

STATE OF NORTH CAROLINA  
COUNTY OF BRUNSWICK

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
09 CVS 1042  
("Anderson")

BERRY ANDERSON, et al., )  
Plaintiffs, )  
 )  
v. )  
 )  
COASTAL COMMUNITIES AT OCEAN )  
RIDGE PLANTATION, INC., et al., )  
Defendants )

STATE OF NORTH CAROLINA  
COUNTY OF BRUNSWICK

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
09 CVS 3376  
("Beadnell")

KATHLEEN BEADNELL, et al., )  
Plaintiffs, )  
 )  
v. )  
 )  
COASTAL COMMUNITIES AT OCEAN )  
RIDGE PLANTATION, INC., et al., )  
Defendants )

STATE OF NORTH CAROLINA  
COUNTY OF BRUNSWICK

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
10 CVS 314  
("Barton")

JOHN BARTON, et al., )  
Plaintiffs, )  
 )  
v. )  
 )  
COASTAL COMMUNITIES AT OCEAN )  
RIDGE PLANTATION, INC., et al., )  
Defendants )

STATE OF NORTH CAROLINA  
COUNTY OF BRUNSWICK

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
10 CVS 496  
("Barry")

JOHN BARRY, III, et al., )  
Plaintiffs )  
 )  
v. )  
 )  
OCEAN ISLE PALMS, INC., et al., )  
Defendants )

STATE OF NORTH CAROLINA  
COUNTY OF BRUNSWICK

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
10 CVS 781  
("Arnesen")

KENNETH ARNESEN, et al., )  
Plaintiffs )  
 )  
v. )  
 )  
RIVERS EDGE GOLF CLUB & )  
PLANTATION, INC., et al., )  
Defendants )

STATE OF NORTH CAROLINA  
COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
09 CVS 1208  
("Gilmartin")

BRANCH BANKING AND TRUST )  
COMPANY, )  
Plaintiff )  
 )  
v. )  
 )  
EILEEN A. GILMARTIN, )  
Defendant/Third-Party )  
Plaintiff )  
 )  
v. )  
 )  
COASTAL COMMUNITIES AT OCEAN )  
RIDGE PLANTATION, INC., et al, )  
Third-Party Defendants )

**ORDER**

THESE civil actions, designated complex business cases by Order of the Chief Justice of the North Carolina Supreme Court, pursuant to N.C. Gen. Stat. § 7A-45.4(b) (hereinafter, references to the North Carolina General Statutes will be to "G.S."), and assigned to the undersigned Chief Special Superior Court Judge for Complex Business Cases, now come before the court for determination of Plaintiffs' and Defendant Eileen A. Gilmartin's motion for a preliminary injunction prohibiting foreclosure proceedings pending disposition of these civil actions on their merits (the "Motion");<sup>1</sup> and

THE COURT, having considered the Motion, briefs in support of and in opposition to the Motion, submissions of counsel and appropriate matters of record, as

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<sup>1</sup> For purposes of the Motion, "Plaintiffs" refers to the collective Plaintiffs in all the captioned civil actions, except *Gilmartin*. As to the latter action, "Plaintiffs" refers to moving Defendant Eileen A. Gilmartin, who also is a counterclaiming Defendant and Third-Party Plaintiff in that action. The Motion is stated in each of the respective Complaints and in the Second Amended Answer and Counterclaims in *Gilmartin*.

discussed *infra*, CONCLUDES that the Motion should be DENIED for the reasons stated herein.

### PROCEDURAL HISTORY

[1] In April 2010, Plaintiffs filed their Amended Complaints<sup>2</sup> in these actions, alleging various claims for relief ("Claim(s)") against numerous Defendants. Included in the actions are Claims<sup>3</sup> against Defendants Branch Banking and Trust Company ("BB&T") and Four Oaks Bank ("Four Oaks") for fraud, unjust enrichment, violation of North Carolina's RICO statute, breach of duty of good faith and fair dealing/negligent supervision, unfair and deceptive trade practice, civil conspiracy and violation of North Carolina's Mortgage Lending Act.

