RETURN TO THE EQUITY COURT

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STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Wells Fargo Bank, N.A., successor in interest to Wells Fargo Bank Minnesota, National Association, as trustee for Salomon Mortgage Loan Trust Series 2003-NBC1,

PLAINTIFF,

v.

Cathy G. Lanier, Randy D. Lanier, Branch Banking and Trust Company, and Job Development Loan Fund, Inc.,

DEFENDANTS.

F10-09485

IN THE COURT OF COMMON PLEAS

C/A No.: 2011-CP-32-00156

ORDER DENYING DEFENDANTS' MOTIONS TO AMEND AND ASSERT COUNTERCLAIMS AND GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION AND FACTS

This is an action to foreclose a mortgage which secured a note. On or about August 11, 1997, for value received, Cathy G. Lanier and Randy D. Lanier executed and delivered to Heritage Federal Savings and Loan Association a promissory note, in writing, for the sum of $425,000.00, secured by a mortgage encumbering three parcels generally described as Parcel 1, 213 Lake Villa Road, Lexington, SC 29072, Parcel 2, 211 Lake Villa Road, Lexington, SC 29072, and Parcel 3, 2651 Knox Station Road, Chester, SC 29706 (hereinafter collectively "the Properties"). Thereafter, through a series of corporate mergers and name changes, Heritage Federal Savings and Loan Association became SunTrust Bank. Subsequently, SunTrust Bank assigned said mortgage unto SunTrust Mortgage. Inc. by virtue of an assignment dated March 16, 2013, recorded March 23, 2014, in the Office of the Register of Deeds for Lexington County in book 15409 at page 303. SunTrust Mortgage, Inc. is in possession of the original note indorsed in blank. The Laniers have been in default on said note and mortgage since

approximately September 1, 2010, and are currently indebted to SunTrust Mortgage, Inc. on said note and mortgage.

The Laniers were previously indebted to Bayview Loan Servicing, LLC (hereinafter "Bayview") and Branch Banking and Trust Company of South Carolina (hereinafter "BB&T") by virtue of a separate judgment of foreclosure and sale entered on October 7, 2011. As a result of that action, Randy D. Lanier filed for Chapter 13 bankruptcy on November 3, 2011, which action, after a hearing, was dismissed on November 7, 2011. The Laniers did not appeal the dismissal, and the time to file an appeal has expired. The Laniers again filed for Chapter 13 bankruptcy on November 8, 2011, which action, after a hearing, was dismissed with prejudice. By order of the bankruptcy court, The Laniers were also prohibited from filing another cause under Chapters 11, 12, and 13 of the bankruptcy code for a period of one year.

On March 25, 2011, the Laniers filed an answer in this foreclosure action. On June 2, 2011, the Laniers filed an amended answer without consent of the plaintiff or leave of the court. On February 14, 2012, the Laniers filed an appeal of Judge Waites' bankruptcy order, and a motion to stay the foreclosure sale. On February 28, 2012, after considering the Laniers second motion to stay the foreclosure sale, the bankruptcy court issued an order denying the Laniers' motion to stay. On March 2, 2012, the bankruptcy court denied the Laniers' appeal of the order denying stay and the Laniers' motion to reconsider, filed March 1, 2012. On July 12, 2012, the Laniers, in the present foreclosure case, filed a second motion to amend answer, and on August 3, 2012, they filed a third motion to amend answer. The Laniers also filed a fourth motion to amend answer on September 6, 2012, alleging counterclaims against plaintiff and requesting the dismissal of this action. On December 10, 2012, the Laniers filed their fifth motion to amend answer, and on May 20, 2014, the Laniers filed their sixth motion to amend their answer.

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II. DISCUSSION

A. THE LANIERS LACK STANDING TO ASSERT COUNTERCLAIMS AGAINST SUNTRUST MORTGAGE, INC.

SunTrust Mortgage, Inc. asserts Cathy G. Lanier and Randy D. Lanier (Defendants) lack standing to amend their answer to assert counterclaims because they failed to list these counterclaims in their bankruptcy schedules. On November 8, 2011, Defendants filed a Chapter 13 voluntary bankruptcy petition and completed the schedules and statements. In paragraph 21 of Schedule B, Defendants were required to set forth "[o]ther contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims." Next to this paragraph, Defendants checked the box under the column "None," indicating Defendants had no claims to assert against parties. Defendants made this statement under penalty of perjury. On November 7, 2011, Defendants' first Chapter 13 case was dismissed, and on January 3, 2012, Defendants' second Chapter 13 case was dismissed with prejudice. The bankruptcy order stated that Defendants sought bankruptcy in bad faith and in order to impede the foreclosure actions filed against them.

