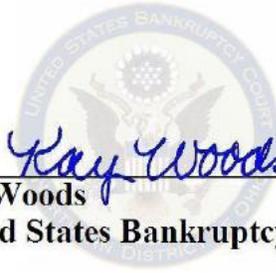


IT IS SO ORDERED.

Dated: November 22, 2011
01:49:53 PM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

JULIE ANN DETCHON and
DEVLIN SCOTT DETCHON,

Debtors.

* * * * *

DEVLIN SCOTT DETCHON and
JULIE ANN DETCHON,

Plaintiffs,

v.

WELLS FARGO BANK, et al.,

Defendants.

CASE NUMBER 11-40172

ADVERSARY NUMBER 11-4160

HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING WELLS FARGO'S MOTION TO DISMISS

This cause is before the Court on Defendant Wells Fargo Bank, N.A.'s Motion to Dismiss the Plaintiffs' Amended Adversary Complaint ("Motion to Dismiss") (Doc. # 37) filed by Defendant Wells

Fargo Bank, N.A. ("Wells Fargo") on September 26, 2011. Plaintiffs/Debtors Devlin Scott Detchon and Julie Ann Detchon filed Plaintiffs' Memorandum in Opposition to Defendant Wells Fargo Bank [sic] Motion to Dismiss Amended Adversary Complaint ("Response") (Doc. # 42) on October 10, 2011. On October 20, 2011, Wells Fargo filed Reply of Defendant Wells Fargo Bank, N.A. to Plaintiffs' Memorandum in Opposition to Motion to Dismiss the Plaintiffs' Amended Adversary Complaint ("Reply") (Doc. # 44). For the reasons set forth herein, the Court will grant the Motion to Dismiss.

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). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Amended Complaint.

The Plaintiffs filed a voluntary petition pursuant to chapter 13 of Title 11, United States Code, on January 21, 2011. On September 9, 2011, the Plaintiffs filed Amended Adversary Complaint ("Amended Complaint"),¹ which asserts one cause of

¹On June 20, 2011, the Plaintiffs filed Adversary Complaint, which commenced the instant adversary proceeding. Upon the Plaintiffs' motion, on September 8, 2011, the Court entered Order Granting Plaintiffs' Motion for Leave to Amend Adversary Complaint (Doc. # 30). The Plaintiffs were granted five days to file an amended complaint.

action against Wells Fargo - i.e., Claim One: Fraudulent Misrepresentation.² Claim One is brought against Wells Fargo in its capacity as the servicing agent for Defendant MidFirst Bank ("MidFirst"), which is the holder of the Plaintiffs' residential note and mortgage.³ (See Am. Compl. ¶ 11) ("At all times referenced in this complaint, Wells Fargo was acting as the servicing agent for Midfirst bank.")

Claim One states, in its entirety:

35. The allegations in the preceding paragraphs of this complaint are realleged and incorporated herein by this reference.
36. The Defendant Wells Fargo, on behalf of Midfirst Bank, made several false misrepresentations to the Plaintiffs, with knowledge of the falsity, with intent to induce Plaintiffs to rely on these misrepresentations, in which the Plaintiffs did foreseeably and justifiably rely on the misrepresentations proximately causing them damage.
37. Specifically, Wells Fargo employees represented to Mr. Detchon over the telephone on or about October or November 2009 that he had to be at least two months behind on his mortgage payments before he could be considered for HAMP; therefore, if he wanted to be considered for the program, he should fall two months behind.
38. In addition, on or about October 2009, Wells Fargo employees made representations of the available loan modification options. However, Wells Fargo employees concealed several of the loss mitigation

²In the Response, the Plaintiffs concede, "The Plaintiffs' Amended Adversary Complaint assert [sic] claims against Counterclaim [sic] Defendant Wells Fargo Bank only for fraudulent misrepresentations." (Resp. at 2 n.1.)

³The Plaintiffs state, "The public record illustrates that Defendant Midfirst did not receive assignment of the mortgage until 7-7-2010." (Am. Compl. ¶ 48.) However, the Plaintiffs also "object that Midfirst is the true holder of their note and mortgage." (*Id.* ¶ 64.) This memorandum opinion makes no finding as to the holder of the Plaintiffs' note and mortgage.

options available to the Plaintiffs.

39. In fact, the Detchons were not two months behind when he [sic] relied on Wells Fargo's representations that he had to be at least two months behind on his mortgage payments before he could be considered for loan modifications.
40. Additionally, the Detchons relied on Wells Fargo's representations that everything was going to be ok [sic] with their loan despite falling at least two months behind on their mortgage payments as suggested by Wells Fargo.
41. Wells Fargo's representations about the loss mitigation options available and the representation regarding the two month default were false as Wells Fargo knew or should have known the terms to enter loan modification programs.
42. This failure to relay information and the affirmative misrepresentation regarding the two month default was done knowingly and with reckless disregard to the Plaintiffs.
43. Defendants' failure to provide correct information regarding the modification options and the affirmative misrepresentation regarding default proximately caused damage to the Plaintiffs.
44. As a result of Wells Fargo's fraudulent failure to relay information and false information related to HAMP, FHA, and loss mitigation options. [sic] Plaintiffs have suffered substantial mental anguish, humiliation, anxiety, stress, and embarrassment. Plaintiffs are entitled to actual damages, including damages for non-economic damages, punitive damages and reasonable attorneys' fees and costs.
45. The Detchons' fraud claims are being alleged against both Midfirst Bank and its agent Wells Fargo.
46. Furthermore, the Plaintiffs believe that discovery will illustrate a financial incentive to make these misrepresentations and that Wells Fargo and Midfirst will actually net more money after default than [sic] had the clients stayed current.

