APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-11231

KAREN C. YEH HO,
Plaintiff-Appellant,
Versus
WELLS FARGO BANK, N.A.,
Defendant-Appellee.

Non-Argument Calendar

Filed date: April 27, 2023

[Document 27-1]

[DO NOT PUBLISH]

Honorable Judges Newsom, Grant and Anderson
(Circuit Judges)

Appeal from the United States District court for the
Southern District of Florida
D.C. Docket No. 9:15-cv-81522-KAM

OPINION OF THE COURT

Before NEWSOM, GRANT, and ANDERSON, Circuit Judges.
PER CURIAM:

Karen Yeh Ho, proceeding *pro se*, appeals following the judgment in favor of Wells Fargo Bank, National Association ("Wells Fargo") as to her claims arising from the foreclosure proceedings of her home, and the loan modification activities during the foreclosure proceedings. First, she argues that the district court erred in granting summary judgment to Wells Fargo as to her discrimination claim under the Equal Credit Opportunity Act ("ECOA") and as to her claim under the Real Estate Settlement Procedures Act ("RESPA").[1] Second, she argue that the district court erred in entering judgment after a bench trial on her ECOA notice claim. Third, Yeh Ho contends that the district court erred in striking her demand for a jury trial.[2] Fourth, she asserts that she is entitled to punitive damages.

I.

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[1] We summarily reject Yeh Ho's RESPA claim. She failed to address this claim in her initial brief on appeal and she cannot adopt her brief in a case not consolidated with this case.
[2] We also summarily reject this claim. Yeh Ho has abandoned this claim by failing to sufficiently address the issue in her brief on appeal. In any event, the district court did not abuse its discretion in striking her demand for a jury trial because Yeh Ho failed to respond to Wells Fargo's motion in the district court. See S.D. Fla. L.R. 7.1(c)(1) (Stating that failure to respond to an opposing party's motion may be deemed sufficient cause for granting the motion).

We review the grant of summary judgment *de novo*, applying the same legal standards as the district court. *Yarbrough v Decatur Hous. Auth.*, 941 F.3d 1022, 1026 (11th Cir. 2019).

On appeal from a judgment in a bench trail, we review a district court's conclusion of law and the application of law to the facts *de novo,* but review the district court's factual findings for clear error. *U.S. Commodity Futures Trading Comm'n v. S. Tr. Metals, Inc.*, 894 F.3d 1313, 1322 (11th Cir. 2018). A district court's findings of fact will not be reversed unless we are left "with the definite and firm conviction that a mistake has been committed" after reviewing the record. *Id.* (Quotation marks omitted).

"When considering a motion for summary judgment, ... courts must construe the facts and draw all inferences in the light most favorable to the nonmoving party and when conflicts arise between the facts evidenced by the parties. [they must] credit the nonmoving party's version." *Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1252 (11th Cir. 2013) (quotation marks omitted, second alteration in original) (concluding that the district court erred in improperly discounting the plaintiff's sworn statements and accepting the officers' assertions as uncontroverted). "Even if a district court believes that the evidence presented by one side is of doubtful veracity, it is not proper to grant summary judgment on the basis of credibility choices." *Id.* (quotation marks omitted). However, the factual dispute must be genuine, "that is, if the evidence is such that a

reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

"[I]ssues not briefed on appeal by a pro se litigant are deemed abandoned." *Timson v. Sampson*, 518 F. 3d 870, 874 (11th Cir. 2008) (citation omitted); see also *United States v. Campbell*, 26 F.4th 860, 873 (11th Cir. 2022) (en banc) (holding that issues not properly presented on appeal are deemed forfeited and will not be addressed absent extraordinary circumstance), cert. denied, 143 S. Ct. 95 (2022). "We have long held that an appellant abandons a claim when [s]he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014). Likewise, "[t]his Court has repeatedly held that an issue not raised in the district court and raised for the first time in an appeal will not be considered by this[C]ourt." *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004)(quotation marks omitted)).

Rule 28 of the Federal Rules of Appellate Procedure provides that, "[i]n a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopy by reference a part of another's brief." Fed. R. App. P. 28(i). Our local rules explain that, in order to adopt another party's brief, the appellant must

"include a statement describing in detail which briefs and which portions of those briefs are adopted." 11th Cir. R. 28-1(f). Federal Rule of Appellate Procedure 28(i) does not allow parties in non-consolidated appeals to automatically adopt and rely on briefs of another case unless they separately move for adoption and the motion is granted. *United States v. Bichsel*, 156 F.3d 1148, 1150 n. (11th Cir. 1998).

The ECOA provides that it shall be unlawful for any creditor to discriminate against any applicant on the basis of marital status. 15 U.S.C. § 1691(a)(1). Regulation B was promulgated to enforce the ECOA. *Regions Banks v. Legal Outsource PA*, 936 F.3d 1184, 1190 (11th Cir. 2019); see 12 C.F.R. § 202 et seq. Both the ECOA and Regulation B carve out exceptions for actions that are not considered discrimination, including when a creditor may require a spouse's signature. See 15 U.S.C. § 1691d(a); 12 C.F.R. § 202.7(d). Under the ECOA, a creditor does not engage in discriminatory conduct when making "[a] request for the signature of both parties to a marriage for the purpose of creating a valid lien, passing clear title, waiving inchoate rights to property, or assigning earnings." 15 U.S.C. § 1691(a). Likewise, Regulation B provides that a creditor may require a spouse's signature upon an applicant's request for secured credit if the creditor reasonably believes it necessary "under applicable state law to make the property being offered as security available to satisfy the debt in the event of default." 12 C.F.R. § 202.7(d)(4).

Additionally, both the ECOA and Regulation B include exceptions to creditor conduct constituting "adverse action." 15 U.S.C. § 1961(d)(6) (stating that

the term "does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default'); 12 C.F.R. § 202.2(c)(2)(ii) (explaining that any action or forbearance taken with respect to an account that is delinquent or in default is not adverse action).

The ECOA and Regulation B also impose certain notification requirements for creditors. See 15 U.S.C. § 1691(d); 12 C.F.R. § 202.9. The ECOA requires creditors to provide applicants against whom adverse action is taken with a statement of reasons regarding the action. 15 U.S.C. § 1961(d)(2). If an application is incomplete, the creditor must, within 30 days of receiving the incomplete, send the applicant a written notice "specifying the information needed, designating a reasonable period of time for the applicant to provide the information, and informing the applicant that failure to provide the information requested will result in no further consideration being given to the application." 12 C.F.R. § 202.9(c)(1)-(2). If the applicant fails to provide the requested information within the designated time period, the creditor is relieved of other notification requirements. *Id.* § 202.9(c)(2). A creditor may orally inform an applicant of the need for additional information, but if the applicant does not supply the information, the creditor must send the written notice. *Id.* § 202.9(c)(3).

The Florida Constitution states that "[t]he owner of home stead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift." Fla. Const. Art. X, § 4. "Florida courts have consistently interpreted this ... provision as

requiring spousal joinder in the execution of a mortgage on homestead property in order for the mortgage to encumber the property and the enforceable in foreclosure, even where only the signatory spouse is an owner of record on the property's deed." Crawford v. Fed. Nat'l Mortg, Ass'n, 266 So. 3d 1274, 1277 (Fla. Dist. Ct. App. 2019).

The district court granted summary judgment in favor of Wells Fargo on Yeh Ho's ECOA discrimination claim but denied summary judgment on her ECOA notice claim. In the subsequent bench trial on the ECOA notification claim, the district court correctly concluded that Wells Fargo had satisfied applicable notice requirements.

We first address Yeh Ho's argument that the district court erred in granting summary judgment for Wells Fargo on her ECOA discrimination claim. We concluded that the district court did not err. Because Yeh Ho had defaulted on the loan at the time Wells Fargo offered the loan modification, the anti-discrimination provision of the ECOA and Regulation B did not apply to her. 15 U.S.C. § 1691(d)(6); 12 C.F.R. § 202.2(c)(2)(ii). On appeal, Yeh Ho does not dispute that the loan was in default. Moreover, even assuming the relevant anti-discrimination provisions did apply to her, the district court correctly concluded that it was reasonable for Wells Fargo to require either Wing's signature or a divorce decree in light of Florida's homestead laws. See Crawford, 266 So. 3d at 1277; 15 U.S.C. §§ 1691d(a), 1691(b)(1). The ECOA expressly provides that such a requirement does not

constitute discrimination. 15 U.S.C. §§ 1691d(a), 1691(b)(1).

Turning to Yeh Ho's argument that the district court erred in entering judgment in favor of Wells Fargo after the bench trial on her ECOA notice claim, we also conclude that the district court did not err. We conclude that Wells Fargo satisfied the notice requirements with respect to the deficiencies in Yeh Ho's application for loan modification. The evidence presented at the bench trial demonstrates that, within 30 days after receiving Yeh HO's final trial payment (deemed by the district court to constitute an application for loan modification), Wells Fargo sent Yeh Ho the November 25, 2013, letter regarding the information it needed to complete the application, which Yeh Ho concedes that she received. This letter satisfied 12 C.F. R. § 202.9(c)(2)'s requirements, because it: (1) specified the information needed, including her and Wing's signatures, or documents indicating why he should not have to sign; (2) designated a reasonable time period of 14 days to provide the information; and (3) informed her that failure to provide the required information would result in Wells Fargo cancelling the modification. 12 C.F.R. § 202.9(c)(2). Moreover, although Yeh Ho's failure to supply the required information relieved Wells Fargo of any other notification requirements, Wells Fargo subsequently informed Yeh Ho of the application's incompleteness again via phone call on January 2, 2014, and then notified her that it could not finalize the agreement on January 13, 2014. 12 C.F.R. § 202.9(a)(1)(ii), (c)(2), (c)(3). The district court thus did not err in

concluding that Wells Fargo provided the requisite notice.

Because all of her claims have failed.[3] Yeh Ho is not entitled to punitive damages.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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[3] Although Yeh Ho also asserts breach of contract claims on appeal, she did not raise such claims in the district court. Thus, such claims are not properly before us.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. **17-11918**

KAREN C. YEH HO,
Plaintiff-Appellant,
Versus
WELLS FARGO BANK, N.A.,
Defendant-Appellee.

Non-Argument Calendar

Filed date June 21, 2018

[DO NOT PUBLISH]

Honorable Judges: Marcus, Martin and Rosenbaum
(Circuit Judges)

Appeal from the United States District court for the
Southern District of Florida
D.C. Docket No. 9:15-cv-81522-KAM

USCA 11 CASE: 17-11918 Document: Date Filed: 06/21/2018 Page: 2 of 13
Before MARCUS, MARTIN and Rosenbaum, Circuit Judges.
PER CURIAM:

Karen Yeh Ho, proceeding pro se, sued Wells Fargo Bank, N.A. for damages she says resulted from Wells Fargo's foreclosure on her house. The district court dismissed her complaint for failure to state a claim, as barred by the Florida litigation privilege, and, in the case of one claim, as barred by the Rocker-Feldman doctrine.[1] After careful review, we affirm the district court in part and reverse in part.

I. Background

In February 2012, Wells Fargo, acting as a loan servicer for Fannie Mae, filed a foreclosure complaint in Florida state court against Ho and her husband. Ho moved to dismiss the foreclosure complaint, asserting Wells Fargo's lack of standing among other defenses.

In August 2013, Ho received an unsolicited loan modification offer from Wells Fargo. The offer required her to continue residing in the home, make three trial payments, continue to make timely payments thereafter, and sign relevant final modification documents. She made the three trial payments. In November 2013, she received the loan

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[1] See Rooker v. Fidelity Trust Co., 263 U.S. 413. 44 S. Ct. 149 (1923), and D.C. Court of Appeals v. Feldman, 460 U.S. 462, 103 S. Ct. 1303 (1983).

modification agreement from Wells Fargo, which she completed and returned to Wells Fargo. Wells Fargo received Ho's signed loan modification agreement on December 6, 2013. But Ho never got a written confirmation of Wells Fargo's receipt of the agreement or any indication of whether the agreement was complete or other loan modification options were available.

In March 2014, the Florida state court denied Ho's pending motion to dismiss the foreclosure complaint. The state court set a trial date of July 17. Six weeks before the trial, new counsel appeared on behalf of Ho. Two days before trial, Ho moved for a continuance, which the court denied on the day of trial. When the delay was not allowed, counsel for Ho and Wells Fargo stipulated to the entry of judgment in favor of Wells Fargo. Ho had no knowledge of the stipulation and judgment and did not consent to it or sign it. The state court entered final judgment and set a foreclosure sale for November 14.

On October 14, the court granted Ho's attorney's request to withdraw from representing her. That day, Ho, proceeding pro se, moved to vacate the foreclosure sale and set a new trial date. Then, on November 10, just days before the sale, she moved to cancel it. The state court denied these motions, and, on November 14, Ho's home was sold.

On December 17, 2014, Ho received the first written response from Wells Fargo about her loan modification agreement. This was over a year after she'd sent the agreement to Wells Fargo and after

her home was sold. In the letter, Wells Fargo explained it rejected Ho's loan modification agreement as incomplete because it was unsigned by her husband.

After the sale, Ho, still proceeding pro se, continued filing motions seeking relief from the foreclosure based on Wells Fargo's fraud. Ultimately, on January 16, 2015, the state court denied her request to vacate the final judgment or rescind the foreclosure sale. She appealed from the state court's order, and the Fourth District Court of Appeal affirmed.

Soon after her appeal concluded, Ho filed this action in federal court. Her complaint includes a claim for the violation of the Real Estate Settlement Practices Act ("RESPA") as well as a claim for "wrongful foreclosure."[2] In her complaint, she says she could have kept her house if Wells Fargo had not foreclosed on it in violation of RESPA. She alleges the foreclosure caused her to suffer more than $362,000 in losses from money she had invested in the home, lost rental income, and unnecessary fees

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[2] The complaint also asserts claims for: (i) fraudulent inducement and fraudulent misrepresentation (Counts II-III); (ii) violations of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.203 (Count IV); (iii) wire or radio fraud, 18 U.S.C. § 1343 (Count V); (iv) violations of the Consumer Financial Protection Act, 12 U.S.C. § 5481 (Count VII_VIII); (v) violations of the Fair Debt Collection Practice Act, 15 U.S.C. § 1692e (Count IX); and (vi) infliction fo emotional distress (Count X). The district court dismissed these claims. Because Ho has not addressed these claims on appeal, she has abandoned them. See Timson v. Sampson, 518 F.3d 870, 874 (11th Cir. 2008) (per curiam).

and costs in defending the foreclosure action. She also alleges wrongful foreclosure because Wells Fargo lacked standing to enforce to enforce the mortgage and fraudulently secured the foreclosure.

