THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge

Case No. 2009-CP-07-03201

Appellate Case No. 2014-001296

National Bank of South Carolina, ... Respondent,

v.

Thaddeus F. Segars; KCS Investments, LLC; Singleton Place Homeowners Association Inc.; and SunTrust Mortgage Inc., ... Defendants,

Of Whom Thaddeus F. Segars is the, ... Appellant.

FINAL BRIEF OF RESPONDENT NATIONAL BANK OF SOUTH CAROLINA

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COUNTER-STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT PROPERLY DETERMINE THAT THE STATUTE OF LIMITATIONS HAD EXPIRED BEFORE SEGARS ASSERTED HIS COUNTERCLAIMS AGAINST NBSC?

II. DID SEGARS' COUNTERCLAIMS REMAIN TIME-BARRED DESPITE HIS NEW ARGUMENTS REGARDING TOLLING OR WAIVER OF THE STATUTE OF LIMITATIONS, AND, EVEN IF THEY WERE NOT TIME-BARRED, WERE SEGARS' NEW ARGUMENTS PRESERVED FOR APPELLATE REVIEW?

III. IS THE CIRCUIT COURT'S RULING IN FAVOR OF NBSC SUPPORTED BY ADDITIONAL SUSTAINING GROUNDS, INCLUDING THAT SEGARS CANNOT ESTABLISH THE ELEMENTS OF HIS COUNTERCLAIMS AS A MATTER OF LAW?

COUNTER-STATEMENT OF THE CASE

This appeal arises out of a case brought by Respondent National Bank of South Carolina ("NBSC") against Appellant Thaddeus F. Segars ("Segars") based on Segars' default on a loan that he entered into with NBSC on June 9, 2004. (Consumer Loan Note/Security Agreement (the "Loan"); R.p. 757.) Segars entered into the Loan for the purpose of purchasing Lot 2 Singleton Beach Place Extension (the "Property"), which is located on Hilton Head Island, South Carolina. (Deposition of Thaddeus F. Segars dated August 4, 2010 ("Segars Dep. I") at 26:9-11; 27:4-9; R.pp. 116:9-11; 117:4-9.) The Property is part of a ten lot subdivision known as Singleton Beach Place Extension (the "Subdivision"). (Segars Dep. I at 11:20-24; R.p. 101:20-24.)

After Segars defaulted on the Loan, NBSC filed and served a Lis Pendens, Summons and Complaint on Segars on July 6, 2009. (NBSC's Summons and Compl. and Lis Pendens; R.pp. 28-53.) Thereafter, NBSC served an Amended Summons and Complaint on August 14, 2009. (NBSC's Am. Summons and Compl.; R.pp. 54-74.)

The Amended Complaint sought foreclosure of the mortgage on the Property. *Id.* Segars served an Answer and Counterclaims on or about September 24, 2009.[1] (Segars' Ans. and Countercl.; R.pp.75-82.) Segars alleged the following counterclaims against NBSC: (i) negligent misrepresentation; (ii) breach of fiduciary duties; and (iii) breach of contract accompanied by a fraudulent act. (*Id.* at pp. 2-7; R.pp. 76-81.) In his Answer and Counterclaim, Segars did not assert affirmative defenses to NBSC's Complaint, and he alleged that he had "suffered damages" in connection with each counterclaim against NBSC. (*Id.* at ¶¶18, 26, 33, Wherefore clause; R.pp. 78, 79, 81.)

In his counterclaims, Segars alleged that the appraiser hired by NBSC to perform an appraisal for the bank erred in his valuation of the Property in that, based upon the applicable baseline[2] and other set back requirements and restrictions, the true value of the Property was a fraction of the estimate given by the appraiser and the price Segars had agreed to pay for the Property. (*Id.* at ¶15; R.p. 77.) Segars further alleged that by transmitting the results of the Appraisal to him, either expressly or by implication, amounted to a negligent misrepresentation by NBSC made to induce him to accept the Loan and borrow money from NBSC. (*Id.* at ¶¶16-18; R.pp. 77-78.)

By Order dated December 16, 2010, the Honorable Carmen T. Mullen granted NBSC summary judgment on its claims and referred the foreclosure action to the Master in Equity while reserving Segars' counterclaims for further hearing. (Judgment

---

[1] KCS Investments, LLC ("KCS"), another defendant to the foreclosure action by virtue of its ownership of the Property, joined Segars in the Answer and Counterclaims, which was subsequently filed on September 28, 2009.

[2] The baseline is established by the Office of Ocean and Coastal Resource Management pursuant to the Coastal Zone Management Act, S.C. Code Ann. § 48-39-280, generally prohibiting construction seaward of the line.

of Foreclosure and Sale dated December 16, 2010 at p. 1; R.p. 21.) This Order also granted NBSC's motion to amend its Reply to Segars' Counterclaims to allege the defense that the claims were barred by the applicable statute of limitation (*id.*), which NBSC filed on February 1, 2011. (NBSC's Am. and Restated Ans. and Reply to Countercl.; R.pp. 83-88.) On March 1, 2011, the Master in Equity issued an Order for Deficiency Judgment to NBSC against Segars in the amount of $263,159.58 (the "Deficiency Judgment"). (Deficiency Judgment; R.p. 798-799.) Segars did not appeal the Deficiency Judgment.

NBSC filed its motion for summary judgment on Segars' counterclaims on June 18, 2012, and Segars opposed the motion and filed his own motion for summary judgment on August 16, 2012. (NBSC's Notice of Mot. and Pl.'s Mot. for Summ. J.; R.pp. 628-647; and Segars' Notice of Mot. and Def.'s Mot. for Summ. J.; R.pp. 659-660.) These motions were heard on March 14, 2013. (Hr'g Tr. dated March 14, 2013 ("MSJ Hr'g Tr."); R.pp. 457-590.) During the hearing, Segars' attorney conceded the claims for breach of fiduciary duty and breach of contract accompanied by a fraudulent act. (*Id.* at 82:13-16; 111:18-22; 129:10-15; R.pp. 538:13-16; 567:18-22; 585:10-15.)

The parties subsequently engaged in an unsuccessful mediation, and on November 18, 2013, the Court held a status conference via telephone during which the parties agreed to submit supplemental briefs in December 2013.[3] (*See* MSJ Order at p. 1; R.p.13.) Segars submitted a brief on December 13, 2013. (Email from Finn Law

[3] The Order states that the parties would submit supplemental briefing by December 6, 2012. The year is clearly a typographical error as the letter is dated 2013, and former counsel for NBSC has advised that he believes the date given by the Court during the status conference was December 16, 2013 (and, in fact, both parties submitted their supplemental briefs by that date).

