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STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	CASE NO. 2009-CP-32-506
BANK OF AMERICA, NA, AS SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTYWIDE HOME LOANS SERVICING, LP Plaintiff v. ELISABETH ORVIN AND RANDY J. ELROD, Defendants	**ORDER ON BANK OF AMERICA, N.A.'S AND ELISABETH ORVIN'S MOTIONS FOR SUMMARY JUDGMENT**

THIS CAUSE, came before the undersigned for a hearing on June 25, 2013 on competing motions for summary judgment pursuant to South Carolina Rule of Civil Procedure 56 filed by Plaintiff/Counterclaim-Defendant Bank of America, N.A. as successor-by-merger to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP ("Bank of America") and Defendant/Counterclaim-Plaintiff Elisabeth Orvin ("Orvin"). Following the hearing on the arguments, review of the parties' briefs and applicable law, the undersigned finds as follows:

It is hereby ORDERED that Bank of America's Motion for Summary Judgment is GRANTED as to Orvin's counterclaim for a violation of the South Carolina Unfair Trade Practices Act only, and DENIED as to all other counterclaims, as genuine issues of material fact remain to be determined by the finder of fact at trial. Orvin's counterclaim for a violation of the South Carolina Unfair Trade Practices Act is hereby dismissed with prejudice.

It is hereby ORDERED that Orvin's Motion for Summary Judgment is DENIED in its entirety, as genuine issues of material fact remain to be determined by the finder of fact at trial.

IT IS SO ORDERED, ADJUDGED, and DECREED

This the 7th day of October, 2013.

Judge James O. Spence
Master-in-Equity
Lexington County, South Carolina

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
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COUNTY OF LEXINGTON 2014 JUN 18 P 2:49) CASE NO. 2009-CP-32-506
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BANK OF AMERICA, NA, AS SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTYWIDE HOME LOANS SERVICING, LP)
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Plaintiff)
)
v.)
)
ELISABETH J. ORVIN AND RANDY J. ELROD,)
)
Defendant)

ORDER ON DEFENDANT'S MOTION FOR RECONSIDERATION

This matter came before the Court on Defendant Elizabeth J. Orvin's Motion for Reconsideration of this Court's October 9, 2013 Order. For the reasons stated herein, the Court denies Defendant's Motion for Reconsideration. Accordingly, Defendant's counterclaim for violation of SCUTPA remains dismissed with prejudice and there remains at least one genuine issue of material fact on the remainder of Defendant's counterclaims.

BACKGROUND

This case involves counterclaims brought by a borrower in a foreclosure action. Bank of America filed a foreclosure action on February 4, 2009. In response, Defendant brought counterclaims for: (1) accounting; (2) South Carolina Consumer Protection Act; (3) South Carolina Unfair Trade Practices Act; (4) Breach of Contract; (5) Fraudulent Breach of Contract; (6) Breach of Home Affordable Modification Program Agreement; (7) Libel; (8) Conversion; (9) Fair Credit Reporting Act; and (10) violation of South Carolina's Attorney Preference Statute.

Plaintiff and Defendant filed cross motions for summary judgment which originally came

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on for hearing before the undersigned on June 25, 2013. Following the hearing, this Court entered an Order on October 9, 2013 granting Bank of America's Motion for Summary Judgment as to Orvin's counterclaim for violation of the South Carolina Unfair Trade Practices Act. The Court denied the remainder of Bank of America's Motion for Summary Judgment and denied Defendant Orvin's Motion for Summary Judgment in its entirety. Defendant Orvin filed a Motion for Reconsideration on October 17, 2013. Oral argument was heard on Defendant Orvin's Motion for Reconsideration on November 14, 2013. Both parties submitted post-hearing briefs.

ORDER, FINDINGS OF FACT AND CONCLUSIONS OF LAW

As discussed above, Bank of America is entitled to summary judgment on Defendant's South Carolina Unfair Trade Practices Act claim and there remain genuine issues of material facts as to all other claims. This Court will address each claim in turn.

