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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

Court of Common Pleas

The Honorable Shannon M. Phillips, Circuit Court Judge

Case No. 2021-CP-42-04184

(Appellate Case No. 2024-000371)

Jamie T. Nesbitt.....Appellant,

v.

Cenlar FSB, Amerihome Mortgage Company, LLC, and Lakeview Loan Servicing, LLC……Respondents.

RESPONDENTS' INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF THE CASE

Appellant Jamie Nesbitt ("Appellant") appeals the trial court's granting of summary judgment to Respondents Cenlar FSB ("Cenlar"), AmeriHome Mortgage Company ("AmeriHome"), and Lakeview Loan Services, LLC ("Lakeview") (collectively "Respondents"). But Appellant's initial brief ("Initial Brief") mischaracterizes the record in this case to contrive grounds for appeal where none exist. As with her motion for reconsideration, Appellant argues the trial court erred in dismissing all of Appellant's claims because Respondents' summary judgment motion only addressed her South Carolina Code § 29-3-320 claim, and not her fiduciary duty and negligence claims. This assertion is patently false. Respondents' motion addressed the fiduciary duty and negligence claims in the third paragraph, and their supporting brief addressed these claims at-length on pages 7 through 11. It was ***Appellant*** who failed to address these arguments in her summary judgment briefing. Appellant also argues the trial court made improper findings of fact when her evidence utterly failed to demonstrate a genuine dispute of any material facts. Therefore, this Court should affirm summary judgment and dismiss this appeal.

FACTUAL BACKGROUND

On August 8, 2019, Appellant signed a note ("Note") in the amount of $182,532 with an interest rate of 4.625%. Affidavit of Daniel Anderson ("Anderson Aff."), ¶ 8, Ex. 1. The same day, Appellant signed a mortgage ("Mortgage") (the Note and Mortgage may be referred to collectively as the "Loan"), securing the Note to the property commonly known as 355 Bryant Road, Inman, South Carolina 29349 ("Property"). Anderson Aff., ¶ 9, Ex. 2; Affidavit of Benjamin W. White ("White Aff."), Exs 1, 3 at Nos. 1-4, Ex. 5 at 21:8-25.[1] Appellant's Loan was

[1] A transcript of the Deposition of Timothy Ray was attached as Exhibit 5 to the Affidavit of Benjamin W. White in support of Respondent's Summary Judgment Motion.

escrowed, meaning that a portion of her monthly mortgage payment went toward an escrow account, which the lender could use to pay Appellant's property taxes on her behalf. Anderson Aff., ¶ 10, Exs. 1, 3; White Aff., Exs. 1, 3 at Nos. 5-9, Exs. 2, 4 at Nos. 2, 4, Ex. 5 at 22:25, 23:1-24. Accordingly, regular property taxes were paid to Spartanburg County from Appellant's escrow account. *Id.*

Seeking to refinance and pay off the Loan, Appellant requested and received a payoff statement from AmeriHome, with an effective date of November 9, 2020 ("November 9 Payoff Statement"). Anderson Aff., ¶ 11, Ex. 4; White Aff., Exs. 1, 3 at Nos. 12-17, Ex. 5 at 24:14-25, 26:20-25, 27:1-3. The November 9 Payoff Statement contained several warnings explaining that the payoff amount may increase before December 7, 2020 if funds were disbursed from the escrow account for a scheduled tax or insurance payment, and the payoff amount should be confirmed prior to remitting payoff funds. Anderson Aff., ¶ 12, Ex. 4; White Aff., Exs. 1, 3 at Nos. 15-17, 7 at 30:25, 31, 32:1-22. These warnings[2] are illustrated below:

Page	Warning
3	Payoff remittances of less than the full payoff amount due will not be applied and interest will continue to accrue until the full amount is received.
3	Please note the required payoff amount MAY CHANGE if a payment is returned, or if fees or advances occur on or after the Effective Date of this statement.
4	SINCE AMOUNTS MAY CHANGE, WE RECOMMEND YOU CONTACT OUR OFFICE PRIOR TO REMITTING FUNDS

[2] All of the payoff statements referenced in this section contain the same warnings regarding escrow advances affecting the payoff amount. Anderson Aff., ¶¶ 17, 19, 22, 23, Exs. 6, 7, 9, 10.

