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United States District Court,
D. Kansas.
Richard REESE, Sr. and Terry J. Reese, Plaintiffs,
v.
1ST METROPOLITAN MORTGAGE CO., and ABN Amro Mortgage Group, Inc., Defendants.
No. Civ.A. 03-2185-KHV.

Oct. 28, 2003.

Neil L. Johnson, Berkowitz Stanton Brandt Williams & Shaw, LLP-KC, Kansas City, MO, for 1st Metropolitan Mortgage Co.

Matthew C. Miller, Shook, Hardy & Bacon L.L.P.--Overland Park, Overland Park, KS for ABN Amro Mortgage Group Inc.

Karl W. Kuckelman, Wallace, Saunders, Austin, Brown & Enochs, Chartered, Overland Park, KS for Plaintiffs.

MEMORANDUM AND ORDER

VRATIL, J.

***1** Richard Reese, Sr. and Terry J. Reese bring suit against 1st Metropolitan Mortgage Co. (1st Metropolitan") and ABN AMRO Mortgage Group, Inc. ("AAMG"), alleging that they violated the Truth In Lending Act, 15 U.S.C. § 1601 *et seq.*, Regulation Z, 12 C.F.R. § 226, the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.*, and the Kansas Consumer Protection Act, K.S.A. §§ 50-626, 627, 634 and 636. This matter comes before the Court on *ABH AMRO Mortgage Group, Inc.'s Partial Motion To Dismiss* (Doc. # 10) filed May 19, 2003; the *Motion Of Defendant 1st Metropolitan Mortgage Co. For Judgment On The Pleadings On Counts I And II* (Doc. # 16) filed June 9, 2003; and plaintiffs' *Motion To Amend* (Doc. # 20) filed July 18, 2003. For reasons stated below, the Court sustains plaintiffs' motion and sustains defendants' motions in part.

Facts

Plaintiffs alleges the following facts:

Plaintiffs own property at 6940 Cottonwood Drive, Shawnee, Kansas. In February of 2002, plaintiffs saw an advertisement by 1st Metropolitan. Plaintiffs called 1st Metropolitan and said that they were interested in refinancing their home loan. In March of 2002, a representative of 1st Metropolitan went to plaintiffs' home to discuss the loan. During this visit, the representative did not give plaintiffs any documentation and plaintiffs did not sign any documents.

On March 18, 2002, the same representative returned to plaintiffs' home. The representative knew that plaintiffs wanted to refinance existing home mortgages and advised them that it was in their best interest to obtain a loan through 1st Metropolitan. Plaintiffs relied on this advice. At this second meeting, the representative gave plaintiffs several documents to sign, but he did not explain the documents or give them copies. One document was a promissory note and mortgage in favor of AAMG. Plaintiffs thereby entered into a consumer credit transaction with 1st Metropolitan and AAMG. The consumer credit was subject to a finance charge and was initially payable to refinance the existing mortgages on plaintiffs' home.

After plaintiffs signed the promissory note and mortgage, David Million, an agent of 1st Metropolitan who was not present at the meeting at plaintiffs' home, notarized plaintiffs' signatures. He back-dated the notarization to March 12, 2002 even though plaintiffs had signed the document on March 18, 2002. FN1

FN1. Plaintiffs originally filed this case in state court on March 17, 2003. They filed a "First Amended Petition For Damages" on March 27, 2003, and AAMG removed the case to federal court on April 11, 2003. Plaintiffs' original complaint alleged that they had signed the loan documents in March of 2002, but did not allege the specific date. *First Amended Petition For Damages*, Exhibit 2 to *Notice Of Removal Of Civil Action* (Doc. # 1) filed April 11, 2003. Defendants filed motions to dismiss or for judgment on the pleadings, arguing that plaintiffs had filed suit after the one-year statute of limitations had expired. In response, on July 18, 2003, plaintiffs filed a motion to amend, seeking leave to file a second amended complaint to allege that they signed the documents on March 18, 2002. *Memorandum In Support Of Motion To Amend* (Doc. # 21).

