IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-556

No. COA20-160-2

Filed 5 October 2021

Mecklenburg County, No. 18-CVS-8266

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

v.

BANK OF AMERICA, N.A., Defendant-Appellee.

Appeal by plaintiffs from order entered 3 October 2019 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard originally in the Court of Appeals 21 October 2020, with an unpublished opinion filed 31 December 2020. Plaintiffs' petition for rehearing was granted 10 March 2021. This opinion supersedes and replaces the 31 December 2020 opinion previously filed in this matter.

Robinson Elliott & Smith, by William C. Robinson, Dorothy M. Gooding, and Robert F. Orr, and Aylstock, Witkin, Kreis & Overholtz, PLLC, by Samantha Katen, Justin Witkin, Chelsie Warner, Caitlyn Miller, and Daniel Thornburgh, for plaintiffs-appellants.

McGuireWoods, LLP, by Bradley R. Kutrow, and Goodwin Procter LLP, by Keith Levenberg, and James W. McGarry, for defendant-appellee.

CARPENTER, Judge.

¶ 1 This matter was previously heard by this Court on 21 October 2020, and a decision was rendered in *Taylor v. Bank of America, N.A.*, __ N.C. App. __, 852 S.E.2d 447 (2020). Pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure, this Court granted plaintiffs' petition for rehearing to consider whether the trial court erred in granting defendant's motion to dismiss and denying plaintiffs' motion for partial summary judgment. We reverse and remand for further findings of fact and conclusions of law.

I. Factual and Procedural Background

¶ 2 Plaintiffs Chester Taylor III, Ronda and Brian Warlick, Lori Mendez, Lori Martinez, Crystal Price, Jeanette and Andrew Aleshire, Marquita Perry, Whitney Whiteside, Kimberly Stephan, Keith Peacock, and Zelmon McBride (collectively, "Plaintiffs")[1] are homeowners residing in various states, including North Carolina,[2] who each sought modification to their home mortgages under the Home Affordable Modification Program ("HAMP"). Defendant Bank of America, N.A. ("Defendant") is a Delaware Corporation with its principal place of business in Charlotte, North

[1] Plaintiffs Crystal Price and Whitney Whiteside were part of the original suit but appear not to be part of this appeal, as their names are not listed on the Appellants' brief.

[2] Chester Taylor is the only Plaintiff who is alleged to reside in North Carolina. Ronda and Brian Warlick, Lisa Mendez, Lori Martinez, and Keith Peacock live in California. Jeanette and Andrew Aleshire live in Wisconsin, but their mortgage was on a home in Minnesota. Marquita Perry lives in Arizona. Kimberly Stephen lives in Michigan. Zelmon McBride lives in Nevada.

Carolina.

¶ 3 Multiple lawsuits, including one brought by the Federal Government and forty-nine states, were subsequently filed against Defendant for the fraudulent HAMP scheme between 2011 and 2014. A multi-district litigation case, *In re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation*, M.D.L. No. 10-2193-RWZ, was filed in 2011 and included class action cases from across the country. The Massachusetts District Court denied class certification of the multi-district case concluding, while the claims may be meritorious, "they rest on so many individual factual questions that they cannot sensibly be adjudicated on a classwide basis." Thus, individual borrowers would have to file individual lawsuits to recover damages resulting from Defendant's fraudulent practices regarding HAMP loan modifications.

¶ 4 On 1 May 2018, Plaintiffs brought this joint underlying action against Defendant, with each Plaintiff outlining their own individual experience with Defendant between the years 2009 and 2014. On 11 April 2019, Defendant filed a motion to dismiss the amended complaint or, in the alternative, to strike impertinent allegations and sever misjoined claims. The motion noted, in pertinent part, that the complaint on its face was barred by the statute of limitations, and the claims were "subject to dismissal under the doctrines of *res judicata* and/or collateral estoppel because the issues involved in this litigation have already been litigated[.]"

¶ 5 On 3 October 2019, the trial court granted Defendant's motion to dismiss. In a short order, the court concluded Plaintiffs' claims were "barred by the applicable statutes of limitation," and "the claims of all Plaintiffs who were parties to foreclosure proceedings were barred by the doctrines of *res judicata* and collateral estoppel."[3] On 31 December 2020, this Court affirmed the decision of the trial court. This Court granted Plaintiffs' petition for rehearing on 10 March 2021.

II. Jurisdiction

¶ 6 Appeal lies in this Court as a matter of right pursuant to N.C. Gen. Stat. § 7A-27(b)(3) (2019).

III. Issue

[3] At the time of this action, there were 13 other pending actions brought on the basis of very similar complaints that raised essentially identical claims that were pending in this case. *See* Aiello, Jetta, et al. v. Bank of America, N.A., 18-CVS-14833; Allred, Amy, et al. v. Bank of America, N.A., 18-CVS-20373; Beams, Lisa, et al. v. Bank of America, N.A., 18-CVS-20374; Bizzell, Gwendaline, et al. v. Bank of America, N.A., 18-CVS-14835; Bowman, Wanda, et al. v. Bank of America, N.A., 18-CVS-14834; Gotts, Erin, et al. v. Bank of America, N.A., 18-CVS-14739; Jackson, Darlene, et al. v. Bank of America, N.A., 18-CVS-16675; Jobe, Kelly, et al. v. Bank of America, N.A., 18-CVS-21455; Martin, Cynthia, et al. v. Bank of America, N.A., 18-CVS-14738; Reardon, Christopher and Larissa, et al. v. Bank of America, N.A., 18-CVS-16676; Smith, Melba, et al. v. Bank of America, N.A., 18-CVS-20375; Taylor III, Chester, et al. v. Bank of America, N.A., 18-CVS-8266; Tyler III, Charles, et al. v. Bank of America, N.A., 18-CVS-22406. The trial court heard background information about the above-titled action as well as the other cases referred to here. The parties in these cases agreed that this case would serve as the first case for briefing on Defendant's motion to dismiss and related motions, so the trial court order applied to Plaintiffs for this case and all pending cases. Discovery in all 13 pending cases was stayed pending the trial court's disposition of the Taylor motion.

¶ 7 The sole issue on appeal is whether the trial court erred in granting Defendant's motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure because the claims were barred under the statute of limitations, and the claims were precluded based on *res judicata* and collateral estoppel.

IV. Standard of Review

¶ 8 "Our review of the grant of a motion to dismiss under Rule 12(b)(6) . . . is de novo." *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013). "We consider 'whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.'" *Id.* at 541, 742 S.E.2d at 796 (quoting *Coley v. State*, 360 N.C. 493, 494–95, 631 S.E.2d 121, 123 (2006)).

V. Discussion

¶ 9 Here, the trial court's order granting Defendant's motion to dismiss stated, in pertinent part:

> THIS MATTER came on for hearing before the undersigned, who has been assigned by the Chief Justice to preside over this exceptional case pursuant to Rule 2.1 of the General Rules of Practice . . . The Court having reviewed the record, including the Complaint, motions, briefs and attached exhibits, along with cited case law, and having heard arguments of counsel for the parties on May 29, 2019; and the Court having concluded based on the foregoing that all Plaintiffs' claims are barred by the applicable statute of limitation, and further that the claims of all Plaintiffs who were parties to foreclosure proceedings are barred by the doctrines of *res judicata* and collateral estoppel[.]

The order appealed from does not state the specific grounds for the trial court's grant of Defendant's motion to dismiss. Nor does the transcript reveal any findings made by the trial court. There is no indication that the trial court did a choice of law analysis, that it considered facts only within the amended complaint, or that it was appropriate to consider Plaintiffs' claims together when the underlying facts established a failed class action based on "so many individual factual questions." The order granting Defendant's motion to dismiss does not state upon what basis the court made its decision, and as such, this Court cannot properly review whether the trial court correctly granted Defendant's motion.

¶ 10 As we cannot determine the reason behind the grant, we cannot conduct a meaningful review of the trial court's conclusions of law, and we must accordingly reverse and remand the order for further findings. "On remand, the trial court may hear evidence and further argument to the extent it determines in its discretion that either or both may be necessary and appropriate." *Pineville Forest Homeowners Ass'n v. Portrait Homes Constr. Co.*, 175 N.C. App. 380, 387, 623 S.E.2d 620, 625 (2006). Thereafter, the court is to enter a new order containing findings that sustain its determination regarding the validity and applicability of the statute of limitations or *res judicata* determinations. However, because this case is at the pleadings stage, the findings must not include facts outside the four corners of the amended complaint. *See Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach*, 251 N.C. App. 771, 775,

796 S.E.2d 120, 123 (2017) (noting it is well established that at the motion to dismiss stage, the trial court and this Court "may not consider evidence outside the four corners of the complaint[.]").

VI. Conclusion

¶ 11 For the foregoing reasons, the trial court's grant of Defendant's motion to dismiss is reversed and the matter remanded for further factual findings and conclusions of law in accordance with this opinion.

REVERSED AND REMANDED.

Judge JACKSON concurs.

Judge DILLON dissents in a separate opinion.

Report per Rule 30(e).

DILLON, Judge, dissenting.

¶ 12 I was on the panel which issued the original opinion in this appeal, reported at *Taylor v. Bank of America, N.A.*, ___ N.C. App. ___, 852 S.E.2d 447 (2020). I continue to believe that Judge Bell got it right. My vote continues to be to affirm the order of the trial court. Accordingly, I dissent.

¶ 13 I write separately to address the statute of limitations issue.

¶ 14 Judge Bell dismissed the complaint, in part, based on her conclusion that the allegations show the claims contained therein were time-barred. *See Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996) (holding that a statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion when apparent from "the face of the complaint" that the action was not timely filed).

¶ 15 In their complaint, Plaintiffs essentially allege that they suffered harm when Defendant fraudulently refused to modify their respective mortgages under the Home Affordable Modification Program ("HAMP") though they each qualified for a loan modification under HAMP. However, they did not file the complaint until 2018, more than three years after they were denied their modifications.

¶ 16 Plaintiffs, though, argue that the statute of limitations was tolled until they could have reasonably discovered the fraud. However, Plaintiffs admit in their complaint that the complaint was not filed until more than three years after their respective homes were foreclosed upon; that is, without Defendant modifying their respective mortgages.

¶ 17 I conclude that the applicable statute of limitations ceased to be tolled, if at all, at least by the time the foreclosures took place. By that time, Plaintiffs became aware that Defendant would not be modifying their respective loans. Indeed, our Supreme Court has held in a case involving fraud and breach of contract claims that the statute begins to run at least by the time the plaintiff becomes aware of the injury. *See Christenbury Eye v. Medflow*, 370 N.C. 1, 9, 802 S.E.2d 888, 894 (2017)*; see also United States v. Kubrick*, 444 U.S. 111, 123 (1979) (recognizing that the discovery rule applies to when the injury is known, not when the legal rights are known, and that the discovery rule includes the duty to seek "advice . . . as to whether he has been legally wrong").

¶ 18 It is evident from the face of the complaint that Plaintiffs did not bring suit until more than three years after they became aware of their injury—when their respective properties were foreclosed upon. They learned they might have a legal claim for fraud only after they had consulted attorneys years later. They should have sought legal advice once they suffered their injury. They did not. Accordingly, I conclude that Judge Bell ruled correctly, noting that her dismissal orders are consistent with a number of dismissal orders from across the country involving similar claims, as referenced in Defendant's brief. I vote to affirm Judge Bell's order.