

COMPASS BANK, Plaintiff, v. TANIA LYNN VANPELT, et al, Defendants. Circuit Court, 7th Judicial Circuit in and for St. Johns County. Case No. CA10-1624, Division 55. April 2, 2015. Howard M. Maltz, Judge.

ORDER ON MOTIONS TO DISMISS
FOURTH AMENDED COUNTERCLAIM AND
ADDITIONAL PARTY COMPLAINT

This cause came on to be heard pursuant to Motions to Dismiss the Defendant's Second Amended Answer, Affirmative Defenses, Demand for Jury Trial and Fourth Amended Counterclaim and Additional Party Complaint, filed by Compass Bank ("Compass"), Wells Fargo Home Mortgage ("Wells Fargo"); Florida Default Law Group ("FDLG") and Carlton Fields, P.A. ("Carlton"). (Dkt. #164 and #165) This Court being fully advised in the premises finds as follows:

This case began as a foreclosure action initiated by Compass against Defendant Tania VanPelt ("VanPelt"). VanPelt ultimately responded by filing a counterclaim against Compass and Additional Party Claims against Wells Fargo, FDLG and Carlton. The operative counterclaim and additional party complaint is VanPelt's Second Amended Answer, Affirmative Defenses, Demand for Jury Trial and Fourth Amended Counterclaim and Additional Party Complaint. (hereinafter "VanPelt's Complaint") (Dkt. #162) VanPelt's Complaint asserts the following claims: Count I -- Violations of Florida's Consumer Collection Practices Act ("FCCPA")(Fla. Stat. §§559.55-559.785) against Compass, Wells Fargo and FDLG; Count III -- Breach of Contract against Wells Fargo and Compass; Count III -- Violations of the Federal Fair Debt Collections Practices Act ("FDCPA")(15 U.S.C. §1692, *et. seq.*) against Wells Fargo, FDLG, and Carlton; Count IV -- common law indemnity against Wells Fargo. Compass, Wells Fargo, FDLG and Carlton move to dismiss all claims asserted against them.

The primary purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted. *Sobi v. Fairfield Resorts, Inc.*, 846 So.2d 1204 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1350a] ; *Provence v. Palm Beach Taverns, Inc.*, 676 So.2d 1022 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1490c]. In making this determination, the trial court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations. *Sobi, supra.*; *City of Gainesville v. State, Dept. of Transp.*, 778 So.2d 519 (Fla. 1st DCA 2001) [26 Fla. L. Weekly D674b]; *Cintron v. Osmose Wood Preserving, Inc.*, 681 So.2d 859, 860-61 (Fla. 5th DCA 1996) [21 Fla. L. Weekly D2249d]; *Provence, supra.* It is not for the Court to speculate whether the allegations are true or whether the pleader has the ability to prove them. *Sobi, supra.*; *City of Gainesville, supra.*; *Provence, supra.* Thus,

“[t]he question for the trial court to decide is simply whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested.” *Sobi, supra.*; *Cintron*, 681 So.2d at 860-61.

A. Count I

Count I of VanPelt's Complaint asserts a claim against Compass, Wells Fargo and FDLG for violation of the FCCPA. VanPelt asserts that Fla. Stat. §559.72(9) and §559.72(18) were violated when these parties sent certain letters to her. The letters giving rise to this claim are attached as Exhibit D to VanPelt's Complaint. VanPelt alleges that these letters constituted improper debt collection because (1) the debt did not exist since the mortgage had been paid off; (2) VanPelt was improperly contacted for debt collection since Compass, Wells Fargo and FDLG knew she was represented by an attorney, and (3) Compass, Wells Fargo and FDLG knew that the named mortgagee in the letters was a non-existent entity.

Fla. Stat. §559.72(9) prohibits collection on a debt when the person knows the debt is not legitimate, or asserts the existence of some other legal right when such person knows the right does not exist. Fla. Stat. §559.72(18) prohibits communication with a debtor regarding the debt knowing the debtor is represented by an attorney.

VanPelt's Complaint states a claim for violation of the FCCPA. The VanPelt Complaint asserts that the debt was not legitimate since VanPelt paid off the subject note, a fact known to Compass, Wells Fargo and FDLG; nevertheless, the debt collection was pursued, including contacting VanPelt about the debt knowing she was represented by counsel. The letters attached to the VanPelt Complaint in support of this claim are similar to the letter in *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211 (11th Cir. 2012) where the court concluded such a letter constitutes debt collection activity under the FDCPA. *See also Owens v. Ronald R. Wolf & Assoc., PL*, 2013 WL 6085121 (S.D. Fla. 2013). Although Count I is a claim under the FCCPA, in *Trent v. Mortgage Elec. Reg. Sys., Inc.*, 618 F. Supp. 2d 1356, 1361 (M.D. Fla. 2007), that Court stated that cases explaining what constitutes debt collection activity under the FDCPA should apply with equal force to FCCPA claims.

