

STATE OF SOUTH CAROLINA

COUNTY OF COLLETON

Wells Fargo Bank, N.A.,

Plaintiff,

v.

Christopher T. Noskowiak and Sonja B. Noskowiak a/k/a Sonja Bennett; South Carolina Department of Motor Vehicles; South Carolina Department of Revenue

Defendants.

Christopher T. Noskowiak and Sonja Noskowiak,

Third Party Plaintiffs,

v.

Frampton Harper, Esquire, Investors Title Insurance Company, Atlantis Title Insurance Company, Harper Law Firm, LLC, Wells Fargo Bank, N.A., as Servicer and Beaufort Mortgage,

Third Party Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
C/A NO.: 2013-CP-15-00430

ORDER GRANTING WELLS FARGO BANK, N.A.'S MOTION FOR SUMMARY JUDGMENT AS TO THE COUNTERCLAIMS OF CHRISTOPHER T. NOSKOWIAK AND SONJA B. NOSKOWIAK

2014 JUN 20 PM 2:50
FILED
COLLETON COUNTY
SOUTH CAROLINA

This matter came before the Court on May 28, 2014 for a hearing on Plaintiff Wells Fargo Bank, N.A.'s ("Wells Fargo") Motion for Summary Judgment, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, as to each of the counterclaims asserted by Defendants Christopher and Sonja Noskowiak ("Defendants") against Wells Fargo in their Answer and Counterclaim ("Answer and Counterclaim") to Wells Fargo's Complaint. Concurrently, the Court heard a Motion for Summary Judgment pursuant to Rule 56, SCRPC filed by Frampton

Harper, Esq. and Harper Law Firm, LLC (collectively, "Harper"). That motion will be addressed in a separate order. Adriane Malanos Belton of Womble Carlyle Sandridge & Rice, LLP appeared on behalf of Wells Fargo. Evan K. Bromley of the Johnson Davis Ward Law Firm appeared on behalf of Harper. The Defendants 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 Defendants' counterclaims against Wells Fargo occurred on or about November 3, 1998. Defendants 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. The debt was later negotiated to First Union Home Equity Bank, N.A., predecessor in interest to Wells Fargo. Wells Fargo filed a foreclosure action against Defendants on June 3, 2013. On July 31, 2013, Defendants answered Wells Fargo's complaint and asserted nine counterclaims against it. Defendants' counterclaims arise out of or relate to the negotiation and closing of the November 3, 1998 loan transaction. Defendants first asserted these claims in their Answer and Counterclaim dated July 31, 2013, over fourteen years after the subject loan 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, Wells Fargo is entitled to summary judgment as to Defendants' counterclaims because they are barred by the applicable statutes of limitations as set forth below. Summary judgment in favor of Wells Fargo as to certain of Defendants' counterclaims 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. Scalise 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).

DISCUSSION

I. South Carolina Unfair Trade Practices Act – First and Second Counterclaims

As to Defendants' First and Second Counterclaims (both styled by Defendants as a "Seventh Defense By Way of Counterclaim"), alleging violation of the South Carolina Unfair Trade Practices Act (SCUTPA), Wells Fargo is a bank regulated by the Federal Reserve System and is therefore exempt from the application of the South Carolina Unfair Trade Practices Act.

See, e.g. Anderson v. Citizens Bank, 294 S.C. 387, 399, 365 S.E.2d 26, 33 (Ct. App. 1987) (finding on grounds other than “general activity test” that banks are exempt from SCUTPA—namely that banks’ unfair and deceptive practices are regulated under rules of the Federal Reserve System not under Federal Trade Commission Act, which guides interpretation of SCUTPA), overruled on other grounds by Ward v. Dick Dyer & Assoc., 304 S.C. 152, 403 S.E.2d 310 (1991) (discontinuing the “general activity test” only).

Furthermore, the present action is a mere dispute between two parties to a private contract—the subject promissory note and mortgage. Therefore, the conduct alleged only affects the parties to the contract, and, consequently, does not impact the public interest, a required element for a claim to be actionable under the SCUTPA. Jeffries v. Phillips, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994). Defendants have not alleged facts to support a finding that the actions of Wells Fargo in this matter would cause injury to the public, nor have Defendants alleged facts sufficient to show that Wells Fargo has engaged in any deceptive acts that rise to the level of an unfair trade practice.

