THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of the Master in Equity

The Honorable Mikell R. Scarborough, Master in Equity
Case No.: 2010-CP-10-6060

APPELLATE CASE No.: 2014-001323

Bank of America, N.A.,..Respondent,

v.

Johnson D. Koola, First Citizens Bank and Trust Company, Inc., f/k/a First Citizens Bank and Trust Company of South Carolina, and Cambridge Lakes Condominium Homeowners Association, Inc., f/k/a Cambridge Lakes Horizontal Property Regime, Defendants,

Of whom Johnson D. Koola is the...Appellant.

REPLY BRIEF OF APPELLANT

Johnson D Koola
1587 Cambridge Lakes Dr
Mt. Pleasant, SC 29464
(843) 849-9241
Appellant pro se

Robert P. Jackman, Esq.
Korn Law Firm P.A.
P.O. Box 12369
Columbia, SC 29211-2369
Attorney for Respondent

RECEIVED
JAN 16 2015
SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities...III

Standard of Review...1

Arguments...1

I. THE MASTER ERRED IN DETERMINING THAT KOOLA HAS NO STANDING AND EXCLUSIVE RIGHT TO ASSERT COUNTERCLAIMS AGAINST BAC AFTER HE REOPENED HIS CHAPTER 7 BANKRUPTCY CASE, AND THE TRUSTEE DECLINED TO RETAIN SUCH CLAIMS...1

II. THE MASTER ERRED IN DETERMINING THAT KOOLA's COUNTERCLAIMS AGAINST BAC ARE BARRED BY STATUTE OF LIMITATIONS...5

III. THE MASTER ERRED IN DETERMINING THAT BAC OWED KOOLA NO DUTY OF CARE, WHICH WAS CREATED THROUGH THE STATUTORY PROVISIONS OF FIRREA FEDERAL APPRAISAL GUIDELINES AND S.C. HORIZONTAL PROPERTY ACT, S.C. Code Ann. §27-31-430...10

IV. THE MASTER ERRED IN DENYING KOOLA'S "MOTION TO SANCTION" BAC WITHOUT DUE CONSIDERATION OF "HOPE FOR HOMEOWNERS PROGRAM" AND "THE ADMINISTRATIVE ORDER" OF THE CHIEF JUSTICE OF SUPREME COURT OF SOUTH CAROLINA 16

V. THE MASTER'S NONCONSIDEARTION OF FEDERAL STATUES AND THE ADMINISTRATIVE ORDER OF THE CHIEF JUSTICE OF SUPREME COURT OF SOUTH CAROLINA VIOLATES CONSTITUTIONAL PROVISIONS. 22

Conclusion...23

TABLE OF AUTHOIRITIES

CASES

Administrative Order No.: 2011-05-02-01 dated May 2, 2011,
Chief Justice of South Carolina Supreme Court.................................. 21,22

Bates v. City of Columbia, 391 S.E.2d 733 (Ct.App. 1999)........................13,23

Crawford v. Central Mortg. Co.
404 S.C.39, 744 S.E.2d 538 (2013)..18

Federal Nat. Mort. Ass'n v. LeCrone, 868 F.2d 190, 193 (6th Cir. 1989)............18

Fedotov v. Peter T. Roach and Associates, P.C.,
354 F.Supp.2d 471 (S.D.N.Y. 2005)..4

Grillo v. Speedrite Products, Inc.,
340 S.C. 498, 532 S.E.2d 1 (Ct.App. 2000)..8

Holly Woods Association of Residential Owners v. Hiller,
392 S.C. 172, 183, 708 S.E.2d 787 (Ct/App. 2004)..................................5,6

In re Paolella, 85 B.R. 974 (Bank. E.D.Pa., 1988).......................................4

Johnson v. Robert E. Lee Academy, Inc.
401 S.C. 500, 504 (2012), 737 S.E.2d 512..20

Management Investors v. United States Mine Workers of America,
610 F.2d 384, 392 (6th Cir. 1979)..2,3

McClain v. Jarrad, 354 S.C. 218, 580 S.E.2d 763 (S.C.App. 2003)................5,6

Menezes v. W.L. Ross & Co., LLC, 403 S.C.522, 744 S.E.2d 178 (2013).........1

Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 161 (2012)...............13

Richards v. D.R. Horton, Inc., 320 Ga.App
771, 740 S.E.2d 732 (Ga.App. 2013)..4

Robertson v. First Union Bank,
350 S.C. 339, 565 S.E.2d 309 (Ct.App.2002)..14

Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.,
282 S.C. 415, 321 S.E.2d 46 (1984)..14

Savannah Bank, N.A. v. Stalliard,
400 S.C. 246, 734 S.E.2d 161 (2012)..14

Scott by McClure v. Fruehauf Corp.,
302 S.C. 364, 396 S.E.2d 354 14

Spaulding v. Wells Fargo Bank, 714 F.3d 769 (4th Cir. 2013) 18

State v. Buyers Service Co. Inc., 292 S.C. 426, 357 S.E.2d 15 (1987) 12

Steffens v. Am. Home Mortgage Servicing, Inc.,
6:10-cv-01788-JMC, 2011 WL 901179 (D.S.C., Mar. 15, 2011) 19

Tyler House Apartments, Ltd. v. U.S., 38 Fed. Cl. 1,6 (1997) 2

Weber v. Bank of America, N.A.,
0:13-cv-01999-JFA, 2013 WL 4820446 (D.S.C. Sep. 10, 2013) 19

Wieters v. Bon-Secours-St, Francis Xavier Hosp.,
378 S.C. 160, 662 S.E.2d 430 (Ct.App. 2008) 22

U.S. CONSTITUTION

U.S. Const. art. VI 22

CODES (Multiple citations)

11 U.S.C.A. § 350(b)

11 U.S.C.A. § 554(c)

12 C.F.R. §§ 34.41, 34.43, 34.44, 34.45, 34.62, 564.1

12 U.S.C.A. §1715z-23 et seq.

South Carolina Horizontal Property Act, § 27-31-10 et seq.

