IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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| DEMARKUS R. HORNE, NINA HORNE, JACKIE BROWN, DONNA BROWN, OLA ELDER JOHNSON, MICHAEL T. JOHNSON, ANITA JORDAN, LAUNDRA MARTIN, AL LEE BUTTS, VERONICA R. PITTS, LISA ELLIS-BLADES, RITA HENIGAN, ROHAN POWELL, LAQUINTA HUTCHINS, TABITHA HUNTER, JAMES HUNTER, and GERRY WHITE,<br><br>Plaintiffs,<br><br>vs.<br><br>HARBOUR PORTFOLIO VI, LP, HARBOUR PORTFOLIO VII, LP, NATIONAL ASSET ADVISORS, LLC, CWAM II, LLC, INVESTMENT TRADING & DEVELOPMENT, SG CAPITAL PARTNERS, JCT CAPITAL, LLC, HAMILTON GREEN CREST, and ORANGE CAPITAL FUNDING LLC,<br><br>Defendants. | ) | CIVIL ACTION<br><br>FILE NO. 1:17-CV-954-RWS |

**PLAINTIFFS' RESPONSE IN OPPOSITION TO NATIONAL ASSET ADVISORS' PARTIAL MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT**

## I. Introduction

Plaintiffs have not alleged that National Asset Advisors, LLC ("NAA") is responsible for the racially discriminatory conduct at the core of this lawsuit. Rather, NAA's "role in this mess," as NAA accurately sums it up, has been the mishandling of the escrow accounts of eight Plaintiffs.[1] Plaintiffs allege that over a number of years, NAA collected amounts from Plaintiffs far in excess of what was actually owed for property taxes, failed to pay property taxes and HOA dues when they came due, and passed along fines and penalties stemming from such failures to the Plaintiffs. (SAC ¶¶ 164-65, 199-200, 211, 242, 265, 314-15, 473-74.)

The Plaintiffs have been harmed by NAA's improper handling of their escrow accounts and retention of funds far in excess of what was needed to make the required payments out of escrow. NAA has moved for partial dismissal of the claims raised against them in this action. For the reasons that follow, except as to the equitable mortgage claim, NAA's motion should be denied.

## II. Discussion

### A. NAA acknowledges that the negligence and RESPA claims have been properly pled for all conduct within the applicable statutes of limitations.

The only argument NAA makes regarding the RESPA and negligence

[1] The escrow claims are brought by Lisa Ellis-Blades, Anita Jordan, LaQuinta Hutchins, Laundra Martin, Ola and Michael Johnson, Al Butts, and Veronica Pitts. For purposes of this brief, "Plaintiffs" refers to these eight plaintiffs.

claims is to seek to limit the claims to conduct within the applicable statutes of limitations. Yet, as discussed below, Plaintiffs have pled ample conduct within the statutory period supporting these claims.

As NAA notes, the statute of limitations for RESPA claims for failure to make timely payments out of escrow is three years. 12 U.S.C. § 2614. However, NAA misapprehends the Georgia limitations period for claims of negligent injury to, or deprivation of, personal property. That period is four years. O.C.G.A. §§ 9-3-31 (four year limitations period for actions based on injury to personalty); 9-3-32 (recovery of personalty); *see also Hardaway Co. v. Parsons, Brinckerhoff, Quade & Douglas*, 267 Ga. 424, 426 (1997) (applying four year statute of limitations to a claim for negligence); *Autumn Trace Homeowners Ass'n v. Brooks*, 238 Ga. App. 107, 107 n.1 (1999) (whether § 9-3-31 or § 9-3-32 applied, the statutory period was four years).

