19-1446-cv
Jackson v. Wells Fargo Home Mortgage

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of April, two thousand twenty.

PRESENT: DENNY CHIN,
RICHARD J. SULLIVAN,
WILLIAM J. NARDINI,
Circuit Judges.

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DENISE JACKSON,
Plaintiff-Appellant,
-v- 19-1446-cv

WELLS FARGO HOME MORTGAGE,
Defendant-Appellee.

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FOR PLANTIFF-APPELLANT: PETER E. SVERD, Law Offices of Peter Sverd, PLLC, New York, New York.

FOR DEFENDANT-APPELLEE: ANDREW B. MESSITE, Reed Smith LLP, New York, New York.

Appeal from the United States District Court for the Eastern District of New York (Chen, *J.*, and Tiscione, *M.J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Plaintiff-appellant Denise Jackson appeals from the March 28, 2019 judgment of the district court dismissing her claims against defendant-appellee Wells Fargo Home Mortgage ("Wells Fargo") for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The *pro se* first amended complaint (the "FAC") alleged civil rights violations in connection with Jackson's unsuccessful efforts to refinance or modify her home mortgage with Wells Fargo. In her counseled appeal, Jackson argues that the district court erred in dismissing the FAC and denying her leave to amend the complaint a second time. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

Jackson commenced this action *pro se* on August 27, 2015. She alleged that Wells Fargo discriminated against her on the basis of her race, in violation of the Fourteenth Amendment, the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* (the "FHA"), 42 U.S.C. § 1981 ("Section 1981"), Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("Title VI"), and state law when it repeatedly denied her mortgage refinance applications.

After Wells Fargo moved to dismiss the FAC, the magistrate judge issued a Report and Recommendation ("R&R") on August 10, 2018, recommending that the motion be granted and that Jackson be denied leave to amend for a second time because amendment would be futile. Jackson objected to the R&R. In a Memorandum and Order issued March 27, 2019, the district court dismissed the federal causes of action in the FAC, declined to exercise supplemental jurisdiction over the state law claims, and denied leave to amend on the ground that amendment would be futile.

This appeal followed. On appeal, Jackson contends that the district court erred in granting Wells Fargo's motion to dismiss because the FAC sufficiently alleged violations of the FHA, Section 1981, Title VI, and related state law claims under the liberal pleadings standard afforded *pro se* litigants.[1] In the alternative, she contends that she should have been granted leave to amend the FAC for a second time.

STANDARD OF REVIEW

We review *de novo* the dismissal of a complaint pursuant to Rule 12(b)(6), "accepting all factual claims in the complaint as true and drawing all reasonable inferences in the plaintiff's favor." *O'Donnell v. AXA Equitable Life Ins. Co.*, 887 F.3d 124, 128 (2d Cir. 2018). "To survive a motion to dismiss, a complaint must contain sufficient

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[1] Jackson does not address the district court's dismissal of her Fourteenth Amendment claim in her briefs. That claim is thus not before us on this appeal. *See Montauk Oil Transp. Corp. v. Tug El Zorro Grande*, 54 F.3d 111, 114 (2d Cir. 1995) ("As a general rule, a Court of Appeals will not pass upon issues that were not presented in the appellants' briefs.").

factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A *pro se* complaint is to be read liberally, and should not be dismissed without granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Shomo v. City of New York*, 579 F.3d 176, 183 (2d Cir. 2009) (alterations and internal quotation marks omitted).

We review a district court's denial of leave to amend on the ground of futility *de novo*, *Smith v. Hogan*, 794 F.3d 249, 253 (2d Cir. 2015), and the decision to decline to exercise supplemental jurisdiction over state law claims for abuse of discretion, *Klein & Co. Futures v. Bd. of Trade of City of N. Y.*, 464 F.3d 255, 259 (2d Cir. 2006).

DISCUSSION

I. Federal Claims

We affirm the judgment of dismissal because even under the liberal pleadings standard afforded *pro se* litigants, the FAC failed to allege a plausible violation of federal law. We further conclude that the district court did not err in denying Jackson leave to amend the FAC for a second time because amendment would have been futile.

A. Applicable Law

The FHA prohibits, *inter alia*, discrimination based on race in the availability and terms and conditions of residential real-estate transactions. 42 U.S.C. § 3605(a). As relevant here, Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. § 1981(a). Title VI provides that no person shall be subject to exclusion from participation in, denial of benefits of, or discrimination in any program receiving federal financial activity based upon race. 42 U.S.C. § 2000d.

B. Analysis

In her counseled appeal, Jackson contends, *inter alia*, that the district court erred in requiring her to make a *prima facie* showing of housing discrimination at the pleadings stage. *See Boykin v. KeyCorp*, 521 F.3d 202, 212 (2d Cir. 2008). We need not decide whether the district court applied the proper pleading standard because we conclude, based on our independent review of the pleading, that the FAC failed to allege a plausible violation of federal law regardless. *See Dettelis v. Sharbaugh*, 919 F.3d 161, 163 (2d Cir. 2019) ("We may affirm on any ground that finds support in the record.").

Jackson failed to state a claim under the FHA, Section 1981, or Title VI because she failed to plausibly allege that Wells Fargo denied her application based on her race or color. The sole allegations of racial discrimination in the FAC were that Jackson is African American, she qualified for a mortgage refinancing, her applications were denied, and all the decisionmakers at Wells Fargo were white. *See, e.g.*, App'x at 30. These allegations are simply not enough to support Jackson's conclusory and speculative assertion that she was targeted on the basis of her race. *See Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103, 108 (2d Cir. 2009) (affirming dismissal of claim where the "complaint present[ed] only conclusory allegations . . . and we find them facially implausible").

We further conclude that the district court did not err in denying Jackson leave to amend her pleading for the second time. Although "[a] *pro se* complaint should not be dismissed without the Court granting leave to amend at least once[,] . . . leave to amend a complaint may be denied when amendment would be futile." *Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014). Here, Jackson was already granted one unsuccessful opportunity to amend her pleading with the court below, and on her counseled appeal she identifies no new facts that would cure the FAC's deficiencies. The district court thus rightly concluded that granting leave to amend was futile. *See Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) (affirming denial of leave to amend on futility grounds

where the plaintiff "has suggested no new material she wishes to plead" and "[t]he problem . . . is substantive").

