

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

Ocwen, FSB, as Assignee of)
Equicredit Corporation of America,)
)
Plaintiff,)
v.)
)
Goldie Johnson, et al.,)
)
Defendant,)
)

No. 99 CH 15713

Memorandum Opinion and Order

This matter comes before the Court on Plaintiff's motion pursuant to 2-615 and 2-619(a)(9). to dismiss Defendant's Second Amended Affirmative Defenses and Counterclaims.

In March 1999, Defendant, Goldie Johnson ("Johnson") was contacted by a mortgage broker who offered to refinance her existing mortgages on her principal residence. Mercantile Mortgage Company granted Johnson a mortgage loan in the amount of \$90,100 with an annual percentage rate of 14.819%. The transaction created a 15-year loan with monthly mortgage payments of \$994.57 and a balloon payment on the 180th month of \$79,722.61. The mortgage was subsequently assigned to Equicredit Corporation of America.

Equicredit brought a foreclosure action against Johnson for default of the mortgage. The mortgage has since been sold and assigned to Ocwen FSB. Johnson has filed a Second Amended Answer, Affirmative Defenses and Counterclaims alleging violations by Plaintiff of the Consumer Fraud Act, Ill.A, as well as common law fraud.

Plaintiff has filed a Motion to Dismiss Johnson's Affirmative Defenses and Counterclaims.

Plaintiff alleges that Johnson's Affirmative Defenses and Counterclaims should be dismissed because, as an assignee, Plaintiff has no liability for the alleged violations with respect to the mortgage loan agreement. Initially, the Court notes the tension between section 1641(a) and 1641(d) as to the extent of assignee liability under TILA. Section 1641(a) of TILA provides:

Except as otherwise specifically provided in this title, any civil action for a violation of this title *** which may be brought against a creditor may be maintained against any assignee of such creditor only if the violation for which such action or proceeding is brought is *apparent on the face of the disclosure statement* ***. (Emphasis added.) 15 U.S.C. 1641(a).

This provision has been held to limit the duty required by assignees under the Act to a review of the assigned documents to determine if they contain violations that a reasonable person can readily discover on the face of those documents. Jackson v. South Holland Dodge, Inc., 197 Ill.2d 39, 48 (2001).

This limitation on assignee liability has been partially abrogated with respect to certain "high cost" mortgage loans by virtue of the Home Ownership Equity Protection Act ("HOEPA") codified under the Truth in Lending Act, 15 U.S.C. § 1641(d). Section 1641(d)(1) provides:

Any person who purchases or is otherwise assigned a mortgage referred to in [15 U.S.C.S. 1602(aa)] shall be subject to *all claims and defenses with respect to the mortgage that the consumer could assert against the creditor of the mortgage*, unless the purchaser or assignee demonstrates, by a preponderance of the evidence, that a reasonable person exercising due diligence, could not determine, based on the documentation required by this title *** that the mortgage was a mortgage referred to in [15 U.S.C.S. 1602(aa)]. (Emphasis added.) 15 U.S.C. 1641(d)(1).

The language of subsection (1) provides in clear and unambiguous terms that assignees are subject to all claims and defenses under *any law* that a borrower could have asserted against the original lender. (Emphasis in original.) Vandenbroeck v. Continmortgage Corp., 53 F.Supp. 965, 968 (W.D. Mich. 1999). However, this provision merely eliminates the holder-in-due-course defense, and is not intended to bestow any new rights upon the borrower. Id. By its terms, section 1641(d)(1) only applies if a plaintiff can assert a claim under some other law, and even then, only affects a state law defense (holder-in-due-course) which a defendant assignee might raise. Id.

The Illinois Consumer Fraud Act does not authorize a claim against an assignee who did not commit the fraudulent act. This issue has been specifically addressed by the Illinois Supreme Court which has held that violations of the Consumer Fraud Act may only be alleged against the perpetrator of the fraud. Zekman v. Direct American Marketers, Inc., 182 Ill 2d 359 (1998). Further, the Consumer Fraud Act does not provide a cause of action against those who knowingly receive the benefits from the person committing a violation of the Act. Id. To find that section 1641(d)(1) provides for a Consumer Fraud Act claim against an assignee would go beyond merely eliminating holder in due course defenses, and would create new rights and claims that did not previously exist. The Consumer Fraud Act is not available as a remedy against an assignee, and there is no authority to suggest that section 1641(d)(1) is intended to create such a remedy.

As noted above, in order to allege a violation of TILA by an assignee, it is necessary to allege that the violation is apparent on the face of the disclosure statement provided in connection with the transaction. Jackson v. South Holland Dodge, Inc., 197

Ill.2d 39, 48 (2001); Taylor v. Quality Hyundai, Inc., 150 F.3d 689, 694-95 (7th Cir. 1998). Defendants have not alleged that there were misrepresentations on the face of the loan documents supplied by the initial lenders, nor do the relevant documents attached to the pleadings reflect any misrepresentations. Since, the Court finds that there is no set of facts which could be proved under the Consumer Fraud Act or TILA pleadings which would entitle Defendant to relief, these claims must be dismissed with prejudice. Summers v. Village of Durand, 267 Ill.App.3d 767 (2nd Dist. 1994).

Finally, as to Johnson's Affirmative Defense and Counterclaim of common law fraud, the Court finds that Defendant has not pled the elements of common law fraud with adequate specificity.

WHEREFORE, IT IS HEREBY ORDERED that Plaintiff's motion to dismiss pursuant to 2-615 is granted and Defendant's Second Amended Affirmative Defenses and Counterclaims alleging violations by Plaintiff of the Consumer Fraud Act and TILA are dismissed with prejudice and the Affirmative Defense and Counterclaim based on common law fraud is dismissed without prejudice.

IT IS FURTHER ORDERED that Defendant shall have 28 days within which to file a Third Amended Counterclaim based on common law fraud.

Enter:

JUDGE RICHARD A. SIEBEL

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