THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Judge

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Common Pleas Case No. 2011-CP-32-3461
Appellate Case No. 2014-001766

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Wells Fargo Bank, N.A.,.....Respondent,

v.

Gisela B. Moore, Thomas J. Moore a/k/a Tom J. Moore, and John Moore, Appellants.

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# FINAL BRIEF OF APPELLANTS

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## STATEMENT OF THE CASE

The Respondent, Wells Fargo Bank, N.A. (hereinafter "Wells Fargo"), filed this action on September 12, 2011, against the Appellants, Gisela B. Moore[1], Thomas J. Moore a/k/a Tom J. Moore, and John Moore (hereinafter "the Moores" or "Appellants") seeking foreclosure of a mortgage. (R. pp. 8-13.) The Moores answered, asserting several defenses and also bringing counterclaims for an accounting, for damages for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (hereinafter "the SCUTPA"), for damages for breach of contract, for damages on a third-party-beneficiary theory for Wells Fargo's breach of its agreement to participate in the Home Affordable Modification Program, and for damages for negligent misrepresentation. (R. pp. 15-24.) The Moores demanded a jury trial. (R. p. 15.)

In discovery, Wells Fargo responded to a request to admit that it "received a payment toward the loan subject of this case within a month before this foreclosure case was filed" by stating "Admitted. However, the payment was not sufficient to bring the borrowers' loan current, so the payment was returned to the borrowers." (R. p. 100.)

On April 25, 2013, Wells Fargo moved for an order of reference to the master-in-equity and for summary judgment. (R. pp. 28-54.) It supported its motion for summary judgment with an affidavit of Amanda Weatherly, a "Vice President Loan Documentation" for Wells Fargo. (R. p. 32.) Her affidavit also references this payment but states that "[t]he last payment applied to this loan was on August 25, 2011. The amount of the payment was $2,148.69." (R. p. 32.)

[1] Gisela Moore died while this action was pending, on May 8, 2012. (R. pp. 103, 111-12.)

In opposition to this motion, the Moores served affidavits of John Moore and Thomas J. Moore. (R. pp. 102-32.) Thomas Moore's affidavit stated that he got the loan subject of this case as a refinance and got it for himself, his mother (Gisela Moore), and his brother, John Moore "through a company called American Mortgage Network and a man named James Moore (no relation)." (R. p. 102.) Thomas Moore stated that "[t]he actions and words of James Moore and the lender led me to believe James Moore was working on behalf of and speaking for the lender making the loan." (R. p. 102.) His affidavit further provided that one of the reasons the loan was obtained was to keep the house in the family and that "our plan was always for my brother John to live in the house and make the mortgage payments. James Moore knew that throughout this process." (R. p. 102.)

Per Thomas Moore's affidavit, James Moore and the lender knew that John Moore, who was not an owner of the property at that time, was going to be who would live in the house and who would be making the mortgage payments. (R. p. 102.) This loan was set up as a loan with taxes and insurance payments escrowed into the monthly mortgage payments. (R. p. 102.) Thomas Moore's affidavit testimony was that even though the lender and James Moore knew that the property was not going to be owner-occupied, they still gave a projection of the upcoming property taxes based on the owner-occupied rate, which is lower than the tax rate for non-owner-occupied property. (R. p. 102.) Thomas Moore's affidavit states that if he had not been led to believe in this way that the property would be taxed at the owner-occupied rate and knew the truth instead, the Moores would have arranged for John to be deeded a title interest in the property. (R. p. 102.)

The property taxes increased to the non-owner-occupied rate for 2009. (R. pp. 103, 104.) John Moore had trouble making the mortgage payments, "which increased because of the escrow by about $150.00 to $200.00 a month, up to around $800.00 a month." (R. p. 103.) Thomas and Gisela Moore deeded a title interest in the property to John Moore, but that was apparently done too late for the property taxes to return to the owner-occupied rate for that year. (R. p. 103.)

In 2010, the taxes returned to the owner-occupied rate, but Wells Fargo continued to send statements for payments at the increased escrow rate. (R. pp. 103, 105-06.) Thomas Moore's affidavit states that:

> Thinking that this would pay off any escrow shortfall, I sent Wells Fargo a check for $1,675.91 (the amount shown for taxes on Wells Fargo's letter attached to this affidavit as Exhibit C). Wells Fargo took that money, but that did not change the payment amounts, and I did not ever see where they credited it to this account.

