RECEIVED

MAR 30 2018

SC Court of Appeals

ELECTRONICALLY FILED - 2018 Mar 20 8:37 AM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4202834

STATE OF SOUTH CAROLINA	)	
COUNTY OF SPARTANBURG	)	**IN THE COURT OF COMMON PLEAS**
PHILLIP FRANCIS LUKE HUGHES, on behalf of the Estate of Jane K. Hughes, Plaintiff,	)	**Civil Action No.: 2017- CP-42-02834**
vs.	)	
BANK OF AMERICA NATIONAL ASSOCIATION Defendant.	)	**ORDER ON MOTION TO DISMISS**

This matter came before this Court for a hearing on the Motion to Dismiss filed by the Defendant, Bank of America, N.A. ("BANA"), on February 22, 2018. Present at the hearing were the following: Brad D. Hewett, Esquire, on behalf of the Plaintiff; and Robert Muckenfuss, Esquire and Elizabeth Timmermans, Esquire on behalf of BANA. Having heard arguments from counsel, and after careful consideration of the pleadings, motion, memoranda, and exhibits filed by the parties, this Court hereby grants BANA's Motion to Dismiss, with prejudice.

FACTS ALLEGED

Plaintiff's late parents opened a $120,000 line of credit from BANA on June 13, 2006, secured by a mortgage on their Spartanburg, South Carolina home. (Compl. ¶ 7.) Plaintiff alleges that on that same day, BANA presented his parents with policy documentation concerning optional line protection coverage ("LPP"). (*Id.* ¶ 11.) The optional LPP would enable a borrower to cancel some or all of the monthly payments on the variable portion of a credit line due to events like disability, accidental death, or involuntary unemployment. (*Id.*) Plaintiff asserts that his parents declined to purchase LPP coverage when they received the

$120,000 line of credit. (*Id.*) Plaintiff alleges that, despite his parents declining LPP coverage, "for several years," BANA drafted a monthly charge of $28.40 from his parents' account for LPP coverage for his father. (*Id.* ¶ 23.)[1] Plaintiff's father passed away in October 2008. (Compl. ¶ 27.) In or about March 2015, BANA notified Mrs. Hughes that it would stop charging for the LPP fee, and upon learning of Mr. Hughes' death, refunded all LPP payments drawn on the Hughes' account after October 2008. (Compl. ¶15, TAC ¶30). In June 2015, Mrs. Hughes also passed away. (Compl. ¶ 29.)

PROCEDURAL HISTORY

This is not Plaintiff's first time suing BANA relating to the LPP product. In 2015, Plaintiff (on behalf of his mother's estate) filed suit against BANA in this court and asserted almost identical factual allegations as those made in this matter, bringing claims of fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent acts, breach of duty of good faith and fair dealing, and a violation of the Truth in Lending Act ("TILA"). BANA removed the action to the United States District Court for the State of South Carolina, Spartanburg Division, Civil Action No. 7:15-cv-05083-MGL (the "2015 Federal Action".) After Plaintiff amended his complaint three times, BANA moved to dismiss Plaintiff's

[1] As discussed herein, Plaintiff previously filed suit against BANA for the LPP product charges and contended in his prior lawsuit that the monthly charges began "on or about June 2006," and that a $28.40 fee was listed on his parents' monthly account statements. (2015 Federal Action Third Am. Compl., Dkt. No. 23, Civil Action No. 7:15-cv-05083-MGL ("TAC") ¶ 25.) In Plaintiff's Response to BANA's Motion to Dismiss the operative Complaint, Plaintiff incorporated the allegations made in his prior 2015 Federal Action TAC into this Complaint. (Pl. Opp. to Motion to Dismiss, pg. 1) This Court may take judicial notice of the allegations made in the TAC, and may consider those allegations without converting Defendant's motion into a motion for summary judgment. *See Lucht v. Youngblood*, 266 S.C. 127, 134, 221 S.E.2d 854, 858 (S.C. 1976) ("Generally, the prior pleadings in an action may be received in evidence against the pleader."); *see also Teilabs, Inc. v. Makor Issues & Right, Ltd.*, 531 U.S. 308, 322-323, 127 S. Ct. 2499, 2509 (S.C. 2007) (noting a court may take judicial notice of publicly-available court documents without converting a motion to dismiss into one for summary judgment.).

