UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

STEVEN BIVENS, on behalf of himself and all persons similarly situated, Plaintiffs, vs. SELECT PORTFOLIO SERVICING, INC., Defendant.	CIVIL ACTION FILE NO. 1:15-CV-4325-ELR-JKL

DEFENDANT SELECT PORTFOLIO SERVICING, INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE CLASS ACTION COMPLAINT

Magistrate Judge Larkins has recommended that Plaintiff's Class Action Complaint be dismissed with prejudice because Plaintiff did not allege as a part of his claim under the Real Estate Settlement Practices Act that he suffered any actual harm. With the Report and Recommendation now before the Court, Plaintiff has made an eleventh-hour Motion for Leave to Amend the Class Action Complaint. Plaintiff purports to cure the deficiencies in his case by adding four paragraphs regarding alleged costs he incurred after filing this action. The proposed amendment is insufficient. The Motion to Amend should be denied, as further litigation based on the proposed amendment would be both prejudicial and futile.

I. PROCEDURAL HISTORY

Plaintiff filed the Class Action Complaint in this putative class action on December 14, 2015. In the Complaint, Plaintiff alleges that he sent SPS a "Qualified Written Request" (QWR) dated March 25, 2015 (March 25 Letter)[1] asking for "a listing of all payments received and charges made to this account since the execution of the note with the reasons for any charges to the account." (Doc. 1, p. 3 ¶ 6.) Plaintiff contends that SPS violated RESPA, 12 U.S.C. § 2605, when it responded by providing Plaintiff with a Payment History Report for the period of time during which SPS has been the loan servicer for the account (beginning on December 1, 2012). (*Id*., p. 3 ¶ 7.) Plaintiff alleges this response was "incomplete." (*Id*.) He also alleges a RESPA violation because the Payment History Report contained codes but no key was provided. (*Id*.) Plaintiff made no reference to any error in his account in the March 25 Letter and makes no allegation here that there is one. (*Id*., p. 11.)

SPS moved to dismiss the Complaint on February 19, 2016. (Doc. 10.) In a June 1, 2016 Final Report and Recommendation (R&R) (Doc. 17), Magistrate

[1] At the time Bivens sent the March 25 Letter, the parties to this case were already engaged in RESPA litigation about purported QWRs that Plaintiff filed against SPS, as well as prior servicers of his home loans, in 2014. *See Bivens v. Bank of America, N.A., et al.*, No. 1:14-cv-1569-ODE (N.D. Ga.). That case remains pending.

Judge Larkins recommends that the Complaint be dismissed with prejudice, finding that a plaintiff must plead that he suffered actual damages in order to sustain a claim under RESPA Section 2605, and Plaintiff failed to do so. (*Id.*) SPS's Motion to Dismiss is now pending for final disposition.

At this late date, Plaintiff now moves to amend his pleading to add allegations that in February and April 2016—nearly a year after he sent the March 25 Letter at issue and months after he filed this lawsuit—he sustained damages in the course of making new attempts to obtain "the missing information." (Docs. 19, 19-1, p. ¶¶ 9-12.) In the proposed Amended Class Action Complaint attached to the Motion to Amend, Plaintiff alleges that he expended resources in the course of taking a meeting with an employee of the Georgia Department of Banking and Finance and sending additional requests for information to SPS. (*Id.*)

For the reasons that follow, these additional allegations are not sufficient to save Plaintiff's case. The Court should deny Plaintiff leave to amend his pleading and dismiss this case with prejudice as the Magistrate recommended.

II. LEGAL STANDARD

In his Motion, Plaintiff accurately states that the Federal Rules of Civil Procedure require that leave to amend a pleading be freely given

> [i]n the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated

> failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.

McKinley v. Kaplan, 177 F.3d 1253, 1258 (11th Cir. 1999). The exceptions are as important as the rule; and in this case, the exceptions apply.