(R. p. 103.)

John Moore's affidavit states that he "fell behind in the mortgage payments because [he] could not make the payments at the increased amount because of the increased escrow portion of the payments." (R. p. 114.) It also provides that he "did, however, send in $675.00 payments for several months after the payment went up. Wells Fargo always accepted those payments." (R. p. 114.) He did that until he was injured and consequently lost income as a result of not being able to earn as much at his job; however, his affidavit notes that he continued to make payments as he could and that "Wells Fargo always accepted those payments and never returned them." (R. p. 114.) It also notes that on August 23, 2011, John Moore "made a payment of $2,148.69 to catch up the arrears on this account. Wells Fargo took the money, but,

instead of crediting the money, they brought this foreclosure case." (R. p. 114.) Attached to his affidavit is a printout of his banking activity indicating that Wells Fargo did not refund the $2,148.69 as it claimed in response to the Moore's requests to admit. (R. pp. 115-31.)

The circuit court heard argument on Wells Fargo's motion for summary judgment on May 13, 2013. (R. p. 62.) At that hearing, Wells Fargo's counsel acknowledged that John and Thomas Moore's affidavits "do create an issue of fact as to the question of whether or not the loan is in default." (R. p. 66 ln. 9-13.)

The circuit court issued an order that stated the following:

> With regard to the Plaintiff's action to foreclose the mortgage and Defendants' counterclaim for an accounting, I find that there is a genuine issue of material fact as to whether the payment for $2,148.69 that Plaintiff received on August 25, 2011 was sufficient to bring the loan current. Therefore, to the extent that Plaintiff seeks summary judgment on the Complaint and on the counterclaim for an accounting, the Motion is DENIED.
>
> Regarding the counterclaims for unfair trade practices and negligent misrepresentation, based on the Affidavit of Thomas Moore, it appears that Defendants might be able to assert such claims against American Home Mortgage Network, Inc. However, there is nothing in the affidavits filed by Defendants that supports a claim for unfair trade practices or negligent misrepresentation against Plaintiff, so summary judgment on those causes of action is GRANTED.
>
> . . .
>
> With regard to the counterclaim for breach of contract, Defendants contend that Plaintiff accepted payments for less than the full amount of the payment and waived the right to accelerate the balance due on the loan. Even if this is true, this does not give rise to a legal counterclaim for which Defendants can recover

> damages. At most, it is a defense to the foreclosure action. Therefore summary judgment on the counterclaim for breach of contract is GRANTED.
>
> The only remaining counterclaim is for an accounting. It is well settled that an action for an accounting is an equitable claim on which there is no right to a jury trial. *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 673 S.E.2d 448 (2009). Therefore, Plaintiff's Motion for Order of Reference is GRANTED.

(R. pp. 3-4.)

The order also granted summary judgment on the third-party-beneficiary claim as to breach of Wells Fargo's agreement with the Treasury Department to participate in the Home Affordable Modification Program.[2]

The Moores moved for reconsideration of this order. (R. pp. 55-61.) A hearing on that motion was held on December 9, 2013. (R. pp. 85-99.) The court denied the Moores' motion to reconsider. (R. pp. 6-7.)

This appeal followed.

## STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). That standard is that "summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further

[2] While a South Carolina appellate court may ultimately decide that a mortgage servicer's breach of its agreement to participate in the Home Affordable Modification Program does provide a borrower with a claim against the servicer on a third-party-beneficiary theory, the Moores have chosen not to challenge the circuit court's ruling on that issue in this appeal.

inquiry into the facts of the case is not desirable to clarify the application of the law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). If "the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]" Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 29 (S.C. 2008).

"When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues." Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008).

In 2009, the South Carolina Supreme Court clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802-3 (2009). In Hancock, the Court held that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Id. More than a scintilla is required only in cases requiring heightened burdens of proof or applying

federal law. Id. Accordingly, when the ordinary burden of proof is applicable, only a scintilla of evidence is required to withstand summary judgment. Id.

