UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Case No.	CV 13-9046 PA (AGRx)	Date	May 11, 2015
Title	City of Los Angeles v. Bank of America Corporation, et al.		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Stephen Montes Kerr	N/A	N/A
Deputy Clerk	Court Reporter	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
None	None	

Proceedings: IN CHAMBERS - COURT ORDER

Before the Court are Motions for Summary Judgment filed by defendants Countrywide Financial Corporation and Countrywide Home Loans, Inc. (collectively "Countrywide") (Docket No. 86) and Bank of America, N.A. (for itself and as successor-by-merger to Countrywide Bank, FSB) and Bank of America Corp. (collectively "BofA") (Docket No. 88). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that these matters are appropriate for decision without oral argument. The hearing calendared for May 11, 2015, is vacated, and the matters taken off calendar.

I. Factual & Procedural Background

Plaintiff City of Los Angeles (the "City" or "Plaintiff"), commenced this action on December 6, 2013. The City's Complaint alleged that, beginning in 2004, Countrywide and BofA (collectively "Defendants") began to flood historically under-served minority communities with high cost and other "predatory" loans, allegedly constituting "reverse redlining." (Compl. ¶¶ 3-5, 11.) Specifically, the Complaint alleged that Defendants engaged in both redlining and reverse redlining. According to the City, Defendants' pattern and practice of reverse redlining has caused an excessive and disproportionately high number of foreclosures on the loans it has made in the minority neighborhoods of Los Angeles. (Compl. ¶ 9.) Plaintiff alleged that Defendants' practice of traditional redlining has also caused an excessive and disproportionately high number of foreclosures in the minority neighborhoods. (Compl. ¶ 10.) The Complaint alleged that Defendants have engaged in a continuous pattern and practice of mortgage discrimination in Los Angeles since 2004 by imposing different terms or conditions on a discriminatory basis. (Comp. ¶ 3.)

According to the Complaint, these allegedly discriminatory lending practices violated the Fair Housing Act ("FHA"), 42 U.S.C. §§ 3601-3631. In addition to the FHA claim, the Complaint asserted a claim for unjust enrichment. In support of both claims, the City alleged that the discriminatory practices and resulting foreclosures in the minority neighborhoods have inflicted significant, direct, and continuing financial harm to the City. (Compl. ¶ 17.) The Complaint sought damages based on reduced property tax revenues as a result of: (a) the decreased value of the vacant properties themselves; and (b) the decreased value of properties surrounding the vacant properties. In addition, Plaintiff sought

damages based on the cost of municipal services that have been and will be required to remedy the blight and unsafe and dangerous conditions which exist at vacant properties that were foreclosed as a result of Defendants' discriminatory lending practices. (Compl. ¶ 19.)

Defendants moved to dismiss the Complaint for failure to state a claim. In denying the Motion to Dismiss, the Court concluded, among other things, that the City had alleged sufficient facts to survive Defendants' challenges to the timeliness of the Complaint and the City's standing to assert its claims. The Court's June 12, 2014 Order denying the Motion to Dismiss described the City's burden to establish its standing at each stage of the litigation:

> Article III of the United States Constitution requires that a litigant have standing to invoke the power of a federal court. Because Article III's standing requirements limit subject matter jurisdiction, a lawsuit is properly challenged by a rule 12(b)(1) motion to dismiss. See Chandler v. State Farm Mut. Auto. Ins. Co., 598 F.3d 1115, 1122 (9th Cir. 2010).
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> The Supreme Court has held that to have standing under the Constitution, a party must show she has suffered an "'injury in fact,'" that there is a "causal connection between the injury" and the defendant's complained-of conduct, and that it is likely "'that the injury will be redressed by a favorable decision.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136-37, 119 L. Ed. 2d 351 (1992). To demonstrate an "injury in fact," a plaintiff must establish an "invasion of a legally protected interest which is (a) concrete and particularized [citations] and (b) 'actual or imminent, not "conjectural" or 'hypothetical.'" Lujan, 504 U.S. at 560. To meet this test, the "line of causation" between the alleged conduct and injury must not be "too attenuated," and "the prospect of obtaining relief from the injury" must not be "too speculative." Allen v. Wright, 468 U.S. 737, 752 (1984); Maya v. Centex Corp., 658 F.3d 1060, 1070 (9th Cir. 2011).
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> The party invoking federal jurisdiction bears the burden of establishing these elements. See FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231, 107 L. Ed. 2d 603, 110 S. Ct. 596 (1990). Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. See Lujan v. National Wildlife Federation, 497 U.S. 871, 883-889, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990); Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 114-15, 60 L. Ed. 2d 66, 99 S. Ct. 1601, and n.31 (1979).

> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." National Wildlife Federation, 497 U.S. at 889. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. At the final stage, those facts must be "supported adequately by the evidence adduced at trial." Gladstone, 441 U.S. at 115, n.31; Lujan, 504 U.S. 555.

(June 12, 2014 Minute Order.) In Gladstone, the Supreme Court held that economic injury to the village as a consequence of alleged violations of the FHA satisfied Article III. 441 U.S. at 92. "A significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services." Id. at 110-11. Relying on Gladstone, this Court concluded that the Complaint's allegations concerning reduced property values and decreased tax revenues due to Defendants' alleged violations of the FHA were sufficient at the pleading stage to survive Defendants' challenge to the City's standing.

Defendants' Motion to Dismiss also contended that the City's FHA and unjust enrichment claims were barred by the applicable two-year statutes of limitations. In denying the Motion to Dismiss, the Court concluded:

> Because the Complaint includes allegations that Defendants engaged in discriminatory lending within two years of the date Plaintiff filed the action, the Court finds that Plaintiff's FHA claim as alleged is not barred by the statute of limitations. The Complaint further alleges the continuation of the FHA violation into the present, providing sufficient allegations to support the continuing violation doctrine at this stage. The Court notes that statute of limitations is an affirmative defense, and this finding does not limit Defendants from raising this issue in a motion for summary judgment or at trial. However, for the purposes of this Motion, the Court accepts the allegations in the Complaint as true. Therefore, Defendants' Motion to Dismiss the FHA claim as time barred is denied.

(June 12, 2014 Minute Order.) In reaching this conclusion, the Court noted that the FHA's statute of limitations provides that an "aggrieved person" "may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or termination of an alleged discriminatory housing practice . . . to obtain appropriate relief with respect to such discriminatory housing practice . . . ." 42 U.S.C. § 3613(a)(1)(A). An FHA claim for discriminatory lending practices begins to run from the date of loan closing. Silva v. G.E. Money Bank, 449 F. App'x 641, 644 (9th Cir.

2011); Davenport v. Litton Loan Servicing, LP, 725 F. Supp. 2d 862 (N.D. Cal. 2010) (same as to reverse redlining claim). The City's unjust enrichment claim is also governed by a two-year statute of limitations. See Cal. Code. Civ. Proc. § 339.

II. Analysis

In their summary judgment motions, which are focused on issues relating to the timeliness of Plaintiff's claims, Defendants again assert that the City's action is barred by the applicable statutes of limitations. Specifically, BofA contends that it is entitled to judgment because the loans it issued within the limitations period were not discriminatory, the City has no evidence that it suffered injury during the limitations period, and even if Defendants issued discriminatory loans during the limitations period, the City cannot use the continuing violations doctrine to recover damages for any discriminatory loans issued by Defendants prior to the limitations period. BofA also asserts that the City's unjust enrichment claim is barred by the applicable statute of limitations and fails as a matter of law because the City has disclaimed any recoverable unjust enrichment damages. Countrywide's Motion contends that the Countrywide entities are entitled to judgment because they issued no loans within the limitations period.

