THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable Richard L. Booth, Sumter County Master-in-Equity

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Case No. 2015-000349
Trial Court Case No. 2010-CP-43-00823

Wells Fargo Bank, N.A., Respondent,

v.

Delores Prescott and Wells Fargo Financial Bank (SD), Defendants,

Of Whom Delores Prescott is the Appellant.

FINAL BRIEF OF APPELLANT

Delores Prescott, *Pro se*
10 Skytop Gardens, Apt. 23
Parlin, New Jersey 08859
Appellant
(732) 485-8145

February 25, 2016

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STATEMENT OF THE CASE

Respondent moved for Summary Judgement May 2014. Alleging judicial estoppel, collateral estoppel and res judicata on Appellant's counterclaims and defense because a party cannot make a representation to a court to induce to rule one way, and then make the opposite representation to a court to achieve a different outcome.

A hearing was held November 19, 2014. The Order of Summary Judgment was decided January 9, 2015 and filed on the record January 13, 2015. (R. p. 2).

Appellant received written notice of entry for the order of Summary Judgment Friday, January 30th, 2015 at 4:53 p.m. via electronic mail from Robert C. Ray, Attorney stating the Order of Summary Judgment including emails of the decision which, resulted in the conclusion of this case. The email advised Appellant she had until February 12, 2015 to appeal the Order of Summary Judgment. Appellant submitted a timely Notice of Appeal to all relevant counsel and the Court of Appeals via certified mail. (R. p. 216).

Counsel withdrew representation on Appeal. Appellant move the Court to withdraw counsel. Appellant was not able to secure a South Carolina attorney. Appellant has prepared this brief *pro se*.

STATEMENT OF FACTS

A foreclosure action can be defeated by pleading and proving an equitable defense. *See* Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 74-76, 698 S.E.2d 244, 247-48 (Ct. App. 2010). Appellant has alleged that Respondent should be barred from foreclosing on the note and mortgage because of its inequitable conduct, including its efforts to induce Appellant's default, its misrepresentations regarding loan modification from 2009 through 2010 which resulted in the aggregation of additional fees and costs, and its failure to properly apply the payments. Shearer v. DeShon, 240 S.C. 472, 484, 126 S.E.2d 514, 520 (1962) (stating a party cannot complain of an error which his own conduct induced). e.g. May 2010 Hshp. Affidavit p. 2-3. (R.pp. 36-38).

Respondent has not denied the factual allegations of Appellant's claims, and they are issues of material fact that have not been resolved. Because there is an ongoing dispute about whether the Respondent has come to court with "clean hands", the Order for Summary Judgment should be reversed. e.g. Op. in Sup. of Sum Jud. p. 8. (R. p. 179).

For the above-stated reasons, Appellant respectfully requests that the order granting Summary Judgment be reversed and the Appellant be entitled to a determination of her claims and defenses.

BACKGROUND AND PROCEDURAL HISTORY

I. THE MORTGAGE

September 2001, Appellant had a permanent residential mortgage with Principal Mortgage on her residence in Rembert, South Carolina, Sumter County. Appellant's original Mortgage had been with Cardinal Mortgage. (e.g. Motion to Dismiss p. 1-2 (R. p. 73).

In June 24, 2003, Appellant refinanced the mortgage agreement with Watermark Financial Partners, LLC, at her home in Sumter, South Carolina and rescinded the loan on the same day; e.g. Motion to Dismiss p. 1-2. (R. p. 74).

July 2003, a different mortgage document was filed in the Sumter County Register of Deeds, which had been materially altered from the documents Appellant signed; e.g. Ans. P. 8-9, Mot. to Dism p. 3, Exhibit F p.1. (R. p. 75).

II. EVENTS WHICH LEAD TO FORECLOSURE ACTION

Pre-Bankruptcy Discharge May 2009 –Case 05-01906
e.g. Ex. B, Sum. Sch. Dkt. 1, Cs. 11-01994 p.4 of 60. (R. p. 343, line 2).

October 2008 Appellant became unemployed and notified Respondent of her change in income. Respondent agents and employees advised Appellant that she would not qualify for refinancing or a reduction in interest because her loan was current. e.g. Affidavit Nov. 2014 Exhibit p 1. (R. p. 149).

February of 2009, Respondent's agent Kim Dehining contacted Appellant by telephone and advised President Obama was implementing a new Home Affordable Program and she would be considered for a modification if she defaulted on her loan. Respondent instructed Appellant to reapply for the modification in March of 2009. e.g Affidavit Nov. 2014, Exhibit A p.1. (R. p. 149).

March of 2009, Appellant submitted a hardship letter and an approval letter from the bankruptcy attorney to discuss modification options with Respondent in accordance with the instructions she received from Respondent's agents and employees and commemorating the advice she received from Respondent. e.g Affidavit Nov. 2014, Exhibit A p.1. (R. p. 149).

Post Bankruptcy May 2009 Discharge Case 05-01906

Appellant received a discharge from the Bankruptcy Court May 2009. e.g. Ex. B, Sum. Sch. Dkt. 1, Cs. 11-01994 p.4 of 60. (R. p. 343, line 2). Prior to June of 2009 Appellant had made all payments on her note and mortgage and had no accumulated arrearage. e.g. Hshp. Affidavit May 2010, page 1. (R. p. 36, line 4).

Forbearance Agreements

Beginning in June of 2009, and continuing through 2010, Appellant entered into a series of "Forbearance Agreements," with the Respondent. Agents and employees of Respondent repeatedly represented to Appellant that if she successfully completed the payments outlined in the agreement that she would be considered for a loan modification e.g. Hshp Affidavit May 2010, p 1-9. (R. pp. 36-39).

Appellant had informed Respondent agents that she was on public assistance in 2009. Respondent agents never informed Appellant that she was ineligible for a FHA Home Affordable Modification because she was unemployed and on public assistance e.g. Hshp Affidavit May 2010 p. 3. (R. p. 38 at ¶15).

Respondent agents continued to represent that it would make a determination about Appellant's eligibility to receive a loan modification during 2010. Despite Appellant's completion of payments under the terms of these agreements, Respondent

never made a determination on Appellant's loan modification for over a year. e.g. Ans. p. 6.

