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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY

COURT OF COMMON PLEAS

THE HONORABLE KRISTI F. CURTIS, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2023-001575

CASE NO. 2019-CP-10-4503

Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans Inc., Pass-Through Certificates 2007 QH2……...Respondent,

v.

Ashley Johnson Beshara as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated the 3rd day of March 2010; Shoreline Farms Community Association, Inc.; Wells Fargo Bank, N.A.; Cadle Rock Joint Venture, L. P. an Ohio Limited Partnership, Curtis Rogers and Julie Rogers

Of Whom Curtis Rogers, Julie Rogers and Ashley Johnson Beshara Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated 3rd day of March 2020 are …….....Appellants,

v.

Nationstar Mortgage LLC, ……..Respondent.

APPELLANTS CURTIS ROGERS AND JULIE ROGERS' INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err in failing to require a party to respond to Rule 33(b) Interrogatories and identify the witness it would call to trial to prove its case?

II. Did the circuit court err as a matter in law in granting summary judgment against homeowners' eliminating their counterclaims and cross-claims when issues of fact exist?

III. Did the trial court commit an error as a matter of law when it approved the abusive practice of repetitive dismissals under Rule 40(j), SCRCP?

IV. Did the trial court err as a matter of law by determining the dismissal of three prior identical actions was not a decision on the merits precluding the filing and prosecution of a fourth action?

INTRODUCTION

This case involves the abuses committed by a mortgagee and its predecessors in interest by attempting to manipulate endorsements of notes and assignments of a mortgages to conceal the accurate passage of ownership; by engaging in obstructive discovery practices to preclude a mortgagor from being able to prepare for trial by refusing to disclose witnesses prior to a trial date being set; and by bringing identical actions three times and dismissing each one. The Rules of Civil Procedure and the rules of law are antithetical to these behaviors and practices and the lower court erred by allowing them to persist.

The rules of court and laws are generally designed to allow for cases to be brought, for litigates to have full and fair disclosure of information and to require cases be timely pursued and brought to an end. They are not designed nor do they allow for the repeated filing of the same matter. If a litigant chooses not to prosecute its suit it gets one opportunity to dismiss. If a litigate dismisses it case and then refiles and chooses again not to prosecute its suit and dismiss for a second time, and a third time, it effectively administers its own fatal blow. Here, the Court is confronted with the novel issue of determining whether a litigate' s unwillingness to prosecute an action and therefore dismisses the action three times under Rule 40(j), SCRCP precludes further litigation.

CONCISE STATEMENT OF FACTS AND PROCUDURAL HISTORY

Curt Rogers ("CRogers") executed a Promissory Note in favor of Homecomings Financial, LLC on January 12, 2007. (hereinafter "CRogers Note) (2009 Compl. ¶6) On the same day CRogers and Julie Rogers (JRogers) executed a Mortgage in favor of Mortgage Electronic Registration Systems, Inc., as nominee for Homecomings, Financial, LLC. (hereinafter "Mortgage")(2009 Compl. ¶7) The Mortgage encumbers the Rogers primary residence. (2009 Compl. ¶8)

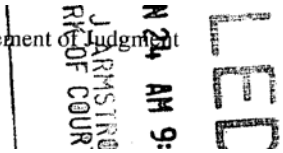
On September 15, 2009, an Assignment of mortgage was filed with the Charleston Register of Deeds (2019 Compl. ¶10(a)) and a foreclosure action was initiated seeking judicial foreclosure of the CRogers Note and Mortgage by Aurora Loan Services, LLC ("ALS") claiming to be the present lien holder. (2009 Compl. ¶7) The case was given Civil Action No. 2009-CP-10-5840. (hereinafter "2009 Action") In paragraph 16 of the Complaint the Plaintiff elected to and did "declare the entire balance of said indebtedness due and payable…" (2009 Complaint, ¶16) On October 23, 2009, the Rogers filed an Answer. (2009 Answer) On March 9, 2010, the 2009 Action was voluntarily dismissed pursuant to Rule 40(j), SCRCP. ("Dismissal Order 1")(Ex. A to Rogers 2019 Answer)

On March 10, 2011, two years later, the matter was restored at the request of ALS. Upon restoration a new civil action number was given to the matter: Civil Acton No. 2011-CP-10-1805. (hereinafter "2011 Action") The Complaint filed in the 2009 Action was the operative Complaint for the 2011 Action. By way of grant of motion, the Rogers filed an Amended Answer and Counterclaim on February 13, 2012. (2011 Amended Answer). On June 12, 2013 an Order of Substitution was filed substituting Nationstar Mortgage LLC for Aurora, the new loan servicer or assignee. (Order Substitution) On March 4, 2014, the Rogers filed a Motion for Summary Judgment.(2011 Motion Sum Judg.) The Rogers motion was noticed by the court for hearing on May 8, 2014 via "Notice of Motions Roster Publication." (Rogers 2019 Memo. Sum Judg.) Shortly thereafter, on June 24, 2014, the case again was dismissed by Order pursuant to Rule 40(j), SCRCP. ("Dismissal Order 2")(Rogers 2019 Answer) Separately, a Form 4 Order was filed. ("Form 4 Order 1")(Rogers 2019 Answer) The Form 4 Order 1 provides:

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.



(Rogers 2019 Answer)

On April 7, 2015 an Order restoring the 2011 Action was filed. (Order Restoring) With the restoration and commencement of a third action the case was given the new civil action number: Civil Action No. 2015-CP-10-1971. (hereinafter "2015 Action"). The Complaint in the 2015 Action was the same as the Complaint in the 2009 Action and 2011 Action. Nothing took place in the 2015 Action except for on May 12, 2016 a Notice of Case Roster was sent notifying the parties the case was on the jury roster for the week of May 16, 2016. (Rogers 2019 Motion Sum. Judg.) The notice of a potential trial resulted in the third voluntary dismissal of the case. On May 16, 2016, only a Form 4 Order was entered ending the matter. ("Form 4 Order 2")(Rogers 2019 Answer, Ex. C) It provides:

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: **By consent of the parties, (see attached), this case is Ordered stricken pursuant to Rule 40(j).**

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

(Rogers 2019 Answer, Ex. C)

On August 27, 2019, this action, the fourth action, was filed seeking foreclosure of the CRogers Note and Mortgage. (hereinafter "2019 Action") (2019 Complaint) by Deutsche Bank and Trusted Company Americas, as Trustee for Residential Accredit Loans, Inc., Pass-Through

Certificates 2007-QH2.[1] (hereinafter "Deutsche") Deutsche initiated the action as "either the servicer and/or mortgagee." (2019 Compl. ¶2) Undisputed is the fact that the CRogers Note and Mortgage that are identified in Paragraphs 7 and 8 of the 2019 Action are the same note and mortgage that were the subject matter of the 2009 Action, 2011 Action and the 2015 Action. (Rogers 2019 Mot. Sum. Judg.)

