

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
 COUNTY OF BEAUFORT 2013 AUG -1 PM 2: 22) FOURTEENTH JUDICIAL CIRCUIT
) CIVIL ACTION NO.: 2011-CP-07-1684

BANK OF THE OZARKS,)
) JERIN ANN ROSENEAU
) BEAUFORT COUNTY, S.C.
) CLERK OF COURT
)

PLAINTIFF,)

vs.)

ORDER

CITY LOFT, LLC, MATTHEW S.)
 McALHANEY, JOHN HUNTER, TBM,)
 LLC, H. RICHARD HILLER, JR.,)
 LEWIS H. WRIGHT, RON LEWIS,)
 PERMINDER BINDRA, THOMAS)
 DANNEMILLER, and HANK, INC.)
 OF GREER,)

DEFENDANTS.)

THIS MATTER CAME BEFORE THE COURT on November 6, 2012, pursuant to Plaintiff, Bank of the Ozarks' (hereinafter referred to as "Plaintiff"), Motion for Summary Judgment with respect to Plaintiff's claims and for an Order dismissing the counterclaims and all affirmative defenses asserted by Defendants City Loft, LLC and Matthew S. McAlhaney (hereinafter individually "City Loft" and "McAlhaney" and collectively the "Defendants"). Present at the hearing were Terry Finger, Esquire and Michael Cerrati, Esquire, attorneys for Plaintiff, Philip Fairbanks, Esquire and Kimberly Smith, Esquire, attorneys for Defendants, and Mark Sharpe, Esquire, attorney for Defendants Richard Hiller, Jr., John Hunter and TMB, LLC.

Based on the pleadings and arguments of counsel, I make the following findings of fact:

1. This is a mortgage foreclosure action based upon a Note and Mortgage entered into between City Loft and Woodlands Bank on or about October 15, 2007 with respect to certain real property in Beaufort County, South Carolina located at 301 Carteret Street, Beaufort, South Carolina. With the original Note, City Loft also executed an Assignment of

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Leases and Rents (the "Assignment").

2. McAlhaney is the sole member of City Loft. McAlhaney, for due and valuable consideration, executed a Guaranty in favor of Woodlands Bank, its successors and assigns on or about October 15, 2007, which obligates Defendant McAlhaney to reimburse Plaintiff for all indebtedness of City Loft arising out of the Note, including any extensions and renewals thereof.

3. The original Note was due to mature on April 15, 2014. This maturity date was amended to July 1, 2012 by Woodlands Bank pursuant to a renewal note dated July 1, 2009.

4. On July 16, 2010, Woodlands Bank was closed by the Office of Thrift Supervision and the Federal Deposit Insurance Corporation ("FDIC") was named Receiver. Thereafter, the FDIC, as Receiver of Woodlands Bank, transferred all right, title, and interest of the Receiver in certain assets of Woodlands Bank to Plaintiff pursuant to that certain Purchase and Assumption Agreement between Bank and the FDIC, dated July 16, 2010 (the "Purchase and Assignment Agreement"). The Note, Mortgage, Assignment and Guaranty at issue in this litigation, together with the underlying debt and all applicable loan documents evidencing, securing and guaranteeing said debt, were assigned and transferred to Plaintiff pursuant to the Purchase and Assignment Agreement and further memorialized in the Master Assignment, dated September 10, 2010 and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina on September 13, 2010 in Record Book 2990 at Page 1821. On August 4, 2011, Plaintiff recorded an Amendment to Master Assignment, dated August 2, 2011, in Record Book 3075 at Page 1422 in the Office of the Register of Deeds for Beaufort County, South Carolina, which includes the Mortgage and Assignment.

5. City Loft failed to pay the required monthly payment under the Note as of

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October 29, 2009, and has not made any other payments, despite demands by Plaintiff.

6. McAlhaney has failed to pay the outstanding indebtedness of City Loft pursuant to the Guaranty, despite demands by Plaintiff.

7. Following Defendants' defaults under the Note, Mortgage and Guaranty, Plaintiff filed the subject Complaint on April 12, 2011 seeking to foreclose on the Mortgage and obtain damages for a breach of the Guaranty.

8. City Loft and McAlhaney filed their Answer, Affirmative Defense and Counterclaims on June 3, 2011, which pleading was subsequently amended on June 15, 2011.