Beginning in early 2010, Appellant started withholding and misapplying Appellant's payments to create false arrearages and penalties on her account, to create the illusion that she was not complying with the forbearance agreements. Respondent failed to apply the payment[s] to any outstanding balance and principal, and instead, held the money as "unapplied funds." e.g. May 2010 Hshp. Affidavit p. 2. (R. p. 37 at ¶5).

The balance and arrearages were only owed because of the new payment schedule designed and encouraged by Respondent, and only remained unpaid because Respondent refused to apply the payments to Appellant's account. The January 2010 payment should have been sufficient to fully reinstate the security instrument under Paragraph 10 of the mortgage. e.g. Hshp Affidavit May 2010, p. 2, (R. p. 37 at ¶6). Ans. p. 6. (R. p. 29 at ¶8).

III. FORECLOSURE COMPLAINT

Paragraph 8 of Respondent's Foreclosure Complaint states "As required by an Administrative Order issued by the South Carolina Supreme Court dated May 22, 2009, the Plaintiff states that, this loan is owned or guaranteed by Fannie Mae, or it is owned or guaranteed by FHLMC, or the Servicer has signed an agreement to participate in the Home Affordable Modification Program ("HMP"); however, Plaintiff alleges upon information and belief, that this loan is not eligible for modification under the HMP because this loan type is not eligible for HMP modification." e.g. Compl. p. 2. (R. p. 19).

Appellant acknowledged in her May 17, 2010 Answer to the Complaint that Respondent did not disclose that the "loan type" was not eligible for a "HMP" or FHA-HAMP modification. e.g. Ans. p. 7-8. (R. pp. 30-31).

Respondent knew that Appellant was ineligible for a modification pursuant to the Home Affordable Modification Program (HAMP), but continued to represent to Appellant that a determination on her eligibility would be made. e.g. Ans. p. 7-8. (R. pp. 30-31).

On April 12, 2010, Respondent issued a 3rd Forbearance Agreement to Appellant, but still never made any determination as to her modification, as was promised nine months earlier. The 3rd Forbearance Agreement required Appellant to pay $563.05 a month, beginning May 12, 2010, June 12, 2010 and July 12, 2010. e.g. Hdshp Affidavit May 2010, p. 3,(R. p. 38) and Affidavit Nov. 2014, Exhibit E. (R. p. 151).

Three days after sending the 3rd Forbearance Agreement, Respondent initiated this foreclosure action on April 15, 2010. On Sunday April 18, 2010 Appellant was hand delivered via courier the Foreclosure Complaint from Respondent. The Complaint was filed with the Sumter County Court on April 16th, 2010 and signed April 15th, 2010 by Suzanne E. Brown, attorney at Brock and Scott representing Respondent e.g. Compl. p. 5. (R. p. 22).

Monday, April 19, 2010 Appellant contacted Respondent regarding the Complaint and spoke with Quanleticia Anderson. Respondent's agent told Appellant "there was no sale date and as long as the payments were made per the April 12, 2010 Agreement no foreclosure action would be taken." Respondent never communicated their intent to foreclose. e.g. Hdshp Affidavit May 2010, p. 3. (R. p. 38 at ¶11).

Answer to Foreclosure Complaint

Appellant answered the Complaint in due course. Appellant requested a Motion to Dismiss e.g. Ans. p.4. (R. p. 27). The answer specifically denied the allegation that Respondent owns and holds the note and mortgage e.g Ans., p. 3-4. (R. pp. 26-27). The answer also raised several affirmative defenses, including a claim that Respondent lacked standing because it did not own the note and mortgage when the foreclosure complaint was filed. e.g. Ans. p. 1- 2. (R. pp. 24-25).

In paragraph 6 page 2 of Respondent's Foreclosure Complaint, Respondent states:

"[o]n July 1, 2003, said Mortgage was recorded in the Sumter County Registry in Mortgage Book 896 at Page 70. Thereafter, the Mortgage was assigned to the Plaintiff herein." Respondent does not say when or how the transfer of the mortgage or assignment took place. e.g. Compl. p. 2. (R. p. 19).

Assignment of Mortgage

April 23, 2010 Appellant searched the Sumter County Register of Deeds. The county records indicated that Watermark Financial Partners, Inc. was listed as the Mortgagee. There was no assignment of Mortgage recorded to any successors or assigns. Watermark Financial Partners is recorded as the Mortgagee from July 2003 through May 17, 2010. e.g. Ans. p. 1- 2. (R. pp. 24-25).

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

return to: BROCK & SCOTT, PLLC Westpark Center 3800 Fernandina Road, Suite 110 Columbia, SC 29210 File No.: 10-08577.[1] e.g. Mot. Dism., Exhibit H, Assignment to Wells. (R. p. 91).

Attorney Brown was acting as V.P. of MERS to allow Respondent to initiate the foreclosure. The document was not attached to Appellant's Complaint, and created a conflict of interest when an attorney for Respondent alleges to also be the V.P. of MERS, assigning a note and mortgage to Respondent, so Respondent could bring a foreclosure action. e.g. Mot. to Dism. P. 4. (R. p. 76). Three years after Respondent alleges it acquired the serving rights to the loan in 2007. e.g., Memo in Oppos. Mot. to Dism. P. 2. (R. p. 95, line 5).

Appellant filed her Answer on May 17, 2010 unware of the facts regarding the Assignment and transfer of the Note. Respondent did not reply to Appellant's Answer to the Complaint. Appellant did not receive a hearing date for her Motion to Dismiss Foreclosure.

Unapplied Lost Trial Payment

May and June 2010 Appellant made a $563.05 under the terms of the forbearance agreement then in force. Affidavit Nov 2014, p.3, Exhibit E & F. (R. pp. 151-158).

As the result of Respondent's own conduct, it declared Appellant had violated the terms of the forbearance agreement, and refused, again, to provide Appellant with a modification determination and placed Appellant's property in "active foreclosure."[2]

Appellant was forced to file for a second bankruptcy Monday, August 2, 2010 to save her home. e.g. Ex. B, Sum. Sch. Dkt. 1, Cs. 11-01994 p.4 of 60 (R. p. 343, line 3).

[1] Appellant's foreclosure file number with the firm.

