IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERRY L. DENTON and CYNTHIA R. DENTON, Plaintiffs, v. SETERUS, INC. and BANK OF AMERICA, N.A. Defendants.	Case No. 18-CV-241-GKF-JFJ

ORDER

This lawsuit in federal court arises out of a $19.66 late fee. Before the court is the Motion to Dismiss First Amended Petition [Doc. 25] of defendant Seterus, Inc. For the reasons set forth below, the motion is granted in part and denied in part.

I. The Allegations

The First Amended Petition [Doc. 23] contains the following factual allegations. In 1998, the plaintiffs, Terry L. Denton and Cynthia R. Denton, purchased real property with a mobile home, which became their primary residence. The purchase was financed by a promissory note and secured by a mortgage.

On or about April 12, 2016, a fire destroyed the mobile home. At the time of the fire, Bank of America, N.A. ("BANA") serviced the mortgage loan. A few days after the fire, the Dentons informed BANA of the fire. A few weeks later, on or about May 2, 2016, BANA sent a payoff statement to the Dentons to process a claim with the Dentons' insurer, Allstate.

One month after the fire, on or about May 12, 2016, BANA transferred servicing of the loan to defendant Seterus, Inc. On or about June 10, 2016, Seterus provided a "Transfer of Servicing Notice." On January 11, 2017, the Dentons provided written authorization to Seterus to

provide a payoff statement directly to Allstate for payoff of the note. Seterus sent a payoff statement dated January 12, 2017, directly to Allstate. In the statement, Seterus claimed a payoff amount due of $41,031.17 good until January 20, 2017, with a $7.17 per diem of interest if payment was received after January 20, 2017. Allstate paid Seterus $41,031.18 in a check dated January 12, 2017.

In a monthly statement dated January 13, 2017, Seterus charged the Dentons for a property inspection. The Dentons allege that any property inspection would simply have confirmed what Seterus already knew—that the structure had been destroyed by fire and that repair of the mobile home was not economically feasible.

In a letter dated January 20, 2017, the day the payoff statement expired, Seterus acknowledged that the Dentons wished to pay off the note with the insurance settlement check. Seterus negotiated the check but did not apply the funds to principal, interest, escrow or any other charge. In a letter dated January 23, 2017, Seterus acknowledged it had received $41,031.18 as payment on the note and demanded payment of an additional $69.82 including interest through January 27, 2017 with an additional $7.17 of interest per day to be added if payment was received after January 27, 2017. The Dentons provided additional written authorization to use the insurance proceeds to pay off the note in a letter dated January 26, 2017.

In a monthly statement dated February 15, 2017, Seterus claimed an outstanding principal balance of $38,044.77 and a past due balance to be paid by March 1, 2017, of $4,465.02. The statement included a threat of additional fees, foreclosure, and loss of property if the loan was not brought current. The statement also reported receipt of "Hazard Claim Funds" on January 19, 2017 in the amount of $41,031.18, which were not applied to the principal, interest, escrow or any other charge. Seterus continued to send monthly statements, which charged interest on the full

principal balance without application of any of the $41,031.18 that Seterus received on January 19, 2017. The statements also included late fees and property inspection expenses.

In a letter dated May 25, 2017, the Dentons, through their counsel at the time, notified Seterus that collection continued including threats of foreclosure despite the note having been paid off in January 2017. In a letter dated June 14, 2017, Seterus acknowledged receipt of the payoff funds on January 19, 2017, and explained that the funds were not applied to the account because it did not receive a "Letter of Intent" from the Dentons. The letter claimed that notice of the need for a letter of intent was provided in a phone call on January 26, 2017, and that the letter of intent was received on February 15, 2017, but Seterus still would not apply the funds to the note as they were insufficient to pay off the note in full. The Dentons and Seterus continued to exchange correspondence during the following months.

The Dentons filed their original petition on March 15, 2018. In response, Seterus moved to dismiss. Thereafter, the Dentons filed the First Amended Petition, thereby mooting the original motion to dismiss. Seterus then filed the instant motion to dismiss.

II. Motion to Dismiss Standard

In considering a motion to dismiss under Rule 12(b)(6), a court must determine whether the plaintiff has stated a claim upon which relief can be granted. A complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The plausibility requirement "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" of the conduct necessary to make out the claim. *Id.* at 556. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662,

678 (2009). The court "must determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Lane v. Simon*, 495 F.3d 1182, 1186 (10th Cir. 2007) (quoting *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007)).

III. Analysis

In the First Amended Petition, the Dentons assert ten causes of action against Seterus: violation of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692, *et seq.* (count I); violation of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1639f (count II); violation of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §§ 2601–17 (count III); interference with contract (count IV); violation of the Oklahoma Consumer Protection Act ("OCPA"), 15 O.S. §§ 751, *et seq.* (count V); violation of Oklahoma's mortgage release requirements statute, 46 O.S. § 15 (count VI); violation of a provision contained in the Uniform Commercial Code ("UCC") that addresses "Tender of Payment" of a negotiable instrument, 12A O.S. § 3-603 (count VII); trespass (count VIII); breach of contract (count IX); and tortious breach of the implied covenant of good faith and fair dealing (count X). The court addresses these causes of action in turn.

