

13-1179

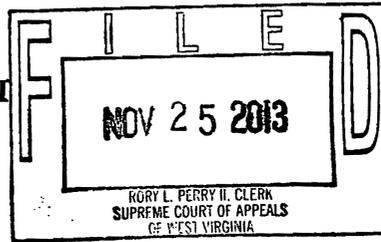
IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA
Division II

FRANKLIN W. JAMES, JR.,
Plaintiff,

v.

CIVIL ACTION NO. 13-C-4
JUDGE WILKES

BANK OF AMERICA, N.A., successor by
merger with BAC Home Loans Servicing, LP;
POWER MORTGAGE & FINANCIAL
SOLUTIONS, INC.; FIDELITY AND DEPOSIT
COMPANY OF MARYLAND; AND
JOHN DOE HOLDER,
Defendants.



2013 OCT 30 PM 3:13
VIRGINIA H. SHEPHERD

CERTIFICATION ORDER

This matter came before the Court this 30 day of October, 2013, pursuant to Defendant Fidelity and Deposit Company of Maryland's Motion to Dismiss Plaintiff's Complaint. The Plaintiff, Franklin W. James, Jr., by counsel Andrew C. Sinner, Esq.; and Defendant, Fidelity and Deposit Company of Maryland, by counsel Thomas H. Ewing, Esq. and William W. Booker, Esq., have fully briefed the issues. The other parties did not respond to this Court's Trial Court Rule 22 Scheduling Order nor the correspondence dated September 24, 2013.

Factual Background¹

cc
10-30-13
D Hedges
C Fenwick
T Ewing
W Booker
A SKINNER

This case was filed on January 4, 2013. The Complaint states three claims for relief: (1) Breach of Fiduciary Duty, (2) Unconscionable Inducement, (3) Illegal Loan, (4) Forced-Placed Insurance. The file evidences that some discovery has taken place. Defendant Fidelity and

¹ These factual recitations are only for contextual purposes. They are derived from the Complaint and any documents incorporated therein.

Deposit Company of Maryland [hereinafter "Fidelity"] recently filed the instant motion to dismiss which requests its dismissal arguing that the bond conditions have not been satisfied.

Fidelity is named in this action solely as surety for the lender who originated the mortgage in this matter: Taylor Bean & Whitaker ("TBW"). *See*, Complaint ¶ 4. TBW, as a lender, was required to obtain a mortgage lender bond under W.Va. Code §§ 31-17-1, *et. seq.* Fidelity issued the necessary Mortgage Lender Bond as TBW's surety, and was the surety at the relevant time. TBW is now, allegedly, bankrupt. *See*, Complaint ¶ 4(a). While the subject bond is not attached to the Complaint it is indisputably incorporated by reference. *See*, Complaint ¶ 4(b); *Forshey v. Jackson*, 222 W.Va. 743, 748-749, 671 S.E.2d 748, 752-753 (2008). The bond in this matter, attached to Fidelity's motion and utilized by Plaintiff in briefing, is the standard bond used by the W.Va. Division of Banking. It names the principal and surety and states "we bind ourselves ... jointly and severally." W.Va. Division of Banking, Bond # 08606879; Complaint ¶ 4(b). It states that it is in "pursuance of the provisions of Article 17, Chapter 31" of the West Virginia Code. It also states, relevantly,

If any person shall be aggrieved by the misconduct of the principal, he may upon recovering judgement [sic] against such principal issue execution of such judgement [sic] and maintain an action upon the bond of the principal in any court having jurisdiction of the amount claimed, provided the Commissioner of Banking assents thereto.

Id.

Reasons for Certification

The instant motion presents an issue of law not directly addressed by the Supreme Court of Appeals of West Virginia, which this Court finds integral to the determination of the Motion

to Dismiss; the question recited below. Plaintiff and Defendant Fidelity have agreed to certification of a question on this issue.

Also, this Court has been made aware of four (4) other currently pending cases before various circuit courts in West Virginia on this particular bond. *See, Staats v. Fidelity and Deposit Co of Md.*, Kanawha County Case 08-C-3407; *Hays v. Bank of America, NA*, Kanawha County Case 13-C-573; *Kerns v. Fidelity and Deposit Co of Md.*, Berkeley County Case 12-C-739; *Cotta v. Fidelity and Deposit Co of Md.*, Kanawha County Case 13-C-1643. Fidelity also represents it and other bond writers are currently involved in litigation in various circuit courts in West Virginia as sureties on this type of mortgage lender/broker bonds that name other principals. These represented facts further compel the following certified question.

This Court also notes that Fidelity has requested several other certified questions, on other, related issues. Yet, the Court finds that these issues are not yet ripe for consideration by this Court as they require further factual development (even if included in the pending motion to dismiss). Further, the issues would depend upon the outcome of the question certified herein. Last, upon first review of the other questions requested by Fidelity, this Court finds that they do not present issues which need clarification or adjudication by the Supreme Court of Appeals at this time.

Question Certified

May a plaintiff maintain an action solely against the surety on a judgment bond made pursuant to W.Va. Code § 31-17-4 without a judgment against the principal on the bond, when the principal has filed bankruptcy, and a judgment against the principal is precluded due to a Chapter 11 Plan confirmation?

This Court's Brief Answer to the Question Certified

YES, the statutory purpose of the bond is to protect consumers against insolvent lenders, *see*, W.Va. Code § 31-17-4 and the public policy of this State should not allow the bankruptcy of insolvent lender to shield a surety on these bonds from liability for the principal's actions.

Status of These Proceedings Pending Resolution of the Certified Question

Considering all matters of record in this case, the Court finds it best to stay this matter in regard to Defendant Fidelity, pending resolution of the certified question by the West Virginia Supreme Court of Appeals.

Accordingly, this question is hereby CERTIFIED TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA.

Therefore, it is hereby ADJUDGED AND ORDERED that upon this Certification Order, this matter is STAYED in regard to Defendant Fidelity and Deposit Company of Maryland, until further order of this Court or the Supreme Court of Appeals of West Virginia; and pursuant to Rule 17 of the Rules of Appellate Procedure, the parties shall prepare a joint appendix as soon as possible, to be submitted as further directed by the Supreme Court of Appeals.

The Court directs the Circuit Clerk to transmit an attested copy of this Certification Order with a list of docket entries to the Clerk of the Supreme Court of Appeals, and distribute attested copies of this Certification Order to the following counsel of record:

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CHRISTOPHER C. WILKES, JUDGE
TWENTY-THIRD JUDICIAL CIRCUIT
BERKELEY COUNTY, WEST VIRGINIA

A TRUE COPY
ATTEST

Virginia M. Sine
Clerk Circuit Court

By: Mildred L. Lawrence
Deputy Clerk

