

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

U.S. Bank National Association, as Trustee,
as successor to U.S. Bank Trust National
Association, as Trustee, for Conseco Finance
Home Equity Loan Trust 2001-C,

Plaintiff,

vs.

Frances L. Mack nka Frances L. Mack-
Marion,

Defendant.

IN THE COURT OF COMMON PLEAS

C/A NO.: 2020-CP-38-00086

ORDER

RECEIVED

Aug 16 2022

SC Court of Appeals

This matter came before the Court for a hearing on the Plaintiff’s Motion to Dismiss Counterclaims pursuant to Rule 12(c), SCRPC. After reviewing the motion, response, and hearing arguments from counsel, the Court GRANTS IN PART and DENIES IN PART the motion.

“In evaluating a Rule 12(c) motion, the court must consider that a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever.” *Pope v. Wilson*, 427 S.C. 377, 384, 831 S.E.2d 442, 445-46 (Ct. App. 2019).

Defendant asserts three (3) counterclaims: (1) violation of the attorney preference or insurance preference provisions contained in S.C. Code § 37-10-102; (2) violation of the High Cost and Consumer Home Loans Act in S.C. Code § 37-23-10; and (3) a declaratory judgment that the loan was closed without an attorney which constitutes the unauthorized practice of law and, therefore, the mortgage is unenforceable. The Court will address these claims in turn.

- I. Violation of the attorney preference or insurance preference provisions contained in S.C. Code § 37-10-102

The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction and except in the case of a loan on property that is subject to the South Carolina Horizontal Property Act (Section

27-31-10, et seq.) the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage and comply with such preference.

S.C. Code § 37-10-102(a).

Violating the attorney preference statute carries a penalty in an amount of not less than \$1,500.00 and not more than \$7,500.00. S.C. Code § 37-10-105(A). However, a claim is time barred in brought more than three (3) years after the violation occurred. If time barred, a borrower may still assert the violation as a setoff in the action. *Id.*

Plaintiff argues the loan at issue in this case occurred in 2001 and, therefore, the claim is outside the statute of limitations and must be converted to an affirmative defense.

However, Defendant also alleged in the counterclaim that the loan was unconscionable based on allegations that the loan was not closed by an attorney and misrepresentations made to the Defendant as to certain disbursements that would be made.

“If the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct, the court may, in an action other than a class action” S.C. Code Ann. § 37-10-105(C). The only time limitation is that an “action pursuant to this subsection may not be brought after the original scheduled maturity date of the debt”

Plaintiff does not dispute the that a question of fact prevents the Court granting it a judgment on the pleadings as to the alleged unconscionability of the loan transaction. Moreover, the loan has not matured.

IT IS THEREFORE ORDERED the motion is GRANTED to the extent Defendant seeks to prove a violation of the attorney preference provision, the claim is time-barred and shall be treated as an affirmative defense with a right to set-off if proven and

IT IS FURTHER ORDERED that a question of fact exists as to the alleged unconscionability of the loan transaction and, therefore, the motion is DENIED as to that provision.

II. Violation of the High Cost and Consumer Home Loans Act in S.C. Code § 37-23-10.

Plaintiff contends the cause of action for the alleged violation of the High Cost and Consumer Home Loans Act is barred as the act became effective January 1, 2004, and applies to loans for which applications were taking on or after that date. Defendant concedes the loan at issue predates the effective date of the act.

IT IS THEREFORE ORDERED that the motion is GRANTED as to the cause of action for the alleged violation of the High Cost and Consumer Home Loans Act.

III. Declaratory judgment regarding the alleged unauthorized practice of law.

Defendant's third counterclaim seeks a declaratory judgment from the Court that the loan originator engaged in the unauthorized practice of law as it is alleged the loan was closed without the supervision of a licensed South Carolina attorney. The Plaintiff seeks judgment as a matter of law in its favor on the ground that any decision concerning the unauthorized practice of law lies solely within the jurisdiction of the Supreme Court of South Carolina.

"Only our supreme court has the constitutional duty to determine what acts constitute the unauthorized practice of law." *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 124-25, 634 S.E.2d 5, 8-9 (Ct. App. 2006). Accordingly, this Court lacks subject matter jurisdiction to hear this claim.

In the alternative, Plaintiff seeks a declaration that because the loan was not closed by a South Carolina attorney, the Court should hold the terms of the mortgage unenforceable.

When a real estate loan is closed without the supervision of a licensed attorney, the closing constitutes the unauthorized practice of law, and the mortgage holder is barred from seeking equitable relief in the form a the foreclosure of the mortgage. *Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 134, 139, 714 S.E.2d 532, 534 (2011) (internal citations omitted). However, the application of this doctrine only applies to mortgages filed after the effective date of the *Matrix* opinion. *BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 624, 731 S.E.2d 547, 550 (2012)

As there is no dispute the subject loan was closed prior to 2011, even if the mortgage loan closing was not supervised by a licensed attorney, it would not invalidate Plaintiff's right to foreclose the mortgage.

IT IS THEREFORE ORDERED that the motion is GRANTED as to the cause of action seeking declaratory relief.

IT IS SO ORDERED.

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Orangeburg Common Pleas

Case Caption: U.S. Bank National Association VS Frances L. Mack , defendant, et al

Case Number: 2020CP3800086

Type: Master/Order/Other

So Ordered

James B. Jackson, Jr. 3077 Master in Equity