IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

MARILYN COLEY and ANTONIO COLEY PLAINTIFFS

v. No. 4:10CV01870 JLH

ACCREDITED HOME LENDERS, INC; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as Nominee for Accredited Home Lenders, Inc.; and HSBC MORTGAGE SERVICES, INC. DEFENDANTS

OPINION AND ORDER

Marilyn and Antonio Coley filed a complaint in the Circuit Court of Pulaski County, Arkansas, against the defendants alleging violations of the National Housing Act, 12 U.S.C. § 1701x, and the Arkansas Statutory Foreclosure Act, Ark. Code Ann. §§ 18-50-101 *et seq.*, as well as common law fraud.[1] Defendants HSBC Mortgage Services, Inc., and Mortgage Electronic Registration Systems, Inc., removed the action to this Court based on both federal question jurisdiction and diversity of citizenship jurisdiction. They have now filed a motion to dismiss all of the plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(6). For the following reasons, the motion to dismiss is granted.

I.

In February 2005 Marilyn and Antonio Coley purchased property located at 16 Woodwind Drive, Little Rock, Arkansas, and executed a mortgage in favor of Accredited Home Lenders, Inc. The security agreement provides:

[1] The complaint also named as a defendant Shapiro & Kirsch, LLP, but those claims were later dismissed. (Document # 13.)

> "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument.

(Compl. Ex. 2 at 1.) On May 12, 2010, MERS, as nominee for Accredited, assigned its interest in the mortgage to HSBC Mortgage Services. (Compl. Ex. 3.) On May 17, 2010, HSBC appointed Mickel Law Firm as its attorney-in-fact and agent in connection with the Coleys' mortgage. On August 30, 2010, Shapiro & Kirsch, LLP, issued a notice of default and intent to sell on behalf of HSBC, explaining that the property would be sold on November 1, 2010. On September 15, 2010, HSBC filed an acceleration of maturity date and limited power of attorney that appointed Shapiro & Kirsch, LLP, as its attorney-in-fact for the purpose of foreclosing on the Coleys' mortgage. It was signed by Maria Vadney as Vice President for HSBC. The nonjudicial foreclosure sale was cancelled when the plaintiffs commenced this action in state court on October 26, 2010.

II.

To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain "a short and plain statement of the claims showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In reviewing the complaint, the Court must "accept as true all of the factual allegations contained in the complaint." *Schaaf v. Residential Funding Corp.*, 517 F.3d 544, 549 (8th Cir. 2008) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007)). All reasonable inferences from the complaint must be drawn in favor of the plaintiff. *Crumpley-Patterson v. Trinity Lutheran Hosp.*, 388 F.3d 588, 590 (8th Cir. 2004). Nevertheless, the complaint must include facts sufficient to show that the plaintiff is entitled to relief. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and

conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1964 (internal citations omitted). Stated differently, the plaintiff must "raise a right to relief upon a speculative level." *Schaaf*, 517 F.3d at 549. Where the facts presented in the complaint do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868, 884 (2009) (quoting Fed. R. Civ. P. 8(a)(2)).

III.

First, the plaintiffs allege that the defendants failed to comply with the notice requirements of 12 U.S.C. § 1701x(c)(5), a provision of the National Housing Act that requires private lenders servicing non-federally insured home loans to advise borrowers of any home ownership counseling that they or the United States Department of Housing and Urban Development may offer. (Compl. ¶ 66.) Regardless whether the defendants are in compliance with §1701x(c)(5), the Act does not create a private right of action. *Gaitan v. Mortg. Elec. Registration Sys.*, No. EDCV 09-1009 VAP, 2009 WL 3244729, at *10 (C.D. Cal. Oct. 5, 2009); *see also Fouche' v. Shapiro & Massey L.L.P.*, 575 F. Supp. 2d 776, 790 n.7 (S.D. Miss. 2008). "The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction." *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831, 834 (9th Cir. 2004) (quoting *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 15, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979)). By its structure, the National Housing Act "govern[s] relations between the mortgagee and the government, and give[s] the mortgagor no claim for duty owed or for the mortgagee's failure to follow" the Act or its regulations. *Mitchell v. Chase Home Fin. LLC*, No. 3:06-CV-2099-K, 2008 WL 623395, at *3 (N.D. Tex. Mar. 4, 2008). Thus, courts have held that the National Housing Act