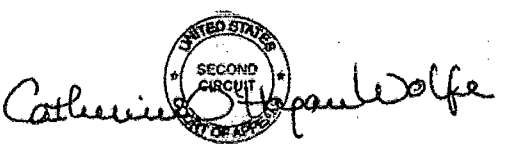
II. State Law Claims

After finding that the FAC failed to state a violation of federal law, the district court declined to exercise supplemental jurisdiction over Jackson's state law claims. Given that Jackson's case was still at the motion to dismiss phase, well before trial, we find no abuse of discretion in that determination. *See Marcus v. AT&T Corp.*, 138 F.3d 46, 57 (2d Cir. 1998) ("In general, where the federal claims are dismissed before trial, the state claims should be dismissed as well.").

* * *

We have considered Jackson's remaining arguments and conclude they are without merit. For the foregoing reasons, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of July, two thousand twenty,

Before: Denny Chin,
Richard J. Sullivan,
William J. Nardini,

Circuit Judges.

Denise Jackson,

Plaintiff - Appellant,

v.

Wells Fargo Home Mortgage,

Defendant - Appellee.

ORDER
Docket No. 19-1446

Appellant Denise Jackson having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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DENISE JACKSON,

Plaintiff,

-against-

WELLS FARGO HOME MORTGAGE,

Defendant.
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REPORT AND RECOMMENDATION

15-CV-5062 (PKC) (ST)

TISCIONE, United States Magistrate Judge:

Plaintiff Denise Jackson, appearing *pro se*, brought this action against Defendant Wells Fargo Home Mortgage ("Wells Fargo") on August 27, 2015, alleging civil rights violations in connection with Plaintiff's attempts to refinance her home mortgage and/or to obtain additional loans. Dkt. No. 1 ("Compl." or the "Complaint"). On March 14, 2016, Wells Fargo moved to dismiss the Complaint. Dkt. No. 17 (Motion to Dismiss); *see* Dkt. No. 15 (Opposition to Motion to Dismiss) ("Pl.'s Opp."). On April 20, 2016, the Honorable Pamela K. Chen referred Wells Fargo's motion to dismiss to me for a report and recommendation. For the reasons described below, I respectfully recommend that Wells Fargo's motion to dismiss the Complaint be granted without prejudice.

I. BACKGROUND[1]

[1] Generally, a court's review on a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure "is limited to the facts as asserted within the four corners of the complaint, the documents attached to the complaint as exhibits, and any documents incorporated by reference." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007); *accord Wilson v. Kellogg Co.*, 628 F. App'x 59, 60 (2d Cir. 2016) (summary order). A court may also consider "matters of which judicial notice may be taken" and "documents either in plaintiff['s] possession or of which plaintiff[ ] had knowledge and relied on in bringing suit." *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993). Plaintiff's opposition to the motion to dismiss attaches as exhibits certain documents related to her loan applications that were

Plaintiff owns and resides on property located at 215 Maple Street, Block 5029, Lot 52, in Brooklyn, New York (the "Property"). Compl. at 1. Plaintiff acquired the deed to the Property on January 28, 1998, and the deed was recorded on March 25, 1998.[2]

On September 1, 2006, Plaintiff executed the relevant mortgage, secured by the Property, for $334,950, payable to 1st Republic Mortgage Bankers, Inc. ("1st Republic"). This mortgage was recorded on September 25, 2006 in the Office of the City Register in City Register File Number ("CRFN") 2006000538578.[3] On July 13, 2016, Mortgage Electronic Registration Systems Inc. (MERS) as nominee for 1st Republic assigned the September 1, 2006 mortgage to Wells Fargo Bank, N.A. The assignment was recorded on July 21, 2016 in CRFN 2016000249476.[4]

Plaintiff alleges that Wells Fargo "violated [her] civil rights by discriminating against [her] because of [her] race" (Pl.'s Opp. at 2) when Wells Fargo allegedly denied her loans for which she was qualified and denied her loan modifications (Compl. at 2). Plaintiff also alleges that Wells Fargo "has unfair lending practices." Compl. at 2. In particular, Plaintiff alleges that she applied to refinance her loan in 2012, when she was "approved in [a] 9 page approval letter, but was refused a closing date"; that she applied for a loan modification under the Home

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incorporated by reference into the Complaint. However, because several relevant public documents relating to the property at issue in this case have not been provided, the Court has accessed, and takes judicial notice of, certain public documents available at the Automated City Register Information System ("ACRIS") website. ACRIS, Office of the City Register, New York City Dep't of Finance, *available at* http://a836-acris.nyc.gov/CP (last visited Jan. 19, 2017); *see Cummins v. Select Portfolio Servicing, Inc.*, 2016 WL 4766237, at *1 n.2 (E.D.N.Y. Sept. 13, 2016).

[2] *See* ACRIS, https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=FT_3070005987107 (last accessed Jan. 19, 2017).

[3] *See* ACRIS, https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2006092001349001 (last accessed Jan. 19, 2017).

[4] *See* ACRIS, https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentImageView?doc_id=2016071800978001 (last accessed Jan. 19, 2017).

Affordable Modification Program (and was presumably rejected) in 2013; and that she reapplied to refinance in 2014 and was again rejected. *Id.*

II. DISCUSSION

A. Legal Standards

Upon a motion to dismiss, a court must determine whether a complaint states a legally cognizable claim by making allegations that, if true, would show that the plaintiff is entitled to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570); *Sarmiento v. United States*, 678 F.3d 147, 152 (2d Cir. 2012). Rule 8 of the Federal Rules of Civil Procedure does not require detailed factual allegations, but "[a] pleading that offers 'labels and conclusions' or 'formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555, 557). A complaint may plausibly entitle a plaintiff to relief when there is "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

There are "[t]wo working principles" that guide analysis of a motion to dismiss: "First, the court must accept all factual allegations as true and draw all reasonable inferences in favor of the non-moving party," and "[s]econd, only a complaint that states a plausible claim for relief survives a motion to dismiss, and this determination is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Snyder v. Perry*, 2015

WL 1262591, at *4 (E.D.N.Y. Feb. 4, 2015) (quoting *Iqbal*, 556 U.S. at 678, 679), *adopted in part by*, 2015 WL 1262591 (E.D.N.Y. Mar. 18, 2015).

