

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Linda M. Ruivo

v.

Case No. 11-cv-466-PB
Opinion No. 2012 DNH 191

Wells Fargo Bank, N.A.

MEMORANDUM AND ORDER

This case concerns a mortgage loan that Linda Ruivo obtained from a predecessor of Wells Fargo Bank in July 2008.¹ Ruivo complains that a broker working for Wells Fargo misrepresented the terms of the loan and that Wells Fargo itself later wrongfully refused her requests to modify the loan. She asserts that Wells Fargo is liable for: (1) violating [N.H. Rev. Stat. Ann. § 97-A:2\(VI\)](#) by making false and misleading statements concerning the terms of the loan (Count I); (2) breaching a loan servicer agreement between Wells Fargo and the Federal National Mortgage Association ("Fannie Mae") that

¹ Ruivo obtained the loan from Wachovia National Bank a few months before Wachovia was acquired by Wells Fargo. Because this change in ownership has no bearing on the outcome of the case, I refer to the defendant at all times as "Wells Fargo," even though it may have been operating under a different name when certain of the events in question occurred.

requires Wells Fargo to follow loan modification guidelines established pursuant to the Home Affordable Mortgage Program ("HAMP") (Count II); (3) breaching the implied duty of good faith and fair dealing by refusing to modify the terms of the loan (Count III); and (4) negligently refusing to consider her request for a loan modification (Count IV). Ruivo also asserts a claim for promissory estoppel based on her contention that she relied on Wells Fargo's promise that it would consider her request for a loan modification in good faith (Count V).

Presently before the court is Wells Fargo's motion to dismiss all claims.

I. BACKGROUND

Ruivo owns property in Moultonborough, New Hampshire. In the late summer or early spring of 2008, Ruivo spoke to a mortgage broker working as an agent for Wells Fargo about the possibility of refinancing her \$500,000 mortgage on the property. Following this discussion, she understood that she might be able to refinance her existing mortgage and obtain an unspecified amount of cash out through a 7% fixed rate loan.

Ruivo planned to use the additional cash from the refinancing to construct a modular home on her property. After speaking with the broker, she made improvements to the property

and installed the modular home. She used \$27,000 of her own money and various lines of credit to fund the construction costs.

The broker informed Ruivo in June 2008 that her loan application had been approved and that she would be receiving a 7% fixed rate loan with \$50,000.00 cash out at the time of closing. At the closing, however, Ruivo learned that the loan terms had been changed to an interest-only adjustable rate loan with no cash back. Ruivo nevertheless agreed to proceed with the refinancing because the broker told her that she had no other option and that she could refinance the loan again at a later date.

Ruivo began to experience economic difficulties in November 2009. After concluding that she would not be able to refinance her home again, she began the process of seeking approval for a loan modification under HAMP. In February 2011, a loan modification officer affiliated with Wells Fargo informed Ruivo that her loan modification request had been approved. Shortly thereafter, however, the same officer told her that her request had been denied because she had a negative Net Present Value²

² The HAMP guidelines require lenders to calculate a borrower's Net Present Value in determining whether the borrower is eligible for a loan modification. See Home Affordable Mortgage Program, Base Net Present Value (NPV) Model V.5.01 Model

("NPV") "due to too much equity." Ruivo attempted to convince Wells Fargo that the NPV determination was inaccurate because it was based on a faulty appraisal. Wells Fargo, however, ignored her pleas and refused to modify its loan.

II. STANDARD OF REVIEW

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must make factual allegations sufficient to "state a claim for relief that is plausible on its face." See [Ashcroft v. Iqbal](#), 556 U.S. 662, 663 (2009) (quoting [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 547 (2007)). A claim is facially plausible when it pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." [Iqbal](#), 556 U.S. at 678 (citations omitted).

