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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

JAMES GASS and MARTHA GASS Plaintiff(s), - against- WELLS FARGO & CO., WELLS FARGO HOME MORTGAGE and RICHARD KABELAC Defendant(s).	Index Number 15713/11 Motion Date December 13, 2011 Motion Cal. Number 15 Motion Seq. Number 1

The following papers numbered 1 to 7 read on this motion by defendants Wells Fargo Home Mortgage and Richard Kabelac pursuant to CPLR § 3211(a) (1), (5) and (7) dismissing the complaint with prejudice.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Supplemental Affirmation- Exhibits	5-7

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

Plaintiffs, who are married, are senior citizens and James Gass is a retiree, and Martha Gass, allegedly now suffers from Alzheimer's disease. They assert that they have limited education, and are incapable of understanding and managing complex personal financial matters. They own their home known as 243-18 136th Avenue, Rosedale, New York, which was encumbered with a mortgage in favor of Countrywide Home Loans (Countrywide) in the principal amount of $120,000.00. After plaintiffs were notified they were in their default in their payment obligation under the Countrywide mortgage, they retained counsel to represent them in connection with the impending foreclosure action. Counsel allegedly referred them to Jamaica Housing Development, Inc. (Jamaica Housing) to receive information and counseling about reverse mortgages.[1] Jamaica Housing, however, allegedly failed to provide them, as

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potential applicants for a "home equity conversion mortgage" (HECM), i.e. a reverse mortgage insured by the Federal Housing Administration (FHA), with proper information or counseling. Plaintiffs allege that Jamaica Housing instead advised them that they did not need a counseling session to obtain a HECM, but rather only a "certificate of counseling." Jamaica Housing allegedly had plaintiffs sign a certificate of counseling, and then gave it to them in a sealed envelope to give to their "reverse mortgage" consultant. Plaintiffs met with defendant Kabelac, a "reverse mortgage consultant," then employed by Wells Fargo Home Mortgage, and gave Kabelac the envelope, but purportedly told him they were not interested in obtaining a reverse mortgage. They claim defendant Kabelac failed to discuss the nature of the "counseling" session they had had with Jamaica Housing, and instead, insisted they consider the Wells Fargo Home Mortgage reverse mortgage "product" without making proper disclosures to them. They admit they formally accepted the HECM counseling certificate on or around April 5, 2005, and on or about April 6, 2005, defendants provided plaintiffs with a "Reverse Mortgage FHA Commitment Letter" (the commitment letter), approving an FHA-insured, reverse mortgage loan from Wells Fargo Bank, N.A. with a principal limit of $187,737.00, and an adjustable interest rate. The closing of the HECM transaction occurred on April 11, 2005, at which time the Countrywide mortgage against plaintiffs' property was satisfied out of the HECM loan proceeds. In early 2006, plaintiffs' son made inquiries as to the terms of the HECM and attempted to obtain a copy of the loan documents and other information from defendants. Plaintiffs retained counsel, who ultimately secured a copy of the complete file regarding the HECM loan.

Plaintiffs thereafter commenced this action alleging they were fraudulently induced into entering into the HECM loan, in that defendants intentionally misrepresented there were no alternative means by which they could prevent foreclosure on their home, defendants' compliance with statutes, regulations and rules applicable to reverse mortgages and the interest rate applicable to the mortgage. Plaintiffs also allege that defendants concealed that other financial and housing options, including other types of HECMs, were available to plaintiffs. They further allege that defendants failed to provide them with proper counseling regarding the financial implications and tax consequences of entering into a HECM loan, failed to verify that they had received proper third-party counseling, and failed to provide disclosures required under federal and state law. Plaintiffs allege that as a result of the fraudulent inducement and concealment, they incurred substantial unnecessary debts and liabilities relating to the HECM loan, and have been wrongfully deprived of substantial equity in their home. Plaintiffs assert causes of action based upon violation of 12 USC § 1715z-20 (e) and (f) and 24 CFR 206.43 (a corresponding regulation governing HECMs), Real Estate Settlement and Procedures Act (RESPA) (12 USC § 2601 *et seq.*), Truth in Lending Act (TILA) (15 USC 1601 *et seq.*), Real Property Law §§ 280 and 280-a, fraud, negligent misrepresentation, and seek rescission and cancellation of the reverse mortgage, compensatory and punitive damages, and an award of attorneys' fees.

