have addressed the issue. *See, e.g., 2010 U.S. Dist. LEXIS 132111, [WL] at *3* (collecting cases).

As with the Servicer Participation Agreement in *Speleos*, the language in Wells Fargo's Servicer Participation Agreement is inconsistent with allowing third-party claims and, therefore, Wigod is not an intended beneficiary under that Agreement. Accordingly, she lacks standing to bring a claim alleging breach of the Agreement, and Count III is dismissed with prejudice.

IV. Negligent Hiring and Supervision (Count IV)

In Count IV, Wigod alleges that Wells Fargo hired temporary employees who were not qualified to determine a borrower's eligibility for a HAMP modification, and failed to safeguard Wigod against the unfitness of its employees. As a result, Wigod alleges, Wells Fargo's employees improperly determined that borrowers like Wigod were not eligible for a HAMP modification.

As was the case with Wigod's breach of contract and promissory estoppel claims, Wigod is alleging that Wells Fargo failed to adhere to the terms and procedures set forth under HAMP in that it failed to permanently modify her mortgage loan even though, she contends, she met the requirements. Her claim **[*17]** of negligent hiring and supervision is therefore premised on Wells Fargo's obligations as a HAMP servicer, a claim for which HAMP provides her with no private right of action to enforce. *See Vida, 2010 U.S. Dist. LEXIS 132000, 2010 WL 5148473, at *5* ("the facts and allegations as pleaded in this case are premised chiefly on the terms and procedures set forth via HAMP and are not sufficiently independent to state" separate state law claims).

Because Wigod's claim of negligent hiring and supervision are really claims that Wells Fargo failed to adhere to the terms and procedures of HAMP, Count IV is dismissed with prejudice.

V. Fraudulent Misrepresentation and/or Concealment (Count V) Negligent Misrepresentation and/or Concealment (Count VI)

In Counts V and VI, Wigod alleges that she suffered damages after reasonably relying on misrepresentations made by Wells Fargo. Specifically, she identifies the misrepresentation as the statement in the Trial Period Plan that Wells Fargo would permanently modify the terms of her mortgage loan as long as she is "in compliance with this Loan Trial Period and [her] representations in Section 1 continue to be true in all material respects." Trial Period Plan [attached as Exhibit A to **[*18]** the First Amended Complaint [23-1]) at 1. Additionally, she alleges damages based upon Wells Fargo's failure to disclose that (a) it would consider her in default if she made the reduced payments required under the Trial Payment Plan rather than the full payments required under her original mortgage loan, and (b) Wells Fargo would "fail to adhere to applicable HAMP guidelines and directives" by denying her a permanent modification even though she qualified for one under HAMP guidelines.

A. Fraudulent Misrepresentation Negligent Misrepresentation

To succeed on her claim of fraudulent misrepresentation, Wigod must be able to establish each of the following: (1) a false statement of material fact; (2) known or believed to be false by the person making it; (3) an intent to induce the plaintiff to act; (4) justifiable reliance on the truth of the statement; and (5) damage resulting from such reliance. *See Weidner v. Karlin, 402 Ill. App. 3d 1084, 932 N.E.2d 602, 605, 342 Ill. Dec. 475 (Ill. App. Ct. 2010)*. The elements of a claim of negligent misrepresentation are similar, except that (1) the defendant need not have known the statement was false, but rather was merely negligent or careless in failing to ascertain the truth, and (2) **[*19]** the defendant must have owed the plaintiff a duty to provide accurate information. *See Kopley Group V., L.P. v. Sheridan Edgewater Properties, Ltd., 376 Ill. App. 3d 1006, 876 N.E.2d 218, 228, 315 Ill. Dec. 218 (Ill. App. Ct. 2007)*. Both claims require justifiable reliance, which is normally a question a question of fact, but "can be determined as a matter of law when no trier of fact could find that it was reasonable to rely on the alleged statements or when only one conclusion can be drawn." *Cozzi Iron & Metal, Inc. v. U.S. Office Equipment, Inc., 250 F.3d*

570, 574 (7th Cir. 2001).