[2] By way of the Motion, Plaintiffs ask the court to issue a preliminary injunction prohibiting Defendants<sup>4</sup> BB&T and Four Oaks from pursuing any foreclosure actions against the Plaintiffs pending a final determination of the merits of the Plaintiffs' Claims.

[3] On October 6, 2010, Plaintiffs voluntarily dismissed Defendant Four Oaks<sup>5</sup> from these actions, pursuant to Rule 41(a), North Carolina Rules of Civil Procedure ("Rule(s)"). Consequently, the Motion seeks relief only as to Defendant BB&T.

[4] The Motion has been fully briefed and argued, and is ripe for determination.

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<sup>2</sup> "Amended Complaints" refers to the Second Amended Complaint in *Anderson*, the Amended Complaints in *Beadnell, Barton, Barry and Arneson*, and the Second Amended Answer and Counterclaims in *Gilmartin*.

<sup>3</sup> The various Claims are individually numbered in the Amended Complaints in each separate civil action. For purposes of this Order, it is not necessary to refer to the specific Claim numbers assigned to each Claim in each Amended Complaint.

<sup>4</sup> While BB&T is the Plaintiff in *Gilmartin*, for purposes of the Motion BB&T will be referred to as Defendant.

<sup>5</sup> Also dismissed was Clifton L. Painter, trustee under the deeds of trust securing the loans made by Four Oaks.

## SUMMARY OF THE DISPUTE

### Parties

[5] Plaintiffs are purchasers of vacant lots (collectively the "Coastal Communities Properties") in various planned residential subdivisions developed by Mark A. Saunders ("Saunders") and Coastal Communities, Inc. ("Coastal Communities") and located in Brunswick County, North Carolina.<sup>6</sup>

[6] Saunders was and is the registered agent, president, organizer, member/manager and/or sole shareholder of Coastal Communities; Coastal Communities at Ocean Ridge Plantation, Inc.; Coastal Communities at Ocean Ridge Plantation, LLC; MAS Properties, LLC; The Mortgage Company of Brunswick, Inc. ("TMC") and other corporate entities located in North Carolina.<sup>7</sup>

[7] Defendants BB&T and BB&T Collateral Service Corporation ("BB&T Trustee" or collectively, "BB&T") are North Carolina corporations with their principal offices located in Forsyth County.<sup>8</sup> BB&T Trustee is the trustee on deeds of trust securing loans made by BB&T to purchasers of Coastal Communities Properties.<sup>9</sup>

### The Alleged Scheme

[8] Plaintiffs, like many other purchasers of real property in North Carolina, bought lots in new real estate developments shortly before the national real estate bubble burst. The number of lawsuits filed in this court alone following the collapse of such developments has increased substantially. *See Allen v. Land Res. Group of N.C.*,

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<sup>6</sup> The substance of the allegations in all the Amended Complaints is the same. For convenience, when specificity is needed, the court will cite to the allegations in the Second Amended Complaint in *Anderson*, unless otherwise indicated. Second Am. Compl. ¶¶ 56-57.

<sup>7</sup> *Id.* ¶ 30.

<sup>8</sup> *Id.* ¶ 44.

<sup>9</sup> *Id.*

*LLC, Rutherford County No. 08 CVS 1283 (N.C. Super. Ct.); Cabrera v. The Ridges at Morgan Creek, LLC, McDowell County No. 09 CVS 544 (N.C. Super. Ct.); Abraham v. Jauregui, Onslow County No. 09 CVS 3608 (N.C. Super. Ct.) and Beattie v. Branch Banking & Trust Company, New Hanover County No. 10 CVS 3891 (N.C. Super. Ct.).*

