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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely
The Honorable Robin B. Stilwell
Circuit Court Judges

Appellate Case No. 2019-01565
Circuit Court Case No. 2017-CP-23-8016

Wells Fargo Bank, N.A..... Respondent,

v.

Michelle Hodges, Individually; Michelle Hodges, as Personal
Representative of the Estate of Ruth Ladson Witherspoon; Stanley
Witherspoon; SC Housing Corp.; Twin Creeks Homeowners
Association, Inc.,..... Defendants.

of whom

Michelle Hodges, Individually and as the Personal Representative
of the Estate of Ruth Ladson Witherspoon is the..... Appellant.

SUPPLEMENTAL APPENDIX

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March 30, 2021

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STATE OF SOUTH CAROLINA)

COUNTY OF Greenville)

Wells Fargo Bank N.A.)
Plaintiff,)

vs.)

Michelle Hodges et al.)
Defendant.)

IN THE COURT OF COMMON PLEAS

13th JUDICIAL CIRCUIT

CASE NO 2017-CP-23-08016

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

1990010PM1251
PULPINKENSINK ORIGINAL SC

Plaintiff's Attorney: _____, Bar No. _____ Address: _____ Phone: _____ Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: <u>Michelle Hodges</u> _____, Bar No. _____ Address: <u>6 Tang Harris Dr.</u> <u>Simperville 29681</u> Phone: _____ Fax _____ E-mail: _____ Other: _____
---	---

MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information
 Nature of Motion: Alter or Amend
 Estimated Time Needed: _____ Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type
 Written motion attached
 Form Motion/Order
 I hereby move for relief or action by the court as set forth in the attached proposed order.
Michelle Hodges 6/18/19
 Signature of Attorney for Plaintiff / Defendant Date submitted

SECTION III: Motion Fee
 PAID - AMOUNT: \$ 25.00
 EXEMPT: (check reason)
 Rule to Show Cause in Child or Spousal Support
 Domestic Abuse or Abuse and Neglect
 Indigent Status State Agency v. Indigent Party
 Sexually Violent Predator Act Post-Conviction Relief
 Motion for Stay in Bankruptcy
 Motion for Publication Motion for Execution (Rule 69, SCRCP)
 Proposed order submitted at request of the court; or,
 reduced to writing from motion made in open court per judge's instructions
 Name of Court Reporter: _____
 Other: _____

JUDGE'S SECTION
 Motion Fee to be paid upon filing of the attached order. JUDGE CODE _____
 Other: _____ Date: _____

CLERK'S VERIFICATION
 Collected by: _____ Date Filed: _____
 MOTION FEE COLLECTED: \$ _____
 CONTESTED - AMOUNT DUE: \$ _____

Greenville County Court of Common Pleas
Attn: Clerk of Court, Peter B. Wickensimer
305 E. North ST
Greenville, SC 29601

19 AUG 16 PM 12:51
Paul Wickensimer COC 601 SC

TOTAL PAGES ¹⁷ FOR MOTION and ~~TOTAL PAGES FOR AFFIDAVIT~~
AFFIDAVIT IN SUPPORT ATTACHED
**NOTICE OF MOTION AND MOTION TO
ALTER/AMEND SUMMARY JUDGMENT**

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF GREENVILLE) **CIVIL CASE #.**
) **2017CP2308016**
Wells Fargo Bank, NA)
)
Plaintiff,)
)
v.)
)
Michelle Hodges, Individually: Michelle Hodges)
as Personal Representative of the Estate of Ruth)
Ladson Witherspoon: Stanley Witherspoon : SC)
Housing Corp.: Twin Creeks Homeowners)
Association, Inc.;)
)
Defendants,)

NOTICE OF MOTION AND MOTION TO ALTER/AMEND ORDER DATE 8/7/19

Now Comes, Defendant Michelle Hodges, proceeding Pro Se and requesting that the court Alter or Amend Order dated 8/7/19 which granted Summary judgment, striking jury trial, dismissing counter claim, and defenses, pursuant to SCRCP Rule 59. I respectfully call the following errors to the courts attention:

Alter or Amend decision of Summary judgment, as there are several issues of disputed material facts which affect the outcome of this case, which have been addressed and now respectfully



called to the Court's attention to facts that have been over looked.. below stating facts sufficient to deny summary judgment, sustain my counter claims an affirmative defenses.

This motion is timely filed as it is filed within 10 days of the Order, which was execute on 8/7/2019.

SUMMARY JUDGMENT GRANTED DISMISSAL OF COUNTER CLAIMS AND DEFENSES

The intermediate order entered, on 7/24/19 shows that discovery was not complete and the Plaintiff's admission of the escrow statement received allowed me to provide the court with a scintilla of evidence in order to withstand a motion for summary judgment, which was not available for to me before the hearing, as admissible evidence.

The escrow statements toughes both promises in the Note and Mortgage and all of my counter claims and defenses. The escrow statement shows:

- Complete breach of the promises in the Note and Mortgage
- And interference with my performance by increasing the payment
- And breach of the implied duty of good faith and fair dealing required By HUD regulation, which is part of the Note and Motgage.

I could not find any cases where the court ruled on the HUD requirement part of the Note and Mortgage, however, I have attached a case *Fleet Real Estate Funding v. Smith 366, Pa. Superior Ct. 116 (1987)* showing 3 states have exercised their equitable power in determining whether a mortgagee's failure to comply with 203.650-203.66 is a legal defense to foreclosure and is a matter for the courts to decide. (Page 4 paragraph 5) Three states have concluded that FHA lenders have an equitable obligation to follow the guidelines established in the HUD Handbook in the event of a default. (page 5 paragraph 3). Hud regulations are part of the contract and loan modifications are the tools of the regulations and a used to

The Plaintiff did not carry its burden as the Plaintiff did not show that the following issues were not disputed material fact for a jury to decide or that the following did not materially affect the out of the Plaintiff's case or my case:



The Plaintiff's fraudulent increase in my payment, requirement that I deposit more in my escrow account than had been allowed by the Note and Mortgage and interfering with my ability to perform my part in the contract and the Plaintiff's repudiation of the contract.

I called the courts attention to the fact that Judge Stilwell did not allow me to Amend my answer 4 26 19 and the decision was made without considering prejudice to either party, Discovery was not complete, as we have never had a scheduling order in this case. The Plaintiff had an opportunity to refute and any claims and no trial date had not and still has not been set.

Therefore it was an abuse of discretion to not allow me to Amend my 6th Amended answer, as it and it affected my substantial rights to bring counter claims before res judicata could affect them and I am required to bring them in the Plaintiff's case or lose them.

Johnson v. SC nation Bank 292 S. C. 51 (1987) 354 S. e. 2d 895.

The Plaintiff did not cover my defense of unclean hands in it reply and therefore should not be included in the Order.

The Order granted when discovery was not complete is premature and an abuse of discretion. See Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) ("[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.")