4	If we collect escrow funds for payment of real estate taxes and hazard or flood insurance, we will continue to make required disbursements from the escrow account until our application of the payoff funds to the account
4	CAUTION: If an escrow disbursement creates a shortage in the escrow account and causes us to advance our funds, the amount of the advance will be added to the amount due and must be paid at time of payoff.

Id. The November 9 Payoff Statement calculated the total due of $178,774.37 by subtracting the funds in the escrow account ($1,471.31) from the principal balance ($179,158.85), interest calculated to 12-07-20 ($828.61), and earned MIP Premium ($248.22). Anderson Aff., ¶ 13, Ex. 3; White Aff., Exs. 1, 3 at Nos. 12-17.

On December 3, 2020, $1,363.46 was disbursed from the escrow account associated with the Loan to pay Appellant's scheduled property taxes, which became due and payable between September 13, 2020, and January 15, 2021.[3] Anderson Aff., ¶ 15, Ex. 3. Because the payoff amount shown on the November 9 Payoff Statement was conditioned a positive escrow balance of $1,471.31, the tax disbursement increased the amount necessary to pay off the Loan. Anderson Aff., ¶¶ 15-16, Exs. 3, 4; White Aff., Exs. 1, 3 at Nos. 8, 19, Ex. 5 at 56:14-21. On December 4, 2020, Cenlar faxed an updated payoff statement ("December 4 Payoff Statement") to the same number as the November 9 Payoff Statement (864-412-2690) reflecting the increased payoff amount that resulted from the tax disbursement. Anderson Aff., ¶ 17, Ex. 6. On December 7, 2020, Cenlar faxed another updated payoff statement ("December 7 Payoff Statement") to the

[3] The Spartanburg County property tax schedule is publicly available on the county website at https://www.spartanburgcounty.org/408/Tax-Procedures.

same number as the November 9 Payoff Statement (864-412-2690) reflecting the increased payoff amount that resulted from the tax disbursement. *Id.*, ¶ 18, Ex. 7.

On December 7, 2020, Cenlar received a wire of $178,774.37 from Appellant. Anderson Aff., ¶ 19. This wire was rejected because it was short of the amount necessary to pay off the Loan, which increased to $180,137.83 on December 3, 2020 when funds in the escrow account were used to pay Appellant's property taxes. Anderson Aff., ¶ 19; White Aff., Exs. 2, 4 at No. 17, Ex. 5 at 40:7-10; 42:18-24, 49:11-17; Compl. ¶ 13. Between November 5, 2020 and the short payoff on December 7, 2020, neither Appellant nor anyone on her behalf contacted Cenlar to confirm the payoff amount or to notify Cenlar that the property taxes would be paid by another party. Anderson Aff., ¶ 20; White Aff., Ex. 5 at 40:7-10; 42:18-24, 49:11-17, 61:5-9. On December 8, 2020, Cenlar informed Appellant the payoff had been rejected because it was short due to the property tax payment, and the payoff funds were returned. Anderson Aff., ¶ 20, Ex. 3; White Aff., Ex. 5 at 58:11-25, 59:1-7; Compl. ¶ 35.

On December 9, 2020, Ms. Nesbitt's escrow attorney, Timothy Ray ("Mr. Ray"), called Cenlar and requested a payoff quote good through December 20, 2020. Anderson Aff., ¶ 22, Ex. 3. On December 11, 2023, an updated payoff statement ("December 11 Payoff Statement") was generated and faxed to Mr. Ray at 864-585-0068. Anderson Aff., ¶ 22, Ex. 8; White Aff., Ex. 5 at 71, 72:1-10. On December 19, 2020, Cenlar requested that Spartanburg County refund the $1,363.46 property tax payment made on December 3, 2020, because Cenlar was informed Ms. Nesbitt and Mr. Ray would make the payment themselves. Anderson Aff., ¶ 23, Ex. 3. On December 30, 2020, another updated payoff statement ("December 30 Payoff Statement") was generated and faxed to Mr. Ray. Anderson Aff., ¶ 24, Ex. 9; White Aff., Ex. 5 at 74:14-24.

On May 27, 2021, AmeriHome Mortgage sent a letter to Appellant with a detailed

explanation of why her attempted payoff on December 7, 2020, was short. Anderson Aff., ¶ 26, Ex. 10. After tendering the short payoff on December 7, 2020, Appellant never again attempted a payoff during the Cenlar servicing period, which ended on May 4, 2021. *Id.*, ¶ 26.