S.C. Code Ann. § 27-31-430

RULES (Multiple citations)

Rule 52, SCRCP

Rule 56, SCRCP

Rule 59(b), SCRCP

OTHERS

C.J.S. Bankruptcy § 650 at 592 3,4

STANDARD OF REVIEW

Supreme Court undertakes a de novo review of all issues of law, and is free to decide matters of law with no particular deference to the trial court. *Menezes v. WL. Ross & Co., LLC*, 403 S.C. 522, 744 S.E.2d 178 (2013).

ARGUMENTS

I. THE MASTER ERRED IN DETERMINING THAT KOOLA HAS NO STANDING AND EXCLUSIVE RIGHT TO ASSERT COUNTERCLAIMS AGAINST BAC AFTER HE REOPENED HIS CHAPTER 7 BANKRUPTCY CASE, AND THE TRUSTEE DECLINED TO RETAIN SUCH CLAIMS.

In May 2012, appellant pro se Johnson D Koola ("Koola") filed a Motion to Reopen his Chapter 7 Bankruptcy case under 11 U.S.C.A. § 350(b) to include the new causes of action and fresh claims of negligence and fraud against respondent Bank of America ("BAC") in Schedule B (ROA # 15). The Bankruptcy Court, by an Order dated May 22, 2012, reopened the Bankruptcy case. On Nov. 6, 2013, the Court closed the Bankruptcy case. Any property which is scheduled in the debtor's schedule of assets, and which is not otherwise administered at the time of closing of a case is abandoned to the debtor and regarded as administered for purposes of closing and reopening the case. Consequently, the assets/claims, which the trustee did not pursue, were reverted to debtor, Koola. 11 U.S.C.A. § 554(c). Koola has now exclusive right to assert counterclaims against BAC. (ROA # 15).

BAC's Motion for Summary Judgment (ROA # 14) argued that Koola lacked standing to assert counterclaims against BAC because Koola filed for bankruptcy in March 2009, but failed to list any of the counterclaims in bankruptcy schedules, and therefore the claims remained under the control of the trustee, not Koola,

after bankruptcy discharge in July 29.

Respondent BAC's Initial Brief contends that Koola reopened his bankruptcy case [in 2012] to include the causes of action against BAC. Citing Koola's Discharge from Bankruptcy dated July 13, 2009, BAC contends further that the trustee declined to pursue any action against BAC. BAC cites to 2009 Discharge instead of 2013 Discharge while referring to Bankruptcy reopening in 2012 and the subsequent closing in 2013, which Koola finds very unethical and leads to misleading the Court.

BAC makes a contradictory statement: 'When Bankruptcy case is closed, "any assets, including claims, that were scheduled by the debtor but not disposed of are deemed abandoned and revert to the debtor".' *Tyler House Apartments, Ltd. v. U.S.*, 38 Fed. Cl. 1,6 (1997) (citing 11 U.S.C. §554(c). Claims that are not set forth on the schedules, however, remain under control of the bankruptcy trustee. *Id.* Therefore, a trustee must formally abandon a claim, in order to revest in the debtor. *Management Investors v. United States Mine Workers of America*, 610 F.2d 384, 392 (6th Cir. 1979). BAC failed to notice that *Tyler House Apartments, supra*, does not make a demand that a trustee must formally abandon a claim, in order to revest in the debtor as does *Management Investors*, *supra*.

Koola contends that "formal abandonment" is an out of context literal expression of the Court's language decided in 1979, some 36 years ago. The *Management Investors* Court said: "In some cases, a bankruptcy trustee chooses to formally abandon a claim. In such cases, the cause of action revests in the bankrupt, and he can then bring the suit. In this case, however, [petitioner] never brought these claims to the trustees' attention". *Management Investors,* 610

F.2d at 392. Later on the Court states: "The predicament in which [Petitioner] now finds himself is the result of his never having listed this right of action as an asset of his bankruptcy estate or otherwise brought it to the attention to the trustee's attention". *Management Investors,* 610 F.2d at 393.

For this Court to come to its own independent conclusion of law, Koola quotes verbatim:

> *"Unless the court orders otherwise, any property scheduled under section 512(1) of this title not otherwise administered at the time of closing is abandoned to the debtor and administered for purposes of section 350 of this title".* 11 U.S.C.A. § 554(c).

and

> *"The trustee having certified that the estate of the above named debtor(s) has been fully administered,*
>
> *IT IS ORDERED THAT:*
>
> *The case trustee is discharged as trustee of the estate of the above named debtor(s) and bond is cancelled. The Chapter 7 case of the above named debtor(s) is closed".* The Order Discharging Trustee and Closing Case [Number: 09-02104-dd] filed November 6, 2013.

