IN THE UTAH COURT OF APPEALS

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Beverly J. Mast fka Beverly Ramseyer, Plaintiff and Appellant, v. First Madison Services, Inc., fka Clayton National, Inc.; Litton Loan Servicing, LP; Salomon Smith Barney, Inc.; Edward C. Hill, an individual; John Does 1-20; and Jane Does 1-20, Defendants and Appellees.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20080025-CA F I L E D (June 18, 2009) 2009 UT App 162

Third District, Salt Lake Department, 030928939
The Honorable Robert P. Faust
The Honorable Stephen L. Henriod

Attorneys: Orson B. West Jr., Salt Lake City, for Appellant
Elizabeth M. Peck, Salt Lake City, for Appellee First Madison Services, Inc.
Darryl J. Lee and Kathryn O. Balmforth, Salt Lake City, for Appellee Litton Loan Servicing, LP

Before Judges Greenwood, Bench, and McHugh.

McHUGH, Judge:

Beverly J. Mast appeals various decisions by the trial court regarding her claims under the Real Estate Settlement Procedures Act (RESPA), see 12 U.S.C. § 2605 (2000).[1] Mast first argues

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[1]Mast also brought claims under the federal Fair Housing Act, see 42 U.S.C. §§ 3609-3619 (2000), the Utah Fair Housing Act, see Utah Code Ann. §§ 57-21-1 to -14 (2000), (collectively, FHA) and the Fair Debt Collection Practices Act (FDCPA), see 15 U.S.C. § 1692e (2000), that were dismissed by the trial court. Although Mast asserts that she has appealed the dismissal of all

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that the trial court erred by granting a motion to dismiss filed by First Madison Services, Inc. fka Clayton National, Inc. (First Madison) for failure to state a claim, see Utah R. Civ. P. 12(b)(6). She also asserts that the trial court erred in excluding emotional distress damages from the jury's consideration in connection with her RESPA violation claim against Litton Loan Servicing, LP (Litton). Finally, Mast claims that the trial court exceeded its discretion in denying her motion for a new trial. We affirm.

We first examine whether the trial court properly dismissed Mast's RESPA claims against First Madison. Dismissal of claims under rule 12(b)(6) is a question of law. See Sony Elecs., Inc. v. Reber, 2004 UT App 420, ¶ 8, 103 P.3d 186. "[T]herefore, we give the trial court's ruling no deference and review it under a correctness standard." Id. (internal quotation marks omitted).

Mast's complaint alleged two violations by First Madison of section 2605(b) of the RESPA, see 12 U.S.C. § 2605(b). The trial court dismissed those claims against First Madison with prejudice. Mast asserts that the trial court dismissed the RESPA claims against First Madison because the statute of limitations for such claims had expired, and First Madison states that the trial court dismissed the claims both because the statute of limitations had run and because First Madison complied with its duty.

In its written ruling, the trial court expressly granted the motion to dismiss Mast's RESPA claims because Mast failed to allege breach of any statutory obligations by First Madison. Mast has not made any arguments regarding the propriety of that ground as a basis for dismissal. Accordingly, we affirm. See Valcarce v. Fitzgerald, 961 P.2d 305, 313 (Utah 1998) ("It is well established that an appellate court will decline to consider an argument that a party has failed to adequately brief.").

We also affirm on the alternate ground that the statute of limitations had expired.[2] The RESPA provides, "Any action

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[1](...continued)
claims, we decline to consider the FHA and FDCPA causes of action due to Mast's failure to brief those issues. See Valcarce v. Fitzgerald, 961 P.2d 305, 313 (Utah 1998).

[2]Dismissal under rule 12(b)(6) of the Utah Rules of Civil Procedure is appropriate where the claim is time-barred based on the allegations of the complaint itself. See Tucker v. State Farm Mut. Auto. Ins. Co., 2002 UT 54, ¶ 8, 53 P.3d 947 (affirming (continued...)

pursuant to the provisions of section 2605 . . . may be brought . . . within 3 years . . . from the date of the occurrence of the violation." 12 U.S.C. § 2614. The complaint identifies November 2000 as the date of the latest alleged violation by First Madison. Mast failed to commence litigation until December 2003, which was after the statute of limitations had run.

