IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA MARTINSBURG

ALAN W. STAATS and BARBARA A. STAATS,

Plaintiffs,

v. **Civil Action No. 3:10-CV-68 (BAILEY)**

BANK OF AMERICA, N.A., d/b/a BANK OF AMERICA HOME LOANS, et al.,

Defendants.

ORDER DENYING MOTION TO RECONSIDER

Currently pending before this Court is the plaintiffs' Motion to Reconsider [Doc. 44], filed December 7, 2010. The defendants responded on December 21, 2010, and the plaintiffs replied on January 3, 2011. The Court has reviewed the record and the arguments of the parties and, for the reasons set out below, concludes that the motion should be **DENIED**.

BACKGROUND

This case involves origination and servicing claims in connection with the plaintiffs' June 2007 loan. With regard to origination, the plaintiffs claim that Countrywide Home Loans, Inc. ("Countrywide") unconscionably induced and defrauded them into the loan by misrepresenting the amount of the monthly payment. As for servicing, the plaintiffs claim that BAC Home Loans Servicing, LP ("BAC") breached its implied duty of good faith and fair dealing and violated the West Virginia Consumer Credit and Protection Act

("WVCCPA") W.Va. Code § 46A-2-122, *et seq*., by instructing them not to make loan payments, while refusing to evaluate them for a loan modification and repeatedly representing that it would provide an affordable loan modification in lieu of foreclosure.

On the defendants' motion, this Court dismissed all claims against Countrywide and a number of claims against BAC [Doc. 43]. First, this Court dismissed the plaintiffs' unconscionable inducement and fraud claims against Countrywide as time-barred. (Id. at 16-18). Next, this Court dismissed the plaintiffs' illegal debt collection claim against BAC as preempted by the National Bank Act ("NBA") insofar as it is a "servicing" claim that "obstructs, impairs, or conditions" an "operating subsidiary" of a national bank, Bank of American, N.A. (Id. at 21). Finally, this Court dismissed the plaintiff's claim that BAC was estopped from foreclosure finding that it more properly takes the form of an equitable defense, not a cause of action. (Id. at 23).

In the instant motion, the plaintiffs ask this Court to reconsider each of those rulings and correct the following four clear errors of law [Doc. 44]. First, the plaintiffs argue that the Court clearly erred in its application of the one-year statute of limitations in W.Va. Code § 46A-5-101(1) to their claim of unconscionable inducement. (Id. at 3-6). In particular, the plaintiffs assert that this Court incorrectly found that the statute of limitations began to run from the date they were aware of the higher-than-expected monthly payment instead of from the due date of the last scheduled payment of the agreement, July 1, 2037. (Id.). Second, the plaintiffs argue that it was clear error for the court to apply the two-year statute of limitations in W.Va. Code § 55-2-12, by analogy, to find that their fraud claim is barred by the doctrine of laches. (Id. at 6-9). Third, the plaintiffs argue that the Court clearly erred by finding their illegal debt collection claim preempted by the NBA, when the original lender

is not a national bank and the state provision does not conflict with federal law. (Id. at 9-19). Fourth, the plaintiffs argue that it constituted clear error for the Court to dismiss their estoppel claim, which they contend has been recognized in West Virginia as an independent cause of action, especially in the context of an attempt to set aside a foreclosure. (Id. at 20-22).

In response, the defendants contend that reconsideration of the Court's rulings is not warranted [Doc. 46]. First, the defendants argue that the Court correctly found the plaintiffs' unconscionable inducement claim time-barred, but even if not, reconsideration of the ruling is unnecessary insofar as the claim fails on its merits as a matter of law. (Id. at 5-9). Second, the defendants argue that the Court properly applied the applicable statute of limitations, by analogy, to find that the plaintiffs' delay in bringing their fraud claim is presumptively unreasonable under the doctrine of laches. (Id. at 9-11). Third, the defendants argue that the Court correctly applied the NBA to the plaintiffs' illegal debt collection claim because: (1) the claim is based upon representations made in servicing by an operating subsidiary of a national bank and (2) servicing claims are expressly preempted by the NBA. (Id. at 11-16). Fourth, the defendants argue that the Court properly dismissed the plaintiffs' estoppel claim because estoppel is a remedy, not an independent cause of action, and any argument that the claim is necessary to set aside the foreclosure must have been raised before the Court's ruling. (Id. at 16-17).

In reply, the plaintiffs re-emphasize and supplement their previous arguments in support of reconsideration [Doc. 47]. First, the plaintiffs argue that their claim for unconscionable inducement is not time-barred nor was dismissal harmless error. (Id. at 1-8). Second, even assuming that the statute of limitations for their fraud claim established

unreasonable delay, the plaintiffs argue that Countrywide still must show that it was prejudiced by that delay. (Id. at 8-10). Third, the plaintiffs argue that the principals of assignee liability require that Courts only apply the NBA to claims regarding loans originated by a national bank, and that the Court failed to apply a conflict preemption analysis. (Id. at 10-14). Fourth, the plaintiffs argue that West Virginia recognizes a claim for estoppel and that dismissal based upon any lack of recognition does substantial injustice. (Id. at 14-15).

