



**Harris v. HSBC Mortgage Corp., et al.**

2019 | Cited 0 times | E.D. Missouri | September 13, 2019

HARRIS,

STATES COURT

OF MISSOURI DIVISION

NATIONSTAR

MEMORANDUM ORDER

("Nationstar"), ("Fannie Mae"), Systems, ("MERS")

HSBC USA, HSBC HSBC Services, ("HSBC")

HSBC's

HSBC THERRIE

Plaintiff, v.

UNITED DISTRICT EASTERN DISTRICT

EASTERN

No. 4:17CV1312 RLW MORTGAGE, LLC., et al.,

Defendants. 1

AND This matter is before the Court on the Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) filed by Defendants Nationstar Mortgage, LLC Federal National Mortgage Association and Mortgage Electronic Registration Inc. (ECF No. 44) and the Motion to Dismiss Count I and to Join in Co-Defendants' Motion to Dismiss Counts II-IV filed by Defendant Bank N.A., d/b/a Mortgage Corporation a/d/b/a/ Mortgage Inc. (ECF No. 59). Both motions are fully briefed.



## Harris v. HSBC Mortgage Corp., et al.

2019 | Cited 0 times | E.D. Missouri | September 13, 2019

After careful consideration, the Court grants Nationstar's motion and grants motion, in part, and denies it, in part, without prejudice.

1 The First Amended Complaint, which is now the operative complaint, lists Nationstar Mortgage, LLC, as the first named defendant. Accordingly, the Clerk of Court shall amend the style of this case name. 2

did not file a reply memorandum in support of its motion and the time to do so has since passed.

BACKGROUND 3 2008, Plaintiff

St. , 10, ("Note") HSBC \$140,000.00 HSBC.

Plaintiff HSBC

Program ("HAMP"). at, Plaintiff,

HSBC

HSBC Plaintiffs at,, HSBC at,

Plaintiff

at, Plaintiff "fundamental

loan."

Plaintiff HSBC, MERS. MERS

Plaintiff On Stay

US Utilities 690

801, 806 2008). In Therrie Harris obtained a home mortgage loan for the purchase of residential real estate located in the City of Louis. (First Am. Compl. ECF No. 43) He executed a promissory note in favor of in the principal amount of approximately

and an accompanying Deed of Trust in favor of (Id.) In or around February 2014, alleges he approached regarding a possible loan modification under the Home Affordable Modification (Id. 11) According to he provided all requested documents over the course of approximately two years while repeatedly represented to him that a loan modification would be prepared and submitted. (Id.)



## Harris v. HSBC Mortgage Corp., et al.

2019 | Cited 0 times | E.D. Missouri | September 13, 2019

Despite these alleged representations, never provided or produced a loan modification and, at one point, stopped returning phone calls. (Id. 12-13)

In 2016, purported to assign the Note to Nationstar. (Id. 14) After the Note was assigned to Nationstar, alleges Nationstar failed to provide him with a loan number or a location where he should direct his payments. (Id. 15) Despite phone calls with Nationstar, maintains he was never given a loan number or informed of aspects of his (Id.)

In March 2017, originally filed this action pro se in state court against numerous defendants, including Nationstar, Fannie Mae, and (ECF No. 7) Nationstar, Fannie Mae, and removed the case to federal court on the basis of federal question and diversity jurisdiction. (ECF No. 1) Counsel entered an appearance on behalf of on June 5, 2017. (ECF No. 15) August 17, 2017, the parties filed a Joint Motion to Litigation,

3 In deciding a motion to dismiss under Rule 12(b)(6), a court assumes all facts in the complaint to be true and construes all reasonable inferences most favorably to the complainant. ex rel. Raynor v. Nat'l Rural Co-op. Fin., Corp., F.3d 951, 955 (8th Cir. 2012); Eckert v. Titan Tire Corp., 514 F.3d (8th Cir.

