

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

U.S. Bank National Association, as Trustee, as successor-in-interest to Bank of America, NA, as Trustee, as successor by merger to LaSalle Bank NA, as trustee for the holders of the Credit Suisse Seasoned Loan Trust 2006-1 Home Equity Pass-Through Certificates, Series 2006-1,

Plaintiff,

vs.

Lydia Elaine Haggwood (a minor), Felicia Wells as Personal Representative of the Estate of Essie L. Morgan, Daniel K. Felkner, First Financial Corporation; Susan M. Brown,

Defendants.

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2012-CP-40-0138

ORDER

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FEB 23 2016

SC Court of Appeals

This matter came before the Court at a hearing on April 22, 2015, on the Motion for Partial Summary Judgment and the Motion to Strike Jury Demand of Plaintiff U.S. Bank National Association, as Trustee, as successor-in-interest to Bank of America, NA, as Trustee, as successor by merger to LaSalle Bank NA, as trustee for the holders of the Credit Suisse Seasoned Loan Trust 2006-1 Home Equity Pass-Through Certificates, Series 2006-1 ("Plaintiff"). Sean M. Foerster, Esquire, appeared on behalf of Plaintiff. Brian L. Boger, Esquire, appeared on behalf of Defendant Felicia Wells as Personal Representative of the Estate of Essie L. Morgan ("Wells"). For the reasons below, the Court grants summary judgment in Plaintiff's favor as to both of Wells's counterclaims and her seventh defense (lack of standing). In light of the Court's granting of summary judgment, Plaintiff's motion to strike Wells's jury demand on her counterclaims is moot.

FINDINGS OF FACT

This is a mortgage foreclosure action. The original mortgage borrower, Essie L. Morgan, died testate on February 13, 2011. On September 27, 2012, Wells, the Personal Representative of the borrower's estate and sole defendant contesting this foreclosure, filed an Answer and Counterclaim in which she asserted the following four affirmative defenses: 1) unclean hands, 2) *in pari delicto*, 3) failure to mitigate damages, and 4) lack of standing. Wells also asserted two counterclaims: 1) violation of S.C. Code Ann. § 37-5-108 ("unconscionable debt collection"), and 2) violation of 15 U.S.C. § 1692e ("Fair Debt Collection Practices Act" or "FDCPA").

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Wells's defense of lack of standing, counterclaim for violation of S.C. Code Ann. § 37-5-108 ("unconscionable debt collection"), and counterclaim for violation of 15 U.S.C. § 1692e ("Fair Debt Collection Practices Act" or "FDCPA") are all based on allegations that the assignment of the Mortgage into the Plaintiff is invalid because it occurred after the trust's alleged closing date of February 28, 2006. (Ans. and Countercl. ¶ 32.) She argues that, as a result, the trust "could not legally acquire possession of any asset including the subject Mortgage" after that closing date, and that, without a valid assignment, Plaintiff has no right to collect the mortgage debt. *Id.*

However, there is no dispute that Plaintiff holds the original Note from the borrower, which contains a blank endorsement.¹ Plaintiff seeks summary judgment on both counterclaims and the defense of lack of standing.

STANDARD

Summary judgment "shall be rendered forthwith if 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, SCRCPC(c). "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Rule 56, SCRCPC(e).

"If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted." Rule 56(d), SCRCPC. "It may thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just." *Id.*

CONCLUSIONS OF LAW

For the following reasons, the Court grants Plaintiff summary judgment on both of Wells's counterclaims and her defense of lack of standing:

¹ Plaintiff's counsel presented the original note, containing the necessary endorsements, to the Court at the hearing on this motion.

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1. S.C. Code Ann. § 37-5-108 is inapplicable to the subject mortgage loan.

The Court grants summary judgment in favor of Plaintiff on Wells's counterclaim for violation of S.C. Code Ann. § 37-5-108 ("unconscionable debt collection") because that statute only applies to "consumer credit transactions," and the subject mortgage loan was not a consumer credit transaction.

"With respect to a *consumer credit transaction*, if the court as a matter of law finds that a person has engaged in, is engaging in, or is likely to engage in unconscionable conduct in collecting a debt arising from that transaction, the court may grant an injunction." S.C. Code Ann. § 37-5-108(2)(emphasis added).

