

12-0150

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

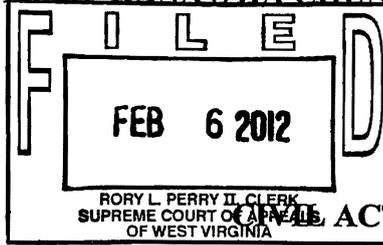
TRIBECA LENDING CORP.,

Plaintiff,

v.

JAMES E. MCCORMICK,

Defendant.



CIVIL ACTION NO. 11-C-1210

FILED
 2011 NOV 21 AM 8:16
 CATHY G. GIBSON, CLERK
 KANAWHA COUNTY CIRCUIT COURT

AMENDED ORDER AND CERTIFICATION OF QUESTIONS

On August 17, 2011, Tribeca Lending Corporation (“Tribeca”), by counsel, Chris R. Arthur, Lesley A. Wheeler-Hoops, and the law firm of Samuel I. White, P.C. filed a Motion to Dismiss the Defendant’s Counter-claims in this matter. On September 20, 2011 Defendant James E. McCormick (“McCormick”), by counsel, Sara Bird of Mountain State Justice, Inc. filed a Response to Tribeca’s Motion to Dismiss. A Notice of Hearing was filed on September 1, 2011, and this Court conducted a hearing pursuant to same on September 27, 2011.

I. STATEMENT OF FACTS

McCormick entered into a mortgage loan with Tribeca for the real property (“Property”) located at 60 8th Avenue, Saint Albans, WV 25177 on September 30, 2005. The loan agreement executed by McCormick provides that McCormick will repay \$116,900.00 to Tribeca over the course of thirty (30) years by making monthly installment payments of \$1,112.38. An accompanying Deed of Trust dated September 30, 2005 was also executed securing the loan agreement. The Deed of Trust provides that McCormick shall pay when due the principal of and the interest on the debt as evidenced by the loan agreement. The Deed of Trust additionally provides that should McCormick breach any covenant or agreement contained in the Deed of Trust, Tribeca shall give notice to McCormick prior to acceleration following the breach and

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provide McCormick time to cure the default. If McCormick fails to cure the default, all sums may be accelerated and Tribeca may invoke the power of sale. It is uncontested that McCormick did breach the terms of the loan agreement and Deed of Trust by failure to make monthly payments, and thus defaulted on the loan. Notice of Right to Cure was sent to McCormick on July 26, 2007. McCormick failed to cure the default and Tribeca invoked the right to sale under the Deed of Trust.

On November 8, 2007, the trustee, under the Deed of Trust, sent McCormick a Notice of Foreclosure Sale *via* certified and regular mail. Said notice informed McCormick that all sums secured by the Deed of Trust were immediately due and payable without further demand and that Tribeca had invoked the power given by the Deed of Trust to sell the real estate at public auction on December 7, 2007. Foreclosure sale was then continued to December 19, 2007 at 1:25 p.m. No bidders appeared at public auction, and as a result, the property was sold back to Tribeca as the noteholder. Trustee's Deed was recorded conveying the Property back to Tribeca on January 8, 2008.

Thereafter, Tribeca, as the new owner of the Property, filed an unlawful detainer action in the Magistrate Court of Kanawha County for immediate possession alleging McCormick to be unlawfully occupying Tribeca's property. This original unlawful detainer action was filed in 2008, to which McCormick removed it to the Circuit Court and upon the same, filed Counterclaims against Tribeca. On September 25, 2009, this Court dismissed the case citing inactivity for more than one year.

On June 2, 2011, Tribeca again filed an unlawful detainer action in the Kanawha County Magistrate Court alleging McCormick to be unlawfully occupying Tribeca's property.

McCormick then filed the presently pending Motion to Remove to Circuit Court, Answer and Counter-claim.

II. ARGUMENTS OF COUNSEL

A. **Applicability of W. Va. Code § 38-1-4(a) -- Challenge to Foreclosure Time Barred by One Year Statute of Limitation.**

Tribeca asserts in its Motion to Dismiss that the West Virginia Legislature enacted W.Va. Code §38-1-4(a) which gives a borrower one year to challenge the validity of a foreclosure sale or to assert claims relating to a loan that was already foreclosed upon. The statute provides in applicable part that “no action or proceeding to set aside a trustee's sale ... shall be filed or commenced more than one year from the date of the sale.” It is uncontested in the Petition and the Counterclaims that the foreclosure sale in this matter occurred on December 19, 2007. The Trustee’s Deed was recorded on January 8, 2007. McCormick’s counter-claims were filed on July 25, 2011, almost four (4) years after the foreclosure sale. Hence, one (1) year had elapsed prior to McCormick’s counter-claims. Thus, McCormick’s counter-claims are time barred.

Defendant McCormick asserts his counter-claims do not arise under W.V. Code §38-1-4(a). Rather, he asserts his counter-claims challenge the enforceability of the underlying mortgage loan agreement by questioning the – validity and viability – of said agreement. For this reason, he asserts his counter-claims are not time barred by the statute of limitations set forth in W.Va. Code §38-1-4(a). Instead, he asserts that his claims arise under the West Virginia Consumer Credit and Protection Act (“WVCCPA”), 46A-1-1 et al.

B. **Applicability of W.Va. Code § 46A-5-101(a) -- Consumer Protection Causes of Action Time Barred by a One Year Statute of Limitation.**

Tribeca further asserts in its Motion to Dismiss that McCormick’s counter-claims are barred under West Virginia Code § 46A-5-101, which provides as follows:

With respect to violations arising from consumer credit sales or consumer loans made pursuant to revolving charge accounts or revolving loan accounts, or from sales as defined in article six [§§ 46A-6-101 et seq.] of this chapter, no action pursuant to this subsection may be brought more than four years after the violations occurred. With respect to violations arising from other consumer credit sales or consumer loans, no action pursuant to this subsection may be brought more than one year after the due date of the last scheduled payment of the agreement.

W. Va. Code § 46A-5-101(1).

Tribeca asserts that under 46A-5-101(1), the statute of limitations for a cause of action for violations arising from the WVCCPA regarding servicing of the Loan runs one year from the due date of the last scheduled payment under the Loan and that in this case, the “date of the last scheduled payment of the agreement” was June 5, 2007, when the Loan was accelerated. It is undisputed that McCormick’s Loan was accelerated in 2007 and all amounts became due and payable on that date. Accordingly, as argued by Tribeca, the statute of limitations began to run in 2007, the date the Loan was accelerated and all amounts became due and payable. After 2007, there were no additional scheduled payments to be made under the Note. The present action was instituted on July 25, 2011, hence, nearly three years had elapsed prior to McCormick’s counter-claims, and almost three years after the Trustee’s Deed was recorded. Therefore, Tribeca asserts such claims are time barred.

McCormick asserts his counter-claims are not time barred. First, McCormick asserts that there is a liberal application of the WVCCPA in order to protect consumers from financial exploitation. Under this perceived liberal application, McCormick argues that the “date of the last scheduled payment of the agreement” is “roughly twenty-four years from now” pursuant to the loan agreement executed by him on September 30, 2005, which provided that McCormick repay \$116,900.00 to Tribeca over the course of thirty (30) years. McCormick thereby asserts that under the express language of the statute his WVCCPA claims have been timely brought.

McCormick further argues W.Va. Code § 46A-5-101(a) does not apply to his counter-claims. McCormick relies upon W.Va. Code § 46A-5-102 in support of this argument which provides in relevant part, “[r]ights granted by this chapter may be asserted as a defense, setoff or counterclaim to an action against a consumer without regard to any limitation of actions.” Therefore, McCormick asserts that because his WVCCPA claims are counter-claims to an unlawful detainer action, rather than direct claims advanced in a complaint, they are not time barred by the statute of limitations set forth in W.Va. Code § 46A-5-101(a).

III. QUESTIONS CERTIFIED

After full consideration of the written pleadings and the oral argument of the parties, the Court found that the legal issues raised are questions of first impression in West Virginia and that the following certified questions should be submitted to the West Virginia Supreme Court of Appeals for consideration. Accordingly, the Court hereby certifies the following questions for the Supreme Court’s consideration:

First Question Presented

1. Is W.V. Code §38-1-4(a), which gives a borrower one year to challenge the validity of a foreclosure sale, and provides in applicable part that “no action or proceeding to set aside a trustee's sale ... shall be filed or commenced more than one year from the date of the sale” applicable when counter-claims are asserted challenging the enforceability of the underlying mortgage loan agreement in response to an unlawful detainer action? **Yes.**

Second Question Presented

2. Under W.Va. Code § 46A-5-101(a), which provides in applicable part that “[w]ith respect to violations arising from other consumer credit sales or consumer loans, no action pursuant to this subsection may be brought more than one year after the due date of the *last*

scheduled payment of the agreement.” (emphasis added) When does the statute of limitations begin to run: the date the applicable Loan was accelerated and all amounts became due and payable; or, the projected date of the final installment payment of the executed loan agreement?

The date the applicable Loan was accelerated and all amounts became due.

Pursuant to W.Va. Code § 58-5-2, the Court also certifies that the above questions arise as purely questions of law relating to the challenge of the sufficiency of the pleading.

RULING

It is, therefore, hereby **ORDERED** that further proceedings in this matter be stayed until such questions have been decided by the West Virginia Supreme Court of Appeals and the decision thereof certified back to this Court. If the Supreme Court’s decision agrees with this Court or the High Court refuses to take the question in, the Defendant’s Motion to Dismiss will be granted.

Tribeca and McCormick are directed to Rule 17 of the Revised Rules of Appellate Procedure with regard to certified questions.

It is further, **ORDERED**, that the Circuit Clerk is **DIRECTED** to transmit this Order to the Clerk of the West Virginia Supreme Court of Appeals and to forward certified copies of this Order to the following:

Chris R. Arthur, Esquire
Lesley A. Wheeler, Esquire
SAMUEL I. WHITE, P.C.
601 Morris Street, Suite 400
Charleston, WV 25301

Sara Bird, Esquire
Mountain State Justice, Inc.
321 West Main St., Ste. 620
Clarksburg, WV 26301

ENTERED: November 18, 2011

Ted J. Kaufman

Judge Ted J. Kaufman
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COUNTY THIS
DAY OF February 2011
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Date: 11-22-11
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Deputy Court Clerk