

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

Case No. 3:15-bk-2731-PMG

Sha'Ron A. Sims,

Debtor.

Chapter 13

Sha'Ron A. Sims,

Plaintiff,

vs.

Adv. No. 3:16-ap-126-PMG

Wells Fargo Bank, N.A. et al.,

Defendants.

**ORDER ON DEFENDANT WELLS FARGO BANK, N.A.'S MOTION TO DISMISS
PLAINTIFF'S THIRD AMENDED COMPLAINT**

THIS CASE came before the Court for hearing to consider Wells Fargo Bank's Motion to Dismiss Plaintiff's Third Amended Complaint. (Doc. 38).

In the Third Amended Complaint, the Debtor asserts that the Defendant, Wells Fargo Bank, N.A., wrongfully attempted to enforce a mortgage against her residential real property after falsely claiming that the mortgage was in default. According to the Debtor, the mortgage was not in default because Wells Fargo, as servicer, had "advanced" the mortgage payments to the holder of the mortgage pursuant to a Master Pooling and Service Agreement.

Courts have consistently held that a servicer's advances under a Pooling and Service Agreement do not satisfy the borrower's obligations under a mortgage, and that the servicer may enforce the mortgage if the borrower fails to make the payments when due. Even if the Debtor's allegations in this case are accepted as true, therefore, the Third Amended Complaint does not state a claim upon which relief can be granted and should be dismissed.

A. The Third Amended Complaint

The Debtor, Sha'Ron A. Sims, filed a petition under Chapter 13 of the Bankruptcy Code on June 17, 2015. On her schedule of assets filed in the Chapter 13 case, the Debtor listed her residential real property located at 9519 Arbor Oak Lane, Jacksonville, Florida (the Property). On her schedule of liabilities, the Debtor listed Wells Fargo as a creditor holding a mortgage on the Property in the approximate amount of \$200,000.00.

On June 13, 2016, the Debtor commenced this adversary proceeding by filing a "Fraudulent Action Suit against Wells Fargo Bank N.A. for Breach of Contract, RICO Violations and Fraudulent Acts under its Home Mortgage Practices, Motion to Value Real Estate, and Demand for a Jury Trial." (Doc. 1).

On February 14, 2017, the Debtor filed a Third Amended Complaint in the adversary proceeding. (Doc. 30). The Third Amended Complaint is 77 pages in length, not including the attachments, and the first portion of the Complaint is divided into nine sections: (1) Introduction and Statement of Claims (pp. 2-4); (2) Jurisdiction and Venue (p. 4); (3) Parties (pp. 5-6); (4) General Allegations (pp. 6-17); (5) Standing and Proximation of Injury under RICO Counts (pp. 17-22); (6) Factual Allegation Common to all RICO Counts (pp. 22-29); (7) Partial List of Predicate Acts and RICO Pattern (pp. 29-44); (8) Relationship of Predicate Acts (pp. 44-45); and (9) Continuity (pp. 45-46).

After these initial allegations or sections, the next portion of the Third Amended Complaint contains six causes of action or Counts, as follows:

1. Count I – “RICO Violations 18 USC 1962(c)” (pp. 46-48).
2. Count II – “RICO Sect. 1962(a)” (pp. 48-50).
3. Count III – “RICO 1962(d)” (pp. 51-53).
4. Count IV – “Florida and Federal Common Law Fraud: Intentional Misrepresentation” (pp. 53-55).
5. Count V – “Florida State Statutory Filing False Document against Florida Real Property” (pp. 55-59).
6. Count VI – “Florida RICO 895.03” (pp. 59-62).

Based on the causes of action set forth in the six Counts, the Debtor seeks injunctive relief, “forfeiture of property,” and money damages. (pp. 62-76) Specifically, the Debtor seeks the sum of \$51,900.00 as actual damages, the sum of \$829,800.00 as treble damages, and the sum of \$30,000,000.00 as punitive damages, for total monetary damages in the amount of \$30,933,600.00. (p. 76).