- 2 - On

2018,

Plaintiff On 2018, Plaintiff

Practices ("MMPA"), Stat. § 407.010 HSBC MMPA

("TILA"), U.S.C. 1601,

Program ("HAMP") HSBC

Plaintiff HSBC

Procedure

"enough face." 550 U.S. 570 (2007). "Factual

"

See Schaaf 2008) indicating that they were pursuing resolution of this matter and wished to avoid incurring unnecessary expenses. (ECF No. 21) that same date, the Court granted the motion to stay and administratively closed the case pending further notice from the parties. (ECF No. 23) After



## Harris v. HSBC Mortgage Corp., et al.

2019 | Cited 0 times | E.D. Missouri | September 13, 2019

several extensions of time to continue settlement negotiations, the parties filed a joint status report on August 2, stating that they were unable to reach a settlement and requested that the stay be lifted and the case be reopened. (ECF No. 37) The Court reopened the case and ordered to file his amended complaint by an agreed-upon deadline. (ECF No. 38)

August 31, filed his First Amended Complaint asserting five counts: violations of the Missouri Merchandising Act Mo. Rev. et seq., against (Count I); violations of the against Nationstar (Count II); violations of the Truth in Lending Act 15 § et seq., against Nationstar (Count 111); breach of contract as a third-party beneficiary pursuant to the Home Affordable Modification

against and Nationstar (Count IV); and seeking declaratory judgment that is entitled to a loan modification and other relief. (ECF No. 43) Nationstar and

then filed their respective motions to dismiss. (ECF Nos. 44 & 59)

LEGAL STANDARD A complaint must be dismissed under Federal Rule of Civil 12(b)(6) for failure to state a claim upon which relief can be granted if the complaint fails to plead facts to state a claim to relief that is plausible on its Bell Atlantic Corp. v. Twombly, 544,

allegations must be enough to raise a right to relief above the speculative level .... Id. at 555. Courts must liberally construe the complaint in the light most favorable to the plaintiff and accept the factual allegations as true. v. Residential Funding Corp., 517 F .3d 544, 549 (8th Cir. (stating that in a motion to dismiss, courts accept as

- 3 -

801, 806 2008)

"[w]here

appropriate." 870 2008) "are

allegation." U.S. (2009) 550 U.S. "begin

truth." to

DISCUSSION

MERS Plaintiffs MERS. MERS. Plaintiff MERS "Parties"

ifif MERS



## Harris v. HSBC Mortgage Corp., et al.

2019 | Cited 0 times | E.D. Missouri | September 13, 2019

if Plaintiff

MERS

MMP MPPA "[t]he true all factual allegations in the complaint); Eckert v. Titan Tire Corp., 514 F.3d (8th Cir. (explaining that courts should liberally construe the complaint in the light most favorable to the plaintiff).

However, the allegations show on the face of the complaint there is some insuperable bar to relief, dismissal under Rule 12(b)(6) is Benton v. Merrill Lynch & Co., 524 F.3d 866, (8th Cir. (citation omitted). Courts not bound to accept as true a legal conclusion couched as a factual Ashcroft v. Iqbal, 556 662, 678

(quoting Twombly, at 555). When considering a motion to dismiss, a court can by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of Id at 679. Legal conclusions must be supported by factual allegations survive a motion to dismiss. Id

As an initial matter, Nationstar, Fannie Mae, and argue First Amended Complaint fails to state a claim against Fannie Mae or None of the five counts are directly asserted against Fannie Mae or In fact, the only time mentions Fannie Mae or is in the introductory section of the First Amended Complaint listing the (First Am. Compl. 3 & 5, ECF No. 43) and when explaining Nationstar and removed the case to federal court (Id at 8) did not address this argument in his response memorandum. Consequently, the Court grants the motion to dismiss with respect to any claims against Fannie Mae or and dismisses them from this action.

I. A claims The is a broad statute that prohibits act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the

- 4 - commerce." 407.020.1; 4:08CV00821ERW,2009 20, 2009). MMP

370,

407.020.2(2)

Plaintiffs MPPA

"Lender" 367.100

See Stahl US. 700 2003) ("The

dismiss. "). 407.020.2(2) Plaintiff MPPA Plaintiff "Lender"



## Harris v. HSBC Mortgage Corp., et al.

2019 | Cited 0 times | E.D. Missouri | September 13, 2019

"any loans." 367.100(3). Plaintiff, "consumer loans" concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or Mo. Rev. Stat. § see Blake v. Career Educ. Corp., No. WL 140742, at \*2 (E.D. Mo. Jan.

