

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED

AUG 06 2014

Mikell R. Scarborough, Master-in-Equity

SC Court of Appeals

Case No. 2010-CP-10-10122

US Bank National Association, as Trustee for the holders of Bear
Stearns ARM Trust, Mortgage Pass-Through Certificates, Series 2005-4,

Respondent,

versus

Anne B. Glassburn, Donivon D. Glassburn, The Bank of New York Mello
f/k/a The Bank of New York Indenture Trustee on behalf of the Note Holders,
CWHEQ Revolving Home Equity Loan Trust Series 2007-A Trust, Tideland
Bank, Atlantic Bank and Trust,

Defendants,

Of Whom

Anne B. Glassburn and Donivon D. Glassburn are

Appellants.

APPELLANTS' MEMORANDUM ON APPEAL JURISDICTION

At the Court's request, Appellants Anne and Donivon Glassburn (hereinafter "the Glassburns") submit this memorandum in support of this court's jurisdiction to hear their appeal. Because one of the orders under review is the denial of a motion to amend their answer that added a jury trial request and claims, a "substantial interest" of the appellants has been affected by the trial court's order and immediate appeal is recognized by statute and case law.

FACTS AND POSTURE OF THE CASE

This is a residential foreclosure action. Respondents sued to take the primary residence of Anne and Donivon Glassburn in Mount Pleasant, South Carolina after Wells Fargo induced the Glassburns to stop making payments, then abruptly stopped taking payments on a finalized modification from them. Wells Fargo eventually sold the loan to Respondent U.S. Bank. Wells Fargo remained the servicer of the loan. Respondent filed suit for foreclosure in December of 2010. The case remained stayed for several years under the Supreme Court's Foreclosure Intervention Order.

In September of 2013, Respondent moved to lift the stay and proceed with foreclosure. The Glassburns contested the motion, asked for judicial review of the denial of a second modification by Wells Fargo, and filed a motion to amend their complaint. The motion to amend is attached hereto as Exhibit A. The motion seeks to add claims for breach of contract and breach of contract accompanied by a fraudulent act against the Respondent. The factual basis for these claims arise from a previous modification the for which the Glassburns had been approved and which they fully complied with for 11 months until Wells Fargo returned the last check without reason.

The trial court entered the order attached hereto as Exhibit B. The order finds that the Motion to Amend is denied because the trial court perceived the amendment to be based on, "the alleged failure of the Plaintiff to comply with the [Supreme Court's] administrative Orders."¹ Order at 2. The draft amended answer attached to the complaint contains a jury trial demand for their two tort claims. Motion to Amend at 9.

¹ Appellants dispute this finding and the legal assertions applied as a result. Appellants claims are based on a contract entered into between Appellants and Respondents that the Respondents breached.

LAW/ANALYSIS

The jurisdiction of the South Carolina appeals courts is controlled by S.C. Code §14-3-330. This court has interpreted that section as allowing, if not requiring, the immediate appeal of a denial of a request for a trial by jury because the failure to timely appeal is deemed a waiver of the right. *Bateman v. Rouse*, 358, S.C. 667 596 S.E.2d 386 (Ct. App. 2004)(“The failure to immediately appeal an order affecting the mode of trial constitutes a waiver of the right to appeal these issues.”).

Here, the trial court denied the Appellants’ motion to amend, which would have added legal claims and a right to a jury trial. *Bateman*, at 673 (jury trial right available for actions at law). As a result, Appellants are required to appeal now to preserve their right to a trial by jury and this court has jurisdiction over this matter.

WHEREFORE the Appellants pray for the relief requested herein and for such other relief as the court deems just, prudent, and proper.

Haller Law Firm, P.C.



David K. Haller

115 River Landing Drive, Suite 102
Charleston, South Carolina 2949
Office voice: 843-849-1384
email: dhaller@hallerlawfirm.com

Amanda M. Reece, Esq.
871 Lowcountry Blvd., Suite 200
Mount Pleasant, SC 29464
Amanda@reecelawfirmllc.com
Lawyers for Appellants

August 4, 2014

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

US Bank National Association, as Trustee for the holders of Bear Stearns ARM Trust, Mortgage Pass-Through Certificates, Series 2005-4,

Plaintiff,

vs.