Applying this standard here, the court must bear in mind that any pleadings filed by a *pro se* plaintiff must be construed liberally to raise the strongest arguments they suggest. *E.g.*, *Kevilly v. New York*, 410 F. App'x 371, 374 (2d Cir. 2010) (summary order); *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 191 (2d Cir. 2008). "A *pro se* complaint 'should not [be] dismiss[ed] without [the Court] granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated.'" *Chavis v. Chappius*, 618 F.3d 162, 170 (2d Cir. 2010) (citation omitted); *see Boykin v. KeyCorp*, 521 F.3d 202, 216 (2d Cir. 2008) (Sotomayor, J.) ("[E]ven after *Twombly*, dismissal of a *pro se* claim as insufficiently pleaded is appropriate only in the most unsustainable of cases."). "[L]eave to re-plead can be denied where it is clear that no amendments can cure the pleading deficiencies and any attempt to replead could be futile." *Leogrande v. New York*, 2013 WL 1283392, at *15 (E.D.N.Y. Mar. 29, 2013) (citing *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000)).

B. Civil Rights Claims

Plaintiff generally invokes numerous civil rights laws as a basis for the Court's jurisdiction and for her claims, including the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* (the "FHA"); 42 U.S.C. § 2000a; 42 U.S.C. § 1981; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; and the Equal Protection Clause, U.S. Const. amend. XIV, § 1. Compl. at 1; Pl.'s Opp. at 1. For the reasons described below, these claims should be dismissed.

As an initial matter, Plaintiff states that Wells Fargo discriminated against her because of her race (Pl.'s Opp. at 2), but does not allege that she is a member of a protected class. *See, e.g.*, *Giano v. Senkowski*, 54 F.3d 1050, 1057 (2d Cir. 1995) ("To prove an equal protection violation,

claimants must prove purposeful discrimination directed at an identifiable or suspect class.") (citations omitted); *Assoko v. City of New York*, 2009 WL 1108745, at *6 (S.D.N.Y. Apr. 24, 2009) (Title VI claims require plaintiffs to "identify their respective race, color, or national origin [to] plead that their race, color, or national origin was the ground for a discriminatory action."); *Tufano v. One Toms Point Lane Corp.*, 64 F. Supp. 2d 119, 127 (E.D.N.Y. 1999) (FHA claim requires showing that "the plaintiff belongs to a class protected by the statute"). The Complaint fails to specify Plaintiff's race or color, so Plaintiff has not adequately stated a civil rights claim. *E.g.*, *Brabham v. St. Luke's Home Residential*, 2015 WL 4598863, at *4 (N.D.N.Y. Apr. 28, 2015), *adopted by*, 2015 WL 4598863 (N.D.N.Y. July 29, 2015); *Assoko*, 2009 WL 1108745, at *6; *Seabrook v. City of New York*, 509 F. Supp. 2d 393, 406 (S.D.N.Y. 2007). Accordingly, Plaintiff's civil rights claims should be dismissed on this basis. Other issues with Plaintiff's civil rights claims are addressed in turn.

1. Fair Housing Act

The FHA prohibits, *inter alia*, discrimination based on race in the availability and terms and conditions of residential real-estate transactions. 42 U.S.C. § 3605(a). As an initial matter, the statute of limitations for bringing a civil action under the FHA is two years "after the occurrence or the termination of an alleged discriminatory housing practice." *Id.* § 3613(a)(1)(A). Therefore, any of the alleged discriminatory acts or practices that occurred or terminated before August 27, 2013 are time-barred.

To state a claim under Section 3605 of the FHA, a plaintiff must plead that: (1) she is a member of a protected class; (2) she attempted to engage in a "real estate-related transaction" and met all of the relevant qualifications for doing so; (3) the defendant refused to transact business with the applicant despite her qualifications; and (4) the defendant continued to engage

in the type of transaction in question with other parties with similar qualifications. *Johnson v. Citibank*, 2000 WL 1558681, at *2 (2d Cir. Oct. 18, 2000) (summary order); *accord Gorham-DiMaggio v. Countrywide Home Loans, Inc.*, 592 F. Supp. 2d 283, 289 (N.D.N.Y. 2008), *aff'd*, 421 F. App'x 97, 100 (2d Cir. 2011) (summary order); *see also Germain v. M&T Bank Corp.*, 111 F. Supp. 3d 506, 520-21 (S.D.N.Y. 2015) (quoting *Gorham-DiMaggio*, 592 F. Supp. 2d at 289).

First, as discussed above, Plaintiff has not sufficiently alleged that she was discriminated against on the basis of any protected class. *See Claude v. Wells Fargo Home Mortg.*, 2014 WL 4073215, at *23 (D. Conn. Aug. 14, 2014). Her FHA claims should be dismissed on this basis alone.

Second, Plaintiff has adequately alleged that she attempted to engage in a "real estate-related transaction" under the statute, but has not presented sufficient allegations of her relevant qualifications. A "residential real estate-related transaction" includes in its definition "[t]he making or purchasing of loans or providing other financial assistance—(A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or (B) secured by residential real estate." 42 U.S.C. § 3605(b)(1). While Wells Fargo cites case law indicating that a real estate-related transaction "does not include assistance for borrowers who have defaulted on their loans" (*Gorham-DiMaggio*, 592 F. Supp. 2d at 290), there is not enough information here to conclude that the loan modifications and new loans sought by Plaintiff fall outside of the definition of a real estate-related transaction. Especially considering the posture of this case with the instant motion to dismiss, the Court has no reason to conclude that Plaintiff "ha[d] defaulted on [her] loans" (*id.*) other than mere speculation. In fact, the plain language of the statute suggests that Plaintiff "attempted to engage in a 'real estate-related transaction'" (*Johnson*, 2000 WL

1558681, at *2): Plaintiff attempted to obtain a loan and/or loan modification for the purpose of improving or maintaining her home, and further, the loan would have been secured by the Property. Compl. at 2, 3.

However, Plaintiff's bare allegations that Wells Fargo "continually denied me loans to which I am qualified for as well as denied me a modification (3) times" do not sufficiently establish her qualifications for the financial assistance she sought. *See Iqbal*, 556 U.S. at 678 ("A pleading that offers 'labels and conclusions' or 'formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'") (citations omitted). For example, the exhibits attached to Plaintiff's opposition do not contain any information that explains her qualifications for the assistance she sought from Wells Fargo. *See* Pl.'s Opp., Exs. 1 & 2.[5] Plaintiff's FHA claims should be dismissed on this basis as well.