Wells Fargo moved to dismiss Ho's complaint. The district court granted Wells Fargo's motion, determining that her allegations either failed to state a claim, were barred by Florida's litigation privilege, or were barred by the Rooker Feldman doctrine. This appeal followed.

II. Standard of Review

A district court's dismissal of a complaint for failure to state a claim is reviewed de novo. Almanza v. United Airlines, Inc., 851 F.3d 1060, 1066 (11th Cir. 2017). We accept the facts alleged in the complaint as true and construe them in the light most favorable to Ho, the plaintiff. *Id.* To survive a motion to dismiss, a complaint need only allege sufficient facts, accepted as true, to "state a claim to relief that is plausible on its fact." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. CT. 1955, 1974 (2007). The complaint must "raise a right to relief above the speculative level," but it need not contain "detailed factual allegations." *Id.* at 555, 127 S. Ct. at 1964-65. Pro se complaints are held to a less stringent standard than those drafted by lawyers. Tannenbaum v. United States, 148 F.3d 1262, 1263 (11th Cir. 1998)(per curiam).

We also review de novo "a district court's decision that the Rooker-Feldman doctrine deprives it of subject matter jurisdiction." Doe v. Fla. Bar, 630 F.3d 1336, 1340 (11th Cir. 2011).

III. DISCUSSION

A. Whether the complaint states a claim for the violation of RESPA ?

The complaint alleges Wells Fargo violated RESPA and its implementing regulations, known as Regulation X. See 12 U.S.C. § 2605(f); 12 C.F.R. § 1024.41(a). The RESPA claim primarily relies on the notification procedures relating to the review of loss mitigation applications, 12 C.F.R. § 1024.41(b)(2)(B), (c), and the prohibition on foreclosure sale. Id. § 1024.41(g).

Section 1024.41(b)(2)(B) requires servicers to notify borrowers in writing whether their loss mitigation applications are complete or incomplete within five days of receipt. 12 C.F.R. § 1024.41(b)(2)(B). If the application is incomplete, the servicer must "state the additional documents and information the borrower must submit to make the loss mitigation application complete." Id. Similarly, § 1024.41(c)(1) requires servicers to evaluate applications and notify borrowers of their determination in writing within thirty days of receiving an application. *Id.* § 1024.41(c)(1). Except for two exceptions not relevant here, subsection (c)(1)'s requirements apply equally to complete and incomplete applications. Id. § 1024.41(c)(2)(i).

finally, § 1024.41(g) prohibits a servicer from conducting a foreclosure sale "[i]f a borrower submits a complete loss mitigation application" after a servicer commences a foreclosure proceeding but more than thirty-seven days before a foreclosure sale. Id. § 1024.41(g). On exception to this general prohibition permits such a sale if "[t]he servicer has sent the borrower a notice pursuant to a paragraph (c)(1)(ii) of this section that the borrower is not eligible for any loss mitigation option and the appeal process in paragraph (h) of this section is not applicable, the borrower has not requested an appeal within the applicable time period for requesting an appeal, or the borrower's appeal has been denied" Id. § 2024.41(g)(1).

Ho alleged Wells Fargo received her signed agreement on December 6, 2013 and failed to provide her with written notice of receipt of her loan modification application within five days. See Id. § 1024.41(b)(2)(B). The complaint alleges that sending the signed agreement constituted a loss mitigation application as defined in 12 C.F.R. § 1024.31.[3]Wells Fargo does not argue otherwise. We therefore assume for purposes of this appeal that Ho sent a loss mitigation application to Wells Fargo, which it received on December 6, 2013. Ho further alleges

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[3] Section 1024.31ion X defines "Loss mitigation application" as " an oral or written request for a loss mitigation option that is accompanied by any information required by a servicer for evaluation for a loss mitigation option." 12 C.F. R. § 1024.31. "Loss mitigation option" means "an alternative to foreclosure offered by the owner or assignee of a mortgage loan that is made available through the servicer to the borrower." *Id.*

Wells Fargo failed to provide written notice that her application was incomplete and failed to evaluate her application within thirty days of receiving it. See id. § 1024.41(c). Ho attached Wells Fargo's December 17, 2014 letter to her complaint. That letter references only Wells Fargo's attempts to contact Ho by telephone and does not suggest any prior attempt to send her written notice of the status of her loan modification.

Ho's complaint also alleges Wells Fargo violated the prohibition on seeking a foreclosure sale before responding to her. See id. § 1024.41(g). This allegation resembles a scenario addressed in the commentary of the Consumer Financial Protection Bureau ("CFPB") about the adoption of the loss mitigation procedures:

> Scenario 2: If a borrower submits a complete loss mitigation application after a servicer has made the first notice or filing for a foreclosure process, but 90 days or more exist before a foreclosure sale, the servicer (1) must review the complete loss mitigation application within 30 days, (2) must allow the borrower at least 14 days to accept or reject an offer of a loss mitigation option, and (3) must permit the borrower to appeal the denial of a loan modification option pursuant to § 1024.41(h), Further, for all loss mitigation application received in this timeframe, the servicer must comply with the requirements for acknowledging a loss

> mitigation application and providing notice of additional information and documents necessary to make an incomplete loss mitigation application complete. The servicer may not proceed to foreclosure judgment or order of sale, or conduct a foreclosure sale, unless these procedures are completed.

See Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10,696, 10821 (Feb. 14, 2013) ("Mortgage Servicing Rules"). Thus, the CFPB commentary contemplates that servicers who foreclose on a home while in violation of § 1024.41(b)(2)(B) also violate § 1024.41(g). Like the scenario addressed by the CFPB, Ho submitted an application to Wells Fargo, but did not receive a written response as required by § 1024.41(b)(2)(B) or (c)(1) before her home was sold in violation of § 1024.41(g). Ho's complaint therefore alleges sufficient facts to state a plausible violation of RESPA and Regulation X. At this stage of proceedings, she has also sufficiently alleged a causal connection between Wells Fargo's RESPA violation and her actual damages. See 12 U.S.C. § 2605(f)(1)(A); Refroe v. Nationstar Mortg., LLC, 822 F. 3d 1241, 1246 (11th Cir. 2016). We therefore conclude Ho's complaint states a plausible claim for relief under RESPA and Regulation X.

The district court found otherwise, dismissing Ho's RESPA claim because she failed to allege the existence of a valid agreement between herself and

Wells Fargo. But an enforceable agreement is not a prerequisite to a claim for a violation of § 2014.41(b)(2)(B) and (g). Section 1024.41(b)(2)(B) requires servicers to notify borrowers whether their loss mitigation applications are complete or incomplete within five days of receiving the applications. 12 C.F.R. § 1024.41(b)(2)(B). If the application is incomplete, the servicer must "state the additional documents and information the borrower must submit to make the loss mitigation application complete. *Id.*. And § 1024.41(g), as interpreted by the CFP, prohibits foreclosures after a borrower submits a "complete loss mitigation application" or submits an incomplete application without notifying the applicant that additional documents are necessary. See 12 C.F.R. § 1024.41(f), (g)(1); Mortgage Servicing Rules, 78 Fed. Reg. at 10, 821. Neither provision requires the existence of an enforceable agreement, and Ho's RESPA claim should not have been dismissed for that reason.

The district court alternatively held Ho's RESPA claim was barred by Florida's litigation privilege. Under Florida law, absolute immunity attaches to "any act occurring during the course of a judicial proceeding .... So long as the act has some relation to the proceeding." See Levin, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co., 639 So. 2d 606, 608 (Fla. 1994). For example, the Florida Supreme Court has held that the litigation privilege bars claims under the Florida Consumer Collection Practice Act that are based on acts that occur during judicial

foreclosure proceedings "so long as the act has some relation to the proceeding." Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole, 950 So. 2d 380, 384 (Fla. 2007) (quotation omitted)(applying the litigation privilege to bar a claim that default letters violated the Florida Consumer Collection Practice Act).

We've described ourselves as "Erie-bound" to apply Florida's litigation privilege to "state-law claims adjudicated in federal court." Jackson v. BellSouth Telecomms, 372 F.3d 1250, 1274-75 (11th Cir. 2004). However, there is no published opinion of this court, in which Florida litigation privilege was held to bar a federal claim. Under the facts alleged in Ho's complaint, the Florida litigation privilege is preempted by RESPA. See 12 U.S.C. § 2616 ("This chapter does not annul, alter, or affect, or exempt any person subject to the provisions of this chapter from complying with, the laws of any State with respect to settlement practices, except to the extent that those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency." (emphasis added)). Applying the Florida litigation privilege to bar Ho's RESPA claim is inconsistent with the cause of action authorized by § 1024.41(a) and (g). These subsections permit a borrower to sue a servicer that moves for "foreclosure judgment, or order of sale" in a state foreclosure proceeding after the borrower submits a "complete loss mitigation application." 12 C.F.R. § 1024.41(a), (g). Because application of the litigation privilege is

inconsistent with the cause of action authorized by RESPA, it cannot bar Ho's RESPA claim.

B. Whether Ho's "wrongful foreclosure" claim is barred by the Rooker-Feldman doctrine The District Court held Ho's "wrongful foreclosure" claim is barred by the Rooker-Feldman doctrine.

This doctrine, generally speaking, provides that lower federal courts lack subject-matter jurisdiction to review final judgments of state courts. Target Media Partners v. Specialty Mktg. Corp., 881 F.3d 1279, 1284 (11th Cir. 2018). Since Rooker and Feldman were decided, "the Supreme Court concluded that the inferior federal courts had been applying Rooker-Feldman too broadly." Target Media, 881 F.3d at 1285. The doctrine "is not simply preclusion by another name," Lance v. Dennis, 546 U.S. 459, 466, 126 s. Ct. 1198, 1202 (2006), and does not "override or supplant preclusion doctrine." Exxon Mobil Corp. v. Saudi Basic Indus., 544 U.S. 280, 284, 125 S. Ct. 1517, 1522 (2005).

Instead, the doctrine is "confined to .... Cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and ejection of those judgments." Id. at 284, 125 S. Ct. 1521-22.

The Rooker-Feldman doctrine, narrow as it is, applies to Ho's claim that Wells Fargo wrongfully foreclosed on her house due to lack of standing or fraud. Ho's state court motions challenged the foreclosure action based on Wells Fargo's alleged

lack of standing and fraud. The state court rejected those arguments, and she appealed to the Fourth District Court of Appeals, which affirmed. After the ruling of the Florida appeals court, Ho filed this action asking the district court to find the foreclosure was wrongful based on fraud and Wells Fargo's lack of standing. Her action, if successful, would "effectively nullify the state court to find the foreclosure was wrongful based on fraud and Wells Fargo's lack of standing. Her action, if successful, would "effectively nullify the state court judgment." And necessarily hold "that the state court wrongly decided the issues." Casale v. Tillman, 558 F.3d 1258, 1260 (11th Cir. 2009) (per curiam) (quotation omitted). For that reason, the district court did not err in concluding it lacked subject-matter jurisdiction over Ho's wrongful foreclosure claims under the Rooker-Feldman doctrine.

C. Whether Ho stated a claim for marital status discrimination

On appeal, Ho argues Wells Fargo violated the Equal Credit Opportunity Act's ("ECOA") prohibition of discrimination against credit applicants on the basis of marital status. See 15 U.S.C. § 1691(a)(1). The complaint did not include an ECOA claim, and the possibility that Wells Fargo violated the ECOA was first raised in a motion to strike Wells Fargo's motion to dismiss, which the district court treated as responses brief. The ECOA claim is therefore not properly before this Court on appeal. Cf. Gilmour v. Gates, McDonald & Co., 382 F.3d 1312, 1315 (11th

Cir. 2004) (per curiam) (holding claim raised in brief in opposition to summary judgment was not before the court on appeal because it was not in the complaint). To the extent Ho contends Wells Fargo violated the Fair Housing Act, 42 U.S.C. § 3605(a), or Florida Statutes § 3605(a), or Florida Statutes § 708.08 those claims are also not before us for the same reason. The proper way to raise a new claim is to amend the complaint through the procedures in Federal Rule of Civil Procedure 15. See Gilmour, 382 F. 3d at 1315.

IV. CONCLUSION

We affirm the dismissal of Ho's "wrongful foreclosure" claim as barred by the Rooker-Feldman doctrine. We reverse the dismissal of Ho's RESPA claim and remand to the district court.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Appendix C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 9:15-81522-CIV-MARRA

KAREN C. YEH HO,
Plaintiff

V

WELLS FARGO BANK, N.A.,
Defendant

Filed MARCH 19, 2022

Document 158

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter was tried before the Court. Based upon the evidence presented during the bench trial, the record in this matter, the argument of counsel and the pro se Plaintiff and otherwise being duly advised in the premises, the Court issues these findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

I. FINDINGS OF FACT

1. On November 30, 2007, Plaintiff executed a promissory note secured by a mortgage ("Mortgage") signed by Plaintiff Karen Yeh Ho ("Plaintiff") and her husband, Wing Kei Ho ("Kei Ho") (collectively, "Borrowers") on property located at 8038 Tangelo Drive, Boynton Beach, FL 33436 ("Property"). See D.E. 85[1] at 2, ¶1; D.E. 41, at 7:26-8:1; WF EX. 4;[2] WF Ex. 5.

2. At the time of the Loan, Plaintiff and Kei Ho were married. D.E. 85 AT 2, ¶ 1; WF Ex. 5 at 1.

3. The Note and Mortgage were subsequently transferred to Wells Fargo, and after Borrowers defaulted on the Mortgage on August 1, 2011, Wells

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[1] D.E. 85 is this Court's Opinion and Order on Motion for Summary Judgment ("MSJ Order"). The paragraph numbers relate to the numbered "Undisputed Material Facts" found by the Court in the MSJ Order.

[2] Wells Fargo's trial exhibits are referred to throughout as "WF Ex. _____."

Fargo filed a foreclosure complaint on February 16, 2012 ("Foreclosure Action"). D.E. 85 at 2. ¶ 1.

4. While the foreclosure action was pending, Wells Fargo approved Plaintiff for a streamline loan modification. WH Ex. 10; WF Ex. 11; see also D.E. 85 at 2, ¶ 2.

