UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:20-cv-21546-KMM

GARY COOPER, on behalf of himself and all others similarly situated,

Plaintiff,

v.

PENNYMAC LOAN SERVICES, LLC,

Defendant.
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ORDER ON MOTION TO DISMISS

THIS CAUSE came before the Court upon Defendant Pennymac Loan Services, LLC's ("Defendant") Motion to Dismiss. ("Mot.") (ECF No. 15). Plaintiff Gary Cooper ("Plaintiff") filed a response in opposition. ("Resp.") (ECF No. 27). Defendant filed a reply. ("Reply") (ECF No. 31). The Parties filed several Notices of Supplemental Authority. (ECF Nos. 30, 36, 37, 38, 39, 40, 41, 42, 46, 49). The Motion is now ripe for review.

I. BACKGROUND[1]

This case arises under the Florida Consumer Collection Practices Act ("FCCPA"), Fla. Stat. §§ 559.55, *et seq*. Plaintiff is a "debtor" or "consumer" as defined by the FCCPA. Compl. ¶ 28. At all relevant times, Plaintiff owned property located at 20024 SW 82 Place, Miami, FL 33189. *Id.* ¶ 2. The property is subject to a mortgage serviced by Defendant. *Id.* ¶ 1; ("Mortgage") (ECF No. 1-1).

[1] The following background facts are taken from the Class Action Complaint and Demand for Jury Trial ("Compl.") (ECF No. 1) and are accepted as true for purposes of ruling on this Motion to Dismiss. *Fernandez v. Tricam Indus., Inc.*, No. 09-22089-CIV-MOORE/SIMONTON, 2009 WL 10668267, at *1 (S.D. Fla. Oct. 21, 2009).

In November 2018, Plaintiff made a mortgage payment to Defendant over the phone. *Id.* ¶ 11. Defendant charged Plaintiff a $15 processing fee in connection with the payment. *Id.* Defendant charged members of Plaintiff's proposed class similar processing fees for payments made pursuant to their separate mortgage agreements. *Id.* ¶ 42. However, "[t]he Mortgage does not expressly provide for or authorize charging processing fees for making payments over the phone." *Id.* ¶ 10. Defendant did not transfer the fee to a third-party payment processor, but "instead retain[ed] a considerable portion thereof." *Id.* ¶ 13; *see also id.* ¶ 43 ("[Defendant] appreciated, accepted and/or retained, in whole or in part, the non-gratuitous benefits conferred by Plaintiff and members of [Plaintiff's proposed] [c]lass.").

On April 10, 2020, Plaintiff filed the Complaint against Defendant alleging (1) violation of § 559.72(9) of the FCCPA, (2) breach of contract, and (3) unjust enrichment. *Id.* ¶¶ 26–45. Defendant now moves the Court to dismiss Plaintiff's Complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) on the grounds that Plaintiff has failed to state a claim upon which relief can be granted. *See generally* Mot.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) provides that a court may dismiss a complaint for failing to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and internal quotation marks omitted). This requirement "give[s] the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citation and alterations omitted). The court takes the plaintiff's factual allegations

as true and construes them in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008).

A complaint must contain enough facts to plausibly allege the required elements. *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295–96 (11th Cir. 2007). A pleading that offers "a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). "[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002).

III. DISCUSSION

Defendant moves to dismiss the Complaint on several grounds. First, Defendant argues that Plaintiff's claims should be dismissed because he failed to comply with a pre-suit notice and cure provision in the Mortgage. Mot. at 4–6. Second, Defendant argues that Plaintiff failed to state a cognizable claim for breach of contract because (1) Plaintiff failed to identify the allegedly breached Mortgage provision, and (2) the alleged breach is not material. Mot at 6–9. Third, Defendant argues that Plaintiff's FCCPA claim fails because (1) a processing fee is not a "debt," and the charging of a processing fee thus cannot be a "debt collection," (2) Plaintiff failed to plead actual knowledge of an unlawful debt collection, and (3) Defendant had a legal right to charge the processing fee. *Id.* at 9–13. Fourth, Defendant argues that Plaintiff's unjust enrichment claim fails because Plaintiff received consideration for the processing fee—the benefit of making his mortgage payment over the phone. *Id.* at 14–15. Fifth, Defendant argues that the voluntary payment doctrine is a complete defense. *Id.* at 15–16.

