

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Taylor Brunson

Plaintiff,

v.

Zack L. Evans, deceased, and any children and heirs at law, distributees and devisees, and if any be deceased then any persons entitled to claim under or through them; also all other persons unknown claiming any right, title, interest, or lien herein, any unknown adults being a class designated as John Doe; and any unknown minors or persons under disability or in the military service being a class designated as Richard Roe; Tina L. Evans individually and as Personal Representative of the Estate of Zack L. Evans; Kara Pitchford; and Autumn Skye Properties, LLC

Defendant(s).

IN THE COURT OF COMMON PLEAS
2024CP3200179

**ORDER GRANTING PLAINTIFF'S
MOTION TO DISMISS
COUNTERCLAIMS**

RECEIVED

Jun 28 2024

SC Court of Appeals

This matter came before the Court on April 9, 2024 on Plaintiff's Motion to Dismiss Defendant Tina L. Evans, individually and as the Personal Representative of the Estate of Zack L. Evans, and Kara Pitchford's Third, Fourth, Fifth, Sixth, and Seventh Counterclaims. Stephanie Trotter Kellahan, Esquire appeared on behalf of Plaintiff. James Edward Bradley, Esquire appeared on behalf of Tina L. Evans and Kara Pitchford (hereinafter "Answering Defendants"). At the hearing, Defendants agreed to dismiss the Fourth Counterclaim and Seventh Counterclaim. For the reasons stated herein, the Third, Fifth, and Sixth Counterclaims are also dismissed.

BACKGROUND

Zack L. Evans owned real property located at 141 Browning Court (hereinafter the “Property”) until his death on May 24, 2023. (Answer, ¶ 3). Upon Mr. Evans’ death, title to the Property devolved to the Answering Defendants in equal shares. (*Id.*). Prior to his death, in October 2019, Mr. Evans gave a promissory note for \$17,220.00 and a mortgage secured by the Property to Wesley Martin. (Complaint, ¶ 9)¹. After Mr. Evans’ death, Wesley Martin assigned the note and mortgage to Plaintiff. (Complaint, ¶ 12). Plaintiff instituted this action on January 15, 2024 seeking foreclosure of the mortgage alleging the Answering Defendants failed to pay the required installments. In response, the Answering Defendants filed counterclaims alleging the note and mortgage were entered into in violation of the South Carolina Consumer Protection Code (hereinafter “SCCPC”). The SCCPC counterclaims all allege the Answer Defendants are entitled to statutory damages and attorney’s fees and costs. In response, Plaintiff filed a Motion to Dismiss the SCCPC counterclaims pursuant to Rule 12(b)(6).

LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6), SCRPC, is properly granted “when the [moving party] demonstrates the [claimant] has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court.” Rule 12(b)(6), SCRPC. In reviewing a motion to dismiss, the court must accept as true the well-pleaded facts in the complaint. See Gressette v. S.C. Elec. & Gas Co., 370 S.C. 377, 379, 635 S.E.2d 538, 538 (2006) (emphasis added). However, the court will not admit inferences drawn by the claimant from such facts, nor will it admit conclusions of

¹The Court may take judicial notice of a matter in the public record that is not subject to reasonable dispute. See Rule 201(b) SCRE. Judicial notice may be taken at any stage of the proceeding. See Sec’y of State for Defence v. Trimble Navigation Ltd., 484 F.3d 700, 705 (4th Cir. 2007) (“in reviewing the dismissal of a complaint under Rule 12(b)(6) we may properly take judicial notice of matters in public record”).

law. See Fireman's Ins. Co. of Newark, New Jersey v. Cincinnati Ins. Co., 302 S.C. 234, 235, 394 S.E.2d 855, 856 (Ct. App. 1990). This requires the claimant “to plead the ultimate facts which will be proved at trial, not evidence which will be used to prove those facts.” Clark v. Clark, 293 S.C. 415, 416, 361 S.E.2d 328, 328 (1987). “Ultimate facts fall somewhere between the verbosity of ‘evidentiary facts’ and the sparsity of ‘legal conclusions.’” Watts v. Metro Security Agency, 346 S.C. 235, 240, 550 S.E.2d 869, 871 (Ct. App. 2001). Legal conclusions “describe a legal status, condition, or legal offense.” Stroud v. Riddle, 260 S.C. 99, 103, 194 S.E.2d 235, 237 (1973). A Rule 12(b)(6) motion is “directed to the factual and legal sufficiency of the complaint...” Woodell v. Marion School Dist., 307 S.C. 297, 298, 414 S.E.2d 794 (Ct. App. 1992).

