

## **RECOGNIZES NEW CAUSE OF ACTION: BREACH OF A DUTY TO NEGOTIATE IN GOOD FAITH**

Were you thinking that the Business Court might, one day, find that a bank owed a fiduciary duty to its customer? That seemed like it might happen eventually, as the NC Supreme Court seemed to hold out that possibility last year, in *Dallaire v. Bank of America, N.A.*, 367 N.C. 363, 368 (2014), in which it said that:

it is possible, at least theoretically, for a particular bank-customer transaction to give rise to a fiduciary relationship under the proper circumstances.

But on Monday of this week, in [\*RREF BB Acquisitions, LLC v. MAS Properties, LLC\*, 2015 NCBC 58](#), Judge McGuire stuck to the long-standing case law in North Carolina that a lender does not owe any fiduciary duties to its customer. At the same time, however, he also recognized a new cause of action, which might have ramifications for claims against any type of entity (not just a lender) which decides to break off negotiations with an opposing party.

The Plaintiff RREF had purchased from BB&T two loans totaling \$5.275 million, which BB&T had made to the Defendants back in 2005. It had purchased the loans from BB&T while they were in default, and shortly after BB&T stopped negotiating a forbearance agreement with the Defendants.

### **No Fiduciary Duty**

The Defendants' lead argument against RREF's lawsuit to collect on the loans was that BB&T had violated a fiduciary duty it owed to them. They said that BB&T had breached its duty by failing to disclose its attempts to sell their loans while it was in the midst of negotiating a forbearance agreement with them.

The Defendants claimed that if they had known that BB&T was selling their loans, they would have tried to buy them themselves or had a third party buy the loans on their behalf.

The basis argued by the Defendants for BB&T's alleged fiduciary duty was that they had a thirty-year relationship with a local office, and that they had worked closely with the Bank in developing various residential communities and in selling homes in those communities. Op. ¶41. BB&T responded that

it owed no fiduciary duties to the Defendants and that it was simply pursuing the options available to it as the holder of loans that were in default.

As Judge McGuire noted, "[t]here is no reported North Carolina appellate case in which a fiduciary relationship has been found in a borrower-lender transaction." Op. ¶38. Given that one of the hallmarks of a fiduciary relationship is "a duty of the fiduciary to act in the best interests of the other party," Judge McGuire held that "it would seem nearly antithetical to require a commercial lender to put a borrower's interest ahead of its own in a business transaction." Op. ¶41.

Another reason the Court refused to find a fiduciary relationship lay in the restructuring negotiations themselves. Both the Defendants and the Bank were at this point represented by attorneys and were "negotiating to protect their respective best interests." (Op. ¶43). If there ever had been a fiduciary relationship between them, "such relationship ceased once BB&T declared Defendants in default of the Loans and the positions of the parties became adverse." Op. ¶43.

### **The New Cause Of Action: Breach Of A Duty To Negotiate In Good Faith**

Although it did grant summary judgment on the fiduciary duty claim, the Court nevertheless allowed the Defendants to go forward on a new claim hitherto not formally recognized in North Carolina: breach of a duty to negotiate in good faith.

The Defendants had been negotiating with BB&T a restructuring of their loans in late 2012. They had at least reached an agreement in principle on nearly every material term of a restructuring. BB&T's representative had recorded on an internal BB&T document that the Bank and its borrowers had been "successful in negotiating a structure for extension and deeds in lieu [which would be submitted] for approval in the next week or so." BB&T in fact sent a term sheet to the Defendants shortly after that which summarized the terms of the agreement. But BB&T did not notify the Defendants that the term sheet represented the "last, best and final terms that BB&T would accept, leading Defendants to conclude that they could request further revisions." Op. ¶87. Shortly thereafter, BB&T ceased communications with the Defendants, and then agreed to sell their loans to Plaintiff RREF.

Judge McGuire concluded that:

based on the unique facts present in this case, Defendants' claim for breach of a duty to negotiate in good faith may be viable. First . . . other jurisdictions have recognized such a claim and the trend is in favor of recognizing such claims. Second, North Carolina already implies in every contract a duty of good faith and fair dealing. The Court sees no reason that an agreement to continue negotiating in good faith would not be enforceable, provided it met all of the requirements for contract formation under North Carolina law. A jury could conclude that while the parties did not reach a final agreement on all of the material terms of a restructure deal in the October 29, 2012 meeting, their words and conduct established an agreement to continue negotiating in attempt to finalize the terms of the agreement and close on a restructure agreement before the end of 2012. While it did not bind either party to the final terms of a restructure deal, such an agreement would carry with it an implied obligation [for] the parties to conduct any further negotiations of the terms in good faith. A jury also could find that BB&T's failure to notify Defendants that the November 1, 2012 term sheet was its best and final offer after months of negotiations, and BB&T's decision to cease communications with Defendants after Defendants responded to the term sheet, were not 'fair dealing' or in 'good faith.'

Op. ¶88.

The Court found that there were issues of fact whether the parties had entered into an agreement to continue negotiating in good faith and whether BB&T had breached that agreement.

I have lots of questions about this type of claim. What establishes an agreement to negotiate in good faith, and when is it acceptable to end those negotiations? What are the damages from a breach of the duty to negotiate in good faith? How do you prove that a negotiating party did not act in good faith? And most important, what will the NC Court of Appeals have to say about this type of claim?