STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	CASE NO.: 2011-CP-32-0156
	)	
SunTrust Mortgage, Inc.,	)	
	)	
Plaintiff,	)	**ORDER DENYING DEFENDANTS' MOTION TO RECONSIDER**
	)	
vs.	)	
	)	
Cathy G. Lanier, Randy D. Lanier, Branch Banking and Trust Company, and Job Development Loan Fund, Inc.,	)	
	)	
Defendants.	)	
	)	

Before this Court is Cathy G. and Randy D. Lanier's motion for the Court to reconsider its decision granting SunTrust Mortgage, Inc.'s motion for summary judgment. In their motion the Laniers argue the Court erred in granting SunTrust Mortgage, Inc.'s motion for summary judgment for the following reasons: (1) the Laniers have standing to pursue their claims; (2) the statute of limitations has not run on the Laniers' claims for violations of the Truth in Lending Act, 15 U.S.C. §1601, *et. seq.* ("TILA") and the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 *et seq.* ("RESPA"); and (3) SunTrust Mortgage, Inc. is not immune from slander of title claims. For the following reasons, the Court denies the Laniers' motion to reconsider and affirms its granting of SunTrust Mortgage, Inc.'s motion for summary judgment.

I. FACTUAL AND PROCEDURAL HISTORY

On or about August 11, 1997, for value received, Cathy G. and Randy D. Lanier (the "Laniers") executed and delivered to Heritage Federal Savings and Loan Association a written promissory note for the sum of $425,000.00 (the "Note"), secured by a mortgage (the "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 (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. ("SunTrust Mortgage") 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 is in possession of the original note. The Laniers have been in default under the Note and Mortgage since approximately September 1, 2010.

The Laniers were previously indebted to Bayview Loan Servicing, LLC and Branch Banking and Trust Company of South Carolina by virtue of a separate judgment of foreclosure and sale entered on October 7, 2011. As a result of that action, the Laniers filed for Chapter 13 bankruptcy on November 3, 2011. After a hearing, the Laniers' bankruptcy action was dismissed on November 7, 2011. The Laniers did not appeal the dismissal, and the time to file an appeal has expired. The Laniers filed for Chapter 13 bankruptcy again on November 8, 2011. This bankruptcy action was dismissed with prejudice after a hearing. By order of the bankruptcy court, the Laniers were prohibited from filing another cause under Chapters 11, 12, and 13 of the Bankruptcy Code for one year.

SunTrust initiated this foreclosure action by filing a Summons, Complaint, and Lis Pendens on January 14, 2011. On March 25, 2011, the Laniers filed an answer in this foreclosure action. On June 2, 2011, without consent of the plaintiff or leave of the court, the Laniers filed their first Motion to Amend. 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. Throughout the bankruptcy proceedings, the

Laniers never listed as an asset any of the claims they seek to assert against SunTrust Mortgage in this matter.

On July 12, 2012, the Laniers—in the present foreclosure action—filed a second Motion to Amend, and on August 3, 2012, they filed a third Motion to Amend. On September 6, 2012, the Laniers filed a fourth Motion to Amend, alleging the following counterclaims against SunTrust Mortgage: (1) violation of TILA, (2) violation of RESPA, (3) violation of the Fair Debt Collections Act, (4) slander of title, (5) lack of good faith and fair dealing, (6) violation of the South Carolina Unfair Trade Practices Act, (7) fraud and swindle, (8) civil conspiracy, and (9) violation of the Racketeer Influenced and Corrupt Organizations Act.

On December 10, 2012, the Laniers filed a fifth Motion to Amend. On May 20, 2014, the Laniers filed their sixth Motion to Amend, again requesting the Court allow them to assert counterclaims against SunTrust Mortgage. On July 1, 2014, SunTrust Mortgage filed a memorandum in opposition to the motion. The Court thereafter entered an order denying the Motion to Amend and granting SunTrust Mortgage summary judgment as to the Laniers' counterclaims on March 18, 2015 (the "Order"). The Laniers filed a Motion for Reconsideration on March 30, 2015. A hearing on the motion was held on November 18, 2015. For the following reasons, the Court denies the Laniers' motion to reconsider and affirms its grant of summary judgment in favor of SunTrust Mortgage.

II. STANDARD OF REVIEW

"A motion under Rule 59(e) long has been viewed as a 'motion for reconsideration' despite the absence of those words from the rule. Consequently, a party is usually allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004) (citations omitted). The decision whether to grant a motion to reconsider is in the trial

court's discretion. *See Brown v. Pearson*, 326 S.C. 409, 416-17, 483 S.E.2d 477, 481 (Ct. App. 1997) (so holding in context of motion for summary judgment).

