

BANKING ALERT

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Debtor in Default May Assert Breach of Contract Claim Against Loan Servicer for Failure to Honor Loan Modification Agreement

In *Wilson v. Roundpoint Mortgage Servicing Corporation*, No. CV 21-19072 (CPO), 2022 WL 3913318, at *1 (D.N.J. Aug. 31, 2022), the United States District Court for the District of New Jersey ruled that a debtor in default could proceed with a breach of contract claim against the servicer of the loan for allegedly failing to honor two mortgage modification agreements.

Plaintiff Ralph F. Wilson (“Plaintiff”) was the sole signatory of a note and mortgage that went into default. Plaintiff made an application for loss mitigation relief with defendant Roundpoint Mortgage Servicing Corporation (“Roundpoint”), the servicer of the loan. Roundpoint approved Plaintiff for a mortgage modification plan, and the parties entered into a Trial Plain Payment Agreement that required Plaintiff to make three monthly payments of \$982.94 in order to be eligible for a permanent loan modification. Plaintiff alleges that, although he made four monthly payments of \$982.94, Roundpoint refused to execute the agreed-upon loan modification. Instead, Roundpoint initiated a foreclosure action in the Superior Court of New Jersey, Atlantic County. In an effort to resolve the foreclosure action, Roundpoint and Plaintiff entered into a second Trial Plain Payment Agreement pursuant to which Plaintiff was required to make three monthly payments, this time in the amount of \$950.37. Plaintiff alleges he made the required payments but Roundpoint once again refused to execute a permanent loan modification.

On October 21, 2022, Plaintiff initiated an action against Roundpoint in the United States District Court for the District of New Jersey alleging: (i) common law negligence and/or reckless indifference and/or intentional misrepresentation, (ii) breach of contract and breach of good faith and fair dealing, (iii) common law fraud and/or violation of the New Jersey Consumer Fraud Act (“CFA”), and (iv) violations of the Truth In Lending Act (“TILA”) and Real Estate Settlement and Procedures Act (“RESPA”). Roundpoint filed a motion to dismiss in response.

Applying New Jersey law, the District Court ruled that Plaintiff’s common law tort claims (common law negligence, reckless indifference and intentional misrepresentation) were barred by the economic loss doctrine which prohibits a party from “recovering in tort economic losses to which their entitlement only flows from a contract.” Because Plaintiff’s tort claims were based on a

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contractual relationship (*i.e.*, the Trial Plain Payment Agreements), and Plaintiff had not articulated any other independent duty of care upon which the claims could survive, the District Court dismissed the tort claims in their entirety with prejudice.

The District Court also ruled that Plaintiff failed to state a claim with respect to his common law fraud/ CFA claims. In the Complaint, Plaintiff generally alleged that Roundpoint engaged in unconscionable commercial practices “in direct contradiction to its promises to provide superior and legal loan servicing.” The Court found that Plaintiff’s vague allegations did not meet the heightened pleading standard of F.R.C.P. 9(b) as Plaintiff did not identify, among other things, the contents of any specific promise, who made the promise and how it was false.

Plaintiff’s TILA and RESPA claims suffered a similar fate. In order to state a claim under TILA, a plaintiff must state “with requisite specificity” which fees and charges were not disclosed. The Court found that Plaintiff’s Complaint lacked the factual basis to support a TILA claim as it did not allege that the agreements at issue included any misleading disclosures or statements. Similarly, under RESPA, a plaintiff must identify a violation of an obligation under the statute. The District Court dismissed Plaintiff’s RESPA claim because, among other things, nothing in the statute imposes a duty on a loan servicer to provide a borrower with any specific loss mitigation options.

The District Court did allow Plaintiff to proceed with his breach of contract claim as Plaintiff had adequately alleged all necessary elements — the existence of a contract (*i.e.*, the Trial Plain Payment Agreements), that he upheld his side of the agreements by making the requisite monthly payments and Roundpoint’s breach by refusing to issue a permanent loan modification. However, the District Court dismissed Plaintiff’s claim for breach of the implied covenant of good faith and fair dealing because the conduct at issue in that claim was the same conduct presented in his breach of contract claim.