Under 12 USC § 1715z-20 (Housing and Community Development Act of 1987), an applicant for a HECM must be provided with counseling by counselors that meet specified qualification standards and follow uniform counseling protocols (*see* 12 USC § 1715z-20[2][f]) .

In lieu of serving an answer, defendants Wells Fargo Home Mortgage and Kabelac move to dismiss the complaint against them pursuant to CPLR § 3211(a) (1), (5) and (7).

At the outset, the court notes that plaintiffs oppose the motion except for that branch of the motion by defendants Wells Fargo Home Mortgage and Kabelac which seeks to dismiss the third cause of action based upon alleged violation of RESPA, the fourth cause of action based upon alleged violation of TILA, and so much of the fifth cause of action as is based upon alleged violation of Real Property Law § 280-a. Defendant Wells Fargo & Co. has not appeared in relation to the motion. That branch of the motion by defendants Wells Fargo Home Mortgage and Kabelac which seeks to dismiss the third cause of action based upon alleged violation of RESPA, the fourth cause of action based upon alleged violation of TILA, and so much of the fifth cause of action as is based upon alleged violation of Real Property Law § 280-a is granted without opposition.

With respect to the remaining branch of the motion to dismiss pursuant to CPLR § 3211 (a) (1) and (7), the Appellate Division, Second Department has held:

> " 'On a motion to dismiss the complaint pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory' (*Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008]; *see Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Smith v Meridian Tech., Inc.*, 52 AD3d 685, 686 [2d Dept 2008]). 'On a motion to dismiss based upon documentary evidence [under CPLR § 3211 (a)(1)], dismissal is only warranted if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law' (*Klein v Gutman*, 12 AD3d 417, 418 [2d Dept 2004]; *see* CPLR § 3211 [a] [1]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Ballas v Virgin Media, Inc.*, 60 AD3d 712, 713 [2d Dept 2009]; *McMorrow v Dime Sav. Bank of Williamsburgh*, 48 AD3d 646, 647 [2d Dept 2008])" (*Moore v Liberty Power Corp., LLC*, 72 AD3d 660 [2d Dept 2010]).

Defendants Wells Fargo Home Mortgage and Kabelac assert that the claims based upon alleged violations of 12 USC § 1715z-20 (e) and (f), and 24 CFR 206.43 fail to state a cause of action because the statute and regulation do not expressly provide for a direct private right of action, and no private right of action can be implied.

Neither 12 USC § 1715z-20 nor 24 CFR 206.43 contain an express private right of action for reverse mortgagors against their mortgagees for violations of the statute (*see Brown ex rel. Richards v Brown*, 157 Wash App 803 [2010]), or the corresponding regulations. To the extent plaintiffs contend a private right of action for alleged violation of the statute may be implied, no

federal court has reached the issue,[2] and the only state court to do so has ruled there is no implied private right of action thereunder (*see Brown ex rel. Richards v Brown*, 157 Wash App 803 [2010], *supra*). There is no federal or state case law regarding whether a private right of action exists under 24 CFR 206.43.

The United States Supreme Court has held that an implied cause of action exists only if the underlying federal statute can be interpreted to disclose the Congressional intent to create one (*see Stoneridge Inv. Partners, LLC v Scientific-Atlanta*, 552 US 148 [2008]; *see e.g. Alexander v Sandoval*, 532 US 275, 286–287 [2001]; *Transamerica Mortgage Advisors. Inc. v Lewis*, 444 US 11 [1979]). In determining the Congressional intent, the language and focus of the statute is considered, along with its legislative history and purpose (*see Cort v Ash*, 422 US 66 [1975]). Furthermore, that the statute may manifest an intent to create a private right is not enough; the statute must also indicate a manifestation of creation of a private remedy (*see Gonzaga University v Doe*, 536 US 273, 283-84 [2002]; *Touche Ross & Co. v Redington*, 442 US 560 [1979).

