

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:)	
REDIE B. LEWIS)	Case No. 03-41515
)	
Debtor.)	
_____)	
)	
REDIE B. LEWIS)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 03-7068
)	
BNC MORTGAGE, INC.,)	
OPTION ONE MORTGAGE CORP.,)	
FIRST UNION NATIONAL BANK,)	
KOZENY & MCCUBBIN, L.C.,)	
MILLER ENTERPRISES, INC.,)	
JEFFREY MILLER, Individually,)	
ADAMSON & ASSOCIATES, INC.,)	
MAPLEWOOD MORTGAGE, INC.,)	
)	
Defendants.)	
_____)	

**MEMORANDUM AND ORDER GRANTING DEFENDANTS’
MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT,
IN PART, AND DENYING DEFENDANTS’ MOTIONS
TO DISMISS AND FOR SUMMARY JUDGMENT, IN PART**

This matter is before the Court on Motion of BNC Mortgage to Dismiss Amended Complaint (Doc. 55), Motion of Option One Mortgage to Dismiss Counts I, II, III, IV and V of the Amended Complaint (Doc. 56), Motion of First Union National Bank for Summary Judgment and Motion to Dismiss

(Doc. 60),¹ Motion of Miller Enterprises and Jeffrey Miller to Dismiss Amended Complaint (Doc. 71), and Motion of Adamson and Associates to Dismiss Counts II and III of the Amended Complaint (Doc. 72).

The Court has jurisdiction to hear this case as it is related to the bankruptcy case that arises under Title 11 of the United States Code, and the parties have all consented to the Court hearing and determining the issues involved in this case and entering all appropriate orders and judgments.²

I. FINDINGS OF FACT

The Court makes the following findings of fact based upon the allegations made in the Amended Complaint (Doc. 44), or upon the additional facts provided in the parties' briefs, resolving all factual disputes in favor of Plaintiff.³

A. Facts Concerning the Involvement of the Parties

All of Plaintiff's claims in this case involve the construction, purchase, financing, and subsequent foreclosure of her home. Plaintiff purchased a home that was constructed by Defendant Miller Enterprises, Inc. ("Miller Enterprises"), whose president is Defendant Jeffrey Miller ("Miller"). Miller Enterprises also carried a second mortgage on the property. Defendant Adamson & Associates ("Adamson") provided

¹Defendant First Union National Bank filed a motion that sought both an entry of summary judgment and dismissal of the Amended Complaint. The Motion for Summary Judgment is based upon res judicata and collateral estoppel, and the Motion to Dismiss is based upon plaintiff's failure to state a claim upon which relief can be granted and the applicable statute of limitations. Because the Motion for Summary Judgment involves completely different legal issues than the Motion to Dismiss, it will be dealt with separately by the Court in this Memorandum and Order.

²28 U.S.C. § 1334 and 28 U.S.C. § 157(c)(2).

³*See Lafay v. HMO Colo.*, 988 F.2d 97, 98 (10th Cir. 1993) (holding that the Court "must accept all well-pleaded allegations in the complaint as true and construe them in the light most favorable to plaintiff").

an appraisal of the property. Defendant Maplewood Mortgage, Inc. (“Maplewood”) apparently served as the closing agent on the property.⁴ Defendant BNC Mortgage, Inc. (“BNC”) was the underwriter for the first mortgage on the house, with Defendant Option One Mortgage Corp. (“Option One”) acting as a servicing agent for BNC. The mortgage and deed rights were eventually assigned to Defendant First Union National Bank (“First Union”), who was represented by Defendant Kozeny & McCubbin, L.C. (“McCubbin”), a law firm, in a foreclosure action in state court against Plaintiff’s house.

B. Relevant Dates

As discussed in more detail below, Defendants have moved to dismiss several of the counts in the Amended Complaint on the basis that the statute of limitations has expired. Therefore, certain dates are critical to the resolution of the motions to dismiss.

As noted above, Plaintiff purchased her home in 2000. Although the parties do not provide the exact date Plaintiff entered into the contract to purchase the home, the parties do agree that the closing date on the purchase of the home was February 18, 2000. On July 19, 2000, Plaintiff filed a complaint with the United States Department of Housing and Urban Development (“HUD”), alleging that Miller Enterprises had engaged in discriminatory lending practices and failed to properly correct construction defects in the

⁴Plaintiff has not obtained service of process on Defendant Maplewood in this proceeding, and Maplewood’s exact involvement in the events surrounding the purchase of the home are not clear. The 120 day period to serve Maplewood, as well as the “John Doe” Defendants, required by Fed. R. Civ. P. 4(m), incorporated into this proceeding by Rule 7004(a), has long expired, as Plaintiff’s Amended Complaint was filed November 25, 2003. In addition, Plaintiff had over 120 days to determine the identities of, and obtain service upon, the John Doe Defendants before the Court stayed discovery on February 12, 2004 (Doc. No. 86).

house. Although Miller Enterprises disagreed with the allegations, it nonetheless agreed to release its second mortgage on the property, and made certain repairs to the property on April 4, 2001.

In September 2000, McCubbin filed a petition for foreclosure on behalf of First Union. In her answer to that petition, filed April 27, 2001, Plaintiff notified McCubbin and First Union that there had not been an assignment of the mortgage and deed to First Union. According to Plaintiff, BNC did not assign the mortgage and deed to First Union until July 2001.

