

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
Case No. 2013-CP-26-7677

Synovus Bank, successor in interest to
The National Bank of South Carolina,

Plaintiff,

vs.

Paul D. Gunter and Brenda Gunter,

Defendants.

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SC Court of Appeals
FILED
HORRY COUNTY
2014 OCT 15 PM 2:56
MELANIE HUGGINS-WARD
CLERK OF COURT

**ORDER GRANTING PLAINTIFF SYNOVUS BANK, SUCCESSOR IN INTEREST TO
THE NATIONAL BANK OF SOUTH CAROLINA'S NOTICE AND MOTION TO
DISMISS DEFENDANTS' COUNTERCLAIMS**

This matter is before the Court on the motion of plaintiff Synovus Bank, successor in interest to The National Bank of South Carolina ("Plaintiff") to dismiss the counterclaims asserted against Plaintiff by Paul D. Gunter and Brenda Gunter (collectively, "Defendants") in Defendants' Answer and Counterclaims filed on May 1, 2014 (the "Answer").

Based on the arguments of counsel and the pleadings properly before the Court and the Order Appointing Receiver¹ entered by the Court on August 26, 2014, and for the reasons set forth below, Plaintiff's Motion is granted.

PROCEDURAL HISTORY

On or about November 18, 2013, Plaintiff commenced this foreclosure action for the purpose of foreclosing its mortgages on two condominiums located in Horry County and

¹ Plaintiff filed a Motion for Appointment of Receiver on February 11, 2014. The Motion for Appointment of Receiver initially was resolved by the filing of a Consent Order setting forth the terms of the parties' agreement regarding the continued management and rental of the condominiums. Plaintiff filed an Emergency Renewed Motion for Appointment of Receiver (the "Receivership Motion") on August 8, 2014, based on Defendants' default under the terms of the Consent Order. See Order Granting Synovus's Emergency Motion for Appointment of Receiver, at pg. 2. The Receivership Motion was granted on August 26, 2014 by order appointing Shroff Hotel Management, Inc. as receiver for the subject properties.

described more fully below. On or about December 27, 2013, Defendants filed a Notice of Motion and Motion to Dismiss Complaint under Rule 12(b)(6), SCRCF, which was resolved by the filing of a Consent Order, pursuant to which Plaintiff agreed to amend its Complaint. Plaintiff filed its Amended Complaint on March 31, 2014. Defendants filed their Answer on May 1, 2014, asserting counterclaims against Plaintiff for “breach of contract-duty of good faith and fair dealing” and “dual tracking.” In the Answer, the only defense asserted by Defendants was the defense of unclean hands.

Plaintiff filed this Motion to dismiss on May 30. A hearing was scheduled on the Motion for September 3, 2014. Prior to the hearing, Plaintiff filed a memorandum in support of its Motion. Defendants did not file a response to the Motion, but counsel for Defendants appeared at the hearing and argued in opposition to the Motion. Counsel for Plaintiff also appeared at the hearing and argued in support of the Motion. At the conclusion of the hearing, the Motion was taken under advisement. The Court now makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. Facts Relative to Plaintiff’s Motion

The following facts appear within Plaintiff’s Amended Complaint and Defendants’ Answer, and the exhibits attached thereto, as well as Orders previously entered in this action:

- a. On or about February 27, 2009, for valuable consideration given, Defendants made, executed, and delivered to Plaintiff a promissory note in the original principal amount of Five Hundred Ninety Five Thousand and No/100 (\$595,000.00) Dollars. The Note was modified on or about September 25, 2009 (collectively, the “Note-1”). As consideration for the Note-1 and the debt evidenced thereby, on February 27, 2009,

Defendants made, executed, and delivered to Plaintiff a mortgage on real property located at 2709 South Ocean Boulevard, Unit 502, Myrtle Beach, South Carolina 29577 (the "Condo-1"), which is more fully described in the mortgage. The mortgage was recorded on March 5, 2009, in the Register of Deeds Office for Horry County in Book 5150 at Page 2349. The mortgage was modified on September 25, 2009, and the modification was recorded on March 15, 2010, in the Register of Deeds Office for Horry County in Book 5239 at Page 2710 (collectively, the "Mortgage-1").

- b. Also on February 27, 2009, for valuable consideration, Defendants made, executed, and delivered to Plaintiff a promissory note in the original principal amount of Six Hundred Eighty Thousand and No/100 (\$680,000.00) Dollars. The Note was modified on or about September 25, 2009 (collectively, the "Note-2"). As consideration for the Note-2 and the debt evidenced thereby, on February 27, 2009, Defendants made, executed, and delivered to Plaintiff a mortgage on the real property located at 2709 South Ocean Boulevard, Unit 501, Myrtle Beach, South Carolina 29577 (the "Condo-2"), which is more fully described in the mortgage. The mortgage was recorded on March 5, 2009, in the Register of Deeds Office for Horry County in Book 5150 at Page 2665. The Mortgage was modified on September 25, 2009, and the modification was recorded on March 15, 2010, in the Register of Deeds Office for Horry County in Book 5239 at Page 2707 (collectively with the Mortgage, the "Mortgage-2").
- c. Neither the Condo-1 nor the Condo-2 is, or has ever been, the principal residence of Defendants. Both properties are generating revenues, and are currently in the hands of a receiver appointed by this Court. Order Appointing Receiver at 3, 4.

