UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT
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UNITED STATES OF AMERICA,

Plaintiff,

- against -

KRISTINA BREWER,

Defendant,

- against -

RUSSELL P. HIGGINS, Rural Housing Program Director for the RECDS District comprising Vermont and New Hampshire, and ROBERTA HAROLD, State of Vermont Director of RECDS,

Counterclaim Defendants.
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2:95-CV-275

MEMORANDUM DECISION AND ORDER

GAGLIARDI, Senior D.J.

In this foreclosure action, Plaintiff brings motions for summary judgment on the original claim and Defendant's counterclaim, and Defendant brings motions to certify a class for a counterclaim, join counterclaim defendants, and compel discovery. Because material issues of fact exist, the Court denies Plaintiff's motions for summary judgment. In addition, the Court grants Defendant's motions to certify a class and join defendants. Defendant's motion to compel discovery is moot.

BACKGROUND

The parties' filings reveal that they agree on certain facts and disagree on others. In this background section, the Court sets out the material facts chronologically and indicates where the parties are in dispute.

On November 16, 1989, Kristina Brewer and her husband, Richard, borrowed $63,000 from the United States in order to purchase a home in Derby Line, Vermont (the "house"). A government agency, the Farmers Home Administration ("FmHA"), made the loan pursuant to § 502 of the Housing Act of 1949 ("§ 502"), as amended, 42 U.S.C. § 1441 et seq. (1994). In 1994, the Rural Economic and Community Development Service ("RECDS") assumed the FmHA's administration of these loans. Because the FmHA and RECDS are the same agency for purposes of this case, RECDS will refer to both entities.[1]

In February of 1990, after Richard Brewer's employer had laid him off, RECDS granted the Brewers a payment moratorium on the loan, pursuant to 42 U.S.C. § 1475. After a two-year moratorium, the Brewers and RECDS modified the original note with a Reamortization and/or Deferral Agreement dated January 16, 1992. Later that same year, after the Brewers had separated,

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[1] Because Plaintiff United States represents RECDS, a United States agency, the Court refers to RECDS as the Plaintiff rather than the United States. Further, for purposes of clarity, the Court refers to RECDS and Brewer instead of Plaintiff and Defendant.

Richard Brewer conveyed his interest in the property to Kristina Brewer ("Brewer") via a quitclaim deed.

In January of 1993, Brewer sought a loan from RECDS to make repairs to the property. RECDS made the loan for $5,500 pursuant to § 504 of the Housing Act of 1949 ("§ 504"), as amended, 42 U.S.C. § 1441 et seq. (1994). As security for the loan, Brewer executed to the United States a second mortgage on the property. An interest credit agreement that effectively lowered Brewer's monthly payment was in effect from November 11, 1989 to August 16, 1994.

In the summer of 1994, Brewer informed RECDS that she planned to move out of the house. RECDS informed her that she would not be eligible for a payment moratorium or interest credit if she were not living in the house. In August of 1994, Brewer moved to Lyndonville, Vermont in order to attend school and participate in the school work-study program. That same month, RECDS informed Brewer that it had canceled her interest credit agreement because she was no longer occupying the house. Brewer informed RECDS officials that she had not abandoned the property and was maintaining homeowner's insurance on the house. Brewer resided in Lyndonville from August of 1994 until April of 1995. During that time, she did not occupy the house and considered selling it.

RECDS accelerated Brewer's loan on December 22, 1994. As part of the acceleration process, the agency sent Brewer a letter informing her that it had accelerated her account and that she had a right to appeal and request a payment moratorium.

At the close of 1994, Brewer lost one of two jobs she held in Lyndonville. On February 8, 1995, Brewer suffered an injury that confined her to a wheelchair for two months and to crutches for a third month. As a result of the injury, Brewer lost her other job.

