STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT BENJAMIN GECY, Plaintiffs, vs. SOUTH CAROLINA BANK & TRUST, JAIME HAMNER AND DEBORAH HAMNER, Defendants.	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT Case No.: 2011-CP-07-1778 ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION and AMENDING ORDER GRANTING SUMMARY JUDGMENT

MOTION FOR RECONSIDERATION

This matter originally came before the Court on February 21, 2014, on the Defendants' Motion for Summary Judgment. Plaintiff appeared pro se and Defendants Hamner were represented by attorney James Wegmann and Defendant SCBT was represented by attorney Samuel Scoville. The Court fully considered all of the evidence presented and the arguments of the parties and granted the Defendants' Motions for Summary Judgment by order dated and filed June 5th, 2014.

The matter thereafter came before the Court on August 5, 2014, on Plaintiff's Motion for Reconsideration of the Order Granting Summary Judgment dated June 5, 2014. Appearing at the appointed place and time was Robert Mathison, appearing on behalf of the Plaintiff; James J. Wegmann, appearing on behalf of the Hamners; and Thomas Holloway, appearing on behalf of SCBT. In between the time of the original hearing on February 21st, 2014 and the reconsideration hearing on August 5th, 2014, the Supreme Court of South Carolina issued a

ruling in the consolidated case of *Kerr v. Branch Banking and Trust Co.* 408 S.C. 328, 759 S.E.2d 724 (April 9, 2014). Having considered the Motion and supporting Memorandum and after hearing the various arguments of Counsel, including Plaintiff's arguments related to the Restatement (Second) of Torts §552, I hereby find that *Kerr v. Branch Banking and Trust Co.* 408 S.C. 328, 759 S.E.2d 724 (April 9, 2014), is controlling in this matter. Consequently, I am amending the previous Summary Judgment Order of June 5th, 2014 to incorporate the *Kerr* Court's recent reported decision.*1*

The incorporation of the Kerr decision and removal of S.C. Code § 37-10-107 discussion from the June 5th, 2014 order does not change the ultimate outcome that the Defendants are entitled, as a matter of law, to Summary Judgment and therefore the Plaintiff's Motion for Reconsideration is hereby denied. To the extent this order conflicts with the prior order of June 5th, 2014, this order controls.

Modified and Amended Order Granting Summary Judgment

FACTS

The Plaintiff asserts five (5) causes of actions: (1) Tortious Interference with Contract (Defendant SCBT Only); (2) Breach of Contract (Hamners Only); (3) Civil Conspiracy (Both Defendants); (4) Negligent Misrepresentation (Both Defendants); and (5) Unfair Trade Practices (SCBT Only). Plaintiff's causes of action stem from two contracts, the first to purchase a lot located at 10 Meredith Lane on Lady's Island and the second to build a home on that lot. The contracts were form contracts that were filled out by and provided by Plaintiff for the Hamners

1 This Court's June 5th, 2014 Order granting summary judgment was based in part on S.C. Code § 37-10-107. The Supreme Court in *Kerr* specifically found that 37-10-107 "only applies to suits between lenders and borrowers ...." *Id.* at Footnote 5.

signatures. Each contract contained a financing contingency that stated in part, "[b]uyer's obligation under this agreement is contingent on Buyer obtaining said loan." The financing contingency in the lot sale contract was not limited to a specific type of loan, amount of loan, interest rate, or loan to value ratio. The financing contingency in the home construction contract was not limited to a specific type of loan, amount of loan, or interest rate but did contain a statement that, "[b]uyer shall apply for a maximum 100% loan (loan-to-value)...."

The Hamners were referred to SCBT by the Plaintiff to finance the transaction. The Hamners applied for a 100% construction loan that would, at the completion of construction, roll into a 100% VA loan. The contracts stated that the original closing date was March 5th, 2010 and both contracts contained a potential thirty (30) day extension to April 5th, 2010 in the event, through no fault of either party, a contingency had not been met. On both March 5th, 2010 and April 5th, 2010, the financing contingency had not been met because, at a minimum, the Plaintiff had not provided SCBT with a fully executed Road Maintenance Agreement (RMA) which was required by the Bank's underwriting procedures as a condition of loan approval.*2* The Hamners provided SCBT with all the requested documents and information pursuant to the financing contingency and took all actions requested by the Bank to process the loan. The Hamners were ready, willing, and able to perform on the contracts and close on the construction loan on either March 5th, 2010 or April 5th, 2010. Unfortunately, however, a completed and signed Road

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2 The Plaintiffs causes of action are all predicated on his belief that the Road Maintenance Agreement, required by SCBT, was an unnecessary condition of loan approval and therefore had SCBT followed "proper" underwriting guidelines, the transaction would have closed. Whether a bank chooses to make a loan or requires a road maintenance agreement as a condition of funding is solely within the purview of the Bank and their loan approval process. The deposition testimony offered by the Plaintiff of the two SCBT employees, Bruce Van Horn and Doug Jacobs, indicates clearly that the road maintenance agreement was a requirement of funding and that the loan was not approved because SCBT never received a signed road maintenance agreement. This is consistent with the SCBT's Credit Denial Letter offered by the Plaintiff stating, "[d]eclined due to not be[ing] able to obtain a Road Maintenance Agreement for the subject property." This is corroborated further by the affidavit of Kenneth Tootle, who was the attorney representing both the Plaintiff and the Hamners in the potential closing of the transaction in which he states, SCBT "also made it clear that my title company could not have any exceptions to the title report."

