

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ROGER B. PARKER and,	:	
SALLY S. PARKER,	:	
	:	
Plaintiff,	:	
v.	:	No. 06-cv-2002
	:	
LONG BEACH MORTGAGE COMPANY,	:	
WASHINGTON MUTUAL HOME LOANS,	:	
OCWEN MORTGAGE COMPANY, LLC.,	:	
MORTGAGEIT, INC., GMAC MORTGAGE	:	
CORPORATION, INDYMAC MORTGAGE	:	
HOLDINGS INC., and	:	
LANCEALOTT FINANCIAL GROUP, INC.	:	
	:	
Defendants.	:	

Green, S.J.

October 3, 2006

MEMORANDUM

Presently pending is Defendant HSBC Bank USA., N.A.'s (hereinafter "HSBC") Motion to Dismiss, and Plaintiff's response thereto. Also pending is Plaintiffs' Motion For Permission to Amend Complaint, and Defendants HSBC and OCWEN Mortgage Company, LLC.'s (hereinafter "OCWEN") consolidated response thereto. For the reasons articulated below HSBC's Motion to Dismiss will be granted in part and denied in part, and Plaintiffs' Motion to Amend the Complaint will be granted in part and denied in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed the instant action seeking a declaration of valid rescission under the Truth-in-Lending Act, 15 U.S.C. § 1601, et seq. (hereinafter "TILA"), and damages under both the TILA and the Real Estate Settlement Practices Act, 15 U.S.C. § 2601, et seq. (hereinafter "RESPA"). The action arises out of two sets of loans made in October and November, 2005 to finance the purchase of a new home and refinance Plaintiffs' original home.

HSBC filed a Motion to Dismiss the Complaint (Dkt. # 24) for failure to state a claim

upon which relief could be granted. Subsequently, Plaintiffs' filed a Motion to Amend the Complaint, seeking to substitute certain parties and remove others. HSBC and OCWEN filed a consolidated response opposing the Motion, claiming that OCWEN was previously dismissed from the action by way of stipulation, and reasserting the claim that the Amended Complaint would still fail to state a claim upon which relief could be granted as to Defendant HSBC, rendering the amended complaint futile.

II. DISCUSSION

At the outset there is a dispute as to whether HSBC is currently a party to this action. HSBC asserts that they were substituted for Defendant OCWEN Mortgage Company, LLC. (hereinafter "OCWEN") by stipulation approved by the court on June 22, 2006. Plaintiff, in their brief in opposition to HSBC's Motion to Dismiss, do not specifically deny the stipulation, rather they claim that "neither the docket nor Counsel's memory support the allegation that this [stipulation] has been done." (See Pl.'s Mem. of Law in Opp. to Mot. to Dismiss at 3).

The court is in receipt of the stipulation, signed by counsel for both parties and approved by the court. The stipulation acknowledges that OCWEN "no longer owns the loan referenced in the Complaint . . ." and therefore agrees to substitute HSBC, as the present owner of the loan, for OCWEN. (Stipulation at ¶ 1). The stipulation further agrees to dismiss OCWEN from the action.¹ Id. Therefore, consistent with the stipulation, HSBC is presently a party to the action.

A. HSBC's Motion to Dismiss

Under Federal Rule of Civil Procedure 12(b)(6) a court may dismiss a complaint for failure to state a cause of action only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 122 S.Ct 992, 998 (2002) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73, 104

¹The court recognizes that the docket does not reflect the substitution.

S.Ct. 2229 (1984)). The court “must take all the well pleaded allegations as true and construe the complaint in the light most favorable to the plaintiff.” Colburn v. Upper Darby Twp., 838 F.2d 663, 665-66 (3d Cir. 1988). In Swierkiewicz, the United States Supreme Court addressed the liberal pleading standards set forth in Fed.R.Civ.P. 8(a)(2), noting that Fed.R.Civ.P. 8(a)(2) only requires “a short and plain statement of the claim showing that the pleader is entitled to relief.” Swierkiewicz 122 S.Ct. at 998-999. The Supreme Court further noted that the statement of facts must simply “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” Id. at 998. (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99 (1957)).

Plaintiffs Complaint raises three claims against HSBC; in Count One Plaintiffs’ claim damages for alleged failures to disclose certain terms, including the “finance charge,” pursuant to 15 U.S.C. § 1638, in Count Two Plaintiffs’ seek a declaration that they validly rescinded the various loans at issue, and in Count Three Plaintiffs’ seek damages for alleged failures to respond to a “qualified written request” as required by the Real Estate Settlement Procedures Act (hereinafter “RESPA”). 12 U.S.C. § 2605

HSBC argues as to Counts One and Two that the TILA exempts residential mortgage transactions from the provisions allowing for rescision. 15 U.S.C. § 1635 (e)(1). HSBC claims, and Plaintiffs admit, that the loans in question which HSBC owns qualify as residential mortgage transactions, and are therefore outside of the scope of the TILA’s rescision provisions. (See Pl.’s Mem. of Law in Opp. to Mot. of HSBC to Dismiss at 3). As to Count Three, HSBC argues that the complaint fails to allege that a qualified written request was ever sent to either OCWEN or HSBC.

