No. COA20-160 TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS
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CHESTER TAYLOR III, JEANETTE and ANDREW ALESHIRE, LORI MARTINEZ, ZELMON MCBRIDE, LORI MENDEZ, KEITH PEACOCK, MARQUITA PERRY, KIMBERLY STEPHAN, RONDA and BRIAN WARLICK,	)	From Mecklenburg County No. 18-CVS-8266
Plaintiffs-Appellants,	)	
v.	)	
BANK OF AMERICA, N.A.,	)	
Defendant-Appellee.	)	

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PLAINTIFFS-APPELLANTS' BRIEF

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PLAINTIFFS-APPELLANTS' BRIEF

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ISSUES PRESENTED

I. Did the trial court err by holding the Amended Complaint failed to establish a limitations defense as a matter of law, despite extensive allegations that Appellants were unaware that the foreclosures and/or short sales were the product of a fraudulent scheme, which was designed to prevent Appellants from discovering their cause of action, rather than Appellants' own errors and omissions or unintentional errors by Bank of America?

II. Did the trial court err by holding the Amended Complaint failed to establish a *res judicata* or collateral estoppel defense, despite Appellants conducting non-judicial foreclosure and extensive allegations that Appellants were unaware that they had a claim for fraud to pursue at the time of the foreclosure?

INTRODUCTION

Just a few years ago, the Defendant/Appellee Bank of America (BOA) defrauded countless families of the precious American dream of home ownership—foreclosing on their houses and making them homeless. The Bank's pernicious foreclosure scheme facilitated the ultimate unjust double-dipping: the Bank collected billions of taxpayer dollars earmarked for mortgage relief while simultaneously charging inflated mortgage sums and illegal homeowner fees, all the while fully intending to cast the vast majority of its paying mortgagors to the curb. Not since the days of Michael Milken and Jordan Belfort has any entity so blatantly preyed on the financial naivety of lay people in a successful effort to game the system.[1] Appellants, Chester Taylor, Ronda and Bryan Warlick, Lori Mendez, Lori Martinez, Jeanette and Andrew Aleshire, Marquita Perry, Kimberly Stephan, Keith Peacock, and Zelmon McBride are a few of BOA's unsuspecting victims. (R pp 197–304).

This appeal involves a classic case of the trial court incorrectly assuming, at the pleading stage, that Appellant mortgagors must know of a mortgagee's fraud at the time they faced foreclosure, bankruptcy and/or short sale, despite extensively alleging reasons they were unaware of the fraud. Countless individuals have their homes forcibly sold every year without believing fraud is

[1] This is not mere hyperbole. An Inspector General report to Congress in 2017 revealed that BOA had denied mortgage modification under the federal program described below to a whopping 79 percent of its mortgagors, despite taking $2 billion in federal aid to do just the opposite. (R p 206).

involved, and Appellants' mortgages were with one of the most reputable banks in the world. The notion that Appellants could *not* be among those duped by a large, extremely profitable, banking giant is implausible. The Bank engaged in fraud before, during, and after Appellants' requests for mortgage relief under HAMP, including destroying critical documents for each mortgagor, in a deliberate effort to prevent mortgagors from discovering the bank's fraud. For these reasons and others, the statute of limitations was tolled and *res judicata* and collateral estoppel are inapplicable.

STATEMENT OF THE CASE

Plaintiffs/Appellants filed this case on 1 May 2018 in the Superior Court of the County of Mecklenburg, North Carolina, Case No. 18-CVS-8266, asserting causes of action for fraud, intentional misrepresentation, promissory estoppel, conversion, unjust enrichment, a statutory claim brought under the North Carolina Unfair and Deceptive Trade Practices Act, and a claim for "wanton and reckless conduct," pursuant to section 1D-1 of the North Carolina General Statutes, et seq. Defendant/Appellee, removed the case to the United States District Court for the Western District of North Carolina. Appellants then moved to remand the case to the Superior Court of the County of Mecklenburg, North Carolina. Appellants' Motion to Remand was granted. (11(c) Supp. p 1).

After the case was remanded to the Superior Court of Mecklenburg County, the Bank filed its Motion to Dismiss the Amended Complaint, primarily

alleging that the claims were barred by the statute of limitations, *res judicata*, and collateral estoppel. (R p 633). The Bank's primary argument in support of its Motion is that Appellants should have known about the scheme, which was purposely hidden and repeatedly lied about, years earlier. Plaintiff/Appellants' Response to the Motion to Dismiss outlines how Appellants were not aware of BOA's covert scheme and had no reason to know about it. (Doc. Ex. p 109). Appellants' Response also details how the Appellants' lack of knowledge of the Bank's fraud was because one of the largest and most profitable companies in the country repeatedly lied to them and destroyed their applications and supporting documents. (Doc. Ex. p 109).

Almost a year and half later, the Superior Court ruled for the Bank, dismissing the cases in a short Order, without explanation, on the grounds that Appellants' claims were barred by the statute of limitations, *res judicata*, and collateral estoppel. This appeal from the Order below challenges the decision on the grounds that the statute of limitations and *res judicata*/collateral estoppel did not bar Appellants' claims. (R p 655).

In total, there are several hundred homeowners whose claims against BOA were designated under Rule 2.1 and consolidated in front of Judge Bell. The remaining cases are currently stayed in Superior Court, pending the resolution of this appeal. (R p 193).

Plaintiffs/Appellants filed their Notice of Appeal on 24 October 2019. (R p

657). The record on appeal was settled on 18 February 2020. (R p 804). Appellants also petitioned the North Carolina Supreme Court for review. That petition was denied on 29 April 2020.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The Superior Court's Order Granting Defendant-Appellee's Motion to Dismiss is a final judgment, and appeal therefore lies to the North Carolina Court of Appeals pursuant to section 7A-27(b) of the North Carolina General Statutes.

STATEMENT OF THE FACTS

A. The Fraudulent Scheme

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. (R pp 198–199). Housing loan defaults were rampant, threatening the viability of several major banks, including Bank of America. (R pp 198–199). Because the economy could not withstand bank insolvency, the federal government implemented the Troubled Assets Relief Program through which Congress appropriated over $200 billion in tax dollars paid by citizens across the country, including Appellants. BOA's share of this funding totaled $45 billion, with an additional $100 billion in future commitments. (R pp 198–199).

The fraud at issue involved the Home Affordable Modification Program

("HAMP"), implemented in March 2009. *Id.* HAMP provided for mortgage "modifications" in the form of lower short-term interest rates that became long-term loans for mortgagors who made timely monthly payments called "Trial Payments". (R pp 200-201).

The federal funds BOA sought under HAMP were not an unrestricted gift from the U.S. Government. There were strings attached — namely, a commitment to modify mortgage terms to prevent homeowners from defaulting on loans and losing their homes. Thus, BOA was contractually compelled to use "reasonable efforts" to "effectuate any modification of a mortgage loan under the Program." *Id.*

BOA knew the loan modifications would cost the company millions of dollars, so instead of using the billions in federal funding it received to help homeowners out of financial difficulty — as it promised to do — BOA opted to prevent HAMP applicants from becoming or remaining eligible for permanent HAMP modification. *Id.* BOA's covert scheme involved numerous acts that misled mortgagors into believing they did not qualify for loan modifications or had failed to follow required procedures, thus surreptitiously yielding a legitimate foreclosure. (R pp 200-205). By way of example only, BOA engaged in the following activities, each of which is confirmed by the sworn testimony of former BOA employees:

- BOA instructed its employees to shred numerous paper applications;

- BOA ordered its employees to tell applicants their submissions lacked required documents and were thus incomplete (even when BOA knew the required documents were present and the applications were valid);
- BOA directed its employees to perform "blitzes" in which all claims older than 60 days were denied simply because BOA had negligently failed to act on them for over two months; a single review team would deny 600 to 1,500 applications at a time;
- BOA had its employees falsify electronic records to suggest applicants had failed to take all required steps, thereby ensuring application denial;
- BOA insisted its employees offer modifications with illegal terms, including interest rates higher than the law allows, despite BOA's receipt of federal funds to do precisely the opposite.
- BOA mandated its personnel tell customers they must be in default for a prolonged period of time to qualify for HAMP, thereby ensuring Trial Payments were untimely and applications were denied.
- BOA converted consumers' Trial Payments into BOA assets rather than applying them against the consumers' mortgage obligations.

(R pp 201–204).

