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United States District Court, N.D. Illinois, Eastern Division.
Janet **AITKEN,** Plaintiff,
v.
FLEET MORTGAGE CORP., Defendant.
No. 90 C 3708.

Feb. 12, 1992.

MEMORANDUM OPINION AND ORDER
ZAGEL, District Judge.

***1** Plaintiff Janet Aitken alleges that defendant Fleet Mortgage Corporation maintained surpluses in its customers' escrow accounts in violation of the Racketeer Influenced and Corrupt Organizations statute ("RICO"), 18 U.S.C. § 1961(a) and (c) (Count I); the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill.Rev.Stat. ch. 121 1/2 , § 261 *et seq.* (Count II); and its customers' mortgage contracts (Count III). Fleet has moved the Court to dismiss all three counts for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6). Fleet has also moved to dismiss Count I under Fed.R.Civ.P. 9(b) for failure to plead fraud with sufficient particularity.

BACKGROUND

Mortgage lenders establish mortgage escrow accounts to collect and hold money they receive from residential mortgageholders to pay taxes and insurance on mortgaged properties when those payments fall due. The escrow arrangement starts with an estimate of the annual tax or other item to be paid from the account. Due to the fairly complex nature of these estimates, especially when numerous items are involved, the lender generally assumes responsibility for their calculation. The estimate is then divided by the number of months remaining before the payment is due. As the borrower makes monthly escrow payments, those payments are accumulated in the account until payment of the item or items are due. Most escrow accounts do not provide for interest payments to the borrower.

Both parties' interests are vulnerable under mortgage escrow arrangements. The mortgage lender or servicer may be compelled to expend its own funds to protect the collateral if the borrower does not make the necessary payments at the appropriate time. At the same time, however, the borrower has little control over the amount of the escrow assessment. As a result, an unscrupulous lender has the opportunity to extract an involuntary interest free loan by requiring the borrower to pay more than is necessary to cover the borrower's tax and insurance obligations. A lender with numerous customers could realize substantial profits from the use of the funds gained through small individual overcharges.

In an attempt to protect the interests of both parties to these mortgage escrow transactions, Congress enacted the federal Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.* ("RESPA"). RESPA allows the lender to collect monthly escrow payments in excess of the amounts actually necessary to pay tax and insurance premiums as they come due. The amount of the excess, however, is limited to the amount that is required to accumulate the estimated payment two months before its actual due date. This excess payment or "cushion" allowed by RESPA provides the lender with a degree of protection against potential delinquent payments. Also, by limiting the lenders cushion to an extra two months' worth of the annual amount necessary to pay taxes and insurance premiums, RESPA mitigates the risk of an assessment that is tantamount to an involuntary interest free loan.

DEFENDANT'S MOTION TO DISMISS

***2** In ruling on a motion to dismiss pursuant to Rule 12(b)(6), this Court must accept as true the well pleaded factual allegations of the plaintiff's complaint and view those allegations in a light most favorable to the plaintiff. *Gillman v. Burlington Northern R. Co.*, 878 F.2d 1020, 1022 (7th Cir.1989). The plaintiff's claim should not be dis-

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missed under Rule 12(b)(6) unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Gordon v. Matthew Bender & Co.,* 562 F.Supp. 1286, 1288 (N.D.Ill.1983), (*citing Conley v. Gibson,* 78 S.Ct. 99, 102 (1957)). The Court will address defendant's arguments in the order in which they were presented in defendant's brief.

1. *Breach Of Contract (Count III)*

Fleet contends that plaintiff's claim rests on an allegation that Fleet computed escrow payments by using an accounting method, termed "individual item analysis," that is both illegal and prohibited under the terms of the mortgage contract. [FN1] Fleet supports the legitimacy of its accounting method by citing this Court's memorandum opinion of July 29, 1991, which held that the use of "individual item analysis" is not per se illegal. Fleet also notes that there are no express terms in the mortgage contract that prohibit the use of "individual item analysis." Finally, Fleet argues that Aitken's claim is an attempt to impose a test for determining the appropriate amount of escrow payments that is not called for in the mortgage contract. Consequently, Fleet concludes, the complaint fails to state a claim because it alleges a breach of duty not imposed by the contract. *See Cushman & Wakefield of Illinois, Inc. v. Northbrook 500 Ltd. Partnership,* 112 Ill.App.3d 951, 445 N.E.2d 1313 (1st Dist.1983).

