THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Master-in-Equity

The Honorable Marvin H. Dukes, III

Case No. 2009-CP-07-04301

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

v.

Mortgage Electronic Registration Systems, Inc., and John Does 1-5000,..... Respondents.

Case No. 2009-CP-07-05088

Bayview Loan Servicing, LLC, ... Respondent,

v.

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

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

Reply to the Appellants' Supplemental Return to the Motion to Dismiss Notice of Appeal filed February 20, 2013

Pursuant to Rule 240(f) of the South Carolina Appellate Court Rules, Respondents Mortgage Electronic Registration Systems, Inc. ("MERS"), Bayview Loan Servicing, LLC ("Bayview"), and CitiMortgage, Inc. ("CitiMortgage") (collectively "Respondents") file this Reply to Appellants' Supplemental Return to the Motion to

Dismiss the Notice of Appeal filed on February 20, 2013, in Appellate Matter No. 2011-192526. This Court should dismiss the Notice of Appeal for two reasons. First, the Notice of Appeal should be dismissed because the Junks seek a second appeal of the April 11, 2011 order issued by the master despite the fact that this Court and the Supreme Court have held this April 11, 2011 Order is not immediately appealable. Second, none of the orders before this Court in Appellate Case No. 2012-210910 impact, address, or otherwise alter the previous ruling on appealability of the April 11, 2011 Order despite the Junks frivolous claims to the contrary.

Throughout their Return, the Junks contend that the master's February 22, 2012 Order[1] finally decided the quiet title issue, and as such, the April 11, 2011 Order is now immediately appealable. See Return p. 2, 3, and 4. This argument illustrates the Junks' misapprehension of the nature of the master's orders in this matter. The Junks brought a quiet title action against MERS. The April 11, 2011 Order, inter alia, dismissed that quiet title action. That dismissal was made without prejudice. This Court found the dismissal without prejudice rendered the issue not immediately appealable. This Court held, in relevant part, that:

> As to the master's order denying Appellant's motion to require MERS to file an indemnity action and **dismissing Appellant's quiet title action**: Int'l Fidelity Ins. Co. v. China Constr. America (SC) Inc., 375 S.C. 175, 181, 650 S.E.2d 677, 680 (Ct. App. 2007) ("[A] dismissal of a

[1] A separate appeal of this February 22, 2012 Order is currently before this Court in Appellate Case No. 2012-210910. This Court previously dismissed an appeal of the April 11, 2011 Order (see Appellate Case No. 2011-192526. That dismissal was affirmed by the Supreme Court. At no time has an appellate court consolidate those two appeals. In the Junks' Return, they attempt to mislead this Court by stating "[t]he cases were consolidated." See Return p. 3. This is untrue. This Court did not consolidate the April 11, 2011 Order with the appeal in Appellate Case No. 2012-210910. The master consolidated the Junks' initial quiet title action (that was dismissed without prejudice by the master and dismissed by this Court) with CitiMortgage's foreclosure action. The consolidation at the trial level has no impact on the appeal.

> claim without prejudice is not an adjudication of the merits of the controversy and has no preclusive effect as a matter of law." (citing McEachern v. Black, 329 S.C. 642, 651, 496 S.E.2d 659, 663 (1998))) . . . .

See Order dated September 13, 2011, at p. 2, attached hereto as Exhibit A (bold emphasis added). The Supreme Court affirmed this result by denying the Junks' petition for certiorari review. Therefore, the dismissal without prejudice of the April 11, 2011 Order is a non-final decision and not immediately appealable.

The February 22, 2012 Order relied on by the Junks in the Return does **not** alter that result. After the master dismissed the quiet title claim against MERS, the Junks sought to hijack CitiMortgage's foreclosure action by bringing a new and distinct quiet title claim as part of a lengthy third-party complaint against twenty-three (23) third-party defendants.[2] The master dismissed the third-party complaint as procedurally improper because the Junks' claims were "not derivative of the Junks' liability to CitiMortgage" and as such, the Junks could not maintain such a claim as a matter of law. See February 22, 2012 Order p. 5-6, 14, attached hereto as Exhibit B. The February 22, 2012 Order in no way addressed, ruled on, impacted, or altered the master's prior April 11, 2011 Order dismissing the quiet title action against MERS without prejudice. In sum, the February 22, 2012 Order addressed a quiet title action brought as a third-party complaint against twenty-three (23) third-party defendants that was wholly unrelated to the issues addressed in the April 11, 2011 Order.

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[2] The third-party defendants are: 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, Citi group 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.

