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JUL 2 2003

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

QUICKEN LOANS, INC., a Michigan corporation, Plaintiff, v. DEMETRIOS A. BOUTRIS, in his official capacity as Commissioner of the California Department of Corporations, Defendant.	NO. CV S-03-0256 GEB JFM ORDER

Plaintiff Quicken Loans, Inc. ("Quicken Loans") moves for reconsideration of the May 8, 2003, Order which failed to reach its argument that the Alternative Mortgage Transaction Parity Act of 1982 ("Parity Act") preempts California's "per diem" statutes.[1] Quicken Loans also moves for partial summary judgment on its claim that Defendant Commissioner Boutris's interpretation and application of California's per diem statutes violate the Takings Clause of the United States Constitution. Defendant opposes the motions and moves for summary judgment of Quicken Loans's takings claim.

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[1] California's per diem statutes prohibit lenders from charging any interest on residential mortgages for a period in excess of one day prior to recordation of the mortgage or deed of trust. See Cal. Civ. Code § 2948.5; Cal. Fin. Code § 50204(o).

Background[2]

Quicken Loans is a Michigan corporation that engages in residential mortgage lending in all fifty states of the United States. (Pl.'s Statement of Undisputed Facts in Support of Mot. for Partial Summ. J. - Takings ("Pl.'s SUF") ¶ 1; Def.'s Response to Pl.'s SUF ¶ 1.) Quicken Loans makes a variety of loans secured by residential mortgages, including home purchase money, refinancing and home equity residential loans. (Id. ¶ 2.) Quicken Loans is licensed and authorized to make residential mortgage loans in California under the California Residential Mortgage Lending Act ("CRMLA"). (Id. ¶ 3.) During 2001 and 2002, Quicken Loans contends it made approximately $500 million and $745 million respectively in loans secured by mortgages on California property. (Pl.'s SUF ¶ 4.) It further asserts it regularly makes alternative mortgage transactions, and has made in excess of 1800 of these loans since 1999 to the present. (Pl.'s Statement of Undisputed Facts in Support of its Mot. for Partial Summ. J. - Parity Act ¶ 5.)

Discussion[3]

Quicken Loans is correct in its position that the May 8 Order should have reached its Parity Act preemption argument. The May 8 Order held California's per diem statutes are preempted by the Depository Institutions Deregulation and Monetary Control Act of 1980

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[2] The Commissioner denies many of the assertions of fact made by Quicken Loans on the basis that no discovery has been conducted; however, the Commissioner states he has "admitted sufficient facts upon which he believes this court may make a substantive ruling on the motion and . . . does not request a delay to conduct discovery prior to responding to the motion." (Def.'s Memo. of P. & A. in Opp'n to Mot. for Partial Summ. J. - Takings at 2.)

[3] Summary judgments standards are well-known and will not be repeated unless relevant to a point decided.

("DIDMCA"), which applies to "any loan, mortgage, credit sale, or advance which is . . . secured by a first lien on residential real property[,]. . . made after March 31, 1980; and [which is a federally related mortgage loan.]" 12 U.S.C. § 1735f-7a(a). In contrast, the Parity Act applies to "alternative mortgage transactions" which do not have to be first liens on residential property. Quicken Loans contends the Parity Act applies to its alternative mortgage transactions that are not first liens and that the Parity Act preempts the Commissioner's auditing authority over these transactions.

I. Parity Act Preemption

Quicken Loans argues California's per diem statutes are preempted by the Parity Act because they cannot be enforced against federally chartered lenders. The Commissioner counters that the per diem laws are not in conflict with or expressly preempted by federal statute or any regulation promulgated by the federal Office of the Thrift Supervision ("OTS") under the Parity Act.

The Parity Act "'authorize[s] non-federally chartered housing creditors to offer alternative mortgages in accordance with the Federal regulations issued by the appropriate Federal regulatory agencies[, thereby allowing] . . . those creditors [to] have parity with federally chartered institutions.'" Nat'l Home Equity Mortgage Ass'n v. Face, 239 F.3d 633, 635 (4th Cir. 2001)(quoting Sen. Conf. Rep. No. 97-641, at 94 (1982), reprinted in 1982 U.S.C.C.A.N. 3128, 3137). According to 12 U.S.C. § 3803(a) of the Parity Act:

> In order to prevent discrimination against State-chartered depository institutions, and other nonfederally chartered housing creditors, with respect to making, purchasing, and enforcing alternative mortgage transactions, housing creditors may make, purchase, and enforce alternative mortgage transactions, except that this section shall apply . . . [and]

> (3) with respect to all other housing creditors, including without limitation, savings and loan associations, mutual savings banks, and savings banks, only to transactions made in accordance with regulations governing alternative mortgage transactions as issued by the Director of the Office of Thrift Supervision for federally chartered savings and loan associations, to the extent that such regulations are authorized by rulemaking authority granted to the Director of the Office of Thrift Supervision with regard to federally chartered savings and loan associations under laws other than this section.

