No. 13-56084

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICARDO GOMEZ,

Plaintiff-Appellant

v.

QUICKEN LOANS, INC.,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT AND URGING REVERSAL

JOCELYN SAMUELS
Acting Assistant Attorney General

DENNIS J. DIMSEY
TERESA KWONG
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-4757

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STATEMENT OF THE ISSUE

The United States will address the following issue:

Whether the Fair Housing Act prohibits a lender from requiring a mortgage loan applicant who receives Social Security Disability Insurance (SSDI) to provide medical documentation concerning the nature and extent of his disability to establish that his SSDI income will continue, if that lender does not require applicants whose income is not disability-based to provide documentation that their income will continue.

INTEREST OF THE UNITED STATES

The United States has a significant interest in this appeal, which involves, *inter alia*, an important issue regarding the standards for proving unlawful disparate treatment on the basis of disability under the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq*. The United States Department of Justice and the United States Department of Housing and Urban Development (HUD) share enforcement authority under the FHA. 42 U.S.C. 3610, 3612, 3614. Pursuant to that enforcement authority, the United States filed a Statement of Interest in this matter in district court. See 2 ER 136 (United States Of America's Statement Of Interest In Opposition To Quicken Loans, Inc.'s Motion To Dismiss).[1]

In addition, the United States has frequently participated as amicus curiae in this Court in cases involving the proper interpretation of the FHA. See, *e.g.*, *Pacific Shores Props., LLC* v. *City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013); *Intermountain Fair Hous. Council* v. *Boise Rescue Mission Ministries*, 657 F.3d 988 (9th Cir. 2011) (brief submitted in response to this Court's invitation for HUD's views); *Balvage* v. *Ryderwood Improvement & Serv. Ass'n, Inc.*, 642 F.3d 765 (9th Cir. 2011) (brief submitted in response to this Court's invitation for HUD's views).

[1] "1 ER" refers to volume one of appellant's Excerpts of Record. "2 ER" refers to volume two of the Excerpts of Record.

STATEMENT OF THE CASE

1. Plaintiff-appellant Ricardo Gomez is an individual with a disability under the FHA, 42 U.S.C. 3602(h), and has received SSDI benefits since 1990 because of his disability. 2 ER 204. Gomez has a mortgage with defendant-appellee Quicken Loans, Inc., a non-bank lender that provides real estate-related loans. Gomez's loan is part of Quicken's "rate drop program," under which Quicken contacts its borrowers and offers to refinance their loans if interest rates drop. 1 ER 5.

In February 2010, Gomez applied to Quicken to refinance his mortgage. As part of the loan application, Quicken required Gomez to provide medical proof of his disability to establish that his SSDI income would continue. Gomez objected that the request violated his privacy, but ultimately provided Quicken with a doctor's letter concerning his disability, dated February 24, 2010, after Quicken refused to approve his loans without such documentation. Quicken approved Gomez's loan on March 23, 2010. 2 ER 207.

Subsequently, Quicken invited Gomez to refinance his loan at a lower rate three times between July 2010 and July 2012. When it approved Gomez's loan application on August 20, 2010, Quicken acknowledged that he had previously complied with its request for documentation of his disability. When Gomez applied to refinance in 2011, Quicken again requested information concerning his disability. After Gomez provided a copy of the February 24, 2010, letter from his

doctor, Quicken approved his loan application on September 16, 2011. In August 2012, Quicken again invited Gomez to refinance his loan at a lower rate and requested that he submit information concerning his disability. Gomez objected. When Gomez submitted his February 24, 2010, doctor's letter, Quicken requested that he provide updated documentation of his disability. Only after Gomez submitted a new letter regarding his disability from his doctor, dated July 25, 2012, did Quicken approve his loan application. 2 ER 207-209.

2. On December 6, 2012, Gomez commenced this action against Quicken, alleging that Quicken discriminated against him based on his disability by requiring documentation of his disability as a requirement of his loan applications, in violation of the FHA, Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691 *et seq.*, and state law. 1 ER 4. Gomez filed a First Amended Complaint on February 25, 2013. 2 ER 203-212. He relied upon both disparate treatment and disparate impact theories of liability. 1 ER 5-6.

