Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LESLIE J. PURIFICACION IA Part 39
Justice

RICHARD BRAHAM and MARIE-YVES x

Plaintiffs,

-against-

J.P. MORGAN CHASE BANK, N.A., and DOES 1-10, inclusive,

Defendants.
x

Index Number 712372/2015

Motion Date June 6, 2017

Motion Seq. No. 4

The following papers read on this motion by defendant JPMorgan Chase Bank, N.A. s/h/a J.P. Morgan Chase Bank, N.A., (Chase) pursuant to CPLR 3211(a)(7) to dismiss the amended complaint insofar as asserted against it with prejudice.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	EF Doc. #99-#113
Answering Affirmation	EF Doc. #121
Reply Affirmation	EF Doc. #122

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiffs commenced this action on November 20, 2015, asserting four causes of action in the original complaint for alleged breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, and violations of General Business Law § 349 and New York State regulation. Defendant Chase moved to dismiss the original complaint pursuant to CPLR 3211(a)(7) insofar as asserted against it based upon failure to state a cause of action and pursuant to Judiciary Law § 470. While that motion was sub

judice, plaintiffs served and filed an amended complaint, as was their right (*see* CPLR 3025[a], 3211[f]; *Perez v Wegman Cos.*, 162 AD2d 959 [4th Dept 1990]). By order dated June 27, 2017 and entered on July 3, 2017, the motion to dismiss the original complaint insofar as asserted against defendant Chase was granted. The court shall now address the instant motion by defendant Chase to dismiss the amended complaint insofar as asserted against it.

In the amended complaint, plaintiffs allege that in 2001, they obtained a mortgage loan on the real property known as 14145 250th Street, Rosedale, New York, in the principal amount of $252,000.00. They also allege that in December 2007, they obtained another mortgage loan from defendant Chase in the principal amount of $273,813.83. They assert six causes of action, i.e. the four causes of action alleged in the original complaint,[1] (albeit assigning different numbers to them), and two additional causes of action based upon alleged violations of the federal Fair Housing Act (the FHA) (42 USC §§ 3601, *et seq.*), Equal Credit Opportunity Act (the ECOA) (15 USC §§ 1691-1691f), and Truth in Lending Act (the TILA) (15 USC § 1601, *et seq.*). Plaintiffs annex to their amended complaint, among other things, a copy of a mortgage dated December 31, 2007 in the principal amount of $506,250.00, and a "Consolidation, Extension, and Modification" Agreement (the CEMA), whereby the first and second mortgages and underlying notes were consolidated, extended and modified to create a mortgage loan in the principal amount of $506,250.00, with a negative amortization feature capping the unpaid principal amount at $556,875.00.

When determining a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]).

In first cause of action asserted in the amended complaint, plaintiffs allege they are African Americans, and defendant Chase unlawfully discriminated against them on the basis of race or ethnicity in violation of the FHA and the ECOA, and seek monetary damages and rescission of the "second mortgage." With respect to the second cause of action for rescission asserted in the amended complaint, plaintiffs allege that defendant Chase violated certain disclosure requirements of the TILA, and the TILA's implementing regulation (12 CFR 226.19[b]), by failing to adequately disclose the negative amortization feature of the mortgage loan, and its effect on the monthly payments and balloon payments.

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[1]With respect to the cause of action for violation of General Business Law § 349, plaintiff has added an allegation that

The loan documents annexed to the amended complaint by plaintiffs demonstrate that the named lender in the consolidated mortgage and the consolidation, extension and modification agreement was Washington Mutual Bank, NA (WaMu), not defendant Chase. In 2008, after WaMu had entered receivership by the Federal Deposit Insurance Corporation (the FDIC), Chase and the FDIC entered into a purchase and assumption agreement (the P&A agreement), pursuant to which Chase acquired all of WaMu's loans and loan commitments (*see JP Morgan Chase Bank v Schott*, 130 AD3d 875, 875-876 [2d Dept 2015]; *JP Morgan Chase Bank, N.A. v Russo*, 121 AD3d 1048 [2d Dept 2014]; *JP Morgan Chase Bank N.A. v Miodownik*, 91 AD3d 546, 547 [1st Dept 2012]).