5. Wells Fargo sent Plaintiff's written offer for a streamlined loan modification on July 20, 2013 ("Offer Letter") because she met the program eligibility criteria based on the value of the Property. *See* D.E. 85 AT 2, ¶ 2; D.E. 41 at App'x 241-48; WF Ex. 10; WF Ex. 11.

6. A streamlined loan modification is different from other loan modification options because the borrower is not required to submit any documentation to apply for the modification. WF Ex. 11. The process is streamlined by only requiring borrowers to make trial period payments and execute the modification agreement. D.E. 85 at 2-3, ¶¶ 2-4. As stated in the Offer Letter, Plaintiff was "already approved" for the streamlined modification "[b]ased on [her] home's value." *See* D.E. 41 at App'x 241-48; WF Ex. 11.

7. The Offer Letter informed Plaintiff that she was eligible for a streamlined loan modification as an option to stay in her home and, if she wanted to pursue this option, she was required to make three timely payments on her Mortgage under a Streamline Modification Trial Period Plan ("TPP"), due on September 1, 2013, October 1, 2013, and November 1, 2013. Id; D.E. 85 at 2, ¶¶ 2-4. As stated in the Offer Letter, Plaintiff was "already

approved" for the streamlined modification "[b]ased on [her] home's value." *See* D.E. 41 at App'x 241-48; WF Ex. 11.

8. After numerous attempts to contact Plaintiff between July 23 and September 13, 2013, *see* WF Ex. 16 (entries dated July 23, 2013 through September 13, 2013), Wells Fargo made contact with Plaintiff on September 17, 2013, and she indicated that she wanted to proceed with the streamlined loan modification. WF EX. 16 (entry dated September 17, 2013).

9. Wells Fargo received Plaintiff's first TPP payment on or about September 27, 2013 and Wells Fargo accepted payment although it was late. *See generally* D.E. 85 at 2, ¶ 3; WF Ex. 16 (entries dated September 20, 2013 through September 27, 2013)

10. Plaintiff also made her second TPP payment on or about September 27, 2013, and subsequently mad the final TPP payment on or about October 31, 2013. *See generally id.*; WF Ex. 16 (entry dated October 31, 2013).

11. Wells Fargo then fully approved Plaintiff's loan modification on November 25, 2013 and sent Plaintiff a letter the following day ("Approval Letter"), enclosing the final modification agreement for both Plaintiff and her husband, Kei Ho, to sign. *See* D.E. 85 at 3, ¶ 4; WF Ex. 17. The Approval Letter states, "[t]his letter confirms our agreement to a modification of your mortgage loan that we recently discussed. In order to finalize the modification, we will need you to complete the required steps outlined

below." WF Ex. 17. The required steps were those typical of a loan closing, including execution and return of original copies of the enclosed modification agreement by both Plaintiff and Kei Ho within fourteen days. The modification agreement expressly required the signature of both Plaintiff and Kei Ho, as Borrowers on the Mortgage. *See* D.E. 85 at 3, ¶ 4; *see* also WF Ex. 16 (entries dated August 25, 2013 and November 25, 2013); WF Ex. 17; WF Ex. 18.

12. The Approval Letter also notes that if one of the Borrowers does not sign the modification agreement, Borrowers must provide supporting documentation as to why a signature is not required to include at a minimum a recorded Quit Claim Deed *and* divorce decree. See WF Ex. 17.

13. Additionally, the Approval Letter states:

> If all pages of the above documents and payment are not received within fourteen (14) days from the date of this letter, we will conclude that you are no longer interested in modifying your existing loan and will cancel your request for a modification. Until we receive the signed and completed documents and payment as requested above, we are unable to complete the modification; we will continue to service your mortgage loan – which may include ... any legal proceedings.

14. On December 6, 2013, Wells Fargo received a copy (not the original) of the modification agreement executed only by Plaintiff and missing the signature of Kei Ho. *See* D.E. 85 at 3, ¶ 5; WF Ex. 19.

15. From, December 9. 2013 to December 31, 2013, Wells Fargo attempted to call Plaintiff on eight different occasions to advise her that Wells Fargo needed originals of the modification agreement executed by both her and Kei Ho as required by the Approval Letter or, alternatively, needed to know her marital status and obtain a divorced decree if it was going to remove Kei Ho from the modification agreement. *See* WF Ex. 16 (entries dated December 9, 2013 through December 26, 2013).

16. Wells Fargo finally contacted Plaintiff on January 2, 2014, at which time Wells Fargo explained the problems with the modification documents to Plaintiff, and she ultimately hung up. WF Ex. 16 (entries dated January 2, 2014).

17. Plaintiff refused to return a fully signed loan modification agreement, or alternatively, a divorce decree to remove Kei Ho from the agreement and acknowledges that she was unwilling to return a fully signed loan modification. *See Id; see also* D.E. 78 AT 4, ¶ 18.

18. In fact, Plaintiff admitted at trial that (1) she received the loan modification documents but that she did not want her husband to sign the loan modification; (2) that her husband did not want to sign the loan modification documents and (3) only she signed the loan modification documents. Kei Ho

testified that they received notices about the loan modification, but he refused to sign it.

19. Wells Fargo then escalated the account for removal from loan modification on January 3, 2014, and the account was removed on January 13, 2014. *See* WF Ex. 16 (entries dated January 13, 2014); WF Ex. 22.

20. Wells Fargo sent Plaintiff a letter on January 13, 2014, notifying her that the loan modification could not be finalized because Wells Fargo did not receive the signed modification agreement ("January Letter"), and the Foreclosure Action resumed. *See id.*

21. On July 17, 2014, Borrowers, via their counsel, consented to final judgment in the Foreclosure Action to foreclose on the Property. *See* D.E. 85 at 5, ¶¶ 12-13; D.E. 41, at App'x 159-61; WF Ex. 41.

22. The Court in the foreclosure action entered Final Judgment in favor of Wells Fargo, and the Property was sold at a foreclosure sale on November 14, 2014. *See* D.E. 85 at 6, ¶ 15; D.E. 41, at App'x 163-69; WF Ex. 42.

23. Borrowers continued to defend the Foreclosure Action for the next several years through an appeal to the Fourth District Court of Appeal. *See* D.E. 85 AT 6, ¶¶ 14-17. The Fourth District Court of Appeal affirmed the foreclosure court's judgment allowing foreclosure on the Property. Id. at 6, ¶ 17.

II. CONCLUSIONS OF LAW

1. The Equal Credit Opportunity Act ("ECOA") and its implementing regulation, Regulation B, set forth requirements for notice that creditor must provide to applicants applying for credit at 15 U.S.C. § 1691(d) AND 12 C.F.R. § 202.9. The type of notice required depends on whether an application is complete or incomplete.

2. ECOA requires that "within thirty days 'after receipt of a completed application for credit, a creditor shall notify the applicant of its actions on the application.'" *Regions Bank v. Legal Outsource PA,* 936 F. 3d 1184, 1192 (11th Cir. 2019); see also 15 U.S.C. § 1691(d)(1).

3. ECOA requires that notice be provided with respect to incomplete applications for credit. Specifically, ECOA requires that receipt of an incomplete application, Well Fargo must notify the applicant within thirty days of either the action taken, or items needed to complete the application. 12 C.F.R. § 202.9(c)(1).

4. Plaintiff's payment of the TPP amounts constitutes her "application" for the streamlined loan modification.

5. Wells Fargo provided timely written notice of approval by sending the November 2013 Approval Letter to Plaintiff within 30 days of receiving the final TPP payment in compliance with 12 C.F.R. § 202.9(a)(1)(i) and 15 U.S.C. § 1691(d)(1).

6. The Approval Letter constituted written notice of incompleteness in accordance with 12 C.F.R. § 202.9(c)(1)(ii) and (c)(2).

7. Wells Fargo's oral notification to Plaintiff of her improperly executed modification agreement and the documentation she needed to submit to finalize the loan modification on January 2, 2014, was also sufficient under 12 C.F.R. § 202.9(c)(3). Once oral notification is provided, the creditor then has thirty (30) days to provide written notification. *Brown v. Wells Fargo Home Mortgage.,* No 15-CV-467-JL, 2017 WL 320615, at *6 (D.N.H. July 26, 2017) ("If the application remains incomplete" after such oral notice of incompleteness, Regulation B obligates the creditor to provide written notice, again within 30 days, 'of action taken in accordance with [12 C.F.R. § 202.9(a)]; or of the incompleteness, in accordance with [12 C.F.R. § 202.9(c)(2)].'"; see also Piotrowski v. Wells Fargo Bank, N.A., No. DKC11-3758, 2015 WL 4602591, at *22 (D. Md, July 29, 2015) ("[T]he clock does not necessarily begin to run when the loan modification application first is submitted. Notice of incompleteness any be provided orally initially and the thirty-day requirement to provide notice of any action taken by the creditor applies after a completed application is submitted."). Plaintiff received the required written notices required no later than the January 13, 2014 Letter, which was within the thirty days after the oral notification of the fact that the modification agreement was not completed properly by either having it signed by her husband or providing evidence of her divorce from her husband.

8. Accordingly, because Wells Fargo gave proper notice to Plaintiff as required by the ECOA, her claim fails on the merit. Since Plaintiff has failed to prove a claim under the ECOA, there is no need for the Court to consider the question of damages.

Accordingly, it is hereby ORDERED AND ADJUDGED that Judgment shall be entered in favor of defendant and against Plaintiff by separate order of the Court.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 18th day of March, 2022.

/S/_____/
KENNETH A. MARRA
United States District Judge

Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 9:15-81522-CIV-MARRA

KAREN C. YEH HO,
Plaintiff

V

WELLS FARGO BANK, N.A.,
Defendant

Filed February 19, 2020

Document 85

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court upon Defendant Wells Fargo Bank, N.A.'s Motion for Summary Final Judgment [DE 71]. The Court has carefully considered the motion, response, reply, the entire Court file, and is otherwise fully advised in the premises.

Background

Following this Court's dismissal of Plaintiff's Complaint in its entirety, the Court of Appeal for the Eleventh Circuit reversed the dismissal of Plaintiff's Real Estate Settlement Practices Act ("RESPA") claim and remanded to this court. Defendant filed an Answer and Affirmative Defenses to the complaint. Thereafter, Plaintiff was granted leave to file an Amended Complaint. Defendant filed a Motion to Dismiss the Amended Complaint, and this Court entered an Order granting Defendant's Motion to Dismiss as to Plaintiff's Fair Housing Act claim (Count II), and denied the Motion to Dismiss as to Plaintiff's Equal Credit Opportunity Act claim (Count I) and her RESPA violation claim (Count III). Plaintiff did not file a Second Amended Complaint, therefore, the remaining claims before the Court are Count I and alleging a violation of Equal Credit Opportunity Act, and Count III alleging a violation of RESPA. Defendant moves for summary judgment as to both claims.

Undisputed Material Facts[1]

1. On November 30, 2007, Plaintiff executed a promissory note("Note")[2] secured by a mortgage ("Mortgage")[3] executed by Plaintiff and her husband, Wing Kei Ho (collectively, "Borrowers") on the subject Property. The loan was subsequently transferred to Defendant, who filed a foreclosure complaint on February 16, 2012 against the Borrowers alleging payment defaults since August 1, 2011. DE 41 at 83-91. The loan related to the servicing of a residential mortgage. DE 41 AT 1, ¶ 1.

2. Based on a review of their records, Defendant offered Plaintiff a streamlined modification trial period plan in July 2013 ("Offer Letter"). DE 72-1, see also DE 41 at 241-248. The Offer Letter informed her that she was eligible for a loan modification as an option to stay in her home and, if she wanted to pursue this option, the offer required her to make timely payments of her Mortgage under a Streamlined Modification Trial Period Plan ("Trial Period Plan" or "TPP"). *Id.*

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[1] "All material facts set forth in the movant's statement filed and supported as required by [Local Rule 56.1(a)] will be deemed admitted unless controverted by the opposing party's statement, provided that the Court finds that the movant's statement is supported by evidence in the record." S.D. Fla. L.R. 56.1(b).

[2] DE 41 at 89-91 shows portions of the Note, which was executed solely by Plaintiff.

[3] DE 82-1 shows the Mortgage, signed and initialed by both Plaintiff and her husband, Wing Kei Ho.

3. The TPP required three payments in the amount of $2,495 due on September 1, 2013, October 1, 2013, and November 1, 2013. Plaintiff made three timely TPP payments. DE 78, ¶ 13.

4. In November 2013, Plaintiff was approved for a loan modification and Defendant generated a Loan Modification Agreement ("Modification Agreement" or "Agreement"). DE 41 AT 142-156; DE 72, Ex. B. The Modification Agreement required the signature of Plaintiff and Wing Kei Ho – Plaintiff's husband and co-signor on the Mortgage. *Id.*

5. Defendant received back the Modification Agreement on December 6, 2013 with only Plaintiff's signature. Wing Kei Ho had not signed the Modification Agreement although his signature was expressly required by the terms of the Modification Agreement. DE 41 AT 142-156.

6. Plaintiff states she sent back the copy of the loan modification she received with her signature notarized by "a Florida Notary that can be found when you do a Notary search" DE 78, ¶ 16. Plaintiff states that she thought if she "wait[ed] for [Defendant's] notary any longer," the delay would result in her "sending in payments and package late which [Defendant]can use as rejection." *Id.*, ¶ 15.

7. Plaintiff alleges that after Defendant's receipt of the Agreement on December 6, 2013, it accepted two more payments under the TPP in December 2013 and January 2014, but rejected payments

made thereafter. DE 41 at 10, ¶¶ 16, 19-20. (See Appx. 38)

8. Plaintiff "never got a written confirmation of [Defendant]'s receipt of the agreement or any indication of whether the agreement was complete or other loan modification options were available." Yeh Ho v. Wells Fargo Bank, N.A., 739 F.App'x 525, 527 (11th Cir. 2018).

9. Plaintiff avers that on December 6, 2013, Defendant told her "that they received the permanent streamline loan modification package and the December 2013 check. I asked if there is any problem. The representative state no problem." Plaintiff Affidavit ("Aff."), DE 78, ¶ 23.

10. "On December 17, 2014, [Plaintiff] received the first written response from [Defendant] about her loan modification agreement. This was over a year after she'd sent the agreement to [Defendant] and after her home was sold. In the letter, [Defendant] explained it rejected [Plaintiff's] loan modification agreement as incomplete because it was unsigned by her husband." Yeh Ho v. Wells Fargo Bank, N.A., 739 F.App'x 525, 527 (11th Cir. 2018).

