

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

CitiMortgage, Inc.,

Plaintiff,

vs.

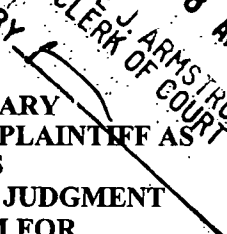
Brodie M. Trickey aka Brodie McCary Trickey
and Barberrry Woods Property Owners
Association,

Defendant(s).

(File No. 4008.72610)

IN THE COURT OF COMMON PLEAS

C/A NO.: 2010-CP-10-5775

FILED
2013 MAY -8 AM 9:43
JULIE J ARMSTRONG
CLERK OF COURT
BY 

**ORDER GRANTING SUMMARY
JUDGMENT IN FAVOR OF PLAINTIFF AS
TO ALL COUNTERCLAIMS
AND DENYING SUMMARY JUDGMENT
AS TO PLAINTIFF'S CLAIM FOR
FORECLOSURE OF MORTGAGE**

This matter came before the Court for a hearing on Plaintiff's Motion for Summary Judgment. Present representing the Plaintiff was Damon C. Wlodarczyk. Mary Leigh Arnold was present on behalf of the Defendant Trickey (hereinafter "borrower").

This matter involves the foreclosure of a mortgage secured by real property owned by the borrower which is located in Charleston County. Plaintiff's counsel filed an Amended *Lis Pendens*, Summons and Complaint on July 19, 2010. Borrower, through his undersigned counsel, filed and timely served an Answer and Counterclaims. The counterclaims are as follows: Breach of Contract and Breach of Covenant of Good Faith and Fair Dealing. Unjust Enrichment, and Negligent Misrepresentation. All of the counterclaims are based upon allegations that borrower was harmed as a result of the denial of his application for a loan modification under the Making Homes Affordable Program (HMP).

On or about June 24, 2011, borrower's counsel filed with the Court a request to be considered for foreclosure intervention as provided for by the May 2011 S.C. Supreme



Court's Administrative Order. As a result, this Court issued an Order filed June 30, 2011, staying the matter pending a decision regarding foreclosure intervention.

On August 25, 2011, Plaintiff's counsel filed with the Court a Certification of Non-Compliance regarding the request for foreclosure intervention in which counsel asserted that borrower failed to produce documents despite several written requests.

On October 4, 2011, borrower's counsel filed with the Court an objection to the Certification of Non-Compliance asserting that borrower could not produce requested tax records because borrower had not filed taxes for the past four years and that borrower did not receive paystubs and, therefore, could not produce the same.

A hearing was held on December 7, 2011, regarding the borrower's objection to Plaintiff's Certification of Non-Compliance. Following oral arguments, the Court issued an Order filed December 9, 2011, providing Plaintiff would re-consider borrower for a loan modification after borrower submitted to Plaintiff's counsel his 2011 Form 1099 proof of income. The Court provided that borrower would supply his proof of 2011 income by January 31, 2012, or the case could proceed to trial.

On November 2, 2012, Plaintiff's counsel filed a Motion for Summary Judgment with supporting affidavit and exhibits. On January 23, 2013, borrower's counsel filed a counter-affidavit. A hearing was held on Plaintiff's summary judgment motion on January 25, 2013.

Plaintiff's counsel argued that borrower failed to comply with the Court's Order providing proof of income; that the borrower's lack of verifiable income resulted in the denial of borrower's HMP application; that borrower cannot maintain a private cause of action for any decision relating to HMP and, therefore, the counterclaims should be

dismissed with prejudice; and that there is no genuine issue regarding the right to an Order for Foreclosure and Sale.

For the reasons set forth herein, the Court finds there are no genuine issues of material fact as to the counterclaims alleged and the Plaintiff is entitled to judgment as a matter of law in its favor as to those claims. The Court, however, finds there is a genuine issue of fact as to the Plaintiff's claim for foreclosure and denies summary judgment as to that cause of action.

