THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Marvin H. Dukes, III, Master in Equity

Case No. 2009-CP-07-04301

Daniel L. Junk and Christine H. Junk, — Appellants,

v.

Mortgage Electronic Registration Systems, Inc., and John Does 1-5,000, — Respondents.

Case No. 2009-CP-07-05088

CitiMortgage, Inc., — Respondent,

v.

Daniel Junk a/k/a Daniel L. Junk and Christine H. Junk and Oldfield Community Association, — Defendants,

Of Whom Daniel L. Junk and Christine H. Junk are, — Appellants,

-and-

Daniel L. Junk and Christine H. Junk, — Counterclaim Appellants,

v.

CitiMortgage, Inc. — Counterclaim Respondent.

-and-

Daniel L. Junk and Christine H. Junk, — Third-party Appellants,

v.

Riley Pope & Laney, LLC , Heidi Carey, Esq., Roy Laney, Esq., T. Lowndes Pope, Esq., Bayview Loan Servicing, LLC, MERSCORP, Inc., Mortgage Electronic Registration Systems, Inc., Citi Master Servicing, Citigroup Global Markets Realty Corp., Citigroup Mortgage Loan Trust, Inc., John Does 1-5,000, Jennifer Oakes, Robert G. Hall, Security Connections, Inc., Krystal Hall, Danielle Sterling, ABC Appraisal Group, Inc., Mark A. Ruplinger, Linda Heller, Harry Jones, Colonial Coast Title Agency, Inc., Lawyers Title Insurance Corporation, Corelogic, Inc. and American Home Mortgage Holdings, Inc. Third-party Respondents.

Return to the Motion to Dismiss the Notice of Appeal filed February 20, 2013

Pursuant to Rules 240 of the South Carolina Appellate Court Rules, Appellants, Counterclaim Appellants and Third-party Appellants Daniel L. Junk and Christine H. Junk ("the Junks") respectfully submit their Return to the Motion to Dismiss the Notice of Appeal filed February 20, 2013 ("Motion to Dismiss").

Respondent/Counterclaim Respondent CitiMortgage Inc.'s ("CitiMortgage") instant motion to dismiss should be denied. The motion is misleading the Court and is factually and procedurally incorrect.

In the Notice of Appeal dated March 23, 2012, initial Appellate Case No. 210910, that was consolidated in the instant appeal currently pending before this Court, the Junks specifically state that *"Daniel L. Junk and Christine H. Junk appeal the order of the Honorable Marvin Dukes, III, dated February 22, 2012, that, among other issues, finally decided Appellants' Quiet Title action, Case No. 2009-CP-07-04301 which is currently pending Writ of Certiorari review in the South Carolina Supreme Court."* The March 23 Notice of Appeal, was filed with a copy

of *both* the April 11 Order and the February 22 Order attached.

The April 11 Order consolidated the Junks' quiet title action with Bayview's foreclosure action. *See* Exhibit "A," p. 10, ln 6. It was and is the Junks' position that, because the April 11 Order directed the Junks to "assert whatever claims or issues they contend apply in their Answer to the Foreclosure Action's complaint[,]" which *at the time* was held by this Court and not to be immediately appealable, the *subsequent dismissal* of the Junks' quiet title action a *second time in in the February 22 Order*,[1] is now a final decision that is ripe for appeal as to the quiet title claims.

This Court's and the South Carolina Supreme Court's holding as to immediate appealability of the April 11 Order's first Notice of Appeal is not the issue before the Court in this Motion. The cases were consolidated; the April 11 Order was appealed and dismissed as not immediately appealable; rehearing was denied; Petition for Writ of Certiorari was filed; the Junks followed the direction of the court in its April 11 Order and brought their quiet title claim a second time along with other claims in their Answer to the foreclosure action; the court held a hearing on the quiet title claim a second time; and, in its February 22, 2012, Order that is pending appeal before this Court, dismissed the quiet title claim a second time without leave to amend. *Id*, FN 1. Notice of Appeal was filed a second time on March 23, 2012, and that Notice of Appeal included both the April 11 Order and the February 22 Order, specifically stating that the quiet title claim had now been decided and that it was a final appealable order as to the quiet title claims.; the Junks filed their Initial Brief in this Appeal addressing the April 11 Order quiet title decision; the Supreme Court denied Certiorari review; the Supreme Court filed the

[1] *See* Exhibit "A" February 22 Order dismissing Third-party Complaint, p.14, ¶D, "**D. The Junks' claim to quiet title to their property falls to state a claim for relief.** As previously discussed, the claim to quiet title fails to allege facts supporting a plausible inference that any of the Third-Party Defendants claim or might claim an interest in the Junks' property, and it is thus not sufficient to state a claim for relief against the Third-Party Defendants."

Remittitur; Respondents filed their Initial Return Brief; the Junks filed a Petition to Amend their Initial Brief and a third Notice of Appeal of the April 11 Order; the Court denies the Petition to Amend the Initial Brief. The third Notice of Appeal was filed for jurisdictional purposes because the remittitur to the lower court was without instructions and there are no further proceedings to be had in the quiet title action after its second dismissal by the court.

Third-party proceedings as directed by the court in the April 11 Order have been subsequently decided by the lower court – specifically, the dismissal of the Junks' quiet title action in the February 22, 2012, Order ("February 22 Order") – making the denial of the quiet title action appealable as a result. The second Notice of Appeal of the April 11 Order was dated March 23, 2012, and was filed and accepted by this Court with the Notice of Appeal of the February 22 Order dismissing the Third-party Complaint *which is the instant consolidated appeal.* The February 20 Notice of Appeal is the third filing of a Notice of Appeal of the April 11 Order. It was filed a third time on February 20, 2013, for jurisdictional purposes over the issues decided in the April 11 Order related to the quiet title action,[2] in conjunction with the Junks' Petition to Amend their Initial Brief.

Respondents' Motion to Dismiss misleads the Court in stating that the February 20 Notice of Appeal is the second filing of a Notice of Appeal of the April 11 Order. CitiMortgage admits that a new ruling after the April 11 Order would be appealable before this Court. Respondent's Motion, p. 5 FN4. *There has been a subsequent ruling on the issue* – the February 22 Order dismissing the quiet title a second time brought as a result of the court's direction in the April 11 Order. To dismiss the February 20 Notice of Appeal would preclude the Junks

[2] In addition to dismissing the Junks' quiet title action, the April 11 Order dismissed: i) the Junks' Motion for MERS to Post a Bond; ii) the Junks' Motion for Judgment on the Pleadings and Default Judgment; iii) the Junks' Motions to Dismiss the Foreclosure pursuant to Rules 12(b)(6), 12(b)(8) & 13(a), SCRCP; and granted Bayview's Motion to Substitute CitiMortgage as Plaintiff. *See* Exhibit"B".

appellate review of the lower court's first decision denying the quiet title action.

In conclusion, CitiMortgage's Motion to Dismiss the Notice of Appeal dated February 20, 2013 should be denied and the Junks request that the current deadlines to perfect the pending appeal be held in abeyance pending consideration of this Motion by the Court.