In deciding a motion to dismiss, I employ a two-pronged approach. See [Ocasio-Hernández v. Fortuño-Burset](#), 640 F.3d 1, 12 (1st Cir. 2011). First, I screen the complaint for statements that "merely offer legal conclusions couched as fact or

[Documentations](#) (Oct. 1, 2011), https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/npvm_odeldocumentationv501.pdf.

threadbare recitals of the elements of a cause of action.” Id. (citations, internal quotation marks, and alterations omitted). A claim consisting of little more than “allegations that merely parrot the elements of the cause of action” may be dismissed. Id. Second, I credit as true all non-conclusory factual allegations and the reasonable inferences drawn from those allegations, and then determine if the claim is plausible. Id. The plausibility requirement “simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence” of illegal conduct. [Twombly](#), 550 U.S. at 556. The “make-or-break standard” is that those allegations and inferences, taken as true, “must state a plausible, not a merely conceivable, case for relief.” [Sepúlveda-Villarini v. Dep't of Educ.](#), 628 F.3d 25, 29 (1st Cir. 2010); see [Twombly](#), 550 U.S. at 555 (“Factual allegations must be enough to raise a right to relief above the speculative level.”).

III. ANALYSIS

Ruivo asserts a number of federal and state claims in five counts. Wells Fargo moves to dismiss each of Ruivo’s claims for failure to state a claim upon which relief can be granted.³ I

³ Wells Fargo also argues that each of Ruivo’s claims is preempted by the Home Owners’ Loan Act (“HOLA”), 12 U.S.C. §

address each count in turn.

A. Count I: N.H. RSA Chapter 397-A, Licensing of Nondepository First Mortgage Bankers and Brokers

Ruivo claims in Count I that Wells Fargo is liable under N.H. Rev. Stat. Ann. § RSA 397-A:2(VI). This statute authorizes the New Hampshire Banking Department to regulate mortgage bankers and mortgage brokers, but it does not expressly authorize enforcement actions by private parties. Accordingly, Ruivo is not entitled to base a claim on this provision unless she can demonstrate that the legislature intended to authorize a right to sue by implication. See [Cross v. Brown](#), 148 N.H. 485, 487 (2002); [Snierson v. Scruton](#), 145 N.H. 73, 79 (2000); [Marquay v. Eno](#), 139 N.H. 708, 715 (1995).

Ruivo has not attempted to use either the language of the statute or its legislative history to support her implied private right of action claim. Nor has she addressed the act's enforcement provisions, which suggest that the legislature intended the statute to be enforced by the Banking Department rather than through suits by private parties. See, e.g., [N.H.](#)

1462 et seq. Pursuant to HOLA, the Office of Thrift Supervision ("OTS") has the power to regulate federal savings associations. [12 U.S.C. § 1464\(a\)](#). The OTS regulations preempt any state law that attempts to regulate the operation of a federal savings association. [12 C.F.R. § 545.2](#). Because I dismiss the claims on other grounds, I do not consider the preemption issue.

[Rev. Stat. Ann. § 397-A:15-a](#) (authorizing the filing of consumer complaints with the Banking Department); [N.H. Rev. Stat. Ann. §397-A:21](#) (authorizing the Banking Commissioner to suspend or revoke licenses and impose penalties on violators). Because Ruvio has failed to present a credible argument to support her implied private right of action claim, her claim must be dismissed.⁴

B. Count II: HAMP Claim

Ruivo's next argument is based on the loan modification guidelines that are incorporated into the Servicer Participation Agreement ("Participation Agreement") between Wells Fargo and Fannie Mae. Ruvio claims that she is entitled to enforce the HAMP guidelines because she is a third party beneficiary to the Participation Agreement.

The short answer to this argument is that I recently determined that a borrower such as Ruvio cannot sue as a third-party beneficiary to enforce a loan servicer agreement.

[Cabacoff v. Wells Fargo, 12-cv-56-PB, Opinion No. 2012 DNH 188, 2012 WL 5392545.](#) Ruvio has given me no reason to reconsider this determination.

⁴ I also reject Ruvio's eleventh-hour attempt to convert her statutory claim into a common law fraud claim. A litigant may not amend a complaint in an objection to a motion to dismiss.

