

ORIGINAL

FILED IN CLERK'S OFFICE
U.S.D.C. - Atlanta

FEB 07 2011

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JAMES N. HATTEN, Clerk
By: [Signature]
Deputy Clerk

FEDERAL DEPOSIT INSURANCE)
CORPORATION, in its capacity as Receiver))
of NEIGHBORHOOD COMMUNITY)
BANK of Newnan, Georgia,)
)
Plaintiff,)
)
v.)
)
SMITH, WELCH & BRITTAIN, LLP)
and JOSEPH MARK BRITTAIN)
)
Defendants.)
_____)

CIVIL ACTION NO. _____

1:11-CV-0372
HLM

JURY TRIAL DEMANDED

COMPLAINT

COMES NOW the Federal Deposit Insurance Corporation ("FDIC"), in its capacity as receiver of Neighborhood Community Bank of Newnan, Georgia, and states this its Complaint, showing as follows:

PARTIES, JURISDICTION, AND VENUE

1.

The FDIC is a corporation organized and existing under the laws of the United States of America. 12 U.S.C. §1811, et seq. The FDIC is an

instrumentality of the United States of America and is charged with, among other duties, the orderly liquidation of failed banks. 12 U.S.C. §1821(d). Neighborhood Community Bank of Newnan, Georgia (“NCB”) was a state chartered member bank under the laws of the State of Georgia, and its deposits were FDIC insured. On or about June 26, 2009, the Commissioner of Banking for the State of Georgia determined that NCB was operating in an unsafe and unsound manner, and secured a court order that NCB be closed. The same Court appointed FDIC as receiver of NCB, and the FDIC accepted the appointment as receiver. By operation of law, the FDIC acquired all of the property, assets, rights, and claims of NCB, including the claims asserted herein, and is the proper party plaintiff to bring this action.

2.

The Defendant, Smith, Welch and Brittain, LLP (“SWB”) is a Georgia limited liability partnership, consisting of attorneys whose partners and associates are duly authorized to practice law in the State of Georgia, and other personnel, including real estate paralegals.

3.

The Defendant, Joseph Mark Brittain (“Brittain”), is an attorney duly licensed to practice law in the State of Georgia who engages in the practice of law as a partner of Defendant SWB.

4.

This Court has subject matter jurisdiction over this matter, as actions in which the FDIC is a party are deemed to arise under federal law pursuant to 12 U.S.C. §1811, et seq., §1819(b)(1) and (2), and 28 U.S.C. §1331 and 1345. The FDIC has the power to bring an action in any court pursuant to 12 U.S.C. §1819.

5.

Venue is proper in this district and division as the principal place of business of SWB and the residence of Defendant Brittain is located herein.

FACTS COMMON TO BOTH COUNTS

6.

This action seeks damages for professional negligence and other misconduct committed by Defendants while representing NCB in four commercial loan transactions which occurred in 2005, 2006 and 2007.

7.

Each of the transactions involved an acquisition and development (“A & D”) loan made by NCB to a limited liability company controlled and owned by a real estate developer named Jeff Grant. Each of the loans was used to purchase and develop specific tracts of real property. Grant intended to install streets, utilities, and other infrastructure required to develop the land into single family residential

building lots on each property, which he planned to sell to home builders and others. Security title to each property was conveyed to NCB by deed to secure debt and related security instruments, to serve as collateral for repayment of the applicable loan.

8.

In representing NCB in its making these loans, Defendants were responsible for tasks that included, without limitation, preparing and obtaining the execution and filing of loan documents, receiving and disbursing loan proceeds, and following NCB's authorized instructions. Defendants' responsibilities for following NCB's instructions included, without limitation, closing the related acquisition and financing transaction so as to obtain first priority security title to the relevant real property, and, where required, providing a first priority security position in any certificates of deposit that were to serve as additional collateral.

9.

Prior to the first NCB loan made to a Jeff Grant company in December of 2005, the Defendants had served as counsel for Grant and his companies in a variety of legal matters, including real estate, corporate, litigation, and employment law matters. Defendants' representation of Grant and his companies continued during the time in which Defendants represented NCB in making the subject loans.

Southern Lumber II Loan

10.