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Signed on behalf of A. Parker Barnes, Jr.
with permission.

Columbus, Ohio
April 20, 2013

Exhibit B

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
Daniel L. Junk and Christine H. Junk,	)	Civil Action No. 2009-CP-07-04301
Plaintiff,	)	
vs.	)	**ORDER**
Mortgage Electronic Registration Systems, Inc., and John Does 1-5000,	)	
Defendants.	)	
Bayview Loan Servicing, LLC	)	Civil Action No. 2009-CP-07- 05088
Plaintiff,	)	
vs.	)	**ORDER**
Daniel Junk a/k/a Daniel L. Junk, Christina H. Junk and Oldfield Community Association,	)	
Defendants.	)	

These related matters came before this Court for hearings on pending motions on December 4, 2010, and February 10, 2011. Both matters were referred to the Beaufort County Master-In-Equity with the consent of the Parties by Orders entered on May 25, 2010. The following motions were heard at the above mentioned hearings:

(a) In Junk v. Mortgage Electronic Registration Systems, Inc., *et al.* ("The Quiet Title Action"):

(1) Defendant Mortgage Electronic Registration Systems, Inc.'s ("MERS") Motion to Dismiss filed Nov. 23, 2009;
(2) Plaintiffs' Motion for MERS to Post an Indemnity Bond filed Nov. 22, 2010; and
(3) Plaintiffs' Motion for Judgment on the Pleadings and Default Judgment filed Jan. 21, 2011.

(b) In Bayview Loan Servicing, LLC v. Daniel Junk *et al.* ("the Foreclosure Action"):

(1) The Junk Defendants' Motion to Dismiss under Rules 13(a) and 12(b)(8) filed Nov. 25, 2009;
(2) The Junk Defendants' Motion to Dismiss under Rule 12(b)(6) filed Nov. 25, 2009; and
(3) Plaintiff's Motion to Substitute CitiMortgage, Inc. as Plaintiff filed Mar. 30, 2010.

On December 4, 2010, Daniel and Christine Junk were represented by A. Parker Barnes, Jr., Esq., and MERS, Bayview Loan Servicing, LLC ("Bayview") and CitiMortgage, Inc. ("CitiMortgage") were represented by Brian P. Crotty, Esq. On January 24, 2011, an Order was entered permitting Daniel Junk to represent himself *pro se* in both actions. At the February 10, 2011 hearing, Mr. Junk appeared *pro se*, while Mrs. Junk was represented by Mr. Barnes, and MERS, Bayview and CitiMortgage were represented by Mr. Crotty. This Court has carefully considered these motions, the supporting memoranda, affidavits, and other materials submitted by the parties and their counsel, the existing record in these matters, and the arguments offered by counsel for the parties. For the reasons stated herein, in the Quiet Title Action, this Court hereby denies Plaintiffs' Motion that MERS Post an Indemnity Bond; denies Plaintiffs' Motion for Judgment on the Pleadings and Default Judgment; and grants MERS' Motion to Dismiss without prejudice. Additionally, for the reasons stated herein, in the Foreclosure Action, this Court denies the Junks' Motions to Dismiss under Rules 13(a), 12(b)(6), and 12(b)(8), and grants Bayview's Motion to Substitute CitiMortgage as Plaintiff in the Foreclosure Action.

FACTUAL BACKGROUND

On November 3, 2006, Daniel and Christina Junk ("the Junks") entered into a mortgage loan transaction ("the Loan") to refinance existing mortgage loans secured by the real property known as 181 Oakfield Way, Okatie, South Carolina. This Loan was evidenced by an adjustable rate note ("the Note") executed by the Junks in favor of American Home Mortgage ("AHM") in the principal amount of $1.2 Million. To secure repayment of the Loan evidenced by the Note, the Junks also executed a mortgage agreement ("Mortgage") expressly granting to MERS and the successors and assigns of MERS the mortgagee interest. The Mortgage disclosed that MERS held the security lien as nominee for Lender and Lender's successors and assigns.

Both the Note and the Mortgage executed by the Junks stated that the Note could be sold by AHM to one or more third parties. Specifically, the first page of the Note contains the following statement:

> I understand that Lender may transfer this Note. Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

Note at ¶ 1. The Mortgage further states the following:

> **20. Sale of Note; Change of Loan Servicer; Notice of Grievance.** The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A Sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written Notice of the Change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing....

Mortgage at ¶ 20.

The Mortgage also identified the role of MERS in this mortgage loan transaction. The first page of the Mortgage stated that "**MERS is the mortgagee under this Security Instrument**" (emphasis in original) and stated that "MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns." Mortgage at p. 1, ¶ (C). The Mortgage further states, under the heading "TRANSFER OF RIGHTS IN THE PROPERTY":

> This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note, and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, **Borrower does hereby mortgage, grant and convey to MERS** (solely as nominee for Lender and Lender's successors and assigns) **and to the successors and assigns of MERS**, the following described property....

Mortgage at p. 3 (emphasis added). Further, the Mortgage states,

> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interest, including, but not limited to, the right to foreclose and sell the Property; ***and to take any action required of Lender***, including, but not limited to, releasing and canceling this Security Instrument.

Id. (emphasis added).

The Junks have acknowledged that at the closing of their loan they were informed that the loan would be serviced by American Home Mortgage Servicing. (Plaintiff's Brief In Opposition to MERS' Mot. To Dismiss ("Pl.'s Opp. Brief") at p. 3). Shortly after the November 3, 2006 closing, AHM sold the Junks' Loan to CitiMortgage, Inc. ("CitiMortgage"). This sale of the Note is acknowledged by the Junks in their filings with the Court. (Pl.'s Opp. Brief at p. 11) (stating that AHM sold the Loan to

CitiMortgage on December 22, 2006). The Junks also admit that in January 2007 they received written notice from AHM that the servicing of this loan had been transferred to CitiMortgage. (Id.). Finally, the Junks admit that, beginning March 1, 2009, they stopped making any payments on the Note. (Pl.'s Opp. Brief at p. 5).

On March 6, 2009, The Junks sent CitiMortgage a letter requesting a copy of the Note and CitiMortgage responded by providing the Junks with both a copy of the Note and a copy of the Mortgage. (Pl.'s Opp. Brief at p. 4). The Junks then sent a letter purporting to be a Qualified Written Request under RESPA to both CitiMortgage and AHM.[1] (Id.). The Junks admit that this letter "requested a full accounting" and information regarding the application of their payments, rather than a statement outlining any alleged errors with the loan. (Id.). CitiMortgage responded to the Junks stating that their letter did not qualify as a Qualified Written Request under RESPA. (Pl.'s Opp. Brief at p. 5).

