

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JULIE COLLIS,

Plaintiff,

v.

RUSHMORE LOAN MANAGEMENT
SERVICES LLC,

Defendant.

Case No. 6:17-cv-02062-JR

ORDER

MCSHANE, Judge:

Magistrate Judge Mustafa T. Kasubhai filed a Findings and Recommendation regarding summary judgement (ECF No. 22) and the matter is now before this Court on Plaintiff's objections. I review *de novo*. *United States v. Bernhardt*, 840 F.2d 1441, 1445 (9th Cir. 1998). Because Plaintiff's claim against a non-lender servicer of a loan falls within the UTPA even though the loan itself does not, I find that the report is incorrect.

BACKGROUND

Plaintiff Julie Collis alleges that Defendant Rushmore Loan Management Services violated Oregon's Unlawful Trade Practices Act ("UTPA") by intentionally neglecting its duties

as her mortgage loan servicer. Pl.'s Compl. ¶ 16, ECF No. 1. Specifically, she alleges that Defendant failed to pay her property taxes as promised, misrepresented that the taxes had been paid, failed to return phone calls, and refused to provide an accounting. Pl.'s Compl. ¶ 4–15. Defendant moved for summary judgment against Plaintiff's claim pursuant to Fed. R. Civ. P. 56, arguing the claim falls outside of the UTPA. Def.'s Mot., ECF No. 12. Magistrate Judge Kasubhai recommends that Defendant's Motion be granted and Plaintiff's claim be dismissed with prejudice. ECF No. 22.

DISCUSSION

One may be liable under the UTPA when, in the course of their business, vocation, or occupation, the person “[e]ngages in any other unfair or deceptive conduct in trade or commerce.” ORS 646.608(1)(u). “Trade and commerce” is defined as “advertising, offering or distributing, whether by sale, rental or otherwise, *any real estate, goods or services*, and include any trade or commerce directly or indirectly affecting the people of this state.” ORS 646.605(8) (emphasis added.) “Real estate, goods or services” means “those that are or may be obtained primarily for personal, family or household purposes, or that are or may be obtained for any purposes as a result of a telephone solicitation, *and includes loans and extensions of credit*, and franchises, distributorships and other similar business opportunities, but does not include insurance.” ORS 646.605(6) (emphasis added).

The UTPA did not apply to loans and extensions of credit until the Oregon legislature amended the statute, effective on March 23, 2010. *See e.g. Lamm v. Amfac Mortg. Corp.*, 44 Or. App. 203, 204-05 (1980) (the UTPA does not apply to “loans and extensions of credit.”); Or. Laws. Spec. Sess. Ch. 94 § 1 (2010). That amendment was not retroactive. Therefore, loans and

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extensions of credit originating before March 23, 2010 are not subject to the UTPA. *Mikityuk v. Northwest Trustee Services, Inc.*, 952 F. Supp. 2d 958, 962 (D. Or. 2013); *Roiland v. Flagstar Bank, FSB*, 989 F. Supp. 2d 1095, 110-08 (D. Or. 2013) (holding that when a claim arises from a loan and deed of trust granted before 2010, a claim on the loan or extension of credit cannot be supported under the Oregon UTPA).

Plaintiff's loan originated in 2003 and was last modified on March 2, 2010. Elliot Decl. ¶ 2, Ex. 1, ECF No. 13; *id.* at ¶ 6, Ex. 5. As such, I agree with the Findings and Recommendation that Plaintiff cannot pursue a claim on the loan or loan modification. *See* Findings and Recommendation 1.

A determination that a plaintiff cannot pursue a claim under the UTPA based on a loan or loan modification, however, does not bar UTPA claims against the servicer of a loan. Allegations against the servicer of a loan by a non-lender are aimed at “those services [that] fall within the UTPA even though the loan itself does not.” *Cullen v. Investment Strategies, Inc.*, 139 Or. App. 119, 127 (1996). In *Cullen* (decided before the 2010 amendment extending UTPA protections to loans and extensions of credit), the Oregon Court of Appeals held that:

[W]here borrowers retain the professional services of a non-lender in connection with a nonbusiness (*i.e.*, personal, family or household purpose) loan, those services fall within the UTPA, even though the loan itself does not. Consequently, a non-lender's material nondisclosures or misrepresentations regarding the character, quality, or cost of such services are actionable under the UTPA.

139 Or. App. 119, 127 (1996).

The court concluded that plaintiff's allegations that “defendant misrepresented or failed to disclose the true cost of its [brokerage] services” were actionable under the UTPA, whereas

allegations pertaining “solely to the loan’s attributes” were not. *Id.* at 129. The *Cullen* inquiry focuses on whether the claim pertains to the loan or loan modification itself.

Here, Plaintiff’s claim does not relate to the loan or loan modification, but to Defendant’s actions—or lack thereof—in servicing the loan. Specifically, Plaintiff alleges that Defendant failed to pay her property taxes as promised, ensured her that it had paid the taxes, failed to return her phone calls, and refused to provide her an accounting. Pl.’s Compl. ¶ 4–15.

I recognize that Defendant here is not the Plaintiff’s retained servicer, as was the case in *Cullen*, but is a mortgage servicer acting as the lender’s agent. This factual difference, however, does not change the essential nature of the service that is being provided by the Defendant. Nor does Defendant cite any authority to suggest its function as a mortgage servicer is different than that found in *Cullen*. See Def.’s Objections 4–6, ECF No. 25. Without distinguishing *Cullen*, the defense simply relies on the repeated mantra that the claims here are based on a loan and loan modification and therefore cannot be subject to the pre-amended UTPA. While I realize that neither side has been able to point to a case that is a direct reproduction of the facts here, *Cullen* is the only Oregon case that distinguishes between the servicer and the lender in the context of the UTPA. At its core, *Cullen* stands for the proposition that claims against the servicing of a loan are actionable under the UTPA even though claims arising out of the loan are not.

As cited by the Plaintiff, a district court in the Eastern District of California, relying in part on *Cullen*, held that the servicing of a loan was subject to the UTPA although the loan itself was not. *Contreras v. Nationstar LLC*, No. 216CV00302MCEEFB, 2017 WL 3438769, at *5 (E.D. Cal. Aug. 10, 2017). Although this opinion involved claims by many plaintiffs in many states and does not thoroughly analyze Oregon’s UTPA, I find it to be persuasive.

CONCLUSION

Magistrate Judge Kasubhai's Findings and Recommendation (ECF No. 22) is rejected.

IT IS SO ORDERED.

DATED this 7th day of February, 2019.

s/ Michael J. McShane
Michael McShane
United States District Judge