No. 102A20-3 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

CHESTER TAYLOR III, RONDA and BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE and ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLEY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE, Plaintiffs, v. BANK OF AMERICA, N.A., Defendant.	From Mecklenburg County

****

DEFENDANT-APPELLANT'S NEW BRIEF

****

INDEX

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution and Statutes

Other Authorities

No. 102A20-3 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

CHESTER TAYLOR III, RONDA and BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE and ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLEY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE, Plaintiffs, v. BANK OF AMERICA, N.A., Defendant.	From Mecklenburg County

****

DEFENDANT-APPELLANT'S NEW BRIEF

****

ISSUES PRESENTED

1. Whether the Court of Appeals' 29 December 2022 majority erred by holding that Plaintiffs, despite affirmatively pleading awareness of their claimed injuries years before they brought suit, could avoid the applicable statutes of limitations solely by alleging they were not "aware of their injury" until retaining their current attorneys.

2. Whether the original panel of the Court of Appeals was correct in its unanimous 31 December 2020 ruling that Plaintiffs' claims were barred by the statute of limitations, *res judicata*, and collateral estoppel.

INTRODUCTION

In its latest opinion in this case, the Court of Appeals—in two sentences of analysis devoid of citation—discarded over a century of precedent holding that a statute of limitations starts running with the plaintiff's knowledge of an injury, not with the awareness of a specific fraud theory. *See*, *e.g.*, *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1 (2017); *Latham v. Latham*, 184 N.C. 55, 61–62 (1922). "North Carolina law has long recognized the principle that a party must timely bring an action upon discovery of an injury to avoid dismissal of the claim," this Court unanimously held in *Christenbury*. 370 N.C. at 2. Following that precedent, and faced with a complaint in which the Plaintiffs affirmatively alleged knowledge of their claimed injuries many years before filing suit, the Superior Court (Hon. Lisa C. Bell, presiding) dismissed this case primarily on statute-of-limitations grounds. The Court of Appeals unanimously affirmed. But then a new panel—over a dissent from Judge Dillon—reversed, in defiance of this Court's precedents. Compounding this error, the new panel ignored North Carolina's door-closing statue, N.C.G.S. § 1-21, which bars out-of-state plaintiffs from suing in North Carolina when their claims are time-

barred in their home states, and thus *also* defied the laws of other states that govern the claims of the mostly out-of-state Plaintiffs here. This Court should correct both errors.

Plaintiffs are mortgagors from six different states who defaulted on their loans, complain that Bank of America mishandled their applications for relief under the federal Home Affordable Modification Program (HAMP) back in 2009 and 2010, and claim that the loss of their properties to foreclosure between 2011 and 2014 was the culmination of a "fraudulent scheme." They waited until 2018 to sue, then argued that all they needed to do to avoid dismissal on statute-of-limitations grounds was to make a rote allegation that they are entitled to toll the statute. Their lawsuit is one of dozens of cases filed by the same attorneys, recycling the same boilerplate pleading essentially unaltered except for names and dates. Courts across the country have dismissed these cases as time-barred and as impermissible attempts to re-litigate long-closed foreclosure cases.

After considering 175 pages of briefing and holding a three-hour motion hearing, Judge Bell reached the same conclusion here and

dismissed Plaintiffs' complaint on limitations and *res judicata* grounds. *See* R pp 664–786, 655–56.

Plaintiffs appealed. The Court of Appeals unanimously affirmed the dismissal on both grounds, holding on *de novo* review that "plaintiffs' complaint fails on its face" because their own allegations established that they were on inquiry notice of their claims years before they filed suit, and that their lawsuit was an improper attempt to re-litigate their foreclosures. *Taylor v. Bank of Am., N.A.*, No. COA20-160, slip op. at 4–11 (N.C. App. Dec 31, 2020).

But after the opinion was issued, two panel members were replaced by newly seated judges, and Plaintiffs petitioned for rehearing. The newly constituted panel allowed the petition, but declined either to affirm or reverse the Superior Court's judgment. Instead, over a dissent from the remaining member of the original panel, the new panel said it could not "determine the reason behind the grant" or "properly review" the dismissal. *Taylor v. Bank of Am., N.A.*, No. 2021-NCCOA-556, slip op. at 6 (N.C. App. Oct. 5, 2021). The majority then remanded the case "for further factual findings and conclusions of law." *Id.* at 7.

Judge Dillon, in dissent, "continue[d] to believe that Judge Bell got it right." *Id.* at ¶ 12. He further stated:

> In their complaint, Plaintiffs essentially allege that they suffered harm when Defendant fraudulently refused to modify their respective mortgages . . . though they each qualified for a loan modification under HAMP. However, they did not file the complaint until 2018, more than three years after they were denied their modifications [and] more than three years after their respective homes were foreclosed upon. . . .
>
> I conclude that the applicable statute of limitations ceased to be tolled, if at all, at least by the time the foreclosures took place. By that time, Plaintiffs became aware that Defendant would not be modifying their respective loans. Indeed, our Supreme Court has held in a case involving fraud and breach of contract claims that the statute of limitations begins to run at least by the time the plaintiff becomes aware of the injury.
>
> It is evident from the face of the complaint that Plaintiffs did not bring suit until more than three years after they became aware of their injury. . . .

Id. at ¶¶ 15–18 (citing, *e.g.*, *Christenbury Eye Ctr. v. Medflow*, 370 N.C. 1, 9 (2017); citation omitted). On the basis of this dissent, Bank of America appealed to this Court.

On 4 November 2022, this Court ruled that the second panel erred by remanding the case instead of "fulfill[ing] its obligation to follow this Court's precedent" and conduct a proper appellate review. *Taylor v. Bank of Am., N.A.*, 382 N.C. 677, 678–80 (Nov. 4, 2022). On remand, the panel reached the merits—albeit in an abbreviated two-sentence analysis—and

the same 2-1 majority ordered the dismissal reversed. *Taylor v. Bank of Am., N.A.*, No. 2022-NCCOA-912 (Dec. 29, 2022). Judge Dillon again "dissent[ed] for the reasoning stated in my [original] dissent": dismissal was proper because "the complaint alleges [that] the foreclosures took place . . . more than three years before the complaint was filed." *Id*., slip op. ¶ 12. And because the statute of limitations starts running on notice of an injury, the clock started running at the time of the foreclosures at the very latest.

Like Judge Bell, Judge Dillon "got it right." *Id*. So did the original Court of Appeals panel when it affirmed the dismissal. Both rulings reflected a proper application of the law as stated in this Court's precedents to the pleaded facts. In contrast, the new majority's two-sentence analysis cited no case law or other authorities supporting its conclusion that "*when* Plaintiffs became aware of the [alleged] fraud will be dispositive" of the limitations issue. *Id*. at ¶ 9. That conclusion contradicts binding precedents of this Court (and equivalent precedents applicable to the out-of-state Plaintiffs) holding that the dispositive fact is the Plaintiffs' awareness of their injury, not their awareness of a specific fraud narrative. Thus the new majority's holding represents an

abrupt departure from longstanding law in North Carolina and elsewhere. On the basis of these and other errors manifest in the majority opinion, Bank of America respectfully urges this Court to reverse and reinstate the judgment of the Superior Court.

STATEMENT OF THE CASE

Plaintiff filed this action on 1 May 2018 in Mecklenburg County Superior Court. R p 11. Plaintiffs are residents of Arizona, California, Michigan, Nevada, North Carolina, and Wisconsin. R pp 197, 207. Defendant Bank of America, N.A., is a national bank headquartered in Charlotte, Mecklenburg County. R p 197. On a consent Motion to Designate Case as Exceptional, the Hon. Lisa C. Bell was appointed to preside under General Rule of Practice 2.1. R p 191.

Plaintiffs filed an Amended Complaint on 13 March 2019 (R p 197), and Defendant filed a Motion to Dismiss on 11 April 2019 (R p 633). Plaintiffs filed a Motion for Partial Summary Judgment on 12 April 2019. R p 637. The Superior Court heard argument on both motions on 29 May 2019. On 2 October 2019, it entered an Order holding all Plaintiffs' claims barred by the applicable statutes of limitation and by the doctrines of *res judicata* and collateral estoppel, and dismissing the case with prejudice

under Rule 12(b)(6). R pp 655–56. Plaintiffs noticed an appeal 24 October 2019.

The Court of Appeals (Berger, Dillon, Young, JJ.) affirmed the Superior Court's order on 31 December 2020. No. COA20-160, slip op. at 1–2 (N.C. App. Dec. 31, 2020) ("*Taylor I*"). On 2 February 2021, Plaintiffs filed a Petition for Rehearing. The petition was then allowed by a new Court of Appeals panel (Carpenter, Dillon, Jackson, JJ.) on 10 March 2021.

The new panel then issued an opinion 5 October 2021 remanding the case to the Superior Court to issue "factual findings and conclusions of law." No. 2021-NCCOA-556, slip op. ¶¶ 10–11 (N.C. App. Oct. 5, 2021) ("*Taylor II*"). Judge Dillon dissented.

Bank of America appealed to this Court on 8 November 2021 on the basis of the dissent. On 4 November 2022, this Court determined that "the Court of Appeals erred by remanding the case to the trial court" and remanded it back to the Court of Appeals for *de novo* review. *Taylor v. Bank of Am., N.A.*, 382 N.C. 677, 678–80 (Nov. 4, 2022).

On 29 December 2022, the Court of Appeals panel applied North Carolina law to each Plaintiff's claim and held it "sufficient[] . . . to

withstand a motion to dismiss." No. 2022-NCCOA-912, slip op. ¶ 9 (Dec. 29, 2022) ("Taylor III"). Judge Dillon again dissented. Defendant timely noticed this appeal on 24 January 2023.

STATEMENT OF GROUNDS FOR APPELLATE REVIEW

Review in this Court is proper pursuant to N.C.G.S. § 7A-30(2) based on the dissents in the Court of Appeals.

STATEMENT OF FACTS

Plaintiffs assert various claims arising from an alleged "scheme" by Bank of America to deny them loan modifications under the federal government's Home Affordable Modification Program. The Amended Complaint follows a long history of litigation concerning HAMP.

A. The Home Affordable Modification Program. The U.S. Treasury Department launched HAMP in 2009 in an effort to mitigate foreclosures in the wake of the last financial crisis.[1] Applicants could qualify for reduced loan payments under HAMP if they were experiencing genuine economic hardships preventing them staying

---

[1] *See generally* CONG. OVERSIGHT PANEL, APR. OVERSIGHT REP.: EVALUATING PROGRESS ON TARP FORECLOSURE MITIG. PROGS. 9 (Apr. 14, 2010), available at *http://www.gpo.gov/fdsys/pkg/CPRT-111JPRT55737/pdf/CPRT-11JPRT55737.pdf*.

current on their loans, but not so severe that they would be likely to slide back into default even with the relief.[2] Servicers were instructed to place potentially qualifying borrowers into Trial Period Plans, during which foreclosure proceedings were stayed and applicants were expected to show their ability to sustain modified payments and submit financial documents to establish eligibility for permanent relief. *See id.*

B. The HAMP MDL. From HAMP's inception, complaints from borrowers who did not obtain permanent modifications—from every participating servicer, including Bank of America—peppered court dockets across the country. Among these, dozens of putative class actions were centralized into federal Multi-District Litigations.[3] Among those was a putative class action against Bank of America referenced in Plaintiffs' complaint, alleging "mismanagement of the HAMP modification process." R p 207 (referred to here as the "HAMP MDL").

---

[2] *See* U.S. Dep't of Treas., Home Affordable Mod. Prog. Guidelines (Mar. 4, 2009), available at *http://www.treasury.gov/press-center/pressreleases/Documents/modification_program_guidelines.pdf*.

[3] *E.g.*, *In re Bank of Am. HAMP Contract Litig.*, No. 10-2193 (D. Mass.); *In re JPMorgan Chase Mortg. Mod. Litig.*, No. 10-2290 (D. Mass.); *In re CitiMortgage, Inc. HAMP Litig.*, No. 11-2274 (C.D. Cal.).

When the HAMP MDL plaintiffs (unsuccessfully) moved for class certification in June 2013, their attorneys found a handful of former bank employees and outside contractors who had been terminated by Bank of America and who agreed to sign declarations accusing the bank of a conspiracy to defraud vulnerable homeowners. *See* R pp 201–04. The MDL court did not credit these declarations when it denied class certification, but their public filing and ensuing media coverage resulted in the declarations still being cited years later to support claims in numerous unrelated lawsuits, including this one. *See id.*

C. Origin of Plaintiffs' Complaint. The complaint in this case is based on a template Plaintiffs' counsel and affiliated co-counsel have filed around the country. Relying on the declarations filed years before in the HAMP MDL, the complaint accuses Bank of America of devising a fraudulent scheme to deny loan modifications to qualified borrowers, and then asserts that each plaintiff was improperly denied a loan modification and so must have been a victim of this "scheme." *See id.*

The first court to address a version of this complaint dismissed it as time-barred and rejected the argument, also made by Plaintiffs here, that the statute of limitations was tolled until the plaintiff's attorney

advised her to sue. It ruled that the plaintiff "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." *Cantrell v. Bank of Am., N.A.*, No. 16-3122, 2017 WL 1246356, at *3 (W.D. Ark. Apr. 3, 2017). The court further held that "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" back in 2011, when she received written notice from the bank on her HAMP application and lost her property to foreclosure. *Id*.

The boilerplate complaint spread to other courts, which likewise rejected it. *E.g.*, *Mandosia v. Bank of Am., N.A.*, No. 17-8153, 2018 U.S. Dist. LEXIS 45237 (C.D. Cal. Mar. 15, 2018), *aff'd*, 794 F. App'x 623 (9th Cir. 2020) (limitations period started running when plaintiff was denied loan modification); *Jones v. Bank of Am., N.A.*, No. 18-0012, 2018 WL 4095687, at *8 n.5 (N.D. Ala. Aug. 28, 2018) (refusing to toll limitations period because plaintiff "was in a position" to "investigat[e] the matter" while applying for HAMP).

In Florida, copies of the complaint were filed on behalf of dozens of plaintiffs in federal and state court. The first, *Torres v. Bank of Am., N.A.*,

No. 17-1534, 2018 WL 573406, at *5 (M.D. Fla. Jan. 26, 2018), was likewise dismissed as time-barred on the ground that the plaintiffs' fraud allegations recycled the claims made in the HAMP MDL and that "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." Numerous "nearly identical cases" were dismissed as time-barred on the same ground. *E.g.*, *Clavelo v. Bank of Am., N.A.*, No. 17-2644, 2018 U.S. Dist. LEXIS 178789, at *2 (M.D. Fla. Sept. 13, 2018). Most of the rest were dismissed as "circuitous but unmistakable attempt[s] to impugn the validity of [] foreclosure judgment[s]" and therefore barred both on jurisdictional grounds and by *res judicata*. *E.g.*, *Peralta v. Bank of Am., N.A.*, No. 17-2580, 2018 WL 3548744, at *4 (M.D. Fla. July 24, 2018).[4]

---

[4] *Accord*, *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).

Attempts to relitigate these dismissals in Florida state court have also failed to dodge the statute of limitations. *See Salazar v. Bank of Am., N.A.*, No. 18-CA-010252, 2020 Fla. Cir. LEXIS 2275 (Fla. Cir. Ct. Oct. 21, 2020) ("[T]he court rejects the notion that a statute of limitations can stay in suspension until one talks to an attorney."); *Acosta v. Bank of Am., N.A.*, No. 18-CA-010491, slip op. at 2 (Fla. Cir. Ct. Aug. 10, 2022) ("Plaintiffs' claims are barred by the statute of limitations and [] the statute is not tolled by their allegations of fraudulent concealment.").

D. The Current Complaint. Plaintiffs 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, and Zelmon McBride brought the instant lawsuit in Mecklenburg County Superior Court on May 1, 2018. R pp 8–188. Taylor lives in Wrightsville Beach; the remaining Plaintiffs live across the country and sue over properties located in California, Arizona, Minnesota, and Michigan. R pp 207, 216, 224, 231, 239, 247, 254, 262, 271. (Price was evidently named in error: no allegations about her appeared in the complaint, and she is not included in the caption of the amended complaint. R p 197. Allegations about Whiteside appeared in

the complaint, R p 61, but not in the amended complaint. Both are listed in the caption on Plaintiffs' Notice of Appeal, R p 657.) They assert claims for common-law fraud, fraudulent concealment, intentional misrepresentation, promissory estoppel, conversion, unjust enrichment, and negligence under the laws of unspecified jurisdictions, plus a claim under the North Carolina Unfair and Deceptive Trade Practices Act, N.C.G.S. § 75-1 *et seq*. R pp 281–301.

As in the cases described in Part C above, the Amended Complaint is premised on Plaintiffs' failures to obtain HAMP modifications as far back as 2009 and their theory that these failures reflected a scheme "specifically designed by BOA to set [Plaintiffs] up for foreclosure." R pp 209, 217, 232, 240–41, 249, 256, 263–64, 272. All Plaintiffs allege foreclosures of their properties, *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. In all cases, they blame these outcomes on the "scheme" alleged in the HAMP MDL declarations, and argue their claims are not barred by the statute of limitations because they "did not know and could not have reasonably discovered these facts until they retained their attorneys." R p 200.

Taylor's allegations are illustrative. He alleges seeking a HAMP modification in February 2010 and promptly receiving a three-month trial plan. R pp 208, 212. Plaintiffs allege that these plans promise that "[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. He 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. He claims he was "frustrate[d]" by "more than thirty" unnecessary requests to "resubmit[] his application and supporting information." R pp 211–12. He then 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 was entered against him. R p 213.

The other Plaintiffs repeat those allegations with different names and dates. Their alleged conversations with the bank representatives who allegedly steered them into harm all date back to 2009 and 2010. R pp 216, 225, 231, 233, 240, 242, 248, 250, 255, 257, 263, 265, 271, 273.

The foreclosures or related outcomes that allegedly injured them occurred in 2011 or 2012, except one in January 2014. R pp 213, 222, 228, 237, 245, 253, 260, 268, 276.

Plaintiffs' counsel followed *Taylor* with similar complaints on behalf of dozens more plaintiffs, resulting in designation of the cases as exceptional civil cases under General Rule of Practice 2.1 and their assignment to Judge Bell. R p 191. On 21 March 2019, Judge Bell entered a case-management order staying all the cases filed after *Taylor* and designating *Taylor* "as the first case for briefing of Defendants' Motion to Dismiss and related motions," with the expectation that *Taylor*'s disposition would guide the rest. R pp 631–32.

E. The Dismissal. On 11 April 2019, Bank of America moved under Rule 12(b)(6) to dismiss *Taylor* as barred by the statute of limitations and *res judicata*, among other grounds. R p 633.

As to the time bar, Bank of America relied on Plaintiffs' allegations that they were frustrated by the handling and denial of their HAMP applications as far back as 2009, and had foreclosure judgments entered against them between April 2011 and January 2014. R. pp. 210, 212, 213, 219, 221, 225, 227, 228, 233–34, 236, 237, 244, 245, 250, 252, 253, 257,

259, 260, 265, 273–74, 274–75, 276. Based on North Carolina case law and equivalent precedents in each Plaintiff's home state holding that the limitations period starts running "as soon as the injury became apparent . . . or should reasonably have become apparent," *Christenbury*, 370 N.C. at 6, Bank of America argued that Plaintiffs could not, as a matter of law, toll the statutes of limitations by contending they lacked notice of all elements of their claims until retaining counsel.

As to *res judicata*, Bank of America relied on the principle that no foreclosure can occur without an adjudication that there is "a valid debt" and a "right to foreclose." *In re Raynor*, 229 N.C. App. 12, 16 (2013). Thus, Bank of America argued, Plaintiffs' claims that their debts were "fraudulent" because they were "wrongfully denied [] HAMP modification[s]" to "set [them] up for foreclosure" could have been asserted in their foreclosure cases and cannot be re-litigated now. *E.g.*, R pp 209, 213, 285.

Plaintiffs cross-moved for summary judgment and noticed that motion for hearing alongside the motion to dismiss. R p 637. Their motion contended that a 2012 industry-wide settlement between the Department of Justice and the nation's five largest mortgage servicers

(including Bank of America) "involve[d] identical issues in fact and law" as their lawsuit, and thus warranted entry of judgment in Plaintiffs' favor on *res judicata* grounds. R pp 206, 642, 647. Bank of America countered that if "identical" claims were indeed asserted nationwide and settled in 2012, *res judicata* would work in the *other* direction and bar *Plaintiffs'* attempt to re-litigate them. It would also negate their arguments on the limitations front that they were incapable of discovering their claims until 2018.

Judge Bell heard three hours of oral argument on both motions. R pp 664–786. After taking the argument and extensive briefing under advisement, the Court granted Bank of America's motion to dismiss and denied Plaintiffs' motion for summary judgment. R p 655. Its Order entered 3 October 2019 stated "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."

F. The Appeal. Plaintiffs appealed on 24 October 2019. On 31 December 2020, a Court of Appeals panel of Judges, Berger, Dillon, and Young unanimously affirmed the Superior Court's dismissal on both

grounds. As a threshold matter, the court noted that Plaintiffs had argued only North Carolina law, but "multiple plaintiffs are residents of states other than North Carolina" and therefore subject to the statutes of limitations of their home states. *Taylor I*, slip op. at 5 (citing *United Va. Bank v. Air-Lift Assocs., Inc.*, 79 N.C. App. 315, 321 (1986)). But "[e]ven assuming *arguendo* that North Carolina's statute of limitations applies," the court continued, "plaintiffs' complaint fails on its face." *Id.* at 6. The statute gave Plaintiffs three years to sue and started running either from "actual discovery" of their claims or when they "should have been discovered in the exercise of reasonable diligence." *Id.* (quoting *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 547 (2003)). Plaintiffs tried to argue that these are *always* questions of fact for a jury. But the court ruled—correctly—that when the dispositive facts are alleged in the complaint and "not in dispute," application of the statute of limitations is "a matter of law." *Id.* (citing *State Farm*, 161 N.C. App. at 548).

Then Judges Berger and Young left the court. On 4 February 2021, Plaintiffs petitioned for rehearing. A reconstituted panel with newly seated Judges Carpenter and Jackson taking Judge Young's and Judge Berger's places allowed the petition on 10 March 2021.

On 5 October 2021, the new panel issued a decision—but not on the merits. Instead, it said that the new panel could not "conduct a meaningful review of the trial court's conclusions of law" because it could not "determine the reason" behind the Superior Court's rulings. *Taylor II*, slip op. ¶¶ 8, 10. It remanded the case and directed the Superior Court to "enter a new order" with "factual findings and conclusions of law" that "sustain its determination." *Id.* at ¶¶ 10–11.

Judge Dillon dissented, writing: "I was on the panel which issued the original opinion in this appeal. I continue to believe that Judge Bell got it right." *Id.* at ¶ 12 (citation omitted). As a matter of law, the dissent stated, "the statute of limitations begins to run at least by the time the plaintiff becomes aware of the injury." *Id.* at ¶ 17 (citing *Christenbury*, *supra*). The alleged injury here was that Bank of America allegedly "refused to modify [Plaintiffs'] respective mortgages" and that their properties were later "foreclosed upon." *Id.* at ¶¶ 15–16. Thus, "the applicable statute of limitations ceased to be tolled, if at all, at least by the time the foreclosures took place." *Id.* at ¶ 17. And "Plaintiffs did not bring suit until more than three years after." *Id.* at ¶ 18. Plaintiffs' assertions that "[t]hey learned they might have a legal claim for fraud

only after they had consulted attorneys years later" were not relevant, the dissent reasoned, because "[t]hey should have sought legal advice once they suffered their injury." *Id.* "Accordingly," the dissent concluded, "Judge Bell ruled correctly," and "her dismissal orders are consistent with a number of dismissal orders from across the country involving similar claims." *Id.*

G. This Court's Decision and Remand. On 4 November 2022, this Court ruled that "the Court of Appeals erred by remanding the case to the trial court." *Taylor v. Bank of Am., N.A.*, 382 N.C. 677, 678 (2022). The Court found "no legal basis or practical reason" to require the Court to make "any factual findings or conclusions of law" in a dismissal order, because the Rules of Civil Procedure don't require any, and an appellate court has no need to perform "an assessment or review of the trial court's reasoning" to conduct a *de novo* review. *Id.* at 679–80. The Court concluded that "the Court of Appeals erred by not conducting a de novo review of the sufficiency of the allegations in plaintiffs' complaint as required by the well-established standard of review," and vacated the decision with instructions to the Court of Appeals "to fulfill its obligation

to follow this Court's precedent and to address" whether the complaint is sufficient to state a claim. *Id*. at 680.

On remand, in a split opinion issued 29 December 2022, the same two-judge majority applied North Carolina's statute of limitations to all Plaintiffs' claims and held their allegations "sufficient[] . . . to withstand a motion to dismiss." *Taylor III*, slip op. ¶ 9. The majority stated that "Plaintiffs allege they are victims of a fraudulent scheme exacted by Defendant" and that they "remained unaware of Defendant's alleged fraudulent scheme for many years." *Id*. at ¶¶ 6, 9. The majority then ruled, without citation to any law or precedent, that "the determination of *when* Plaintiffs became aware of the [alleged] fraud will be dispositive of whether the applicable statute of limitations had expired prior to Plaintiffs bringing their claims." *Id*. at ¶ 9.

Judge Dillon again dissented "for the reasoning stated in my [prior] dissent." *Id*. at ¶ 12. This appeal followed.

STANDARD OF REVIEW

This Court "review[s] a dismissal under Rule 12(b)(6) *de novo*." *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5 (2017). "When the complaint on its face reveals that no law supports the claim . . . or discloses facts that necessarily defeat the claim, dismissal is proper." *Id.* (quoting *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448 (2015)). And "[o]nce a defendant raises a statute of limitations defense, 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).

ARGUMENT

I.

Plaintiffs' Claims Are Time-Barred Under All Applicable Statutes of Limitations.

This case came before the Court of Appeals three times, and the Court "got it right" the first time. *Taylor II*, slip op. ¶ 12 (Dillon, J., dissenting). The second time, the panel majority erred by avoiding the merits. 382 N.C. at 680. The third time, it erred *on* the merits. This Court should correct the Court of Appeals' erroneous departure from well-settled North Carolina law and its erroneous failure to consider the laws

of the jurisdictions that govern the out-of-state Plaintiffs' claims, and reinstate the Superior Court's dismissal order.

A. The majority erred giving out-of-state Plaintiffs the benefit of North Carolina law in violation of North Carolina's door-closing statute.

At every stage of this case, Plaintiffs relied solely on North Carolina law. But North Carolina's door-closing statute 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. Plaintiffs have the burden of showing that their claims are timely. *See Horton*, *supra*. Because of the door-closing statute, that means Plaintiffs also carry the burden of showing that their claims are timely under "the laws of the jurisdiction in which [they] arose"—not only in North Carolina. N.C.G.S. § 1-21.[5] Plaintiffs did not carry this burden, and, in choosing to present arguments only under North Carolina law at every stage of these proceedings, did not even try. This, by itself, is sufficient ground on which to reverse the Court of Appeals as to every out-of-state Plaintiff.

---

[5] More precisely, Plaintiffs must show both. As Plaintiffs argue, their claims must be timely under North Carolina law to avoid dismissal, but under N.C.G.S. § 1-21, they must *also* be timely where they arose

Plaintiffs' claims each arose in their home states, as the places where "the real estate at issue is located" and where their alleged "economic loss was felt." *Synovus Bank v. Coleman*, 887 F. Supp. 2d 659, 669 (W.D.N.C. 2012) (citing *United Va. Bank v. Air-Lift Assocs.*, 979 N.C. App. 315, 321 (1986), for the proposition that "Virginia law applied where bank's wrongful sale of collateral occurred in Virginia"). When the original Court of Appeals panel affirmed the dismissal, it correctly recognized this and held that because most "plaintiffs are residents of states other than North Carolina and suffered their purported harms elsewhere," "[p]ursuant to North Carolina law, the applicable statutes of limitations for these claims are those which apply in those states." *Taylor I*, slip op. at 5.

But after granting reconsideration, the new Court of Appeals majority—without acknowledging the applicable law was in dispute—analyzed all Plaintiffs' claims under North Carolina's statute of limitations and North Carolina's rules for when an action accrues. *Taylor III*, slip op. ¶ 8. This was erroneous in multiple respects.

First, the new panel had no authority to undo the original panel's holding that Plaintiffs' home-state statutes of limitation control, because

Plaintiffs' petition for rehearing did not contest that ruling. *See* Pet. for Reh'g, No. COA20-160 (filed Feb. 4, 2021). Under North Carolina's rehearing rules, rehearing can be granted "as to all or fewer than all points suggested in the petition"—not *more* points than suggested in the petition. N.C. R. APP. P. 31(c); *see also* N.C. R. APP. P. 28(b)(6). The second panel thus lacked the power to reverse the original panel's resolution of an issue on which rehearing was never sought.

Second, Plaintiffs never argued, at any stage of this litigation, that their claims are timely under any state's laws other than North Carolina's, and so waived any right to evade their home-state statutes of limitations if North Carolina's door-closing statute is given its appropriate and intended effect. *See*, *e.g.*, *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309 (2001) ("issues and theories of a case not raised below will not be considered on appeal"). They chose to rest exclusively on North Carolina law under the assumption that only *lex fori*, the law of the forum, was relevant, and presented no argument to carry their burden of showing that their claims are timely under their home-state laws. So, not only did Plaintiffs fail to preserve the issue of the applicable law in their Petition for Rehearing,

they also failed in their briefing and argument to the Superior Court and Court of Appeals to preserve any argument that their claims are timely if their home-state laws apply. The new panel erred by letting Plaintiffs prevail on the basis of an argument Plaintiffs waived twice over—and, as noted, without any apparent realization that it was doing so.

It also erred on the substance to the extent its application of North Carolina law reflects a *sub silentio* ruling on the question of which law applies. As the Court of Appeals recently made clear in another case, N.C.G.S. § 1-21 is "a legislative exception" to the "traditional" rule in which "procedural rights are determined by *lex fori*, the law of the forum." *Izzy Air, LLC v. Triad Aviation, Inc.*, 284 N.C. App. 655, 658 (2022). In that case, it affirmed dismissal, ruling:

> As Plaintiffs' cause of action arose in South Carolina and Plaintiffs failed to file this action before South Carolina's three-year statute of limitation ran, this failure bars their claim not only in South Carolina, but also in North Carolina, pursuant to N.C. Gen. Stat. § 1-21.

Id. at 660. The Court erred by failing to hold likewise here. Then it compounded all of these errors by reaching a conclusion contrary *both* to North Carolina law and the laws of the other states. As set forth further in Part I.B below, case law in each applicable jurisdiction expressly

forecloses the legal principle the majority pronounced (however erroneously) under North Carolina law. *Compare Taylor III*, slip op. ¶ 8 (ruling that "*when* Plaintiffs became aware of the [alleged] fraud will be dispositive"), *with*, *e.g.*, *Siskin v. Koral*, No. B241715, 2013 WL 5477376, at *8 (Cal. Ct. App. Oct. 2, 2013) (ruling that plaintiff's "actual knowledge is irrelevant").[6] In the case of the Michigan Plaintiff (R p 254), the applicable law forecloses her claims so categorically there is no room for Plaintiffs to argue otherwise. *Compare* R p 705 (invoking "the rule about discovery in regards to fraud" "[i]n North Carolina") *with Boyle v. GMC*, 661 N.W.2d 557, 558, 560 (Mich. 2003) (holding Michigan law "reject[s] a discovery rule in fraud cases").

The door-closing rule is unequivocal: "No action barred in the state of origin may be litigated here." *Little v. Stevens*, 267 N.C. 328, 334 (1966). "The purpose of this provision is to prevent a non-resident claimant from coming into this State and prosecuting a claim . . . under the [North Carolina] statute of limitations, where the claim would be outlawed under the statute prevailing in the state where the cause of

---

[6] *Accord*, *e.g.*, *Pedro v. City of L.A.*, 229 Cal. App. 4th 87, 105 (Cal. Ct. App. 2014) ("The word 'discovery' as used in" the discovery rule "is not synonymous with actual knowledge").

action arose." *Id.* at 332. But that is precisely what Plaintiffs are attempting here. The panel majority's failure to address—much less apply—N.C.G.S. § 1-21, the door-closing statute, was reversible error. And Plaintiffs' failure to carry their "burden of showing that the action was instituted within the prescribed period" under each applicable statute of limitations requires the dismissal of each out-of-state Plaintiff's claim. *Horton*, 344 N.C. at 136.

B. The majority erred in its cursory analysis of the limitations issues.

The majority based its decision on the assumption that a statute of limitations "[g]enerally" presents "a question of fact for a jury." *Taylor III*, slip op. ¶ 8. But whether or not this is true "generally" does not aid the Court in determining whether it is true *here*. It is well-established that "[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 statute bars the claim." *Wilson v. Pershing, LLC*, 253 N.C. App. 643, 652 (2017). And that is the situation here. "[W]here the facts are admitted or established the question of the bar of the applicable statute becomes a question of law"—not a question of fact. *In re Will of*

Evans, 46 N.C. App. 72, 75–77 (1980). Judge Bell thus properly considered the statute of limitations in dismissing the complaint.

1. The majority erred in holding the dates of Plaintiffs' actual awareness of the supposed fraud "dispositive."

The majority held that Plaintiffs had alleged enough to evade the statute of limitations because they alleged a fraud, and further alleged they were "unaware" of it "for many years." *Taylor III*, slip op. ¶ 9. The majority then held, without citation, that "the determination of *when* Plaintiffs became aware of the [alleged] fraud will be dispositive." *Id*. This is fundamentally wrong as a matter of well-established law—in North Carolina, and elsewhere.

Although North Carolina law applies to only one Plaintiff's claims, it is a useful place to begin. North Carolina's three-year fraud statute of limitations runs "from the time when the fraud or mistake was known or should have been discovered in the exercise of ordinary diligence." *Peacock v. Barnes*, 142 N.C. 215, 218 (1906). *Peacock*'s reference to when the claim "*should* have been discovered" is a clear indication that there is, as a matter of law, *nothing* "dispositive" about when Plaintiffs *actually* "became aware" of their current fraud theory. *Taylor III*, slip op. ¶ 9.

This Court's application of this rule in *Christenbury* is instructive. The plaintiff there brought contract and fraud claims alleging the defendants cheated it out of royalties they were obliged to pay for more than "ten years," but "never" paid. 370 N.C. at 3. The Court did not inquire as to when the plaintiff knew it was a fraud victim, because that is not the dispositive question. Rather, it applied "well settled" precedent holding that "where the right of a party is once violated the injury immediately ensues and the cause of action arises," and held that the statutes of limitation started running "when defendants failed to pay the first [] royalty payment," which was sufficient to put the plaintiff on "notice of its injury." *Id.* at 6 (quoting *Sloan v. Hart*, 150 N.C. 269, 274 (1909)). And with such "notice" came a duty to "inquire" into potential claims and "initiate[] [them] within the prescribed time or not at all." *Id.* at 5–6 (quoting *Shearin v. Lloyd*, 246 N.C. 363, 370 (1957)).