[9] Plaintiffs now bring an action for damages and rescission arising out of their purchase of Coastal Communities Properties based upon allegations that "Saunders, his companies, and their agents, along with other participants in the scheme, created an artificial market for the sale of vacant lots in the Saunders subdivisions through high-pressure, misleading sales tactics, fraudulent appraisals with pre-determined values, unscrupulous lending practices, the affixing of excessive revenue stamps on recorded deeds, and other such conduct."<sup>10</sup>

[10] From 2004 through 2007, BB&T was the lender for the majority of purchasers of Coastal Communities Properties, including Plaintiffs.<sup>11</sup> In late 2006 or early 2007, Four Oaks became the primary lender when BB&T ceased making loans for Coastal Communities Properties.<sup>12</sup>

[11] Plaintiffs contend that Saunders, through TMC, steered purchasers to BB&T and that BB&T allowed Saunders to completely and totally control the entire loan process, including the selection of the appraiser for Coastal Communities Properties, James Powell Appraisers ("JPA").<sup>13</sup> Plaintiffs allege that BB&T (a) improperly relied upon appraisals generated from an appraiser hand-picked by Saunders and subject to

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<sup>10</sup> Pls' Mem. Law Supp. Mot. Prelim. Inj. 4.

<sup>11</sup> Second Am. Compl. ¶ 43.

<sup>12</sup> *Id.* ¶ 162.

<sup>13</sup> Pls' Mem. Law Supp. Mot. Prelim. Inj. 5.

Saunders' control,<sup>14</sup> (b) helped facilitate Saunders' scheme by choosing to forego an independent, unbiased appraisal process and instead to allow Saunders, through TMC and JPA, to control the entire loan process and (c) "pushed through" loan applications submitted by purchasers of Coastal Communities Properties regardless of whether the purchasers were qualified so that BB&T employees could earn bonuses or commission through BB&T's "Matrix" program.<sup>15</sup>

[12] Plaintiffs ask the court to enter a preliminary injunction enjoining BB&T from going forward with thirty-six (36) pending foreclosures on \$8,551,090 worth of loans that are in default.<sup>16</sup> BB&T has already foreclosed on fourteen (14) lots owned by Plaintiffs, and injunctive relief is no longer available to the foreclosure sales that have been confirmed.

#### PRELIMINARY INJUNCTION

[13] A preliminary injunction is an extraordinary measure that "should not be lightly granted." *Travenol Lab., Inc. v. Turner*, 30 N.C. App. 686, 692 (1976). It is an ancillary remedy that will only be issued (a) if a moving party is able to show a likelihood of success on the merits of its case and (b) that it is likely to sustain irreparable loss unless the injunction is issued; or if, in the opinion of the court, in weighing the respective interests of the parties, issuance is necessary for the protection of the moving party's rights during the course of litigation. *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401 (1983). The burden is on the moving party to establish its right to a preliminary injunction. *Id.*; *Ridge Cmty. Investors, Inc. v. Berry*, 293 N.C. 688, 701

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<sup>14</sup> *Id.*

<sup>15</sup> Second Am. Compl. ¶¶ 143-44. The Matrix program allows BB&T employees to earn points based upon the number of loans issued and to use those points to earn bonuses and/or higher salaries.

<sup>16</sup> Defs' Mem. Law Opp. Pls.' Mot. Prelim. Inj. 4.

(1977); *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 466 (2003); *Pruitt v. Williams*, 25 N.C. App. 376, 379 (1975); *Smith v. N.C. Motor Speedway, Inc.*, 1997 NCBC 5, ¶ 26 (N.C. Super. Ct. 1997); *see also* G.S. 1-485 (providing, in the context of this action, that a preliminary injunction may be issued when it appears by the complaint that the plaintiff is entitled to the relief demanded and that the relief, or any part of it, consists of restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff); *see also* Rule 65.

#### Likelihood of Success on the Merits

[14] The court's first inquiry is whether Plaintiffs have demonstrated a likelihood of success on the merits of their Claims against BB&T. This likelihood of success results from the movant's prima facie showing of the requisite elements of the claims asserted. *Elec. South, Inc. v. Lewis*, 96 N.C. App. 160, 165 (1989).

