

Case No. CC-02-2020-C-224

Upon due consideration of the briefing, the arguments of counsel, and the entire record in this action, the Court has determined that Defendant Navy Federal's Motion to Dismiss should be **GRANTED** pursuant to West Virginia Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which any relief can be granted, and the Complaint dismissed with prejudice as against Defendant Navy Federal only, based upon the following findings (to the extent that the Court makes any factual determinations in the instant Order, the Court intends that these findings are made only for purposes of deciding this motion):

Standard of Decision.

1. In West Virginia, “[t]he purpose of a 12(b)(6) motion is to test the sufficiency of the complaint.” *Sheglia v. Gassaway Pub. Library*, 2020 W. Va. LEXIS 326, at *8 (W. Va. May 26, 2020).

2. “Dismissal for failure to state a claim is proper where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Murphy v. Smallridge*, 196 W. Va. 35, 36, 468 S.E.2d 167, 168 (1996) (internal quotation marks omitted).

3. To survive a motion to dismiss under Rule 12(b)(6), “the complaint must articulate sufficient information to outline the elements of a claim or permit inferences to be drawn that these elements exist.” *Goodwin v. City of Shepherdstown*, 241 W. Va. 416, 421, 825 S.E.2d 363, 368 (2019) (internal quotation marks omitted).

4. The court should “ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations.” *Forshey v. Jackson*, 222 W. Va. 743, 756, 671 S.E.2d 748, 761 (2008) (quoting Franklin D. Cleckley, et al., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b)(6)[2] at 347).

5. A party moving to dismiss under Rule 12(b)(6) “may introduce certain pertinent documents if the plaintiff fails to do so.” *Mountaineer Fire & Rescue Equip., LLC v. City Nat’l Bank of W. Va.*, 854 S.E.2d 870, 889 (W. Va. 2020) (quoting *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th Cir. 1997)).

6. Exhibits attached to a Motion to Dismiss can include documents attached to the complaint, *Forshey*, 222 W. Va. at 749, 671 S.E.2d at 753, along with “other materials fairly incorporated” in the complaint, including “documents referred to in the complaint but not annexed to it.” *Chesapeake Appalachia, L.L.C. v. Hickman*, 236 W. Va. 421, 433 n.14, 781

S.E.2d 198, 210 n.14 (2015).

7. “Even where a document is not incorporated by reference, the court may consider it where the complaint ‘relies heavily upon its terms and effect,’ which renders the document ‘integral’ to the complaint.” *Forshey*, 222 W. Va. at 748, 671 S.E.2d at 753 (internal citation omitted).

8. The Supreme Court of Appeals of West Virginia has made clear that notice is the governing principal when determining whether to consider documents attached to a motion to dismiss that are not included in the complaint:

[G]enerally, the harm to the plaintiff when a court considers material extraneous to a complaint is the lack of notice that the material may be considered. Accordingly, where plaintiff has actual notice of all the information in the movant’s papers and has relied upon these documents in framing the complaint the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated.

Id. (quoting *Bryant v. Mut. Bank*, 524 F. Supp. 2d 753, 757 n.4 (W.D. Va. 2007)); *see also Mountaineer Fire & Rescue*, 854 S.E.2d at 890 (“A finding that the plaintiff has had notice of documents used by defendant in a 12(b)(6) motion is significant since . . . the problem that arises when a court reviews statements extraneous to a complaint generally is the lack of notice to the plaintiff”); *Beddall v. State St. Bank & Tr. Co.*, 137 F.3d 12, 17 (1st Cir. 1998) (“When, as now, a complaint’s factual allegations are expressly linked to—and admittedly dependent upon—a document (the authenticity of which is not challenged), that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6).”)

9. The Court has exercised its discretion where necessary to exclude matters that it deems outside the pleadings, not incorporated by reference to the Complaint, or otherwise not integral to the Complaint.

Plaintiff’s Request to Supplement/Amend Plaintiff’s Response to Navy Federal’s Motion

10. On August 11, 2021, Plaintiff filed a motion for leave to supplement/amend her

response to the instant Motion to Dismiss on the basis that Plaintiff had obtained an affidavit from an inspector of the subject property contradicting in part, or at least diminishing, the factual claims made by Navy Federal as a result of that inspector's contemporaneous notes, introduced by Navy Federal in exhibits to its Motion, regarding signs of water damage to the home's basement.

The Court has determined that Navy Federal's Motion to Dismiss should be decided on federal statutory grounds that do not require detailed factual determinations at this stage of the case. Therefore, the Court will DENY Plaintiff's Motion to Supplement/Amend. This ruling pertains only to Plaintiff's attempt to utilize the inspector's affidavit as to Navy Federal's Motion to Dismiss.

