

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Chester H. Hall, Jr.

v.

Civil No. 13-cv-387-JD
Opinion No. 2014 DNH 133

Bank of America, N.A.
and Federal Home Loan
Mortgage Corporation

O R D E R

Chester H. Hall, Jr. filed a petition to enjoin foreclosure and then filed an amended petition and complaint against Bank of America, N.A. and the Federal Home Loan Mortgage Corporation ("FHLMC") in state court. The defendants removed the case to this court and moved to dismiss all claims.¹ Hall objects.

Standard of Review

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss on the ground that the plaintiff's complaint fails to state a claim on which relief may be granted. In assessing a complaint for purposes of a motion to dismiss, the court "separate[s] the factual allegations from the conclusory statements in order to analyze whether the former, if taken as true, set forth a plausible, not merely conceivable, case for relief." Juarez v. Select Portfolio Servicing, Inc., 708 F.3d 269, 276 (1st Cir. 2013) (internal quotation marks omitted). "If

¹The Federal Housing Finance Agency's motion to intervene was granted.

the facts alleged in [the complaint] allow the court to draw the reasonable inference that the defendants are liable for the misconduct alleged, the claim has facial plausibility.” Id. (internal quotation marks omitted).

The defendants appended documents to the motion, including the note, the mortgage, assignments, Hall’s bankruptcy petition, and Hall’s bankruptcy discharge. Hall appended documents to his objection, including the mortgage and related documents, a subordination agreement, and documents from his bankruptcy case. Because the documents the parties submitted are not objected to and may be considered for purposes of a motion to dismiss, the motion is not converted to one for summary judgment. Fed. R. Civ. P. 12(d); see Watterson v. Page, 987 F.2d 1, 3-4 (1st Cir. 1993); accord Schaefer v. Indymac Mortg. Servs., 731 F.3d 98, 100, n.1 (1st Cir. 2013).

Background

In 2008, Hall refinanced his 2005 home mortgage with Countrywide Bank, FSB. The interest rate on the mortgage loan increased in 2008 because of the adjustable rate provision. Hall could not afford the monthly payments after the interest rate increase. Hall agreed to pay Countrywide \$10,000 in order to have a ten year interest only loan with a thirty year fixed interest rate.

Countrywide continued to charge Hall both principal and interest on the loan and the interest rate continued to change. Hall fell behind on his payments. Bank of America, N.A. succeeded Countrywide through merger. Hall again offered to pay a lump sum, but Bank of America refused to accept his offer. Hall attempted to engage in loss mitigation efforts without success.

Hall filed for bankruptcy in April of 2011 and listed his mortgage as a debt to be discharged. He was granted a discharge under 11 U.S.C. § 727 on January 30, 2012. Hall alleges that Bank of America or FHLMC scheduled foreclosures approximately twelve times based on his default on the 2008 mortgage. Bank of America assigned Hall's mortgage to FHLMC in March of 2014.

Discussion

Hall brings ten claims against Bank of America and FHLMC.² He alleges fraud and misrepresentation in inducing the mortgage and in loan modification, wrongful foreclosure and lack of standing to foreclose, promissory estoppel, and failure to act in good faith. The defendants move to dismiss on the grounds that Hall cannot assert the claims challenging the validity of the mortgage that he failed to disclose in the bankruptcy proceeding, that the fraud and misrepresentation claims are time barred, that

²A stipulation of dismissal was previously entered as to an eleventh claim.

the fraud and misrepresentation claims are not properly pleaded, that the economic loss doctrine bars the tort claims, that the claims challenging foreclosure fail as a matter of law, that Hall fails to state a claim for promissory estoppel, and that Hall fails to state a claim for violation of the implied covenant of good faith and fair dealing. Hall objects, arguing that he is asserting defenses to foreclosure, not claims that are subject to the issues that the defendants raise; that he adequately pleaded fraud and negligent misrepresentation; that the defendants breached the contract with him; that the defendants do not have the authority to foreclose; and that he pleaded sufficient facts to support his "promissory estoppel defense" and "good faith and fair dealing defenses."

A. Defenses Rather than Claims

In response to the motion to dismiss, Hall asserts, citing Bolduc v. Beal Bank, SSB, 994 F. Supp. 82, 90 (D.N.H. 1998), that his claims are more properly considered as affirmative defenses to the defendants' foreclosure efforts. Based on that reasoning, Hall contends that the issues raised by the defendants in the motion to dismiss do not apply to his complaint.