JURISDICTIONAL ISSUE

- A Summary Judgment Order in favor of the Plaintiff, due to the fact that the Court has subject matter jurisdiction to make decisions on foreclosure cases; after my correct assertion of lack of jurisdiction, due to the nonclaim "Bar" under the South Carolina Code Section 62-3-608 in this case, is an error of the Court.

On page 3 of the Court's Order the following case is cited *Beach First Nat'l Bank v. Gurnham* (*In re Estate of Gurnham*), 407 S. C. 194, 205, 754 S.E. 2d 875, 881 (2014). This case was



reviewed by the South Carolina Supreme Court under Appellate Case No. 2012-207047 and the SC Supreme Court clarified the following:

- Three elements of jurisdiction –
Personal jurisdiction, subject matter jurisdiction and the court's power to render judgment quoting *Indep. Sch. Dist. O. 1 of Okla. County v. Scott*, 15 P.3d 1244, 1248, (Okla. Civ. App. 2000) (PDF version of the Appellate case page 11, 2nd paragraph)

- What the Nonclaim statute does not do
Does not implicate subject matter jurisdiction, nor divests the court of Subject matter jurisdiction
Citing (*In re Estate of Ongaro*, 998 P.2d 1097, 1103 (Colo. 2000)
(PDF version page 11, 1st paragraph)

- 2 avenues/remedies for secured creditors –
 - Under the Mortgage/Security
Pursue foreclosure on the security, without presenting a claim against the estate and may do so outside of the time limits of the nonclaim statute.
 - Under the Note/debt
Seek to recover directly from the assets of the estate, requiring the claim to be presented in the probate court.
(PDF version page 7 item C.)

In this case the Plaintiff is suing the Heirs (me and my brother Stanley G. Witherspoon) and me, as the Personal Representative of the Estate and when the Plaintiff moved for summary judgment, it attached a copy of the note, declaring its election of remedies, making the case for summary judgment and case a creditor's claim and because the Plaintiff did not file a creditor's claim and receive a denial of that claim creating a right of action, the nonclaim statute applies to the Plaintiff's summary judgment and case. Therefore the Circuit Court lacks the power to make law on creditor's claims, as the Probate court has exclusive jurisdiction over the probate of estate assets and creditor claims.. And after I asserted the nonclaim statute and the Plaintiff responded and still did not state facts of its supposed rights under the security instrument or provide a copy



of the mortgage. However, the Plaintiff did attach a copy of the Deed of distribution, but the Deed of Distribution is only a tool that allows the property to be transferred from the deceased to the heirs and is not the security instrument.

I provided a copy of the creditor's claims that were filed in probate Court, evidencing that the Plaintiff did not file a creditor's claim, demonstrating that there is an material issue that changes the outcome of this case, which is the courts lack of jurisdiction/power to rule on the Plaintiff's cause, therefore the Order for summary judgment in favor of the Plaintiff is an error of the court and the Order is void as the court has exceeded its jurisdiction

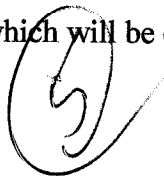
I am not in default on the Mortgage, the Plaintiff breached the contract by using my escrow account for purposes not intended and fraudulently increasing my payments, interfering with my ability to make the payment and further interfering with my ability to make the payments by failing to follow HUD regulations in a fair and accurate determination of a loan modification, required by HUD. To be sure that the Plaintiff failed to follow regulations, first the Plaintiff needed to determine whether or not I am the successor in interest, under the consumer Financial protection promulgated rules.

If I am not the successor in interest, then the property is non owner occupied an I don't qualify for loss

mitigation, via HUD or foreclosure Intervention required by . However, I proper determination of

STRIKE JURY DEMAND

The affect of Judge Stilwell's ruling that I could not amend my answer, is an abuse of discetion, Which is carrying over to whether or not my case can be heard by a jury, which turns on the damage claim in my answer which will be corrected when I am allowed to amend my answer.

A handwritten signature or mark, possibly the number '5' inside a circle, located below the text.

OBJECTION TO REFERRAL TO THE MASTER

Referral to the Master in equity affects to my substantial right in the mode of trial and was improper, as the requirements of the South Carolina Supreme court Administrative Order 2011-05-2-01, have not been satisfied, as I alleged an Implied Breach of good faith and fair dealing, when I alleged fraud in the performance of the contract, due to the fact that the Plaintiff, as the supposed subsequent lender promised to be subject to HUD regulations, per the Mortgage page item 9. See case attached.

I alleged the breach of good faith and fair dealing in the Plaintiff's determination of loss mitigation/foreclosure intervention and the Plaintiffs only response was the court do not address loan modification and not whether or not the proper procedures are a disputed material fact, which affect the out of both cases.

Demand Jury Trial.

I incorporate all statements and exhibits from my Memo in opposition to Plaintiff's Motion for summary judgment and Motion for reconsideration dated 8/5/19.

Wherefore, I have fully addressed all issues in the Order dated 8/7/19, I pray that the Order be altered or amended according my pleadings above.

Respectfully submitted,


Michelle Hodges, Pro Se Defendant

864-714-5263

6 Young Harris Dr

Simpsonville, SC 29681

Certified mail

PO Box 95

Mauldin, SC 29662.

Fleet Real Estate Funding v. Smith

366 Pa. Superior Ct. 116 (1987)

530 A.2d 919

FLEET REAL ESTATE FUNDING CORP., Appellee, v. Robert SMITH and Vergie Smith.
Appeal of Vergie SMITH.

Supreme Court of Pennsylvania.

Argued November 20, 1986.

Filed September 3, 1987.

*118 Irv Ackelberg, Philadelphia, for appellant.

Gary E. McCafferty, Philadelphia, for appellee.

Before CAVANAUGH, OLSZEWSKI and TAMILIA, JJ.

OLSZEWSKI, Judge:

Instantly, Vergie Smith appeals an order granting appellee's motion for summary judgment and denying her cross-motion for partial summary judgment in a mortgage foreclosure action. The trial court held that appellee had complied with the notice provisions of Act 6 of 1974, 41 P.S. § 101 et seq., and that summary judgment was appropriate because appellant admitted that she was in default on the mortgage. Appellant contends on appeal that the trial court erred in: (1) declining to consider her defense that appellee failed to service the mortgage in accordance with federal law; and (2) concluding without discussion that she was not entitled to a \$1,000 recoupment plus costs and attorney's fees due to violations of the federal Truth in Lending Act, 15 U.S.C. § 1601 et seq. Having reviewed the record and

considered the arguments raised on appeal, we *119 reverse and remand for further proceedings. Jurisdiction is relinquished.

On October 23, 1970, appellant and her husband, who is now deceased, executed and delivered to the Fidelity Bond and Mortgage Company a mortgage upon their newly purchased residence. The mortgage is insured against default by the Federal Housing Administration (FHA) under Subchapter II of the National Housing Act, 12 U.S.C. § 1701 et seq. In conjunction with the mortgage transaction, appellant received a disclosure statement mandated by the Truth in Lending Act, 15 U.S.C. § 1601 et seq. Appellee, Fleet Real Estate Funding Corporation, subsequently obtained the mortgage by assignment from Fidelity Bond and Mortgage Company in November 1979.