In their Return, the Junks claim that this February 22, 2012 Order constitutes a "subsequent ruling" or a "final decision" on the quiet title action that allows an appeal of the April 11, 2011 Order. See Return p. 3 and 4, respectively. That is simply nonsensical. As noted above, the February 22, 2012 Order dismissing the third-party complaint has no impact on the master's prior and unrelated April 11, 2011 Order. The "subsequent ruling" or "final decision" in the February 22, 2012 Order in the third-party action would be appealable.

The proper vehicle to challenge the dismissal of the third-party quiet title claims was by appeal of the February 22, 2012 Order. The Junks have done so, and that appeal (Appellate Case No. 2012-210910) remains pending in this Court. However, the February 22, 2012 Order does not retroactively allow for a second appeal of the April 11, 2011 Order, which this Court and the Supreme Court previously found not immediately appealable.[3] As a result, no reason or legal basis exists to allow the Junks to re-appeal the April 11, 2011 Order.

Moreover, the Junks' claim that the quiet title issue has been finally decided is a complete misrepresentation to this Court. When the initial quiet title claim was dismissed, it was dismissed without prejudice so as to allow the Junks to reassert the claim against the foreclosing entity. That entity, after substitution allowed by the master, is CitiMortgage. The Junks have arguably[4] re-asserted the quiet title action against CitiMortgage as a counterclaim in the underlying foreclosure action. CitiMortgage filed an answer to that counterclaim. The foreclosure action and the

[3] Notably, the Junks fail to provide any authority that would support their contention to the contrary.

[4] CitiMortgage in no way concedes the viability or propriety of that purported quiet title counterclaim and reserves all rights and remedies to challenge that claim before the master.

counterclaim remain pending and un-ruled upon before the master. Thus, the Junks cannot reasonably assert the February 22, 2012 Order finally ruled on the dismissal of the quiet title action in the April 11, 2011 Order because it remains pending before the master.

In conclusion, this Court should dismiss the February 20, 2013 Notice of Appeal because this Court and the Supreme Court have previously held that the April 11, 20011 Order is not immediately appealable and nothing has altered that fact.[5] This Court should not allow such an appeal.

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Columbia, South Carolina

April 25, 2013

[5] The Junks have admitted that the February 20, 2013 Notice of Appeal is nothing but procedural gamesmanship intended to delay the foreclosure and confuse this Court. In the Return, the Junks admit the February 20, 2013 Notice of Appeal "is the third filing of a Notice of Appeal of the April 11 Order." See Return p. 4. This Court cannot condone such frivolous attempts to continually re-appeal issues previously ruled on by this Court and affirmed by the Supreme Court.

EXHIBIT
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A

The South Carolina Court of Appeals

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September 13, 2011

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Re: Junk, D. v. Mortgage Electric & Bayview
2011192526

Dear Counsel:

Enclosed is a copy of an Order of the Court regarding your Motions in the above case.

The remittitur in the case will be sent to the Clerk of Court for Beaufort County according to the South Carolina Appellate Court Rules.

Very truly yours,

V. Claire Allen, Deputy
CLERK

TAG/laf
cc: James, Y. Becker, Esquire
The Honorable Jerri Roseneau

The South Carolina Court of Appeals

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

v.

Mortgage Electronic Registration Systems, Inc., and John Does 1-5000, Respondents,

and

Bayview Loan Servicing, LLC, Respondent,

v.

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

Of Whom Daniel L. Junk and Christina H. Junk are Appellants.

The Honorable Marvin Dukes, III
Beaufort County
Trial Court Case Nos. 2009-CP-07-04301 and 2009-CP-07-05088

ORDER

Appellants filed Notices of Appeal from the master's orders (1) dismissing their quiet title action and denying their motion to require Mortgage Electronic Registration Systems, Inc., (MERS) to file an indemnity bond, and (2) permitting CitiMortgage, Inc., to substitute for Bayview Loan Servicing, LLC, (Bayview) in Bayview's foreclosure action and declining to dismiss the foreclosure action. This court consolidated the appeals. Respondents filed a motion to dismiss the consolidated appeal. After Appellants filed a return five days late, Respondents

filed a motion to strike Appellant's return as untimely and another motion for an extension of time to file their reply. Appellants then filed a motion for leave to file their return out of time.

