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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Lead Case No. 10-22431-rdd
Adv. Proc. No. 10-08361-rdd

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In the Matter of:
RICHARD GRIFFIN and DESMARIE GRIFFIN,
Debtors.

- - - - -x

GRIFFIN, et al.,
Plaintiffs,
v.

AMERICAN HOME MORTGAGE SERVICING, INC.,
Defendant.

- - - - -x

U.S. Bankruptcy Court
300 Quarropas Street
White Plains, New York

August 31, 2010
10:15 a.m.

B E F O R E:
HON. ROBERT D. DRAIN
U.S. BANKRUPTCY JUDGE

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MODIFIED BENCH RULING ON MOTION TO DISMISS

Transcribed by: Esther Accardi

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BENCH RULING

THE COURT: The Court has before it a motion to dismiss under Bankruptcy Rule 7012 by the sole defendant in this adversary proceeding, American Home Mortgage Servicing, Inc., or AHMSI, for failure to state a claim.

The plaintiffs in their complaint have asserted three causes of action.

The first is for breach of the Real Estate Settlement Procedures Act, 28 U.S.C. Section 2601 et seq., or RESPA. The second is for breach of contract. And the third is for negligence.

The RESPA violation is premised upon two different theories, which would independently if, in fact, true, constitute breaches or violations of RESPA.

First, the plaintiffs allege, although they did not allege it in the paragraphs actually stating a cause of action, but they allege it in their complaint, that they provided a proper qualified written request under Section 2605(e) of RESPA, and that, while AHMSI, the servicer of their loan, complied in part with that request, it did not comply in full with it, and, therefore, it breached its obligation to do so under Section 2605.

Secondly, the complaint alleges that the servicer misapplied certain payments, unspecified, to incorrect amounts allegedly due under the loan and that, therefore, because the

1 lender or the servicer had not corrected such misapplications,
2 it had also violated Section 2605(e).

3 The breach of contract claim is premised on the latter
4 set of allegations, i.e. the alleged misapplications, as is the
5 negligence claim. And, in addition, it's also premised on a
6 failure to allegedly respond fully to the qualified written
7 request.

8 When considering a motion under Federal Rule of Civil
9 Procedure 12(b)(6), which is incorporated in Bankruptcy Rule
10 7012, the Court must assess the legal feasibility of the
11 complaint, not weigh the evidence that might be proffered in
12 its support. *Koppel v. 4987 Corp.*, 167 F.3d 125, 133 (2d Cir.
13 1999). The Court's consideration is "limited to facts stated
14 on the face of the complaint and where the documents appended
15 to the complaint are incorporated in the complaint by
16 reference, as well as to matters of which judicial notice may
17 be taken." *Hertz Corp. v. City of New York*, 1 F.3d 121, 125
18 (2d Cir. 1993), cert. denied 510 U.S. 1111 (1993).

19 The Court accepts the complaint's factual allegations
20 as true and must draw reasonable inferences in favor of the
21 plaintiff. *Tellabs Inc. v. Makor Issues & Rights Ltd.*, 551 U.S.
22 308, 323 (2007). Federal Rule of Civil Procedure 8(a),
23 incorporated in Bankruptcy Rule 7008, does not, moreover,
24 require a claimant to set forth any legal theory justifying the
25 relief sought, only sufficient factual reference to show that

1 the claimant may be entitled to some form of relief. Newman v.
2 Silver, 713 F.2d 14, 15 (2d Cir. 1983), and Tolle v. Carroll
3 Touch Inc. 997 F.2d 1129, 1134 (7th Cir. 1992).

4 However, if a complaint's allegations are clearly
5 contradicted by documents incorporated into the pleadings by
6 reference, the Court need not accept them. Labajo v. Best Buy
7 Stores, L.P., 478 F. Supp.2d 523, 528 (S.D.N.Y. 2007).