Maintenance Agreement, as required by SCBT for loan approval, was never provided to the Bank and the contracts, by their very terms, expired on the close of business April 5, 2010.

LEGAL ANALYSIS

Rule 56(c) of the South Carolina Rules of Civil Procedure requires Summary Judgment to be granted if "there is no genuine issue of material fact and ... the moving party is entitled to judgment as a matter of law. S.C.R. Civ. P. 56(c). Although the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact, "this initial responsibility may be discharged by showing, that is pointing out to the trial court, that there is an absence of evidence to support the nonmoving party's case." Baughman v. Am.Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

The purpose of Summary Judgment is to expedite the disposition of cases not requiring the services of fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "The trial court should grant Summary Judgment 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." Turner v. Milliman, 381 S.C. 101, 108, 671 S.E.2d 636 640 (Ct. App. 2009) (citing S.C.R. Civ. P. 56(c) and Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003).

When a party makes a motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of his pleadings, 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." S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc., 283 S.C. 182, 188-89, 322 S.E.2d 453, 457 (Ct. App.1984). If the adverse party does not respond accordingly, the trial court shall enter summary

judgment against him if appropriate. Id. at 189, 322 S.E.2d at 457. When a party makes no factual showing in opposition to a motion for summary judgment the trial "court must grant summary judgment to the moving party if, under the facts presented, the latter is entitled to summary judgment as a matter of law." *Id.; see also* Hancock vs. Mid-South Mgm't Co., Inc., 381 S.C. 326, 330-31, 673 S.E.2d 801, 803 (2009) (indicating summary judgment is appropriate where plaintiff has not proven even a scintilla of evidence).

Ongoing Discovery

The plaintiff requested a continuance from the hearing of this Motion on a claim discovery was not complete. Plaintiff filed a Verified Complaint against the Defendants on April 15, 2010. The parties exchanged extensive written discovery and SCBT filed a Motion for Summary Judgment on March 19, 2012 and the Hamners joined in the summary judgment motion shortly thereafter. Plaintiff's counsel was relieved from representing Plaintiff on May 8, 2012. The case was stayed on or about July 7, 2012 when Mr. Gecy filed for Chapter 7 Bankruptcy protection in the United States Bankruptcy Court. After the bankruptcy proceeding was complete this case was restored to the active roster on Motion of the Plaintiff and the Motion for Summary Judgment was restored to the Motions Roster. Since the time the case was restored, Plaintiff requested and was granted the opportunity to conduct depositions and in fact has conducted additional discovery including the taking of six depositions. During the discussion of scheduling this Motion all parties, including the Plaintiff, agreed to the hearing date of February 21, 2013. During the Summary Judgment hearing, Plaintiff requested more time to take two (2) additional depositions.

This Motion for Summary Judgment is being heard nearly three years after the filing of the Verified Complaint and two years after the filing of the Motion for Summary Judgment.

Extensive written discovery has been exchanged and all parties to the action have been deposed along with five fact witnesses. Generally, it is not premature for the trial court to grant summary judgment after all parties have been deposed because the litigants have had a full and fair opportunity to develop the record of the case. See George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 594, 545 S.E. 2d 500, 506 (2001), finding summary judgment was not premature because defendant "had a full and fair opportunity to develop the record on this issue and failed to do so."); also see Bayle v. South Carolina Department of Transportation., 344 S.C. 115, 128-29, 542 S.E.2d 736, 742-43 (Ct. App. 2001) (stating it was not error to grant summary judgment because no further discovery would have contributed to the resolution of the case).

This case is sufficiently mature and all parties have had a full and fair opportunity to develop the record and more than enough time to complete the record for purposes of summary judgment. All parties previously agreed to the hearing date of February 21, 2014. The Plaintiff was questioned by the Court extensively concerning the two depositions he wished to take that spawned the Motion for Continuance and after much discussion, and for reasons stated within, no further discovery would contribute to the resolution of issues in the case.