STANDARD

Summary Judgment is warranted only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRC. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party." Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000). The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. However, once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent must come forward with specific facts showing there is a genuine issue for trial." Garvin v. Bi-Lo, Inc., 337 S.C. 436, 523 S.E.2d 481 (Ct. App. 1999). The opponent cannot merely rely upon the pleadings, but must submit some additional evidence creating a genuine issue of material fact.

ANALYSIS

In support of the Motion for Summary Judgment, the Plaintiff submitted an Affidavit of a business records custodian for the Plaintiff. The Affidavit and attachments thereto presented evidence as follows:

1. That the Plaintiff is the owner and holder of a Note and Mortgage securing real property as issue in this action between borrower and Plaintiff;
2. That the borrower defaulted on the terms of the Note and Mortgage as of March 1, 2010;
3. The borrower had applied for relief under HMP prior to the filing of the current action but was declined for HMP and Supplemental Modification in May 2010;
4. That a Notice of Right to Cure and Acceleration of Debt letter was mailed to the borrower on May 5, 2010;
5. That borrower applied for relief under the May 2011 S.C. Supreme Court Administrative Order regarding foreclosure intervention but was denied for that relief for failing to cooperate as evidenced by the Notice of Denial on record with the Court;
6. The amounts due and collectable under the Note and Mortgage as of September 22, 2012, exclusive of court costs and attorney fees totals \$338,721.65, along with a *per diem* interest rate of \$65.99.

In addition to the Affidavit, Plaintiff's counsel offered to the Court for consideration a copy of the deposition transcript of borrower which provided the following evidence for consideration:

1. Borrower has not received any formal form of income documentation (W-2, 1099, K-1) since 2009;
2. Borrower has not filed State or Federal Taxes since 2009;
3. Borrower initial request to Plaintiff for any type of relief (forbearance, modification, etc.) occurred after the subject loan was in default.

Counsel for borrower submitted a counter-affidavit filed on January 23, 2013.

The counter-affidavit presented evidence as follows:

1. That borrower is the owner of the real property which is the subject of this foreclosure action, located at 1759 Hickory Knoll, Johns Island, SC 29455, which is his principal residence;
2. The Note and Mortgage referenced in the within matter originated with CitiMortgage, Inc.;
3. In or around January of 2009, borrower began pursuing a modification of the Note and Mortgage from Plaintiff;
4. In September of 2009, borrower entered in a Home Affordable Modification Trial Period Plan (hereinafter "TPP") with Plaintiff;
8. That borrower made all payments, on time, under the TPP beginning on September 29, 2009 and continued to make payments under the TPP until May of 2010 at which point in time Plaintiff refused to accept the payment;
9. That borrower sent Plaintiff all of the documents requested of him in order to modify my loan, often sending the same documents more than once.

FINDINGS

As an initial matter, the Court finds that borrower failed to comply with the Court's December 9, 2011 Order instructing borrower to produce verifiable evidence of his 2011 income to Plaintiff's counsel by January 31, 2012. Accordingly, the Court finds that Plaintiff has complied with and acted in good faith regarding the S.C. Administrative Order, the borrower's request for foreclosure intervention, and the filing of the Certification of Non-Compliance.

As to the counterclaims alleged against the Plaintiff by borrower, the Court finds that all of the factual allegations set forth by borrower in support of the counterclaims relate directly to the issue of whether or not borrower was entitled to a loan modification under HMP. The Court finds that based upon the recent case of Stevens v. American Home Mortgage Servicing, Inc. 2011 WL 901179 (D.S.C. March 15, 2011), Plaintiff is entitled to an Order dismissing the counterclaims with prejudice. In Stevens, the United States District Court for the District of South Carolina found that HMP provides financial incentives for participating lenders to modify the terms of current loans for qualified borrowers who have defaulted and face foreclosure. However, the Court ruled that nowhere in the HMP guidelines or in the HMP legislation is a private right of action expressly provided. Accordingly, the District Court adopted the report and recommendation of the U.S. Magistrate in dismissing the state law private cause of action for breach of implied covenant of good faith and fair dealing which was based on the loan servicer's rejection of the plaintiff borrower's application for a loan modification under HMP.