On December 16, 2021, Appellant filed an action in the Spartanburg County Court of Common Pleas for the Seventh Judicial Circuit, naming as defendants Cenlar, Hancock Mortgage Partners, LLC ("Hancock"), AmeriHome, Lakeview, and Flagstar FSB ("Flagstar"). *See* Complaint ("Compl."). Appellant alleged Respondents failed to release their mortgage lien on Appellant's real property despite her tendering $178,774.37 on or about December 7, 2020, in violation of South Carolina Code § 29-3-310 and in breach of Respondents' legal duties. *Id.* On September 13, 2023, Respondents moved for summary judgment pursuant to South Carolina Rule of Civil Procedure 56(a) and (c). *See* Respondents' Motion for Summary Judgment ("MSJ Mot."). Respondents argued Appellant failed to produce any evidence she ever tendered payment in full for the loan secured by her mortgage or establish she was owed fiduciary duties. Mot. at 1.

After hearing oral argument on November 20, 2023, the trial court granted Respondents' motion for summary judgment on November 29, 2023 after "review and consideration of the parties' pre-hearing submissions and oral argument . . ." *See* Order Granting Summary Judgment ("MSJ Order"). Appellant moved for reconsideration ("Reconsideration Mot.") pursuant to South Carolina Civil Procedure Rule 59(e), arguing, as she does again on appeal, Respondents' motion for summary judgment did not address her fiduciary duty claim and that the trial court failed to consider her affidavit. *See* Reconsideration Mot. The trial court denied Appellant's motion for reconsideration because it was "unable to discovery any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Final Order Denying Motion of Reconsideration ("Reconsideration Order") at 1

(citing *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 527, 753 S.E.2d 428, 433 (2014)).

Appellant now appeals the MSJ and Reconsideration Orders, arguing the trial court erred in "improperly making factual determinations reserved for the finder of fact" and granting summary judgment on Appellant's fiduciary duty and negligence claims "when Respondent failed to raise those issues in its motion for summary judgment or even at oral argument . . ." Initial Brief at 1.

STANDARD OF REVIEW

"When reviewing the grant of a summary judgment motion, appellate courts apply the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008). "Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a [circuit] court may grant a motion for 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.'" *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009) (quoting Rule 56(c), SCRCP).

"The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005). "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." *Id.* "Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Id.* "To

survive a motion for summary judgment, the non-moving party must offer some evidence that a genuine issue of material fact exists as to each element of the claim." *Chastain v. Hiltabidle,* 381 S.C. 508, 514, 673 S.E.2d 826, 829 (Ct. App. 2009).

ARGUMENT

I. APPELLANT FAILED TO DISPUTE ANY MATERIAL FACTS

a. Appellant's Payoff Was Short.

Appellant failed to dispute any material facts as to whether she ever tendered the full amount due on the Loan. Appellant's primary claim was based on South Carolina Code § 29-3-310, which provides,

> Any holder of record of a mortgage ***who has received full payment or satisfaction*** or to whom a legal tender has been made of his ***debts, damages, costs, and charges*** secured by mortgage of real estate shall . . . within three months after the certified mail, or other form of delivery, with a proof of delivery, request is made, enter satisfaction in the proper office on the mortgage which shall forever thereafter discharge and satisfy the mortgage [emphasis added].

S.C. Code Ann. § 29-3-320 provides,

> Any holder of record of a mortgage having received such payment, satisfaction, or tender as aforesaid who shall not, by himself or his attorney, within three months . . . enter satisfaction as aforesaid shall forfeit and pay to the person aggrieved a sum of money not exceeding one-half of the amount of the debt secured by the mortgage, or twenty-five thousand dollars, whichever is less, plus actual damages, costs, and attorney's fees[.]

A plaintiff claiming violation of S.C. Code § 29-3-320 must first establish "he has made full payment of his 'debts,' ***including any applicable 'damages, costs, and charges'*** . . ." *Dykeman v. Wells Fargo Home Mortgage, Inc.*, 381 S.C. 333, 340 (2009) (emphasis added). Full payment of ***all*** amounts secured by a mortgage is required to trigger the duty to satisfy the mortgage under S.C. Code § 29-3-310. *See Rowell v. Whisnant,* 360 S.C. 181, 187 (Ct. App. 2004). Where additional amounts are owed, tender of only principal and interest will not suffice

to trigger the statutory duty to satisfy the mortgage. *Id.* (declining to find violation of S.C. Code § 29-3-10 where payment did not include attorneys' fees owed on note). Indeed, "[a] mortgage is not satisfied where an outstanding obligation to that mortgage remains." *Quarter Pointe Ventures, LLC v. Lineberger*, 2016-002060, 2019 WL 2373763, at *4 (S.C. Ct. App. June 5, 2019).