By the same token, here, where Plaintiffs contend they did not receive loan modifications they were owed, they were on notice of that alleged injury at the time they failed to receive them, and were then on the clock to investigate and initiate any claims within the "statutorily prescribed period." *Id.* at 5. At no step of this analysis is their

"unaware[ness] of Defendant's alleged fraudulent scheme" even relevant, much less dispositive. *Taylor III*, slip op. ¶ 9.

When this case last reached this Court, Plaintiffs tried to distinguish *Christenbury* by saying it was a contract case, not a fraud case.[7] That's not right: the *Christenbury* plaintiff asserted "four claims," including both "breach of contract" and "fraud." 370 N.C. at 3. *Christenbury* expressly applied the fraud statute of limitations, N.C.G.S. § 1-52(9), and quoted the legal standard from *Sloan* expressly applicable both to "the law of contracts, *as well as torts*," in upholding dismissal on limitations grounds. *Id*. at 6, 7 n.4 (emphasis added); *Sloan*, 150 N.C. at 274. Moreover, Plaintiffs' attempt to frame *Christenbury* as a contract case is doubly misplaced, because *this case, too, is a contract case*: Plaintiffs claim they were denied HAMP modifications in purported violation of written "agreement[s]" they reached with the bank. R pp 199, 212, 221, 227, 236, 244, 259, 267, 275.[8]

---

[7] *See Taylor v. Bank of Am., N.A.*, No. 102A20-2, available at *https://youtu.be/bM70e61VD1s?t=2661.*

[8] If the dismissal of their claims is not upheld on limitations grounds, the Superior Court will have occasion to decide whether it must alternatively be dismissed as an improper attempt to transform a contract dispute into a tort action. *See N.C. State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294

The law of the out-of-state Plaintiffs' home states is consistent with *Christenbury*. There, as here, "actual knowledge is irrelevant" (*Siskin*, *supra*), and the "discovery rule charges a plaintiff with presumptive knowledge of information that would have been revealed if he or she had conducted a reasonable investigation." *Pedro*, 229 Cal. App. 4th at 104; *accord*, *e.g.*, *Blackburn v. Summit Healthcare Ass'n*, 829 F. App'x 823, 825–26 (9th Cir. 2020) ("Under Arizona law, . . . all of Plaintiffs' claims accrued [when] Plaintiffs had knowledge of their injuries. . . . Such knowledge was sufficient to trigger a duty to investigate.") (citing *ELM Retirement Ctr., LP v. Callaway*, 246 P.3d 938, 941 (Ariz. Ct. App. 2010) (discovery rule "does not permit a party to hide behind its ignorance when reasonable investigation would have alerted it to the claim")).

N.C. 73, 81 (1978) ("Ordinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor.").

2. The majority erred finding the dates of Plaintiffs' awareness of their alleged injuries "a question of fact for a jury," when those dates were expressly pleaded in their complaint.

The "dispositive" question here is *not* "when Plaintiffs became aware of the [alleged] fraud" (*Taylor III*, slip op. ¶ 9), but rather when Plaintiffs became aware of their alleged *injuries* or anything else giving them cause to investigate. *See, e.g.*, *Christenbury*, 370 N.C. at 2 ("North Carolina law has long recognized the principle that a party must timely bring an action upon discovery of an injury to avoid dismissal.").[9] The majority erred in finding any "question of fact for a jury" on this issue (*Taylor III*, slip op. ¶ 8), because the complaint affirmatively alleges Plaintiffs' awareness of their alleged injuries when they happened.

As Judge Dillon's dissent correctly observed, "[i]t is evident from the face of the face of the complaint" that Plaintiffs "should have []

---

[9] *Accord*, *e.g.*, *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 492 (1985) ("a cause of action accrues at the time the injury occurs"); *Crabbe v. White*, 248 P.2d 193, 196 (Cal. 1952) ("[A] mere averment of ignorance of a fact which a party might with reasonable diligence have discovered is not enough to postpone the running of the statute. . . . [I]f it appears that the plaintiff had notice or information of circumstances which would put him on an inquiry which, if followed, would lead to knowledge, or that the facts were presumptively within his knowledge, he will be deemed to have had actual knowledge of these facts.").

discovered" their claims "more than three years" before they brought suit, because they were concededly "aware of their injury": the foreclosures on "their respective properties" or related property losses. *Taylor II*, slip op. ¶ 18. Thus, "the applicable statute of limitations ceased to be tolled, if at all, at least by the time the foreclosures took place." *Id*. And those times are affirmatively alleged in the complaint for every Plaintiff:

Plaintiff	*Alleged Injury*	*State*
Taylor	Sept. 25, 2012 foreclosure (R p 213)	North Carolina
Warlicks	Sept. 21, 2011 bankruptcy (R p 222)	California
Mendez	Aug. 22, 2012 short sale (R p 228)	California
Martinez	Aug. 4, 2011 foreclosure (R p 237)	California
Aleshires	Aug. 31, 2011 foreclosure (R p 245)	Minnesota
Perry	Jan. 7, 2014 foreclosure (R p 253)	Arizona
Stephan	June 7, 2011 foreclosure (R p 260)	Michigan
Peacock	Oct. 4, 2012 short sale (R p 268)	California
McBride	Apr. 15, 2011 foreclosure (R p 276)	Arizona

This lawsuit was not filed until 1 May 2018. R p 3. For every Plaintiff, the time bar is apparent from the face of the complaint.

Plaintiffs tried to evade the consequences of their own allegations in two ways. First, they contended that despite their knowledge of their alleged injuries, they lacked knowledge of the fraud theory derived from the 2013 HAMP MDL declarations. The Court of Appeals rejected a squarely analogous theory in *Doe v. Roman Catholic Diocese of Charlotte*, 242 N.C. App. 538, 543 (2015), where an alleged victim of clergy abuse

sued decades later, arguing that even though he knew of his harm, "he did not discover" he had "fraud-related" claims until decades later when he learned his abuse was part of a "pattern" the diocese "hid." The Court of Appeals found this immaterial and held the harm "put Doe on inquiry notice" as to any alleged fraud. *Id*. at 544.

Second, Plaintiffs argued to the trial court that they could survive dismissal so long as their complaint recited the words, "I did not know and I could not know," and that this recitation is "the end of the analysis." R p 706. But if saying those nine words were all it took to evade a statute of limitations, no complaint would *ever* be dismissed. Ample precedents of this Court and others dismissing complaints with conclusory allegations that the plaintiffs could not have discovered their claims establish that such a recitation is nowhere close to "the end of the analysis":

- In *Christenbury*, the plaintiff tried to excuse its "fail[ure] to assert its rights" to royalty payments for "fourteen years" by contending the royalties it was owed were "uniquely within the knowledge" of the defendants and the plaintiff "did not have the ability to discover the truth, excusing any further requirement to investigate." *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 2015 NCBC LEXIS 64, ¶¶ 27, 35 (N.C. Super. June 19, 2015). The Business Court ruled that "merely because Defendants might have additional information that was uniquely within their knowledge" "do[es] not excuse" Plaintiff's failure to take action

"upon Defendants' failure to make a report or to pay minimum royalties," and dismissed the case as time-barred. *Id*. at ¶ 35. This Court, as discussed, affirmed, "[b]ecause plaintiff had notice of its injury yet failed to assert its rights" "when defendants failed to pay the first [] royalty payment." 370 N.C. at 6.

- In *Stunzi v. Medlin Motors, Inc.*, 214 N.C. App. 332, 334 (2011), a plaintiff suing in 2009 over a 2004 car purchase tried to excuse his untimely complaint by claiming the defendant "willfully withheld th[e] information" that the car "had been branded a lemon." The Court of Appeals affirmed the dismissal of his fraud claim as time-barred, holding that "[p]laintiff's reliance on the discovery rule is misplaced" and that "the fraud should have been discovered" when plaintiff first bought the car and received a disclosure that the car had been repaired to meet acceptable operating standards. *Id*. at 337–38, 340.

- In *Wilson*, the plaintiff brought fraud claims over his inability to cash a check "issued 15 years" prior. 253 N.C. App. at 646. He tried to excuse his untimely claims by alleging the defendants' alleged fraud "could not have been discovered with reasonable diligence" "until Wilson's recent discovery of the check." *Id*. at 654. The Court of Appeals affirmed the dismissal of the claims as time-barred because the plaintiff "had the capacity to investigate the [] Account's status at any time," and thus his "failure to use due diligence in discovering the alleged fraud has been established as a matter of law." *Id*. at 655.

- In *Evans*, the plaintiffs brought suit in 1978 to contest a will admitted to probate on 1972. 46 N.C. App. at 73. They tried to avoid the statute of limitations by claiming another heir "misled them as to the contents of the will" and they did not "discover" this "fraud" until 1977. *Id*. at 76. The Court of Appeals rejected this argument because "the contents of the will were discoverable as a matter of public record," and affirmed dismissal. *Id*.

- In *DePalma v. Roman Cath. Diocese*, 167 N.C. App. 370, 2004 WL 2793377, at *7 (N.C. App. 2004), a plaintiff suing over a

> school football injury tried to avoid the statute of limitations by claiming he did not "discover" the school's "deception" about "the facts of the injury" until later. The Court of Appeals affirmed the dismissal of the case as time-barred because the plaintiff "knew [he] had been injured," and the cause of action "springs into existence" with the injury. *Id*. at *10–11 (quoting *McCarver v. Blythe*, 147 N.C. App. 49, 499 (2001)).

In every one of these cases, the plaintiffs in effect recited the same "I did not know and I could not know" language that Plaintiffs contend is enough to avoid dismissal. In every case, the court rejected that assertion and dismissed the complaint. And until the new Court of Appeals panel allowed the rehearing, this case was just another one in the same series: Plaintiffs sued years after their alleged injuries, tried to avoid the statute of limitations by claiming they did not know their injuries came from a supposed fraud, but failed to state a claim because the supposed fraud "did not preclude plaintiffs from taking prompt action in 2014" or earlier. *Taylor I*, slip op. at 8.

The dismissal of Plaintiffs' complaint was also consistent with "dismissal orders from courts across the country" rejecting near-identical versions of the very same complaint. *Taylor II*, slip op. ¶ 18. In *Mandosia*, the Ninth Circuit rejected the argument that the plaintiff's "fraud claim did not accrue until she learned about the [alleged] fraud," because by

her own account (in the same template complaint Plaintiffs use here), she was put on "inquiry notice" of her claims through her knowledge of the "missing or allegedly incomplete applications," "her receipt of a notice of foreclosure," or, "at the latest, the [] foreclosure sale of her home." 794 F. App'x at 625. *Cantrell* likewise held that the plaintiff "possessed all the facts she needed to enable her to file a lawsuit" when she experienced how the bank allegedly "processed her HAMP modification paperwork" or when she "lost her home to foreclosure/bankruptcy." 2017 WL 1246356, at *3. Such alleged harms give "notice" of a possible claim and impose the duty to investigate it and assert it "within the prescribed time or not at all." *Christenbury*, 370 N.C. at 5–6.

C. Plaintiffs' own allegations foreclose their discovery-rule and fraudulent-concealment arguments.

In the courts below, Plaintiffs went back and forth between relying on the discovery rule and the fraudulent-concealment doctrine, as though the two concepts were interchangeable. *See*, *e.g.*, R pp 279, 704. They are actually two separate doctrines, albeit with some overlapping elements.[10]

---

[10] The discovery rule determines when a claim accrues, while fraudulent concealment can "toll the running of the statute of limitations *after* the action has accrued." *Stallings v. Gunter*, 99 N.C. App. 710, 716 (1990).

Neither one assists Plaintiffs, given the facts pled in their own complaint.

The discovery rule—where it exists—merely provides that the fraud statute of limitations starts running either from "actual discovery" of Plaintiffs' claims, or when they "should have been discovered in the exercise of reasonable diligence," whichever comes first. *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 547 (2003). As already shown, the date Plaintiffs "should have [] discovered" their claims is tied as a matter of law to Plaintiffs' knowledge of their injuries. Once aware of their injuries—or any other "facts and circumstances" that would arouse "suspicion" of wrongdoing—Plaintiffs are then on "inquiry notice" as a matter of law. *Doe v. Roman Cath. Diocese of Charlotte*, 242 N.C. App. 538, 543–44 (2015). And once on inquiry notice, "then as a matter of law plaintiffs are charged with the knowledge that a reasonable inquiry would have disclosed." *Thorpe v. DeMent*, 69 N.C. App. 355, 361, *aff'd*, 312 N.C. 488 (1984).

Here, the complaint affirmatively alleges every fact pertinent to the legal analysis: the alleged injuries, the suspicions of wrongdoing, and the knowledge a reasonable inquiry would have disclosed. Their knowledge of their alleged injuries, as noted, is affirmatively pled through their

allegations about their foreclosures and property losses, but, as Judge Dillon's dissent pointed out, that is "at least" as far back as their knowledge goes. *Taylor II*, slip op. ¶ 17. Plaintiffs allege other injuries and suspicions going back even further.

Even before the foreclosures, Plaintiffs allege harm from the "wrongful[] deni[al]" of HAMP modifications *E.g.*, R pp 211–12. Such allegations that they are "receiving none of the pecuniary benefits" to which they claim to have been entitled are sufficient to establish they "knew, or with due diligence should have known, the facts constituting the alleged fraud" as a matter of law. *Hiatt v. Burlington Indus., Inc.*, 55 N.C. App. 523, 529–30 (1982); *accord*, *e.g.*, *Christenbury*, *supra*.

And even before the HAMP denials, Plaintiffs allege being "repeatedly" "frustrate[d]" by improper requests for missing documents and other grievances about the application process, to the point of making "frequent phone calls to ensure proper compliance with HAMP." *E.g.*, R p 211. Mortgagors making "frequent phone calls to ensure proper compliance" due to repeated frustrations cannot simultaneously claim they had no cause for suspicions and no discernible reason to make such inquiries. *See*, *e.g.*, *Mandosia*, 794 F. App'x at 625 (plaintiff's complaints

about "missing or allegedly incomplete [HAMP] applications" put her on inquiry notice).

Lastly, Plaintiffs also affirmatively allege "the knowledge that a reasonable inquiry would have disclosed." *Thorpe*, 69 N.C. App. at 361. Specifically, they say they concluded they were fraud victims when their current lawyers told them about:

> (i) The HAMP MDL "filed in 2011" alleging "mismanagement of the HAMP modification process" and "arbitrarily denied permanent modifications." R p 207.
>
> (ii) Declarations publicly filed in the HAMP MDL in 2013 accusing Bank of America of a "strategy" of "denying" and "delaying HAMP applications." R pp 201–02.[11]
>
> (iii) Suits filed by the federal government and 49 State attorneys general against five major mortgage servicers, including Bank of America, in 2011, which resulted in the $25 billion National Mortgage Settlement announced to the public in 2012. R p 206. Plaintiffs affirmatively allege that "[t]he conduct complained of" in their own complaint "involves identical issues in fact and law raised in the federal lawsuit" brought in 2011. R p 207.

---

[11] In an effort to extend the life of these allegations, Plaintiffs also cited a newer declaration dated 2017. R p 201. But it was a word-for-word copy of one of the 2013 declarations. *See Eddie Torres*, 2018 WL 573406, at *5 (refusing to toll statute of limitations based on the 2017 declaration because "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").

The immediately apparent fact about all these things Plaintiffs "learn[ed]" after making an inquiry is that they were all matters of public record in 2011, 2012, and 2013, and they are therefore things Plaintiffs would have "learn[ed]" earlier if they had made an inquiry earlier. R p 200; *see Evans*, 46 N.C. App. at 76 (claims time-barred because the "alleged fraud" was "discoverable as a matter of public record").

Neither North Carolina nor any other jurisdiction's law lets a plaintiff keep a statute of limitations suspended indefinitely merely by putting off the investigation they have a duty to perform. In *Peacock*, this Court stated the rule that:

> 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.

142 N.C. at 218. The law in the jurisdictions governing the out-of-state Plaintiffs' claims, where they recognize a discovery rule at all, is consistent. "[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).[12] But "waiting for the facts to find [them]" is exactly what Plaintiffs describe themselves doing. The discovery rule does not apply under such circumstances.

Neither does the doctrine of fraudulent concealment. It imposes the same diligence requirement as the discovery rule, plus an additional requirement that plaintiffs show they could not discover their claims due to representations made by the defendant "to induce [the plaintiff] not to assert [his] rights," denying the plaintiff "the opportunity to investigate." *Christenbury*, 2015 NCBC LEXIS 64, at ¶ 34 (citing *Oberlin Cap., LP v. Slavin*, 147 N.C. App. 52, 69 (2001)).[13] But here, as in *Christenbury*, the

---

[12] *Accord*, *e.g.*, *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"); *Richards v. Powercraft Homes, Inc.*, 678 P.2d 449, 451 (Ariz. Ct. App. 1983) (finding it "not necessary . . . 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.").

[13] *Accord*, *e.g.*, ; *Moore v. GM*, No. 17-029670, 2020 WL 5085949, at *7 (Mich. Ct. App. Aug 27, 2020) ("Because plaintiffs failed to allege specific acts taken by defendant that are the 'employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action,' and because the alleged fraud could have been discovered with reasonable diligence, their complaint does not adequately allege fraudulent concealment.") (citing

complaint "contains no allegations supporting any potential finding that Defendants made representations to induce [Plaintiffs] not to assert rights [] or on which [Plaintiffs] relied when refraining from taking action." *Id.* ¶ 61. And Plaintiffs cannot claim they "could not have learned the true facts by exercise of reasonable diligence" when their complaint affirmatively alleges they *did* "learn[] the true facts" once they exercised some diligence, however belatedly. *Id.*

D. The dates Plaintiffs responded to lawyer solicitations are not legally relevant.

Plaintiffs' primary argument in favor of tolling the limitations period is that they "did not know, and could not have reasonably discovered," any grounds for their claims "until [they] retained [their] attorneys in this matter." R p 211. This theory is unsustainable as a matter of law and affirmatively pled facts.

Plaintiffs' current attorneys found them in 2016 and 2017. R pp 211, 214, 230, 239, 247, 254, 262, 270, 278. But their attorneys did not base their claims on anything *newly discovered* in 2016 or 2017. They just asserted Plaintiffs were fraud victims based on claims made in the 2011

Doe v. Roman Cath. Archbishop of Archdiocese of Detroit, 264 Mich. App. 632, 642 (Mich. Ct. App. 2004); citation omitted).

MDL and the 2012 National Mortgage Settlement (*see supra* Part I.C), then made rote allegations that Plaintiffs had no way of knowing this until retaining them. R pp 200–07. The complaint does not—and cannot—plead any facts to suggest that answering solicitations of Plaintiffs' current attorneys is the only possible way to learn about matters of public record like the HAMP MDL and the National Mortgage Settlement. To the contrary, the facts as pled in the complaint are that Plaintiffs learned about these matters of public record once they inquired into their current lawsuit. But Plaintiffs were under a duty to inquire years earlier (*see*, *e.g.*, *Christenbury*, *Doe*, *Wilson*), and would have learned the same things then, if they had discharged that duty then. That is why courts across the country, faced with other versions of Plaintiffs' complaint, "reject[ed] the notion that a statute of limitations can stay in suspension until one talks to an attorney. The plaintiff chooses how long he waits before consulting an attorney, so making the date of legal consultation determinative would abrogate all statutes of limitation." *Salazar*, 2020 Fla. Cir. LEXIS 2275, at *3.[14] There, as here, plaintiffs

[14] *Accord*, *e.g.*, *Cantrell*, 2017 WL 1246356, at *2–3 (rejecting claim that plaintiff could not be aware of the "scheme" alleged in the HAMP MDL

"could have learned" of the grounds for their claims sooner if they had "hir[ed] a lawyer" sooner.

As Judge Dillon noted in dissent, the U.S. Supreme Court has ruled similarly. *See Taylor II*, slip op. ¶ 17 (citing *United States v. Kubrick*, 444 U.S. 111, 123 (1979)). In *Kubrick*, the Court differentiated "ignorance of the fact of [the plaintiff's] injury" from "ignorance of his legal rights," because once 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. The "reasonable diligence" required of plaintiffs *includes* the duty to seek "advice . . . as to whether he had been legally wronged." *Id.* at 123 n.10.

And in *Wood v. Carpenter*, 101 U.S. 135, 140–41 (1879), the Court held: "A general allegation of ignorance at one time and of knowledge at another are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner." Plaintiffs do not do this. They claim "ignorance" of their claims while going through their foreclosures before

---

declarations "until [they] consulted with [their] attorney"); *Jones*, 2018 WL 4095687, at *8 n.5; *Mandosia*, 2018 U.S. Dist. LEXIS 45237, at *7.

2014 and "knowledge" after retaining their current attorneys in 2016–17, but do not—and cannot—explain how they were prevented from acquiring that knowledge sooner. R pp 214, 222, 229, 237, 246, 254, 262, 269. Instead, the facts they allege preclude that inference. Everything their attorneys base their claims on was "public record" by 2013. R pp 201–04; *Evans*, 46 N.C. App. at 76.

The "fatal flaw" in suspending statutes of limitations in those circumstances "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). "[A]ny 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).[15]

---

[15] *Accord*, *e.g.*, *McGee v. Weinberg*, 97 Cal. App. 3d 798, 803 (Cal. Ct. App. 1979) (plaintiff with "complete knowledge of her loss . . . had every

That is why the law imposes a duty on plaintiffs to "go find the facts" instead of "wait[ing] for the facts to find [them]." *Jolly*, *supra*. And the complaint concedes on its face that when Plaintiffs finally went to "find the facts," everything they found dated from 2013 and earlier. *See* Part I.C. They are "charged with th[is] knowledge" as of the earliest date they were obliged to investigate. *Thorpe*, 69 N.C. App. at 362–63. The date on which their attorneys found them is not relevant.

This Court is also free to take judicial notice of another, independent reason why Plaintiffs' asserted inability to sue until responding to attorney solicitations can bear no weight. Court dockets nationwide are replete with lawsuits from the earliest days of HAMP in which other plaintiffs managed to timely assert the same claims Plaintiffs assert here, against Bank of America and every other participating HAMP servicer.[16] They did not need to hire Plaintiffs'

---

opportunity to further explore the facts and to consult an attorney if necessary").

[16] *See*, *e.g.*, *Funderburk v. JPMorgan Chase Bank, N.A.*, 241 N.C. App. 415, 420 (2015) ("trial court properly" took judicial notice of court records and mortgage documents on motion to dismiss); *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); *Zloop, Inc. v. Parker Poe Adams & Bernstein, LLP*, 2018 NCBC LEXIS 16, at *14 (N.C. Super. Ct. Feb. 16, 2018) ("Courts may in

current counsel to do so, nor did they need to invoke the inflammatory accusations found in the HAMP MDL declarations. To the contrary, many brought their claims *pro se* with no legal representation at all, based on the same grievances Plaintiffs now assert. *Compare*, *e.g.*, R pp 211–12 (complaining Plaintiffs were "wrongfully denied [] HAMP modification[s]" after requests to "resubmit" documents), *with Ramos v. Bank of Am., N.A.*, No. 11-3022, 2012 WL 5928732, at *2 (D. Md. Nov. 26, 2012) (*pro se* plaintiff complaining she was "den[ied] a Permanent Modification" after requests to "re-produce documents"); R p 215 (alleging Bank of America "had no intention of approving" Plaintiffs' HAMP applications), *with Ferrerr v. U.S. Bank, N.A.*, No. 14-20741, 2014 WL 4639431, at *7 (Sept. 16, 2014) (*pro se* plaintiff accusing bank of "having no intention of honoring [] agreement" to provide HAMP modifications).

There is "no justification for applying the discovery rule to delay the accrual of plaintiff's causes of action beyond the point at which their factual basis became accessible to plaintiff to the same degree as it was accessible to every other member of the public." *Shively v. Bozanich*, 80

---

their discretion take judicial notice of court filings made in other jurisdictions.").

P.3d 676, 690 (Cal. 2003). Plaintiffs' complaint alleges no factual basis for their claims that was inaccessible to them years earlier. That's because it is not a case about Plaintiffs' belated discovery of their claims at all. It is a case about their attorneys' belated discovery of their clients.

E. Cases Like This Are the Reason Why Statutes of Limitations Exist.

Statutes of limitations embody the public policy of "preventing surprises through the revival of claims that have been allowed to slumber." *Christenbury*, 370 N.C. at 9 (quoting *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944)). Their purpose "is to afford security against stale demands," a security that "must be jealously guarded, for 'with the passage of time, memories fade or fail altogether, witnesses die or move away, and evidence is lost." *Id.* at 5–6 (quoting *Estrada v. Burnham*, 316 N.C. 318, 327 (1986) (brackets omitted)); *see also*, *e.g.*, *Latham*, 184 N.C. at 66 ("No person ought to be permitted to lie by whilst transactions can be fairly investigated and justly determined until time has involved them in uncertainty and obscurity, and then ask for an inquiry.").

These are not mere technicalities or hypothetical problems. Plaintiffs expressly base their claims on things that may or may not have

been said in telephone calls with a variety of mostly unnamed people going back to 2009 and 2010. *E.g.*, R pp 216, 231, 248, 255, 263, 271, 273. These conversations were *already* nearly a decade in the past when Plaintiffs filed suit in 2018. "Defendants are prejudiced" when forced to defend a claim under such disadvantages. *GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170, 180 (4th Cir. 2007). Plaintiffs are relying on the passage of time to make incendiary fraud allegations in the vaguest, most generalized terms while omitting from their narrative basic facts like whether or not their loans were already in default "at the time of th[e] phone calls" alleged to have fraudulently induced their defaults. R pp 208, 217, 232, 240, 248, 255, 263, 272.

Moreover, as prior courts have apprehended, Plaintiffs' arguments for suspending the statutes of limitations "would abrogate all statutes of limitations" by letting plaintiffs hold them in suspension *forever*. *Salazar*, 2020 Fla. Cir. LEXIS 2275, at *3. Nothing would preclude future plaintiffs fifty years from now from bringing the same claims and professing an inability to discover them until hiring their new lawyers. That is not the law, for good reason. "There is a place for finality in the law. . . . There was a time when these claims could and should have been

fairly adjudicated, but that time has long passed." *GO*, 508 F.3d at 180. This Court should give the applicable statutes of limitations the full and appropriate effect intended by the respective state legislatures.

II.

The Res Judicata Dismissal Was Never Reconsidered and Should Be Reinstated.

The Superior Court also ruled "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. Again, this Court need go no further than the face of the complaint to affirm this ruling.

Res judicata and collateral estoppel "bar[] every ground of recovery or defense which . . . could have been presented in [a] previous action." *Goins v. Cone Mills Corp.*, 90 N.C. App. 90, 93 (1988); *see also*, *e.g.*, *McCallum v. N.C. Co-op Extension Serv.*, 142 N.C. App. 48, 52 (2001) (collateral estoppel bars decided issues from being "contested again between the same parties"). Plaintiffs allege in this case that the bank engineered a scheme "specifically designed . . . to set Plaintiff[s] up for foreclosure," tricked them into defaulting on their loans, sabotaged their efforts to cure their defaults, "committed fraud in the discharge of its foreclosure procedures," and damaged them by foreclosing on their loans.

E.g., R pp 208, 209, 211, 283. As numerous other courts construing identical complaints have held, these are undoubtedly claims that "could have been raised in the state court foreclosure [proceedings] before final judgment was entered." *E.g.*, *Clavelo*, 2018 U.S. Dist. LEXIS 178789, at *2–3; *Zuluaga v. Bank of Am., N.A.*, No. 17- 2543, 2018 WL 5014552, at *3 (M.D. Fla. Oct. 16, 2018); *Colon*, 2018 WL 5024083, at *4; *Rosselini*, 2018 U.S. Dist. LEXIS 178792, at *5; *accord*, *e.g.*, *Peralta*, 2018 WL 3548744, at *4 (calling these lawsuits "circuitous but unmistakable attempt[s] to impugn the validity of the foreclosure judgment[s]"). North Carolina law is consistent. *See Espey v. Select Portfolio Servs., Inc.*, 240 N.C. App. 293 (2015) (*res judicata* bars any "collateral attack on an order . . . which authorized defendants to proceed with a foreclosure").

Beyond that, Plaintiffs are seeking to impugn the validity of foreclosures rendered in four other states. But the "public Acts, Records, and judicial Proceedings" of other states are constitutionally owed "Full Faith and Credit" here, U.S. CONST. Art. IV, § 1, and "entitled in the courts of this State to be given such faith and credit as it has by law or usage in the State in which it was pronounced." *Fed. Land Bank v. Garman*, 220 N.C. 585, 591 (1942). Plaintiffs make no argument that the

laws of their respective home states entitle them to relitigate their foreclosures as they seek to do here. Once again, this Court should not allow these disparate Plaintiffs to use North Carolina's judicial forum to impugn the judgments and proceedings of their own states.

CONCLUSION

For these reasons, Bank of America respectfully urges this Court to reverse the erroneous panel decision of the Court of Appeals on the basis of the dissent and reaffirm the judgment of the Superior Court.

Respectfully submitted this 23rd day of February, 2023,

McGuireWoods LLP

Electronically submitted
Bradley R. Kutrow
Attorney for Defendant-Appellant
201 North Tryon Street, Suite 3000
Charlotte, North Carolina 28202
(704) 343-2049
State Bar No. 13851
bkutrow@mcguirewoods.com

N.C. R. APP. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Dylan M. Bensinger
N.C. Bar No. 58759
MCGUIREWOODS, LLP
201 North Tryon Street, Suite 3000
Charlotte, North Carolina 28202
Tel: 704.343.2127
Fax: 704.343.2300
dbensinger@mcguirewoods.com

Keith Levenberg (admitted *pro hac vice)*
GOODWIN PROCTER LLP
1900 N Street, Northwest
Washington, D.C. 20036
Tel.: (202) 346-4000
Fax: (202) 346-4444
klevenberg@goodwinlaw.com

James W. McGarry (admitted *pro hac vice)*
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, Massachusetts 02210
Tel.: (617) 570-1000
Fax: (617) 523-1231
jmcgarry@goodwinlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on 23 February 2023 the foregoing **Defendant-Appellant's New Brief** was electronically filed and served upon each of the parties in this action by email and by mailing a copy by First Class mail, addressed as follows:

William C. Robinson
Dorothy M. Gooding
Robinson Elliott & Smith
P.O. Box 36098
Charlotte, North Carolina 23236
srobinson@reslawfirm.net
dgooding@reslawfirm.net

Electronically submitted
Bradley R. Kutrow

**IN THE CIRCUIT COURT OF THE
THIRTEENTH JUDICIAL CIRCUIT IN AND FOR
HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION**

JUAN JESUS ACOSTA, CAROLINA ZALAZAR, JOSE MONCADA AND EVELYN MOLINA AND EDELSO CARMENATES, Plaintiffs, v. BANK OF AMERICA, N.A., Defendant.	CASE NO. 18-CA-010491 Division: L

ORDER GRANTING DEFENDANT BANK OF AMERICA N.A.'S MOTION FOR SUMMARY JUDGMENT

THIS CAUSE having come before the Court at a special set hearing on July 26, 2022 at 3:00 p.m. on Defendant Bank of America, N.A.'s Motion for Summary Judgment on Res Judicata, Statute of Limitations, and Other Threshold Issues (the "Motion") and this Court, having considered the motion, the opposition filed by Plaintiffs and the Reply filed by Defendant, along with the record and being duly advised on the premises, the Court hereby finds that:

On October 25, 2018, Plaintiffs, Juan Jesus Acosta, Carolina Zalazar, Jose Moncada, Evelyn Molina and Edelso Carmenates' ("Plaintiffs") each brought causes of action for common law fraud in the same complaint against Bank of America. Plaintiffs are mortgagors who defaulted on their loans and claim Bank of America committed fraud in the handling of their requests for relief under the federal Home Affordable Modification Program.

Before the Court is the Defendant's Motion which argues, *inter alia*, that the claims are time barred by Florida's four-year statute of limitations. In support of the Motion, Defendant submits an affidavit from Bank of America authenticating several loan servicing records including the Plaintiffs' payment histories and correspondence relating to Plaintiffs' alleged attempts to receive

CASE NO.: 18-CA-010252

loan modification assistance under the Home Affordable Modification Program. The undisputed record evidence submitted by Bank of America and legal authority submitted by Bank of America in its briefing establishes that the Plaintiffs' claims are barred by the statute of limitations and that the statute is not tolled by their allegations of fraudulent concealment.

Accordingly, it is ORDERED AND ADJUDGED that Bank of America's Motion is hereby GRANTED. The Court finds that the four-year statute of limitations for common law fraud applies to Plaintiffs' claims. Plaintiffs shall take nothing by this action and shall go hence without day.

ORDERED AND ADJUDGED on _____.

Electronically Conformed 8/10/2022
Darren D. Farfante

_____
Hon. Darren D. Farfante
CIRCUIT COURT JUDGE

Conformed Copies to:

James R. Liebler, II, LIEBLER, GONZALEZ & PORTUONDO, Courthouse Tower - 25th Floor 44 West Flagler Street, Miami, FL 33130 (Email: service@lgplaw.com; JRLII@lgplaw.com; mkv@lgplaw.com)

Keith Levenberg, Esq., GOODWIN PROCTER, LLP, 901 New York Avenue, N.W., Washington, D.C., 20001 (Email: klevenberg@goodwinlaw.com)

John W. Adams Jr., Esq., ADAMS LAW ASSOCIATION, P.A., 1074 Bloomingdale Ave., Valrico, FL 33596 (Email: jadams@adamslawassociation.com; paralegal@adamslawassociation.com)

829 Fed.Appx. 823 (Mem)
This case was not selected for
publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally
governing citation of judicial decisions issued on or after
Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Justin BLACKBURN; Carson Miller; Michelle Stoddart, on behalf of themselves and all other persons similarly situated, Plaintiffs-Appellants,

v.

SUMMIT HEALTHCARE ASSOCIATION, an Arizona non-profit entity, dba Summit Healthcare Regional Medical Center, dba Summit Healthcare Snowflake Medical Center; Mariposa Surgical Services LLC, an Arizona limited liability company; S3 Investors Incorporated, an Arizona corporation; Fill Centers USA, an Arizona partnership; Heber Women's Clinic, an Arizona sole proprietorship; Snowflake Women's Clinic, an Arizona sole proprietorship; Twigs Link Corporation, an Arizona corporation, dba T.W.I.G.S., dba Weight Is Gone Surgically; Iris Stratton; Daniel Stratton, a married couple; S. Ross Fox, M.D.; Kathy Fox, a married couple; Kristie Blackman; Walter Blackman, a married couple; Katie Holmes; Holmes, named as John Doe Holmes, a married couple; Gwendolyn Hall, a single woman; Ariel Ortiz; Ortiz, named as Jane Doe Ortiz, a married couple, aka Cynthia Ortiz; Lee Grossbard, M.D.; Grossbard, named as Jane Doe Grossbard, a married couple, aka Shelley Grossbard; Jason Stratton; Does, named as John Does I-V; Jane Does I-V; ABC Partnerships I-X and XYZ Corporations I-X; Stratton, named as Jane Doe Stratton, a married couple, Defendants-Appellees,

and

Pedro Kuri; Kuri, named as Jane Doe Kuri, a married couple; Mario Almanza; Almanza, named as Jane Doe Almanza, a married couple; Robert Berger, M.D.; Berger, named as Jane Doe Berger, a married couple; William Lawson, M.D.; Lawson, named as Jane Doe Lawson, a married couple, aka Judy Lawson; Melissa Bracker; Bracker, named as: John Doe Bracker; Stevie Burnside, aka Stevie Billingsley; Billingsley, named as: John Doe Billingsley; Mariposa Surgical Services International LLP, an Arizona limited liability partnership; GSLE Consulting LLC, an Arizona limited liability company; Sandra Brimhall; Brimhall, named as John Doe Brimhall, a married couple; Tammy Hall-Kubitza; Kubitza, named as John Doe Kubitza, a married couple, Defendants.