The interpretation of complex and highly specialized Bankruptcy laws by a pro se and by non-bankruptcy certified legal consul is prone to misinterpretation and results in wrong legal conclusion. To set the record straight, Koola quotes the relevant sections of "Abandonment of Property of the Estate" from Corpus Juris Secundum:

> *"§ 650 Deemed Abandonment*
>
> *Scheduled property that is not liquidated or otherwise disposed of by the trustee will be returned to the debtor when the case is closed.*
>
> *The Bankruptcy Code provides that unless the Court orders otherwise, any property which is scheduled in the debtor's schedule of assets and which is not otherwise administered at the time of the closing of a case is abandoned to the debtor and regarded as administered for purposes of*

closing and reopening the case. 11 U.S.C.A. § 554(c). *The provision establishes that scheduled property that is not liquidated or otherwise disposed of by the trustee will be returned to the debtor when the case is closed.*

In order for property to be abandoned by operation of law under the above provision, the debtor must formally schedule the property before the close of the case, and it is not enough that the trustee learns of the property through other means.... C.J.S. Bankruptcy § 650 at 592.

§ 650 Effect of Abandonment

....

The effect of the abandonment of a claim is to revest the ownership of it in the debtor, retroactive to the filing of the bankruptcy petition. Upon abandonment, property of the estate revests in the debtor with all the rights and obligations existing prior to the bankruptcy filing, *or as if the property had never been held by the trustee as part of the estate.... In turn, the trustee....will cease to have control over the right of property....* C.J.S. Bankruptcy § 650 at 592. (Internal citations omitted).

The authorities in *Fedotov v. Peter T. Roach and Associates, P.C.*, 354 F.Supp.2d 471 (S.D.N.Y. 2005), *In re Paolella*, 85 B.R. 974 (Bank. E.D.Pa., 1988), and *Richards v. D.R. Horton, Inc.*, 320 Ga.App. 771, 740 S.E.2d 732 (Ga.App. 2013), support Koola's position that Koola has now standing to pursue his counterclaims against BAC.

The respondent BAC's Initial Brief reiterates the ruling from the bench of the Master in Equity for Charleston County ("the Master") that "the appellant's claims could be pursued only in federal bankruptcy court." Again, BAC failed to notice that the Master's Order (ROA # 2), as initially written, did not include the Master's ruling from the Bench. In fact the Master abandoned his ruling from the Bench that Koola could pursue his counterclaims only in the in the Bankruptcy court and not in the State court in the foreclosure action. However, the Master added a handwritten post-script as an afterthought to the Order

on page 4: "Furthermore, Mr. Koola received a Ch. 7 Bankruptcy discharge in ca. # 09-01024 on July 13, 2009 rendering Koola's claims moot" without citations of any authority from Bankruptcy code and case law.

> *"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58;....The findings of the Master, to the extend that the court adopts them, shall be considered as the findings of the court...."* Rule 52, SCRCP

The Master's Order does not state *findings of fact and conclusions of law.* It is respectfully submitted to this Court that the Master seriously erred in the interpretation of Bankruptcy laws and related case laws and their application to Koola's claims. The Master erroneously dismissed Koola's counterclaims against BAC. The Master was prejudicial toward Koola.

II. THE MASTER ERRED IN DETERMINING THAT KOOLA's COUNTERCLAIMS AGAINST BAC ARE BARRED BY STATUTE OF LIMITATIONS.

In appellant's Initial Brief, Koola claimed that the three year Statute of Limitations began to run in September 2010 in the case at bar, and therefore, Koola's counterclaims, which he filed in March 2011, are not barred by the Statute of Limitations.

The Statute of Limitations does not run from the date of the negligent act, but from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence. *McClain v. Jarrad*, 354 S.C. 218, 580 S.E.2d 763 (S.C.App. 2003); *Holly Woods Association of Residential Owners v. Hiller*, 392 S.C. 172, 183, 708 S.E.2d 787 (Ct/App. 2004). BAC fails to recognize or refuses to admit the difference

between these two dates to determine when the Statute of Limitations began to run.

BAC argues in its Initial Brief that the Statute of Limitations began to run in February 2004, <u>the date of the negligent act</u>, because Koola's allegations against BAC for fraud and negligence occurred in 2004 when he signed the note and mortgage. The authorities in *McClain v. Jarrad, supra and Holly Woods Association of Residential Owners v. Hiller, supra,* render this claim without merit. Therefore, this Court should deny BAC's argument that the Statute of Limitations in the case at bar began to run in February 2004.

Alternatively, BAC argues that Statute of Limitations began to run in June 2008 because Koola clearly knew that a claim against BAC could potentially exist when Cambridge Lakes Home Owners Association ("HOA") filed a construction defects lawsuit in June 2008. If June 2008 is accepted as the date when Statute of Limitations began to run, the Statute of Limitations did not bar Koola's counterclaims as Koola filed his counterclaims in March 2011. Therefore, this Court should deny BAC's argument that Koola's counterclaims against BAC are barred by the Statute of Limitations.

Koola represents to this Court to determine whether the Statute of Limitations in the case at bar began to run September 2010 and not earlier after reviewing the factual arguments below. Koola's counterclaims arose because the predecessor in interest to BAC, Countrywide Home Loan Servicing, LP ("Countrywide/BAC"), violated FIRREA Federal Appraisal guidelines (codified into 12 C.F.R. §§ 34.41, 34.43, 34.44, 34.45, 34.62, 564.1) in the appraisal of condominium, which Koola bought in 2004. [Interagency Real estate Appraisal

Regulations, final revisions (FIL-41-94) and Interagency Appraisal and Evaluation Guidelines dated October 27, 2014, adopted pursuant to Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA 1989") is designated here as "FIRREA Federal Appraisal guidelines".]