[15] Plaintiffs argue that where an injunction is sought to prevent a foreclosure action, the court should issue the injunction if there is a "serious controversy" as to default or the amount due.<sup>17</sup> Plaintiffs contend there exists in this matter a serious controversy as to whether BB&T improperly withheld material information from Plaintiffs and other purchasers regarding Saunders' control of the loan process. In response, BB&T argues that Plaintiffs' Motion should be denied because their allegations against BB&T are implausible on their face and not supported by the evidence.

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<sup>17</sup> Pls' Mem. Law Supp. Mot. Prelim. Inj. 12, relying upon *Superscope v. Kincaid*, 56 N.C. App. 673, 677-78 (1982).

[16] All of the Claims asserted against BB&T are premised upon alleged omissions by BB&T.<sup>18</sup> The gravamen of Plaintiffs' Claims against BB&T is that the bank had a duty under the North Carolina Mortgage Lending Act ("MLA"), G.S. 53-243, *et seq.* (repealed and replaced by the Secure and Fair Enforcement Mortgage Licensing Act G.S. 53-244.010 *et seq.*), to appraise the collateral for the loans and inform Plaintiffs of the details of the loan process, including Saunders' alleged involvement and selection of JPA as the appraiser.<sup>19</sup>

[17] In an ordinary debtor-creditor relationship, a lender does not owe any duty to its borrower beyond the terms of the loan agreement. *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 61 (1992) ("[P]arties to a contract do not thereby become each others' fiduciaries; they generally owe no special duty to one another beyond the terms of the contract . . ."). "A lender is only obligated to perform those duties expressly provided for in the loan agreement to which it is a party." *Lassiter v. Bank of North Carolina*, 146 N.C. App. 264, 268 (2001).

[18] In support of their argument that BB&T owed Plaintiffs a duty to disclose certain information regarding the appraisal and loan processes under the MLA, Plaintiffs primarily rely upon *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30 (2009). In that case, the plaintiffs purchased property that was in a flood zone and the defendant mortgage broker arranged the financing for the transaction. *Id.* at 31. Prior to closing, the defendant broker obtained a certification that the property was located in a flood zone as well as a survey which contained the same information. *Id.* Despite its

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<sup>18</sup> Pls' Mem. Law Supp. Mot. Prelim. Inj. 13. ("For the most part, the claims against BB&T and Four Oaks are not premised upon any statements made to the Plaintiffs . . . . [T]he claims against BB&T and Four Oaks are claims of omission, not claims of commission.")

<sup>19</sup> *Id.* 14-16.

knowledge that the property was located in a flood zone, the defendant failed to disclose that fact to plaintiffs prior to closing. *Id.* at 32. It was not until after plaintiffs had closed on the purchase of the property that the defendant informed plaintiffs that the property was in fact located in a flood zone. *Id.* The defendant also waited until the closing to give the plaintiffs a copy of the flood certification on which the defendant had whited out the date indicating when he had received it. *Id.* The Court of Appeals concluded that the General Assembly intended to prohibit such conduct through the MLA which makes it unlawful for any person to "misrepresent or conceal the material facts . . . likely to influence, persuade, or induce an applicant for a mortgage loan." *Id.* at 45. In reaching this conclusion, the court noted that "the Defendant's conduct amounted to more than a negligent failure to notify Plaintiffs that the property in question was located in a designated flood plain." *Id.* at 42. To the contrary, the court observed that the defendant actively and intentionally withheld the information that the property lay in a flood plain. *Id.*

[19] The facts of the instant case are materially distinguishable from those in *Guyton* in several respects. First, unlike the plaintiffs in that case, Plaintiffs admit that they did not have contact with BB&T before executing their purchase contracts.<sup>20</sup> Plaintiffs do not allege facts that suggest BB&T made any misrepresentations to them. Plaintiffs do not allege that they ever saw or relied upon any appraisal of the property they purchased. In substance, Plaintiffs' allegations against BB&T are made "upon information and belief" and lack the necessary specificity to show the requisite elements of the Claims asserted.<sup>21</sup> Second, the plaintiffs in *Guyton* alleged that the defendant

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<sup>20</sup> *Beadnell Am. Compl.* ¶ 139.

