IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

DONNA KEMP, et al.,	:	
	:	
Plaintiffs,	:	
	:	Case No. 441428-V
v.	:	
SETERUS, INC. et. al.,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

The second amended complaint in this case, a putative class action, was filed by plaintiff, Donna Kemp ("Kemp"), against defendants Seterus, Inc. ("Seterus") and the Federal National Mortgage Association ("Fannie Mae"). Kemp alleged that Seterus charged her mortgage account, which is currently owned by Fannie Mae, for property inspection fees that are prohibited by Maryland law.

The defendants have moved to dismiss. The court held a hearing on September 13, 2018. At the end of the hearing, the court took the motion under advisement. All submissions have been reviewed, and the motion is now ripe for decision. No further hearing is necessary. *Phillips v. Venker*, 316 Md. 212, 219 & n.2 (1989).

I. PRELIMINARY PROCEDURAL MATTER

This lawsuit was filed as a putative class action. Md. Rule 2-231(c) directs the court to "determine by order as soon as practicable after commencement of the action whether it is to be maintained as a class action." Ordinarily, questions about the maintainability of a lawsuit as a class action should be determined before any substantive

issue, especially when a motion for class certification is pending before the court. *See Kirkpatrick v. Gilchrist*, 56 Md. App. 242, 248–50 (1983). However, no motion for class certification is pending in this case, and, at the hearing on September13, 2018, both sides agreed that the court should rule on the motion to dismiss before considering the question of class certification.

The Court of Appeals has not spoken directly to this procedural question in any of its decision on class actions. However, in *Piven v. Comcast Corp.*, 397 Md. 278, 282 (2007), the Court affirmed the circuit court's dismissal of a putative class action, for improper venue, before any hearing on class certification. *See also Creveling v. Government Employees Ins. Co.*, 376 Md. 72, 82 (2003), in which the circuit court denied a motion to dismiss before considering, and denying, a motion for class certification.

No motion for class certification has been filed in this case, and an early determination of whether the complaint does, or does not, state a viable cause of action would promote the efficient conduct of this litigation. If there is no viable cause of action, then there is no reason for the parties to engage in the expensive and time-consuming process of determining whether a class should be certified. In Maryland, "there is no statutory or constitutional right to pursue by way of a class action the various claims that are the subject" of the plaintiff's complaint. *Cutler v. Wal-Mart Stores, Inc.*, 175 Md. App. 177, 188 (2007). To the contrary, Md. Rule 2-231 is simply "a procedural device, created by the judiciary's adoption of a court rule to facilitate management of multiple similar claims." *Id.*

The court concludes that, in the proper case, it may decide a motion to dismiss before considering class certification. Such a procedure is both permissible and

consistent with the purposes of Md. Rule 2-231. Such an approach also is consistent with the federal decisions under Fed. R. Civ. Pro. 23. *See, e.g., Curtin v. United Airlines,* 275 F.3d 88, 93 (D.C. Cir. 2001); *Cowan v. Bank United of Texas*, 70 F.3d 937, 941 (7th Cir. 1995); *Wright v. Schock*, 742 F.2d 541, 543 (9th Cir. 1984). It also is consistent with the approach used in states with similar class action rules. *GMS Mine Repair & Maintenance, Inc. v. Miklos*, 798 S.E.2d 833, 842–45 (W. Va. 2017)("[A] trial court may defer ruling on class certification until it first decides a dispositive motion directed to the named plaintiff's claim, and that the decision as to how best to proceed is dependent upon the facts and circumstances of a given case.").

II. STANDARD OF REVIEW

In considering a motion to dismiss for failure to state a claim, the court "must assume the truth of all well-pleaded relevant and material facts, as well as all inferences that reasonably can be drawn therefrom. Dismissal is proper only if the alleged facts fail to state a cause of action." *A.J. DeCoster Co. v. Westinghouse Elec. Corp.*, 333 Md. 245, 249 (1994). "[A]ny ambiguity or uncertainty in the allegations bearing on whether the complaint states a cause of action must be construed against the pleader." *Sharrow v. State Farm Mutual*, 306 Md. 754, 768 (1986).