"Consumer credit transaction" includes "a consumer credit sale (Section 37-2-104) or consumer loan (Section 37-3-104) or a refinancing or consolidation thereof, a consumer lease (Section 37-2-106), or a consumer rental-purchase agreement (Section 37-2-701)." S.C. Code Ann. § 37-1-301(11).

Because it is undisputed that the loan at issue in this case is secured by a first lien real estate mortgage, it does not fall within any of these types of transactions. S.C. Code Ann. § 37-3-105(1) ("consumer loan" does not include a loan secured by a first lien or equivalent security interest in real estate."); S.C. Code Ann. § 37-2-104(2)(b) ("consumer credit sale" does not include... a sale of an interest in land if the debt is secured by a first lien or equivalent security interest in real estate."); S.C. Code Ann. § 37-2-106(1) ("consumer lease" means a lease of goods...); S.C. Code Ann. § 37-2-701(6) ("Consumer rental-purchase agreement" means an agreement for the use of personal property...).

Therefore, this counterclaim fails as a matter of law.

2. The FDCPA is inapplicable to Plaintiff under these facts.

Plaintiff is entitled to summary judgment on Wells's counterclaim for violation of the FDCPA because Plaintiff is not a "debt collector" regulated by the FDCPA.

A "debt collector" only includes "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6)(emphasis added).

Because Plaintiff is the holder of the Note and is attempting to collect the subject debt for itself, it is a "creditor"² rather than a debt collector with respect to this loan.

"Creditors" are not subject to liability under the FDCPA. *See Maguire v. Citicorp Retail Services, Inc.*, 147 F.3d 232, 235 (2nd Cir. 1998) ("As a general matter, creditors are not subject to the FDCPA");

² "Creditor" means "any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. § 1692a(4)(emphasis added).

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Staub v. Harris, 626 F.2d 275, 277 (3rd Cir. 1980)(“The [FDCPA] does not apply to persons or businesses collecting debts on their own behalf”); *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th Cir. 1985)(“The legislative history of section 1692a(6) indicates conclusively that a debt collector does not include the consumer’s creditors”); *MacDermid v. Discover Fin. Services*, 488 F.3d 721, 734 (6th Cir. 2007)(“The term ‘debt collector’ has a particular meaning, however: it refers only to persons attempting to collect debts due ‘another’”); *Aubert v. American Gen. Fin., Inc.*, 137 F.3d 976, 978 (7th Cir. 1998)(“Because creditors are generally presumed to restrain their abusive collection practices out of a desire to protect their corporate goodwill, their debt collection activities are not subject to the [FDCPA] unless they collect under a name other than their own”).

Therefore, this counterclaim fails as a matter of law.

3. The assignment of mortgage is irrelevant to Plaintiff’s standing to foreclose.

Whether Plaintiff took an assignment of mortgage after the trust’s closing date is irrelevant to the issue of Plaintiff’s standing because, under South Carolina law and the terms of the Note and Mortgage, Plaintiff holds both instruments and has the right to enforce them.

A person or entity is entitled to enforce a negotiable promissory note if they are “(i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 36-3-309 or 36-3-418(d).”³ S.C. Code Ann. § 36-3-301. A “holder” is a person or entity “who is in possession of a document or title or an instrument or a certificated investment security drawn, issued, or indorsed to him or to his order or to bearer or in blank,” i.e., someone who takes the promissory note through the process of “negotiation.” S.C. Code Ann. § 36-1-201(20); S.C. Code Ann. § 36-3-201. “When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.” § 36-3-205(b).

In this case, there is no dispute that Plaintiff has physical possession of the original Note containing an endorsement in blank from the prior holder. The terms⁴ of the original Note confirm Plaintiff’s right to enforce it.

South Carolina has long upheld “the familiar and uncontroverted proposition ... that the assignment of a note secured by a mortgage carries with it an assignment of the mortgage, but that the assignment of the mortgage alone does not carry with it an assignment of the note.” *Hahn v. Smith*, 157

³ S.C. Code Ann. § 36-3-309 deals with the enforcement of instruments which have been lost, destroyed, or stolen, and S.C. Code Ann. § 36-3-418(d) deals with circumstances where an instrument has been paid or accepted by mistake and the payor or acceptor recovers payment or revokes acceptance. Neither is applicable here.

⁴ “The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the ‘Note Holder.’” Note ¶ 1. “The Note Holder may enforce its rights under this Note against each person individually or against all of us together.” Note ¶ 8.