(*Id.* ¶¶ 35-46 (emphasis in original).) Claim One is based on two

alleged actions by Wells Fargo: (i) Wells Fargo, on behalf of MidFirst, misrepresented that the Plaintiffs' mortgage account needed to be at least two months in default in order for the Plaintiffs to qualify for the Home Affordable Modification Program ("HAMP") - *i.e.*, Wells Fargo made an affirmative misrepresentation; and (ii) Wells Fargo, on behalf of MidFirst, failed to disclose to the Plaintiffs several available loss mitigation options - *i.e.*, Wells Fargo's omission of information constituted negative misrepresentation.

The Plaintiffs assert, "Because Wells Fargo's employees told Mr. Detchon that he should fall two months behind on his mortgage payments in order to be considered for HAMP, he did not make his December 2009 or January 2010 mortgage payments." (*Id.* ¶ 26.) With respect to damages as a result thereof, the Plaintiffs state, "Defendants' actions have caused the Detchons stress, many bouts of crying, anxiety, strain on their spousal relationship, loss of sleep, embarrassment, loss of time in dealing with this situation, humiliation, inconvenience, frustration, anger, mental anguish, and attorneys' fees and costs." (*Id.* ¶ 34.)

B. Wells Fargo's Motion to Dismiss.

Wells Fargo moves the Court to dismiss "all counts of the Amended Complaint," pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted. (Mot. to Dismiss at 1.) However, the Plaintiffs concede that only Claim One is pled against Wells Fargo. (*See supra* at 3

n.2.) Accordingly, the Motion to Dismiss is moot with respect to the remainder of the Amended Complaint – *i.e.*, Claims Two and Three and the objection to the proof of claim.

Wells Fargo moves to dismiss Claim One on two bases: (i) there is no private right of action pursuant to HAMP, the Federal Housing Administration (“FHA”) regulations or the U.S. Department of Housing and Urban Development (“HUD”) regulations (collectively, “Lending Regulations”); and (ii) the Plaintiffs have not alleged facts sufficient to state a claim for fraudulent misrepresentation under Ohio law.⁴

First, Wells Fargo asserts that Claim One is actually based on Wells Fargo’s alleged failure to comply with the Lending Regulations. Wells Fargo contends that Claim One must be dismissed because it is well-settled that there is no private right of action for an alleged violation of the Lending Regulations. “No matter what its appellation, there is simply no private claim based on the allegation that Wells Fargo failed to comply with HAMP or with FHA or HUD guidelines, failed to properly implement HAMP, or misrepresented its requirements.” (Mot. to Dismiss at 8 (citations omitted).)

Second, Wells Fargo argues that the negative misrepresentation portion of Claim One does not state a claim because Wells Fargo owed no duty to the Plaintiffs to disclose available loan modification

⁴Wells Fargo states, and the Plaintiffs do not dispute, “The property at issue is located in Ohio and the transaction occurred in Ohio. If there is a state law claim, Ohio law applies.” (Mot. to Dismiss at 9 n.3 (citation omitted).)

options. Wells Fargo asserts, "Fraud can be based on non-disclosure IF the defendant had a duty to speak," and no such duty applies to a mortgage servicer. (*Id.* at 10 (citations omitted) (emphasis in original).) "Without a duty to speak, there can be no claim for fraudulent non-disclosure under Ohio law." (*Id.* at 11 (footnote omitted).)

Finally, Wells Fargo states that the affirmative misrepresentation portion of Claim One is barred by (i) the statute of frauds as "alleged parol statements that directly contradict the terms of the Note and Mortgage;" and (ii) the principle that "fraud cannot be based on the misrepresentation of the law." (*Id.* at 13 (citations omitted).)

C. The Plaintiffs' Response.

Throughout the Response, the Plaintiffs contend that they "are not attempting to bring a cause of action under HAMP or the FHA. . . . Rather, the Court is faced with Plaintiffs' claim for affirmative misrepresentations against Wells Fargo, a state law claim." (Resp. at 2.) Stated differently, "[T]he Plaintiffs [sic] fraud claim is not predicated on Wells Fargo's compliance with the guidelines; rather, the claim is centered on affirmative misrepresentations." (*Id.* at 7.)

With respect to Wells Fargo's state law arguments concerning the affirmative misrepresentation portion of Claim One, the Plaintiffs assert that (i) the statute of frauds is not applicable because the Plaintiffs "are not seeking to enforce terms of any oral

agreement that directly contradicts the terms of the note and mortgage" (*id.* at 10); and (ii) Wells Fargo did not make legal representations but, instead, "made misrepresentations of fact, the actions required by Plaintiffs in order to be eligible for loan modifications of their loan" (*id.* at 12). Regarding the negative misrepresentation portion of Claim One, the Plaintiffs argue that Wells Fargo had a duty to disclose available loss mitigation options under four distinct theories: (i) FHA-insured mortgage lenders must comply with applicable servicing regulations; (ii) the duty of good faith and fair dealing; (iii) the law of deceit; and (iv) the existence of a *de facto* fiduciary relationship.