In response, Plaintiff argues that (1) compliance with the notice and cure provision would be futile because Defendant did not attempt to cure injuries to prospective class-members, (2)

Plaintiff has alleged a material breach of the Mortgage because processing fees are not expressly permitted, (3) courts have found processing fees like those alleged here to be debts under the FCCPA, (4) Plaintiff has alleged actual knowledge of an unlawful debt collection because Defendant was in physical possession of the Mortgage, (5) Defendant had no legal right to charge the processing fee because such fees are not expressly authorized by the Mortgage or under Florida law, (6) unlawful consideration cannot be the basis for dismissal of Plaintiff's unjust enrichment claim, and (7) the voluntary payment doctrine does not apply to Plaintiff's claims and is improper at the motion to dismiss stage. *See generally* Resp. The Court addresses each issue in turn.

A. Breach of Contract

The Mortgage states that the "law of the jurisdiction in which the Property is located," in this case the state of Florida, governs. Mortgage ¶ 20. Under Florida law, a plaintiff must allege facts indicating the following to state a cognizable claim for breach of contract: (1) the existence of a valid contract; (2) a material breach of that contract; and (3) damages resulting from the breach. *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009); *Abbot Lab., Inc. v. Gen. Elect. Cap.*, 765 So. 2d 737, 740 (Fla. Dist. Ct. App. 2000). As explained below, Defendant persuasively argues that Plaintiff's failure to provide pre-suit notice bars Plaintiff's breach of contract claim, and that Plaintiff failed to properly allege a breach.

i. Plaintiff's Failure to Provide Pre-Suit Notice is Fatal

The Mortgage contains a Notice and Cure provision which states as follows:

> Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to [the Mortgage] or that alleges that the other party has breached any provision of . . . [the Mortgage], until such Borrower or Lender

> has notified the other party . . . of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action.

Mortgage ¶ 20. Plaintiff does not allege that he or any member of his purported class provided pre-suit notice to Defendant, and provides no justification for that failure. Instead, Plaintiff argues that compliance with the Mortgage's notice and cure provision would be futile because although Defendant subsequently refunded Plaintiff the processing fees that he incurred, Defendant "has failed to reimburse *class members* for the amounts charged," and has failed to change its procedures to "charge only the actual amount incurred by [Defendant] to process over the phone payments." Resp. at 12 (emphasis added).

The Mortgage's notice and cure provision requires borrowers to provide their own notice of suit to "join, or be joined" as members of a class. Mortgage ¶ 20. Thus, the plain language of the provision would require the members of Plaintiff's purported class to provide their own notice to Defendant, affording Defendant the opportunity to take corrective action as it relates to *each* of their grievances. The provision does not include a mechanism by which a Plaintiff can provide such notice on behalf of his purported class members. And, in any event, Defendant would not be able to provide any corrective action to a borrower whose identity and individual grievance has not yet been identified.

Thus, because Plaintiff failed to abide by the Mortgage's notice and cure provision, and Plaintiff's argument regarding futility is inapposite, Plaintiff's breach of contract claim is barred. *See Wilson v. EverBank, N.A.*, 77 F. Supp. 3d 1202, 1219–20 (S.D. Fla. 2015) (dismissing breach

of contract claim for failing to provide pre-suit notice required by the parties' mortgage agreement).[2]

ii. Plaintiff Failed to Allege Breach of the Mortgage

Defendant also argues that Plaintiff fails to identify a provision of the Mortgage that Defendant allegedly breached by charging the convenience fee. Mot. at 6–8. Defendant points to a provision in the Mortgage that states: "[t]he absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee." *Id.* at 6–7 (quoting Mortgage ¶ 14). Plaintiff argues that because the Mortgage does not expressly authorize such a fee, Defendant breached the Mortgage by charging it. Resp. at 10–11.[3]