Breach of Contract

The Plaintiff states in his pleadings that the "Hamners failed to perform and thereby unjustifiably breached the Agreement to Buy and Sell Real Estate for 10 Meredith Lane." The Hamners ability to perform was predicated upon obtaining financing of a construction loan from SCBT. It is well settled law in South Carolina that a failure of a financing contingency clause will excuse the buyer from liability under the contract with the seller. *See*, Storen v. Meadors, 295 S.C. 438, 440, 369 S.E.2d 651, 652 (Ct. App. 1988) and Gregory v. Taylor, 042610 SCCA,

2010-UP-252. The Hamners made a good faith effort to obtain financing and as part of the process and requirements under the financing clause, provided the Bank with all documents and information necessary to obtain financing. In addition, the record is clear that the Hamners assisted the Plaintiff in attempting to get the required signatures on the Road Maintenance Agreement which was an SCBT requirement for loan approval.

The Plaintiff argues that SCBT's requirement of a Road Maintenance Agreement was an unnecessary underwriting requirement and that the bank should have approved the Hamner's loan without it and allowed the closing to go through prior to the April 5th, 2010 deadline. Even if arguably the Road Maintenance Agreement requirement was ultimately found to be unnecessary, the Hamners have no control over the SCBT's underwriting guidelines and the Bank issued a loan denial to the Hamners based on a lack of a fully executed Road Maintenance Agreement. The Court questioned the Plaintiff extensively as to whether or not he had any evidence that SCBT had approved the loan and the Hamners had refused to close on the approved loan. The Plaintiff agreed the loan was never approved but again reiterated that it wasn't approved because SCBT made the Road Maintenance Agreement a condition of the loan approval which the Plaintiff believes is an unnecessary condition to financing approval.

There is no genuine issue and the parties all agree that the Hamners' loan to purchase the property and build the home was never approved by SCBT either by the original closing date of March 5th, 2010 or by the extension period of April 5th, 2010. Consequently, the financing contingency clauses of the Plaintiff/Hamner contracts operate to insulate the Hamners from all contractual liability under the contracts and therefore Plaintiff's Breach of Contract claim against the Hamners is dismissed with prejudice.

No Duty Owed to Plaintiff

The Supreme Court in Kerr affirmed the trial court's decision to grant motions to dismiss and held that the bank did not owe a duty of care to non- customer investors of a company. In Kerr the Plaintiff's attempted to frame their claims as alleged misrepresentations made to them in their capacity as investors of a company that had a relationship with the bank. The Court aptly noted that, "at it's core, this case resolves around contractual relationships between BB & T and it's customer, Skywaves Company.... [and] our inquiry here is confined to whether the Plaintiffs – as investors directors, officers, and shareholders of Company-- may maintain a lawsuit [for negligent misrepresentation, fraudulent inducement, negligence, and Unfair Trade Practices Act] ... for what amounts to a breach of contract between Company and BB & T." The Court stated, "[W]e find there is no basis in the law for a finding that BB & T owed a duty to appellant, as non-customer investors ..."

Accordingly, I also find that there is no basis in law to allow Plaintiff, to maintain a lawsuit for the stated claims, as a non-party to the Hamner's application to the bank for mortgage financing.

Negligent Misrepresentation

Notwithstanding the complete bar to Plaintiff's claims as required by Kerr, Plaintiffs' allegations are also insufficient to state a claim for negligent misrepresentation, negligence, conspiracy, interference with contract or lender liability. Plaintiffs' claim for negligent misrepresentation fails as a matter of law because Plaintiff has not alleged a legally viable false statement or any fact that would tend to create a right for them to rely on any alleged misrepresentation by Defendants. Plaintiff's only claim appears to be that the lender's

underwriting requirement for an RMA was not proper and should not have been required as a condition of a loan. In this case, there is no false statement claimed. Negligent misrepresentation is predicated upon the transmission of a negligently made false statement. See Armstrong v. Collins, 366 S.C. 204, 220, 621 S.E.2d 368, 376 (Ct. App. 2005); Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003); Robertson v. First Union Nat'l Bank, 350 S.C. 339, 349, 565 S.E.2d 309, 315 (Ct. App. 2002); Brown v. Stewart, 348 S.C. 33, 42, 557 S.E.2d 676, 680–81 (Ct. App. 2001); West v. Gladney, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000).

A negligent misrepresentation case requires that there first be a false representation predicated upon misstatements of fact rather than upon expression of opinion, intent, or confidence that the deal would be satisfactory. See Bishop Logging Co. v. John Deere Indus. Equip. Co., 317 S.C. 520, 526–27, 455 S.E.2d 183, 187 (Ct. App. 1995) (finding statements by equipment seller concerning expected performance of logging system were opinions as to future performance and could not be basis for claim of fraud). More specifically, the alleged false representation must be of a present or pre-existing fact. See Spires v. Acceleration Nat'l Ins. Co., 417 F. Supp. 2d 750, 755-56 (D.S.C. 2006) (applying South Carolina law). The negligent representation cannot be based on unfulfilled promises or statements as to future events. See Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 105, 439 S.E.2d 283, 285 (Ct. App. 1993). In addition, an integral component of this element is that the representation be false at the time it is made. See GSM Dealer Servs., Inc. v. Chrysler Corp., 32 F.3d 139, 142 (4th Cir. 1994) (applying South Carolina law).

