In the
United States Court of Appeals
For the Second Circuit

August Term 2020

No. 20-1683-cv

KIM NAIMOLI,

Plaintiff-Appellant,

v.

OCWEN LOAN SERVICING, LLC,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of New York
No. 18 Civ. 06180 (EAW), Elizabeth A. Wolford, District Judge, Presiding.
(Argued April 5, 2021; Decided January 7, 2022)

Before: PARKER and MENASHI, *Circuit Judges.*[*]

Plaintiff-Appellant Kim Naimoli appeals from a judgment of the United States District Court for the Western District of New York (Wolford, *J.*) dismissing her claims against Defendant-Appellee Ocwen Loan Servicing, LLC.

[*] Judge Robert A. Katzmann, originally a member of the panel, died on June 9, 2021. The two remaining members of the panel, who are in agreement, have determined the matter. *See* 28 U.S.C. § 46(d); 2d Cir. IOP E(b); *United States v. Desimone*, 140 F.3d 457, 458-59 (2d Cir. 1998).

Naimoli sued under the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2601–2617, alleging that Ocwen's failure to record her mortgage instruments and its actions in losing key mortgage documents constituted covered errors under the catch-all provision of Regulation X (RESPA's implementing regulation). The district court granted Ocwen summary judgment, holding that Naimoli's asserted errors did not fall within the catch-all provision because they were errors relating to loss mitigation options rather than errors relating to the servicing of Naimoli's loan. We disagree. We conclude that Naimoli's asserted errors are covered by the catch-all provision of Regulation X. Accordingly, we REVERSE and REMAND for further proceedings consistent with this opinion.

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BARRINGTON D. PARKER, Circuit Judge:

Kim Naimoli took out a mortgage loan to finance the purchase of her home, but she defaulted on her mortgage payments. In order to avoid foreclosure, Naimoli requested a loan modification from her loan servicer, Ocwen Loan Servicing, LLC. Ocwen approved her for a trial period mortgage

loan modification plan. Although Naimoli successfully completed the trial period plan, Ocwen denied her the loan modification because it had failed to record her mortgage as it was obligated to do and because it had lost key documents that it had required Naimoli to re-execute in order to implement the loan modification. To secure the promised loan modification, Naimoli sued Ocwen under the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2601–2617.

RESPA, a consumer protection statute, regulates the real estate settlement process, and, along with its implementing regulations, provides a framework for borrowers to remedy errors relating to the servicing of their mortgage loans. One of RESPA's implementing regulations, Regulation X, "allows borrowers to notify mortgage servicers of possible account errors." *Finster v. U.S. Bank Nat'l Ass'n*, 723 F. App'x 877, 878 (11th Cir. 2018). Regulation X requires servicers to respond to "any written notice from the borrower that asserts an error and that includes . . . information that enables the servicer to identify the borrower's mortgage loan account, and the error the borrower believes has occurred." 12 C.F.R. § 1024.35(a). However, the Regulation applies only to the "covered errors" listed in § 1024.35(b). That provision also contains a catch-all provision (on which this

appeal turns) covering "[a]ny other error relating to the servicing of a borrower's mortgage loan . . . ." 12 C.F.R. § 1024.35(b)(11).

After Ocwen denied Naimoli's mortgage-loan modification, Naimoli availed herself of RESPA's remedies by submitting a Notice of Error asserting that "Ocwen's actions, in failing to honor the terms of the [trial period plan] and record the [] mortgage documents, constitute[d] an error in the servicing of the Borrower's loan" pursuant to 12 C.F.R. § 1024.35's catch-all provision. After Ocwen summarily responded that the denial was valid, Naimoli commenced this action.

Naimoli alleged that the errors committed by Ocwen in handling her loan modification documents were errors relating to servicing of a mortgage loan, and, consequently, were subject to the provisions of RESPA and Regulation X. The district court disagreed and granted Ocwen summary judgment. The court concluded that Naimoli's asserted errors challenged the denial of her loan modification, which does not relate to the servicing of the loan and was therefore not a covered error under 12 C.F.R. § 1024.35(b)(11).

This appeal followed. The dispositive issue is whether the errors listed in Naimoli's notice of error fall under 12 C.F.R. § 1024.35's catch-all provision. We

hold that the text of the catch-all provision of Regulation X, which includes the terms "any other errors" and "relating to," is sufficiently expansive to cover the errors Naimoli asserts. Accordingly, we reverse and remand for further proceedings.

