THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon

Case No. 11-CP-29-00873

Appellate Case No. 2014-001505

Wells Fargo Bank, N.A.,
Successor, by merger to Wachovia Bank, N.A., ... Respondent,

v.

Ronald P. Pappas, a/k/a Ronald Peter Pappas, and
Camine Pappas, ... Appellants,

And

Ronald P. Pappas, a/k/a Ronald Peter Pappas, and
Camine Pappas, ... Cross-Plaintiffs,

v.

Wells Fargo Bank, N.A.,
Successor by merger to Wachovia Bank, N.A., and
Cargo Development, LLC,
A North Carolina limited liability Company, ... Cross-Defendants.

BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

The Plaintiff WELLS FARGO BANK moved successfully for summary judgment on the Defendants PAPPAS' Counterclaims for unfair and deceptive trade practices, fraud and negligent misrepresentation. In response to the Plaintiff's summary judgment Motion, the Defendants submitted their Affidavit setting out their attempts to complete discovery as to specific items. The Defendants maintain that their attempts to obtain those items were diligent and bore no indication of delay or an attempt at a generalized "fishing expedition." They maintain that the existence or non-existence of those items were vital to their defense of the summary judgment Motion, and to their prosecution of the case. They argue that, in the absence of such discovery, summary judgment was improperly considered and granted.

STATEMENT OF THE CASE

In May, 2006, the Appellants RONALD P. PAPPAS and CAMINE PAPPAS purchased, as an investment, a residential lot in what was to be Edgewater, a new subdivision in Lancaster County, developed by Craft Development, LLC. The price was $229,000.00. This subdivision did not perform as expected.

This lot was financed by the predecessor in interest to the Respondent WELLS FARGO BANK, N.A. with a note having a balloon payment in June, 2009. At closing, they were charged with the cost for an appraisal of the lot. They requested a copy of that appraisal. It was not supplied until this action was filed. No reason for that failure has been stated.

By January, 2008, complaints had been made to HUD alleging failures to comply with the Interstate Land Sales Full Disclosure Act by Craft Development.

In July, 2009, at the urging of the bank and upon expiration of the original Note, the Appellants refinanced with the Bank at a figure of $210,954.69. At the second closing, they were again charged with the cost for an appraisal of the lot. They again requested a copy of that appraisal. This request was repeated during the Deposition of the Appellant RONALD P. PAPPAS. To date, they have not been supplied with that appraisal. This foreclosure action is premised upon the documents of the second closing.

In December, 2013, the Respondent Bank filed its Motion for Summary Judgment. In response, the Appellants filed their Affidavit in Response to that Motion.

By their Affidavit and argument at hearing, counsel for Appellants set out their theory that the undisclosed appraisal must either show a true and lesser figure, which did not support the

2009 refinance, or the former, original figure, which misled the Appellants and caused them to forego their right to timely plead causes of action under the Interstate Land Sales Full Disclosure Act and otherwise.

The Respondent's Motion for Summary Judgment was granted by Order entered April 11, 2014, written notice of which was received on May 16, 2014. The Appellants' Motion under Rule 59(a) and (e), S.C.R.C.P. was denied by Order filed June 12, 2014, written notice of which was received on June 13, 2014. This appeal followed.

ARGUMENTS

I. HAVE THE APPELLANTS ADEQUATELY DEMONSTRATED THEIR NEED FOR FURTHER, SPECIFIC DISCOVERY UNDER RULE 56(e), S.C.R.C.P.?

In their responsive pleading, the Appellants PAPPAS specifically addressed the appraisals required by the Plaintiff Bank and its predecessor, and the failure to supply the same after their request:

> 19. In the course of the transaction Plaintiff has committed or engaged in the following unfair and/or deceptive acts or practices in violation of Title 39, Chapter 5:
>
> a) knowingly misrepresenting the value of the subject real estate in the appraisal furnished to the Defendants;
> b) negligently appraising the value of the subject real property when the Defendants' reliance thereon and resulting injury (which are alleged hereby) was reasonably foreseeable;
> c) using methods of appraisal that included, but did not disclose the existence of an "extraordinary" or "hypothetical condition" in that the amenities of the subdivision were not funded and the lots unsold, in that the owner and developer had failed to provide proof that it or they had failed to comply with HUD regulatory requirements, and in the use of comparables to state what was an undisclosed prospective value;
> d) failing to supply the Defendants with a copy of the Real Estate Appraisal; and
> e) failing to supply the Defendants with a copy of the Real Estate Appraisal after their request therefor.