III. AMENDMENT TO PLAINTIFF'S COMPLAINT WOULD PREJUDICE SPS.

Permitting this Plaintiff's claim to survive, on the basis that he manufactured damages during the course of the litigation, where there were none at the time of his initial filing, would not only be prejudicial to this defendant, but it would also create a bad precedent. Plaintiff's initial Complaint contained no allegation of actual damages whatsoever. When SPS identified the absence of damages as grounds for dismissal, Plaintiff did not move to amend at that time to show that he had, in fact, suffered damages, but just failed to plead them. Instead, he countered the argument with an argument that he was entitled to sue despite having suffered no damages because RESPA provides for borrowers to recover statutory damages where the borrower can show a "pattern or practice of noncompliance" with Section 2605. (Doc. 11.) Months later, and only after the Magistrate rejected that argument in his Final Report and Recommendation (Doc. 17), Plaintiff belatedly sought leave to amend.

Notably, Plaintiff has not moved to amend his pleading to show that he suffered damages when SPS purportedly failed to provide him with information back in 2015. Instead, he alleges that in 2016, during the pendency of this litigation, he took additional steps to obtain that information by sending new correspondence to SPS and incurred (minimal) costs in doing so. In sum, it appears Plaintiff took action for the purpose of creating damages in the course of this lawsuit, in order to avoid its dismissal. The timing of Plaintiff's motion should evoke additional scrutiny, and the post-filing damages should not be deemed acceptable to cure the deficiencies in his suit. Instead, the Court should exercise its discretion and deny the Motion to Amend.

IV. AMENDMENT OF PLAINTIFF'S COMPLAINT IS FUTILE.

Plaintiff's Motion to Amend should also be denied because the additional allegations Plaintiff proposes to add do not cure the deficiencies in Plaintiff's pleading. He still cannot state a claim upon which relief can be granted.

Section 2605(e) of RESPA imposes an obligation on loan servicers to respond to a QWR from a borrower within prescribed time periods. 12 U.S. C. § 2605(e). Where the servicer fails to comply with its obligations under Section 2605, the servicer may be liable to a borrower who asserts an individual claim for "any actual damages to the borrower as a result of the failure" and "additional

damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of [Section 2605]," up to $2000. 12 U.S.C. § 2605(f)(1).

To state a claim for a violation of Section 2605(e) against SPS, Plaintiff must assert well-pled allegations showing that: (1) SPS is a loan servicer; (2) Plaintiff sent SPS a valid QWR; (3) SPS failed to adequately respond within the statutory period; and (4) Plaintiff is entitled to damages. *Dynott v. Nationstar Mortg., LLC*, No. 1:13-cv-1474-WSD, 2014 WL 1028886, at *18 (N.D. Ga. Mar. 17, 2014). Even with the additional allegations set forth in Plaintiff's proposed Amended Complaint, Plaintiff fails to satisfy elements 2, 3, and 4 of this claim. That is fatal to his case, amendment or not.

A. The March 25 Letter Is Not a Valid QWR Requiring a Response.

By statutory definition, a QWR is written correspondence that "includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower." 12 U.S.C. §2605(e)(1)(B)(ii). RESPA requires a loan servicer to respond to a QWR that seeks "information relating to the servicing of such loan." 12 U.S.C. § 2605(e). Servicers are not required " 'to respond to any question that a borrower may ask—no matter how broad, vague, or

far afield.' " *Dynott*, 2014 WL 1028886, at *17 (quoting *DeVary v. Countrywide Home loans, Inc.*, 701 F. Supp. 2d 1096, 1106 (D. Minn. 2010)). Instead, servicers are only required to respond to inquiries about the servicing of the loan. *Id.*

The term "servicing" is a defined term under RESPA, meaning "receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan . . . and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan." 12 U.S.C. § 2605(i)(3). "A written inquiry that does not relate to servicing is not a QWR." *Smith v. Bank of Am. Home Loans*, 968 F. Supp. 2d 1159, 1170 (M.D. Fla. 2013).

Here, the March 25 Letter does not relate to SPS's servicing of Plaintiff's loan. (Doc. 19, p. 12.) It can't, because as the Payment History Report SPS voluntarily provided to Plaintiff reflects, and as Plaintiff has testified in other litigation, Plaintiff stopped paying on the loan SPS services in 2010, well before SPS began servicing his loan, so SPS has never received a single payment from Plaintiff. (Doc. 19, pp. 22-32; *see also* Deposition of Steven Bivens in Civil Action No. 1:14-CV-01569-ODE, relevant excerpts at Doc. No. 89-1, pp. 19, 22.) The plain language of the statute creates a limited obligation on the part of the servicer to provide the borrower with information related to the payments it has

received and how it later used those funds to pay obligations under the terms of the borrower's loan. Accordingly, any request Plaintiff made was wholly unrelated to the narrow category of servicing information to which SPS was obligated to respond under the statute.

