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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Court Judge

Case No. 2014-CP-21-00916

Beneficial Financial I Inc., successor by merger to Beneficial Mortgage Co. of South Carolina, Appellant,

v.

Jon Windham, a/k/a Jon D. Windham; Frances Windham, a/k/a Frances C. Windham; and Jerry Coker, a/k/a Jerry L. Coker; Carolina Bank a/k/a Carolina Bank & Trust Co., The United States of America, by and through its agency, the Internal Revenue Service; and The Citizens Bank, Defendants,

Of Whom Jon Windham a/k/a Jon D. Windham is the Respondent

Appellate Case No. 2017-001954

APPELLANT'S FINAL BRIEF

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1. Did the Circuit Court err in granting Appellee's motion for summary judgment?

STATEMENT OF THE CASE

Appellant Beneficial Financial I Inc. (the "Lender") appeals the circuit court's grant of summary judgment in favor of the appellee Jon Windham (the "Borrower").

On or about June 25, 2002, Borrower executed and delivered to the Lender's predecessor-in-interest Beneficial Mortgage Co. of South Carolina a promissory note in the original principal sum of $191,912.51, payable in monthly installments. (R. p. 7, ¶7; R. pp. 14-16). The promissory note is secured by a mortgage covering real property located at 3790 & 3794 Southborough Road, Florence, South Carolina. (R. p. 7, ¶8; R. pp. 17-21).

The note and mortgage required the Borrower to make monthly payments of principal and interest. (R. pp. 14-21). Since June 29, 2012, the Borrower has failed to make monthly payments of principal and interest under the note and mortgage. (R. pp 10-11). The Lender thus initiated case number 2014-CP-21-916 to foreclose the mortgage. (R. p. 6).

The Borrower answered and asserted counterclaims against Beneficial. (R. pp. 22, 28). Specifically, the Borrower purported to state claims for: (1) violation of the South Carolina Unfair Trade Practices Act; (2) intentional infliction of emotional distress; (3) negligent training and supervision; (4) reckless and wanton training and supervision; (5) breach of the implied covenant of good faith and fair dealing; (6) fraud; and (7) negligent misrepresentation. (R. pp. 31-36). The Borrower's counterclaims hinge on two primary allegations: (i) the Borrower contends that the Lender wrongfully force placed insurance on the Borrower's residence; and (ii) the Borrower contends that the Lender promised, but did not extend, a loan modification. (R. pp. 29-36). The Lender denied in its reply that it is liable to the Borrower in any way. (R. pp. 40-47).

The Borrower was entitled to, and requested, foreclosure intervention pursuant to the Chief Justice's Administrative Order. (R. p. 58, lines 5-8). The parties also engaged in

discovery. Specifically, the Borrower requested—and the Lender provided—the Borrower's loan file and correspondence. (R. p. 65-66). The Borrower also requested a Rule 30(b)(6) deposition of the Lender's corporate representative. (R. p. 66). Due to decreased staffing due to a wind down of its business, the Lender experienced difficulty scheduling a corporate representative to travel to South Carolina for a Rule 30(b)(6) deposition. (R. p. 58, line 11- p. 59, line 19). During the same time, the parties discussed a loan modification that would have fully and finally resolved all of the claims in the case. (R. p. 54, lines 9-16.)

The Borrower filed a motion to compel the Lender's deposition, and the Lender agreed to produce a witness on or before July 10, 2017, or in the alternative to forego putting on affirmative testimony in opposition to the Borrower's counterclaims. (R. p. 70). The parties scheduled a deposition for Monday, July 10, 2017. (R. pp. 59, 70). In the days leading up to July 10, however, settlement became imminent, and counsel for the Borrower and Lender agreed that the deposition did not need to go forward as scheduled because a settlement was imminent. (R. p. 54, lines 17-18). On July 11, 2017, counsel for the Lender began a multi-week federal jury trial, about which Borrower's counsel was aware. (R. p. 54, lines 18-21).

On July 26, 2017, the Borrower moved for summary judgment on liability only on all of his counterclaims. (R. p. 72). The Borrower supported its motion for summary judgment with his affidavit. (R. pp. 91-94). The Borrower's affidavit consisted of 10 paragraphs that were not supported by any documents or exhibits. (R. pp. 91-94). In his affidavit, the Borrower alleged that: (i) his homeowners' insurance did not lapse but the Lender force placed insurance on his property; (ii) he missed monthly mortgage payments when his monthly payment increased due to the lender-placed insurance; (iii) he requested and was granted a temporary loan modification; (iv) the Lender has never offered him a permanent loan modification; and (v) as a result of this

foreclosure action, the Borrower has suffered "anxiety, embarrassment, humiliation, and fear," as well as "physical distress, including loss of sleep, headaches, pain and suffering." (R. pp. 91-94).

The Borrower did not allege any specific medical conditions that he suffered as a result of the Lender's allegedly wrongful conduct, and did not support his conclusion that he suffered emotional and physical distress with any third-party testimony or medical records. (R. pp. 91-94). Nor did the Borrower allege that he ever sought medical treatment or lost work as a result of his emotional and physical distress, or present any third-party testimony or corroborating evidence of his distress.

In addition, the Borrower's affidavit did not contain any detail or allegations about: (i) specific representations that the Lender made to him with respect to lender-placed insurance or a potential modifications; (ii) the Borrower's reliance on any such representations; (iii) harm, other than purported emotional and physical distress—that the Borrower suffered as a result of any of the Borrower's actions; (iv) the Lender's hiring, training, or supervision practices; or (v) specific employees or employee actions that the Lender could have, but did not properly train or supervise or prevent, respectively. (R. pp. 91-94).

The Florence County Court of Common Pleas conducted a hearing on the Borrower's motion for summary judgment on August 31, 2017. (R. p. 4). During that hearing, counsel for Lender explained the settlement posture of the case and presented case law that held that the scant facts alleged by Borrower—even if true—did not support judgment as a matter of law for the Borrower. (R. p. 54, line 7- p. 56, line 16.) The Court truncated the Lender's oral argument, awarding summary judgment in favor of the Borrower on the grounds that the Lender had not filed a submission in opposition to the Borrower's motion. (R. p. 59, line 11- p. 60, line 17).

From the Court's order granting summary judgment on liability on the Borrower's claims, the Lender timely appeals.

ARGUMENT

The Lender asks this Court to reverse the trial court's grant of summary judgment in favor of the Borrower because the Borrower's summary judgment motion was not supported by evidence, and the scant evidence that it did present does not support judgment as a matter of law on several of his counterclaims.

I. Standard of Review

In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56(c) of the South Carolina Rules of Civil Procedure. *Cowburn v. Leventis*, 366 S.C. 20, 30 (Ct. App. 2005). Summary judgment can only be affirmed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* In an appeal from an order granting summary judgment, this Court must liberally construe the record in favor of the non-moving party and give the non-moving party the benefit of all favorable inferences that the Court might reasonably draw from the record. *Lattie v. SHS Enters., Inc.*, 300 S.C. 417, 389 S.E.2d 300 (Ct. App. 1990); *Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986).

II. The Borrower was not entitled to summary judgment by default.

At the hearing on Borrower's motion for summary judgment, the Borrower took the position, and the Court agreed, that the Borrower was automatically entitled to summary judgment because the Lender did not submit a brief or affidavit in opposition to the Borrower's motion. This is not, however, the law. Rather, a party moving for summary judgment who fails to demonstrate absence of a genuine issue of material fact is not entitled to summary judgment even though his adversary did not come forward with controverting materials. *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990); *Yarborough v. Rogers*, 306 S.C. 260, 411 S.E.2d 424 (1991). Indeed, the party opposing summary judgment

need not come forward in any way if the moving party has not supported its motion to the point of showing the issue is a sham. *Title Ins. Co. v. Christian*, 267 S.C. 71, 266 S.E.2d 240 (1976)("Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied, even if no opposing evidentiary matter is presented.")(finding that summary judgment was inappropriate where the movant made no effort to clarify disputed issues of fact in their affidavits, even when the non-moving party did not submit affidavits).

Here, the Borrower's 10-paragraph affidavit did not even attempt to address many of the elements of his counterclaims, and the testimony he did present did not support his claims as a matter of law. Specifically, (i) even if the Lender placed lender-placed insurance on the property when it was otherwise insured and failed to modify the Borrower's loan, those practices are not unfair practices as a matter of law; (ii) the Borrower's purported emotional and physical distress is not actionable as a matter of law; (iii) the Borrower did not put on any evidence at all to support his negligent and reckless hiring, supervision, and training claims; (iv) there is no independent claim under South Carolina law for the breach of the implied covenant of good faith and fair dealing; (v) the Borrower's affidavit, even if true, does not support a finding of fraud or negligent misrepresentation as a matter of law. The trial court's order granting summary judgment should therefore be reversed.

1. Even if the Lender placed lender-placed insurance on the property when it was otherwise insured and failed to modify the Borrower's loan, those practices are not unfair practices as a matter of law.

The Borrower claims that two acts by the Lender—placing lender-placed insurance on the mortgaged property and failing to modify the Borrower's residential mortgage loan—are unfair trade practices under S.C. Code Ann. § 39-5-10. Even if all of the allegations in the

Borrower's 10-paragraph affidavit are true, however, neither act rises to an unfair trade practice as a matter of law.

a. There is no independent cause of action for failing to modify a loan.

To the extent the Borrower's UTPA claim is based upon the Lender's alleged failure to modify the Borrower's claim, it fails. Neither any South Carolina Supreme Court Administrative Order nor any federal program creates a private cause of action for failure to provide a loan modification or a meaningful process through which to petition a lender for a loan modification. *Weber v. Bank of America, N.A.*, 2013 WL 4820446 at *5 (D.S.C. 2013); *see also Steffens v. Am. Home Mortgage Servicing, Inc.*, Civ. A 6-10-1788-JMC, 2011 WL 901812 (D.S.C. Jan. 5, 2011)(holding that denial of a loan modification under HAMP and other similar programs does not create a private right of action). Nor does failure to modify a loan have an impact upon the public interest, which is an essential element of a UTPA claim. *Id.* at *5. The Borrower was not, therefore, entitled to summary judgment on its UTPA claim to the extent it is based upon allegations that the Lender did not modify the Borrower's loan.

b. The Borrower's claim with respect to lender-placed insurance is a breach of contract claim.

The note and mortgage govern the Lender's ability to place hazard insurance on the mortgaged property in the absence of borrower-purchased insurance. (R. pp. 14-21). To the extent the Borrower's UTPA claim is based upon an allegation that the Lender placed hazard insurance on the Borrower's residence at a time when the Borrower had his own insurance in place, the Borrower has thus alleged a breach of contract. "A mere breach of contract does not constitute a violation of the UTPA." *Key Company, Inc. v. Fameco Distributors, Inc.*, 292 S.C. 524, 357 S.E.2d 476 (Ct. App. 1987); *South Carolina Nat'l Bank v. Silks*, 295 S.C. 107, 367 S.E.2d 421 (Ct. App. 1988). Although the Borrower could have attempted to differentiate his

claim from a mere breach of contract by proving the potential for repetition through evidence of (i) the same kinds of actions occurred in the past; or (ii) procedures that create a potential for repetition of the unfair and deceptive acts, *Daisy Outdoor Advertising Co. v. Abbott*, 322 S.C. 489, 473 S.E.2d 47 (1996), the Borrower did not do so here. The Borrower's UDTP claim thus fails as a matter of law, and summary judgment should be reversed.

2. The Borrower's purported emotional and physical distress is not actionable as a matter of law.

In support of his claim for intentional infliction of emotional distress ("IIED"), the Borrower claimed that he suffered emotional and physical distress in the form of "anxiety, embarrassment, humiliation, and fear," as well as "physical distress, including loss of sleep, headaches, pain and suffering." These alleged ailments are woefully inadequate under South Carolina law to support an IIED claim.

South Carolina law is clear that a plaintiff may not—as the Borrower did here—state a claim for IIED by simply alleging "I suffered emotional distress." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 358 (S.Ct. 2007). "Passing references" to "fairly ordinary" symptoms are insufficient; the plaintiff must rather provide third-party testimony and corroborating evidence. *Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981); *Hansson*, 374 S.C. at 359-60.

To that end, South Carolina appellate courts have rejected IIED claims in which the plaintiff alleged symptoms that were more specifically described than the general anxiety, sleeplessness, headaches and "pain and suffering" that the Borrower described. For example, in *AJG Holdings, LLC v. Dunn*, 392 S.C. 160 (Ct. App. 2014), the Court of Appeals found that when a plaintiff testified that the defendant's actions caused him to develop high blood pressure and digestive problems, his nerves were "shot," and he took medication for high blood pressure and nervousness, and his wife testified that she had been "emotionally ill" and lost twenty

pounds, such symptoms were not so "severe such that no reasonable man could be expected to endure it." 392 S.C. 160 (Ct. App. 2014). And in *Smith v. Moore*, the Court of Appeals similarly found that emotional distress was not "severe" when the plaintiff did not seek any sort of medical help, miss work, or suffer from the inability to perform her job, but rather was the victim of some rumors. 2012 WL 10864148 (S.C. Ct. App. Oct. 31, 2012) at *2. Nor was it sufficient for the plaintiff to allege that he lost sleep at night and visited a dentist when there was no evidence that his relationship with his wife or his job performance was affected. *Hansson*, 374 S.C. at 359-60.

Here, Borrower alleged only vague symptoms of physical and emotional distress that were far less specific than those identified in *AJG Holdings*, *Smith*, and *Hansson*, and provided no third party testimony or evidentiary proof that he suffered any such distress. Accordingly, the Borrower did not submit sufficient evidence as a matter of law, and this Court should reverse the trial court's order granting summary judgment on the Borrower's IIED claim.

3. The Borrower did not put on any evidence at all to support his negligent and reckless hiring, supervision, and training claims.

The Borrower's affidavit does not contain any reference at all, much less evidence in support of, his claims for negligent or reckless hiring, supervision, and training claims. In order to prove negligent supervision, the Borrower had to prove that that the Lender knew or should have known that its employment of a specific person created an undue risk of harm to the public or acted negligently in entrusting its employee with a tool that created an unreasonable risk of harm to the public. *James v. Kelly Trucking Co.*, 377 S.C. 628 (2008)(emphasis added). The Borrower not only did not allege the elements of negligent hiring, supervision, or training, but did not include any allegations in his sworn affidavit to support such a claim. The Borrower is

not, therefore, entitled to summary judgment on that claim, and the trial court should reverse that order.

Because the Borrower did not, and cannot, prove negligent hiring, training, or supervision, he also did not prove reckless hiring, training, or supervision, as recklessness implies the doing of a negligent act knowingly. *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011). If there was no negligence, there could not therefore have been recklessness. This Court should therefore reverse the trial court's summary judgment order on the Borrower's reckless hiring, training, and supervision claim.

4. There is no independent claim under South Carolina law for the breach of the implied covenant of good faith and fair dealing.

The Borrowers asserted a claim and obtained summary judgment for breach of the implied covenant of good faith and fair dealing. There is not, however, an independent cause of action in South Carolina for breach of the covenant of good faith and fair dealing. *RoTec Services, Inc. v. Encompass Services, Inc.* 359 S.C. 467, 474 (Ct. App. 2004). The Borrower did not even attempt to state a claim for breach of any express contractual term, likely because it could not do so given the language in the note and mortgage that permits the Lender to place hazard insurance on its collateral. (R. pp. 14-21). *See, e.g., Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 465 S.E.2d 84, 85 (1995)(holding that there cannot be a breach of the implied covenant of good faith and fair dealing where "a party to a contract [does] what provisions of the contract expressly [give] him the right to do."); *Volvo Constr. Equip. North Am., Inc. v. CLM Equip. Co., Inc.*, 386 F.3d 581, 589 (4th Cir. 2002). The Borrower was not as a matter of law, therefore, entitled to summary judgment on his claim for breach of the implied covenant of good faith and fair dealing.

5. The Borrower's affidavit, even if true, does not support a finding of fraud as a matter of law.

The Borrower's affidavit does not put on any evidence—much less clear and convincing evidence—of many of the elements of fraud. In order to establish a claim for fraud, a party must establish by clear and convincing evidence (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *M.B. Kahn. Constr. Co. v. S.C. Nat'l Bank of Charleston*, 275 S.C. 381, 384 (1980). The Borrower did not, however, include any testimony in his affidavit that established any specific representations that the Lender made to him, that the Borrower was unaware of the truth or falsity of those representations, that the Borrower relied on any such representations, or his consequent and proximate injury. Having failed to put on any evidence at all—much less clear and convincing evidence—of at least four elements of fraud, the Borrower was not entitled to summary judgment on that claim. This Court should therefore reverse the trial court's summary judgment order on the Borrower's fraud claim.

6. The Borrower's affidavit, even if true, does not support a finding of negligent misrepresentation as a matter of law.

Nor did the Borrower submit adequate evidence to obtain summary judgment on its negligent misrepresentation claim. To establish liability for negligent misrepresentation, the plaintiff must show by a preponderance of the evidence (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the representation; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached the duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary

loss as the proximate result of his reliance on the representation. *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 240 (2010).

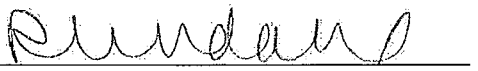
Here, as with the Borrower's purported fraud claim, the Borrower has not identified any specific representations upon which he relied, or that he actually relied on any such representations to his detriment. Even if he had, however, the Borrower's negligent misrepresentation claim would nonetheless be fatally flawed because the Borrower did not, and cannot, show that if he relied on any specific representations, such reliance was reasonable. Under South Carolina law, where there is no confidential or fiduciary relationship between parties in an arms' length transaction between mature, educated people, there is no right to rely. *Florentine Corp., Inc. v. PEDA I, Inc.*, 287 S.C. 382, 339 S.E.2d 112, 114 (1985). It is well established that lenders and borrowers do not stand in a confidential or fiduciary relationship to one another. *See, e.g., Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986)(finding that a bank/customer relationship is merely a lender/borrower relationship and not a fiduciary relationship). The Borrower did not, therefore, present evidence that established the claims of his negligent misrepresentation claim, and the trial court erred in entering judgment on that claim.

III. Conclusion

The Borrower's motion for summary judgment, submitted in the midst of settlement negotiations, was supported by such scant evidence that grant of summary judgment was inappropriate, even if Lender did not present contradicting affidavits. Indeed, the Borrower's affidavits ignored several claims in their entirety, and did not contain sufficient detail for the Lender to even identify which representations were purportedly negligent or fraudulent. As a result, and especially in light of the fact that the Court must liberally construe the record in the

Lender's favor, the Lender respectfully requests that this Court reverse the trial court's grant of summary judgment for the Borrower.

Respectfully Submitted,



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May 8, 2018

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