does not contain a private right of action. *See City of Rohnert Park v. Harris,* 601 F.2d 1040, 1046-47 (9th Cir.1979) ("The regulatory scheme provides for HUD oversight, not private action, to enforce agency compliance . . . ."); *Mitchell,* 2008 WL 623395, at *3 (determining that there is no private right of action available to a mortgagor under the National Housing Act); *Fantroy v. Countrywide Home Loans, Inc.*, No. 3:06-CV1889-K, 2007 WL 2254941, at *2 (N.D. Tex. July 24, 2007) (same); *Goss v. Fairfield Housing Auth.*, No. 3:03CV0935(WIG), 2006 WL 1272623, at *3 (D. Conn. Mar.14, 2006) (finding no private right of action for damages under the National Housing Act); *Saratoga Sav. & Loan Ass'n v. Fed. Home Loan Bank of San Francisco,* 724 F. Supp. 683, 690 (N.D. Cal.1989) ("Likewise, plaintiffs do not have a private right of action under the National Housing Act."). For that reason, the federal claims asserted against the defendants under the National Housing Act are dismissed without leave to amend.

The Coleys also allege that the defendants violated the state Statutory Foreclosure Act concerning nonjudicial foreclosures, and they seek to enjoin the defendants from proceeding with the foreclosure sale that was scheduled for November 1, 2010. They also seek an order declaring the Mortgagee's Notice of Default and Intention to Sell, the Limited Power of Attorney, and the Corporate Assignment of Mortgage to be fatally defective and invalid.

Statutory foreclosures are governed by Arkansas's Statutory Foreclosure Act, Ark. Code Ann. §§ 18-50-101 to -117 (2010). Under the Statutory Foreclosure Act, a mortgagee may not sell property in a nonjudicial foreclosure sale unless:

> (1) The . . . mortgage is filed for record with the recorder of the county in which the trust property is situated;
>
> (2) There is a default by the mortgagor . . . ;

> (3) The mortgagee . . . has filed for record . . . a duly acknowledged notice of default and intention to sell . . . ;
>
> (4) No action has been instituted to recover the debt . . . or, if such action has been instituted, the action has been dismissed; and
>
> (5) A period of at least sixty (60) days has lapsed since the recording of the notice of default and intention to sell.

Ark. Code Ann. § 18-50-103.

The Coleys first argue that the defendants violated § 18-50-103 because Accredited Home Lenders, the lender named the security agreement, did not pursue the foreclosure—rather, HSBC did. The Coleys contend that MERS, as a mere agent for Accredited, was not authorized to transfer or assign the mortgage to HSBC. The security instrument, which was attached to the complaint,[2] states that "MERS is . . . acting solely as nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument." (Compl. Ex. 2.) The security instrument also states that "Borrower irrevocably mortgages, grants and conveys to MERS (solely as nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS" the property on Woodwind Drive in Little Rock. (*Id.* at 3.) In other words, MERS was an agent of Accredited.

The Supreme Court of Arkansas has "specifically reject[ed] the notion that MERS may act on its own, independent of the direction of the specific lender who holds the repayment interest in the security instrument at the time MERS purports to act." *Mortgage Electronic Registration Sys.,*

[2] "A court may consider the complaint, matters of public record, orders, materials embraced by the complaint, and exhibits to the complaint in deciding a motion to dismiss under Rule 12(b)(6)." *Franz v. BAC Home Loans Servicing, LP*, Civil No. 10-2025 (DWF/FLN), 2011 WL 846835, at *1 (D. Minn. Mar. 8, 2011) (citing *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999)).

Inc., v. Sw. Homes of Ark., Inc., 2009 Ark. 152, 301 S.W.3d 1, 4-5 (2009). The court reasoned that "[a]n agent is authorized to do, and to do only, what it is reasonable for him to infer that the principal desires him to do in the light of the principal's manifestation and the facts as he knows or should know them at the time he acts." *Id.* at 5 (quoting *Hot Stuff, Inc. v. Kinko's Graphic Corp.*, 50 Ark. App. 56, 59, 901 S.W.2d 854, 856 (1995)). In that case, the court refused to set aside a foreclosure to which the principal had been a party because, under those circumstances, it was not reasonable for the agent, MERS, to presume that the principal would want the foreclosure to be set aside.

Here, the security instrument grants MERS "the right: to exercise any or all of [Accredited's] interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and cancelling this Security Instrument." (Compl. Ex. 2 at 3.) Based on this grant of authority, MERS transferred the mortgage and note to HSBC. (Compl. Ex. 3 ("[T]he said Assignor hereby assigns . . . the said Mortgage together with the Note or other evidence of indebtedness . . . .").) Although the Coleys contend that MERS did not have authority to make the transfer, the security agreement attached to their complaint says otherwise.

