

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

FREDDIE TORRES,

Plaintiff,

v.

WELLS FARGO BANK, N.A. and
PATRIOT MORTGAGE COMPANY

Defendants.

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EP-13-CV-0064-DCG

ORDER GRANTING DEFENDANT’S MOTION TO DISMISS

On this day, the Court considered Defendant Wells Fargo Bank N.A.’s (hereinafter “Wells Fargo”) unopposed¹ “Motion to Dismiss Plaintiff’s Original Petition and Brief in Support” (hereinafter “Motion to Dismiss”)(ECF No. 8), filed May 14, 2013. After carefully reviewing the above motion, the Court finds sufficient cause to grant, in part, Defendant Wells Fargo’s Motion to Dismiss. Plaintiff’s Complaint fails to state a claim upon which relief can be granted by this Court.

I. BACKGROUND

On November 9, 2000, Plaintiff Freddie Torres (hereinafter “Plaintiff”) began active duty service in the United States Army (hereinafter “U.S. Army”). See Def.’s Mot. to Dismiss 6, Ex. 3, ECF 8.²

¹ Defendant filed the instant “Motion to Dismiss” on May 14, 2013. A “Motion to Dismiss” is a dispositive motion. Local Court Rule CV-7(e)(2) provides that “[a] response to a dispositive motion shall be filed not later than 14 days after the filing of the motion.” See W.D. Tex. Civ. R. 7(e)(2). To date, Plaintiff has filed no responsive pleading. Therefore, the instant motion is, alternatively, granted as unopposed. See *Id.* (“If there is no response filed within the time period prescribed by this rule, the court may grant the motion as unopposed”).

² Courts, when “deciding a motion to dismiss for failure to state a claim[,] . . . may . . . consider matters of which they may take judicial notice.” See *Lovelace v. Software Specturm, Inc.*, 78 F.3d 1015,

On August 8, 2008, Plaintiff executed a Promissory Note (hereinafter “Note”) and Deed of Trust in favor of Patriot Mortgage Company³ and secured by a certain piece of real property located at: 4613 Joseph Rodriguez Drive, El Paso, Texas 79938 (hereinafter “the Property”). *See* Pl.’s Compl. 1, ECF 1.

On April 12, 2010, Plaintiff was deployed to Afghanistan and “ordered to report back to his home station in El Paso, Texas, not later than April 30th, 2011.” *Id.* at 4.

On June 9, 2010, Defendant Wells Fargo issued to Plaintiff: an “Acceleration Notice” and “Notice of Substitute Trustee Sale” indicating that the Property would be sold at auction on July 6th, 2010. *Id.* at 5.

On April 15, 2011, Plaintiff “discovered [the Property] . . . had been foreclosed [up]on by Wells Fargo during his deployment.”⁴ *Id.* at 2.

On September 20, 2012, Plaintiff concluded his active duty military service with the U.S. Army. *See* Def.’s Mot. to Dismiss 6, Ex. 3.

On March 7, 2013, Plaintiff filed his present Complaint alleging: (1) “Wrongful Reporting of Derogatory Credit Data”, (2) “Violation of [the] Service-members Civil Relief Act”, 50 U.S.C. App. §§ 510-597b, (3) “Wrongful Conversion of Property”, (4) “Unjust Enrichment”, (5)

1017–8 (5th Cir. 1996). Defendant’s Motion to Dismiss includes a “Status Report Pursuant to Service-members Civil Relief Act” issued by the Department of Defense noting the date the Plaintiff began active military service. *See* Def.’s Mot. to Dismiss 6, Ex. 3. Defendant requests the Court take judicial notice of the Report. *Id.* at n.3. Federal Rule of Evidence 201(d) demands that “a court shall take judicial notice if requested by a party and supplied with the necessary information.” *See* Fed. R. Evid. 201(d). Pursuant to Federal Rule of Evidence 201(d), the Court takes judicial notice of the “Status Report Pursuant to Service-members Civil Relief Act” issued by the Department of Defense and supplied by Defendant Wells Fargo. However, the Court’s conclusions in this Order are not reliant, solely, upon the information contained therein.

³ “The original mortgagee was Patriot [Mortgage Company] . . . [however,] Wells Fargo was the mortgagee at the time of the alleged foreclosure.” *See* Pl.’s Compl. 4.

⁴ Plaintiff’s Complaint alleges the foreclosure took place on July 6th, 2010. *See* Pl.’s Compl. 2.

“Breach of Contract”, and (6) “Violation of [the] Deceptive Trade Practices Act”. See Pl.’s Compl. 5–10.

