

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF BEAUFORT )  
 )  
 BANK OF THE OZARKS, )  
 )  
 PLAINTIFF, )  
 )  
 vs. )  
 )  
 TREE HOPE INVESTMENTS, LLC, )  
 )  
 DEFENDANT. )  
 )  
 and )  
 )  
 TREE HOPE INVESTMENTS, LLC, )  
 )  
 DEFENDANT, )  
 )  
 vs. )  
 )  
 WOODLANDS BANK, GULF )  
 FINANCIAL HOLDINGS, INC., )  
 GRAHAM HOLCOMBE and HOWARD )  
 BOWDEN, )  
 )  
 ADDITIONAL PARTIES )  
 ON COUNTERCLAIM. )

IN THE COURT OF COMMON PLEAS  
 FOURTEENTH JUDICIAL CIRCUIT  
 CIVIL ACTION NO.: 2011-CP-07-1469

ORDER GRANTING  
 SUMMARY JUDGMENT AS TO  
 CERTAIN COUNTERCLAIMS AND  
 AFFIRMATIVE DEFENSES OF  
 TREE HOPE INVESTMENTS, LLC

2013 MAY 16 AM 10:49  
 CLERK OF COURT

THESE MATTERS CAME BEFORE ME on December 20, 2012, pursuant to Plaintiff and Counterclaim Defendant's, Bank of the Ozarks (hereinafter referred to as "Bank" or "Plaintiff") Motion for Summary Judgment as to certain counterclaims and affirmative defenses of Defendant Tree Hope Investments, LLC (hereinafter "Tree Hope" or "Defendant"). Present at the hearing was Michael Cerrati, attorney for Plaintiff, and Robert Mathison, Jr., attorney for Defendant.

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 Defendant and Woodlands Bank on or about July 20, 2007 with respect to certain real property in Beaufort County, South Carolina known and described as 11.06 acres on St. Helena Island. The Note was subsequently renewed on or about August 25, 2009.

2. 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 and Mortgage, 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.

3. Defendant failed to pay the required monthly payment on December 5, 2010. Following Defendant's default under the Note and Mortgage, Plaintiff filed the current Complaint on March 28, 2011.

4. On June 17, 2011, Defendant filed its Amended Answer and Counterclaim asserting numerous counterclaims and affirmative defenses, including Fraud and Deceit, Conversion, Unfair Trade Practices, Coercion and Duress, Equitable Estoppel, Waiver, Unclean Hands and Bad Faith.

5. Defendant's counterclaim for Fraud and Deceit is based upon certain alleged representations, statements and/or promises to Defendant and/or the concealment of certain facts from Defendant despite the alleged duty to disclose by Defendants Graham Holcombe and Howard Bowden allegedly on behalf of Defendants Woodlands Bank, Gulf Financial Holdings, Inc. and Plaintiff, which Defendant identified collectively as "Plaintiff's Representation." Defendant Holcombe has never been employed by Plaintiff and Defendant Bowden was not employed by Plaintiff at the time the alleged Plaintiff's Representations at issue were allegedly made. In addition, all of the alleged Plaintiff's Representations occurred prior to July 16, 2010.

6. Defendant's counterclaim for Conversion is based upon the alleged refusal by Woodlands Bank and Plaintiff to allow Defendant to withdraw funds on deposit in its bank account initially with Woodlands Bank and then after July 16, 2010 with Plaintiff. Defendants allege that such conversion was secured by fraud included in the above-referenced Plaintiff's Representations.

7. Defendant's counterclaim for a violation of South Carolina's Unfair Trade Practices Act is based upon the above-referenced Plaintiff's Representations as well as the allegations underlying Defendant's Conversion counterclaim.

8. Defendant's counterclaim for Coercion and Duress is based upon alleged threats and coercion, which allegedly induced Tree Hope to renew the Note on or about August 25, 2009.

9. Defendant's affirmative defense for Equitable Estoppel is based upon alleged representations to Defendant that Defendant's loan was renewable as an interest only obligation and the above-referenced Plaintiff's Representations, which allegedly lulled Defendant into a false sense of security about its present and future relationship with the bank. According to

Defendant's Amended Answer and Counterclaim, the alleged representations ceased on or about March 31, 2010.

10. Defendant's affirmative defense of Waiver is based upon the above-referenced Plaintiff's Representations and the allegations supporting Defendant's Equitable Estoppel defense.

11. Defendant's affirmative defense of Unclean Hands is based upon the allegations contained in the entire Amended Answer Counterclaim, including the above-referenced Plaintiff's Representations, counterclaims and affirmative defenses.

12. On February 2, 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.

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. Plaintiff has been authorized by the FDIC to plead and assert certain federal 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 claims and affirmative defenses by Defendant against Plaintiff, as the assignee of the FDIC.

3. 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.

4. 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 (4<sup>th</sup> Cir. 1997) (dismissing claims for wrongful dishonor, unfair trade practices, fraud, civil conspiracy and fraudulent misrepresentation).

5. 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 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 (5<sup>th</sup> Cir. 1990). 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 (11<sup>th</sup> Cir. 1991).