(1) South Carolina Unfair Trade Practices Act Claim

As Bank of America stated during the June 25, 2013 hearing on the parties' motions for summary judgment and during the motion for reconsideration hearing, this case is a mere breach of contract case. Defendant's Unfair Trade Practices claim requires something more than a mere breach of contract, and it therefore cannot survive summary judgment.

Defendant relies on six declarations filed by former Bank of America employees in a now-dismissed case from the United States District Court for the District of Massachusetts. *In re Bank of America HAMP Contract Litigation*, 2013 U.S. Dist. LEXIS 126028, at *47 (D. Mass. Sept. 4, 2013). These declarations do not create a genuine issue of material fact.

First, and most importantly, the testimony of each declaration focuses upon alleged policies and procedures designed to *deny* loan modification. Defendant, on the other hand, was

approved for loan modifications July 2009, July 2010, and December 2012—two of which she chose not to accept. The declarations, therefore, are irrelevant to Defendant's situation. Even if the allegations in the declarations are true, they are inapposite to Defendant's experiences.

Second, the declarations submitted by the defendant relate to testimony regarding Home Affordable Modification Program ("HAMP") loan modifications, as opposed to ordinary investor modifications conducted outside of the federal HAMP program. The July 2009 Modification around which this case centers, on the other hand, was not a HAMP modification. Testimony from MDL Declarations regarding the alleged processes of a *different* program is irrelevant to the Defendant's situation.

Third, three of the six declarations submitted by the Defendant were made by declarants that were not employed by Bank of America in 2009—the period in which the alleged breach occurred. In other words, not only does this testimony relate to the alleged processes of a different program, but also the alleged processes during a *different* time period.

In fact, the federal court presiding over the multi-district litigation in which the declarations were originally submitted denied class certification, finding that "individual questions . . . predominate on plaintiffs' claims regarding Bank of America's allegedly unfair and deceptive acts and practices." *In re Bank of America HAMP Contract Litigation*, 2013 U.S. Dist. LEXIS 126028, at *47 (D. Mass. Sept. 4, 2013). Specifically, the court noted that "[t]o the extent these claims are based on other unfair practices, there are individual factual issues as to whether each plaintiff was actually affected by the same alleged practices." *Id.* In other words, the court found that allegations of "unfair trade practices" cannot simply be transferred from one borrower to another—actual evidence that an individual borrower was affected by alleged conduct is necessary.

This principle has been embraced by South Carolina courts in its own unfair trade practices jurisprudence. Specifically, South Carolina courts hold that alleged misconduct by a lender in a loan transaction impacts only the individual borrower, and does not satisfy the "public interest" requirement. *Robertson v. First Union National Bank*, 565 S.E.2d 309 (S.C. Ct. App. 2002); *Accord Kerr v. Branch Banking and Trust Co.*, 2011 WL 9368349 (S.C. Ct. Comm. Pl. Oct. 28, 2011) (finding that a borrower's allegations of a lender's alleged misconduct in a loan transaction "do not comprise unfair or deceptive acts that are actionable under the SCUTPA because business relationships that affect only the parties to the complained-of transaction are not actionable under the SCUTPA").

The declarations also do not create a genuine issue of material fact because they are inadmissible hearsay. In her Motion for Reconsideration, Defendant argues that the hearsay rule does not apply during the summary judgment stage. This is inaccurate. *See, e.g., Hall v. Fedor*, 561 S.E.2d 654, 657 (S.C. Ct. App. 2002) (statements which were clearly hearsay and did not fall under any of the hearsay exceptions would be inadmissible evidence at trial and were thus inadmissible to refute a motion for summary judgment); *Woodward v. Norfolk S. Corp.*, 2012 S.C. App. Unpub. LEXIS 798 (S.C. Ct. App. Dec. 5, 2012) (finding that hearsay evidence could not be considered at the summary judgment stage); *Lasher v. Day & Zimmerman Int'l, Inc.*, 516 F.Supp.2d 565, 569 (D.S.C. 2007) ("Hearsay evidence may not be considered on a motion for summary judgment.").

