(4)

MEMORANDUM IN SUPPORT OF

APPEAL FOR SUMMARY JUDGMENT

STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT OF COMMON PLEAS ERR IN GRANTING SUMMARY JUDGMENT BASED ON JUDICIAL ESTOPPEL?

2. DID THE COURT OF COMMON PLEAS ERR IN FINDING APPELLANT'S COUNTERCLAIMS AND AFFIRMATIVE DEFENSES ARE BARRED BY THE STATUE OF LIMITATIONS, RES JUDICATA AND COLLATERAL ESTOPPEL?

3. DID THE COURT OF COMMON PLEAS ERR IN GRANTING SUMMARY JUDGMENT OF THE MISINTERPRETATION OF THE TERM ABANDONMENT PROPERTY?

4. DID THE COURT OF COMMOM PLEAS ERR IN GRANTING SUMMARY JUDGMENT ABOUT THE DISPUTES OF THE MATERIAL FACTS IN THE FORECLOSURE ACTION?

5. DID THE COURT OF COMMON PLEAS ERR IN GRANTING SUMMARY JUDGMENT ON THE FRAUD AND NEGLIGENT MISPRESENTATION CLAIM?

6. DID THE COURT OF COMMON PLEAS ERR IN GRANTING SUMMARY JUDGMENT ON THE CONTRACT CLAIM?

ATTACHMENTS

A. Order of Summary Judgment
Hearing date: November 19, 2014
Decided: January 9, 2015
Filed on Record on January 13, 2015.

B. Order Denying Motion to Dismiss Foreclosure
Hearing date: April 9, 2014
Decided: April 17, 2014
Filed on Record: April 22, 2014

C. Order Granting Amendment of Answer
Hearing date: November 20, 2013
Decided: December 2, 2013
Filed on Record: January 2, 2014
(Unsigned Copy attached)

D. Proof of Service

I. Factual and Procedural Background

September 2001, Appellant had a permanent residential mortgage with Principal Mortgage on her residence in Rembert, South Carolina, Sumter County. Appellant's original Mortgage had been with Cardinal Mortgage.

In June 2003, Appellant signed a mortgage agreement with Watermark Financial Partners, LLC, at her home in Sumter, South Carolina.

July 2003, a different mortgage document was filed in the Sumter County Register of Deeds, which had been materially altered from the documents Appellant signed. (Ans. ¶13 page 8-9).

In 2008, Appellant lost her job and feared that she would not be able to fulfil her obligations under the note and mortgage. Appellant notified Respondent of her change in income and requested assistance. Respondent agents and employees advised Appellant that she would not qualify for refinancing or a reduction in interest because her loan was current.

In February of 2009, Respondent's agent Kim Dehining contacted Appellant by telephone and advised President Obama was implementing a new Home Affordable Program and she would be considered for a modification if she defaulted on her loan. Respondent instructed Appellant to reapply for the modification in March of 2009.

In March of 2009, Appellant submitted a hardship letter in accordance with the instructions received from agents and employees of Respondent, and commemorating the advice she received from Respondent. Prior to March of 2009 Appellant had made all payments on her note and mortgage and had no accumulated arrearage.

Beginning in June of 2009, and continuing through 2010, Appellant entered into a series of "Forbearance Agreements," with the Respondent. Agents and employees of Respondent repeatedly represented to Appellant that if she successfully completed the payments outlined in the agreement that she would be considered for a loan modification.

Appellant had informed Respondent agents that she was on public assistance in 2009. Respondent agents never informed Appellant that she was ineligible for a FHA Home Affordable Modification because she was unemployed and on public assistance. Respondent agents continued to represent that it would make a determination about Appellant's eligibility to receive a loan modification during 2010. Despite Appellant's completion of payments under the terms of these agreements, Respondent never made a determination on Appellant's loan modification for over a year.

Paragraph 8 of Respondent's Foreclosure Complaint states "As required by an Administrative Order issued by the South Carolina Supreme Court dated May 22, 2009, the Plaintiff states that, this loan is owned or guaranteed by Fannie Mae, or it is owned or guaranteed by FHLMC, or the Servicer has signed an agreement to participate in the Home Affordable Modification Program ("HMP"); however, Plaintiff alleges upon information and belief, that this loan is not eligible for modification under the HMP because this loan type is not eligible for HMP modification."

