

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-12564

JANICE ELLERY and LILIAN PATINO,

Plaintiffs-Appellants,

versus

FAY SERVICING, LLC,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:23-cv-60260-MD

Before JILL PRYOR and LUCK, Circuit Judges, and COVINGTON,* District Judge.

COVINGTON, District Judge:

Janice Ellery and Lilian Patino appeal the dismissal of their suit against the servicer of their residential mortgages, Fay Servicing, LLC (“Fay”). Ellery alleges that Fay violated the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692–1692p, by sending her letters falsely stating that a proposed short sale was not an arm’s-length transaction. Plaintiffs also allege that Fay violated the Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2601 *et seq.*, by failing to adequately respond to their notices of error (“NOEs”) regarding Fay’s denial of certain short sale purchase offers. The district court dismissed the complaint for failure to state a claim under either the FDCPA or RESPA. After careful consideration, we affirm.

I.

Plaintiffs defaulted on two residential mortgage loans serviced by Fay and separately pursued the loss mitigation option of selling their homes at short sales. However, Fay denied Plaintiffs’ applications for approval of the short sales on the basis that they were not arm’s-length transactions. Plaintiffs submitted NOEs challenging Fay’s determinations, but Fay did not provide further explanation or approve the sales.

* Honorable Virginia M. Covington, United States District Judge for the Middle District of Florida, sitting by designation.

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Plaintiffs brought claims for violation of the FDCPA, as well as a similar Florida law, and violation of RESPA and Regulation X, 12 C.F.R. pt. 1024, which was promulgated by the Consumer Finance Protection Bureau to implement RESPA. With respect to the FDCPA claim, which is limited to Ellery, Ellery alleged that Fay violated 15 U.S.C. § 1692e(10) by issuing letters denying Ellery's proposed short sale ("the Denials") that falsely stated the offer was not an arm's-length transaction. Plaintiffs alleged that Fay violated RESPA by inadequately responding to their NOEs in violation of 12 C.F.R. § 1024.35(e) and 12 U.S.C. § 2605(e) and (k).

Fay moved to dismiss the complaint, among other things, for failure to state a claim. Fay argued that Ellery failed to state a claim for violation of the FDCPA because the Denials were not sent in connection with the collection of Ellery's debt and, therefore, did not fall within the ambit of 15 U.S.C. § 1692e. Fay also argued that Plaintiffs failed to state a claim for violation of RESPA because Fay did not have an obligation to respond to the NOEs as they did not assert errors related to loan servicing. The district court agreed and dismissed the complaint without prejudice. As Plaintiffs did not file an amended complaint, the district court dismissed the complaint with prejudice for lack of prosecution. Plaintiffs appeal.

II.

We review *de novo* the district court's grant of a motion to dismiss for failure to state a claim, accepting all factual allegations in the complaint as true and construing them in the light most

favorable to the plaintiffs. *Henderson v. Washington Nat. Ins. Co.*, 454 F.3d 1278, 1281 (11th Cir. 2006). We also review *de novo* the district court’s interpretation of statutes and federal regulations. *Owner-Operator Indep. Drivers Ass’n, Inc. v. Landstar Sys., Inc.*, 622 F.3d 1307, 1316, 1320 (11th Cir. 2010).

III.

We begin by considering Fay’s argument that Plaintiffs’ failure to challenge the dismissal of the complaint for lack of prosecution requires affirmance. We then address Ellery’s challenges to the dismissal of the FDCPA and RESPA claims.

A.

An appeal from a final order or judgment brings up for review “all prior non-final orders and rulings which produced the judgment.” *Mickles v. Country Club Inc.*, 887 F.3d 1270, 1278 (11th Cir. 2018) (citation modified). Accordingly, contrary to Fay’s contention, Plaintiffs’ failure to challenge the dismissal with prejudice for lack of prosecution does not preclude appellate review of the prior order dismissing the complaint for failure to state a claim.

B.