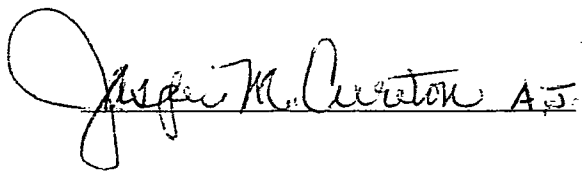
After careful consideration, we grant Appellants' petition to file their return to the motion to dismiss out of time, and we deny Respondents' motion for an extension of time to file a reply and motion to strike Appellants' return as untimely. Finally, we grant Respondents' initial motion and dismiss the consolidated appeal because neither order challenged herein is immediately appealable. See S.C. Code Ann. § 14-3-330 (1976 & Supp. 2010) (permitting appeal from an order that affects a party's substantial right and "(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, . . . or (c) strikes out an answer or any part thereof or any pleading in any action").

As to the master's order denying Appellants' motion to require MERS to file an indemnity bond and dismissing Appellants' quiet title action: Int'l Fidelity Ins. Co. v. China Constr. America (SC) Inc., 375 S.C. 175, 181, 650 S.E.2d 677, 680 (Ct. App. 2007) ("[A] dismissal of a claim without prejudice is not an adjudication of the merits of the controversy and has no preclusive effect as a matter of law." (citing McEachern v. Black, 329 S.C. 642, 651, 496 S.E.2d 659, 663 (1998))); Collins v. Sigmon, 299 S.C. 464, 467, 385 S.E.2d 835, 837 (1989) (recognizing when a court dismisses a case without prejudice, "the plaintiff can reassert the same cause(s) of action" in another case) (internal quotation marks omitted).

As to the master's order permitting CitiMortgage, Inc., to substitute for Bayview in the foreclosure action and declining to dismiss the foreclosure action: McLendon v. S.C. Dep't of Highways & Pub. Transp., 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994) (interpreting § 14-3-330 and holding that, like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be

raised again at a later stage of the proceedings and, therefore, is not directly appealable); Neeltec Enters., Inc. v. Long, 391 S.C. 177, 179, 705 S.E.2d 57, 58 (Ct. App. 2011) (noting an order substituting parties is not immediately appealable when it is not final and does not "fit within a statutory exception permitting an appeal from an interlocutory order").

AND IT IS SO ORDERED.



Columbia, South Carolina

cc: A. Parker Barnes, Jr., Esquire
Daniel L. Junk, J.D.
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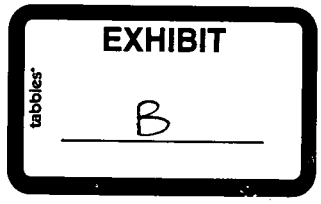
Michael J. Anzelmo, Esquire



STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

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.

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

pg 16

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.

$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).

5 of 16

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

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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.

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.

11 9/16

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. Musser*, 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.

Nonetheless, because the Court has ruled that the Third-Party Complaint should be dismissed as to all Third-Party Defendants, as explained above, the default issue is now moot.

V. THE FORECLOSURE ACTION IS NOT AFFECTED BY THE DISMISSAL OF THE THIRD-PARTY COMPLAINT AND MAY PROCEED.

As the Court has previously found, the third-party claims are independent claims arising out of a separate transaction or occurrence from the Note and Mortgage which are the subject of the Plaintiff's foreclosure action. Because CitiMortgage's foreclosure claim and the third-party claims are not related and do not affect one another, the foreclosure action shall proceed with the hearings previously scheduled for Thursday, February 23, 2012 at 10:00 a.m., notwithstanding any possible appeal of this order.

CONCLUSION

FOR THE FOREGOING REASONS, the motions to dismiss the Third-Party Complaint are GRANTED, the Junks' motion to join all Third-Party Defendants as counterclaim defendants is DENIED, and the motions for relief from default are GRANTED.

AND IT IS SO ORDERED.

Marvin H. Dukes III
Master-in-Equity for Beaufort County

Beaufort, South Carolina
Wednesday, February 22, 2012

16 day/b

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Master-in-Equity

The Honorable Marvin H. Dukes, III

Civil Action No.: 2009-CP-07-04301
Court of Appeals Tracking No.: 2011-92526

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

v.

Mortgage Electronic Registration Systems, Inc., and John Does 1-5000,..... Respondents,

---

Civil Action No.: 2009-CP-07-05088

Bayview Loan Servicing, LLC,..... Respondent,

v.

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

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

Proof of Service

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Plaintiff, do hereby certify that I have served

all counsel in this action with a copy of the pleading(s) hereinbelow by all by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: **Reply to the Appellants' Supplemental Return to the Motion to Dismiss Notice of Appeal filed February 20, 2013**

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April 25, 2013