Ashley Johns Beshara as Trustee of Revocable Trust Agreement for 2235 Shoreline Drive ("Beshara") was named as a defendant in the 2019 Action because of the trust instrument created in 2010. (2019 Compl. ¶11). On October 18, 2019 Beshara filed a Motion to Dismiss (Beshara Motion to Dismiss) that was denied on June 20, 2020. On June 12, 2020 the Rogers filed a Motion to Intervene that was granted on June 28, 2020. On July 7, 2020 Beshara filed an Answer and Counterclaim which was amended on July 15, 2020 by way of an Amended Answer, Counterclaim and Third-Party Complaint. (Beshara Am. Answer) Beshara brought Nationstar Mortgage LLC (hereinafter "Nationstar" and jointly with Deutsche as "Respondents") into the action as a third-party defendant. On August 13, 2020, Rogers filed an Answer, Counterclaim and Crossclaim. (2019 Rogers Ans. Counterclaim) On September 9, 2020 Deutsche and Nationstar filed a joint Motion to Dismiss the Counterclaims and Third-Party claims of Beshara (2019 Joint Motion Dismiss) and joint Motion to Dismiss the Rogers counterclaims and crossclaims. (2019 Joint Moton Dismiss 2). On January 8, 2021 and May 24, 2021, the respective motions to dismiss were denied.

On September 7, 2022, Rogers filed a Motion to Compel and for Sanctions against Deutsche and Nationstar as to their joint discovery responses. (Motion Compel) Rogers specifically sought to

[1] Deutsche, Aurora and Nationstar are all in privity and basically one in the same. They all claim to be either owners, holders, mortgagees, services or successors in interest to or of the CRogers Note and Mortgage.

have the name of the witness that would appear and testify at trial. On September 8, 2022 the Rogers filed a Motion for Summary Judgment. (2019 Rogers Motion Sum. Judg.) On October 7, 2022, Nationstar filed a Motion for Partial Summary Judgment as to both Beshara and the Rogers (2019 Nationstar Partial Sum. Judg.) followed by an Amended Motion for Partial Summary Judgment on October 10, 2022. (2019 Nationstar Amended Partial Sum. Judg.) The motions came for hearing on February 2, 2023.[2]

On July 10, 2023 an *Order Denying Defendants Motion for Summary Judgment, Granting Plaintiff and Third-Party Motion for Summary Judgment and Granting, In Part, Defendants' Motion to Compel* was entered. (Order). On July 20, 2023, both the Rogers and Beshara filed a Notice of Motion and Motion to Reconsider and Supporting Memorandum (Rogers Motion Recon. and Beshara Recon.) On September 20, 2023 Deutsche and Nationstar filed opposition to the Motions to Reconsider. The Motions for Reconsideration were denied on November 1, 2023.

STANDARD OF REVIEW

The Order subject to review here has two different applicable standards of review. The discovery and summary judgment rulings are reviewed under the respective standards.

Discovery Standard of Review.

"A trial judge's rulings on discovery matters will not be disturbed by an appellate court absent a clear abuse of discretion." *Hollman v. Woolfson*, 683 S.E.2d 495, 384 S.C. 571 (2009), and

[2] Prior to the hearing the following memorandum were filed: 1) February 1, 2023, Plaintiff and Third-Party Defendant's Motion for Partial Summary Judgment and Incorporated Memorandum in Support; (2) Plaintiff and Third-Party Defendant's Brief in Opposition to Roger's Moton to Compel and For Sanctions; (3); February 2, 2023 Rogers Memo in Support of Summary Judgment; (4) February 2, 2023, Rogers Memorandum in Opposition to Summary Judgment; (5) February 10, 2023, Rogers Supplemental Response in Opposition to Amended Moton for Summary Judgment.

Dunn v. Dunn, 298 S.C. 499, 381 S.E.2d 734 (1989).

Summary Judgment Standard of Review.

"Since it is a drastic remedy, summary judgment `should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.'" *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) . "An appellate court reviews the grant of summary judgment under the same standard applied by the circuit court." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). The circuit court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). "A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David*, 367 S.C. at 250, 626 S.E.2d at 5. Summary judgment "must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Nonetheless, the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is `not merely engaged in a "fishing expedition."' *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (quoting *Baughman*, 306 S.C. at 112, 410 S.E.2d at 544).

ARGUMENT

1. THE REFUSAL TO IDENTIFY TRIAL WITNESS IS UNDENIABLY PREJUDICIAL TO THE OPPOSING PARTY AND DEFEATS THE ESSENTIAL PURPOSE OF DISCOVERY.

The trial court chose not to require Deutsche and Nationstar to identify the witness(es) they will bring to trial to prove their case. "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528 (2000). The lower court's ruling was an abuse of discretion.

The Rogers propounded separately to Deutsche and Nationstar the standard interrogatories developed by the Supreme Court and set forth in Rule 33(b)(1)-(8), SCRCP. The first request in the Rule and made by the Rogers, is to give the names and addresses of the party's witnesses. Rule 33(b), SCRCP. On May 13, 2022 Deutsche and Nationstar submitted joint responses to the discovery requests. (Motion Compel) Deutsche, the Plaintiff, with the burden of proof, and Nationstar failed to give the name(s) of a witness(es) that would testify on their behalf at trial. Rather, they responded with "a representative" who can be reached through the undersigned counsel. In fact, in response to the Motion to Compel filed by the Rogers on September 7, 2022, they admitted witnesses were not identified and boldly stated none would be identified until a trial date is set.[3] (Memo. Opp. to Compel)

A primary goal of discovery is the disclosure of relevant information and any attempt to thwart that purpose should be prohibited by the courts. As the Supreme Court stated in *In re Anonymous Member of S.C. Bar*, 346 S.C. 177, 193, 552 S.E.2d 10, 18 (2001), "[t]he primary

[3] In this matter a Consent Scheduling Order had been entered providing discovery would end on September 22, 2022. When a trial date is set would be a period outside the time set for discovery to be concluded pursuant to a Scheduling Order. (Scheduling Order)

objective of discovery is to ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed." The entire thrust of our discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party. *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997). The purpose of discovery is to provide the opportunity for full and fair disclosure and to give the trial attorney the means to prepare for the trial. When the rights to discovery are impeded or not given, prejudice to the trial lawyers means to prepared for trial must be presumed. *Samples v. Michell*, 329 S.C. 105, 114, 495 S.E.2d 213, 217 (Ct. App. 1997). Additionally, "[u]nless the party who has failed to submit to discovery can show a lack of prejudice, reversal is required." *Id*. at 217, *citing, Downe v. Dixon*, 294 S.C. 42, 362 S.E. 2d 317 (Ct. App. 1987).