Under Md. Rule 2-303(b), a complaint must state those facts "necessary to show the pleader's entitlement to relief." Unlike Fed. R. Civ. Pro. 8(a), Maryland retains vestiges of code pleading in that a plaintiff must allege sufficient facts to constitute a cause of action. *Ver Brycke v. Ver Brycke*, 379 Md. 669, 696–97 (2004); *Scott v. Jenkins,* 345 Md. 21, 27–28 (1997). "The well-pleaded facts setting forth the cause of action must be pleaded with sufficient specificity; bald assertions and conclusory statements by the

pleader will not suffice." *RRC Northeast, LLC v. BAA Maryland, Inc.*, 413 Md. 638, 644 (2010). The court credits facts pleaded in the complaint, and reasonable inferences from those facts, but not "conclusory charges that are not factual allegations." *Morris v. Osmose Wood Preserving*, 340 Md. 519, 531 (1995); *see Mohiduddin v. Doctors Billing & Management Solutions*, Inc., 196 Md. App. 439, 445 (2010).

Whether or not to grant a motion to dismiss "depends solely on the adequacy of the plaintiff's complaint." *Green v. H & R Block, Inc.*, 355 Md. 488, 501 (1999). The court's review of the motion in this case will be cabined to the four corners of the complaint, the documents referred to in, or appended to the complaint as exhibits and "those facts that may fairly be inferred from the matters expressly alleged." *Bennett Heating & Air Conditioning v. NationsBank of Maryland*, 342 Md. 169, 174 (1996); *see Sutton v. FedFirst Financial Corp.*, 226 Md. App. 46, 74 n.13 (2015).

III. THE SECOND AMENDED COMPLAINT

In 2007, Kemp, the named plaintiff, refinanced her home mortgage with a loan from Countrywide Home Loans, Inc. The loan is secured by a deed of trust on real property located in Glen Burnie, Maryland. At some point thereafter, the loan was assigned to Fannie Mae. Seterus, the loan servicer, declared the loan in default in April 2017. In response to Kemp's request for information, Seterus wrote to Kemp and informed her that, in connection with her loan default, it had charged her loan account with certain property inspection fees from August 26, 2016, through July 24, 2017. In September 2017, Kemp was informed by Seterus that she owed a total of $180.00 in property inspection fees. Under Kemp's deed of trust, a borrower may be charged "fees

for services performed in connection with a [b]orrowers's default . . . including, but not limited to, ... property inspection and valuation fees."

In November 2017, Seterus, on behalf of Fannie Mae, offered Kemp a loan modification.[1] The offer required Kemp to pay the inspection fees as part of the loan balance. Kemp accepted the loan modification offer on November 22, 2017.[2] Shortly thereafter, on December 19, 2018, Kemp sued Seterus and Fannie Mae, on behalf of a putative class, alleging a variety of causes of action, including a federal claim based on the Truth in Lending Act, 15 U.S.C. § 1601 et seq.

Kemp amended her complaint on January 30, 2018, and the defendants removed the case to federal court on February 15, 2018. The federal court dismissed Kemp's federal claim, with prejudice, on June 18, 2018, and remanded the case back to state court for disposition of the remaining claims.[3]

IV. LEGAL ANALYSIS

Maryland's general principles of statutory construction are well settled. The court's goal "is to identify and effectuate the legislative intent underlying the statute."

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[1] Kemp's personal liability under the note had already been eliminated in bankruptcy on January 21, 2011, as she received a discharge under Chapter 7, 11 U.S.C § 727. Consequently, she is no longer personally liable for the loan she obtained from Countrywide. However, a creditor may still may enforce a valid lien, such as a mortgage, against the debtor's property after the bankruptcy, unless that lien is eliminated or discharged in bankruptcy. A discharge under Chapter 7 "only prevents enforcement of personal liability; it does not prevent foreclosure of a mortgage that remains in default after a discharge is issued and a Chapter 7 case is closed." *In re Wilson*, 492 B.R. 691, 696 (Bankr. S.D.N.Y. 2013). Kemp's real property remains encumbered by the loan, remains subject to the terms of the deed of trust, and may be the subject of a foreclosure action, which is an *in rem* proceeding. *Johnson v. Home State Bank*, 501 U.S. 78, 82-83 (1991).