Plaintiff at most has only alluded to and alleged that "[d]efendants made a false statement to Plaintiff regarding their intention to close the loan and/or their reasons for failing to close the loan. (See Paragraph 74 Amended Complaint). Even if taken as true, such a representation does not relate to present or pre-existing fact and therefore cannot, as a matter of law, satisfy the requirements for a claim for negligent misrepresentation.

No Right to Rely

In addition to showing that a false representation was made, a plaintiff must also show that he had a right to rely on such representation in order to pursue a claim for either negligent misrepresentation or fraudulent misrepresentation. See GSM Dealer Servs., Inc. v. Chrysler Corp., 32 F.3d 139, 142 (4th Cir. 1994) (applying South Carolina law). Plaintiff did not have a right to rely on any statements because Plaintiff did not have a fiduciary relationship with either defendant. When there is no fiduciary relationship between the parties and the situation involves an arm's length transaction between mature, educated parties, as is the case here, there is no right to rely. Lands Inn, Inc., supra. (citing Florentine Corp. v. PEDA I., Inc., 339 S.E.2d 112, 114 (S.C. 1985)); see also First Savings Bank, FSB v. Capital Investors, Inc., 450 S.E.2d 83 (Ct. App. 1994), rev'd in part on other grounds, 459 S.E.2d 307 (S.C. 1995).

Plaintiff makes no allegations as to any fiduciary relationship between SCBT and them. Instead, as the bulk of Plaintiffs' allegations reflect, the relationship at issue is the one between SCBT and the Hamners and Plaintiff and the Hamners but not Plaintiff and SCBT. Plaintiff has not alleged any specific facts that would create a fiduciary relationship between Plaintiff and SCBT. Accordingly, Plaintiff has not sufficiently pled and cannot establish that he had a right to rely on any alleged false statements by SCBT.

and claims are generally a state and federally regulated arena. "Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States . . . " are generally exempt from the provisions of the SCUTPA. S.C. Code Ann. § 39-5-40(a).

Additionally, to be actionable under the SCUTPA, the unfair or deceptive act or practice must have an impact upon the public interest. Noack Enterprises, Inc. v. Country Corner Interiors, 351 S.E.2d 347 (S.C. Ct. App. 1986). Here, Plaintiff merely offers a conclusion of law that the "unfair acts and practices of Defendants have an impact on the public interest, have potential for repetition." Absent from the Amended Complaint are any facts that would even tend to show that the supposed conduct impacted the public directly or that the conduct is otherwise capable of repetition. At most, the Amended Complaint alleges, in sum, that SCBT failed to follow a lending guideline and that failure prevented SCBT from providing financing to the Hamners before the Hamner/Plaintiff contracts expired by operation of time. These allegations do not comprise "unfair or deceptive acts" that are actionable under the SCUTPA because business relationships that affect only the parties to the complained-of transaction are not actionable under the SCUTPA. See Novack Enterprises, Inc. 351 S.E.2d at 349–50.

For the reasons set forth herein, Summary Judgment for all claims and causes of action is hereby GRANTED to all Defendants with prejudice and the Plaintiff's Motion for Reconsideration is DENIED.

Marvin H. Dukes, III
Special Circuit Judge and Master In Equity

Beaufort, South Carolina
_____, 2014

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	IN THE COURT OF COMMON PLEAS CA NO. 2011-CP-07-1778
Benjamin Gecy, Plaintiff, vs. South Carolina Bank & Trust, Jaime Hamner and Deborah Hamner, Defendants.	ORDER

This matter came before the Court on February 21, 2014, on Motion for Summary Judgment of all Defendants. Plaintiff appeared pro se and Defendants Hamners were represented by attorney James Wegmann and SCBT was represented by attorney Samuel Scoville. The Court fully considered all of the evidence presented and the arguments of the parties and for the reasons that follow, the Court grants Defendants Motions for Summary Judgment.

FACTS

The Plaintiff asserts five (5) causes of actions: (1) Tortious Interference with Contract (Defendant SCBT Only); (2) Breach of Contract (Hamners Only); (3) Civil Conspiracy (Both Defendants); (4) Negligent Misrepresentation (Both Defendants); and (5) Unfair Trade Practices (SCBT Only). Plaintiff's causes of action stem from two contracts, the first to purchase a lot located at 10 Meredith Lane on Lady's Island and the second to build a home on that lot. The contracts were form contracts that were filled out by and provided by Plaintiff for the Hamners signatures. Each contract contained a financing contingency that stated in part, "[b]uyer's obligation under this agreement is contingent on Buyer obtaining said loan." The financing

contingency in the lot sale contract was not limited to a specific type of loan, amount of loan, interest rate, or loan to value ratio. The financing contingency in the home construction contract was not limited to a specific type of loan, amount of loan, or interest rate but did contain a statement that, "[b]uyer shall apply for a maximum 100% loan (loan-to-value)...."

