

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ABN AMRO MORTGAGE GROUP, INC.,)
Plaintiff,)

vs.)

1:04-cv-0956-SEB-JPG

PROMISED LAND MORTGAGE LLC;)
GREENHOUSE RESOURCES LLC;)
ROMERO BRICE;)
GUARANTEED LAND TITLE LLC;)
TITLE ONE AND REAL ESTATE)
EXCHANGE SERVICES COMPANY;)
TITLE SOLUTIONS AGENCY OF)
INDIANA, INC.;)
CORBIN TITLE SERVICES, INC.;)
KING’S TITLE AND ABSTRACT)
COMPANY;)
FIRST AMERICAN TITLE)
INSURANCE COMPANY;)
FIDELITY NATIONAL TITLE)
INSURANCE COMPANY;)
KATHERINE A. ROBINSON AND)
JAMES L. SPICER d/b/a K.A.R.)
APPRAISAL SERVICES,)
Defendants.)

**ENTRY DENYING DEFENDANTS’ MOTION TO DISMISS
AND ORDERING PLAINTIFF TO FILE SUPPLEMENTAL
DOCUMENTATION IN SUPPORT CLAIMS**

This matter comes before the Court on the Motions to Dismiss filed by three defendants, Guaranteed Land Title LLC (“GLT”), Title One and Real Estate Exchange Services Company (“Title One”), and First American Title Insurance Company (“First American”) (collectively the “Moving Defendants”) directed towards Counts II-VII and

XII of Plaintiff ABN AMRO Mortgage Group, Inc.'s ("ABN AMRO") Complaint filed on June 3, 2004. ABN AMRO brought this action under 18 U.S.C. § 1964 based on claims of an alleged mortgage fraud scheme involving 109 mortgage loans originated by Defendant Promised Land Mortgage LLC ("Promised Land"), which scheme, ABN AMRO alleges, was devised, operated and managed as an enterprise for the purpose of racketeering activity.¹ ABN AMRO has also brought various state tort and contract claims against Defendants. The Moving Defendants jointly and severally moved to dismiss the claims against them, pursuant to Fed.R.Civ.P. 12(b)(6), arguing that the Complaint fails to state a claim and Rule 9(b) for failing to set forth its claims with particularity.

As we explain below, ABN AMRO's Complaint comports with the general pleading requirements of Fed.R.Civ.P. 8 regarding the counts not involving fraud and, thus, as to those counts (II, III, IV, and VIII) we DENY the Moving Defendants' motions to dismiss. However, ABN AMRO's Complaint does not satisfy the pleading requirements of Fed.R.Civ.P. 9(b) for the fraud and RICO claims (Counts V, VI, and XIII) because the Complaint fails to state when the allegedly fraudulent closings occurred. Because this is a readily correctable deficiency, we allow ABN AMRO an opportunity to amend the Complaint within fifteen days from the date of this ruling.

¹ In addition to federal question jurisdiction, ABN AMRO invokes jurisdiction, pursuant to 28 U.S.C. § 1332, based on complete diversity between Plaintiff and Defendants and an amount in controversy exceeding \$100,000.

Factual Background

ABN AMRO is a nationwide wholesale mortgage lender that markets mortgage loans for the residential real estate market and purchases mortgage loans originated by various mortgage brokers throughout the United States. Compl. ¶ 20. In 2001 and 2002, AMRO purchased 109 mortgage loans (the “Loans”) originated by Promised Land on properties located in Marion County, Indianapolis, Indiana. Id. at ¶ 21

ABN AMRO contends that all of the Loans are in default and foreclosure actions have been instituted, and in some instances completed, on a number of the Loans and that it plans to foreclose on the remaining Loans as well. ABN AMRO states that the total amount of the original principal on the Loans exceeded six million dollars and that currently the outstanding debt amount exceeds five million dollars. ABN AMRO estimates that the aggregate value of properties securing the Loans is something less than one million dollars. Compl. ¶¶ 24-26

In late 2002, after the Loans began to go into default, ABN AMRO’s investigation revealed that the Loans originated by Promised Land and Romero Brice (“Brice”)² were part of an alleged scheme to defraud ABN AMRO by:

- (a) inducing ABN AMRO to purchase and fund the Loans based upon (i) false and misleading appraisals of the properties, (ii) improper, false, and/or fraudulent information regarding the prospective borrowers, (iii) improper, false, and/or fraudulent loan and closing documentation, and (b) thereafter disbursing Loan proceeds for improper and unauthorized individuals and entities.