Fleet's argument rests on a mischaracterization of the complaint. The basis of plaintiff's claim is that Fleet used a method of computing escrow payments that resulted in a balance in excess of that allowed by the contract. It is irrelevant whether the excessive balance was achieved by "individual item analysis" or picking a number out of a hat. If Fleet has charged escrow payments that caused the balance in the escrow account to exceed the maximum amount set by the contract, then it has breached the terms of that contract.

Plaintiff alleges that the terms of the contract allowed for the balance in the escrow account to accumulate at a rate that would result in the full amount needed to pay an item one month before the item's due date. In the event that the borrower's payments resulted in an excess balance, the excess was to be applied to future payments refunded to the mortgagor. The terms of the contract support this allegation. The relevant terms of the contract state as follows:

[T]ogether with, and in addition to, the monthly payments of principal and interest ... the Mortgagor will pay to the Mortgagee ... the following sums:

(a) An amount sufficient ... to pay the next mortgage insurance premium ... as follows:

(I) If and so long as said note of even date and this instrument are insured or are reinsured under the provisions of the National Housing Act, an amount sufficient to *accumulate* in the hands of the holder *one (1) month prior to this due date the annual mortgage insurance premium,* in order to provide such holder with funds to pay such premium to the Secretary of Housing and Urban Development pursuant to the National Housing Act, as amended, and applicable Regulations thereunder....

***3** (b) A sum equal to the premiums that will next become due and payable on policies of fire and other hazard insurance covering the mortgaged property, plus taxes and assessments next due on the mortgage property (*all as estimated by the mortgagee) less all sums already paid therefor divided by the number of months to elapse before one month prior to the date when such ... premiums, taxes and assessments will become delinquent,* such sums to be held by Mortgagee in trust to pay said ... premiums, taxes and special assessments; and

(c) All payments mentioned in the two preceding subsections of this paragraph and all payments to be made under the note secured hereby shall be added together and the aggregate amount thereof shall be paid by the Mortgagor each month in a single payment to be applied by the Mortgagee to the following items in the order set forth.

(I) premium charges under the contract of insurance

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with the Secretary of Housing and Urban Development....

(II) ... taxes, special assessments, fire, and other hazard insurance premiums;

(III) interest on the note secured hereby; and

(IV) amortization of the principal of said note....

If the total of the payments made by the Mortgagor under subsection (b) of the preceding paragraph shall exceed the amount of the payments actually made by the Mortgagee for ... taxes, and assessments, or insurance premiums, ... such excess, at the option of Mortgagee, shall be credited on subsequent payments to be made by the Mortgagor or refunded to the Mortgagor.

Although the use of "individual item analysis" makes it more difficult to determine when the escrow balance has exceeded the amount allowed by contract, it is clear that plaintiff has alleged facts that show a balance in excess of a one month cushion. For example, plaintiff's calculations show that in 1987 total expenditures for property taxes and property and mortgage insurance amounted to $1,007.60 for the entire year. Yet by July of that year the balance in the escrow account had already risen to $1,020.73. Two months later, after all escrow payments had been paid for that year, the balance in the account still remained at $493.00 with six months left until the next payment of $359.93 needed to be made. In addition, Fleet continued to collect monthly escrow payments in excess of $90. These facts are sufficient to support a breach of contract claim.

2. *Fraud And Deceptive Business Practices*

Plaintiff alleges that Fleet knowingly charged excessive escrow payments in order to use the funds for its own purposes. According to plaintiff, this practice violates the Illinois Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act"), which states:

[U]nfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with the intent that others rely upon the concealment, suppression or omission of such material fact ... in the conduct of any trade or commerce are hereby declared unlawful....

***4** *Ill.Rev.Stats. ch. 121 1/2 , par. 262*.

In response, Fleet contends that plaintiff's allegations do not establish an "unfair" or "deceptive" act under the Consumer Fraud Act; that at most plaintiff's allegations amount to a breach of contract claim. As defendant acknowledged in its reply brief, this Court rejected materially identical arguments in the related case of *Robinson v. Empire of America Realty Credit Corporation.*, (1991 WL 26593 at *2) (1991 U.S.Dist. LEXIS 2084 at 5-6) (N.D.Ill.1991). We also reject those arguments here.

