

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE: \*  
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DIANE ELAINE BARBER, \*  
\* CASE NUMBER 03-40045  
Debtor. \*  
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DIANE ELAINE BARBER, \*  
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Plaintiff, \*  
\*  
vs. \* ADVERSARY NUMBER 03-4162  
\*  
COUNTRYWIDE HOME LOANS, INC., \*  
et al., \*  
\*  
Defendants. \*

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M E M O R A N D U M O P I N I O N  
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This matter is before the Court upon the Motion to Dismiss the Amended Complaint<sup>1</sup> filed on behalf of Defendant The Mortgage Zone ("TMZ") on June 22, 2006. With leave of Court, Mark Beatrice, Trustee,<sup>2</sup> filed his Response on July 19, 2006. TMZ filed its Reply on July 28, 2006.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(K).

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<sup>1</sup>The original complaint in this case was filed on August 4, 2003, and did not include claims against Defendant The Mortgage Zone.

<sup>2</sup>By Memorandum Opinion and Order dated June 30, 2006, the Court substituted Trustee for Plaintiff/Debtor Diane Elaine Barber pursuant to Fed. R. Civ. P. 17(a) and 25(c).

In the Amended Complaint, filed on March 28, 2006, Trustee alleges that TMZ, a mortgage broker, through its agent David Kotowski, fraudulently induced Debtor Diane Elaine Barber ("Debtor") to refinance the existing mortgage on her residence, located at 222 Upland Avenue, Youngstown, Ohio, by misrepresenting that TMZ could consolidate all of her outstanding debt while significantly reducing her monthly interest rate, annual percentage rate, and monthly mortgage payment. Am. Compl. ¶ 22, see also Good Faith Estimate at 1 (Ex. 11 attached to Amended Complaint).

Trustee contends that TMZ engaged in a pattern of fraudulent conduct in order to acquire the mortgage, which included submitting no less than three mortgage applications to Defendant Countrywide Home Loans, Inc. ("Countrywide"), two of which contained fabricated information regarding Debtor's monthly income. Am. Compl. ¶¶ 20-21. Trustee further contends that TMZ not only built hidden fees into the mortgage process but also manipulated the application such that Debtor was ultimately subject to a higher interest rate, a higher annual percentage rate, and a larger monthly payment than originally represented by TMZ. Am. Compl. ¶ 19. Debtor signed the mortgage documents at issue in the case *sub judice* on June 28, 2001.

The Amended Complaint sets forth eight causes of action against TMZ including breach of contract (First Claim), breach of fiduciary duty (Second Claim), fraud (Fifth and Sixth Claim), conversion (Count Eight), civil conspiracy (Tenth Claim), and violations of the Ohio Mortgage Broker Act, OHIO REV. CODE ANN. § 1322.01, *et seq.*

("OMBA") (Third Claim) and the Ohio Pattern of Corrupt Activity Act, OHIO REV. CODE ANN. § 2923.31, *et seq.* ("OPCA") (Eleventh Claim<sup>3</sup>).

Trustee's civil conspiracy and OPCA claims<sup>4</sup> are premised upon TMZ's alleged violations of OMBA, the Ohio Consumer Sales Practices Act, OHIO REV. CODE ANN. § 1345.01, *et seq.* ("OCSPA"), the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, *et seq.* ("RESPA"), the Truth In Lending Act, 15 U.S.C. § 1601, *et seq.* ("TILA"), the Home Owners Equity Protection Act, 15 U.S.C. § 1602, *et seq.* ("HOEPA"), as well as alleged violations of federal criminal statutes including 18 U.S.C. §§ 1010 and 1341.

In his prayer for relief, Trustee seeks a release of the lien on the Upland Avenue residence, the cancellation of all instruments of indebtedness naming Countrywide as a creditor, lien holder, or assignee, and compensatory, statutory, and punitive damages.

In its Motion to Dismiss, TMZ argues that Debtor should have been aware of the unfavorable loan terms and inflated settlement costs of the mortgage on June 28, 2001. Therefore, TMZ contends that Trustee's claims based upon breach of fiduciary duty, fraud, conversion, civil conspiracy, and violations of OPCA are time barred by their respective statutes of limitations.

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<sup>3</sup>In the Amended Complaint, Trustee incorrectly identifies his OPCA claim as his Thirteenth Claim.

