STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM OCONEE COUNTY

HONORABLE CORDELL MADDOX CIRCUIT COURT JUDGE

APPELLATE CASE NO: 2013002037

BRANCH BANKING AND TRUST COMPANY .....RESPONDENT

VS

SARAH L. GRAY, JEFFERY GRAY, SUNTRUST BANK, WEST UNION DEVELOPMENT, LLC AND BANK OF ANDERSON, N.A., ... of whom JEFFERY GRAY is APPELLANT

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in failing to sustain Respondent's objections to the admissibility of Jeffery Gray's affidavit?

2. Did the trial court err in granting Respondent's Motion for Summary Judgment?

STATEMENT OF THE CASE

On July 29, 2003, Sarah L. Gray[1] and Jeffery Gray (Appellant) executed and delivered to the Respondent a promissory note in the amount of $180,000.00 requiring monthly payments over 30 years at the fixed interest rate of 5.5%. The interest rate represented a market rate at the time of closing the loan and was not a "subprime loan" or high interest rate loan. (Miller Affidavit ¶¶ 6 and 7).

In order to secure the repayment of the loan, Appellant signed a mortgage in which Mortgage Electronic Registration Systems, Inc. (MERS) was the mortgagee as nominee for the Respondent. MERS serves as the mortgagee of record for certain residential loans originated by the Respondent and did not purchase the loan or have any interest in the loan. MERS is used for the purpose of facilitating the sale and transfer of mortgage loans on the secondary market since MERS maintains a register of the ownership of loans for which it serves as mortgagee of record. In this case, however, the Respondent did not sell the loan but kept it in-house and has serviced the loan since its origination. (Miller Affidavit ¶ 5).

The mortgage created a first lien on the following real property with improvements:

Exhibit "A"

> All that certain piece, parcel or lot of land, lying and being situate in the State of South Carolina, County of Oconee, being shown and designated as Lot Number Fifteen (15) of the Summit Phase I, as shown and more fully described on a plat thereof prepared by R Jay Cooper, PE & LS #4682 of Clemson Engineering Services, dated June 23,1997 and recorded in the Office of the Clerk of Court for Oconee County, South Carolina in Plat Book A508 at Page 5. The metes, bounds, courses and distances as

[1] Sarah L. Gray did not appeal the Order Granting the Respondent Summary Judgment. Only Jeffery Gray is the Appellant.

shown upon said plat are incorporated herein by reference thereto. Reference being invited to said plat for a fuller more accurate description of the above described property.

This being the same property conveyed unto Jeffery A Gray and Sarah L. Gray herein by deed of Laura Leigh Zane, Trustee of the Revocable Living Trust of Laura Leigh Zane, dated November 1, 2001 recorded December 3, 2001 of record in the Office of the Clerk of Court for Oconee County, South Carolina in Book 1186 at Page 305.

Exhibit "B" to Motion for Summary Judgment and Memorandum in Support.

The instant action began when the Respondent filed its foreclosure Complaint on December 21, 2011 asserting that the Appellant failed to pay as promised after May 1, 2011. (Miller Affidavit ¶ 10). Prior to filing the foreclosure Complaint, Ivan Hobbs, a BB&T employee designated as an authorized "signing officer" of MERS, assigned the mortgage to the Respondent so that the Respondent became the mortgagee of record on the loan and the true party in interest. (Hobbs' Affidavit ¶¶ 3, 6, and 7; Exhibit "A" to the Complaint).

At the time of the closing of the loan, the Respondent provided to the Appellant written notice of the right to select an attorney to close the loan and the right to select an agent to furnish the required homeowner's insurance coverage. (Miller Affidavit ¶ 8 and Exhibit "A" to Miller Affidavit). The Appellant admitted James A. Belk, Esquire was selected as the attorney to close the transaction. Appellant's Response to Respondent's Request to Admit No. 6, Exhibit "A" to Respondent's Motion for Summary Judgment and Memorandum in Support.