BACKGROUND

Naimoli executed the mortgage at issue on June 25, 2008, in favor of IndyMac Bank, F.S.B., which secured payment of a consolidated note in the amount of $227,100. The 2008 Mortgage was also subject to a Consolidation, Extension and Modification Agreement (the "CEMA," and together with the 2008 Mortgage and Consolidated Note, the "Mortgage Loan"), which consolidated the two existing loans and related mortgages that encumbered property located at 827 South Main Street, Geneva, New York:

a. A mortgage dated July 23, 2002, executed by Naimoli in favor of Coral Mortgage Inc. (the "2002 Mortgage") that secured payment of a note in the amount of $253,5000; and

b. A mortgage dated June 25, 2008, executed by Naimoli in favor of IndyMac (the "Gap Mortgage") that secured payment of a note in the amount of $2,875.49.

IndyMac Bank failed to record the Gap Mortgage, the CEMA, and the 2008 Mortgage at the time of their executions. In September 2013, IndyMac transferred the servicing of the Mortgage Loan to Ocwen.

In 2010, Naimoli defaulted on her loan. In order to avoid foreclosure, she requested a loan modification under the Home Affordable Modification Program ("HAMP"). HAMP was part of the Emergency Economic Stabilization Act of 2008 ("EESA"), which Congress enacted in response to the 2008 economic crisis. Pub. L. No. 110–343, 122 Stat. 3765 (codified as amended at 12 U.S.C. §§ 5201–5261). The EESA authorized the Secretary of the Treasury to establish the Troubled Asset Relief Program ("TARP"). 12 U.S.C. § 5219(a)(1). TARP directed the Secretary of the Treasury to "implement a plan that seeks to maximize assistance for homeowners" and allowed the Secretary to "use loan guarantees and credit enhancements to facilitate loan modifications to prevent avoidable foreclosures." *Id.* Under this authority, the Department of the Treasury announced the "Making Home Affordable Program," which included HAMP. HAMP was aimed at helping homeowners who were in, or were at immediate risk of being in, default on their home loans by reducing monthly payments to

sustainable levels. *See Thomas v. JPMorgan Chase & Co.*, 811 F. Supp. 2d 781, 786–87 (S.D.N.Y. 2011).

Ocwen advised Naimoli that she was approved for a HAMP Trial Period Plan (the "HAMP TPP"). Through the TPP, Ocwen approved Naimoli for a three-month Trial Modification Plan with a new, lower mortgage payment of $2,818.40 and advised Naimoli that "if you successfully complete the [TPP] by making the required payments, you will receive a modification with an interest rate of 3.50000%, which will be fixed for 40 years from the date the modification is effective." The TPP otherwise indicated that if Naimoli timely submitted her three payments, Ocwen would issue a permanent modification agreement for her execution. However, during the trial period, Ocwen told Naimoli that it could not implement the permanent modification agreement until the CEMA, the Gap Mortgage, the 2008 Mortgage, and the Consolidated Note (the documents that IndyMac failed to record) were re-executed and recorded.

On December 3, 2015, Ocwen sent instructions and unexecuted copies of the documents to Naimoli for re-execution. Naimoli properly executed them and returned them to Ocwen on August 12, 2016. Counsel for Naimoli attempted to confirm Ocwen's receipt of the package on multiple occasions between August

17 and August 29, 2016. On September 2, 2016, Ocwen responded that it would re-issue yet another set of the documents for Naimoli to sign. Contrary to its promise, Ocwen never sent the documents for re-execution. Nevertheless, Naimoli fully complied with the terms of the TPP.

On October 31, 2016, Ocwen wrote Naimoli stating that it had identified issues during the title search that might prevent them from implementing the modification but that she should "continue making the monthly payments outlined in the modification agreement." The reason for the title issue was that Ocwen had failed to record the documents it had committed to record. Naimoli explained that Ocwen had already received the executed Requested Instruments on August 12, 2016, and she provided Ocwen with UPS records verifying their delivery.

In December 2016, Ocwen notified Naimoli that she was no longer eligible for the loan modification. In January 2017, Naimoli appealed the denial of the loan modification, contending that Ocwen had received the original documents that needed to be recorded and that they had not been recorded because Ocwen had refused to pay the required recording fees. Ocwen denied the appeal (citing

the loan title issues) and in March began rejecting Naimoli's modification payments.

In December 2017, Naimoli sent Ocwen a notice of error pursuant to 12 C.F.R. § 1024.35(b)(11) ("NOE"). The NOE requested that the Ocwen correct errors related to Naimoli's mortgage loan account. The NOE asserted that Ocwen: (1) failed to provide Naimoli with the promised permanent loan modification despite Naimoli having accepted the offer, (2) neglected to record the documents it had received over a year earlier, and (3) wrongfully rejected Naimoli's February 2017 payment. Ocwen responded that it was "currently in the process of resolving th[e] title issue" and that the loan modification denial was valid.

