

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
C/A NO: 2014-CP-32-02795

Nationstar Mortgage LLC d/b/a Mr. Cooper and Federal National Mortgage Association (“Fannie Mae”), a corporation organized and existing under the laws of the United States of America and its assignee Nationstar Mortgage LLC d/b/a Mr. cooper,

**ORDER GRANTING
PLAINTIFF’S SECOND MOTION FOR
SUMMARY JUDGMENT**

**and for scheduling
Merits Hearing re: Amounts Due to Plaintiff**

PLAINTIFF,

RECEIVED
(Deficiency Waived)
May 14 2026
SC Court of Appeals

v.
D. Randolph Whitt; and Pearce W. Fleming,

DEFENDANTS.

This matter came back before this Special Referee on the Plaintiff’s filing of a Second Motion for Summary Judgment on October 4, 2024. A hearing on the Plaintiff’s Motion was held in Lexington County on March 14, 2025 with attorney Jessica O’Brian Perez representing the Plaintiff and Defendant D. Randolph Whitt representing himself. All references to the Defendant in this Order will only refer to the Defendant Whitt, because the other Defendant Pearce W. Flemming is only named due to his status as a secondary lien holder.

The Plaintiff’s 2024 Motion asserts in part that there are no material facts in dispute concerning the Plaintiffs claims that: “i) it holds a valid and enforceable note and mortgage; ii). the loan is in default pursuant to the terms and conditions contained therein; and iii). Plaintiff is entitled to the foreclosure of its mortgage”. This Court’s prior Order for Partial Summary Judgment dated April 7, 2017, recorded April 10, 2017 (hereinafter referred to as the “2017 SJ Order”), is binding in this case and already decided the above three points and others in the particulars ruled upon in that Order.

The Plaintiff's 2024 Motion further asserts that "there are no material facts in dispute concerning the Defendant's defenses or counterclaims and entry of summary judgment in Plaintiff's favor is proper." Regarding the Defendant's defenses and counterclaims, the 2017 SJ Order held that:

"13. [a]s of the Requests for Admissions dated October 15, 2015, Defendant admitted to the application of law to the facts in existence at that time, that he had not suffered any damages, did not have valid claims against the Plaintiff, did not have valid defenses to the foreclosure of the Mortgage and was not entitled to reimbursement of attorneys' fees and costs.

As to all other matters raised by the pleadings in this case, I find that there are genuine issues of material fact and therefore summary judgment is not warranted. This includes, but is not limited to, issues concerning the determination of the amount owed to the Plaintiff reflecting the calculation of portions of the debt over and above the principal and interest calculations."

The Plaintiffs' Memorandum in Support of Second Motion for Summary Judgment filed October 24, 2024 repeatedly and incorrectly referred to an Order for Summary Judgment by this Court that was dated April 29, 2016, recorded May 6, 2016 (hereinafter referred to as the 2016 SJ Order), and also attached the 2016 SJ Order as Exhibit 3 to the Memorandum. The 2016 SJ Order was vacated by Order of this Court dated August 1, 2016, recorded August 4, 2016, and therefore the 2016 SJ Order has no bearing on this case whatsoever. While these errors in the Plaintiffs' Memorandum in Support of Second Motion for Summary Judgment are mistakes as to citation and exhibit, it is clear from the text of the Memorandum that the Plaintiff was referring to the 2017 SJ Order where partial summary judgment was granted "on events transpiring before October 15, 2025" and that the order held "open the total amount of the judgment" [Pl's Mem. in Supp. of Second Mot. for Summ. Jud., dated Oct. 24, 2024, at p. 2], which were only findings of the Court in the 2017 SJ Order. At the Hearing on this Second Motion for Summary Judgment, Plaintiffs' Counsel explained and apologized for the mistakes of the incorrect citations and inadvertent attachment of the 2016 SJ Order instead of the 2017 SJ Order, and the parties were

all familiar with the case history and that only the 2017 SJ Order has relevance in this case. While these mistakes were unfortunate, they have not caused any prejudice to the Defendant and they have not affected the review of the issues before this Court in the Plaintiff's Second Motion for Summary Judgment.

The issues before the Court in this Second Motion for Summary Judgment can only be those issues of material fact not already ruled upon as a matter of law and concluded in the 2017 SJ Order. The 2017 SJ Order left open two categories of issues that were not ruled upon and require further legal proceedings to conclude; those being (a) issues raised in the determination of the amount owed to the Plaintiff in the foreclosure, and (b) issues raised by the Defendant concerning defenses or counterclaims that may be based only upon facts arising after October 15, 2015. Plaintiff's Second Motion for Summary Judgment only seeks an order of summary judgment concerning (b) above, and does not extend to the issues still outstanding regarding the determination of the amount owed to the Plaintiffs in this foreclosure.

