

Concurring Opinion by Ginoza, C.J.

I concur with the majority but write separately to further explain my reasoning. Plaintiff-Appellant Claus Zimmerman Hansen (**Hansen**) challenges the Circuit Court's order granting a motion to dismiss his Second Amended Complaint, filed by Defendants-Appellees Bank of America, National Association As Trustee For Washington Mutual Mortgage Pass-Through Certificates Series 2007-0A4 Trust (**Bank of America**), and US Bank As The Successor Trustee to Bank of America (collectively **Defendants**). In paragraph 45 of the Second Amended Complaint, Hansen asserts that Defendants engaged in Unfair and Deceptive Acts and Practices (**UDAP**) that violate Hawaii Revised Statutes (**HRS**) §§ 480-2¹ and/or 481A-3.²

¹ HRS § 480-2 (2008) provides:

§ 480-2 Unfair competition, practices, declared unlawful. (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.

(b) In construing this section, the courts and the office of consumer protection shall give due consideration to the rules, regulations, and decisions of the Federal Trade Commission and the federal courts interpreting section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

(c) No showing that the proceeding or suit would be in the public interest (as these terms are interpreted under section 5(b) of the Federal Trade Commission Act) is necessary in any action brought under this section.

(d) No person other than a consumer, the attorney general or the director of the office of consumer protection may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section.

(e) Any person may bring an action based on unfair methods of competition declared unlawful by this section.

² HRS § 481A-3 (2008) provides:

[§ 481A-3] Deceptive trade practices. (a) A person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person:

- (1) Passes off goods or services as those of another;
- (2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(continued...)

The Second Amended Complaint contains fairly extensive factual assertions that are often not clear or easy to understand. I agree, however, that it was error to dismiss Hansen's UDAP claim under HRS § 480-2. The allegations in the Second Amended Complaint, which we must deem as true for purposes of our *de novo* review in this appeal, include a variety of assertions related to the sale and assignment of Hansen's mortgage and note that he originally entered into with Washington

²(...continued)

- (3) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
 - (4) Uses deceptive representations or designations of geographic origin in connection with goods or services;
 - (5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have;
 - (6) Represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;
 - (7) Represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
 - (8) Disparages the goods, services, or business of another by false or misleading representation of fact;
 - (9) Advertises goods or services with intent not to sell them as advertised;
 - (10) Advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
 - (11) Makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions; or
 - (12) Engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.
- (b) In order to prevail in an action under this chapter, a complainant need not prove competition between the parties or actual confusion or misunderstanding.
- (c) This section does not affect unfair trade practices otherwise actionable at common law or under other statutes of this State.

Mutual Bank, FA. Paragraphs 14 through 32 appear to allege in brief that: a Pooling and Servicing Agreement (**PSA**) established the Washington Mutual Mortgage Pass-Through Certificates WMALT Series 2007-4 Trust (**the Trust**);³ Hansen's mortgage and note were sold by Washington Mutual Bank, FA to WaMu Asset Acceptance Corp., and then to the Trust, but these transactions were not recorded in the Bureau of Conveyances (**Bureau**); "Washington Mutual Bank" was seized and placed "into the receivership of the Federal Deposit Insurance Corporation (**FDIC**)"; Bank of America merged with LaSalle Bank NA, trustee for the Trust, and became the trustee; Barbara Hindman (**Hindman**), acting for the FDIC, executed an assignment of Hansen's mortgage and note that was recorded in the Bureau; Hindman's assignment is misleading because the FDIC sold nothing to Bank of America; because Hansen's mortgage and note were already in the Trust, Hindman's assignment of the mortgage and note contained numerous false statements, misrepresentations and material omissions, including that the FDIC assigned Hansen's mortgage and note to Bank of America.

The Second Amended Complaint further alleges, in relevant part:

33. On December 15, 2009, Bank of America executed a Notice of Mortgagee's Non-Judicial Foreclosure Under Power of Sale ("Notice of Sale") announcing Bank of America's intention to foreclose on the property by way of public sale on January 26, 2010.

34. The assertions made in this foreclosure notice were inaccurate, incomplete and not supported by competent and reliable evidence.

35. The Defendants knew, or neglected to have in place sufficient reviews and supervision of sworn statements to discover, the fraudulent documents that they were relying upon in the foreclosure process, such as the inaccurate foreclosure affidavit, was legally insufficient and

³ Some parts of the Second Amended Complaint refer to the "Washington Mutual Mortgage Pass-Through Certificates WMALT Series 2007-OA4 Trust," (emphasis added) which appears to be referring to the same trust. There are other apparent inconsistencies in the Second Amended Complaint in its reference to certain entities.

factually inadequate to support the claim of the right to foreclosure.

36. This Notice of Sale was recorded with the State of Hawaii Bureau of Conveyances on December 24, 2009, as Document #2009-195958. The foreclosure sale did not take place.

37. From the last payment by Mr. Hansen on the mortgage in November 2008 until the notice of non-judicial foreclosure on December 15, 2009, the Defendants did not make any serious attempt to modify the loan to avoid foreclosure.

38. Prior to the Notice of Mortgagee's Non-Judicial Foreclosure Under Power of Sale, the Defendants did not notify the Plaintiff of all loss mitigation options.

39. Defendants violated federal laws, Federal Housing Authority regulations and guidance, HAMP and other MHA servicer participation agreements program requirements and contractual requirements governing loss mitigation. Defendants failed to discharge their required loan modification obligations. In the course of this conduct, management and oversight of loan modifications with regard to Plaintiff's requested loan modification, the Defendants engaged in a pattern of unfair and deceptive practices which, include, but are not limited to, the following:

- a. failing to perform proper loan modification underwriting;
- b. failing to gather or evaluate loan modification application documentation and other paper work;
- c. failing to provide adequate staffing to implement programs;
- d. failing to adequately train staff responsible for loan modifications;
- e. failing to establish adequate processes for loan modifications;
- f. denying Plaintiff in a trial modification;
- g. wrongfully denying modification applications;
- h. failing to respond to Plaintiff's inquiries;
- i. providing false or misleading information to Plaintiff while referring the loan to foreclosure during the loan modification application process;
- j. providing false or misleading information to Plaintiff while initiating foreclosures where the Plaintiff was in good faith actively pursuing a loss mitigation alternative offered by the Defendants;
- k. providing false or misleading information to Plaintiff about loan modification while scheduling and conducting foreclosure sales;
- l. misrepresenting or failing to provide accurate and timely information to Plaintiff who was in need of, and eligible for, loss mitigation services, including loan modifications;
- m. falsely advising Plaintiff that he must be at least 60 days delinquent in loan payments to qualify for a loan modification;
- n. miscalculating Plaintiff's eligibility for loan modification programs and improperly denying loan modification relief to him;

o. misleading Plaintiff by representing that a loan modification application would be handled promptly when Defendants regularly failed to act on loan modifications in a timely manner;

p. failing to properly process Plaintiff's applications for loan mitigation and modifications, including failing to account for documents submitted by Plaintiff and failing to respond to his reasonable requests for information and assistance;

q. failing to assign adequate staff resources with sufficient training to handle the demand from distressed borrowers including Plaintiff; and

r. misleading Plaintiff by providing false or deceptive reasons for denial of loan modifications.

(Emphases added).

In turn, paragraphs 45 through 49 of the Second Amended Complaint allege:

45. Defendants engaged in UDAPs that violate HRS § 480-2(a) and/or 481A-3, by participating the following:

i. in the fabrication of the Assignment that was made with the intent to deceive and/or create confusion or misunderstanding for the Plaintiff, the public, and the courts, as to authority to transfer Plaintiff's Property knowing that it was incompetent and unreliable evidence to support an assertion of foreclosure;

ii. by violating HRS 502-83 in not recording transfers of real estate interests;

iii. in creating and allowing a servicer compensation structure to continue when compensation and cost structures between the Servicers and the trust created Servicer incentives to foreclose rather than restructure the loan even though modifications would benefit both the owner of the mortgage and the borrower;

iv. in failing to institute and operate a process of service and communication with the borrowers in default management situations so that loss mitigation could be successfully utilized.

46. As a direct and proximate result of one or more of these acts and/or omissions of Defendants and their unfair and deceptive business practices the Plaintiff has been damaged.

47. Defendants' described acts and practices were contrary to public policy, in violation of Hawaii law and were deceptive, immoral, unethical, oppressive, unscrupulous and substantially injurious to consumers, and were, therefore, unfair in violation of HRS § 480-2(a).

48. Defendants' described acts and practices involved material representations, omissions or practices that were likely to mislead consumers acting reasonably under the circumstances, and were therefore deceptive in violation of HRS §§ 480-2(a), 481A-3 and 454M, or all of them.

49. Defendants' described acts and practices make it impossible for State of Hawaii Bureau of Conveyances to maintain accurate records of the title to real property in the State of Hawaii, and they have, in particular, caused a break in the chain of title to Plaintiff's property making the title to the property unmarketable and uninsurable.

(Emphases added).

In sum, the Second Amended Complaint alleges a variety of false and misleading conduct by Defendants -- including false statements and misrepresentations in an assignment of the mortgage and note by Hindman to Bank of America that was recorded in the Bureau, and a fraudulent or misleading notice of non-judicial foreclosure filed in the Bureau (which did not result in a foreclosure) -- that created a cloud on title and rendered Hansen's property unmarketable and uninsurable. Hansen further alleged a variety of false, misleading and/or deceptive actions related to Hansen's "requested loan modification." Hansen's allegations do not challenge the validity of the assignment of the mortgage and note in the context of a judicial foreclosure, see U.S. Bank N.A. v. Mattos, 140 Hawai'i 26, 35, 398 P.3d 615, 624 (2017); U.S. Bank Nat'l Ass'n v. Salvacion, 134 Hawai'i 170, 174-76, 338 P.3d 1185, 1189-91 (App. 2014), and he does not seek relief as to title to the subject property. Rather, Hansen seeks monetary damages, including because he claims the Defendants' conduct caused a break in the chain of title to his property rendering his property unmarketable and uninsurable. Because we must accept as true the factual allegations in the Second Amended Complaint, there are sufficient factual allegations in the Second Amended Complaint to support a UDAP claim under HRS § 480-2. See Hungate v. Law Office of David B. Rosen, 139 Hawai'i 394, 410-12, 391 P.3d 1, 17-19 (2017); Agard v. Deutsche Bank Nat'l Tr. Co., No. CAAP-13-0002872, 2015 WL 337254 at *5-6 (Hawai'i App. Jan. 26, 2015) (Ginoza, J. concurring).

With regard to Hansen's claim under HRS § 481A-3, entitled "Deceptive Trade Practices," it is unclear whether this is a viable claim in this case. However, neither party addressed, on appeal or in the circuit court proceedings, whether the allegations in the Second Amended Complaint support a claim under the statutory language in HRS § 481A-3 or the scope of this statute. Given this record, it appears the Circuit Court's dismissal of this claim should also be vacated.

Based on the above, I respectfully concur.

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