After directing homeowners into its fraudulent scheme, BOA then foreclosed on mortgagors whose HAMP applications were denied as a result of any of the above actions. After all, the fraudulent scheme was designed to take

the money homeowners paid as they thought their applications were being seriously evaluated, then foreclosing on the mortgagors and taking their homes after taking their money. (R pp 201–204).

It is beyond dispute that BOA's massive campaign of fraud was deliberate. (R pp 200–204). One ex-BOA employee testified the company gave its employees foreclosure quotas to ensure the company would oust as many customers as possible from their homes. (R p 206). Another ex-BOA employee testified that employees who refused to play ball -- those who actually approved fair mortgage modifications -- were disciplined or outright fired. (R p 202). The federal government created HAMP to ensure homeowner protection. However, at the height of the program, BOA was denying protection to four out of five applicants. (R p 206).

B. The Unwitting Victims

Plaintiffs/Appellants in this case are a group of homeowners whose HAMP applications were wrongfully denied, resulting in foreclosure, short sale and/or bankruptcy. (R pp 197–304). Each of the Appellants had mortgages with Bank of America. After experiencing hardship, due in part to the state of the economy, Appellants contacted the Bank, requesting a HAMP modification. Starting with that conversation, Appellants were then told a series of lies by Bank employees. First, they were told that they needed to intentionally miss payments on their mortgage because default was required for HAMP. This was false. Second, after

sending in their HAMP applications on numerous occasions, they were told that the applications were lost, missing, or incomplete. This was false. Third, they were told that they were approved to make Trial Payments. This was false. And finally, Appellants were impermissibly and unknowingly charged inspection fees while they were still living in their homes.

Given the complex, sophisticated, and deliberately covert nature of the Bank's labyrinth of lies, Appellants neither suspected nor had reason to suspect the Bank's wrongdoing. They relied on BOA's misrepresentations and lies, to the detriment of them and their families.

ARGUMENT

I. STANDARD OF REVIEW

"The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663 (2013). The complaint's material factual allegations must be taken as true. *Id.* Evidence outside the four corners of the complaint may not be considered in determining whether the complaint states a claim on which relief can be granted. *Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach*, 251 N.C. App. 771, 775, 796 S.E.2d 120, 123 (2017).

II. SUMMARY OF THE ARGUMENT

This Appeal turns on one central question: when did Plaintiffs/Appellants know that they lost their home as a result of Bank of America's fraudulent scheme? The Amended Complaint makes clear they did not know of the fraudulent scheme until they consulted with counsel. Taking that allegation as true, the claims cannot be barred by the statute of limitations or *res judicata*.

The Superior Court's order dismissing Appellants' Amended Complaint on limitations grounds at the pleading stage should be reversed for any of the following reasons. First, a jury should determine whether Appellants discovered or should have discovered the fraud more than three years prior to filing. *Feibus & Co. v. Godley Const. Co.*, 301 N.C. 294, 304–05, 271 S.E.2d 385, 392 (1980). Appellants thoroughly pleaded their diligence in seeking the cause of their injury, as they called the Bank over and over seeking answers. The Amended Complaint recounts the lies told to each of the Appellants, as well as the Bank's intricate scheme to defraud the Appellants and keep them from knowing they had a cause of action. Second, Appellants pleaded that they discovered the fraud at the time they consulted with counsel because the Bank's calculated lies kept Appellants from learning the truth any sooner. This assertion was sufficient to survive a Rule 12(b)(6) motion.

Similarly, the defense of *res judicata* and collateral estoppel cannot be applied in light of the allegation that Appellants did not know of the fraudulent

scheme at the time of foreclosure. The Superior Court's order and judgment dismissing Appellants' Amended Complaint on *res judicata* and collateral estoppel grounds at the pleading stage should be reversed for any of the following independent reasons: First, Appellants were each parties to non-judicial foreclosure proceedings. Non-judicial foreclosures are not susceptible to an attack on *res judicata* or collateral estoppel grounds because, by definition, non-judicial foreclosures do not involve a prior proceeding or final judgment on the merits. *See In re Lucks*, 369 N.C. 222, 229, 794 S.E.2d 501, 506-07 (2016). In dismissing the case, the Superior Court necessarily assumed that the foreclosures were judicial, an assumption which turned out to be false. Independently, there is no identity between the prior foreclosures and the fraud allegations. Appellants do not seek to re-litigate or re-open foreclosures but instead seek money damages. Moreover, Appellants could not have discovered the Bank's fraud at the time of foreclosure because the Bank's own actions prevented discovery of it. As a result, Appellants could not raise fraud as a defense when they had no knowledge of it at the time of foreclosure. And fourth, the Bank's systematic practice of fraud was extrinsic to all prior foreclosure proceedings, preventing a proper determination on the merits.

Finally, if there was any defect in the Amended Complaint, the Superior Court should have granted Plaintiffs' request for leave to amend.

III. APPELLANTS' CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS.

"In general a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and maintain a suit arises." *Pierson v. Buyher*, 330 N.C. 182, 186, 409 S.E.2d 903, 905 (1991). However, pursuant to section 1–52(9) of the North Carolina General Statutes, the three-year statute of limitations for an action alleging claims for fraud "shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

Unlike other claims founded in tort, fraud claims are tolled by the discovery rule. Pursuant to section 1–52(9), the discovery rule for fraud claims in North Carolina runs from the "discovery ... of the facts constituting the fraud or mistake." *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 547, 589 S.E.2d 391, 396 (2003). North Carolina law expressly ties the accrual of a cause of action for fraud to a plaintiff's actual or constructive discovery of her cause of action, not the mere occurrence of fraud. *Nash v. Motorola Commc'ns & Elecs., Inc.*, 96 N.C. App. 329, 331, 385 S.E.2d 537, 538 (1989), *aff'd*, 328 N.C. 267, 400 S.E.2d 36 (1991) (citing *Rothmans Tobacco Co. v. Liggett Group, Inc.*, 770 F.2d 1246, 1249 (4th Cir. 1985)). Knowledge of one's damages is not enough. The plaintiff must have reason to know or suspect that the damages are the product of wrongdoing. *Id.*

Further, in deciding the Rule 12(b)(6) motion, the trial court was required to determine "whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted." *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). In making this determination, the trial court was required to "take all well-pleaded allegations of the complaint . . . as true." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). "[T]he complaint is to be liberally construed, and the trial court should not dismiss the complaint unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 444, 666 S.E.2d 107, 116 (2008) (quoting *Meyer v. Walls*, 347 N.C. 97, 111–12, 489 S.E.2d 880, 888 (1997)). A dismissal based on the statute of limitations is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted, construing the non-movant's pleadings liberally in his favor and giving him the benefit of all relevant inferences of fact to be drawn therefrom. *Reidsville v. Burton*, 269 N.C. 206, 152 S.E.2d 147 (1967). While the Superior Court's Order failed to provide any details, the dismissal based on the statute of limitations incorrectly applied well-established North Carolina law.

"[A] trial court's decision to dismiss an action based on the statute of limitations" is reviewed *de novo*. *Boyd v. Sandling*, 210 N.C. App. 455, 458, 708 S.E.2d 311, 313 (2011). "Ordinarily, a dismissal predicated upon the statute of

limitations is a mixed question of law and fact. But where the relevant facts are not in dispute, all that remains is the question of limitations which is a matter of law." *Id.*

A. The Superior Court erred because whether the Appellants exercised reasonable care and due diligence is a question of fact to be resolved by a jury.

It is well established that when a plaintiff should have, in the exercise of reasonable care and due diligence, discovered the fraud is a question of fact to be resolved by a jury. *Feibus & Co.*, 301 N.C. at 304–05, 271 S.E.2d at 392; *see also Huss v. Huss*, 31 N.C. App. 463, 468, 230 S.E.2d 159, 163 (1976) (stating "[w]hether the plaintiff in the exercise of due diligence should have discovered the facts more than three years prior to the institution of the action is ordinarily for the jury when the evidence is not conclusive or is conflicting"). "This is particularly true when the evidence is inconclusive or conflicting." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 386 (2007).

