

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

NAIMAH BEY : CIVIL ACTION  
 :  
 v. :  
 :  
 : No. 04-4529  
 OPTION ONE MORTGAGE CORP., et al. :

**ORDER-MEMORANDUM**

AND NOW, this 25<sup>th</sup> day of April, 2005, the motion of defendant Option One Mortgage Corp. to dismiss plaintiff's pro se complaint is granted, Fed. R. Civ. P. 12(b)(6)<sup>1</sup>; and plaintiff's motion to amend the complaint is denied, Fed. R. Civ. P. 15(a).

This is plaintiff Naimah Bey's second attempt to recover damages for predatory lending practices allegedly engaged in by defendants Option One Mortgage Corp. and GRP Loan, LLC. Plaintiff's first complaint, filed on February 4, 2004, set forth claims for "Money Lent," "Breach of Contract," "Violations of Truth In Lending," and "Violations of Federal Trade Commission Act." Complaint, Naimah Bey v. Option One Mortgage Corp., Civ. A. No. 04-501 (Bey I). In Bey I, plaintiff's default on a loan secured by a note and mortgage in favor of defendants had resulted in a judgment of foreclosure against her home. Complaint, Bey I. That action was dismissed with prejudice. Order-Memorandum, July 27, 2004.

Plaintiff's current complaint is a reiteration of that filed in Bey I. Based on the same loan transaction, it includes 26 counts for inter alia, "Unfair Trade Practices (Count 1)," "Disclosure

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<sup>1</sup> "Dismissal for failure to state a claim is appropriate only if it 'appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Wheeler v. Hampton Twp., 399 F.3d 238, 243 (3d Cir. 2005), quoting Worldcom, Inc. v. Graphnet, Inc., 343 F.3d 651, 653 (3d Cir. 2003).

Violations (Counts 2, 5, 11),” “Failure to Disclose” (Counts 12, 14, 18-25), “Right to Rescind Violations (Counts 6, 10),” “Disceptive [sic] Grouping Violations (Count 8),” “Inflation of Acceleration Fees (Counts 13, 15),” and “Injunctive Relief (Count 26).” Complaint, Bey II.

The doctrine of claim preclusion bars plaintiff’s second action because there was “(1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action.” Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 963 (3d Cir. 1991), citing United States v. Athlone Indus., Inc., 746 F.2d 977, 983 (3d Cir. 1984). Reliance by plaintiff on new or different theories of recovery will not avoid preclusion. Lubrizol, 929 F.2d at 963. Where, as here, in both complaints “the acts complained of, the material facts alleged, and the witnesses and documentation required to prove the allegations are all the same,” id., claim preclusion must be applied to the latter case. Plaintiff may not circumvent the finality of the first judgment by filing a second action.

Plaintiff also requests leave to amend the complaint to allege “fraud.”<sup>2</sup> Axiomatically, leave to amend “shall be freely given when justice so requires,” Fed. R. Civ. P. 15(a), unless the amendment would be futile.<sup>3</sup> Here, any effort by plaintiff to assert a claim against defendants in this second action based on the foreclosed loan is subject to the principles of claim preclusion, and any

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<sup>2</sup> A proposed amended complaint was not attached to the motion, and the motion does not aver facts constituting fraud.

<sup>3</sup> Rule 15(a) declares that leave to amend ‘shall be freely given when justice so requires’; this mandate is to be heeded. . . . In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of amendment, futility of amendment, etc. - the leave should, as the rules require, ‘be freely given.’” Foman v. Davis, 371 U.S. 178, 182 (1962). See also Jablonski v. Pan Am World Airways, Inc., 863 F.2d 289, 292 (3d Cir. 1988)

amendment would appear to be futile. The motion to amend must therefore be denied and plaintiff's complaint, for the reasons stated, dismissed with prejudice.

BY THE COURT:

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Edmund V. Ludwig, J.