

NOTICE

Decision filed 12/21/15. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2015 IL App (5th) 150099-U

NO. 5-15-0099

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

| | | |
|------------------------------|---|-----------------------|
| TRAVIS PORTER, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellant, |) | Jackson County. |
| |) | |
| v. |) | No. 14-L-17 |
| |) | |
| PENNYMAC LOAN SERVICES, LLC, |) | Honorable |
| |) | Christy W. Solverson, |
| Defendant-Appellee. |) | Judge, presiding. |

JUSTICE STEWART delivered the judgment of the court.

Presiding Justice Schwarm and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly dismissed the plaintiff's complaint alleging unfair acts or practices under the Illinois Consumer Fraud and Deceptive Business Practices Act where the defendant complied with the Real Estate Settlement Procedures Act and was therefore exempt from liability under section 10(b)(1) of the Consumer Fraud and Deceptive Business Practices Act.

¶ 2 The plaintiff, Travis Porter, filed a complaint against the defendant, PennyMac Loan Services (PennyMac), alleging that PennyMac's actions constituted unfair acts or practices under the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2014)). PennyMac filed a motion to dismiss pursuant to section 2-619 of the Illinois Code of Civil Procedure (735 ILCS

5/2-619 (West 2014)). The trial court granted PennyMac's motion to dismiss. Porter filed a timely notice of appeal. We affirm.

¶ 3

BACKGROUND

¶ 4 On August 15, 2012, Porter took out a mortgage loan with American Equity Mortgage, Inc. Pursuant to the terms of the mortgage, a portion of Porter's monthly payment was to be deposited in an escrow account for the payment of real estate taxes, property insurance premiums, and mortgage insurance premiums. The mortgage specifies that the amount to be collected and maintained in escrow is to be determined by the Real Estate Settlement Procedures Act (RESPA). At his closing, Porter received a "First Payment Letter" delineating that his monthly mortgage payment of \$1,227.57 consisted of \$779.35 for principal and interest, \$118.96 for hazard insurance, \$174.39 for mortgage insurance, and \$154.87 for county property taxes.

¶ 5 On September 12, 2012, PennyMac sent Porter a letter notifying him that his mortgage was sold to Ginnie Mae and that PennyMac was the new servicer of the loan.

¶ 6 PennyMac conducted an escrow analysis. The annual escrow account disclosure statement sent to Porter and dated February 1, 2013, showed that Porter's projected escrow balance as of March 31, 2013, was \$1,345.76 and that it should have been \$3,474.42. The statement listed Porter's shortage as \$2,127.56 and stated that, per federal law, the shortage would be collected over 12 months, or he could pay it in full. To cover the shortage, his monthly mortgage payment was temporarily increased to \$1,565.35 starting April 1, 2013.

¶ 7 Porter sent letters to PennyMac on April 16 and 26, 2013, requesting information about the increased monthly mortgage payment amount. Porter questioned the new payment amount stating that his real estate taxes had only increased \$67 and that his insurance had not increased. He paid \$1,227.57 representing the original monthly loan amount and advised that he would only send that amount until he was informed of how the increased amount was calculated.

¶ 8 On May 14, 2013, PennyMac sent Porter a letter in response to his correspondence. In the letter, PennyMac clarified that a tax reserve was collected to pay for one tax installment but that it had been discovered that two tax installments per year were due on the mortgaged property. PennyMac indicated that, after a review of Porter's escrow account, it was determined that there were insufficient funds for the second tax installment and that the payment was increased to collect for the additional taxes. A breakdown of the new monthly payment, effective April 1, 2013, was set out showing the amounts due for principal and interest, taxes, insurance, mortgage insurance, and the shortage.

¶ 9 On June 11, 2013, Porter sent another letter demanding an explanation of how PennyMac calculated the new monthly mortgage payment.

¶ 10 On June 18, 2013, PennyMac sent Porter a letter stating it had not received his mortgage payment due June 1, 2013, and asking that he contact one of its loan specialists to discuss options to help with his payment or past due amounts. On the same date, someone from the research department at PennyMac sent Porter's attorney a letter, indicating that on May 14, 2013, PennyMac sent a letter delineating the amounts

comprising the new monthly loan payment. A copy of the May 14, 2013, letter and the annual escrow account disclosure statement were attached.

¶ 11 On June 24 and July 22, 2013, Porter sent letters to PennyMac demanding an itemized list of credits given, the amounts in escrow for real estate taxes and insurance, the outstanding balance on the loan, and any arrearages owed. His July 22, 2013, letter asked PennyMac to set forth the factual basis for its claim that he owed mortgage insurance. He acknowledged that PennyMac had the right to insist that he escrow sufficient funds to pay for his property taxes in the amount of \$3,784.12 but stated that his monthly payment should only increase from \$1,227.54 to \$1,388.