8 Moreover, the court is "not bound to accept as true a
9 legal conclusion couched as a factual allegation." Papasan v.
10 Allain, 478 U.S. 265, 286 (1986). Instead, the complaint must
11 state more than labels and conclusions and a formulaic
12 recitation of the elements of a cause of action will not do.
13 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). That
14 is, as set forth in Twombly, Rule 8 requires not detailed
15 factual allegations, but demands more than an unadorned "The
16 defendant unlawfully harmed me accusation," Ashcroft v. Iqbal,
17 1291 S. Ct. 1937, at 1949 (2009).

18 Relatedly, while the Supreme Court has confirmed in
19 the light of the notice pleading standard under Rule 8(a) that
20 a complaint does not need detailed factual allegations to
21 survive the Rule 12(b)(6) motion, see Erickson v. Pardus, 127
22 S. Ct. 2197, 2200 (2007), the complaint's "factual allegations
23 must be enough to raise a right to relief above the speculative
24 level." Bell Atlantic v. Twombly, 550 U.S. 555. The complaint
25 must contain sufficient facts accepted as true to state a claim

1 that is "plausible on its face." Id. at 570." In other words,
2 if the claim would not otherwise be plausible on its face, the
3 plaintiff must allege sufficient facts to "nudge the claim
4 across the line from conceivable to plausible." Id. Otherwise,
5 the defendant should not be subject to the burdens of discovery
6 and the worry of overhanging litigation.

7 Evaluating plausibility is a "context specific task
8 that requires the reviewing court to draw on its judicial
9 experience and common sense. But where the well pleaded facts
10 do not permit the court to infer more than mere possibility of
11 misconduct the claimant has alleged, but it has not shown, that
12 the pleader is entitled to relief." *Ashcroft v. Iqbal*, 1291 S.
13 Ct. at 1950 (internal citations omitted).

14 Where there are well pleaded factual allegations the
15 Court should assume their veracity and then determine whether
16 they plausibly give rise to entitlement to relief. "The
17 plausibility standard is not akin to a probability requirement,
18 but it asks for more than a sheer possibility that a defendant
19 has acted unlawfully." Id. at 1949. In sum, therefore, in
20 dismissing *Twombly* the Supreme Court has observed that "The
21 pleading standard Rule 8 analysis does not require detailed
22 factual allegations, but it demands more than an unadorned
23 "the-defendant-unlawfully-harmed-me accusation."

24 Therefore, in determining whether a claim should
25 survive a motion to dismiss, the court must first identify each

1 element of the cause of action." Id. at 1947. Next the court
2 must identify the allegations that are not entitled to the
3 assumption of truth because they are legal conclusions, not
4 factual allegations. Id. at 1951. Finally, the court must
5 assess the factual allegations in the context of the elements
6 of the claim to determine whether they plausibly suggested
7 entitlement to relief. Id.

8 Here, one of the causes of action, breach of contract,
9 is easily dealt with on the face of the complaint. That is
10 because the complaint is solely against the servicer of the
11 loan, AHMSI, and AHMSI is not in contractual privity with the
12 debtors. Certainly there's no allegation of such privity in
13 the complaint. Therefore, AHMSI cannot be liable for breach of
14 contract absent such an allegation or an allegation that it was
15 acting as the agent for someone who was in privity and that
16 privity can be imputed to it, which, again, is not alleged.
17 See *Diamond v. OneWest Bank*, 210 WL 1742536 at page 3, (D.
18 Ariz. April 29, 2010), and *Conder v. Home Savings of America*,
19 680 F. Supp. 2d 1168, 1174 (C.D. Cal. 2010), as well as the
20 authorities cited therein.

