

Defendant BAC Home Loans Servicing, L.P. ("BAC") on September 23, 2010, which seeks dismissal of claims 3¹, 5², and 7 of the Complaint. On October 21, 2010, Plaintiff/Debtor Michael Kolesar ("Plaintiff") filed Memorandum in Opposition to Motion to Dismiss ("Response") (Doc. # 18), in which he states that he "will withdraw" claims 3 and 5 of the Complaint. (Response at 1.) The Court therefore deems claims 3 and 5 to be voluntarily dismissed.

Plaintiff commenced this Adversary Proceeding on August 2, 2010, by filing Complaint for Violations of Federal and State Law ("Complaint") (Doc. # 1). The Complaint alleges seven claims, including Seventh Claim for Relief (Fair Debt Collection Practices Act) ("Claim Seven"). Claim Seven alleges that BAC "is a debt collector as defined by the FCPA [sic]. The Defendant attempted to collect a mortgage debt used primarily for personal, family, or household purpose." (Compl. ¶ 44). BAC argues that Claim Seven should be dismissed as a matter of law because BAC is not a debt collector as defined by the Fair Debt Collection Practices Act ("FDCPA"). (Mot. to Dismiss at 5.)

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

¹In Claim Three, which has been voluntarily dismissed, Plaintiff alleged violations of the Ohio Consumer Sales Practices Act.

²Claim Five, which has also been voluntarily dismissed, alleged that BAC breached its fiduciary duty to the Plaintiff.

is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. Background

A. The Complaint

The Complaint arises "as a counterclaim to the proof of claim filed by BAC in [Plaintiff's bankruptcy case]. This action primarily arises from improper servicing by BAC that has led to two improper foreclosures." (Compl. ¶ 9.)

The following facts are based on Plaintiff's Complaint³. In or about November 2005, Plaintiff was approximately three mortgage payments behind, but tendered \$5,000.00 to BAC⁴ to cure the arrearages. BAC rejected this payment. (*Id.* ¶ 10.) Plaintiff contends that "this payment was rejected based on the improper assessment of forced placed insurance on November 28, 2005." (*Id.* ¶ 11.) Further, on November 28, 2005, BAC assessed more than \$3,500.00 for hazard insurance, an assessment that occurred despite the fact that Plaintiff had maintained hazard insurance on the property. (*Id.* ¶ 12.) Two months later, in January 2006, BAC further assessed \$2,170.00 for forced placed insurance. This time, however, "BAC acknowledged receipt of proof of insurance and

³As this Memorandum Opinion addresses a Motion to Dismiss, the Court construes the facts in the light most favorable to the Plaintiff. See *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007).

⁴In November 2005, BAC was known as Countrywide Home Loans, Inc. (Compl. ¶ 10.)

attempted to refund the \$2,170.00. . . . BAC also assessed and refunded the amount of \$2,481.00 in conjunction with charging the \$2,170.00. This assessment and refund occurred 5 successive times ultimately resulting in an additional charge of \$311.00.”

(*Id.* ¶ 13.) Plaintiff asserts that but for the improper assessment of insurance, “the first foreclosure filed at the end of November 2005 would not have occurred.” (*Id.* ¶ 15.)

In April 2006, Plaintiff and BAC “agreed to a resolution of the first foreclosure. The agreement provided that the debtor would tender approximately \$13,900.00 and the loan would be brought current. The debtor did in fact tender this money in April of 2006. The Defendant cashed the check and an order was submitted that the foreclosure complaint was dismissed at BAC’s costs.” (*Id.* ¶ 16.)

Plaintiff contends that BAC (i) failed to honor the reinstatement, (ii) continued to hold the loan in delinquent status, and (iii) charged the Plaintiff for foreclosure fees and continued forced placed insurance. (*Id.* ¶ 17.) In August 2006, BAC again foreclosed on Plaintiff’s residence. From August 2006 to the present, BAC “has continued to force place insurance . . . on the property and charge fees and costs that are unreasonable, non-bona fide [sic], and outright fraudulent.” (*Id.* ¶ 18.)

B. The Motion to Dismiss

In the Motion to Dismiss, BAC contends that is it not a debt collector for purposes of the FDCPA and, thus, is not subject to the statute. BAC asserts that “[t]he law is well settled that ‘[a] debt

collector does not include the consumer's creditors, a mortgage servicing company, or assignee of a debt, as long as the debt was not in default at the time it was assigned." (Mot. to Dismiss at 5) (citing *Martin v. Select Portfolio Serving Holding Corp.*, 2008 WL 618788, at *4 (S.D. Ohio Mar. 3, 2008)) (emphasis added) (citation omitted). BAC further alleges in a footnote that "[e]ven if this Court were to find that BAC is a debt collector under the FDCPA (which it is not), dismissal of Kolesar's FDCPA claim would still be warranted because he has failed to allege which specific statutes BAC violated or plead sufficient facts to sustain such claim." (Mot. to Dismiss at 5, n. 3.)

