IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PERRY AND CHRISTINE HAMUS,

Plaintiffs,

v.

BANK OF NEW YORK MELLON, COUNTRYWIDE HOME LOANS, INC., BAC HOME LOANS SERVICING, BANK OF AMERICA, N.A., and MORTGAGE ELECTRONIC REGISTRATION SYSTEM, INC., and LANDSAFE, INC.

Defendants.

OPINION AND ORDER

10-cv-682-slc

In 2006, plaintiffs Perry and Christine Hamus borrowed money from defendant Countrywide Home Loans, Inc. for the purchase of a home. About two years later, the Hamuses defaulted on their loan payments and nearly lost their home in a state court foreclosure proceeding. In this federal lawsuit, the Hamuses have sued most of the entities that had a role in this series of events. In an opinion and order entered May 13, 2011, I granted defendants' motion to dismiss plaintiffs' first amended complaint, but allowed plaintiffs an opportunity to attempt to cure their pleading deficiencies by filing another amended complaint. Dkt. 27.

On June 3, 2011, plaintiffs filed their second amended complaint in which they beefed up the allegations in support of their original claims and raised some new claims. Dkt. 28. Before the court is defendants' motion to dismiss this second amended complaint. Dkt. 31. As discussed below, the second amended complaint fails to state any plausible claims for relief against any of the defendants. Accordingly, I will dismiss the second amended complaint with prejudice.

In their latest complaint, plaintiffs have asserted eight causes of action against the various defendants in this case as charted below:[1]

Count	Cause of Action	Defendants
I	Slander of Title in violation of Wis. Stat. § 706.13	Bank of America, N.A. /BAC Home Loans Servicing, L.P and MERS
II	Fraud/ Intentional Misrepresentation	Countrywide and Landsafe
III	Truth in Lending Act (TILA)	Countrywide and Bank of America, N.A./BAC Home Loans Servicing, L.P.
IV	Real Estate Settlement Procedures Act (RESPA)	Countrywide and Bank of America, N.A./BAC Home Loans Servicing, L.P.
V	Unjust Enrichment	Countrywide and Bank of America, N.A./BAC Home Loans Servicing, L.P./MERS
VI	Fair Debt Collection Practice Act	Bank of America, N.A./BAC Home Loans Servicing, L.P./MERS
VII	Violation of Wisconsin's Deceptive Trade Practices Act, Wis. Stat. § 100.18	Countrywide and Bank of America, N.A./BAC Home Loans Servicing, L.P
VIII	Defamation	Bank of America, N.A./BAC Home Loans Servicing, L.P.
IX	Civil Conspiracy	MERS/Bank of America, N.A./BAC Home Loans Servicing, L.P.

At the crux of many of these claims is plaintiffs' contention that, although they "do not necessarily dispute" that they owe somebody money on their home mortgage loan, the actual holder of that note is not currently known and may never be known because of the multiple times their mortgage was repackaged and sold on the secondary, mortgage-backed securities

[1] As in their first amended complaint, plaintiffs name Bank of New York Mellon as a defendant but still fail to allege any wrongdoing on its part or explain why it is a defendant in this case. Accordingly, I will dismiss this party with prejudice.

market. Theoretically, this "show me the note" defense could prevail in state court should plaintiffs' home be the subject of another state-court foreclosure action. However, it is not enough to put defendants on the hook for fraud, slander of title, defamation or the other civil torts that plaintiffs assert in their complaint.

The facts alleged in plaintiffs' first amended complaint and the controlling legal standards are set forth in the May 13 order and are incorporated herein by reference. To the extent that plaintiffs have alleged new or additional facts in their second amended complaint, I address them in the analysis below.

OPINION

Count 1: Slander of Title: Violation of Wis. Stat. § 706.13, against BA and MERS

In their first amended complaint, plaintiffs alleged that defendants Bank of America and MERS committed fraud by falsely representing that Bank of America "had the right to foreclose" on plaintiffs' home by virtue of the alleged assignment of plaintiffs' first mortgage from MERS to Bank of America. As I noted in the opinion and order on defendants' motion to dismiss that complaint, plaintiffs' misrepresentation claim had two components: 1) that MERS is merely a nominee for the lender, Countrywide, and as such, lacked any tangible interest in the mortgage that it could assign to Bank of America; and 2) even if MERS validly assigned the mortgage to Bank of America, that assignment was "a legal nullity" because, in the course of the complicated mortgage-backed security process, it was separated from the underlying promissory note that plaintiffs executed. Amended Complaint, dkt. 15, at ¶¶ 19-34. According to plaintiffs, without ownership of the note, Bank of America had no right to bring a foreclosure action, even if it

