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NO. COA12-1279-2  
NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

RL REGI NORTH CAROLINA, LLC,  
Plaintiff,

vs.

New Hanover County  
No. 10-CVS-5742

LIGHTHOUSE COVE, LLC, LIGHTHOUSE  
COVE DEVELOPMENT CORP., INC., GLEN  
C. STYGAR, JOHN R. LANCASTER,  
LETICIA S. LANCASTER, LIONEL L.  
YOW and CONNIE S. YOW,  
Defendants.

Appeal by Plaintiff from order entered 22 March 2012 by Judge Allen Baddour and judgment entered 1 June 2012 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Cross-appeal by Defendant Connie S. Yow from orders entered 22 March 2012 and 27 March 2012 by Judge Allen Baddour and judgment entered 1 June 2012 by Judge Jay D. Hockenbury.

Originally heard in the Court of Appeals 13 March 2013. By opinion entered 20 August 2013, this Court affirmed the trial court's judgment against Plaintiff with respect to its claims against Ms. Yow, rendering moot the issues raised in Ms. Yow's cross-appeal. *RL Regi v. Lighthouse Cove*, \_\_\_ N.C. App. \_\_\_, 748 S.E.2d 723 (2013).

By opinion entered 20 August 2014, the Supreme Court of North Carolina reversed this Court's opinion and remanded this case to this Court for consideration of the issues raised in Ms. Yow's cross-appeal. *RL Regi v. Lighthouse Cove*, \_\_\_ N.C. \_\_\_, 762 S.E.2d 188 (2014).

*Nelson Mullins Riley & Scarborough, LLP, by Christopher J. Blake, Joseph S. Dowdy, and Meghan E.B. Pridemore, for Plaintiff.*

*Shipman & Wright, LLP, by Matthew W. Buckmiller, for Defendant, Connie S. Yow.*

DILLON, Judge.

This case comes to us on remand from the Supreme Court of North Carolina, which reversed this Court's prior decision, for the purpose of considering the issues raised in Ms. Yow's cross-appeal. On remand, after carefully reviewing the opinion from the Supreme Court and the arguments advanced by the parties, we find no error.

#### I. Background

The subject matter of this action involves a default with respect to loans obtained from a bank to finance a real estate development "gone bad." This background is provided for the understanding of the issues addressed in this opinion.

Additional information regarding this case may be found in this Court's prior opinion and in the Supreme Court's opinion.

A. The 2006 Loan Transaction

Lionel Yow, Glen Stygar, and John Lancaster (the "LC Owners") formed two entities (the "LC Entities") through which they planned to develop a residential subdivision called Lighthouse Cove. In April 2006, Regions Bank agreed to provide financing to the LC Entities for use in acquiring the real estate and developing Lighthouse Cove (the "Loans"), subject to certain conditions. One of the conditions required by Regions Bank was that Defendant Connie Yow, the wife of Lionel Yow, enter into a contract (the "Guaranty Contract") with Regions Bank agreeing to personally guaranty the Loans to the LC Entities, even though she was not an owner, officer, or director of the LC Entities or otherwise involved in the Lighthouse Cove development.

B. The 2009 Forbearance Agreement

By 2009, as the Lighthouse Cove development was struggling, the LC Entities defaulted on the Loans. Though Regions Bank had remedies available to it, including the right to foreclose, Regions Bank entered into a Forbearance Agreement with the LC Entities, the LC Owners, and Ms. Yow. In the Forbearance

Agreement, Regions Bank promised to defer payments that were then due under the terms of the Loans; the LC Owners and LC Entities promised to abide by certain conditions, including new repayment terms; and Ms. Yow promised to give up certain rights set out in a "Waiver of Claims" provision. However, Lighthouse Cove continued to struggle; and the LC Entities again defaulted.

#### C. The 2011 Lawsuit

In March 2011, Plaintiff, who had become the successor-in-interest to Regions Bank in matters relating to Lighthouse Cove, filed a complaint in this action alleging various claims arising from the default on the Loans by the LC Entities, including a breach of contract claim against Ms. Yow arising under her Guaranty Contract.

In her responsive pleading, Ms. Yow alleged that the Guaranty Contract was unenforceable because it violated the federal Equal Credit Opportunity Act (the "ECOA"). Additionally, Ms. Yow asserted counterclaims against Plaintiff in which she sought monetary damages and other affirmative relief.

