

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

CAROLYN M. WILE : CIVIL ACTION
 :
 v. :
 :
 GREEN TREE SERVICING, LLC., :
 et al. : NO. 04-2866

MEMORANDUM

Bartle, J. November , 2004

Plaintiff Carolyn M. Wile ("Wile") has sued defendant Green Tree Servicing, LLC ("Green Tree") under: (1) the Truth-in-Lending Act ("TILA"), 15 U.S.C. § 1601, et. seq; and (2) the Pennsylvania Home Improvement Finance Act ("HIFA"), PA. STAT. ANN. tit. 73, § 500-101, et seq. She has also sued defendant Accelerated Mortgage Company ("Accelerated") under: (1) the Pennsylvania Credit Services Act ("CSA"), PA. STAT. ANN. tit. 73, § 2183, et seq.; (2) the Pennsylvania Loan Broker Trade Practices Act ("LBTPA"), 37 PA. CODE § 305.3(a)(1)-(4); and (3) the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), PA. STAT. ANN. tit. 73, § 201-1, et seq. While the complaint is not a model of clarity, it appears that Wile is also bringing common-law claims of fraud and breach of fiduciary duty against both defendants. Before the court is the motion of Green Tree to dismiss Wile's complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

In considering a motion to dismiss for failure to state a claim upon which relief can be granted, we accept all well-pleaded facts in the complaint as true. In re Rockefeller Ctr. Prop., Inc. Secs. Litig., 311 F.3d 198, 215 (2002). We may consider "an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993). Additionally, we may consider matters of public record. Id. A complaint is properly dismissed only if "it appears that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 46-47 (1957).

On January 17, 2001, Wile entered into a "Home Remodeling Agreement" with American Home Concepts, Inc. for certain improvements to her home. The agreement is a form with handwritten inserts. According to its terms, no work was to be done until "'Accelerated Mortgage' gives the customer [Wile] a comfortable monthly payment and she signs all mortgage papers." Accelerated was not a signatory to the contract. On January 23, 2001, Wile entered into a loan agreement, not with Accelerated, but with Conseco Finance Consumer Discount Company ("Conseco"). As security for the \$19,000 loan, Conseco took a second mortgage on Wile's home. Accelerated was identified in the loan agreement simply as a mortgage broker and received a fee of \$900. According to her complaint, Wile believes that at some point

Green Tree became either the holder or servicer of her loan. Green Tree explains that Conseco sold Wile's loan to a securitization trust¹ and retained the servicing rights. Then, on February 3, 2003, Conseco filed for bankruptcy relief and sold the servicing rights to Green Tree Investment Holdings, LLC ("Green Tree Investment"). Defendant Green Tree identifies Green Tree Investment as an "affiliate." Green Tree Investment subsequently assigned the servicing rights of Wile's loan to defendant Green Tree.²

Wile avers that Conseco did not properly set up the loan transaction as a home improvement installment loan and included fees not discussed with her in violation of various provisions of federal and state consumer protection statutes. As such, although the home improvements were adequately performed, Wile sought to rescind the loan contract and obtain damages from Conseco. Wile admits that she filed a proof of claim against Conseco during its bankruptcy proceedings and subsequently settled the claim for \$10,000. She now seeks a second bite at the apple by pursuing Green Tree for more money and rescission of her loan. Though Green Tree was not the originator of Wile's

1. Neither party has provided the name of the securitization trust to the court.

2. Although Green Tree has not provided evidence of this assignment, since Wile concedes that Green Tree is either the servicer or the holder of her loan, the court will consider this information in connection with the pending motion to dismiss.

loan, she argues that as an assignee of her loan's servicing rights, Green Tree is liable for Conseco's actions.

