United States District Court
for the
Southern District of Florida

Federal Housing Finance Agency, Plaintiff	)	
	)	
v.	)	Civil Action No. 16-21221-Civ-Scola
	)	
Deloitte & Touche, LLP, Defendant.		

Order on Motion to Alter or Amend Order

On January 18, 2017, the Court granted the Federal Housing Finance Agency's ("FHFA's") motion to substitute as the plaintiff in this matter. (Order Denying Mot. to Remand and Granting Mot. to Substitute, ECF No. 50.) The original plaintiffs, each of whom is a private shareholder of the Federal National Mortgage Association ("Fannie Mae"), have moved the Court to alter or amend the Order pursuant to Federal Rule of Civil Procedure 59(e). (Mot. Under Fed. R. Civ. P. 59(e), ECF No. 57.)

"The only grounds for granting a Rule 59 motion are newly-discovered evidence or manifest errors of law or fact. A Rule 59(e) motion cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (internal quotations omitted).

> It is an improper use of the motion to reconsider to ask the Court to rethink what the Court already thought through—rightly or wrongly. The motion to reconsider would be appropriate where, for example, the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension. A further basis for a motion to reconsider would be a controlling or significant change in the law or facts since the submission of the issue to the Court. Such problems rarely arise and the motion to reconsider should be equally rare.

Z.K. Marine Inc. v. M/V Archigetis, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992) (Hoeveler, J.) (citation omitted).

The Court held that the original plaintiffs' claims were derivative and therefore properly belonged to the FHFA under the Housing and Economic Recovery Act of 2008 ("HERA"). (Order, ECF No. 50.) The original plaintiffs argue that the Court made manifest errors of law and fact by omitting from the

Order any consideration of their claims for negligent misrepresentation against Defendant Deloitte & Touche, LLP ("Deloitte"). (Mot. Under Fed. R. Civ. P. 59(e) at 1-2, ECF No. 57.) The original plaintiffs assert that those "shareholders who were induced by Deloitte's negligent audit reports to purchase and hold shares of Fannie Mae may recover damages against Deloitte arising from that reliance." (*Id.* at 3.)

In support of their position, the original plaintiffs cite to *Citigroup Inc. v. AHW Investment Partnership*, 140 A.3d 1125 (Del. 2016). In *Citigroup*, the plaintiffs were holders of Citigroup Inc.'s stock. 140 A.3d at 1140. They sued Citigroup and its officers and directors, asserting claims for negligent misrepresentation, among others, because Citigroup failed to disclose accurate information about its true financial condition in its public filings and financial statements. *Id.* at 1128. The Supreme Court of Delaware held that the plaintiffs' claims of negligent misrepresentation against the corporation were direct because the directors of the corporation owed a fiduciary duty to the corporation's stockholders. *Id.* at 1139-40. The court specifically noted that the claims at issue were direct because "they belong to the holders and are ones that only the holders can assert, not claims that could plausibly belong to the issuer corporation, Citigroup." *Id.* at 1138.

There is a significant difference between *Citigroup* and this case: the original plaintiffs did not bring this suit against Fannie Mae; rather, they brought the suit against Deloitte, Fannie Mae's independent auditor. (Compl., ECF No. 1-1.) The original plaintiffs acknowledge that Deloitte owed a duty to Fannie Mae, but assert that Deloitte also owed a duty to them. (Reply at 9, ECF No. 59.) The Supreme Court of Delaware has noted that in "determining whether stockholders can bring a claim for breach of fiduciary duty directly, or whether a particular fiduciary duty claim must be brought derivatively on the corporation's behalf," courts should apply the two-pronged test set forth in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004). *Citigroup*, 140 A.3d at 1139. "Under *Tooley,* whether a claim is solely derivative or may continue as a dual-natured claim must turn *solely* on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)? In addition, to prove that a claim is direct, a plaintiff must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation." *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248, 1260 (Del. 2016) (internal quotations and citations omitted).