On March 23, 2009, the Junks sent another purported Qualified Written Request to AHM which included a "Notice of Claim and Rescission" purporting to rescind the Loan transaction. (Am. Compl. in the Quiet Title Action at ¶ 34). This was sent to AHM despite the fact that the Junks were aware that the servicing of the Loan was with CitiMortgage and that AHM had been in bankruptcy since August of 2007. (Pl.'s Opp. Brief at pp. 3-4). In this attempt to rescind the loan, the Junks included language in their letter which asserted that AHM's failure to rebut Plaintiffs' claim would result in the

[1] At this time, the Junks were aware that the ***servicing*** of their loan was handled by CitiMortgage and not American Home Mortgage. See Pl.'s Opp. Brief at p. 3 (acknowledging receipt in January 2007 of written notice that servicing of the Loan had been transferred to CitiMortgage). Thus, because RESPA's provisions regarding Qualified Written Requests apply only to "loan servicers," sending such a letter to AHM more than two years after both the Loan and servicing of the Loan had been transferred was of no effect. 15 U.S.C. § 2605(e); see also DeVary v. Countrywide Home Loans, Inc., 701 F. Supp. 2d 1096, 1106 (D. Minn. 2010) (holding that under RESPA only loan servicers are required to respond to any qualified written request from the borrower).

Plaintiffs purportedly being granted an "unlimited Power of Attorney" and "full authorization" to sign a satisfaction of the obligation. (Pl.'s Opp. Brief at p. 5). On April 20, 2009, apparently based AHM making no response to the March 23, 2009 letter, Daniel Junk recorded a "Satisfaction of Mortgage" in which he declared and represented himself to be an agent of AHM and the "owner and holder" of the Mortgage. (Pl.'s Opp. Brief at p. 7).

Following the Junk's suspension of making payments under the Note in March 2009, CitiMortgage began sending them correspondence and notices regarding their default status. Specifically, letters and notices were sent by CitiMortgage to the Junks on April 1, 2009, May 4, 2009, and May 19, 2009. (Pl.'s Opp. Brief at p. 7). In June of 2009, the servicing rights for the Junks' loan was transferred by CitiMortgage to Bayview Loan Servicing, LLC ("Bayview"). The Junks have acknowledged receiving written notice from CitiMortgage dated June 15, 2009, and written notice from Bayview dated July 1, 2009, informing them that the servicing of the Loan was transferred to Bayview. (Pl.'s Opp. Brief at p. 7). Following this transfer of servicing, Bayview sent the Junks correspondence and notices regarding their default status on July 6, 2009, July 9, 2009 and July 17, 2009. (Pl.'s Opp. Brief at p. 8). On July 21, 2009, the Junks sent a letter to Bayview disputing the debt. (Pl.'s Opp. Brief at p. 8). Bayview responded by identifying itself as the servicer of the loan, providing a loan history for the Plaintiffs' loan and informing them of the date of their default. (Pl.'s Opp. Brief at p. 8).

The Junks filed the Quiet Title Action on September 11, 2009, and amended their Complaint on September 14, 2009. The Defendants named in the Quiet Title Action are

AHM[2], MERS and John Does 1 – 5000. Despite being aware of the sale of the loan to CitiMortgage and the transfer of servicing rights to CitiMortgage and then to Bayview, the Junks excluded as named defendants these entities whom the Junks knew had an interest in this action and with whom the Junks had directly corresponded. Instead, the Junks included "John Doe" defendants who were served by publication.

On September 25, 2009, the Mortgage in this case was assigned by MERS to Bayview. This assignment was recorded on October 19, 2009. Following the recording of that assignment, Bayview initiated the Foreclosure Action on October 26, 2009. In March of 2010, the servicing rights regarding the Junks' Loan were transferred by Bayview back to CitiMortgage, and the Mortgage was assigned by Bayview to CitiMortgage. The assignment of the Mortgage by Bayview to CitiMortgage was recorded on March 19, 2010. Shortly thereafter, on March 30, 2010, a motion was filed in the Foreclosure Action to substitute CitiMortgage as the Plaintiff in that action in the place of Bayview.

ORDER

A. The Junk's Motion to Require MERS to Post an Indemnity Bond is Denied.

Both the Quiet Title Action and the Foreclosure Action center on the Mortgage Loan entered into by the Junks on November 3, 2006. The Junk's motion seeking to have MERS's post an indemnity bond, however, relates not to the November 3, 2006 Mortgage, but instead to a *prior* mortgage dated September 26, 2005 (that was to be paid off as part of the November 3, 2006 mortgage loan transaction). The Junks admit that MERS, which was also the mortgagee on the 2005 Mortgage, filed a satisfaction as to the

[2] AHM was subsequently dismissed by Plaintiffs after it filed a Suggestion of Bankruptcy.

September 26, 2005 Mortgage, but assert that they never received the Note from the 2005 loan transaction marked paid in full or satisfied. Significantly, the Junks do not contend that any attempt by anyone has been made to collect on the 2005 Note in the more than four years since that loan was apparently paid off. The Junks' motion to require MERS to post a bond relating to the 2005 Mortgage is without any basis or support. The 2005 Mortgage has been satisfied of record, and there is no reason to justify this Court requiring MERS to post any bond. Thus, this motion is denied.

B. The Junks' Motion for Judgment on the Pleadings and for Default Judgment in the Quiet Title Action is Denied.

The Junk's Motion for judgment on the pleadings and default judgment is based on their claim that, because MERS has assigned the Mortgage to Bayview, MERS no longer has any interest in the property. Additionally, the Junks contend that Bayview falls within one of the "John Doe" defendants who were served with the Quiet Title Action by publication, and by failing to answer the Quiet Title action's Complaint, Bayview is in default. Because the Junks were aware that Bayview and CitiMortgage may have had an interest in the mortgage loan, and because the Junks would have been easily able to serve both Bayview and CitiMortgage through normal means, neither the inclusion of "John Doe" defendants, nor the use of service by publication was effective as to these entities.

Rule 10(a)(1), SCRCP allows the use of "john doe" parties "[w]hen a party does not know the name of an adverse party." Similarly, Rule 17(e), SCRCP specifically allows "unknown parties" to be named in quiet title actions. As for service on unknown parties, service by publication on "persons unknown" is authorized in quiet title actions. S.C. Code Ann. § 15-67-40. However, "such persons as are known or appear of record to

have some right, title, interest, estate or lien in or on the real property in controversy" must still be individually served. Id. A plaintiff is required to exercise due diligence to identify a method of service on all such parties before resorting to service by publication. S.C. Code Ann. §§ 15-9-710, 15-9-720.

Prior to filing the Quiet Title Action, the Junks had corresponded with both CitiMortgage and Bayview regarding the mortgage loan at issue. The Junks were well aware, based on the default warning letters they admit receiving from these entities, that one or both of them claimed some interest in the mortgage lien. Thus, neither Bayview nor CitiMortgage could be considered to be a proper "John Doe" defendant. Additionally, because the Junk's had been in direct communication with both Bayview and CitiMortgage, service by publication would be improper as to either entity, as such service may only be used where the party cannot be found within the State. Aside from having addresses for both Bayview and CitiMortgage, either entity's agent for service of process could have been ascertained through a simple search of the Secretary of State's database. Therefore, Bayview and CitiMortgage were not proper "John Doe" defendants in the Quiet Title Action, and the Junks' service by publication as to the John Doe defendants was of no effect as to either Bayview or CitiMortgage. Thus, The Junk's Motion for Judgment on the Pleadings and Default Judgment is hereby denied.