Defendants first represented NCB in a finance transaction involving a Grant owned company as borrower in a loan to Southern Lumber II, LLC (“Southern Lumber II”) in late December 2005 and early January 2006. In the loan application to NCB for the Southern Lumber II loan, Grant represented that the loan purpose was to purchase approximately 41 acres in Henry County, Georgia for \$1,992,011.66, and develop it into a subdivision. **See Exhibit 1.** The NCB loan committee, after investigation and analysis, approved the loan for \$3,905,136.00, an amount intended to fund the stated purchase price and additional development costs, with the requirement that the borrower furnish an equity payment with its own funds of \$390,500.00, to be in the form of a certificate of deposit in that amount that would be posted with NCB as collateral in addition to the real estate.

11.

After the loan was approved, Defendants were engaged by NCB to represent only NCB in its making the loan to Southern Lumber II. They were instructed to close the transaction utilizing an initial loan advance of \$2,000,000.00 to provide the sum required to purchase the 41 acres for \$1,992,011.66. **See Exhibit 2.**

12.

Defendants were also instructed that Southern Lumber II was required to purchase with its own funds a certificate of deposit, which NCB would hold as collateral.

13.

No one at NCB ever communicated permission for Defendants to deviate from closing the loan and disbursing the funds for any amount other than the agreed upon land purchase price, or to pay any portion of the initial \$2,000,000.00 advance by NCB of loan funds to Grant or any of his companies, or to excuse the requirement that the borrower use its own funds to purchase the certificate of deposit.

14.

Unknown to NCB at the time it approved and made the loan to Southern Lumber II, Grant and Southern Lumber II had misrepresented and overstated the purchase price of the land in the loan application. Grant and Southern Lumber II actually had an agreement to purchase the property for \$1,336,725.00, an amount \$673,275.00 less than the purchase price represented to NCB.

15.

On December 29, 2005, Defendants conducted the closing of the loan to Southern Lumber II. The loan Settlement Statement dated December 29, 2005, and the receipts and disbursements of funds reflected therein, made it appear that Defendants complied with the instructions of NCB and followed the course of action required by NCB. **See Exhibit 3.** An NCB loan officer attended this closing.

16.

The loan closing Settlement Statement falsely represented that a transaction had occurred with an initial loan advance to purchase the land at a price of \$1,992,011.66. The Settlement Statement also falsely represented that the borrowers purchased a \$400,000.00 certificate of deposit using their separate funds. Such a transaction would have conformed to the terms of NCB's loan commitment. Although Defendant Brittain was the SWB attorney hired by NCB to close the Southern Lumber II loan, the Settlement Statement that was given to the loan officer was a HUD-1 Settlement Statement that was improperly signed by another attorney employed by SWB, the identity of whom will be ascertained in discovery.

17.

Five days later, on January 3, 2005, Defendants conducted a closing of the purchase of the real estate by Southern Lumber II. Because Defendants were to be present representing NCB's interest in the closing of the purchase of the real estate, and NCB had advanced to Defendants' escrow account on December 29, 2005 the initial loan disbursement, no action was required by any NCB representatives at the purchase transaction, and neither NCB's loan officer, nor other NCB representatives, were required to be present at the closing of the purchase of the real estate.

18.

Instead of creating a Settlement Statement for the closing of the Southern Lumber II loan and related land purchase that accurately showed the receipt and use of all funds in the transaction, Defendants created two conflicting Settlement Statements, one given to NCB at the loan closing, and one not given to NCB that depicted the purchase of the real estate several days later. **See Exhibit 4.**

19.

At or prior to the real estate closing for Southern Lumber II, a separate real estate Settlement Statement was created by Defendants for the real estate purchase. This second Settlement Statement reflected the undisclosed lower purchase price

for which the real estate collateral was purchased. It detailed a transaction with a materially different land purchase price of \$1,336,725.00. It also reflected that the additional \$673,275.00 that NCB advanced for the misrepresented higher purchase price of \$1,992,011.66 was disbursed by Defendants to one of Grant's companies, Southern Lumber, Inc. Grant then used \$400,000.00 of the \$673,275.00 of loan proceeds to purchase from NCB the certificate of deposit NCB demanded, instead of using his own funds, as required.

20.

