Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARCO VILLALOBOS & ANGELA YBARRA, a marital community,

Plaintiffs,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, BARCLAYS CAPITAL REAL ESTATE, INC., *et al.*,

Defendants.

C09-1450-JCC

ORDER

This matter comes before the Court upon the motion to dismiss of Defendant Deutsche Bank National Trust Company (Dkt. No. 50), and the motion to dismiss of Defendant Barclays Capital Real Estate. (Dkt. No. 68). Both motions have been fully briefed.[1] Having reviewed the relevant record and concluded that oral argument is unnecessary, the Court hereby DENIES the motions for the reasons explained below.

[1] With respect to the motion to dismiss of Defendant Deutsche Bank, the Court has also considered Plaintiff's response (Dkt. No. 55), Defendant's reply. (Dkt. No. 56), and the parties' various supporting exhibits and declarations. With respect to the motion to dismiss of Defendant Barclays Capital, the Court has also considered Plaintiffs' response (Dkt. No. 72), Defendant's reply (Dkt. No. 75), and the parties' various supporting exhibits and declarations.

I. BACKGROUND

This case deals with a mortgage-loan dispute. Plaintiffs Marcos Villalobos and Angela Ybarra are native Spanish speakers who speak and read limited English. In July 2006, they purchased a home for approximately three-hundred thousand dollars. (Second Amended Complaint 8 (Dkt. No. 45)). They financed the purchase with two mortgage loans. The terms of each loan were onerous indeed: The first loan was for a total of $235,200, and had a term of thirty years. For the first two years, the interest rate on the first loan was 6.9 percent. It was scheduled to adjust twice per year, until reaching an interest rate of 13.49 percent. (*Id.* 13). The second loan had a term of fifteen years and a fixed interest rate of 9.9 percent. At the end of the fifteen-year term, it also required a balloon payment of more than forty-eight thousand dollars. (*Id.*). The original lender was Defendant WMC Mortgage.

Plaintiffs allege that they were induced to sign these loans only after a variety of individuals, some of whom are named as defendants, fraudulently represented their terms or otherwise violated state and federal mortgage laws. According to Plaintiffs, Defendant Juan Peraza-Zamudio brokered their mortgage loan while he was working as an employee for Defendant Loan Network, LLC. Among other alleged irregularities, Defendant Juan Peraza allegedly prepared a loan application which misidentified Plaintiffs' employers and overstated their monthly income by more than one thousand dollars. (*Id.* 9–10).

According to Plaintiffs, they received a telephone call in August 2006 from a representative of Defendant WMC Mortgage, telling them that they must meet her that very day in order to sign the loan documents. (*Id.* 11). They agreed to meet the representative at a local restaurant, where they signed a variety of lending forms, including two promissory notes and two deeds of trust. (*Id.*). The documents which they signed today bear the seal of a Washington State notary. In fact, Plaintiffs allege, no notary was present when they signed the documents. (*Id.* 12). Because they were unable to read the English-language documents for themselves, Plaintiffs relied on the verbal representations of Defendant Juan Peraza-Zamudio. (*Id.*). According to Plaintiffs, these representations were generally false.

Plaintiffs also point to a series of irregularities in the loan documents. For example, the disclosure forms required under the Truth in Lending Act list the "final settlement fee" as $2675. A form required by the Department of Housing and Urban Development, on the other hand, lists the "final settlement fee" as $930. According to Plaintiffs, "this discrepancy likely hides additional broker compensation[.]" (*Id.* 15). Documents also tend to indicate that Plaintiffs were charged for two separate appraisals, each of which cost four hundred dollars. (*Id.*).

Finally, Plaintiffs allege that several named defendants benefitted financially from the fraudulent dealings of other defendants. Specifically, Plaintiffs allege that Defendant Barclays Capital—acting through an affiliate corporation named Sutton Funding, LLC—conspired with Defendant WMC Mortgage to "contract with aggressive mortgage brokers to identify, recruit, and commit a high number of subprime borrowers[.]" (*Id.* 7). According to Plaintiffs, documents that have been filed with the Securities and Exchange Commission demonstrate that Defendant Barclays Capital purchased more than three billion dollars of mortgages originated by Defendant WMC Mortgage in the five months between July and December 2006. (*Id.* 8). Plaintiffs allege that Defendant Barclays Capital was aware of lending abuses in the nation's mortgage market when it contracted with Defendant WMC Mortgages. To support that allegation, Plaintiffs point to a letter which Defendant Barclays Capital received in 2003 from the Office of the Comptroller of the Currency, warning the bank to avoid predatory lending practices in brokered mortgage loans. (*Id.*).

