

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	CASE NO. 11-71493-JB
	:	
KUNMI OLULEYE,	:	
	:	CHAPTER 13
Debtor.	:	
	:	
KUNMI OLULEYE,	:	
	:	ADVERSARY PROCEEDING
Plaintiff,	:	NO. 11-5518-JB
	:	
v.	:	
	:	
METLIFE HOME LOANS,	:	
A DIVISION OF METLIFE BANK, N.A.,	:	
and FEDERAL NATIONAL	:	
MORTGAGE ASSOCIATION,	:	
	:	
Defendants.	:	

ORDER

This adversary proceeding is before the Court on defendants' motion for judgment on the pleadings (Docket No. 6). In the motion, filed pursuant to Federal Rule of Civil Procedure 12(c), made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7012(b), defendants request a judgment in their favor contending that the complaint fails to state a claim upon which relief can be granted. Plaintiff did not file a response, and the motion came before the Court for a hearing on January 17, 2012, the same day as a hearing on confirmation of debtor's Chapter 13 plan. Jonathan Melnick appeared on behalf of the debtor, Kunmi Oluleye, and Ms. Oluleye was also present. John Andrie appeared for the defendants, MetLife Home Loans, a Division of MetLife Bank, N.A., and Federal National Mortgage Association ("Fannie Mae").

Sonya Buckley was present on behalf of the Chapter 13 Trustee in debtor's bankruptcy case. Based on the parties' arguments and a review of the record, the Court concludes that this adversary proceeding should be dismissed.

Plaintiff debtor commenced this adversary proceeding with a *pro se* complaint against defendants MetLife Home Loans and Fannie Mae to determine the nature, extent and validity of defendants' lien on plaintiff's residence located at 2838 Heather Row Ridge, Lilburn, GA (the "Property"). Debtor has since retained counsel Jonathan Melnick. At the January 17, 2012 hearing, plaintiff's attorney explained that plaintiff initiated this adversary proceeding with the belief that she was unfairly treated by defendant MetLife during the course of her application for a loan modification. Debtor filed this Chapter 13 case solely to address her disputes with MetLife and Fannie Mae, and counsel acknowledged that debtor is ineligible for a Chapter 13 discharge as she received a discharge under Chapter 7 on March 16, 2011.

The motion to dismiss the adversary proceeding and the plan confirmation hearing were both scheduled for a hearing on Tuesday, January 17, 2012. On January 11, 2012, counsel for plaintiff and counsel for defendants called Chambers to inform the Court that the parties would be submitting a joint motion to dismiss this adversary proceeding. Chambers directed counsel to file the motion by Friday, January 13, 2012 if they wished to be excused from appearing in Court. On January 13, 2012, counsel for both parties called Chambers again, this time to inform the Court that Ms. Oluleye had changed her mind and did not wish to dismiss the adversary proceeding.

The status of the main Chapter 13 case is as follows. The January 17, 2012 confirmation hearing was the third scheduled hearing on confirmation, and the Chapter 13 Trustee had filed objections to confirmation. In an order entered on December 16, 2011, the Court advised debtor

that her case was not in a confirmable posture and that debtor would need to bring her plan payments current and file an amended plan in order for her case to be confirmed. At the conclusion of the January 17, 2012 hearing, the Court placed the case on a 10-day status, requiring debtor to pay \$1,844.00 to the Chapter 13 Trustee and file and serve on counsel for the defendant an amended Chapter 13 plan by January 27, 2012, or the bankruptcy case would be dismissed. If debtor meets the 10-day status requirements, the Chapter 13 Trustee will reset a hearing on plan confirmation.

With respect to defendants' motion for judgment on the pleadings in the adversary proceeding, Mr. Melnick stated that he believed defendants' motion had merit and that his client Ms. Oluleye does not have a cause of action against defendants. Mr. Melnick stated that he had advised Ms. Oluleye that she would be better served by filing an objection to a proof of claim. The Court agrees with counsel, but as of the hearing date, MetLife had not filed a proof of claim in the bankruptcy case. The Court thus explained to the parties that MetLife cannot be paid through the Chapter 13 case until a proof of claim is filed.

The *pro se* complaint contains a number of allegations that are, for the most part, confusing. The allegations include references to the Truth-in-Lending Act ("TILA"), 15 U.S.C. § 1602, the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq., in addition to several state law claims. With respect to plaintiff's TILA claim, pursuant to 15 U.S.C. §§ 1635 and 1640(3), the time limit for the exercise of the right to rescission is three years after the date of consummation of the transaction, and the time limit for civil liability for damages is one year from the date of the occurrence of the violation. For a money damages action, "[t]he violation 'occurs' when the transaction is consummated". *Smith v. Am. Fin. Sys., Inc. (In re Smith)*, 737 F.2d 1549,

1552 (11th Cir. 1984) (citing *Wachtel v. West*, 476 F.2d 1062, 1065 (6th Cir. 1973) (holding that violation of disclosure occurs at the time a contractual relationship is created between creditor and customer)). The loan transaction at issue was consummated between debtor and the original mortgagee on September 3, 2003. Debtor filed this *pro se* adversary proceeding on September 9, 2011, well beyond the one-year and three-year statutes of limitations, and claims for violations of TILA are time-barred. Accordingly, plaintiff's TILA claim is dismissed *with prejudice*.