Defendant raised the following in his Amended Answer and Counterclaims dated February 25, 2015: (1) the defense of unclean hands, (2) the defense of failure to state a claim, (3) a First Counterclaim for "Breach of Contract – Duty of Good Faith and Fair Dealing", and (4) a Second Counterclaim for "Dual Tracking/CFPB Regs".

Defendant represented at the March 12, 2024 hearing that the open issues before the Court in his opinion were (1) the Affirmative Defense of Unclean Hands, (2) Counterclaim for Breach of the Duty of Good Faith and Fair Dealing, and the (3) Counterclaim for Dual-Tracking CFPB regulations. This one affirmative defense and two counterclaims are still viable in this case only to the extent that they do not contradict the holdings of the 2017 SJ Order which is final, and only to the extent they are based upon facts arising after the date of October 15, 2015.

Plaintiff filed a Reply to the Defendant's counterclaims and later was permitted to file an Amended Reply pursuant to an Order of the Court dated November 29, 2022, recorded January 9, 2023. Defendant's allegations in his Amended Answer and Counterclaims limit the allegations to the conduct of the Defendant "as outlined above" which specifically assert actions that occurred prior to October 15, 2015. Defendant never further amended his Counterclaims to allege factual allegations occurring after October 15, 2015, even though this Court set forth the following in the Court's Order dated November 29, 2022:

"Defendant Whitt also asserts in his Memorandum that he should be granted a "reciprocal right to amend" his Answer and counterclaims if the Plaintiff is allowed to amend the Reply to counterclaims. This argument is not properly before this Court. However, if the Defendant Whitt makes the appropriate Motion with an attached proposed Amended Answer and Counterclaim, this Court will address such Motion if it is not consented to by the Plaintiff."

At his deposition on March 12, 2024, the Defendant testified that he was still considering amending his counterclaims. Whitt Dep. 27:2-12 and 30:6-124, Mar. 12, 2024. A complete transcript of that deposition was submitted to the Court following the hearing at Defendant's request for supplemental consideration in connection with this Second Motion for Summary Judgment. Defendant stated that he could compile a list of post October 15, 2015 actions that would support the claim of a breach of good faith and fair dealing as "part of the process of actually doing an amendment" to his counterclaim, but he had not prepared such a list at that time. Whitt Dep. 30:17-24, Mar. 12, 2024. The Defendant did not raise or summarize any list of factual assertions arising after October 15, 2015, in any amended pleading. Defendant filed an Affidavit in Opposition to this Motion for Summary Judgment dated March 11, 2025 where he also did not list or summarize his factual assertions arising after October 15, 2015. In Defendant's arguments to this Court at the hearing, his deposition testimony, and his Affidavit,

the Defendant identified the following actions occurring after October 15, 2015, as the factual basis for his defense and counterclaims:

1. Defendant asserts that there was a failure to provide notice to him of a 2016 hearing. The record reflects that this issue was addressed by this Court through an Order vacating the 2016 SJ Order and rescheduling the hearing, thereby curing any defect in notice and resulting in no prejudice to the Defendant. Accordingly, the Court finds that the alleged failure of notice, which resulted in a vacated order and rescheduled hearing, fails as a matter of law to establish a viable claim for relief and cannot support a defense of unclean hands or either remaining counterclaim in this action.

2. Defendant asserts that during the course of this litigation, Plaintiff was permitted to file an Amended Reply to Counterclaims by Order of this Court dated November 29, 2022 discussed above, and that Plaintiff allegedly misrepresented that the amendment would only change parties and would not add claims. The Order of this Court dated November 29, 2022, was not appealed or revised, and remains a valid and binding Order of this Court. Allegations challenging the propriety of arguments made to the Court or the outcome of motions previously decided by Order of this Court fail as a matter of law to establish an independent factual basis for relief and cannot support a counterclaim in this action. Furthermore, the Defendant had the same opportunity to Amend his pleadings, which he did not; and this Court finds no prejudice or damages alleged to the Defendant that would support the defense or counterclaims subject to this motion as a matter of law.

3. Defendant asserts generally as a basis for his defense and counterclaims that affidavit(s) submitted by Plaintiff to the Court concerning the amounts due contained errors, which Defendant contends constitutes a breach of good faith and fair dealing. While it is true that

the Plaintiff did not meet the burden of proof for Summary Judgment as to the amount due to the Plaintiff in the rescheduled hearing that resulted in the 2017 SJ Order. Arguments concerning errors or misrepresentations in affidavits of opposing parties in litigation are matters for cross examination at a hearing on the merits. The failure to satisfy the requirements for Summary Judgment in full as to the amounts due to the Plaintiff does not give rise to a separate defense for the Defendant or basis for an actionable defense or counterclaim in this case.

4. Defendant asserts that the actions of the Plaintiff and Plaintiff's counsel during the foreclosure litigation amount to a continuing course of action as a pattern of behavior that violates the duty of good faith and fair dealing. Matters of mistake or oversight in Plaintiff's actions or Plaintiff's counsel's actions have been addressed by the Court as they have arisen, and the Court has permitted rescheduling and amendments when requested to cure any defects in the litigation process. These procedural and litigation process matters do not give rise to, nor do they support, the remaining defense or counterclaims in this action; accordingly, summary judgment is appropriate as a matter of law on these issues.

5. Defendant asserts a counterclaim alleging that Plaintiff engaged in impermissible dual tracking during the pendency of the foreclosure proceedings. Defendant's assertions that he should have been offered a loan modification by Plaintiff and that communications regarding loan-modification options and trial payment plans should have been directed to him as a mortgagor by foreclosure counsel, rather than by the servicer to his ex-wife as the sole signatory on the Note, are based upon facts that existed prior to October 15, 2015. Defendant's Affidavit in Opposition to Summary Judgment dated March 11, 2025 includes, as Exhibit A, Plaintiff's Certification of Compliance with Administrative Order 2011-05-02-01, wherein Plaintiff, among other things, certified that the mortgagor did not meet the requirements of FNMA for loan

modification. This Certification was filed in this action on March 2, 2015, and the facts surrounding Plaintiff's determination that loan modification was not available were previously addressed by the Court in granting summary judgment in the 2017 SJ Order. Plaintiff's continuation of actions consistent with its position held prior to October 15, 2015 does not give rise to new or separate counterclaims of this nature. Defendant has not alleged or presented any evidence of facts arising after October 15, 2015 sufficient to support this cause of action.

Defendant's deposition reflects that he was questioned regarding documents from the servicer, Seterus, Inc., addressed solely to Defendant's ex-wife and dated February 18, 2016, titled "Mortgage Trial Modification Offer," which Defendant testified he had not previously seen. Whitt Dep. 31:15 – 33:17, Mar. 12, 2024. Although this communication to Defendant's ex-wife occurred after the October 15, 2015 Request to Admit date addressed in the 2017 SJ Order, it does not give rise to facts that alter the outcome of this counterclaim under the current summary judgment motion. Defendant has not demonstrated that he was entitled to an independent loss-mitigation review or to an offer of loan modification or trial payment plan under the applicable servicing regulations. Even when these allegations are viewed in the light most favorable to Defendant for purposes of this Summary Judgment Motion, this Court finds no genuine issue of material fact concerning the alleged dual tracking from facts arising after October 15, 2015 and therefore summary judgment in favor of Plaintiff on this counterclaim is appropriate.

This Court continues to be mindful of the summary judgment standard applicable in this case. “Summary judgment is a drastic remedy and should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues.” Hoard v. Roper Hospital, Inc., 694 S.E.2d 1, 4 (S.C. 2010). Summary judgment is appropriate when “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), SCRPC.

“In ascertaining whether any triable issue of fact exists, the trial court must view all evidence and all inferences that can be reasonably drawn from it in the light most favorable to the non-moving party.” Rawlinson Rd Homeowners Assoc, Inc. v. Jackson, 716 S.E.2d 337, 341 (S.C. Ct. App. 2011) (*citing* Belton v. Cincinnati Ins. Co., 360 S.C. 575, 578, 602 S.E.2d 389, 391 (2004)). “[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” *Id.* at 341 (*quoting* Hancock v. Mid-South Mgmt. Co., 673 S.E.2d 801, 803 (S.C. 2009)).

“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. *Id.* At 342 (*quoting* David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006)).

The Court finds no genuine issue of material fact exists to support any of the alleged counterclaims or the defense of unclean hands, therefore summary judgment in favor of Plaintiff is appropriate as to all remaining defense and counterclaims asserted by Defendant.

IT IS THEREFORE ORDERED for the reasons set forth above, Plaintiff's Second Motion for Summary Judgment is granted.

A final hearing on the merits of the only remaining issue in this case, namely the calculation of the amount owed to the Plaintiff, shall be scheduled in due course.

IT IS SO ORDERED.

/s/ Lisa Lee Smith
Lisa Lee Smith
Special Referee for Lexington County

Lexington, South Carolina
April 15, 2026