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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Lisa Lee Smith, Special Referee

Appellate Case No. 2026-001142
Case No. 2014-CP-23-02795

Nationstar Mortgage LLC d/b/a Mr. Cooper[1] 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, ...Respondents,

v.

D. Randolph Whitt and Pearce W. Fleming, ...Defendants.

Of whom D. Randolph Whitt is the .... Appellant.

INITIAL BRIEF OF RESPONDENTS

[1] Rocket Mortgage, LLC is successor by merger to Nationstar Mortgage LLC, effective February 2, 2026.

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INTRODUCTION

This appeal arises from a mortgage foreclosure action spanning more than a decade, in which Appellant D. Randolph Whitt ("Appellant") has repeatedly sought to avoid the consequences of a loan default through counterclaims that lack both factual and legal support. The Special Referee correctly granted summary judgment in favor of Respondents Federal National Mortgage Association ("Fannie Mae") and Nationstar Mortgage LLC d/b/a Mr. Cooper ("Nationstar") on all remaining counterclaims and defenses asserted by Appellant, and that decision should be affirmed.

The underlying facts are not genuinely disputed. Fannie Mae holds a valid and enforceable note and mortgage. The loan is in default. And critically, Appellant did not sign the Note--a fact conclusively established by the 2017 Summary Judgment Order and not subject to collateral attack on this appeal. Appellant signed only the Mortgage as a joint property owner, a status that does not entitle him to independent loss mitigation review under the applicable CFPB servicing regulations.

Two summary judgment orders have already winnowed this case significantly. The 2017 Summary Judgment Order established: based on Appellant's own deemed admissions, that as of October 15, 2015, Appellant had suffered no damages, held no valid claims against Fannie Mae, and had no valid defenses to the foreclosure. The 2017 Order preserved only those claims supported by facts arising after that date. Despite an express invitation from the Court to amend his counterclaims to allege such post-cutoff facts, Appellant never did so. More than a year after that invitation, Appellant testified at deposition that he was still merely "considering" an amendment and had not even compiled a list of qualifying post-October 15, 2015, facts.

The counterclaims that survived the 2017 SJ Order, dual tracking under CFPB regulations and breach of the implied duty of good faith and fair dealing, fail as a matter of law on multiple independent grounds. Appellant' s dual tracking claim rests entirely on pre-cutoff conduct and a single post-cutoff document addressed solely to his ex-wife, the actual Note obligor, which Appellant admitted he had never previously seen. His good faith and fair dealing claim fares no better: South Carolina law does not recognize an independent cause of action for breach of that covenant, and the litigation conduct Appellant identifies, procedural disputes over notice and motion practice, was addressed and remedied by the trial court at each turn without prejudice to Appellant. Such conduct does not constitute a breach of the mortgage contract's implied duty of good faith and cannot sustain a claim for relief.

The Special Referee's order granting Respondents' Second Motion for Summary Judgment should be affirmed in its entirety.

COUNTER STATEMENT OF THE CASE

On or about August 1, 2014, Respondent Federal National Mortgage Association ("Fannie Mae") commenced a foreclosure action in the Court of Common Pleas, Lexington County, South Carolina, Case No. 2014-CP-32-02795 against Appellant D. Randolph Whitt ("Appellant"). On or about March 27, 2015, Appellant served an amended answer and counterclaims, asserting two counterclaims against Fannie Mae: (1) Breach of Contract – Duty of Good Faith and Fair Dealing and (2) Dual Tracking/CFPB Regulations. On April 6, 2015, Fannie Mae filed a reply to Appellant's counterclaim. On December 10, 2015, Fannie Mae filed a motion for summary judgment, including as to Appellant's counterclaims. The Special Referee granted Fannie Mae's motion for summary judgment and entered judgment in favor of Fannie Mae on all counterclaims and defenses raised by Appellant by Order dated April 29, 2016 ("2016 SJ Order"). The Special Referee later vacated the 2016 SJ Order by order dated August 1, 2016.

On August 29, 2016, Fannie Mae filed a renewed motion for summary judgment. Appellant filed a memorandum and affidavit in opposition to this motion on November 16, 2026. Fannie Mae's motion for summary judgment was granted in part and denied in part by order dated April 7, 2017, recorded April 10, 2017 ("2017 SJ Order"). The Special Referee found there are no material facts in dispute concerning the following: 1) Fannie Mae holds a valid and enforceable note and mortgage; 2) the loan is in default; and 3) Fannie Mae is entitled to the foreclosure of the property. Further, as to Appellant's defenses and counterclaims, the 2017 SJ Order provided:

> 13. As of the Requests for Admissions dated October 15, 2015, [Appellant] 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 [Fannie Mae], 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 wanted. This includes, but is not limited to, issues concerning the determination at the amount owed to [Fannie Mae] reflecting the calculation of portions of the debt over and above the principal and interest calculations.

Nationstar Mortgage LLC d/b/a Mr. Cooper ("Nationstar") (collectively with Fannie Mae, "Respondents") was joined as a Plaintiff in this action by Order dated May 5, 2022. On January 17, 2023, Respondents filed an amended reply to Appellant's amended answer and counterclaim.

On October 24, 2024, Respondents filed a second motion for summary judgment, as well as a supporting memorandum and affidavit, as to Appellant's defenses and counterclaim. On March 11, 2025, Appellant filed an affidavit in opposition to the second motion for summary judgment. The Special Referee granted Respondents' second motion for summary judgment by order dated April 15, 2026, recorded April 16, 2026 ("2026 SJ Order"). The trial court found: "no genuine issue of material fact exists to support any of the alleged counterclaims or the defense of unclean hands", making summary judgment in favor of Plaintiffs appropriate as to all remaining defense and counterclaims asserted by Appellant.

COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the Special Referee correctly granted summary judgment on Appellant's counterclaim for dual tracking where Appellant did not sign the Note, was not a "borrower" under the applicable servicing regulations, and failed to present any evidence of facts arising after October 15, 2015, sufficient to support the claim.

2. Whether the Special Referee correctly granted summary judgment on Appellant's defense of unclean hands and counterclaim for breach of the duty of good faith and fair dealing where Appellant never amended his counterclaims to allege post-October 15, 2015, facts despite express invitation by the Court, and where the identified litigation conduct was remedied without prejudice and fails as a matter of law to support an independent claim for relief.

STANDARD OF REVIEW

"When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP." *Coker v. Cummings*, 381 S.C. 45, 51, 671 S.E.2d 383, 386 (Ct. App. 2008). Summary judgment is warranted "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. "To determine if any genuine issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

ARGUMENT

I. The Special Referee Correctly Granted Summary Judgment on the Dual Tracking Counterclaim.

A. *Appellant Did Not Sign the Note and Is Not Entitled to Loss Mitigation Review.*

Appellant's central argument on this issue is that his status as a "borrower" is established by the mortgage signature page and a page of servicing requirements attached to his affidavit. This argument conflates two distinct concepts: being a mortgagor and being a borrower obligated on the Note.

The 2017 SJ Order conclusively established that "Robin F. Whitt made, executed and delivered a Note dated June 26, 1998" and that "Defendant D. Randolph Whitt did not sign the Note, and has not assumed the loan by becoming an obligor on the Note." (Order, April 10, 2017.) Appellant signed only the Mortgage as a joint property owner, not the Note as a borrower. (Order, April 10, 2017.) This finding is binding and is not subject to collateral attack on this appeal.

The applicable servicing regulations and CFPB requirements governing loss mitigation review apply to borrowers—that is, obligors on the note who are responsible for repayment. *See* 12 C.F.R.§ 1024.41(a) ("A borrower may enforce the provisions of this section pursuant to section 6(f) of RESPA (12 U.S.C. § 2605(f).") Appellant's signature on the mortgage, which merely pledged the real property as security, does not confer upon him the status of a "borrower" entitled to independent loss mitigation review. The Special Referee correctly found that "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." (Order, April 16, 2026.)

Moreover, Plaintiff's Certification of Compliance with South Carolina Supreme Court Administrative Order 2011-05-02-01, filed on March 2, 2015, certified that the mortgagor did not meet the requirements of FNMA for loan modification. This certification and the underlying determination pre-date the October 15, 2015, cutoff established by the 2017 Order. Appellant identifies no new facts arising after that date to support his dual tracking claim.

B. *Appellant Failed to Present Evidence of Post-October 15, 2015, Facts Supporting Dual Tracking.*

The 2017 Order established, based on Appellant's deemed admissions under Rule 36, SCRCP, that as of October 15, 2015, Appellant "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." (Order, April 10, 2017.) The 2017 Order preserved only claims based on facts arising *after* that date.

Appellant's dual tracking allegations are rooted entirely in pre-October 15, 2015 conduct. (Amended Answer and Counterclaims, March 27, 2015.) The only post-cutoff evidence identified—a February 18, 2016 document titled "Mortgage Trial Modification Offer" from servicer Seterus, Inc.—was addressed solely to Appellant's ex-wife, Robin F. Whitt, as the sole signatory on the Note. (Amended Answer and

Counterclaims, March 27, 2015.) Appellant admitted at his deposition that he had not previously seen this document. (Whitt Dep. 31:15 – 33:17, March 12, 2024.) This communication to a different party does not create a genuine issue of material fact as to whether Plaintiff engaged in dual tracking with respect to Appellant.

As the Special Referee correctly found, 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." (Order, April 16, 2026.) Appellant presented no evidence that any new loss mitigation review was initiated, offered to him, or required after the cutoff date. Summary judgment was therefore appropriate.

C. *Appellant Fails to Cite Authority to Support Reversal.*

Appellant's brief cites no authority directly supporting a dual tracking claim under these facts. Appellant references South Carolina Supreme Court Administrative Order 2011-05-02-01 and "CFPB regulations" in general terms but identifies no specific regulatory provision that was violated after October 15, 2015, and no specific provision that entitles a non-obligor on the Note to an independent loss mitigation review. (Appellant's Br. at 2-3.) This failure to identify applicable authority with specificity is fatal to Appellant's argument on appeal.

II. The Special Referee Correctly Granted Summary Judgment on the Defense of Unclean Hands and the Counterclaim for Breach of the Duty of Good Faith and Fair Dealing.

A. *Appellant Never Amended His Counterclaims to Allege Post-October 15, 2015, Facts.*

A threshold problem with Appellant's claims is that he never amended his counterclaims to allege facts arising after October 15, 2015, despite being expressly invited to do so. The Court's Order dated November 29, 2022 specifically noted that if Appellant filed an appropriate motion with an attached proposed Amended Answer and Counterclaim, the Court would address it. (Order, November 29, 2022.) Appellant took no such action. At his deposition on March 12, 2024— more than a year later— Appellant testified that he was merely "still considering" amending his counterclaims and had not even compiled a list of post-October 15, 2015, actions that would support his claims. (Whitt Dep. 30:17-24, Mar. 12, 2024.)

Having declined repeated opportunities to plead his claims with specificity, Appellant cannot now complain that the Special Referee failed to credit unpled factual assertions. A party opposing summary judgment must do more than rest on the allegations of his pleadings; he must set forth specific facts showing a genuine issue for trial. Rule 56(e), SCRCP. Appellant's pleadings contain no post-October 15, 2015, allegations, and his affidavit and oral argument at the hearing failed to identify facts sufficient to create a triable issue. (March 14, 2025 Transcript; March 11, 2025 Whitt Aff.)

B. *The Specific Factual Assertions Identified by Appellant Fail as a Matter of Law.*

The Special Referee carefully considered each factual basis Appellant identified for his post-cutoff claims and correctly concluded that none gives rise to a genuine issue of material fact:

Alleged Failure of Notice of the 2016 Hearing. Any defect in notice was cured when the Court vacated the resulting order and rescheduled the hearing. (Order, August 3, 2016.) Appellant suffered no prejudice.

Alleged Misrepresentation Regarding Scope of Amended Reply. The Order permitting the Plaintiff to file an Amended Reply was entered November 29, 2022, and was never appealed. (Order, November 29, 2022.) Challenges to the propriety of arguments made to the Court or the outcome of motions previously decided by Order do not establish an independent factual basis for relief. Moreover, Appellant was granted the same opportunity to amend his own pleadings and declined to do so. (Order, November 29, 2022.)

*Alleged Pattern of Litigation Misconduct***.** Appellant's characterization of litigation conduct as a "pattern of behavior" violating good faith does not transform procedural disputes into a breach of contract claim. Matters of mistake or oversight were addressed by the Court as they arose through rescheduling and amendments. These procedural remedies eliminated any prejudice. A party's dissatisfaction with an opponent's litigation conduct does not give rise to a breach of the implied covenant of good faith inherent in the underlying mortgage contract.

C. *South Carolina Law Does Not Support an Independent Claim Based on Conduct in Litigation.*

Appellant's own authority undermines his position. In *RoTec Services, Inc. v. Encompass Services, Inc.*, 359 S.C. 467, 597 S.E.2d 881 (S.C. App. 2004), this Court held that there is no independent or "special" cause of action for breach of the implied covenant of good faith and fair dealing—it is simply a breach of contract claim. The implied covenant of good faith and fair dealing attaches to the *performance and enforcement* of the contract, not to the conduct of subsequent litigation over the contract. None of the conduct Appellant identifies—notice issues, motion practice disputes, affidavit errors — constitutes a breach of the mortgage contract's implied duty of good faith. (Appellant Br. at 6.) These are grievances regarding litigation procedure properly addressed through the procedural mechanisms of the court, as they were.

Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 147 S.E.2d 481 (1966), does not help Appellant. That case merely recognized that an implied duty exists in a contractual relationship—it did not hold grievances with an opposing party's conduct in litigation constitutes a breach of that duty. *Id.* at 367, 147 S.E.2d at 484. Similarly, *Tharpe v. G.E. Moore Co.*, 254 S.C. 196, 174 S.E.2d 397 (S.C. 1970), involved a duty to perform work "in a workmanlike manner" in the context of an independent contractor relationship—a factual context entirely inapposite to this mortgage foreclosure case. *Id.* at 201, 174 S.E.2d 399.

D. *Plantation Federal Bank v. Gray Is Distinguishable.*

Appellant relies on *Plantation Federal Bank v. Gray*, 401 S.C. 507 (S.C. App. 2013), but that case is distinguishable in critical respects. In *Gray*, the Court of Appeals addressed the propriety of proceeding with a *foreclosure sale* of a vacant lot where counterclaims remained pending. The court found that the allegations of the counterclaims "involve questions of fact that will most certainly arise in the foreclosure action." Here, the Special Referee has not proceeded to foreclosure sale. Instead, the Special Referee properly examined whether Appellant's counterclaims present triable issues of fact and found they do not—because Appellant has presented no competent evidence of post-October 15, 2015, facts sufficient to sustain them. (Order, April 16, 2026.) *Gray* does not stand for the proposition that a defendant's mere assertion of counterclaims, unsupported by specific factual allegations, precludes summary judgment. *See generally Gray*, 401 S.C. 507.

E. ***The Defense of Unclean Hands Cannot Survive Summary Judgment.***

The equitable defense of unclean hands requires that the party asserting it demonstrate that the opposing party's misconduct is directly related to the subject matter of the litigation and that the party asserting the defense was harmed thereby. *First Union Nat'l Bank of S.C. v. Soden*,333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998) ("The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant."). Here, for the same reasons that Appellant's counterclaims fail, his defense of unclean hands lacks the factual foundation necessary to create a genuine issue of material fact. (*See* Whitt Aff. March 11, 2025.) The identified conduct throughout litigation was remedied without prejudice, and Appellant has not connected any alleged misconduct to the core subject matter of the foreclosure in a manner that would warrant denial of relief to Plaintiff.

III. The Special Referee's Characterization of Respondents' Conduct Was Supported by the Record and Raises No Reversible Error.

Appellant takes issue with the Special Referee's description of certain conduct as "matters of mistake or oversight." However, viewed in context, the Special Referee's point was not that the conduct was trivial, but that it was *addressed and remedied* by the trial court through appropriate procedural mechanisms. The 2016 Order was vacated and the hearing rescheduled. (Order, August 3, 2016.) Amendments were permitted when necessary. (Order, November 30, 2016; Order, May 11, 2022; Order, November 29, 2022.) The trial court permitted Appellant to amend his own pleadings. (Order, November 29, 2022.) At every juncture, the trial court ensured that Appellant suffered no prejudice from any procedural irregularity. The Special Referee's conclusion that these remedied procedural matters "do not give rise to, nor do they support, the remaining defense or counterclaims in this action" is not erroneous.

CONCLUSION

For the foregoing reasons, the Order of the Special Referee granting Plaintiffs' Second Motion for Summary Judgment should be affirmed.

Dated: August 21, 2026

/s/ Laurel Christmas

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