Third, Plaintiff has sufficiently alleged that Wells Fargo declined to modify Plaintiff's loan or rejected her applications for a new loan. *See* Compl. at 2; Pl.'s Opp. at 2. Finally, the Complaint fails to adequately allege that Wells Fargo refinanced mortgages or extended loans to other individuals with similar qualifications to Plaintiff. Plaintiff does not adequately allege her qualifications, as discussed in the second prong, and does not even attempt to describe the

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[5] These documents were incorporated by reference in the Complaint. Compl. at 2 (referring to a "9 page approval letter" and a "2012 denial"). Though Plaintiff calls Exhibit 1 to her opposition an approval letter, it is more accurately a commitment letter dated July 30, 2012 that explains the "loan conditions and documents needed to finalize your mortgage" (Pl.'s Opp, Ex. 1 at 1) and expresses the fact that "final approval is not guaranteed" (*id.* at 6). The "2012 denial" is a Truth-In-Lending Disclosure dated July 2, 2012. Pl.'s Opp, Ex. 2. As mentioned above, neither of these documents provides sufficient detail to explain why Plaintiff was ultimately qualified for the loan she sought (rather than preliminarily approved).

purported qualifications of others to whom Wells Fargo extended financial assistance. Plaintiff's FHA claims should be dismissed for this reason as well.

Accordingly, Plaintiff's FHA claims should be dismissed.

2. 42 U.S.C. § 2000a

Section 2000a broadly outlaws, *inter alia*, discrimination in places of public accommodation based on race. 42 U.S.C. § 2000a(a). "It is well-settled that a plaintiff alleging a violation of Section 2000a must allege facts which show [she] was deprived of equal use and enjoyment of a covered facility's services and facts which demonstrate discriminatory intent." *Macer v. Bertucci's Corp.*, 2013 WL 6235607, at *8 (E.D.N.Y. Dec. 3, 2013) (internal quotation marks and citations omitted).

Plaintiff fails to plead any of the components of a Section 2000a claim. Plaintiff has not alleged any deprivation of equal use or enjoyment of a "public accommodation," as defined in Section 2000a. *See* 42 U.S.C. § 2000a(b) (listing "establishments which serve[ ] the public [as] a place of public accommodation"). As stated earlier, Plaintiff has not alleged that she is a member of a protected class. Finally, even assuming that Plaintiff is a member of a protected class, she has not alleged "any other facts that plausibly support an inference that [Defendant] discriminated against [P]laintiff on account of her race." *Macer*, 2013 WL 6235607, at *8. Therefore, Plaintiff's claims under 42 U.S.C. § 2000a should also be dismissed.

3. 42 U.S.C. §§ 1981 and 2000d

42 U.S.C. § 1981 provides, *inter alia*, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." 42 U.S.C. § 1981(a). Title VI of the Civil Rights Act of 1964 provides that no

person shall be subject to exclusion from participation in, denial of benefits of, or discrimination in any program receiving federal financial activity based upon race. 42 U.S.C. § 2000d. "In order to establish a clam based on either statute, the plaintiff must show, *inter alia*, that the defendant discriminated against [her] on the basis of race, that the discrimination was intentional, and that the discrimination was a substantial or motivating factor for the defendant's actions." *Tolbert v. Queens Coll.*, 242 F.3d 58, 69 (2d Cir. 2001) (internal quotation marks and citations omitted). Plaintiff fails to establish any of these elements.

As discussed, Plaintiff has failed to establish that she is the member of a protected class, let alone made sufficient allegations that she was discriminated against based on her race. Therefore, Plaintiff has not sufficiently alleged that any such discrimination was intentional, nor has she alleged that any purported discrimination was the "substantial or motivating factor" for Wells Fargo's alleged failure to refinance Plaintiff's mortgage or to make additional loans to her. *See Iqbal*, 556 U.S. at 678. Accordingly, Plaintiff's claims under 42 U.S.C. §§ 1981 and 2000d should also be dismissed.

4. Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment essentially "direct[s] that all persons similarly situated should be treated alike" by state actors. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). For the reasons stated below, Plaintiff's potential claims under the Equal Protection Clause also fail.

First, an equal protection claim requires a plaintiff to allege her membership in a particular suspect class. *Giano*, 54 F.3d at 1057. Plaintiff has failed to do so here. Second, an equal protection claim is only valid against a state actor. *See Zaidi v. Amerada Hess Corp.*, 723 F. Supp. 2d 506, 518 & n.3 (E.D.N.Y. 2010) ("purely private action" not covered by equal

protection claim). Plaintiff does not allege that Wells Fargo was a state actor or was acting under color of state law. *See Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (to be found a state actor, there must be "a sufficiently close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.") (*quoted in Sykes v. Bank of Am.*, 723 F.3d 399, 406 (2d Cir. 2013)); *see also Secard v. Wells Fargo Bank, N.A.*, 2015 WL 6442563, at *3 (E.D.N.Y. Sept. 9, 2015) (for purposes of 42 U.S.C. § 1983, "Wells Fargo and Hogan Lovells are private actors."), *adopted by*, 2015 WL 6442346 (E.D.N.Y. Oct. 23, 2015). Third, as discussed above, Plaintiff has not pleaded sufficient facts to allow the Court to conclude that she was treated differently than others similarly situated as a result of intentional or purposeful discrimination. *See Phillips v. Girdich*, 408 F.3d 124, 129 (2d Cir. 2005). For these reasons, Plaintiff's equal protection claim should be dismissed.

C. Plaintiff's Other Claims

Plaintiff also alleges that Wells Fargo "has unfair lending practices" because they have denied her loans and loan modifications for which she is purportedly qualified. Compl. at 2. However, outside of Plaintiff's civil rights claims, there is no clear federal statute that is implicated by Plaintiff's allegations.