In South Carolina, Countrywide/BAC owed an *additional duty of care* to Koola to ensure that its appraisal of converted condominiums also complied with South Carolina Horizontal Property Act, § 27-31-10 et seq. ("HPA") and more specifically S.C. Code Ann. § 27-31-430 ("HPA § 27-31-430") (the Disclosure of the Physical Condition of the [Condominium] Building). Countrywide/BAC required a "Builder's Certification" (ROA # 5) from Builder as a precondition to approving Koola's loan is the affirmative evidence that Countrywide/BAC owed Koola an additional duty of care to ensure compliance with HPA § 27-31-430.

The HOA initiated construction-defects litigation in June 2008. In September 2010 Koola learned that in July 2010 the HOA amended its Summons and Complaint to include violations of HPA and more specifically HPA § 27-31-430 (ROA # 9 and # 10). This alerted Koola to review the Master Deed and the Builder's Certification.

Thus, Koola learned in September 2010 that: (i) The developer/seller violated the HPA, specifically HPA § 27-31-430; (ii) The developer/seller falsified "Builder's Certification"; (iii) Countrywide/BAC's failed to appraise Koola's converted condominium in compliance with FIRREA Federal Appraisal guidelines; and (iv) Countrywide/BAC's appraisal was based on a falsified "Builder's Certification". Koola asserted these counterclaims in his Amended Answer and Counterclaims filed in March 2011. Koola's actions and counterclaims are thus

well within the three-year Statute of Limitations.

In view of the developer/seller's assertion in the Master Deed (ROA # 4 at 1) that: (i) The condo conversion complied with the provisions of the HPA; (ii) His declaration in the "Builder's Certification" that he has complied with HPA § 27-31-430; and (iii) Countrywide/BAC's ready acceptance of the Builder's Certification and the subsequent appraisal, Koola didn't realize that he had claims against BAC in 2004 or in 2008.

For BAC to argue that Koola knew in 2004 that the "Builder's Certification" was falsified implies that BAC also had this information 2004 and did not act on it while completing the appraisal because both parties received copies of the "Builder's Certification. BAC has not produced any evidence to support its argument that Koola knew in 2004 or 2008 or before September 2010 that "Builder's Certification" was falsified and fraudulent. Koola's counterclaims are therefore timely and not barred by Statute of Limitations.

Koola has demonstratively shown to this Court that September 2010 is the date when Koola discovered the injury resulting from the wrongful conduct of BAC.

"Newly discovered evidence which by due diligence could not have been discovered in time and fraud, misrepresentation or other misconduct of adverse party are grounds for a new trial and/or amendment of judgments". Rule 59(b), SCRCP.

A key element in the reasonable diligence test is "notice". BAC cites to *Grillo v. Speedrite Products, Inc.,* 340 S.C. 498, 532 S.E.2d 1 (Ct.App. 2000), to support its argument when Koola received "notice" about his injury from BAC's statute violations. The plaintiff/appellant in Grillo, started to experience

symptoms of dizziness, headache, and euphoria since May of 1992 while using an ink product containing a toxic chemical solvent at his job. He consulted two doctors in December 1992 and January 1993 for his conditions. In April 1993, Grillo was diagnosed with acute transient narcosis due to toxic chemical solvent. In December 1995, Grillo initiated a complaint alleging causes of action for negligence and strict liability against the ink manufacturer. During trial, the trial court granted summary judgment to the defendant/respondent arguing that Grllo received notice about his condition in May 1992. The Court of Appeals reversed the Trial Court's decision stating that more than one inference can be drawn when a reasonable person would have been on notice that he might have a cause of action against defendant/respondent. The Appellate Court even suggested that institution of an action by plaintiff/appellant based on temporary symptoms in May 1992 would likely have been premature and possibly frivolous.

The same argument holds good for the case at bar. In June 2008, Koola knew about construction defects in the common elements of the condominiums when the HOA initiated the construction defects litigation. Koola cannot initiate an action for construction defects against BAC because BAC is not responsible for construction defects. <u>In September 2010, Koola learned that Countrywide/BAC failed to appraise Koola's converted condominium in compliance with FIRREA Federal Appraisal guidelines, and Countrywide/BAC's appraisal was based on a falsified "Builder's Certification"</u>. Therefore, Koola can maintain an action against BAC in September 2010 and has a legal right to sue BAC since September 2010.

In *Holly Woods Ass'n of Residence Owners, supra,* the Court of Appeals differentiated the causes of action that plaintiff/respondent experienced before

and after 2002 and ruled that Statute of Limitations did not bar the causes of action that the plaintiff/respondent experienced after 2002. The same objective standard applied to the Koola's case at bar.

III. THE MASTER ERRED IN DETERMINING THAT BAC OWED KOOLA NO DUTY OF CARE, WHICH WAS CREATED THROUGH THE STATUTORY PROVISIONS OF FIRREA FEDERAL APPRAISAL GUIDELINES AND S.C. HORIZONTAL PROPERTY ACT, S.C. Code Ann. § 27-31-430.

Koola's counterclaims arose from BAC's negligence stemming from its breach of statutorily created duty of care to Koola for noncompliance with FIRREA Federal Appraisal guidelines and HPA § 27-31-430.