Finally, even if the SCUTPA were applicable to this case, it contains a three year statute of limitations, codified as S.C. Code Ann. § 39-5-150. The acts alleged by Defendants as a basis for this claim occurred, and should have been discovered, at or near the time of the loan origination in 1998. Defendants have not alleged any facts to support this cause of action which indicate any alleged violations occurred or were reasonably discovered within the last three years.

For the reasons set forth above, Wells Fargo is entitled to summary judgment as to Defendants first and second counterclaims.

II. South Carolina Consumer Protection Code – Third, Fifth and Sixth Counterclaims

As to Defendants' Third Counterclaim (styled as an "Eighth Defense By Way of Counterclaim") alleging violations of the South Carolina Consumer Protection Code, in that Wells Fargo failed to ascertain Defendants' Attorney or insurance preference at closing, Defendants' counterclaim is barred by the applicable three 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 loan closing on November 3, 1998, as evidenced by the subject Note and Mortgage. Defendants failed to raise this cause of action until July 31, 2013, the filing date of their Answer and Counterclaim, which is well beyond the applicable period of limitations.

Additionally, there is no genuine issue of fact as to whether Wells Fargo ascertained Defendants' attorney preference pursuant to § 37-10-102 because Defendants, upon closing on the subject loan on November 3, 1998, executed a "Borrower's Right to Counsel Notice." Moreover, a letter dated November 29, 2012, was admitted into evidence at the hearing stating that the Defendants were given an opportunity to hire another closing attorney but instead chose to use the one hired by Beaufort Mortgage.

As to Defendants' Fifth Counterclaim (styled as a "Tenth Defense By Way of Counterclaim") alleging violation of the South Carolina Consumer Protection Code, S.C. Code Ann. § 37-5-203, et seq., Defendants' claim is barred by operation of the one 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 loan closing on November 3, 1998. Defendants failed to raise this cause of action until July 31, 2013, the filing date of their Answer and Counterclaim, which is well beyond the applicable period of limitations.

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

As to Defendants' Sixth Counterclaim (styled as an "Eleventh Defense By Way of Counterclaim") alleging violation of the South Carolina Consumer Protection Code, S.C. Code Ann. § 37-5-203, et seq., Defendants' claim is barred by operation of the applicable one 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. Defendants failed to raise this cause of action until July 31, 2013, the filing date of their Answer and Counterclaim, which is well beyond the applicable period of limitations.

To the extent Defendants' sixth counterclaim 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 Defendants' fifth counterclaim, above.

Therefore, for the reasons set forth above, Wells Fargo is entitled to summary judgment as to Defendants' Third, Fifth and Sixth Counterclaims.

¹ Defendants 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 in Paragraph 4 above, any TILA claim would be barred by the one year statute of limitations, so too would any claim under HOEPA.

III. Mortgage Loan Broker's Act

As to Defendants' Fourth Counterclaim (styled as a "Ninth Defense By Way of Counterclaims") alleging violation of the Mortgage Loan Broker's Act (the "Act"), and to the extent this cause of action is directed at Wells Fargo, Wells Fargo is entitled to judgment as a matter of law because the Act did not go into effect until January 1, 2010, whereas the events giving rise to this cause of action occurred on or around the subject loan closing on November 3, 1998, well before the effective date of the Act. *See* S.C. Code Ann. § 40-58-10, et seq.; 2009 S.C. Acts 673. The language of the Act does not provide for retroactive application, and therefore it cannot apply to Wells Fargo in this action. *See Bartley v. Bartley Logging Co.*, 293 S.C. 88, 90, 359 S.E.2d 55, 56 (1987) ("The general rule is that statutes are to be construed prospectively rather than retroactively absent a specific provision or a clear legislative intent to the contrary unless the statute is remedial or procedural in nature."). To the extent Defendants also allege a violation of the South Carolina Unfair Trade Practices Act within this cause of action, summary judgment in favor of Wells Fargo is appropriate for the reasons set forth in Part I of this Order, above.