Plaintiff filed her Chapter 13 bankruptcy proceeding on May 20, 2003. She filed this adversary proceeding on August 4, 2003, and her Amended Complaint on November 25, 2003. For purposes of this motion, the Court will use the August 4, 2003 filing date as the date all the claims were initiated against all Defendants in this case.

C. Claims Brought by Plaintiff

Plaintiff sets out five causes of action in her Amended Complaint. In Count I, Plaintiff claims that McCubbin and First Union were negligent in filing the foreclosure proceeding against Plaintiff's property because BNC had not assigned the mortgage to First Union before the foreclosure was filed. In Count II, Plaintiff claims that all Defendants have engaged in an illegal enterprise in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). In Count III, Plaintiff contends that (1) Miller, and his company Miller Enterprises, committed fraud and misrepresentation concerning the quality and construction of the house; (2) Adamson and Maplewood furthered the false representations concerning the quality and construction of the house; and (3) Miller made misrepresentations concerning the financing of the purchase, and failed to disclose certain facts about the financing to Plaintiff. In Count IV, Plaintiff claims that BNC and First Union violated the Truth in Lending Act by failing to make certain disclosures prior to

the closing on the property. Finally, in Count V, Plaintiff claims that BNC, First Union, Miller, Miller Enterprises and Option One discriminated against her in connection with the purchase of the house in violation of the Truth in Lending Act.

Additional facts will be discussed below, when necessary.

II. CONCLUSIONS OF LAW

A. Counts I, III, IV and V are all dismissed based upon the motions to dismiss filed by the various defendants.

1. Standards for a Motion to Dismiss

Federal Rule of Bankruptcy Procedure 7012(b) incorporates Federal Rule of Civil Procedure 12(b) into all adversary proceedings. To prevail on a Rule 12(b)(6) motion to dismiss for failure to state a claim, the movant must demonstrate beyond a doubt that there is no set of facts in support of plaintiff's theory of recovery that would entitle plaintiff to relief.⁵ All well-pleaded allegations will be accepted as true and will be construed in the light most favorable to Plaintiff.⁶

2. Counts I, III, IV and V are all barred by the applicable statute of limitations.

Various defendants have moved to dismiss the claims for negligence (Count I), fraud (Count III), TILA violations (Count IV) and discrimination (Count V) on the basis that the claims were brought outside the applicable statute of limitations. For the reasons set forth below, the Court finds that each of these claims is time-barred and must be dismissed.

⁵*Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, Kansas*, 927 F.2d 1111, 1115 (10th Cir. 1991).

⁶*In re American Freight System, Inc.*, 179 B.R. 952, 956 (Bankr. D. Kan. 1995).

a. The negligence claim contained in Count I is barred by the two-year statute of limitations.

In Count I of her Amended Complaint, Plaintiff contends that Defendants McCubbin and First Union were negligent in filing a foreclosure proceeding against her property at a time when First Union had not yet received an assignment of the mortgage and deed rights from BNC. Plaintiff also contends that Option One was negligent because it claimed to be the servicer of the mortgage, but had failed to notify Plaintiff that there was an assignment of rights.

Defendants contend that the negligence claim is barred by the applicable statute of limitations. Because Plaintiff is a Kansas resident and thus her claim for negligence arises under Kansas law, it is governed by the Kansas statute of limitations.⁷ Pursuant to K.S.A. 60-513(a)(4), a claim based upon negligence must be commenced within two years from the date the cause of action accrues.⁸ A negligence cause of action is not deemed to have accrued “until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party”⁹

McCubbin filed the foreclosure petition on behalf of First Union with Johnson County District Court on September 22, 2000. According to the Amended Complaint in this proceeding, Plaintiff notified

⁷See *Blackwell v. Harris Chemical North America, Inc.*, 11 F. Supp. 2d 1302, 1306-07 (D. Kan. 1998) (applying state statute of limitations statute to state law causes of action) and *Cowdrey v. City of Eastborough, Kan.*, 730 F.2d 1376, 1379 (10th Cir.1984) (applying Kansas statute of limitations to state law claims brought in federal court).

⁸*Biriz v. Williams*, 262 Kan. 769, 770 (1997).

⁹K.S.A. 60-513(b) (1994).

McCubbin and First Union with her answer filed April 27, 2001 that there had not been an assignment of the mortgage and deed.¹⁰ Therefore, the act giving rise to the negligence cause of action took place on September 22, 2000, and Plaintiff clearly knew of the alleged wrongful act no later than April 27, 2001, when she notified Defendants of their alleged misdeed in her state court answer. Pursuant to K.S.A. 60-513, the negligence cause of action thus arose no later than April 27, 2001, and must have been filed no later than April 27, 2003, to be timely. Because this action was not brought until August 4, 2003, over three months later, it clearly falls outside the two-year statute of limitations.

Plaintiff's response to Defendant's statute of limitations defense is set forth, in full, as follows:

Finally, as to the issue of the statute of limitations, the continuing actions of Defendant First Union National Bank tolls the statute of limitations as indicated previously in this response.

