IN THE COUNTY COURT OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR ST. LUCIE COUNTY, FLORIDA

GARY D. MERRITT, an individual

Plaintiff,

v. CASE NO.: 2016SC001636

SETERUS, INC.

Defendants.
_____/

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

THIS CAUSE came before the Court on March 30, 2017, on the Defendant's, Seterus, Inc.'s, Motion to Dismiss the Amended Complaint of Plaintiff, Gary D. Merritt, pursuant to the Florida Rules of Civil Procedure 1.140(b)(6) and 1.420(b). The Court, having reviewed the Motion, the Amended Complaint, and the Court file, and having heard argument of counsel and being otherwise fully advised in the premises, the Court states as follows:

I. BACKGROUND

1. The Court dismissed Plaintiff's claims once by Order dated January 5, 2017, dismissing the original Complaint without prejudice with twenty (20) days leave to amend.

2. Plaintiff's Amended Complaint contains four (4) counts and alleges that the Defendant sent two (2) letters (dated September 8, 2016 and October 5, 2016) to Plaintiff in violation of the Florida Consumer Collection Practices Act ("FCCPA"), Fla. Stat. § 559.72 & 559.77. Plaintiff claims the letters violated the FCCPA because they sought to collect amounts barred by res judicata (Counts 1 & 3) and the statute of limitations (Counts 2 & 4). Those bars arose when Plaintiff's predecessor's prior foreclosure action, Case No. 3013CA001859, was involuntarily dismissed, without prejudice, for failure to appear at trial on September 24, 2015.

II. APPLICABLE STANDARD

When considering a motion to dismiss, all factual allegations are accepted as true and considered in the light most favorable to the nonmovant. *Almarante v. Art Institute of Fort Lauderdale, Inc.*, 921 So. 2d 703, 704–05 (Fla. 4th DCA 2006). "In order to state a cause of action, a complaint must allege sufficient ultimate facts to show that the pleader is entitled to relief." *Kohl v. Blue Cross and Blue Shield of Florida, Inc.*, 988 So. 2d 654, 658 (Fla. 4th DCA 2008) (quoting *Taylor v. City of Rivera Beach*, 801 So. 2d 259, 262 (Fla. 4th DCA 2001)).

III. DISCUSSION

A. Defendant's Letters Were Not an Attempt to Collect a Debt and Therefore Not Actionable Under the FCCPA.

In most cases, periodic mortgage statements are not an attempt to collect a debt and therefore cannot form the basis of an FCCPA claim. The FCCPA provisions in question only apply to the "collection of any debt." *See* Fla. Stat. 559.72; *Florida First Fin. Group, Inc. v. De Castro*, 815 So. 2d 789, 792 (Fla. 4th DCA 2002). The Court should look at the animating purpose of a communication to determine if it is an attempt to collect a debt. *See Gburek v. Litton Loan Servicing LP*, 614 F.3d 380, 384 (7th Cir. 2010).[1] Communications which merely communicate to the consumer the status of their account are not an attempt to collect a debt. *See Bailey v. Sec. Nat. Servicing Corp.*, 154 F.3d 384, 388 (7th Cir. 1998).

Sending a periodic statement for residential mortgage loans is required by the federal Truth in Lending Act ("TILA"), and Regulation Z. *See generally,* 15 U.S.C. 1638(f); 12 C.F.R. 1026.41. Courts have routinely held that communications which are statutorily required simply cannot

[1] At times the Court will cite to federal court and federal regulator's interpretation of analogous language in the Fair Debt Collection Practices Act to assist its efforts to construe the FCCPA. Florida's legislature has expressly directed the Court to do so, stating in the FCCPA, that: "In applying and construing this section, due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to the federal Fair Debt Collection Practices Act." Fla. Stat. 559.77(5).