Plaintiff relies heavily on *Wilson v. Everbank, N.A.* for the proposition that because "the Mortgage does not expressly permit [Defendant] to charge "processing fees" over and above the actual cost to process payments made by Plaintiff," Defendant has breached. *Id.* at 10. In *Wilson*, the plaintiffs alleged that the defendant, a mortgage loan servicing company, improperly over-charged fees and premiums for force-placed insurance policies that the defendant initiated upon the plaintiffs' lapses in voluntary insurance coverage. 77 F. Supp. 3d at 1213. Although the

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[2] Defendant argues that Plaintiff's failure to provide pre-suit notice should also bar Plaintiff's FCCPA claim. Mot. at 4–5. However, the Court is persuaded by Magistrate Judge Becerra's well-reasoned Report and Recommendation, adopted by Judge King, in *Garay v. Select Portfolio Servicing Inc*., where she found that because the mortgage agreement in question did not "*specifically* address the processing fees at issue," the mortgage agreement was not so central to the plaintiff's FCCPA claim as to bar the claim for failure to comply with the mortgage agreement's pre-suit notice provision. *See* (ECF No. 40-1 at 5–10); (ECF No. 42-1 at 1–2). Here, because the processing fee is not specifically addressed in the Mortgage, Plaintiff's technical breach in failing to provide pre-suit notice does not bar his FCCPA claim.

[3] Plaintiff also argues, in a footnote, that the same provision that Defendant identifies limits Defendant "to charge fees only when the borrower is in default." Resp. at 11 n.7. However, no language in that provision, nor in any other provision of the Mortgage, so limits Defendant. *See generally* Mortgage.

mortgage agreements in question explicitly permitted the defendant "to obtain force-placed coverage and charge the premiums to the borrower" in the event that the borrower failed to maintain insurance coverage on the property, the plaintiffs alleged that the defendants had an exclusive relationship with a force-placed insurance provider, and that "[p]art of the fees charged to [the] [p]laintiffs as . . . premiums . . .were kickbacks . . . disguised as 'commissions' or 'expense reimbursements.'" *Id.* at 1214.

Judge Bloom found that the plaintiffs had successfully alleged a material breach because the defendant had charged the plaintiffs "costs beyond the cost of coverage that were not reasonably related to [the defendant's] loan servicing—unearned commissions that in actuality represent amounts kicked back from the insurers to [the defendant], costs truly associated with insuring an entire loan portfolio and not the individual mortgaged property, and risk-free reinsurance costs." *Id.* at 1217–18.

Here, Plaintiff alleges that Defendant retains a "considerable portion" of the processing fee and passes on only a "small fraction" of the fee to a third-party payment processor. Compl. ¶ 13. Plaintiff does not allege that Defendant conspired with the third-party payment processor to over-charge borrowers to process payments over the phone. Nor does Plaintiff allege that he was contractually obliged, or otherwise forced, to make a payment over the phone. Nor does Plaintiff allege that the portion retained by Defendant was *unreasonable* in consideration of the time presumably spent by a Defendant employee to take down Plaintiff's payment information and dispatch that information to Defendant's third-party payment processor. In other words, none of the hallmarks of *Wilson* that constituted charges that "were not permitted under [the] mortgage agreements" are present here. *Wilson*, 77 F. Supp. 3d at 1217. Defendant argues, persuasively, that Defendant merely charged a fee for an "optional service[] offered and accepted," which is

unlike the allegation that the *Wilson* defendant charged what amounted to a kickback for an involuntary service. *See generally id.*

Accordingly, because Plaintiff fails to allege a breach of any provision of the Mortgage, and the Mortgage expressly disclaims the prohibition of charging fees in the absence of express authorization, Plaintiff's claim for breach of contract substantively fails.[4] *See Pierce v. State Farm Mut. Auto. Ins. Co.*, No. 14-22691-CIV, 2014 WL 7671718, at *4 (S.D. Fla. Dec. 17, 2014) (dismissing breach of contract claim because, among other reasons, the plaintiff "failed to identify which specific provision of the contract was allegedly breached"); *Waddell v. U.S. Bank Nat'l Ass'n*, 395 F. Supp. 3d 676, 685–86 (E.D.N.C. 2019) (holding that a similar mortgage contract was not breached where a defendant charged a processing fee that was not expressly addressed by the contract).