At no point does Plaintiff provide any legal support for her contention that "the continuing actions" of this, or any other defendant, tolls the applicable statute of limitations on this negligence claim. Similarly, Plaintiff completely fails to provide any factual analysis of what acts continue, or how these alleged continuing actions would justify the tolling of the statute of limitations, even if there was some legal basis to support the tolling of the negligence claim. The Court has the authority to disregard this claim on this basis alone.¹¹

However, in an effort to protect Plaintiff from any potential harm caused by her failure to properly address

¹⁰Although the Amended Complaint does not indicate the date the state court answer was filed, Plaintiff included a file stamped copy of that answer as an attachment to the Amended Complaint in this case and specifically incorporated it into her Amended Complaint. Therefore, the Court can consider this additional information without treating this Motion to Dismiss as a motion for summary judgment. *See Hill v. Bellman*, 935 F.2d 1106, 1112 (10th Cir. 1991) (holding that "[a] written document that is attached to the complaint as an exhibit is considered part of the complaint and may be considered in a 12(b)(6) dismissal").

¹¹*See Smith v. Barber*, 195 F. Supp. 2d 1264, 1280 n.9 (D. Kan. 2002) (declining to even address claims raised by defendants because they provided no support for their assertions).

this issue, the Court has reviewed applicable Kansas law to determine if there is any basis, based upon the facts contained in the pleadings, to toll the statute of limitations on the negligence claim in this case based upon any alleged continuing actions of Defendants.

Kansas does recognize the theory of a continuing tort in negligence cases, which appears to be the only possible legal theory that Plaintiff is attempting to employ to survive the statute of limitations defense. “Under Kansas law, where a cause of action is predicated on numerous acts occurring over an extended period, the cause of action accrues anew with each act, at least until the injury becomes permanent.”¹² The Court finds, however, that this theory provides no relief to Plaintiff in this case.

First, Count I of the Amended Complaint is based upon very specifically alleged actions – the filing of the foreclosure petition before the assignment of the mortgage and the deed – not upon numerous acts occurring over an extended period of time. Second, even if Count I were based upon continuing actions, Kansas law dictates that the cause of action accrues at the time of each act causing damage. In other words, the cause of action relating to the filing of the petition before the assignment accrued, at the latest, at the time Plaintiff learned of the allegedly improper actions, and any claim based upon the filing of the petition must have been brought within two years of that date. If Defendants have engaged in further acts of negligence that harmed Plaintiff, those additional acts may have created new causes of action which could have been filed at a later date, but they do not extend the time for bringing a claim based upon the filing of the foreclosure petition.

¹²*Cordon v. Trans World Airlines, Inc.*, 442 F. Supp. 1064, 1066 (D. Kan. 1977) (citing *Henderson v. Talbott*, 175 Kan. 615 (1954) and *Simon v. Neises*, 193 Kan. 343 (1964)).

The Court finds that Count I of the Amended Complaint is barred by Kansas' two-year statute of limitations relating to negligence claims. The claim clearly arose, at the latest, on April 27, 2001, when Plaintiff demonstrated her awareness of the alleged wrongdoing. Any action on those facts had to be filed within two years from that date. Because the Complaint in this case was not filed until August 4, 2003, and there is no apparent legal basis to toll the applicable statute of limitations, the claim is untimely and will be dismissed.

b. The fraud claim contained in Count III of the Amended Complaint is barred by the two-year statute of limitations.

Count III of the Amended Complaint alleges that Defendants Miller, Miller Enterprises, Maplewood Mortgage and Adamson committed fraud against Plaintiff. Liberally construing the allegations contained in the Amended Complaint, Plaintiff appears to allege that the following fraudulent statements were made to her detriment:¹³

1. Defendants Jeffrey Miller and Miller Enterprises represented to Plaintiff that when the house was finished, it would be built up to building code standards and would have certain qualities;
2. Defendants Adamson and Maplewood made representations about the house's quality and falsely indicated that the work was completed in a professional, workmanlike manner;
3. Jeffrey Miller instructed Plaintiff that he would tell the lender that he was going to carry a \$29,000 note, but drafted and recorded a note for \$59,900;

¹³The Amended Complaint does not set out the alleged fraudulent statements in any sort of clear manner, and includes allegations against parties against whom no relief is sought in the prayer for relief for Count III. The Court has attempted, out of an abundance of caution, to filter out every possible allegedly fraudulent statement contained in the Amended Complaint. In doing so, the Court is in no way making a finding that any of these alleged fraudulent statements have been pled with the specificity required for a fraud claim.

4. Jeffrey Miller did not disclose to Plaintiff the identity of the underwriters;
5. Plaintiff did not receive notice from Defendant BNC that it would be the primary lender on the property until the first day of closing;
6. At the time of closing, on or about February 18, 2000, Jeffrey Miller and Miller Enterprises reassured Plaintiff that the construction would be completed and up to specification and code, and promised to provide her with a fully functional and aesthetically pleasing home.

Under Kansas law, the statute of limitations for a fraud claim is two-years.¹⁴ “The statute of limitations for fraud begins to run when the injured party has actual knowledge of the fraud or when the fraud could have been discovered with reasonable diligence.”¹⁵

Plaintiff does not dispute that she was aware of the alleged fraud more than two years prior to the filing of this adversary proceeding. In fact, she raised most, if not all, of these issues in her answer to the state court foreclosure proceeding as well as in and the complaint she filed with HUD against Defendants Miller and Miller Enterprises in July, 2000. Instead, Plaintiff again attempts to utilize a “continuing tort” theory to toll the statute of limitations in this case.

The first theory advanced by Plaintiff is that (1) because Miller has allegedly not complied with the contractual requirements of the HUD enforcement agreement and (2) because other Defendants are continuing to take tortious action against her, the statute of limitations has not yet been triggered. In other words, Plaintiff is claiming that the statute of limitations for bringing the fraud claim against Defendants contained in Count III should be tolled based upon an alleged subsequent breach of contract and because

¹⁴*Paulsen v. Gutierrez*, 962 F. Supp. 1367, 1369 (D. Kan. 1997) (citing K.S.A. 60-513(a)(3)).