Appellant defaulted upon the mortgage beginning in January of 1985.[1] Appellee sent appellant a notice of intention to foreclose on September 10, 1985 and then commenced foreclosure proceedings on October 24, 1985. This appeal followed the trial court's entry of summary judgment for appellee.

A motion for summary judgment may properly be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Pa.R.C.P. 1035(b). See also *Washington Federal Savings & Loan Association v. Stein*, 357 Pa.Super. 286, 288-90, 515 A.2d 980, 981 (1986); *Rybas v. Wapner*, 311 Pa.Super. 50, 54, 457 A.2d 108, 109 (1983). In passing upon a motion for summary judgment, the court must examine the record in the light most favorable to the nonmoving party. *Pocono International Raceway, *120 Inc. v. Pocono Produce, Inc.*, 503 Pa. 80, 83, 468 A.2d 468, 470 (1983); *Zimmerman v. Zimmerman*, 322 Pa.Super. 121, 124, 469 A.2d 212, 213 (1983). "It is not part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried." *Thorsen v. Iron and Glass Bank*, 328 Pa.Super. 135, 141, 476 A.2d 928, 931 (1984); *Wilk v. Haus*, 313 Pa.Super. 479, 482, 460 A.2d 288, 290 (1983). Any doubt must be resolved against the moving party. *Washington Federal Savings & Loan Association*, supra, 286 Pa.Super. at 288-90, 515 A.2d at 981; *Chorba v. Davlisa Enterprises, Inc.*, 303 Pa.Super. 497, 500, 450 A.2d 36, 38 (1982).

Appellant argues that summary judgment for appellee was improper because she has raised disputed factual issues regarding appellee's servicing of her FHA-insured mortgage. Appellant contends that appellee failed to follow certain regulations and guidelines issued by the Department of Housing and Urban Development (HUD), which administers the National Housing Act's mortgage insurance program. The regulations are set forth at 24

C.F.R. §§ 203.500 through 203.660, while the guidelines are contained in HUD Handbook 4330.1, on Administration of Insured Home Mortgages. Both the regulations and the Handbook provisions identify practices, including methods of forbearance relief, which HUD considers acceptable for lending institutions servicing HUD-insured mortgages. Appellant maintains that she may raise appellee's alleged failure to follow these regulations and Handbook provisions as a defense to this foreclosure action.

While our appellate courts have never addressed this argument, federal courts have determined that the HUD Handbook is merely a statement of HUD policy, which does not have the force of law and which does not establish procedural prerequisites to foreclosure. In *Brown v. Lynn*, 385 F. Supp. 986 (N.D.Ill. 1974) (hereinafter *Brown I*), plaintiffs contended that the mortgagee defendants had violated legally binding federal regulations by failing to pursue the prescribed alternatives to foreclosure outlined in the existing *121 HUD Guidebook. The court rejected this contention, stating that:

... the HUD guidelines upon which the plaintiffs have particularly relied as a source for the "regulatory" scheme underlying the programs, have not been issued pursuant to the Administrative Procedure Act. As such, they only contain statements of policy and not regulations, per se, having the force and effect of law. *Faggins v. Kassler & Co.*, 72 C 125 (N.D.Ill., July 26, 1972). Statements of policy have no binding effect upon the mortgagees, *FHA v. Morris Plan Co.*, 211 F.2d 756 (9th Cir. 1954), and are unenforceable in the courts. *Faggins*, supra. The guidelines, in their present form, therefore, cannot be used to require the mortgagees to pursue the alternatives listed therein, and, accordingly, do not give rise to a claim of duty owed or a remedy.

Brown I, supra, 385 F. Supp. at 998. The plaintiffs subsequently requested clarification and reconsideration of this aspect of the opinion. In *Brown v. Lynn*, 392 F. Supp. 559 (N.D.Ill. 1975) (hereinafter *Brown II*), the court denied plaintiffs' motion for reconsideration, explaining that:

[i]n the absence of impracticality or emergency, HUD's failure to publish the Guide or Handbook in the Federal Register violates the provisions of § 10.5 [of HUD's own "mini APA"], and consequently these publications cannot constitute rules or regulations. They are thus not legally binding upon the mortgagees and are not enforceable in a lawsuit such as this seeking monetary damages and injunctive relief.

Brown II, supra, 392 F. Supp. at 562. The court also noted that HUD's intention not to make the Handbook obligatory was further reflected in an affidavit submitted in another



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case by Fred W. Pfaender, Director of Loan Management for HUD and the person responsible for publishing the HUD Handbook. In that affidavit, Pfaender stated that:

The Department does not intend to create, nor to imply the creation of vested rights in private citizens based on a mortgagee's non-compliance with the advisory guidelines *122 contained in Handbook 4191.1, nor to imply that the various forbearance provisions discussed in Handbook 4191.1 must be followed by mortgagees as conditions precedent to maintaining an action to foreclose an insured mortgage.

Brown II, supra, 392 F. Supp. at 562. Relying on this testimony and HUD's "purposeful avoidance of publishing the Handbook in the Federal Register," the court concluded that HUD did not intend the Handbook to be binding. Id.[2]

Subsequent to the decisions in Brown I and Brown II, HUD promulgated the mortgage servicing provisions contained in the Handbook as regulations. See 24 C.F.R. §§ 203.500 through 203.660. As a result, the precedential value of the holding of the Brown decisions that these provisions are merely statements of policy and non-binding has been considerably lessened. Nevertheless, a review of the regulations demonstrates that HUD has still declined to mandate compliance with the servicing provisions as a legal prerequisite to foreclosure. The regulations do mention HUD's position on this issue, but only with respect to the requirements concerning assignment of these mortgages to HUD. Specifically, 24 C.F.R. § 203.500 states that:

[t]he Department takes no position on whether a mortgagee's failure to comply with §§ 203.650-203.662 is a legal defense to foreclosure; that is a matter to be determined by the courts.

Other than this provision, the regulations are silent on HUD's position as to whether a failure to comply with the servicing requirements of 24 C.F.R. §§ 203.500 through 203.660 is a legal defense to foreclosure. Rather than addressing the effect of a violation in a foreclosure action, the regulations focus on the mortgagee's relationship with HUD, providing that "a pattern of refusal or failure to comply will be the cause for withdrawal of a mortgagee's approval" as an FHA-insured mortgage lender. 24 C.F.R. § 203.500. In view of the foregoing, we conclude that *123 federal law does not mandate that a mortgagee comply with the regulations and Handbook provisions prior to foreclosing on an FHA-insured mortgage.