Wigod alleges that she reasonably relied on the opening paragraph in the Trial Period Plan that Wells Fargo would permanently modify the terms of her mortgage loan as long as she made the four payments required under the Plan and that her representations of her financial condition remained true—it makes no mention of any other requirements. However, elsewhere in the Trial Period Plan, Wigod was advised that she must meet *all* of HAMP's requirements for modification:

> the Plan is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (I) I *meet* all *of the conditions required for modification* . . . **[*20]** I further understand and agree that the Lender will not be obligated or bound to make any modification of the Loan Documents if I fail to meet any one of the requirements under this Plan.

Trial Period Plan (attached as Exhibit A to First Amended Complaint [23-1]) ¶ 2(G) (emphasis added).

The quoted paragraph is at odds with the opening statement that to obtain a permanent modification, she merely needed to make the four reduced payments required under the Trial Period Plan and supply accurate financial information. Given those inherently contradictory statements, Wigod could not reasonably have relied on just the opening statement because it would have required her to ignore the remainder of the contract which required her to meet *all* of HAMP's requirements. Indeed, the uniform Trial Period Plan has been interpreted as "explicitly not [being] an enforceable offer for loan modification." Vida, 2010 U.S. Dist. LEXIS 132000, 2010 WL 5148473, at *6. Accordingly, in light of the language of the Trial Period Plan as a whole, any reliance Wigod placed on just the opening sentence was not reasonable and, therefore, as a matter of law, she cannot establish the elements of either a fraudulent or negligent misrepresentation. **[*21]** *See* Cozzi Iron, 250 F.3d at 574 (reliance is unreasonable as a matter of law "when no trier of fact could find that it was reasonable to rely on the alleged statements").

B. Fraudulent Concealment Negligent Concealment

Wigod also alleges that Wells Fargo either fraudulently or negligently concealed from her (1) "that by her entering into and complying with the [Trial Period Plan] Agreement, Defendant would consider and report her as being in default on her mortgage," and (2) that Wells Fargo "would fail to adhere to applicable HAMP guidelines and directives and would, in contravention of those directives, re-evaluate the Plaintiff's eligibility using different standards and calculations than those required under the directives." First Amended Complaint [23-1] ¶¶ 109, 114, 120. To establish a fraudulent or negligent misrepresentation based upon an omission or concealment, in addition to the elements of a fraudulent or negligent misrepresentation, a plaintiff must show that the defendant owed a duty to supply the omitted or concealed information. *See* Weidner v. Karlin, 402 Ill. App. 3d 1084, 932 N.E.2d 602, 605, 342 Ill. Dec. 475 (Ill. App. Ct. 2010) ("it is necessary to show the existence of a special or fiduciary relationship, **[*22]** which would raise a duty to speak") (internal quotation marks and citation omitted).

Wells Fargo seeks dismissal of Wigod's claims of alleged concealment based upon the absence of any fiduciary or other duty to speak. Specifically, Wells Fargo points out that under Illinois law, a "mortgagor-mortgagee relationship does not create a fiduciary relationship as a matter of law." Graham v. Midland Mortgage Co., 406 F. Supp. 2d 948, 953 (N.D. Ill. 2005) (internal quotation marks and citation omitted). Wigod responds that Wells Fargo owed her a duty not merely as a mortgagor, but rather because of its "position of influence and superiority over plaintiff" due to its role as "a HAMP servicer." Response [42-1] at 28. However, as was the case with Wigod's breach of contract, promissory estoppel, and negligent hiring and supervision claims, her concealment claims are premised on Wells Fargo's obligations as a HAMP servicer and, therefore, HAMP provides her with no private right of action to enforce those claims. *See* Vida, 2010 U.S. Dist. LEXIS 132000, 2010 WL 5148473, at *5 ("the facts and allegations as pleaded in this case are premised chiefly on the terms and procedures set forth via HAMP and are not sufficiently independent **[*23]** to state" separate state law claims).

Accordingly, the motion to dismiss Wigod's claims of fraudulent and negligent misrepresentation and concealment (Counts V and VI) are dismissed with prejudice.

