UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MARY R. JOHNSON,

Plaintiff,

vs. Case No. 3:16-cv-178-J-MCR

SPECIALIZED LOAN SERVICING, LLC,
and THE BANK OF NEW YORK MELLON,

Defendants.
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**ORDER**

**THIS CAUSE** is before the Court on Defendant Specialized Loan Servicing, LLC's ("SLS") Motion to Dismiss Second Amended Complaint (the "Motion") (Doc. 49) and Plaintiff's response in opposition thereto (Doc. 55). After consideration of the memoranda submitted by the parties and for the reasons stated herein, the Motion is due to be **DENIED**.

## I. INTRODUCTION

Plaintiff filed her Complaint on January 11, 2016, in the County Court of the Fourth Judicial Circuit, in and for Duval County, Florida, seeking redress for alleged violations of 12 C.F.R. § 1024.41(g) and 12 U.S.C. § 2605 of the Real Estate Settlement Procedures Act ("RESPA"), and 15 U.S.C. § 1692 of the Fair Debt Collection Practices Act ("FDCPA"). (Doc. 2.) Defendants SLS and The Bank of New York Mellon timely filed a notice of removal to this Court on February 24, 2016. (Doc. 1.) On May 2, 2016, Defendants filed a motion to

dismiss the complaint. (Doc. 14.) However, on May 10, 2016, Plaintiff filed an Amended Complaint against Defendants.

On May 20, 2016, Defendants filed a motion to dismiss the Amended Complaint. (Doc. 19.) On January 17, 2017, the Court granted in part and denied in part the motion to dismiss. (Doc. 24.) Specifically, the Court denied Defendants' motion to dismiss to the extent that Defendants argued Plaintiff failed to: (a) adequately allege that she performed all conditions precedent prior to filing suit; (b) adequately pled a cause of action under RESPA because the Home Affordable Modification Program and 12 C.F.R. § 1024.35(e) do not provide private causes of action; (c) adequately allege actual damages under RESPA; (d) adequately plead an FDCPA claim against SLS. (Doc. 24.) The Court granted Defendants' motion to dismiss with respect to Plaintiff's statutory damages claim under RESPA (Count I) and Plaintiff's FDCPA claim against The Bank of New York Mellon (Count III). As such, the Court denied Counts I and III without prejudice and allowed Plaintiff an opportunity to file a second amended complaint.

On April 12, 2017, Plaintiff timely filed her Second Amended Complaint, asserting claims solely against SLS.[1] (Doc. 47.) Plaintiff's Second Amended Complaint adds another RESPA count against SLS, as well as claims against SLS for common law negligence and violations of the Florida Consumer Collection Practices Act, Section 559.72 of the Florida Statutes. Plaintiff seeks

[1] Plaintiff filed a second amended complaint in error on the same date. (Doc. 46.)

punitive damages associated with her common law negligence claim and emotional distress damages associated with her second RESPA count.

On May 4, 2017, SLS filed the instant Motion. (Doc. 49.) Surprisingly, the Motion includes many of the same arguments previously rejected by the Court in its Order on the first motion to dismiss. On May 30, 2017, Plaintiff filed her response in opposition to the Motion. (Doc. 55.)

## II. STANDARD

To survive a motion to dismiss brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). A claim is plausible on its face where "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Plausibility means "more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotation marks omitted).

The determination of whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. The Court is "not bound to accept

as true a legal conclusion couched as a factual allegation." *Id.* "[B]are assertions" that "amount to nothing more than a 'formulaic recitation of the elements'" of a claim "are conclusory and not entitled to be assumed true." *Id.* at 680.

In evaluating the sufficiency of a complaint, a court should make reasonable inferences in plaintiff's favor, but is "not required to draw plaintiff's inference." *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009) (internal citation and quotation marks omitted). "Similarly, unwarranted deductions of fact in a complaint are not admitted as true for the purpose of testing the sufficiency of plaintiff's allegations." *Id.* (internal citation and quotation omitted); *see also Iqbal*, 556 U.S. at 681 (stating conclusory allegations are "not entitled to be assumed true").

## III. DISCUSSION

The relevant facts of this case were laid out in the Court's prior Order on the first motion to dismiss (Doc. 24) and re-alleged in Plaintiff's Second Amended Complaint (Doc. 47 at 2-4). As such, the Court finds it unnecessary to reiterate the facts in this Order.

SLS reiterates the three general arguments that it made in the first motion to dismiss as to why the Motion should be granted. SLS again contends that Plaintiff failed to properly allege that she satisfied a contractual condition precedent to filing suit, that Plaintiff failed to properly allege that she has any

recourse under RESPA, and that Plaintiff's claims under the FDCPA fail because SLS does not fall within the FDCPA's definition of a "debt collector." (Doc. 49 at 4-12.) Defendant also argues that Plaintiff's common law negligence claim should be dismissed. The undersigned addresses the specific arguments set forth by SLS below.

**A. Pleading "Conditions Precedent"**

SLS reiterates its argument that Plaintiff failed to adequately allege the existence of all conditions precedent prior to filing suit. The Court already rejected SLS's argument in this regard in its prior Order on the first motion to dismiss; therefore, the Court rejects SLS's argument for the same reasons here.