[2] Second Amended Complaint at ¶¶ 33 & 34; Loan Modification Agreement, dated November 22, 2017.

[3] The claim that was dismissed by the federal court was count VI of the second amended complaint.

Department of Health v. Kelly, 397 Md. 399, 419 (2007); *see Donlon v. Montgomery County Public Schools*, 460 Md. 62, 75–76 (2018). "To ascertain the Legislature's intent, we first examine the plain language of the statute; if the language is unambiguous when construed according to its ordinary meaning, then we will 'give effect to the statute as it is written.'" *Id.* at 419 (quoting in part *Oakland v. Mountain Lake Park*, 392 Md. 301, 316 (2006)). Even if the language of a statute is clear, the court may examine extrinsic sources, such as archival legislative history, as a check on its reading of the statute. *SVF Riva Annapolis v. Gilroy*, 459 Md. 632, 640 (2018).

"If, however, the language is subject to more than one interpretation, or when the language is not clear when it is part of a larger statutory scheme, it is ambiguous, and we endeavor to resolve that ambiguity by looking to the statute's legislative history, case law, statutory purpose, as well as the structure of the statute." *People's Insur. Counsel Div. v. Allstate Insur. Co.*, 408 Md. 336, 352 (2009); *see Deville v. State*, 383 Md. 217, 223 (2004) ("A statute is ambiguous when there are two or more reasonable alternative interpretations of the statute.").

A. Usury Law

Kemp's claim in count IV of the second amended complaint is premised upon the alleged violation of Md. Code Ann., Com. Law § 12-121 (2013 Rep. Vol), specifically, defendants' imposition of property inspection fees which are under certain circumstances prohibited by Section 12-121.[4] The court's analysis, therefore, begins with the statutory language in question. *Koste v. Town of Oxford*, 431 Md. 14, 26 (2013).

[4] Md. Code Ann., Com. Law § 12-415 (2013 Rep. Vol.) *See Master Financial Inc., v. Crowder*, 409 Md. 51, 58–59 (2009).

Section 12-121(a) defines a lender's inspection fee, which is the fee about which Kemp's is complaining. According to the statute: "the term 'lender's inspection fee means *a fee imposed by a lender* to pay for visual inspection of real property."[5] Section 12-121(b) goes on to prohibit the imposition of an inspection fee, except in circumstances not pertinent to this case.[6] The key question in this case is whether either or both of the defendants are lenders within the meaning of the statute. If they are, at least arguably there is a viable cause of action. If they are not lenders, or their conduct is otherwise not covered under the statute, they cannot be liable for its violation. *See Thompkins v. Mountaineer Investments, LLC*, 439 Md. 118, 141 (2014) (assignee is not liable for violations of the Secondary Mortgage Loan Law committed by the original lender, either directly under the statute or at common law); *Laroccca v. Creig Northrop Team, P.C.*, 217 Md. App. 536, 563–64 (2014) (employees of institutions that did not provide the home equity lines of credit to plaintiffs were lenders).

Under the statute, a lender is defined, as follows: "'Lender' means a person who makes a loan under this subtitle."[7] The term lender is not otherwise defined in the statute.[8] The cases that have been decided under this statute have all involved the banks that actually provided the funding for the second mortgage or the refinance. *See Larocca*, 217 Md. App. at 564–65. Apart from *Taylor v. Friedman*, 344 Md. 572 (1997), no case

[5] Md. Code Ann., Com. Law § 12-121(a) (2013 Rep. Vol.) (emphasis added).

[6] Inspection fees may be charges in respect of new construction, repairs or other alterations to the property that are required by the lender. Md. Code Ann., Com. Law § 12-121(C) (2013 Rep. Vol.).

[7] Md. Code Ann., Com. Law § 12-101(f) (2018 Supp.) (Effective January 1, 2019, the term lender is defined as "a licensee or a person who makes a loan subject to this subtitle.); Md. Code Ann., Com. Law § 12-101(g) (2018 Supp.) (A licensee "means a person that is required to be licensed to make loans under this subtitle, regardless of whether the person actually is licensed.").

