STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

(FILED: March 30, 2015)

KENT, SC.	**SUPERIOR COURT**
Joanne Miller, **Plaintiff** **v.** **Wells Fargo Bank, N.A.,** **Beverly Fischel,** **Defendants**	**C.A. No. KC-11-0060**

DECISION

I

Summary of Claims

RUBINE, J. This matter was tried before the Court sitting without a jury. Pro se Plaintiff, Joanne Miller (borrower), was a borrower.[1] The loan was secured by a residential mortgage on property located at 233 Beach Avenue in Warwick, Rhode Island, originally owned jointly by the borrower and her now-former husband. The original complaint was handwritten and imprecise.[2] Essentially, the complaint sets forth facts recounting the efforts the borrower made to obtain a loan modification in light of her then-current financial circumstances. In its penultimate sentence, there is the statement, "I am suing for fraudulent representation." That statement is the only reference to a cause of action associated with the facts she alleges in the original complaint. On or about March 2, 2011, before Defendants answered the original complaint, the borrower, without leave of Court, filed an amended complaint. The March 2 amendment—also filed pro

[1] The Note reflects an original indebtedness of $204,000.

[2] Although the complaint was filed pro se, the pleading failed to even approximate the requirements of Rule 8 of the Superior Court Rules of Civil Procedure which requires "a short and plain statement of the claim showing that the pleader is entitled to relief, and . . . a demand for judgment for the relief the pleader seeks."

se—repeats in paragraph 1 the facts that form the basis of the complaint. The borrower alleges a violation of the Deceptive Trade Practices Act and seeks injunctive relief to prevent Wells Fargo Bank, N.A. (the Bank) from initiating eviction proceedings. In a crude prayer for relief, the borrower also states she wants ownership of her house returned to her with clear title, as well as lost wages and compensation for pain and suffering. She also appears to allege a violation of the Deceptive Trade Practices Act. On October 12, 2011, the Court granted a motion to further amend the complaint, and on that day a pleading captioned "Amended Verified Complaint" was filed.

This pleading will hereafter be referred to as the "second amended complaint." As of the date of trial, October 1, 2014, the second amended complaint appears to be the borrower's operative pleading.[3] Although not organized in the form of separate counts, the second amended complaint when construed liberally appears to allege the following claims:

1. That Defendants violated the provisions of the Rhode Island Mortgage Foreclosure Consultant Regulation, codified at G.L. 1956 §§ 5-79-1, et seq.

2. That the actions of Defendants violated the Rhode Island Deceptive Trade Practices Act, codified at G.L.1956 §§ 6-13.1-1, et seq.

3. That the Defendants violated the "mortgage-related provisions of the Omnibus Appropriations Act of 2009."

4. That the Defendants breached the implied covenant of good faith and fair dealing.

5. That the Defendants breached Section 2-101, et seq. of the Uniform Commercial Code

6. That Defendants by their agent/employee, Natura Gibbons, represented to borrower that her foreclosure would be rescinded; a representation which borrower relied on to her detriment. This statement suggests a claim for promissory estoppel.

[3] Although borrower was represented by counsel as of June 7, 2012, inexplicably the second amended complaint was filed pro se and not signed by counsel of record.

The second amended complaint did not explicitly restate a claim of fraudulent representation as contained in the original complaint.

II

Facts

The facts which form the basis of each of the claims alleged are as follows:

The parties stipulated to certain facts, which stipulation marked as Joint Exhibit 1 is incorporated by reference in these findings of fact.

At trial, the borrower reviewed her efforts to obtain a loan modification or other workout option for her loan which had fallen into default as a result of changed financial circumstances. Her testimony regarding the details of her oral communications with the Bank, standing alone, was not convincing because of her failure to recall and failure to keep accurate notes of the dates of telephone conversations and the identity of the representatives of the Bank with whom she had spoken.

However, her testimony, when supported by the documentary evidence of communications with the Bank and the Bank's response thereto, evidenced a clear chronology of events upon which the Court relies concerning borrower's efforts to obtain a loan modification and the Bank's response.[4]

On or about early August 2009, the borrower believed she would be unable to make her mortgage payments timely. Her fear of late payments followed several events in her personal life which materially changed her financial circumstances. The borrower decided to call the Bank. She explained to a woman whom she believed to be a customer service representative of

[4] Likely because borrower was pro se, exhibits were introduced without any effort to introduce the documents in proper chronological order, making it difficult for the Court to follow the correspondence trail.

the Bank or Wells Fargo Home Mortgage (a wholly-owned subsidiary of the Bank) that she had recently divorced her former husband, the co-obligor on the mortgage note. As a result of the divorce, the borrower was receiving child support payments, which had been reduced per court order. She also explained she was employed principally as a real estate broker, and that her income was sporadic and unpredictable as it was entirely comprised of sales commissions, and a recent property sale she had negotiated had fallen through, thus affecting the cash she had available to meet her mortgage payment. Her scheduled monthly mortgage payment was $1645.30. In the early August telephone conversation, the borrower indicated she had available cash of only $900. She stated she was willing to pay that amount towards the August mortgage payment and told the Bank representative she would pay the balance of the August installment as part of her next regularly-scheduled mortgage payment. There is no evidence that the Bank agreed to the modification suggested by the borrower. In response, the Bank representative told the borrower that she might be a good candidate for the Bank's loan modification program or other "work-out" alternatives designed to prevent foreclosure for qualified borrowers.[5] The representative indicated she would send the necessary paperwork to begin the application and review process for loan modification. The borrower claims she was further told that while she was under review for loan modification she would not be required to pay her monthly mortgage

[5] The loan modification program was not unique to the Bank but was part of a national loss mitigation process following the passage of the Homeowner Affordability and Stability Plan, which was signed into law by President Obama on February 18, 2009. The guidance provided by the U.S. Department of Treasury (Treasury) was considered uniform guidance to mortgage lenders and servicers on loan modification and became known as the "Home Affordable Modification Program" known by the acronym "HAMP." As of April 6, 2009, Treasury promulgated Supplemental Directive 09-01 which was in effect at the time the borrower was being considered for loan modification. Among the qualifying criteria is that a borrower's monthly mortgage payment prior to modification is greater than 31% of the borrower's verified monthly gross income.