The plaintiff has alleged misrepresentations in the form of inaccurate statements of the escrow deposits required. For the purpose of this motion, we accept plaintiff's contention that due to the complexity of the calculations she could not determine the correct amount of the escrow payment, and that she reasonably relied on the statements in making her monthly escrow payments. A misrepresentation of the amount due in a manner designed to conceal the true amount required states a claim under the Consumer Fraud Act. *See* *People ex rel. Hartigan v. Stianos*, 131 Ill.App.3d 575, 475 N.E.2d 1024 (1985) (holding that practice of charging excessive sales tax was deceptive and unfair). As Judge Hart concluded in denying a motion to dismiss a claim based on excessive escrow charges, "[t]he continuous surplus in the escrow account is enough at this time to support an *allegation* of fraud, though whether fraud in fact exists cannot be determined at this time." *Leff v. Olympic Federal Savings & Loan Assn.,* slip op. 86 C 3026 at 13 (N.D.Ill. Sept. 18, 1986).

3. *The RICO Claim (Count I)*

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(a) *Section 1962(a)*

Plaintiff alleges that the defendant violated 18 U.S.C. § 1962(a) of the Racketeer Influenced and Corrupt Organizations statute ("RICO") by overstating escrow payment requirements and using the mail to communicate the misrepresented charges to its customers. Section 1962(a) states:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity ... in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or proceeds of such income, ... in the ... operation of, any enterprise which is, engaged in, or the activities of which affect, interstate or foreign commerce.

Plaintiff argues that the requirements of § 1962(a) have been met because Fleet: (a) engaged in a pattern of mail fraud; (b) received money as a result; and (c) used that money in its operations. Fleet correctly notes, however, that plaintiff has not alleged an investment injury. This Court has previously held that to meet the requirements of § 1962(a) the plaintiff must allege an injury that was caused by the investment of funds derived from the racketeering activity. *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.,* 1989 WL 152670, 1989 U.S. District. LEXIS 14147 (N.D.Ill.1990); *Robinson,* 1991 WL 26593, 1991 U.S. Dist. LEXIS 2084. Based on the plain language of this section and recent decisions of other courts interpreting § 1962(a), *see, e.g., Craig v. First American Capital Resources, Inc.,* 740 F.Supp. 530, 537-38 (N.D.Ill.1990); *Quaknine v. MacFarlane,* 897 F.2d 75, 82-83 (2nd Cir.1990), we are not persuaded to change our previous holdings. Since plaintiff failed to allege an injury sustained as a result of the investment of funds obtained from the racketeering activity, plaintiff's § 1962(a) claim must be dismissed.

(b) *Section 1962(c)*

***5** Plaintiff has also asserted an independent RICO claim under § 1962(c). Section 1962(c) reads as follows:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity....

Plaintiff alleges that the predicate acts of racketeering required under RICO are satisfied by defendant's violation of the federal mail fraud statue, 18 U.S.C. 1341. [FN2]

Fleet asserts that the complaint does not adequately allege the elements of mail fraud claim. Specifically, Fleet states that plaintiff cannot allege a fraudulent misrepresentation. This argument is without merit. The intentional submission of inaccurate requests for payment pursuant to a contractual relationship with the intent of obtaining funds not due under the contract may amount to a scheme to defraud. *See Haroco Inc. v. American Nat'l Bank & Trust Co.,* 747 F.2d 384 (7th Cir.1984), *aff'd* 105 S.Ct. 3291 (1985) (upholding RICO/mail fraud complaint premised on systematic overcharge of interest by bank); *Leff v. Olympic Federal,* slip op. 86 C 3026 (N.D.Ill. Sept. 18, 1986) (overescrowing as basis of RICO/mail fraud claim). Although we cannot decide at this point whether fraud was actually present, plaintiff has alleged facts that support a claim of a scheme to defraud.

Under Rule 9(b) plaintiff must allege facts with particularity to support both "the factual basis for believing that the defendants acted with an intent to defraud" and the existence of a scheme to defraud. *Serig v. South Cook County Serv. Corp.,* 581 F.Supp. 575, 580 (N.D.Ill.1984). Plaintiff has adequately specified the alleged misrepresentation, the transaction that facilitated the alleged fraud and the parties involved. If satisfactory evidence of the facts alleged is produced, the finder of fact could infer the requisite intent. Rule 9(b) must be read in conjunction with Rule 8(a)(2), which requires only a "short plain statement of the claim showing that

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the pleader is entitled to relief." *Latimer v. Hall Financial Group, Inc.,* 1990 WL 133225 at *4-5, 1990 U.S.Dist. LEXIS 12028 at 11-12 (N.D.Ill.1990). Applying this standard, we find that the allegations have been pled with sufficient particularity.