21 So AHMSI's motion with regard to the breach of
22 contract claim is granted.

23 The second cause of action for negligence is also
24 easily dealt with on the face of the complaint. That is
25 because the plaintiffs, to sustain a tort action for

1 negligence, must assert more than a simple breach of contract:
2 they must assert a legal duty that is independent of the
3 contract that has been breached. See *In re Jacques*, 416 B.R.
4 63, 81 (Bankr. E.D.N.Y. 2009), and the cases cited therein,
5 including *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d, 222, 232
6 (2001), and *In re Johns Insulation, Inc.*, 221 B.R. 683, 691
7 (Bankr. E.D.N.Y. 1998).

8 I do not believe that the complaint sets forth a
9 specific duty owed to the plaintiffs by AHMSI other than
10 AHMSI's responsibilities under RESPA, and, as I'll discuss in a
11 moment, I conclude that the complaint and the record before me,
12 which includes all of the documents referred to and
13 incorporated into the complaint, with the exception of the
14 purported qualified written request of the plaintiffs, does not
15 state a claim for violation of RESPA. Therefore, the complaint
16 also would not state a claim for negligence against AHMSI. See
17 *In re Jacques*, 416 B.R. at 82.

18 The RESPA statute sets forth two separate duties that,
19 as I've noted, allegedly have been breached by AHMSI.

20 First, under Section 2605(e)(1), the servicer or
21 lender in respect of a qualified loan-- and there is no dispute
22 here that this is a qualified loan for purposes of this motion
23 to dismiss-- must respond to a qualified written request from
24 the borrower or its agent for information relating to the
25 servicing of the loan with a written response acknowledging

1 receipt of the correspondence within twenty days. And then, as
2 set forth in (e)(2), not later than sixty days after receipt
3 from any borrower of a qualified written request under
4 paragraph 1, the servicer shall (A) make appropriate
5 corrections in the account of the borrower, including the
6 crediting of any late charges or penalties, and transmit to the
7 borrower a written notification of such correction, and (B),
8 after conducting an investigation, provide the borrower with a
9 written explanation or clarification that includes, to the
10 extent applicable, a statement of the reasons for which the
11 servicer believes the account of the borrower is correct as
12 determined by the servicer.

13 As is evident from the definitional provisions that
14 I've quoted as well as the definition of "servicing" that
15 appears in subsection (i)(3) of Section 2605, a qualified
16 written request for purposes of 2605(e)(1) is for information
17 relating to the servicing of such loan. And the qualified
18 written request must include a statement of the reasons for the
19 belief of the borrower, to the extent applicable, that the
20 account is in error, or provide sufficient detail to the
21 servicer regarding other information sought by the borrower.
22 See 2605(e)(1)(B)(ii).

23 The definition of servicing that appears in 2605(i)(3)
24 states "The term servicing means receiving any scheduled
25 periodic payments from a borrower pursuant to the terms of any

1 loan, including amounts for escrow accounts described in
2 Section 2609 of this title, and making the payments of
3 principal and interest and such other payments with respect to
4 the amount received from the borrower as may be required
5 pursuant to the terms of the loan."

6 All of this is consistent with the stated purpose of
7 RESPA, which is to help borrowers engaged in a dispute with a
8 lender or servicer of the loan to overcome the difficult task
9 of obtaining account information or getting an actual person to
10 take their complaint seriously, which the Seventh Circuit
11 described as "vexing and protracted undertaking." *Miller v.*
12 *McCalla, Raymer, Padrick, Cobb, Nichols & Clark, L.L.C.*, 214
13 *F.3d 872 (7th Circuit 2000).*

14 To have a viable cause of action under RESPA, however,
15 individuals must show not only the failure to comply with the
16 provisions of Section 2605, but also actual damages to the
17 borrower as a result of the failure, as set forth in
18 2605(f)(1)(A), as well as any additional damages that the court
19 may allow in the case of a pattern or practice of noncompliance
20 with the requirements of Section 2605, in an amount not to
21 exceed 1,000 dollars.