Defendant Barclays Capital was also responsible for having securitized Plaintiffs' mortgage loan. In December 2006, Defendant Barclays Capital created a mortgage-backed security trust with more than one billion dollars in assets. One of the principal beneficiaries of this trust was Defendant Deutsche Bank. (*Id.*). Plaintiffs describe the structure of the trust with some specificity. They point to a pooling-and-service agreement between Defendant WMC Mortgage, Defendant Barclays Capital and Defendant Deutsche Bank. Under the terms of the agreement, it was the responsibility of Defendant

WMC Mortgage to initiate mortgage loans and to transfer those loans to the trust. The trust, in turn, "transferred all right, title, and interest to the mortgages to Deutsche Bank for the purpose of holding the mortgages in trust[.]" (*Id.* 17). Finally, the trust administrators sold securities in the loans to investors. These securities remained in trust, held by Defendant Deutsche Bank. (*Id.*).

II. LEGAL STANDARD

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows a party to test the formal sufficiency of an opponent's claim to relief by bringing a motion to dismiss for failure to state a claim upon which relief can be granted. A motion to dismiss under rule 12(b)(6) is not a forum in which to litigate the merits of the underlying allegations. *See* WRIGHT & MILLER, FEDERAL RULES OF CIVIL PROCEDURE § 1349 (3d ed. 2004). In fact, when a defendant moves to dismiss under Rule 12(b)(6), this Court accepts all the allegations in the complaint as true, and construes them in the light most favorable to the plaintiff. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 508 n.1 (2002).

This Court analyzes the sufficiency of a complaint against the strictures of Rule 8, which requires that a plaintiff offer only "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" FED. R. CIV. P. 8(a)(2); *see also Swierkiewicz*, 534 U.S. at 511–12 (discussing the relationship between notice pleading under Rule 8 and the Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted). In cases that involve allegations of fraud, this Court analyzes the sufficiency of the complaint against the requirements of Rule 9, which states that "[i]n allegations involving fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b). A plaintiff satisfies this heightened pleading requirement by adequately identifying "the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." *Odom v. Microsoft Corp.*, 486 F.3d 541, 553 (9th Cir. 2007). A plaintiff may plead the defendant's allegedly fraudulent state of mind with general allegations: "Malice, intent, knowledge, and other conditions of mind of a person may be averred generally." FED. R. CIV. P. 9(b).

Whether or not a plaintiff's claim sounds in fraud and is therefore subject to the heightened pleading requirements of Rule 9, the "complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, -- U.S. --, --, 129 S.Ct. 1937, 1949 (2009) (internal markings omitted). When considering whether a plaintiff has stated a claim for relief that is plausible, this Court draws all reasonable inferences in the plaintiff's favor: "A claim has facial plausibility when the plaintiff pleads factual matter that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

III. RELEVANT LAW

Plaintiffs' complaint contains twelve separate claims for relief, only the last three of which are against those defendants which now move for dismissal: Defendant Deutsche Bank and Defendant Barclays Capital. The first several claims are against Defendant Juan Peraza-Zamudio and Defendant WMC Mortgage. Plaintiffs allege that these defendants fraudulently misrepresented the terms of their mortgage loans, and thereby violated a variety of state and federal lending laws, including the Washington State Consumer Protection Act. (Second Amended Complaint 20–25 (Dkt. No. 45)). Plaintiffs' three claims against Defendant Deutsche Bank and Defendant Barclays Capital allege that these bank defendants aided and abetted the fraudulent activities of the other defendants. Plaintiffs therefore state three separate claims against Defendant Deutsche Bank and Defendant Barclays Capital: aiding and abetting, civil conspiracy, and joint venture. (*Id.* 29–32).

A. Consumer Protection Act

The Washington State Consumer Protection Act broadly declares that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are . . . unlawful." WASH. REV. CODE § 19.86.020. In order to state a valid claim for relief under the Act, a plaintiff must allege that a defendant has committed (1) an unfair deceptive act or practice, (2) which occurred in trade or commerce, (3) which impacts the public interest, (4) and which proximately caused

injury to the plaintiff's business or property. *Guijosa v. Wal-Mart Stores, Inc.*, 32 P.3d 250, 255 (Wash. 2001). When analyzing whether an allegedly unfair business practices has an adverse impact on the public interest, courts consider the following factors: (1) whether the alleged acts were committed in the course of the defendant's business; (2) whether the acts are part of a pattern or generalized course of conduct; (3) whether repeated acts were committed prior to the act involving the plaintiff; (4) whether there is a real and substantial potential for repetition of the defendant's conduct; and (5) whether the allegedly unfair act was likely to affect many different consumers. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 537–38 (Wash. 1986).

