UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA, Plaintiff,	:	
v.	:	File No. 95 CV 275
KRISTINA A. BREWER, Defendant.	:	

MEMORANDUM AND ORDER

This is a foreclosure action brought by the government arising out of a loan with the Farmers Home Administration ("FmHA"), made to Defendant Kristina Brewer ("Brewer") pursuant to Sections 502 and 504 of the Housing Act of 1949, as amended, 42 U.S.C. § 1441 et. seq. (1994). Brewer filed a class action counterclaim against the United States Department of Agriculture ("USDA"), alleging failure to comply with federal statute and regulations and violations of procedural due process rights. Russell P. Higgins and Roberta Harold of the USDA Rural Housing Service were added as counterclaim defendants.

USDA moved for summary judgment on both its claim and Brewer's counterclaim. USDA also objected to class certification. The matter was assigned to United States District Judge Lee J. Gagliardi, who denied both summary judgment requests, and certified the class. United States v. Brewer, No. 95-cv-275 (D. Vt. Sept. 18, 1996) (memorandum decision and

order). On April 30, 1997, USDA filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim (paper 40). As an alternative, it sought to have the Court decertify or re-define the class. Both requests have raised numerous issues already decided by Judge Gagliardi, although couched in different terms. For the reasons stated below, the Court denies the Motion to Dismiss and declines to recertify or re-define the class.

I. Background

Judge Gagliardi summarized the facts in his decision dated September 18, 1996, familiarity with which is assumed. The class was initially defined as follows:

> (1) All homeowners in the State of Vermont currently participating in 502 and 504 single family home ownership program whose loans are in a state of acceleration or USDA may accelerate in the future; and
>
> 2) all participants in these programs, former and current, in the State of Vermont whose loans USDA accelerated at any time since October 11, 1989.

By order dated February 12, 1997, Judge Gagliardi amended the date in subsection (2) to April 26, 1993.

The following additional facts are pertinent to the Court's determination. Brewer filed a moratorium request on February 12,

1996. She had requested the moratorium form from USDA in October 1995, prior to filing her answer and counterclaim in this lawsuit on November 24, 1995. Her moratorium request was denied, as was her appeal. She requested a further review by the USDA District Director of the denial, which remains pending. Brewer filed a second moratorium request on July 5, 1996, on different grounds, which was also denied. She did not appeal this denial. On January 27, 1997, Brewer deeded her property to USDA as part of an "Offer to Convey Security" procedure pursuant to 7 C.F.R. pt. 1956. The offer requires transfer of the property in return for possible reduction or elimination of the outstanding debt. USDA accepted the offer, although a determination as to whether the entire debt will be eliminated has not been made. USDA's decision may depend in part upon its decision on her moratorium request.

II. Class Certification

USDA has made numerous objections to class certification. It objects to the procedures employed by the Court in arriving at its decision, specifically its refusal to extend discovery on the certification issue, to permit briefing from USDA, to make adequate findings of fact warranting certification, and to limit appropriately the size of the class. USDA neglected to raise

these issues before Judge Gagliardi when it requested clarification of the class certification order. This Court has reviewed Judge Gagliardi's findings regarding certification, and, finding them in compliance with Fed. R. Civ. P. 23, declines to revisit the issue. The Court notes that USDA chose not to submit briefing, and that USDA chose not to join Brewer in her vociferous objection to limitations on discovery.

III. Motion to Dismiss for Lack of Subject Matter Jurisdiction

USDA has raised several objections to subject matter jurisdiction, some of which were addressed by Judge Gagliardi, some of which are new. Essentially, USDA argues lack of standing, mootness, failure to exhaust administrative remedies, and sovereign immunity.

A. Standing

To establish standing to bring a lawsuit:

> First, the plaintiff must have suffered an 'injury in fact'--an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be 'likely,' as opposed to merely 'speculative' that the injury will be 'redressed by a favorable decision.'

