

HEARING DATE: April 11, 2013 at 10:00 A.M. (ET)

**UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK**

In Re:

RESIDENTIAL CAPITAL, LLC, *et al.*,
Debtors.

Case No. 12-12020
Chapter 11

Jointly Administered

KEVIN J. MATTHEWS

Plaintiff

Adv. Proc. No. 12-01933 (MG)

v.

GMAC Mortgage Co., LLC
Defendant

**PLAINTIFF'S FURTHER OBJECTION AND OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS**

Plaintiff Kevin J. Matthews by and through his undersigned counsel, hereby objects and opposes Defendant GMAC Mortgage Co.'s Motion to Dismiss the Plaintiff's Adversary Proceeding (Doc. 6) ("Motion")¹ and in support states the following:

¹ Plaintiff previously filed his initial opposition on January 28, 2013 (Doc. 10). This paper is intended to respond to Defendant's further contentions within 21 days of the initial service. By this reference Plaintiff further incorporates his prior argument in his Motion for Partial Summary Judgment filed with the Court on January 17, 2013 (Doc. 5).



1. Plaintiff admits the allegations of paragraph 1 of Debtors' Motion, except insofar as Debtors now aver that Mr. Matthews's claims involve a non-core proceeding. Debtors have previously acknowledged to this court, when Mr. Matthews claims were pending in the Circuit Court for Baltimore City, Maryland that his claims constituted "a 'core proceeding' pursuant to 28 U.S.C. § 157(b)(2)(B). *See* Doc. 1500 in the underlying bankruptcy action (Case no. 12-12020).
2. To the extent that Defendant recites a correct summary of the background in the underlying bankruptcy case, which is not relevant to the claims presented by Mr. Matthews, Plaintiff admits the allegations of paragraphs 2-7.
3. Plaintiff admits that he entered into a loan transaction with USAA for his residential home on or about February 14, 2008. Given the conflicting evidence presented in the state court proceedings he cannot admit to the remainder of the factual allegations in paragraph 8.
4. Plaintiff denies the allegation in paragraph 8 that he has defaulted on his payments under Maryland law. *Piotrowski v. Wells Fargo Bank, N.A.*, CIV.A. DKC 11-3758, 2013 WL 247549, FN 10 (D. Md. Jan. 22, 2013) ("a mortgagor of a loan that is insured by the Fair Housing Administration ("FHA") may seek to enjoin foreclosure proceedings based on the mortgagee's violation of regulations promulgated by the U.S. Department of Housing and Urban Development, even if the mortgagor is in default, where such regulations are 'alluded to in the parties' FHA-prescribed form deed of trust.' *Wells Fargo Home Mortg., Inc. v. Neal*, 398 Md. 705, 728, 922 A.2d 538 (2007) ("[U]nder principles of equity, a mortgagee's commencement of a foreclosure proceeding on an FHA-insured mortgage, without first having adhered to the mandatory HUD loss mitigation regulations, may

invalidate the mortgagee's declaration of default."'). Here, Mr. Matthews' well pled complaint suggests that the VA HAMP and loss mitigation programs were not complied with by GMAC and as such GMAC's declaration of default does not exist.

5. Plaintiff denies the allegations of paragraph 11. GMAC has not filed a Complaint to foreclose but has filed an Order to Docket which is a different type of process in Maryland. Plaintiff incorporates his summary judgment argument (Doc. 5) at Pages 10-15 of 23 as if restated herein.
6. Plaintiff admits the allegations of paragraph 12.
7. Plaintiff admits the allegations of paragraph 13 except insofar as it characterizes Plaintiff's well-pled statements of fact as "allegations." Plaintiff does not admit that the summary of Mr. Matthews allegations in the Circuit Court for Baltimore City are complete and accurate.
8. Plaintiff admits the allegations of paragraphs 14-19. Mr. Matthews would also state in candor to the Court that he has also filed for partial summary judgment against some of the remaining parties and those motions are pending.
9. Plaintiff admits the allegations of paragraphs 20-25 to the extent that GMAC attempts to describe the documents which speak for themselves.
10. Plaintiff admits that generally the allegations in paragraph 26 that he has reasserted his prior claims in this action that he previously asserted against GMAC in the Circuit Court of Baltimore City. He denies that the claims are identical in every respect. Plaintiff further notes that he filed his claims in part in this Court because GMAC demanded that his claims were a core proceeding that should be brought in this Court.