payments. This statement lacks credibility as it would be inconsistent with the documentary evidence.[6]

The Bank never agreed to halt the foreclosure process by reason of the borrower's request for modification. The borrower was not entitled to a loan modification simply because she submitted a hardship letter.[7] The Bank indicated that it would enforce its rights by declaring default and acceleration until the loan modification review was complete. The borrower was advised that during the process of determining eligibility for loan modification, "we may at times agree to postpone the date of foreclosure. But that foreclosure was not halted or suspended until a viable plan has been approved." It should be noted that the HAMP guidelines provide that during the HAMP evaluation a home will not be referred to foreclosure or sold at a foreclosure sale if foreclosure process has already been initiated.

Although the borrower may have honestly believed she was entitled to loan modification by reason of financial hardship, the requirements of the HAMP program were that she had to

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[6] For instance, on multiple occasions the borrower was advised that the Bank reserved the right to enforce their rights under the note and mortgage, notwithstanding the fact that she had requested loan modification and that review of the request was ongoing. In other words, foreclosure was not halted or suspended until a viable plan was approved. It should be noted that the HAMP guidelines provide that during the HAMP evaluation, a home will not be referred to foreclosure or sold at a foreclosure sale if foreclosure process has already been initiated. Because, as of October 29, 2009, the Bank notified the borrower that the Bank could not proceed with evaluation of the request due to incomplete information and documentation, and, as of that day, the Bank made what was characterized as a "final decision," the borrower was advised that her request for modification was denied. Once the Bank denied her request and issued its final decision, the request for loan modification was no longer under evaluation, and the HAMP guidelines no longer required the Bank to abate the foreclosure process.

[7] In fact, the borrower submitted not one, but five, "hardship letters." It seems to the Court that the borrower was overwhelmed by her difficult financial circumstances and sincerely believed that simply by stating in a letter that her financial circumstances rendered her ability to stay current on her mortgage difficult, was all that was necessary to qualify for loan modification. It seemed difficult for the borrower to understand that loan modification was not an entitlement, but rather a program requiring the submission of verifiable and current evidence of income and financial condition.

submit current and verifiable evidence of income in order for her loan to be considered eligible for the program

On September 3, 2009, the borrower received mail from Wells Fargo Home Mortgage in Fort Mills, S.C., which included a cover letter and financial forms. These forms, when completed and returned, would begin the application process for loan modification. The borrower was to complete and return the forms by September 18, 2009. She was further instructed to call the phone number identified in the letter and to make such contact as soon as possible. The borrower testified that she returned the requested financial documents before September 18, 2009, as instructed. However, there was no documentary evidence to corroborate her testimony of sending the information to the Bank before September 18, 2009.[8] On or about November 3, 2009, the borrower received a letter from the Des Moines, Iowa office indicating the requested financial information had to be mailed or faxed to their Fort Mills, S.C. office within ten days. From the very outset, the communications concerning the need to return information to the Bank were contradictory and confusing. The borrower was told on September 3 that the requested information had to be sent no later than September 18, but on November 3, she was told by a different office of the Bank that the information had to be sent in ten days, that is by November 13, 2009, or her request would be cancelled. However, on October 29, 2009, the borrower was sent a denial letter because of her failure to provide the necessary information as required within the timeframe required by her trial modification period workout plan.[9] At no time, more particularly on or before October 29, 2009, is there any evidence that the borrower agreed to a trial modification period workout plan or that such a plan was prepared. The

[8] The first documented fax containing financial information was sent on November 2, 2009.

[9] Two additional "final decision" of denial letters were sent on November 19, 2009 and February 15, 2010, citing the same reason for denial.

borrower testified to a subsequent series of communications both in writing and in telephone calls which she placed to toll-free numbers referenced in the Bank correspondence. She received a letter dated September 14, 2009 from the California office of Wells Fargo Mortgage Company. The letter was unsigned but bore the letterhead of Wells Fargo Home Loan located in Temecula, California. This letter represents the first time the borrower received any communication from that office. The letter identified the total loan delinquency as $3350.94 and indicated further that if such delinquency amount was not paid in full by October 14, 2009, the Bank would proceed with acceleration of the mortgage note and foreclose. After that deadline passed, on October 29, 2009, the borrower received a final decision denying her request for loan modification.

On September 14, 2009, the borrower received another letter advising her that she was entitled to home ownership counseling from the United States Office of Housing and Urban Development (HUD). Since the borrower had received counseling from HUD sometime earlier, she chose not to repeat that process again. Thereafter, the borrower had several conversations with Bank representatives who she contacted as directed in correspondence from the Bank. The Bank requested that she refax documentation. The borrower claims to have recorded one of the phone conversations but was unable to locate the tape recording at the time of trial. In certain communications from the Bank, the borrower was advised that the financial information she submitted was incomplete or not current. The borrower believed she addressed these deficiencies by sending, usually by fax, additional information requested. When she was notified that her application remained incomplete, she became increasingly frustrated as she believed she had complied with every request for information. Eventually, on or about October 29, 2009, the borrower was advised by unsigned letter from Wells Fargo Home Mortgage in Des Moines, Iowa that the Bank was unable to adjust her mortgage as the Bank had not been provided all of the financial information within the timeframe required per her trial modification period workout plan. The borrower at no time, particularly before October 29, 2009, entered into a trial modification period workout plan nor is there evidence that such a plan ever was created. In fact, the Bank's employee, Ms. Bowles, testified that no such plan was ever created for the borrower. The October 29 letter on one hand stated that the information provided has been "carefully reviewed"; however, based upon the Bank's position at that time that they did not have the information necessary to evaluate her case, it is far from clear what information the Bank was "carefully reviewing." The borrower received several additional letters from either the Des Moines office or from the office in Fort Mills, S.C. stating that the Bank had not received the requested information and documentation. The borrower claims to have spoken with people who she believed were agents of the Bank. As stated earlier, her recollection of such telephone conversations was somewhat speculative in that she was unable to recall dates with specificity and unable to identify the persons with whom she spoke, although her recollection seemed consistent in that she attempted to confirm that the requested information had been received by the Bank.