Both parties agree that in February and March of 1995, Brewer spoke with Russell P. Higgins, the Rural Housing Program Director for RECDS in the State of Vermont, Kristin E. Mason, RECDS Assistant County Supervisor, and Brian Kuper, RECDS County Supervisor. The parties disagree, however, as to the content of these conversations. Brewer claims that she informed each of these officials that she was immobile due to her injury and asked each of them what options she had with respect to the house and the loan from RECDS. Brewer contends that in each case the RECDS officials told her that, unless she sold the house, RECDS would institute foreclosure proceedings against her. RECDS, on the other hand, asserts that Brewer did not tell Higgins of her injury at this time, nor did she inform Mason or Kuper that she wanted to return to the home or stop the foreclosure process. RECDS further contends that Brewer did not advise Kuper of any

circumstances that would have led him to believe that she was eligible for a payment moratorium.

Brewer moved back into the house in May of 1995. On May 22, 1995, she met with Kuper to discuss the status of the house. While both parties agree that the meeting took place, they disagree as to its content. Brewer claims that she and Kuper reviewed her financial situation and that Kuper signed a housing verification form for her to submit to her Department of Social Welfare caseworker. Brewer maintains that when she asked Kuper what options she had for keeping the house, he replied that she could pay the full arrearage, sell the house, or let RECDS take the house back through foreclosure. According to Brewer, Kuper never mentioned that she had the option of seeking a payment moratorium. RECDS maintains that, at this meeting, Brewer simply told Kuper that she wanted to bring her account current and was working with an attorney on ways to do so. RECDS claims that Brewer did not tell Kuper of any circumstances that would have informed him that she was eligible for a payment moratorium. Specifically, RECDS contends that she never told Kuper about her injury, hospitalization, unreimbursed medical expenses, or lost employment income.

RECDS filed a foreclosure complaint in this Court on September 12, 1995. Upon receiving the summons and complaint, Brewer claims that she contacted Higgins, who told her that she

could stop the foreclosure proceeding by paying the arrears in full. RECDS, however, claims that Brewer contacted Melissa A.D. Ranaldo, the Assistant United States Attorney on the case, informed Ranaldo about her injury and hospitalization, and told Ranaldo that she wanted to resume making monthly payments and pay her arrearage over time. Ranaldo then contacted Higgins, who, upon hearing about Brewer's injuries for the first time, advised Ranaldo to inform Brewer of the possibility of a payment moratorium. RECDS further asserts that Ranaldo attempted to contact Brewer and was in the process of doing so on September 22 when Brewer's attorney, Wendy Morgan, contacted Ranaldo. Brewer had obtained Morgan as counsel through Vermont Legal Aid, Inc. on September 21, 1995.

On October 2, 1995, Brewer contacted Kuper at RECDS and requested a payment moratorium application. Kuper sent her one on October 3. Brewer submitted a completed moratorium application form on or about May 10, 1996. She currently resides in the house.

DISCUSSION

Brewer answered RECDS's complaint and summons with an affirmative defense and a counterclaim. The affirmative defense states that RECDS did not comply with the federal statutes and regulations for loan servicing and that compliance is a prerequisite to RECDS's foreclosure on the mortgages. Brewer bases her counterclaim, filed as a class action, on RECDS's alleged failure to meet the Constitutional and statutory notice requirements regarding the availability of a payment moratorium after RECDS has accelerated a borrower's loan. Further, Brewer moves to compel discovery on the class action counterclaim, for a continuance of the summary judgment motions, and to join additional parties as counterclaim defendants. RECDS has moved for summary judgment on both its foreclosure claim and Brewer's class action counterclaim.

I. SUMMARY JUDGMENT

Summary judgment is appropriate if the documents before the Court "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden is on the moving party to demonstrate the absence of a genuine issue of material fact, and, in considering the motion, the Court must resolve all ambiguities and draw all inferences in favor of the nonmoving party. Gallo v. Prudential Services, Ltd. Partnership, 22 F.3d 1219, 1223 (2d Cir. 1994).

A. Summary Judgment With Respect to Foreclosure

RECDS claims that it is entitled to summary judgment because there is no genuine issue as to any material fact regarding its foreclosure claim. It asserts that Brewer admits that she owes RECDS money based on two promissory notes secured by two mortgages against the property in question. Despite Brewer's affirmative defense, RECDS contends that, as a matter of law, it has met its obligations to notify Brewer of the available payment moratorium relief, including those obligations developed in United States v. Shields, 733 F. Supp. 776 (D. Vt. 1989).

