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5 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
6 AT SEATTLE

7 SCOTT and SHANNON RANEY,

8 Plaintiffs,

9 v.

10 GREEN TREE SERVICING LLC,

11 Defendant.

C14-1937 TSZ

MINUTE ORDER

12 The following Minute Order is made by direction of the Court, the Honorable
13 Thomas S. Zilly, United States District Judge:

14 (1) Defendant's motion for partial summary judgment, docket no. 28, is
15 DENIED in part and DEFERRED in part, as follows:

16 (a) Defendant's motion for summary judgment as to plaintiffs' first,
17 second, and fourth claims for breach of contract, breach of the covenant of good
18 faith and fair dealing, and outrage or intentional infliction of emotional distress,
19 respectively, and as to plaintiffs' claim for emotional distress damages, is
20 DENIED. The Court is satisfied that genuine disputes of material fact exist,
21 and/or that defendant is not entitled to judgment as a matter of law, as to such
22 claims.

23 (b) Defendant's motion for summary judgment as to plaintiffs' third
claim for negligence and as to plaintiffs' prayer for credit-related damages is
DEFERRED pending further briefing as set forth below.

(2) Plaintiffs' motion for partial summary judgment, docket no. 25, which
relates to their first claim for breach of contract and to the first four elements (*i.e.*, unfair
or deceptive act or practice, trade or commerce, public interest, and injury to business or
property) of their fifth claim for violation of Washington's Consumer Protection Act
("CPA") is DEFERRED pending further briefing as set forth below.

1 (3) By February 22, 2017, the parties shall file supplemental briefs, not to
2 exceed eighteen (18) pages in length, on the following topics:

3 (a) Plaintiffs have asked the Court to take judicial notice of a Stipulated
4 Order for Permanent Injunction and Monetary Judgment entered in *Fed. Trade*
5 *Comm'n v. Green Tree Servicing LLC*, Case No. 15-cv-2064 (D. Minn. Apr. 23,
6 2015) [hereinafter, "FTC Order"]. Defendant objected on three grounds: (i) the
7 request for judicial notice was untimely; (ii) the request was improperly filed or
8 noted; and (iii) the FTC Order contains adjudicative facts of which the Court may
9 not take judicial notice. Defendant's first contention lacks merit; the FTC Order
10 was also attached to the declaration of plaintiffs' counsel that accompanied
11 plaintiffs' motion for partial summary judgment. Defendant's third argument
12 relies on a false premise; the FTC Order did not make factual findings,¹ but rather
imposed monetary penalties and future requirements on defendant. *See* Ex. 6 to
Vondra Decl. (docket no. 27-6). The Court is satisfied that defendant's second
objection is adequately addressed by allowing further briefing by both parties,
which should discuss, at a minimum (i) whether the FTC Order is entitled to full
faith and credit, (ii) whether the steps taken after entry of the FTC Order to
foreclose on the Deed of Trust at issue violated the FTC Order, (iii) if so, how
such conduct relates to plaintiffs' claims in this matter, and (iv) whether defendant
is estopped by the FTC Order from denying that the loan modification agreement
executed by plaintiffs in December 2013 was effective and binding on defendant
when it began servicing the loan in January 2014.

13 (b) The Deed of Trust at issue listed Abacus Mortgage, Inc. ("Abacus")
14 as the lender and Flagstar Bank, FSB ("Flagstar") as the trustee. *See* Ex. 2 to
15 Raney Decl. (docket no. 26-2). When Abacus transferred beneficial interest in the
16 Deed of Trust to Flagstar in July 2013, *see* Recording No. 201307170389
17 (<http://www.snoco.org/RecordedDocuments/RealEstate/SearchEntry.aspx>),
18 Flagstar became both the trustee and the beneficiary, seemingly in violation of
RCW 61.24.020. Although Flagstar transferred beneficial interest in the Deed of
Trust to defendant in May 2014, *see* Ex. 4 to Vondra Decl. (docket no. 27-4),² the
appointment of Quality Loan Service Corporation of Washington ("QLS Corp.")
as successor trustee was not recorded in Snohomish County until March 2015.
See Ex. 1 to Stip. Mot. (docket no. 15). Thus, Flagstar appears to have been the

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20 ¹ Indeed, the FTC Order explicitly indicated that defendant neither admitted nor denied the allegations in
the operative complaint, except as necessary to establish jurisdiction.