Anne B. Glassburn; Donivon D. Glassburn; The Bank of New York Mellon f/k/a The Bank of New York Indenture Trustee on behalf of the Note Holders, CWHEQ Revolving Home Equity Loan Trust Series 2007-A Trust; Tidelands Bank; Atlantic Bank and Trust,


Defendant(s).

(511784.17316 CSG)

IN THE COURT OF COMMON PLEAS

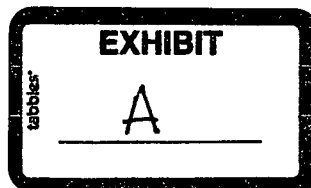
DOCKET NO.: 2010-CP-10-10122

ORDER

FILED
2014 JUN 30 AM 11:4
JULIE J. ARMSTRONG
CLERK OF COURT
BY 

This matter came before me at a hearing on June 2, 2014 on Plaintiff's Motion to Lift Stay in Case filed on September 30, 2013, Defendants Anne B. Glassburn and Donivon D. Glassburn's Motion to Amend their Answer filed on November 8, 2013 and Defendants Anne B. Glassburn and Donivon D. Glassburn's Motion to Compel and for Sanctions dated May 29, 2014. Charles S. Gwynne Jr., Esquire, appeared on behalf of the Plaintiff; and David K. Haller, Esquire and Amanda Reece, Esquire appeared on behalf of the Defendants Anne B. Glassburn and Donivon D. Glassburn ("Defendants").

Defendants allege that the Plaintiff has not complied with the South Carolina Supreme Court Administrative Order 2009-05-20-01 dated May 22, 2009 regarding the Home Affordable Modification Program ("HAMP") and the South Carolina Supreme Court Administrative Order 2011-05-02-01 dated May 2, 2011 regarding all loss mitigation options ("Orders"). Defendants argue the Plaintiff has failed to fully participate in discovery and failed to produce certain loss mitigation underwriting documents that would demonstrate a bad faith review of the borrower's



loan for a loan modification. Plaintiff argues that it has produced underwriting documents subject to a protective order that clearly demonstrate, based on the financial information provided by the Defendants, that the Defendants were fully reviewed, but denied, for a loan modification under HAMP and non-HAMP options.

The Court finds that the Orders require the parties to act in good faith in loss mitigation review of eligible mortgage loans. The Orders requires lenders to review loans through its normal loss mitigation processes and procedures. The Court is not free to substitute its own judgment when lenders have acted within its discretion to deny a borrower for a loan modification. This is akin to the business judgment rule. Additionally, the Court finds that the Orders do not create a private right of action for borrowers.

The court finds that the Plaintiff has demonstrated good faith and reasonable efforts in reviewing the Defendants for a loan modification under the Orders. It is important to note that the Defendants loan is an interest only loan and the court recognizes the difficulty in modifying this type of loan.

The Plaintiff's Motion to Lift Stay in Case is granted and the case may proceed to a final foreclosure hearing. The Defendants' two remaining motions are based on alleged failure of the Plaintiff to comply with the administrative Orders. Based on the Court's ruling the Defendants' Motion to Amend their Answer and Motion to Compel and for Sanctions are denied.

IT IS THEREFORE ORDERED THAT:

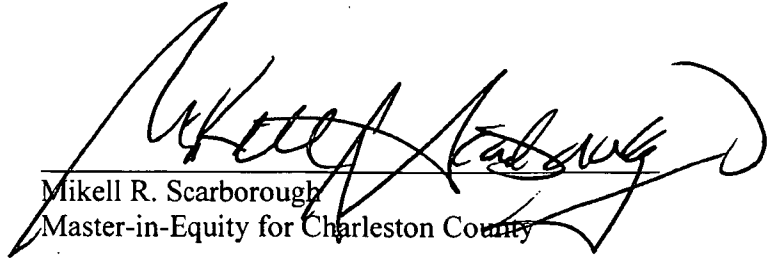
1. Plaintiff's Motion to Lift Stay in Case is granted;
2. Defendants Motion to Amend their Answer is denied;

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3. Defendants Motion to Compel and for Sanctions is denied.