<sup>4</sup>A civil conspiracy claim cannot succeed without an underlying unlawful act. *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475, 700 N.E.2d 859 (1998). Similarly, a properly pleaded OPCA claim must allege the commission of two or more specifically prohibited state or federal criminal offenses by the defendant. *Universal Coach, Inc. v. New York City Transit Auth., Inc.*, 90 Ohio App.3d 284, 291, 29 N.E.2d 28 (1993).

## I. Standard of Review

A motion to dismiss made pursuant to FED. R. CIV. P. 12(b)(6) is for failure to state a claim upon which relief can be granted; it is incorporated into the Bankruptcy Rules through FED. R. BANKR. P. 7012. The defense of limitations may be properly raised by a motion to dismiss where "the complaint shows that the action was not brought within the statutory period." *Duncan v. Leeds*, 742 F.2d 989, 991 (6th Cir. 1984) (citing *Rauch v. Day & Night Manufacturing Corp.*, 576 F.2d 697, 702 (6th Cir. 1978)).

A court, in determining such a motion, must presume that the factual allegations of the complaint are true. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Similarly, all reasonable inferences are to be made in favor of the nonmoving party. *Id.* As a consequence, the Court may not grant a Rule 12(b)(6) motion based on a disbelief of a complaint's factual allegations. *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995) (citations omitted).

The Court's task under Rule 12(b)(6) is to determine the sufficiency, and not the merits, of the complaint. See *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236 (6th Cir. 1993). The issue to be decided is whether the plaintiff is entitled to offer evidence to support the claims stated in the complaint. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

## II. Law

As an initial matter, the Court finds that the following statutes of limitations apply to the claims set forth in the Amended

Complaint and are relevant to the motion to dismiss before the Court: (1) breach of fiduciary duty (Second Claim) - four years, see OHIO REV. CODE ANN. § 2305.09(D) (West 2006);<sup>5</sup> (2) fraud (Fifth and Sixth Claim) - four years after "the fraud is discovered", see OHIO REV. CODE ANN. § 2305.09(C) (West 2006); (3) conversion (Count Eight) - four years after "the wrongdoer is discovered," see OHIO REV. CODE ANN. § 2305.09(B) (West 2006); and (4) the OPCA claim (Eleventh Claim) - five years "after the unlawful conduct terminates or the cause of action accrues or within any longer statutory period of limitations that may be applicable," see OHIO REV. CODE ANN. § 2923.34(K) (West 2006).

The statute of limitations for the civil conspiracy claim (Tenth Claim) is governed by the nature of the underlying cause of action. *Michael v. Michael*, 2000 WL 1005209, \*3 (Ohio App. 6 Dist.); *Krause v. Case Western Reserve Univ.*, (Dec. 19, 1996), Cuyahoga App. No. 70526, unreported; *Cully v. St. Augustine Manor*, (Apr. 20, 1995), Cuyahoga App. No. 67601, unreported. Trustee premises his civil conspiracy claim on Defendants' alleged OCSA, OMBA, HOEPA, TILA, and RESPA violations.

Accordingly, the following statutes of limitations apply to the civil conspiracy claim: (1) OCSA violations - two years,<sup>6</sup> see OHIO

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<sup>5</sup>Because Trustee does not argue that TMZ's fiduciary duty is memorialized in any written agreement between the parties, this Court finds that Trustee's fiduciary duty claim is premised exclusively upon the common law of Ohio. See *Creaturo v. Duko*, 2005 WL 678513 \*7 (Ohio App. 7th Dist.)

<sup>6</sup>The discovery rule, discussed *infra*. at 9-11, is applicable for limitations purposes to claims for rescission under OCSA, however it does not apply to OCSA claims for money damages. *Rosenow v. Shutrump & Assoc.*, 163 Ohio App.3d 500, 839 N.E.2d 82 (Ohio App. 7 Dist. 2005).

REV. CODE ANN. § 1345.10 (West 2006); (2) OMBA violations - two years, see *Id.*; (3) HOEPA and TILA violations - one year,<sup>7</sup> see 15 U.S.C. § 1640(e) and (5) RESPA - three years, see 12 U.S.C. § 2614 (West 2006); (6) 18 U.S.C. §§ 1010 and 1341 violations - five years, see 18 U.S.C. § 3282 (West 2006).<sup>8</sup>

Although Debtor executed the mortgage documents in this case on June 28, 2001, TMZ concedes that fraudulent concealment may be used as grounds to equitably toll the respective statutes of limitations. However, both FED. R. CIV. P. 9(b) and OHIO R. CIV. P. 9(B) require a party alleging fraudulent concealment to plead the circumstances giving rise to it with particularity. *Evans v. Pearson Enterprises, Inc.*, 434 F.3d 839, 851 (6th Cir. 2006); see also *Aluminum Line Products Co. v. Brad Smith Roofing Co.*, 109 Ohio App.3d 246, 259-60, 671 N.E.2d 1343, 1351-53 (8th Dist. 1996); *Eilford v. Burt*, 1994 WL 470319 (Ohio App. 2nd Dist.); *Lewandowski v. W.E. Mikhail. M.D., Inc.*, 1992 WL 139922 \*4 (Ohio App. 6th Dist.).