To the extent that Plaintiff is deemed to have pleaded any claims under state law, I respectfully recommend that the Court decline to exercise supplemental jurisdiction over them pursuant to 28 U.S.C. § 1367, and that the Court dismiss those claims as well.[6]

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[6] To the extent that any claims about alleged "unfair lending practices" are considered at this point, they amount to no "more than . . . unadorned, the-defendant-unlawfully-harmed me accusation[s]" that do not suffice to state a claim. *Iqbal*, 556 U.S. at 678. It may be theoretically possible, for example, that with additional factual allegations, Plaintiff may plead a violation of Section 349 of the New York General Business Law, which prohibits "[d]eceptive acts or

D. Leave to Amend

Rule 15(a)(2) of the Federal Rules of Civil Procedure provides that leave to amend a complaint shall be "freely give[n] . . . when justice so requires" (Fed. R. Civ. P. 15(a)(2)), though "a district court has discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007). "[W]here the plaintiff is unable to demonstrate that [s]he would be able to amend [her] complaint in a manner which would survive dismissal, opportunity to replead is rightfully denied." *Hayden v. Cnty. of Nassau*, 180 F.3d 42, 53 (2d Cir. 1999). In this Circuit, the "relaxed standard" in Rule 15 "applies with particular force to *pro se* litigants." *Pangburn v. Culbertson*, 200 F.3d 65, 70 (2d Cir. 1999). A *pro se* complaint should not be dismissed without giving the plaintiff an opportunity to amend her complaint except "in the most unsustainable of cases." *Boykin*, 521 F.3d at 216 (Sotomayor, J.); *accord Chavis*, 618 F.3d at 170.

Here, as discussed, the Complaint plainly fails to state a claim. However, it is possible that a valid claim may be stated through more detailed allegations. Accordingly, especially considering Plaintiff's *pro se* status, I respectfully recommend that Plaintiff be given leave to amend the Complaint so that she may have the opportunity to correct its myriad defects and to expound upon its conclusory allegations. *Palmer v. Fannie Mae*, 2016 WL 5338542, at *5

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practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state." N.Y. Gen. Bus. Law § 349(a). "To state a claim for deceptive business practices under this statute, plaintiff must allege that the act or practice is consumer-oriented, misleading in a material way, and that the plaintiff suffered as a result of the deceptive act." *Munroe v. Specialized Loan Servicing, LLC*, 2016 WL 5339364, at *9 n.11 (E.D.N.Y. Jan. 21, 2016) (internal quotation marks and citation omitted), *adopted by*, 2016 WL 1248818 (E.D.N.Y. Mar. 28, 2016). "With respect to the first element, [the] plaintiff must demonstrate that the acts or practices have a broader impact on consumers at large." *McCarthy v. Wachovia Bank. N.A.*, 759 F. Supp. 2d 265, 281 (E.D.N.Y. 2011) (internal quotation marks and citation omitted). At this point, however, even if supplemental jurisdiction were granted, I respectfully recommend that the Court dismiss any claims akin to those as insufficiently pleaded under *Iqbal*.

(E.D.N.Y. Sept. 23, 2016) (granting leave to amend to *pro se* plaintiff "in the interest of justice, especially in light of plaintiff's *pro se* status" so that she could "set forth in an amended complaint what facts support her conclusory claim that she was the victim of discrimination based on her pregnancy and familial status"); *see Tucker v. Bowery Residents' Comm.*, 95 F. App'x 386, 387-88 (2d Cir. 2004) (summary order) ("[I]t is clear that relatively minor amendments to the complaint could make claims that would not be frivolous under these [civil rights] acts. There are serious issues of law and fact as to whether a valid claim could ultimately be made out in this case, but where that is so, dismissal of a *pro se* complaint without giving the plaintiff a chance to replead is inappropriate.") (citation omitted).

III. CONCLUSION

For the foregoing reasons, I respectfully recommend that the Court grant the motion to dismiss filed by Defendant Wells Fargo Home Mortgage. However, I respectfully recommend that the Complaint be dismissed without prejudice and that Plaintiff be granted leave to amend the Complaint to assert a valid claim.

Defendant's counsel is directed to serve a copy of this Report and Recommendation upon Plaintiff at her last known address via return receipt delivery and to file proof of service with the Court within seven days of the filing of this Report and Recommendation.

IV. OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b)(2) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report and Recommendation to file written objections. Failure to file timely objections shall constitute a

waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. *See Marcella v. Capital Dist. Physicians' Health Plan, Inc.*, 293 F.3d 42, 46 (2d Cir. 2002); *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989); *see also Thomas v. Arn*, 474 U.S. 140 (1985).

SO ORDERED.

/s/
Steven L. Tiscione
United States Magistrate Judge
Eastern District of New York

Dated: Brooklyn, New York
January 19, 2017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DENISE JACKSON,

Plaintiff,

- against -

WELLS FARGO HOME MORTGAGE,

Defendant.

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MEMORANDUM & ORDER
15-CV-5062 (PKC) (ST)

PAMELA K. CHEN, United States District Judge:

Before the Court are the objections of *pro se* Plaintiff Denise Jackson to the Report and Recommendation of the Honorable Steven L. Tiscione, United States Magistrate Judge, recommending that Defendant Wells Fargo Home Mortgage's motion to dismiss be granted in its entirety. Finding no merit to Plaintiff's objections and no error in the Report and Recommendation, the Court dismisses this action.

I. Background

On August 27, 2015, Plaintiff Denise Jackson ("Plaintiff"), appearing *pro se*, brought this action against Defendant Wells Fargo Home Mortgage ("Defendant"), alleging civil rights violations in connection with Plaintiff's attempts to refinance her home mortgage and/or obtain additional loans. (*See generally*, Complaint, Dkt. 1.) On March 14, 2016, Defendant moved to dismiss the complaint. (Dkt. 17.) On April 12, 2017, the Court granted Plaintiff leave to amend the complaint after Judge Tiscione recommended dismissing the initial complaint without prejudice for failure to state a claim. (Minute Entry for Apr. 12, 2017; *see also* Dkt. 21.) Plaintiff's amended complaint (Dkt. 34) and supplement (Dkt. 36-1) (collectively, "Amended Complaint") allege the same civil rights violations as in the initial complaint, in addition to fraud, deceptive business practices, and breach of contract under state law. On September 21, 2017, Defendant

moved to dismiss the amended complaint. (Dkt. 42.) The motion was referred to Judge Tiscione for a Report and Recommendation ("R&R") pursuant to 28 U.S.C. § 636(b) and Local Rule 72.1(d). In the R&R, Judge Tiscione recommended that the Court grant Defendant's motion to dismiss. (Report & Recommendation ("R&R"), Dkt. 43, at ECF[1] 367.) On October 22, 2018, Plaintiff served objections to Judge Tiscione's R&R. (Plaintiff's Objections to R&R ("Pl.'s Objs."), Dkt. 51.)