Finally, Fleet argues that plaintiff has not alleged the type of relationship between Fleet and the Fleet/Norstar Financial Group that is adequate to support a claim under § 1962(c). Fleet correctly states that there must be a nexus between the racketeering activity and the affairs of the enterprise. *See Overnite Transp. Co. v. Truck Drivers Local No. 705,* 904 F.2d 391 (7th Cir.1990). To demonstrate the appropriate nexus, the plaintiff must satisfy a three-part test: "(1) The defendant must have committed the racketeering acts; (2) the defendant's position in or relationship with the enterprise facilitated the commission of the acts; and, (3) the acts had some effect on the enterprise." *Overnite Transp. Co.,* 904 F.2d at 393. Fleet asserts that plaintiff has failed to allege facts that satisfy the second prong of *Overnite's* tripartite test. We disagree.

***6** The plaintiff has alleged that Fleet is part of the Fleet/Norstar Financial Group; that the group consists of a number of commonly-owned corporations engaged in the common business of commercial and consumer finance; that Fleet is engaged in the business of servicing residential mortgage transactions; and that the subsidiary, Fleet, conducted those businesses through the pattern of fraud alleged. Complaint para. 6, 29. "We think it virtually self-evident that a subsidiary acts on behalf of and thus conducts the affairs of its parent corporation." *Haroco,* 747 F.2d at 402- 03. It is equally self-evident that the pooling of resources in order facilitate the business of the enterprise as a whole is the underlying purpose of group corporate activity. Through participation in the enterprise, Fleet, in all likelihood, had access to a larger capital and customer base and thereby gained the opportunity to service additional mortgages. Such access would facilitate its ability to carry out a scheme to defraud its customers through excessive escrow charges.

Congress intended that the provisions of RICO be interpreted broadly. *Haroco,* 747 F.2d at 392. "Congress ... deliberately chose to use the broad terms to ensure that the criminal and civil provisions would be effective." *Id.* Like the court in *Haroco,* 747 F.2d at 403, this Court "doubt[s] that more detailed allegations on the subject would serve any useful purpose, and we see no reason to require them."

Moreover, defendant's reliance on *Overnite Transp. Co.* to support its "lack of nexus" argument is misplaced. The RICO claim in *Overnite Transp. Co.* was brought by an employer against a local union for acts of violence and intimidation involving destruction of the employer's trucks. *Overnite Transp. Co.,* 904 F.2d at 393. The court stated that a gang of hoodlums could have easily caused the destruction to the trucks; there was no showing that the union's relationship with the employer facilitated its ability to damage the trucks. *Id.* at 394. In contrast, here, plaintiff alleges that Fleet and the other members of the Fleet/Norstar Financial Group were engaged in the common business of providing residential and corporate finance. It was only through the business of servicing residential mortgages that Fleet could possibly have committed the alleged scheme to defraud. Therefore, this case is distinguishable from *Overnite Transp. Co.*

For the foregoing reasons, defendant's motion to dismiss the RICO claim based on § 1962(a) is granted. Defendant's motion is denied with respect to all other claims.

FN1. There are two primary methods of computing the amount of an escrow payment. "Under the first [method], often referred to as the aggregate method, 'estimated requirements for anticipated disbursements for the next twelve months are added, the balance in the [escrow] account at the time of the analysis is subtracted ... and the result is divided by twelve to arrive at monthly escrow requirements for the com-

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ing year....' In other words, all escrow obligations ... are lumped together to determine the required monthly escrow payment from the mortgagor, even if the individual escrow items are of great disparity in amount and become due on different dates. Under the second method, commonly known as individual item analysis, the lender creates sub-accounts within the escrow account corresponding to each expenditure that must be paid out. The lender then calculates the escrow amount needed to ensure that each escrow sub-account never falls below zero." (Defendant's supporting memorandum at 4).

FN2. A pattern of racketeering may be established by showing the commission of two acts of racketeering within ten years. *Haroco v. American Nat. Bank & Trust Co. of Chicago,* 747 F.2d 384, 386 (7th Cir.1984), *aff'd* 105 S.Ct. 3291 (1985). Mail fraud is defined under § 1961 as a racketeering activity. *Haroco,* 747 F.2d at 386. "A person commits mail fraud by using the mails for the purpose of executing a scheme or artifice to defraud." *Id. (citing United States v. Wormick,* 709 F.2d 454, 461-62 (7th Cir.1983)).

Not Reported in F.Supp., 1992 WL 33926 (N.D.Ill.)

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