Naimoli then sued Ocwen, alleging violations of RESPA and asserting various state law causes of action as well. Ocwen moved for summary judgment and the district court granted the motion. The district court held that errors in evaluation of loss mitigation options are not covered errors under Regulation X's catch-all provision, and that the errors Naimoli relied on were essentially challenges to the denial of her loan modification, which are not covered by

RESPA or Regulation X. This appeal followed.[1] This Court reviews *de novo* a district court's grant of summary judgment.

DISCUSSION

I.

RESPA is a consumer protection statute that regulates the real estate settlement process, including loan servicing and assignments. 12 U.S.C. § 2601(a). In 2010, RESPA was amended pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), which, among other things, added provisions governing the way in which federal mortgage loan servicers responded to requests for information ("RFIs") or assertions of error from borrowers. Dodd-Frank also created the CFPB, which is responsible for promulgating rules and regulations implementing RESPA.

One such regulation is Regulation X, which went into effect in January 2014. *See* Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act, 78 Fed. Reg. 10696, 10696 (Feb. 14, 2013). Section 1024.35 of Regulation X "allows borrowers to notify mortgage servicers of possible account errors." 12

[1] After oral argument, the panel solicited and received the views of the Consumer Financial Protection Bureau (CFPB) concerning the interpretation of the relevant portions of RESPA and Regulation X.

C.F.R. § 1024.35. Loan servicers, then, are required to respond to "any written notice from the borrower that asserts an error and that includes . . . information that enables the servicer to identify the borrower's mortgage loan account, and the error the borrower believes has occurred." *Id*. § 1024.35(a). The obligation to respond, though, applies only to the "covered errors" listed in § 1024.35(b). This subsection enumerates ten specific covered errors,[2] and then includes an

[2] The ten enumerated covered errors in 12 C.F.R. § 1024.35(b) are:
(1) Failure to accept a payment that conforms to the servicer's written requirements for the borrower to follow in making payments.
(2) Failure to apply an accepted payment to principal, interest, escrow, or other charges under the terms of the mortgage loan and applicable law.
(3) Failure to credit a payment to a borrower's mortgage loan account as of the date of receipt in violation of 12 CFR 1026.36(c)(1).
(4) Failure to pay taxes, insurance premiums, or other charges, including charges that the borrower and servicer have voluntarily agreed that the servicer should collect and pay, in a timely manner as required by § 1024.34(a), or to refund an escrow account balance as required by § 1024.34(b).
(5) Imposition of a fee or charge that the servicer lacks a reasonable basis to impose upon the borrower.
(6) Failure to provide an accurate payoff balance amount upon a borrower's request in violation of section 12 CFR 1026.36(c)(3).
(7) Failure to provide accurate information to a borrower regarding loss mitigation options and foreclosure, as required by § 1024.39.
(8) Failure to transfer accurately and timely information relating to the servicing of a borrower's mortgage loan account to a transferee servicer.
(9) Making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process in violation of § 1024.41(f) or (j).
(10) Moving for foreclosure judgment or order of sale, or conducting a foreclosure sale in violation of § 1024.41(g) or (j).

eleventh "catch-all provision," which encompasses "[a]ny other error relating to the servicing of a borrower's mortgage loan." *Id*. § 1024.35(b)(11).

At the core of this appeal is whether the errors Naimoli alleged Ocwen committed in handling her loan documents are "covered errors" under the catch-all provision. Primarily relying on *Sutton v. CitiMortgage, Inc.*, 228 F. Supp. 3d 254 (S.D.N.Y. 2017), the district court concluded that the errors Naimoli asserted were essentially challenges to the denial of her loan modification, which are not covered under RESPA or Regulation X. Specifically, the district court likened Naimoli's asserted errors and efforts to get Ocwen to implement the promised final modification to the *Sutton* plaintiff's attempts to challenge her eligibility for a mortgage loan amortization extension.

The court determined that because Ocwen had not yet extended the promised permanent modification agreement, its actions in losing and otherwise failing to record the necessary documents are distinguishable from situations involving failures by mortgage loan servicers to honor permanent modification agreements. The court next concluded that the catch-all provision was limited to RESPA's definition of "servicing," and because Ocwen's failure to record the documents did not relate to the receipt or making of payments pursuant to the

terms of Naimoli's loan with Ocwen, it was not an error related to the servicing of Naimoli's loan. Finally, the court held that Ocwen's refusal to accept Naimoli's February 2017 payment did not constitute a covered error under § 1024.35(b)(1) because Ocwen had already refused to implement the final modification agreement. Therefore, the court concluded, Ocwen was no longer obligated to accept Naimoli's modification payments, and Ocwen's rejection of the payment was not a covered error under § 1024.35(b)(1).

