

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 AssociationDefendants,

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

FINAL REPLY BRIEF OF APPELLANT/RESPONDENT

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August 15, 2014

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SC Court of Appeals

TABLE OF CONTENTS

ARGUMENT	1
I. APPELLANT PROFFERED SUFFICIENT FACTS TO SUPPORT A CLAIM FOR BREACH OF CONTRACT.	1
A. The alleged failure of the Bank to return a sign modification agreement is not an issue properly before the Court.	3
B. The claim for breach of good faith was not separate from the claim for breach of contract.	3
II. ISSUES OF FACT EXISTED AS TO THE CAUSES OF ACTION FOR UNJUST ENRICHMENT AND NEGLIGENT MISREPRESENTATION.	4
CONCLUSION	4

TABLE OF AUTHORITIES

CASES

<i>Barroso. Ocwen Loan Servicing, LLC</i> , No. B229112, 2012 WL 3573906 (Cal Ct. App. Aug. 21, 2012).....	3
<i>Corvello v. Wells Fargo Bank</i> , 728 F. 3d 878 (9 th Cir. 2013).....	3
<i>Hancock v. Mid-South Management Co., Inc.</i> , 381 S.C. 326 (2009).....	3
<i>Koester v. Carolina Rental Center, Inc.</i> , 443 S.E.2d 392, 394 (1994).....	2
<i>Pennington v. HSBC Bank USA, N.A.</i> 493 F. App'x 548 (5 th Cir. 2012).....	3
<i>Rotec Services, Inc. v. Encompass Service, Inc.</i> , 359 S.C. 467 (Ct. App. 2004).....	3, 4
<i>Spence v. Spence</i> , 368 S.C. 106, 628 S.E.2d 869 (2006).....	2
<i>Toussaint v. Ham</i> , 292 S.C. 415, 357 S.E.2d 8 (1987).....	2
<i>Vaughn v. A.E. Green Co., Inc.</i> , 277 S.C. 392, 287 S.E.2d 493.....	2
<i>Wilder Corp. v. Wilke</i> , 330 S.C. 71, 497 S.E.2d 731 (1998).....	3

RULES

RULE 12(B)(6), SCRCP.....	2
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I. APPELLANT PROFFERED SUFFICIENT FACTS TO SUPPORT A CLAIM FOR BREACH OF CONTRACT.

Respondent argues that the allegations of the Counterclaim did not sufficiently set forth a claim for breach of contract and therefore summary judgment was appropriate. The limited focus on the allegations of the Counterclaims is misplaced. The Court's review should have included all evidence before it.

Here Respondent filed a Motion for Summary Judgment as to the Appellant's counterclaims. The motion was supported by the Affidavit of a Business Operations Analyst. (R. pp. 95-98). The affidavit addresses events occurring after the commencement of the within case. (R. pp. 95-98). Attached to Respondent's Affidavit were a number of documents. (R. pp. 95-157). Appellant filed an Affidavit in Opposition to Plaintiff's Motion for Summary Judgment. (R. p. 223). Attached to Appellant's Affidavit were a number of documents including a Home Affordable Trial Period Plan (hereinafter "TPP") (R. p. 223-253). Appellant established that the TPP contract was offered, executed and returned to Respondent. (R. p. 223-253) Appellant established nine payments were made and accepted in accordance with the TPP. (R. pp. 223-240). Appellant asserted Respondent breached the TPP by arbitrarily rejecting payments and Respondent offered nothing in dispute. Appellant asserted he provided all necessary documentation as required by the TPP (R. p. 224) and Respondent countered asserting Appellant did not provide documents requested during a period unrelated to the TPP. (R. pp. 95-98). 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. ((R. pp. 229-230, 232, 234-235, 239-240).

Likewise, the Consolidated Note Report contradicted Respondent's position and corroborated Appellant's position that he was told at a certain point in time that he was declined due to excessive forbearance; not for lack of documentation. (R. p. 224-228).

While a ruling on a Rule 12(b) (6) motion must be based solely on the allegations set forth on the face of the complaint, *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987), a ruling on summary judgment entails a review of the evidence submitted and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). The Court in considering summary judgment was not limited to the four corners of a claim as postulated by Respondent.¹ The Court was required to look beyond the allegations of the Complaint and consider all the facts before it. For the court to disregard evidence, and to weigh evidence at the summary judgment stage is wholly improper. "Summary judgment should be granted where it is perfectly clear that no issue of fact is involved." *Vaughn v. A.E. Green Co., Inc.* 277 S.C. 392, 393, 287 S.E.2d 493, 494 (1982).