The text of 12 USC § 1715z-20 does not include " 'rights-creating' " language (*see Alexander v Sandoval*, 532 US 275, 288 [2001], *supra*). Rather, its focus is on authorizing the Secretary (Secretary) of the United States Department of Housing and Urban Development (HUD) to carry out a program of mortgage insurance designed to meet the needs of elderly homeowners, and to encourage and increase participation of mortgagees and participants in the mortgage market in the making and servicing of home equity conversion mortgages for elderly homeowners (*see* 12 USC § 1715z-20 [a]) . Although the statute provides that the Secretary require certain disclosures be made to mortgagors (*see* 12 USC § 1715z-20 [e] and [k]) and establish limits on origination fees (*see* 12 USC § 1715z-20 [r]), and prohibits the mortgagor from being required to purchase certain forms of insurance as a requirement or condition of eligibility (*see* 12 USC § 1715z-20 [o]), the enforcement mechanisms therein are given to the Secretary (*see* 12 USC § 1715z-20 [h], and [i]). Likewise, the requirements under 24 CFR 206.43 for disclosure (*see* 24 CFR 206.43[a]) and inquiry into the use of certain lump sum disbursements (*see* 24 CFR 206.43 [b]), also lack "rights-creating" language, and plaintiffs offer no rationale for implying a private right of action based on those regulations. Plaintiffs make no showing that anything in the legislative history demonstrates a Congressional intent that a private right of action exist under 12 USC § 1715z-20 or 24 CFR 206.43. This court concludes that 12 USC § 1715z-20 and 24 CFR 206.43 do not confer any privately enforceable right and thus, the first and second causes of action asserted in the complaint fail to state a cause of action against defendants Wells Fargo Home Mortgage and Kabelac.

Likewise, the fifth cause of action, based upon violation of Real Property Law § 280, fails

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[2] This court recognizes that a state court is not bound to follow the construction of a federal statute made by any federal court other than the Supreme Court of the United States (*see People ex rel. Ray v Martin*, 294 NY 61, 73 [1945], *affd* 326 US 496 [1945]), or by any other state court.

to state a cause of action against defendants Wells Fargo Home Mortgage and Kabelac.

Plaintiffs assert that defendant Wells Fargo Home Mortgage failed to deliver to them, as reverse mortgage applicants, certain disclosures mandated under the statute. Real Property Law § 280, however, does not expressly provide for a private right of action based upon a violation of the statute.[3] Relief may be had under a state statute if a legislative intent to create such a right is "fairly implied" in the statutory provisions and their legislative history (*see Brian Hoxie's Painting Co. v Cato–Meridian Cent. School Dist.*, 76 NY2d 207, 212 [1990]; *Maraia v Orange Regional Medical Center*, 63 AD3d 1113 [2d Dept 2009]).[4] In making this determination, the court must examine " '(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme' " (*Ahmad v Nassau Health Care Corp.*, 8 AD3d 512, 513 [2d Dept 2004], quoting *Sheehy v Big Flats Community Day*, 73 NY2d 629 [1989]) (*see also Maraia v Orange Regional Medical Center*, 63 AD3d 1113 [2009]).

Real Property Law § 280 was added in 1993 as part of a bill (L 1993, ch 613), which according to its sponsors, was intended to increase the availability of reverse mortgages to homeowners 60 years of age or older (*see* Senate Introducer Mem. in Support, Bill Jacket, L 1993, ch 613, at 27; Assembly Sponsor's Mem. in Support, Bill Jacket, L 1993, ch 613, at 25). In this instance, it is undisputed that plaintiffs were over sixty years of age at the time of the making of the HECM (*see* Real Property Law § 280 [1] [e]), and therefore, are persons for whose benefit the law was enacted.

Nevertheless, it appears from the legislative history that recognition of an implied private right of action for alleged violations of the statute would not promote the legislative purpose, and would be inconsistent with the overall legislative scheme. The sponsors indicated the

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[3] The United States Court of Appeals for the Second Circuit, in the case *Wolfert ex rel. Estate of Wolfert v Transamerica Home First, Inc.*, (439 F3d 165 [2006], *certiorari denied* 549 US 882 [2006]), had occasion to consider whether the provision found in Real Property Law § 280(10), imposing a certain "50-50" requirement upon lenders in relation to their offerings of reverse mortgages, created a private right of action. That court determined that such a provision did not explicitly authorize a private right of action, and could not be considered to imply one. The Circuit Court's decision regarding state law is not binding on this court (*see Baker v Andover Associates Management Corp.*, 30 Misc 3d 1218[A] [2009]; *see also People v Dietze*, 75 NY2d 47 [1989]; *see generally Nussbaum v Mortgage Service America Co.*, 913 F Supp 1548 [SD Fla,1995]).