No. 19-17227
|
Submitted November 16, 2020 * Phoenix, Arizona
|
FILED November 20, 2020

Attorneys and Law Firms

Robert Miles Gregory, Attorney, Law Office of Robert M. Gregory, P.C., Gilbert, AZ, for Plaintiffs-Appellants

Michael R. Ellsworth, Esquire, Counsel, Riggs, Ellsworth & Porter, P.L.C., Show Low, AZ, for Defendants-Appellees S3 Investors Incorporated, Fill Centers USA, Twigs Link Corporation, Iris Stratton, Daniel Stratton, S. Ross Fox, Kathy Fox

William W. Drury, Jr., John Anthony Klecan, Esquire, Renaud Cook Drury Mesaros, PA, Phoenix, AZ, for Defendants-Appellees Heber Women's Clinic, Snowflake Women's Clinic, Gwendolyn Hall

Kristie Blackman, Pro Se

Vaughn Alan Crawford, Esquire, Trial Attorney, Andrew Martin Jacobs, Esquire, Attorney, Snell & Wilmer L.L.P., Phoenix, AZ, for Defendants-Appellees Ariel Ortiz, Ortiz

James Christopher Goodwin, Esquire, Attorney, J. Goodwin Law PLLC, Goodyear, AZ, for Defendants-Appellees Lee Grossbard, Grossbard

Appeal from the United States District Court for the District of Arizona, James Alan Soto, District Judge, Presiding, D.C. No. 2:18-cv-01956-JAS-LCK

Before: BYBEE, MURGUIA, and BADE, Circuit Judges.

***824** MEMORANDUM **

Plaintiffs-Appellants Justin Blackburn, Carson Miller, and Michelle Stoddart (Plaintiffs) appeal the district court's dismissal of their class action complaint, in which they alleged that Defendants fraudulently and negligently misrepresented their ability to provide safe and affordable

laparoscopic adjustable gastric banding (lap band/bariatric surgery) and affordable post-surgery aftercare in Arizona. Because the parties are familiar with the facts, we will not recite them here. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

The district court first dismissed all claims against all Defendants as time-barred. The district court also determined that none of the Plaintiffs had standing to sue Defendant Dr. Lee Grossbard (Grossbard), ***825** and Stoddart lacked standing to sue Defendant Dr. Ariel Ortiz (Ortiz). Although we agree that all claims are time-barred, we turn first to the question of standing because standing is a jurisdictional question that must be addressed. *See* *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

1. The Court reviews de novo a dismissal for lack of standing. *See* *San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676, 699 (9th Cir. 2012). To satisfy Article III's case or controversy requirement, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

All Plaintiffs lack standing to sue Grossbard because they have failed to allege that their injuries are fairly traceable to Grossbard by virtue of his role as a medical advisor to Defendant Fill Centers USA (Fill Centers). Plaintiffs have not alleged any facts showing Grossbard's personal participation in or knowledge of the alleged misrepresentations regarding the qualifications of Plaintiffs' aftercare provider, Defendant Nurse Gwendolyn Hall (Hall), or the general safety and cost of aftercare.

The district court likewise did not err in holding that Stoddart lacked standing to sue Ortiz. Ortiz did not treat Stoddart or refer her to Hall; her claims are thus based solely on his role as a medical advisor to Fill Centers. But Stoddart alleges no acts on the part of Ortiz indicating that her injuries—namely, an inability to procure affordable aftercare—are fairly traceable to him.

2. As set forth above, the district court also dismissed all claims against all Defendants as time-barred. The Court reviews de novo a dismissal on statute of limitations grounds. *See* *Johnson v. Lucent Techs. Inc.*, 653 F.3d 1000, 1005 (9th Cir. 2011).

Plaintiffs filed their original complaint on April 3, 2018. Under Arizona law, the statute of limitations is one year for consumer fraud, *see* Ariz. Rev. Stat. Ann. (A.R.S.) § 12-541, three years for common law fraud, *see* A.R.S. § 12-543, and two years for negligent misrepresentation and negligent supervision, *see* A.R.S. § 12-542. Arizona applies the discovery rule to these types of claims, pursuant to which "a cause of action does not 'accrue' until a plaintiff discovers or by the exercise of reasonable diligence should have discovered that he or she has been injured by the defendant's negligent conduct." *Anson v. Am. Motors Corp.*, 155 Ariz. 420, 747 P.2d 581, 584 (Ariz. Ct. App. 1987) (citation omitted). Although the discovery rule does not require a plaintiff to "know *all* the facts underlying a cause of action to trigger accrual," a plaintiff must "possess a minimum requisite of knowledge sufficient to identify that a wrong occurred and caused injury." *Doe v. Roe*, 191 Ariz. 313, 955 P.2d 951, 961 (1998) (citation omitted).

Applying the discovery rule, all of Plaintiffs' claims accrued by 2014 because at that point Plaintiffs had knowledge of their injuries sufficient to trigger a duty to investigate. Plaintiffs' attempt to recast their claims as focused solely on Hall's licensing and qualifications is not supported by the First Amended Complaint (FAC) and does not excuse the absence of any allegations ***826** establishing Plaintiffs' exercise of reasonable diligence to discover the necessary facts underlying their current claims. According to the FAC, Blackburn and Miller knew by 2013 and 2014 that they had not received the safe post-surgical care that Defendants had promised, and Stoddart knew by 2014 that Defendants' assurance of affordable aftercare was hollow. Such knowledge was sufficient to trigger a duty to investigate under Arizona law. *See* *ELM Retirement Ctr., LP v. Callaway*, 226 Ariz. 287, 246 P.3d 938, 941 (Ariz. Ct. App. 2010) (observing that the discovery rule "does not permit a party to hide behind its ignorance when reasonable

investigation would have alerted it to the claim" (citation omitted)).

AFFIRMED.

All Citations

829 Fed.Appx. 823 (Mem)

Footnotes

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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

Notice: [*1] PURSUANT TO RULE 32(b), NORTH CAROLINA RULES OF APPELLATE PROCEDURE, THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE TWENTY-ONE DAY REHEARING PERIOD.
THIS IS AN UNPUBLISHED OPINION. PLEASE REFER TO THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE FOR CITATION OF UNPUBLISHED OPINIONS.

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.

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).

End of Document

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

J. Scott Davidson, Davidson Law Firm, Batesville, AR, Joseph H. Aughtman, Aughtman Law Firm, Montgomery, AL, for Plaintiff.

Blake B. Goodsell, Bradley Arant Boult Cummings, Birmingham, AL, Judy Simmons Henry, Johnathan D. Horton, Wright, Lindsey & Jennings LLP, Little Rock, AR, Mary Clay W. Morgan, Bradley Arant Boult Cummings LLP, Jackson, MS, for Defendants.

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

Daniel James Thornburgh, Caitlyn Corrine Prichard, Aylstock, Witkin, Kreis, Overholtz, PLLC, Pensacola, FL, for Plaintiffs.

Ira Scott Silverstein, James Randolph Liebler, James Randolph Liebler, II, Liebler Gonzalez & Portuondo PA, Miami, FL, Keith Levenberg, Goodwin Procter, LLP, Washington, DC, for Defendant.

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.").

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)*

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, 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

[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)*.

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

End of Document

[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

Attorneys and Law Firms

John W. Adams, Jr., Adams Law Association, P. A., Valrico, FL, for Plaintiffs.

Ira Scot Silverstein, James Randolph Liebler, II, Liebler, Gonzalez & Portuondo, PA, Miami, FL, for Defendant.

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).

167 N.C.App. 370
Unpublished Disposition
NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.
Court of Appeals of North Carolina.

Marcus J. DePALMA, Arlene M. DePalma, and Philip N. DePalma, Plaintiffs,

v.

ROMAN CATHOLIC DIOCESE OF RALEIGH, Cardinal Gibbons High School, Brother Michel Bettigole, Troy Davis, David Mills, Dean Monroe, and Wayne Stewart, Defendants.

No. COA04-206.
|
Dec. 7, 2004.

***1** Appeal by plaintiffs from order entered 7 October 2003 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 21 October 2004.

Attorneys and Law Firms

Marcus J. DePalma, Arlene M. DePalma, and Philip N. DePalma, pro se.

Poyner & Spruill, by J. Nicholas Ellis, for defendant-appellees.

Opinion

LEVINSON, Judge.

Plaintiffs appeal from an order granting defendants' motion to dismiss their complaint under N.C.G.S. § 1A-1, Rule 12(b)(6) (2003), for failure to state a claim for relief and as barred by the applicable statute of limitations. We affirm.

In October 1999, plaintiff Marcus DePalma was enrolled as a student at defendant Cardinal Gibbons High School ("the school"), in Raleigh, North Carolina, and played on the school's footballteam. On 15 October 1999 Marcus injured his knee and ankle while playing in a school football game. On 31 May 2003 plaintiffs filed suit against the Diocese, the school, and several individual school personnel. On 15 July 2003 defendants moved to dismiss plaintiffs' complaint under N.C.G.S. § 1A-1, Rule 12(b)(6), as barred by the applicable statute of limitations, and also for failure to comply with the Rules of Civil Procedure. On 7 October 2003 the trial court granted defendants' motion and ordered plaintiffs' complaint dismissed with prejudice. From this order, plaintiffs appeal.

Standard of Review

A motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) (2003), challenges the legal sufficiency of a plaintiff's pleadings:

A Rule 12(b)(6) motion will be granted '(1) when the face of the complaint reveals that no law supports plaintiff's claim; (2) when the face of the complaint reveals that some fact essential to plaintiff's claim is missing; or (3) when some fact disclosed in the complaint defeats plaintiff's claim.' We treat all factual allegations of the pleading as true but not conclusions of law.

Sterner v. Penn, 159 N.C.App. 626, 628, 583 S.E.2d 670, 672 (2003) (quoting *Walker v. Sloan,* 137 N.C.App. 387, 392, 529 S.E .2d 236, 241 (2000)) (other citations omitted). On appeal, our standard of review " 'is 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.' " *Bowman v. Alan Vester Ford Lincoln Mercury,* 151 N.C.App. 603, 606, 566 S.E.2d 818, 821 (2002)(quoting *Holloman v. Harrelson,* 149 N.C.App. 861, 864, 561 S.E.2d 351, 353, *disc. review denied,* 355 N.C. 748, 565 S.E.2d 665 (2002)).

If, in its ruling on a Rule 12(b)(6) motion, the trial court considers evidence outside the pleadings, the motion is converted to one for summary judgment. *See Silvers v. Horace Mann Ins. Co.,* 324 N.C. 289, 292, 378 S.E.2d 21, 24 (1989) ("court considered matters outside the pleadings and thus treated the motions to dismiss as motions for summary judgment"). However, "where, as here, the matters outside the pleading considered by the trial court consist only of briefs and arguments of counsel, the trial court need not 'convert the Rule 12 motion into one for summary judgment under Rule 56 [.]' " *Governor's Club Inc. v. Governors Club Ltd. P'ship,* 152 N.C.App. 240, 246, 567 S.E.2d 781, 785 (2002), *aff'd,* 357 N.C. 46, 577 S.E.2d 620 (2003) (quoting *Privette v. University of North Carolina,* 96 N.C.App. 124, 132, 385 S.E.2d 185, 189 (1989)).

***2** In the instant case, the court's order states in pertinent part that "[a]fter reviewing the pleadings and hearing argument

from counsel and the DePalmas, the Court finds that the motion should be granted." We conclude that the trial court did not consider evidence outside the pleadings; therefore, this Court will confine its review to the pleadings.

The dispositive issue in this case is whether plaintiffs' claim is barred by the applicable statute of limitations. "A statute of limitations defense may properly be asserted in a Rule12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim." *Horton v. Carolina Medicorp,* 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996). "Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff. A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired." *Id.* (citations omitted).

Plaintiffs' *pro se* complaint was captioned "Tort-Negligent Supervision." The body of the complaint alleges that defendants were negligent in failing to inform Marcus of the seriousness of his October 1999 knee injury, failing to properly treat his knee injury, failing to properly supervise Marcus, and failing to properly hire, train, and supervise certain school personnel. Plaintiffs also asserted an individual claim against defendant David Mills, in his capacity as athletic trainer, for "breach [of] his duty as a paramedical professional." Plaintiffs sought compensatory and punitive damages from defendants "jointly and/or severally for their negligent acts and omissions herein set forth[.]" We conclude that plaintiffs' complaint asserts claims against defendants for negligence.

"Claims based on negligence are governed by [N.C.G.S.] § 1-52(5)," *White v. Consol. Planning, Inc.,* 166 N.C.App. 283, ----, 603 S.E.2d 147, 147 (2004), which provides that a claim must be brought within three years on an action for "any other injury to the person or rights of another, not arising on contract and not here after enumerated." Thus, the general statute of limitations for negligence claims is three years. *See Johnson v. Raleigh,* 98 N.C.App. 147, 148, 389 S.E.2d 849, 850 (1990) ("statute of limitations for personal injury allegedly due to negligence is three years").

In the instant case, plaintiffs' complaint asserts claims for negligence arising "[o]n or about October 15, 1999 and for a time thereabout[.]" The complaint generally asserts that defendants were negligent in their response to Marcus's knee injury, including their treatment of Marcus's 15 October 1999 knee injury, their subsequent supervision of Marcus, and their failure to inform Marcus of the seriousness of the 15 October 1999 injury. Plaintiffs' claim against Mills individually also arises from the 15 October 1999 knee injury and Mills' alleged failure to "attend to the needs of an injured student athlete" and "intercede and protect the Plaintiff from a known or potential harm[.]" Finally, plaintiffs' complaint expressly asserts that defendants' negligence occurred "[d]uring the time period between October, 1999 through December 2000[.]" Thus, the factual allegations of plaintiffs' complaint uniformly assert that defendants' negligence arose on 15 October 1999 and continued for some period of time thereafter. We conclude that the complaint clearly establishes that plaintiffs' alleged cause of action accrued on 15 October 1999. Consequently, because plaintiffs' complaint was not filed until 31 May 2003, it was barred by the applicable three-year statute of limitations.

***3** Plaintiffs, however, argue on appeal that "the events which lead up to the injury complained of did not occur until August 2000through November 2000"; that "the facts of the injury were never revealed by the Defendants"; and that the "date of discovery of this deception was November 17 2000 and should be the controlling date for the court to determine the issue of the Statute of Limitations." We reject plaintiffs' argument for several reasons.

First, plaintiffs' arguments are based in part on documents outside the complaint. Plaintiffs' brief cites an affidavit executed by plaintiff Arlene DePalma and a medical record kept by a Dr. Szura as proof of a "pattern of deceit" and of the date of its discovery. However, neither the affidavit nor the medical record referenced in plaintiffs' brief were part of the complaint. Therefore, these are not considered in our review of the trial court's order. As discussed above, the factual allegations in the complaint unequivocally assert that defendants' negligence began on the date of Marcus's 15 October 1999 injury, and the complaint fails to allege any negligent actions by the defendants between August and November 2000.

For the same reason, we do not consider certain of plaintiffs' assertions, made for the first time on appeal and not contained in their complaint. These include allegations that defendants violated certain specifically identified provisions of the General Statutes or of the North Carolina Administrative Code; that a Dr. Szura performed a test on 15 October 1999 diagnosing Marcus's knee condition; that the defendants intentionally concealed this "diagnosis" from plaintiffs; and

that defendants conspired to prevent plaintiffs from learning the extent of Marcus's knee injury. None of these assertions are contained in plaintiffs' complaint, which is based on allegations of negligence, contains only a generalized conclusory allegation that defendants' actions were "contrary to State Law and/or Administrative Regulation," and which does not mention Dr. Szura.

Secondly, we reject plaintiffs' argument that their complaint states a basis to extend the statute of limitations. Plaintiffs argue on appeal that they did not learn of defendants' negligence until November 2000. On this basis, plaintiffs contend that the statute of limitations was tolled until their belated "discovery" of the extent of Marcus's injuries. It is true that an exception to the three year statute of limitations is found in N.C.G.S. § 1-52(16), which provides in relevant part that in an action for personal injury "[u]nless otherwise provided by statute, ... the cause of action ... shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs[.]" However, the statute "serves to delay the accrual of a cause of action in the case of latent damages until the plaintiff is aware he has suffered damage, not until he is aware of the full extent of the damages suffered." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.,* 69 N.C.App. 505, 509, 317 S.E.2d 41, 43 (1984), *aff'd,* 313 N.C. 488, 329 S.E.2d 350 (1985). Accordingly, "as 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 aggravation of the original injury." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.,* 313 N.C. at 493, 329 S.E.2d at 354 (1985) (citing *Matthieu v. Gas Co.,* 269 N.C. 212, 152 S.E.2d 336 (1967)).

***4** "In applying the discovery rule, it must be determined when [plaintiff] knew or should have known the cause of action accrued. Under common law, 'when the right of the party is once violated, even in ever so small a degree, the injury ... at once springs into existence and the cause of action is complete.' " *McCarver v. Blythe,* 147 N.C.App. 496, 499, 555 S.E.2d 680, 683 (2001) (quoting *Mast v. Sapp,* 140 N.C. 533, 540, 53 S.E. 350, 352 (1906). Thus, "where plaintiffs clearly know more than three years prior to bringing suit about damages, yet take no legal action ... the fact that further damage is caused does not bring about a new cause of action." *Robertson v. City of High Point,* 129 N.C.App. 88, 91, 497 S.E.2d 300, 302 (1998) (citing *Pembee Mfg. Corp. v. Cape Fear Constr. Co.,* 313 N.C. 488, 329 S.E.2d 350 (1985)).

In the instant case, the complaint asserts that defendants were negligent in their treatment of and response to Marcus's October 1999 injury. By its own terms, plaintiffs' complaint alleges that defendants' negligence began on 15 October 1999. It is undisputed that on 15 October 1999 plaintiffs knew Marcus had been injured. Thus, "plaintiff's injuries were apparent to plaintiff and his [condition] could have been generally recognized and diagnosed by a medical professional ... plaintiff's injuries and [condition] were not latent; thus, § 1-52(16) is inapplicable to the facts of this case." *Soderlund v. Kuch,* 143 N.C.App. 361, 370, 546 S.E.2d 632, 638 (2001). Moreover, defendants' "supervision" of Marcus in relation to his football injury also arose on 15 October 1999. Finally, the allegations of plaintiffs' complaint do not support their arguments on appeal that plaintiffs (1) were unaware of defendants' negligence or of the nature of Marcus's injury until November 2000, (2) were prevented by defendants from determining the extent of Marcus's injury, or (3) could not reasonably have learned of defendants' negligence or the extent of Marcus's injury at some time within three years of his 15 October 1999 injury. We conclude that plaintiffs' complaint fails to include any allegations that would toll the applicable statute of limitations.

We also reject plaintiffs' argument that the "continuing supervision" of Marcus by defendants between 15 October 1999 and December 2000 is the equivalent, for purposes of the statute of limitations, of a medical "continuing course of treatment." Plaintiffs cite no authority to support this proposition, and we find none. Moreover, "[o]ur Supreme Court has adopted the 'continuing course of treatment doctrine' with regard to malpractice by hospitals and other health care providers." *Delta Envtl. Consultants, Inc. v. Wysong & Miles Co.,* 132 N.C.App. 160, 169, 510 S.E.2d 690, 696 (1999) (citing *Horton v. Carolina Medicorp, Inc.,* 344 N.C. 133, 472 S.E.2d 778 (1996)). This Court has not extended the doctrine to situations outside of the medical malpractice arena. *See Delta, id.* at 170, 510 S.E.2d at 697 ("inlight of the holding in *Horton,* which narrowly defines the 'continuing course of treatment doctrine,' we elect not to expand the doctrine's breadth"). Plaintiffs herein argue vehemently that they have **not** filed a medical malpractice

claim, making the "continuing course of treatment" exception inapplicable.

***5** For the reasons discussed above, we conclude that plaintiffs' claim was barred by the statute of limitations, and was properly dismissed by the trial court. Having reached this conclusion, we have no need to address the parties' arguments regarding the special requirements for filing a medical malpractice claim. The trial court's order is

Affirmed.

Judges TYSON and BRYANT, concur.
Report per Rule 30(e).

All Citations

167 N.C.App. 370, 605 S.E.2d 267 (Table), 2004 WL 2793377

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

Attorneys and Law Firms

Daniel James Thornburgh, Caitlyn Corrine Prichard, Aylstock, Witkin, Kreis, Overholtz, PLLC, Pensacola, FL, for Plaintiff.

Ira Scott Silverstein, James Randolph Liebler, James Randolph Liebler, II, Liebler Gonzalez & Portuondo PA, Miami, FL, Keith Levenberg, Pro Hac Vice, Goodwin Procter, LLP, Washington, DC, for Defendants.

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

Not Reported in Fed. Supp., 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.

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

John W. Adams, Jr., Adams Law Association, P. A., Valrico, FL, for Plaintiffs.

David Arnold Karp, Heather Lynn Fesnak, Akerman LLP, Tampa, FL, Keith Eric Levenberg, Goodwin Procter, LLP, Washington, DC, William P. Heller, Akerman LLP, Fort Lauderdale, FL, for Defendant.

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).

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

Maria Diaz, Hialeah, FL, pro se.

Enrique Diaz, Cross City, FL, pro se.

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.

End of Document

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

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

---

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

2018 WL 4095687
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.

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)*

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 17, 2010 that her documents were either not received,

[1] The Court grants BANA's Request for Judicial Notice, and takes judicial notice of the various recorded documents attached to the RJN.

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

UNITED STATES DISTRICT JUDGE

End of Document

[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.

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.

Attorneys and Law Firms

Shannon Elizabeth Ponek, Julia B. Strickland, Stroock & Stroock & Lavan LLP, Los Angeles, CA, Lisa Marie Simonetti, for Defendants.

Ramzi Abadou, Terence S. Ziegler, PHV, Edward W. Ciolko, PHV, Donna Siegel Moffa, PHV, Amanda R. Trask, PHV, Kessler Topaz Meltzer & Check, LLP, Radnor, PA, for Plaintiff.

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.

2020 WL 5085949
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Terry MOORE, Ellen Moore, David O'Nions, Diane O'Nions, Joellen Pisarczyk, and Marvin Pisarczyk, Plaintiffs-Appellees,
v.
GENERAL MOTORS LLC, Defendant-Appellant.

No. 348579, 349727
|
August 27, 2020

Livingston Circuit Court, LC No. 17-029670-CE

Before: Gadola, P.J., and Gleicher and Stephens, JJ.

Opinion

Per Curiam.

***1** In these consolidated cases, defendant, General Motors LLC, appeals by leave granted the orders of the trial court denying in part defendant's motion for summary disposition and denying its renewed motion for summary disposition. We reverse and remand for further proceedings.

I. FACTS

These interlocutory appeals arise from a proposed class action in which plaintiffs seek damages and injunctive relief for contamination of their residential well water. Plaintiffs, Terry and Ellen Moore, David and Diane O'Nions, and Joellen and Marvin Pisarczyk, are three couples who own or owned homes in The Oaks, a residential subdivision in Milford, Michigan. Plaintiffs allege that the well water at their Milford homes is contaminated with sodium and chloride, and that the source of the contaminants is defendant's car testing facility in Milford, known as the Milford Proving Grounds. Plaintiffs allege that the contamination was and is caused by the excessive use of de-icing road salt at the Proving Grounds.

The Milford Proving Grounds were owned by General Motors Corporation (Old GM) from 1924 until July 9, 2009. On June 1, 2009, Old GM initiated Chapter 11 bankruptcy proceedings. See *In re Motors Liquidation Co.*, 585 B.R. 708, 716 (Bankr. S.D.N.Y., 2018). Defendant, also referred to herein as New GM, purchased the Proving Grounds from the bankruptcy estate of Old GM, and since July 10, 2009, has owned and operated the Proving Grounds. Plaintiffs allege that before July 10, 2009, Old GM, and since July 10, 2009, New GM, released hundreds of thousands of tons of de-icing salt at the Proving Grounds, resulting in extremely high concentrations of sodium and chloride in surface and groundwater at the Proving Grounds, which migrated into groundwater beneath plaintiffs' properties. The salt was used at the Proving Grounds to de-ice the extensive system of roads, parking lots, and sidewalks, and was also used in the testing facility to test the corrosive effect of the de-icing chemicals on test cars.

The parties entered into a tolling agreement on July 1, 2016, tolling as of that date the limitations period for any complaint arising from the alleged contamination. On November 30, 2017, plaintiffs initiated this action alleging that defendant violated Michigan's NREPA [1] and Michigan's EPA, [2] and also alleging fraud, negligence, trespass, and private and public nuisance.

Defendant removed plaintiffs' complaint to the Federal District Court for the Eastern District of Michigan, seeking to enforce the Sale Order entered by the federal bankruptcy court for the Southern District of New York to effectuate the sale of Old GM's assets, including the Proving Grounds, to New GM, and thereby seeking to bar plaintiffs' claims in this case. Under the terms of the Sale Order, New GM agreed to assume certain liabilities of Old GM related to the real property Old GM transferred to New GM, including liabilities arising under environmental laws, while expressly excluding certain liabilities. See *In re Motors Liquidation Co.*, 585 B.R. at 716.

***2** The bankruptcy court held that under its Sale Order, plaintiffs in this case are precluded from pursuing against New GM common law claims arising from Old GM's contamination of plaintiffs' groundwater. *In re Motors Liquidation Co.*, 585 B.R. at 715-716. However, recognizing that groundwater migration from the Proving Grounds may have taken place over time, the bankruptcy court held that plaintiffs could pursue claims arising from groundwater contamination that occurred after the bankruptcy, even if

the contamination was caused by Old GM prior to the bankruptcy, and could also pursue claims arising from New GM's conduct. *Id.* The bankruptcy court also held that with regard to claims for damages based on violation of statutorily-based environmental laws, New GM assumed liability only for compliance with such laws after it purchased the Proving Grounds, including liability for remediation or clean-up for contamination caused by Old GM. *Id.* at 731.

The bankruptcy court explained that although its role was not to decide the claims that were pending in this case before the federal district court, its role as "gatekeeper" was to decide what claims and allegations would get through the "gate" under the bankruptcy Sale Order. *Id.* at 723, 725. The bankruptcy court stated:

> The Court agrees with the Plaintiffs that they have sufficiently supported their independent claims against New GM with allegations that hinge on New GM conduct. For example, allegations such as those in Court XI that New GM continued contaminating the groundwater by causing releases of salt after it acquired the [Proving Grounds] in 2009, are not problematic, as they are claims independent of Old GM and that could support New GM's independent liability, regardless of Old GM's actions before the 363 Sale. Similarly, as the Court explained above, for personal injury or property damage claims based on groundwater contamination from Old GM's dumping of road salt *before* the 363 Sale, but which migrated from the Property *after* the Property was owned by New GM, the Sale Order does *not* bar such claims. Whether Michigan law recognizes claims for personal injury or property damage against a property owner ... is an issue for the Michigan District Court, not for this Court. [*Id.* at 726.]

After the bankruptcy court issued its decision, the federal district court remanded this case to the trial court. In light of the bankruptcy court's decision, plaintiffs filed their Second Amended Complaint, alleging violations of the NREPA by New GM but relating to conduct of Old GM, alleging violations of the NREPA by New GM, and also alleging against New GM fraud, negligence, trespass, private nuisance, and public nuisance. Defendant moved for summary disposition of the Second Amended Complaint under MCR 2.116(C)(7), (8), and (10), contending that plaintiffs' claims were barred by the statute of limitations, that plaintiffs failed to comply with a statutory notice provision of NREPA, that plaintiffs lacked standing, that defendant's use of salt at the Proving Grounds was legally authorized, that plaintiffs failed to state a claim for recovery of response activity costs under NREPA, and that plaintiff failed to adequately allege fraud and trespass.

The trial court granted defendant's motion for summary disposition of plaintiffs' trespass claim pursuant to the parties' stipulation, but denied defendant's motion in all other respects. The trial court held that plaintiffs' claims were not barred by the statute of limitations and stated in part:

> Plaintiffs [do] not necessarily dispute that the statute of limitation could bar their claims, however, they argue that defendant[ ] engaged in a continuous concerted and systematic attempt to conceal that contamination and that the statute of limitations therefore must be tolled under MCL 600.5855, until defendant admitted it was the source of contamination. As we see here today defendant by counsel has not admitted that Old GM or New GM is the source of the contamination. Thus, I do find that the plaintiffs' claim – claims are timely in that regard with reference to the statute of limitations.

***3** The trial court also rejected defendant's additional arguments for summary disposition, and thereafter entered an order denying in part the motion for summary disposition. After plaintiffs were deposed during discovery, defendant again moved for summary disposition under MCR 2.116(C)(7), (8), and (10), arguing that plaintiffs' depositions produced

information negating plaintiffs' claims. Defendant also requested that the trial court rule on the bases for summary disposition asserted in defendant's first motion for summary disposition that the trial court had not specifically ruled upon. The trial court denied the motion, finding material issues of fact and holding that summary disposition was not warranted at that time.

This Court granted defendant's applications for leave to appeal the trial court's orders denying in part its motion for summary disposition and denying its renewed motion for summary disposition, and also granted defendant's motion to consolidate the two appeals. [3]

II. DISCUSSION

A. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Johnson v. Vanderkooi*, 502 Mich. 751, 761; 918 N.W.2d 785 (2018). We also review de novo issues involving the proper interpretation of statutes. *Titan Ins. Co. v. Hyten*, 491 Mich. 547, 553; 817 N.W.2d 562 (2012).

Summary disposition under MCR 2.116(C)(7) is appropriate when a claim is barred by the statute of limitations. *Frank v. Linkner*, 500 Mich. 133, 140; 894 N.W.2d 574 (2017). When reviewing a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7), this Court considers all documentary evidence in the light most favorable to the nonmovant, *RDM Holdings, Ltd. v. Continental Plastics Co.*, 281 Mich. App. 678, 687; 762 N.W.2d 529 (2008), and accepts the complaint as factually accurate unless it is specifically contradicted by affidavits or other documentation. *Frank*, 500 Mich. at 140. If there is no factual dispute, whether a claim is barred by the statute of limitations is a question of law for the Court. *RDM Holdings*, 281 Mich. App. at 687.

A motion for summary disposition pursuant to MCR 2.116(C)(8) "tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v. Rozwood*, 461 Mich. 109, 119; 597 N.W.2d 817 (1999). A motion for summary disposition under this section is properly granted when, considering only the pleadings, the alleged claims are clearly unenforceable as a matter of law and no factual development could justify recovery. *Id.*

B. STATUTE OF LIMITATIONS

Defendant contends that the trial court erred by denying its motion for summary disposition under MCR 2.116(C)(7) because plaintiffs' claims are barred by the statute of limitations and are not saved by the fraudulent concealment tolling provision of MCL 600.5855. We agree that Counts I and II of plaintiffs' Second Amended Complaint are barred by the statute of limitations.

A statute of limitations is a " 'law that bars claims after a specified period; specif[ically], a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued.' " *Frank*, 500 Mich. at 142, quoting *Black's Law Dictionary* (10th ed.) (alteration in original). The purpose of a statute of limitations is to protect a defendant from being compelled to defend against stale claims. *Stephens v. Dixon*, 449 Mich. 531, 534; 536 N.W.2d 755 (1995).

To determine the applicable limitations period, a court considers the "gravamen of an action" from the complaint as a whole to determine the exact nature of the claim. *Adams v. Adams*, 276 Mich. App. 704, 710-711; 742 N.W.2d 399 (2007). Here, plaintiffs' Second Amended Complaint alleges violations of the NREPA arising out of the conduct of Old GM, violations of the NREPA arising out of the conduct of New GM, fraud, negligence, private nuisance, and public nuisance, and seeks injunctive relief and compensation for property damage.

***4** With regard to plaintiff's claims under the NREPA, the period of limitations is established by MCL 600.5813. See *Dep't of Environmental Quality v. Gomez*, 318 Mich. App. 1, 24; 896 N.W.2d 39 (2016) (applying six-year limitation period of MCL 600.5813 to NREPA actions). The applicable statute of limitations for plaintiffs' claims of damage to their property is MCL 600.5805, which provides:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

> (2) Except as otherwise provided in this section, the period of limitations is 3 years after the time of the death or injury for all actions to recover damages for the death of a person or for injury to a person or property.

Plaintiffs' claim of fraud is subject to the residual six-year limitations period of MCL 600.5813. See *Citizens Ins. Co. of America v. Univ. Physician Group*, 319 Mich. App. 642, 651; 902 N.W.2d 896 (2017). In addition, the parties in this case agreed to toll the limitations period as of July 1, 2016. Thus, plaintiffs' common law claims, with the exception of fraud, are barred by the statute of limitations if they accrued before July 1, 2013, while plaintiffs' statutory claims and fraud claim are barred if they accrued before July 1, 2010.

To determine whether plaintiffs timely filed their complaint requires ascertaining when the plaintiffs' claims accrued for purposes of determining a starting point for the limitations period. The time of accrual for claims subject to the limitations period of MCL 600.5805(2) is defined by MCL 600.5827, which provides that the limitations period begins to run "from the time the claim accrues" and that "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." See also *Trentadue v. Buckler Automatic Lawn Sprinkler Co.*, 479 Mich. 378, 388; 738 N.W.2d 664 (2007). Interpreting this language, our Supreme Court in *Trentadue* explained that "the wrong is done when the plaintiff is harmed rather than when the defendant acted." *Id.* (quotation marks, citation, and alteration omitted). Our Supreme Court has also stated that "[o]nce all of the elements of an action for ... injury, including the element of damage, are present, the claim accrues and the statute of limitations begins to run. Later damages may result, but they give rise to no new cause of action, nor does the statute of limitations begin to run anew as each item of damage is incurred." *Connelly v. Paul Ruddy's Equip. Repair & Serv. Co.*, 388 Mich. 146, 151; 200 N.W.2d 70 (1972).

More recently, in *Frank* our Supreme Court explained that determination of the date of accrual requires determination of when plaintiffs "first incurred the harms they assert." *Frank*, 500 Mich. at 150. "The relevant 'harms' for that purpose are the actionable harms alleged in a plaintiff's cause of action." *Id.* "Additional damages resulting from the same harm do not reset the accrual date or give rise to a new cause of action." *Id.* at 155. In *Bauserman v. Unemployment Ins. Agency*, 503 Mich. 169, 183; 931 N.W.2d 539 (2019), our Supreme Court again explained that "a claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results," *id.*, and that the date of the wrong is "the date on which the defendant's breach harmed the plaintiff, as opposed to the date on which defendant breached his duty." *Id.*, quoting *Frank*, 500 Mich. at 147.