B. The Debtor's allegations and Wells Fargo's response

The Debtor's claims are based primarily on the “General Allegations” found on pages 6 through 17 of the Third Amended Complaint.

Generally, the Debtor alleges (1) that Wells Fargo had transferred her mortgage to a Pass Through Trust, (2) that the Trust (as owner of the mortgage) and Wells Fargo (as servicer of the mortgage) had entered into a Master Pooling and Service Agreement (PSA), and (3) that Wells Fargo agreed in the PSA to “advance” all principal and interest payments due under the Debtor's mortgage to the owner/Trust.

The Debtor further alleges that Wells Fargo later declared her mortgage in default and filed a lis pendens on the Property on June 5, 2015. The Debtor filed her bankruptcy petition shortly thereafter, on June 17, 2015, and Wells Fargo filed a Proof of Claim in the Chapter 13 case that reflected prepetition arrearages due on the mortgage in the amount of \$23,607.84.

The Debtor acknowledges that she had fallen "behind on payments." The Debtor asserts, however, that the mortgage was not in default on the date that Wells Fargo filed the lis pendens or on the date that she filed her bankruptcy petition, because Wells Fargo had made the mortgage payments to the Trust in accordance with the terms of the PSA. Consequently, the Debtor contends that the lis pendens and Proof of Claim filed by Wells Fargo were false and fraudulent, and that Wells Fargo had wrongfully attempted to enforce the mortgage against her Property. (See Third Amended Complaint, ¶¶ 28-39)

Wells Fargo disputes the allegations made by the Debtor. Wells Fargo asserts, for example, that it "has owned the Note and the Mortgage since June 2012 and has not placed the Mortgage Loan in any pool of securitized mortgage loans since then. For this reason, Wells Fargo is not a party to any PSA pertaining to the Mortgage Loan and there is no applicable pooling and servicing agreement to any of Plaintiff's allegations." Wells Fargo denies, therefore, that it made any "advance payments to the Trust" under such a PSA. (Doc. 38, p. 2).

C. Discussion

The Court has considered the Debtor's Third Amended Complaint, Wells Fargo's Motion to Dismiss the Third Amended Complaint, and the parties' presentations at the hearing on the Motion to Dismiss the Complaint. Even if the Debtor's allegations are accepted as true, the Court finds that the

Third Amended Complaint fails to state a claim upon which relief can be granted, and should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Courts have consistently rejected the claims asserted by the Debtor in the Third Amended Complaint. See, for example, Rivera v. Deutsche Bank National Trust Company, 2016 WL 5868693 (9th Cir. BAP); Schmeglar v. Wells Fargo Bank, N.A., 2016 WL 1020322 (N.D. Ill.), *affirming* 531 B.R. 735 (Bankr. N.D. Ill. 2015); Pulliam v. Pennymac Mortgage Investment Trust Holding, LLC, 2014 WL 3784238 (D. Me.); Ouch v. Federal National Mortgage Association, 2013 WL 139765 (D. Mass.); and Casault v. Federal National Mortgage Association, 915 F.Supp.2d 1113 (C.D. Cal. 2012).

First, according to these decisions, any advances made by a servicer under a PSA are not made on behalf of or for the benefit of the borrower, but instead are made solely for the benefit of the parties to the agreement. A borrower is not a party to a PSA or a third-party beneficiary of a PSA, and the advances do not reduce or negate the borrower's loan obligations. Rivera v. Deutsche Bank, 2016 WL 5868693, at 10(The borrowers were not parties to or beneficiaries of the PSA, and the advances were not payments made on their behalf or for their benefit.); Schmeglar v. Wells Fargo, 531 B.R. at 739(Wells Fargo's advances were not made on behalf of or for the benefit of the debtor.); Pulliam v. Pennymac, 2014 WL 3784238, at 4(The debtor's complaint was dismissed, because there was no plausible basis to determine that the advances were made for the debtor's benefit.).