IV. Real Estate Settlement Procedures Act – Seventh and Eighth Counterclaims

As to Defendants' Seventh Counterclaim (styled as a "Twelfth Defense By Way of Counterclaim") alleging violation of the Real Estate Settlement Procedures Act ("RESPA"), specifically 12 U.S.C. § 2607(d), Defendants' claim is barred by the operation of the applicable one 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. Defendants failed to raise this cause of action until July 31, 2013, the filing date of their Answer and Counterclaim, 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 Defendants, the Defendants' Seventh Counterclaim is also barred by this longer three year period of limitations as the claims were brought over fourteen years after the loan closing took place.

As to Defendants' Eighth Counterclaim (styled as a "Thirteenth Defense By Way of Counterclaim") alleging unspecified violations of RESPA, Defendants allege the violations occurred "prior to the institution of this action." Defendants failed to present any evidence prior to or at the hearing that any alleged violation occurred in the last three years and therefore this counterclaim is barred by the applicable three year period of limitations provided in 12 U.S.C. § 2614.

Therefore, for the reasons set forth above, Wells Fargo is entitled to summary judgment as to Defendants' Seventh and Eighth Counterclaims.


V. Home Ownership and Protection Act

As to Defendants' Ninth Counterclaim (styled as a "Fourteenth Defense By Way of Counterclaim") alleging violation of "HOMA requirements," Defendants fail to articulate a recognizable cause of action under the law. In the event Defendants intended to plead a violation of the Home Ownership and Protection Act ("HOEPA") rather than "HOMA," Defendants' claim is barred for the reasons set forth in Part II and footnote one, above; namely that any action alleged under HOEPA would be barred by the applicable one year statute of limitations found in 15 U.S.C. § 1640(e). To the extent this counterclaim alleges a violation of the South Carolina Unfair Trade Practices Act, Wells Fargo is entitled to summary judgment for all of the reasons stated in Part I, above.

CONCLUSION

For the reasons set forth above, Wells Fargo is entitled to summary judgment pursuant to Rule 56, SCRPC as to each of the Defendants' nine counterclaims asserted in this action.

IT IS SO ORDERED.



Carmen T. Mullen
Fourteenth Judicial Circuit

June 17, 2014
Beaufort, South Carolina

MADE THE MISTAKE OF PUTTING
ADDRESS IN RIGHT PLACE. I CALLED
AND LEFT A MESSAGE ON WHAT TO
DO BECAUSE OF TIME. NO ONE
HAS YET TO RETURN MY CALL, SO
I RESORT THE CHANGES.

CHRIS NOSTROMO



RECEIVED

AUG 14 2014

SC Court of Appeals

STATE OF SOUTH CAROLINA,)
)
COUNTY OF Colleton)
)
Christopher T. Noskowiak; Sonja B.)
Noskowiak a/k/a Sonja Bennett; South)
Carolina Department of Motor Vehicles;)
South Carolina Department of Revenue,)
Plaintiff)

vs.)

Wells Fargo Bank, N.A.,)
Defendant.)

vs.)

Frampton Harper, Esquire; Investors Title)
Insurance Company, Atlantis Title)
Insurance Company, Harper Law Firm)
LLC, Wells Fargo Bank, N. A. as)
servicer and Beaufort Mortgage.)

Third Party Defendant's.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

**MOTION AND AFFIDAVIT TO
PROCEED IN FORMA PAUPERIS**

FILE NO. 2013-CP-15-430

RECEIVED

AUG 14 2014

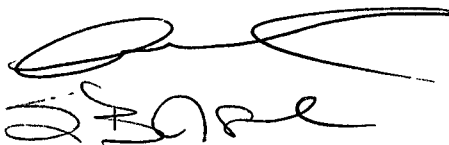
SC Court of Appeals

I/We Christopher T. Noskowiak and Sonja B. Noskowiak, being duly sworn, state that we are the Plaintiffs. Due to me (Christopher Noskowiak) being disabled and this being our source of income, do not have the funds available to pay the costs of filing and service in the present matter. I/We hereby request that the complaint be filed and service made without costs.

Sworn to and Subscribed before me)
this 18th day of July, 2014.)

Notary Public for South Carolina)

My Commission expires)



Signature of Plaintiff or
Person Filing Complaint on Behalf of
Plaintiff

ORDER

Leave is *granted* to proceed in forma pauperis without payment of the filing fee.