Appellant acknowledged in her May 17, 2010 Answer to the Complaint that Respondent did not disclose that the "loan type" was not eligible for a "HMP" or FHA-HAMP modification. (Ans. ¶ 10 at page 7-8).

Respondent knew or should have known at that Appellant was ineligible for a modification pursuant to the Home Affordable Modification Program (HAMP), but

continued to represent to Respondent that a determination on her eligibility would be made.

Beginning in early 2010, Respondent started withholding and misapplying Appellant's payments to create false arrearages and penalties on her account, to create the illusion that she was not complying with the forbearance agreements. For example, and without limitation, Appellant paid Respondent $3,200.00 on January 4, 2010. The payment was endorsed *"Deposit Only Wells Fargo Bank NA DBA Americas Svcg Co As Trustees for Various Investors 4121206965."* Respondent failed to apply the payment to any outstanding balance and principal, and instead, held the money as "unapplied funds."

The balance and arrearages were only owed because of the new payment schedule designed and encouraged by Respondent, and only remained unpaid because Respondent refused to apply the payments to Appellant's account. The January 2010 payment should have been sufficient to fully reinstate the security instrument under Paragraph 10 of the mortgage.

On April 12, 2010, Respondent issued a 3rd Forbearance Agreement to Appellant, but still never made any determination as to her modification, as was promised nine months earlier. The 3rd Forbearance Agreement required Appellant to pay $563.05 a month, beginning May 12, 2010, June 12, 2010 and July 12, 2010.

Three days after sending the 3rd Forbearance Agreement, Respondent initiated this foreclosure action on April 15, 2010. At all times prior to April 15, 2010, Respondent represented that it was the lawful owner and servicer of Appellant's Note and Mortgage.

On Sunday April 18, 2010 Appellant was hand delivered via courier the Foreclosure Complaint from Respondent. The Complaint was filed with the Sumter

County Court on April 16th, 2010 and signed April 15th, 2010 by Suzanne E. Brown, attorney at Brock and Scott representing Respondent.

Monday, April 19, 2010 Appellant contacted Respondent regarding the Complaint and spoke with Quanleticia Anderson. Respondent's agent told Appellant "there was no sale date and as long as the payments were made per the April 12, 2010 Agreement no Foreclosure action would be taken."

Appellant answered the Complaint in due course. The answer specifically denied the allegation that Respondent owns and holds the note and mortgage. The answer also raised several affirmative defenses, including a claim that Respondent lacked standing because it did not own the note and mortgage when the foreclosure complaint was filed. (Ans.¶5-7 at pages 1- 2).

Respondent's alleged statement in paragraph 14 of the Foreclosure Complaint says "Plaintiff as holder of the said Note and Mortgage."

April 23, 2010 Appellant searched the Sumter County Register of Deeds. The county records indicated that Watermark Financial Partners, Inc. was listed as the Mortgagee. There was no assignment of Mortgage recorded to any successors or assigns. Watermark Financial Partners is recorded as the Mortgagee from July 2003 through May 17, 2010.

On May 17, 2010 at 01:42:30 p.m. an Assignment of Mortgage was filed with Vicki M. McCarthy Sumter County Register of Deeds by R. Carter.
Respondent's attorney Suzanne E. Brown is named as Assignor and her signature appears on the Assignment of Mortgage as the Vice President of Mortgage Electronic Registration Systems (MERS) as nominee for Watermark Financial Partners, Inc . The

top left corner of the document says " Prepared by and return to: BROCK & SCOTT, PLLC Westpark Center 3800 Fernandina Road, Suite 110 Columbia, SC 29210 File No.: 10-08577 [Appellant's foreclosure file number with the firm].

Wherein attorney Suzanne Brown on April 15, 2010, purported to assign the mortgage and note to Respondent. Attorney Brown was acting as V.P. of MERS. Respondent believed the assignment would allow them to bring the foreclosure. The document does nothing to address the conflict of interest created when an attorney for Respondent is also the V.P. of MERS, assigning a mortgage to Respondent, so Respondent could bring a foreclosure action. See, *In Re Conway*, 305 S.C. 388 (1991).

The Compliant does not state when and how Respondent became the holder or owner of the note and mortgage. The Complaint list Watermark as the "Lender." In 2003 Watermark was not an authorized FHA agent for the state of South Carolina and was not licensed to do business as a mortgage broker in the state of South Carolina.