A. FDCPA (Count I)

In count I, the Dentons assert a claim against Seterus for violations of the FDCPA. "The elements of a cause of action under the FDCPA are: (1) the plaintiff has been the object of collection activity arising from a consumer debt; (2) the defendant attempting to collect the debt qualifies as a 'debt collector' under the FDCPA; and (3) the defendant has either engaged in an activity prohibited by the FDCPA or has failed to perform a duty required by the FDCPA." *Kirby v. White*, No. 15-CV-034-JHP-TLW, 2016 WL 7495815, at *5 (N.D. Okla. Dec. 30, 2016) (citing *Russey v. Rankin*, 911 F. Supp. 1449, 1453 (D.N.M. 1995)).

In its motion, Seterus does not dispute that the Dentons are consumers and that it is a debt collector, but instead argues that it did not violate any provision of the FDCPA. The Dentons allege that Seterus violated three FDCPA provisions: 15 U.S.C. §§ 1692e(2),1692e(5), and 1692f(1). Section 1692e provides, in relevant part, as follows:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
> . . .
> (2) The false representation of --
> (A) the character, amount, or legal status of any debt[.]
> . . .
> (5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

Section 1692f provides, in relevant part, as follows:

> A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
> (1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

The Dentons allege that Seterus violated section 1692e(2) by misrepresenting the character, amount, and legal status of the debt in statements, correspondence, and payoff quotes after receipt of the funds that it refused to apply. They allege that Seterus violated section 1692e(5) by threatening to take action, including foreclosure and assessment of fees and costs, that could not legally be taken after receipt of the funds that it refused to apply. And they allege that Seterus violated section 1692f(1) by attempting to collect amounts, including interest, fees, and other charges, not authorized by the agreement and not permitted by law.

If the court accepts the factual allegations in the First Amended Petition as true and draws all reasonable inferences in the Dentons' favor, then the conduct of Seterus violated the FDCPA as

alleged. The Dentons plausibly allege that Seterus wrongly refused to apply the funds received from Allstate to the loan balance, repeatedly misrepresented the amount owed by the Dentons, and wrongly continued to charge interest and property inspection fees. In defense of its conduct, Seterus advances three main arguments. As explained below, the court finds none of these arguments persuasive.

1. Late-Fee Argument

First, Seterus argues that, by the time it received Allstate's check on January 19, 2017, the funds of $41,031.18 were insufficient because it had assessed a late fee of $19.66 two days earlier—on January 17, 2017. The court notes that, in light of the circumstances, jurors might view this fee as petty, callous, and hypertechnical, and they might well feel sympathy for the Dentons' Kafkaesque experience following the destruction of their home by fire. But, regardless, the late-fee argument has a more fundamental flaw for purposes of the instant motion. Even if Seterus was entitled to assess a $19.66 late fee on January 17, 2017, this argument does not explain why Seterus refused to apply the insurance proceeds to the loan balance and continued—for months—to charge interest and property inspection fees.

2. Authorization Argument

Second, Seterus argues that it was not obligated to apply the insurance proceeds to the loan balance because it did not receive the Dentons' written authorization to do so until February 13, 2017, after the payoff statement had expired. Among other reasons, this argument fails because it is inconsistent with the factual allegations in the First Amended Petition, which the court must accept as true when evaluating the sufficiency of the pleadings. Paragraph 31 of the First Amended Petition states that, on January 11, 2017, the Dentons provided written authorization to Seterus to provide a payoff statement directly to Allstate for payoff of the note. [Doc. 23, p. 5]. With their

response, the Dentons submitted a purported copy of the written authorization.[1] [Doc. 36-1]. The document appears to contain a fax cover sheet, which is dated January 11, 2017, and includes the following handwritten message signed by the Dentons: "Here is the authorization letter you requested from us to give Allstate claim agent Roy Berg [the] payoff amount so we can be done with Seterus & this mortgage."[2] [Doc. 36-1, p. 3]. The document also appears to contain a handwritten authorization letter addressed to Seterus and signed by the Dentons. In relevant part, the letter states as follows:

> I am writing to give Allstate Roy Berg claim adjuster permission to receive payoff amount from you so they can cut Seterus [a] payoff check and payoff [the] mortgage since we no longer have a home to live in due to fire . . . . Please give him the payoff amount before next Monday.

[Doc. 36-1, p. 2]. Accepting the factual allegations in the First Amended Petition as true and drawing reasonable inferences in favor of the Dentons, the court finds that the Dentons provided Seterus with written authorization to apply the insurance proceeds to the loan no later than January 11, 2017.

