

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas

James B. Jackson, Jr., Special Circuit Judge

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Appellate Case No. 2015-001633  
Common Pleas Case No. 2013-CP-38-01427

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Newtek Small Business Finance, Inc.,.....Respondent,

v.

Kiritkumar H. Mehta,.....Appellant.

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FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES

- I. Did the lower court err in granting summary judgment to the Respondent creditor where the court concluded it could not consider evidence of the Respondent's misrepresentation that a short sale transaction would eliminate any further liability on the subject debt?
  
- II. Did the lower court err in granting summary judgment where it applied the parol evidence rule and related contractual interpretation principles to the Appellant, who was not a party to the short sale agreement?
  
- III. Did the lower court err in granting summary judgment where discovery had just begun and where the Appellant had not had a full and fair opportunity to complete discovery?
  
- IV. Did the lower court err in denying the Appellant's motion to amend and add parties where there would have been no prejudice to the Respondent by allowing the amendment?

## STATEMENT OF THE CASE

The Respondent, Newtek Small Business Finance, Inc. (hereinafter “Newtek”), sued Kiritkumar H. Mehta (hereinafter “Mehta”) stating that he breached a guaranty of a note given by Krishna of Orangeburg, Inc. (hereinafter “Krishna of Orangeburg”) and alleging Mehta owed Newtek \$306,072.36 on the guaranty. (R. pp. 8-22.) Mehta answered the complaint, asserting failure to mitigate damages and release or waiver as defenses. (R. pp. 24-25.) The answer alleged the following:

The Plaintiff entered into a settlement with the borrower on the note subject of this transaction in which the Plaintiff satisfied the mortgage that had secured the note debt in exchange for payment to the Plaintiff of an amount of money that was less than what the Plaintiff claimed to have been owed on the note debt.

The property subject of the mortgage was worth more than the note debt amount.

The Plaintiff voluntarily relinquished its ability to be compensated fully from the property that was its collateral for the subject note debt.

Through its own actions and inactions, the Plaintiff has failed to take reasonable steps to mitigate its damages subject of this case.

The Plaintiff’s recovery should be barred or lessened by its failure to mitigate its damages.

...

The settlement described above may have released or otherwise extinguished the debt upon which the Plaintiff now sues.

(R. pp. 24-25.)

Newtek made a motion for summary judgment. (R. pp. 27-50.) The affidavit supporting the motion noted that Krishna of Orangeburg’s note to Newtek was for

\$725,000.00, that Newtek had previously sued Krishna of Orangeburg for foreclosure of the mortgage that secured the note, and that Newtek then accepted \$437,000.00 in satisfaction of the mortgage. (R. pp. 29-30.) The affidavit stated that Newtek was owed an additional \$315,632.30. (R. p. 30.) Attached to the affidavit supporting Newtek's motion was a recorded satisfaction of mortgage document that stated the mortgage was satisfied but also the following:

However, this satisfaction shall not, in any manner, constitute a waiver of payment of the underlying and associated Promissory Note. Newtek Small Business Finance, Inc. reserves the right to collect any and all deficiency that may still be due and owing under the underlying and associated Promissory Note and any related documents, specifically, but not limited to Guarantees associated with the Promissory Note.

(R. p. 49.)

While that satisfaction document was signed by an officer of Newtek, it was not signed by Mehta or anyone on behalf of Krishna of Orangeburg. (R. pp. 49-50.)

Mehta and Newtek reached a settlement, subject to the approval of the Small Business Administration (hereinafter "SBA"), which guaranteed the underlying loan; however, SBA ultimately did not approve the settlement. (R. p. 91 ln. 2-21.)

After the settlement broke down, a hearing was set on Newtek's summary judgment motion. Mehta served an affidavit in opposition to the motion, in which Mehta testified as follows:

My name is Kiritkumar H. Mehta, and I go by the nickname "Chris." I have personal knowledge of the facts set forth in this affidavit and am competent to testify about them.