ELECTRONICALLY FILED - 2018 Mar 20 8:37 AM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4202834

Third Amended Complaint. Prior to the District Court's ruling on the motion to dismiss, Plaintiff voluntarily dismissed his fraud-based claims (fraud, fraudulent concealment, and breach of contract accompanied by fraudulent acts). (2015 Federal Action, Dkt. No. 31.) On February 13, 2017, District Court Judge Mary Geiger Lewis granted BANA's motion to dismiss the remaining claims, holding that Plaintiff's breach of contract and TILA claims were time-barred and that equitable tolling did not apply to save the untimely claims. (2015 Federal Action, Dkt. No. 33 at 4.)

Plaintiff appealed the District Court Order to the Fourth Circuit Court of Appeals. On September 22, 2017, after a *de novo* review, the Fourth Circuit affirmed the trial court's order and held that Plaintiff's claims relating to the LPP product were time barred and not subject to equitable tolling. *Hughes, on behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n*, 697 F. App'x 191, 193 (4th Cir. 2017). Plaintiff petitioned the Supreme Court of the United States for a *writ of certiorari*. On January 22, 2018, the Supreme Court denied Plaintiff's writ. *Hughes, on Behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n*, No. 17-884, 2018 WL 491558, at *1 (U.S. Jan. 22, 2018).

While Plaintiff's appeal of the District Court's Order in the 2015 Federal Action was still pending before the Court of Appeals, Plaintiff filed this lawsuit (again in a representative capacity on behalf of his mother's estate). While Plaintiff again alleged that BANA improperly charged his parents for an unwanted LPP product, Plaintiff brought claims for fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), breach of fiduciary duty, and conversion. Plaintiff also asserts a statutory survival cause of action in an effort to enforce his six substantive causes of actions.

ELECTRONICALLY FILED - 2018 Mar 20 8:37 AM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4202834

ELECTRONICALLY FILED - 2018 Mar 20 8:37 AM - SPARTANBURG - COMMON PLEAS - CASE#2017CP420283

LEGAL CONCLUSIONS

The Court hereby grants BANA's Motion to Dismiss on the several grounds articulated by BANA in its motion to dismiss and during the hearing on its motion, namely that the claims are barred by the doctrine of *res judicata*. In addition to *res judicata*, Plaintiff's fraud-related claims are all barred as those claims did not survive the death of the Plaintiff's parents; the SCUTPA statute itself does not allow Plaintiff to bring a claim in a representative capacity; and all of Plaintiff's claims are barred by the applicable statutes of limitations.

A. THE DOCTRINE OF RES JUDICATA BARS PLAINTIFF'S CLAIMS.

Plaintiff's Complaint involves the same parties and is based on the same transaction, same occurrence, and same issues (BANA's allegedly wrongful charging of Plaintiff's parents for the LPP product) that were previously litigated and adjudicated by the District Court. Plaintiff's claims are therefore barred under the doctrine of *res judicata*.

"*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (S.C. 1999); *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 190–92, 417 S.E.2d 569, 571 (S.C. 1992). "Under the doctrine of *res judicata*, [a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Plum Creek*, 334 S.C. at 34, 512 S.E.2d at 109 (quoting *Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (S.C. 1987)); *see also id.* ("To establish *res judicata*, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit.").

ELECTRONICALLY FILED - 2018 Mar 20 8:37 AM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4202834

Pursuant to the doctrine of *res judicata*, Plaintiff is barred from re-litigating his claims before this Court. First, in both this action and the 2015 Federal Action, Plaintiff sued Defendant BANA. Second, the subject matter of the two lawsuits is identical. Both lawsuits seek damages for the alleged injury resulting from BANA charging Plaintiff's parents for the LPP product in connection with a 2006 loan.

Finally, Plaintiff's claims relating to the LPP product were already adjudicated in the 2015 Federal Action. In the 2015 Federal Action, the District Court held that Plaintiff's claims were time-barred under a three year statute of limitations. Here, all of Plaintiff's claims have a statute of limitations period of three years. Thus, if Plaintiff's claims were time-barred in 2015, his 2017 claims before this Court are likewise barred.

The District Court and the Court of Appeals also considered the record and rejected Plaintiff's request to apply the scarcely used equitable tolling doctrine to save his claims. The District Court squarely held that "the charge for the mortgage insurance appeared on the Hughes' monthly checking account statements from 2006 to 2015. Thus any argument they failed to discover the purported wrongdoing by Defendant during this period of time, although they exercised due diligence, is bereft of any merit." (2015 Federal Action, Dkt. No. 23 at 4.) The Fourth Circuit reviewed the dismissal of the action, *de novo*, and affirmed the District Court's holding on equitable tolling:

> Generally, parties "are entitled to equitable tolling only if they show that they have pursued their rights diligently and extraordinary circumstances prevented them from filing on time." *Raplee v. United States*, 842 F.3d 328, 333 (4th Cir. 2016), *cert. denied*, 137 S. Ct. 2274 (2017). "[E]quitable tolling is reserved for those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result." *Id.* "[T]he use of equitable tolling must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes." *Lawrence v. Lynch*, 826 F.3d 198, 204 (4th Cir. 2016) (internal quotation marks omitted). Where a plaintiff has alleged fraudulent

> concealment of his cause of action, equitable tolling requires a plaintiff to demonstrate that "(1) the party pleading the statute of limitations fraudulently concealed facts that are the basis of the plaintiff's claim, and (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." *Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 122 (4th Cir. 1995). With these standards in mind, we have reviewed the briefs and the record before us and conclude that the district court did not err in granting the motion to dismiss Appellants' claims.

Hughes, on behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n, 697 F. App'x 191, 192-193 (4th Cir. 2017).

That Plaintiff's causes of action in this suit are not identical to the causes of action in the 2015 Federal Action does not save his barred claims. All of Plaintiff's claims were equally available, and within the scope and purview of suit at the time of the 2015 Federal Action. *See e.g. Sub-Zero Freezer Co.*, 308 S.C. at 192, 417 S.E.2d at 571 ("The claims were either litigated in the prior actions or could have been so litigated. Thus, the trial court properly held that Clarkson's claims were barred by *res judicata* ..."). In fact, Plaintiff previously brought identical fraud-based claims against BANA in the 2015 Federal Action but subsequently dismissed them. Plaintiff is therefore barred from re-litigating previously dismissed claims and new claims based on the allegations already adjudicated in federal court.

B. PLAINTIFF'S FRAUD-RELATED CLAIMS AND SCUTPA CLAIM CANNOT BE BROUGHT BY AN ESTATE.

Plaintiff is barred from bringing fraud-related claims on behalf of his deceased mother under both the South Carolina's survivability and SCUTPA statutes. *See* S.C. Code Ann. §§ 15-5-90, and 39-5-140. Although the survivability statute generally allows causes of action for personal injuries to survive the death of a person, the South Carolina Supreme Court has expressly ruled that fraud-related claims do not survive a person's death. *Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 15 S.E.2d 117, 119 (S.C. 1941) (holding that a cause of action

ELECTRONICALLY FILED - 2018 Mar 20 8:37 AM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4202834

for fraud did not survive the death of a person). The South Carolina Supreme Court affirmed that fraud claims do not survive death in 2002. In *Ferguson v. Charleston Lincoln Mercury, Inc.*, the South Carolina Supreme Court analyzed the survivability of fraud and fraudulent concealment-based allegations brought by a plaintiff's estate against a car dealership. The Court held:

> South Carolina case law has continued to recognize a common law exception [to the survivability statute] regarding causes of action for fraud or deceit. . . . At the core of Mr. Ferguson's complaint was the allegation that CLM misled him into paying more for the car than he should have paid, and concealed the overcharge either through intentionally deceptive actions or through grossly negligent disclosure practices. Allegations of such fraud and deceit are exempted from the general survival statute and do not survive the plaintiff's death. Accordingly, we hold that Mr. Ferguson's cause of action did not survive his death.

Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563-64, 564 S.E.2d 94, 97-98 (S.C. 2002). More recently, in 2008, the South Carolina Court of Appeals reaffirmed this long-standing exception to the survivability of a fraud claim in *Brailsford v. Brailsford.* The court noted:

> South Carolina . . . has long recognized several exceptions to the survivability of a claim, including an exception for fraud. . . . The fraud exception to survivability is not limited only to a cause of action titled "fraud." In *Ferguson,* our supreme court recognized that although Ferguson's cause of action arose under the "Dealer Act,"5 the essence of the Defendant's alleged conduct amounted to misleading Mr. Ferguson, and concealing overcharges by either intentional deception or gross negligence. The court held that because such actions fit within the ambit of fraudulent or deceptive conduct, it was insignificant what "label" the Plaintiff gave to such conduct.

Brailsford v. Brailsford, 380 S.C. 443, 449-450, 669 S.E.2d 342, 345 (S.C. Ct. App. 2008) (internal citations omitted). Accordingly, Plaintiff's claims for fraud, fraudulent concealment, and breach of contract with fraudulent intent are all barred.[2]

---

[2] In addition, because Plaintiff's SCUTPA claim is also based on fraud and fraudulent concealment, the SCUTPA claim is also barred by the common law application of the survivability statute. *See e.g. Davis v. Life Care Centers of Am., Inc. et al,* Case No. 02-CP-10-

ELECTRONICALLY FILED - 2018 Mar 20 8:37 AM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4202834

Similarly, the plain language of the SCUTPA statute does not allow for a representative of an estate, like Plaintiff, to maintain an action under the Act. SCUPTA clearly states:

> Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, *but not in a representative capacity*, to recover actual damages.