Count One of the Complaint seeks damages pursuant both to a claim for failure to disclose a “finance charge” pursuant to 15 U.S.C. § 1640 (a)(2)(iii), and to a claim for rescision related damages pursuant to 15 U.S.C. § 1640 (a)(3). Plaintiffs concede that they cannot

recover against HSBC for rescission under the TILA, and since Count One fails to allege any other grounds for such recovery, HSBC's Motion to Dismiss is granted as to the portion of Count One that seeks rescission related damages.

HSBC also challenges Plaintiffs' claim in Count One for failure to disclose "finance charges" on the grounds that the Complaint does not allege that HSBC, as an assignee of the loan, failed to properly disclose anything. Assignees, however, are liable for statutory damages for TILA violations when the violations are proven to be apparent on the face of the documents assigned. See 15 U.S.C. § 1641(a). The standard under which the court must consider a Motion to Dismiss is merely whether it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. With that standard in mind, it is apparent that Plaintiffs *could* establish that the alleged violations were apparent on the face of the documents assigned to HSBC. Consequently, HSBC's Motion is denied as to the portion of Count One that seeks damages for failure to disclose finance charges.

Count Two seeks a declaration that Plaintiffs validly rescinded the loan. Again, Plaintiffs concede that they cannot assert such a claim against HSBC under the TILA. In Count Two, however, Plaintiffs' allege that their claim for rescission rests not only on the TILA but also on "common-law principles." (See Pl.'s Complaint ¶ 29).² Plaintiffs', however, fail to indicate what principles of common-law they rely on for the proposition that they are permitted to rescind the loans. Consequently, they fail to meet the requirement that a complaint "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests" as required by Swierkiewicz. Since the Complaint does not adequately assert alternate grounds for rescission, HSBC's Motion to Dismiss Count Two is granted.

Count Three seeks damages for alleged failure to respond to a "qualified written request," as defined by RESPA. A "qualified written request" is defined as

²Plaintiffs only raise this alternate ground in Count Two.

a written correspondence, other than notice on a payment coupon or other payment medium supplied by the servicer, that --

(i) includes, or otherwise enables the servicer to identify, the name and account of the borrower; and

(ii) includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

12 U.S.C. § 2605 (e)(1)(B). The Complaint does not allege that Plaintiffs' ever sent such a request to either HSBC or the OCWEN. Plaintiffs' concede that they do not have a claim against HSBC under RESPA, and further concede that they did not send a qualified written request to OCWEN, because either OCWEN was not a servicer of the loan at the time or because Plaintiffs were unaware of OCWEN's involvement. (See Pl.'s Mem. of Law in Opp. to Mot. of HSBC to Dismiss at 4). Plaintiffs' claim that because the letter which they mailed to Defendant Long Beach Mortgage Company concerning the loan which OCWEN ultimately became the servicer of is attached to the Complaint as an exhibit that OCWEN should now be aware of the existence of the qualified written request, and therefore be liable for failing to respond to it. *Id.* An exhibit, attached to a complaint, addressed to a different party, can hardly be said to be a "qualified written request" under RESPA that requires response by OCWEN. In any event, Plaintiffs' have already agreed by way of stipulation to dismiss OCWEN from this action and substitute HSBC. Given Plaintiffs' admission that they do not have a claim against HSBC under RESPA, the court will grant HSBC's Motion to Dismiss Claim Three.

B. Plaintiffs' Motion to Amend the Complaint

Federal Rule of Civil Procedure 15 permits a party to amend its pleadings once as a matter of course at any time before a responsive pleading is due. Fed. R. Civ. Pro. 15(a). Otherwise, a party may amend its pleadings only by leave of court or with written consent of the adverse party. *Id.* Leave to amend should ordinarily be freely given when justice so requires, however, where an amendment would be futile, such leave is properly denied. See *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410 (3d Cir. 1997).

If an amended complaint would not survive a Rule 12(b)(6) motion to dismiss, the proposed amendment is futile. In the present case, the proposed Amended Complaint does not seek to change any of the substantive claims, only to substitute certain parties for others. To the extent that the Amended Complaint seeks to reassert claims against OCWEN, the Motion to Amend will be denied, consistent with the stipulation dismissing OCWEN from the action. To the extent that the court has already granted portions of HSBC's Motion to Dismiss the original complaint, those portions of the Motion to Amend the Complaint will similarly be denied.

Appropriate orders follow.

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MORTGAGEIT, INC., GMAC MORTGAGE	:	
CORPORATION, INDYMAC MORTGAGE	:	
HOLDINGS INC., and	:	
LANCEALOTT FINANCIAL GROUP, INC.	:	
	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 3rd day of October, 2006, **IT IS HEREBY ORDERED** that HSBC's Motion to Dismiss (Dkt. # 24) is **GRANTED** in part and **DENIED** in part. **IT IS FURTHER ORDERED** that;

- 1) HSBC's Motion to Dismiss the portion of Count One seeking damages for recession is **GRANTED**;
- 2) HSBC's Motion to Dismiss the portion of Count One seeking damages for failures to disclose is **DENIED**;
- 3) HSBC's Motion to Dismiss Count Two is **GRANTED**;
- 4) HSBC's Motion to Dismiss Count Three is **GRANTED**;

BY THE COURT:

s/Clifford Scott Green_____

CLIFFORD SCOTT GREEN, S.J.