Firm to Honorable Marvin H. Dukes, III dated December 13, 2013 attaching Supplemental Brief; R.pp. 773-779; and Def.s' Brief in Supp. of their Mot. for Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J. dated March 13, 2013; R.pp. 661-669.)[4] NBSC submitted a supplemental brief on December 12, 2013, which was filed on December 16, 2013. (Pl.'s Supplemental Mem. in Supp. of Mot. for Summ. J.; R.pp. 648-658.) Thereafter, the Honorable Marvin H. Dukes, III sent an email to NBSC's counsel requesting a proposed order granting summary judgment to NBSC. By letter dated January 13, 2014, Segars submitted a letter to the Court in response to the Court's email wherein he attempted to raise new arguments related to compulsory counterclaims and recoupment. (Letter from Thomas J. Finn to Honorable Marvin H. Dukes, III dated January 13, 2014 at 1; R.pp. 782-783.) NBSC then submitted a letter in response to Finn's letter on January 15, 2014 and objected to the Court considering the additional untimely briefing submitted by Segars' counsel without permission from the Court. (Letter from Jennie S. Cerrati to Honorable Marvin H. Dukes, III dated January 15, 2014 at 1; R.pp. 784-788.) By separate letter that same day, NBSC submitted the requested proposed Order. (Letter from Jennie S. Cerrati to Honorable Marvin H. Dukes, III regarding proposed Order dated January 15, 2014 at 1; R.pp. 789-791.) One week later, the Court granted NBSC's motion for summary judgment on the basis that Segars failed to assert his claims within the three year statute of limitations. (MSJ Order at 1-6; R.pp. 13-18.)[5] The Court appears to have properly

[4] Segars appears to have resubmitted his earlier briefing of March 13, 2013 as his supplemental brief.

[5] The order was actually entered on February 11, 2014.

excluded the untimely raised claims as it does not reference the new arguments in the MSJ Order. *Id.*

Segars filed a motion for reconsideration on February 27, 2014. (Segars' Notice of Mot. and Mot. to Recons.; R.pp. 718-719.) The Motion mentioned no specific grounds as to why the Court should reconsider its ruling. *Id.* The Court heard this motion on May 14, 2014. (Hr'g Tr. dated May 14, 2014 ("MTR Hr'g Tr."); R.pp. 591-622.) At the hearing, Segars' attorney confirmed that the only remaining claim at issue was negligent misrepresentation. (*Id.* at 14:8-13; R.p. 604:9-13 (wherein Segars' attorney stated: "I think we had three causes of action. . . . . I think we might have dispensed with the other two and might have only been left with negligent misrepresentation in the end.")) He also attempted to argue the new grounds regarding tolling or waiver of the statute of limitations. (*Id.* at 9:19-15:8, R.pp. 599:19-605:8.) The Court denied Segars' motion for reconsideration the next day. (Form 4 Judgment in a Civil Case Order denying Mot. to Recons. dated May 15, 2014; R.pp. 19-20.) This appeal followed.

FACTS

A. Background

1. The Singleton Beach Place Extension Subdivision

Segars, who was a real estate agent with over 23 years of experience (Segars Dep. I. at 51:3-4; R.p. 141:3-4), was well acquainted with the Singleton Beach Place Extension Subdivision before he entered into the Loan with NBSC. In 2001, he entered into a contract to purchase three ocean front lots (Lots 1, 2 and 3), which would eventually be combined with other properties to create the Subdivision consisting of ten

lots. (Segars Dep. I at 12:6-19; 16:15-17:19; R.pp. 102:6-19; 106:15-107:19.) However, rather than close on the purchase of the three lots, Segars assigned his contract to Richardson Street Partners ("RSP") and Paul Gaughf ("Gaughf") who closed and took title to these lots. (Segars Dep. I at 12:17-22; R.p. 102:17-22.) RSP later partnered with J.J. Development to develop the Subdivision.

At that time, the location of the baseline set by the South Carolina Department of Health & Environmental Control's ("DHEC") Office of Ocean and Coastal Resource Management ("OCRM") limited the buildable space of the lots in the Subdivision. (Segars Dep. I at 9:13-10:7, R. pp. 99:13-100:7). Thus, RSP and J.J. Development proceeded to determine if the OCRM baseline could be moved seaward to increase the building envelope. (Segars Dep. I at 15:3-17:19; R.p. 105:3-107:19.) Segars testified that he was familiar with the current location of the OCRM baseline, the negative impact of its location on the buildable area of the lots and thus the value of the lots, and the developers' desire to move the location seaward. (Segars Dep. I at 9:13-10:16; 16:2-6; 16:15-17:21; R.pp. 99:13-100:16; 106:2-6; 106:15-107:21.) He further testified that the owner of J.J. Development advised him that OCRM and the Town of Hilton Head Island had subsequently agreed to relocate the OCRM baseline seaward of the existing line. (Segars Dep. I at 15:6-16:13; R.pp. 105:6-106:13.)

2. The Surveys Showing the Location of the OCRM Baseline for all Lots within the Subdivision

A survey of the Subdivision was prepared on November 12, 2002 and recorded in Beaufort County on January 29, 2003 (the "First Survey"). (Boundary Reconfiguration of Singleton Beach Place Extension Survey dated November 12, 2002;

R.p. 728; and Segars Dep. I at 18:12-19:16; R.pp. 108:12-109:16.) It depicts two baselines -- one labeled "Beach Management Act Baseline" and the other labeled "Future Beach Management Act Baseline." (First Survey; R.p. 728.) Segars, who in 2003 was acting as the real estate agent for RSP, testified that he reviewed the survey with RSP's attorney shortly after the First Survey was recorded. (Segars Dep. I at 19:17-20:8; R.pp.109:17-110:8.) Segars' and his client's primary concern with the location of the baseline was to ensure that a house of 4,000 square feet could be constructed on the Property.[6] (Segars Dep. I at 20:12-21:3; 23:11-14; R.pp. 110:12–111:3; 113:11-14.) The First Survey showed that the Town of Hilton Head had approved the survey, but it did not bear a stamp indicating the approval of DHEC-OCRM. (First Survey; R.p.728; and Segars Dep. I at 19:8-16; R.p. 109:8-16.)

On or about December 4, 2003, Sea Island Land Survey, LLC prepared a new survey for the Subdivision for J.J. Partners and RSP, which was recorded in Beaufort County on December 15, 2003 in Plat Book 96 at Page 160 (the "Approved Survey"). (Boundary Reconfiguration of Singleton Beach Place Extension Survey dated December 4, 2003; R.p.729; and Segars Dep. I at 46:17-47:9; R.pp. 136:17-137:9.) The Approved Survey showed the current OCRM baseline only; the line marked "Future Beach Management Act Baseline," i.e. the proposed future baseline that Segars and the developers wanted to increase the buildable space for the lots in the Subdivision, had been removed. (Approved Survey; R.p. 729.) Unlike the First Survey, the Approved

[6] Segars' testimony is that he and RSP's attorney reviewed the survey with respect to Lots 1, 2, 3, as these were the lots RSP would be receiving and placing for resale. (Segars Dep. I at 21:6-8; R.p. 111:6-8.) The lots were contiguous and subject to the same building restrictions, and thus the buildable envelope would be similar for each.

Survey bore a stamp indicating that it had been approved by DHEC-OCRM on November 20, 2003. (*Id.*; and Segars Dep. I at 47:10-48:11; R.pp. 137:10-138:11.) Segars admitted that both surveys showed the actual existing baseline, that only the First Survey shows a "future" baseline, and that the First Survey was not approved by DHEC-OCRM. (Segars Dep. I at 47:22- 48:11; R.pp. 137:22-138:11.) The Approved Survey was recorded in Beaufort County, and thus was a matter of public record before Segars' contract to purchase the Property and prior to NBSC's loan to Segars to purchase the Property. (Approved Survey; R.p. 729; and Segars Dep. I at 18:12-25; 46:12-24; 77:7-12; R.pp. 108:12-25; 136:12-24; 167:7-12.)

Thereafter, Segars, as listing agent for the Property, offered the Property (i.e., Lot 2) for sale at a listing price of approximately $2,000,000.00. (Segars Dep. I at 24:16-25:2; R.pp. 114:16-115:2.)[7] While Segars does not recall if he assisted in arriving at the listing price, he testified that it is his practice to consult and advise his clients as to an appropriate listing price. (Segars Dep. I at 25:2-20; R.p. 115:2-20.)