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

Judge Gagliardi addressed the issue of standing in his September 18, 1996 Order. This Court sees no reason to disturb his findings. Brewer received notice of her right to seek a post-acceleration moratorium on her payments on October 2, 1995, almost two months before she filed her counterclaim and four months before she filed for a moratorium. USDA argues that Brewer cannot prove an injury in fact, because any harm she may have suffered was remedied when she received notice of her right to file for a post-acceleration moratorium. Further, it argues that since her moratorium application was denied, Judge Gagliardi's assessment that her moratorium application would be successful was incorrect, and Brewer has suffered no injury from the alleged procedural violation.

At the outset, it appears that the denial of the moratorium application is not yet final. Regardless, Brewer claims her right to procedural due process was violated. Denial of such a right is an injury sufficient to confer standing. Carey v. Piphus, 435 U.S. 247, 266 (1978); Douglas County v. Babbitt, 48 F.3d 1495, 1500 (9th Cir. 1995), cert. denied, 116 S.Ct. 698 (1996). Subsequent denial of the moratorium request is immaterial.

An additional injury allegedly occurred when USDA filed its

foreclosure action without providing adequate notice of Brewer's right to seek post-acceleration moratorium on payments. Courts have consistently required federal agencies to fulfill all regulatory requirements regarding notice of rights before proceeding with a foreclosure action. See United States v. Gomiller, 545 F. Supp. 17, 21 (N.D. Miss. 1981) (government cannot proceed with foreclosure until regulations relating to moratorium relief are fully complied with); United States v. Trimble, 86 F.R.D. 435, 436 (S.D. Fla. 1980) (failure of government to comply with moratorium notice regulation is defense to mortgage foreclosure action); United States v. Rodriguez, 453 F. Supp. 21, 22 (E.D. Wash. 1978) (moratorium notice provisions must be complied with before mortgage may be foreclosed); United States v. Villanueva, 453 F. Supp. 17, 19 (E.D. Wash. 1978) (same). If USDA failed to comply with notice obligations under 7 C.F.R. 1951.312© and this Court's ruling in United States v. Shields, 733 F. Supp. 776, 785 (D. Vt. 1989), Brewer would have the right to dismissal of the foreclosure action.

Brewer has standing to raise her claim, which was not destroyed when USDA denied her moratorium request.

B. Mootness

USDA seeks dismissal of the class action, arguing that the

class representative's claim is now moot. Because the representative now has no claim, she cannot proceed, and the class action fails for lack of a class representative.

A controversy which is no longer alive as to the class representative, but remains alive for the class of persons she has been certified to represent, will not necessarily be dismissed for mootness. Sosna v. Iowa, 419 U.S. 393, 401 (1975). Discussing Sosna's holding in a later case, the United States Supreme Court stated that given a properly certified class action, mootness turns on whether, given the specific circumstances of the particular case at the time it is before the court, the unnamed members of the class have personal stakes in the outcome of the controversy sufficient to ensure that an adversary relationship exists. Franks v. Bowman Transp. Co., 424 U.S. 747, 755-56 (1976).

In the instant case, the class was first certified in Judge Gagliardi's Order of September 18, 1996. USDA argues that the relevant date for class certification was the February 1997 Order, because the final parameters of the class were defined in that decision. The Court disagrees. The class was effectively defined and certified in November, subject to a minor amendment in February. Brewer's deed to USDA erasing her personal stake in

the lawsuit occurred in January 1997, well after class certification.

The class in this case consists of mortgagors who have been foreclosed upon in the past or may be foreclosed upon in the near future by USDA. Their interests in the lawsuit remain viable despite the mootness of Brewer's claim. Under Sosno and Franks, the lawsuit survives the mooting of Brewer's individual claim, and Brewer may continue as class representative.

Even were the Court to determine that the class was defined and certified in February 1997, and that Brewer's personal interest ended prior to certification, the Court would not dismiss the lawsuit. Generally, courts will relate certification back to the time of filing of the complaint when the issue raised by the lawsuit would evade review. Sosno, 419 U.S. at 412, n. 11. The Second Circuit addressed the relation back doctrine in Robidoux v. Celani, 987 F.2d 931, 938-39 (2d Cir. 1993):

> Where class claims are inherently transitory, the termination of a class representative's claim does not moot the claims of the unnamed members of the class. Even where the class is not certified until after the claims of the individual class representatives have become moot, certification may be deemed to relate back to the filing of the complaint in order to avoid mooting the entire controversy.

(internal citations and quotations omitted). The class

members' claims are inherently transitory, because once a member learns by any means that he or she may apply for a moratorium post-acceleration, the member will most likely do so. The moratorium process will be set in motion to be granted or denied, but in any event any procedural violations will never be addressed. In a situation such as this, the relation back principle should be applied so that the interests of unnamed class members are protected. See also Comer v. Cisneros, 37 F.3d 775, 799 (2d Cir. 1994) (transitory nature of public housing market and delay in class certification warranted relation back).

C. Failure to Exhaust Administrative Remedies

USDA seeks dismissal of the lawsuit based upon Brewer's failure to exhaust administrative remedies. See Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50 (1938) (no one entitled to judicial relief until prescribed administrative remedy has been exhausted). Pursuant to 7 C.F.R. § 3550.4, persons denied moratorium relief may appeal to the National Appeals Division of USDA. A final determination by the National Appeals Division is ordinarily a prerequisite to judicial review of an agency adverse decision. 7 C.F.R. § 11.13; 7 U.S.C. § 6912(e).

There are numerous exceptions to the exhaustion requirement, however. McKart v. United States, 395 U.S. 185, 193 (1969). One exception concerns constitutional challenges to the adequacy of an administrative remedy, when the available administrative remedies are inadequate, Gonzalez v. Shanker, 533 F.2d 832, 834 (2d Cir. 1976), or when the wrong alleged could not or would not have been corrected by resort to the administrative hearing process. J.G. v. Board of Educ., 830 F.2d 444, 447 (2d Cir. 1987). Where parties assert deprivation of their due process rights to proper notice, they "cannot be faulted" for failure to exhaust. Id.

Brewer raised statutory and constitutional challenges to the adequacy of USDA's notice concerning the availability of post-acceleration moratorium. The exhaustion of administrative remedies doctrine does not apply here, where the constitutionality and adequacy of the agency's own practice is at issue.

D. Sovereign Immunity

USDA argues that this lawsuit is essentially a tort action for which Brewer seeks money damages from the United States. In fact, Brewer seeks only declaratory and injunctive relief. Congress has eliminated the defense of sovereign

immunity for actions in federal court seeking relief other than money damages and stating a claim that an agency acted or failed to act in an official capacity. 5 U.S.C. § 702; B.K. Instrument Co. v. United States, 715 F.2d 713, 724 (2d Cir. 1983). Sovereign immunity does not provide a defense to this lawsuit.

IV. Motion to Dismiss for Failure to State a Claim

Alternatively, USDA seeks dismissal of the counterclaim under Fed. R. Civ. P. 12(b)(6). Essentially USDA contends it provided adequate notice to post-acceleration claimants concerning their right to file for moratorium relief and that Brewer did not suffer any property deprivation without due process of law. USDA raised these arguments in its Motion for Summary Judgment. Judge Gagliardi addressed these arguments in his September 18, 1996 Order.

In reviewing a motion to dismiss, the court must accept as true the factual allegations of the complaint and draw all reasonable inferences in favor of the plaintiff. Buckley v. Consolidated Edison Co., 127 F.3d 270, 71 (2d Cir. 1997). Only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief" should a claim be dismissed pursuant to Fed.

R. Civ. P. 12(b)(6). Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

The counterclaim alleges that homeowners in Brewer's circumstances do not receive adequate, accurate and comprehensible information concerning their eligibility to apply for a moratorium. It also alleges that Brewer did not learn of her eligibility to apply for a moratorium until nearly nine months after her loan was accelerated, when she sought advice from Vermont Legal Aid. Judge Gagliardi concluded, in denying summary judgment for USDA on Brewer's counterclaim, that USDA's post-acceleration notice policy and procedure could not be said as a matter of law to comply with the Housing Act and the Constitution. I agree, and as a consequence hold that USDA has not sustained its burden of showing no set of facts which would entitle the counterclaimants to relief.

V. Order

For the reasons cited above, USDA's Motion to Dismiss and Motion to Decertify (Paper 40) are DENIED.

Dated at Burlington, in the District of Vermont, this 27 day of January, 1998.

William K. Sessions III
U.S. District Judge