Compass further argues in support of its motion that the letters attached to VanPelt's Complaint were not sent by it, but were sent by Wells Fargo and FDLG; therefore, it cannot be liable because VanPelt fails to establish Compass had knowledge that the debt was not legitimate. This argument is without merit. According to the allegations in VanPelt's Complaint, Wells Fargo and FDLG were acting as agents on behalf of Compass, the alleged holder or owner of the note and mortgage that was the subject of the foreclosure. Knowledge of the agent can be imputed to the principal through

agency theory. *See Kaplan v. Assetcare, Inc.*, 88 F.Supp.2d 1355, 1363 (S.D. Fla. 2000).

FDLG further argues dismissal of Count I is warranted because that claim is time barred. Pursuant to Fla. Stat. §559.77(4), FCCPA claims must be brought within two years of the date of violation(s). The letters which VanPelt asserts are the basis for her FCCPA claims are dated May 11, 2010 through May 18, 2010. Thus, her FCCPA action needed to be asserted by no later than May 18, 2012. FDLG argues in its motion that the claim against it was not asserted until March 20, 2014. However, a review of the Court's docket reveals that on September 22, 2011 VanPelt sought leave to file a Second Amended Counterclaim, which was attached to her motion, asserting a claim against FDLG (as well as Wells Fargo and Compass) for violations of the FCCPA as a result of the aforementioned letters. (Dkt. #75) Thus, the claim in Count I is not time barred.

Count I of VanPelt's Complaint states a claim under the FCCPA and the Motions to Dismiss that claim are denied.

B. Count II

Count II asserts a claim for breach of contract against Wells Fargo and Compass. It is unclear from VanPelt's Complaint what contract she alleges was breached. VanPelt alleges in Count II that “[t]he *contracts* at issue are the subject Note and Mortgage, together with the verbal agreement reached by VanPelt and Crystal, an authorized representative of [Wells Fargo], acting as servicer/agent for . . . Compass” (emphasis added) (Dkt. #162 ¶54) It is unclear from this allegation, as well as the other allegations in VanPelt's Complaint, whether she is suing on the Note and Mortgage, an oral agreement between Wells Fargo and Compass' representative, or both. During the hearing on the Motions to Dismiss, VanPelt's counsel stated that she is suing on a breach of the note and mortgage, based on Compass and Wells Fargo's failure to satisfy the mortgage upon payoff, not a verbal agreement between VanPelt and the representative regarding the payoff amount. However, this Court is bound by the four-corners of the Complaint, which fails to plead with clarity which contract is being sued upon.

Additionally, if VanPelt is suing under the Note and Mortgage, she is required to attach the same to her Complaint and failure to do so requires dismissal. *See* Rule 1.130, Fla. R. Civ. P.; *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 500 (Fla. 4th DCA 2001) [26 Fla. L. Weekly D849a] (“Where a complaint is based on a written instrument, the complaint does not state a cause of action until the instrument or an adequate portion thereof is attached to or incorporated in the complaint.”) If Count II is based on a verbal agreement on a payoff amount, such a

claim may not be actionable under Fla. Stat. §687.0304. Thus, Count II of VanPelt's Complaint fails to state a claim against Wells Fargo and Compass and will be dismissed without prejudice.

C. Count III

Count III of VanPelt's Complaint asserts a claim under the FDCPA against Wells Fargo, FDLG and Carlton for allegedly violating 15 U.S.C. § 1692e(10) by “making a false representation to the Court that Ms. VanPelt owed a debt to [Compass].” (Dkt. #162 ¶63) In *Trent*, 618 F. Supp. 2d at 1361, the Court held that “foreclosing on a mortgage is not a debt collection activity for the purpose of the FDCPA.” *See also Cowan v. MTGLQ Investors, L.P.*, 2010 WL 3701779, *4 (M.D. Fla. 2010). It should be noted however, that in *Freire v. Aldridge Connors, LLP*, 994 F. Supp. 2d 1284, 1287-88 (S.D. Fla. 2014), the Court held that “in the Eleventh Circuit, the filing of a mortgage foreclosure action will constitute debt collection activity only when the complaint seeks also to collect on the note, that is, to demand payment on the underlying debt.” *Citing Reese, supra*. However, *Reese*, as discussed above, involved a letter sent by the mortgagees' counsel notifying the mortgagor that the promissory note needed to be paid, and if not paid, a foreclosure action would be instituted, which the Court explained constituted the debt collection activity, rather than the initiation of a foreclosure lawsuit. The Court in *Freire* expanded *Reese* to include the filing of a foreclosure lawsuit within the definition of debt collection activity; a conclusion not specified by the Court in *Reese*. Because the actions complained of in Count III were actions taken in court during a foreclosure proceeding, it was not a debt collection activity under the FDCPA.