What Plaintiff's correspondence does ask for is a variety of information that is decidedly not related to SPS's handling of payments on his loan. The majority of Plaintiff's requests relate to foreclosure of a security interest and various transfers of interests in the Note and Security Deed. (Doc. 19, p. 12.) While the Eleventh Circuit has not squarely addressed the issue of whether inquiries related to the ownership and validity of a loan trigger a RESPA obligation, the majority of courts that have addressed the issue have concluded they do not. *See, e.g.*, *Medrano v. Flagstar Bank, FSB*, 704 F.3d 661, 667 (9th Cir. 2012) ("The statute . . . distinguishes between letters that relate to borrowers' disputes regarding servicing . . . and those regarding the borrower's contractual relationship with the lender . . . because only servicers of loans are subject to § 2605(e)'s duty to respond—and they are unlikely to have information regarding those loans' originations."); *Armendariz v. Bank of Am., N.A.*, No. EP-15-CV-00020, at *12 (W.D. Tex. Apr. 15, 2015) (collecting cases and concluding that "[c]ourts have consistently held that a borrower's written demand for the production of certain

loan documents does not relate to the 'servicing' of a loan, and therefore does not trigger a loan servicer's response obligations under the statute."); *Smith*, 968 F. Supp. 2d at 1170 (M.D. Fla. 2013) (holding that request for information about loan validity is outside scope of RESPA and collecting cases).

Plaintiff also asks for information about loan modification. Courts across the country have consistently held that requests for information about loan modification in QWRs do not trigger an obligation to respond on the part of the servicer because they do not relate to servicing. *See, e.g., Tavake v. Chase Bank*, No. 2:12-CV-0041-KJM-AC, 2012 WL 6088305, at *4 (E.D. Cal. Dec. 6, 2012) report and recommendation adopted in part, No. 2:12-CV-0041 KJM AC, 2013 WL 1326312 (E.D. Cal. Mar. 30, 2013) ("For RESPA purposes, a QWR must relate to the servicing of a loan and not to a loan modification."); *Davenport v. Wells Fargo Home Mortg.*, No. CIV. PJM 14-2369, 2015 WL 4475467, at *2 (D. Md. July 17, 2015) ("A mere request for information on loan modifications does not constitute a QWR."); *Smallwood v. Bank of Am., N.A.*, No. 1:15-CV-336, 2015 WL 7736876, at *8 (S.D. Ohio Dec. 1, 2015) (reviewing relevant authority and finding borrower's inquiries to servicer regarding information and documents about loan modification were not valid QWRs triggering an obligation on the part of the Defendant under RESPA); *Mayer v. EMC Mortg. Corp.*, No. 2:11-CV-147,

2014 WL 1607443, at *5 (N.D. Ind. Apr. 22, 2014) ("A servicer's denial of a permanent loan modification and any actions related to any loan modification are outside the term "servicing", and thus cannot be pursued under RESPA.")

Accordingly, no obligation to respond to Plaintiff's letter arose under RESPA, and the Amended Complaint, if permitted, would be subject to dismissal.

B. SPS Satisfied Any Obligations to Respond.

Even if the Court construes the March 25 Letter to constitute a valid QWR, SPS satisfied its statutory response obligations. Where a borrower makes a request for servicing information in a QWR, RESPA requires that the servicer "provide the borrower with a written explanation or clarification that includes (i) information requested by the borrower or an explanation of why the information requested is unavailable or cannot be obtained by the servicer; and (ii) the name and telephone number of an individual employed by, or the office or department of, the servicer who can provide assistance to the borrower." 12 U.S.C. § 2605(e); *Carter v. Countrywide Home Loans, Inc.*, 2009 WL 2742560, at *6 (E.D. Va. Aug. 25, 2009). SPS complied with RESPA in all respects. .

SPS responded in good faith, providing its payment history for Plaintiff's loan for the past two and one-half years, as well as the name and direct contact information of an individual at SPS to whom Plaintiff could direct further inquiry.