11. Specifically, the December 17, 2014 letter ("Denial Letter") stated Upon successful completion of the trail payment plan, a modification agreement was approved. On November 26, 2013, we sent the original packet with the terms of the modification to First

American Notary and a copy of the modification packet to you.

The original modification packet was sent to the notary who was to contact you to set up a time to sign the modification documents. The loan modification copy sent to your attention included instructions that a notary would be in contact with you to sign the original modification documents.

From November 27, 2013, through December 06, 2013, we attempted to contact you via telephone to see if you had been contacted by First American Notary service to establish a time to sign the modification documents.

On December 06, 2013, we received the signed agreement from you. However, upon review of the signed agreement, we found that Wing Kei Ho did not sign and the agreement was stamped "copy". As a result, the signed agreement was not accepted.

From December 09, 2013, through December 31, 2013, we attempted multiple times to contact you via telephone to inform you that the following items were needed to complete the loan modification:

- We received a Quit Claim Deed but also needed a divorce decree

- Signed redrafted modification documents or original modification documents signed by both you and Wing Kei Ho
- Your marital status

We're unable to complete a modification for your account as you did not return the original signed modification documents. As a result, your account was removed from this review on January 13, 2014. DE 72 AT 33-34, Ex. E.

12. On May 27, 2014, the foreclosure case was set for a non-jury trial on July 17, 2014. DE 10, Ex. A, Doc. 85. Just two days before trial, Plaintiff, through counsel, filed a motion for continuance, which was denied at a hearing the morning of trial. DE 41 at 138-140, 157-158.

13. On the day of trial, counsel for Defendant and the Borrowers' attorney (apparently without Plaintiff's knowledge or consent) executed a stipulation to the entry of judgment in favor of Defendant ("Stipulation to Judgment") whereby Defendant agreed to request a sale date no less than one-hundred twenty days from the date of the judgment and the Borrowers (i) acknowledged Defendant's standing; (ii) admitted their default; (iii) admitted Defendant fulfilled all conditions precedent; (iv) admitted their interest in the subject property was inferior; (v) withdrew all affirmative defenses or counterclaims regarding fulfillment of conditions precedent; (vi) acknowledged the validity of the debt; (vii) consented to entry of judgment; and (viii) waived

all rights or defenses to object or otherwise impede or delay the foreclosure sale and issuance of the certificate of title. DE 41 at 159-162. Accordingly, a final judgment was entered ("final Judgment"), setting a foreclosure sale date of November 14, 2014. DE 41 at 163-169.

14. On October 14, 2014, an order was entered permitting counsel to withdraw from the foreclosure action. DE 41 AT 183. On that same day, Plaintiff appears to have filed a motion to vacate the sale and set a trial date. DE 41 at 181. Similarly, on November 10, 2014, Plaintiff filed yet another motion to cancel the sale. DE 41 AT 184. On November 12, 2014, the foreclosure court denied Plaintiff's requests to cancel the sale. DE 41 at 185.

15. On November 14, 2014, pursuant to the Final Judgment, the Property was sold at a foreclosure sale ("Foreclosure Sale") to Federal National Mortgage Association ("FNMA") for a credit-bid of $250,100. DE 10, Ex. A, Doc 126.

16. On January 16, 2015, the foreclosure court denied Plaintiff's request to vacate Final Judgment or rescind the Foreclosure Sale. DE 41 at 226.

17. On January 23, 2015 the Borrowers filed a Notice of Appeal with the Fourth District Court of Appeal. DE 10, Ex. B. On February 13, 2015, Plaintiff filed her brief. *Id.* Following the briefing, on October 1, 2015 the Appellate Court entered its decision affirming the foreclosure on the Property. Id.

18. On November 4, 2015, Plaintiff filed her Complaint against Defendant in this Court. DE 1. On August 29, 2016, this Court entered an Order granting Defendant's Motion to Dismiss and dismissed Plaintiff's Complaint in its entirety. DE 15. Plaintiff appealed the Order of Dismissal to the Eleventh Circuit Court of Appeal. DE 21.

19. On Appeal, the Eleventh Circuit affirmed the dismissal of all causes of action except for the RESPA claim. DE 25. In sum, the appellate Court held that the claim was not barred by Florida's litigation privilege and that Plaintiff had alleged facts sufficient to state a claim under RESPA. *Id.* Accordingly, the Eleventh Circuit remanded the action as to the RESPA claim to this Court for further proceedings. Id. This Court filed an Order reopening the case on July 25, 2018. DE 26.

Standard of Review

A court must grant summary judgement when, viewing the evidence and factual inferences in the light most favorable to the nonmoving party, the court finds that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Lofton v. Sec'y of Dept. of Children & Family Servs., 358 F.3d 804, 809 (11th Cir. 2004) (citing Fed. R. Civ. P. 56(c)). Importantly, in evaluating a motion for summary judgment, a court must disregard factual disputes that are immaterial under the governing substantive law. Id. ("Only factual disputes that are material under the

substantive law governing the case will preclude entry of summary judgment."); see also Anderson v. Liberty Lobby, In., 477 U.S. 242, 248 (1986)("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.").

On the moving party has met its burden, Rule 56€ requires the nonmoving party to go beyond the pleadings and by its own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). For an Equal Credit Opportunity Act claim of discrimination based on sex or marital status, the ultimate burden of persuasion remains with the claimant. Equal Credit Opportunity Act, § 701(a)(1), 15 U.S.C.A. § 1691(a)(1); 12 C.F.R. § 202.1.

"A document filed pro se is "to be liberally construed," and "a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) CITING *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). "A careful and meticulous analysis first by the parties, but ultimately by the district court will aid significantly in preventing the waste of private and judicial resources and time." Barker v. Norman, 651 F.2d 1107, 1123 (5th Cir 1981); Gordon v. Watson, 622 F.2d 120, 123 (5th Cir. 1980).

Equal Credit Opportunity Act[4]

The Equal Credit Opportunity Act ("ECOA") is an anti-discrimination statute which creates a private right of action against a creditor who "discriminate[s] against any applicant, with respect to any aspect of a credit transaction ... on the basis of race, color, religion, national origin, sex or marital statute that must be construed "broadly to effectuate its remedial goals." *Regions Bank v. Legal Outsource PA*, 936 F.3d 1184, 1208 (11th Cir. 2019) citing *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1211 n.6 (6th Cir. 1997); *Securities and Exchange Commission v. Levin*, 849 F.3d 995, 1001 (11th Cir. 2017) (observing that remedial legislation "is entitled to a broad construction"); and *Morante-Navarro v. T&Y Pine Straw, Inc.*, 350 F.3d 1163, 1166 (11th Cir. 2003).

It "was enacted, in part, to address discrimination against married women in obtaining credit." Richardson v. Everbank, 152 So.3d 1282, 1285 (Fla. Dis. Ct. App. 2015). "Regulation B,[5]

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[4] Plaintiff's original Complaint did not include an ECOA claim, so when Plaintiff raised it before the Eleventh Circuit on appeal, the appellate court determined that it was "no properly before [it] on appeal." The Eleventh Circuit advised Plaintiff "[t]he proper way to raise a new claim is to amend the complaint through the procedure in Federal Rule of Civil Procedure 15." *Yeh Ho v. Wells Fargo Bank, N.A.*, 739 F.App'x 525, 531 (11th Cir. 2018). This she did, and now this ECOA claim is properly before the Court.

[5] "Congress mandated that the agency charged with overseeing ECOA – first the Federal Reserve, now the Consumer Financial Protection Bureau – promulgate regulations 'to carry out the [statute's] purposes.'" *R. BB Acquisition, LLC v. Bridgemill*

Which was promulgated to implement the prohibition, 12 C.F.R. § 202.1 (2012), specifically bans a lender from requiring an applicant's spouse to guarantee a loan if the applicant otherwise qualifies for the loan." *Id.*

"However, the signature of a spouse or other party may properly be required in a number of circumstances, including to make the property relied upon for credit accessible to the creditor in the event of default or where the liability of an additional party is necessary to support the credit requested. 12 C.F.R. § 202.7(d)." *Id.*; see also Gonzalez v NAFH Nat'l Bank, 93 So.3d 1054, 1057-58 (Fla. Dist. Ct. App. 2012) (finding no violation of ECOA and explaining that it was "not just reasonable but prudent for the creditor bank to have [wife] execute the mortgage" where real property securing loan was jointly owned by husband and wife).

It appears that *pro se* Plaintiff is asserting a number of ECOA violations, including that Defendant violated the ECOA when, in its Denial Letter, it inquired about her marital status, when it requested a divorce decree (in response to receiving a quit claim deed), and when it required her husband's signature on the Modification Agreement. Complaint ("Compl."), DE 41, §§ 124, 127-129, UMF, ¶ 7. It also appears Plaintiff is complaining that the original lender violated the ECOA when it required her husband to co-sign the Mortgage in 2007. DE 41, ¶ 124.

Commons Dev'pt Grp., LLC, 754 F.3d 380, 383 (6th Cir. 2014) (quoting 15 U.S.C. § 1691b(a)). "Regulation B is the result of congress's directive." Id.

As far as her claim that Defendant violated the ECOA when, in its Denial Letter, it inquired about her marital status, and requested a divorced decree (in response to receiving a quit claim deed), this claim also fails as a matter of law. Discrimination is an essential element that must be established for a claimant to proceed under section 1691(a). *Bowen v. First Family Fin. Servs., Inc.*, 223 F.3d 1331, 1336 (11th Cir. 2000); *Ballerino v. Countrywide Home Loans, Inc., No. 09-20239, 2009 WL 2460739, AT *2 (S.D. Fla. July 15, 2009).* The ECOA specifically spells out that "activities not constituting discrimination" include a creditor's "inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness." 15 U.S.C. § 1691(b)(1) (emphasis supplied).

In addition, there is an express exception for requiring a spouse's signature in section 1691d of the ECOA, which states that requests for a spouse's signature "for the purpose of creating a valid lien, passing clear title, waiving inchoate rights to property, or assigning earnings, shall not constitute discrimination" under the Act. 15 U.S.C. § 1691d(a); see also 12 C.F.R. § 202.7(d)(1) (stating"[e]xcept as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person, *other than a joint applicant*, on any credit instrument *if* the applicant." Is creditworthy for the amount and terms requested) (emphasis supplied); 12 C.F.R. § 202.7(d)(4) (confirming that

with regard to "secured credit, a creditor may require the signature of the applicant's spouse ... on any instrument necessary, or reasonably believed by the creditor to be necessary .... to make the property being offered as security available to satisfy the debt in the event of a default, for example, an instrument to create a valid lien, pass clear title, waive inchoate rights, or assign earnings").

Cases in both Florida and across the country have applied this exception. See, e.g., *Gonzalez v. NAFH Nat. Bank*, 93 So. 3d 1054, 1057-58 9Fla. Dist. Ct. App. 2012) (holding that requiring signature of both spouses of jointly owned property "not just reasonable but prudent for the creditor bank to have [wife] execute the mortgage so as to create a valid lien against this property to assure payment in the event of a default."); *In re Woodford*, 600 B.R. 520, 524 (Bankr. W.D. Va. 2019) (rejecting ECOA claim by debtor-wife that requiring husband to execute deed of trust as collateral for wife's loan was discriminatory); Ballard v. Bank of Am., N.A., 734 F.3d 308, 311 (4th Cir. 2013) ("ECOA regulations clarify that, in an application for secured credit, 'a creditor may require the signature of the applicant's spouse ... on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the property being offered as security available to satisfy the debt in the event of default.'") (quoting 12 C.F.R. § 202.7(d)(4)); United States v. Joseph Hirsch Sportswear, Co., No. 85-CV-1546, 1989 WL 20604, at *2 (E.D.N.Y. Feb. 28, 1989) (holding that execution of mortgages by spouses to establish valid liens is a

"practice that does not violate the ECOA") (citing 15 U.S.C. § 1691d(a)).

Therefore, Plaintiff's argument that Defendant violated ECOA when it required her husband execute the Modification Agreement is directly contradicted by the plan language of the statute. As indicated in the letter dated November 25, 2013, Defendant explicitly noted "[a]ll mortgagors needed to sign their name as it is printed on the documents in blue or black ink." DE 72, Ex. B. This same letter further explained upon provision of additional documents showing a mortgagor would no longer be included, Defendant could remove them, such as a divorce decree. *Id.*

It is undisputed that Plaintiff's husband is a co-owner on the deed[6] and is a signatory to the Mortgage. Even if Plaintiff's husband conveyed his interest in the property to Plaintiff by way of a quit claim deed, if he was still married to Plaintiff and residing at the property, he would have a homestead right to the property. *Jones v. Federal Farm Mortg.* Corp., 188 So. 804, 805 (Fla. 1939) (it is settled law that the homestead cannot be mortgaged without the joint consent of both spouses); *Taylor v. Maness*, 941 So.2d 559, 563 (Fla. Dist. Ct. App. 2006) ("the owner of homestead real estate must, if married, be joined by his or her spouse in order to alienate the homestead"); *Pitts v. Pastore*, 561 So.2d 297, 300

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[6] The Court takes judicial notice of the recorded deed at Book Number 22301, Page 1318 from Palm Beach County Public Records. Fed. R. Evid. 201(b); Horne v. Potter, 392 F.App'x 800, 802 (11th Cir. 2010) (holding district court may take judicial notice of public records)

(Fla. Dist. Ct. App. 1990) (the Florida constitution "requires the owner's spouse to join in any alienation of homestead property"). Thus, an inquiry about his marital status relative to Plaintiff was reasonable, relevant, and not discriminatory. See 12 C.F.R. § 202.7(d)(4) (confirming that with regard to "secured credit, a creditor may require the signature of the applicant's spouse ... on any instrument necessary, or reasonably believed by the creditor to be necessary .... To make the property being offered as security available to satisfy the debt in the event of a default, for example, an instrument to create a valid lien, pass clear title, waive inchoate rights, or assign earnings"). This regulation also defeats Plaintiff's assertion that the ECOA "prohibition states that is is (sic) illegal for creditors to insisted (sic) on Karen Yeh Ho's husband, Wing Kei Ho must sign the mortgage." Compl. § 124.