Furthermore, this Court has addressed the issue of whether an agent can transfer a mortgage and note on behalf of its principal in a nearly identical case, *Peace v. Mortgage Electronic Registration System, Inc.*, 4:09CV00966 SWW, 2010 WL 2384263 (E.D. Ark. Jun. 11, 2010). In that case, the plaintiff alleged that an agent of a company that was assigned a note and mortgage by MERS violated the Fair Debt Collection Practices Act by sending a Notice of Default and Intention to Sell to the plaintiffs. The Court determined that since MERS effectively transferred both the note and mortgage to the assignee, and the agent was acting on the assignee's behalf, the notice was valid,

and it dismissed the plaintiff's claims. *Id.* at *3. Similarly, in this case, the exhibits attached to the complaint indicate that MERS acted within its role as agent when it transferred the note and mortgage from its principal to HSBC. Thus, HSBC was within its rights in attempting to collect on the mortgage, and the claims against it must be dismissed.

The Coleys next argue that, even if the assignment to HSBC was valid, the subsequent Notice of Default and Intention to Sell was invalid because it was prepared and filed by the Law Offices of Shapiro & Kirsch more than two weeks before HSBC executed a limited power of attorney giving Shapiro & Kirsch the power to act on its behalf. (*See* Compl. Exs. 1 & 4.) Pursuant to § 18-50-103(3) of the Arkansas Code, a mortgagee may not sell property unless *the mortgagee, trustee, or beneficiary* has filed for record a Notice of Default and Intention to Sell. The notice must include (1) the names of the parties to the mortgage; (2) a description of the property; (3) the book and page numbers where the mortgage is recorded; (4) the default for which foreclosure is made; (5) the mortgagee's intention to sell, including a warning that "YOU MAY LOSE YOUR PROPERTY IF YOU DO NOT TAKE IMMEDIATE ACTION"; and (6) the time, date, and place of the sale. Ark. Code Ann. § 18-50-104(a).

The Notice of Default and Intention to Sell that Shapiro & Kirsch filed on August 30, 2010, includes all of the requisite elements listed above. It also states that, "pursuant to Arkansas Code Annotated § 18-50-102, the undersigned is the appointed attorney-in-fact of the mortgagee and is acting on behalf of and with the consent and authority of the mortgagee who is exercising its power of sale . . . ." (Compl. Ex. 1.) Under § 18-50-102(d), "[a] mortgagee may delegate his or her powers and duties . . . to an attorney-in-fact, whose acts shall be done in the name of and on behalf of the mortgagee." The appointment of the attorney-in-fact must be made "by a duly executed,

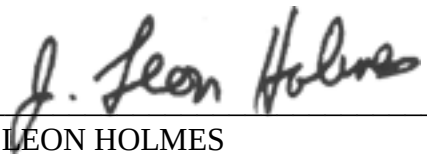
acknowledged, and recorded power of attorney." Ark. Code Ann. § 18-50-102(e). The power of attorney that delegated authority to Shapiro & Kirsch was not executed until September 15, 2010, more than two weeks after the Notice of Default and Intention to Sell was filed. While this could be enough to invalidate the Notice of Default and Intention to Sell, it is not enough to enjoin Shapiro & Kirsch from filing a similar notice in the future. HSBC executed, acknowledged, and recorded a power of attorney authorizing Shapiro & Kirsch "to act on, and with the consent, powers, duties, rights and authority of the Mortgagee, who is exercising its power of sale pursuant to Ark. Code Annotated § 18-50-115, including selling the real property as described in the Mortgage in accordance with its terms and provisions." (Compl. Ex. 4.) Whether the Notice of Default was valid is moot because the nonjudicial foreclosure sale described in the notice was cancelled. Thus, Shapiro & Kirsch would be required by law to file a new Notice of Default and Intention to Sell before a sale could take place.

Finally, to the extent that the plaintiffs allege common law fraud, the complaint must be dismissed for failure to state a claim. To establish fraud, a plaintiff must show: "(1) a false representation of material fact; (2) knowledge that the representation is false or that there is insufficient evidence upon which to make the representation; (3) intent to induce action or inaction in reliance upon the representation; and (5) damage suffered as a result of the reliance." *Watkins v. Am. Mortg. Assocs., Inc.*, 4:09CV00835 SWW, 2010 WL 1417973, at *3 (E.D. Ark. Mar. 31, 2010) (citing *Knight v. Day*, 343 Ark. 402, 405, 36 S.W.3d 300, 302-03 (2001)). The defendants argue that the complaint alleges none of these elements. The Coleys did not respond to the defendants' arguments that the complaint fails to state a claim for fraud. Therefore, any claim for fraud that the Coleys are seeking to assert will be dismissed without prejudice.

CONCLUSION

For the reasons stated above, the defendants' motion to dismiss the complaint is GRANTED. The plaintiffs' claims are dismissed with prejudice, except for their claims of fraud, which are dismissed without prejudice. Document #14.

IT IS SO ORDERED this 29th day of March, 2011.



J. LEON HOLMES
UNITED STATES DISTRICT JUDGE