

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

TILLMAN INDUSTRIAL PROPERTIES,
LLC, a Michigan limited liability company;
and ROOSEVELT TILLMAN,

Plaintiffs,

vs.

MERCANTILE BANK MORTGAGE
COMPANY, LLC, a Michigan limited
liability company; and MERCANTILE
BANK CORPORATION, a Michigan
corporation,

Defendants.

Case No. 13-08428-CZB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER GRANTING IN PART, AND DENYING IN
PART, DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

The Court understands the explosive nature of the allegations in this case: Plaintiffs Tillman Industrial Properties, LLC (“TIP”) and Roosevelt Tillman have accused Defendants Mercantile Bank Mortgage Company, LLC (“Mercantile Mortgage”) and Mercantile Bank Corporation (“Mercantile Bank”) of engaging in racial discrimination in lending practices. In addition, the Court appreciates the moral outrage expressed by both sides in their briefs and at oral argument. But vindication for either side depends upon unstinting adherence to settled principles of Michigan and federal law, so the parties must bear with the Court as this case proceeds methodically to resolution. At this early stage of the proceedings, both of the defendants have demanded summary disposition under MCR 2.116(C)(7) and (8). The Court shall grant such relief with respect to Counts Three and Four, but the plaintiffs must be allowed to further develop their claims in Counts One and Two.

I. Factual Background

The defendants have requested summary disposition pursuant to MCR 2.116(C)(7) and (8). A “motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint[,]” so the Court must consider only the pleadings and accept well-pleaded factual allegations as true in considering relief on that basis. See Maiden v Rozwood, 461 Mich 109, 119-120 (1999). The Court has more latitude in considering relief under MCR 2.116(C)(7) because “[a] party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence.” See id. at 119. But the contents of the complaint must be “accepted as true unless contradicted by documentation submitted by the movant[,]” id., so the Court shall use the allegations in the complaint as a starting point and then adjust those allegations as the record requires.

According to the plaintiffs’ Second Amended Class Action Complaint, Plaintiff Tillman and his company, Plaintiff TIP, enjoyed a longstanding relationship with the defendants. Beginning in 2000, the defendants – acting principally through their employee, Pat Julien – reached out to several minority communities in West Michigan to build the defendants’ lending portfolio and spur growth in minority communities. See Second Amended Complaint, ¶¶ 7-11. Tillman and his companies “borrowed approximately \$2.5 million from Mercantile through several promissory notes” that were “secured by mortgages on real property” in 2005 and beyond. See id., ¶ 48. Then, as the recession of 2008 began to take hold, the defendants allegedly “instituted a policy that was both intentionally discriminatory and discriminatory in effect” by “aggressively call[ing] the loans on most, if not all, of the minority owned businesses it had recently targeted.” Id., ¶¶ 14-15. “Mercantile executed this plan by taking a zero tolerance approach to its minority borrowers, while allowing white borrowers in similar circumstances greater opportunities to catch up on missed payments or re-finance.” Id.,

¶ 16. Specifically, minority “business borrowers who missed just one or two payments would have their loans called” and “Mercantile would immediately foreclose.” *Id.*, ¶ 17. If “those borrowers told the bank that they could catch up or that they would like to re-finance, the bank told them that they were not interested in ‘that kind’ of business anymore.” *Id.* The plaintiffs were ensnared by this practice when “Mercantile accelerated the Tillman Entities’ debts and Mr. Tillman’s personal guarantees in 2011” and soon thereafter “began to foreclose by advertisement on the many properties securing the Tillman Entities’ and Mr. Tillman’s debts.” *Id.*, ¶¶ 50-51.

This case came into existence in a procedurally roundabout manner. When the defendants began the process of foreclosure and eviction with respect to more than ten properties controlled by Plaintiff Tillman and his companies, the plaintiffs filed counterclaims in the district-court matters. Although the district courts ultimately ordered the evictions requested by the defendants, none of the district courts acted on the counterclaims, which instead were transferred to the Kent County Circuit Court for resolution on the merits. In an effort to bring order to the chaos that had arisen through the assertion of the counterclaims in the various district-court proceedings, the Court directed the plaintiffs to amend their counterclaims to properly identify the parties and clean up the allegations presented in the counterclaims. Thus, the plaintiffs’ Second Amended Class Action Complaint sets forth four claims against two correctly identified defendants. Those four claims include allegations of intentional lending discrimination in violation of federal law, disparate-impact lending contrary to federal law, fraudulent inducement under Michigan common law, and violation of the Truth in Lending Act.¹ The defendants have moved for summary disposition on all four of those claims.

