THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable Richard L. Booth, Master in Equity

Appellate Case No. 2015-000349
Circuit 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.

BRIEF OF RESPONDENT

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

S. Sterling Laney, III
550 South Main Street, Suite 400
Greenville, South Carolina 29601
(864) 255-5400

M. Todd Carroll
1727 Hampton Street
Columbia, South Carolina 29201
(803) 454-6504

Attorneys for Respondent

February 16, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES

1. Can a borrower challenge a bank's foreclosure on a mortgage after the borrower has surrendered her interest in the mortgaged property to the bank as part of bankruptcy proceedings?

2. Can a borrower dispute a bank's entitlement to enforce the terms of a note and mortgage after the borrower has affirmatively conceded in court proceedings both the validity of the note and her default on it?

3. Can a borrower prosecute counterclaims against a bank as part of foreclosure proceedings after the borrower has sworn under oath to the Bankruptcy Court that she does not have any counterclaims against the bank?

4. Can a borrower avoid summary judgment by filing an affidavit that contradicts her sworn statements to the Bankruptcy Court?

STATEMENT OF THE CASE

This case presents a clear abuse of the judicial process. Here, a borrower has avoided paying her mortgage since 2010, avoided foreclosure by filing multiple bankruptcy proceedings, and is attempting to avoid the consequences of her representations to the Bankruptcy Court through this appeal. After almost five years of nonpayment on the mortgage, the trial court rightly held the borrower to her representations to a federal court and granted summary judgment in Wells Fargo's favor, a decision that is consistent with a uniform body of case law.

I. Wells Fargo commenced foreclosure proceedings in April 2010 due to Ms. Prescott's default under her note and mortgage.

In 2003, Ms. Prescott obtained a loan in the principal amount of $81,301 that was secured by a mortgage on real property in Sumter County. (Note and Mortgage; R. pp. 84, 208.) Ms. Prescott's original lender subsequently assigned the note and mortgage to Wells Fargo. (Assignment of Note and Mortgage; R. p. 91.)

Because of her failure to timely make payments, Wells Fargo commenced foreclosure proceedings on April 16, 2010. (Complaint (Apr. 16, 2010); R. p. 18.) Ms. Prescott answered the Complaint without asserting any counterclaims. (Answer (May 17, 2010); R. p. 24.)

II. To stall foreclosure, Ms. Prescott filed bankruptcy on two separate occasions, but she conceded in her bankruptcy filings the validity of Wells Fargo's claim and the absence of any counterclaims of her own.

Shortly after answering the Complaint, Ms. Prescott commenced voluntary Chapter 13 bankruptcy proceedings in the District of South Carolina. In the asset schedules she filed in her bankruptcy matter, Ms. Prescott declared under penalty of perjury two key points that are dispositive of this case:

(1) Wells Fargo was a creditor with a loan secured by a mortgage on her property; and

(2) Ms. Prescott did not have any "contingent or unliquidated claims" or "counterclaims" to pursue against anyone, including Wells Fargo.

(Summary of Schedules at 7, 11 from *In re Prescott*, Case No. 10-5552-dd (Bankr. D.S.C. Aug. 15, 2010); R. pp. 227, 301.) The Bankruptcy Court ultimately dismissed Ms. Prescott's case because she had not proposed a plan that met Chapter 13's requirements. (Order from *In re Prescott*, Case No. 10-5552-dd (Bankr. D.S.C. Jan. 19, 2011); R. p. 338.)

Undeterred, less than two months later, Ms. Prescott filed a second voluntary Chapter 13 bankruptcy case. Just as in her initial bankruptcy case, Ms. Prescott filed schedules that again conceded both Wells Fargo's status as a secured creditor with a mortgage on her property and the absence of any counterclaims against the bank. (Summary of Schedules at 13, 17 from *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. Mar. 28, 2011); R. pp. 352, 356.) And just as before, she filed these under the penalty of perjury. (*Id.* at 36; R. p. 375.)

In addition to these concessions from her sworn asset schedules, several additional bankruptcy filings confirm Wells Fargo's status as a secured creditor to which she was in default.

First, Wells Fargo filed a claim in Ms. Prescott's bankruptcy proceedings, in which it asserted a secured debt of over $80,000. (Wells Fargo's Proof of Claim (Claim No. 3-1) from *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. Apr. 11, 2011); R. pp. 401–412.) Ms. Prescott did not object to Wells Fargo's claim.