ANALYSIS

The SCCPC establishes obligations of creditors in certain consumer transactions. S.C. Code § 37-1-301(13) defines a “Creditor” as the person who grants credit in a credit transaction. While some provisions of the SCCPC also apply to assignees of a creditor, those provisions generally address activities or obligations that arise after the assignment. See Kathleen Goodpasture Smith, The South Carolina Consumer Protection Code, 65 (2001). (“Though assignees take all rights conferred by the SCCPC on creditors, they are liable for the obligations imposed on creditors by [Title 37] only with respect to occurrences after assignment, unless the SCCPC provides otherwise.”)

It is undisputed that Plaintiff was not involved in the original mortgage transaction. Instead, Plaintiff’s involvement began December 7, 2023 when Plaintiff received assignment of the mortgage from the original creditor, Wesley Martin. Because all of the SCCPC counterclaims attack the formation of the original note and mortgage and do not allege Plaintiff took any prohibited action after December 7, 2023, the Answering Defendants cannot state a claim for relief

against Plaintiff for the SCCPC counterclaims. Therefore, the SCCPC counterclaims are hereby dismissed.

A. The Answering Defendants' Third Counterclaim Alleging Violation of the Attorney Preference Statute is Dismissed

Defendants allege that the note and mortgage at issue were entered in violation of the attorney preference provision of S.C. § 37-10-102. Defendants do not dispute that Plaintiff is an assignee of the original lender and was not involved in the original loan transaction. As such, Defendants' Third Counterclaim fails as a matter of law.

1. Plaintiff Cannot Be Held Liable for an Alleged Violation of the Attorney Preference Statute by the Original Lender.

The South Carolina attorney-preference statute requires a creditor to ascertain, prior to closing, the preference of a borrower as to the legal counsel that is employed to represent the debtor in all matters relating to the closing of a mortgage loan. S.C. Code Ann. § 37-10-102. If a creditor violates this provision, the debtor has a cause of action to recover actual damages and also a right “to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars.” *Id.* § 37-10-105.

“Creditor” is defined as “the person who grants credit in a credit transaction or, except otherwise provided, an assignee of a creditor’s right to payment.” S.C. Code § 37-1-301(13). However, the assignee of a debt “takes only the benefits, not the burdens of the assigned obligation.” *Rosemond v. Campbell*, 288 S.C. 516, 522-523, 343 S.E.2d 641, 645 (S.C. Ct. App. 1986). “Thus, as against the assignee, the obligor can only assert a claim defensively when the assignee seeks to enforce the obligation; *he has no common law right to sue the assignee*

affirmatively on a claim against the assignor arising from the underlying obligation.” *Id.* (emphasis added); see also JPMorgan Chase Bank, N.A. v. Guertin, CA 3:12-2363-MBS, 2012 WL 5550770 (D.S.C. Nov. 15, 2012) (“Defendants cite no authority, nor does the court find any, to support the proposition that a subsequent assignee is imputed with and can be held liable for the wrongful conduct of a promissory note’s original obligee.”). Moreover, the attorney-preference statute specifically limits a debtor’s right to affirmatively recover for an alleged violation of the statute only “from the person violating this chapter.” S.C. Code § 37-10-105(A). Therefore, as a matter of law, Plaintiff cannot be held liable for an alleged violation of the attorney-preference statute by the original lender. Accordingly, the Answering Defendants’ claim for affirmative relief for alleged violation of the attorney-preference statute is dismissed.

B. The Answering Defendants’ Fifth Counterclaim Alleging Violation of the High-Cost and Consumer Home Loans Act is Dismissed

The Answering Defendants allege the note and mortgage at issue were entered in violation of the High-Cost and Consumer Home Loans Act. However, Plaintiff is neither a Lender, Mortgage Broker, nor Originator. Therefore the Answering Defendants’ Fifth Counterclaim is dismissed.