[*Id.*, Para. 19 of Amended Answer, Counterclaims and Crossclaim, RECORD ON APPEAL, p.34-35.]

In their Affidavit in Response to the Plaintiff's Motion for Summary Judgment [RECORD ON APPEAL, p.266-269], reference was made to the explicit request for the second appraisal, of 2009, in the Deposition of RONALD E. PAPPAS taken in October, 2013. Mr. PAPPAS reiterates the failure to turn over the second Appraisal at [SUPPLEMENTAL RECORD ON APPEAL, p.157, 1.16 - p. 158, 1.5, and at p.167, 1.24 – p.168, 1.4., RECORD p.40 and 42.] The request for the second Appraisal was restated by Mr. PAPPAS and by his counsel:

24 [Q. Mr. LANEY] Are you aware from the appraisal done in 2009
25 according to HUD, which I believe you established is
1 page 78 of Plaintiffs 13, was that also the same
2 appraiser, the Pigmans, if you know?
3 A.[Mr. PAPPAS] I don't know anything about the second appraisal
4 except that I paid for it.
5 Q. Okay.
6 MR. FOSTER: And I assume that Counsel can
7 supply that to us?
8 MR. LANEY: An appraisal? The 2009?
9 MR. FOSTER: Yes.
10 MR. LANEY: I'll inquire, and if we have it
11 we'll certainly --
12 MR. FOSTER: Okay. I have nothing further.

[SUPPLEMENTAL RECORD ON APPEAL, Deposition of RONALD E. PAPPAS, p.167, l.24 – p.168,l.12, RECORD, p.42.]

The Appellants reiterate that no reason for the failure to produce this document has ever been stated, in any pleading or at the hearing resulting in the Order appealed from. [SUPPLEMENTAL RECORD ON APPEAL, Deposition of RONALD E. PAPPAS, p.167, l.24 – p.168,l.12, RECORD p.42 and generally.]

Rule 56, S.C.R.C.P, governing summary judgment and the motions to that end, is derived

from the former Federal Rule 56. Rule 56(f), S.C.R.C.P. provides:

> **(f) When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

To quote MOORE'S FEDERAL PRACTICE:

> Rule 56 does not require that any discovery take place before a motion for summary judgment can be granted. However, if a party cannot adequately defend a summary judgment motion, Rule 56 (f) provides a means to obtain time for further discovery. If the court finds that a party opposing a summary judgment motion cannot present facts essential to justify the party's opposition, the court may: (1) deny the motion for summary judgment; (2) order a continuance to permit affidavits to be obtained or discovery to be had; or (3) make any other order that is just.
>
> [J. Moore *et al.*, MOORE'S FEDERAL PRACTICE, 56.10[8](a) (3d ed. 1999); footnotes omitted.]

By the Affidavit of Counsel, served on counsel for Respondent by e-mail five days before hearing, the Appellants address the non-disclosure of the second, 2009 appraisal. [RECORD ON APPEAL, p.266-269.] By the same Affidavit, and in argument on the Respondent's summary judgment Motion, the Appellants plead their need for the document, and for its examination by their expert.[RECORD ON APPEAL, p.266-269.]