Deutsche and Nationstar's refusal to disclose who will testify at trial defies the purpose of the discovery rules. Being provided the names of the witnesses that a party plans to call as witnesses at trial is an essential need if not right. Parties are entitled to know who will come and testify to prove a party's case and what they will testify to at trial. Parties are entitled to the names of the witnesses so they can investigate the witness and learn if they have testified in other matters, been litigates or have any history that would make their credibility suspect. Parties are entitled to the names of witnesses so they can depose the witnesses and assess the witness' qualifications, demeanor and character in order to prepare for trial.

Discovery affords parties full and fair disclosure prior to a trial date being set. Here, however, Deutsche and Nationstar intentionally refused to provide who it will bring to trial until a trial date is set. A trial date could be set on 24 hours' notice. If such were to occur the Rogers would have no opportunity to prepare for the undisclosed witness(es). Obstructing the Rogers from being able to prepare for trial is highly prejudicial to the Rogers. *See Downey v. Dixon*, 294 S.C. 42, 362

S.E. 2d 317 (Ct App. 1987) ("The rights of discovery provided by the rules give the trial lawyer the means to be prepared for trial. Where these rights are not accorded, prejudice must be presumed...").

The Rules of discovery do not make distinctions for different type parties. There are no exceptions and the discovery rules apply equally to all parties and types. Thus, while Deutsche and Nationstar do not believe they have to comply and can withhold the names of their witness until a trial date is set, there is no basis for their position nor does such a position show a lack of prejudice. It shows the opposite. No party should be given this advantage over another, and the trial court abused its discretion in failing to impose a meaning deterrent to such behavior. *See, Samples v. Michell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997).

2. THE ROGERS ESTABLISHED THE NECESSARY ELEMENTS AS TO ALL OF THEIR COUNTERCLAIMS AND CROSS CLAIMS OR THAT ISSUES OF FACT EXISTED PRECLUDING THE GRANT OF SUMMARY JUDGMENT.

2.A. Respondents' refusal to identity their witnesses prior to a trial date being set precluded summary judgment in their favor.

The lower court erred by granting summary judgment prematurely in favor of Deutsche and Nationstar. Pending at the time of the motions hearing was the Rogers' Motion to Compel addressing the Respondents abusive discovery practices. Because Deutsche and Nationstar refused to identify their trial witnesses' names prior to a trial date being set, discovery was incomplete. Because of this obstructive behavior the Rogers did not have a full and fair opportunity to complete discovery or defend against the motion. *See Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (quoting *Baughman*, 306 S.C. at 112, 410 S.E.2d at 544). Respondents' motion for summary judgment was premature and should have been denied.

2.B. The Affidavit submitted by Deutsche and Nationstar was defective and should have been excluded.

The moving party has the initial burden of demonstrating no issue of material fact exists. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115-117, 410 S.E.2d 537, 545 (1991). "The rule governing summary judgment provides that '[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (S.C. 2003), *citing* Rule 56(e), SCRCP; See also, *Montgomery v. CSX Transport, Inc.*, 376 S.C. 37, 656 S.E.2d 20 (2008); *Saro v. Ocean Holiday Partnership*, 314 S.C. 116, 441 S.E.2d 385 (Ct. App. 1994); *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993); The Affidavit submitted by Deutsch was insufficient.

Deutsche and Nationstar submitted the Affidavit of Alan Blunt an employee of Nationstar with no apparent affiliation with Deutsche. The Rogers objected to the Affidavit. (Rogers Memo. Opp. Sum. Judg.) Paragraph 9 of the Affidavit references a Revocable Trust Agreement of the Rogers. Blunt is not a party to the Agreement. Blunt was not a witness to the Agreement. Blunt was incapable of authenticating the document or offering testimony relating to it. Rule 901, SCRE. The statement and document did not constitute admissible evidence.

Likewise, Paragraph 10 of the Affidavit is an unsupported conclusory statement. It relates to a time period where the Affiant's was not the alleged custodian of records or during a time period where Nationstar had an interest in the account. The statement is hearsay and inadmissible evidence.

Lastly, in Paragraph 12 of the Affidavit reference is made to a "Pooling and Servicing Agreement" which is unsigned and attached. The Rogers specifically requested a copy of all "serving agreements (master, sub-serving, contingency, specialty and back-up)" in discovery.

(Rogers Mot. Compel, Ex. A). However, Deutsche and Nationstar objected to producing any such document:

> **ANSWER: Nationstar and DBTCA object to this Request as vague, ambiguous, neither relevant nor reasonably calculated to lead to the discovery of admissible evidence and overly broad. Nationstar and DBTCA further object this Request seeks confidential, sensitive and/or trade secret information.**

(Rogers Mot. Compel, Ex. A). If a party refuses to produce a document on the grounds it would not lead to admissible evidence, it then contradicts itself by attaching the document to an Affidavit in support of its motion for summary judgment. Accordingly, each of these paragraphs is problematic and do not rise to a level of admissible evidence. Thus, the Affidavit as whole failed to meet the requirements of Rule 56(e), SCRCP. The trial court erred in failing to exclude from consideration the Affidavit over the objection of the Rogers.

2.C. The lower court erred in making findings of facts and applied flawed analysis requiring reversal of its grant of summary judgment for Respondents.

Deutsche and Nationstar moved for partial summary judgment as to the Rogers contending the "Rogers cannot substantiate any element of any claim." (Amended Motion for Partial Sum. Judg.) The Rogers claims consist of the following: (1) declaratory judgment; (2) negligent misrepresentation; (3) abuse of process; (4) malicious prosecution; and (5) unfair trade practices. (Rogers Answer, Counterclaim and Crossclaim)

1. None of the counterclaims or crossclaims are time barred.

The lower court disposed of all of the Rogers claims ruling they are time barred. (Order, p. 9). It did so by proclaiming the "Rogers' claims arise largely from events that transpired in the litigation of this matter between 2009 and 2016." (Order, p. 8).

The question of when a statute of limitations runs is generally one left to the jury. *Dunbar v. Carlson*, 341 S.C. 261, 269, 533 S.E.2d 913, 917 (Ct. App. 2000) ("[G]enerally, statute of limitations issues are for the jury, rather than the court, to resolve."). Specifically, the question of when a plaintiff discovered, or should have discovered the alleged harm is for the jury to decide because it is an objective question. *Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) (stating in a medical malpractice action that when there is conflicting testimony regarding time of discovery of facts giving notice, the date on which discovery should have been made becomes an issue for the jury to decide); and *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) ("The burden of establishing the bar of the statute of limitations rests upon the one interposing it…and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide.").