DISCUSSION

I. Applicable Standard

Pursuant to Federal Rule 54(b) of Civil Procedure, a district court "retains power to amend interlocutory orders to achieve complete justice." ***Shrewsbury v. Cyprus Kanawha Corp.***, 183 F.R.D. 492, 493 (S.D. W.Va. 1998). In reviewing a motion under Rule 54(b), a district court is "guided by the general principals" of Rule 59(e). ***Id.*** "There are three circumstances in which the district court can grant a Rule 59(e) motion: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." ***United States ex rel. Becker v. Westinghouse Savannah River Co.,*** 305 F.3d 284, 290 (4th Cir. 2002) (quoting ***Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.***, 148 F.3d 396, 403 (4th Cir. 1998)).

II. Analysis

The plaintiffs seek the entry of an order reconsidering this Court's November 4, 2010, Order Granting In Part and Denying In Part Defendants' Motion for Judgment on the Pleadings [Doc. 43]. In support of their motion, the plaintiffs neither identify an intervening

change in controlling law, nor present evidence not available at the time of disposition. The basis appears to be that this Court has committed one or more clear errors of law. The Court will now consider those asserted errors of law, in turn.

A. Unconscionable Inducement (Count I)

In the challenged Order, this Court dismissed the plaintiffs' unconscionable inducement claim against Countrywide as untimely. The plaintiffs argue that this was error and that the claim should be reinstated. The defendants respond that even if the Court erred in its timeliness determination, the claim should not be reinstated because it fails on its merits. This Court agrees.

Significantly, the allegations surrounding the closing cannot as a matter of law support the plaintiffs' unconscionable inducement claim because those allegations concern the asserted actions of Francis J. Houston. (See [Doc. 36] at ¶ 36). On June 16, 2010, the Circuit Court of Jefferson County, West Virginia, dismissed Houston, and the plaintiffs moved to set aside the Order. When the defendants removed before ruling was made, this Court denied the plaintiffs' motion on August 30, 2010, finding that the plaintiffs' allegations "provide inadequate support for the legal conclusion that Defendant Houston acted as the closing agent for Countrywide." ([Doc. 25] at 8). Instead, the Court noted that the Deed of Trust "clearly reflects that Defendant Houston acted solely as a notary on the day in question." (Id.). As such, support must come from the other allegations in Count I.

However, the remaining allegations fail to support a claim for unconscionable inducement against Countrywide. "Unconscionability in West Virginia . . . requires both 'gross inadequacy in bargaining power' and "terms unreasonably favorable to the stronger party.'" ***Adkins v. Labor Ready, Inc.***, 303 F.3d 496, 502 (4th Cir. 2002) (quoting ***Troy***

Mining Corp. v. Itmann Coal Co., 176 W.Va. 599, 603, 346 S.E.2d 749, 753 (1986)). In their Amended Complaint, the plaintiffs allege that they were unconscionably induced into the loan by a Countrywide representative who represented that their monthly payment would be $717.45, though it was over $100 more when they received their first billing statement. ([Doc. 36] at ¶¶ 12(b), 15, 32, 35). The Court finds that these allegations, when taken as true, fail as a matter of law to satisfy either prong required to show unconscionability.

First, the loan documents indicate that the plaintiffs assented to a total monthly payment of $828.27. In particular, the one-page New Loan Payment Form [Doc. 37-3][1], which the plaintiffs signed along with the Deed of Trust [Doc. 37-1] and Note [Doc. 37-2] on June 23, 2007, provides a straightforward breakdown of the monthly payment. According to the breakdown, the monthly payment would be comprised of $717.45 for principal and interest, $43.03 for county taxes, and $67.79 for hazard insurance. The breakdown then denotes that the "Total Payment" would be $828.27. Located approximately one (1) inch below are the plaintiffs' signatures. Based upon this assent, the Court will not find that any unequal bargaining power compelled the plaintiffs to agree. *See* ***Knapp v. Am. Gen. Fin. Inc.***, 111 F.Supp.2d 758, 763 (S.D. W.Va. 2000) (recognizing as "a widely accepted principle of contracts" that "one who signs or accepts a written

[1]Though the Court excluded the New Loan Payment Form in its consideration of the defendants' Motion for Judgment on the Pleadings [Doc. 37], the Court now elects to consider the document as one integral to providing context to the Deed of Trust, which the Amended Complaint incorporated by reference. *See* ***Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.***, 367 F.3d 212, 234 (4th Cir. 2004) (finding that a court ruling on a motion to dismiss may consider any documents integral to and relied on in the complaint–regardless of whether those documents are actually attached to the complaint).

instrument will normally be bound in accordance with its written terms"); *see also* ***Johnson v. Washington***, 559 F.3d 238, 245 (4th Cir. 2009) (finding plaintiffs' claims of oral misrepresentation failed because "the documents they signed plainly stated the terms of the transaction").

