IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master in Equity

Case No. 2010-CP-10-5775

CitiMortgage, Inc. .....Respondent/Appellant,

v.

Brodie M. Trickey aka Brodie McCary Trickey
and Barberry Woods Property Owners Association .....Defendants,

Of whom Brodie M. Trickey is the .....Appellant/Respondent.

INITIAL BRIEF OF APPELLANT/RESPONDENT

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January 27, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

I. **Did the trial court err in finding no material question of fact exists as to Defendant's counterclaims for breach of contract and good faith and fair dealing?**

II. **Did the trial court err in finding no material question of fact exists as to Defendant's counterclaim for unjust enrichment?**

III. **Did the trial court err in finding no material question of fact exists as to Defendant's counterclaim for negligent misrepresentation?**

IV. **Did the trial court err in considering an affidavit which is not made on personal knowledge?**

STATEMENT OF THE CASE

On July 19, 2010, CitiMortgage (hereinafter "Respondent") initiated foreclosure proceedings against Brodie Trickey (hereinafter "Appellant"), the owner of certain real property located in Charleston County. (Amended Lis Pendens, Summons and Complaint). Three (3) days after commencing the action, and prior to a responsive pleading being due, Respondent filed a Motion and Order for Reference. (Motion Reference). On August 6, 2010, before a responsive pleading was due, the Clerk of Court executed the Order of Reference submitted. (Order Reference).

Appellant filed an Answer and Counterclaim on August 23, 2010, setting forth counterclaims for: (1) breach of contract and of the covenant of good faith and fair dealing; (2) unjust enrichment; and (3) negligent misrepresentation. (Answer and Counterclaim). On September 10, 2010, Appellant filed a Notice of Motion and Motion to Vacate Order of Reference Cancel Foreclosure Hearing. (Motion to Vacate).

On September 20, 2010, the Master in Equity filed a Form 4 Order continuing the hearing that had been set and the case for 60 days and placed the matter on the contested

roster. (Form 4 Order, Sept. 20, 2010). On the same day Respondent filed a Reply to Appellant's Counterclaims. (Reply).

On May 23, 2011, Respondent filed a Notice of Right to Foreclosure Intervention. (Notice of Right). On June 30, 2011, the Court filed an Order staying the case pursuant to the South Carolina Supreme Court Administrative Order 2011-05-02-01. (Form 4 Order, June 30, 2011). On August 25, 2011, Respondent filed Certification of Mortgagor Non-Compliance. (Certification). On October 4, 2011, Appellant filed Opposition to [Respondent's] Certificate of Non-Compliance. (Opposition). On December 9, 2011, the Court filed an Order requiring "Plaintiff CitiMortgage to re-evaluate defendant for loan modification..." (Form 4 Order, Dec. 9, 2011).

On November 1, 2012, Respondent filed a Motion for Summary Judgment supported by the Affidavit of a Business Operations Analyst. (Motion for Sum. Judg.). On January 23, 2013, Appellant filed an Affidavit in Opposition to Plaintiff's Motion for Summary Judgment. (Affidavit Trickey). A hearing was held on January 25, 2013, resulting in an Order being filed on May 8, 2013, granting summary judgment as to all counterclaims asserted by Appellant and denying summary judgment as to Plaintiff's claim for foreclosure of the mortgage. (Order, May 8, 2013). The Court determined the counterclaims should be dismissed because as determined in *Stevens v. American Home Mortgage Servicing, Inc.*, 2011 WL901179 (D.S.C. March 15, 2011), no private right of action is expressly provided for and Appellant had no verifiable income for a HMP loan modification or this foreclosure action. (Order, May 8, 2013).

On May 24, 2013, Appellant filed a Motion for Reconsideration. (Motion for Reconsideration). On July 19, 2013, the Honorable Mikell R. Scarborough, Master in

Equity held a hearing on the Motion for Reconsideration. On October 8, 2013 the Court filed an Order denying Appellant's Motion for Reconsideration. (Order, Oct. 8, 2013). Appellant served the Notice of Appeal in this matter on November 8, 2013. (Notice of Appeal). Respondent filed a Notice of Cross Appeal on November 14, 2013. (Cross Appeal).