A. The City's Asserted Injury and Standing

In its Complaint and arguments in opposition to Defendants' Motion to Dismiss, the City claimed that it suffered from decreased property tax revenues resulting from the large number of foreclosures caused by Defendants' allegedly discriminatory lending policies. The City has abandoned this theory of injury, however, and the undisputed facts in support of and in opposition to Defendants' Motions for Summary Judgment establish that of the loans issued by BofA during the limitations period that the City considers to have been discriminatory, only two of those loans resulted in foreclosure and the City has no evidence that it has suffered a decrease in property tax revenues as a result of these foreclosures or Defendants' allegedly discriminatory lending policies.

The City has also abandoned its initial contention that it incurred costs to remedy the blight and unsafe and dangerous conditions existing at vacant properties following foreclosure. In its discovery responses, the City admitted:

> Plaintiff does not seek to recover damages for municipal services previously provided at any property at issue. Plaintiff may seek to recover costs to be incurred in the future to remedy conditions which existed at properties that were foreclosed as a result of Defendants' discriminatory lending practices.

(Undisputed Fact 167.) The City has no evidence of any costs it has incurred or will suffer as a result of any foreclosure at issue in this action.

The City's new theory of injury occurring during the limitations period and its resulting standing to pursue its claims at this stage of the proceedings is its contention, based on a motion adopted by the City Council on November 22, 2011, that the City has an interest in "ensuring that [the City's] residents are free from housing discrimination." (Disputed Fact 238.) According to the City's new theory, because an "aggrieved person" entitled to commence an action under the FHA must merely be a person who "claims to have been injured by a discriminatory housing practice," 42 U.S.C. § 3602(i)(1) (emphasis added), the City's claim to have been injured by discriminatory loans issued to its citizens is sufficient to satisfy Article III's standing requirement. (See Opposition 17:21-25 ("Here the City claims to have been injured, and among those injuries is one for which proof automatically flows from proof of discriminatory loan issuance. That is, discriminatory loan issuance establishes that the City has already suffered injury to its interest in 'ensuring that [its] residents are free from housing discrimination.'").)

While it is enough, at the pleading stage, to "claim" an injury in fact, as the Court indicated in its Order denying the Motion to Dismiss, to survive a summary judgment motion, a plaintiff must provide sufficient evidence of that injury to create a triable issue of fact. See Lujan, 497 U.S. at 883-89 (requiring an affidavit containing facts establishing injury as opposed to averments of injury to defeat a summary judgment motion challenging the plaintiff's standing to pursue a claim); see also Havens Realty Corp. v. Coleman, 455 U.S. 363, 379, 102 S. Ct. 1114, 1124, 71 L. Ed. 2d 214 (1982) ("If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low-and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests."); id. at n.21, 102 S. Ct. at 1125 ("Of course HOME will have to demonstrate at trial that it has indeed suffered impairment in its role of facilitating open housing before it will be entitled to judicial relief.").

The City's claimed injury to its interest in ensuring that its citizens are free from housing discrimination is not the type of "concrete and demonstrable injury" required for standing to pursue an FHA claim. Havens Realty Corp. 455 at 379. The City has cited no precedent to support its assertion that this "injury" is one "for which proof automatically flows from proof of discriminatory loan issuance." Indeed, the City's new standing theory, and insistence that it need not provide any evidence of injury when its standing is challenged by way of a summary judgment motion, would obliterate Article III's standing requirement that a plaintiff must suffer an "injury in fact" to pursue a claim. Nor may the City evade the necessity of establishing its standing by using the "concrete injury" suffered by its citizens to support the City's claim. See City of Sausalito v. O'Neill, 386 F.3d 1186, 1197 (9th Cir. 2004) ("As a municipality, Sausalito may not simply assert the particularized injuries to the 'concrete interests' of its citizens on their behalf. Rather, as a municipality, Sausalito may sue to protect its own 'proprietary interests' that might be 'congruent' with those of its citizens.") (quoting Colorado Rive Indian Tribes v. Town of Parker, 776 F.2d 846, 848 (9th Cir. 1985)).

