IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

TIM L. NEFF, et al.,

Plaintiffs,

v.

FLAGSTAR BANK, FSB,

Defendant.

Case No. 2:11-cv-1136
JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Norah McCann King

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OPINION AND ORDER

Presently before the Court is the defendant 's motion to dismiss. (ECF No. 3.) For the reasons set forth below, the Court **GRANTS IN PART AND DENIES IN PART** the defendant's motion.

I.

On September 30, 2008, the plaintiffs, Tim L. and Bobbie K. Neff, executed a note in favor of the defendant Flagstar Bank, FSB ("Flagstar"), payment of which was secured by a mortgage to Mortgage Electronic Registration System, Inc. ("MERS") as nominee for Flagstar, against real property located at 174 Salem Avenue in Fredericktown, Ohio ("Property"). Because of financial difficulties, the Neffs contacted Flagstar in September 2009 about modifying their loan, and Flagstar requested that the Neffs complete and submit certain documents toward that end. The Neffs completed and submitted the documents. In October 2009, Mr. Neff was injured during the course of his employment. Flagstar requested that the Neffs send additional paperwork related to a potential loan modification, and they complied.

On February 15, 2010, Flagstar sent the Neffs a letter offering them a "reinstatement

arrangement" and indicated that they would be reviewed for a loan modification after they made four payments of $1,116.92. (Compl. ¶ 28, Ex. A.) The letter provides that the Neffs' "account will be allowed to remain delinquent" so long as they make each required payment on or before March 1, April 1, May 1, and June 1, 2010. (Compl., Ex. A at 1.) After each payment was made, the Neffs were to submit additional documents so that Flagstar could determine "alternatives to cure the delinquency." *Id.*

The Neffs signed the letter on February 19, 2010 and sent in the first payment contemplated by it. In a telephone conversation in April 2010, "Flagstar told Mr. Neff to make the remaining payments according to the [letter], and [Flagstar] would offer a loan modification after determining affordability." (Compl. ¶ 33.)

The Neffs made the May payment. On May 11, 2010, Flagstar sent the Neffs a letter informing them that they were in default on their loan.

The Neffs submitted their June 2010 payment and, in another telephone conversation that month, Flagstar represented to Mr. Neff that it would provide a loan modification agreement.

On August 31, 2010, Flagstar "sent the Neffs a letter requesting more documents, which they next promptly sent." *Id.* ¶¶ 44-45. "[O]n September 14, 2010, [Flagstar] sent the Neffs another letter indicating that they were still in default." *Id.* ¶ 46. Mr. Neff contacted Flagstar, which again requested documents. Mr. Neff supplied the requested documents.

In November 2010, Mr. Neff called Flagstar, which again informed Mr. Neff that he needed to continue to submit paperwork, and that Flagstar was reviewing his file for a modification.

On December 16, 2010, a law firm, on behalf of Flagstar, sent a letter to the Neffs indicating that the their loan was in default and that they owed Flagstar $151,351.10. In January 2011, Mr. Neff called Flagstar to ask about the status of the contemplated loan modification. Flagstar indicated that it was working on the modification.

On January 21, 2011, Flagstar filed a complaint for foreclosure in the Knox County, Ohio, Court of Common Pleas, Case Number 11FR01-0042 ("Foreclosure Action").

On February 22, 2011, Flagstar sent the Neffs a letter requesting more documents. Specifically, Flagstar requested that the Neffs send a financial form and their last two paystubs. Mr. Neff submitted the requested documents.

There was no contact between the parties until May 2001 when Mr. Neff telephoned Flagstar. At that time, Flagstar informed him that it needed to continue to update his file with more financial paperwork. Mr. Neff provided the requested paperwork.

The Neffs aver that, "[g]enuinely believing that [Flagstar] was completing a loan modification for the[m], the Neffs did not answer the state foreclosure action." *Id.* ¶ 65. In July 2011, default judgment was entered against the Neffs in the Foreclosure Action.