STANDARD OF LAW

South Carolina Rule of Civil Procedure 12(b)(6) provides for dismissal of a complaint due to its “failure to state facts sufficient to constitute a cause of action.” “The question is whether, in the light most favorable to the [claimant], and with every doubt resolved in his behalf, the complaint states any valid claim for relief.” *Plyler*, 373 S.C. at 645, 647 S.E.2d at 192 (citing *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987)).

When deciding a motion to dismiss under Rule 12(b)(6), SCRCPP, the court should only consider the allegations set forth in the pleadings. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007) (citing *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)). If, in the court’s consideration of a motion to dismiss, “matters outside the pleadings are presented to and not excluded by the court, ‘the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 [of the South Carolina Rules of Civil Procedure].’” *Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 574, 593 S.E.2d 624, 627 (Ct. App. 2004) (quoting S.C.R. Civ. P. 12(b)).

CONCLUSIONS OF LAW

I. Defendants’ first counterclaim for “breach of contract-duty of good faith and fair dealing” fails to state a valid cause of action.

Defendants’ first counterclaim for “breach of contract-duty of good faith and fair dealing” fails to state a cause of action for which relief can be granted. South Carolina law is clear and unequivocal that there is no independent cause of action for breach of the covenant of good faith and fair dealing separate and apart from a breach of contract cause of action. *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 597 S.E.2d 881 (Ct. App. 2004); see also *In re Ducane Gas Grills, Inc.*, 320 B.R. 341, 354 (Bankr. D.S.C. 2004); *King v. Carolina First*

Bank, -- F. Supp.2d --, 2014 WL 2548357, at *6 (D.S.C. June 6, 2014); *Floyd v. Mgmt. Analysis & Utilization, Inc.*, 2014 WL 971937, at *4 (D.S.C. Mar. 12, 2014).

Defendants' Answer alleges that Plaintiff violated its duty of good faith and fair dealing under the Mortgages. Yet, Defendants' Answer fails to assert a claim for breach of contract, and fails to identify any specific provisions of the Mortgages that Plaintiff allegedly breached. The Answer merely asserts a cause of action for breach of the covenant of good faith and fair dealing. This, standing alone, cannot be asserted as an independent cause of action apart from a breach of contract action.

Assuming, for the sake of argument, that Defendants' Answer properly asserted a cause of action for breach of contract, it must still be dismissed pursuant to Rule 12(b)(6). In South Carolina, the elements for a cause of action for breach of contract are: "the existence of the contract, its breach, and the damages caused by such breach." *Southern Glass & Plastics Co., Inc. v. Kemper*, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012) (citing *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)). The Answer both fails to allege how Plaintiff failed to perform any of its obligations under the Mortgages, and also completely fails to state how Defendants were damaged, or the amount of Defendants' damages. Thus, the second and third elements required to assert a breach of contract are absent, and Defendants' first counterclaim fails.

Finally, in reviewing the Defendants' Answer, the Court notes that Defendants failed to plead set-off as an affirmative defense to the relief sought by Plaintiff. It is well established that affirmative defenses must be asserted in a responsive pleading, or they are waived. See Rule 8(c), SCRCPP ("In pleading to a preceding pleading, a party shall set forth affirmatively the defenses: . . . and any other matter constituting an avoidance or affirmative defense.") (emphasis

added); *Plyler v. Burns*, 373 S.C. 637, 648, 647 S.E.2d 188, 194 (2007) (“Generally, ‘a failure to plead an affirmative defense is deemed a waiver of the right to assert it.’”) (quoting *Whitehead v. State*, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002)); *Madren v. Bradford*, 378 S.C. 187, 192-93, 661 S.E.2d 390, 393 (Ct. App. 2008). The South Carolina Supreme Court has previously stated:

In a situation where a plaintiff supposedly owes a defendant monies, but nevertheless brings a suit in contract against the defendant, the proper defense to the action is a counterclaim or set-off. It is fundamental that these affirmative defenses must be pleaded. The defendant did not do so, and therefore, the trial judge properly disregarded any evidence concerning the alleged credits due.

Carolina Mechanical Contractors, Inc. v. Yeargin Construction Co., Inc., 261 S.C. 1, 12, 198 S.E.2d 224, 230 (1973) (internal citations omitted). See also *Hurst v. Sumter Co.*, 189 S.C. 376, 1 S.E.2d 238, 240 (1939) (“Under the settled law of this State, an essential preliminary to the allowance of an offset is that the offset claimed must be pleaded, and there must be some evidence tending to establish such plea. The answer of defendant did not plead . . . an offset, and it follows that it was error to allow same.”).