When a debtor files for bankruptcy, an estate is created that is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C.A. § 541(a). Unless the bankruptcy court orders otherwise, the debtor is required to file a list of all creditors and a schedule of assets and liabilities. *Id.* at § 541(a)(1)(A)-(B)(i). "Legal and equitable interests" has been broadly defined and includes causes of action. *In re Educators Group Health Trust*, 25 F.3d 1281, 1283-84 (5th Cir. 1994). When the causes of action giving rise to the debtors' counterclaims begin before the present case commences and initial pleadings are filed, the debtor must list those causes of action on his bankruptcy petition. *See In re Iredale*,

429 B.R. 853, 855 (Bankr. D. S.C. 2010). Whether the debtor knew about the possible counterclaims at the time he filed the bankruptcy petition is immaterial. *See id.*

When the bankruptcy case is closed, "any assets, including claims, that were scheduled by the debtor but not disposed of are deemed abandoned and revert to the debtor." *Tyler House Apartments, Ltd. v. United States*, 38 Fed. Cl. 1, 6 (1997). Claims that are not set forth on the schedules, however, remain under the control of the bankruptcy trustee. *See id.* "If a cause of action belongs to the estate, then the trustee has exclusive standing to assert the claim." *Educators Group Health Trust*, 25 F.3d at 1284. Therefore, a debtor may not amend his cause of action to include counterclaims he no longer possesses. *See Iredale*, 429 B.R. at 855-56. Further, a debtor's persistence in alleging counterclaims of this kind may be construed as bad faith. *See id.* at 856.

In the present case, Plaintiff initiated this foreclosure action on January 14, 2011. Assuming Defendants' alleged counterclaims arise out of the present foreclosure action, at the time Defendants filed for bankruptcy in 2011, Defendants were required to list all outstanding claims on their itemized bankruptcy schedule. Defendants assert in their amended answer and counterclaim the following counterclaims which Defendants did not list on Schedule B: a) violation of Truth in Lending Act; b) violation of RESPA; c) violation of the Fair Debt Collections Act; d) slander of title; e) lack of good faith and fair dealing; e) violation of the South Carolina Unfair Trade Practices Act; f) fraud and swindle; g) civil conspiracy ; h) and RICO violations. Therefore, as Defendants' bankruptcy cases were disposed of in 2011 and early 2012, Defendants' causes of action remain under the control of the bankruptcy trustee, and only the bankruptcy trustee has standing to assert the claims against SunTrust Mortgage, Inc. Accordingly, Defendants have no standing to assert the counterclaims.

In their memorandum, Defendants allege that "their bankruptcy case was dismissed because of lack of jurisdiction of the bankruptcy court based on 11 USC § 109(e). " Defendants further allege "[t]hat means the Bankruptcy Court never took jurisdiction over this matter and that there never was an estate created as a result of the bankruptcy filing, so the argument by Plaintiff is invalid in total." According to Defendants, this means the argument asserted by SunTrust Mortgage, Inc.. regarding the Defendants lack of standing is invalid.

The Defendants do not cite anything in support of their argument. First, nowhere in the bankruptcy court's order does the bankruptcy court state that it lacks jurisdiction. Instead, the bankruptcy court concludes that the Defendants had "actual knowledge that the debts exceeded the limitations provided by 11 USC §109(e) and that they were not eligible to file the present bankruptcy case." The bankruptcy court found the Defendants "filed the present case in bad faith and to impede [a mortgagee's foreclosure sale]."

Second, the relevant time with regard to whether a debtor has standing to assert pre-petition claims that are not listed on the debtor's bankruptcy schedules is whether a bankruptcy trustee has been appointed. *See Iredale,* 429 B.R. at 855 ("Once a trustee is appointed, the chapter 7 debtor has no standing to pursue a pre-petition cause of action.."). In both of Defendants' bankruptcy cases, a trustee was appointed. Therefore, the Defendants lack standing to assert their counterclaims against SunTrust Mortgage, Inc.

B. IN THE ALTERNATIVE, THE LANIERS' COUNTERCLAIMS SHOULD BE DISMISSED BASED ON THE FOLLOWING GROUNDS

1. *Violation of Truth in Lending Act – 15 U.S.C. § 1601 et seq.*

In Defendants' first counterclaim for violation of the Truth in Lending Act, Defendants allege that Plaintiff violated numerous provisions in the Truth in Lending Act in regards to the consummation of the loan transaction. Pursuant to 15 U.S.C. § 1610, any action brought forth

under the Truth in Lending Act must be brought within one year from the date of the occurrence of the violation. 15 U.S.C. § 1610 (2012). As stated in the Introduction and Facts, Defendants executed a promissory note and a mortgage on August 11, 1997, to SunTrust Mortgage, Inc's predecessor in interest. Therefore, any action brought outside one year from August 11, 1997, the date the loan closed, is barred by the statute of limitations. The amended answer and counterclaim of Defendants was filed on December 10, 2012, over fifteen years following the date of the subject loan closure. Thus, Defendants' counterclaims based upon the Truth in Lending Act should therefore be dismissed pursuant to 15 U.S.C. § 1610.