[2] On July 5, 2010 Appellant attempted to make the final trial payment through Plaintiff's automated system

IV. PROCEEDINGS BEFORE THE BANKRUPTCY COURT

After the commencement of Appellant's bankruptcy the June 2010 payment was applied to Appellant's mortgage statement dated August 5, 2010. Respondent wrongfully withheld the June 2010 payment from application until August 5, 2010. e.g. Affidavit Nov. 2014 p.3. (R. p. 160).

The case was dismissed on January 19, 2011. e.g. Ex. B, Sum. Sch. Dkt. 1, Cs. 11-01994 p.4 of 60. (R. p. 343, line 3).

Appellant refiled a petition with the bankruptcy court March 28, 2011.

August 2011 Appellant contacted her bankruptcy attorney and asked if the plan could be modified to include September, October, November and December 2011 mortgage payments.[3] The Trustee would not agree to amend the plan but gave Appellant permission to discuss the circumstances with Respondent. Respondent's reply was the settlement order dated January 10, 2012 e.g. Ex. D. Set. Order Dkt. 32, Case 11-01994. (R. p. 438).

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

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

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but the system would not allow it. Instead, the call was routed to the Loss Mitigation Department. Appellant spoke with Respondent's agent Donna Williams who informed Appellant that the June payment of $563.05 was not received. Appellant advised agent that the payment was delivered to Respondent's Fort Mills, South Carolina location on June 7, 2010. The agent advised Appellant that her account would be noted and someone in management would call within 48 hours regarding the issue. July 2010 Appellant did not receive a return call from anyone on Respondent's management team. Appellant could not get through to Respondent when attempts to call were made. The calls were routed to an automated system and none of the prompts would allow Appellant to actually speak to a live person.

[3]Appellant had emergency issue.

stipend of $379.03, April $648.00 and stipend of $379.03, May $648.00 and stipend $379.03, June $648.00 and stipend of $379.03, July $648.00 and stipend of $379.03, August $643.00 and stipend of $379.03. September $648.00 and stipend of $379.03, October $648.00 and stipend of $379.03. e.g. Ord. Grt. Rel. Stay, Ex #2 Pmt. His. Case 11-01994. (R. p. 219).

The August 2012 regular mortgage payment cleared the bank, however, the stipend of $379.03 was returned to Appellant's bank on or about September 3, 2012. Appellant immediately contact Respondent to advise there was an issue with her checking account. Respondent's agent Scott S. advised that the check would automatically redeposit. It did not. Appellant mailed a money order of $379.03 to Respondent to cover the returned check. e.g. Ord. Grt. Rel. Stay, Sept. 26, 2012, Case 11-01994, e.g. Ord. Grt. Rel. Stay, Ex #2 Pmt. His. (R. p. 219, line 13-14).

On or about September 21, 2012 Respondent moved to have the automatic stay lifted. September 25, 2012 it was granted. e.g. Ord. Grt. Rel. Stay, Ex #2 Pmt. His. Case 11-01994.

V. PROCEEDINGS UPON RETURN TO CIRCUIT COURT

December 2012 Appellant found issues that appeared to be fraudulent regarding the mortgage and note attached to the Motion for Relief from Automatic Stay and Assignment of Mortgage and Note that is on file with Sumter County Register of Deeds. The bankruptcy attorney advised Appellant the fraudulent issues discovered about the mortgage were civil matters that should be addressed in state court because the property was no longer apart of the bankruptcy. e.g. Memo in Sup. p. 1-2, Nov. 27, 2013. (R. p. 63).

February 2013 Appellant contact Robert C. Ray of the Greenville Bar and discussed the new information that Appellant discovered regarding her mortgage documents. e.g. Memo in Sup. p. 1-2, Nov. 27, 2013. (R. p. 63).

March 2013 Appellant hired Mr. Ray and he contacted Brock and Scott to first seek permission to amend Appellant's *pro se* Answer in lieu of completing the Foreclosure Intervention document forwarded to Appellant. Soon after Appellant hired counsel, Respondent changed its counsel to Womble, Carlyle, Sandridge & Rice of Greenville, S.C. and representatives of the law firm contacted Appellant's counsel. Appellant's attorney had been negotiating Appellant's Amended Answer and Counterclaim with Respondent's new attorney since April 2, 2013. e.g. Memo in Sup. p. 1-2, Nov. 27, 2013 (R. p. 63).

Mr. Ray moved to amend *pro se* answer to include affirmative defenses, counterclaims and crossclaims. A Hearing was held November 20, 2013 and the Order to amend the *pro se* answer was granted December 2, 2013 and filed on the record January 4, 2014. (R. p. 16).

Based on the information discovered regarding the mortgage and assignment Mr. Ray moved to have the foreclosure case dismissed. A hearing was held on April 9, 2014. The motion to dismiss foreclosure was denied April 17, 2014 and filed on the record April 22, 2014. Respondent moved for Summary Judgement May 2014. A hearing was held November 19, 2014. The Order of Summary Judgment was decided January 9, 2015 and filed on the record January 13, 2015. (R. pp. 2-16).

Appellant received written notice of entry for the order of Summary Judgment Friday, January 30th, 2015 at 4:53 p.m. via electronic mail from Robert C. Ray, Attorney

stating the Order of Summary Judgment including emails of the decision which, resulted in the conclusion of this case. The email advised Appellant she had until February 12, 2015 to appeal the Order of Summary Judgment. (R. p. 216).

Counsel withdrew representation on Appeal. Appellant was not able to secure a South Carolina attorney. Appellant has prepared this brief *pro se*.

I. DID THE MASTER IN EQUITY ERR IN GRANTING SUMMARY JUDGMENT BASED ON A MISINTERPRETATION OF THE BANKRUPTCY TERM ABANDONDMENT?

ARGUMENT

The Master-In-Equity incorrectly determined that Appellant abandoned the interest in the property at 6365 Saxton Road. Respondent has not identified any statue, cited any authority or judicial precedent and has not provided any certified authenticated evidence from the Bankruptcy Court that imposes a legal assertion that Appellant agreed to surrender ownership of the property at 6365 Saxton Road to Respondent. If there was a question concerning the property's ownership, the bankruptcy court was the proper forum to address those issues.

