

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Peach REO, LLC, a Delaware limited liability company,)

Civil Action No. 2015-CP-42-4448

Plaintiff,)

vs.)

**ORDER GRANTING
MOTION TO DISMISS
COUNTERCLAIMS AND
THIRD-PARTY COMPLAINT**

Blalock Investments, LLC; Todd Smith; Debra Masuga; Subway Real Estate, LLC; and County of Spartanburg, a political subdivision of the State of South Carolina,)

Defendants.)

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SC Court of Appeals

and)

Blalock Investments, LLC; Todd Smith; and Debra Masuga,)

Third Party Plaintiffs,)

vs.)

Capital Crossing Servicing Company, LLC,)

Third Party Defendant.)

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This matter came before the Court at 3:00 p.m. on Thursday, May 26, 2016, for the purpose of hearing the Motion to Dismiss the Counterclaims and Third-Party Complaint of Defendants/Third-Party Plaintiffs Blalock Investments, LLC, Todd Smith, and Debra Masuga (collectively, "Debtors") filed in this matter by Plaintiff Peach REO, LLC, a Delaware limited liability company ("Peach"), and Third-Party Defendant Capital Crossing Servicing Company, LLC ("Capital Crossing," and collectively with Peach, the "Lender"). After a review of the Motion before the Court and hearing

arguments from counsel for Peach, Capital Crossing, and Debtors, I hereby **GRANT** Lender's Motion:

FINDINGS OF FACT:

1. This is a foreclosure action based on a \$1.9M note and mortgage by Blalock Investments, LLC, which was guaranteed by Todd Smith and Debra Masuga.
2. Debtors admit they defaulted in the monthly payments on the loan in February 2013, failed to pay the loan in full upon its maturity in October 2013, and failed to pay the property taxes, which caused the property to be sold at a tax sale in November 2013.
3. Debtors asserted the following counterclaims against Peach and third-party claims against Capital Crossing:
 - a. Counterclaim for breach of the implied covenant of good faith and fair dealing;
 - b. Counterclaim and third-party claim for violation of South Carolina's Unfair Trade Practices Act;
 - c. Counterclaim and third-party claim for tortious interference with contract; and
 - d. Counterclaim and third-party claim for failure to act in a commercially reasonable manner.
4. Lender filed the instant Motion to Dismiss the counterclaims and third-party claims.

CONCLUSIONS OF LAW:

5. Debtors' claims are all generally based on their assertion that Lender should have allowed them to "mitigate its damages and reduce or eliminate the amount owed" by the

Debtors following their default. See generally Answer, Counterclaims, and Third-Party Complaint at ¶¶ 56, 59.

6. However, Lender was entitled to recover the full amount owed on the loan and had no duty to mitigate these damages in any way. Cisson Const., Inc. v. Reynolds & Associates, Inc., 311 S.C. 499, 503-04, 429 S.E.2d 847, 849-50 (Ct. App. 1993) (holding lenders have no duty to mitigate their damages where they have a right to recover the full amount sought upon borrowers' default) (citing 22 Am. Jur. 2d Damages § 506 (1988)); see also Wells Fargo Bank, N.A. v. C&S Carolina Ventures, LLC, et al., Order by Master-in-Equity Gordon Cooper Granting Plaintiff's Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment (June 22, 2012) (relying on Cisson to find that a lender had no duty to accept a short sale for less than the full balance due on the subject loan after the borrowers' default); Wells Fargo Bank, N.A. v. Coastal Consulting & Development Co., LLC, et al., Order by Master-in-Equity Mikell Scarborough Granting Plaintiff's Motion for Summary Judgment (August 27, 2012) (relying on Cisson to find that a lender had no duty to accept a short sale for less than the full balance due on the subject loan after the borrowers' default).
7. Moreover, the specific conduct on which each of Debtors' counterclaims and third-party claims are based fails to support any cause of action.
8. First, Debtors complain they were not given an extension or modification of the subject loan and have not been able to reach any settlement on the loan.
9. Debtors have not identified any contractual provision or other legal authority that requires Lender to give Debtors an extension or settlement of their loan.

10. To the contrary, Lender is not obligated to extend or modify the loan or accept any settlement for less than the full balance owed on the loan pursuant to the loan documents and South Carolina law. See Promissory Note attached to Amended Complaint as Exhibit A at p. 2 (“[Blalock Investments, LLC] agree[s] that [Lender] may at [Lender’s] option extend this note”) (emphasis added); Guarantees attached to Amended Complaint as Exhibit J at p. 2 (“Lender may, but shall not be obligated to, enter into transactions resulting in the creation or continuance of indebtedness”) (emphasis added); see also Cisson Const., Inc., 311 S.C. at 503-04, 429 S.E.2d at 849-50; Branch Banking and Trust Co. of South Carolina v. Carolina Crank & Core, Inc., 362 S.C. 647, 608 S.E.2d 896 (Ct. App. 2005) (recognizing a lender’s right to refuse renewal of a note and proceed with its right to enforce its remedies instead); S.C. Code Ann. § 37-10-107 (actions based on a lender’s failure to renew, modify, amend, or cancel a loan are barred unless the plaintiff has a writing signed by the lender containing the material terms and conditions).
11. In any event, Debtors allege they were offered a six-month extension if they brought the loan current and paid \$200,000.00 at the original maturity date, which they refused.
12. Therefore, Debtors’ complaint that Lender did not give them an extension, modification, or settlement of the subject loan fails to state any cause of action against Lender.
13. Next, Debtors alleged that Lender failed to immediately take action on Debtors’ liability after Debtors’ default on the loan.
14. Again, Debtors have not identified any contractual provision or other legal authority which would require Lender to take such immediate action.

