

STATE OF SOUTH CAROLINA

COUNTY OF LANCASTER

WELLS FARGO BANK, N.A., Successor  
by merger to WACHOVIA BANK, N.A.,

Plaintiff,

v.

RONALD P. PAPPAS, a/k/a  
Ronald Peter Pappas, and  
CAMINE PAPPAS,

Defendants.

RONALD P. PAPPAS, a/k/a  
Ronald Peter Pappas, and  
CAMINE PAPPAS,

Cross-Plaintiffs,

v.

WELLS FARGO BANK, N.A., and  
CRAFT DEVELOPMENT, LLC,  
A North Carolina limited liability company,

Cross-Defendants

IN THE COURT OF COMMON PLEAS

C.A. No.: 2011-CP-29-873

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**SC Court of Appeals**

**ORDER**

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LANCASTER, SC

This matter came before the Court on Motion of Plaintiff, Wells Fargo Bank, N.A., successor by merger to Wachovia Bank, N.A. ("Wells Fargo" or "Plaintiff"), for summary judgment in its favor as to all pending claims between Wells Fargo and Defendants, Ronald P. Pappas and Camine Pappas ("Defendants"), in this matter. The Court held a hearing on Wells Fargo's Motion on February 18, 2014. S. Sterling Laney, III of the Womble Carlyle law firm appeared on behalf of Wells Fargo. John Martin Foster attended on behalf of Defendants. Amy Purwin Hunt of the Horack Talley law firm appeared on behalf of Third Party Defendant, Craft

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Development, LLC. Based on the arguments of counsel, the pleadings, memoranda and other documents on file with the Court, including but not limited to the Affidavit of John Martin Foster and the transcript of the deposition of Ronald A. Pappas filed prior to the hearing, and the common and statutory laws of the State of South Carolina and the United States of America, the Court grants Wells Fargo's Motion for Summary Judgment.

### **FACTUAL BACKGROUND**

This case arises out of Defendants' purchase of a lot in the Edgewater Subdivision development in Lancaster County ("Edgewater"). In late 2005 and early 2006, Defendants attended a number of "showcase" events put on by the developer of Edgewater, Craft Development, LLC (the "Developer"), to promote Edgewater to potential real estate investors/purchasers.

On March 29, 2006, Defendants executed an "Agreement to Buy and Sell Real Estate" (the "Contract") with the Developer to purchase Lot 311 in Edgewater (the "Property"). The Property was (and remains today) a vacant, unimproved lot. The Contract did not contain an appraisal contingency that required the property to appraise for the purchase price or for any other dollar-amount. Instead, the Contract expressly stated that the Property was sold "as is". The Contract also expressly disclaimed any obligations for future development of the Property or the Edgewater development. In addition, there is no reference in the Contract to Wachovia Bank ("Wachovia," now Wells Fargo), nor was Wachovia a party to the Contract.

During early 2006, Defendants communicated with representatives of both SunTrust Bank and Wachovia regarding financing for their purchase of a lot in Edgewater. Defendants selected Wachovia as their lender and, after executing the Contract, worked with Wachovia to secure financing to help fund their purchase of the Property. In connection with making a loan

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for the Property purchase, Wachovia requested and, on May 10, 2006, received an appraisal for the Property (the "2006 Appraisal").

On or about May 30, 2006, Defendants made, executed and delivered to Wachovia a Promissory Note in the principal amount of \$206,100.00 (the "Original Note"). To secure the Original Note, Defendants made, executed and delivered to Wachovia a Real Estate Mortgage covering the Property. Defendants did not review the 2006 Appraisal prior to agreeing on the purchase price and signing the Contract to purchase the Property, nor did they review it prior to closing the purchase transaction on May 30, 2006. Defendants used 100% of the proceeds of the Wachovia loan to fund their purchase of the Property. None of those loan funds were used to improve that lot. Defendants thereafter made payments to Wachovia pursuant to the terms and conditions set forth in the Original Note. Defendants made no improvements to the Property after the date of its purchase.

On or about June 1, 2009, the Original Note matured, so Defendants contacted Wachovia to negotiate a new loan to refinance the original loan that they had obtained from Wachovia. On or about July 22, 2009, Defendants executed a Negotiable Promissory Note in the original principal sum of \$210,954.69 (the "Refinance Note") payable to Wachovia. This Refinance Note re-financed the 2006 Wachovia loan that was used to purchase the Property. The Refinance Note is secured by a Mortgage made, executed, and delivered by Defendants to Wachovia on July 22, 2009 and recorded on July 23, 2009 in Book 2135 at Page 99 in the Lancaster County Registry (the "Mortgage"), (the Mortgage and Refinance Note shall be collectively referred to as the "Loan Documents" or the "Loan"). Defendants thereafter failed to make payments as required by the terms of the Refinance Note, which by its own terms, constitutes an event of default. Significantly, Defendants do not dispute the authenticity of the Loan Documents.