It is only "*when a motion for summary judgment is made and supported as provided in [Rule 56]*" that the non-movant is required to meet the motion with factual material that shows there is a genuine issue for trial. Rule 56(e), SCRCP (emphasis added).

"Whether a party is entitled to a jury trial is a question of law." Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). "An appellate court may decide questions of law with no particular deference to the [circuit] court." Id. at 15.

## ARGUMENT

### I. The lower court conflated the potential for offset with the idea that a counterclaim that results in an offset constitutes only a defense.

The circuit court seemed to conflate the question of whether the effect of the Moores' success on their counterclaims may result only in an offset against Wells Fargo's claim with a different question, that of whether the counterclaims were actually only defenses. (R. pp. 3-4, p. 83 ln. 7-8.) This equated the proverbial apples and oranges. *Whether something is a counterclaim* is a different inquiry from *what the effect of success on the claim would be.*

As the Moores' counsel noted to the circuit court,

> Even if – and that's just an if – but even if the ultimate result of the claim results in an offset against the debt, that doesn't mean that because that's going to happen that the Moores – that there aren't some facts here that can show that the Moores are entitled to a verdict on a breach-of-contract claim.

(R. p. 97 ln. 18-25.)

That argument, rejected by the circuit court, is consistent with South Carolina law. A look at cases from the mid-20th century on through more recent cases reveals this.

In Bank of Commerce of Charlotte v. Waters, 215 S.C. 543, 56 S.E.2d 350, 354 (1949), the South Carolina Supreme Court quoted authority calling it "well settled that in action by an assignee, a claim in favor of defendant against assignor can be allowed as a set-off, *counterclaim* or reconvention, only to the extent of the claim sued upon[.]" (Emphasis added). Though the case noted that, as against an assignee, a defendant could not achieve relief above that which would essentially cancel the plaintiff's claim against him, it also continues to refer to the defendant's counterclaim as a *counterclaim*; that the relief that might be achieved on it was limited to an offset did not turn the counterclaim into a *mere* defense. Id. The counterclaim retains its nature as a counterclaim. See id.

In 1973, the Court noted that "[i]n 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 a set-off." Carolina Mechanical Contractors, Inc. v. Yeargin Const. Co., Inc., 261 S.C. 1, 12, 198 S.E.2d 224, 230 (1973). That the counterclaim also has a defensive function vis-à-vis the plaintiff's claim does not make it stop being a counterclaim. See id.

After the adoption of the Rules of Civil Procedure in South Carolina, older perceived distinctions between an equitable set-off and a counterclaim seem to have become more blurred and are perhaps now discarded. In 1997, the Supreme Court,

quoting 20 Am.Jur.2d Counterclaim, Recoupment, & Setoff § 88 (1995), observed as follows:

> [T]he general rule concerning the effect of a setoff is that
>
> > a setoff . . . becomes part of a single controversy between the parties, requiring only one verdict and one judgment according to the facts. Generally, if an established setoff or counterclaim is less than the plaintiff's demand, the plaintiff has judgment for the residue only.

Brasington Tile Co. v. Worley, 327 S.C. 280, 286, 491 S.E.2d 244, 247 (1997). The important thing, for purposes of this appeal, about this passage is that the counterclaim is not treated as though it stops being a counterclaim simply because its effect may be only to reduce the amount of the judgment in favor of the plaintiff. Id.

In 2012, this court noted

> that an award for setoff may exceed the underlying claim. This is correct under Rule 13, SCRCP, which states "[a] counterclaim *may or may not* diminish or defeat the recovery sought by the opposing party. It *may* claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party." (emphasis added [by Court of Appeals]).

Wachovia Bank Nat'l. Ass'n. v. Beane, 397 S.C. 612, 619, 725 S.E.2d 715, 718 (Ct. App. 2012). Consistently with Rule 13, SCRCP, and this court's opinion in Beane, a counterclaim may diminish or defeat the plaintiff's recovery or it may not; however, regardless of whether success on the counterclaim ultimately produces only a setoff or produces a net judgment in favor of the defendant, it is still a counterclaim. Id.