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15. To the contrary, Lender is not obligated to take any action immediately after Debtors' default pursuant to the loan documents. See Promissory Note attached to Amended Complaint as Exhibit A ("By waiving your right to declare an event to be a default, you do not waive your right to later consider the event as a default if it continues or happens again.").
16. Debtors do not dispute that the instant foreclosure action was filed within the statute of limitations.
17. Accordingly, Debtors' complaint that Lender did not immediately take action against them following their default fails to state any cause of action against Lender.
18. Next, Debtors complain that Lender did not consider or approve proposed leases or short sales of the subject property since their default.
19. Again, Debtors have not identified any contractual provision or other legal authority that obligates Lender to consider or approve such short sales or leases.
20. To the contrary, Lender was not obligated to approve any lease or sale of the subject property in lieu of being paid the full amount owed on the loan. Cisson Const., 311 S.C. at 503-04, 429 S.E.2d at 849-50; C&S Carolina Ventures, Order by Master-in-Equity Gordon Cooper Granting Plaintiff's Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment (June 22, 2012); Coastal Consulting, Order by Master-in-Equity Mikell Scarborough Granting Plaintiff's Motion for Summary Judgment (August 27, 2012).
21. Therefore, Debtors' complaint that Lender did not consider or approve proposed leases or short sales of the subject property following Debtors' default fails to state any cause of action against Lender.

22. Debtors additionally allege that Lender is seeking “more than what was owed on the loan at maturity”—specifically, interest, late fees, and unpaid property taxes that have accrued since Debtors failed to pay the loan in full once it matured—which Debtors attribute to Lender’s actions in refusing to approve sales or leases of the property or immediately pursuing its legal remedies.
23. As set forth above, Lender had no obligation to approve short sales or leases or to immediately pursue its legal remedies.
24. More importantly, Debtors ignore the fact that they could have avoided the accrual of these amounts by paying the loan and property taxes as they were required to do. See Mortgage at § 2, attached to Amended Complaint as Exhibit B (“Mortgagor shall pay all taxes, charges and assessments which may become a lien upon the premises . . .”).
25. Because each of the Debtors’ counterclaims and third-party claims is based on conduct which fails to state any cause of action against Lender, each of these claims is hereby dismissed.
26. Additionally, Debtors’ counterclaim for breach of the implied covenant of good faith and fair dealing is hereby dismissed because South Carolina courts do not recognize it as an independent cause of action. RoTec Services, Inc. v. Encompass Services, Inc., 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004) (concluding that “the implied covenant of good faith and fair dealing is not an independent cause of action . . .”); see also Regions Bank v. College Ave. Development, LLC, 2010 WL 973480, at * 3 (D.S.C. 2010) (concluding that breach of implied covenant of good faith and fair dealing is not an independent cause of action); In re Ducane Gas Grills, Inc., 320 B.R. 341, 354 (Bankr.

D.S.C. 2004) (holding that breach of implied covenant of good faith and fair dealing cause of action is not an independent cause of action).

27. Debtors have not asserted an independent claim for breach of contract nor have they identified any specific contractual provisions which Lender allegedly violated.

28. Moreover, Debtors have not even alleged the existence of a contract between them and Capital Crossing, the loan servicer.

29. Instead, as set forth in more detail above, each of the acts by Lender complained of by Debtors was within Lender's rights as set forth in the loan documents and South Carolina law.

30. Accordingly, Debtors' cause of action for breach of the implied covenant of good faith and fair dealing does not state an independent cause of action and is hereby dismissed for this additional reason.

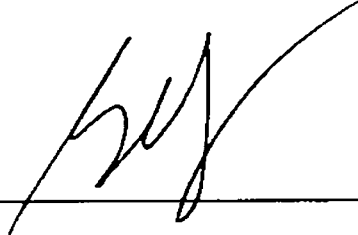
31. This Court has considered all other arguments in opposition to this Motion advanced by Debtors and found them to be without merit.

Based on these findings of facts and conclusions of law,

IT IS HEREBY ORDERED that the Motion to Dismiss Counterclaims and Third-Party Complaint is granted; and

IT IS FURTHER ORDERED that each of the counterclaims and third-party claims are hereby dismissed.

AND IT IS SO ORDERED.



The Honorable Gordon G. Cooper
Master-in-Equity for Spartanburg County

Columbia South Carolina
June 8, 2016.

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