On June 17, 2011, Wells Fargo, successor by merger to Wachovia, instituted this action to foreclose the Refinance Note and Mortgage. The Defendants answered the Complaint on August 25 and then, on September 29, 2011, filed an Amended Answer and Counterclaims, asserting the following counterclaims: (i) South Carolina Unfair Trade Practices Act violations, S.C. Code Ann. § 39-5-10 et seq.; (ii) RESPA violations, 12 U.S.C. § 2601 et seq.; (iii) Interstate Land Sales Full Disclosure Act violations, 15 U.S.C. §§ 1701-1720; (iv) Fraud; and (v) Negligent Misrepresentation. Wells Fargo replied, denying all of Defendants' counterclaims.

#### **LEGAL STANDARD**

Under Rule 56(c), SCRPC, "Summary judgment is appropriate '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.'" Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003). "The evidence, and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Id. However, "when a motion for summary judgment is made and supported as provided by the rule, an adverse party may not rest upon the mere allegations or denials of his pleadings. The adverse party's response, including affidavits or as otherwise provided by the rule, must set forth specific facts showing there is a genuine issue for trial." SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990) (quoting Rule 56(e), SCRPC). Furthermore, to survive summary judgment, the party bearing the burden of proof must establish a prima facie case as to each essential element of the claim. Baughman v. Amer. Tel. & Tel. Co., 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991).

## LEGAL ANALYSIS AND CONCLUSIONS OF LAW

### **I. Wells Fargo's claim for foreclosure of the Refinance Note and Mortgage.**

The Defendants have admitted signing the Refinance Note and the Mortgage, establishing the debt. They have also admitted failing to make payments to Wells Fargo as required by the terms of the Refinance Note, establishing default on the Loan. Upon default, the terms of the Refinance Note permit Wells Fargo to declare all amounts due under the Refinance Note immediately due and payable and institute an action for foreclosure of the Mortgage. "Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt." U.S. Bank Trust Nat. Ass'n v. Bell, 385 S.C. 364, 374-75, 684 S.E.2d 199, 205 (S.C. Ct. App. 2009). As there is no genuine issue of material fact with respect to whether the Defendants executed the Loan Documents, received the proceeds of the loan, and then defaulted on their payment obligations under the Loan Documents, I find that Wells Fargo is entitled to summary judgment on its foreclosure cause of action. Accordingly, Wells Fargo is entitled to foreclose the Mortgage and seek and obtain a deficiency judgment against Defendants, and this Court grants summary judgment in favor of Wells Fargo on its foreclosure complaint. Further, the parties are directed to refer this matter to a Special Referee, pursuant to Rules 33 and 71, SCRPC, to complete the foreclosure proceedings in this matter.

### **II. Wells Fargo is entitled to summary judgment on Defendants' SCUTPA claims.**

Defendants' claim under South Carolina Unfair Trade Practices Act ("SCUTPA") fails because the SCUTPA does not apply to private transactions where there is no evidence of adverse effect on the public interest. The South Carolina Supreme Court has refused to provide a test to determine what constitutes an "impact upon the public interest," but that requirement is most commonly met by demonstrating that acts or practices have the potential for repetition. See Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475,

351 S.E.2d 347 (Ct. App. 1986); Global Protection Corp. v. Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (Ct. App. 1998). "The potential for repetition may be shown in two ways: 1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or 2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts." Crary v. Djebelli, 329 S.C. 385, 388 (S.C. 1998).

A mere breach of contract cannot constitute a violation of the SCUPTA. See Key Co., Inc. v. Fameco Distr., Inc., 292 SC 524, 357 S.E.2d 476 (Ct. App. 1987). Moreover, "conduct which only affects the parties to the transaction provides no basis for a UTPA claim...." Jefferies v. Phillips, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994). Here, we have nothing more than a dispute between the two parties to a private contract – the Refinance Note and Mortgage – regarding appraisals of the Property. Wells Fargo was not required to provide the Defendants with copies of any appraisals it obtained in connection with the original loan or refinancing, taking this claim outside of the factors outlined in Crary, supra. 12 C.F.R. § 202.14. Accordingly, there is no genuine issue of material fact regarding the appraisals, and the Court grants Wells Fargo summary judgment on the Defendants' claim for violation of the SCUTPA.

