

STATE OF SOUTH CAROLINA)	
)	BEFORE THE MASTER IN EQUITY
COUNTY OF SUMTER)	THIRD JUDICIAL CIRCUIT
Wells Fargo Bank, N.A.,)	Civil Action No. 2010-CP-43-00823
)	
Plaintiff,)	
)	
vs.)	<u>ORDER</u>
)	
Delores Prescott and Wells Fargo)	
Financial Bank (SD),)	
)	
Defendants.)	
)	

Before the Court are two motions: (1) Wells Fargo Bank, N.A.'s Motion for Summary Judgment; and (2) Wells Fargo's Motion to Strike Delores Prescott's Amended Answer and Counterclaims. The parties fully briefed the issues presented in these motions, and the Court heard oral argument on these motions on November 19, 2014. During that hearing, the Court requested additional briefing from the parties, which was provided.

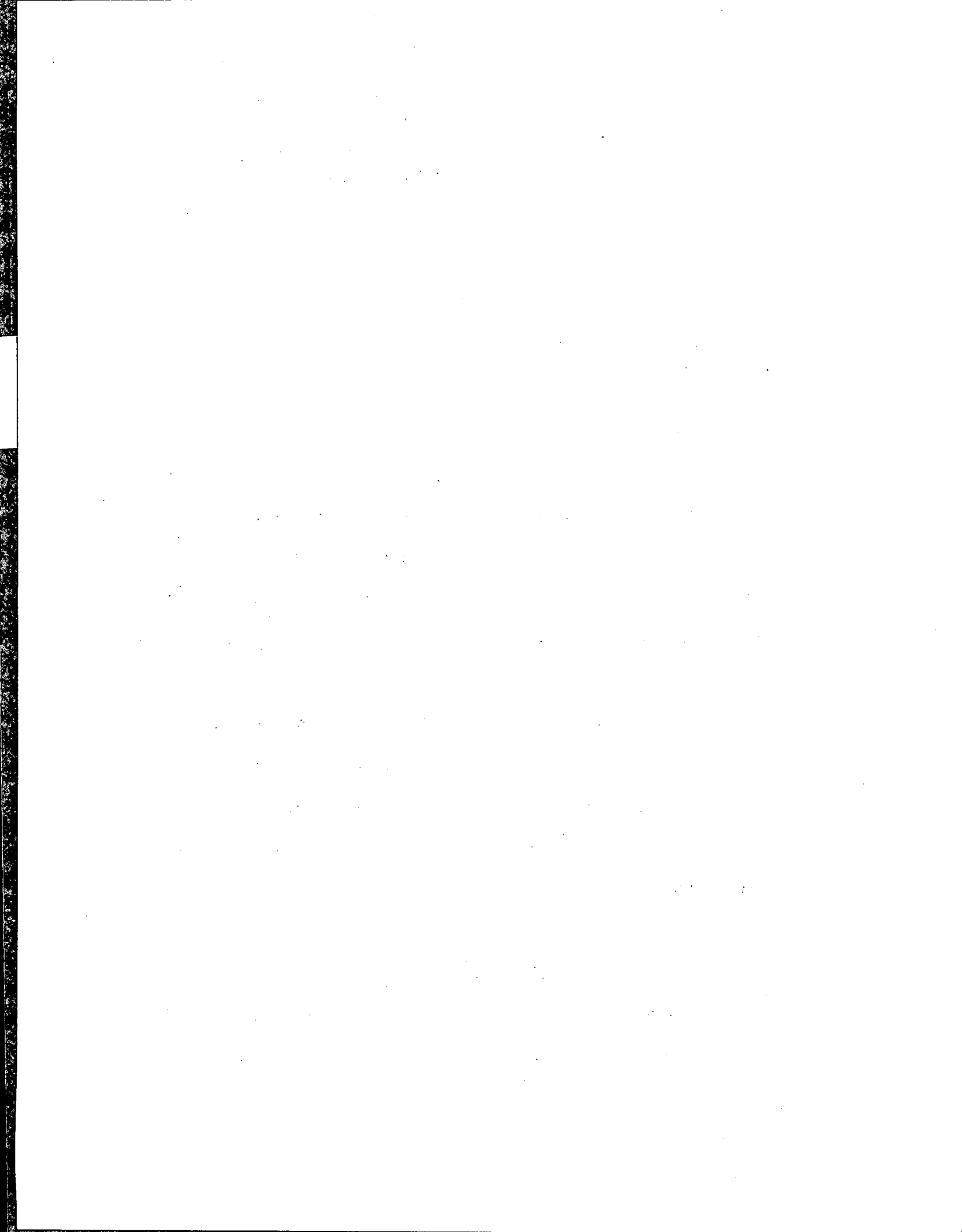
The Court has fully and carefully considered all of the evidence presented, all written submissions by the parties, and all arguments of counsel. Because there does not appear to be any disputed material fact, and because Wells Fargo is entitled to judgment on all claims and potential counterclaims as a matter of law, the Court grants summary judgment in Wells Fargo's favor.