Notwithstanding this conclusion, we believe that trial courts in Pennsylvania may exercise their equity powers to restrict a mortgagee who has not, within the reasonable expectations

10

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of good faith and fair dealing, followed or applied the forbearance provisions of the HUD regulations and Handbook. In *Brown II*, although holding that the Handbook was not legally binding and not enforceable in an action for monetary damages and injunctive relief, the court observed that its decision did not limit state or federal foreclosure courts "from exercising their equity powers by refusing to grant foreclosures where mortgagees have flagrantly disregarded the forbearance provisions of the HUD Handbook." *Brown II*, supra, 392 F. Supp. at 562. The court explained:

That holding, however, does not preclude foreclosure courts from allowing mortgagors to raise non-compliance with the Handbook as a defense to a "quick" foreclosure. Somewhat analogous to the situation where HUD could suspend or terminate mortgagees for poor servicing practices, even though such conduct would not give rise to a lawsuit, so too, a court of equity may restrict a mortgagee who has not, within the reasonable expectations of good faith and fair dealing, followed or applied the guidelines. On the theory that the guidelines are sensible, equitable standards of conduct, consistent with, and issued in furtherance of, the national housing goals, foreclosure courts can, and in appropriate instances should, direct the parties to pursue and exhaust the alternatives to foreclosure enumerated in the Handbook. Merely rubber-stamping mortgagees' foreclosure actions, when they have acted barely within the formal legal bounds of these loosely defined housing programs, will contribute further to the needless loss of homes and to the creation of virtual ghost areas within our inner cities. Foreclosure *124 courts need not woodenly perpetuate the national tragedy surrounding quick foreclosures to which we referred in our earlier opinion, but, where appropriate, they should require adherence to the policies and procedures prescribed by the Handbook.

Id. at 563. At least three states have applied this reasoning in concluding that FHA lenders have an equitable obligation to follow the guidelines established in the HUD Handbook in the event of a mortgagor's default. *Federal National Mortgage Association v. Ricks*, 83 Misc.2d 814, 372 N.Y.S.2d 485 (1975); *Heritage Bank, N.A. v. Ruh*, 191 N.J.Super. 53, 465 A.2d 547 (1983); *Associated East Mortgage Company v. Young*, 163 N.J.Super. 315, 394 A.2d 899 (1978); *Cross v. Federal National Mortgage Association*, 359 So. 2d 464 (Fla.App. 1978). Today we follow the lead of these decisions and hold that a mortgagor of an FHA-insured mortgage may raise as an equitable defense to foreclosure, the mortgagee's deviation from compliance with the forbearance provisions of the HUD Handbook and regulations.[3]

We agree that these provisions contain "sensible, equitable standards of conduct, consistent with, and issued in furtherance of, the national housing goals." *Brown II*, supra,

392 F. Supp. at 563. The legislative purpose of the National Housing Act is to assist in providing a decent home and a suitable living environment for every American family. 12 U.S.C.A. § 1701t. The mortgage insurance program implements this goal by making available to low-income families, mortgages which they could not otherwise afford. See 12 U.S.C.A. § 1709. Given these goals and objectives, implementation must not end with the purchase of the home and the receipt of a mortgage by a low-income *125 family; retention of the home must be viewed with equal importance. In this regard, the remedy included in the HUD regulations is inadequate to protect the individual mortgagor. As the Appellate Court of Illinois has reasoned:

H.U.D.'s withdrawal of a mortgagee's approval to participate in the mortgage insurance program after repeated violations of the servicing requirements is a useless remedy for the individual faced with the immediate problem of the foreclosure action; an action which could possibly be avoided by either assignment of the mortgage to H.U.D. or further efforts to arrange a revised payment plan.

Banker's Life Company v. Denton, 120 Ill.App.3d 576, 579, 76 Ill.Dec. 64, 66, 458 N.E.2d 203, 205 (1983). Finally, mortgagees benefit from participation in the HUD program since the risk of loss in cases of default is substantially reduced, if not eliminated. See 12 U.S.C.A. § 1710. If such mortgagees do not care to abide by HUD forbearance provisions, they should not participate in HUD's mortgage insurance program.

We have reviewed the pleadings and the affidavits filed in this case. Giving appellant the benefit of all reasonable inferences and resolving all doubts against appellee, we conclude that material facts are in dispute concerning appellee's alleged failure to adequately service the mortgage.[4] Summary judgment for appellee is therefore inappropriate in this case.

Appellant also argues to this Court that the trial court erred in entering summary judgment without considering her defense that she is entitled to a \$1,000 recoupment plus costs and attorney's fees due to violations of the federal Truth in Lending Act, 15 U.S.C. § 1601 et seq. (TILA). We note, for the purposes of remand, that appellant's TILA defense is not entitled to consideration in this action.

*126 The TILA is a federal consumer protection statute which, inter alia, requires prospective creditors to fully disclose the credit costs of a given loan to prospective debtors. Household Consumer Discount v. Vespaziani, 490 Pa. 209, 415 A.2d 689 (1980). Under 41 P.S. § 401, residential mortgage lenders must provide the disclosures required by the TILA to residential mortgage debtors.

A panel of this Court recently addressed a mortgagor's right to assert a set-off for an alleged violation of the TILA as a counterclaim to a mortgage foreclosure action. In *New York Guardian Mortgage Corporation v. Dietzel*, 362 Pa.Super. 426, 524 A.2d 951 (1987), the panel explained:

Section 1640(h) of the Act provides: A person may not take any action to offset any amount for which a creditor is potentially liable to such person under subsection (a)(2) of this section against any amount owed by such person, unless the amount of the creditor's or assignee's liability under this subchapter has been determined by judgment of a court of competent jurisdiction in an action of which such person was a party. This subsection does not bar a consumer then in default on the obligation from asserting a violation of this subchapter as an original action, or as a defense or counterclaim to an action to collect amounts owed by the consumer brought by a person liable under this subchapter. (Emphasis added). Additionally, § 1640(e) of the Act which is labelled "Jurisdiction of courts; limitations on actions" states: This section does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action. . . . (Emphasis added). These provisions make clear that a person can assert a claim under the Act only in an action for a money judgment either as a counterclaim to an action to collect money owed by the consumer, or in an *127 original claim brought by the consumer. Therefore, a counterclaim for a set-off under the Act can only be asserted in an action which contemplates a personal judgment. An action in mortgage foreclosure is strictly an in rem proceeding, and the purpose of a judgment in mortgage foreclosure is solely to effect a judicial sale of the mortgaged property. *Meco Realty Co. v. Burns*, 414 Pa. 495, 200 A.2d 869 (1964). A judgment in a mortgage foreclosure action is not a judgment for money damages and therefore cannot be "an action to collect amounts owed" or "an action to collect the debt" as required under § 1640(h) and (e) of the Truth-In-Lending Act. Therefore, a set-off for an alleged violation of the Truth-In-Lending Act cannot be asserted as a counter-claim in a mortgage foreclosure action.

Id. In view of the foregoing, appellant cannot assert her TILA defense in this action.[5]

We reverse and remand for proceedings consistent with this opinion. Jurisdiction is relinquished.[6]

CAVANAUGH, J., files a dissenting opinion.

CAVANAUGH, Judge, dissenting:

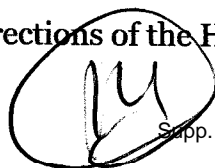


I respectfully dissent.