The Court conducted an analysis under *Tooley* in the Order and determined that the alleged harms, which the Court characterized as the depletion of Fannie Mae's assets and the loss of value to the original plaintiffs' shares, were premised on harms to Fannie Mae rather than the original plaintiffs individually. (Order at 8-9, ECF No. 50.) Therefore, the Court held that under *Tooley* and Delaware law, the plaintiffs' claims were derivative. (*Id.*)

The original plaintiffs argue that the Court "did not address the nature of the harm caused by the individual Plaintiffs' reliance on Deloitte's negligent misrepresentations." (Mot. Under Fed. R. Civ. P. 59(e) at 3, ECF No. 57.) However, in their opposition to the FHFA's motion to substitute, the original plaintiffs described the harm they suffered as "breaches of fiduciary duty and negligent misrepresentations that resulted in the unlawful transfer of the economic bundle of rights and value of their stock to a dominant shareholder," and stated that their "claims are direct because they seek to redress FHFA's, with Deloitte's assistance, improper expropriation of value and rights from the minority class of shareholders to Fannie's controlling shareholder, Treasury." (Opp. at 11, 12, ECF No. 20.) The original plaintiffs further stated that "the crux of Plaintiffs' claims is. . . that accounting improprieties at Fannie facilitated an unlawful 'extraction from [Plaintiffs], and a redistribution to [Treasury,] the controlling shareholder of. . .the economic value' of their stock." (*Id.* at 15.) Similarly, in their Motion to Remand, the original plaintiffs stated that "the gravamen of Plaintiffs' Complaint is. . . [that] because of Deloitte's actions and inactions, the Net Worth Sweep improperly allocated to a single, dominant shareholder whatever profits Fannie makes, harming minority shareholders and destroying Plaintiffs' economic interest in Fannie to which they are entitled as owners of stock." (Mot. for Remand at 19, ECF No. 23.) These are the precise harms that the Court addressed in the Order. (Order at 8-10, ECF No. 50.)

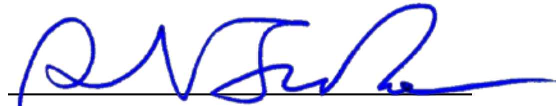
The original plaintiffs now assert "that inducement is a separate and individual injury to the purchasing shareholder, which gives rise to a direct claim under *Tooley*." (Mot. Under Fed. R. Civ. P. 59(e) at 6, ECF No. 57.) However, the original plaintiffs failed to make this argument in their opposition to the FHFA's motion to substitute or in their motion to remand; rather, they repeatedly characterized the harm that they suffered as the loss of value of their stock. (Opp. at 11-13, 15, ECF No. 20.) A Rule 59(e) motion cannot be used to raise arguments that could have been raised prior to the entry of judgment. *Arthur*, 500 F.3d at 1343.

Thus, the original plaintiffs have not demonstrated that any of the grounds for granting a Rule 59(e) motion exist. In the alternative, the original plaintiffs have requested leave to amend the Complaint pursuant to Federal

Rule of Civil Procedure 15(a)(2). (Mot. Under Fed. R. Civ. P. 59(e) at 10, ECF No. 57.) However, Rule 15(a) "by its plain language, governs amendment of pleadings *before* judgment is entered; it has no application *after* judgment is entered." *Jacobs v. Tempur-Pedic Intern., Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010) (emphasis in original). After judgment has been entered, a plaintiff may seek leave to amend if he is granted relief under Rule 59(e) or Rule 60(b)(6). *Id.* (citing *United States ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1361 n.22 (11th Cir. 2006). Since the original plaintiffs have not met their burden under Rule 59(e), the Court denies leave to amend.

Having reviewed the motion, the FHFA's response (ECF No. 58), the record, and the relevant legal authorities, the Court **denies** the motion to alter or amend judgment (**ECF No. 57**).

Done and ordered in chambers, at Miami, Florida, on April 26, 2017.



Robert N. Scola, Jr.
United States District Judge