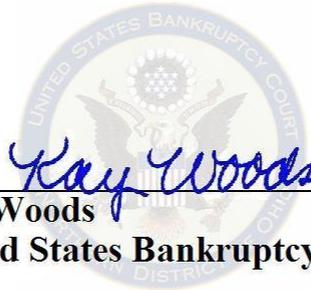


IT IS SO ORDERED.



Dated: April 07, 2010
10:02:22 AM

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

PHILLIP D. PACE, SR. and
HOWARLETTE V. PACE,

Debtors.

* * * * *

PHILLIP D. PACE, SR., et al.,

Plaintiffs,

v.

FIRST FRANKLIN LOAN SERVICES
aka HOME LOAN SERVICES, INC.,
et al.,

Defendants.

CASE NUMBER 09-43655

ADVERSARY NUMBER 09-4343

HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING MOTION TO DISMISS

This cause is before the Court on Defendants Home Loan Services, Inc. and Deutsche Bank National Trust Company, as

Trustee's [sic] Motion to Dismiss First, Second, Fourth, Fifth and Sixth Claims of Plaintiffs' Adversary Complaint ("Motion to Dismiss") (Doc. # 15) filed by Defendants Home Loan Services, Inc.¹ ("HLS") and Deutsche Bank National Trust Company, as Trustee for First Franklin Mortgage Loan Trustee 2006-FF7 Mortgage pass-through Certificates Series 2006-FF7 ("Deutsche Bank") on February 18, 2010. On March 15, 2010, Plaintiffs/Debtors Phillip D. Pace, Sr. and Howarlette V. Pace filed Memorandum in Opposition to Motion to Dismiss ("Memo in Opposition") (Doc. # 24). On April 1, 2010, Defendants filed Motion for Leave to File a Reply Brief in Support of Their Motion to Dismiss First, Second, Fourth, Fifth and Sixth Claims of Plaintiffs' Adversary Complaint (Doc. # 27).²

The Motion to Dismiss asserts that the Complaint fails to state a claim upon which relief can be granted in the First, Second, Fourth, Fifth and Sixth Claims, and, therefore, those claims must be dismissed pursuant to Federal Rule of Bankruptcy Procedure 7012(b) and Federal Rule of Civil Procedure 12(b)(6).

For the reasons stated below, the Court will grant, in part, and deny, in part, the Motion to Dismiss. Moreover, the Court will

¹ Plaintiffs incorrectly named HLS as First Franklin Loan Services aka Home Loans Services, Inc. in the Complaint. (See Compl. ¶ 9.)

² This Court's Adversary Case Management Initial Order (Doc. # 4) expressly states, "Absent prior leave of the Court, no reply or further pleading will be permitted." (Case Mgt. Order ¶ 6B (emphasis added).) Although Defendants style their motion as one seeking leave, it fails in that regard. In the first paragraph Defendants request leave to file a Reply Brief; the remainder of the "motion" is the reply brief itself. Defendants clearly did not obtain prior leave of the Court before filing Document 27. As a consequence, this Court disregards the document and, to the extent necessary, denies Defendants the leave they request.

provide Debtors leave to file an amended complaint.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). 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).

I. FACTUAL AND PROCEDURAL BACKGROUND

Debtors filed a voluntary petition pursuant to chapter 13 of the Bankruptcy Code on September 25, 2009 ("Filing Date"). On December 16, 2009, Debtors filed Complaint (Doc. # 1). Debtors' Complaint asserts six claims for relief: (i) improper proof of claim ("First Claim"), (ii) violation of the Real Estate Settlement Procedures Act ("RESPA") ("Second Claim"), (iii) violation of the Ohio Consumer Sales Practices Act, (iv) breach of contract ("Fourth Claim"), (v) breach of contract and the covenant of good faith and fair dealing ("Fifth Claim"), and (vi) negligent loan servicing ("Sixth Claim"). (See Compl.)