The trial court mimicked the Respondents' and improperly found that the claims "arise largely from events that transpired in the litigation of this matter between 2009 and 2016…"[4] The Court did not delineate the "largely" events that occurred between 2009 and 2016. Nor did the Court delineate the events not encompassed within the "largely" events. ("other events"). Consistent with the Rogers contention, the facts and events that support their claims expand beyond the referenced time frame, the Court found that there were other events that occurred outside the referenced time frame. Thus, the Court's ruling inherently leaves open whether the other events fall within or outside a statute of limitations; an issue for a jury to determine. The court erred in determining the claims were time barred.

[4] Respondents conceded in their pleadings that the facts supporting the claims expand beyond the 2009 to 2016 time frame by stating the "claims arise largely from events that transpired in litigation of this matter between 2009 and 2016." (Motion for Partial Sum Judg., p. 7)

Additionally, the Court erred by failing to consider the Rogers argument that the claim for declaratory judgment is not necessarily subject to a three-year statute of limitations as asserted by Respondents because of the nature of the claim. "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991); *City of Hartsville v. S.C. Mun. Ins. & Risk Financing Fund*, 382 S.C. 535, 677 S.E.2d 574 (2009). "A declaratory judgment action is like a chameleon." *Noisette v. Ismail*, 299 S.C. 243, 384 S.E. 2d 310 (Ct. App. 1989). "Its color is determined by its background, i.e., the underlying action." *Jacobs v. Service Merchandise Co*., 297 S.C. 123, 375 S.E.2d 1 (Ct.App.1988) (the character of a declaratory judgment action is determined by the main purpose of the complaint).

Here, the underlying action for mortgage foreclosure sounds in equity. *See, Carolina First Bank v. Badd, L.L.C.*, 414 S.C. 289, 778 S.E.2d 106 (2015). More importantly, the relief sought in the declaratory judgment cause by Rogers is for injunctive relief which is equitable. Generally, statutes of limitation do not bar the equitable relief. *See Richland County v. Kaiser*, 351 S.C. 89, 567 S.E. 2d 260 (Ct. App. 2002), *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 543 S.E.2d 563 (Ct. App.2001). The declaratory judgment claim is equitable and is not subject to a three-year statute of limitations. The court erred by failing to address the equitable claims not being subject to a statute of limitations.

Likewise, the court erred in failing to consider as argued by the Rogers that under South Carolina law, "a defendant may be estopped from claiming the statute of limitations as a defense if 'the delay that otherwise would give operation to the statute had been induced by the defendant's conduct.'" *Wiggins v. Edwards*, 314 S.C. 126, 130, 442 S.E.2d 169, 171 (1994)(*quoting Dillon County School Dist. Number Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 332 S.E.2d 555

(Ct. App.1985), cert. dismissed, 288 S.C. 468, 343 S.E.2d 613 (1986), overruled on other grounds by *Atlas Food Sys. & Servs. v. Crane Nat'l Vendors*, 319 S.C. 556, 462 S.E.2d 858 (1995)). Whether a defendant is estopped from claiming the statute of limitations is ordinarily a question of fact. *See Black v. Lexington School Dist. No. 2*, 327 S.C. 55, 488 S.E.2d 327 (1997). The court erred by failing to address or give consideration to the arguments presented.

2. Negligent misrepresentation is for a jury to determine.

A claimant must establish the following elements to establish liability for negligent misrepresentation:

> 1) the defendant made a false representation to the plaintiff; 2) the defendant had a pecuniary interest in making the representation; 3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; 4) the defendant breached that duty by failing to exercise due care; 5) the plaintiff justifiably relied on the representation; and 6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation.

Sauner v. Pub. Serv. Auth. of South Carolina, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003).

The lower court committed several errors with regard to the cause of action for negligent misrepresentation. The court erred by making findings of fact. *David*, 367 S.C. at 250, 626 S.E.2d at 5. ("A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony…")

The subject Note is a pick a pay loan with a negative amortization feature. Monthly statements required to be sent have been sent and contain information and representation as to the account. The Rogers contend the monthly statements sent concerning their account contain inaccurate and misinformation. The Rogers further contend that Respondents dissemination of the monthly statements to Beshara that is not an accountholder constitutes negligent misrepresentation. (Memo. Opp. Sum. Judg.) Furthermore, the Rogers have postured that the maintenance of the

mortgage on the public record is a negligent misrepresentation. All of which are present and pre-existing facts not anticipated future events. *Id.* at 408.

The Court erred by focusing on its perception and finding of CRogers understanding or misunderstanding of the loan terms. (Order, p. 10-11) Additionally, the Court misplaced reliance on the case of *Beneficial Fin. I, Inc. v. Windham*, 431 S.C. 256, 847 S.E. 2d 793 (Ct. Appl 2020). *Beneficial* does not support the statement "loan terms are not 'representations.'" (Order, p. 11) Instead, Beneficial supports the concept that "[r]presentations based on statements as to future events or unfulfilled promises are not usually actionable" *Id*. at. 274, which has no application here.

The Rogers came forward with deposition testimony (Def. Sup. Resp. Opp. Sum. Judg., Ex. A.) to which the court gave no consideration. Issues of material fact were asserted and summary judgment was improperly granted. *See State Farm Auto. Ins. Co. v. Pennsylvania Nat'l Mut. Casualty Ins. Co.*, 263 S.C. 391, 210 S.E.2d 613 (1974) (whether or not there has been a misrepresentation is an ultimate issue of fact for the jury). The court erred in failing to view the facts in the light most favorable to the Rogers as to the claim for negligent misrepresentation.

3. The actions committed within the legal process by Respondents is an abuse of process.

"'The tort of abuse of process is intended to compensate a party for harm resulting from another party's misuse of the legal system." *Pallares v. Seinar,* 407 S.C. 359, 370, 756 S.E.2d 128, 133 (2014). The court lacked a proper understanding of the law surrounding abuse of process and erred in granting summary judgment on this cause of action by finding "[t]he improper filing of actions may constitute malicious prosecution, but it can never constitute abuse of process…" (Order, p. 12).