¶ 12 On July 22, 2013, PennyMac sent Porter a letter acknowledging receipt of his letters dated April 16, April 26, May 14, May 20, June 18, and July 8, 2013. PennyMac informed Porter that, as previously advised at the time of closing, in accordance with the settlement statement, a tax reserve was collected to annually pay for one tax installment of \$1,858.40. That figure was used to calculate the monthly payment. Upon review, it was discovered that two tax installments were due on the property, and the monthly payment was increased to collect for the additional taxes. The letter set out the amounts due to bring the loan current and paid through August 1, 2013.

¶ 13 On July 25, 2013, PennyMac sent Porter a notice of default and intent to accelerate. The notice informed Porter that he was in default under the terms of the loan and that he must pay \$2,296.08 to cure his default.

¶ 14 On August 15, 2013, Porter sent PennyMac another letter about the increased mortgage amount. On August 27, 2013, PennyMac sent Porter a letter with copies of its

previous correspondence to him attached. On September 3, 2013, PennyMac sent Porter a letter with enclosures of the loan documents he requested. On September 11, 2013, Porter sent PennyMac another letter questioning the amount of the increased mortgage payment. He reiterated that he would only continue to pay \$1,227.57 monthly. PennyMac accelerated the loan and reported Porter's default to the credit reporting agencies.

¶ 15 On February 11, 2014, Porter filed a complaint against PennyMac for deceptive trade practices. He alleged that PennyMac's actions violated the Consumer Fraud Act in that it made continuous attempts to force him to make mortgage payments that were in excess of the amounts required by his note. He argued that PennyMac made an adverse report to national reporting agencies causing a substantial reduction in his credit. On October 9, 2013, he refinanced his loan obligation but, because of PennyMac's actions, he was charged 4.678% interest and had to incur \$1,405.88 in fees for refinancing. He asserted that, by providing a negative report to credit reporting agencies, PennyMac made an oppressive attempt to extort him into making payments in excess of the amounts required by his note.

¶ 16 PennyMac filed a notice of removal to remove the action from the circuit court to the United States District Court for the Southern District of Illinois. Porter filed a motion to remand the case to the circuit court, which was granted.

¶ 17 PennyMac filed a motion to dismiss Porter's complaint pursuant to section 2-619 of the Code of Civil Procedure. It alleged that Porter's claim was premised on his assertion that PennyMac mismanaged the escrow account connected to his mortgage

loan. It argued that the management of mortgage loan escrow accounts is regulated by section 2609 of RESPA and, thus, while Porter couched his claim as a Consumer Fraud Act claim, it was actually a claim for a purported RESPA violation. PennyMac argued that Porter's claim failed since there is no private right of action under section 2609 of RESPA.

¶ 18 Porter filed a response to the motion to dismiss, and on February 1, 2015, the court granted PennyMac's motion. The court found that the Consumer Fraud Act contains an exemption from liability for conduct authorized by federal statutes and regulations. RESPA is a federal statute setting forth requirements regarding the residential real estate settlement process. The court found that, while Porter's complaint did not specifically allege that PennyMac violated RESPA, his claim was premised on PennyMac's decision to raise his monthly mortgage payments after a review of his escrow account revealed the existence of a shortage. The court held that this conduct was regulated by RESPA, and because PennyMac's actions were authorized by RESPA, it was exempt from liability under the Consumer Fraud Act. It held that PennyMac acted as authorized by RESPA in calculating the amount of monthly escrow payments Porter would need to make to ensure an escrow balance sufficient to pay all estimated taxes and insurance premiums. The court held that PennyMac acted properly in calculating amounts due under RESPA and did not violate the Consumer Fraud Act.

¶ 19 Porter filed a timely notice of appeal.

¶ 21 Porter argues that his complaint alleges sufficient facts to show that PennyMac's actions were not protected by RESPA and that they constituted oppressive behavior such that a claim was stated under the Consumer Fraud Act.

¶ 22 In ruling on a section 2-619 motion, a court must accept as true all well-pleaded facts in the plaintiff's complaint and all inferences that can reasonably be drawn in the plaintiff's favor. *Chicago Teachers Union, Local 1 v. Board of Education of the City of Chicago*, 189 Ill. 2d 200, 206 (2000). The motion should only be granted if the plaintiff can prove no set of facts that would support a cause of action. *Id.* We review a court's disposition of a section 2-619 motion *de novo*. *Id.*

¶ 23 Porter argues that his complaint is premised on two violations: (1) PennyMac engaged in oppressive tactics by trying to force him to pay an indebtedness that was not owed, and (2) PennyMac fouled his credit forcing him to refinance at an unfavorable interest rate. He asserts that PennyMac engaged in a calculated course of action to coerce him into paying monies in excess of what was owed. Porter argues that PennyMac increased his mortgage payment to \$1,565.35 per month for the 30-year life of the loan. He asserts that this will result in his paying \$60,000 more than what the note, mortgage, and escrow amounts required. Porter argues that PennyMac unilaterally raised his debt service payments; that he repeatedly demanded an explanation as to why his debt service was raised; that none of PennyMac's correspondence offered an explanation setting forth how or why the payments were raised; and that, when he refused to pay the additional amounts, PennyMac fouled his credit and foreclosed, forcing him to refinance at

unfavorable rates. He contends that if a debt servicing company fraudulently and routinely adds on additional charges, refuses to explain the new charges, and then fouls its customers' credit, a suit should lie under the Consumer Fraud Act.