C. Count III: Breach of Implied Covenant of Good Faith And Fair Dealing

The New Hampshire Supreme Court has recognized that “[i]n every agreement, there is an implied covenant that the parties will act in good faith and fairly with one another.” [Birch Broadcasting, Inc. v. Capitol Broadcasting Corp., Inc.](#), 161 N.H. 192, 198 (2010). Ruivo claims that Wells Fargo breached this duty by failing to adequately consider her request for a loan modification. Am. Compl. ¶ 82-83 (Doc No. 23).

As Wells Fargo notes in its motion to dismiss, New Hampshire does not recognize a claim for breach of the implied covenant of good faith and fair dealing absent a contract between the parties. See [J & M Lumber & Const. Co., Inc. v. Smyjunas](#), 161 N.H. 714, 724 (2011). Ruivo therefore cannot base her good faith and fair dealing claim on the Participation Agreement because, as I have explained, she cannot sue as a third-party beneficiary to enforce the agreement. Therefore, any claim she may have for breach of the implied covenant of good faith and fair dealing must arise from her mortgage loan contract with Wells Fargo.

In New Hampshire, contracting parties are obligated to act in good faith when exercising discretion in performing their contractual duties. See [Scott v. First Am. Title Ins. Co.](#), No.

06-CV-286-JD, 2007 WL 135909, at *5 (D.N.H. Jan. 17, 2007) (citing [Ahrendt v. Granite Bank](#), 144 N .H. 308, 312-13 (1999)). This duty of good faith prohibits "behavior inconsistent with the parties' agreed-upon common purpose and justified expectations as well as 'with common standards of decency, fairness, and reasonableness.'" [Birch Broadcasting](#), 161 N.H. at 198 (quoting [Livingston v. 18 Mile Point Drive](#), 158 N.H. 619, 624 (2009)). The duty of good faith and fair dealing applies, however, only when the agreement grants a contracting party discretion in performing his duties under the agreement and an unreasonable exercise of that party's discretion causes harm to the other contracting party.⁵ [Scott](#), 2007 WL 135909, at *5 (citing [Ahrendt](#), 144 N.H. at 312-13).

Ruivo claims that Wells Fargo unreasonably exercised discretion granted to it under the loan agreement, but she does not point to any specific provision in the agreement to support her claim. Instead, she appears to argue that Wells Fargo is liable because it abused the discretion that a party to a

⁵ The duty of good faith and fair dealing also may be invoked with respect to issues concerning contract formation and the termination of at will employment. See [Birch](#), 161 N.H. at 198. These aspects of the duty of good faith and fair dealing, however, have no bearing on the present dispute.

contract always has to agree to another party's request to modify the contract. I am unpersuaded by this argument.

Parties are bound by the agreements they enter into and the court will not use the implied covenant of good faith and fair dealing to force a party to rewrite a contract so as to avoid a harsh or inequitable result. [Moore v. Mortg. Elec. Registration Sys., Inc.](#), 848 F. Supp. 2d 107, 130; [Olbres v. Hampton Co-op. Bank](#), 142 N.H. 227, 233 (1997); [Mills v. Nashua Fed. Savs. & Loan Assoc.](#), 121 N.H. 722, 726 (1981). Accordingly, "[c]ourts have generally concluded that the covenant of good faith and fair dealing in a loan agreement cannot be used to require the lender to modify or restructure the loan." [Moore](#), 848 F. Supp. 2d at 130 (citing [FAMM Steel, Inc. v. Sovereign Bank](#), 571 F.3d 93, 100-01 (1st Cir. 2009)).

The loan agreement between Ruvio and Wells Fargo does not obligate Wells Fargo to consider requests to modify the loan. Accordingly, Ruvio has failed to state a claim for breach of the implied covenant of good faith and fair dealing.