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S.C. 157, 154 S.E. 112, 115 (1930); *see also Ballou v. Young*, 42 S.C. 170, 20 S.E. 84, 85 (1894) (“The transfer of a note carries with it a mortgage given to secure payment of such note.”). Thus, when Plaintiff became the holder of the note, it is also became the holder of the mortgage. “No written assignment of the mortgage is required under state law.” *In re Woodberry*, 383 B.R. 373, 377 (Bkrcty. D.S.C. 2008).

As the holder of the Note, Plaintiff has the right to enforce both the Note and Mortgage and the right to collect the underlying debt. The trust’s closing date and the date of the mortgage assignment are irrelevant to the Plaintiff’s right to collect the debt and foreclose the mortgage. The type of argument made by Wells in this case has been rejected by the Fourth Circuit Court of Appeals in a case construing South Carolina law. *Scheider v. Deutsche Bank Nat. Trust Co.*, 572 F. App’x 185, 188-89 (4th Cir. 2014)(“The Scheiders argue primarily that the assignment of their mortgage five years after the trust’s closing date violated the terms of the PSA and is thus void ... [b]ut we need not evaluate the impact of the PSA. Under South Carolina law and the terms of the instruments themselves, Deutsche Bank holds both the note and the mortgage.”).

Therefore, Wells’s lack of standing defense and both counterclaims fail as a matter of law.

4. Reference of case.

In light of the Court granting summary judgment on both counterclaims, Plaintiff’s Motion to Strike Jury Demand is moot as there are no longer any claims in this action for which there is a right to a jury trial. *Carolina First Bank v. BADD, L.L.C.*, 2015 WL 340791, at *1 (S.C. Jan. 28, 2015), *reh’g granted* (Apr. 9, 2015)(“Because a foreclosure action is one sounding in equity, a party is not entitled, as a matter of right, to a jury trial.”). Thus, this action is now properly referable to the Master in Equity. Rule 53(b), SCRPC (“In ... an action for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court.”).

IT IS THEREFORE ORDERED THAT:

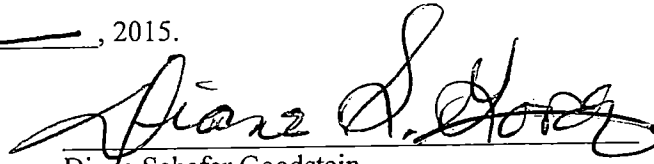
1. Plaintiff’s motion for partial summary judgment as to Wells’s defense of lack of standing, counterclaim for violation of S.C. Code Ann. § 37-5-108, and counterclaim for violation of 15 U.S.C. § 1692e is granted;
2. Plaintiff’s motion to strike jury demand is moot; and
3. This entire action is referred to the Honorable Joseph M. Strickland, as Master in Equity, to take testimony and to direct entry of final judgment in this action under Rule 53(b), SCRPC, and all matters arising from or reasonably related to such action. The Master in Equity shall retain jurisdiction to perform all necessary acts incident to this foreclosure action, including issuance of a writ of assistance or issuance of any rule to show cause, including, but not limited to, any rule to show cause why a party should not be bound by the judgment of foreclosure. Further, the Master in Equity shall retain jurisdiction to hear any action contesting the validity of the foreclosure action or sale or any motions pursuant to the

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South Carolina Rules of Civil Procedure, including, but not limited to, Rule 60(b), SCRPC. Judicial sales will be conducted pursuant to S.C. Code § 15-39-680 or on any other convenient sale's date as may be determined by the Master in Equity.

AND IT IS SO ORDERED.

This 2 day of June, 2015.



Diane Schafer Goodstein
Circuit Court Judge

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Sean M. Foerster
Circuit Judge

2112
Judge Code

6-2-2015
Date

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For Clerk of Court Office Use Only

FEB 23 2016

This judgment was entered on the appropriate attorney's box on this se) as follows:

day of May, 2015 and a copy mailed first class or placed in the day of May, 2015 to attorneys of record or to parties (when appearing pro SC Court of Appeals

Sean M. Foerster, Esquire
Rogers Townsend & Thomas, P.C.
P. O. Box 100200
Columbia, SC 29202

Brian L. Boger, Esquire
Law Offices of Brian L. Boger
P. O. Box 85
Columbia, SC 29202-0085

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Felicia Wells
7435 Innisfree Place
Charlotte, NC 28226

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

