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SC Court of Appeals

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

2015 SEP 11 PM 3:58

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

C.A. No. 2012-CP-07-...

TD Bank, N.A., Successor by Merger to Carolina First Bank,

Plaintiff,

v.

Black Diamond, LLC; J. Christopher Lindgren; David A. Brosman; Julie H. King; and The Greenery, Inc.,

Defendants.

BEAUFORT COUNTY, S.C.
CLERK OF COURT

ORDER GRANTING TD BANK'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANT'S CLAIMS FOR BREACH OF CONTRACT; BREACH OF FIDUCIARY DUTY; DURESS; AND UNFAIR TRADE PRACTICES

In this foreclosure action, TD Bank, N.A., Successor by Merger to Carolina First Bank, ("**TD Bank**" or "**the Bank**") has moved the Court to grant it summary judgment on Defendants Black Diamond, LLC, J. Christopher Lindgren, and David A. Brosman's[1] (collectively, "**Defendants**") counterclaims, contending that there are no genuine issues of material fact as to any such claims. On March 24, 2015, the Court held a hearing on the Bank's Summary Judgment Motion.

After review of the Bank's Motion and its supporting Memorandum, Defendants' Memorandum in Opposition, and hearing arguments from counsel, the Court, for the reasons set forth below, **GRANTS** TD Bank summary judgment on Defendants' breach of contract and of the covenant of good faith and fair dealing claim as it relates to the cross-collateralization of the loans and the Bank's decision not to agree to a proposed short sale; breach of fiduciary duty; duress; and unfair trade practices, but it **DENIES** the Bank's Motion for Summary Judgment on Defendants' remaining counterclaims.

[1] The remaining defendants in this case, Julie H. King and The Greenery, Inc., have not made claims against the Bank.

BACKGROUND:

This is a commercial foreclosure action involving:

- Two promissory notes that Defendant Black Diamond, LLC ("**Black Diamond**") executed in favor of the Bank: (1) a January 2008 Promissory Note for $3.5 Million ("**the $3.5 Million Note**"), and (2) a July 2008 Promissory Note for $2 Million ("**the $2 Million Note**") (collectively, "**the Notes**");
- Mortgages on two parcels of Beaufort County, South Carolina real property that Black Diamond provided to the Bank to secure the Notes ("**the Mortgages**"); and
- Guaranty Agreements that Defendants J. Christopher Lindgren and David A. Brosman (collectively, "**the Guarantors**") executed in favor of the Bank and which guaranteed Black Diamond's payment of the Notes.

Pursuant to the terms of the $2 Million Note, the Notes are cross-collateralized. $2 Million Note, at ¶ 10. In particular, the $2 Million Note provides: "This Loan is cross-collateralized and cross defaulted with [the $3.5 Million Note] in the name of Black Diamond, LLC in the amount of $3,500,000.00 dated January 25, 2008 secured by real estate mortgage." Id.

TD Bank alleges that Black Diamond is in default under the Notes, and it seeks to foreclose on the Mortgages that Black Diamond executed in its favor and recover any deficiency after the foreclosure sale from the Guarantors, who guaranteed Black Diamond's debts to the Bank. Compl.

In response to the Complaint, Black Diamond and the Guarantors filed the following counterclaims against the Bank: breach of the covenant of good faith and fair dealing; breach of contract; breach of fiduciary duty; negligent misrepresentation; duress; interference with prospective economic relations; and unfair trade practices. Those counterclaims are all based on the following allegations: (1) that the Bank coerced Defendants into cross-collateralizing the loans and agreeing to the retention of a property manager; (2) that TD Bank interfered with the property manager's contract; (3) that TD Bank elected not to agree to a September 2010

proposed short sale (which entailed a release of its mortgage on one parcel of property in conjunction with a proposed sale for an amount less than what was owed on the corresponding note); and (4) that TD Bank interfered with tenants. Answer and Counterclaims.

FINDINGS:

I. TD Bank Is Entitled to Summary Judgment on Defendants' Claim for Breach of Contract and of the Covenant of Good Faith and Fair Dealing to the Extent that Cause of Action Is Based on the Bank's Cross-Collateralization of the Notes and the Bank's Refusal to Consent to a Short Sale.

To the extent that Defendants' counterclaim for breach of contract and covenant of good faith and fair dealing[2] is based on the Bank's cross-collateralizing of the Loans and its refusal to consent to a September 2010 proposed short sale, the Court grants TD Bank summary judgment because there are no material questions of fact and the Bank is entitled to judgment as a matter of law as the statute of limitations bars any breach based on the July 2008 cross-collateralization and South Carolina law imposes no duty on a Bank to modify loan documents.