[8] *Cf.* Md. Code Ann., Fin. Inst. § 11-501(j)(1)(i)–(iii). (The General Assembly specifically included "mortgage servicers," like Seterus, within the statutory definition of Mortgage lender).

has been cited to the court imposing liability on a person or legal entity other than the one which provided the loan proceeds directly to the borrower. *Taylor* is not dispositive because the issue of the identity of the "lender" was not before the Court of Appeals. The defendant in *Taylor* was the holder of the note secured by the deed of trust when the foreclosure was instituted. *Taylor*, 344 Md. at 574–75. Critically, the issue of the identity of the lender was neither briefed nor decided by the Court of Appeals in *Taylor*. The Court of Appeals simply assumed, without comment, that the note holder was the lender for purposes of the statute.[9]

Ordinarily, in drafting statutes, when the General Assembly uses the word "means" "the definition is intended to be exhaustive." *Hackley v. State*, 389 Md. 387, 393 (2005). By contrast, when the General Assembly uses the term "includes" in a statute, the term generally is intended to be illustrative and not a limitation. *Tribbitt v. State*, 403 Md. 638, 647–48 (2008). In this case, the meaning of the statute is plain; only "persons"[10] which make loans to "borrowers"[11] are lenders and thus covered by the statute.

Nowhere in the second amended complaint does Kemp allege that either Seterus or Fannie Maw "makes loans," or that Kemp borrowed money from either defendant. According to Kemp, "as the assignee of the maker of the loans" to Kemp and the other

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[9] *Taylor* may stand for the proposition that in order to be a lender, the defendant need not have made the particular loan at issue. Nonetheless, a defendant must still make loans to qualify as a lender under § 12-101(f). That issue simply was not litigated in *Taylor*. In this case, Kemp has not alleged that either Seterus or Fannie Mae actually make loans to borrowers. Her argument is that as assignees of Countywide they stand in the lender's shoes.

[10] Md. Code Ann., Com. Law § 12-101(g) (2018 Supp.) (persons "include" individuals and all forms of entities).

[11] Md. Code Ann., Com. Law § 12-101(b) (2018 Supp.) ("[b]orrower' means a person who borrows money under this subtitle").

putative class members, "Fannie Mae is now the lender and maker of the loans, and Seterus is authorized to act as its agent."[12]

The problem with the plaintiff's theory of the case, however, is that the facts alleged, even if true, do not fit the applicable statute under which she has sued. Kemp does not allege that either Seterus or Fannie Mae made any of the loans in questions, or even makes any loans in general, within the meaning of Section 12-101. Fannie Mae bought Kemp's loan in the secondary market from the financial institution which made her the loan, Countrywide Mortgage. Just as alchemy cannot transform lead into gold, Fannie Mae's purchase of Kemp's loan from Countrywide does not make Fannie Mae a lender under the statute.

"Fannie Mae is a government-sponsored private corporation whose mission includes increasing the availability and affordability of homeownership for low-moderate, and middle-income Americans. *Fannie Mae does not originate loans, but rather, purchases loans from mortgage lenders in the secondary market.*" *Fannie Mae v. Olympia Mortgage Corp.*, No. 04-CV4971, 2007 WL 3077045 at *1 (E.D.N.Y. Oct. 22, 2007) (emphasis added). In fact, under federal law, Fannie Mae "is prohibited from originating loans." *Affordable Communities of Missouri v. Fannie Mae*, 714 F.3d 1069, 1074 (8th Cir. 2013) (citing 12 U.S.C. § 1719(a)(2)(B)(2010)). Adopting Kemp's thesis would render what Fannie Mae did in this case arguably in violation of federal law, and at odds with congressional intent. This court declines to adopt Kemp's thesis.[13]

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[12] Second Amended Complaint at ¶ 5.

