

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Vincent Ofor,

Civil No. 09-1402 (PAM/JJG)

Plaintiff,

v.

MEMORANDUM AND ORDER

Ocwen Loan Servicing, LLC,
Aames Funding Corporation,
U.S. Bank N.A,

Defendants.

This matter is before the Court on Motions to Dismiss filed by Defendants Ocwen Loan Servicing, LLC (“Ocwen”) and U.S. Bank N.A. (“U.S. Bank”). Plaintiff concedes that Ocwen’s Motion should be granted but opposes U.S. Bank’s Motion. For the reasons that follow, U.S. Bank’s Motion is denied.

BACKGROUND

Plaintiff Vincent Ofor brought a two-count Complaint in Ramsey County alleging claims arising out of his home mortgage loan and his subsequent default, foreclosure, and the sheriff’s sale of his home. Ofor filed the Complaint on December 10, 2008. Although the Complaint purports to ask that the sheriff’s sale be enjoined, the sale went forward as scheduled on December 11, 2008. None of the Defendants was served before May 26, 2009. Defendants removed the case in June 2009. Ofor did not exercise his statutory right to redeem after the sheriff’s sale, and that right expired in June 2009. See Minn. Stat. § 580.001 et seq.

Ofor claims that he was out of town in October 2005 when the mortgage closing occurred, and that his wife, who signed the closing documents for him, did not have a valid power of attorney to do so. Therefore, Ofor contends that there was no contract between him and the mortgage company. (Compl. Count I.) He also claims that the various entities that handled his loan, specifically Defendant Aames Funding Corp. (“Aames”),¹ violated the Truth in Lending Act (“TILA”), 15 U.S.C. § 1601 et seq. (Compl. Count II.) In particular, Ofor contends that Aames failed to make the disclosures required by TILA, thus giving Ofor a three-year right to rescind. The Complaint states that Ofor exercised his right to rescind in October 2005² and again in June 2008. At the hearing on this matter, Ofor’s counsel asserted that the Complaint’s reference to an October 2005 rescission attempt was mistaken, and that there was no such rescission attempt. In any case, Defendants denied Ofor rescission in July 2008. Ofor contends that the failure to grant him rescission also violated TILA.

Aames originated the mortgage at issue. Ocwen is the loan servicer, and U.S. Bank is essentially the loan holder, albeit in a more complicated transaction that involves U.S. Bank as trustee of an asset-backed securities trust, of which Ofor’s mortgage is presumably

¹ Aames has not appeared in this matter. According to counsel, Aames is currently in bankruptcy proceedings. The Complaint also names another Defendant, Minnesota One Mortgage, but this Defendant is not in the caption to the Complaint and does not appear on the docket.

² In the same paragraph, the Complaint references an October 29, 2007, rescission letter, and an October 29, 2005, rescission letter. (Compl. ¶ 13.) The reference to an October 2007 letter is apparently a typographical error.

only a small part. U.S. Bank's Motion to Dismiss seeks a dismissal only of Count II of the Complaint, because U.S. Bank contends that Count I does not raise any claim against U.S. Bank. Ofor apparently disagrees with this assertion, arguing at the hearing that the contract claim is against both Aames and U.S. Bank. Whether or not Ofor can properly raise a contract claim against U.S. Bank is not at issue in this Motion. The only claim at issue in U.S. Bank's Motion to Dismiss is Ofor's TILA claim.

DISCUSSION

For purposes of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court takes all facts alleged in the complaint as true. See Westcott v. Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990). The Court must construe the allegations in the complaint and reasonable inferences arising from the complaint favorably to the plaintiff and will grant a motion to dismiss only if "it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." Morton v. Becker, 793 F.2d 185, 187 (8th Cir. 1986) (citations omitted). The complaint must include "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007). Thus, a well-pled complaint may proceed even if it appears "that recovery is very remote and unlikely." Id. at 1965 (quotation omitted).

U.S. Bank argues that Ofor's TILA claim should be dismissed for two reasons: first, because the claim is untimely under TILA's statute of limitations, and second, because the sale of the property terminated Ofor's rights under TILA.

