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JUN 15 2015

SC Court of Appeals

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT

Mitchell D. Snider,) Civil Action No. 2013-CP-26-02135
)
 Plaintiff,)
)
 vs.) **ORDER**
)
 CitiMortgage, Inc. and Kim Sprinkle)
 Snider,)
)
 Defendants.)

2015 FEB 24 PM 1:27

BEFORE THE COURT is a Motion for Summary Judgment filed by Defendant CitiMortgage, Inc. ("CitiMortgage") as to all of the claims asserted by Plaintiff Mitchell D. Snider ("Plaintiff") in the above-captioned matter. A hearing was held on November 19, 2014, at 1:00 p.m., with Thad H. Westbrook, Esq. and Sarah B. Nielsen, Esq. appearing for CitiMortgage and Benjamin A. Baroody, Esq. appearing for Plaintiff.¹ After hearing the arguments of the Parties and after considering the written submissions, the Court finds and rules as follows:

UNDISPUTED FACTS

1. On April 26, 2005, to refinance their existing debt, Plaintiff and K. Snider signed a Note in the original principal sum of \$225,000.00, with an interest rate of 5.500% ("Note"). The monthly principal and interest payment under the Note was \$1,547.75.

¹ Defendant Kim Sprinkle Snider ("K. Snider") has not answered or otherwise appeared in this matter and was not present for the hearing.

2. The Note is secured by a Mortgage, also signed by Plaintiff and K. Snider, which secures certain real property known as 218 Green Lake Drive, Myrtle Beach, SC 29572 (the "Myrtle Beach Property").

3. At the time of the signing of the Note and Mortgage, Plaintiff and K. Snider were married and resided in the Myrtle Beach Property as their primary residence.

4. On or about October 17, 2006, Plaintiff and K. Snider separated and proceeded with divorce proceedings before the Horry County Family Court, 2007-DR-26-1540.

5. On March 10, 2009, Plaintiff and K. Snider filed the Final Divorce Decree, incorporating a written settlement agreement. The Final Divorce Decree granted K. Snider sole and exclusive ownership and possession of the Myrtle Beach Property and required Plaintiff to execute a quit claim deed conveying his undivided $\frac{1}{2}$ interest to K. Snider. Plaintiff executed and recorded the quit claim deed, thereby relinquishing his ownership interest in the Myrtle Beach Property. The Final Divorce Decree granted K. Snider the authority to satisfy the payment obligations, recognized Plaintiff's ongoing payment obligations under the Note and Mortgage, and required Plaintiff to pay monthly alimony payments to K. Snider.

6. The Final Divorce Decree provided that the Horry County Family Court retained jurisdiction over the matter and granted the parties remedies through Rule to Show Cause proceedings for failure to abide by the terms of the Final Divorce Decree.

7. Plaintiff and K. Snider defaulted on the payment obligations under the Note and Mortgage and, on February 23, 2011, K. Snider requested a loan

modification from CitiMortgage. As part of the loan modification review, K. Snider provided CitiMortgage with copies of the Final Divorce Decree and the quit claim deed.

8. CitiMortgage approved K. Snider for a trial period payment plan ("Trial Plan") beginning May 1, 2011, with monthly Trial Plan payments of \$1,374.37. On July 25, 2011, the Trial Plan was converted to a Loan Modification Agreement, which was signed by K. Snider. Plaintiff did not sign the Loan Modification Agreement.

9. On September 12, 2011, Plaintiff filed a Rule to Show Cause and Affidavit with the Horry County Family Court. In the Affidavit, Plaintiff acknowledged the existence of the loan modification review, the fact that his name may not be removed from the loan as part of the loan modification, and requested that he be allowed to make future monthly payments directly to CitiMortgage.

10. The Horry County Family Court issued an Order dated August 9, 2012, which acknowledged the existence of the Loan Modification Agreement, and granted Plaintiff the relief requested in his Affidavit: That he pay the modified monthly payments in the amount of \$1,344.09, beginning August 1, 2012, until his monthly alimony obligation ceased on February 1, 2015 or the Mortgage was satisfied. Plaintiff's monthly alimony payment to K. Snider was offset by the modified Mortgage payment.

11. From August 1, 2012, to the date of the summary judgment hearing, Plaintiff paid the modified monthly Mortgage payments to CitiMortgage.