9. City Loft filed for bankruptcy protection under Chapter 11 on October 3, 2011. Plaintiff was granted a relief from stay on February 1, 2012, and the bankruptcy proceeding was terminated on August 15, 2012.

10. Plaintiff amended its Complaint on March 23, 2012 and City Loft and McAlhaney thereafter amended their Answer on April 17, 2012. Defendants' Amended Answer includes affirmative defenses for Unclean Hands and a Breach of the Duty of Honesty and the Observance of Fair Dealing; it also includes counterclaims for Unfair Trade Practices, Common Law Fraud and Negligent Misrepresentation.

11. Defendants' affirmative defense for Unclean Hands is based upon Defendants' belief that Plaintiff and/or Plaintiff's predecessor, Woodlands Bank, engaged in the unauthorized practice of law by virtue of the fact that the renewal of City Loft's Note on July 1, 2009 was prepared by a non-attorney employee of Woodlands Bank. Defendants allege that Plaintiff is barred from seeking the equitable relief of mortgage foreclosure because Plaintiff's action to foreclose is based, in part, on the renewal Note.

12. Defendants' counterclaim for Common Law Fraud is based upon certain alleged

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representations by representatives of both Woodlands Bank and Plaintiff that caused Defendants to believe that Defendants were obligated on an instrument or debt that had a maturity date in February 2010, which, according to Defendants, was approximately four (4) years earlier than its actual maturity date. Defendants allege that such actions caused Defendants to cease servicing the debt owed to Plaintiff and to forego potential opportunities to obtain alternate financing.

13. Defendants' allegations for the Common Law Fraud counterclaim also serve as the underlying basis for the Negligent Misrepresentation counterclaim and the affirmative defense for a Breach of the Duty of Honesty and the Observance of Fair Dealing.

14. Defendant's counterclaim for Unfair Trade Practices is based upon certain alleged conduct by Plaintiff consisting of acquiring failed financial institutions at substantial discounts and liquidating the assets acquired without regard to normal community-based lending and banking practices. This affirmative defense also includes the allegations contained in the additional counterclaims and the affirmative defense for a Breach of the Duty of Honesty and the Observance of Fair Dealing.

15. On September 5, 2012, a Consent Order was signed by the Honorable Carmen T. Mullen granting Plaintiff's Motion to Deem Plaintiff's First Set of Requests for Admissions to Defendants City Loft, LLC and Matthew S. McAlhane as admitted by Defendants. The factual findings in the Consent Order, to the extent they are not set forth herein, are incorporated herein.

16. On October 16, 2012, Plaintiff obtained formal authorization from the FDIC to assert certain special powers in this action assigned to it as a result of the Purchase and Assignment Agreement.

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Based on the above findings of fact, I make the following conclusions of law:

1. Under SCRCP 56(c); summary judgment is proper "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."

2. South Carolina has long had the discovery rule that failure to respond to requests for admission renders any matter listed in the request conclusively admitted for trial, regardless of whether the admission concerns a matter responded to in a party's pleadings. *Scott v. Greenville Housing Authority*, 353 S.C. 639, 645, 579 S.E.2d 151, 154-155 (S.C. App., 2003). With respect to the effect of an admission under SCRCP 36(a), the rule further states that "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." SCRCP 36(b). Moreover, courts have consistently held that matters deemed admitted as a result of a party's failure to respond to requests for admission may form an adequate foundation for granting summary judgment. *Dukes v. South Carolina Ins. Co.*, 770 F.2d 545, 549 (5th Cir. 1985).

3. Summary judgment for Plaintiff on its claims for Mortgage Foreclosure and Breach of Guaranty is appropriate based upon the September 5, 2012 Consent Order signed by the Honorable Carmen T. Mullen granting Plaintiff's Motion to Deem Plaintiff's First Set of Requests for Admissions to Defendants City Loft, LLC and Matthew S. McAlhaney as admitted by Defendants.

4. Pursuant to the above-referenced cases and rules, Defendants' admissions are conclusive and binding; namely, that: the Note, including the renewal Note, Mortgage, Guaranty and Assignment are true and accurate copies of the loan documents at issue; Defendants received

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Plaintiff's notice of default and right to cure in connection with the subject loan; City Loft and McAlhaney, as the sole member of City Loft, have failed to make the required payments in connection with the subject loan; City Loft has failed to cure the default under the subject loan as required by the Note and Mortgage; and McAlhaney has failed to cure the default under the subject loan as required by the Guaranty. Defendant McAlhaney's deposition testimony, on behalf of himself and as the 30(b)(6) deposition witness for City Loft, confirms the foregoing admissions and further supports this Court's finding.