² Brice is allegedly the owner and managing member of Promised Land. Id. at ¶ 4.

Id. at ¶¶ 28-29.³

A. *The Alleged Scheme to Defraud ABN AMRO*

ABN AMRO contends that Promised Land and Brice, with the assistance of others, recruited individuals to act as “straw borrowers” for themselves and other parties involved in the scheme. The alleged scheme was promoted and marketed by Brice and Promised Land as an “investment club.” The straw borrowers were not required to provide any down payment but would at closing receive a payout of \$10,000, purportedly for improvements to the properties and/or to underwrite the initial mortgage payments. Under the scheme, once repairs were made, the borrower was to rent and/or sell the property, thus generating a gain on the investment. Initially, plans called for Greenhouse Resources LLC (“Greenhouse”) to make some of the repairs, although ultimately no repairs were ever made.⁴ The “straw borrowers” were enticed on the grounds that this was a “no loss” means of making money and further they were not required to make any investment of their money in order to profit from the scheme. Id. at ¶¶ 33-34.

ABN AMRO asserts that Promised Land and Brice prepared the initial loan applications and related documentation and provided it to ABN AMRO. However, much of the material information in the applications was incorrect, improper, false, and/or

³ AMRO alleges that for nearly all the Loans Defendants James L. Spicer and Katherine A. Robinson d/b/a K.A.R. Appraisals provided appraisals that greatly exceeded reasonable (or fair market) values. Id. at ¶ 30.

⁴ Brice is allegedly the owner and managing member of Greenhouse. Id. at ¶ 4.

fraudulent. Id. at ¶ 35. Once the Loans were approved by ABN AMRO in reliance on the incorrect, improper, false, and/or fraudulent material information provided, Promised Land and Brice proceeded to closing. Id. at ¶ 37.

B. *Plaintiff's Allegations in the Complaint concerning the Closing Title Agencies.*

ABN AMRO alleges that GLT, Title One, Title Solutions Agency of Indiana, Inc. (“Title Solutions”), Corbin Title Services, Inc. (“Corbin”), King’s Title and Abstract Company (“King’s Title”) and First American Title Insurance Company (“First American”) (collectively the “Closing Title Agencies”), each agreed to perform closing services for and on behalf of ABN AMRO with regard to one or more to the Loans.⁵ Id. at ¶¶ 40, 71. In addition, First American and Fidelity National Title Insurance Company (“Fidelity”) provided ABN AMRO (or its predecessor in interest) with insured closing letters for the Closing Title Agencies conducting the closings. Id. at ¶ 51; Ex. C.; Ex. D.

ABN AMRO contends that the Closing Title Agencies, in violation of their duties to ABN AMRO emanating from their agency relationship, failed to perform the requisite closing services consistent with reasonable commercial practices and procedures, in at least six ways:

First, many of the closings occurred virtually simultaneously, often three or four

⁵ GLT closed forty three of the Loans, Title One closed thirty six of the Loans, Title Solutions closed fifteen of the Loans, Corbin Title closed two of the Loans, Kings Title closed four of the Loans, and First American closed four of the Loans. Compl. ¶¶ 40-41; see also Ex. B.

on the same day, at the same location, utilizing the same Closing Title Agency, and many occurred at Brice's home attended only by the closing agent and the "straw borrower." Compl. ¶¶ 42-43, 50.

Second, the closings on nearly every Loan generated payments to Greenhouse from the Closing Title Agencies in amounts ranging from \$10,000-\$20,000 reportedly as payoffs of existing mortgages (which in fact did not exist) or payments for construction services (which had not been performed). ABN AMRO alleges that the Closing Title Agencies made these payments to Greenhouse without requiring any supporting documentation, contrary to the industry's normal and customary business practices. *Id.* at ¶ 44, 47.

Third, in addition to Greenhouse, other individuals or entities also received substantial payments at the closings from the Loan proceeds that were characterized either as purported payoffs of existing mortgages (again, which did not exist) or payoffs for services (which had not been performed). ABN AMRO further contends that Closing Title Agencies did not require any supporting documentation before making these payments, contrary to normal and customary practices in the industry. *Id.* at ¶ 47.

Fourth, the HUD-1 closing statements, prepared by the Closing Title Agencies, incorrectly stated that the "straw borrowers" contributed their own funds at closing when, in fact, they provided no funds at all. Instead, funds were provided by some other individual or entity, often the seller or buyer of other properties involved in the scheme. ABN AMRO also asserts that the persons or entities providing these funds received a

refund of their down payments in the form of a payoff at the closing, all of which was overseen by the respective Closing Title Agency. Compl. ¶ 45.

