

filed by Wells Fargo Bank, N.A., ("Wells Fargo"). That motion is addressed in a separate order. Evan K. Bromley of the Johnson Davis Ward, PA appeared on behalf of the Harper Defendants. Adriane Malanos Belton of Womble Carlyle Sandridge & Rice, LLP appeared on behalf of Wells Fargo. The Noskowiaks attended *pro se*.

BACKGROUND

At the hearing and in the pleadings on file with the Court, counsel for Harper and Wells Fargo presented the material facts of the case as set forth herein, which were uncontested by Defendants.

The loan transaction that gave rise to all the Noskowiaks' third-party claims against the Harper Defendants occurred on or about November 3, 1998. The Noskowiaks executed a note and mortgage in favor of N.F.C. of South Carolina, Inc. in exchange for a loan in the amount of Sixty-Five Thousand One Hundred Sixty (\$65,160.00) Dollars. Mr. Harper served as the Noskowiaks closing attorney in the loan transaction. The debt was later negotiated to First Union Home Equity Bank, N.A., predecessor in interest to Wells Fargo. Law Firm was not organized as an entity in the State of South Carolina on or about October 1, 2008, almost ten (10) years after the closing of the subject loan transaction.

Wells Fargo filed a foreclosure action against the Noskowiaks on June 3, 2013. On August 12, 2013, the Noskowiaks filed their Answer, Counterclaim and Third-Party Complaint, wherein the Noskowiaks asserted five (5) third-party claims against the Harper Defendants, among others. The Noskowiaks' third-party claims alleged against the Harper Defendants all arise out of the closing of the subject loan transaction on November 3, 1998. The Noskowiaks first asserted these third-party claims in their Answer, Counterclaim and Third-Party Complaint filed on August 12, 2013, over fourteen (14) years after the subject loan transaction closed.

Pro se Defendants represented to the Court during the hearing that the real property which secures Wells Fargo's loan does not have proprietary access to potable water. The property was gifted to the Noskowiaks by Mrs. Noskowiak's father, Roy Bennett, approximately three months before the Noskowiaks took out the subject loan.

Based on the evidence before the Court, the Harper Defendants are entitled to summary judgment, as a matter of law, as to all the Noskowiaks' third-party claims against the Harper Defendants because each claim is barred by the applicable statutes of limitations as set forth below. Summary judgment in favor of the Harper Defendants as to certain of the Noskowiaks' third-party claims against the Harper Defendants is also appropriate for the additional reason discussed below.

STANDARD

In evaluating a motion for summary judgment, the Court must view "the evidence and all reasonable inferences . . . in the light most favorable to the non-moving party." Hansson v. Sealise Builders of S.C., 374 S.C. 352, 355, 650 S.E.2d 68, 70 (2007). Summary judgment is appropriate when "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." Rule 56(c), SCRPC.

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). A party's response to a motion for summary judgment "must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial If he does not so respond, summary judgment should be entered against him." Moody v. McLellan, 295 S.C. 157, 163, 367 S.E.2d 449, 453 (1988) (citations omitted).

CONCLUSIONS OF LAW

I. South Carolina Unfair Trade Practices Act – First Third-Party Claim

As to the Noskowiaks' first third-party claim against the Harper Defendants (styled by the Noskowiaks as a "Seventh Defense By Way of Counterclaim & Third-Party Complaint"), alleging violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), the complained of acts do not provide the Noskowiaks a basis for a claim against the Harper Defendants under the SCUTPA. To be actionable under the SCUTPA, an unfair or deceptive practice or act must adversely affect the public interest. Jefferies v. Phillips, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Cl. App. 1994). This adverse effect on the public must be proved by specific facts. *Id.* Conduct which only affects the parties to a transaction provides no basis for a claim under the SCUTPA. *Id.*

The acts alleged by the Noskowiaks were specific and unique to the 1998 loan transaction and could only have affected the parties to the transaction. Further, the Noskowiaks have not alleged any facts to support a finding that the actions of the Harper Defendants would cause injury to the public, nor have the Noskowiaks alleged facts sufficient to show that Harper Defendants have engaged in any deceptive acts that rise to the level of an unfair trade practice.

Further, the SCUTPA contains a three (3) year statute of limitations, codified in S.C. Code Ann. § 39-5-150. The acts complained of occurred, and should have been discovered, at or near the time of the loan closing origination in 1998. The Noskowiaks have not alleged any facts supporting this cause of action which indicate any alleged violations occurred or were reasonably discovered within the last three years. Thus, even if the complained of acts provided a basis for a claim under the SCUTPA, such claim would be barred by the three (3) year statute of limitations found in S.C. Code Ann. §39-5-150. Additionally, Law Firm was not formed as an entity until approximately ten (10) years after the closing of the subject loan transaction.