¹ The plaintiffs have framed their second amended complaint as a class-action matter, but the Court cannot yet address class certification under MCR 3.501 and binding Michigan precedent. *See, e.g., Duskin v Dep’t of Human Services*, No 310353 (Mich App April 1, 2014) (published decision).

II. Legal Analysis

The Court’s review at this early stage is narrowly circumscribed. The Court may only award summary disposition under MCR 2.116(C)(8) if “the claims alleged are ‘so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.’” See Maiden, 461 Mich at 119. Although the Court has more latitude under MCR 2.116(C)(7), “[t]he contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant.” Id. “If there is no factual dispute, whether a plaintiff’s claim is barred under a principle set forth in MCR 2.116(C)(7) is a question of law for the court to decide.” RDM Holdings, Ltd v Continental Plastics Co, 281 Mich App 678, 687 (2008). “If a factual dispute exists, however, summary disposition is not appropriate.” Id. With these principles in mind, the Court must address each of the four claims advanced by Plaintiffs Tillman and TIP in their second amended complaint.²

A. Intentional Lending Discrimination.

Count One of the second amended complaint presents a claim for intentional discrimination in lending under both the federal Fair Housing Act (“FHA”), 42 USC 3605 and 3613, and the federal Equal Credit Opportunity Act (“ECOA”), 15 USC 1691(a)(1). The FHA forbids a “person or other

² The defendants contend that the Court must engage in an exacting form of review pursuant to the decisions of the United States Supreme Court in Bell Atlantic Corp v Twombly, 550 US 544 (2007), and Ashcroft v Iqbal, 556 US 662 (2009), but those rulings flowed from standards prescribed by the Federal Rules of Civil Procedure. When a case is in federal court, the federal rules governing summary judgment control. Gafford v General Electric Co, 997 F.2d 150, 165-166 (6th Cir 1993). Conversely, when a case is in a Michigan court, the Michigan rules governing summary disposition apply. See id. Not surprisingly, only one truly anomalous Michigan appellate decision has discussed the standards of Twombly and Iqbal, and the dissent’s reliance upon those decisions was rejected by the majority. Compare Duncan v State of Michigan, 284 Mich App 246, 373-376 (2009) (Whitbeck, J, dissenting), aff’d in part, 486 Mich 906, rev’d on reconsideration, 486 Mich 1071, reinstated on reconsideration, 488 Mich 957 (2010), with 284 Mich App at 326 n 24 (majority opinion). The law in Michigan therefore appears to preclude reliance upon Twombly and Iqbal.

entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color . . . or national origin.” See 42 USC 3605(a). “To state a claim for relief under” that provision, “the plaintiffs must plead that (1) they were a member of a protected class; (2) they attempted to engage in a ‘real estate-related transaction’ with [the defendants] and met all relevant qualifications for doing so; (3) [the defendants] refused to transact business with [them] despite their qualifications; and (4) the defendants continued to engage in that type of transaction with other parties with similar qualifications.” See Michigan Protection and Advocacy Service, Inc v Babin, 18 F3d 337, 346 (6th Cir 1994). The ECOA states: “It shall be unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of race, color, [or] national origin[.]” See 15 USC 1691(a)(1). A plaintiff “can establish a *prima facie* case of credit discrimination by showing: (1) Plaintiff was a member of a protected class; (2) Plaintiff applied for credit from Defendants; (3) Plaintiff was qualified for the credit; and (4) despite Plaintiff’s qualification, Defendants denied [the] credit application.” Mays v Buckeye Rural Electric Cooperative, Inc, 277 F3d 873, 877 (6th Cir 2002).