LEGAL STANDARD

12. Under Rule 56, SCRPC, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 547 (1991). Once

the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Id.* Rather, the non-moving party must come forward with specific facts showing there is a genuine issue for trial. *Id.*

FINDINGS AND CONCLUSIONS

13. Plaintiff asserts six (6) causes of action² against CitiMortgage: (1) declaratory judgment/novation; (2) estoppel; (3) rescission; (4) breach of contract/breach of the covenant of good faith and fair dealing; (5) violation of the South Carolina Consumer Protection Code;; and (6) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"). All six claims relate to and stem from the Loan Modification Agreement signed by K. Snider. CitiMortgage moved for summary judgment on all six (6) causes of action arguing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Having considered the arguments of the Parties and the applicable law, this Court agrees. Each cause of action is addressed, in turn.

14. First, this Court finds that the novation cause of action fails as a matter of law. Under South Carolina law, a novation is an "agreement between all parties concerned for the substitution of a new obligation between the parties with the intent to extinguish the old obligation." *Wayne Dalton Corp. v. Acme Doors, Inc.*, 302 S.C. 93, 96, 394 S.E.2d 5, 7 (Ct. App. 1990). At summary judgment, Plaintiff bears the burden of establishing that all parties consented to the substitution of a new agreement for an old one. *See id.* This Court finds that Plaintiff has failed to meet that burden. Under South

² Plaintiff asserts a seventh cause of action for interference with a contractual relationship and this Court finds that it is only asserted as to K. Snider and not as to CitiMortgage.

Carolina law, the modification of a pre-existing agreement is not a novation. *Moore v. Weinberg*, 373 S.C. 209, 218, 644 S.E.2d 740, 744 (Ct. App. 2007); *Superior Auto Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973). Here, the Loan Modification Agreement, based on its plain terms, modifies the existing agreement, *i.e.*, the Note and Mortgage; it does not extinguish it. Accordingly, this Court finds that Plaintiff's novation cause of action fails as a matter of law.

15. Second, this Court finds that South Carolina law recognizes estoppel as only a defense, not an independent claim. See *Collins Entm't, Inc. v. White*, 363 S.C. 546, 562, 611 S.E.2d 262, 270 (Ct. App. 2005). For this reason, Plaintiff cannot recover damages as to CitiMortgage on an estoppel theory and, therefore, summary judgment is proper. Additionally, this Court finds that the underlying theory for Plaintiff's estoppel cause of action fails for the same reasons as the novation cause of action. Specifically, the Court finds that the Loan Modification Agreement, by its own terms, is not a new and separate obligation from the Note and Mortgage. Further, this Court finds that Plaintiff failed to present any evidence showing that CitiMortgage induced him to alter his position, resulting in prejudice to him. *Rushing v. McKinney*, 370 S.C. 280, 293, 633 S.E.2d 917, 924 (Ct. App. 2006). Therefore, this Court finds that Plaintiff's estoppel "claim" fails as a matter of law.

16. Third, this Court finds that summary judgment in favor of CitiMortgage is also proper on these facts with respect to Plaintiff's rescission claim. Plaintiff seeks rescission due to the execution of the Loan Modification Agreement not being supervised by a South Carolina attorney. The undersigned finds that Plaintiff's theory does not support a claim for rescission in light of the South Carolina Supreme

Court's decision in *Crawford v. Central Mortg. Co.*, 404 S.C. 39, 47, 744 S.E.2d 538, 542 (2013). Therefore, summary judgment in favor of CitiMortgage is proper.

17. Fourth, Plaintiff asserts a Breach of Contract cause of action against Defendant CitiMortgage. CitiMortgage argues that Plaintiff has ratified the contract. This Court makes no findings as to the issue of ratification. However, based on the facts in this case and arguments of counsel, the Court finds modification of the original loan agreement does not constitute a breach of contract. Therefore, summary judgment is warranted as to this cause of action.

18. Fifth, the Court finds that the Loan Modification Agreement does not, as a matter of law, qualify as a "consumer credit transaction" or "consumer loan" to support a claim under the South Carolina Consumer Protection Code. See S.C. Code Ann. § 37-1-301(11); S.C. Code Ann. § 37-3-104; S.C. Code Ann. § 37-3-105. Because Plaintiff's Consumer Protection Code claim surrounds the signing of the Loan Modification Agreement, and appropriate disclosures related thereto, the undisputed facts presented do not invoke the protections of the South Carolina Consumer Protection Code. Therefore, the Court grants summary judgment in favor of CitiMortgage.

