IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-97

Filed: 1 November 2016

Franklin County, No. 14 CVS 1116

Sheila McLean, Plaintiff,

v.

Bank of America, N.A., Nationstar Mortgage LLC, and Wells Fargo Bank, N.A., solely in its capacity as trustee for the Securitized Asset Backed Receivables, LLC 2005-FR5 Mortgage Pass-Through Certificates, Series 2005-FR5, Defendants.

Appeal by plaintiff from order entered 1 September 2015 by Judge Robert H. Hobgood in Franklin County Superior Court. Heard in the Court of Appeals 25 August 2016.

The Law Office of Benjamin D. Busch, PLLC, by Benjamin D. Busch, for plaintiff-appellant.

McGuireWoods, LLP, by Christopher B. Karlsson, for defendant-appellees.

McCULLOUGH, Judge.

Sheila McLean ("plaintiff") appeals from an order dismissing her complaint for failure to state a claim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. For the reasons stated herein, we affirm.

I. Background

On 10 December 2014, plaintiff filed a complaint against Bank of America, N.A. ("BANA"), Nationstar Mortgage, LLC ("Nationstar"), and Wells Fargo Bank, N.A. ("Wells Fargo") solely in its capacity as trustee for the Securitized Asset Backed Receivables, LLC 2005-FR5 Mortgage Pass-Through Certificates, Series 2005-FR5 (the "Trust") (collectively referred to as "defendants").

On 13 January 2015, plaintiff filed the "First Amended Complaint" against defendants. Plaintiff alleged as follows: On 2 June 2005, plaintiff executed a purchase money note ("Note") in the amount of $81,000.00 to the order of Fremont Investment & Loan for the purchase of her home at 106 Cayuga Cove in Louisburg, North Carolina. Contemporaneously, plaintiff executed a deed of trust against her home to secure the Note. The beneficiary of the deed of trust was Mortgage Electronic Registration Systems, Inc. ("MERS"). Countrywide Home Loans Servicing, LP ("Countrywide") serviced the loan account for plaintiff on behalf of an undisclosed principal. In or around 1 July 2007, plaintiff defaulted on the Note when the adjustable-rate kicked in, increasing her monthly payment by $135.00 per month. On 27 November 2007, plaintiff and Countrywide entered into a forbearance agreement and plaintiff successfully completed the agreement. Her account was current as of 20 February 2008. In or around 28 February 2008, plaintiff spoke with two Countrywide representatives who agreed to waive the increased payments and instructed her to make a payment of $914.82 on 1 April 2008 and regular monthly

payments of $634.34. Plaintiff further alleged that on 1 July 2008, BANA purchased Countrywide and BANA began to service its loans through BAC Home Loans Servicing, LP ("BAC"). Plaintiff made her October payment on 11 October 2008, but BAC returned the payment stating that it did not represent the total amount due. BAC representatives told her to not make any payments until her loan modification application under the Making Home Affordable Act ("MHA") could be reviewed.

Plaintiff alleged that in or around 1 November 2005, Securitized Asset-Backed Receivables, LLC ("SABR") issued a prospectus for the sale of bond certificates originated by the Trust. Under the prospectus, SABR would deposit a pool of loans worth approximately $528,808,000.00 in exchange for bond certificates issued from the Trust of even value. A pooling and servicing agreement ("PSA") between the Trust and Countrywide governed the collection of the loan pool and other rights and obligations. Plaintiff alleged that "[o]n information and belief and without admission that the Trust is a holder or owner of Plaintiff's loan entitled to foreclose under the terms of her deed of trust, Plaintiff's loan was originated for the deposit into the Trust" and that the Trust does not allow modifications related to any of the loans in its corpus, as stated in the PSA.

Plaintiff alleged that in January 2009, she submitted a MHA application for review by BAC for a modification. Plaintiff did not make any more payments because she was advised not to by BAC while her modification was being reviewed. In June

of 2009, BAC representatives informed plaintiff she would have to re-apply because her paperwork had been misplaced. BAC responded on 27 October 2010 and stated that the "workout assistance you have requested is not an option." On 9 December 2010, BAC sent a more formal response stating that plaintiff was not eligible for a Home Affordable Modification:

> Because we are unable to create an affordable payment equal to 31% of your reported gross income without changing the terms of your loan beyond the requirements of the program. In other words, to create an affordable payment for you, the investor (owner) of your loan would be required to delay collecting too large a portion of your principal balance until the loan pays off, beyond what the Home Affordable Modification Program allows.