It has been noted by this Court, that no South Carolina case has defined the "process" aspect of abuse of process. However, it has been determined that the tort of abuse of process "embraces the full range of activities and procedures attendant to litigation." *Food Lion Inc. v. United Food & Commercial Workers International Union*, 351 S.C. 65, 70, 567 S.E.2d 251 (Ct. App. 2002) (judicial process must in some manner be involved for there to be claim for abuse of process). "Actions for abuse of process have been based on: appeal of a trial court judgment, *Cisson v. Pickens Sav. & Loan Ass'n*, 258 S.C. 37, 186 S.E.2d 822 (1972); appeal of the decision of a Board of Adjustment, *LaMotte v. Punch Line of Columbia, Inc*., 296 S.C. 66, 370 S.E.2d 711 (1988); wrongful intervention, *Cisson*, 258 S.C. 37; improper venue, *Mercury Marine Division of Brunswick Corp. v. Costas*, 288 S.C. 383, 342 S.E.2d 632 (Ct. App. 1986); filing suit after a voluntary dismissal, *Mercury*, 288 S.C. 383, 342 S.E.2d 632 (Ct. App. 1986); and filing a complaint with an administrative agency. *Hainer v. American Medical Internat'l, Inc*., 320 S.C. 316, 465 S.E.2d 112 (Ct. App. 1995), aff'd, 328 S.C. 128, 492 S.E.2d 103 (1997)" 1 - A. Definition (Elements of Civil Causes of Action (S.C. Bar) (2021 Ed.)).

The actions committed by Respondents and their predecessors in interest throughout all four civil actions rise to a level of abuse of process. The Rogers have provided evidence that Deutsche and Nationstar as the agent and servicer of Deutsche brought this 2019 Action for the ulterior purpose of trying to mitigate or improperly rectify problematic issues. Nationstar and/or Deutsche have acted improperly by manipulating endorsements and assignments of the CRogers Note and Mortgage in nefarious manners. ALS, Respondents' predecessor in interest, initiated the 2009 Action to foreclose upon the Mortgage securing the CRogers Note although there was no endorsement of the CRogers Note to ALS. (Beshara Ans. ¶43) The lack of endorsement of the CRogers Note to ALS impacted its ability to enforce the CRogers Note or Mortgage. Consequently,

the Rogers asserted, amongst other defenses, the defense of standing. (Rogers Ans. ¶ 16) Ultimately before ownership issues were addressed, the 2009 Action was dismissed pursuant to Dismissal Order 1. (Dismissal Order 1).

During the course of the 2011 Action in June of 2013 ALS submitted a proposed Order seeking to substitute plaintiff on the ground the CRogers Note and Mortgage had been assigned to Nationstar. (Beshara Ans. ¶ 42 and Order Substitution) An Order was entered on June 14, 2013, without notice to the Rogers or hearing. (Order Substitution) No version of the CRogers Note bears an endorsement to Nationstar (Beshara Ans. ¶ 43) and there is no assignment of record of the Mortgage being assigned to Nationstar. (Beshara Ans. ¶43) On June 28, 2013, the Rogers moved to vacate the Order substituting Nationstar. (Motion Vacate June 28, 2013)

On July 10, 2013, Nationstar in response to discovery requests produced a version of the CRogers Note which contained an endorsement from Homecomings Financial, LLC to Residential Funding and a second endorsement from Residential Funding Company, LLC to Deutsche Bank Trust Company Americas as Trustee (for an unidentified trust). (Beshara Ans. ¶ 59) On November 16, 2013, Nationstar's counsel in the 2011 Action produced for the first time the third version of CRogers Note which contained a new and third endorsement whereby Nationstar as attorney in Fact for Deutsche Bank Trust Company Americas as Trustee (for an unidentified trust) endorse the note in blank. (Beshara Ans. ¶ 61-61) Respondents admitted however, that the CRogers Note produced in July of 2013 in response to discovery, could only be enforced by Residential Funding, and not Nationstar or ALS; and as of 2/28/14 no assignment of the Mortgage had been executed to Residential Funding, Deutsche Bank Trust Company Americas as Trustee, Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2, or Nationstar. (Beshara Ans. ¶ 65 and 2011 Motion Sum. Judg.)

On March 3, 2014, the Rogers's filed a Motion for Summary Judgment in the 2011 Action, based upon Nationstar's lack of standing and alternations to the CRogers Note. (2011 Motion Sum Judg.) Nationstar then sought to retroactively try and fix the issue by having its counsel for the 2011 Action file another Assignment of Mortgage dated Apri1 1, 2014 wherein Nationstar as alleged attorney in fact for ALS assigned the Mortgage to Deutsche Bank Trust Company Americas as Trustee for Residential Accredit Loans, Inc., Pass-Through Certificates 2007-QH2, which was recorded by Nationstar's attorney in the 2011 Action on April 14, 2014, in Book 0398 at Page 768 in the RMC Office for Charleston County.[5] (Beshara Ans. ¶ 66)

As described above, Nationstar as Deutsche's agent committed willful acts in or around November of 2013, by executing an alleged endorsement of the CRogers Note and in April of 2014, executing an alleged assignment of the mortgage and doing so in both cases as an alleged attorney in fact for distinct entities. The Rogers have demonstrated that Nationstar as Deutsche's agent committed the willful act of creating documentation (potentially bogus) in an effort to try align the documentation in order to justify and continue the prosecution of a foreclosure matter ten years, and three dismissals after it had begun by bringing the present action. This action, the 2019 Action and fourth action was brough in the name Deutsche for the first time[6]. Nationstar further sought to avoid

[5] It can also be inferred from the allegations that because last endorsement of the CRogers Note was not on the copy of the CRogers Note produced in discovery in July of 2013, that Nationstar who executed the most recent endorsement did so after the Roger's had moved to vacate Nationstar as plaintiff based upon standing.

[6] Nationstar in response to discovery asserted that the Securitized Trust was assigned the CRogers Note and Mortgage in 2007, however, Auroa Loan Service ("ALS") brought the 2009 Action in its name, despite the CRogers Note never being endorsed to ALS. Then Nationstar and/or ALS moved to substitute Nationstar as plaintiff in the 2011 Action alleging to the Court that the CRogers Note and Mortgage had been assigned to Nationstar despite the fact the CRogers Note and Mortgage were never endorsed or assigned to Nationstar. Nationstar remained the named Plaintiff in 2015 Action and not until this action was Deutsche named as a party. Whether Deutsche is an owner or holder of the CRogers Note or assignee of the Mortgage by way of proper endorsement or assignment has yet to be addressed by the Court.

issues and problems, particularly a res judicata issue, by not naming the Rogers as defendants, the parties on the CRogers Note and Mortgage.

Not only did the trial court misconstrue the law relating to abuse of process but it ignored the multiple events and actions committed by Respondents' and their predecessors attempting to manipulate the legal process to the detriment of the Rogers. Summary judgment should have been denied**.**

4. The three prior foreclosures did end favorably for the Rogers because they were all dismissed.

The Court erred by basing its determination to grant summary judgment on the cause of action for malicious prosecution on the faulty determination there was no adjudication on the merits in the prior actions. As discussed more fully below, a case ending by way of a Rule 40(j), SCRCP Order is a dismissal of the action. *Goodwin v. Landquest Development, LLC,* 414 S.C.623, 779 S.E.2d 826 (Ct. App. 2015).

