

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JEFFREY ZINK, on behalf of himself and
all others similarly situated,

Plaintiff,

**DECISION AND
ORDER**

13-CV-01076-RJA-JJM

v.

FIRST NIAGARA BANK, N.A.,

Defendant.

BACKGROUND

Plaintiff Jeffrey Zink commenced this action on July 19, 2013, seeking to certify a class and recover statutory liability from defendant First Niagara Bank, N.A. (“First Niagara”) pursuant to New York’s Real Property Law (“RPL”) §275(1)¹ and Real Property Actions and Proceedings Law (“RPAPL”) §1921(1), for its allegedly “systematic failure to timely present to the county clerks of New York State proof that mortgages have been satisfied”. Complaint [1], ¶ 1; Amended Complaint [21], ¶ 1.²

¹ RPL §275(1) states: “Whenever a mortgage upon real property is due and payable, and the full amount of principal and interest due on the mortgage is paid, a certificate of discharge of mortgage shall be given to the mortgagor or person designated by him or her The person signing the certificate shall, within thirty days thereafter, arrange to have the certificate presented for recording to the recording officer of the county where the mortgage is recorded. Failure by a mortgagee to present a certificate of discharge for recording shall result in the mortgagee being liable to the mortgagor in the amount of five hundred dollars if he or she fails to present such certificate within thirty days, shall result in the mortgagee being liable to the mortgagor in the amount of one thousand dollars if he or she fails to present a certificate of discharge for recording within sixty days and shall result in the mortgagee being liable to the mortgagor in the amount of one thousand five hundred dollars if he or she fails to present a certificate of discharge for recording within ninety days.” RPAPL §1921(1) contains similar provisions.

² Bracketed references are to CM/ECF docket entries.

By Text Order dated November 18, 2013 [38], Hon. Richard J. Arcara referred the case to me for supervision of pretrial proceedings, including the preparation of a Report and Recommendation on dispositive motions [38]. On June 15, 2015 plaintiff filed an uncontested motion [92] seeking conditional certification of a settlement class and preliminary approval of a class action settlement. By Report and Recommendation dated October 20, 2015 [94] (the “2015 R&R”), subsequently adopted by Judge Arcara [98], I recommended that the motion be denied, without prejudice to renewal. The contents of the 2015 R&R, discussing in detail the relevant facts and applicable considerations for conditional class certification and preliminary settlement approval, are incorporated by reference and will not be repeated here.

On January 28, 2016 plaintiff filed a second uncontested motion [101] seeking the same relief. Oral argument was held on February 22, 2016 [110]. Since plaintiff requests only conditional certification and preliminary settlement approval (as opposed to final relief) I view the motion as nondispositive. For the following reasons, the motion, as amended,³ is granted.

ANALYSIS

The pending motion attempts to address the concerns which I expressed in recommending denial of the prior motion. For example, the prior motion provided that attorney’s fees and plaintiff’s incentive payment, if approved by the court, would be paid from the \$2.2 million settlement fund, thereby reducing the amount available to class members. 2015 R&R [94], p. 21. However, the present proposal “[r]equires that Defendant pay any attorney’s fees, costs, and any service award for Plaintiff *separate and apart* from the \$2,200,000 settlement fund [E]ach Class member who makes a claim will receive their total amount authorized

³ The parties have substituted Epic Class Action and Claims Solutions, Inc. for Angeion Group, LLC as the settlement administrator [118].

under the Settlement Agreement”. Plaintiff’s Memorandum of Law [101-1], p. 8 of 34 (emphasis added).

Although I still have some concerns as to the amount of attorney’s fees to be sought by plaintiff’s counsel and/or plaintiff’s entitlement to an incentive payment (2015 R&R [94], pp. 15-17), those concerns can be addressed when application for those payments is made.⁴ The pending motion also provides for objective and unbiased notice to class members, both by mail and by publication, and satisfies my concerns regarding diversity jurisdiction. Plaintiff’s Memorandum of Law [101-1], pp. 8-9 of 34. Moreover, while plaintiff suggests that he “faces a substantial risk at class certification, not the least reason being that whether a class of mortgagors bringing claims under New York’s mortgage satisfaction laws should be certified is a matter of first impression” (*id.*, p. 21 of 34), classes involving similar statutory violations have been certified. *See, e.g., In re Consolidated Mortgage Satisfaction Cases*, 780 N.E.2d 556 (Sup. Ct. Ohio 2002).