In the Memorandum In Support of Summary Judgment ¶4 page 3 states, "June 17, 2013 Appellant proposed to amend her Chapter 13 plan to abandon her interest in the property that secured Wells Fargo's debt. She even highlighted her abandonment in blue so that there would not be any confusion as to the proposed amendment."

The section that is highlighted in "blue" in Respondent's e.g. Exhibit "H", Motion to Modify Chapter 13 Plan at (Dkt. No. 39 *In re Prescott II*) (June 17, 2013)) is simply the Trustee advising all creditors of the fact that Respondent received relief from stay and the order to terminate the automatic stay was issued September 2012 ("as to the property Wells Fargo Home Mortgage; 6365 Saxton Rd., Rembert SC 29128)." (R. p. 444).

The filing of a bankruptcy case creates a bankruptcy estate, which is comprised of all of the debtor's property, including, among other things, all legal and equitable interests of the debtor in property as of the date of the bankruptcy filing. 11 U.S.C. § 541.

During a bankruptcy case, one of the few ways to divest property from the estate is through abandonment pursuant to 11 U.S.C. § 554.

Estate property may be abandoned if the property is burdensome to the estate or the property is of inconsequential value and benefit to the estate. 11 U.S.C. § 554.

Typically, a trustee or debtor in possession will abandon property of the estate after a determination that the property does not yield any value to the estate or its administration will reduce the available assets of the estate. Usually, an abandonment determination is made in the following circumstances: (i) the debtor has no equity in the property because the creditors claim in the property exceeds the value of the property, (ii) the cost to maintain the property during the case is too costly, (iii) there are tax consequences to the estate following any sale of the property, or (iv) the property is subject to environmental liabilities.

The trustee or debtor in possession may abandon any estate property after notice and a hearing. 11 U.S.C. § 554(a); Fed. R. Bankr. P. 6007. By filing a motion, any party in interest may seek a court order requiring the trustee or debtor in possession to abandon property. 11 U.S.C. § 554(b); Fed. R. Bankr. P. 6007(b). In the event an objection is filed to the notice of abandonment or the motion requesting abandonment, the court will schedule a hearing. Regardless of who seeks abandonment, the party must prove that abandonment is appropriate because either the estate property is burdensome or it is of inconsequential value and benefit to the estate. Although the party seeking abandonment is required only to meet one of the grounds for abandonment, often both grounds are met and in making a determination for abandonment, "the court need not consider speculative factors" Kaler v. Nelson (*In re Nelson*), 251 B.R. 857 at 860 (8th Cir. BAP 2000).

Pursuant to 11 U.S.C. § 554(c), any scheduled estate property that has not been administered or dealt with by an order of the bankruptcy court is abandoned to the debtor. Any estate property that is not abandoned and that is not administered in the case remains property of the estate. 11 U.S.C. § 554(d). Additionally, any unscheduled assets that are not abandoned at the time of the closing of the case remain property of the estate.

The entry of an order for abandonment or the completion of a technical abandonment removes the property from the estate and returns it to the debtor or any party with a possessory interest in the property. *In re* Franklin Signal Corp., 65 B.R. 268, 271 (Bankr. D. Minn. 1986). Upon abandonment, "ownership and control of the asset is reinstated with all rights and obligations as before filing a petition in bankruptcy." Id. at 274. Although abandoned property is no longer estate property and not usually subject to the jurisdiction of the bankruptcy court, a creditor must still take steps under non-bankruptcy law to pursue its remedies. Once the trustee abandons the estate property in which a secured creditor holds a lien, the secured creditor can then pursue its remedies under state law, such as commencing a foreclosure by action.

Respondent erroneously believed that the order lifting the automatic stay under 11 U.S.C. § 362 released the estate's interest in the property as it does in an abandonment. The estate still maintains an interest in the property for any amounts that exceeded the Respondent's claim. e.g. Exhibit G (Dkt. No. 35 *In re Prescott II* (September 26, 2012 Order Granting Relief From Stay in Respondent's Memorandum In Support of Summary Judgment p. 2. (R. p. 442, lines 9-16). The trustee's abandonment of the property was in accordance with 11 U.S.C. § 554(a) of the Bankruptcy Code which provides "After

notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate."

Respondent or any other creditor did not move to object or attend any hearing regarding the petition of abandonment.

There were no additional requests made by Respondent or any evidence to support a specific ruling on any Order entered by the Bankruptcy Court which construed Appellant surrendering the ownership of the property to Respondent.

Additionally, Respondent alleges that "Ms. Prescott affirmatively told the Bankruptcy Court that if it approved her proposed Chapter 13 plan, then she would surrender the property at issue in this case to Wells Fargo....The Bankruptcy Court took her at her word." e.g.. Memorandum in Support of Summary Judgement p. 4. (R. p. 165, lines 17-19).

There is no evidence in the record to support these assertions from the Bankruptcy Court Records, Transcripts or any Sworn Affidavits from the Bankruptcy Court Trustee or Bankruptcy Counsel.

Accordingly, Respondent has alleged insufficient facts on the abandonment of the property and as an element to assert the doctrines of judicial estoppel, collateral estoppel and res judicata. Appellant respectfully submits that there are triable issues of material fact.

For the above-stated reasons, Appellant respectfully requests that the order granting Summary Judgment be reversed and the Appellant be entitled to a determination of her claims and defenses.

II. DID THE MASTER IN EQUITY ERR IN GRANTING SUMMARY JUDGMENT BASED ON THE DOCTRINE OF JUDICIAL ESTOPPEL?

ARUGMENT

Appellant appeals the Master-In-Equity's Order granting Respondent's Motion for Summary Judgment on the theory of judicial estoppel.

South Carolina officially recognized the doctrine of judicial estoppel in Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). "Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." Id. The purpose of judicial estoppel is to protect the integrity of the courts, not to protect litigants from allegedly improper or deceitful conduct by their adversaries. Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 42, 577 S.E.2d 202, 208 (2003); see also Quinn v. Sharon Corp., 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000) (Anderson, J., concurring) (providing a thorough discussion of the history, purpose, and application of judicial estoppel). Judicial estoppel in South Carolina generally applies only to inconsistent statements of fact, not inconsistent positions of law. Carrigg v. Cannon, 347 S.C. 75, 82-83, 552 S.E.2d 767, 771 (Ct. App. 2001).