5. In view of Defendants' admissions and defaults under the Note, Mortgage and Guaranty, there is no genuine issue as to any material fact that would place into controversy any of the facts and claims alleged in the Complaint. Therefore, Plaintiff is entitled to summary judgment on its claims for Mortgage Foreclosure and Breach of Guaranty. Pursuant to the Guaranty, McAlhaney is obligated to reimburse Plaintiff for all indebtedness of City Loft arising out of the Note, including any extensions and renewals thereof.

6. In *Crawford v. Central Mortgage Company* and *Warrington v. The Bank of South Carolina*, Opinion No. 27273, heard June 19, 2012 and filed June 19, 2013, the South Carolina Supreme Court held that lenders do not engage in the unauthorized practice of law by preparing and mailing loan modifications to borrowers and recording the executed documents without participation of a licensed attorney.

7. Summary Judgment for Plaintiff on Defendants' Unclean Hands affirmative defense is, therefore, appropriate as the Supreme Court's ruling clarifies that the preparation of the renewal Note, which modified the terms of the Note, by a non-attorney employee of Woodlands Bank did not constitute the unauthorized practice of law.

8. Plaintiff has been authorized by the FDIC to plead and assert certain federal

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statutory defenses, including without limitation those in 12 U.S.C. § 1823(e) and those arising out of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) and its progeny, that operate to legally bar certain counterclaims and affirmative defenses by Defendants against Plaintiff, as the assignee of the FDIC.

9. The doctrine that emerged from *D'Oench* (the "D'Oench Doctrine"), which was essentially codified and expanded by Section 12 U.S.C. § 1823(e), as amended, provides as follows:

No agreement which tends to diminish or defeat the interest of the [FDIC] in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [FDIC] unless such agreement—

- (A) is in writing,
- (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
- (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
- (D) has been, continuously, from the time of its execution, an official record of the depository institution.

10. A party must satisfy all four requirements of the aforementioned statute before it can enforce an agreement against the FDIC (or its assigns). *Young v. FDIC*, 103 F.3d 1180, 1197 (4th Cir. 1997) (dismissing claims for wrongful dishonor, unfair trade practices, fraud, civil conspiracy and fraudulent misrepresentation).

11. In *Langley v. Federal Deposit Ins. Corp.*, 484 U.S. 86, 90-93, 108 S.Ct. 396, 401 (1987), the Supreme Court held that the term "agreement" in 12 U.S.C. § 1823(e) includes express promises of future acts and also fraudulent misrepresentations, written collateral agreements, unwritten agreements and unrecorded agreements. The term "agreement" further

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includes not only promises of future conduct, but also oral representations as well as misrepresentations of existing facts, and even extends to affirmative claims to extend or finance future loans. *Bell & Murphy and Assoc., Inc. v. Interfirst Bank Gateway, N.A.*, 894, F.2d 750, 753 (5th Cir. 1990) (finding that it is irrelevant to the applicability of the *D'Oench, Duhme* rule whether the borrower was coerced, under economic duress, into accepting the terms of the agreement proposed by the failed bank). The fraudulent nature of any alleged misrepresentation does not affect the operation of 12 U.S.C. § 1823(e). *Savers Fed. Sav. & Loan Ass'n v. Amberley Huntsville, Ltd.*, 934 F.2d 1201, 1207 (11th Cir. 1991).

12. Summary judgment for Plaintiff on Defendants' counterclaim for Common Law Fraud is appropriate pursuant to the *D'Oench* Doctrine, 12 U.S.C. § 1823(e) and the aforementioned case law because Defendants' counterclaim is based upon alleged misrepresentations that fail to comply with the four statutory requirements of 12 U.S.C. § 1823(e).

13. Moreover, consistent with the holdings in *Bell & Murphy and Associates, Inc.* and *Langley*, it is irrelevant whether or not representatives of Woodlands Bank actually made certain misrepresentations that caused McAlhaneey to believe that Defendants were obligated on an instrument or debt which had a maturity date in February 2010 and/or that Defendants owed payment obligations to State Bank if the resulting agreements are not reduced to a writing that meets the requirements of the *D'Oench* Doctrine and § 1823(e).