The A, however, does not apply to the following: Any institution, company, or entity that is subject to chartering, licensing, or regulation by the director of the department of insurance, financial institutions and professional registration under chapter 354 or chapters 374 to 385, the director of the division of credit unions under chapter or director of the division of finance under chapters 361 to 369, or chapter 371, unless such directors specifically authorize the attorney general to implement the powers of this chapter or such powers are provided to either the attorney general or a private citizen by statute. Mo. Rev. Stat. § (emphasis added).

HSBC and Nationstar argue separate claims against them asserting violations of the (Counts I and II respectively) should be dismissed because the statute explicitly exempts them as entities that are licensed, chartered, and regulated by the Missouri division of finance. Specifically, Nationstar contends it is a pursuant to section of Missouri's Revised Statutes and is required to obtain a certificate of registration from the director of the division of finance pursuant to section 367.110. In support, Nationstar has attached a screenshot of its license information found on the website for the Missouri division of finance (ECF No. 45-1 ), of which the Court takes judicial notice. v. Dep 't of Agric., 327 F.3d 697, (8th Cir. district court may take judicial notice of public records and may thus consider them on a motion to Accordingly, Nationstar argues the exemption in section applies and prevents from pursuing his claims.

argues the statute Nationstar cites is inapposite to its functions. is defined as person engaged in the business of making consumer credit Mo. Rev. Stat. § According to the same section defines credit as

- 5 - "[

compensation." 367.100(l)(a)

.100 MMP

"consumer loans" "consumer loan" Prior 2002, for

Secured

Unsecured

I, 2002,

367.100(1) 2008.



## Harris v. HSBC Mortgage Corp., et al.

2019 | Cited 0 times | E.D. Missouri | September 13, 2019

§ 10, "lender" 367.100,

MMPA 407.020.2(2).

407.020.2(2). MMP "unless

"lender" .100 Statutes "Pawnbrokers Small Loans" "small" "pawnbroker."

"lender" of "consumer loans" 367.100. unsecured loans or loans that are secured by a security agreement or any other lien on tangible personal property or by the assignment of wages, salary or other Id. §

(emphasis added). Because Nationstar is a lender with respect to real property, Plaintiff concludes it is not a lender under section 367 and, therefore, not exempt from claims under the A. 4

Nationstar replies that Plaintiff only cites half the definition of credit under the section. The full definition of credit is as follows:

(a) to January 1, loans the benefit of or use by an individual or individuals:

a. by a security agreement or any other lien on tangible personal property or by the assignment of wages, salary or other compensation; or b. and whether with or without comakers, guarantors, endorsers or sureties; (b) Beginning January and thereafter, loans for personal, family or household purposes in amounts of five hundred dollars or more[.] Id. § (emphasis added). Plaintiff obtained his loan for household purposes in (First Am. Compl. ECF No. 43) Accordingly, Nationstar argues it is properly considered a

under section subject to registration with the division of finance pursuant to section 367.110, and, therefore, exempt from claims pursuant to section The Court agrees.

While not argued by Plaintiff, the Court nevertheless addresses an additional factor impacting exemption under section As explained above, that section exempts certain regulated institutions from A claims such directors specifically authorize 4 Plaintiff also argues Nationstar is not a under 3 67 because that chapter of the Missouri Revised is and and the loan at issue was neither a

loan nor issued by a For the reasons stated herein, this title is immaterial as the Court finds Nationstar fits the definition of in light of the definition credit in section

