

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI

DALLAS DUHON

PLAINTIFF

VS.

CIVIL ACTION NO. 1:06-CV-718-LG-RHW

TURSTMARK BANK and
FIDELITY NATIONAL FINANCIAL, INC.
D/B/A LSI FLOOD SERVICES

DEFENDANT

OPINION

Summary of Factual Allegations in the Pleadings

On June 9, 2006, the Plaintiff, Dallas A. Duhon, filed this action to recover losses he sustained as a result of flood damage incurred from hurricane Katrina against Trustmark Bank ("Trustmark") and Fidelity National Financial, Inc., d/b/a FSI Flood Services ("LSI").

In June of 2005, Duhon purchased a home located at 2301 Rue Beau Chenes, Ocean Springs, Mississippi. The purchase of the home was financed through Trustmark by a mortgage executed in favor of Coastal. Coastal subsequently assigned the mortgage to Trustmark. As a part of the loan closing, Trustmark and/or Coastal was required to determine if the property was in the floodplain and subject to mandatory flood insurance coverage under the National Flood Insurance Program ("NFIP"). Trustmark and/or its loan originator, Coastal, contracted with LSI who made an erroneous determination that the structure was not affected by a special flood hazard area as defined by NFIP. This determination is evidenced by a FEMA form 81-83 Oct 02. The form was made an exhibit to the complaint, and was a part of the loan closing documents. The form issued by LSI clearly indicated that the property was not in a flood hazard area. Duhon did not obtain flood insurance, the loan was closed and Duhon acquired title to the property.

On August 29, 2005, hurricane Katrina struck the Mississippi Gulf Coast and caused extensive wind and flooding damage. Duhon now claims, as a result of Trustmark's and LSI's negligence, misrepresentation and breach of contract, he is now saddled with extensive, if not total damage, to the home and contents. In addition, he claims that as a result of FEMA elevation guidelines, he will be faced with the additional burden of elevating the home to comply with these guidelines.

On Motion of LSI, this case was removed to the United States District Court For the Southern District of Mississippi, Southern Division. On Motion of the Plaintiff, the case was remanded back to the Circuit Court of Jackson County, Mississippi by order dated February 25, 2007 and by Order of the District Court denying Trustmark's Motion to Reconsider dated April 12, 2007.

Subsequent Pleadings

After remand, Duhon filed a MRCP Rule 15 Motion to Amend his complaint with an attached copy of the proposed Amended Complaint. For the purposes of this opinion, the Court will treat the Motion to Amend as allowed. The Court notes that Trustmark did not object to the Motion to Amend, so long as Trustmark was dismissed from the case. Trustmark filed its Motion for a Judgment on the pleading pursuant to Mississippi Rules of Civil Procedure Rule 12(c) on September 7, 2007. LSI filed a separate motion to dismiss. The Plaintiff filed a Memorandum in Opposition to Motions to Dismiss on September 4, 2007. On September 4, 2007, LSI filed its Supplemental Brief in Support of its pending Motion to Dismiss. On September 11, 2007, LSI filed its Motion for Leave to File Responsive Brief which apparently includes its proposed supplement, and the Court will accept the Motion as a Supplement Brief.

Trustmark and LSI Motions for Judgment on the Pleadings

Trustmark asserts in its brief filed before the Amended Petition that the Plaintiff has no cause of action based on 42 U. S. C. 4104b(e).

In Count 1-Claim Against Trustmark found in the original Complaint, the Plaintiff alleges *per se* negligence based on the violation of 42 U. S. C. A. 4001, et. seq.

42 U. S. C. 4104b(e) states:

(e) Reliance on previous determination. Any person increasing, extending, renewing, or purchasing a loan secured by improved real estate or a mobile home may rely on a previous determination of whether the building or mobile home is located in an area having special flood hazards (and shall not be liable for any error in such previous determination), if the previous determination was made not more than 7 years before the date of the transaction and the basis for the previous determination has been set forth on a form under this section, unless--

(1) map revisions or updates pursuant to section 1360(f) [42 USCS § 4101(f)] after such previous determination have resulted in the building or mobile home being located in an area having special flood hazards; or

(2) the person contacts the Director to determine when the most recent map revisions or updates affecting such property occurred and such revisions and updates have occurred after such previous determination.

It is clear that this Section explicitly grants immunity from liability based on the theory of *per se* negligence. In *Cruey v. First Am. Flood Data Servs.*, 174 F. Supp. 2d 525 the *Cruey* Court stated that no action based on *per se* negligence for a *federal claim* could be predicated on the statute when it reasoned:

That Congress did not intend to create a private right of action under § 4104b is most apparent from the plain language of the statute. As noted above, the only subsections that could conceivably give rise to an implied right of action are subsections(d) or (e). But both sections address strictly the relationship between the lender and the "person" (hereinafter "third person") providing information respecting special flood hazard determinations, and the subsections make no mention of the party (in the instant case, plaintiffs) borrowing from the lender. Specifically, subsection (d) applies to "any *lender* (or other person required to use the [SFHDF]) who makes, increases, extends, or renews a loan", subsection (e) to "any person increasing, renewing, or purchasing a loan". 42 U.S.C. § 4104b(d)-(e) (emphasis added). Plaintiff - and, in fact, any borrower in the triangular borrower-

lender-third person relationship contemplated by § 4104b - clearly does not fall within the tight confines of the aforementioned language. Quite simply, the statute is concerned with dealings between lenders and third persons who provide information respecting special flood hazard determinations, not with dealings between lenders and borrowers (plaintiffs in the instant action).