The FDCPA prohibits debt collectors from using “any false, deceptive, or misleading representation or means *in connection with the collection of any debt.*” 15 U.S.C. § 1692e (emphasis added). “A communication has the necessary nexus to debt collection under the FDCPA if it ‘conveys information about a debt and its aim is at

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least in part to induce the debtor to pay.” *Lamirand v. Fay Servicing, LLC*, 38 F.4th 976, 979 (11th Cir. 2022) (quoting *Caceres v. McCalla Raymer, LLC*, 755 F.3d 1299, 1302 (11th Cir. 2014)). “To determine whether a communication has those traits, we view it ‘holistically.’” *Id.* (quoting *Daniels v. Select Portfolio Servicing, Inc.*, 34 F.4th 1260, 1268 (11th Cir. 2022)). A “communication that expressly states that it is ‘an attempt to collect a debt,’ that asks for payment of a certain amount by a certain date, and that provides for a late fee if the payment is not made on time is plausibly ‘related to debt collection.’” *Daniels*, 34 F.4th at 1268 (quoting *Reese v. Ellis, Painter, Ratterree & Adams, LLP*, 678 F.3d 1211, 1217 (11th Cir. 2012)). Statements that are “merely a ministerial response to a debtor inquiry, rather than part of a strategy to make payment more likely” are not debt collection activity. *Grden v. Leikin Ingber & Winters PC*, 643 F.3d 169, 173 (6th Cir. 2011); see *Dyer v. Select Portfolio Servicing, Inc.*, 108 F. Supp. 3d 1278, 1283 (M.D. Fla. 2015) (finding that “letters sent in response to correspondence or an inquiry from a debtor are communications induced by the debtor and not the debt collector” and, thus, “do not fall within the ambit of the FDCPA”).

According to Ellery, the district court, in dismissing the FDCPA claim, incorrectly held that the scope of 15 U.S.C. § 1692e(10) is limited to “communications” by a debt collector. It is true that the statutory language of §1692e is not limited to “communications.” Rather, the subsection Ellery claims Fay violated, § 1692e(10), prohibits “[t]he use of any *false representation or deceptive means* to collect or attempt to collect any debt or to obtain information concerning a consumer.” 15 U.S.C. § 1692e(10) (emphasis

added). However, the district court's decision was not based on whether the Denials were "communications" as opposed to "representations" or "means." The district court merely held that the Denials were not within the purview of the FDCPA because they were not made in connection with the collection of Ellery's debt.

Ellery also argues, for the first time on appeal, that the FDCPA claim was based not only on the Denials but also on "Fay's conduct in failing to explain why it believed that Ellery's short sale purchase offer was not an arm's length transaction and refusing to work with her to implement her short sale purchase offer." We decline to consider this contention as Ellery has not demonstrated that appellate review of this issue is warranted. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1332 (11th Cir. 2004) (enumerating five circumstances under which we have permitted issues to be raised for the first time on appeal).

Ellery's primary argument is that Fay violated 15 U.S.C. § 1692e(10) because the Denials falsely stated that the proposed short sale was not an arm's-length transaction. Ellery contends that the Denials were made to induce her to settle her debt and, therefore, are communications made in connection with collection of her debt. We disagree.

The Denials merely rejected a proposed short sale of Ellery's home on the grounds that it was not an arm's-length transaction. The Denials did not identify the balance due, demand payment, or mention consequences of nonpayment. True, the bottom of the Denials contain language stating, "Fay Servicing, LLC is a debt

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collector, and information you provide to us will be used for that purpose.” But such language is not dispositive. *See Daniels*, 34 F.4th at 1271 (holding that “monthly mortgage statements required by the [Truth in Lending Act] and its regulations can plausibly constitute communications in ‘connection with the collection of a[] debt’ under the FDCPA” if “they contain ‘this is an attempt to collect a debt’ language,” in addition to “request[ing] or demand[ing] payment of a certain amount by a certain date” and “provid[ing] for a late fee if the payment is not made on time,” and “the history between the parties suggests that the statement is an attempt to collect on a disputed debt”).

Other than the language at the bottom of the Denials, none of the indicators of debt collection efforts are present here. *See id.* at 1267–68 (discussing indicators of debt collection, such as whether the creditor’s communication or representation: (1) “listed the amount due to the lender,” (2) “demanded full and immediate payment,” (3) “threatened collection and attorney’s fees if the full payment was not paid,” (4) “indicated that failure to dispute the amount would result in the debt being assumed valid by the lender,” and (5) “stated that it was for purpose of collecting a debt” (citations and internal quotation marks omitted)). The Denials did not state the amount owed, request payment, or discuss consequences of nonpayment. Moreover, as Fay sent the Denials in response to Ellery’s submission of the short-sale applications, they were communications induced by Ellery. *See Grden*, 643 F.3d at 173. Viewed holistically, the Denials do not have “the necessary nexus to debt collection under the FDCPA.” *Lamirand*, 38 F.4th at 979.