I disagree with the majority's holding that a mortgagee's deviation from compliance with the forbearance provisions of the HUD Handbook and regulations may constitute an equitable defense to a foreclosure action. I believe this improperly expands the intended scope of the HUD regulations. *128 I believe that the court's intervention in this area is improper, absent clear mandates from the legislature, and in the long run could result in diminished sources of mortgage funds.

In and of themselves, the HUD regulations are neutral as to whether non-compliance is a legal defense to foreclosure actions. See, e.g., 24 C.F.R. 203.500. However, the regulations do say that "a pattern of refusal or failure to comply will be the cause for withdrawal of a mortgagee's approval" as an FHA-insured mortgage lender. 24 C.F.R. 203.500. Thus, non-compliance with the HUD regulations may result in a sanction. However, that sanction is limited in two respects: 1) the sanction only concerns HUD's relationship with the mortgagee and in no way addresses the mortgagee's relationship or obligations with the mortgagors; and, (2) HUD may only raise the sanction where there is evidence of a pattern of refusal or outright failure to comply with its regulations. In other words, the sanction will not arise for a mere technical violation of some regulation.

I believe the majority errs in holding, without legislative or administrative mandate to do so, that these regulations are binding, with the force and effect of law, on the mortgagee vis a vis the mortgagor. This allows the individual mortgagor to rely on regulations which heretofore only HUD had the authority to apply. Further, the majority allows an equitable defense to arise where only a "deviation from compliance with the forbearance provisions of the HUD Handbook and regulations" is demonstrated. This goes far beyond *Brown v. Lynn*, 392 F. Supp. 559 (N.D.Ill. 1975), relied upon extensively by the majority, which limited use of the equitable defense to situations where "... mortgagees have flagrantly disregarded the forbearance provisions of the HUD Handbook." *Id.*, 392 F. Supp. at 562. Further, the majority's reference to decisions from sister states is not entirely persuasive. While the Florida decision provides some authority, the New York case, *Federal National Mortgage Association v. Ricks*, 83 Misc.2d 814, 372 N.Y.S.2d 485 (1975), is not an appellate decision. The *129 majority cites two New Jersey decisions. However, the latter New Jersey decision, *Heritage Bank N.A. v. Ruh*, 191 N.J. Super. 53, 465 A.2d 547 (1983), limited the earlier New Jersey decision, *Associated East Mortgage Company v. Young*, 163 N.J. Super. 315, 394 A.2d 899 (1978), to its facts which involved "[an] imprudent and callous lender" who approached the court with unclean hands given his "unconscionable" conduct in failing to follow the specific directions of the HUD Handbook. *Id.* at 333, 394 A.2d at 899.



Supp. App. 16

The court in *Heritage*, to the contrary, held that a mortgagor could not raise an equitable defense of a mortgagee's failure to follow the HUD regulations and procedures unless the mortgagee's conduct was "monstrously harsh" or "shocking to the conscience." *Heritage Bank N.A. v. Ruh*, 191 N.J.Super. at 71, 72, 465 A.2d 547, 557 (1983). The *Heritage* court, in denying the defendant-mortgagor's claim, stated:

Further, defendant materially contributed to her predicament by failing to make any overtures in the beginning to plaintiff concerning her four months delinquency; failing to contact plaintiff about the default for nearly a year, and failing to show any good faith effort to make any payment into an escrow account until prompted by the court. Defendant's flagrantly acquiescent conduct does not induce the court to extend equitable relief to one to whom such culpable negligence can be attributed. The doctrine of clean hands has its logical justification only in consideration of good conscience and natural justice. There are cases in which a court of equity, fulfilling the reasons and objects for its existence may, in furtherance of a natural justice, aid one who is comparatively more innocent. (Citations omitted.)

Id. at 71-73, 465 A.2d at 557-558.

It is clear that the majority's decision, which would require a trial where defendant could demonstrate a mere violation of the HUD regulations, goes well beyond the cases it cites as authority for its position.

*130 I respectfully dissent and would affirm the lower court's decision.

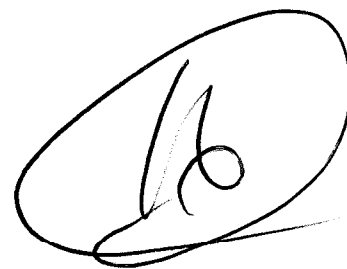
NOTES

[1] Appellant admits in paragraph 8 of her "Declaration" that she began missing mortgage payments in January of 1985. Explaining her default, appellant alleges, inter alia, that she became ill in November of 1984 and on doctor's orders, could not work from that time until the summer of 1985, and that she paid over \$1,000 in utility bills in January and February of 1985 so as not to lose her utility service. Declaration of Vergie Smith, paragraphs 7 and 8.

[2] See also *Hernandez v. Prudential Mortgage Corp.*, 553 F.2d 241 (1st Cir. 1977); *Roberts v. Cameron-Brown Co.*, 556 F.2d 356 (5th Cir. 1977).

[3] We note that an action of mortgage foreclosure is an action at law in Pennsylvania, see Pa.R.C.P. 1141. Equitable relief is available in an action at law where such relief can be granted consistently with principles of law. Std.Pa.Prac.2d § 79:4. Because the rights of the parties to an FHA-insured mortgage have not been clearly established in Pennsylvania, we

15

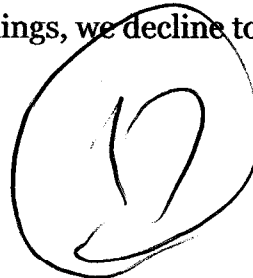
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believe the equitable relief discussed in this opinion can be granted consistently with principles of Pennsylvania law.

[4] Appellant's "Declaration" states that at no time since the default began has her mortgage company offered to help her save her home from foreclosure. Declaration of Vergie Smith, paragraph 12.

[5] We observe that the appellants in New York Guardian Mortgage asserted their right to set-off in a counterclaim, whereas the appellant in the instant case alleged her entitlement to set-off as a defense. This distinction, however, does not require that we depart from the rationale and holding of New York Guardian Mortgage. See 15 U.S.C. §§ 1640(h) and 1640(e), which both mention asserting a violation as a matter of defense.

[6] We note that appellant also alleges on appeal that the trial court erred in entering summary judgment without determining the specific amount owing on the mortgage. In view of our decision to remand for further proceedings, we decline to address this question.



STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF GREENVILLE)
)
 Wells Fargo Bank, NA)
)
 Plaintiff)
)
 Michelle Hodges, Individually: Michelle Hodges)
 as Personal Representative of the Estate of Ruth)
 Ladson Witherspoon: Stanley Witherspoon : SC)
 Housing Corp.: Twin Creeks Homeowners)
 Association, Inc.;)
)
 Defendants,) **CASE O. 2017CP208016**
)
) **CERTIFICATE OF SERVICE**

I the undersigned defendant, Michelle Hodges, do certify that I have served the below parties, via first class mail as shown below.