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

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

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

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

The party against whom judicial estoppel is to be applied must have intentionally misled the court to gain unfair advantage. This bad faith requirement is the determinative factor. Zinkand v. Brown, 478, F.3d 634, 638 (4th Cir. 2007) (citations and internal quotation marks omitted). (R. pp. 179-180).

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

In this case however, Appellant did not conceal or deny owning an asset. To the contrary, she informed the Bankruptcy court and Respondent of her potential claims against Respondent with a copy of her written *pro se* Answer to Respondents Foreclosure Complaint on August 2, 2010 and March 28, 2011. Judicial estoppel is a principle developed to prevent a party from taking a position in a judicial proceeding that is inconsistent with a stance previously taken in court. Zinkand v. Brown, 478 F.3d 634, 638 (4th Cir. 2007). Federal law controls the application of judicial estoppel, since it relates to protection of the integrity of the federal judicial process. Allen v. Zurich Ins. Co., 667 F.2d 1162, 1168 n.4 (4th Cir. 1982). e.g. Memo in Opp. Mot. to Dism. p.

The foreclosure complaint and answer were disclosed in the bankruptcy. Even if Appellant should have supplemented her bankruptcy pleadings after she actually filed this action, her initial disclosure of the claims precludes from finding that she acted in bad faith. Accordingly, this aspect of the Respondent's judicial estoppel claim should be rejected. See Zinkand, 478 F.3d at 638 (noting that bad faith is "the determinative factor" of a judicial- estoppel analysis (internal quotation marks omitted)). Finally, there is absolutely no evidence that the allegedly contradictory positions were taken in a deliberate attempt to mislead the court. *See* Cothran, 357 S.C. at 217, 592 S.E.2d at 632 (requiring some evidence of intent to mislead). Essential elements of estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position. Mayes v. Paxton, 313 S.C. 109, 437 S.E.2d 66 (1993). "Estoppel cannot exist if the knowledge of both parties is equal and nothing is done by one to mislead the other." Evins v. Richland County Historic Pres. Comm'n, 341 S.C. 15, 15, 532 S.E.2d 876, 878 (2000).

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

Respondent's own authorities reached the same conclusion. In Whitten v. Fred's Inc., 601 F.3d 231 (4th Cir., 2010), the court held a Plaintiff's failure to list certain claims

in its bankruptcy documents did not prevent the party from raising them later, noting that all interested parties were aware of the claims despite the omission. The court noted that "[e]ven if Whitten should have supplemented her bankruptcy pleadings after she filed this action her initial disclosure of the claims precludes us from finding that she acted in bad faith." Whitten, 601 F. 3d at 242. (R. p. 180, lines 5-11).

In Appellants' initial responsive pleadings and supporting documents filed in 2010, the Appellant asserted numerous defenses and pleaded all relevant facts contesting Respondent's entitlement to foreclosure. Those claims have be clarified in the Appellant's subsequent amendments, however, the positions espoused are not contradictory to those taken at earlier stages in this litigation. (R. p. 180, lines 12-16).

Judicial estoppel applies only if a party's prior inconsistent position benefited the party or was adopted by the court.

March 2014 Appellant's Bankruptcy Plan was dismissed. Under 11 U.S.C. § 349(b), "the pre-discharge dismissal of a bankruptcy case returns the parties to the positions they were in before the case was initiated." *In re* Sanitate, 415 B.R. 98, 104 (Bankr. E.D. Pa. 2009). Many courts have interpreted this statute to mean that dismissal of a bankruptcy case restores the status quo ante. *Id.* at 105; see also *In re* Crump, 467 B.R. 532, 535 (Bankr. M.D. Ga. 2010). As the Sanitate court notes, "[t]hese broad readings are in harmony with Congress' stated intent that the purpose of this section is to 'undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case.'" 415 B.R. at 105 (quoting S. Rep. No. 989, 95th Cong., 2d Sess. 48-49 (1977)). Since the Bankruptcy

Court dismissed Appellant's bankruptcy plan without granting a discharge, the court's acceptance of that plan was negated and the parties were no longer bound by its terms.

As a result, the Master-In-Equity cannot find that Appellant successfully asserted an inconsistent position in the bankruptcy court and apply judicial estoppel to bar her with the pursuit of her Amended Answer and present Counterclaims. While the Respondent may have been prejudiced by the delay in pursuing foreclosure which resulted from the automatic stay, March 2011 through September 2012 this slight prejudice is insufficient to bar appellant's claim under the principle of judicial estoppel.

e.g. R. Ex. G. Ord. Grt. Rel frm. Sty. Sept. 26, 2012 (R. p. 442).

For the above-stated reasons, Appellant respectfully requests that the order granting Summary Judgment be reversed and the Appellant be entitled to a determination of her claims and defenses.

III. **DID THE MASTER IN EQUITY ERR IN BARRING APPELLANT'S COUNTERCLAIMS AND AFFIRMATIVE DEFENSES BY THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL?**

ARUGMENT

Res Judicata is designed to ensure that an issue or claim that was or could have been resolved in prior litigation is not subject to re-litigation. Three elements are necessary for res judicata to attach: (1) the parties or their privies must be the same as in prior litigation; (2) the subject matter must be the same as in prior litigation; (3) there must be a prior adjudication by a court of competent jurisdiction. Pye v. Aycock, 325 S.C. 426, 432, 480 S.E.2d 455,458 (Ct. App.1997).

In this case, Appellant's counterclaims are not the same as the subject matter, and there are no prior adjudications of the Amended Answer and Counterclaims by a court of competent jurisdiction. (Amended Answer and Counterclaims August 2014. (R. p. 132).

Appellant's counterclaims against the Respondents are not an attempt to contest the right of Respondent to foreclose, but are an attempt to determine whether the negligent misrepresentation she received from the Respondent was the proximate cause of the foreclosure. Proximate cause is a question of fact for the jury, and it may be proved by direct or circumstantial evidence. Player v. Thompson, 259 S.C. 600, 193 S.E.2d 531, 533 (1972). May 2010 Ans. p. 8, (R. p. 31.)