Plaintiff alleged that the "real reason Plaintiff did not qualify for the MHA, HAMP (Home Affordable Modification Program), or any modification" was because the Trust did not allow for modification of any terms of any loan per the express terms of its PSA with BAC. Plaintiff asserted that BAC knew or should have known that the Trust did not allow for modifications of the loan under any circumstances and that as a proximate result of BAC's failure to promptly advise plaintiff, she fell arrears on an account that likely rendered a Chapter 13 bankruptcy out of reach for plaintiff.

Plaintiff alleged that over the next several months, she received conflicting information from BAC representatives "concerning her eligibility for even an in-house modification." On or about 1 July 2011, BAC merged with and into BANA and BANA began servicing plaintiff's loan according to its PSA with the Trust. On

14 September 2011, BANA denied an application for a modification plaintiff had submitted on 5 May 2011 "because Plaintiff's only source of income at that [time] was unemployment benefits." On 30 March 2012, plaintiff received correspondence that she may qualify for a modification and had been assigned a customer relationship manager. In or around June 2012, plaintiff submitted a new application after gaining employment. Throughout 2012 and 2013, BANA sent plaintiff multiple letters stating that BANA "has several programs designed to help homeowners who are having trouble making their monthly mortgage payment, and it's possible that one could help you." Plaintiff alleged that although BANA knew or should have known that the Trust does not allow modification, BANA sent correspondence to plaintiff on 27 June 2012 that stated "[H]ave a personalized discussion with a home loan specialist about your financial situation. They will explain the details of foreclosure alternatives such as loan modification, short-sale, or a deed-in-lieu and will evaluate which options are available to you." Plaintiff alleged that BANA employed a strategy of delaying the HAMP application by claiming items were missing and took six months to review plaintiff's June application. Plaintiff's application was denied on 19 December 2012 because BANA did not have the contractual authority to modify plaintiff's loan, a fact that plaintiff alleged BANA knew or should have known throughout the modification requests between 2009 and late 2012. On 3 January 2013, a BANA representative called plaintiff, stating that an in-house

modification was still possible only to be later informed on 9 January 2013 that the Trust did not allow modifications. Plaintiff alleged that BANA knew or should have known this fact through plaintiff's multiple dealings with BANA concerning her loan. On or about 26 December 2013, BANA transferred the servicing rights to this loan to Nationstar.

Plaintiff further alleged that Wells Fargo, as trustee for the Trust, caused to be recorded a substitution of trustee under plaintiff's deed of trust. On 26 October 2009, the substitute trustee initiated foreclosure proceedings on behalf of the Trust alleging that the Trust was the holder of plaintiff's note and entitled to foreclose under power of sale. The foreclosure hearings were continued for several years. On 9 January 2012, MERS assigned all rights and interests it had in plaintiff's deed of trust to the Trust by a recorded assignment. In or around April 2013, plaintiff contested the foreclosure proceedings. On or about 16 September 2013, the substitute trustee voluntarily dismissed the foreclosure without prejudice. Nationstar filed a new appointment of substitute trustee, Substitute Trustee Service, Inc. ("STS"). STS re-filed a foreclosure of the deed of trust under power of sale alleging that Nationstar was now the holder of plaintiff's note and entitled to foreclose. Following a contested hearing, Nationstar's petition to foreclose under power of sale was denied. Nationstar appealed said order where it remains pending as of the filing date of plaintiff's amended complaint.

Based on the foregoing allegations, plaintiff brought forth the following claims: declaratory judgment against the Trust and Nationstar that Nationstar may not foreclose under power of sale without an assignment of the beneficial interest of the deed of trust to Nationstar and that Nationstar lacks authority to appoint a substitute trustee under N.C. Gen. Stat. § 45-10; violations of the North Carolina Debt Collection Act ("NCDCA"); unfair and deceptive trade practices ("UDTP"); violation of the implied covenant of good faith and fair dealing; negligent misrepresentation; and unjust enrichment against BANA.

On 29 January 2015, plaintiff filed a "Motion for Preliminary Injunction," moving the trial court to issue a preliminary injunction preventing STS, as substitute trustee, from proceeding to a foreclosure sale.

On 11 February 2015, defendants BANA and Nationstar filed a "Motion to Dismiss" pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for an order to dismiss all claims against defendants.