Put simply, the City must have evidence that it suffered an "injury in fact" during the limitations period to defeat BofA' Motion for Summary Judgment. See Alpha III, Inc. v. City of San Diego, 187 F.

App'x 709, 711 (9th Cir. 2006) ("[W]e find no retaliation against Alpha III during the limitations period. We also find no act of discrimination during the limitations period that injured Alpha III.") (emphasis added). Although not argued by the City, the Court additionally notes that the possibility that the City may, during the limitations period, have suffered some residual loss of property tax revenues caused by lending practices occurring before the limitations period does not create a timely injury. See Garcia v. Brockway, 526 F.3d 456, 462 (9th Cir. 2008) ("'[A] continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation.'") (quoting Ward v. Caulk, 650 F.2d 1144, 1147 (9th Cir. 1981)). Because the City has no evidence that it has suffered any cognizable injury during the limitations period, it lacks standing to pursue its FHA claim.

The City's admission that it does not seek to recover damages for past expenses incurred to remedy conditions at foreclosed properties also dooms its claim for unjust enrichment. Without evidence of the costs incurred by the City as a result of Defendants' past allegedly discriminatory behavior, the City cannot prevail on a claim to recover those costs. See Uzyel v. Kadisha, 188 Cal. App. 4th 866, 894, 116 Cal. Rptr. 3d 244, 266 (2010) ("The party seeking disgorgement has the burden of producing evidence permitting at least a reasonable approximation of the wrongful gain."). To the extent the City has changed its theory and wishes to recover costs it may incur in the future, that theory was not alleged in the Complaint. Instead, the Complaint only sought damages "based on the cost of municipal services that will be required to remedy the blight and unsafe and dangerous conditions which exist at the vacant properties that were foreclosed as a result of [Defendants'] illegal lending practices." (Compl. ¶ 19 (emphasis added).) Additionally, with only two foreclosures having occurred during the limitations period arising out of the allegedly discriminatory lending practices, and no evidence that those properties remained vacant, and the current health of the housing market making such vacancies from future foreclosures unlikely, there simply is no evidence in support of these anticipated costs or the likelihood that they will be incurred. Having failed to meet its burden to establish that it has suffered any damages from Defendants' conduct, the City cannot prevail on its claim for unjust enrichment and Defendants are entitled to summary judgment.[1/]

The City alleged and argued one set of facts and legal theories in its Complaint and in opposition to the Motion to Dismiss, and then abandoned those facts and theories in opposition to the Motions for Summary Judgment in favor of legal claims unsupported by any relevant legal authority and a complete

[1/] In its Opposition, the City asserts that "this issue [is] ill-suited for resolution by summary judgment" because "discovery to date has been restricted to the statute of limitations." The Court rejects this argument. The City's discovery responses have disclaimed any recovery of past costs and the evidence to support the City's claimed damages, whatever that evidence may be, is within the knowledge of the City, not Defendants, so the City needs no discovery to obtain the evidence that would support its claim for unjust enrichment damages. Moreover, the City has not attempted to comply with the requirements of Federal Rule of Civil Procedure 56(d) to obtain a delay in the Court's consideration of this issue pending further discovery. See Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp., 525 F.3d 822, 827 (9th Cir. 2008).

absence of supporting evidence. The Court does not condone these types of bait-and-switch litigation tactics. Nor is it proper to assert theories for the first time in opposition to a summary judgment motion that are not alleged in the Complaint. See Gilmour v. Gates, McDonald & Co., 382 F.3d 1312, 1315 (11th Cir. 2004) ("A plaintiff may not amend her complaint through argument in a brief opposing summary judgment.") (citing Shanahan v. City of Chicago, 82 F.3d 776, 781 (7th Cir. 1996)); see also Coleman v. Quacker Oats Co., 232 F.3d 1271, 1294-95 (9th Cir. 2000). The Court therefore concludes that the City has no evidence of injury within the limitations period and, as a result, Defendants are entitled to summary judgment on both claims asserted in the Complaint.