B. Segars' Purchase of the Property

1. Purchase Contract for the Property

On or about March 15, 2004, Segars entered into a contract to purchase the Property. (Contract of Sale—Offer and Acceptance dated March 15, 2004 (the "Contract"); R.pp. 730-734; and Segars Dep. I at 27:4-9; R.p. 117:4-9.) The Contract's purchase price was $1,600,000.00, and it contained a financing contingency

[7] Segars also listed Lot 1 for sale for approximately $2,000,000.00, but that lot had not sold as of Segars' deposition in August of 2010. (Segars Dep. I at 24:16-23 and 26:3-6; R.pp. 114:16-23; 116:3-6.) Lot 3 sold to another party for approximately $1,400,000.00 in 2003 or 2004, but Segars was not the listing agent. (Segars Dep. I at 23:18- 24:15; R.pp. 113:18-114:15.)

whereby should Segars fail to obtain financing within thirty-five days of the Contract, he could terminate; however, should he fail to take action as required by the terms thereof, the contingency would be deemed waived. (Contract at ¶¶2, 3; R.p. 730; and Segars Dep. I at 27:10-28:23; R.pp. 117:10-118:23.) Additionally, the Contract was contingent upon a due diligence review of the Property and purchase by Segars on or before March 12, 2004. (Contract at ¶6; R.p. 731; and Segars Dep. I at 28:24-29:5; R.pp. 118:24-119:5.) Segars completed his due diligence review of the property without termination of the Contract. (Segars Dep. I at 29:2-10; R.p. 119:2-10.) In addition to being a purchaser, Segars was the listing agent for the Property and drafted the Contract himself. (Contract at p. 5; R.p. 734; and Segars Dep. I at 24:16-25:5; 26:19-21; R.pp. 114:16-115:5; 116:19-21.)

2. Loan from NBSC

Segars applied for the Loan from NBSC to finance the purchase of the Property on May 18, 2004. (Credit Application; R.pp. 735-737; and Segars Dep. I at 38:18-22; R.p. 128:18-22.) At the time of the application, the financing contingency of the Contract had expired. (Contract at ¶3; R.p. 730; and Segars Dep. I at 73:3-9; 75:3-8; R.pp. 163:3-9; 165:3-8.) On June 2, 2004, Segars executed a commitment letter for a loan from NBSC (the "Commitment Letter"). (Commitment Letter from Douglas K. Matney of NBSC to Tad Segars dated May 28, 2004; R.pp. 741-743; and Segars Dep. I at 41:8-13; R.p. 131:8-13.) Among other contingencies, the Commitment Letter was subject to an appraisal of the Property acceptable to NBSC in the amount of $1,600,000 or greater. (Commitment Letter at p. 1; R.p. 742; and Segars Dep. I at 41:23-42:6; R.pp. 131:23-132:6.) As Segars admitted, this contingency was for NBSC's benefit and

protection. (Segars Dep. I at 97:19-21; R.p. 187:19-21.) There was no such contingency for Segars' benefit, and his Contract to purchase the Property likewise had no contingency that the Property be appraised for any particular amount. (Contract; R.pp. 730-734; and Segars Dep. I at 96:19-24; R.p. 186:19-24.) Thus, he was contractually obligated to purchase the Property no matter what value an appraisal provided.

On June 2, 2004, seven days prior to the closing, NBSC obtained an appraisal of the Property from Stephen V. Linsday of the Linsday Company, an independent appraiser licensed by the State of South Carolina, who estimated the value of the Property to be $1,600,000.00. (Appraisal of Stephen V. Linsday (the "Appraisal"); R.pp. 744-756; and Segars Dep. I at 42:7-10; 62:21-63:18; R.pp. 132:7-10; 152:21-153:18.) Segars testified that he did not review the Appraisal prior to closing (Segars Dep. I at 62:5-8, 14-16; R.p. 152:5-8, 14-16.)

On or about June 9, 2004, NBSC made the Loan to Segars in the principal amount of $1,360,000.00 as financing for the purchase of the Property. (Consumer Loan Note/Security Agreement; R.pp. 757-758; and Segars Dep. I at 43:13-18; R.p. 133:13-18.) The Loan was secured by a first priority mortgage on the Property. (Mortgage of Real Property dated June 9, 2004; R.pp. 759-763; and Segars Dep. I at 45:3-12; R.p. 135:3-12.) The deed conveying the Property to Segars specifically referenced the Approved Survey in the legal description and made no reference to the First Survey. (General Warranty Deed signed on May 24, 2004 (the "Deed") at p. 1; R.pp. 738-740; and Segars Dep. I at 49:13-17; R.p. 139:13-17.) Further, the Deed specifically referenced the location of the OCRM baseline as being depicted on the plat

prepared by Sea Island Land Survey, LLC and recorded in the Beaufort County Register of Deeds on December 15, 2003 in Plat Book 96 at Page 160 (i.e. the Approved Survey), and Segars expressly acknowledged receipt of this plat by acceptance of the Deed. (General Warranty Deed at p. 2; R.p. 739; and Segars Dep. I at 50:9-22; R.p. 140:9-22.) Despite this acknowledgment in the Deed, Segars testified that he did not recall seeing the plat and that he probably never read the Deed. (Segars Dep. I at 50:21-51:6; R.pp. 140:21-141:6.) Thereafter, the Loan was renewed and/or modified on two occasions to extend the maturity date. (Consumer Loan Note/Security Agreement dated July 7, 2005; R.pp. 769-770; Consumer Loan Note/Security Agreement dated January 24, 2007; R.pp. 771-772; and Segars Dep. I at 52:5-53:15; R.pp. 142:5-143:15.)

C. Segars' Discovery that the OCRM Baseline Had Not Been Moved and Subsequent Litigation Regarding the Same.

Segars testified that he could not remember when he first learned that the OCRM baseline had not been moved. (Segars Dep. I at 59:5-9; R.p. 149:5-9.) However, he states in his Brief that he "does not deny that he was aware of issues concerning the set back line relating to lot 2 in 2005. . ." (Segars' Br. at p. 13). Additionally, he has been involved in a multitude of lawsuits regarding the failure of OCRM to move the baseline that show that he was indeed aware that it had not been moved at least by March 16, 2005 if not before.

First, Segars testified that sometime in 2005, he, along with a group of other owners, retained the services of C.C. ("Cotton") Harness, III, Esquire ("Harness") to intervene in a case pending against DHEC in the Administrative Law Court of the State of South Carolina (the "ALC Case") that sought to move the baseline seaward.

(Deposition of Thaddeus F. Segars dated January 19, 2011 ("Segars Dep. II") at 20:17-21:17; R.pp. 264:17-265:17.) On March 16, 2005, Harness filed a Motion to Intervene in that case alleging that Segars and other lot owners were adversely affected by DHEC's position refusing to relocate the OCRM baseline. (Mot. to Intervene in case number 04-ALJ07-0304-CC dated March 16, 2005 at p. 2; R.p. 626 (stating that "[t]he parties have standing and meet the grounds for intervention in that: . . . Each lot owner is adversely affected by the position taken by DHEC/OCRM and the Town of Hilton Head Island. Movement of the line allows for highest and best use of their land and failure to move the line materially affects use, enjoyment and value of these lots."); and Segars Dep. II at 22:11-18; R.p. 266:11-18.)