AND IT IS SO ORDERED.

6/24, 2014


Mikell R. Scarborough
Master-in-Equity for Charleston County

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2010-CP-10-10122

US Bank National Association, as Trustee)
for the holders of Bear Stearns ARM Trust)
Mortgage Pass-Through Certificate)
Series 2005-4,)

Plaintiff,)

versus)

Anne B. Glassburn, Donivon D. Glassburn,)
The Bank of New York Mellon f/k/a The)
Bank of New York Indenture Trustee on)
behalf of the Note Holders, CWHEQ)
Revolving Home Equity Loan Trust Series)
2007-A Trust, Tidelands Bank, Atlantic)
Bank and Trust;)

Defendants.)

GLASSBURN DEFENDANTS
MOTION TO AMEND

BY _____

JULIE J. ARMSTRONG
CLERK OF COURT

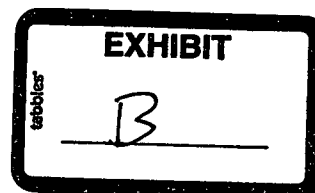
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FILED

TO: CHARLIE GWYNN, ESQ., ATTORNY FOR THE PLAINTIFF

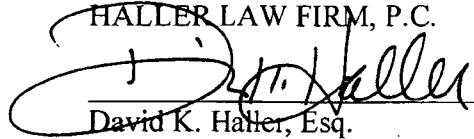
YOU WILL PLEASE TAKE NOTICE that defendants Anne B. Glassburn and Donivon D. Glassburn will move, in ten (10) days at the Charleston County Courthouse, or at such other time and place as the court deems proper, for an order pursuant to SCRCP Rule 15 allowing the defendants to amend their answer in this matter. A draft of the proposed amended answer is attached hereto as Exhibit A. Defense counsel has complied with SCRCP Rule 11.

Prayer and Signature Block Follow Next Page



WHEREFORE the defendants move for the relief requested herein and such other relief as the court deems just, prudent, and proper.

HALLER LAW FIRM, P.C.

A handwritten signature in black ink, appearing to read "D. K. Haller", is written over a horizontal line. The signature is stylized and somewhat cursive.

David K. Haller, Esq.

115 River Landing Drive, Suite 102

Charleston, SC 29492

843-849-1384

dhaller@hallerlawfirm.com

Attorney for the Defendants

This 27th day of November, 2013

Charleston, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2010-CP-10-10122

US Bank National Association, as Trustee)
for the holders of Bear Stearns ARM Trust)
Mortgage Pass-Through Certificate)
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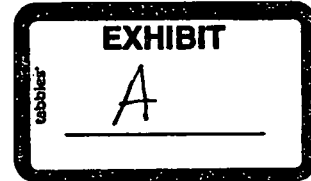
Plaintiff,)

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Anne B. Glassburn, Donivon D. Glassburn,)
The Bank of New York Mellon f/k/a The)
Bank of New York Indenture Trustee on)
behalf of the Note Holders, CWHEQ)
Revolving Home Equity Loan Trust Series)
2007-A Trust, Tidelands Bank, Atlantic)
Bank and Trust;)

Defendants.)

GLASSBURN DEFENDANTS
AMENDED ANSWER AND
COUNTERCLAIM



TO: CHARLIE GWYNN, ESQ., ATTORNEY FOR THE PLAINTIFF

Defendants Anne B. Glassburn and Donivan D. Glassburn answer the plaintiff's
complaint and counterclaims against it as follows:

FOR A FIRST DEFENSE

1. Each and every allegation of the complaint not hereinafter specifically admitted is denied
and strict proof thereof demanded.

