STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE THIRD JUDICIAL CIRCUIT
COUNTY OF LEE	)	Civil Action No.: 2013-CP-34-[illegible]

Ernestine N. Palmer, as Trustee of the Article IV Trust created under the Will of Mary Denman Newman, deceased, Ronald O. Palmer, Ernestine N. Palmer, as Trustee of the Article IV Trust created under the Will of James E. Newman, deceased,	)	**ORDER GRANTING PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND FOR ADDITIONAL TIME TO RESPOND TO DEFENDANTS' REQUESTS FOR ADMISSION OR, IN THE ALTERNATIVE, MOTION TO WITHDRAW OR AMEND UNDER RULE 36(b) AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**
Plaintiffs,	)	
vs.	)	
Hatcham Gove Inc., David H. Lucas,	)	
Defendants.	)	

This matter is before the Court on competing motions. Plaintiffs have filed a motion for partial summary judgment on Defendants counterclaim for violation of S.C. Code Ann. § 37-10-102 and a motion for additional time to respond to Defendants' requests for admission or, in the alternative, to allow Plaintiffs to withdraw or amend any deemed admissions pursuant to Rule 36(b), SCRCP. Defendants have moved for summary judgment based solely on deemed admissions under 36(a). A hearing upon these motions was held on September 12 at 9:30am. For the reasons set forth herein, both of the Plaintiffs motions are **GRANTED** and Defendants' motion is **DENIED**.

This proceeding was initiated by Plaintiff, Ernestine N. Palmer, as Trustee of the Article IV Trust created under the Will of Mary Denman Newman, deceased, as a foreclosure proceeding in her attempt to collect upon a $700,000 mortgage. Defendant Hatcham Grove, Inc. is a South Carolina corporation owned and controlled by Defendant David H. Lucas. (See ¶'s 41 of Defendants Answer, Counterclaim, and Third Party Complaint). As admitted in Defendants answer, the said Plaintiff and her husband, Plaintiff Ronald O. Palmer, have been close personal friends with Defendant David H. Lucas for over 40 years. (See ¶'s 42 of Defendants Answer, Counterclaim, and Third Party Complaint) The mortgage loan to Defendants came about when Plaintiffs became aware of Defendant Lucas' financial difficulties that threatened the imminent loss of his home located on the subject property. (See ¶'s 43, 44 of Defendants Answer, Counterclaim, and Third Party Complaint). However, while now admitting that not even a single payment has been made towards the loan, Defendants responded to the foreclosure

complaint with several precarious defenses, counterclaims, and third party complaints. The pleadings show that Plaintiffs have repeatedly denied the substance of Defendants claims in this regard.

The only defenses of Defendants to the foreclosure cause of action are based on alleged oral modifications of the subject promissory note and mortgage. (See Defendants' Supplemental Responses to Plaintiffs First Set of Interrogatories). Defendants alleged that Plaintiff Ronald O. Palmer, though not the mortgagee, orally agreed that repayment of the loan would come from Defendant David H. Lucas' distributions of profit from an unrelated and now defunct entity, Grease Guard, LLC. (See ¶ 44 of Defendants Answer, Counterclaim, and Third Party Complaint). Defendants have further plead counterclaims and third party causes of action concerning the breach of the allegedly modified contract. However, it has been the law of this state since before its founding that such oral modifications, even if true, are unenforceable under the Statute of Frauds. *e.g.*, Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989) (holding that a contract required to be in writing by the Statute of Frauds, S.C. Code Ann. § 32-3-10, such as a mortgage cannot be orally modified); Windham v. Honeycutt, 279 S.C. 109, 302 S.E.2d 856 (1983); Harby v. Wilson, 106 S.C. 7, 90 S.E. 183 (1916).

Defendants appear to have little support for their remaining counterclaims and third party causes of action as well. The first counterclaim and third party cause of action was for an accounting of any payments to Plaintiffs from any source. As noted above, Defendants have now admitted that there have never been any payments whatsoever made towards the subject $700,000 promissory note from either Defendants and that Grease Guard, LLC never made any profits in order to facilitate any payments under the alleged oral modification of the promissory note and mortgage. (See Deposition of David H. Lucas, p. 20, ln. 23-25; p. 39, ln.9-p.41, ln.17). Therefore, there does not appear anything for which to account.