The following facts are derived from the Complaint, which, for purposes of the Motion to Dismiss, the Court will view in the light most favorable to Debtors. Deutsche Bank holds the note and mortgage on Debtors' principal residence, which is located in Trumbull County, Ohio. HLS is the servicing agent for Deutsche Bank for Debtors' note and mortgage. Although Debtors fell behind in paying their property taxes, they had worked out a payment plan with the Trumbull County Treasurer to cure the delinquent taxes. Despite

Debtors' arrangement with the Trumbull County Treasurer, Defendants paid the Treasurer, on behalf of Debtors, (i) the entire delinquent tax balance and (ii) an additional year of property taxes. After paying Debtors' property taxes, Defendants increased Debtors' monthly mortgage payment from \$805.68 to \$1,523.00.

Although Debtors timely made their mortgage payments, in accordance with the terms of the note and mortgage, Defendants consistently and improperly assessed late fees. In addition, Defendants initiated proceedings to foreclose on Debtors' residence.

Debtors exercised their rights under RESPA by sending Defendants a qualified written request, which disputed the alleged mortgage arrearages and requested an investigation regarding Defendants' application of the payments made by Debtors. Defendants responded to Debtors' qualified written request on November 2, 2009 ("Response"). Debtors contend the Response identified improper charges, which demonstrated Defendants either (i) did not properly investigate the disputes in Debtors' qualified written request or (ii) failed to conduct any investigation into such disputes.

II. STANDARD FOR REVIEW

Federal Rule of Civil Procedure 8(a)(2), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7008(a), requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2) (West 2010). The complaint does not have to contain "detailed factual allegations," but it must contain more than mere

"labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Federal Rule of Civil Procedure 12(b)(6), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012(b), provides that a claim can be dismissed if it fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6) (West 2010). Accordingly, a complaint will be dismissed if it fails to allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949.

In determining whether a claim alleges enough facts to state a claim to relief that is plausible on its face, the court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007); see also *Twombly*, 550 U.S. at 555. However, the Court does not have to accept as true legal conclusions or unwarranted factual inferences. *Iqbal*, 129 S. Ct. at 1949-50; *Directv, Inc.*, 487 F.3d at 476.

II. ANALYSIS

A. First Claim: Improper Proof of Claim

Debtors' First Claim asserts (i) Defendants' Proof of Claim (Claim No. 5)³ filed on October 12, 2009, contains improper and inconsistent charges, and (ii) Defendants' collection of and attempt to collect such improper charges by filing the Proof of Claim violates Federal Rule of Bankruptcy Procedure 3001 and the automatic stay in 11 U.S.C. § 362(a)(3).

Defendants urge dismissal of the First Claim because: (i) there is no private cause of action for violating Rule 3001, and (ii) filing a proof of claim, even if erroneous, does not violate the automatic stay.

Debtors concede Rule 3001 does not provide a private cause of action. In addition, Debtors clarify they are not alleging that filing a proof of claim violates the automatic stay by "withdrawing" any such allegation. Nevertheless, Debtors argue the First Claim should not be dismissed because (i) it is actually an objection to the Defendants' Proof of Claim under Rule 3007, and (ii) Defendants are violating the automatic stay through their "ongoing attempt to collect the over-escrowed payments." (Memo in Opp. at 5.)

Paragraphs 15 and 16 of the Complaint expressly state that Debtors object to Defendants' Claim No. 5 and further object to Defendants' calculation of the monthly payment on the basis that

³ On February 18, 2010, Defendants (i) amended Claim No. 5 (Claim No. 5-2), and (ii) filed the Motion to Dismiss.