Three elements must be pled in order to establish fraudulent concealment: (1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts. *Evans*, 434 F.3d at 851 (*citing Dayco Corp.*

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<sup>7</sup>The statute of limitations on TILA violations may extend to three years if certain required disclosures were not made. See 15 U.S.C. § 1635 (West 2006).

<sup>8</sup>TMZ does not challenge the civil conspiracy claim to the extent that it is premised upon the alleged violations of 18 U.S.C. §§ 1010 and 1341.

*v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975)),  
*cert. denied* 419 U.S. 997, 95 S.Ct. 310 (1974).

"If the plaintiff has delayed beyond the limitations period, he must fully plead the facts and circumstances surrounding his belated discovery and the delay which has occurred must be shown to be consistent with the requisite diligence." *Campbell v. Upjohn*, 676 F.2d 1122, 1126 (6th Cir. 1982) (*quoting Dayco*, 523 F.2d at 394). Accordingly, "a mere allegation of due diligence without asserting what steps were taken is insufficient" to survive a motion to dismiss. *Dayco*, 523 F.2d at 394; *see also Iron Workers Local Union No. 17 Ins. Fund and its Trustees v. Phillip Morris Co.*, 29 F.Supp.2d 801, 809 (N.D. Ohio 1998) ("Merely invoking the doctrine does not satisfy the law").

### **III. Analysis**

#### **A. The OPCA claim**

Debtor signed the mortgage documents at issue exactly four years and nine months prior to the filing of the Amended Complaint. R.C. § 2923.34(K), captioned "Civil Proceedings," provides, in pertinent part, "Notwithstanding any other provision of law providing a shorter period of limitations, a civil proceeding or action under this section may be commenced at any time within five years after the unlawful conduct terminates or the cause of action accrues or within any longer statutory period of limitations that may be applicable." OHIO REV. CODE ANN. § 2923.34(K). As a consequence, Trustee's OPCA claim was filed within the prescribed

five year statute of limitations. Therefore, TMZ's motion to dismiss Count Eleven fails as a matter of law.

B. The Fraud and Conversion Claims

The "discovery rule" is an exception to the general rule in Ohio that a cause of action typically accrues and the statute of limitations begins to run at the time the wrongful act was committed. *Collins v. Sotka*, 81 Ohio St.3d 506, 507, 692 N.E.2d 581 (1998). The rule provides that a cause of action does not arise until the plaintiff discovers, or by the exercise of reasonable diligence should have discovered, that he or she was injured by the wrongful conduct of the defendant. *Id.* (citing *O'Stricker v. Jim Walter Corp.*), 4 Ohio St.3d 84, 447 N.E.2d 727 (1983).

Ohio's discovery rule prescribes a two-pronged test: (1) the discovery of the injury; and (2) the knowledge that the injury was "caused by the conduct of the defendant." *O'Stricker*, 4 Ohio St.3d at 86,, paragraph two of the syllabus. "Since the rule's adoption, the Ohio Supreme Court has reiterated that discovery of an injury alone is insufficient to start the statute of limitations running if at that time there is no indication of wrongful conduct of the defendant." *Norgard v. Brush Wellman, Inc.*, 95 Ohio St.3d 165, 167, 766 N.E.2d 977, 979 (2002).

Here, Trustee asserts that TMZ's alleged fraud and conversion were discovered after August 3, 2005 when the parties exchanged discovery on the original complaint in the above-captioned case. Trustee further asserts that the alleged fraud and conversion could not have been discovered prior to August 3, 2005. In its Motion to

Dismiss, TMZ argues that Debtor should have known the facts giving rise to the fraud and conversion claims against TMZ on June 28, 2001.

Where the determination of the running of a statute of limitations is the subject of a factual dispute between the parties, the question of fact precludes dismissal. *In re First Energy Corp. Securities Litigation*, 316 F.Supp.2d 5581, 602 (N.D. Ohio 2004) (citing *Newman v. Warnaco Group Inc.*, 335 F.3d 187, 194-95 (2nd Cir. 2003)). Essentially, TMZ argues that Trustee's statement regarding Debtor's inability to discover TMZ's role in the alleged fraud prior to August 2005 warrants disbelief. However, as stated earlier, the Court may not grant a motion to dismiss based on a disbelief of a complaint's factual allegations. *See Columbia Natural Res*, 58 F.3d at 1109.