22 Thus, the courts have consistently dismissed
23 complaints under RESPA if they do not allege actual damages or
24 state merely that in a conclusory fashion the defendant caused
25 damages to the plaintiff. See, for example, *Gorham v. Bank of*

1 America, N.A., 2010 U.S. Dist. LEXIS 41797 (N.D.N.Y Apr. 28,
2 2010) at page 10, and Jones v. Select Portfolio Servicing,
3 Inc., 2008 U.S. Dist. LEXIS 33284 at 9-10 (E.D. Pa. Apr. 22,
4 2008), as well as Gorham-DiMaggio v. Countrywide Home Loans,
5 2009 U.S. Dist. LEXIS 52078 at page 31 (N.D.N.Y. June 19,
6 2009).

7 Here, as I noted during oral argument, although the
8 alleged qualified written request sent by the Griffins is
9 referred to and incorporated in the complaint, I've not been
10 provided with a copy of it. And I do not know whether as a
11 whole it complies with the definitional requirements of Section
12 2605(e). However, it appears clear to me from the record of
13 oral argument that the request did not state the reasons for
14 the borrowers' belief that the account was in error or provide
15 in sufficient detail to the servicer, the rationale for the
16 other information sought and how it relates to the servicing of
17 the loan, as such term is defined in Section 2605(i), which
18 relates to the allocation of payments in respect of the loan.

19 As detailed in the complaint, the alleged deficiencies
20 in the response to the QWR all go only, at best, obliquely, to
21 servicing of the loan. Instead, they QWRsought such
22 information as inspection reports and appraisals, a copy of the
23 mortgage pooling and servicing agreement, a copy of the
24 prospectus offered to investors and any underlying trust, all
25 written loss mitigation rules and the workout procedures

1 related to any defaults regarding the loan and similar loans,
2 copies of all servicing, master servicing, subservicing,
3 contingency servicing, special servicing, or backup servicing
4 agreements with respect to the account and whether the loan is
5 subject to any electronic tracking agreement, and whether the
6 servicing of loans is provided pursuant to any type of mortgage
7 electronic registration system, and, if so, providing a copy of
8 that system's procedures manual, whether this is a MERS
9 designated mortgage loan and if the answer is yes, to identify
10 the electronic agent and the type of mortgage electronic
11 servicing system, identifying whether the mortgage is part of a
12 mortgage warehouse loan, and, if so, stating the full name and
13 address of the lender and attaching a copy of warehouse loan
14 agreement, and if whether upon a notice of a default or not the
15 mortgage warehouse lender has the right to override any
16 servicers or subservicers and provide instructions directly to
17 the electronic agent, and whether the mortgage is part of a
18 whole loan sale agreement, and, if the answer is yes, then
19 asking the recipients to state the name and address of the
20 purchaser, the custodian, the trustee, the electronic agent,
21 and the servicer or subservicer.

22 Other information that, arguably, goes closer to the
23 purposes of a QWR under the statute are as follows: identify
24 the provisions under the deed of trust and/or note that
25 authorizes charging each and every fee against the loan,

1 summary of all fixed or standard legal fees approved for any
2 form of legal services rendered in connection with this
3 account, and a copy of the LSAMS transaction history report for
4 the debtors' mortgage loan account with a detailed description
5 of all fee codes.

6 The latter three categories arguably fall within the
7 definition of information that should be responded to in the
8 QWR. However, the former requests, to my mind, without further
9 explanation of why they were sought, or why they should have
10 been in the QWR, go beyond the request of information relating
11 to loan servicing. Instead, it appears to me it was sought to
12 assist the debtors, perhaps, in the potential negotiation of
13 the loan and/or challenging the bona fides of the loan as it
14 was originated. See *Williams v. Wells Fargo Bank N.A.*, 2010 WL
15 146, 3521 (N.D. Cal. Apr. 13, 2010) at page 3-5.

16 It's also alleged by the plaintiff that the failure to
17 correct alleged misapplications of funds by the servicer and --
18 by the servicer constitutes a violation of RESPA Section
19 2605(e)(2)(A). The motion to dismiss makes two points in
20 response.

