

No. _____

TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

CHESTER TAYLOR III, RONDA and)
BRIAN WARLICK, LORI MENDEZ,)
LORI MARTINEZ, CRYSTAL PRICE,)
JEANETTE and ANDREW ALESHIRE,)
MARQUITA PERRY, WHITNEY)
WHITESIDE, KIMBERLY STEPHAN,)
KEITH PEACOCK, ZELMON MCBRIDE,)

From Mecklenburg County
No. 18-CVS-8266

Appellants,)

v.)

BANK OF AMERICA, N.A.,)

Appellee.)

PLAINTIFFS' PETITION FOR DISCRETIONARY REVIEW PRIOR TO
DETERMINATION BY THE COURT OF APPEALS

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Pursuant to Rule 15(a) of the North Carolina Rules of Appellate Procedure and N.C. Gen. Stat. § 7A-31(b), Plaintiffs respectfully petition the Court for discretionary review prior to determination by the Court of Appeals.

INTRODUCTION

This bypass petition seeks the Court's review of a critically important case filed by homeowners, like Chester Taylor, against one of the biggest and most profitable companies in America: Bank of America (BOA). Under the guise of the Home Affordable Modification Program ("HAMP"), BOA fraudulently denied benefits to

homeowners by repeatedly lying to them and destroying their documents, ultimately forcing unsuspecting homeowners into foreclosure. In bringing this case, Chester Taylor and the other Plaintiff homeowners seek to hold BOA accountable for this egregious fraud.

In late 2008 / early 2009, America experienced one of its worst economic downturns since the Great Depression. A housing crisis accompanied the collapse as mortgages became increasingly unaffordable. Housing loan defaults were rampant, threatening the viability of several major banks, including BOA. Because the economy could not withstand bank insolvency, the federal government implemented the Troubled Assets Relief Program (TARP), in which over \$200 billion in taxpayer funds was provided to banks. BOA's share of this funding totaled \$45 billion, with an additional \$100 billion in future commitments.

The BOA fraud at issue in this case involved the "HAMP", implemented in March of 2009. HAMP provided for mortgage "modification" in the form of lower short-term interest rates that became long-term for mortgagors who made timely monthly payments (called "Trial Payments").

The federal funds BOA sought under HAMP were not some unrestricted windfall for the benefit of the banks. Instead, there was a specific federal objective—namely, a commitment to modify mortgage terms to help prevent homeowners from defaulting on loans and losing their homes. Thus, BOA was compelled to contractually commit to use "reasonable efforts" to "effectuate any modification of a mortgage loan under the Program."

BOA knew the loan modifications would reduce the profits anticipated by the bank by millions of dollars. Instead of using the billions in federal funding it received to help homeowners out of financial difficulty — as it promised to do — BOA instead opted to prevent HAMP applicants from becoming or remaining eligible for permanent HAMP modifications. BOA's covert scheme involved numerous acts that misled and deceived mortgagors, like Chester Taylor, into believing they did not qualify for loan modifications or had failed to follow required procedures. The result—numerous foreclosures of properties including the properties of the Plaintiffs here, for individuals deprived of a legitimate opportunity to avoid foreclosure had BOA not engaged in the fraudulent scheme.

By way of example only, BOA instructed its employees: to shred paper documents and delete electronic files from applicants, tell applicants their submissions were incomplete or untimely, offer modifications with illegal terms including higher interest rates than the law allows, tell homeowners they were required to be in default in order to qualify for a HAMP modification, and convert trial payments into BOA assets rather than applying them against consumers' mortgage obligations. Then, BOA foreclosed on mortgagors whose applications were denied as a result of any of the above actions by BOA.