Defendants are requiring Debtors to pay too much into escrow. The First Claim incorporates paragraphs 1 through 19 as if fully restated. As a consequence, although the First Claim is not a model of clarity, it does contain Debtors' objection to Claim No. 5. Moreover, Debtors allege that, subsequent to the Filing Date, Defendants are assessing improper charges through the increased monthly payment, which could constitute a violation of the automatic stay. These allegations are sufficient to withstand the Motion to Dismiss; however, for purposes of clarity, the Court will direct Debtors to amend the First Claim to expressly (i) object to Claim No. 5 (as amended) and/or (ii) allege violation(s) of the automatic stay.

B. Second Claim: Violation of RESPA

Debtors' Second Claim alleges a violation of RESPA. Debtors allege that (i) they sent a qualified written request ("QWR") to HLS "disputing that they were behind and requesting an investigation into the payments" (Compl. ¶ 17), and (ii) HLS failed to "conduct a proper investigation (if any was done at all) into the dispute regarding the loan" (Compl. ¶ 18).

Defendants assert that Debtors' RESPA claim fails because Defendants were not required to conduct a "reasonable" investigation after they received Debtors' QWR. (Mot. to Dismiss at 7.) Debtors counter that Defendants' argument is absurd because it contemplates that an unreasonable investigation could comply with RESPA's requirements.

After receipt of a QWR, RESPA requires a loan servicer to (i) conduct an investigation into the claims asserted by the borrower, and (ii) respond to the borrower.

(2) Action with respect to inquiry. Not later than 60 days . . . after the receipt from any borrower of any qualified written request . . . the servicer shall --

(A) make appropriate corrections in the account of the borrower . . . and transmit to the borrower a written notification of such correction;

* * *

(B) after conducting an investigation, provide the borrower with a written explanation or clarification that includes --

(i) to the extent applicable, a statement of the reasons for which the servicer believes the account of the borrower is correct as determined by the servicer; [or]

* * *

(C) after conducting an investigation, provide the borrower with a written explanation or clarification that includes --

(i) information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer[.]

12 U.S.C. § 2605(e)(2) (LexisNexis 2010) (emphasis added).

Therefore, unless the servicer simply corrects the errors identified by the borrower in the QWR, the servicer is required to conduct an investigation under subsection (B) or (C). *Id.*

Debtors allege the Response to their QWR evidences Defendants' lack of a proper investigation because the Response continued to assess improper charges. Debtors also allege, in the alternative,

that Defendants may not have conducted any investigation. As a consequence, Debtors allege enough facts in the Second Claim to state a claim to relief that is plausible on its face and to withstand the Motion to Dismiss.

C. Fourth and Fifth Claims: Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing

Defendants allege the Fourth and Fifth Claims fail to state a cause of action because Debtors fail to identify (i) a contractual relationship between the Debtors and Defendants and (ii) the specific contractual term that was breached. Defendants further argue the Fourth and Fifth Claims should be dismissed because, under Ohio law, breach of "good faith and fair dealing" does not exist as a cause of action separate and apart from a breach of contract claim.

Debtors argue that paragraph 14 of the Complaint sets forth enough facts to demonstrate a breach of paragraph 2 of the mortgage instrument and paragraph 13 alleges a breach of paragraph 3 of the mortgage instrument. (Memo in Opp. at 6-7.) Debtors further contend that the overall improper servicing of their loan "violates the implied covenant of good faith and fair dealing." (*Id.* at 7.)

A breach of contract claim in Ohio must allege (i) the existence of a binding contract, (ii) the breaching party's failure to perform its contractual obligations without legal excuse, (iii) the non-breaching party's substantial performance of the contract and (iv) the damages suffered by the non-breaching party as a result of the breach. *See, e.g., Am. Sales, Inc. v. BOFFO*, 593 N.E.2d 316,

321 (Ohio Ct. App. 1991); *Garofalo v. Chicago Title Ins. Co.*, 661 N.E.2d 218, 226 (Ohio Ct. App. 1995).