Moreover, false statements made to the Court and not to the consumer do not constitute a violation of 15 U.S.C. §1692e(10). In *O'Rourke v. Palisades Acquisitions XVI, LLC* 635 F.3d 938 (7th Cir. 2011) a FDCPA claim was similarly brought based on a creditor allegedly misleading a court regarding the debt. In affirming summary judgment in favor of the creditor and finding such conduct does not constitute a FDCPA violation, the Seventh Circuit explained that “when read in light of the Act's purpose and numerous provisions, the [FDCPA's] prohibitions are clearly limited to communications directed to the consumer and do not apply to state judges.” *Id.* at 941. *See also Leone v. Credit Card Receivables Fund, Inc.*, 2009 WL 8477347 (S.D. Fla. 2009)(dismissal of FDCPA claim premised upon allegations in state court lawsuit on a debt that debtor asserted were “unlawful”).

Additionally, the impermissible actions alleged in Count III -- making false statements to the Court -- are barred by the litigation privilege. “Federal and Florida law both recognize absolute immunity from civil actions based upon an attorney's conduct in previous litigation.” *Coursen v. JP Morgan Chase & Co.*, 2013 WL 5437341, *9

(M.D Fla. 2013), *aff'd. Coursen v. Shapiro & Fishman, GP*, 588 Fed. Appx. 882 (11th Cir. 2014). “[A]bsolute immunity must be afforded to any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior. . . so long as the act has some relation to the proceeding.” *Id. citing Kinsey v. HLM Fin. Svcs.*, 2013 WL 536019, *2 (11th Cir. 2013).

For the forgoing reasons, Count III of VanPelt's Complaint fails to state a claim and is barred by the litigation privilege. Therefore, Count III will be dismissed with prejudice.

D. Count IV

Count IV of VanPelt's Complaint asserts a claim for common law indemnity against Wells Fargo. Indemnity is a right that arises when one party “discharges a duty owed by him, but which, as between himself and another, should have been discharged by the other.” *Houdaille Ind., Inc. v. Edwards*, 374 So.2d 490, 492-93 (Fla. 1979). *See also Rosati v. Vaillancourt*, 848 So.2d 467, 470 (Fla. 5th DCA 2003) [28 Fla. L. Weekly D1560a]; *Progressive Express Ins. Co. v. Fla. Dept. of Financial Svcs.*, 125 So.3d 201, 203-04 (Fla. 4th DCA 2013) [38 Fla. L. Weekly D286a]. To state a claim for common law indemnity, a party must allege; “1) that he is wholly without fault; 2) that the party from whom he is seeking indemnity is at fault; and 3) *that he is liable to the injured party only because he is vicariously, constructively, derivatively, or technically liable for the wrongful acts of the party from whom he is seeking indemnity.*” *Doles v. Koden Int'l, Inc.*, 779 So.2d 609, 611 (Fla. 5th DCA 2001) [26 Fla. L. Weekly D640c](emphasis added).

Nowhere in her Complaint does VanPelt allege that she is liable to Compass only because she is vicariously, constructively, derivatively, or technically liable for the wrongful acts of Wells Fargo. Thus, VanPelt's Complaint fails to plead a claim for common law indemnity and this claim will be dismissed. Although, based on the facts asserted in the VanPelt's Complaint it does not appear she can plead a claim for common law indemnity, she will be given one last opportunity to attempt to plead this cause of action if she so chooses.

E. Procedural Irregularities

Wells Fargo, FDLG and Carlton also seek dismissal for procedural irregularities in being added as additional parties to counterclaims against Compass. These parties allege they are improperly joined as parties under Rule 1.170(h), Fla. R. Civ. P. This Court's separate order severing certain claims for trial will cure any procedural irregularities; therefore, this ground need not be addressed.

Therefore, it is ORDERED AND ADJUDGED that

1. The Motions to Dismiss Count I of VanPelt's Complaint are DENIED;
2. The Motions to Dismiss Count II of VanPelt's Complaint are GRANTED without prejudice;
3. The Motions to Dismiss Count III of VanPelt's Complaint are GRANTED with prejudice;
4. The Motions to Dismiss Count IV of VanPelt's Complaint are GRANTED without prejudice;
5. VanPelt is given 20 days to file a Fifth Amended Counterclaim and Additional Party Complaint, in accordance with this Order.
6. Compass, Wells Fargo, FDLG and Carlton shall respond to VanPelt's Fifth Amended Counterclaim and Additional Party Complaint within 20 days of receipt of the same.

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