FOR A SECOND DEFENSE

SCRCP Rule 12(b)(6)

2. The complaint fails to state a claim for which relief may be granted and should be dismissed
pursuant to SCRCP Rule 12(b)(6).

FOR A THIRD DEFENSE

3. Paragraph one of the complaint is denied and strict proof thereof demanded.

4. Defendants deny paragraph 2 of the complaint and demand strict proof thereof.
5. Defendants deny paragraph 3 of the complaint and demand strict proof thereof.
6. Paragraph 4 is false, frivolous and denied by the defendants and strict proof thereof demanded. Defendants demand sanctions pursuant to the South Carolina Frivolous Civil Proceedings Act against the plaintiff.
7. Defendants deny paragraph 5 and 6 of the complaint and demand strict proof thereof.
8. As to paragraphs 7, 8, 9, and 10 of the complaint, defendants admit that a Note and Mortgage on the property described in paragraph 8 was executed by Anne Glassburn. They deny the Note and Mortgage described in those paragraphs remains in effect or that the plaintiff is the real party in interest. The Note and Mortgage were modified in 2010; however, the plaintiff has breached the modification, refused payment, and brought this action.
9. Defendants deny paragraph 11 of the complaint and demand strict proof thereof.
10. Defendants deny paragraph 12 of the complaint and demand strict proof thereof. Any injury or damage claimed by the plaintiff is caused by its prior breach of the modified Note and Mortgage.
11. Paragraph 13 of the complaint is admitted.
12. As to paragraph 14 of the complaint, defendants admit that counsel has been retained, but deny that plaintiff is entitled to any award of fees.
13. Defendants deny paragraph 15 of the complaint and demand strict proof thereof.
14. Defendants deny paragraph 16 of the complaint and demand strict proof thereof.
15. Defendants deny paragraph 17 of the complaint and demand strict proof thereof.
16. As to the paragraph entitled, "WHEREFORE" the defendants deny the plaintiff is entitled to any relief and, therefore, deny the same and demand strict proof thereof.

FOR A FOURTH AND AFFIRMATIVE DEFENSE

(UNCONSCIONABILITY)

17. The Note the plaintiff seeks to enforce in this action is unconscionable and unenforceable as a matter of law.

FOR A FIFTH AND AFFIRMATIVE DEFENSE

(UNCLEAN HANDS)

18. Plaintiff's claims are barred by the doctrine of unclean hands. As to the facts and circumstances of the plaintiff's inequitable conduct, defendants crave reference to the facts and circumstances of the defendants' counterclaims and such other facts and circumstances as may be developed during discovery.

FOR A SIXTH AND AFFIRMATIVE DEFENSE

(PRIOR BREACH)

19. Plaintiff's claims are barred by their prior breach of the modification of the subject note and mortgage. Specifically, the plaintiff's employees instructed the defendant to stop making payments on the note. Because the plaintiff is not entitled to gain from its preclusion of the defendants' performance, it is not entitled to relief here.

FOR A SEVENTH AND AFFIRMATIVE DEFENSE

(CONTRIBUTORY NEGLIGENCE)

20. Plaintiff's claims are barred by the doctrine of contributory negligence.

FOR AN EIGHTH AND AFFIRMATIVE DEFENSE

(DURESS)

21. Plaintiff's claims are barred by the doctrine of duress.

FOR A NINTH AND AFFIRMATIVE DEFENSE

(FRAUD)

22. Plaintiff's claims are barred by the doctrine of fraud in the inducement.

FOR A TENTH AND AFFIRMATIVE DEFENSE

(ILLEGALITY)

23. These defendants are informed and believe that the plaintiff's conduct may have occurred by some illegal means, thereby nullifying the transaction. Accordingly, the plaintiff's claims are barred by illegality.