3. Repair Argument

Third, Seterus argues that it was not obligated to apply the insurance proceeds to the loan balance under the terms of the mortgage because it never determined that restoration or repair was not economically feasible. With its motion, Seterus submitted several exhibits, including copies of the publicly recorded mortgage, dated August 28, 1998 [Doc. 29-1], and the note, dated August

[1] The court can consider this document without converting Seterus's motion to a motion for summary judgment because the First Amended Petition expressly refers to and relies upon it, and Seterus does not dispute its authenticity. *See Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1253–54 (10th Cir. 2005) (recognizing that "a document central to the plaintiff's claim and referred to in the complaint may be considered in resolving a motion to dismiss, at least where the document's authenticity is not in dispute").

[2] The court has modified the capitalization of the quoted language for readability.

28, 1988 [Doc. 29-2].[3] The note provides, in relevant part, that the borrower has a right to "make a full prepayment or partial prepayments without paying a prepayment charge" and that the note holder shall use all prepayments to reduce the amount of principal. [Doc. 29-2, p. 2 § 4]. Section 5 of the mortgage provides, in relevant part, as follows:

> Unless Lender and Borrower otherwise agree in writing, insurance proceeds shall be applied to restoration or repair of the Property damaged, if the restoration or repair is economically feasible and Lender's security is not lessened. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with any excess paid to Borrower.

[Doc. 29-1, p. 4].

Seterus argues that "the plain and unambiguous language of the Mortgage grants Seterus the exclusive authority to determine whether repairs are economically feasible." [Doc. 44, p. 2]. Seterus therefore contends that it had no obligation to apply the insurance proceeds to the loan balance because the Dentons cannot allege "that Seterus determined repair was not economically feasible." [*Id.*]. The court finds this argument unpersuasive for multiple reasons.

First, the relevant contractual language does not unambiguously support Seterus's interpretation. Section 5 does not expressly grant Seterus the unilateral right to decide whether restoration or repair is economically feasible. Instead, section 5 states that insurance proceeds *shall* be applied to the sums secured by the security instrument *if* restoration or repair is not economically feasible. [Doc. 29-1, p. 4]. The First Amended Petition alleges that restoration or repair was not economically feasible, satisfying the relevant condition. [Doc. 23, p. 5 ¶ 34].

[3] The court can consider the mortgage and the note without converting the motion to a motion for summary judgment because the First Amended Petition expressly refers to and relies upon the documents, and the Dentons do not dispute their authenticity. The court can also consider the mortgage because it is publicly available in the land records for Creek County, Oklahoma. *See Satterfield v. City of Tulsa*, No. 06-CV-0501-CVE-PJC, 2008 WL 111981, at *2 n.1 (N.D. Okla. Jan. 8, 2008) (holding that court could take judicial notice of land deeds because they were public records).

Moreover, Seterus appears to misconstrue the purpose of the relevant contractual language. This confusion is illustrated by contrasting this case with a case cited by Seterus: *Avila v. CitiMortgage, Inc.*, 801 F.3d 777 (7th Cir. 2015). In *Avila*, a borrower alleged that a lender "violated a fiduciary duty and breached its mortgage agreement with him by using the payout from his homeowner's insurance policy to pay down his loan rather than repair his damaged house." *Id.* at 780. Thus, the situation in *Avila* was in some respects the opposite of the situation here: the borrower wanted to use insurance proceeds for *repairs*—not to pay down his loan. As part of its decision, the Seventh Circuit reviewed and discussed contractual language similar to the language at issue here. *Id.* at 784. The court explained that, without such language, the borrower "could use the insurance proceeds to repair his house or pay down his loan at his discretion." *Id.*

According to the *Avila* court, such language enables the lender to protect its interests by shifting "discretion" to the lender to ensure that repairs would be economically feasible and that its security would not be lessened. *Id.* Although such language may protect the lender's interests when the borrowers wish to use insurance proceeds *for repairs*, it does not give the loan servicer unfettered discretion to preclude borrowers from using insurance proceeds *to pay down the loan*—especially where the borrowers have expressed a clear wish to do so in writing and the insurance proceeds are sufficient or nearly sufficient to pay off the entire loan balance. Section 5 of the mortgage cannot reasonably be read to mean that the borrowers have no recourse if the loan servicer receives and retains insurance proceeds but refuses to apply them to pay down the loan.

Moreover, even if section 5 granted Seterus some discretion to determine whether restoration or repair was economically feasible, Seterus was obligated to exercise that discretion in accordance with the duty of good faith and fair dealing. *See Wathor v. Mut. Assur. Adm'rs, Inc.*, 87 P.3d 559, 561 (Okla. 2004) ("Every contract in Oklahoma contains an implied duty of good

faith and fair dealing."). The First Amended Petition plausibly alleges that Seterus failed to do so. Seterus has failed to offer any adequate explanation for its continued refusal to apply the insurance proceeds to the loan balance. According to the First Amended Petition, any property inspection—for which Seterus repeatedly charged the Dentons—would have confirmed that the structure had been destroyed by fire and that repair was not economically feasible. [Doc. 23, p. 5 ¶ 34]. The court finds and concludes that the Dentons have alleged sufficient facts to state a claim for relief under the FDCPA that is plausible on its face.