According to defendant Chase, this court does not have jurisdiction over plaintiffs' claims based upon alleged violations of the FHA and the ECOA because plaintiffs have not exhausted the statutorily-mandated administrative claims review process under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (the FIRREA) (Pub L No 101–73, 103 Stat 183 [1989]). The FIRREA establishes an administrative review process for claims against a failed bank for which the FDIC has been appointed receiver (*see* 12 USC § 1821[d]). Under the FIRREA, claims against failed lending institutions first must be submitted to the FDIC for administrative review and adjudication prior to judicial review in a federal district court (*see Carlyle Towers Condo. Assn. Inc. v F.D.I.C.*, 170 F3d 301, 307 [2d Cir 1999]). In addition, FIRREA's exhaustion requirement applies to claims against a bank that purchases the failed bank's assets, where such claims are based on the conduct of the failed bank or the FDIC (*see* 12 USC § 1821(d)(13)(D)(ii); *Rundgren v Washington Mut. Bank, FA*, 760 F3d 1056, 1064–1065 [9th Cir 2014]; *Tellado v IndyMac Mortg. Services*, 707 F3d 275 [3d Cir 2013]). However, where the borrower claims have been assumed by the purchasing bank, FIRREA does not apply (*see Jo v JPMC Specialty Mtge., LLC*, 248 F Supp 417, 424-425 [WD NY 2017]; *Federal Housing Finance Agency v JPMorgan Chase & Co.*, 902 F Supp 2d 476, 501-502 [SD NY 2012]; *see also Bank of N.Y. v First Millennium, Inc.*, 607 F3d 905, 921 [2d Cir 2010]).

On September 25, 2008, the FDIC transferred to Chase certain assets and liabilities of WaMu pursuant to a Purchase and Assumption Agreement (P&A Agreement). Under section 2.5 of the P&A, Chase refused to assume certain liabilities. This section provides that:

> 2.5 Borrower Claims. Notwithstanding anything to the contrary in this Agreement, any liability associated with borrower claims for payment of or liability to any borrower for monetary relief, or that provide for any other form of relief to any borrower, whether or not such liability is reduced to judgment, liquidated or unliquidated, fixed or contingent, matured or unmatured, disputed or undisputed, legal or equitable, judicial or extra-judicial, secured or

> unsecured, whether asserted affirmatively or defensively, related in any way to any loan or commitment to lend made by the Failed Bank prior to failure, or to any loan made by a third party in connections with a loan which is or was held by the Failed Bank, or *otherwise arising in connection with the Failed Bank's lending or loan purchase activities are specifically not assumed by the Assuming Bank* (emphasis supplied).

(*see Jo v JPMC Specialty Mtge., LLC*, 248 F Supp 417, 423; *Cassese v Washington Mut., Inc.*, 2008 WL 7022845 2008 U.S. Dist. LEXIS 111709, 2008 WL 7022845, at *3 [ED NY Dec. 22, 2008]). Thus, pursuant to section 2.5 of the P&A Agreement, Chase did not assume the potential liabilities of WaMu associated with borrower claims where the claims directly relate to WaMu's lending practices (*see JP Morgan Chase Bank N.A. v Miodownik*, 91 AD3d 546).

The first cause of action asserted by plaintiffs in the amended complaint against defendant Chase relates to alleged violations of the FHA and the ECOA in connection with WaMu's lending practices and origination of the consolidated mortgage loan. It is undisputed that plaintiffs have not presented their claims of violation of the FHA and the ECOA to the FDIC for administrative review and adjudication. Under such circumstances, this court lacks subject matter jurisdiction over the claims asserted in the first cause of action in the amended complaint against defendant Chase (*see e.g. Willner v Dimon*, 849 F3d 93 [4th Cir 2017]; *Proal v JPMorgan Chase Bank, N.A.*, 641 Fed Appx 9 [1st Cir 2016]; *Mansor v JPMorgan Chase Bank, N.A.*, 183 F Supp 3d 250 [D Mass April 26, 2016]; *Lazarre v JPMorgan Chase Bank, N.A.*, 780 F Supp 2d 1320 [SD Fla 2011]).

The second cause of action asserted in the amended complaint against defendant Chase based upon violation of the TILA and corresponding regulation stems from alleged disclosure defects in the consolidated loan documents, and therefore is based upon the conduct of WaMu. Because the operative loan documents were drafted and executed by WaMu, not defendant Chase, FIRREA likewise bars the TILA rescission claims against Chase in this court (*see Grady v Levin*, 655 Fed Appx 601 [9th Cir 2016]; *Rundgren v Wash. Mut. Bank, FA*, 760 F3d 1056, 1064 [9th Cir 2014]; *Shaw v Bank of America*, 2017 WL 4409426, 2017 US Dist LEXIS 164794 [SD Cal 2017]; *Kelley v JPMorgan Chase Bank, N.A.*, 564 BR 406 [ND Cal 2017]; *In re Kelley*, 545 BR 1 [Bankr ND Cal 2016]; *Rathbun v IndyMac Mortg. Services*, 916 F Supp 2d 1174 [D Mont 2013]; *In re Shirk*, 437 BR 592 [Bankr SD Ohio 2010]); *but see Long v JP Morgan Chase Bank, N.A.*, 848 F Supp 2d 1166, 1175 [D Haw 2012] ["Any remedy of rescission [a borrower] may have must be invoked against the current holder of the mortgage loan"]; *King v Long Beach Mortg. Co.*, 672 F Supp 2d 238, 246–47 [D Mass 2009 ["Rescission in the TILA context ... only makes sense if exercised by the consumer ... against the current creditor(.)"]; *Paatalo v JPMorgan Chase*