#### D. Summary Judgment

Plaintiff moved for summary judgment, in part, with respect to its breach of contract claim against Ms. Yow and Ms. Yow's

counterclaims. Following a hearing, the trial court entered an order granting summary judgment in Plaintiff's favor with respect to Ms. Yow's counterclaims but denied Plaintiff's motion with respect to its breach of contract claim against Ms. Yow, concluding that there existed a genuine issue of material fact with regard to her defense based on a violation of the ECOA.

#### E. The Trial

On 21 May 2012, the matter came on for trial on the sole issue of Plaintiff's breach of contract claim based on the Guaranty Contract, with the trial court having summarized this claim in its jury instructions as follows:

[T]his is a case in which Plaintiff is seeking to recover a deficiency monetary judgment against Defendant, Connie S. Yow. On the other hand, the Defendant, Connie S. Yow, says that [Plaintiff] should not recover judgment against her because [Regions Bank, Plaintiff's predecessor in interest] violated the Equal Credit Opportunity Act.

The trial court submitted four questions to the jury. Based on the factual findings contained in the jury's special verdict, the trial court concluded that the Guaranty Contract violated the ECOA and was, therefore, unenforceable. Accordingly, the trial court entered judgment in favor of Ms. Yow with respect to Plaintiff's breach of contract claim. Plaintiff appealed from

the judgment. Ms. Yow cross-appealed the trial court's prior ruling granting summary judgment in favor of Plaintiff with respect to her counterclaims.

F. First Appeal to this Court

On appeal, we essentially made three holdings. The first holding involved the application of federal law. Specifically, we held that the trial court properly concluded that the Guaranty Contract violated the ECOA based on the jury's finding that Regions Bank *required* Ms. Yow to personally guaranty the Loans as a condition of making the Loans to the LC Entities.<sup>1</sup>

Our second holding involved the application of North Carolina law. Specifically, we held that the Guaranty Contract entered into in violation of the ECOA could not be enforced by Plaintiff, as the successor to the offending bank, under North Carolina law.

Third, in another application of North Carolina law, we held that the expansive waiver contained in the Forbearance

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<sup>1</sup> 12 C.F.R. § 202.7(d)(5), which is a rule promulgated by the Federal Reserve Board interpreting the ECOA, provides that "[i]f, under a creditor's standards of creditworthiness, the personal liability of an additional party is necessary to support the credit requested, a creditor may request [an additional person to serve as] a . . . guarantor. . . . The applicant's spouse may serve as an additional party, **but the creditor shall not require that the spouse be the additional party.**" (Emphasis added).

Agreement could not be used by Regions Bank in the prosecution of *its* claim against Ms. Yow under the Guaranty Contract to avoid Ms. Yow's affirmative defense that the contract was entered into in violation of applicable law.<sup>2</sup> In this holding, we did *not* reach the issue of whether Regions Bank could invoke the waiver as a defense to *Ms. Yow's potential claims* against Plaintiff under the ECOA, such as claims for actual damages or attorney's fees, see 15 U.S.C. § 1691e(a), (d).<sup>3</sup>

#### G. The Supreme Court Opinion

Plaintiff appealed to the Supreme Court. In reversing the result reached by this Court, the Supreme Court did not overrule every holding contained in this Court's opinion, but only

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<sup>2</sup> We note that the jury was not asked to determine whether Regions Bank *required* Ms. Yow to execute the Forbearance Agreement as a condition of Regions Bank's agreement to defer the payments that were then due on the Loans. Therefore, the issue of whether Ms. Yow's signature on the Forbearance Agreement was *itself* a violation of the ECOA - which prohibits discrimination "regarding *any* aspect of a credit transaction," see 12 C.F.R. § 202.4(a) (emphasis added) - and, therefore, unenforceable under North Carolina law, was not before this Court or the Supreme Court.

<sup>3</sup> We recognize that certain federal statutory *claims* available to a borrower may be waived as part of a negotiated settlement. For instance, in a case cited by our Supreme Court in this matter, the Fourth Circuit held that a guarantor in Maryland could waive her ECOA claims as part of a negotiated settlement in the context of a loan default. See *Ballard v. Bank of America*, 734 F.3d 308, 314 (4th Cir. 2013) (holding that by signing a waiver, the guarantor "waived her right to bring an action against [the bank], and thus her state and federal ECOA claims must fail").

overruled our third holding, relating to the enforceability of the waiver language contained in the Forbearance Agreement as applied to Ms. Yow's affirmative defense:

It is unnecessary, however, for us to determine in this case whether a violation of the ECOA occurred and, if so, whether such a violation creates an affirmative defense to the recovery of the indebtedness. Regardless of whether plaintiff violated the ECOA, [Ms. Yow] waived any possible claims under [the] [ECOA] statute.

