

STATE OF SOUTH CAROLINA

] IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

] CIVIL CASE NO 2017CP2308016  
] ATTACHMENTS TO NOTICE OF

APPEAL

Wells Fargo Bank, N. A.,

]

Plaintiff,

]

v.

]

]

Michelle Hodges, Individually; Michelle Hodges, ]  
as Personal Representative of the Estate of Ruth ]

Ladson Witherspoon, Stanley Witherspoon; SC ]

Housing Corp.; Twin Creeks Homeowners ]

Association, Inc., ]

Defendants.

]

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# EXHIBIT "A"

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STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS  
THIRTEENTH JUDICIAL CIRCUIT

Wells Fargo Bank, NA,

Plaintiff,

v.

Michelle Hodges, Individually; Michelle Hodges, as Personal Representative of the Estate of Ruth Ladson Witherspoon; Stanley Witherspoon; SC Housing Corp.; Twin Creeks Homeowners Association, Inc.;

Defendants.

Case No. 2017-CP-23-08016

ORDER

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SC Court of Appeals

This matter came before the Court on July 22, 2019, for a hearing on various motions. The Court dispensed with several motions via a Form 4 Order entered on July 24, 2019. This Order addresses Plaintiff Wells Fargo Bank, N.A.'s ("Plaintiff" or "Wells Fargo") remaining two motions: Motion for Summary Judgment and Motion to Strike Defendant's Jury Trial Demand (collectively the "Motions"). At the hearing, Wells Fargo was represented by S. Sterling Laney, III, Esquire of Womble Bond Dickinson (US) LLP. Defendant Michelle Hodges ("Defendant" or "Hodges") appeared *pro se*.

After carefully reviewing the motion and memoranda submitted by the parties, hearing arguments from the parties, and considering the applicable law and facts related to the motion, the Court, in viewing the facts in the light most favorable to Defendant, finds it is proper to enter an Order Granting Wells Fargo's Motion for Summary Judgment and dismissing Defendant's counterclaims and the affirmative defenses of Lack of Subject Matter Jurisdiction, Lack of Standing, Fraud on the Court, and Protection from Sale Due to Transfer by Desent (sic) with

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prejudice. In light of the Court's ruling regarding Defendant's counterclaims, the Court grants Wells Fargo's Motion to Strike the Defendant's Jury Trial Demand and further orders that this case be referred to the Honorable Charles B. Simmons, Jr., Master in Equity for Greenville County, for final disposition.

### **FACTUAL BACKGROUND**

This is a mortgage foreclosure action that was initiated on December 22, 2017. The loan in question was entered into on March 28, 2012 between Defendant's mother, Ruth Witherspoon, and NVR Mortgage Finance, Inc. Since Wells Fargo filed its foreclosure complaint, Defendant has amended her answer and counterclaims multiple times. Defendant's current pleading, which is the subject of this Order, is her "Sixth Amended Answer and Counterclaim", which was filed on July 30, 2018. In this pleading, Defendant asserted the following counterclaims against Wells Fargo: (1) Actual Fraud; (2) Breach of Fiduciary Duty; (3) Intentional Infliction of Emotional Distress; (4) Negligence; (5) Deceptive Business Practices All of Which Occurred; and (6) Fair Debt Collection Prohibited. Defendant also asserted the following affirmative defenses: (1) Fraud Upon the Court; (2) Protection from Sale Due to Transfer by Desent (sic); (3) Lack of Standing; (4) Unclean Hands; and (5) Lack of Jurisdiction.

### **LEGAL STANDARD**

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452 (2001) (citations omitted). To this end, summary judgment must be granted "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 for summary

judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.” *Cunningham ex rel. Grice v. Helping Hands, Inc.*, 352 S.C. 485, 491 (2003). However, “when a motion for summary judgment is made and supported as provided by the rule, an adverse party may not rest upon the mere allegations or denials of his pleadings.” *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 497 (1990) (quoting Rule 56(e), SCRCP). Rather, “[t]he adverse party’s response, including affidavits or as otherwise provided by the rule, must set forth specific facts showing there is a genuine issue for trial.” *Id.*