C. **MERS' Motion to Dismiss the Quiet Title Action is Granted Without Prejudice.**

As discussed above, Bayview and CitiMortgage were not properly made parties to the Quiet Title Action. Thus, MERS is the sole Defendant in that action. The Mortgage at issue has been assigned by MERS to Bayview, and by Bayview to CitiMortgage.

Additionally, this Court is simultaneously granting the motion substituting CitiMortgage as the Plaintiff in the Foreclosure Action that was initiated by Bayview while it was the servicer of the Loan and the holder of record of the Mortgage. The Junks' Quiet Title Action raises numerous issues challenging the validity and effect of the Mortgage that is the subject of the Foreclosure Action. In the interests of justice and judicial economy, these actions should be consolidated in some manner. Therefore, this Court hereby grants MERS' motion to dismiss the Quiet Title Action without prejudice, and directs the Junks to assert whatever claims or issues they contend apply in their Answer to the Foreclosure Action's complaint.

D. **The Junks' Motion to Dismiss the Foreclosure Action under Rules 13(a) and 12(b)(8) is Denied.**

The Junks contend that the Foreclosure Action should have been asserted by Bayview as a compulsory counterclaim to the Quiet Title Action under Rule 13(a), SCRCP. Additionally, the Junks contend that dismissal is appropriate under Rule 12(b)(8), SCRCP, because the Quiet Title Action constituted another action that was pending between the same parties for the same claim. However, as stated above, neither Bayview nor CitiMortgage were properly made parties to the Quiet Title Action. Therefore, neither Rule 13(a), nor Rule 12(b)(8) are applicable, and the Junk's Motion to Dismiss the Foreclosure action on these grounds is hereby denied.

E. **The Junks Motion to Dismiss the Foreclosure Action Under Rule 12(b)(6) is Denied.**

The Foreclosure Action Complaint asserts three separate causes of action: (1) fraudulent satisfaction of the mortgage, (2) reformation of the deed and/or mortgage, and (3) foreclosure of the mortgage. The Junks have moved to dismiss this Complaint under

Rule 12(b)(6), SCRCP on the following grounds: (1) Bayview lacked standing to bring the action; (2) the Mortgage that is the subject of the action is not a valid mortgage; (3) the Assignment of the Mortgage from MERS to Bayview was invalid; (4) any assignment of the Note and Mortgage was invalid due to AHM's bankruptcy; and (5) MERS' interest in the Mortgage was invalidated when AHM transferred the Note and no assignment of the Mortgage was recorded. None of these grounds provides a basis for dismissal of the Foreclosure Action Complaint under Rule 12(b)(6).

"In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." Cole Vision Corp. v. Hobbs, 384 S.C. 283, 286, 680 S.E.2d 923, 924 (Ct. App. 2009). Copies of documents attached as exhibits to a pleading are a part of the pleadings. S.C.R. Civ. P. 10(c). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Id.

The Complaint includes three causes of action. Each claim expressly includes allegations sufficient to meet all required legal elements under South Carolina law, and satisfies the standard under Rule 8, especially when viewed in the required light most favorable to the Plaintiff, and with every doubt resolved in its behalf. The Junks' Motion does not allege that Plaintiff has improperly pleaded the referenced causes of action, and Plaintiff's Complaint can certainly be read to state valid claims for relief.

The Junks contend that Bayview lacked standing to bring the Foreclosure Action because it was not the holder of the Note. At the time the Foreclosure Action was initiated by Bayview, it was the servicer of the Junks' loan. In the case of In re

Woodberry, 383 B.R. 373, 379 (D.S.C. Bankr. 2008), the U.S. District Court for the District of South Carolina held "that a loan servicer, with a contractual duty to collect payments and foreclose mortgages in the event of default, has standing to move for relief from stay in the Bankruptcy Court." Subsequent decisions in the District of South Carolina have extended this to apply where the servicer did not hold the note. Harris v. Option One Mortgage Corp., 261 F.R.D. 98, 103-04 (D.S.C. 2009); In re Dendy, 396 B.R. 171, 178 (D.S.C. 2008) (noting that the servicer was the general agent for the holder of the mortgage by servicing the loan and collecting the loan payments). This view follows the holdings in other jurisdictions that loan servicers have standing to bring foreclosure actions by virtue of their pecuniary interest in collecting payments under the terms of the note and mortgage. In re Taiman, 48 B.R. 250, 252 (E.D. Pa. 1985) (servicer is real party in interest under Rule 17(a) for relief from stay); Bankers Trust v. 236 Beltway, 865 F. Supp 1186 (E.D. Va 1994) (both lender and servicer have standing to foreclose even if servicer is not the holder of the mortgage); In re O'Dell, 268 B.R. 607, 618 (N.D. Ala. 2001) aff'd 305 F.3d 1297 (11th Cir,. 2002) (servicer is real party in interest in proceedings involving loans which it services); In re Miller, 320 B.R. 203 (N.D. Ala 2005) (servicer permitted to seek relief from stay). Thus, the Junk's contention that Bayview lacks standing is without merit.

Even if Bayview had lacked standing to bring the Foreclosure action, any issue as to standing is resolved by the substitution of CitiMortgage as the Plaintiff. The original Note, bearing an endorsement from AHM to CitiMortgage, is in CitiMortgage's possession. Additionally, CitiMortgage is the current assignee of record of the Mortgage. Rule 17(a), SCRCP provides that "[n]o action shall be dismissed on the ground that it is

not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or joinder or substitution of, the real party in interest." Thus, any issue as to standing is resolved by CitiMortgage's substitution as Plaintiff in this action.

The Junks' remaining grounds are not properly applicable to a Rule 12(b)(6) motion. This Court must consider the Complaint in the light most favorable to the plaintiff, and with every doubt resolved in its behalf. Under this standard, the Plaintiff has stated facts sufficient to establish the causes of action asserted. Therefore, the Junks' Motion to dismiss under Rule 12(b)(6) is hereby denied.

F. **Bayview's Motion to Substitute CitiMortgage as the Plaintiff in the Foreclosure Action is Granted.**

Bayview has moved, pursuant to Rule 25(c) to substitute CitiMortgage as the Plaintiff in the Foreclosure Action. This motion is based on the assignment of the Mortgage from Bayview to CitiMortgage. Additionally, substitution of CitiMortgage is also appropriate under Rule 17(a) based upon CitiMortgage's possession of the original Note bearing an endorsement to CitiMortgage and the fact that it is now also the holder of record of the Mortgage. This Court hereby grants the motion to substitute CitiMortgage as the Plaintiff in the Foreclosure Action and orders that the Foreclosure Action be hereinafter captioned as: "CitiMortgage, Inc. v. Daniel L. Junk, Christina H. Junk and Oldfield Community Association."

