

## BofA Gets Pushback In Bid To End Md. Escrow Interest Suit

By **Jon Hill**

Law360 (August 10, 2021, 6:17 PM EDT) -- A former Maryland borrower behind class action litigation accusing Bank of America of flouting that state's mortgage escrow interest law urged a Baltimore federal judge Monday to reject the bank's bid to shut down her case, calling it a meritless and procedurally improper request.

In a lightly redacted brief, plaintiff Cynthia Clark told U.S. District Judge Stephanie Gallagher that Bank of America NA is "brazenly" seeking a summary judgment win in the case despite its continued refusal to pay escrow interest to Maryland borrowers as required by state statute, which the judge previously ruled is not federally preempted for the bank.

"In short, BofA asks this court to deny Maryland borrowers the ability to give this court's order any practical effect," Clark said. "BofA's arguments are without merit, and its motion should be denied."

Clark, who relocated from Maryland to Georgia after filing the suit in 2018, argued that Bank of America also bucked the court's procedural rules when it moved for summary judgment in June.

According to Clark, those rules address situations where both sides in a case plan to seek summary judgment, requiring each to first agree on who will file the opening motion and then providing for consolidated briefing. But Bank of America filed its motion without notice and without an agreement on who would go first, Clark said.

"Plaintiff raised this violation with BofA, who refused to stay the motion. As such, BofA's motion should also be denied on this basis," Clark said in her brief.

Clark, who has also moved for certification of a proposed Maryland borrower class, is one of a number of plaintiffs who have brought multimillion-dollar class action claims against major banks for allegedly ignoring state laws that mandate the payment of interest on funds held in mortgagors' escrow accounts.

Although Bank of America and other banks have argued these state laws are preempted for federally chartered financial institutions like themselves, the Ninth Circuit notably rejected this line of attack in a 2018 decision that other judges have since followed, including Judge Gallagher.

Last year, Judge Gallagher issued a decision concluding that Maryland's escrow interest statute **was not preempted** for Bank of America under federal law and allowing much of Clark's suit to proceed.

When the bank tried to appeal that ruling to the Fourth Circuit, she **shot down the request** and described Clark's case as boiling down to the "two critical facts" that lenders are obligated to pay escrow interest under Maryland law and that Bank of America "concedes" it has not done so for Clark.

In pushing for summary judgment, however, Bank of America has contended there is nevertheless no private right of action for Clark to enforce this escrow interest law.

And while Clark has also claimed the bank's noncompliance with the law amounted to a deceptive practice under Maryland's consumer protection laws, Bank of America argued in June that Clark has not pointed to any misrepresentation in her mortgage documents that could support such a claim.

"There is no evidence that plaintiff relied on any statements made by Bank of America about interest on her escrow account," the bank said in its summary judgment brief, citing Clark's deposition testimony to argue that she did not view escrow interest as an important borrowing consideration for her.

"Each time she refinanced her mortgage with Bank of America, plaintiff never investigated whether she would receive interest on her escrow account," the bank added. "This remains true years after plaintiff filed this lawsuit: She obtained a new mortgage from a different lender in Georgia, yet has no idea still today whether she would receive interest on the escrow account associated with that mortgage loan."

But Clark wrote off such arguments in defending her case Monday, insisting that the escrow interest law does afford her an implied private right to sue. She also accused the bank of trying to "muddy the water" with cherry-picked testimony intended to make itself look better and "falsely suggest" that this interest didn't matter that much to her.

"For instance, BofA asserts that its use of escrow accounts is a 'benefit to the borrowers,'" Clark said. "Regardless of whether plaintiff found her escrow account 'helpful' as BofA contends, that does not change BofA's duty under Maryland law to pay plaintiff interest on her escrowed funds."

A Bank of America spokesperson declined to comment. Counsel for Clark did not immediately return a request for comment Tuesday.

Clark is represented by Hassan A. Zavareei and Anna C. Haac of Tycko & Zavareei LLP, Jonathan M. Streisfeld and Daniel Tropin of Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Todd S. Garber and Bradley F. Silverman of Finkelstein Blankinship Frei-Pearson & Garber LLP, and Jeffrey S. Goldenberg of Goldenberg Schneider LPA.

Bank of America is represented by Mark W. Mosier, Andrew Soukup and Jeffrey Huberman of Covington & Burling LLP as well as by Thomas M. Hefferon and Tierney E. Smith of Goodwin Procter LLP.

The case is Clark v. Bank of America NA, case number 1:18-cv-03672, in the U.S. District Court for the District of Maryland.

--Editing by Patrick Reagan.