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
Appellants,	)	
v.	)	
BANK OF AMERICA, N.A.,	)	
Appellee.	)	

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PLAINTIFFS-APPELLANTS'

REPLY BRIEF

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INTRODUCTION

The Superior Court's decision, and the position set forth by the Bank, essentially means that so long as any defendant successfully hides their fraudulent conduct long enough, they will always be immune to suit. In fact, to Appellants' knowledge, the Bank has yet to acknowledge any form of fraud, deceit, or wrongdoing in the HAMP process. Yet, the Bank somehow argues that the Appellants should have known about it many years ago. Left to stand, the Superior Court's decision would be a dangerous precedent.

The Bank's arguments are based on the premise that once the Appellants discovered they had been injured, they must have known the Bank engaged in fraud and that fraud caused their injury. The Bank makes such a giant inferential leap with little explanation and with no explanation at all as to why a reasonable mind could not conclude otherwise. Reasonable minds could conclude Appellants neither suspected nor had reason to suspect the loss of their homes was the product of the Bank's fraud, as opposed to inadvertence, by themselves or the corporation. Discovery might suggest otherwise, but the Amended Complaint does not.

Pursuant to N. C. R. App. 28(h), Appellants now address the arguments set forth in Appellee's brief. Appellants respectfully ask this Court to reverse the Superior Court's decision and remand this case for further proceedings.

ARGUMENT

I. The Superior Court Erred in Dismissing Appellants' Claims on the Grounds of Statute of Limitations.

The Bank attempts to convolute the issues on this appeal when, in fact, the issues are quite simple. Appellants' Amended Complaint alleged that they did not discover and could not have discovered the Bank's fraud until they contacted their attorneys, and the Appellants specifically plead that date. Appellants further plead that the Bank took affirmative action to fraudulently conceal any evidence of the fraudulent scheme. North Carolina law applies and those allegations are sufficient to withstand a Rule 12(b)(6) Motion to Dismiss.

A. North Carolina law applies to Appellants' Claims.

The Bank's argument that any other state's statute of limitations applies is a red herring. According to well-established North Carolina law, statute of limitations is a procedural device, and ordinarily, North Carolina law governs. *See Sayer v. Henderson*, 225 N.C. 642, 643 (1945) ("The statutes of limitation have been uniformly held by this Court, and so far as we know by other courts, to be governed by the law of the forum."). "Simply put, North Carolina courts ordinarily apply the North Carolina statute of limitations." *Stokes v. Se. Hotel Props.*, Ltd., 877 F. Supp. 986, 993 (W.D.N.C. 1994).

By its plain language, only when an action "is barred by the laws of the jurisdiction in which it arose" does North Carolina's borrowing statute apply. N.C. Gen. Stat. § 1-21. Here, none of the Appellants' home states have a statute

of limitation shorter or more restrictive than North Carolina's.[1] Therefore, North Carolina's borrowing statute is inapplicable. *See Stokes*, 877 F. Supp. at 993 (stating that "North Carolina borrowing statute was inapplicable . . . where cause of action occurred in Florida and Florida statute of limitations was longer than North Carolina's.") None of the Appellants' claims are barred by any of the relevant states' laws. *See supra* note 1. Therefore, the North Carolina statute of limitations must be applied. *Id.*

B. Whether Appellants exercised due diligence is a question of fact for a jury.

Despite the overwhelming weight of the case law, the Bank argues that the application of the discovery rule is only "sometimes" a question of fact. Appellee's Br. p. 15. This is misleading. The general rule is that "when [the] plaintiff should, in the exercise of reasonable care and due diligence, have discovered the [alleged] fraud is a question of fact to be resolved by the jury." *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 486, 593 S.E.2d 595, 601 (2004) (quoting *Feibus & Co. v. Godley Constr. Co.*, 301 N.C. 294, 304–05,

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[1] *See* Cal. Civ. Proc. Code § 338 (three-year statute of limitations with a discovery rule) *see also* Ariz. Rev. Stat. Ann. § 12-543 (three-year statute of limitations with a discovery rule); Minn. Stat. Ann. § 541.05 (6) (six-year statute of limitations with a discovery rule). Further, while Michigan, which has a six-year statute of limitations, does not recognize a discovery rule, Michigan law provides generous tolling when, like here, the plaintiff pleads fraudulent concealment. *See Korean Am. Scholarship Fund v. Jong Dae Kim*, No. 334373, 2017 WL 4846001, at *2 (Mich. Ct. App. Oct. 26, 2017) (stating "[u]nder MCL 600.5855, the statute of limitations is tolled when a party conceals the fact that the plaintiff has a cause of action"). Indeed, the Supreme Court of Michigan has stated that "MCL 600.5855 provides for essentially unlimited tolling based on discovery when a claim is fraudulently concealed." *Trentadue v. Buckler Lawn Sprinkler*, 479 Mich. 378, 391; 738 N.W.2d 664 (2007).

271 S.E.2d 385, 392 (1980) and stating "[i]n their complaint, plaintiffs allege they only recently discovered the acts of defendants and could not have discovered, with reasonable diligence, such acts until then. This allegation is sufficient to withstand a Rule 12(b)(6) motion to dismiss")). Put another way, only "[w]hen the facts are admitted or established" is "the determination of the expiration of the statute of limitations [ ] a matter of law." *Calhoun v. Calhoun*, 76 N.C. App. 305, 308, 332 S.E.2d 734, 736 (1985).[2] Furthermore, "it is generally held that when it appears that by reason of the confidence reposed the confiding party is actually deterred from sooner suspecting or discovering the fraud, he is under no duty to make inquiry until something occurs to excite his suspicions." *Vail v. Vail*, 233 N.C. 109, 116-17, 63 S.E.2d 202, 208 (1951) (emphasis added; internal quotation marks omitted).

Like the defendant in *Wells Fargo Bank, N.A. v. Coleman*, 239 N.C. App. 239, 244, 768 S.E.2d 604, 608 (2015), the Bank is arguing that "had [Appellants] done any of [the] follow-up diligence, [they] would have discovered the [fraud]." In that opinion, authored by Judge Richard Dietz, this Court noted that mere

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[2] Interestingly, many of the cases cited by the Bank in discussing the discovery rule are at the summary judgment stage or later. *See Doe v. Roman Catholic Diocese of Charlotte, NC*, 242 N.C. App. 538, 775 S.E.2d 918 (2015) (on appeal from summary judgment); *Thorpe v. DeMent*, 69 N.C. App. 355, 317 S.E.2d 692, *aff'd*, 312 N.C. 488, 322 S.E.2d 777 (1984) (on appeal from summary judgment); *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 751 P.2d 923 (1988) (on appeal from summary judgment); *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 544, 589 S.E.2d 391, 394 (2003) (appeal from summary judgment); *Peacock v. Barnes*, 142 N.C. 215, 55 S.E. 99, 100 (1906) (appeal from a jury verdict). This is an important distinction. Appellants urge this Court to keep in mind that this case is still at the motion to dismiss stage.

indications of fraud "do[ ] not trigger the statute of limitations as a matter of law." *Id.* Wells Fargo, the plaintiff in that case, brought a foreclosure action seeking reformation of the deed on the ground of mutual mistake. *Id.* Wells Fargo argued that its failure to immediately double-check the legal description on the deed was not unreasonable. *Id.* at 246. This Court agreed stating that "[u]nder *Vail* and *Huss*, whether this type of double-checking would be necessary 'in the exercise of due diligence,' and at what point it should have taken place, are factual determinations that cannot be resolved at summary judgment. *Id.* (citing *Huss v. Huss*, 31 N.C.App. 463, 468, 230 S.E.2d 159, 163 (1976); *Vail v. Vail*, 233 N.C. 109, 117, 63 S.E.2d 202, 208 (1951)).[3] The Court made clear that "the running of the limitations period turns on the factual determination of when, in the exercise of due diligence, the party reasonably should have been expected to follow up and ultimately discover the mistake. This is a factual determination that ordinarily must be resolved by a jury." *Id.* at 245.

Here, even if there were "mere indications" that the Bank committed fraud by not granting the HAMP modification, that is insufficient to trigger the statute of limitations as a matter of law. *Id.* The running of the statute of limitations turns on the *factual determination* of when the Appellants should have been expected to follow up and when they would have ultimately discovered

[3] In each of these three cases (*Wells Fargo*, *Huss* and *Vail*), the court reversed the trial court's dismissal based on statute of limitations, holding that a jury should determine the discovery rule issue. It is even more imperative that this Court do the same here, as this case is still at the pleadings stage. *See Huss*, 31 N.C.App. at 468, *Vail*, 233 N.C. at 117.

the Bank's fraud. *Id.* Appellants specifically pleaded due diligence, and there is no indication whatsoever that their search resulted in, or could have resulted in, the discovery of the fraud.

Moreover, the facts are not "admitted or established," as required to make "the determination of the expiration of the statute of limitations [ ] a matter of law." *Calhoun*, 76 N.C. App. at 308. Far from it—the facts surrounding Appellants' discovery of the Bank's fraud are hotly disputed. As discussed in the initial brief, Appellants have pleaded that they repeatedly called the Bank to inquire about the issues with their HAMP modification, and each time, they were lied to. (R pp 208, 216, 231, 240, 248, 255, 263, 272). And, Appellants stated that the specific purpose of these lies was to prevent them from uncovering the truth. *Id.* The Bank argues that this cannot carry Appellants' burden of pleading a "reasonable investigation" because that was for the purpose of "seeking HAMP modifications" not to "investigate whether they were legally wronged." Appellee's Br. p. 24. The problem with this argument is that Appellants' legal claim is one for a wrongful denial of a HAMP modification. Therefore, calling about the modification is necessarily inquiring about why they did not receive one. Indeed, Bank representatives should have been in the best position to know why Appellants were not granted HAMP modifications. Yet, they told Appellants it was because their documents were incomplete, missing, or lost. (R. pp 210, 219, 234, 242, 250, 257, 265, 273). The reason this did not "arouse[ ]" their "suspicion" of fraud is because with each call, the Bank fed Appellants more lies and

falsehoods with the intent to keep them from knowing about the existence of fraud.[4] *Id.*

Interestingly, the Bank also argues Appellants should have discovered the fraud because "all of it had been public since 2013 at the latest." Appellee's Br. p. 24. This argument is nonsensical. The Bank has yet to acknowledge any form of fraud, deceit, or wrongdoing in the HAMP process. Further, the contention that "all of it had been public since 2013 at the latest" is clearly inaccurate. In Exhibit 7 to the Amended Complaint, Appellants attached the January 27, 2017 SIGTARP Quarterly Report to Congress. (R pp 166–172). The Report, which discloses SIGTARP's investigation results from that quarter, states that Bank of America "has one of the worst track records in HAMP, denying "79% of all who applied for HAMP." *Id.* The fact that Congress was not even aware of the results until January 2017 destroys any argument that the Appellants should have or could have been aware as early as 2013.

Perhaps the greatest evidence that a reasonable person could conclude Appellants did not suspect fraud is common sense. Bank of America implemented its labyrinth of lies precisely so its mortgagors would not realize they were being defrauded. The Bank would not have successfully denied mortgage modifications to 79 percent of its mortgagors if every reasonable person

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[4] If the court finds that the Appellants were "actually deterred" from "sooner suspecting or discovering the fraud" they are "under no duty to make inquiry until something occurs to excite [their] suspicions." *Vail*, 233 N.C. at 117. Nonetheless, Appellants here have alleged that even if their suspicions were excited, they still used due diligence to investigate.

knew they were being defrauded upon foreclosure. (R pp 166–172). The issue is a classic question of fact that should be resolved by a jury. More certainly, these allegations are sufficient to withstand a Rule 12(b)(6) Motion.

C. The Amended Complaint alleges fraudulent concealment separately and distinctly from the discovery rule.

Although similar in its application to the discovery rule, the principle of fraudulent concealment allows for even greater exceptions to a statute of limitations. While the discovery rule operates to defer the accrual of a statute of limitations (i.e., delays the time before the limitations clock starts) until the knowledge of wrongdoing is understood by plaintiff, fraudulent concealment tolls the statute of limitations (even after it has begun to accrue for knowledge of wrongdoing) until the cause of action against the particular defendant is fully learned. *See Connor v. Schenck*, 240 N.C. 794, 795, 84 S.E.2d 175, 176 (1954).

Ultimately, like with the discovery rule, whether a defendant's conduct had the effect of concealment or whether the circumstances were sufficient to give the wronged party reasonable notice of the underlying cause of action are questions of fact, not law. *See Ward v. Fogel*, 237 N.C. App. 570, 582, 768 S.E.2d 292, 301 (2014). Therefore, such issues are to be addressed by the fact-finder and should not be dismissed summarily at the pleading stage.

The Bank notes that a claim of fraudulent concealment requires active or affirmative conduct on the part of the defendant.[5] Appellee's Br. p. 26.

[5] The Bank cites to *Torres v. Bank of Am., N.A.*, 8-17-cv-01534-RAL-TBM (M.D. Fla. 2017) in support. Appellee's Br. pp. 24–25. However, just as it did in its Motion to

Appellants agree. However, the Bank states that the "only basis" Appellants offer for fraudulent concealment is that they "believe[d] the bank's representations." Appellee's Br. pp. 26–27. This is wholly inaccurate. In the Amended Complaint, Appellants repeatedly alleged the Bank went above and beyond to affirmatively and fraudulently conceal its misconduct by systematically misleading customers, like Appellants, into believing that the customers were at fault for losing their homes.

Appellants have alleged, *inter alia*, the following facts supporting estoppel by fraudulent concealment: (1) that the Bank used various methods to scramble customer submissions across multiple internal systems so that its employees believed customer's documents had not been submitted and denied their applications as a result (R p 205), (2) that employees were either incentivized to lie to customers (or punished if they failed to lie) about the receipt of documents, the status of their applications, or the steps to qualify for HAMP (R pp 205–206), and (3) that third-party companies and bank managers were complicit in the massive scheme to deliberately neglect, conceal, and delete customer files and payment records, with the specified purpose of denying as many HAMP applications as possible. (R pp 201–205). Although a vast number of homeowners were harmed by this fraudulent scheme, the Bank nevertheless concealed its

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Dismiss, the Bank fails to point out the substantial differences in the Amended Complaint and the complaint in *Torres*. Most notably, the operative complaint in the *Torres* case failed to allege tolling of the statute of limitations and did not even mention the application of the discovery rule. *See* Plaintiff/Appellants' Response to the Motion to Dismiss (Doc. Ex. p 109).

participation as the cause of the wrongdoing from the public eye for several years. (R pp 166–172). In the end, when the Bank notified Appellants that they were not approved for a HAMP modification, it was reasonable for them to assume they simply failed to meet the criteria or failed to follow the proper procedures, instead of assuming wrongdoing on the part of the Bank. It was not until Appellants contacted their attorneys about the Bank's misconduct that they became aware of the Bank's fraud and its role in the loss of their homes. (R pp 211, 220, 226, 235, 243, 251, 258, 266, 275). The facts necessary to establish all elements of estoppel by fraudulent concealment were sufficiently alleged in the Superior Court prior to this appeal.

II. The Superior Court Erred in Dismissing Appellants' Claims on the Grounds of *Res Judicata* and Collateral Estoppel.

The crux of Appellants' argument with regard to *res judicata* and collateral estoppel is that Appellants neither suspected nor had reason to suspect the Bank's wrongdoing.[6] As a result, they could not have addressed the Bank's fraud at the time of their foreclosures because, simply put, they were still unaware of it. As discussed in detail above, Appellants have long maintained that they could

[6] The Bank attempts to convolute the issues on appeal by arguing waiver with regard to Appellants' non-judicial foreclosures. The Bank's argument on waiver misinterprets Appellants' position—Appellants have not raised a new argument but instead illustrated the Superior Court's error in assuming facts outside of the four corners of the Amended Complaint. Appellants consistently urged the Superior Court not to consider facts outside the Amended Complaint. Because the foreclosures faced by Appellants were non-judicial in nature, there was no prior action in which Appellants could have litigated the issue of fraud. The Superior Court assumed the foreclosures were judicial in nature—a fact outside the Amended Complaint—and should be reversed.

not have discovered the fraud earlier because the Bank's nefarious scheme was designed to keep them in the dark.

The Bank's hurried argument states that Appellants unawareness of their claims is not relevant to the preclusion analysis. Appellee's Br. p. 30. This assertion ignores the very definition of *res judicata*. *Res judicata* only bars "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) (emphasis added) (quoting *Fickley v. Greystone Enters.*, 140 N.C. App. 258, 260 (2000)). Without knowledge of their claims at the time of the foreclosure, it is impossible for the fraud claims to have been properly litigated. Moreover, the Bank's unilateral assumption that the Appellants did not lack a means of knowledge must be ignored at this stage of the proceedings.

Furthermore, contrary to the Bank's assertion, Appellants do not contend the foreclosures were wrongful. Quite the opposite—Appellants readily admit the state court judgment is valid in light of what was known at the time that judgment was entered. Appellants did not pay their regular mortgage payments—as instructed by bank representatives—and did default on their mortgages. (R p 208). The remedy Appellants seek here is different than if they were to have contested their foreclosures at the time of foreclosure proceedings. Here, having only recently discovered the fraudulent scheme perpetrated against them, Appellants intend only to seek money damages for their loss. *See*

Shelton v. Fairley, 72 N.C. App. 1, 8 (1984) (reasoning that "there is no identity of the matters' which is a prerequisite to the application of the doctrine of *res judicata*.").

The Bank relies heavily on *Traber v. Bank of Am.*, 242 N.C. App. 523, 2015 N.C. App. LEXIS 638, *10-11. However, the facts of *Traber* are distinctly different than those at issue here. *Id.* In *Traber*, this Court's holding that *res judicata* barred the later claims was based on the court's reasoning that plaintiffs had filed two complaints in which they alleged precisely the same HAMP violations and same injury. *Id.* at *10–11 (reasoning, that "[b]ecause plaintiffs alleged precisely the same HAMP violations in the 2010 complaint as they did in the 2013 complaint and that they suffered the same injury (that they were denied a HAMP loan modification . . .) the claims asserted in the 2013 complaint are barred by *res judicata*.") That is simply not the case here. The foreclosures at issue were brought by the Bank against the Appellants for defaulting on their mortgages. Here, in reverse, Appellants brought a claim against the Bank alleging fraud in the HAMP process that occurred separately and distinctly from the mortgage. The two claims are different, and Appellants are not attacking the underlying foreclosure.

CONCLUSION

Bank of America should not be deemed immune from suit simply because they were able to successfully hide systemic and institutionalized fraud for many years. Affirming the trial court's decision would set a dangerous precedent. For all of the reasons stated, Plaintiffs/Appellants respectfully request that the decision, order and judgment of the Superior Court be reversed and, this lawsuit be remanded for further proceedings.

This 11th day of August 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 3,750 words (excluding cover, index, table of authorities, certificate of service, this certificate of compliance, and appendices) as reported by the word-processing software.

Date: August 14, 2020.

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CERTIFICATE OF SERVICE

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

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