Rule 15 of the Federal Rules of Civil Procedure allows one amendment of the pleadings, before a responsive pleading is served or within twenty days after service. Fed.R.Civ.P. 15(a). Subsequent amendments are allowed by leave of court or by written consent of an adverse party and should be "freely given when justice so requires." *Id.* "The decision to grant leave to amend a complaint, after the permissive period, is within the trial court's discretion ... and will not be disturbed absent an abuse of that discretion." *Woolsey v. Marion Labs., Inc.*, 934 F.2d 1452, 1462 (10th Cir.1991). The district court should deny leave to amend only when it finds "undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." *Frank v.. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir.1993). Plaintiffs' motion is unopposed, and the Court finds no reason to deny leave to amend. The Court therefore sustains plaintiffs' motion.

Plaintiffs allege that defendants violated (1) the Truth In Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, and Regulation Z, 12 C.F.R. § 226, by advertising consumer credit in violation of the Act, entering a consumer transaction with plaintiffs without providing required disclosures, and failing to notify plaintiffs of their right to rescind (Count I); (2) the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.*, by not providing required disclosures (Count II); and (3) the Kansas Consumer Protection Act ("KCPA"), K.S.A. §§ 50-626, 627, 634 and 636, by not providing information and a good faith estimate of settlement expenses or notice of plaintiffs' right to rescind (Count III). *First Amended Petition For Damages* at 5-7, Exhibit 2 to *Notice Of Removal Of Civil Action* (Doc. # 1) filed April 11, 2003.

***2** AAMG asks the Court to dismiss Counts I and II, arguing that plaintiffs's TILA claim is time-barred and that RESPA does not provide a private cause of action. 1st Metropolitan seeks judgment on the pleadings on Counts I and II, making the same arguments as AAMG.

Legal Standard

In ruling on a Rule 12(b)(6) motion to dismiss, the Court accepts as true all well pleaded facts in the amended complaint and views them in a light most favorable to plaintiffs. *Zinermon v. Burch*, 494 U.S. 113, 118, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). The Court makes all reasonable inferences in favor of plaintiffs, and liberally construes the pleadings. Rule 8(a), Fed.R.Civ.P.; *Lafoy v. HMO Colo.*, 988 F.2d 97, 98 (10th Cir.1993). The Court may not dismiss a cause of action for failure to state a claim unless it appears beyond a doubt that plaintiffs can prove no set of facts in support of their theories of recovery that would entitle them to relief. *Jacobs,*

Visconsi & Jacobs, Co. v. City of Lawrence, Kan., 927 F.2d 1111, 1115 (10th Cir.1991). Although plaintiffs need not precisely state each element of their claims, they must plead minimal factual allegations on material elements that must be proved. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir.1991).

A motion for judgment on the pleadings under Rule 12(c), Fed.R.Civ.P., is governed by the same standards as a motion to dismiss under Rule 12(b)(6). *See Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 528 (10th Cir.1992).

Analysis

A. Truth In Lending Act

Defendants ask the Court to dismiss plaintiffs' claim under the TILA, arguing that it is barred because they filed this case more than one year after the loan transaction was consummated. The statute of limitations, 15 U.S.C. § 1640(e), provides that an action may be brought "within one year from the date of the occurrence of the violation." *Id.* Plaintiffs' second amended complaint alleges that defendants violated the TILA by advertising consumer credit and by entering a consumer transaction with plaintiffs on March 18, 2002 without providing required disclosures or notifying plaintiffs of their right to rescind.[FN2] The second amended complaint does not specifically allege when defendants advertised consumer credit in violation of the TILA, but it alleges that plaintiffs responded to the advertisement in February of 2002. Plaintiffs did not file suit until March 17, 2003. Thus, any claim that defendants violated the TILA by advertising consumer credit is barred and must be dismissed. Plaintiffs' claim that defendants violated the TILA by entering a consumer transaction with them on March 18, 2002, without providing required disclosures and notifying them of their right to rescind, is within the one-year limitations period. The Court therefore overrules defendants' motions as to this claim.