Appellant filed her Answer on May 17, 2010 unware of the facts regarding the Assignment, transfer of the Mortgage and Watermark not authorized to conduct business in South Carolina. Respondent did not reply to Appellant's Answer.

May and June 2010 Appellant made a $563.05 under the terms of the forbearance agreement then in force. The payments were endorsed *"Deposit Only Wells Fargo Bank NA DBA Americas Svcg Co As Trustees for Various Investors 4121206965."*

July 1, 2010 Respondent's agent advised Appellant that she would be able to make the final trial payments via telephone for an additional charge of $20.00.

On July 5, 2010 Appellant attempted to make the payment through Plaintiff's automated system but the system would not allow it. Instead, the call was routed to the

Loss Mitigation Department. Appellant was told by Respondent's agent Donna Williams that the June trial payment of $563.05 was not received.

Appellant advised Respondent's agent that the payment was delivered to Respondent's Fort Mills, South Carolina location on June 7, 2010. Appellant gave the Respondent's agent the United States Postal Service Priority Mail tracking number 0309 2880 0000 3878 6457 of the package. Respondent's agent advised Appellant her account would be noted and someone in management would call within 48 hours regarding the issue.

July 2010 Appellant did not receive a return call from anyone on Respondent's management team. Appellant could not get through to Respondent when attempts to call were made. The calls were routed to an automated system and none of the prompts would allow Appellant to actually speak to a live person.

In 2009 and 2010 Appellant sought advice from Respondent and relied on the information provided by Respondent to obtain a modification. As the result of Respondent's own conduct, it declared Appellant had violated the terms of the forbearance agreement, and refused, again, to provide Appellant with a modification determination and placed Appellant's property in "active foreclosure."

Respondent's encouragement to enter default, its subsequent misrepresentations regarding the modification agreements, status and misapplication of payments, Appellant was forced to file for bankruptcy.

II. Proceedings before the Bankruptcy Court

After the commencement of Appellant's bankruptcy the June 10 payment was applied to Appellant's mortgage statement dated August 5, 2010. Respondent wrongfully withheld the June 2010 payment from application until August of 2010.

Appellant filed Chapter 13 Bankruptcy on August 2, 2010. The case was dismissed on or about January 2011. Appellant refiled a petition with the bankruptcy court March 2011. Appellant disclosed all of the issues with the modification and was informed there was no private right of action under FHA or HAMP.

Appellant made her regular monthly mortgage payment to Respondent beginning April 2011 and the trustee paid the arrearage through the plan.

August 2011 Appellant contacted her bankruptcy attorney and asked if the plan could be modified to include September, October, November and December 2011 mortgage payments. The trustee would not amend the plan but gave permission to discuss the circumstances with Respondent. Respondent's reply was the settlement order dated January 10, 2012.

The Bankruptcy order stated that Appellant was to continue to remit the regular monthly payment of $647.64 and cure the post-petition arrearage by making nine (9) consecutive installments of $379.03 per month commencing on February 2012.

Appellant complied with the order and made payments as follows:
January 2012 $648.00, February $648.00 and stipend of $379.03, March $648.00 and stipend of $379.03, April $648.00 and stipend of $379.03, May $648.00 and stipend $379.03, June $648.00 and stipend of $379.03, July $648.00 and stipend of $379.03,

August $643.00 and stipend of $379.03. September $648.00 and stipend of $379.03, October $648.00 and stipend of $379.03.

The August 2012 stipend of $379.03 was returned to Respondent on or about September 3, 2012. Appellant immediately contact Respondent to advise there was an issue with her checking account. Respondent's agent Scott S. advised that the check would automatically redeposit. It did not. Appellant mailed a money order of $379.03 to Respondent to cover the returned check. On or about September 21, 2012 Respondent moved to have the automatic stay lifted. September 25, 2012 the stay was granted.

III. Proceedings Upon Return to Circuit Court

December 2012 Appellant began doing research regarding her mortgage and found that there were issues that appeared to be fraudulent regarding the mortgage documents and assignment that was on file with Sumter County Register of Deeds. The bankruptcy attorney advised Appellant the fraudulent issues discovered about the mortgage were civil matters that should be addressed in state court because the property was no longer apart of the bankruptcy.