Fifth, despite documentation prepared by the Closing Title Agencies that provided otherwise, the existence and amounts of prior mortgages on most of the collateral properties were false, and payments by the Closing Title Agencies purporting to relate to such mortgages were made with reasonable care. Id. at ¶ 49.

Sixth, the Closing Title Agencies knew or should have known there was incorrect, improper, incomplete, false, and/or fraudulent information contained in: (i) the appraisals provided by Defendants Katherine A. Robinson and James L. Spicer d/b/a K.A.R. Appraisal Services (collectively “K.A.R.”), (ii) the Loan applications and related documentation, and (iii) the HUD-1 closing statements and affidavits by borrowers and mortgagors. Id. at ¶ 52. The Closing Title Agencies owed ABN AMRO a duty to disclose any and all improper, incomplete, false, and/or fraudulent information. Id. at ¶ 78.

C. Procedural Background.

Based on these allegations, on June 3, 2004, ABN AMRO brought this lawsuit in thirteen counts: (1) breach of contract by Promised Land; (2) negligence by the Closing Title Agencies; (3) breach of fiduciary duty by the Closing Title Agencies; (4) negligent misrepresentation by the Closing Title Agencies; (5) constructive fraud by the Closing Title Agencies; (6) fraud and dishonesty by the Closing Title Agencies; (7) breach of contract by First American and Fidelity; (8) negligence by K.A.R.; (9) fraud by K.A.R.;

(10) deception by Promised Land, Greenhouse, and Brice; (11) breach of constructive trust by Greenhouse, Promised Land, and Brice; (12) a RICO claim against Promised Land, Greenhouse, and Brice; and (13) a RICO claim against GLT, Title One, and Title Solutions.

Defendants, Title One, GLT and First American (collectively the “Moving Defendants”), jointly and severally move to dismiss claims II-VII and XIII for failure to state a claim, pursuant to Fed.R.Civ.P. 12(b)(6), and Rule 9(b) for failure to set forth the claims with particularity.⁶

Legal Analysis

A. *Motion to Dismiss Standard of Review*

Under Rule 12(b)(6), a party seeking dismissal bears a weighty burden: it must show that on the basis of pleadings alone, there is no claim for relief under any set of facts. Ed Miniat, Inc. v. Globe Life Ins. Group Inc., 805 F.2d 732, 733 (7th Cir. 1986), cert. denied, 482 U.S. 915 (1987).

As a practical matter, a Rule 12(b)(6) dismissal is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. Owner-Operator Indep. Drivers Ass'n v. Mayflower Transit, Inc., 161 F. Supp. 2d 948, 950-51 (S.D.Ind. 2001) (Barker, J.) (quoting 5A Charles A. Wright and Arthur R. Miller, Federal Practice & Procedure:

⁶ Although the Moving Defendants repeatedly refer to a motion to dismiss filed by King’s Title, we find no record of any such motion.

Civil § 1357). In analyzing a Rule 12(b)(6) motion, we treat all well-pleaded factual allegations as true and construe all inferences that reasonably may be drawn from those facts in a light most favorable to the party opposing the motion – in this case, ABN AMRO. Lee v. City of Chicago, 330 F.3d 456, 459 (7th Cir. 2003); Szumny v. Am. Gen. Fin., 246 F.3d 1065, 1067 (7th Cir. 2001). We are not required, however, to cast a blind eye to “facts alleged in the complaint that undermine the plaintiff’s claim.” Arazie v. Mullane, 2 F.3d 1456, 1465 (7th Cir. 1993) (citing Roots Partnership v. Lands' End, Inc., 965 F.2d 1411, 1416 (7th Cir.1992))

B. *ABN AMRO’s non-fraud claims*

In Counts II, III, IV and VII of the Complaint,⁷ ABN AMRO alleges that, in violation of their duties, the Closing Title Agencies improperly performed the closing services on which Plaintiff’s non-fraud claims are based. The Moving Defendants, however, maintain that these claims should be dismissed because, in fact, the Closing Title Agencies owed no duty to ABN AMRO.