Jamile J. Francis III (accepts service)
Womble Bond Dickinson
550 S. Main ST #400
Greenville, SC 29601

Robert P. Wood (accepts service)
Rogers, Townsend & Thomas
1221 S. Main ST 14th Floor
Columbia, SC 29201

Certified Mail
S. Sterling Laney, III Partner
Womble Bond Dickinson
550 S. Main Street #400
Columbia, SC 29601

H. Guyton Murrel
Tracey C. Easton
SC Housing Corp
300-C Outlet Pointe Blvd
Columbia, SC 29210

Michelle Hodges 8/14/17
 Michelle Hodges, Defendant
 6 Young Harris Dr
 Simpsonville, SC 39286
 FOR CERTIFIED MAIL SEND TO:
 PO Box 95
 Mauldin, SC 29681
 864-704-5263

C



Date: September 08, 2017

Account Information	
Fax:	1-866-590-8910
Telephone:	1-800-416-1472
Correspondence:	P.O. Box 10335 Des Moines, IA 50306
Hours of Operation:	Mon - Thurs, 7 a.m. - 9 p.m., Fri, 7 a.m. - 8 p.m., Sat, 8 a.m. - 4 p.m. CT
Loan Number:	Redacted
Property Address:	6 YOUNG HARRIS DR SIMPSONVILLE, SC 29681

Subject: Your request for assistance

We service your mortgage in accordance to FHA's guidelines.

Dear MICHELLE HODGES:

We're responding to your request for assistance and the options that may be available to help you. We realize that the process can take some time, and we appreciate your patience while we review your options.

Here's what we found

We carefully reviewed the information you provided us, which included a process that compared your information to the qualifications for assistance associated with your loan. Here is the result of that review.

Program Name: FHA HAMP Loan Modification

Program Description:

This program modifies the existing terms of the loan. To qualify, FHA product guidelines must be met.

At this time, you do not meet the requirements of this program because:

Based on the documentation you provided, we are unable to create an affordable mortgage payment that still meets the requirements of the program. We reached this decision by reviewing your monthly gross income, which is calculated as \$1,953.00, along with reviewing the other information you provided. Your gross monthly income is your income before taxes and other deductions.

Once we determined that you did not meet the requirements for a particular program, we did not continue to evaluate that program based on other criteria related to your loan type or information you may have supplied. Instead we moved to evaluate you for the next available program based on your information and the qualifications associated with your loan.

Δπ EXHIBIT 10
 Deponent: Hodges
 Date: 5-23-19 Rptr: KLF
 WWW.DRPOBOOK.COM

If you believe our decision on your eligibility for assistance is incorrect, you can appeal within 20 calendar days from the date of this letter. You can follow the instructions outlined in the enclosed Appeal Request Form.

Talk to me about your other options

We have options available to help you avoid a foreclosure. You are eligible for a short sale and deed in lieu of foreclosure provided you meet the requirements.

If the amount you owe on your mortgage is higher than what you think you can sell your house for, you may want to consider what is known as a "short sale." This option could allow you to list your home for sale, for an amount that is less than you owe.

During the short sale process, you'll need to submit documentation to us that we will evaluate. For example, a short sale requires a purchase contract. Once we receive a purchase contract Wells Fargo Home Mortgage will review the terms of the contract and obtain the appraised value of the property.

If you are interested in a short sale, contact me right away. I can help explain the short sale process, guidelines and your eligibility.

If you are unable to sell your home or find a short sale is not the right alternative to foreclosure for you, another option to consider might be a deed in lieu of foreclosure, sometimes referred to as a Mortgage Release. If you are interested in a deed in lieu of foreclosure, please contact me right away so we can determine your eligibility and coordinate an appraisal and inspection of your property.

Keep in mind, if you accept a deed in lieu of foreclosure, you must agree to vacate the property within an agreed upon time.

The loan may be included in a Single Family Loan Sale

It is possible that the loan may be included in a Single Family Loan Sale by FHA. This means that FHA may sell the loan to an investor, and the servicer of the loan may change.

Note that foreclosure may happen if any of these events occur:

- If you can't qualify for a mortgage assistance program.
- If you aren't able to meet the terms of any mortgage assistance programs. (If, for example, you didn't make your mortgage payments on time.)
- If your mortgage assistance program is denied.
- If you didn't respond to our request for information and can't be considered for a mortgage assistance program.

Also note that there may be limitations to foreclosure if the loan is in bankruptcy.

We're here for you

If you have any questions about the information in this letter please call me at the phone number listed below.

Sincerely,

AXL QUINN
Home Preservation Specialist
Wells Fargo Home Mortgage
Ph: 844-422-0853 ext: 1335523495
Fax: 1-866-590-8910

Contact us

If you'd like to request information, notify us of an error, or share any concerns you may have about the servicing of your loan, please contact us at P.O. Box 10335, Des Moines, IA 50306. Please include your account number with all correspondence.

Get free counseling to help manage expenses and avoid foreclosure. Reach out to a local HUD-approved, non-profit housing counseling agency if you're struggling to keep up with monthly expenses, or want help to avoid

foreclosure. At no cost, a counselor will work closely with you, providing the information and assistance you need. To find an agency near you, go to www.hud.gov/offices/hsg/sfh/hcc/fc. Or call 1-800-569-4287 (TDD 1-800-877-8339). You can also call HOPE Hotline at 1-888-995-HOPE (4673).

Be sure you avoid anyone who asks for a fee for counseling or a loan modification, or asks you to sign over the deed to your home, or to make your mortgage payments to anyone other than Wells Fargo Home Mortgage America's Servicing Company.

Where appropriate Wells Fargo Home Mortgage America's Servicing Company is required to inform you that, as your account servicer, we are attempting to collect a debt and any information obtained will be used for that purpose. However, if you are a customer involved in an active bankruptcy case or you received a discharge in a bankruptcy case where the account was not otherwise reaffirmed or excepted from discharge, then this notice is being provided to you for informational purposes only, and this is not a bill or a request for payment as to any such customer(s).

We may report information about your account to consumer reporting agencies. Late payments, missed payments, or other defaults on your account may be reflected in your credit report.

The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The Federal agency that administers compliance with this law concerning this creditor is Bureau of Consumer Financial Protection, 1700 G Street NW., Washington, DC 20006.

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HP601 ML



October 4, 2017

ESTATE OF RUTH WITHERSPOON
C/O MICHELLE HODGES
PO BOX 95
MAUDLIN, SC 29662-0000

Account Information

Online:	wellsfargo.com
Fax:	1-866-590-8910
Telephone:	1-800-416-1472
Correspondence:	PO Box 10335 Des Moines, IA 50306
Hours of operation:	Mon-Thurs, 7 a.m. - 9 p.m., Fri, 7 a.m. - 8 p.m., Sat, 8 a.m. - 4 p.m., CT
Loan number:	Redacted
Property address:	6 Young Harris Dr Simpsonville SC 29681

085

Subject: Decision on your loan modification and next steps

Dear Estate Of Ruth Witherspoon:

In response to your appeal request, we have completed a review of the decision we made about your mortgage.