B. TILA (Count II)

In count II, the Dentons allege that Seterus failed to timely apply the insurance proceeds to their account in violation of TILA, 15 U.S.C. § 1639f, and Regulation Z, 12 C.F.R. § 1026.36(c)(1)(i). On its face, the text of section 1639f does not display an intent by Congress to create a private remedy against loan servicers. *Cf. Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy."). Furthermore, TILA's civil damages provision, 15 U.S.C. § 1640(a), "only provides for *creditor* liability—not servicer liability." *Lucien v. Fed. Nat. Mortg. Ass'n*, 21 F. Supp. 3d 1379, 1383 (S.D. Fla. 2014). It appears that every or almost every federal court to decide this issue has held that there is no private right of action against loan servicers under TILA. *See, e.g., id.* ("Courts applying TILA uniformly hold that there is no servicer liability under TILA."); *Meaney v. Nationstar Mortg.*, No. CV TDC-16-2959, 2018 WL 1014927, at *8 (D. Md. Feb. 21, 2018) ("TILA creates a private right of action against only creditors, not loan servicers."); *Kim v. Shellpoint Partners, LLC*, No. 15CV611-LAB (BLM), 2016 WL 1241541, at *6 (S.D. Cal. Mar. 30, 2016) (same); *Henson v. Bank of Am.*, 935 F. Supp. 2d 1128, 1147 (D. Colo. 2013) (dismissing TILA claims against

servicer). Because TILA does not provide for a private right of action against servicers, the Dentons' TILA claim against Seterus must be dismissed.

C. RESPA (Count III)

In count III, the Dentons assert a claim against Seterus for violation of RESPA, which "is a consumer protection statute enacted to regulate real estate settlement processes." *Berneike v. CitiMortgage, Inc.*, 708 F.3d 1141, 1145 (10th Cir. 2013). Under RESPA, a mortgage servicer may be liable to a borrower if it fails to timely and adequately respond to a qualified written request ("QWR"). *See* 12 U.S.C. § 2605(e)–(f). A QWR is a "written correspondence, other than notice on a payment coupon," that includes the name and account of the borrower and the reasons for the borrower's belief that the account is in error or adequate details about other information sought. *Id.* § 2605(e)(1)(B). Within thirty days of receipt of a QWR, a loan servicer generally must investigate and make appropriate corrections to the borrower's account, provide a written notification of any correction or an explanation why no correction was necessary, and provide a contact number for a representative. *Berneike*, 708 F.3d at 1145; 12 U.S.C. § 2605(e)(2).

The regulations implementing RESPA further provide that a servicer generally must respond to a notice of error by either (A) correcting the error errors identified by the borrower or (B) conducting "a reasonable investigation and providing the borrower with a written notification that includes a statement that the servicer has determined that no error occurred, a statement of the reason or reasons for this determination," and certain other information. 12 C.F.R. § 1024.35(e)(1)(i).

The Dentons allege they sent QWRs to Seterus on May 25, 2017; June 20, 2017; August 8, 2017; October 10, 2017; and December 6, 2017.[4] [Doc. 23, pp. 12–16 ¶¶ 66–99]. They further allege that Seterus violated RESPA by failing to perform a reasonable investigation of the errors identified in the letters and failing to correct the errors. For example, on May 25, 2017, the Dentons sent a letter notifying Seterus that collection continued despite the note having been paid off in January of 2017. [Doc. 23, p. 12 ¶ 66]. In its response letter, Seterus acknowledged receipt of the insurance proceeds on January 19, 2017, and explained that the funds were not applied to the account because it did not receive a "Letter of Intent" from the Dentons until February 15, 2017, and because the funds were insufficient to pay off the note in full. [*Id.* ¶ 69]. In its responses to subsequent QWRs, Seterus essentially repeated the same explanation.

These allegations—in conjunction with the other allegations in the First Amended Petition—support a reasonable inference that Seterus failed to conduct a reasonable investigation, as the responses from Seterus do not adequately explain why Seterus continually refused to apply the insurance proceeds to the loan balance even after the Dentons provided authorization to do so. Thus, the Dentons plausibly allege that Seterus failed to comply with the requirements of RESPA and its implementing regulations.

Seterus also argues that the Dentons fail to adequately allege damages as to their RESPA claim. Under RESPA's damages provision, individuals are entitled to "any actual damages" resulting from a failure to comply with RESPA, as well as "any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this

[4] The Dentons allege that Seterus failed to acknowledge or respond to their October 10, 2017 letter. [*Id.* ¶ 94–97]. In its opening brief, Seterus refers to an acknowledgement and response attached as "Ex. E" to its motion, but no such exhibit was submitted with its motion. [Doc. 26, p. 15]. Thus, for present purposes, the court must accept as true the Dentons' allegation that Seterus failed to acknowledge or respond to their October 10, 2017 letter, as required by RESPA. Moreover, were the court to consider Seterus's exhibit, it is likely the court would be bound to convert the present motion to one for summary judgment and permit additional supplementation of evidence.

section, in an amount not to exceed $2,000." 12 U.S.C. § 2605(f)(1). In the First Amended Petition, the Dentons allege the Seterus's RESPA violations caused them harm, "including out of pocket expenses, assessment of fees and costs not owed, and emotional distress," and the Dentons seek "actual damages, including emotional distress, and statutory damages" for the alleged violations. [Doc. 23, p. 20 ¶¶ 123–24]. More generally, they allege that Seterus's conduct caused emotional distress including anger, sleeplessness, feelings of helplessness, hopelessness, and a strain on their relationship. [Doc. 23, p. 17 ¶¶ 101–02].