violate the fair debt collection prohibitions on false, misleading and deceptive debt collection communications. *See Jang v. A.M. Miller & Assoc.*, 122 F.3d 480, 484 (7th Cir.1997) (affirming dismissal of class action, which complained that defendants' letters were false and deceptive even though the "letters tracked the required statutory language nearly verbatim"); *In re Whitmarsh*, 383 B.R. 735, 736–37 (Bankr. D. Neb. 2008) (finding no liability under the FDCPA for statutorily required notices). Carving periodic statements out from the reach of the FCCPA's debt collection protections is consistent with the interpretation of the Consumer Financial Protection Bureau ("CFPB") of analogous provisions of the FDCPA.[2] A review of the CFPB's interpretation shows that the various communications carved out by the CFPB from the reach of federal fair debt collection law are uniformly federally mandated informational disclosures, the purpose of which is not to collect a debt, but rather to comply with federal law by providing disclosures that Congress has deemed beneficial to consumers. The animating purpose of a periodic statement under TILA is not debt collection, but rather to provide meaningful informational disclosure regarding the terms of credit, in compliance with mandatory federal law.

Plaintiff counters that while sending a periodic mortgage statement is required by law, sending a debt collection letter with allegedly inaccurate information can still be a violation. That is certainly true. However, because the FCCPA only regulates the collection of debt, and the Defendant's statements were not an attempt to collect, Plaintiff's remedy for an inaccurate informational disclosure under TILA does not lay in the FCCPA. Additionally, Plaintiff argued that the language in the letters: "[t]his is an attempt to collect a debt. All information obtained will be used for that purpose" is dispositive of the Court's inquiry and transformed those statements

[2] While the Federal Trade Commission originally had jurisdiction to interpret the FDCPA, the 2013 Dodd-Frank Act has passed that authority to the CFPB. In the spirit of the legislatures directive to give due weight to the FTC's interpretations of the FDCPA, the Court will also give due weight to the newly constituted CFPB's interpretations of the FDCPA when construing the FCCPA.

into attempts to collect a debt. However, that is contrary to established authority which holds that the inclusion of this language is not probative to the animating purpose of the letter. *See e.g. Maynard v. Cannon*, 401 Fed. Appx. 389, 395 (10th Cir. 2010); *Lewis v. ACB Bus. Services, Inc.*, 135 F.3d 389, 399 (6th Cir. 1998); *Gburek*, 614 F.3d at 386; *Goodson v. Bank of Am., N.A.*, 600 Fed. Appx. 422, 432 (6th Cir. 2015); *Muller v. Midland Funding, LLC,* 14-CV-81117-KAM, 2015 WL 2412361, at *9 (S.D. Fla. May 20, 2015). Ironically, the FDCPA requires the inclusion of this so-called "mini-miranda" disclaimer in various types of communications whose animating purpose is not to collect a debt. *See* 15 U.S.C. 1692e(11); *Lewis,* 135 F.3d at 399; *Maynard* 401 Fed. Appx. at 395; *Gburek*, 614 F.3d at 386; *Goodson*, 600 Fed. Appx. at 432.

B. The Amended Complaint Fails to State a Cause of Action in Counts I and III Because The Doctrine of *Res Judicata* Does Not Apply to the Dismissal of the Foreclosure Action.

Even if the Court construes the letters as debt collection activity regulated by the FCCPA, the doctrine of *res judicata* does not bar collection of the amounts described in the Amended Complaint for two reasons. First, the doctrine of *res judicata* does not apply to a dismissal without prejudice because such dismissals are not an adjudication on the merits. *See Tilton v. Horton,* 137 So. 801, 808 (Fla. 1931) and *Markow v. Am. Bay Colony, Inc.*, 478 So. 2d 413, 414 (Fla. 3d DCA 1985). Second, the doctrine of *res judicata* would not preclude the collection of these amounts in an acceleration and foreclosure premised on a new and different default even if the initial dismissal was with prejudice. *See Singleton v. Greymar Associates*, 882 So. 2d 1004, 1006 (Fla. 2004); *Bartram v. U.S. Bank Nat. Ass'n*, 41 Fla. L. Weekly S493, 2016 WL 6538647 (Fla. Nov. 3, 2016); and *Desylvester v. Bank of N.Y. Mellon*, (Fla. App., 2017). Counsel for the Plaintiff all but conceded these points during argument in open court but did not have the benefit of these most recent cases when drafting his complaint or amended complaint.