Additionally, the Respondent provided to the Appellant disclosures as required by law. The disclosures include a Federal-Truth In Lending Disclosure Statement provided

to the closing attorney prior to the closing on July 29, 2003. (Miller Affidavit ¶ 9 and Exhibit "B" to Miller Affidavit).

The Appellant alleges four (4) causes of action in the counterclaim:

a) Violation of the South Carolina Unfair Trade Practices Act;

b) Breach of contract and/or breach of contract accompanied by fraudulent act;

c) Violation(s) of South Caroling Consumer Protection Code;

d) Violation(s) of Federal Fair Debt Collection Practices Act.

The Respondent filed a Motion for Summary Judgment as to the Appellant's counterclaims and requested an Order referring the foreclosure action to the Master-In-Equity for Oconee County. A hearing on the Motion occurred on July 30, 2013 and the trial court granted the relief sought by an Order dated August 13, 2013 and filed with the Clerk of Court for Oconee County on August 16, 2013.

The within appeal was thereafter initiated.

ARGUMENTS

1. DID THE TRIAL COURT ERR IN FAILING TO SUSTAIN RESPONDENT'S OBJECTIONS TO THE ADMISSIBILITY OF JEFFERY GRAY'S AFFIDAVIT?

A trial court may properly grant a Motion for Summary Judgment 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 judgment as a matter of law." Rule 56(c), South Carolina Rules of Civil Procedure (SCRCP).

"When a Motion for Summary Judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Rule 56(e) SCRCP.

"The adverse party may serve opposing affidavits not later than two (2) days before the hearing." Rule 56(c), SCRCP. "Supporting and opposing affidavits 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 matter stated therein." Rule 56(e), SCRCP.

The hearing by the trial court on the Respondent's Motion for Summary Judgment was heard on Tuesday, July 30, 2013. On Sunday, July 28, 2013, Appellant faxed his purported Affidavit addressed to a paralegal of one of the attorneys for the Respondent. The fax number utilized was the main fax number of McNair Law Firm, P.A. at its

Greenville, South Carolina office and was not faxed to the paralegal's personal fax number or the personal fax number of any attorney with McNair Law Firm, PA. The paralegal whose name appeared on the facsimile coversheet, was not at work on Sunday, July 28, 2013 and did not receive the faxed document until Monday, July 29, 2013, one (1) day before the hearing relating to the Summary Judgment Motion.

Appellant's purported Affidavit is fatally defective for multiple reasons and the trial court abused its discretion in failing to sustain the Respondent's objections to the admissibility of the Appellant's Affidavit.

a) Affidavit was never served.

"Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the Court. Service upon the attorney or upon a party shall be made by delivering a copy to him or mailing it to him at his last known address or, if no address is known, by leaving it with the Clerk of Court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there be no one in charge, leaving it an conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving a copy at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original Summons and Complaint." Rule 5(b)(1), SCRCP. "Service cannot be accomplished via facsimile." *Trowell v. SC Dept. of Public Safety*, 384 S.C. 232, 237, 681 S.E.2d 893, 896 (S.C. Ct. App. 2009). Appellant's counsel admits he did not personally serve

Appellant's purported Affidavit by leaving a copy personally with counsel for the Respondent or by mail and that he faxed the purported Affidavit on Sunday, July 28, 2013. (Transcript, p. 17, f. 11-25; p. 18 f. 1-8). The trial court did specifically rule relating to the service by fax and the trial judge stated as follows:

> Now, look, as far as the Affidavit, probably serving it on Sunday by fax is not correct.
> (Transcript, p. 29, f. 9-10).

Accordingly, Appellant's purported Affidavit was never served and should not have been considered in any particular by the trial court.

b) <u>Appellant failed to serve his purported Affidavit not later than two (2) days before the hearing.</u>

"When a Motion is to be supported by affidavit, the affidavit shall be served with the Motion; and, except as otherwise provided in Rule 59(c), additional or opposing affidavits may be served not later than two (2) days before the hearing, unless the Court permits them to be served at some other time." Rule 6(d), SCRCP. "The adverse party may serve opposing Affidavits not later than two (2) days before the hearing." Rule 56(c), SCRCP.

Appellant's counsel admits as set forth hereinabove that his ill-fated attempt to "serve" the Appellant's Affidavit via facsimile was within two (2) days before the Summary Judgment hearing. In *Jernigan v. King*, 312 S.C. 331, 335 440 S.E.2d 379, 382 (S.C. Ct. App. 1983), an Affidavit in opposition to a pending Motion for Summary Judgment was served on the date of the hearing. The trial court ruled that the Affidavit in opposition should not be considered because it was not served outside the two (2) day time limit imposed by Rule 56(c), SCRCP. The Court of Appeals concluded that it was within the trial court's discretion to reject the untimely affidavit.

In addition to the Appellant failing to properly serve his purported affidavit, he compounded his error by failing to get the purported affidavit in the hands of counsel for the Respondent "not later than two (2) days before the hearing." Rule 56(c), SCRCP. For this reason, the Appellant's purported Affidavit should not have been considered in any particular by the trial court.

c) Affidavit contains hearsay and would not be admissible in evidence.

"Supporting and opposing affidavits 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." Rule 56(e), SCRCP.

As key element to Appellant's counterclaims is whether Ivan Hobbs was a Vice President of MERS and was authorized to assign the mortgage to the Respondent. The affidavit of Hobbs filed with the Respondent's Supplemental Memorandum in Support of its Motion for Summary Judgment definitively established that he was a signing officer of MERS and was authorized to execute the mortgage assignment on behalf of MERS. Attached as Exhibit "B" to Hobbs' Affidavit is a corporate resolution of MERS listing Hobbs as having authority to sign on behalf of MERS and said corporate resolution was dated prior to the date on which Hobbs signed the mortgage assignment.

The Appellant's purported affidavit recites that after he was served with the foreclosure Complaint, he telephoned MERS and asked the person working at MERS if Ivan Hobbs was employed by MERS and was informed by MERS' agent that there was no one employed by MERS by that name. (Gray Affidavit, p. 2). The Affidavit also recites that the MERS website as of January 9, 2012 did not list Hobbs as an officer. Those recitations are blatant hearsay and would not be admissible in evidence.

"'Hearsay' is a statement other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted." Rule 801(c), South Carolina Rules of Evidence. The only purpose the Appellant has in reciting his alleged telephone conversation with an unknown person at MERS and a review of the MERS website is to offer those events in evidence to prove the truth of the matter asserted. There are no exceptions under Rule 803 of the South Carolina Rules of Evidence which are applicable. Since those statements in the purported affidavit would not be admissible in evidence, the Affidavit should not have been considered by the trial court for any purpose and the Respondent's objections to the admissibility of Appellant's purported Affidavit should have been sustained.

2. THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

An appellate court utilizes the same standard applied by the trial court under Rule 56, SCRCP when reviewing an Order granting summary judgment. *Grinnell Corp. v. Wood* 389 S.C. 350, 355, 698 S.E.2d 796, 798. Rule 56(c) provides that "the judgment sought shall be rendered forthwith 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." Once the party moving for summary judgment meets the initial burden of showing the absence of a genuine issue as to any material fact, the non-moving party may not simply rest on the mere allegations contained in the pleadings. Rather, the non-moving party must come forward with specific facts showing there is a genuine issue for trial. The purpose of summary judgment is to expedite the disposition of cases which

do not require the services of a fact finder. *Grant v. Mt. Vernon Mills*, 370 S.C. 138, 634 S.E.2d 15 (S.C. Ct. App. 2006). In determining whether any trial with issues of fact exist, the Court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Cullum Mechanical Const. Inc. v. S.C. Baptist Hospital*, 344 S.C. 426, 432, 544 S.E.2d 838, 841 (2001). As set forth in Respondent's argument relating to Appellant's purported affidavit containing facts which are not admissible into evidence, failure to serve the purported Affidavit and not serving the purported affidavit outside of the two (2) days prior to the Summary Judgment Motion hearing, the Appellant has not set forth any evidence which creates a genuine issue of material fact. Appellant has failed to establish any genuine issues of material fact.

a) Appellant's holder in due course assertion is inapplicable due to the facts of this case.

Appellant asserts in Paragraph 9 of his Counterclaim that Respondent is not a holder in due course. This allegation is not supported by any evidence and Appellant is confused and does not understand the distinction between a negotiable instrument such as a promissory note and a mortgage. S.C. CODE ANN. § 36-3-102(a) (Supp. 2008) provides that "this chapter applies to negotiable instruments."[2] S.C. CODE ANN. § 36-3-104 (Supp.) defines what is meant by the term "negotiable instrument" as follows:

[2] A significant portion of Article 3 of South Carolina's version of the Uniform Commercial Code has been amended since the Appellant signed and delivered his promissory note and the mortgage which is the subject of the foreclosure action. However, in deciding the case, the Appellate Court must apply "the law in effect at the time the cause of action accrued because it controls the party's legal relationships and rights. *Stephens v. Draffin*, 327 S.C. 1, 5, 488 S.E.2d 307, 309 (1997). The cause of action in the instant case accrued in May 2011 when the Appellant defaulted on the payments as required by the promissory note.

a) Except as provided in Subsections (c) and (d), "negotiable instrument" means an unconditional promise or Order to pay a fixed amount of money, with or without interest or other charges described in the promise or Order, if it:

(1) Is payable to bearer or to Order at the time it is issued or first comes into possession of the holder;

(2) Is payable on demand or at a definite time;

(3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any action in addition to the payment of money but the promise or Order may contain: (i) an undertaking or power to give, maintain or protect collateral to secure payment, (ii) an authorization or power to beholder to confess judgment or realize, own or disposed of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

b) Instrument means a negotiable instrument.

The question of whether a promissory note secured by a real estate mortgage retains its status as a negotiable instrument was presented in *Spindler v. Swindler*, 355 S.C. 245, 584 S.E.2d 438 (S.C. Ct. App. 2003). The Court of Appeals held that "the negotiability of a note is not altered by the execution of a related real estate mortgage."

Appellant attempts to connect the granting of the mortgage to MERS as a nominee for the Respondent and the subsequent assignment by MERS of the mortgage to the Respondent prior to the institution of the foreclosure action as a negotiation of the promissory note. Additionally, the Appellant asserts that at the time the mortgage was assigned to the Respondent, the Appellant was in default on the payments and, therefore, somehow, the Respondent is not a holder in due course of the promissory note. It is

unclear from the Appellant's argument how that adversely impacts or affects the right of the Respondent to bring the foreclosure action. The best response to the Appellant's argument that Respondent is not the holder in due course is it is of no legal consequence.

Appellant's primary basis for all of his counterclaims is his belief that the mortgage contract is defective in some way because MERS is listed as the mortgagee and Appellant operates under the mistaken belief that the mortgagee must be the lender or note holder. Established South Carolina law and Fourth Circuit precedent reject this theory and provide clarity to eliminate Appellant's misunderstandings about MERS. Initially, a mortgage is a contract. Adams v. Fellers, 88 S.C. 212, 70 S.E. 722, 723 (1911). The freedom to contract allows parties to a mortgage to contract for MERS to serve as a mortgagee as the nominee for the lender. (The use of a nominee in real estate transactions, and as a mortgagee in a recorded mortgage, is a longstanding practice.) *Deutsche Bank National Trust Co. v. Pietranico*, 928 N.Y.S.2nd 829, 833 (N.Y. Sup. Ct. 2011). A "nominee" is a person designated to act in place of another, usually in a very limited way. BLACK'S LAW DICTIONARY 1076 (8th ed. 2004). A "nominee" means "a party who holds bare legal title for the benefit of others" or a "person designated to act in the place of another." *Kiah v. Aurora Loan Services, LLC*, 2011 WL 841282 at *8 (B. Mass. Mar. 4, 2011).

South Carolina Federal courts have affirmed MERS designation as the mortgagee of record along with the corollary legal principle that MERS may serve as the mortgagee as nominee for the lender and the lenders successors and assigns. *Reese v. U.S. Bank National Assn.*, 2012 WL 1952819 at *1 (D.S.C. Apr. 30, 2012) ("MERS as [lenders] nominee and the mortgagee under Plaintiff's mortgage have the authority to assign the

mortgage to [lender's successor and assigns] through a mortgage assignment.") The South Carolina Supreme Court and the South Carolina Court of Appeals have also affirmed MERS' role as the mortgagee. *BAC Loan Home Servicing, L.P. v. Kinder*, 398 S.C. 619, 731 S.E.2d 547, 548 (2012) (Borrower "secured payment of...[the] note with a mortgage...in favor of Mortgage Electronic Registration Systems, Inc. as nominee for [lender]"); *Bank of America, N.A. v. Draper*, 2013 WL 2422875 at *1 (Ct. App. 2013) ("To secure the note, [borrower] gave a mortgage to Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for [lender]").

b) <u>No violation of the Consumer Protection Code.</u>

In order to advance his argument relating to alleged violations of the South Carolina Consumer Protection Code, the Appellant summarily concludes that MERS as the mortgagee was Appellant's creditor. Appellant's reliance on *Plyer v. Elliott*, 19 S.C. 257 (1883) is misplaced. The *Plyer* case involved an action to recover on a promissory note and to foreclose a mortgage given to secure the same debt. After the promissors (Defendant Elliott and another individual who did not sign the mortgage) executed the promissory note, the payee on the promissory note (Plaintiff Plyer) added the words "bearing interest at 15%" but he erased the language before the note was produced at trial. The Defendant asserted that the promissory note was materially altered without consent of the promissors and a jury in Lancaster County in 1881 rendered a verdict against the Plaintiff due to the alteration of the promissory note which destroyed its validity. Upon appeal to the South Carolina Supreme Court, the Court held in a 2-1 decision that even though the promissory note was invalid due to its material alteration after execution, the debt could be proven because of it being recited in the mortgage. The

Court stated that "it must be kept in mind that there is a difference between the debt itself and the security for it." The *Plyer* case does not stand for the proposition that a mortgagee which is a different entity than the lender becomes a creditor simply by being listed as the mortgagee. Appellant's reference to S.C. CODE ANN. § 37-1-301(13) (1976) as defining a creditor is inapplicable. MERS did not grant credit to the Appellant and was not an assignee of the creditor's right to payment. The conclusory statement that MERS is a creditor within the meaning of the South Carolina Consumer Protection Code has no factual or legal basis and is without merit.

Additionally, the Appellant's assertion that the mortgage loan secured by the Appellant's residence was at an exceptionally high APR has no factual basis whatsoever. The interest rate on the promissory note in the amount of $180,000.00 payable over 30 years was 5.5% representing a market rate of interest as of the date of closing and the loan was not a "subprime loan or high interest rate loan." Miller Affidavit ¶ 7. Respondent provided to Appellant at the time of closing the Federal Truth-In-Lending Disclosure Statement showing the APR at 5.560%. Appellant admitted they were provided with a copy of the Federal Truth-In-Lending Disclosure Statement. Appellant's Response to Request to Admit No. 7, Exhibit "D."

Appellant also asserts that they were not provided "Borrower's Preference of Legal/Counsel Insurance Agent" form but Appellant admitted that it received the form and selected James S. Belk, Esquire of Anderson, South Carolina to close the loan. Appellant's Response to Request to Admit No. 6, Exhibit "C."

c) <u>The Statute of Limitations bars any claim under the Consumer Protection Code</u>.

Appellant's Counterclaim arising out of the alleged failure of the Respondent to comply with the "attorney preference" provision of the South Carolina Consumer Protection Code is barred is barred by the Statute of Limitations. The applicable provision reads as follows:

> No debtor may bring an action for a violation of this chapter more than three (3) years after the violation occurred except as set forth in Subsection (c).
> S.C. CODE ANN. § 37-10-105(A)(1976).

It should be noted that the provisions of Subsection (c) are not applicable to the within action. The loan in question was closed on July 29, 2003. Appellant filed his Counterclaim in January of 2012, almost nine (9) years later. The Counterclaim relating to alleged violations of the Consumer Protection Code must be dismissed as time barred even if the conclusion is reached that there is some genuine issue of material fact.

d) <u>Respondent is not a debt collector under the Federal Fair Debt Collection Practices Act.</u>

Appellant also asserts that Respondent has violated the Federal Debt Collection Practices Act (FDCPA) and that the Respondent is a debt collector within the meaning of FDCPA. Appellant fails to assert any facts to substantiate the allegation that the Respondent is a debt collector. Merely alleging an entity is a "debt collector" is by itself insufficient. *Swain v. CACH, LLC*, N.D. Cal. 2009, 699 F. Supp. 2d 1109. Respondent is not a debt collector because it falls within the creditor exemption of the FDCPA. 15 U.S.C.A. § 1692(a)(6)(A)&(F). The FDCPA defines "creditor" as "any person who offers or extends credit creating a debt or to whom the debt is owed. 15 U.S.C.A. § 1692(a)(4). Because Respondent has only been the entity "to whom a debt is owed" with

respect to the promissory note signed by the Appellant, it follows that Respondent is not a debt collector with respect to the promissory note. In *Bradford v. HSBC Mortgage Corp. et al.*, 829 F. Supp. 2d 340, E.D. Va. 2011), the Court held that a mortgage lender was not a "debt collector." The FDCPA "generally applies only to debt collectors" and the statute defines a debt collector as any person who regularly collects or attempts to collect...debts owed or due...another." 15 U.S.C.A. § 1692(a)(6). The Court also held that "bare allegations of the Complaint or of counsel in briefs and arguments do not raise a genuine issue of material fact as to whether a (bank) is a "debt collector."

The FDCPA defines "creditor" as any person who offers or extends credit creating a debt to whom the debt is owed. 15 U.S.C.A. § 1692(a)(4). Since the Respondent is the entity "to whom the debt is owed" with respect to the promissory note signed by the Appellant, it naturally follows that Respondent is not a debt collector with respect to the promissory note signed by the Appellant and it also follows that Respondent is not subject to the provisions of the FDCPA.

e) Appellant has abandoned any argument relating to his counterclaims pertaining to violation of the South Carolina Unfair Trade Practices Act and breach of contract accompanied by fraudulent act.

Appellant sets forth in his statement of the case that he alleged four (4) causes of action in his counterclaim including violation of the South Carolina Unfair Trade Practices Act and breach of contract accompanied by a fraudulent act. However, he does not set forth any arguments relating to the South Carolina Unfair Trade Practices Act or breach of contract accompanied by fraudulent act. The Appellant only argues his position on violations of the South Carolina Consumer Protection Code and the Federal Fair Debt Collection Practices Act. "An issue raised on appeal but not argued in the

Brief is deemed abandoned and will not be considered by the Appellate Court." *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 106, 439 S.E.2d 283, 284 (S.C. Ct. App. 1993); *Bell v. Bennett*, 307 S.C. 286, 294, 414 S.E.2d 786, 791 (S.C. Ct. App. 1992). Accordingly, those two (2) issues are deemed abandoned and should not be considered by the Appellate Court.

Even if the Appellate Court were to consider the two (2) issues, the alleged violation of the South Carolina Unfair Trade Practices Act and the breach of contract accompanied by fraudulent act are premised on the Appellant's allegation that the assignment of the mortgage by MERS to the Respondent was fraudulent because the Appellant alleges that Ivan Hobbs who signed the assignment on behalf of MERS was not authorized to do so. That allegation is without any merit as evidenced by the Affidavit of Hobbs ¶ 9, Exhibit "B." Appellant has not provided any evidence which refutes Hobbs' Affidavit.

CONCLUSION

There are no genuine issues of material fact relating to Respondent's actions and conduct and for the reasons stated herein, Respondent respectfully requests that the Order of the lower Court granting summary judgment be affirmed.

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