

U.S. District Court Judge Blake Finds That The Home Affordable Modification Program Does Not Preclude Plaintiffs From Bringing Their State Law Claims But Dismisses Their Claims On The Merits

In her January 8, 2013 opinion, the Honorable Catherine C. Blake of the U.S. District Court for the District of Maryland (the “Court”) dismissed plaintiffs Robert Goss and Shirley Goss’s (“Plaintiffs” or the “Gosses”) complaint against Bank of America, N.A. (“Defendant” or “Bank of America”). Despite the Court’s recent dismissal of complaints presenting substantially similar claims under the Home Affordable Modification Program (“HAMP”) by the same attorney, Judge Blake issued an opinion that may provide an important distinction and fair warning to mortgage servicers.

In the previous two cases, *Matthews v. Wells Fargo Bank, N.A.*, No. MJG-12-1204, 2012 U.S. Dist. LEXIS 126646 (D. Md. Sept. 5, 2012) and *Spaulding v. Wells Fargo Bank, N.A.*, No. GLR-11-2733, 2012 U.S. Dist. LEXIS 101776, (D. Md. July 23, 2012), the Court stated that it had “made it clear that absent a [Trial Period Plan (“TPP”)] Agreement [between Plaintiff and Defendant], a suit that seeks the general enforcement of the HAMP guidelines must be dismissed.” *Spaulding*, 2012 U.S. Dist. LEXIS 101776 at *10 (granting defendant’s motion to dismiss where plaintiffs’ claims were based on defendant’s denial of their HAMP application and plaintiffs did not allege that a TPP was in place or even offered); *see Matthews*, U.S. Dist. LEXIS 126646 (granting defendant’s motion to dismiss and adopting, *mutatis mutandis*, Judge Russell’s decision in *Spaulding*); *Ramos v. Bank of Am., N.A.*, No. DKC-11-3022, 2012 U.S. Dist. LEXIS 77123, 2012 WL 1999867, at *3 (D. Md. June 4, 2012); *Coulibaly v. J.P. Morgan Chase Bank, N.A.*, No. DKC 10-3517, 2011 U.S. Dist. LEXIS 87495, 2011 WL 3476994 at *15

(D. Md. Aug. 8, 2011); *Allen v. CitiMortgage, Inc.*, No. CCB-10-2740, 2011 U.S. Dist. LEXIS 86077, 2011 WL 3425665, at *4 (D. Md. Aug. 4, 2011); *see also Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 558-59 (7th Cir. 2012). The Court explained that in these cases, the plaintiffs' claims were allowed to proceed on the basis of a previously established TPP agreement. *Spaulding*, 2012 U.S. Dist. LEXIS 101776 at *10.

In the *Goss* opinion, Plaintiffs had not entered into a TPP agreement with Defendant. Nevertheless, Judge Blake explained that despite a plaintiff's inability to "enforce HAMP guidelines on behalf of the federal government or as a third-party beneficiary of the HAMP participation agreement between the federal government and the mortgage servicer[,] . . . the absence of a private right of action from a federal statute provides no reason to dismiss a claim under a state law just because it refers to or incorporates some element of the federal law." (Op. at 4-5.) Thus, Plaintiffs were not precluded from pursuing their state law claims, and Judge Blake proceeded to evaluate their six counts against Defendant.

Plaintiffs' complaint charged Defendant, as successor by merger to BAC Home Loans Servicing LP, "with using unfair and deceptive trade practices by making false statements of material fact in connection with [Plaintiffs'] loan modification application." (Compl. at 2, ¶ 1.) Moreover, Plaintiffs alleged that Defendant "failed to honor *its promise* to process a loan modification application under [HAMP]." (*Id.*) Plaintiffs did not seek to assert a private right of action under HAMP. (Compl. at 2, ¶ 2.) Rather, Plaintiffs sought "to hold Bank of America liable for its false statements (which were false independent of HAMP), and to enforce Bank of America's promise (which happened to be a promise to comply with the rules governing HAMP) as it induced detrimental reliance by Robert and Shirley Goss." (*Id.*)

Judge Blake explained that:

under HAMP, participating mortgage servicers are promised incentives by the federal government if they process mortgage modification applications under guidelines promulgated by the U.S. Department of Treasury. Servicers agree to enter into [TPPs] with eligible homeowners that may lead to a permanent modification of their mortgage terms to avoid foreclosure. If homeowners meet the HAMP eligibility criteria, they are entitled to a TPP—the guidelines leave no discretion to the servicer to deny eligible applicants.

(Op. at 1-2.) Plaintiffs' claims arose out a TPP Defendant offered them, which allegedly failed to comply with HAMP.

On June 21, 2011, Defendant sent Plaintiffs a letter, promising to review Plaintiffs' eligibility for a loan modification under the rules governing HAMP. (Compl. at 2, ¶ 3.) Plaintiffs claimed that from then on, they relied on Defendant's promise by "devoting resources to completing and submitting the application forms and documentation required as part of a HAMP application, and by not attempting to sell the home, simply submitting to foreclosure, or taking legal action sooner." (Compl. at 3, ¶ 4.)