My greatest concern with the prior proposal was the absence of a detailed explanation of the potential defenses justifying the proposed settlement amount. “The most important consideration is the ‘strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.’” *Martin v. Cargill, Inc.*, 295 F.R.D. 380, 384 (D. Minn. 2013). Plaintiff’s counsel “deposed a representative of NTC, the third party that prepares and presents certificates of discharge on behalf of First Niagara, who described the uniform procedures it follows when preparing and presenting certificates, and who attested to the fact that the NTC data identifying class members and their alleged damages is accurate, reliable, and complete NTC’s data demonstrates that there are 5010 members of the Settlement Class, 2792 for whom

⁴ The settlement is not contingent upon such fees or payments being awarded by the court. Settlement Agreement [101-3], §§5.04(b), (e).

certificates of discharge were presented more than thirty but less than sixty-one days late, 1137 for whom certificates of discharge were presented more than sixty but less than ninety days late, and 1081 for whom certificates of discharge were presented more than ninety-one days late.”

“[U]nder one of the two mortgage satisfaction statutes, the maximum potential recovery if the case were to be litigated to judgment by trial would be \$4,154,500. The \$2.2 million Defendant is making available is 53% of that amount.” Plaintiff’s Memorandum of Law [101-1], p. 24 of 34. In my view, none of the defenses discussed in the prior motion, either individually or collectively, appeared to be of sufficient strength to warrant a 53% reduction from full value of the case. *See* 2015 R&R [94], pp. 18-22.

The pending motion mentions two additional defenses. First, “[d]efendant will argue . . . that a significant reason that mortgage satisfactions are sometimes presented late is because there are variations in the requirements various counties impose when setting rules for the presentment of satisfactions”. Plaintiff’s Memorandum of Law [101-1], p. 21 of 34. First Niagara suggests that it “could seek discovery from every county clerk to determine the circumstances of presentment of each satisfaction and to determine what impact 62 potentially different procedures has had in the litigation”. First Niagara’s Memorandum of Law [102], p. 8 of 8.

However, as plaintiff point s out, “county requirements are well known to lenders like First Niagara and it is only a failure to devote sufficient resources that result in lenders’ noncompliance”. Plaintiff’s Memorandum of Law [101-1], p. 21 of 34. “The intricacies of the operations of the various county recording offices are not at the heart of this dispute.” Piro v. National City Bank, 2004 WL 170335, *3 (Ct. App. Ohio 2004), rev'd on other grounds, 825 N.E.2d 599 (Sup. Ct. Ohio 2005) (involving a similar statute).

Moreover, First Niagara has not disputed plaintiff's assertion that "NTC, the third party that prepares and presents certificates of discharge on behalf of First Niagara . . . attested to the fact that the NTC data identifying class members and their alleged damages is accurate, reliable, and complete" (Blankinship Declaration [101-2], ¶5), and that the certificates were filed late (*id.*, ¶7). Under those circumstances, liability under the statutes appears to be automatic. "RPL §275 and RPAPL §1921 both clearly state that liability for penalties arises upon the mortgagor's 'failure' to timely present the mortgage discharge for filing. Where the Legislature wished to condition a penalty upon a showing of 'willful failure', it said so It did not do so here, and I may not add to a statute language not employed by the Legislature." 2015 R&R [94], pp. 18-19 of 26. Therefore, I do not consider this first new defense to be sufficiently meritorious to warrant a substantial reduction the value of the claims.

However, First Niagara also raised a potential second new defense, which I view more seriously. "Another, perhaps even more significant, risk to Zink's and affected mortgagors' claims, is a current review by the United States Supreme Court of a similar statute - the Fair Credit Reporting Act. In Spokeo Inc. v. Robins, No. 13-1339, the Supreme Court is considering whether a violation of a federal statute entitling a consumer to civil penalties where no economic injury is suffered confers Article III standing. Spokeo could affect the viability of Zink's claims. In the event of a favorable decision on lack of standing, First Niagara would argue here that the same reasoning should apply to Zink's state statute claims." First Niagara's Memorandum of Law [102], p. 5 of 8.

Over the parties' objections [105, 107], I stayed further proceedings pending the Supreme Court's decision in Spokeo, reasoning that "[u]ncertainty as to subject matter jurisdiction cannot be treated merely as a factor to be weighed in the settlement equation; for

unless subject matter jurisdiction is established, I cannot even consider the Uncontested Motion, much less approve it. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (“[w]ithout jurisdiction the court cannot proceed at all in any cause”). March 1, 2016 Decision and Order [111], p. 4.