[13] Kemp's reliance on an "advisory notice" by the Maryland Office of the Commission of Financial Regulation is misplaced. The agency simply has not said that Section 12-121 applies to either Seterus or Fannie Mae. Even if it had, the court is not obligated to give blind deference in the face of unambiguous statutory language. *Gomez v. Jackson Hewitt*, 427 Md. 128, 170–73

B. Common Law Claims

In Count I of her second amended complaint, Kemp seeks a declaration that the defendants are not entitled to charge or collect property inspection fees. Kemp's deed of trust specifically allows such fees, and Kemp has not cited any statute, apart from Section 12-121, that potentially bars such fees. The court has rejected her cause of action under Section 12-121. A court is not required to issue a declaratory judgment when there is no viable claim for relief and no actual justiciable controversy between the parties. *Converge Services Group, LLC v. Curran*, 383 Md. 462, 477 (2004); *see Marriott Corp. v. Village Realty & Inv.*, 58 Md. App. 145, 153 & nn.3 & 4, *cert. denied*, 300 Md. 316 (1984).

In count II, Kemp asserts a cause of action for unjust enrichment against Seterus for its charging of property inspection fees. Kemp's claim fails for two independent reasons. First, the plain language of her loan modification agreement makes it clear that no such fees were added to the principal balance of her loan. Instead, they were paid by Seterus, not Kemp. Second, even if Seterus had charged and retained such fees, it is not unjust for it to do so as they were expressly authorized by the deed of trust Kemp signed in April 2007, when Kemp obtained her loan from Countrywide.[14] Under these circumstances, no claim for unjust enrichment will lie. *Everhart v. Miles*, 47 Md. App. 131, 136 (1980).

(2012); *Marriott Employees Federal Credit Union v. Motor Vehicle Administration*, 346 Md. 437, 445–46 (1997).

[14] The language of the deed of trust is specifically referenced in paragraph 26 of the second amended complaint. As a consequence, the court may refer to it on a motion to dismiss. *Advance Telecom Process LLC v. DSFederal, Inc.*, 224 Md. App. 164, 175 (2015).

C. Other Statutory Claims

In count III, Kemp alleges that Seterus violated the Maryland Consumer Debt Collection Act,[15] ("MCDCA") which prohibits debt collectors from using threatening or underhanded methods to collect debts.[16] Kemp also alleges in this same count that the conduct violates the Maryland Consumer Protection Act (MCPA).[17] In count IV, Kemp alleges a claim under Section 12-121.

In count V she alleges a claim, only against Seterus, under the Maryland Mortgage Fraud Protection Act.[18] Kemp's theory of liability is that Seterus violated the statute by representing to Kemp that she owed sums for property inspection fees when, she contends, Seterus, knew it was unlawful to collect those fees.

Under the MCDCA a debt collector may not "[c]laim, attempt or threaten to enforce a right with knowledge that the right does not exist."[19] Two elements are essential to a claim under the MCDCA. First, that the defendant did not possess the right to collect the amount of debt sought, and second, that the defendants attempted to do so knowing that they lacked the right to do so. *Price v. Murdy*, No. CV-GLR-17-736, 2018 WL 1583551 at *12 (D. Md. Mar. 30, 2018). The knowledge component is either actual knowledge that the debt was invalid or reckless disregard as to the validity of the debt. *Id.*

Kemp alleges that Seterus violated the MCDCA by representing to Kemp in correspondence that she owns sums for property inspection fees when Seterus, allegedly,

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[15] Md. Code Ann., Com. Law § 14-204 (2013 REP. VOL.).

[16] Md. Code Ann., Com. Law § 14-202 (2018 SUPP.).

[17] *Id.*

[18] Md. Code Ann., Real. Prop. Law § 7-409 (2015 Rep. Vol.).

[19] Md. Code Ann., Com. Law § 14-202 (8) (2018 SUPP.).

knew that it was unlawful to collect those fees.[20] This claim fails because it was not unlawful for Seterus to seek collection of those fees.

In addition, the claim fails because in the three letters identified in the complaint, Seterus made it clear that if the recipient had received a bankruptcy discharge, as Kemp had, no collection was sought or intended. The Fourth Circuit recently affirmed the dismissal of an analogous claim made under the federal Fair Debt Collection Practices Act. *Lovegrove v. Ocwen Home Loans Servicing, LLC*, 666 Fed. Appx. 308 (4th Cir. 2016) (concluding that a nearly identical communication was not an attempt to collect a debt). The court agrees with the reasoning of the Fourth Circuit in *Lovegrove*, as well as the district court in *Lovegrove v. Brock & Scott, PLLC*, No. 2:16-CV-4182017 WL 216698 at *4–5 (E.D. Va. Jan. 17, 2017), that the language used by Seterus in its letters to Kemp is not an attempt to collect a debt within the meaning of the MCDCA. *See also Thompson v. Ocwen Financial Corp.*, No. 3:16-CV-01606, 2018 WL 513720 at *4 (D. Conn. Jan. 23, 2018) ("the act of enforcing a security interest alone when the underlying debt already has been discharged in bankruptcy is not an act of 'debt collection' that is subject to the FDCPA."). For that additional reason, this claim must be dismissed.