5. Respondents engaged in unlawful trade practices.

The court erred as a matter of law by determining that a party that brings an action based upon a contract cannot be counter sued under the terms of the same contract. (Order, p. 17) The lower court held: "As mere assignees of the mortgage loan, Deutsche Bank and Nationstar are not subject to any claims arising from origination of the loan." (Order, p. 17)

The first incorrect conclusion made by the court is that Nationstar is an assignee. The facts clearly establish Nationstar never received an ownership interest in either the CRogers Note or Mortgage. (See discussion above in Section 2.C.2) Nationstar is not an assignee.

Second the Court incorrectly relies on the case of *Rosemond v. Campbell*[7]. The Court erred in finding *Rosemond* provides a complete blanket of protection to an assignee of a note and mortgage. In fact, the Rosemond case states: "[c]onsequently, the assignee of a debt takes the obligation subject to all claims and defenses the obligor may have against the assignor." *Id*. at 645. Further, the Mortgage by its terms' states in paragraph 16 that it is governed by federal law and the law of the jurisdiction in which the property is located. S.C. law provides the rights of an assignee are subject to; "(1) "all terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract…" S.C. Code Anno. §36-9-404, South Carolina Code of Laws (2024 Edition). The court erred in concluding an assignee is sheltered from all liability.

Additionally, the court failed to address the Rogers argument that Deutsche and Nationstar do not claim to be "holders in due course." Since neither Deutsche or Nationstar are holders in due course they are subject to all claims and the court erred in granting summary judgment.

The court erred in concluding the claims of unfair trade practices are based solely on the procedural history of the three prior foreclosure actions. This is inconsistent and obviously incorrect based on the various acts committed by Deutsche and Nationstar complained of by the Rogers and recited by the Court. (Order, pp. 16-17). The complained of acts show that Deutsche and Nationstar are engaged in trade and commerce. One who lends money, and both who impose charges and collect alleged debts from consumers are engaged in activities involved in commerce.

Likewise, the complained activities have potential for repetition. As determined in the case of *Beneficial Financial I, Inc., v. Jon Windham,* Op. No. 5753 (Ct. App. August 5, 2020), a lenders

[7] 288 S.C. 516, 343 S.E. 2d 641 (Ct. App. 1986)

action of force placing insurance on a consumer in violation of a mortgage contract has the potential for repetition. *See Crary v. Djebelli,* 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998) (holding evidence indicating mortgage broker had other opportunities to enter into similar transactions was sufficient evidence to support a finding of a SCUTPA violation); *York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) (holding allegation of car dealership's alleged misrepresentation of a car's accident history was sufficient to survive directed verdict motion for SCUTPA violation because the dealership was in the business of selling cars; thus, "[c]ertainly the alleged acts or practices have the potential for repetition"). The Rogers specifically pled and established repetition by citing in ¶ 118 of their Answer and Counterclaim the case of 2012-CP-15-166, a case with similarities to the Rogers claims against Deutsche.

Contrary to the court's determination, a pecuniary loss been established. Collecting a debt through deception or unfair means also causes "ascertainable loss." *Halloran v. Spillane's Servicenter, Inc.*, 41 Conn. Supp., 587 A.2d 176, 181 (1990). Furthermore, the court's notation that the Rogers have contested the litigation initiated against them (Order, p. 20) over the past fifteen years is an ascertainable and pecuniary loss. Summary judgment was inappropriate.

6. Mortgagors are entitled to seek a determination of the enforcement of a mortgage contract.

A cause of action under the Declaratory Judgment Act is established by showing the existence of a justiciable controversy, defined as "a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." *Farmer v. CAGC Ins. Co.*, 424 S.C. 579, 819 S.E.2d 142 (Ct. App. 2018). The Court erred as a matter of law by concluding the Rogers declaratory judgment is "unnecessary and duplicative" because the issues of standing and the authority to enforce the debt will be decided in Plaintiff's case. (Order, p. 21).

The court provided no authority or proper rationale for concluding it was proper to grant summary judgment disposing of the Rogers cause of action for declaratory judgment. The Rogers claim for declaratory judgment is not duplicative of Deutsche's cause for foreclosure. The Rogers seek declaratory judgment as follows:

> 80. Defendants seek a declaration of the following;
> a. The Note is unenforceable due to its unconscionable terms specifically including but not limited to negative amortization;
> b. The dismissal of three prior actions involving the same Note and Mortgage preclude and/or bar the within action;
> c. Plaintiff lacks standing, authority or ownership to bring the within action; and
> d. The divergent direction of the Mortgage renders the Mortgage unenforceable.

(2019 Rogers Ans. Counterclaim, ¶80)

The Rogers have alleged a real and substantial controversy concerning the very contracts Deutsche has sued upon. Differently from Deutsche, the Rogers seek a determination of the enforceability of the contract due to its negative amortization feature and whether they have any obligations under the contracts. Additionally, they seek a determination as to the impact of the initiation of the within suit in light of the prior three suites that were dismiss. The Defendants' claims are therefore the very type of controversy the Declaratory Judgment Act contemplates, as it invites a party affected by a contract and law to ask a court to define how the contract and law impacts the party's rights. *See Farmer v. CAGC Ins. Co*., 424 S.C. 579, 819 S.E.2d 142 (Ct. App. 2018).

The Court further erred by improperly making findings of fact. *See David v. McLeod Reg'l Med. Ctr*., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). After concluding the cause was unnecessary because issues would be decided in Plaintiff's case (Order, p. 21), the court goes further and determines "Deutsche Bank's constructive possession of the original note, with all proper endorsements, provide Deutsche Bank with standing to prosecute this current action." (Order, p.

21). The issue of standing was not before the court. Neither was there any evidence before the court as to the possession of the CRogers Note. Additionally, the only evidence before the Court on the endorsements were the admissions made by Respondents in response to the Rogers discovery requests which are evidence of improper endorsements. How the court could conclude the endorsements were proper is incomprehensible and error.

The lower court also acted improperly by concluding the negative amortization feature was not oppressive. (Order, p. 22). Again, this issue was not before the court for determination. The court did not have the necessary evidence before it to make this finding and/or conclusion. The court did not sit in this instance as a fact finder. Moreover, it is this very issue the court says will be determined in Deutsche's case. The court erred as a matter of law.

3. THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO CONSIDER THE SPECIFIC LANGAGE OF RULE 40(j), SCRCP AND ALLOWING THE CONTINUANCE OF A FOURTH ACTION AFTER THREE PRIOR DISMISSALS OF THE SAME ACTION.

Before this Court is an issue of first impression. The issue being, whether Rule 40(j), SCRCP allows for repeated dismissals without consequence. The Rogers content Rule 40(j), SCRCP clearly indicates it provides a one-time privilege and a second dismissal under the Rule is akin to a second dismissal under Rule 41, SCRCP and determination on the merits.