II. ANALYSIS

Wells Fargo seeks dismissal of the Plaintiff’s claims pursuant to Federal Rule of Civil Procedure 12(b)(6). See Def.’s Mot. to Dismiss 1. “To survive a [Rule 12(b)(6)] motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)(internal citations omitted)(quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). Moreover, it is incumbent upon the Plaintiff to “show[] that . . . [he or she] is entitled to relief.” *Id.* at 1950.

Every claim⁵ included in the Plaintiff’s Complaint relies upon the allegation that “Wells Fargo’s foreclosure . . . during Plaintiff’s active duty with the U.S. Army . . . violated [50 U.S.C. App. § 532 and/or] . . . 50 U.S.C. App. § 533” (hereinafter “Section 532 or 533 of the Service-members Civil Relief Act”). See Pl.’s Compl. 7. Plaintiff is not entitled to the protections included in Section 532 or Section 533 of the Service-members Civil Relief Act. Therefore, he has failed to state a claim upon which relief can be granted.

A. Plaintiff is Not Entitled to the Protections Included in Section 533 of the Service-members Civil Relief Act

⁵ Plaintiff’s Complaint includes six counts: (1) “Wrongful Reporting of Derogatory Credit Data”, (2) “Violation of [the] Service-members Civil Relief Act”, (3) “Wrongful Conversion of Property”, (4) “Unjust Enrichment”, (5) “Breach of Contract” and (6) “Violation of [the] Deceptive Trade Practices Act”. See Pl.’s Compl. 5–10. Each count relies upon establishing a violation of 50 U.S.C. App. § 532 and/or 50 U.S.C. App. § 533. *Id.* at 6 (Regarding Count 1: “Defendants caused to be entered into the credit report . . . adverse entries . . . which, had the Defendants complied with the SCRA, would not have been made”); *Id.* at 7 (Regarding Count 2: “Wells Fargo’s foreclosure . . . violated 50 U.S.C. App. § 533”); *Id.* at 8 (Regarding Count 3: “Defendants wrongfully foreclosed . . . in violation of the SCRA . . . amount[ing] . . . to a clear repudiation of Plaintiff’s rights to . . . possess and occupy their property”); *Id.* at 9 (Regarding Count 4: “Defendants . . . were unjustly enriched by the . . . foreclosure . . . in violation of the SCRA”); *Id.* (Regarding Count 5: “Defendants . . . breached the contract by foreclosing . . . without . . . court order as required under the SCRA”); *Id.* at 10 (Regarding Count 6: “Defendants violated the DTPA when . . . Defendants violated . . . the SCRA”).

Plaintiff is not entitled to relief pursuant to Section 533 of the Service-members Civil Relief Act: (1) Section 533 of the Service-members Civil Relief Act applies only to obligations that originated before military service, (2) Plaintiff began military service on November 9, 2000, (3) Plaintiff's obligation to Defendant Wells Fargo originated on August 8, 2008, (4) thus, Section 533 of the Service-members Civil Relief Act is inapplicable to Plaintiff's obligation to Wells Fargo.

1. Section 533 of the Service-members Civil Relief Act Applies Only to Obligations that Originated Before a Period of Military Service

Section 533 of the Service-members Civil Relief Act provides, in relevant part, that:

- (a) . . . ***This section applies only to an obligation*** on real or personal property owned by a service-member ***that*** –
 - (1) ***Originated before the period of the service-member's military service*** and for which the service-member is still obligated; and
 - (2) Is secured by a mortgage, trust deed, or other security in the nature of a mortgage

See 50 U.S.C. App. § 533(a)(emphasis added).

2. Plaintiff Began 'Military Service' on November 9, 2000

Section 511(2) of the Service-members Civil Relief Act defines "military service" and provides, in relevant part, that:

- (2) . . . ***The term "military service" means -***
 - (a) ***in the case of a*** service-member who is a ***member of the Army***, Navy, Air Force, Marine Corps, or Coast Guard –
 - (i) ***active duty***, as defined in section 101(d)(1) of title 10, United States Code, and
 - (ii) in the case of a member of the National Guard, includes service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days under section 502(f) of title 32, United States Code, for purposes of responding to a national emergency declared by the President and supported by Federal funds;

See 50 U.S.C. App. § 511(2)(emphasis added). During his service, Plaintiff was a "member of the Army." *See* Pl.'s Compl. 5 ("Plaintiff . . . was on active duty with the U.S. Army"). For "a member of the Army", the term 'military service' "means . . . active duty." *See* 50 U.S.C. App. §

511(2). Plaintiff began his active duty military service on November 9, 2000. *See* Def.'s Mot. to Dismiss 6, Ex. 3. Therefore, for the purposes of the Service-members Civil Relief Act, Plaintiff began his "military service" on November 9, 2000.