[4] The Second Circuit, in *Wolfert ex rel. Estate of Wolfert v Transamerica Home First, Inc.*, (439 F3d 165 [2006], *certiorari denied* 549 US 882 [2006]) (*see* n 3), did not address the issue of whether the violation of any provision found in Real Property Law § 280, other than the "50-50" provision found in Real Property Law § 280(10), could form the basis for an implied right of action.

Banking Department had received comments in connection with the proposed bill that no banking organization, or licensed mortgage lender doing business in New York, had been willing to make a reverse mortgage under the then current law (*see* Letter from Senate Sponsor to the Governor's Counsel, Bill Jacket, L 1993, ch 613, at 24; Letter from Assembly Sponsor to the Governor, Bill Jacket, L 1993, ch 613, at 3). The sponsors also indicated that the proposed statute "addresse[d] the concerns of [those] lenders" and was intended "to ensure lender participation and afford New York State residents the opportunity to "take advantage of this socially desirable product" (*id.*). In addition, one of the sponsors of the bill indicated HUD was sponsoring a demonstration project, administered by the FHA, to provide older homeowners with various types of reverse mortgages, and that FHA would insure 25,000 of the home equity conversion mortgages (*see* Senate Introducer Mem. in Support, Bill Jacket, L 1993, ch 613, at 27). The New York State Banking Department, in writing in support of the proposed statute, commented that, for those lenders which chose to enter the reverse mortgage market, the bill clarified the authority of the lender to participate in the HECM insurance demonstration program of the FHA (*see* Banking Department Memorandum dated July 15, 1993, Bill Jacket, L 1993, ch 613, at 20). Thus, to permit a mortgagor to bring a private right of action for relief against a lender, even when the claim is based upon failure to provide mandated disclosures, would discourage lenders from making reverse mortgages *(see Brian Hoxie's Painting Co. v Cato–Meridian Cent. School Dist.*, 76 NY2d 207, 213 [1990]).

In addition, under the legislative scheme of Real Property Law § 280, the remedy for a lender's failure to comply with the provide proper disclosures and receipt of unauthorized fees, etc., as part of a pattern of conduct demonstrating incompetence or untrustworthiness, lies in the form of administrative action in the discretion of the Superintendent of Financial Services (*see* Real Property Law § 280 [1] [f], [g] [L 2011, c 62, pt A, § 104]) (2 NYCRR 79.13).

Under these circumstances, an implied private cause of action would be incompatible with both the basic purposes underlying Real Property Law § 280 and the means chosen by the Legislature to enforce it. Plaintiffs, therefore, are not entitled to seek relief from defendants Wells Fargo Home Mortgage and Kabelac based upon an alleged violation of Real Property Law § 280.

The sixth, seventh and ninth causes of action are predicated on claims of fraud, and seek money damages and rescission. To sustain such a claim for fraud, a plaintiff must allege that (1) the defendant misrepresented or omitted a material fact, (2) the defendant knew such facts were false, (3) the defendant's misrepresentations or omissions were made with the intention of inducing plaintiff's reliance, (4) the plaintiff justifiably relied on the misrepresentation or omission, and (5) the plaintiff suffered damages as a result (*see e.g. Barclay Arms, Inc. v Barclay Arms Assocs.*, 74 NY2d 644 [1989]; *Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 406-407 [1958]; *Orlando v Kukielka*, 40 AD3d 829 [2d Dept 2007]). CPLR § 3016 (b), furthermore, requires that where the cause of action is based upon fraud or misrepresentation "the circumstances constituting the wrong shall be stated in detail."