II. Standard of Review

A district court reviewing a magistrate judge's recommended ruling "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). With respect to a magistrate judge's recommendation on a dispositive matter, the Court reviews *de novo* those determinations as to which a party has specifically objected. *See id.* ("A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made."); Fed. R. Civ. P. 72(b)(3) ("The district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to."). However, "objections that are merely perfunctory responses argued in an attempt to engage the district court in a rehashing of the same arguments set forth in the original papers will not suffice to invoke *de novo* review." *Frankel v. New York City*, Nos. 06-CV-5450 (LTS) (DFE) & 07-CV-3436 (LTS) (DFE), 2009 WL 465645, at *2 (S.D.N.Y. Feb. 25, 2009) (quotation and brackets omitted). Accordingly, "[g]eneral or conclusory objections, or objections which merely recite the same arguments presented to the

[1] "ECF" refers to the pagination generated by the Court's CM/ECF docketing system and not the document's internal pagination.

magistrate judge, are reviewed for clear error." *Chime v. Peak Sec. Plus, Inc.*, 137 F. Supp. 3d 183, 187 (E.D.N.Y. 2015) (quotation omitted).

At the same time, the Court is mindful that "the submissions of a *pro se* litigant must be construed liberally and interpreted to raise the strongest arguments that they suggest." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (quotation and emphasis omitted). Nevertheless, "even a *pro se* party's objections to a Report & Recommendation must be specific and clearly aimed at particular findings in the magistrate's proposal, such that no party be allowed a 'second bite at the apple' by simply relitigating a prior argument." *Pinkney v. Progressive Home Health Servs.*, No. 06-CV-5023 (LTS) (JCF), 2008 WL 2811816, at *1 (S.D.N.Y. July 21, 2008).

III. Analysis

The Court has reviewed the amended complaint, the parties' respective submissions relating to Defendant's motion to dismiss, and Judge Tiscione's well-reasoned and thorough R&R. While Plaintiff nominally raises objections to the R&R's recommended dismissal of her Fair Housing Act ("FHA") claim, she fails to specifically articulate any valid objections to this or her other claims.[2] The Court addresses each of Plaintiff's claims, as to which the R&R recommends dismissal, in turn.

[2] Defendant requests that the Court decline to consider the "new evidence" presented in Plaintiff's Objections to the R&R. (Dkt. 50, at ECF 412–13.) Given Plaintiff's *pro se* status, the Court elects to consider the documents Plaintiff affixes to her objections (Pl.'s Objs., at ECF 445–71), though it ultimately has not influenced the outcome in this matter. *See Mil'chamot v. N.Y.C. Hous. Auth.*, No. 15-CV-108 (PAE), 2016 WL 659108, at *1 n.1 (S.D.N.Y. Feb. 16, 2016) ("[B]ecause a *pro se* plaintiff's allegations must be construed liberally, it is appropriate to consider factual allegations made in a *pro se* plaintiff's opposition papers, so long as the allegations are consistent with the complaint.").

A. Federal Civil Rights Claims

Plaintiff brings several claims under federal civil rights laws, namely: the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*; 42 U.S.C. § 1981 ("§ 1981"); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("Title VI"); and the Equal Protection Clause, U.S. Const. amend. XIV, § 1. (Amended Complaint ("Am. Compl."), Dkt. 36, at ECF 172.)

1. FHA Claim

Although Plaintiff's objections reference the FHA (Pl.'s Objs., at ECF 427, 431), the Court is unable to discern any specific objection Plaintiff makes as to the R&R's reasoning on her FHA claim. The Court will therefore review the R&R's conclusion as to this claim for clear error. *See Pinkney*, 2008 WL 2811816, at *1 ("To the extent . . . that a party makes only conclusory or general objections, or simply reiterates the original arguments, the Court will review the Report [& Recommendation] strictly for clear error.").

The R&R did not clearly err in concluding that Plaintiff's FHA claim, which encompasses three mortgage denials, is partially time-barred. A party bringing a civil action under the FHA must do so no more than two years "after the occurrence or the termination of an alleged discriminatory housing practice." 42 U.S.C. § 3613(a)(1)(A). Judge Tiscione rejected Plaintiff's effort to circumvent the statute of limitations, reasoning as follows:

> Plaintiff attempts to argue that her 2014 loan denial somehow extends the statute of limitations on the 2012 denial because, in the 2014 Resolution Letter, "Wells Fargo acknowledged their fault for breaching the 2012 contract." . . . To the extent Plaintiff is arguing that equitable tolling applies, she has not alleged sufficient facts to justify equitable tolling. . . . There does not appear to be any other legal basis for the 2014 denial tolling the statute of limitations for the 2012 denial. . . . [T]he denials are discrete events that "constitute independently actionable conduct" and would not be considered a continuing violation for statute of limitations purposes. *See Jordan v. Chase Manhattan Bank*, 91 F. Supp. 3d 491, 503–04 (S.D.N.Y. 2015). Therefore, any of the alleged discriminatory acts or practices that occurred or terminated before August 27, 2013 are time-barred.

(R&R, at ECF 371 (citations to court documents omitted).)

The Court holds that this reasoning is not clearly erroneous. Plaintiff's allegations of mortgage loan denials in 2012, 2013, and 2014 "pertain to separate and discrete events" that, "if motivated by discriminatory animus, would constitute independently sanctionable conduct." *Jordan*, 91 F. Supp. at 503–04. Any continuing-violation theory of equitable tolling that would salvage the timeliness of an FHA claim based on the 2012 denial would therefore fail. *See Pantoja v. Scott*, No. 96-CV-8593 (AJP), 2001 WL 1313358, at *11 (S.D.N.Y. Oct. 26, 2001) ("[T]he continuing violations theory should be applied where the type of violation . . . could not reasonably have been expected to be made the subject of a lawsuit when it first occurred because its character as a violation did not become clear until it was repeated during the limitations period." (quotation and brackets omitted)).