February 2013 Appellant contact Robert C. Ray of the Greenville Bar and discussed the new information that Appellant discovered regarding her mortgage documents.

March 2013 Appellant hired Mr. Ray and he contacted Brock and Scott to first seek permission to amend Appellant's pro se Answer. Soon after Appellant hired counsel, Respondent changed its counsel to Womble, Carlyle, Sandridge & Rice of Greenville, S.C. and representatives of the law firm contacted Appellant's counsel. Appellant's attorney had been negotiating Appellant's Amended Answer and Counterclaim with

Respondent's new attorney since April 2, 2013. Mr. Ray moved to amend pro se answer to include affirmative defenses, counterclaims and cross claims. The Order to amend the pro se answer was granted December 2, 2013.

Based on the new information discovered regarding the mortgage and assignment Mr. Ray moved to have the foreclosure cased dismissed. A hearing was held on April 9, 2014. The motion to dismiss foreclosure was denied.

IV. Abandonment of Property

In this case the automatic stay was lifted September 25, 2012. Ten (10) months prior to the Trustee's July 2013 order of abandonment as permitted by 11 U.S.C. §506(a), §506(d), 325(a), and applicable law. The Order says "Pursuant to 11 U.S.C. §522(f)(1)(A) and/or (B), the court hereby finds that the security interests to be avoided as set forth in the confirmed plan or by separate order impair an exemption to which the debtor would otherwise be entitled under 11 U.S.C. §522(b) and South Carolina Code §15-41-30 and are therefore, avoided."

In the Order of Summary Judgment there is a deliberate contradiction of the court's ruling regarding the "abandonment" issue. The court agreed with attorney Robert C. Ray that the abandonment in bankruptcy was not a transfer of the property to Respondent, but merely the surrender of the property from the bankruptcy estate, back to the possession of the Appellant as if it had never been part of the bankruptcy estate.

Accordingly, the order needs to remove or modify the language appearing at pages 3, 4 and 8 to reflect the true ruling of the court. The court did not rule that the "abandonment" in itself had any preclusive effect on Appellant.

In the Order of Summary Judgment the Footnote [[1]]on page eight (8) was not the ruling of the court. At no time during the hearing did the court find or hint that Appellant's affidavit was a "sham," attorney Robert C. Ray objected to that assertion. In fact, Respondent didn't deny that the events described actually took place only that they are procedural and equitable bars to raising those issues at this juncture. Accordingly, this footnote should be removed as it was not the ruling of the court.

Respondent contends that Appellant should be judicially estopped from pursuing her claims because she failed to identify any counterclaims against Respondent in connection with the Foreclosure action as assets of her bankruptcy estate in her Summary of Schedules filings with the United States Bankruptcy Court, which filings are also on file with the state court.

ARGUEMENT

V. Judicial Estoppel

"Judicial estoppel precludes a party from adopting a position that is inconsistent with a stance taken in prior litigation. The purpose of the doctrine is to prevent a party from playing fast and loose with the courts, and to protect the essential integrity of the judicial process." Lowery v. Stovall, 92 F.3d 219, 223 (4th Cir. 1996) (internal quotation marks omitted).

Three elements must be satisfied before judicial estoppel will be applied.

a. The party to be estopped must be seeking to adopt a position that is inconsistent with a stance taken in prior litigation. The position at issue must be one of fact as opposed to one of law or legal theory.

b. The prior inconsistent position must have been accepted by the court.

c. The party against whom judicial estoppel is to be applied must have intentionally misled the court to gain unfair advantage. This bad faith requirement is the determinative factor. Zinkand v. Brown, 478, F.3d 634, 638 (4th Cir. 2007) (citations and internal quotation marks omitted).

Judicial estoppel has often been applied to bar a civil lawsuit brought by a debtor who concealed the existence of the legal claim from creditors by omitting the lawsuit from the bankruptcy petition. See, e.g., Cannon-Stokes v Potter, 453 F3d 446, 448 (7th Cir. 2006) ("All six appellate courts that have considered this question hold that a debtor in bankruptcy who denies owning an asset, including a chose in action or other legal claim, cannot realize on that concealed asset after bankruptcy ends.").