¹⁵*Andale Equipment, Inc. v. Deere & Co.*, 985 F. Supp. 1042, 1046 (D. Kan. 1997) (citing *Wolf v. Brungardt*, 215 Kan. 272 (1974)).

other Defendants in this case continue to engage in tortious conduct against Plaintiff. Once again, Plaintiff provides no legal basis for this claim. The Court has again undertaken the task of reviewing Kansas law in an effort to determine if Plaintiff's claim has any legal basis, and again the Court has found no support for Plaintiff's position.

Plaintiff also claims that when she first realized that she had been harmed, she filed an administrative complaint with HUD. Again, Plaintiff provides no legal or factual analysis to explain how this fact could possibly extend the statute of limitations in this case, and the Court has been unable to find any legal support for Plaintiff's position.

Kansas law is clear that the statute of limitations for a fraud claim "begins to run when the injured party has actual knowledge of the fraud or when the fraud could have been discovered with reasonable diligence."¹⁶ The fact that the party perpetrating the fraud may also have harmed the injured party by breaching a subsequent contract, or that other defendants in a case may continue committing torts against the injured party, is no basis for tolling the statute of limitations of the fraud claim. Similarly, the fact that a defendant may be in breach of a contract between the parties has no effect on the running of the statute of limitations for the fraud claim. Plaintiff clearly knew of the alleged fraudulent conduct more than two years prior to filing this adversary proceeding and, therefore, the fraud claims contained in Count III of her Amended Complaint are barred by the two-year statute of limitations.

¹⁶*Andale Equipment*, 985 F. Supp. at 1046 (citing *Wolf v. Brungardt*, 215 Kan. 272 (1974)).

c. The TILA claims contained in Count IV of the Amended Complaint are barred by the one-year statute of limitations.

In Count IV of the Amended Complaint, Plaintiff seeks damages against Defendants BNC and First Union for alleged violations of the Truth in Lending Act (TILA). Plaintiff claims that BNC committed the following violations of the TILA:

1. BNC failed to notify Plaintiff that it was going to be the lender on the purchase agreement at least three days prior to closing in violation of 15 U.S.C. § 1638; and
2. BNC failed to take into consideration Plaintiff's ability to repay the indebtedness, including her current and expected income, current obligations, and employment in violation of 15 U.S.C. § 1639(h).

Plaintiff claims First Union is liable for the TILA violations as an assignee of BNC.

To bring an action under the TILA, Plaintiff must bring the action within one year from the date of the occurrence of the violation.¹⁷ In this case, the statute of limitations began to run on the date of the closing, February 18, 2000, which is the date the alleged violations of the TILA occurred.¹⁸ However, the statute of limitations is not jurisdictional, and may be subject to equitable tolling under appropriate circumstances.¹⁹ Therefore, unless some legal basis exists for tolling the statute of limitations in this case, the statute of limitations expired on these TILA claims on February 18, 2001, more than two years before the filing of the Complaint in this case.

¹⁷15 U.S.C. § 1640(e) .

¹⁸*See Morris v. Lomas and Nettleton Co.*, 708 F. Supp. 1198, 1203 (D. Kan. 1989).

¹⁹*See Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703 (11th Cir. 1998); *Ramadan v. Chase Manhattan Corp.*, 156 F.3d 499 (3rd Cir. 1998); and *King v. State of Cal.*, 784 F.2d 910 (9th Cir. 1986).

Plaintiff alleges two basis for tolling the statute of limitations on this claim. First, Plaintiff alleges “the ongoing and continuing action to pursue foreclosure through the state court action tolls the statute of limitations.” Once again, Plaintiff fails to provide any legal support or factual analysis to support this claim. A review of relevant federal law revealed no legal basis for tolling the statute of limitations on a TILA claim on the basis that the offending party may have engaged in other misconduct at a later time.

Plaintiff also claims that she “preserved her answer and defenses in the state court action” and, therefore, “her claims have not expired.” As with Plaintiff’s other attempts to avoid the statute of limitations, she fails to provide any legal support or factual analysis to support this allegation. The Court finds that even if Plaintiff did raise these TILA claims in the state court foreclosure proceeding, that act does not serve to toll the statute of limitations on a future affirmative action against Defendants.²⁰

The one-year statute of limitations for TILA violations began to run in this case on February 18, 2000. Because there is no legal basis to toll the statute of limitations in this case, Plaintiff’s cause of action expired on February 18, 2001, more than two years before the filing of the Complaint in this case. Therefore, the TILA claims contained in Count IV of the Amended Complaint are time-barred and will be dismissed.

d. The discrimination claims contained in Count V of the Amended Complaint are barred by the two-year statute of limitations.

²⁰If anything, Plaintiff’s admission that she raised these claims in the state court foreclosure proceeding only serves to strengthen Defendants’ position that these claims are also barred by principles of claim preclusion. However, because the Court finds that the claims are barred by the statute of limitations, it does not reach the claim preclusion defense.

Plaintiff, in Count V of the Amended Complaint, alleges that Defendants BNC, Miller, Miller Enterprises, First Union and Option One violated the Equal Credit Opportunity Act (ECOA) by discriminating against her based on her race in violation of 15 U.S.C. § 1691. All of the alleged discriminatory conduct involves actions that she contends took place prior to the closing on her home on February 18, 2000.