Here, section 3 of the Mortgage provides, "Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the 'Funds') to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance." Anderson Aff., Ex. 2 § 3. Section 3 further provides, "Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items." *Id.* Section 26 provides, "[t]he lien of this Security Instrument shall secure the existing indebtedness under the Note ***and any future advances made under this Security Instrument*** up to 150% of the original principal amount of the Note plus interest thereon, attorneys' fees and court costs [emphasis added]." *Id.* § 26.

The language of the Mortgage plainly permits the lender to advance property taxes from an escrow account. *Id.* Both Appellant and Mr. Ray (her escrow attorney) admit the Mortgage was "escrowed" at the time of the attempted payoff, meaning Cenlar would regularly pay Appellant's property taxes from the escrow account associated with the Loan. White Aff., Exs. 1, 3 at Nos. 5-9, Exs. 2, 4 at Nos. 2, 4, Ex. 5 at 22:25, 23:1-24. Appellant's escrow account history shows regular disbursements for property taxes and insurance. Anderson Aff., ¶ 10, Ex. 3. On November 9, 2020, the amount required to pay off the Mortgage was $178,774.37. Anderson Aff., ¶ 11, Ex. 4; White Aff., Exs. 1, 3 at Nos. 12-17, Ex. 5 at 24:14-25, 26:20-25, 27:1-3. This payoff amount was contingent on a positive escrow account balance of $1,471.31. Anderson Aff., ¶ 5,

Ex. 3; White Aff., Exs. 1, 3 at Nos. 12-17.

On December 3, 2020, $1,363.46 was disbursed from the escrow account to pay Appellant's scheduled property taxes, which became due and payable between September 13, 2020, and January 15, 2021. Anderson Aff., ¶ 15, Ex. 3. Because the payoff amount shown on the November 9 Payoff Statement was calculated based on a positive escrow balance of $1,471.31, the tax disbursement increased the amount necessary to pay off the Loan. Anderson Aff., ¶¶ 13, 15, Exs. 3, 4; White Aff., Exs. 1, 3 at Nos. 8, 19, Ex. 5 at 56:14-21. On December 7, 2020, Cenlar received a wire of $178,774.37 from Appellant. Anderson Aff., ¶ 19. This wire was ***short*** of the amount necessary to pay off the Loan, which increased to $180, 137.83 on December 3, 2020 when funds in the escrow account were used to pay Appellant's property taxes. Anderson Aff., ¶ 19; White Aff., Exs. 2, 4 at No. 17, Ex. 5 at 40:7-10; 42:18-24, 49:11-17; Compl. ¶ 13.

Between November 5, 2020 and the short payoff on December 7, 2020, neither Appellant nor anyone on her behalf contacted Cenlar to confirm the payoff amount or to notify Cenlar that the property taxes would be paid by another party. Anderson Aff., ¶ 20; White Aff., Ex. 5 at 40:7-10; 42:18-24, 49:11-17, 61:5-9. Without any such notice, Cenlar proceeded with the regularly scheduled property tax payment on December 3, 2020, which diminished the funds in the escrow account. When this payment occurred, the amount due was no longer $178,774.37. Because Appellant's payment of $178,774.37 on December 7, 2020, her only attempt to pay off the Loan, was not enough to satisfy her debt, Respondents incurred no duty to discharge the Mortgage.

b. The Trial Court Properly Considered the Parties' Evidence.

In her Initial Brief, Appellant argues the trial court "erred because its orders fail to address [her] evidence, which is contrary to the court's obligation to view all evidence in the light most favorable to [her]." Initial Brief at 7. But the trial court's chosen wording in its orders does not

mean it somehow failed to "view all evidence in the light most favorable" to the nonmoving party. Rule 56 only requires "an order specifying the facts that appear without substantial controversy" only if "judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary." Rule 56(d), SCRCP. In any case, the trial court granted summary judgment "upon review and consideration of the parties' pre-hearing submissions and oral argument . . ." MSJ Order. The trial court then denied reconsideration "[a]fter careful consideration of the able arguments and filing of counsel and review of the record," explaining it could not "discovery any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered." Reconsideration Order at 1.