Because TMZ's statute of limitations challenge goes to the merits rather than the sufficiency of Trustee's claim that Debtor could not have discovered TMZ's role in the alleged fraudulent scheme prior to the exchange of discovery in August 2005, this Court finds that TMZ's Motion to Dismiss the fraud and conversion claims must fail as a matter of law.

### C. The Fiduciary Duty Claim

R.C. § 2305.09 contains its own discovery rule for certain torts, such as fraud and conversion (*see supra.* at 5-6, 9-11) and the Ohio Supreme Court has concluded that the legislature's failure to include a discovery rule for all of the tort claims under R.C. § 2305.09 implies that it was not the legislature's intent to apply

the discovery rule to such excluded claims. *Investors REIT One v. Jacobs*, 46 Ohio St.3d 176, 181, 546 N.E.2d 206 (1989). Therefore, the discovery rule is inapplicable to claims for breach of fiduciary duty. See *Jim Brown Chevrolet, Inc. v. S.R. Snodgrass, A.C.*, 141 Ohio App.3d 583, 587, 752 N.E.2d 335 (Ohio App. 11th Dist. 2001); *Helman v. EPL Prolong, Inc.*, 139 Ohio App.3d 231, 249, 743 N.E.2d 484 (Ohio App. 7th Dist. 2000).

Accordingly, a claim for breach of fiduciary duty accrues when the claimant's interest is impaired by such a breach, rather than when the breach is discovered. *Jim Brown Chevrolet Inc.*, 141 Ohio App.3d at 338. Therefore, in the instant matter, any act constituting a breach of fiduciary duty that occurred more than four years prior to the filing of the Amended Complaint is barred by R.C. § 2305.09(D).

Because the Amended Complaint reveals on its face that Debtor's interest were impaired by TMZ's alleged breach of fiduciary duty in April 2001, Trustee's breach of fiduciary duty claim is time barred by the applicable statute of limitations.

#### D. The Civil Conspiracy Claims

In an attempt to toll the remaining statutes of limitations in this case, Trustee alleges in the Amended Complaint that TMZ "took affirmative steps to conceal their [unlawful acts] from [Debtor], and in spite of [Debtor's] exercise of due diligence, [Debtor] could not have and did not discover the [claims against TMZ] until August 5, 2005." Am. Compl. ¶¶ 60, 64, 71, 76, 83, 97. The crux of TMZ's statute of limitations argument with respect to the

remaining claims is that Trustee has failed to plead the facts demonstrating fraudulent concealment with particularity.

In his Response Brief, Trustee cites *Velotta v. Leo Petronzio Landscaping, Inc.*, 69 Ohio St.2d 376, 433 N.E.2d 147 (1982) and *Mitchell v. Haynes*, 2001 WL 1004256 (Ohio App. 7th Dist.), for the proposition that a plaintiff does not have the burden to affirmatively plead compliance with the statute of limitations in Ohio. The Ohio Supreme Court in *Velotta* wrote, "A motion to dismiss a complaint under Civ. R. 12(B) which is based upon the statute of limitations is erroneously granted where the complaint does not conclusively show on its face the actions were barred by the statute of limitations." *Id.* at 379. Because Trustee alleges fraudulent concealment, he concludes that the Amended Complaint does not conclusively show that the claims at issue are time-barred.

However, the Sixth Circuit Court of Appeals requires a plaintiff to affirmatively plead fraudulent concealment where the plaintiff's claims appear to be past the time limit. In *Hoover v. Langston Equipment Associates, Inc.*, 958 F.2d 742 (6th Cir. 1992), the Sixth Circuit explained the rationale behind the pleading requirement:

Under the normal rules of pleading, the statute of limitations is an affirmative defense and must be raised in the answer. Since Rule 9(f) makes allegations of time material, however, the defense of the statute may be raised on a motion to dismiss under Rule 12(b)(6) when it is apparent from the face of the complaint that the time limit for bringing the claim has passed. Thus, although Rule 9(f) apparently was designed simply to require a higher level of information in the pleadings, the federal courts have employed the rule as a screening device for time-barred claims and this seems consistent with general

policies set forth in Rule 1 of achieving a just, speedy, and inexpensive adjudication of complaints.