B. Common Law of Fraud

In order to state a valid claim for relief sounding in the common law of fraud, a plaintiff must allege (1) the representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that the false statement be acted upon by the person to whom it was made; (6) ignorance of the statement's falsity by the person to whom it was made; (7) the victim's reliance on the truth of the representation; (8) the victim's right to rely on the statement; and (9) consequent damage, proximately caused by the false statement. *Beckendorf v. Beckendorf*, 457 P.2d 603, 606–07 (Wash. 1969).

C. Civil Conspiracy

Under the law of Washington State, an action for civil conspiracy lies "where there is an agreement by two or more persons to accomplish some purpose, not in itself unlawful, by unlawful means." *Sterling Business Forms, Inc. v. Thorpe*, 918 P.2d 531, 533 (Wash. App. 1996). A plaintiff need not prove that the allegedly conspiring defendants precisely coordinated their behavior: "To be liable, each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy." *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999). A plaintiff may rely upon circumstantial evidence in

order to assert a claim of civil conspiracy: "A defendant's knowledge of and participation in a conspiracy may be inferred from circumstantial evidence and from evidence of the defendant's actions." *Id.*

D. Aiding and Abetting

Washington State courts follow the general rule "that a person who knowingly assists another in the commission of a tort, or who knowingly assists another in violating his fiduciary duty or trust obligation, is liable for losses proximately caused thereby." *Lahue v. Keystone Inv. Co.*, 496 P.2d 343, 353 (Wash. App. 1972). A bank that performs routine banking transactions for a customer can be held liable for aiding and abetting that customer to commit a tort, if the bank knew that the routine transactions were part of a scheme to injure a third party: "[The] ordinary business transactions that a bank performs for a customer can satisfy the substantial-assistance element of an aiding-and-abetting claim if the bank actually knew that those transactions were assisting the customer in committing a specific tort." *In re First Alliance Mortgage Co.*, 471 F.3d 977, 996 (9th Cir. 2006).

E. Joint-Venture Liability

Under the law of Washington State, an agreement creates a joint venture when two or more parties enter into a (1) contract, (2) in which the parties share a common purpose, (3) which creates a community of interest, and (4) in which each of the parties has an equal right to control the agencies used to accomplish the common purpose of the contract. *Knisely v. Burke Concrete Accessories, Inc.*, 468 P.2d 717, 720–21 (Wash. App. 1970). A plaintiff need not offer into evidence a signed and written contract in order to support an allegation of joint-venture liability: "The relationship or a joint venture may be inferred from the facts of the case and contract may either be express or implied." *Refrigeration Engineering Co. v. McKay*, 486 P.2d 304, 311 (Wash. App. 1971).

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IV. DISCUSSION

Because Plaintiffs have adequately identified "the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations," *see Odom*, 486 F.3d at 553, and because they have pled "sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face," *see Iqbal*, 129 S.Ct. at 1949, Plaintiffs have successfully stated claims upon which relief can be granted. The Court therefore denies Defendants' motions to dismiss.

A. Pleading Requirements

Plaintiffs describe the allegedly fraudulent behavior of Defendant Juan Peraza-Zamudio and other individuals involved in the loan-origination process with great particularity. According to Plaintiffs, Defendant Juan Peraza-Zamudio misrepresented the terms of the mortgage loan they were securing, submitted fraudulent loan-application documents in their names, and prepared fraudulent forms that were required under the Truth in Lending Act and other federal lending laws. (Second Amended Complaint 8–12 (Dkt. No. 45)). Plaintiffs provide specific examples of each category of fraudulent misrepresentation. For example, Plaintiffs allege the "uniform residential loan application" which was submitted in their name overstated their monthly income by more than one thousand dollars per month. (*Id.* 10). Plaintiffs further allege that a disclosure form required under the Truth in Lending Act listed a "final settlement fee" of $2675, while a disclosure form required by the Department of Housing and Urban Development listed a "final settlement fee" of $930. (*Id.* 15). By pleading the allegedly fraudulent behavior with such specificity, Plaintiffs have adequately identified "the circumstances constituting fraud so that the defendants can prepare an adequate answer from the allegations." *See Odom*, 486 F.3d at 553.