The Hamners were referred to SCBT by the Plaintiff to finance the transaction. The Hamners applied for a 100% construction loan that would, at the completion of construction, roll into a 100% VA loan. The contracts stated that the original closing date was March 5th, 2010 and both contracts contained a potential thirty (30) day extension to April 5th, 2010 in the event, through no fault of either party, a contingency had not been met. On both March 5th, 2010 and April 5th, 2010, the financing contingency had not been met because, at a minimum, the Plaintiff had not provided SCBT with a fully executed Road Maintenance Agreement (RMA) which was required by the Bank's underwriting procedures as a condition of loan approval.*1* The Hamners provided SCBT with all the requested documents and information pursuant to the financing contingency and took all actions requested by the Bank to process the loan. The Hamners were ready, willing, and able to perform on the contracts and close on the construction loan on either March 5th, 2010 or April 5th, 2010. Unfortunately, however, a completed and signed Road Maintenance Agreement, as required by SCBT for loan approval, was never provided to the Bank and the contracts, by their very terms, expired on the close of business April 5, 2010.

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1 The Plaintiffs causes of action are all predicated on his belief that the Road Maintenance Agreement, required by SCBT, was an unnecessary condition of loan approval and therefore had SCBT followed "proper" underwriting guidelines, the transaction would have closed. Whether a bank chooses to make a loan or requires a road maintenance agreement as a condition of funding is solely the purview of the Bank and their loan approval process. The deposition testimony offered by the Plaintiff of the two SCBT employees, Bruce Van Horn and Doug Jacobs, indicates clearly that the road maintenance agreement was a requirement of funding and that the loan was not approved because SCBT never received a signed road maintenance agreement. This is consistent with the SCBT's Credit Denial Letter offered by the Plaintiff stating, "[d]eclined due to not be able to obtain a Road Maintenance Agreement for the subject property." This is corroborated further by the affidavit of Kenneth Tootle, who was the attorney representing both the Plaintiff and Hamners in the potential closing of the transaction in which he states, SCBT "also made it clear that my title company could not have any exceptions to the title report."

LEGAL ANALYSIS

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judgment as a matter of law." *Id.; see also* Hancock vs. Mid-South Mgm't Co., Inc., 381 S.C. 326, 330-31, 673 S.E.2d 801, 803 (2009) (indicating summary judgment is appropriate where plaintiff has not proven even a scintilla of evidence).

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S.C. 582, 594, 545 S.E. 2d 500, 506 (2001), finding summary judgment was not premature because defendant "had a full and fair opportunity to develop the record on this issue and failed to do so."); also see Bayle v. South Carolina Department of Transportation., 344 S.C. 115, 128-29, 542 S.E.2d 736, 742-43 (Ct. App. 2001) (stating it was not error to grant summary judgment because no further discovery would have contributed to the resolution of the case).

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Breach of Contract

The Plaintiff states in his pleadings that the "Hamners failed to perform and thereby unjustifiably breached the Agreement to Buy and Sell Real Estate for 10 Meredith Lane." The Hamners ability to perform was predicated upon obtaining financing of a construction loan from SCBT. It is well settled law in South Carolina that a failure of a financing contingency clause will excuse the buyer from liability under the contract with the seller. *See*, Storen v. Meadors, 295 S.C. 438, 440, 369 S.E.2d 651, 652 (Ct. App. 1988) and Gregory v. Taylor, 042610 SCCA, 2010-UP-252. The Hamners made a good faith effort to obtain financing and as part of the process and requirements under the financing clause, provided the Bank with all documents and information necessary to obtain financing. In addition, the record is clear that the Hamners assisted the Plaintiff in attempting to get the required signatures on the Road Maintenance Agreement which was an SCBT requirement for loan approval.

The Plaintiff argues that SCBT's requirement of a Road Maintenance Agreement was an unnecessary underwriting requirement and that the bank should have approved the Hamner's loan without it and allowed the closing to go through prior to the April 5th, 2010 deadline. Even if arguably the Road Maintenance Agreement requirement was ultimately found to be unnecessary, the Hamners have no control over the SCBT's underwriting guidelines and the Bank issued a loan denial to the Hamners based on a lack of a fully executed Road Maintenance Agreement. The Court questioned the Plaintiff extensively as to whether or not he had any evidence that SCBT had approved the loan and the Hamners had refused to close on the approved loan. The Plaintiff agreed the loan was never approved but again reiterated that it wasn't approved because SCBT made the Road Maintenance Agreement a condition of the loan approval which the Plaintiff believes is an unnecessary condition to financing approval.