The plaintiffs in Bolduc sought an injunction to prevent foreclosure on their home and alleged that the defendant had violated the Equal Credit Opportunity Act, the Bank Holding Company Act, the Truth in Lending Act, and New Hampshire

statutes. Id. at 86-88. The defendant argued that the Bolducs' suit was barred by the Financial Institutions Reform, Recovery and Enforcement Act ("FIRREA"), which imposes exhaustion requirements for claims made against a failed bank after the FDIC is appointed receiver. Id. at 88.

The FIRREA exhaustion requirement pertains to actions seeking payment from FDIC-run banks. 12 U.S.C. § 1821(d)(13)(D). The district court held that the FIRREA exhaustion requirement did not apply to the Bolducs because they were asserting defenses against the bank's efforts to collect from them rather than claims against the bank for money. Id. at 90. On appeal, the court also concluded that the Bolducs' suit did not fall within the FIRREA exhaustion requirement because the Bolducs were not seeking payment from the bank. Bolduc v. Beal Bank, SSB, 167 F.3d 667, 671-72 (1st Cir. 1999).

Despite the breadth of the language used by the district court in Bolduc, the case is limited to the issue it addresses, the application of the FIRREA exhaustion requirement. The appeals court decision makes the distinction plain. The FIRREA exhaustion requirement is not an issue in this case.

Bolduc does not support the proposition asserted by Hall that a suit to stop foreclosure proceedings alleges affirmative defenses, not claims. Instead, the Federal Rules of Civil Procedure govern the pleadings in this case. See Fed. R. Civ. P. 8. As the plaintiff, Hall alleges claims that are subject to the defendants' motion to dismiss.

B. Effect of Bankruptcy

The defendants contend that Hall cannot pursue his claims for fraud, misrepresentation, promissory estoppel, and breach of the duty of good faith and fair dealing in Counts I, II, III, IV, VI, and X because Hall failed to raise those claims during the bankruptcy proceeding and then received a discharge of the note. In response, Hall acknowledges the general rule that a debtor in a bankruptcy action is estopped from later litigating claims that were not disclosed during the bankruptcy proceeding. See Guay v. Burack, 677 F.3d 10, 20-21 (1st Cir. 2012). He argues, however, that judicial estoppel should not apply here because he did not conceal the claims in the bankruptcy court.

In Guay, the court noted that some circuits have allowed an exception to the rule of judicial estoppel when the debtor lacked knowledge of undisclosed claims or did not intend to conceal the claims. Id. at 20. The court left the question open, because the facts in Guay did not require a decision, but strongly suggested that the exception would not be recognized in this circuit. Id. at n.7 ("We have never recognized such an exception and have noted that deliberate dishonesty is not a prerequisite to application of judicial estoppel. Schomaker v. United States, 334 Fed. Appx. 336, 340 (1st Cir. 2009) [parenthetical omitted]."). Exceptions to judicial estoppel may arise when "the party's prior position was based on inadvertence or mistake," or when a change in the governing law causes a change in legal positions. Boston Gas Co. v. Century Indem. Co., 708

F.3d 254, 263 (1st Cir. 2013) (quoting New Hampshire v. Maine, 532 U.S. 742, 753 (2001)).

To the extent exceptions to judicial estoppel may exist, they are not applicable here. Based on the complaint, Hall knew the facts that he alleges in support of his claims in 2011 when he filed for bankruptcy protection and before he received the discharge in bankruptcy in January of 2012. Hall does not suggest he was mistaken during the bankruptcy proceeding about the claims he now asserts or that the law has changed.

Hall does not dispute that if his claims are construed as claims, rather than affirmative defenses, and if no exception applies, he is judicially estopped by the bankruptcy proceeding from asserting the claims he makes here in Counts I, II, III, IV, VI, and X. Therefore, the defendants' motion to dismiss Counts I, II, III, IV, VI, and X is granted. Because the motion is granted on the ground of judicial estoppel, the court need not consider the alternative grounds raised by the defendants in support of the motion to dismiss those claims.

C. Claims Challenging Foreclosure - Counts V, VII, VIII, and IX

The defendants move to dismiss Hall's claims that challenge foreclosure on the grounds that the defendants' actions do not breach the mortgage or note, wrongful foreclosure does not pertain where foreclosure has not yet occurred, and the bifurcation theory that the mortgage is void unless the same party holds the note is not valid under New Hampshire law. Hall

objects, arguing that the defendants breached the contract by foreclosing, that the bankruptcy discharge does not preclude the requirement that the defendants prove their authority to foreclose, that a claim of wrongful foreclosure is actionable before foreclosure is complete, and that the defendants cannot foreclose because they cannot show that they hold the note and the mortgage.