*RL Regi*, \_\_\_ N.C. at \_\_\_, 762 S.E.2d at 190.

In its analysis, rather than treating Regions Bank's ECOA violation as an affirmative defense available to Ms. Yow, which could not be waived by stipulation under North Carolina law, the Supreme Court treated Ms. Yow's defense to Regions Bank's cause of action against her as a "claim" available to her under the federal ECOA statute, which under North Carolina law *could* be waived by stipulation. For instance, in the first paragraph of the opinion, the Supreme Court stated:

In this case we consider the effect of a waiver on *claims* arising from a guarantor-lender relationship, including *claims under the federal Equal Credit Opportunity Act ("ECOA")*. In exchange for a lender's willingness to restructure loans after default, a guarantor may waive *prospective claims* against the lender.



*Id.* at \_\_\_\_, 762 S.E.2d at 188 (emphasis added). In its concluding paragraph, the Supreme Court stated:

In executing the [F]orbearance [A]greement, defendant acknowledged the enforceability of her guaranty and *waived her potential claims, including those under the ECOA*, in exchange for leniency in repaying the debt. The trial court improperly allowed [Ms. Yow] to assert a *claim she waived*, thus depriving plaintiff of its rights under the [F]orbearance [A]greement.

*Id.* at \_\_\_\_, 762 S.E.2d at 191 (emphasis added).

Additionally, in rejecting this Court's rationale for treating the waiver as unenforceable based on a conclusion that the Guaranty Agreement violated applicable law, the Supreme Court, referring to the legality of the loan transaction as a whole rather than to the legality of the Guaranty Contract specifically, stated as follows:

There is nothing facially illegal about this loan relationship in which a lender provided a loan upon certain conditions; moreover, parties routinely forego *claims* in settlement agreements. Here a waiver of potential defenses to the guaranty, including a potential defense for a violation of the ECOA, was a part of [Ms. Yow's] decision to accept the benefits of the forbearance agreement.

*RL Regi*, \_\_ N.C. at \_\_\_\_, 762 S.E.2d at 191 (emphasis added).

Accordingly, the Supreme Court reversed the decision of this Court, concluding that because Ms. Yow executed the

Forbearance Agreement, Regions Bank and its successors in interest could sue to enforce the Guaranty Contract against her, notwithstanding the fact that Regions Bank might have procured the Guaranty Contract as a result of a form of discrimination prohibited under the ECOA. As a result, in its mandate the Supreme Court remanded the matter to this Court to address the issues raised by Ms. Yow in her cross-appeal.

## II. Analysis

On remand, we address the four issues raised by Ms. Yow in her cross-appeal. First, Ms. Yow argues that the trial court erred by denying her motion for summary judgment with respect to her ECOA defense. However, this argument has no merit given the decision of our Supreme Court in this matter. Furthermore, as Plaintiff points out, the decision to deny summary judgment is not reviewable once a judgment has been rendered on the merits, as is the case here. *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985).

Second, Ms. Yow contends that the trial court erred by granting summary judgment against her with respect to her claims. Most of Ms. Yow's claims are based on allegedly improper conduct by Regions Bank which occurred prior to the Forbearance Agreement being signed; and we believe that, based

on the Supreme Court's opinion, those claims are waived. Regarding Ms. Yow's contention that Regions Bank acted in bad faith following the execution of the Forbearance Agreement when it sold its interest to a third party without first offering the deal to her, we note that Ms. Yow did not make any allegation in her pleadings concerning the sale of Regions Bank's interest as a basis for her counterclaims; and therefore, this claim cannot be raised on appeal. See *Westminster v. Town of Cary*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001). In any event, Ms. Yow cites no authority for the proposition that a bank acts in bad faith by selling its interest in a loan to a third party for a negotiated price rather than first offering the same deal to the debtors. Accordingly, this argument is overruled.

Third, Ms. Yow argues that the trial court erred by refusing to compel Plaintiff to disclose during discovery the price it paid to Regions Bank. However, Plaintiff has failed to show how this evidence was relevant to any matter in the proceeding; and she has not cited any legal authority in support of her argument. Accordingly, this argument is overruled.

Finally, Ms. Yow argues that the trial court erred by refusing to direct a verdict in her favor based on her ECOA

defense. Again, based on the Supreme Court's decision in this matter, this argument is overruled.

III. Conclusion

The judgment entered on 1 June 2012 is reversed. The judgment entered on 22 March 2012 is affirmed.

REVERSED, in part, NO ERROR, in part.

Judges CALABRIA and ERVIN concur.

Report per Rule 30(e).