In August 2011, Mr. Neff called Flagstar to ask about the loan modification. Flagstar requested that Mr. Neff send more paperwork and stated that it was working on a new agreement for the Neffs.

In September 2011, Flagstar called the Neffs and "asked Mr. Neff to send more paperwork and [indicated] that if the property is foreclosed on, although a default judgment had

already been entered, that Mr. Neff should call [Flagstar]." *Id.* ¶ 73. "The Neffs understood 'foreclosure' to mean the scheduled sale of the property, not realizing the implications of Flagstar having already secured a default judgment against them." *Id.* ¶ 74. Mr. Neff asked Flagstar whether the Neffs should retain counsel to help resolve the their situation with Flagstar. Flagstar told Mr. Neff not to obtain counsel, that it could do the same thing an attorney could do, and that counsel was not necessary.

On September 14, 2011, the Court of Common Pleas in Knox County ordered a sheriff's sale of the Neffs' home. In October 2011, Mr. Neff received a notice of the foreclosure sale through the newspaper, which indicated that their home would be sold on December 9, 2011. Mr. Neff called Flagstar, and was told that he needed to send more financial documents to complete the loan modification, which he did.

On November 16, 2011, the Neffs retained counsel. On November 23, 2011, counsel for the Neffs filed in the Knox County Court of Common Pleas a motion for relief from judgment and a motion to stay the sheriff's sale. On December 6, 2011, Flagstar opposed those motions. On December 11, 2012, the state court entered on its docket an "express[] confirm[ation]" that it overruled the Neffs' motion for relief from judgment and stay of sheriff's sale.

On December 20, 2011, the Neffs filed the instant action. The Neffs bring federal and state claims, alleging that this Court possesses federal question jurisdiction over its federal claim, and supplemental and diversity jurisdiction over its state law claims.

On February 17, 2012, Flagstar moved to dismiss this action pursuant to Federal Rule of

Civil Procedure 12(b)(6) (Doc. No. 3), which this Court granted (Doc. No. 17). The Neffs appealed that decision, and the Sixth Circuit reversed and remanded. The Court now considers Flagstar's motion to dismiss in light of the circuit court's decision.

II.

In evaluating a complaint to determine whether it states a claim upon which relief can be granted under Rule 12(b)(6), the Court must construe the complaint in favor of the plaintiff, accept the factual allegations contained in it as true, and determine whether the factual allegations present any plausible claim. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–5570 (2007). "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (clarifying the plausibility standard articulated in *Twombly*). The factual allegations of a pleading "must be enough to raise a right to relief above the speculative level . . . ." *Twombly*, 550 U.S. at 555 (citation omitted).

III.

The facts relied upon in this Opinion and Order were taken from the pleadings or documents that are properly considered part of the pleadings and from the filings in the Foreclosure Action of which this Court takes judicial notice. *See Weiner v. Klais and Co., Inc.*, 108 F.3d 86, 89 (6th Cir. 1997) (documents are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to the plaintiff's claim); *see also Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 972 n.5 (6th Cir. 2005) (court has discretionary authority to take judicial notice of the filings in the record of the state court proceeding).

In their complaint, the Neffs allege three claims for relief: violation of the Fair Debt Collections Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*; fraudulent misrepresentation; and promissory estoppel.[1] Flagstar moves for dismissal of all three claims.

A. Fair Debt Collection Practices Act

Flagstar requests dismissal of the Neffs' FDCPA claim, arguing that the statute does not apply to it because Flagstar does not meet the statutory definition of debt collector. This Court agrees.

"The FDCPA prohibits the use of 'any false, deceptive, or misleading representation or means in connection with the collection of any debt'" by a debt collector. *Lewis v. ACB Bus. Servs.*, 135 F.3d 389, 400 (6th Cir. 1998) (citing 15 U.S.C. § 1692e). The purpose of the FDCPA is to "eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). If a court finds that a party has violated the FDCPA, a court may hold that party liable for monetary damages. *Id.* § 1692k.

