United States District Court, N.D. Florida,
Tallahassee Division.
Jennifer E. EMBURY, Plaintiff,
v.
BANK OF AMERICA, N.A., et al, Defendant.

No. 1:13–cv–211–MW.
Signed April 17, 2014.

ORDER GRANTING IN PART, AND DENYING IN PART, MOTION TO DISMISS AMENDED COMPLAINT

MARK E. WALKER, District Judge.

The Court has considered Defendant's Motion to Dismiss Amended Complaint, ECF No. 34, and Plaintiff's Opposition to Dismiss Amended Complaint, ECF No. 36, without hearing. The Motion to Dismiss Amended Complaint is GRANTED IN PART and DENIED IN PART. As to Plaintiff's claims sounding in fraud and in negligence, Counts III and VI, the motion is DENIED. As to all remaining counts, Counts I, II, IV, V and VII, the motion is GRANTED and those claims are dismissed with prejudice.

Plaintiff nominally sets forth seven claims for relief. All seven claims involve the same facts which must be regarded as true for purposes of resolving this motion.

Plaintiff purchased a home and acreage located in Alachua County Florida, at 1317 SW 226th Street, Newberry, Florida, executing a mortgage note in favor of Defendant's predecessor in interest, Taylor, Bean & Whitaker Mortgage Corporation, on or about March 3, 2009. The principle amount of the mortgage was $165,598.00. Plaintiff subsequently defaulted on the mortgage note. The mortgage note was eventually assigned to Defendant Bank of America, N. A., on or about June 5, 2012. Defendant brought a Verified Complaint for Mortgage Foreclosure and Other Relief on October 17, 2012, in state court, seeking recovery for the principle still owed plus interest and other specified relief. This resulted in a Final Judgment of Foreclosure rendered on or about January 31, 2014, in the total amount of $219,005.16. The property is scheduled to be sold to the highest bidder on May 6, 2014.

Plaintiff's claims, to paraphrase and simplify, center about the fact that Defendant, either through its predecessor BAC Home Loans Servicing L. P., or the Defendant itself, embarked upon a tortious or otherwise wrongful course of conduct while negotiating with the Plaintiff to modify or

restructure the loan in question under the HAMP Program [FN1], so as to ensure that the foreclosure would take place, and Plaintiff was damaged as a result. According to Plaintiff, she was qualified for a renegotiated or restructured loan, however, Defendant purposefully or negligently frustrated the negotiation process until the mortgage note could be assigned to Defendant, who then rapidly foreclosed upon the subject property.[FN2] Importantly, Plaintiff does not claim that Defendant promised to renegotiate or restructure her loan but merely indicated that she would be considered for a renegotiated or restructured loan. Moreover, Plaintiff does not claim that she entered into a standardized Trial Period Plan Agreement ("TPP agreement").

> FN1. Home Affordable Modification Program. *See* § 101, 109, Emergency Economic Stabilization Act of 2008, as amended.
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> FN2. According to the Plaintiff (among other things), she and even her attorney supplied her loan package of materials to the Defendant on numerous occasions, that the Defendant did not process her documents timely, did not communicate with her timely, often reported that her documents had not been received or else had been misplaced and had to be re-submitted. On occasion the Defendant changed the representative working with the Plaintiff, which further frustrated and delayed the process. It is alleged that the Defendant's actions were purposeful, and if not purposeful, then negligent.
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> > Lawsuits accusing Bank of America Corporation of reneging on promises to help distressed homeowners modify mortgage loans, and instead, driving them into foreclosure, have been filed in 26 states, although class action status was recently denied. *See In re Bank of America Home Affordable Modification Program (HAMP) Contract,* M.D. No. 10–2193, 2013 WL 475969 (D.Mass. September 4, 2013).

Each of the claims will be analyzed in the order presented. This Court, as it must, liberally construes pro se pleadings.

As for Counts I and II, Plaintiff claims "breach of contract." Plaintiff does not claim that Defendant entered an agreement to modify or restructure the loan at issue and subsequently breached the agreement. And, Plaintiff concedes that HAMP does not create a private right of action.[FN3] Instead, Plaintiff claims that Defendant did not intend to modify or restructure the loan at issue but instead either intentionally or negligently played "rope a dope" with her. Stated otherwise, Plaintiff's claims revolve about Defendant not contracting with her, as opposed to there being a breach of contract. Here, there is no contract so there can be no breach of contract under Florida law.

FN3. *Miller v. Chase Home Fin., LLC,* 677 F.3d 1113, 1116 (11th Cir.2012) (holding there is no private cause of action under HAMP).

It is no answer that Plaintiff was an intended beneficiary of the HAMP agreement between the lender and the government. While Plaintiff may potentially benefit from the program, she was an incidental beneficiary and thus may not enforce the agreement absent clear intent to the contrary.

It is also important to note that this case is distinguishable from other cases around the country in which breach of contract claims survived motions to dismiss. In many of those cases, the plaintiffs had been deemed eligible and had entered into TPP agreements under which new loan repayment terms had been formulated. Those plaintiffs bottom their breach of contract and/or promissory estoppels claims on such agreements as opposed to the HAMP agreement and/or some "promise" to consider an application.

Accordingly, Counts I and II are dismissed with prejudice.

As for Count III, Plaintiff claims that Defendant committed a fraud by playing "rope a dope" with Plaintiff.[FN4] While this Court in no way comments on the merits of the claim, Plaintiff states a claim for fraud under Florida law.

FN4. These are precisely the same allegations advanced under Counts I and II. Plaintiff simply casts the conduct as "fraud" instead of "breach of contract."

It is no answer that such a claim was a compulsory counterclaim to the state foreclosure which was waived or is otherwise barred as a collateral attack on a state judgment. Plaintiff does not claim "fraud in the inducement" relating to the note which is the subject of the foreclosure or otherwise challenge a state judgment.

Accordingly, the motion to dismiss is DENIED as to Count III.

As for Count IV, Plaintiff claims "false pretenses." There is no such tort under Florida law. Accordingly, Counts IV is dismissed with prejudice.

As for Count V, Plaintiff claims intentional infliction of emotional distress. This claim is also known as the "tort of outrage." Whether Defendant's conduct is outrageous enough to support such

a claim "is a matter of law, not a question of fact." *Gandy v. Trans World Compter Tech. Group,* 787 So.2d 116, 119 (Fla. 2d DCA 1985). Construing the facts in the light most favorable to Plaintiff, the alleged conduct is not sufficiently outrageous to state a claim for intentional infliction of emotional distress. It is not even close. Accordingly, Count V is dismissed with prejudice.

As for Count VI, arguing in the alternative, Plaintiff claims that Defendant negligently played "rope a dope" with Plaintiff. There is certainly no prohibition to pleading in the alternative. While this Court in no way comments on the merits of the claim, Plaintiff states a claim for negligence under Florida law.

Accordingly, motion to dismiss is DENIED as to Count VI.

As for Count VII, Plaintiff claims promissory estoppel. Here, unlike other cases, Plaintiff does not claim that Defendant promised to modify or restructure the loan if certain conditions were met; rather, Plaintiff alleges that Defendant would merely "consider" modifying or restructuring her loan. Plaintiff cannot state a claim for promissory estoppels under these facts.

Accordingly, Count VII is dismissed with prejudice.

For these reasons,

IT IS ORDERED:

The Motion to Dismiss Amended Complaint, ECF No. 34, is **DENIED** as to Counts III and VI, and is **GRANTED** as to all remaining counts, Counts I, II, IV, V and VII, and those claims are dismissed with prejudice.

SO ORDERED.