Sections 1951.313 and 1951.312(c) of Title 7 of the Code of Federal Regulations[2] define RECDS's obligations with respect to payment moratoriums on loans that the agency has issued pursuant to the Housing Act of 1949. Section 1951.313(b) details when moratorium relief is available, and the pertinent part provides:

> Eligibility requirements. The borrower will be provided a form to complete when [RECDS] becomes aware of existing circumstances beyond the borrower's control which may entitle a borrower to a moratorium or if the borrower requests a moratorium without filing the form. If needed, [RECDS] will assist the borrower in completing the form. All of the following conditions must exist before a moratorium can be granted:
>
> (1) The borrower is temporarily unable for one of the following reasons to continue making scheduled payments without unduly impairing his/her standard of living:
>
> (i) Income reduction of at least 20 percent. If the borrower is currently receiving interest credit, the 20 percent reduction will be from the income on which the current interest credit agreement is based. . . .

[2] 7 C.F.R. § 1951.313 (1995) has been resequenced as 7 C.F.R. § 1951.314 (1996); however, for clarity, the Court will continue to refer to the section by its 1995 section number.

(ii) The need to pay unexpected and unreimbursed expenses resulting from an accident, illness, injury or death of a family member or damage to the security property if adequate hazard insurance coverage was unavailable.

(2) The borrower must occupy the dwelling unless the dwelling is determined by [RECDS] to be uninhabitable.

(3) The borrower's account is not currently accelerated.

(4) The borrower agrees to notify [RECDS] if the circumstances on which the moratorium was based change.

7 C.F.R. §1951.313(b) (1995). RECDS concedes that requirement (b)(3) does not apply in Vermont since the Shields decision. Shields, 733 F. Supp. at 784 (finding that the "blanket prohibition of post-acceleration moratorium relief embodied in 7 C.F.R. § 1951.313(b)(3) is invalid").

Section 1951.312(c) describes the obligation of RECDS to notify borrowers of the availability of a payment moratorium:

> Moratorium. When it is known (or if it appears) that circumstances exist which may entitle a borrower to a moratorium, [RECDS] will inform the borrower this assistance may be available and provide the borrower a form on which to apply for a moratorium.

7 C.F.R. § 1951.312(c) (1996).

The Shields court invalidated the post-acceleration payment moratorium prohibition because it conflicted with the plain reading of 42 U.S.C. § 1475, the authority for the regulation. Shields, 733 F. Supp. at 784. The statute provides for moratorium relief "[d]uring any time that any such loan is outstanding. . . ." 42 U.S.C. § 1475 (1994). The court found that the Congressional policy behind the statute requires the same moratorium relief before and after RECDS accelerated a loan.

Shields, 733 F. Supp. at 784. Because the policy behind providing moratorium relief applies with the same force both pre- and post-acceleration, it stands to reason that the notification requirements stated in § 1951.312(c) apply to borrowers at any time their loans are outstanding, regardless of whether RECDS has accelerated their accounts.

Therefore, under § 1951.312(c), RECDS had the obligation to inform Brewer of the possible availability of a payment moratorium and provide her with an application form if RECDS knew or it appeared that circumstances existed that might have entitled Brewer to such relief. The regulation's wording is plain, and, notably, it does not provide for an exception if RECDS had reason to believe that a borrower knew that moratorium relief was available. The policy behind the requirement is to ensure that RECDS inform low-income homeowners who borrow funds under §§ 502 or 504 and who appear to qualify for a payment moratorium of this option before foreclosing on their homes.

The parties' accounts of the discussion between Brewer and RECDS agents differ. As RECDS brings this summary judgment motion, however, the Court must resolve all ambiguities and draw all inferences in favor of Brewer. In this light, Brewer contacted three agency officials, Higgins, Mason, and Kuper in February and March of 1995, and she informed each of these officials that she was immobile due to her injury and asked each

what options she had with respect to the house and the loan from RECDS. In each case, the RECDS officials told her that she needed to sell the house or foreclosure would proceed; they did not mention that she had an option of a payment moratorium. In addition, Brewer met with Kuper on May 22, after she had reoccupied the house. She and Kuper reviewed her financial situation, and Kuper signed a housing verification form for her to submit to her Department of Social Welfare caseworker. When Brewer asked him what options she had for keeping the house, he replied that she could pay the full arrearage, sell the house, or let RECDS take the house back through foreclosure. Kuper never mentioned the option of a payment moratorium.