It has usually been held that Rule 56(f) should be liberally construed. *Gonzalez* v. *K-Mart Corp.*, 940 F.Supp. 429, 431 (D.P.R. 1996); *Elliott Assoc., L.P.* v. *Republic of Peru*, 961 F.Supp. 83, 86 (S.D.N.Y. 1997). In that regard, it is certainly true that a party seeking a Rule 56(f) continuance is generally required to demonstrate due diligence in discovery. *Savannah Bank, N.A.* v. *Stalliard*, 400 S.C. 246, 734 S.E.2d 161 (2012); *Baughman* v. *American Tel. and Tel. Co.*; *Ayala-Gerena* v. *Bristol Myers-Squibb Co.*, 95 F.3d 86, 92 (1st Cir. 1996); *Cannizzaro* v. *Neiman Marcus, Inc.*, 979 F. Supp. 465, 471-472 (N.D. Tex. 1997); *Theotokatos* v. *Sara Lee Personal Prods.*, 971 F. Supp. 332, 343 (N.D.Ill. 1997); *Nidds* v. *Schindler Elevator Corp.*, 113 F.3d 912,921 (9th Cir. 1997) *cert. denied*, -- U.S. --, 139 L. Ed. 2D 287 (1997).

In this matter, the specific document requested was made prior to this action, was plead, had its absence stated by the Appellant RONALD PAPPAS in deposition, was specifically addressed in that deposition by his counsel, and its discovery was undertaken by Plaintiff's counsel. [SUPPLEMENTAL RECORD ON APPEAL, Deposition of RONALD E. PAPPAS, p.167, l.24 – p.168,l.12, RECORD p.42.] It was referenced in their Affidavit in Response to the Plaintiff's Summary Judgment Motion, and at the hearing thereon. [RECORD ON APPEAL, p.266, Para. 7.0 and Transcript of Hearing, p.575,l.23 – p.576,l.22.] The Appellants submit there can be no reasonable question as to diligent attempts to obtain this document.

To again quote MOORE'S FEDERAL PRACTICE:

> A court may reject a request for time to conduct further discovery, even if properly and timely made, if it deems the request to be based on speculation as to what potentially could be discovered.
>
> [J. Moore *et al.*, MOORE'S FEDERAL PRACTICE, 56.10[8](a) (3d ed. 1999); footnotes omitted.]

In other words, the defending party cannot expect the Court to allow a mere "fishing expedition", but must seek specific, discoverable matter by its Affidavit. *Ortiz Cameron* v. *D.E.A.*, 959 F.Supp. 92,93-94 (D.P.R. 1997); *Mason Tenders Dist. Council Pension Fund* v. *Messera*, 958 F.Supp. 869, 894 (S.D.N.Y. 1997); *City of Rome* v. *Glanton*, 958 F.Supp. 1026, 1039 (E.D.Pa.), *aff'd without op.*, 133 F.3d 909 (3d Cir. 1997); *Theotokatos* v. *Sara Lee Personal Prods.*, *supra*; *Wesley* v. *Don Stein Buick, Inc.*, 996 F.Supp. 1299, 1309 (D.Kan. 1998).

The requested discovery here is specific, as shown by all references thereto: the Amended Answer, Counterclaim and Crossclaim; the request made at the Appellant RONALD PAPPAS' deposition; the Affidavit in Response to the Respondent's Summary Judgment Motion; the colloquy at the hearing on the Motion. The Appellants have fulfilled all requirements of Rule 56(e) and (f), including that of specificity.

II. THE APPELLANTS HAVE ADEQUATELY ALLEGED COUNTERCLAIMS, AND THE MISSING DISCOVERY IS MATERIAL TO THEIR PROOF.

In the case at hand, the Respondents PAPPAS have specifically alleged Unfair Trade Practices under the South Carolina Act in their Counterclaim:

19. In the course of the transaction Plaintiff has committed or engaged in the following unfair and/or deceptive acts or practices in violation of Title 39, Chapter 5:

f) knowingly misrepresenting the value of the subject real estate in the appraisal furnished to the Defendants;
g) negligently appraising the value of the subject real property when the Defendants' reliance thereon and resulting injury (which are alleged hereby) was reasonably foreseeable;
h) using methods of appraisal that included, but did not disclose the existence of an "extraordinary" or "hypothetical condition" in that the amenities of the subdivision were not funded and the lots unsold, in that the owner and developer had failed to provide proof that it or they had failed to comply with HUD regulatory requirements, and in the use of comparables to state what was an undisclosed prospective value;
i) failing to supply the Defendants with a copy of the Real Estate Appraisal; and
j) failing to supply the Defendants with a copy of the Real Estate Appraisal after their request therefor.