In Count One of their second amended complaint, Plaintiff Tillman and his company allege that they “are black or black-owned businesses[.]” see Second Amended Complaint, ¶ 163, that they were the victims of intentional discrimination “because of their race” insofar as the defendants made requirements and followed procedures with respect to the plaintiffs that the defendants do not require “of similarly situated white borrowers[.]” see id., ¶ 165, that the defendants impaired their ability to engage in real estate and credit transactions, see id., ¶¶ 166-168, and that they would have been able to engage in such real estate and credit transactions on the terms made available to the defendants’

white borrowers. See id., ¶¶ 17, 22, 166-168. In sum, Count One pleads a paradigmatic claim for the type of discrimination proscribed by the FHA and the ECOA. Whether the plaintiffs can provide evidence to support that claim is a matter that must be left for another day. For now, the Court must permit the plaintiffs to proceed with their claim of intentional discrimination in Count One because the defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) "may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" Maiden, 461 Mich at 119. The allegations set forth in Count One easily overcome that low hurdle.

B. Disparate-Impact Lending Discrimination.

The plaintiffs' claim in Count Two for disparate-impact discrimination under the FHA and the ECOA involves one of the most contentious debates in federal law today. The federal courts of appeals have long recognized the viability of the disparate-impact theory under the statutory schemes at issue here. E.g., Inclusive Communities Project, Inc v Texas Dep't of Housing and Community Affairs, 747 F3d 275, 280 (5th Cir 2014) ("[V]iolation of the FHA can be shown by either proof of intentional discrimination or by proof of disparate impact."); Golden v City of Columbus, 404 F3d 950, 963 (6th Cir 2005) ("we assume that disparate impact claims are permissible under ECOA"). But the United States Supreme Court has twice granted *certiorari* to consider whether such a theory can exist under the FHA, e.g., Township of Mt Holly v Mt Holly Gardens Citizens in Action, 133 S Ct 2824 (2013), only to have the cases settle, and thereby be removed from the Supreme Court's docket. E.g., Township of Mt Holly v Mt Holly Gardens Citizens In Action, 134 S Ct 636 (2013). As a result, the disparate-impact theory remains viable, and it requires the plaintiffs to plead a *prima*

facie case that includes a policy that “has a significantly greater discriminatory impact on [women and minorities].” Golden, 404 F3d at 963.

Count Two contends that the defendants “employed a systematic approach to reduce [their] exposure to certain non-owner occupied CRE and construction businesses given the nature of that type of lending and depressed economic conditions[,]” see Second Amended Complaint, ¶ 173, and the defendants’ “systematic approach’ had a disparate impact on black borrowers and black-owned businesses,” see id., ¶ 174, in that it “led to the acceleration of debts for primarily black borrowers and black-owned businesses[,]” id., ¶ 175, which, in turn, “led to the foreclosure of property owned by primarily black borrowers and black-owned businesses.” Id., ¶ 176. These allegations form the basis for a viable disparate-impact claim under the FHA and ECOA. To be sure, the plaintiffs will ultimately have to come forward with evidence of disparate impact to survive a motion for summary disposition under MCR 2.116(C)(10), but that showing need not be made until after the plaintiffs have had an opportunity to conduct meaningful discovery. See Liparoto Constr, Inc v General Shale Brick, Inc, 284 Mich App 25, 33-34 (2009). For now, the Court must deny summary disposition to the defendants pursuant to MCR 2.116(C)(8) because the disparate-impact claim is not “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” See Maiden, 461 Mich at 119.

C. Fraudulent Inducement.

The plaintiffs’ fraudulent-inducement claim in Count Three rests upon a familiar Michigan common-law theory. That is, the plaintiffs assert that the defendants “buried cross-collateralization, cross-guaranty and cross-default provisions in each of the promissory notes[,]” see Second Amended

Complaint, ¶ 180, and structured a loan for his home “as a trap,” see id., ¶ 188, by making that loan to Plaintiff TMI, see id., ¶ 187, and then depriving Plaintiff Tillman of the money he needed to start a new business. See id., ¶¶ 185, 202, 204, 206. This claim, however, suffers from two fatal flaws. Accordingly, the Court must grant summary disposition on Count Three to the defendants pursuant to MCR 2.116(C)(7) and (8) for the following reasons.

“Fraud in the inducement occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon.” Samuel D Begola Services, Inc v Wild Brothers, 210 Mich App 636, 639 (1995). Here, the plaintiffs cannot establish reliance because “alleged misrepresentations regarding the terms of written documents that are available to the plaintiff cannot support the element of reasonable reliance.” See Cummins v Robinson Twp, 283 Mich App 677, 698 (2009). The plaintiffs have based their entire claim for fraudulent inducement upon promises made orally about the contents of documents that Plaintiff Tillman reviewed and signed. That claim cannot survive a motion for summary disposition under MCR 2.116(C)(8).

