IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOELLYN L. ANDREWS, *

Plaintiff, *

v. *

Civil No.: RDB-09-2437

SELECT PORTFOLIO SERVICING, INC., *

Defendant.

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MEMORANDUM OPINION

Plaintiff Joellyn L. Andrews ("Andrews") filed this *pro se* action against Defendant Select Portfolio Servicing, Inc. ("SPS"). Andrews purports to assert claims for breach of contract, fraud and deceit, deceptive trade practices, negligent misrepresentation and usury. Defendant's submission has been reviewed and no hearing is necessary. *See* Local Rule 105.6 (D. Md. 2008). Presently pending is Defendant's Motion to Dismiss (Paper No. 4), Plaintiff's Motion for Leave to File a Surreply (Paper No. 15) and Plaintiff's Motion for a Hearing (Paper No. 18). For the reasons stated below, Defendant's Motion to Dismiss (Paper No. 4) is GRANTED, Plaintiff's Motion for Leave to File a Surreply (Paper No. 15) is DENIED and Plaintiff's Motion for a Hearing (Paper No. 18) is DENIED.

BACKGROUND

This Court reviews the facts relating to this claim in the light most favorable to the petitioner. *See, e.g., Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). This case involves a residential mortgage loan in default that Accredited Home Lenders, Inc. ("Accredited") made to Plaintiff Joellyn L. Andrews and that was serviced by Defendant Select Portfolio Servicing, Inc.

On October 31, 2005, Plaintiff Joellyn L. Andrews, along with Wilbert Andrews, Jr., purchased a residence located at 5636 Jefferson Pike, Frederick, Maryland (the "Property"). Compl. ¶ 6; Mot. Dismiss, Ex. D. In order to pay for the Property, Andrews obtained a residential mortgage loan of $279,920 from Accredited, which was secured against the Property. Mot. Dismiss, Ex. C. In return for the loan, Andrews promised to make periodic payments of principal and interest to her lender "starting at an annual interest rate of 7.490%." Compl. ¶ 8. The interest rate is scheduled to adjust in September 2012. *Id.* ¶ 14. SPS did not originate Andrews's loan nor own it, but SPS did acquire the servicing of Andrews's loan on April 1, 2008. *Id.* ¶ 59.

On October 3, 2009, Andrews filed for bankruptcy. *Id.* Andrews contends that she made payments under the terms of her loan through November 2008. *Id.* ¶ 19. Andrews states that she stopped paying off her loan at that point because she contends that she believed that she no longer had a duty to make payments under the terms of her loan when "the self evident amortization schedule of the loan over the life of its payments citing the amount of interest to be paid monthly as a part of each monthly payment did not constitute interest of 7.490% or any future rate calculable in the loan contract on the actual amount . . . that would ever be at risk in the life of the loan contract." *Id.* On February 26, 2009, Andrews was dismissed from bankruptcy, due to her failure to file an amended plan. Mot. Dismiss, Ex. E. Andrews subsequently filed the subject 54 page Complaint in the Circuit Court for Frederick County, Maryland. On September 17, 2009, Defendant SPS filed a Notice of Removal to this Court pursuant to 28 U.S.C. § 1441(a), because this Court has original, diversity jurisdiction under 28 U.S.C. § 1332–Andrews is a Maryland resident, SPS is a Utah resident, and Andrews asserts an amount in controversy of over $400,000.[1]

[1] In her Opposition, Andrews claims that this Court improperly granted removal and that diversity jurisdiction does not exist. Opp. at 7. In support of this argument, Andrews contends

Andrews's Complaint alleges the following nine counts: (1) Breach of Contract, (2) Fraud, (3) Deceptive Trade Practices, (4) Negligent Misrepresentation, (5) Usury, (6) "Lack of Jurisdiction and Standing of Defendant to Enforce the Rights of Contract in Foreclosure," (7) "Breach of Contract--Misrepresentation of Material Fact in Documents and Events of the Loan Closing," (8) "Breach of Supplement Provisions of a Contract in law--(Withholding of Material Fact)," and (9) Void and Unlawful Lien. These claims generally assert that Accredited did not loan Andrews the full $279,920 principal balance of her loan. *Id.* ¶ 11. Instead, Andrews maintains that because lenders are only required to retain a percentage of assets and deposits under the Federal Reserve System, Accredited was only "actually plac[ing] at risk" a small portion of the $279,920 and advanced the remaining amount through a "depository institution credit." *Id.* ¶ 11.

STANDARD OF REVIEW

Under Rule 8(a)(2), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *See* Fed. R. Civ. P. 8(a). Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes the dismissal of a complaint if it fails to state a claim upon which relief can be granted, and therefore a Rule 12(b)(6) motion tests the legal sufficiency of a complaint.

A complaint must be dismissed if it does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Under the plausibility standard, a complaint must contain "more than labels and conclusions" or a "formulaic

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that she is not a citizen of Maryland. However, Andrews specifically states that she is a citizen of Maryland in her Complaint. Compl. ¶ 3. Accordingly, removal was proper. *See Ultrasound Imaging Corp. v. Am. Soc'y of Breast Surgeons*, 358 F. Supp. 2d 475, 480 (D. Md. 2005) (explaining that a plaintiff was bound by the assertions she made in her complaint, and that she could not use motions and briefs to amend this complaint).

recitation of the elements of a cause of action" in order to survive a motion to dismiss. *Id.* at 555. Thus, a court considering a motion to dismiss "can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 129 U.S. 1937, 1950 (2009). Well-pleaded factual allegations contained in the complaint are assumed to be true "even if [they are] doubtful in fact," but legal conclusions are not entitled to judicial deference. *See Twombly*, 550 U.S. at 570 (stating that "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation'" (citations omitted)). Thus, even though Rule 8 "marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, . . . it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* at 1950.