The CFPB disagreed. *See* CFPB Amicus Br. at 19-32. When asked by this this Court for its interpretation of the applicable provisions of RESPA and Regulation X, the CFPB stated its belief that "[c]ontrary to the district court's conclusion, . . . the servicer's mismanagement of the borrower's mortgage loan documents in this case, including the servicer's failure to record those documents after telling the borrower it would do so, is a covered error under § 1024.35(b)'s catch-all provision." *Id.* at 2. A threshold question, then, is how much deference this Court should give to the CFPB's interpretation here. We conclude that we need not enter the deference thicket at all.

When Congress has entrusted rulemaking authority under a statute to an administrative agency, the court evaluates the agency's implementing

regulations under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *see also United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001). Following *Auer v. Robbins*, 519 U.S. 452 (1997), this court explained that an agency's guidance concerning ambiguities in its own regulations is "entitled to deference and [is] controlling unless plainly erroneous or inconsistent with the regulation" in question. *See Linares Huarcaya v. Mukasey*, 550 F.3d 224, 229 (2d Cir. 2008) (internal quotation marks omitted). More recently, in *Kisor v. Wilkie*, the Supreme Court clarified that *Auer* deference is warranted only when the agency's interpretation "reflect[s] [the] agency's authoritative, expertise-based, fair, or considered judgment." 139 S. Ct. 2400, 2414 (2019) (internal quotation marks and alteration omitted). Whether an interpretation qualifies for such deference requires a court to "make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id.* at 2416. Accordingly, to the extent that this Court finds RESPA and Regulation X to be ambiguous, the CFPB's interpretation of the scope of the catch-all provision might be entitled to deference.

However, as will become clear, we do not find the provisions in question to be ambiguous. *See infra* at 15-16. Instead, our reading of the Regulation

generates the conclusion that the catch-all provision includes the kind of errors that Naimoli raised. Accordingly, we see no ambiguity that would require us to consider the reasonableness of the CFPB's interpretation under *Chevron* or *Auer*.

We therefore conclude that the district court erred in holding that Naimoli's asserted errors were not covered by § 1024.35(b)'s catch-all provision. Contrary to the district court's ruling, our reading of Regulation X yields the conclusion that where a loan servicer mishandles loan documents in the manner Naimoli alleges here, a covered error has occurred. As noted, Regulation X requires loan servicers to respond to "any written notice from the borrower that asserts an error and that includes . . . information that enables the servicer to identify the borrower's mortgage loan account, and the error the borrower believes has occurred." 12 C.F.R. § 1024.35(a). However, this obligation is triggered only if the asserted error is covered by § 1024.35(b), which includes "[*a*]*ny* other error *relating to* the servicing of a borrower's mortgage loan." *Id.* § 1024.35(b)(11) (emphasis added).

Both "any" and "relating to" are capacious terms. By way of comparison, the regulation does not limit the catch-all provision's application to errors "in" the servicing of a consumer loan, which would mean that only errors directly

involved with loan servicing would be covered. Instead, the regulation utilizes the broad term "relating to." We read this to mean that any error that has some connection with or pertains to loan servicing is covered (except of course where the regulation specifically excludes an error). *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (noting that the "ordinary meaning" of "relating to" is "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with").

We conclude that Naimoli's NOE "relates to" the servicing of her loan. RESPA defines "servicing" as "receiving any scheduled periodic payments from a borrower pursuant to the terms of any federally related mortgage loan . . . and making the payments to the owner of the loan or other third parties of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract." 12 C.F.R. § 1024.2(b). In other words, an error is covered by the catch-all provision if it relates to or is connected with either (a) the loan servicer's receipt of payments from borrowers or (b) the loan servicer's making of payments to the loan's owners or third parties.

Naimoli's NOE implicated both of these definitions of servicing. Her notice related to the loan servicer's receipt of payments from borrowers because Ocwen's loss of the loan documents made Naimoli ineligible for the loan modification and new interest rate. Naimoli's notice also related to the loan servicer's making of payments to the loan's owners or third parties because Ocwen's failure to record those documents, and thereby preserve the priority of the mortgage lien on Naimoli's home, jeopardized Ocwen's ability to make payments to the loan's owners in the event of a foreclosure. The district court was mistaken, therefore, in concluding that the catch-all provision does not cover "[t]he failure to record instruments" because that error "does not concern servicing" but instead "concerns the modification of the terms of the loan." *Naimoli v. Ocwen Loan Serving, LLC*, No. 6:18-CV-06180, 2020 WL 2059780, at *9 (W.D.N.Y. Apr. 29, 2020). In other words, Naimoli's asserted errors "relate to" loan servicing under the Regulation.