[*Id.*, RECORD ON APPEAL, Para. 19 of Amended Answer, Counterclaims and Crossclaim, p.4-5.]

By its Order, the Circuit Court finds a failure to plead a violation of the UDAP Act which impacts the public interest, as defined under South Carolina precedent. [Order of April 11, 2014, RECORD ON APPEAL, p.5-6.] In *Daisy Outdoor Advertising Co.* v. *Abbott*, 322 S.C. 489, 473 S.E.2d 47 (1996), our Supreme Court discussed the question of proof for the impact on the public of an alleged UDAP violation:

Plaintiffs in prior cases generally have shown potential for repetition in two ways: by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence *(e.g., Jones Chevrolet),* or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts *(e.g., Haley Nursery, Dowd).* Sometimes, the potential for repetition or other adverse impact on the public interest will be apparent. Conversely, it will sometimes be apparent that an action has no real potential for repetition. For example, unfair or deceptive acts in

the sale of a business itself, or in sales outside the ordinary course of business, are not readily susceptible to repetition and, therefore, have no impact on the public interest.

. . .

Generally, plaintiffs will prove potential for repetition by the two means described above. We decline to hold, however, that those are the only means for showing potential for repetition/public impact. Rather, each case must be evaluated on its own merits. We expressly reject any rigid, bright line test that delineates in minute detail exactly what a plaintiff must show to satisfy the potential for repetition/public impact prong of the UTPA test.

[Id., 322 S.C. at 498-97, 473 S.E.2d at 51.]

The Appellants maintain that the actions and inaction of the Respondent with regard to the appraisals and its failure to produce the same are "apparent" in their public impact, in the sense used in *Daisy Outdoor Advertising, supra.* If, however, that position is rejected, it is clear from the above-cited language that this is an issue which the Respondents both can, and are required to, argue and prove within the scope of further discovery and trial. The requirement of public interest will not serve to allow a conclusion that their Counterclaim is without merit. The proof of that Counterclaim relies directly upon the requested, and refused, discovery.

The Respondent's position at argument below was that no cause of action could result from disclosure of the second, 2009 Appraisal. The Appellants cite in response the language of 51 AM.JUR.2D *Limitation of Actions* § 387 (2002):

It has been held that, to avoid a statute of limitations defense on the grounds of estoppel, the defendant's representation or act must have been calculated to mislead or deceive and to induce inaction by the injured party, or done with the intention that the conduct be acted upon by the plaintiff. However, it has also been held that a defendant is estopped from asserting the statute of limitations if the plaintiff's failure to act within the statutory period results from a reasonable reliance on the defendant's conduct or representations, even if there was no intent to mislead, deceive, or delay the plaintiff. [Ftn.3: *Dever* v. *Simmons*, 292 Ill.App.3d 70, 226 Ill.Dec. 1, 684 N.E.2d 997 (1st Dist. 1997).]

Under either view, the defendant must have had actual or constructive knowledge of the true facts, and the defendant's conduct or deception must include positive efforts or active steps, above and beyond the wrongdoing upon which the plaintiff s claim is

founded, to prevent the claimant from suing in time.

Actual fraud in the technical sense, bad faith, or an intent to mislead or deceive is not essential to create such an estoppel. [Ftn.8: *Wilson* v. *Butt*, 168 Va. 259, 190 S.E. 260, 109 A.L.R. 1434 (1937).]

[*Id.*; footnotes omitted, other than those cited.]

Our Courts are in agreement with the stated principle. In *Kleckley* v. *Northwestern Nat. Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000), the Supreme Court stated:

> Kleckley could have also argued that Northwestern should be estopped from asserting the statute of limitations defense. "Under South Carolina law, a defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant's conduct." *Black v. Lexington Sch. Dist. No. 2*, 327 S.C. 55, 488 S.E.2d 327 (1997) (citations omitted); *see also Holy Loch Distribs., Inc. v. Hitchcock*, 332 S.C. 247, 503 S.E.2d 787 (Ct.App.1998). [*Id.*, 338 S.C. at 136, 526 S.E.2d at 220.]