There is absolutely no indication that the six declarants would be available to testify at trial. Defendant has not noticed any depositions of the six declarants, nor has she expressed any intent to do so. In fact, Defendant has not even identified the six declarants as potential witnesses at trial, despite an ongoing obligation to supplement her interrogatory responses with

that information.

In sum, Defendant's introduction of the six declarations is a transparent attempt to distract the court from the reality that there is *no factual evidence* that Bank of America engaged in any unfair or deceptive conduct in this case. Defendant should not be allowed to use irrelevant and inadmissible hearsay declarations from a different proceeding to manufacture a genuine issue of fact so as to survive summary judgment.

(2) Breach of Contract

Orvin argues that she is entitled to summary judgment on her breach of contract counterclaim because "Bank of America made an unequivocal offer to Ms. Orvin for the permanent modification of her mortgage loan," that "Ms. Orvin did all she was required to do to accept that offer," and "Bank of America failed to accept her payments, and . . . failed to perform its obligations under the terms of the modified mortgage loan." (M. to Reconsider at 4.)

As the non-moving party, Bank of America must only "submit a mere scintilla of evidence in order to withstand" Defendant's motion for summary judgment as to her breach of contract claim. *Hancock v. Mid-South Management Co., Inc.*, 673 S.E.2d 801, (S.C. 2009).

Defendant has failed to address Bank of America's argument, raised during the June 25, 2013 hearing, there remains a genuine issue as to whether the July 2009 modification was supported by mutual consideration. The 2009 Modification was simply an agreement to pay an existing debt under modified terms. Because "all the debt was pre-existing, the [modification] must be supported by some new consideration other than the original debt." *See Branch Banking and Trust v. Carolina Crank & Core, Inc.*, 608 S.E.2d 896 (S.C. Ct. App. 2005).

In *Future Group, II v. Nationsbank*, 478 S.E.2d 45, 49 (S.C. 1996), the Supreme Court of South Carolina found that a corporate guarantee of a $500,000 line of credit was unsupported by

mutual consideration, because at the time of the guarantee, the line of credit had been exhausted and no new funds were extended by the Bank in exchange for the guarantee. In ruling that the Bank had not given consideration in exchange for the guarantee, the Court relied upon the maxim that "[c]onsideration that is wholly past is not consideration." *Id.*

The Fifth Circuit and Eastern District of Virginia have applied similar principles in finding that borrowers did not provide consideration in exchange for loan modifications. In *Powell v. Bank of America, N.A.*, 2011 U.S. Dist. LEXIS 141020 (E.D. Va. Dec. 8, 2011), the borrower argued that the Bank breached a contract to modify the borrower's loan. The court found that the borrower failed to allege that she provided the Bank with consideration in exchange for the modification. *Id.* at *6. Specifically, the court found that voluntary forbearance of other "foreclosure alternatives" does not constitute consideration unless the forbearance was part of an express agreement. *Id.* Similarly, in *James v. Wells Fargo Bank, N.A.*, 2013 U.S. App. LEXIS 9108, at *5–6 (5th Cir. Tex. May 3, 2013), the Fifth Circuit upheld the district court's ruling that the plaintiffs' breach of contract claim failed as a matter of law, in part because the parties' oral agreement to enter into loan modification proceedings never ripened into an enforceable contract due to plaintiffs' lack of consideration. *Id.* at *6 (*citing Arthur J. Gallagher & Co. v. Dieterich*, 270 S.W.3d 695, 702 (Tex. Ct. App. 2008) ("When a party agrees to do no more than that which he is already bound to do under an existing contract, the consideration is not sufficient to support a modification.").

As in those cases, there is a question here as to whether Defendant provided in exchange for the July 2009 Modification. The debt was pre-existing, and "consideration that is wholly past is not consideration" for a new contract. *See Branch Banking and Trust v. Carolina Crank & Core, Inc.*, 608 S.E.2d 896 (S.C. Ct. App. 2005). There is also a factual dispute as to whether

Bank of America had the authority to enter into a contract to modify the mortgage loan on behalf of an investor. Accordingly, there are genuine issues of material fact that remain as to Defendant's breach of contract counterclaim.

