

ORIGINAL

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

Wells Fargo Bank, N.A.,)

Plaintiff,)

vs.)

Gisela B. Moore, Thomas J. Moore)

a/k/a Tom J. Moore, and John Moore)

Defendants.)

IN THE COURT OF COMMON PLEAS

2011 OCT -4 P # 58

Civil Action No. 2011-CP-32-3461

ORDER GRANTING PARTIAL SUMMARY JUDGMENT AND REFERRING CASE TO MASTER IN EQUITY

This matter came before the Court upon Plaintiff's Motion for Summary Judgment and Motion for Order of Reference. In support of the Motion for Summary Judgment, Plaintiff submitted the Affidavit of Amanda Weatherly. In opposition to the Motion for Summary Judgment, Defendants filed the Affidavit of John Moore and the Affidavit of Thomas Moore. Having reviewed the pleadings and affidavits, and having heard the arguments of counsel, I find and conclude as follows:

FINDINGS OF FACT

1. The loan that is this subject of this action is evidenced by a promissory note and mortgage dated July 17, 2008, in the original principal amount of \$90,000.00. The mortgaged property is a house located at 583 Rainbow Circle in West Columbia, South Carolina.
2. The loan was originally made by American Mortgage Network, Inc. to Gisela B. Moore and Thomas J. Moore, but the mortgaged property is not occupied by Thomas Moore or Gisela Moore.
3. The loan was subsequently assigned to Plaintiff.

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4. Thomas Moore asserts that the agent of American Mortgage Network, Inc. who assisted him with the mortgage loan transaction did not properly calculate the property taxes on the mortgaged property. This mistake caused the monthly payments to be higher than anticipated and resulted in the inability of Defendants to make the monthly payments when due.

5. An interest in the property was conveyed to John Moore, who presently resides in the mortgaged property. John Moore acknowledges that he got behind on the monthly payments due to an injury that resulted in reduced income.

6. The last payment made on this loan was in the amount of \$2,148.69, and was received by Plaintiff on August 25, 2011. John Moore contends that this payment was sufficient to cure the arrearage on the loan.

7. This action was filed on September 12, 2011. In response to the Complaint, Defendants filed an Answer and Counterclaim and demanded a jury trial. The counterclaims alleged are for an accounting, unfair trade practices, breach of contract, breach of the Home Affordable Modification Program (HAMP), and negligent misrepresentation.

CONCLUSIONS OF LAW

1. "The purpose of summary judgment is to expedite the 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). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002), *citing* Rule 56(c), SCRPC.

2. When considering a motion for summary judgment, all inferences which can be reasonably drawn from the evidence before the court are viewed in the light most favorable to the

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nonmoving party. Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002).

3. With regard to the Plaintiff's action to foreclose the mortgage and Defendants' counterclaim for an accounting, I find that there is a genuine issue of material fact as to whether the payment for \$2,148.69 that Plaintiff received on August 25, 2011 was sufficient to bring the loan current. Therefore, to the extent that Plaintiff seeks summary judgment on the Complaint and on the counterclaim for an accounting, the Motion is DENIED.

4. Regarding the counterclaims for unfair trade practices and negligent misrepresentation, based on the Affidavit of Thomas Moore, it appears that Defendants might be able to assert such claims against American Mortgage Network, Inc. However, there is nothing in the affidavits filed by Defendants that supports a claim for unfair trade practices or negligent misrepresentation against Plaintiff, so summary judgment on those causes of action is GRANTED.

5. Concerning the counterclaim for breach of HAMP, the United States District Court for the District of South Carolina has held that the HAMP program does not create a private right of action by borrowers. *Steffens v. American Home Mortgage Servicing, Inc.*, 2011 WL 901179 (D.S.C. 2011). The Fourth Circuit Court of Appeals recently reached a similar conclusion in *Spaulding v. Wells Fargo Bank, N.A.*, Op. No. 12-1973 (4th Cir. Ct. App. 4/19/13). Therefore, summary judgment on the HAMP counterclaim is GRANTED.

6. With regard to the counterclaim for breach of contract, Defendants contend that Plaintiff accepted payments for less than the full amount of the payment and waived the right to accelerate the balance due on the loan. Even if this is true, this does not give rise to a legal

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counterclaim for which Defendants can recover damages. At most, it is a defense to the foreclosure action. Therefore, summary judgment on the counterclaim for breach of contract is GRANTED.