might have had legal title to the mortgage.[2] *Id*. at ¶32. In dismissing the claim, I found it unnecessary to decide whether BA actually had standing to bring the state court foreclosure action, finding that even if it didn't, plaintiffs failed to allege any facts indicating that they relied on that alleged misrepresentation to their detriment.

In their second amended complaint, plaintiffs re-assert their claim that the assignment of mortgage executed by MERS to BA was a "sham" because MERS acts merely as an agent for the lenders and thus lacks any tangible property interest to assign. However, plaintiffs have changed their legal theory from fraud to slander of title.

Wisconsin has codified the common law of slander of title in Wis. Stat. § 706.13, which provides as follows:

> In addition to any criminal penalty or civil remedy provided by law, any person who submits for filing, entering in the judgment and lien docket or recording, any lien, claim of lien, lis pendens, writ of attachment, financing statement or any other instrument relating to a security interest in or the title to real or personal property, and who knows or should have known that the contents or any part of the contents of the instrument are false, a sham or frivolous, is liable in tort to any person interested in the property whose title is thereby impaired, for punitive damages of $1,000 plus any actual damages caused by the filing, entering or recording.

To establish slander of title, the plaintiff must prove that the defendant: (1) filed, documented or recorded (2) a knowingly false, sham or frivolous claim of lien or other instrument relating to real or personal property (3) that impairs title. *Kensington Dev. Corp. v. Israel*, 142 Wis. 2d 894, 904, 419 N.W. 241, 245 (1988). Title generally relates to the formal right of ownership and the right to possess property. *Niedert v. Rieger*, 200 F.3d 522, 528 (7th Cir. 1999).

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[2] Plaintiffs assert that they have reason to believe that the lender, Countrywide, still retains legal title to the note.

In addition to alleging facts to support their claim that MERS' assignment of the mortgage was a sham, plaintiffs allege that "BA knew that the assignment of mortgage was a sham document" and that, as a result of its creation and recording, it is now impossible for plaintiffs to sell their home. Second Amended Complaint, dkt. 26, ¶¶106-108.

Even when all reasonable inferences are granted in favor of plaintiffs, their allegations fall short of showing a plausible claim for slander of title. Again, as was the case with the first amended complaint, I reach this conclusion without deciding the hotly-debated and quintessential state law question regarding what, if any, interest or authority is conferred to MERS by virtue of a mortgage designating MERS as the "nominee" for the lender. Plaintiffs' allegations fail for other reasons.

First, although plaintiffs *allege* that defendants "knew [the assignment] was a sham," this is a mere conclusion: plaintiffs' complaint is devoid of facts that suggest any reasonable possibility that plaintiffs could meet their burden of proving intent at trial. Second, the fact that both parties are able to cite a number of cases from courts in various states that have reached different conclusions on the matter shows that plaintiffs could *not* establish that BA and MERS "knew or should have known" that the assignment was a sham. *Compare* Defs.' Br. in Supp. of Mot. to Dismiss, dkt. 32, at 5-6 (citing cases finding that MERS, as nominee of lender, had right to assign lender's interest in mortgage) *with* Pltfs.' Br. in Opp. to Mot. to Dismiss, dkt. 33, at 10-11 (citing cases finding that MERS has no beneficial interest in mortgage).

Indeed, the Wisconsin Court of Appeals appears to be tilted in defendants' direction. In *Countrywide Home Loans Servicing LP v. Rohlf*, 2010 WL 4630328, *3 (Wis. App. Nov. 17, 2010) (unpublished), the defendants in a foreclosure action argued that MERS, who was the

"nominee" of the original lender, American Sterling Bank, lacked the authority to assign the note to Countrywide. The appellate court rejected the argument, finding that MERS had the authority to assign the mortgage and that the "assignment of mortgage transfers both the note and mortgage." *Id*. Although *Rohlf* had not been decided at the time MERS assigned the mortgage in this case, it nonetheless supports BA's and MERS' contention that the assignment was valid.