Defendants also claim that any alleged violations of ECOA are barred by the statute of limitations. All claims for violations of ECOA must be brought within two years of the date of the occurrence of the violation.²¹ Although no specific details or dates are provided by Plaintiff, it is clear, based upon the factual allegations contained in her Amended Complaint, that all alleged acts of discrimination took place prior to the closing of the purchase of Plaintiff's house on February 18, 2000. Therefore, the statute of limitations on these claims expired, at the latest, on February 18, 2002, which was prior to the filing of the Complaint in this case.

Plaintiff alleges the same two bases for tolling the statute of limitations on this claim as she did for her TILA claim. First, Plaintiff alleges "the ongoing and continuing action to pursue foreclosure through the state court action tolls the statute of limitations." Second, Plaintiff claims that she "preserved her answer and defenses in the state court action" and, therefore, "her claims have not expired." Once again, Plaintiff fails to provide any legal support or factual analysis to support these claims, and instead relies upon the bare assertions that the statute of limitations should be tolled. A review of relevant federal law revealed no legal basis for tolling the statute of limitations on a ECOA claim on either of these bases.

²¹15 U.S.C. § 1691e(f).

The two-year statute of limitations for ECOA violations began to run in this case no later than February 18, 2000. Because Plaintiff has presented no legal or factual basis to toll the statute of limitations in this case, Plaintiff's cause of action expired no later than February 18, 2002, more than a year before she filed her Complaint in this case. Therefore, the discrimination claims under the ECOA contained in Count IV of the Amended Complaint are time-barred and will be dismissed.

B. Count II of the Amended Complaint fails to contain the specificity required to bring a RICO claim.

Count II of the Amended Complaint alleges that all the Defendants have violated the Racketeer Influenced and Corrupt Organizations Act ("RICO")²² resulting in damages to Plaintiff. Each of the Defendants has moved to dismiss Count II pursuant to Fed. R. Civ. P. 12(b)(6),²³ on the basis that it fails to plead the elements of the RICO claim with the particularity required by Fed. R. Civ. P. 9(b).²⁴

In order to survive a Rule 12(b)(6) motion, a RICO claim must allege (1) conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity.²⁵ Plaintiff is required to allege with particularity each element of a RICO violation and its predicate acts of racketeering.²⁶ In requiring the

²²18 U.S.C. § 1961, et seq.

²³Fed. R. Civ. P. 12(b)(6) is made applicable to bankruptcy proceedings by Fed. R. Bankr. P. 7012(b).

²⁴Fed. R. Civ. P. 9(b) is made applicable to bankruptcy proceedings by Fed. R. Bankr. P. 7009.

²⁵*Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1362 (10th Cir. 1989) (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985)).

²⁶*Hall v. Doering*, 997 F. Supp. 1445, 1453 (D. Kan. 1998) (citing *Farlow v. Peat, Marwick Mitchell & Co.*, 956 F.2d 982, 989 (10th Cir. 1992)).

specificity of pleading in a RICO case, the Tenth Circuit recognized the policy of notice pleadings under the Federal Rules of Civil Procedure “requires a court to read Rule 9(b)’s requirements in harmony with Rule 8’s call for a ‘short and plain statement of the claim’ which presents ‘simple, concise, and direct’ allegations.”²⁷ However, the Tenth Circuit found that “that the threat of treble damages and injury to reputation which attend RICO actions justify requiring plaintiff to frame its pleadings in such a way that will give the defendant, and the trial court, clear notice of the factual basis of the predicate acts.”²⁸ To that end, courts have found that “the Rule of pleading with particularity requires assertions of time, place, and contents of false representations ... [and] the identity of the person making the representation and what was obtained or given up thereby.”²⁹

Furthermore, as the requirements relate to corporate defendants, the rule requires that plaintiffs identify the specific individuals acting for the corporation who made the alleged misrepresentations.³⁰ Courts have also noted that “while [the] plaintiff need only give fair notice in her complaint, the list of elements is deceptively simple . . . because each concept is a term of art which carries its own inherent

²⁷*Cayman Exploration*, 873 F.2d at 1362.

²⁸*Id.*

²⁹*Hall v. Doering*, 997 F.Supp. 1445, 1453 (D. Kan. 1998) (quoting *Meyer v. Cloud County Bank & Trust*, 647 F. Supp. 974, 975-76 (D. Kan. 1986)).

³⁰*Gottstein v. National Ass'n for Self Employed*, 53 F. Supp. 2d 1212, 1218 (D. Kan. 1999).

requirements of particularity. For example, 'conduct' embodies the requirements of one or more of the four substantive violations set out in §§ 1962(a) through (d).'³¹

The Court finds that Count II of the Amended Complaint fails to contain the specificity required of a properly pled RICO claim. The Amended Complaint contains numerous general allegations concerning the alleged roles of most, though not all, of Defendants in this alleged enterprise, but does not provide any of the specific information required by the Court of Appeals for the Tenth Circuit. The Amended Complaint lacks any specifics as to time, place, and contents of false representations and, in regard to the corporate defendants, entirely fails to identify those persons who allegedly conducted the improper activities or who made the allegedly fraudulent representations on behalf of the corporations. Similarly, the Amended Complaint fails to give Defendants clear notice of the particulars of the predicate acts that support her claim. In fact, the Amended Complaint fails to even specify which specific provisions of RICO the Defendants have allegedly violated.