- 6 -

statute." 407.020.2(2) Other 407.025.1,



## Harris v. HSBC Mortgage Corp., et al.

2019 | Cited 0 times | E.D. Missouri | September 13, 2019

407.025.1 407.020.2(2). See,

2018

870,

"[t]he

construction." State 2017 \*10 2017

407.020.2(2). See 410, 2014) the attorney general to implement the powers of this chapter or such powers are provided to either the attorney general or a private citizen by Mo. Rev. Stat. § (emphasis added). plaintiffs have argued section which allows private citizens to bring civil actions to recover damages for MMP A violations, provides the power to bring claims against otherwise-exempted entities. Several courts presented with this issue, however, have found that section does not act as an exception to section e.g., *Rashaw v. United Consumers Credit Union*, 685 F.3d 739, 745 (8th Cir. 2012); *Memhardt v. Nationstar Mortg., LLC*, No. 4:17-CV-01411-AGF, WL 5923445, at \*7 (E.D. Mo. Nov. 13, 2018); *Reitz v. Nationstar Mortg., LLC*, 954 F. Supp. 2d 892-93 (E.D. Mo. 2013); *Meyers v. Kendrick*, 529 S.W.3d 54, 62 (Mo. App. 2017). 5

The Court finds the reasoning of these cases to be persuasive and agrees that contention that one provision of the MMPA completely negates another violates well-accepted principles of statutory *Rashaw*, 685 F.3d at 745; see also *Vogt v. Farm Life Ins. Co.*, No. 2:16-CV-04170-NKL, WL 471574, at (Feb. 3, 2017), vacated in part on other grounds, No. 2:16-CV-04170-NKL,

WL 1498073 (W.D. Mo. Apr. 26, 2017). Accordingly, Plaintiffs MMPA claim against Nationstar in Count II is dismissed. Because the Court finds Nationstar is exempt from MMPA claims, it does not address Nationstar's other arguments concerning the sufficiency of Plaintiffs claims under Federal Rule of Civil Procedure Rule 9(b) or whether loan modifications are subject to the MMPA. 6

5 Plaintiff argues the cases Nationstar cites from the Missouri Court of Appeals are not binding on the Court. The Court nevertheless finds those cases to be persuasive. Furthermore, the sole opinion Plaintiff cites from the Supreme Court of Missouri did not consider the issue of exemption under section *Conway v. CitiMortgage, Inc.*, 438 S.W.3d 412 (Mo. (en bane). 6 The Court notes HSBC did not make any of these arguments in its separate motion to dismiss concerning the MMP A claim against it in Count I.

- 7 -

MMPA HSBC





## Harris v. HSBC Mortgage Corp., et al.

2019 | Cited 0 times | E.D. Missouri | September 13, 2019

HSBC, "financial institution"

HSBC's MMPA

30

U.S.C.

Plaintiffs While the Court finds Nationstar has established the against it should be dismissed, has not met its burden. Nationstar cites the precise statutory basis for its exemption argument and attached proof of its registration with the Missouri division of finance.

on the other hand, merely asserts it is a but fails to offer any similar evidence to show it is in fact subject to the authority of the division of finance. Consequently, the Court denies motion to dismiss with regard to the claim against it without prejudice.

II. TILA claims The TILA provides, in relevant part: not later than days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer, including--

(A) the identity, address, telephone number of the new creditor; (B) the date of transfer; (C) how to reach an agent or party having authority to act on behalf of the new creditor; (D) the location of the place where transfer of ownership of the debt is recorded; and (E) any other relevant information regarding the new creditor. 15 § 1641(g)(1) (emphasis added). Count III of the First Amended Complaint alleges Nationstar failed to provide such written notice within thirty days after the Note was assigned to it.

Nationstar argues claim under the TILA should be dismissed because that statute does not establish an obligation for a servicer to provide the requisite notice. Nationstar cites to other districts within this circuit that have dismissed TILA claims brought against loan

- 8 - See, USA 2014

10, 2014) ("The JPMorgan

granted."); Summit 2013 2013), 2013

2013) ("Dismissal

notice."); LP, Supp. 1104, 1107 2011) ("Section



## Harris v. HSBC Mortgage Corp., et al.

2019 | Cited 0 times | E.D. Missouri | September 13, 2019

servicer."). Plaintiff

10,

"A

obligation." U.S.C. "[a]

obligation."