On May 1, 2013, the district court granted Quicken's motion to dismiss the First Amended Complaint for failure to state a claim. 1 ER 4-6. With respect to Gomez's disparate treatment claims, the district court stated that he needed to either allege (1) "facts demonstrating that the defendant's actions were 'more likely than not' based on discriminatory intent" or (2) "facts offering direct evidence of intentional discrimination." 1 ER 5-6 (citing *McGinest* v. *GTE Serv.*

Corp., 360 F.3d 1103, 1122-1123 (9th Cir. 2004)). The court held that Gomez failed to allege sufficient facts to support finding either discriminatory intent or direct evidence of disparate treatment. 1 ER 6. The court concluded that an exemption in ECOA, 15 U.S.C. 1691(b)(2), allows Quicken to request "information related to the source of current or future income" to determine Gomez's creditworthiness; therefore, in the court's view, Quicken demonstrated that it had a legitimate, non-discriminatory reason to require proof of Gomez's "current and future disability." 1 ER 6.

As for Gomez's disparate impact claims, the district court stated he must allege that "(1) Defendant had a specific and clearly delineated policy that was neutral in direction, (2) Defendant's lending patterns had a disparate impact on disabled persons, and (3) there was a causal connection between the specific challenged policy and the alleged disparate impact." 1 ER 6 (citing *Paige* v. *California*, 291 F.3d 1141, 1144-1145 (9th Cir. 2002), cert. denied, 537 U.S. 1189 (2003)). The court held that Gomez "fail[ed] to allege any facts indicating that Defendant had a facially-neutral policy that caused Defendant to engage in lending patterns that had a disparate impact on a disabled person." 1 ER 6.

On May 15, 2013, two weeks after the district court dismissed his First Amended Complaint, Gomez filed a motion to reopen the case pursuant to Federal Rules of Civil Procedure 59(e) and 60(b), and for leave to file a Second Amended

Complaint. 2 ER 76-84. The Second Amended Complaint contained additional allegations, such as "Quicken's policy of imposing special terms and conditions for loan qualification on loan applicants with disabilities receiving disability income benefits * * * applies, by its terms, only to persons with disabilities and therefore is facially discriminatory with respect to persons with disabilities." 2 ER 93 (Second Amended Complaint ¶ 29). On June 17, 2013, the district court denied Gomez's motion, based upon its previous holding that Quicken "had a legitimate non-discriminatory reason for requesting medical proof of Plaintiff's disability – the need to evaluate Plaintiff's creditworthiness." 1 ER 3.

SUMMARY OF THE ARGUMENT

The plain language of the Fair Housing Act and its implementing regulations prohibit lenders from imposing different terms or conditions for the availability of real estate-related loans because of the loan applicant's disability. Here, Gomez alleged that Quicken requested that he provide medical documentation of his disability to determine whether his SSDI income would continue, and approved his loan applications only after he provided a doctor's letter concerning his disability. In dismissing Gomez's disparate treatment claim under the FHA, the district court held that Quicken had a legitimate, non-discriminatory reason to require documentation of Gomez's disability, in addition to his SSDI award letter, in order to evaluate his creditworthiness.

1. The district court's decision was erroneous because it directly conflicts with the language of the FHA and its implementing regulations. Lenders may legitimately inquire into a mortgage applicant's creditworthiness, but in doing so, they must avoid imposing requirements on people with disabilities that they do not demand of other applicants. Thus, mortgage lenders may not apply different income-verification standards to individuals whose income is based on their disability. Fairly construed, Gomez's complaint alleges that, because of his disability, Quicken subjected him to additional requirements for determining his creditworthiness, beyond those it required for non-disabled mortgage applicants. This allegation properly states a claim of disparate treatment under the FHA. As alleged in the First Amended Complaint, Quicken violated the FHA by requiring Gomez, whose income is disability-dependent, to verify his income in a manner and to an extent not required by individuals whose income is not disability-dependent.