In this case however, Appellant did not conceal or deny owning an asset. To the contrary, she informed the Bankruptcy court and her creditor, Respondent of her potential claims against Respondent with a copy of her written pro se Answer to Respondents Foreclosure Complaint on August 2, 2010 and March 28, 2011. To date, Appellant has not received a reply from Respondent to the original Answer of the complaint.

Judicial estoppel is a principle developed to prevent a party from taking a position in a judicial proceeding that is inconsistent with a stance previously taken in court. Zinkand v. Brown, 478 F.3d 634, 638 (4th Cir. 2007). Federal law controls the application of judicial estoppel, since it relates to protection of the integrity of the federal judicial process. Allen v. Zurich Ins. Co., 667 F.2d 1162, 1168 n.4 (4th Cir. 1982).

The foreclosure complaint and answer were disclosed in the bankruptcy. Prescott was informed that the denial of a loan modification under Home Affordable Modification Program ("HAMP") (or other similar programs) does not create a private cause of

action." Weber v. Bank of Am., N.A., 2013 U.S. Dist, LEXIS 128863, *11-12 (D.S.C. Sept. 10, 2013) (citing Steffens v. Am. Home Mortgage Servicing, Inc., 2011 U.S. Dist. LEXIS 26586, 2011 WL 901812 (D.S.C. Jan. 5, 2011)). "Nowhere in the HAMP Guidelines, nor in the [legislation authorizing creation of HAMP], does it expressly provide for a private right of action." Steffens, 2011 U.S. Dist. LEXIS 61489, 2010 WL 257988 (D.Ariz. June 22, 2010)). Even if Appellant should have supplemented her bankruptcy pleadings after she actually filed this action, her initial disclosure of the claims precludes from finding that she acted in bad faith. Accordingly, this aspect of the Respondent's judicial estoppel claim should be rejected. See Zinkand, 478 F.3d at 638 (noting that bad faith is "the determinative factor" of a judicial- estoppel analysis (internal quotation marks omitted)).

VI. Counterclaims and Affirmative Defenses

The rules governing the amendment of pleadings strongly favor amendment. An amendment should be granted freely when justice so requires and there is no prejudice to the other party. Kelly v. South Carolina Farm Bureau Mutual Insurance Co., 316 S.C. 319; 450 S.E.2d 59, (Ct. App. 1994).

The party opposing an amendment has the burden of demonstrating it will be prejudiced by the amendment of the pleading. Stanley v. Kirkpartick, 592 S.C. 169, 174, 592 S.E.2d 296, 299 (2004). The prejudice contemplated by Rule 15, is the lack of notice that a new issue will be tried and a lack of opportunity to refute it. Id.

At all relevant times the Respondent has been aware of the facts and allegations of the Amended Complaint through Appellants' Hardship Affidavit dated May 17, 2010, and her Answer to Complaint and Affirmative Defenses dated May 17, 2010.

Additionally, the amendment was authorized in advance of Respondent's filing for Summary Judgment. Accordingly, the Respondent cannot show any prejudice to preclude Appellant's proposed Amendment.

A. <u>The Amended Answer and Counterclaim state Timely Causes of Action and Defenses authorized by Law.</u>

1. Appellant's claims are not time-barred.

The Counterclaims and Defenses are timely, because they relate back to the filing of the original Answer filed May 18, 2010. Rule 15(c). SCRCP, states that an Amendment relates back to the original pleading "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading." Appellant's claims and defenses clearly arise out of the same transaction or occurrence as the Respondent claims and Appellant's initial defenses, namely the mismanagement of Appellant's mortgage and misrepresentations made by the Respondent, in connection with the alleged default, acceleration and foreclosure process. See Answer to Complaint and Affirmative Defenses, ¶¶7-12, May 17, 2010, and Hardship Affidavit Explanations, May 17, 2010. Because they relate back to the time of the initial Answer, they are not barred by the statute of limitations. Additionally, Appellant's claims fall under the extended six-year statute of limitations provided in S.C. Code Ann.§37-23-70, including the claims relating to Respondent's efforts to encourage Appellant's default and misrepresentations in connection with contemplated modification.

Finally, while Respondent complains of the pass of time, it is indisputable that Appellant could not amend her pleadings during the pendency of bankruptcy

proceedings, and that any right to amend or assert a claim during that time would have belonged exclusively to the Trustee. See, Weber v Bank of America, C/A No. 0:13-cv-01999-JFA (D.S.C., Rock Hill Division, September 10, 2013).