In this case, the documents attached to the complaint show that Flagstar was the original creditor and that it was collecting in its own name. As this Court explained in an analogous situation:

> The term "debt collectors" refers to "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the

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[1]The Neffs style this claim as a "breach of contract and promissory estoppel." However, the Neffs only allege facts to support a claim of promissory estoppel. Moreover, the parties make no argument in their briefing related to a breach of contract claim. Therefore, the Court accepts this claim as one for promissory estoppel.

> collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692(a) (6). However, that term expressly does not include "any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor." § 1692(a)(6)(A). Mortgage companies collecting debts are not "debt collectors." *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985) (noting that legislative history of the act indicates that a "debt collector" does not include the consumer's creditors, a mortgage servicing company, or an assignee of a debt as long as the debt was not in default at the time it was assigned). As to Defendant Countrywide, therefore, this cause fails as a matter of law. *See Williams v. Countrywide Home Loans*, 504 F. Supp.2d at 190.

Miller v. Countrywide Home Loans, 747 F. Supp. 2d 947, 962 (S.D. Ohio, 2010). *See also JP Morgan Chase Bank, N.A. v. Horvath*, 2012 U.S. Dist. LEXIS 40314, at *25 (S.D. Ohio March 23, 2012) (dismissing FDCPA against bank/mortgage company because it could not be considered a "debt collector": "The Horvaths allege that they originated their mortgage loan with Chase, stayed with Chase through the attempted loan modification process, and that Chase filed a foreclosure action against them for failure to pay the debt owed to Chase-not some other entity.")

The Neffs contend that

> a factual dispute exists as to whether Defendant was acting as a debt collector. This will turn on the capacity in which Defendant held the loan at various points in time, and whether that capacity changed after default. Just because Defendant's name is on the note and now Defendant is seeking to enforce the note and mortgage, it is not determinative of whether the obligation was ever transferred and reacquired, therefore subjecting it to the FDCPA. Whether the Defendant transferred the note, as is normal during the securitization process, is a matter of fact left for the discovery phase of the litigation. Thus, a factual argument about whether Defendant Flagstar is a debt collector is appropriate after discovery, not in a Motion to Dismiss.

(Pl. Mem. in Opp. at 4–5; Doc. No. 8.)

The Neffs do not rely on any case to support these legal arguments, nor do they explain

how a transfer and reacquisition of the debt is legally relevant here. The FDCPA defines "debt collector" as one who collects consumer debts owed to another. 15 U.S.C. § 1692a(6). The term does not include any person who collects any debt owed or due to the extent such activity concerns a debt which "was originated by such person" or "was not in default at the time it was obtained by such person." 15 U.S.C. § 1692a(6)(F)(ii), (iii). The Neffs do not allege, nor can it be reasonably inferred from the complaint, that Flagstar was attempting to collect a debt that is owed to another entity. Thus, there is no issue of fact as to whether Flagstar was acting as a debt collector. Accordingly, the Court **GRANTS** Flagstar's motion to dismiss as it relates to Plaintiffs' claim filed under the FDCPA.

B. Fraudulent Misrepresentation

When sitting in diversity, this Court applies the substantive law the forum state. *Hayes v. Equitable Energy Res. Co.*, 266 F.3d 560, 566 (6th Cir. 2001) (*citing Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Macurdy v. Sikov & Love, P.A.*, 894 F.2d 818, 820 (6th Cir. 1990)). In Ohio,

> [t]he elements of fraud or fraudulent misrepresentation are (1) a representation or, where there is a duty to disclose, concealment of a fact; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) followed by justifiable reliance upon the representation or concealment by the other party and (6) a resulting injury proximately caused by the reliance.

Funk v. Durant, 155 Ohio App.3d 99, 103 (Ohio Ct. App. 2003) (citing *Friedland v. Lipman*, 68 Ohio App.2d 255 (Ohio App. 8 Dist. 1980)).