VI. Illinois Consumer Fraud Act (Count VII)

Finally, Wigod alleges violations of Illinois' Consumer Fraud and Deceptive Business Practices Act based upon the same statements or omissions at issue in its claims of fraudulent and negligent misrepresentations and omissions, namely: (1) Wells Fargo's purported promise that Wigod would obtain a permanent modification as long as she made the reduced payments required under the Trial Period Plan and her financial disclosures remained accurate; (2) Wells Fargo's alleged failure to disclose that it would consider her in default on her original mortgage if she paid no more than the reduced payments required under the Trial Period Plan; and (3) Wells Fargo's alleged failure to disclose that it would not follow

HAMP guidelines when evaluating her eligibility for a permanent modification.

The Consumer Fraud and Deceptive Business Practices Act prohibits unfair methods of competition and unfair or deceptive acts or practices, including the use of any "deception, **[*24]** fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission." *815 Ill. Comp. Stat. § 505/2*. To prevail on a claim under the Act, Wigod must establish the following: (1) an unfair or deceptive act by the defendant; (2) the defendant's intention that the plaintiff rely on the unfair or deceptive act; (3) the unfair or deceptive act occurred in the course of trade or commerce; and (4) the unfair or deceptive act proximately caused the plaintiff's damages. *See Siegel v. Shell Oil Co., 612 F.3d 932, 934-35 (7th Cir. 2010)* (applying Illinois law).

Wells Fargo argues that Wigod's complaint fails to plausibly suggest that she would be able to establish two of the required elements. First, it contends that Wigod's complaint does not plausibly suggest that she could establish an intent to deceive. The court agrees. Wigod argues that Wells Fargo lured her into pursuing a permanent modification all the while knowing that it would never offer those borrowers a permanent modification. But it also alleges that Wells Fargo's participation in HAMP was voluntary. If **[*25]** Wells Fargo was intent on denying permanent modifications to borrowers such as Wigod, it would make no sense for Wells Fargo to voluntarily participate in a program aimed at providing modifications. In other words, if Wells Fargo did not want to permanently modify its borrowers' mortgages, it would not have chosen to voluntarily participate in the government's modification program. Wigod contends that Wells Fargo's motivation was to "extract as much money as possible from borrowers Defendant identified as being at risk for default prior to foreclosure," but by sending Wigod a Temporary Payment Plan, Wells Fargo agreed to accept *less* from her each month for four months than she was previously obligated to pay. Thus, Wigod's allegations do not plausibly suggest an intent to deceive.

Second, Wells Fargo contends that Wigod's allegations do not plausibly suggest that she has suffered any injury. Wigod alleges that she was injured because she poured all her financial resources into making the four payments required under the Trial Payment Plan, and therefore was unable to "pursue other avenues for saving her home and credit." Am. Compl. [23-1] ¶ 125. However, the fact that Wells Fargo agreed **[*26]** not to foreclose on her home if she made substantially reduced payments for four months, as opposed to the full payment she was otherwise obligated to pay, would have left her with more financial resources to pursue other options, rather than fewer resources. Additionally, to establish damages under the Consumer Fraud Act, Wigod must be able to show that Wells Fargo's alleged "deception deprive[d] the plaintiff of the benefit of her bargain by causing her to pay more than the actual value of the property." *Kim v. Carter's Inc., 598 F.3d 362, 365 (7th Cir. 2010)* (internal quotation marks and citation omitted). Given Wigod's allegation that Wells Fargo agreed not to foreclose on her home even if she paid less than she owed, her complaint does not plausibly suggest that she suffered any actual pecuniary loss as a result of Wells Fargo's alleged deception. *Id.* (to establish claim under Consumer Fraud Act, plaintiff must have suffered an "actual pecuniary loss").

Accordingly, Wigod has not plausibly suggested an intent to deceive or an injury proximately caused by the alleged deception, and therefore Wells Fargo's motion to dismiss her claim under Illinois' Consumer Fraud and Deceptive Practices **[*27]** Act is granted. Because she cannot allege an intent to deceive or damages that would be consistent with her allegations that Wells Fargo agreed to a trial period of accepting monthly payments that were less than Wigod owed, the consumer fraud claim in Count VII is dismissed with prejudice.

CONCLUSION

For the reasons stated, the court grants Wells Fargo's motion to dismiss and dismisses Wigod's claims with prejudice. The clerk is directed to enter a *Rule 58* judgment and terminate this case from the court's docket.

DATE: January 25, 2011

/s/ Blanche M. Manning

Judge Blanche M. Manning

United States District Judge

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