BACKGROUND

I. Proceedings before the Circuit Court

Based on the evidence presented and arguments of counsel, the following facts are not disputed. This case involves the foreclosure of a note and mortgage that was





secured by real property in Sumter County. Wells Fargo filed its foreclosure complaint on April 16, 2010, which Ms. Prescott answered on May 17, 2010. In her answer, Ms. Prescott did not assert any counterclaims. Wells Fargo is the holder of the note, as it has presented the original note to the Court, and is the servicer of the loan as well.


B. Proceedings before the Bankruptcy Court

Following the close of pleadings, Ms. Prescott commenced voluntary Chapter 13 bankruptcy proceedings in the District of South Carolina. In those proceedings, she responded “NONE” when asked to disclose all “contingent or unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims.” Summary of Schedules at 7 (Dkt. No. 8 in *In re Prescott*, Case No. 10-5552-dd (Bankr. D.S.C. Aug. 15, 2010)) (“*In re Prescott I*”). Ms. Prescott further conceded in her bankruptcy proceedings that Wells Fargo was a creditor with a loan secured by a mortgage on the property at issue in this case. *Id.* at 11. She declared both of these facts to be “true and correct” under penalty of perjury. *Id.* at 31.

The Honorable David R. Duncan, United States Bankruptcy Court Judge, ultimately dismissed that bankruptcy matter because Ms. Prescott had not proposed plan that complied with Chapter 13’s requirements. Order (Dkt. No. 29 in *In re Prescott I* (Jan. 19, 2011).)

Ms. Prescott then filed a second voluntary Chapter 13 bankruptcy case on March 28, 2011. In her second bankruptcy case, Ms. Prescott again conceded that:

- (1) She did not have any counterclaims to pursue; and
- (2) Wells Fargo was a secured creditor with a mortgage on her property in Sumter County.

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Summary of Schedules at 13 (no counterclaims) and 17 (Wells Fargo is a secured creditor) (Dkt. No. 1 in *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. Mar. 28, 2011)) ("*In re Prescott I*"). Just as before, Ms. Prescott swore to both of these facts under penalty of perjury. *Id.* at 36.

On April 11, 2011, Wells Fargo filed a claim in Ms. Prescott's second bankruptcy proceeding in which it claimed a secured debt of over \$80,000. Wells Fargo's Proof of Claim (Claim No. 3-1 in *In re Prescott II* (Apr. 11, 2011).) Ms. Prescott did not file any objection to this claim.

During the second bankruptcy matter, Wells Fargo moved for relief from the automatic stay that attaches to bankruptcy proceedings so that it could prosecute its foreclosure claim. Motion for Relief from Automatic Stay (Dkt. No. 26 in *In re Prescott II* (Dec. 9, 2011).) As proof of its security interest, Wells Fargo provided the Bankruptcy Court with the same note and mortgage upon which its foreclosure claim is based. *Id.* at 8-17.

In response, Ms. Prescott "certified" the validity of Wells Fargo's factual assertions, conceded that Wells Fargo was a secured creditor, and stated that she is "behind on payments due on this loan," while requesting time to "catch up on payments." Answer to Motion for Relief from Stay (Dkt. No. 27 in *In re Prescott II* (Dec. 22, 2011).) The Bankruptcy Court ultimately granted Wells Fargo's request and held that Ms. Prescott was "in default" of her payments to the bank. Order Granting Relief from Stay (Dkt. No. 35 in *In re Prescott II* (Sept. 26, 2012).)

On June 17, 2013, Ms. Prescott proposed to amend her Chapter 13 plan to abandon her interest in the property that secured Wells Fargo's debt:

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The Debtor moves to Amend the confirmed Chapter 13 plan due to abandon interest in property located at 6365 Saxton Rd., Rembert, SC 29128 to Wells Fargo Home Mortgage. Wells Fargo Home Mortgage received relief from stay in September 2012.