B. FCCPA

The FCCPA prohibits collecting a consumer debt when the creditor "knows that the debt is not legitimate, or assert(s) the existence of some other legal right when such person knows that the right does not exist." § 559.72(9). Defendant argues that Plaintiff fails to state a claim under the FCCPA because the convenience fee at issue is not a consumer debt within the meaning of the FCCPA, and that Plaintiff fails to allege that Defendant did not have a legal right to charge the convenience fee. The Court considers both arguments below.

i. The Convenience Fee is Not a Debt Under the FCCPA

Even within this district, there is not a consensus as to whether an ancillary fee, such as the convenience fee charged here, constitutes a debt for the purposes of the FCCPA. *Compare Fusco*

[4] Because the Court found that Plaintiff failed to allege a breach, and in light of the fact that the Court has previously declined to address the materiality of an FDCPA claim at the motion to dismiss stage, the Court declines to address Defendant's materiality argument here. *See Hill v. Resurgent Cap. Serv's, L.P.*, 461 F. Supp. 3d 1232, 1239 (S.D. Fla. 2020).

v. Ocwen Loan Servicing, LLC, No. 20-cv-80090-MIDDLEBROOKS, 2020 WL 2519978, at *5 (S.D. Fla. Mar. 2, 2020) (finding that a payment processing fee charged by a mortgage loan servicer is not a debt under the meaning of the FCCPA), *with Michael v. HOVG, LLC*, 232 F. Supp. 3d 1229, 1238 (S.D. Fla. 2017) (denying motion to dismiss FCCPA claim regarding convenience fee because "the least sophisticated consumer may plausibly believe" that in charging the fee, the defendant was threatening to enforce a debt or assert the existence of some legal right to the fee). This split has yet to be resolved by the Eleventh Circuit.

The Court, however, is persuaded by the well-reasoned analysis conducted by Judge Singhal in *Estate of Derrick Campbell v. Ocwen Loan Servicing, LLC*. 467 F. Supp. 3d 1262. There, Judge Singhal, himself persuaded by the Middle District's Judge Moody's "well-reasoned, commonsense approach and analysis in *Turner v. Ocwen Loan Servicing, LLC*, No. 8:20-cv-137-T-30SPF (M.D. Fla. Feb. 24, 2020)," adroitly analyzed the issue before the Court:

> Here, it is not contested that Defendant is a debt collector when recouping Plaintiff's defaulted mortgage payments. But *that* is the debt that exists in this case—the defaulted mortgage payments. Plaintiff's argument that the convenience fees are part of the debt too, or at a minimum, incidental to the debt, is unpersuasive. Logically, it is difficult to define as a debt something that isn't yet owed. . . . This choice of payment allows an immediate processing of the payment, with no delay similar to what may exist if payment was made via regular mail, overnight courier or online. The debt portion of the payment is the overdue mortgage payment. The not-yet-incurred convenience fee is not a debt under the plain meaning of [the FCCPA or the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692, *et seq.*].

Id. at 1264–65.

Just like in *Campbell*, the processing fee here is "a separate transaction neither part of, nor incidental to, the [] debt." *Id.* at 1265. Plaintiff does not allege that the convenience fee was added to the total debt owed pursuant to the terms of the Mortgage, nor does Plaintiff allege that the fee was ever a debt in so far as Plaintiff had not immediately paid the fee. Accordingly, because Plaintiff has not, and cannot under these facts, allege that Defendant was collecting a debt under

the FCCPA, the Court dismisses Plaintiff's FCCPA claim with prejudice. *See id.* (dismissing FCCPA and FDCPA claims with prejudice).

ii. Plaintiff Failed to Plead that Defendant Had No Legal Right to Fee

Even if Plaintiff could allege that Defendant was collecting a debt by charging and receiving a processing fee, Plaintiff failed to allege that Defendant had no legal right to do so. Plaintiff presents no Florida law that Defendant ran afoul of by charging the fee. Rather, Plaintiff merely alleges that Defendant was not *expressly authorized* to charge such a fee under Florida law or the Mortgage. *See* Resp. at 7–9. However, Plaintiff conflates the relevant inquiry in the FDCPA analysis with the relevant inquiry here. The FDCPA prohibits threatened collection of debts not expressly authorized by the relevant debt contract or permitted by state law. § 1692f(1). The FCCPA contains no such prohibition. *See* § 559.72(9); *see also Revien v. E. Rev., Inc.*, No. 9:17-CV-80959-ROSENBERG/REINHART, 2018 WL 1412058, at *3–5 (S.D. Fla. Mar. 21, 2018) (analyzing separately whether debt collection was expressly authorized by contract or law as to the plaintiff's FDCPA claim, and whether the defendant knew it had no legal right to collect the debt as to the plaintiff's FCCPA claim).