2. The district court's dismissal of the complaint is also at odds with current federal guidelines, which require mortgage lenders to treat SSDI award letters stating the recipient's benefit level and containing no expiration date as sufficient documentation that the applicant's income will continue. Contrary to the district court's conclusion, where an applicant for a mortgage provides a copy of such an SSDI award letter, these federal guidelines specify that additional documentation

concerning the nature and expected duration of his disability is unnecessary to properly document his creditworthiness.

3. The district court further erred in relying on an exemption in ECOA in dismissing Gomez's disparate treatment claim under the FHA. The court impermissibly interpreted an exemption in the ECOA – which does not address discrimination based on disability and which by its terms applies only to that subchapter of ECOA – to circumscribe the protections in the FHA, a statute that prohibits discrimination based on disability.

For these reasons, the district court's dismissal of Gomez's FHA disparate treatment claim is reversible error.

ARGUMENT

THE DISTRICT COURT ERRED IN DISMISSING GOMEZ'S CLAIM OF DISPARATE TREATMENT UNDER THE FHA

A. Standard Of Review

This Court reviews de novo a district court's dismissal of a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party. See *Skilstaf, Inc.* v. *CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012). The standard for notice pleading under Federal Rule of Civil Procedure 8(a)(2) requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The

complaint need only contain sufficient factual allegations that, accepted as true, state a claim for relief that is "plausible," *i.e.*, 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).

B. Statutory And Regulatory Requirements

The FHA makes it unlawful "for any person or other 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 * * * handicap." 42 U.S.C. 3605(a). Residential real estate-related transactions include loans "for purchasing, constructing, improving, repairing, or maintaining a dwelling" and loans "secured by residential real estate." 42 U.S.C. 3605(b)(1).

Under HUD's regulations, "[i]t shall be unlawful for any person or entity engaged in the making of loans or in the provision of other financial assistance relating to the purchase, construction, improvement, repair or maintenance of dwellings or which are secured by residential real estate to impose different terms or conditions for the availability of such loans or other financial assistance because of * * * handicap." 24 C.F.R. 100.130(a). HUD's regulations further provide that unlawful conduct under this section includes, but is not limited to, "[u]sing different policies, practices, or procedures in evaluating or in determining

creditworthiness of any person in connection with the provision of any loan or other financial assistance for a dwelling or for any loan or other financial assistance which is secured by residential real estate because of * * * handicap." 24 C.F.R. 100.130(b)(1). HUD's interpretation of the FHA is entitled to deference. *Meyer* v. *Holley*, 537 U.S. 280, 287-288 (2003); *Balvage* v. *Ryder Improvement & Serv. Ass'n*, 642 F.3d 765, 775 (9th Cir. 2011).

C. The District Court Failed To Properly Apply The FHA's Prohibition Against Imposing Additional Or Different Conditions On Loans Based On The Applicant's Disability

1. The district court erred in dismissing Gomez's disparate treatment claim under the FHA. The court ruled that Gomez failed to establish a prima facie case of disparate treatment based on disability because, according to the court, his complaint demonstrates that Quicken had a legitimate nondiscriminatory reason to demand information concerning the nature and extent of his disability; that is, the need to ascertain Gomez's creditworthiness. 1 ER 6. In so ruling, the district court failed to consider the explicit prohibition in the FHA and its implementing regulations against imposing different terms or conditions for the availability of real estate-related loans based on disability. See 42 U.S.C. 3605(a); 24 C.F.R. 100.130(a) and (b)(1).[2]

[2] The district court also impermissibly conflated the determination of whether Gomez sufficiently alleged a claim for relief with whether Quicken has a

(continued…)