Bank, 146 F Supp 3d 1239 [D Ore 2015]). In any event, a borrower's right of rescission under the TILA expires three years after the date of consummation of the transaction or upon the sale of the property, whichever comes first, even if the disclosures required under the TILA are never made (*see* 15 USC § 1635[f]; *Jesinoski v Countrywide Home Loans, Inc.*, ___ US ___, 135 SCt 790, 792, 190 LEd 2d 650 [2015]; *Beach v Ocwen Fed. Bank*, 523 US 410 [1998]). The consolidated mortgage loan was originated on December 31, 2007, and the TILA rescission claim was asserted for the first time in the amended complaint filed on March 14, 2017.

The fourth and fifth causes of action in the amended complaint for breach of contract and breach of the implied covenant of good faith and fair dealing fail to state a claim against defendant Chase. Plaintiffs have no private right of action under the federal Home Affordable Modification Program (the HAMP) as would support their claim to recover damages or obtain equitable relief based upon a denial of their request for a permanent loan modification under the HAMP (*see Davis v Citibank, N.A.*, 116 AD3d 819 [2d Dept 2014]; *see also BAG Home Loans Servicing, LP v McCombie*, 133 AD3d 1252 [4th Dept 2015] [a mortgagor has no private right of action against a recipient of funds under the TARP]). To the extent the third cause of action asserted in the amended complaint alleges violation of General Business Law § 349 and 3 NYCRR 419.11(b), by alleging violations of the HAMP guidelines or directives, it too fails to state a cause of action (*see Seller v Citimortgage, Inc.*, 118 AD3d 511 [1st Dept 2014] [a cause of action under General Business Law § 349 alleging violations of the HAMP rules and directives constitutes an impermissible "end run" around the absence of a private right of action under the HAMP). To the extent the third cause of action asserted in the amended complaint alleges violation of General Business Law § 349, by alleging violation of 12 CFR 226.19(b), the claim also fails. That regulation requires certain disclosure under the TILA. As discussed above, plaintiffs were required to present their claim of violation of the TILA and its corresponding regulations for administrative review and adjudication under the FIRREA. Plaintiffs may not use a claim of violation of 12 CFR 226.19(b) as the basis for a section 349 claim.

With respect to the sixth cause of action in the amended complaint sounding in promissory estoppel, the aggrieved party must allege a clear and unambiguous promise, a reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained by the party asserting the estoppel by reason of his or her reliance (*see Ripple's of Clearview, Inc. v Le Havre Associates*, 88 AD2d 120, 123 [2d Dept 1982]). Furthermore, "[r]ecovery under the doctrine of promissory estoppel is limited to cases where the promisee suffered unconscionable injury [citations omitted]" (*Halliwell v Gordon*, 61 AD3d 932,934 [2d Dept 2009]). Plaintiffs have failed to allege a clear and unambiguous promise made by defendant Chase, and make an insufficient claim of actual, unconscionable injury.

With respect to that portion of the third cause of action in the amended complaint predicated upon alleged violation of General Business Law § 349, General Business Law § 349 prohibits deceptive business practices. A viable claim pursuant to General Business Law § 349 is based upon allegations that (1) the challenged conduct was consumer-oriented, (2) the conduct or statement was materially misleading, and (3) the consumer sustained damages (*see Emigrant Mortg. Co., Inc. v Fitzpatrick*, 95 AD3d 1169 [2d Dept 2012]; *Lum v New Century Mtge. Corp.*, 19 AD3d 558, 559 [2d Dept 2005]; *see also Blue Cross & Blue Shield of V.J., Inc. v Philip Morris USA Inc.*, 3 NY3d 200, 205 [2004]; *Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000]; *Gaidon v Guardian Life Ins. Am.*, 94 NY2d 330, 344 [1999]). Plaintiffs allege that defendant Chase engaged in deceptive and misleading business practices, in violation of General Business Law § 349, "by providing multiple SPOC's [single points of contact]" in violation of 3 NYCRR 419.2(f), and thus, failing to comply with 3 NYCRR 419.3. The alleged failure by defendant Chase to provide a single point of contact does not amount a deceptive business practice or conduct that has an impact on the public at large, and as such, do not state a cause of action for violation of General Business Law § 349 (*see Gawych v Astoria Federal Savings and Loan*, 148 AD3d 681 [2d Dept 2017]).

The motion by defendant Chase to dismiss the amended complaint insofar as asserted against it is granted.

Dated: OCT 24 2017

Hon. Leslie J. Purificacion, J.S.C.