Adverse Action

In the end, the *anti-discrimination protections* ECOA are inapplicable to Plaintiff's case, as Plaintiff's loan was already in default and in active foreclosure at the time Plaintiff attempted to apply for a loan modification. DE 41 at 83-91; McNeal Dec. § 8 (DE 72); 15 U.S.C. § 1691(d)(6); 12 C.F.R. § 202.2(c)(2)(ii). It is undisputed that Plaintiff had already defaulted on her mortgage loan modification .[7] Under the plain language of the and its regulations, Defendant's ultimate refusal to allow Plaintiff to modify her loan, which was in foreclosure, does not constitute an adverse action

[7] UMF ¶ 1.

and therefore her claim for discrimination fails as a matter of law. *Molina v. Aurora Loan Services, LLC*, 635 F.App'x 618, 624 (11th Cir. 2015) ("Molina") cert. denied sub nom. *Molina v. Aurora Loan Srvcs.*, - - U.S. - -, 136 s. Ct. 2465 (2016); see also, *Stefanowicz v. SunTrust Mortg.*, No. 3:16-00368, 2017 WL 1103183, at *7-8 (M.D. Pa. Jan. 9, 2017), (rejecting a plaintiff's ECOA discrimination claim, in part because "[i]t also clear from the facts alleged that [plaintiff] was in default at the time of the alleged discrimination, under which circumstances the defendants' failure to allow her to modify her loan does not constitute a prohibited "adverse action"' (citations omitted)), report and recommendation adopted, No. 3:16-CV-00368, 2017 WL 1079163 (M.D. Pa. Mar. 22, 2017); *Berry v. Wells Fargo*, No. 15-5269, 2015 WL 8601866, at *4 (N.D. Ill. Dec. 14, 2015) (rejecting a Plaintiff's ECOA discrimination claim because "the latest alleged 'credit transaction' that could qualify as an "adverse action' under the ECOA was [plaintiff's] November 2009 attempt to receive a loan modification. The foreclosure proceedings and all the allegations that accompany those proceedings do not fall within the 'adverse action' definition necessary to state an ECOA claim"); *Mashburn v. Wells Fargo Bank, N.A.*, No. C11-0179-JCC, 2011 WL 2940363, *6 (W.D. Wash. Jul. 19, 2011) ("Defendant's denial of the loan modification does not constitute an adverse action, because it was a refusal to extend additional credit under an existing credit arrangement where the applicant was delinquent.").

Notification

Finally, Plaintiff alleges an ECOA violation pursuant to 15 U.S.C. § 1691(d)(1)[8] which provides that within thirty days "after receipt of a completed application for credit, a creditor shall notify the applicant of its actions on the application."[9] See *Regions Bank v. Legal Outsource PA,* 936 F.3d 1184, 1192 (11th Cir. 2019); 12 C.F.R. § 202.9(a); Compl.123. "At least one court has correctly observed that the case law in the Eleventh Circuit is 'scant' as to the question of whether a showing of discrimination is required to trigger the [notification] protections of section 1691(d)." *Adam v. Bank of America, N.A.,* 237 F. Supp. 3d 1189, 1209 (N.D. Ala. 2017) citing *Ramos v. Wells Fargo Bank, N.A.,* 2016 WL 233142, at *5

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[8] A plaintiff may maintain a private right of action to recover actual damages, punitive damages, costs and attorney fees caused by violations of ECOA notification requirements. See 15 U.S.C. § 1691e(a), (b), (d); *Stevens v. GFC lending, LLC,* 138 F.Supp.3d 1345, 1348 (N.D. Ala. 2015); *Chen v Whitney Nat. Bank,* 65 so. 3d 1170, 1172-73 (Fla. Dist. Ct. App. 2011); *Ford v. Citizens and Southern Nat. Bank,* 700 F. Supp. 1121, 1123 (N.D. Ga. 1988); *Cherry v. Amoco Oil Co.,* 490 F.Supp. 1026, 1029 (D.C. Ga. 1980).

[9] There are two different potential ECOA violations: claims for discrimination (15 U.S.C. § 1691(a)) and claims for inadequate notice (15 U.S.C. § 1691(d)). These are separate causes of action with their own elements. See, e.g., *Green v. Central Mortgage Co.,* 148 F.Supp. 3d 852, 879 (N.D. Cal. 2015) (distinguishing between discrimination claims under § 1691 (a)- (c) and violations of procedure under § 1691(d)-(e)); *Davis v. U.S. Bancorp,* 383 F.3d 761, 766 (8th Cir. 2004) (setting apart ECOA'S procedural requirements for extending credit and communicating with applicants from "generalized prohibition of discrimination"); see also *Vazquez v. Bank of Am.,* N.A., 2013 WL 6001924 at *11 (N.D. Cal. Nov. 12, from the prohibition against discrimination in lending").

(S.D. Fla. Jan. 13, 2016) (which followed the logic of *Vasquez v. Bank of America, N.A.*, 2013 WL 6001924, at *11 (N.D. Cal. Nov. 12, 2013) and held that a plaintiff need not plead that she was a victim of discrimination to state a claim under the ECOA).

Courts that have addressed this issue have squarely held that plaintiffs alleging a violation of the notice requirement of the ECOA pursuant to subsection (d) were not required to allege discrimination or be members of a protected class. See *Cannon v. Metro Ford, Inc.*, 242 F.Supp. 2d 1322, 1331 (S.D. Fla. 2002) (finding "that Plaintiff need not allege membership in a protected class to state a claim for violation of the ECOA's written notification requirements, 15 U.S.C. § 1691(d), as implemented by 12 C.F.R. § 202.9(a)(2)."); *Baez v. Potamkin Hyundai, Inc,* No. 09-21910, 2010 WL 11553183, at *7 (S.D. Fla. July 3, 2010) (same); *Jochum v. Pico Credit Corp.*, 730 F.2d 1041, 1043 n.3 (5th Cir. 1984) (finding that although the plaintiffs had not alleged discrimination, they stated a "cognizable claim" if they could prove that the creditor "failed to comply with the separate and independent notification requirements of § 1691(d)"); *Banks v. JP Morgan Chase Bank, N.A.*, 2015 WL 2215220, at *5 (C.D. Cal. May 11, 2015) (holding that the elements of an ECOA notice claim do not include "borrower's membership in a protected class"); *Sayers v. General Motors Acceptance Corp.*, 522 F. Supp. 835, 840 (W.D. Mo. 1981) ("If a creditor fails to satisfy these [notification] requirements, he is in violation of the ECOA, regardless of whether he is engaged in any prohibited discriminatory action."); *Green v. Central Mortgage Co.*, 148 F. Supp. 3d 852, 879 (N.D. Cal. 2015) (finding that "[t]he defendants'

argument does not distinguish between violations of ECOA's discrimination provisions and violations of ECOA's procedural requirements" and "ECOA's procedural requirements apply regardless of whether the [discrimination elements] have been satisfied"O; *Thompson v. Galles Chevrolet Co.*, 807 F.2d 163, 166 (10th Cir. 1986) (regardless of whether it engaged in any prohibited discriminatory actions, a creditor violates the ECOA if it fails to satisfy the notification requirements, even for incomplete applications); *Coulibaly v. J.P. Morgan Chase Bank, N.A.*, No. 10-3517, 2012 WL 3985285, at *4 (D. Md. Sept. 7, 2012) ("When a creditor fails to comply with [Regulation B notification] requirements, it is in violation of the ECOA, regardless of whether it engaged in any prohibited discrimination").

Complete vs. Incomplete Application

Defendant's obligation to notify Plaintiff that her application was approved, that a counteroffer was made, or that an adverse action was taken, pursuant to 15 U.S.C. § 1691(d)(1) and 12 C.F.R. § 202.9(a)(1), *arises, however, only when an application is complete. Wright v. Suntrust Bank,* No. 04-CV- 2258, 2006 WL 2714717, at *4 (N.D. Ga. Sept. 18, 2006). An application is deemed complete once a creditor "has received all the information that the creditor regularly obtains and considers in evaluating applications for the amount and type of credit requested (including, but not limited to, credit reports [and! any additional information requested from the applicant)." 12 C.F.R. § 202.2(f).

In this case, the record fails to reflect that

Plaintiffs application was complete when received by Defendant on December 6, 2013, as Plaintiffs husband had not signed it. Therefore, the Court finds that Defendant did not have any obligation to notify Plaintiff pursuant to 15 U.S.C. § 1691(d)(1) or 12 C.F.R. § 202.9(a)(i), as alleged.

However, the fact that the notification obligations associated with *complete* applications were not triggered by receipt of Plaintiffs incomplete Modification Agreement on December 6, 2013 does not end the inquiry. Regulation B provides, in pertinent part, that after receiving an application that is incomplete regarding matters that an applicant can complete, the creditor must notify the applicant 30 days after receiving the application that the application is incomplete. See 12 C.F.R. § 202.9(c)(l)(ii)).[10]

With respect to the notification of incompleteness, Regulation B specifies that if additional information is needed from an applicant, the creditor must send a written notice to the applicant specifying the information needed, designating a reasonable period of time for the applicant to provide the information, and informing the applicant that failure to provide the information requested will result in no further consideration being

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[10] "(c) Incomplete applications -

(1) Notice alternatives, within 30 days after receiving an application that is incomplete regarding matters that an applicant can complete, the creditor shall notify the applicant either:

(i) Of action taken, in accordance with paragraph (a) of this section.

given to the application (12 C.F.R. § 202.9(c)(2)), although it also provides that, at its option, a creditor may inform the applicant orally[11] of the need for additional information. But, if after orally notifying the applicant, the applicant remains incomplete, the creditor must then send written notice of

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(ii) Of the incompleteness, in accordance with paragraph (c)(2) of this section; or

(2) Notice of incompleteness, if additional information is needed from an applicant, the creditor shall send a written notice to the applicant specifying the information needed, designating a reasonable period of time for the applicant to provide the information, and informing the applicant that failure to provide the information requested will result in no further consideration being given to the application. The creditor shall have no further obligation under this section if the applicant fails to respond within the designated time period. If the applicant supplies the requested information within the designated time period, the creditor shall take action on the application and notify the applicant in accordance with paragraph (a) of this section

(3) Oral request for information. At its option, a creditor may inform the applicant orally of the need for additional information. If the application remains incomplete the creditor .shall send a notice in accordance with paragraph (c)(1) of this section." 12 C.F.R. § 202.9(C).

[11] Regulation 202.9(c)(3) provides that creditors can request the additional information from the applicant orally. Defendant claims to have attempted just this: that between December 9, 2013 and December 31, 2013, it "attempted multiple times to contact [Plaintiff] via telephone to inform" her that certain items were needed to complete the loan modification. UMF 7. However, because the application remained incomplete Defendant was required to send a written notice in accordance with paragraph (c)(1). Regulation 202.9(c)(1) required Defendant either to notify Plaintiff of the action taken in accordance with 202.9(a) or provide a written notice of incompleteness in accordance with paragraph 202.9(c)(2).

incompleteness. See 12 C.F.R. § 202.9(c)(3).

Thus, the creditor has a duty to notify an applicant if the application is incomplete. If the creditor elects to notify the applicant orally, and the application remains incomplete, then the creditor is required to send written notice of the incompleteness. *Piotrowski v. Wells Fargo Bank, N.A.*, No. 11-3758, 2015 WL 4602591, AT *7 (d. Md. July 29, 2015) citing *Kirk v. Kelley Buick of Atlanta, Inc.*, 336 F. Supp. 2d 1327, 1332 (N.d. Ga. 2004). And a creditor is required to use reasonable diligence in obtaining the information necessary to complete an applicant's application.[12] Regulation B provides that "[w]ithin 30 days after receiving an application that is incomplete regarding matters that an applicant can complete, the creditor shall notify the applicant either: (i)[o]f action taken or (ii)[o]f the incompleteness..." 12. C.F.R. § 202.9(c)(1); *Wright v. Suntrust Bank*, No. 04-CV-2258, 2006 WL 2714717, AT *4 (N.D. Ga. Sept. 18, 2006).

Plaintiff states in her Concise Statement of Material Facts that on "December 6, 2013, Wells Fargo Bank, N.A. told me that they received the

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[12] An Official Staff Interpretation of Regulation B states that although, with respect to what is a completed application, a creditor has the latitude to establish its own information requirements, the creditor nevertheless must act with reasonable diligence to collect information needed to complete the application, so that, for example, the creditor should request information from third parties, such as a credit report, promptly after receiving the application, and if additional information is needed from the l, such as an address or a telephone number to verify employment, the creditor should contact the applicant promptly. 12 C.F.R. Pt. 202, Supp. 1 ¶ 2(f)(6).

permanent streamline loan modification package and the December 2013 check. I asked if there is any problem. The representative state no problem." DE 80 If 3. A reasonable trier of fact could conclude that Plaintiff believed that her Modification Agreement had been accepted because Defendant accepted the new mortgage payment on January 2, 2014. DE 80 4. It was only in February 2014 that Defendant first refused Plaintiffs payment. DE 80 ¶¶ 15-16.

Since Defendant presents no evidence of having given Plaintiff any written notice (until one year later, after her home was foreclosed), the Court finds that a genuine issue of material fact exists regarding whether Defendant violated Regulation B by failing to notify Plaintiff that it would not extend credit based on her incomplete application or that her application was incomplete. *Yeh Ho v. Wells Fargo Bank, N.A.*, 739 F.App'x 525, 527 (11th Cir. 2018); Kirk v. Kelly Buick of Atlanta, Inc., 336 F. Supp. 2d 1327, 1332 (N.D. Ga. 2004).

Real Estate Settlement Practices Act Claim

Plaintiff also alleges Defendant violated RESPA and its implementing regulations, known as Regulation X. *See* 12 U.S.C. 2605(f); 12 C.F.R. § 1024.41(a). DE 41 AT 157-174. Specifically, Plaintiff contends that Defendant: (1) violated 12 C.F.R. § 1024.41(b) by not providing her with a written confirmation on the completeness of her "loan modification package" within five business days after receipt; (2) violated 12 C.F.R. § 1024.41(c) by not providing her a written response "on acceptance or other modification options" within 30 days of receipt

of the "loan modification package"; (3) violated 12 C.F.R. § 1024.41(c) by not providing Plaintiff with written notification of its evaluation of the "loss mitigation documents"; and (4) violated 12 C.F.R. § 1024.41(g) by proceeding with the foreclosure action on or about December 6, 2013, while her "permanent streamline loan modification [was] in place." DE 41 at 36-38, ¶¶ 159-174.