21 ² Defendant contends that Federal Home Loan Mortgage Corporation ("Freddie Mac") owned the loan in
22 January 2014, and that defendant obtained the right to service the loan from Freddie Mac, not Flagstar.
Christensen Decl. at 7 (docket no. 31). To the extent defendant is asserting that, for some period of time,
23 Freddie Mac held the promissory note, while Flagstar was the beneficiary of the Deed of Trust, defendant
is describing an arrangement that runs contrary to the Washington Supreme Court's decision in *Bain v.*
Metro. Mortg. Group, Inc., 175 Wn.2d 83, 285 P.3d 34 (2012).

1 trustee for the Deed of Trust from its execution in March 2007 until QLS Corp.'s
2 substitution in March 2015. *See* RCW 61.24.010(2) (“Only upon recording the
3 appointment of a successor trustee in each county in which the deed of trust is
4 recorded, the successor trustee shall be vested with all powers of an original
5 trustee.”). The parties shall address the effect, if any, of Flagstar’s approximately
6 10-month-long dual position as trustee and beneficiary on (i) the validity of the
7 Deed of Trust at issue, (ii) defendant’s interests in the Deed of Trust, (iii) the
8 enforceability of the loan modification agreement executed by plaintiffs in
9 December 2013, and (iv) plaintiffs’ claims in this action.

6 (c) Plaintiffs seek partial summary judgment as to their breach of
7 contract claim, specifically asking for a ruling that the loan modification
8 agreement they executed in December 2013 was binding on defendant when it
9 began servicing the loan in January 2014, and citing *Corvello v. Wells Fargo*
10 *Bank, NA*, 728 F.3d 878 (9th Cir. 2013), and *Steadman v. Green Tree Servicing,*
11 *LLC*, 2015 WL 2085565 (W.D. Wash. May 5, 2015). *Corvello*, however, merely
12 reversed the grant of a Rule 12(b)(6) motion, and *Steadman* denied in relevant part
13 defendant’s motion for summary judgment. The parties shall address (i) whether,
14 in light of the procedural posture of *Corvello* and *Steadman*, as well as *Young v.*
15 *Wells Fargo Bank, N.A.*, 717 F.3d 224 (1st Cir. 2013), and *Wigod v. Wells Fargo*
16 *Bank, N.A.*, 763 F.3d 547 (7th Cir. 2012), such authorities can be used as support
17 for summary judgment in favor of plaintiffs, (ii) what law governs in this matter as
18 to the question of contract formation, and (iii) whether such question is reserved
19 for the trier of fact; *see Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d
20 171, 178 n.10, 94 P.3d 945 (2004) (“Whether there was mutual assent is normally
21 a question of fact for the jury.”).

14 (4) By 9:00 a.m. on February 23, 2017, the parties shall provide copies of their
15 supplemental briefs, along with a copy of this Minute Order, to Judge Bruce W. Hilyer
16 (Ret.) in connection with the mediation scheduled for February 27, 2017. The pending
17 cross-motions for partial summary judgment, docket nos. 25 and 28, are RENOTED to
18 March 3, 2017. If the parties reach a settlement, they shall immediately, and no later than
19 4:00 p.m. on March 3, 2017, notify Karen Dews by telephone at (206) 370-8830.

18 (5) The Clerk is directed to send a copy of this Minute Order to all counsel of
19 record.

19 Dated this 9th day of February, 2017.

21 William M. McCool
22 Clerk

22 s/Karen Dews
23 Deputy Clerk