CONCLUSION

For the reasons stated herein, in the Quiet Title Action, this Court hereby: (a) denies Plaintiffs' Motion that MERS Post an Indemnity Bond; (b) denies Plaintiffs' Motion for Judgment on the Pleadings and Default Judgment; and (c) grants MERS'

Motion to Dismiss without prejudice. Because the Quiet Title Action has now been dismissed any other motions pending therein are hereby denied as moot. As for the Foreclosure Action, for the reasons stated herein, this Court hereby: (a) denies the Junks' Motions to Dismiss under Rules 13(a), 12(b)(6), and 12(b)(8); and (b) grants Bayview's motion to substitute CitiMortgage as Plaintiff. Pursuant to Rule 12(a), SCRCP, the Junks shall have fifteen (15) days from the their receipt of this Order to file a responsive pleading to the Foreclosure action Complaint, unless a Scheduling Order designating a different timeframe is entered by this Court.

IT IS SO ORDERED

The Honorable Marvin H. Dukes, III
Beaufort County Master-In-Equity

April 11, 2011

Exhibit A

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

Case No. 2009-CP-07-05088

CitiMortgage, Inc.,

Plaintiff,

v.

Daniel L. Junk and Christine H. Junk, et al.,

Defendants,

Daniel L. Junk and Christine H. Junk,

Counterclaim Plaintiffs,

v.

CitiMortgage, Inc.

Counterclaim Defendant.

Daniel L. Junk and Christine H. Junk,

Third-Party Plaintiffs,

v.

Riley Pope & Laney, LLC, Heidi Carey, Esq., Roy Laney, Esq., T. Lowndes Pope, Esq., Bayview Loan Servicing, LLC, Merscorp, Inc., Mortgage Electronic Registration Systems, Inc., Citi Master Servicing, Citigroup Global Markets Realty Corp., Citigroup Mortgage Loan Trust, Inc., John Does 1-5,000, Jennifer Oakes, Robert G. Hall, Security Connections, Inc., Krystal Hall, Danielle Sterling, ABC Appraisal Group, Inc., Mark A. Ruplinger, Linda Heller, Harry Jones, Colonial Coast Title Agency, Inc., Lawyers Title Insurance Corporation, Corelogic, Inc. and American Home Mortgage Holdings, Inc.,

Third-Party Defendants.

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JEAN MIDDLEBEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

ORDER

GRANTING MOTIONS TO DISMISS THIRD-PARTY COMPLAINT,

DENYING MOTION TO JOIN ALL THIRD-PARTY DEFENDANTS AS COUNTERCLAIM DEFENDANTS,

AND

GRANTING MOTIONS FOR RELIEF FROM DEFAULT

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INTRODUCTION

On September 14, 2011 and January 17, 2012, the Court held hearings on the following motions[1]:

1. The Motion to Dismiss filed by Riley Pope & Laney, LLC, Heidi Carey, Esq., Roy Laney, Esq., and T. Lowndes Pope, Esq.;

2. The Motion to Dismiss, Strike, and/or Sever the Third-Party Complaint filed by Mortgage Electronic Registration Systems, Inc., MERSCORP, Inc., Citi Master Servicing, Citigroup Global Markets Realty Corp., Citigroup Mortgage Loan Trust, Inc., and Jennifer Oakes;

3. The Motion to Strike and/or Sever the Third-Party Complaint filed by CitiMortgage, Inc.;

4. The Motion to Dismiss, Strike, and/or Sever the Third-Party Complaint filed by Bayview Loan Servicing, LLC and Robert G. Hall;

5. The Motion to Dismiss filed by Corelogic, Inc.;

6. The Motion for Relief from the Entry of Default filed by Colonial Coast Title Agency, Inc.;

7. The Motion to Set Aside Entry of Default filed by Linda Heller and Harry Jones; and

8. The Motion to Join All Third-Party Defendants as Counterclaim Defendants filed by Daniel L. Junk and Christine H. Junk.

For the reasons set forth herein, the motions to dismiss the Third-Party Complaint are granted on both procedural and substantive grounds, the Junks' motion to join all Third-Party Defendants as counterclaim defendants is denied, and the motions for relief from default are granted.

FACTUAL BACKGROUND

This matter began as a simple foreclosure action filed against the Junks on October 26, 2009 by Bayview Loan Servicing, LLC ("Bayview").[2] The foreclosure action is based upon a

[1] A motion to set aside the entry of default filed by Third-Party Defendants Security Connections and Krystal Hall was also heard at the September 14, 2011 hearing and was granted by separate Order of this Court.

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$1,200,000.00 loan evidenced by a Note and Mortgage given by the Junks dated November 3, 2006. By Order of this Court filed April 12, 2011, CitiMortgage, Inc. ("CitiMortgage") was substituted as the Plaintiff in the foreclosure action. On June 16, 2011, the Junks filed their First Amended Answer, Counterclaims, and Third-Party Complaint.[3] In addition to asserting various counterclaims against CitiMortgage, this pleading also included a Third-Party Complaint purporting to assert claims for (a) civil conspiracy; (b) slander of title; (c) legal professional negligence; and (d) quiet title against 23 named Third-Party Defendants.[4] The following is a list of the Third-Party Defendants along with a summary of how they are alleged to have been involved with the mortgage loan that is the subject of the underlying foreclosure action:

- Riley Pope & Laney, LLC is the law firm that originally represented Bayview and that filed this foreclosure action;
- Heidi Carey, Esq., Roy Laney, Esq., and T. Lowndes Pope, Esq. are attorneys with Riley Pope & Laney, LLC who were involved in representing Bayview in this lawsuit;
- Bayview Loan Servicing, LLC was the original Plaintiff in this action and was the servicer of the Junks' loan and the assignee of the Mortgage at the time the foreclosure action was filed;
- Mortgage Electronic Registration Systems, Inc. ("MERS") was the Mortgagee, acting as the nominee for the lender and the Lender's successors and assigns, under the terms of the Junks' Mortgage;
- MERSCORP, Inc. is the parent corporation of MERS;

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[2] Bayview was the servicer of the Junks' mortgage loan at the time the foreclosure action was filed.

[3] The Junks' original Answer, Counterclaims and Third-Party Complaint was filed but never served on any party.

[4] The third-party claim for legal professional negligence was asserted only against Riley Pope & Laney, LLC, Heidi Carey, Esq., Roy Laney, Esq., and T. Lowndes Pope, Esq. The third-party claim for slander of title was asserted against the foregoing parties and Bayview, MERS Jennifer Oakes, Robert G. Hall, SCI, Krystal Hall, Danielle Sterling, Colonial Coast, Lawyers Title, CoreLogic, and AMHI. The other two claims appear to have been asserted against all of the named Third-Party Defendants.