A. Cross-Collateralization of Loans:

Defendants contend that the Bank breached the Notes by cross-collateralizing them in July 2008. However, the statute of limitations for such a claim lapsed before Defendants filed their breach of contract counterclaim. S.C. Code Ann. § 15-3-530 provides a three year statute of limitation for breach of contract claims. The discovery rule determines the date of accrual for such a legal claim, and, under that rule, Defendant's breach of contract claim based on the cross-collateralization of the Notes accrued on the date Defendants "either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence." Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct. App. 1998). In this case,

[2] South Carolina does not recognize a cause of action for the breach of the covenant of good faith and fair dealing that is independent and separate from a breach of contract cause of action. See, e.g., RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004).

Defendants admit that the Notes were cross-collateralized and allegedly breached in July 2008. See Lindgren Depo., at 50:111 (acknowledging the loans were cross-collateralized in July 2008). Furthermore, the very text of the $2 Million Note, which was executed in July 2008, expressly states that the Note is "cross-collateralized and cross defaulted with" the $3.5 Million Note, and Defendants are charged with knowledge of that Note's provisions. See e.g., generally, York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 81, 749 S.E.2d 139, 146 (Ct. App. 2013 (A "party who signed a contract is deemed to have read and understood 'the effect' of the contract"). However, Defendants did not file their counterclaim based on that cross-collateralization until April 2012 (for Black Diamond and Lindgren) and May 2012 (for Brosman) — over three years after they knew of the cross-collateralization and the alleged breach. As a result, to the extent Defendants' breach of contract cause of action is based on the cross-collateralization of the Notes, the statute of limitation bars the claim and TD Bank is entitled to summary judgment on it as a matter of law.

B. Proposed Short-Sale:

Additionally, the Bank is entitled to summary judgment on Defendants' breach of contract claim to the extent that cause of action is based on the Bank's refusal to release its mortgage in conjunction with a September 2010 proposed sale of the property for an amount less than that owed by Defendants on the Notes. Defendants contend that the Bank had a duty to not only consider a loss mitigation / short sale proposal, but to also approve the sale of its collateral for less than the amount owed. There is simply no legal authority or contractual agreement between the parties to support or establish such an alleged duty, which essentially would rewrite the terms of the parties loan documents. In fact, other courts have held that banks had no legal duty to consider or approve loss mitigation or loan modification requests. See, e.g., James v.

Vanderbilt Mortgage, 2012 WL 441170, *4 (W.D.N.C. Jan. 23, 2012), affirmed and adopted, 2012 WL 440355 (W.D.N.C. Feb. 10, 2012) (holding that the lender had "no duty to forgo its rights under the terms of the loan to foreclose on the property"); Mudge v. Bank of Am., N.A. and TD Bank, N.A., 2013 WL 6095561, *3 (D.N.H. Nov. 20, 2013) (noting that a short sale "necessarily rewrites the terms of the parties' mortgage agreement," and the covenant of good faith and fair dealing in a loan document "cannot be used to require the lender to modify or restructure the loan").

As a result, to the extent Defendants' breach of contract claim is based on the breach of that non-existent duty, it fails as a matter of law.

II. The Bank Also Is Entitled to Summary Judgment on Defendants' Breach of Fiduciary Duty Claim Because There Is No Evidence that the Bank Either Owed Bank Owed No Fiduciary Duty to Defendants.

The Court also grants TD Bank summary judgment on Defendants' breach of fiduciary claim, which fails as a matter of law because there is no evidence that the Bank owed a fiduciary duty to Defendants or that the Bank breached such a purported duty.

To establish a claim for breach of fiduciary duty, Defendants must establish: (1) that the Bank owed them a fiduciary duty; (2) that the Bank breached that duty; and (3) that Defendants have suffered damages as a proximate result of that breach. See generally Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004). "A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." Regions Bank v. Schmauch, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct. App. 2003). However, "South Carolina holds [that] the normal relationship between a bank and its customer is one of creditor-debtor and **is not fiduciary in nature**," id., at 671, 582 S.E.2d at 444, and Defendants have presented

claim is based on the cross-collateralization of the loans, the applicable statute of limitations, S.C. Code Ann. § 15-3-530, bars such a cause of action.

For the reasons explained above, the Court grants the Bank summary judgment on Defendants' counterclaim for duress.