Kemp also alleges that Seterus violated Section 14-202(9) of the MCDCA by filing documents in government and court records indicating that it had the right to collect inspection fees when it did not, in fact, have the right to do so. [21] Kemp does not specify in the second amended complaint pleading which government documents are at issue. In her opposition memorandum, Kemp refers the court to the deed of trust. But

[20] Second Amended Complaint at ¶ 80.

[21] *Id.* at ¶ 81.

the mere recordation of a deed of trust does not implicate Section 14-202(9), which requires "a communication which simulates legal or judicial process or gives the appearance of being authorized, issued, or approved by a government. . . when it is not." The deed of trust did not simulate legal or judicial process, and letters from Seterus do not give the appearance of being authorized or issued by a lawyer when they were not. The court is aware of no authority, and Kemp has cited none, that makes Section 14-202(9) applicable simply because a recorded deed of trust is referred to in a letter from a debt collector.

Under the MCPA,[22] a private party must allege an unfair or deceptive practice that is relied on and which causes them actual injury. *Lloyd v. General Motors Corp.*, 397 Md. 108, 140-41 (2007). In this case, Kemp's claim under the MCPA is dependent upon her contention that the defendants violated Section 14-202(8) of the MCDCA; that is to threaten to enforce a right "with knowledge that the right does not exist." Because Kemp's MCPA claim is derivative of a failed MCDCA claim, it too must be dismissed. *Bey v. Shapiro Brown & Alt, LLP*, 997 F. Supp. 2d 310, 319 (D. Md. 2014).[23]

To be legally sufficient under the MFPA, the factual allegations must be tantamount to alleging deceit, *i.e.*, at the very least an alleged false statement of material fact made with the intent to deceive and intended to be relied on by the borrower or other party to the lending process. *In re Blackston*, 557 B.R. 858, 873 (Bkrtcy, D. Md. 2016); *see also Thomas v. Nadel*, 427 Md. 441, 450–51 & n.18 (2012)(definition of fraud under

[22] Md. Code Ann., Com. Law § 13-301 (2018 SUPP.).

[23] The level of pleading specificity under the MCPA depends upon the particular trade practice at issue. *McCormick v. Medtronic, Inc.*, 219 Md. App. 485, 529-30 (2014). In this case, the second amended complaint is deficient under either pleading standard.

Maryland law). According to Kemp, Seterus misrepresented that it was authorized to impose property inspection fees in its July 24, 2017, September 25, 2017, and September 26, 2017 correspondence, and that Kemp relied on those misrepresentations when she accepted her Loan Modification Agreement. In other words, Kemp is claiming that Seterus committed a fraud when it modified Kemp's loan, to Kemp's benefit, and lowered her monthly payment. The problem with Kemp's argument is that the Loan Modification Agreement waived the property inspection fees. She could not, therefore, have relied on a material misrepresentation about property inspection fees because, at the end of the day, none where charged. In short, Kemp has failed to plead, with the requisite particularity, a claim of fraud under the MMFPA. *See Amenu-El v. Select Portfolio Services*, No. CV-RDB-177-2008, 2017 WL 4404428 at *5 (D. Md. Oct. 4, 2017).

Conclusion

The second amended complaint will be dismissed for failure to state a claim, with prejudice, and without leave to amend.[24] All other pending motions are denied, as moot. It is SO ORDERED this 19th day of October, 2018.

Ronald B. Rubin, Judge

[24] The court has determined that any further amendments would be futile. *See Gaskins v. Marshall Craft Associates, Inc.*, 110 Md. App. 705, 716 (1996).