<sup>21</sup> *See Second Am. Compl.* ¶¶ 109-150.

broker purposefully withheld a specific piece of information – that the property was in a flood plain – which the defendant was required to disclose under federal law. *Id.* Here, Plaintiffs argue that BB&T had a duty to disclose the details of the loan process including the identity of the appraiser, Saunders' relationship with the appraiser and BB&T's internal guidelines regarding the loan process.

[20] In this case, the Plaintiffs seek to have the court impose duties on BB&T that are outside the terms of the loan agreements and to transform the ordinary debtor-creditor relationship into something resembling a fiduciary relationship. Appraisals are for the bank's benefit and not for the borrower. *Camp v. Leonard*, 133 N.C. App. 554, 559 (1999). BB&T completed internal reviews of the appraisal reports prepared by JPA.<sup>22</sup>

[21] Plaintiffs have not alleged facts or propounded evidence sufficient to show that BB&T improperly relied on appraisals by an outside and approved appraiser or that BB&T breached a duty to Plaintiffs outside of the loan agreements. Further, the defendant broker's conduct in *Guyton* was so egregious that the Court of Appeals concluded the MLA was intended to protect against this very conduct. 199 N.C. App. at 43. The defendant had in his possession documents, including the survey and certification, which indicated that the property was located in a flood zone, but failed to turn over that information to the plaintiffs. *Id.* at 32. Unlike that case, Plaintiffs here fail to allege specific facts showing that BB&T knew Saunders and his companies were

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<sup>22</sup> See Walker Aff. ¶ 13. ("For a very brief time and for a very small number of loans (prior to October 2005), TMC would send along with the loan application and other financial information, an appraisal that had been prepared by [JPA]. BB&T would complete an internal review of this report and submit it with the completed loan package. This practice was acceptable standard for BB&T to accept an outside appraisal completed by an approved appraiser and conducted for another financial institution, as long as the client was not involved in the ordering and/or completion of the appraisal.").

defrauding purchasers and that BB&T was actively assisting Saunders to commit mortgage fraud. There has been no sufficient allegation or showing that BB&T acted improperly in relying on appraisals by JPA.

[22] Plaintiffs also rely on *Cabrera v. Wachovia Bank*, 09 CVS 544,<sup>23</sup> a case similar to this one, where the plaintiffs alleged that developers and banks participated in a fraudulent scheme to induce the plaintiffs to purchase lots. There, in a September 18, 2009 Order, Judge Diaz granted the plaintiffs' motion for preliminary injunction against the defendant banks and preliminarily enjoined the banks from commencing or threatening foreclosure proceedings. Order at 5. Judge Diaz noted that the banks presented no evidence in opposition to the plaintiffs' motion for preliminary injunction. *Id.* at 3. Here, unlike the defendants in *Cabrera*, BB&T has offered substantial evidence in opposition to Plaintiffs' Motion, including affidavits<sup>24</sup> by BB&T employees stating that they did not receive bonuses and/or higher salaries because they issued loans to purchasers of Coastal Communities Properties. Becky Sink ("Sink"), Senior Vice President of BB&T and administrator of BB&T's incentive plan, testifies by affidavit that any allegation that BB&T employees received bonuses or higher salaries based solely on the issuance of loans on Coastal Communities Properties is not true.<sup>25</sup> Sink states that BB&T's bonus system creates disincentives for making bad loans and that interest-only balloon loans – like the ones offered to Plaintiffs – actually lower a BB&T's employee's incentive bonus.<sup>26</sup> Sink's testimony directly refutes Plaintiffs' allegations

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<sup>23</sup> This is the same case as *Cabrera v. The Ridges at Morgan Creek, LLC, McDowell County No. 09 CVS 544 (N.C. Super. Ct.)*, cited above in paragraph 8. The case caption changed upon voluntary dismissal of Defendant The Ridges at Morgan Creek, LLC, on September 3, 2009.