Second, Wells Fargo sought relief from the automatic stay of this foreclosure action that attaches when bankruptcy proceedings are commenced. In that filing, the bank asserted that it was a secured creditor, and it attached the same note and mortgage on which this case is based as proof of its security interest. (Wells Fargo's Motion for Relief from Automatic Stay from *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. Dec. 9, 2011); R. pp. 414–430.)

In response, Ms. Prescott "certified" the validity of Wells Fargo's factual assertions, conceded that she is "behind on payments due on this loan," and requested time to "catch up on payments." (Prescott's Answer to Motion for Relief from Stay from *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. Dec. 22, 2011); R. p. 432.) The Bankruptcy Court granted Wells Fargo's request for relief from the automatic stay and held that Ms. Prescott was "in default" on her note. (Order Granting Relief from Stay from *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. Sept. 26, 2012); R. p. 442.)

Third, Ms. Prescott sought leave to amend her Chapter 13 plan to abandon her interest in the property that secured Wells Fargo's loan. She highlighted her abandonment in blue so that there would not be any confusion as to her proposed amendment:

> The Debtor moves to Amend the confirmed Chapter 13 plan due to abandon interest in property located at 6365 Saxton Rd., Rembert, SC 29128 to Wells Fargo Home Mortgage. Wells Fargo Home Mortgage received relief from stay in September 2012.

(Prescott's Motion to Modify Chapter 13 Plan at 1 from *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. June 17, 2013) (blue highlighting and grammatical errors in original); R. p. 444.) In that same filing, Ms. Prescott verified her intention to abandon any interest in the secured property to Wells Fargo:

> 6. Surrender of property: The debtor will surrender the following property upon confirmation of the plan. The order confirming plan shall terminate the

> automatic stay as to that property: Wells Fargo Home Mortgage; 6365 Saxton Rd., Rembert, SC 29128. Any creditor affected by this provision may file an itemized proof of claim for any unsecured deficiency within a reasonable time after the surrender of the property.

(*Id.* at 6; R. p. 449.)

On July 17, 2013, Judge Duncan accepted Ms. Prescott's representations and issued an order confirming the Chapter 13 plan with the modifications that Ms. Prescott proposed. (Order Confirming Plan and Resolving Motions from *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. July 17, 2013); R. p. 453.)

III. Upon returning to the trial court, Ms. Prescott repeatedly took positions that were plainly inconsistent with her representations to the Bankruptcy Court.

Once the bankruptcy proceedings closed, this case's result should have been simple. Ms. Prescott affirmatively told the Bankruptcy Court that she was in default on a secured debt owed to Wells Fargo. She further represented that if the Bankruptcy Court approved her proposed Chapter 13 plan, she would surrender the property at issue in this case to Wells Fargo. Though the Bankruptcy Court took her at her word, Ms. Prescott did precisely the opposite, and erected numerous procedural hurdles in this case:

Attempting to Add New Counterclaims

Two months after the Bankruptcy Court confirmed Ms. Prescott's modified Chapter 13 plan, she sought leave to amend her answer in this case and, for the first time, to assert previously-undisclosed counterclaims against Wells Fargo. (Prescott's Motion to Amend Answer and Counterclaim (Sept. 20, 2013); R. p. 41.) The trial court granted that motion on December 2, 2013. (Order (Dec. 2, 2013); R. p. 16.) But Ms. Prescott did not file her proposed amended pleading, as discussed below.

Seeking Dismissal of Wells Fargo's Foreclosure Case

In addition to attempting to assert undisclosed counterclaims, Ms. Prescott also filed a motion to dismiss Wells Fargo's foreclosure case based on a newfound argument that Wells Fargo was not a secured creditor—a position that was also squarely contrary to her numerous representations to the Bankruptcy Court. (Prescott's Motion to Dismiss (Jan. 3, 2014); R. p. 70.)

In opposing dismissal, Wells Fargo provided the trial court with a series of Ms. Prescott's statements and filings to the Bankruptcy Court. (Wells Fargo Bank's Memorandum in Opposition to Motion to Dismiss (Apr. 4, 2014); R. p. 94.) Additionally, it filed an affidavit confirming the bank's status as the holder of the original note. (Aff. Andrea Kruse (Apr. 4, 2014); R. p. 106.) Accordingly, the trial court denied Ms. Prescott's motion. (Order (Apr. 17, 2014); R. p. 13.)

Filing Even More New Counterclaims and a Sham Affidavit

Two weeks after the trial court denied Ms. Prescott's motion to dismiss, Wells Fargo moved for summary judgment. (Motion for Summary Judgment (May 5, 2014); R. p. 124.) In response, Ms. Prescott submitted two filings.

