STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS

CASE NO. 2015-CP-02-2849

WELLS FARGO BANK, N.A.

PLAINTIFF,

V.

MICHAEL G. MORGAN; MARGARET H. FITCH, M.D.; ERIC J. OLIG; SOUTH CAROLINA DEPARTMENT OF REVENUE; LINDA LAWRENCE BOWEN,

DEFENDANTS.

ORDER GRANTING PLAINTIFF WELLS FARGO BANK, N.A.'S MOTION TO DISMISS DEFENDANT MICHAEL G. MORGAN'S AMENDED COUNTERCLAIM

This matter came before the Court at a hearing on June 11, 2018 on Plaintiff Wells Fargo Bank, N.A.'s ("Wells Fargo") Motion to Dismiss Defendant Michael G. Morgan's ("Morgan") Amended Counterclaim. Stacie C. Knight argued the motion for Wells Fargo, and Taylor M. Smith argued the motion for Morgan. In addition, the parties submitted memoranda of law prior to the hearing. After due consideration, the Court GRANTS the Motion.

I. BACKGROUND

This is a contested foreclosure action that arises out of Morgan's failure to repay a $1.3 million loan he obtained from Wells Fargo's predecessor, Wachovia Mortgage, FSB, in April 2008. Complaint, ¶ 18, 23; Amended Answer ¶ 18.

In his Original Answer and Counterclaim, filed on February 4, 2016, Morgan alleged a violation of the South Carolina Attorney Preference Statute, S.C. Code, § 37-10-102, that occurred at his loan's closing in April 2008. Morgan's Amended Answer and Counterclaim, filed on May 4, 2018, also alleges a violation of the Attorney Preference Statute. According to

Morgan, (1) an unidentified individual "falsified and forged [his] signature" on unspecified "documents relating to the application for and origination" of his loan, (2) an unidentified individual engaged in unspecified acts of "concealment," and (3) he was "depriv[ed] of his right to choose his own, unconflicted counsel to represent him at the closing of the mortgage loan" and "no attorney licensed to practice law in South Carolina supervised the closing of the mortgage loan." Amended Counterclaim, ¶¶ 40-41, 43, 45. Morgan seeks unspecified damages and attorneys' fees, along with a declaration that his mortgage loan is "void or unenforceable." *See id.*, Prayer for Relief.

II. STANDARD OF REVIEW

A circuit court may dismiss a counterclaim it fails to allege facts sufficient to constitute a cause of action. *See* S.C. R. Civ. P. 12(b)(6). "The question for the court is whether in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the allegations set forth on the face of the complaint state any valid claim for relief." *Logan v. Cherokee Landscaping and Grading Co.*, 389 S.C. 611, 617, 698 S.E.2d 879, 882 (Ct. App. 2010) (quotations and citation omitted). The Court may sustain the dismissal when "the facts alleged in the complaint do not support relief under any theory of law." *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App. 2003).

The statute of limitations is an affirmative defense. Generally, an affirmative defense may not be asserted in a Rule 12(b)(6) motion to dismiss unless the allegations of the complaint demonstrate the existence of the affirmative defense. *See Spence v. Spence*, 368 S.C. 106, 123, 628 S.E.2d 869, 878 (2006). However, "[m]ost courts allow such defenses to be raised in a motion to dismiss under Rule 12(b) when there is no disputed issue of fact raised by an affirmative defense, or the facts are completely disclosed on the face of the pleadings, and

realistically nothing further can be developed by pretrial discovery or a trial on the issue raised by the defense." *Id.* (citations omitted). As explained below, in the present case, even if the Court takes everything in Morgan's pleading as true, it is apparent that the Amended Counterclaim is barred by the applicable statute of limitations and should be dismissed with prejudice.

III. LAW/ANALYSIS

The Attorney Preference Statute, S.C. Code, § 37-10-102, provides:

> Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose:
>
> (a) The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction ...
>
> The creditor may comply with this section by:
>
> (1) including the preference information on or with the credit application ... or
>
> (2) providing written notice to the borrower of the preference information with the notice being delivered or mailed no later than three business days after the application is received or prepared. ... .

The statute of limitations for claims under the Attorney Preference Statute is found in S.C. Code, § 37-10-105(A), which provides:

> If a creditor violates a provision of this chapter, the debtor has a cause of action, other than in a class action, to recover actual damages and also a right in an action, other than in a class action, to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars. No debtor may bring a class action for a violation of this chapter. ***No debtor may bring an action for a violation of this chapter more than three years after the violation occurred, except as set forth in subsection (C).*** The three-year statute of limitations applies to actions commenced after May 2, 1997. No inference should be drawn as to the applicable statute of limitations for any

> pending actions. This subsection does not bar a debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action.