Although the Court finds that the Amended Complaint fails to meet the specificity requirements for a RICO claim, the Court will not dismiss Count II at this time. Instead, the Court will grant Plaintiff another opportunity to amend her Complaint to comply with the requirements for bringing a RICO claim.³² Plaintiff will be given until **September 8, 2004** to file a second Amended Complaint that complies with the

³¹*Burdett v. Harrah's Kansas Casino Corp.*, 260 F. Supp. 2d 1109, 1120 (D. Kan., 2003) (internal quotations omitted).

³²*See Cayman Exploration*, 873 F.2d at 1362-63 (holding that a trial court has the discretion to allow amendments to the pleadings to comply with the specificity requirements of a RICO claim).

specificity requirements for bringing a RICO claim.³³ The Court has given this extended period because the Court wishes to ensure that its decision to stay discovery, entered February 12, 2004, does not deprive Plaintiff of her opportunity to discover the facts necessary to plead this RICO claim with the required particularity. The Court cautions Plaintiff's counsel to properly draft the second Amended Complaint so that it is in conformity with the specificity requirements for bringing a RICO claim, as it is unlikely the Court will grant leave for a fourth attempt to bring the pleadings within the requirements of the law.³⁴

C. Summary Judgment is not appropriate at this time as to Count II on the grounds of res judicata and collateral estoppel.

In addition to seeking dismissal of Count II on the grounds that it fails to plead the RICO claim with the required particularity, First Union also seeks summary judgment on this claim on the basis of res judicata and issue preclusion.

1. Standard for Summary Judgment

³³Because the Court has found that Counts I, III, IV and V are all to be dismissed based upon the pertinent statute of limitations, Plaintiff is barred from including those counts in her second Amended Complaint. The Court orders that by doing so, Plaintiff is in no way waiving her right to appeal the Court's decision as it relates to the dismissal of those claims and is not deemed to have abandoned those claims. The Court simply believes it would be a waste of Defendants' time, as well as this Court's time, to prepare and review answers to the second Amended Complaint that include the four counts that are dismissed with this order.

³⁴The Court further cautions Plaintiff not to include in her Second Amended Complaint any additional claims for which the statute of limitations has expired. In a recent response to Option One and Kozeny & McCubbins Motions for Sanctions, Plaintiff threatens to file a claim for "malicious prosecution and abuse of prosecution claims against Defendants McCubbin, Option One and First Union." If these claims are based on the Johnson County foreclosure proceeding, it would seem at first blush that those claims would also be time-barred.

Summary judgment is appropriate if the moving party demonstrates that there is “no genuine issue as to any material fact” and that the moving party is “entitled to a judgment as a matter of law.”³⁵ The rule provides that “the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.”³⁶ The substantive law identifies which facts are material.³⁷ A dispute over a material fact is genuine when the evidence is such that a reasonable jury could find for the nonmovant.³⁸ “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.”³⁹

The movant has the initial burden of showing the absence of a genuine issue of material fact.⁴⁰ The movant may discharge its burden “by ‘showing’ – that is, pointing out to the ... court – that there is an absence of evidence to support the nonmoving party’s case.”⁴¹ The movant need not negate the nonmovant's claim.⁴² Once the movant makes a properly supported motion, the nonmovant must do more

³⁵ Fed. R. Civ. P. 56(c), made applicable to adversary proceedings by Fed. R. Bankruptcy Proc. 7056(c).

³⁶ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

³⁷ *Id.* at 248.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1036 (10th Cir. 1993).

⁴¹ *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

⁴² *Id.* at 323.

than merely show there is some metaphysical doubt as to the material facts.⁴³ The nonmovant must go beyond the pleadings and, by affidavits or depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial.⁴⁴ Rule 7056(c) requires the Court enter summary judgment against a nonmovant who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof.⁴⁵

⁴³ *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

⁴⁴ *Celotex*, 477 U.S. at 324.

⁴⁵ *Id.* at 322.

2. Analysis of First Union's Summary Judgment Motion.

First Union claims that Plaintiff's RICO claim was a compulsory counterclaim to the foreclosure proceeding in state court, and that some of the issues raised by Plaintiff were already raised and decided by the state court, thus barring her from now bringing those claims. For res judicata to apply, four conditions must be met: "(1) identity in the things sued for, (2) identity of the cause of action, (3) identity of persons and parties to the action, and (4) identity in the quality of the persons for or against whom the claim is made."⁴⁶ A judgment issued by a court of competent jurisdiction is preclusive as to all of the matters actually raised, and those matters which should have been raised.⁴⁷

Plaintiff contends that res judicata or claim preclusion is inapplicable for two reasons. First, Plaintiff claims the state court did not have proper jurisdiction, thus rendering the judgment void. Second, Plaintiff claims that her RICO count includes actions by First Union that took place after the entry of the state court judgment, thus resulting in a claim that had not arisen prior to the state court judgment.

a. Plaintiff is barred from raising any claims that were previously decided by the state court in the foreclosure proceeding.

Plaintiff claims that the state court judgment is void because that court lacked jurisdiction to enter a judgment and because First Union did not have standing to bring the claim. The basis for these claims is that First Union was not the proper party to bring the foreclosure action because it was not the real party in interest. It is undisputed that Plaintiff raised this issue before the state court, which ultimately rejected Plaintiff's claims and entered a judgment in favor of First Union. Plaintiff did not appeal the state court

⁴⁶*O'Keefe v. Merrill Lynch & Co.*, 32 Kan. App. 2d 474 (2004) (citing *Jackson Trak Group, Inc. v. Mid States Port Authority*, 242 Kan. 683 (1998)).