### LAW/ANALYSIS

#### **I. Subject Matter Jurisdiction**

As a threshold matter, the Court finds that it has subject matter jurisdiction to hear this foreclosure case. Defendant argued that Wells Fargo’s failure to file a claim in her mother’s probate estate divests this Court of subject matter jurisdiction. Defendant is incorrect. Under the South Carolina Probate Code, a secured creditor is not required to file a claim against the probate estate if it is solely seeking to foreclose the mortgage and is not attempting to hold the estate liable for the deficiency following the foreclosure sale. S.C. Code Ann. §62-3-104. (“This section has no application to a proceeding by a secured creditor of the decedent to enforce his right to his security except as to any deficiency judgment which might be sought therein.”). *See also Beach First Nat’l Bank v. Gurnham (In re Estate of Gurnham)*, 407 S.C. 194, 205, 754 S.E.2d 875, 881 (2014) (discussing intersection of probate law and mortgage foreclosure actions and holding that, “the secured creditor may pursue foreclosure proceedings on the security for the mortgage without presenting a claim against the estate.”). It is hornbook South Carolina law that the court of common pleas in the county where the property affected by the foreclosure action is located has

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subject matter jurisdiction. *Meaders Bros. v. Skelton*, 234 S.C. 134, 107 S.E.2d 1 (1959). See also 27 S.C. Jur. Mortgages §105.

In the present case, Wells Fargo has indicated it is not seeking a deficiency judgment against the estate. (See Complaint at ¶13). Accordingly, Wells Fargo was not required to file a claim in Defendant's mother's probate estate. Therefore, this Court has subject matter jurisdiction over this foreclosure action because the property at issue is located at 6 Young Harris Drive, Simpsonville, South Carolina 29681, which is located in Greenville County, South Carolina.

## II. Counterclaims

### a. Tort-Based Counterclaims

Wells Fargo is entitled to summary judgment as to all of the tort-based counterclaims asserted by the Defendant. During her deposition and again at the hearing, Defendant admitted that all of her tort-based counterclaims were based on the failed loan modification review that took place in 2017. No matter how she couches her counterclaims – whether as fraud, breach of contract with fraudulent intent, breach of fiduciary duty, intentional infliction of emotional distress, or negligence, deceptive business practices – they fail as a matter of law.

In *Weber v. Bank of America, N.A.*, No. 0:13-cv-01999-JFA, 2013 Lexis 128863, at \*7 (D.S.C. Sep. 10, 2013), the borrowers sued the bank following their failure to be approved for a loan modification. *Id.* at \*11. The borrowers argued that the bank's failure to consider them and/or approve them for a loan modification was negligence per se because it violated the 2011 South Carolina Supreme Court's Administrative Order regarding Foreclosure Intervention (the "Administrative Order") or federal loss mitigation guidelines, such as HAMP. *Id.* at \*7. The court in *Weber* granted the bank's motion to dismiss holding that, "the 'denial of a loan modification under HAMP [or other similar programs] does not create a private cause of action.'" *Id.* at \*12.

The court in *Weber* concluded that “the [Toal] Administrative Order does not impose a duty on Defendant to provide a loan modification, and neither the [Toal] Administrative Order nor the ‘other federal programs’ create a private cause of action for failure to provide a loan modification or meaningful process through which to petition Defendant for a loan modification.” *Id.* at \*17. Several South Carolina courts since *Weber* have addressed these same types of claims and agreed that the denial of a loan modification does not create a private cause of action. *See Carrington v. Mnuchin*, Civil Action No. 5:13-03422-JMC, 2014 U.S. Dist. LEXIS 119430, at \*28-29 (D.S.C. Aug. 27, 2014) (dismissing claims for fraud and breach of contract for fraudulent based on alleged failure to evaluate and approve the borrowers for a loan modification). *See also Thomas v. Enter. Bank of S.C.*, Civil Action No. 1:16-cv-02793-JMC, 2018 U.S. Dist. LEXIS 47958, at \*4 (D.S.C. Mar. 23, 2018) (dismissing claims for fraud, misrepresentation, and breach of contract based on the loan modification process).

Accordingly, based on the holdings of *Weber* and its progeny, Defendant’s tort-based counterclaims of (1) fraud, (2) breach of fiduciary duty, (3) intentional infliction of emotional distress, (4) negligence, and (5) unfair trade practices all fail as a matter of law because there is not a private cause of action for failure to provide a loan modification. The Court, therefore, grants summary judgment and dismisses these counterclaims with prejudice.

The Court further finds and holds that even if these tort-based counterclaims could constitute a private cause of action in this case, each of them should still be dismissed for the alternative reasons provided by Wells Fargo during oral argument as well as in its Motion for Summary Judgment and Reply in Support of its Motion for Summary Judgment.