The second Settlement Statement depicting the details of the actual purchase of the real estate and use of the loan proceeds was not given to NCB at the time of the January 3, 2006 closing, or at any time until May 27, 2009, when the lawyers representing Defendants against the instant claims produced it at the request of NCB's counsel.

21.

At no time after the closing of the Southern Lumber II loan did Defendants inform NCB of Grant's improper and unauthorized use of the loan funds. Said Defendants withheld this information from their client, NCB, despite the fact that it was critical to a variety of decisions by NCB, including whether to report Grant to criminal authorities, whether to file reports with various government regulatory

agencies, whether to declare the loan in default and begin recovery efforts, and whether to do any further business with Grant.

22.

Had it known of Grant's wrongful conduct in the Southern Lumber II loan, NCB would have declined all future loan requests by Grant and his companies. Instead of disclosure of this critical information, Defendants withheld it. In the eighteen months that followed, Defendants continued to accept engagements to represent NCB in making additional loans to Grant and his companies.

Orchard Road Loan

23.

A little more than a month after the Southern Lumber II closing, Defendants represented NCB in a real estate acquisition and development loan to another company controlled by Grant, Orchard Road, LLC ("Orchard Road"). Grant's application for the Orchard Road project, and Defendants' handling of the loan closing was virtually identical to that in the Southern Lumber II loan. At no time before or after the closing of the Orchard Road transaction did Defendants reveal to NCB Grant's prior wrongful conduct in the Southern Lumber II loan.

24.

For Orchard Road, Grant represented in his loan application that the

purchase price of the land was \$3.36 million. **See Exhibit 5.** He requested a loan amount sufficient to purchase the land at that price, together with additional funds to cover the cost of development as a subdivision. The total loan request was \$6,259,605.00.

25.

The NCB loan committee was unaware of Grant's wrongful conduct in the Southern Lumber II loan. Had it known of these facts, NCB would have declined all future loan requests by Grant and his companies, including the Orchard Road loan application. Without that information, the NCB loan committee, after investigation and analysis, approved the Orchard Road application, as reflected in NCB's A&D Loan Commitment dated February 24, 2006. **See Exhibit 6.**

26.

The Orchard Road loan was approved for the requested amount of \$6,259,605.00. Defendants were then engaged by NCB to represent only NCB in its making the loan to Orchard Road. **See Exhibit 7.** Defendants were instructed to close the transaction with the use of loan proceeds for land acquisition at a purchase price of \$3.36 million.

27.

Defendants were also instructed that Orchard Road was required to purchase

with its own funds, and post with NCB as additional collateral, a certificate of deposit.

28.

No one at NCB ever communicated any permission for Defendants to deviate from closing the Orchard Road loan in a manner that would authorize Defendants to use loan proceeds to acquire the land at less than the represented land purchase price, or to deviate from the requirement that the borrower purchase with its own funds the certificate of deposit. Furthermore no one at NCB authorized Defendants to disburse any loan proceeds to or for Grant or his companies for the purpose of reimbursing costs allegedly incurred in work on the site, or for real estate commissions.

29.

When NCB approved and made the loan to Orchard Road, NCB was unaware that Grant and Orchard Road had submitted with the loan application falsified contracts for the purchase of the land that overstated the true purchase price of the land. **See Exhibit 8.** Grant and Orchard Road actually had agreements to purchase the property for only \$2,637,650.00, an amount some \$722,350.00 less than the \$3.36 million purchase price represented to NCB in the loan request.

30.

On February 27, 2006, Defendants conducted the closing of the loan to Orchard Road at their offices. The loan closing Settlement Statement dated February 27, 2006, and the receipts and disbursements of funds reflected therein, made it appear that Defendants complied with the instructions of NCB and followed the course of action required by NCB. **See Exhibit 9.** An NCB loan officer attended this closing.

31.

The loan closing Settlement Statement falsely represented that a transaction had occurred with an initial loan advance of \$3,405,018.03 used to purchase the land at a price of \$3.36 million and to pay closing costs. The Settlement Statement also falsely represented that the borrower purchased, with its own funds, a certificate of deposit in the amount of \$625,960.00. Such a transaction would have conformed to the terms of NCB's loan commitment. Defendant Brittain signed this Settlement Statement. The NCB loan officer was given this Settlement Statement, after which he left Defendants' office.

