

United States District Court
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

SIMON CHO, HAE CHO

v.

WELLS FARGO BANK, N.A.

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Civil Action No. 4:16-CV-256

(Judge Mazzant/Judge Nowak)

**MEMORANDUM ADOPTING REPORT AND
RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

Came on for consideration the report of the United States Magistrate Judge in this action, this matter having been heretofore referred to the Magistrate Judge pursuant to 28 U.S.C. § 636. On June 14, 2017, the report of the Magistrate Judge (Dkt. #66) was entered containing proposed findings of fact and recommendations that Defendant's Motion for Summary Judgment (Dkt. #46) be granted in part and denied in part and Defendant's Motion for Partial Summary Judgment (Dkt. #47) be denied. The Magistrate Judge recommended that Plaintiffs' claims for reformation and declaratory judgment be dismissed. Having received the report of the Magistrate Judge (Dkt. #66), having considered each of Defendant's timely filed objections (Dkt. #67), Plaintiffs' response thereto (Dkt. #68), and having conducted a de novo review, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct, and the Court hereby adopts the Magistrate Judge's report (Dkt. #66) as the findings and conclusions of the Court.

BACKGROUND

The underlying facts and legal claims are set out in further detail by the Magistrate Judge and need not be repeated here in their entirety (*see* Dkt. #66). Accordingly, the Court sets forth herein only those facts pertinent to Defendant's objections.

In September 2011, Plaintiffs applied for a home equity loan. Hae Cho signed a "Special Durable Power of Attorney for Real Estate Transactions" appointing her husband, Simon Cho, as

her Power of Attorney (“POA”). The POA strictly limited Simon Cho’s authority to acting “on behalf of Hae Cho to sell the [P]roperty and perform acts associated with the sale of the [P]roperty.” The POA authorized Simon Cho to “[c]ontract to sell the Property for any price on any terms,” “[c]onvey the Property,” “[e]xecute and deliver any legal instruments relating to the sale and conveyance of the Property,” and “[a]ccept notes, deeds of trust, and other legal instruments” on Hae Cho’s behalf. The POA does not reference refinancing or encumbering the Property, or using it as security for a loan. On November 1, 2011, Simon Cho, solely on behalf of Hae Cho through the POA, executed a Texas Home Equity Note in the principal amount of \$197,600.00 payable to Wells Fargo (“Note”). Simon Cho did not sign the Note on his own behalf. As security for the Note, Simon Cho, individually and on behalf of Hae Cho as her power of attorney, executed a Texas Home Equity Security Instrument dated November 1, 2011 (“Security Instrument” or “Deed of Trust”), which granted a security interest in the Property.

Of the loan proceeds, \$138,392.24 were used to pay off debts against the Property, including the first loan secured by the Property and serviced by IndyMac Federal Bank, FSB in the amount of \$113,560.75; the home equity loan held and serviced by Capital One in the amount of \$19,422.61; and real estate taxes owed to Collin County for 2011 in the amount of \$5,408.88. The remainder was paid to Plaintiffs. Hae Cho was not present at the real estate closing.

On April 16, 2015, Plaintiffs brought suit in the 429th Judicial District Court of Collin County, Texas seeking a declaration that the Loan violated the Texas Constitution. Specifically, Plaintiffs’ state court pleading alleged causes of action for quiet title, statutory and common law fraud, and reformation of the Deed of Trust and sought: (1) a judgment declaring that the Note violated Article XVI Section 50(a)(6)(A) of the Texas Constitution, declaring all principle and interest of the loan forfeited as provided by Article XVI Section 50(a)(6)(Q)(xi) of the Texas

Constitution, and ordering Defendant to disgorge any amount already paid under the Note; (2) an order requiring Defendant to remove its lien on the Property and refrain from attempting any further legal action to collect on the Note; (3) a damage award for common law fraud; (4) a damage award for statutory fraud under Section 27.01 of the Texas Business and Commerce Code; and (5) an order reforming the Deed of Trust to remove Simon Cho as a party and signatory to appropriately reflect the underlying Note. In support of their fraud and reformation claims, Plaintiffs allege Charles Park, while acting in the course of his employment for Defendant Wells Fargo, represented to Plaintiff Simon Cho that Simon Cho was not an owner of the Property, and the Property was owned solely by Hae Cho.