The very definitions of *defense* and *counterclaim* in Black's Law Dictionary 153, 186 (2d pocket ed. 2001) (unnecessary internal punctuation, abbreviation, and

pronunciation marks omitted), given below, bear out the idea that, though one of the functions of a counterclaim is often to serve as an offset to the plaintiff's claim, a counterclaim remains a counterclaim despite its potential to produce offset:

> Defense. A defendant's stated reason why the plaintiff or prosecutor has no valid case; esp., a defendant's answer, denial, or plea.
>
> Counterclaim. A claim for relief asserted against an opposing party after an original claim has been made; esp., a defendant's claim in opposition to or as a setoff against the plaintiff's claim.

Simply because the Moores' claims may produce an offset against Wells Fargo's claim does not mean that they are somehow not counterclaims and constitute only defenses. Even if the Moores' claims could *only* produce an offset against Wells Fargo's claims, they would still be counterclaims. The circuit court's ruling to the contrary is in opposition to South Carolina law.

The circuit court committed reversible error, and its decision to grant summary judgment should be reversed.

Further, it is far from certain that the Moores' success on their counterclaims could result only in an offset against Wells Fargo's claim. As noted by the Moores' counsel, the record does not establish that Wells Fargo necessarily actually has a claim against the Moores, since the record does not establish that Wells Fargo owns the note and mortgage. (R. p. 78 ln. 12 through p. 79 ln. 9.)

"A mortgage and a note are separate securities for the same debt, and a mortgagee who *has a note and a mortgage* to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action." U.S. Bank Natl. Trust Assn. v. Bell, 385 S.C. 364, 684 S.E.2d 199, 204 (Ct. App. 2009) (emphasis added).

A plaintiff in a foreclosure action has the burden of establishing the existence of a debt owed to it, its ownership of the mortgage securing that debt, and the debtor's default of the debt obligation. See id. at 205.

In a mortgage originated in the Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS") system, as this one was, (R. pp. 40, 42), ownership of the note and ownership of the mortgage – things we usually think of as going hand-in-hand – are vested in different entities from the outset of the loan. Mortgage Electronic Registration Systems, Inc. v. Neb. Dept. of Banking & Finance, 704 N.W.2d 784, 270 Neb. 529 (2005) (generally describing how the MERS system operates).

> MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members' interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members.
>
> . . .
>
> Mortgage lenders hire MERS to act as their nominee for mortgages, which allows the lenders to trade the mortgage note and servicing rights on the market without recording subsequent trades with the various register of deeds throughout [the country].
>
> To execute a MERS Mortgage, the borrower conveys the mortgage to MERS, who is acting as a contractual nominee. MERS becomes the recorded [mortgagee],

> however, the lender retains the note and servicing right. The lender can then sell that note and servicing rights on the market and MERS records each transaction electronically on its files.

Id. at 530, 533.

Here, ownership of the note and mortgage did not go together; they were split at the outset of the loan, with the mortgagee being one entity (MERS) and the noteholder being another. (R. pp. 35, 40, 42.) As a threshold matter, Wells Fargo would have needed to establish that both the note (which was given to American Mortgage Network, Inc.) and the mortgage (which was given to MERS) had been transferred to it before the circuit court could even begin to consider an argument premised upon Wells Fargo having a claim against the Moores. Wells Fargo never even adduced evidence of such transfers. (R. pp. 30-54.)

It was reversible error for the circuit court to grant summary judgment on this basis.

## II. The lower court erred in ruling that, as a matter of law, counterclaims arising from the conduct of the original lender could not lie against Wells Fargo as an assignee.

While the circuit court acknowledged that the Moores could assert their negligent misrepresentation and unfair trade practices claims against American Home Mortgage Network, Inc., the court granted summary judgment on those claims in favor of Wells Fargo on the theory that those claims would not lie against Wells Fargo, who claims to own the note and mortgage as an assignee thereof. (R. p. 3.) This is not consistent with South Carolina law. An assignee of a note and mortgage ordinarily takes the note and mortgage subject to whatever claims and defenses lie against the original lender, as this court has held. Rosemond v. Campbell, 288 S.C.

