UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BEVERLY ADKINS, CHARMAINE WILLIAMS, REBECCA PETTWAY RUBBIE McCOY, WILLIAM YOUNG, on behalf of themselves and all others similarly situated, and MICHIGAN LEGAL SERVICES,

Plaintiffs,

- against -

MORGAN STANLEY, MORGAN STANLEY & CO. LLC, MORGAN STANLEY ABS CAPITAL I INC., MORGAN STANLEY MORTGAGE CAPITAL INC., and MORGAN STANLEY MORTGAGE CAPITAL HOLDINGS LLC,

Defendants.

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12 Civ. 7667 (HB)

MEMORANDUM ORDER

Hon. HAROLD BAER, JR., District Judge:

On July 25, 2013, the Court granted in part and denied in part Defendants' motion to dismiss the complaint in this action. *Adkins v. Morgan Stanley*, No. 12. Civ. 7667, 2013 WL 3835198 (S.D.N.Y. July 25, 2013). Familiarity with that opinion is assumed. Defendants now seek immediate review of that decision pursuant to 28 U.S.C. § 1292(b). Specifically, Defendants ask the Court to certify for review (1) whether the Fair Housing Act ("FHA") excludes a discovery rule, (2) whether mortgage loan purchasers like Defendants can be liable under the FHA for discrimination measured only in a different party's book of business, and (3) whether mortgage loan purchasers can be liable under the FHA for discrimination in the terms and conditions of loans that they did not purchase. For the reasons stated below, Defendants' motion for certification of an immediate appeal is DENIED. Defendants also moved to stay this case following the Supreme Court's grant of certiorari in *Township of Mount Holly v. Mount Holly Gardens Citizens in Action, Inc.*, No. 11-1507. But Defendants withdrew that application following the subsequent settlement in that action. *See Mt. Holly Garden Citizens in Action, Inc. v. Township of Mount Holly*, No. 08-cv-02584 (D.N.J. Nov. 15, 2013).

DISCUSSION

The Court "may certify an immediate appeal of an interlocutory order if the court finds that the 'order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" *Century Pac., Inc. v. Hilton Hotels Corp.*, 574 F. Supp. 2d 369, 370 (S.D.N.Y. 2008) (quoting § 1292(b)). But even if each of these statutory criteria are met, the Court still has "broad discretion to deny certification." *SPL Shipping Ltd. v. Gujarat Cheminex Ltd.*, No. 06 Civ. 15375, 2007 WL 1119753, at *1 (S.D.N.Y. Apr. 12, 2007) (quoting *Nat'l Asbestos Workers Med. Fund v. Philip Morris, Inc.*, 71 F. Supp. 2d 139, 166 (E.D.N.Y. 1999)). Here, none of Defendants' proposed issues are appropriate for interlocutory review.

A. Whether the Discovery Rule Applies to FHA Claims

First, there is not a "substantial ground for difference of opinion" in the Second Circuit as to whether the FHA excludes a discovery rule. Indeed, Defendants focus much of their energy on reasserting their interpretation of the Supreme Court's decision in *TRW Inc. v. Andrews*, 534 U.S. 19 (2001). But "[a] mere claim that a district court's decision was incorrect does not suffice to establish substantial ground for a difference of opinion." *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Ams.*, 426 F. Supp. 2d 125, 129 (S.D.N.Y. 2005). Indeed, as the Court noted in denying Defendants' motion to dismiss, district courts within the Second Circuit have not hesitated in applying a discovery rule to FHA claims. *See, e.g.*, *Clement v. United Homes, LLC*, 914 F. Supp. 2d 362, 371–72 (E.D.N.Y. 2012) ("Claims under the FHA . . . are subject to the discovery rule . . . .").

While Defendants rely upon authority from other jurisdictions that declined to apply the discovery rule to FHA actions, *see, e.g.*, *Garcia v. Brockway*, 526 F.3d 456, 465 (9th Cir. 2008), "[d]isagreement among courts outside the circuit . . . does not alone support the certification of an interlocutory appeal." *U.S. ex rel. Colucci v. Beth Israel Med. Ctr.*, No. 06 Civ. 5033, 2009 WL 4809863, at *1 (S.D.N.Y. Dec. 15, 2009) (citing *Ryan, Beck & Co. v. Fakih*, 275 F. Supp. 2d 393, 398 (E.D.N.Y. 2003)). Instead, the Court must analyze "the strength of the arguments in opposition to the challenged ruling." *Id.* (quoting *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996)). And in that regard, Defendants' recitation of case law does not alter the Court's conclusion that the text and structure of the FHA supports a discovery rule.