***5** In *Henry v. Dow Chemical Co.*, 501 Mich. 965 (2018), a case involving the presence of dioxin in the soil of the plaintiffs' properties allegedly caused by the defendant's dumping of dioxin into the Tittabawassee River, our Supreme Court held that the plaintiffs were harmed when the dioxin allegedly was placed in the soil of their properties, and that the period of limitations therefore began to run from the date that "wrong" occurred. *Id.*

Most recently, our Supreme Court in *Mays v. Governor*, —— Mich. ——, ——*Mays v. Governor*, —— Mich. ——, ——; —— N.W.2d —— (2020)—— N.W.2d —— (2020) (Docket Nos. 157335-7; 157340-2) again discussed when a claim accrues under MCL 600.5827. In that case, the plaintiffs filed an action in the Court of Claims alleging damages arising from the Flint water crisis, and seeking to hold the state, certain government officials, and certain state departments liable. With regard to the plaintiffs' claims of inverse-condemnation of their properties, the defendants moved for summary disposition arguing that the plaintiffs had failed to comply with the statutory notice requirement of MCL 600.6431 by filing either the claims or notice of the intention to file the claims within one year of the accrual of the claims and, regarding property damage, within six months following the event giving rise to the cause of action. *Id.* at slip op. 17-18. The Court of Claims denied summary disposition of the inverse-condemnation claims, and this Court affirmed that determination.

Our Supreme Court in *Mays* expressly affirmed the holding of the Court of Appeals with regard to the plaintiffs' inverse-condemnation claims.[4] The Court distinguished the facts of that case from those of *Henry*, concluding in *Mays* that questions of fact remained regarding when the plaintiffs sustained their alleged injuries and when each plaintiff's claim accrued. *Id.* at slip op. 20-21, 35. The Supreme Court's opinion in *Mays*, however, does not purport to overturn either *Henry* or *Trentadue*, see *id.* at slip op. 17-21, and in the lead opinion of *Mays* Justice Bernstein summarizes, echoing *Frank*, that "[t]hus, determining the time when plaintiffs'

claims accrued requires us to determine when plaintiffs were *first* harmed." *Id.* at slip op. 18 (emphasis added).

In this case, similar to the facts of *Henry*, the harm alleged is the presence of chloride and excessive salt in the water under plaintiffs' properties. Applying the reasoning of *Henry* to this case, and in accordance with the principles articulated in *Trentadue*, *Frank*, and *Mays*, plaintiffs' claims accrued when they allegedly were first harmed. Here, plaintiffs allege that defendant polluted plaintiffs' water; the wrong occurred not when defendant allegedly dumped the contaminants, nor when the damage resulted, but when plaintiffs first were harmed by the contaminants reaching their groundwater. The applicable periods of limitation therefore began to run from the date of that "wrong."

1. COUNTS I & II

In Counts I and II of plaintiffs' Second Amended Complaint, plaintiffs seek to hold New GM liable under the NREPA (including claims under Michigan's EPA) based upon the alleged releases of the sodium and chloride by Old GM. In the factual allegations of their Second Amended Complaint plaintiffs allege that the chemicals were present in the water under their properties at least by 1997. Defendant argues that because plaintiffs assert that the contaminants reached their groundwater before July 1, 2010 (the earliest date on which the claim could accrue and still be actionable), these counts are barred by the statute of limitations.

***6** The burden of proving that a claim is barred by the statute of limitations rests with the party asserting that defense. *Prins v. Michigan State Police*, 291 Mich. App. 586, 589; 805 N.W.2d 619 (2011). Here, defendant correctly asserts that plaintiffs allege in their Second Amended Complaint that contamination by Old GM reached plaintiffs' groundwater in the 1990s. Any claim against Old GM based upon the alleged contamination accrued at the time of that harm, and the statute of limitations began to run at that point. Defendant therefore accurately argues that plaintiffs' claims based upon the conduct of Old GM in this case are barred by the statute of limitations,[5] and it is entitled to summary disposition of Counts I and II of the Second Amended Complaint under MCR 2.116(C)(7). See *Stephens v. Worden Ins. Agency, LLC*, 307 Mich. App. 220, 227; 859 N.W.2d 723 (2014) (Summary disposition under MCR 2.116(C)(7) is appropriate when the undisputed facts demonstrate that the plaintiff's claim is barred by the statute of limitations).

2. FRAUDULENT CONCEALMENT

Plaintiffs argue that the statute of limitations does not bar their claims because it is tolled by defendant's fraudulent concealment of its liability for the claims, contrary to MCL 600.5855, which provides:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on this claim, 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 claim, although the action would otherwise be barred by the period of limitations.

This provision permits the tolling of a statutory limitations period when a defendant fraudulently conceals the existence of a claim. *Mays*, 323 Mich. App. at 39. Under the statute, the plaintiff has two years within which to bring the claim from the time he or she discovers, or reasonably should have discovered, the claim if the plaintiff demonstrates fraudulent concealment by the defendant. *Frank*, 500 Mich. at 148. Our Supreme Court has observed that this statute "provides for essentially unlimited tolling based on discovery when a claim is fraudulently concealed." *Trentadue*, 479 Mich. at 391.

This Court has defined fraudulent concealment as "employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and fraudulent." *Doe v. Roman Catholic Archbishop of Archdiocese of Detroit*, 264 Mich. App. 632, 642; 692 N.W.2d 398 (2004) (quotation

marks and citation omitted). The alleged concealment must involve conduct designed to prevent the recognition of a cause of action. *Id.* Mere silence ordinarily is insufficient to establish fraudulent concealment. *Reserve at Heritage Village Ass'n v. Warren Fin. Acquisition, LLC*, 305 Mich. App. 92, 123; 850 N.W.2d 649 (2014) "[T]here must be concealment by the defendant of the existence of a claim or the identity of a potential defendant," *McCluskey v. Womack*, 188 Mich. App. 465, 472; 470 N.W.2d 443 (1991). In addition, to successfully assert the fraudulent concealment exception, a plaintiff "must plead in the complaint the acts or misrepresentations that comprised the fraudulent concealment," and must demonstrate that the defendant made affirmative acts or misrepresentations designed to prevent discovery. *Mays*, 323 Mich. App. at 39.

***7** To take advantage of the tolling provision, however, the plaintiff must be reasonably diligent in investigating and pursuing the cause of action. See *Prentis Family Foundation, Inc. v. Barbara Ann Karmanos Cancer Inst.*, 266 Mich. App. 39, 48; 698 N.W.2d 900 (2005). Fraudulent concealment does not toll the running of the limitation period if the plaintiff could have discovered the fraud, including if the fraud could have been discovered from public records. See *id.* at 45 n. 2. If the plaintiff was aware of a possible cause of action, he or she was sufficiently apprised of the cause of action for purposes of the fraudulent concealment statute. *Doe*, 264 Mich. App. at 643 "The fraudulent concealment which will postpone the operation of the statute must be the concealment of the fact that plaintiff has a cause of action. If there is a known cause of action there can be no fraudulent concealment which will interfere with the operation of the statute...." *Id.* at 646-647 (quotation marks and citation omitted).

In this case, plaintiffs contend that the limitations periods were tolled by fraudulent concealment until October 13, 2014, when defendant acknowledged potential responsibility for the contamination. The trial court concluded:

> ... [plaintiffs] argue that defendant[ ] engaged in continuous concerted and systematic attempts to conceal that contamination and that the statute of limitations therefore must be tolled under MCL 600.5855, until defendant admitted it was the source of contamination. As we see here today defendant by counsel has not admitted that Old GM or New GM is the source of the contamination. Thus, I do find that the plaintiffs' claim – claims are timely in that regard with reference to the statute of limitations.

Defendant argues that merely denying that it contaminated the groundwater is not the equivalent of fraudulently concealing that it contaminated the groundwater. We agree. Although the Second Amended Complaint alleges actions by Old GM to mislead investigations of the source of the groundwater contamination, it does not allege affirmative acts or misrepresentations by New GM that were designed to prevent discovery, alleging only that New GM denied and failed to admit that it was the source of the groundwater contamination. In addition, plaintiffs allege facts that indicate that the contamination was known to the public and the developer of the properties by at least the 1990s. Because plaintiffs failed to allege specific acts taken by defendant that are the "employment of artifice, planned to prevent inquiry or escape investigation, and mislead or hinder acquirement of information disclosing a right of action," *Doe*, 264 Mich. App. at 642, and because the alleged fraud could have been discovered with reasonable diligence, their complaint does not adequately allege fraudulent concealment. The statute of limitations with regard to Counts I and II therefore was not tolled due to fraudulent concealment.

C. NOTICE OF THE NREPA CLAIM

Defendant also contends that plaintiffs' claims under the NREPA fail because plaintiffs failed to provide notice as required by MCL 324.20135 and thereby deprived the trial court of jurisdiction over that claim. We agree.

The contention that a claim is jurisdictionally defective is typically brought under MCR 2.116(C)(4). A motion brought under MCR 2.116(C)(4) tests the trial court's subject matter jurisdiction, and this Court determines whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law. *McKenzie v. Dep't of Corrections*, —— Mich. App. ——, ——*McKenzie v. Dep't of Corrections*, —— Mich.

App. ——, ——; —— N.W.2d —— (2020)—— N.W.2d —— (2020) (Docket No. 347061); slip op. at 2.

Plaintiffs allege in Counts VIII and IX of their Second Amended Complaint that defendant violated the NREPA. The purpose of Part 201 of the NREPA, of which MCL 324.20135 is a part, is "to provide for appropriate response activity to eliminate unacceptable risks to public health, safety, or welfare, or to the environment from environmental contamination at facilities within the state." MCL 324.20102(c); *Tennine Corp. v. Boardwalk Commercial, L.L.C.*, 315 Mich. App. 1, 8; 888 N.W.2d 267 (2016). Under MCL 324.20135(3)(a), a plaintiff must give written notice of the intent to file a suit to the Michigan Department of Environmental Quality (MDEQ), the attorney general, and the proposed defendants at least 60 days before filing a complaint.

***8** Plaintiffs allege in their Second Amended Complaint that they provided notice to defendant, the MDEQ, and the attorney general on November 29, 2017, and filed their Complaint the next day on November 30, 2017. Plaintiffs argue that the purpose of the notice provision was nonetheless fulfilled because the notice was provided to the MDEQ and the attorney general in ample time to permit those entities to bring the suit before the filing of the Second Amended Complaint on July 18, 2018.

The statute, however, is clear and unambiguous that an action "shall not be filed under subsection (1)(a) or (b)" unless "[t]he plaintiff has given at least 60 days' notice in writing of the plaintiff's intent to sue, the basis for the suit, and the relief to be requested" to the MDEQ, the attorney general, and the proposed defendants. MCL 324.20135(3)(a). This Court has referred to the 60-day notice provision of subsection (3)(a) as a condition that must be met before a private civil action may be filed under MCL 324.20135. See *Cairns v. City of East Lansing*, 275 Mich. App. 102, 114; 738 N.W.2d 246 (2007). Although plaintiffs argue that the notice given was adequate as a practical matter because the Second Amended Complaint was not filed until months after the notice was given, plaintiffs point to no authority that substantial compliance with the statute is adequate to fulfill the notice provision. Because plaintiffs failed to provide notice as required by MCL 324.20135, plaintiffs were not able to sue under the statute, and defendant was therefore entitled to summary disposition of plaintiffs' claims under the NREPA. [6]

D. THE REMAINING COUNTS

In the remaining counts of the Second Amended Complaint alleging fraud, nuisance, and negligence, plaintiffs seek to hold New GM liable for its own conduct after it purchased the Proving Grounds. Plaintiffs allege that since it purchased the Proving Grounds on July 10, 2009, New GM has been dumping contaminants at the Proving Grounds that are migrating to plaintiffs' groundwater. [7]

Plaintiffs do not specifically allege when contaminants from New GM reached their groundwater for the first time. To successfully allege a claim that is not barred by the statute of limitations, plaintiffs in this case must allege that the contaminants released by New GM reached their groundwater for the first time after July 1, 2010, for purposes of their claims of fraud and after July 1, 2013, for their claims of negligence and nuisance. Because plaintiffs have not done so, plaintiffs have failed to state claims for fraud, negligence, and nuisance, and defendant is entitled to summary disposition of those claims under MCR 2.116(C)(8). [8]

***9** Defendant also contends that the plaintiffs' Second Amended Complaint does not adequately allege fraud, and therefore fails to state a claim for fraud under MCR 2.116(C)(8). We agree. Actionable fraud, also known as fraudulent misrepresentation, requires that (1) the defendant made a material representation, (2) the representation was false, (3) at the time the defendant made the representation, the defendant knew it was false or made it recklessly, without knowing whether it was true, and as a positive assertion, (4) the defendant intended that the plaintiff rely upon the representation, (5) the plaintiff acted in reliance upon the representation, and (6) the plaintiff suffered damage. *Titan Ins. Co.*, 491 Mich. at 555. The plaintiff must also establish that reliance upon the defendant's representations was reasonable. *Foreman v. Foreman*, 266 Mich. App. 132, 141-142; 701 N.W.2d 167 (2005).

Silent fraud, also known as fraudulent concealment, requires that (1) the defendant suppressed a material fact, (2) which the defendant had a duty to disclose, and (3) the defendant concealed the material fact with the intent to defraud. See *Titan Ins. Co.*, 491 Mich. at 557. A claim for fraud must be pleaded with particularity, addressing each element, MCR 2.112(B)(1); *Stephens*, 307 Mich. App. at 229-230,

although intent and knowledge may be alleged generally. MCR 2.112(B)(2).

In Count X of plaintiffs' Second Amended Complaint, plaintiffs allege that (1) defendant knew that the contamination was migrating from the Proving Grounds as of the day they took possession, (2) defendant failed to notify plaintiffs, (3) defendant denied that the source of the contamination was the Proving Grounds, (4) defendant made positive assertions that the source of the contamination was not the Proving Grounds, (5) defendant made the assertions with the intent to defraud or reckless disregard for the truth, and (6) plaintiff suffered damages as a result of defendant's fraud. The Second Amended Complaint fails, however, to allege that plaintiffs acted in reliance upon defendant's representations, and thus is missing an element necessary to state a prima facie case of fraud. Plaintiffs also fail to allege that defendant had a duty to disclose the material facts allegedly suppressed, and thus is missing an element necessary to state a prima facie case of silent fraud. The trial court therefore erred by failing to grant defendant summary disposition of plaintiffs' fraud claim.

When a trial court grants summary disposition under MCR 2.116(C)(8), (9), or (10), the trial court is required to give the nonmovant an opportunity to amend its pleadings as provided by MCR 2.118, unless the evidence demonstrates that amendment is not justified. MCR 2.116(I)(5); see also *Jawad A. Shah, M.D., PC v. State Farm Mut. Auto. Ins. Co.*, 324 Mich. App. 182, 209; 920 N.W.2d 148 (2018). Leave to amend is to be freely granted when justice requires, MCR 2.118(A)(2), and should be denied only for particularized reasons, such as undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies, undue prejudice, or futility. *Shah*, 324 Mich. App. at 208. On remand, the trial court should permit plaintiffs an opportunity to seek to amend their complaint to cure the deficiencies that otherwise entitle defendant to summary disposition of these counts.

We reverse the order of the trial court denying defendant summary disposition of Counts I and II of plaintiffs' Second Amended Complaint because those counts are barred by the statute of limitations. We also reverse the order of the trial court denying defendant summary disposition of Counts VIII and IX of the Second Amended Complaint seeking relief under the NREPA because plaintiffs did not comply with the notice provisions of the statute. We also reverse the order of the trial court regarding the remaining claims (Counts X, XI, XIII, and IV, being fraud, negligence, private nuisance, and public nuisance), and remand those counts to the trial court to permit plaintiffs to move to amend their complaint to cure the deficiencies that otherwise entitle defendant to summary disposition of these counts.

***10** Reversed and remanded. We do not retain jurisdiction.

All Citations

Not Reported in N.W. Rptr., 2020 WL 5085949

Footnotes

1 Michigan's Natural Resources and Environmental Protection Act, MCL 324.101 *et seq.*

2 Michigan's Environmental Protection Act, MCL 324.1701 *et seq.*, is Part 17 of the NREPA.

3 *Moore v. General Motors LLC*, unpublished order of the Court of Appeals, entered June 29, 2019 (Docket No. 348579); *Moore v. General Motors LLC*, unpublished order of the Court of Appeals, entered June 29, 2019 (Docket No. 349727).

4 In all other respects, the Supreme Court affirmed the opinion of this Court by equal division. *Mays*, —— Mich. at —— (BERNSTEIN, J.); slip op. at 4.

5 Pursuant to the decision of the bankruptcy court, New GM can be liable for damages to plaintiffs for failure to comply with statutorily-based environmental laws caused by the conduct of New GM, or as remediation for conduct of Old GM. But for purposes of the statute of limitations, plaintiffs' claims must arise from conduct

of New GM, because the initial contamination by Old GM predates the cut-off date for accrual under the statute of limitations.

6 Because we conclude that defendant is entitled to summary disposition of plaintiffs' claims under the NREPA, including its claims under Michigan's EPA, we decline to reach defendant's additional arguments regarding this claim that plaintiffs lack standing, that defendant's releases of contaminants were permitted, and that plaintiffs failed to allege their cost recovery claims.

7 With regard to common law tort liability for alleged contamination of plaintiffs' groundwater, the bankruptcy court held that its Sale Order does not preclude plaintiffs' potential causes of action against New GM with regard to contamination that migrated from the Proving Grounds after July 10, 2009 (the date New GM purchased the Proving Ground), whether by conduct of New GM after that date or by conduct of Old GM before that date. But, as noted, for purposes of the statute of limitations, plaintiffs' claims must arise from conduct of New GM, because the initial contamination by Old GM predates the cut-off date for accrual under the statute of limitations.

8 The defendant has the burden of proving the facts that establish that a claim is barred by the statute of limitations. *Stephens*, 307 Mich. App. at 227. Thus, while plaintiffs' failure to allege when the harm occurred from New GM's conduct means they have failed to state a claim under MCR 2.116(C)(8), it does not establish that their claims are barred by the statute of limitations.

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 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

Aaron C. Hemmings, Hemmings & Stevens, P.L.L.C., Raleigh, NC, Aylstock, Witkin, Kreis & Overholtz, PLLC, Pensacola, FL, John W. Adams, Jr., Adams Law Association, P. A., Valrico, FL, for Plaintiffs.

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).

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)

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 reviewed Plaintiff's Response to the Court's Order to Show Cause (Doc. 28), as

---

[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 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).

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

---

[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*).

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]

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

End of Document

[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 *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).

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

Circuit Court of the Thirteenth Judicial Circuit of Florida, Hillsborough County, Civil Division

October 21, 2020, Decided

Case No: 18-CA-010252

Reporter
2020 Fla. Cir. LEXIS 2275 *

Moises Salazar; Jose Espinel, Plaintiff v. Bank of America, N.A., Defendant

Counsel: [*1] For Plaintiff: AARON C HEMMINGS, HEMMINGS & STEVENS, P.L.L.C., RALEIGH, NC; JOSEPH H AUGHTMAN, AUGHTMAN LAW FIRM, MONTGOMERY, AL; Moises Salazar, Valrico, FL; Jose Espinel, Valrico, FL; Luisa Espinel, Valrico, FL; Gabino Peralta, Valrico, FL; Arely M Ramirez, Valrico, FL; Rodolfo Bejerano Blanco, Valrico, FL; Loraine Arenal Moreno, Valrico, FL; Aimee Rostgaard, Valrico, FL; Carlos Perez, Valrico, FL; JOHN W ADAMS JR, ADAMS LAW ASSOCIATION, P.A., VALRICO, FL.

For Defendant: JAMES RANDOLPH LIEBLER II, LIEBLER, GONZALEZ & PORTUONDO, MIAMI, FL; Bank of America, N.A., Charlotte, NC; KEITH LEVENBERG, GOODWIN PROCTER LLP, WASHINGTON, DC; IRA SCOT SILVERSTEIN, LIEBLER, GONZALEZ & PORTUONDO, MIAMI, FL.

Judges: Steven Scott Stephens, Judge.

Opinion by: Steven Scott Stephens

Opinion

Order Granting Motion for Summary Judgment

The defendant moved for summary judgment, relying on the statute of limitations, res judicata, and other grounds, The court held a hearing January 28, 2020 and among other grounds for opposing the motion, plaintiff plaintiff argued that the motion came too soon, and further discovery was necessary.

The court ruled on the record that the motion was well taken on statute of limitations grounds. The plaintiff [*2] was nevertheless afforded a 90 day period during which the plaintiff could conduct discovery and further develop its avoidance of the statute of limitations and, if warranted, file a motion for reconsideration of the summary judgment. The defendant was authorized to submit a proposed final judgment after 90 days if no motion for reconsideration was filed. The ruling was not reduced to writing but is clearly expressed in the transcript, appended to Doc. 72, Defendant's reply to plaintiff's supplemental response, at 36-37.

Rather than follow the court's ruling, plaintiff filed a supplemental response in opposition to the motion (Doc. 71). The court will treat it as a motion for reconsideration and it will be denied, as the claims remain barred by the statute of limitations.

The first 34 allegations of the complaint describe a general fraudulent scheme the defendant allegedly committed against the united States, without any indication any of it affected the individual plaintiffs. The court declines the opportunity to be distracted by

"the fraud" and instead looks to specific false representations ostensibly made to specific plaintiffs.

According to the complaint, Plaintiff Salazar borrowed [*3] money from the defendant, did not pay, and was foreclosed. In 2011, he called the bank as was told he would have to be behind in his payments to qualify for a loan modification. This "false statement of fact" started the cascade of events that led to the foreclosure of the mortgage. Plaintiff did not learn that it was false until his attorneys told him in 2017.

As it did before, the court rejects the notion that a statute of limitations can stay in suspension until one talks to an attorney. The plaintiff chooses how long he waits before consulting an attorney, so making the date of legal consultation determinative would abrogate all statutes of limitation. Even if that were a valid concept, it is not applicable here, where the alleged misrepresentation is more legal than factual. The plaintiff could have learned the falsity of the claim right away by investigating himself or hiring a lawyer then. The statute begins to run when knowledge of the cause of action becomes available. "In fraud cases... the statute of limitations begins running either at the time that plaintiff learned of the fraud or when the plaintiff reasonably should have learned about the facts supporting the fraud claim..." [*4] *Laney v. Am. Equity Inv. Life Ins. Co.*, 243 F. Supp. 2d 1347, 1357 (M.D. Fla. 2003);See also *Davis v. Monahan*, 832 So. 2d 708 (Fla. 2002).

The plaintiff submitted several decisions recently rendered by the Middle District of Florida denying similar res judicata and statute of limitations attacks on similar causes of action. This court adopts the reasoning of those decisions regarding res judicata. It respectfully reaches a different conclusion on the statute of limitations issue, however, noting that the date of consultation with lawyers was not mentioned in the federal cases, and it is the operative date relied on by the plaintiffs in this action. This case also has a different procedural trajectory from those, so a different application of the summary judgment rules follows.

The motion for summary judgment is granted and the supplemental response, treated as a motion for reconsideration, is denied. The defendant is directed to submit a proposed final judgment denying all relief.

Done and Ordered in Hillsborough County, Florida this 21st day of October, 2020.

ELECTRONICALLY CONFORMED

10/21/2020

Steven Scott Stephens, Judge

End of Document

2013 WL 5477376
Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
Only the Westlaw citation is currently available.

Court of Appeal, Second District, Division 4, California.

Jane SISKIN, Plaintiff and Appellant,
v.
Peter KORAL et al., Defendants and Respondents.

B241715
|
Filed October 2, 2013

APPEAL from a judgment of the Superior Court of Los Angeles County, Michelle R. Rosenblatt, Judge. Affirmed. (Los Angeles County Super. Ct. No. BC462606)

Attorneys and Law Firms

Brown George Ross, Peter W. Ross, Sylvia P. Lardiere, and Lori Sambol Brody, for Plaintiff and Appellant.

Kelley Drye & Warren, Andrew M. White, David E. Fink, and Eric W. May, for Defendants and Respondents.

MANELLA, J.

INTRODUCTION

***1** Jane Siskin appeals from a judgment of dismissal, following an order granting summary judgment in favor of respondents Peter Koral (Koral) and L'Koral Incorporated (L'Koral). Appellant contends the trial court erred in determining that her causes of action were time-barred by the applicable statutes of limitations. Finding no reversible error, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Appellant began working for Koral in 1994. In 2005, she became a 9.91 percent shareholder of L'Koral; Koral owned the remaining 90.09 percent. At the beginning of 2005, appellant was the president of sales for L'Koral, and Koral was its chief executive officer. L'Koral was in the business of designing, manufacturing, and distributing apparel throughout the United States. It had two divisions: one division manufactured and sold expensive blue jeans and related apparel under the trade name "Seven for All Mankind" (the Seven Division); the other manufactured more moderately priced apparel (the Moderate Division). Later that same year, L'Koral spun off the Seven Division to a subsidiary known as Seven for All Mankind, LLC (Seven, LLC). Shortly thereafter, on March 1, 2005, L'Koral sold 50 percent of Seven, LLC to Bear Stearns. Appellant received her pro rata share of the sale proceeds.

Shortly after the sale to Bear Stearns, appellant entered into negotiations to sell her ownership interest back to L'Koral. On April 30, 2007, appellant signed an agreement (the Redemption Agreement) to sell her 9.91 percent ownership interest in L'Koral for approximately $4.2 million and a 30 percent share of the Moderate Division, which was spun off into a separate entity. As a result of the sale, Koral became the sole owner of L'Koral. Four months later, on August 31, 2007, L'Koral and Bear Stearns sold Seven, LLC to VF Corp. (VFC) for approximately $773.1 million (the VF Sale). Appellant remained a business partner of Koral until October 2009, when she bought out Koral's 70 percent interest in the Moderate Division.

In 2010, the Internal Revenue Service (IRS) conducted an audit of L'Koral's tax accounting of the 2007 Redemption Agreement. Appellant was told that "the IRS found improbable L'Koral Inc.'s assertion that my interest in L'Koral Inc. was purchased for only $4.2 million, when the VF Sale took place just four months thereafter and, according to the IRS, established that my interest was much more valuable." In the course of the IRS audit, in February 2011, a representative of Koral admitted to appellant's representative that the negotiations between L'Koral, Bear Stearns, and VFC for the sale of Seven, LLC began within days of appellant's signing the Redemption Agreement.

On May 27, 2011, appellant filed a complaint against respondents, alleging causes of action for intentional misrepresentation, concealment, and negligent misrepresentation. Appellant alleged that she entered into negotiations to sell her ownership interest in L'Koral based

upon Koral's representations that L'Koral was unlikely to sell the balance of its interest in Seven, LLC any time soon, and that any such sale would take place, if at all, many years in the future. She further alleged that in early 2007, Koral was "heavily" pressuring her to sell her ownership interest, even "threaten[ing] that, unless she did so immediately, he would simply shut down the Moderate Division." Before finally agreeing to sell her ownership interest in April 2007, appellant alleged that she sought and obtained Koral's assurances that "no plans were in the offing to sell the balance of Seven, LLC; no discussions regarding such a sale were underway; and any possibility of such a sale remained years distant." Based upon these assurances, appellant sold her ownership interest back to L'Koral.

***2** Appellant also alleged that "[i]mmediately after learning of the VF Sale, Siskin confronted Koral and asked whether this deal had been under discussion or contemplated in any way prior to the execution of the Redemption Agreement on April 30, 2007. Koral assured Siskin that it had not. He told her the discussions between L'Koral, Inc., Bear Stearns and VF had not commenced until some months after the Redemption Agreement had closed." Appellant sought to recover approximately $34 million from respondents, the difference between what she had received for her shares and what she would have received had she not sold her shares four months earlier.

Subsequently, appellant served a document subpoena on VFC. In response, VFC produced (1) a confidentiality agreement between VFC and Seven, LLC on May 14, 2007, (2) a letter of intent for the VF Sale signed June 15, 2007, and (3) a transcript of a deposition taken in June 2009 in an unrelated action, in which Koral testified that his intention as of March 2005 was to sell Seven, LLC within three years.

Appellant also served a document subpoena on Irving Place Capital Management, L.P. (IPC), the successor to Bear Stearns. IPC informed appellant that it could not locate any responsive records, as Bear Stearns had been sold to JP Morgan Chase in May 2008. "As a result ..., IPC simply does not have, in its possession, custody or control, all of [Bear Stearns's] electronic documents and communications."

On September 8, 2011, appellant filed a first amended and supplemental complaint, which added allegations related to the documents produced by VFC. Specifically, she alleged that in a June 2, 2009 deposition, Koral testified that, at the time of the sale of 50 percent of Seven, LLC to Bear Stearns on March 1, 2005, he had "a plan to sell the rest of Seven *within three years*." As to the sale of Seven, LLC to VFC, appellant alleged that "[a] Confidentiality Agreement was signed between VF and Seven on May 14, 2007, just two weeks after Siskin signed the Redemption Agreement. A Letter of Intent for the VF Sale was signed one month later, on June 15, 2007."

After filing an answer generally denying the allegations and raising the affirmative defense of statute of limitations, respondents filed a motion for summary judgment. In their motion, respondents alleged that all of appellant's claims were time-barred as a matter of law. Respondents asserted that in verified discovery responses, appellant had stated that she first learned of the VF Sale "just a few days before that transaction was reported by the press in late August 2007." Appellant also admitted that she "confronted" Koral regarding the timing of the VF Sale within one week of learning of it, and that she conducted no investigation other than that inquiry. Thus, respondents asserted, appellant was on inquiry notice in August 2007. Unless the statute of limitations was tolled or Koral was estopped from asserting it as a defense, appellant's claims for intentional misrepresentation and concealment expired in August 2010, and her claim for negligent misrepresentation expired in August 2009.

Respondents also contended that appellant could not show the applicable statutes of limitations were tolled. They argued that a reasonable and diligent investigation would have revealed information indicating that Koral likely misled appellant in April 2007. They asserted that appellant could have contacted VFC and Bear Stearns to inquire about the timing of the negotiations for the VF Sale, as the contact information for the parties and their attorneys was publicly available. They noted that VFC produced the transactional documents and deposition transcript immediately after appellant requested them from VFC. Respondents also submitted a Form 8–K filed by VFC with the Securities and Exchange Commission (SEC) on July 26, 2007. In the publicly available Form 8–K, VFC included a July 26, 2007 "Agreement and Plan of Merger By and Among VF Corporation, Ring Company, Ring Five LLC, Seven For All Mankind, LLC, and Certain Unitholders" (the Purchase Agreement), and a press release announcing the purchase. The Purchase Agreement included the contact information for VFC, Bear Stearns, L'Koral, and Koral, and for their respective attorneys.

***3** Appellant opposed the motion for summary judgment, contending that the reasonableness of her investigation was a question of fact that could not be decided on summary judgment. She argued that her duty to investigate Koral's representations was relaxed because Koral was her fiduciary and a long-time business partner. In a declaration, appellant stated that after learning of the VF Sale, she asked Koral whether the sale had been under discussion or contemplated prior to the execution of the Redemption Agreement on April 30, 2007. Koral assured her that it had not; rather, he represented, the discussion between L'Koral, Bear Stearns and VFC had commenced months later. Appellant asserted that: "I trusted Koral and accepted his word on the matter. I had no reason to disbelieve him. He had been my business partner for thirteen years. He remained my business partner until two years later (October 2009), when my current partner and I bought defendants' controlling interest in the Moderate Division. Further, I was not aware of any means available to me to investigate or challenge his assurances. I had no information available to me that would have established that Koral was lying."

Appellant further contended that neither VFC nor Bear Stearns would have provided information voluntarily to her; VFC had produced the documents during the discovery process. Appellant also filed evidentiary objections to respondents' assertion that "[c]opious information about the VF Sale, including numerous documents and contact information for multiple parties involved in the VF Sale and their attorneys has been available to the public since July 26, 2007."

Respondents filed a reply, contending that appellant's investigation was not diligent or reasonable as a matter of law, because she did nothing to investigate whether Koral had misled her, other than confronting him. They also filed evidentiary objections to two assertions in appellant's declaration—that she was not aware of any means available to her to investigate Koral's representations when she confronted him after the VF Sale, and that she had no information available to determine whether Koral was then lying to her.

On April 26, 2012, the trial court granted respondents' motion for summary judgment, overruled appellant's evidentiary objections, and sustained respondents' evidentiary objections. The court held that appellant was on inquiry notice of her claims in late August 2007, as by that time, appellant had a suspicion of wrongdoing. As the court characterized it, "what the complaint and Siskin describe in late August 2007 can be boiled down to her inquiring as to whether or not Defendant Koral had lied to her [in April]." The court determined that appellant could not avail herself of the delayed discovery rule because "she did not actually conduct an investigation of whether or not Koral was lying to her beyond taking Koral's word that he did not lie to her." For the same reason, appellant was not entitled to the tolling of the applicable statutes of limitations under the fraudulent concealment doctrine. In addition, the court found appellant's assertion that VFC and Bear Stearns would not have cooperated with her requests for documents in August 2007 was speculative and unsupported by evidence.

A judgment of dismissal of appellant's amended and supplemental complaint was entered May 17, 2012. Appellant timely appealed.

DISCUSSION

Appellant contends the trial court erred in determining that she was on inquiry notice of her claims in August 2007. She disputes the court's determination that she was not entitled to tolling of the applicable limitations period under the fraudulent concealment doctrine. Finally, she challenges the trial court's evidentiary ruling that struck two assertions in her declaration—that she was not aware of any means to investigate Koral's representations in August/September 2007, and that she had no information available to determine whether he was then lying to her.

A. Standard of Review

"A defendant is entitled to summary judgment if the record establishes as a matter of law that none of the plaintiff's asserted causes of action can prevail. [Citation.]" (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.) Generally, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) In moving for summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action—for

example, that the plaintiff cannot prove element *X*." (*Id.* at p. 853.)

***4** " 'Review of a summary judgment motion by an appellate court involves application of the same three-step process required of the trial court. [Citation.]' " (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662.) The three steps are (1) identifying the issues framed by the complaint, (2) determining whether the moving party has made an adequate showing that negates the opponent's claim, and (3) determining whether the opposing party has raised a triable issue of fact. (*Ibid.*)

"Although we independently review the grant of summary judgment [citation], our inquiry is subject to two constraints. First, we assess the propriety of summary judgment in light of the contentions raised in [appellant's] opening brief. [Citation.] Second, to determine whether there is a triable issue, we review the evidence submitted in connection with summary judgment, with the exception of evidence to which objections have been appropriately sustained. [Citations.]" (*Food Safety Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1124.)

B. Accrual of Causes of Action

Appellant alleged three causes of action in her complaint: intentional misrepresentation, concealment, and negligent misrepresentation. The first two causes of action are governed by the three-year limitations period set forth in California Code of Civil Procedure section 338, subdivision (d).[1] (§ 338, subd. (d) [fraud claims]; *Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1391.) The cause of action for negligent misrepresentation is governed by the two-year limitations period set forth in section 339. (§ 339 [claims upon an obligation or liability not based on a writing]; *E–Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1316.)