The Court does note that SLS presents the novel argument that Plaintiff was required to allege that she provided written notice of the breach of her loan in accordance with her mortgage, but failed to do so. SLS cited no case law in support of its position. It is also unclear why SLS failed to raise this argument in the first motion to dismiss. Nevertheless, when read in the light most favorable to Plaintiff, the "notice-and-cure" provision applies only to disputes between Plaintiff and her lender concerning acts relating to the mortgage contract. The clause imposes no such obligations regarding disputes Plaintiff has with SLS, which services the loan secured by the mortgage. *See, e.g., Graham v. Ocwen Loan Servicing, LLC*, No. 16-cv-800011-CIV-COHEN/SELTZER, 2016 WL 1573177, at *4 (S.D. Fla. April 19, 2016) (rejecting a similar argument and noting that the case

arises from distinct statutory duties imposed on loan servicers); *Wynkoop v. Wells Fargo Home Mortg.*, No. 11-60392-CV, 2011 WL 2078005, at *2 (S.D. Fla. May 26, 2011) (rejecting similar argument and noting that the plaintiff's RESPA and corresponding negligence claims arise from statutory duties and not upon a duty imposed upon the defendant by the mortgage); *see also Schmidt v. Wells Fargo Home Mortg.*, No. 3:11-cv-59, 2011 WL 1597658, at *3 (E.D. Va. April 26, 2011), *aff'd* 482 F. App'x 868 (4th Cir. 2012) (analyzing a substantively identical provision and stating that "[t]he notice-and-cure provisions in the deeds of trust bind the borrower and the lender, not the borrower and the loan servicer"). Therefore, SLS's motion to dismiss based upon failure to plead a condition precedent is denied.

**B. Recourse under RESPA**

**i. Private Cause of Action**

SLS again contends that Title 12, Section 1024.35(e) of the Code of Federal Regulations does not provide a private right of action for damages. As discussed in the prior Order, the basis of Plaintiff's claims is supported by RESPA itself, 12 U.S.C. §§ 2605(e)-(f). (Doc. 24 at 11-12.) Thus, SLS's argument, while technically correct, fails.

**ii. Actual Damages Under RESPA**

SLS also reiterates its argument that Plaintiff failed to sufficiently plead actual damages under RESPA. The Court already rejected SLS's argument in

this regard in its prior Order on the first motion to dismiss; therefore, the Court rejects SLS's argument for the same reasons here.

With respect to SLS's additional argument that Plaintiff has not suffered actual damages because her loan has been modified to the terms initially presented to her in the permanent loan modification, such argument in premature at the motion to dismiss stage. While Plaintiff may not be able to prove she suffered actual damages, the Court must accept her well-pled allegations as true when analyzing a motion to dismiss. Plaintiff has sufficiently alleged that she suffered late fees and other increased fees and costs to reinstate her mortgage as a result of the alleged RESPA violations.[2]

**C. Recourse Under the FDCPA**

SLS makes the same argument as in its first motion to dismiss, urging the Court to dismiss Plaintiff's FDCPA claim against it. Upon review of the well-pled allegations in the Second Amended Complaint, and for the reasons stated in its prior Order, the Court is able to make a reasonable inference that SLS is a mortgage servicing company that acquired the loan at issue while the loan was in default and meets the requirement of a "debt collector" under the FDCPA. Thus, Defendant SLS's request to dismiss the FDCPA count against it is due to be denied.

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[2] Plaintiff also alleged that she suffered emotional distress damages as a result of SLS's violations under RESPA, which SLS did not challenge in the Motion. (Doc. 47 at 14.)

### D. Recourse Under Common Law Negligence

Finally, SLS argues that Plaintiff's common law negligence claim against it must be dismissed. SLS argues that Plaintiff's negligence claim must be dismissed because Plaintiff cannot show that it owed a legal duty to Plaintiff and because any duties owed by the mortgage servicer arise out of contract and not tort. On the other hand, Plaintiff argues that Florida common law supports a claim for negligence per se for violations of federal administrative regulations, such as Regulation X of RESPA.

It appears that a negligence per se claim is appropriate under Florida law where a plaintiff adequately alleges that a particular defendant breached the duties imposed upon it by RESPA. *See Nunez v. J.P. Morgan Chase Bank, N.A.*, 648 F. App'x 905, 910 (11th Cir. 2016) (reversing district court decision dismissing negligence per se claim based on RESPA violations where the plaintiff sufficiently pled RESPA violations); *Nunez v. J.P. Morgan Chase Bank, N.A.*, 6:14-cv-1485-Orl-31GJK, 2017 WL 1552049, at *9 (M.D. Fla. May 1, 2017) (holding on remand that the plaintiff's "negligence per se claim is dependent on a finding that [the defendant] breached the duties imposed on it by RESPA. As described above, a reasonable jury could find that [the defendant] violated RESPA and that Nunez suffered damages as a result. Therefore, [the plaintiff's] negligence per se claim stands"). Plaintiff alleged sufficient facts to support a negligence per se claim based on SLS's RESPA violations. (Doc. 47 at 15.)

Plaintiff also alleged adequate facts to support a punitive damages claim at this stage. Thus, SLS's request to dismiss Count IV of the Second Amended Complaint is due to be denied.

## IV. CONCLUSION

For the foregoing reasons, it is **ORDERED**:

The Motion (**Doc. 49**) is **DENIED**.

**DONE** and **ORDERED** at Jacksonville, Florida, on October 24, 2017.

MONTE C. RICHARDSON
UNITED STATES MAGISTRATE JUDGE

Copies to:

Counsel of Record