Under “Indiana [law] the existence of a tort duty is a question of law.” Merrill v. Trump Indiana, Inc., 320 F.3d 729, 731 (7th Cir. 2003) (citing Benton v. City of Oakland, 721 N.E.2d 224, 232 (Ind.1999)). However, we are unable to resolve this issue because the parties are in disagreement as to the factual basis of any alleged relationship between

⁷ The substance of these claims is as follows: Count II, negligence by Closing Title Agencies; Count III, breach of fiduciary duty by Closing Title Agencies; Count IV, negligent misrepresentation by Closing Title Agencies; and Count VII, breach of contract claims against First American Title Insurance Company and Fidelity National Title Insurance Company.

them that would give rise to such a duty. ABN AMRO alleges that the Closing Title Agencies served as closing agents acting on its behalf, which created certain duties towards it. The exhibits attached to the Complaint corroborate ABN AMRO's contention that the Closing Title Agencies owed at least some sort of duty to ABN AMRO.⁸ The Moving Defendants have both conspicuously refused to clarify their relationship with ABN AMRO⁹ and deny that any such a relationship existed.¹⁰ These challenges to the factual allegations in the Complaint, however, are inappropriate in the context of a motion to dismiss because all well-pled allegations are treated as true. These assertions would be more fruitfully advanced in a motion for summary judgment, after a factual record has been developed. Thus, we hold that the Moving Defendants have failed to establish that

⁸ The Master Closing Protection Letters issued by Fidelity and First American support ABN AMRO's allegations insofar as the letters provide coverage for losses resulting from:

Fraud or dishonesty of the Issuing Agent or Approved Attorney in handling your funds or documents in connection with such closing.

Ex. D at 3; see also Ex. C at 1 (same).

⁹ This position is best demonstrated through the following statement made by First American:

First American admits that it can owe a fiduciary duty to its customers, including ABN AMRO, with regard to the closing of loans and disbursement of proceeds, but denies that it owed ABN AMRO any fiduciary duty in connection with the matters that are at issue in this lawsuit.

Answer by First American at ¶ 67. First American's briefs do not further clarify this nuance distinction.

¹⁰ For example, GLT asserts that "there was never any direct involvement between ABN [ABN AMRO] and GLT." GLT's Brief in Supp. at 5.

there is no set of facts upon which ABN AMRO would be entitled to relief.

Counts II, III, IV and VII of the Amended Complaint satisfy the notice pleading requirements of Federal Rule of Civil Procedure 8 and Plaintiff has pled sufficient facts to provide Defendant with fair notice of its claims. See Scott v. City of Chicago, 195 F.3d 950, 952 (7th Cir. 1999). Dismissal is accordingly unwarranted.

C. *Rule 9(b)*

ABN AMRO's fraud and RICO claims are evaluated under the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), which requires all averments of fraud be pled with particularity. See Vicom, Inc. v. Harbridge Merchant Services, Inc., 20 F.3d 771, 777 (7th Cir. 1994). Under Seventh Circuit precedent, a plaintiff may satisfy the requirements of Rule 9(b) by providing a "general outline" of the circumstances constituting the alleged fraud, sufficient to "reasonably notify the defendant[] of [its] purported role" in the fraud. Midwest Grinding Co., Inc. v. Spitz, 976 F.2d 1016, 1020 (7th Cir. 1992). Although a complaint need not spell out every element of a legal theory, a claim of fraud must elucidate the details with "particularity" - "the who, what, when, where, and how: the first paragraph of any newspaper story." Hemenway v. Peabody Coal Co., 159 F.3d 255, 261 (7th Cir. 1998) (quoting DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir. 1990)). These requirements are lessened somewhat where a plaintiff alleging fraud prior to discovery does not have access to all the facts necessary to lay out the details. See Katz v. Household Int'l, Inc., 91 F.3d 1036, 1040 (7th Cir. 1996); Bankers Trust Co. v. Old Republic Ins., 959 F.2d 677, 684 (7th

Cir.1992).

The purpose of requiring that fraud be pled with particularity is not “to give the defendant . . . enough information to prepare his defense [because a] charge of fraud is no more opaque than any other charge.” Ackerman v. Northwestern Mut. Life Ins. Co., 172 F.3d 467, 469 (7th Cir. 1999) (explaining a defendant can “get all the information he needs to meet it by filing a contention interrogatory”) (citing Fed.R.Civ.P. 33(c); Vidimos, Inc. v. Laser Lab Ltd., 99 F.3d 217, 222 (7th Cir. 1996); Taylor v. FDIC, 132 F.3d 753, 762 (D.C.Cir. 1997); Shushany v. Allwaste, Inc., 992 F.2d 517, 519 (5th Cir. 1993)). The Seventh Circuit has held that the primary purpose of the heightened pleading requirement is “to force the plaintiff to do more than the usual investigation before filing his complaint,” (Ackerman, 172 F.3d at 469) and, by extension, to protect a defendant’s reputation from unfair harm and to minimize “strike suits” and “fishing expeditions.” Uni*Quality, Inc. v. Infotronx, Inc., 974 F.2d 918, 924 (7th Cir. 1992).