Rule 56(c), SCRCP allows a party to move for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." If the moving party has provided the necessary support, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response . . . must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Rule 56(e), SCRCP.

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003); *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Under South Carolina law, where "plain, palpable and indisputable facts exist on which reasonable minds cannot differ," summary judgment in favor of the moving party is proper. *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976).

III. LAW AND ANALYSIS

A. Chapter 13 Debtors' Standing

The Laniers argue the Court erred in finding they lacked standing to bring their claims due to their failure to include the pre-petition claims on their bankruptcy schedule.

When a Chapter 13 petition is filed, a bankruptcy estate is automatically created. 11 U.S.C. § 541; 11 U.S.C. § 1306. Section 541(a)(1) of the Bankruptcy Code broadly defines property of an estate as "all legal or equitable interests of the debtor in property as of the commencement of the case." Therefore, a pre-petition claim is the property of the estate. *See* 11

U.S.C. §541(a)(1) ; *In re Iredale*, 429 B.R. 853, 855 (Bankr. D.S.C. 2010); *Richardson v. United Parcel Serv.*, 195 B.R. 737, 739 (E.D. Mo. 1996) ("Causes of action which belong to the debtor . . . are estate property."). "When an action is not disclosed by the debtor, it remains property of the bankruptcy estate even after the case is closed—indeed, unless it is administered or abandoned by the trustee, the action remains property of the estate 'forever.'" *In re Arana*, 456 B.R. 161, 170 (Bankr. E.D. N.Y. 2011) (citation omitted).

On November 8, 2011, the Laniers filed a petition for Chapter 13 bankruptcy. The schedules attached to the bankruptcy petition required the petitioning party to list all claims of any nature, including counterclaims. The Laniers listed "None" on their schedule. The Laniers verified this information by signing the petition under penalty of perjury. Therefore, the Laniers do not have standing to bring any causes of action which existed at or prior to the time of the filing of the Chapter 13 bankruptcy petition; such right, under the statutory framework of the Bankruptcy Code, belongs solely to the trustee (because such property belongs to the bankruptcy estate). Without the trustee as no less than a co-plaintiff (or co-counterclaim plaintiff, as in the present case), the Laniers cannot pursue their claims. *See In re Gardner*, 218 B.R. 338, 342 (Bankr. E.D. Pa. 1998) (finding the issue of standing for a Chapter 13 party was alleviated due to the appearance of the trustee); *Richardson*, 195 B.R. at 739 (holding a Chapter 13 debtor lacked standing to pursue an action in his own name).[1] Accordingly, the Court finds that the Laniers' claims remain the property of the estate and they lack standing to assert any unreported claim that existed prior to filing for bankruptcy protection.

[1] While not binding precedent because it is an unpublished opinion, this Court notes that the South Carolina Court of Appeals has previously agreed with the ruling set forth herein. *See MidFirst Bank v. Brooks*, No. 2008-UP-196, 2008 WL 9841165, at *3 (S.C. Ct. App. Mar. 20, 2008) (affirming Master-In-Equity's summary judgment order as "proper based on the determination that [appellant] lacked standing to assert the defenses and counterclaims that she raised in her responsive pleadings" because of her Chapter 13 bankruptcy action, despite her claim that such lack of disclosure was inadvertent).

B. Judicial Estoppel

Next, the Court finds the Laniers are judicially estopped from asserting their pre-petition bankruptcy claims based on their failure to include the claims on their bankruptcy petitions.

Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding. *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004). The doctrine's function is to protect the integrity of the judicial process and the integrity of the courts rather than to protect litigants from allegedly improper or deceitful conduct by their adversaries. *Commerce Center of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc.*, 347 S.C. 545, 556 S.E.2d 718 (Ct. App. 2001); *see also Cothran*, 357 S.C. at 215, 592 S.E.2d at 631 (stating the purpose of the doctrine is to ensure the integrity of the judicial process). Stated otherwise, judicial estoppel precludes a party from adopting a position in conflict with one earlier taken. *Hawkins v. Bruno Yacht Sales*, 353 S.C. 31, 42, 577 S.E.2d 202, 208 (2003); *Commerce Center*, 347 S.C. at 554, 556 S.E.2d at 723.