STATEMENT OF THE FACTS

This consumer transaction originated on or about September 26, 2007, with Appellant executing a Note and Mortgage in favor of Respondent and its nominee, Mortgage Electronic Registration System ("MERS"). (Complaint). In late 2008, Appellant contacted Respondent to seek loss mitigation assistance with his mortgage. (Affidavit Trickey). Appellant was having financial difficulties as a contractor due to the downturn in the economy and housing market. (Affidavit Trickey). In January of 2009, Respondent entered into a six month Forbearance Agreement with Appellant. As agreed Appellant made the initial payment. (Affidavit Trickey). Prior to the second payment becoming due, Respondent terminated the Forbearance Agreement without explanation. (Trickey Affidavit). Notwithstanding, Appellant continued to regularly contacted Respondent seeking loss mitigation to avoid foreclosure and maintain his home. (Affidavit Trickey).

In September of 2009 Appellant entered into Trial Payment Plan Agreement (hereinafter "TPP") with Respondent entitled Home Affordable Modification Trial Period Plan. (Affidavit Trickey). The TPP Agreement states in relevant part:

> If I am in compliance with this Trial Period Plan (the "Plan") and my representations in Section 1 continue to be true in all material respects, then the Lender [CitiMortgage, Inc.] ***will provide me with*** a Home Affordable Modification Agreement ("Modification Agreement"), as set

:rm in Section 3. that would amend and supplement (1) the Mortgage on :e Property, and (2) the Note Secured by the Mortgage. . .

. I have not already done so, I am providing confirmation of the :asons I cannot afford my mortgage payment and documents to permit verification of all of my income (except that I understand that I am not required to disclose any child support or alimony unless I wish to have such income considered) to determine whether I qualify for the offer described in this Plan. (the "Offer") I understand that after I sign and return two copies of this Plan to the Lender [CitiMortgage, Inc.], the Lender will send me a signed copy of this Plan if I qualify for the Offer or will send me written notice that I do not qualify for the Offer.

2. The Trial Period. On or before each of the following due dates, I will pay the Lender the amount set forth below ("Trial Period Payment"), which include a payment for Escrow items, including real estate taxes, insurance premiums and other fees, if any, of U.S. $1226.83. .

A. TIME IS OF THE ESSENCE under this Plan;

3. If I comply with the requirements in Section 2 and my representation in Section 1 continue to be true in all material respects, *the Lender will send me a Modification Agreement* for my signature which will modify my Loan Documents as necessary to reflect this new payment amount and waive any unpaid late charges accured to date. (Affidavit Trickey).

Appellant executed two copies of the TPP Agreement as directed and returned the same to Respondent. (Affidavit Trickey). Appellant timely made payment pursuant to the TTP for a period of nine (9) months from September 2009 until May of 2010 in the amount of $1,226.83. (Affidavit Trickey). The May 2010 payment was ultimately refused and returned by Respondent. (Affidavit Trickey). Appellant was verbally notified that Respondent did not send him the permanent modification documents because the forbearance amount exceeded the limit. (Affidavit Trickey). A representative of Respondent averred Appellant was declined in May 2010 for a Supplemental Modification without providing a basis for the decline. (Affidavit Nixon). In contrast to the averments of Respondent's representative, the Consolidated Note Report provided by Respondent states Appellant was "eligible for 1st lien supplemental modification offer." (Affidavit Trickey).

While making payments between September and May Appellant sent to Respondent the documents required by Respondent. (Affidavit Trickey). In some instances Appellant sent the same documents more than once. (Affidavit Trickey). Respondent acknowledged receipt of the following requested documentation from Appellant: 4506-T, bank statements, P&L, hardship affidavit, 2008 Federal Tax Return, homeowner's insurance, property tax and other documents. (Affidavit Trickey).

On May 12, 2010, Respondent declared Appellant in default. (Affidavit Nixon). On July 19, 2010, Respondent filed the within action alleging that Appellant was in default upon the terms of the Note since March of 2010. (Complaint) Appellant responded asserting counterclaims arising from the circumstances involving loss mitigation activities that occurred prior to the filing of the Complaint. (Answer and Counterclaim).

STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment under the same standard required of the circuit court pursuant to Rule 56(c), SCRCP. *Edwards v. Lexington Co. Sheriff's Dep't.*, 386 S.C. 285, 290, 688 S.E.2d 125, 128 (2012). The *de novo* review applies to matters properly preserved and admitted into evidence." *Hansen v. DHL Laboratories, Inc.*, 316 S.C. 505, 510, 450 S.E.2d 624, 627 (Ct. App. 1994), *clarified by* 319 S.C. 79, 459 S.E.2d 850 (1995).