Furthermore, the acts alleged by the Noskowiaks to be violations of the SCUTPA sound as de facto legal malpractice claims – failing to reserve an easement – when alleged by the Noskowiaks against their closing attorney, Mr. Harper, moreso than violations of the SCUTPA. In that regard, the Noskowiaks have failed to allege or otherwise establish the “standard of care” owed by Defendant Harper by expert testimony or affidavit, nor have the Noskowiaks asserted factual allegations that they “most probably” would have had a different, successful outcome had Mr. Harper not committed the complained of acts, both of which are necessary for a plaintiff to sustain a legal malpractice action in South Carolina. See Hall v. Fedor, 349 S.C. 169; 561 S.E.2d 654 (2002).

For the reasons set forth above, the Harper Defendants are entitled to summary judgment, as a matter of law, as to the Noskowiaks first third-party claim against them of a violation of the SCUTPA.

II. South Carolina Consumer Protection Code – Second, Third, and Fourth Third-Party Claims

A. Second Third-Party Claim

As to the Noskowiaks’ second third-party claim (styled as an “Eighth Defense By Way of Counterclaim & Third-Party Complaint”) alleging violations of the South Carolina Consumer Protection Code, arising from the Harper Defendants’ alleged failure to ascertain the Noskowiaks’ attorney or insurance preference at closing, pursuant to S.C. Code Ann. § 37-10-102.

The Noskowiaks’ claim is barred by the applicable three (3) year statute of limitations provided in S.C. Code Ann. § 37-10-105(a), which applies to this particular cause of action. The alleged events giving rise to this cause of action undisputedly occurred on or around the closing of the subject loan transaction on November 3, 1998. The Noskowiaks did not allege this claim

against the Harper Defendants until August 12, 2013, the filing date of their Answer, Counterclaim, and Third-Party Complaint, which is well beyond the applicable period of limitations. Further, Law Firm was not formed as an entity until approximately ten (10) years after the closing of the subject loan transaction.

Additionally, there is no genuine issue of fact as to whether Wells Fargo ascertained the Noscowskiaks' attorney preference pursuant to § 37-10-102 because the Noscowskiaks, upon closing on the subject loan on November 3, 1998, executed a "Borrower's Right to Counsel Notice" along with an addendum to their loan application for attorney and insurance preference, both of which were admitted into evidence at the hearing. It is also undisputed that the Noscowskiaks executed a "Certification for Title Insurance and RESPA and Insurance Department Acknowledgement Form", wherein the Noscowskiaks elected not to obtain an owner's title insurance policy, and such Certification was admitted into evidence at the hearing. Moreover, a letter dated November 29, 2012 written by the Noscowskiaks was admitted into evidence at the hearing, wherein the Noscowskiaks admit that they were given an opportunity to hire another closing attorney but instead chose to use the one hired by Beaufort Mortgage, Mr. Harper.

Furthermore, the Harper Defendants are not creditors of the Noscowskiaks and are not regularly engaged in the business of extending or arranging for the extension of credit, and, thus, are not subject to civil liability under S.C. Code Ann § 37-10-102.

For the reasons set forth above, the Harper Defendants are entitled to a grant of summary judgment, as a matter of law, as to the Noscowskiaks' second third-party claim against them pursuant to S.C. Code Ann. § 37-10-102.

B. Third Third-Party Claim

As to the Noscowskiaks' third third-party claim against the Harper Defendants (styled as a "Tenth Defense By Way of Counterclaim & Third-Party Complaint") alleging violation of the

South Carolina Consumer Protection Code, S.C. Code Ann. § 37-5-203, *et seq.*, arising from the Harper Defendants allegedly assessing the Noskowiaks upfront fees and charges exceeding eight (8) percent of the loan amount, and alleged failure to provide the Noskowiaks certain HOEPA disclosures, among other things.

The Noskowiaks' claim is barred by operation of the one (1) year statute of limitations provided in § 37-5-203(5). The alleged events giving rise to this cause of action undisputedly occurred on or around the closing of the subject loan transaction on November 3, 1998. The Noskowiaks failed to raise this cause of action until August 12, 2013, the filing date of their Answer, Counterclaim, and Third-Party Complaint, which is well beyond the applicable period of limitations. Additionally, Law Firm was not formed as an entity until approximately ten (10) years after the closing of the subject loan transaction.

To the extent the Noskowiaks' third third-party claim against the Harper Defendants can be construed to allege a violation of the Truth in Lending Act (TILA), the Noskowiaks' claim is barred by operation of the applicable one (1) year statute of limitations under 15 U.S.C. 1640(e) based on the same lapse in time as described immediately above.¹ Additionally, the Noskowiaks cannot maintain a cause of action pursuant to both TILA and S.C. Consumer Protection Code § 37-5-203 where, as here, the Noskowiaks are pursuing relief for the same violation. See S.C. Code Ann. § 37-5-203(5).