21 First, it alleges, citing *In re Jacques*, 416 B.R. at
22 63, that the complaint does not allege actual damages and
23 proximate cause thereof with a sufficient amount of
24 plausibility to assert a claim under RESPA. Relatedly, the
25 motion to dismiss states that the complaint is wholly

1 conclusory as to the payments that were unapplied and, in fact,
2 does not state more, in effect, than that the debtors believed,
3 or believe certain payments were unapplied, and, therefore,
4 that the damages, as asserted in the complaint, are wholly
5 speculative, and, therefore, would not pass muster under
6 Twombly or Iqbal.

7 It seems to me that if a complaint in a nonspeculative
8 fashion asserted that a servicer or a lender had misapplied the
9 borrowers' payments on the loan, it would clearly assert
10 damages. And the failure to correct those damages, to my mind,
11 would constitute proximate cause of actual damages in that the
12 defendant would still be improperly billed for its loan, which
13 seems to fit, to my mind, exactly within the language and
14 purpose of RESPA. That is different -- or that would be a
15 different scenario than simply saying that, for example, the
16 servicer's failure to respond to a QWR caused damages without
17 specifying how those damages were caused. See *Hutchinson v.*
18 *Delaware Savings Bank FSB*, 410 F. Supp. 2d 374 (D.N.J. 2006).
19 And *Cortez v. Keystone Bank*, 2000 U.S. Dist. LEXIS 5705 at 39-
20 40 (E.D. Pa. May 2, 2000).

21 The problem with the complaint, however, is that the
22 damages, as pled here, particularly when tied into the
23 requirements of a qualified written request under Section
24 2605(e)(2)(A), or rather the failure to allege a request that
25 ties into a duty under Section 2605(e)(2)(A) means that the

1 alleged damages are, in fact, speculative under RESPA and fall
2 afoul of Twombly and Iqbal.

3 There's nothing in the complaint that suggests that
4 the alleged QWR included a statement of the reasons for the
5 borrowers' belief that the account was in error. Given that,
6 and given the failure to identify errors that are, at least,
7 plausible, as opposed to grounds for additional questions that
8 the debtors may have of the defendant, I believe that the
9 complaint does not set forth a cause of action for failure to
10 make appropriate corrections. I don't believe the statute puts
11 the onus on the lender to prove a negative.

12 Some error or potential error must be identified in
13 the QWR and/or identified in the complaint. And that isn't the
14 case here beyond the nebulous assertion that the debtors
15 believe that the payments were misapplied.

16 So, while misapplication would constitute proximate
17 cause of damages, the complaint here does not, except in an
18 entirely speculative way, assert such misapplication. And,
19 therefore, I believe it fails the tests of Iqbal and Twombly.
20 See *In re Jacques*, 416 B.R. at 74.

21 So the defendant can submit an order consistent with
22 my ruling.

23 As I stated during oral argument, it seems to me that
24 AHMSI continues to owe an ongoing obligation to the Griffins
25 under RESPA and that if the Griffins want to better understand

1 their payment history and how the servicer has applied the
2 monies that have been paid, they can make a new RESPA request
3 that pinpoints their concerns based on the information that
4 they have and that has been previously provided to them. And
5 if that request is not properly responded to, (then, of course,
6 more detail would be required in the response based upon how
7 much detail is put in the inquiry) then the debtors may have a
8 cause of action that they can commence a lawsuit over.

9 But based upon the rationale of my analysis of the
10 problems with the complaint under RESPA, I conclude that the
11 present complaint does not state a claim under RESPA. It,
12 accordingly, doesn't state a claim under New York law for
13 negligence given that there's no other duty that the servicer
14 owes the Griffins other than compliance with RESPA. And it
15 clearly does not support the breach of contract claim given the
16 lack of privity between the servicer and the Griffins.

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