There is no genuine issue and the parties all agree that the Hamner loan to purchase the property and build the home was never approved by SCBT either by the original closing date of March 5th, 2010 or by the extension period of April 5th, 2010. Consequently, the financing contingency clauses of the Plaintiff/Hamner contracts operate to insulate the Hamners from all contractual liability under the contracts and therefore Plaintiff's Breach of Contract claim against the Hamners is dismissed with prejudice.

The Statute of Frauds Bars Lender Liability

Section 37-10-107 of the South Carolina Code bars all of the Plaintiffs' claims against defendants, as a matter of law. Many states, including South Carolina, have enacted specialized statutes concerning loan and credit agreements. These statutes bar enforcement of oral lending agreements and bar fraud and other tort claims based on alleged oral voluminous and other

non-written conduct concerning these loan agreements. Specifically, *Section 37-10-107 of the South Carolina Code Annotated* provides:

(1) No person may maintain an action for legal or equitable relief or a defense based upon a failure to perform an alleged promise, undertaking, accepted offer, commitment, or agreement:

(a) to lend or borrow money;

(b) to defer or forbear in the repayment of money; or

(c) to renew, modify, amend, or cancel a loan of money or any provision with respect to a loan of money, involving in any such case a principal amount in excess of fifty thousand dollars, unless the party seeking to maintain the action or defense has received a writing from the party to be charged containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing.

(2) Failure to comply with subsection (1) precludes an action or defense based on any of the following legal or equitable theories:

(a) an implied agreement based on course of dealing or performance or on a fiduciary relationship;

(b) promissory or equitable estoppel;

(c) part performance, except to the extent that the part performance may be explained only by reference to the alleged promise, undertaking, accepted offer, commitment, or agreement; or

(d) negligent misrepresentation.

S.C. Code Ann. § 37-10-107.

Plaintiff alleges the lender's requirement for a Common Road Maintenance Agreement to be in place for the care and maintenance of the private road was improper under custom and/or applicable State and/or Federal lending guidelines. The Plaintiff does not allege that he had a written contract with the bank. Plaintiff merely claims that the contracts with the Hamners expired before Hamners loan application could be approved as a result of the RMA requirement of the bank. Plaintiff alleges, in the alternative, that SCBT directed the Hamners to purchase a different property, but could provide not even a scintilla of evidence to support that bare allegation. In fact, the only evidence in the record is that the Hamners very much wanted to purchase the 10 Meredith Lane property; diligently tried to help Plaintiff obtain the required signatures on the RMA; provided all the necessary documents to the bank for loan approval; and were ready, willing, and able to close if the loan had been approved.*2*

Plaintiff has not alleged or otherwise provided a writing to evidence any material terms and/or conditions of the alleged promises or representations made to him therefore his claims fail as a matter of law. See Carolina First Bank v. Lucas, Case No. 03-CP-10-1907, 2004 WL 5208410 (S.C. Com. Pl. Jun. 14, 2004); see also Robertson v. First Union Nat'l Bank, Case No. 99-CP-10-288, 2000 WL 35722762 (S.C. Com. Pl. Aug. 8, 2000). Specifically, Plaintiff has not alleged that he "received a writing from the party to be charged [i.e. SCBT] containing the material terms and conditions of the promise, undertaking, accepted offer, commitment, or agreement and the party to be charged, or its duly authorized agent, has signed the writing." S.C. Code Ann. § 37-10-107(1)(c). Accordingly, as a matter of law, Plaintiffs cannot "maintain an action for legal . . . relief . . . based upon [SCBT's alleged] failure to lend . . . money [to Hamners.]" S.C. Code

2 The record indicates that approximately two (2) weeks after the April 5th, 2010 closing deadline, the Hamners contacted a Realtor and began to look for another property, due, in part, to receiving notice from their Landlord that they would have to vacate their rental home. The record further indicates that on or about April 21st, 2010, the Hamners entered into an agreement to purchase a home and that the closing on that home occurred on May 28th, 2010.

Ann. § 37-10-107(1)(a). Under these circumstances, Plaintiff cannot establish his claims against SCBT, as a matter of law.[3]

Further, Plaintiff can point to no written agreement, law or regulation that limits the banks ability to determine their underwriting standards and requirements for lending. A key purpose of the lenders statute of frauds is to protect financial institutions and other lenders from claims outside the four corners or an agreement or that are inconsistent with the written agreements outlining the terms of the transaction. Because the statutes within Title 37 should "be liberally construed and applied to promote [Title 37's] underlying purposes and policies," any question regarding the applicability of section 37-10-107 to the alleged agreement is resolved in Defendant's favor. See S.C. Code Ann. § 37-10-102(1).

Section 37-10-107 Bars Fraud, Civil Conspiracy, Negligent Misrepresentation and UTPA Claims.