FN2. Even if the Court considered only the first amended complaint, it would overrule defendants' motions as to plaintiffs' claim that defendants violated the TILA by entering a consumer transaction with plaintiffs in March of 2002 without providing required disclosures or notifying plaintiffs of their right to rescind. The Court must draw all reasonable inferences in favor of plaintiffs, and portions of "March of 2002" could fall within the limitations period. *See Aldrich v. McCulloch Prop., Inc.*, 627 F.2d 1036, 1041 n. 4 (10th Cir.1980) (court may resolve statute of limitations defense on Rule 12(b) motion only if dates in complaint make clear that right sued upon has been extinguished).

B. Real Estate Settlement Procedures Act

Congress enacted RESPA in 1974 to provide consumers more information about the nature and costs of the settlement process and to protect them from unnecessarily high and abusive settlement charges. 12 U.S.C. § 2601. RESPA regulates the provision of real estate "settlement services," which are defined as "any service[s] provided in connection with a real estate settlement, including, but not limited to ... the origination of a federally related mortgage loan." *Id.* § 2602(3).

***3** Count II of plaintiffs' second amended complaint alleges that defendants did not provide the required RESPA disclosures and that defendants violated 12 U.S.C. §§ 2603 and 2604 of RESPA. Defendants ask the Court to dismiss plaintiffs' RESPA claim, arguing that Sections 2603 and 2604 do not provide a private cause of action. Plaintiffs respond that even though these specific sections do not expressly authorize a private cause of action, one is implied. The Tenth Circuit has not addressed this issue.

1. Section 2603

RESPA authorized the Secretary of Housing and Urban Development (the "Secretary") to develop a standard real estate settlement form to be utilized in all federally related mortgage loans.[FN3] 12 U.S.C. § 2603(a). The costs of settlement must be disclosed to the borrower prior to closing by means of this standard form.[FN4] 12 U.S.C. § 2605. In addition, the lender must complete and make available to the borrower either before or at settlement this uniform settlement statement reflecting the actual settlement costs.[FN5] 12 U.S.C. § 2603(b).

FN3. Originally, 12 U.S.C. § 2603 provided that:

> The Secretary, in consultation with the Administrator of Veterans' Affairs, the Federal Deposit Insurance Corporation, and the Federal Home Loan Bank Board, shall develop and prescribe a standard form for the statement of settlement costs which shall be used (with such minimum variations as may be necessary to reflect unavoidable differences in legal and administrative requirements or practices in different areas in the country) as the standard real estate settlement form in all transactions in the United States which involve federally related mortgage loans. Such form shall conspicuously and clearly itemize all charges imposed upon the borrower and all charges imposed upon the seller in connection with the settlement and shall indicate whether any title insurance premium included in such charges, covers or insures the lender's interest in the property, the borrower's interest, or both. Such form shall include all information and data required to be provided for such transactions under the Truth in Lending Act and the regulations issued thereunder by the Federal Reserve Board, and may be used in satisfaction of the disclosure requirements of that Act, and shall also include provision for execution of the waiver allowed by section (6(c)).
>
> This section was subsequently amended to permit the Secretary greater leeway in allowing variations from the prescribed form.

FN4. 12 U.S.C. § 2605, provided in relevant part that:

> (a) Any lender agreeing to make a federally related mortgage loan shall provide or cause to be provided to the prospective borrower, to the prospective seller, and to any officer or agency of the Federal Government proposing to insure, guarantee, supplement, or assist such loan, at the time of the loan commitment, but in no case later than twelve calendar days prior to settlement, upon the standard real estate settlement form developed and prescribed under section (4) or upon a form developed and prescribed by the Secretary specifically for the purposes of this section, and in accordance with regulations prescribed by the Secretary, an itemized disclosure in writing of each charge arising in connection with such settlement. For the purposes of complying with this section, it shall be the duty of the lender agreeing to make the loan to obtain or cause to be obtained from persons who provide or will provide services in connection with such settlement the amount of each charge they intend to make. In the event the exact amount of any such charge is not available, a good faith estimate of such charge may be provided.