3.A A Rule 40(j), SCRCP Order is an order of dismissal.

One point of prior confusion over the effect of Rule 40(j), SCRCP has already been determined. When a Rule 40(j) Order has been entered the case has ended and is deemed dismissed. *See Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 630-631, 779 S.E.2d 826 (Ct. App. 2015) ("there is a basis in our law for considering a case stricken pursuant to the rule as the equivalent of dismissed"); and *Pers. Care, Inc. v. Theos*, 825 S.E.2d 281 (Ct. App. 2019)(the procedural posture

of the case is "dismissed" in the context of a Rule 40(j) motion to restore). In *Goodwin*, the Court reasoned when determining whether a Rule 40(j) Order is equivalent to a dismissal, that "the tolling period would not be necessary if striking the case pursuant to Rule 40(j) were not the equivalent of a dismissal." *Id.* at 831.

3.B. Rule 40(j), SCRCP is not a tool to allow for abusive or unlimited dismissals.

By changing the procedure for dismissal of cases when called for trial but not ready under the former Rule 40(c), SCRCP, Rule 40(j), SCRCP did not create an open-ended avenue for repeated dismissals. To the contrary.

In interpreting the meaning of the South Carolina Rules of Civil Procedure, courts apply the same rules of construction used to interpret statutes. *Green v. Lewis Truck Lines, Inc.* , 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994). "If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." *Pers. Care, Inc. v. Theos*, 825 S.E.2d 281 (S.C. App. 2019), *quoting, Knotts v. S.C. Dept. of Natural Res*., 348 S.C. 1, 10, 558 S.E.2d 511, 516 (2002), and s*ee Crusader Servicing Corp. v. Cnty of Laurens*, 382 S.C.25, 29, 674 S.E.2d 495, 497 (Ct. App. 2009) ("Statutory interpretation is a question of law."); *Grant v. City of Folly Beach*, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001) ("If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the [c]ourt has no right to look for or impose another meaning.")

Rule 40(j), SCRCP provides:

> **(j) Case Stricken from Docket by Agreement.** A party may strike its complaint, counterclaim, cross-claim or third party claim from any docket **one time** as a matter of right, provided that all parties adverse to that claim, counterclaim, cross-claim or third party claim agree in writing that it may be stricken, and all further agree that if the claim is restored upon

> motion made within 1 year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored. A party moving to restore a case stricken from the docket shall provide all parties notice of the motion to restore at least 10 days before it is heard. Upon being restored, the case shall be placed on the General Docket and proceed from that date as provided in this rule.

Rule 40(j), SCRCP replaced Rule 40(3)(c), SCRCP providing for a new procedure for dismissing and restoring cases. *Graham v. Dorchester County School Dist*., 339 S.C. 121, 528 S.E. 2d 80 (Ct. App. 2000); and *Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 630, 779 S.E.2d 826, 830 (Ct. App. 2015)("In the notes to the 1994 amendments to the South Carolina Rules of Civil Procedure, Rule 40(j) is described as ' substantially revis[ing] the procedure for dismissing a case previously found in Rule 40(c)(3)."). Rule 40(j), SCRCP revised and restricted the former Rule 40(c)(3), SCRCP, which only struck a case and left it pending before the court. Rule 40(j), SCRCP does not leave a matter pending before the court but rather dismisses it and limits the dismissals. Unlike Rule 40(c)(3), SCRCP, Rule 40(j), SCRCP provides for the tolling of the of limitations for a claim dismissed, if the claim is restored upon motion made within one year of the date of removal. *See, Maxwell v. Genez*, 356 S.C. 617, 621, 591 S.E.2d 26, 28 (2003). "'The effect of the [Rule 40(j)] is not to set a new deadline, but to extend the statute of limitations' deadline by applying the rule's tolling provision when the motion to restore is made within a year." *Pers. Care, Inc. v. Theos*, 825, S.E. 2d 281 (Ct. App. 2019), *citing, Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 630, 779 S.E.2d 826, 830 (Ct. App. 2015).

Rule 40(j), SCRCP uses the words "one time." The words have meaning that cannot be ignored. Clearly the Rules specifies a one-time strike. It allows on a singular occasion for the dismissal of a case that protects against a statute of limitations challenge in the future if the Rule is properly followed. *See, Maxwell*, 356, S.C. 617, 622 n. 2, 591 S.E. 2d 26, 28 n. 2 (2003) ("Parties

who consent to strike a claim pursuant to Rule 40(j) agree not to challenge the statute of limitations for one year.").

The trial court's failure to give the words meaning was error. (Order) Nothing in the Rule suggests it was adopted to allow for anything more than a onetime dismissal. Multiple dismissals are not contemplated or permitted. The Rule is designed to dismiss cases not ready for trial and clear congested dockets under restricted conditions. Nothing in the Rule promotes the idea that a party that refuses to prosecute the action it commenced and bring it to conclusion before the court, can simply repeatedly dismiss and restore as done here. The Court erred in refusing to give the words used their plain meaning. *Grant v. City of Folly Beach*, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001). The multiple dismissals ended the matter with finality and precludes the prosecution of a fourth matter.

3.C. A party only has a single opportunity to voluntarily dismiss without prejudice.

A case dismissed pursuant to Rule 40(j), SCRCP has been compared to a dismissal under Rule 41(a). In the notes to the 1994 Amendments addressing the revisions to 40(j) it is stated: "A case can also be dismissed voluntarily under Rule 41(a)." Rule 40, General Docket, Trial Rosters and Call of Cases for Trial, South Carolina Rules Anno. (SC Bar)(2022 Ed.)).

Rule 41(a), SCRCP houses the long accepted two-dismissal rule. "Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim." Rule 41(a), SCRCP. Rule 41, SCRCP provides where an action has been previously dismissed the second dismissal operates as an adjudication on the merits.

Both Rules 40(j) and 41(a), SCRCP permit only one voluntary dismissal. "Dismissal, unless otherwise stated, is an adjudication on the merits." "James F. Flanagan, South Carolina Civil Procedure, 490 (2020 Ed.). The second voluntary dismissal was an adjudication on the merits and therefore with prejudice. Because both the second and third voluntary dismissals functioned as an adjudication on the merits, this forth action by Deutsche is barred. *See, Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986) ("A dismissal 'with prejudice' indicates an adjudication on the merits and, operating as res judicata, precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication."); *Laughon v. O'Braitis*, 360 S.C. 520, 527, 602 S.E.2d 108, 111 (Ct. App. 2004) ("In a subsequent action involving the same subject matter, the dismissal finally settles all matters litigated in the earlier proceedings, and all matters which might have been litigated therein."). The court erred in finding the second and third dismissals were not decisions on the merits.