11. Plaintiff admits the allegations of paragraph insofar as they describe the incorporation of Federal Rule of Civil Procedure 12 into Bankruptcy Rule 7012. Plaintiff denies all other allegations of paragraph 27.
12. Plaintiff generally admits the allegations of paragraph 28 related to the requirements of the Bankruptcy Rules, but denies that there has been any breach of same by Plaintiff.
13. Plaintiff denies the allegations of paragraph 29. Plaintiff submits that service was made on Defendant's registered agent in the State of Maryland on November 19, 2012 by certified mail, postage pre-paid, which service was accepted on November 20, 2012 by "Digivey" at CSC Lawyers Incorporating Service Co., and Plaintiff served Defendant's attorneys on November 19, 2012 by certified mail, postage pre-paid, which service was received on November 21, 2012 by Richard Pantoya of Morrison & Foerster, LLP. In any event, Defendant has effectively waived any objection to improper service by accepting the terms of the Stipulation and Order dated December 20, 2012 in this case (Docket Entry 0003) granting it additional time to respond to the complaint.
14. Plaintiff generally admits the allegations of paragraph 30 related to the standard of review for motions to dismiss. Plaintiff denies all allegations of paragraph 30 related to Plaintiff's failure to state a claim upon which relief can be granted.
15. Plaintiff denies the allegations of paragraph 31. Defendant attempts to recast Plaintiff's case as asserting a private cause of action attempting to enforce the VA HAMP program which the complaint is not. Plaintiff is not asserting a cause of action for Defendant failure to offer Plaintiff a loan modification. Rather, Plaintiff asserts causes of action under the Maryland Consumer Protection Act ("MCPA"), the Maryland Mortgage Fraud Protection Act ("MMFPA") and the Maryland Consumer Debt Collection Act

(“MCDCA”). This distinction is lost or Defendant or else ignored by it in its attempt to revise Plaintiff’s complaint. Maryland law provides for a private right of action for Defendant’s knowing material omissions, misrepresentations and misstatements to Plaintiff in the course of evaluating Plaintiff for a loan modification. Regarding the MCPA for example, the Maryland Court of Appeals held: “[a]n ‘unfair or deceptive trade practice’ includes any false or misleading statement or representation which has the capacity, tendency, or effect of deceiving or misleading consumers ...*Section 13-408 of that article provides for a private cause of action to recover for loss or injury sustained as the result of a practice forbidden by the [M]CPA.*” *Hoffman v. Stamper*, 867 A.2d 276, 294 (Md. Ct. App. 2005) (Emphasis added). Moreover, GMAC’s theory that all of Mr. Matthews’ state law claims concerning HAMP in any way are not allowed is also not supported by statute or regulation, and, indeed is contrary to the language of HAMP, Congressional intent, and the HAMP guidelines. HAMP explicitly provides that state law claims are not impaired by the program. In a savings clause, the Emergency Economic Stabilization Act specifies “[a]ny exercise of the authority of the Secretary pursuant to this chapter shall not impair the claims or defenses that would otherwise apply with respect to persons other than the Secretary.” 12 U.S.C. § 5229(b)(2). Since the Emergency Economic Stabilization Act serves as the statutory authority for HAMP, the savings clause likewise preserves enforcement of HAMP under state law. Likewise, federal law expressly recognizes that state contract and tort law complement HAMP to prevent avoidable foreclosures, and the statute expressly contemplates that enforcement of state law will take place against a factual background that includes HAMP. *See* 15 U.S.C. § 1639a(c) (setting HAMP as the “standard industry practice for purposes of all

Federal and State laws”). The Seventh Circuit has rejected GMAC’s overreaching argument and has found such claims which may relate to HAMP to be entirely permissible under state laws like those in this action. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 581 (7th Cir. 2012)(“The absence of a private right of action from a federal statute provides no reason to dismiss a claim under a state law just because it refers to or incorporates some element of the federal law”).

16. Plaintiff denies the allegations of paragraph 32 for substantially the same reasons he denies the allegations of paragraph 31. Defendant again attempts to evade Plaintiff’s well-pled allegations of knowing material misrepresentations by Defendant in its review of Plaintiff’s application for a loan modification by recasting Plaintiff’s argument as an attempt to state a cause of action for failure to comply with loss mitigation requirements, which it emphatically is not. Again, Plaintiff asserts a cause of action for material omissions, misrepresentations and misstatements to Plaintiff in the course of evaluating him for a loan modification. *See generally* Complaint. *See also Marchese v. JPMorgan Chase Bank, N.A.*, CIV.A. GLR-12-1480, 2013 WL 136427 (D. Md. Jan. 8, 2013)(denying a motion to dismiss similar unfair and deceptive practices related to loss mitigation asserted herein).