Indeed, the primary authority upon which Defendants' rely, *Garcia v. Brockway*, leaves unaddressed other authority requiring an expansive interpretation of the FHA. *See Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir. 1988) (noting that Title VII and Title VIII "are part of a coordinated scheme of federal civil rights laws enacted to end discrimination" and "the Supreme Court has held that both statutes must be construed expansively to implement that goal" (citing *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211–12 (1972))); *Garcia*, 526 F.3d at 475 (Fisher, J., dissenting) ("[T]he Supreme Court has frequently instructed that the FHA should be interpreted flexibly in order to effectuate Congress' ambitious remedial goals in passing the statute . . . ." (citing *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731 (1995))). Nor was the Ninth Circuit's interpretation of the FHA provided in the context of a racial disparate impact claim. *Compare Garcia*, 526 F.3d at 465 (considering design-and-construction claim) *with Davidson v. Bd. of Governors of State Colls. & Univs. for W. Ill. Univ.*, 920 F.2d 441, 445 (7th Cir. 1990) (describing statute of limitations concerns facing disparate impact plaintiffs). Thus, to the extent other courts might reach a different conclusion, that disagreement does not present the "'exceptional circumstances' . . . justify[ing] a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Colucci*, 2009 WL 4809863, at *2.

B. Defendants' Remaining Issues for Certification

Defendants next ask the Court to certify for review whether a mortgage loan purchaser can be liable under the FHA for discrimination brought about only through a loan originator. Similarly, Defendants seek interlocutory review of whether their liability extends to loans that they did not purchase from New Century. But both of these issues challenge the factual premise of Plaintiffs' claims and can be developed only through discovery. Accordingly, they do not pose controlling questions of law and certification of an appeal is inappropriate.

Defendants' assertion that they cannot be liable for causing a disparate impact because of New Century's role in originating the actual loans to borrowers misconstrues what is required to prove a disparate impact claim. As the Second Circuit has made clear, "to make out a prima facie case under the FHA on a theory of disparate impact, a plaintiff must demonstrate that an outwardly neutral practice actually or predictably has a discriminatory effect; that is, has a significantly adverse or disproportionate impact on minorities, or perpetuates segregation." *Fair Hous. in Huntington Comm. Inc. v. Town of Huntington, N.Y.*, 316 F.3d 357, 366 (2d Cir. 2003).

Therefore, under traditional principles of disparate impact liability, Defendants' theory here is inextricably bound together with the facts of causation. Particularly given that Defendants challenge the Court's order following a motion to dismiss and not a motion for summary judgment, these circumstances do not pose a controlling question of law that can be certified for appeal. *See Century Pac., Inc.*, 574 F. Supp. 2d at 371 ("The 'question of law' certified for interlocutory appeal 'must refer to a pure question of law that the reviewing court could decide quickly and cleanly without having to study the record.'" (internal quotation marks omitted) (quoting *In re Worldcom, Inc.*, No. M-47 HB, 2003 WL 21498904, at *10 (S.D.N.Y. June 30, 2003))).

Nor is there substantial ground for a difference of opinion on this issue. Defendants' proposal in effect asks the Court to certify for appeal whether to graft a new requirement upon the framework describe above: specifically, a requirement that a defendant must be the last party to act for it to be liable for the effects of its transactions. But Defendants cite no case law adopting this departure from established disparate impact case law. And without support for their position beyond their own argument, no substantial ground for a difference of opinion exists. *See Colucci*, 2009 WL 4809863, at *1 ("The 'mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate substantial ground for difference of opinion.'" (quoting *In re Flor*, 79 F.3d at 284)).

Defendants' final issue for which they seek certification fares no better. Limiting this action to only those loans that Defendants actually purchased would not terminate this action, nor would it materially advance the ultimate termination of the litigation. Indeed, it is undisputed that Defendants allegedly purchased the loan of at least one of the named plaintiffs. Thus, even a successful appeal would still require substantial additional litigation and discovery. *See Century Pac., Inc.*, 574 F. Supp. 2d at 373 (interlocutory appeal unavailable where movant "failed to demonstrate that the immediate appeal of this action would result in the saving of judicial resources or otherwise 'avoid protracted litigation'" (quoting *In re World Trade Ctr. Disaster Site Litig.*, 460 F. Supp. 2d 134, 144 (S.D.N.Y. 2007))). And determining whether Defendants' policies resulted in a disparate impact even with regard to loans they did not purchase cannot be resolved without a detailed review of the record. *See In re World Trade Ctr. Disaster Site Litig.*, 460 F. Supp. 2d at 145 (declining to certify where question "cannot be

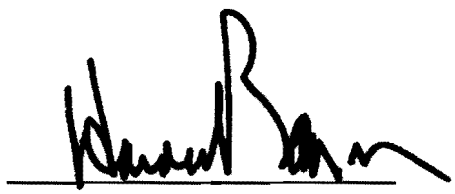
answered without consideration of a developed record"). Accordingly, the Court declines to certify any of Defendants' proposed issues for appeal.

CONCLUSION

I have considered Defendants' remaining arguments and find them meritless. For the foregoing reasons, Defendants' motion for a certification of appeal is DENIED. The Clerk of Court is instructed to close this motion and remove it from my docket.

SO ORDERED.

Date: 12/13/13
New York, New York



HAROLD BAER, JR.
United States District Judge