In August of 2008, Segars sued RSP, Gaughf, and Fidelity National Title Insurance Company ("Fidelity"), for fraudulent and negligent misrepresentation, among others, and alleged that "in late 2005 [he] learned of the corrective plat recorded on December 15, 2003, and as a result, the residence represented in the architectural drawing provided to [him] could not be constructed on Lot 2, but that pursuant to said plat only a residence approximately 2,000 square feet could be constructed on Lot 2." (Order Granting Defs. RSP and Gaughf's Mot. to Dismiss in Civil Action No. 2008-CP-07-2791 filed May 20, 2009, Honorable Marvin H. Dukes, III, p. 3 (citing Compl. at ¶ 16); R.pp. 1-5.) The Court ruled that, "Plaintiff admits in his Complaint he was put on notice [in late 2005] that a claim might exist when he discovered the existence of the corrective plat" and dismissed Segars' claims based on the statute of limitations. (Order Granting Defs.' Mot. to Dismiss, filed May 20, 2009, Honorable Marvin H. Dukes, III, p. 4; R.p. 4.)

Segars also commenced a civil action against his lawyer, William Newton, and his firm, Jones, Patterson, Simpson & Newton, P.A., alleging legal malpractice in January of 2009. Segars alleged that "he informed Newton the decision to purchase was based on the enforceability of the 'future' baseline and the ability to build a house of at least 4,000 square feet on the lot" and, further, that "Newton was negligent in advising him the 'future' baseline was enforceable." (Order Granting Summ. J. to Defs., filed July 2, 2010, Honorable Carmen T. Mullen, p. 3; R.p. 8.) The Court found that "by March 2005 at the latest, [Segars] had actual knowledge Newton's alleged advice regarding the enforceability of the 'future' baseline was wrong and, accordingly, should have known a claim against Newton might exist." (*Id.* at 4; R.p. 9.) Further, the Court explained that Segars "was on constructive notice of the plat [recording the DHEC-OCRM Approved Survey] and its contents in October 2004 due to his participation as a party in the plat revocation lawsuit, the very subject of which was the [Approved Survey]" and granted summary judgment to Defendants on the grounds that the statute of limitations had expired before he commenced the action. (*Id.* at 4-5; R.pp. 9-10.)

Finally, Segars filed another action against Fidelity, his title insurance company, on February 24, 2011. (*See* Thaddeus Segars v. Fidelity Nat'l Title Ins. Co., Civil Action No. 2011-CP-07-00931 (S.C.Com.Pl., Beaufort).) This lawsuit asserted claims for breach of contract, among others, based on the fact that on June 23, 2004, Fidelity issued a policy in the amount of $1,600,000.00 on Lot 2 and then failed to cover Segars' damages when he later filed a claim because the land was "unbuildable." The Court held that Segars "discovered or should have discovered the facts underlying his Complaint at the time of the issuance of the title insurance policies, because the matters

of which he now complains were matters of public record at that time." (Order Granting Def.'s Mot. to Dismiss, filed May 24, 2012, Honorable Carmen T. Mullen, p. 2; R.p. 12.) Further, the Court held that "[Segars] is not a bona fide purchaser because sufficient record notice was available as of the date of the issuance of the policies to charge him with a duty to inquire, which if pursued with due diligence, would have supplied him with knowledge of the restrictions and plats." (*Id.*) Accordingly, the Court dismissed Segars' claims because they were all barred by the statute of limitations. (*Id.*)

D. Segars' Default on the Loan

On or about March 24, 2009, over four years after he first learned that the OCRM baseline had not been relocated, Segars defaulted on the Loan. (Segars Dep. I at 53:19-20; R.p. 143:19-20; Am. and Restated Compl. at ¶15; R.p. 60; Ans. & Countercl. at ¶7; R.p. 76.) This litigation followed.

STANDARD OF REVIEW

In reviewing an order granting a motion for summary judgment, the appellate court should apply the same standard as the circuit court. *See Silvester v. Spring Valley Country Club,* 344 S.C. 280, 284-85, 543 S.E.2d 563, 566 (Ct. App. 2001) (citing *McDonnell v. Consol. Sch. Dist. of Aiken,* 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994)). Pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure, summary judgment is appropriate where there is "no genuine issue as to any material fact," and the moving party shows that it is entitled to judgment as a matter of law. S.C. R. Civ. P. 56(c); *see also City of Columbia v. ACLU of South Carolina,* 323 S.C. 384, 386, 475 S.E.2d 747, 748 (1996). In determining whether summary

judgment is proper, the appellate court must view all evidence in the light most favorable to the non-moving party. *Barr v. City of Rock Hill,* 330 S.C. 640, 642, 500 S.E.2d 157, 158 (Ct. App. 1998) (citing *Café Assocs. Ltd. v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991)).

ARGUMENT

Segars' appeal challenges the Circuit Court's MSJ Order, which granted NBSC summary judgment on his counterclaims on the grounds that the statute of limitations had expired before he commenced those claims. MSJ Order at p. 1-2, R.pp. 13-14. The MSJ Order finds that NBSC is entitled to summary judgment as to "all Defendants' counterclaims" (*id.*), but only the counterclaim for negligent misrepresentation should be at issue in this appeal as Segars has previously conceded his other claims.[8] Segars based his counterclaims, which were served on NBSC on or about September 24, 2009, entirely upon an appraisal performed for NBSC's benefit, which he claimed provided an inaccurate value of the Property given the location of the OCRM baseline. Thus, the statute of limitations would bar his claims if he knew or should have known prior to September 24, 2006 that a claim against NBSC regarding the appraisal might exist.

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[8] Segars conceded both the breach of contract accompanied by a fraudulent act and the breach of fiduciary duty claims at the outset of the summary judgment hearing and again at the hearing on his motion to reconsider. For unknown reasons, only the concession regarding the former was captured in the Order granting NBSC summary judgment. (MSJ Order at p.1; R.p. 13; MSJ Hr'g Tr. at 82:13-16; 111:18-22; 129:10-15; R.pp. 538:13-16; 567:18-22; 585:10-15; and MTR Hr'g Tr. at 14:9-13; R.p. 604:9-13.) However, the claim for the latter should be barred as well. *Kirkland v. Allcraft Steel Co., Inc.,* 329 S.C. 389, 392, 496 S.E.2d 624, 626 (1998) (citations omitted)(holding that "[a] stipulation is an agreement, admission or concession made in judicial proceedings by the parties thereto or their attorneys. Stipulations, of course, are binding upon those who make them.").

The Circuit Court correctly determined that Segars had actual or constructive knowledge of facts that would suggest an error in the Appraisal at least by March 16, 2005 as that is when his attorney filed a motion to intervene on his behalf in the ALC case involving DHEC in which he acknowledged that the OCRM baseline had not been moved and alleged that the failure to move it negatively impacted the value of the Property. (Motion to Intervene in case number 04-ALJ07-0304-CC dated March 16, 2005 at p. 2; R.p. 626.) Segars' argument that he was not on notice of a potential claim against NBSC based on the Appraisal until he actually saw it and the appraiser's related file materials is insufficient as a matter of law. As soon as he knew that the OCRM baseline had not been moved (if not before as the location of the baseline was a matter of public record), Segars had notice that the value of his Property was negatively impacted and thus that there might be a problem with the appraisal. Additionally, Segars' arguments that his claims were timely because the statute of limitations was tolled or waived because his claims were compulsory counterclaims or claims of recoupment lack merit and are not preserved for review. Finally, numerous additional sustaining grounds exist to support the Circuit Court's decision granting NBSC summary judgment. Accordingly, this Court should affirm the Circuit Court's MSJ Order.

I. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE STATUTE OF LIMITATIONS HAD EXPIRED BEFORE SEGARS COMMENCED HIS COUNTERCLAIMS AGAINST NBSC.

Segars' counterclaim for negligent misrepresentation is subject to a three year statute of limitations. *See* S.C. Code Ann. § 15-3-530 (5) (which provides for a three-

year limitations period on tort claims).[9] Generally, a cause of action accrues under South Carolina law at the moment a breach of duty occurs. *Grooms v. Med. Soc'y of S.C.*, 298 S.C. 399, 402, 380 S.E.2d 855, 857 (Ct. App. 1989) (citing *Livingston v. Sims*, 197 S.C. 458, 15 S.E.2d. 770 (1941)). However, "the 'discovery rule' provides an exception to the general rule and tolls the statute of limitations until a 'person kn[ows] or by the exercise of reasonable diligence should. . . know[ ] that he ha[s] a cause of action.'" *Barr*, 330 S.C. at 644, 500 S.E.2d at 160 (quoting S.C. Code Ann. § 15-3-535); *see also Bayle v. S.C. Dept. of Transp.*, 344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001). The statute of limitations "starts to run upon discovery of 'such facts, as would have led to the knowledge thereof if pursued with reasonable diligence. . . ." *Id.* at 644-45, 500 S.E.2d at 160 (quoting *Burgess v. Am. Cancer Soc'y,* 300 S.C. 182, 185, 386 S.E.2d 798, 800 (Ct. App. 1989)). A party has constructive notice of a claim if he knows of facts and circumstances of an injury that "'would put a person of common knowledge and experience on notice that some right. . . has been invaded or that some claim against another party might exist.'" *Graniteville Co. v. IH Services, Inc.*, 316 S.C. 146, 148, 447 S.E.2d 226, 228 (Ct. App. 1994) (quoting *Snell v. Columbia Gun Exch., Inc.,* 276 S.C. 301, 278 S.E.2d 333 (1981)) (emphasis omitted). "The date on which discovery should have been made is an objective, not subjective, question." *Kruetner v. David*, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995) (citing *Wiggins v. Edwards,* 314 S.C. 126, 442 S.E.2d 169 (1994)).

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[9] If not already conceded, Segars' claim for breach of fiduciary duty would be subject to a three year statute of limitations as well.

A. The Circuit Court Correctly Determined that by March 16, 2005, Segars Knew that He Had Been Adversely Affected by DHEC's Refusal to Relocate the OCRM Baseline.

Segars served his counterclaims on NBSC or about September 24, 2009.[10] In order to avoid a statute of limitations defense, he could not have been on actual or constructive notice that some right had been invaded or that some claim against another party might exist prior to September 24, 2006.[11] Segars' claims against NBSC all relate to the Appraisal performed by Linsday, whom NBSC hired to perform an appraisal for the bank. More specifically, Segars alleges that Linsday erred in his valuation of the Property in that, based upon the applicable OCRM baseline and other set back requirements and restrictions, the true value of the Property was a fraction of the estimate Linsday gave because the lot was "unbuildable." (Segars' Ans. and Countercl., R.pp. 75-82.) Segars further alleged that although he did not see the Appraisal before closing, NBSC impliedly transmitted the results to him simply by proceeding with the closing and he alleged that this amounted to a negligent misrepresentation made to induce him to accept the Loan. (*Id.*; R.pp. 75-82.; Segars Dep. I 75:9-12; 88:10-89:11; R.pp.165:9-12; 178:10-179:11.)

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[10] The MSJ Order states that Segars asserted his counterclaims on or about August 19, 2009; however, this appears to be incorrect as the pleading itself indicates that it was served on September 24, 2009 and filed on September 28, 2009. The difference in the dates is immaterial for purposes of this appeal.

[11] An argument could also be made that Segars was on constructive notice as of the date of his loan and the closing on the purchase of the Property (i.e., June 9, 2004) as not only was the Approved Survey recorded and part of the public record, it was referenced on the General Warranty Deed conveying the Property to him. (General Warranty Deed dated May 24, 2004; R.pp. 738-740.)

The Circuit Court found that Segars knew that he had been adversely affected by the failure of the OCRM baseline to move by March 16, 2005 at the latest because that is when his attorney, Harness, moved to intervene in the ALC case that sought to have the baseline moved. In that case, Segars and others alleged that the failure of DHEC-OCRM to move the baseline negatively impacted the value of the Property. (Motion to Intervene in case number 04-ALJ07-0304-CC dated March 16, 2005; R.pp. 625-627.) The Court also noted that three other courts had determined that Segars "learned of the location of the OCRM Line in relation to his claimed inability to build on the property" in the 2004-2005 timeframe. (MSJ Order at 3-4; R.pp. 15-16.)[12] The Court then held as follows:

> Based on the evidence and deposition testimony in this matter and the previous findings of this Court, it is clear that, by March 16, 2005 at the latest, Segars had actual knowledge that the OCRM Line was not located where he thought at the time of purchase of the Property and that the actual location affected his ability to build a residence on the Property. This discovery, pursued with reasonable

[12] More specifically, the Court noted the following cases brought by Segars: against his attorney (Civil Action No. 2009-CP-07-00381)(wherein Court found Segars "'was on constructive notice of the [2003 Plat/Approved Survey] and its contents in October 2004 due to his participation as a party in a plat revocation lawsuit against the town of Hilton Head.'"); against the title company and the sellers (Civil Action No. 2008-CP-07-2791)(wherein the Court found that that in late 2005, Segars learned of the Approved Survey/plat and that as a result only a house of 2,000 square feet could be built on lot 2); and against the title company individually (Civil Action No. 2011-CP-07-00931)(wherein the Court found that Segars discovered or should have discovered the facts at issue because they "were matters of public record at that time") (emphasis in original). (MSJ Order at p. 4-5; R.pp. 16-17.) *See also* Order Granting Defs. RSP and Gaughf's Mot. to Dismiss, filed May 20, 2009, Honorable Marvin H. Dukes, III, p. 4; R.p. 4; Order Granting Summ. J. to Defs., filed July 2, 2010, Honorable Carmen T. Mullen, p. 4-5; R.pp. 9-10; and Order Granting Def.'s Mot. to Dismiss, filed May 24, 2012, Honorable Carmen T. Mullen, p. 2; R.p. 12.) All of these lawsuits have been adjudicated and dismissed based on the expiration of the statute of limitations. Segars made no allegation against NBSC or the appraiser in any of the foregoing suits, and he has never made a claim against the appraiser.

> diligence would have led Segars to conclude that [the] appraisal might be in error, and thus, should have known a claim based on the appraisal might exist. I find that Defendants failed to file the counterclaims on the alleged erroneous appraisal within three years.

(MSJ Order at 5; R.p. 17.) Thus, because Segars failed to assert his claims until more than four years later, the Circuit Court properly found that his claims were barred by the statute of limitations. (*Id.* at 3-4; R.pp. 15-16.)

