

Ms. Doe defaulted under the terms and conditions of the Mortgage and Note by failing to pay her monthly mortgage payment and real estate taxes. Decker initiated foreclosure proceedings and sold the Property to a third party bidder who later assigned his rights to XYZ Credit Management Corp. (“XYZ ”), Decker’s parent company.

On May 11, 2006, Ms. Doe filed a Pro Se Complaint, C.A. No. [] (the “Prior Action”), in Suffolk Superior Court seeking, among other things, injunctive relief to prevent the foreclosure sale from being completed. A copy of the Complaint in the Prior Action is attached hereto as Exhibit “A”. Ms. Doe asserted that Decker had breached its fiduciary duty to her by failing to give her proper notice of the sale, failing to advertise the sale adequately, and selling the Property for less than its alleged fair market value. The Court (Gants, J.) initially approved the injunction, ex parte, but on May 31, 2006, Judge Gants vacated his earlier order stating that Ms. Doe “is not likely to prevail on the merits ... and that the balance of equities favors the defendant [Decker] and the buyer at foreclosure of this property.” See Order, May 31, 2006, a copy of which is attached hereto as Exhibit “B”.

On December 12, 2006, Ms. Doe filed a motion to amend her Complaint, to add claims for violation of the federal Truth-in-Lending Act (“TILA”) and Regulation Z, and violation of Massachusetts G.L. c. 140D¹. A copy of the motion is attached hereto as Exhibit “C”. Decker opposed the motion and a hearing was held. On December 26, 2006, the Court (Spurlock, J.) denied Ms. Doe’s motion to amend, stating “[m]otion denied as these same issues were litigated at a preliminary injunction hearing and further the plaintiff’s right to rescind was extinguished with the foreclosure sale and it would be unduly prejudicial to allow the amendment at this point.” A copy of the Court’s Order is attached hereto as Exhibit “D”. A certified Copy of the Suffolk Superior Court Docket is attached hereto as Exhibit “E”.

¹ At this point, Ms. Doe had obtained counsel.

On March 19, 2007, Decker filed a motion for summary judgment on all counts in the Prior Action and Ms. Doe filed an opposition. On December 13, 2007 the Court (Lauriat, J.) allowed Decker's motion for summary judgment. A copy of the Court's "Memorandum of Decision and Order ..." are attached hereto as Exhibit "F". On January 3, 2008, Judgment was entered in favor of Decker. See Docket, Exhibit "E".

On October 12, 2007, Ms. Doe filed the Present Action against Decker and Gemstone Mortgage Corp. ("Gemstone") in Suffolk Superior Court (C.A. []), alleging five causes of action against Decker:

- Count I: Violation of the Truth In Lending Act ("TILA") 15 U.S.C. sec. 1501 et seq., and regulation Z promulgated thereunder as to Decker Only;
- Count II: Violation of the State Law Truth In Lending Act G.L. c. 140 D sec. 1 et seq.;
- Count III: Violation of Common Law Doctrine of Fraud as to Decker;
- Count V: Violation of 15 U.S.C. sec. 1639 ("Home Ownership and Equity Protection Act") and Regulation Z sec. 226.32; and in Violation of the Corresponding State Law G.L. 140D and the Code of Massachusetts Regulations; and
- Count VIII: Grant of Common Law Rescission as to both Defendants.

A copy of the complaint in the Present action is attached hereto as Exhibit "G".²

On February 6, 2008, the Present Action was removed to the United States District Court of Massachusetts (C.A. []).

Decker now moves this Court to dismiss the Complaint in the Present Action because Ms. Doe's claims are subject to res judicata/claim preclusion and pursuant to Fed. R. Civ. P. 12(b)(6).

² Consideration of the attached documents is appropriate in the context of this motion to dismiss, where, as here, the plaintiff relies on particular documents as a basis of her claim, without converting the motion to one for summary judgment. When documents are central to a plaintiff's claims, the documents can be considered at the pleading stage. Palmer v. Champion Mortgage, 465 f.3d 24 (1st Cir. 2006); Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, 1015 (1st Cir. 1988).

2. Argument.

2.1 Standard of Review.

Although, a court deciding a motion to dismiss must assume the truth of all well-pleaded facts in plaintiff's Complaint, dismissal is appropriate where, as here, "the plaintiff's factual averments hold out no hope of recovery on any theory adumbrated" in the Complaint. In re Colonial Mortgage Bankers Corp., 324 F.3d 12, 15 (1st Cir. 2003). The United States Supreme Court held that the pleading requirements in the Federal Rules of Civil Procedure "require[] more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1959 (2007). Thus, a Plaintiff's "bald assertions, unsupported conclusions, periphrastic circumlocutions, and the like need not be credited." Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996). A complaint must allege "enough facts to state a claim for relief that is plausible on its face." Bell Atlantic Corp., 127 S. Ct. at 1974.