(3) Fraudulent Breach of Contract

Defendant's counterclaim for fraudulent breach of contract also revolves around her allegations of the failed loan modification efforts. (Answer and Counterclaim ¶ 54-56.).

To establish a claim for breach of contract accompanied by a fraudulent act, a party must show: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach. *Conner v. City of Forest Acres*, 560 S.E.2d 606, 612 (2002). Fraudulent intent is normally proved by circumstances surrounding the breach. *Floyd v. Country Squire Mobile Homes, Inc.*, 336 S.E.2d 502, 503-04 (S.C. Ct. App. 1985). The fraudulent act that must accompany the breach is defined as "any act characterized by dishonesty in fact or unfair dealing." *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 597 S.E.2d 881, 883 (S.C. Ct. App. 2004). The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach, but it must be connected with the breach itself and not too remote in time or character. *Floyd*, 336 S.E.2d at 504. The fraudulent act must also be separate and apart from the conduct constituting the breach itself. *Meddin v. Southern Ry.-Carolina Div.*, 62 S.E.2d 109, 112 (S.C. 1950)).

Here, there is a genuine issue as to whether Bank of America's alleged breach of the 2009 Modification was done with fraudulent intent. More specifically, there is an issue of fact as to whether Bank of America's alleged failure to implement the 2009 Modification was caused by an unintentional error or some conduct "characterized by dishonesty." There is also a genuine issue as to this claim for the reasons stated in the section discussing Defendant's breach of

contract counterclaim because the alleged error is the very same failure to perform that forms the basis of Defendant's breach of contract claim, not the separate fraudulent act necessary to sustain the claim for fraudulent breach. *Campbell v. Johnson & Towers, Inc.*, 2000 U.S. Dist. LEXIS 19958 at *17 (D.S.C. Nov. 30, 2000) ("South Carolina law does not recognize a tort claim when the parties' duties are defined by a contract.")

There is also a question of fact as to whether there was an independent fraudulent act accompanying the alleged breach of the 2009 Modification. To the extent her claim of fraud is based on the bank's alleged communications of mixed messages about the status of the 2009 Modification, those statements do not constitute a separate fraudulent act as a matter of law. *D.R. Horton, Inc. v. Wescott Land Co., LLC*, 730 S.E.2d 340, 355 (S.C. Ct. App. 2012) (allegations that a defendant's "shifting reasons" for failure to perform did not constitute a

In sum, there is a genuine issue of fact as to whether the modification offer was accompanied by some fraudulent conduct or, whether the evidence shows that after an initial period of confusion,[1] Bank of America (1) researched the status of the 2009 Modification, (2) determined that it had not been implemented, (3) recommended that the best way to proceed was to enter a new loan modification agreement, and offered the Defendant a *more favorable* loan modification.

(4) Breach of Home Affordable Modification Program Agreement

Defendant's Breach of Home Affordable Modification Program Agreement is based on the Bank's failure to honor the alleged modification. (Answer and Counterclaim ¶ 57-66.). Because there remains an issue of fact with regard to the impact of the alleged modification, whether it was accompanied by some sort of fraudulent act, and whether the modification was

[1] This period of confusion appears to have been due, at least in part, to a "mix up" over whether the Defendant had retained a National Association of Consumer Advocate (NACA) representative to negotiate and pursue loss mitigation alternatives on her behalf in 2009.

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supported by consideration, Defendant is not entitled to summary judgment on this counterclaim for these reasons and the reasons stated in the sections on the breach of contract and fraudulent breach of contract sections above.

(5 & 6) Libel and Fair Credit Reporting Act claims

Defendant's counterclaims for libel and violation of the Fair Credit Reporting Act revolve around whether: (1) Bank of America's credit reporting was factually inaccurate; and (2) whether Bank of America's investigation was reasonable in light of the allegations. *See Dalton v. Capital Associated Indus.*, 257 F.3d 409, 415 (4th Cir. 2001) ("[A] consumer must present evidence tending to show that a credit reporting agency prepared a report containing inaccurate information."); *Chiang v. Verizon New England Inc.*, 595 F.3d 26, 29–30 (1st Cir. 2010) ("[A] § 1681s-2(b) claim requires plaintiff to show actual inaccuracies that a furnisher's objectively reasonable investigation would have been able to discover.").