D. Wells Fargo's Reply.

Wells Fargo's Reply is primarily a restatement of the arguments made in the Motion to Dismiss; however, Wells Fargo further argues that the Plaintiffs have failed to allege recoverable damages:

Even if there were a private right of action for misinforming a plaintiff of under what circumstances one may be eligible to qualify for HAMP (and there is not), the Complaint does not (because it could not) allege that the Detchons would have qualified for a HAMP modification but later did not. Nor is there a right to a modification under HAMP. The Complaint simply fails to identify any facts alleging damages from this supposed misrepresentation. This final variant fails as a matter of law.

(Reply at 10 (internal citations omitted).)

II. STANDARD FOR REVIEW AND LEGAL STANDARD

A. Failure to State a Claim.

Federal Rule of Civil Procedure 12(b)(6), made applicable to

the instant adversary proceeding by Federal Rule of Bankruptcy Procedure 7012(b), requires that a pleading containing a claim for relief be dismissed if it fails to "state a claim upon which relief can be granted." FED. R. CIV. P. 12 (West 2011); FED. R. BANKR. P. 7012 (West 2010). A claim will be dismissed if it fails to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "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." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 556). A claim does not need 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.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). As a consequence, a claim "'must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory.'" *Bishop v. Lucent Techs., Inc.*, 520 F.3d 516, 519 (6th Cir. 2008) (quoting *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005)).

In determining whether a claim alleges enough facts to survive a motion to dismiss, 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. Although the court "must accept all well-pleaded factual allegations in the complaint as true, [it] need not 'accept as true a legal conclusion couched as a factual allegation.'" *Hensley Mfg., Inc. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555).

B. Fraudulent Misrepresentation.

To establish a claim for fraudulent misrepresentation, also known as intentional misrepresentation/fraud, under Ohio law, the Plaintiffs must demonstrate:

(a) a representation or, where there is a duty to disclose, concealment of a fact, (b) which is material to the transaction at hand, (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation or concealment, and (f) a resulting injury proximately caused by the reliance.

Andersons, Inc. v. Consol, Inc., 348 F.3d 496, 505 (6th Cir. 2003) (quoting *Carpenter v. Scherer-Mountain Ins. Agency*, 733 N.E.2d 1196, 1204 (Ohio Ct. App. 1999)).

"An action for fraud/intentional misrepresentation may lie 'not only as a result of affirmative misrepresentations, but also for negative ones, such as the failure of a party to a transaction . . . fully [to] disclose facts of a material nature where there exists a duty to speak.'" *Id.* (quoting *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 684 N.E.2d 1261, 1269 (Ohio Ct. App. 1996)) (emphasis added). "[A] duty to disclose arises primarily in a situation

involving a fiduciary or other similar relationship of trust and confidence.'" *Id.* at 509 (quoting *Federated Mgmt., Co. v. Coopers & Lybrand*, 738 N.E.2d 842, 855 (Ohio Ct. App. 2000)).

III. ANALYSIS

A. Private Right of Action.

Wells Fargo maintains that Claim One must be dismissed because there is no private right of action pursuant to the Lending Regulations, even if the alleged violation is disguised under some other theory. The Plaintiffs do not dispute that the Lending Regulations provide no private right of action. (See Resp. at 2) ("Plaintiffs are not asking the Court to create a private right of action that isn't there.") Rather, the Plaintiffs argue that they "are not attempting to bring a cause of action under HAMP or the FHA" (*id.*) and, thus, "the proper inquiry for the Court is to look at the elements of fraud and whether the Plaintiffs have pled facts entitling relief" (*id.* at 8).

In *Wells Fargo Bank, N.A. v. Favino*, 2011 U.S. Dist. LEXIS 35618 (N.D. Ohio Mar. 31, 2011), the mortgagor brought a counterclaim against the mortgagee for wrongful foreclosure based upon the mortgagee's alleged failure to comply with, *inter alia*, HUD regulations and FHA policy. The District Court for the Northern District of Ohio dismissed the wrongful foreclosure claim for failure to state a claim and stated:

There is no private right of action for breach of HUD regulations or FHA policy. There is also no private right of action available to a mortgagor for a