1. Wrongful Foreclosure - Breach of Contract - Count V

In support of his breach of contract claim, Hall alleges:

"[Hall's] first and second mortgage allow foreclosure only in the event that [he] defaults on his obligations under the Note and/or Mortgage. BOA [Bank of America] claims that [Hall] defaulted by not making his monthly mortgage payments. Hall could not afford his monthly mortgage payments, because Countrywide Bank, FSB and/or BOA breached the terms of his contract by increasing his monthly interest rate and by charging him principal in addition to interest.

First Am. Verified Petition & Complaint, ¶ 40. He further alleges that as a result of Bank of America's "own breach," he defaulted, and Bank of America "attempted foreclosure." He concludes that "[a]s a proximate result of BOA's wrongful foreclosure, [he] has suffered losses. . . ." Id. ¶ 42.

The defendants assert that the only contract that is still enforceable is the mortgage because the note has been discharged in bankruptcy. The defendants further assert that once Hall defaulted, they were allowed to proceed with foreclosure as provided by the mortgage and the power of sale statutes, RSA

§ 477:25--:27-a, § 477:29, and § 479:25. Therefore, they contend, they did not breach their contract with Hall.

In his objection, Hall contends that in 2008, after the parties executed the note and mortgage, he entered into a new agreement with Countrywide that provided new payment terms. In support, Hall cites paragraph 12 of his complaint which states that in early 2008 his interest rate increased because of the adjustable rate provision so that he could not afford his monthly payments and that he agreed to pay \$10,000 to Countrywide "in exchange for a ten (10) year interest-only loan at a thirty (30) year fixed rate." Hall now asserts that his breach of contract claim can be based on his allegations about a separate contract.

Hall apparently does not intend to pursue the breach of contract claim alleged in Count V of his amended complaint, that the defendants breached the mortgage and note. As the defendants point out, Hall cannot amend his complaint to assert a new claim by allegations in his objection to the motion to dismiss.³

To the extent Hall intended to allege a claim of wrongful foreclosure, he has not alleged facts to support that claim. See Worrall v. Fed. Nat'l Mortg. Ass'n, 2013 WL 6095119, at *3 (D.N.H. Nov. 20, 2013).

³Hall is represented by counsel.

2. Counts VII, VIII, and IX

Hall challenges the defendants' power and authority to foreclose. In Count VII, Hall alleges that FHLMC lacks the power and authority to foreclose because it does not hold the mortgage or the note. In Count VIII, Hall alleges that the defendants cannot foreclose because under New Hampshire law the note and mortgage must be transferred together and it appears that the note and mortgage have been "bifurcated." In Count IX, Hall alleges that the defendants breached a duty owed to him to act in good faith and with due diligence by foreclosing or threatening to foreclose without first determining whether they had a right to foreclose.

In support of their motion to dismiss, the defendants have demonstrated, through copies of the note, mortgage, and public documents, that Countrywide Bank provided a refinance loan to Hall in 2008 in exchange for the note and the mortgage on Hall's property. In 2009, Countrywide merged with Bank of America. Bank of America held the note and mortgage on Hall's property through the bankruptcy proceeding, resulting in discharge of the note in January of 2012, until it assigned the mortgage to FHLMC in March of 2014. FHLMC is the record holder of the mortgage.

Because the note is no longer enforceable, having been discharged in bankruptcy, and FHLMC holds Hall's mortgage, the defendants move to dismiss the claims challenging their authority to foreclose. Hall acknowledges that he did not file a reaffirmation agreement as to the loan and does not dispute that

the note was discharged through his bankruptcy proceeding. Hall makes a convoluted argument that because he intended to keep his home when he originally filed for bankruptcy protection under Chapter 13, he can hold "[FHLMC] to its burden of proving that it has the power and authority to foreclose."

The defendants have demonstrated that FHLMC holds the mortgage to Hall's home and that the note is unenforceable. Therefore, Hall's claims challenging the defendants' power and authority to foreclose lack merit and are dismissed.

Conclusion

For the foregoing reasons, the defendants' motion to dismiss (document no. 23) is granted. All claims in the amended petition and complaint are dismissed with prejudice.

SO ORDERED.


Joseph A. DiClerico, Jr.
United States District Judge

June 11, 2014

cc: Jennifer Turco Beaudet, Esq.
Mark Sutherland Derby, Esq.
Stephen T. Martin, Esq.
Thomas J. Pappas, Esq.
David W. Rayment, Esq.