Summary judgment is available when "there is no genuine issue as to any material fact and...the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. The moving party has the initial burden of demonstrating no issue of material fact exists. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115-117, 410 S.E.2d

537, 545 (1991). Admitted evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). "Thus, the appellate court reviews all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 240, 672 S.E.2d 799 (Ct. App. 2009). "Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Koester v. Carolina Rental Center, Inc.*, 443 S.E.2d 392, 394 (1994). Summary judgment is improper when there is an issue as to the construction of a written contract and the contract is ambiguous because the intent of the parties cannot be gathered from the four corners of the instrument." Pee *Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799 (Ct. App. 2009). A "non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment" where the case involves state law claims. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330-331, 673 S.E.2d 801 (2009).

A genuine issue of fact "can be created only by evidence which would be admissible at trial." *Hansen*, 316 S.C. at 510, 450 S.E.2d at 627. In order for a Court to consider materials and affidavits in support or opposition to summary judgment, they must be admissible and "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993).

SUMMARY OF THE ARGUMENT

The Court erred in granting the Respondent's Motion for Summary Judgment on Appellant's state law counterclaims for breach of contract, unjust enrichment and negligent misrepresentation. All three causes have a protracted history in South Carolina jurisprudence. The state law counterclaims asserted arise from the circumstance surrounding the loss mitigation activities engaged in to avoid foreclosure. Respondent conceded it is an undisputed fact that it entered into Trial Period Plan (TPP) with Appellant (i.e. an agreed upon modified mortgage payment). (Tr. Hearing Jan. 25, 2013). Respondent did not dispute that Appellant honored the terms of the TPP and made payment for nine (9) months. Respondent offered no material or admissible facts relating to the facts supporting the counterclaims. Respondent's arguments to support summary judgment were nothing more than misdirections.

Respondent sought summary judgment on two grounds. First, Respondent asserted there is no private right of a cause of action under HAMP. Second, Respondent claimed loss mitigation efforts that transpired after litigation was commenced precluded the right to assert counterclaims.

As to the first argument, Appellant did not nor was he attempting to assert a cause of action under HAMP. The counterclaims are state based causes of action. The Court improperly granted summary judgment ignoring the causes of action and facts asserted. As to the second ground the Court erred by looking to facts post commence of litigation that had no relevance to the asserted counterclaims. Additionally the Court considered and relied on an insufficient affidavit. The Court improperly granted summary judgment.

ARGUMENT

I. APPELLANT PROFFERED EVIDENCE ESTABLISHING ISSUES OF FACT EXISTED AS TO THE COUNTERCLAIM FOR BREACH OF CONTRACT AND GOOD FAITH AND FAIR DEALING ELIMINATING A BASIS FOR SUMMARY JUDGMENT.

Well established in South Carolina law is the concept that every contract has an implied covenant of good faith and fair dealing. See *Rotec Services, Inc. v. Encompass Service, Inc.*, 359 S.C. 467, 472-73, 597 S. E. 2d 881 (Ct. App. 2004); *Parker v. Byrd*, 309 S.C. 189, 420 S.E.2d 850 (1992); *See also, Mincey v. World Savings Bank, FSB*, 614 F. Supp. 2d 610 (D.S.C. 2008)(Under South Carolina law, where there is a loan agreement between the parties, there is an implied covenant of good faith and fair dealing.); and *Restatement (Second) of Contracts* § 205 (Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.)

In order to establish a claim for breach of contract one must assert and prove: (1) a binding contract entered into by the parties, (2) a breach or failure to perform the contract, and (3) damage suffered by the plaintiff as a direct and proximate result of the beach. *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 85, 124 S.E.2d 602, 610 (1962). Whether the parties have a meeting of the minds is ordinarily a question of fact for the jury to decide. *Hobgood v. Pennington*, 300 S.C. 309, 387 S.E.2d 690, 693 (1989); S*ee also, Jones v. Ridgely Communications, Inc.*, 304 S.C. 452, 405 S.E.2d 402 (1991) (jury issue exists where evidence is susceptible of more than one reasonable inference as to the construction of a contract). A contract is ambiguous when the intent of the parties cannot be gathered from the four corners of the instrument." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799 (Ct. App. 2009).

Here Respondent moved for summary judgment as to Appellant's cause action for breach of contract and good faith and fair dealing. Respondent submitted an affidavit in

support. The affidavit submitted was attested to by Cassie Nixon a Business Operations Analyst. (Affidavit Nixon). The affidavit contains no statement that it is being made on personal knowledge. (Affidavit Nixon). Indeed the only issue relating to the Appellant's counterclaims addressed in the Affidavit submitted by Respondent is contained within paragraph 4. (Affidavit Nixon). In paragraph 4 Cassie Nixon states Appellant was reviewed for a supplemental modification but was declined in May of 2010. (Affidavit Nixon). No reason for the denial was provided. (Affidavit Nixon). Neither was evidence submitted as to how the alleged denial was conveyed to Appellant.

Appellant in opposition to the motion Appellant submitted his affidavit. (Affidavit Trickey). Appellant averred that he was offered and accepted both a Forbearance Agreement and TPP from Respondent. (Affidavit Trickey). Attached to Appellant's Affidavit was a copy of the TPP submitted to him by Respondent and signed and returned as required. (Affidavit Trickey). Appellant made timely payments for a nine month period from September 29, 2009 until May of 2010. (Affidavit Trickey). Appellant further averred that he provided all documentation request of him during the TPP process. (Affidavit Trickey). Finally Appellant averred that Respondent breached its contract with him, in part, by claiming contrary to the terms of the TPP he was verbally informed he was denied for a permanent modification due to excessive forbearance. (Affidavit Trickey).

Although none of these issues were disputed or addressed in the Affidavit submitted by Respondent (Affidavit Nixon), Respondent's counsel conceded on the record that it was undisputed it entered a TPP with Appellant which provided for a reduced payment. (Tr. Hearing Jan. 25, 2013). Additionally, Respondent's counsel

conceded Appellant made the required payments pursuant to the TPP. (Tr. Hearing Jan. 25, 2013). Though there was no evidence to support the proposition, Respondent's counsel argued that Appellant did not honor the terms of the TPP because Appellant failed to provide documents to verify his income. (Tr. Hearing Jan. 25, 2013, and Affidavit Nixon).[1]

"In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Strother v. Lexington County Recreation Comm'n,* 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998). Appellant clearly has established issues of fact. Appellant asserted a contract existed and Respondent conceded the same. Appellant asserted payments were made in accordance with the contract and Respondent conceded the same. Appellant asserted Respondent breached the TPP agreement and Respondent offered nothing in dispute. Appellant asserted he provided all necessary documentation as required by the TPP and Respondent countered asserting Appellant did not provide documents requested post commencement of litigation. Respondent's asserted basis and the Court's finding that Appellant was declined for a permanent loss mitigation due to lack of documentation was and is controvert by Respondent's own Consolidated Note Report that documentation was receive. Likewise, the Consolidated Note Report contradicted Respondent's asserted position and corroborated Appellant's position that he was told he was declined due to excessive forbearance. (Affidavit Trickey). Lastly Respondent's Consolidated Note Report contradicts the Affidavit submitted by Respondent by noting in April of 2010 "eligible for 1st lien supplemental

[1] The allegations relating to documentation in the Nixon Affidavit do not relate to the time period of the TPP process (2009 and 2010) but rather refer to a time period after litigation had been commenced. (Affidavit Nixon).

modification offer." (Affidavit Trickey). Indeed Appellant established by far more than scintilla evidence that material issues of fact exist as to his cause of action for breach of contract that precluded summary judgment.

A. State law claims are not preempted by the lack of a cause of action under HAMP.

Rather than address any of the elements or relevant facts as to the breach of contract claim Respondent argued and the trial court found there is no private right of action under HAMP citing to the case of *Stevens v. American Home Mortgage Servicing, Inc.*, 2011 WL 901179 (D.S.C. March 15, 2011) (The cite to Stevens was incorrect and the intended and proper citation should have been *Steffens v. American Home Mortgage Servicing, Inc.*, C.A. No. 6:10-cv-01788-JMC). Appellant was at no time trying to assert a cause of action under HAMP. Appellant's counterclaims sound in and arise out of state law causes of action. State law causes of action are not preempted by HAMP.

A number of courts have held that while there may be no private right to file suit directly under HAMP, state law claims relating to loss mitigation efforts are not preempted. *See Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012); *Benjamin v. BAC Home Loans, Serv., L.P.*, 2012 WL 1067999 (S.D. Ga. Mar. 2012); *Picini v. Chase Home Fin. LLC*, 854 F. Supp. 2d 266 (E.D. N.Y. 2012); *Allen v. CitiMortgage, Inc.*, 2011 U.S. Dist. LEXIS 86077 (D. Md. Aug. 4, 2011); *Bosque v. Wells Fargo*, 762 F. Supp. 2d 342 (D. Mass. 2011); *West v. JPMorgan Chase Bank, N.A.*, 154 Ca. Rptr. 3d 285 (Cal. Ct. App. 2013); *See also* , *Corvello v. Wells Fargo Bank*, 728 F. 3d 878 (9th Cir. 2013)(bank contractually obligated to offer a permanent modification if compliance with TPP); *Young v. Wells Fargo Bank, N.A.*, 717 F. 3d 224 (1st Cir.

2013); *But see, Miller v. Chase Home Finance, LLC*, 677 F.3d 113 (11th Cir. 2012)(breach of contract and other state based claims fail because they are not independent of HAMP).

In *Wigod*, a case now cited in over 100 cases, the lower court determined the case should be dismissed because the allegations of the complaint were "HAMP claims in disguise" and an 'impermissible end-run around the lack of a private action in the 2008 Act and HAMP." The "end-run" theory was the primary basis on which the district court dismissed Wigod's complaint. That court explained that "`the facts and allegations as pleaded in this case are premised chiefly on the terms and procedures set forth via HAMP and are not sufficiently independent to state a separate state law cause of action." *Id.* at 581. . . The 7th Circuit Court of Appeals in reviewing Wigod stated "[t]he end-run theory is built on the novel assumption that where Congress does not create a private right of action for violation of a federal law, no right of action may exist under state law, either[.]" The Court went on to allow Wigod's state law causes of action, determining that they were not preempted by federal law. *Id.*

In this case, the lower court granted summary judgment relying on *Stevens v. , American Home Mortgage Servicing, Inc.*, 2011 WL 901179 (D.S.C. March 15, 2011)(again correct name is *Steffens*.) In *Steffens*, the Plaintiff filed an action in federal court against the servicer AHMSI, asserting causes of action for violation of due process and breached of the implied covenant of good faith and fair dealing under the servicer participation agreement between AHMSI and Fannie Mae. *Id.* The magistrate judge issued a report and recommendation which stated in relevant part: "that the court dismiss all of the plaintiff's claims because they are based in HAMP and related to legislation and

laws for which no private cause of action exists. . . that plaintiff's claim for beach of the implied covenant of good faith and fair dealing should be dismissed because she does not have a contract with AHMSI, has not alleged that she is a third-party beneficiary to contracts with other, and has failed to bring a claim for breach of contract." *Id.* Thereafter plaintiff filed an objection to the report and recommendation limiting the objection to the due process claim. *Id.* Upon review of the report and recommendation the district court judge stated: "[t]he magistrate judge makes only a recommendation to the Court, to which any party may file written objections . . . The Court is required to make a de novo determination of those portions of the report or specified findings or recommendation as to which an objection is made." *Id.* The court went on to say in addressing only those causes objected to, its order "only addresses Plaintiff's objections with the analysis of her due process claim." *Id.* Thereafter the court states "[t]he court finds that participation in a program sponsored by the federal government is not enough to constitute action under the color of *federal law*. HAMP itself does not confer a "protected property interest." *Id.*

In this case Appellant did not nor was he attempting to plead a cause of action under HAMP. The lower court's reliance upon *Steffens* was misplaced. Contrary to the case at bar, in *Steffens* under federal requirements the plaintiff sought to, but failed to allege a proper a breach of contract claim to which the Plaintiff was actually a party. *Id.* Here there are several contracts (the note and mortgage) and the TPP which is a modification of the terms of those contracts, that exist without dispute. Here the issue is whether Respondent complied with the requirements of the TPP, and whether Respondent in its dealing with Appellant breached its contracts under the subject note

and mortgage and/or TPP by failing to act in good faith and fair dealing; by making negligent misrepresentations to Appellant regarding the TPP; and, by unjustly enriching itself to the detriment of Appellant. Rather that rely on *Steffens*, which is distinguishable, Appellant asserted and believes the reasoning as adopted in *Wigod*, which is similar to the circumstances here, should have been followed.

II. ISSUES OF FACT WERE ESTABLISHED AS TO WHETHER RESPONDENT WAS UNJUSTLY ENRICHED TO THE DETRIMENT OF APPELLANT.

"A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another. Unjust Enrichment is an equitable doctrine which permits the recovery of that amount the defendant has been unjustly enriched at the expense of the plaintiff." *Dema v. Tenet Physician Services-Hilton*, 383 S.C. 115, 123, 678 S.E.2d 430 (2009). Unjust enrichment is akin to restitution. *Ellis v. Smith Grading & Paving, Inc.*, 294 S.C. 470, 473, 366 S.E.2d 13 (Ct. App. 1988). The remedy in part for unjust enrichment is restitution. To recover restitution in the context of unjust enrichment, the plaintiff must show: (1) he conferred a non-gratuitous benefit on the defendant; (2) the defendant realized some value from the benefit; and (3) it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value. *Inglese v. Beal*, 403 S.C. 290, 297, 472 S.E.2d 687 (Ct. App. 2013).

In this case the lower court did not address Appellant's cause of action for unjust enrichment. Instead the lower court summarily stated that Appellant's counterclaims as a whole relate directly to HAMP and there is no private cause of action under HAMP. Again, Appellant did not plead a private cause of action under HAMP. Appellant plead a cause of action for unjust enrichment.

Undisputed is the fact that based on the written representations made by Respondent in the TPP, Appellant made nine months of payments to Respondent which was an amount in excess of twelve thousand ($12,000.00) dollars. (Affidavit Trickey). If the TPP has no significance or is nothing more that unenforceable representations, then Respondent was unjustly enrichment to Appellant's detriment.

Additionally Appellant provided further evidence of instances of unjust enrichment by way of Respondent's own loan file and communication records for Appellant's loan. (Affidavit Trickey). The evidence drawn from Respondent's records establish that Respondent charged Appellant a qualifying payment, withheld Appellant's payments under the TPP and placed them in a suspense account, as wells as, charged Appellant payment method fees or speed pay fees after Appellant had entered into the TPP Agreement with Respondent. All of which Appellant contended were improper but not addressed by the Court. (Motion for Reconsideration). Hence, issues of fact existed as to the cause of action for unjust and enrichment and the court's granting of summary judgment in error.

III. APPELLANT PRESENTED MORE THAN A MERE SCINTILLA OF EVIDENCE TO ESTABLISH NEGLIGENT MISREPRESENTATION.

Like the cause of action for unjust enrichment the court summarily granted summary judgment as to the claim for negligent misrepresentation without addressing the issues present as to the cause of action. To establish liability for negligent misrepresentation, a party must show (1) a false representation was made; (2) a pecuniary interest existed when making the representation; (3) a duty of care was owed to see that the communication consisted of truthful information; (4) the duty was breached by failing to exercise due care; (5) the representation was justifiably relied on; and (6) a pecuniary

loss was suffered as the proximate result of the reliance upon the representation. *Sauner v. Public Service Authority of South Carolina*, 354 S.C. 397, 407, 581 S.E.2d 161 (2003). These general rules have been applied in numerous cases to support the recognition of a negligent misrepresentation claim where the misrepresented fact(s) induced the plaintiff to enter a contract or business transaction. *Gilliland v. Elmwood Properties*, 301 S.C. 295, 301, 391 S.E.2d 577 (1990) (citations omitted).

Appellant provided evidence of instances of misrepresentations. Appellant entered into a forbearance agreement and the TPP with Respondent and made payment pursuant to the agreement on the representation he would receive permanent loss mitigation relief. Additionally, Respondent's records incredulously clearly state Respondent told Appellant false information while addressing issues during the loss mitigation process. (Affidavit Trickey and Tr. Hearing Jan. 25, 2013).

Appellant further provided evidence of misrepresentations made by Respondent including, but not limited to, Respondent advising Appellant on January 7, 2009 when Appellant requested to be considered for a loan modification, that he should "send in the wop [work out plan] in the month of April [three months later] to start the process of the loan mod [modification]" (Affidavit Trickey); by continually representing to Appellant that he needed to send in HAMP or financial documentation which Appellant had already provided to Respondent; by representing to Appellant that Respondent *will* provide Appellant permanent modification after he complied with the TPP Agreement; by representing that Respondent would provide Appellant a written notification for any denial pursuant to the TPP Agreement; by informing Appellant during a telephone conversation that he was not eligible for a Permanent Modification pursuant to the TPP

Agreement and HAMP because the forbearance amount exceeds the limit; by representing, after Appellant had request a copy of the documents he had sent in because his brief case had been stolen, that it could not provide Appellant a copy of those documents. Therefore Appellant pled and provided evidence of Appellant's cause of action for Negligent Misrepresentation and the Court's Grant of Summary Judgment as to this cause of action was in error.

IV. THE AFFIDAVIT SUBMITTED BY RESPONDENT LACKED EVIDENTIARY SUFFICIENCY.

In regard to affidavits it has been recognized in South Carolina that affidavits must be based upon personal knowledge, set forth the facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. *See* Rule 11(c), SCRCP; Rule 56(e), SCRCP; *Montgomery v. CSX Transport, Inc.*, 376 S.C. 37, 656, S.E.2d 20 (2008) (applying the personal knowledge requirement of Rule 56(e)); and *Saro v. Ocean Holiday Partnership*, 314 S.C. 116, 441 S.E.2d 385 (Ct. App. 1994)("facts stated in affidavits must be admissible evidence."). Generally affidavits are to be made on personal knowledge setting forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated. *See Baughman v. American Telephone & Telegraph Co,* 306 S.C. 101, 410 S.E. 2d 537 (1991).

Here the affidavit submitted by Respondent was not based on personal knowledge. The affidavit lacked an essential condition necessary to provide a basis to support summary judgment. The condition lacking, Respondent failed to offer any evidence in support of its motion. Thus, the only proper evidence was that of Appellant's establishing issues of fact. The Court improperly granted summary judgment.

CONCLUSION

The lower court committed error by granting summary judgment. The facts established by Appellant clearly establish issues of fact. Viewing the facts in a light most favorable to Appellant should have precluded summary judgment. The lower court's decision should be reversed.

Respectfully Submitted,

Dated: January 26, 2014

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APPELLANT/RESPONDENT'S DESIGNATION OF MATTER

Appellant/Respondent proposes the following be included on the Record of Appeal:

Order Reference
Form 4 Order, Sept. 20, 2010
Form 4 Order, June 30, 2011
Form 4 Order, Dec. 9, 2011
Order, May 8, 2013
Order, October 8, 2013

Amended Lis Pendens, Summons and Complaint)
Motion Reference
Answer and Counterclaim
Motion to Vacate
Notice of Right to Foreclosure Intervention
Certification of Mortgagor Non-Compliance
Opposition to Certificate of Non-Compliance.
Motion for Summary Judgment
Affidavit of Brodie Trickey in Opposition to Plaintiff's Motion for Summary Judgment

Motion for Reconsideration
Notice of Appeal
Cross Appeal
Transcript Hearing, January 25, 2013
Transcript Hearing July 19, 2013

I certify that this designation contains no matter which is irrelevant to this Appeal.

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity Judge

Case No. 2010-CP-10-5775

CitiMortgage, Inc. .....Respondent/Appellant

v.

Brodie M. Trickey aka Brodie McCary Trickey
and Barberry Woods Property Owners Association .....Defendants,

Of whom Brodie M. Trickey is the .....Appellant/Respondent.

PROOF OF SERVICE

I certify that I have served the Appellant/Respondent's Initial Brief and Designation of Matter To Be Included In The Record Of Appeal on counsel of record by depositing a copy of it in the United States Mail, postage prepaid, on this 27th day of January, 2014, addressed to the other Counsel of record:

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January 27, 2014

Jenny Abbott Kitchings
Clerk of Court, SC Court of Appeals
1015 Sumter Street
Columbia. SC 29

RE. Citimortgage Inc v.. Brodie M. Trickey, et al.
Appellate Case No. 2013-002437

Ms. Kitchings:

Please find enclosed with regards to the above referenced the following:

1. Appellant/Respondent Initial Brief (original and two copies);
2. Appellant/Respondent Designation of Matter; and
3. Proof of Service.

By copy of this letter I am service counsel of record with the same.

With kind regards,

MARY LEIGH ARNOLD, PA

Mary Leigh Arnold

CC:
Damon C. Wlodarczyk
Derek F. Dean

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