D. Count IV: Negligence

Ruivo claims in Count IV that Wells Fargo assumed a duty to exercise reasonable care in considering her request for a loan modification by agreeing to the Participation Agreement. She then asserts that it acted negligently in refusing to accede to

her request to modify the loan. Wells Fargo responds by claiming that a borrower may not base a negligence claim on an alleged breach of a Participation Agreement. (Doc. No. 25-1) (citing Moore, 848 F. Supp. 2d at 133).

In New Hampshire, a breach of contract, without more, generally does not give rise to a tort claim. See Wyle v. Lees, 162 N.H. 406, 410 (2011); Plourde Sand & Gravel v. JGI E., Inc., 154 N.H. 791, 794 (2007); Lawton v. Great Sw. Fire Ins. Co., 118 N.H. 607, 613 (1978) (citing Barrett v. New England Tel. & Tel. Co., 80 N.H. 354 (1922)). Instead, a separate claim in tort will lie only if the facts constituting the breach of contract also breach an independent tort duty owed by the defendant to the plaintiff. Lawton, 118 N.H. at 613. Accordingly, to recover in tort, Ruivo must show that her losses resulted from Wells Fargo's breach of an independent duty arising "outside the terms of" the Participation Agreement. See Animal Hosp. of Nashua, Inc. v. Antech Diagnostics, 11-CV-448-SM, 2012 WL 1801742, at *2 (D.N.H. May 17, 2012).

As I have explained, Ruivo cannot sue as a third-party beneficiary to the Participation Agreement and she cannot overcome this deficiency simply by recharacterizing her third-party beneficiary claim as a tort claim. To the extent that she argues that Wells Fargo owes her a tort duty to renegotiate her

loan because they have "special relationship," this argument is also unpersuasive. In limited circumstances, a bank can be held liable to a borrower in tort "whenever influence has been acquired and abused [by the lender] or confidence has been reposed and betrayed." [Seymour v. N.H. Sav. Bank](#), 131 N.H. 753, 759 (1989) (quoting [Lash v. Cheshire County Savings Bank](#), 124 N.H. 435, 438 (1984)); see also [Ahrendt](#), 144 N.H. at 314; [Murphy Fin. Dev. Corp.](#), 126 N.H. 536, 541 (1985); [Robinson v. Colebrook Guar. Sav. Bank](#), 109 N.H. 382, 384 (1969). The court, however, has never held that a bank has a tort duty to entertain a borrower's application to modify a lawful loan agreement and I decline to recognize such a duty here.

E. Count V: Promissory Estoppel, in the Alternative

Ruivo also asserts a claim for promissory estoppel. Under this equitable principle, "a promise reasonably understood as intended to induce action is enforceable by one who relies on it to his detriment or to the benefit of the promisor." [Panto v. Moore Bus. Forms, Inc.](#), 130 N.H. 730, 738 (1988) (citing Restatement (Second) of Contracts § 90 (1981)). Promissory estoppel is only applied the absence of an express agreement. [Great Lakes Aircraft Co., Inc. v. City of Claremont](#), 135 N.H. 270, 290 (1992). "It serves to impute contractual stature based upon an underlying promise, and to provide a remedy to the party

who detrimentally relies on the promise.” Id. (citing 2A Corbin on Contracts § 196A, at 55-56 (Supp. 1991)).

Ruivo claims that Wells Fargo promised her that it would consider her loan modification request in good faith but she fails to plausibly allege a claim either that she relied on the promise to her detriment or that Wells Fargo benefitted in some way from making the promise. It is not sufficient to allege, as she has done, only that she has been harmed by losing out on the benefit of a renegotiated loan. Accordingly, she has failed to state a viable promissory estoppel claim.

IV. CONCLUSION

For the reasons set forth above, I grant defendant’s motion to dismiss (Doc. No. 25). The clerk shall enter judgment accordingly and close the case.

SO ORDERED.

/s/Paul Barbadoro
Paul Barbadoro
United States District Judge

November 19, 2012

cc: David H. Bownes, Esq.
David M. Bizar, Esq.