516, 343 S.E.2d 641 (Ct. App. 1986). The pertinent language of Rosemond is as follows:

> At common law, an assignee's rights can be no greater than those of his assignor. Dixie Wood Preserving Co. v. Albert Gersten & Associates, 244 S.C. 57, 135 S.E.2d 368 (1964). Consequently, the assignee of a debt takes the obligation subject to all claims and defenses the obligor may have against the assignor. Id. However, absent an agreement to the contrary, the common law assignee takes only the benefits, not the burdens of the assigned obligation. Koppers Company v. Kaiser Aluminum and Chemical Corp., 9 N.C. App. 118, 175 S.E.2d 761 (1970). Thus, as against the assignee, the obligor can only assert a claim defensively when the assignee seeks to enforce the obligation; he has no common law right to sue the assignee affirmatively on a claim against the assignor arising from the underlying obligation. Langel v. Betz, 250 N.Y. 159, 164 N.E. 890 (1928); Pargman v. Maguth, 2 N.J.Super. 33, 64 A.2d 456 (1949).

288 S.C. at 522-23.

The circuit court ruled that "it appears that Defendants might be able to assert such claims [for negligent misrepresentation and violation of the SCUTPA] against American Home Mortgage Network, Inc." (R. p. 3.) Since the Moores could assert these claims against the original lender, American Home Mortgage Network, Inc., they can, from a defensive posture in this action, assert them against Wells Fargo. (R. p. 88 ln. 21 through p. 89 ln. 3, p. 96 ln. 25 through p. 97 ln. 4.) That is what they did here. Under the law, as noted in Rosemond, the Moores may recover on these claims against an assignee of the note and mortgage, which is what Wells Fargo says it is, up to the amount found to be due on the assignee's claim. 288 S.C. at 522-23.

It was reversible error for the circuit court to grant summary judgment on these claims on the basis that they could not be asserted against Wells Fargo, because they can.

## III. Factual material in the record, including some recognized in the court's order, demonstrates the existence of genuine issues of material fact that precluded summary judgment.

Even the circuit court acknowledged the existence of a factual issue in the record that made summary judgment breach of contract claim improper, though the circuit court did not recognize that this factual issue had that effect. (R. p. 3.) The court found "that there is a genuine issue of material fact as to whether the payment for $2,148.69 that [Wells Fargo] received on August 25, 2011 was sufficient to bring the loan current." (R. p. 3.)

To recover for breach of contract, a claimant must prove that there was a binding contract entered into by the parties, the other party breached the contract, and damage as a proximate result. See Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 124 S.E.2d 602, 610 (1962). Here, there is a genuine issue of material fact as to all of that.

Notes and mortgages are contractual documents. See Saro Investments v. Ocean Holiday Partnership, 314 S.C. 116, 122, 441 S.E.2d 835 (Ct. App. 1994) (construing mortgage transaction in accordance with "settled principles of contract law"). Attached as Exhibits A and B to the affidavit of Amanda Weatherly that Wells Fargo served in support of its summary judgment motion are copies of the note and mortgage documents at issue in this case. (R. pp. 35-54.) The mortgage, in paragraph 22, provides as follows:

> Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18[3] unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. *If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding.* Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorney's fees and costs of title evidence, all of which shall be additional sums secured by this Security Instrument.

(R. p. 52 (emphasis added).)

Only if the default is not cured by the date given in the pre-acceleration notice does the right to bring a foreclosure action accrue to the mortgagee under this mortgage. (R. p. 52.) If "there is a genuine issue of material fact as to whether the payment for $2,148.69 that [Wells Fargo] received on August 25, 2011 was sufficient to bring the loan current[,]" then there is a genuine issue of material fact about whether Wells Fargo followed the process required by the mortgage in order for acceleration of the debt to take place and whether Wells Fargo breached the mortgage

[3] Section 18 of the mortgage is not at issue in this case.

contract by bringing this foreclosure action when the debt had not been accelerated and no right to bring the action existed. (R. pp. 3, 52 p. 74 ln. 23-25, p. 97 ln. 9-13); see Southern Atlantic Financial Services, Inc. v. Middleton, 356 S.C. 444, 448, 449 n. 4, 590 S.E.2d 27 (2003) (where pre-acceleration notice required by contract, giving of notice per contract is precondition to acceleration). It appears impossible for Wells Fargo *not* to have breached the contractual relationship between the parties if "the payment for $2,148.69 that [Wells Fargo] received on August 25, 2011 was sufficient to bring the loan current[,]" since this action was filed on September 12, 2011 – less than 30 days from the date that payment was made. (R. pp. 3, 8-14.)