C. The Amended Complaint Fails to State a Cause of Action in Counts I and III Under the FCCPA Based on the Allegation That the Periodic Statements Sought to Collect Amounts Barred by the Statute of Limitations for Mortgage Foreclosure.

Similarly, even if the Court construes the letters as debt collection activity regulated by the FCCPA, the Plaintiff's contention that those statements should have carved out amounts allegedly barred by the statute of limitations for mortgage foreclosure is flawed for three reasons: 1) the statute of limitations has not yet run on any of the Defendant's claims because the debt is not presently accelerated, 2) a statute of limitations defense would not bar the defendant's recovery in a new foreclosure action, and 3) the statute of repose, not the statute of limitations, is the appropriate measure of the truthfulness of the figures set forth in the letters.

1. The Debt Has Not Been Accelerated.

The statute of limitations begins to run when the claim at issue accrues. *See* Fla. Stat. 95.031; *Penthouse N. Ass'n, Inc. v. Lombardi*, 461 So. 2d 1350, 1352 (Fla. 1984). A claim accrues when the facts satisfy the last element of the cause of action. *See* Fla. Stat. 95.031(1); *Kipnis v. Bayerische Hypo-Und Vereinsbank, AG*, 202 So. 3d 859, 861 (Fla. 2016), opinion after certified question answered, 844 F.3d 944 (11th Cir. 2016). In the context of mortgage foreclosure on a mortgage, the last element of the claim is acceleration of the debt, not the date of particular defaults. *See Locke v. State Farm Fire & Cas. Co.,* 509 So. 2d 1375, 1377 (Fla. 1st DCA 1987); *Greene v. Bursey*, 733 So.2d 1111, 1115 (Fla. 4th DCA 1999). Even if the debt was once accelerated, the dismissal of the previous foreclosure proceedings unwound any prior election to accelerate. *See Bartram v. U.S. Bank Nat. Ass'n,* 41 Fla. L. Weekly S493, 2016 WL 6538647, *1 (Fla. Nov. 3, 2016) ("Absent a contrary provision in the residential note and mortgage, dismissal of the foreclosure action against the mortgagor has the effect of returning the parties to their pre-foreclosure complaint status. . . .").

2. The Statute of Limitations Would Not Bar Recovery of the Mortgage Debt in a New Foreclosure.

The Defendant is not time-barred by the statute of limitations from filing a new foreclosure which accelerates the entire debt. In *Bartram v. U.S. Bank Nat. Ass'n,* 41 Fla. L. Weekly S493, 2016 WL 6538647, *1 (Fla. Nov. 3, 2016), the Florida Supreme Court held that, "[o]nce there were future defaults, however, the Bank had the right to file a subsequent foreclosure action—and to seek acceleration of all sums due under the note—so long as the foreclosure action was based on a subsequent default, and the statute of limitations had not run on that particular default." When a mortgage foreclosure action is involuntarily dismissed pursuant to Rule 1.420(b), either with or without prejudice, the effect of the involuntary dismissal is revocation of the acceleration, which then reinstates the mortgagor's right to continue to make payments on the note and the right of the mortgagee, to seek acceleration and foreclosure based on the mortgagor's subsequent defaults. Accordingly, the statute of limitations does not continue to run on the amount due under the note and mortgage. (emphasis added). The Court is not persuaded by Plaintiff's argument pursuant to Sanchez v Rushmore Loan Management Services, LLC, Case No. 15-cv-2714 (MD FLA June 3, 2016) and Collazo v. HSBC Bank, 3D14-2208, Slip Op dated Oct 13, 2016. When refusing to follow these opinions, other Courts have observed that the later withdrawn by the Florida Third District Court of Appeal because it misstated Florida law. Specifically, Judge Dalton observed with respect to *Sanchez*:

> The Court notes that a decision has issued from this District, which found that a dunning letter that "failed to exclude from the amount due the monthly installment payments that exceeded five years" was "sufficient to establish" at the pleading stage that "the letter may have been deceptive or misleading to the least sophisticated consumer." *See Sanchez v. Rushmore Loan Mgmt. Servs., LLC*, No. 8:15–cv–2714–T–30UAM, 2016 WL 3126515, at *2 (M.D. Fla. June 3, 2016). The Court is not persuaded by this decision because the unpublished state law case relied upon by the court for its SOL

> analysis—*Collazo v. HSBC Bank USA, N.A.*, No. 3D14–2208, 2016 WL 1445419 (Fla. 3d DCA Apr. 13, 2016)—has been withdrawn. *See Collazo v. HSBC Bank USA, N.A.*, No. 3D14–2208, —— So.3d ——, 2016 WL 6246446 (Fla. 3d DCA Oct. 13, 2016).

See Garrison v. Caliber Home Loans, Inc., 616CV978ORL37DCI, 2017 WL 89001, at *3 FN 19 (M.D. Fla. Jan. 10, 2017). Thus, the Court does not find Plaintiff's citation to *Sanchez* to be persuasive or that it can be distinguished.

3. Expiration of the Statute of Limitations Cannot Change the Balance of the Mortgage To Be Disclosed.

Even if the Court was persuaded that the statute of limitations had run, the Plaintiff still fails to state a cause of action in these counts. When a cause of action is time-barred by a statute of limitations, the underlying contract and mortgage lien are not substantively affected. Thus, the expiration of the statute of limitations would not change what ought to be disclosed in a periodic disclosure concerning the Mortgage. *See Danielson v. Line*, 135 Fla. 585, 185 So. 332, 333 (1938) (noting that the statute of limitations only affects "the remedy for collecting the note [, but it] in no wise affects the debt or the obligation the note represents"). The statute of limitations is merely procedural in character, and while it can stop a lawsuit, it does not substantively affect the rights of the parties involved. *Id.*; *Allie v. Ionata*, 503 So. 2d 1237, 1240–41 (Fla. 1987). Instead, it is the statute of repose for mortgages that would actually alter the amount of the mortgage lien which the Defendant would be obligated to disclose to the Plaintiff.

The substance/procedure distinction between the statute of limitations and statute of repose was the basis for the dismissal of a virtually identical claim earlier this year. *See Garrison* 2017 WL 89001, at *3. In that case the Court held:

> Defendant's SOL Argument is that Plaintiff cannot base her claims on the SOL Issue because: (1) the statute of limitations is "a defense,

> not an affirmative cause of action;" (2) unlike a "statute of repose," a statute of limitations does not terminate a lien or extinguish a claim; and (3) the applicability of any statute of limitations cannot be resolved before a legal action is brought to enforce the Loan. ... Absent some authority supporting Plaintiff's arguments in the context of this action, the Court finds that the SOL Issue does not provide a plausible basis for Plaintiff's claims. Instead, the SOL Issue should be raised—if at all—as an affirmative defense to an actual collection or foreclosure action.

IV. CONCLUSION

Accordingly, it is ORDERED AND ADJUDGED as follows:

1. The Defendant's Motion to Dismiss the Amended Complaint is GRANTED;

2. Plaintiff's Amended Complaint is DISMISSED WITH PREJUDICE;

3. The Court reserves jurisdiction to rule on the Defendant's request for attorney's fees and costs.

DONE AND ORDERED in chambers in St. Lucie County, FL this 24th day of April, 2017.

HONORABLE EDMOND W. ALONZO