FIRREA Federal Appraisal guidelines mandate: (i) Real estate appraisals by mortgagees are required to protect the interest of the public and Federal financial institutions; (ii) The Board of Directors of mortgagees shall maintain their own written Loan Policy establishing an effective real estate appraisal program consistent with the public interest requirements mandated by FIRREA Federal Appraisal guidelines; and (iii) The Loan Policy should determine the appropriate type and content of appraisal for different lending transactions.

The legal mandates found in the FIRREA Federal Appraisal guidelines created a duty of care on the part of Countrywide/BAC to Koola to ensure that Countrywide/BAC's loan approval process of Koola's original mortgage loan met and followed the mandated FIRREA Loan Policy requirements and appraisal guidelines. In South Carolina, Countrywide/BAC owed an *additional duty of care* to Koola to ensure that its appraisal of converted condominiums also complied with HPA § 27-31-430. It was *only* for this reason that Countrywide/BAC asked the

developer/seller to certify in the "Builder's Certification" whether the lending transaction is a "Condo Conversion" and if so, "whether the structural, health and safety repairs have been completed". Simply put, that Countrywide/BAC required a "Condo Conversion Builder's Certification" as a precondition to approving Koola's loan is the affirmative evidence that Countrywide/BAC owed Koola a duty of care to ensure compliance with HPA § 27-31-430.

Negligence is the breach of a duty of care owed to the plaintiff by the defendant. To state a cause of action for negligence, the plaintiff must allege facts which demonstrate: (i) A duty of care owed by the defendant; (ii) A breach of that duty by a negligent act or omission; (iii) A negligent act or omission resulted in damages to the plaintiff; and (iv) That damages proximately resulted from the breach of duty. Countrywide/BAC's failure to appraise Koola's converted condominium in compliance with FIRREA Federal Appraisal guidelines and its failure to verify the accuracy and truthfulness of the "Builder's Certification" to comply with HPA § 27-31-430 and the subsequent damage resulted in a breach of duty of care to Koola. BAC is liable for negligence *per se*.

Whether a particular act is negligent depends on foreseeability and a person of ordinary reason and prudence standard. BAC should be held to a person of superior knowledge, and it should have been foreseeable for BAC that if it failed to appraise Koola's condominium under the guidelines of FIRREA Federal Appraisal guidelines and to confirm compliance with HPA § 27-31-430, certain damages will result. BAC failed in both these tests.

To confirm the breach of duty for negligence, the burden or inconvenience caused by duty of care should be determined. To appraise Koola's

condominium under the guidelines of FIRREA Federal Financial guidelines and to confirm compliance with HPA § 27-31-430, BAC ought to have: (i) Asked the developer/seller whether he provided the "Disclosure of the Physical Condition of the Building" report to Koola (HPA § 27-31-430); (ii) Or, alternatively, verified with Koola whether he received the "Disclosure of the Physical Condition of the Building" Report from the developer/seller; and/or (iii) Asked the appraiser to appraise the condominium (depending upon whether it has been converted from apartment) in compliance with HPA § 27-31-430. Asking any one of these questions and getting answers to them would have taken just a few minutes of time, hardly a burden or inconvenience. *Scott by McClure v. Fruehauf Corp.*, 302 S.C. 364, 396 S.E.2d 354. Furthermore, the preparation of instruments necessary to effectuate real estate sales transactions and compliance with FIRREA Federal Appraisal guidelines and HPA § 27-31-430 require attorney supervision. *State v. Buyers Service Co. Inc.*, 292 S.C. 426, 357 S.E.2d 15 (1987). There are no evidences in record to confirm that an attorney supervised these activities related Koola's mortgage loan documentation. These failures proximately caused Koola significant damage when it became known that the condominium Koola purchased and Countrywide/BAC had appraised was materially overvalued due to uncompleted repairs falsely certified as having been completed in the "Builder's Certification".

In its reply to Koola's First Set of Requests for Admission, BAC has *admitted* that BAC is obligated to follow the FIRREA Federal Appraisal guidelines, and that Plaintiff has to order an appraisal appropriate for different lending transactions depending on whether the real estate being appraised is a condo

conversion or a new condominium or a single family unit or a residential or non-residential unit (ROA # 20: BAC's Responses to Koola's Request for Admission at 1, 2). These admissions, which cannot be denied during trial, confirm that Countrywide/BAC had a duty of care to ensure that the mandates of FIRREA Federal Appraisal guidelines were followed for the approval process of Koola's loan. *Bates v. City of Columbia,* 391 S.E.2d 733 (Ct.App. 1999).

BAC did not produce: (i) Documents, which BAC provided to the appraiser when the appraiser was engaged by BAC to get the appraisal done; and (ii) Countrywide/BAC's written "Loan Policy" for real estate appraisal (ROA # 21: BAC's Responses to Koola's Request for Production at 2 and 3) which were requested in Koola's Request for Production. These objections are evidences of an effort by BAC to conceal its negligence.

The developer/seller falsified the Builder's Certification claiming compliance with HPA § 27-31-430. The developer's action has met all the elements of fraud. BAC perpetuated the fraud committed by the developer/seller (ROA # 14 at 1; ROA # 18 at 13). BAC is a joint tortfeasor with the developer/seller. Furthermore, BAC financed a mortgage transaction, which was fraudulently conveyed to Koola by the developer/seller. Elements of actionable Fraud consist of (1) a representation, (2) its falsity, (3) its materiality, (4) speaker's knowledge of its falsity, (5) his intent that it should be acted upon by person, (6) hearer's ignorance of its falsity, (7) his reliance on its truth, (8) his right to rely thereon, and (9) his subsequent and proximate injury. *Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 161 (2012).* BAC's appraisal of Koola's condominium met all these elements of fraud.