2. *Violations of RESPA – 12 U.S.C. § 2601 et seq.*

In Defendants' second counterclaim, Defendants allege that plaintiff violated RESPA by failing to accurately comply with disclosure requirements at the time of the closing of the subject property. Defendants' alleged violation of RESPA fails as a matter of law as it is barred by the applicable statute of limitations under RESPA. Pursuant to 12 U.S.C. § 2614, any action brought pursuant to 12 U.S.C. § 2605 relating to a closing must be brought within three years of the violation. 12 U.S.C. § 2614. As Defendants did not assert a cause of action under REPSA until on or about September 6, 2012, more than fifteen years after the alleged cause of action accrued, it is barred by the statute of limitations set forth in 12 U.S.C. § 2614.

3. *Violation of Fair Debt Collections Practices Act – 15 U.S.C. § 1692e*

In Defendants' third counterclaim, Defendants allege that plaintiff violated the Fair Debt Collections Practices Act by engaging in various false representations with respect to the debt owed. This counterclaim should be dismissed as Defendants have failed to provide sufficient facts in their pleading to support a cause of action.

In South Carolina, "[a] pleading which sets forth a cause of action, whether an original

claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled." Rule 8(a), SCRCP.

Defendants fail to provide any facts supporting their allegations and any entitlement to relief. Defendants have not complied with the requirements for the pleading of a counterclaim, and therefore Defendants' counterclaim for Violation of the Fair Debt Collection Practices Act should be dismissed.

4. *Slander of Title*

In Defendants' fourth counterclaim, Defendants allege that plaintiff disparaged Defendants' exclusive valid title by filing documents relating to this foreclosure action. This counterclaim should be dismissed as the pleadings in this case are absolutely privileged.

"Under South Carolina case law, "[w]hen a communication is absolutely privileged, no action lies for its publication, no matter what the circumstances under which it is published, i.e., an action will not lie even if the report is made with malice." *Hainer v. American Med. Intern.*, Inc., 328 S.C. 128, 135, 492 S.E.2d 103, 106 (1997). "The [absolute] privilege covers anything that may be said in relation to the matter at issue, whether it be in the pleadings, in affidavits, or in open court." *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 22, 567 S.E.2d 881, 892 (Ct. App. 2002). "South Carolina has long recognized that relevant pleadings . . . are absolutely privileged." *Id.* at 23, 567 S.E.2d at 893.

Defendants' cause of action in this case arises out of the pleadings in this case. Because the statements in the pleadings are absolutely privileged, no cause of action can arise from any

misrepresentations made by statements in the pleadings.

5. *Inequitable Foreclosure Attempt, Lack of Good Faith and Fair Dealing*

In Defendants' fifth counterclaim, Defendants allege that plaintiff has placed the court in a position to award an inequitable and unconscionable foreclosure. This counterclaim should be dismissed as Defendants have failed to provide sufficient facts in their pleading to support a cause of action.

In South Carolina, "[a] pleading which sets forth a cause of action, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled." Rule 8(a), SCRCP.

Defendants fail to provide any facts supporting their allegations and any entitlement to relief. Defendants have also not complied with the requirements for the pleading of a counterclaim.

6. *Subject Property Outside of Jurisdiction for Lexington County, SC*

In Defendants' sixth counterclaim, Defendants claim that a parcel of property subject to this foreclosure action is located in Chester County, South Carolina, and is therefore not in the jurisdiction of the courts of Lexington County. As properties subject to this action are located in both Chester and Lexington counties, plaintiff's foreclosure action may take place in either county. Therefore, Defendants' counterclaim should be dismissed.

In South Carolina, when more than one parcel of land is subject to a foreclosure proceeding, the action may take place in either county in which the land is located. *See Barrett*

v. Watts, 13 S.C. 441, 443-44 (1880). In this case, the properties subject to the foreclosure action are located in both Lexington County and Chester County. Therefore, Plaintiff has the option of foreclosing all parcels of property in Lexington County.

