

For the first time a North Carolina court has found a cause of action exists against a lender for breach of duty to negotiate in good faith. In *RREF BB Acquisitions, LLC v. MAS Properties, L.L.C.*, No. 13 CVS 193, 2015 WL 3646992 (N.C. Super. June 9, 2015) the North Carolina Business Court allowed the claim to survive the lender's motion for summary judgment.

In *RREF BB Acquisitions*, the borrowers had two outstanding loans with BB&T—the first originated in 1997 and the second in 2005. The loan terms were one and three years, respectively, but each loan was generally renewed or extended annually through 2012. In 2012 BB&T advised the borrowers that BB&T would no longer renew the loans and the loans matured. Despite BB&T's notice of non-renewal and subsequent maturity, BB&T and the borrowers entered into negotiations with the borrowers including both face to face meetings and the exchange of documents regarding proposed terms. The negotiations lasted several months during which BB&T sent a proposed forbearance agreement as well as a reservation of rights letter. In October of 2012, BB&T met with and presented a term sheet to the borrowers which contained disclaimers on every page that it did "not constitute any kind of commitment or undertaking" and that the terms therein were "subject to the internal approval process" of BB&T. In November, the borrowers sent the term sheet back to BB&T with revisions, stating that it reflected their understandings at the face to face meeting.

At the same time BB&T was negotiating with the borrowers, BB&T was shopping the loans around for sale. After receiving the borrowers' revised term sheet in November, BB&T went "dark" on any further communications and negotiations with the borrowers. BB&T's policy was to cease communications once the loans were posted for sale—in this case to RREF BB Acquisitions, LLC.

RREF BB Acquisitions, LLC purchased the loans in December of 2012 and later brought suit against borrowers for default of the loans. The borrowers brought multiple contract and tort claims against RREF BB Acquisitions, LLC and BB&T. Generally, all of the borrowers' affirmative claims were dismissed at summary judgment except for the breach of duty to negotiate in good faith against BB&T and a claim for unfair and deceptive trade practices related to the same facts which carry the potential for treble damages and reimbursement of attorneys' fees.

The Business Court acknowledged a claim for breach of duty to negotiate in good faith had not previously been expressly recognized in North Carolina. The Business Court, however, noted the "trend" for courts to find a cause of action exists for breach of duty to negotiate, including a North Carolina Court of Appeals' decision concerning West Virginia law where that court stated:

agreements [to negotiate] do not commit the parties to their ultimate contractual objective. Rather, they commit the parties to negotiate the open issues in good faith in an attempt to reach the contractual objective within the agreed framework. Under this duty to negotiate in good faith, a party is barred from renouncing the deal, abandoning the negotiations, or insisting on conditions that do not conform to the preliminary agreement.

In addition, the Business Court stated that it saw no reason why an agreement to continue to negotiate should not be enforceable, and that BB&T's failure to notify the borrowers of its "best and final offer" could constitute a breach of fair dealing and good faith.

Although the Business Court allowed the cause of action to proceed, it did state that its conclusion was "based on the unique facts present in this case". BB&T and the borrowers had a relationship of over 30 years, and the loans at issue were renewed and/or extended almost annually. In addition, the negotiations were lengthy, extensive, and there was a dispute as to whether the parties had reached a "meeting of the minds" prior to the sale of the loans in October and as set forth in the exchanged term sheet.

The Business Court is not an appellate court, and accordingly its opinions constitute "persuasive" authority to other courts. Nevertheless, lenders should expect borrowers to plead facts and/or claims so as to avail themselves of this new cause of action in a like manner. In an effort to minimize this possibility, lenders should revisit the language in their post-default communications with borrowers, such as default letters, "reservation of rights" letters, and pre-negotiation agreements, to expressly deny the existence of any agreement to negotiate absent a written agreement among the parties, and allowing the lenders to terminate any negotiations at any stage without notice.