Plaintiffs do not cite any Wisconsin case finding such assignments by MERS to be fraudulent. Further, the plain language of the mortgage, which designated MERS as Countrywide's nominee, also granted it the "right to exercise any or all of [the Lender's] interests, including, but not limited to, the right to foreclose and sell the Property." This language, along with the lack of Wisconsin law determining the actual rights conferred to MERS by that language, trumps plaintiffs' conclusory allegations of intent.

Further, assuming for the sake of argument that plaintiffs had alleged facts sufficient to allow an inference of actual or constructive knowledge on the part of BA or MERS, their second amended complaint lacks allegations sufficient to support an inference that the assignment of the mortgage from MERS to BA impaired title. As defendants point out, plaintiffs do not dispute that they signed notes and mortgages; their dispute concerns who currently owns those loan documents. Having admitted that the original mortgage placing an encumbrance on their home is valid, it is difficult to see how the mere assignment of that mortgage from one party to another, even if fraudulent, placed any additional encumbrance on the property or otherwise interfered with their right of ownership. As the Wisconsin Supreme Court observed more than a century ago, *Tidioute Sav. Bank v. Libbey*, 77 N.W. 182, 183 (Wis. 1898):

> [W]hen the mortgagee transfers the debt, without assigning the mortgage or other security, he becomes a trustee, and holds the security for the benefit of the owner of the note, and the latter may enforce the trust. The debtor is in no wise injured by such rule. He has agreed that the security shall stand for the payment of the debt, and it is of no consequence to him to whom it is paid. He has to pay it but once.

Plaintiffs do not present any facts to show that they attempted to sell their home but were thwarted by the allegedly-fraudulent assignment. They assert only in conclusory terms that the assignment has made it "impossible" to sell their home. Such conclusory allegations are insufficient to carry plaintiffs' burden to state a plausible claim for relief. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

Count II: Fraud/Intentional Misrepresentation against Countrywide and Landsafe

In the first amended complaint, plaintiffs alleged that Countrywide had intentionally lied to them about their loan terms when it issued a "pre-approval Certificate" stating that plaintiffs were approved for a home loan of $225,000 with a fixed interest rate of 6.625% with no points. Plaintiffs alleged that, based upon the pre-approval certificate, they "agreed to enter into loans that were not fully disclosed and that were in fact loans for which they did not qualify and that they would not have agreed to had they understood the true nature of the loans." Amended Complaint, dkt. 15, at ¶103. According to plaintiffs, no one from Countrywide explained the final loan terms to them before closing, and they entered into an interest-only adjustable rate mortgage loan and a loan with a balloon payment without understanding how the loans worked.

In dismissing this claim, I found that insofar as plaintiffs were alleging fraud "on the ground that the ultimate loan package they received was different from that offered by

Countrywide in the conditional loan approval," the claim was not actionable. Opinion and Order, May 13, 2011, dkt. 27, at 23-24 (citing *Schurmann v. Neau*, 2001 WI App 4, ¶10, 240 Wis. 2d 719, 624 N.W.2d 157 (claim of misrepresentation cannot be brought based on future events or facts not in existence when the representation was made or on unfulfilled promises). *See also Jefferson v. Briner, Inc.*, 2006 WL 1720692 (E.D. Va. June 21, 2006) (plaintiffs could not bring fraud claim based on conditional loan approval because final approval depended on future events); *Aitken v. Taylor Bean & Whitaker Mortgage Corp.*, 2008 WL 755264 (N.D. Ohio 2008) (pre-approval letter does not create enforceable contract for a mortgage loan). To the extent that plaintiffs appeared to be alleging that someone from Countrywide deceived them about the terms of the loans that they ultimately agreed to, I found the claim was not pled with the particularity required by Fed. R. Civ. P. 9(b):

> Plaintiffs fail to allege clearly what it is they did not understand about the contracts they entered, what was said by anyone at Countrywide to mislead them, how they relied on any misrepresentations that were made or even when, where or by whom the alleged misrepresentations were made. Although plaintiffs assert in their brief that it is unreasonable to expect them to recall the name of the Countrywide loan officer (who they allege has since left the company), that is the least of their problems. More fundamental is their omission of any details about [*what*] they were told, how they relied on this information to their detriment, or why it took them more than four years to realize that the terms of their loans were not what they understood them to be.