Gomez's First Amended Complaint adequately alleges that Quicken treated him differently from other mortgage applicants on the basis of his disability by demanding documentation about his disability, in addition to his SSDI award letter, to determine whether his income would continue. Fairly read, Gomez's complaint alleges facts that, at a minimum, create the inference that he was treated differently because of his protected status, *i.e.*, disability. Specifically, the complaint alleges that each time Gomez applied for a loan, Quicken required additional documentation about his disability before approving his loan application (see 2 ER 207-209), and that Quicken imposed different standards and requirements on loan applicants based on disability. See 2 ER 206 (First Amended Complaint 4 (alleging that Quicken used "different qualification criteria," "impos[ed] different terms or conditions * * * [on] loans," and used "different policies, practices, or procedures in evaluating or in determining [the] creditworthiness" of loan applicants based on the applicants' disability)). Indeed, Quicken itself reads Gomez's complaint as alleging disability-based disparate treatment. See 2 ER 185

(…continued)
legitimate, non-discriminatory defense. On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the district court's analysis should focus solely on whether the plaintiff's complaint, as alleged, states a claim upon which relief may be granted. See *Rivera* v. *Peri & Sons Farms, Inc.*, 735 F.3d 892, 902 (9th Cir. 2013) (plaintiffs ordinarily need not plead on the subject of an anticipated affirmative defense, and a district court should not address a defendant's possible defenses in a motion to dismiss unless the affirmative defense is obvious on the face of the complaint).

(Motion to Dismiss 2 (noting that the First Amended Complaint asserts that "Quicken Loans allegedly required him (unlike non-disabled applicants) to make disclosure of 'medical information' as part of his qualifications.")).

Drawing all reasonable inferences in Gomez's favor, the First Amended Complaint fairly alleges that Quicken demanded additional documentation beyond Gomez's SSDI benefits award letter about his disability benefits income by requiring additional information about the nature and extent of his disability, but, for example, did not require individuals without disabilities who are employed to provide additional verification of continuity of their income beyond a pay stub and tax returns. 2 ER 206-209. In keeping with usual lending industry practice, Quicken presumably required individuals who rely on employment income to submit documentation of their income only in the form of a pay stub and tax returns. Absent any contrary indication in the record, it is reasonable to infer from the allegations of the complaint that Quicken does not look beyond an employed applicant's pay stub and tax returns to verify the likelihood of future employment by, for instance, calling the applicant's employer to ascertain whether the employer intends to continue employing the applicant or requiring the applicant to provide performance reviews from his employer. See 2 ER 206 (First Amended Complaint 4 (alleging that Quicken used different standards and requirements for evaluating creditworthiness based on an applicant's disability)). Lenders generally do not

require employers to provide guarantees or statements about the nature or likelihood of an applicant's *future* employment. Accordingly, the disparate treatment fairly alleged here is that Quicken required Gomez to provide documentation beyond his SSDI award letter to establish continuity of income, while presuming that income of employed applicants would continue based upon receipt of a pay stub and tax returns.

Gomez thus has alleged sufficient facts to state a plausible claim of disparate treatment under the FHA and its implementing regulations: Quicken discriminated against Gomez by imposing different terms or conditions on his loan because of his disability. See 42 U.S.C. 3605(a) (prohibiting discrimination in the terms or conditions of a mortgage based on disability); 24 C.F.R. 100.130(a) (making it unlawful to "impose different terms or conditions for the availability of [real estate-related] loans" because of the loan applicant's disability; 24 C.F.R. 100.130(b)(1) (making it unlawful to use "different policies, practices or procedures in evaluating or in determining creditworthiness" of the applicant because of the applicant's disability).

2. The district court's decision is also inconsistent with current federal guidance regarding the receipt of SSDI benefits. Pursuant to that guidance, an SSDI award letter stating the benefits level and containing no expiration date is sufficient to show that the applicant's SSDI income – much like an applicant's pay

stub or statement of wages from an employer – is likely to continue into the future. Thus, where a mortgage applicant receives SSDI benefits and presents an SSDI award letter, a lender need not require additional documentation about the recipient's disability in order to assess his or her creditworthiness. This reliance on the SSDI award letter, without further inquiry into the applicant's disability, is described in HUD's guidance regarding documentation requirements for income from social security for loans insured by the Federal Housing Administration:

> If the Notice of Award or equivalent document does not have a defined expiration date, the lender shall consider the income effective and likely to continue. The lender should not request additional documentation from the borrower to demonstrate continuance of Social Security Administration income. Under no circumstance may lenders inquire into or request documentation concerning the nature of the disability or the medical condition of the borrower.