mortgagee's noncompliance with the National Housing Act, 12 U.S.C. § 1701. See *Mitchell v. Chase Home Fin. LLC*, No. 3:06-CV-2099-K, 2008 U.S. Dist. LEXIS 17040, 2008 WL 623395, at *3 (N.D. Tex. Mar. 4, 2008). The *Mitchell* court further stated that "the regulations promulgated under the National Housing Act govern relations between the mortgagee and the government, and give the mortgagor no claim for duty owed or for the mortgagee's failure to follow said regulations." *Id.*; see also *Roberts v. Cameron-Brown Co.*, 556 F.2d 356, 360-61 (5th Cir. 1997); *In Re Miller*, 124 Fed. Appx. 152, 155 (4th Cir. 2005); *Leggette v. Washington Mutual Bank*, No. 3:03-CV-2909-D, 2005 U.S. Dist. LEXIS 24405, 2005 WL 2679699, at *5 (N.D. Tex. 2005); *Baker v. Northland Mortgage Co.*, 344 F. Supp. 1385 (N.D. Ill. 1972). A failure of a mortgagee [sic] to adhere to the HUD servicing requirements in the regulations can be an affirmative defense to foreclosure, but does not form the basis for a claim. *GMAC Mortg. of Pennsylvania v. Gray*, 1991 Ohio App. LEXIS 6004, 1991 WL 268742, at *7-8 (Ohio App. Dec. 10, 1991); see also *In re Shirk*, 437 B.R. 592, 607-08 (Bkrtcy.S.D. Ohio 2010) ("It is well-established that the [National Housing Act] and attending regulations do not expressly or implicitly create a private right of action to mortgagor for a mortgagee's noncompliance with the Act or regulations.); *Federal Nat. Mortg. Ass'n v. LeCrone*, 868 F.2d 190, 193 (6th Cir. 1989) (no express or implied right of action in favor of the mortgagor exists for violation of HUD mortgage servicing policies) (internal citation omitted). Therefore, [the mortgagor]'s contention of "wrongful foreclosure" must fail, as it cannot be a cause of action, only an affirmative defense.

Id. at *35-36 (emphasis added).

In *Aleem v. Bank of Am., N.A.*, 2010 U.S. Dist. LEXIS 11944 (C.D. Cal. Feb. 9, 2010), the plaintiffs alleged that the defendants engaged in unfair business practices in violation of state law because, *inter alia*, the defendants (i) failed to determine the plaintiffs' eligibility for HAMP; and (ii) failed to comply with the National Housing Act in that the defendants did not advise the plaintiffs of home ownership counseling offered by HUD. The district court dismissed the plaintiffs' unfair business practices

claim and stated:

The [California Business and Professions Code] cannot create a private right of action where none exists under the federal statute. Though Plaintiffs mention the National Housing Act and the HAMP, they fail to allege any elements related to violations of these statutes, nor do they provide a basis for concluding that a private right of action exists under these statutes. Thus, to the extent Plaintiffs' [state law] claim is based upon the National Housing Act or HAMP, Plaintiffs have failed to state a claim.

Id. at *9-10 (internal citations and parentheticals omitted); see also *Hubert v. PNC Bank, Nat'l Assoc.*, 2011 U.S. Dist. LEXIS 102603, *11 (E.D. Mich. Sep. 12, 2011) (citations omitted) ("Virtually every court has held that HAMP does not provide for a private cause of action.")

The plaintiffs in *Aleem* also asserted an unjust enrichment claim against the defendants for, *inter alia*, refusing to determine whether the plaintiffs were eligible for a HAMP modification. The court dismissed the unjust enrichment claim because "Plaintiffs' federal allegations regarding unjust enrichment appear to be an attempt at enforcing a private right of action under TARP and HAMP. There is no express or implied right to sue fund recipients, however, under TARP or HAMP." *Aleem*, 2010 U.S. Dist. LEXIS 11944 at *12 (citations and parentheticals omitted).⁵

It is well-settled, and not disputed by the Plaintiffs, that there is no private right of action pursuant to the Lending

⁵The *Aleem* court declined to reach the merits of the plaintiffs' claims to the extent they were predicated on violations of state law. See *Aleem*, 2010 U.S. Dist. LEXIS 11944 at *11, *13.

Regulations – *i.e.*, HAMP, the FHA regulations or the HUD regulations. Like the claims of the parties in *Favino* and *Aleem*, Claim One is, at its core, an attempt to enforce a private right of action for alleged violations of the Lending Regulations. For example, the Plaintiffs state, “Wells Fargo in its role as the mortgage servicer is charged with the duty to implement both the HAMP program and the FHA loss mitigation program. The Detchons’ [sic] relied on Wells Fargo’s affirmative misrepresentation that they must fall behind before Wells Fargo can help them qualify for HAMP.” (Am. Compl. ¶ 30.) The Plaintiffs also state, “As a result of Wells Fargo’s fraudulent failure to relay information and false information related to HAMP, FHA, and loss mitigation options. [sic] Plaintiffs have suffered substantial mental anguish, humiliation, anxiety, stress, and embarrassment.” (*Id.* ¶ 44.) “In the facts before the Court, Wells Fargo failed to comply with the loss mitigation guidelines.” (Resp. at 14.)

Despite being pled as a state law claim, Claim One is clearly an attempt to hold Wells Fargo liable for its failure to comply with the Lending Regulations. Because there is no private right of action under the Lending Regulations, Claim One fails to state a claim upon which relief can be granted. Accordingly, the Court will grant the Motion to Dismiss.

B. Elements of Fraudulent Misrepresentation.

Even if there were a private right of action based upon alleged violations of the Lending Regulations, Claim One fails to plead

the elements of fraudulent misrepresentation under Ohio law. Specifically, the Plaintiffs have failed to demonstrate that Wells Fargo owed a duty to the Plaintiffs to disclose available loss mitigation options and, thus, the negative misrepresentation portion of Claim One fails to state a claim. In addition, the affirmative misrepresentation portion of Claim One fails to state a claim because the Plaintiffs have not asserted facts sufficient to establish that they justifiably relied upon Wells Fargo's alleged misrepresentations or that such reliance proximately caused injury to the Plaintiffs.