The common law of Ohio imposes an implied duty of good faith in the performance of contracts. *Stars of Cleveland, Inc. v. Fred Martin Dodge Suzuki, Inc.*, 2009 Ohio 4012, ¶ 41 (Ohio Ct. App. 2009). However, the breach of the implied covenant of good faith and fair dealing is part of a breach of contract claim, and, therefore, it cannot be sustained without a breach of contract claim. *Gates v. Ohio Sav. Ass'n*, 2009 Ohio 6230, ¶ 54 (Ohio Ct. App. 2009)

Debtors allege that Deutsche Bank breached its contract with Debtors. The Complaint sets forth: (i) the note and mortgage between Debtors and Deutsche Bank; (ii) Debtors substantially performed the note and mortgage by timely making monthly payments; (iii) Deutsche Bank breached the note and mortgage by requiring Debtors to pay more than required into the escrow account for taxes and improperly increasing Debtors monthly payment; and (iv) Debtors were injured by Deutsche Bank's breach. As a consequence, Debtors allege enough facts to state a claim for breach of contract against Deutsche Bank. Because Debtors state a plausible claim for breach of contract against Deutsche Bank, Debtors also state a plausible claim for breach of the implied covenant of good faith and fair dealing.

Contrary to Defendants' assertion that Debtors must specify the term of the contract that was breached, Debtors are simply required

to make "a short and plain statement of the [breach of contract] claim showing that the [Debtors are] entitled to relief." FED. R. CIV. P. 8(a)(2) (West 2010). There is no heightened pleading standard for a breach of contract claim. See FED. R. CIV. P. 9 (West 2010); *Unencumbered Assets, Trust v. JP Morgan Chase Bank (In re Nat'l Century Fin. Enters.)*, 617 F. Supp. 2d 700, 720 (S.D. Ohio 2009); and *Cairns v. Ohio Sav. Bank*, 109 Ohio App. 3d 644, 648 (Ohio Ct. App. 1996). Here, Debtors have pled enough facts to allow the Court to draw reasonable inferences that Deutsche Bank breached the contract and the implied covenant of good faith and fair dealing.

Defendants, however, correctly point out that Debtors fail to state a claim for breach of contract against HLS because Debtors have not identified a binding contract between Debtors and HLS. Debtors allege that HLS services their mortgage and is the servicing agent for Deutsche Bank. (Compl. ¶ 9.) Despite these allegations, the only contractual relationship Debtors identify in the Complaint is with Deutsche Bank through the note and mortgage. HLS's role in servicing Debtors' mortgage does not create a contractual relationship between Debtors and HLS. The agency relationship between Deutsche Bank and HLS does not make HLS liable for Deutsche Bank's alleged breach of contract. See *Stryker Farms Exch. v. Mytczynskyj*, 129 Ohio App. 3d 338, 342 (Ohio Ct. App. 1998) ("An agent for a disclosed principal, acting within the scope of his authority and in the name of the principal, may not ordinarily be held personally liable."). Because Debtors fail to state a cause

of action for breach of contract against HLS, they also fail to state a claim for breach of the implied covenant of good faith and fair dealing.

As a consequence, Debtors' Fourth and Fifth Claims allege enough facts to state a claim that is plausible on its face against Deutsche Bank, but not against HLS. Therefore, with respect to Debtors' Fourth and Fifth Claims, (i) the Motion to Dismiss will be denied with respect to Deutsche Bank and (ii) granted with respect to HLS.

In Debtors' Memo in Opposition, Debtors request leave to amend the Complaint to combine Debtors' Fourth and Fifth Claims into one claim. The Court will grant this request.

D. Sixth Claim: Negligent Loan Servicing

Defendants urge the Court to dismiss Debtors' Sixth Claim. Without any discussion, Debtors assert they "are willing to withdraw this claim." (Memo in Opp. at 7.) The Court will treat Debtors' willingness to withdraw their Sixth Claim as a concession that this cause of action should be dismissed. As a consequence, the Motion to Dismiss will be granted as to Debtors' Sixth Claim.