Generally, the limitations period starts running when the last element of a cause of action is complete. (*Fox v. Ethicon Endo–Surgery, Inc.* (2005) 35 Cal.4th 797, 806 (*Fox*).) As used in this context, the " 'elements' " of a cause of action are the " 'generic' " elements of wrongdoing, causation, and injury. (*Id.* at p. 807.) Here, the wrongdoing that formed the basis for appellant's causes of action were Koral's alleged misrepresentations in April 2007. According to the complaint, Koral made three misrepresentations: (1) that "no plans, were in the offing to sell the balance of Seven[, LLC]"; (2) that "no discussions regarding such a sale were underway"; and (3) that "any possibility of such a sale remained years distant." Appellant contended these misrepresentations caused her injury, as she would not have sold her 9.91 percent ownership interest in L'Koral had she known the representations were false. Finally, appellant alleged she suffered an economic injury as a result of the alleged misrepresentations when Seven, LLC was sold in August 2007; she contends she would have made over $38 million from the VF Sale had she kept her ownership interest.

In their motion for summary judgment, respondents made an adequate showing that appellant's causes of action were time-barred as a matter of law. On the face of her complaint, appellant's causes of action accrued in August 2007, when the last element of her causes of action was completed. However, the applicable statutes of limitations here codified the " 'discovery rule,' which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." (*Fox, supra,* 35 Cal.4th at p. 807 ["The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action."].) For example, section 339 provides that a negligent misrepresentation cause of action "shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder." Similarly, section 338, subdivision (d) provides that a cause of action on a fraud claim "is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud." As our Supreme Court has explained, "[t]he Legislature, in codifying the discovery rule, has ... required plaintiffs to pursue their claims diligently by making accrual of a cause of action contingent on when a party discovered or *should have* discovered that his or her injury had a wrongful cause." (*Fox, supra,* 35 Cal.4th at p. 808; see also *Dias v. Nationwide Life Ins. Co.* (E.D.Cal.2010) 700 F.Supp.2d 1204, 1222 (*Dias*) ["The limitations period for fraud ... incorporates the 'delayed discovery rule.' "]; *Doe v. Roman Catholic Bishop of Sacramento* (2010) 189 Cal.App.4th 1423, 1430–1431 [concealment claim accrues on inquiry notice].)[2]

***5** "[T]he statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110 (*Jolly*).) The plaintiff has reason to suspect when she has notice or information of circumstances to put a reasonable person on inquiry. The plaintiff need not know the specific facts necessary to establish the cause of action. Rather, the plaintiff must seek to learn the facts necessary to bring the cause of action in the first place; she cannot " 'sit' " on her rights. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 398 (*Norgart*); see also *Kline v. Turner* (2001) 87 Cal.App.4th 1369, 1374["[D]iscovery" in the context of the accrual of a fraud claim occurs "when the plaintiff suspected or should have suspected that an injury was caused by wrongdoing"].) "In other words, plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation." (*Fox, supra,* 35 Cal.4th at pp. 807–808.)

"While resolution of the statute of limitations issue is normally a question of fact, where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper." (*Jolly, supra,* 44 Cal.3d at p. 1112; see also *Norgart, supra,* 21 Cal.4th at p. 405 [affirming summary judgment on statute of limitations ground]; *Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 902–903 [same]; *Sanchez v. South Hoover Hospital* (1976) 18 Cal.3d 93, 103 [same].)

C. Inquiry Notice

As our Supreme Court has held, "the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her." (*Jolly, supra,* 44 Cal.3d at p. 1110.) Here, the only legitimate inference from the undisputed facts is that appellant actually suspected Koral had done something wrong in August 2007. Appellant alleged that Koral pressured her heavily to sell her shares in early 2007, even threatening to shut down the Moderate Division if she did not sell immediately. Before agreeing to sell in April 2007, she sought and obtained Koral's assurances that [1] "no plans were in the offing to sell the balance of Seven[, LLC]; [2] ... no discussions regarding such a sale were underway; and [3] ... any possibility of such a sale remained years distant." It is undisputed that a mere four months later, Koral and Bear Stearns sold Seven, LLC to VFC for nine times the value appellant had received from L'Koral. Immediately after learning of the sale, appellant—in the words of her complaint —"confronted Koral" and asked him whether discussions regarding the sale had been underway or contemplated prior to April 30, 2007. The only legitimate inference from these undisputed facts is that in August 2007, appellant suspected that Koral had lied to her in April 2007 and caused her to suffer an economic loss.

Appellant contends that it is reasonable to infer that in August 2007, she had no suspicion that Koral had lied to her, because (1) she believed in and trusted him, based upon their lengthy business partnership; (2) the timing of the VF Sale did not conclusively establish that Koral had lied to her in April 2007, as the VF opportunity might have arisen after April 30, 2007; and (3) Koral owed a fiduciary duty to appellant to disclose his intent to sell Seven, LLC. Appellant's contentions do not obviate the fact that she confronted Koral to inquire whether the negotiations to sell Seven, LLC to VFC had been underway or contemplated before April 30, 2007—conduct irreconcilable with her current claim that she trusted him, believed that the timing of the VF Sale was not inherently suspicious, and relied on the fiduciary relationship between them. Rather, the only legitimate inference is that despite her later assertions, appellant was suspicious of Koral's wrongdoing in August 2007, and acted upon her suspicions by asking him about the timing of the negotiations to sell Seven, LLC. As the trial court aptly observed, appellant's conduct amounted to "inquiring as to whether or not Defendant Koral had lied to her." Her inquiry evinced an understandable suspicion as to the truth of Koral's April representations. In short, the evidence establishes that upon learning of the VF Sale in August 2007, appellant suspected that Koral had wronged her in August 2007; her causes of actions accrued at that time.

***6** Even were we to find a triable issue of fact existed as to her actual suspicion, we would conclude that a reasonable person in appellant's position "should have suspected that an injury was caused by wrongdoing." (*Kline v. Turner, supra,* 87 Cal.App.4th at p. 1374.) No reasonable person would have placed much trust in Koral based upon, in appellant's words, "the fact that he had treated her fairly in the past." Months before the sale, Koral had heavily pressured appellant to sell her shares, including using economic threats. In addition, although appellant now argues she received what seemed like

a fair price for her ownership interest in April 2007, it could not have appeared nearly so fair in August after the VF sale, when what had been her minority interest sold for nine times the price she had received only four months earlier.

Likewise, no reasonable person would have found the timing of the VF Sale innocuous. The sale of Seven, LLC in August 2007 established that Koral's third April representation—that any sale would occur years in the future—was wrong, and cast doubt on the truthfulness of the other two representations. Koral had represented that he did not intend to sell Seven, LLC in the near future; yet a mere four months later, he had secured a buyer, negotiated a deal satisfactory to the company's other shareholder, and closed a sale involving three-quarters of a billion dollars.

Finally, a reasonable person would have been suspicious in August 2007, despite the fiduciary relationship that existed when Koral made his three representations in April 2007. As stated in *Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 201–202 (*Hobbs*), "[w]here a fiduciary relationship exists, facts which ordinarily require investigation may not incite suspicion [citation] and do not give rise to a duty of inquiry [citation]." However, "once a plaintiff becomes aware of facts which would make a reasonably prudent person suspicious, the duty to investigate arises and the plaintiff may then be charged with knowledge of the facts which would have been discovered by such an investigation." (*Id.* at p. 202, italics omitted; *Lee v. Escrow Consultants, Inc.* (1989) 210 Cal.App.3d 915, 921 (*Lee*) [same].) While appellant may have been entitled to rely on Koral's representations in April regarding his present and future plans for L'Koral, the VF Sale necessarily cast them in a different light. As explained above, the facts known to appellant following the VF Sale would have caused any reasonable person to question the veracity of Koral's representations in April that he had no plans to sell the company and did not contemplate doing so for years.

On this point, *Miller v. Bechtel Corp.* (1983) 33 Cal.3d 868 (*Miller*) is particularly instructive. There, the plaintiff wife sued her husband for misrepresenting the value of a marital asset (stock in Bechtel) and fraudulently inducing her to relinquish her interest in the stock during the dissolution proceedings. (*Id.* at pp. 871–872.) Our Supreme Court affirmed a grant of summary judgment in favor of the husband. The court held that notwithstanding the fiduciary relationship between the parties, the wife was aware of facts that imposed upon her a duty to investigate her husband's representations. Specifically, her attorneys had expressed suspicions about the stated value of the stock, and had written the husband's attorney seeking more information about the valuation. (*Id.* at pp. 874–875.) Because the wife had failed to make further inquiry, such as asking Bechtel or examining public records, the court found she could be charged with the knowledge acquired from such inquiry, which would "at the very least have reinforced plaintiff's doubts whether the 'true value' of the stock was as represented in the property settlement agreement." (*Id.* at p. 875.)

***7** Here, from April to August 2007, appellant had no duty to investigate Koral's April representations because a reasonably prudent person would have had no reason to become suspicious of the representations. However, in late August 2007, appellant learned that Koral had sold Seven, LLC for multiples of the price she had received from L'Koral, just four months after assuring her that it would be years before Seven, LLC would be sold. When viewed in conjunction with the fact that Koral had pressured appellant heavily to sell her shares just months earlier, a reasonable person in appellant's situation would have been suspicious of Koral's April representations. Thus, a duty to investigate arose. Appellant confronted Koral and inquired about the timing of the negotiations to sell Seven, LLC, but failed to conduct a further inquiry that would "at the very least have reinforced plaintiff's doubts." (*Miller, supra,* 33 Cal.3d at p. 875.) In short, appellant had inquiry notice in August 2007.

D. Fraudulent Concealment Doctrine

Appellant contends the applicable limitations periods were tolled under the fraudulent concealment doctrine. " 'It has long been established that the defendant's fraud in concealing a cause of action against him tolls the applicable statute of limitations, but only for that period during which the claim is undiscovered by plaintiff or until such time as plaintiff, by the exercise of reasonable diligence, should have discovered it.' " (*Bernson v. Browning–Ferris Industries* (1994) 7 Cal.4th 926, 931.) Stated differently, the fraudulent concealment doctrine tolls the limitations period only as long as a plaintiff's reliance on the defendant's misrepresentations is reasonable. (*Grisham v. Phillip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 637.) " '[W]hether reliance was reasonable is a question of *fact* for the jury, and may be decided as a matter of law only if the facts permit reasonable minds to come to just one

conclusion.' " (*Id.* at pp. 637–638, quoting *Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1666, italics omitted.)

Here, appellant contends that her suspicions about Koral's representations in April 2007 were allayed and that she was lulled into not filing her lawsuit within the applicable limitations periods by Koral's August misrepresentations about the timing of the negotiations to sell Seven, LLC to VFC. (See *Mercer v. Elliott* (1962) 208 Cal.App.2d 275, 281 ["One cannot justly or equitably lull his adversary into a false sense of security and thereby cause him to subject his claim to the bar of the statute of limitations...."].) On the record before us, however, appellant's asserted reliance was not reasonable as a matter of law. Koral was the one person who had heavily pressured appellant to sell her ownership interest, who had falsely assured her that "any possibility" of a sale remained "years distant," who had then sold Seven, LLC for nine times the price that appellant had received just four months prior, and who had benefitted greatly from the transaction. (See *Roland v. Hubenka* (1970) 12 Cal.App.3d 215, 225 ["Where a buyer learns one representation by a seller is false, he may not assume other representations by the seller were true."].)

Appellant contends she could reasonably rely upon Koral's August representations because he was still her fiduciary at that time. Although Koral and appellant were no longer partners in Seven, LLC in August 2007, appellant contends Koral had a fiduciary duty to fully disclose the truth about the negotiations to sell Seven, LLC. Assuming Koral owed appellant a continuing fiduciary duty with respect to the sale of her interest in L'Koral, by August 2007, appellant was aware of facts that should have raised her suspicions regarding his April representations. (*Hobbs, supra,* 164 Cal.App.3d at p. 202.) As the *Alfaro* court stated, "A person in a fiduciary relationship may relax, but not fall asleep." (*Alfaro, supra,* 171 Cal.App.4th at p. 1394.) Here, appellant was aware that one of Koral's April representations was demonstrably false, which should have raised her suspicions about his remaining representations. She was also aware that her April sale resulted in Koral's having reaped $34 million more from the VF Sale than he would have earned had appellant not acceded to his pressure to sell her shares. (See *Rutherford v. Rideout Bank* (1938) 11 Cal.2d 479, 486 [when plaintiff discovered that a representation "by one in whom she had implicit trust and confidence" had been motivated by personal gain, "[a]t this point inquiry became a duty and plaintiff was chargeable with what she would discover if inquiry were made."].) On these undisputed facts demonstrating that at least one of Koral's April representations was not true, that the timing of the sale cast doubt on the remaining representations, and that the sale of appellant's shares Koral had pressured her to make redounded to his financial benefit and to her detriment, no reasonable person in appellant's position could blindly have accepted his assurances that no sale had been planned and no negotiations initiated until "months" after she relinquished her shares.

***8** Appellant's reliance on *Dias* and *Lee* is misplaced. Those cases involved facts that would not have made a reasonably prudent person suspicious that the fiduciary had committed wrongdoing. In *Lee,* the plaintiff was aware that escrow had not closed, but had no notice that the escrow agent was disbursing monies to other parties in violation of the escrow instructions. (*Lee, supra,* 210 Cal.App.3d at pp. 921–922.) In *Dias,* the plaintiffs received notices that insurance premiums were owed, but the notices did not establish or suggest that their insurance agent had lied when he previously told them that the premiums would vanish over time. (*Dias, supra,* 700 F.Supp.2d at pp. 1208, 1224–1225.) In contrast here, appellant had notice of facts establishing that Koral had lied to her or suggesting that he had harmed her by depriving her of the significant financial gain from a planned sale of Seven, LLC.

Dias is also distinguishable because, in addition to the agent's assurance that the premium notices were a mistake, the company did not cancel the plaintiffs' insurance, despite their disregard of the premium notices. (*Dias, supra,* 700 F.Supp.2d at pp. 1223–1224.) The conduct of the company thus supported the plaintiffs' reliance. Here, in contrast, appellant neither sought nor obtained confirmation of Koral's August representations. Given the level of suspicion a reasonable person would have possessed (and appellant evidently did possess), it was unreasonable to rely on Koral's uncorroborated assurances about the timing of the VF Sale. As no reasonable person would have relied on the assurances of the person most likely to have misled her, appellant may not rely on the doctrine of fraudulent concealment to toll the running of the statute of limitations. (See *Miller, supra,* 33 Cal.3d at p. 875 [despite fiduciary relationship between husband and wife, wife's claims for fraud were time-barred

because she did not investigate his representations despite her suspicions].)

E. Futility of Investigation

Appellant argues that assuming a duty to investigate arose, any investigation would have been futile. In connection with this argument, she contends the trial court improperly sustained objections to two assertions in her declaration. [3] Appellant asserted that after speaking with Koral following the VF Sale, (1) "I was not aware of any means available to me to investigate or challenge his assurances," and (2) "I had no information available to me that would have established that Koral was lying." As to the latter, being on inquiry notice obligated appellant to seek out the information necessary to bring her claims. (See *Norgart, supra,* 21 Cal.4th at p. 398 [inquiry notice means that "within the applicable limitations period, [plaintiff] must indeed seek to learn the facts necessary to bring the cause of action in the first place—he 'cannot wait for' them 'to find' him and 'sit on' his 'rights'; he 'must go find' them himself if he can"]; cf. *Miller, supra,* 33 Cal.3d at pp. 874–875 [where plaintiff did not actually make an inquiry, her assertion that her inquiry to a third party would be unavailing is not a fact within her personal knowledge].) Thus, the trial court properly sustained the objection on relevance grounds.

As to appellant's first assertion—that she was not aware of any means to find the necessary information—her actual knowledge is irrelevant. Appellant is charged with knowledge of all available means to investigate, even if she was not actually aware of those means. (See *Fox, supra,* 35 Cal.4th at p. 808 [plaintiff deemed to have inquiry notice of defendant's wrongdoing when she discovers or *should have discovered* facts]; *Hobbs, supra,* 164 Cal.App.3d at p. 202 [where plaintiff has duty to investigate, she may be "charged with knowledge of the facts which would have been discovered by such an investigation."].) Regardless of appellant's actual knowledge of the means to investigate or challenge Koral's August assertions, she should have been aware (1) that she could contact VFC and Bear Stearns directly and ask for information that could corroborate or contradict Koral's assertions, and (2) that she could review publicly available SEC filings of the various parties for such information.

***9** Appellant contends that any investigation would have been futile. Specifically, she asserts that VFC and Bear Stearns were prohibited from disclosing the timing of the negotiations under the May 14, 2007 confidentiality agreement, which applied to VFC, Seven, LLC, and their affiliates, who appellant contends included Bear Stearns and Koral. [4] We are not persuaded. Even assuming the confidentiality agreement prohibited any disclosure, appellant could have discovered information indicating that Koral had lied about the timing of the negotiations. Specifically, VFC filed a publicly available Form 8–K, which included a July 26, 2007 Purchase Agreement and press release. In the Purchase Agreement, VFC agreed to a plan to purchase Seven, LLC, as the boards of directors for the respective companies had approved the transaction. The date of the Purchase Agreement and the board approval process created a reasonable inference that the negotiations to sell Seven, LLC did not commence months after appellant sold her ownership interest. Thus, appellant cannot show that any investigation would have been futile, as such investigation would, "at the very least[,] have reinforced plaintiff's doubts" as to the veracity of Koral's representations in August 2007. [5] (*Miller, supra,* 33 Cal.3d at p. 875.)

Appellant's causes of action accrued in August 2007 because she was on inquiry notice following the VF Sale. As she was not entitled to tolling under the fraudulent concealment doctrine, the applicable limitations periods expired by August 2010. Because she first filed her complaint in May 2011, her causes of action were time-barred. The trial court properly granted summary judgment to respondents and dismissed appellant's complaint.

DISPOSITION

The judgment of dismissal is affirmed. Costs are awarded to respondents.

We concur:

EPSTEIN, P.J.

SUZUKAWA, J.

All Citations

Not Reported in Cal.Rptr., 2013 WL 5477376

Footnotes

1 All further statutory citations are to the Code of Civil Procedure.

2 Although the parties separately discuss the delayed discovery rule, as the cases make clear, the rule is incorporated into the statutes of limitations applicable to appellant's claims.

3 Generally, we review a trial court's evidentiary ruling for an abuse of discretion; however, where the ruling is based only upon written objections without further reasoning, it is reviewed de novo. (See *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 535.) Although the parties dispute what standard of review is applicable here, we reach the same conclusions under either standard of review.

4 Because Bear Stearns did not sign the confidentiality agreement, it arguably was not bound by the contract.

5 Appellant contends her duty of inquiry did not include reviewing regulatory filings. However, the cases she cites do not support her contention. (See *Miller, supra,* 33 Cal.3d at p. 875 [after noting that a plaintiff who sues a fiduciary for fraud is not charged with knowledge contained in the public records, the court stated that when suspicions are aroused, plaintiff could be so charged]; *Bennett v. Hibernia Bank* (1956) 47 Cal.2d 540, 562 [on appeal from demurrer, where plaintiffs alleged a fiduciary relationship had not been repudiated, "the fact that a document disclosing these events was a matter of public record filed with the Secretary of State cannot alone cause the statute to run"]; *Cameron v. Evans Securities Corp.* (1931) 119 Cal.App. 164, 171 [where respondent has no duty to inquire, he was under no duty to investigate public records].) Here, appellant had a duty to investigate, and thus, she is charged with any knowledge reasonably obtained from examining public records.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-556

No. COA20-160-2

Filed 5 October 2021

Mecklenburg County, No. 18-CVS-8266

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, Plaintiffs-Appellants,

v.

BANK OF AMERICA, N.A., Defendant-Appellee.

Appeal by plaintiffs from order entered 3 October 2019 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard originally in the Court of Appeals 21 October 2020, with an unpublished opinion filed 31 December 2020. Plaintiffs' petition for rehearing was granted 10 March 2021. This opinion supersedes and replaces the 31 December 2020 opinion previously filed in this matter.

Robinson Elliott & Smith, by William C. Robinson, Dorothy M. Gooding, and Robert F. Orr, and Aylstock, Witkin, Kreis & Overholtz, PLLC, by Samantha Katen, Justin Witkin, Chelsie Warner, Caitlyn Miller, and Daniel Thornburgh, for plaintiffs-appellants.

McGuireWoods, LLP, by Bradley R. Kutrow, and Goodwin Procter LLP, by Keith Levenberg, and James W. McGarry, for defendant-appellee.

CARPENTER, Judge.

¶ 1 This matter was previously heard by this Court on 21 October 2020, and a decision was rendered in *Taylor v. Bank of America, N.A.*, __ N.C. App. __, 852 S.E.2d 447 (2020). Pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure, this Court granted plaintiffs' petition for rehearing to consider whether the trial court erred in granting defendant's motion to dismiss and denying plaintiffs' motion for partial summary judgment. We reverse and remand for further findings of fact and conclusions of law.

I. Factual and Procedural Background

¶ 2 Plaintiffs 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, and Zelmon McBride (collectively, "Plaintiffs")[1] are homeowners residing in various states, including North Carolina,[2] who each sought modification to their home mortgages under the Home Affordable Modification Program ("HAMP"). Defendant Bank of America, N.A. ("Defendant") is a Delaware Corporation with its principal place of business in Charlotte, North

[1] Plaintiffs Crystal Price and Whitney Whiteside were part of the original suit but appear not to be part of this appeal, as their names are not listed on the Appellants' brief.

[2] Chester Taylor is the only Plaintiff who is alleged to reside in North Carolina. Ronda and Brian Warlick, Lisa Mendez, Lori Martinez, and Keith Peacock live in California. Jeanette and Andrew Aleshire live in Wisconsin, but their mortgage was on a home in Minnesota. Marquita Perry lives in Arizona. Kimberly Stephen lives in Michigan. Zelmon McBride lives in Nevada.

Carolina.

¶ 3 Multiple lawsuits, including one brought by the Federal Government and forty-nine states, were subsequently filed against Defendant for the fraudulent HAMP scheme between 2011 and 2014. A multi-district litigation case, *In re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation*, M.D.L. No. 10-2193-RWZ, was filed in 2011 and included class action cases from across the country. The Massachusetts District Court denied class certification of the multi-district case concluding, while the claims may be meritorious, "they rest on so many individual factual questions that they cannot sensibly be adjudicated on a classwide basis." Thus, individual borrowers would have to file individual lawsuits to recover damages resulting from Defendant's fraudulent practices regarding HAMP loan modifications.

¶ 4 On 1 May 2018, Plaintiffs brought this joint underlying action against Defendant, with each Plaintiff outlining their own individual experience with Defendant between the years 2009 and 2014. On 11 April 2019, Defendant filed a motion to dismiss the amended complaint or, in the alternative, to strike impertinent allegations and sever misjoined claims. The motion noted, in pertinent part, that the complaint on its face was barred by the statute of limitations, and the claims were "subject to dismissal under the doctrines of *res judicata* and/or collateral estoppel because the issues involved in this litigation have already been litigated[.]"

¶ 5 On 3 October 2019, the trial court granted Defendant's motion to dismiss. In a short order, the court concluded Plaintiffs' claims were "barred by the applicable statutes of limitation," and "the claims of all Plaintiffs who were parties to foreclosure proceedings were barred by the doctrines of *res judicata* and collateral estoppel."[3] On 31 December 2020, this Court affirmed the decision of the trial court. This Court granted Plaintiffs' petition for rehearing on 10 March 2021.

II. Jurisdiction

¶ 6 Appeal lies in this Court as a matter of right pursuant to N.C. Gen. Stat. § 7A-27(b)(3) (2019).

III. Issue

[3] At the time of this action, there were 13 other pending actions brought on the basis of very similar complaints that raised essentially identical claims that were pending in this case. *See* Aiello, Jetta, et al. v. Bank of America, N.A., 18-CVS-14833; Allred, Amy, et al. v. Bank of America, N.A., 18-CVS-20373; Beams, Lisa, et al. v. Bank of America, N.A., 18-CVS-20374; Bizzell, Gwendaline, et al. v. Bank of America, N.A., 18-CVS-14835; Bowman, Wanda, et al. v. Bank of America, N.A., 18-CVS-14834; Gotts, Erin, et al. v. Bank of America, N.A., 18-CVS-14739; Jackson, Darlene, et al. v. Bank of America, N.A., 18-CVS-16675; Jobe, Kelly, et al. v. Bank of America, N.A., 18-CVS-21455; Martin, Cynthia, et al. v. Bank of America, N.A., 18-CVS-14738; Reardon, Christopher and Larissa, et al. v. Bank of America, N.A., 18-CVS-16676; Smith, Melba, et al. v. Bank of America, N.A., 18-CVS-20375; Taylor III, Chester, et al. v. Bank of America, N.A., 18-CVS-8266; Tyler III, Charles, et al. v. Bank of America, N.A., 18-CVS-22406. The trial court heard background information about the above-titled action as well as the other cases referred to here. The parties in these cases agreed that this case would serve as the first case for briefing on Defendant's motion to dismiss and related motions, so the trial court order applied to Plaintiffs for this case and all pending cases. Discovery in all 13 pending cases was stayed pending the trial court's disposition of the Taylor motion.

¶ 7 The sole issue on appeal is whether the trial court erred in granting Defendant's motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure because the claims were barred under the statute of limitations, and the claims were precluded based on *res judicata* and collateral estoppel.

IV. Standard of Review

¶ 8 "Our review of the grant of a motion to dismiss under Rule 12(b)(6) . . . is de novo." *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013). "We consider 'whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.'" *Id.* at 541, 742 S.E.2d at 796 (quoting *Coley v. State*, 360 N.C. 493, 494–95, 631 S.E.2d 121, 123 (2006)).

V. Discussion

¶ 9 Here, the trial court's order granting Defendant's motion to dismiss stated, in pertinent part:

> THIS MATTER came on for hearing before the undersigned, who has been assigned by the Chief Justice to preside over this exceptional case pursuant to Rule 2.1 of the General Rules of Practice . . . The Court having reviewed the record, including the Complaint, motions, briefs and attached exhibits, along with cited case law, and having heard arguments of counsel for the parties on May 29, 2019; and the Court having concluded based on the foregoing that all Plaintiffs' claims are barred by the applicable statute 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[.]

The order appealed from does not state the specific grounds for the trial court's grant of Defendant's motion to dismiss. Nor does the transcript reveal any findings made by the trial court. There is no indication that the trial court did a choice of law analysis, that it considered facts only within the amended complaint, or that it was appropriate to consider Plaintiffs' claims together when the underlying facts established a failed class action based on "so many individual factual questions." The order granting Defendant's motion to dismiss does not state upon what basis the court made its decision, and as such, this Court cannot properly review whether the trial court correctly granted Defendant's motion.

¶ 10 As we cannot determine the reason behind the grant, we cannot conduct a meaningful review of the trial court's conclusions of law, and we must accordingly reverse and remand the order for further findings. "On remand, the trial court may hear evidence and further argument to the extent it determines in its discretion that either or both may be necessary and appropriate." *Pineville Forest Homeowners Ass'n v. Portrait Homes Constr. Co.*, 175 N.C. App. 380, 387, 623 S.E.2d 620, 625 (2006). Thereafter, the court is to enter a new order containing findings that sustain its determination regarding the validity and applicability of the statute of limitations or *res judicata* determinations. However, because this case is at the pleadings stage, the findings must not include facts outside the four corners of the amended complaint. *See Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach*, 251 N.C. App. 771, 775,

796 S.E.2d 120, 123 (2017) (noting it is well established that at the motion to dismiss stage, the trial court and this Court "may not consider evidence outside the four corners of the complaint[.]").

VI. Conclusion

¶ 11 For the foregoing reasons, the trial court's grant of Defendant's motion to dismiss is reversed and the matter remanded for further factual findings and conclusions of law in accordance with this opinion.

REVERSED AND REMANDED.

Judge JACKSON concurs.

Judge DILLON dissents in a separate opinion.

Report per Rule 30(e).

No. COA20-160-2 – *Taylor v. Bank of America, N.A.*

DILLON, Judge, dissenting.

¶ 12 I was on the panel which issued the original opinion in this appeal, reported at *Taylor v. Bank of America, N.A.*, ___ N.C. App. ___, 852 S.E.2d 447 (2020). I continue to believe that Judge Bell got it right. My vote continues to be to affirm the order of the trial court. Accordingly, I dissent.

¶ 13 I write separately to address the statute of limitations issue.

¶ 14 Judge Bell dismissed the complaint, in part, based on her conclusion that the allegations show the claims contained therein were time-barred. *See Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996) (holding that a statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion when apparent from "the face of the complaint" that the action was not timely filed).

¶ 15 In their complaint, Plaintiffs essentially allege that they suffered harm when Defendant fraudulently refused to modify their respective mortgages under the Home Affordable Modification Program ("HAMP") though they each qualified for a loan modification under HAMP. However, they did not file the complaint until 2018, more than three years after they were denied their modifications.

¶ 16 Plaintiffs, though, argue that the statute of limitations was tolled until they could have reasonably discovered the fraud. However, Plaintiffs admit in their complaint that the complaint was not filed until more than three years after their respective homes were foreclosed upon; that is, without Defendant modifying their respective mortgages.

¶ 17 I conclude that the applicable statute of limitations ceased to be tolled, if at all, at least by the time the foreclosures took place. By that time, Plaintiffs became aware that Defendant would not be modifying their respective loans. Indeed, our Supreme Court has held in a case involving fraud and breach of contract claims that the statute begins to run at least by the time the plaintiff becomes aware of the injury. *See Christenbury Eye v. Medflow*, 370 N.C. 1, 9, 802 S.E.2d 888, 894 (2017)*; see also United States v. Kubrick*, 444 U.S. 111, 123 (1979) (recognizing that the discovery rule applies to when the injury is known, not when the legal rights are known, and that the discovery rule includes the duty to seek "advice . . . as to whether he has been legally wrong").

¶ 18 It is evident from the face of the complaint that Plaintiffs did not bring suit until more than three years after they became aware of their injury—when their respective properties were foreclosed upon. They learned they might have a legal claim for fraud only after they had consulted attorneys years later. They should have sought legal advice once they suffered their injury. They did not. Accordingly, I conclude that Judge Bell ruled correctly, noting that her dismissal orders are consistent with a number of dismissal orders from across the country involving similar claims, as referenced in Defendant's brief. I vote to affirm Judge Bell's order.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-160

Filed: 31 December 2020

Mecklenburg County, No. 18 CVS 8266

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, Plaintiffs,

v.

BANK OF AMERICA, N.A., Defendant.

Appeal by plaintiffs from order entered 3 October 2019 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 October 2020.

Robinson Elliott & Smith, by William C. Robinson and Dorothy M. Gooding, Robert F. Orr, and Aylstock, Witkin, Kreis & Overholtz, PLLC, by Samantha Katen, Justin Witkin, Chelsie Warner, Caitlyn Miller, and Daniel Thornburgh, for plaintiffs-appellant.

McGuireWoods, LLP, by Bradley R. Kutrow, and Goodwin Procter LLP, by Keith Levenberg and James W. McGarry, for defendant-appellee.

YOUNG, Judge.

Where plaintiffs' complaint, on its face, demonstrated that the statute of limitations had expired, and failed to demonstrate a basis for tolling the statute, the

trial court did not err in granting defendant's motion to dismiss on the basis of the statute of limitations. Where at least some of plaintiffs' allegations stemmed from purportedly wrongful foreclosures, the trial court did not err in granting defendant's motion to dismiss such claims on the bases of *res judicata* and collateral estoppel. Plaintiffs failed to preserve the issue of amending their pleadings with timely motion or objection, and we therefore decline to address such issue. We affirm the order of the trial court granting defendant's motion to dismiss and denying plaintiffs' motion for partial summary judgment.

I. Factual and Procedural Background

On 1 May 2018, 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, and Zelmon McBride (collectively, plaintiffs) brought the underlying action against Bank of America, N.A. (defendant). In the complaint, each plaintiff outlined their own individual experience with defendant, through which defendant allegedly enacted a "fraudulent scheme" on homeowners seeking Home Affordable Modification Program (HAMP) modifications to their mortgages. Under HAMP, homeowners who agreed to participate in the program were offered the opportunity to modify their home mortgage debt. Plaintiffs alleged that defendant secretly formed a scheme to preclude eligible applicants, such as plaintiffs, from receiving permanent HAMP modifications. Plaintiffs further

alleged that the running of any statute of limitations was tolled by defendants' fraudulent concealment of their business practices. Plaintiffs alleged that they suffered damages consisting of the time and money spent on filing multiple copies of required documents with defendant, and the ultimate foreclosures of their homes when their HAMP modifications were denied. Plaintiffs raised claims for common law fraud, intentional misrepresentation, promissory estoppel, conversion, unjust enrichment, and unfair and deceptive trade practices. Plaintiffs additionally sought punitive damages. On 13 March 2019, plaintiffs filed an amended complaint, alleging common law fraud, fraudulent concealment, intentional misrepresentation, promissory estoppel, conversion, unjust enrichment, unfair and deceptive trade practices, and negligence, and seeking punitive damages.

On 11 April 2019, defendant filed a motion to dismiss the amended complaint or, in the alternative, to strike impertinent allegations and sever misjoined claims. The motion noted that while the complaint listed separate factual allegations pertinent to each plaintiff, the actual claims did not plead with particularity each plaintiff's alleged harm; that the complaint failed to show actual false statements made by defendant; that the complaint on its face was barred by the statute of limitations; that the complaint was barred by the doctrines of *res judicata* and collateral estoppel as these issues had already been litigated in foreclosure proceedings; and that the complaint included allegations copied from filings in

another lawsuit. On 12 April 2019, plaintiffs filed a motion for partial summary judgment, alleging that courts had previously entered judgments against defendant for defendant's misconduct, and therefore that the doctrines of *res judicata* and collateral estoppel precluded relitigation of the issue of defendant's fraud.

On 3 October 2019, the trial court entered an order on defendant's motion to dismiss or strike and plaintiffs' motion for partial summary judgment. The court concluded that plaintiff's claims were barred by the applicable statutes of limitation, and that the claims of all plaintiffs who were parties to foreclosure proceedings were barred by the doctrines of *res judicata* and collateral estoppel. Accordingly, the court granted defendant's motion to dismiss, and denied plaintiffs' motion for partial summary judgment.

Plaintiffs appeal.

II. Motion to Dismiss

In their first and second arguments, plaintiffs contend that the trial court erred in granting defendant's motion to dismiss on the bases of the statute of limitations and *res judicata* and collateral estoppel. We disagree.

A. Standard of Review

"This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to

dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

B. Statute of Limitations

In its order, the trial court held that plaintiffs' claims were barred by the applicable statute of limitations. On appeal, plaintiffs contend that this was error.

From the face of plaintiffs' amended complaint, we can derive the following facts: The HAMP program was implemented in March of 2009; the federal government sued defendant, resulting in a consent judgment in April of 2012 and a settlement in August of 2014; and a multi-district class action was filed in 2011, although ultimately dismissed. Plaintiffs alleged harms ranging from 2009 through 2014, but all asserted that they "did not know" and "could not have reasonably discovered" that they had actionable claims until retaining counsel in 2016 and 2017.

As a preliminary matter, we note that multiple plaintiffs are residents of states other than North Carolina and suffered their purported harms elsewhere. Pursuant to North Carolina law, the applicable statutes of limitations for these claims are those which apply in those states, not that of North Carolina. *See e.g. United Virginia Bank v. Air-Lift Assocs., Inc.*, 79 N.C. App. 315, 321, 339 S.E.2d 90, 94 (1986) (holding that the substantive law of the state where the last act occurred giving rise to the purported injury governed the alleged unfair and deceptive trade practices action).