A. TILA Statute of Limitations

The Complaint appears to state two different claims under TILA. The first claim is an action to enforce TILA's three-year right of rescission under 15 U.S.C. § 1635. (See Compl. ¶ 29 (“Mr [sic] Ofor has a continuing right to rescind the mortgage as provided under 15 U.S.C. § 1635(f)”)). The second is a claim under § 1635(b) that the lender wrongfully refused to cancel the mortgage after receiving a rescission notice. (See Compl. ¶ 36 (“Defendants have failed to return to the Plaintiff any money or property given by Mr. Ofor . . . as required by [TILA].”)).

U.S. Bank does not dispute, for the purposes of this Motion, that Ofor has alleged sufficient facts to establish his entitlement to the three-year continuing right to rescind that § 1635(f) provides. Thus, his first TILA claim is not at issue in this Motion.

TILA provides that, “[w]ithin 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise” 15 U.S.C. § 1635(b). Ofor contends that U.S. Bank wrongfully refused to cancel the mortgage after receiving Ofor's notice of rescission in June 2008. U.S. Bank's Motion asks the Court to dismiss this claim as untimely.

Section 1640 provides a cause of action for violations of § 1635. Id. § 1640(a). Claims for violations of § 1635 are subject to a one-year statute of limitations. Id. § 1640(e). Because Ofor's lawsuit was filed and served within one year of the alleged violation of § 1635(b), his claim is timely.

B. Sale of the Property

U.S. Bank argues in the alternative that the sheriff's sale cut off Ofor's right to rescind, so that he has no claim for the alleged wrongful refusal to rescind. TILA is clear that the right of rescission expires either three years after the credit transaction is consummated or "upon the sale of the property." 15 U.S.C. § 1635(f). There is no dispute that the property has been sold at a sheriff's sale and that Ofor did not exercise his state-law right of redemption within the six-month redemption period after the sheriff's sale. Ofor argues that his right to rescind under TILA did not expire on the sale of the property because he exercised the right to rescind in June 2008, nearly six months before the sale. He further argues that he filed a notice of lis pendens the day before the sheriff's sale, and thus that any purchaser of the property had notice of his TILA claim.

The parties do not cite to any on-point authority for their respective contentions, and the Court has found none. The decisions stating unequivocally that the right to rescind expires with the sale are, in the main, cases in which the homeowner did not exercise the right to rescind until after the sale. See, e.g., Meyer v. Ameriquest Mortgage Co., 342 F.3d 899, 903 (9th Cir. 2003) ("The regulation is clear: the right to rescind ends with the sale."). When the homeowner properly gives notice of the rescission before the sale, however, courts find that the right to rescind does not expire with the sale. See, e.g., Jones v. Saxon Mortgage, Inc., 161 F.3d 2, 1998 WL 614150, at *3 (4th Cir. 1998) (unpublished table decision) (noting that homeowner "would have had to give proper notice of rescission prior to the foreclosure sale or his right of rescission would have expired on the date of the foreclosure sale"); but cf. Connors v. Home Loan Corp., No. 08cv1134-L(LSP), 2009 WL

1615989, at *4 (S.D. Cal. June 9, 2009) (finding TILA rescission claim barred when home was sold two months after lawsuit was filed and rescission notice was given).

Ofor exercised his purported right to rescind almost six months before the sheriff's sale. It may be that he did not in fact have the right to rescind, that his notice of rescission was somehow improper, or that he is estopped from asserting the right to rescind. Those inquiries, however, must await further record development. On the face of the Complaint, Ofor has sufficiently stated a claim that U.S. Bank's failure to allow him to rescind his loan constituted a violation of TILA. U.S. Bank's Motion to Dismiss is denied.

CONCLUSION

Accordingly, **IT IS HEREBY ORDERED** that:

1. Ocwen's Motion to Dismiss (Docket No. 2) is **GRANTED**; and
2. U.S. Bank's Motion to Dismiss (Docket No. 6) is **DENIED**.

Dated: Monday, August 31, 2009

s/ Paul A. Magnuson
Paul A. Magnuson
United States District Court Judge