E. Identification of Defendants in Debtors' First and Second Claims

In footnotes, Defendants assert that (i) Debtors' First Claim should be dismissed as against HLS because it fails to assert a claim against HLS, and (ii) Debtors' Second Claim should be dismissed as against Deutsche Bank because it fails to assert a

claim against Deutsche Bank.⁴ Debtors' Memo in Opposition asserts that Deutsche Bank and HLS, as the servicing agent for Deutsche Bank, are jointly liable for all of the allegations in the Complaint. The Court will require Debtors to clarify their specific claims against each Defendant.

III. CONCLUSION

For the reasons stated above:

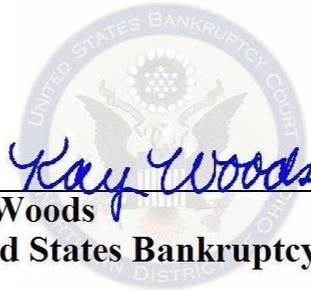
- (i) The Motion to Dismiss will be denied with respect to Debtors' First and Second Claims;
- (ii) With respect to Debtors' Fourth and Fifth Claims, the Motion to Dismiss will be (a) denied with respect to Deutsche Bank and (b) granted with respect to HLS;
- (iii) The Motion to Dismiss will be granted with respect to Debtors' Sixth Claim; and
- (iv) Debtors will be granted 14 days to (a) amend their First Claim, (b) combine the Fourth and Fifth Claims, and (c) clarify the allegations against each Defendant.

An appropriate order will follow.

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⁴ Defendants treat the Fourth, Fifth, and Sixth Claims as against both Defendants because of perceived ambiguity in the Complaint.

IT IS SO ORDERED.



Dated: April 07, 2010
10:02:22 AM

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

PHILLIP D. PACE, SR. and
HOWARLETTE V. PACE,

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PHILLIP D. PACE, SR., et al.,

Plaintiffs,

v.

FIRST FRANKLIN LOAN SERVICES
aka HOME LOAN SERVICES, INC.,
et al.,

Defendants.

CASE NUMBER 09-43655

ADVERSARY NUMBER 09-4343

HONORABLE KAY WOODS

ORDER (i) GRANTING, IN PART, AND DENYING, IN PART,
DEFENDANTS' MOTION TO DISMISS AND (ii) GRANTING
DEBTORS 14 DAYS TO FILE AN AMENDED COMPLAINT

This cause is before the Court on Defendants Home Loan

Services, Inc. and Deutsche Bank National Trust Company, as Trustee's [sic] Motion to Dismiss First, Second, Fourth, Fifth and Sixth Claims of Plaintiffs' Adversary Complaint ("Motion to Dismiss") (Doc. # 15) filed by Defendants Home Loan Services, Inc. and Deutsche Bank National Trust Company, as Trustee for First Franklin Mortgage Loan Trustee 2006-FF7 Mortgage pass-through Certificates Series 2006-FF7 on February 18, 2010. On March 15, 2010, Plaintiffs/Debtors Phillip D. Pace, Sr. and Howarlette V. Pace filed Memorandum in Opposition to Motion to Dismiss (Doc. # 24).

For the reasons stated in the Court's Memorandum Opinion Regarding Motion to Dismiss entered this date:

- (i) The Motion to Dismiss is denied with respect to Debtors' First and Second Claims;
- (ii) With respect to Debtors' Fourth and Fifth Claims, the Motion to Dismiss is (a) denied with respect to Deutsche Bank and (b) granted with respect to HLS;
- (iii) The Motion to Dismiss is granted with respect to Debtors' Sixth Claim; and
- (iv) Debtors are granted 14 days to file an amended complaint that (a) amends Debtors' First Claim, (b) combines Debtors' Fourth and Fifth Claims, and (c) clarifies which Defendant is allegedly liable under each claim of such amended complaint.

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