It is now clear that the second counterclaim and third party cause of is without merit. It alleges a violation of the attorney preference statute (S.C. Code Ann. § 37-10-102). Since filing his pleading, however, Mr. Lucas has stipulated under oath that 1) this claim is based solely on the fact that no attorney preference form was obtained at the closing of the loan notwithstanding the fact that the statute does not require such a form; 2) that the attorney closing the transaction had represented him on numerous occasions prior to the loan closing; 3) that he never voiced any objection to this attorney closing the transaction; and 4) that he did not want anyone else to represent him in the closing. (See Defendants' Supplemental Responses to Plaintiffs' First Set of Interrogatories and Deposition of David H. Lucas, p. 81, ln.6-p. 82, ln.22). Therefore, even when viewing the evidence in the light most favorable to Defendants, they simply cannot maintain this cause of action. It is for this reason, Plaintiffs motion for partial summary judgment on this claim is granted.

Defendants further plead causes for violation of the Unfair Trade Practices Act, promissory estopple, interference with contractual relations and prospective advantages, and theft of corporate

opportunities all of which concern Defendants allegations relating either to the claimed oral modifications or what Defendant David H. Lucas now admits is merely a theory that Plaintiff Ronald O. Palmer for an unspecified reason intentionally harmed Grease Guard, LLC's ability to repay an approximately $3million outstanding obligation to Mr. Palmer and that Mr. Palmer is now actually indebted to the company. (See Defendants Answers to Plaintiffs First Set of Interrogatories and Deposition of David H. Lucas, p. 42, ln. 6-p.52, ln.12).

Even though the pleadings show that Plaintiffs repeatedly denied each of the substantive allegations that form the basis of all of their defenses, counterclaims and third party causes of action, Defendants served Requests for Admissions seeking further denials of these very same allegations. Counsel for the Plaintiffs filed an affidavit stating that he did not receive these requests until June 20, 2014. Plaintiffs served their denials only four days late on July 25, 2014. Based solely on this shortcoming, Defendants now seek to have the requests deemed admitted and ask this court to grant summary judgment. This Court denies that motion.

Instead, the Court will enlarge the time in which Plaintiffs had to serve their denials to the Defendants' requests for admission and allow Plaintiffs to withdraw or amend the deemed admissions pursuant to Rule 36(b), SCRCP. To do otherwise in these circumstances would frustrate the very intent and purpose the rules of civil procedure were promulgated. See Rule 1, SCRCP (stating that the Rules "shall be construed to secure the ***just***, speedy, and inexpensive determination of every action." emphasis added). Commentators and courts alike have recognized that the primary purpose of procedural rules is to promote the ends of justice. 4 Wright & Miller, Federal Practice and Procedure: Civil 3rd § 1029 (2014).

Towards this end, Rule 6, SCRCP, provides, "[w]hen by these rules ...an act is required...to be done at or within a specified time,...the court ... may at any time in its discretion ... upon motion made after the expiration of the specified period, for good cause shown, permit the act to be done." And, Rule 36(b) states that "the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admissions fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits."[1]. A trial court "may allow a party to amend or withdraw its answers to a request to admit when: (1) the presentation of the merits is furthered by the amendment; and (2) the party who obtained the admission cannot demonstrate prejudice because of the amendment." Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc., 347 S.C. 545, 557, 556 S.E.2d 718, 724 (Ct.App.2001); see also Tuomey Reg'l Med. Ctr., Inc. v. McIntosh, 315 S.C. 189, 191, 432 S.E.2d 485, 487 (1985) ("Rule 36,

[1] Both rules are mirror images of the federal rules. See Committee Notes to Rules 6 and 36, SCRCP

SCRCP allows amendment of an admission in the discretion of the court when 'the merits of the action will be subserved thereby and the party who obtained the admissions fails to satisfy the court that withdrawal or amendment will prejudice him....' ").

Rule 36 is intended only to expedite the trial and to relieve the parties of the cost of proving facts that will not be disputed at trial, and the rule is to be construed liberally. 8 Wright & Miller, Federal Practice and Procedure: Civil 3rd § 2252 (2014). It is not, therefore, intended as a mechanism to cynically obtain admissions of fact relating to key factual issues well known to be disputed by the party seeking the admissions. See Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E. 2d 537 (1991). Rather, as with other rules of civil procedure, mere technicalities will not be allowed to prevail to the detriment of substantial justice. 8 Wright & Miller, Federal Practice and Procedure: Civil 3rd § 2252 (2014). Here, while it is true that Plaintiffs were four days late in serving their denials, given Defendants admission that they have not made a single payment towards the subject $700,000 promissory note and Defendant Lucas' inability to point to any competent evidence to support Defendants' claims, it is clear that the first element is met. Refusal to allow Plaintiffs late answers in this context would not aid, but rather hinder the presentation of the merits.