In the Reconsideration Order, the trial court cites *Woodson v. DLI Properties, LLC*, in which the Supreme Court of South Carolina held "findings and conclusions" in an order granting summary judgment "are not required for appellate review . . ." 406 S.C. 517, 527, 753 S.E.2d 428, 433 (2014). The court cited South Carolina Civil Procedure Rule 52, which provides that "[f]indings of facts and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 . . ." *Id.* Indeed, "not all situations require a detailed order, and the trial court's form order may be sufficient if the appellate court can ascertain the basis for the trial court's ruling from the record on appeal." *Porter v. Lab. Depot*, 372 S.C. 560, 568, 643 S.E.2d 96, 100 (Ct. App. 2007).

c. Appellant's Affidavits Fail to Dispute Respondents' Tax Payment.

Appellant points to two affidavits "reflecting that it was [Appellant] who paid the real property taxes in question and that [Respondents] had actual or constructive knowledge that the taxes had been paid." *Id.* at 8. Appellant's "evidence even included canceled checks and registers showing that the taxes were paid by [Appellant] out of closing. *Id.* (citing Affidavits of Timothy

Ray, Esq. ("Ray Aff.") and Crystal Phillips ("Phillips Aff."). Respondent's evidence, meanwhile, "showed that they did nothing more than send money to a third-party escrow type company with which to pay the taxes and was totally devoid of proof that the taxes were actually paid to the county authority by this escrow company or that Respondents were not fully reimbursed after the fact." *Id.* at 8-9. Appellant also argues she "presented much more than the quantum of evidence that would permit a reasonable inference to have been drawn . . ." *Id.* at 9 (citing *Kitchen Planners, LLC v. Friedman*, 440 S.C. 460-61, 892 S.E.2d 297, 300 (2023).[4]

Appellant's affidavits fail to create a genuine dispute of material fact, because evidence of Appellant's own tax payment does nothing to dispute ***Respondents'*** tax payment, *i.e.*, the material transaction for purposes of determining whether Appellant's payoff was adequate. It only shows, at most, Appellant and Respondents both paid the property taxes, which still would have reduced the funds in her escrow account, increased the outstanding payoff balance, and resulted in the short payoff. Further, Appellant's escrow attorney admitted in his deposition that neither Appellant nor anyone on her behalf contacted Respondents to confirm (a) the payoff amount or (b) that Appellant would pay the taxes herself. White Aff., Ex. 5 at 40:7-10; 42:18-24, 49:11-17, 61:5-9.

The only reference in Appellant's affidavits to the material issue of whether ***Respondents*** paid the taxes appears in the Phillips Affidavit. She alleges,

> I also contacted Spartanburg County Treasurer recently to ask about Nesbitt's property taxes for tax year 2020. I was told the only payment they had received was from Attorney Tim Ray on 12/10/2020. I was told they never received a check from any other source.

[4] Appellant's "quantum of evidence" standard has no basis in South Carolina law, which instead requires a "genuine dispute as to any material fact" to overcome summary judgment. *Clegg*, 377 S.C. at 653, 661 S.E.2d at 796. To the extent Appellant refers to the "mere scintilla of evidence" standard, this standard was overruled in the very case Appellant cites in her brief. *See Friedman*, 440 S.C. at 460-61, 892 S.E.2d at 300.

Phillips Aff. ¶ 18. But this conclusory statement vaguely describing a "recent" conversation with an unidentified tax official, is ***double hearsay***. Appellant is offering Ms. Phillips' outside statement, describing another purported statement from a tax official, to show Respondents did not pay Appellant's property taxes. *Jackson v. Speed*, 326 S.C. 289, 304, 486 S.E.2d 750, 758 (1997) ("Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted."). As Respondents argued in the summary judgment hearing, inadmissible hearsay cannot dispute a material fact to avoid summary judgment. *See* Rule 56(e), SCRCP ("Supporting ***and opposing*** affidavits shall be made on personal knowledge [and] shall set forth such facts as would be ***admissible in evidence*** . . ") (emphasis added); *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) ("Our appellate courts have interpreted Rule 56(e) to mean materials used to support or refute a motion for summary judgment must be those [that] would be admissible in evidence."). In *Hall*, Court of Appeals found deposition testimony was insufficient to dispute a fact to avoid summary judgment, because it relied on hearsay statement from a third party, as the Phillips Affidavit does in the present case. *Id.*