First, she filed a document entitled "Amended Answer and Counterclaim," though this filing was not the same pleading that she proposed filing when she sought leave to amend in September 2013. (Amended Answer and Counterclaim (Aug. 21, 2014); R. p.128.) In this purported pleading, Ms. Prescott asserted a series of new counterclaims based on allegations regarding Wells Fargo's pre-foreclosure conduct. (*Id.* ¶¶ 19–69; R. pp. 131–137.)

Second, Ms. Prescott filed an affidavit from herself. In this affidavit, she attempted to contradict her own statements to the Bankruptcy Court—now alleging that Wells Fargo had engaged in "illegal" conduct and made "misrepresentations"—in order to manufacture a factual dispute. (Aff. Delores Prescott (Nov. 15, 2014); R. p. 144.)

Wells Fargo moved to strike or dismiss Ms. Prescott's purported amended pleading. (Wells Fargo's Motion to Strike or Dismiss Amended Answer and Counterclaim (Sept. 5, 2014); R. p. 140.) It also filed a memorandum in support of its motion for summary judgment, in which the bank argued that both judicial estoppel and res judicata prohibited Ms. Prescott from contesting the foreclosure and from asserting previously-undisclosed counterclaims. (Wells Fargo's Memorandum in Support of Summary Judgment (Nov. 18, 2014); R. p. 162.)

The trial court held a hearing on Wells Fargo's motion for summary judgment and motion to strike Ms. Prescott's "amended pleading" on November 19, 2014. During that hearing, the trial court orally ruled that the note was enforceable, that Ms. Prescott was in default on the note, and that her counterclaims fail as a matter of law. (Order at 5 (Jan. 9, 2015); R. p. 6.) The court also requested that the parties submit additional briefing as to the legal effect of a debtor abandoning or surrendering property during bankruptcy proceedings. Wells Fargo supplied the requested briefing. (Wells Fargo's Post-Hearing Memorandum in Support of Motion for Summary Judgment (Dec. 3, 2014); R. p. 182.) Ms. Prescott filed nothing.

The trial court granted Wells Fargo's motion for summary judgment, and directed the parties to appear for a damages hearing to determine the sum owed to Wells Fargo. (Order (Jan. 9, 2015); R. p. 2.) This appeal followed.

STANDARD OF REVIEW

This Court reviews grants of summary judgment under the same standard that is applied at the trial level. *Foster v. Foster*, 384 S.C. 380, 383, 682 S.E.2d 312, 313 (Ct. App. 2009). Summary judgment should be issued when the evidence collectively shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. Courts agree that "[t]he purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

ARGUMENTS AND AUTHORITIES

It is hornbook law that a litigant cannot make a statement to one court to induce a favorable ruling, but then take a contrary position to another. The twin doctrines of judicial estoppel and res judicata are rooted in the principle that a party is bound to its representations to a court and the results that flow from those representations.

Judicial estoppel is designed to "protect the integrity of the judicial process" by prohibiting parties from making inconsistent factual representations to the court. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). In order for it to apply, a party must take inconsistent positions in the same or related proceedings as part of an effort to mislead the court, and the party must receive some benefit from its representations. *Cothran v. Brown*, 357 S.C. 210, 215–16, 592 S.E.2d 629, 632 (2004).

Similarly, res judicata prevents the re-litigation of issues previously resolved. For it to apply, there must be similarity of parties and subject matter from prior litigation, as was as a "prior adjudication of the issue by a court of competent jurisdiction." *Pye v. Aycock*, 325 S.C. 426, 432, 480 S.E.2d 455, 458 (Ct. App. 1997).

The trial court's reliance on these complementary doctrines when granting judgment in Wells Fargo's favor in this foreclosure action is unimpeachable. Its order should be affirmed accordingly, as discussed below.

I. The trial court properly granted judgment in Wells Fargo's favor because Ms. Prescott conceded her debt, her default, and her lack of any claims against Wells Fargo to the Bankruptcy Court.

In her bankruptcy proceedings, Ms. Prescott forfeited her interest in the property underlying this foreclosure action. She also affirmed to the Bankruptcy Court that Wells Fargo was a secured creditor, and that she had defaulted on her note. Finally, she never indicated that she had any kind of claim against Wells Fargo. Against this series of representations, the trial court rightly held her to her word and granted judgment in Wells Fargo's favor on its foreclosure claim and Ms. Prescott's counterclaims.

A. Because Ms. Prescott affirmatively surrendered her interest in the subject property to Wells Fargo during her bankruptcy proceedings, she is precluded from contesting any part of the foreclosure.