The same principle applies in this case. If, in fact, Defendants had a valid claim against Plaintiff for breach of contract/breach of the covenant of good faith and fair dealing, if proven, this claim would have provided a partial or complete defense to the claims asserted by Plaintiffs, and therefore, Defendants would be entitled to a set-off in the amount of their proven damages. To this end, in order to properly preserve their claim and their right to set-off, Defendants were required to raise the defense of set-off in their Answer.

While it is true that in a previous case, the South Carolina Supreme Court rejected the argument that a party’s set-off claim was waived as a result of the party’s failure to assert it as an affirmative defense in its responsive pleading, that case is distinguishable from the present case.

See *Broome v. Watts*, 319 S.C. 337, 342, 461 S.E.2d 46, 49 (1995). *Broome* involved a set-off against the amount of damages owed by automobile accident victims' underinsured motorist carrier of the amount paid by the underinsured motorist's insurance carrier. *Id.* The court looked at the applicable statute and found that because set-off was statutorily mandated, set-off did not have to be pled as an affirmative defense, stating that set-off "was not a matter properly triable to the jury, and therefore was not a matter constituting an affirmative defense which [the UIM insurance carrier] was under a duty to plead and prove." *Id.* In this case, Defendants are not relying on any statute in asserting their claims against Plaintiff, and in fact, there is no applicable statute requiring the Court to set off the damages incurred by Defendants, if proven, against the amount due and owing to Plaintiff.

Further, the amount of damages to be set off is an element that Defendants must sufficiently plead, in compliance with Rule 12(b)(6), SCRCP, and prove. Defendants' Answer is completely devoid of any allegations regarding how they have been damaged or the amount of their damages, other than to state that they have suffered damages as a result of Plaintiff's alleged conduct. *Broome* is distinguishable from this case, and Defendants were required both to plead the nature and the amount of their damages and to assert a defense of set-off in their Answer. Because they failed to do either, their claim for breach of contract fails and must be dismissed.

II. Defendants' second counterclaim for "dual tracking" has no legal merit.

Defendants' second counterclaim for "dual tracking" claims that Plaintiff's actions violated Consumer Financial Protection Bureau ("CFPB") regulations and South Carolina common law. However, this counterclaim also fails to state a cause of action and must be dismissed.

Defendants' "dual tracking" counterclaim provides absolutely no detail regarding which CFPB regulations or common laws were violated or how the regulations or law were violated. Defendants also have failed to allege how they have been damaged by Plaintiff's alleged improper conduct. Defendants' failure to properly plead this claim is fatal.

Further, and of equal importance, the CFPB regulations Defendants appear to rely on are wholly inapplicable in this case. Title 12 C.F.R. § 1024.39 through 1024.41 address mortgage servicing requirements for delinquent borrowers and set forth certain loss mitigation procedures that servicers must follow upon receipt of a loss mitigation application from a borrower. Specifically, 12 C.F.R. § 1024.41 prevents "dual tracking" by requiring a servicer who receives a loss mitigation application from a borrower within a certain time period prior to a foreclosure sale to evaluate the borrower's application before the foreclosure may proceed. However, these regulations are inapplicable in the present case because the regulations apply only to mortgage loans secured by property "that is a borrower's principal residence." 12 C.F.R. § 1024.30 ("The procedures set forth in §§ 1024.39 through 1024.41 of this subpart only apply to a mortgage loan that is secured by a property that is a borrower's principal residence."). It is undisputed that neither of the Condos is, or has ever been, the principal residence of Defendants. Thus, the CFPB regulations regarding "dual tracking" cannot, as a matter of law, apply in this case.

Finally, Defendants' second counterclaim alleges Plaintiff's undescribed conduct violates South Carolina common law. Yet, South Carolina has never recognized a cause of action for "dual tracking." Defendants' second counterclaim fails to state a cause of action and must be dismissed.

CONCLUSION

For the reasons set forth above, Plaintiff's Motion to dismiss Defendants' counterclaims is granted.

AND IT IS SO ORDERED.



The Honorable Larry B. Hyman, Jr.
Circuit Judge, Horry County

~~September~~
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September 3, 2014

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF HORRY
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2013CP2607677

Synovus Bank	National Bank of South Carolina	Paul D Gunter	Brenda Gunter
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PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Clerk of Court	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

Defendant's Motion to Rule 59 (E) – Denied
 Plaintiff's Motion for Order holding Defendant in Contempt – Denied
 Plaintiff's Motion for Order of Reference – Granted Atty Tara Nauful to submit a formal Order.

This order ends does not end the case.
 Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

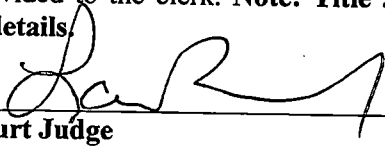
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	N/A

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge

may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.



Circuit Court Judge

2152

Judge Code

2/9/2015

Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

William Harold Short Jr. Adams And Reese LLP 1501 Main Street, 5Th Floor Columbia, SC 29201-5802

David Randolph Whitt PO Box 12125 Columbia, SC 29211-2125

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Melanie Huggins-Ward - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