C. The Response

Plaintiff responds that BAC's "own documents in the proof of claim(POC) [sic] illustrate that BAC could only have acquired the loan after default." (Resp. at 1.) Plaintiff further contends that BAC meets the definition of a debt collector because the account was in default at the time that BAC acquired it:

[t]he POC indicates that payments are due from May of 2006 until January of 2010. The assignment of mortgage indicates that Countrywide Home Loans, Inc [sic] was assigned the mortgage in August of 2006, three months into the default. The note attached to the POC illustrates that America's Wholesale Lender originated the loan in 2002. . . . [T]he default alleged by the Defendant in the POC began as early as May of 2006. Therefore, the servicing by BAC began after the loan was already in default.

(Resp. at 3.) Plaintiff also cites to specific sections of the FDCPA, i.e., 15 U.S.C. §§ 1692e(2) and 1692f(1), which Plaintiff asserts BAC violated. (*Id.* at 3-4.)

II. Standard for Review

Federal Rule of Civil Procedure 8(a)(2) 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). 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 Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Rule 12(b)(6) 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). 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.

Referring to *Twombly*, the Court of the Appeals for the Sixth Circuit noted:

The Supreme Court has recently clarified the law with respect to what a plaintiff must plead in order to survive a Rule 12(b)(6) motion. The Court stated that "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Additionally, the Court emphasized that even though a complaint need not contain "detailed" factual allegations, its "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true."

Association of Cleveland Fire Fighters v. City of Cleveland, 502 F.3d 545, 548 (6th Cir. 2007) (citations omitted) (alteration in original).

III. Analysis

Plaintiff's Claim Seven is based on BAC's alleged violation of the FDCPA and alleges that BAC is a debt collector for the purposes of the statute. BAC's Motion to Dismiss counters that because BAC is a creditor and loan servicer of Plaintiff, it is not subject to the FDCPA.

Under the FDCPA, a "debt collector" is defined as:

any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the

purpose of section 808(6), such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include –

. . .

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity

(i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement;

(ii) concerns a debt which was originated by such person;

(iii) concerns a debt which was not in default at the time it was obtained by such person; or

(iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

15 U.S.C. § 1692(a)(6) (West 2010) (emphasis added).

The Sixth Circuit Court of Appeals has routinely held that a creditor is not a debt collector and, thus, is not subject to the FDCPA if the loan was not in default at the time the creditor obtained the loan. See *Wadlington v. Credit Acceptance Corp.*, 76 F.3d 103, 106 (6th Cir. 1996) (“The legislative history of the section 1692a(6) indicates conclusively that a debt collector does not include the consumer’s creditors . . . or an assignee of a debt, as long as the debt was not in default at the time it was assigned.”)

BAC appears to acknowledge this basic proposition by citing *Martin v. Select Portfolio Serving Holding Corporation*⁵, 2008 WL

⁵This case is cited by BAC in the Motion to Dismiss.

618788, (S.D. Ohio Mar. 3, 2008), which holds:

A servicing company is subject to the FDCPA nonetheless if the loan was in default at the time the servicing company acquired the loan account. Even if the debt was not actually in default when the servicing company acquired it, if the servicing company acquired it as a debt in default, and based its collection activities on that understanding, the servicer will be subject to the [FDCPA] as a "debt collector."

Id. at *4 (citing *F.T.C. v. Check Investors, Inc.*, 502 F.3d 159, 173-74 (3d Cir. 2007); *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 539 (7th Cir. 2003)).

Both the FDCPA itself and Sixth Circuit precedent indicate that a loan servicer/creditor is not a debt collector as long as it was assigned the debt prior to the debt being in default. The Complaint addresses two periods of default: prior to November 2005, and between April 2006 and August 2006. (Compl. ¶¶ 10, 18.) Based on allegations in the Response, it appears that the default occurred prior to the assignment of the debt (to either Countrywide Home Loans, Inc. or to BAC). (Resp. at 3-4.) In the Motion to Dismiss, BAC does not allege that the loan was not in default at the time of the assignment, and in fact, fails to address the status of the loan at the time of the assignment.

IV. Conclusion

Pursuant to the FDCPA, a loan servicer is not a debt collector if such servicer was assigned the debt prior to default. Taken together, the Complaint and Response sufficiently state that the loan was in default prior to being assigned to BAC. However, in order to survive the Motion to Dismiss, the Complaint must allege

enough facts to state a claim that is facially plausible. In the Response, Plaintiff requested leave to amend the Complaint if this Court found the Complaint to be insufficient. In light of the additional facts set forth in the Response, granting Plaintiff leave to amend the Complaint appears appropriate.

Accordingly, the Court will grant the Plaintiff leave to amend the Complaint. In the event the Plaintiff fails to file and serve an amended complaint within twenty-one (21) days after entry of the order that accompanies this Memorandum Opinion, the Court will grant the Motion to Dismiss.

An appropriate Order will follow.

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2010.

For the reasons set forth in this Court's Memorandum Opinion Regarding Partial Motion to Dismiss Adversary Complaint filed on this date, this Court grants the Plaintiff leave to amend the Complaint. If the Plaintiff fails to file and serve an amended complaint within twenty-one (21) days after entry of this Order, the Court will grant the Motion to Dismiss.

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