Although even Segars admits in his Brief that he knew that the OCRM baseline had not been moved as of some time in 2005 (*see* Segars' Br. at p. 13), he asserts that this knowledge is irrelevant and that he did not know he had a potential claim against NBSC based on the Appraisal until he obtained a copy of the appraiser's file in 2009 and learned that Linsday had relied upon the Approved Survey (i.e. the survey that showed the actual baseline and not the line marked "Future OCRM Baseline," which was the correct and approved survey of record). (*Id.* at p. 13-17.) This argument has no merit. As soon as Segars knew that the OCRM baseline had not moved to the location of the "Future OCRM Baseline," he had knowledge that the value of the Property may have been negatively impacted as is evidenced by his hiring an attorney to intervene in the ALC Case to make these exact allegations. While he may not have known exactly what the Appraiser relied on to arrive at his estimate,[13] a reasonable person would have investigated that upon learning that the value was less than what the Appraisal stated. Segars was on actual notice (or at a minimum constructive notice) that something might

[13] Ironically, Segars appears to be implying that he did not think he had a claim if the appraiser relied on the incorrect and unapproved survey, which showed the potential "Future Baseline," but that he believed he had a claim once he learned that the appraiser relied on the correct approved survey of public record. This is simply nonsensical.

not be right with the Appraisal, that some right had been invaded and that some claim against another party might exist well prior to September 24, 2006, and thus, his counterclaims are barred by the statute of limitations. *Graniteville Co.*, 316 S.C. at 148, 447 S.E.2d at 228.

II. SEGARS' COUNTERCLAIMS REMAIN TIME-BARRED DESPITE HIS NEW THEORIES REGARDING TOLLING OR WAIVER OF THE STATUTE OF LIMITATIONS, AND THESE NEW ARGUMENTS WERE NOT PRESERVED FOR APPELLATE REVIEW.

A. Segars' Counterclaims Remain Time-Barred.

Segars' new theories regarding the tolling or waiver of the statute of limitations due to his assertion that his counterclaims were compulsory counterclaims or claims of equitable recoupment fail as a matter of law. With regard to counterclaims filed after the statute of limitations has run, some jurisdictions allow the limitations period to be tolled (allowing compulsory counterclaims) or waived (allowing claims asserted defensively as equitable recoupment). Because it is unclear which remedy Segars is seeking in this appeal, NBSC will address both.

1. Segars is Not Entitled to a Tolling of the Statute of Limitations based on his Counterclaims being Compulsory Counterclaims because the Statute of Limitations had already Expired.

Segars is not entitled to tolling because the statute of limitations for his claims expired before NBSC filed its foreclosure action. Segars' statement of the supposed majority rule is not accurate. In cases where the statute of limitations has not already run, the majority view is that the institution of plaintiff's suit tolls or suspends the running of the statute of limitations governing a compulsory counterclaim. § 1419 Compulsory Counterclaims—Statute of Limitations, 6 Fed. Prac. & Proc. Civ. § 1419

(3d ed.); see, e.g., *Burlington Indus. v. Milliken & Co.*, 690 F.2d 380, 389 (4th Cir. 1982) (citation omitted)). However, "tolling [is] immaterial [where] the limitations period [on defendants' compulsory counterclaim] expired before the plaintiff's suit is brought." § 1419 Compulsory Counterclaims—Statute of Limitations, 6 Fed. Prac. & Proc. Civ. § 1419 (3d ed.); *Keckley v. Payton*, 157 F. Supp. 820, (N.D. W. Va. 1958) (stating that "the weight of authority holds that unless a set-off or counterclaim takes the form of recoupment, which is not the case in this tort action, the statute of limitations applies as much to a set-off or counterclaim as to an original action. See an annotation in 1 A.L.R.2d 634, for cases so holding from thirty-six states.")

Additionally, while none of the authority cited by Segars that provides for tolling of the statute of limitations is mandatory or binding in South Carolina, the statute he cites also supports the proposition that compliance with statutes of limitations as to a defendant's counterclaims is required for tolling. *See, e.g.,* Ga. Code Ann. § 9-3-97 (extending the statute of limitations, "so as to allow parties, up to and including the last day upon which the answer or defensive pleadings should have been filed. . . provided that the final date allowed by such limitations for the commencement of such actions *shall not have expired* prior to filing of the main action.") (emphasis added).

As set forth above, the limitations period on Segars' claims ran at the very latest in March of 2008 and thus expired prior to NBSC's filing its foreclosure action in July of 2009. (*See supra* Argument, I(A) at pp. 18-21.) Accordingly, the statute of limitations cannot be tolled.

2. Segars is Not Entitled to a Waiver of the Statute of Limitations based on Equitable Recoupment because his Counterclaims were Affirmative Claims and not Defensive Claims of Recoupment.

Some courts allow a defendant to assert claims defensively in the form of equitable recoupment where the limitations period on his claims has expired before the plaintiff filed suit. §1419 Compulsory Counterclaims—Statute of Limitations, 6 Fed. Prac. & Proc. Civ. § 1419 (3d ed.). Segars cites to no South Carolina cases allowing recoupment claims after the statute of limitations has expired, and NBSC is not aware of any. However, even in states that have allowed recoupment claims to be brought after the statute of limitations has expired, the defendant cannot seek affirmative relief but rather can only use such claims defensively as the case cited by Segars in his Brief supports. (Segars' Br. at p. 11 (citing *Murray v. Mansheim*, 779 N.W.2d 379, 390 (S.D. 2010).) In *Murray*, the Court held as follows:

> We narrow our holding to disallow compulsory counterclaims seeking affirmative relief when, as here, the limitations period expired after the plaintiff initiated his action by service of summons but before the defendant served his counterclaim. . . . We find persuasive the distinction between compulsory counterclaims seeking recoupment and those seeking affirmative relief. The latter are independent actions subject to statutes of limitation. The former are in the nature of a defense and, as noted by the United States Supreme Court, are "never barred by the statute of limitations so long as the main action itself is timely."

Murray, 779 N.W.2d at 390 (citation omitted). *See also Nalley v. McClements*, 295 F. Supp. 1357, 1360 (D. Del. 1969) (denying defendants' motion for leave to amend their answer to add a counterclaim in the nature of a recoupment and holding that "the counterclaim could not constitute a purely defensive measure by way of recoupment to

reduce or extinguish plaintiffs' claim but is actually a demand for an affirmative judgment"); *Dowell v. G & G Motorcycles, Inc.*, 2014 WL 6712893, No. 3:14CV263, at *3 (E.D. Va. Nov. 26, 2014)(finding defendant was entitled to reduce the purchase price by $118,741.07 for recoupment where defendant asserted recoupment "purely as a defense to [plaintiff's] claim").

In this case, Segars filed his counterclaims after the statute of limitations had expired. *See supra* Argument, I(A) at pp. 18-21. He asserted them not as affirmative defenses or counterclaims of recoupment or set-off but rather as counterclaims for independent causes of action for negligent misrepresentation, breach of fiduciary duty and breach of contract accompanied by a fraudulent act, all of which sought the affirmative relief of money damages. (Ans. and Countercl. at ¶¶18, 26, 33, and "Wherefore" clause; R.pp. 78, 79, 81.)[14] Furthermore, the Court subsequently granted NBSC summary judgment on its foreclosure claim and referred that matter to the Master in Equity (Judgment of Foreclosure; R.pp. 21-27.) This effectively bifurcated Segars' counterclaims from the foreclosure action with the counterclaims to be heard separately as affirmative claims for money damages. *Id.* Segars did not appeal either the Judgment of Foreclosure or the subsequently issued Deficiency Judgment and thus those orders are now final.