Leave is granted to proceed in forma pauperis without payment of the service cost.

Leave is *denied* to proceed in forma pauperis.

Dated:

, 2

JUDGE/CLERK OF COURT

, South Carolina

NOTICE TO PLAINTIFF: The Court may assess costs against either party at hearing.

PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
[In The Supreme Court]

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2013-CP-15-0430

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AUG 14 2014

SC Court of Appeals

Wells Fargo, NA

Respondent,

v.

Christopher T. Noskowiak,
Sonja B. Noskowiak,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Wells Fargo, NA by depositing a copy of it in the United States Mail, postage prepaid, on July 23, 2014, addressed to their attorney of record, Adriane Malanos Belton, Esq, Post Office Box 999 Charleston, South Carolina 29402

July 23, 2014

s/ Christopher T. Noskowiak

Christopher T. Noskowiak

710 Weslegacy Ln

Walterboro, South Carolina 29000

(843) 599 - 1021

Pro Se

PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
[In The Supreme Court]

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2013-CP-15-0430

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AUG 14 2014
SC Court of Appeals

Frampton Harper, Esquire,
Investors Title Insurance
Company, Atlantis Title
Insurance Company, Harper
Law Firm, LLC, Wells Fargo
Bank, N.A. as Servicer and
Beaufort Mortgage

Respondent,

v.

Christopher T. Noskowiak,
Sonja B. Noskowiak,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Frampton Harper Esq, by depositing a copy of it in the United States Mail, postage prepaid, on July 23, 2014, addressed to his attorney of record, Adriane Evan K. Bromley, Esq, 10 Pickney Colony Road, Suite 200, Bluffton, South Carolina 29902

July 23, 2014

s/ Christopher T. Noskowiak
Christopher T. Noskowiak
710 Weslegacy Ln
Walterboro, South Carolina 29000



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

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July 30, 2014

Christopher T. Noskowiak
710 Weslegacy Lane
Walterboro SC 29488

Sonja B. Noskowiak aka Sonja Bennett
710 Weslegacy Lane
Walterboro SC 29488

Re: Wells Fargo Bank v. Christopher Noskowiak
Appellate Case No. 2014-001628

Dear Mr. and Mrs. Noskowiak:

Upon reviewing your motion to proceed in forma pauperis, the following deficiency or deficiencies have been noted under the South Carolina Appellate Court Rules (SCACR), and any deficiency must be corrected within ten (10) days of the date of this letter:

- The document has been signed by the appellant, Christopher Noskowiak and, therefore, is accepted as only Mr. Noskowiak's request to proceed without the payment of fees.
- The motion filed by the appellant is not in compliance with Rule 240, SCACR. If it is the appellant's intention to file this motion with this Court, then it must be substantially in the format provided in appendix C of the South Carolina Appellate Court Rules.
- A proof of service has not been provided. You must serve and file a proof of service substantially in the format shown by Form 7 in Appendix C to part II of the SCACR.

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AUG 14 2014

SC Court of Appeals

Very truly yours,

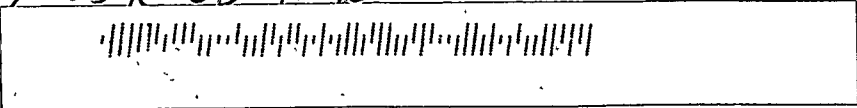
V. Claino Allen, Deputy

CLERK

cc: Adriane Malanos Belton, Esquire
Shelton Sterling Laney, III, Esquire
Evan K. Bromley, Esquire
Barry L. Johnson, Esquire

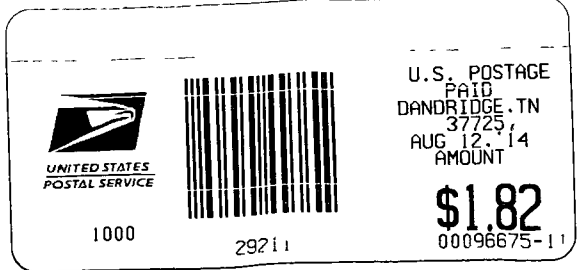
CHARS NASKORNAK

1415 D



DANDRIDGE TN

37725



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CLERK OF COURT
1015 SUMNER ST
COLUMBIA, S.C. 29211