12 U.S.C. § 2605, Pub.L. No. 93-533, § 6, Dec. 22, 1974, 88 Stat. 1726, repealed by Pub.L. No. 94-205, § 5, Jan. 2, 1976, 89 Stat. 1158. Although this section was

> subsequently repealed, a less stringent form of advance disclosure is still required. The lender must provide the borrower with a good faith estimate of the settlement costs. 12 U.S.C. § 2604(c).

FN5. Section 2603(b) provides for two exceptions to this requirement:

> (1) the Secretary may exempt from the requirements of this section settlements occurring in localities where the final settlement statement is not customarily provided at or before the date of settlement, or settlements where such requirements are impractical and (2) the borrower may, in accordance with regulations of the Secretary, waive his right to have the form made available at such time. Upon the request of the borrower to inspect the form prescribed under this section during the business day immediately preceding the day of settlement, the person who will conduct the settlement shall permit the borrower to inspect those items which are known to such person during such preceding day.
>
> 12 U.S.C. § 2603(b).

2. Section 2604

Section 2604(a) of Title 12 instructs the Secretary to prepare information booklets to lenders, which are designed to help borrowers.[FN6] Section 2604(b) gives the Secretary discretion in prescribing the form and detail of these information booklets, but they must include in clear and concise language:

FN6. "The Secretary shall prepare and distribute booklets to help persons borrowing money to finance the purchase of residential real estate better to understand the nature and costs of real estate settlement services. The Secretary shall distribute such booklets to all lenders which make federally related mortgage loans." 12 U.S.C. § 2604(a).

(1) a description and explanation of the nature and purpose of each cost incident to a real estate settlement;

(2) an explanation and sample of the standard real estate settlement form developed and prescribed under section 2603 of this title;

(3) a description and explanation of the nature and purpose of escrow accounts when used in connection with loans secured by residential real estate;

(4) an explanation of the choices available to buyers of residential real estate in selecting persons to provide necessary services incident to a real estate settlement; and

(5) an explanation of the unfair practices and unreasonable or unnecessary charges to be avoided by the prospective buyer with respect to a real estate settlement.

12 U.S.C. § 2604(b). Additionally, lenders must give borrowers a good faith estimate of charges for settlement services which they will likely incur in connection with settlement, *id.* § 2604(c), and lenders must distribute the informational booklet to loan applicants at time of receipt or preparation of applications.[FN7] *Id.* § 2604(d).

FN7. "Such booklet shall be provided by delivering it or placing it in the mail not later than 3 business days after the lender receives the application, but no booklet need be provided if the lender denies the application for credit before the end of the 3-day period ." 12 U.S.C. § 2604(d).

3. Private Cause Of Action Under RESPA

To determine whether a federal statute implicitly creates a private cause of action, a court should de-

termine (1) whether Congress created the statute for plaintiffs' special benefit; (2) whether Congress intended to create a private remedy; (3) whether a private remedy would be consistent with the legislative purpose; and (4) whether the area is so traditionally relegated to the states that it would be inappropriate to infer a cause of action based solely on federal law. *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). The key inquiry is whether Congress intended to create a private right of action. *See Schmeling v. NORDAM*, 97 F.3d 1336, 1343-44 (10th Cir.1996) ("[t]he four-factor [*Cort*] analysis has in effect been condensed into factor (2)-whether Congress expressly or by implication, intended to create a private cause of action.") (citing *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16, 100 S.Ct. 242, 62 L.Ed.2d 146) (1979) (Scalia, J., concurring) (" '[W]e effectively overruled the *Cort v. Ash* analysis in *Touche Ross*, converting one of its four factors (congressional intent) into the *determinative factor*.)); *Parry v. Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 306 (6th Cir.2000). The other *Cort* factors are relevant insofar as they assist in determining congressional intent. *Touche Ross & C. v. Redington*, 442 U.S. 560, 575-76, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979). In *Alexander v. Sandoval*, 532 U.S. 275, 286-87, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001), the United States Supreme Court explained:

***4** Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.

Sections 2603 and 2604 outline the disclosures which lenders must provide borrowers, but they do not create a private cause of action against mortgage lenders who fail to make such disclosures. Further, the legislative history reveals no such intent. Section 2605 originally authorized a private cause of action for damages for failure to provide the required disclosures. [FN8] Pub.L. No. 93-533 § 6, 88 Stat. 1726 (1974), repealed by Pub.L. No. 94-205 § 5, 89 Stat. 1158 (1976). The present Section 2604(c), which replaced the original Section 2605, does not provide a private right of action. 12 U.S.C. § 2604(c). The fact that Congress eliminated this provision for a private cause of action strongly suggests that it intended to eliminate a private damage remedy for a violation of Section 2604. Moreover, other provisions of RESPA explicitly provide private civil remedies, *see, e.g.*, 12 U.S.C. §§ 2605(f), 2607(d)(2) and (5), and 2608(b), thus suggesting that Congress did not intend a private remedy for violations of Sections 2603 or 2604. *See Collins v. FMHA-USDA*, 105 F.3d 1366, 1368 (11th Cir.1997); *State of La. v. Litton Mortgage Co.*, 50 F.3d 1298, 1301-02 (5th Cir.1995) (no implied private cause of action under Section 2609); *McWhorter v. Ford Consumer Fin. Co., Inc.*, 33 F.Supp.2d 1059 (N.D.Ga.1997) (no private right of action to enforce Section 2604).

> FN8. Originally, Section 2605 provided in relevant part that: "(b) If any lender fails to provide a prospective borrower or seller with the disclosure as required [Section 2605(a)] ... it shall be liable to such borrower or seller ... in an amount equal to(1) the actual damages involved or $500, whichever is greater, and (2) in the case of any successful action to enforce the foregoing liability, the court costs of the action together with a reasonable attorney's fee." Pub.L. No. 93-533 § 6, 88 Stat. 1726 (1974), repealed by Pub.L. No. 94-205, § 5, Jan. 2, 1976, 89 Stat. 1158.

As a matter of law, the Court finds that Sections 2603 and 2604 do not give plaintiffs a private right of action. The Court therefore sustains defendants' motions on plaintiffs' RESPA claims.

IT IS THEREFORE ORDERED that *ABH AMRO*

Mortgage Group, Inc.'s Partial Motion To Dismiss (Doc. # 10) filed May 19, 2003 be and hereby is SUSTAINED in part. Plaintiffs' claims that AAMG (1) violated the Truth In Lending Act, § 1601 *et seq.*, by advertising consumer credit, and (2) violated the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2603 and 2604, are dismissed. AMMG's motion is otherwise OVERRULED. Plaintiffs' claim that AAMG violated the Truth In Lending Act, § 1601 *et seq.*, by entering a consumer transaction with them without providing required disclosures and notifying them of their right to rescind remains. Plaintiffs' Kansas Consumer Protection Act, K.S.A. §§ 50-626, 627, 634 and 636 claim against AAMG also remains.

IT IS FURTHER ORDERED that the *Motion Of Defendant 1st Metropolitan Mortgage Co. For Judgment On The Pleadings On Counts I And II* (Doc. # 16) filed June 9, 2003 be and hereby is SUSTAINED in part. Plaintiffs' claims that 1st Metropolitan (1) violated the Truth In Lending Act, § 1601 *et seq.*, by advertising consumer credit, and (2) violated the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2603 and 2604, are dismissed. 1st Metropolitan's motion is otherwise OVERRULED. Plaintiffs' claim that 1st Metropolitan violated the Truth In Lending Act, § 1601 *et seq.*, by entering a consumer transaction with them without providing required disclosures and notifying them of their right to rescind remains. Plaintiffs' Kansas Consumer Protection Act, K.S.A. §§ 50-626, 627, 634 and 636 claim against 1st Metropolitan also remains.

***5** IT IS FURTHER ORDERED that plaintiffs' *Motion To Amend* (Doc. # 20) filed July 18, 2003 be and hereby is SUSTAINED.

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