Further, Wells Fargo put nothing before the court about when or even whether any pre-acceleration notice was given. Under Rule 56, SCRCP, "the party seeking summary judgment has the initial responsibility of demonstrating the absence of any genuine issue of material fact." Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545-46 (1991). "The party seeking summary judgment has the burden of clearly establishing by the record properly before the court the absence of a triable issue of fact." Owens v. Magill, 308 S.C. 556, 562, 419 S.E.2d 786, 790 (1992). "A party who fails to show the absence of genuine issue of material fact is not entitled to summary judgment even though his adversary does not come forward with opposing materials." Standard Fire v. Marine Contracting, 301 S.C. 418, 421, 392 S.E.2d 460, 462 (1990). Here, the Moores *did* come forward with opposing materials.

The circuit court misapprehended the Moores' grounds for their breach of contract claim, limiting it to Wells Fargo's acceptance of payments for less than the

full amount due and waiver of acceleration. (R. pp. 3, 97 ln. 5-15.) These are aspects of the breach of contract claim, since acceptance of payments less than the amount due can amount to a waiver of the right to accelerate the debt and bring a foreclosure action. See Rakestraw v. Dozier Assocs., Inc., 285 S.C. 358, 329 S.E.2d 437 (1985). Another aspect of this claim, though, is Wells Fargo's misapplication (or non-application) of payments made by John and Thomas Moore. (R. p. 75 ln. 23-24, p. 89 ln. 7-20.) This misapplication or non-application was in violation of the duties of the parties' contract and necessarily resulted in damage to the Moores because these amounts were not properly applied to pay down principal and interest, resulting in a larger debt. (R. p. 57.) It was error for the circuit court to grant summary judgment on this claim.

The record also showed the existence of a genuine issue of material fact as to the SCUTPA claim. To recover under the SCUTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered damages as a result. Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006). The South Carolina Supreme Court has stated that demonstrating the potential for an unfair trade practice's repetition is a demonstration of the requisite "adverse effect on the public interest." Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21 (1998). The Court has "specifically declined" to hold that such potential for repetition must be demonstrated by any particular means and has stated that "each case must be evaluated on its own merits." Id.

Wells Fargo's arguments to the circuit court centered around whether there was potential for repetition here. There is at least some evidence that Wells Fargo did repeat behavior of simply taking and not applying payments to this mortgage loan. Thomas Moore's affidavit states that:

> Thinking that this would pay off any escrow shortfall, I sent Wells Fargo a check for $1,675.91 (the amount shown for taxes on Wells Fargo's letter attached to this affidavit as Exhibit C). Wells Fargo took that money, but that did not change the payment amounts, and I did not ever see where they credited it to this account.

(R. p. 103.)

Wells Fargo's response to the Moores' request to admit that it "received a payment toward the loan subject of this case within a month before this foreclosure case was filed" states "Admitted. However, the payment was not sufficient to bring the borrowers' loan current, so the payment was returned to the borrowers." (R. p. 100.) This, viewed in the light most favorable to the Moores, is an acknowledgement that Wells Fargo did not credit the payment toward the loan balance. John Moore's affidavit states that on August 23, 2011, he "made a payment of $2,148.69 to catch up the arrears on this account. Wells Fargo took the money, but, instead of crediting the money, they brought this foreclosure case." (R. p. 114.) Attached to his affidavit is a printout of his banking activity that shows Wells Fargo did not refund the $2,148.69 as it claimed in response to the Moore's requests to admit. (R. pp. 115-31.)

This showed a genuine issue of material fact about whether the unfair practice of taking borrowers' payments but not applying them to their loan balances had the potential for repetition because, in the light most favorable to the Moores, it showed a genuine issue of material fact about whether this practice *had been* repeated.

It was error for the court to grant summary judgment on the SCUTPA claim.

## IV. The case should not have been referred to the master-in-equity.

Since the circuit court granted summary judgment on all the at-law claims in this case, it did not reach the issue of whether the Moores pled compulsory counterclaims entitling them to a jury trial. (R. pp. 1-5.) They did.