"A long-standing tenet of bankruptcy law requires one seeking benefits under its terms to schedule, for the benefit of creditors, all his interests and property rights." *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 416 (3d Cir. 1988). "It is a generally recognized proposition that one cannot play fast and loose with the courts." *Payless Wholesale Dist., Inc. v. Albert Culver (P.R.) Inc.*, 989 F.2d 570, 571 (1st Cir. 1993) (internal quotation marks omitted). Numerous courts have held the omission or nondisclosure of a cause of action as an asset in a bankruptcy schedule provides an appropriate basis for imposition of judicial estoppel. *Id.* at 571-72; *Hay v. First Interstate Bank*, 978 F.2d 555, 557 (9th Cir. 1992); *Oneida*, 848 F.2d at 419-20; *Management Investors v. United Mine Workers*, 610 F.2d 384, 391-93 (6th Cir. 1979); *Jim Meagher Chevrolet, Inc. v. General Motors Corp.*, No. 4:93CV2385 GFG (E.D.

Mo. Aug. 26, 1994); *In re H.R.P. Auto Center, Inc.*, 130 B.R. 247, 254-55 (Bankr. N.D. Ohio 1991).

Judicial estoppel is specifically utilized by the courts to prevent the type of conduct sought here: assertion post-petition of pre-petition claims against a creditor of the bankrupt party. *See Welsh v. Quabbin Timber, Inc.*, 199 B.R. 224, 229 (D. Mass. 1996) (plaintiff estopped from proceeding with action against bank which was a creditor in his bankruptcy case); *In re H.R.P. Auto Center*, 130 B.R. at 254 (debtor estopped from asserting undisclosed counterclaim against major creditor); *In re Hoffman*, 99 B.R. 929, 935-36 (N.D. Iowa 1989) (estopping a lender liability suit against one of the plaintiff's primary bankruptcy creditors).

In the instant matter, the Laniers signed a federal court filing—their bankruptcy petition—under penalty of perjury. The document admittedly has inaccuracies, including the failure to list any of the claims the Laniers desire to assert in this matter. The Laniers were required to disclose the existence of any claim that existed prior to filing for bankruptcy. The claims the Laniers have raised in this action existed prior to filing for bankruptcy. Even assuming the best of intentions by the Laniers, to allow them to bring these claims would impinge on the integrity of this Court. The Laniers are therefore judicially estopped from seeking any of their pre-petition claims.

C. Statute of Limitations

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

The Laniers argue the Court erred in applying TILA's one year statute of limitations. Pursuant to 15 U.S.C. §1640(e), any action brought under TILA must be brought within one year from the date of the occurrence of the violation. Any action brought to enforce a violation of Section 1639 of TILA must be brought within three years of the occurrence of the violation. 15 U.S.C. §1640(e).

The Laniers executed a promissory note and a mortgage to SunTrust Mortgage's predecessor in interest on August 11, 1997. In their fourth amended complaint, the Laniers alleged SunTrust Mortgage violated TILA at the "consummation of the transaction" when they failed to provide the Laniers with the statutorily required documents. Therefore, the Laniers' claim must have been brought by August 11, 2001, at the latest. The Laniers first filed their claim for violation of TILA on September 6, 2012—over ten (10) years since the claims allegedly occurred. Accordingly, the Laniers' claim is barred by the statute of limitations set forth in Section 1640(e) of TILA.

ii. Violation of RESPA, 12 U.S.C. § 2601 *et seq.*

The Laniers allege SunTrust Mortgage violated Section 2605(e)(2) of RESPA at the time of closing on the sale of the Properties by failing to correctly and accurately comply with the disclosure requirements. Under Section 12 U.S.C. § 2614, any claim for a violation of Section 2605 relating to a closing must be brought within three (3) years of when the alleged violation occurred.

The Laniers closed on the Properties in 1997. They filed their first claim on September 6, 2012—over ten (10) years after the alleged violation occurred. Accordingly, the Laniers' claim for violation of RESPA for failing to correctly and accurately comply with the disclosure requirements is barred by the three year statute of limitations. *See* 12 U.S.C. § 2614.

D. Slander of Title

The Laniers allege SunTrust Mortgage disparaged their title by filing the foreclosure complaint and lis pendens.

"Privileged communications are either absolute or qualified." *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 22, 567 S.E.2d 881, 892 (Ct. App. 2002). "When 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." *Id.* (quoting *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." *Id.* (citation omitted) (alteration in original). A lis pendens is absolutely privileged. *Id.* at 32, 567 S.E.2d at 897.

The Laniers' slander of title claim is derived from the foreclosure complaint and the accompanying lis pendens. These documents are absolutely privileged communications. Therefore, the Court dismisses the Laniers' slander of title cause of action on the grounds that pleadings—including the lis pendens—are absolutely privileged and no action lies in the publication of absolutely privileged communications.

IV. CONCLUSION

For the reasons set forth herein, the Laniers' motion to reconsider is **DENIED**.

AND IT IS SO ORDERED.

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

February _____, 2016
Lexington, South Carolina