Even assuming *arguendo* that North Carolina's statute of limitations applies to these claims, plaintiffs' complaint fails on its face. The applicable statute of limitations for relief on the grounds of fraud or mistake is three years from discovery of the fraud or mistake. N.C. Gen. Stat. § 1-52(9) (2019). This Court has held that "discovery" means "either actual discovery or when the fraud should have been discovered in the exercise of reasonable diligence." *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 547, 589 S.E.2d 391, 396 (2003).

Plaintiffs contend that whether a plaintiff should have discovered fraud in the exercise of due diligence is a question of fact for a jury. It is true that this is ordinarily the case. However, that truism comes with a caveat. This Court has held that "[w]hether the plaintiff in the exercise of due diligence should have discovered the facts more than three years prior to the institution of the action is ordinarily for the jury *when the evidence is not conclusive or is conflicting*." *Huss v. Huss*, 31 N.C. App. 463, 468, 230 S.E.2d 159, 163 (1976) (emphasis added). When the evidence is not in dispute, our Courts have been able to address this issue as a matter of law. *See Darsie*, 161 N.C. App. at 548, 589 S.E.2d at 397 (holding that "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").

Plaintiffs' claims all allege roughly the same set of facts: that they applied for HAMP modification, that they were asked to submit paperwork, that they were asked to resubmit paperwork, that they were asked to make trial payments after the trial payment period had concluded, and that they were denied relief after believing that they had done everything required of them. These issues ranged from 2009 through 2014. They all claim that they did not realize that these were actionable harms until speaking to attorneys in 2017. Yet by 2011, as acknowledged in plaintiffs' complaint, defendant was already defending lawsuits for its practices.

It is clear, from the face of the complaint, that plaintiffs knew something was wrong with their applications at the time. It is likewise clear that, had plaintiffs engaged in some simple research, they would have heard about the ongoing litigation involving defendant's business practices. "[O]ur courts have determined that a plaintiff cannot simply ignore facts which should be obvious to him or would be readily discoverable upon reasonable inquiry." *S.B. Simmons Landscaping & Excavating, Inc. v. Boggs*, 192 N.C. App. 155, 161-62, 665 S.E.2d 147, 151 (2008).

Plaintiffs contend that defendant's fraud prevented them from learning that something was amiss, and therefore precluded their duty to inquire. It is true that, in a confidential relationship, "when it appears that by reason of the confidence reposed the confiding party is actually deterred from sooner suspecting or discovering the fraud, he is under no duty to make inquiry until something occurs to excite his

suspicions." *Vail v. Vail*, 233 N.C. 109, 116-17, 63 S.E.2d 202, 208 (1951) (citation and quotation marks omitted). However, plaintiffs' complaint does not allege that defendant in any way prevented plaintiffs from learning the truth. Taking plaintiffs' complaint as true, defendant merely insisted that plaintiffs' HAMP applications were proceeding, but by 2014 denied them all. This did not preclude plaintiffs from taking prompt action in 2014, or indeed anytime before 2017. It did not preclude plaintiffs from discovering defendant's ongoing litigation.

It is clear that plaintiffs bore a duty to inquire into the business practices which caused them concern. However, they did not file their complaint until 2018. Even if we were to give plaintiffs the benefit of the doubt and extend the statute of limitations from the last possible date of their interactions with defendant, that happened in 2014. That means that plaintiffs had until 2017 to file their complaint. They did not, and thus ran afoul of the statute of limitations.

We therefore hold that the trial court did not err in granting defendant's motion to dismiss on the basis of the statute of limitations.

C. *Res Judicata* and Collateral Estoppel

The trial court also held that the claims of all plaintiffs who were parties to foreclosure proceedings were barred by the doctrines of *res judicata* and collateral estoppel. This follows the logic that those proceedings would have already litigated

plaintiffs' rights as to the properties that were foreclosed as a result of defendant's purported fraud. On appeal, plaintiffs contend that this was error.

"The doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) are companion doctrines which have been developed by the Courts for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation." *Little v. Hamel*, 134 N.C. App. 485, 487, 517 S.E.2d 901, 902 (1999) (citation and quotation marks omitted).

> Under the doctrine of res judicata or "claim preclusion," a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies. *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413, 474 S.E.2d 127, 128 (1996); *Hales v. North Carolina Ins. Guar. Ass'n*, 337 N.C. 329, 333, 445 S.E.2d 590, 594 (1994). The doctrine prevents the relitigation of "all matters ... that were or should have been adjudicated in the prior action." *McInnis*, 318 N.C. at 428, 349 S.E.2d at 556. Under the companion doctrine of collateral estoppel, also known as "estoppel by judgment" or "issue preclusion," the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding. *McInnis*, 318 N.C. at 433-34, 349 S.E.2d at 560; *Bradley v. Hidden Valley Transp., Inc.*, 148 N.C. App. 163, 166, 557 S.E.2d 610, 613 (2001), *aff'd per curiam*, 355 N.C. 485, 562 S.E.2d 422 (2002). Whereas res judicata estops a party or its privy from bringing a subsequent action based on the "same claim" as that litigated in an earlier action, collateral estoppel precludes the subsequent adjudication of a previously determined issue, even if the subsequent

> action is based on an entirely different claim.

Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004).

As a preliminary matter, plaintiffs argue that the trial court erred in applying *res judicata* and collateral estoppel to those plaintiffs who went through a non-judicial foreclosure proceeding. However, as this matter was not raised before the trial court, it was not preserved, and we will not consider it for the first time on appeal. N.C.R. App. P. 10(a)(1).

Plaintiffs further allege that there is not an identity between the foreclosure claims and the current litigation. Plaintiffs note that those were claims where plaintiffs' properties were foreclosed, whereas the instant litigation seeks relief for defendant's fraud.

However, again viewing the complaint on its face, while it is true plaintiffs sought damages for "the costs of sending their HAMP applications and financial documents" and "the loss of time" from doing same, it is clear that the bulk of their damages come from "the loss of their homes and the equity in those homes[.]" Moreover, in their factual allegations of wrongdoing, plaintiffs include allegations that defendant "committed fraud in the discharge of its foreclosure procedures[,]" resulting in "loss of homes due to improper, unlawful, or undocumented foreclosures." It is therefore abundantly clear that at least some portion of plaintiffs' complaint is the allegation that defendant's fraud resulted in plaintiffs' foreclosure.

Our Supreme Court has held that "subsequent actions which attempt to proceed by asserting a new legal theory or by seeking a different remedy are prohibited under the principles of *res judicata*." *Bockweg v. Anderson*, 333 N.C. 486, 494, 428 S.E.2d 157, 163 (1993). Even assuming *arguendo* that some portions of plaintiffs' complaint allege conduct independent of and apart from the foreclosure of plaintiffs' properties, it is clear that some portion of the complaint – a significant portion – is premised upon the notion that the foreclosures themselves were wrongful. Repackaging that allegation as a claim for fraud is nonetheless prohibited under the doctrines of *res judicata* and collateral estoppel. Accordingly, we hold that any portions of plaintiffs' complaint alleging that they were wrongfully foreclosed upon were barred.

For this reason, we hold that the trial court did not err in granting defendant's motion to dismiss on the bases of *res judicata* and collateral estoppel.

III. Motion to Amend

In their third argument, plaintiffs contend that the trial court erred in dismissing the complaint without first granting plaintiffs leave to amend. We hold that this error is unpreserved, and dismiss such argument.

Plaintiffs contend that Rule 15(a) of the North Carolina Rules of Civil Procedure states that leave to amend shall be given when justice so requires. We acknowledge that this is so; the Rules provide that a party may amend his pleading

once as a matter of course before responsive pleadings are served, or any time within 30 days; that he may amend his pleading by leave of the court or by written consent of the adverse party; and that "leave shall be freely given when justice so requires." N.C.R. Civ. P. 15(a).

However, in the instant case, plaintiffs contend that the trial court "erred in dismissing [plaintiffs'] claims with prejudice, without giving an additional opportunity to amend their complaint." What plaintiffs do not contend, and what the record does not show, is that plaintiffs filed a motion to amend the complaint after this dismissal was announced. While the Rules of Civil Procedure are clear, the Rules of Appellate Procedure are equally clear:

> In order to 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 if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C.R. App. P. 10(a)(1).

Plaintiffs failed to make a timely motion to amend their complaint. As such, this issue is not preserved for appeal.

Even had the issue been so preserved, however, plaintiffs could show no error. This Court has held that "our standard of review for motions to amend pleadings requires a showing that the trial court abused its discretion." *Delta Envtl.*

Consultants of N.C., Inc. v. Wysong & Miles Co., 132 N.C. App. 160, 165, 510 S.E.2d 690, 694 (1999). This Court has further held that "[r]ulings on motions to amend after the expiration of the statutory period are within the discretion of the trial court; that discretion is clearly not abused when granting the motion would be a futile gesture." *Lee v. Keck*, 68 N.C. App. 320, 326, 315 S.E.2d 323, 328 (1984).

As we have held above, plaintiffs' claims were barred by the statute of limitations. As such, amendment of plaintiffs' complaint would have been a futile gesture; no change to their factual allegations would alter the legal bar of the statute of limitations. Even had plaintiffs properly raised and preserved the issue of amending the pleadings, the trial court would not have abused its discretion in denying such a motion.

IV. Conclusion

Plaintiffs' complaint, on its face, showed the span of time between plaintiffs' reasonable discovery of their cause of action and the filing of the complaint. The undisputed evidence shows no basis for plaintiffs' allegation that they were somehow fraudulently prevented from discovering their harm prior to the expiration of the statute of limitations. Accordingly, we hold that the trial court did not err in granting defendant's motion to dismiss on that basis. Moreover, plaintiffs' complaint clearly attempts, at least to some degree, to relitigate the issues of plaintiffs' respective foreclosures. Inasmuch as those have already been litigated and settled, the trial

court did not err in granting defendant's motion to dismiss on the basis of *res judicata* and collateral estoppel. And although we decline to address the issue of amending the pleadings as such issue is unpreserved, we note in dicta that the trial court would not have abused its discretion in denying such a motion.

AFFIRMED.

Judges DILLON and BERGER concur.

Report per Rule 30(e).

Zloop, Inc. v. Parker Poe Adams & Bernstein, LLP

North Carolina Superior Court, Mecklenburg County

February 16, 2018, Decided

17 CVS 5480

Reporter
2018 NCBC LEXIS 16 *; 2018 NCBC 16; 2018 WL 943954

ZLOOP, INC., Plaintiff, v. PARKER POE ADAMS & BERNSTEIN, LLP; ALBA-JUSTINA SECRIST a/k/a A-J SECRIST; and R. DOUGLAS HARMON, Defendants.

Subsequent History: Appeal dismissed by *Zloop, Inc. v. Parker Poe Adams & Bernstein, LLP, 2018 NCBC LEXIS 40 (Apr. 30, 2018)*

Motion granted by *Zloop, Inc. v. Parker Poe Adams & Bernstein LLP, 371 N.C. 341, 813 S.E.2d 252, 2018 N.C. LEXIS 408 (May 21, 2018)*

Writ of certiorari granted, Motion dismissed by, As moot *Zloop, Inc. v. Parker Poe Adams & Bernstein, LLP, 371 N.C. 475, 818 S.E.2d 109, 2018 N.C. LEXIS 779 (Sept. 20, 2018)*

Motion granted by *Zloop, Inc. v. Parker Poe Adams & Bernstein LLP, 2019 N.C. LEXIS 614 (N.C., July 5, 2019)*

Motion granted by *Zloop, Inc. v. Parker Poe Adams & Bernstein LLP, 2019 N.C. LEXIS 656 (N.C., July 25, 2019)*

LexisNexis® Headnotes

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

***HN1*[] Pretrial Judgments, Judgment on Pleadings**

Judgment on the pleadings is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain. Judgments on the pleadings are disfavored in law, and the trial court must view the facts and permissible inferences in the light most favorable to the nonmoving party. Courts should grant *N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 12(c)*, motions only when a plaintiff has either failed to allege facts necessary to support a cause of action or has pleaded facts which defeat that claim. The court does not make findings of fact in ruling upon a *Rule 12(c)* motion and, in considering the motion, assumes the truth of the nonmovant's factual averments.

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

***HN2*[] Pretrial Judgments, Judgment on Pleadings**

As a general proposition, in deciding a motion for judgment on the pleadings, the trial court looks solely to the pleadings in the action at bar, and considers only facts that have been properly pleaded and documents that are attached to, referred to, or incorporated by the pleadings. A court may also consider documents that memorialize events to which the complaint makes clear reference, documents upon which the plaintiff is suing, even if the documents are not included in the complaint, and allegations or exhibits presented by the movant's own pleadings if the nonmovant

has admitted the truth of allegations or the authenticity of the documents.

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

HN3[] **Pretrial Judgments, Judgment on Pleadings**

A court may properly consider matters of which it may take judicial notice without converting a *N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 12(c)*, motion to one for summary judgment.

Evidence > Judicial Notice > Adjudicative Facts > Facts Generally Known

Evidence > Judicial Notice > Adjudicative Facts > Verifiable Facts

HN4[] **Adjudicative Facts, Facts Generally Known**

A judicially noticeable fact is one that is (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *N.C. Gen. Stat. § 8C-1, N.C. R. Civ. P. 201(b) (2015)*.

Evidence > Judicial Notice > Adjudicative Facts > Judicial Records

HN5[] **Adjudicative Facts, Judicial Records**

Courts may in their discretion take judicial notice of court filings made in other jurisdictions.

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > Liability of Principals

HN6[] **Authorized Acts of Agents, Liability of Principals**

North Carolina courts have long recognized the in pari delicto doctrine, which prevents the courts from redistributing losses among wrongdoers. The defense operates to bar a plaintiff's claims when the plaintiff is at least equally at fault with the defendant and the allegedly wrongful conduct complained of is the subject of the lawsuit.

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > Liability of Principals

HN7[] **Authorized Acts of Agents, Liability of Principals**

Imputation of wrongdoing is not necessary to apply the in pari delicto doctrine when the plaintiff is himself the wrongdoer. However, in an action by a corporation, the in pari delicto doctrine may be used to bar the corporation's claims only where the acts of its owners or agents are imputed to the corporation through the laws of agency. The question of whether misconduct will be imputed becomes more complex when the agent acts primarily for personal benefit, but also under color of corporate authority and in a manner that benefits the corporation in some way.

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > Liability of Principals

HN8[] **Authorized Acts of Agents, Liability of Principals**

A principal is generally bound by the knowledge and acts of its agent when the agent clearly acts within the scope of his authority to conduct the principal's business.

Business & Corporate Law > ... > Duties &

Liabilities > Authorized Acts of Agents > Liability of Principals

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > Scope of Authority

HN9 **Authorized Acts of Agents, Liability of Principals**

A corporation is generally presumed not to have knowledge of or be liable for the actions of an agent who entirely abandons the corporation's interests and acts wholly outside the scope of the agent's authority for her personal benefit.

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > Liability of Principals

HN10 **Authorized Acts of Agents, Liability of Principals**

Where the conduct of the agent is such as to raise a clear presumption that he would not communicate to the principal the facts in controversy, or where the agent, acting nominally as such, is in reality acting in his own business or for his own personal interest and adversely to the principal, or has a motive in concealing the facts from the principal, the imputation rule does not apply.

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > Scope of Authority

HN11 **Authorized Acts of Agents, Scope of Authority**

Acts of an agent taken for personal benefit, outside the scope of agency, and adverse to the principal's interest will not be imputed.

Governments > Courts > Judicial Precedent

HN12 **Courts, Judicial Precedent**

Where a panel of the Court of Appeals of North Carolina has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court. A different rule governs Court of Appeals decisions affirmed by an evenly-divided Supreme Court of North Carolina.

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > Liability of Principals

HN13 **Authorized Acts of Agents, Liability of Principals**

Delaware recognizes but then narrowly applies the adverse interest exception and will impute an agent's wrongful, self-serving conduct to the corporation so long as even a minor, incidental, or illusory benefit flows to the corporation from those wrongful acts.

Torts > Malpractice & Professional Liability > General Overview

Torts > ... > Comparative Fault > Multiple Parties > General Overview

HN14 **Torts, Malpractice & Professional Liability**

Professional negligence claims are subject to a defense grounded on the in pari delicto doctrine.

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > Liability of Principals

HN15 **Authorized Acts of Agents, Liability of Principals**

The in pari delicto doctrine has been broadly

recognized as promoting two primary policies: deterring wrongful conduct by refusing wrongdoers any legal or equitable relief, and protecting against the misuse of judicial resources. Courts have occasionally referenced other policies, such as: (1) providing proper incentives for corporations to police their own conduct; (2) maintaining the integrity of the corporate form; (3) not giving corporations rights which natural persons do not have; and (4) giving deference to federal statutory schemes that rely on private rights of action for enforcement.

Torts > ... > Multiple Defendants > Concerted Action > Civil Aiding & Abetting

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

HN16[] Concerted Action, Civil Aiding & Abetting

The North Carolina Superior Court, Mecklenburg County, concludes that on appeal the North Carolina Supreme Court will hold that North Carolina does not recognize a claim of aiding and abetting breach of fiduciary duty.

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > Liability of Principals

HN17[] Authorized Acts of Agents, Liability of Principals

Generally, the in pari delicto doctrine is not applied to bar a claim by a corporation against its own wrongdoing agents. Some have referred to this rule of law as the fiduciary duty exception to in pari delicto.

Torts > ... > Multiple Defendants > Concerted Action > Civil Aiding & Abetting

HN18[] Concerted Action, Civil Aiding & Abetting

The Restatement (Second) of Torts recognizes potential liability for those acting in concert, stating that for harm resulting to a third person from the tortious conduct of another, one is subject to liability if he knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself. *Restatement (Second) of Torts § 876(b)* (Am. Law Inst. 1979). Most jurisdictions that impose aider-abettor liability do so under *Restatement (Second) of Torts § 876* and incorporate its elements.

Torts > ... > Multiple Defendants > Concerted Action > Civil Aiding & Abetting

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

HN19[] Concerted Action, Civil Aiding & Abetting

The North Carolina Superior Court, Mecklenburg County, concludes that if the North Carolina Supreme Court recognizes an aiding-and-abetting claim, it will base the elements of any such claim on *Restatement (Second) of Torts § 876(b)*.

Torts > ... > Multiple Defendants > Concerted Action > Civil Aiding & Abetting

HN20[] Concerted Action, Civil Aiding & Abetting

The Court of Appeals of North Carolina, citing to *Restatement (Second) of Torts § 876*, held that the prerequisites necessary to establish aiding and abetting liability include: (1) the existence of a violation by the primary party; (2) knowledge of the violation on the part of the aider and abettor; and (3) substantial assistance by the aider and

abettor in the achievement of the primary violation.

Torts > ... > Multiple Defendants > Concerted Action > Civil Aiding & Abetting

HN21[] Concerted Action, Civil Aiding & Abetting

The third element of an aiding-and-abetting claim grounded on *Restatement (Second) of Torts § 876* is that the aider-abettor must have lent substantial assistance or encouragement to the achievement of the breach of fiduciary duty. *Restatement (Second) of Torts § 876(b)*. When addressing the claim in a securities context, the Court of Appeals of North Carolina recognized that this element requires a showing of a substantial causal connection between the culpable conduct of the alleged aider and abettor and the harm to the plaintiff, or a showing that the encouragement or assistance is a substantial factor in causing the resulting tort. The North Carolina Superior Court, Mecklenburg County, concludes that proving a substantial causal connection is a higher burden than the burden for other claims requiring only proof of a proximate cause.

Torts > ... > Multiple Defendants > Concerted Action > Civil Aiding & Abetting

HN22[] Concerted Action, Civil Aiding & Abetting

Comment d of Restatement (Second) of Torts § 876 outlines factors that courts may consider in determining whether a party's assistance rises to the level of substantial assistance, including: the nature of the act encouraged, the amount of assistance given by the defendant, the defendant's presence or absence at the time of the tort, his relation to the primary tortfeasor, and the defendant's state of mind.

Torts > ... > Multiple Defendants > Concerted Action > Civil Aiding & Abetting

HN23[] Concerted Action, Civil Aiding & Abetting

Other courts recognize that substantial assistance, in the context of an aiding and abetting claim, must mean more than mere assistance.

Torts > ... > Multiple Defendants > Concerted Action > Civil Aiding & Abetting

HN24[] Concerted Action, Civil Aiding & Abetting

Should a claim of aiding and abetting breach of fiduciary duty be first recognized as a basis for asserting liability against counsel, the claim will demand proof that the attorney lent substantial assistance to the breach on which the claim is based beyond merely providing routine legal services, acting as a scrivener, or remaining silent absent a duty to disclose. However, an attorney may be liable for aiding and abetting his client's breach of fiduciary duty if he actively participates in the conduct constituting the underlying breach of fiduciary duty.

Torts > ... > Multiple Defendants > Concerted Action > Civil Aiding & Abetting

HN25[] Concerted Action, Civil Aiding & Abetting

A plaintiff must allege that an aider-abettor rendered substantial assistance to the primary violation, not merely to the person committing the violation. Stated otherwise, defendants must have had direct involvement in the transaction or have deliberately covered up the fraud.

Counsel: [*1] Rossabi Reardon Klein Spivey PLLC, by Gavin J. Reardon and Amiel J. Rossabi, and Allen & Gooch, by James H. Gibson (pro hac

vice) and Charles M. Kreamer (pro hac vice), for Plaintiff Zloop, Inc.

Robinson, Bradshaw & Hinson, P.A., by Robert W. Fuller and Stuart L. Pratt, for Defendants Parker Poe Adams & Bernstein, LLP, Alba-Justina Secrist a/k/a A-J Secrist, and R. Douglas Harmon.

Judges: James L. Gale, Chief Business Court Judge.

Opinion by: James L. Gale

Opinion

ORDER & OPINION ON DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO N.C.R.C.P. 12(c)

1. THIS MATTER is before the Court on Defendants Parker Poe Adams & Bernstein, LLP, Alba-Justina Secrist, and R. Douglas Harmon's Motion for Judgment on the Pleadings Pursuant to *N.C.R.C.P. 12(c)* ("Motion"). For the reasons discussed below, the Court GRANTS the Motion.

Gale, Chief Judge.

I. INTRODUCTION

2. This case "raises thorny questions relating to the bounds of legitimate legal advocacy and transgressive participation by attorneys at law in a client's illegal conduct." *Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C., 331 F.3d 406, 407 (3d Cir. 2003)*.

3. Plaintiff Zloop, Inc. ("Zloop") is a bankrupt electronic-waste-recycling corporation in the process of liquidation that was formerly managed or owned by Robert Boston ("Boston") and Robert **[*2]** LaBarge ("LaBarge"), each of whom allegedly looted Zloop for personal benefit. Defendants are the law firm Parker Poe Adams & Bernstein, LLP ("Parker Poe") and two of its present or former attorneys Alba-Justina Secrist ("Secrist") and R. Douglas Harmon ("Harmon") (collectively, "Defendants"). In this action, Zloop seeks to recover damages based on claims for: (1) legal malpractice; (2) breach of Defendants' fiduciary duties owed to Zloop as its corporate counsel; and (3) aiding and abetting Boston and LaBarge's breach of their fiduciary duties owed to Zloop as its owners, managers, or directors. Zloop is currently maintaining a separate action against Boston and LaBarge before the United States District Court for the Western District of Louisiana ("Louisiana Lawsuit").

4. Defendants move for judgment on the pleadings pursuant to *North Carolina Rule of Civil Procedure 12(c)*. The Motion rests on two primary contentions: (1) the common law doctrine of *in pari delicto* bars any claim for professional malpractice; and (2) North Carolina does not recognize a claim for aiding and abetting a breach of fiduciary duty. Defendants contend that Zloop's amended complaint ("Amended Complaint") must be dismissed because Zloop's own allegations **[*3]** support each of those two contentions as a matter of law.

5. Assuming solely for purposes of the Motion that all of Zloop's allegations are true, the Court concludes that the Motion must be granted and the Amended Complaint must be dismissed because, as a matter of law: (1) Zloop's claims for Defendants' professional malpractice are barred by the *in pari delicto* doctrine; (2) no claim for aiding and abetting breach of fiduciary duty has been recognized in North Carolina; and (3) even if the North Carolina Supreme Court ultimately recognizes an aiding and abetting breach of fiduciary claim, Zloop has failed to allege the essential elements of any such claim.

II. FACTUAL BACKGROUND

6. The Court accepts the following facts and construes them in Zloop's favor solely for purposes of ruling on the Motion.

7. Zloop was in the business of recycling electronic waste, including collecting old "e-waste" (i.e., obsolete computers, televisions, and radios), crushing the materials, and then harvesting and reselling the copper, plastic, and other usable byproducts gleaned from the waste. (Am. Compl. ¶ 5, ECF No. 52.) Zloop originally intended to operate pursuant to a franchise model. (Am. Compl. ¶ 5.) **[*4]**

8. Boston and LaBarge incorporated Zloop as a Delaware limited liability company ("LLC") in July 2012. (Am. Compl. ¶¶ 6-8.) In November 2012, LaBarge filed Zloop's Application for Certificate of Authority with the North Carolina Secretary of State, listing himself and Boston as Zloop's sole managers. (Am. Compl. ¶ 10; Am. Compl. Ex. 3, ECF No. 52.1.)

9. In the fall of 2012, Boston and LaBarge promoted Zloop's franchise opportunity and overall potential to Louisiana resident Kendal Mosing ("Mosing"). Between November 2012 and May 2014, Mosing advanced Zloop a total of $27,498,179, which was used to purchase franchises, LLC interests, and stock; to provide loans; and to grant pledges to secure Zloop's line of credit. (Am. Compl. ¶ 11.)

10. In or before January 2013, Zloop retained the law firm of McGuire Woods LLP ("McGuireWoods") as corporate counsel in connection with a potential securities offering. (Am. Compl. ¶ 14.) McGuireWoods provided Boston and LaBarge with a draft private placement memorandum ("PPM"), which Boston and LaBarge substantially edited before distributing to investors. (Am. Compl. ¶¶ 15-16.)

11. In April 2013, Boston and LaBarge altered this PPM ("April PPM") to offer **[*5]** convertible debt rather than preferred equity. (Am. Compl. ¶ 17.) Schedule A of the April PPM shows Zloop's total capital as $5,100,000, nearly $5,000,000 of which Mosing had contributed by that time. (Am. Compl. ¶ 18.) The April PPM recites that Boston and LaBarge each had 6,250,000 voting units in Zloop, LLC, and that Mosing had 1,200,000 non-voting units. (Am. Compl. ¶ 17.)

12. The April PPM also included an unexecuted operating agreement that included a provision that Zloop, LLC members would be issued stock proportional to their LLC interests if Zloop, LLC was converted to a corporation. (Am. Compl. ¶ 18.)

13. In May 2013, Zloop hired Mike Watson ("Watson") as its CEO. (Am. Compl. ¶ 28.)

14. On June 10, 2013, McGuireWoods advised Boston and LaBarge that Zloop had improperly broken the escrow provisions of its securities offering by taking and spending proceeds before the offering had closed. (Am. Compl. ¶¶ 20, 34.) McGuireWoods advised that immediate disclosures to investors were necessary, that Zloop should distribute a revised PPM, and that McGuireWoods would withdraw as Zloop's counsel if its advice was not followed. (Am. Compl. ¶¶ 20-21.)

15. Around this same time, Zloop hired **[*6]** Jack Jacobi ("Jacobi") and Jason Schubert ("Schubert") as its COO and CFO, respectively. (Am. Compl. ¶ 28.)

16. Zloop retained Parker Poe on June 19, 2013, and discharged McGuireWoods the following day. (Am. Compl. ¶¶ 23, 26.) When transmitting its files to Parker Poe, McGuireWoods cautioned Parker Poe that it should be aware of McGuireWoods' most recent advice to Zloop. (Am. Compl. ¶ 27.)

17. On July 10, 2013, Schubert began a review of Zloop's corporate records to prepare a revised PPM, and when doing so discovered numerous "red flags," including: a $1,300,000 payment for a racing contract for Boston's son, listed as an "advertising" expense; a $247,000 payment for private jet service, listed as a "marketing" expense; and a listing of Boston's wife and son as employees even though they provided no services to Zloop. (Am. Compl. ¶¶ 31-32.) Zloop's capitalization table, which Schubert reviewed, listed Boston, LaBarge, and their spouses as owning 87% of

Zloop's voting shares even though they had made no investment, as compared to Mosing owning less than 1% of the non-voting shares even though he had, by that date, contributed $7,890,000, which sum was reflected in the table as "franchise **[*7]** fees." (Am. Compl. ¶ 33.) Schubert also discovered, as had McGuireWoods, that Zloop had broken escrow in connection with its securities offering. (Am. Compl. ¶ 34.)

18. Parker Poe revised the April PPM and delivered it to Boston and LaBarge on July 12, 2013. The draft did not modify this capitalization table and made no reference to Zloop having broken escrow. (Am. Compl. ¶ 36.)

19. On July 15, 2013, Watson, Schubert, and Jacobi informed Parker Poe that they intended to immediately resign their offices unless Boston and LaBarge gave them management control of Zloop. (Am. Compl. ¶¶ 39-42.) Parker Poe was advised of the factual basis leading to the demand that Boston and LaBarge surrender management control. (Am. Compl. ¶ 42.) Parker Poe advised Boston and LaBarge to refuse the demand, and the three officers then resigned and cautioned that they should not be referenced as a source for any information to be included in a PPM. (Am. Compl. ¶¶ 44-46.)

20. On August 28, 2013, Parker Poe advised Zloop to terminate the debt offering and to provide refunds to those who had already subscribed. (Am. Compl. ¶¶ 50-51.)

21. On September 23, 2013, a Moore & Van Allen attorney representing a Zloop investor **[*8]** wrote Harmon, expressing concern "regarding the manner in which Zloop and [Parker Poe] have handled recent events." (Am. Compl. ¶ 57.)

22. In February 2014, Parker Poe, Boston, and LaBarge discussed the possibility of converting Zloop from an LLC to a corporation in order to facilitate Zloop's repurchase of outstanding franchises. (Am. Compl. ¶ 75.) As a part of its efforts, Parker Poe engaged franchise attorney Eric Newman to provide an opinion regarding the legality of Zloop's outstanding franchise agreements. (Am. Compl. ¶ 75.) Mr. Newman concluded that many of Zloop's franchises had been created in violation of state and federal law. (Am. Compl. ¶ 75; Am. Compl. Ex. 35, ECF No. 52.4.)

23. On March 26, 2014, Parker Poe acted as counsel in a transaction by which Zloop converted from an LLC to a corporation, whereby 10,000 shares were issued to replace the 13,960,000 outstanding LLC units, apportioned as follows without any additional financial payment: Boston and LaBarge received 4,895 shares each; Mosing received 100 shares; and three other persons received the remaining 110 shares. (Am. Compl. ¶ 78; Am. Compl. Ex. 41.) Parker Poe did not require any valuation of Zloop in connection **[*9]** with the transaction. (Am. Compl. ¶ 78.) Secrist acted as Zloop's incorporator. Boston and LaBarge were elected as Zloop, Inc.'s only directors. (Am. Compl. ¶¶ 80-82; Am. Compl. Ex. 41A.)

24. On March 27, 2014, Parker Poe provided Boston and LaBarge with a PPM that contemplated Zloop's termination of outstanding franchises in exchange for cash or Zloop stock. (Am. Compl. ¶¶ 82-83.) This PPM did not disclose the various facts regarding the earlier break in escrow, any opinion regarding the illegality of the outstanding franchises, or the misconduct reported by the officers who had earlier resigned. (Am. Compl. ¶¶ 82-83.)

25. At least by May 29, 2014, Parker Poe had become aware that Mosing had accused Zloop of misusing its $14,000,000 line of credit that Mosing had secured. (Am. Compl. ¶ 93.)

26. On June 26, 2014, Parker Poe arranged for a "friends and family" offering, whereby Boston and LaBarge offered to sell their Zloop stock to family and close friends. (Am. Compl. ¶ 97.)

27. At some point, Mosing discovered that Boston and LaBarge had fabricated a UCC-1 financing statement that Mosing had relied on to perfect his

security interest in some of Zloop's North Carolina property. (Am. Compl. **[*10]** ¶ 100.)

28. On August 28, 2014, Mosing initiated the Louisiana Lawsuit, naming Boston, LaBarge, and Zloop as defendants. (Am. Compl. ¶¶ 100-02.)

29. In February 2015, Parker Poe ceased representing Zloop. (Am. Compl. ¶ 108.)

30. On August 10, 2015, Zloop filed for bankruptcy in Delaware. Ultimately, the bankruptcy proceeding developed evidence that: Boston purchased six personal vehicles with Zloop funds; LaBarge purchased three personal vehicles with Zloop funds; Boston and LaBarge took personal advances of at least $2,763,504; Boston spent at least $4,648,103.59 of Zloop funds to benefit the racing career of his son, Justin; Boston and LaBarge purchased a personal airplane using Zloop funds; Boston and LaBarge purchased a property in Hickory, North Carolina using Zloop funds but without giving title to Zloop; and Zloop assets were sold to pay for millions of dollars of Zloop's bankruptcy professional expenses. (Am. Compl. ¶¶ 108, 111.)

31. The Delaware bankruptcy court approved a chapter 11 liquidation plan, which granted Mosing an unsecured claim of $40,000,000. (Am. Compl. ¶112.)

32. A review of the record in the Louisiana Lawsuit reveals that on December 20, 2016, Mosing caused Zloop **[*11]** to be realigned from a defendant to a plaintiff. (Defs.' First Am. Answer Ex. A, Second Am. Supp. Restated Compl. ¶ 2, ECF No. 34 ("LA Am. Compl.").) Zloop then filed an amended complaint in that action on March 29, 2017 ("Louisiana Amended Complaint").

33. The Court has become aware that LaBarge pleaded guilty to conspiracy to commit wire fraud on November 2, 2017, and that a federal jury convicted Boston of conspiracy, wire fraud, securities fraud, and money laundering on December 8, 2017. *U.S. v. Boston*, Docket No. 3:17-CR-00114-RJC-DSC, ECF Nos. 41, 44, 71.

III. PROCEDURAL BACKGROUND

34. Zloop filed its initial complaint in this action in the Mecklenburg County Superior Court on April 17, 2017.

35. On April 24, 2017, Defendants filed a Notice of Designation as Mandatory Complex Business Case under *N.C. Gen. Stat. §7A-45.4(a)*. The case was so designated by the Chief Justice and assigned to the undersigned that same day.

36. On June 26, 2017, Defendants filed their answer and the Motion.

37. The Court calendared the Motion for hearing on September 8, 2017.

38. On September 7, 2017, Zloop moved for leave to file an amended complaint and provided Defendants' counsel with the proposed amended complaint.

39. On September **[*12]** 8, 2017, the Court held the hearing as noticed, based on its understanding from counsel that the allegations in the proposed amended complaint added additional factual allegations but did not substantively add to or change the causes of action asserted in the initial complaint or alter the bases on which Defendants had moved to dismiss the action. The parties agreed that the Motion, briefing, and argument could be deemed to have been made in response to the proposed amended complaint if the Court elected to grant leave to file it. (Hearing Tr. 7:7-22, Sept. 8, 2017.)

40. On September 11, 2017, with Defendants' consent, the Court granted Zloop's motion for leave to amend, and Zloop filed the Amended Complaint on September 25, 2017, which Defendants answered on September 29, 2017.