Furthermore, "[a]n alternative mortgage transaction may be made by a housing creditor in accordance with this section, notwithstanding any State constitution, law, or regulation." 12 U.S.C. § 3803(c). "An alternative mortgage is one which is not a traditional, fully amortized, fixed rate loan."[4] Shinn v. Encore Mortgage Services, Inc., 96 F. Supp. 2d 419, 422 (D.N.J. 2000).

> The practical effect of the [Parity Act's] statutory scheme is to permit a non-federally chartered housing creditor to make a loan either under state law, in which case the loan transaction remains subject to the full range of

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[4]

> [T]he term "alternative mortgage transaction" means a loan or credit sale secured by an interest in residential real property, a dwelling, all stock allocated to a dwelling unit in a residential cooperative housing corporation, or a residential manufactured home (as that term is defined in section 5402(6) of Title 42)- (A) in which the interest rate or finance charge may be adjusted or renegotiated; (B) involving a fixed-rate, but which implicitly permits rate adjustments by having the debt mature at the end of an interval shorter than the term of the amortization schedule; or (C) involving any similar type of rate, method of determining return, term, repayment, or other variation not common to traditional fixed-rate, fixed-term transactions, including without limitation, transactions that involve the sharing of equity or appreciation; described and defined by applicable regulation.

12 U.S.C. § 3802(1).

> state regulations, or under federal law, in which case the loan transaction becomes subject to federal regulations governing similar loans by federally chartered lending institutions. Non-federally chartered housing creditors exercise this regulatory "option" by affirmatively complying with substantive federal regulations identified by the Office of Thrift Supervision.

Face, 239 F.3d at 635-36. Quicken Loans has provided no evidence that it complied with the substantive federal regulations identified by the OTS when engaging in the alternative mortgage transactions at issue. Therefore, Quicken Loans has failed to show that the Parity Act governs the loans at issue and its motion for partial summary judgment is denied.

II. Takings Clause

Both parties seek partial summary judgment of Quicken Loans's claim that the Commissioner's interpretation and application of California's per diem statutes constitute an unconstitutional regulatory taking under the Fifth Amendment. At the hearing on June 30, 2003, Quicken Loans clarified that neither its Complaint nor its regulatory taking motion asserts a facial challenge against the per diem statutes; rather it challenges the Commissioner's application of the statutes to the interest Quicken Loans seeks to earn on mortgage loans.[5]

Quicken Loans suggests that California's per diem statutes do not authorize the Commissioner to limit when interest accrues on mortgage loans to just one day prior to recording of the mortgage or deed of trust, and Quicken Loans explicitly argues that the Commissioner incorrectly interprets the term "recording" in the per

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[5] Therefore Quicken Loans has withdrawn any facial challenge asserted in its Complaint.

diem statutes. The Commissioner contends that "recording" occurs when the Recorder's office affixes the official seal on the mortgage or deed of trust, notwithstanding when the document is delivered to the Recorder's office. (Def.'s Response to Separate Statement of Undisputed Facts - Takings at ¶ 8.) Quicken Loans counters that California Civil Code section 1170 prescribes when recording occurs, and that under this section recording occurs upon delivery of the mortgage or deed of trust to the Recorder's office. Section 1170 provides, "An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the Recorder's office, with the proper officer, for record."

To prevail on an as-applied challenge under the takings clause, Quicken Loans is required to establish that the Commissioner has (1) taken its property by application of the per diem statues in a manner that goes too far (2) without tendering just compensation for the taking. Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496, 1500 (9th Cir. 1990). "Both the taking element and the compensation element must be ripe before the claim is justiciable [in federal court]." Id. "[T]o assert an as-applied takings claim, [Quicken Loans] must establish two things: (1) the [Commissioner] has reached a final decision on the applicability of the [per diem statutes] to [Quicken Loans's] property; and (2) [Quicken Loans] is unable to receive just compensation from [California]." San Remo Hotel v. City and County of San Francisco, 145 F.3d 1095, 1102 (9th Cir. 1998). The ripeness doctrine "prevents 'the courts . . . from entangling themselves in abstract disagreements over administrative policies, and also ... protect[s] the agencies from judicial interference until an administrative decision has been formalized and

its effects felt in a concrete way by challenging parties.'" Washington Legal Foundation v. Legal Foundation of Washington, 271 F.3d 835, 850 (9th Cir. 2001)(citation omitted).