Plaintiffs allege that defendants made "a false representation of material fact as to the

existence of alternative means by which they could prevent foreclosure on their home" (complaint ¶ 100). Such allegation is insufficient to sustain a fraud claim. They have failed to identify the specific factual details from which fraud may be inferred (*see* CPLR 3013, 3016; *Cohen v Houseconnect Realty Corp.*, 289 AD2d 277 [2d Dept 2001]). In addition, they fail to allege facts which show they reasonably relied upon a representation by defendants that the HECM was their only option to save their home from foreclosure. Rather, they allege that they were "*induced*" by their own defense counsel in the foreclosure action "to apply for a reverse mortgage through Wells Fargo, claiming it was the only possible method to re-mortgage the premises" (complaint ¶ 30) (emphasis supplied) . To the extent defendant Kabelac allegedly "informed" plaintiffs" they had to repay a " 'loan' which held an interest rate of 4.88%, which rate was valid for a period of sixty (60) days" (complaint ¶ 38), plaintiffs do not claim this statement was false or constituted a material misrepresentation of the HECM loan's terms. Furthermore, to the extent plaintiffs allege that defendants made material misrepresentations regarding the interest rate applicable to the HECM loan, plaintiffs have failed to state with specificity the nature of the claimed misrepresentations and when, where and by whom they were made (CPLR § 3016 [b]). The allegation that defendants made false misrepresentations regarding plaintiffs' understanding of the terms and conditions of the reverse mortgage, and receipt of mortgage counseling, and defendants' own compliance with statutes, rules and regulations applicable to reverse mortgages is insufficient to support a claim for rescission based upon fraudulent misrepresentation (*see Channel Master Corp. v Aluminium Ltd. Sales*, 4 NY2d 403, 406-407 [1958], *supra*). Plaintiffs' allegations also fail to show a reasonable reliance on any alleged material omission, because the documentary evidence submitted by defendants in support of their motion prove that plaintiffs were provided with multiple disclosures which contradict their claim of nondisclosure (*see Berardino v Ochlan*, 2 AD3d 556 [2d Dept 2003]).

With respect to the negligent misrepresentation and omission claims set forth in the eighth cause of action, a plaintiff, to state a cause of action based on these theories, must allege:

> " '(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect [or withheld]; and (3) reasonable reliance on the information [or omission]' (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d [173,] 180, quoting *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]; *see Stilianudakis v Tower Ins. Co. of N.Y.*, 68 AD3d 973 [2d Dept 2009]). '[L]iability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified' (*Kimmell v Schaefer*, 89 NY2d 257 [1996])" (*High Tides, LLC v DeMichele*, 88 AD3d 954, 955-956 [2d Dept 2011]).

Plaintiffs allege that defendants "ignored or negligently failed to advise [them] about the mortgage or its operation" (complaint ¶ 114), and "the true costs of the mortgage (complaint ¶ 115), and "were aware that [p]laintiffs would rely on their negligent misstatements in

furtherance of their pursuit of the reverse mortgage" (complaint ¶ 116). To the extent they allege defendants failed to advise them concerning the HECM or its costs, a typical borrower-lender relationship will not support a negligent misrepresentation claim (*see Dobroshi v Bank of Am., N.A.*, 65 AD3d 882, 884 [1st Dept 2009]), and plaintiffs herein have failed to allege a basis for finding a duty of care owed to them by defendants premised upon a "special relationship" (*cf. Smith v Ameriquest Mortg. Co.*, 60 AD3d 1037 [2d Dept 2009]), beyond the duties found in TILA, RESPA and Banking Law § 280. Plaintiffs make no allegation that plaintiff Martha Gass lacked the requisite capacity to enter into the HECM loan by virtue of her suffering from Alzheimer's disease (*see Gala v Magarinos*, 245 AD2d 336 [2d Dept 1997]), or that any proceeding had been brought for the purpose of adjudicating her incompetent prior to her entry into the HECM loan. To the extent plaintiffs do not identify the claimed "negligent misstatements," they also have failed to specify the alleged incorrect information imparted to them (CPLR § 3016 [b]).

Plaintiffs, therefore, have failed to state a claim against defendants Wells Fargo Home Mortgage and Kabelac for fraud, and negligent mispresentation and omission.

That branch of the motion by defendants Wells Fargo Home Mortgage and Kabelac to dismiss the first, second, sixth, seven, eighth and ninth causes of action, and so much of the fifth cause of action which is based upon violation of Real Property Law § 280 asserted against them is granted.

Dated: March 22, 2012

DARRELL L. GAVRIN, J.S.C.