Because Segars raised his claims as affirmative counterclaims for money damages and not as affirmative defenses of recoupment to the foreclosure action, the

[14] *See also* MTR Hr'g Tr. 13:16-18; 14:3-13; R.p. 603:16-18; 604:3-13 (wherein at hearing on Segars' motion to reconsider, his attorney stated: "No, Judge. We did not have any affirmative defenses as I recall.")

statute of limitations was not waived and his counterclaims could not be asserted even if South Carolina allowed defensive recoupment claims.

B. Segars' New Theories regarding Tolling or Waiver of the Statute of Limitations Were Not Timely Raised and Thus are Not Preserved for Appellate Review.

Segars' new arguments relating to tolling or waiver of the statute of limitations were not timely raised during NBSC's motion for summary judgment or in Segars' subsequent Rule 59(e) motion. As a result, these new theories have not been preserved for appellate review.

A court may not grant a motion for summary judgment on grounds not included in the notice of motion or argued fully at the hearing. *Turbeville v. Floyd*, 288 S.C. 171, 174, 341 S.E.2d 651, 653 (Ct. App. 1986) (reversing circuit court's order granting summary judgment because the ground upon which the order was based was not included in the motion or argued before the lower court). Here, Segars' arguments regarding tolling or waiver of the statute of limitations based on his assertion that his claims were compulsory counterclaims and/or claims of recoupment were not included in any of his briefing prior to the hearing, nor were they argued at the summary judgment hearing. Segars also did not raise these new theories in the supplemental briefing invited by the Circuit Court after the hearing. (Email from Finn Law Firm to Honorable Marvin H. Dukes, III dated December 13, 2013 attaching Supplemental Brief which was Resubmission of Defendants' Brief in Support of their Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment dated March 13, 2013; R.pp. 773-779.) Thereafter, following all briefing and the Court's request for a proposed order from counsel from NBSC granting the motion,

Segars first raised the new arguments in a letter to the Court mere days before the Court issued its order. (Letter from Thomas J. Finn to Honorable Marvin H. Dukes, III dated January 13, 2014; R.pp. 782-783.) Because Segars neither included his arguments in timely briefing nor argued these issues at the hearing, his arguments were not properly raised and thus are not preserved for review.

Furthermore, Segars' new theories were not preserved for appellate review in the motion to reconsider. "[A] party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not." *Stevens & Wilkinson of S. Carolina, Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) (citing *Hickman v. Hickman,* 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990)). Where an argument was "never presented to the trial court before the filing of the Motion to Alter or Amend," it is not preserved for appellate review. *Brailsford v. Brailsford,* 380 S.C. 443, 448, 669 S.E.2d 342, 345 (Ct. App. 2008); *see also Poch v. Bayshore Concrete Products/S. Carolina, Inc.*, 386 S.C. 13, 31, 686 S.E.2d 689, 699 (Ct. App. 2009) *aff'd as modified*, 405 S.C. 359, 747 S.E.2d 757 (2013) (appellant's argument not preserved for appellate review where raised in Rule 59(e) motion on basis that "[a] party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not.").

As discussed above, Segars' tolling and waiver of the statute of limitations theories were not properly raised via a letter after all briefing deadlines had passed and after the Court had advised that it would rule in NBSC's favor and thus were effectively raised for the first time in his motion to reconsider. Because new theories may not be

raised on a motion to reconsider, Segars' arguments are not preserved for appellate review. These arguments could have and should have been raised prior to the expiration of the briefing deadlines and prior to the Court advising the parties of its ruling. Accordingly, Segars' new theories are not preserved for review and should not be considered.

III. Several Additional Sustaining Grounds Support the Circuit Court's Ruling in Favor of NBSC.

Several additional sustaining grounds support the Circuit Court's MSJ Order dismissing Segars' counterclaims, which would require the affirmance thereof. *See I'on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419-20, 526 S.E.2d 716, 723 (2000) (holding that the appellate court may affirm for any ground appearing in the record because "a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court."). First, Segars fails to meet the essential elements of the causes of action for his sole remaining counterclaim for negligent misrepresentation. In addition, although NBSC believes that Segars has conceded his claim for breach of a fiduciary duty against NBSC (*see supra* Counter-Statement of the Case at pp. 3 and 5), even if that claim was considered by this Court, it cannot survive summary judgment as Segars cannot establish that NBSC owed him a fiduciary duty.

A. Segars Cannot Establish the Elements of his Counterclaim for Negligent Misrepresentation as a Matter of Law.

Segars' first counterclaim against NBSC is for negligent misrepresentation stemming from the Appraisal by Mr. Linsday. Even if the Appraisal in question was

prepared in error, Segars' claim must fail because he cannot demonstrate any false representation by NSBC and he cannot show that he was entitled to rely on the Appraisal.

1. NBSC is entitled to summary judgment on Segars' counterclaim for negligent misrepresentation because he cannot demonstrate that NBSC made any false representation regarding the Appraisal.

To establish liability for negligent misrepresentation, Segars must show that: (1) NBSC made a false representation to Segars, (2) NBSC had a pecuniary interest in making the representation, (3) NBSC owed a duty of care to see that it communicated truthful information to Segars, (4) NBSC breached that duty by failing to exercise due care, (5) Segars justifiably relied on the representation, and (6) Segars suffered a pecuniary loss as the proximate result of his reliance upon the representation. *Sauner v. Pub. Serv. Auth. of S. Carolina*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003); *Quail Hill, LLC v. County of Richland, South Carolina*, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010).

In this case, Segars cannot say that NBSC made *any* representation to him regarding the Appraisal. He testified that he never reviewed or saw the Appraisal prior to the closing. (Segars Dep. I 62:5-8; R.p. 62:5-8.) Further, he could not recall if NBSC ever advised him of the amount of the Appraisal other than to say it was generally his practice to inquire prior to closing as to the amount of an appraisal, and that he *probably* asked Doug Matney what the lot appraised for prior to closing. (Segars Dep. I 73:24-74:14; R.pp. 163:24-164:14.) Thus, there is no evidence in the record that NBSC made any representation to Segars regarding the Appraisal or the appraised value of the Property.

Even assuming that Segars did inquire as to the amount of the Appraisal, a response by NBSC as to what the Property appraised for would be an accurate and truthful statement of fact as to what the Appraisal stated. There is no dispute that the final estimate of value as described by the Appraisal was $1,600,000.00. (Appraisal dated June 2, 2004, R.pp. 744-756.) Accordingly, Segars cannot demonstrate that NBSC made a false representation to him.

2. Segars' claim for negligent misrepresentation also fails because he was not entitled to rely on the Appraisal as a matter of law.

Furthermore, Segars could not have relied upon the Appraisal as a matter of law because he was contractually committed to purchase the Property regardless of the amount of the Appraisal and because there is no question that the plat depicting the DHEC-OCRM approved baseline, i.e. the Approved Survey, was recorded and thus a matter of public record prior to his closing on the Property.