Seterus argues that the Dentons' alleged damages could not have stemmed from its supposed failure to adequately respond to their letters because the alleged damages "were necessarily triggered by [the Dentons'] failure to make the required mortgage payments." [Doc. 26, p. 15]. This argument presupposes that Seterus properly refused to apply the insurance proceeds to the loan balance. As discussed above, the Dentons plausibly allege that Seterus's refusal was improper and that Seterus failed to comply with RESPA's requirements. The allegations in the First Amended Petition support a reasonable inference that Seterus's failure to conduct a reasonable investigation in response to the Dentons QWRs caused, at least in part, the Dentons' alleged damages.[5] Therefore, the Dentons have stated a claim for relief under RESPA that is plausible on its face.

D. Contractual Interference (Count IV)

In count IV, the Dentons assert a claim against Seterus for contractual interference. They allege that Seterus "interfered with, frustrated and prevented the Dentons performance under the

[5] It appears courts are divided as to whether borrowers can recover damages for emotional distress as "actual damages" under RESPA. *See Ogden v. PNC Bank*, No. 13-CV-01620-MSK-MJW, 2014 WL 4065617, at *3 n.4 (D. Colo. Aug. 15, 2014) (comparing cases), *aff'd*, 599 F. App'x 331 (10th Cir. 2015). The court does not rule on this issue now because the parties have not raised it.

contract by interfering with [their] efforts to pay off the note and mortgage owed to Fannie Mae." [Doc. 23 ¶ 130].

Oklahoma law recognizes a claim for tortious interference with a contractual relationship if the plaintiff can prove "(1) the interference was with an existing contractual or business right; (2) such interference was malicious and wrongful; (3) the interference was neither justified, privileged nor excusable; and (4) the interference proximately caused damage." *Wilspec Techs., Inc. v. DunAn Holding Grp., Co.*, 204 P.3d 69, 74 (Okla. 2009). Additionally, "the claim is viable only if the interferor is not a party to the contract or business relationship." *Id.* As a corollary, "an agent or employee of a principal cannot be held liable for interfering with a contract between the principal and a third party, unless the agent was acting in bad faith and against the interests of the principal." *Newport/Granada, L.L.C. v. Wachovia Bank*, No. CIV. 09-0116-HE, 2009 WL 3698126, at *2 (W.D. Okla. Nov. 2, 2009) (internal citation and quotation marks omitted).

Seterus argues that the Dentons fail to state a claim for contractual interference for three reasons: (1) the full amount due was not tendered; (2) the alleged damages were not caused by Seterus but by the Dentons' conduct; and (3) Seterus was acting in the interests of its principal, Fannie Mae. The first argument is unpersuasive because, as discussed above, even if the insurance proceeds were $19.66 short of the total amount due, the Dentons plausibly allege that Seterus improperly refused to apply the proceeds to the loan balance. Likewise, the second argument is unpersuasive because it presupposes that Seterus was justified in refusing to apply the insurance proceeds to the loan balance.

The third argument is unpersuasive because the allegations in the First Amended Petition support a reasonable inference that Seterus acted in bad faith and against the interests of Fannie Mae by holding $41,031.18 owed to Fannie Mae and wrongfully refusing to apply it as payment

since January 19, 2017. *See Martin v. Johnson*, 975 P.2d 889, 896–97 (Okla. 1998) ("If an [agent] acts in bad faith and contrary to the interests of the [principal] in tampering with a third party's contract with the [principal] we can divine no reason that the [agent] should be exempt from a tort claim for interference with contract."). The Dentons have therefore stated a claim for relief for contractual interference that is plausible on its face.

E. Violation of the OCPA (Count V)

In count V, the Dentons assert a claim against Seterus for violation of the OCPA. They allege that Seterus's misrepresentations, omissions and other conduct have deceived or could reasonably be expected to deceive or mislead the Dentons. [Doc. 23, p. 22 ¶ 141].

To state a claim under the OCPA, a plaintiff must show (1) that the defendant engaged in an unlawful practice as defined under 15 O.S. § 753; (2) that the challenged practice occurred in the course of defendant's business; (3) that the plaintiff, as a consumer, suffered an injury in fact; and (4) that the challenged practice caused the plaintiff's injury. *Patterson v. Beall*, 19 P.3d 839, 846 (Okla. 2000). Section 753 identifies thirty-two different "unlawful practices." *See* 15 O.S. § 753.