1. S.C. Code § 37-23-30 Does Not Prohibit Charging Fees of 10% of the Loan Balance

The Answering Defendants’ Fifth Counterclaim alleges the subject note and mortgage violate S.C. Code § 37-23-30 because the loan charges fees of 10% of the loan balance. (Am. Answer, ¶ 36(a)). This claim fails as a matter of law and is dismissed because the plain language of S.C. Code § 37-23-30 does not contain any prohibition against charging fees of 10% of the loan balance.

2. Plaintiff is Not A Lender in a High-Cost Home Loan Pursuant to S.C. Code 37-23-40

S.C. Code 37-23-40 contains certain limitations on *lenders* of high-cost home loans. It is undisputed that Plaintiff was not the lender of the subject loan. Therefore, as with Defendants' affirmative claim for violation of the attorney-preference statute, the Answering Defendants' claim for violation of S.C. Code § 37-23-40 fails as a matter of law and is dismissed.

3. Plaintiff is Not a Mortgage Broker or Originator Subject to the Requirements of S.C. § 37-23-45, § 37-23-70 and § 37-23-75.

Where a mortgage transaction involves a mortgage broker, S.C. Code § 37-23-45 requires the mortgage broker give the borrower certain disclosures before closing. S.C. Code § 37-23-70(D) requires a mortgage broker or originator to, at the time of application for a mortgage loan, provide the borrower certain disclosures. Finally, S.C. Code § 37-23-75 requires a mortgage broker to make certain disclosures prior to the scheduled closing of a home loan.

A "mortgage broker" is defined as "a person or organization in the business of soliciting, processing, placing, or negotiating mortgage loans for others." S.C. Code § 37-23-20(3). A "originator" is defined as "an employee of a mortgage broker or mortgage lender whose job is to inform loan applicants of rates, terms, and other aspects of the mortgage. S.C. Code § 37-23-20(12).

Defendants do not allege Plaintiff is a mortgage broker or loan originator in general or acted as either role in this transaction. Additionally, all of these statutes involve some action be taken at or before the closing table. As with the Answering Defendants' claims for violation of the attorney-preference statute, Plaintiff cannot be held liable for the alleged violations of the parties involved in the original transaction. Accordingly, the Answering Defendants' claim for violation of S.C. Code § 37-23-45, § 37-23-70 and § 37-23-75 fail as a matter of law and are dismissed.

C. The Answering Defendants' Sixth Counterclaim Alleging Violation of the Mortgage Lending Licensing Requirements is Dismissed

The Answering Defendants allege this foreclosure suit and the underlying note and mortgage all violate the mortgage licensing provisions of the SCCPC. However, the Answering Defendants have failed to allege that Plaintiff is a Mortgage Lender as defined by S.C. Code § 37-22-110(2). Accordingly, Plaintiff is not required to be licensed by the SCCPC and the Answering Defendants' Sixth Counterclaim is dismissed.

S.C. Code § 37-22-120(A) prohibits a person from acting as a mortgage lender without first obtaining a license pursuant to Chapter 22. A person "acts as a mortgage lender" by engaging the making or servicing of a mortgage loan for compensation or gain. S.C. Code § 37-22-110(2). "Mak[ing] a mortgage loan" is defined as "clos[ing] a mortgage loan, advancing funds, or making a commitment to advance funds to a borrower under mortgage loan." S.C. Code § 37-22-110(27).

The Answering Defendants do not, and cannot, allege that Plaintiff acted as a mortgage lender with regarding to this transaction. Because Plaintiff was not acting as a mortgage lender he was not obligated to be licensed under Section 37-22-120(A). Accordingly, the Sixth Counterclaim alleging violation of the licensing statute is dismissed.

IT IS HEREBY ORDERED THAT the Third Fourth, Fifth, Sixth, and Seventh Counterclaims are dismissed for failure to state a claim upon which relief can be granted.

AND IT IS SO ORDERED.

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Lexington Common Pleas

Case Caption: Taylor Brunson VS Zack L. Evans, deceased, & any children & heirs
at law , defendant, et al
Case Number: 2024CP3200179
Type: Order/Dismissal

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134