1. Duty to Disclose.

The negative misrepresentation portion of Claim One – *i.e.*, the Plaintiffs' allegations that Wells Fargo concealed available loss mitigation options – states a claim only if Wells Fargo had an affirmative duty to disclose all available loss mitigation options. See *Andersons, Inc. v. Consol, Inc.*, 348 F.3d 496, 505 (6th Cir. 2003) (quoting *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 684 N.E.2d 1261, 1269 (Ohio Ct. App. 1996)) (“An action for fraud/intentional misrepresentation may lie . . . ‘for negative [misrepresentations] . . . where there exists a duty to speak.’”) The Plaintiffs claim that Wells Fargo was under a duty to disclose available loss mitigation options under four distinct theories: (i) FHA-insured mortgage lenders must comply with servicing regulations; (ii) the duty of good faith and fair dealing; (iii) the law of deceit; and (iv) the existence of a *de facto* fiduciary

relationship.

First, the Plaintiffs argue, "It is well established that FHA-insured mortgage lenders must comply with applicable servicing regulations before commencing foreclosure proceedings." (Resp. at 13 (citations omitted).) In support of this argument, the Plaintiffs cite a series of cases in which mortgagors asserted violations of the HUD regulations as defenses in foreclosure proceedings. *See, e.g., Wash. Mut. Bank v. Mahaffey*, 796 N.E.2d 39, 41 (Ohio Ct. App. 2003) ("[W]e agree with [the mortgagor] . . . with respect to his equitable defense of the bank's alleged failure to have complied with [HUD regulations].") Although a violation of the Lending Regulations may serve as a defense to a foreclosure proceeding, the Plaintiffs offer no support for their argument that the Lending Regulations impose affirmative duties upon mortgage servicers that may serve as the basis for a fraudulent misrepresentation claim. Furthermore, as stated *supra* at 11-14, there is no private right of action for failure to comply with the Lending Regulations. Accordingly, the Court finds that the Lending Regulations did not impose a duty to speak upon Wells Fargo that may serve as the basis for fraudulent misrepresentation.

Second, the Plaintiffs summarily state, "[T]here are facts from which the trier of fact can reasonably conclude that a de facto fiduciary relationship existed between Wells Fargo and the Plaintiffs, giving rise to a duty to disclose." (Resp. at 15.) In the Amended Complaint, the Plaintiffs contend that they "reposed

special trust in Wells Fargo to manage the loss mitigation for their loan as their mortgage servicer and from Wells Fargo's own representations that they could help them with loan modification as long as they were two payments behind." (Am. Compl. ¶ 30.)

In *Umbaugh Pole Bldg. Co. v. Scott*, 390 N.E.2d 320 (Ohio 1979), the Supreme Court of Ohio stated, "The relationship of debtor and creditor without more is not a fiduciary relationship. A fiduciary relationship may be created out of an informal relationship, but this is done only when both parties understand that a special trust or confidence has been reposed." *Id.* at 322, syllabus ¶ 1 (emphasis added). The Supreme Court of Ohio found that the appellate court erred in finding a fiduciary relationship existed between a lending association and mortgagors because the "only basis for the finding of the fiduciary relationship was the association's giving of advice and counseling to the [mortgagors] relevant to their loans and business activities. But here the offering and giving of advice was insufficient to create a fiduciary relationship." *Id.* at 323 (emphasis added). The court noted that "the advice was given in a congenial atmosphere and in a sincere effort to help the [mortgagors] prosper, nevertheless, the advice was given by an institutional lender in a commercial context in which the parties dealt at arms length, each protecting his own interest." *Id.* (citations omitted). The court further stated,

[W]hile a limited amount of advice and counseling was given, this did not vitiate the business relationship because neither party had, nor could have had, a reasonable expectation that the creditor would act solely

or primarily on behalf of the debtor. Also, the rendering of advice by the creditor to the debtors does not transform the business relationship into a fiduciary relationship. The borrowers could not reasonably believe that the association was acting in a fiduciary capacity.

Id. (internal citations omitted) (emphasis added).

The issue of whether a *de facto* fiduciary relationship exists between a mortgagor and a mortgage servicer was addressed in *Cairns v. Ohio Sav. Bank*, 672 N.E.2d 1058 (Ohio. Ct. App. 1996). In *Cairns*, the mortgagors argued that the defendant served as a fiduciary in its role as mortgage servicer, particularly because the defendant administered the mortgagors' escrow account. The appellate court concluded that a fiduciary relationship did not exist because the relationship between a mortgagor and a mortgage servicer is not "a relationship in which 'special confidence and trust is reposed in the integrity and fidelity' of [the mortgage servicer]." *Id.* at 1062. The court concluded:

Since [the mortgagors] have premised their tort claims for fraud and negligent misrepresentation on the existence of fiduciary duties between the parties and we have determined that [the mortgagors] have failed to set forth any facts which would entitle them to relief under a claim for breach of fiduciary duty, we find that the trial court appropriately dismissed their claims for fraud and negligent misrepresentation.

