

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF COLLETON) FOR THE FOURTEENTH JUDICIAL
CIRCUIT

Melissa Jean Marks,

Plaintiff,

vs.

Old South Mortgage Corporation,
John Does 1-100, Nationstar
Mortgage, LLC

Defendant.

CIVIL CASE NO.: 2012-CP-15-262

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT**

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PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS

This matter came before the Court on Defendant Nationstar Mortgage, LLC's ("Nationstar") Motion for Summary Judgment in favor of Nationstar as to all claims raised by Plaintiff Melissa Jean Marks ("Plaintiff") in her "Declaratory Judgment Complaint and Petition for Injunction," pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. Having reviewed the memoranda and pleadings submitted by the parties and having heard oral arguments, taking the evidence in the light most favorable to the non-moving party, the Court finds that no genuine issues of material fact exist, and this Court hereby GRANTS Nationstar's Motion for Summary Judgment for the reasons set forth below.

FACTUAL BACKGROUND

On October 5, 2007, Plaintiff executed and delivered to Old South Mortgage Corp. a promissory note in the amount of \$ 76,000.00 dollars (the "Note") and a mortgage on property known generally as 209 Presidential Ct., Round O, South Carolina 29474-4374 (the "Mortgage") to secure the re-payment of the Note. (Compl., Apr. 6, 2012, ¶6). Plaintiff was represented by counsel at the closing, which occurred on October 5, 2007. (Compl., ¶18; Ex. 4, Compl.,

Engagement Letter). Flagstar wired the loan proceeds to Plaintiff's counsel, which was used to purchase the property. (Compl., ¶84; Ex. 4, Compl., Wire Transfer). At the closing, Plaintiff signed several documents disclosing Old South's right and intention to transfer the loan and servicing rights. (Ex. 4, Compl. Mortgage, ¶20; Note, ¶1 (the Note was endorsed in to Flagstar at the closing)). The documents signed at closing were provided to Plaintiff by her closing attorney on or about October 8, 2007. (Ex. 4, Compl., Ltr to Marks from Tuten, Oct. 7, 2013). Subsequently, Flagstar transferred the servicing rights to Nationstar. (Compl. ¶28; Ex. 12, Compl.) On or about April 20, 2011, Plaintiff filed a Chapter 13 bankruptcy petition. Plaintiff named Nationstar as the secured creditor of the loan in her Chapter 13 bankruptcy petition and schedules. (*In re Marks*, 11-02619-jw, Bankruptcy Petition, Co. 1, pp. 16-30, attached to Nationstar's Motion for Summary Judgment.) The confirmed Chapter 13 Plan orders Plaintiff will continue to make mortgage payments to Nationstar. (Chapter 13 Plan, Doc. 9, p. 3, attached to Nationstar's Motion for Summary Judgment). Nationstar is the current loan servicer and Fannie Mae is the investor of the loan. Nationstar has not filed a foreclosure action against Plaintiff. Plaintiff is current on her post-petition payments to Nationstar.

PROCEDURAL BACKGROUND

On or about April 6, 2012, Plaintiff filed this state court action naming only Old South Mortgage Corporation and John Does 1-100 and Fictitious Corporations 1-100. Nationstar was not named as a party. After learning about the state court action, on or about May 9, 2012, Nationstar filed a motion to modify the bankruptcy stay in order to intervene in the state court action. On or about May 14, 2012, after notice that Nationstar was seeking to intervene, but prior to the hearing in the bankruptcy court on Nationstar's motion to modify the bankruptcy stay and intervene, Plaintiff filed a Motion for Summary Judgment in the state court action.

The Bankruptcy Court issued an Order Modifying Stay, which stated:

It is not disputed by either the Debtor [Plaintiff] or the Movant [Nationstar] that Debtor is current on her post-petition payments to movant, and in fact, Debtor was current on the loan payments when the bankruptcy was filed. However, Movant would be prejudiced if Debtor were granted the relief she is seeking in the State Court Action unless Movant is allowed to intervene and assert its rights to the mortgage and underlying obligation in such action.

Order Modifying Stay at 2, In Re Marks, No. 11-02619-jw (Bankr. D.S.C. May 25, 2012), Doc. No. 24.

Following the Order issued by the Bankruptcy Court, Nationstar sought to intervene in the state court action. After a hearing, Nationstar's Motion to Intervene was granted. The Order granting Nationstar's Motion to Intervene found as follows:

I find that Nationstar may intervene as a matter of right because both prongs of Rule 24(a) are satisfied. Section 15-53-80 grants Nationstar an unconditional right to intervene because Plaintiff seeks declaratory judgment that could affect Nationstar's claim under the Note and Mortgage, which satisfies Rule 23(a)(1). Nationstar claims an interest in the action that is not being protected by any other named party as contemplated in Rule 23(a)(2), because Old South is a dissolved corporation and is not claiming any interest in the Note and Mortgage, and none of the other defendants have been served.