Meanwhile, as discussed *supra*, Respondents presented the trial court with admissible evidence from their business records, including the escrow account history, showing a tax payment left the escrow account on December 3, 2020 earmarked for property taxes, and was later refunded. The only conclusion to be drawn from the available evidence is that Appellant never paid her loan in full. Therefore, the trial court's granting of summary judgment to Respondents was appropriate.

II. SUMMARY JUDGMENT ON APPELLANT'S COMMON LAW CLAIMS WAS PROPER

a. Respondent Addressed the Fiduciary Duty and Negligence Claims.

Respondent's summary judgment motion, brief, and argument thoroughly addressed Appellant's fiduciary duty and negligence claims. In her Initial Brief, Appellant argues

Respondents' "Notice of Motion and Motion for Summary Judgment discuses only Nesbitt's first cause of action" and therefore the trial court erred in granting summary judgment on these claims.[5] Initial Brief at 9-10. This argument either completely ignores or willfully disregards the third paragraph of Respondents' Motion, which plainly states,

> Because Plaintiff never tendered payment in full, Defendants were not required by statute or common law to enter a satisfaction of Plaintiff's mortgage. ***Nor can Plaintiff establish as a matter of law that an arms-length transaction between a bank and a customer gave rise to fiduciary duties or duties of care***.

Mot. at 1. And even if Respondents' Motion did not specifically reference this argument as Appellant ***falsely*** claims, Respondents' supporting brief discussed fiduciary duty and negligence at length, ***as Appellant concedes***. Initial Brief at 9-10. As Appellant also concedes, the South Carolina Supreme Court has held summary judgment to be appropriate "[e]ven if the notice were insufficient" and the moving party "fully argued the issues without objection at the hearing . . ." *Salvo v. Hewitt, Coleman & Assocs., Inc.*, 274 S.C. 34, 39, 260 S.E.2d 708, 711 (1979). Here, Respondents argued at the hearing that Appellant failed to tender payment in full for the Loan, whereas Appellant's alleged satisfaction of the Loan formed the basis of her negligence and fiduciary duty claims. *See* Transcript of Hearing – November 20, 2023. Appellant did not object to these arguments based on inadequate notice at the hearing. Therefore, even under Appellant's tortured facts and law, summary judgment was proper. *Id.*

b. The Trial Court Correctly Granted Summary Judgment As To Fiduciary Duty and Negligence.

i. Fiduciary Duty

The trial court's granting summary judgment as to Appellant's fiduciary duty claim was

[5] Despite Respondent having already addressed this disingenuous argument when it appeared in Appellant's Motion to Reconsider, Appellant has disappointingly raised it again on appeal. *Compare* Motion to Reconsider at 1-2; *with* Initial Brief at 9-10.

proper because Respondents had no fiduciary duties to Appellant with regard to the payoff, Appellant never tendered payment in full, and Respondents attempted to warn Appellant before the attempted payoff and resolve the issue thereafter. "To establish a claim for breach of fiduciary duty, [a claimant] must prove: (1) the existence of a fiduciary duty; (2) a breach of that duty owed to the [claimant] by the defendant; and (3) damages proximately resulting from the wrongful conduct of the defendant." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335–36 (2012).

In her Complaint, Appellant alleged, "One or more of the [Respondents] owed a fiduciary duty to [Appellant] . . . These fiduciary duties were created by contract,[6] in which, [Appellant], as borrowee, reposed faith, confidence and trust in the lenders." Compl. ¶¶ 42-43. If Appellant refers to the Mortgage, she does not indicate what term gives rise to the alleged fiduciary duty. Regarding payoff and release, the Mortgage only provides, "Upon payment of all sums secured by this Security Instrument, this Security Instrument shall become null and void. Lender shall release this Security Instrument." Anderson Aff., Ex. 2. Likewise, if Appellant refers to the November 9 Payoff Statement, she does not indicate how the November 9 Payoff Statement constitutes a contract or where it creates such a duty. *See S. Glass & Plastics, Co. v. Kemper*, 399 S.C. 483, 491, (Ct. App. 2012) ("The necessary elements of a contract are an offer, acceptance, and valuable consideration.").