Id.; see also *Webb v. Chase Manhattan Mortg. Corp.*, 2007 U.S. Dist. LEXIS 15183 (S.D. Ohio Mar. 5, 2007) (finding that a fiduciary relationship did not exist between the mortgagors and their mortgage servicer); *Wells Fargo Bank, N.A. v. Favino*, 2011 U.S. Dist. LEXIS 35618, *42 (N.D. Ohio Mar. 31, 2011) ("[The mortgagor] does not allege any facts that indicate that a fiduciary relationship was

formed between him and the bank from a 'special trust or confidence.' . . . His threadbare allegations without any factual support simply do not state a claim for relief, and accordingly this claim must be dismissed.")

In the instant proceeding, the Plaintiffs have not alleged facts sufficient to demonstrate the existence of a *de facto* fiduciary relationship. The Plaintiffs appear to base the existence of a fiduciary relationship on the allegation that Wells Fargo offered the Plaintiffs advice in its capacity as mortgage servicer. As set forth above, absent additional facts that establish a special relationship of confidence and trust as understood by both parties, the Plaintiffs' allegations do not support the existence of a *de facto* fiduciary relationship.

Third, the Plaintiffs state that Wells Fargo is bound by a duty of good faith and fair dealing. However, under Ohio law, "[t]here is no separate tort cause of action for breach of good faith and [sic] separate from a breach of contract claim. Rather, 'good faith is part of a contract claim and does not stand alone.'" *Northeast State Coll. of Massotherapy v. Burek*, 759 N.E.2d 869, 875 (Ohio Ct. App. 2001) (quoting *Lakota Loc. School Dist. v. Brickner*, 671 N.E.2d 578, 584 (Ohio Ct. App. 1996)). The Plaintiffs do not assert a breach of contract claim against Wells Fargo. Furthermore, the Plaintiffs provide no support for the argument that the duty of good faith and fair dealing somehow equates to a duty to disclose or creates the special relationship of trust necessary to support

a negative misrepresentation claim. Thus, the Plaintiffs' negative misrepresentation claim cannot stand upon the duty of good faith and fair dealing.

Finally, the Plaintiffs state that, pursuant to the law of deceit, "'A party is under a duty to speak . . . if the party fails to exercise reasonable care to disclose a material fact . . . and the non-disclosing party knows that the failure to disclose such information . . . will render a prior statement or representation untrue or misleading.'" (Resp. at 14 (quoting *Miles v. Perpetual Savings & Loan Co.*, 388 N.E.2d 1367, 1369 (Ohio 1979)).) However, the Plaintiffs offer no facts that support application of the law of deceit to this proceeding. Indeed, the Plaintiffs fail to assert that Wells Fargo's alleged concealment of available loss mitigation options rendered any prior statement(s) by Wells Fargo untrue or misleading. As a result, the Court finds that the law of deceit is inapposite to the negative misrepresentation portion of Claim One.

The Plaintiffs have offered no set of facts under which Wells Fargo was required to disclose all available loan modification options to the Plaintiffs. Wells Fargo owed no duty of disclosure to the Plaintiffs, as the Plaintiffs' mortgage servicer, and any duties arising under the Lending Regulations may not serve as the basis for a private cause of action. Furthermore, no special relationship of trust existed between the Plaintiffs and Wells Fargo, regardless of whether Wells Fargo offered advice to the Plaintiffs. As a consequence, the negative misrepresentation

portion of Claim One fails to state a claim, pursuant to Ohio law, upon which relief can be granted.

2. Justifiable Reliance and Resulting Injury.

In the Reply, Wells Fargo argues that Claim One "fails to plead any facts showing recoverable damages. . . . The Complaint simply fails to identify any facts alleging damages from this supposed misrepresentation." (Reply at 10.) The Court agrees and finds that the Plaintiffs have not asserted facts sufficient to support a claim for fraudulent misrepresentation under Ohio law. In particular, the Plaintiffs have not demonstrated that they justifiably relied upon the alleged misrepresentations of Wells Fargo or that such reliance proximately caused injury to the Plaintiffs. *See Andersons, Inc. v. Consol, Inc.*, 348 F.3d 496, 505 (6th Cir. 2003).

The Plaintiffs assert, "Because Wells Fargo's employees told Mr. Detchon that he should fall two months behind on his mortgage payments in order to be considered for HAMP, he did not make his December 2009 or January 2010 mortgage payments [sic]." (Am. Compl. ¶ 26.) However, the Plaintiffs admit that "previously they had already been in default, but by the grace of family members and friends, they were [sic] to catch up." (*Id.* ¶ 25.) Furthermore, in Schedule D, the Plaintiffs state that their mortgage account with Defendant Midland Mortgage Company was "Last Active 11/01/09." (Sch. D at 1.) Thus, it appears that the Plaintiffs did not make a single mortgage payment from November 2009 through the January 21, 2011 petition date. Although the Plaintiffs imply that

they allowed their mortgage to become two months delinquent based upon the directive of Wells Fargo, the Plaintiffs do not assert that they were otherwise able to make their mortgage payments and, in fact, do not appear to have made a single subsequent payment.