Op. and Order, dkt. 27, at 24.

In their second amended complaint, plaintiffs attempt to cure these deficiencies by providing more detail about their interactions with Countrywide before and at the time they

entered into the contract. With respect to the two loans that the plaintiffs actually did contract for with Countrywide, plaintiffs allege the following:

> 1. Countrywide's agent, Eleanor Fritsche inflated Perry Hamus's income on his loan application without his knowledge;
>
> 2. When the Hamuses told Fritsche they were worried about their ability to make mortgage payments, Fritsche promised the Hamuses that they would receive raises in the future and would quickly build equity in their house and be able to refinance;
>
> 3. Countrywide, aided and abetted by Landsafe Appraisals, knowingly inflated the appraisal value of the Hamus's home beyond the fair market value; and
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> 4. Countrywide told the plaintiffs that they qualified for a rural mortgage home loan when in fact they did not.

Perhaps the court can be forgiven mild skepticism regarding the timing of plaintiffs' fraud allegations: plaintiffs made payments on their loans for more than two years, then attempted on numerous occasions to negotiate a modification with BA without ever claiming that the loans were bogus until plaintiffs faced a state court foreclosure action. Further, plaintiffs still have not alleged facts to explain why it took them so long to realize that they misunderstood the terms of their loans.

In any case, even with these new allegations, plaintiffs have not shown a real possibility of success on a fraud claim. To prove common law fraud, plaintiffs must prove: (1) a false representation; (2) made with intent to defraud; (3) reliance on the misrepresentation; and (4) injury resulting from the reliance. *Batt v. Sweeney*, 2002 WI App 119, ¶13, 254 Wis. 2d 721, 647 N.W. 2d 868. With respect to the first and third alleged representations above, plaintiffs admit that they did not know that Fritsche had inflated Perry Hamus's income and that they "did not see the appraisal before or at the closing," *Id.*, ¶20. If plaintiffs did not see the

allegedly inflated income and appraisal figures, then it follows that they could not have relied on them. *Zimmerman v. Logemann*, 2011 WL 1674956, *15 (W.D. Wis. March 17, 2011) ("[I]f plaintiffs were not aware of the use of an inflated income to qualify them for the loan, then they could not possibly have relied on that misrepresentation"). *Accord Newsom v. Countrywide Home Loans, Inc.*, 714 F. Supp. 2d 1000, 1014 (N.D. Cal. 2010) (dismissing fraud claim based on allegedly inflated income numbers on loan application because alleged misstatement was made to lender and not the plaintiffs); *Oglesbee v. IndyMac Fin. Services,* Inc., 686 F. Supp. 2d 1313, 1316 (S.D. Fla. 2010) (same); *Battah v. ResMAE Mortgage Corp.*, 2010 WL 4260530, *4 (E.D. Mich. 2010) ("[]t is absurd for a person to sue for fraud based on the claim that he reasonably relied on inflated statements regarding his own income on a loan application").

The fourth statement is perplexing: it relates to Countrywide's initial, conditional loan approval and is essentially the same claim this court dismissed in the May 14 order. Plaintiffs appear to claim that when they went to the closing, they understood that the terms of their loan agreement with Countrywide were going to be the same as stated in the pre-approval certificate, when, in fact, the actual terms to which they ultimately agreed were less favorable. However, plaintiffs do not allege that anyone from Countrywide lied to them at the closing and *told* them that the contract terms to which they were agreeing were the same terms stated on the pre-approval certificate, or that Countrywide somehow hid the actual, final contract terms from them.

Indeed, plaintiffs assert in the second amended complaint that they had a lawyer, Mark Wittman, who attended the closing with them and that they were given a copy of the loan documents right after the closing. Second Amended Complaint, dkt. 28, ¶¶17, 20. These facts

counter plaintiffs' allegations of deceit. Plaintiffs now allege that their lawyer "sat in a corner and did not oversee the closing or verify the accuracy of any of the documents;" they go so far as to suggest that their lawyer actually was representing Countrywide, although they have not brought a claim against him. But even if neither Wittman nor Fritsche went out of his or her way to ensure that the Hamuses knew the details about what they were signing, "either not reading a contract or not being aware of its unambiguous terms does not relieve a party from being bound by a contract he or she has signed." *Raasch v. City of Milwaukee*, 2008 WI App 54, ¶10, 310 Wis. 2d 230, 241, 750 N.W.2d 492, 497; *Hennig v. Ahearn*, 230 Wis.2d 149, 156, 601 N.W.2d 14, 18 (Ct. App. 1999) ("[T]he general rule is that a party who signs a contract after a fair opportunity to read the contract is bound by its terms."). There is nothing in plaintiffs' most recent complaint suggesting more than a mere possibility that plaintiffs could show Countrywide tricked them into agreeing to loan terms they did not understand.