¶ 24 Porter's claim is based on his assertion that PennyMac did not have the right under the note and mortgage to raise his monthly escrow amounts. The management of mortgage escrow accounts is regulated by section 2609 of RESPA (12 U.S.C. § 2609 (2012)) and 12 C.F.R. § 1024.17 (2014). Section 2609(b) provides, in pertinent part, that "the servicer shall notify the borrower not less than annually of any shortage of funds in the escrow account." 12 U.S.C. § 2609(b) (2012). Section 1024.17(c)(3) of the Code of Federal Regulations provides that the servicer must conduct an annual escrow account analysis to determine the borrower's monthly escrow account payment for the next year and whether a shortage exists, and must make any adjustments to the account. 12 C.F.R. § 1024.17(c)(3) (2014). Upon completing the escrow analysis, the servicer must submit an annual escrow account statement to the borrower. *Id.* Section 2609(c)(2)(B) of RESPA provides that the statement must clearly itemize the amount of the borrower's current monthly payment; the portion of the monthly payment being placed in the escrow account; the total amount paid into the escrow account during the period; the total amount paid out of the escrow account during the period for taxes, insurance premiums and other charges; and the balance in the escrow account at the conclusion of the period. 12 U.S.C. § 2609(c)(2)(B) (2012). If the escrow account analysis discloses a shortage greater than or equal to one month's escrow account payment, the servicer may require the borrower

to repay the shortage in equal monthly installments over at least a 12-month period. 12 C.F.R. § 1024.17(f)(3)(ii)(B) (2014).

¶ 25 PennyMac conducted an escrow analysis of Porter's account, which led it to discover a shortage in the account. It sent Porter an annual escrow account disclosure statement dated February 1, 2013. The statement listed the anticipated annual disbursements. It also showed that his projected escrow balance as of March 31, 2013, was \$1,345.76 and that it should have been \$3,474.42. PennyMac informed Porter that:

"[t]his means you have a shortage of \$2,127.56. Per Federal Law, the shortage may be collected from you over 12 months or more unless it is less than 1 month's deposit, in which case we have the additional option of requesting payment within 30 days. We will collect the shortage over 12 months."

PennyMac informed Porter that the new mortgage payment was \$1,565.35 and set out the amounts due for principal and interest, the escrow deposit, and the shortage.

¶ 26 Porter repeatedly requested information about the increased monthly mortgage payment. In a letter dated May 14, 2013, PennyMac informed Porter that a tax reserve had been collected to pay for one tax installment, but that it had discovered that two tax installments per year were due on the mortgaged property. A review of the escrow account revealed that there were insufficient funds to pay the second tax installment. PennyMac increased the monthly mortgage payment to collect for the additional tax installment. It listed the amount due for the monthly payment as \$1,565.35 and delineated the amounts for principal and interest, taxes, insurance, mortgage insurance, and to cover the shortage. The only changes from the amounts set out in the "First

Payment Letter" were the amounts for taxes and to cover the shortage. Per the annual escrow account disclosure statement, the shortage was to be collected over 12 months.

¶ 27 "The Consumer Fraud Act contains an exemption from liability for conduct authorized by federal statutes and regulations." *Weatherman v. Gary-Wheaton Bank of Fox Valley, N.A.*, 186 Ill. 2d 472, 480 (1999). The Consumer Fraud Act provides that it does not apply to "[a]ctions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States." 815 ILCS 505/10b(1) (West 2014). "By complying with RESPA, a lender is exempt from liability under section 10b(1) of the Consumer Fraud Act." *Weatherman*, 186 Ill. 2d at 489.

¶ 28 PennyMac performed the annual escrow account analysis and submitted the annual escrow account statement to Porter on February 1, 2013. In the annual escrow account disclosure statement, PennyMac informed Porter that there was a shortage and that it would collect the shortage over a 12-month period. PennyMac complied with RESPA's requirements for analyzing and adjusting Porter's escrow payments and with RESPA's notification requirements. Because PennyMac complied with RESPA, it is exempt from liability under section 10b(1) of the Consumer Fraud Act. Thus, the circuit court properly granted PennyMac's motion to dismiss.

¶ 29 CONCLUSION

¶ 30 For the reasons stated, we affirm the judgment of the circuit court of Jackson County.

¶ 31 Affirmed.