New York Federal Court Dismisses Complaint Against Bank That Processed Wire Transfers

In *Huang v. Hong Kong and Shanghai Banking Corporation Ltd.*, 2022 WL 4123879 (S.D.N.Y. Sept. 9, 2022), the District Court granted a bank’s motion seeking dismissal of claims asserted by a customer claiming the bank was liable for a series of wire transfers it processed on her behalf that totaled over \$1,000,000.

By way of factual background, the plaintiff, Yen Hwa Huang (“Plaintiff”), claimed that in August 2019, she received a phone call from a person claiming to work at the Chinese Consulate in New York who advised her she was being investigated for fraud and money laundering. The caller further advised Plaintiff that, in order to avoid prosecution and extradition, Plaintiff would have to provide the “investigators” access to her bank accounts and send a series of wire transfers. Plaintiff was further advised not to discuss the “investigation” with anyone else. As advised, Plaintiff went to four separate financial institutions where she maintained accounts, liquidated her holdings at each institution, and sent four wires to an account maintained at Hong Kong and Shanghai Banking Corporation LTD (“HSBC HK”). For each of the wires, HSBC Bank USA, N.A. (“HSBC”) served as the intermediary bank, which accepted and processed the money transfers from Plaintiff’s various New York banks. Each of the wire transfers was sent to a different account maintained at HSBC HK. As soon as the money was deposited into these accounts, the money was immediately transferred and the account at HSBC HK emptied. The first three wires allegedly cleared without issue, but the fourth, in the amount of \$160,000, was flagged by HSBC HK as “possible fraud” and the money was returned to Plaintiff. Plaintiff, however, subsequently rewired those funds through a different bank. After the four transfers were completed, Plaintiff realized she was the victim of fraud and sought to have the wire transfers recalled, which proved unsuccessful. In May 2020, Plaintiff filed suit against, among

others, HSBC HK, HSBC, and several unnamed defendants for aiding and abetting fraud, aiding and abetting conversion, negligence, and violation of UCC Article 4A. HSBC filed a motion to dismiss those claims.

On the motion, the District Court initially addressed HSBC's argument that the UCC displaced all common law claims asserted by Plaintiff. In reviewing the relevant law, the District Court noted that courts have permitted plaintiffs to pursue common law claims relating to wire transfers where the allegations concern the bank's conduct before and after the wire transfer and not the "mechanics of processing a wire transfer," *i.e.*, the bank's failure to properly monitor the fraudster's account for fraudulent activity or the bank's refusal to conduct a proper investigation after learning of the fraud. In reviewing Plaintiff's allegations, the District Court held that Plaintiff's allegations concerning HSBC's failure to maintain reasonable security procedures, including HSBC's alleged failure to detect and investigate suspicious activity, fell outside the scope of Article 4A. Accordingly, the District Court held that Article 4A did not displace the common law claims.

Turning to the common law claims on their merits, the District Court held that the aiding and abetting fraud and aiding and abetting conversion claims were not adequately pled as there were no plausible facts alleged indicating that HSBC had direct and clear knowledge of the wrongdoing. The Court agreed with HSBC's argument that because HSBC only served as the intermediary bank, there was no plausibility to the suggestion that HSBC actually knew the wire transfers were part of a fraudulent scheme. The Court also held that Plaintiff could not demonstrate the other prong of an aiding and abetting claim – substantial assistance – holding that "ordinary business transactions a bank performs for a customer" do not the type of conduct sufficient to meet the substantial assistance prong of an aiding and abetting claim.

The District Court also agreed with HSBC that Plaintiff's negligence claim should be dismissed, finding that Plaintiff, a non-customer of HSBC, was owed no duty by HSBC to protect Plaintiff from the fraudulent conduct of third-parties.

Finally, the District Court dismissed the Article 4A claims without prejudice as Plaintiff had failed to identify which specific provisions of Article 4A applied to her claims. While the District Court provided Plaintiff thirty days to amend her Complaint to address the deficiencies in the Article 4A claim, the District Court noted that the potentially relevant provisions of Article 4A, Sections 202 and 203, generally apply in circumstances where the wire transfers are unauthorized. Here, the District Court stated, the wire transfers were authorized by Plaintiff, albeit under false pretenses.

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