IV. The Court Also Grants the Bank Summary Judgment on Defendants' UTPA Claim.

The Court grants the Bank summary judgment on Defendants' UTPA counterclaim because the UTPA does not apply to private transactions like the ones involved in this case, where there is no evidence of adverse effect on the public interest. The South Carolina Supreme Court has refused to provide a test to determine what constitutes an "impact upon the public interest," but that requirement is most commonly met by demonstrating that acts or practices have the potential for repetition. See Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986); Global Protection Corp. v. Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (Ct. App. 1998). "The potential for repetition may be shown in two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts." Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998). A mere breach of contract cannot constitute a violation of the SCUPTA. See Key Co., Inc. v. Fameco Distr., Inc., 292 SC 524, 357 S.E.2d 476 (Ct. App. 1987). Moreover, "conduct which only affects the parties to the transaction provides no basis for a UTPA claim . . . ." Jefferies v. Phillips, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994).

Here, we have nothing more than a dispute between parties to a private loan transaction as documented in the loan documents. The sole act or practice of the Bank identified by

Defendants as purportedly affecting the public interest was its decision not to release its mortgage to accommodate the September 2010 proposed short sale. Such a decision is dependent on a number of unique factors, including the property in question, the terms of the subject loan documents and the amounts owed on the notes secured by the property, and is a matter solely and uniquely between Plaintiff and Defendants, not affecting the public interest. See, e.g., Drs. Steuer & Latham, P.A. v. Nat'l Med. Enterprises, Inc., 672 F. Supp. 1489, 1522 (D.S.C. 1987) aff'd, 846 F.2d 70 (4th Cir. 1988) (granting summary judgment based on absence of a showing of harm to the public interest); Jefferies v. Phillips, 316 S.C. 523, 527-28, 451 S.E.2d 21, 23 (Ct. App. 1994) ("To be actionable under the UTPA, an unfair or deceptive practice or act must adversely affect the public interest. Therefore, conduct which only affects the parties to the transaction provides no basis for a UTPA claim. This adverse effect on the public must be proved by specific facts. . . . Jefferies introduced no evidence of specific facts which show any member of the public was adversely affected by this transaction. Without this showing, Phillips' conduct cannot be said to affect anyone other than the parties to this controversy, in which case the conduct falls outside the scope of the UTPA.").

Alternatively, the Bank, which is federally regulated, is exempt from the provisions of the UTPA; as a result, Defendants' UTPA counterclaim fails a matter of law. The application of the UTPA is drawn from the interpretation of 15 U.S.C. 45(a)(1), the corollary federal statute granting authority to the Federal Trade Commission ("**FTC**") to regulate and prohibit unfair methods of competition and unfair and deceptive acts affecting commerce. See S.C. Code § 39-5-20 (providing that "[i]t is the intent of the legislature that in construing paragraph (a) of this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to § 5(a) (1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)),

as from time to time amended"). Banks are specifically exempt from the Federal Trade Commission's (the "**FTC**") power to regulate and prohibit unfair competition and unfair or deceptive acts that affect commerce. See 15 U.S.C. 45(a)(2) ("The Commission is hereby empowered and directed to prevent persons, partnerships or corporations, ***except banks*** . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.") (emphasis added). Thus, because the UTPA looks to the FTC for guidance regarding the applicability and enforcement of the provisions of the UTPA, federally regulated banks are likewise exempt from the provisions of the UTPA. See, e.g., Lands Inn, Inc. v BB&T of South Carolina, 2:98-158-23 (D.S.C. Apr. 12, 1999); JJH Transport, LLC and Joel Herring v. BB&T of South Carolina, 2006-CP-21-1814 (S.C. Court Common Pleas, Florence County); BB&T of South Carolina v. Eartha Marshall, 2003-CP-40-3272 (S.C. Court Common Pleas, Richland County).

Accordingly, summary judgment should be granted and Defendants' UTPA claim should be dismissed.

CONCLUSION:

WHEREFORE, the Court **GRANTS** TD Bank summary judgment on Defendants' counterclaims for: (1) breach of contract and of the covenant of good faith and fair dealing, to the extent that claim is based on the cross-collateralization of the loans and the Bank's decision not to agree to a proposed short sale; (2) breach of fiduciary duty; (3) duress; and (4) unfair trade practices. However, the Court **DENIES** the Bank's Motion to Summary Judgment on Defendants' remaining counterclaims for: (1) negligent misrepresentation; (2) interference with prospective economic relations; and (3) breach of contract and of the covenant of good faith and

fair dealing to the extent such a claim is *not* based on the cross-collateralization of the loans or the Bank's decision not to consent to the proposed short sale.

IT IS SO ORDERED.

This 11 day of 6/1/ 2015

The Honorable Marvin H. Dukes, III

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