To assert direct liability based on a negligence claim in South Carolina, a plaintiff must show that (1) defendants owed him a duty of care; (2) defendants breached this duty by a negligent act or omission; (3) defendants' breach was the proximate cause of their injuries; and (4) he suffered injury or damages. Dorrell v. S.C. Dep't of Transp., 361 S.C. 312, 605 S.E.2d 12, 15 (2004) (citation omitted). The duty of care is that standard of

conduct the law requires of an actor in order to protect others against the risk of harm from his actions. Snow v. City of Columbia, 305 S.C. 544, 409 S.E.2d 797, 803 (S.C.Ct.App.1991).

Proximate cause requires proof of: (1) causation-in-fact, and (2) legal cause. Bramlette v. Charter–Medical–Columbia, 302 S.C. 68, 393 S.E.2d 914, 916 (1990). Causation-in-fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence, and legal cause is proved by establishing foreseeability. Id. Although foreseeability of some injury from an act or omission is a prerequisite to establishing proximate cause, the plaintiff need not prove that the actor should have contemplated the particular event which occurred. See, e.g., Greenville Mem'l Auditorium v. Martin, 301 S.C. 242, 391 S.E.2d 546 (1990). The defendant may be held liable for anything which appears to have been a natural and probable consequence of his negligence. Greenville Mem'l Auditorium, 391 S.E.2d at 547–48. A plaintiff therefore proves legal cause by establishing the injury in question occurred as a natural and probable consequence of the defendant's negligence. Bramlette, 393 S.E.2d at 916.

e.g. May 2010 Hrdshp. Affidavit p.1. (R. p. 36).

Appellant and her counsel were fully apprised through discovery and the extensive research in this case, including every aspect of Respondent's involvement in negligent misrepresentation actions. This includes every act which led to the Respondent's Foreclosure Complaint. (R. pp. 131-134) Amd Ans. and Cntrclm, p. 4-7.

Appellant's counterclaims, which are compulsory, rest on her allegations, that Respondent "wrongfully, unlawfully, intentionally, willfully, and illegally declared

Appellant to be in default and accelerated the balance due on the note and mortgage[,]" fraudulently induced Appellant into executing a trial payment plan, and intentionally "frustrated [Appellant's] ability to comply with the terms and conditions on her part to be performed." These allegations all involve questions of fact that will most certainly arise in the foreclosure action, especially when considered in light of Appellant's defenses to the foreclosure action, including unclean hands. (May 2010 Hrdship Affidavit p.1-3.(R.pp. 36-38) Ans. p.2, 3,7,8. (R. pp. 24, 26, 30, 31).

The issues in the amended counterclaims and affirmative defenses are whether Respondent caused Appellant's foreclosure by negligent misrepresentation. Because these are two different issues, Appellant is entitled to a determination of her Amended Answer, Counterclaims and Affirmative Defenses and the Order of Summary Judgment to bar her claims based on the doctrine of res judicata and collateral estoppel should be reversed.

Collateral Estoppel

The Master In Equity granted Summary Judgment barring Appellant from pursuing her counterclaims and affirmative defenses against the Respondents because " a party who admits a debt is owed in bankruptcy proceedings is barred from later disputing that debt. Respondent relies on Gilbert, No. 08-84618, 2010 WL 2026520, at *1 (Bankr. N.D. Ga. Mar. 1, 2010) (explaining that a debtor's decision to surrender property during a bankruptcy proceeding "bars the debtor from maintaining possession of the collateral and from contesting the right of the creditor to foreclose on the property"). (R. pp. 8-9).

Respondent citing Gilbert is misplaced. In Gilbert, the debtor's decisions was to surrender the ownership of the property during her bankruptcy proceedings.

In the present case, Appellant did not surrender ownership of the property to Respondent during a bankruptcy proceeding and there is no evidence in the record to support this assertion. Pursuant to 11 U.S.C. § 554(c), any scheduled estate property that has not been administered or dealt with by an order of the bankruptcy court is abandoned to the debtor. Under 11 U.S.C. § 349(b), "the pre-discharge dismissal of a bankruptcy case returns the parties to the positions they were in before the case was initiated." If there was a question concerning the property's ownership, the bankruptcy court was the proper forum to address those issues. 11 U.S.C. § 554(a) of the Bankruptcy Code which provides "After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate."

Respondent did not move to object or attend any hearing regarding the petition of abandonment. There were no additional requests made by Respondent or any evidence to support a specific ruling on any Order entered by the Bankruptcy Court which construed Appellant surrendering the ownership of the property to Respondent.

Respondent argues that Appellant is collaterally estopped from pursuing her counterclaims in this action. "Collateral estoppel precludes the re-adjudication of an issue that has previously been litigated and adjudicated on the merits in another action between the same parties or their privies." Waldroup v. Greene County Hosp. Auth., 265 Ga. 864, 866-867(2), 463 S.E.2d 5 (1995). Here there were clearly no litigation and adjudication in the bankruptcy court of the claims presented in this action.

Essential elements of estoppel as related to the party claiming the estoppel are: (1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position. Mayes v.

Paxton, 313 S.C. 109, 437 S.E.2d 66 (1993). "Estoppel cannot exist if the knowledge of both parties is equal and nothing is done by one to mislead the other." Evins v. Richland County Historic Pres. Comm'n, 341 S.C. 15, 15, 532 S.E.2d 876, 878 (2000).

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

Appellant's counterclaims, which are compulsory, rest on her allegations, that Respondent "wrongfully, unlawfully, intentionally, willfully, and illegally declared Appellant to be in default and accelerated the balance due on the note and mortgage[,]" fraudulently induced Appellant into executing a trial payment plan, and intentionally "frustrated [Appellant's] ability to comply with the terms and conditions on her part to be performed." These allegations all involve questions of fact that will most certainly arise in the foreclosure action, especially when considered in light of Appellant's defenses to the foreclosure action, including unclean hands. Respondent has been aware of the issues in this case since May 2010. e.g. Appellant's pro se Answer, Hardship Affidavit and Recent Affidavit are all consistent with Respondent's actions in the case.

The issues in the amended counterclaims and affirmative defenses are whether Respondent caused Appellant's foreclosure by negligent misrepresentation. Because these are two different issues, Appellant is entitled to a determination of her Amended

Answer, Counterclaims and Affirmative Defenses and the Order of Summary Judgment to bar her claims based on the doctrine of res judicata and collateral estoppel should be reversed.

