

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-62821-CIV-ZLOCH

WALEED B. HAMID,

Plaintiff,

vs.

O R D E R

OCWEN LOAN SERVICING, LLC, et
al.,

Defendants.

THIS MATTER is before the Court upon Defendant Wells Fargo Bank, National Association, as Trustee for American Home Mortgage Investment Trust 2004-1 Mortgage-backed Notes, Series 2004-1's Motion To Strike Jury Trial Demand (DE 6) and Defendant Ocwen Loan Servicing, LLC's Motion To Strike Jury Trial Demand (DE 7). The Court has carefully reviewed said Motions, the entire court file and is otherwise fully advised in the premises.

On November 13, 2013, Plaintiff commenced the above-styled cause in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, alleging violations of the Truth in Lending Act, 15 U.S.C. § 601, et seq. (hereinafter "TILA") against Defendant Wells Fargo Bank, National Association, as Trustee for American Home Mortgage Investment Trust 2004-1 Mortgage-backed Notes, Series 2004-1 (hereinafter, "Wells Fargo") and Ocwen Loan Servicing, LLC. DE 1, pp. 5-14. On December 30, 2013, Defendants removed the above-styled cause to the District Court for the Southern District of Florida. See DE 1. According to the Complaint, Defendant Wells Fargo owns a mortgage on

Plaintiff's residence, and Defendant Ocwen Loan Servicing, LLC, is the loan servicer for the mortgage at issue. See DE 1, pp. 6-7.

In Count I of his Complaint, Plaintiff seeks declaratory relief from this Court that Defendant Ocwen Loan Servicing, LLC, violated two sections of the TILA, namely, 15 U.S.C. §§ 1641(f)(2) and 1639(1)(2). Count II of the Complaint claims that Defendant Wells Fargo has substantial control over Ocwen Loan Servicing, LLC, by virtue of a Servicing Agreement, and that Defendant Wells Fargo is therefore vicariously liable for Defendant Ocwen's alleged violation of 15 U.S.C. § 1641(f)(2).¹ Plaintiff demands a jury trial on all issues so triable.

The Court notes that the alleged violations of the TILA surround the Mortgage assigned to Defendant Wells Fargo. See DE 1, p. 7, ¶¶ 15 & 16. Further, Section 25 of the Mortgage contains a jury trial waiver, which provides as follows:

25. Jury Trial Waiver. The Borrower hereby waives any right to a trial by jury in any action, proceeding, claim or counterclaim, whether in contract or tort, at law or in equity, arising out of or in any way related to this Security Instrument or the Note.

DE 6, p. 29 ("Exhibit A").

By the instant Motions (DE Nos. 6 & 7), Defendants ask the Court to strike Plaintiff's demand for a jury trial, asserting that Plaintiff waived his demand for a jury trial by the knowing and voluntary execution of the Mortgage at issue. Plaintiff does not

¹ On February 3, 2014, Plaintiff withdrew Count III of the Complaint, which claimed Defendant Wells Fargo is vicariously liable for Defendant Ocwen Loan Servicing, LLC's, alleged violation of 15 U.S.C. § 1639(1)(2) of the TILA. See DE 13; DE 1, pp. 12-14.

contest the validity and enforceability of Section 25 of the subject Mortgage (hereinafter, "the Waiver") against Defendant Wells Fargo. Therefore, the Court will grant Defendant Wells Fargo's Motion To Strike Jury Trial Demand (DE 6) as to the only remaining count against said Defendant, Count II.

However, Plaintiff opposes the enforcement of the Waiver as to Defendant Ocwen Loan Servicing, LLC. DE 12. Specifically, Plaintiff argues that because Defendant Ocwen is a non-party to the Mortgage, it cannot enforce the Waiver therein. Plaintiff points to two similar cases in support of his argument, Omega v. Deutsche Bank Trust Co. Americas, 920 F. Supp. 2d 1298 (S.D. Fla. 2013), and Williams v. Wells Fargo Bank N.A., Case No. 11-cv-21233-RNS, 2011 WL 4901346 (S.D. Fla. Oct. 14, 2011). In both of these actions, the District Court for the Southern District of Florida enforced a jury-trial waiver contained in a mortgage against the lender, but refused to enforce said waiver against the loan servicer. In each case, the District Court found that the loan servicers could not enforce the jury trial waivers because they were non-parties to the mortgages. See Omega, 920 F. Supp. 2d 1298 (holding loan servicer could not invoke a jury trial waiver contained in a mortgage to which it was a non-party); Williams, 2011 WL 4901346, at * 13 (citing Paracor Fin., Inc. V. Gen. Elec. Capital Corp., 96 F.3d 1151, 1166 (9th Cir. 1996) (noting that "a jury waiver is a contractual right and generally may not be invoked by one who is not a party to the contract"). The Court agrees and will, therefore, deny Defendant Ocwen Loan Servicing, LLC's, Motion To

Strike Jury Trial Demand (DE 7).

Plaintiff further requests that the Court try the above-styled cause with an advisory jury, even if the Court finds the Waiver enforceable by Defendant Wells Fargo, pursuant to Federal Rule of Civil Procedure 39(c). "In an action not triable of right by a jury, the court . . . may try any issue with an advisory jury." Fed. R. Civ. P. 39(c)(1). The Court finds that judicial economy will be served by trying both of Plaintiffs' claims together. Therefore, the jury will provide a binding verdict as to Count I against Defendant Ocwen Loan Servicing, LLC, and will advise the Court as to Count II against Defendant Wells Fargo.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Defendant Wells Fargo Bank, National Association, as Trustee for American Home Mortgage Investment Trust 2004-1 Mortgage-backed Notes, Series 2004-1's Motion To Strike Jury Trial Demand (DE 6) be and the same is hereby **GRANTED**; and

2. Defendant Ocwen Loan Servicing, LLC's, Motion To Strike Jury Trial Demand (DE 7) be and the same is hereby **DENIED**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 26th day February, 2014.



WILLIAM J. ZLOCH
United States District Judge

Copies furnished:
All Counsel of Record