3 The Plaintiff could point to no authority that would allow a Seller, or other third party Plaintiff, to assert causes of action against a lender for failure to approve a loan for a separate buyer. If a Seller or other third party could assert such a cause of action, the potential number of suits would be limitless every time a buyer is denied a loan. Vendors such as material suppliers, subcontractors, etc. would be able to assert claims against a lender who fails to approve a buyer's construction loan, etc.

South Carolina state and federal trial courts have found that fraud, negligent misrepresentation, civil conspiracy and UTPA claims are barred by Section 37-10-107. See e.g. Lands Inn, Inc. v. Branch Banking and Trust Company of South Carolina, C.A. No. 2:98-158-23 (S.C. Com. Pl. April 12, 1999) (citing Derrick v. Branch Banking and Trust Company of South Carolina, 96-CP-42-2095 (S.C.Ct.Cm. P.) Kerr v. Branch Banking & Trust Co., 2009-CP-10-7516 (S.C. Bus. Ct. 9th Cir. Nov 8, 2011) amended June 15, 2012. Notwithstanding the foregoing, alternatively Plaintiffs' allegations are insufficient to state a claim for negligent misrepresentation, negligence, conspiracy, interference with contract or lender liability. Plaintiffs' claim for negligent misrepresentation fail as a matter of law because Plaintiff has not alleged a legally viable false statement or any fact that would tend to create a right for them to rely on any alleged misrepresentation by Defendants. Plaintiff's only claim appears to be that the lender's underwriting requirement for an RMA was not proper and should not have been required as a condition of a loan. In this case, there is no false statement claimed. Negligent misrepresentation is predicated upon the transmission of a negligently made false statement. See Armstrong v. Collins, 366 S.C. 204, 220, 621 S.E.2d 368, 376 (Ct. App. 2005); Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003); Robertson v. First Union Nat'l Bank, 350 S.C. 339, 349, 565 S.E.2d 309, 315 (Ct. App. 2002); Brown v. Stewart, 348 S.C. 33, 42, 557 S.E.2d 676, 680–81 (Ct. App. 2001); West v. Gladney, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000).

A negligent misrepresentation case requires that there first be a false representation predicated upon misstatements of fact rather than upon expression of opinion, intent, or confidence that the deal would be satisfactory. See Bishop Logging Co. v. John Deere Indus. Equip. Co., 317 S.C. 520, 526–27, 455 S.E.2d 183, 187 (Ct. App. 1995) (finding statements by equipment seller

concerning expected performance of logging system were opinions as to future performance and could not be basis for claim of fraud). More specifically, the alleged false representation must be of a present or pre-existing fact. See Spires v. Acceleration Nat'l Ins. Co., 417 F. Supp. 2d 750, 755-56 (D.S.C. 2006) (applying South Carolina law). The negligent representation cannot be based on unfulfilled promises or statements as to future events. See Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 105, 439 S.E.2d 283, 285 (Ct. App. 1993). In addition, an integral component of this element is that the representation be false at the time it is made. See GSM Dealer Servs., Inc. v. Chrysler Corp., 32 F.3d 139, 142 (4th Cir. 1994) (applying South Carolina law).

Plaintiff at most has only alluded to and alleged that "[d]efendants made a false statement to Plaintiff regarding their intention to close the loan and/or their reasons for failing to close the loan. (See Paragraph 74 Amended Complaint). Even if taken as true, such a representation does not relate to present or pre-existing fact cannot, as a matter of law, satisfy the requirements for a claim for negligent misrepresentation.

No Right to Rely

In addition to showing that a false representation was made, a plaintiff must also show that he had a right to rely on such representation in order to pursue a claim for either negligent misrepresentation or fraudulent misrepresentation. See GSM Dealer Servs., Inc. v. Chrysler Corp., 32 F.3d 139, 142 (4th Cir. 1994) (applying South Carolina law). Plaintiff did not have a right to rely on any statements because Plaintiff did not have a fiduciary relationship with either defendant. When there is no fiduciary relationship between the parties and the situation involves an arm's length transaction between mature, educated parties, as is the case here, there is no right

to rely. Lands Inn, Inc., supra. (citing Florentine Corp. v. PEDA I., Inc., 339 S.E.2d 112, 114 (S.C. 1985)); see also First Savings Bank, FSB v. Capital Investors, Inc., 450 S.E.2d 83 (Ct. App. 1994), rev'd in part on other grounds, 459 S.E.2d 307 (S.C. 1995).

Plaintiff makes no allegations as to any fiduciary relationship between SCBT and them. Instead, as the bulk of Plaintiffs' allegations reflect, the relationship at issue is the one between SCBT and Hamners and Plaintiff and Hamners but not Plaintiff and SCBT. Plaintiff has not alleged any specific facts that would create a fiduciary relationship between Plaintiff and SCBT. Accordingly, Plaintiff has not sufficiently pled and cannot establish that he had a right to rely on any alleged false statements by SCBT.