7. *Failure to Comply with SC Supreme Court Administrative Order 2011-05-0201 or to Offer Solutions Under HAMP; Violation of South Carolina Unfair Trade Practices Act; Fraud and Swindle; Civil Conspiracy; and Violations of RICO*

In Defendants' seventh, eighth, ninth, tenth, and eleventh counterclaims, Defendants claim that: plaintiff has failed to comply with SC Supreme Court Administrative Order 2011-05-02-01 or to offer solutions under HAMP; plaintiff committed unlawful business practices; plaintiff committed fraud; plaintiff conspired to victimize Defendants; and plaintiff directly involved itself in a pattern of racketeering activity, respectively. As Defendants have failed to state a cause of action for which relief can be granted for any of these counterclaims, each should be dismissed as a matter of law.

In South Carolina, "[a] pleading which sets forth a cause of action, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled." Rule 8(a), SCRCP.

Defendants fail to provide any facts supporting their allegations and any entitlement to relief. Defendants have not complied with the requirements for the pleading of a counterclaim, and therefore Defendants' counterclaims for failure to comply with SC Supreme Court Administrative Order 2011-05-0201 or to offer solutions under HAMP; violation of South Carolina Unfair Trade Practices Act; fraud and swindle; civil conspiracy; and violations of RICO

should be dismissed as a matter of law.

C. THE ALLEGEDLY NEWLY- DISCOVERED EVIDENCE DOES NOT ALLOW DEFENDANTS TO ASSERT THE COUNTERCLAIMS

Defendants assert that, because SunTrust Mortgage, Inc. failed to fully respond to Defendants' discovery requests, Defendants only recently learned of their counterclaims and that Defendants should therefore be able to assert the counterclaims against SunTrust Mortgage, Inc. However, a review of Defendants' discovery requests reveals that they are requesting numerous documents that are either irrelevant to this case or impossible for SunTrust Mortgage, Inc. to provide. Also, the "important" information that Defendants purport to have discovered through their "securitization audit" is that the loan may be securitized. According to the affidavit of William McCaffrey, who performed the "securitization audit," this basically leads to the conclusion that plaintiff cannot enforce the note at issue in this case.

Even if true, whether the loan at issue in this case was securitized could clearly have been discovered previously by the Defendants. Because Defendant could easily have, but did not, find this purported evidence sooner, Defendants should not avoid the bar of the statute of limitations. The fact that Defendants may have only recently discovered it also has no effect on the Defendants' lack of standing to assert the claim because they failed to assert it in their bankruptcy schedules. *See Iredale,* 429 B.R. at 855 ("That Defendant may have only recently become aware of [the claim] is of no consequence; it is part of the bankruptcy estate, subject to control by the Trustee.") .

Although the court requested that the Defendants set forth specifically how the newly-discovered evidence related to the counterclaims they wish to assert, the Defendants failed to do so. The court should not have to speculate as to this relationship, but the Defendants may be attempting to assert either the "splitting" theory, or that someone else owns the note and

mortgage such that SunTrust Mortgage, Inc. cannot maintain this action. Both arguments fail.

Proponents of the "splitting" theory believe that once a loan is securitized, the mortgage is split from the note, making the note unenforceable. *See Larota-Florez v. Goldman Sachs Mortg. Co.* 719 F.Supp. 636, 641-42 (E.D.VA. 2010) (discussing the theory). Courts have routinely dismissed this argument. *See id.* ("Foreclosures are routinely and justifiably conducted by trustees of securitized mortgages. Therefore, Plaintiff's arguments for declaratory judgment and quiet title based on the so-called 'splitting' theory fail as a matter of law.").

Second, SunTrust Mortgage, Inc. is in possession of the original note, and the note is indorsed in blank. *See* S.C. Code § 36-3-205(a) and (b) (defining 'special indorsement' and 'blank indorsement') . Since SunTrust Mortgage, Inc. is in possession of the original note indorsed in blank, it is a "holder" of the note. *See* S.C. Code § 36-1-201 (20) (defining "holder"). As "holder" of the note, SunTrust Mortgage, Inc. is entitled to enforce the note. *See* S.C. Code § 36-3-301 (defining 'person entitled to enforce" an instrument); *see also Bank of America v. Draper,* ___ S.C. ___, 746 S.E.2d 478, 482 (Ct. App. 2013) (citing this same language in support of its finding that Bank of America was the holder of the note in that case). Even if SunTrust Mortgage, Inc. were the servicer, as opposed to the owner, of the note, SunTrust Mortgage, Inc. would still be entitled to maintain this foreclosure action. *See Draper,* 746 S.E.2d at 480-83 (servicer of loan has standing to maintain the foreclosure action).