Following a hearing held at the 3 August 2015 civil session of Franklin County Superior Court, the trial court entered an "Order on Defendants' Motion to Dismiss" on 1 September 2015. Plaintiff voluntarily dismissed her claims of negligent misrepresentation and unjust enrichment against BANA without prejudice. The trial court found that plaintiff failed to state any claim against defendants upon which relief may be granted and granted defendants' motion to dismiss. The trial court

further found that no grounds existed to grant plaintiff's requested injunctive relief and denied her motion for preliminary injunction.

Plaintiff appeals.

II. Discussion

Plaintiff argues that the trial court erred in granting defendants' Rule 12(b)(6) motion to dismiss because she stated a NCDCA and UDTP claim, as well as a claim for declaratory relief. Furthermore, plaintiff contends that if our Court concludes that plaintiff stated a claim for relief, then we should remand for reconsideration of whether an injunction should issue.

> A motion to dismiss made pursuant to G.S. 1A-1, Rule 12(b)(6) tests the legal sufficiency of the complaint. In order to withstand such a motion, the complaint must provide sufficient notice of the events and circumstances from which the claim arises, and must state allegations sufficient to satisfy the substantive elements of at least some recognized claim. The question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. In general, a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim*. Such a lack of merit may consist of the disclosure of facts which will necessarily defeat the claim as well as where there is an absence of law or fact necessary to support a claim. Our standard of review on a motion to dismiss for failure to state a claim is *de novo* review.

Parker v. Town of Erwin, __ N.C. App. __, __, 776 S.E.2d 710, 729 (2015) (internal citations and quotation marks omitted) (emphasis in original).

First, we address plaintiff's contention that her amended complaint was sufficient to support a UDTP and NCDCA claim against BANA.

"[O]ur General Assembly intended for NCDCA claims – brought under Article 2, Chapter 75 – to be subject to the same general requirements that apply to [UDTP] claims brought under Article 1, Chapter 75." *Simmons v. Kross Lieberman & Stone, Inc.*, 228 N.C. App. 425, 429, 746 S.E.2d 311, 315 (2013).

Section 75-1.1 of our General Statutes states, in pertinent part, that "unfair or deceptive acts or practices in or affecting commerce[ ] are declared unlawful." N.C. Gen. Stat. § 75-1.1(a) (2016). "In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) [the] defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Bumpers v. Cmty. Bank of N. Va.*, 367 N.C. 81, 88, 747 S.E.2d 220, 226 (2013) (citation omitted).

The NCDCA is contained in N.C. Gen. Stat. §§ 75-51 to -55. "In it, our legislature has proscribed certain activities in the area of debt collection." *Reid v. Ayers*, 138 N.C. App. 261, 263, 531 S.E.2d 231, 233 (2000). "[B]efore a claim for unfair debt collection can be substantiated, three threshold determinations must be satisfied. First, the obligation owed must be a 'debt'; second, the one owing the

obligation must be a 'consumer'; and third, the one trying to collect the obligation must be a 'debt collector.' " *Green Tree Servicing LLC v. Locklear*, 236 N.C. App. 514, 520, 763 S.E.2d 523, 527 (2014) (citation omitted). "[O]nce the three threshold requirements in section 75-50 are satisfied, a claim for unfair debt collection practices must then meet the three generalized requirements found in section 75-1.1: (1) an unfair act (2) in or affecting commerce (3) proximately causing injury." *Reid*, 138 N.C. App. at 266, 531 S.E.2d at 235.

"[W]hether an action is unfair or deceptive is dependent upon the facts of each case and its impact on the marketplace." *Norman Owen Trucking, Inc. v. Morkoski*, 131 N.C. App. 168, 177, 506 S.E.2d 267, 273 (1998) (citation and internal quotation marks omitted).

> If a practice has the capacity or tendency to deceive, it is deceptive for the purposes of the statute. "Unfairness" is a broader concept than and includes the concept of "deception." A practice is unfair when it offends established public policy, as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.

Supplee v. Miller-Motte Bus. College, Inc., __ N.C. App. __, __, 768 S.E.2d 582, 598 (2015) (citation omitted).

In support of her NCDCA claim, plaintiff alleged that BANA "falsely represent[ed] to Plaintiff that a modification could be performed on her loan when BANA knew or should have known that the Trust it services the loan for does not

allow modifications under any circumstances." Specifically, plaintiff pointed to letters sent from BANA dated 30 March 2012, 27 June 2012, and 23 April 2013, as well as "countless statements from BANA representatives [that] stated or implied that there were options available to the Plaintiff to stay in her home when BANA knew or should have known that BANA could not modify Plaintiff's mortgage."