Motion to Modify Chapter 13 Plan at 1 (Dkt. No. 39 in *In re Prescott II* (June 17, 2013))

(errors in original). She further verified the effect of this abandonment:

6. Surrender of property: The debtor will surrender the following property upon confirmation of the plan. The order confirming plan shall terminate the automatic stay as to that property: Wells Fargo Home Mortgage; 6365 Saxton Rd., Rembert, SC 29128. Any creditor affected by this provision may file an itemized proof of claim for any unsecured deficiency within a reasonable time after the surrender of the property.

Id. at 6.

On July 17, 2013, Judge Duncan issued an order confirming the Chapter 13 plan with the modifications proposed by Ms. Prescott. Order Confirming Plan and Resolving Motions (Dkt. No. 43 in *In re Prescott II* (July 17, 2013).)

C. Proceedings Upon Return to Circuit Court

Two months after Judge Duncan confirmed a Chapter 13 plan with Ms. Prescott's proposed amendments, Ms. Prescott moved for leave to file an amended answer and counterclaims for breach of the South Carolina Consumer Protection Code, the South Carolina Unfair Trade Practices Act, and for breach of a fiduciary duty. The Court granted that motion on December 2, 2013.

However, instead of filing such an amended pleading, Ms. Prescott filed a motion on January 3, 2014, to dismiss the complaint in its entirety. The basis for Ms. Prescott's motion was a newfound argument that Wells Fargo was not actually a secured creditor entitled to foreclose on this property. In opposing that motion, Wells Fargo identified the same representations from Ms. Prescott to the Bankruptcy Court that are recited above

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and argued that Ms. Prescott cannot legally avoid foreclosure—particularly when she has already abandoned her interest in this property.

After a hearing, the Court denied Ms. Prescott's motion to dismiss by order dated April 17, 2014. Less than three weeks later, Wells Fargo moved for summary judgment based on the same arguments it used to defeat Ms. Prescott's motion to dismiss.

On August 25, 2014, after Wells Fargo's motion for summary judgment had been pending for nearly four months, Ms. Prescott filed an amended answer and—for the first time—asserted counterclaims against Wells Fargo. Wells Fargo moved to strike this filing.

On November 19, 2014, the Court heard arguments regarding Wells Fargo's motions. Both Wells Fargo and Ms. Prescott were represented by counsel. At the close of that hearing, the Court orally ruled that the doctrines of res judicata and collateral estoppel compel the following results: (1) the parties' loan agreement is enforceable, (2) Ms. Prescott is in default on that note, and (3) Ms. Prescott's counterclaims fail as a matter of law. Additionally, the Court requested further briefing on whether Ms. Prescott could collaterally attack the mortgage through an unclean hands affirmative defense and regarding the legal effect of Ms. Prescott abandoning the property during her bankruptcy proceedings.

The parties have now fully briefed the issues, and Wells Fargo's motions are ripe for decision.

STANDARD OF REVIEW

Rule 56(c), SCRCP, provides that summary judgment should be issued when the evidence collectively shows that "there is no genuine issue as to any material fact and

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that the moving party is entitled to judgment as a matter of law.” A party opposing summary judgment “may not rest upon the mere allegations or denials of his pleading,” but instead “must set forth specific facts showing there is a genuine issue for trial.” *Id.* 56(e). Courts are clear that “[t]he purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

DISCUSSION

The Court finds that Wells Fargo is entitled to summary judgment on both its foreclosure claim and regarding Ms. Prescott’s counterclaims and defenses because a party cannot make a representation to a court to induce it to rule one way, and then make the opposite representation to a different court to achieve a different outcome. This prohibition is a cornerstone of res judicata, judicial estoppel, and overall fairness.

Judicial estoppel is designed to protect the integrity of the courts by preventing a party from taking “a position in conflict with one earlier taken in the same or related litigation.” *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). In order for this doctrine to apply, a party must attempt to mislead the court by taking two “totally inconsistent” positions in litigation, and it must benefit in some way from a court adopting the party’s first representation. *Cothran v. Brown*, 357 S.C. 210, 215–16, 592 S.E.2d 629, 632 (2004).

Likewise, res judicata is designed to ensure that an issue or claim that was or could have been resolved in prior litigation is not subject to re-litigation. Three elements are necessary for res judicata to attach: (1) the parties or their privies must be the same as in prior litigation; (2) the subject matter must be the same as in prior litigation; and

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(3) there must be a prior adjudication by a court of competent jurisdiction. *Pye v. Aycock*, 325 S.C. 426, 432, 480 S.E.2d 455, 458 (Ct. App. 1997).

