

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 13-62437-Civ-SCOLA

ANTHONY ALAIMO,

Plaintiff,

vs.

HSBC MORTGAGE SERVICES, INC.,

Defendant.

_____ /

Order Granting Motion To Dismiss

Plaintiff Anthony Alaimo has sued the present owner of his home mortgage, HSBC Mortgage Services, Inc. (HSBC). HSBC received Alaimo's mortgage through a voluntary assignment. HSBC also serviced Alaimo's mortgage. In August 2012, Alaimo requested that HSBC provide him with the identity of the owner or master servicer of the mortgage loan, as well as an accurate statement of the total outstanding balance that would be required to satisfy the mortgage loan in full as of a specified date. This information must be provided to a borrower, upon request, under Section 1641(f)(2) of the Truth in Lending Act (TILA), and Section 226.36(c)(1)(iii) of Regulation Z. According to Alaimo, HSBC failed to provide the required information. Alaimo's complaint consists of three counts: Count I seeks declaratory relief; Count II asserts a violation of Section 1641(f)(2) of TILA; and Count III asserts a violation of Section 226.36(c)(1)(iii) of Regulation Z. (*See* ECF No. 1.) HSBC moved to dismiss the entire complaint. (ECF No. 8.) Alaimo subsequently withdrew Count I of his complaint. (ECF No. 17, at 1 fn. 1.) Alaimo also withdrew his allegation that HSBC is a "creditor" as defined under TILA, and pursues his claims against HSBC as an "assignee." (ECF No. 17, at 3.)

A. Legal Standard

When considering a motion to dismiss under Rule 12(b)(6), the Court must accept all of a complaint's well-pled factual allegations as true, construing them in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008). Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a pleading need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Though the Rule does not require detailed factual allegations, it does require "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) (brackets, internal citation, and internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Bell Atl.*

Corp. v. Twombly, 550 U.S. 544, 556 (2007)). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* So a pleading that offers mere “labels and conclusions” or “a formulaic recitation of the elements of a cause of action” will be dismissed. *Id.*

Faced with a motion to dismiss, a court should therefore “(1) eliminate any allegations in the complaint that are merely legal conclusions; and (2) where there are well-pleaded factual allegations, assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Am. Dental Assoc. v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) (internal quotation marks omitted). Moreover, “courts may infer from the factual allegations in the complaint obvious alternative explanations, which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer.” *Id.* (brackets and internal quotation marks omitted). “This is a stricter standard than the Supreme Court described in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), which held that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Mukamal v. Bakes*, 378 F. App’x 890, 896 (11th Cir. 2010) (internal quotation marks omitted). These precepts apply to all civil actions, regardless of the cause of action alleged. *Kivisto v. Miller, Canfield, Paddock & Stone, PLC*, 413 F. App’x 136, 138 (11th Cir. 2011).

B. Analysis

HSBC moves to dismiss Alaimo’s claims on several grounds. First, HSBC argues that it cannot be liable under TILA because any alleged TILA violations were not apparent on the face of any disclosure statement or other documents assigned. HSBC also argues that there is no private cause of action for a violation of Section 226.36(c)(1)(iii) of Regulation Z. Finally, HSBC urges the Court to dismiss the action because it claims that Alaimo’s request was improperly motivated and sent only to generate attorney’s fees and create leverage in a state foreclosure action between the same parties. Because the Court finds HSBC’s first two arguments dispositive, it does not consider the third.

1. Count II – Violation of Section 1641(f)(2) of TILA

Alaimo alleges that HSBC violated Section 1641, Liability of Assignees, by failing to disclose requested information, including the name, address, and telephone number of the current owner of his mortgage loan. Section 1641 provides, in relevant part:

- (a) Prerequisites. Except as otherwise specifically provided in this subchapter, any civil action for a violation of this subchapter or proceeding under section 1607 of this title which may be brought against a creditor may be maintained against any assignee of such creditor only if the violation for which such action or proceeding is brought is apparent on the face of the disclosure statement, except where the assignment was involuntary. For the purpose of this section, a violation apparent on the face of the disclosure statement includes, but is not limited to (1) a disclosure which can be

determined to be incomplete or inaccurate from the face of the disclosure statement or other documents assigned, or (2) a disclosure which does not use the terms required to be used by this subchapter.”

15 U.S.C. § 1641(a).

As this Court has previously concluded, “TILA has limited the liability of assignees. An assignee may only be held liable for violations that are apparent on the face of disclosure documents that exist at the time of the assignment.” *Signori v. Fed. Nat’l Mortg. Assoc.*, 934 F. Supp. 2d 1364, 1367 (S.D. Fla. 2013) (Scola, J.). The phrase “or other documents assigned” provides strong support that Congress intended assignees to be responsible only for violations within documents that existed prior to assignment. Additionally, a 1979 Senate Report states that Section 1641 (labeled “Liability of Assignees”) was intended to “[eliminate] two uncertainties under present law as to an assignee’s liability for an *original creditor’s* violation of the act.” S. Rep. No. 73, S. REP. 96-73, 18, 1980 U.S.C.C.A.N. 280, 296 (emphasis added). The TILA provisions are clear that the disclosure documents referred to in Section 1641(a) are documents generated in connection with the origination of the loan. *Signori*, 934 F. Supp. 2d at 1368.

