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APR 13 2017

SC Court of Appeals

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS)
FIFTEENTH JUDICIAL CIRCUIT)

Deutsche Bank National Trust Company,)
as Trustee on Behalf of the)
Certificateholders of Morgan Stanley ABS)
Capital I Inc. Trust 2004-NC8 for)
Mortgage Pass Through Certificates, Series)
2004-NC8,)

Civil Action No. 2012-CP-26-04695

Plaintiff,)

vs.)

James T. Burr a/k/a James Burr and Grand)
Water & Sewer Authority,)

Defendants.)

**ORDER GRANTING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

2017 APR 13 30 AM 8:31
HORRY COUNTY
CLERK OF COURT

CPA
BEFORE THE COURT is Plaintiff Deutsche Bank National Trust Company, as Trustee on Behalf of the Certificate holders of Morgan Stanley ABS Capital I Inc. Trust 2004-NC8 for Mortgage Pass Through Certificates, Series 2004-NC8's ("Deutsche Bank") Motion for Partial Summary Judgment as to Defendant James T. Burr a/k/a James Burr's ("Burr") counterclaims and affirmative defenses. The parties appeared before this Court for a hearing on Deutsche Bank's motion on September 22, 2016. Deutsche Bank and Burr were represented by counsel at the hearing. After consideration of the pleadings, the parties' written submissions, and oral argument of counsel, the Court finds as follows:

FINDINGS OF FACT

1. On September 25, 2004, Burr executed a note (the "Note") in the amount of \$107,250.00 and secured by a mortgage (the "Mortgage") on certain real property located at 1414 North Dogwood Drive, Garden City, SC 29576 (the "Property").
2. The Note and Mortgage were later assigned to Deutsche Bank.

3. On June 13, 2012, Deutsche Bank commenced this foreclosure action against Burr alleging that Burr had been in default on the loan since June 1, 2009.

4. On October 18, 2013, Burr filed an Amended Answer and Counterclaim.

5. Burr's Amended Answer and Counterclaim asserted counterclaims for accounting, violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), S.C. Code Ann. § 39-5-10, *et seq.*, and negligent misrepresentation, and affirmative defenses for unclean hands, estoppel, and novation.

6. All of Burr's counterclaims and affirmative defenses are based on the allegation that in mid-2008, the servicer of the loan did not finalize and close a refinance loan agreement after Burr allegedly applied for it.

7. Burr alleges that the refinance loan failed to close because the parties could not agree on who would conduct the closing.

8. By consent order, this case was referred to the Master-in-Equity for Horry County, South Carolina on July 8, 2016, with authority to enter a final judgment.

9. Thereafter, Deutsche Bank moved for partial summary judgment and a hearing was set for December 15, 2015. The only response in opposition filed by Burr was an affidavit from Burr's attorney saying he could not oppose the motion because Burr would not communicate with him.

10. That hearing was continued on December 14, 2015, after Burr's attorney filed a motion to be relieved as counsel because he could not reach his client.

11. The motion to be relieved was subsequently withdrawn on March 10, 2016, and Burr moved for summary judgment on Deutsche Bank's claim. A hearing on cross-motions for summary judgment was held on May 12, 2016.

12. On June 7, 2016, the Court, with Burr's consent, dismissed Burr's negligent misrepresentation counterclaim.

13. The Court denied summary judgment as to all remaining claims, holding that both parties should complete discovery before a final judgment was determined.

14. On June 8, 2016, Deutsche Bank served on Burr its First Set of Interrogatories, Requests for Production, and Requests to Admit.

15. Among other things, Deutsche Bank's Requests to Admit asked the following:

- a. Admit Defendant did not sign a promissory note concerning the refinance loan that he alleges he applied for in the Answer and Counterclaim and that forms the basis of his counterclaims and affirmative defenses.
- b. Admit that Defendant did not sign a mortgage concerning the refinance loan that he alleges he applied for in the Answer and Counterclaim and that forms the basis of his counterclaims and affirmative defenses.
- c. Admit Defendant has never made a payment on the refinance loan that he alleges he applied for in his Answer and Counterclaims and that forms the basis of his counterclaims and affirmative defenses.

16. Burr failed to respond to Deutsche Bank's discovery requests within thirty days. Accordingly, the Requests to Admit are deemed admitted pursuant to Rule 36(a) of the South Carolina Rules of Civil Procedure.