Genuine issues of fact remain as to these claims because, as discussed above, there remains an issue for trial as to whether Bank of America had to perform obligations under the modification, whether the modification agreement was supported by consideration, and whether Bank of America made the reports to the credit reporting agencies with malice such that Defendant can support her libel counterclaim. *See Barnhill v. Bank of America, N.A.*, 378 F. Supp. 2d 696, 704–05 (D.S.C. 2005) (finding that the FCRA preempts defamation claims unless the statement was made with malice, and dismissing the borrower's defamation claims that did not allege that the statements were made with malice).

(7) South Carolina Attorney Preference Statute S.C. Code Ann. § 37-10-102

Defendant alleges that "Plaintiff's predecessor in interest" did not comply with the attorney preference and insurance preference provisions of South Carolina Code § 37-10-102.

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(Countercl. ¶ 90). More specifically, Defendant argues that she was not given an opportunity to select an attorney to represent her in the loan closing conference in violation of S.C. Code Ann. § 37-10-102(a). This section requires (in pertinent part) that,

> [w]henever the primary purpose of a loan that is secured in whole or part by a lien on real estate is for a personal, family or household purpose - [t]he creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction . . . .

Genuine issues of material fact remain for trial as to this claim, including: (1) whether Countrywide Home Loans Servicing, LP is the same entity as Countrywide Home Loans, Inc. – the entity that originated the loan; (2) whether Defendant executed the attorney preference forms; and (3) whether Bank of America, N.A. is liable for the actions of Countrywide Home Loans, Inc.; and (4) whether the counterclaim is barred by the statute of limitations.

(8) Conversion

Defendant's conversion claim is also based on Bank of America's alleged failure to implement the 2009 Modification, albeit indirectly. Defendant alleges that Bank of America, as a result of its failure to implement the 2009 Modification, misapplied her loan payments made after the 2009 Modification should have taken effect. (Ex. 7, Elrod Depo. 42: 21–25; 43: 1–14). At her deposition, Defendant explained that the conversion claim is based on her post-2009 Modification payments being placed into a partial suspense account, rather than being immediately applied towards her outstanding principal balance. (Ex. 7, Elrod Depo. 42: 21–25; 43: 1–14).

Conversion is a wrongful act which may arise by either a wrongful taking or wrongful detention. *Kirby v. Horne Motor Co.*, 366 S.E.2d 259, 261 (S.C. Ct. App. 1988). There remains an issue for trial as to whether any property that was wrongfully taken or detained by Bank of

America. Included in this issue for trial is the impact of Defendant's decision to voluntarily make payments of $911.67 after the 2009 Modification. (Countercl. ¶ 33; Ex. 7, Elrod Depo. 42: 10–13). Related to this issue is the question of whether Bank of America wrongfully detained the Defendant's funds, *i.e.*, that it should have returned the funds that the Defendant voluntarily paid towards her mortgage. In short, genuine issues remain as to whether Bank of America's retention of voluntary mortgage payments was wrongful.

(9 & 10) Accounting and Plaintiff's Foreclosure Claim

Defendant is not entitled to summary judgment on Defendant's accounting counterclaim or Plaintiff's foreclosure claim because the counterclaims discussed above show that there are issues for trial regarding whether the modification was entered into, the impact of the alleged modification, and whether Bank of America rightfully accepted and applied Defendant's payments.

WHEREFORE, for the foregoing reasons, the Court orders:

(1) Bank of America is entitled to summary judgment on Defendant's South Carolina Unfair Trade Practices Act claim and that claim is dismissed with prejudice;

(2) Genuine issues of material fact remain as to all other counterclaims brought by Defendant.

James O. Spence

The Honorable James O. Spence