Plaintiffs' negligence claim is a freestanding claim, governed by the Georgia statute of limitations for negligence claims, even though the duties breached were supplied by RESPA. *See Johnson v. Citimortgage, Inc.*, 351 F. Supp. 2d 1368, 1379 (N.D. Ga. 2004) (negligent servicing of a mortgage loan may give rise to a claim for negligence because a duty may exist independent of the contract); *Mauldin v. Sheffer*, 113 Ga. App. 874, 879-80(1966) (a negligence claim may exist

for conduct that also violated the relevant contract where a duty exists imposed by law, such as a duty imposed by statute); O.C.G.A. § 51-1-8 (codifying a claim for damages based on the breach of a duty imposed by statute).

All eight Plaintiffs raising escrow-related claims have alleged violations within the applicable statutory periods (three and four years, respectively) that support their RESPA and negligence claims. Mr. and Mrs. Johnson alleged that as of January 20, 2016 their escrow balance was $3,662.15 and their tax obligation for 2016 was only $1,392.16. (SAC ¶ 165.) Ms. Jordan alleged that over the period of time from September 2012 to December 2016, NAA had collected $10,348 from her, but her total tax obligation during this time period was only $3,798. (*Id.* ¶ 199.) Ms. Martin alleged that she has paid $184 per month into escrow for the past five years, which would result in her paying roughly twice her annual tax obligation.[2] (*Id.* ¶¶ 211, 220; Exhibit A, Property Tax Bill.) Mr. Butts and Ms. Pitts alleged that NAA paid their 2015 and 2016 property taxes late and passed on the late fees to them. (SAC ¶ 242.) Ms. Blades alleged that she was charged approximately $1,800 more than she actually owed for property taxes in 2014,

[2] Ms. Martin's annual property tax bills from 2012 through 2016 have been: $844.98, $844.40, $1108.32, $1460.41, $842.40. These average out to $1,020.10 per year; yet NAA has been collecting approximately $2,208 per year. The Court may take judicial notice of the property tax bill, attached hereto as Exhibit A. *See McClain v. Bank of Am. Corp.*, 2013 WL 1399309, at *5, n.5 (S.D. Ga. Apr. 5, 2013) (court may consider public records such as county property tax records) (*citing Univeral Express, Inc. v. United States SEC*, 177 F. App'x 52, 53 (11th Cir.2006).

2015, and 2016. (*Id*. ¶ 265.) Ms. Hutchins alleged that she has paid $50 per month into escrow for HOA dues since November 2014, yet NAA has failed to pay the HOA dues during the past three years, or to pay her 2016 property taxes. (*Id*. ¶¶ 314-15.) Thus, all eight Plaintiffs have alleged conduct within the past three and four years supporting these claims.

**B. Plaintiffs have properly pled a breach of contract claim against NAA based on breach of the escrow agreement.**

NAA attempts to avoid liability for breach of contract by arguing that NAA and Plaintiffs are not in privity. This argument must be rejected at this early stage of the proceedings, as Plaintiffs have sufficiently pled a contractual relationship with NAA and a breach of that contract based on its mishandling of the escrow funds it agreed to collect.

Plaintiffs have pled facts leading to a reasonable inference that NAA was a party to the escrow agreement. The parties to each purchase contract were clearly the Plaintiffs and Harbour; however, the escrow agreement is a separate contract. (*Id*. ¶ 478; Ex. 1.) Plaintiffs attached an example of the escrow contract as Exhibit 1 to the Complaint. The memorandum agreement shows Harbour's name at the top, NAA's mailing address, and is "from" Rachael Pressley. (*Id*. Ex. 1) Moreover, Plaintiffs alleged that NAA was the entity that collected the escrow payments and had the responsibility to make payments out of escrow in a timely manner and

refund any excess funds to Plaintiffs, and failed to do so. (*Id.* ¶¶ 473-75, 481.) These facts could support a reasonable inference that NAA entered into the escrow agreement on its own behalf, rather than as agent for Harbour.