In Ms. Prescott's bankruptcy filings, she affirmatively abandoned and surrendered her interest in the property at issue in this case to Wells Fargo. (Prescott's Motion to Modify Chapter 13 Plan at 1, 6 from *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. June 17, 2013); R. pp. 444, 449.) She made this decision—which she highlighted in blue in her filings—as part of an effort to amend her Chapter 13 plan. The Bankruptcy Court accepted her proposed amendments and confirmed her as-amended Chapter 13 plan. (Order Confirming Plan and Resolving Motions from *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. July 17, 2013); R. p. 453.) The trial court rightly cited and relied on this abandonment when granting summary judgment to Wells Fargo in subsequent foreclosure proceedings. (Order at 7–8 (Jan. 9, 2015); R. pp. 8–9.)

As a matter of bankruptcy law, a Chapter 13 debtor cannot modify the rights of a secured creditor, like Wells Fargo here, when that creditor's security interest encumbers the debtor's primary residence. *See* 11 U.S.C. § 1322(b)(2) (providing that a Chapter 13 bankruptcy plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence"). Accordingly, in her bankruptcy case, Ms. Prescott had two choices with respect to her loan: either she could affirm Wells Fargo's note and mortgage and continue making the agreed-upon payments, or she could surrender the property. *See id.* § 1325(a)(5)(C) (providing that a debtor may "surrender[] the property securing such [a secured] claim to such holder" as part of a Chapter 13 plan).

Ms. Prescott chose to surrender the property. Her decision has consequences in this case that are dispositive of the outcome, as courts agree that surrendering property pursuant to a Chapter 13 plan "bars the debtor from maintaining possession of the collateral ***and from contesting the right of the creditor to foreclose on the property.***" *In re Gelibert*, Case No. 08-84618, 2010 Bankr. LEXIS 1160, at *3 (Bankr. N.D. Ga. Feb. 26, 2010) (emphasis added). As one bankruptcy court summarized the law on this point:

> Although not defined in the Bankruptcy Code, the term "surrender" was contemplated by Congress to be the relinquishing of possession or control to the holder of the secured claim. A confirmed Chapter 13 plan has a res judicata effect, and the terms of the plan govern the disposition of the property. . . . The Debtors' confirmed Chapter 13 Plan indicates that both Debtors will surrender their interest in the Property and are bound to honor the Plan, which includes affirmative steps to relinquish title and control of the property under non-bankruptcy law.

In re Pyburn, Case No. 11-1137, 2014 Bankr. LEXIS 2255, at *6–7 (Bankr. N.D. W. Va. May 21, 2014) (internal citation omitted).

To avoid this conclusion, Ms. Prescott appears to argue to this Court that she never surrendered this property, but instead the Bankruptcy Trustee was responsible for the filing that indicated that the property was being relinquished to Wells Fargo. (*See* Br. of Appellant at 20 (claiming that the bankruptcy filing that surrendered property to Wells Fargo was actually "the Trustee advising all creditors of the fact that Respondent received relief from stay").) This position, which was never argued below, is nonsense.

The bankruptcy filing that surrendered Ms. Prescott's property to Wells Fargo was entitled "Notice and Motion to Modify and Memorandum in Support of ***Debtor's Motion*** to Modify Chapter 13 Plan After Confirmation." (Prescott's Motion to Modify Chapter 13 Plan at 1 from *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. June 17, 2013) (emphasis added); R. p. 444.) It began by declaring: "***The Debtor*** moves to Amend the confirmed Chapter 13 plan due to abandon interest in property located at 6365 Saxton Rd., Rembert, SC 29128 to Wells Fargo Home Mortgage." (*Id.* (emphasis added, blue highlighting and grammatical errors in original).) It continued: "***The debtor*** will surrender the following property upon confirmation of the plan. The order confirming plan shall terminate the automatic stay as to that property: Wells Fargo Home Mortgage, 6365 Saxton Rd., Rembert, SC 29128." (*Id.* at 6 (emphasis added); R. p. 449.) And it was filed by counsel identified in two places as "Attorney for ***the Debtor***." (*Id.* at 1, 7 (emphasis added); R. pp. 444, 450.)

In short, the Court should reject Ms. Prescott's newfound attempt to distance herself from the position she staked out in Bankruptcy Court, as the filing that surrendered the property to Wells Fargo was unambiguously from Ms. Prescott herself, not from the Bankruptcy Trustee.