Appellant provided evidence of the TPP, payments made in accordance with it, payments accepted for nine months, then the unrequited rejection of payments. Taking all the facts before the court in the light most favorable to the Appellant, issues of fact exist as to the claim for breach of contract. 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.

¹ Notwithstanding if the Court were reviewing from a 12(b)(6) standard of review the allegations of counterclaim viewed in the light most favorable to Appellant state a valid claim for relief for breach of contract. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). The allegations of the Counterclaim were entitled breach of contract and state: Appellant entered into an agreement with the Plaintiff as evidence by the contracts referenced in the Complaint; that the contracts contained an implied covenant of good faith and fair dealing which required Plaintiff to act in a reasonable manner; that Plaintiff breached the implied terms of the contract including but not limited to, by "failing to properly contact the Defendant, provide the Defendant with information, and properly apply conditions of the modification program (i.e. the TPP)(Answer and Counterclaim).

Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330-331, 673 S.E.2d 801 (2009). A scintilla of evidence was submitted and summary judgment should not have been granted.

A. The alleged failure of the Bank to return a sign modification agreement is not an issue properly before the Court.

“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Respondent argues for the first time that its’ alleged failure to sign the TPP submitted to Appellant implies there is no contract between the parties. (Respondent’s Brief, pp. 13-17). To attempt to factually support this statement Respondent cites to an Exhibit attached to Appellant’s deposition. This exhibit, however, was never submitted into evidence. In fact, the deposition transcript was specifically not admitted into evidence or included in the record at the request of Respondent. (R. pp. 256-257) The Exhibit never having been admitted into evidence, reference or citation to the same is improper. Additionally, the issue of Respondent’s alleged failure to return a signed copy of the TPP and any argument related thereto never having been raised before or ruled upon by the lower, the issue is not properly before this Court. The Respondent’s argument contained in pages 13-17 should not be considered.²

B. The claim for breach of good faith was not separate from the claim for breach of contract.

The case of *RoTec Servs. Inc. v. Encompass Servs. Inc.*, 359 S.C. 467, 597 S.E. 2d 881 (Ct. App. 2004) cited by Respondent has no application here. Appellant’s breach of good faith claim

² Respondent cites to the case of *Pennington v. HSBC Bank USA, N.A.* 493 F. App’x 548, (5th Cir. 2012) for the proposition that a bank’s failure to sign a TPP renders the TPP unenforceable. Appellant draws to the Court’s attention several cases which have differing determination: *Barroso v. Ocwen Loan Servicing, LLC*, No. B229112, 2012 WL 3573906 (Cal. Ct. App. Aug. 21, 2012)(the failure of the bank to sign a TPP did not render the TPP unenforceable); and *Corvello v. Wells Fargo Bank*, 728 F. 3d 878 (9th Cir. 2013)(bank contractually obligated to offer a permanent modification if compliance with TPP)

was asserted within the first counterclaim for breach of contract. The claims were not asserted separately. Thus, *RoTec* has no application here.

II. ISSUES OF FACT EXISTED AS TO THE CAUSES OF ACTION FOR UNJUST ENRICHMENT AND NEGLIGENT MISREPRESENTATION.

Respondent acknowledges the lower court summarily dismissed the causes of action for unjust enrichment based on the proposition there is no private right of action for HAMP. Again, Appellant set forth state causes of action. Each cause of action was separately designated and set forth. (R. p. 62).

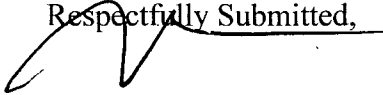
Respondent as the Court focus on certain allegations of the Answer and Counterclaim and does not look beyond. Indeed the evidence before the court at the time of Summary Judgment hearing far exceeded those allegations. The Affidavits by both parties supplemented the allegations and established relevant facts to be considered by the court. The Affidavits establish Appellant made payments under a Forbearance Agreement and TPP. The evidence established that Respondent accepted payments and that Respondent received the benefit of payments under an agreement it claims is unenforceable. The record showed Respondent by virtue of the writing it claimed was unenforceable but sent to Appellant, that Appellant was told he would receive a permanent modification after complying with the TPP. The lower court had before it evidence before it which it should have considered and certainly established issues of fact.

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.

Dated: August 15, 2014

Respectfully Submitted,



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PROOF OF SERVICE

I certify that I have served the Appellant/Respondent's Final Reply Brief on counsel of record by depositing a copy of it in the United States Mail, postage prepaid, on this 18th day of August, 2014, addressed to the other Counsel of record:

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