After considering the testimony and documents in evidence, this Court is able to find with some confidence that prior to the final decision dated October 29, 2009, the Bank was in receipt of substantially all the information necessary to verify and evaluate the borrower's sources of income for purposes of acting on the loan modification request.[10] Such information

[10] Under HAMP guidelines 23.3, even if a borrower submits incomplete information, if the servicer can determine, based on the documentation and information submitted, that the borrower is not eligible for loan modification, the borrower should be sent a non-approval notice. In borrower's case, she was never denied loan modification based on her eligibility, but rather as a result of incomplete information.

had been received by the Bank well before the borrower received denial on October 29, and well before she received the foreclosure notice dated January 15, 2010.[11]

However, the Bank, in writing, repeatedly insisted that they still had not received the requested information. Based upon the credible evidence, the Court finds that the Fort Mills, S.C. office actually received the faxes dated November 13, 2009 (thirty-five pages) containing substantial information concerning the borrower's financial condition, and, in addition, the Bank received another significant amount of material by way of a forty-four page fax on January 5, 2010. In fact, the borrower's forty-four page fax delivery sent to Fort Mills, S.C., dated January 5, 2010, was comprehensive and appears to have responded to the statements from various Bank employees. Accordingly, the Court believes that by prior to January 15, 2010, the date borrower was notified of a scheduled foreclosure sale, the Bank had sufficient information, even if considered incomplete, to determine the borrower's eligibility for loan modification. Any correspondence from the Bank after January 12, 2010 stating that her file lacked information necessary for review was misleading to the borrower. Before the notice of foreclosure was sent on January 15, 2010, the borrower was entitled to a decision on the merits of her request, affirmative or negative, rather than being literally bombarded with communications from different offices of the Bank indicating that her request could not be evaluated due to incomplete documentation.

The Court does not find that the Bank was intentionally trying to deceive the borrower, but that the Bank is an enormous corporation, and the staff given the responsibility of communicating with borrowers about loan modification and loan default was so decentralized that no one office was aware of the status of the review process for any individual borrower.

[11] The letter scheduling the foreclosure was dated January 15, 2010, the foreclosure sale was scheduled for March 10, 2010.

The borrower received correspondence from at least four different offices; Des Moines, Iowa; Fort Mills, South Carolina; Temecula, California; and Bloomington, Minnesota, operating within various departments, each having some responsibility to review requests for loan modification or to enforce mortgage debt obligations and to communicate with borrowers concerning necessary documentation; and ultimately to notify borrowers of the results of the review process and the status of loan payments/default. It should be noted that the borrower was notified on October 29, 2009 that her modification was denied not because her verifiable income rendered her ineligible, but due to insufficient information from borrower. Due to the facts supported by correspondence from the Bank, the Court finds that the Bank was communicating erroneous and misleading information to a borrower seeking loan modification. As stated earlier, the Court does not believe the Bank was intentionally trying to deceive or confuse the borrower. The inability or unwillingness of the Bank to better centralize the loan modification process leads to this level of misinformation and confusion to a borrower facing imminent loss of her home by foreclosure, clearly a disruptive and emotionally charged action.

Despite the borrower's efforts to obtain loan modification, the foreclosure sale was held as scheduled on March 10, 2010.[12] Thereafter, the borrower, by letter dated March 28, 2010, began the process to request rescission of the foreclosure. The rescission request prompted consideration by the office of the President of the Bank, the Office of the Comptroller of the Currency (OCC), and Bank representatives operating out of the Bank's offices in Bloomington, MN. Communications similar in tone and substance were exchanged between the borrower and the Bank. Although the borrower alleges that Natura Gibbons, a Bank employee, made representations to her that the foreclosure would be rescinded, there is no evidence in the record

[12] A foreclosure deed was later executed on March 17, 2010 and recorded on April 13, 2010.

to support this allegation of misrepresentation. The borrower's request for rescission was denied on August 12, 2010. The confusing nature of the Bank's contacts with the borrower concerning rescission is exemplified by letters sent by Andrew Rosaaen, one of several individuals identifying themselves as Executive Mortgage Specialist, Office of the President. For example, although the Bank had already foreclosed, and notwithstanding the fact that on September 9, 2010 the Bank's Des Moines office sent the borrower a letter confirming that loan modification and rescission were each denied, on September 20, 2010, Mr. Rosaaen sent a letter requesting more financial information to "provide assistance in exploring options to resolve [the borrower's] financial difficulties." Mr. Rosaaen sent an additional letter on September 28, 2010, again seeking financial information "to determine what workout options are available for your loan." It defies reason for Bank employees to continue to seek financial information for workout options after both loan modification and rescission have been denied. Nevertheless, on October 4, 2010, Mr. Rosaaen sent another letter to the borrower, advising her that her request for rescission was under review. On October 7, 2010, Mr. Rosaaen advised the borrower that the Bank had closed her file as a result of incomplete financial documentation. However, on November 22, 2010, Mr. Rosaaen sent yet another letter to the borrower advising her that her file was closed because the foreclosure was valid, stating "Wells Fargo Home Mortgage (WFHM) has thoroughly reviewed your account in extensive detail."

Once again, this Court finds this series of letters, all from the same individual at the Bank, to be confusing and inconsistent. There have been no further communications from the Bank concerning loan modification or rescission. At the time of trial, the property had been conveyed as a result of the foreclosure sale and rescission had been denied. The Court will now consider whether these facts support any of the causes of action as alleged in the second amended complaint.

III

Standard of Review

This Decision addresses both the Court's findings of fact and conclusions of law following bench trial in accordance with Rule 52(a) of the Rhode Island Superior Court Rules of Civil Procedure. It also serves as the Court's ruling on Defendants' Motion for Judgment as a Matter of Law pursuant to Rule 52(c) of the Rhode Island Superior Court Rules of Civil Procedure.