Plaintiff servicers. e.g., Renner v. Chase Bank NA, No. 3:14-CV-39, WL 12605489, at \*3 (D.N.D. Dec. plaintiff] alleges [in the complaint] that is the 'servicing agent' for Fannie Mae. A loan servicer is not a 'creditor' under the TILA. [The plaintiff] has failed to state a claim under the TILA upon which relief may be granted. Krieger v. Mortg. Corp., No. CIV. 12-2522 SRN/JJG, WL 1149536, at \*6 (D. Minn. Mar. 1, report and recommendation adopted, No. CIV. 12-2522 SRN/JJG, WL 1149777 (D. Minn. Mar. 19, is warranted because TILA does not establish an obligation on any Defendant[, none of whom were the new creditor of the subject loan,] to provide the allegedly deficient Kebasso v. BAC Home Loans Servicing, 813 F.

2d n.7 (D. Minn. 1641(g) ... imposes obligations on 'the creditor that is the new owner or assignee of the debt,' not on the mortgagees or loan

argues the relevant notice requirements under the TILA nevertheless apply to Nationstar because it is the assignee of the loan. (First Am. Compl. ECF No. 43) This argument, however, fails to take into account other provisions of the TILA. servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as an assignee of such obligation for purposes of this section unless the servicer is or was the owner of the 15 § 1641(±)(1) (emphasis added). Further, servicer of a consumer obligation arising from a consumer credit transaction shall not be treated as the owner of the obligation for purposes of this section on the basis of an assignment of the obligation from the creditor or another assignee to the servicer solely for the administrative convenience of the servicer in servicing the Id. § 1641(±)(2) (emphasis added).

The Court agrees with Nationstar that, as a loan servicer, the notice requirements in the TILA are inapplicable to it unless also alleges Nationstar owns the loan. The First

- 9 - Plaintiff

Plaintiff Plaintiffs

HAMP HSBC 8



## Harris v. HSBC Mortgage Corp., et al.

2019 | Cited 0 times | E.D. Missouri | September 13, 2019

### Plaintiff Servicer Participation

HAMP "The

[HAMP]

servicer." 4:15-CV-00667-AGF, 2015

2015) 11-33861-EPK, 2012 909200, (Ban1a. S.D. 2012)

2012) "correctly HAMP

SP As"). "Eighth

HAMP." 2012

2012)

Plaintiffs

HSBC's

60)

10 Amended Complaint does not so allege. 7

While the Court must liberally construe the complaint in the light most favorable to and accept the factual allegations as true, see Schaaf, 517 F.3d at 549, the Court cannot supply factual allegations has failed to include. Accordingly, the Court dismisses TILA claim against Nationstar.

III. Claim for breach of contract as a third-party beneficiary under Nationstar and argue Count IV against them, alleging is entitled to damages as a third-party beneficiary of the Agreement between Nationstar and the government, should be dismissed because does not provide for a private right of action. vast majority of courts to examine this issue have held that a homeowner is not an intended third-party beneficiary of the servicer participation agreement between his or her servicer and the government and does not have the right to enforce the agreement against the

Victorian v. Wells Fargo Home Mortg., No. WL 8663993, at \*4 (E.D. Mo. Dec. 14, (quoting In re Newell, No. WL

at \*2 Fla. Mar. 15, (collecting cases)); see also Wigodv. Wells Fargo Bank, NA., 673 F.3d 547, 559 n.4



## Harris v. HSBC Mortgage Corp., et al.

2019 | Cited 0 times | E.D. Missouri | September 13, 2019

(7th Cir. (finding that district courts around the country have ... foreclose[ d] claims by homeowners seeking modifications as third-party beneficiaries of Likewise, Circuit courts have ... declined to recognize a private right of action based on a borrower's status as a third-party beneficiary of

Guthrie v. Bank of Am., Nat. Ass 'n, No. CIV. 12-2472 ADM/LIB, WL 6552763, at \*4 (D. Minn. Dec. 14, (collecting cases).