Although Mast argues that the statute of limitations was tolled by the equitable discovery rule,[3] the Utah Supreme Court in Ockey v. Lehmer, 2008 UT 37, 189 P.3d 51, rejected this argument when the plaintiff was aware of the facts giving rise to her claims before the statute of limitations expired. See id. ¶ 39. The complaint alleges that Mast learned that First Madison had assigned the servicing of her loan in November 2000 and that she knew of the sale of the loan by at least May 2003. Because the three-year statute of limitations expired, at the earliest, in June 2003, three years after the first alleged violation by First Madison, the equitable discovery rule is not applicable.[4]

Mast's next argument is that the trial court should have allowed her to amend her complaint to assert an allegation of negligence against First Madison. However, Mast has failed to demonstrate that this issue was preserved for appeal. See Pratt v. Nelson, 2007 UT 41, ¶ 15, 164 P.3d 366 ("[T]o preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." (internal quotation marks omitted)). Rather than preserve the issue, Mast notified the trial court that she did not seek leave to amend the complaint. Indeed, in her opposition

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[2](...continued)
dismissal under 12(b)(6) when "inclusion of dates in the complaint indicat[ed] that the action [wa]s untimely render[ing] it subject to dismissal for failure to state a claim" (internal quotation marks omitted)).

[3]We recognize that there is a split of authority regarding whether the RESPA statute of limitations can be equitably tolled. See Perkins v. Johnson, 551 F. Supp. 2d 1246, 1253 & n.5 (D. Colo. 2008) (discussing holdings of other jurisdictions). We do not decide that issue today, however, because even if tolling is applicable in the context of a RESPA claim, Mast is not entitled to such tolling.

[4]Mast "did not raise the alternative argument that [s]he acted reasonably in failing to file suit before the limitations period expired." Ockey v. Lehmer, 2008 UT 37, ¶ 37, 189 P.3d 51 (internal quotation marks omitted). Consequently, we do not consider that argument.

to First Madison's motion to dismiss, Mast stated, "In this matter leave to amend is believed to be unnecessary at this time against [First Madison]." Further, there is no indication in the record that Mast attempted to amend her complaint at a later date. Consequently, we do not consider this issue further. See Tschaggeny v. Milbank Ins. Co., 2007 UT 37, ¶ 20, 163 P.3d 615 (stating that issues raised for the first time on appeal are waived).

We next consider Mast's claim that the trial court erred in failing to instruct the jury on emotional distress damages during the trial of the claim against Litton. "Whether a jury instruction correctly states the law presents a question of law which we review for correctness." State v. Houskeeper, 2002 UT 118, ¶ 11, 62 P.3d 444; Martinez v. Wells, 2004 UT App 43, ¶ 14, 88 P.3d 343.

We need not address the merits of Mast's challenge to the jury instructions because she has failed to preserve the issue for review. See Chapman v. Uintah County, 2003 UT App 383, ¶ 26, 81 P.3d 761 ("In order to appeal the giving or the refusal of a jury instruction, a party must properly object to the instructions in the trial court and explain its grounds, with specificity, for challenging the instructions." (internal quotation marks omitted)). Mast has not pointed us to, and we have not located, any place in the record where she objected to the jury instructions on damages; nor did Mast's counsel offer any alternative instructions. To the contrary, Mast's attorney affirmatively represented to the court that he had no objections to the instructions as given.

Further, even if we were to assume that Mast adequately preserved her claim, we cannot conclude that a different result is in order. Any alleged error by the trial court in excluding emotional distress damages from the jury instructions was harmless because the alleged emotional distress resulted from the foreclosure itself, not from the alleged RESPA violation. See generally H.U.F. v. W.P.W., 2009 UT 10, ¶ 44, 203 P.3d 943 ("[H]armless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings." (alteration in original) (internal quotation marks omitted)).

Finally, we review Mast's claim that she is entitled to a new trial. A trial court generally has broad discretion to deny a motion for new trial. See Ostler v. Buhler, 1999 UT 99, ¶ 5, 989 P.2d 1073. However, when that decision depends upon questions of law, we review the decision for correctness. See id.

Mast contends that her request for a new trial was based upon "newly discovered evidence," Utah R. Civ. P. 59(a)(4). The evidence upon which Mast relies, however, is the deposition testimony of Litton's former vice president. Because that testimony was available to Mast for two-and-a-half years prior to trial, we agree with the trial court that the evidence was not newly discovered. See In re L.M., 2003 UT App 75, ¶ 8, 68 P.3d 276 (holding that in order to warrant a new trial the evidence must have been incapable of being produced at trial with reasonable diligence).

Affirmed.

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Carolyn B. McHugh, Judge

I CONCUR:

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Pamela T. Greenwood,
Presiding Judge

I CONCUR IN THE RESULT:

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Russell W. Bench, Judge