⁴⁷*Id.*

judgment, and the time for doing so has long passed. The Court finds that Plaintiff is barred from now collaterally attacking that state court judgment in this proceeding.

The *Rooker-Feldman* doctrine, established by two Supreme Court decisions handed down 60 years apart, provides that “a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States [trial] court.”⁴⁸ Section 1257 of Title 28 of the United States Code provides that the proper court in which to obtain such review is the United States Supreme Court.⁴⁹ The Tenth Circuit Bankruptcy Appellate Panel has recognized the applicability of the *Rooker-Feldman* doctrine to bankruptcy courts.⁵⁰

The Court finds that the *Rooker-Feldman* doctrine is applicable to the issue of whether First Union was the proper party in interest to bring the foreclosure action. The state court made the following specific findings in regard to the foreclosure proceeding:

1. it had jurisdiction over all of the parties;
2. it had jurisdiction over the subject matter of the case;
3. First Union was the true owner of the note and mortgage; and
4. First Union was entitled to the relief prayed for in the foreclosure petition.

⁴⁸*Johnson v. De Grandy*, 512 U.S. 997, 1005-1006 (1994) (citing to *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983)).

⁴⁹*Feldman*, 460 U.S. at 476.

⁵⁰*In re Abboud*, 237 B.R. 777, 780 (10th Cir. B.A.P. 1999). *See also Goetzman v. Agribank, FCB (In re Goetzman)*, 91 F.3d 1173 (8th Cir. 1996) (holding that the bankruptcy court lacked subject matter jurisdiction to determine the amount of a debt that had been previously determined in state trial court) and *In re Beardslee*, 209 B.R. 1004 (Bankr. D. Kan. 1997).

As mentioned above, Plaintiff did not appeal any of these findings to a state appellate court. Instead, Plaintiff is asking this Court to, in essence, overturn the findings made by the state court and rule that it lacked jurisdiction over the parties and that First Union was in fact not the proper party. It is this type of collateral attack, which seeks reversal of a state court judgment by a federal trial court, that the *Rooker-Feldman* doctrine prohibits. Plaintiff's relief from any incorrect or improper rulings by the state trial court was to the Kansas Court of Appeals, and this Court will not, and in fact cannot, sit in the place of those appellate courts.

Alternatively, rules of preclusion apply in bankruptcy actions.⁵¹ As the Supreme Court noted in *Marrese v. American Academy of Orthopaedic Surgeons*,⁵² the preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by the full faith and credit statute, which provides that state judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."⁵³ This statute directs a federal court to refer to the preclusion law of the state in which judgment was rendered.

The threshold constitutional question, whether Plaintiff had a full and fair opportunity to be heard, is easily determined in the affirmative. Under the principles of claim preclusion, a final judgment on the merits of an action precludes the parties from relitigating not only the adjudicated claim, but also any

⁵¹ *Cf. Grogan v. Garner*, 498 U.S. 279, 284–85, n.11 (1991) (stating that collateral estoppel principles apply in discharge proceedings).

⁵² 470 U.S. 373, 380 (1985).

⁵³ 28 U.S.C. § 1738.

theories or issues that were actually decided, or could have been decided, in that action.⁵⁴ Plaintiff clearly raised the issues concerning First Union's standing to bring the claim in state court and contested the issue of whether First Union was the proper party in interest.

The full faith and credit statute requires this Court to analyze state law to determine whether that judgment has preclusive effect. In *Indiana University Foundation v. Reed (In re Estate of Reed)*,⁵⁵ the Court held:

The doctrine of res judicata is a bar to a second action upon the same claim, demand or cause of action. It is founded upon the principle that the party, or some other with whom he is in privity, has litigated, or had an opportunity to litigate, the same matter in a former action in a court of competent jurisdiction [R]es judicata forbids a suitor from twice litigating a claim for relief against the same party. The rule is binding, not only as to every question actually presented, considered and decided, but also to every question which might have been presented and decided. . . . [Res judicata] requires that all the grounds or theories upon which a cause of action or claim is founded be asserted in one action or they will be barred in any subsequent action. . . . This rule is one of public policy. It is to the interest of the state that there be an end to litigation and an end to the hardship on a party being vexed more than once for the same cause.⁵⁶

Contrary to Plaintiff's position, claim preclusion applies to issues of jurisdiction, both personal and subject matter.⁵⁷ Because the state court heard and decided the issues concerning First Union's standing to bring the claim, the rules of preclusion bar Plaintiff from relitigating those issues in this action.

⁵⁴See *Grimmett v. S & W Auto Sales Co., Inc.*, 26 Kan. App. 2d 482, 487 (1999).

⁵⁵236 Kan. 514 (1985).

⁵⁶*Id.* at 519 (citations omitted and emphasis added).

⁵⁷See *Insurance Corp. Of Ireland, Ltd. V. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) (holding "It has long been the rule that principles of res judicata apply to jurisdictional determinations – both subject matter and personal.").

b. Summary judgment in favor of First Union on the RICO claim is premature.