This action is not and was not properly referable. The at-law claims in this action, which are compulsory counterclaims on which a jury trial has been demanded, cannot lawfully be referred to the master-in-equity. Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 755 S.E.2d 437 (2014); Johnson v. S.C. Natl. Bank, 292 S.C. 51, 54-56, 354 S.E.2d 895, 897 (1987). This court has said that "a defendant in an equity action, such as a mortgage foreclosure, has a right to a jury trial on a counterclaim that is legal and compulsory in character. . . . A counterclaim is compulsory if the counterclaim arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim. Two tests a court may use in determining whether a claim arises out of the same transaction or occurrence are whether the issues of fact and law raised by the claim and counterclaim are largely the same and whether there is any logical relation between the claim and the counterclaim. A counterclaim is compulsory if the question posed by either test is answered affirmatively." N.C. Fed. Sav. & Loan Assn. v. DAV Corp., 294 S.C. 27, 30-31, 362 S.E.2d 308, 310 (Ct. App. 1987) (internal citations and quotation marks omitted). A test for determining if a counterclaim is compulsory is whether there is a "logical relationship" between the claim and the counterclaim. Mullinax v. Bates, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995). In N.C. Fed. Sav. & Loan Ass'n v.

DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), our Supreme Court adopted the "logical relationship" test and held DAV's counterclaim was compulsory because "there [was] a logical relationship between the enforceability of the note which [was] the subject of the foreclosure action and the validity of the purported oral agreement which, if performed, would have avoided default on the note by the joint venture."

Wells Fargo argued that the case of Wells Fargo Bank, N.A. v. Smith, 398 S.C. 487, 730 S.E.2d 328 (Ct. App. 2012), supported its position that the Moores' at-law counterclaims were not compulsory. By order on June 11, 2014, the Supreme Court of South Carolina directed this court to depublish its opinion in that case; accordingly, Smith no longer has precedential value. Wells Fargo Bank, N.A. v. Smith, App. Case No. 2012-212901 (S.C. Sup. Ct. Order dated June 11, 2014). Here, however, even under a Wells Fargo v. Smith analysis in which a counterclaim is not compulsory unless success on the counterclaim would mean that the plaintiff *cannot* prevail on its foreclosure claim, the Moores have asserted a compulsory breach of contract counterclaim and, since the SCUTPA claim has a basis in the same underlying facts, a compulsory SCUTPA claim.

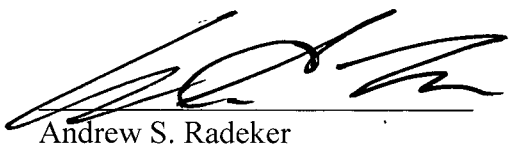
The circuit court found "that there is a genuine issue of material fact as to whether the payment for $2,148.69 that [Wells Fargo] received on August 25, 2011 was sufficient to bring the loan current." (R. p. 3.) If the loan was current, there was no default and Wells Fargo cannot prevail on its foreclosure claim.

The Moores pled compulsory counterclaims in this case, and the master's reference of this action to the master-in-equity was reversible error.

## CONCLUSION

This court should reverse the circuit court's grant of summary judgment on the Moores' at-law counterclaims and remand the case for trial. This court should reverse the circuit court's decision to refer the case to the master-in-equity or, in the alternative, direct that the issue of whether the counterclaims are compulsory be heard on remand.

Respectfully submitted,



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June 16, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Judge

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Common Pleas Case No. 2011-CP-32-3461
Appellate Case No. 2014-001766

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Wells Fargo Bank, N.A.,.....Respondent,

v.

Gisela B. Moore, Thomas J. Moore a/k/a Tom J. Moore, and John Moore, Appellants.

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CERTIFICATE OF COUNSEL

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I certify that the foregoing brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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PROOF OF SERVICE

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I certify that I served the final brief of appellants and final reply brief of appellants by depositing a copy of each of them on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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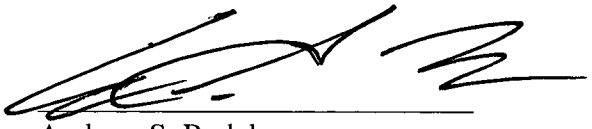

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