Rule 52(c) provides that "the court may enter judgment as a matter of law against the party who has been fully heard on an issue, but [s]uch a judgment shall be supported by findings of fact and conclusions of law." Hernandez v. JS Pallet Co., 41 A.3d 978, 983 (R.I. 2012) (internal quotations omitted). Thus, "in considering a Rule 52(c) motion, the trial justice weighs 'the credibility of witnesses and determines the weight of the evidence presented by [the] plaintiff.'" Broadley v. State, 939 A.2d 1016, 1020 (R.I. 2008) (quoting Pillar Prop. Mgmt., L.L.C. v. Caste's, Inc., 714 A.2d 619, 620 (R.I. 1998) (mem.)). Additionally, in a nonjury case, "the trial justice need not view the evidence in the light most favorable to the nonmoving party." Id. (citing Estate of Meller v. Adolf Meller Co., 554 A.2d 648, 651 (R.I. 1989)).

IV

Analysis

In its Motion for Judgment as a Matter of Law, the Bank argued that: (1) Sec. 5-79-1 is inapplicable because the Bank by definition is not a "mortgage foreclosure consultant"; (2) Sec. 6-13.1-1, et seq., the Deceptive Trade Practices Act, does not apply to mortgage loans; (3) Sec.

6-13.1-1, et seq. does not allow private actions where the activity is subject to the regulation of a government agency; (4) Title VI, Section 626, Mortgage-Related Provisions of Omnibus Appropriations Act of 2009 is inapplicable because it only authorizes the issuance of rules and does not actually prohibit any conduct; (5) The Bank could not have breached the implied covenant of good faith and fair dealing because there was no contractual obligation to consider loss mitigation options; (6) U.C.C. § 2-101 et seq. is inapplicable because the Bank did not transact "goods" with the borrower; and (6) The borrower has failed to establish that Natura Gibbons is an agent or employee of the Bank or that she made the statement as alleged. This Court will now consider the borrower's claims and Defendants' arguments and address each of the borrower's claims in turn.

1. The Rhode Island Mortgage Foreclosure Consultant Regulation, codified at G.L. 1956 §§ 5-79-1, et seq.

The Bank states that it is excluded from the provisions of §§ 5-79-1, et seq. which regulates contracts between property owners and "foreclosure consultants." Section 5-79-1 defines a foreclosure consultant as:

> "(2) 'Foreclosure consultant' means any person who, directly or indirectly, makes any solicitation, representation, or offer to any owner to perform for compensation or who, for compensation, performs any service which the person in any manner represents will in any manner do any of the following:
>
> "(i) Stop or postpone the foreclosure sale;
>
> "(ii) Obtain any forbearance from any beneficiary or mortgagee;
>
> "(iii) Assist the owner to exercise the right of redemption provided in § 34-23-2;
>
> "(iv) Obtain any extension of the period within which the owner may reinstate the owner's obligation;
>
> "(v) Obtain any waiver of an acceleration clause contained in any promissory note or contract secured by a mortgage on a residence in foreclosure or contained in the mortgage;
>
> "(vi) Assist the owner in foreclosure or loan default to obtain a loan or advance of funds;

> "(vii) Avoid or ameliorate the impairment of the owner's credit resulting from the recording of a notice of default or the conduct of a foreclosure sale; or
> "(viii) Save the owner's residence from foreclosure."

However, that section also precludes a list of ten categories of persons and entities. The Bank specifically avers that it is excluded from § 5-79-1 pursuant to subsections 3(vi) and 3(vii), which state:

> "(3) A foreclosure consultant does not include any of the following:
> . . .
> "(vi) A person who holds or is owed an obligation secured by a lien on any residence in foreclosure when the person performs services in connection with this obligation or lien of the obligation or lien did not arise as the result of or as part of a proposed foreclosure reconveyance;
> "(vii) Any person or entity doing business under any law of this state, or of the United States relating to banks, trust companies, savings and loan associations, industrial loan and thrift companies, regulated lenders, credit unions, insurance companies, or a mortgagee which is a United States Department of Housing and Urban Development approved mortgagee and any subsidiary or affiliate of these persons or entities, and any agent or employee of these persons or entities while engaged in the business of these persons or entities; . . ."

Here, the Bank is not excluded because it is a business of the United States "relating to banks." Sec. 5-79-1. Therefore, Defendants are excluded from §§ 5-79-1, et seq. The Court does not believe that the evidence supports a finding that the Defendants are a mortgage foreclosure consultant as defined in the statute, and judgment must be entered in favor of Defendants as to this claim as a matter of law.

2. The Rhode Island Deceptive Trade Practices Act (DTPA), codified at G.L. 1956 §§ 6-13.1-1, et seq.

The Bank claims that it is entitled to judgment as a matter of law on the borrower's first cause of action because, as they contend, the DTPA does not apply to mortgage loans. Under the Rhode Island DTPA,

> "Any person who *purchases or leases goods or services* primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of

> money or property, real or personal, as a result of the use or employment by another person of a method, act, or practice declared unlawful by § 6-13.1-2, may bring an action under the rules of civil procedure . . ." Sec. 6-13.1-5.2(a) (emphasis added).

The Bank contends that a mortgage loan does not fall within the category of goods and services and, therefore, the borrower's claims do not fall under the DTPA. Though the Rhode Island Supreme Court has not interpreted the phrase "goods or services" within the meaning of the DTPA, this Court has. The Rhode Island Superior Court has held that "the Deceptive Trade Practices Act speaks of purchases or leases of goods or services primarily for personal, family or household purposes[]. A morgage [sic] loan is not a purchase or lease of goods or services and hence the subject matter of the statute is inapplicable." <u>De Simone v. Warwick Fed. Sav. & Loan Ass'n</u>, No. C.A. 80-822, 1981 WL 386509, at *1 (R.I. Super. Oct. 20, 1981) (Needham, J.).