32.

Later that day, on February 27, 2006, Defendants conducted a closing of the purchase of the real estate by Orchard Road. Because Defendants were to be

present representing NCB's interest in the closing of the purchase of the real estate, and NCB had advanced to Defendants' escrow account on February 27, 2006 the initial loan disbursement, no action was required by any NCB representatives at the purchase transaction, and neither NCB's loan officer, nor other NCB representatives, were required to be present at the closing of the purchase of the real estate.

33.

In violation of NCB's instructions, Defendants wrongfully prepared four separate Settlement Statements for the real estate purchases that enabled improper, prohibited uses to be made of NCB's loan funds by Grant and Orchard Road. **See Exhibits 10-13.** The real estate Settlement Statements were also inconsistent with the loan closing Settlement Statement Defendants had prepared. They detailed a series of four related purchase transactions with a combined land purchase price of \$2,637,650.00, which was a materially different combined price than the \$3.36 million price for the land stated in the loan closing Settlement Statement.

34.

The real estate Settlement Statements also reflected that an additional \$722,350.00 that NCB advanced for the land purchase was disbursed by Defendants to one of Grant's companies, Southern Lumber, Inc., for a variety of

charges.

35.

Disbursement of the \$722,350.00 to Southern Lumber Inc. was not for authorized loan purposes and was in breach of NCB's loan commitment and the instructions given to Defendants.

36.

Grant then used \$625,960.00 of the \$722,350.00 of NCB's loaned funds to purchase the certificate of deposit from NCB as additional collateral, instead of making the purchase with his own funds, as required.

37.

Grant left the closing in possession of a check written by Defendants to his company Southern Lumber, Inc. for the remaining amount of the initial loan advance of almost \$100,000.00, another violation of NCB's instructions to Defendants.

38.

The real estate Settlement Statements depicting the details of the actual purchase of the real estate and use of the loan proceeds in the Orchard Road transaction were not given to NCB at the time of the February 27, 2006 closing, or at any time until July 2008, when Defendants produced them after the loan had

gone into default.

39.

As the proximate result of Defendants' wrongful conduct, as described herein, NCB lost over \$5.3 million on the Orchard Road loan. There is no chance of repayment from Grant or Orchard Road, as both are hopelessly insolvent.

40.

At no time after the closing of the Orchard Road loan did Defendants inform NCB of Grant's improper and unauthorized usage of the loan funds. Defendants withheld this information from their client, NCB, despite the fact that it was critical to a variety of decisions by NCB, including whether to report Grant to criminal authorities, whether to file a report with various government regulatory agencies, whether to declare the loan in default and begin recovery efforts, and whether to do any further business with Grant.

41.

Had it known of Grant's wrongful conduct in the Southern Lumber II or Orchard Road loans, NCB would have declined all future loan requests by Grant and his companies. Despite not making disclosures to their client of Grant's conduct, Defendants continued to accept future engagements to represent NCB in making additional loans to Grant and his companies in which Grant engaged in the

same conduct.

Rogers Road Loan

42.

In July 2006, Grant submitted a loan application to NCB for a \$1,902,500.00 loan to another company he controlled, Rogers Road, LLC (“Rogers Road”), to acquire and develop land into a subdivision of lots for single family residences. Without knowledge of Grant’s prior wrongful conduct, NCB’s loan committee, after investigation and analysis, approved the application.

43.

NCB then hired Defendants to represent only NCB in making the loan to Rogers Road. Despite Defendants having witnessed Grant’s wrongful conduct in two prior NCB loans, they failed to inform NCB after they were hired about what they knew, thereby depriving NCB of material information critical to its decision whether to approve the loan to Rogers Road.

44.

On July 26, 2006, Defendants represented NCB in closing the loan to Rogers Road in the amount of \$1,902,500.00. NCB would not have made the Rogers Road loan if Defendants had complied with their professional duty and disclosed to their client Grant’s wrongful conduct in the prior Southern Lumber II and Orchard

Road loans. Grant and Rogers Road defaulted on the loan in 2008.

45.