In Motion for Reconsideration, Koola represented to the Master that Federal, and State authorities, various Federal Financial agencies and many private investors in mortgage-backed securities offered by BAC had filed numerous lawsuits against BAC alleging violations and fraudulent practices in lending transactions. BAC settled most of the cases and paid more than $50 billion in fines and settlements between 2010 and 2013 (ROA # 18). Just recently in August 2014, BAC settled a mortgage-related litigation and probe with the U.S. Justice Department, six states and several other regulators for $16.5 billion. There are few instances where jury found BAC liable for fraud related to mortgages made and sold to Fannie Mae and Freddie Mac under "FIRREA 1989". BAC is equally liable to Koola under these statutory provisions.

The respondent's Initial Brief cites the authorities in *Savannah Bank, N.A. v. Stalliard,* 400 S.C. 246, 734 S.E.2d 161 (2012), *Regions Bank v. Schmauch, supra*, and *Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.*, 282 S.C. 415, 321 S.E.2d 46 (1984) to support its arguments that BAC has no duty of care to Koola. Koola has addressed these authorities in his Initial Brief and found them to be of no relevance in the case at bar. Above all, none of them has stated that the duty of care claimed in those cases was created by FIERRA Federal Appraisal guidelines and HPA § 27-31-430.

The respondent's Initial Brief cites *Robertson v. First Union Bank*, 350 S.C. 339, 565 S.E.2d 309 (Ct.App.2002) to support its arguments that BAC has no duty of care to Koola. Koola rebuts the arguments therein: (i) The appraisal of subject matter of the property in *Robertson* does not fall under the purview of FIRREA Federal Appraisal guidelines; (ii) The borrowers in *Robertson* had already fixed

the purchase price of the property. Koola's purchase of his condominium was subject to mortgage loan approval, which in turn was subject to satisfactory appraisal. If the purchase price were lower, then the developer/seller would not accept the purchase offer, and the contract to buy the condominium would fall through; (iii) Koola paid for the appraisal; therefore BAC cannot argue that the appraisal was for the benefit of BAC only and cannot argue that Koola could undertake a second appraisal at his own expense; (iv) Since the common elements of a condominium belong to all the condominium owners, an individual condominium buyer cannot inspect the condominium and the common elements for latent defects; (v) BAC stands to gain enormously as follows: Koola had committed to make an initial down payment of 10%. This eliminates lot of risk for BAC. BAC sold Koola's loan to Fannie Mae immediately after the closing of the condominium purchase eliminating all the risks. And finally, if the condominium is foreclosed for a net loss, then BAC would surrender the foreclosed property to Fannie Mae and walk away with "clean hands". The taxpayers will bear the burden of foreclosure. Thus, BAC stands to make more profit when Koola's condominium is finally foreclosed.

Respondent BAC's Initial Brief does not address the statutory provisions of FIRREA Federal Appraisal guidelines and HPA § 27-31-430 while arguing that BAC had no duty of care. The Master's Order (ROA # 2) did not address the statutory provisions of FIRREA Federal Appraisal guidelines and HPA § 27-31-430 while deciding that BAC owed Koola no duty of care. The adjudication in the case at bar was arbitrary and not based on laws.

IV. THE MASTER ERRED IN DENYING KOOLA'S "MOTION TO SANCTION" BAC WITHOUT DUE CONSIDERATION OF "HOPE FOR HOMEOWNERS PROGRAM" AND "THE ADMINISTRATIVE ORDER" OF THE CHIEF JUSTICE OF SUPREME COURT OF SOUTH CAROLINA.

In August 2012, Koola filed a "Motion to Sanction" BAC in this instant action for its repeated bad faith denial of Koola's applications for loan modification (ROA # 16).

The Respondent's Initial Brief argues that: (i) Koola cannot point to any specific law that requires BAC to provide him with a loan modification with the terms that he says he needs in order to be able to afford monthly payments; (ii) Koola would not have a private right of action against BAC for violating those guidelines; (iii) BAC further argues that social security benefits are the only source of regular income for him; and (iv) The Master properly denied Koola's Motion for Sanction.

The relevant sections of "HOPE for Homeowners Program", 12 U.S.C.A. §1715z-23 et seq., state that:

(i) The purpose of the HOPE for Homeowners Program is (1) To allow homeowners to avoid foreclosure by reducing the principal balance outstanding, and interest rate charged, on their mortgages; (2) To target mortgage assistance under this section to homeowners for their principal residence. 12 U.S.C.A. §1715z-23(b)(2) and (4);

(ii) The principal obligation amount of the refinanced eligible mortgage to be insured shall (A) be determined by the reasonable ability of the mortgagor to make his or her mortgage payments; and (B) not exceed 90% of the appraised value of the property to which such mortgage relates. 12 U.S.C.A. §1715z-

23(e)(2)(A)and ((B);

(iii) All penalties for refinancing the eligible mortgage, and all fess and penalties related to default or delinquency on the eligible mortgage, shall be waived or forgiven. 12 U.S.C.A. §1715z-23(e)(3);

(iv) The principal obligation amount of the eligible mortgage to be insured shall not exceed 132% of the dollar amount limitation in effect for 2007 under section 1454(a)(2) of this title for a property of the appropriate size. 12 U.S.C.A. §1715z-23(e)(6);

(v) Any appraisal conducted in connection with a mortgage insured under this section shall (A) Be based on the current value of the property; and (B) Be conducted in accordance with Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. 12 U.S.C.A. §1715z-23(e)(8)(A),(B);

vi) "HOPE for Homeowners Program", denies loan modification to millionaires. 12 U.S.C.A. §1715z-23(e)(12).