The Flood Insurance Protection Act Bars Ms. Lawler's Claims Against Navy Federal

11. Congress passed the Flood Insurance Protection Act (the "Act"), 42 U.S.C. § 4012a; 12 C.F.R. § 760.1, *et seq.*, to "protect the lender and the federal government from the financial risk that is posed by uninsured homes located in flood zones." *Audler v. CBC Innovis Inc.*, 519 F.3d 239, 252 (5th Cir. 2008).

12. The Act permits lenders, such as Navy Federal, to rely on information provided by a third-party as to whether a given property is within a special flood hazard area, provided the third-party guarantees the accuracy of that information. 42 U.S.C. § 4104b(d).

13. The Act also provides a liability shield from lawsuits brought by homeowners for lenders who rely on flood zone determinations provided by third-parties. *See* 42 U.S.C. § 4104b(e). *See also Clark v. Amsouth Mortg. Co.*, 474 F. Supp. 2d 1249, 1253 (M.D. Ala. 2007) ("Here, the plain language of § 4104b(d) in the NFIA authorizes lending institutions to use third-party determination companies, as AmSouth and Dovenmuehle did, and § 4104d(e) in the statute releases them from liability. . . . The Clarks' claims, both federal and state, against AmSouth and Dovenmuehle are therefore barred."); *Duhon v. Trustmark Bank*, 2007 U.S. Dist. LEXIS 18078,

at *4-5 (S.D. Miss. Feb. 25, 2007) (Section 4104b(e) constitutes “a grant of immunity to Regulated Lenders that rely on third parties to make SFHA determinations.”); *Ford v. First Am. Flood Data Servs.*, 2006 U.S. Dist. LEXIS 74350, at *19 (M.D.N.C. Oct. 11, 2006) (“In addition, [§ 4104b(e)] allows lenders to rely on third-party determinations, thereby shielding lenders from liability for error.”); *Lukosus v. First Tenn. Bank Nat’l Ass’n*, 2003 U.S. Dist. LEXIS 11941, at **2-6 (W.D. Va. July 9, 2003) (dismissing claims of negligence, constructive fraud, actual fraud, and breach of contract against mortgage lender that relied on determination from third-party that property was not in a Special Flood Hazard Area); *Cruey v. First Am. Flood Data Servs., Inc.*, 174 F. Supp. 2d 525, 529 (E.D. Ky. 2001) (Section 4014b(e) “authorizes lenders to rely on information respecting special flood hazard determinations provided by third persons, and shields lenders from liability for any error in such third person determinations. In substance, this amounts to an *express denial* of a cause of action by the borrower as against the lender, at least with respect to actions predicated on special flood hazard determinations made by third persons within the previous seven (7) years.”) (internal citation omitted); *Wells Fargo Bank, N.A. v. Fonder*, 868 N.W.2d 409, 414 (S.D. 2015) (“the [Act] does prohibit liability for lenders as against borrowers”).

14. Ms. Lawler applied for a mortgage loan from Navy Federal to finance her purchase of the Property. (Compl. ¶ 51.)

15. At Ms. Lawler’s request, Navy Federal contacted its vendor, CoreLogic, to determine whether the Property was located in a flood hazard zone. (Curran Decl. ¶ 5, Ex. 3 at 12, 15.)

16. CoreLogic guaranteed the accuracy of its flood hazard determination. (*Id.*)

17. Under the Act, Navy Federal was entitled to rely on CoreLogic’s determination. 42 U.S.C. § 4104b(d).

18. Applying the Act, Navy Federal is shielded from liability for Ms. Lawler’s

claims. 42 U.S.C. § 4104b(e).

19. In conclusion, the Act bars Ms. Lawler from asserting any of her claims against Navy Federal and her Complaint is dismissed in its entirety, with prejudice, for failure to state a claim for which relief can be granted.

Remaining Grounds for Dismissal Raised in Navy Federal's Motion to Dismiss are Moot

20. Navy Federal's Motion to Dismiss raises numerous other grounds alleged to provide separate and distinct reasons for the Court to dismiss Plaintiff's Complaint against it. Because the Court has determined that the Plaintiff's claims against Navy Federal are barred by federal statute, as discussed above, the Court declines to address the remaining claims by Navy Federal, deeming them MOOT.

Ruling

ACCORDINGLY, based on the foregoing findings, conclusions and analysis, Defendant Navy Federal Credit Union's *Motion to Dismiss* is hereby **GRANTED** for the reasons stated herein. Ms. Lawler's Complaint as to Navy Federal Credit Union is hereby **DISMISSED, WITH PREJUDICE**.

The Clerk of the Court shall furnish attested copies of this Order to all counsel of record.

/s/ R. Steven Redding
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtswv.gov/e-file/ for more details.