IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SAYDEI G. BARLEE, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
FIRST HORIZON NATIONAL CORPORATION, et al.	:	NO. 12-3045

MEMORANDUM

Bartle, J. April 4, 2013

Before the court is the motion of United Guaranty Residential Insurance Company ("United Guaranty") for reconsideration of the court's Order dated February 27, 2013 granting in part and denying in part the motion of United Guaranty to dismiss. In the alternative, United Guaranty moves the court for an order certifying the issues for immediate appellate review under 28 U.S.C. § 1292(b).

Plaintiffs Saydei G. Barlee ("Barlee") and Barry D. Broome ("Broome") instituted this putative class action for alleged violations of the Real Estate Settlement Procedures Act of 1974 ("RESPA") and common law unjust enrichment against defendants First Horizon National Corporation ("FHNC"), First Tennessee Bank, N.A. ("First Tennessee Bank"), First Horizon Home Loan Corporation ("First Horizon Home Loan"),[1] FT Reinsurance

1. Until February 7, 2007, defendant First Horizon Home Loan was a wholly-owned subsidiary of defendant First Tennessee Bank, which was a wholly-owned subsidiary of defendant First Horizon

(continued...)

Company ("FT Reinsurance"), United Guaranty, Genworth Mortgage Insurance Corporation ("Genworth"), Republic Mortgage Insurance Company ("Republic"), and Radian Guaranty Inc. ("Radian").[2]

We granted the motion of United Guaranty as to the claims of plaintiff Barlee because of lack of standing under Rule 12(b)(1). As to plaintiff Broome, United Guaranty moved to dismiss under Rule 12(b)(6) on statute of limitations grounds. We denied the motion because Broome had adequately pleaded equitable tolling. United Guaranty now reargues that its motion as to Broome should have also been granted. It contends that Broome did not sufficiently allege that United Guaranty committed an act of fraudulent concealment that prevented him from discovering his claims during the limitations period. According to United Guaranty, the equitable tolling allegation, as presently pleaded, does not vitiate the untimeliness of the complaint.

The purpose of a motion for reconsideration "is to correct manifest errors of law or fact or to present newly

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1. (...continued)
National Corporation. On that date, they merged with First Tennessee Bank emerging as the surviving corporation. For the purpose of the present motions before the court, we will refer to First Horizon National Corporation, First Horizon Home Loan, and First Tennessee Bank together as "First Horizon."

2. We granted the motions of Genworth, Republic, and Radian because the plaintiffs did not have standing to sue them under Rule 12(b)(1) of the Federal Rules of Civil Procedure. We denied the motion of First Horizon and FT Reinsurance under Rule 12(b)(6) of the Federal Rules of Civil Procedure because the plaintiffs have adequately pleaded equitable tolling.

discovered evidence." Max's Seafood Café by Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999) (citing Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir. 1985)). Accordingly, the party seeking reconsideration must show at least one of the following grounds: "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." Id. (citing North River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995)). United Guaranty maintains that the court made a clear error of law or fact and seeks to prevent manifest injustice.

As described in the February 27, 2013 Memorandum and Order, Broome obtained a mortgage loan from First Horizon on or about April 10, 2008 for the purchase of his home located in Atlanta, Georgia. Broome was required to pay $55.19 per month for private mortgage insurance in connection with this loan. First Horizon selected his insurer, United Guaranty, which was reinsured by FT Reinsurance, First Horizon's subsidiary. Broome instituted suit on May 31, 2012, which was over four years after his RESPA claim accrued upon the closing of his loan transaction.

We reiterate that Broome must allege the following to invoke the doctrine of equitable tolling: "(1) that the defendant actively misled the plaintiff; (2) which prevented the plaintiff from recognizing the validity of her claim within the limitations period; and (3) where the plaintiff's ignorance is

not attributable to her lack of reasonable due diligence in attempting to uncover the relevant facts." Cetel v. Kirwan Fin. Group, Inc., 460 F.3d 494, 509 (3d Cir. 2006). "Because the question whether a particular party is eligible for equitable tolling generally requires consideration of evidence beyond the pleadings, such tolling is not generally amenable to resolution on a Rule 12(b)(6) motion." Drennan v. PNC Bank, NA, 622 F.3d 275, 301-02 (3d Cir. 2010) (citation omitted).

As we previously explained in our earlier Memorandum, Broome included a section in the First Amended Complaint in support of equitable tolling of RESPA's statute of limitations. His allegations included the following:

> Plaintiffs and members of the putative class could not, despite the exercise of due diligence, have discovered the underlying basis for their claims. Further, Defendants knowingly and actively concealed the basis for Plaintiffs' claims by engaging in a scheme that was, by its very nature and purposeful design, self-concealing.
> ...
> Plaintiffs' and the putative Class members' "purported" delay was excusable because they did not discover, and reasonably could not have discovered, Defendants' conduct as alleged herein absent specialized knowledge and/or assistance of counsel.
> ...
> First Horizon used its form mortgage documents, disclosures of affiliated business arrangements, and the entire artifice of a seemingly legitimate business arrangement, to affirmatively mislead Class members about the relationship between the reinsurer, FT Reinsurance, and the lender, First Tennessee Bank and/or First Horizon Home Loans, and to represent that, rather than a kickback or unearned fee, any payments exchanged between the affiliated businesses, or given to them

> from the Private Mortgage Insurer Defendants through referral, were for actual services rendered.
> ...
> Putative Class members exercised due diligence by fully participating in their loan transactions.

We held that these allegations were sufficient to plead equitable tolling. As all parties know, this is not a decision on the timeliness of this lawsuit. Whether the statute of limitations bars this action must await another day.

There is no reason for this court to reverse its earlier decision. Although Broome specifically refers to First Horizon as "us[ing] its form mortgage documents, disclosures of affiliated business arrangements, and the entire artifice of a seemingly legitimate business arrangement, to affirmatively mislead Class members," he also avers that all the defendants "actively concealed the basis for Plaintiffs' claims." Moreover, as noted above, United Guaranty was the private mortgage insurer which contracted with First Horizon on Broome's mortgage and which in turn was reinsured by FT Reinsurance, First Horizon's subsidiary. Accordingly, there was a clear agreement between United Guaranty and First Horizon. We do not know at this time the extent of cooperation between First Horizon and United Guaranty on those aspects of the mortgage documents involving the alleged captive reinsurance scheme. Broome's pleading, in this regard however, is sufficient to state a plausible basis for equitable tolling. Bell Atlantic v. Twombly, 550 U.S. 554, 570 (2007). We will not dismiss Broome's claims against United

Guaranty at this early stage of the litigation. Again, our decision does not end the matter because discovery will follow with United Guaranty having the right at the proper time to have this court revisit the issue.

United Guaranty also requests in the alternative that we certify our February 27, 2013 Order for immediate appeal. Pursuant to 28 U.S.C. § 1292(b), the court may do so when its decision "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." In our view, our Order does not involve a controlling question of law as to which there is a substantial ground for difference of opinion. It is well established by our Court of Appeals that equitable tolling is "not generally amenable to resolution on a Rule 12(b)(6) motion." Drennan, 622 F.3d at 301-02 (citation omitted). Further, it would not advance the ultimate termination of the litigation since the case would still move forward in this court against First Horizon. The motion to certify will be denied.