2.2 The Court should allow Decker's Motion to Dismiss Counts I, II, III, V and VIII because they are barred under res judicata/claim preclusion.

Not satisfied with two bites at the apple (at the hearing on the preliminary injunction and via the motion to amend in the Prior Action), Ms. Doe asserts in the Present Action five claims against Decker, all of which arise from the same facts, transactions or occurrences on which she based her claims in the Prior Action between the same parties. Therefore, because a valid, final judgment has entered in the Prior Action, Ms. Doe is barred by res judicata/claim preclusion from relitigating claims which could have been, but were not, joined in the Prior Action.

The preclusive effect in this Court of a judgment of the Massachusetts Superior Court in the Prior Action is that which a Massachusetts state court would give such a judgment. In In re: Sonus Networks, Inc., 499 F.3d 47, 56 (1st Cir. 2007), the Court of Appeals for the First Circuit explained:

Under the full faith and credit statute, 28 U.S.C. § 1738, a judgment rendered in a state court is entitled to the same preclusive effect in federal court as it would be given within the state in which it was rendered. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984). Thus, the preclusive effect of the state court judgment at issue here is determined under Massachusetts law.

The doctrine of claim preclusion provides that “a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.” Hughes v. McMenamon, 379 F.Supp.2d 75, 78 (D. Mass 2005). (Emphasis added).

As the names suggest, claim preclusion operates on the level of the claim, and issue preclusion operates on the level of the issue. Claim preclusion is based on the idea that the precluded litigant had the opportunity and incentive to fully litigate the claim in an earlier action, so that all matters that were or could have been adjudicated in the earlier action on the claim are considered to have been finally settled by the first judgment.

Sonus Networks, 499 F.3d at 56, citing Kobrin v. Bd. of Registration in Med., 444 Mass. 837, 832 N.E.2d 628, 634 (2005).

Under Massachusetts law, to establish claim preclusion there must be: (1) sufficient identity between the parties in the two suits; (2) sufficient identity between the causes of action asserted in the earlier and later suits, and (3) a final judgment on the merits in an earlier suit. Hughes, 379 F.Supp.2d at 78; Kobrin, 444 Mass. 837, 843; DaLuz v. Department of Correction, 434 Mass. 40, 45, 746 N.E.2d 501 (2001).

In this case, Ms. Doe claims are barred by claim preclusion because: (1) this suit is between the same parties of an earlier suit; (2) there is sufficient identity between the causes of action asserted in the earlier suits; and (3) a final judgment was entered on the merits in an Prior Action.

2.2.1 There is sufficient identity between the Parties involved in the Prior Action

Ms. Doe and Decker are the same parties that litigated the Prior Action. Therefore this element of claim preclusion is satisfied.

2.2.2 There is sufficient identity between the causes of action asserted here and in the Prior Action.

All of the claims which Ms. Doe asserts against Decker in the Present Action arise from the same facts and dealings with Decker on which she based her claims in the Prior Action. The TILA and c.140D claims in the Present Action clearly arise from the same loan transaction and foreclosure as gave rise to Ms. Doe's claims in the Prior Action that Decker had breached its fiduciary duty to her by failing to give her proper notice of the sale, failing to advertise the sale adequately, and selling the Property for less than its alleged fair market value. In fact, Counts I and II of the Complaint in the Present Action (alleging violations of TILA/Regulation Z and Massachusetts c.140D) are identical to the TILA and c.140D claims which Ms. Doe sought unsuccessfully to amend into the Prior Action and which she relied upon when unsuccessfully seeking injunctive relief in that case. Count III (Fraud), Count V (HOEPA/high cost loan) and Count VIII (common law rescission) also arise from the October 15, 2004, loan from Decker to Ms. Doe. Thus, there is sufficient identity between the causes of action alleged here and in the Prior Action.

2.2.3 Judgment entered against Ms. Doe in the Prior Action with Decker.

Two actions of the Superior Court in the Prior Action constitute final judgments entitled to preclusive effect. First, as set forth more fully in the factual section of this memorandum, the Superior Court entered summary judgment in the Prior Action in favor of Decker on all claims. Such a summary judgment is a final judgment having preclusive effect. In re Goldstone, 445 Mass. 551, 839 N.E.2d 825 (Mass. 2005) ("Summary judgment decisions are entitled to

preclusive effect where the parties were fully heard, the court's decision is supported by a reasoned opinion, and the opinion was subject to review or was in fact reviewed.”). The Superior Court’s summary judgment in the Prior Action meets these requirements.