Neither the First Amended Petition nor the Dentons' response brief identifies which subsection(s) of section 753 Seterus allegedly violated. Based on the wording of the alleged violation in the First Amended Petition, it appears the Dentons intend to assert a violation under subsection twenty, which is the "catchall provision." *Patterson*, 19 P.3d at 846. That subsection declares unlawful any "unfair or deceptive trade practice as defined in Section 752 of this title." 15 O.S. § 753(20). The OCPA defines a deceptive trade practice as follows:

> "Deceptive trade practice" means a misrepresentation, omission or other practice that has deceived or could reasonably be expected to deceive or mislead a person to the detriment of that person. Such a practice may occur before, during or after a consumer transaction is entered into and may be written or oral[.]

15 O.S. § 752(13). And the OCPA defines a consumer transaction as follows:

> "Consumer transaction" means the advertising, offering for sale or purchase, sale, purchase, or distribution of any services or any property, tangible or intangible, real, personal, or mixed, or any other article, commodity, or thing of value wherever located, for purposes that are personal, household, or business oriented[.]

15 O.S. § 752(2).

Based on the statutory text, it is clear that "the OCPA is intended to apply to consumer transactions." *Melvin v. Credit Collections, Inc.*, No. CIV.00-CV-211-T, 2001 WL 34047943, at *3 (W.D. Okla. Apr. 5, 2001); *see also* 15 O.S. § 761.1(A) (giving a private right of action only to "an aggrieved consumer"). Accordingly, numerous courts have held that the OCPA generally does not apply to debt collection activities performed by persons or entities uninvolved in the underlying consumer transaction.[6] *See, e.g.*, *West v. Ditech Fin. LLC*, No. CIV-16-213-M, 2016 WL 3200296, at *3 (W.D. Okla. June 8, 2016); *Walkabout v. Midland Funding LLC*, No. CIV-14-939-M, 2015 WL 2345308, at *3 (W.D. Okla. May 14, 2015); *White v. CitiMortgage*, No. CIV-12-531-R, 2012 WL 13024694, at *2 (W.D. Okla. June 15, 2012); *Swanson v. Sharpiro & Cedja, LLP*, No. CIV-08-0508-HE, 2010 WL 3075277, at *1 n.7 (W.D. Okla. Aug. 5, 2010); *Hollis v. Stephen Bruce & Assocs.*, No. CIV-07-131-C, 2007 WL 4287623, at *4 (W.D. Okla. Dec. 5, 2007); *Bynum v. Cavalry Portfolio Servs., L.L.C.*, No. 04-CV-0515-CVE-PJC, 2006 U.S. Dist. LEXIS 97305, *9 (N.D. Okla. Jan. 20, 2006); *Oklahoma ex rel. Bd. of Regents of Univ. of Oklahoma v. Greer*, 205 F. Supp. 2d 1273, 1274 (W.D. Okla. 2001); *Melvin*, 2001 WL 34047943, at *3.

Here, the Dentons allege that Seterus became their mortgage loan servicer when BANA transferred its servicing rights to Seterus in 2016—nearly two decades after formation of the

[6] Section 753 of the OCPA was amended on May 12, 2012, to include paragraphs 31 and 32, which apply to debt collectors in specific circumstances not relevant here. *See* 15 O.S. § 753(31)–(32); *Walkabout v. Midland Funding LLC*, No. CIV-14-939-M, 2015 WL 2345308, at *3 (W.D. Okla. May 14, 2015).

mortgage loan agreement and the underlying purchase of real property. They further allege that Seterus acted as a debt collector. They do not allege that Seterus ever owned the note or that it had any involvement in the original loan transaction. In other words, the Dentons do not allege that they engaged in any consumer transaction with Seterus, which merely performed collection activities in connection with a pre-existing mortgage loan.[7] Indeed, the Dentons expressly assert that they "did not choose to do business with Seterus." [Doc. 36, p. 30]. Consequently, the First Amended Petition fails to state a claim against Seterus under the OCPA.

Furthermore, the OCPA does not apply to "[a]ctions or transactions regulated under laws administered by the Corporation Commission or any other regulatory body or officer acting under statutory authority of this state or the United States." 15 O.S. § 754(2). Here, the Dentons assert that the actions of Seterus were regulated under federal law, including the FDCPA, TILA, and RESPA, and there is no dispute that federal law regulates the servicing activities at issue. Therefore, the Dentons' claim against Seterus under the OCPA must be dismissed.[8] *See Voorhis v. BOK Fin. Corp.*, No. 13-CV-197-CVE-TLW, 2013 WL 5937395, at *10 (N.D. Okla. Nov. 4, 2013) (holding that OCPA did not apply to transaction regulated under RESPA and TILA).