As the proximate result of Defendants' wrongful conduct and concealment in connection with the Rogers Road loan, NCB lost over \$2 million. There is no chance of repayment from Rogers Road, as it, like Grant, is hopelessly insolvent.

West Panola Loan

46.

In May 2007, Defendants represented NCB in a loan to another company controlled by Grant, West Panola, LLC ("West Panola"). Grant's scheme, his loan application, and Defendants' handling of the loan closing followed the same improper course of conduct as that in the Southern Lumber II and Orchard Road loans.

47.

For West Panola, Grant represented in his loan application that the purchase price of approximately 45 acres of land was \$1,060,000.00. **See Exhibit 14.** He submitted to NCB a falsified sales contract with Henry L. Hand, Sr., as seller, that falsely confirmed that price. **See Exhibit 15.** He requested a loan for an amount sufficient to purchase the land at that price and to develop it. The total loan request was \$2,234,445.00.

48.

The NCB loan committee was unaware of Grant's wrongful conduct in the Southern Lumber II and Orchard Road loans. Had it known of these facts, NCB would have declined all future loan requests by Grant and his companies, including the West Panola loan application. Without that information, NCB, after investigation and analysis, approved the West Panola application. **See Exhibit 16.**

49.

Defendants were then engaged by NCB to represent only NCB in its making the loan to West Panola. The loan as approved was for the requested amount of \$2,234,445.00, later revised to \$2,128,217.00, but subsequently further revised and closed for the amount of \$2,215,300.00.

50.

Defendants were instructed to close the West Panola transaction with the use of loan proceeds based upon a land purchase price of \$1,060,000.00, for which NCB would fund \$848,000.00 toward the purchase price pursuant to the requirement that Grant and West Panola contribute equity of \$212,000.00 from borrower's own funds toward the purchase of the land.

51.

No one at NCB ever communicated any permission for Defendants to

deviate from closing the West Panola loan in a manner that would authorize Defendants to utilize loan proceeds to acquire the land at less than the agreed upon land purchase price, or to waive the requirement that the borrower provide the equity payment from its own funds to be used in the land purchase. No one at NCB authorized Defendants to disburse any loan proceeds to Grant or his companies for purposes not permitted in connection with the \$867,366.50 initial draw.

52.

When NCB approved and made the loan to West Panola, NCB was unaware that Grant and West Panola had misrepresented the purchase price of the land in the loan application submitted to the bank. Contrary to the falsified single land acquisition contract Grant presented to the bank with a false purchase price of \$1,060,000.00, Grant and West Panola actually had an agreement to purchase the property from two separate sellers for an aggregate price of \$770,600.00, an amount some \$289,400.00 less than the misrepresented price.

53.

On May 21, 2007, Defendants conducted the closing of the loan to West Panola at their offices. The loan closing Settlement Statement dated May 21, 2007, and the receipts and disbursements of funds reflected therein, made it appear

that Defendants complied with the instructions of NCB and followed the course of action required by NCB. See **Exhibit 17**. An NCB loan officer attended this closing.

54.

The Settlement Statement falsely represented that a transaction had occurred in which \$848,000.00 would be disbursed toward the purchase of the land with a cost represented to NCB of \$1,060,000.00. Such a transaction would have conformed to the terms of NCB's loan commitment. Defendant Brittain signed this Settlement Statement. The NCB loan officer was given this Settlement Statement, after which he left Defendants' office.

55.

Later that day, on May 21, 2007, Defendants conducted a closing of the purchase of the real estate by West Panola. Because Defendants were to be present representing NCB's interest in the closing of the purchase of the real estate, and NCB had advanced to Defendants' escrow account on May 21, 2007 the initial loan disbursement, no action was required by any NCB representatives at the purchase transaction, and neither NCB's loan officer, nor other NCB representatives, were required to be present at the closing of the purchase of the real estate.

56.

Defendants prepared real estate Settlement Statements that were inconsistent with the loan closing Settlement Statement. The real estate Settlement Statements detailed two land purchase transactions in which no money was contributed by Grant or West Panola. **See Exhibits 18-19.** One of the purchases was for \$645,600.00 for 43.04 acres; the other was for \$125,000.00 for 2.42 acres. The aggregate price of \$770,600.00, funded entirely by NCB, was materially different from both the \$1,060,000.00 amount Defendants were instructed was the price for the land, and from the \$1,060,000.00 beginning point in the calculation that yielded the \$848,000.00 disbursement stated in the loan closing Settlement Statement for land purchase after Grant's contribution of \$212,000.00.