B. **Countrywide's Motion**

Countrywide Financial Corporation and Countrywide Home Loans, Inc. did not make any loans, discriminatory or otherwise, during the limitations period. The City's claims against those entities are therefore untimely and Countrywide is entitled to summary judgment. In reaching this conclusion, the Court has not determined that BofA is not liable as a possible successor for the actions of Countrywide Financial Corporation and Countrywide Home Loans, Inc. if BofA has engaged in discriminatory lending practices during the limitations period and the continuing violation doctrine allows the City to assess liability against BofA for the actions of Defendants occurring prior to the limitations period. That issue is beyond the scope of Countrywide's Motion.

C. **Remaining Issues**

Because the Court has concluded that Defendants are entitled to summary judgment because the City has failed to provide any admissible evidence that it suffered damages during the limitations period, the Court need not address the remaining issues raised in Defendants' Motions. The Court notes, however, that Defendants convincingly assert that, even if Defendants issued discriminatory loans during the limitations period, those loans differ in important ways from the types of loans Defendants issued prior to the 2008-09 financial crisis that formed the basis of the Complaint's allegations of discriminatory lending practices. Moreover, the procedures adopted by Defendants since the financial crisis to prevent the issuance of discriminatory loans have fundamentally altered Defendants' lending practices. In these circumstances, a plaintiff may not rely on the continuing violation doctrine to revive otherwise stale claims. See Havens Realty Corp., 455 U.S. at 380-81, 102 S. Ct. 1125 ("[W]here a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed [within the limitations period] of the last asserted occurrence of that practice."). To satisfy the requirements for application of the continuing violation doctrine, the practice occurring within the limitations period must be the same as the earlier practice. See National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 120, 122 S. Ct. 2061, 2076 (2002) (quoting with approval the Ninth Circuit's conclusion that "'the pre- and post-limitations period incidents involve[d] the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers.'") (quoting Morgan v. National R.R. Passenger Corp., 232 F.3d 1008, 1017 (9th Cir. 2000)); see also Berry v. Bd. of Supervisors, 715 F.2d 971, 981 (5th Cir. 1983) (holding that a plaintiff seeking to invoke the continuing

violation doctrine to revive otherwise stale claims must establish that "the alleged acts involve the same type of discrimination"); Alpha III, Inc., 187 F. App'x at 711 ("[A party can meld untimely and timely acts into a single timely claim only if, at a minium, the timely acts injure the same FHA-protected right as the untimely acts."). The evidence in the record establishes that the allegedly discriminatory practices occurring within the limitations period differ substantially from those occurring earlier in both type and frequency. As a result, were the Court to reach the issue, it would conclude that the City cannot rely on the continuing violation doctrine to reach that earlier conduct and the City would not be entitled to recover damages for any allegedly discriminatory loans issued prior to the limitations period.

Conclusion

Despite some misgivings that the City's Complaint advanced somewhat novel claims for which there would be a lack of evidentiary support, the Court denied Defendants' Motion to Dismiss and allowed the City time to pursue the theories alleged in the Complaint. The City, perhaps because there is no evidence to support those claims, or for some other unknown reason, subsequently abandoned those theories in favor of new legal theories that are unsupported by legal precedent and for which there is a complete lack of evidentiary support. What the Court suspected at the pleading stage has become apparent on Defendants' Motions for Summary Judgment: The City has no evidence that it has suffered any damages as a result of Defendants' allegedly discriminatory loans. Nor has the City advanced a viable legal claim or sought in a timely manner to amend its Complaint to state one. The Court therefore Court grants Defendants' Motions for Summary Judgment. The Court will issue a Judgment consistent with this Order.

IT IS SO ORDERED.