Other federal and state courts have also interpreted DTPA statutes similarly and this Court finds those cases as persuasive authority. For example, applying Texas law, the Fifth Circuit observed:

> "we agree, that plaintiffs' [Texas] DTPA claim fails as a matter of law because plaintiffs are not "consumers" within the meaning of the Act, and they did not seek or acquire "goods or services" as defined by the Act. *See Fix v. Flagstar Bank, FSB,* 242 S.W.3d 147, 160 (Tex.Ct.App. 2007) ("[A] person cannot qualify as a consumer if the underlying transaction is a pure loan because money is considered neither a good nor a service."); *Montalvo v. Bank of Am. Corp.,* 864 F. Supp. 2d 567, 595 (W.D. Tex. 2012) ("Texas federal courts have recently addressed DTPA claims like [plaintiff]'s claim and concluded that a person seeking a loan modification under the HAMP using a loan servicer is not a consumer under the DTPA.")" <u>James v. Wells Fargo Bank, N.A.</u>, 533 F. App'x 444, 447 (5th Cir. 2013).

Additionally, the United States District Court for the Northern District of Alabama has interpreted the Alabama DTPA:

> "Under the Alabama DTPA, any bank or affiliate of a bank that is regulated by one of a number of agencies is exempt from the provisions of the Alabama DTPA. Ala. Code § 8–19–7. Most loans and many, if not most, mortgage loans

> are made by banks or affiliates of banks that are regulated by one of the listed agencies. Therefore, by virtue of this section, most loans and mortgages would not be subject to the provisions of the Alabama DTPA. This is a strong indication that the Alabama legislature did not intend to include loans and mortgages within the definition of goods or services for purposes of this statute. No court has held that a loan is a good or service under this statute, and this court will not be the first to do so. The court is of the opinion, therefore, that a mortgage loan is not a good or service under the Alabama DTPA. As a result, the Deermans do not fall within the definition of consumer under the statute with respect to their mortgage, and they do not have a private right of action under this statute." Deerman v. Fed. Home Loan Mortg. Corp., 955 F. Supp. 1393, 1399 (N.D. Ala. 1997) aff'd sub nom. Deerman v. Fed. Home Loan Mortg., 140 F.3d 1043 (11th Cir. 1998) (emphasis added)

Particularly similar to the case at bar is Montalvo v. Bank of Am. Corp., 864 F. Supp. 2d 567, 579-80 (W.D. Tex. 2012). In Montalvo, a plaintiff sought modification of her loan from her lender, including the complete review of her loan modification applications with the objective of saving her home. Id. That court held that the plaintiff did not seek "services" from lender, since she did not pay or seek to pay for the services offered by lender, and thus, mortgagor was not a consumer under Texas's Deceptive Trade Practices and Consumer Protection Act.[13] Id. The court elaborated that while there may have been services involved, and those services may have value, the mortgagor did not seek to obtain such services by purchase or lease. Id.

Here, like the plaintiff in De Simone and Montalvo, the current borrower's action involves a mortgage loan and the actions surrounding such loan, including borrower's request to obtain a loan modification.[14] See 1981 WL 386509; 864 F. Supp. 2d at 579-80. The Rhode Island Superior Court and the United States District Court for the Western District of Texas have each found that DTPA statutes do not apply to mortgage loans. This Court finds the rationale of those cases persuasive and finds that the Rhode Island DTPA statute does not apply to mortgage

[13] The language of the Texas Act is similar to that of Rhode Island. It is codified at Tex. Bus. & Com. Code Ann. § 17.46(b).

[14] In De Simone, the plaintiff alleged a wrongful increase in interest rate of a mortgage loan. 1981 WL 386509.

loans. Accordingly, this Court grants judgment for the Bank as a matter of law on claims where borrower alleges a violation of the Rhode Island DTPA.

In addition, there is a second reason that the DTPA does not apply to the Bank relative to its consideration of loan modification applications. Regulated companies are exempt from coverage under the DTPA. See Chavers v. Fleet Bank, N.A., 844 A.2d 666, 670 (R.I. 2004); State v. Piedmont Funding Corp., 119 R.I. 695, 382 A.2d 819 (1978) (finding that the General Assembly clearly intended to exempt all those activities and business relations which are subject to monitoring by state or federal regulatory bodies or officers). There is no question that the Bank is a Federal Bank which is regulated by the federal government. For that reason, the DTPA is inapplicable to the Bank. In conclusion, the DTPA is inapplicable to the Bank under the circumstances involving borrower's attempts at loan modification for two reasons:

1. A mortgage is not in the category of goods or services subject to the DTPA;
2. The Bank is a federally regulated entity, and therefore not subject to the DTPA.

For those reasons, Defendants are entitled to judgment as a matter of law on borrower's claim of violation of the DTPA.

3. The "Mortgage-Related Provisions of the Omnibus Appropriations Act of 2009"

The Bank next contends that Title VI, Section 626 is inapplicable because it is merely a directive, directing the Federal Trade Commission to issue rules relating to deceptive acts or practices regarding loan modifications. After reviewing this statute, the Court concludes, as the Bank contends, the Omnibus Appropriations Act does not contain a provision for a private right of action. In pertinent part, it states:

> "(1) Within 90 days after the date of enactment of this Act, the Federal Trade Commission shall initiate a rulemaking proceeding with respect to mortgage loans in accordance with section 553 of title 5, United States Code. Such rulemaking shall relate to unfair or deceptive acts or practices regarding mortgage loans,

> which may include unfair or deceptive acts or practices involving loan modification and foreclosure rescue services. Any violation of a rule prescribed under this subsection shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices."

This section creates no cause of action that borrower may pursue; and borrower has failed to state a claim upon which relief can be granted under this statute. Therefore, Defendants are entitled to judgment as a matter of law for the claim alleging a violation of Title VI, Section 626 Mortgage-Related Provisions of Omnibus Appropriations Act of 2009.