7 Rather, Nationstar contends that First Amended Complaint indicates Fannie Mae is the actual owner of the loan while Nationstar is merely the servicer to whom the mortgage was assigned for administrative convenience. 8 As indicated above, Motion to Dismiss Count I and to Join in Co-Defendant's Motion to Dismiss Counts II-IV and accompanying memorandum (ECF Nos. 56 & offer substantive analysis directed only at Count I. It joins in Nationstar's arguments regarding the other counts.

- - Plaintiff

See, 10-08836 DDP (SSX, 2010 2010); 515CY0232LEKTWD, 2015

30, 2015), 2016

2016). Plaintiff "a position."

Plaintiff HAMP. HAMP V

IV.

[Plaintiff]

HAMP [Plaintiff]

[Plaintiff]

Plaintiffs HAMP. Plaintiff HAMP.

"any to" notes there is no binding authority in this circuit but cites to several cases that have found third-party beneficiary claims to be meritorious. e.g., Sampson v. Wells Fargo Home Mortg., Inc., No. CV WL 5397236, at \*3 (C.D. Cal. Nov. 19,

Voss v. Bank of Am., NA., No. WL 9581832, at \*9 (N.D.N.Y. Dec. on reconsideration in part, No. 515CV0232LEKTWD, WL 3746575 (N.D.N.Y. July 8, Nevertheless, concedes those cases represent minority (ECF No. 47, at 5)



## Harris v. HSBC Mortgage Corp., et al.

2019 | Cited 0 times | E.D. Missouri | September 13, 2019

The Court is persuaded by the majority position and finds cannot bring a third- party beneficiary claim under Consequently, Count IV and the request for declaratory relief to in Count related are dismissed.

Claim for declaratory judgment Count V, while not directed at any specific defendant, asks the Court to declare the following:

that is entitled to a loan modification, that the Court compel Nationstar to provide loan modification terms consistent with guidelines in place when first applied for a loan modification, that the Court compel Nationstar to refrain from making any derogatory credit report until the loan modification is agreed to, and that the Court compel Nationstar to reimburse

for his attorneys' fees, costs, and expenses. (First Am. Compl. 45, ECF No. 43)

first two requested forms of declaratory relief concern his claims pursuant to As previously discussed, cannot bring a third-party beneficiary claim under Therefore, his requests for declaratory relief that he is entitled to a loan modification and compelling Nationstar to provide such a modification and refrain from making derogatory credit report until the loan modification is agreed are denied as moot. Likewise,

- 11 - Plaintiff Plaintiffs

IS ORDERED

Pursuant Procedure Plaintiff DISMISSED

IS ORDERED

DISMISSED

Order Partial Order. IS ORDERED

RONNIE

STATES the Court agrees with Nationstar that has failed to state any claim against it and denies

request for attorneys' fees, costs, and expenses. Accordingly, IT HEREBY that Defendants Nationstar Mortgage, LLC, Federal National Mortgage Association, and Mortgage Electronic Registration Systems, Inc.'s Motion to Dismiss to Federal Rule of Civil 12(b)(6) (ECF No. 44) is GRANTED



## Harris v. HSBC Mortgage Corp., et al.

2019 | Cited 0 times | E.D. Missouri | September 13, 2019

Therrie Harris's claims against Nationstar are with prejudice. IT FURTHER that Defendants Federal National Mortgage Association, and Mortgage Electronic Registration Systems, Inc. are from this action with prejudice.

A separate of Dismiss accompanies this Memorandum and IT FURTHER that Defendant HSBC's Motion to Dismiss Count I and to Join in Co-Defendants' Motion to Dismiss Counts II-IV (ECF No. 59) is GRANTED, in part, as to its motion to join Nationstar's motion regarding Counts II-IV, and DENIED, in part, as to its motion to dismiss Count I without prejudice. Consequently, Count I against HSBC is the only remaining claim.

HSBC is reminded of its obligation to answer or otherwise respond to the First Amended Complaint within the time set by the rules. Dated of September, 2019.

L. WHITE UNITED DISTRICT JUDGE

- 12 -