Second, the Superior Court denied Ms. Doe’s motion to amend her Complaint in the Prior Action to add claims under TILA and Massachusetts c.140D. It is well established that a denial of a motion to amend can operate as a final judgment with preclusive effect, at least where judgment has entered as to all claims in the action and the denial of the motion to amend was thereafter appealable. 18 Fed. Prac. & Proc. Juris.2d §4412 (Wright and Miller state: “An order that denies leave to amend the pleadings to advance an additional part of a claim partially asserted might seem to fall within the principle that a plaintiff should be free to bring a second action on a theory that could not be advanced in the first action. It appears well-settled, however, that claim preclusion bars a second action on the part excluded from the first action.”). See also Shahidi v. Michael, 2005 Mass. App. Div. 152, 2005 WL 3294663, *2 (11/22/05) (“the denial of a motion to amend to add a claim in the first action must be challenged directly by way of appeal. Failure to do so may result in claim preclusion in the second action”); Restatement (second) of Judgments, §26 com. “b” (1982).

As (1) the parties to the cases are the same; (2) there is a sufficient identity between the causes of action asserted in the Prior and Present Actions, and (3) there was a final judgment on the merits in the Prior Action, claim preclusion bars all of Ms. Doe’s claims in the Present action because they could have been brought in the Prior action.

2.3 The Court should allow Decker’s Motion to Dismiss Count I of Ms. Doe’s Complaint, alleging violations of the federal Truth-in-Lending Act.

2.3.1 Ms. Doe’s claims for TILA damages are barred by the one-year statute of limitations

The TILA statute, 15 U.S.C. § 1640(e), states in pertinent part that “[a]ny action

under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.” Ms. Doe filed her Complaint alleging violations under the Truth in Lending Act on October 12, 2007. The TILA violations cited in Ms. Doe’s Complaint allegedly took place not later than the date of the loan closing, October 15, 2004. See paragraph 7 of the Plaintiff’s Complaint. Thus, Ms. Doe’s damages claims under TILA are time barred because she brought the claims almost three years after the violations allegedly took place.

2.3.2 Ms. Doe’s claims for rescission under TILA are extinguished by the foreclosure sale of her property.

A mortgagor’s right to rescind under TILA is extinguished by a foreclosure sale of mortgaged property. The language of TILA §1635 makes this very clear, providing that an obligor’s right to rescind “shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first...” (emphasis added). See also In re Hall v. Financial Enterprises Corp., 188 B.R. 476, 484 (D. Mass. 1995) (Debtor sent rescission notice one month after foreclosure sale and Court held debtor’s right to rescind was barred by the foreclosure of the mortgage); see R.G. Financial Corp. v. Vergara-Nunez, 446 F.3d 178, (1st Cir. 2006) (obtaining a default judgment of foreclosure also extinguishes the debtor’s right of rescission).

The Property was foreclosed on April 11, 2006, well before Ms. Doe’s filing a Complaint on October 12, 2007, seeking rescission of her mortgage under TILA. A copy of the Assignment of Bid is attached hereto as Exhibit G. As a result, Ms. Doe’s right to rescind has been extinguished by way of foreclosure.

2.3.3 Ms. Doe’s claims for rescission under TILA are barred because she did not exercise the right of rescission within three business days.

Even if this Court were to rule that the foreclosure did not terminate Ms. Doe's right to rescind, she failed to rescind within three days after the closing as required. Under §1635(a), a borrower has until, midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later," to rescind. It is undisputed that Ms. Doe did not attempt to rescind the loan within three business days of its consummation. Her rescission claim is, therefore, time barred.

2.4 The Court should allow Decker's Motion to Dismiss on Count II of Ms. Doe's Complaint, alleging violation of Massachusetts G.L. c. 140D

2.4.1 Ms. Doe's claims for rescission under c. 140D are extinguished by the foreclosure sale of her property.

Just as foreclosure sale extinguishes a mortgagor's rescission rights under TILA (See §2.3.2, supra.), the foreclosure terminates the mortgagor's right to rescind under the Massachusetts CCCDA, G.L. c. 140D, §10(f). In Hall, the court stated,

The debtor sent a rescission notice to Financial one month after the foreclosure sale.... However, assuming for purposes of the Defendant's motion that Financial failed to comply with the disclosure requirements of the TILA and CCCDA, the Court concludes that the Debtor's right to rescind is barred by both the foreclosure of the mortgage and the statute of limitations.

Under TILA, "an obligor's right of rescission shall expire three years after the date of consummation of the transaction upon the sale of the property, whichever occurs first...." ... The Debtor's right to rescind the loan under TILA expired on September 9, 1991, long before the foreclosure and the filing of her bankruptcy petition. Alternatively, even if the statute of limitations had not expired, the Debtor's claim is barred by the foreclosure sale. According to the Official Staff Commentary to Regulation Z, which was promulgated by the Board of Governors of the Federal Reserve System to implement TILA, "[a] sale or transfer of the property need not be voluntary to terminate the right to rescind." Official Staff Commentary to Regulation Z, §226.23(a)(3).