Although I had not previously focused on the question of Article III standing, I could not ignore the question once it was presented to me. *See Cave v. East Meadow Union Free School District*, 514 F.3d 240, 250 (2d Cir. 2008) (“[i]f a court perceives at any stage of the proceedings that it lacks subject matter jurisdiction, then it must take proper notice of the defect”).⁵ Having focused on the question (albeit belatedly), my March 1, 2016 Decision and Order [111] detailed several reasons why Article III standing might be found not to exist. Those reasons are incorporated by reference here, without express repetition.

On May 16, 2016, the Supreme Court rendered its decision in Spokeo. ___ U.S. ___, 136 S.Ct. 1540 (as revised May 24, 2016). By Text Order dated May 17, 2016 [112], I lifted the stay which I had previously imposed, and invited the parties to “address whether plaintiff has sustained a concrete and particularized injury sufficient to establish Article III standing” in light of Spokeo. First Niagara, “acknowledg[ing] its obligations to support the settlement and its continued cooperation with plaintiff Zink to obtain approval of the settlement”,

⁵ Although First Niagara had previously moved to dismiss for lack of standing (First Niagara’s Memorandum of Law [37-1], Point II), that motion was denied. *See* January 27, 2014 Amended Report and Recommendation [51], adopted by Judge Arcara [59]. However, that motion focused on statutory standing, not Article III standing. “[W]hat has been called ‘statutory standing’ in fact is not a standing issue, but simply a question of whether the particular plaintiff has a cause of action under the statute . . . This inquiry does not belong to the family of standing inquiries . . . because the absence of a valid cause of action does not implicate subject-matter jurisdiction”. American Psychiatric Association v. Anthem Health Plans, Inc., ___ F.3d ___, 2016 WL 2772853, *4 (2d Cir. 2016); Advanced Video Technologies, LLC v. HTC Corp., 103 F. Supp. 3d 409, 418 (S.D.N.Y. 2015) (“statutory standing is not really ‘standing’ at all”).

defers to plaintiff on the question of standing (First Niagara's Submission [113], p. 2), and plaintiff has filed additional submissions [114 - 117] arguing that standing exists.

While the Court in Spokeo did not definitively decide which types of statutory violations suffice to create Article III standing,⁶ some portions of the opinion could lead to the conclusion that standing does not exist in this case. For example, the Court cautioned that "Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing Deprivation of a procedural right without some concrete interest that is affected by the deprivation is insufficient to create Article III standing". 136 S. Ct. at 1547-48, 1549. It could be argued that First Niagara's failure to timely file a mortgage satisfaction was a mere procedural violation which did not affect any concrete interest of plaintiff, since he does not allege that he suffered any adverse consequences (such as inability to sell the property) from the belated filing.

On the other hand, the Court noted that a concrete injury is not "necessarily synonymous with 'tangible' [T]he law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure Just as the common law permitted suit in such instances, the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified." Id. at 1549 (emphasis in original).

The doctrine of standing has been described as "incoherent and confusing". Hessick, "Standing, Injury in Fact, and Private Rights", 93 Cornell L. Rev. 275, 276 (2008).

⁶ "[T]he Ninth Circuit[']s standing analysis was incomplete We take no position as to whether the Ninth Circuit's ultimate conclusion - that Robins adequately alleged an injury in fact - was correct." 136 S.Ct. at 1550.

However, Justice Thomas's concurring opinion in Spokeo offers a reasonable (to me, at least) resolution to the confusion, by focusing on the nature of the right being asserted. "Common-law courts imposed different limitations on a plaintiff's right to bring suit depending on the type of right the plaintiff sought to vindicate. Historically, common-law courts possessed broad power to adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more. Private rights are rights belonging to individuals, considered as individuals." 136 S.Ct. at 1551.

"Common-law courts, however, have required a further showing of injury for violations of public rights - rights that involve duties owed to the whole community, considered as a community, in its social aggregate capacity." Id. "[W]hen a plaintiff seeks to vindicate a public right, the plaintiff must allege that he has suffered a concrete injury particular to himself But the concrete-harm requirement does not apply as rigorously when a private plaintiff seeks to vindicate his own private rights. Our contemporary decisions have not required a plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the injury-in-fact requirement." Id. at 1552. "Congress can create new private rights and authorize private plaintiffs to sue based simply on the violation of those private rights A plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right." Id. at 1553, *citing* Havens Realty Corp. v. Coleman, 455 U.S. 363, 373-74 (1982).