In the case at hand, the Respondent Bank had a duty to disclose the 2009 Appraisal required by it and requested by the Appellant. Had the same been disclosed the Appellants would have been on notice of their rights to pursue a claim based on either an improper Appraisal or one based upon the Respondent Bank's failure to disclose a lessened value for the collateral land. There is a third possibility: that no such Appraisal exists, and the Appellants were charged for a document that does not exist.

Based upon the information available at the hearing, the Appellants did not contest the Respondent Bank's Summary Judgment as to their cause of action based upon the Real Estate Settlement and Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.* or the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 *et seq.* [RECORD ON APPEAL, Transcript or Hearing, p.26,l.7-10.] The Appellants acknowledge that under the existing precedent, the doctrine of equitable estoppel will not affect the statutory limitation on RESPA claims. *Moll* v *U.S. Life Title Ins. Co. of New York*, 654 F.Supp. 1012 (S.D.N.Y., 1987).

The unavailability of a RESPA claim does not, however, defeat the viability of the Appellants' claims under UDAP [RECORD ON APPEAL, Second Defense and Counterclaim, p.33-35.], fraud [RECORD ON APPEAL, Fifth Defense and Counterclaim, p.38-39.] or that for negligent misrepresentation [RECORD ON APPEAL, Sixth Defense and Counterclaim, p.39-41.]. Those

causes were, the Appellants maintain, adequately plead and shall be adequately evidenced by the discovery they seek. The existence, or non-existence, of the 2009 Appraisal is sufficient bases (under any of the factual alternatives discussed herein) to support each of the three Counterclaims and, thus, to avoid summary judgment.

CONCLUSION

The Appellants PAPPAS have demonstrated their need for further discovery in order to respond adequately to the Plaintiff's Motion for Summary Judgment. Their pursuit of this information has been diligent and has been directed to specific items referenced in their pleadings. Their need for those items has been clearly set out in the manner specified by Rule 56(e) and (f), S.C.R.C.P.

Given the pleadings herein, the existence or non-existence of the items sought by discovery is a fact adequate to show the factual existence o29f their Counterclaims for unfair and deceptive practices, for fraud and for negligent misrepresentation.

Respectfully submitted,

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May 6, 2015

Rock Hill, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
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The Honorable R. Knox McMahon

Case No. 11-CP-29-00873

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Wells Fargo Bank, N.A.,
Successor by merger to Wachovia Bank, N.A., ... Cross-Defendant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this final Brief of Appellants complies with Rule 210(b), S.C.A.C.R.

May 6, 2015

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LANCASTER COUNTY
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Wells Fargo Bank, N.A.,
Successor by merger to Wachovia Bank, N.A., and
Cargo Development, LLC,
A North Carolina limited liability Company, ... Cross-Defendants.

PROOF OF SERVICE

I certify that I have served the Brief of Appellants, dated May 6, 2015, on the following counsel of record:

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by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the

respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; of if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 233(b), S.C.A.C.R.

May 7th, 2015

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May 7, 2015

The Honorable Jenny Abbott Kitchings
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Re: Wells Fargo Bank, N.A., Respondent,
v. Ronald P. Pappas and Camine Pappas, Appellants.
Appellate Case No. 2014-001505

Dear Ms. Kitchings:

In accordance with Rules 211 and 267, S.C.A.C.R., enclosed herewith please find the original and fifteen (15) copies each of the Appellants' Final Brief, and of the Appellants' Reply Brief, in the matter above, together with the respective Certificates of Service for the same in the above referenced case.

By copy of this letter, I am serving the attorneys for the Respondent with a copy of the Final Brief and Reply Brief of the Appellants, as evidenced by the Certificates of Service.

Please return the extra conformed copies to my office in the enclosed self-addressed, stamped envelope. As always, thank you, and your staff, for your assistance in these matters.

Sincerely yours,

John Martin Foster

jmf/
enclosures

cc: Client File

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