Even assuming that a private cause of action for HMP decisions could be maintained against a private servicer, the uncontested evidence before the Court is borrower had no verifiable income at all times relevant to his request for an HMP loan modification or this foreclosure action. Accordingly, the Court finds that borrower cannot maintain his alleged causes of action against Plaintiff for failing to offer him a loan modification when the borrower, for all intents and purposes, has zero (0) income and could not, therefore afford any loan payment.

CONCLUSIONS OF LAW

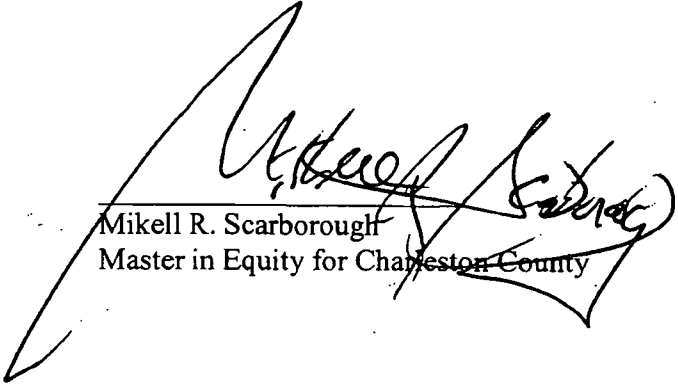
Based upon findings of fact set forth above, the Court makes the following conclusions of law:

1. Plaintiff has complied with the S.C. Administrative Order concerning foreclosure intervention and the borrower has failed to cooperate which has been certified to the Court and, therefore, this case may proceed to trial;
2. That borrower cannot maintain a private cause of action against the Plaintiff for failing to modify the terms of his mortgage loan under HMP and, therefore, the counterclaims are dismissed with prejudice;
3. That even if the borrower could maintain a private cause of action for the Plaintiff's HMP decision, Plaintiff is entitled to a judgment as a matter of law because the borrower has no verifiable income upon which a loan modification could be made;
4. That a genuine issue of fact remains as to the cause of action for the foreclosure of the mortgage and, therefore, summary judgment is denied as to that issue and the case shall proceed to trial.

IT IS SO ORDERED.

Charleston, South Carolina

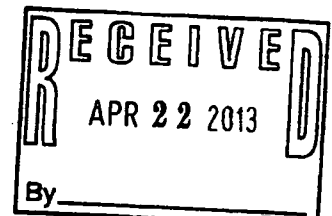
April 26, 2013



Mikell R. Scarborough
Master in Equity for Charleston County

RILEY POPE & LANEY, LLC
ATTORNEYS AND COUNSELORS AT LAW

2838 DEVINE STREET
POST OFFICE BOX 11412 (29211)
COLUMBIA, SOUTH CAROLINA 29205



(803) 239-1414

TELEPHONE
(803) 799-9993

April 18, 2013

Honorable Mikell R. Scarborough
Master in Equity, Charleston County
100 Broad Street, Suite 266
Charleston, SC 29401

Re: CitiMortgage, Inc. vs. Brodie M. Trickey aka Brodie McCary Trickey and Barberry
Woods Property Owners Association
Calendar No.: 2010-CP-10-5775
Our File No.: 4008.72610

Dear Judge Scarborough:

Per the Court's instructions following the Summary Judgment hearing, please find enclosed a proposed Order granting in part and denying in part the Plaintiff's motion. I apologize for the delay in getting this to you.

Sincerely,

A handwritten signature in black ink, appearing to read "Damon C. Wlodarczyk".

Damon C. Wlodarczyk

DCW/
Enclosures

cc: Mary Leigh Arnold
Attorney for Brodie McCary Trickey
749 Johnnie Dodds Blvd., Suite B
Mt. Pleasant, SC 29464

Derek F. Dean, Esquire
Attorney for Barberry Woods Property Owners' Association
147 Wappoo Creek Drive, Suite 604
Charleston, SC 29412