In support of her UDTP claim, plaintiff alleged that the HAMP program was created to "stabilize the housing market and help struggling homeowners get relief and avoid foreclosure" and that violations of HAMP protocol for HAMP review have been recognized as a basis for UDTP claims. Citing to the HAMP manual section 4.7.3, plaintiff argued that within thirty days from the date that an "Initial Package is received from a person applying for a HAMP modification," the servicer must determine whether the borrower meets basic eligibility criteria for any MHA program. Plaintiff alleged that despite this provision, BANA waited approximately eleven months from plaintiff's first application to give a formal denial with a reason for plaintiff's non-HAMP eligibility on 9 December 2010. She also alleged that despite knowing that BANA services plaintiff's loan for a non-participating investor in the MHA and that plaintiff does not qualify for HAMP, plaintiff reviewed a second HAMP application on or about 5 May 2011, waiting four months for a formal denial, and plaintiff reviewed a third HAMP application in June 2012, waiting six months for a formal denial.

The foregoing allegations establish that both plaintiff's NCDCA and UDTP claims are premised on the argument that because a loan modification was not available to plaintiff, BANA's communications with plaintiff representing that plaintiff could obtain a modification and processing plaintiff's applications for a modification were unfair or deceptive. However, plaintiff's amended complaint reveals the absence of facts sufficient to satisfy the requirement that BANA's communications or actions amounted to an unfair or deceptive act.

First, plaintiff has mischaracterized BANA's communications and interpreted them as an affirmative representation that a loan modification was an option. Plaintiff's amended complaint directs our attention to three specific communications that merely convey that BANA would be open to discuss the possibility of foreclosure alternatives *such as* loan modification, short sale, deed-in-lieu, etc., and would evaluate which options would be available to plaintiff. Nowhere in these communications does BANA represent that a loan modification is an option available to plaintiff.

The 30 March 2012 letter from BANA stated that a customer relationship manager had been assigned to plaintiff. It further informed plaintiff as follows, in pertinent part:

> [BANA] has several programs designed to help homeowners who are having trouble making their monthly mortgage payment, and it's possible that one could help you.

> Together, we can review your individual situation and determine which of our programs may be available to you. . . . We will discuss where you are in the loan assistance process, where you've been and what some possible outcomes are.

The 27 June 2012 letter sent by BANA stated as follows, in relevant part:

> We value your relationship with [BANA] and understand that you may be experiencing difficulty making your mortgage payments. Let us help.
>
> We would like to invite you to our Cary Customer Assistance Center to have a personalized discussion with a home loan specialist about your financial situation. They will explain the details of foreclosure alternatives such as loan modification, short sale, or a deed-in-lieu and will evaluate which options are available to you.

The 23 April 2013 letter from BANA provided as follows, in pertinent part:

> [BANA] has several programs designed to help homeowners who are having trouble making their monthly mortgage payment, and it's possible that one could help you.
>
> . . . .
>
> As your Customer Relationship Manager, I will work with you to review your individual situation and help determine which of our programs may be available to you.
>
> . . . .
>
> One of the most important things you can do to successfully complete the loan assistance process is to provide us with all of the documents we require within the timeline requested. Depending on your individual situation, we will

> request income and property related documents. Once we determine what program is right for your loan, we will provide you with instructions for the preferred method of submitting those documents to us.

Second, as defendants note, the relationship between plaintiff and BANA is governed by the mortgage loan documents. The relevant loan documents do not impose an affirmative duty on BANA "to negotiate after a default event[,]" a fact that plaintiff readily concedes. In *Wachovia Bank & Trust Co., N.A. v. Carrington Dev. Assocs.*, 119 N.C. App. 480, 459 S.E.2d 17 (1995), the defendant filed a counterclaim alleging that the plaintiff committed an unfair or deceptive trade practice by refusing to disburse funds as required under the loan agreement. Our Court held that because the plaintiff had no duty to disburse funds, there was no unfair or deceptive act and thus, the UDTP cause of action failed. *Id.* at 487, 459 S.E.2d at 21. Similarly, we also conclude that because BANA had no contractual duty to negotiate after a default event, plaintiff's allegations that BANA's communications with plaintiff through letters discussing foreclosure alternatives, BANA's acceptance of plaintiff's loan modification applications, and the delay in BANA's responses to those applications amounted to an unfair or deceptive acts fails.

