UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

BERNADETTE M. MORLEY-MOWER, *et al.*, Plaintiff,	)	Civil Action No. 5:16-mc-1
v.	)	REPORT & RECOMMENDATION
PROFESSIONAL FORECLOSURE CORPORATION OF VIRGINIA, SUBSTITUTE TRUSTEE, *et al.* Defendants.	)	By: Joel C. Hoppe United States Magistrate Judge

Plaintiff Bernadette M. Morley-Mower ("Morley-Mower" or "Plaintiff"),[1] proceeding *pro se*, commenced this action on January 4, 2016, by filing a Complaint for Temporary Restraining Order, Preliminary Injunction and Declaratory Relief ("Complaint"). ECF No. 1. Defendants Professional Foreclosure Corporation of Virginia ("PFC") and PHH Mortgage Corporation ("PHH") filed a Motion to Dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. ECF No. 6. The motion is before me by referral under 28 U.S.C. § 636(b)(1)(B). ECF No. 4. Having considered the parties' filings and the applicable law, I find that Plaintiff's Complaint fails to plead sufficient facts to support her claims, and I **RECOMMEND** that the presiding District Judge **GRANT** Defendants' Motion to Dismiss, **DENY** Plaintiff's request for a preliminary injunction and temporary restraining order, and **DISMISS** the Complaint.

I. Factual and Procedural History

This case arises out of a mortgage transaction between Plaintiff and PHH relating to a property located at 630 Ott Street, Harrisonburg, Virginia 22801 ("the Property"). Plaintiff

[1] Geoffrey Morley-Mower, a named plaintiff, is deceased. No licensed attorney has entered an appearance on behalf of Mr. Morley-Mower's estate.

commenced this action on January 4, 2016, at 11:30 a.m., the day of the scheduled foreclosure of the Property, seeking to enjoin that foreclosure. Compl. 1. Although she asserts that she will suffer harm from the foreclosure, Plaintiff identifies no violation of the law arising from the then-imminent foreclosure and offers no facts in support of her claim. Plaintiff nonetheless proposes three alternatives to foreclosure: refinancing her mortgage, loan modification, and loss mitigation. Compl. 2.

Defendants moved to dismiss the action. Defendants proffered various facts and appended copies of the promissory note, deed of trust, credit line deed of trust, Internal Revenue Service ("IRS") tax lien, and Morley-Mower's bankruptcy case docket sheet. Mot. to Dismiss 1–3, Exs. A–E, ECF Nos. 6-2 to 6-6. The mortgage documents are integral to the Complaint and may be considered by the Court. *See Goines v. Valley Cmty. Servs. Bd.*, --- F.3d ---, 2016 WL 2621262, at *3 (4th Cir. May 9, 2016) ("[W]e may consider a document submitted by the movant that was not attached to or expressly incorporated in a complaint, so long as the document was integral to the complaint and there is no dispute about the document's authenticity."). Considering the dearth of facts alleged in the Complaint, the Court will note some of the facts proffered in the Defendants' motion to dismiss simply to give Plaintiff's action context and make it more understandable. Cognizant of the standard of review on a motion to dismiss, the Court does not assign any weight to those proffered facts.

The foreclosure is based upon a promissory note that Plaintiff executed in favor of PHH on October 1, 2003, and which is secured by a deed of trust on the Property. Mot. to Dismiss 1–2. The mortgage loan is owned by Federal National Mortgage Association, and PHH is the loan servicer. *Id.* at 2. In addition to the original deed of trust, the Property was encumbered by a credit line deed of trust in the amount of $58,000.00 that was executed by Plaintiff on April 18,

2007, *id.* at 1, and an IRS tax lien in the amount of $66,483.14 that was recorded on December 12, 2011, *id.* at 2. On April 1, 2013, Plaintiff defaulted on the promissory note and on the obligation to pay real property taxes and maintain insurance. *Id.* Plaintiff retained possession of the property in January 2016. *Id.*