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### **b. Fair Debt Collection Practices Act**

A review of each of Defendant's pleadings reveals that she has not cited to a single section of the Fair Debt Collection Practices Act in her counterclaim which Wells Fargo allegedly violated. In her deposition, Defendant was asked to elaborate on the basis for her claim. Her response was, "The cause of action is for fair debt collection. I don't know." (See Hodges Dep. 100:15-16). In addition to her failure to specifically plead this cause of action and be able to articulate what the basis for her claim is, Defendant's counterclaim for violation of the Fair Debt Collection Practices Act fails as a matter of law because Wells Fargo is a "creditor" and not a "debt collector." 15 U.S.C. §1692a(4) and (6)(F). *See, e.g. Davis v. Dillard Nat'l Bank*, 1:02 CV 00546, 2003 WL 21297331, \*4 (M.D.N.C. June 4, 2003) ("Crediting institutions, such as banks, are not debt collectors under section 1692a(6)(A) because they collect their own debts and are in the business of lending money to consumers.") Additionally, "Loan servicers are not 'debt collectors' under the FDCPA unless the debt being serviced was in default at the time the servicer obtained it." *Taggart v. Wells Fargo Home Mortg., Inc.*, No. 10-cv-00843, 2010 U.S. Dist. LEXIS 102747, at \*34 (E.D. Pa. Sep. 27, 2010).

In the present case, the only evidence before this Court is that Wells Fargo was at all times collecting a debt in its own name. Further, Wells Fargo was at the very least the loan servicer prior to the loan being in default. Accordingly, Wells Fargo cannot be considered a debt collector; therefore, Defendant's Fair Debt Collection Practices Act claim fails as a matter of law and Wells Fargo is entitled to summary judgment and this counterclaim is dismissed with prejudice.

### **III. Affirmative Defenses**

As more specifically set forth below, the Defendant's affirmative defenses of (1) fraud on the court, (2) protection from sale due to transfer by descent (sic), and (3) lack of standing fail as a

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matter of law. The Court, therefore, grants Wells Fargo's Motion for Summary Judgment and dismisses the aforementioned affirmative defenses with prejudice.

**a. Fraud on the Court**

Defendant argued that certain statements made during the course of this litigation constitute fraud on the court. "Fraud on the court" claims are reserved for the "most egregious misconduct." *Chewing v. Ford Motor Co.*, 354 S.C. 72, 579 S.E.2d 605 (2003). "Attorney fraud", as alleged in this case, goes to the heart of the judicial system. *Id.* at 83; 579 S.E.2d at 611. Importantly, fraud on the court claims are only allowed where extrinsic fraud exists. *Chewing v. Ford Motor Co.*, 354 S.C. 72, 78-79, 579 S.E.2d 605, 608-09 (2003) ("Extrinsic fraud is fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action."). On the other hand, intrinsic fraud is "fraud which was presented and considered in trial." *Id.* "Relief is granted for extrinsic but not intrinsic fraud on the theory that the latter deceptions should be discovered during the litigation itself, and to permit such relief undermines the stability of all judgments." *Id.* at 82; 579 S.E.2d at 610 (quoting *Mr. G. v. Mrs. G.*, 320 S.C. 305, 308, 465 S.E.2d 101, 103 (Ct. App. 1995)).

This affirmative defense fails for multiple reasons. First, the Court finds that any statements made during the course of this litigation, including the pleadings, are entitled to an absolute privilege and cannot form the basis of a fraud on the court claim. *See Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (Ct. App. 2002) (holding that filing of *lis pendens* could not form basis for action for slander of title because filing enjoyed absolute privilege). Second, the Court finds that there was nothing fraudulent about the statements at issue.

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Third, each of Defendant's fraud on the court claims regard filings or statements being made during the course of this litigation. Defendant has been free to contest the truth and veracity of these filings and statements and is, in fact, doing so. Accordingly, in no way has Defendant been prevented from fully trying and presenting her case based on these allegedly false or fraudulent pleadings and/or statements. Therefore, Defendant's fraud on the court claims, at most, concern intrinsic fraud and cannot support an affirmative defense of fraud on the court. For these reasons, Wells Fargo is entitled to summary judgment as to this affirmative defense and it is dismissed with prejudice.