The United States Supreme Court in the case of *Cooter Gell v. Hartmarx Corporation*, 496 U.S. 384, 110 S. Ct. 2447, 10 L. Ed. 2d 359 (1990) was confronted with determining whether a federal court was divested of jurisdiction from determining Rule 11 sanctions for failure to make sufficient prefiling inquiries to support a complaint, after plaintiff voluntarily dismissed the case pursuant to Rule 41(a)(1), FRCP. Although *Cooter* is not on point, because of certain issues addressed by the Court, it is instructive here.

The Court noted that both Rule 11, FRCP and Rule 41(a)(1), FRCP are aimed at curbing abuses of the judicial system. The Court further noted that:

> Rule 41(a)(1) permits a plaintiff to dismiss an action without prejudice only when he files a notice of dismissal before the defendant files an answer or motion for summary judgment and only if the plaintiff has never previously dismissed an action "based on or including the same claim." Once the defendant has filed a summary judgment motion or answer, the plaintiff may dismiss the action only by stipulation, Rule 41(a)(1)(ii), or by order of the court, "upon such terms and conditions as the court

> deems proper" Rule 41(a)(2). If the plaintiff invokes Rule 41(a)(1) a second time for an "action based on or including the same claim," the action must be dismissed with prejudice.

Id. at 394.

Like the federal rule 41(a)(1), FRCP, Rules 40(j) and 41(a)(1), SCRCP, were designed to limit abuses. Rule 40(j), SCRCP was designed to limit a dismissal to one occasion but only with the consent of all parties. It was designed to afford litigates with limited protection with regard to the statute of limitations once, but only if the proscribed times were followed. Similarly, Rule 41(a) was designed to limit dismissals without prejudice. Thus, like the federal Rule 41(a), Rules 40(j) and 41(a)(1), SCRCP were aimed at curbing abuse and not allowing succussive filings. To permit this fourth action to proceed would be to allow the very abuses Rule 40(j) and 41(a)(1) were designed to preclude and should not be allowed.

3.D. **Equity does not reward the non-vigilant for their own inaction.**

"In equity goods guys should win and bad guys should lose." *SUEM – Spitz's Ultimate Equitable Maximu: In Equity Good Guys Should Win and Bad Buys Should Loose*, Roger Young and Stephen Spitz, South Carolina Law Review, Vol. 55, Issue 1, Article 7, p. 175 (Fall 2003). Deutsche is responsible for its and its predecessor's deleterious behavior and the situation it finds itself.

It is now approaching 14 years since the first action on the CRogers Note and Mortgage was commenced. The matter has been in and out of the court repeatedly with little to no activity on the part of the Deutsche other than allowing time to expire. Deutsche could have avoided the present posture if finds itself in if it had bother to prosecute any of the three prior actions.

Two years lapsed between the filing of 2009 Action and the 2011 Action. Three years after the 2011 Action had commenced with no trial, the Rogers filed a motion for summary judgment.

Approximately a month after the Notice of Hearing on the Rogers' motion had been set the matter was again dismissed. Slightly less than a year later the 2015 Action was filed. No activity took place in the 2015 Action except for the notice of a trial term. Within days of the trial notice the matter was again dismissed. Deutsche did nothing in any of the actions to prosecute the claim. In fact, when the Rogers dispositive motion came up for hearing Deutsche ran. It ran and hide when the matter came up for trial. Deutsche has avoided prosecution of the matters.

In addition to failing to prosecute, Deutsche in the present action has chosen to engage in obstructive discovery behavior. The Rogers propounded upon Deutsche and Nationstar the standard interrogatories provided for in Rule 33(b), SCRCP on April 11, 2022. Rather than provide the names of their corporate witnesses they intend to call to prove their case, they generically responded with "a representative" and no specific name. Pursuant to Rule 11, SCRCP the Rogers wrote to counsel on May 13, 2022 outlining their deficiencies and recommended reading the Honorable Roger Young's memorandum addressing discovery responses and practices. Receiving no response, on September 7, 2022 the Rogers filed a Motion to Compel which is pending. To date, Deutsche has not identified a witness that will testify on its behalf to prove its case even though the matter has appeared on the jury roster January 9, 2023.[8]

Contrary to Deutsche and lenders' general belief they are subject to the same rules of law and court as anyone else with no special treatment because they are a financial institution. Nonetheless, Deutsche unlike any other litigate thinks it can dismiss and refile a case as many times as it wishes with impunity. Deutsche thinks it does not have to do the fundamental task of telling the other side the name of the witness it will call at trial to prove its case. Deutsche operates under

[8] When this matter appeared on the January 9, 2023 trial roster Deutsche requested a continuance so all pending motions could be heard.

the misperception the rules of law, procedure and court do not apply to it. Deutsche operates under the misperception it cannot be held accountable for its failures. The bar to Deutsche prosecuting this fourth action is of its own making. The rule of law must be followed and Deutsche should lose because of the choices it has made.

In *Georganne Apparel Inc., v. Todd,* 303 S.C. 87, 399 S. E. 2d 16 (Ct. App. 1990), a trial court's dismissal of an action with prejudice was upheld. The history of *Georganne* is as follows:

- January 1986 initial Complaint was filed;
- September 1986 case struck pursuant to 40(c)(3) at Plaintiff's request;
- September 1987 case restored at Plaintiff's request;
- February 1988 Plaintiff entered consent order limiting claim against Accounts to professional negligence;
- May 1988 Order entered precluding Plaintiff for calling designated expert because of failure to cooperate in setting up expert deposition;
- May 1988 Plaintiff's motion to dismiss pursuant to Rule 41(a)(2) granted without prejudice but with conditions;
- September 1988 Plaintiff filed new complaint adding a party and causes of action;
- November 1988 trial court dismiss case with prejudice finding Plaintiff's addition of parties and causes of action violated the May 1988 Order.

Taking in the totality of circumstances including the violation of the May Order and the fact Plaintiff had been given abundant opportunity to litigate, the court found no abuse of discretion. "There is a limit beyond which the court should allow a litigate to consume the time of the court and to prolong unnecessarily time, effort and costs to defending parties." *Id*. at 19. As in *Georganna,* taking in the totality of the circumstances specifically including the three (3) dismissals, Deutsche should not be allowed to consume the time of the court a fourth time with an action it chose to voluntarily dismiss three prior times. The court erred by failing to the totality of circumstances into consideration as urged by the Rogers thereby committing error.

CONCLUSION

Therefore, for the forgoing reasons, Appellants Curtis and Julie Rogers, respectfully ask this Court to reverse the lower court's finding of partial summary judgment as to the Rogers' claims in favor of Respondents as material questions of fact exist; that Respondents be required to fully and fairly respond to discovery; and that summary judgment be granted in their favor due to Respondents dismissal of the three prior matters.

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