Should Brewer establish these facts at trial, RECDS would not have met its obligations under § 1951.312(c). RECDS knew of or it appeared that circumstances existed that may have entitled Brewer to a payment moratorium, and RECDS did not inform her of the option of moratorium relief and did not provide her with an application form.

When it enacted the public housing acts, Congress specifically announced that one of the legislation's objectives was to provide "a decent home and suitable living environment for every American family." Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 281 (1968) (quoting 42 U.S.C. § 1441). It further called upon all agencies involved in housing to

exercise their power consistently with the Act's national housing policy. 42 U.S.C. § 1441 (1994). Because federal regulations implement the statute and because foreclosure seems anathematic to the statute's purpose, courts have consistently required federal agencies to fulfill all regulatory requirements, particularly those relating to payment moratoriums, before proceeding with a foreclosure action. United States v. Gomiller, 545 F. Supp. 17, 20-21 (N.D. Miss. 1981) ("The government cannot proceed with foreclosure until the regulations relating to moratorium relief are fully complied with."); United States v. Villanueva, 453 F. Supp. 17, 19 (E.D. Wash. 1978) (holding that the federal regulations governing notice of moratorium relief govern the procedures that an agency must follow before foreclosing on a federally assisted housing loan); United States v. Rodriguez, 453 F. Supp. 21, 22 (E.D. Wash. 1978) (finding that the government cannot foreclose its mortgage securing a federally assisted farm housing loan without first complying with the regulations governing notification of moratorium relief); United States v. Trimble, 86 F.R.D. 435, 436-37 (S.D. Fla. 1980) (stating that the government's failure to comply with regulations requiring notification of moratorium relief is a valid defense to the foreclosure of a mortgage based on a FmHA loan).

Again, should Brewer establish at trial the facts she alleges, there would be considerable evidence that RECDS failed to comply with 1951.312(c) by not notifying Brewer when it knew

of or it appeared that she was eligible for a payment moratorium. Accordingly, the Court denies RECDS's motion for summary judgment on its foreclosure claim.

B. Summary Judgment With Respect to the Counterclaim

RECDS also moves for summary judgment on Brewer's counterclaim challenging RECDS's practices in administering the program of payment moratorium relief under §§ 502 and 504. The counterclaim alleges that the Vermont RECDS staff follows a policy of restricting borrowers' access to moratorium relief once it has accelerated a loan, and that this policy is contrary to the holding in Shields, 733 F. Supp. 776.

1. Standing

In support of its summary judgment motion, RECDS first asserts that Brewer has no standing to sue. Constitutional standing has three elements: first, the plaintiff must have suffered an injury, actual or imminent; second, the conduct complained of must have a causal connection with the injury; and finally, a favorable decision must be able to redress the injury. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992); Frank v. United States, 78 F.3d 815, 822 (2d Cir. 1996).

In the instant case, Brewer meets the standing requirements. She suffers an imminent injury because RECDS has begun the foreclosure process and that may force her out of her home.

RECDS's alleged failure to provide Brewer with notice of a possible payment moratorium has a strong causal connection to her injury. Brewer's pleadings ostensibly meet the requirements for a payment moratorium set forth in Shields' interpretation of 7 C.F.R. § 1951.313(b). If RECDS had provided the required notice and application form, it seems likely that Brewer would have applied for and the agency would have granted her a payment moratorium. Finally, because this Court has the power to stop the foreclosure process through injunctive relief, a decision favorable to Brewer would clearly redress her injury.