Originally, PHH scheduled the Property for foreclosure on October 19, 2015. *Id.* Plaintiff filed for bankruptcy on October 15, 2015, Case No. 15-50991 (W.D. Va. Bankr.). *Id.* at 3. She noted that she was told by "someone" that the only way to keep the Property and stay foreclosure was to file an emergency Chapter 13 petition. Pl.'s Resp. 1, ECF No. 12. Through bankruptcy, she sought to "reorganize [her] finances and pay of[f] significant debts." *Id.* The October 19 foreclosure sale was cancelled pursuant to 11 U.S.C. § 362(a). Mot. to Dismiss 3. The bankruptcy court then dismissed the proceeding, Pl.'s Resp. 1, after which Defendants scheduled a new foreclosure sale for January 4, 2016, Mot. to Dismiss 3. On December 31, 2015, Plaintiff sent two e-mails to Shapiro & Brown, LLP, informing them of her intention to file suit. Compl. 1. The foreclosure sale proceeded as scheduled, and the Property was sold to a third-party purchaser, Randy Baker, on January 4, 2016, for $182,000.00. Mot. to Dismiss 3.

That same day, Plaintiff filed her Complaint. After Defendants moved to dismiss the action, Plaintiff filed a response. ECF No. 12. She challenged Defendants' characterization of the bankruptcy proceedings and requested more time to file a more detailed response. On February 16, 2016, the Court granted Plaintiff's request for an extension, giving her until February 22, 2016, to file a response to the motion to dismiss. ECF No. 14. As of the date of this Report and Recommendation, Plaintiff has made no additional filings.

II. Discussion

A. Defendant's Motion to Dismiss

Defendants contend that Plaintiff has failed to state a claim upon which relief can be granted and move for dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. A complaint must "state[] a plausible claim for relief" that "permit[s] the court to infer more than the mere possibility of misconduct." *Ashcroft v. Iqbal,* 556 U.S. 662, 679 (2009). In making this determination, the Court accepts as true all well-pled facts and construes those facts in the light most favorable to the plaintiff. *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). The Court need not accept legal conclusions, formulaic recitation of the elements of a cause of action, or "bare assertions devoid of further factual enhancements," however, as those are not well-pled facts for Rule 12(b)(6)'s purposes. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (citing *Iqbal*, 556 U.S. at 678).

Plaintiffs must plead enough facts to "nudge[] their claims across the line from conceivable to plausible," and the Court should dismiss a complaint that is not "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. Federal courts have an obligation to construe *pro se* pleadings liberally, so that any potentially valid claim can be fairly decided on its merits rather than the *pro se* litigant's legal acumen. *Rankin v. Appalachian Power Co.*, No. 6:14cv47, 2015 WL 412850, at *1 (W.D. Va. Jan. 30, 2015) (citing *Boag v. MacDougall,* 454 U.S. 364, 365 (1982)). Still, "a *pro se* plaintiff must . . . allege facts that state a cause of action, and district courts are not required 'to conjure up questions never squarely presented to them.'" *Considder v. Medicare*, No. 3:09cv49, 2009 WL 9052195, at *1 (W.D. Va.

Aug. 3, 2009) (quoting *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985)), *aff'd*, 373 F. App'x 341 (4th Cir. 2010). For the reasons stated below, I find that Plaintiff has failed to state a plausible claim for relief and recommend that Defendants' motion be granted.

The Complaint is barebones, alleging only that Plaintiff owns a home, Defendants hold the mortgage, and a foreclosure sale is scheduled for January 4, 2016. Even under a liberal reading, the Complaint fails to point to any law that would limit Defendants' right to foreclose, fails to allege any facts showing that she is entitled to a loan modification or a refinance of her mortgage, and fails to allege any claim of wrongdoing by Defendants.

Although Plaintiff has not stated that she is in default, it is reasonable to infer from her filings that she has defaulted on the promissory note. *See* Pl.'s Resp. 1 (noting advice that "bankruptcy . . . was the only way to 'stay' the foreclosure" and acknowledging "arrearage on mortgage"), 2 (explaining her dire financial situation). The promissory note states that default occurs if Plaintiff fails to pay the full amount due each month. Mot. to Dismiss, Ex. A, at 2. The deed of trust states that in the event of a default, the lender may require immediate payment in full and "may invoke the power of sale and any other remedies permitted by Applicable Law." *Id.* Ex. B, at 13; *see also id.* Ex. C, at 4 (credit line deed of trust remedies on default). When a borrower defaults on a payment, Virginia law allows a trustee under a deed of trust to "declare all the debts and obligations secured by the deed of trust at once due and payable and [to] take possession of the property and proceed to sell the same at auction." Va. Code § 55-59(7). Plaintiff alleges nothing in the promissory note, the deed of trust, or the credit line deed of trust to counter Defendants' right to foreclose.