What is more, "requests for admission as to central facts in dispute are beyond the proper scope of the rule [36]. Such requests have consistently been held improper." 8 Wright & Miller, Federal Practice and Procedure: Civil 3rd § 2256 (2014), *citing*, Pickens v. Equitable Life Assur. Soc. of U. S., 413 F.2d 1390, 1393–1394 (5th Cir. 1969). In fact, our Supreme Court has held that while the withdrawal of deemed admissions or the allowance of late denials is a matter lying within the discretion of this Court, the denial of a motion to withdraw any deemed admissions would constitute a reversible abuse of such discretion where, as here, the sought admissions, "if not dispositive, involve key factual elements" of both parties claims and defenses. Baughman, *supra*. (holding that deemed admissions that are either dispositive or involve key factual issues thwart the presentation of the merits requiring the allowance of the withdrawal of any such admissions under Rule 36(b))[2].

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[2] During the hearing, Defendants counsel cited Scott v. Greenville Housing Authority, 353 S.C. 639, 579 S.E.2d 151 Ct. App. 2003) as supporting their position that Plaintiffs should not be allowed to withdraw the deemed admissions based solely on the fact that the matters had been previously denied in the pleadings. However, Plaintiffs, here, do not rely solely on the fact that the matter sough for admission had been repeatedly denied in the pleadings. As provided in the rule, they sufficiently show that the presentation of the merits would be subserved by the withdrawal and that Defendants have shown no prejudice. The Court of Appeals in Scott similarly did not base its decision on denials in pleadings, but instead based its determination that the trial court should not have allowed withdrawal in that case on the ***prejudice*** placed on Scott. There, GHA had failed to cooperate in discovery, had denied the existence of certain documents, and then surprised Scott with the records during the middle of trial. These are not

In the instant case, Defendants requests seek the admission of facts that go to the very crux of their and Plaintiffs' claims and defenses. Defendant David H. Lucas concedes in his deposition testimony that he has no competent evidence to prove the matters covered by the deemed admissions. Nevertheless, they, in essence, ask this Court, based solely on the barest of technicality, to deny relief to Plaintiff Ernestine N. Palmer on her $700,000 mortgage in face of Defendant Lucas' admission that not a single payment has been made. It is clear, therefore, that the presentation of the merits is subserved by allowing Plaintiff to withdraw the deemed admissions and substitute the denials served on July 25, 2014 in their place.

Therefore, the Court's only inquiry is whether allowing Plaintiffs late denials would visit prejudice on Defendants. While it is their burden under Rule 36(b), the Defendants have not cited any particular prejudice. This is understandable. There can be no prejudice visited by requiring them to prove by competent evidence the substance of their bald allegations. That they have little, if any, evidence to do so cannot form the basis of any claim of prejudice.

More importantly, however, the reference to "prejudice" in Rule 36(b) is to the prejudice stemming from reliance on the binding effect of the admission. 8 Wright & Miller, Federal Practice and Procedure: Civil 3rd § 2264 (2014). Defendants cannot be said to have relied on any deemed admissions here. Plaintiffs have repeatedly denied these matters in any and all other pleadings in which such matters were mentioned. It is likewise insufficient for Defendants to assert they have relied on the deemed admissions in support of their summary judgment. It has been consistently held that such reliance does not constitute prejudice under rule 36(b). Id., *citing*, Conlon v. U.S., 474 F.3d 616, 624 (9th Cir. 2007); In re Durability Inc., 212 F.3d 551, 556 (10th Cir. 2000); F.D.I.C. v. Prusia, 18 F.3d 637, 640 (8th Cir. 1994). Instead, when considering "prejudice" under Rule 36(b), courts have focused on the prejudice that the nonmoving party would suffer *at trial*. Id. Because the trial is not imminent, no prejudice can be found in this case. Therefore, Plaintiffs motion in this regard is granted and the responses to the Defendants requests to admit served on July 25, 2014 shall be Plaintiffs admissions or denials for all purposes within this proceeding.

Because Defendants' relied entirely on the deemed admissions in their motion for summary judgment, said motion is denied. It should also be noted that even if the admissions were not withdrawn, Defendants motion would fail. As noted above, any deemed admissions

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circumstances present in the case at bar, and, for the reasons cited herein, there is no prejudice to the Defendants in allowing the withdrawal of any deemed admissions. Therefore, Baughman, *supra*, a Supreme Court opinion, is binding upon this Court.

concerning the alleged oral modifications would not result in summary judgment because such modifications are unenforceable under the Statute of Frauds. Player, *supra*; Windham, *supra*; Harby, *supra*. Moreover, given the deposition testimony of Defendant Lucas, there are clearly still questions of fact with regard to the other claims which Defendants assert the admissions support. Accordingly, the motion is denied, alternatively, because Defendant is not entitled to judgment as a matter of law and questions of material fact remain.

AND IT IS SO ORDERED.

W. Jeffery Young, Judge
Third Circuit, Court of Common Pleas

Sumter, South Carolina
September 12, 2014