We first turn to the issue of whether Green Tree is liable for Conseco's alleged violations of the TILA and the HIFA. Wile points to § 1641(d)(1) of the TILA in support of holding Green Tree liable as an assignee for Conseco's alleged violations. This section provides in pertinent part that "[a]ny person who purchases or is otherwise assigned a mortgage ... shall be subject to all claims and defenses with respect to that mortgage that the consumer could assert against the creditor of the mortgage." 15 U.S.C. § 1641(d)(1). Although there is disagreement among the Circuits, several bankruptcy court decisions in the Third Circuit have held that this provision subjects an assignee to liability for causes of action that can be asserted against a creditor of a loan and abrogates an assignee's ability to raise a holder-in-due-course defense. See e.g., Harvey v. EMC Mortgage Corp., No. Civ.A. 02-1386, 2003 WL 21460063, at *6-7 (Bankr. E.D. Pa. June 9, 2003); Barber v. Fairbanks Capital Corp., 266 B.R. 309, 320 (Bankr. E.D. Pa. 2001). In Harvey the bankruptcy judge held, however, that § 1641(d)(1) will not supersede an underlying law that forecloses assignee liability. 2003 WL 21460063, at *7.

In this case, it would seem that the TILA and the HIFA both provide Wile with a claim against the creditor of the mortgage. Nonetheless, assignee liability under § 1641(d)(1) is not applicable here for several reasons. First, Green Tree is

merely a servicer of the loan. Section 1641(f) of the TILA states that "[a] servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as an assignee of such obligation for purposes of this section."

Moreover, even if Green Tree is the holder of Wile's loan, a sale order ("Sale Order") in Consecos bankruptcy proceedings further protects Green Tree from assignee liability. Consecos filed for Chapter 11 bankruptcy relief in the United States District Court for the Northern District of Illinois on February 3, 2003. On March 14, 2003, the Bankruptcy Judge entered the Sale Order in Consecos bankruptcy proceedings. Pursuant to this order, Green Tree Investment purchased Consecos assets³ "free and clear of liens, claims, and encumbrances." In re Consecos, Inc., Case No. 02 B 49672, at 1 (N.D. Ill. Bankr. March 14, 2003). The Sale Order refers to "Purchased Assets", "as defined more specifically in the Purchase Agreement." Id. at 2. The purchase agreement defines "Purchased Assets" to include "assets, properties, Contracts (other than Excluded Contracts) ... and ... Servicing Rights" of Consecos. Amended and Restated Asset Purchase Agreement, March 14, 2003, at 20. The Bankruptcy

3. The Sale Order identifies CFN Investment Holdings, LLC as the purchaser. Defendant Green Tree has notified us that CFN was the previous name of Green Tree Investment Holdings, LLC.

Judge further ordered that as of the Closing Date⁴ the purchased assets would be transferred to Green Tree Investment:

free and clear of: (a) all Interests; and (b) all debts arising under, relating to, or in connection with any acts of the CFC Debtors, claims (as that term is defined in section 101(5) of the Bankruptcy Code), liabilities, obligations, demands, guaranties, options, rights, contractual commitments, restrictions, interests and matters of any kind and nature, whether arising prior to or subsequent to the commencement of these cases, and whether imposed by agreement, understanding, law, equity or otherwise (including, without limitation, claims and encumbrances: (i) that purport to give to any party a right or option to effect any forfeiture, modification, right of first refusal, or termination of any of the Sellers' or the Buyer's interests in the Purchased Assets, or any similar rights...specifically excluding Permitted Liens and Assumed Liabilities....⁵

In re Conseco, Inc., Case No. 02 B 49672, at 11.

The Sale Order further stated that:

[e]xcept as expressly permitted by the Purchase Agreement, all persons ... holding Interests or Claims of any kind or nature whatsoever against the CFC Debtors or in the Purchased Assets (whether legal or equitable ...) arising under or out of, in connection with, or in any way relating to, the CFC Debtors, the Purchased Assets, the operation of the CFC Debtors' businesses prior to the Closing Date or the transfer of the Purchased Assets to the Buyer, shall be and hereby are

4. The Sale Order incorporates the definition of Closing Date identified in the purchase agreement. The purchase agreement does not identify the Closing Date as a specific calendar day, but as the date when the buyers' and sellers' obligations under the purchase agreement are satisfied.