In any case, South Carolina does not recognize a fiduciary duty in this context. *See Regions*

[6] Not only does Appellant fail to point to the *term* creating this fiduciary duty, she fails to even specify what *contract*. *See Cline v. S. Ry. Co.*, 110 S.C. 534 (1918) (finding "the complaint does not state facts sufficient to constitute a cause of action" because "the alleged contract is too vague, indefinite, and uncertain to constitute a cause of action for an alleged breach thereof"). This ambiguity is fatal to Appellant's cause of action for breach of fiduciary duty, but this brief also assumes *arguendo* that Appellant references the mortgage and/or the November 9 Payoff Statement.

Bank v. Schmauch, 354 S.C. 648, 671 (Ct. App. 2003) ("South Carolina holds the normal relationship between a bank and its customer is one of creditor-debtor and not fiduciary in nature."); *Burwell v. S.C. Nat. Bank*, 288 S.C. 34, 40 (1986) ("The normal bank-depositor arrangement creates a creditor-debtor relationship rather than a fiduciary one."); *Johnson v. Serv. Mgmt., Inc.*, 319 S.C. 165, 167–68 (Ct. App. 1995), *aff'd*, 324 S.C. 198 (1996) ("The relationship between a general depositor and his bank is that of creditor and debtor, and money deposited, unless put into a special account or specifically designated to be kept separate, becomes the property of the bank and goes into its general account."); *Nat'l Loan & Exch. Bank v. New York Life Ins. Co.*, 149 S.C. 378 (1929) ("There was no peculiar or confidential relationship between plaintiff and [creditor]. They were dealing at arm's length in the ordinary business relationship of creditor and debtor.").

Here, Respondents were the servicers of Appellant's loan on the receiving end of an arms-length payoff transaction that Appellant initiated. Courts recognize an exception to this rule where the bank "undertakes to advise the customer as part of the services the bank offers," but Appellant has no evidence of Respondents providing any such advice. *Burwell*, 288 S.C. at 40. Appellant cannot establish any kind of special relationship between her and Respondents giving rise to fiduciary duties. *See Land v. Green Tree Servicing, LLC*, No. CA 8:14-1165-TMC, 2014 WL 5527854, at *5 (D.S.C. Oct. 31, 2014) ("Plaintiffs have failed to allege sufficient special circumstances creating a fiduciary relationship [between borrower and servicer] so as to create a duty.").

Even if Appellant could establish the existence of a fiduciary duty, she cannot show any breach thereof. *See In re Int'l Payment Grp., Inc.*, 733 F. App'x 98, 104 (4th Cir. 2018) ("Even if [the bank] was [the customer's] fiduciary, it did not breach its fiduciary duties by acting in

accordance with the contractual obligations between them."). She does not allege, nor can she establish, Respondents mismanaged or misappropriated any funds. The short payment resulted from Appellant and her escrow attorney's failure to follow the instructions on the November 9 Payoff, and their failure to notify Respondents of her intent to pay the property taxes herself. Anderson Aff., ¶ 20; White Aff., Ex. 5 at 40:7-10; 42:18-24, 49:11-17, 61:5-9. Respondents acted in accordance with their obligation to pay Appellant's property tax from the escrow account, as established in the Mortgage and admitted by Appellant and her escrow attorney. Anderson Aff., ¶ 10, Exs. 1, 3; White Aff., Exs. 1, 3 at Nos. 5-9, Exs. 2, 4 at Nos. 2, 4, Ex. 5 at 22:25, 23:1-24.

Respondents also took numerous steps to avoid and then remedy the short payoff, including: (1) posting warnings on the November 9 Payoff Statement about escrow disbursements and confirming before payment; (2) sending updated payoff statements on December 4, 7, and 11, 2020 reflecting the new payoff amount; (3) explaining to Appellant why the payoff was rejected and returning the funds; (4) sending additional updated payoff statements on December 11, 2020 and December 30, 2020 at Appellant's request; (5) requesting a tax refund from Spartanburg County once Appellant notified them of her own payment; and (6) providing an explanatory letter to Appellant again explaining why the payment was rejected. *See generally*, Anderson Aff. Appellant's Loan remains unpaid due to her and her agent's errors, obstinance, and insistence that Respondents accept the amount shown on the November 9 Payoff Statement, and not due to any breach of fiduciary duty on the parts of Respondents.