7. An action to foreclosure a mortgage is an equitable proceeding in which there is no right to a jury trial. *Wells Fargo Bank v. Smith*, Opinion No. 4988 (Ct. App. 8/8/12).

8. The only remaining counterclaim is for an accounting. It is well-settled that an action for an accounting is an equitable claim on which there is no right to a jury trial. *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 673 S.E.2d 448 (2009). Therefore, Plaintiff's Motion for Order of Reference is GRANTED.

Based on the foregoing Findings of Fact and Conclusions of Law, it is:

ORDERED that Plaintiff's Motion for Summary Judgment on its action for foreclosure and on Defendants' counterclaim for an accounting is DENIED.

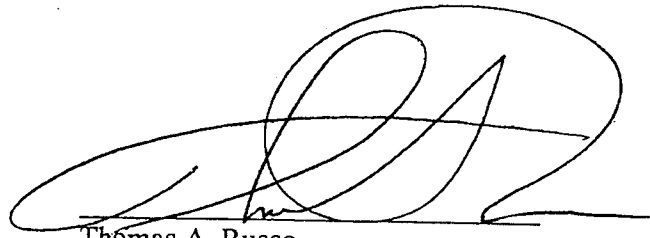
IT IS FURTHER ORDERED that Plaintiff's Motion for Summary Judgment on Defendants' counterclaims for unfair trade practices, breach of contract, breach of HAMP, and negligent misrepresentation is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Order of Reference is GRANTED and that the above-captioned case be and the same hereby is referred to James O. Spence, Master-in-Equity for Lexington County, to take the testimony and other evidence offered and to direct entry of judgment in this action, without further order of this Court. Any appeal from the final judgment entered by the Master-in-Equity should be made directly to the South Carolina Court of Appeals.

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Lex. Co. C.C.C.P., G.S. & F.C.


AND IT IS SO ORDERED.



Thomas A. Russo
Presiding Judge
Lexington County Court of Common Pleas

Lexington, South Carolina
10/2, 2013

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Lex. Co. C.C.C.P., G.S. & F.C.

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON) **FILED** IN THE COURT OF COMMON PLEAS

Wells Fargo Bank, N.A.,) 2014 JUN 30 P. 4: 18 Civil Action No. 2011-CP-32-3461

Plaintiff,

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC
**ORDER DENYING MOTION
FOR RECONSIDERATION**

vs.

Gisela B. Moore, Thomas J. Moore)
a/k/a Tom J. Moore, and John Moore)

Defendants.)
_____)

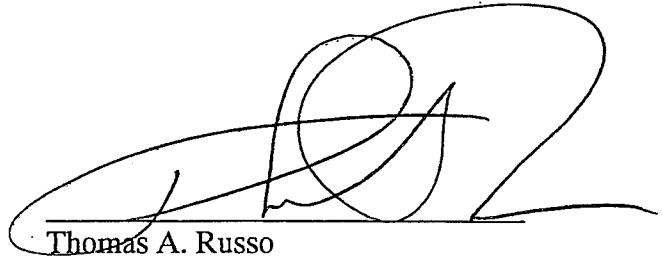
This matter came before the Court upon Defendants' Motion to Reconsider the Order Granting Partial Summary Judgment and Referring Case to Master in Equity. Having reviewed the Motion and supporting Memorandum, and having heard the arguments of counsel, the Court does not believe that there is a basis for reconsidering the Order Granting Partial Summary Judgment and Referring Case to Master in Equity. However, the Findings of Fact set forth in the Order were based on the record before the Court at the summary judgment hearing and are not the law of the case and are not binding on the fact finder in subsequent proceedings in this matter. *See Weil v. Weil*, 299 S.C. 84, 382 S.E.2d 471 (Ct. App. 1989).

Accordingly, based on the foregoing, it is

ORDERED that Defendants' Motion to Reconsider is DENIED.

IT IS FURTHER ORDERED that the Findings of Fact set forth in the Order Granting Partial Summary Judgment and Referring Case to Master in Equity are not the law of the case and are not binding on the fact finder in subsequent proceedings in this matter.

AND IT IS SO ORDERED.



Thomas A. Russo
Presiding Judge
Lexington County Court of Common Pleas

Lexington, South Carolina
6/25, 2014