Furthermore, the Court holds that the R&R did not clearly err in concluding that, to the extent Plaintiff's FHA claim was not time-barred, it nevertheless should be dismissed for failure to state a claim. Under the FHA, a plaintiff states a claim of housing discrimination by showing: "(1) that [she is a] member[] of a protected class; (2) that [she] sought and w[as] qualified to rent or purchase the housing; (3) that [she] w[as] rejected; and (4) that the housing opportunity remained available to other renters or purchasers." *Mitchell v. Shane*, 350 F.3d 39, 47 (2d Cir. 2003). The R&R found that Plaintiff's FHA claim failed to sufficiently plead the second and fourth elements. Although Plaintiff alleged that she "qualified for, met the terms and conditions, was eligible for, and met all requirements of the loans that [she] requested and applied for" (Am. Compl., Dkt. 36-1, at ECF 175), Judge Tiscione did not err in concluding that these allegations constituted "formulaic recitations of the elements of a cause of action" that "will not do." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (quotation omitted). As the R&R observed, the amended complaint

incorporates a Resolution Letter that plainly indicates that Plaintiff did not meet the income-to-debt ratio required for her 2013 loan and was unable to pay the fees required for her 2012 loan. (R&R, at ECF 373.) *See Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103, 108 (2d Cir. 2009) (affirming dismissal of claim where the "complaint present[ed] only conclusory allegations as to [one] element, and we find them facially implausible").[3]

Most importantly, as Judge Tiscione correctly observed, Plaintiff does not adequately allege that the housing opportunity she was denied remained available to other renters or purchasers. Plaintiff alleges that "Wells Fargo refused to give [her] the mortgage assistance because of [her] race"; that "[e]veryone [she] communicated with and had authority over [her] application was white"; that she was never offered a home equity loan despite her qualifications; and that Wells Fargo targeted her based on the location of her property through the unlawful practice of "redlining." (Am. Compl., Dkt. 36-1, at ECF 175, 181, 186.) Although Plaintiff need not plead discriminatory animus on the part of Defendant to state an FHA claim, she must nevertheless allege facts showing that Defendant treated her "differently from similarly situated [individuals] not in the protected [racial] class[], despite her qualifications for the loan[s,] because of her race." *Boykin v. KeyCorp*, 521 F.3d 202, 206 (2d Cir. 2008) (quotation omitted); *see id.* at 215 (finding the allegations in the complaint sufficient to state a claim).

[3] As for the 2014 loan, the Court does not find Judge Tiscione's consideration of Plaintiff's overall financial eligibility—*i.e.*, that "the plausibility of [Plaintiff's] general allegation[] that she was qualified [for the 2014 loan] is undermined by her failure to meet the requirements for the 2012 and 2013 loans, as detailed in the documents incorporated by reference in the Amended Complaint[]" (R&R, at ECF 373)—to be clearly erroneous. *See Alcantara-Flores v. Vlad Restoration Ltd.*, No. 16-CV-3847 (MKB) (RML), 2017 WL 1655187, at *2 (E.D.N.Y. May 2, 2017) (describing "highly deferential standard" of clear error review as justifying reversal only "if, based on all the evidence, [the] reviewing court 'is left with the definite and firm conviction that a mistake has been committed'" (quoting *In re Gordon*, 780 F.3d 156, 158 (2d Cir. 2015)).

As the R&R observed, Plaintiff does not allege that Defendant offered home equity loans to similarly qualified applicants of a different race and does not attempt to connect her protected status to Defendant's allegedly wrongful refusal to approve her loan applications. (R&R, at ECF 374.) Plaintiff thus fails to state a claim under the FHA. *See Williams v. Calderoni*, No. 11-CV-3020 (CM), 2012 WL 691832, at *7 (S.D.N.Y. Mar. 1, 2012) ("[I]t is hornbook law that the mere fact that something bad happens to a member of a particular racial group does not, without more, establish that it happened *because* the person is a member of that racial group." (emphasis in original)). Moreover, as the R&R properly concluded, Plaintiff's reference to "redlining" does not suffice to plead this element. *See Ng v. HSBC Mortg. Corp.* (RRM) (VVP), No. 07-CV-5434, 2010 WL 889256, at *11 (E.D.N.Y. Mar. 10, 2010) (dismissing claim where the allegations tendered in support were "vague, conclusory," and "lack[ed] the sort of factual specificity that forms the basis for a plausible claim"). Neither does the amended complaint's incorporation of newspaper articles about Defendant's prior misconduct that bears no apparent connection to Plaintiff's situation or FHA claim. *See Palmer v. Fannie Mae*, No. 14-CV-4083 (JFB) (AYS), 2016 WL 5338542, at *3 n.4 (E.D.N.Y. Sept. 23, 2016) ("Plaintiff's opposition references a newspaper article concerning maternity-related mortgage discrimination; however, the article . . . makes no reference to [the defendant], and thus, it appears inapposite to the instant case. In any event, plaintiff does not explain how the alleged practices referenced in the article relate to her situation." (citation omitted)).

Plaintiff's FHA claim is therefore dismissed.

2. Section 1981 and Title VI Claims

Plaintiff's objections make no specific reference to her § 1981 and Title VI claims, so the Court will review the R&R for clear error as to these claims. *See Pinkney*, 2008 WL 2811816, at

*1. In order to state a claim under either of these statutes, "the plaintiff must show, *inter alia*, that the defendant discriminated against [her] on the basis of race, that that discrimination was intentional, and that the discrimination was a substantial or motivating factor for the defendant's actions." *Tolbert v. Queens Coll.*, 242 F.3d 58, 69 (2d Cir. 2001) (citations and quotations omitted).

The R&R did not clearly err in determining that the amended complaint fails to state a claim based on § 1981 or Title VI.[4] The Court notes that the standard for liability under these statutes is *more* exacting than the standard required to sustain an FHA claim, which the Court has already determined Plaintiff has failed to meet. As stated, *supra*, Plaintiff alleges that "Wells Fargo refused to give [her] the mortgage assistance because of [her] race"; that "[e]veryone [she] communicated with and had authority over [her] application was white"; that she was never offered a home equity loan despite her qualifications; and that Wells Fargo targeted her based on the location of her property through the unlawful practice of "redlining." (Am. Compl., Dkt. 36-1, at ECF 175, 181, 186.)