CCCDA and the regulations promulgated thereunder essentially mirror the provisions of TILA and Regulation Z. The major

difference is the statute of limitations. Whereas TILA allows consumers three years to rescind, CCCDA provides a four-year statute of limitations. Thus, the statute of limitations for the Debtor's claim under CCCDA expired on September 9, 1992. Alternatively, the foreclosure bars the Debtor's attempted rescission.

188 B.R. at 483-84. See, also, Khan v. Dime Savings Bank of New York, FSB, 1993 WL 818711, *4-5 (Mass. Super. 1993)(noting that under Massachusetts law, a foreclosure results in the borrower's loss of all rights and interest in the property, G.L. c. 183, §21, and thus extinguishes the right of rescission under G.L. c. 140D, §10(f)); Snowden v. Chase Manhattan Mortg. Corp., 17 Mass.L.Rptr. 667, 2004 WL 1194656, *3 n.5 (Mass. Super. 4/27/04) (“However, even assuming that Chase failed to comply with the disclosure requirements of CCCD, an obligor's right of rescission ‘shall expire four years after the date of consummation of the transaction or upon sale of the property ...’ G.L. 140D, § 10(f).’[A] foreclosure sale would terminate an unexpired right to rescind.”)

Decker foreclosed on the Property on April 11, 2006, well before Ms. Doe filed her Complaint in the Present Action on October 12, 2007, seeking rescission of her mortgage under c.140D. As a result, Ms. Doe's right to rescind has been extinguished.

2.4.2 Ms. Doe's claims for rescission under c.140D are barred because she did not exercise the right of rescission within three business days.

Even if this Court were to rule that the foreclosure did not terminate Ms. Doe's right to rescind, she failed to rescind within three days after the closing as required. Under the Massachusetts CCCDA, G.L. c. 140D, §10(a), a borrower has until “midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later,” to rescind. It is undisputed that

Ms. Doe did not attempt to rescind the loan within three business days of its consummation. Her rescission claim is, therefore, time barred.

2.5 This Court should dismiss Count III of Ms. Doe's complaint, alleging fraud, because she cannot prove that her reliance, if any, was reasonable.

In Count III of her Complaint, Ms. Doe claims that Decker is guilty of fraud because it induced her to enter into the loan by making false statements concerning the finance charges and closing costs that would be imposed. The Court should dismiss this claim because, as a matter of law, Ms. Doe could not have reasonably relied upon Decker's allegedly false statements.

To state a claim for common law fraud, the plaintiff "must allege and prove that the defendant made a false representation of a material fact with knowledge of its falsity for the purpose of inducing the plaintiff to act thereon, and that the plaintiff relied upon the representation as true and acted upon it to [her] damage." Masingill v. EMC Corp., 449 Mass. 532, 540 (2007) (Emphasis added). With regard to the reasonable reliance element of the claim, the Supreme Judicial Court recently stated:

It is unreasonable as a matter of law to rely on prior oral representations that are (as a matter of fact) specifically contradicted by the terms of a written contract. This is a rule of long standing....

Id. at 541. (Emphasis added). Ms. Doe could not reasonably rely on allegedly false statements by Decker concerning finance charges or closing costs when confronted with loan documents which addressed the same issues and contradicted what she claims to have been told.

2.6 There is no common law right to rescission

Count VIII of Ms. Doe's Complaint alleges a cause of action for common law rescission. This claim suffers from a number of fatal flaws. First, because Ms. Doe bases her claim of rescission on conduct by Decker which she claims violated TILA and c.140D, the right to rescind is governed by those statutes, not by common law. It would make no sense for a

common law right to rescind to exist in parallel with the statutory rights granted by TILA and c.140D.

Second, even if Ms. Doe at one time had a common law right to rescind her loan, just as the TILA/CCCDA right to rescind lasts only so long as a debtor maintains an interest in the property, any common law common law right to rescind ended when Decker foreclosed her mortgage and sold the property to a third party bidder. The cases cited above in which courts held that the debtor's right to rescind under TILA or c.140D were extinguished by foreclosure would make no sense if the debtors could have avoided the effect of foreclosure merely by invoking common law foreclosure.

Because there either is no common law right of recession for claims to which TILA or c.140D allegedly apply, or any such right of rescission was extinguished by foreclosure, this court should dismiss Count VIII.

3. Conclusion.

For all the foregoing reasons, the Court should grant Decker's Motion to Dismiss Count's I, II, III, V, and VIII and grant such other and further relief as the Court deems

appropriate.

Respectfully submitted,
The Defendant,
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By its attorneys,

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