The payment history SPS sent Plaintiff does contain codes, but Plaintiff fails to acknowledge that it also provides the amount of each charge and a narrative description of such charges. (Doc. 19, pp. 22-32.) Moreover, Plaintiff has identified no authority whatsoever that supports his theory that SPS owed him a key to explain codes for charges that do not relate to any amount SPS received from him. This response was sufficient and does not constitute a violation of Section 2605(e).

The fact that Plaintiff decided in December 2015—eight months later—that he was not satisfied with SPS's response does not automatically mean that a plausible RESPA claim exists. Congress did not intend for Section 2605(e) to operate in hindsight as a "gotcha" – essentially enabling borrowers to tie the hands of loan servicers "by inundating a lender with qualified written requests until they receive a single unsatisfying response." *Banayan v. OneWest Bank F.S.B.*, No. 11CV0092, 2012 WL 896206, at *6-7 (S.D. Cal. March 14, 2012). This standard should be applied here. Plaintiff—in the midst of contentious litigation with SPS and knowing full well he had not ever made a single payment to SPS—requested an account history. SPS (through its counsel) provided Plaintiff an account history showing that no payment for the Loan had been received by SPS since it began servicing the loan on December 1, 2012 and provided a direct line to an SPS

employee who could assist with additional concerns. There was no follow-up inquiry until February 2016, long after this case was filed and after the same parties had engaged in extensive discovery in a separate action about SPS's response to another purported QWR related to the same loan sent years before.

Since the proposed Amended Complaint does not plausibly allege a RESPA violation, permitting the amendment would be futile.

C. Plaintiff Can't Show Actual Damages

To sustain a claim under Section 2605, the plaintiff must establish "a causal link" between the actual damages he is claiming and the RESPA violation he is alleging. *Habib v. Bank of Amer. Corp.*, No. 10-04079, 2011 WL 2580971, at *4 (N.D. Ga. Mar 15, 2011). There must be a causal relationship between the violation and the alleged harm. Plaintiff made no allegation of actual damages in his original Complaint. The purpose of his Motion to Amend is to obtain permission to add four paragraphs to his pleading that purport to cure this deficiency. But Plaintiff's proposed Amended Complaint still does not plausibly allege that he was injured by the fact SPS did not provide him an account statement for the period before SPS began servicing the loan. Nor does it show that he suffered any harm because he did not receive a code sheet for the SPS account history he received.

Plaintiff merely alleges that he met with an official of a state government agency in February 2016 and sent two more letters to SPS in February and April 2016, nearly one year after SPS responded to the March 25 Letter. (Doc. 19, p. 4 ¶¶ 9-12). All of this conduct occurred after Plaintiff filed this lawsuit. His failure to pursue any additional response makes clear that he did not, in fact, need the information about his account for any purpose other than litigation. He has never asserted any allegation of a servicing error affecting the balance of his account. He has asserted no allegation that he needed the information in order to make a payment. (He has made no effort to make a payment since 2010.) Rather than showing that a statutory violation proximately caused an injury to him, Plaintiff has only shown that since filing this lawsuit he has made a concerted effort to attempt to create damages in order to preserve his claim. These are not allegations of damages that flow from any alleged violation.

Plaintiff simply cannot show that he suffered actual damages as a result of the alleged RESPA violations here. Because actual damages are required to sustain this claim, and Plaintiff has demonstrated that he cannot satisfy this requirement, the Court should deny the Motion to Amend and not prolong this litigation any further.

D. The Proposed Amended Complaint Does Not State a Claim for Statutory "Pattern or Practice" Damages.

1. Plaintiff's failure to show actual damages precludes the recovery of statutory damages.

As Magistrate Judge Larkins recently explained in the R&R in this case, under the plain language of Section 2605(f), a borrower cannot recover statutory damages in the absence of actual damages. (Doc. 17, pp. 9-12.) As noted in the R&R, the Eleventh Circuit recently addressed this issue, in dicta, in its opinion in *Renfroe v. Nationstar Mortg., LLC*, and agreed that the statute's language "indicate[s] that a plaintiff cannot recover pattern-or-practice damages in the absence of actual damages." No. 15-10582, ___ F.3d ___, 2016 WL 2754461, at *5 n.4 (11th Cir. May 12, 2016). Here, Plaintiff has not plausibly alleged that he suffered any harm as a result of SPS's conduct. Accordingly, statutory damages are not available, either, and Plaintiff's proposed Amended Complaint is fatally deficient.[2]