¹ The Noskowiaks also assert violations of Regulation Z and the Home Ownership and Protection Act (HOEPA). However, Regulation Z is a regulation to implement the Truth in Lending Act (TILA) and does not create any private right of action apart from the codified provisions of TILA, found in 15 U.S.C. 1601 *et seq.* Furthermore, HOEPA amended the Truth in Lending Act in 1994 and is incorporated, along with TILA, into the codified provisions of 15 U.S.C. 1601 *et seq.*; therefore, as with TILA, any cited HOEPA provision is governed by the statute of limitations set forth in 15 U.S.C. 1640(e). For the same reasons, as set forth above, any TILA claim would be barred by the one year statute of limitations, so too would any claim under HOEPA.

Furthermore, the Harper Defendants are not creditors of the Noskowiaks and are not regularly engaged in the business of extending or arranging for the extension of credit, and, thus, are not subject to civil liability under S.C. Code Ann § 37-5-203.

For the reasons set forth above, the Harper Defendants are entitled to a grant of summary judgment, as a matter of law, as to the Noskowiaks' third third-party claim against them pursuant to S.C. Code Ann. § 37-5-203, *et seq.*

C. Fourth Third-Party Claim

As to the Noskowiaks' fourth third-party claim against the Harper Defendants (styled as an "Eleventh Defense By Way of Counterclaim & Third-Party Complaint") alleging violation of the South Carolina Consumer Protection Code, S.C. Code Ann. § 37-5-203, *et seq.*, arising from the Harper Defendants alleged failure to disclose monthly payment schedules to the Noskowiaks in violation of Regulation Z.

The Noskowiaks' claim is barred by operation of the applicable one (1) year statute of limitations provided in § 37-5-203(5), which applies to this particular cause of action. The alleged events giving rise to this cause of action occurred on or around the loan closing on November 3, 1998, as seen above. The Noskowiaks failed to raise this cause of action until August 12, 2013, the filing date of their Answer, Counterclaim, and Third-Party Complaint, which is well beyond the applicable period of limitations. Additionally, Law Firm was not formed as an entity until approximately ten (10) years after the closing of the subject loan transaction.

To the extent the Noskowiaks' fourth third-party claim can be construed to allege a violation of the Truth in Lending Act and/or Regulation Z, the Court incorporates herein the grounds for summary judgment set forth in its discussion of the Noskowiaks' third third-party claim immediately above.

Furthermore, the Harper Defendants are not creditors of the Noskowiaks and are not regularly engaged in the business of extending or arranging for the extension of credit, and, thus, are not subject to civil liability under S.C. Code Ann § 37-5-203.

For the reasons set forth above, the Harper Defendants are entitled to a grant of summary judgment, as a matter of law, as to the Noskowiaks' fourth third-party claim against them pursuant to S.C. Code Ann. § 37-5-203, *et seq.*

III. Real Estate Settlement Procedures Act – Fifth Third-Party Claim

As to the Noskowiaks' fifth third-party claim against the Harper Defendants (styled as a "Twelfth Defense By Way of Counterclaim & Third-Party Complaint") alleging violation of the Real Estate Settlement Procedures Act ("RESPA"), specifically 12 U.S.C. § 2607(d), for the Harper Defendants alleged failure to provide the Noskowiaks with certain disclosures along with the Harper Defendants allegedly having received certain fees or other things of value for the referral of the Noskowiaks.


The Noskowiaks' claim is barred by the operation of the applicable one (1) year statute of limitations provided in 12 U.S.C. § 2614. The alleged events giving rise to this cause of action occurred on or around the loan closing on November 3, 1998, as seen above. The Noskowiaks failed to raise this cause of action until August 12, 2013, the filing date of their Answer, Counterclaim, and Third-Party Complaint, which is well beyond the one-year limitation period. It should be noted that there is a three year statute of limitations found in 12 U.S.C. § 2614 which governs certain actions under RESPA. However, even when viewed in the light most favorable to the Noskowiaks, the Noskowiaks' fifth third-party claim is also barred by this longer three (3) year period of limitations as the claims were brought over fourteen (14) years after the closing of the subject loan transaction took place. Additionally, Law Firm was not formed as an entity until approximately ten (10) years after the closing of the subject loan transaction.

For the reasons set forth above, the Harper Defendants are entitled to a grant of summary judgment, as a matter of law, as to the Noskowiaks' fifth third-party claim against them alleging violations of RESPA.

CONCLUSION

For the reasons set forth above, the Harper Defendants are entitled to summary judgment pursuant to Rule 56, SCRPC, as to each of the Noskowiaks' five (5) third-party claims asserted against the Harper Defendants in this action.

IT IS SO ORDERED.


Carmen T. Mullen
Fourteenth Judicial Circuit

2-1, 2014
Beaufort, South Carolina