Because these allegations "consist[] of nothing more than conclusory allegations that [Plaintiff] was mistreated as a result of h[er] race," *Brown v. Greene*, No. 11-CV-4917 (BMC), 2012 WL 911560, at *3 (E.D.N.Y. Mar. 16, 2012), the Court adopts the R&R's recommendation to dismiss. *See Burgis v. N.Y.C. Dep't of Sanitation*, 798 F.3d 63, 68 (2d Cir. 2015) ("[T]o state a discrimination claim under . . . § 1981, plaintiffs must sufficiently allege that defendants acted with discriminatory intent. Here, plaintiffs fail to allege in other than conclusory fashion any specific instances of discrimination with respect to any individual plaintiff or others similarly

[4] The Court holds, for the same reasons articulated in Part III.A(1), that Judge Tiscione did not clearly err in determining that the § 1981 and Title VI claims should be partially dismissed on timeliness grounds. (R&R, at ECF 378.)

situated." (citation omitted)); *Gregory v. Daly*, 243 F.3d 687, 692 (2d Cir. 2001) ("[A] complaint consisting only of naked assertions, and setting forth no facts upon which a court could find a violation of the Civil Rights Acts, fails to state a claim under Rule 12(b)(6)." (quotation and brackets omitted)).

Accordingly, the Court dismisses Plaintiff's § 1981 and Title VI claims.

3. Equal Protection Claim

Plaintiff's objections make no specific reference to her Equal Protection claim, so the Court will review the R&R for clear error as to this claim. *See Pinkney*, 2008 WL 2811816, at *1.

The Court holds that the R&R did not clearly err in recommending dismissal of Plaintiff's Equal Protection Claim. First, as the R&R noted (R&R, at ECF 378–79), Equal Protection claims may only be brought against state actors, and "a private entity" like Defendant "does not become a state actor for purposes of § 1983 merely on the basis of the private entity's creation, funding, licensing, or regulation by the government." *Fabrikant v. French*, 691 F.3d 193, 207 (2d Cir. 2012) (quotation omitted). "Rather, there must be such a close nexus between the state and the challenged action that the state is responsible for the specific conduct of which the plaintiff complains." *Id.* (quotation, brackets, and emphasis omitted). As Judge Tiscione explained (R&R, at ECF 378–79), courts routinely consider mortgage lenders like Defendant to be private entities in the context of claims like the Equal Protection action initiated by Plaintiff. *See, e.g.*, *DeSouza v. Park W. Apartments, Inc.*, No. 15-CV-1668 (MPS), 2018 WL 2990099, at *16 (D. Conn. June 14, 2018); *Secard v. Wells Fargo Bank, N.A.*, No. 15-CV-499 (JS) (ARL), 2015 WL 6442563, at *3 (E.D.N.Y. Sept. 9, 2015); *Brown v. Chase Bank*, No. 13-CV-5309 (WFK) (LB), 2013 WL 5537302, at *2 (E.D.N.Y. Oct. 7, 2013). Second, as explained, *supra*, the R&R did not clearly err in concluding that Plaintiff has not pleaded sufficient facts to allow the Court to conclude that she

was treated differently than other similarly situated individuals as a result of discriminatory animus. *See Philips v. Girdich*, 408 F.3d 124, 129 (2d Cir. 2005) ("To prove a violation of the Equal Protection clause, . . . a plaintiff must demonstrate that he was treated differently than others similarly situated as a result of intentional or purposeful discrimination.").

Accordingly, Plaintiff's Equal Protection Claim is dismissed.

B. State Law Claims

Having dismissed all of Plaintiff's federal claims, the Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state claims. *See* 18 U.S.C. § 1367(c)(3); *Marcus v. AT&T Corp.*, 138 F.3d 46, 57 (2d Cir. 1998) ("In general, where the federal claims are dismissed before trial, the state claims should be dismissed as well.").

C. Leave to Amend

"Although Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend shall be freely given when justice so requires, it is within the sound discretion of the district court to grant or deny leave to amend." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007) (quotation omitted). In recommending that the Court deny Plaintiff leave to amend the amended complaint, Judge Tiscione reasoned:

> Here, Plaintiff has had multiple opportunities to allege sufficient specific facts to render her claims plausible, including in her original Complaint, the Amended Complaint, and in her opposition papers. Leave to amend would be futile because plaintiff has already had two bites at the apple and they have proven fruitless. Plaintiff's allegations of discriminatory intent, deceptive practices, and fraud still lack any factual basis and are purely conjectural. It does not appear that further opportunities to amend would allow Plaintiff to cure such significant defects. An amendment is considered futile where the plaintiff is unable to demonstrate that she would be able to cure the defects in a manner that would survive a motion to dismiss.
>
> In addition, leave to amend is particularly inappropriate where the problem with plaintiff's causes of action is substantive. Plaintiff's claims suffer from numerous substantive defects. First, several of the claims are potentially time barred. Second,

> the attached documents fail to support her breach of contract claims as a matter of law. Third, a lack of state action bars her Equal Protection Clause claim. Fourth, Plaintiff fails to provide any legal basis for her mortgage fraud claim. Finally, the documents underpinning Plaintiff's loan denial discrimination claims indicate that she was objectively unqualified to receive at least the 2012 and 2013 loans.

(R&R, at ECF 393–94 (quotations, citations, and brackets omitted).) The Court agrees with the above analysis and therefore denies Plaintiff leave to amend for a second time. *See Nielsen v. Rabin*, 746 F.3d 58, 62 (2d Cir. 2014) ("A *pro se* complaint should not be dismissed without the Court granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated. However, leave to amend a complaint may be denied when amendment would be futile." (quotations and citation omitted)).

CONCLUSION

Plaintiff has failed to raise any objection that warrants rejection or modification of the R&R, with which the Court concurs. The Court rejects Plaintiff's objections, adopts in full Judge Tiscione's R&R, and grants Defendant's motion to dismiss, as recommended by Judge Tiscione. The Clerk of Court is respectfully directed to enter judgment in Defendant's favor and terminate this action.

SO ORDERED.

/s/ Pamela K. Chen
Pamela K. Chen
United States District Judge

Dated: March 27, 2019
Brooklyn, New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DENISE JACKSON,

JUDGMENT

Plaintiff,

15-CV-5062 (PKC) (ST)

v.

WELLS FARGO HOME MORTGAGE,

Defendant.

----------X

A Memorandum and Order of the Honorable Pamela K. Chen, United States District Judge, having been filed on March 27, 2019, adopting the Report and Recommendation of Magistrate Judge Steven Tiscione, dated August 10, 2018, granting Defendant's motion to dismiss; it is

ORDERED and ADJUDGED that Defendant's motion to dismiss is granted; and that judgment is hereby entered in favor of Defendant.

Dated: Brooklyn, New York
March 28, 2019

Douglas C. Palmer
Clerk of Court

By: */s/Jalitza Poveda*
Deputy Clerk

Additional material from this filing is available in the Clerk's Office.