4. The Implied Covenant of Good Faith and Fair Dealing

Rhode Island law recognizes "that virtually every contract contain[s] an implied covenant of good faith and fair dealing between the parties." Centerville Builders, Inc. v. Wynne, 683 A.2d 1340, 1342 (R.I. 1996) (quoting Crellin Techs., Inc. v. Equipmentlease Corp. 18 F.3d 1, 10 (1st Cir. 1994)). However, the requirement that parties deal fairly with one another only applies after a binding contract is formed. Id.; see also Ide Farm & Stable, Inc. v. Cardi, 110 R.I. 735, 739, 297 A.2d 643, 645 (1972); Psaty & Fuhrman, Inc. v. Housing Auth. of Providence,76 R.I. 87, 93, 68 A.2d 32, 36 (1949). Moreover, there is no independent cause of action in tort regarding unfair dealing. See A.A.A. Pool Serv. & Supply, Inc. v. Aetna Cas. & Sur. Co., 121 R.I. 96, 98, 395 A.2d 724, 725 (1978).

Defendants ask this Court to rely on a line of federal cases interpreting Massachusetts law, stating that a party acting according to the express terms of a contract cannot be considered a breach of the duties of good faith and fair dealing. See e.g., Frappier v. Countrywide Home Loans, Inc., 750 F.3d 91, 97 (1st Cir.), cert. denied 135 S. Ct. 179 (2014). In that case, the First Circuit has held that where a mortgagee accepted post-closing monthly installment payments from a mortgagor, with the alleged knowledge that the mortgagor could not afford the mortgage loan, the mortgagee did not breach an implied covenant of good faith and fair dealing under Massachusetts law, as the mortgagee was merely acting in accordance with the express terms of the contract. Id. The First Circuit has also stated that "[t]he concept of good faith 'is shaped by the nature of the contractual relationship from which the implied covenant derives,' and the 'scope of the covenant is only as broad as the contract that governs the particular relationship.'" Young v. Wells Fargo Bank, N.A., 717 F.3d 224, 238 (1st Cir. 2013) (quoting Ayash v. Dana–Farber Cancer Inst., 443 Mass. 367, 822 N.E.2d 667, 684 (2005)). Notably, when addressing a loan modification issue similar to the instant case, the First Circuit stated:

> "[T]he 2007 Mortgage as modified by the 2009 Agreement is the only contract between the [plaintiffs] and [defendant]. And as the district court correctly pointed out, nothing in the mortgage imposes a duty on [the defendant] to consider a loan modification prior to foreclosure in the event of a default. *See Peterson v. GMAC Mortg., LLC,* No. 11–11115, 2011 WL 5075613, at *6 (D. Mass. Oct. 25, 2011) ('Under Massachusetts case law, absent an explicit provision in the mortgage contract, there is no duty to negotiate for loan modification once a mortgagor defaults.')….The implied covenant of good faith 'cannot "create rights and duties not otherwise provided for in the existing contractual relationship."' *Young,* 717 F.3d at 238. It would therefore be an error to extend the implied covenant to encompass a duty to modify (or consider modifying) the loan prior to foreclosure, where no such obligation exists in the mortgage." MacKenzie v. Flagstar Bank, FSB, 738 F.3d 486, 493 (1st Cir. 2013) (some interior citations omitted).

Moreover, we note that this Court has addressed a similar issue in Gillette of Kingston, Inc. v. Bank Rhode Island, which held:

> "[The defendant] suggests that under Rhode Island law, in the absence of a breach of an express contractual provision, there can be no breach of the implied covenant of good faith and fair dealing. In *A.A.A. Pool Serv. & Supply Inc., supra,* our Supreme Court clearly held that unfair denial of an insurance claim does not give rise to an independent tort claim for bad faith. Nothing in that case, however, stands for the sweeping proposition that a contracting party, having the discretion to exercise a contractual right, may do so in bad faith. Nor does the case of *Ide Farm & Stable, Inc., supra,* foreclose the claims asserted herein by the Plaintiffs. While recognizing the relevance of the implied covenant of good faith and fair dealing, the Court simply upheld the trial justice's fact finding that no breach of the implied covenant was proven by the plaintiff under the facts of that

> case. *Ide Farm & Stable, Inc.*, 110 R.I. at 740, 297 A.2d at 645." Gillette of Kingston, Inc. v. Bank Rhode Island, No. WC 05-0616, 2006 WL 1314259, at *6 (R.I. Super. May 5, 2006) (Rubine, J.).

This Court then went on to hold,

> "[T]here appears to be consistent recognition in commercial and banking jurisprudence that '[g]ood faith between contracting parties requires the party vested with contractual discretion to exercise it reasonably, and he may not do so arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.' *Carrico v. Delp*, 141 Ill. App. 3d 684, 690, 490 N.E.2d 972, 976 (1986). Furthermore, exercise of a discretionary right under an agreement when used as a pretext for an effort to gain an improper advantage, or to thwart the reasonable expectations of the parties may also constitute a breach of the implied covenant of good faith and fair dealing. *See Anthony's Pier Four, Inc. v. HBC Associates*, 411 Mass. 451, 473, 583 N.E.2d 806, 820 (1991); *Southwest Sav. & Loan Ass'n v. Sunamp Sys., Inc.*, 172 Ariz. 553, 559, 838 P.2d 1314, 1320 (1992). Merely because a party reserves the right to take action under a particular set of circumstances does not mean that there can never be a breach of the implied covenant, even if the discretion is exercised arbitrarily, by improper means, or for an improper purpose." Id.; see also Okmyansky v. Herbalife Int'l of Am., Inc., 415 F.3d 154, 158 n.3 (1st Cir. 2005) ("[c]eding discretion in a contract is not tantamount to subjecting oneself to legalized tyranny. Every contract contains an implied covenant of good faith and fair dealing . . . . Consequently, not even the reservation of absolute discretion can clear the way for a totally arbitrary and unprincipled exercise of a contracting party's power.").