Plaintiffs attempt to prop up their fraud allegations by pointing to discrepancies between their loan file and the file they received much later from their attorney, alleging that some signatures that "appear to be forged" and in some cases "seem to have been photo shopped." Sec. Amended Complaint, dkt. 28, ¶100(d). Plaintiffs fail to identify exactly which documents they claim to be forged, fail to attach any documents to their complaint and fail to set forth any fact explaining the basis for their accusations. The only "fact" alleged is that plaintiffs do not remember signing certain documents at a closing that occurred five years ago. Such an unremarkable allegation does not establish a plausible claim of forgery or fraud; indeed, given the time that has elapsed and the numerous documents typically signed at a closing, it would be more remarkable if plaintiffs claimed that they actually *could* recall signing each document.

Absent more detail showing that plaintiffs have a valid basis for their forgery allegations, their allegations will be disregarded.

This leaves Fritsche's alleged promise of future raises and increased property values. Neither of these actions is actionable because they are merely predictions of future events. *Hartwig v. Bitter*, 29 Wis. 2d 653, 646, 139 N.W. 2d 644 (Wis. 1966). As the court noted in *Hartwig*, 29 Wis. 2d at 647:

> Ordinarily a prediction as to events to occur in the future is to be regarded as a statement of opinion only, on which the adverse party has no right to rely . . where the statement is that prices will remain unchanged, that taxes will be reduced, that cattle will reach a given weight within a specified time, that the plaintiff will be able to obtain a position, or that he will have profitable building lots next to a highway, the law has required him to form his own conclusions.

(quoting Prosser, Law of Torts (hornbook series), (3rd ed.), p. 744, sec. 104).

In sum, when plaintiffs' complaint is sifted to separate their factual allegations from their conclusory allegations, what's left is an ill-advised transaction with an unpopular set of defendants. There are no indicia of fraud or false statements that would allow these claims to proceed. Accordingly, this cause of action, along with the unjust enrichment claim alleged in count V, will be dismissed.[3]

[3] Plaintiffs did not offer any separate argument in defense of their unjust enrichment claim, mentioning it only in the caption of their argument related to the fraud claim. Accordingly, I infer that the two claims rest on the same insufficient set of allegations.

Count III: Truth in Lending Act against Countrywide and BA

The Hamuses allege that Countrywide failed to provide certain disclosures required by the Truth in Lending Act, 15 U.S.C. § 1601 *et seq*. ("TILA") and its implementing regulation, Regulation Z. Second Amended Complaint, dkt. 28, at ¶¶113-117. Plaintiffs seek statutory damages pursuant to 15 U.S.C. § 1640.[4]

Claims seeking statutory damages under the TILA are subject to a one-year statute of limitations, 15 U.S.C. § 1640(e), which requires that plaintiffs bring suit "within one year from the date of the occurrence of the violation." Here, the violations that plaintiffs complain of, *i.e.,* that Countrywide or BA failed to disclose finance charges accurately, failed to provide two copies of the notice of the right to rescind and failed to provide an accurate date for the expiration of the rescission period, occurred in 2006, five years ago.

Plaintiffs argue that the statute of limitations should be tolled in this case under the discovery rule doctrine, which postpones starting the limitations clock when a plaintiff could not have been expected to discover that she was injured any earlier than she did. *Cada v. Baxter*, 920 F. 2d 446, 450 (7th Cir. 1990). Although plaintiffs acknowledge having received a folder containing their mortgage and all of the closing documents after the closing in 2006, they nonetheless assert that "it would have been impossible for them to have known that the law had been violated because of forgery and what can best be described as a sham of an attorney." As noted above, however, nothing but speculation undergirds plaintiffs' broad accusations of forgery and a plot to gull them with a zombie attorney. Nothing prevented plaintiffs from examining

[4] Plaintiffs also had alleged that they were entitled to rescind the mortgage contract under 15 U.S.C. § 1635(f), but now concede that this claim is time-barred. *See* Plts.' Br. in Opp. to Mot. to Dismiss, dkt 33, at 13.

their loan documents and discovering their TILA claims long ago. Their TILA claim is time-barred.

