THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Doyet A. Early III, Circuit Judge

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SC Court of Appeals

Appellate Case No. 2018-002068

Wells Fargo Bank, N.A.,.....Respondent,

v.

Michael G. Morgan; Margaret H. Fitch, M.D.; Eric J. Olig; South Carolina Department of Revenue; Linda Lawrence Bowen; Defendants,

Of whom Michael G. Morgan is the.....Appellant.

MOTION TO DETERMINE VALIDITY OF ORDER SUBJECT OF APPEAL

Appellant hereby moves pursuant to Rules 201(a) and 260(c), SCACR, to have this court determine a threshold matter in the above-captioned appeal: whether the document filed in the underlying action on November 2, 2018, that purports to be an order denying Appellant's motion to reconsider the dismissal of his counterclaim is actually a valid order at all. This issue may be dispositive of this appeal.

Given the procedural events that led up to that order's filing, the order appears simply to be void. While Appellant brought this appeal out of an abundance of caution, if this court rules that the order is indeed void, there is no need for the parties and the court to go through the process of an appeal of that order, and the court can simply dispose of this appeal by ruling on this motion. The grounds for this motion are as set forth below.

PROCEDURAL BACKGROUND

On August 24, 2018, an order was filed that granted Respondent's motion to dismiss Appellant's counterclaim. A copy of that order is attached as Exhibit A to this motion. Appellant moved for reconsideration of that order. A copy of that motion to reconsider is attached as Exhibit B to this motion. Following a hearing on the motion to reconsider, the circuit judge who had dismissed the counterclaim filed an order on October 29, 2018, that granted the motion to reconsider, reversed the decision to dismiss the counterclaim, and referred this action to the master-in-equity. A copy of that order is attached as Exhibit C to this motion.

On November 2, 2018, the judge who had already granted the motion to reconsider and referred the case filed an order that stated that Appellant's motion to reconsider was denied. A copy of that order is attached as Exhibit D to this motion. That order did not purport to undo or even mention the order granting the motion to reconsider that had already been filed. As shown by the email exchange attached as Exhibit E to this motion, Respondent's counsel contacted the circuit judge's law clerk about the entry of these two orders. The judge's law clerk stated that the order that granted the motion to reconsider and referred the case to the master was signed in error and that the later-filed order denying the motion to reconsider was "the correct order." Neither the circuit court nor the equity court took any further action about the matter. Out of an abundance of caution, Appellant brought this appeal of the August 24 and November 2 orders.

LEGAL ANALYSIS

"A master's authority to determine issues referred to him by the circuit court is a question of subject matter jurisdiction[.]" Deep Keel, LLC v. Atl. Private Equity Grp., LLC, 413 S.C. 58, 74-75, 773 S.E.2d 607, 616 (Ct. App. 2015); accord Bunkum v. Manor Properties, 321 S.C. 95, 99, 467 S.E.2d 758, 761 (Ct. App. 1995) (question concerning scope of master's authority under order of reference was "issue[] relating to subject matter jurisdiction"); Bonney v. Granger, 292 S.C. 308, 322, 356 S.E.2d 138, 147 (Ct. App. 1987) ("[b]y consenting to an order of reference without limitation, [the appellant] submitted to the master's subject matter jurisdiction to the same extent as if the matter were before the circuit court"). By statute, "[w]hen some or all of the causes of action in a case are referred to a master-in-equity or special referee, the master or referee shall enter final judgment as to those causes of action[.]" S.C. Code Ann. § 14-11-85. Consistently with this statute, Rule 53(c), SCRCP, provides that, once a case has been referred, "the master or special referee shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter."

"When a case is referred to a master, Rule 53(c) gives the master the power to conduct hearings in the same manner as the circuit court, unless the order of reference specifies or limits his powers." Deep Keel, 413 S.C. at 75 (quoting Smith Cos. of Greenville, Inc. v. Hayes, 311 S.C. 358, 360, 428 S.E.2d 900, 902 (Ct. App. 1993)). "Once an action is referred, the master possesses all power and authority that a circuit judge sitting without a jury would have in a similar matter." Normandy Corp. v. S.C. Dept. of Transp., 386 S.C. 393, 688 S.E.2d 136, 142 (Ct. App. 2009). Accordingly, when a case is referred to a master-in-equity without any limitations on the scope of

the master's power, i.e., the entire case is referred, subject matter jurisdiction over the whole case is moved from the circuit court and is vested in the equity court of the master. Normandy Corp., 688 S.E.2d at 142; Bonney, 292 S.C. at 322; see Deep Keel, 413 S.C. at 75; Smith Cos., 311 S.C. at 360.

When an order is rendered in the absence of subject matter jurisdiction, that order is void. Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 183, 561 S.E.2d 659 (Ct. App. 2002); Bunkum, 321 S.C. at 95. Here, the November 2 order is void. The circuit judge had already ruled on the motion to reconsider on October 29, concluding the proceedings related to that motion, and referred the entire case, without limitation, to the master-in-equity. At the time that the circuit judge filed the order purporting to deny the motion to reconsider, subject matter jurisdiction of this case had vested in the master-in-equity. Normandy Corp., 688 S.E.2d at 142; Bonney, 292 S.C. at 322; see Deep Keel, 413 S.C. at 75; Smith Cos., 311 S.C. at 360. The circuit court lacked jurisdiction to enter the November 2 order, which is, accordingly, void. Deep Keel, 413 S.C. at 75; Normandy Corp., 688 S.E.2d at 142; Universal Benefits, 349 S.C. at 183; Bunkum, 321 S.C. at 95; Smith Cos., 311 S.C. at 360; Bonney, 292 S.C. at 322.

HOW THIS COURT CAN DEAL WITH THIS ISSUE

If this court issues an order determining the November 2 order to be void, then there will be nothing for Appellant to appeal. Rule 201, SCACR. The dismissal of his counterclaim having been undone by the October 29 order, he would not be an aggrieved party. Rule 201(b), SCACR. Since the November 2 order would be determined to be a void order, it would be nullity, not a "final judgment, appealable order or decision." Rule 201(a), SCACR; accord Universal Benefits, 349 S.C. at 183;

Smith v. Ocean Lakes Family Campground, 315 S.C. 379, 380, 381, 433 S.E.2d 909, 910 (Ct. App. 1995).

There does not appear to be a large body of case law concerning how our state's appellate courts are to treat an appeal of an order that the appellate court determines is void. In Bradley v. Hullander, decided before the adoption of the South Carolina Appellate Court Rules, our Supreme Court dealt with the order on the merits of the appeal and ruled for the appellant as to that order, issuing an opinion that determined the order was invalid. 266 S.C. 188, 195, 22 S.E.2d 283, 287 (1976). Of note, though, is that Bradley also involved the appeal of another order, which was not void. Id. at 191-93, 195.

In Smith v. Ocean Lakes Family Campground, this court dismissed an appeal, apparently after briefing, issuing an opinion that determined that "there has been no valid order entered in this case, and the appealed order is a nullity entered without power or authority." 315 S.C. at 380-82 & n. 1. From the opinion, it appears that the order determined to be void was the only order subject of the appeal. Id. at 380-82.

The Supreme Court, in Hudson v. S.C. Dept. of Transp., issued an opinion that vacated an appealed order upon determining it to be void. 324 S.C. 245, 478 S.E.2d 839, 840 (1996). The opinion does not discuss whether there was any briefing in the appeal, and it appears to have been an appeal of only the order the Court determined was void. Id.

The situation was somewhat different in the Deep Keel case, in which this court determined that a finding by the master-in-equity had exceeded the scope of his limited jurisdiction under the limits given in the order of reference. 413 S.C. at 74-75. Because

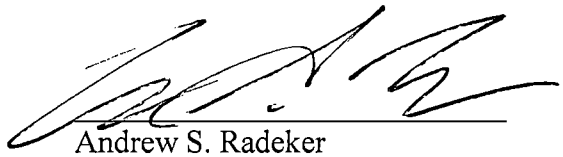
that particular finding exceeded the scope of the order of reference, this court vacated that finding. Id. at 75, 76.

As Appellant's undersigned counsel sees it, while there is only one proper determination of whether the November 2 order is void, there is more than one way the court could rule on this motion. The court could issue an order (whether published or unpublished) that determines that the November 2 order is void. Since that determination would mean that Appellant is not aggrieved and has nothing to appeal, it would be proper for the court to dismiss this appeal once an order issues making that determination. The court could, in theory, determine in its ruling on this motion that the November 2, 2018, order is not void, though, as discussed above, that determination would be incorrect. In that event, this appeal would simply proceed. The court also could decline to decide the issue of the validity of the November 2 order at this time and make that determination later, after briefing and perhaps oral argument.

The November 2 order issued in the absence of jurisdiction, and it is void, as discussed above. Appellant believes it is in the interest of judicial efficiency, for all involved, for the court to so state and issue an order accordingly.

WHEREFORE Appellant prays for an order determining the November 2, 2018, order subject of this appeal to be void and, accordingly, dismissing this appeal, or alternatively, for the court to make a ruling giving guidance on how the parties are to deal with the issue of the validity of this order as outlined above.

Respectfully submitted,



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December 11, 2018

Exhibit A

Order dismissing counterclaim

STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
COUNTY OF AIKEN	**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

Exhibit B

Motion to reconsider order dismissing counterclaim

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	Case No. 2015-CP-02-2849
Wells Fargo Bank, N.A., **Plaintiff,** **vs.** **Michael G. Morgan; Margaret H. Fitch, M.D.; Eric J. Olig; South Carolina Department of Revenue; Linda Lawrence Bowen;** **Defendants.**	**MOTION TO RECONSIDER**

YOU WILL PLEASE TAKE NOTICE that Defendant Michael G. Morgan (hereinafter "Mr. Morgan") moves before this court pursuant to Rules 52(b) and 59(e), SCRCP, as well as pursuant to all other applicable law, in the above-captioned action for an order that reconsiders, alters, clarifies, and/or amends the order filed August 24, 2018[1], that granted the Plaintiff (hereinafter "Wells Fargo")'s motion to dismiss Mr. Morgan's counterclaim in this case.

Grounds for this motion include the following:

1. In this mortgage foreclosure action, Mr. Morgan's counterclaim asserted the violation of S.C. Code Ann. § 37-10-102, commonly referred to as the attorney-preference statute, with regard to the subject mortgage loan. Mr. Morgan's counterclaim also asserted that he was entitled to the enhanced penalties for that violation under S.C. Code Ann. § 37-10-105(C). The court ruled that dismissal was proper on the basis that the counterclaim was barred by the statute of limitations and on the basis that Mr. Morgan had not pled sufficient facts to constitute

[1] The Defendant received written notice of the entry of this order on the day it was filed, through an email sent by the e-filing notification system. As yesterday, September 3, was Labor Day, this motion is timely.

unconscionability or inducement by unconscionable conduct. The court's decision was incorrect.

2. Mr. Morgan did plead sufficient facts to state a claim under S.C. Code Ann. § 37-10-105(C), as discussed below. But the court's determination that Mr. Morgan's counterclaim claim is barred under a statute of limitations defense would be incorrect regardless of whether that particular subsection is involved. The following language from S.C. Code Ann. § 37-10-105(A), quoted in Mr. Morgan's memorandum, plainly notes that a violation of the attorney preference statute, S.C. Code Ann. § 37-10-102, may be raised by a defendant in a collection proceeding, such as this foreclosure, regardless of whether a claim for that violation would otherwise be barred by the statute of limitations:

> 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.**

S.C. Code Ann. § 37-10-105(A) (emphasis added.)

3. Plainly, Mr. Morgan is the defendant debtor asserting this violation in this action to collect a debt. His assertion of the violation of the attorney preference statute is not, and cannot be, time-barred. Id. It was error for the court to conclude otherwise.
4. Accordingly, his counterclaim would survive even if it did not allege unconscionability or inducement by unconscionable conduct – because it has a

defensive function even at its most barebones, and it is not time-barred. Id. The amended answer and counterclaim alleges that "[a]ll counterclaims asserted in this action are also asserted as defenses to the extent permitted by law."

5. Mr. Morgan's counterclaim does allege sufficient facts that, when taken as true and with all reasonable inferences therefrom drawn in his favor, allege unconscionability or inducement by unconscionable conduct.

6. The purpose of S.C. Code Ann. §§ 37-10-102 and -105, as well as the purpose of the Consumer Protection Code in general, is to protect consumers, and these statutes are to be liberally construed to that end. S.C. Code Ann. § 37-1-102; King v. Am. Gen. Finance, Inc., 386 S.C. 82, 89, 90, 687 S.E.2d 321, 324 (2009); Davis v. Nationscredit Fin. Services Corp., 326 S.C. 83, 484 S.E.2d 471 (1997); Camp v. Springs Mtg. Corp., 310 S.C. 514, 426 S.E.2d 304 (1992). The court must, accordingly, interpret S.C. Code Ann. § 37-10-105 consistently with that purpose, i.e., liberally in favor of consumer protection.

7. Especially in light of this principle, Morgan's amended answer and counterclaim certainly does allege unconscionability or inducement by unconscionable conduct.

8. The order in this case takes a very narrow view of what constitutes unconscionability. That is error. In discussing unconscionability, our Supreme Court has said that "[a]bsence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 669 (2007). Many factors have been used to assess unconscionability; it is not a one-size-fits-all inquiry.

9. At issue in this case is a South Carolina mortgage loan. Under South Carolina law, a person has the right to be represented by an attorney of his own choice, without conflicts of interest, in a mortgage closing. See Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773, 777-78 (2003); State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987). A South Carolina mortgage loan closing, including a refinance, must be supervised by an attorney licensed to practice law in South Carolina. Id. The right to be represented by an attorney of one's own choice is a substantial right. Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005).

10. "The unauthorized practice of law is inherently prejudicial[.]" Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), *aff'd as modified* 404 S.C. 421, 746 S.E.2d 35, 76 (2013); accord Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532, 534 (2011). "[C]losing a [mortgage] loan without the supervision of an attorney constitutes the unauthorized practice of law." Matrix, 714 S.E.2d at 534.

11. The closing of a South Carolina mortgage loan without its supervision by a licensed South Carolina attorney, particularly where the customer is not given any opportunity to select an attorney to represent him, is inducement of the loan by unconscionable conduct under S.C. Code Ann. § 37-10-105(C). That is what the amended answer and counterclaim alleges in this case. That is simply consistent with existing precedent under Coffey and Matrix.

12. Further, Mr. Morgan's amended answer and counterclaim alleges that many of his loan documents were falsified and his signature forged – all without his knowledge. He was deprived of a meaningful choice in entering into the subject mortgage loan.

Perhaps more importantly for our purposes, that is something that the court could conclude or infer based on what he alleged.

13. The order's reliance on the standard for pleading a fraud claim is misplaced and, indeed, confusing. *Inducement* and *fraud* are not the same things. The court's application of the standard for pleading a fraud claim to a different kind of claim was error, as was its evaluation of whether Mr. Morgan pled facts to support the elements of fraud. Respectfully, the court confused Mr. Morgan's claim with a fraud claim, which has different elements and a different pleading standard.

14. It was further error for the court to rely, as it did throughout the order, on trial-level and unpublished opinions, treating them as though they were precedent. To do so is error. See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 554-56, 813 S.E.2d 292, 297-99 (Ct. App. 2018); Higgins v. Med. Univ. of S.C., 326 S.C. 592, 601, 486 S.E.2d 269, 273 (Ct. App. 1997).

15. Plus, the order (which was drafted by Wells Fargo's counsel) shows that the court has very much misapprehended Mr. Morgan's argument. On page six of the order, the court writes that "[e]ssentially, Morgan argues that the alleged violation of the Attorney Preference Statute renders his loan unconscionable and unenforceable." That is not at all what Mr. Morgan argues, as noted above.

16. At no point was Mr. Morgan contending that there is a private right of action for the mere unauthorized practice of law or that the mere unauthorized practice of law renders this loan unenforceable. Rather, the unauthorized practice of law is unconscionable conduct, and, when it is coupled with an attorney preference violation, that is something brings a claim within the ambit of S.C. Code Ann. §

37-10-105(C). As noted above, one does not need to make new law to recognize this, as this is simply consistent with existing law.

17. The court erred in dismissing the counterclaim with prejudice. When a dismissal is done "under Rule 12(b)(6) for failure to state a cause of action, the dismissal generally is without prejudice. The plaintiff in most cases should be given an opportunity to file and serve an amended complaint" or, as in this case, counterclaim. Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006); accord Dockside Assn. v. Detyens, Simmons & Carlisle, 297 S.C. 91, 95, 374 S.E.2d 907, 909 (Ct. App. 1988). There was no reason for the court to deviate from applying these same principles here.

18. Also, as discussed above, Mr. Morgan's claim plainly has a defensive function, and the court should either rule it should not have been dismissed as a defense or clarify that it was not.

19. Further, Mr. Morgan hereby incorporates as if here set forth verbatim all of the arguments made in his previously filed memorandum and other filings in this case, all of the arguments made at the hearing on Wells Fargo's motion to dismiss.

Upon information and belief, consultation with opposing counsel concerning the substance of this motion would not have served any useful purpose.

Respectfully submitted,

/s/ Andrew S. Radeker
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ATTORNEYS FOR DEFENDANT
MICHAEL G. MORGAN

Columbia, South Carolina
September 4, 2018

Exhibit C

Order granting motion
to reconsider and
referring case
to master-in-equity

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	Case No. 2015-CP-02-2849
Wells Fargo Bank, N.A., **Plaintiff,** **vs.** **Michael G. Morgan; Margaret H. Fitch, M.D.; Eric J. Olig; South Carolina Department of Revenue; Linda Lawrence Bowen;** **Defendants.**	**ORDER**

This matter comes before me upon Defendant Michael G. Morgan (hereinafter "Morgan")'s motion that asks the court to reconsider the order filed August 24, 2018, that granted the Plaintiff (hereinafter "Wells Fargo")'s motion to dismiss Morgan's counterclaim in this foreclosure case. The court is persuaded that the decision to dismiss the counterclaim was premature and that a decision on the merits of that claim should be made on a fully developed factual record. Further, as Morgan's motion to reconsider noted, in its previous order the court applied the heightened standard of pleading for fraud to Morgan's amended answer and counterclaim, and that standard is not applicable to the counterclaim alleged.

In this mortgage foreclosure action, Morgan's counterclaim asserts the violation of S.C. Code Ann. § 37-10-102, commonly referred to as the attorney-preference statute, with regard to the subject mortgage loan. Morgan's counterclaim also asserts that he is entitled to the enhanced penalties for that violation under S.C. Code Ann. § 37-10-105(C), which is applicable where the mortgage loan is unconscionable or was induced by unconscionable conduct.

The court ruled that dismissal was proper on the basis that the counterclaim was barred by the statute of limitations and on the basis that Morgan had not pled sufficient facts to constitute

unconscionability or inducement by unconscionable conduct. Having reviewed Morgan's amended answer and counterclaim in the light most favorable to him, taking all his factual allegations as true and drawing all reasonable inferences in his favor, the court concludes that Morgan did allege facts sufficient to state a violation of S.C. Code Ann. § 37-10-102 and facts sufficient to state that the loan was induced by unconscionable conduct. There is no dispute that Morgan alleges the failure to ascertain his preference as to counsel to represent him in the closing of the mortgage loan and that Morgan alleges that no attorney supervised the closing. Morgan also alleges that, without his knowledge or permission, falsified and forged documents were submitted and used in connection with the origination of that mortgage loan.

These circumstances could be construed to constitute inducement of the loan by unconscionable conduct. In discussing unconscionability, our Supreme Court has said that "[a]bsence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 669 (2007). The court finds some merit to Morgan's contention that there is no litmus test or list of elements for unconscionability. Indeed, at the hearing on the motion to reconsider, Wells Fargo's counsel acknowledged that the law in this area is not thoroughly developed. Accordingly, anything that speaks to the fundamental fairness of the origination and closing of the subject mortgage loan is relevant to whether the loan was induced by unconscionable conduct.

Morgan alleges facts from which a factfinder could conclude that the loan was originated based on false information and forged documents submitted without his knowledge. Morgan also alleges that the loan was closed without the supervision of an attorney. Under South Carolina law, a person has the right to be represented by an attorney of his own choice, without conflicts of

interest, in a mortgage closing. See Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773, 777-78 (2003); State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987). The right to be represented by an attorney of one's own choice is a substantial right. Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005). A South Carolina mortgage loan closing, including a refinance, must be supervised by an attorney licensed to practice law in South Carolina. See Doe, 585 S.E.2d at 777-78; Buyers Service, 292 S.C. at 431-32. "[C]losing a [mortgage] loan without the supervision of an attorney constitutes the unauthorized practice of law." Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532, 534 (2011). A primary purpose of requiring a lawyer to supervise a mortgage loan closing is to protect the mortgage loan customer, who typically lacks familiarity with the mortgage lending process and is not in a position to know whether something is wrong with the loan or the closing documents. See Doe, 585 S.E.2d at 777-78; Buyers Service, 292 S.C. at 431-32. Accordingly, whether a mortgage loan closing was supervised by an attorney speaks to the fundamental fairness of the process and to whether customer's entry into the mortgage loan was the product of an informed, meaningful choice. This is consistent with the principle that "[t]he unauthorized practice of law is inherently prejudicial[.]" Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), *aff'd as modified* 404 S.C. 421, 746 S.E.2d 35, 76 (2013); accord Matrix, 714 S.E.2d at 534.

As part of the South Carolina Consumer Protection Code, the purpose of S.C. Code Ann. §§ 37-10-102 and -105 is to protect consumers, and these statutes are to be liberally construed to that end. S.C. Code Ann. § 37-1-102; King v. Am. Gen. Finance, Inc., 386 S.C. 82, 89, 90, 687 S.E.2d 321, 324 (2009); Davis v. Nationscredit Fin. Services Corp., 326 S.C. 83, 484 S.E.2d 471 (1997); Camp v. Springs Mtg. Corp., 310 S.C. 514, 426 S.E.2d 304 (1992). The court must, accordingly, interpret S.C. Code Ann. § 37-10-105 consistently with that purpose, i.e., liberally in

favor of consumer protection. In light of this, the court determines that Morgan's allegations of falsification and forgery, particularly when coupled with his allegation that the mortgage loan was closed through the unauthorized practice of law, without an attorney present to protect Morgan, could be construed to constitute inducement of the subject mortgage loan through unconscionable conduct under S.C. Code Ann. § 37-10-105(C).

The other basis on which the court dismissed Morgan's counterclaim was the statute of limitations. The determination that Morgan has alleged facts sufficient to invoke S.C. Code Ann. § 37-10-105(C) disposes of this as a basis for dismissal. The statute of limitations under S.C. Code Ann. § 37-10-105(C) provides that "[a]n action pursuant to this subsection may not be brought after the original scheduled maturity date of the debt[,]" and Wells Fargo does not contend that the mortgage loan has matured. Also, as pointed out in the motion to reconsider, the statute of limitations would not bar a counterclaim that merely alleged violation of the attorney preference statute without any unconscionability. While the statute of limitations for bringing an action for violation of the attorney preference statute is usually three years from the date of the violation, this "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." S.C. Code Ann. § 37-10-105(A). This foreclosure action is an action to collect a debt brought against Morgan by Wells Fargo, so Morgan could raise a violation of S.C. Code Ann. § 37-10-102 in this case without regard to how much time has passed since the violation.

Additionally, Morgan's counsel noted to the court that, while there is no published appellate opinion concerning S.C. Code Ann. § 37-10-105(C), there is a case pending in the Court of Appeals, Quicken Loans, Inc. v. Wilson, App. Case No. 2016-001214, that may produce some

precedent concerning what constitutes inducement by unconscionable conduct under S.C. Code Ann. § 37-10-105(C). Given the unsettled posture of the law in this area, Morgan's counterclaim should not be dismissed at the 12(b)(6) stage but should be dealt with on its merits after the development of a factual record. See Garner v. Morrison Knudsen Corp., 318 S.C. 223, 226, 456 S.E.2d 907, 909 (1995) (novel issues "should not ordinarily be decided in ruling on a 12(b)(6) motion to dismiss"); Tyler v. Macks Stores of S.C., Inc., 275 S.C. 456, 459, 272 S.E.2d 633, 634 (1980) ("[a] novel issue . . . is best decided in light of the testimony to be adduced at trial").

Morgan's counsel also suggested at the hearing that this case be referred to the master-in-equity, as neither party has demanded a jury trial. "Actions to foreclose liens or obtain partition of real property shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53." Rule 71(a), SCRCP. The court finds that reference to the master-in-equity is proper and warranted.

Accordingly, it is therefore hereby ORDERED that:

1) The court hereby reconsiders and reverses the dismissal of Morgan's counterclaim;
2) This action is hereby referred to the Honorable M. Anderson Griffith, Master-in-Equity for Aiken County, pursuant to Rule 53(b), SCRCP; and
3) Morgan shall pay the master-in-equity's reference fee.

And IT IS SO ORDERED.

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/Other

So Ordered

s/D.A. Early III 2136

Exhibit D

Purported
order denying
motion to reconsider

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 DENYING DEFENDANT'S MOTION TO RECONSIDER

This matter came before this court on September 4, 2018 on Defendant Michael G. Morgan's (hereinafter "Defendant") Motion to Reconsider the Court's August 24, 2018 Order Granting Plaintiff Wells Fargo Bank, N.A.'s (hereinafter "Plaintiff") Motion to Dismiss Defendant's Amended Counterclaim. A hearing was held on October 16, 2018. Andrew S. Radeker appeared for Defendant and Stacie C. Knight appeared for Plaintiff.

After carefully conserving the record, arguments of counsel, and proposed orders submitted by counsel, the Court Stands by its prior ruling dismissing Defendant's Amended Counterclaim.

Therefore, the Court respectfully denies Defendant's Motion to Reconsider.

AND IT IS SO ORDERED.

October 30 2018
Bamberg, South Carolina

D.A. Early III, Presiding Judge

Exhibit E

Email message from judge's law clerk

Drew Radeker

From: Early, Doyet A. Law Clerk (Gaillard Dotterer) <dearlylc@sccourts.org>
Sent: Monday, November 5, 2018 12:01 PM
To: Knight, Stacie C.
Cc: Drew Radeker; Taylor Smith
Subject: Re: Wells Fargo Bank v. Michael G. Morgan, 2015CP022849 - Motion to Reconsider - hearing
Attachments: image003.jpg; image005.png

Drew and Stacie,

The order that was electronically signed was signed in error. The order filed on Friday is the correct order. The motion to reconsider is denied. Please let me know if you have any further questions.

Thank you,
Gilly Dotterer

Sent from my iPhone

On Nov 5, 2018, at 11:19 AM, Knight, Stacie C. <SKnight@winston.com<mailto:SKnight@winston.com>> wrote:

Good morning Gilly,

I represent Wells Fargo in this matter. I have copied counsel for Defendant Morgan on this email.

Last Monday, Judge Early entered an order granting Mr. Morgan's motion to reconsider. On Friday, however, he entered an order denying the motion to reconsider. I've attached both orders here for easy reference.

Can you let us know which order Judge Early intended to enter as his ruling on the motion?

Thank you,

Stacie Knight

Stacie C. Knight

Winston & Strawn LLP

D: +1 704-350-7712

sknight@winston.com<mailto:sknight@winston.com>

winston.com<https://urldefense.proofpoint.com/v2/url?u=http-3A__www.winston.com&d=DwMFAg&c=YGvVmrQQ6VQOFx3Z93C9uQ&r=q-aq4Y0DaJWxPYVywfffU9vFX5dZ3BQByT_YizqmAVY&m=xTBRMVha3psP33v0IlymaZuJftIlFg4J4dApcaz1eTc&s=fuKoGWUIKcWVP6zspMB6_lXqSxALMCKgHV9uSiKvZgY&e=>

<image003.jpg>
From: Knight, Stacie C.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Doyet A. Early III, Circuit Judge

Appellate Case No. 2018-002068

Wells Fargo Bank, N.A.,.....Respondent,

v.

Michael G. Morgan; Margaret H. Fitch, M.D.; Eric J. Olig; South Carolina Department of Revenue; Linda Lawrence Bowen, Defendants,

Of whom Michael G. Morgan is the.....Appellant.

PROOF OF SERVICE

I certify that I served the foregoing motion to determine validity of order subject of appeal in this case by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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411 Maple St.
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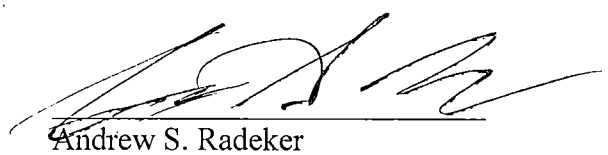
Mary O. Guynn, Esq.
Smith, Massey, Brodie, Guynn & Mayes
P.O. Box 519
Aiken, SC 29802

December 11, 2018

Respectfully submitted,



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