- CitiMaster Servicing is a division of CitiMortgage and is alleged to oversee servicing activities;

- Citigroup Global Markets Realty Corp. is alleged to be a party to the Master Loan Purchase and Servicing Agreement under which the Junks' loan was purchased by Citigroup from the original lender;

- Citigroup Mortgage Loan Trust, Inc. is alleged to be involved in the securitization of mortgage loans and is further alleged to have been a purchaser of the Junks' loan;

- Jennifer Oakes is an employee of CitiMortgage who previously submitted two affidavits in this matter;

- Robert G. Hall is an employee of Bayview who executed the mortgage assignment from MERS to Bayview, and the mortgage assignment from Bayview to CitiMortgage;

- Security Connections, Inc. ("SCI") is alleged to have recorded a mortgage satisfaction relating to a ***prior*** mortgage[5] given by the Junks;

- Krystal Hall is alleged to be an employee of Security Connections, Inc. who executed the mortgage satisfaction relating to the ***prior*** mortgage given by the Junks;

- Danielle Sterling is alleged to be a former employee of the original lender (American Home Mortgage) whose name appears on the indorsement of the Note in this matter;

- ABC Appraisal Group, Inc. is alleged to have provided an appraisal of the property that is the subject of the Junks' mortgage loan;

- Mark A Ruplinger, Harry Jones, and Linda Heller are alleged to be employees of ABC Appraisal Group, Inc., who were involved in the Junks' appraisal;

- Colonial Coast Title Agency, Inc. ("Colonial Coast") is alleged to be the title insurance agency that issued a title insurance commitment relating to the mortgage loan that is the subject of this action;

- Lawyers Title Insurance Corporation ("Lawyers Title") is alleged to be the title insurance company that issued a title insurance policy relating to the mortgage loan that is the subject of this action;

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[5] The mortgage loan that is the subject of this action was made on November 3, 2006. The mortgage to which Security Connections is alleged to have been involved was given on September 26, 2005 and is a separate and distinct mortgage loan from the mortgage loan that is the subject of this foreclosure.

- CoreLogic, Inc. is alleged to provide mortgage processing services, settlement services, default solutions, and servicing and technology solutions to CitiMortgage, including printing and delivering draft affidavits; and

- American Home Mortgage Holdings, Inc. ("AMHI"), is alleged to have been the MERS member for which MERS was acting as nominee rather than American Home Mortgage.

ANALYSIS

I. THE JUNKS' THIRD-PARTY CLAIMS ARE PROCEDURALLY IMPROPER.

The Junks' Third-Party Complaint is an improper attempt to assert claims against the Third-Party Defendants that are not derivative of the Junks' liability to CitiMortgage.

A defendant may join other persons to an action as third-party defendants only in specific, limited circumstances. Rule 14(a), SCRCP, states that "a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." "Under Rule 14, the third-party plaintiff must have a substantive claim against the third-party defendant founded upon ***derivative liability.***" *First Gen. Servs. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (1994) (emphasis added). Thus, the liability of the third-party defendants must be ***dependent*** upon the original action such that "[t]he outcome of the principle claim must impact the third-party defendant's liability." *Id.* A prerequisite to the assertion of a third-party claim under Rule 14 is "a legal theory based on indemnification, contribution, express or implied warranty, subrogation, indemnity contract, or some other derivative liability theory that permits the defendant to shift some or all of his liability to the impleaded party. Impleader is improper without a substantive right to shift liability to the third-party defendant." JAMES F. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 122 (3d ed. 2010).

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Applied to this case, third-party practice is proper only if the Third-Party Defendants would be liable to the Junks for all or part of CitiMortgage's claims against the Junks. The foreclosure action centers upon the Junks' Note and Mortgage dated November 3, 2006. The Junks do not allege, and cannot plausibly allege, that any of the Third-Party Defendants are liable to pay the Junks' mortgage debt. Therefore, the outcome of CitiMortgage's claim for foreclosure of the Note and Mortgage does not, and in the circumstances of this case could not, in and of itself, create any liability by the Third-Party Defendants. The Junks' claims against the Third-Party Defendants are not based on any theory of derivative or secondary liability, such as indemnity or guaranty, and accordingly cannot be asserted as third-party claims. For these reasons, the Court grants the motions to dismiss the Third-Party Complaint in its entirety as procedurally improper.

II. THE JUNKS' THIRD-PARTY CLAIMS CANNOT BE ASSERTED AS COUNTERCLAIMS.

In an apparent attempt to avoid the procedural defects in their third-party claims, the Junks have moved to join all Third-Party Defendants as counterclaim defendants. Granting this motion would be equivalent to dismissing the Junks' third-party claims and then allowing them to re-join the Third-Party Defendants as counterclaim defendants for the purpose of asserting the third-party claims against them as counterclaims. For the reasons that follow, the Court concludes that the Junks should not be allowed to do so.

The Junks' joinder motion is based on Rules 13(h), 14(c), 19, and 20, SCRCP. Rule 13(h), SCRCP, states, "Parties other than those to the original action *may* be made parties to a counterclaim or cross-claim in accordance with Rules 19 and 20." (Emphasis added.) Rule 14(c) similarly provides that "the Court *may* order that a party designated as a third-party

defendant be joined as a plaintiff or defendant under Rules 19 or 20, ***when the ends of justice and efficiency in proceedings would be served thereby***...." (Emphasis added.)

Significantly, both Rules 13(h) and 14(c) give the Court discretion in deciding joinder of parties. As stated by Professor Flanagan,

> Impleader is always discretionary with the Court. . . . [T]he court must balance the desire to avoid circularity of action against the delay and prejudice that may occur to the existing parties. In particular the joinder of additional parties and claims may unduly complicate the original action and justify severing the impleaded claims and parties.

JAMES F. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 124 (3d ed. 2010). Thus, neither Rule 13(h) nor Rule 14(c) ***requires*** joinder of additional parties or provides an independent method for exercising the court's discretion in considering joinder separate from the standards set forth in Rules 19 and 20.

A. The Third-Party Defendants are not "necessary" parties to this foreclosure action.

Rule 19, SCRCP, allows a person to be impleaded as a third-party in an action only if "(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject matter of the action . . . ." Rule 19(a) SCRCP.

In this case, the Third-Party Defendants do not need to be joined as parties in order for CitiMortgage to obtain complete relief in the foreclosure action, nor are they required for the Junks to obtain complete relief under any of their defenses or counterclaims against CitiMortgage. Until the Junks began adding third-party defendants, this action was merely a typical residential mortgage foreclosure case. In such an action, the only necessary parties are persons who claim an interest in the note, persons who are liable for the debt secured by the mortgage, and persons who have or claim an interest in the real property encumbered by the

mortgage, either by holding title to the property or by claiming a lien on the property. None of the Third-Party Defendants are (or can claim to be) the current holder of the Note and Mortgage, and none claim (or are alleged to have) any obligation to pay the Note.

In their fourth cause of action to quiet title, the Junks allege, on information and belief, that the Third-Party Defendants claim or might claim an interest in the property adverse to the Junks. (Third-Party Complaint, p. 149, ¶ 337.) These unsupported allegations alone are not enough to establish that the Third-Party Defendants have an interest in the property. Rule 8(a)(2) of the South Carolina Rules of Civil Procedure is more demanding and requires that a pleading contain "a short and plain statement of the *facts* showing that the pleader is entitled to relief." (Emphasis added.) Similarly, the Junks have not alleged any *facts* in their claims for civil conspiracy, slander of title, and negligence supporting a plausible inference that any of the Third-Party Defendants could claim or might claim an interest in the Junks' property. Given the lack of factual allegations, and especially since this is simply a mortgage foreclosure action, there is no basis to conclude that, in the absence of the Third-Party Defendants, complete relief cannot be accorded among those already parties.