In addition, the Plaintiffs do not allege that they were eligible for HAMP or, if eligible, they were entitled to a HAMP modification. The Plaintiffs also fail to allege that Wells Fargo representatives told the Plaintiffs that they would qualify for a HAMP modification if their mortgage was two months delinquent. (See Am. Compl. ¶ 26) (emphasis added) ("Wells Fargo employees represented to Mr. Detchon . . . he had to be at least two months behind . . . before he could be considered for HAMP; therefore, if he wanted to be considered for the program, he should fall two months behind.)

In *Marks v. Bank of Am., N.A.*, 2010 U.S. Dist. LEXIS 61489 (Dist. Ariz. June 21, 2010), the district court dismissed the mortgagor's breach of contract claim, which was based upon the lender's alleged failure to fulfill contractual obligations required by HAMP. The court found that the mortgagor was not an intended third-party beneficiary under HAMP and stated:

Under the HAMP, a qualified borrower would not be reasonable in relying on an agreement between a participating servicer and the U.S. Department of Treasury as manifesting an intention to confer a right on the borrower because the agreement does not *require* that the participating servicer modify eligible loans. *Escobedo*, 2009 U.S. Dist. LEXIS 117017, 2009 WL 4981618, *3. Even Fannie Mae, which has rights under the Agreement, cannot force a participating servicer to make a particular loan modification. *Id.* Fannie Mae can

take steps against a participating servicer, but cannot impose a modification. *Id.* Thus, a borrower could not require the servicer to make any particular loan modification under the HAMP Agreement.

Id. at *8 (footnote omitted) (emphasis in original). The court further stated,

Here, Defendant was not obligated to modify Plaintiff's loan. As a result, the Agreement does not grant Plaintiff the *right* to enforce the provisions of the agreement. Because Defendant was not required to admit or deny Plaintiff's loan, only to *consider*, Plaintiff could not have been reasonably believed that Defendant was obligated to modify her loan.

Id. at *11 (emphasis in original); see also *Wright v. Bank of Am., N.A.*, 2010 U.S. Dist. LEXIS 73807, *14 (N.D. Cal. July 22, 2010) (emphasis in original) ("Like the defendant in *Marks*, Defendants here are not obligated to modify Plaintiff's loan [pursuant to HAMP] but to evaluate it.")

Even if Wells Fargo misrepresented the HAMP eligibility requirements to the Plaintiffs, which the Court assumes occurred for purposes of this Motion to Dismiss, the Plaintiffs were not justified in relying upon those misrepresentations to cease making their mortgage payments. As stated above, (i) the Plaintiffs do not contend that they were otherwise eligible for HAMP; and (ii) the Plaintiffs were not entitled to a HAMP modification even if eligible. Thus, it was not reasonable for the Plaintiffs to cease making their mortgage payments in anticipation of receiving a HAMP modification, regardless of the representations made by Wells Fargo.

The Plaintiffs also have not demonstrated that their reliance on Wells Fargo's alleged misrepresentations proximately caused

injury to the Plaintiffs. Again, the Plaintiffs do not assert that they were able to make their mortgage payments or that they were entitled to a HAMP modification. In fact, the damages alleged by the Plaintiffs, except for attorney's fees and costs associated with this proceeding, are entirely non-economic. The Plaintiffs state that the fraudulent conduct of Wells Fargo caused the Plaintiffs "substantial mental anguish, humiliation, anxiety, stress, and embarrassment." (Am. Compl. ¶ 44.)

Because the Plaintiffs do not allege economic damages, this Court will evaluate the mental distress component of the Plaintiffs' fraudulent misrepresentation claim using a standard akin to the tort of intentional infliction of emotional distress. To prevail on a claim of intentional infliction of emotional distress, a plaintiff must establish that:

"(1) the actor either intended to cause emotional distress or knew or should have known that actions taken would result in serious emotional distress to the plaintiff; (2) the actor's conduct was so extreme as to go beyond all possible bounds of decency and was such that it can be considered utterly intolerable in a civilized community; (3) the actor's actions were the proximate cause of plaintiff's psychic injury; and (4) the mental anguish suffered by plaintiff is serious and of a nature that no reasonable person could be expected to endure it."

Stalvey v. NVR, Inc., 2011 U.S. Dist. LEXIS 88065, *20-21 (N.D. Ohio Aug. 9, 2011) (quoting *Garcia v. ANR Freight Sys., Inc.*, 942 F. Supp. 351, 359 (N.D. Ohio 1996)); see also *Umbaugh Pole Bldg. Co. v. Scott*, 390 N.E.2d 320 (Ohio 1979) (finding that there can be no recovery for mental anguish and suffering in the absence of malice

or contemporary physical injury inflicted on the aggrieved party by the wrongdoer).

In the instant proceeding, the Plaintiffs' statements of Wells Fargo's conduct do not support damages for emotional distress. Particularly, the Plaintiffs have not alleged that (i) Wells Fargo intended to cause emotional distress or knew or should have know its conduct would result in serious emotional distress; (ii) Wells Fargo's conduct was beyond all possible bounds of decency and utterly intolerable; and (iii) the Plaintiffs' mental anguish is severe. Rather, the Plaintiffs summarily state, "Defendants' actions have caused the Detchons stress, many bouts of crying, anxiety, strain on their spousal relationship, loss of sleep, embarrassment, loss of time in dealing with this situation, humiliation, inconvenience, frustration, anger, mental anguish, and attorneys' fees and costs." (Am. Compl. ¶ 34.) These blanket allegations by the Plaintiffs are not sufficient to support a tort claim for non-economic damages. Accordingly, the Court finds that the Plaintiffs have failed to state a fraudulent misrepresentation claim based upon non-economic damages.