To survive a Rule 12(b)(6) motion, the legal framework of the complaint must be supported by factual allegations that "raise a right to relief above the speculative level." *Id.* The Supreme Court has recently explained that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to plead a claim. *Iqbal*, 129 U.S. at 1949. On a spectrum, the plausibility standard requires that the pleader show more than a sheer possibility of success, although it does not impose a "probability requirement." *Id.* Instead, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* At bottom, the court must "draw on its judicial experience and common sense" to determine whether the pleader has stated a plausible claim for relief. *Id.*

ANALYSIS

I. Andrews's Motion to Dismiss (Paper No. 4)

A. Andrews's Complaint is Based Upon an Invalid Legal theory

The "vapor money" theory states that any debt based upon a loan of credit rather than legal tender is unenforceable. *Johnson v. Deutsche Bank Nat'l Trust Co.*, No. 09-21246, 2009 WL 2575703, at *1 (S.D. Fla. July 1, 2009). This theory has been consistently rejected by federal courts as frivolous and insufficient to withstand a motion to dismiss. *See, e.g., Kuder v. Wash. Mut. Bank*, 2009 WL 2868730, at * 3 (E.D. Cal. Sep. 2, 2009) ("All of plaintiff's claims are based in whole or in part on this frivolous theory and are therefore subject to dismissal); *Richardson v. Deutsche Bank Trust Co. Americas*, No. 08-1857, 2008 WL 5225824, at * 7 (M.D. Pa. Dec. 12, 2008) (holding that the vapor money theory is "patently frivolous and a waste of judicial resources").

Andrews's claims in Counts One through Five, Seven and Eight are all based on the allegation that Accredited did not risk its own or its depositors' assets when it lent her $279,920 to purchase her home in October 2005, but instead only actually put at risk $8,397.60. Opp. at 2-3. Andrews explains that this smaller amount was "the cash reserve requirement ratio fractional reserve percentage of [Accredited's] assets and deposits required to be held and actually placed at risk of the actual face principal of the loan" in accordance with the requirements of the federal reserve system. Compl. ¶ 11. Thus, according to Andrews, Accredited risked $8,397.60 of its own assets, and the remaining $272,522.40 was "free credit" from the Federal Reserve. In Counts Six and Nine, Andrews attempts to state a claim for fraud by alleging that Accredited made misrepresentations by not informing her that her lender was loaning her credit and not hard money. Compl. ¶¶ 34-35. Although Andrews contends that she "has not espoused the vapour money theory as a basis for her claims" (Opp. at 2), all of her claims all plainly rely upon the very essence of the vapor money theory. Since that legal theory is invalid, Andrews's Complaint must be dismissed.

B. Andrews Fails to State a Basis for a Claim against SPS

Even if the vapor money theory did provide a legal basis for Andrews's claims, Andrews fails to provide any factual allegations to support her claim against SPS. As the Supreme Court explained in *Ashcroft v. Iqbal*, 129 U.S. 1937, 1950 (2009), "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In this case, Andrews's claims against SPS are based upon the unsupported assumption that SPS is responsible for Accredited's actions because it is Accredited's "predecessor." Compl. ¶ 5. However, Andrews never explains how SPS is responsible for Accredited's actions. Instead, Andrews concedes that Accredited originated her loan and that SPS cannot foreclose on her loan from Accredited because SPS has not been established as the legal holder of the debt. Compl. ¶ 59. Furthermore, in her Opposition, Andrews states that she brought suit against SPS because "it has been impossible to tell who is the party to sue here." Opp. at 5. Since Andrews has not provided any support for her assertion that SPS is liable for Accredited's actions, her Complaint must be dismissed.

II. Andrews's Motion for Leave to File a Surreply (Paper No. 15)

Parties are not generally permitted to file a surreply. *See* Local Rule 105.2(a); *Stoyanov v. Mabus*, No. 07-1764, 2009 WL 4664518, at * 8 (D. Md. Dec. 9, 2009). A party moving for leave to file a surreply must show a need for a surreply. *Id.* If a defendant does not raise new legal issues or new theories in its reply brief, there is no basis to permit a plaintiff to file a surreply. *TECH USA, Inc. v. Evans,* 592 F. Supp. 2d 852, 862 (D. Md. 2009); *Interphase Garment Solutions, LLC v. Fox TV Stations, Inc.*, 566 F. Supp. 2d 460, 466 (D. Md. 2008). Andrews explains in her Motion for Leave to File a Surreply that she would like further briefing because SPS's Reply "goes into greater detail in its arguments for dismissal on certain points than

was required of Plaintiff to defend against previous to this." Surreply Mot. at 1. However, Andrews does not specify what details or arguments require further briefing. Furthermore, SPS's Reply brief raises no new legal issues and argues no new legal theories. Accordingly, Andrews's Motion for Leave to File a Surreply (Paper No. 15) must be denied.

III. Andrews's Motion for Hearing (Paper No. 18)

Having failed to raise colorable legal arguments, a hearing is not necessary in this matter. Accordingly, her Motion for Hearing (Paper No. 18) is denied.

CONCLUSION

For the reasons stated above, Defendant's Motion to Dismiss (Paper No. 4) is GRANTED, Plaintiff's Motion for Leave to File a Surreply (Paper No. 15) is DENIED and Plaintiff's Motion for a Hearing (Paper No. 18) is DENIED.

A separate Order follows.

Dated: March 23, 2010

/s/ Richard D. Bennett
Richard D. Bennett
United States District Judge