Count IV: Real Estate Settlement Procedures Act (against Countrywide and BA)

In their second amended complaint, plaintiffs allege in conclusory terms that Countrywide violated Section 2607 of RESPA, which prohibits the splitting of "any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed." § 2607(b). Section 2607(c) outlines payments which are acceptable under RESPA and § 2607(d) outlines the penalties for violations of section 2607.

Although plaintiffs' theory of relief is not clear from their amended complaint, they explain in their brief that their RESPA claim is founded on the fact that their Settlement Statement shows that they were charged $320 for appraisal fees paid to Landsafe Appraisal Services, Inc. (which is a wholly-owned subsidiary of Countrywide), whereas a review of the appraisal shows that it was performed by Martin Appraisal Services in Marshfield, Wisconsin. Whether this discrepancy is sufficient to state a plausible claim of charge-splitting is dubious; it is just as likely that Landsafe simply subcontracted with Martin Appraisal and paid it the entire $320 charged on the settlement statement. In any event, it is unnecessary to decide this question because the claim is time-barred.

Like the TILA, RESPA has a one-year statute of limitations. 12 U.S.C. § 2614. Plaintiffs assert that "because the appraisal of the property was farmed out to a local appraiser, [they] could not have, nor would they have had any reason to, question the appraisal fees in any way."

However, the fact that the appraisal was "farmed out" was not hidden from them; as plaintiffs' admit, they have had a copy of the appraisal since the closing date. Second Amended Complaint, dkt. 28, ¶21 ("at the end of the closing the Hamuses received a folder with copies of their mortgage, along with the appraisal and other closing documents."). As with claims under TILA, neither the discovery rule nor the doctrine of equitable tolling permits a plaintiff to bring a RESPA claim whenever he gets around to reading his closing documents.

Count VI: Fair Debt Collection Practices Act (against BA/BAC)

As noted in the order addressing plaintiffs' first amended complaint, Congress enacted the FDCPA in order to eliminate "the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). To this end, the FDCPA prohibits a debt collector from various forms of oppressive or harassing conduct, including making false or misleading representations related to the character, amount or legal status of any debt. 15 U.S.C. § 1692e(2)(A). 15 U.S.C. § 1692(k)(d) requires an FDCPA action to be brought "within one year from the date on which the violation occurs."

As in their first amended complaint, plaintiffs allege that BA violated the Fair Debt Collection Practices Act by "falsely representing the status of the debt, in particular, that it is due and owing to a note holder, even though the original note holder, Countrywide, never transferred or endorsed the note to another entity." Amended Complaint, dkt. 28, at ¶126. Plaintiffs made this same claim in their first amended complaint and I dismissed on the ground that the alleged communications in which BA made this representation were made more than one year before plaintiffs filed their complaint; therefore, the claims were barred by the one-year

statute of limitations. Op. and Order, dkt. 27, at 22. Plaintiffs have amended their complaint to assert new communications by BAC in which it allegedly misrepresented the status of the debt. Specifically, plaintiffs allege that BAC violated the FDCPA when it: 1) left voice mails for the Hamuses throughout 2010 stating that the Hamuses were preapproved for lower interest rates and consolidation of bills; and 2) sent notices to the plaintiffs containing the following language: "BAC HOME LOANS SERVICING, LP services your home loan on behalf of your note (Note holder)."

Plaintiffs' new allegations are insufficient to state a claim under the FDCPA. Title 15 U.S.C. § 1692a(6)(F)(iii) provides that the term "debt collector" does not include a person collecting or attempting to collect a debt to the extent that such activity "concerns a debt which was not in default at the time it was obtained by such person." "The legislative history of section 1692a(6) indicates conclusively 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." *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985) (citing S. Rep. No. 95–382, 95th Cong., 1st Sess. 3, reprinted in 1977 U.S. Code Cong. & Ad. News 1695, 1698). *See also Montgomery v. Huntington Bank*, 346 F.3d 693, 699 (6th Cir. 2003) ("[T]he federal courts are in agreement: A bank that is a creditor is not a debt collector for the purposes of the FDCPA and creditors are not subject to the FDCPA when collecting their accounts.") (internal quotation marks omitted).