D. *ABN AMRO’s fraud-based claims*

Moving Defendants claim that Counts V, VI, and XIII of the Complaint¹¹ do not comply with Rule 9(b) requirements because they fail to embody fraud allegations stated with particularity. However, in so arguing, Moving Defendants are essentially asking the Court to invert the standard of review by drawing all possible inferences in their favor. In

¹¹ Count V, constructive fraud against the Closing Title Agencies; Count VI, fraud and dishonesty against the Closing Title Agencies; and Count XIII, RICO against GLT, Title One, and Title Solutions.

particular, Moving Defendants request that we find that: (1) despite acting as closing agents, the Closing Title Agencies owed no duties to the principal on whose behalf they were working; (2) the Closing Title Agencies prepared official documents in relation to a real estate transaction which did not need to be completed in an honest or accurate fashion because their principal would not read the documents, let alone rely on them; and (3) the Closing Title Agencies, which were given large sums of money by their principal, could dispense those funds in their discretion without other obligations or restrictions. These contentions by Moving Defendants display an obvious misunderstanding of the purpose of a motion to dismiss.

Our analysis causes us to conclude that Counts V, VI, and XIII satisfy the pleading requirements of Rule 9(b), insofar as they provide a “general outline” of the circumstances constituting the alleged fraud, and are sufficient to “reasonably notify the defendant[] of [its] purported role” in the fraud. Midwest Grinding Co., 976 F.2d at 1020. ABN AMRO’s Complaint as drafted complies with Rule 9(b), asserting that its pre-filing investigation identified 109 loans in which fraud allegedly occurred, and for each of the fraudulent transactions, ABN AMRO has provided the last name of the borrower, the address of the property involved, and which closing agent performed the closing tasks. See Ex. B. ABN AMRO has also specified the actions it alleges constituted fraud by the Closing Title Agencies. See Compl. ¶¶ 77-80 (failing to disclose to ABN AMRO information the Closing Title Agencies knew or should have known was false/inaccurate); 83-86 (preparing documents which contained information the Closing

Title Agencies knew or should have known was false/misleading and upon which ABN AMRO relied); and 128-130 (agreeing to and facilitating the activities of Brice and Promised Land in defrauding ABN AMRO). These factual allegations, if true, would provide a legal and factual basis allowing Plaintiff to prevail on its fraud claims; accordingly, there is no concern that and this litigation constitutes either a “fishing expedition” or a “strike suit.”

As mentioned at the outset of this entry, however, we are of the view that the Complaint does not adequately apprise the Defendants of the specific dates on which each of the loan closings occurred. See *Midwest Grinding Co.*, 976 F.2d at 1020 (stating “the specificity standard, at minimum, requires a plaintiff to identify the time and place of the alleged predicate acts”) (citation omitted). This deficiency, in our view, is subject to easy correction by ABN AMRO, and so we direct Plaintiff to file amended counts of the complaint asserting the fraud-based claims on or before April 8, 2005, listing the respective closing dates or an explanation as to why Plaintiff is unable to provide such information at this time. Upon the filing of the amended complaint, the Moving Defendants’ Motions to Dismiss will be **DENIED** in its entirety. **FAILURE TO AMEND THE FRAUD CLAIMS WILL SUBJECT COUNTS V, VI, AND XIII TO POSSIBLE DISMISSAL (WITHOUT PREJUDICE), PURSUANT TO RULE 9(b), F.R.CIV.P.**

Summary

For the reasons set forth above, pursuant to Fed.R. Civ.P. 8, the Complaint adequately pleads ABN AMRO’s non-fraud based claims (Counts II, III, IV, and VII)

against the Moving Defendants and, therefore, the Moving Defendants' motions to dismiss are **DENIED**.

With regard to ABN AMRO's fraud and RICO claims, Counts V, VI, and XII, do not satisfy the pleading requirements of Fed.R.Civ.P. 9(b) but Plaintiff shall be permitted fifteen (15) days within which to correct this deficiency as outlined previously, whereupon the Moving Defendants' Motions to Dismiss will be **DENIED** in full.

Date: _____

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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