In a remarkably similar case, mortgagors sued a lending bank and appraiser claiming that they were harmed by entering into a mortgage agreement with a bank secured by property with an overestimated appraisal value. *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 565 S.E.2d 309 (Ct. App. 2002). The Court granted the defendants' motions for summary judgment on the claims for fraud, conspiracy, negligent representation and unfair trade practices, stating that the mortgagor's "lack of reliance [was] glaringly absent" because "[t]he purchase price for the commercial property was already agreed upon before [the mortgagor] approached Bank for a loan." *Id.* at 348, 565 S.E.2d at 314. The Court held that the mortgagor's negligent misrepresentation claim failed because they failed to prove reliance on the 1993 appraisal. *Id.* at 350, 565 S.E.2d at 315. Further, the Court found that it was

undisputed that the parties agreed to a contract price without seeing an appraisal, and the Bank's commitment letter before the appraisal was made was nothing more than a promise to finance. *Id.*

Here, not only did Segars agree to a price and enter into the Contract to purchase the Property without seeing the Appraisal, he allowed his financing contingency and due diligence period expire before applying for the Loan from NBSC. (Contract of Sale—Offer and Acceptance at ¶6; R.p. 731; and Segars Dep. I at 27:10-29:10; R.pp. 117:10-119:10.) Thus, Segars was contractually committed to purchase the property for $1,600,000.00 at the time he applied for the Loan regardless of the amount of the Appraisal. Accordingly, Segars could not have relied upon the Appraisal in moving forward with the purchase of the Property and the Loan.

Segars' negligent misrepresentation claim must also fail because he could not justifiably have relied on the Appraisal when the actual OCRM baseline, knowledge of which per his own testimony and actions show would provide notice that the Property was not worth $1.6 Million, was a matter of public record. "'There is no liability for casual statements, representations as to matters of law, or matters which [the claimant] could ascertain on his own in the exercise of due diligence.'" *Quail Hill*, 387 S.C. at 240, 692 S.E.2d at 508 (quoting *AMA Mtg. Corp. v. Strasburger*, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992)). In addition, in determining the issue of justifiable reliance in the context of a negligent misrepresentation claim, South Carolina courts have consistently held that "while issues of reliance are ordinarily resolved by the finder of fact, there can be no reasonable reliance on a misstatement if the plaintiff

knows the truth of the matter." *Id.* (quoting *McLaughlin v. Williams*, 379 S.C. 451, 457-58, 665 S.E.2d 667, 671 (Ct. App. 2008) (citations omitted)).

In *Quail Hill*, the plaintiff, a real estate developer, retained a licensed real estate broker to represent his interest in the purchase of a 72.5 acre parcel for development as a manufactured-home subdivision. *Id.* at 227, 692 S.E.2d at 501.The agent met with the Richland County Subdivision Coordinator who advised that the applicable zoning would allow for intended use; however, after the property was purchased and during the development phase, the plaintiff learned that the zoning advice had been erroneous. *Id.* at 227-28, 692 S.E.2d at 501-02. The Supreme Court found the claim to be controlled by the question of whether the plaintiff could have justifiably relied on the representation of the County staff and reasoned that the alleged reliance was not justified because a review of the official Richland County Zoning Map by Quail or its agent would have revealed the true zoning classification. *Id.* at 241, 692 S.E.2d at 509. *See also Schnellmann v. Roettger*, 368 S.C. 17, 21, 627 S.E.2d 742, 746 (Ct. App. 2006) (holding that Plaintiffs' claim that they relied on the square footage in the MLS listing, despite having an inspection clause in their contract and despite a summary appraisal conducted prior to closing that listed the lesser square footage but was not reviewed by Plaintiffs, was "unreasonable as a matter of law.")

Here, Segars alleges that the appraiser erred in failing to consider the impact of the then existing OCRM baseline and the effect thereof on the potential construction on the Property, which he claims negatively impacted the value of the Property. As explained above, there is no question that the Approved Survey depicting the DHEC-OCRM Approved baseline was recorded in the Beaufort County records prior to Segars

contracting to purchase the Property and that he closed in the face of such public records. (Approved Survey; R.pp. 728-729; and Segars Dep. I at 18:12-25; 46:12-24; 77:7-12; R.pp. 108:12-25; 136:12-24; 167:7-12). As such, the location of the baseline was easily discoverable by Segars through his own due diligence. Thus, because he had access to records showing the true location of the OCRM baseline prior to closing, Segars cannot meet the burden of proving the element of reliance and his counterclaim for negligent misrepresentation fails as a matter of law.

For the foregoing reasons, Segars' counterclaim for negligent misrepresentation fails as a matter of law.

B. Segars' Counterclaim for Breach of Fiduciary Duty also Fails as a Matter of Law because He Cannot Establish the Existence of a Fiduciary Relationship with NBSC.

Even assuming that Segars did not already concede his second counterclaim for breach of fiduciary duty (*see supra* Counter-Statement of Case at pp. 3 and 5 and Argument at p. 15, n. 8), it must fail because he cannot establish the existence of a fiduciary duty. "A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one reposing confidence." *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992) (citing *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987)). South Carolina has consistently held that the normal relationship between a bank and its customer is one of creditor-debtor and is not fiduciary in nature. *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986); *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 220 S.E.2d 116 (Ct. App. 1976); *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d

432 (Ct. App. 2003). A bank may be held to a fiduciary duty if it "undertakes to advise the customer as a part of services the bank offers. *Id.* (emphasis added). However, no duty exists between a bank and its depositor when the bank is unaware of any special trust reposed on it. *Id.* at 41, 340 S.E.2d at 790; s*ee also Steele v. Victory Savings Bank*, 295 S.C. 290, 294, 368 S.E.2d 91, 93 (Ct. App. 1988).

To prove the existence of a fiduciary relationship between NBSC and Segars, Segars, at a minimum, must allege and demonstrate that NBSC undertook to advise him as part of a service that NBSC offers. Segars did not allege such advice nor did he testify that any such advice was given. Instead, an independent third party appraiser performed the Appraisal, not NBSC or any agent thereof. (Appraisal dated June 2, 2004; R.pp. 744-756.) Accordingly, there is no allegation or evidence in the record that NBSC at any time undertook to advise Segars as part of the services it offers, and, thus, no fiduciary relationship existed between the parties. As such, Segars' counterclaim for breach of fiduciary duty fails as a matter of law, and NBSC is entitled to summary judgment as to this claim.

CONCLUSION

As set forth above, this Court should affirm the Circuit Court's decision to dismiss Segars' counterclaims against NBSC because he failed to assert them before the expiration of the statute of limitations. In addition, Segars' counterclaims remain time-barred despite his new theories regarding tolling or waiver of the statute of limitations because the statute of limitations expired prior to NBSC filing its foreclosure suit and because Segars brought his claims as affirmative claims, and not defensive claims of recoupment. Finally, numerous additional sustaining grounds support affirmance of the

MSJ Order, including that Segars cannot establish the elements required for either a negligent misrepresentation claim or a breach of fiduciary duty claim. Accordingly, this Court should affirm the decision of the Circuit Court that there is no genuine issue of material fact and that NBSC is entitled to judgment as a matter of law as to all of Segars' counterclaims.

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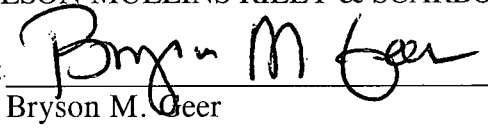
By: 

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge

Case No. 2009-CP-07-03201
Appellate Case No. 2014-001296

National Bank of South Carolina, ... Respondent,

v.

Thaddeus F. Segars; KCS Investments, LLC; Singleton Place Homeowners Association Inc.; and Suntrust Mortgage Inc., ... Defendants,

Of Whom Thaddeus F. Segars is the, ... Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent National Bank of South Carolina complies with Rule 211(b), SCACR.

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THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: FINAL BRIEF OF RESPONDENT NATIONAL BANK OF SOUTH CAROLINA

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June 22, 2015

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