Although the Court finds that any RICO claim based upon actions that arose prior to the filing of the foreclosure action are barred, summary judgment is not appropriate at this time. Plaintiff alleges in her response to the summary judgment motion that First Union took actions in furtherance of the alleged illegal scheme by the defendants after the entry of the state court judgment. If the RICO claim is based, at least in part, on actions by First Union that took place following the judgment in the state court proceeding, *res judicata* and issue preclusion would not operate to bar the RICO claim.⁵⁸

As noted above, the Amended Complaint lacks the required specificity for a RICO claim. The use of broad allegations and lack of necessary information makes it impossible for the Court to determine at this time if Plaintiff's claim is valid that First Union engaged in illegal conduct after the conclusion of the state court proceeding, which could create a RICO cause of action that is not barred by rules of preclusion. Therefore, First Union's summary judgment motion must be denied without prejudice, pending the filing of a second Amended Complaint by Plaintiff.

The Court cautions Plaintiff to carefully examine the law concerning *res judicata* and issue preclusion in determining whether to continue pursuing a RICO claim against First Union. It appears to the Court, based upon the information that has been presented to this point, that any RICO claim against First Union is likely to be barred based upon the prior lawsuit involving these two parties. However, without the benefit of a properly drafted Complaint, the Court is unable to make that determination. Given the benefit of the Court's analysis in this order, combined with the arguments raised by First Union in its motion

⁵⁸See *Waddell & Reed Financial, Inc. v. Torchmark Corp.*, 292 F. Supp. 2d 1270 (D. Kan. 2003).

for summary judgment, the Court will not look favorably upon any further attempt to include First Union in a RICO claim that is barred by the rules of preclusion. The Court is not, in any way, attempting to dissuade plaintiff from bringing a valid, timely claim against First Union in her Second Amended Complaint, but will not hesitate to provide appropriate remedies to First Union should plaintiff's second Amended Complaint contain a claim against First Union that plaintiff should have known was barred by *res judicata* or other similar rules of preclusion. The Court's decision to allow Plaintiff to amend her complaint should not be viewed as an opportunity to continue pursuing an invalid RICO claim against First Union, or any other party.

III. SCHEDULING ORDER

The Court lifts the stay of discovery as to the only remaining claim – the RICO claim. Any party may conduct discovery on this claim, even before the Second Amended Complaint is filed, until **November 3, 2004**. This allows, after amendment, eight additional weeks to conclude discovery. A final pretrial conference will be held **December 8, 2004 at 1:40 P.M.** at the United States Bankruptcy Court, 444 S.E. Quincy, Room 215, Topeka, Kansas 66683. Plaintiff shall be responsible for submitting one agreed pretrial order, covering all parties and all claims, after consultation with Debtors' counsel, no later than **December 3, 2004**. The pretrial order form can be accessed on the Court's website at www.ksb.uscourts.gov under "Judges' Corners."

IV. CONCLUSION

The Court finds that Counts I, III, IV and V of the Amended Complaint are all barred by the applicable statute of limitations and are dismissed. Plaintiff's reliance on a continuing tort theory to toll the statute of limitations in each of those counts is without merit. In addition, the Court finds that Plaintiff has

failed to provide the required specificity for a RICO claim in Count II, but will give Plaintiff another opportunity to amend her complaint to bring it into compliance with the pleading requirements for a RICO claim in the Tenth Circuit.

The Court denies First Union's Motion for Summary Judgment, without prejudice. Summary judgment is not appropriate at this time because plaintiff has alleged that the RICO claim against First Union involves activity that occurred following the state court judgment in the foreclosure proceeding. First Union is free to raise these issues again in the event Plaintiff's second Amended Complaint contains a claim against First Union that is barred by *res judicata* or other rules of preclusion.

The Court also requires Plaintiff to show cause within ten (10) days why Defendant Maplewood Mortgage, Inc. and John Does 1-100 should not be dismissed from this proceeding based upon her failure to properly serve those Defendants within the 120 day period required by Fed. R. Bankr. P. 7004(a), which incorporates Fed. R. Civ. Proc. 4(m). Failure to show cause will result in the dismissal of all claims against those Defendants.

IT IS, THEREFORE, BY THIS COURT ORDERED that the Motion of BNC Mortgage to Dismiss Amended Complaint (Doc. 55), Motion of Option One Mortgage to Dismiss Counts I, II, III, IV and V of the Amended Complaint (Doc. 56), Motion of First Union National Bank to Dismiss (Doc. 60), Motion of Miller Enterprises and Jeffrey Miller to Dismiss Amended Complaint (Doc. 71), and Motion of Adamson and Associates to Dismiss Counts II and III of the Amended Complaint (Doc. 72) are granted in part and denied in part. Counts I, III, IV and V are barred by the statute of limitations and are dismissed, with prejudice. Plaintiff shall have until **September 8, 2004** to file a second Amended Complaint, containing only the RICO Count from the First Amended Complaint, and it must meet the

pleading requirements for bringing a RICO claim. First Union National Bank's Motion for Summary Judgment (Doc. 60) is denied, without prejudice.

IT IS FURTHER ORDERED that Plaintiff shall show cause within ten (10) days why Defendants Maplewood Mortgage, Inc. and John Does 1-100 should not be dismissed from this proceeding based upon lack of service of process.

IT IS SO ORDERED this _____ day of July, 2004.

JANICE MILLER KARLIN
United States Bankruptcy Judge
District of Kansas

CERTIFICATE OF MAILING

The undersigned certifies that a copy of the Memorandum and Order Granting Defendants' Motions to Dismiss, in Part, and Denying Defendants' Motions to Dismiss, In Part, was deposited in the United States mail, prepaid on this _____ day of July, 2004, to the following:

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