3. *Plaintiff's Obligation to Wells Fargo Originated on August 8, 2008*

Plaintiff's "obligation [to Wells Fargo] . . . secured by a . . . trust deed . . . originated" on August 8, 2008. *See* Pl.'s Compl. 1 ("Plaintiffs were borrowers under a certain Promissory Note dated August 8th, 2008 . . . and also mortgagors of a certain piece of real property located at 4613 Joseph Rodriguez Drive, El Paso, Texas 79938").

4. *Section 533 of the Service-members Civil Relief Act is Inapplicable to Plaintiff's Obligation to Wells Fargo*

Section 533 of the Service-members Civil Relief Act applies only to obligations that originated before a period of military service. Plaintiff's obligation to Wells Fargo did not originate before his period of military service. *See* Pl.'s Compl. 1 ("Plaintiffs were borrowers under a certain Promissory Note dated August 8th, 2008 . . . and also mortgagors of a certain piece of real property . . . Prior to these transactions, Plaintiff . . . was serving as military personnel on active duty with the Army"). His military service began on November 9, 2000, and his obligation to Wells Fargo originated almost eight years later, on August 8, 2008. Therefore, Plaintiff is not entitled to the protections included in Section 533 of the Service-members Civil Relief Act. *See Shield v. Hall*, 207 S.W.2d 997, 1000 (Tex. Civ. App. 1948)("The Soldiers' Civil Relief Act⁶ has no application here for the reason that at the time defendant executed the note and mortgage he was in the Military Service").

B. Plaintiff is Not Entitled to the Protections Included in Section 532 of the Service-members Civil Relief Act

⁶ The Soldier's Civil Relief Act is a prior version of the Service-members Civil Relief Act.

Plaintiff is not entitled to relief pursuant to Section 532 of the Service-members Civil Relief Act: (1) Section 532 of the Service-members Civil Relief Act applies only to contracts “for which a deposit or installment has been paid” by a service-member before entering military service, (2) Plaintiff did not pay a deposit or installment on his contract with Wells Fargo before he entered military service, (3) thus, Section 532 of the Service-members Civil Relief Act is inapplicable to Plaintiff’s contract with Wells Fargo.

1. Section 532 of the Service-members Civil Relief Act Applies Only to Contracts “For Which a Deposit or Installment Has Been Paid” Before Entering Military Service

Section 532 of the Service-members Civil Relief Act provides, in relevant part, that:

(2) . . . This section applies only to a contract for which a deposit or installment has been paid by the service member *before the service member enters military service.*

See 50 U.S.C. App. § 532(2)(emphasis added).

2. Plaintiff Did Not Pay a Deposit or Installment on his Contract with Wells Fargo Before he Entered Military Service

For the purposes of the Service-members Civil Relief Act, Plaintiff ‘entered military service’ on November 9, 2000. *See* Sec. II(A)(2). Plaintiff entered into a contract with Patriot Mortgage, which was later assigned to Wells Fargo, on August 8, 2008. *See* Pl.’s Compl. 1 (“Plaintiffs were borrowers under a certain Promissory Note dated August 8th, 2008”). Plaintiff does not affirmatively assert in his Complaint that he made any deposit or installment payment on his contract with Wells Fargo. However, because the contract did not exist until August 8, 2008, the earliest that Plaintiff could have paid a deposit or installment was August 8, 2008 – nearly eight years after he entered military service.

3. Section 532 of the Service-members Civil Relief Act is Inapplicable to Plaintiff’s Contract With Wells Fargo.

Section 532 of the Service-members Civil Relief Act applies only to contracts “for which a deposit or installment has been paid” before entering military service. *See* 50 U.S.C. App. §

532(2). Plaintiff's contract with Wells Fargo did not even come into existence until August 8, 2008, nearly eight years after Plaintiff entered military service. *See* Pl.'s Compl. 1 ("Plaintiffs were borrowers under a certain Promissory Note dated August 8th, 2008"). Therefore, Section 532 of the Service-members Civil Relief Act is inapplicable to Plaintiff's contract with Wells Fargo. *See Whigham v. Chase Auto Fin. Corp.*, 826 F. Supp. 2d 914, 921 (E.D. Va. 2011)("the language of § 532 is clear . . . the SCRA applies only to contracts entered into before military service").

III. CONCLUSION & ORDER

For the foregoing reasons,

IT IS HEREBY ORDERED that the "Motion to Dismiss Plaintiff's Original Petition and Brief in Support" (ECF No. 8) filed by Defendant Wells Fargo is **DENIED IN PART, GRANTED IN PART.**

IT IS FURTHER ORDERED that the "Complaint" (ECF No. 1) filed by Plaintiff Freddie Torres is **DISMISSED WITHOUT PREJUDICE.**

So **ORDERED** and **SIGNED** this 5th day of June 2013



DAVID C. GUADERRAMA
UNITED STATES DISTRICT JUDGE