57.

Defendants also wrote and delivered a check to West Panola for \$85,274.96, which was not authorized by NCB's instructions. The real estate Settlement Statements failed to disclose this payment. The fact that Defendants disbursed this money to West Panola was not disclosed to NCB until its attorneys requested in September 2008 a copy of Defendants' escrow account records related to the West Panola loan transaction. **See Exhibit 20.**

58.

The real estate Settlement Statements depicting the details of the actual purchases of the real estate and use of the loan proceeds in the West Panola loan were not given to NCB at the time of the May 21, 2007 closing, or at any time until July 2008, when Defendants produced them after the loan had gone into default.

59.

As the proximate result of Defendants' wrongful conduct, as described herein, NCB lost over \$1.1 million. There is no chance of repayment from West Panola, as it, like Grant, is hopelessly insolvent.

COUNT I

CLAIMS FOR LEGAL MALPRACTICE AND BREACH OF FIDUCIARY DUTY

60.

The allegations of paragraphs 1 – 59 are incorporated herein as if repeated verbatim.

61.

At all times relevant hereto, an attorney-client relationship existed between Defendants and NCB. As a result, Defendants owed NCB the duty to use such standards of skill, prudence and diligence as lawyers of ordinary skill and capacity

commonly possess and exercise in the performance of the tasks which they undertake.

62.

Defendants also owed NCB a fiduciary duty, one aspect of which was the duty to represent NCB with undivided loyalty. The fact that Defendants represented Grant and his companies in other matters did not lessen the standard of care or the fiduciary duty Defendants owed NCB, nor did it permit Defendants to cut corners with providing protection for NCB, even if that worked to the detriment of Grant and his companies.

63.

The conduct of Defendants, as described above, constituted repeated breaches of the professional standard of care owed NCB. Defendants' conduct was negligent and constituted professional malpractice. *See* Affidavit of William D. Montgomery, attached hereto in compliance with O.C.G.A. § 9-11-9.1.

64.

Defendants' negligence and professional malpractice was the proximate cause of losses totaling more than \$6 million that NCB sustained in the Orchard Road, Rogers Road and West Panola transactions.

65.

The conduct of Defendants, as described above, was a breach of the fiduciary duties of fidelity, loyalty and trust owed NCB, and was the proximate cause of the losses described above.

COUNT II

ATTORNEYS FEES AND EXPENSES OF LITIGATION

66.

The allegations of paragraphs 1 - 65 are incorporated herein as if repeated verbatim.

67.

Defendants' conduct, as described above, has been in bad faith, has caused Plaintiff unnecessary trouble and expense, and has been stubbornly litigious, thereby entitling Plaintiff to an award of the attorneys' fees and expenses incurred in the prosecution hereof.

WHEREFORE, on the within and foregoing Complaint, Plaintiff prays that it be awarded relief as follows:

- 1.) On Count I, that judgment be entered for Plaintiff and against

Defendants in such amounts in excess of \$6 million as are shown at time of trial or hearing of the case;

2.) On Count II, that judgment be entered for Plaintiff and against Defendants for such attorneys' fees and expenses of litigation as are shown at time of trial or hearing of the case;

3.) That all claims asserted herein be tried before a jury;

4.) That Plaintiff have such other and further relief as this Court deems just and equitable.

DIETRICK, EVANS, SCHOLZ & WILLIAMS, LLC

By:  _____

Rickman P. Brown
State Bar of Georgia No. 089276
Scott E. Tinnon
State Bar of Georgia No. 712844
Scott A. Schweber
State Bar of Georgia No. 631286
Attorneys for Plaintiff
3490 Piedmont Road, N.E., Ste. 1200
Atlanta, Georgia 30305
(404) 841-9400

CASEY GILSON, P.C.

By: George P. Shingler
George P. Shingler *Ys RFB*
State Bar of Georgia No. 642850
Attorney for Plaintiff
Six Concourse Parkway, Suite 2200
Atlanta, Georgia 30328
(770) 512-0300