BOA has been accused in this case of committing some of the most widespread and egregious fraud in the history of the mortgage industry. After agreeing to participate in the HAMP program, BOA denied HAMP benefits to a staggering 79 percent of homeowners who applied for the program. *See* SIGTARP, Office of the

Special Inspector General For the Troubled Asset Relief Program, Quarterly Report to Congress, January 27, 2017, full report accessed at: <https://www.sigtar.gov/pages/Reports-Testimony-Home.aspx>. The report noted that BOA “has one of the worst track records in HAMP.” *Id.* BOA was also involved in the largest ever False Claims Act payout related to mortgage fraud. *Id.*

On this other side of the case is a group of homeowners like Chester Taylor. Mr. Taylor is a forty-four-year-old who went to work in the boating industry near Wilmington, North Carolina. He first purchased his dream home in 2005, and for years, he never missed a payment. Unfortunately, around the time the economy took a turn for the worse, Mr. Taylor was also needed to care for his ailing father. He turned to BOA for help requested a modification, sending in at least ten properly completed applications and faxing documents, requested by BOA, more than thirty times, all to no avail. In fact, Mr. Taylor said that there were days he would call BOA up to seven times in one day to check on the status of his application. Each time, he was told his documents were missing or incomplete. At the instruction of BOA representatives, Mr. Taylor also made timely trial payments for a full year, despite that fact that HAMP only required these payments to be made for three months. Then, despite Mr. Taylor’s compliance with BOA’s instructions, submissions of completed applications, and timely trial payments, BOA noticed the foreclosure of Mr. Taylor’s home in 2012. Mr. Taylor did not understand where he went wrong until he saw an advertisement in November 2016, stating that BOA had wrongfully denied modifications to thousands of homeowners, after shredding

and deleting customer files. His case, along with ten other Plaintiffs, was filed in the Superior Court of Mecklenburg County in May 2018.

STATEMENT OF FACTS

Procedural History

After Plaintiffs filed their case in Mecklenburg County Superior Court, BOA filed its Motion to Dismiss the First Amended Complaint alleging, *inter alia*, that the claims were barred by the statute of limitations, *res judicata*, and collateral estoppel.¹ Almost a year and half later, Judge Lisa Bell ruled for Bank of America, dismissing the cases in a short Order, without explanation, on the grounds advanced by BOA that Plaintiffs' claims were barred by the statute of limitations, *res judicata*, and collateral estoppel. Plaintiffs/Appellants' appeal from the Order below challenges the decision on the grounds that the statute of limitations and *res judicata*/collateral estoppel did not bar Plaintiffs' claims.

The decision below is grounded on a Superior Court judge engaging in a fact-finding determination in lieu of a jury as to when Plaintiffs knew or should have known they were victims of fraud — and in doing so entering an Order without any findings. Plaintiffs adequately pleaded they were unaware, and had no reason to be aware, of BOA's fraudulent conduct until they contacted their attorney in this matter. Thus, any decision regarding the statute of limitations should have been placed in the hands of a jury. Similarly, Plaintiffs' claims cannot be barred by *res judicata* or

¹ BOA also argued that the Plaintiffs did not allege their claims with particularity and argued, in the alternative, that the individual claims should be severed. Judge Bell only ruled on the issues of statute of limitations, *res judicata*, and collateral estoppel. *Res judicata* and collateral estoppel are sister doctrines, and were grouped together in argument and in the court's Order.

collateral estoppel because Plaintiffs properly pleaded that Plaintiffs' could not have pursued a claim which they could not reasonably be aware of during the state court foreclosure proceedings.

Related Litigation

In cases similar to the case at hand, multiple federal judges across the Middle and Southern Districts of Florida all ruled in Plaintiffs' favor at the motion to dismiss stage on the same issues that are brought up here: statute of limitations and *res judicata*. For example, in *Captain v. Bank of America, N.A.*, BOA's Motion to Dismiss, which is remarkably similar to the one in this case, was denied in its entirety. 0:18-cv-60130-CMA, ECF No. 22 (S.D. Fla. March 6, 2018). The Court ruled that the claim was not barred by the statute of limitations. *Id.* In *Dykes v. Bank of America, N.A.*, 0:17-cv-62412-WPD, ECF No. 30 (S.D. Fla. April 26, 2018), the Court also rejected each BOA argument and in doing so, specifically held that the case was not time-barred, and the operative complaint sufficiently alleged facts to support the fraud claim. *Id.* Further, Judge William F. Jung in the Middle District of Florida, also denied BOA's Motions to Dismiss which argued both a statute of limitations defense and *res judicata*. *Cruz et al v. Bank of America, N.A.*, 8:17-cv-02627-WFJ-SPF, ECF No. 47 (M.D. Fla. October 31, 2018); *Blanco et al v. Bank of America, N.A.*, 8:17-cv-02626-WFJ-SPF, ECF No. 40 (M.D. Fla. October 31, 2018); *Zenteno et al v. Bank of America, N.A.*, 8:17-cv-02591-WFJ-TGW, ECF No. 40 (M.D. Fla. October 31, 2018). Those cases are still pending.

REASONS SUPPORTING IMMEDIATE REVIEW

The statutory criteria for bypass petitions is set forth in N.C. Gen. Stat. § 7A-31(b). Under that section, review by this Court prior to the Court of Appeals is warranted if 1) “[t]he subject matter of the appeal has significant public interest”; or 2) the appeal “involves legal principles of major significance to the jurisprudence of the state.” N.C. Gen. Stat. §7A-31(b)(1)-(2). This appeal satisfies both criteria. In addition, under the circumstances of this case, including the number of plaintiffs whose cases cannot move forward without a resolution of this appeal, allowing the appeal to bypass the Court of Appeals will promote judicial economy.

For each of these reasons, both independently and collectively, the Court should grant immediate review.

I. The subject matter of this appeal has immense public interest and importance.

The first statutory criteria for a bypass petition asks whether “[t]he subject matter of the appeal has significant public interest.” N.C. Gen. Stat. § 7A-31(b)(1). A case may garner public interest either because an important issue is at stake or because important litigants are locked in dispute. Here, both elements are satisfied.

This case centers around one of the largest banks in our country defrauding thousands of Americans during the HAMP process, leaving them homeless, their credit decimated, and the American dream out of reach because of the long-term financial implications of the foreclosures. Defendant, BOA, is a multinational company with operations in approximately 35 countries, serving approximately 66

million customers. Bank of America Investor Relations, Corporate Profile, accessed on January 9, 2020 at: http://investor.bankofamerica.com/financial-information/corporate-profile#fbid=_8Go-JNH25u.

Here, Plaintiffs seek review of a case that has garnered widespread public interest and media coverage.² This public interest is justified, as this case will likely impact the rights of hundreds of homeowners who have faced foreclosure, bankruptcy, and more. In addition to the plaintiffs listed on this Complaint, the complaints of several hundred additional plaintiffs are pending in Superior Court but are currently stayed pending the resolution of this appeal. Until this appeal is resolved, hundreds of people have no avenue within which to pursue their claims.

Moreover, this case has been the subject of much media attention because of the statements of several whistleblowers. Numerous former BOA employees have come forward and claimed that BOA deliberately denied eligible homeowners loan modifications and lied to them about the status of their mortgage payments. *Former Bank of America workers allege it lied to home owners*, Reuters, June 14, 2013, accessed January 9, 2020 at <https://www.reuters.com/article/us-bankofamerica-mortgages/former-bank-of-america-workers-allege-it-lied-to-home-owners-idUSBRE95D10O20130614?irpc=932>. BOA used tactics such as shredding documents and deleting computer files in a process known as a “blitz” in order to

² *Bank of America destroyed documents as borrowers tried to save their homes, suit says*, Charlotte Observer, June 5, 2018, accessed January 9, 2020 at <https://www.charlotteobserver.com/news/business/banking/article212484029.html>; *Homeowners Claim Bank of America Schemed to Steal Their Homes*, Courthouse News Service, June 29, 2017, accessed January 9, 2020 at <https://www.courthousenews.com/homeowners-claim-bank-america-schemed-steal-homes/>.

intentionally lead homeowners into foreclosure. *Id.* The Amended Complaint includes this testimony. For example, according to Rodrigo Heinle: “Upon the instruction of my manager Jamal Brown, and other managers, I deleted thousands of homeowner HAMP application files from Bank of America computer databases, as many as six thousand (6,000) in one day.” *See* Am. Compl. at ¶ 18. Simone Gordon stated: “Employees who were caught admitting that BOA had received financial documents or that the borrower was actually entitled to a permanent loan modification were disciplined and often terminated without warning.” *Id.* at ¶ 20. The statements of four other former BOA employees are included in the Amended Complaint, with additional damning statements. *Id.* at ¶¶ 18–23.

This case involves a critically important issue as well as important litigants, many of whom, like Mr. Taylor, cannot move on or seek any other recourse until this appeal is resolved. The subject matter of this appeal has immense public interest and importance. For this reason alone, this appeal warrants immediate review.

II. This case involves legal principles of the highest significance to the State’s jurisprudence.

The second statutory criteria for a bypass petition asks whether the appeal “involves legal principles of major significance to the jurisprudence of the State.” N.C. Gen. Stat. § 7A-31(b)(2).

This is a classic case of a group of individual citizens trying to hold a large corporation accountable. However, they were never even given the chance to prove their case in court. Instead, despite the fact that Plaintiffs pleaded that they did not discover and could not have discovered BOA’s fraud until information was made

public by attorneys, the Superior Court inappropriately took on the role of fact finder and ruled on this issue. *See e.g.*, Am. Compl. ¶ 43, 49, 58. According to longstanding North Carolina law, if a plaintiff asserts that she did not discover the alleged fraud until a certain date, that “is sufficient to establish the approximate date from which the statute of limitations began to run on their claims.” *Jennings v. Lindsey*, 69 N.C. App. 710, 716 (1984) (holding that plaintiffs’ assertion that they did not discover the fraud until September 1981 was sufficient to withstand a motion to dismiss). However, the Superior Court ignored years of precedent. Despite Plaintiffs pleading 1) that they did not know about BOA’s fraud at the time of foreclosure and 2) that they did not discover the fraud until information was released by their attorneys, the lower court dismissed the case, blatantly usurping the function of a jury.

Similarly, the Superior Court granted the motion to dismiss on the grounds of *res judicata*. However, *Res judicata* acts as a bar to “matters actually litigated and determined, [or] matters which *could properly have been litigated and determined in the former action*. . . .” *Moody v. Able Outdoor, Inc.*, 169 N.C.App. 80, 87 (2005) (quoting *Fickley v. Greystone Enters.*, 140 N.C.App. 258, 260 (2000)). In the same manner as with the statute of limitations, it is axiomatic that a party cannot bring a claim until she becomes aware of its existence. Plaintiffs adequately pleaded they were unaware, and had no reason to be aware, of BOA’s fraudulent conduct before the state court issued its foreclosure judgment.

Absent this Court’s review, the Superior Court’s decision stands for a dangerous precedent: that regardless of the allegations in a well-pled complaint,

judges are permitted to play fact finder. The ability to bring a case and have a chance to be heard in court is the most fundamental legal right. Indeed, it is the very backbone of the American justice system. The precedent from the Superior Court threatens that right. For that reason, this appeal warrants this Court's immediate review.

III. Under the circumstances of this case, bypassing the Court of Appeals will promote judicial economy.

Hundreds of plaintiffs have been in litigation now for nearly three years, and millions of dollars are at stake as Plaintiffs seek compensation for the wrongs committed against them. As the North Carolina Constitution says in Article I, Declaration of Rights, Sec. 18, "...every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law...." In addition to the Plaintiffs on this Complaint, as mentioned above, there are several hundred additional plaintiffs whose cases have been filed and are stayed in Superior Court, pending the resolution of this appeal. Like Mr. Taylor, each of these Plaintiffs have already lost their homes, and any additional delay would further harm the people who need help the most. In contrast, immediate review of this case by this Court would expedite relief for these Plaintiffs.

Further, because of the scale of this litigation, it is nearly certain that any decision of the Court of Appeals, will result in the litigants seeking review by this Court. Certifying this case for review now will truncate these appeals by a year or more. Further, this case is on appeal from a Rule 12(b)(6) Motion, meaning the record is not substantial, and review from this Court could be decided quickly and efficiently.

For these reasons, immediate review by this Court would strongly promote judicial economy.

ISSUES FOR WHICH REVIEW IS SOUGHT

Plaintiffs respectfully requests that the Court allow discretionary review on the following issues:

- Whether the Superior Court erred in granting Bank of America's Motion to Dismiss on the basis of Statute of Limitations and *res judicata*/collateral estoppel.

CONCLUSION

Plaintiffs respectfully requests that the Court allow discretionary review of this appeal prior to determination by the Court of Appeals.

Date: March 6, 2020.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the foregoing Plaintiffs' Petition for Discretionary Review Prior to Determination by the Court of Appeals upon all other parties to this cause as indicated below by mailing to the opposing party's counsel by depositing said document, enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the USPO for mailing via first class mail and electronic mail:

Date: March 6, 2020

/s/ William C. Robinson
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