Nor is there any legitimate dispute that such a surrendering of property in one court operates to bar any contrary assertions in later proceedings. *See, e.g.*, *In re Carter*, 390 B.R. 648, 653–54 (Bankr. W.D. Mo. 2008) ("This Court has expressly approved the application of res judicata effect to plan provisions providing the surrender in lieu of the debt."); *see also Hayne Federal Credit Union*, 327 S.C. at 252, 489 S.E.2d at 477 ("Under the doctrine of judicial estoppel, because Father previously claimed that Son owned the property, but now claims he owns the property, then Father would be estopped from asserting the latter claim.").

Accordingly, the trial court rightly relied on both judicial estoppel and res judicata when it held that Ms. Prescott's surrender of the property, and the Bankruptcy Court's subsequent amendment of her Chapter 13 plan in light of that surrender, precluded her from contesting Wells Fargo's foreclosure claim.

B. Because Ms. Prescott affirmed to the Bankruptcy Court both the validity of her note and her default of that note, she is precluded as a matter of law from contesting Wells Fargo's foreclosure claim.

Prior to forfeiting her interest in the subject property, Ms. Prescott also represented to the Bankruptcy Court that she has an enforceable loan agreement with Wells Fargo on which she had defaulted. In particular, she:

- Identified Wells Fargo as a creditor holding a secured claim (Summary of Schedules at 17 from *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. Mar. 28, 2011); R. p. 356);
- Listed the property at issue here as the security for Wells Fargo's loan (*id.*);
- Indicated that this loan was in "arrears" (*id.*); and
- Indicated that this secured debt was not "disputed" (*id.*);

all under the penalty of perjury (*id.* at 36; R. p. 375.)

Later, Wells Fargo filed proof of its secured claim, and indicated that the loan was already in arrears. (Wells Fargo's Proof of Claim (Claim No. 3-1) from *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. Apr. 11, 2011); R. pp. 401–412.) Ms. Prescott did not object to that claim, which is not surprising, as she had already conceded these same points in her earlier filings.

And when Wells Fargo sought relief from the automatic stay over this litigation, Ms. Prescott responded as follows: "The Debtor is behind on payments due on this loan, debtor request an agreement allowing time to catch up on payments." (Prescott's Answer to Motion for Relief from Stay from *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. Dec. 22, 2011) (errors in original); R. p. 432.)

The Bankruptcy Court accepted these representations as true, granted relief from the automatic stay, and specifically held that Ms. Prescott missed payments on the note and "is therefore in default." (Order Granting Relief from Stay from *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. Sept. 26, 2012); R. p. 442.)[1]

Based on these representations and the Bankruptcy Court's acceptance of them, the trial court granted summary judgment in Wells Fargo's favor. That ruling is consistent with settled law, as courts agree—based on res judicata, judicial estoppel, or both—that a party who concedes the existence of a debt in bankruptcy proceedings

---

[1] These representations were all made almost one year before Ms. Prescott surrendered her interest in the mortgaged property. Ten months after granting Wells Fargo's motion for relief from the automatic stay, the Bankruptcy Court issued another order that confirmed Ms. Prescott's proposed amended Chapter 13 plan that accounted for her surrender of the mortgaged property. (Order Confirming Plan and Resolving Motions from *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. July 17, 2013); R. p. 453.) Because Ms. Prescott both (1) conceded the propriety of Wells Fargo's foreclosure claim and (2) surrendered her interest in the mortgaged property to Wells Fargo, the trial court rightly granted summary judgment on Wells Fargo's foreclosure claim based on either or both sets of Ms. Prescott's representations to the Bankruptcy Court.

cannot later challenge the debt's validity. *See, e.g., Celli v. First Nat'l Bank*, 460 F.3d 289, 295–96 (2d Cir. 2006) ("In summary, we hold that the Chapter 13 bankruptcy confirmation order is res judicata with respect to the debtor's and the Trustee's post-confirmation attempt to avoid a confirmed, recorded lien on the debtor's property where the lien was claimed by FNB at the outset of the bankruptcy proceedings and included by the debtor in his plan."); *Adair v. Sherman*, 230 F.3d 890, 894–95 (7th Cir. 2000) ("These authorities lead us to the conclusion that, when a proof of claim is filed prior to confirmation, and the debtor does not object prior to confirmation, the debtor may not file a post-confirmation collateral attack that calls into question the proof of claim."); *First Union Commercial Corp. v. Nelson, Mullins, Riley, & Scarborough*, 81 F.3d 1310, 1317 (4th Cir. 1996) ("Once a plan is confirmed, neither a debtor nor a creditor can assert rights that are inconsistent with its provisions."); *Mbazira v. Litton Loan Servicing, LLP*, Case No. 10-11831-FDS, 2011 U.S. Dist. LEXIS 85271, at *10–11 (D. Mass. July 27, 2011) ("Other courts that have considered post-confirmation attacks on the validity of secured claims have likewise rejected these efforts. . . . Although the matter is typically viewed as a question of res judicata rather than judicial estoppel, several courts of appeals have held debtors estopped from challenging the status of secured claims after confirmation.").