(vii) The term eligible mortgage means (A) the mortgagor of which (i) occupies such property as his or her principal residence and (ii) cannot afford his or her mortgage payments and (B) originated on or before January 1, 2008. 12 U.S.C.A. §1715z-23(s)(3)(A)(i),(ii),(B).

BAC states that BAC filed a Notice of Denial of loan modification on May 12, 2102 because the post-modification Payment-to-Income Ratio was greater than fifty-five or less than ten percent of gross income. BAC does not state what is the final dollar amount it arrived at as the monthly mortgage debt payment. There are no documentation on record that BAC considered the relevant sections of

"HOPE for Homeowners Program", 12 U.S.C.A. §17515z-23 et seq.,

enumerated above while reviewing Koola's applications for a good faith loan modification.

The Mortgagor shall have had a ratio of [monthly] mortgage debt [payment] to income greater than 31%. 12 U.S.C.A. §1715z-23(e)(1)(C). If the ratio is below 31%, BAC is not obliged to offer loan modification. BAC has repeatedly informed Koola that Koola's loan may be eligible for other loan assistance options if Koola's loan is not eligible for loan modification. Specifically, three options are available: (i) Koola represented to the Master that BAC could have offered Koola an affordable loan modification especially after the five largest mortgage banks, including BAC, settled a claim for $25 billion with the United States and 49 state officials specifically intended for loan modification by reduction in interest rate and principal balance. (TR page 26, ROA # 18); (ii) On August 21, 2014, BAC settled another mortgage related litigation with the U.S. Justice Department, six states and several other regulators for $16.5 billion, of which $7 billion is intended for consumer relief; (iii) Koola further represented to the Master that if the principal obligation amount of the refinanced mortgage [after loan modification] remains unaffordable in spite of the good faith efforts of BAC, the difference between Koola's affordability and the principal obligation amount of the refinanced mortgage could be covered through support from S.C. HELP, a federally funded program administered through the State of South Carolina to offer assistance for homeowners facing foreclosure. *Crawford v. Central Mortg. Co.*, 404 S.C.39, 744 S.E.2d 538 (2013).

The respondent's Initial Brief cites the authorities in *Federal Nat. Mort. Ass'n v. LeCrone*, 868 F.2d 190, 193 (6th Cir. 1989) And *Spaulding v. Wells Fargo Bank*, 714 F.3d 769 (4th Cir. 2013) to support its arguments. Koola has

addressed these authorities in his Initial Brief and found them to be of no relevance for the case at bar. BAC has presented the following additional authorities in its Initial Brief:

(i) *Steffens v. Am. Home Mortgage Servicing, Inc.*, 6:10-cv-01788-JMC, 2011 WL 901179 (D.S.C., Mar. 15, 2011). The Court denied the plaintiff's claim stating that the Home Affordable Modification Program does not provide a private cause of action for defendants. Koola represents to this Court that participation of the mortgagees in the "HOPE for Homeowners Program" is voluntary. 12 U.S.C.A. §1715z-23(b)(1). The law has not specified any particular entity, which could pursue an action or denied a private cause of action against mortgagees for violation of any provisions of "HOPE for Homeowners Program". When mortgagees agree to participate in the "HOPE for Homeowners Program", mortgagees assume a duty of care to homeowners to offer a good faith loan modification within the guidelines of 12 U.S.C.A. §1715z-23 et seq. Ordinarily, the common law imposes no duty on a person to act. When an act is voluntarily undertaken, however, the actor assumes the duty to use due care. *Johnson v. Robert E. Lee Academy, Inc.* 401 S.C. 500, 504 (2012), 737 S.E.2d 512 (*internal citations omitted*);

(ii) *Weber v. Bank of America, N.A.*, 0:13-cv-01999-JFA, 2013 WL 4820446 (D.S.C. Sep. 10, 2013). The Court dismissed Webers' action because plaintiffs argued that Chief Justice Toal's Administrative Order, 2011-05-02-11, mandates foreclosure assistance be provided to all foreclosure defendants for owner occupied residences which the Court found to be not true. The Court further found that plaintiff's petition based on Chief Justice Toal's Administrative Order

should have been made to the State Court adjudicating their foreclosure action and not in the District Court.

Koola represents to this Court that (i) "HOPE for Homeowners Program", 12 U.S.C.A. §1715z-23 et seq., is the specific law that requires BAC to provide Koola with a good faith loan modification; (ii) Participation of the mortgagees in the "HOPE for Homeowners Program" is voluntary. 12 U.S.C.A. §1715z-23(b)(1). The law has not specified any particular entity, which could pursue an action or denied a private cause of action against mortgagees for violation of any provisions of "HOPE for Homeowners Program". For this reason, any affected party may pursue action against the mortgagees. Further, the Chief Justice of South Carolina Supreme Court, through an "Administrative Order" has ordered that the Court may, in its discretion, impose such sanctions on those parties who have not attempted to reach an agreement for foreclosure intervention in good faith; (iii) When mortgagees agree to participate in the "HOPE for Homeowners Program", mortgagees assume a duty of care to homeowners to offer a good faith loan modification within the guidelines of 12 U.S.C.A. §1715z-23 et seq.