41. As agreed by the parties, the Court treats the Motion as having been presented, briefed, and

argued in connection with the Amended Complaint and Defendants' answer.

42. The Motion is ripe for resolution.

IV. STANDARD OF REVIEW

43. ***HN1***[⬆] Judgment on the pleadings is "appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain. Judgments on the pleadings are disfavored **[*13]** in law, and the trial court must view the facts and permissible inferences in the light most favorable to the non-moving party." *Shehan v. Gaston Cty., 190 N.C. App. 803, 806, 661 S.E.2d 300, 303 (2008)* (quoting *Carpenter v. Carpenter, 189 N.C. App. 755, 757, 659 S.E.2d 762, 765 (2008))*. Courts should grant *12(c)* motions only when a plaintiff has either failed to allege facts necessary to support a cause of action or has pleaded facts which defeat that claim. *Robertson v. Boyd, 88 N.C. App. 437, 440, 363 S.E.2d 672, 675 (1988)*. The Court does not make findings of fact in ruling upon a *12(c)* motion and, in considering the motion, assumes the truth of the nonmovant's factual averments. *Ragsdale v. Kennedy, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974)*.

44. ***HN2***[⬆] As a general proposition, "[i]n deciding a motion for judgment on the pleadings, the trial court looks solely to the pleadings" in the action at bar, *Reese v. Mecklenburg Cty., 204 N.C. App. 410, 421, 694 S.E.2d 453, 461 (2010)* (citing *Wilson v. Crab Orchard Dev. Co., 276 N.C. 198, 206, 171 S.E.2d 873, 878 (1970))*, and considers only facts that have been properly pleaded and documents that are attached to, referred to, or incorporated by the pleadings. *Wilson, 276 N.C. at 206, 171 S.E.2d at 878-79*; *see, e.g., Holcomb v. Landquest Ltd. Liab. Co., No. 16 CVS 10147, 2017 NCBC LEXIS 36 at *9-10 (N.C. Super. Ct. Apr. 21, 2017)* (holding that the Court may consider a complaint filed in an earlier case if it was filed in the same court and referred to in the current complaint). A court may also consider documents that memorialize events to which the complaint makes "clear reference," *Reese v. Charlotte-Mecklenburg Bd. of Educ., 196 N.C. App. 539, 546, 676 S.E.2d 481, 486 (2009)*, documents upon which the plaintiff is suing, even if the documents are not included in the complaint, *Coley v. N.C. Nat'l Bank, 41 N.C. App. 121, 126, 254 S.E.2d 217, 220 (1979)*, and allegations or exhibits presented **[*14]** by the movant's own pleadings if the nonmovant has admitted the truth of allegations or the authenticity of the documents. *See Horne v. Town of Blowing Rock, 223 N.C. App. 26, 30, 732 S.E.2d 614, 617 (2012)*; *Reese, 196 N.C. App. at 546, 676 S.E.2d at 486*; *Weaver v. Saint Joseph of the Pines, Inc., 187 N.C. App. 198, 204-05, 652 S.E.2d 701, 708 (2007)*.

45. Additionally, ***HN3***[⬆] a court may properly consider matters of which it may take judicial notice without converting a *Rule 12(c)* motion to one for summary judgment. *See Tellabs, Inc., v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)* (noting that courts may take judicial notice on a *12(b)(6)* motion without converting the proceeding to one for summary judgment); *N.C. State Bar v. Lienguard, Inc., No. 11 CVS 7288, 2014 NCBC LEXIS 11, at *5 (N.C. Super. Ct. Apr. 4, 2014)* (taking judicial notice on a *Rule 12(c)* motion). ***HN4***[⬆] A judicially noticeable fact is one that is "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *N.C. Gen. Stat. § 8C-1, Rule 201(b)* (2015); *see also Smith v. Beaufort Cty. Hosp. Ass'n, 141 N.C. App. 203, 211, 540 S.E.2d 775, 780 (2000)*.

46. ***HN5***[⬆] Courts may in their discretion take judicial notice of court filings made in other jurisdictions. *Muteff v. Invacare Corp., 218 N.C. App. 558, 569, 721 S.E.2d 379, 387 (2012)* (citing *West v. G.D. Reddick, Inc., 302 N.C. 201, 203, 274 S.E.2d 221, 223 (1981))* (holding that the trial court did not err in judicially noticing a certain Texas

Supreme Court opinion because the opinion was "capable of demonstration by readily accessible sources of indisputable accuracy"); *see also, e.g.*, *Indep. Tr. Corp. v. Stewart Info. Servs. Corp., 665 F.3d 930, 943 (7th Cir. 2012)* (noting with approval that the district court, in a *12(b)(6)* proceeding, had judicially noticed "the indisputable facts that those documents [filed **[*15]** in other jurisdictions] exist, they say what they say, and they have had legal consequences"); *Rothman v. Gregor, 220 F.3d 81, 91-92 (2d Cir. 2000)* (reviewing a trial court's dismissal under *12(b)(6)* and taking judicial noticeas a public record-of a complaint filed by one of the parties in a different jurisdiction when neither party contested the accuracy of the extrinsic complaint); *In re FedEx Ground Package Sys., 2010 U.S. Dist. LEXIS 30303, at *10 (N.D. Ind. Mar. 29, 2010)* (citing *Gen. Elec. Capital v. Lease Resolution, 128 F.3d 1074, 1081 (7th Cir. 1997))* ("Court documents from another case may be used to show that the document was filed, that [a] party *took a certain position*, and that certain judicial findings, allegations or admissions were made.") (emphasis added).

V. ANALYSIS

A. North Carolina Law Governs Zloop's Claims.

47. Zloop's claims directly against Boston and LaBarge in the Louisiana Lawsuit are likely governed by Delaware law pursuant to the internal affairs doctrine. *See* *Bluebird Corp. v. Aubin, 188 N.C. App. 671, 680-81, 657 S.E.2d 55, 63 (2008)* (affirming a trial court's application of the internal affairs doctrine to determine that New York law governed a derivative claim against a New York corporation). In contrast, Zloop's claims against Defendants are more properly resolved pursuant to North Carolina law. *See* *Harco Nat'l. Ins. Co. v. Grant Thornton LLP, 206 N.C. App. 687, 692, 698 S.E.2d 719, 722 (2010)* (quoting *Boudreau v. Baughman, 322 N.C. 331, 335, 368 S.E.2d 849, 853-54 (1988)* (holding that in general, "matters affecting the substantial rights of the parties are determined by *lex loci*, the law of the situs of **[*16]** the claim . . . . For actions sounding in tort, the state where the injury occurred is considered the situs of the claim."); *Islet Scis., Inc. v. Brighthaven Ventures, LLC, No. 15 CVS 16388, 2017 NCBC LEXIS 4, at *12 (N.C. Super. Ct. Jan. 12, 2017)* (citing *Harco, 206 N.C. App. at 692, 698 S.E.2d at 722-23*) ("North Carolina's choice of law principles applicable to claims affecting the substantial rights of the parties, such as torts, should be applied to . . . aiding and abetting claim[s]."). Here, because Zloop alleges that Defendants' acts were performed in or directed from Defendants' Charlotte, North Carolina office, (Am. Compl. ¶ 2), North Carolina law governs the Motion. However, as will be evident from the Court's discussion below, the choice of law is not determinative, for the Motion's outcome would be the same whether Delaware or North Carolina law applied.

B. An In Pari Delicto Defense is Available Regarding Zloop's Legal Malpractice and Breach of Fiduciary Duty Claims.

(1) North Carolina courts have adopted the in pari delicto doctrine.

48. *HN6*[⬆] North Carolina courts "have long recognized the *in pari delicto* doctrine, which prevents the courts from redistributing losses among wrongdoers." *Whiteheart v. Waller, 199 N.C. App. 281, 285, 681 S.E.2d 419, 422 (2009)*. The defense operates to bar a plaintiff's claims when the plaintiff is at least equally at fault with the defendant and the allegedly wrongful conduct complained **[*17]** of is the subject of the lawsuit. *See, e.g.*, *Freedman v. Payne, 246 N.C. App. 419, 784 S.E.2d 644, 649 (N.C. App. 2016)*; *Byers v. Byers, 223 N.C. 85, 90, 25 S.E.2d 466, 469-70 (1943)* ("The law generally forbids redress to one for an injury done him by another, if he himself first be in the wrong about the same matter whereof he complains.").

(2) Whether a fiduciary's wrongs will be imputed to his principal in order to apply the in pari delicto doctrine is ultimately a question of agency.

49. HN7[] Imputation of wrongdoing is not necessary to apply the *in pari delicto* doctrine when the plaintiff is himself the wrongdoer. *See, e.g.*, *Byers, 223 N.C. at 90, 25 S.E.2d at 470* (plaintiff-husband denied divorce decree based on a condition he wrongfully created). However, in an action by a corporation, the *in pari delicto* doctrine may be used to bar the corporation's claims only where the acts of its owners or agents are imputed to the corporation through the laws of agency. *See Kirschner v. KPMG LLP, 15 N.Y.3d 446, 938 N.E.2d 941, 950, 912 N.Y.S.2d 512 (N.Y. 2010)*. The question of whether misconduct will be imputed becomes more complex when the agent acts primarily for personal benefit, but also under color of corporate authority and in a manner that benefits the corporation in some way.

50. The facts of this case fall between two well-established agency principles. On one hand, HN8[] a principal is generally bound by the knowledge and acts of its agent when the **[*18]** agent clearly acts within the scope of his authority to conduct the principal's business. *Curtis, Collins & Holbrook Co. v. United States, 262 U.S. 215, 222, 43 S. Ct. 570, 67 L. Ed. 956 (1923)* (imputing to a corporation knowledge that its vice president had fraudulently obtained patents on its behalf); *see also Sparks v. Union Tr. Co., 256 N.C. 478, 482, 124 S.E.2d 365, 368 (1962)* (describing "the general rule that knowledge of the agent is imputed to the principal"); *Stewart v. Wilmington Tr. SP Servs., Inc., 112 A.3d 271, 302-03 (Del. Ch. 2015)*, *aff'd*, *126 A.3d 1115 (Del. 2015)* ("A basic tenet of corporate law, derived from principles of agency law, is that the knowledge and actions of the corporation's officers and directors, acting within the scope of their authority, are imputed to the corporation itself."). On the other hand, HN9[] a corporation is generally presumed not to have knowledge of or be liable for the actions of an agent who entirely abandons the corporation's interests and acts wholly outside the scope of the agent's authority for her personal benefit. *Sparks, 256 N.C. at 482, 124 S.E.2d at 368*. This latter rule is summarized as follows:

> HN10[] [w]here the conduct of the agent is such as to raise a clear presumption that he would not communicate to the principal the facts in controversy, or where the agent, acting nominally as such, is in reality acting in his own business or for his own personal interest and adversely to the principal, or has a motive in concealing the facts from the principal, **[*19]** this [imputation] rule does not apply.

Id. (quoting *Fed. Res. Bank v. Duffy, 210 N.C. 598, 603, 188 S.E. 82, 84 (1936)*).

51. Other courts have referred to this agency rule as the "adverse interest" exception, meaning that HN11[] acts of an agent taken for personal benefit, outside the scope of agency, and adverse to the principal's interest will not be imputed. *See, e.g.*, *Kirschner, 938 N.E.2d at 950-51*. North Carolina courts have not adopted the exception by name, but have applied the underlying reasoning. *See Sledge Lumber Corp. v. S. Builders Equip. Co., 257 N.C. 435, 439, 126 S.E.2d 97, 100 (1962)* (quoting *Brite v. Penny, 157 N.C. 110, 114, 72 S.E. 964, 965 (1911)*) ("[A] corporation is not bound by the action or chargeable with the knowledge of its officers or agents in respect to a transaction in which such officer or agent is acting in his own behalf, and does not act in *any* official or representative capacity for the corporation.") (emphasis added); *see also Wilson Lumber & Milling Co. v. Atkinson, 162 N.C. 298, 305, 78 S.E. 212, 215 (1913)* ("[I]f the agent is engaged in perpetrating an *independent fraud on his own account*, knowledge of facts relating to the fraud will not be imputed to the principal.") (emphasis added); *Bank of Proctorville v. West, 184 N.C. 220, 223, 114 S.E. 178, 180 (1922)* ("[T]he [imputation]

rule fails . . . where the agent is engaged in the transaction in which he is interested adversely to his principal, or is *engaged in a scheme to defraud the latter*.") (emphasis added); *Tillery Envtl. LLC v. A&D Holdings, Inc., No. 17 CVS 6525, 2018 NCBC LEXIS 13, at *29 (N.C. Super. Ct. Feb. 8, 2018)* (quoting *Norburn v. Mackie, 262 N.C. 16, 23, 136 S.E.2d 279, 284-85 (1964)*) ("A principal is generally 'responsible to third parties for injuries resulting **[*20]** from the fraud of his agent committed during the existence of the agency and *within the scope of the agent's actual or apparent authority from the principal*.'") (emphasis added).

52. Here, the Court is required to determine whether Boston's and LaBarge's acts will be imputed to Zloop where their acts, although primarily for personal benefit, were taken under the color of their authority to act for Zloop and

Zloop received at least some incidental benefit from their wrongs.

(3) The North Carolina Court of Appeals' decision in CommScope is neither controlling nor persuasive precedent.

53. The North Carolina Court of Appeals considered the application of *in pari delicto* in the context of professional malpractice claims asserted by a corporation against its accounting firm. *CommScope Credit Union v. Butler & Burke, LLP, 237 N.C. App. 101, 103, 764 S.E.2d 642, 646 (2014)*, *aff'd in part, rev'd in part*, *369 N.C. 48, 790 S.E.2d 657 (2016)*. In *CommScope*, the IRS required the credit union to pay a significant tax deficiency and assessment after the credit union's general manager failed to file various forms that would have avoided taxation and the accounting firm did not discover the failure. *Id. at 102, 764 S.E.2d at 645-46*. The credit union asserted claims against its accounting firm for professional malpractice, negligence, and breach of fiduciary trust. **[*21]** *Id. at 103, 764 S.E.2d at 646*. The accounting firm asserted an *in pari delicto* defense based on the credit union's general manager's negligence. *Id.* The trial court granted *Rule 12(b)(6)* and *12(c)* motions based on the defense. *Id.* The Court of Appeals reversed. *Id.*

54. The Court of Appeals held, as a matter of law, that the general manager's acts could not be imputed to the credit union. *Id. at 108-09, 764 S.E.2d at 649-50*. It premised its holding on two determinations: first, that there was no basis to conclude that the general manager was acting within the scope of his employment when he failed to file tax returns because, in so failing, he did not advance the credit union's interests in any way; and second, that the complaint did not allege that the general manager's actions constituted wrongs that were at least equal to the defendant-accounting firm's own wrongs in failing to implement proper auditing procedures. *Id.*

55. On discretionary review, the Supreme Court of North Carolina accepted the case to determine whether the accounting firm had a fiduciary duty and whether the claims against it were barred by the *in pari delicto* doctrine. It then affirmed in part and reversed in part. *CommScope, 369 N.C. at 51, 790 S.E.2d at 659*. The Supreme Court justices were equally divided on whether the *in pari delicto* ***[*22]*** defense barred the claim, thus leaving the Court of Appeals' holding regarding *in pari delicto* "undisturbed" but standing "without precedential value." *Id. at 56, 790 S.E.2d at 663*.

56. Zloop, however, argues that the Court of Appeals' holding in *CommScope* doctrine is binding and dispositive as to the application of the *in pari delicto* doctrine in this case. Zloop erroneously relies on *In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act etc., 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)*, which held that ***HN12***[↑] "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *Id.* A different rule governs Court of Appeals decisions affirmed by an evenly-divided Supreme Court. *See, e.g.*,

Hardin v. KCS Int'l, Inc., 199 N.C. App. 687, 694, 682 S.E.2d 726, 732 (2009) (holding that *Currituck Assocs. Residential P'ship v. Hollowell, 166 N.C. App. 17, 601 S.E.2d 256* *aff'd per curiam by an equally divided court*, *360 N.C. 160, 622 S.E.2d 493 (2005)*, was not controlling); *Daniels v. Durham Cty. Hosp. Corp., 171 N.C. App. 535, 540-41, 615 S.E.2d 60, 64 (2005)* (rejecting the decision in *Campbell v. Pitt Cty. Mem'l Hosp., Inc., 84 N.C. App. 314, 352 S.E.2d 902 (1987)*, *aff'd by an equally divided supreme court*, *321 N.C. 260, 362 S.E.2d 273 (1987)*, because "the North Carolina Supreme Court was evenly divided and accordingly affirmed the *Campbell* opinion, but stripped it of precedential value"); *Elliot v. N.C. Dep't of Human Res., 115 N.C. App. 613, 620, 446 S.E.2d 809, 813 (1994)* (noting that the court must "analyze this question without regard to this Court's decision in *Kempson [v. N.C. Dep't of Human Res., 100 N.C. App. 482, 397 S.E.2d 314 (1990)*, *aff'd by an equally divided Supreme Court, 328 N.C. 722, 403 S.E.2d 279 (1991)]*" because *Kempson* stood **[*23]** without precedential value), *aff'd per curiam*, *341 N.C 191, 459 S.E.2d 273 (1995)*; *Blitz v. Xpress Image, Inc., No. 05 CVS 679, 2006 NCBC LEXIS 12, at *26 n.12 (N.C. Super. Ct. Aug. 23, 2006)* ("Because *Pitts* was affirmed by [an] equally divided Supreme Court, it stands without precedential value. After considering the analysis in *Pitts*, the Court declines to adopt its conclusion."). Under this rule, the Court of Appeals' *CommScope* holding regarding *in pari delicto* is not binding precedent.

57. Although it is not binding, the Court has further considered whether the Court of Appeals' *CommScope* holding regarding *in pari delicto* is persuasive authority. *Cf. Lord v. Beerman, 191 N.C. App. 290, 296 n.3, 664 S.E.2d 331, 336 (2008)* (holding that a case cited by a party, which had been affirmed by an evenly divided Supreme Court, "may be persuasive authority in this case"). The Court concludes that there are several factual distinctions that make the *CommScope* opinion of little relevance. First, the Amended Complaint reveals that Zloop enjoyed at least some benefit from Boston's and LaBarge's wrongful conduct, whereas CommScope received no benefit from its agent's failure to act. Second, the Amended Complaint reveals substantially more aggravated wrongful conduct by Boston and LaBarge than was at issue in *CommScope*, where it was clear that the Court of Appeals was persuaded that the auditing firm's **[*24]** malfeasance far outweighed the agent's failure to file tax forms. *Commscope, 237 N.C. App. at 108, 764 S.E.2d at 649* ("[N]othing in Plaintiff's complaint establishes that [the agent]'s failure to file the tax forms was an example of intentional wrongdoing, as opposed to negligence, or for that matter, that [the agent]'s alleged failure was not excusable conduct.").

(4) An agent's wrongful acts, even when taken primarily for personal benefit, will be imputed to the corporation when they yield some benefit to the corporation.

58. There is then no controlling North Carolina precedent teaching whether the *in pari delicto* doctrine bars a corporation's claims against its professional services providers when such claims are based on the corporation's agent's intentional, wrongful conduct that, while motivated by personal gain, nevertheless benefited the corporation in some way and is at least equal to the conduct charged against the professional services provider. In the absence of such precedent, the Court appropriately considers decisions from other jurisdictions, particularly Delaware. *White v. Hyde, No. 16 CVS 1330, 2016 NCBC LEXIS 74, at *15 (N.C. Super. Ct. Oct. 4, 2016)* ("Absent guidance from the North Carolina appellate courts, this Court may look to, but is not controlled by, Delaware law."); *First Union Corp. v. Suntrust Banks, Inc., Nos. 1 CVS 100075, 4486, 8036, 2001 NCBC LEXIS 7, at *31 (N.C. Super. Ct. Aug. 10, 2001)* **[*25]** ("North Carolina courts have frequently looked to Delaware for guidance because of the special expertise and body of case law developed in the Delaware Chancery Court and the Delaware Supreme Court."). It is particularly

appropriate here to consider Delaware law as Zloop is incorporated in Delaware. (Am. Compl. ¶ 8.)

59. ***HN13***[⬆] Delaware recognizes but then narrowly applies the adverse interest exception and will impute an agent's wrongful, self-serving conduct to the corporation so long as even a minor, incidental, or illusory benefit flows to the corporation from those wrongful acts. Vice Chancellor Parsons' opinion in *Stewart v. Wilmington Trust SP Services, Inc.*, illustrates how the Delaware Chancery Court applies the exception. *112 A.3d 271 (Del. Ch. Mar. 26, 2015)*, *aff'd*, *126 A.3d 1115 (Del. Nov. 2, 2015)*. In *Stewart*, the receiver for insurance companies that had been defrauded by their controlling owner brought breach-of-contract, negligence, and aiding and abetting breach of fiduciary duty claims against its auditors for their failure to timely discover and mitigate the owner's pervasive fraud. *Id. at 282-89*. Even though Vice Chancellor Parsons assumed that the owner had siphoned off funds for purely personal use, he found **[*26]** that the owner's bad acts should still be imputed to the companies because the owner's acts provided some benefits to them, even if temporary and ultimately illusory. *Id. at 310-11* (noting that the owner's "machinations," including fraudulently obtaining the companies' authorization as Delaware-domiciled insurers, improved, "if only for a time," the companies' position). Accordingly, Vice Chancellor Parsons upheld the *in pari delicto* defense.

60. In allowing the defense, Vice Chancellor Parsons explained that "[where a high-level officer or director also solely owns or otherwise dominates the corporation, the principal-agent distinction virtually disappears." *Id. at 311*. Stated otherwise, the "adverse interest exception will not aid an agent-principal who does wrong by protecting the corporation he controls from the effect of *in pari delicto*." *Id.*

61. New York likewise follows the rule that an agent's wrongful acts are imputed to the corporate principal unless the agent totally abandons the principal's interest and provides no benefit to the corporation. *Kirschner, 938 N.E.2d at 952*. Other courts recognize this rule, but condition its application in some circumstances. For example, Pennsylvania allows a professional services firm to **[*27]** pursue an *in pari delicto* defense only if it demonstrates that it dealt with the corporation's wrongdoing agent in good faith. *Official Comm. Unsecured Creditors Allegheny Health Educ. & Research Found. v. PricewaterhouseCoopers, LLP, 605 Pa. 269, 989 A.2d 313, 335 (2010)*. New Jersey bars the *in pari delicto* defense by a professional services firm that "is negligent within the scope of its engagement." *NCP Litig. Tr. v. KPMG LLP, 187 N.J. 353, 901 A.2d 871, 889 (2006)*.

62. The Court concludes that, on the facts of this case, the North Carolina Supreme Court would adopt the Delaware and New York approach and impute to a corporation the acts of its agents when the agents' acts are taken under color of authority and at least marginally benefit the corporation. Boston's and LaBarge's acts should then be imputed to Zloop so long as their conduct occurred in their corporate capacities and benefitted Zloop.

63. Zloop's own allegations in the Amended Complaint demonstrate that (1) Boston and LaBarge acted as Zloop's owners or directors when engaging in their misconduct, (Am. Compl. ¶ 96 (Boston and LaBarge committed "fraudulent acts *in their operation of Zloop* and dealings with investors") (emphasis added)), and (2) that Zloop received at least some benefit from the wrongful conduct, particularly in Boston and LaBarge's raising funds for Zloop's operation. (*See e.g.*, Am. Compl. ¶¶ 11, 83 (Boston and **[*28]** LaBarge's fraud allowed Zloop to temporarily remain in business and obtain franchises and lines of credit).) As such, Boston's and LaBarge's acts are imputed to Zloop as a matter of law.

C. *In Pari Delicto* Bars Zloop's Legal Malpractice and Breach of Fiduciary Duty Claims.

64. For purposes of the Motion, the Court accepts as true Zloop's allegations that Defendants committed professional malpractice. The Court must determine whether claims based on that malpractice are barred by the doctrine of *in pari delicto*.

(1) Claims grounded on Defendants' duties as corporate counsel are subject to the *in pari delicto* doctrine.

65. ***HN14***[⬆] Professional negligence claims are subject to a defense grounded on the *in pari delicto* doctrine. *Whiteheart, 199 N.C. App. at 287, 681 S.E.2d at 423*. Although couched as a fiduciary duty claim, Zloop's claim for Defendants' professional malpractice is to be treated as a negligence claim. *Heath v. Craighill, Rendleman, Ingle & Blythe, P.A., 97 N.C. App. 236, 244, 388 S.E.2d 178, 183 (1990)* ("Breach of fiduciary duty is a species of negligence or professional malpractice."). Zloop's claims for Defendants' professional malpractice are then subject to an *in pari delicto* defense whether pleaded as a negligence claim or a breach of fiduciary duty claim.

(2) Zloop's allegations render the *in pari delicto* defense complete against [*29] its professional malpractice claims as a matter of law.

66. In addition to concluding that Boston's and LaBarge's conduct must be imputed to Zloop, before applying the *in pari delicto* doctrine, the Court must also be satisfied that their conduct is at least equal to the wrongs asserted against Defendants. *See Freedman, 784 S.E.2d at 649*. That is an easy conclusion to reach based on Zloop's own allegations, which unequivocally demonstrate that Boston's and LaBarge's intentional and criminal conduct was at least equal to, if not substantially more egregious, than Defendants' alleged misconduct, which is based in negligence rather than in knowing and intentional misconduct or fraud. (*See, e.g.*, Am. Compl. ¶¶ 83(c), (y), 96, 102, 104, 111.) Accordingly, the Court concludes that Zloop's own pleading demonstrates that Zloop's legal malpractice and breach of fiduciary duty claims are barred by the *in pari delicto* doctrine as a matter of law.

(3) No Public Policy Overrides the Defense.

67. Zloop seeks to avoid the *in pari delicto* defense by claiming that applying the doctrine here would be inconsistent with the policies on which the doctrine is based. (*See* Pl's. Br. Opp. Defs.' Mot. J. Pleadings 22, ECF No. 48 ("Equity **[*30]** and public policy support giving victims redress against all those who contributed to their injuries.").)

68. ***HN15***[⬆] The *in pari delicto* doctrine has been broadly recognized as promoting two primary policies: deterring wrongful conduct by refusing wrongdoers any legal or equitable relief, and protecting against the misuse of judicial resources. *Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 306, 105 S. Ct. 2622, 86 L. Ed. 2d 215 (1985)*. Courts have occasionally referenced other policies, such as: (1) providing proper incentives for corporations to police their own conduct, *Kirschner, 938 N.E.2d at 951-52* ("[I]mputation fosters an incentive for a principal to select honest agents and delegate duties with care."); (2) maintaining the integrity of the corporate form, *Stewart, 112 A.3d at 303* (quoting *In re Am. Int'l Grp., Inc., Consol. Derivative Litig., 976 A.2d 872, 893 (2009)*) ("Though at [a] superficial level it may appear harsh to hold an "innocent" corporation (and, ultimately, its stockholders) to answer for the bad acts of its agents, such 'corporate liability is essential to the continued tolerance of the corporate form, as any other result would lack integrity.'"); (3) not giving corporations rights which natural persons do not have, *In re Am. Int'l Group, Consol. Derivative Litig., 976 A.2d at 893*. ("[T]he operative point is that [not allowing an *in pari delicto* defense in this case] would allow corporations to sue their own co-conspirators for actions that were undertaken, **[*31]** at least in part,

for the corporation's own interest, giving corporations rights that natural persons do not have."); and (4) giving deference to federal statutory schemes that rely on private rights of action for enforcement. *See, e.g.*, *Pinter v. Dahl, 486 U.S. 622, 633, 108 S. Ct. 2063, 100 L. Ed. 2d 658 (1988)* (noting that "broad judge-made law" including *in pari delicto* should not "undermine the congressional policy favoring private suits as an important mode of enforcing federal securities actions"); *Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 140, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968)* (refusing to apply *in pari delicto* in antitrust cases).

69. The Court believes the following admonition of our Supreme Court dispenses with the policy arguments:

> [t]he allegations of the complaint are discreditable to both parties. They blacken the character of the plaintiff as well as soil the reputation of the defendant. As between them, the law refuses to lend a helping hand. The policy of the civil courts is not to paddle in muddy water, but to remit the parties, when *in pari delicto*, to their own folly. So, in the instant case, the plaintiff must fail in his suit.

Bean v. Home Detective Co., 206 N.C. 125, 126, 173 S.E. 5, 6 (1934).

70. In sum, the Court concludes that *in pari delicto* bars Zloop's claims for Defendants' alleged professional malpractice. The Court now turns to whether Zloop's claim for Defendants' aiding **[*32]** and abetting Boston and LaBarge's breaches of fiduciary duty must also be dismissed.

D. Zloop's Aiding and Abetting Breach of Fiduciary Duty Claim must also be Dismissed.

(1) An aiding and abetting breach of fiduciary duty claim does not exist in North Carolina until it is recognized by North Carolina appellate courts.

71. It is axiomatic that Zloop's aiding and abetting breach of fiduciary duty claim must be dismissed if the cause of action is not recognized in North Carolina. ***HN16***[↑] The Court now concludes that on appeal the North Carolina Supreme Court will hold that North Carolina does not recognize a claim of aiding and abetting breach of fiduciary duty. Alternatively, for the reasons discussed below, the Court further finds that, should the North Carolina Supreme Court recognize such a claim, Zloop's Amended Complaint nevertheless fails because Zloop has not, as a matter of law, alleged the essential elements of any such claim.

72. This Court has in earlier opinions noted the uncertainty regarding whether North Carolina recognizes an aiding and abetting breach of fiduciary duty claim. *Tong v. Dunn, No. 11 CVS 1522, 2012 NCBC LEXIS 16, at *12* (quoting *Battleground Veterinary Hosp., P.C. v. McGeough, No. 05 CVS 18918, 2007 NCBC LEXIS 33 at *17 (N.C. Super. Ct. Oct. 19, 2007))* ("Without a definitive recent statement from our appellate courts, '[i]t remains an open question **[*33]** whether North Carolina law recognizes' the claim.") (alteration in original); *see also Islet Scis., Inc., 2017 NCBC LEXIS 4, at *14* ("North Carolina's appellate courts have not, to-date, expressly recognized a cause of action for aiding and abetting breach of fiduciary duty."). Federal courts in North Carolina have approached the claim differently. In *Laws v. Priority Trustee Services. of N.C., L.L.C., 610 F. Supp. 2d 528, 532 (W.D.N.C. 2009)*, the court observed that "the Supreme Court of North Carolina has never recognized [a cause of action for aiding and abetting breach of fiduciary duty]." Another decision from the Western District dismissed a claim against an attorney who allegedly personally promoted a Ponzi scheme to investors because "North Carolina does not recognize [an aiding and abetting breach of fiduciary duty] claim." *Bell v. Kaplan, No. 3:14CV352, 2016 U.S. Dist. LEXIS 24408, at *15 (W.D.N.C. Feb. 29, 2016)*. In contrast, a decision from the bankruptcy

court in the Middle District concluded that "North Carolina law recognizes a cause of action for aiding and abetting breach of fiduciary duty." *Moseley v. Arth, Case No. 2003 Bankr. LEXIS 1437, at *49 (Bankr. M.D.N.C. 2003)*.

73. The Court now concludes and holds that North Carolina does not recognize a claim of aiding and abetting breach of fiduciary duty. Accordingly, Zloop's aiding-and-abetting claim must be dismissed.

74. The following analysis supports the Court's alternative holding that **[*34]** Zloop has failed, as a matter of law, to allege the essential elements of any aiding and abetting breach of fiduciary duty claim that may be recognized in North Carolina.

(2) The Court need not address the question of whether any aiding and abetting breach of fiduciary duty claim is subject to the *in pari delicto* doctrine.

75. Zloop alleges that the breaches of fiduciary duty from which its aiding-and-abetting claim derives arise from Boston and LaBarge's duties as Zloop's owners, managers, or directors. ***HN17***[⬆] Generally, the *in pari delicto* doctrine is not applied to bar a claim by a corporation against its own wrongdoing agents. *See, e.g., In re Am. Int'l Grp., Inc., Consol. Derivative Litig., 976 A.2d at 890* (noting that public policy is best served by not applying *in pari delicto* in suits brought by corporations against their own insiders and agents). Some have referred to this rule of law as the "fiduciary duty exception" to *in pari delicto*. *Stewart, 112 A.3d at 304*; *see also In re HealthSouth Corp. S'holders Litig., 845 A.2d 1096, 1107 (Del. Ch. 2003)* (noting that "because corporations must act through living fiduciaries . . . the application of the *in pari delicto* doctrine has been rejected in situations when corporate fiduciaries seek to avoid responsibility for their own conduct vis-a-vis their corporations" and concluding that a contrary holding would **[*35]** be "transparently silly").

76. It is less clear whether the *in pari delicto* doctrine would apply to a corporation's claim against those who aided that breach. Delaware apparently would not recognize an *in pari delicto* defense to at least certain aiding-and-abetting claims in that context. *Stewart, 112 A.3d at 318-20*. In allowing an aiding-and-abetting claim against auditors to proceed even when professional malpractice claims were rejected, Vice Chancellor Parsons determined that the *in pari delicto* doctrine should not bar aiding-and-abetting claims against an auditor that enjoyed a special relationship with the companies that would have allowed it to discover and mitigate the agent's wrongdoing. *Stewart, 112 A.3d at 318-20*.

77. If the *in pari delicto* doctrine applies to Zloop's aiding-and-abetting claim, the defense is complete and the claims are barred by that doctrine as a matter of law for the same reasons the doctrine bars Zloop's professional malpractice claims. The Court need not consider that issue further because the Court finds that Zloop's aiding-and-abetting claim fails whether or not *in pari delicto* applies because Zloop has failed to allege the essential elements of the claim.

(3) If the Supreme Court of North Carolina recognizes [*36] an aiding and abetting breach of fiduciary duty claim, it will impose elements at least as demanding as a claim defined by the *Restatement (Second) of Torts § 876(b)*.

78. ***HN18***[⬆] The Restatement (Second) of Torts recognizes potential liability for those acting in concert, stating that "[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." *Restatement (Second) of Torts § 876(b)* (Am. Law Inst. 1979). Most jurisdictions that impose aider-abettor liability do so under *Section 876* and incorporate its elements. *See, e.g., Cent. Bank of Denver, N.A. v. First*

Interstate Bank of Denver, N.A., 511 U.S. 164, 181, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994) (citing *Section 876* in discussing aiding-and-abetting claims).

79. The North Carolina Supreme Court has not yet considered an aiding and abetting breach of fiduciary duty claim grounded on *Section 876*. *Tong, 2012 NCBC LEXIS 16, at *5 n.3* ("The North Carolina Supreme Court . . . expressly adopted *Section 876* as it applies to the negligence of joint tort-feasors [in *Boykin v. Bennett, 253 N.C. 725, 118 S.E.2d 12 (1961)]*, but has not been presented with the question of its applicability to aiding and abetting claims."). The North Carolina Court of Appeals endorsed *Section 876* when analyzing an aiding-and-abetting claim in the securities context. *Blow v. Shaughnessy, 88 N.C. App. 484, 490-91, 364 S.E.2d 444, 447 (1988)* (citing *Section 876* in recognizing a cause of action for **[*37]** aiding and abetting breach of fiduciary duty and observing many federal courts' use of *Section 876* in recognizing such claims). The Supreme Court of the United States later held that a private plaintiff may not maintain an aiding-and-abetting suit under *section 10b*. *Cent. Bank of Denver, 511 U.S. at 191*. That holding casts substantial doubt on the continued vitality of *Blow. Laws v. Priority Tr. Servs. of N.C., L.L.C, 610 F. Supp. 2d 528, 532 (W.D.N.C.2009)*.