5. Wile's loan is not listed in the purchase agreement as either a Permitted Lien or an Assumed Liability.

forever barred, estopped and permanently enjoined from asserting, prosecuting or otherwise pursuing against the Buyer, its property, its successors and assigns, its affiliates or the Purchased Assets, such persons' or entities' Interests or Claims.

Id. at 12-13. The terms and provisions of the purchase agreement and the Sale Order extended to the benefit of "the Buyer and its respective affiliates, successors, and assigns." Id. at 23.

The Closing Date has apparently occurred as Wile has not raised this issue. Under the Sale Order, as of the Closing Date, the buyer of Consec's assets received the assets free and clear of any claims, liabilities, and obligations, whether imposed by law or equity, that will modify or terminate the buyer's rights in the assets. The Sale Order further states that except as otherwise provided, all persons with claims or interests against the assets or Consec are "forever barred" from pursuing their claims or interests against "the Buyer, its property, its successors and assigns, its affiliates or the Purchased Assets." Id. at 12-13. These provisions "inure to the benefit of ... the Buyer and its respective affiliates, successors, and assigns." Id. at 23.

Regardless of whether defendant Green Tree now services or holds Wile's loan, it benefits from the protection of the Sale Order by virtue of its being an "affiliate" of the original buyer and holder, Green Tree Investment. Wile's claims for monetary damages and for rescission against Green Tree, whether under TILA, HIFA, or the common law, are barred by the clear language

of the Sale Order. Accordingly, we will dismiss the complaint against defendant Green Tree, insofar as it relates to Consecoco's actions regarding the origination of Wile's loan.

Wile also seeks damages from Green Tree for Accelerated's actions regarding the origination of her loan. As stated above, Accelerated did not lend any money to Wile. Its only involvement in the loan transaction was as a mortgage broker. Wile alleges that Accelerated failed to disclose its role and charges in the loan transaction, thus engaging in common-law fraud, breach of a fiduciary duty, and violations of the CSA, the LBTPR, and the UTPCPL. She maintains that Green Tree may be called to account because of § 1641(d)(1) of the TILA and because Green Tree "benefitted from Accelerated's actions."

As noted above, § 1641(d)(1) applies only to purchasers and assignees of mortgages. There is no allegation that Accelerated ever sold or assigned to Green Tree any rights in Wile's loan. Moreover, under § 1641(d)(1), a purchaser or assignee may only be held liable for claims that could be asserted against a "creditor of the mortgage." A broker is not a "creditor of the mortgage." 15 U.S.C. § 1602(f); Robey-Harcourt v. BenCorp Financial Co. Inc., 326 F.3d 1140, 1142 (10th Cir. 2003); Calica v. Independent Mortgage Bankers Ltd., Civ.A. No. 88-0452, 1989 WL 117057, at *1 (E.D.N.Y. Sep. 28, 1989).

Section 1602(f) defines "creditor" as:

a person who both (1) regularly extends, whether in connection with loans, sales or property or services, or otherwise, consumer

credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) *is the person to whom the debt arising from the consumer credit transaction is initially payable on the fact of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement.*

Since Accelerated never made a loan to Wile, Accelerated is not a "creditor of the mortgage." Thus, Green Tree cannot be held liable under § 1641(d)(1) for Accelerated's alleged fraud, breach of fiduciary duty or statutory violations. Because she cannot make out such a claim against Accelerated, she may not assert such a claim against Green Tree. Wile's bare assertion of liability against Green Tree because it "benefitted from Accelerated's actions" is simply without merit. We therefore will dismiss Wile's claim for damages against Green Tree, insofar as it relates to Accelerated's actions.

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ORDER

AND NOW, this day of November, 2004 for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the motion of defendant Green Tree Servicing, LLC to dismiss plaintiff's complaint against it is GRANTED.

BY THE COURT:

J.