Thus, the Appellant's claims are not barred by the statue of limitations.

2. The Amended Answer and Counterclaim States Adequate Claims of Relief. Appellant has restyled her original "Answer and Affirmative Defenses" into claims for Fraud, Negligent Misrepresentation, Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, as well as equitable defenses, including Unclean Hands. Respondent claims the Appellant has not stated facts to state a cause of action under Rule 12(b)(6). In ruling on a 12(b)(6) motion, the court must construe the counterclaims in the light most favorable to the nonmovant to relief on any theory of the case. Freemantle v. Preston, 398 S.C. 186, 728 S.E.2d 40 (2012). If the facts alleged would entitle the non-moving party to any relief, dismissal under Rule 12(b)(6) is improper. Id.

B. Fraud and Negligent Misrepresentation

The allegations of the counterclaims state claims for relief distinguishable from the inadequate claims identified in the Respondent's motion. A claim of fraud consists of the following elements:

> (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

Regions Bank v. Schmauch, 354 S.C. 648. 672. 582 S.E.2d 432, 444-45 (Ct.App.2003).

A claim for negligent misrepresentation consists of the following elements:

> (1) the defendant made a false representation to the plaintiff (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

The key difference between fraud and negligent misrepresentation is that "fraud requires the conveyance of a known falsity, while negligent misrepresentation is predicated upon transmission of a negligently made false statement." Brown v. Stewart, 348 S.C. 33, 42, 557 S.E.2d 676, 680-81 (Ct.App.2001). Negligent Misrepresentation also requires showing (1) the defendant owed a duty of care to see that the information communicated was truthful and that (2) the defendant breached that duty failing to exercise due care. Id.

Respondent does not identify any particular element that is lacking in the counterclaims, but instead relied on a case from the South Carolina District court, Weber v. Bank of America, C/A No. 0:13-cv-01999-JFA (D.S.C., Rock Hill Division, September 10, 2013), asserting that the decision bars any possible fraud or negligent misrepresentation claim for arising out of the loan modification process. The distinctions between the Appellant's counterclaims and that case are clear.

The plaintiff in Weber alleged that he requested mortgage assistance after becoming unemployed. He further alleged that the bank told him from the outset of their discussion that he was not eligible for assistance due to his unemployment. Weber p.1.

The bank persistently denied his renewed requests for modification. Id. Furthermore, the plaintiff merely called the bank's promise to refinance a "sham practice" without reference to any duty or misstatement of material fact.

By comparison in this case, Appellant has alleged that the Respondent never informed her that modification was unavailable because of her unemployment. Furthermore, Respondent never made a determination on her eligibility for a loan modification despite knowledge that Appellant was never eligible for such assistance. Here, the misrepresentation was that a determination would be made, but never was, not that unfavorable determination had been made. Additionally, the Respondent told the Appellant that she had to go into default before she would be eligible for assistance.

Appellant has alleged all the necessary facts to make out her claim. Specifically, Appellant has alleged that (1) she informed Respondent of her financial vulnerability and reliance on public assistance; (2) requested information and advise from Respondent; (3) that Respondent was aware that she was relying on that advice (4) that Respondent made misrepresentations regarding (a) default being a pre-condition for modification and (b) that a modification determination would be made; (5) that the misrepresentations were material to the transaction, and (6) that Respondent knew or should have known that the representations were false when made or made with reckless disregard as to their truth or falsity. Appellant has further alleged that she (7) relied on Respondents misrepresentations and that she (8) suffered injury as a result of this (9) reasonable reliance.

Unlike the plaintiff in Weber, Appellant has alleged a duty on behalf of Respondent to support her negligent misrepresentation action. The court in Weber read

the complaint to allege a duty on behalf of banks to provide some form of loan modification program, which duty simply does not exist. Weber, p.7. In this case, the breached duty derives from both the common law duties of care and disclosure and from applicable statutory law.