Here, after this case was commenced, and after she had answered Wells Fargo's complaint, Ms. Prescott represented to the Bankruptcy Court that:

- (1) She owed a debt to Wells Fargo that was secured by the same property at stake in this foreclosure action;
- (2) She did not have any viable counterclaims to assert against Wells Fargo;
- (3) She was behind on her payments to Wells Fargo; and
- (4) She abandoned her interest in the subject property when the Bankruptcy Court confirmed the Chapter 13 plan.

These assertions and concessions make judgment proper in Wells Fargo's favor on its claim and on Ms. Prescott's counterclaims and defenses.

I. Wells Fargo's Foreclosure Claim

Regarding Wells Fargo's foreclosure claim, a party who admits a debt owed in bankruptcy proceedings is barred from later disputing that debt. *See, e.g., Celli v. First Nat'l Bank*, 460 F.3d 289, 295–96 (2d Cir. 2006) (“In summary, we hold that the Chapter 13 bankruptcy confirmation order is res judicata with respect to the debtor's and the Trustee's post-confirmation attempt to avoid a confirmed, recorded lien on the debtor's property where the lien was claimed by FNB at the outset of the bankruptcy proceedings and included by the debtor in his plan.”); *Mbazira v. Litton Loan Servicing, LLP*, Case No. 10-11831-FDS, 2011 U.S. Dist. LEXIS 85271, at *10–11 (D. Mass. July 27, 2011) (“Other courts that have considered post-confirmation attacks on the validity of secured claims have likewise rejected these efforts. . . . Although the matter is typically viewed as a question of res judicata rather than judicial estoppel, several courts of appeals have held

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debtors estopped from challenging the status of secured claims after confirmation.”); *In re Gilbert*, No. 08-84618, 2010 WL 2026520, at *1 (Bankr. N.D. Ga. Mar. 1, 2010) (explaining that a debtor’s decision to surrender property during a bankruptcy proceeding “bars the debtor from maintaining possession of the collateral and from contesting the right of the creditor to foreclose on the property”).

Because Ms. Prescott affirmed her secured debt to Wells Fargo, conceded that she had missed payments, never disputed any of Wells Fargo’s statements about that debt to the Bankruptcy Court, and affirmatively abandoned her interest in the property during bankruptcy proceedings as part of an amendment to her Chapter 13 plan, she is estopped from disputing Wells Fargo’s entitlement to foreclose its lien. Accordingly, Wells Fargo is entitled to judgment as a matter of law on its foreclosure claim.¹

Ms. Prescott argues that those concessions should not prevent her from being able to assert an affirmative defense of unclean hands to Wells Fargo’s foreclosure claim because judicial estoppel operates to bar a litigant from asserting inconsistent facts before different tribunals, but does not apply when a party only presents differing legal theories. The Court disagrees with Ms. Prescott’s argument.

Ms. Prescott’s attempt to present an unclean hands affirmative defense is predicated upon facts that were known by Ms. Prescott at the time she made her bankruptcy filings, but that she never disclosed to the Bankruptcy Court. She could have disclosed these facts in her bankruptcy petitions and filings before that Court, but she did

¹ In opposing summary judgment, Ms. Prescott filed an affidavit in which she attempted to create a disputed material fact by contradicting her sworn statements and representations to the Bankruptcy Court. The Court rejects such posturing to create a sham issue of material fact. *See, e.g., Dunes W. Golf Club, LLC v. Town of Mt. Pleasant*, 401 S.C. 280, 311, 737 S.E.2d 601, 617 (2012) (noting parenthetically that “a party cannot take inconsistent positions in an attempt to create a sham issue of material fact”).

not. Instead, she represented that the parties' note and mortgage were valid and enforceable and that Wells Fargo was a secured creditor. Accordingly, res judicata and judicial estoppel prevent Ms. Prescott from asserting a different position before this Court by way of an affirmative defense that is based on facts contrary to those that she asserted during the bankruptcy proceedings.

II. Ms. Prescott's Counterclaims

Ms. Prescott's counterclaims are likewise barred by res judicata and collateral estoppel. Courts are clear a party who does not disclose the existence of a claim on its bankruptcy schedules is precluded from later bringing that claim. *See, e.g., Whitten v. Fred's, Inc.*, 601 F.3d 231, 241 (4th Cir. 2010) ("Judicial estoppel has often been applied to bar a civil lawsuit brought by a plaintiff who concealed the existence of the legal claim from creditors by omitting the lawsuit from his bankruptcy petition."), *overruled in unrelated part by Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013); *Sprowl v. Pfizer, Inc.*, Case No. 8:08-cv-3316-RBH, 2010 U.S. Dist. LEXIS 30939, at *15 (D.S.C. Mar. 30, 2010) ("[U]pon review, it appears to the court that Plaintiff may actually be judicially estopped from bringing this suit based on Plaintiff's failure to amend his bankruptcy petition to disclose his potential legal claims.").