NAA should be held liable on contracts it enters into with the express or implied understanding that it was binding itself individually. *See Thompson v. Floyd*, 310 Ga. App. 674, 679 (2011). In *Thompson*, the CEO of a company moved for summary judgment on the plaintiff's breach of contract claim, arguing that no contractual privity existed between him individually and plaintiff. *Id.* The court, viewing the facts in the light most favorable to the plaintiff, held that the CEO could be liable individually if he acted on his own behalf rather than as an agent of the company. *Id.* at 680-81. Plaintiffs here have pled sufficient facts that could support an inference that NAA entered into the escrow agreement on its own behalf: namely that the escrow agreement attached as Exhibit 1 came from NAA's South Carolina mailing address and NAA in fact handled all aspects of the escrow account. (SAC ¶¶ 473-75; Ex. 1.)

The cases that NAA cites for its argument that no privity exists with Plaintiffs are distinguishable. In the cases cited by NAA, the plaintiffs were trying to enforce contractual obligations contained in pooling and servicing agreements to which plaintiffs themselves were not parties. *See Turner v. Bank of Am., N.A.*,

2013 WL 12109237, at *5 (N.D. Ga. July 3, 2013); *Blake v. Bank of America*, 845 F. Supp. 2d 1206, 1212 (M.D. Ala. 2012). Here, it is undisputed that Plaintiffs were parties to the escrow agreements; the question is whether NAA was a party to the agreement on its own behalf or merely as an agent.

Further, Harbour may have limited its principal-agent relationship with NAA in the servicing contract between the two entities. Where a lender disclaims a principal-agent relationship in the servicing contract, the servicer can be held directly liable for mishandling an escrow account. *See Martorella v. Deutsche Bank Nat'l Tr. Co.*, 161 F. Supp. 3d 1209, 1225 (S.D. Fla. 2015) (allowing breach of contract claim against servicer for mishandling escrow where the loan holder had disclaimed any agency relationship for escrow servicing). When questions of privity arise on a motion to dismiss and the plaintiff has not had the opportunity to review agreements between the alleged principal and agent, dismissal would be "unjust and premature." *Block v. Seneca Mortg. Servicing*, 221 F. Supp. 3d 559, 578 (D.N.J. 2016) (denying motion to dismiss breach of contract claim against a mortgage servicer). "The factual question of what the relationships were between Defendants, and what obligations they incurred, must therefore be resolved on summary judgment or at trial." *Id*.

NAA's arguments about third party beneficiary status are irrelevant.

Plaintiffs did not allege a third party beneficiary claim. They have not had the opportunity to review the servicing contract between NAA and Harbour, and so would have no basis to determine whether there has been a breach of that contract or whether they might be third party beneficiaries of it. That issue is not before the Court.

The escrow contract was clearly breached through the mismanagement of the escrow accounts of these Plaintiffs, failure to make timely payments out of escrow, and improper withholding of their excess escrow funds. Resolving the question of whether NAA was a party to this agreement in its individual capacity is premature at this stage. Plaintiffs have adequately pled a factual basis for this claim against NAA.

**C. Plaintiffs have properly pled an unjust enrichment claim against NAA.**

Under Georgia law, an unjust enrichment claim requires the plaintiff to establish: 1) that plaintiff conferred a benefit on the defendant and 2) that equity requires the defendant to compensate the plaintiff for this benefit. *Chem–Nuclear Sys., Inc. v. Arivec Chems., Inc.,* 978 F.Supp. 1105, 1110 (N. D. Ga. 1997).

If in fact no enforceable contract exists between Plaintiffs and NAA regarding the escrow mismanagement, Plaintiffs can recover based on the alternative theory of unjust enrichment. Defendants improperly withheld Plaintiffs'

escrow funds, and Plaintiffs did not receive a corresponding benefit in return. *See Ga. Tile Distribs., Inc. v. Zumpano Enters., Inc.*, 205 Ga. App. 487, 488 (1992). Moreover, Georgia courts have allowed pleading of a breach of contract claim and unjust enrichment in the alternative. *See Graybill v. Attaway Constr. & Assocs., LLC*, 341 Ga. App. 805, 811 (2017) (upholding pleading in the alternative); *Reynolds v. CB&T*, __ Ga. App. __, 2017 Ga. App. LEXIS 426, at *15 (Sept. 22, 2017) (same); *WESI, LLC v. Compass Envtl., Inc.*, 509 F. Supp. 2d 1353, 1363 (N.D. Ga. 2007) (same).