California Finance Code sections 50321 and 50323 set forth the procedural requirements that must be met before an order issued by the Commissioner becomes final. Section 50321 reveals if the Commissioner "has reasonable grounds to believe that any [mortgage lender] licensee has violated . . . any law or rule binding upon it, the [C]ommissioner shall, by written order addressed to the licensee, direct the discontinuance of the violation." Cal. Fin. Code § 50321. However, no such order "may become final except after notice to the affected licensee of the [C]ommissioner's intention to make the order final and of the reasons for the finding." Id. § 50323. Section 50323 further prescribes:

> The [C]ommissioner shall also notify the licensee that upon receiving a request the matter will be set for hearing to commence within 15 business days after receipt. The licensee may consent to have the hearing commence at a later date. If no hearing is requested within 30 days after the mailing or service of the required notice, and none is ordered by the [C]ommissioner, the order may become final without hearing and the licensee shall immediately discontinue the practices named in the order.

Id.

In the present action, neither party has established that the Commissioner has issued a final order on the application of California's per diem statutes to Quicken Loans. Instead the parties rely on a letter dated March 11, 2002, in which the Commissioner identified five loans disclosing that Quicken Loans overcharged per diem interest and the Commissioner further expressed concern that "it appears that there may be other loans with the same problem." (Request

for Judicial Notice in Support of Pl.'s Mot. for Partial Summ. J. - Takings Ex. B at Ex. A.) This letter has not been shown to constitute the Commissioner's final decision under California Financial Code section 50323.[6]

Notwithstanding the parties' failure to show that the Commissioner has taken final action as required by Section 50323, the parties argued at the June 30 hearing that this case is ripe because the Commissioner has expressed his final decision on the application of the per diem statutes to Quicken Loans. They also argued at that hearing that the exact amount of property involved in the alleged taking is immaterial because the "taking" focus should be on the Commissioner's interpretation and application of the per diem statutes to Quicken Loans's property. This argument is premised on the existence of a property interest, even though that interest has not yet been established, and even assuming its existence, its precise value is presently unknown. Further, the parties' respective arguments about when "recording" occurs under the per diem statutes, considered in the context of the as-applied takings challenge, indicate they could be inviting the federal court to become entangled in an abstract disagreement. This is because should recordation under each party's interpretation occur at the same time, resolving their

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[6] Quicken Loans also submitted a letter which it received from the Commissioner, dated January 28, 2003, in which the Commissioner rejected arguments made by Quicken Loans in a June 11, 2002, letter. (Request for Judicial Notice in Support of Pl.'s Mot. for Partial Summ. J. - Takings Ex. B at Ex. B.) The Commissioner's January 28 letter ends by requesting Quicken Loans, "within 14 days of the date of [the] letter [to] submit Quicken's plan to complete review and a proposed date for completion of this review and the date for submission of the report of the review." (Id. Ex. B. at Ex. B at 1.) Neither the Commissioner's March 11 nor January 28 letters show that the Commissioner has taken final action required under Section 50323.

dispute on when "recording" occurred would decide an issue that is immaterial to Quicken Loans's as-applied takings claim.

Not only do the parties appear to invite resolution of an issue of past events where there is no certainty that judicial decision makes a difference to the as-applied takings claim, Quicken Loans has failed to satisfy the second ripeness requirement obligating it to seek just compensation from the state.

> The Fifth and Fourteenth Amendments do not prohibit the taking of property; they prohibit the taking of property without just compensation. Therefore, there is no constitutional injury until the plaintiff has availed himself of the state's procedures for obtaining compensation for the injury, and been denied compensation.

San Remo Hotel, 145 F.3d at 1102. "Ordinarily, a plaintiff must seek compensation through state inverse condemnation proceedings before initiating a takings suit in federal court, unless the State does not provide adequate remedies for obtaining compensation." Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725, 734 n.8 (1997). Quicken Loans has failed to show that California does not provide adequate remedies for obtaining compensation for the alleged taking by the Commissioner. See Massingill v. Department of Food & Agriculture, 102 Cal. App. 4th 498, 506 (2002) ("property owner may bring an inverse condemnation action and, if successful, the regulatory agency must either withdraw the regulation or pay just compensation").

Because the parties have failed to establish that the as-applied takings claim is ripe, both parties' motions are denied.

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Since Quicken Loans's as-applied takings claim is unripe, it is dismissed.

IT IS SO ORDERED.

DATED: July 2, 2003

GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

kdc

United States District Court
for the
Eastern District of California
July 3, 2003

* * CERTIFICATE OF SERVICE * *

2:03-cv-00256

Quicken Loans Inc

v.

Boutris

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on July 3, 2003, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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