As plaintiffs admit, BAC began servicing the mortgage loan before plaintiffs defaulted. This means that it is a creditor, not a debt collector, and the FDCPA does not apply. *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103 (6th Cir. 1996) (no FDCPA claim against a loan servicer

because it acquired contracts at the time of sale and before default); *Crawford v. Countrywide Home Loans, Inc.*, 2011 WL 3875642, * 8 (N.D. Ind. Aug. 31, 2011) (same); *Gathing v. MERS, Inc.*, 2010 WL 889945 (W.D. Mich. March 10, 2010) (same).

Count VII: Violation of Section Wis. Stat § 100.18

In their second amended complaint, plaintiffs assert a new cause of action under Wisconsin's Deceptive Trade Practices Act, Wis. Stat. § 100.18(1).[5] This claim is based on

[5] Wisconsin Stat. § 100.18(1) provides:

> Fraudulent representations. (1) No person, firm, corporation or association, or agent or employee thereof, with intent to sell, distribute, increase the consumption of or in any wise dispose of any real estate, merchandise, securities, employment, service, or anything offered by such person, firm, corporation or association, or agent or employee thereof, directly or indirectly, to the public for sale, hire, use or other distribution, or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate, merchandise, securities, employment or service, shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, or over any radio or television station, or in any other way similar or dissimilar to the foregoing, an advertisement, announcement, statement or representation of any kind to the public relating to such purchase, sale, hire, use or lease of such real estate, merchandise, securities, service or employment or to the terms or conditions thereof, which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

misrepresentations allegedly made by BA regarding the loan modification. Specifically, plaintiffs allege that defendants BA and Countrywide violated Wis. Stat. § 100.18 by:

> 1) Promising to act upon requests for mortgage modifications within a specific period of time, but stalling the Hamuses for much longer periods of time;
>
> 2) Making false assurances to the Hamuses that their home would not be foreclosed while their requests for modifications were pending, but sending notices of intent to accelerate and then filing a foreclosure lawsuit;
>
> 3) Falsely informing the Hamuses that they must be in default on their mortgage loan to be eligible for modification; and
>
> 4) Giving the Hamuses "inaccurate and deceptive" reasons for denying their request for a modification.

The purpose of § 100.18 is "to protect the residents of Wisconsin from any untrue, deceptive or misleading representations made to promote the sale of a product" to a consumer. *K & S Tool & Die Corp.*, 2006 WI App 148, ¶ 26, 295 Wis.2d 298, 720 N.W.2d 507; *see also State v. Automatic Merchandisers of America, Inc.*, 64 Wis.2d 659, 663, 221 N.W.2d 683, 686 (1974); *Peterson v. Cornerstone Property Development*, 2006 WI App 132, ¶ 26, 294 Wis.2d 800, 815, 720 N.W.2d 716, 723. To state a claim under this statute, plaintiffs must allege facts that plausibly support an inference that: (1) the defendant made a representation to "the public" with the intent to induce an obligation, (2) the representation was "untrue, deceptive or misleading," and (3) the representation caused a pecuniary loss to the plaintiff. *Novell v. Migliaccio*, 2008 WI 44, ¶ 49, 309 Wis. 2d 132, 749 N.W.2d 544. For the purposes of Wis. Stat. § 100.18(1), a statement made to one person may constitute a statement made to "the public." *Bonn v. Haubrich*, 123 Wis. 2d 168, 173 n. 4, 366 N.W.2d 503 (Ct. App. 1985).

Plaintiffs have failed to allege facts that plausibly state a claim under Wis. Stat. § 100.18. Assuming for the sake of argument that plaintiffs could establish that they are members of the "public"– notwithstanding their long-standing relationship with Countrywide/BA[6] –the allegations in their second amended complaint do not support an inference that Countrywide/ BA's alleged misrepresentations were made with intent to induce plaintiffs to purchase any product or service or to take any action. Indeed, the gist of plaintiffs' allegations seems to be that Countrywide/BA made false statements about the availability of loan modification in an attempt to *prevent* plaintiffs from obtaining a modification, not to induce them to enter into one. Accordingly, plaintiffs cannot establish the first element of their claim under Wis. Stat. § 100.18.