Beyond that, the statute of frauds bars the plaintiffs’ reliance upon oral promises purportedly made in the context of a lending arrangement. See MCL 566.132(2)(a). Specifically, our Legislature has decreed that an “action shall not be brought against a financial institution to enforce” a “promise or commitment to lend money, grant or extend credit, or make any other financial accommodation . . . unless the promise or commitment is in writing and signed with an authorized signature by the financial institution[.]” Id. Our Court of Appeals has noted that “[t]his language is unambiguous.” See Crown Technology Park v D&N Bank, FSB, 242 Mich App 538, 550 (2000). “It plainly states that a party is precluded from bringing a claim – no matter its label – against a financial institution

to enforce the terms of an oral promise to waive a loan provision” or make any other accommodation to a borrower. *Id.* Therefore, the Court must grant summary disposition under MCR 2.116(C)(7) to the defendants on Count Three because of the clear mandate in our statute of frauds.

D. Violation of the Truth In Lending Act.

Count Four presents a claim under the Truth in Lending Act (“TILA”), 15 USC 1601, *et seq.* Citing to Subpart C of the TILA,³ the plaintiffs assert that the defendants acted unlawfully “by failing to clearly and conspicuously disclose in writing, the amount financed, the principal loan amount, and the fact that the bank was requiring [Plaintiff TIP] to pledge [Plaintiff] Tillman’s personal residence as security for each and every one of the Tillman Entities’ credit obligations.” *See* Second Amended Complaint, ¶ 218. To the extent the plaintiffs’ TILA claim seeks damages, it had to be filed within the one-year statute of limitations that began running on the date of the challenged transaction. *See* 15 USC 1640(e). The plaintiffs did not meet that requirement, so their TILA claim is time-barred.⁴ Consequently, the defendants must be granted summary disposition on Count Four pursuant to MCR 2.116(C)(7). Beyond that, the TILA claim applies only to consumer transactions, as opposed to the type of commercial transaction at issue here with Plaintiff TIP. *See Wisdom v First Midwest Bank of Poplar Bluff*, 167 F3d 402, 405 n 1 (8th Cir 1999), *citing* 15 USC 1603(1). Thus, the defendants must be awarded summary disposition pursuant to MCR 2.116(C)(8).

³ As the defendants accurately explain in their brief, Subpart C of the TILA actually takes the form of a regulation commonly known as “Regulation Z.” *See* 12 CFR 226.1(a). Nevertheless, the governing language of the TILA with respect to the scope of that statutory scheme and its statute of limitations limits the ability of the plaintiffs to pursue relief under Subchapter C.

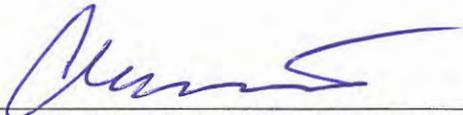
⁴ The plaintiffs seem to concede that their TILA claim for damages is foreclosed by the one-year statute of limitations, so they have changed course and now seek rescission instead. Suffice it to say that rescission is no longer an option, so damages constitute the only available remedy.

III. Conclusion

For all of the reasons set forth in this opinion, the Court shall deny summary disposition to the defendants on Counts One and Two, which present claims for intentional discrimination under the FHA and ECOA as well as disparate-impact discrimination under both of those federal statutory scheme. But the Court shall grant summary disposition to the defendants under MCR 2.116(C)(7) and (8) as to the plaintiffs' claims for fraudulent inducement and violation of Subpart C of the TILA without permitting the plaintiffs to amend those fatally defective claims.⁵

IT IS SO ORDERED.

Dated: June 2, 2014



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge

⁵ According to MCR 2.116(I)(5), the Court ordinarily must afford the plaintiffs a chance to amend their complaint if the Court grants summary disposition under MCR 2.116(C)(8), (9), or (10). Here, however, the Court has granted summary disposition under MCR 2.116(C)(7) as well, and the Court concludes in any event that amendment of Counts Three and Four would be futile. Thus, the Court need not permit the plaintiffs to amend those claims. See Ormsby v Capital Welding, Inc, 471 Mich 45, 52-53 (2004).