Plaintiffs submitted a HAMP application to Bank of America on May 14, 2012. (Compl. at 3, ¶ 5.) On June 8, 2012, Defendant offered Plaintiffs a modification, including a TPP with an acceptance deadline of August 1, 2012. (Compl. at 3, ¶ 6.) According to Plaintiffs, the "offer proposed a modified monthly payment that was higher than permitted under the HAMP Guidelines [and that b]y making the offer, Bank of America represented – at least implicitly – that the proposed monthly payment was in accordance with the HAMP Guidelines." (Compl. at 3, ¶ 7.) Plaintiffs concluded that this representation was false, and did not accept the offer by the August 1 deadline. (Compl. at 4, ¶ 8.)

Consequently, on August 2, 2012, Bank of America rejected Plaintiffs' HAMP application "due to expiration of the deadline." (Compl. at 4, ¶ 9.) Defendant stated in its correspondence, "The workout assistance you have requested is not an option." (*Id.*) According to Plaintiffs, this statement was false because "[1] [Plaintiffs] qualified for a HAMP modification, and [2] Bank of America had not yet offered a modification that complied with its *promise to process the application under HAMP.*" (Compl. at 4, ¶ 9.)

Plaintiffs alleged further that Defendant's June 8, 2012 offer "did not even come close to complying with the HAMP Guidelines" and that according to the U.S. Department of the Treasury's HAMP statistics, Defendant "fails to assist over 90% of its customers entitled to HAMP modifications." (Compl. at 4, ¶ 10.) Plaintiffs alleged therefore that Bank of America "never intended to keep its *promise to process the application under the HAMP Guidelines*"; thus, this promise constituted a false statement of material fact. (Compl. at 4, ¶ 10.)

Plaintiffs stated that Defendant's June 21, 2011 promise was "an intentional false statement" and along with the aforementioned misrepresentations, they were made to defraud the Gosses. (Compl. at 5, ¶ 11.)

Plaintiffs sought compensatory damages plus interest, the costs of the action, punitive damages, attorney fees, and specific performance—that is, requiring Bank of America to process Plaintiffs' May 14, 2012 loan modification application under the HAMP guidelines.

Defendant's Memorandum in Support of its Motion to Dismiss cited the two aforementioned cases, *Matthews* and *Spaulding*, in which plaintiffs had alleged, "via state law causes of action, that the respective defendants . . . owed the plaintiffs a duty to comply with HAMP by agreeing to process their requests for a HAMP loan modification." (Def. Mem. In

Supp. of Mot. to D. at 2, citing *Matthews*, 2012 U.S. Dist. LEXIS 126646 at *2-3 and *Spaulding*, 2012 U.S. Dist. LEXIS 101776 at *8.) The Court found in both cases that the “allegations were nothing more than thinly-veiled attempts to assert an impermissible right of action under HAMP and therefore dismissed the complaints. (*Id.*) Defendant also addressed the substance of Plaintiffs’ claims and moved to dismiss on the grounds that Plaintiffs’ claims failed in other material respects.

Judge Blake did not rely on *Matthews* and *Spaulding* to dismiss the complaint outright and rather addressed each of the Plaintiffs’ six counts. Judge Blake discussed the first two counts—violation of the Maryland Consumer Protection Act (“MCPA”) and common law fraud, together, and found that the June 2011 letter in which Defendant offered Plaintiffs assistance with a loan modification did not constitute a false statement or misrepresentation. (*Id.* at 6.) Moreover, even if other statements Plaintiffs alleged in the complaint could be considered false and misleading, Plaintiffs still could not demonstrate that they relied on these statements, and consequently, suffered an actual injury. (*Id.*) In sum, because Plaintiffs could not show that they reasonably and detrimentally relied on a false statement by Defendant, Judge Blake dismissed these two counts. (*Id.*)

Judge Blake analyzed the third count, promissory estoppel, as a detrimental reliance claim and concluded that the June 2011 letter did not “plausibly include a clear and definite promise that [Defendant] would take any action on the Gosses’ mortgage.” (*Id.* at 7.) Rather, the letter “merely offered to assist them in seeking a modification.” (*Id.*) This count was therefore dismissed.

Judge Blake also dismissed counts four and five, negligence and negligent misrepresentation, on the grounds that Defendant owed no duty in tort to Plaintiffs. (*Id.* at 9.) Finally, Judge Blake dismissed count six, breach of implied-in-fact contract, where the June 2011 letter lacked sufficient bargained-for consideration and was “at most, akin to a ‘letter of intent’ that [Defendant] would enter into a TPP agreement with the Gosses.” (*Id.* at 7-8.) Thus Judge Blake distinguished the June 2011 letter from TPPs—“formal written agreements, unequivocally stating an intent to be bound, and . . . supported by additional consideration” which, courts have found, sufficient to establish contractual rights. (*Id.* at 8.) Here, Defendant offered Plaintiffs the opportunity to enter into a TPP with Defendant, but Plaintiffs chose not to accept. Thus, Plaintiffs could not rely on a TPP, or any other agreement outside of their mortgage agreement with Defendant, to establish a contractual relationship with Defendant. (*Id.*)

In conclusion, mortgage servicers should be aware that a plaintiff may be able to pursue state law claims arising out of HAMP where they have previously been foreclosed.