F. Refusal to Release Mortgage (Count VI)

In count VI, the Dentons allege that Seterus failed to release the mortgage as required by 46 O.S. § 15. Seterus argues, and the Dentons do not dispute, that the First Amended Petition fails to state a claim against Seterus pursuant to 46 O.S. § 15 because the Dentons fail to allege that

[7] This court's decision in *Horton v. Bank of Am., N.A.*, 189 F. Supp. 3d 1286 (N.D. Okla. 2016), is distinguishable. In *Horton*, the court held that the OCPA is applicable to consumer loan transactions and allowed the plaintiffs' OCPA claim to go forward against the defendant bank, which held the plaintiffs' mortgage loan. *Id.* at 1293–94. Here, the Dentons do not allege that Seterus lent money, is in the business of mortgage lending, or ever held their mortgage.

[8] Although Seterus cited the exemption under section 754(2) for the first time in its reply, the court has considered its exemption argument because Seterus argued generally in its opening brief that "the OCPA does not even apply here," and plaintiffs' counsel was aware of the exemption issue. [Doc. 26, p. 17; Doc. 36, p. 23; Doc. 35, p. 11].

Seterus was the holder of the mortgage. Instead, the Dentons allege that Seterus was the servicer and that Fannie Mae owned the note and mortgage. Accordingly, the Dentons' claim against Seterus under 46 O.S. § 15 must be dismissed.[9]

G. UCC (Count VII)

In count VII, the Dentons assert a claim against Seterus for violation of Oklahoma's UCC. In particular, they allege that Seterus violated 12A O.S. § 3-603 by rejecting lawfully tendered payments. Seterus argues that the Dentons fail to state a claim under 12A O.S. § 3-603 for two reasons.

First, Seterus argues that the Dentons failed to tender the full amount due. But the Dentons allege that the amount tendered was in excess of the amount actually required to pay off the loan. [Doc. 23, p. 5 ¶ 33]. Moreover, even if the amount tendered was not sufficient to pay the full amount payable under the mortgage, the Dentons plausibly allege that they were entitled to discharge of their obligation "to the extent of the amount of the tender," as well as discharge of their obligation "to pay interest after the due date on the amount tendered." *See* 12A O.S. § 3-603(b)–(c).

Second, Seterus argues that it had a good-faith basis for holding the insurance proceeds in restricted escrow. But, as discussed above, the allegations in the First Amended Petition support a reasonable inference that Seterus did not act in good faith when it continually refused to apply the insurance proceeds to the loan. Therefore, Seterus's motion to dismiss must be denied as to the Dentons' UCC claim.

[9] In their response, the Dentons request leave to amend their pleading to add the note holder, Fannie Mae, as a new defendant. Such requests should be made by separate motion. *See* LCvR7.2(e) ("A response to a motion may not also include a motion or a cross-motion made by the responding party.").

H. Trespass (Count VIII)

In count VIII, the Dentons assert a claim against Seterus for trespass. They allege that Seterus repeatedly caused its agents to enter their property and inspect their home; that this entry was done without right or lawful authority; and that this trespass caused them harm, "including the loss of tranquility and peace of their home, fear, and anxiety." [Doc. 23, p. 24 ¶¶ 156–61].

In its motion, Seterus advances two arguments regarding the trespass claim. First, Seterus argues that the claim fails because the Dentons consented to the alleged property inspections. Section 9 of the mortgage provides as follows: "Lender or its agent may make *reasonable* entries upon and inspections of the Property. Lender shall give Borrower notice at the time of or prior to an inspection specifying *reasonable cause* for the inspection." [Doc. 29-1, p. 4] (emphasis added). The Dentons plausibly contend that repeatedly charging $85.00 for an appraisal of a burned out property securing a $19.66 late-fee balance is not a reasonable entry or inspection. Thus, the court finds Seterus's first argument unpersuasive.

Second, Seterus argues that the trespass claim fails because the Dentons do not allege any damage to property. Seterus cites *Douthit v. Scott*, 155 P.2d 538, 540 (Okla. 1945), in which the Oklahoma Supreme Court indicated that the plaintiffs had the burden of proving that damage was done to their property as part of their trespass claim. Seterus interprets *Douthit* to stand for the proposition that property damage is an essential element of any trespass claim, but the decision may be reasonably interpreted to stand for the more modest proposition that a plaintiff bears the burden of proof as to any alleged property damage. The decision provides no reasoning as to this issue and Seterus has not cited—and the court has not located—any subsequent decision citing *Douthit* for the claimed proposition. More recent decisions by the Oklahoma Supreme Court discussing trespass claims make no reference to property damage as an essential element of the tort. *See, e.g., Williamson v. Fowler Toyota, Inc.*, 956 P.2d 858, 862 (Okla. 1998) ("Trespass

involves an actual physical invasion of the real estate of another without the permission of the person lawfully entitled to possession."). In discussing a trespass claim, the Oklahoma Court of Appeals has quoted the Restatement (Second) of Torts, § 158, which provides, "One is subject to liability to another for trespass, *irrespective of whether he thereby causes harm to any legally protected interest of the other*, if he intentionally . . . enters land in the possession of the other, or causes a thing or a third person to do so . . . ." *Angier v. Mathews Expl. Corp.*, 905 P.2d 826, 829 (1995). And the United States District Court for the Western District of Oklahoma recently held that, under Oklahoma law, "actual damages are not necessary to support a claim for trespass to property." *Bynum v. State Farm Fire & Cas. Co.*, No. CIV-18-540-D, 2018 WL 3769871, at *4 (W.D. Okla. Aug. 9, 2018). The court concludes that property damage is not an essential element of a trespass claim under Oklahoma law. Therefore, the Dentons have stated a trespass claim that is plausible on its face.