On September 10, 2013, the Plaintiff, a company called Quantum Mortgage Corporation, and Krishna of

Orangeburg, Inc., of which I am a principal, entered into a short sale transaction in which the entire purchase price of \$437,000.00 from Quantum Mortgage Corporation went to pay debt to the Plaintiff as a short sale. This transaction was arranged by Quantum Mortgage Corporation and the Plaintiff, and Vivek Naik, of Quantum Mortgage Corporation, told me the sale's proceeds would take care of any outstanding debt owed to the Plaintiff, Newtek Small Business Finance. Vivek told me he would handle the sale and satisfaction to ensure no further money was owed to Newtek on my behalf. Vivek assured me that the short sale would satisfy all debt owed to the Plaintiff.

Before the closing of the short sale, Jose Morales of Newtek Small Business Finance also told me that as a result of the short sale, there would be no more debt owed to the Plaintiff.

I would not have allowed the short sale to occur for that price if I had not believed that the short sale would satisfy all the debt owing to the Plaintiff. I could have gotten the money together to bring the loan current, but, because of these representations, I did not.

On September 24, 2013 it appears the Plaintiff signed a Satisfaction of Mortgage reflecting receipt of the funds of the September 10<sup>th</sup> sale.

Based on the statements by Morales and Vivek, as well as the Plaintiff's receipt of funds from the September 10<sup>th</sup> sale, I believed any debt or obligation I may have owed to Plaintiff was satisfied.

On the same day as the September 10<sup>th</sup> short sale, Quantum Mortgage sold a portion of the property it bought at the short sale for \$605,000.00, as the attached deed reflects.

The value of the property at the time of the September 10<sup>th</sup> sale was sufficient to satisfy the entire indebtedness owed to Plaintiff.

(R. pp. 66-67.)

Mehta also moved to amend to add additional defenses and counterclaims and to add third-party claims against Vivek Naik (hereinafter “Vivek”) and Quantum Mortgage Corporation (hereinafter “Quantum Mortgage”). (R. pp. 51-72.) Mehta served discovery requests. (R. pp. 183-95.)

Newtek submitted a return and memorandum in support of its motion for summary judgment, to which it attached contract documents from the short sale and documents purportedly exchanged in negotiations concerning the short sale. (R. pp. 129-63.)

After hearing both the summary judgment motion and Mehta’s motion to amend and add parties, the court took the motions under advisement. (R. p. 101 ln. 16 through p. 102 ln. 14.) The court later issued an order that granted Newtek’s motion as to liability only and denied Mehta’s motion to amend and add parties. (R. p. 4.) The order determined the issue of summary judgment in the plaintiff’s favor on the basis of the parol evidence rule, concluding as follows:

Specifically, the Court finds that the parol evidence rule prohibits the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument. . . .

In the instant case, Mehta’s affidavit specifically seeks to contradict the written contract for sale and the associated satisfaction of mortgage regarding the issue of whether Newtek would accept the sales proceeds in full satisfaction of all funds owed.

(R. p. 3.) The order stated that Mehta’s “motion to amend his pleadings is summarily denied.” (R. p. 4.)

Mehta moved for reconsideration of the order. (R. pp. 73-78.) The court held a hearing on the motion to reconsider. (R. p. 105 ln. 8-15.) The court denied the motion to reconsider. (R. pp. 5-7.)

This appeal followed.

### **STATEMENT OF FACTS**

Vivek set up a very profitable situation for Quantum Mortgage. Quantum Mortgage was able to buy Krishna of Orangeburg's property for \$437,000.00 (with Krishna of Orangeburg paying an additional \$109,250.00 in settlement charges that did not come out of the purchase price funds – including a \$43,315.39 “consulting fee” to Quantum Mortgage), then sell it for \$605,000.00 on the same day. (R. pp. 47-48, 68-71.)

Jose Morales, an employee of Newtek, told Mehta that if Krishna of Orangeburg went through with the short sale, no more debt would be owed. (R. p. 66.) Morales knew this was not true; after all, it was Morales who signed the satisfaction document on behalf of Newtek stating that it was not a waiver of the remaining debt. (R. pp. 49-50.) Morales may have thought that his misrepresentation to Mehta would not turn out to make any difference in the end - Morales may have thought the SBA would take care of the shortfall, since SBA guaranteed the loan. (R. p. 91 ln. 9-12.) In fact, Morales may have thought that, in convincing Mehta to have Krishna of Orangeburg go through with the short sale, he was bringing Newtek one step closer to getting the remainder of the loan paid off by the SBA.

Mehta could have brought the loan current. (R. pp. 66-67.) He might have been able to find a buyer in Yogi of Orangeburg, LLC, which bought the property from

Quantum Mortgage for much more than the short sale price. (R. pp. 68-69.) Instead, relying both on what Vivek told him and what Morales (on behalf of Newtek) told him, he had Krishna of Orangeburg go ahead with the short sale – because he believed it would extinguish the debt and thus end his liability on the guaranty. (R. pp. 66-67.)

Morales’ misrepresentation to Mehta is not contradicted by any document *signed by Mehta* or by Krishna of Orangeburg. The mortgage satisfaction document signed and recorded by Newtek is not something Mehta saw or would have seen. The closest Newtek came to a contradiction in something *Mehta* might even have seen was Newtek’s much-touted Schedule 5 to the short sale contract – a document that simply does not address whether any liability on the debt or guaranty was to survive the short sale. (R. p. 161.) Only Newtek signed that document. (R. p. 161.)

#### **STANDARD OF REVIEW**

**Summary judgment.** When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRPC. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). That standard is that “summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law.” Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

“All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.” Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). If “the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]” Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 29 (S.C. 2008).

“When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues.” Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008).

In 2009, the South Carolina Supreme Court clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802-3 (2009). In Hancock, the Court held that “in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” Id. More than a scintilla is required only in cases requiring heightened burdens of proof or applying federal law. Id. Accordingly, when the ordinary burden of proof is applicable, only a scintilla of evidence is required to withstand summary judgment. Id.

“Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003) (internal quotation marks omitted); accord Lanham v. Blue Cross and Blue Shield of South Carolina, Inc., 349 S.C. 356, 363, 563 S.E.2d 331, 334 (2002); Doe v. Batson, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001); Baughman v. American Telephone and Telegraph Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

**Motion to amend and add parties.** Leave to amend a pleading shall be freely given when justice so requires and the grant of such leave does not work prejudice to the other party. Rule 15, SCRPC, strongly favors amendment, and courts are encouraged to freely grant leave to amend. Stanley v. Kirkpatrick, 357 S.C. 169, 174, 592 S.E.2d 296, 298 (2003). While motions to amend are addressed to the sound discretion of the trial court, the party opposing amendment has the burden of establishing that the motion should not be granted. Foggie v. CSX Transportation, Inc., 313 S.C. 98, 103, 431 S.E.2d 587, 590 (1993). To successfully oppose a motion to amend, the party opposing the motion must establish that it would be prejudiced by the amendment. Stanley, 357 S.C. at 174. “The prejudice Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it.” Id.

The decision of whether to grant a motion to assert a third-party claim is addressed to the sound discretion of the trial court as well. See Beach v. Hudson, 298 S.C. 424, 426, 380 S.E.2d 869, 871 (Ct. App. 1989). “[T]he court may properly consider the effect the additional parties and claims will have on the adjudication of the main action – in particular, whether continued joinder will serve to complicate the

litigation unduly or will prejudice the other parties in any substantial way.” Id. (internal quotation marks omitted).

“An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions.” In re: Care and Treatment of Miller, 393 S.C. 248, 256, 713 S.E.2d 253, 257 (2011).

### ARGUMENT

**I. It was proper to consider Newtek’s misrepresentations, and, when they are considered, they make plain that summary judgment was not proper.**

The lower court ruled that it could not consider Newtek’s representation that the debt (and thus Mehta’s liability on the guaranty of that debt, too) would be wiped out if Mehta caused Krishna of Orangeburg to go through with the short sale to Quantum Mortgage. (R. pp. 3, 66.) That was prejudicial error, and, when one does consider this representation, it becomes clear that summary judgment was not proper.

While it is certainly true that “a guaranty of payment is an obligation separate and distinct from the original note,” Citizens and Southern Nat’l Bank of S.C. v. Lanford, 313 S.C. 540, 543-45, 443 S.E.2d 549, 551 (1994), it is also true that “a guaranty is a collateral undertaking, and it is essential to its existence that there should be someone liable as principal, and if there is no valid claim against the principal, there is no existing contract of guaranty.” Carroll County Sav. Bank of Uniontown v. Strother, 22 S.C. 552 (1885). If there is no debt owed on the guaranteed obligation, there is no debt owed on the guaranty. Id. Here, where there was a fact question about whether Newtek relinquished the remaining Krishna of Orangeburg debt – like its employee told Mehta it would – when the short sale closed, it was error for the lower

court to decide that, as a matter of law, Mehta was liable to Newtek on his guaranty of that debt. (R. p. 66.)

“Waiver is a question of fact for the finder of fact. Waiver is a voluntary and intentional abandonment or relinquishment of a known right. It may be expressed or implied by a party’s conduct[.]” Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). There is a genuine issue of material fact in this case about whether Morales’ statement to Mehta that “as a result of the short sale, there would be no more debt owed to” Newtek means that Newtek voluntarily and intentionally abandoned or relinquished the debt that would have remained owed to it after payment of the \$437,000.00. (R. p. 66.) As Mehta’s counsel stated to the lower court, “[t]here’s a fact issue as to whether there was a waiver or settlement of any of the remaining debt in connection with the transaction[.]” (R. p. 94 ln. 12-14.) That is consistent with the law, which provides that waiver is a question of fact. Id. It is also consistent with how the settlement statement from the short sale transaction treated the money paid to Newtek. (R. p. 47, p. 96 ln. 18 through p. 97 ln. 1.) As Mehta’s counsel pointed out to the court, “on it it says payoff of first mortgage loan, Newtek Small Business Finance, Inc., \$437,000 on it. It doesn’t say accepted partial payment or paid in exchange for release of lien. It says payoff.” (R. p. 47, p. 96 ln. 18 through p. 97 ln. 1.)

The lower court seemed tacitly to acknowledge that Newtek’s representation to Mehta was sufficient to create a genuine issue of fact – the only reason the court determined that this evidence was not *material* was the parol evidence rule. (R. p. 3.)

For at least three reasons, the parol evidence rule did not render this evidence immaterial and did not bar its consideration by the court.

**a. The parol evidence rule does not bar this evidence, as Mehta was not a party to the short sale agreement.**

The parol evidence rule is a poorly named rule of law, since it is not a rule of evidence at all but, rather, one of the substantive law of contract construction. The rule is applicable in cases where one party to a contract takes a position on what the terms of a contract are that contradicts the terms that are contained in an integrated writing. E.g., McLeod v. Sandy Island Corp., 265 S.C. 1, 10-11, 216 S.E.2d 746, 750 (1976). “The general rule is that all conversations and parol agreements between the parties prior to or contemporaneous with the written agreement are considered to have been merged therein so that they cannot be given in evidence for the purpose of changing the contract or showing an intention or understanding different from that expressed in the written agreement.” Id.

The rule prohibits *the parties* to a contract from saying that the terms of their deal are at odds with what their final, integrated write-up of the deal says that the terms are. Baptist Foundation for Christian Educ. v. Baptist College at Charleston, 282 S.C. 53, 57, 317 S.E.2d 453, 456-57 (Ct. App. 1984). It does not, however, operate against someone who was not a party to the contract (or does not stand in that party’s shoes, such as an assignee), as this court has said in the past. Id.

Ordinarily, parol evidence cannot be given for the purpose of changing an intention or understanding different from that which is expressed in a written agreement. However, when there is a controversy between a third party and one of the parties to the instrument in question, parol evidence is admissible.

Id. (internal citations omitted).

Baptist Foundation is not an outlier. Our Supreme Court has expressed the same principle:

The rule that parol evidence is inadmissible to vary, explain, or contradict a writing is one for the benefit of the parties to the instrument and is generally limited to them and their privies. It does not apply to a controversy between third parties, or to a controversy between a third party and one of the parties to the instrument.

City of Orangeburg v. Buford, 227 S.C. 280, 284, 87 S.E.2d 822, 824 (1955).

This statement is consistent with American law of the parol evidence rule generally.

[T]he parol evidence rule is inapplicable to this case. The rule is used to preclude parties to a transaction from introducing prior and contemporaneous statements to alter the terms of a written agreement. There is no dispute here between the 1985 seller of the property and the purchaser over the terms of that deal.

• U.S. v. Krug, 967 F.2d 594 (9<sup>th</sup> Cir. 1992) (internal citation omitted).

Here, the lower court glossed over the fact that the contract at issue – the short sale agreement – was not one to which Mehta was a party. (R. pp. 1-7, p. 92 ln. 8-10, p. 106 ln. 4-23, p. 124 ln. 2-5, pp. 149, 154.) Mehta’s counsel pointed this out in argument at the hearing on the summary judgment motion and the hearing on the motion to reconsider. (R. p. 92 ln. 8-10, p. 106 ln. 4-23, p. 124 ln. 2-5.) Mehta’s counsel also noted that Newtek “hasn’t made any corporate veil piercing allegations or anything trying to say, ‘Oh, you really are Krishna of Orangeburg.’” (R. p. 124 ln. 6-8.) “A corporation is not a natural person and maintains a separate and distinct identity apart from its shareholders.” Mangum v. Maryland Cas. Co., 330 S.C. 573, 576, 500

S.E.2d 125 (Ct. App. 1998). This “principle is equally applicable, whether the corporation has many or only one stockholder.” Id. (quoting Costas v. First Fed. Sav. & Loan Ass’n, 283 S.C. 94, 102, 321 S.E.2d 51, 56 (1984)).

The parol evidence rule certainly did not bar *Mehta* from presenting anything about the circumstances surrounding the short sale transaction, and it was prejudicial error for the lower court to rule otherwise and grant summary judgment for Newtek. That contravened established South Carolina law. City of Orangeburg, 227 S.C. at 284; Baptist Foundation, 282 S.C. at 57.

**b. The parol evidence rule is inapplicable to the short sale agreement in any event, since it is silent as to whether the short sale would do away with the debt or with Mehta’s liability on the guaranty.**

“When a contract is silent as to a particular matter, parol evidence is admissible to reveal the parties’ true intent.” Keith v. River Consulting, Inc., 365 S.C. 500, 506, 618 S.E.2d 302, 305 (Ct. App. 2005). *Mehta* pointed out to the lower court that the short sale agreement does not state that the debt will *not* be extinguished by the short sale – it just does not speak to this issue one way or another. (R. p. 92 ln. 22 through p. 93 ln. 11, p. 109 ln. 6-14.)

The lower court found that “*Mehta*’s affidavit specifically seeks to contradict the written contract for sale and the associated satisfaction of mortgage[.]” (R. p. 3.) Taking the last first, the satisfaction of mortgage document is signed only by Newtek and is not part of the short sale agreement. (R. pp. 49-50, 149-61.) As to the written sale contract, where is the contradiction between *Mehta*’s affidavit and a document that does not speak to the question of whether any of Krishna of Orangeburg’s debt will survive the short sale? (R. pp. 149-61.) No such contradiction exists. This falsely

perceived contradiction infected the lower court's reasoning and brought about the ruling that brings this appeal before this court. The lower court erred.

**c. The parol evidence rule does not apply in the context of torts or where there has been material misrepresentation.**

“The parol evidence rule has been held inapplicable to tort causes of action (including negligent misrepresentation) since the rule is one of substantive contract law.” Redwend Ltd. Partnership v. Edwards, 354 S.C. 459, 581 S.E.2d 496 (Ct. App. 2003). “Neither the parol evidence rule nor a merger clause in a contract prevents one from proceeding on tort theories of negligent misrepresentation and fraud.” Frewil, LLC v. Price, Op. No. 5293 (S.C. Ct. App. filed Feb. 4, 2015) (Shearouse Adv. Sh. No. 5 at 36, 39)(quoting Slack v. James, 364 S.C. 609, 616, 614 S.E.2d 636, 640 (2005)). Parol evidence is “freely admissible to establish allegations of fraud, mistake, or other equitable grounds for relief.” Yarn Indus. v. Krupp Int’l, Inc., 736 F.2d 125, 129 (4<sup>th</sup> Cir. 1984) (citing Allen-Parker Co. v. Lollis, 257 S.C. 266, 185 S.E.2d 739, 742 (1971)). Regardless of any other reason why the parol evidence rule does not apply here, these well-established principles, even were this point to stand alone, mean that Mehta’s testimony about Morales’ representation to him is admissible and should have been considered by the court.

Viewed in the light most favorable to Mehta, the record – including Mehta’s testimony about Newtek’s employee, Morales, telling him that the short sale transaction would get rid of the remaining debt and Newtek’s contradictory satisfaction of mortgage document bearing Morales’ signature on behalf of Newtek – shows a genuine issue of material fact about whether Newtek at least negligently misrepresented to

Mehta that the short sale would wipe out the Krishna of Orangeburg debt and, thus, Mehta's liability on the guaranty of that debt. (R. pp. 49-50, 66.)

One of the counterclaims that Mehta sought to add by amendment (which the lower court should have allowed, as discussed below) was negligent misrepresentation. (R. p. 58, p. 90 ln. 23-25.) "Negligent misrepresentation has been described as an 'emerging and developing field of law.'" Michael G. Sullivan & Douglas S. MacGregor, Elements of Civil Causes of Action 451 (5th ed. 2015) (quoting Gruber v. Santee Frozen Foods, Inc., 309 S.C. 13, 419 S.E.2d 795 (Ct. App. 1992)). It is an action in negligence (thus, not one with a heightened burden of proof). Id. "Recovery in a negligent misrepresentation action is based upon negligent conduct and predicated upon a negligently made false statement where a party suffers either injury or loss as a consequence of relying upon the misrepresentation inducing him or her to enter a contract or business transaction." Id.

Negligent misrepresentation has the following elements: 1) a false representation by the party against which the claim is asserted; 2) that party's pecuniary interest in making the statement; 3) that party owed a duty of care to see that it communicated truthful information to the party asserting the claim; 4) the party against which the claim is asserted breached the duty by failing to exercise due care; 5) the claimant justifiably relied upon the representation; and 6) the claimant suffered a pecuniary loss as the proximate result of his reliance upon the representation. Bishop Logging Co. v. John Deere Equip. Co. 317 S.C. 502, 528 n. 6, 455 S.E.2d 183 (Ct. App. 1995).

Though the court made its ruling on parol evidence grounds, Newtek argued that Morales' representation that there would be no more debt owed after the short sale does not satisfy the first element of negligent misrepresentation because it was a promise as to future events. Mehta argued that if a false representation, such as a promise that the promisor has no intention of keeping, is made for the purpose of inducing a party to go through with a transaction, this is an exception to the general rule that statements about what will happen in the future cannot satisfy this element of a negligent misrepresentation claim. (R. p. 94 ln. 23 through p. 95 ln. 5, p. 107 ln. 23 through p. 108 ln. 19.)

In Turner v. Milliman, our Supreme Court summarized the law in this area as follows:

Ordinarily, to be actionable, a statement must relate to a present or preexisting fact, and cannot be predicated on unfulfilled promises or statements as to future events. However, where one promises to do a certain thing, having at the time no intention of keeping his agreement, it is a fraudulent misrepresentation of a fact, and actionable as such. Entering into an agreement, with no intention of keeping such agreement, constitutes fraudulent misrepresentation; however, mere breach of contract does not constitute fraud. A future promise is not fraudulent unless such promise was part of a general design or plan, existing at the time, to induce a party to enter into a contract or act as he or she otherwise would not have acted, to his or her injury. Evidence of mere nonperformance of a promise is not sufficient to establish either fraud or a lack of intent to perform. An inference of a lack of intent to perform a promise can only be made when nonobservance of a promise is coupled with other evidence.

392 S.C. 116, 123-24, 708 S.E.2d 766, 770 (2011) (internal quotation marks, citations, and citation-related punctuation omitted).

Here, there was a scintilla (and more) of evidence that Morales' statement to Mehta fell within the situation described by the Supreme Court in the passage from Turner quoted above. It can be inferred from the circumstances of Morales' conversation with Mehta, which occurred before the short sale, that the statement was made for the purpose of inducing Mehta to cause Krishna of Orangeburg to go through with the short sale and as part of a design or plan to bring that about. (R. p. 66.) That is an inference to which Mehta is entitled at the summary judgment stage. E.g., Englert, 377 S.C. at 133-34. Viewed in the light most favorable to Mehta, the record – in particular the satisfaction of mortgage document and the difference between the proposed Schedule 5 to the short sale purchase and sale agreement and the Newtek-signed Schedule 5 to that agreement – indicates that Newtek (and, indeed, Morales himself) knew that it had no intention of waiving, releasing, or otherwise extinguishing the debt remaining after payment of the \$437,000.00. (R. pp. 49-50, 148, 161.) Newtek presented no evidence that Mehta was actually aware before the short sale that Newtek had taken the position that the unpaid debt would still be owed, and, further, whether a party has the right to rely on a statement is ordinarily a fact question for the jury. See Armstrong v. Collins, 366 S.C. 204, 220, 621 S.E.2d 368 (Ct. App. 2005) (fact question concerning right to rely). Obviously, Newtek did not honor its representation to Mehta, or this case would never have been brought. This is non-observance coupled with other evidence that Newtek did not intend to honor its representation, which was made for the purpose of inducing the transaction, at the time it made the representation – just as described in Turner. 392 S.C. at 123-24. Just as did the facts of Turner, the facts of

this case meet the scintilla-of-evidence threshold necessary to defeat a summary judgment motion. Id. at 124.

The court erred in granting summary judgment.

**II. Because Mehta had not had a full and fair opportunity to complete discovery, the lower court erred in granting summary judgment.**

It is well established that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. Lanham, 349 S.C. at 363; Batson, 345 S.C. at 322; Baughman, 306 S.C. at 112; Schmidt, 357 S.C. 310. In the absence of discovery, summary judgment will not be granted unless the opposing party has procrastinated in making use of discovery methods or extraordinary circumstances exist. Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69, 75 (1999).

In Baughman, the Court focused on 1) whether additional discovery would likely uncover relevant evidence, 2) whether the party opposing summary judgment had been dilatory in seeking discovery, 3) whether the moving party had satisfied the opposing party's discovery requests, 4) the importance to the position of the opposing party of the information sought in the unsatisfied requests, 5) the difficulty of proving the contentions the information was sought to bolster, and 6) whether the court was aware of the need for further discovery. 306 S.C. at 112-14.

Mehta's discovery requests sought information about the involvement of SBA, the negotiations leading up to the short sale, the communications between Newtek and Mehta, and the communications between Newtek and SBA. (R. pp. 183-90.) All of that information is relevant to the dispute between the parties. Here, under the circumstances, Mehta was not dilatory in seeking discovery, as the reason no discovery

had been conducted before Mehta served his requests is that the parties had believed they had settled the case, subject to SBA approval that was ultimately denied. (R. p. 91 ln. 2 through p. 92 ln. 6.) Newtek has not served Mehta with discovery requests, so he cannot have failed to satisfy Newtek's nonexistent discovery requests. In what is essentially a "he said/he said" situation between Mehta and Morales, notes of communications between them like what is sought by Mehta may be critical in proving Mehta's case. Mehta also made the court aware of the discovery situation. (R. p. 91 ln. 2 through p. 92 ln. 6.) Each of the six factors used in Baughman's analysis indicates that lack of a full and fair opportunity to complete discovery means that the lower court should have denied Newtek's motion for summary judgment.

**III. There would have been no prejudice to Newtek for the lower court to grant Mehta's motion to amend and add parties, and it was error to deny the motion.**

The party opposing a proposed amendment of a pleading has the burden of establishing that the motion should not be granted. Foggie, 313 S.C. at 103. To successfully oppose a motion to amend, the party opposing the motion must establish that it would be prejudiced by the amendment. Stanley, 357 S.C. at 174. "The prejudice Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it." Id.

With regard to a motion to add third-party claims, "the court may properly consider the effect the additional parties and claims will have on the adjudication of the main action – in particular, whether continued joinder will serve to complicate the litigation unduly or will prejudice the other parties in any substantial way." Beach, 298 S.C. at 426 (internal quotation marks omitted).

Newtek did not establish sufficient prejudice in this case for the court to deny the motion to amend and add parties. Had the motion been granted, Newtek would have had sufficient time to gird itself to meet the issues presented by the proposed amended pleading. It is not as though the case were on the cusp of trial. Granting the motion would have allowed the pleadings to reflect the issues that the facts of the case present; this is the purpose of a motion to amend. (R. p. 75.) Further, nothing about either bringing in Vivek and Quantum Mortgage as third-party defendants or asserting the counterclaims against Newtek would really change the scope of discovery or what would be needed to prepare for trial. (R. pp. 51-72.)

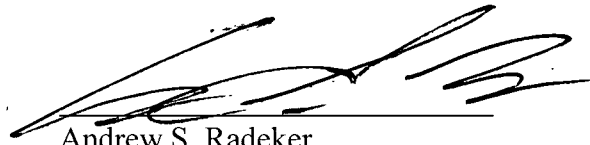
Indeed, the lower court's comments at the hearing on this motion and the summary judgment motion indicate that the motion to amend and add parties was denied only because the lower court believed summary judgment was proper (which, as discussed above, it was not). (R. p. 101 ln. 23-24.) The court stated that "if I deny summary judgment I am pretty sure I would let you amend." (R. p. 101 ln. 23-24.) The fact that the orders below contain no independent analysis of the motion to amend bears out that the grant of summary judgment was the only reason the motion was denied.

To deny this motion was error, and this court should reverse that decision.

### **CONCLUSION**

The lower court erred prejudicially in granting Newtek's summary judgment motion and in denying Mehta's motion to amend and add parties. The court should reverse these rulings and remand for trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'A. S. Radeker', written over a horizontal line.

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April 26, 2016

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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**RECEIVED**

APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas

APR 26 2016  
**SC Court of Appeals**

James B. Jackson, Jr., Special Circuit Judge

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Appellate Case No. 2015-001633  
Common Pleas Case No. 2013-CP-38-01427

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Newtek Small Business Finance, Inc.,.....Respondent,

v.

Kiritkumar H. Mehta,.....Appellant.

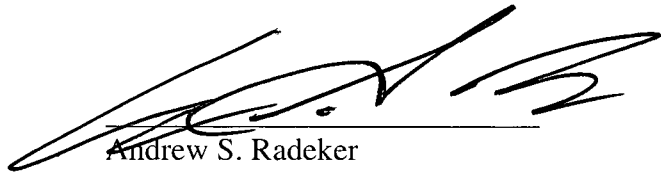
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CERTIFICATE OF COUNSEL

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I certify that the foregoing brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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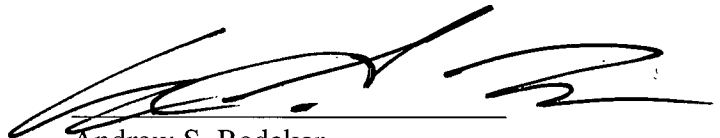
Kiritkumar H. Mehta,.....Appellant.

PROOF OF SERVICE

I certify that I served the Appellant's final brief and final reply brief in this case by depositing a copy of each of them on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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