In the Amended Complaint, the Plaintiff alleges *state law* claims against Trustmark/Coastal of breach of contract, negligence and induced reliance.

In the Amended Complaint, the Plaintiff alleges state law claims against LSI of negligence and detrimental reliance.

In a similar factual situation, but involving a diversity suit in federal court where the court was called upon to decide the application of *state law* based on a theory that the NFIA imposed a duty to insure, the Court in Callahan V. Country Wide Home Loans, Case No. 3:06CV105/RV/MD (2006), made the following analysis:

Callahan claims that her lack of flood insurance coverage was caused by Country Wide's negligence. Callahan not does allege a federal cause of action for damages under the NFIA, but rather that the NFIA imposed a duty upon Country Wide to insure that she had flood insurance if her property was in a flood hazard area. Callahan alleges that Country Wide's failure to do so was negligence and negligent misrepresentation. Under Florida law, the violation of a federal, state, or local statute may, depending on the circumstances, constitute:

- a) strict liability;
- b) negligence per se; or
- c) simply evidence of negligence

In interpreting Florida law, the *Callahan* court concluded that Callahan was not a member of the protected class for which NFIA was designed to protect.

The Callahan court further concluded that:

However, a state court may choose, for reason of comity, not to allow or create a state law causes of action based on the violation of federal statutes where doing so would be out of keeping with the particular federal statutory scheme. Most states dealing with this issue have held that these federalism concerns preclude any state common law action based on a violation of the NFIA.

In Ford v. First American Flood Data Services, 2006 WL 2921432 (M. D. N. C.), the Court reached a similar result in a diversity case where the plaintiff's claim was predicated upon state law negligence and breach of contract when it is found:

When state courts have addressed the issue, they have almost uniformly decided not to allow private causes of action by borrowers based on violations of the Act,

usually reasoning that legislative intent and principles of federalism and separation of powers caution against it. See, e.g., *Dollar v. Nationsbank of Ga.*, N.A., 534 S.E.2d 851, 853 (Ga. Ct. App. 2000) (refusing to allow a state law claim by borrower against lender holding that because the flood zone determination was made for the benefit of lender, lender had no duty to borrower under the Act and thus borrower did not justifiably rely on lender's representations); *Jack v. City of Wichita*, 933 P.2d 787, 793 (Kan. Ct. App. 1997) (holding that the Act does not create a duty supporting a negligence claim and that the borrower-lender relationship is not the kind of special relationship which imposes a duty); *Lehmann v. Arnold*, 484 N.E.2d 473, 481 (Ill. App. Ct. 1985) (ruling that legislative intent and federalism concerns prohibit state law claims for Act violations); *R.B.J. Apartments, Inc. v. Gate City Sav. & Loan Ass'n*, 315 N.W.2d 284, 290 (N.D. 1982) (refusing to recognize a state law cause of action for a violation of the Act, reasoning that separation of powers and federalism concerns direct against adopting a federal statute as the standard of care in a negligence case when the statute allows no express or implied private right of action); *Pippin v. Burkhalter*, 279 S.E.2d 603, 604 (S.C. 1981) (holding that there can be no implied right of action in favor of the purchaser under the Act because the Act was intended to protect a class of loans and not an outright purchaser).

Apparently, Mississippi courts have not addressed the issue of allowing private state law claims based on violations of the Act. Based on cases found in other states and federal cases, such a claim would not exist in this state.

In addition to the simple negligence claim, plaintiff alleges a detrimental reliance claim and claim for breach of contract.

Apart from the Federalism concerns, the detrimental reliance claim must also fail because it does not show a factual basis for detrimental reliance based on the FEMA Form 81-83 which is the centerpiece of the detrimental reliance claim. In the center of the form is found the following language:

This flood determination is provided solely for the use and benefit of the entity named in Section 1, Box 1 in order to comply with the 1994 Reform Act and may not be used or/relieved upon by any other entity or individual for any purpose, including, but not limited to deciding whether to purchase a property or determining the value of a property.

Factually, it is difficult to understand how a detrimental reliance claim could arise in the face of the language contained in the FEMA Form 81-83.

The plaintiff also alleges a cause of action based on alleged contractual obligations found in the deed of trust. The Court can find no such obligations, and as

pointed out by Trustmark, the document is crafted in such a way that no obligations to place flood insurance can be found either by implication or from the language itself.

It is accordingly the opinion of this Court that the Motion to Dismiss should be sustained as to the Defendants Trustmark and LSI.

Ordered this the 26 day of September, 2007.



Edward C. Prisock
Special Judge