Can a Mortgage Servicer be Sued by a Borrower For Breach of Contract?

Summary by: David R. Chenelle, Esq.

The short answer is "No", and was answered by the U.S. Bankruptcy Court, District of Massachusetts.

The facts of this case began in 2003 when Kimmy Jackson ("Jackson") bought her condominium unit. A few years after her purchase her financial troubles began, resulting in the foreclosure of her unit in 2008. After filing several bankruptcy petitions and complaints against various lenders and servicers, and eventually getting her unit deeded back to her, Jackson now has one case pending in the First Circuit Court of Appeals and one that has just been resolved. It is the second of these two which is the subject of this article.

With her condo unit being deeded back to her, Jackson alleges that in January of 2018, she submitted a loan modification request to the then servicer of her mortgage, Capital One, which responded with a request for further information and clarification. Jackson claims that those additional documents and information were provided, while Capital One indicates that Jackson failed to respond, and thereafter closed its file.

Having just been assigned as the servicer to Jackson's account in May of 2018 Rushmore Loan Management Services ("Rushmore"), sent her three separate letters advising Jackson of her rights and mitigation options. Jackson failed to respond to the various letters from Rushmore and instead sent a Qualified Written Request ("QWR"), pursuant to 12 U.S.C. § 2605(e)(1), requesting a number of documents and information concerning her loan. Rushmore responded to the QWR within the statutory period of time (30 days). Thereafter, Jackson's loan was once again transferred. The last day that Rushmore serviced Jackson's account was November 18, 2018.

Notwithstanding that Rushmore's involvement in Jackson's case was for less than 7 months, Jackson filed a three count complaint in the U.S. Bankruptcy Court

against Rushmore alleging: 1) violations of the Federal Real Estate Settlement Procedures Act (RESPA); 2) violations of various federal regulations and state laws; and 3) breach of contract.

Although the first two counts appeared initially to be of significance the court, (J. Hoffman) upon review of the pleadings quickly dispatched both of them as Jackson had failed to meet her burden of pleading specific facts and actual damages directly linked to those counts. The court made several hard comments that the complaint was unverified and that Jackson failed to provide the minimum requirement of supporting affidavits, two points which appear to have doomed Jackson's case from the outset.

Thereafter, the court provided extensive analysis into the third count of the complaint which also brought in the first two counts, claiming that Rushmore's failure to comply with RESPA and "failure to act in good faith or deal fairly with her, constituted a breach of its duty under Ms. Jackson's promissory note and mortgage". Even though Rushmore was not party to those contracts, Jackson claimed it was still liable as Rushmore was the noteholder/mortgagee's appointed agent.

The key issue missed by Jackson was the fact that Rushmore, as a servicer, was not a direct party to the contracts. Under Massachusetts law, in order to succeed on a claim for breach of contract, a plaintiff must prove that a valid contract existed between the parties, that the plaintiff was able to perform under the contract, that the defendant breached its duties, and that the breach caused the plaintiff damage. (See *Bose Corp. v. Ejaz*, 732 F.3d 17, 21 (1st Cir. 2013). Stated another way, neither party can be a stranger to the contract, as there must be privity between the plaintiff (Jackson here) and the alleged breach party (Rushmore). (See *Mellen v. Whipple*, 67 Mass. 317 (1854)).

Jackson sought to overcome the well and extensively established case law by claiming that Rushmore was liable as an agent for the lender with the support of one cited case, which the court quickly rejected. The court's concluding analysis went on to state that courts have consistently held that without an assignment of specific contractual obligations, there is no contractual privity between a borrower and a loan servicer with respect to a note and mortgage, and, therefore, the borrower cannot prevail against the servicer on a breach of contract claim. See Mazzei v. Money Store, 308 F.R.D. 92, 109 (S.D.N.Y. 2015).

Finding that Jackson failed to identify any assignable contractual obligations from the lender to Rushmore, it held there was no contractual privity between her and Rushmore.