2. Statutory Compliance

RECDS next asserts that its policies and practices of notification of payment moratorium relief meet the statutory and Constitutional requirements of notice. As discussed above, however, viewed in a light most favorable to Brewer, RECDS's policies and practices do not meet these standards. Section 1951.312(c) of Title 7 of the C.F.R. requires RECDS to provide notice of and an application form for a payment moratorium whenever RECDS knows or it appears that a borrower may be eligible. As discussed above, after Shields, this federal regulation applies to RECDS both pre- and post-acceleration. Given RECDS's and Brewer's contrasting accounts of the conversations between Brewer and RECDS agents, this Court cannot find as a matter of law that RECDS's policies and practices for giving borrowers post-acceleration notice of moratorium relief do

not violate the Housing Act of 1949, 42 U.S.C. § 1471 et seq. (1994).

II. CLASS CERTIFICATION

Brewer moves to certify a class for her counterclaim. The proposed class consists of: (1) All homeowners in the State of Vermont currently participating in the § 502 or § 504 single family home ownership program whose loans are in a state of acceleration or RECDS may accelerate in the future; and (2) all participants in these programs in the State of Vermont whose loans RECDS accelerated at any time since October 11, 1989. Because the class meets the requirements of Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, the Court grants Brewer's motion and certifies the requested class.

The proposed class meets the numerosity requirements of Rule 23(a)(1). Brewer estimates that there are several hundred households in Vermont currently participating in either the § 502 or § 504 programs or both. Rule 23(a)(1) does not require an exact number of class members, particularly in cases such as this, where the precise information is in the defendant's control. German v. Federal Home Loan Mortgage Corp., 885 F. Supp. 537, 552-53 (S.D.N.Y. 1995) (citing Clarkson v. Coughlin, 783 F. Supp. 789, 798 (S.D.N.Y. 1992). All of these homeowners are potential class members, as RECDS could accelerate any of the accounts for failure to make the required payments. Joining

several hundred participants in an action of this nature is impractical because the class members are unrelated in any way other than being Vermont homeowners under these programs. Further, by definition, the class members are predominantly in the lower economic strata and are unlikely to bring these actions individually. See Town of Newcastle v. Yonkers Contracting Co., 131 F.R.D. 38 (S.D.N.Y. 1990) (certifying a class of 36 members because of the inconvenience of individual litigation and because the nature of the action favored class action). Finally, Brewer's proposed class contains future members that she cannot identify now, but that the class will virtually represent. See Matthies v. Seymour Manufacturing Co., 270 F.2d 365, 370-71 (2d Cir. 1959); Bruce v. Christian, 113 F.R.D. 554, 557 (S.D.N.Y. 1986).

Brewer's proposed class meets Rule 23(a)(2)'s requirement that there are questions of fact or law common to the proposed class. The factual questions regard RECDS's actual policies and practices with respect to post-acceleration moratorium relief. The legal question is whether these policies and practices violate the agency's Constitutional and statutory obligations. Because the questions relate to the agency and the agency is involved in each loan acceleration and payment moratorium, both the questions of fact and law are common to each class member. See In re Gulf Oil/Cities Service Tender Offer Litigation, 112 F.R.D. 383, 386 (S.D.N.Y. 1986).

Brewer's claim, as the representative of the class, is typical of the entire class's claims, as Rule 23(a)(3) requires. Her claim raises both questions of fact and law that are common to the class and has the "essential characteristics common to the class." James Wm. Moore, 3B Moore's Federal Practice, para. 23.06-2 (1995). Each class member's claim arises from the same course of events: RECDS accelerates a class member's loan and then fails to provide notification of possible payment moratorium relief. Similarly, each class member will make a similar legal argument: that the Housing Act of 1949 requires the RECDS to provide notification of the availability of a payment moratorium to qualifying borrowers regardless of acceleration. Werner v. Satterlee, 797 F. Supp. 1196, 1214 (S.D.N.Y. 1992).

Rule 23(a)(4) requires that, as the representative of the class, Brewer will fairly and adequately protect the interests of the class. Brewer, like other members of the class, seeks to ensure that RECDS follow the appropriate procedure when foreclosing on a home. She does not have interests that are antagonistic to the other members of the class she represents. Further, her counsel, Vermont Legal Aid, Inc., is a qualified law office with experience in representing low-income people in class action cases and is capable of fairly and adequately protecting the class interests. See James Wm. Moore, 3B Moore's Federal Practice, para. 23.07[1] (1995).