IV. CONCLUSION

There is no private right of action based upon a mortgage servicer's failure to comply with the Lending Regulations - *i.e.*, HAMP, the FHA regulations or the HUD regulations. Accordingly, the Plaintiffs have failed to state a claim for fraudulent misrepresentation because Claim One is, in actuality, based upon

Wells Fargo's alleged failure to comply with the Lending Regulations.

In order to prevail on the negative misrepresentation portion of Claim One - *i.e.*, the allegations that Wells Fargo concealed available loss mitigation options - the Plaintiffs were required to establish that Wells Fargo was under a duty to disclose said loss mitigation options. The facts contained in the Amended Complaint and the Response are insufficient to demonstrate the existence of a *de facto* fiduciary relationship, and Wells Fargo was not acting in a fiduciary capacity as the Plaintiffs' mortgage servicer. Moreover, the Lending Regulations cannot serve as the basis for the negative misrepresentation claim because there is no private right of action under the Lending Regulations. As a consequence, Wells Fargo was under no duty to disclose all available loss mitigation options to the Plaintiffs and, thus, cannot be liable to the Plaintiffs for fraudulent misrepresentation based upon its alleged failure to disclose.

Finally, the Plaintiffs have failed to assert facts that demonstrate they justifiably relied on Wells Fargo's alleged misrepresentations or that the Plaintiffs were proximately injured as a result thereof. The Plaintiffs do not allege that they were capable of making their mortgage payments or that they were entitled to a HAMP modification. Furthermore, the conduct of Wells Fargo does not warrant the imposition of non-economic damages.

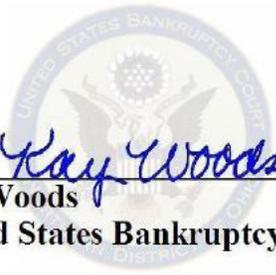
For the reasons set forth above, the Court finds that Claim One

fails to state a claim upon which relief can be granted. Accordingly, the Court will grant Wells Fargo's Motion to Dismiss. An appropriate order will follow.

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IT IS SO ORDERED.

Dated: November 22, 2011
01:49:53 PM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

JULIE ANN DETCHON and
DEVLIN SCOTT DETCHON,

Debtors.

* * * * *

DEVLIN SCOTT DETCHON and
JULIE ANN DETCHON,

Plaintiffs,

v.

WELLS FARGO BANK, et al.,

Defendants.

CASE NUMBER 11-40172

ADVERSARY NUMBER 11-4160

HONORABLE KAY WOODS

ORDER GRANTING WELLS FARGO'S MOTION TO DISMISS

This cause is before the Court on Defendant Wells Fargo Bank, N.A.'s Motion to Dismiss Plaintiffs' Amended Adversary Complaint ("Motion to Dismiss") (Doc. # 37) filed by Defendant Wells

Fargo Bank, N.A. ("Wells Fargo") on September 26, 2011. Plaintiffs/Debtors Devlin Scott Detchon and Julie Ann Detchon filed Plaintiffs' Memorandum in Opposition to Defendant Wells Fargo Bank [sic] Motion to Dismiss Amended Adversary Complaint (Doc. # 42) on October 10, 2011. On October 20, 2011, Wells Fargo filed Reply of Defendant Wells Fargo Bank, N.A. to Plaintiffs' Memorandum in Opposition to Motion to Dismiss the Plaintiffs' Amended Adversary Complaint (Doc. # 44).

For the reasons set forth in this Court's Memorandum Opinion Regarding Wells Fargo's Motion to Dismiss entered on this date, the Court hereby finds that:

- (1) Claim One of the Amended Complaint is the only claim asserted against Wells Fargo;
- (2) The Motion to Dismiss is moot with respect to Claims Two and Three and the objection to the proof of claim;
- (3) There is no private right of action pursuant to HAMP, the FHA regulations or the HUD regulations;
- (4) Because Claim One is based upon the alleged failure of Wells Fargo to comply with HAMP, the FHA regulations and the HUD regulations, Claim One fails to state a claim upon which relief can be granted;
- (5) Because Wells Fargo owed no duty to the Plaintiffs to disclose all available loss mitigation options, the negative misrepresentation portion of Claim One fails to state a claim upon which relief can be granted;

- (6) The Plaintiffs failed to state facts sufficient to demonstrate that the Plaintiffs ceased making their mortgage payments in justifiable reliance upon Wells Fargo's representations;
- (7) The Plaintiffs failed to state facts sufficient to demonstrate that the Plaintiffs suffered injury as a proximate result of Wells Fargo's representations; and
- (8) Claim One fails to state a claim upon which relief can be granted pursuant to Ohio law.

Based upon the foregoing findings of fact and conclusions of law, the Motion to Dismiss is hereby granted.

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