(emphasis added). "[S]ubsection (C)," S.C. Code § 37-10-105(C), apparently contains a "relaxed statute of limitations,"[1] and provides that "[a]n action pursuant to this subsection may not be brought after the original scheduled maturity date of the debt." However, because Morgan's allegations fail to state a claim for unconscionability, he cannot take advantage of its longer limitations period.

In order to proceed under § 37-10-105(C), Morgan must properly allege either (1) substantive unconscionability—that the loan transaction itself is unconscionable, or (2) procedural unconscionability—that it was induced by unconscionable conduct. *See, e.g., Boone v. Quicken Loans, Inc.*, No. 5:15-cv-04772-JMC, 2016 WL 3552025, at *4 (D.S.C. June 30, 2016). An unconscionable transaction is one that contains "terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996); *see also Centura Bank v. Cox*, No. 2004-UP-348, 2004 WL 6331130, at *3 (Ct. App. May 25, 2004) (same). For conduct to qualify as unconscionable inducement, it must be "an affirmative misrepresentation or active deceit." *McFarland v. Wells Fargo Bank, N.A.*, 810 F.3d 273, 277 (4th Cir. 2016). Morgan does not adequately allege any of these things.

First, Morgan does not allege that any of his loan's terms were so oppressive that no reasonable person would have accepted the agreement. Thus, Morgan does not allege substantive unconscionability as a matter of law. *See, e.g., Mosley v. Quicken Loans, Inc.*, No.

[1] *See Greene v. Household Fin. Corp.*, No. 3:02-2436-17, Order Granting Defendant's Motion for Summary Judgment at 9 (D.S.C. Jan. 12, 2004).

1:16-cv-00384-JMC, 2016 WL 3551999, at *4 (D.S.C. June 30, 2016); *see also Boone*, 2016 WL 3552025, at *5; *O'Neal v. Quicken Loans, Inc.*, No. 1:15-cv-03712-JMC, 2016 WL 3569402, at *6 (D.S.C. June 30, 2016).

Nor does Morgan adequately allege procedural unconscionability. First, the Court finds that Morgan's conclusory allegations of forgery by an unidentified individual on unspecified loan documents, and of unidentified acts of "concealment," are insufficiently pled as a matter of law. *See Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986) (a mere conclusory allegation, unsupported by any particularized allegations of fact, is insufficient); *see also Hartsel v. Selective Ins. Co. of S.C.*, No. 2011-UP-226, 2011 WL 11734337, at *3 (Ct. App. May 18, 2011) (rejecting conclusory allegations in support of breach of fiduciary duty claim). Indeed, these allegations sound in fraud and accordingly are subject to S.C. R. Civ. P. 9(b),[2] which provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." In order to allege fraud, the following elements must be alleged with particularity: "(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a 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." *King v. Oxford*, 282 S.C. 307, 311, 318 S.E.2d 125, 127 (Ct. App. 1984). "A complaint is fatally defective if it fails to allege all nine elements of fraud. Where the complaint omits allegations on any element of fraud, the trial court should grant the defendant's motion to dismiss the claim." *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993) (citation omitted). Here, among other things, Morgan not identify the person who allegedly forged

[2] *See Chewning v. Ford Motor Co.*, 346 S.C. 28, 36, 550 S.E.2d 584, 588 (Ct. App. 2001).

documents or "concealed" information from him, nor does he identify the particular documents he claims were forged. Moreover, because Morgan does not make any allegations that he chose to apply for or accept his loan based on anything Wells Fargo did or did not do, he does not allege reliance. Thus, his allegations of forgery and concealment are insufficient to bring his claim within S.C. Code, § 37-10-105(C).

Morgan also argues that his claim comes within the exception set forth in S.C. Code, § 37-10-105(C) because his loan was closed without an attorney and because he was "depriv[ed] of [his] right to choose his own, unconflicted counsel to represent him in the closing of the mortgage loan at issue." Amended Counterclaim, ¶ 45. Essentially, Morgan argues that the alleged violation of the Attorney Preference Statute renders his loan unconscionable and unenforceable. The Court does not agree.

First, there is no private right of action for the alleged unauthorized practice of law. *See, e.g., Franklin v. Chavis*, 371 S.C. 527, 535, 640 S.E.2d 873, 877 (2007). Accordingly, any claims based on such an allegation necessarily fail as a matter of law. *See id.* (affirming dismissal of breach of fiduciary duty claim based upon the alleged unauthorized practice of law); *see also Hambrick v. GMAC Mortg. Corp.*, 6370 S.C. 118, 123-25, 634 S.E.2d 5, 8-9 (Ct. App. 2006) (affirming dismissal of complaint when charges of unauthorized practice of law were the basis for alleged causes of action because only the South Carolina Supreme Court can determine what constitutes the unauthorized practice of law).

Second, the South Carolina Supreme Court has held that the alleged unauthorized practice of law cannot render a mortgage unenforceable unless that mortgage was recorded after August 8, 2011. *See BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 624, 731 S.E.2d 547, 550 (2012); *Matrix Fin. Servs. Corp. v. Frazier*, 394 S.C. 134, 140, 714 S.E.2d 532, 535

(S.C. 2011). Here, it is undisputed that the mortgage at issue was recorded in 2008. Complaint, ¶ 18; Amended Answer, ¶ 18. Thus, as a matter of law, the alleged unauthorized practice of law cannot support Morgan's Counterclaim, which seeks to prohibit Wells Fargo from enforcing the mortgage. *See Deutsche Bank Nat'l Trust Co. v. Booms*, No. 2015-UP-097, 2015 WL 793201, at *1 (Ct. App. Feb. 25, 2015) (affirming circuit court's rejection of unclean hands defense based upon alleged unauthorized practice of law because the subject mortgage was recorded before August 8, 2011).

Finally, the Court finds that an alleged violation of the Attorney Preference Statute cannot support a procedural unconscionability claim. Morgan presented the Court with only one decision, from Lexington County, permitting such a claim to proceed. *Nationstar Mortg. LLC v. Fowler*, No. 2013-CP-32-1482, Order Denying Motion to Dismiss Cross-Claim and Third-Party Complaint (Lexington Cty. Dec. 12, 2013). On the other hand, Wells Fargo cited numerous decisions from the U.S. District Court for the District of South Carolina rejecting procedural unconscionability claims based upon alleged violations of the Attorney Preference Statute. *See, e.g., Mosley*, 2016 WL 3551999, at *3-4 (rejecting the argument that a loan was induced by unconscionable conduct simply because the lender allegedly violated the Attorney Preference Statute); *Boone*, 2016 WL 3552025, at *5 (rejecting the argument that a loan was induced by unconscionable conduct simply because the lender allegedly violated the Attorney Preference Statute and applying the three-year statute of limitations to the claim). Wells Fargo also pointed to *Deutsche Bank Nat'l Trust Co. v. Booms*, 2015 WL 793201. There, although the South Carolina Court of Appeals did not directly address the issue, it held that the circuit court did not err in holding that the subject note and mortgage were not unconscionable, even though the lender violated the Attorney Preference Statute.

The Court finds the federal decisions to be better-reasoned, and *Booms* suggests that suggests that the South Carolina appellate courts would agree. In addition, accepting Morgan's argument would eviscerate the three-year statute of limitations generally applicable to attorney preference violations. If Morgan is correct, then every loan with an attorney preference violation is necessarily unconscionable and thereby subject to the longer limitations period in S.C. Code, § 37-10-105(C). However, it is well-established that South Carolina courts "will not construe a statute in a way which leads to an absurd result or renders it meaningless." *Florence County Democratic Party v. Florence County Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012). To construe the statutes in the manner suggested by Morgan would render the three-year limitations period in § 37-10-105(A) meaningless. Accordingly, the Court rejects Morgan's proffered construction.

Finally, Morgan's procedural unconscionability claim fails for the simple reason that he does not allege inducement. As set forth above, Morgan does not make any allegations that he chose to apply for or accept his loan based on anything Wells Fargo did or did not do. Therefore, the Court finds Morgan has not stated a procedural unconscionability claim. *See, e.g., Boone*, 2016 WL 3552025, at *5 ("The facts as alleged indicate that Plaintiff applied for the loan with Defendant. There is no allegation that Plaintiff chose to apply for the loan based on statements made, or conduct, by Defendant regarding Plaintiff's ability to choose an attorney for closing. Therefore, Plaintiff has not stated a claim for unconscionable inducement."); *Hosey v. Quicken Loans, Inc.*, No. 1:17-cv-02060-JMC, 2018 WL 1471891, at *5 (D.S.C. Mar. 26, 2018) (same).

IV. CONCLUSION

It is undisputed that Morgan's loan closed in April 2008 and that Morgan first filed his claim under S.C. Code, § 37-10-102 in February 2016. For the foregoing reasons, the Court finds that the claim is subject to the three-year statute of limitations contained in § 37-10-105(A), and that it was time-barred as of April 2011.

Accordingly, it is therefore hereby ORDERED that Wells Fargo's Motion to Dismiss Morgan's Amended Counterclaim is GRANTED, and Morgan's Amended Counterclaim is dismissed WITH PREJUDICE.

AND IT IS SO ORDERED.

Date:_____

_____
The Honorable Doyet A. Early, III
Circuit Judge

Aiken Common Pleas

Case Caption: Wells Fargo Bank NA VS Michael G Morgan , defendant, et al

Case Number: 2015CP0202849

Type: Order/Dismissal

So Ordered

s/D.A. Early III 2136