

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Peach REO, LLC, a Delaware limited liability company,)

Civil Action No. 2015-CP-42-4448

Plaintiff,)

ORDER DENYING
MOTION TO AMEND JUDGMENT

vs.)

Blalock Investments, LLC; Todd Smith;)
Debra Masuga; Subway Real Estate,)
LLC; and County of Spartanburg, a)
political subdivision of the State of)
South Carolina,)

Defendants.)

and)

Blalock Investments, LLC; Todd Smith;)
and Debra Masuga,)

Third Party Plaintiffs,)

vs.)

Capital Crossing Servicing Company,)
LLC,)

Third Party Defendant.)

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SC Court of Appeals

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This matter came before the Court at 2:30 p.m. on Wednesday, July 13, 2016, for the purpose of hearing Defendants/Third-Party Plaintiffs Blalock Investments, LLC, Todd Smith, and Debra Masuga's (collectively, "Debtors") *Motion to Amend Judgment* ("Motion"). Plaintiff Peach REO, LLC, a Delaware limited liability company ("Peach") and Third-Party Defendant Capital Crossing Servicing Company, LLC's ("Capital Crossing," and collectively with Peach, the "Lender") filed an Opposition in response to the Motion ("Opposition").

After a review of the Motion and Opposition before the Court and hearing arguments from counsel for Peach, Capital Crossing, and Debtors, I hereby **DENY** Debtors' Motion in its entirety.

FINDINGS OF FACT:

1. This is a foreclosure action based on a \$1.9M note and mortgage by Blalock Investments, LLC, which was guaranteed by Todd Smith and Debra Masuga.
2. Debtors admit they defaulted in the monthly payments on the loan in February 2013, failed to pay the loan in full upon its maturity in October 2013, and failed to pay the property taxes, which caused the property to be sold at a tax sale in November 2013.
3. Debtors asserted the following counterclaims against Peach and third-party claims against Capital Crossing in their Answer, Counterclaims, and Third-Party Complaint (the "Answer and Counterclaim"):
 - a. Counterclaim for breach of the implied covenant of good faith and fair dealing;
 - b. Counterclaim and third-party claim for violation of South Carolina's Unfair Trade Practices Act;
 - c. Counterclaim and third-party claim for tortious interference with contract; and
 - d. Counterclaim and third-party claim for failure to act in a commercially reasonable manner.
4. On June 8, 2016, the Court entered its Order granting Lender's *Motion to Dismiss Counterclaims and Third-Party Complaint* ("Dismissal Order"), which is the order that the Debtors seek to alter or amend.

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CONCLUSIONS OF LAW:

I. Debtors' Request to Amend Their Answer and Counterclaim is Denied.

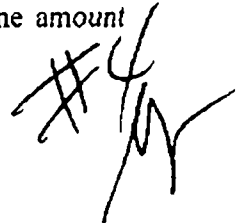
1. Debtors request in their Motion to amend the Answer and Counterclaim in order to apparently assert additional claims against Lender. The Court denies this request.
2. Debtors' request to amend is improper at this stage. South Carolina Rule of Civil Procedure Rule 59(e) ("Rule 59(e)"), which is the legal basis for the Debtors' Motion, is not the appropriate avenue for raising issues for the first time. See, e.g., Hickman v. Hickman, 301 S.C. 455, 456-57, 392 S.E.2d 481, 482 (Ct. App. 1990) (explaining that "Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier") (internal citations omitted); Stevens & Wilkinson of S. Carolina, Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) (noting that "a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not").
3. Here, Debtors raised the request to amend for the first time after judgment. This cannot be done. The request is procedurally defective and barred.
4. Next, the request to amend is not even compliant with SCRPC 15. No motion to amend was made and no proposed amended complaint was offered. See SCRPC 15(a) (requiring a party to seek Court approval under Rule 15 in order to amend a pleading if all responsive pleadings have been served). Thus, in addition to coming too late, the request is defective.
5. Further, Debtors' request to amend is unduly delayed. Debtors filed their Answer and Counterclaim in January 2016, and, therefore, had approximately six (6) months to seek leave to amend. They have not offered any reasonable explanation for their tardiness.

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See Holland ex rel. Knox v. Morbark, Inc., 407 S.C. 227, 235, 754 S.E.2d 714, 719 (Ct. App. 2014) (finding that the trial court properly denied a motion to amend where the moving party offered no explanation for its delay in bringing the amendment).

6. Finally, the Debtors' proposed amendments would be futile, as Debtors' Motion advances the same arguments that this Court has already considered and rejected. See Sullivan v. Hawker Beechcraft Corp., 397 S.C. 143, 153-54, 723 S.E.2d 835, 840-41 (Ct. App. 2012) (affirming denial of motion to amend where no new factual allegations were provided to support the new, proposed amended pleading). Specifically, Debtors allege in the Motion that Lender wrongfully refused to modify, settle, or accept less than the full balance owed on the subject loan, such as by potential leases or a sale of the subject property. This allegation forms the underlying basis for all of Debtors' counterclaims and third-party claims previously asserted and those that they apparently wish to assert via their proposed amendment. See Dismissal Order at ¶¶ 8, 12, 18, and 26. However, Lender is not obligated to consider or accept less than the full balance owed on the loan and has no duty to mitigate this amount in any way pursuant to the subject loan documents and South Carolina law. See Promissory Note attached to Amended Complaint as Exhibit A at p. 2 ("[Blalock Investments, LLC] agree[s] that [Lender] may at [Lender's] option extend this note . . .") (emphasis added); Guarantees attached to Amended Complaint as Exhibit J at p. 2 ("Lender may, but shall not be obligated to, enter into transactions resulting in the creation or continuance of indebtedness . . .") (emphasis added); see also Cisson Const., Inc. v. Reynolds & Associates, Inc., 311 S.C. 499, 503-04, 429 S.E.2d 847, 849-50 (Ct. App. 1993) (explaining that lenders are entitled to recover the full amount owed on the loan and have no duty to mitigate the amount



owed). Indeed, the facts of this case fit squarely within Cisson, as the complaining party in that case, like here, argued that the lender had a duty to mitigate the amounts owed on the subject debt. Id. at 501, 429 S.E.2d at 848. However, the court in Cisson specifically explained that the lender in that case was “permitted to enforce the note in its full amount against *any party to the note or guaranty*” and was not obligated to “*pursue or exhaust a particular remedy, or take any action before seeking full payment on the note.*” Id. at 504, 429 S.E.2d at 850 (emphasis added).

7. Therefore, Debtors’ allegation that Lender did not somehow - whether by leases, a sale, or otherwise – modify, mitigate or accept less than the full balance owed on the subject loan fails to support any cause of action, old or new, against Peach or Capital Crossing. Thus, Debtors’ request to amend to include additional claims based on this complained-of conduct is futile.

II. Debtors’ Request to Alter or Amend the Dismissal Order is Also Denied.

A. There is no legal basis to alter or amend the Dismissal Order.

8. Debtors’ Motion merely restates the same arguments and factual allegations previously asserted, which were rejected by this Court making the motion unwarranted. A Rule 59(e) motion is not designed to re-argue or rehash issues already rejected. See Concerned Citizens Comm. for Ashley River v. S. Carolina Coastal Council, 310 S.C. 267, 271 n.3, 423 S.E.2d 134, 137 n.3 (1992) (Finding that the circuit court “rul[ed] on the issue . . . [,therefore, a] Rule 59(e) motion was not necessary.”)¹
9. For the reasons set forth in the Dismissal Order, the Court correctly dismissed all of Debtors’ counterclaims and third-party claims (collectively hereafter, the

¹ South Carolina state courts can rely on federal law in interpreting and applying Rule 59(e). Elam v. S.C. Dep’t of Transp., 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004) (analyzing and applying federal law regarding Rule 59(e) and stating “Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical.”)

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"Counterclaims") because the specific conduct on which each claim is based – that Lender wrongfully refused to modify, settle, or accept less than the full balance owed on the subject loan – fails to support any cause of action against either Peach or Capital Crossing.² As explained, Lender is entitled to the full amount owed on the loan and has no duty to mitigate this amount in any way. See Cisson, 311 S.C. at 503, 429 S.E.2d at 849.

10. Additionally, the Court correctly dismissed Debtors' counterclaim for breach of the implied covenant of good faith and fair dealing because South Carolina courts do not recognize it as an independent cause of action. RoTec Services, Inc. v. Encompass Services, Inc., 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004) (concluding that "the implied covenant of good faith and fair dealing is not an independent cause of action ..."). Debtors did not identify any contrary controlling precedent in their Motion.

11. Debtors apparently attempt to assert a breach of contract claim against Capital Crossing in their Motion, essentially alleging that Capital Crossing breached a contractual duty to exercise discretion in accepting less than the full balance owed on the loan in good faith. The Court need not address this purported claim because the Debtors' request to amend their Answer and Counterclaim is denied for the reasons set forth above. Further, Debtors' purported breach of contract claim fails because (1) Debtors have not alleged the existence of a contract between them and Capital Crossing, and (2) Capital Crossing was under no duty to accept anything less than the full balance owed on the loan as explained herein. Cisson, 311 S.C. at 503, 429 S.E.2d at 849.

12. Debtors also cannot rely on an alleged violation of the South Carolina Unfair Trade

² All "affirmative defenses" asserted by the Debtors in their Answer and Counterclaim, including their "affirmative defense of failure to mitigate," fail for the same reason.

Practices Act, S.C. Code § 39-5-10, *et seq.* ("SCUTPA"), as an underlying basis for their Counterclaims, which Debtors appear to do in their Motion. Conduct that affects only the parties to the transaction and not the public interest provides no basis for a SCUTPA claim. Haley Nursery Co. v. Forrest, 298 S.C. 520, 381 S.E.2d 906, 908 (1989). The facts as alleged by the Debtors apply only to the parties to this action and not to the public interest.

13. Debtors' independent SCUTPA claim also fails on the basis that no contract was breached, thus, no wrong occurred at all. In order to sustain an action under the SCUTPA, some underlying predicate act must have occurred. See Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006) (providing that to recover under SCUTPA, the moving party must demonstrate that some "unfair or deceptive" act occurred). Here, Debtors' allegations fail to show any wrongdoing or "unfair or deceptive" acts by Plaintiff for the reasons explained above, much less any acts that could cause any harm to the public.
- B. Debtors fail to offer any reason justifying altering or amending the judgment under SCRCP 59(e).
14. Debtors have not shown that the Court misapprehended or overlooked the applicable law that applies here. See Elam, 361 S.C. at 22, 602 S.E.2d at 779 (recognizing that a Rule 59(e) Motion should be granted only when the court misapprehends or misapplies the law).
15. There is nothing new for the Court to consider. Debtors' Motion does not assert any proper new grounds whatsoever that this Court has not already considered and rejected.
16. For the reasons explained above, the Court correctly applied applicable South Carolina statutes, procedural rules, and case law. Debtors have simply requested that the Court

change its conclusions to rule in their favor, which is not a valid basis to grant their Motion.

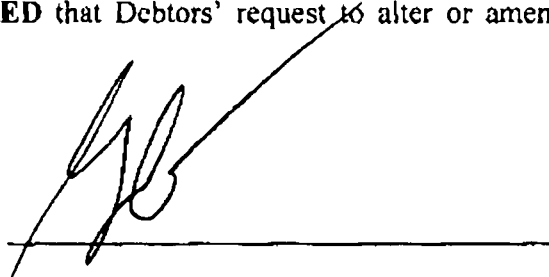
17. This Court properly found Debtors failed to adequately plead any cause of action against Peach or Capital Crossing.

Based on these findings of fact and conclusions of law,

IT IS HEREBY ORDERED that Debtors' request to amend their Answer and Counterclaim is denied; and

IT IS FURTHER ORDERED that Debtors' request to alter or amend the Dismissal Order is denied.

AND IT IS SO ORDERED.

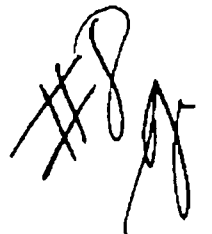


The Honorable Gordon G. Cooper
Master-in-Equity for Spartanburg County

Columbia, South Carolina

July 29, 2016.

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K. H. DEWANEY



STATE OF SOUTH CAROLINA
 COUNTY OF SPARTANBURG
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2016 CP-42-4448

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AUG 26 2016

SC Court of Appeals

Peach REO, LLC - Plaintiff

Blablock Investments, LLC

Blablock Investments, LLC, et al, Third Party
 Plaintiffs

Capital Crossing Servicing Co., Third
 Party Defendant

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Tara C. Sullivan	Attorney for : <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant And Third Party Defendant <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- X DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(4), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends X does not end the case.
 Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order: N/A		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

3065
Judge Code

7-29-2016
Date

For Clerk of Court Office Use Only

This judgment was entered on the 1 day of Aug, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 2 day of Aug, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Tara C. Sullivan and Frank B. Knowlton
P.O. Box 11070
Columbia, SC 29211
ATTORNEY(S) FOR THE PLAINTIFF(S)

Adam C. Bach, Esq.
1306 S. Church Street
Greenville, SC 29605
ATTORNEY(S) FOR THE DEFENDANT(S)
M Hope Backley
CLERK OF COURT

Alexandra J. Miller

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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