Accordingly, the district court properly dismissed the FDCPA claim.

C.

Plaintiffs' remaining challenge is to the dismissal of the RESPA claim.

Regulation X gives borrowers a formal mechanism, the NOE, to address and correct errors in the servicing of their mortgage loans. *See* 12 C.F.R. § 1024.35(a). A servicer in receipt of an NOE typically must respond by correcting the error and providing a written notification of the correction or by conducting a reasonable investigation and notifying the borrower in writing that it has determined no error occurred. *See* 12 C.F.R. § 1024.35(e)(1)(i)(A)–(B). The regulation enumerates various “covered errors” that may be the subject of an NOE. 12 C.F.R. § 1024.35(b)(1)–(10). It also contains a catch-all provision covering “[a]ny other error relating to the servicing” of a loan. 12 C.F.R. § 1024.35(b)(11). Under RESPA, “[s]ervicing means receiving any scheduled periodic payments from a borrower pursuant to the terms of any federally related mortgage loan, . . . and making the payments to the owner of the loan or other third parties . . . as may be required pursuant to the terms of the mortgage servicing loan documents or servicing contract.” 12 C.F.R. § 1024.2(b).

Plaintiffs argue that the district court improperly overlooked their claim that the NOEs asserted a covered error under § 1024.35(b)(7), which covers a servicer’s “[f]ailure to provide accurate information to a borrower regarding loss mitigation options

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and foreclosure, as required by § 1024.39.” 12 C.F.R. § 1024.35(b)(7). Not so.

Pursuant to 12 C.F.R. § 1024.39, a servicer must notify eligible delinquent borrowers of the *availability* of loss mitigation options, if applicable. A servicer generally must provide to a delinquent borrower a written notice containing certain information “no later than the 45th day of the borrower’s delinquency and again no later than 45 days after each payment due date so long as the borrower remains delinquent.” 12 C.F.R. § 1024.39(b)(1). The written notice must contain, if applicable, “a statement providing a brief description of examples of loss mitigation options that may be available from the servicer” and “either application instructions or a statement informing the borrower how to obtain more information about loss mitigation options from the servicer.” 12 C.F.R. § 1024.39(b)(2)(iii)–(iv).

The requirements of § 1024.39 do not apply to communications regarding the servicer’s *evaluation* of loss mitigation applications. As the NOEs challenged Fay’s decision to deny the short sale applications rather than Fay’s failure to notify Plaintiffs of the availability of loss mitigation options, § 1024.39 is not applicable here. Even if the NOEs could be interpreted as claiming that Fay failed to notify Plaintiffs of the availability of loss mitigation options, Plaintiffs have not made any allegations as to how or when Fay contacted them after they defaulted on their loans. Plaintiffs have only challenged Fay’s conduct in denying the proposed short sales. Thus, they have not plausibly alleged that Fay did not provide

accurate information as required by § 1024.39. *See Cilien v. U.S. Bank Nat'l Ass'n*, 687 F. App'x 789, 792 (11th Cir. 2017) (finding that the plaintiff did not state a claim for violation of § 1024.39 where she did not make allegations about when and how the servicer contacted her after she first defaulted).

That leaves us with Plaintiffs' contention that Fay's improper classification of "the short sale purchase offers as non-arm's-length transactions without any meaningful review" is a covered error under § 1024.35(b)(11). Plaintiffs acknowledge that the catch-all provision "does not encompass errors relating to a servicer's evaluation of a loss mitigation application." *See* 78 FR 10696-01 ("declin[ing] to add a servicer's failure to correctly evaluate a borrower for a loss mitigation option as a covered error"); *Naimoli v. Ocwen Loan Servicing, LLC*, 22 F.4th 376, 384–85 (2d Cir. 2022) (stating that "challenges to the merits of a servicer's loss mitigation determination" are excluded from the catch-all provision); *Fustolo v. Select Portfolio Servicing, Inc.*, 123 F.4th 528, 533 (1st Cir. 2024) ("Challenges to the merits of a servicer's evaluation of a loss mitigation application do not relate to the 'servicing' of the loan and so are not covered errors under RESPA."). Accordingly, Plaintiffs assert that they are not challenging Fay's determination of their eligibility for a loss mitigation option but rather are challenging "errors in the processing of the short sale offers." We are not persuaded.