Plaintiffs also allege that Defendant Barclays Capital and Defendant Deutsche Bank were aware of these irregularities, and that they conspired to accomplish them. In support of these claims, Plaintiffs argue that Defendant Barclays Capital contracted to purchase more than three billion dollars in mortgage loans from Defendant WMC Mortgage, a company with a reputation as a predatory lender. (*Id.* 8).

Plaintiffs point out that Defendant Barclays Capital reached such an agreement after having been warned about irregularities in the mortgage-lending market by the Office of the Comptroller of the Currency, which is an important federal banking regulatory agency. (*Id.* 7). Finally, Plaintiffs point out that both banking defendants received notice of the fraudulent lending activities of earlier alleged conspirators when they received the lending documents themselves. As Plaintiffs allege, "[T]he [disclosure] violations were apparent on the faces of the documents, putting . . . Deustsche Bank and Barclays Capital on notice that the subject loan transactions involved deceptive and misleading practices and fraud." (*Id.* 16). Because Rule 9 of the Federal Rules of Civil Procedure allows a plaintiff to overcome a motion to dismiss with only general averments of a defendant's malice or knowledge, and because Plaintiffs have provided detailed factual allegations to support the inference of Defendants' knowledge, their claims survive the requirements of Rule 9.

B. Substantive Claims

Plaintiffs' claims which sound in the Washington State Consumer Protection Act survive. Plaintiffs have successfully alleged that certain named defendants committed unfair deceptive acts and that these acts have injured their property interest in their home. *See Guijosa*, 32 P.3d at 255 (listing elements). It goes without saying that such acts have the potential to adversely affect the public interest: The banking defendants allegedly securitized more than three billion dollars of mortgages initiated by Defendant WMC Mortgage alone. The allegedly wrongful acts were therefore "part of a pattern or generalized course of conduct," and had the potential "to affect many different customers." *See Hangman Ridge*, 719 P.2d at 537–38.

Plaintiffs claims which sound in the common law of fraud also survive. Plaintiffs allege that certain named defendants misrepresented terms such as the interest rate and term of their mortgage loans. (Second Amended Complaint 13–16 (Dkt. No. 45)). Plaintiffs further allege that defendants fraudulently charged them for brokerage fees to which they were unentitled, and that the defendants

listed these fees as "final settlement fees" on federal disclosure forms. (*Id.* 15). A reasonable person would consider such key terms to be "material," and a reasonable person would be entitled to rely on the representations of individuals who hold themselves out as mortgage professionals. *See Beckendorf*, 457 P.2d at 606–07 (listing the elements of fraud).

C. Theories of Liability

However one wishes to describe the allegedly wrongful participation of Defendant Barclays Capital and Defendant Deutsche Bank—whether sounding in civil conspiracy, aiding and abetting, or joint venture—the analysis is essentially the same: Plaintiffs have successfully alleged that the banking defendants knowingly participated in a scheme to defraud borrowers. To support these allegations, Plaintiffs rely on a letter from the Office of the Comptroller of the Currency and fraudulent misstatements in the loan documents that the banking defendants received. Because a plaintiff may rely upon circumstantial evidence to support each of the proffered theories of liability, *see, e.g.*, *Gilbrook*, 177 F.3d at 856 (civil conspiracy), *Refrigeration Engineering*, 486 P.2d at 311 (joint venture), and because Plaintiffs have submitted circumstantial evidence tending to indicate that the banking defendants knowingly participated in a scheme to defraud, their claims survive.

Defendants' arguments to the contrary fail. Defendants argue, for example, that Plaintiffs cannot demonstrate that they knew of the underlying wrongs, and point out that the trust agreement "expressly requires compliance with all laws, including predatory-lending laws." (Barclays Reply 8 (Dkt. No. 75)). This argument is spurious indeed: Defendants cannot insulate themselves from liability merely by stating in a governance document that they will follow the law. They must *in fact* follow the law.

Plaintiffs allege that Defendants have in fact broken the law. Plaintiffs shall have an opportunity to prove as much. Defendants' motions to dismiss are denied.

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V. CONCLUSION

For the reasons explained above, the Court hereby DENIES the motion to dismiss of Defendant Deutsche Bank (Dkt. No. 50) and the motion to dismiss of Defendant Barclays Capital Real Estate. (Dkt. No. 68). The Court therefore STRIKES Defendants' motion to stay discovery (Dkt. Nos. 78 & 82) as moot.

SO ORDERED this 3rd day of May, 2011.

JOHN C. COUGHENOUR
United States District Judge