17. Plaintiff denies the allegations of paragraph 33. Plaintiff does not attempt to escape his obligations to make mortgage payments (he has established an escrow account for that purpose), and does not attempt to avoid his obligations under the Maryland Rules. Plaintiff does not assert that Defendant would not be entitled to foreclose on the property if Defendant had complied with the law in its attempts to do so; however Plaintiff does assert that Defendant does not have the right to foreclose on the property through the

making of knowing material omissions, misrepresentations and misstatements in its transactions with Plaintiff. Plaintiff incorporates his summary judgment argument (Doc. 5) at Pages 15-21 of 23 as if restated herein.

18. Plaintiff admits the allegations of paragraph 34 and states the inference and conclusion by the Defendant is not relevant or material.

19. Plaintiff admits the allegations of paragraphs 35-36 except to the extent that the underlying documents speak for themselves and GMAC's efforts at debt collection and foreclosure are still subject to the requirements of Maryland law. Plaintiff incorporates his summary judgment argument (Doc. 5) at Pages 10-15 of 23 as if restated herein.

20. Plaintiff admits the allegations of paragraph 36 insofar as they relate the holdings of Maryland courts regarding enforceability of contracts. Plaintiff denies that those holdings apply in this case and that Plaintiff has made any attempt to "transform dismissal of his prior foreclosure from one without prejudice to one with prejudice."

21. Plaintiff denies the allegations of paragraph 37 since it implies the Plaintiff suffered no damages as a result of the dismissal and no Maryland law supports that conclusion and certainly the well-pled complaint does not support the conclusion.

22. Plaintiff denies the allegations of paragraphs 38-65 for the reasons stated in his Motion for Partial Summary Judgment. Plaintiff incorporates his summary judgment argument (Doc. 5) as if restated herein.

23. Plaintiff denies the allegations of paragraphs 42 and 48. Plaintiff has amply demonstrated injury and loss as the result of Defendant deceptive practices, as shown in Plaintiff's Complaint ¶¶ 7, 9, 55, 86, 90, 92, 93, 94, 101, 102, 103, 105, 106, 107, 109 and 112.

24. Plaintiff denies the allegations of paragraph 46. Plaintiff has amply demonstrated reliance on the Defendant material omissions, misrepresentations and misstatements, as shown in Plaintiff's Complaint ¶¶ 1, 5, 7, 47, 49, 50, 54, 61, 75, 77, 81, 86, 110, 114 and 124.
25. Plaintiff denies the allegations of paragraph 47. Plaintiff has amply demonstrated the materiality of Defendants omissions, misrepresentations and misstatements, as shown in Plaintiff's Complaint ¶¶ 23, 30, 60, 65, 67, 74, 77, 120, 133 and 135.
26. Plaintiff denies the allegations of paragraph 55 insofar as the right to occupy the property is conditioned on the performance of a legal foreclosure, which did not occur in this case.
27. Plaintiff denies the allegations of paragraph 56 because it puts the cart before the horse by claiming that taking possession of the property pursuant to its illegal foreclosure was not an attempt to collect a debt. The illegal foreclosure upon which the purported "right" to possess the property is premised was the attempt to collect a debt that Plaintiff puts at issue, and as shown by the Complaint and other pleadings filed in this case, because Defendant knew or should have known that the foreclosure was illegal, it was attempting to enforce a right with knowledge that the right did not exist.
28. Plaintiff denies the allegations of paragraph 59 and notes that Defendant's reliance on *Stewart v. Bierman*, 859 F. Supp. 2d 754 (D. Md. 2012) for the proposition that the method of conducting a foreclosure is immaterial is respectfully misplaced. Plaintiff further notes that the case is pending appeal in the Fourth Circuit and has been fully briefed by the parties.
29. Plaintiff denies the allegations of paragraphs 63-64. Plaintiff has amply demonstrated particular facts and circumstances in his Complaint of numerous misrepresentations of Defendant/Debtor's agents and representatives, as well as Plaintiff's course of conduct

based on those misrepresentations and the benefit obtained by those misrepresentations, namely the jurisdiction of the court and the color of law asserted when wrongfully taking possession of Mr. Matthews' property.

CONCLUSION

WHEREFORE, based upon the forgoing argument and objection/opposition, Mr. Matthews requests that the Court DENY Defendant GMAC's Motion to Dismiss.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify and give notice that a copy of the foregoing was sent by electronic means to opposing counsel for GMAC and also regular U.S. mail, postage pre-paid, will be sent on this day the 5thth day of February, 2013 to the following parties in this action:

Gary Lee
Norman Rosenbaum
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