**b. Protection from sale Due to Transfer by Desent (sic)**

Defendant argued that Wells Fargo was prohibited from declaring the loan in default based on the "due on sale" provision contained in the mortgage. The due on sale provision is typically triggered when the original mortgagor transfers their interest in the property without the consent of the mortgagee. However, the Garn-St. Germain Depository Act of 1982, 12 U.S.C. §1701j-3, prohibits a mortgagee from declaring a default based on the due on sale provision when the transfer is the result of the death of the mortgagor.

In the present case, Wells Fargo declared a default under the terms of the loan due to lack of payment. In fact, the complaint is devoid of any mention of a default due to the transfer of the subject property. Accordingly, Defendant's affirmative defense on this point is irrelevant and is dismissed with prejudice.

**c. Lack of Standing**

Defendant's affirmative defense, claiming lack of standing, fails as a matter of law because the subject Promissory Note is endorsed in blank and Wells Fargo is in possession of the original Promissory Note. Under the South Carolina's version of Article 3 of the UCC, S.C. Code Ann. §

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36-3-301, possession of the original note endorsed in blank is prima facie evidence of ownership. *In re Woodberry*, 383 B.R. 373, 377 (Bankr. D.S.C. 2008) “(Possession of a bearer instrument is prima facie evidence of ownership”). See also *In re Neals*, 459 B.R. 612, 619 (holding where the original note has been presented and there is undisputed evidence the person trying to enforce the note was also the loan servicer responsible for collecting payments on and enforcing the terms of the note, then such entity has the right of a holder, including the right to enforce the note under South Carolina’s version of Article 3 of the UCC). Additionally, Wells Fargo has indisputably been the loan servicer at all times relevant to this lawsuit. Indeed, the crux of Defendant’s entire defense in this case is the denial of a loan modification by Wells Fargo. It is well-established that a loan servicer has standing in a mortgage foreclosure action. *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 224, 746 S.E.2d 478, 483 (Ct. App. 2013).

Accordingly, based on either Wells Fargo’s possession of the original note or its status a loan servicer, there is no genuine issue of material fact as to Wells Fargo’s standing to initiate this foreclosure action. Defendant’s affirmative defense of lack of standing is dismissed with prejudice.

#### **IV. Motion to Strike Jury Demand**

Since the only remaining claims in this action are equitable, the Court grants Wells Fargo’s motion to strike Defendant’s jury demand based on the reasons set forth in Wells Fargo’s Motion to Strike Jury Demand, oral arguments, and applicable South Carolina law.

#### **CONCLUSION**

For the reasons set forth above, Wells Fargo is entitled to summary judgment as to each of the Defendant’s counterclaims asserted in this action. In addition, Wells Fargo is entitled to summary judgment as to the following affirmative defenses: (1) lack of subject matter

jurisdiction; (2) fraud on the court, (3) protection from sale due to transfer by desent (sic), and (4) lack of standing. Given that the only remaining claims in this action are equitable, the Court finds that Wells Fargo's Motion to Strike Defendant's Jury Demand should be granted.

**THEREFORE IT IS ORDERED, ADJUDGED AND DECREED THAT:**

1. Wells Fargo's Motion for Summary Judgment is granted in its entirety;
2. Defendant's counterclaims are hereby dismissed with prejudice;
3. Defendant's affirmative defenses of (1) lack of subject matter jurisdiction; (2) fraud on the court, (3) protection from sale due to transfer by desent (sic), and (4) lack of standing are hereby dismissed with prejudice;
4. Wells Fargo's Motion to Strike Jury Demand is granted in its entirety; and
5. The above-captioned action is referred to the Honorable Charles B. Simmons, Jr., Master in Equity for Greenville County, to take testimony and other evidence offered and to make appropriate findings of facts and conclusions of law with authority to enter a final judgment in this case pursuant to Rule 53 and 71, SCRC. Any appeal of the final judgment shall be to the South Carolina Supreme Court or the Court of Appeals in accordance with S.C. Code §14-11-85 and Rule 53(e), SCRC.

**AND IT IS SO ORDERED.**

[JUDGE PERRY H. GRAVELY'S SIGNATURE PAGE TO FOLLOW]

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Greenville Common Pleas

**Case Caption:** Wells Fargo Bank NA vs. Michelle Hodges , defendant, et al  
**Case Number:** 2017CP2308016  
**Type:** Order/Summary Judgment

So Ordered

s/ Honorable Perry H. Gravely, #2755

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