> Under RESPA, a consumer protection statute that regulates the real estate settlement process, the Consumer Financial Protection Bureau ("CFPB") is tasked with prescribing rules and regulations. See 12 U.S.C.S § 2617(a). RESPA's Regulation X, became effective January 10, 2014. See Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10696-01, 10696 (Feb. 14, 2013). This regulation places certain obligations on mortgage servicers when a borrower submits a loss mitigation application and lays out distinct procedures and rules for submitting such application regarding measures for assessing completeness, timelines and evaluation protocols. See generally 12 C.F.R. § 1024.41.

Clark v. HSBC Bank USA, National Association, 664 F. App'x 810, 811-12 (11* Cir. 2016) ("Clark"). Among a servicer's duties under Regulation X - relevant to the violations alleged in this action — are duties to: (1) evaluate a borrower's loss mitigation application for completeness, (2) timely notify the borrower of missing documents and information, and (3) refrain

from obtaining a foreclosure judgment or order of sale if a borrower submits a complete loss mitigation package after the servicer has initiated foreclosure proceedings. Id. at 812 (citing 12 C.F.R. § 1024.41(b), (c), (g)).

In her Amended Complaint, Plaintiff asserts that Defendant violated all three of the aforementioned provisions. DE 41 AT 33-38. However, Plaintiff s loan modification agreement was received by Defendant on December 6, 2013,[13] the effective date of Regulation X on January 10, 2014, relieving Defendant from any obligation to comply with Regulation X. DE 41 at 35, ¶ 142; McNeal Decl. ¶ 19.

When a borrower submits an application for a loan modification to the loan servicer prior to the effective date of Regulation X, the borrower is precluded from sustaining a claim against the servicer under Regulation X. See *Lage v. Ocwen Loan Servicing LLC,* 145 F. Supp. 3d 1172, 1184 (S.D. Fla. 2015) ("Lage") (concluding that borrower could not sustain a claim as matter of law against loan servicer for a violation of Regulation X where borrower's loan modification application was submitted prior to the January 10, 2014 effective date of Regulation X);[14] Clark, 664 F.App'x at 813 (same); *Miller v. Bank of*

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[13] Plaintiff concedes in her Opposition memorandum that Defendant "received her signed agreement on December 6, 2013." DE 79 at 3.

[14] Lage was affirmed by the 11th Circuit, but the Court more narrowly held that because the application was not filed within the timeframe provided by 12 C.F.R. § 1024.41(c), the protections of that provision were not triggered. *See Lage v. Ocwen Loan Servicing LLC,* 839 F.3d 1003, 1011 (11th Cir. 2016).

New York Mellon, 228 F. Supp. 3d 1287, 1291 (M.D. Fla. 2017)(same).

In *Lage,* the Court considered Ocwen's motion for summary judgment and recognized the obligations imposed upon servicers by Regulation X, but concluded that "in order for a borrower to avail himself or herself of Regulation X's protections, the borrower's application must be received by the servicer *after* the Effective Date [of Regulation X]." Id. at 1184 ("By imposing an effective date of January 10, 2014, the CFPB intended to institute a clear starting point with respect to when a servicer's obligations under Regulation X would be triggered.").

Therefore, even if a loss mitigation application is submitted before the effective date of Regulation X and becomes complete or "facially complete" sometime after the effective date, the servicer's obligations under 12 C.F.R. § 1024.41 do not apply. *See id.* at 1186 ("[T]he *submission* of the application on or after January 10, 2014 is a prerequisite to obtaining these protections set forth in 12 C.F.R. § 1024.41." (Emphasis in original)). Thus, in *Large,* where the borrower's application for a loan modification was received two days prior to the effective date of Regulation X, the servicer had no obligation to abide by Regulation X. *See id.* at 1188 ("Because Ocwen was under no obligation to review Plaintiffs application at the point of its original submission under Regulation X, it had no continuing obligation to determine whether the application had achieved completeness. Thus, there was no requirement that Ocwen review the application within the 30-day period provided by 12 C.F.R. § 1024.41(c), and Ocwen was free to proceed

with the foreclosure sale without fear of violating 12 C.F.R. § 1024.41(g)."). Consequently, the borrower's claim against the servicer for violation of 12 C.F.R. § 1024.41 failed as a matter of law. *See id.*

The same conclusion is required here. Defendant sent, and Plaintiff received, an offer for the TPP from Defendant is July 2013. DE 41 AT 8, 241-248; McNeal Decl. ¶ 12, Ex. A. Defendant sent, and Plaintiff received, the Modification Agreement in November 2013. DE 41 at 9-10; McNeal Decl. If 16, Ex. B. Plaintiff signed the Modification Agreement on December 4, 2013, and returned it to Defendant with only her signature. Defendant received it on December 6, 2013. De 41 ¶ 10, 142-156, McNeal Decl. If 10. Plaintiff makes no allegation that she submitted an application for a loan modification after sending the Modification Agreement to Defendant in early-December 2013 - approximately one month before the January 10, 2014 effective date of Regulation X. As such, there is no evidence to support Plaintiffs claim that she submitted an application for a loss mitigation to which Regulation X would apply. *See Lage,* 145 f. Supp. 3d at 1186. Because Defendant had no obligation to abide by the requirements of 12 C.F.R. § 1024.41, Plaintiffs claim is precluded by the Effective Date, fails as a matter of law, and Defendant is entitled to summary judgment. See id. Accordingly, it is hereby

ORDERED AND ADJUDGED that Defendant Wells Fargo Bank, N.A.'s Motion for Summary Final Judgment **[DE 71] is granted in part and denied in part.** It is granted as to Count III, the RESPA claim. It is denied as to Count I where

genuine issues of material fact remain as to whether the notification provided by Defendant fell short of the notification requirements of the ECOA.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 19th day of February, 2020.

/S/
KENNETH A. MARRA
United, States District Judge

Appendix E

SUPREME COURT OF FLORIDA

CASE NO. **33997**

Ben SMITH and Sylvia Smith His Wife,
Appellants,
V
Exerdell B. MARTIN, and Albert C. Martin,
Appellees.

March 2, 1966

Rehearing Denied April 13, 1966.

Smith v. Martin, 186 So. 2d 16 – Fla. Supreme Court 1966

Eugene C. Heiman, of Myers, Heiman & Kaplan, Miami, for appellants.

Sheldon R. Rosenthal, Miami, for appellees.

THOMAS, Justice.

On 3 April 1964 Exerdell Martin, wife of Albert C. Martin, borrowed $1850 from the appellants to discharge a note and mortgage held by one William Lay encumbering real property owned by the wife. She executed a note evidencing the loan and signed the instrument "Exerdell B. Martin, a single woman". As security for the note she executed and delivered to the Smith a mortgage which, too, described her as "a single woman." She wasn't single at all, having been continuously married to Albert for approximately 17 years. Moreover, it appears from the record that the money Exerdell received from the Smiths was used to pay a first mortgage to Lay, and closing costs including an abstract of title, counsel fees, taxes, recording charges and the like totaling $1671.64. The balance of $178.36 was paid to Exerdell.

*17 When Exerdell failed to make any payments on the note, or mortgage, by 2 September 1964, although the first installment matured 1 June of that year the Smiths filed suit to foreclose. Then here came Albert with a petition to intervene proclaiming that at all relevant times he had been the husband of Exerdell and that he should be allowed to intervene to protect "his interest" in the encumbered property.

On the same day Exerdell filed her answer admitting most of the salient features of the complaint but

asserting that she was married all along and that she had told the mortgage broker, United Mortgage Company, she was married and "that the said agents, [sic] United Mortgage Company, did request and procure her signature before the words, 'a single woman', by fraud and deceit in that they represented that the words, 'a single woman', would be stricken and deleted from the mortgage and mortgage note." Excerdell swore before a notary public that the statements in the answer were true. The record shows that a copy of the pleading was mailed to counsel for appellants by Sheldon R. Rosenthal who appears in this court as attorney for Exerdell and her husband.

Later the plaintiffs sought an order of the court to amend the complaint to include a prayer that the court declare in the alternative that the debt was an equitable mortgage or an equitable lien on the property. This motion was denied, and the court granted the defendants' motion for summary decree.

The chancellor faithfully recited the record establishing the duplicity of Exerdell in the transaction by which money was extracted from the appellants for her benefit. He rejected the motion to amend the complaint so that an equitable lien could be decreed and concluded that in strict observance of decisions of this court on this subject he could only hold that the mortgage was void because the husband did not join in its execution.

Here we pause on the way to a solution of the crucial jurisdictional problem, to say that notwithstanding appellees' contention in their brief that the "decree appealed from did not pass upon the validity of

Section 693.01 *** and Section 708.08, Florida Statutes [F.S.A.], but merely applied the existing law to the facts," we have a diametrically opposite view because of the language in the decree: "The Court specifically passes upon and rejects the attacks on the constitutionality of Section 693.01[sic], F.S. and Section 708.08, F.S." To us that was sufficient to vest in this court jurisdiction of the case under Section 4 of Article V of the Constitution, F.S.A. Without making an excursion into semasiology we observe simply that passing upon and rejecting attacks on the validity of an act necessarily involved determination of that validity.

At a glance it would appear that the first provision of Section 693.01 securing to a married woman the right to convey and mortgage her separate real property was neutralized by the later provision that she could do so if her husband joined in the instrument, a subject on which we animadverted in Miller v. Phillips et vir. 157 Fla. 175, 25 So.2d 194. But a study of the act and its purpose seems to dispel the thought. The original law was enacted by the Legislative Council of the Territory of Florida in 1835. Before that, in 1824, the Legislative Council had adopted an act intended to allay all doubts about the separate rights of husband and wife under the laws of East and West Florida springing from the introduction of the Common Law of England. This law now appears as Section 708.01, F.S.A. said by this court in Blood v. Hunt, 97 Fla. 551, 121 So. 886, "[a]t common law a husband had a freehold interest in the lands of the wife during the coverture, and his interest in such lands could be conveyed by him or subjected to his debts." Moreover, continued the court, the husband had "during the coverture the

right to the possession *18 and control of the wife's real property, and the right to the rents and profits thereof." So on further reflection it now seems that Section 693.01 may have served a real purpose and not have been as ineffectual as first appeared.

Section 708.08 has the same counterbalancing provision but much in the introductory provisions deals with problems unrelated to the ones facing us in this controversy and these would save it from condemnation for unconstitutionally.

We are of the opinion that no error was committed by the chancellor in declining to hold invalid either Section 693.01 or Section 708.08, because we have not been convinced of their invalidity in an entirely beyond a reasonable doubt which is the test often applied. Taylor v. Dorsey, 155 Fla. 305, 19 So.2d 876.

Now back to Exerdell and her devious transaction. We think it is obvious that what she did was morally wrong and we further think that in a court of equity it should be rectified. When the chaff is blown from the grain she is shown to have relieved her separate property of an encumbrance with the money of the Smiths. Moreover, we believe the victims of her crafty conduct can find redress in a court of equity without any violence being done to organic law.

We proceed to examine the merits of the case and in doing so we go immediately to Section 2, Article XI of the Constitution where we find that "[a] married woman's separate real *** property may be charged in equity and sold *** for money *** due upon any agreement made by her inwriting for the benefit of her separate property ***." This course attempted to

the pursued by appellants seems particularly appropriate for a note and mortgage easily fall within the definition of "agreement" *** in writing for the benefit of her separate property."

Plainly the property of Exerdell has been benefited by the money secured from the Smiths for with it she discharged an outstanding mortgage on it. Her land should be held responsible for the debt even though the mortgage and note were, because of her connivance, defectively executed. To hold these instruments constituted an "agreement made by her in writing for the benefit of her separate property," to quote the language of Section 2, Article XI, would be no more strained than a holding that if execution of a mortgage to secure the purchase price is faulty still the land may be subjected to the debt, as we held in Highland Crate Cooperative v. Guaranty Life Ins. Co. of Florida. 154 Fla. 332, 17 So.2d 515. We repeat here what we said there: "The principle of estoppel would in such a situation immediately suggest itself."

We find ourselves in disagreement with the chancellor though we are certain he undertook to adhere meticulously to our decisions as he interpreted them.

We decide that Exerdell's property should be subjected to lien in the amount of the money she extracted from the Smiths.

Reverse.

Thornal, C.J., Roberts and O'Connell, JJ., and Mason, Circuit Judge. Concur.

Appendix F

SUPREME COURT OF NORTH CAROLINA

CASE NO. 427PA 13

RL REGI NORTH CAROLINA, LLC.,
Appellant,

v.

LIGHTHOUSE COVE, LLC., Appellee.

Decided August 20, 2014

RL REGI NORTH CAROLINA, LLC V. LIGHTHOUSE COVE, LLC.,
762 S.E.2D 188 (N.C. 2014) 367 N.C. 425
Decided August 20, 2014.

NO. 427PA 13 Supreme Court of North Carolina.

RL REGI North Carolina, LLC v. Lighthouse Cove, LLC, 762 S.E.2D 188 (N.C. 2014) 367 N.C. 425 Decided August 20, 2014.

No. 427PA 13.

2014-08-20

RL REGI NORTH CAROLINA, LLC. V. LIGHTHOUSE COVE, LLC; Lighthouse Cove Development Cor., Inc.; Glen C. Stygar; John R. Lancaster; Leticia S. Lancaster; Lionel L. Yow; and Connie S. Yow.

Nelson Mullins Riley & Scarborough, LLP, Raleigh, by Christopher J. Blake and Joseph S. Dowdy, for plaintiff-appellant, Stubbs & Perdue, P.A., Raleigh, by Matthew W. Buckmiller, for defendant-appellee Connie S. Yow.

NEWBY, Justice.

On discretionary review pursuant to N.C.G.S. $ 7A-31 and on writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a unanimous decision of the Court of Appeals, _____ N.C. App. _____, 748 S.E.2d 723 (2013), affirming a judgment entered on 1 June 2012 by Judge Jay D. Hockenbury in Superior Court, New Hanover County, Heard in the Supreme Court on 5 May 2014. Nelson Mullins Riley & Scarborough, LLP, Raleigh, by Christopher J. Blake and Joseph S. Dowdy, for plaintiff-appellant. Stubbs & Perdue,

P.A., Raleigh, by Matthew W. Buckmiller, for Defendant-appellee Connie S. Yow. Ward and Smith, P.A., New Bern, by Jason T. Strickland and Matthew A. Cordell, for North Carolina Bankers Association, Inc., amicus curiae.