FOR AN ELEVENTH AND AFFIRMATIVE DEFENSE

(LACHES)

24. The plaintiff's claims are barred by the doctrine of laches.

FOR A TWELFTH AND AFFIRMATIVE DEFENSE

(MISREPRESENTATION)

25. The plaintiff's claims are barred by the doctrine of misrepresentation.

FOR A THIRTEENTH AND AFFIRMATIVE DEFENSE

(MISTAKE)

26. These defendants entered into the agreement with the plaintiff in good faith based on the faulty representations made by the plaintiff. As a result, the plaintiff's claims are barred by the doctrine of mistake.

FOR A FOURTEENTH AND AFFIRMATIVE DEFENSE

(WAIVER)

27. The plaintiff's claims are barred by the doctrine of waiver.

FOR A FIFTEENTH AND AFFIRMATIVE DEFENSE

(FAILURE TO MITIGATE)

28. The plaintiff's claims are barred by the doctrine of failure to mitigate. Specifically, the defendants were performing under a modification agreement at the time of the claimed breach and continued to perform successfully for months after until the plaintiff terminated the contract without cause, kept the modification payments, and brought suit to foreclosure without cause.

FOR A SIXTEENTH AND AFFIRMATIVE DEFENSE

(PAYMENT)

29. Plaintiff's claims are barred by the doctrine of payment.

FOR AN SEVENTEENTH AND AFFIRMATIVE DEFENSE

(ACCORD & SATISFACTOIN)

30. Plaintiff's claims are barred by the doctrines of accord and satisfaction. Specifically, the parties reached an agreement to modify the terms and conditions of the Note and Mortgage, which both parties successfully performed until the plaintiff unilaterally terminated

FOR AN EIGHTEENTH AND AFFIRMATIVE DEFENSE

(FAILURE TO NAME AN INDISPENSIBLE PARTY)

31. Plaintiff's claims are barred for failure to name an indispensable party.
32. In September of 2009, plaintiff's servicer (Wells Fargo) and defendants entered into an agreement by which the Note and Mortgage was modified. Under the agreement, defendants' Note and Mortgage would continue to be paid down upon the monthly payment of \$2,170.00 per month beginning November 1, 2009.
33. The modification became an available option only after the plaintiff instructed and induced the defendants to stop making payments on the note in the first place.
34. Defendants' made the payment on November 1, 2009, and for eleven consecutive months thereafter.
35. In June of 2010, after seven months of receiving funds from the Glassburns, Wells Fargo attempted to breach the modification by telling the Glassburns that their modification had been denied for, "failure to produce documents." This was untrue and intended to mislead. Still, the Glassburns continued to make payments on the modification it had already agreed to with Wells Fargo and Wells Fargo continued to accept the payments.

36. In August of 2010, Wells Fargo again attempted to negate the existing modification by claiming that the Glassburns' problems were only a temporary hardship. This was untrue and intended to mislead. Still, the Glassburns continued to make payments on the modification it had already agreed to with Wells Fargo and Wells Fargo continued to accept the payments.
37. In September of 2010, Wells Fargo for the third time attempted to negate the existing modification by claiming that Anne Glassburn, the borrower, had too much cash reserves. This was untrue and intended to mislead. Still, the Glassburns continued to make payments on the modification it had already agreed to with Wells Fargo and Wells Fargo continued to accept the payments.
38. Plaintiff accepted these payments through October of 2010. Then, without cause or reason, Wells Fargo returned and refused to accept the Glassburns properly tendered payment.
39. Plaintiff, through counsel, filed suit and served the same on or about December 10, 2010, in the middle of the Christmas holiday season.

FOR A NINETEENTH AND AFFIRMATIVE DEFENSE BY WAY OF A COUNTERCLAIM

BREACH OF CONTRACT

40. Defendants incorporate by reference paragraphs 32 through 39 as if stated hereinafter verbatim.
41. The modification described herein was a valid contract between the parties, amending and modifying other terms of the Note and Mortgage. Defendants were ready, willing, and able to perform under the modified Note and Mortgage. Plaintiff failed and refused to accept payments even after being tendered and it has breached the agreement.

42. As a direct and proximate result of the plaintiff's breach of contract, defendants have been injured and suffered damages. Defendants are entitled to a judgment against the plaintiff for the full amount of all consequential damages suffered.