The Court of Appeals has recognized the existence of duty to exercise due care in giving information when the party making a representation has a pecuniary interest in the transaction. Winburn v. Insurance Company of North America, 287 S.C. 435, 339 S.E. 2d 142 (Ct. App. 1985). Even where no fiduciary duty exits between two parties (as between a bank and its customer), a court will find a duty of care and a duty to disclose where the party making a representation has a financial interest in the representation, knows the other person is relying on the representation, and the representation and the party intentionally undertakes to provide advice or counsel. See, Restatement (Second) of Torts, §552 (1977); See First Federal Savings Bank v. Knauss, 296 S.C. 136, 370 S.E.2d 906 (1988) (stating §552 applied in negligent misrepresentation case against bank by borrower). Additionally, S.C. Code Ann. §37-23-70 clearly imposes a duty on banks by prohibiting them from making certain statements and representations in consumer loan transactions. Any encouragement to enter default is strictly prohibited. Accordingly, Appellant has alleged sufficient facts for both fraud and negligent misrepresentation and her case is clearly distinguishable from Weber.

C. Contract Claims

Finally, from the face of the Amended Answer and Counterclaim it is obvious that Appellant has not plead a "stand-alone" claim for a breach of the covenant of good faith and fair dealing, but plead that breach in conjunction with a breach of contract claim. No

independent or unique remedy has been sought from the claim, and it is clearly an additional breach of the same contract that is the basis for Respondent's own action. Respondent's reliance on Rotec Servs. V. Encompass, Servs., 359 S.C. 467, 472-73, 597 S.E.2d 881, 883-84, is misplaced. In Rotec, the court held that there was no contractual obligation breached, and as a result a claim for a breach of implied covenants of that contract could not stand alone. Here, Appellant has alleged breaches of specific provisions of the contract between the parties and that the Respondent acted in bad faith in allowing those breaches to occur. Specifically, Appellant has alleged that Respondent mismanaged and misapplied payments from Appellant, as it was required to do under the Mortgage Agreement. The application of funds was clearly a discretionary act controlled by Respondent, which discretion was abused in repeatedly failing to properly apply funds.

Additionally, the Respondent points to good reason for disallowing the Appellant's breach of contract claim. There is no dispute that there was a contract between the parties. The Appellant has alleged a breach of a material term that relates directly to the performance and obligation of the parties. Plaintiff's failure to apply payments in accordance with the contract had a bearing on Appellant's alleged failure to comply with the payment terms of the note and mortgage. Accordingly, the Appellant's breach of contract claim should be considered at the liability stage and not, as Respondent contends, as an afterthought at the damages stage.

VII. Order for Summary Judgment

While the "admission" listed in Respondent's motion for Summary Judgment do make out the prima facie elements of a foreclosure action, they do not resolve the factual

disputes raised by Appellant's equitable defenses. A foreclosure action can be defeated by pleading and proving an equitable defense. See Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 74-76, 698S.E.2d 244, 247-48 (Ct. App. 2010). Appellant has alleged that Respondent should be barred from foreclosing on the note and mortgage because of its inequitable conduct, including its efforts to induce Appellant's default, its misrepresentations regarding loan modification which resulted in the aggregation of additional fees and costs, and its failure to properly apply payments. Respondent have not denied the factual allegations of Appellant's claims, and there are issues of fact yet to be resolved. Because there is an ongoing dispute about whether the Respondent has come to court with clean hands, the Order for Summary Judgment on the foreclosure action should be denied.

A. The Appellant's Claims are not Judicially Estopped

The Appellant has steadfastly asserted its defenses, and has notified the Respondent of its defenses and counterclaims throughout this action. The Appellant's alleged omissions in bankruptcy filings do not preclude her claims and defenses under a theory of judicial estoppel. The failure of the Bankruptcy Trustee to include the equitable and legal claims does not demonstrate the necessary bad faith on the part of the Appellant to prevent the assertion of these arguments in the actions.

The Respondent's own authorities reached the same conclusion. In Whitten v Fred's Inc., 601 F3d 231 (4th Cir., 2010), the court held a Plaintiff's failure to list certain claims in its bankruptcy documents did not prevent the party from raising them later, noting that all interested parties were aware of the claims despite the omission. The court noted that "[e]ven if Whitten should have supplemented her bankruptcy pleadings after she filed this

action her initial disclosure of the claims precludes us from finding that she acted in bad faith." Whitten, 601 D 3d at 242.

In Appellants' initial responsive pleadings and supporting documents filed in 2010, the Appellant asserted numerous defenses and pleaded all relevant facts contesting Respondent's entitlement to foreclosure. Those claims have be clarified in the Appellant's subsequent amendments, however, the positions espoused are not contradictory to those taken at earlier stages in this litigation.