Despite Plaintiff's argument that allowing Nationstar to intervene would cause delay and expense as Old South consents to the relief Nationstar is seeking, and because John Does 1-100 and Fictitious Corporations 1-100 were not served with process, I find that no named party will be prejudiced by Nationstar's intervention in this case.

(Order Granting Nationstar Mortgage, LLC's Mot. To Intervene, Den. Mot. To Substitute Parties, & Granting Pl.'s Mot. To Continue Hr'g on Mot. for Summ. J. 2-3, Aug. 2, 2012).

Thereafter, Plaintiff filed a Motion to Compel Discovery and then filed a motion to Amend Complaint to add Fannie Mae as a defendant. Plaintiff's Motion to Amend was denied, after a hearing, because the court determined it would be futile to add Fannie Mae as a party for the following reasons: (1) Plaintiff lacked standing as a result of her Chapter 13 Bankruptcy filing; and (2) Nationstar is the proper party to enforce the note and mortgage, because it is the

holder of the original note, endorsed in blank. (Order Den. Pl.'s Mot. for Leave to Amend Compl. & Granting Pl.'s Mot. to Withdraw Mot. for Summ. J. 3-5, Feb. 27, 2013).

Based on the Order Denying Plaintiff's Motion to Amend, the Court also denied the Motion to Compel on the grounds it was moot. Plaintiff subsequently filed a Motion to Reconsider these two orders, which was denied. (Order Den. Pl.'s Mot. for Recons. of Leave to Amend Compl. and of Order Den. Pl.'s Mot. to Compel Answers to Interrogs. & Reqs. for Produc., Apr. 12, 2013). Other motions filed by Plaintiff include a Motion to Defer ADR, which was denied, and a Motion to Stay the Action in order to seek guidance from the Bankruptcy Court, which was denied.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRPC; Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). When determining whether any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Id. "The trial court should grant summary judgment against a party who fails to make a showing sufficient to establish the existence of an essential element of the party's case." Fender & Latham, 316 S.C. 48, 50, 446 S.E.2d 448. (Ct. App. 1995). A party opposing a motion for summary judgment may not rest on the mere allegations of his pleadings, but must set forth or point to specific facts showing that there is a genuine issue of material fact. Rule 56(c), SCRPC; accord Strickland v. Madden, 323 S.C. 63, 448 S.E.2d 581 (Ct. App. 1994). The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

DISCUSSION

I. PLAINTIFF'S CLAIMS ARE BARRED BY *RES JUDICATA*

Nationstar is entitled to summary judgment because Plaintiff's claims are barred by the doctrine of *res judicata*. In Re Nix, CA 10-01103-HB, 2012 WL 27667 (Bankr. D.S.C. Jan. 5, 2012) (holding that debtor's claims based on pre-confirmation activity were barred by the doctrine of *res judicata* based on confirmed Chapter 13 plan). The petitions filed in Plaintiff's Chapter 13 bankruptcy and the confirmed plan state that Nationstar is the secured creditor entitled to receive payment on the mortgage note. The confirmation of Plaintiff's bankruptcy plan serves as *res judicata* to the claims brought in this lawsuit.

"The *res judicata* effect of a confirmed Chapter 13 plan on the debtor and creditors is set forth in 11 U.S.C. § 1327." Id. at 20. The "rights of creditors and responsibilities of the debtor are defined" in the confirmed plan. Id. Therefore, parties are precluded from raising issues which could have been raised prior to the plan confirmation. Id., see also Abraham v. Bank of America, N.A. (In Re Abraham), Adversary No. 10-80118-jw, 2010 WL 5437253 (Bankr. D.S.C. Sept. 20, 2010) (holding that debtor was judicially estopped from asserting contrary position in state court litigation based on his failure to list any causes of actions against defendant in bankruptcy schedules).

Plaintiff proclaims that she was unaware of her claims until after plan confirmation, and subsequently amended her schedules to disclose the existence of the state court action. This argument is of no consequence. "Judicial estoppel will be imposed when the debtor has knowledge of enough facts to know that a potential cause of actions exists during the pendency of the bankruptcy, but fails to amend his schedules or disclosure statements to identify the cause of action as a contingent asset. In re Family Dollar FLSA Litigation, 2011 U.S. Dist. 119281 at

17 (W.D. N.C. 2011). In In re Family, the debtor's failure to disclose a state court action to the bankruptcy court was deemed intentional because the debtor had reason to know of the existence of the claims when she filed bankruptcy, and had motive for concealment of the claim from the bankruptcy because disclosure would have resulted in a less favorable payment plan). It does not matter whether or not the debtor is aware that she has a duty to disclose her claims. Id. at 19.