After thoroughly reviewing the allegations of plaintiff's amended complaint and assuming, without deciding, that plaintiff has sufficiently plead that BANA's actions were in or affecting commerce and that it proximately caused plaintiff injury, we are unable to hold that the allegations contained in plaintiff's complaint

demonstrate that BANA's alleged actions were unfair or deceptive. Accordingly, we hold that the trial court did not err in granting defendants' motion to dismiss as to plaintiff's NCDCA and UDTP claims.

Next, we address plaintiff's argument that the amended complaint sufficiently stated a claim for declaratory relief.

Plaintiff sought a declaratory judgment from the trial court that "Nationstar may not foreclosure under power of sale without an assignment of the beneficial interest of the Deed of Trust to Nationstar and that Nationstar lacks authority to appoint a substitute trustee under N.C. Gen. Stat. § 45-10." However, we agree with defendants that the prior pending action doctrine defeats plaintiff's claim. The prior pending action doctrine provides that:

> When a prior action is pending between the same parties, affecting the same subject matter in a court within the state or the federal court having like jurisdiction, the subsequent action is wholly unnecessary and therefore, in the interest of judicial economy, should be subject to a plea in abatement. Moreover, where the prior action has been adjudicated by the trial court but is pending appeal it will continue to abate a subsequent action between the parties on substantially identical subject matter and issues. In determining whether the parties and causes are the same for the purpose of abatement by reason of the pendency of the prior actions, the ordinary test is this: "Do the two actions present a substantial identity as to parties, subject matter, issues involved and relief demanded."

State ex rel. Onslow County v. Mercer, 128 N.C. App. 371, 375, 496 S.E.2d 585, 587-88 (1998) (internal citations and quotation marks omitted).

Here, plaintiff alleged in her complaint as follows, in pertinent part:

> 72. Following the mortgage service transfer to Nationstar, Nationstar caused to be filed in the Franklin County register of deeds a new appointment of substitute trustee, Substitute Trustee Service, Inc. (STS). STS re-filed a foreclosure of the deed of trust under power of sale alleging that Nationstar was now the holder of Plaintiff's note and entitled to foreclose. No assignment of the beneficiary interest under Plaintiff's deed of trust has been assigned to Nationstar as reflect[ed] in the Franklin County Register of Deeds.
>
> 73. Following a contested hearing, the Clerk of Franklin County denied Nationstar's petition to foreclose under power of sale and Nationstar appealed said order where it remains pending as of the filing date of this Complaint.

Applying the principles of the prior pending action doctrine to the circumstances before us, we find that the parties, subject matter, legal issues, and relief demanded in the present case are substantially similar to those raised in Nationstar's foreclosure action which was commenced prior to plaintiff's current action. Therefore, we hold that the trial court did not err by dismissing plaintiff's claim for declaratory relief.

In light of our disposition of this case, we need not reach plaintiff's remaining arguments.

III. Conclusion

For the reasons stated above, we affirm the order of the trial court, granting defendants' motion to dismiss.

AFFIRMED.

Judge HUNTER, JR. concurs.

Judge DIETZ concurs in a separate written opinion.

Report per Rule 30(e).

DIETZ, Judge, concurring.

I concur. When the terms of a contract are quoted in a complaint, the trial court properly can review those contract terms on a motion to dismiss under Rule 12(b)(6). *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60, 554 S.E.2d 840, 847 (2001).

Here, Plaintiff asserts that the applicable pooling and servicing agreement "does not allow a modification under any circumstances and this information was known or should have been known" by Bank of America. But the language from that agreement, quoted in the complaint at Paragraph 29, shows that the agreement only limits modifications that change the mortgage interest rate, reduce or increase the principal balance, or change the maturity date of the loan.

Thus, even accepting every allegation in the complaint as true, Plaintiff failed to allege facts sufficient to support her claims because her core allegation—that Bank of America "falsely represent[ed] to Plaintiff that a modification could be performed on her loan when [Bank of America] knew or should have known that the Trust it services the loan for does not allow for modification under any circumstances"—was defeated by contract language quoted in the complaint. Accordingly, the trial court properly granted Bank of America's motion to dismiss for failure to state a claim on which relief could be granted.