

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

HALPERN FAMILY PROPERTY :
INVESTMENT, L.P., : C.A. No. 09C-11-008 WLW
:
Plaintiff, :
:
v. :
:
TOLANDO D. ANDERSON and :
CATHY ANDERSON, his wife, :
:
Defendants. :

TOLANDO D. ANDERSON and :
CATHY ANDERSON, his wife, :
:
Defendants/
Counterclaim Plaintiffs, :

v. :

HALPERN FAMILY PROPERTY :
INVESTMENT, L.P., :
:
Counterclaim Defendant/ :
Third Party Plaintiff, :

JOHN E. O'BRIEN and BROWN :
SHIELS & O'BRIEN, L.L.C., :
:
Third Party Defendants/ :
Fourth Party Plaintiffs :

v. :

WACHOVIA BANK, N.A. :
:
Fourth Party Defendant. :

Submitted: May 5, 2011
Decided: September 6, 2011

ORDER

Upon Fourth Party Defendants' Motion for Summary Judgment
Granted

Richard E. Berl, Jr., Esquire of Smith O'Donnell Feinberg & Berl, LLP,
Georgetown, Delaware; attorneys for Plaintiff Halpern Family Property
Investment, L.P.

Gary R. Dodge, Esquire of Gary R. Dodge, P.A., Dover, Delaware; attorneys for
Defendants/Counterclaim Plaintiffs Tolando and Cathy Anderson.

Roy S. Shiels, Esquire and John E. O'Brien, Esquire of Brown Shiels & O'Brien,
LLC, Dover, Delaware; attorneys for Defendant Brown, Shiels & O'Brien.

Mary E. Sherlock, Esquire and Kenneth M. Portner, Esquire of Weber, Gallagher,
Simpson, Stapleton, Fires and Newby, LLP, Dover, Delaware; attorneys for Fourth
Party Defendant Wells Fargo Bank N.A. successor by merger to Wachovia Bank,
N.A.

WITHAM, R.J.

The Court granted summary judgment to Plaintiff in the underlying action. However, a fourth party claim remains to be resolved and appears to be the final matter before this Court.

FACTS

Tolando and Cathy Anderson (“Defendants”) entered into a mortgage agreement with Fourth Party Defendant Wachovia Bank, N.A. in March 2002.¹ The agreement provided for the creation of a \$400,000 mortgage on the Defendants property at 131-135 Bradford Street in Dover, Delaware. Defendants have made monthly payments as required by the terms of the mortgage agreement, and, if they continue to do so, the mortgage will be completely paid off when the final payment is tendered in November 2011.

According to Defendants, Tolano Anderson obtained an oral release of the Wachovia mortgage on 131 Bradford Street for no consideration sometime during January 2009. Mr. Anderson claims to have obtained the release during a phone conversation with a Wachovia representative. Defendants explained that it was not difficult to obtain the release of the Bradford street property because the other properties under the mortgage had sufficient value to secure the debt. However, Wells Fargo (Wachovia’s successor in interest) has no record of an oral release being given to Defendants.

On February 20, 2009, Defendants entered a contract to sell the 131 Bradford Street property to Halpern Family Investment, LLC. (“Plaintiff”). The contract

¹ Wells Fargo Bank, N.A. acquired Wachovia Bank through a merger in 2008.

contains a clause requiring Defendants to provide marketable title. The property was conveyed by a special warranty deed in March 2009. However, the Wachovia loan remained on the property. Defendants claim that they believed the mortgage had been released pursuant to the unrecorded January phone conversation with Wachovia.

Mr. O'Brien, of the Dover law firm Brown, Shiels, and O'Brien ("BSO"), represented Plaintiff as a settlement agent during the transaction. Jeff Halpern, Plaintiff's investment manager, provided an affidavit in which he describes the relationship between Mr. O'Brien and his company. He affirmed that Mr. O'Brien's job was to represent Plaintiff's interest in the acquisition of the property. He explained that he provided Mr. O'Brien with a copy of the contract and trusted that he would do whatever was necessary in order to "see that everything would be done properly." Mr. O'Brien conducted a title search, but failed to identify the Wachovia loan.

PROCEDURAL HISTORY

Plaintiff filed three claims against Defendants: breach of contract, breach of warranty, and fraud. Plaintiff also filed a legal malpractice action against Mr. O'Brien and BSO. The action was consolidated into this case. Mr. O'Brien and BSO then filed a fourth party claim against Wells Fargo. However, the fourth party claim subsequently became orphaned from the main case after Plaintiff dropped all of its claims against Mr. O'Brien and BSO.

The Court entered summary judgment for Plaintiff on the underlying action. Wells Fargo has filed a motion for summary judgment on the fourth party claim. The

motion is before the Court.

Standard of Review

Summary Judgment should be granted if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.² The facts must be viewed in the light most favorable to the non-moving party.³ Summary Judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.⁴ However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.

DISCUSSION

Summary judgment is appropriate for two reasons. First, as explained in the Court's order granting summary judgement to Plaintiff on the underlying action, there is no evidence that the Anderson's ever obtained a legally enforceable modification (release) on their mortgage. The fourth party complaint is entirely reliant on the argument that Wells Fargo failed to execute the supposed release. There is no basis for the fourth party claim in light of the Court's finding that there is no evidence of such a release.

Second, the fourth party complaint (for contribution and indemnification) was

² Super. Ct. Civ. R. 56(c).

³ *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. Ct. 1995).

⁴ *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

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predicated on the potential liability of BSO and Mr. O'Brien. Plaintiff dropped its professional negligence claim against BSO and Mr. O'Brien. Thus, BSO and Mr. O'Brien do not stand to be held liable, and thus they have no standing to obtain contribution or indemnification from Wells Fargo.

CONCLUSION

For the foregoing reasons, Wells Fargo's motion for summary judgment is **GRANTED**.

/s/ William L. Witham, Jr.

Resident Judge

WLW/dmh

oc: Prothonotary

cc: Counsel