Here, the petitions filed in Plaintiff's Chapter 13 bankruptcy and the confirmed plan state that Nationstar is the secured creditor entitled to receive payment on the mortgage note. Therefore, the confirmation of Plaintiff's bankruptcy plan serves as *res judicata* to the claims brought in this lawsuit.

II. UNCONSCIONABILITY BARRED BY *RES JUDICATA*

Plaintiff's Complaint alleges a cause of action for unconscionability. This cause of action is barred by the doctrine of *res judicata*. In Re Nix, CA 10-01103-HB, 2012 WL 27667 (Bankr. D.S.C. Jan. 5, 2012) (holding debtor's unconscionability cause of action was barred by doctrine of *res judicata* since it existed prior to the confirmation of the bankruptcy plan).

III. FRAUD CLAIMS BARRED FOR FAILURE TO ESTABLISH DAMAGES

Nationstar is entitled to summary judgment on Plaintiff's fraud cause of action because Plaintiff has not alleged sufficient facts to show she was injured. At the closing on October 5, 2007, Plaintiff signed several documents disclosing Old South's right and intention to transfer the loan and servicing rights. (Ex. 4, Compl. Mortgage, ¶20; Note, ¶1 (the Note was endorsed in to Flagstar at the closing). Plaintiff admits she was represented by counsel at the closing who was aware that Flagstar disbursed the loan proceeds enabling Plaintiff to purchase the Property. See Compl. ¶ 8. The documents signed at closing were provided to Plaintiff by her closing attorney on or about October 8, 2007. (Ex. 4, Compl., Ltr to Marks from Tuten, Oct. 7, 2013).

Plaintiff received the loan to purchase the Property, and has not alleged facts sufficient to show injury. First, Plaintiff cannot show an injury with regard to her claim that Old South did not actually fund the loan, since her loan was funded enabling her to purchase the Property. Second, Plaintiff received the benefit of the loan. Plaintiff was represented by counsel at the closing and her attorney was aware at the closing that the loan was being funded by Flagstar and not Old South. Finally, Plaintiff is current in her payments and assured the Bankruptcy Court that she would continue to remain current. Pl.'s Motion for Temp. Stay of Proceeding, Ex. A, page 8, lines 4 – 9.

IV. NOTE AND MORTGAGE ARE ENFORCEABLE AS A MATTER OF LAW

It is well-established that the mortgage follows the note and that assignment of the mortgage is not required. Union Nat'l Bank v. Cook, 110 S.C. 99,96 S.E. 484 (1918); Midfirst Bank, SSB v. C. W. Haynes, 893 F. Supp. 1304 (D.S.C. 1994). In July 2012, the South Carolina Supreme Court again held that an "assignment of a mortgage does not need to be recorded, and failure to do so has no effect on the rights of the assignee." BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 623, 731 S.E.2d 547, 549 (2012).

South Carolina's version of Article 3 of the Uniform Commercial Code governs the enforceability of negotiable instruments including promissory notes secured by mortgages on real estate. Swindler v. Swindler, 335 S.C. 245, 584 S.E.2d 438 (Ct. App. 2007). S.C. Code Ann. Section 36-3-301 provides there are three categories of persons entitled to enforce a negotiable instrument: (1) the holder of the instrument; (2) a nonholder in possession of the instrument who has rights of the holder; and (3) a party who once had possession of a now lost instrument. S.C. Code Ann. § 36-3-301. Most importantly, a party may be entitled to enforce an instrument even though it "is not the owner of the instrument." Id.

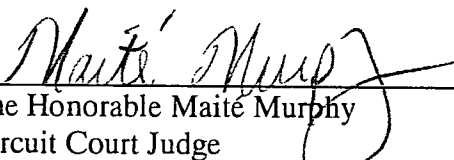
Here, by virtue of its possession of the original note, if the loan were in default, Nationstar would be the proper party to enforce the note.

ORDER

Accordingly, and based upon the discussion above, there are no issues of material fact that have been brought to the attention of this Court, and

THIS COURT NOW GRANTS NATIONSTAR'S MOTION FOR SUMMARY JUDGMENT on all of Plaintiff's causes of action.

AND IT IS SO ORDERED.



The Honorable Maité Murphy
Circuit Court Judge

September 12, 2013