Even assuming that the bargaining power prong is satisfied, the plaintiffs have failed to provide allegations sufficient for the Court to find that their monthly payment constituted an unfair term. Significantly, the plaintiffs' monthly payment for principal and interest *was* $717.45. That the plaintiffs had to pay additional sums for county taxes and property insurance cannot, standing alone, deem the monthly payment an unfair term on its face.

Insofar as the plaintiffs have failed to state a claim for unconscionable inducement, the Court finds restatement unwarranted. Accordingly, the plaintiffs' motion should be **DENIED** to the extent that it requests reinstatement of Count I (Unconscionable Inducement).

B. Fraud (Count II)

Next, the plaintiffs argue that the Court clearly erred by relying on the statute of limitations for a fraud claim at law to dismiss their equitable fraud claim as precluded by the doctrine of laches. This Court disagrees.

When sitting in equity, a trial court retains the discretion to apply an analogous statute of limitations as an absolute bar. This discretion is in accord with the maxim that "equity follows the law," which the Supreme Court of Appeals of West Virginia has adopted. *See, e.g.,* ***Maynard v. Board of Educ.***, 178 W.Va. 53, 357 S.E.2d 246 (1987). As one district court explained, "courts do not apply a traditional analysis when utilizing a statute

of limitations by analogy. Instead, courts use the analogous statute of limitations as a presumptive time period for laches to bar a claim. A delay beyond the statutory period is presumptively unreasonable." ***In re Hendry***, 2009 WL 4927636, *3 (D. Del. Dec. 21, 2009) (internal citations omitted). Contrary to the plaintiffs' argument, this presumption applies to the delay and prejudice prongs. *See* ***Id.*** (explaining that the presumptively unreasonable delay was presumptively prejudicial).

Insofar as this Court merely exercised its equitable discretion to apply a statute of limitations by analogy, allowing equity to follow the law, reinstatement in unwarranted. Accordingly, the plaintiffs' motion should be **DENIED** to the extent that it requests reinstatement of Count II (Fraud).

C. Illegal Debt Collection (Count V)

The plaintiffs' third error of law, which concerns the dismissal of their illegal debt collection claim, is two-fold: (1) the Court erred in applying the NBA, even though the original lender is not a national bank; and (2) the Court erred in finding their claim preempted, even though the state statute does not conflict with federal law. The Court will consider each argument, in turn.

1. Applicability of the NBA

The plaintiffs argue that a court should always consider the status of the originating lender dispositive in deciding whether to apply the NBA's preemption framework. In particular, the plaintiffs argue that because their loan was not originated by a national bank, BAC should not have the benefit of NBA preemption, even though the claim is based solely upon BAC's alleged conduct in servicing the loan. This Court disagrees.

In support of their argument, the plaintiffs cite ***Phipps v. FDIC***, 417 F.3d 1006 (8th Cir. 2005). In ***Phipps***, three couples filed a putative class action against their lender, Guaranty National Bank of Tallahassee ("GNBT"), to challenge a number of origination fees which they paid to a third-party, Equity Guaranty LLC ("Equity"). ***Id.*** at 1009. The plaintiffs argued that the various fees were "finder's fees" paid to a non-national bank, and thus, that NBA preemption should not apply. ***Id.*** Rejecting this contention, the Eighth Circuit explained that courts should look to the originating entity to determine whether NBA preemption applies. ***Id.*** at 1013. In ***Phipps***, because the fees were more properly characterized as interest charged by GNBT, a national bank, the Court applied NBA preemption to preclude the plaintiffs' attempt to challenge those fees under state usury laws. ***Id.***

However, insofar as ***Phipps*** and the other cited cases[2] involve origination claims, those cases are distinguishable from the instant case. In fact, this Court agrees that it is only logical when dealing with origination claims to first determine whether the originating entity is a national bank before applying NBA preemption. This does not mean, however, that the NBA never applies to a loan originated by a non-national bank. Instead, the cases cited by the plaintiffs merely recognize that the NBA governs the acting entity. For origination claims, therefore, a court should consider the originating entity. By contrast, a court should consider the servicing entity when a plaintiff pleads a servicing claim.

Here, the plaintiffs allege that BAC violated the WVCCPA by instructing them not to

[2]For example, ***Gilmor v. Preferred Credit Corp.***, 2005 WL 3478149 (W.D. Mo. Dec. 20, 2005) also dealt with usury claims brought pursuant to state law.

make payments toward their debt while refusing to modify their loan. This is clearly a servicing claim brought against an operating subsidiary of a national bank. As such, NBA preemption applies.