ii. Negligence

Nor could Appellant establish her third claim for negligence as a matter of law and fact. "To state a cause of action for negligence the plaintiff must allege facts which demonstrate the concurrence of three essential elements: (1) a duty of care owed by the defendant; (2) a breach of

that duty by negligent act or omission; and (3) damage proximately resulting therefrom." *Brown v. S.C. Ins. Co.*, 284 S.C. 47, 51 (Ct. App. 1984), *overruled on other grounds*, *Charleston Cnty. Sch. Dist. v. State Budget & Control Bd.*, 313 S.C. 1 (1993). "First, the court must determine, as a matter of law, whether the law recognizes a particular duty . . . If there is no duty, the defendant is entitled to a judgment as a matter of law." *Moore v. Weinberg*, 373 S.C. 209, 221 (Ct. App. 2007), *aff'd*, 383 S.C. 583 (2009). "Generally, duty is defined as the obligation to conform to a particular standard of conduct toward another." *Id.*

Simply stated, South Carolina does not recognize a duty of care in this context. *See Citizens & S. Nat'l Bank of South Carolina v. Lanford*, 313 S.C. 540, 545 (1994) ("The law does not impose a duty on the bank to explain to an individual what [she] could learn from simply reading the document."); *Brown v. C & S Real Estate Servs., Inc.*, 314 S.C. 463, 467 (Ct. App. 1994) ("C & S, as mortgagee, was not in a fiduciary capacity with the [borrowers] and, thus, did not have a heightened duty of care in its dealings with them."); *Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 251 (2012) ("As an initial matter, we must determine whether Bank owes Appellant a duty of care in the processing of a loan application. We find Bank does not owe Appellant a duty of care under these facts."). Here, Respondents had no duty to explain to Appellant what she could have learned from reading the mortgage, the property tax schedule, and the warnings on the November 9 Payoff Statement. Nor did Respondents have a legal duty to accept Appellant's short payment, especially when they had no notice of a property tax payment by another party. Respondents, as servicers of her loan, owed Appellant no special duties of care recognized under South Carolina law.

Appellant's negligence claim also fails because her relationship with Respondents is governed by the terms of her loan, as laid out in the Mortgage and note. In *Land v. Green Tree*

Servicing, LLC, the court declined to recognize a duty of care for a servicer to a borrower. *See Land*, No. CA 8:14-1165-TMC, 2014 WL 5527854, at *5. Applying South Carolina law, the court held,

> Plaintiffs cannot pursue a claim of negligence where their relationship with Green Tree is governed by an express contract, and where they have failed to allege that Green Tree owed them a duty separate and distinct form its obligations under that contract. Without citing to any authority, Plaintiffs merely allege that Defendants had a duty to act as reasonable and prudent loan servicing companies and agents. However, this is not a duty that arises under South Carolina law [internal citation omitted].

Here, the note and mortgage govern Appellant's relationship to Respondents. The Mortgage makes clear that only upon "payment of all sums secured by this Security Instrument" does the lender incur a duty to "release this Security Instrument." Anderson Aff., Ex. 2 § 23. Section 3 of the mortgage provides, "Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the 'Funds') to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance." *Id.* § 3. Appellant can point to no legally cognizable duty outside of this contractual language that would govern the payoff of her loan.

Even if Appellant could establish a duty of care, she has no evidence of negligent conduct that would breach the duty. Her loan remains unpaid due to Appellant and her agent's errors, obstinance, and insistence that Respondents accept the amount shown on the November 9 Payoff Statement. Appellant has not alleged and cannot show Respondent misappropriated any funds. The short payment was returned immediately on December 8, 2020. The property tax disbursement from her escrow account was paid to Spartanburg County. Anderson Aff., ¶ 15, Ex. 3. The undisputed facts confirm Appellant never tendered payment in full for her Loan, despite Respondents' actions to prevent and remedy her short payment.

Therefore, the trial court was presented with a full record and thorough briefing on Appellant's fiduciary duty and negligence claims before granting summary judgment to Respondents, and Appellant received full notice of these arguments.

CONCLUSION

For the foregoing reasons, Respondents respectfully request the Court affirm summary judgment and dismiss the appeal. Respondents further request any additional relief this Court deems just and proper.

This the 10th day of July, 2024.

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