*Id.* at 744 (internal citations omitted). As such, in cases where the complaint discloses a failure by the plaintiff to file within the time allowed, the Sixth Circuit obligates the plaintiff to come forward with allegations explaining why the statute of limitations should be tolled. *Id.* at 745; see also *Auslander v. Energy Mgmt. Corp.*, 832 F.2d 354, 356 (6th Cir. 1987) (explaining that plaintiff facing motion to dismiss had to plead "circumstances which would indicate why the alleged fraud was not discovered earlier and which would indicate why the statute should be tolled.").

Contrary to TMZ's protestations, Trustee in the above-captioned case has complied with the heightened pleading requirement. The Amended Complaint states that TMZ's acts, which form the basis of the Amended Complaint, were discovered after August 5, 2005. In his Response, Trustee explains that August 5, 2005 was the date that discovery was provided on the original complaint in this case. The Court finds that the Amended Complaint provides a sufficient reason for Debtor's late discovery of the operative facts in this case. To hold otherwise the Court would necessarily have to engage in the very sort of fact finding that is prohibited when entertaining a motion to dismiss.

The District Court for the Southern District of Ohio reached the same conclusion in a case involving allegations of fraud, civil conspiracy, and violations of OPCA and TILA in *Matthews v. New Century*, 185 F.Supp.2d 874 (S.D. Ohio 2002). Like Trustee in the

case *sub judice*, the *Matthews* plaintiffs alleged that a mortgage broker fraudulently misrepresented their income and employment in order to further a home improvement scam specifically targeting elderly unmarried female borrowers. *Id.* at 879-80. The *Matthews* plaintiffs further alleged that the mortgage broker fraudulently induced them to undertake home improvement loans by promising them a low interest rate, when, in fact, the plaintiffs were ultimately subject to substantially higher interest rates than originally represented by the broker. *Id.* at 881.

In response to the argument that the *Matthews* plaintiffs failed to plead the fraudulent concealment allegation in their TILA claim with particularity, the Court wrote:

Here, the Plaintiffs allege that New Century fraudulently concealed the actual terms of the Plaintiffs' loans until well after they had closed, and the Plaintiffs had begun payments. They assert, furthermore, that they could not learn the actual terms of their loans, despite their due diligence. Thus, assuming that the Plaintiffs' well-pleaded claims are true, which the Court must do in deciding a motion to dismiss, the statute of limitations on their claims did not begin to run until they discovered, or had reasonable opportunity to discovery, the fraud of which they complain.

*Id.* at 884.

The same is true in the above-captioned case. Trustee alleges that the date that Debtor discovered the alleged acts of TMZ that give rise to the claims in the Amended Complaint was August 5, 2005. Accepting as true the allegation that Debtor was not able to discover the claims prior to the exchange of discovery in this case, the Court finds that the facts alleged are sufficient to survive the Motion to Dismiss on the claim for civil conspiracy.

Finally, in the closing paragraphs of its Reply Brief, TMZ argues that the legislative history of TILA reveals that Trustee is not the proper party to bring suit. Because TILA was enacted to protect homeowners and consumers, TMZ reasons that TILA was not intended to benefit a bankruptcy estate. Reply at 6-7. Not surprisingly, TMZ cites no authority for its conclusion.

In fact, Circuit courts that have examined the issue have uniformly concluded that a trustee in bankruptcy has standing to assert a TILA claim. See *Murphy F. Household Finance Corp.*, 560 F.2d 206, 207 *Guerpo v. Amresco Residential Mortg. Corp.*, 13 Fed. Appx. 649, 650 (9th Cir. 2001); *First National Bank and Trust Co. v. Flatau (In re Wood)*, 643 F.2d 188, 195 (5th Cir. 1980). Accordingly, TMZ's standing argument is without merit.

An appropriate Order will follow.

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**HONORABLE KAY WOODS**  
**UNITED STATES BANKRUPTCY JUDGE**

UNITED STATES BANKRUPTCY COURT  
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O R D E R  
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For the reasons set forth in the Court's Memorandum Opinion, this Court denies Defendant The Mortgage Zone, Inc.'s Motion to Dismiss the Amended Complaint with respect to Trustee's claims for fraud, conversion, civil conspiracy and violations of the Ohio Pattern of Corrupt Activity Act, OHIO REV. CODE ANN. § 2923.31, et seq., and grants the Motion to Dismiss the Amended Complaint with respect to Trustee's claim for breach of fiduciary duty.

IT IS SO ORDERED.

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HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE