

Greenville County Court of Common Pleas
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Paul Wickensimer CDC CIVL SC

STATE OF SOUTH CAROLINA
PLEAS

) IN THE COURT OF COMMON
)

COUNTY OF GREENVILLE

)
) CASE NO. 2017CP2308016
)

Wells Fargo Bank, NA

) DEFENDANT – Michelle Hodges
) NOTICE OF ORDERS BEING
) APPEALED
)

Plaintiff,

v.

Michelle Hodges, Individually: Michelle Hodges
as Personal Representative of the Estate of Ruth
Ladson Witherspoon: Stanley Witherspoon : SC
Housing Corp.: Twin Creeks Homeowners
Association, Inc.;

Attached is a of all ordered being appealed, according to my Notice of Appeal dated
9/6/2019

Michelle Hodges 9/23/19
Michelle Hodges
864-714-5263

RECEIVED
SEP 25 2019
SC Court of Appeals

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Wells Fargo Bank, NA,
Plaintiff,

Case No. 2017-CP-23-08016

v.

Michelle Hodges, Individually; Michelle Hodges, as Personal Representative of the Estate of Ruth Ladson Witherspoon; Stanley Witherspoon; SC Housing Corp.; Twin Creeks Homeowners Association, Inc.;

Defendants.

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ORDER
SEP 25 2019
SC Court of Appeals

This matter came before the Court on July 22, 2019, for a hearing on various motions. The Court dispensed with several motions via a Form 4 Order entered on July 24, 2019. This Order addresses Plaintiff Wells Fargo Bank, N.A.'s ("Plaintiff" or "Wells Fargo") remaining two motions: Motion for Summary Judgment and Motion to Strike Defendant's Jury Trial Demand (collectively the "Motions"). At the hearing, Wells Fargo was represented by S. Sterling Laney, III, Esquire of Womble Bond Dickinson (US) LLP. Defendant Michelle Hodges ("Defendant" or "Hodges") appeared *pro se*.

After carefully reviewing the motion and memoranda submitted by the parties, hearing arguments from the parties, and considering the applicable law and facts related to the motion, the Court, in viewing the facts in the light most favorable to Defendant, finds it is proper to enter an Order Granting Wells Fargo's Motion for Summary Judgment and dismissing Defendant's counterclaims and the affirmative defenses of Lack of Subject Matter Jurisdiction, Lack of Standing, Fraud on the Court, and Protection from Sale Due to Transfer by Desent (sic) with

prejudice. In light of the Court's ruling regarding Defendant's counterclaims, the Court grants Wells Fargo's Motion to Strike the Defendant's Jury Trial Demand and further orders that this case be referred to the Honorable Charles B. Simmons, Jr., Master in Equity for Greenville County, for final disposition.

FACTUAL BACKGROUND

This is a mortgage foreclosure action that was initiated on December 22, 2017. The loan in question was entered into on March 28, 2012 between Defendant's mother, Ruth Witherspoon, and NVR Mortgage Finance, Inc. Since Wells Fargo filed its foreclosure complaint, Defendant has amended her answer and counterclaims multiple times. Defendant's current pleading, which is the subject of this Order, is her "Sixth Amended Answer and Counterclaim", which was filed on July 30, 2018. In this pleading, Defendant asserted the following counterclaims against Wells Fargo: (1) Actual Fraud; (2) Breach of Fiduciary Duty; (3) Intentional Infliction of Emotional Distress; (4) Negligence; (5) Deceptive Business Practices All of Which Occurred; and (6) Fair Debt Collection Prohibited. Defendant also asserted the following affirmative defenses: (1) Fraud Upon the Court; (2) Protection from Sale Due to Transfer by Desent (sic); (3) Lack of Standing; (4) Unclean Hands; and (5) Lack of Jurisdiction.

LEGAL STANDARD

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452 (2001) (citations omitted). To this end, summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist for summary

judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” *Cunningham ex rel. Grice v. Helping Hands, Inc.*, 352 S.C. 485, 491 (2003). However, “when a motion for summary judgment is made and supported as provided by the rule, an adverse party may not rest upon the mere allegations or denials of his pleadings.” *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 497 (1990) (quoting Rule 56(e), SCRPC). Rather, “[t]he adverse party’s response, including affidavits or as otherwise provided by the rule, must set forth specific facts showing there is a genuine issue for trial.” *Id.*

LAW/ANALYSIS

I. Subject Matter Jurisdiction

As a threshold matter, the Court finds that it has subject matter jurisdiction to hear this foreclosure case. Defendant argued that Wells Fargo’s failure to file a claim in her mother’s probate estate divests this Court of subject matter jurisdiction. Defendant is incorrect. Under the South Carolina Probate Code, a secured creditor is not required to file a claim against the probate estate if it is solely seeking to foreclose the mortgage and is not attempting to hold the estate liable for the deficiency following the foreclosure sale. S.C. Code Ann. §62-3-104. (“This section has no application to a proceeding by a secured creditor of the decedent to enforce his right to his security except as to any deficiency judgment which might be sought therein.”). *See also Beach First Nat’l Bank v. Gurnham (In re Estate of Gurnham)*, 407 S.C. 194, 205, 754 S.E.2d 875, 881 (2014) (discussing intersection of probate law and mortgage foreclosure actions and holding that, “the secured creditor may pursue foreclosure proceedings on the security for the mortgage without presenting a claim against the estate.”). It is hornbook South Carolina law that the court of common pleas in the county where the property affected by the foreclosure action is located has

subject matter jurisdiction. *Meaders Bros. v. Skelton*, 234 S.C. 134, 107 S.E.2d 1 (1959). See also 27 S.C. Jur. Mortgages §105.

In the present case, Wells Fargo has indicated it is not seeking a deficiency judgment against the estate. (See Complaint at ¶13). Accordingly, Wells Fargo was not required to file a claim in Defendant's mother's probate estate. Therefore, this Court has subject matter jurisdiction over this foreclosure action because the property at issue is located at 6 Young Harris Drive, Simpsonville, South Carolina 29681, which is located in Greenville County, South Carolina.

II. Counterclaims

a. Tort-Based Counterclaims

Wells Fargo is entitled to summary judgment as to all of the tort-based counterclaims asserted by the Defendant. During her deposition and again at the hearing, Defendant admitted that all of her tort-based counterclaims were based on the failed loan modification review that took place in 2017. No matter how she couches her counterclaims – whether as fraud, breach of contract with fraudulent intent, breach of fiduciary duty, intentional infliction of emotional distress, or negligence, deceptive business practices – they fail as a matter of law.

In *Weber v. Bank of America, N.A.*, No. 0:13-cv-01999-JFA, 2013 Lexis 128863, at *7 (D.S.C. Sep. 10, 2013), the borrowers sued the bank following their failure to be approved for a loan modification. *Id.* at *11. The borrowers argued that the bank's failure to consider them and/or approve them for a loan modification was negligence per se because it violated the 2011 South Carolina Supreme Court's Administrative Order regarding Foreclosure Intervention (the "Administrative Order") or federal loss mitigation guidelines, such as HAMP. *Id.* at *7. The court in *Weber* granted the bank's motion to dismiss holding that, "the 'denial of a loan modification under HAMP [or other similar programs] does not create a private cause of action.'" *Id.* at *12.

The court in *Weber* concluded that “the [Toal] Administrative Order does not impose a duty on Defendant to provide a loan modification, and neither the [Toal] Administrative Order nor the ‘other federal programs’ create a private cause of action for failure to provide a loan modification or meaningful process through which to petition Defendant for a loan modification.” *Id.* at *17. Several South Carolina courts since *Weber* have addressed these same types of claims and agreed that the denial of a loan modification does not create a private cause of action. *See Carrington v. Mnuchin*, Civil Action No. 5:13-03422-JMC, 2014 U.S. Dist. LEXIS 119430, at *28-29 (D.S.C. Aug. 27, 2014) (dismissing claims for fraud and breach of contract for fraudulent based on alleged failure to evaluate and approve the borrowers for a loan modification). *See also Thomas v. Enter. Bank of S.C.*, Civil Action No. 1:16-cv-02793-JMC, 2018 U.S. Dist. LEXIS 47958, at *4 (D.S.C. Mar. 23, 2018) (dismissing claims for fraud, misrepresentation, and breach of contract based on the loan modification process).

Accordingly, based on the holdings of *Weber* and its progeny, Defendant’s tort-based counterclaims of (1) fraud, (2) breach of fiduciary duty, (3) intentional infliction of emotional distress, (4) negligence, and (5) unfair trade practices all fail as a matter of law because there is not a private cause of action for failure to provide a loan modification. The Court, therefore, grants summary judgment and dismisses these counterclaims with prejudice.

The Court further finds and holds that even if these tort-based counterclaims could constitute a private cause of action in this case, each of them should still be dismissed for the alternative reasons provided by Wells Fargo during oral argument as well as in its Motion for Summary Judgment and Reply in Support of its Motion for Summary Judgment.

b. Fair Debt Collection Practices Act

A review of each of Defendant's pleadings reveals that she has not cited to a single section of the Fair Debt Collection Practices Act in her counterclaim which Wells Fargo allegedly violated. In her deposition, Defendant was asked to elaborate on the basis for her claim. Her response was, "The cause of action is for fair debt collection. I don't know." (See Hodges Dep. 100:15-16). In addition to her failure to specifically plead this cause of action and be able to articulate what the basis for her claim is, Defendant's counterclaim for violation of the Fair Debt Collection Practices Act fails as a matter of law because Wells Fargo is a "creditor" and not a "debt collector." 15 U.S.C. §1692a(4) and (6)(F). See, e.g. *Davis v. Dillard Nat'l Bank*, 1:02 CV 00546, 2003 WL 21297331, *4 (M.D.N.C. June 4, 2003) ("Crediting institutions, such as banks, are not debt collectors under section 1692a(6)(A) because they collect their own debts and are in the business of lending money to consumers.") Additionally, "Loan servicers are not 'debt collectors' under the FDCPA unless the debt being serviced was in default at the time the servicer obtained it." *Taggart v. Wells Fargo Home Mortg., Inc.*, No. 10-cv-00843, 2010 U.S. Dist. LEXIS 102747, at *34 (E.D. Pa. Sep. 27, 2010).

In the present case, the only evidence before this Court is that Wells Fargo was at all times collecting a debt in its own name. Further, Wells Fargo was at the very least the loan servicer prior to the loan being in default. Accordingly, Wells Fargo cannot be considered a debt collector; therefore, Defendant's Fair Debt Collection Practices Act claim fails as a matter of law and Wells Fargo is entitled to summary judgment and this counterclaim is dismissed with prejudice.

III. Affirmative Defenses

As more specifically set forth below, the Defendant's affirmative defenses of (1) fraud on the court, (2) protection from sale due to transfer by descent (sic), and (3) lack of standing fail as a

36-3-301, possession of the original note endorsed in blank is prima facie evidence of ownership. *In re Woodberry*, 383 B.R. 373, 377 (Bankr. D.S.C. 2008) "(Possession of a bearer instrument is prima facie evidence of ownership)". See also *In re Neals*, 459 B.R. 612, 619 (holding where the original note has been presented and there is undisputed evidence the person trying to enforce the note was also the loan servicer responsible for collecting payments on and enforcing the terms of the note, then such entity has the right of a holder, including the right to enforce the note under South Carolina's version of Article 3 of the UCC). Additionally, Wells Fargo has indisputably been the loan servicer at all times relevant to this lawsuit. Indeed, the crux of Defendant's entire defense in this case is the denial of a loan modification by Wells Fargo. It is well-established that a loan servicer has standing in a mortgage foreclosure action. *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 224, 746 S.E.2d 478, 483 (Ct. App. 2013).

Accordingly, based on either Wells Fargo's possession of the original note or its status as a loan servicer, there is no genuine issue of material fact as to Wells Fargo's standing to initiate this foreclosure action. Defendant's affirmative defense of lack of standing is dismissed with prejudice.

IV. Motion to Strike Jury Demand

Since the only remaining claims in this action are equitable, the Court grants Wells Fargo's motion to strike Defendant's jury demand based on the reasons set forth in Wells Fargo's Motion to Strike Jury Demand, oral arguments, and applicable South Carolina law.

CONCLUSION

For the reasons set forth above, Wells Fargo is entitled to summary judgment as to each of the Defendant's counterclaims asserted in this action. In addition, Wells Fargo is entitled to summary judgment as to the following affirmative defenses: (1) lack of subject matter

jurisdiction; (2) fraud on the court, (3) protection from sale due to transfer by desent (sic), and (4) lack of standing. Given that the only remaining claims in this action are equitable, the Court finds that Wells Fargo's Motion to Strike Defendant's Jury Demand should be granted.

THEREFORE IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. Wells Fargo's Motion for Summary Judgment is granted in its entirety;
2. Defendant's counterclaims are hereby dismissed with prejudice;
3. Defendant's affirmative defenses of (1) lack of subject matter jurisdiction; (2) fraud on the court, (3) protection from sale due to transfer by desent (sic), and (4) lack of standing are hereby dismissed with prejudice;
4. Wells Fargo's Motion to Strike Jury Demand is granted in its entirety; and
5. The above-captioned action is referred to the Honorable Charles B. Simmons, Jr., Master in Equity for Greenville County, to take testimony and other evidence offered and to make appropriate findings of facts and conclusions of law with authority to enter a final judgment in this case pursuant to Rule 53 and 71, SCRPC. Any appeal of the final judgment shall be to the South Carolina Supreme Court or the Court of Appeals in accordance with S.C. Code §14-11-85 and Rule 53(e), SCRPC.

AND IT IS SO ORDERED.

[JUDGE PERRY H. GRAVELY'S SIGNATURE PAGE TO FOLLOW]



Greenville Common Pleas

Case Caption: Wells Fargo Bank NA vs. Michelle Hodges , defendant, et al
Case Number: 2017CP2308016
Type: Order/Summary Judgment

So Ordered

s/ Honorable Perry H. Gravelly, #2755

Electronically signed on 2019-08-07 11:00:59 page 11 of 11

ATTORNEYS AND PARTIES OF RECORD SERVED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)
Wells Fargo Bank, NA)
Plaintiff)
Michelle Hodges, Individually: Michelle Hodges)
as Personal Representative of the Estate of Ruth)
Ladson Witherspoon: Stanley Witherspoon : SC)
Housing Corp.: Twin Creeks Homeowners)
Association, Inc.;)
Defendants,)
CASE O. 2017CP208016)
CERTIFICATE OF SERVICE)

I the undersigned defendant, Michelle Hodges, do certify that I have served the below parties, via first class mail as shown below.

Certified Mail
S. Sterling Laney, Attorney
Womble Bond Dickinson
550 S. Main Street #400
Greenville, SC 29601

H. Guyton Murrell, Attorney
Tracey C. Easton, Attorney
SC Housing Corp
300-C Outlet Pointe Blvd
Columbia, SC 29210

Twin Creeks HOA
3104 Grandview Dr
Simpsonville, SC 29680

Stanley Witherspoon
PO Box 95
Mauldin, SC 29662


Michelle Hodges, Defendant

19 SEP 23 PM 1:17
Paul Wickensimer COC GUL SC

Greenville County Court of Common Pleas
Attn: Clerk of Court, Peter B. Wickensimer
305 E. North ST
Greenville, SC 29601

Dear Clerk of the Court:

STATE OF SOUTH CAROLINA
PLEAS

) IN THE COURT OF COMMON
)

COUNTY OF GREENVILLE

) CASE NO. 2017CP2308016
)

Wells Fargo Bank, NA

) DEFENDANT – Michelle Hodges

Plaintiff,

) AFFIDAVIT OF MAILING

) AND PROOF OF SERVICE
)

v.

Michelle Hodges, Individually: Michelle Hodges
as Personal Representative of the Estate of Ruth
Ladson Witherspoon: Stanley Witherspoon : SC
Housing Corp.: Twin Creeks Homeowners
Association, Inc.;

I Michelle Hodges, being sworn, state that on 9/23/19, I filed copies of the orders being appealed, according to the attached certificate of service and which were stated in the Notice of Appeal.

I deposited all envelopes, with sufficient postage, in the United States Mail.

I Michelle Hodges, hereby certify that the above statements are true and correct, under the penalty of perjury.

Michelle Hodges 9/23/2019 864-714-5263
Michelle Hodges, Pro Se Defendant 6 Young Harris DR Simpsonville, SC 29681
for Certified mail: PO Box 95.- Mauldin, SC 29661 michellehodges938@gmail.com

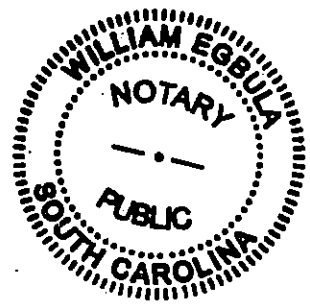
Sworn/affirmed before me this
23rd day of September, 2019

William Egbula

(Notary Public/Clerk of Courts)

my commission expires: 7/2/28

William Egbula
Notary Public
State of South Carolina, County of Greenville
Commission Expires July 2, 2028



MICHELLE HODGES
6 Young Harris DR
Simpsonville, SC 29681
864-714-5263

RECEIVED
SEP 25 2019
SC Court of Appeals

September 21, 2019

South Carolina Supreme Court
Attn: Clerk of Court, Mr. Daniel E. Shearouse
3 Supreme Court Building
1231 Gervis St
Columbia, SC 29201

RE: 2019-001565

14 pages total

I Timley filed the Notice of Appeal with the Supreme Court via fax on 9/16/2019 and I ~~inadvertently~~ included the Memo copy of the Judgement which was dated 7/24/19. However, my Notice of Appeal shows that I am appealing the Order dated 8/7/2017 which is attached.

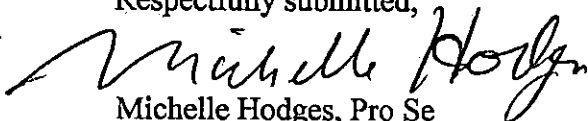
Pursuant to rule 203(e)(1)(D) I listed myself as the party taking the appeal. However, upon receipt of my Notice of Appeal, reaching the SC Supreme Court, a Notice was issued that my case had been incorrectly filed with the Supreme Court, citing the caption of my case. The Plaintiff in the lower court, incorrectly included the Estate in their caption, as the Estate had been enclosed prior to its filing of the complaint. Further, I cannot legally defend in the name of Estate, proceeding on a pro se basis. Please advise me of your correction in this matter.

Also, I attached all copies of the orders that I am appealing to the Notice of Appeal, which was faxed to your office on 9/16/19 and attached to this letter is a copy of the August 7, 2019 Order, as I inadvertently included a copy of the 7/24/19 draft for the 8/7/19 order.

And I have included a clocked copy of Notice of Orders being appealed, which has been filed with the Circuit court and served upon all parties, and proof of service is also attached.

If you need to reach me concerning these matters, please call me at the number above.

Respectfully submitted,



Michelle Hodges, Pro Se
Appellant

CASE # 2017CP230801
 Proof of Service
 of orders Appealed

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PS Form 3817, April 2007 PSN 7530-02-000-9065

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 Paul Wickens/temer COC GUL SC

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To: TC HOA
 3104 Grand Meadows Dr
 Simpsonville SC 29681

PS Form 3817, April 2007 PSN 7530-02-000-9065

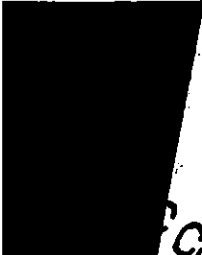
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From: M. Hodges
6 Yamp Harris Dr
Simpsonville, SC 29681



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SEP 25 2019

Court of Appeals

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C. SUPREME COURT



29201



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