> *"An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special relationship. Ordinarily, the common law imposes no duty on a person to act.. When an act is voluntarily undertaken, however, the actor assumes the duty to use due care.*

Johnson v. Robert E. Lee Academy, Inc. 401 S.C. 500, 504 (2012), 737 S.E.2d 512 (*internal citations omitted*); (iv) When the mortgagees accept compensation from the Secretary, FHA, for offering loan modification to homeowners, this duty of care becomes mandatory and absolute. 12 U.S.C.A. §1715z-23(x).

The Chief Justice of the Supreme Court of South Carolina has ordered that:

*"[I]n the event the Court, having jurisdiction over the foreclosure action, determines that any party to the foreclosure action, or their acting agent, has failed to comply with the terms of this Order, or has not attempted to reach an agreement for foreclosure intervention in good faith, the Court may, in its discretion, impose such sanctions as it determines to be reasonable and just under the circumstances, including without limitation, the assessm*ent of reasonable attorneys' fees and costs against the culpable party."
Administrative Order No.: 2011-05-02-01 dated May 2, 2011, Chief Justice of South Carolina Supreme Court.

At the end of motion hearing, the Master ordered from the bench:

"Here's what I'm going to do. Mr. Koola, based on the circumstances I'm hearing. I do not find the basis upon which to grant sanctions under Rule 11. I understand your frustration....(TR p 29).

What I'm going to do for today is I'm going to grant Mr. Hayes' [Consul for BAC] motion. And that's going to dismiss the counterclaims. I'm going to deny your motion for sanctions under Rule 11 and the Chief' Justice's Order.... (TR. p 30).

So I would suggest you go back to the drawing board with SC HELP. I would suggest the Home Ownership Resource Center and see if they have any wiggle room with the Bank of America. They are not the easiest bank to deal with. I am well aware of that...." (TR p 31).

The Master's Order has not set forth the findings of fact and conclusions of law, which were the grounds for the Master's decision in this action and does not even mention various provisions of 12, U.S.C.A. §1715z-23 et seq., that Koola presented to the Master. Master's conclusion was that the Bank of America: "They are not the easiest bank to deal with. I am well aware of that...."

"The Administrative Order" of the Chief Justice of Supreme Court of South Carolina is the Law that gives authority to the Citizens of South Carolina to pursue actions against BAC for good faith violations of the provisions of "HOPE for Homeowners Program", (12 U.S.C.A. §1715z-23 et seq.).

V. THE MASTER'S NONCONSIDEARTION OF FEDERAL STATUES AND THE ADMINISTRATIVE ORDER OF THE CHIEF JUSTICE OF SUPREME COURT OF SOUTH CAROLINA VIOLATES CONSTITUTIONAL PROVISIONS.

The Master's Order did not consider any of the authorities stemming from Federal statutes presented by Koola: Bankruptcy codes, 11 U.S.C.A. §§ 350(b) 541(a), 521(a)(1)(A)-(B)(i) and 554(c); FIRREA Federal Appraisal guideline, 12 C.F.R. §§ 34.41, 34.43, 34.44, 34.45, 34.62, 564.1; and "HOPE for Homeowners Program", 12 U.S.C.A. §1752z-23 et seq. The Master's Order has not cited any Federal or South Carolina statutes and relevant authorities from Federal and State Court decisions. The Master's Order considered invalidated or inappropriate authorities from other states having no jurisdiction in South Carolina. Thus, the Master's Order is in violation of Constitutional provisions. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;....shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the constitution or Laws of any State to the Contrary notwithstanding. U.S. Const. art. VI.

> "Courts will reject a statutory interpretation, which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention. A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law".

Wieters v. Bon-Secours-St, Francis Xavier Hosp., 378 S.C. 160, 662 S.E.2d 430 (Ct.App. 2008). (Internal citations omitted).

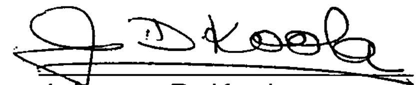
In an unprecedented action the Master's Order does not consider the "Administrative Order" of the Chief Justice of South Carolina while denying Koola's Motion for Sanction, thereby overruling the Chief Justice of South Carolina.

Throughout the motion hearing, it was the Master rather than the counsel for BAC, who was establishing BAC's claims. The Master acted as a "counsel" for "counsel for BAC". This presented a serious handicap for Koola. The trial court is precluded from making finding of fact, on summary judgment, that is contrary to and inconsistent with fact established by pleadings. Rule 56, SCRCP, *Bates v. City of Columbia, supra.*

CONCLUSION

Based upon the foregoing points and authorities, Koola respectfully prays to this Honorable Court that the April 24, 2014 Order of the Hon. Master in Equity granting Summary Judgment to BAC, denying Koola's counterclaims against BAC, and denying Koola's Motion to Sanction should be reversed, and Koola's claims against BAC restored and undertake a de novo review of all issues of law and decide the matters of law with no particular deference to the trial court.

Respectfully submitted,



Johnson D. Koola
1587 Cambridge Lakes Dr
Mt. Pleasant, SC 29464
(843) 849-9241

Appellant pro se

January 14, 2015