Brewer's class action is maintainable only if, in addition to satisfying Rule 23(a), she satisfies one of the prerequisites listed in § 23(b). Here, the proposed class action satisfies § 23(b)(2), which states:

> The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Fed. R. Civ. P. 23(b)(2). Brewer's claim that RECDS refused to provide her with notice of the availability of payment moratorium relief after it had accelerated her loan alleges grounds generally applicable to the class. Equitable relief for the class as a whole is appropriate because RECDS can unilaterally stop an individual proceeding by granting a moratorium once a plaintiff retains counsel and litigates the notification issue. Thus, RECDS can moot the issue before it is resolved and retain the ability to deny notification to unrepresented homeowners. The result would be that the legal precedent needed to protect low-income homeowners may never be set. Final injunctive or declaratory relief for the class would resolve the issue.

Thus, Brewer's proposed class meets the requirements of Rule 23 of the Federal Rules of Civil Procedure. Accordingly, the Court grants the motion for class certification.

III. JOINDER OF COUNTERCLAIM DEFENDANTS

Brewer moves to join certain officers of the United States of America as defendants in the class action counterclaim pursuant to Rules 13(h) and 20(a) of the Federal Rules of Civil Procedure. Specifically, she requests joinder of Mr. Dan Glickman, the Secretary of the U.S.D.A., RECDS's parent federal agency; Mr. Russell P. Higgins, Rural Housing Program Director for the RECDS District comprising Vermont and New Hampshire; and Ms. Roberta Harold, the State of Vermont Director of RECDS. Because joining the regional RECDS officials will suffice to address any decision the Court makes in this case and Brewer's motion complies with the rules of permissive joinder, the Court grants Brewer's motion with respect Higgins and Harold and denies it with respect to Glickman.

Rule 13(h) of the Federal Rules of Civil Procedure provides that Rule 20(a) governs the permissive joinder of parties to a counterclaim. See Fed. R. Civ. P. 20 advisory committee's note (noting that counterclaim parties should be treated in the usual fashion as plaintiffs and defendants under Rules 19 and 20). The essence of Rule 20(a) is to promote efficiency in judicial proceedings. See Fed. R. Civ. P. Rule 1. It allows a plaintiff to join multiple defendants in one action if the plaintiff asserts a right that arises out of the same series of transactions or occurrences and if the action poses a common question of law or fact.

The Administrative Procedure Act ("APA"), 5 U.S.C. ch. 7 (1996), defines the proper defendants in an action against a federal agency. It provides that, if there is no special statutory review procedure, a plaintiff may bring an action against the "United States, the agency by its official title, or appropriate officer." 5 U.S.C. § 703 (1996). The legislative history of the 1976 amendment to the APA makes clear that Congress intended § 703 to mean that a plaintiff could bring an action against any combination of these entities or officials. Administrative Agency Actions, H.R. Rep. No. 94-1656, 94th Cong., 2nd Sess. 18 (1976).

In the instant case, both Higgins and Harold play an integral part in setting and implementing RECDS's policies and practices with respect to payment moratorium relief in Vermont; hence a decision for Brewer would affect both of them. Brewer's claim against each arises out of the same series of transactions and occurrences and involves common questions of law and fact. Thus, Brewer's motion satisfies both the spirit and form of Rule 20(a). Further, both Higgins and Harold fall within the permissible defendants described in § 703 of the APA. Accordingly, the Court grants Brewer's motion to join Higgins and Harold as counterclaim defendants and to amend the caption to include them.

IV. DISCOVERY

As the Court has denied RECDS's motion for summary judgment and certified the class for Brewer's counterclaim, RECDS's objections to discovery are moot. Therefore, the parties shall proceed with discovery.

Accordingly, the Court denies Plaintiff's motions for summary judgment and grants Defendant's motion for class certification. The Court grants Defendant's motion to join counterclaim defendants Higgins and Harold, but denies the motion with respect to Glickman. Defendant's motion to compel discovery is moot.

So Ordered.

Senior U.S.D.J.

DATED: Manchester, VT
September 18, 1996