In order for the discovery rule to be determined as a matter of law, as the Superior Court did here, the evidence must show "without conflict that the claimant had both the *capacity and opportunity to discover the fraud*." *State Farm Fire & Cas. Co.*, 161 N.C. App. at 548, 589 S.E.2d at 397 (emphasis added). For example, this Court reversed an order granting a motion to dismiss in *Huss*, 31 N.C. App. at 468, 230 S.E.2d at 163. This Court held that the pleadings did not disclose sufficient facts to establish as a matter of law that the respondent

failed to exercise due diligence. *Id.* The Court noted that because the pleadings did not reveal the facts leading to the discovery of the fraud, the court could not speculate on the facts surrounding the discovery nor judge the likelihood of the plaintiff's success. *Id.*; *see also Vail v. Vail*, 233 N.C. 109, 115, 63 S.E.2d 202, 207 (1951) (concluding "that the evidence, measured by the applicable rules of law, is sufficient to sustain, though not necessary to impel, a finding of all the essential elements of fraud. That makes it a prima facie case for the jury").

i. Case law confirms that Appellants' allegations were sufficient to create an issue of fact for the jury.

Consider *Feibus & Co.*, 301 N.C. at 305, 271 S.E.2d at 392. The plaintiffs brought a cause of action for fraud against a contractor for property damage caused by the improper installation of a drainage pipe. The trial court granted a directed verdict based on the statute of limitations, since the drainage pipe was installed four years prior to the commencement of the action.[2] On appeal to the Supreme Court of North Carolina, the Supreme Court noted that the statute of limitation began to run: "at the time of discovery regardless of the length of time between the fraudulent act or mistake and plaintiff's discovery of it." *Id.* The Court went on to note that "[w]hen plaintiff should, in the exercise of reasonable care and due diligence, have discovered the fraud is a question of fact to be

[2] The standard of review for a motion for a directed verdict is the same as that for a motion to dismiss. *See State v. Burrus*, 344 N.C. 79, 93, 472 S.E.2d 867, 876 (1996); *State v. Ingle*, 336 N.C. 617, 630, 445 S.E.2d 880, 886 (1994) ("it is well settled that a motion to dismiss and a motion for a directed verdict have the same effect"), cert. denied, 514 U.S. 1020, 131 L.Ed.2d 222 (1995).

resolved by the jury." *Id.* Finally, the Court reversed and remanded the case, holding that:

> Plaintiff offered proof that the subject of the alleged fraud, the drainage pipe, was buried deep in the ground and had never been inspected by plaintiff because of defendants' assurances that it was well constructed and "nothing to worry about," and that the damage caused by the drainage system was not apparent until the cave-in. While we express no opinion as to whether this evidence, by itself, would be sufficient to require an ultimate finding in plaintiff's favor, we do consider it sufficient to create an issue of fact for the jury and to overcome a motion for directed verdict.

Id.

The facts here are remarkably similar to *Feibus*. Appellants contacted the Bank on numerous occasions. Each time, they were told that the issues with their mortgages were their own fault and thus, not actionable. The Amended Complaint sufficiently pleads that bank employees gave Appellants assurances, on which they reasonably relied. Because of those assurances, Appellants had no reason to suspect that one of the largest companies in the country systematically lied to customers, destroyed documentation, and withheld valuable information, system-wide.

Similarly, in *N.C. Nat'l. Bank v. Carter*, 71 N.C. App. 118, 124, 322 S.E.2d 180, 184 (1984), a case involving a fraudulent and inaccurate deed, this Court determined that when the plaintiff should have discovered the fraud was a decision for the jury. There, this Court noted that the plaintiff and defendant had a "long and satisfactory" business relationship and that the plaintiff "had

sufficient confidence in [defendant] to believe the representations made by its bank officers." *Id.* Further, this Court noted that there were no events or occurrences that would have reasonably caused the plaintiff to become aware of the true facts regarding the fraud until the property was surveyed. *Id.* The same is true in this case. There is no evidence that any of the Appellants had anything less than a long and (up until that time) satisfactory relationship with the Bank. Further, they trusted the Bank to hold the loan for one of their most important possessions: their homes. Indeed, this relationship caused Appellants to have sufficient confidence in the Bank to believe the representations made by its officers. Appellants had no reason to expect that the Bank would deceptively use this relationship to fraudulently profit at the expense of their customers.

ii. Appellants adequately pleaded due diligence.

Because the Motion to Dismiss was granted, the Superior Court must have determined that the pleadings "disclose[d] sufficient facts to establish as a matter of law that respondent failed to exercise due diligence." *Id.* There is no place in the Amended Complaint that even comes close to providing such disclosure. The record is clear that Appellants were diligent in seeking answers. Appellants contacted Bank of America over and over again. (R pp 209, 218, 226, 233, 241, 249, 255, 266, 273). Each time, they were led to believe their foreclosures were their own fault. The record lacks any event or occurrence that would have reasonably caused the Appellants to become aware of the true facts

regarding the fraud until they consulted with their attorneys. In fact, in its Motion and Reply, the Bank fails to point out a single allegation affirmatively stating when Appellants discovered or should have discovered the fraud.

In its Motion to Dismiss, the Bank argued that Appellants cannot benefit from fraudulent concealment without alleging his or her own diligence. (Doc. Ex. p 31). The Bank's argument fails for two reasons: First, as noted in the Response to the Motion to Dismiss, that is not the standard in North Carolina. Unless the pleadings unequivocally establish when the plaintiff discovered or should have discovered the fraud – and that discovery is more than three years before the commencement of the action – dismissal at the pleadings stage is improper. *Huss*, 31 N.C. App. at 468, 230 S.E.2d at 163 (stating "[a] judgment on the pleadings based on the statute of limitations is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted, construing the non-movant's pleadings liberally in his favor and giving him the benefit of all relevant inferences of fact to be drawn therefrom").

Second, as noted, Appellants did, in great detail, allege their diligence. Appellants devoted an entire section of the Amended Complaint to how the Bank purposely and deliberately concealed its fraud, preventing them from discovering the fraud despite their diligence. (R p 200–206). Appellants also explain how the fraud described in the Amended Complaint was designed to prevent mortgagors, and did prevent Appellants, from discovering their cause of

action. Among these acts of fraud was the continued destruction of documents. *Id.* The Amended Complaint outlined the sworn affidavits of six (6) former Bank of America employees. (R pp 201–206). These declarations establish that bank managers took action "in order to conceal" the fact HAMP applications were received, and that it was BOA's "deliberate practice" to "string homeowners along" while processing their modification application. (R pp 201–202). A jury could reasonably infer that the destruction of documents and deliberate concealment was designed to insulate the Bank from liability by preventing customers from discovering the Bank's deception. Of course, it is impossible to know whether this is true before discovery has occurred, and this case is still at the pleading stage.

Appellants explicitly alleged that they had no reason to suspect nefarious practices by their own bank until consulting with counsel. (R p 200). The idea that one of the largest and most profitable banks in the world would defraud its own customers is not something many people would expect. Nothing in the Amended Complaint suggests Appellants would have held a different belief. In fact, the far more plausible conclusion, and the one that Appellants initially reached, is that they failed to qualify for a loan modification because they failed to submit all required paperwork. Either way, that is for the jury to decide. Further, it is unlikely Appellants would have uncovered other lawsuits even if they did conduct an investigation. Nothing in the Amended Complaint suggests

Appellants, as lay persons, have any experience uncovering litigation. But again, what Appellants knew and should have known is a question of fact for the jury, especially in light of the myriad of ways Appellants pleaded their diligence.

B. The Superior Court erred because Appellants' assertion of when they discovered the Bank's fraud was sufficient to establish the date from which the statute of limitations began to run.

Fraud is difficult to describe. Indeed, as North Carolina Supreme Court Justice Johnson observed:

> Fraud has no all-embracing definition. Because of the multifarious means by which human ingenuity is able to devise means to gain advantages by false suggestions and concealment of the truth, and in order that each case may be determined on its own facts, it has been wisely stated "that fraud is better left undefined," ... However, in general terms, fraud may be said to embrace "all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another or the taking of undue or unconscientious advantage of another.