<sup>24</sup> See Sink, Etheridge, Graham and Walker Affs.

<sup>25</sup> Sink Aff. ¶ 10.

<sup>26</sup> *Id.* ¶¶ 5, 7. ("Merely having high loan production or high loan growth would not qualify an employee for a substantial bonus, or necessarily even any bonus.").

that BB&T employees had an economic incentive to issue loans regardless of whether the purchasers were qualified.

[23] Equally problematic for Plaintiffs is the issue of what, if anything, BB&T would gain by issuing risky, under-collateralized loans. Plaintiffs argue that the Matrix incentive program motivated BB&T employees to issue loans to purchasers of Coastal Communities Properties regardless of whether they were qualified borrowers.<sup>27</sup> However, Plaintiffs' allegations are based upon unreasonable inferences. The court shares the same concerns as the court in *Feeley v. Total Realty Mgmt.*, 1:08cv1212 (GBL) (2009 E.D. Va.),<sup>28</sup> as to why a bank would enter into risky, under-collateralized loans based upon knowingly false information. The allegation that BB&T exposed itself to under-collateralized loans so that BB&T employees could obtain bonuses and/or higher salaries is improbable. Sink's affidavit as well as several other affidavits submitted by BB&T, directly refutes this allegation.<sup>29</sup> Plaintiffs simply have not alleged facts sufficient to establish BB&T benefited from making under-collateralized loans. *See Robertson v. First Union Nat'l Bank*, 350 S.E.2d 309, 315 (S.C. App. 2002) ("[W]e can think of no logical reason why [a] [b]ank would make it a practice to intentionally make loans for an amount in excess of the collateral's value and risk substantial losses in the event of default.").

[24] Plaintiffs' Amended Complaints fail to allege facts that show BB&T acted improperly in issuing loans to purchasers of Coastal Communities Properties. Since Plaintiffs' Claims against BB&T are premised on alleged duties owed to Plaintiffs by

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<sup>27</sup> Pls' Mem. Law Supp. Mot. Prelim. Inj. 6.

<sup>28</sup> "[T]here are insufficient allegations to support a plausible conclusion that the Banks would enter into risky loans based upon knowingly false information so the Banks would sustain a loss." *Feeley*, 1:08cv1212 at 3-4.

<sup>29</sup> See Sink Aff.; Walker Aff. ¶¶ 23-28.

BB&T outside the terms of the loan agreements, duties the court concludes likely are non-existent, failure of Plaintiffs' Claims is probable. Accordingly, the court CONCLUDES that Plaintiffs have failed to demonstrate a likelihood of success on the merits of their Claims against BB&T.

Irreparable Harm

[25] It is not necessary for the court to determine whether Plaintiffs would suffer an irreparable injury if BB&T is not enjoined from initiating or resuming foreclosure proceedings because Plaintiffs have failed to demonstrate a likelihood of success on the merits of their Claims asserted against BB&T.

[26] Accordingly, the court CONCLUDES that Plaintiffs have failed to establish they are entitled to a preliminary injunction to enjoin BB&T from initiating or resuming foreclosure proceedings against Plaintiffs.

NOW THEREFORE, based upon the foregoing CONCLUSIONS, it is ORDERED, ADJUDGED and DECREED that:

[27] Plaintiffs and Defendant Eileen A. Gilmartin's motion for a preliminary injunction prohibiting foreclosure proceedings pending disposition of these civil actions on their merits is DENIED.

[28] In due course, Defendant BB&T may initiate or resume foreclosure proceedings on loans to Plaintiffs that are currently in default.

This the 13th day of May, 2011.

/s/ John R. Jolly, Jr.  
John R. Jolly, Jr.  
Chief Special Superior Court Judge for  
Complex Business Cases