[2] As SPS argued in its briefing of the Motion to Dismiss (Docs. 10, 14), even if the statutory language provided for statutory damages as an alternative to actual pecuniary damages (which it does not), Plaintiff would have to show that he had suffered a "concrete and particularized" harm as a result of the violation in order to establish standing to proceed with this lawsuit. The Supreme Court recently held in *Spokeo, Inc. v. Robins*, that "Article III standing requires a concrete injury even in the context of a statutory violation." ___ U.S. ___, 136 S.Ct. 1540, 1549 (2016), as revised (May 24, 2016). A plaintiff still must "satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to

2. Plaintiff has not plausibly alleged that SPS has a pattern and practice of non-compliance with Section 2605.

Should the Court reach the question of whether Plaintiff's proposed Amended Complaint states a claim based on statutory damages alone, it must still conclude that the Complaint does not set forth well-pled allegations that would entitle him to such relief. To maintain a claim for statutory damages, Plaintiff must show that SPS has a "pattern or practice of noncompliance with the requirements of [Section 2605]." 12 U.S.C. § 2605(f). He has not.

Courts interpret the term "pattern or practice" by the ordinary meaning of the words. *McLean v. GMAC Mortg. Corp.*, 595 F.Supp.2d 1360, 1365 (2009). "The term suggests a standard or routine way of operating." *Id.* (quoting *In re Maxwell*, 281 B.R. 101, 123 (Bankr. D. Mass. 2002). None of Plaintiff's allegations demonstrates any kind of uniform failure to comply with Section 2605 on the part of SPS.

In the proposed Amended Complaint, Plaintiff alleges that SPS has a practice to send incomplete payment histories and to send coded payment histories

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authorize that person to sue to vindicate that right." *Id.* An allegation of "a bare procedural violation, divorced from any concrete harm" would not be sufficient to create standing to sue. *Id.* Bivens' allegations about post-Complaint correspondence simply do not satisfy the "concrete and particularized harm" requirement, as any related costs to him do not flow from the alleged violations the year before.

without any key to the codes. (Doc. 19, p. 4 ¶¶ 13, 14.) In support of these allegations, Plaintiff relies upon testimony given by SPS corporate representative Mark Syphus in the other litigation pending between these parties. (*Id.*) But a reading of that testimony does not plausibly lead to a conclusion that SPS's response to Plaintiff's QWR is part of a "pattern or practice of noncompliance with [Section 2605]," as Plaintiff must show. Instead, the testimony reflects that SPS treats requests for payment histories on "a case-by-case basis" and that SPS's response to a request "depends on what [the borrowers] request." (*Id.*, pp. 38-39.) With respect to whether SPS sends a "code sheet" explaining the codes in a payment history, Mr. Syphus testified that he is unaware of any SPS policy on that issue and that in practice some responses to borrowers include a code sheet and others do not. (*Id.*, pp. 39-40.) Furthermore, because these parties were already in litigation at the time Plaintiff sent the March 25 Letter, the response was crafted and sent by the undersigned counsel, and not SPS employees. (Doc. 19-1, p. 19.) As such, it was not treated as ordinary borrower correspondence and it falls outside the scope of SPS's standard or routine way of operating.

Accordingly, Plaintiff's amendment also has not cured his failure to plausibly allege a claim for statutory damages and leave to file it should not be granted.

CONCLUSION

For all of the foregoing reasons, the Court should deny Plaintiff's Motion for Leave to Amend Class Action Complaint.

DATED: June 23, 2016.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1D, I hereby certify that this brief has been prepared in compliance with Local Rule 5.1C, using 14-point Times New Roman font.

/s/ Alexandra M. Dishun
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CERTIFICATE OF SERVICE

I certify that I have this 23rd day of June, 2016 electronically filed the foregoing **DEFENDANT SELECT PORTFOLIO SERVICING, LLC'S OPPOSITION TO PLAINTIFF'S MOTION TO AMEND CLASS ACTION COMPLAINT** with the Clerk of Court using the CM/ECF system, which will electronically serve the same on Plaintiff's counsel of record listed below:

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