NEWBY, Justice.

In this case we consider the effect of a waiver on claims arising from a guarantor-lender relationship, including claims under the federal Equal Credit Opportunity Act ("ECOA"). In exchange for a lender's willingness to restructure loans after default, a guarantor may waive prospective claims against the lender. Because we hold that defendant waived any potential claims, including those under the ECOA, we reverse the decision of the Court of Appeals.

In 2006 Regions Bank provided $4,208,000 in financing for the acquisition and partial development of approximately fifty-seven acres of land in Brunswick County to Lighthouse Cove, LLC and Lighthouse Cove Development Corp., Inc. ("the LC Entities"). The loan was secured by the real estate and guaranteed by the individual business partners and their spouses, including Lionel L. Yow and his wife, defendant Connie S. Yow. By 2009 the LC Entities had defaulted on the obligations. As part of a restructuring agreement, on 7 December 2009, defendant executed a forbearance agreement that:

> .. recognize[d] and agree[d] that such Borrower [wa]s in default of its

> obligations under its respective Loan Documents as a result of the Payment Defaults and that the Lender has the present and immediate right to payment in full of all of the Obligations and the right to exercise any or all of its respective remedies contained in the Loan Documents.

According to the parties' arrangement, Regions Bank "agree[d] to not exercise any of the Collection Remedies under the Loan Documents" and to forego payments on the principal debt during the agreed upon forbearance period. In exchange, defendant waived "any and all claims, defenses and causes of action."

Waiver of Claims. Each Oligor acknowledges that the Lender has acted in good faith and has conducted itself in a commercially reasonable manner in its relationship with each of the Obligors in connection with this Agreement and in connection with the Obligations, the [Letter of Credit] Obligations and the Loan Documents, each of the Obligors hereby waiving and releasing any claims to the contrary. Each Obligor --- releases and discharges the Lender --- from any and all claims, defenses and causes of action, whether known or unknown and whether now existing or hereafter arising, including without limitations, any usury claims, that have at any time been owned, or that Obligor or any affiliate of an Obligor and that arise court of any one or more circumstances or events that occurred prior to the date of this Agreement.

Defendant further acknowledged that she freely and voluntarily entered into the agreement "after an adequate opportunity and sufficient period of time to review, analyze, and discuss ... all terms and conditions of this Agreement." Eventually, the LC Entities defaulted on their obligations under the forbearance agreement.

In September 2010, plaintiff RL REGI North Carolina, LLC purchased Regions Bank's interest in the LC Entities' loans. Three months later, plaintiff filed an action seeking recovery of the indebtedness from the business partners and their spouses. Defendant asserted as an affirmative defense that plaintiff's predecessor in interest obtained her guaranty of the loans in violation of the ECOA, which, *inter alia.* Prohibits discrimination in credit transactions based on marital status. On 22 March 2012, the trial court entered an order granting summary judgment in facor of plaintiff on all claims, counterclaims, and affirmative defenses, except those with regard to defendant. The trial court concluded that a genuine issue of material fact existed as to whether plaintiff's predecessor in interest violated the ECOA in obtaining her guaranty.

Following a jury trial, the trial court entered judgment for defendant, concluding that Regions Bank had procured her guaranty in violation of the ECOA and that this violation constituted an affirmative defense. Plaintiff appealed from both the denial of its motion for summary judgment and the post-trial judgment that concluded plaintiff violated

the ECOA which voided the guaranty agreement signed by defendant.

On appeal the Court of Appeals unanimously affirmed the trial court. *RL REGI N.C. LLC v. Lighthouse Cove, LLC,* -- N.C.App. ---, 748 S.E.2D 723 (2013). The Court of Appeals held, *inter alia,* that defendant's execution of the forbearance agreement "waiv[ing] all defenses" could not waive the defense that the guaranty was acquired in violation of the ECOA. Id. at ---, 748 S.E.2D at 730. Plaintiff sought discretionary *190 review in this Court, which we allowed, inter alia, to decide whether defendant retained any claims under the ECOA when she executed a forebearance agreement that broadly waived potential defenses. *RL Regi N.C., LLC v. Lighthouse Cove,* LLC, --- N.C. ----, 753 S.E.2d 667 (2014).

The ECOA prohibits lending institutions from discriminating against applicants in credit transactions "on the bais of race, color, religion, national origin, sec or marital status, or age." 15 U.S.C. §1691(a)(1) (2012). To enforce the prohibition against discrimination based on marital status, federal law authorizes the Board of Governors of the Federal Reserve system to prescribe rules lending institutions must follow in procuring spousal guarantees. *Id.* § 1691b(a)(1); *see* Equal Credit Opportunity Act (Regulation B), 12 C.F.R. Pt. 202 (2014), Supp. I to Pt. 202—Official Staff Interpretations, para. 7(d)(6), cmt. 2; FDIC, Financial Institution Letter No. FIL6-04, guidance on Regulation B Spousal Signature Requirements,

2004 WL 61154, at *5 (Jan. 13, 2004). While a creditor may not automatically require that a spouse be a party to a loan, it can do so if it first finds the applicant in not independently creditworthy. FCIC, Financial Institution Letter NO. FILE6-04, 2004 WL 61154, AT *5.

Some courts have held that, when a lender circumvents the ECOA requirements, a guarantor may assert the lender's violation as an affirmative defense and avoid the contract. *Bank of the West v. Kline,* 782 N.W.2d 453, 461 (Iowa 2010)*; see also Integra Bank/Pittsburgh v. Freeman,* 839 F. Supp. 326, 329 (E.D.pa. 1993)*; Still v. Cunningham,* 94 P.3d 1104, 1114 (Alaska 2004)*; Eure v. Jefferson Nat'l Bank, 248 Va. 245, 252, 448 S.E.2d 417, 421 (1994).* Other courts have held a violation is not a defense to collection of the debt. *See FDIC v. 32 Edwardsville, Inc.*, 873 F.Supp. 1474, 1480 (D. Kan. 1995); *Riggs Nat'l Bank of Washingotn, D.C. v. Linch,* 829 F. Supp. 163, 169 (E.D.Va. 1993), aff'd, 36 F.3D 370 (4TH CIR. 1994); *CMF Va. Land, L.P. v. Brinson,* 806 F.Supp. 90, 95 (E.D.Va. 1992); *Diamond v. Union Bank & Trust of Bartlesville,* 776 F.Supp. 542, 544 (N.D.Okla. 1991).

It is unnecessary, however, for us to determine in this case whether a violation of the ECOA occurred and, if so, whether such a violation creates an affirmative defense to the recovery of the indebtedness. Regardless of whether plaintiff violated the ECOA, defendant waived any possible claims under that statute.

The waiver here is part of the contractual forbearance agreement. Applying contract forbearance agreement. Applying contract principles, we determine the intent of the parties by the plain meaning of the written terms. *E.g., Powers v. Travelers Ins. Co.*, 186 N.C. 336, 338, 119 S.E. 481, 482 (1923). "We must decide the case, therefore, ... by what is written in the contract actually made by them." *Id.* (citation and quotation marks omitted). Parties are free to waive various rights, including those arising under statutes. *See Clement v. Clement,* 230 N.S. 636, 640, 55 S.E.2d 459, 461 (1949); *Cameron v. McDonald,* 216 N.C. 712, 715, 6 S.E.2d 497, 499 (1940); *In re West,* 212 N.S. 189, 192, 193 S.E. 134, 136 (1937); *see also Ballard v. Bank of Am.,* 734 F.3d 308, 313 (4th Cir. 2013). In contracts parties understand that "liability to the burden is a necessary incident to the right to the benefit." *Norfleet v. Cromwell,* 70 N.S. 510, 516, 70 N.S. 633, 641 (1874) (citations omitted).

In executing the forbearance agreement, defendant acknowledged the enforceability of her guaranty and waived a wide array of potential claims. The agreement expressly releases the lender from "any and all claims, defenses and causes of action." The comprehensive language contained in the agreement, inter alia, "waive[s] and release[s] any claims" that may challenge the lender's
good faith" or "commercially reasonable" conduct. Defendant argues that the waiver's phrase "in tort or in contract" limits the otherwise broad language in the agreement from covering statutory claims. This

argument overlooks the preceding phrase "including without limitation" and the overall expansive language of the waiver. Given the wide ranging nature of the statement "waiving and releasing any claims," we do not agree that the release should be interpreted to exclude statutory claims. *191

Defendant argued, and the Court of Appeals agree, that the waiver was unenforceable because the original loan relationship violated public policy. The cases cited for this view, however, hold that a contract which on its fact involves illegal conduct will not be enforced. See *Cansler v. Penland*, 125 N.C. 408, 409, 125 N.C. 578, 579, 34 S.E. 683, 684 (1899) (holding a contract in which a sheriff authorized another to exercise certain duties of the sheriff was inherently illegal and unenforceable); cf. *Martin v. Underhill,* 265 N.C. 669, 673-74, 144 S.E. 2d 872, 875-76 (1965) (finding a contract to bid on property for another at a public auction was not illegal in its essence and was thus enforceable). There is nothing facially illegal about this loan relationship in which a lender provided a loan upon certain conditions; moreover, parties routinely forego claims in settlement agreements. Here a waiver of potential defenses to the guaranty, including a potential defense for a violation of the ECOA, was a part of defendant's decision to accept the benefits of the forbearance agreement.

In a recent decision on similar facts, the United States Court of Appeals for the Fourth Circuit enforced a waiver of potential claims under the ECOA. Ballard, 734 F.3d at 314. That court

analogized a settlement of claims under the ECOA to one under the Equal Employment Opportunity Act. Id.; *see, e.g., Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 52, 94 S.Ct. 1011, 1021, 39 L.Ed.2d 147, 160 (1974) ("[P]resumably an employee may waive his cause of action under [the Equal Employment Opportunity Act] as part of a voluntary settlement."). In either scenario, a waiver does not operate as a precondition to the original contract for credit or employment; instead, it acts as a "negotiated benefit" or compromise of the original contract terms. *Ballard,* 734 F.3d at 314. Defendant's waiver here was not a precondition for the LC Entities to receive the original loan, but rather it was a negotiated settlement.

In executing the forbearance agreement, defendant acknowledged the enforceability of her guaranty and waived her potential claims, including those under the ECOA, in exchange for leniency in repaying the debt. The trial court improperly allowed defendant to assert a claim she waived, thus depriving plaintiff of its rights under the forbearance agreement. The Court of Appeals erroneously affirmed the trial court's judgment. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for consideration of defendant's remaining issues on appeal.

REVERSED AND REMANDED.

Appendix G

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 6:13-cv-208-Ori-36DAB

PNC BANK, N. A.,
Plaintiff
V
SANFORD MILLER, MARY KELLY MILLER,
Defendant

Filed 06/06/2013

Document 21

ORDER

ORDER

This cause comes before the Court on the Report and Recommendation of Magistrate Judge David A. Baker, file don May 16, 2013 (Doc. 19). In the Report and Recommendation, the Magistrate Judge recommends that Plaintiff PNC Bank, National Association's ("Plaintiff") Amended Motion to Strike Defendants Sanford Miller and Mary Kelly Miller's ("Defendants") First Affirmative Defense or, in the Alternative, Motion for Partial Judgement on the Pleadings ("Amended Motion to Strike") (Doc. 14) be denied as to Count Two.[1] *See* Doc. 19. None of the parties have objected to the Report and Recommendation and the time to do so has expired.

The Court agrees with the Magistrate Judge that Defendants should be permitted to assert an alleged violation of the Equal Credit Opportunity Act ("ECOA") as an affirmative defense to enforcement of a guaranty. *See id.* Permitting the affirmative defense is consistent with Florida law recognizing that illegality of contract may be raised as an affirmative defense, as well as the public policy behind the enactment of the ECOA. *See, e.g., Power Fin. Credit Union v. Nat'l Credit Union Admin. Bd.*, 494 F. App'x 982, 986 (11th Cir. 2012) ("[A] contract which violates a provision of ... a statute is void and illegal and, will not be enforced in [Florida] courts."); *Citgo Petroleum Corp. v. Bulk Petroleum Corp.*, No. 08-CV-654-TCK-PJC, 2010 WL 3212751, at *4 (N.D.

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[1] As Defendants have conceded that their first affirmative defense does not apply to Counts One or Three, Magistrate Judge Baker recommends that the Amended Motion to Strike be denied, as moot, as to those Counts. See Doc. 19, p. 5 n.2.

Okla. Aug. 12, 2010) (permitting defensive use of an ECOA violation under the doctrine of recoupment and noting that cases decided by the First and Third Circuits, which "represent the weight of authority and what appears to be the trend," have also permitted defensive use); *Bank of the West v. Kline*, 782 N.W.2D 453, 463 (Iowa 2010) (permitting the affirmative defense because it is consistent with Iowa law that contracts made in contravention of a statute are void, as well as the public policy behind the enactment of the ECOA); *Chen v. Whitney Nat'l Bank*, 65 So. 3d 1170, 1174 (Fla. 1st Dist. Ct. App. 2011) (permitting the affirmative defense because it is consistent with Florida law recognizing that illegality of contract may be raised as an affirmative defense, as well as the public policy behind the enactment of the ECOA). Therefore, after careful consideration of the Report and Recommendation of the Magistrate Judge, in conjunction with an independent examination of the court file, the Court is of the opinion that the Magistrate Judge's Report and Recommendation should be adopted, confirmed, and approved in all respects.

Accordingly, it is hereby ORDERED:

1. The Report and Recommendation of the Magistrate Judge (Doc. 19) is adopted, confirmed, and approved in all respects and is made a part of this Order for all purposes, including appellate review.
2. Plaintiff's Amended Motion to Strike (Doc. 14) is DENIED as moot as to Counts One and Three, and DENIED as to Count Two.

DONE and ORDERED in Orlando, Florida on June 6, 2013.

/S/_____
Charlene Edwards Honeywell
United States District Judge

Copies furnished to:
Counsel of Record
Unrepresented Parties
United States Magistrate Judge David A. Baker

Appendix H

DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

CASE NO. 2D15-331

Walter G. NOWLIN and Valerie A. NOWLIN, Appellant,

v.

NATIONSTAR MORTGAGE, LLC, Appellee.