In the instant case, there were no contract terms which afford borrower any right or impose upon the Bank any obligation to modify a mortgage loan or to consider such modification. Rather than mandate the exercise of discretion, the mortgage contains clear and unambiguous language that Defendant may foreclose for a payment default, without first considering loan modification. Accordingly, without the Bank having any contractual obligation to modify a mortgage loan or to exercise any discretion with respect to modification, there are no facts to establish that the Bank either breached its obligation to modify borrower's loan or undertook to exercise such a contractual obligation arbitrarily. There being no obligation to exercise discretion to allow a borrower to modify the terms of the loan to avoid default and foreclosure, there can be no set of facts upon which this Court could find that the Bank exercised its contractual discretion arbitrarily or by improper means. See Gillette of Kingston, Inc., 2006 WL 1314259, at *6. As a result, the borrower has failed as a matter of law to establish a claim for breach of the implied warranty of good faith and fair dealing, and Defendants are entitled to judgment as a matter of law on such claim.

5. Section 2-101, et seq. of the Uniform Commercial Code

The borrower alleges that Defendants' conduct was an unfair business practice in violation of Section 2-101, et seq. of the Uniform Commercial Code (UCC). That Code, however, only applies to the sale of goods. Under a section titled "scope," the UCC itself states:

> "Unless the context otherwise requires, this Article applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this Article impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers." U.C.C. § 2-102.

This language is mirrored in Rhode Island's adoption of the UCC:

> "Unless the context otherwise requires, this chapter applies to transactions in goods; it does not apply to any transaction which, although in the form of an unconditional contract to sell or present sale, is intended to operate only as a security transaction, nor does this chapter impair or repeal any statute regulating sales to consumers, farmers, or other specified classes of buyers." G.L. 1956 § 6A-2-102.

Under the UCC, "goods" are defined as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action." U.C.C. § 2-105; see also § 6A-2-105. The Court finds that as a matter of law, a mortgage loan clearly does not fall within the definition of "goods" under the UCC. Accordingly, the Defendants are entitled to judgment as a matter of law on the claim that it violated Chapter 2 of the UCC.

6. Promissory Estoppel

In her second amended complaint, the borrower asserts that an individual named Natura Gibbon made alleged promises to rescind the foreclosure. The borrower asserts that those promises are now enforceable under the doctrine of promissory estoppel, as she detrimentally relied on these promises. Although borrower did not plead promissory estoppel as an independent cause of action, reference to the alleged statements of Natura Gibbons regarding rescission may be broadly viewed as an attempt to allege the elements of promissory estoppel. Defendants argue that they are entitled to judgment as a matter of law on this cause of action because borrower failed to establish all elements of promissory estoppel, namely by failing to establish that Natura Gibbons was an agent or employee of the Bank. Under the doctrine of promissory estoppel,

> "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of its promise." East Providence Credit Union v. Geremia, 103 R.I. 597, 601, 239 A.2d 725, 727 (1968) (quoting Restatement of Contracts, § 90).

"A successful promissory estoppel action must include a clear and unambiguous promise." Filippi v. Filippi, 818 A.2d 608, 625 (R.I. 2003). Moreover, the party who asserts promissory estoppel has the burden of proving that all of its elements have been established. Lichtenstein v. Parness, 81 R.I. 135, 138-39, 99 A.2d 3, 5 (1953); Jotorok Grp., Inc. v. Computer Enters., Inc., No. PC01-3237, 2005 WL 2981658, at *12 (R.I. Super. Nov. 4, 2005) (Savage, J.) (finding that the plaintiff failed to establish sufficient evidence to demonstrate that it acted in forbearance on the defendant's promise to enter into an agreement). In reviewing the legal basis for establishing a claim for promissory estoppel, this Court finds that the borrower failed to produce any evidence which could be construed as meeting the requirements of such claim. See Geremia, 103 R.I. at 601, 239 A.2d at 727. Namely, the borrower failed to sufficiently establish at trial that any promises of rescission were made by any agent of the Defendants, upon which promises she detrimentally relied.

As a result, if the complaint may be liberally construed to allege such a cause of action, judgment must be entered for the Defendants on such a claim, due to borrower's failure to meet her burden of proving such a claim by a fair preponderance of evidence. Accordingly, judgment must be entered for the Defendants, and the claim of borrower for promissory estoppel should be denied and dismissed as a matter of law.

V

Conclusion

Although the Court has concluded that the facts as found do not establish a claim under any of the theories of liability contained in the second amended complaint, the Court is concerned as to whether the actions of the Bank in considering loan modification for this borrower may constitute a violation of the Consent Judgment entered in the case of United States v. Bank of Am. Corp., et al., No. 12–0361 (D.D.C. Apr. 4, 2012).[15] Both the State of Rhode Island, as a Plaintiff, and Wells Fargo Bank, N.A. and Wells Fargo & Company, as Defendants, were parties to the lawsuit as well as signatories to the Consent Judgment. As part of the Consent Judgment, the participating states, including Rhode Island, were paid a settlement fund

[15] That Consent Judgment negotiated among several mortgage lenders/servicers, the United States and several participating Plaintiff states, became known as the "national settlement." It was filed with the Court on April 4, 2012. It resolved a complaint filed on March 12, 2012, wherein the United States and the participating states alleged that several mortgage lenders/servicers violated—among other laws—the Unfair and Deceptive Trade Practices Laws of the Plaintiff States, the federal False Claims Act, the federal Financial Institutions Reform, Recovery, and Enforcement Act of 1989, the Service members Civil Relief Act, the Bankruptcy Code, and the Federal Rules of Bankruptcy Procedure.

by the participating Defendants, including Wells Fargo Bank. The settlement fund was allocated among the participating states "to be used to the extent practicable for purposes intended to avoid preventable foreclosures, to ameliorate the effects of the foreclosure crisis, to enhance law enforcement efforts to prevent and prosecute financial fraud, or unfair or deceptive acts or practices, and to compensate the States for costs resulting from the unlawful conduct of the Defendants." Rhode Island's allocation from the settlement fund was $8,500,755.00. Enforcement of Defendants' obligations under the Consent Judgment was delegated to the Attorneys General of the state Plaintiffs.[16] Neither the borrower in this case nor the Court is authorized to enforce the terms of the settlement.[17] Specifically, the National Settlement provides, as to Rhode Island, that the State Attorney General shall receive all state government designated funds which must be held in a separate account and used solely for mortgage foreclosure related issues and/or consumer education, outreach, training or related consumer issues to be determined by the Rhode Island Attorney General. This Court has not and cannot determine whether any of the actions of the Bank, in general or with respect to the borrower, violated any of the provisions of the Consent Judgment or provide a proper remedy in the event that such a violation is found to exist.[18]

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[16] The Consent Judgment also provided for a Monitoring Committee, which Committee shall choose and retain a Settlement Administrator to administer the distribution of cash payments to individual borrowers.