Additionally, Plaintiff cannot establish a claim for negligent or intentional lender liability against SCBT. To prove such a claim, Plaintiff must establish a duty of care, a breach of that duty and damages proximately caused by the breach. McKnight v. South Carolina Dept. of Corrections, 684 S.E.2d 566, 569 (S.C.Ct.App.2009). In this case, SCBT had no duty to Plaintiff. Plaintiff alleges that "SCBT owed Plaintiff a duty of care because SCBT possessed expertise or special knowledge that would ordinarily make it reasonable for Plaintiff to rely on SCBT and because SCBT had pecuniary interest in the transaction and [SCBT] breached its duty of by failing to exercise care." (See paragraph 77 of the Amended Complaint). However, Plaintiff cannot manufacture an alleged duty on behalf of SCBT. Instead, "duty is generally defined as the obligation to conform to a particular standard of conduct toward another." Murray v. Bank of America, N.A., 354 S.C. 337, 343, 580 S.E.2d 194, 197 (Ct. App. 2003). "Ordinarily, the common law imposes no duty on a person to act." Id. "An affirmative legal duty to act exists if created by statute, contract, relationship, status, property interest, or some other special circumstance." Id. In this case, SCBT did not have a duty to Plaintiff as the Hamners were the

applicants for financing and Plaintiff was not. SCBT did not owe any duty to Plaintiff via Hamners application for financing and, therefore, Plaintiff cannot establish a claim for negligence or lender liability.

Civil Conspiracy

There are three elements to the tort of civil conspiracy: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; and (3) causing the plaintiff special damage. Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 682 S.E.2d 871, 874 (Ct. App. 2009). Any claim for civil conspiracy must contain or allege additional facts "in furtherance of the conspiracy rather than reallege other claims within the complaint." Id. Furthermore, the plaintiff must plead "special damages" that are different then the damages sought in the other causes of action." Id. at 875.

The Plaintiff has failed to allege "additional facts" particular to or in furtherance of the alleged conspiracy. The plaintiff has merely recycled or realleged facts from the other claims within the complaint which is fatal to his civil conspiracy cause of action. Additionally, the plaintiff has plead the same special damages in four of the five causes of action cited but has failed to distinguish any "special damages" that relate only to the civil conspiracy cause of action. Therefore, as with the recycling of facts, the plaintiff's civil conspiracy cause of action fails on its face.

Finally, the Plaintiff has merely recited the elements of the cause of action. A party adverse to a Motion for Summary Judgment may not rest upon mere allegations, but must in his response, by affidavits or as otherwise provided in the Rule, set forth specific facts showing that there is a genuine issue for trial. S.C. Elec. & Gas Co. v. Combustion Eng'g, Inc., 283 S.C. 182, 188-89, 322 S.E.2d 453, 457 (Ct. App. 1984). In the event the adverse party "makes no

factual showing in opposition to a Motion for Summary Judgment, the "court must grant summary judgment to the moving party if, under the facts presented, the latter is entitled to summary judgment as a matter of law." Id.

Finally, Plaintiff, as a person without privity with the bank and to which no duty is owned under Hamners application for financing has not pled sufficient allegations against SCBT to support a claim for violation of the SCUTPA. Plaintiffs' claims are essentially that SCBT failed to follow federal lending guidelines for the Hamners applications. Such allegations and claims are generally a state and federally regulated arena. "Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States ..." are generally exempt from the provisions of the SCUTPA. S.C. Code Ann. § 39-5-40(a).

Additionally, to be actionable under the SCUTPA, the unfair or deceptive act or practice must have an impact upon the public interest. Noack Enterprises, Inc. v. Country Corner Interiors, 351 S.E.2d 347 (Ct. App. 1986). Here, Plaintiff merely offers a conclusion of law that the "unfair acts and practices of Defendants have an impact on the public interest, have potential for repetition." Absent from the Amended Complaint are any facts that would even tend to show that the supposed conduct impacted the public directly or that the conduct is otherwise capable of repetition. At most, the Amended Complaint alleges, in sum, that SCBT failed to follow a lending guideline and that failure prevented SCBT from providing financing to the Hamners before the Hamner/Plaintiff contracts expired by operation of time. These allegations do not comprise "unfair or deceptive acts" that are actionable under the SCUTPA because business relationships that affect only the parties to the complained-of transaction are not actionable under the SCUTPA. See Novack Enterprises, Inc. 351 S.E.2d at 349–50.

For the reasons set forth herein, Summary Judgment for all claims and causes of action is hereby GRANTED to all Defendants with prejudice.

Marvin H. Dukes, III
Special Circuit Judge and Master In Equity

Beaufort, South Carolina
6/5, 2014

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