On appeal, Ms. Prescott now argues that she should not be bound to her representations to the Bankruptcy Court because her response to the Complaint in this case disputed the debt. (Br. of Appellant at 27.) But this position makes little sense in light of the sequence of filings.

This foreclosure action was commenced on April 16, 2010, and Ms. Prescott answered the Complaint a month later. Following her May 2010 pleading in the state court, she made numerous representations to the Bankruptcy Court admitting the amount of her debt, her default under her loan agreement, and Wells Fargo's undisputed status as a secured creditor.

Ms. Prescott made the first of these admissions in an August 2010 bankruptcy filing. (Summary of Schedules at 11 from *In re Prescott*, Case No. 10-5552-dd (Bankr. D.S.C. Aug. 15, 2010); R. p. 301.) And she reiterated the enforceability of Wells Fargo's security interest in repeated bankruptcy filings for ***nearly three more years***:

- March 2011: She filed her schedules of assets and debts under oath, which listed Wells Fargo as a secured creditor with a mortgage on her property. (Summary of Schedules at 17 from *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. Mar. 28, 2011); R. p. 356.)

- April 2011: Wells Fargo filed its proof of claim, to which Ms. Prescott did not object. (Wells Fargo's Proof of Claim (Claim No. 3-1) from *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. Apr. 11, 2011); R. pp. 401–412.)

- December 2011: Ms. Prescott "certified" the validity of Wells Fargo's arguments in favor of relief from the automatic stay, conceded that she is "behind on payments due on this loan," and requested time to "catch up on payments." (Prescott's Answer to Motion for Relief from Stay from *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. Dec. 22, 2011); R. p. 432.)

- June 2013: Ms. Prescott moved to amend her Chapter 13 plan to surrender her interest in the subject property to Wells Fargo. (Prescott's Motion to Modify Chapter 13 Plan at 1, 6 from *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. June 17, 2013); R. pp. 444, 449.)

On July 17, 2013, Judge Duncan accepted Ms. Prescott's representations and issued an order confirming the Chapter 13 plan with the modifications that Ms. Prescott proposed. (Order Confirming Plan and Resolving Motions from *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. July 17, 2013); R. p. 453.)

After making factual representations that induced the Bankruptcy Court to give her the protections afforded by Chapter 13 of the Bankruptcy Code for several years, Ms. Prescott cannot undo the effect of those repeated admissions by pointing to a generic pleading previously filed in her foreclosure case and suggesting that the Bankruptcy Court really should have known that all of her representations to that court were untrue. This attempt to whipsaw two courts with inconsistent representations is precisely the type of misconduct prohibited by judicial estoppel, as well as a party's duty of candor to the court. Rule 3.3(a) of the Rules of Professional Conduct, Rule 407, SCACR.

Nor can Ms. Prescott avoid the results of her factual statements to the Bankruptcy Court by arguing that they were erased when her bankruptcy case was dismissed. (Br. of Appellant at 27.) Under the Bankruptcy Code, the dismissal of a case causes only certain rights to re-vest in the debtor; it is not, as Ms. Prescott argues, a magic wand that makes an entire bankruptcy proceeding vanish from the public record. *See generally* 11 U.S.C. § 349 (providing that the dismissal of proceedings reinstates certain types of transactions taken during bankruptcy proceedings, but does not undo or otherwise strike from the record any statement or representation made by a debtor); *In re Parrish*, 275 B.R. 424, 433 (Bankr. D.D.C. 2002) (holding that a trustee is obligated to disburse funds according to a confirmed Chapter 13 plan even after a case is dismissed, and rejecting the argument that dismissal would "require the creditors to return all payments received under the plan to the debtor").

Dismissal of Ms. Prescott's bankruptcy case several months after the Bankruptcy Court approved and then amended her Chapter 13 plan does not suddenly erase the fact that she enjoyed the protections of the Bankruptcy Code for several years or wipe away

her myriad representations to the Bankruptcy Court that resulted in her enjoying those protections. Instead, Ms. Prescott's repeated, unambiguous representations regarding the debt she owed to Wells Fargo and the Bankruptcy Court's orders issued in reliance on those representations fully satisfy the elements of judicial estoppel and res judicata. Accordingly, this Court should affirm the trial court's application of these doctrines to grant judgment in Wells Fargo's favor regarding its foreclosure claim.