19. Sixth, the SCUTPA claim is subject to and barred by the regulated industry exception. See S.C. Code Ann. § 39-5-40(a). CitiMortgage, as a loan servicer, operates within a "robust regulatory regime," as recognized by the South Carolina Supreme Court in *Crawford*. 404 S.C. at 47, 744 S.E.2d at 542. For this reason, the Court finds that the SCUTPA's statutorily-defined exemption from liability applies and CitiMortgage is entitled to judgment as a matter of law. The undisputed facts evidence that Plaintiff was aware of the loan modification review, aware that his signature would

not be required for modification, and aware that he would remain liable for the underlying debt even in light of the resulting Loan Modification Agreement. For those reasons, this Court finds that the conduct was not, as a matter of law, unfair or deceptive sufficient to invoke the SCUTPA.


20. Finally, the Court notes that at the time of the filing of this action by Plaintiff, there was not a default on the payment terms under the Note, Mortgage, and Loan Modification Agreement, and neither a foreclosure action nor collection action has been filed by CitiMortgage. Further, Plaintiff failed to present any evidence that his credit had been damaged in light of the Loan Modification Agreement. In fact, Plaintiff admitted that his credit actually improved during the relevant time-frame. Thus, at this time, any alleged future damages would be considered uncertain, contingent, and speculative, at best. For these reasons, this Court finds that summary judgment is proper on the claims currently asserted by Plaintiff in light of the undisputed facts before this Court. To the extent Plaintiff suffers purported damages in the future as a result of a foreclosure or collection action, this Order does not serve as a bar to the assertion of new and independent claims, arising after the date of this Order, that may exist separate and apart from those asserted in this action.

21. For all of the foregoing reasons, this Court finds there is no genuine issue of material fact as to the causes of action asserted against CitiMortgage in Plaintiff's Complaint, and CitiMortgage is entitled to judgment as a matter of law.

THEREFORE, IT IS HEREBY ORDERED that CitiMortgage's Motion for Summary Judgment is **GRANTED**, in its entirety, CitiMortgage is entitled to

judgment as a matter of law on all of Plaintiff's claims, and they are hereby dismissed with prejudice.

AND IT IS SO ORDERED, this 23 day of Feb., 2015.


The Honorable D. Craig Brown
Presiding Judge, 15th Judicial Circuit

Florence, South Carolina

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COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS)
) **SC Court of Appeals**
FIFTEENTH JUDICIAL CIRCUIT)

Mitchell D. Snider,)
)
) Plaintiff,)

Civil Action No. 2013-CP-26-02135

vs.)

CERTIFICATE OF SERVICE

CitiMortgage, Inc. and Kim Sprinkle)
Snider,)
)
) Defendant.)

I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Defendant, CitiMortgage, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: Order filed February 24, 2015

Counsel Served: Benjamin A. Baroody, Esquire
Bellamy Law Firm
P.O. Box 357
Myrtle Beach, SC 29578

March 4, 2015

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SC Court of Appeals

Honorable Jenny Abbott Kitchings
Clerk of Court
Court of Appeals
1015 Sumter Street - 2nd Floor
Columbia, South Carolina 29201

Re: Mitchell D. Snider v CitiMortgage, Inc. and Kim Sprinkle Snider
Civil Action No.: 2013-CP-26402135
Appellate Case No.: 2015-001233
Our File No.: 24432.87961.39

Dear Ms. Kitchings:

Enclosed herewith please find two copies of the Order of the Honorable D. Craig Brown dated February 23, 2015, and filed with the Clerk of Court of Horry County on February 24, 2015 and the Order of the Honorable D. Craig Brown dated April 22, 2015, and filed with the Clerk of Court of Horry County on May 1, 2015 in connection with the above-referenced matter. I would kindly ask that these document be attached to the Notice of Appeal in Appellate Case No. 2015-001233.

With kindest regards, I am

Yours very truly,

BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.


Benjamin A. Baroody

BAB/dg
Enclosures as noted
cc: Client

Lindsey Headrick Altman, Esquire
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