I. Breach of Contract (Count IX)

In count IX, the Dentons assert a claim against Seterus for breach of contract. They allege that Seterus, as either a servicer or a subservicer and as an agent of the note holder, "is subject to the terms of the note and mortgage."[10] [Doc. 23, p. 25 ¶ 163]. They further allege that Seterus breached the terms of the note and mortgage in three ways: (1) "by failing to properly apply insurance proceeds to payoff the note after notice that repair and restoration was not economically feasible, in light of the loan terms requiring proceeds to be applied to pay off the loan in such circumstances," (2) "by holding funds and not applying the payments as required by the note and

[10] Several courts have concluded that "loan servicers are not in privity of contract with mortgagors where the servicers did not sign a contract with the mortgagors or expressly assume liability" *Mazzei v. Money Store*, 308 F.R.D. 92, 109 (S.D.N.Y. 2015) (collecting cases), *aff'd*, 829 F.3d 260 (2d Cir. 2016); *see also Pickett v. Ditech Fin., LLC*, 322 F. Supp. 3d 287, 293 (D.R.I. 2018) ("As a general principle, a mortgage servicer is not a party to a mortgage contract."); *Boedicker v. Rushmore Loan Mgmt. Servs., LLC*, No. 2:16-CV-02798-JTM, 2017 WL 1408158, at *4 (D. Kan. Apr. 20, 2017) (plaintiff failed to allege a plausible claim for breach of contract against mortgage loan servicer). But the court does not rule on this issue now because the parties have not raised it.

mortgage including applying prepayment to principal," and (3) "by requiring additional terms and conditions not provided for in the note or mortgage before applying insurance proceeds to pay off the note." [Doc. 23, p. 25 ¶¶ 166–68].

Seterus argues that the Dentons fail to state a claim for breach of contract for three reasons: (1) Seterus did not receive sufficient funds to satisfy the amount due on January 19, 2017, or any time thereafter; (2) Seterus did not determine whether repair was economically feasible under section 5 of the mortgage; and (3) the alleged damages were not caused by Seterus's conduct, but instead were the result of the Dentons' failure to make the required payments. For the reasons discussed above, none of these arguments are persuasive. Therefore, Seterus's motion to dismiss must be denied as to the Dentons' claim for breach of contract.

J. Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing (Count X)

In count X, the Dentons assert a claim against Seterus for tortious breach of the implied covenant of good faith and fair dealing. They allege that "Seterus tortiously breached the terms of the note by failing to act in good faith and [fair] dealing in repeatedly failing to apply payments . . . despite repeated notice of the destruction of the structure and by creating a pretense for refusal to apply the payoff through additional non-contractual obligations being forced upon the Dentons." [Doc. 23, p. 26 ¶ 173]. They further allege that "Seterus engaged in these breaches with gross recklessness and/or wanton negligence." [*Id.* ¶ 175].

Oklahoma courts recognize that, under certain limited circumstances, "[g]ross recklessness or wanton negligence on behalf of a party to a contract may call for an application of the theory of tortious breach of contract." *Rodgers v. Tecumseh Bank*, 756 P.2d 1223, 1227 (Okla. 1988); *see also Beshara v. S. Nat. Bank*, 928 P.2d 280, 291 (Okla. 1996) ("When the factual situation warrants, an action for a breach of contract may also give rise to a tort action for a breach of the implied covenant of good faith and fair dealing."). The allegations in this case share some similarities with

those in *Beshara*. In that case, the Oklahoma Supreme Court overturned the dismissal of a claim for tortious breach of contract where a depositor alleged that his bank's actions in withholding the funds in his account were "intentional, malicious, and in reckless and wanton disregard." *Id.* at 288.

In viewing all of the factual allegations in the First Amended Petition, and drawing reasonable inferences therefrom, the court finds that the Dentons have plausibly alleged that Seterus breached the covenant of good faith and fair dealing with gross recklessness and wanton negligence. At this stage of the litigation, the Dentons should be "allowed the opportunity to proceed on [their] allegations for tortious breach of the duty of good faith and fair dealing." *Beshara*, 928 P.2d at 288.

IV. Conclusion

WHEREFORE, Seterus's Motion to Dismiss [Doc. 25] is granted in part and denied in part. The motion is granted as to plaintiffs' claims against Seterus in count II (TILA), count V (OCPA), and count VI (46 O.S. § 15) of the First Amended Petition. The motion is otherwise denied.

IT IS SO ORDERED this 14th day of March, 2019.

GREGORY K. FRIZZELL
UNITED STATES DISTRICT JUDGE