In this case, the Debtor relies on a Pooling and Servicing Agreement attached to her Complaint. (Attachment to Docs. 9, 30). The PSA attached to the Complaint is dated September 1, 2006, and does not identify the mortgagors or borrowers as parties to or beneficiaries of the agreement. Additionally, Article IV of the PSA, which is entitled "Distributions and Advances by the Servicers," does not provide for any reduction of a borrower's liability as a result of a servicer's advance.

Second, any advances by a servicer under a PSA do not satisfy a borrower's mortgage obligations, because the PSA provides that the advances are reimbursable. Rivera v. Deutsche Bank, 2016 WL 5868693, at 11 (Because the servicer's advances are reimbursable, they do not satisfy the debtor's obligations under the mortgage.); Schmeglar v. Wells Fargo, 531 B.R. at 739 (Wells Fargo's advances are reimbursable from future collections or foreclosure proceeds, with the result that the debtor's debt to the Trust is not satisfied by the advances.) (citing Casault v. FNMA, 915 F.Supp.2d at 1135).

In this case, Section 3.01(b) of the PSA attached to the Debtor's Complaint provides that a servicer's advances for taxes and assessments are "reimbursable in the first instance from related collections from the Mortgagors," and Section 4.01(e) of the PSA attached to the Debtor's Complaint provides that a servicer is entitled to reimbursement of its advances "from recoveries from the related Mortgagor or from all Liquidating Proceeds and other payments or recoveries (including Insurance Proceeds and Condemnation Proceeds) with respect to the related Mortgage Loan." (Attachment to Docs. 9, 30).

Third, a PSA specifically authorizes the servicer to enforce the mortgage if the borrower does not make the payments when due. Rivera v. Deutsche Bank, 2016 WL 5868693, at 11 (Servicers under the PSA are authorized to liquidate and foreclose loans not paid by the borrower.); Schmeglar v. Wells Fargo, 531 B.R. at 739 (The PSA expressly authorizes Wells Fargo to initiate a foreclosure action when the debtor fails to make his mortgage payment, even if Wells Fargo has made advances to the Trust.).

In this case, Section 3.15 of the PSA attached to the Debtor's Complaint provides that the servicer shall use its best efforts "to foreclose upon or otherwise comparably convert . . . the ownership of properties securing such of the Mortgage Loans as come into and continue in default and as to which no satisfactory arrangements can be made for collection of delinquent payments."

Finally, a mortgage generally defines the term "default" as the borrower's failure to make the payments required by the loan documents. Schmeglar v. Wells Fargo, 531 B.R. at 739 (Contrary to the debtor's contention that the mortgage was not in default, the Note clearly defined a default as the borrower's failure to make the payments when due.) (citing Casault v. FNMA, 915 F.Supp.2d at 1136).

In this case, the Note signed by the Debtor provides that the lender may declare a default if the borrower fails to pay any monthly payment in full, and the Mortgage signed by the Debtor provides that the borrower defaults by failing to make the monthly payments under the mortgage. (Doc. 38, Exhibit 1).

For all of these reasons, the Debtor's Third Amended Complaint fails to state a claim upon which relief may be granted, and should be dismissed. Any advances by Wells Fargo under a PSA, even if made as alleged, would not satisfy the Debtor's repayment obligations under her Note and Mortgage or nullify the Debtor's prepetition default under her loan documents. Schmeglar v. Wells Fargo, 531 B.R. at 739-40. Consequently, Wells Fargo was not prohibited from enforcing the mortgage after the Debtor failed to pay the amounts required under her loan documents and fell "behind on payments."

Accordingly:

IT IS ORDERED that Defendant Wells Fargo Bank, N.A.'s Motion to Dismiss Plaintiff's Third Amended Complaint is granted, and the Debtor's Third Amended Complaint is dismissed.

DATED this 28 day of April, 2017.

BY THE COURT

Paul M. Glenn
PAUL M. GLENN
United States Bankruptcy Judge