Plaintiffs cite to the Official Bureau Interpretations to Part 1024 to support their claim that Fay's "evaluation" of Plaintiffs'

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applications to participate in a short sale ended when it offered them “the opportunity to enter into a short sale” prior to the submission of the subject short sale offers. Plaintiffs therefore contend that the NOEs concerned “Fay’s implementation of [Plaintiffs’] short sale purchase offers,” rather than Fay’s evaluation of the proposed short sales. Plaintiffs’ contention is not supported by the Interpretations.

The Interpretations explain that a servicer complies with its obligation pursuant to § 1024.41(c)(1) to evaluate a complete loss mitigation application “if the servicer makes a determination regarding the borrower’s eligibility for a loss mitigation program.” 12 C.F.R. pt. 1024, Supp. I. Although the Interpretations state that a servicer complies with its duty to evaluate the borrower for a short sale option by allowing the buyer to enter into a listing agreement, it does not say that the servicer’s duties end there. The servicer must not only evaluate the borrower’s eligibility for a loss mitigation option but also decide whether it will grant or deny a borrower’s application for a loss mitigation option that is offered to the borrower pursuant to 1024.41(c). *See* 12 C.F.R. § 1024.41(d) (explaining what information must be communicated to a borrower if a “complete loss mitigation application is denied for any trial or permanent loan modification option available to the borrower”). As it is undisputed that Fay rejected the proposed short sales and, therefore, ultimately denied Plaintiffs’ loss mitigation applications, Plaintiffs’ attempt to characterize the NOEs as challenging the “processing of” their loss mitigation applications is unconvincing

and not supported by the language of the regulation or the Interpretations.

The only case on which Plaintiffs rely is the Second Circuit’s distinguishable decision in *Naimoli*. In *Naimoli*, the Second Circuit held that the borrower’s NOE that claimed the servicer wrongfully failed to provide the borrower with a promised permanent loan modification “relate[d] to’ the servicing of her loan” and, therefore, fell within the catch-all provision of § 1024.35(b)(11). 22 F.4th at 381, 383–85. The NOE alleged that the servicer committed various errors in handling the borrower’s loan documents, such as failing to record documents and rejecting a payment. *Id.* at 380–81. The Second Circuit acknowledged that “erroneous loss mitigation eligibility determinations” are not covered errors under § 1024.35(b). *Id.* at 384. However, the Second Circuit explained that the borrower’s asserted errors were related to the servicing of her loan and “were correctable without overturning [the servicer’s] determination regarding her loss mitigation application.” *Id.* The Second Circuit held that “the narrow exception to the catch-all provision, which excludes challenges to the merits of a servicer’s loss mitigation determination,” did not apply to the borrower’s asserted errors merely because they “accompanied a complaint about [the servicer’s] determination of her loss mitigation application.” *Id.* at 384–85.

In this case, even though Plaintiffs frame the NOEs as challenges to the “implementation” rather than the “evaluation” of a loss mitigation option, the substance of the NOEs challenged the

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merits of Fay's loss mitigation determinations. *Naimoli*, 22 F.4th at 384–85. Unlike in *Naimoli*, Plaintiffs here do not allege that Fay did anything wrong other than deny the proposed short sale transactions based on Fay's determination that the sales were not arm's length. Therefore, *Naimoli* does not support a finding that Plaintiffs' NOEs asserted errors that fell within the catch-all provision of § 1024.35(b)(11).

Plaintiffs' claim is a challenge to Fay's determinations denying the proposed short sales on the grounds that they were not arm's-length transactions. These are loss mitigation determinations, and, therefore, are not covered errors under § 1024.35(b)(11). See 78 FR 10696-01; *Naimoli*, 22 F.4th at 384–85; *Fustolo*, 123 F.4th at 533. Accordingly, Fay did not have an obligation to respond to the NOEs. See 12 C.F.R. § 1024.35(b) (identifying 11 categories of covered errors that can trigger a servicer's obligation to respond to a NOE). The district court properly dismissed the RESPA claim.

AFFIRMED.