Moreover, the fact that the Junks may contend that some or all of the Third-Party Defendants are joint tortfeasors with CitiMortgage does not render them "necessary" parties under Rule 19(a)(1). A joint tortfeasor is not required to be joined because the existing defendant is jointly and severally liable and accords the plaintiff complete relief. *South Carolina Dep't of Health & Envtl. Control v. Fed-Serv Indus., Inc.*, 294 S.C. 33, 362 S.E.2d 311 (Ct. App. 1987).

The requirements of Rule 19(a)(2) are also not satisfied in this case, because, as demonstrated above, none of the Third-Party Defendants claim any interest relating to the subject matter of the action, that is, the Note, the Mortgage, and the mortgaged property.

In sum, the conclusory allegations in the Junks' Third-Party claims are insufficient to establish that the Third-Party Defendants are necessary parties to this action or have an interest in the subject property or this mortgage foreclosure action sufficient to warrant joinder under Rule 19(a)(1) or (2).

B. There is no appropriate basis for permissive joinder of the Third-Party Defendants.

Rule 20(a), SCRCP, states, "All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action."

Here, CitiMortgage's claims against the Junks arise out of the mortgage loan dated November 3, 2006, and the Junks' failure to pay the sums owed when due. The Junks' claims against the Third-Party Defendants arise out of a later civil action, commenced on October 26, 2009, to foreclose the mortgage securing the Junks' debt. The claims that the Junks desire to assert are independent claims, arising out of a completely separate transaction or occurrence than CitiMortgage's claims, and nothing would be gained by adding parties to this action for the sole purpose of adjudicating the Junks' claims. On the contrary, adding parties for that purpose would be confusing and inefficient and would serve only to complicate and further delay the foreclosure action that has already been significantly delayed.

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For the foregoing reasons, the Junks' motion to join all Third-Party Defendants as counterclaim defendants is denied on procedural grounds.

III. THE JUNKS' THIRD-PARTY CLAIMS FAIL AS A MATTER OF LAW.

A. The Junks' claim for civil conspiracy is an improper attempt to assert a claim for malicious prosecution of a civil action that is still pending.

Although the Junks have labeled their first third-party claim as a cause of action for civil conspiracy, it is substantively a claim for malicious prosecution. The elements of a cause of action for malicious prosecution are (1) institution or continuation of original judicial proceedings, either civil or criminal; (2) by, or at the instance of, the defendant; (3) termination of such proceedings in his favor; (4) malice in instituting the proceedings; (5) lack of probable cause; and (6) resulting injury or damage. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 441, 629 S.E.2d 642, 651 (2006); *McBride v. Sch. Dist.*, 389 S.C. 546, 565, 698 S.E.2d 845, 855 (Ct. App. 2010).

In their first third-party claim, the Junks expressly or implicitly allege five of the six elements of a cause of action for malicious prosecution, except, of course, termination of the proceedings in their favor. Specifically, the Junks allege that this claim arises from "the filing of a malicious and knowingly fraudulent foreclosure action against the Junks." (Junks' Answer, etc. p. 90, ¶ 211.) They further allege that as a result of the "numerous malicious and knowingly false and fraudulent pleadings," they have suffered "money damages, special damages, statutory damages, and punitive damages." (*Id.* ¶¶ 212-13.) The Junks are thus clearly alleging that CitiMortgage's foreclosure action against them has been maliciously prosecuted and that they have been damaged by such prosecution.

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The labels the Junks have applied to their third-party claims are not determinative of the legal nature of those claims. Rule 8(f), SCRCP, states, "All pleadings shall be so construed as to do substantial justice to all parties." This rule requires that a court review an entire pleading and probe the substance of its allegations to determine the true nature of a claim alleged. *See Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 437, 673 S.E.2d 448, 458 (2009) ("Our courts have held that it is the substance of the requested relief that matters regardless of the form in which the request for relief was framed.") (internal citations omitted); *Parrish v. Allison*, 376 S.C. 308, 327, 656 S.E.2d 382, 392 (Ct. App. 2007) ("In construing a complaint or a responsive pleading, the court must review the entire pleading."); *accord General Dynamics Corp. v. United States*, 139 F.3d 1280, 1283 (9th Cir. 1998) (holding that a court should not accept labels of claims to ascertain the nature of a cause of action).

In probing the substance of the claims in this case, the Court finds that the claim for civil conspiracy is really a claim for malicious prosecution. Construed as a claim for malicious prosecution, the Junks' first third-party claim fails as a matter of law, because the action the Junks allege is being maliciously prosecuted has not been terminated in their favor.[6] As noted above, a key requirement for a claim of malicious prosecution is that it cannot be asserted unless and until the prosecution on which the claim is based has been terminated in favor of the person asserting the claim. *Law*, 368 S.C. at 435, 629 S.E.2d. at 648.

For this reason, the Junks' claim for civil conspiracy is dismissed, and it cannot be re-asserted as a counterclaim.

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[6] For this reason, the Court's April 11, 2011 Order dismissing the Junks' originally filed quiet title complaint has not prejudiced the Junks. If the Third-Party Defendants have information that may be relevant to the claims and defenses of the foreclosure action, then that information may be sought by the Junks through normal Third-Party discovery available under the South Carolina Rules of Civil Procedure.

B. The Junks' claim for slander of title fails because it is based on the filing of documents that are absolutely privileged.

The Junks allege that certain Third-Party Defendants have "slandered the Junks' title to their property in Beaufort County in filing and recording false and malicious documents . . . falsely and maliciously publicizing that the Junks' property is allegedly in foreclosure . . . ." (Junks' Answer, etc. p. 130, ¶ 306.) In support of this claim, the Junks refer to notices of lis pendens filed by certain Third-Party Defendants. (*Id.* at 132-33, ¶307(e) and (g).) The Junks further allege that certain Third-Party Defendants filed in this court "a joint motion to substitute Plaintiff with a supporting affidavit from Jennifer Oakes." (*Id.* at 134, ¶ 307(j).) Finally, the Junks allege that the same Third-Party Defendants filed the supplemental affidavit of Jennifer Oakes in support of the motion. (*Id.* ¶ 307(k).) These allegations will not support a claim for slander of title.

The filing of a notice of lis pendens filed in conjunction with an action involving the same real estate is absolutely privileged in South Carolina and cannot form the basis of an action for slander of title. *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 32, 567 S.E.2d 881, 897 (Ct. App. 2002). Similarly, "defamatory matter contained in pleadings filed according to law in a court having jurisdiction, if relevant and pertinent to the issues in the case, is absolutely privileged." *Redfearn v. Pusser*, 276 S.C. 506, 506-07, 280 S.E.2d 206,___ (1981).

The documents on which the Junks base their third-party claim for slander of title are absolutely privileged and will not support the claim. The notice of lis pendens was filed in conjunction with the foreclosure action involving the same property. The motion to substitute Plaintiff and the supporting affidavits were all filed according to law and contained information relevant and pertinent to the issues in the case. The Court finds that these filings were proper

and cannot for the basis of an action for slander of title. The Junks' second third-party claim is therefore dismissed, and it cannot be re-asserted as a counterclaim.