Furthermore, Plaintiff has not cited any provision under Virginia law, the promissory note, the deed of trust, or the credit line deed of trust that entitles her to loan modification.

Virginia law does not require the trustee to modify the agreement prior to exercising its foreclosure right. *See* Va. Code § 55-59 *et seq.* Defendants have no legal duty to modify the agreement to allow for refinance or loan modification. *See Erdman v. Preferred Research, Inc.*, 852 F.2d 788, 790 (4th Cir. 1988) (explaining that the plaintiff had no duty to modify his contract). Having reviewed the promissory note, deed of trust, and credit line deed of trust, the Court cannot find any provision requiring loan modification. *See* Mot. to Dismiss, Exs. A, B, C. Plaintiff thus has not alleged facts showing that Defendants breached any obligation to her, including any implied duty of good faith and fair dealing. *See Chance v. Wells Fargo Bank, N.A.*, No. 3:12cv320, 2012 WL 4461495, at *4 (E.D. Va. Sept. 25, 2012); *Spoor v. PHH Mortg. Corp.*, No. 5:15cv42, 2011 WL 993666, at *5 (N.D.W. Va. Mar. 11, 2011) ("[B]ecause no right to modification was granted in the contract, there is no implied covenant with respect to modification."); *see also Erdman*, 852 F.2d at 790 (finding no breach of good faith when the plaintiff refused to modify contractual rights and obligations). Accordingly, the Defendants' motion to dismiss should be granted.

B. Plaintiff's Request for Injunctive Relief

Plaintiff initiated this action on the date of the foreclosure sale seeking a temporary restraining order and a preliminary injunction. Compl. 1. She argues in conclusory fashion that: (1) she will face imminent irreparable injury if the foreclosure proceeds; (2) she has an inadequate remedy at law because she would be unable to redeem the Property, which is her "primary residence and life savings;" (3) the balance of equities favors granting an injunction; and (4) she is likely to succeed on the merits. Compl. 1. As the foreclosure sale occurred on January 4, 2016, the relief she requested–to forestall foreclosure–is not available.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008)). A court may grant an injunction only if a plaintiff can "establish that [s]he is likely to succeed on the merits, that [s]he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [her] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20; *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 249 (4th Cir. 2014) (applying *Winter*); *see also Bridgeforth v. Potter*, No. 3:10cv30, 2010 WL 2671313, at *1 (W.D. Va. July 2, 2010) (finding that the standards for a temporary restraining order and preliminary injunction are the same). When determining whether to impose a preliminary injunction, a court "must separately consider each *Winter* factor," *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013), and the "[p]laintiff bears the burden of establishing that each of these factors supports granting the injunction," *Direx Israel, Ltd.v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991) (quotations omitted).

Under the first factor, Plaintiff is not likely to succeed on the merits, as she has failed to allege any facts sufficient to survive a motion to dismiss. Moreover, the foreclosure she seeks to enjoin has already occurred, and she has provided no information showing that the equities tip in her favor or that the public interest will be served by a preliminary injunction. While the Court is sympathetic to her difficult financial situation and the prospect of losing her home, Plaintiff simply has not shown that she is entitled to a preliminary injunction.

III. Conclusion

For the foregoing reasons, I find that the Complaint, ECF No. 1, fails to state a claim for which the Court can grant relief, and I therefore **RECOMMEND** that the presiding District

Judge **GRANT** Defendants' Motion to Dismiss, ECF No. 6, deny Plaintiff's request for a temporary restraining order and preliminary injunction, and dismiss the Complaint.

Notice to Parties

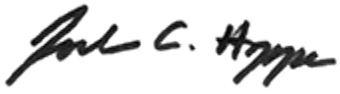
Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C):

> Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to file timely written objections to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14 day period, the Clerk is directed to transmit the record in this matter to the Honorable Elizabeth K. Dillon, United States District Judge.

The Clerk shall send copies of this Report and Recommendation to all counsel of record and unrepresented parties.

ENTER: June 21, 2016



Joel C. Hoppe
United States Magistrate Judge