IV. DID THE MASTER IN EQUITY ERR IN GRANTING SUMMARY JUDGMENT IN REPONDENT'S FAVOR ON APPELLANT'S AMENDED ANSWER AND COUNTERCLAIMS AS A MATTER OF LAW?

ARUGMENT

The rules governing the amendment of pleadings strongly favor amendment. An amendment should be granted freely when justice so requires and there is no prejudice to the other party. Kelly v. South Carolina Farm Bureau Mutual Insurance Co., 316 S.C. 319; 450 S.E.2d 59, (Ct. App. 1994). Mem. In Op. Mot to Dism. Ctn p.2. (R. p. 173A).

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

At all relevant times the Respondent has been aware of the facts and allegations of the Amended Complaint through Appellant's Hardship Affidavit dated May 17, 2010, and her Answer to Complaint and Affirmative Defenses dated May 17, 2010. Additionally, the amendment was authorized in advance December 2013 of Respondent's filing for Summary Judgment. Order Granting Amendment and Counterclaims (R. p. 16).

Accordingly, the Master-In-Equity cannot show any prejudice to preclude Appellant's proposed Amendment.

For the above-stated reasons, Appellant respectfully requests that the order granting Summary Judgment on the Amended Answer and Counterclaims be reversed and the Appellant be entitled to a determination of her claims and defenses.

V. DID THE MASTER-IN-EQUITY ERR IN GRANTING SUMMARY JUDGMENT ON THE APPELLANT'S AMENDED ANSWER AND COUNTERCLAIM STATING TIMELY CAUSES OF ACTION AND DEFENSES AUTHORIZED BY LAW?

ARUGMENT

The Counterclaims and Defenses are timely, because they relate back to the filing of the original Answer filed May 19, 2010. Rule 15(c) SCRCP, states that an Amendment relates back to the original pleading "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading." (R. p. 173B).

Appellant's claims and defenses clearly arise out of the same transaction or occurrence as the Respondent claims and Appellant's initial defenses, namely the mismanagement of Appellant's mortgage and misrepresentations made by the Respondent, in connection with the alleged default, acceleration and foreclosure process. See Answer to Complaint and Affirmative Defenses, 2-3, May 17, 2010, and Hardship Affidavit Explanations, May 17, 2010. Because they relate back to the time of the initial Answer, they are not barred by the statute of limitations. (R. p. 174).

Additionally, Appellant's claims fall under the extended six-year statute of limitations provided in S.C. Code Ann.§37-23-70, including the claims relating to

Respondent's efforts to encourage Appellant's default and misrepresentations in connection with contemplated modification.

Finally, while Respondent complains of the pass of time, it is indisputable that Appellant could not amend her pleadings during the pendency of bankruptcy proceedings, and that any right to amend or assert a claim during that time would have belonged exclusively to the Trustee. See, Weber v Bank of America, C/A No. 0:13-cv-0l999-JFA (D.S.C., Rock Hill Division, September 10, 2013).

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

The Amended Answer and Counterclaim States Adequate Claims of Relief. Appellant has restyled her original "Answer and Affirmative Defenses" into claims for Fraud, Negligent Misrepresentation, Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, as well as equitable defenses, including Unclean Hands.

Respondent claims the Appellant has not stated facts to state a cause of action under Rule 12(b)(6). In ruling on a 12(b)(6) motion, the court must construe the counterclaims in the light most favorable to the nonmovant to relief on any theory of the case. Freemantle v. Preston, 398 S.C. 186, 728 S.E.2d 40 (2012). If the facts alleged would entitle the non-moving party to any relief, dismissal under Rule 12(b)(6) is improper. Id. (R. p. 174 at 2).

For the above-stated reasons, Appellant respectfully requests that the order granting Summary Judgment on the Amended Answer and Counterclaims be reversed and the Appellant be entitled to a determination of her claims and defenses.

VI. DID THE MASTER IN EQUITY ERR IN GRANTING SUMMARY JUDGEMENT ON APPELLANT'S COUNTERCLAIM STATING TIMELY CAUSES OF ACTION FOR FRAUD AND NEGLIGENT MISPRESENTATION AS A MATTER OF LAW?

ARGUMENT

The statute of limitations on a negligence claim accrues at the time of the negligence or when facts and circumstances would put a person of common knowledge on notice that he might have a claim against another party. Kreutner v. David, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995). This standard is known as the discovery rule. Id. "The statute is not delayed until the injured party seeks advice of counsel or develops a full-blown 229*229 theory of recovery; instead, reasonable diligence requires a plaintiff to `act with some promptness.'" Maher v. Tietex Corp., 331 S.C. 371, 377, 500 S.E.2d 204, 207 (Ct.App.1998) (citations omitted). (Memo in Sup. of Amd Ans. Nov. 2013 (R. p. 64).

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

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

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

A claim for negligent misrepresentation consists of the following elements:

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

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

In the Motion for Summary Judgement Respondent does not identify any particular element that is lacking in the counterclaims, but instead relied on a case from the South Carolina District court, Weber v. Bank of America, C/A No. 0:13-cv-01999-JFA (D.S.C., Rock Hill Division, September 10, 2013), asserting that the decision bars any possible fraud or negligent misrepresentation claim for arising out of the loan modification process. The distinctions between the Appellant's counterclaims and that case are clear. (R. p. 141 at ¶4).

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

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

By comparison in this case, Appellant has alleged that the Respondent never informed her that modification was unavailable because of her unemployment. (Ans. p. 7. (R. p. 30 at ¶10)

Furthermore, Respondent never made a determination on her eligibility for a loan modification despite knowledge that Appellant was never eligible for such assistance.

Here, the misrepresentation was that a determination would be made, but never was, not that unfavorable determination had been made. Additionally, the Respondent told the Appellant that she had to go into default before she would be eligible for assistance. (Affidavit 2014, Exhibit A. (R. p. 149).

Appellant has alleged all the necessary facts to make out her claim. Specifically, Appellant has alleged that (1) she informed Respondent of her financial vulnerability and reliance on public assistance; (2) requested information and advice from Respondent; (3) that Respondent was aware that she was relying on that advice (4) that Respondent made misrepresentations regarding (a) default being a pre-condition for modification and (b) that a modification determination would be made; (5) that the misrepresentations were material to the transaction, and (6) that Respondent knew or should have known that the representations were false when made or made with reckless disregard as to their truth or falsity. Appellant has further alleged that she (7) relied on Respondents misrepresentations and that she (8) suffered injury as a result of this (9) reasonable reliance. (Affidavit Nov. 2014, Exhibit A., Affidavit May 2010, Ans. May, 2010).