[17] This Court is without jurisdiction to determine if the behavior of the Bank is violative of the Consent Judgment or to determine the proper relief if such a violation is determined.

[18] One provision of the Consent Judgment which the Attorney General may find pertinent is the requirement that "servicer shall provide accurate information to borrowers relating to the qualification process or eligibility factors for loss mitigation programs." In addition, the Consent Judgment provides that each settling defendant must establish an easily accessible and reliable single point of contact (SPOC) for each potentially eligible first lien mortgage borrower, so that borrower has access to an employee of servicer to obtain information throughout the loss mitigation, loan modification and foreclosure process.

This Court expresses no opinion as to whether the Bank acted in violation of any of the substantive or procedural terms of the Consent Judgment; such a determination must be considered by the Rhode Island Attorney General.

Accordingly, the Court exercises its inherent equitable authority to refer this case to the Rhode Island Attorney General to conduct its own independent investigation of the facts and circumstances presented by the borrower and to consider what relief, if any, is available to the borrower under the terms of the Consent Judgment.

After fully considering the facts and law presented in this case, this Court will enter judgment for the Defendants on all claims asserted by the borrower, but shall forthwith refer this matter to the Rhode Island Attorney General to consider whether Defendants have acted contrary to any terms of the Consent Judgment and, if so, to determine what should be the consequence of any violation so found.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Joanne Miller v. Wells Fargo Bank, N.A., Beverly Fischel**
CASE NO:	**KC-11-0060**
COURT:	**Kent County Superior Court**
DATE DECISION FILED:	**March 30, 2015**
JUSTICE/MAGISTRATE:	**Rubine, J.**

ATTORNEYS:

For Plaintiff:	**Joanne Miller, pro se**
For Defendant:	**Randall L. Souza, Esq.** **David Bizar, Esq.**

STATE OF RHODE ISLAND
KENT, SC

SUPERIOR COURT

JOANNE C. MILLER,

Plaintiff,

vs.

CA NO KC-2011-0060

WELLS FARGO BANK, N.A.,

Defendants.

JOINT STATEMENT OF UNDISPUTED FACTS

Pursuant to the Court's Pre-Trial Order dated June 18, 2014, the parties, Plaintiff Joanne C. Miller ("Miller") and Defendant, Wells Fargo Bank, N.A. ("Wells Fargo"), jointly submit this joint statement of undisputed facts.

1. On March 30, 2005, Plaintiff, Joanne C. Miller ("Plaintiff" or "Miller") and her then-husband, Dean S. Miller (collectively, the "Millers"), entered into a Fixed Rate Note ("Note") with Wells Fargo, by which the Millers promised to pay $204,000.00 to Wells Fargo, beginning on May 1, 2005, in monthly installment amounts. The Note provides that the Millers "will pay principal and interest by making a payment every month . . . at Wells Fargo Bank, N.A. . . . in the amount of U.S. $ 1,206.74." The Note further provides that "Interest will be charged on unpaid principal until the full amount of Principal has been paid" and that the Millers "will pay interest at a yearly rate of 5.875%."

2. On the ~~same date, to secure the Millers' repayment obligations~~ under the Note, the Millers granted a Mortgage ~~("Mortgage")~~ in and to their residential property located at 233 Beach Avenue, Warwick, Rhode Island (the "Property") to "WELLS FARGO BANK, N.A." The Mortgage was recorded on April 4, 2005 at Book 5645, Page 39 of the Land Records of the City of Warwick, Rhode Island.

3. On October 24, 2006, the Millers executed a Quitclaim Deed granting to Joanne Miller and Joanne Miller's heirs, successors, executors and assigns (only) all of their interest in and to the Property. The Quitclaim Deed was recorded on October 25, 2006 at Book 6368, Page 80 of the Land Records of the City of Warwick, Rhode Island

3. On October 24, 2006, the Millers executed a Quitclaim Deed granting to Joanne Miller and Joanne Miller's heirs, successors, executors and assigns (only) all of their interest in and to the Property. The Quitclaim Deed was recorded on October 25, 2006 at Book 6368, Page 80 of the Land Records of the City of Warwick, Rhode Island.

4. In 2009, Miller communicated with Wells Fargo in an attempt to modify the loan. Miller submitted certain information and documentation in support of a potential loan modification.

5. On March 10, 2010, Wells Fargo conducted a foreclosure auction. Wells Fargo conveyed the Property to Federal Home Loan Mortgage Corporation ("Freddie Mac") via a Foreclosure Deed and Assignment of Bid ("Foreclosure Deed"). The Foreclosure Deed was recorded on April 13, 2010 at Book 7254, Page 320 of the Land Records of the City of Warwick, Rhode Island.

6. Subsequent to the foreclosure auction, Miller requested that the foreclosure sale be rescinded.

Respectfully submitted,

Joanne C Miller

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Dated: October 30, 2014

CERTIFICATE OF SERVICE

I, Joanne Miller, Pr-Se, Plaintiff herein, hereby certify that I served a true signed copy of this Joint Statement of Undisputed Facts upon all counsel of record and pro se parties by electronic mail on October 30, 2014.

Joanne C. Miller

Joanne C. Miller

10/30/14 350pm