Moreover, although the processing fee in this case might have constituted an incidental fee to the underlying debt, which would be forbidden by the FDCPA if not otherwise expressly authorized, "the fact that the [processing] fee is incidental to the payment of Plaintiff's debt is immaterial under the FCCPA." *Fusco*, 2020 WL 2519978, at *5. Accordingly, Plaintiff's FCCPA claim is subject to dismissal on this basis as well.

C. Unjust Enrichment

To survive a motion to dismiss, a plaintiff claiming unjust enrichment must plead that (1) the plaintiff has conferred a benefit on the defendant, (2) the defendant has knowledge of the benefit, (3) the defendant accepted the benefit, and (4) it would be inequitable for the defendant to

benefit without paying consideration. *Della Ratta v. Della Ratta*, 927 So. 2d 1055, 1059 (Fla. Dist. Ct. App. 2006). "When a defendant has given adequate consideration to someone for the benefit conferred, a claim of unjust enrichment fails." *Am. Safety Ins. Serv's, Inc. v. Griggs*, 959 So. 2d 322, 331–32 (Fla Dist. Ct. App. 2007).

Although Plaintiff does allege that "it would be unjust for [Defendant] to be permitted to retain the benefit" of the processing fee, Plaintiff does not allege that Defendant accepted such benefit without giving due consideration. Compl. ¶¶ 40–45. Indeed, Defendant notes that Plaintiff received consideration for the fee by way of "assistance of a live representative to make his payment by phone." Mot. at 14. Although Plaintiff argues that consideration that violates Florida law does not bar a claim for unjust enrichment, Plaintiff has not adequately pled that the processing fee is violative of the FCCPA, nor any other Florida law. Accordingly, Plaintiff's claim for unjust enrichment fails as a matter of law. *See Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194, 1198 n.3 (11th Cir. 2011) (dismissing an unjust enrichment claim because the plaintiff agreed to pay the fee in question in exchange for a service rendered by the defendant, and thus failed to allege that the defendant withheld consideration for the benefit conferred).[5]

Accordingly, Defendant persuasively argues for the dismissal of all counts of the Complaint.

IV. CONCLUSION

UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that

[5] Because the Court dismisses each of Plaintiff's claims, the Court declines to consider the merits of Defendant's argument regarding the voluntary payment doctrine. And, in any event, "the voluntary payment doctrine is an affirmative defense that may not be raised on a motion to dismiss." *Deere Constr., LLC v. Cemex Constr. Materials Fla., LLC*, 198 F. Supp. 3d 1332, 1342 (S.D. Fla. 2016).

Defendant's Motion to Dismiss (ECF No. 15) is GRANTED in part and DENIED in part. Plaintiff's claim for violation of the FCCPA is DISMISSED WITH PREJUDICE, and Plaintiff's claims for breach of contract and unjust enrichment are DISMISSED WITHOUT PREJUDICE. It is further ORDERED that, pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure, Plaintiff is granted leave to file an amended complaint on or before January 5, 2021. Failure to do so may result in dismissal of the matter for failure to prosecute and failure to obey court orders. *See* Fed. R. Civ. P. 41(b); *Lewis v. Fla. Dep't of Corr.*, 739 F. App'x 585, 586 (11th Cir. 2018). It is further ORDERED that Defendant shall answer or otherwise respond to Plaintiff's Amended Complaint on or before January 12, 2021.

DONE AND ORDERED in Chambers at Miami, Florida, this 23rd day of December, 2020.

K. MICHAEL MOORE
CHIEF UNITED STATES DISTRICT JUDGE

c: All counsel of record