Here's what we found

After carefully reviewing the information we currently have, we have determined that you still do not meet the requirements for a loan modification.

Talk to me about your other options

We have options available to help you avoid a foreclosure. You are eligible for a short sale and deed in lieu of foreclosure provided you meet the requirements.

If the amount you owe on your mortgage is higher than what you think you can sell your house for, you may want to consider what is known as a "short sale". This option could allow you to list your home for sale, for an amount that is less than you owe.

During the short sale process, you'll need to submit documentation to us that we will evaluate. For example, a short sale requires a purchase contract. Once we receive a purchase contract Wells Fargo Home Mortgage will review the terms of the contract and obtain the appraised value of the property.

If you are interested in a short sale, contact me right away. I can help explain the short sale process, guidelines and your eligibility.

If you are unable to sell your home or find a short sale is not the right alternative to foreclosure for you, another option to consider might be a deed in lieu of foreclosure, sometimes referred to as a Mortgage Release. If you are interested in a deed in lieu of foreclosure, please contact me right away so we can determine your eligibility and coordinate an appraisal and inspection of your property.

Keep in mind, if you accept a deed in lieu of foreclosure, you must agree to vacate the property within an agreed upon time.

Account Information

Loan number:	0412780801
Property address:	6 Young Harris Dr Simpsonville SC 29681

The loan may be included in a Single Family Loan Sale

It is possible that the loan may be included in a Single Family Loan Sale by FHA. This means that FHA may sell the loan to an investor, and the servicer of the loan may change.

Note that foreclosure may happen if any of these events occur:

- ó If you can't qualify for a mortgage assistance program.
- ó If you aren't able to meet the terms of any mortgage assistance programs. (If, for example, you didn't make your mortgage payments on time.)
- ó If your mortgage assistance program is denied.
- ó If you didn't respond to our request for information and can't be considered for a mortgage assistance program.

Also note that there may be limitations to foreclosure if the loan is in bankruptcy.

We're here for you

If you have any questions about our reviewed decision, or want to discuss other options to avoid foreclosure, please call the phone number below.

Sincerely,

AXL QUINN

AXL QUINN

Home Preservation Specialist

Wells Fargo Home Mortgage

Ph: 1-844-422-0853 ext. 1335523495

Fax: 1-866-590-8910

Email: Axl.B.Quinn@wellsfargo.com

Contact us

If you'd like to request information, notify us of an error, or share any concerns you may have about the servicing of your loan, please contact us at P.O. Box 10335, Des Moines, IA 50306. Please include your account number with all correspondence.

Get free counseling to help manage expenses and avoid foreclosure. Reach out to a local HUD-approved, non-profit housing counseling agency if you're struggling to keep up with monthly expenses, or want help to avoid foreclosure. At no cost, a counselor will work closely with you, providing the information and assistance you need. To find an agency near you, go to www.hud.gov/offices/hsg/sfh/hcc/fc. Or call 1-800-569-4287 (TDD 1-800-877-8339). You can also call HOPE Hotline at 1-888-995-HOPE (4673).

Be sure you avoid anyone who asks for a fee for counseling or a loan modification, or asks you to sign over the deed to your home, or to make your mortgage payments to anyone other than Wells Fargo Home Mortgage.

Where appropriate Wells Fargo Home Mortgage is required to inform you that, as your account servicer, we are attempting to collect a debt and any information obtained will be used for that purpose. However, if you are a customer involved in an active bankruptcy case or you received a

Account Information

Loan number: 0412780801

Property address: 6 Young Harris Dr
Simpsonville SC 29681

discharge in a bankruptcy case where the account was not otherwise reaffirmed or excepted from discharge, then this notice is being provided to you for informational purposes only, and this is not a bill or a request for payment as to any such customer(s).

We may report information about your account to consumer reporting agencies. Late payments, missed payments, or other defaults on your account may be reflected in your credit report.

The Federal Equal Credit Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act. The Federal agency that administers compliance with this law concerning this creditor is Bureau of Consumer Financial Protection, 1700 G Street NW, Washington, DC 20006.

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MICHELLE HODGES
WELLS FARGO vs MICHELLE HODGES

1 correct?

2 A. Yes, I did apply for the loan modification.

3 Q. And who did you apply to?

4 A. First in January -- I'm sorry, December of 2016, I
5 applied directly with Wells Fargo.

6 Q. Okay.

7 A. And then --

8 Q. I'm sorry, did you say January '15?

9 A. No. December --

10 Q. I'm sorry.

11 A. -- 2016.

12 Q. Thank you.

13 A. I think it was -- well, I don't want to give the
14 exact date. It was at the end of 2016 --

15 Q. Okay.

16 A. -- that I applied directly with the Plaintiff.

17 Q. Okay. Wells Fargo?

18 A. Yes.

19 Q. Okay. And we're going to look at the denial letters
20 here in a second. You received two or three
21 different denial letters from Wells Fargo, correct?

22 A. I received one denial letter.

23 Q. Okay.

24 A. Well, I'll just say, I received the denial letter, I
25 think it was in September. I'm not sure, but if you

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1 A. Yes. I withdrew that first request because I didn't
2 feel like I could get it -- I couldn't get any
3 questions answered or any -- I just felt like I was
4 -- it wasn't going to happen.

5 Q. Okay. And after February of 2017, you applied
6 again?

7 A. Yes.

8 Q. Okay.

9 A. I sought assistance to try and get help with the
10 mortgage and I was told to reapply.

11 Q. Okay.

12 (MARKED, PLAINTIFF'S EXHIBIT NUMBER 10,
13 SEPTEMBER 8, 2017 LETTER, ATTACHED)

14 CONTINUED BY MR. LANEY:

15 Q. And so, this is Plaintiff's exhibit number ten, and
16 that is a letter dated September 8th, 2017,
17 addressed to you. It says "Dear Michelle Hodges."

18 A. I'm sorry, what was --

19 Q. It says "Dear Michelle Hodges, we're responding to
20 your request for assistance." And this is dated
21 September 8th, 2017, and if you go down about three-
22 quarters of the way, it says "at this time you do
23 not meet the requirements of this program because"
24 and it says "based on the documentation you've
25 provided, we are unable to create an affordable

1 mortgage payment that still meets the requirements
2 of the program. We've reached this decision by
3 reviewing your monthly gross income which is
4 calculated at \$1,953.00, along with reviewing the
5 other information you've provided."
6 A. What is your question?
7 Q. That that's what the letter states.
8 A. Yes.
9 Q. Okay. And you received that letter?
10 A. Yes.
11 Q. And you appealed that decision?
12 A. Yes.
13 Q. Okay.
14 A. And in this letter I wanted to point out that it
15 says "FHA HAMP" on here.
16 Q. Okay.
17 A. Where does it say it? It used to say it.
18 Q. It says "program name, FHA HAMP."
19 A. Right. And you said earlier that HAMP had expired.
20 Q. Yeah. So, it does say the programs name is FHA --
21 A. HAMP.
22 Q. -- HAMP loan modification.
23 A. Uh-huh.
24 Q. It also says "mortgages in accordance to FHA's
25 guidelines. We service your mortgage and --"

1 Q. Okay.

2 A. -- which is a false statement.

3 Q. Okay. You mentioned here for the first time a
4 fiduciary relationship, and you mention later on
5 about a fiduciary relationship.