**III. Defendants' abandonment of its RESPA claims and ILSA claims entitles Wells Fargo to summary judgment on those claims.**

The Defendants asserted counterclaims under the Real Estate Settlement Procedures Act ("RESPA") and the Interstate Land Sales Act ("ILSA"). RESPA applies to "federally related mortgage loans" which are defined as a loan "secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of one to four families." 12 U.S.C. § 2602(1)(A). Specifically exempt from RESPA is "Any loan secured by vacant or unimproved property, unless within two years from

the date of the settlement of the loan, a structure or a manufactured home will be constructed or placed on the real property using the loan proceeds." 24 C.F.R. § 3500.5(b)(4).

ILSA regulates "developers" or subdivisions and limits liability to "developers" and their "agents." 15 U.S.C. § 1709(a). Federal courts have consistently held that a lending institution acting in the ordinary course of its business is not considered a "developer" within the meaning of ILSA. See e.g. Cumberland Cap. Corp. v. Harris, 621 F.2d 246, 251 (6th Cir. 1980); Keeneally v. Bank of Nova Scotia, 711 F.Supp.2d 1174, 1191-92 (S.D. Cal 2010) (collecting cases).

At the hearing on this matter, Defendants voluntarily abandoned their claims under RESPA and ILSA. Accordingly, Wells Fargo is entitled to summary judgment on these claims and the Courts grants Wells Fargo summary judgment on the Defendants' RESPA and ILSA claims.

**IV. Wells Fargo is entitled to summary judgment on Defendants' fraud and negligent misrepresentation claims.**

Wells Fargo is entitled to summary judgment on Defendants' "fraud by misrepresentations" claim and negligent misrepresentation claim, both of which are based on the 2006 Appraisal. Fraud must be pled with specificity. Rule 9(b), SCRPC. To establish fraud, Plaintiff must allege: (1) a representation of fact; (2) its falsity; (3) its materiality; (4) either knowledge of falsity or a reckless disregard of its truth or falsity; (5) intent that the representation should be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) and the hearer's consequent and proximate injury. Schnellmann v. Roettger, 373 S.C. 379, 381, 645 S.E.2d 239, 241 (2007). Failure of the Defendants to prove any element of fraud is fatal to the action. Id.

To establish a claim for negligent misrepresentation, the Defendants must show: (1) Wells Fargo made a false representation to Defendants; (2) Wells Fargo had a pecuniary interest

in making the false representation; (3) Wells Fargo owed a duty of care to see that it communicated truthful information to Defendants; (4) Wells Fargo breached that duty by failing to exercise due care; (5) the Defendants justifiably relied on the representation; and (6) the Defendants suffered a pecuniary loss as a proximate result of their reliance upon the representation. Carolina Chloride, Inc. v. Richland County, 394 S.C. 154, 164, 714 S.E.2d 869, 873 (2011). The Defendants must also show that any reliance was reasonable. Id. at 164, 714 S.E.2d at 874. Moreover, "there can be no liability for [ . . . ] matters which [claimant] could ascertain on his own in the exercise of due diligence." West v. Gladney, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000); King v. Oxford, 282 S.C. 307, 312, 318 S.E.2d 125, 128 (Ct. App. 1984) ("Courts do not sit for the purpose of relieving parties who refuse to exercise reasonable diligence or discretion to protect their own interests."). Further, because the "application for credit" made by the Defendants with Wells Fargo was not going to be "secured by a lien on a dwelling" as described above, Wells Fargo was not required to provide the Defendants with copies of any appraisals obtained in connection with the original loan or the refinancing. 12 C.F.R. § 202.14.

Defendants' fraud and negligent misrepresentation claims center on an alleged negligently-conducted appraisal upon which Defendants now contend they relied. However, the Defendants executed the Contract prior to engaging Wells Fargo to finance their purchase of the Property. The Contract stated that the Property was sold "as is" and the Contract did not contain an appraisal contingency. Defendants agreed to the purchase price of the Property before Wells Fargo requested the 2006 Appraisal of the Property. In addition, Defendants admit that they did not see the 2006 Appraisal until 2013, some seven years after the original loan closing and four years after closing the Refinance Loan. Accordingly, Defendants could not have relied on the 2006 Appraisal for any purpose.

In Robertson v. First Union Nat'l Bank, the South Carolina Court of Appeals rejected arguments similar to those of the Defendants herein. Robertson v. First Union Nat'l Bank, 350 S.C. 339, 565 S.E.2d 309 (Ct. App. 2002). In Robertson, the borrowers agreed to purchase commercial property. Id. at 344, 565 S.E.2d at 312. After agreeing to purchase the property, the borrowers approached the bank in order to obtain financing. Id. The bank then ordered an appraisal on the property. Id. The borrowers were not provided a copy of the appraisal until after the purchase agreement has been executed. Id. In rejecting the borrowers' fraud claim, the Court noted that the borrowers' "reliance is glaringly absent" because "the purchase price [. . .] was already agreed upon before [borrowers] approached the bank." Id. at 348, 565 S.E.2d at 314.