Plaintiff's FDCPA claim under 15 U.S.C. § 1692g, validation of disputed debts, must also be dismissed. Plaintiff's allegations in her complaint indicate the FDCPA violation is in reference to the initiation of a foreclosure on the Property, although defendants ultimately did not foreclose on the Property. It is well-observed that foreclosure of a security deed is not debt collection activity under 15 U.S.C. § 1692a but merely "enforcement of a security interest" under 15 U.S.C. § 1692f(6). *E.g.*, *Warren v. Countrywide Home Loans, Inc.*, 2009 WL 2477764, at *2 (11th Cir. Aug. 14, 2009). Accordingly, plaintiff's FDCPA claim is dismissed *with prejudice*.

Plaintiff's claim for wrongful foreclosure should be dismissed, as defendants did not conduct a foreclosure sale on the Property. In her complaint, plaintiff states that defendants cancelled two attempted foreclosures on the Property, and defendants' counsel represented again at the hearing that a foreclosure sale never occurred. Given this fact, plaintiff's claim that defendants attempted to foreclose on the Property without sending her the proper notice does not entitle her to any relief. Plaintiff appears to rely on O.C.G.A. § 44-14-162.2, which requires at least 30-days' notice prior to a non-judicial foreclosure sale. However, the notice requirement under O.C.G.A. § 44-14-162.2 only applies to "the *exercise of a power of sale* of property". O.C.G.A. § 44-14-162.3(a) (emphasis added). Any failure by defendants to comply with O.C.G.A. § 44-14-

162.2 was remedied by the cancellation of a pending foreclosure sale.

The Court makes no finding with respect to plaintiff's claim that defendants have no right to foreclose on the Property under Georgia law. In their answer to plaintiff's complaint, defendants state that defendant MetLife Home Loans is the servicer of the loan and secured creditor on the Property. Defendants include a copy of the security deed and assignment, which show that First Horizon Home Loan Corporation was the original lender, First Horizon Home Loan Corporation assigned the security deed to MetLife on July 17, 2008, and the assignment was recorded in the Superior Court of Gwinnett County on September 26, 2008. The parties suggest there may be some question as to the holder of the note. But whether MetLife has the authority to foreclose on the Property is a matter of state law, does not involve any bankruptcy issues, and should be litigated in the Superior Court of Gwinnett County. Accordingly, plaintiff's claims disputing defendants' right to foreclose on the Property are dismissed without prejudice to plaintiff's right to assert such claims in the Superior Court of Gwinnett County.

Plaintiff's remaining disputes as to the amount of the unpaid loan balance and her contentions with respect to any loan modification can be more properly addressed through an objection to a proof of claim. However, debtor should be aware that the bankruptcy court has no authority to force a lender to approve an application for a loan modification. A proof of claim must be filed for MetLife if it is to be provided for in this Chapter 13 case. Finally, debtor's counsel represented to the Court on January 17, 2012 that he will amend the Chapter 13 plan to provide that debtor will make the mortgage payments of \$1,165.00 to the Chapter 13 Trustee until any dispute regarding the mortgage claim, if filed, is resolved.

In her complaint, plaintiff also requested that the Court enter an Order compelling defendants to have an appraisal performed on the Property to determine the Property's fair market value. At this time, there is no legal basis for such an order. Defendants have not sought relief from the automatic stay or any other form of relief that would require them to establish the value of the Property. Accordingly, plaintiff's request that the Court compel an appraisal is denied at this time.

In accordance with the above reasoning, plaintiff's claims under the Truth-in-Lending Act and the Fair Debt Collection Practices Act are dismissed *with prejudice*; plaintiff's claim for wrongful foreclosure is dismissed *with prejudice*, as both parties represent that defendants did not conduct a foreclosure sale of the Property; plaintiff's claim that defendants do not have the authority to foreclose on the Property under Georgia law is dismissed without prejudice to plaintiff's right to assert such claim in the Superior Court of Gwinnett County; and plaintiff's claim disputing the amount of the unpaid loan balance is dismissed without prejudice to plaintiff's right to object to any proof of claim with respect to the Property that is filed in the bankruptcy case.

IT IS SO ORDERED, this 30th day of January, 2012.


JOYCE BIHARY
UNITED STATES BANKRUPTCY JUDGE

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