The Court is not persuaded by Alaimo’s argument that analysis of Section 1641(g) requires the Court to depart from its earlier ruling in *Signori*. Section 1641(g) imposes an obligation on assignees to provide written notice to the borrower when it acquires the mortgage loan. 15 U.S.C. § 1641(g). This provision does impose an obligation on assignees. It does not, however, include a specific exception to the prerequisites for suit against an assignee identified in Section 1641(a).

This Court is mindful of the policy implications in holding that the plain language of Section 1641 limits civil actions under TILA against assignees to those in which the violation is apparent on the face of documents generated in connection with the origination of the loan—assignees may escape liability for violating TILA and it may be more difficult for consumers to take advantage of TILA’s protections. However, this Court will not take on a legislative function. As this Court has previously noted, “[i]f the statute, as written, creates a loophole through which assignees can avoid liability for failing to comply with TILA disclosures, it is up to Congress, not this Court, to close that loophole.” *Signori*, 934 F. Supp. 2d at 1368.

The information provided by HSBC after receiving Alaimo’s Section 1641(f)(2) request was provided after assignment of the obligation, so the information HSBC provided is not considered a “disclosure statement” for purposes of assignee liability under TILA. Accordingly, HSBC cannot be liable for the TILA violation Alaimo has alleged in Count II.

2. Count III – Violation of Section 226.36(c)(1)(iii) of Regulation Z

HSBC moves to dismiss Count III because there is no private right of action under Section 226.36(c)(1)(iii) of Regulation Z. Within the Southern District of Florida, there is a split of authority as to whether there is a private right of action under Section 226.36(c)(1)(iii) of Regulation Z. Because Count III must be dismissed

regardless of which approach the Court applies, it need not determine whether there is a private right of action under Section 226.36(c)(1)(iii) of Regulation Z.

In *Kievman v. Federal National Mortgage Association*, the court held that there is no private right of action for violations of Section 226.36(c)(1)(iii). In holding that there is no private right of action stemming from this regulation, Judge Ungaro noted:

Titled ‘Prohibitions’, 15 U.S.C. § 1639(l)(2) authorizes the Board, ‘by regulation or order, to prohibit acts or practices in connection with’ mortgage loans or the refinancing of mortgage loans. 15 U.S.C. § 1639(l)(2)(A), (B). Subsection (m) authorizes the Federal Trade Commission to pursue civil enforcement actions for the violation of any regulation promulgated under subsection (l)(2). Plaintiffs, in their briefing, did not suggest that this Court could or should imply a private right of action to enforce this regulation, and the Court declines to do so.

Kievman v. Fed. Nat’l Mortg. Assoc., 901 F. Supp. 2d 1348, 1353 (S.D. Fla. 2012) (Ungaro, J.). Here, Alaimo also alleges that HSBC violated Section 1639(1)(2) of TILA by failing to comply with Section 226.36(c)(1)(iii) of Regulation Z. Under Judge Ungaro’s approach, Count III must be dismissed.

In *Runkle v. Federal National Mortgage Association*, Judge Dimitrouleas concluded that a private right of action exists for violations of Section 226.36(c)(1)(iii) of Regulation Z. *Runkle v. Fed. Nat’l Mortg. Assoc.*, 905 F. Supp. 2d 1326, 1330-31 (S.D. Fla. 2012) (Dimitrouleas, J.), *vacated on other grounds on reconsideration*, No. 12-cv-61247, 2012 WL 6554755 (S.D. Fla. Dec. 10, 2012). Under Judge Dimitrouleas’s analysis, Section 1640 of TILA allows a private cause action against “any creditor who fails to comply with any requirement imposed under this part.” 15 U.S.C. § 1640(a). Judge Dimitrouleas went on to explain:

Section 1639 is a part of TILA. Section 1639(l)(2) allows the Bureau to prohibit acts and practices that are unfair, and failing to provide a payoff statement is unfair. Because the Bureau has prohibited the refusal to provide a payoff statement, it has imposed a requirement, and therefore a creditor can be liable for failing to comply with that requirement. As a result, the Court finds that a violation of 15 U.S.C. § 1639(l)(2) can be brought as a private cause of action.

Runkle, 905 F. Supp. 2d at 1331.

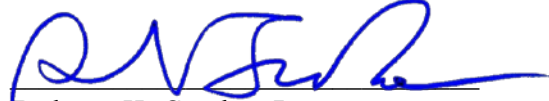
If a private cause of action does exist, Alaimo would not be able to demonstrate that HSBC, an assignee, is liable under TILA because the information provided by HSBC after receiving Alaimo’s Regulation Z Section 226.36(c)(a)(iii) request was provided after assignment of the obligation. So, the information HSBC provided is not considered a “disclosure statement” for purposes of assignee liability under TILA, and HSBC cannot be liable for the alleged violation of Regulation Z. (*See supra.*)

Conclusion

Having considered the motion, the record, and the relevant legal authorities, it is **ordered and adjudged** that HSBC’s Motion to Dismiss (ECF No. 8) is **granted**. The

complaint is **dismissed** with prejudice. Relatedly, the Motion to Stay Discovery (ECF No. 26) is **denied as moot**. The Clerk shall **close** this case.

Done and ordered in chambers, at Miami, Florida, on March 10, 2014.

A handwritten signature in blue ink, appearing to read 'R. N. Scola, Jr.', written over a horizontal line.

Robert N. Scola, Jr.
United States District Judge