6. Summary judgment for Plaintiff on Defendant’s counterclaim asserting Fraud and

Deceit is appropriate pursuant to the *D'Oench* Doctrine, 12 U.S.C. § 1823(e) and the aforementioned case law because Defendant's counterclaim is based upon the above-referenced Plaintiff's Representations, which occurred prior to Plaintiff's involvement with Defendant's loan after July 16, 2010. Plaintiff's Representations are no more than alleged representations concerning future conduct and extensions or refinancing of Defendant's loan. There is no allegation by Defendant and no evidence that the alleged representations complied with the four statutory requirements of 12 U.S.C. § 1823(e). Accordingly, such a claim cannot survive against Plaintiff.

7. Summary judgment for Plaintiff on Defendant's counterclaim for Conversion is also appropriate under the *D'Oench* Doctrine, 12 U.S.C. § 1823(e) and the aforementioned case law for the same reasons noted immediately above; provided that summary judgment is only granted to the extent of the alleged conduct attributable to and amount of funds that were allegedly converted by Woodlands Bank.

8. Summary judgment on Defendant's counterclaim for a violation of South Carolina's Unfair Trade Practices Act 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 Plaintiff's Representations and the lack of compliance with the statutory requirements of 12 U.S.C. § 1823(e).

9. Summary judgment for Plaintiff is also warranted on Defendant's counterclaim for a violation of South Carolina's Unfair Trade Practices Act to the extent it is based upon alleged actions by Plaintiff because Defendant has failed to allege any specific facts to support the assertion that Plaintiff actually violated South Carolina's Unfair Trade Practices Act.

10. To recover damages for a violation of South Carolina's Unfair Trade Practices Act Defendant must prove: (1) a violation of the Act by the commission of an unfair or deceptive act in trade or commerce, (2) proximate cause, and (3) damages. *See Harris v. Option One Mortg. Corp.*, 261 F.R.D. 98, 106 (D.S.C. 2009); *Schnellmann v. Roettger*, 368 S.C. 17, 23, 627 S.E.2d 742, 745-46 (Ct. App. 2006).

11. Defendant's claim for this violation is based upon alleged conduct by the Perpetrators (i.e., the agents and employees of Woodlands Bank, Gulf Financial Holdings and/or Bank, including, without limitation, Graham Holcombe and Howard Bowden). Pursuant to Defendant's Amended Answer and Counterclaim, the alleged conduct and actions complained of occurred prior to the closing of Woodlands Bank, the FDIC's appointment as Receiver and Plaintiff's acquisition of Defendant's loan on July 16, 2010. In addition, Defendant has not provided any evidence supporting a finding that such a private transaction between Defendant and Plaintiff affects the public interest or is capable of repetition. Therefore, summary judgment must be granted.

12. Defendant's affirmative defense for Coercion and Duress is barred as a matter of law under the *D'Oench* Doctrine, 12 U.S.C. § 1823(e) and the aforementioned case law due to the fact that it relates to alleged conduct by Woodlands Bank that occurred prior to Bank's assignment of the Defendant's loan from the FDIC and because it is not based upon any express language of the loan agreements or meet the. *See FDIC v. Vernon Real Estate Investments, Ltd.*, 798 F.Supp. 1009, 1015 (S.D.N.Y. 1992) (granting summary judgment as to claims and affirmative defenses for negligence, want of care, poor business decisions and unclean hands because such claims, more equitable and "personal" in nature, are not rooted in any express language of the loan agreements and are thus barred by *D'Oench*).

13. Tree Hope's additional equitable affirmative defenses for Equitable Estoppel, Waiver and Unclean Hands are similarly barred by the *D'Oench* Doctrine, 12 U.S.C. § 1823(e) and the aforementioned case law due to their reliance on the above-referenced "Plaintiff's Representations" and failure to meet the requirements of 12 U.S.C. § 1823(e). *See FDIC v. Vernon Real Estate Investments, Ltd.*, 798 F.Supp. 1009, 1015 (S.D.N.Y. 1992).

14. None of Defendant's aforementioned counterclaims and affirmative defenses are based upon written agreements, let alone written agreements that meet the statutory requirements of 12 U.S.C. § 1823(e). Consequently, summary judgment is appropriate in this instance.

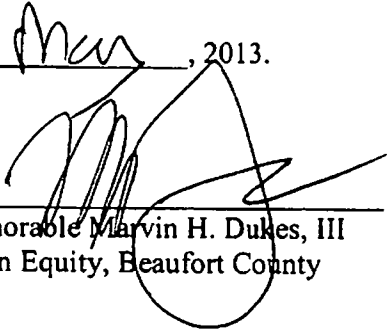
Therefore, it is ORDERED, ADJUDGED, and DECREED that:

1. Plaintiff's Motion for Summary Judgment is granted with respect to Defendant's counterclaims for Fraud and Deceit, Unfair Trade Practices, Coercion and Duress as well as to Defendant's affirmative defenses of Equitable Estoppel, Waiver, Unclean Hands and Bad Faith.

2. Plaintiff's Motion for Summary Judgment is also granted with respect to Defendant's counterclaim for Conversion solely to the extent of the alleged conduct attributable to and the amount of funds that were allegedly converted by Woodlands Bank.

AND IT IS SO ORDERED this 16 day of March, 2013.

Beaufort, South Carolina

  
The Honorable Marvin H. Dukes, III  
Master in Equity, Beaufort County