D. AMENDMENT OF THE PLEADINGS TO SHOW SUNTRUST MORTGAGE, INC. AS THE PLAINTIFF

On August 29, 2012, plaintiff's attorney mailed to the court a proposed order substituting SunTrust Mortgage, Inc. as the plaintiff in this action. The proposed order was sent to the clerk of court and a copy mailed to all of the parties who had appeared in the action.

Although the signature line on the proposed order listed the signer as "Master-in-Equity for Lexington County," the order was signed by R. Knox McMahon, a circuit court judge. Discovering that the order was signed by Judge McMahon instead of the master in equity for Lexington County, to whom the case had previously been referred pursuant to Rule 53 of the South Carolina Rules of Civil Procedure, plaintiff's attorneys, on December 4, 2012, mailed a new proposed order substituting plaintiff to the master in equity. This second proposed order, which has not been signed, was also mailed to all parties who had appeared in the action. There is no case on point, but case law strongly implies that, since the case had already been referred to the master in equity, the circuit court judge lacked jurisdiction to sign the proposed order. If the circuit court lacked jurisdiction to sign the order, the order would be void.

In *Smith v. Ocean Lakes Family Campground,* 315 S.C. 379, 433 S.E.2d 909 (Ct. App. 1995), the order of reference provided that the final order should be filed by the master in equity within ninety days of the date of the order of reference; otherwise, the order of reference was null and void. *Smith,* 315 S.C. at 380-81; 433 S.E.2d at 910. The order of reference was dated May 8, 1991, and although the hearing before the master in equity occurred on July 10, 1991, the final order was not filed until September 30, 1991. *Id.* The court of appeals held that, since the order of reference specifically provided the reference would be null and void if the master in equity did not file the final order within ninety days, the master lost the power to issue the final order when the final order was not filed within ninety days. *Id.* In holding the final order was a "nullity," the court stated that "the case has thus been withdrawn from [the master in equity] and *returned to the circuit court,* where it remains pending." *Id.* (emphasis added).

In order for the case to be "returned" to circuit court, it seems clear the case would have first had to be removed from the circuit court by the order of reference. If this is true, after the

reference in the present case, the circuit court lost jurisdiction to sign the order substituting plaintiff and amending caption when the order of reference was filed. If the circuit court did not have the power to sign the order substituting plaintiff and amending caption, it, like the final order issued in *Smith,* should be a nullity.

Although the order substituting plaintiff and amending caption signed by Judge McMahon is probably void for lack of jurisdiction, whether it is a nullity does not affect the validity of anything else in this case. Rule 25(c) of the South Carolina Rules of Civil Procedure, which is entitled "Substitution of Parties," provides: "In case of any transfer of interest, *the action may be continued by or against the original party*, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." (emphasis added). Interest in the note and mortgage at issue in this case have been transferred to SunTrust Mortgage, Inc., and since the court has not signed the second proposed order substituting plaintiff and amending caption, the court has not directed that SunTrust Mortgage, Inc. be substituted as plaintiff. Therefore, the court has allowed the case to be continued by the original party.

E. DISMISSAL OF THE CASE

The note at issue in this case was recently paid off by Branch Banking and Trust Company, which held a second mortgage on the property. Branch Banking and Trust Company foreclosed on its mortgage and currently holds title to the property at issue in this foreclosure case. SunTrust Mortgage, Inc. has therefore moved that its current foreclosure action be dismissed.

III. CONCLUSIONS OF LAW

There is no genuine issue of material fact as to the counterclaims alleged by Defendants, therefore, SunTrust Mortgage, Inc. should be granted summary judgment as to the counterclaims. SunTrust Mortgage, Inc. should also be substituted as the plaintiff in this case. Finally, this case should be dismissed, as the note at issue in the case has been paid off by Branch Banking and Trust Company, which foreclosed on its second mortgage and is the current owner of the property.

IV. ORDERS

IT IS ORDERED that plaintiff's motion for summary judgment as to the counterclaims asserted by the defendants, Cathy G. Lanier and Randy D. Lanier, be and hereby is granted.

IT IS FURTHER ORDERED that all of the motions to amend their answer filed by the defendants, Cathy G. Lanier and Randy D. Lanier, be and hereby are denied.

IT IS FURTHER ORDERED that SunTrust Mortgage, Inc. be and hereby is substituted as the plaintiff in this matter.

IT IS FURTHER ORDERED that this case be and hereby is dismissed.

IT IS SO ORDERED!

James O. Spence

THE HONORABLE JAMES O. SPENCE
MASTER IN EQUITY FOR LEXINGTON COUNTY

March 18, 2015
Lexington, South Carolina

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