Defendant's original answer, in response to the state court petition, raised affirmative defenses, including the statute of limitations and the doctrine of unclean hands. Moreover, while the case was still pending in state court, Defendant filed a counterclaim on March 3, 2016, requesting a judgment of judicial foreclosure, an order of equitable subrogation, and a judgment on its alleged equitable lien. Defendant removed the case to federal court on April 14, 2016 on the grounds of diversity jurisdiction. Subsequent to removal, on September 27, 2016, Plaintiffs filed an Amended Complaint. Plaintiffs' Amended Complaint seeks an order removing any cloud on the title to their residential property, damages for fraudulent misrepresentations allegedly made by Defendant during loan discussions, damages for breach of a note provided by Defendant and secured by a deed of trust on the Property, and reformation of the deed of trust to remove Simon Cho as a party and signatory. In support of Plaintiffs' fraud claim, the Amended Complaint asserts additional allegations related to Charles Park, including that approximately a month before the loan closing, Charles Park represented to Plaintiff Simon Cho that Simon Cho was not required to be a borrower on the Loan, Hae Cho could be the only borrower, and the Home Equity Loan could

be closed without Hae Cho's knowledge. Plaintiffs further claim Charles Park failed to inform Hae Cho that the loan was a home equity loan and intentionally concealed that fact from her.

Defendant moved for summary judgment and/or partial summary judgment on each of Plaintiffs' claims. The Magistrate Judge entered a report and recommendation on June 14, 2017, recommending Defendant's Motion for Summary Judgment be granted in part and denied in part (dismissing Plaintiff's claims for reformation and declaratory judgment) and Defendant's Motion for Partial Summary Judgment be denied. Subsequently, on June 22, 2017, Defendant filed its objections to the Magistrate Judge's report and recommendation. Plaintiffs filed their Response on July 6, 2017.

ANALYSIS

A party who files timely written objections to a magistrate judge's report and recommendation is entitled to a de novo review of those findings or recommendations to which the party specifically objects. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(2)-(3). The Magistrate Judge made the following findings and conclusions in the report and recommendation: (1) the POA signed by Hae Cho did not authorize Simon Cho to sign the Note and/or Deed of Trust to the Property in favor of Defendant on Hae Cho's behalf; (2) Plaintiffs' additional fraud allegations were not barred by limitation when they related back to the original allegations (and a fact issue exists as to Plaintiffs' fraud claims); (3) Plaintiffs' reformation claim should be dismissed because Simon Cho signed the Deed of Trust consistent with his intent that such would encumber the Property as security for the home equity loan; (4) Plaintiffs' declaratory judgment claim should be dismissed because Plaintiffs could not obtain a judgment that Defendant violated section 50(a)(6) of the Texas Constitution or that Plaintiffs are entitled to forfeiture remedies under section 50(a)(6)(Q)(xi) for any such violation; (5) summary judgment is inappropriate for

Defendant's equitable subrogation counterclaim because Defendant may have perpetrated fraud and the balance of the equities is unclear; and (6) summary judgment is inappropriate for Defendant's judicial foreclosure counterclaim (after concluding Defendant is not entitled to entry of an equitable subrogation lien on the current record). Defendant objects to the Magistrate Judge's findings that (1) Simon Cho lacked authority through the POA to sign the Loan documents; (2) Plaintiffs' fraud claim was not barred by limitation or that Plaintiffs can demonstrate reliance despite their conduct and the Loan documents; (3) Defendant's counterclaim for an equitable subrogation lien be denied when this conclusion "would allow Plaintiffs to profit from their misconduct"; and (4) Defendant's counterclaim for judicial foreclosure "for the same reasons [Defendant] should have been granted dispositive relief on its equitable subrogation claim." The Court notes neither party objects to the Magistrate Judge's finding that Plaintiff's claims for reformation and declaratory judgment should be dismissed. As such, the Court adopts these findings and proceeds to evaluate those objections related to the POA's authority, Plaintiffs' fraud claim, and Defendant's equitable subrogation and judicial foreclosure counterclaims.

Objection 1: Authority Given to Simon Cho in POA

Defendant first objects to the Magistrate Judge's finding that the POA authorized Simon Cho to sell the Property but not to encumber it as security for a loan on the grounds that if Simon Cho had the authority under the POA to sell or convey the Property and to accept notes and security instruments, then a necessary corollary to those powers is to mortgage the Property. Plaintiffs argue to the contrary that the plain language of the POA does not permit Simon Cho to encumber the Property.

Texas courts construe a power of attorney as a whole in order to ascertain the parties' intentions and rights. *In re Estate of Miller*, 446 S.W.3d 445, 455 (Tex. App.—Tyler 2014, no

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