In their attempt to oversimplify the issue, NAA argues that Plaintiffs' unjust enrichment claim must be dismissed because it has no interest in the real property and thus could not be enriched by Plaintiffs' improvements and other investments. However, Plaintiffs pled their unjust enrichment claim more broadly than this. Plaintiffs alleged that they have spent a significant amount on various expenses, including property taxes, and that NAA should not be allowed to reap a windfall based on these payments. (SAC ¶¶ 446-69.) This satisfies all elements of an unjust enrichment claim.

NAA cites *Scott v. Mamari Corporation* to support their argument that NAA only received an indirect benefit from the Plaintiffs' home repairs and improvements. 242 Ga. App. 455, 458-459 (2000). However, Plaintiffs claim that

NAA was unjustly enriched by retaining unauthorized excess amounts in escrow and failing to use the escrow funds to pay Plaintiffs' property taxes and HOA fees. Plaintiffs have thus pled facts showing that NAA obtained a direct, rather than indirect, benefit from wrongfully holding unauthorized funds in escrow.

To the extent that a loan servicer retains funds that the contract does not permit it to retain, courts have held that such retention results in an unjust benefit. *See Anderson v. Barclays Capital Real Estate, Inc*, 2010 WL 2541807, at *3 (N.D. Ohio June 18, 2010). In *Anderson*, the plaintiff alleged that defendant mortgage servicer was unjustly enriched when it kept portions of the plaintiff's payments and failed to properly apply them to principal, interest, and escrow in the order required by the contract. *Id.* at *1. In their motion to dismiss, the defendant argued that it collected payments on behalf of and for the benefit of the holder of the plaintiff's note, and therefore, the payments could not constitute a benefit conferred on the defendant. *Id.* at *3. The court rejected the servicer's arguments, finding the plaintiff's allegation that money was unaccounted for, or placed in incorrect accounts, created at least a reasonable inference that the defendant retained the money for its own benefit. *Id*. (*citing Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009)).

The *Anderson* case is squarely on all fours with the Plaintiffs' claims herein. Plaintiffs have alleged that NAA collected a monthly escrow payment to pay for

property taxes and HOA fees, but mishandled the servicing of the escrow accounts. (SAC ¶¶ 473-75, 479.) NAA collected excess funds, failed to return all overpaid funds to Plaintiffs, and failed to make timely payments out of the escrow account. (*Id*.) Plaintiffs have alleged facts supporting a reasonable inference that NAA retained at least some of their money for its own benefit. Plaintiffs' unjust enrichment claim against NAA should proceed.

### D. Plaintiffs do not oppose dismissal of the equitable mortgage claims against NAA.

Plaintiffs do not oppose dismissal of the equitable mortgage claims against NAA, given that it does not hold any of their contracts.

## III. Conclusion

For the reasons set forth above, Plaintiffs respectfully request that the Court deny NAA's Partial Motion to Dismiss, except with respect to Plaintiffs' equitable mortgage claims. To the extent the Court finds any claims to be insufficiently pled, Plaintiffs seek leave to amend to repair any pleading deficiencies.

Respectfully submitted this 19th day of October, 2017,

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## CERTIFICATION PURSUANT TO LOCAL RULE 7.1(D)

I hereby certify that the foregoing brief was prepared using Times New Roman 14 point font, in accordance with Local Rule 5.1(C).

/s/ Sarah B. Mancini
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## CERTIFICATE OF SERVICE

I certify that on this date I electronically filed the foregoing Response in Opposition to Harbour Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint using this Court's ECF System, which will automatically send email notification to the following attorneys of record:

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Respectfully submitted this 19th day of October, 2017.

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