Decided June 10, 2016

Nowlin v. Nationstar Mortgage, LLC, 193 So.3d 1043 (Fla. Dist. Ct. App. 2016) Decided June 10, 2016

District court of Appeal of Florida Second District

Nowlin v. Nationstar Mortgage, LLC, 193 So. 3d 1043 (Fla. Dist. Ct. App. 2016) Decided June 10, 2016

No. 2D15-331

06-10-2016

Walter G. NOWLIN and Valerie A. Nowlin, Appellants, v. NATIONSTAR MORTGAGE, LLC, Appellee.

Peter Ticktin, Kendrick Almaguer, and Satyen D. Gandhi of The Ticktin Law Group, P.A., Deerfield Beach, for Appellants.

Nancy M. Wallace and Michael J. Larson of Akerman LLP, Tallahassee; and William P. Heller of Akerman LLP, Fort Lauderdale, for Appellee.

OPINION

Honorable Judge, CASANUEVA, LUCAS and SALARIO, JJ., Concur.

Walter G. Nowlin and Valerie A. Nowlin appeal a final judgment of foreclosure entered in favor of Nationstar Mortgage, LLC, and they raise two claims of error. First, the Nowlins contend that the trial court erred in finding that the trial court erred in finding that they defaulted on the mortgage when the loan had been modified, and second, they contend that the trial court erred in finding that Nationstar complied with

a condition precedent clause contained in the mortgage. On the authority of Geen Tree Servicing, LLC v. Milam, 177 so.3d 7 (Fla. 2d DCA 2015), reh'g denied, (Oct. 13, 2015); Ortiz v. PNC Bank, National Ass'n. 188 So.3d 923 (Fla. 4th DCA 2016); Bank of New York v. Mieses, 187 So.3d 919 (Fla. 3d DCA 2016); and Bank of New York Mellon v. Johnson, 185 So.3d 594 (Fla. 5th DCA 2016), we affirm the trial court's ruling as to the second issue without further discussion.

We agree with the Nowlins that the trial court erred in entering a final foreclosure judgment when the loan at issue had been modified. We will also address an issue created by the manner in which the final judgment was issued.

I. FACTS AND PROCEDURAL HISTORY

BAC Home Loans Servicing filed an amended foreclosure complaint against eh Nowlins which alleged that the Nowlin defaulted on a mortgage and promissory note that were executed on October 7, 2002.[1] BAC alleged that the installment payment due on August 1, 2009, was not received, and no subsequent payments had been received. BAC later transferred its right to enforce the loan to Nationstar, and Nationstar was substituted as the plaintiff on July 28, 2014.

At the subsequent bench trial, the Nowlins testified that BAC modified their mortgage in July 2009. Prior to this, the Nowlins had never missed a payment and had never made a later payment. On July 28, 2009,

---

[1] The original complaint was filed on June 18, 2010.

BAC, through its Home Retention Division, issued a letter to the Nowlins which state, "We are pleased to advise you that your loan modification has been approved. In order for the modification to be valid, the enclosed documents need to be signed and returned." Two documents had to be returned: a Step Rate Loan Modification Addendum to Loan Modification Agreement and a Loan Modification Agreement. The modification documents were signed, notarized, and sent back to BAC via Federal Express. The Nowlins used the Federal Express envelope which was provided to them by BAC. The Nowlins produced a receipt from Federal Express indicating that the envelope was shipped on August 17, and that it was received on August 18, 2009.

The Nowlins were also required to send to BAC cashier's checks for three consecutive mortgage payments beginning on October 1. They were informed that after the third payment was received, the modification would become permanent. The Nowlins introduced a certified check that was cashed by BAC on September 9 for the first payment that was due on October 1. Two other certified checks were introduced into evidence which had been cashed by BAC for the payments due on November 1 and December 1.

Despite the Nowlins' compliance with the terms of the modification agreement, BAC sent a letter to the Nowlins in December 2009, notifying them that BAC was going to accelerate their loan because the August 1, 2009, payment had not been received . When Ms.

Nowlin called to find out why the modification was cancelled, BAC informed her that the modification had been cancelled in November, and they would have to obtain another modification. The Nowlins sent in the paperwork for the second loan modification, but BAC claimed that the paperwork was not in their file.

II. EVIDENCE ESTABLISHED A VALID AGREEMENT TO MODIFY LOAN

We conclude that there was a valid modification agreement between BAC and the Nowlins and, therefore, the trial court erred in entering the judgment of foreclosure. "A contract is made when the three elements of contract formation are present: offer, acceptance, and consideration. No person or entity is bound by a contract absent the essential elements of offer and acceptance." 11 Fla. Jur.2d Contracts § 25 (2016) (footnotes omitted).

Further, "[w]ith a bilateral contract such as the one in this case, acceptance is the last act necessary to complete the contract." Perzold Air Charters v. Phoenix Corp., 192 F.R.D. 721, 725 (M.D. Fla. 2000). "Pursuant to contract law, the acceptance of an offer which results in an enforceable agreement must be (1) absolute and unconditional; (2) identical with the terms of the offer; and (3) in the mode, at the place, and within the time expressly or impliedly stated within the offer." Gillespie v. Bodkin, 902 So.2d 849, 850 (Fla.1st DCA 2005).

When the acceptance of an offer is conditioned upon the mailing of the acceptance, the acceptance "is effective upon mailing and not upon receipt." Morrison v. Thoelke, 155 So.2d 889, 905 (Fla. 2d DCA 1963).

> An acceptance may be transmitted by any means which the offeror has authorized the offeree to use and, if so transmitted, is operative and completes the contract as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror, unless the offer otherwise provides.

Kendel v. Pontious, 261 So.2d 167, 169 (Fla. 1972) (quoting Restatement (First) of Contracts § 64 (Am. Law Inst. 1932)).

BAC specifically defined what actions would constitute an acceptance of its offer to modify the mortgage contract. The Nowlins were required to sign and return the documents provided by BAC, and they were required to make three monthly payments beginning on October 1, 2009. The Nowlins testified that they returned the signed documents in the Federal Express envelope provided by BAC, and they produced a receipt from Federal Express indicating that the envelope was shipped on August 17 and that it was received on August 18, 2009.

At trial, Nationstar did not dispute the contents of the July 28 letter, the fact that a Federal Express

envelope was enclosed to facilitate the return of the loan documents, or the fact that Federal Express delivered a package to a Pittsburg address and its Home Retention Division address is 100 Beecham Drive, Suite 104, Pittsburgh, Pennsylvania. Rather, its default specialist testified that Nationstar had no record of receiving the loan modification documents. Therefore, it contended, the Nowlins must not have returned the loan modification documents. We do not find merit in this argument, because it was the mailing of the documents that constituted an acceptance of the offer, not whether Nationstar's records showed that the documents were received.

Finally, the evidence reflected, without contradiction, that subsequent to the mailing of the loan modification documents, the Nowlins tendered three consecutive monthly payments in the amount required by BAC. Nationstar's witness confirmed that each of the Nowlins three payments had been received and accepted. When a party accepts the benefits under a contract, courts must ratify the contract even if that party contends that it had a contrary intent. Stevenson v. Stevenson, 661 So.2d 367, 369 (Fla. 4th DCA 1995). Thus, by accepting the benefits of the loan modification, Nationstar cannot now question the validity of the contract. Having entered into a valid modification agreement, Nationstar could only foreclose by alleging and proving a breach of the modification agreement and neither of which was done here. See Kuhlman v. Bank of Am., N.A., 177 So.3d 1282, 1283 (Fla. 5th DCA 2015).

III. FINAL JUDGMENT

Although not raised by the parties, we are greatly concerned over the final judgment issued in this case. The trial transcript reflects that the proceedings were heard before the Honorable Sandra Taylor. At the conclusion of the foreclosure trial, she made no findings of fact or rulings of law. However, the final judgment purports to have been rendered by Honorable Donald C. Evans, Senior Judge. Nothing in our record establishes or even hints at why a judge, other than the trial judge, entered this final judgment. The entry of a final judgment by a judge who did not preside over the trial, without more, is improper. "[A] successor judge may not enter an order or judgment based upon evidence heard by the predecessor judge." Hartney v. Piedmont Tech., Inc., 814 So. 2d 1217, 1218 (Fla. 1st DCA 2002) (quoting Carr v. Byers, 578 So.2d 347, 348 (Fla. 1st DCA 1991)); see also Acker v. State, 823 So.2d 875, 876 (Fla. 2d DCA 2002) (reversing probation order where judge who signed the order did not hear the testimony of the witnesses nor could she evaluate their credibility).

IV. CONCLUSION

We reverse the final judgment of foreclosure and remand with directions to enter judgment in favor of the Nowlins.

LUCAS AND SALARIO, JJ., CONEUR.

APPENDIX J

U.S. CONSTITUTION ARTICLE I SECTION 10

Nor impairing the Obligation of Contracts

U.S. CONSTITUTION FIFTH AMENDMENT: (IN RELEVANT PART)

No be deprived of life, liberty, or property, without due process of law

U.S. CONSTITUTION SEVENTH AMENDMENT CIVIL TRIAL RIGHTS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONSTITUTION EIGHTH AMENDMENT

Excessive bail shall not be required, no excessive fine imposed, nor cruel and unusual punishments inflicted.

U.S. CONSTITUTION FOURTEENTH AMENDMENT: (SECTION 1, IN RELEVANT PART)

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONSTITUTION 4TH AMENDMENT: (IV, SECTION 1, IN RELEVANT PART)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FLORIDA CONSTITUTION Article X, Section 4.

Section 4: Homestead; exemptions. – (c) The homestead shall not be subject to devise if the owner is survived by spouse or minor child, except the homestead may be devised to the owner's spouse if there be no minor child. The owner of homestead real estate, joined by the spouse if married, may alienate the homestead by mortgage, sale or gift and, if married, may by deed transfer the title to an estate by the entirety with the spouse. If the owner or spouse is incompetent, the method of alienation or encumbrance shall be as provided by law.

FLORIDA STATUES SECTION 732.702(1):

The rights of a surviving spouse to – Homestead...., may be waived wholly or partly, before or after marriage, by a written contract, agreement, or waiver, signed by the waiving party in the presence of two subscribing witnesses... Unless the waiver proves to the contrary, a waiver of "all rights,"

or equivalent language, in the property or estate of a present or prospective spouse..., is a waiver of all rights to ... Homestead .., by the waiving party in the property of the other and a renunciation by the waiving party of all benefits that would otherwise pass to the waiving party from the other by intestate succession or by the provisions of any will executed before the written contract, agreement, or waiver.

FLORIDA STATUTES SECTION 708.08 Real and personal property married women's property. –

Married women's right; separate property. – (1) Every married woman is empowered to take charge of and manage and control her separate property, to contract and to be contracted with, to sue and be sued, to sell, convey, transfer, mortgage, use, and pledge her real and personal property and to make, execute, and deliver instruments of every character without the joinder or consent of her husband in all respects as fully as if she were unmarried. Every married woman has and many exercise all rights and powers with respect to her separate property, income, and earnings and many enter into, obligate herself to perform, and enforce contracts or undertakings to the same extent and in like manner as if she were unmarried and without the joinder or consent of her husband. All conveyance, contracts, transfers, or mortgages of real property or any interest in it executed by a married woman without the joinder of her husband before or after the effective date of

the 1968 Constitution of Florida are as valid and effective as though the husband had joined.

42 U.S.C. SECTION 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

15 U.S.C. §1691 provides:

(1)To make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness.

15 U.S.C. §1691a(b) provides:

The term "applicant" means any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit

plan for an amount exceeding a previously established credit limit.

15 U.S.C. §1691a(d) provides:

> The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor.

15 U.S.C. §1691(b)(1) provides Activities not constituting discrimination:

> To make an inquiry of marital status if such inquiry is for the purpose of ascertaining the creditor's rights and remedies applicable to the particular extension of credit and not to discriminate in a determination of credit-worthiness;

15 U.S.C. §1691d(a). provides Applicability of other laws:

> Requests for signature of husband and wife for creation of **valid lien**, etc. A request for the signature of both parties to a marriage **for the purpose of creating a valid lien**, passing clear title, waiving inchoate rights to property, or assigning earnings, shall not constitute discrimination under this subchapter: Provided, however, **That this provision shall not be construed to permit a creditor to take sex or marital status into account in connection with the evaluation of creditworthiness of any applicant.**

15 U.S.C. §1691d(c) provides State laws prohibiting separate extension of consumer credit to husband and wife:

> Any provision of State law which probhits the separate extension of consumer credit to each party to a marriage shall not apply in any case where each party to a marriage voluntarily applies for separate credit from the same creditor: Provided. That in any case where such a State law is to prempted, each party to the marriage shall be solely responsible for the debt so contracted.

12 C.F.R. § 202.7 (d)(1) provides in pertinent part rules concerning extensions of credit.

> (d) Signature of spouse or other person-
> (1) Rule for qualified applicant. Except as provided in the paragraph, a creditor shall not require the signature of an applicant's spouse or other person, **other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested.** A creditor shall not deem the submission of a joint financial statement or other evidence of jointly held assets as an application for joint credit.

12 C.F.R. § 202.7 (4) Secured credit provides:

> If an applicant requests secured credit, a creditor may require the signature of the applicant's spouse or other person on any instrument necessary, or reasonably believed by the creditor to be necessary, under applicable state law to make the property being offered as security available to satisfy the debt in the event of default, for example, an instrument to credit a valid lien, pass clear title, waive in choate rights, or assign earning.

CASE NO:

IN THE

SUPREME COURT OF THE UNITED STATES

KAREN C. YEH HO,
PETITIONER

VERSUS

WELLS FARGO BANK, N.A.,
RESPONDENT

SUPPLEMENTAL APPENDIX FOR PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT COURT
CASE NO: 22-11231-GG

Respectfully submitted by:
KAREN C. YEH HO, PRO SE
Petitioner, Appellant, Plaintiff
9174 Chianti court
Boynton Beach, FL 33472
(561)460-1989

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SPECIAL APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-11231

KAREN C. YEH HO,
Plaintiff-Appellant,
Versus
WELLS FARGO BANK, N.A.,
Defendant-Appellee.

Filed date: June 15, 2023

[Document 30-2]

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEATING EN BANC

Honorable Judges Newsom, Grant and Anderson
(Circuit Judges)

Appeal from the United States District court for the
Southern District of Florida
D.C. Docket No. 9:15-cv-81522-KAM

ORDER OF THE COURT

Before NEWSOM, GRANT, and ANDERSON, Circuit Judges.
PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Rehearing EN BANC is also treated as a Petition for Rehearing before the panel and is DENIED. FRAP 35, IOP 2.