Havens involved claims by "testers" alleging violation of the Fair Housing Act of 1968, 42 U.S.C. §§3601 *et seq.* "[T]esters are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices. Section 804(d) states that it is unlawful for an individual

or firm covered by the Act ‘[t]o represent to *any person* because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available,’ 42 U.S.C. § 3604(d) (emphasis added), a prohibition made enforceable through the creation of an explicit cause of action in § 812(a) of the Act, 42 U.S.C. § 3612(a). Congress has thus conferred on all ‘persons’ a legal right to truthful information about available housing A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages under the Act’s provisions.” *Id.* at 373-74.

“That the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of § 804(d).” *Id.* at 374. “[R]espondent Coleman - the black tester - alleged injury to her statutorily created right to truthful housing information. As part of the complaint, she averred that petitioners told her on four different occasions that apartments were not available in the Henrico County complexes while informing white testers that apartments were available. If the facts are as alleged, then respondent has suffered specific injury from the challenged acts of petitioners . . . and the Art. III requirement of injury in fact is satisfied.” *Id.*

It would appear to me that plaintiff Zink’s injury is no more ephemeral than that of the testers in *Havens*. Although the majority opinion in *Spokeo* does not mention *Havens*, “[t]he Supreme Court ‘does not normally overturn, or . . . dramatically limit, earlier authority *sub silentio*.’” *United States v. Apple, Inc.*, 791 F.3d 290, 324 (2d Cir. 2015), *cert. denied*, 136 S. Ct.

1376 (2016) (*quoting* Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1, 18 (2000)).

It has also been suggested that a distinction should be drawn between state and federal statutes for purposes of Article III standing. *See* Ross v. AXA Equitable Life Insurance Co., 115 F. Supp. 3d 424, 434 (S.D.N.Y. 2015) (“the Court is not aware of (and Plaintiffs do not cite) any authority suggesting that a *state* legislature can confer Article III standing upon a plaintiff who suffers no concrete harm merely by authorizing a private right of action based on a bare violation of a state statute”). However, there is contrary authority. *See, e.g.,* FMC Corp. v. Boesky, 852 F.2d 981, 993 (7th Cir. 1988) (“the actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing The same must also be true of legal rights growing out of state law”); Cantrell v. City of Long Beach, 241 F.3d 674, 684 (9th Cir. 2001) (“state law can create interests that support standing in federal courts. If that were not so, there would not be Article III standing in most diversity cases”); Chelan County Washington v. Bank of America Corp., 2015 WL 4129937, *3 (E.D. Wash. 2015) (“[i]n diversity actions . . . a state statute which creates a concrete legal interest may satisfy the injury-in-fact requirement for federal standing”).

The existence of standing need only be proven “by a preponderance of the evidence”. Perry v. Village of Arlington Heights, 186 F.3d 826, 829 (7th Cir. 1999), “mean[ing] very simply . . . that something is more likely than not so”. Floyd v. City of New York, 959 F. Supp. 2d 540, 572, n. 101 (S.D.N.Y. 2013). “[A] fact has been proven by a preponderance of the evidence if . . . the scales tip, however slightly, in favor of the party with the burden of proof as to that fact.” Ostrowski v. Atlantic Mutual Insurance Companies, 968 F.2d 171, 187 (2d Cir. 1992).

In my view, under the present state of the law the scales tip slightly (but only slightly) in favor of finding that plaintiff has Article III standing to pursue claims on behalf of himself and the class. However, the substantial possibility that a higher court might eventually rule otherwise, particularly when coupled with the other defenses potentially available to First Niagara, warrants the settlement agreement's significant reduction from full value of the class members' claims.⁷

CONCLUSION

"Preliminary approval is not tantamount to a finding that the settlement is fair and reasonable. It is at most a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness." Chambery v. Tuxedo Junction Inc., 10 F. Supp. 3d 415, 419 (W.D.N.Y. 2014) (Wolford, J.).

For the reasons discussed, I find that the uncontested motion [101] demonstrates such "probable cause". Therefore, the motion, as amended, is granted. A further conference to discuss the logistics of implementation will be held on July 8, 2016 at 2:00 p.m. Counsel may participate by telephone upon advance notice to chambers.

Dated: July 1, 2016

/s/ Jeremiah J. McCarthy
JEREMIAH J. MCCARTHY
United States Magistrate Judge

⁷ If that occurs prior to the final resolution of this action, then the action must be dismissed. *See* Fed. R. Civ. P. ("Rule") 12(h)(3) ("[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action").