U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: **08-08404-hb**
Adversary Proceeding Number: **10-80047-hb**

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT

The relief set forth on the following pages, for a total of 9 pages including this page, is hereby ORDERED.

FILED BY THE COURT
05/24/2012

US Bankruptcy Judge
District of South Carolina

Entered: 05/24/2012

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

In re, Timothy Carl Kain and Ruth Mulfinger Kain, Debtor(s).	C/A No. 08-08404-HB Adv. Pro. No. 10-80047-HB Chapter 13 **ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT**
Timothy Carl Kain Ruth Mulfinger Kain, Plaintiff(s), v. Bank of New York Mellon, f/k/a Bank of New York as Trustee for the Certificateholders CWABS, Inc. Asset-Backed Certificates, Series 2005-16 Bank Of America NA BAC Home Loans Servicing LP f/k/a Countrywide Home Loans Servicing LP Colorado Federal Savings Bank CWABS, Inc. Countrywide Home Loans, Inc. Mortgage Electronic Registration Systems, Inc., Defendant(s).	

THIS MATTER comes before the Court upon the Motion to Alter or Amend Judgment under Rule 9023 ("Motion"),[1] and Brief in Support thereof,[2] filed by Timothy Carl Kain and Ruth Mulfinger Kain ("Plaintiffs"). That Motion was filed pursuant to Fed. R. Civ. P. 59(e), made applicable to this adversary proceeding by Fed. R. Bankr. P. 9023,

[1] Doc. No. 202, filed Apr. 13, 2012.
[2] Doc. No. 210, filed May 4, 2012.

asking the Court to alter or amend its findings and the decision and judgment previously entered in this adversary proceeding. Claimant Objected to Plaintiffs' request.[3]

PROCEDURAL HISTORY

By Order and Judgment entered on March 30, 2012,[4] the Court denied Plaintiffs' Motion for Summary Judgment and granted the Motion for Summary Judgment filed by Defendant Bank of New York, f/k/a Bank of New York as Trustee for the Certificateholders CWABS, Inc. Asset-Backed Certificates, Series 2005-16 ("Claimant"). As a result, the Proof of Claim filed by Claimant was allowed in the Plaintiffs' bankruptcy case as a mortgage claim secured by their residence. Plaintiffs challenged the validity of the Proof of Claim and Claimant's interest in their residence, but as stated in the Summary Judgment Order, "Plaintiffs' Motion [for Summary Judgment] and Objection [to Claimant's Motion for Summary Judgment] were not accompanied by significant references to the record that would support their case, and did not highlight any genuine dispute of material fact."[5]

PLAINTIFFS' MOTION TO ALTER OR AMEND

Plaintiffs' Motion and Brief assert that the Court made a clear error of law with respect to consideration of certain exhibits presented by Claimant in support of its Motion for Summary Judgment. Plaintiffs argue that the Court should not have concluded that the Affidavit of Sharon Mason[6] was legally sufficient to support Claimant's Motion because it was not based solely on her own personal knowledge and, therefore, does not meet the requirements of Fed. R. Civ. P. 56(c)(4).[7] Additionally, Plaintiffs claim that only the

[3] Doc. No. 211, filed May 15, 2012.
[4] Doc. Nos. 198-99.
[5] Or. on Cross Mot. for Summ. J. (Doc. No. 198 at 8).
[6] Doc. No. 170, Ex. A.
[7] This rule provides that "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

previously designated corporate representative for trial could submit an affidavit. Plaintiffs also assert that, pursuant to Fed. R. Civ. P. 56(c)(2), the Court should not have considered certain documents that were attached to Claimant's own discovery responses because they are self-serving and would be inadmissible at trial.

Plaintiffs also claim that the Court made a clear error of law with respect to the denial of Plaintiffs' Motion for Summary Judgment, arguing that the Court should have granted Plaintiffs' request for a declaratory judgment finding that the Remaining Defendants[8] "have no enforceable secured or unsecured claim against property of the estate in bankruptcy."[9] Additionally, Plaintiffs argue that the Court should not have concluded that Plaintiffs do not have standing to challenge the existence of the Pooling and Service Agreement ("PSA"), based on the fact that Plaintiffs are not parties to the PSA, because "any person, even a non-party to this action, would have standing to bring to this court's attention the non-existence of a party to an action pending before this court, since no live controversy can exist between a non-entity and a debtor whose case is being administered by this court."[10] Further, Plaintiffs contend that the Court should not have held that Plaintiffs do not have standing to assert the strong-arm powers of the Chapter 13 Trustee under 11 U.S.C. § 544(a) because, despite the fact that this Court has previously adopted the contrary approach, a recent decision from the Bankruptcy Court for the Southern District of Ohio allowed the debtor to do so through derivative standing. *See Bank of NY v. Sheeley (In re Sheeley)*, C/A No. 08-32316, Adv. No. 11-3028, slip op. (Bankr. S.D. Ohio Apr. 2, 2012).

[8] The Remaining Defendants are Countrywide Home Loans, Inc., Bank of America NA f/k/a Countrywide Home Loans Servicing LP, BAC Home Loans Servicing LP, CWABS, Inc., and Mortgage Electronic Registration Systems, Inc.
[9] Am. Compl. (Doc. No. 8 at 10, ¶ 61(c)).
[10] Pls.' Br. in Supp. Mot. Reconsid. (Doc. No. 210 at 3).

Finally, the Plaintiffs assert that the Court should have certified a question to the South Carolina Supreme Court to determine whether an adjustable rate note is a negotiable instrument under the former version of Article 3 of the Uniform Commercial Code, S.C. Code Ann. § 36-1-101 (2003) *et seq.* ("Former Article 3"), because the South Carolina state courts have not addressed this issue.

LEGAL STANDARD

Rule 59(e) does not set forth a standard for the Court to grant a motion to alter or amend a judgment. However, the Fourth Circuit recognizes three grounds to amend an earlier judgment: "(1) to accommodate an intervening change in the controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998) (citations omitted), *cert. denied*, __ U.S. __, 67 U.S.L.W. 3337 (Jan. 19, 1999). In considering a Rule 59(e) motion, "the court views the evidence in the light most favorable to the prevailing party." *Gregg v. Ham*, C/A No. 3:08-4040-CMC, 2010 WL 2232208, at *1 (D.S.C. June 3, 2010) (citing *Perrin v. O'Leary*, 36 F. Supp. 2d 265, 266 (D.S.C. 1998)).

"In general 'reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly."" *Pac. Ins. Co.*, 148 F.3d at 403 (quoting 11 Wright et al., *Federal Practice and Procedure*, § 2810.1, at 124 (2d ed. 1995)). A party's mere disagreement with the Court's ruling does not warrant a Rule 59(e) motion. *U.S. ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 290 (4th Cir. 2002). Furthermore, a Rule 59(e) motion does not allow an opportunity to reargue a case. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486 n.5, 128 S. Ct. 2605 (2008) (quotation marks and citation omitted) ("Rule 59(e) permits a court to alter or amend a judgment, but it

may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.").

From the outset, the Court notes that all of the arguments presented in Plaintiffs' Motion and Brief were also asserted by Plaintiffs and considered by the Court at the summary judgment stage.

THE AFFIDAVIT

Any argument for reconsideration based on the Affidavit of Sharon Mason is immaterial because the Court did not substantially rely on the contents of that Affidavit when making its decision.[11] Further, any reliance on the Affidavit would have been harmless since other exhibits presented by the Claimant supported entry of the judgment.

DISCOVERY REPONSES

Likewise, the Court finds that Plaintiffs' argument that Claimant's discovery responses are inadmissible as a whole because they are self-serving is without merit. Fed. R. Civ. P. 56(c)(1)(A) specifically states that a party may support its position by "citing to particular parts of materials in the record, including . . . interrogatory answers, or other materials . . ." Fed. R. Civ. P. 56(c)(1)(A). The fact that the evidence supporting Claimant's motion was presented as part of discovery responses does not, in itself, preclude Claimant from relying on them. Furthermore, Plaintiffs previously requested verification of Claimant's discovery responses, which was done.[12] *See* Fed. R. Civ. P. 33(b). Accordingly, Plaintiffs' argument that these documents and responses are self-serving does not persuade

[11] *See* Doc. No. 198 at 5 n.17 (citing various sources other than the Affidavit of Sharon Mason); *see also id.* at 8-9 n.24 (discussing admissibility of exhibits presented by Claimant).
[12] *See* Doc. No. 101, Ex. 4 (Plaintiffs' First Interrogatories and Request for Production of Documents, requesting pursuant to Fed. R. Civ. P. 33 that the Claimant "fully answer under oath and in writing each of the interrogatories set forth herein and that [Claimant] produce the documents requested herein . . ."); *see also* Doc. No. 198 at 8-9 n.24 (discussing the Court's ability to consider the discovery responses at the summary judgment stage).

the Court to utilize the "extraordinary remedy" of altering its prior decision. *See Pac. Ins. Co.*, 148 F.3d at 403 (quoting 11 Wright et al., *Federal Practice and Procedure*, § 2810.1, at 124 (2d ed. 1995)).

DECLARATORY JUDGMENT

The Court previously considered and denied Plaintiffs' request for a declaratory judgment with regard to the Remaining Defendants because it did not deem such relief necessary. The Court's Order clearly reflects that these parties[13] "have no interest in or liability resulting from this adversary proceeding. [These] parties did not file claims in Plaintiffs' bankruptcy case and after due notice, did not assert any right to payment under the Note or Mortgage[.]"[14]

STANDING TO CHALLENGE THE PSA AND ASSERT § 544(A) CLAIM

The Court is not persuaded by the Plaintiffs' arguments that it wrongfully denied their Motion for Summary Judgment based on their lack of standing to challenge the PSA or bring a claim under § 544(a). Plaintiffs have presented no persuasive authority in their Motion or Brief to support the contention that they have standing to challenge the PSA, especially in light of the vast authority supporting the contrary. Plaintiffs rely on *In re Sheeley*, to establish derivative standing for them to bring a claim under § 544(a). *See* Adv. No. 11-3028, slip op. However, *Sheeley*, which was issued by the Bankruptcy Court for the Southern District of Ohio, does not constitute an intervening change in *controlling* law and is distinguishable on its facts. *See id.*

[13] *See supra* note 8.
[14] Doc. No. 198 at 19-20.

CERTIFICATION TO SOUTH CAROLINA SUPREME COURT

Plaintiffs argue that the Court should have certified to the South Carolina Supreme Court the question of whether an adjustable rate mortgage is a negotiable instrument under Former Article 3. This issue was squarely addressed in a recent opinion from this Court where Judge Duncan denied the same request because the necessity of a decision from the South Carolina Supreme Court was questionable since the question was based on an interpretation of statutes no longer in effect. *In re McFadden*, C/A No. 10-03899-DD, slip op. at 49 (Bankr. D.S.C. May 9, 2012). Judge Duncan also acknowledged the abundance of case law from other jurisdictions—as well as the analysis in this matter—regarding the statutory principles and purposes of the UCC, which rendered an interpretation from the Supreme Court unnecessary. *Id.* In addition, the Court recognizes that the bankruptcy courts are regularly required to interpret state law as a matter of first impression. *See In re Sims*, 421 B.R. 745, 750 (Bankr. D.S.C. 2010) ("In construing a state statute a federal court follows the decisions of the highest state court and in the absence of a controlling decision should interpret the statute as it believes the state court would." (citing *Caron v. Farmington National Bank (In re Caron)*, 82 F.3d 7, 9 (1st Cir.1996); *Milligan v. Trautman (In re Trautman)*, 496 F.3d 366, 368 (5th Cir. 2007))). Therefore, no basis for reconsideration exists for the failure to certify this question to the state's highest court.

CONCLUSION

As the Court recognized in its prior Order, it is important to note that Plaintiffs' Motion for Summary Judgment and Objection were not accompanied by significant references to the record that would support their case and did not highlight any genuine dispute of material fact for trial. Claimant's Motion, in contrast, was properly supported by

sufficient evidence. The Court is not obligated to deny Claimant's Motion for Summary Judgment in order to allow Plaintiffs to conduct a fishing expedition at trial. *NationsBank, N.A. v. Martin Color-Fi, Inc. (In re Martin Color-Fi, Inc.),* Adv. Pro. No. 99-80033-W, 1999 WL 33486094, at *11 (Bankr. D.S.C. Sept. 24, 1999) (finding that the defendants' argument failed because they put forth no evidence and since they produced no evidence after the close of discovery, the Court was not obligated to allow the suit to proceed to trial for a fishing expedition). After a careful review of the prior record and decision, the Court cannot find that there has been any intervening change in controlling law or any new evidence for the Court to consider. Further, the Court is not persuaded that it made a clear error of law or that there is any manifest injustice to prevent with regard to its denial of Plaintiffs' Motion for Summary Judgment and award of Summary Judgment for Claimant. Accordingly, Plaintiffs' Motion to Alter or Amend Judgment under Rule 9023 is denied.

AND IT IS SO ORDERED.