Moreover, the fact that Naimoli identified these errors while in pursuit of a loss mitigation option does not impair their connection to the servicing of her loan. All parties agree that a loan servicer's failure to properly evaluate a borrower for a loss mitigation option is not a covered error under § 1024.35(b).

However, the fact that Naimoli was seeking loss mitigation does not mean that the errors she identified are unrelated to servicing. In fact, erroneous loss mitigation eligibility determinations are excluded under § 1024.35(b) not because loss mitigation is unrelated to servicing, but because when the CFPB issued its 2013 Final Rule, it determined that allowing consumers to enforce the loss mitigation standards set by the loan's owner against a servicer would perversely risk discouraging consumer-friendly loss mitigation standards. *See* 78 Fed. Reg. at 10817-18. It is therefore of no import that Naimoli's asserted errors accompanied a complaint about Ocwen's determination of her loss mitigation application. Furthermore, the errors Naimoli identified were correctable without overturning Ocwen's determination regarding her loss mitigation application, because Ocwen could simply have located and recorded the documents without changing its decision regarding loss mitigation. Accordingly, the narrow exception to the catch-all provision, which excludes challenges to the merits of a servicer's loss mitigation determination, does not apply to the Naimoli's asserted errors.

Finally, we note that Ocwen argues in its letter brief that Naimoli failed to address the issue of damages and that she therefore abandoned it on appeal. *See*

Without a challenge to the district court's finding that Naimoli lacked damages, Ocwen asserts, this Court would be issuing an advisory opinion. We disagree.

On appeal, Naimoli raises only her § 1024.35 claim. As discussed at length above, Naimoli argues that Ocwen committed covered errors when it failed to record her mortgage documents, lost her documents, and rejected her February 21 payment pursuant to the trial plan. The district court held that those actions were not covered errors because the actions were "merely variations of Plaintiff's challenge to the denial of her loan modification." *Naimoli*, 2020 WL 2059780, at *10. Because it held that those errors were not covered by § 1024.35(b)(11), the district court "grant[ed] summary judgment in favor of Defendant as to Plaintiff's § 1024.35(e)(1) claim." *Id.* That was the sole reason that the district court gave for granting summary judgment as to those errors. The district court later granted summary judgment on Naimoli's other claims (her § 1024.36(c) and (d) claims) for failure to present evidence of damages, but the district court's conclusions on damages were limited to these other claims concerning whether Ocwen failed to timely acknowledge or respond to her requests for information. Those conclusions did not apply to her claim that Ocwen failed to properly respond to her notice of error. The district court expressly drew this distinction:

> In her opposition to Defendant's motion for summary judgment, Plaintiff argues that her actual damages were incurred as a result of Defendant's denial of her loan modification, not Defendant's failure to acknowledge or timely respond to the RFIs. . . . However, the Court has already concluded that Plaintiff cannot sustain her RESPA claim based on Defendant's denial of her request for a loan modification. As such, because Plaintiff does not argue, nor does the record indicate, that there is a genuine issue of material fact as to whether Defendant's failure to timely acknowledge or respond to the RFIs proximately caused actual damages to Plaintiff, Plaintiff's remaining RESPA claims must fail.

Id. at *12. The district court's inquiry into damages is limited to whether the damages were caused by the RFI-related conduct. The district court held that Naimoli "has not submitted evidence raising a triable issue of fact as to whether the damages were a result of Defendant's failure to timely acknowledge the RFIs or Defendant's 15-day delay in responding to RFI #1, as opposed to the denial of her loan modification or the general possibility of foreclosure." *Id.* at *14.

By contrast, when considering the claim Naimoli raises under § 1024.35, the record does include evidence of actual damages. Naimoli alleges that Ocwen has not provided any "substantive response" to the notice of error, and that such a response would include either "[c]orrecting the error" or "[c]onducting a reasonable investigation." The asserted errors prevent Naimoli from obtaining the loan modification to which she argues she is entitled, and which would have

had an interest rate of 3.5 percent as opposed to the 6.25 percent rate that she must pay absent the modification. Naimoli further alleges in the complaint that Ocwen "continues to send reinstatement demands for the Loan," meaning that she will be required to repay the loan without modification. We do not believe that Naimoli needs to make an additional showing of damages to survive summary judgment on her § 1024.35 claim.

CONCLUSION

For the foregoing reasons, we **REVERSE** and **REMAND** for further proceedings consistent with this opinion.