Here, as in Robertson, the Defendants agreed to purchase the property before any appraisal was conducted. Just as in Robertson, the Defendants received a copy of the appraisal well after they executed the Contract and the purchase price for the Property was already established. And here, as in Robertson, "reliance is glaringly absent". Id. at 348, 565 S.E.2d at 314. The Defendants bear the burden of proof as to each element of the fraud claim. See Baughman, 306 S.C. at 116, 410 S.E.2d at 545-46. For the reasons discussed above, Defendants cannot meet their burden as to the reliance element. There is simply no genuine issue of material fact as to whether Defendants could rely upon the 2006 Appraisal, or whether the Defendants were entitled to rely on any appraisal obtained by Wells Fargo and, accordingly, the Court grants Wells Fargo summary judgment on these claims.

As an additional sustaining ground, there can be no liability for fraud "on matters which [claimant] could ascertain on his own in the exercise of due diligence." West, 341 S.C. at 134, 533 S.E.2d at 337; see also, King v. Oxford, 282 S.C. 307, 312, 318 S.E.2d 125, 128 (Ct. App. 1984). Stated differently, Wells Fargo cannot be liable to Defendants for the content of its appraisal if Defendants could have, through their own due diligence, independently determined


the value of the subject Property before signing the Contract and prior to signing the Refinance Note. Defendants failed to take any steps to independently ascertain the value of the Property at any time prior to the institution of this action. On this ground as well, the Defendants' fraud and negligent misrepresentation claims fail as a matter of law, and Wells Fargo is entitled to summary judgment on both of these claims.

Additionally, the Defendants' fraud claim fails because they have failed to prove the materiality of the alleged negligently conducted appraisal. Because the appraisal did not exist at the time Defendants executed the Contract, the information contained in that appraisal was not, and could not have been, material to the Defendants' decision to purchase the Property or the price they were willing to pay for it. Further, as in Robertson, there is no evidence that the appraisal was negligently performed or that the value of the Property was different from the appraised value. Robertson, 350 S.C. at 348, 565 S.E.2d at 314. Any of these reasons alone entitle Wells Fargo to summary judgment on the Defendants' fraud and negligent misrepresentation claims, and since there are no genuine issues of material fact bearing on these claims, this Court grants Wells Fargo summary judgment on the Defendants' claims for fraud and negligent misrepresentation.

#### CONCLUSION

For the reasons stated above, the Court (1) grants summary judgment in favor of Wells Fargo on its foreclosure claim, and (2) grants Wells Fargo's Motion for Summary Judgment as to all of Defendants' counterclaims.

IT IS SO ORDERED.

  
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R. Knox McMahon, Judge for the 11<sup>th</sup> Circuit

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF LANCASTER )

WELLS FARGO BANK, N.A., Successor, )  
by merger to WACHOVIA BANK, N.A., )

Plaintiff, )

vs. )

RONALD P. PAPPAS, a/k/a )  
Ronald Peter Pappas, and )  
CAMINE PAPPAS, )

Defendants. )

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RONALD P. PAPPAS, a/k/a )  
Ronald Peter Pappas, and )  
CAMINE PAPPAS, )

Cross-Plaintiffs, )

vs. )

WELLS FARGO BANK N.A., and )  
CRAFT DEVELOPMENT, LLC, )  
A North Carolina limited liability company, )

Cross-Defendants. )

IN THE COURT OF COMMON PLEAS  
SIXTH JUDICIAL CIRCUIT

C.A. No. 2011-CP-29-873

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**SC Court of Appeals**

**ORDER DENYING DEFENDANTS'  
AND CROSS-PLAINTIFFS'  
MOTION TO ALTER OR AMEND  
JUDGMENT**

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SOUTH CAROLINA

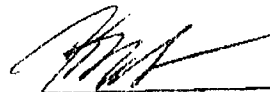
This matter is before the Court pursuant to Defendants' and Cross-Plaintiffs' Motion to Alter or Amend Judgment pursuant to Rule 59(a) and (e) SCRCP. A hearing on Plaintiff Wells Fargo's Motion for Summary Judgment was heard in Lancaster County on February 18, 2014. An Order was filed on April 11, 2014, granting summary judgment in favor of Wells Fargo on its foreclosure claims and as to all of Defendants' counterclaims. The Court has reviewed the

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Defendants' and Cross-Plaintiffs' Motion and finds that oral arguments would not assist in this matter and finds that any additional hearing would be redundant and unnecessary.

Therefore, it is **ORDERED** that the Defendants and Cross-Plaintiffs' Motion to Reconsider is **DENIED**, and the prior ruling is reaffirmed in toto.



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The Honorable R. Knox McMahon  
Presiding Judge  
Sixth Judicial Circuit

Lancaster, South Carolina  
June 12, 2014