C. Because Ms. Prescott affirmed to the Bankruptcy Court that she did not have any potential claims against Wells Fargo, she is precluded as a matter of law from pursuing her counterclaims.

Just as Ms. Prescott's representations to the Bankruptcy Court bar her ability to challenge Wells Fargo's foreclosure claim, so too do they prohibit her counterclaims.

Despite numerous opportunities—as well as an affirmative duty—to disclose all potential claims she had to her creditors and to the Bankruptcy Court, Ms. Prescott repeatedly stated under oath that she had "NONE." (Summary of Schedules at 7 from *In re Prescott*, Case No. 10-5552-dd (Bankr. D.S.C. Aug. 15, 2010) (all capitals in original); R. p. 227; Summary of Schedules at 13 from *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. Mar. 28, 2011) (all capitals in original); R. p. 352.) She never supplemented or amended these filings to indicate that she intended to assert claims against Wells Fargo despite the fact that, on appeal, she argues that the factual allegations supporting her undisclosed counterclaims arose ***before*** this foreclosure was filed. (*E.g.*, Br. of Appellant at 29.)

Courts agree that Ms. Prescott's failure to disclose any potential claims against Wells Fargo in her sworn bankruptcy filings prohibit her from pursuing claims in later proceedings. *See, e.g., Cannon-Stokes v. Potter*, 453 F.3d 446, 448–49 (7th Cir. 2006)

(affirming trial court's ruling that judicial estoppel barred a claimant from recovering on a claim that was not disclosed in bankruptcy schedules and remarking that this conclusion was uniform among every appellate court that had addressed the issue); *Leible v. Material Control Inc.*, Case No. 13-CV-00047A(Sr), 2015 U.S. Dist. LEXIS 125050, at *8–9 (W.D.N.Y. Sept. 18, 2015) (applying judicial estoppel to preclude a party "from pursuing his personal injury claim" when he failed to disclose it on bankruptcy schedules); *Sprowl v. Prizer, Inc.*, Case No. 8:08-cv-3316-RBH, 2010 U.S. Dist. LEXIS 30939, at *15 (D.S.C. Mar. 30, 2010) ("[U]pon review, it appears to the court that Plaintiff may actually be judicially estopped from bringing this suit based on Plaintiff's failure to amend his bankruptcy petition to disclose his potential legal claims.").

In response to this uniform body of law, Ms. Prescott argues on appeal that she should not be held to her sworn statements to the Bankruptcy Court because she supposedly "notified" Wells Fargo of her "defenses and counterclaims throughout this action." (Br. of Appellant at 26.) This position is incorrect and is not supported by anything in the record.[2]

All Wells Fargo knew was the same thing the rest of the world did: Ms. Prescott did not assert any counterclaims in response to the bank's foreclosure complaint (Answer (May 17, 2010); R. p. 24), and then she swore under oath multiple times to the

---

[2] The trial court rejected Ms. Prescott's attempts to avoid summary judgment by filing a sham affidavit in which she alleged that Wells Fargo had engaged in "illegal" conduct and had made "misrepresentations" to her—positions that are entirely opposite of those she took before the Bankruptcy Court. (Order at 8 n.1 (Jan. 9, 2015); R. p. 9.) This Court reviews that decision for an abuse of discretion. *McMaster v. Dewitt*, 411 S.C. 138, 144, 767 S.E.2d 451, 454 (Ct. App. 2014). There is no legitimate basis for suggesting that the trial court abused its discretion in disregarding Ms. Prescott's sham affidavit, as she filed it in November 2014 after several years of repeatedly affirming the validity of Wells Fargo's mortgage and her default on the note, and with the specter of summary judgment looming against her.

Bankruptcy Court that she did not have any counterclaims to assert (Summary of Schedules at 7 from *In re Prescott*, Case No. 10-5552-dd (Bankr. D.S.C. Aug. 15, 2010) (all capitals in original); R. p. 227; Summary of Schedules at 13 from *In re Prescott*, Case No. 11-1994-dd (Bankr. D.S.C. Mar. 28, 2011) (all capitals in original); R. p. 352). The Court should reject Ms. Prescott's appellate posturing and, instead, affirm the trial court's straightforward application of judicial estoppel and res judicata to bar her counterclaims.