FOR A TWENTIETH AND AFFIRMATIVE DEFENSE BY WAY OF A COUNTERCLAIM

BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT

43. Defendants incorporate by reference paragraphs 32 through 38 as if stated hereinafter verbatim.
44. Plaintiff, through its servicer and agent, modified the subject loan and mortgage and the same became a contract.
45. Plaintiff breached the contract by failing to accept payments when tendered by the defendants.
46. Plaintiff fraudulently intended to breach the contract and not merely to its making; and the fraudulent act accompanied the breach, by, among other things, making false pretenses for the breach and refusing payment under the modification.
47. As a direct and proximate result of plaintiff's breach of contract accompanied by a fraudulent act, the defendants have been injured and suffered damages. Defendants are entitled to a judgment against the plaintiff for actual damages, in an amount to a determined by a jury of their peers, and punitive damages in sufficient amount to deter such similar conduct in the future.

48. DEFENDANTS PRAY FOR A TRIAL BY JURY.

WHEREFORE the defendants pray for the relief requested herein, for dismissal of the plaintiff's complaint with prejudice, for judgment in their favor, for actual damages, for punitive damages, attorneys fees, prejudgment interest, and such other relief as may be just, prudent, and proper.

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Case No. 2010-CP-10-10122

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f/k/a The Bank of New York Indenture Trustee on behalf of the Note Holders,
CWHEQ Revolving Home Equity Loan Trust Series 2007-A Trust, Tidelands
Bank, Atlantic Bank and Trust,

Defendants,

Of Whom

Anne B. Glassburn and Donivon D. Glassburn are

Appellants.

PROOF OF SERVICE

The undersigned counsel for the appellants certifies that I mailed the forgoing
Memorandum on Appeal Jurisdiction to counsel of record at their addresses below by first class,
United States Mail, postage paid on August 4, 2014.

Charles S. Gwynne, Jr.
P.O. Box 100200
Columbia, SC 29203

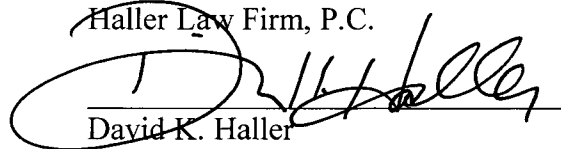
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AUG 06 2014

SC Court of Appeals

Samuel H. Altman, Esq.
Derfne, Altman, & Wilborn
575 King Street, Suite 8
Charleston, SC 29403

Haller Law Firm, P.C.

A handwritten signature in black ink, appearing to read "D. Haller", is written over a horizontal line. The signature is stylized and somewhat cursive.

David K. Haller

115 River Landing Drive, Suite 102
Charleston, South Carolina 2949
Office voice: 843-849-1384
Fax: 843-853-9377
email: dhaller@hallerlawfirm.com

Amanda M. Reece, Esq.
871 Lowcountry Blvd., Suite 200
Mount Pleasant, SC 29464
Amanda@reecelawfirmllc.com

Lawyers for Appellants

Haller Law Firm, P.C.
Counselors at Law

David K. Haller
Certified Civil Court Mediator

August 4, 2014

V. Claire Allen, Deputy Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

In Re: *U.S. Bank, et al. v. Glassburn*
Case No. 2010-CP-10-10122

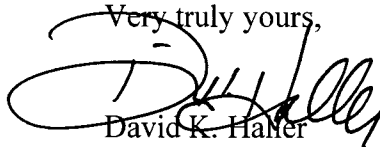
Dear Ms. Allen:

Enclosed please find the original and seven (7) copies of Appellants' Memorandum in Support of Appellate Jurisdiction, along with Proof of Service. Kindly file retrun one copy to me in the enclosed envelope.

By copy of this letter I am serving counsel of record.

Thank you for your assistance in this matter.

Very truly yours,



David K. Haller

cc: Charles S. Gwynne
Samuel Altman
Amanda Reece

RECEIVED

AUG 06 2014

SC Court of Appeals