80. Courts in other jurisdictions since *Central Bank of Denver* have adopted *Section 876* when analyzing claims that attorneys aided and abetted a client's breach of duty. *See, e.g., Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C., 331 F.3d 406, 414 (3d Cir. 2003)*; *Reynolds v. Schrock, 341 Ore. 338, 142 P.3d 1062, 1066 (Or. 2006)*; *Thornwood, Inc. v. Jenner & Block, 344 Ill. App. 3d 15, 799 N.E. 2d 756, 278 Ill. Dec. 891 (Ill. Ct. App. 2003)*.

81. ***HN19***[⬆] The Court concludes that if the North Carolina Supreme Court recognizes an aiding-and-abetting claim, it will base the elements of any such claim on *Section 876(b)*. *See Tong, 2012 NCBC LEXIS 16, at *13* (citing *Section 876* in evaluating an assumed aiding-and-abetting claim); *see also Sompo Japan Ins., Inc. v. Deloitte & Touche, LLP, No. 03 CVS 5547, 2005 NCBC LEXIS 1, at *3 (N.C. Super. Ct. June 10, 2005)* (noting that North Carolina courts will "adopt *Section 876* on a case-specific basis guided by the 'concert of action' involved").

82. In *Blow*, ***HN20***[⬆] the Court of Appeals, citing to *Section 876*, held that the

> prerequisites necessary to establish aiding and abetting liability . . . include: (1) the existence of a . . . violation by the primary party; (2) knowledge of the violation on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in the achievement of the primary **[*38]** violation.

Blow, 88 N.C. App at 490, 364 S.E.2d at 447.

83. The parties do not dispute that Boston and LaBarge breached a fiduciary duty owed to Zloop. There is then, no contest that Zloop has adequately alleged the first element of its claim. Defendants do challenge whether Zloop has alleged the second and third elements of any such claim.

84. As to the second element, the Court concludes that the element requires actual, not implied, knowledge of the underlying breach of fiduciary duty. *See Blow, 88 N.C. App. at 493, 364 S.E.2d at 449* (approving jury instructions in which the judge told the jury that "[y]ou'd have to know about the fraud"); *Ivey v. Crown Mem'l Park, LLC, 333 B.R. 76, 80 (Bankr. M.D.N.C. 2005)* ("An alleged aider and abettor must have actual knowledge of the breach of the fiduciary's duty."); *Kolbeck v. LIT Am., 939 F. Supp. 240, 246, (S.D.N.Y. 1996)* ("[A]ctual knowledge is necessary to impose liability for participating in a breach of fiduciary duty."). The knowledge element includes a degree of scienter. Before his retirement from this court, Judge Ben Tennille observed that "there is not a lower level of culpability or scienter for aiding and abetting than for the underlying tort." *Sompo*

*Japan, 2005 NCBC LEXIS 1, at *11-12*; *see also, Tong, 2012 NCBC LEXIS 16, at *26* ("[I]t is clear that the primary party and the aiding and abetting party must have the same level of culpability or scienter."). He further noted that an aiding-and-abetting claim is **[*39]** best conceptualized as a "vehicle to accomplish liability for *equally culpable acts*." *Sompo Japan, 2005 NCBC LEXIS 1, at *11* (emphasis added). The Court adopts Judge Tennille's reasoning.

85. ***HN21***[↑] The third element of an aiding-and-abetting claim grounded on *Section 876* is that the aider-abettor must have lent "*substantial* assistance or encouragement" to the achievement of the breach of fiduciary duty. *Restatement (Second) of Torts § 876(b)* (Am. Law Inst. 1979) (emphasis added). When addressing the claim in a securities context, the North Carolina Court of Appeals recognized that this element requires a "showing of [a] 'substantial causal connection between the culpable conduct of the alleged aider and abettor and the harm to the plaintiff, or a showing that the encouragement or assistance is a substantial factor in causing the resulting tort.'" *Blow, 88 N.C. App. at 491, 364 S.E.2d at 447-48* (quoting *Metge v. Baehler, 762 F.2d 621, 624 (8th Cir. 1985)*). The Court concludes that proving a "substantial causal connection" is a higher burden than the burden for other claims requiring only proof of "a proximate cause." *Compare Restatement (Second) of Torts § 876(b)* (Am. Law Inst. 1979) *and Blow, 88 N.C. App. at 491, 364 S.E.2d at 447-48 with* North Carolina Pattern Jury Instructions, General Civil Vol. No. 1, § 102.19 (2017) ("Proximate cause is a cause which in a natural and continuous sequence produces a person's injury . . . There may be more than one proximate cause **[*40]** of injury. Therefore, the plaintiff need not prove that the defendant's negligence was the sole proximate cause of the injury.") *and* Prosser & Keeton on Torts 265-67 (5th ed. 1984) (discussing the but-for and substantial factor tests for determining whether a defendant's acts proximately caused a plaintiff's injury).

86. ***HN22***[↑] *Comment d of Section 876* outlines factors that courts may consider in determining whether a party's assistance rises to the level of "substantial assistance," including: the nature of the act encouraged, the amount of assistance given by the defendant, the defendant's presence or absence at the time of the tort, his relation to the primary tortfeasor, and the defendant's state of mind. *Restatement (Second) of Torts § 876(b)*, *cmt.d* (Am. Law Inst. 1979); *see also, e.g., In re TMJ Implants Prods. Liab. Litig., 113 F.3d 1484, 1495 (8th Cir. 1997)*; *Halberstam v. Welch, 705 F.2d 472, 478, 227 U.S. App. D.C. 167 (D.C. Cir. 1983)*; *Monsen v. Consolidated Dressed Beef Co., 579 F.2d 793, 800 (3d Cir. 1978)* (analyzing the factors enumerated in *Section 876's Comment d*).

87. ***HN23***[↑] Other courts have recognized that "substantial assistance" must mean more than mere assistance. *See, e.g., Mazzaro de Abreu v. Bank of Am. Corp., 525 F. Supp. 2d 381, 391 (S.D.N.Y. 2007)* (holding that Bank of America had not "substantially assisted" a massive fraud, even though its accounts were used to perpetrate the scheme and it violated its own internal policies and federal regulations in approving fraudulent transactions); *Rosner v. Bank of China, 528 F. Supp. 2d 419, 427 (S.D.N.Y. 2007)* (noting that a bank's violations of law did not in that case **[*41]** elevate its actions "into the realm of 'substantial assistance'").

88. The substantial assistance requirement has arisen in cases brought against lawyers accused of having aided and abetted a client's breach of fiduciary duty. As one court recognized, in that context, "substantial assistance means something more than the provision of routine professional services." *Abrams v. McGuireWoods LLP, 518 B.R. 491, 503 (N.D. Ind. 2014)* (quoting *Meridian Horizon Fund, LP v. KPMG (Cayman), 487 Fed. App'x 636, 643 (2d Cir. 2012)*. Another court has recognized that the fact that attorneys may, at the direction of their clients during the course of representation, draft documents that prove to be misleading does not necessarily constitute

substantial assistance. *Schatz v. Rosenberg, 943 F.2d 485, 497 (4th Cir. 1991)* (noting that "the 'substantial assistance' element requires that a lawyer be more than a scrivener for a client . . . While it is true that some of [the primary wrongdoer]'s documents prepared by [the law firm] (on the basis of information provided by [the primary wrongdoer]) were misleading, this fact alone does not meet the 'substantial assistance' threshold."). Further, some courts have held that an attorney's silence to aid his client's fraud does not constitute substantial assistance. *See Varga, 952 F. Supp. 2d at 860* ("[F]ailing to alert others cannot constitute substantial assistance as a matter of law."); **[*42]** *Quintel Corp. v. Citibank, 589 F. Supp. 1235, 1245 (S.D.N.Y.1984)* (allegations that attorney remained silent to aid his client's fraud did not adequately plead an aider-and-abettor claim because the plaintiff never alleged that the attorney "had a direct involvement in the transaction or deliberately covered up the fraud"); *but see Lerner v. Fleet Bank, N.A., 459 F.3d 273, 295 (2d Cir. 2006)* ("[T]he mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff.").

89. Courts have also found that the substantial assistance necessary to support a lawyer's liability as an aider and abettor must be directly related to the underlying breach of fiduciary duty on which the aiding and abetting claim is based, in that the assistance must be directed at the "primary . . . violation, *not merely to the person committing the violation*." *Schatz v. Rosenberg, 943 F.2d 485, 497 (4th Cir. 1991)* (noting that the substantial assistance element in an aiding-and-abetting securities fraud claim required "that the lawyer . . . *actively participate* in soliciting sales or negotiating terms of the deal on behalf of a client") (emphasis added); *Quintel, 589 F. Supp. at 1245*. As the *Schatz* court explained,

> [i]f a lawyer, for example, is a member of the investment group, acts as a general agent for the investment group and not merely **[*43]** its attorney, or *actively participates in the transaction by inducing or soliciting sales or by negotiating terms of the deal*, the lawyer may be held liable for substantially assisting a securities violation. However, when a lawyer offers no legal opinions or affirmative misrepresentations to the potential investors and merely acts a scrivener for the investment group, the lawyer cannot be liable as a matter of law for aider and abettor liability . . . .

Schatz, 943 F.2d at 497 (emphasis added).

90. In contrast, the Court of Appeals for the Third Circuit held that a plaintiff had sufficiently alleged that the defendant law firm went "beyond the bounds of permissible advocacy" in an attempt to help their client avoid paying a judgment by knowingly creating and recording a sham lease, preparing and recording a "corrective" lease, and writing a letter to the county clerk's office misrepresenting the effect of a court order. *Morganroth, 331 F.3d at 412*. On those facts, the court held that the plaintiff adequately alleged that the defendant law firm "actively, knowingly, and intentionally participated in their client's unlawful efforts to avoid execution on his property" and allowed the plaintiff's aiding-and-abetting claims to survive *12(b)(6)*. **[*44]** *Id. at 408, 414*.

91. These cases teach that, ***HN24***[↑] should a claim of aiding and abetting breach of fiduciary duty be first recognized as a basis for asserting liability against counsel, the claim will demand proof that the attorney lent substantial assistance to the breach on which the claim is based beyond merely providing routine legal services, acting as a scrivener, or remaining silent absent a duty to disclose. However, an attorney may be liable for aiding and abetting his client's breach of fiduciary duty if he "actively participates" in the conduct constituting the underlying breach of fiduciary duty. *Schatz, 943 F.2d at 497*.

(4) Zloop has not adequately alleged the

essential elements of any aiding and abetting breach of fiduciary duty claim that may be recognized in North Carolina.

92. The Court has concluded that North Carolina does not recognize a claim for aiding and abetting breach of fiduciary duty. That conclusion alone requires that Zloop's aiding-and-abetting claim be dismissed. The Court alternatively holds that even if such a claim may be recognized in the first instance, Zloop has, as a matter of law, failed to allege the essential elements of such a claim.

93. Zloop alleges that Boston and LaBarge breached their **[*45]** fiduciary duties to Zloop by (1) failing to act in best interests of Zloop, (2) circulating materially false documents, (3) requesting that Parker Poe make a friends and family offering, (4) fabricating the bogus UCC-1, (5) obtaining for themselves the benefits of Mosing's investments, and (6) not recommending that a lawsuit be filed against themselves. (Am. Compl. ¶ 132; *see also* Am. Compl. ¶¶ 34, 47, 96, 104, 111.) To survive *Rule 12(c)*, Zloop's allegations must tie Defendants' assistance to those breaches, and the assistance must be knowing and substantial.

94. Accepted as true, the allegations of the Amended Complaint detail that Defendants had actual knowledge of at least some of Boston's and LaBarge's wrongdoing, including that they had broken escrow, (Am. Compl. ¶¶ 37, 42), misled investors, (Am. Compl. ¶¶ 56, 60), and engaged in self-dealing. (Am. Compl. ¶ 99.) Construed liberally, Zloop's allegations may be read to allege that Defendants acted with scienter equal to Boston and LaBarge. (*See, e.g.*, Am. Compl. ¶ 134 (o), (q), (s).) Whether Zloop's Amended Complaint survives the Motion depends on whether it has adequately alleged facts which, if accepted as true, rise to the level of substantial **[*46]** assistance tied to the underlying breaches of fiduciary duty.

95. The Amended Complaint alleges that Defendants substantially assisted Boston and LaBarge's underlying breaches of duty in at least twenty-three ways. (Am. Compl. ¶ 134.) These allegations can be segregated between complaints that Defendants' failed to act, provided routine legal services to Zloop, and affirmatively assisted Boston and LaBarge in gaining control over Zloop necessary to accomplish their wrongful purposes.

96. The Court acknowledges but need not resolve the question of whether inaction can ever constitute substantial assistance for purposes of an aiding and abetting breach of fiduciary duty claim. *Compare Lerner, 459 F.3d at 295* (holding that inaction constitutes substantial assistance "only if the defendant owes a fiduciary duty directly to the plaintiff"), *with Varga, 952 F. Supp. 2d at 859* ("[F]ailing to alert others cannot constitute substantial assistance as a matter of law."). Without resolving that issue, the Court concludes that, under the particular facts of this case, Zloop's allegations based solely on Defendants' failures to act do not rise to the level of "substantial assistance" required for an aiding-and-abetting claim. *See Bottom v. Bailey, 238 N.C. App. 202, 212, 767 S.E.2d 883, 889 (2014)* (holding that an **[*47]** allegation that a party was merely "aware" of fraudulent acts was insufficient to survive *12(b)(6)*); *see also Varga, 952 F. Supp. 2d at 859*; *Quintel, 589 F. Supp. at 1245*.

97. The Court further concludes that Zloop's allegations complaining of Defendants' performance of routine legal services, including allegations that Defendants: continued to represent Zloop; drafted and prepared documents that perpetuated Boston and LaBarge's majority ownership; created PPMs and other documents that proved to be false or misleading; created Boston and LaBarge's share certificates that were void; and proposed that Zloop buy back franchises with proceeds from a debt offering, (Am. Compl. ¶ 134 (f), (j), (m), (q), (t), (v)-(w)), likewise do not constitute "substantial assistance." *See Abrams, 518 B.R. at 503* (performing routine legal services is not substantial assistance); *Schatz, 943 F.2d at 497* (drafting documents, at client's direction, that prove to be misleading is not substantial assistance).

98. The Court also concludes that Zloop's allegations of Defendants' affirmative, intentional acts do not constitute substantial assistance. These allegations include:

> • "attempting to dissuade the Independent Officers from action by excusing Boston and LaBarge's thefts and illegally breaking escrow as mere **[*48]** 'gaps in the corporate records'" (Am. Compl. ¶ 134(n));
> • "siding with Boston and LaBarge, and advising them not to acquiesce to the Independent Officers' demands that they cede control, when presented with overwhelming evidence of Boston and LaBarge's pervasive and ongoing wrongdoing" (Am. Compl. ¶ 134(o));
> • "intentionally denying and frustrating the rights of the actual stockholders of Zloop to elect its directors upon its conversion to a corporation" (Am. Compl. ¶ 134(r));
> • "unilaterally installing Boston and LaBarge as the directors of Zloop with full knowledge that they had engaged in pervasive wrongdoing to the detriment of Zloop, and that they were likely to continue to do so as long as they had the means and opportunity" (Am. Compl. ¶ 134(s)); and
> • "intentionally frustrating changes in the management and controls of Zloop that would have ended Boston and LaBarge's ability to steal from the company." (Am. Compl. ¶ 134(u).)

99. Admittedly, these allegations certainly raise troubling issues of professional malpractice. However, the Court is not persuaded that they rise to the level of "substantial assistance" that North Carolina appellate courts would impose as an essential element **[*49]** of any aiding and abetting breach of fiduciary duty claim because (1) those acts are not adequately tied as a causative factor to *the underlying breaches* of fiduciary duty on which the claim is based and (2) the Louisiana Amended Complaint demonstrates that any assistance Defendants rendered, even if sufficiently tied to the underlying breaches, was not substantial.

100. As discussed above, ***HN25***[↑] a plaintiff must allege "that a[n aider-abettor] rendered 'substantial assistance' *to the primary . . . violation, not merely to the person committing the violation*." *Schatz, 943 F.2d at 497 (4th Cir. 1991)* (emphasis added). Stated otherwise, Defendants must have had "*direct involvement in the transaction*" or have deliberately covered up the fraud. *Quintel, 589 F. Supp. at 1245* (emphasis added); *see also Morganroth, 331 F.3d at 412, 414*.

101. Zloop's allegations of Defendants' affirmative acts fall short of those in *Morganroth*, where the law firm itself filed false deeds and lied to a government official. *331 F.3d at 412-13*. Rather, Zloop alleges here only that Parker Poe's affirmative and knowing acts gave Boston and LaBarge the *opportunity to do those kinds of things themselves. See Schatz, 943 F.2d at 497* (noting that a plaintiff must allege "that a[n aider-abettor] rendered 'substantial assistance' *to the primary . . . violation, not **[*50]** merely to the person committing the violation*") (emphasis added). Zloop does not allege or suggest facts that Parker Poe encouraged, was directly involved in, or otherwise substantially assisted Boston and LaBarge in their breaking escrow, siphoning Mosing's funds for personal use, or filing a fraudulent UCC-1. The lack of allegations regarding Defendants' direct participation in the underlying frauds likely compels a finding that Zloop's allegations of Defendants' wrongs do not constitute substantial assistance.

102. If the Court were restricted to a review of only the Amended Complaint, liberal *Rule 12(c)* standards might argue in favor of deferring critical analysis of Zloop's claim until a summary judgment motion is presented under *Rule 56*. However, Zloop's own allegations in the Louisiana Lawsuit defeat any inferences in Zloop's favor that the *Rule 12(c)* standard might arguably require.

103. The Louisiana Amended Complaint provides further details of Boston's and LaBarge's conduct—

and the control they maintained over Zloop—that make clear that Boston and LaBarge did not depend on Defendants for that control and that Defendants' acts did not substantially assist their wrongdoing even though Defendants took **[*51]** certain actions in the course of the wrongdoing.

104. In the Louisiana Amended Complaint, Zloop alleges that Boston and LaBarge completely controlled Zloop and committed fraud at "all relevant times," (LA Am. Compl. ¶¶ 4, 5), including before June 19, 2013, when Parker Poe began representing Zloop, and after February 2015, when Parker Poe's representation ended. (*See* Am. Compl. ¶ 23 (representation begins), ¶ 108 (representation ends).)

105. For example, Zloop alleges that on March 11, 2013, *before* Defendants represented Zloop, "there was no board of directors for [Zloop], only two managing members who had *total control* of the same: LaBarge and Boston." (LA Am. Compl. ¶ 49 (emphasis added); *see also, e.g.*, LA Am. Compl. ¶¶ 13-16 (alleging that between September 23, 2012 and October 2, 2012, Boston and LaBarge mailed franchise-related documents to Mosing or Mosing's advisor without including a franchise disclosure document, in violation of state and federal law); LA Am. Compl. ¶¶ 19-22 (alleging that on October 4, 2012, Boston and LaBarge promulgated a materially incorrect franchise disclosure document); LA Am. Compl. ¶¶ 27-28 (alleging that on October 5 and 15, 2012, Boston and LaBarge **[*52]** violated state and federal securities laws by failing to disclose certain information in franchise documents); LA Am. Compl. ¶¶ 57, 59 (alleging that Boston and LaBarge broke escrow before May 10, 2013).)

106. Zloop further alleges that Boston and LaBarge dominated Zloop and committed fraud *after* Defendants ceased representing them, alleging that Boston and LaBarge "controlled Zloop until [September 24, 2015, when] the [chief restructuring officer] was appointed." (LA Am. Compl. ¶¶ 139, 159; *see also* LA Am. Compl. ¶ 130 (alleging that on March 9, 2015, after Parker Poe's representation ended, Boston and LaBarge nefariously used Zloop to take out an equity loan secured by property purchased using Mosing's funds).) According to the Louisiana Amended Complaint, Boston and LaBarge "exerted *complete control over Zloop* and were the agents of action for the acts complained of herein." (LA Am. Complaint ¶ 167 (emphasis added).)

107. In sum, Zloop alleges in the Louisiana Amended Complaint that Boston and LaBarge completely and continuously controlled Zloop and committed fraud *before*, *during*, *and after* Parker Poe represented them. Those allegations defeat any finding or inference that Defendants **[*53]** were the substantial cause of or lent substantial assistance to Boston and LaBarge's breaches of fiduciary duties. *See* *Blow at 491, 364 S.E.2d at 448*; *see also* *Restatement (Second) of Torts § 876 cmt.d* (Am. Law Inst. 1979) ("The assistance of or participation by the defendant may be so slight that he is not liable for the act of the other."). The fact that Defendants' undertakings may have had some additive effect is not adequate to constitute the substantial assistance necessary for any aiding and abetting breach of fiduciary claim. *Self v. Yelton, 201 N.C. App. 653, 659, 688 S.E.2d 34, 38 (2010)* (quoting *Brown v. Neal, 283 N.C. 604, 611, 197 S.E.2d 505, 509 (1973)* ("[B]efore holding a defendant liable for an injury to a plaintiff, it must be shown that defendant's actions were a *substantial factor* of the *particular* injuries for which plaintiff seeks recovery.") (first emphasis added).

108. Accordingly, the Court concludes that Zloop's allegations, viewed collectively and accepted as true, reveal that Zloop has not alleged the essential elements of any aiding and abetting breach of fiduciary duty claim that may ultimately be recognized in North Carolina.

VI. CONCLUSION

109. The Court does not by this Order & Opinion

make any ruling or express any opinion as to whether Defendants met or failed to meet their professional standards of conduct as corporate counsel. Rather, it holds **[*54]** that because Zloop's own allegations dictate that Boston's and LaBarge's acts must be imputed to Zloop, the doctrine of *in pari delicto*, the elements of which are fully made out on the pleadings alone, bars Zloop's legal malpractice and breach of fiduciary duty claims as a matter of law.

110. The Court holds that North Carolina does not recognize a claim for aiding and abetting breach of fiduciary duty. Alternatively, the Court concludes that Zloop has, as a matter of law, failed to allege the essential elements of any such claim that may be recognized.

111. The Court need not reserve its ruling in anticipation of a further amended complaint Zloop might seek to file based on additional information learned from criminal proceedings involving Boston and LaBarge. For the foregoing reasons, the Court GRANTS Defendants' Motion and the Amended Complaint is DISMISSED WITH PREJUDICE.

SO ORDERED, this the 16th day of February, 2018.

/s/ James L. Gale

James L. Gale

Chief Business Court Judge

End of Document

2018 WL 2215606
Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Tampa Division.

Jose ZULUAGA, Plaintiff,
v.
BANK OF AMERICA, N.A., Defendant.

Case No. 8:17–cv–2543–T–33TGW
|
Signed 05/15/2018

Attorneys and Law Firms

Caitlyn Corrine Prichard, Aylstock, Witkin, Kreis & Overholtz, PLLC, Pensacola, FL, John W. Adams, Jr., Adams Law Association, P. A., Valrico, FL, for Plaintiff.

Ira Scot Silverstein, James Randolph Liebler, II, Liebler, Gonzalez & Portuondo, PA, Miami, FL, for Defendant.

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 to Dismiss Plaintiff's Amended Complaint (Doc. # 34), filed on March 27, 2018. Plaintiff Jose Zuluaga filed his response in opposition on April 11, 2018. (Doc. # 36). The Amended Complaint, (Doc. # 27), represents Plaintiff's fourth attempt at pleading in this case. For the reasons below, the Court grants Bank of America's Motion to Dismiss in part and denies in part. Finding that leave to amend at this juncture would be futile, Plaintiff may not file a second amended complaint.

I. Background

On June 27, 2017, over 70 Plaintiffs sued Bank of America in one action in the Middle District of Florida. Torres, et al. v. Bank of America, N.A., No. 8:17–cv–1534, (M. D. Fla. June 27, 2017), Doc. # 1. Plaintiff Jose Zuluaga was one 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 was implemented by the Federal Government in March of 2009, to help homeowners facing foreclosure. (Doc. # 27 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 a loan modification with BOA under HAMP.

In the original lawsuit, BOA filed a Motion to Dismiss under Fed. R. Civ. P. 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). Plaintiff Jose Zuluaga filed a separate complaint on October 30, 2017. (Doc. # 1). Three months later, on March 7, 2018, Plaintiff filed an Amended Complaint. (Doc. # 27). Thus, the operative complaint in this matter is Plaintiff's fourth attempt to properly plead his cause of action.

The Amended Complaint alleges BOA committed four fraudulent acts: (1) falsely telling Plaintiff that he "must be in default and behind" on his mortgage to be eligible for a HAMP loan modification and failing to tell Plaintiff that he could qualify for HAMP if default was reasonably foreseeable ("HAMP Eligibility Claim"); (2) falsely telling Plaintiff the requested supporting financial documents Plaintiff had submitted to BOA were incomplete ("Supporting Documents Claim"); (3) falsely telling Plaintiff that he was approved for a HAMP modification and needed to start making trial payments ("HAMP Approval Claim"); and (4) fraudulently omitting how inspection fees charged to Plaintiff's account would be applied ("Inspection Fee Claim"). (Doc. # 27 at ¶¶ 38, 41, 48, 55).

***2** In its Motion to Dismiss, BOA argues that Plaintiff's fraud claims are barred by the statute of limitations and banking statute of frauds. (Doc. # 34 at 6, 11). BOA also contends that Plaintiff's Amended Complaint violates Rule 9(b) by failing to allege circumstances constituting fraud with sufficient particularity. (Id. at 14). These arguments are addressed in turn.

II. Legal Standard

On a Rule 12(b)(6) motion to dismiss, this Court accepts as true all the allegations in the Complaint and construes them in the light most favorable to the plaintiff. Jackson v. Bellsouth Telecomms., 372 F.3d 1250, 1262 (11th Cir. 2004). Further, the Court favors the plaintiff with all reasonable inferences from the allegations in the Complaint. Stephens v. Dep't of Health & Human Servs., 901 F.2d 1571, 1573 (11th Cir. 1990) ("On a motion to dismiss, the facts stated in [the] complaint and all reasonable inferences therefrom are taken as true."). However, the Supreme Court explains that:

> 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. Factual allegations must be enough to raise a right to relief above the speculative level.

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citations omitted). In addition, courts are not "bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286 (1986). Furthermore, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

Generally, "[t]he scope of review must be limited to the four corners of the complaint." St. George v. Pinellas Cty., 285 F.3d 1334, 1337 (11th Cir. 2002). "There is an exception, however, to this general rule. In ruling upon a motion to dismiss, the district court may consider an extrinsic document if it is (1) central to the plaintiff's claim, and (2) its authenticity is not challenged." SFM Holdings, Ltd. v. Banc of Am. Sec., LLC, 600 F.3d 1334, 1337 (11th Cir. 2010).

III. Analysis

A. Statute of Limitations

Under Florida law, there is a four-year statute of limitations for any "legal or equitable action founded on fraud." Fla. Stat. § 95.11(3)(j). The time period to sue begins running when the plaintiff discovers, or should have discovered with due diligence, the facts giving rise to the fraud. Fla. Stat. § 95.031(2)(a). In its Motion to Dismiss, BOA argues that all of Plaintiff's claims are barred by the statute of limitations. The Court disagrees; only Plaintiff's Inspection Fee Claim is time barred.

Arguing that Plaintiff should have discovered the basis for his fraud claim "when the relevant statements were made," BOA submits that each of Plaintiff's claims should be barred. (Doc. # 34 at 6). BOA points to a document it calls the Supplemental Directive posted on the Treasury Department's website and posits that the posted guidelines for HAMP eligibility gave Plaintiff an opportunity to discover with due diligence any facts giving rise to fraud. (Doc. # 34 at 7–8).

But, the Court is not convinced that the Supplemental Directive should be taken into account in determining whether the statute of limitations has barred Plaintiff's claims. "A document attached to a motion to dismiss may be considered by the court ... only if the attached document is: (1) central to the plaintiff's claim; and (2) undisputed." Horsley v. Feldt, 304 F.3d 1125, 1134 (11th Cir. 2002). The Supplemental Directive is not attached either to the Amended Complaint, nor the Motion. Furthermore, the Supplemental Directive is not central to Plaintiff's fraud claims. Plaintiff's claims are based on the alleged false statements and omissions made by BOA to Plaintiff through the HAMP process. While the Supplemental Directive may be central to BOA's statute of limitations defense, it is not central to Plaintiff's claims.

***3** Even if the Supplemental Directive were to be considered alongside the Amended Complaint, it is not clear that, with due diligence, Plaintiff should have discovered the basis of his fraud allegations. BOA argues that Plaintiff should have consulted this document to understand the guidelines of HAMP and thus discover any misrepresentations. (Doc. # 34 at 7). But the Supplemental Directive is a 38–page document filled with complicated financial and legal requirements. This document, which is intended to be used by banking professionals, does not establish a reasonable expectation that Plaintiff should have discovered the basis of his fraud allegations earlier. See Order Granting in Part and Denying in Part Motion to Dismiss, Carmenates, et al. v. Bank of

America, N.A., No. 8:17–cv–2635–T–23JSS, (M.D. Fla. Feb. 1, 2018), Doc. # 12.

BOA has not met its burden of showing that Plaintiff knew, or should have known, that the statements relating to the HAMP Eligibility, HAMP Approval or Supporting Documents claims were false. A statute of limitations defense is an affirmative defense and BOA bears the burden of proof. La Grasta v. First Union Securities, Inc., 358 F.3d 840, 845 (11th Cir. 2004). BOA has not shown that Plaintiff knew, or should have known, that the statements were false regarding HAMP's eligibility requirements or his HAMP approval. Additionally, BOA has failed to establish that Plaintiff knew, or should have known, that the financial documents he submitted to BOA were not actually incomplete. Thus, the statute of limitations has not run with respect to the HAMP Eligibility, HAMP Approval or Supporting Documents claims.

Finally, with respect to the Inspection Fee Claim, the statute of limitations began to run when Plaintiff's account was charged. There is no reason that a diligent mortgagor would not and could not check his or her bank account and notice the fees. (Carmenates Order at 6). Plaintiff claims the inspection fees were last charged in 2012. (Doc. # 27 at ¶ 55). Therefore, Plaintiff's Inspection Fee Claim is barred by the statute of limitations and thus, is dismissed with prejudice.

B. Banking Statute of Frauds

Florida's Banking Statute of Frauds requires credit agreements to be signed and in writing. Fla. Stat. § 687.0304. A credit agreement is "an agreement to lend or forbear repayment of money, goods, or things in action, to otherwise extend credit, or to make any other financial accommodation." Fla. Stat. § 687.0304(1)(a). As recognized by the Court in Bloch v. Wells Fargo Home Mortg., to the extent verbal conversations add "to the purported 'promise', such addition is barred by ... 'Florida's Banking Statute of Frauds.' " 755 F.3d 886, 889 (11th Cir. 2014).

The banking statute of frauds is applicable to fraud claims where the borrower has alleged that the lender orally agreed to make financial accommodations to the borrower. Coral Reef Drive Land Dev., LLC v. Duke Realty Ltd. P'ship, 45 So.3d 897, 902–03 (Fla. 3d DCA 2010). Only Plaintiff's HAMP Approval Claim involves an oral statement regarding a credit agreement under the banking statute of frauds. Because Plaintiff's other claims do not involve a credit agreement as defined by the statute, they are not barred. Therefore, Plaintiff's HAMP Approval Claim is dismissed with prejudice.

C. Rule 9(b)

Rule 9(b) requires a plaintiff alleging fraud to "state with particularity the circumstances constituting the fraud or mistake." Fed. R. Civ. P. 9(b). In Florida, to state a claim for fraud, a "plaintiff must allege: (1) the defendant made a false representation of material fact, (2) the defendant knew that the representation was false, (3) the defendant made the representation for the purpose of inducing the plaintiff to act in reliance thereon, and (4) the plaintiff's injury was caused by justifiable reliance on representation." Berkey v. Pratt, 390 Fed. Appx. 904, 909 (11th Cir. 2010).

***4** Furthermore, Rule 9(b) requires that "a complaint identify (1) the precise statements, documents or misrepresentations made;

(2) the time and place of and persons responsible for the statement; (3) the content and manner in which the statements misled the plaintiff; and (4) what the Defendants gain[ ] by the alleged fraud." W. Coast Roofing and Waterproofing, Inc. v. Johns Manville, Inc., 287 Fed. Appx. 81, 86 (11th Cir. 2008) (citing Ambrosia Coal & Const. Co. v. Pages Morales, 482 F.3d 1309, 1316–17 (11th Cir. 2007)).

1. HAMP Eligibility Claim

In his attempt to obtain a loan modification, Plaintiff alleges BOA falsely informed him that he "must be in default and behind" on his mortgage. (Doc. # 27 at ¶ 38). However, in order to qualify for a HAMP loan modification, a mortgagor need not be in default, as default need only be reasonably foreseeable. (Id.). In his Complaint, Plaintiff provides the name of the BOA representative that told him the false statement, as well as the date the statement was made. (Id.). According to Plaintiff, the BOA representative made the false statement to induce Plaintiff's reliance, triggering his purposeful default on his mortgage. (Id. at ¶¶ 38, 40). His loss of home equity and "money paid as trial payments" to BOA demonstrate damage resulting from the false statements. (Id.). At this juncture, Plaintiff has stated a claim for HAMP Eligibility that survives the Motion to Dismiss.

2. Supporting Documents Claim

When applying for a HAMP loan modification, Plaintiff sent financial documents to BOA and was then told that the documents were incomplete. (Doc. # 27 at ¶ 42). While the Complaint alleges this statement by BOA was false, (Id. at ¶ 43), Plaintiff has failed to support the allegation with well-pleaded and specific facts. Plaintiff states only in a conclusory fashion that the statement was false. But Rule 9(b) requires more than conclusory statements. United States ex rel. Clausen v. Lab Corp. of America, Inc., 290 F.3d 1301, 1313 (11th Cir. 2002). Despite multiple pleading attempts, Plaintiff has failed to satisfy Rule 9(b) and thus, the Supporting Document Claim is dismissed with prejudice.

Accordingly, it is

ORDERED, ADJUDGED, and **DECREED:**

(1) Defendant Bank of America's Motion to Dismiss Plaintiff's Amended Complaint (Doc. # 34) is **GRANTED** in part and **DENIED** in part.

(2) Plaintiff's Supporting Documents Claim is **DISMISSED WITH PREJUDICE**.

(3) Plaintiff's HAMP Approval Claim is **DISMISSED WITH PREJUDICE**.

(4) Plaintiff's Inspection Fee Claim is **DISMISSED WITH PREJUDICE.**

(5) Plaintiff's HAMP Eligibility Claim survives. BOA is directed to file an answer to the surviving claim within 14 days.

DONE and **ORDERED** in Chambers in Tampa, Florida, this 15th day of May, 2018.

All Citations

Not Reported in Fed. Supp., 2018 WL 2215606

End of Document