II. Ms. Prescott's remaining issues are not properly before the Court.

In addition to challenging the trial court's order granting judgment in Wells Fargo's favor, Ms. Prescott's opening brief discusses several peripheral issues that are not properly before the Court:

Collateral Estoppel: In Section III of her brief, Ms. Prescott argues that the trial court improperly relied on the doctrine of collateral estoppel in granting summary judgment. As explained above, though, the trial court based its decision on the doctrines of res judicata and judicial estoppel, not collateral estoppel. As such, the Court should disregard her incorrect arguments on this point.

Amendment of Pleadings: In Section IV of her brief, Ms. Prescott argues that she should have been permitted to amend her answer to assert counterclaims. But the trial court granted her that very relief, and Ms. Prescott amended her pleading to assert counterclaims. (Order (Dec. 2, 2013); R. p. 16.) Her arguments, therefore, are improper for appellate review.

Statutes of Limitations: In Section V of her brief, Ms. Prescott argues that her counterclaims are not prohibited by the applicable statutes of limitations. Her claims failed, though, because they were squarely contradicted by her repeated statements to the

Bankruptcy Court about her note and the mortgaged property, not because of any limitations period. Because the trial court made no rulings based on any statutes of limitations, this issue is not preserved for review.

Substance of Claims: Ms. Prescott devotes the remainder of her brief to arguing that she properly pled her counterclaims and that her sham affidavit should be considered in support of those claims. But her appellate arguments ignore the fact that the trial court granted judgment in Wells Fargo's favor because she made representations to the Bankruptcy Court that were entirely contrary to her new allegations before the state court. Her appellate arguments cannot overcome the prohibition against whipsawing multiple courts with inconsistent factual assertions. *See U.S. Bank Nat'l Ass'n v. Zarrabi*, 560 F. App'x 181, 182 (4th Cir. 2014) (explaining that the application of judicial estoppel is reviewed for an abuse of discretion).

The Court should disregard these aspects of Ms. Prescott's brief accordingly.

CONCLUSION

In order to short-circuit foreclosure proceedings, Ms. Prescott sought the protection of the Bankruptcy Court and Chapter 13 of the Bankruptcy Code. During her bankruptcy proceedings, she conceded that she owed a debt to Wells Fargo and that she was in arrears on that debt; she affirmed that she had no claims against Wells Fargo; and she surrendered to Wells Fargo her interest in the property that secured her note.

Against this backdrop, there is no legitimate argument that the trial court erred in granting summary judgment to Wells Fargo on its foreclosure claim and on Ms. Prescott's counterclaims, as she has already conceded to a parallel court the exact issues at stake in this case. Accordingly, the Court should affirm the trial court's ruling.

Respectfully submitted,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

By: _____

S. Sterling Laney, III
South Carolina Bar 6933
550 South Main Street, Suite 400
Greenville, South Carolina 29601
(864) 255-5400
slaney@wcsr.com

M. Todd Carroll
South Carolina Bar 74000
1727 Hampton Street
Columbia, South Carolina 29201
(803) 454-6504
todd.carroll@wcsr.com

Attorneys for Respondent

February 16, 2016February 15, 2016
Columbia, South Carolina

CERTIFICATE OF COUNSEL

The below-signed counsel certifies that this brief complies with Rule 211(b), SCACR.

Respectfully submitted,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

By: _____

M. Todd Carroll

Attorneys for Respondent

February 16, 2016

PROOF OF SERVICE

I, the undersigned Legal Secretary of the law offices of Womble Carlyle Sandridge & Rice LLP, Attorneys for Respondent, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by mailing a copy of the same, postage prepaid, to the following address(es):

Pleading: Brief of Respondent

Parties Served: Delores Prescott
10 Skytop Gardens, Apt. 23
Parlin, New Jersey 08859

Appellant

Edwin T. Mathis

February 16, 2016

WOMBLE CARLYLE SANDRIDGE & RICE
A LIMITED LIABILITY PARTNERSHIP

1727 Hampton Street
Columbia, SC 29201

Telephone: (803) 454-6504
Fax: (803) 454-6509
www.wcsr.com

Direct Dial: 803-454-7730
Direct Fax: 803-381-9130
E-mail: Todd.Carroll@wcsr.com

February 16, 2016

Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Wells Fargo v. Delores Prescott
Appellate Case No. 2015-000349

Dear Ms. Kitchings:

Enclosed please find the original Brief of Respondent along with 15 copies for filing. Please file the originals and return a stamped copy to us via our courier. Thank you.

With kind regards, I remain

Very truly yours,

M. Todd Carroll

MTC/tm
Enclosures

cc: Delores Prescott