Ms. Prescott affirmatively stated "NONE"—on two different occasions—when asked by the Bankruptcy Court to disclose all counterclaims she could pursue. As a result, all of Ms. Prescott's counterclaims are barred as a matter of law, irrespective as to whether they are timely asserted under Rule 15, SCRC. Summary judgment is therefore appropriate in Wells Fargo's favor on Ms. Prescott's counterclaims, and the Court likewise denies as moot Wells Fargo's motion to strike.

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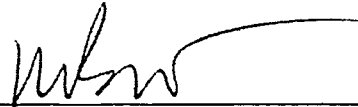
CONCLUSION

The doctrines of judicial estoppel and res judicata are designed to preserve the integrity of the judicial process, to conserve public and private resources by avoiding relitigation of previously-decided issues, and to give parties finality and certainty in judgments. Ms. Prescott's post-bankruptcy arguments in this case run counter to each of these principles and are barred by these doctrines.

For the reasons explained above, the Court grants summary judgment in Wells Fargo's favor on its claim and Ms. Prescott's counterclaims and affirmative defenses. The only issues remaining for resolution are the sum owed to Wells Fargo on its foreclosure claim and whether the mortgage should be reformed to correct an apparent typographical error regarding the legal description of the property, both of which shall be resolved at a damages hearing to be held at a time appointed by the Court after consultation with the parties.

AND IT IS SO ORDERED.

1/9, 2015
Sumter, South Carolina



The Honorable Richard L. Booth
Sumter County Master-In-Equity

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STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER)

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2014 APR 22 AM 11:30
JAMES C. DANIELL
CLERK OF COURT
SUMTER COUNTY, S.C.

IN THE COURT OF COMMON PLEAS

CASE NO. 2010-CP-43-00823

CERTIFIED TRUE COPY
OF ORIGINAL FILE

Barbara Stape
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

Wells Fargo Bank, N.A..)

Plaintiff)

Vs.)

Delores Prescott and Wells Fargo)
Financial Bank (SD))

Defendants.)

ORDER

COPY

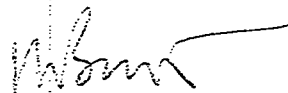
Individual Defendant in this matter previously filed and served a Motion to Dismiss the Complaint of the Plaintiff based on Rule 12(b) of the South Carolina Rules of Court. The basis of the Motion was that the Plaintiff failed to state facts sufficient to constitute a cause of action.

A hearing was held before me on April 9, 2014 attended by counsel for Plaintiff and for Individual Defendant. Both parties submitted briefs to the Court prior to the hearing. At the hearing, counsel for the Individual Defendant sought to advance arguments that went beyond the mere content of the pleadings in this matter and I determined that the hearing would not be enlarged nor treated as one for summary judgment pursuant to Rule 56.

After reviewing the arguments of counsel and the pleadings, I find that the Complaint of the Plaintiff does state facts sufficient to constitute a cause of action and therefore Defendant's Motion should be denied.

IT IS THEREFORE ORDERED that the Motion of Individual Defendant to dismiss the
Complaint of the Plaintiff shall be and hereby is denied.

Dated 4/17 2014



Richard L. Booth, Master in Equity
For Sumter County

STATE OF SOUTH CAROLINA)
)
COUNTY OF SUMTER)
)
Wells Fargo Bank, N.A.,)
)
Plaintiff,)
)
vs.)
)
Delores Prescott; Wells Fargo)
Bank, (SD))
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
CASE NO: 2010-CP-43-00823

Order

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This comes before me upon Defendant Delores Prescott's motion to amend her answer. A hearing was held before me attended by counsel for Plaintiff and Defendant Prescott. Based on the arguments and citations of the parties thereat, I am of the opinion that in the furtherance of justice Defendant Prescott's motion should be granted for the purpose of allowing her to plead affirmative defenses, compulsory counterclaims and cross claims as to the parties to this lawsuit and the matters alleged in the complaint, and also to maintain any third party-complaint she deems necessary. I am not granting her leave to maintain any permissive counterclaims which she may maintain through separate action.

It is therefore

ORDERED: That Defendant Delores Prescott is granted leave to amend her answer to plead affirmative defenses as to the matters alleged in the complaint of the Plaintiff, to maintain compulsory counterclaims and cross claims as to the parties to this lawsuit, and also to maintain any third party complaint as she deems proper.

December 2, 2013

Richard L. Booth
Master in Equity