Unlike the plaintiff in Weber, Appellant has alleged a duty on behalf of Respondent to support her negligent misrepresentation action. The court in Weber read the complaint to allege a duty on behalf of banks to provide some form of loan modification program, which duty simply does not exist. Weber, p.7. In this case, the breached duty derives from both the common law duties of care and disclosure and from applicable statutory law.

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

For the above-stated reasons, Appellant respectfully requests that the order granting Summary Judgment be reversed and the Appellant be entitled to a determination of her Fraud and Negligent Misrepresentation claims and defenses.

VII. DID THE MASTER IN EQUITY ERR IN BARRING APPELLANT'S BREACH OF CONTRACT CLAIM AS A MATTER OF LAW?

ARUGMENT

From the face of the Amended Answer and Counterclaim it is obvious that Appellant has not plead a "stand-alone" claim for a breach of the covenant of good faith and fair dealing, but plead that breach in conjunction with a breach of contract claim. No independent or unique remedy has been sought from the claim, and it is clearly an additional breach of the same contract that is the basis for Respondent's own action.

In the Motion for Summary Judgment Respondent's reliance on Rotec Servs. V. Encompass, Servs., 359 S.C. 467, 472-73, 597 S.E.2d 881, 883-84, is misplaced. In Rotec, the court held that there was no contractual obligation breached, and as a result a claim for a breach of implied covenants of that contract could not stand alone. (R. p. 141 at ¶4). Here, Appellant has alleged breaches of specific provisions of the contract between the parties and that the Respondent acted in bad faith in allowing those breaches to occur. Specifically, Appellant has alleged that Respondent mismanaged and misapplied payments from Appellant, as it was required to do under the Mortgage Agreement. The application of funds was clearly a discretionary act controlled by Respondent, which discretion was abused in repeatedly failing to properly apply funds. (Mem in Sup of Amd Ans Cntrclm. p 2-10. (R. pp. 129-137).

Additionally, the Respondent points to good reason for disallowing the Appellant's breach of contract claim. There is no dispute that there was a contract between the parties. The Appellant has alleged a breach of a material term that relates directly to the performance and obligation of the parties. Plaintiff's failure to apply payments in accordance with the contract had a bearing on Appellant's alleged failure to comply with the payment terms of the note and mortgage.[4] Accordingly, the Appellant's breach of contract claim should be considered at the liability stage and not, as Respondent contends, as an afterthought at the damages stage. (Ans. p.8) (R. p. 31 at ¶12).

For the above-stated reasons, Appellant respectfully requests that the order granting Summary Judgment be reversed and the Appellant be entitled to a determination of her Breach of Contract claims and defenses.

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[4]Appellant's loan is insured by the Federal Housing Administration (FHA). Respondent stands to receive full or near-full reimbursement from the federal government for the fees, expenses, accrued interest, and unpaid principal balance remaining upon the completion of the foreclosure of her home. This pecuniary benefit provides the motivation to avoid a loan modification with Appellant under FHA-HAMP or other Housing and Urban Development (HUD)-FHA loss mitigation options. Because the claim involves an FHA-insured mortgage, the question of what fees and costs may be charged is not limited to the parties' agreement or otherwise applicable state law. The Secretary (of HUD) is authorized and directed to make rules and regulations dealing with federally-insured mortgages. See 12 U.S.C. § 1715(b). Where HUD rules or regulations are incorporated into an insured mortgage, they are binding upon both the mortgagor and mortgagee.

VIII. DID THE MASTER IN EQUITY ERR BY ASSERTING APPELLANT'S NOVEMBER 2014 AFFIDAVIT IS A "SHAM" AS A MATTER OF FACT OR LAW?

ARUGMENT

Appellant contends that the Master In Equity incorrectly applied the Sham Affidavit rule citing Dunes W. Golf Club, LLC v. Town of Mt. Pleasant, 401 S.C. 280, 311, 737, S.E.2d 601,617 (2012) (noting parenthetically that "a party cannot take inconsistent positions in an attempt to create a sham issue of material fact). (R. p. 168).

Appellant's Affidavit of November 2014 is not a "[S]ham" and is in accordance with Rule 56(e) SCRCP, as issues of fact and personal knowledge. The present Affidavit is consistent with Appellant's original Answer and Hardship Affidavit prepared at the time she answered Respondent's Complaint May 17, 2010. *See* Rule 10(c), SCRCP ("A copy of any plat, photograph, diagram, document, or other paper which is an exhibit to a pleading is a part thereof for all purposes if a copy is attached to such pleading."); Lee v. Kelley, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct. App. 1989) ("[B]y virtue of Rule 10(c), SCRCP, the attachment became a part and parcel of the complaint."); Metal Serv. Corp. v. Industr. Elec. Co., 253 S.C. 507, 509, 171 S.E.2d 703, 704 (1970) (considering materials attached to complaint when deciding defendant's demurrer to the complaint).

The Master In Equity has not given any reason or justification for this assertion in distinguishing between a "sham" affidavit versus one that merely corrects or clarifies an issue previously addressed by Appellant. (R. p. 24-34, 36-39, 144-160).

For the above-stated reasons, Appellant respectfully requests that the order granting Summary Judgment be reversed and the Appellant be entitled to a determination of her Breach of Contract claims and defenses.

CONCLUSION

The Master In Equity incorrectly granted Respondent Summary Judgment in regards to the issues of judicial estoppel, collateral estoppel and res judicata. Appellant raised several issues of material fact as to the elements of these doctrines being misplaced and the consistency of the statements in the counterclaims and affidavits submitted throughout this case.

CERTIFICATE OF APPELLANT

The undersigned certifies that her Final Brief complies with Rule 208(b), SCACR.

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February 25, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies on the 25th day of February 2016, she served a copy of The foregoing FINAL BRIEF OF APPELLANT by depositing same in the United States Mail first class, mail, proper postage, affixed, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

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