Accordingly, the Order for Summary Judgment should be denied, and the Appellant be entitled to a determination of her claims and defenses.

B. Appellant's Claims are not barred from Collateral Estoppel

Under South Carolina law, "[c]ollateral estoppel, also known as issue preclusion, prevents a party from re-litigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." Id.

In its Order of Summary Judgment the Court of Common Pleas found Appellant was collaterally estopped from pursuing her negligence counterclaims and affirmative defenses against the Respondents because " a party who admits a debt is owed in bankruptcy proceedings is barred from later disputing that debt. Respondent relies on 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").

Appellant did not abandon her interest in property or surrender the property to Respondent during bankruptcy proceedings. The bankruptcy Trustee merely surrendered the property from the bankruptcy estate, back to the possession of the Appellant as if it had never been part of the bankruptcy estate. Respondent did not object to the Trustee abandonment at the confirmation hearing July 2013.

Appellant's assertion of counterclaims and affirmative defenses claims against Respondent does not preclude her from asserting that the Respondents' actions were also proximate causes of the Foreclosure.

Appellant contends that her counterclaims and affirmative defenses can all be proximate causes of her permanent damages. Appellant further argues she cannot be collaterally estopped from asserting counterclaims against the Respondent because the issues of breach of contract, negligence, breach of covenant of good faith and fair dealing and misrepresentation were not actually litigated in the proceedings of any court. Appellant's counterclaims against the Respondents are not an attempt to contest the right of Respondent to foreclose, but are an attempt to determine whether the negligent misrepresentation she received from the Respondent was a cause of the foreclosure action.

Appellant and her counsel were fully apprised through discovery and the extensive research in this case, including every aspect of Respondent's involvement in negligent misrepresentation actions. This includes every act which led to the Respondent's Foreclosure Complaint.

The issue in the present counterclaims and affirmative defenses are whether Respondent caused Appellant's foreclosure by negligent misrepresentation. Because these are two different issues, Appellant is entitled to a determination of her counterclaims and defenses and the Order of Summary Judgment should be denied.

C. Appellant's Claims are not barred from Res Judicata

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; (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).

In this case, the counterclaims are not the same as the subject matter, and there is no prior adjudication by a court of competent jurisdiction.

Appellant's counterclaims against the Respondents are not an attempt to contest the right of Respondent to foreclose, but are an attempt to determine whether the negligent misrepresentation she received from the Respondent was a cause of the foreclosure.

Appellant and her counsel were fully apprised through discovery and the extensive research in this case, including every aspect of Respondent's involvement in negligent misrepresentation actions. This includes every act which led to the Respondent's Foreclosure Complaint.

The issue in the present counterclaims and affirmative defenses are whether Respondent caused Appellant's foreclosure by negligent misrepresentation. Because

these are two different issues, Appellant is entitled to a determination of her counterclaims and defenses and the Order of Summary Judgment should be denied.

CONCLUSION

This is a matter of Public Policy.

Respondent's litigation tactics, which involve filing dozens of briefs, motions and other filings which slow down proceedings in foreclosure actions are an injustice to the judicial system.

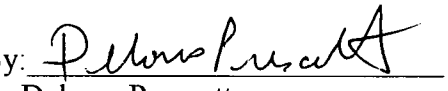
The bundling of mortgages to sell as securities which allow them to make money off loans, negligent misrepresentation, predatory lending and the integrity of their accounting system would find a legal challenge to any borrower who might wish to contest Respondent's practices simply too burdensome, even in the event of foreclosure .

It is only through litigation that Respondent's abuses can be uncovered. Only through litigation and extensive discovery over a period of years was this practice discovered. It is unlikely that most borrowers will be able to discern problems with their mortgages, notes and assignments without extensive discovery and costly legal representation.

Consequently, most borrowers are often unable to hire the kind of legal firepower necessary to counter Respondent's army of lawyers. When exposed, Respondent revealed its true corporate character by denying any obligation to correct its past transgressions, and their illegal strategies ensure it does not have to.

Accordingly, the Order of Summary Judgment should be denied in its entirety, and the Appellant should be entitled to a determination of her counterclaims and affirmative defenses.

Respectfully Submitted

By: 

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