17. Deutsche Bank's counsel wrote to Burr's counsel on July 19, 2016, informing Burr that his discovery responses were overdue and requesting Burr provide responses to the Interrogatories and Requests for Production by July 22, 2016.

18. On July 25, 2016, having received no response, Deutsche Bank moved to dismiss Burr's counterclaims and affirmative defenses for failure to prosecute and, in the alternative, for summary judgment.

19. A hearing on Deutsche Bank's motion was scheduled for September 22, 2016.

20. On September 21, 2016, Burr's counsel served responses to Deutsche Bank's Interrogatories and Requests for Production.

21. Neither party submitted the discovery responses as an exhibit at the September 22, 2016, hearing. However, at the hearing Burr's counsel admitted that the responses did not create a genuine issue of material fact that would prevent summary judgment from being granted.

22. Despite several invitations from the Court, Burr has never submitted any evidence concerning his application for, or the terms of, the refinance loan that he alleges he entered into in 2008.

CONCLUSIONS OF LAW

23. A motion for summary judgment should be granted where the Court is satisfied 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), SCRCF. A party opposing a motion for summary judgment must "do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial." *Hedgepath v. AT&T Co.*, 378 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct. App. 2001). Moreover, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013). Reliance on allegations in a pleading is insufficient to overcome a motion for summary judgment. Rule 56(e), SCRCF.

24. All of Burr's counterclaims and affirmative defenses are based on an alleged agreement to refinance his loan in 2008 that was never consummated.

25. Burr has produced no application for a loan refinance or other documentation demonstrating the material terms of the refinance agreement or that both parties entered into the agreement.

26. By failing to respond to Deutsche Bank's requests to admit, Burr admitted that he did not sign a promissory note or mortgage concerning the alleged 2008 refinance loan and that he has never made a payment on that alleged loan.

27. Moreover, during the hearing on Deutsche Bank's motion to dismiss for failure to prosecute or, in the alternative, for summary judgment, Burr's counsel admitted Burr's discovery responses were insufficient to create a genuine issue of material fact as to whether the parties entered into a loan refinance agreement. *See Hedgepath*, 378 S.C. at 354, 559 S.E.2d at 335; Rule 56(e), SCRPC.

28. An agreement to agree that leaves open material terms does not create an enforceable contract. *See, N. Am. Rescue Prods., Inc. v. Richardson*, 411 S.C. 371, 379, 769 S.E.2d 237, 241 (2015); *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 579, 762 S.E.2d 696, 701 (2014); *Ellis v. Taylor*, 316 S.C. 245, 249, 449 S.E.2d 487, 489 (1994).

29. Based on the foregoing, the Court concludes there was no meeting of the minds between Burr and Deutsche Bank or Deutsche Bank's servicer and that the parties, therefore, did not enter into a refinance loan. Burr remains in default on his original loan with Deutsche Bank.

30. The Court further concludes there is no evidence to support Burr's contention that Deutsche Bank or its agents committed any act that would support Burr's counterclaims under the SCUTPA and for an accounting, or his affirmative defenses for unclean hands, estoppel, and/or novation.

31. Accordingly, pursuant to Rule 56, SCRPC, Deutsche Bank is entitled to summary judgment as to all of Burr's counterclaims and affirmative defenses.

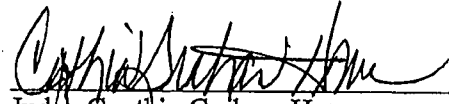
32. As an additional grounds for granting summary judgment, the Court concludes that Burr's SCUTPA counterclaim is barred by the three-year statute of limitations. *See* S.C. Code Ann. § 39-5-150.

33. Burr's SCUTPA claim arose in 2008, but he did not assert the claim until October 18, 2013. Therefore, the statute of limitations expired more than two years before Burr asserted his claim.

34. The Court also finds Burr's accounting counterclaim is barred by the doctrine of laches. *See Richey v. Dickinson*, 359 S.C. 609, 612, 598 S.E.2d 307, 309 (Ct. App. 2004). The Court finds Burr knew of his claim for an accounting in 2008, but waited over five years to assert the claim. Therefore, the doctrine of laches precludes Burr from asserting this claim.

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NOW THEREFORE, based on the foregoing, the Court hereby GRANTS Deutsche Bank's Motion and enters summary judgment as to Burr's counterclaims and affirmative defenses.

IT IS SO ORDERED.


Judge Cynthia Graham Howe
Master-in-Equity
Horry County, South Carolina

September 29, 2016