Vail, 233 N.C. at 113, 63 S.E.2d at 205. This Court previously noted "[b]ecause fraud is difficult to define, it is likewise difficult to establish with certainty when the statute of limitations on a claim of fraud begins to run." *Jennings v. Lindsey*, 69 N.C. App. 710, 715, 318 S.E.2d 318, 321 (1984). It is precisely because of this difficulty that this Court has held that the assertion of when a plaintiff discovered the existence of the alleged fraud "is sufficient to establish the approximate date from which the statute of limitations began to run on their claims." *Id.*

Time and time again, courts in North Carolina, including this one, have allowed claims to proceed by starting the running of the statute of limitations on the date alleged in the complaint. In *Jennings v. Lindsey*, the plaintiffs alleged that they did not discover fraud until September 1981, and this Court noted that the defendants' assertion to the contrary "merely creates a conflict that, in the procedural context of this case, must be resolved in plaintiffs' favor." *Id.*

Likewise, in *BDM Investments*, the court held that the plaintiff's allegations that they "could not have discovered and did not discover the fraud . . . until well after March 1, 2007" constituted "disputed evidence." *BDM Investments v. Lenhil, Inc.*, No. 11 CVS 449, 2012 WL 194383, at *12 (N.C. Super. Jan. 18, 2012), *aff'd*, 826 S.E.2d 746 (N.C. Ct. App. 2019). The court noted that the statute of limitations issue "may ultimately have to be revisited on summary judgment," which is precisely the course of action the trial court should have taken in this instance. *Id.*

In *Hunter v. Guardian Life Ins. Co. of America*, "plaintiffs allege they only recently discovered the acts of defendants and could not have discovered, with reasonable diligence, such acts until then." *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 486, 593 S.E.2d 595, 601 (2004). The Court of Appeals held that this quite simple "allegation [was] sufficient to withstand a Rule 12(b)(6) motion to dismiss." *Id.*

Appellants have pleaded they discovered the Bank's fraud when they first consulted with counsel in December 2016, January 2017, February 2017, March 2017, and April 2017. (R pp 211, 220, 226, 235, 243, 251, 258, 266, 275). This claim was filed on 1 May 2018, within the three-year statute of limitation (R p 6). *See* N.C. Gen. Stat. Ann. § 1–52(9). That allegation is sufficient to withstand a motion to dismiss on statute of limitations grounds.

Additionally, Appellants pleaded that the Bank purposely exacted an insidious scheme of fraud and deceit, one with the intent of keeping Appellants from knowing about the scheme. Appellants pleaded that bank representatives blatantly lied to them about needing to be in default to receive a modification in order to keep them from discovering the truth about BOA's fraudulent scheme. (R pp 208, 216, 231, 240, 248, 255, 263). Appellants also alleged they were unaware that their trial payments were not being used to satisfy their mortgage obligations – and in fact, that they were not being counted as mortgage payments at all. (R pp 212, 227, 236, 244, 252, 259, 267, 275).

In an attempt to distract from Appellants' allegations, the Bank pointed to numerous facts outside the Amended Complaint. "Perhaps the most fundamental concept of motion practice under Rule 12 is that evidence outside the pleadings. . . cannot be considered in determining whether the complaint states a claim on which relief can be granted." *Jackson/Hill Aviation, Inc.*, 251 N.C. App. At 775, 796 S.E.2d at 123. In fact, when an argument requires the

court to consider items outside the complaint, those arguments must be rejected. *Id.* (stating "[b]ecause all of the [defendant's] arguments require us to consider the ordinance [an attachment to the motion to dismiss], we must reject those arguments").[3] To be clear, none of the Bank's outside arguments undermine Appellants' case. Nevertheless, Appellants' assertion of when they discovered the fraud was sufficient to establish the date from which the statute of limitations began to run on their claims. Appellants alleged the date they discovered the Bank's fraud, and at this stage, outside arguments raised by the Bank must be ignored.

The allegations of the Amended Complaint clearly outline when Appellants' became aware of their cause of action and detailed why they could not have discovered the fraud prior to that time. The Amended Complaint states explicitly when each Appellant became aware of the Bank's fraud. This allegation was sufficient to withstand a Motion to Dismiss, and the lower court's ruling should be reversed.

IV. APPELLANTS' CLAIMS ARE NOT BARRED BY *RES JUDICATA* AND COLLATERAL ESTOPPEL.[4]

[3] The Bank discussed numerous items that were outside the four corners of the Amended Complaint, such as the HAMP Guidelines and previous lawsuits against the Bank. (Doc. Ex. pp 31, 41). Putting aside for a second the fact that the HAMP Guidelines are full of legalese and financial jargon, difficult even for attorneys to understand, the Amended Complaint never states Appellants had any knowledge of them or the previous lawsuits. Those are properly addressed during discovery, not at the pleadings stage.

[4] This section does not apply to Plaintiffs who did not suffer foreclosure actions against

"The doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) are companion doctrines which have been developed . . . for the dual purposes of protecting litigants from the burden of *relitigating previously decided matters* and promoting judicial economy by preventing needless litigation." *Williams v. Peabody*, 217 N.C. App. 1, 5, 719 S.E.2d 88, 92 (2011) (emphasis added). "The party seeking to assert *res judicata* has the burden of establishing its elements." *Auto. Grp., LLC v. A-1 Auto Charlotte, LLC*, 230 N.C. App. 443, 446, 750 S.E.2d 562, 565 (2013). "A party must show (1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits in order to prevail on a theory of *res judicata*." *Id.* Similarly, "[t]he elements of collateral estoppel . . . are as follows: (1) a prior suit resulting in a final judgment on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined." *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 678, 657 S.E.2d 55, 61 (quoting *McDonald v. Skeen*, 152 N.C. App. 228, 230, 567 S.E.2d 209, 211, *disc. rev. denied*, 356 N.C. 437, 571 S.E.2d 222 (2002)). The Superior Court erred in finding that Bank of America established the elements of *res judicata* and collateral estoppel.

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their homes. Specifically, Rhonda and Brian Warlick filed for bankruptcy and their home was not foreclosed. (R pp 221–222). Plaintiffs Lori Mendez and Keith Peacock each sold their homes in short sales to avoid the inevitable foreclosures that resulted from Bank of America's fraud. (R pp 228, 270).

"*Res judicata* is also a procedural question of law to be reviewed *de novo* pursuant to North Carolina law." *Bluebird Corp.*, 188 N.C. App. at 679. North Carolina's laws regarding *res judicata* and collateral estoppel apply. *See Beall v. Beall*, 156 N.C. App. 542, 544, 577 S.E.2d 356, 358 (2003) (applying North Carolina law to claim regarding Florida contract when determining issues of *res judicata* and collateral estoppel). The Superior Court's Order erred in dismissing Appellants' claims in the well pleaded Amended Complaint on the grounds of *res judicata* and collateral estoppel, and thus, this decision should be reversed and remanded for further proceedings.

A. The Superior Court erred by applying *res judicata* and collateral estoppel to non-judicial foreclosure cases; however, the Superior Court should not have reached that analysis because it required the assumption of facts outside the four corners of the Amended Complaint.

The Superior Court issued a blanket ruling to all Appellants who lost their homes to foreclosure, and in doing so, made an egregious mistake: the court applied *res judicata* and collateral estoppel to all of those Appellants. However, each of the Appellants who faced foreclosure were parties to non-judicial foreclosures. This alone is sufficient to warrant reversal of the Superior Court's dismissal.[5]

[5] Appellants note that the nature of the foreclosures in this case were not addressed before the trial court. However, Appellants repeatedly urged the Superior Court not to consider any facts outside the four corners of the Amended Complaint. It bears repeating that this Court should also not consider any facts outside the Amended Complaint. Because the Amended Complaint does not state whether the foreclosures were judicial or non-judicial, the trial court should have denied the Motion to Dismiss.

Unlike in judicial foreclosures, in non-judicial foreclosures, there is no "final judgment on the merits in an earlier suit". *See Auto. Grp., LLC*, 230 N.C. App. at 446, 750 S.E.2d at 565. Neither is there "a prior suit resulting in a final judgment on the merits". *Bluebird Corp.*, 188 N.C. App. at 678, 657 S.E.2d at 61. A non-judicial foreclosure, by definition, is not a judicial action. *In re Lucks*, 369 N.C. 222, 229, 794 S.E.2d 501, 506-07 (2016). As a result, "the Rules of Civil Procedure and traditional doctrines of *res judicata* and collateral estoppel applicable to judicial actions do not apply." *Id.* Simply put, because there was not a prior action where Appellants could litigate the issue of fraud, their current actions cannot be dismissed for *res judicata* or collateral estoppel. Yet, the court's order applied *res judicata* and collateral estoppel to all Appellants' claims "who were parties to foreclosure proceedings". (R p 655). Without any "prior suit" resulting in a "judgment on the merits", Appellants' current, fraud claims cannot be barred by *res judicata* or collateral estoppel. *Id.*

Further, there is nothing in the Amended Complaint that states the type of foreclosure proceedings faced by each Appellant. As a result, the Superior Court should have assumed the foreclosure proceedings were non-judicial. *See Ford v. Peaches Entm't Corp.*, 83 N.C. App. 155, 349 S.E.2d 82 (1986) ("A motion to dismiss for failure to state a claim upon which relief may be granted under [Rule 12(b)(6)] is addressed to whether the facts alleged in the complaint, when viewed in the light most favorable to the plaintiffs, give rise to a claim for relief

on any theory."). However, the Superior Court erred by doing the opposite. In dismissing the claims on *res judicata* or collateral estoppel grounds, the Superior Court necessarily assumed that Appellants were parties to judicial foreclosures, and therefore parties to a prior suit—a prerequisite to the application of *res judicata* or collateral estoppel. This assumption was false. Moreover, the Superior Court should have never reached that analysis because it involved facts outside the four corners of the Amended Complaint. It is well established that at the motion to dismiss stage, the Court "may not consider evidence outside the four corners of the complaint. . ." *Jackson/Hill Aviation, Inc.*, 251 N.C. App. at 775, 796 S.E.2d at 123.

This is a classic example of why courts are not permitted to consider facts outside of the complaint before discovery. The Motion to Dismiss should have been denied, and during discovery, Appellants would have had the chance to prove each foreclosure was conducted though a non-judicial process. The Superior Court erred by making the assumption – which turned out to be false – that the Appellants were parties to judicial foreclosures and then used that false assumption to dismiss Appellants' case. Because the Appellants were parties to non-judicial foreclosures, the Bank cannot show "a final judgment on the merits in an earlier suit." *Auto. Grp., LLC*, 230 N.C. App. at 446, 750 S.E.2d at 565. The lower court should be reversed.

B. Independently, the Superior Court erred because there was no identity of the causes of action between this lawsuit and the foreclosures.

Even assuming there were final judgments on the merits (i.e., judicial foreclosures), which there were not, the Bank must also establish "an identity of the causes of action in both the earlier and the later suit." *Id.* The Bank also fails to establish this element. The rationale behind this requirement is to provide finality to previous judgments. As discussed above, there was no previous judgment on the merits. However, independently, there is no identity in the two causes of action. This argument is not complicated. The first cause of action was a foreclosure against Appellants. This appeal involves a fraud case brought against Bank of America.

In the Amended Complaint, Appellants pleaded a claim for money damages on the basis of fraud perpetrated by the Bank. In contrast, foreclosures litigate the amount contractually owed on a note and transfers title from the mortgagor. *See generally, In re Simpson, P.C.*, 211 N.C. App. 483, 493, 711 S.E.2d 165, 172 (2011). Appellants have not asked the Superior Court to relitigate foreclosure actions and do not contend that the foreclosure actions were wrongfully decided. Appellants have instead brought a cause of action with an identity clearly separate from the non-judicial foreclosure actions pursued by the Bank against Appellants. *See Bluebird Corp.*, 188 N.C. App. at 678, 657 S.E.2d at 61.

Further, *res judicata* is inapplicable where the performance of an act was sought in one action and a money judgment in the other. *Edwards v. Edwards*, 118 N.C. App. 464, 473, 456 S.E.2d 126, 131 (1995). When the previous matter seeks performance of an act and the current matter seeks a money judgment, "there is no identity of the matters," which is a "prerequisite to the application of the doctrine of *res judicata*." *Shelton v. Fairley*, 72 N.C. App. 1, 8, 323 S.E.2d 410, 416 (1984). In a foreclosure, specific performance is sought. *See Banks v. Hunter*, 251 N.C. App. 528, 534-35, 796 S.E.2d 361, 367 (2017) (stating "[p]laintiff's pursuit of specific performance in the district court to terminate Defendant's (the mortgagor's) interest in her property . . . by definition, constitutes a 'foreclosure'"). In the fraud action here, Appellants do not seek to overturn the foreclosures, and if Appellants were to receive the money damages they seek here, the foreclosures would remain intact. There is no dispute that Appellants defaulted on their mortgages. But they were induced to do so by the Bank's fraudulent conduct. This action does not call into question the finality of the foreclosures, and thus, the lower court's decision should be reversed.

C. Independently, the Superior Court erred because Appellants adequately pleaded that they were unaware of the Bank's fraud at the time of foreclosure.

Even taking great leaps to assume that 1) Appellants were parties to judicial foreclosures (they were not) and 2) Appellants seek to overturn the foreclosure proceedings (they do not), the Superior Court still erred because

Appellants pleaded throughout the Amended Complaint that they were unaware of the Bank's fraud at the time they faced foreclosure. What's more: Appellants pleaded they could not have discovered the Bank's fraud at the time of foreclosure because the Bank purposely concealed it.

It is axiomatic that Appellants could not raise a claim of which they were not aware. This is also true in the context of *res judicata*. "[W]here the owner of the cause of action had no knowledge or means of knowledge of the item, the judgment in the first action does not ordinarily bar a subsequent action for the omitted item." *Gaither Corp. v. Skinner*, 241 N.C. 532, 536, 85 S.E.2d 909, 912 (1955); cited for support in *Christian v. Am. Home Assur. Co.*, 577 P.2d 899, 905 (Okla. 1977) (quoting *Gaither* for the proposition that "[w]here plaintiff's omission of an item of his cause of action was brought about by defendant's fraud, deception or wrongful concealment, the former judgment has been held not to be a bar to suit on the omitted part of the claim").

Appellants pleaded facts establishing they had no "reasonable opportunity" to pursue their fraud claims at the time of foreclosure because they had no actual or constructive knowledge of fraud. Appellants could not have discovered the fraud because the Bank's nefarious scheme was designed to keep them in the dark. Appellants pleaded that the Bank orchestrated a secret, system-wide scheme to lie to and defraud mortgagors. Specifically, Appellants

were told to miss mortgage payments,[6] that their applications and supporting documents needed to be resent,[7] and that they were approved for and required to make payments for a trial payment plan.[8] Appellants pleaded that instead of properly considering Appellants for modifications, bank employees routinely shredded documents with no review, intentionally allowed homeowner documents to sit for months without reviewing them, and despite making payments, borrowers were listed as delinquent. (R pp 201–204). Most importantly, Appellants pleaded that they were unaware of the Bank's fraudulent scheme at the time of foreclosure, and they had no reason not to believe the Bank's lies before they consulted with counsel. (R pp 211, 220, 226, 235, 243, 251, 258, 266, 275). The issue here is not whether there were facts supporting the fraud available at the time Appellants lost their homes. Instead, the key issue is whether the facts supporting the fraud *could have been discovered*. Appellants have asserted time and time again that they could not.

Appellants have not found a single case and the Bank has not pointed to a single case in North Carolina where a fraud action is barred by *res judicata* when the plaintiff was unaware of the fraud during the pendency of the

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[6] For example, a bank employee "told Plaintiff [Chester Taylor] that he 'had to be two to three months behind' on his mortgage loan to be eligible." (R p 208).

[7] Aleshire Appellants were told that their documents were "not received" and they were instructed to "re-send supporting documents and additional supporting documents.". (R p 242).

[8] For example, "BOA sent Plaintiff a letter and [HAMP] agreement stating her application was approved and requested that she make three (3) 'trial payments' of $1,463.77." (R p 252).

foreclosure. In fact, in *Bryant*, this Court addressed a fraud claim brought in a separate action following a foreclosure action. *See Bryant v. Nationstar Mortg. LLC*, No. COA17-592, 262 N.C. App. 507, 821 S.E.2d 306 (Table), 2018 WL 6053289 (Nov. 20, 2018). This Court analyzed the fraud claims brought against a bank on the merits, determining there was no need to address the *res judicata* issue. *Id.* Indeed, the *res judicata* issue would undoubtedly need to be addressed prior to the merits, if the case was to be dismissed on *res judicata* grounds. *Id.* This is important because it is what the Superior Court should have done in this case. Further, the Superior Court should have considered the state law in which each of the foreclosures occurred— Michigan, California, Arizona, Minnesota, and North Carolina. These states agree that *res judicata* does not bar claims where defendant's fraud, deception, or wrongful concealment, prevents the other party from asserting claims in a prior proceeding.[9]

Appellants were diligent in seeking answers for their foreclosures but were repeatedly lied to and deceived by the Bank. The Bank strategically

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[9] *See Allied Fire Prot. v. Diede Constr., Inc.*, 127 Cal. App. 4th 150 (2005) (reasoning *res judicata* does not bar a second action where it cannot be said that plaintiff knew or should have known of the claim when the first action was filed" and that the plaintiffs were unaware of the facts giving rise to a claim due to defendant's fraud)"; *Sprague v. Buhagiar*, 539 N.W.2d 587 (Mich. Ct. App. 1995) (recognizing fraud exception to the general rule of *res judicata* when the fraud alleged is extrinsic and involves facts outside the facts of the case); *State ex rel. Darwin v. Arnett*, 235 Ariz. 239, 244 (affirming Restatement Second exception to *res judicata* if a "'misrepresentation caused the other party's failure to include the claim in the earlier case,' and if the party seeking to avoid *res judicata* could not have realized that it had a claim."); *Vineseck v. Great N. R. Co.*, 136 Minn. 96 (1917) (reasoning that a defendant cannot rely on the defense of *res judicata* when he has misled the plaintiff by actual fraud, or by misrepresentations).

prevented them from discovering the fraud earlier and now uses that concealment to their advantage. It should not be tolerated.

D. Independently, the Superior Court erred because the Bank's fraud was extrinsic to the foreclosures.

The Superior Court's judgment should be set aside for any of the three reasons discussed above. However, setting aside each of the prior arguments, the Appellants' fraud claims cannot be barred by *res judicata* because the fraud alleged is extrinsic to the foreclosure actions.

While collateral attacks are typically not permitted on a judgment rendered by a court of competent jurisdiction, this is not the case when the alleged fraud is considered extrinsic. *See Smith v. Smith*, 334 N.C. 81, 86, 431 S.E.2d 196, 199-200 (1993). "[J]udgments may be collaterally attacked if the fraud is extrinsic." *Id.; see also Caswell Realty Assocs. I v. Andrews Co.*, 121 N.C.App. 483, 486, 466 S.E.2d 310, 312 (1996) (quoting *Scott v. Farmers Coop. Exch., Inc.*, 274 N.C. 179, 182, 161 S.E.2d 473, 476 (1968)). Intrinsic fraud would bring into question fraud upon the court or fraud involved in the determination of a cause on its merits, which is not what Appellants have raised here. *See Courtney v. Courtney*, 40 N.C.App. 291, 253, S.E.2d 2 (1979). However, extrinsic fraud "deprives the party of the opportunity of presenting his case, or his defense, upon the hearing, and renders the result as to him no trial at all in the legal sense." *Horne v. Edwards*, 215 N.C. 622, 3 S.E.2d 1, 4 (1939).

The Bank's fraud is unquestionably extrinsic to the foreclosure action.

Appellants did not allege that the Bank committed fraud *during* the foreclosure process (i.e., intrinsic fraud). Instead, the Bank hid the fraudulent acts it committed prior to the foreclosure and prevented Appellants from fully participating in the foreclosure actions. Appellants were unable use the Bank's fraud to defend themselves during foreclosure because they were unaware of it. The prior judgments are susceptible to attack because extrinsic fraud is alleged. The Superior Court's judgment should be reversed.

V. FINALLY, THE SUPERIOR COURT ERRED BY DISMISSING APPELLANTS' COMPLAINT WITHOUT FIRST GRANTING LEAVE TO AMEND.

Rule 15(a) of the Rules of Civil Procedure states that leave to amend pleadings "shall be freely given when justice so requires," and liberal amendments are encouraged. *Taylor v. Triangle Porsche–Audi, Inc.*, 27 N.C.App. 711, 714, 220 S.E.2d 806, 809 (1975).

The trial court erred in dismissing Appellants' claims with prejudice, without giving an additional opportunity to amend their complaint. When a complaint is evaluated for dismissal on the basis of the statute of limitations, the crux of the limitations issue generally turns on the additional facts pleaded to show an exception to limitations—either the discovery rule, fraudulent concealment, or some other form of tolling. To the extent the court below was not satisfied that Appellants pleaded enough additional facts to show an exception to limitations or *res judicata* (especially given that each foreclosure was non-

judicial), it should have given them an opportunity to add such facts before deciding - sight unseen - that no such amendment could possibly work.

CONCLUSION

For all of the reasons stated, Plaintiffs/Appellants respectfully request that the decision, order and judgment of the Superior Court be reversed and that this lawsuit be remanded for further prosecution. Plaintiffs/Appellants further request all other relief to which they are entitled.

This 29th day of May 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for plaintiffs certifies that the foregoing brief, which is prepared using proportional font, is less than 8,677 words (excluding cover, index, table of authorities, certificate of service, this certificate of compliance, and appendices) as reported by the word-processing software.

Date: May 29, 2020.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the foregoing Plaintiffs'-Appellants' Brief upon all other parties to this cause as indicated below by electronic mail:

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CONTENTS OF ADDENDUM

262 N.C.App. 507
Unpublished Disposition
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN THE REPORTER.
An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.
Court of Appeals of North Carolina.

Steve D. BRYANT, Plaintiff,
v.
NATIONSTAR MORTGAGE, LLC and Substitute Trustee Services, Inc., Defendants.

No. COA17-592
|
Filed: November 20, 2018

Appeal by plaintiff from judgment entered 10 October 2016 by Judge Gregory R. Hayes in Catawba County Superior Court. Heard in the Court of Appeals 9 January 2018. Catawba County, No. 16-CVS-1395

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Opinion

BERGER, Judge.

**1 Steve D. Bryant ("Plaintiff") appeals the dismissal of several claims for relief he had asserted against Nationstar Mortgage, LLC ("Defendant Nationstar" or "Nationstar") and Substitute Trustee Services, Inc. ("Defendant Substitute Trustee Services" or, collectively with Nationstar, "Defendants"). For the reasons stated below, we affirm the trial court's dismissal of Plaintiff's complaint.

Factual and Procedural Background

Because the judgment here under review dismissed Plaintiff's complaint for failure to state claims for which relief can be granted, our review is restricted to the facts as alleged in the complaint. Generally, Plaintiff's claims arose from alleged actions by Defendants in their foreclosure of Plaintiff's property located in Hickory, North Carolina, which he had owned since December 21, 2005.

On April 5, 2007, Plaintiff refinanced his property by granting an initial deed of trust with a principal amount of $584,000.00, and also an equity line of credit deed of trust with a principal amount of $73,000.00. Through a series of assignments, Defendant Nationstar came to hold both deeds of trust.

On August 30, 2009, Plaintiff contracted with an insurance company to insure the property against "all direct physical loss or damage to the extent of $649,000.00" for a term ending August 30, 2010. During that term, the dwelling situated on the property was destroyed by fire. To recoup its loss to its security for the debt, Defendant Nationstar filed suit against the property's insurer and settled that suit for $445,000.00 on May 29, 2013. Plaintiff alleged that both this "secret lawsuit" and the amount for which it was settled had been fraudulently hidden from him so that the proceeds of the settlement could be kept by Defendant Nationstar and not applied to Plaintiff's debt balance. Plaintiff alleged that had this amount been applied to the debt, his debt would have been satisfied.

Plaintiff further alleged that Defendant Substitute Trustee Services had a fiduciary duty owed to Plaintiff under which it should have enforced the terms of the deeds of trust. Defendant Substitute Trustee Services allegedly had a duty to investigate the lawsuit settlement amount and protect Plaintiff's interests in the foreclosure proceedings that were initiated by Defendant Nationstar at some point after the insurance settlement.

Defendant Nationstar initiated foreclosure proceedings by representing that Plaintiff owed a debt of $764,037.96 and was in default, despite the fact that Nationstar had allegedly received $445,000.00 that should have been applied to the balance of the loan. Plaintiff alleged that Defendant "Nationstar initiated and fraudulently continued with the foreclosure by fraudulently concealing the Settlement Amount." However, after a second foreclosure hearing before the Catawba County Clerk of Superior Court, "Nationstar

and Substitute Trustee were informed that Nationstar could have been owed no more than $197,970.67, and Nationstar and Substitute Trustee breached fiduciary duties to Bryant by continuing to proceed with the foreclosure."

**2 Plaintiff further alleged that on November 25, 2014, Defendant Nationstar allegedly "purchased the [p]roperty pursuant to a credit bid of $391,332.04 [ ] that required [Defendant] Nationstar to apply th[is amount] to any amount Nationstar asserted Bryant owed." Plaintiff also alleged that a surplus of $193,361.37 should have been submitted to the Catawba County Clerk of Court, and then credited to him.

The complaint containing these allegations above asserted claims for fraud, constructive fraud, unjust enrichment, unfair and deceptive trade practices, breaches of a fiduciary duty, and breaches of contract including implied covenants of good faith and fair dealing; a claim for violations of the North Carolina statutes governing foreclosure; and a claim for violations of the North Carolina Debt Collections Act. In an order entered October 10, 2016, the trial court dismissed all claims included in Plaintiff's complaint with prejudice. Plaintiff timely appeals.

Analysis

"The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). However, "conclusions of law or unwarranted deductions of fact are not admitted." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (citation omitted). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Products, Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4, *aff'd per curiam*, 357 N.C. 567, 597 S.E.2d 673 (2003).

"Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428-29 (2007) (citation and quotation marks omitted).

In his complaint, Plaintiff alleged claims against Defendants for fraud, constructive fraud, breach of fiduciary duty, breach of contract, violation of North Carolina's Debt Collection Act, unjust enrichment, violation of North Carolina's statute governing foreclosure actions, and unfair and deceptive trade practices. Plaintiff contends the trial court erred in granting Defendants' motion to dismiss all of Plaintiff's claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim for which relief can be granted. We disagree, and address each argument in turn.

I. Fraud, Constructive Fraud & Breach of Fiduciary Duty Claims

"Fraud can ... be broken into two categories, actual and constructive. Actual fraud is the more common type, arising from arm's length transactions." *Terry v. Terry*, 302 N.C. 77, 82, 273 S.E.2d 674, 677 (1981). The "essential elements of actual fraud are: (1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Id.*, 302 N.C. at 83, 273 S.E.2d at 677.

**3 "In all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." N.C. Gen. Stat. § 1A-1, Rule 9(b) (2017). "The particularity required cannot be satisfied by using conclusory language or asserting fraud through mere quotes from the statute." *Terry*, 302 N.C. at 85, 273 S.E.2d at 678. "The particularity required by the rule generally encompasses the time, place and contents of the fraudulent representation, the identity of the person making the representation and what was obtained by the fraudulent acts or representations." *Id.* (emphasis removed).

Here, in his complaint, Plaintiff did not allege that Defendants made any false representation or concealment of material fact that is considered by North Carolina law to fulfill this required element. On appeal, Plaintiff argues Defendants had a "duty to disclose" the filing of a separate lawsuit. However, Plaintiff is unable to establish that this particular duty, and its application to Defendants' actions, is recognized by the law

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of our State. Plaintiff further asserts that Nationstar's filing of a Form 1099-C with the United States Internal Revenue Service constituted fraudulent misrepresentation to Plaintiff. This also is unsupported by any articulable legal theory, and we decline to implement such a standard. Accordingly, without allegations recognized here as sufficient to fulfill a requisite element of fraud, Plaintiff's claim fails as a matter of law. Thus, the trial court did not err in dismissing Plaintiff's claim for fraud.

"Constructive fraud arises where a confidential or fiduciary relationship exists, and its proof is less exacting than that required for actual fraud. When a fiduciary relation exists between parties to a transaction, equity raises a presumption of fraud when the superior party obtains a possible benefit." *Head v. Gould Killian CPA Grp., P.A.*, ––– N.C. ––––, ––––, 812 S.E.2d 831, 837 (2018) (citations and quotation marks omitted). "Though difficult to define in precise terms, a fiduciary relationship is generally described as arising when there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Id*. (citation and quotation marks omitted). "Ordinary borrower-lender transactions, by contrast, are considered arm's length and do not typically give rise to fiduciary duties." *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 368, 760 S.E.2d 263, 266-67 (2014) (citation omitted). "[T]he law does not typically impose upon lenders a duty to put borrowers' interests ahead of their own. Rather, borrowers and lenders are generally bound only by the terms of their contract and the Uniform Commercial Code." *Id*. at 368, 760 S.E.2d at 267 (citations omitted).

Here on appeal, Plaintiff alleges Defendants committed constructive fraud because Defendants had "intentionally concealed the Secret Lawsuit and Settlement Agreement, did not apply the Settlement Amount as required by the Deed of Trust, fraudulently represented that the Loan was uncured to initiate foreclosure, continued foreclosure[,] and caused foreclosure." However, Plaintiff failed to allege in his complaint an ongoing fiduciary duty owed him by Defendants. The ordinary borrower-lender relationship between the parties as alleged did not amount to a fiduciary duty. *See Dallaire*, 367 N.C. at 368, 760 S.E.2d at 266-67; *Head*, ––– N.C. at ––––, 812 S.E.2d at 837.

Further, Plaintiff's allegations in his complaint rely on the "secret" filing of a separate lawsuit by Nationstar, against N.C. Grange Mutual Insurance Company in 2012, in an erroneous attempt to establish a duty owed by Defendant. However, Plaintiff did not allege a duty, fiduciary or otherwise, under which Defendants were required to disclose to him the existence of other lawsuits to which Plaintiff is not a named party. Additionally, Plaintiff uses this alleged duty to try to make a claim pursuant to N.C. Gen. Stat. § 45-21.31, alleging that Defendants owed a fiduciary duty to Plaintiff, which they breached when they failed to determine a surplus after the foreclosure proceeding and pay this surplus to the Clerk of Court. Again, because Plaintiff did not allege a fiduciary duty recognized in North Carolina, both this claim and Plaintiff's claim for constructive fraud were properly dismissed.

II. Breach of Contract and Unjust Enrichment Claims

****4** Plaintiff contends the trial court erred by dismissing his claim for breach of contract and unjust enrichment. Plaintiff alleged in his complaint that Defendants had breached the contractual terms contained in the Deed of Trust. Plaintiff also alleged that Defendant Nationstar was unjustly enriched by its receipt of $445,000.00 paid them in settlement for damages to the property, but not applying this amount against monies owed by Plaintiff. Plaintiff's claims are predicated upon alleged errors in the power of sale foreclosure on the Property. However, Plaintiff is collaterally estopped from re-litigating the validity of the power of sale foreclosure because he did not seek to appeal or enjoin the foreclosure when he had that opportunity before it became final, and because a proper foreclosure was conducted by the Clerk of Court. Therefore, his claims for breach of contract and unjust enrichment were properly dismissed by the trial court.

During the foreclosure proceedings, the Clerk of Court found Plaintiff had defaulted under the Deed of Trust. Plaintiff did not appeal from the Foreclosure Order or seek to enjoin the foreclosure proceedings between the foreclosure hearing and the sale of the Property. Section 45-21.16(d) provides the requirements necessary for the Clerk of Court to conduct a power of sale foreclosure:

> The hearing provided by this section shall be held before the clerk of court in the county where the land, or any portion thereof, is situated. ... However, prior to that hearing, the mortgagee or trustee shall file the notice of hearing in any other county

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> where any portion of the property to be sold is located. Upon such hearing, the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents.

N.C. Gen. Stat. § 45-21.16(d) (2017). As part of the hearing, the clerk of court must make findings of fact limited to the following:

> (1) the existence of a valid debt of which the party seeking to foreclose is the holder; (2) the existence of default; (3) the trustee's right to foreclose under the instrument; (4) the sufficiency of notice of hearing to the record owners of the property; (5) the sufficiency of pre-foreclosure notice under section 45-102 and the lapse of the periods of time established by Article 11, if the debt is a home loan as defined under section 45-101(1b); and (6) the sale is not barred by section 45-21.12A.

In re Foreclosure of Young, 227 N.C. App. 502, 505, 744 S.E.2d 476, 479 (2013).

After these findings have been made, a party can appeal a Section 45-21.16 hearing "to the superior court for a *de novo* hearing, [and] the inquiry before a judge of superior court is also limited to the same issues." *Funderburk v. JPMorgan Chase Bank, N.A.*, 241 N.C. App. 415, 422, 775 S.E.2d 1, 6 (2015) (citation and quotation marks omitted). While Section 45-21.16(d) precludes a party's ability to raise affirmative defenses directly, Section 45-21.34 provides an avenue through which equitable relief may be sought by enjoining the foreclosure. *See id.* at 423, 744 S.E.2d at 6 (citation omitted); *In re Foreclosure of Goforth Properties*, 334 N.C. 369, 374, 432 S.E.2d 855, 859 (1993) (citation omitted) ("Equitable defenses to foreclosure ... may not be raised in a hearing pursuant to N.C.G.S. § 45-21.16 or on appeal therefrom but must be asserted in an action to enjoin the foreclosure sale under N.C.G.S. § 45-21.34.").

Section 45-21.34 provides the following remedy:

> Any owner of real estate ... having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the time that the rights of the parties to the sale or resale becoming fixed ... to enjoin such sale, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner[.]

N.C. Gen. Stat. § 45-21.34 (2017).

Here, the Catawba County Clerk of Court held a foreclosure hearing on October 30, 2014. The Clerk of Court made all findings required by Section 45-21.16 and entered an order finding that Plaintiff was in default. Plaintiff did not appeal from the Clerk of Court's order for a *de novo* hearing pursuant to Section 45-21.16(d1). On November 25, 2014 at 12 p.m., a power of sale foreclosure was properly conducted on the Property. Defendant Nationstar purchased the Property for $391,332.04. No upset bids were placed, and the Final Report and Account of Foreclosure Sale was entered on December 16, 2014. Plaintiff had the opportunity to enjoin the sale pursuant to Section 45-21.34, but chose not to do so. Thus, the Clerk of Court's order constituted a final judgment of foreclosure. Because Plaintiff did not seek to appeal the foreclosure pursuant to Section 45-21.16, or file an action to enjoin the foreclosure pursuant to Section 45-21.34, Plaintiff is barred from collaterally attacking the foreclosure in a separate action. *Howse v. Bank of Am., N.A.* —— N.C. App. ——, ——, 804 S.E.2d 552, 557 (2017) ("an equitable action pursuant to N.C.G.S. § 45-21.34 must be commenced prior to the time the rights of the parties become fixed [pursuant to Section 45-21.29A]." (citation and quotation marks omitted)). "[T]he language of N.C. Gen. Stat. § 45-21.34 contemplate[s] that a party seeking to avoid a foreclosure sale will take such action as is necessary to prevent the sale from becoming final." *Goad v. Chase Home Fin., LLC*, 208 N.C. App. 259, 264, 704 S.E.2d 1, 4 (2010) (citation and quotation marks omitted).

****5** Because Plaintiff did not seek a *de novo* hearing in Catawba County Superior Court and did not file an injunction

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pursuant to Section 45-21.34, the rights of the parties became fixed pursuant to Section 45-21.29A. Thus, any claims collaterally attacking the foreclosure of the Property are barred by collateral estoppel, and cannot be prosecuted by a separate and distinct action. *Funderburk*, 241 N.C. App. at 423, 775 S.E.2d at 7. Accordingly, the trial court did not err in dismissing Plaintiff's breach of contract and unjust enrichment claims because these claims were improper collateral attacks.

III. Unfair and Deceptive Trade Practices Claim

"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) (brackets and citation omitted). "A practice is unfair when it offends public policy and when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Walker v. Branch Banking & Tr. Co.*, 133 N.C. App. 580, 583, 515 S.E.2d 727, 729 (1999) (citation omitted).

Under N.C. Gen. Stat. § 75-1.1, "a mere breach of contract does not constitute an unfair or deceptive act. Egregious or aggravating circumstances must be alleged before the provisions of the Act may take effect." *Harty v. Underhill*, 211 N.C. App. 546, 552, 710 S.E.2d 327, 332 (2011) (citations omitted). "[I]t is well recognized that actions for unfair or deceptive trade practices are distinct from actions for breach of contract, and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1." *Watson Elec. Constr. Co. v. Summit Companies., LLC*, 160 N.C. App. 647, 657, 587 S.E.2d 87, 95 (2003) (citations omitted).

Plaintiff alleges the following in his complaint for a Chapter 75 claim:

> 115. Nationstar's acts and omissions are in and affecting commerce in the [S]tate of North Carolina.
>
> 116. Upon information and belief, Nationstar engaged and/or paid either Substitute Trustee and/or the law firm acting on behalf of Substitute Trustee.
>
> 117. Substitute Trustee's acts and omissions are in and affecting commerce in the [S]tate of North Carolina.
>
> 118. Nationstar's conduct in seeking to initiate foreclosure, and Substitute Trustee's breaches of contract and duties in continuing the foreclosure were unfair and deceptive.
>
> 119. Nationstar directing that other collections agents claim that $764,037.96 was owed and seek to recover that amount amounts [*sic*] to an unfair and deceptive representation, intending to intimidate and intimidating Plaintiff.
>
> 120. Nationstar and Substitute Trustee requiring payment of attorney fees as part of the Final Report and Accounting was deceptive and unfair.
>
> 121. Nationstar (i) attempting to foreclose of the Property after the debt was materially cured and/or satisfied, (ii) continuing to send debt collection notices in violation of North Carolina's Debt Collection Act; and (iii) continuing foreclosure proceedings amount to unconscionable means prohibited by N.C.G.S. § 75-55.
>
> 122. Nationstar's breaches of covenants of good faith and fair dealing were accompanied by substantial aggravating factors including fraud, breaches of fiduciary duties and deception.
>
> 123. Plaintiff has incurred emotional distress and anxiety regarding potential outstanding amounts owed to Nationstar and potential tax liability in 2016.
>
> ****6** 124. Nationstar's acts omissions and practices were unfair, offended established public policy, were immoral, unethical, and unscrupulous and/or had the tendency and/or capacity to deceive.
>
> 125. Plaintiffs are entitled to all actual and consequential damages, including attorney fees and all other damages qualifying for trebling to be trebled, as well as attorney's fees as allowed by N.C.G.S. § 75-16.1.

These allegations from Plaintiff's complaint do not allege sufficient facts to sustain an unfair and deceptive trade practices claim under Chapter 75. The allegations are not distinct from the purported breach of contract, breach of covenants of good faith and fair dealing, or breach of fiduciary duty claims. Additionally, the complaint does not allege actions of Defendants that demonstrate "[e]gregious or aggravating circumstances." *Harty*, 211 N.C. App. at 552,

710 S.E.2d at 332. Further, Plaintiff's claims for attorney's fees and trebled damages do not allege that Nationstar's "action was frivolous and malicious." N.C. Gen. Stat. § 75-16.1 (2017). Plaintiff's complaint also does not contain facts demonstrating that Defendants' actions were intended to deceive or that a fiduciary duty existed. Further, the majority of Plaintiff's Chapter 75 claim relies on the validity of the foreclosure proceeding which is not before this Court. Accordingly, Plaintiff's Chapter 75 claim is insufficient; and thus, the trial court did not err in granting Defendant's motion to dismiss on this claim.

IV. Violations of North Carolina Debt Collections Act

Plaintiff alleged in his complaint that Nationstar violated the North Carolina Debt Collections Act in its communications regarding the default and foreclosure of the Property. Specifically, Plaintiff alleged violations of North Carolina General Statute §§ 58-70-95(5) and 58-70-115. As an exhibit to his complaint, Plaintiff attached a communication from Nationstar's attorney notifying Plaintiff of the foreclosure proceedings as evidence of threats and coercion prohibited by Section 58-70-95(5), and also includes a general allegation that Defendant submitted false information concerning the debt owed in violation of Section 58-70-115.

As part of the North Carolina Debt Collections Act, Section 58-70-95(5) provides:

> No collection agency shall collect or attempt to collect any debt alleged to be due and owing from a consumer by means of any unfair threat, coercion, or attempt to coerce. Such unfair acts include, but are not limited to, the following:
>
> (5) Representing that nonpayment of an alleged debt may result in the arrest of any person[.]

N.C. Gen. Stat. § 58-70-95(5) (2017).

The communication from Nationstar was attached to the complaint as Exhibit 5. Plaintiff alleged it violated the North Carolina Debt Collections Act by threatening arrest if the debt was not paid. From examination of Exhibit 5, it is clear that there is no language in the letter that states or implies a threat of arrest, and Plaintiff failed to allege specific facts in his complaint showing the threat of arrest. Section 59-70-130 provides that debt collectors may not attempt to collect any debt in a multitude of ways. However, Plaintiff failed to allege facts in his complaint sufficient to show a violation of this Section of the North Carolina Debt Collection Act. Therefore, Plaintiff's claim for violations of the North Carolina Debt Collection Act is without merit, and the trial court did not err in dismissing it.

Conclusion

****7** For the reasons stated above, the trial court did not err in dismissing each of Plaintiff's claims for relief. Therefore, we affirm the judgment.

***307** AFFIRMED.

Report per Rule 30(e).

Judges BRYANT and MURPHY concur.

All Citations

262 N.C.App. 507, 821 S.E.2d 306 (Table), 2018 WL 6053289

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