2. Preemption Analysis

The plaintiffs argue that the Court applied a field preemption analysis instead of applying a conflict preemption analysis, when it dismissed their illegal debt collection claim. This Court disagrees.

Instead, this Court found the plaintiff's illegal debt collection claim preempted because "it falls within a category of state laws that is *expressly* preempted." ([Doc. 43] at 21) (emphasis added). In particular, the preemption regulation promulgated by the Office of Comptroller of the Currency expressly states that "a national bank may make real estate loans . . . without regard to state law limitations concerning, *inter alia* . . . [p]rocessing, origination, servicing, sale or purchase of, or investment or participation in, mortgages[.]" 12 C.F.R. § 34.4(a)(10). By express intention, state laws that attempt to limit a national bank's processing or servicing of a mortgage *conflict* with federal law. Because the plaintiffs attempt to hold BAC liable for servicing activity, their illegal debt collection claim is preempted by section 34.4(a)(10).[3]

Insofar as this Court merely applied the express language of section 34.4(a)(10),

[3]The Court should correct its characterization of the analysis applied by the Ninth Circuit in ***Martinez v. Wells Fargo Home Mortg., Inc.***, 598 F.3d 549 (9th Cir. 2010), when it stated that the Ninth Circuit "in essence, applied a field preemption analysis to find that a provision of California's counterpart to the WVCCPA was preempted by 12 C.F.R. § 34.4(a)." ([Doc. 43] at 21, n. 9). Instead, upon a second review of the case, this Court now would characterize the ***Martinez*** Court as finding that the California provision falls within a category of state laws that is *expressly* preempted by section 34.4(a).

reinstatement in unwarranted. Accordingly, the plaintiffs' motion should be **DENIED** to the extent that it requests reinstatement of Count V (Illegal Debt Collection).

D. Estoppel (Count VII)

Finally, the plaintiffs argue that the Court clearly erred by dismissing their estoppel claim, finding that it was instead an affirmative defense. The defendants respond that reinstatement is not warranted because estoppel is a remedy, not an independent cause of action. This Court agrees.

In general, when a trust grantor intends to challenge a foreclosure, "the proper remedy is for the grantor to seek an injunction or to file an action to have the foreclosure set aside." ***Lucas v. Fairbanks Capital Corp.***, 618 S.E.2d 488, 497 (2005). When the basis of that challenge concerns representations not to make payments during a loan modification request, courts have held that equitable relief may be appropriate. *See, e.g.,* ***Clendenin v. Wells Fargo Bank, N.A.***, 2009 WL 4263506, *5 (S.D. W.Va. Nov. 24, 2009).

In ***Clendenin***, debtors who had been foreclosed upon after requesting a loan modification brought suit against Wells Fargo, N.A. ("Wells Fargo"). ***Id.*** at *2. "The Complaint assert[ed] three causes of action: unconscionable inducement (Count I), illegal debt collection (Count II), and breach of contract (Count III) [and] contain[ed] a request for equitable relief in Count IV." ***Id.*** Wells Fargo moved to dismiss "those portions of Count III . . . [that] assert breach of contract based on an alleged obligation to accept a loan modification and all of Count IV [for] fail[ure] to state a claim upon which relief can be granted." ***Id.*** (internal quotations omitted). Upon consideration of Count IV, the court denied dismissal, explaining:

> ***Rather than stating its own cause of action, Count IV is a detailed request for equitable relief.*** It is wholly dependent on the success of the other claims in the Complaint. Should the Clendenins prevail on those other claims, the relief sought in Count IV may be appropriate."

Id. at *5 (emphasis added).

Clearly, the court in ***Clendenin*** recognized that a request for equitable relief from a foreclosure is not an independent cause of action, but a remedy available only upon the success of other causes of action. Rather than dismiss the count, the court elected to reduce it to a request for relief that the court would consider should the Clendenins prevail on their other claims.

In contrast, this Court now finds it equally appropriate for a court to dismiss a count containing only a request for equitable relief, while considering the same remedy available as relief for another cause of action. Here, therefore, the Court finds that reinstatement of the plaintiffs' estoppel claim is unwarranted. Rather, the Court considers that the same equitable relief sought by the plaintiffs' estoppel claim is available should they prevail on Count IV (Breach of Contract). Accordingly, the plaintiffs' motion should be **DENIED** to the extent that it requests reinstatement of Count VII (Estoppel).

CONCLUSION

For the foregoing reasons, the Court finds that the plaintiffs' Motion to Reconsider **[Doc. 44]** should be, and hereby is, **DENIED**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to any counsel of record herein.

DATED: January 13, 2011.