6 A. Uh-huh.

7 Q. What do you base that upon? Why do you think
8 there's a fiduciary relationship?

9 A. It's based on the mortgage contract.

10 Q. Okay.

11 A. And also, under the Consumer Financial Protection
12 Bureau, it states under the rules that were
13 promulgated for determining whether or not there is
14 a successor in interest, that -- well, when you go
15 through the process of providing documentation, that
16 whole loan modification, that's how the relationship
17 is -- it became an agency relationship.

18 Q. Okay. So, it's all based on your application for a
19 loan modification?

20 A. No.

21 Q. Okay. What's it based on?

22 A. The fiduciary relationship is based on -- okay,
23 under the law of agency, under the contract, the
24 relationship is developed -- I'm not saying this
25 exactly how it needs to be said, but the

1 relationship determines the duty that is owed for a
2 fiduciary relationship.

3 Q. Okay.

4 A. And under that relationship of me providing the
5 documentation, they owed me a duty of care to
6 qualify me to -- for the correct program and
7 determinc if I was the successor in interest or not.
8 And provide the correct program and the correct
9 determination.

10 Q. So, in essence, this really boils down to you
11 believe they should have qualified you for a loan
12 modification and they didn't?

13 A. What is -- what I'm saying right now is that the
14 correct -- the incorrect program -- the procedures
15 were not followed properly and there was no duty of
16 care provided.

17 Q. Okay.

18 A. According to the procedures that the Plaintiff is
19 supposed to follow --

20 Q. Okay.

21 A. -- I making the determinations on what programs I
22 qualified for and which ones I didn't.

23 Q. Okay. So, that's the -- in essence what I'm saying.
24 Your quarrel and disagreement with Wells Fargo is
25 based on the fact that you don't believe they

1 followed proper procedures in considering your loan
2 modification?

3 A. They didn't follow proper procedures or make the
4 correct determination.

5 Q. Okay.

6 A. That's what I'm saying.

7 Q. And the correct determination would have been to
8 approve you for a loan modification?

9 A. I know that sounds funny, but --

10 Q. That's --

11 a. -- I'm still researching that issue. But -- I need
12 to take a break. Is that possible?

13 Q. Yes, ma'am. Certainly this is not an endurance
14 contest. We'll take a break and be off the record.

15 (OFF THE RECORD)

16 CONTINUED BY MR. LANEY:

17 Q. Ms. Hodges, we're back on the record. We took a
18 little break and you moved your car, and you are
19 still under oath as we just discussed.

20 MR. LANEY: And if you would, would you read
21 back the last question that I asked Ms. Hodges
22 before we took a break?

23 (READBACK PROVIDED BY COURT REPORTER)

24 CONTINUED BY MR. LANEY:

25 Q. All right. Ms. Hodges, we were talking about the



1 A. The -- okay. It's based on the fact that the
2 complaint states -- makes a false statement that the
3 HAMP program had expired December of 2016.

4 Q. Okay.

5 A. Yet this letter is dated September of 2017.

6 Q. Yes, ma'am.

7 A. So -- and then, if I had been properly considered
8 under the program, they would have been able to give
9 me a specific denial reasons. The fact that they're
10 stating that they were unable to calculate a payment
11 does not conform with the FHA waterfall guidelines.
12 Because the waterfall guidelines that I sent you
13 during the discovery process, it shows how the
14 mortgage lender calculates the payment.

15 Q. Okay.

16 A. So, why would HUD give you a guideline to calculate
17 the payment but it's not acceptable.

18 Q. Okay.

19 A. That reason doesn't --

20 Q. Okay. I'm going to show you what the letter says.

21 A. Okay.

22 Q. The letter says they are unable to create an
23 affordable mortgage payment.

24 A. Uh-huh.

25 Q. They don't say they can't calculate a payment. They

1 A. Because I was thinking, okay, did they use mine --
2 so, it wouldn't be the four-hundred dollar
3 calculation that I gave you before.

4 Q. Okay. Do you know what it would be?

5 A. No, I have to calculate it.

6 Q. Okay. All right. Paragraph 52, you say the
7 Plaintiff did not consider me for the FHA HAMP
8 program. They did consider you, they just denied
9 you for it; wouldn't you agree with that?

10 A. No. I believe they made up a fraudulent reason.

11 Q. So, you don't believe they considered you at all?

12 A. No, I believe that's a fraudulent denial reason.

13 Q. Okay.

14 A. Because they said we're unable to create a payment -
15 -

16 Q. Okay.

17 A. -- when the guidelines show them how to create a
18 payment.

19 Q. Okay. So, you believe the fact that you submitted
20 all the documentation and they say they reviewed all
21 the documentation, but could not create an
22 affordable monthly payment --

23 A. Uh-huh.

24 Q. -- you believe that's just all made up?

25 A. Yes, I do.

1 A. Okay.

2 Q. So, I'll ask you some more about that. The breach
3 of fiduciary duty, what do you base that upon?

4 A. The mortgage contract determines that there is a
5 relationship.

6 Q. Okay.

7 A. The relationship determines what the duty is.

8 Q. Okay.

9 A. The duty was to mitigate -- properly mitigate.

10 Q. Okay. Do you have any relationship with Wells Fargo
11 other than the mortgage loan relationship?

12 A. At the time I did. I have a banking relationship
13 with Wells Fargo as well.

14 Q. Checking account you had with them?

15 A. Yes. Uh-huh.

16 Q. Okay. Any --

17 A. But this relationship is sufficient to establish
18 that there was a fiduciary relationship because
19 there was a -- it was a relationship of -- one of
20 confidence and trust.

21 Q. Okay.

22 A. Me providing them with my personal information, them
23 reviewing my personal information, and --

24 Q. And that's what --

25 A. -- setting the expectation that they're going to let

1 me know what the decision. Yes --

2 Q. Okay.

3 A. -- that's a fiduciary relationship.

4 Q. That's what you're basing it upon? It's the loan
5 application -- loan modification process is what --

6 A. And the escrow --

7 Q. -- you're basing --

8 A. And the escrow also. But --

9 Q. Yes.

10 A. -- for this particular counterclaim, I'm referring
11 to this.

12 Q. Do you have any investments with Wells Fargo?

13 A. No, I don't.

14 Q. Okay. Do you deal with any -- you didn't deal with
15 a banker in Greenville and talk with him about this
16 process?

17 A. No, but --

18 Q. Okay.

19 A. No, I didn't. No.

20 Q. Okay. So, it's all based upon the documents you
21 submitted to Wells Fargo for the modification?

22 A. That's --

23 Q. That's the fiduciary relationship you believe --

24 A. -- what establishes -- it is.

25 Q. That's what you believe --