Flagstar moves to dismiss the fraudulent misrepresentation claim, asserting that it was not

pled with sufficient particularity, is barred by the statute of frauds, does not apply because Flagstar only offered opinions, and the Neffs pled no actual injury. Flagstar's arguments are not well taken.

As set forth above, the Neffs specifically pled that a representative of Flagstar informed them on numerous occasions, specifically laid out in the complaint, that a loan modification was being considered, for the Neffs to make certain payments, to continue to provide the requested information, and to not obtain counsel for the Foreclosure Action. The Neffs suggest that Flagstar's representations were false in that it had no intention of modifying the loan, just in keeping the Neffs from responding in foreclosure or seeking to remedy the delinquency through other avenues so that it could obtain the Property. The Neffs aver that they relied on these representations by taking no action in the Foreclosure Action, in which a default judgment had been entered but no sheriff sale had yet been ordered or conducted. The Neffs had previously arranged certain payments with Flagstar, which they made. The Court can reasonably infer that absent Flagstar's representations, the Neffs would have addressed the delinquency of their mortgage and/or the Foreclosure Action without Flagstar's assistance but did not do so in detrimental reliance on Flagstar's representations.

As to Flagstar's argument related to the Statute of Frauds, the Court finds that it misses the mark. While it is true that the Statute of Frauds requires all loan modifications to be in writing to be enforceable, Ohio Rev. Code § 1335.02(B), the Neffs are not trying to enforce an oral modification of their loan. The Neffs do not claim that Flagstar agreed to certain modifications that they are now trying to enforce. Instead, the Neffs' complaints are about the

alleged fraudulent actions of Flagstar during the contacts between them in the Neffs' attempts to modify their loan.

Construing the complaint in favor of the Neffs, accepting the factual allegations contained in it as true and drawing all reasonable inferences in their favor, the Court concludes that the Neffs have presented a plausible claim for fraudulent misrepresentation. Accordingly, the Court **DENIES** Flagstar's motion to dismiss as it relates to that claim.

C. Promissory Estoppel

"To succeed on a promissory estoppel claim, a party must show: (1) a clear and unambiguous promise; (2) reliance on that promise; (3) reliance that was reasonable and foreseeable; and (4) damages caused by that reliance." *Current Source, Inc. v. Elyria City Sch. Dist.*, 157 Ohio App. 3d 765, 773 (Ohio Ct. App. 2004) (citations omitted). Flagstar contends that the Neffs' promissory estoppel claim fails because the Statue of Frauds prohibits the enforcement of a loan modification that is not in writing and because the Neffs failed to allege detrimental reliance. Flagstar's arguments are not well taken.

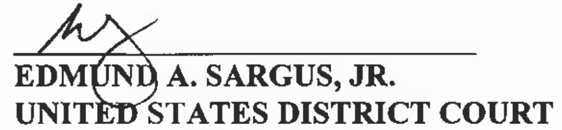
As the Court explained *supra*, the Neffs are not attempting to enforce an oral modification to their mortgage loan. Therefore, the Statute of Frauds is inapplicable. Further, and again explained above, drawing all reasonable inferences in favor of the Neffs, they sufficiently allege detrimental reliance. That is, they did not address the delinquency of their mortgage and/or the Foreclosure Action because of their reliance on Flagstar's promises of assistance. Consequently, the Court **DENIES** Flagstar's motion to dismiss as it relates to the Neffs' promissory estoppel claim.

IV.

Based on the foregoing, the Court **GRANTS IN PART AND DENIES IN PART** Flagstar's motion to dismiss. (ECF No. 3.) Specifically, the Court **GRANTS** the motion as it relates to the Neffs' claim under the FDCPA, 15 U.S.C. § 1692 *et seq.*, and **DENIES** the motion as to the fraudulent misrepresentation and promissory estoppel claims.

IT IS SO ORDERED.

7-25-2013
DATE



EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT COURT