See HUD's Mortgagee Letter 12-15 at 3 (Aug. 17, 2012), available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/letters/mortgagee/2012ml. Although this guidance was issued after the events underlying Gomez's claims, it predated the district court's dismissal of the First Amended Complaint on May 1, 2013.

Similarly, the income documentation guidelines issued by Fannie Mae and Freddie Mac – the primary purchasers and guarantors of residential mortgages generated by lenders such as Quicken – do not require lenders to obtain proof of an applicant's continued disability when the lenders rely on disability benefit income

to qualify a mortgage applicant. For example, Fannie Mae's Guidelines for mortgage providers regarding income assessment provide that SSDI benefits "do not have defined expiration dates," and that a lender may consider such income as "stable, predictable, and likely to continue and is not expected to request additional documentation from the borrower." See, *e.g.*, Fannie Mae Selling Guide 252 (Apr. 1, 2009), available at https://www.fanniemae.com/content/guide/sg0309.pdf. Fannie Mae revised its Selling Guide on May 15, 2012, "to clarif[y] that Social Security income for * * * long-term disability does not have a defined expiration date and must be expected to continue." See Fannie Mae Selling Guide Announcement SEL-2012-04, Attachment 2 at 4 (May 15, 2012), available at https://www.fanniemae.com/content/announcement/sel1204.pdf. The district court's determination that lenders have a legitimate nondiscriminatory reason for requiring additional documentation from applicants beyond their SSDI award letters is at odds with this federal guidance.

3. Furthermore, the district court's reliance on an exemption in ECOA does not support its position. The court erred in incorporating ECOA's exemption into the FHA. See 1 ER 6 (citing 15 U.S.C. 1691(b)(2)). The ECOA exemption at issue provides:

> It shall not constitute discrimination for purposes of this subchapter for a creditor–

> (2) to make an inquiry of * * * whether the applicant's income derives from any public assistance program if such inquiry is for the purpose of determining the amount and probable continuance of income levels, credit history, or other pertinent element of credit-worthiness as provided by the regulations of the Bureau [of Consumer Financial Protection].

15 U.S.C. 1691(b)(2).

By its terms, this exemption does not support the district court's dismissal of Gomez's FHA disparate treatment claim. In the first place, this exemption applies only "for purposes of this subchapter"; *i.e.*, it is limited to the ECOA. 15 U.S.C. 1691(b). In addition, it makes lawful only inquiries to determine whether "the applicant's income derives from any public assistance program." 15 U.S.C. 1691(a)(2). In this case, it is undisputed that Gomez's income derives from a public assistance program (SSDI). The exemption also limits such inquiries to those made "for the purpose of determining the amount and probable continuance of [the applicant's] income levels." 15 U.S.C. 1691(b)(2). There is no issue regarding the *amount* of Gomez's income level and, as discussed (pp. 13-15, *supra*), Gomez's SSDI income should be deemed continuous in determining his creditworthiness. Moreover, ECOA does not address discrimination on the basis of disability, as does the FHA. It is improper to interpret an exemption in a statute that does not address discrimination on the basis of disability in a manner that would circumscribe the protections in a statute that does. Accordingly, the district

court was not at liberty to apply this ECOA exemption as a basis for dismissing Gomez's disparate treatment claim under the FHA.

CONCLUSION

This Court should reverse the district court's dismissal of Gomez's disparate treatment claim under the FHA.

Respectfully submitted,

JOCELYN SAMUELS
Acting Assistant Attorney General

s/ Teresa Kwong
DENNIS J. DIMSEY
TERESA KWONG
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-4757

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the type-volume limitation imposed by Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d). The brief was prepared using Microsoft Word 2007 and contains 3578 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

s/ Teresa Kwong
TERESA KWONG
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2014, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT AND URGING REVERSAL with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the Appellate CM/ECF system.

s/ Teresa Kwong
TERESA KWONG
Attorney