C. The Junks' claim for professional negligence fails as a matter of law.

The Junks' third-party claim for professional negligence is against Third-Party Defendants Riley Pope & Laney, LLC, Heidi Carey, Roy Laney, and T. Lowndes Pope (the "RPL Parties").[7] This third-party claim alleges that in the course of representing Third-Party Defendants Bayview Loan Servicing, LLC and Mortgage Electronic Registration Systems, Inc. in a mortgage foreclosure action against the Junks, the RPL Parties breached duties owed to the Junks. (Junks' Answer, etc. pp. 135-48, ¶¶ 314-31.) The Junks' claim for professional negligence lacks merit as a matter of law.

"An attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client." *Gaar v. North Myrtle Beach Realty Co., Inc.*, 287 S.C. 525, 528-29, 339 S.E.2d 887, 889 (Ct. App. 1986). Litigation is typically conducted in an attorney's professional capacity and not in, or for, his own personal interest. *Id.* at 529, 339 S.E.2d at 889. "In his professional capacity the attorney is not liable . . . for injury allegedly arising out of the performance of his professional activities." *Id.*

An attorney-client relationship did not exist between the RPL Parties and the Junks at any time relevant to this action, and consequently no duty was owed to the Junks. Nor did the Third-Party Complaint allege that such a duty was breached by the RPL Parties. Indeed, none of the South Carolina Rules of Professional Conduct cited in the Third-Party Complaint (i.e., 1.1, 3.1,

[7] The Junks also brought a claim against the RPL Parties for Sanctions for Fraud Upon the Court, Filed November 24, 2010, that was dismissed by this court during a hearing which took place on April 9, 2011.

3.3, 4.1, 5.1, 5.2, and 11)[8] establish an independent duty owed to the Junks by the RPL Parties. For these reasons, the Junks' third-party claim of legal professional negligence is dismissed, and it cannot be re-asserted as a counterclaim.

D. The Junks' claim to quiet title to their property fails to state a claim for relief.

As previously discussed, the claim to quiet title fails to allege facts supporting a plausible inference that any of the Third-Party Defendants claim or might claim an interest in the Junks' property, and it is thus not sufficient to state a claim for relief against the Third-Party Defendants.

IV. THE MOTIONS FOR RELIEF FROM THE ENTRY OF DEFAULT ARE GRANTED.

Third-Party Defendants Linda Heller, Harry Jones, and Colonial Coast have each filed motions to set aside the entry of default. The Court grants the motions.

A court may set aside an entry of default for "good cause shown." Rule 55(c), SCRCP. The standard for relief from the entry of default under Rule 55(c) is less rigorous than the standard for relief from a default judgment under Rule 60(b). *Sundown Operating Co., Inc. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009); *see also Top Value Homes, Inc. v. Harden*, 319 S.C. 302, 306, 460 S.E.2d 427, 429 (Ct. App. 1995) (explaining that under Rule 55(c), courts exercise a "a broader, more liberal discretion than otherwise would be exercised under Rule 60(b)"). To demonstrate "good cause," a party must "provide an explanation for the default and give reasons why vacation of the default entry would serve the

[8] The same rules are also cited in the Affidavit of attorney Thomas A. Pendarvis, which was attached to the Third-Party Complaint to support the professional negligence claim. The court respectfully disagrees with Mr. Pendarvis' interpretation of these rules as they relate to this set of facts.

interests of justice." *Sundown*, 383 S.C. at 607, 681 S.E.2d at 888. "Once a party has put forth a satisfactory explanation for the default, the trial court must also consider (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." *Id.* at 607-08, 681 S.E.2d at 888. "A motion under Rule 55(c) is addressed to the sound discretion of the trial court." *Id.* at 608, 681 S.E.2d at 888.

Based on the written materials submitted in this case, including affidavits, as well as the arguments of counsel at the hearing, the Court finds that Linda Heller, Harry Jones, and Colonial Coast have each established "good cause" for relief from the entry of default. Additionally, the moving parties acted promptly in filing the motions for relief and each has set forth meritorious defenses. Moreover, the Junks are unable to show how they are prejudiced if relief from the entry of default is granted. Mr. Junk admitted at the hearing that there was no prejudice as to Heller and Jones, and he was unable to establish any prejudice aside from the minimal delay resulting from Colonial Coast being granted relief from default. "Prejudice is not significant unless it is something greater than would be experienced by the ordinary litigant in being required to litigate on the merits. Some delay will necessarily result when a default is reopened, but delay in gaining judgment is not considered by itself, to be undue prejudice that would justify denying relief." 10 James Wm. Moore et al., *Moore's Federal Practice* ¶ 55.70 [2][c] (3d. ed. 2010).

For these reasons, as well as those stated in the motions, memoranda, supporting affidavits, and at the hearing, the Court grants the motions to set aside the entry of default.[9]

[9] At the hearing held on January 17, 2012, Mr. Junk requested that this Court "certify" the ruling granting Colonial Coast's motion for relief from the entry of default pursuant to Rule 54(b), SCRCP. This request is now moot given that the Third-Party Complaint has been dismissed.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Marvin H. Dukes, III, Master in Equity

Case No. 2009-CP-07-04301
Case No. 2009-CP-07-05088

Daniel L. Junk and Christine H. Junk, — Appellants,

v.

Mortgage Electronic Registration Systems, Inc., and John Does 1-5,000, — Respondents.

CitiMortgage, Inc., — Respondent,

v.

Daniel Junk a/k/a Daniel L. Junk and Christine H. Junk and Oldfield Community Association, — Defendants,

Of Whom Daniel L. Junk and Christine H. Junk are, — Appellants,

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Daniel L. Junk and Christine H. Junk, — Counterclaim Appellants,

v.

CitiMortgage, Inc. — Counterclaim Respondent.

Daniel L. Junk and Christine H. Junk, — Third-party Appellants,

v.

Riley Pope & Laney, LLC , Heidi Carey, Esq., Roy Laney, Esq., T. Lowndes Pope, Esq.,

Bayview Loan Servicing, LLC, MERSCORP, Inc., Mortgage Electronic Registration Systems, Inc., Citi Master Servicing, Citigroup Global Markets Realty Corp., Citigroup Mortgage Loan Trust, Inc., John Does 1-5,000, Jennifer Oakes, Robert G. Hall, Security Connections, Inc., Krystal Hall, Danielle Sterling, ABC Appraisal Group, Inc., Mark A. Ruplinger, Linda Heller, Harry Jones, Colonial Coast Title Agency, Inc., Lawyers Title Insurance Corporation, Corelogic, Inc. and American Home Mortgage Holdings, Inc.

Third-party Respondents.

PROOF OF SERVICE

I certify that I have served the Appellants', Counterclaim Appellants' and Third-party Appellants' Return to the Motion to Dismiss the Notice of Appeal date February 20, 2013, on counsel listed below by depositing a copy of it in the United States Mail, postage prepaid, on April 20, 2013.

April 20, 2013

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