S.C. Code Ann. § 39-5-140 (emphasis added). It is clear that "an unfair trade practices claim may not be brought in a representative capacity." *Wogan v. Kunze,* 366 S.C. 583, 609, 623 S.E.2d 107, 121 (S.C. Ct. App. 2005), *aff'd as modified,* 379 S.C. 581, 666 S.E.2d 901 (S.C. 2008). Accordingly, all of Plaintiff's claims based on fraud and deceit – fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, and violation of the SCUTPA did not survive the death of Plaintiff's parents and may not be brought on behalf of Mrs. Hughes' estate.

C. PLAINTIFF'S CLAIMS ARE ALL TIME BARRED.

Statutory law and common law set a three-year statute of limitations period for each of Plaintiff's claims: 1) fraud (*see* S.C. Code § 15-3-530(7)); (2) fraudulent concealment (*id.*); (3) breach of contract accompanied by a fraudulent act (*see* S.C. Code § 15-3-530(1)); (4) violation of the SCUTPA) (*see* S.C. Code Ann. § 39-5-150); (5) breach of a fiduciary duty (*see Mazloom v. Mazloom*, 382 S.C. 307, 323, 675 S.E.2d 746, 755 (S.C. Ct. App. 2009) ("Generally, the statute of limitations is three years for actions for a breach of a fiduciary duty.")); and (6) conversion (*see* S.C. Code Ann. §§ 15-3-530(4) and 15-3-530(5)).

The relevant statutes of limitation began to run on Plaintiff's claims when Mrs. Hughes could or should have known, using reasonable diligence, that a cause of action might exist. "The

---

3566, 2003 WL 25460625 (S.C. Ct. Comm. Pleas Mar. 28, 2003) ("SCUTPA does not survive the death of an alleged injured party.").

ELECTRONICALLY FILED - 2018 Mar 20 8:37 AM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4202834

exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed." *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (S.C. 1981). Because Plaintiff alleged that his parents started receiving payment deductions from their account, and notice of said deductions on each monthly statement, beginning in June 2006, the statute of limitations on their potential claims ran in June 2009.

This Court agrees with the findings by the District Court and the Court of Appeals in the 2015 Federal Action that equitable tolling does not apply in this case. Mrs. Hughes was given actual notice of the alleged improper charges by both monthly charges being deducted from her account and the monthly bank and/or home equity loan statements identifying those charges. Plaintiff specifically alleges that "BANA withdrew a monthly charge of $28.40 from the Hughes' BANA joint checking account beginning on or about June 2006" for his father's LPP coverage. (TAC ¶ 25.) Plaintiff also states that the LPP fee appeared on his parents' checking account statements. (Compl. ¶ 23.) The South Carolina Supreme Court has maintained that "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 117, 687 S.E.2d 29, 32 (S.C. 2009). "It has been observed that equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Id.* at 116. Here, because Plaintiff's parents received actual monthly notice of the charges being deducted from their account from 2006 to 2015, Plaintiff's allegations on the face

ELECTRONICALLY FILED - 2018 Mar 20 8:37 AM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4202834

of the complaint make clear that nothing was hidden from him. Plaintiff also does not plead that BANA engaged in conduct that prevented his parents from filing suit during the appropriate time-period. Accordingly, the scarcely used doctrine of equitable tolling is not appropriate for this case.

CONCLUSION

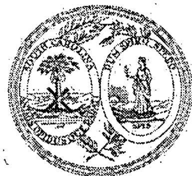
For all of the above-stated reasons, this Court hereby GRANTS Bank of America, N.A.'s Motion to Dismiss the Plaintiff's Complaint with prejudice.

AND IT IS SO ORDERED.

ELECTRONIC SIGNATURE PAGE TO FOLLOW

ELECTRONICALLY FILED - 2018 Mar 20 8:37 AM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4202834

ELECTRONICALLY FILED - 2018 Mar 20 8:37 AM - SPARTANBURG - COMMON PLEAS - CASE#2017CP4202834



Spartanburg Common Pleas

Case Caption:	Phillip Francis Luke Hughes , plaintiff, et al VS Bank Of America National Association
Case Number:	2017CP4202834
Type:	Order/Dismissal

It is so Ordered.

s/ R. Keith Kelly - 2165

Electronically signed on 2018-03-19 14:41:34