Further, plaintiffs cannot show that defendants' alleged misrepresentations caused them a pecuniary loss. According to plaintiffs, defendants' alleged misrepresentations concerning the loan modification harmed them because, if these representations had not been made, then plaintiffs "could have pursued other financial options, including a loan modification with a Fannie Mae approved lender other than BA, which would have potentially reduced their principal payments." Dkt. 33, at 12, fn.6. As defendants point out, however, plaintiffs fail to allege facts explaining how or why BA's alleged misrepresentations hindered them from approaching other lenders about a modification. Additionally, plaintiffs' claim that they *might* have been able to reduce their principal payments with another lender but for BA's alleged

[6] *See Automatic Merchandisers of America, Inc.*, 64 Wis. 2d at 663, 221 N.W.2d at 686 (where plaintiffs have particular relationship with defendants that distinguish them from "the public" that legislature intended to protect, § 100.18 does not apply)

deception is insufficient to raise the possibility of relief above the speculative level. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 561 (2007). Accordingly, this claim will be dismissed.

Count VIII: Defamation Claim against Bank of America

Plaintiffs reassert their defamation claim against BA. I previously dismissed this claim because it was unclear what statement by whom plaintiffs claimed was defamatory. In their second amended complaint, plaintiffs' clarify that the alleged defamatory statements were statements by BA to credit reporting agencies in which BA indicated that plaintiffs had defaulted on debt payments owed to Countrywide/BA. Plaintiffs allege such statements are false because their debt actually is owed to whoever now owns the note. Plaintiffs argue that if that person cannot be identified, then they may actually not owe a debt to anyone.

The elements of a claim for defamation are: 1) a false statement; 2) communicated by speech, conduct or in writing to a person other than the one defamed; and 3) the communication is unprivileged and tends to harm one's reputation, lowering him or her in the estimation of the community or deterring third persons from associating or dealing with him or her. *Ladd v. Uecker*, 2010 WI App 28 ¶ 8, 323 Wis. 2d 798 (citing *Torgerson v. Journal/Sentinel, Inc.*, 201 Wis. 2d 524, 534, 536 N.W.2 d 472 (1997)). Truth is an absolute defense to a defamation claim. *Lathan v. Journal Co.*, 30 Wis.2d 146, 158, 140 N.W.2d 417 (1966). It is not necessary that the "statement in question be true in every particular. All that is required is that the statement be substantially true." *Id*.

Here, the allegedly defamatory statement is that plaintiffs owed debt to BA, when in fact, plaintiffs owe the money to somebody else. By plaintiffs' admission, BA's statement is

substantially true; the only alleged inaccuracy is the name of the creditor. However, plaintiffs have not alleged that this particular inaccuracy is the reason they cannot sell their home or find a job. Contrary to plaintiffs' suggestion, the fact that a clear chain of title may not exist from Countrywide to the ultimate purchaser of the note does not mean that plaintiffs did not default on their debt payments. This claim shall be dismissed.[7]

Conclusion

Even when the allegations of the second amended complaint are construed in the light most favorable to plaintiffs, they fail sufficiently to establish that any of the defendants could be found liable on any of plaintiffs' claims. Accordingly, the second amended complaint must be dismissed. Further, I agree with defendants that the second amended complaint should be dismissed with prejudice. *Arreola v. Godinez*, 546 F.3d 788, 796 (7th Cir. 2008) (district court has broad discretion to deny leave to amend when there is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice to the defendants, or where the amendment would be futile). Plaintiffs have had ample opportunity to tailor their complaint and have raised at least 10 various theories of relief between their first amended and second amended complaints. Plaintiffs' claims of liability fail not for a lack of specificity that could be cured with more detailed allegations, but because these claims simply do not fit the facts.

[7] Further, although defendants do not raise this issue, this claim may be preempted by the Fair Credit Reporting Act. 15 U.S.C. § 1681h(e) (providing immunity to consumer reporting agencies and entities furnishing information from common law defamation actions unless defendant furnished false information with malice or willful intent to injure).

ORDER

IT IS ORDERED that defendants' motion to dismiss the second amended complaint is GRANTED, and plaintiffs' second amended complaint is DISMISSED WITH PREJUDICE. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 27th day of September, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge