

CONDUCT IN A FORECLOSURE PROCEEDING CAN GIVE RISE TO AN UNFAIR OR DECEPTIVE TRADE PRACTICE?

Today's post continues our "traps for the unwary" series. In [*Bryant v. Nationstar Mortgage, LLC*](#), the North Carolina Court of Appeals affirmed the dismissal of a claim under N.C. Gen. Stat. § 75-1.1 arising from alleged impropriety in connection with a foreclosure.

In *Bryant*, a homeowner brought a 75-1.1 claim in a separate lawsuit after the lender completed a foreclosure on his home. The Court dismissed the claim, in part, because the claim related to the lender's conduct in the foreclosure proceeding itself. The Court indicated that the issues relating to the foreclosure should have been brought in the foreclosure proceeding rather than in a separate lawsuit.

But could the 75-1.1 claim even have been brought in the foreclosure proceeding? We discuss those complexities below.

The Mortgage Company's "Secret" Lawsuit

Bryant owned a house on which Nationstar held both a first and second mortgage. A fire destroyed the house completely.

Bryant had property damage insurance that covered the fire. Nationstar sued the insurer to recover for the damages to its collateral. After filing suit, Nationstar settled with the insurer.

Nationstar then initiated a foreclosure proceeding against Bryant, presumably because Bryant stopped making mortgage payments after the house burned down. In the foreclosure proceeding, Nationstar did not disclose, at least initially, that it had received the insurance proceeds or applied them to the amount that Nationstar alleged Bryant owed.

Bryant Files Suit After the Foreclosure Proceeding is Complete

Bryant did not contest the foreclosure proceeding directly. Instead, Bryant brought a lawsuit in the Catawba County Superior Court after Nationstar completed the foreclosure. Bryant alleged that Nationstar did not inform him about either the filing or the settlement of the lawsuit against the insurer. Bryant also asserted that the amount for which Nationstar settled was

enough to satisfy Bryant's debt and, as a result, the foreclosure proceeding was improper.

Bryant brought claims against Nationstar, as well as the substitute trustee also involved in the foreclosure proceeding. The claims included fraud, constructive fraud, breach of fiduciary duty, breach of contract, unjust enrichment and violation of section 75-1.1.

The Superior Court dismissed all of Bryant's claims on a 12(b)(6) motion. Bryant appealed the dismissal.

The Court of Appeals affirmed, dispatching Bryant's claims in short order. The appeals court determined that Bryant did not adequately plead fraud because he did not allege that either Nationstar or the trustee made any affirmative misrepresentation.

The Court also concluded that the defendants did not have an affirmative duty to disclose either the lawsuit or the settlement with the insurer. The court noted its prior decisions holding that such a duty does not ordinarily arise in the [debtor/creditor context](#). The Court dismissed the constructive fraud and breach of fiduciary duty claims accordingly.

As for the breach of contract and unjust enrichment claims, the Court dismissed them based on Bryant's failure to raise those claims in the foreclosure proceeding itself. The Court indicated that the breach issues should have been raised either at the foreclosure hearing before the Clerk of Court or in a *de novo* appeal of the foreclosure proceeding to the Superior Court. According to the Court, the unjust enrichment claim should have been raised in an equitable proceeding to enjoin the foreclosure pursuant to [N.C. Gen. Stat. § 45-21.34](#).

The Court then affirmed the dismissal of the 75-1.1 claim on two primary bases. First, the conduct alleged was essentially a breach of contract, i.e. a breach of the loan documents, and Bryant had failed adequately to allege [egregious and aggravating circumstances](#). Second, the alleged conduct concerned "the validity of the foreclosure proceedings" which "was not before [the] Court."

Timing is Everything?

So what should Bryant have done? The Court indicated that Bryant should have brought his breach of contract claim in the foreclosure proceeding and should have brought his unjust enrichment claim in an action to enjoin the foreclosure. Assuming that Bryant had done either or both, it is unlikely that he could have brought an accompanying 75-1.1 claim in either the foreclosure or an action to enjoin the foreclosure.

As the Court pointed out, the issues in the foreclosure proceeding are strictly limited to the issues of: (1) whether there is a valid debt; (2) whether there is a default; (3) the trustee's right to foreclose under the loan documents; (4) the adequacy of the foreclosure notice; and (5) whether the property owner is on active military status. Thus, the issue of whether the lender committed an unfair and deceptive trade practice is not an issue that can be raised directly in the foreclosure proceeding.

Likewise, the statute allowing for collateral challenges to foreclosure proceedings only specifies injunction of the foreclosure proceeding itself as a remedy. The statute does not appear to contemplate that a plaintiff would bring a 75-1.1 claim for damages in conjunction with seeking an injunction.

Bryant could have raised the underlying issues in the foreclosure proceeding and/or an action to enjoin the foreclosure and then brought a 75-1.1 claim in a separate lawsuit, but that would be an inefficient process and could give rise to a potential defense for claim splitting. The Court's reasoning does not provide a clear path for a 75-1.1 claim.

Under the circumstances, would Bryant have been better off bringing a "pure" 75-1.1 claim that did not include any other claims for relief? Hopefully, the courts will provide more guidance on these procedural points in future cases.