14. This Court finds that all of the actions that allegedly caused Defendants to be misled took place between June or July 2009 and July 7, 2010, with the bulk of the correspondence at issue occurring from November 2009 to February 2010. There is no evidence of any alleged misrepresentations by Plaintiff following the acquisition of City Loft's loan on

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July 16, 2010. The *D'Oench* Doctrine and § 1823(e) prohibit Defendants from relying on such actions of Woodlands Bank as the basis for certain claims against Plaintiff.

15. Defendants have alleged that "knowledge, motive, intent and other states of mind attributable to Woodlands Bank are likewise chargeable to [Plaintiff]" because "several former officers and a law firm employed by, acting on behalf of, and/or representing Woodlands Bank continued in the same or similar roles in relation to [Plaintiff]." However, in light of the specific requirements of the *D'Oench* Doctrine and § 1823(e) noted above, these factors are insufficient to maintain certain claims and defenses against an assignee of the FDIC.

16. Summary judgment on Defendants' counterclaim for Negligent Misrepresentation to the extent it is based upon the alleged conduct of Woodlands Bank is similarly granted pursuant to the *D'Oench* Doctrine, 12 U.S.C. § 1823(e) and the aforementioned case law due to the reliance on the above-referenced alleged misrepresentations and the lack of compliance with the statutory requirements of 12 U.S.C. § 1823(e).

17. Defendants' affirmative defense for Breach of the Duty of Honesty and the Observance of Fair Dealing insofar as it relies on alleged actions by Woodlands Bank must also be summarily dismissed pursuant to the *D'Oench* Doctrine and § 1823(e) for the foregoing reasons. As with the aforementioned counterclaims for Common Law Fraud and Negligent Misrepresentation, there is no allegation by Defendants nor any evidence that the alleged misrepresentations complied with the four statutory requirements of 12 U.S.C. § 1823(e).

18. Summary Judgment for Plaintiff is also appropriate for Defendants' affirmative defense for a breach of the Duty of Good Faith and Fair Dealing and all of Defendants' counterclaims with respect to the alleged actions or conduct by Plaintiff (rather than by Woodlands Bank) because Defendants cannot establish that there was any actionable conduct by

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Plaintiff to support such allegations and/or violations.

19. Defendants' allegations underlying these claims are centered on alleged misrepresentations that occurred between June or July 2009 and July 7, 2010, which predate Plaintiff's acquisition of and involvement with City Loft's loan. There is no evidence of any actions or conduct by Plaintiff following July 16, 2010 that provides a basis for Defendants' claims.

20. This Court finds that Defendants have not produced any evidence of damages that have resulted from the alleged actions or conduct by Plaintiff and further that Defendants' deposition testimony confirms that they do not possess any such evidence. The evidence presented also indicates that Defendants defaulted on their respective obligations under the loan documents prior to any of the alleged misrepresentations or misleading conduct by Woodlands Bank, which was well before any alleged actions or conduct by Plaintiff.

21. Consequently, Plaintiff is entitled to summary judgment as set forth herein as a matter of law.

Therefore, it is ORDERED, ADJUDGED, and DECREED that:

1. Plaintiff's Motion for Summary Judgment is granted with respect to Plaintiff's claims for Mortgage Foreclosure and Breach of Guaranty as to Defendants City Loft and McAlhane.

2. Plaintiff's Motion for Summary Judgment is further granted as to Defendants' affirmative defenses of Unclean Hands and a Breach of the Duty of Honesty and the Observance of Fair Dealing, which are all dismissed.

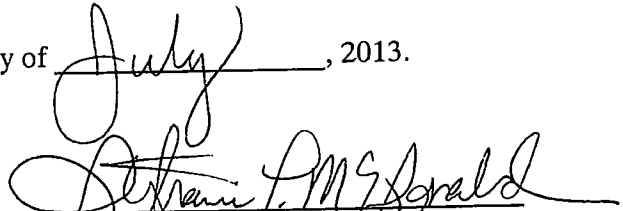
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3. Plaintiff's Motion for Summary Judgment is further granted with respect to Defendants' counterclaims for Unfair Trade Practices, Common Law Fraud and Negligent Misrepresentation, which are all dismissed.

4. This matter shall be set for a foreclosure hearing to establish Plaintiff's damages and proceed with the foreclosure of the Mortgage.

AND IT IS SO ORDERED this 29th day of July, 2013.

Charleston, South Carolina


The Honorable Stephanie P. McDonald
Presiding Judge