THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge
Civil Action No. 2013-CP-40-0712

Green Tree Servicing, LLC,

Respondent,

v.

Jacqueline L. Taylor a/k/a Jacqueline Taylor Hendricks,

Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Respondent commenced a foreclosure action against Appellant after Appellant defaulted on her mortgage payments on November 1, 2009. The foreclosure action sought judgment against Appellant for the entire balance on her promissory note. The Appellant filed a timely Answer and Counterclaim against Respondent on July 3, 2014. However, Appellant subsequently filed an amended Answer and Counterclaim on August 18, 2014. Respondent then filed a Motion to strike Appellant's Amended Answer and Counterclaim on September 3, 2014.

Appellant filed for a Chapter 13 bankruptcy on October 3, 2014. Appellant disclosed her scheduled assets in a Summary of Schedules to the United States Bankruptcy Court for the District of South Carolina on February 3, 2015. The bankruptcy proceeding was dismissed on March 13, 2015 by court order.

Respondent's foreclosure action was then dismissed by court order on August 17, 2015, but Appellant's counterclaims were not. Respondent filed a Motion for Summary Judgment on Appellant's Counterclaims on April 19, 2016. Appellant then filed a Memorandum of Law in Opposition to Respondent' s Motion for Summary Judgment on Appellant's Counterclaims. On April 9, 2016, Judge G. Thomas Cooper, Jr., a Resident Circuit Judge for the Fifth Judicial Circuit, granted Respondent's Motion for Summary Judgment on Appellant's Counterclaims.

Appellant timely filed a Motion to Alter or Amend Judgment under Rule 59(e) of SCRCP on May 5, 2016. Appellant's motion was denied by Court Order on May 31, 2016 by Judge G. Thomas Cooper, Jr. The Appellant then timely filed a Notice of Appeal on June 30, 2016.

During this proceeding, Respondent was fully aware and on notice of the counterclaims against it. After filing the original Answer and Counterclaim, Appellant's bankruptcy counsel at the time advised Appellant to exclude the counterclaims against Respondent in the bankruptcy schedule, as the attorney categorized the claims as "moot" due to Appellant's mortgage modification . Therefore Appellant subsequently filed an amended Answer and Counterclaim on August 18, 2014 based on this advice. Thus, the satisfaction of certain elements for judicial estoppel is in question as is Respondent's alleged motive to conceal disclosing claims to the Bankruptcy Court.

ARGUMENT

1. THE TRIAL COURT ERRED IN DETERMINING ALL FIVE ELEMENTS OF THE JUDICIAL ESTOPPEL TEST WERE MET SINCE THE THIRD AND FOURTH ELEMENTS CANNOT BE SATISFIED.

Respondent has not satisfied the third and fourth elements of the Judicial Estoppel test because Appellant did not receive an advantage or benefit due to the dismissal of the bankruptcy proceedings and Appellant did not intentionally mislead the court.

"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."[1] South Carolina case law has established a five-prong test for determining when a court should apply judicial estoppel. Under *Cothran v. Brown*, the following elements are *necessary* to satisfy judicial estoppel: "(1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been

[1] *Sims v. Amusib of South Carolina, Inc.*, 408 S.C. 202, 213, 758 S.E.2d 187, 193 (Ct. App. 2014).

successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent."[2]

Appellant did not receive a benefit from the bankruptcy proceeding because the proceeding was dismissed. In a Chapter 13 bankruptcy proceeding, a debtor receives the benefit of reorganizing his estate to pay off creditor liens without having to liquidate his assets to repay the liens and also stops creditors from foreclosing on liens.[3] However, if the debtor's bankruptcy proceeding is dismissed or discharged, this benefit is not awarded to the debtor. Furthermore, in order "for the doctrine of judicial estoppel to apply, the party taking the position must have been successful in maintaining a previous position and have received some benefit from it."[4] In the present case, Appellant's Chapter 13 proceeding was dismissed and Appellant failed to receive the protection of U.S.C. § 1301(a).

a. The trial court erred in determining Appellant had motive to fail to disclose the claims to the bankruptcy court solely based upon the possibility of adding assets to the bankruptcy estate.

Appellant's omission of the counterclaims does not rise to the level of an intentional concealment of claims from the court. Respondent relies on the case *Calafiore v. Werner Enterprises, Inc.* to establish Appellant's intentional motive for not disclosing the counterclaim. Specifically, Respondent quotes "if...undisclosed claims [or defenses]

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[2] *Id.* (quoting *Cothran v. Brown*, 357 S.C. 210, 215 592 S.E.2d 629, 631 (2004) (emphasis added)).

[3] *See generally* 11 U.S.C. § 1301(a).

[4] *Drexler v. CitiMortgage, Inc.*, No. 2013–UP–164, 2013 WL 8507872, at *3 (S.C. Ct. App. 2013) (quoting *Cothran*, 357 S.C. at 216, 592 S.E.2d R 632).

would have added assets to the bankruptcy estate, [the debtor] will usually be deemed to have had a motive to conceal those claims."[5] However, Respondent fails to reference a common standard[6] the court references in *Calafiore* to determine whether the omission of a claim is intentional or inadvertent. Under this standard, Appellant did not intentionally conceal the counterclaim to add assets or gain a benefit. Instead, Appellant followed her bankruptcy attorney's guidance to forego pleading the counterclaim since Appellant was to receive a loan modification. By receiving the loan modification, the counterclaim, in the words of her attorney, would be "moot." Therefore Respondent failed to show an intentional omission under the language in *Calafiore* for not disclosing the counterclaim on the bankruptcy schedule.

The Trial Court should have denied the motion and ruled the judicial estoppel doctrine inapplicable since Appellant failed to receive a benefit from the dismissed bankruptcy proceeding and Appellant never intentionally misled the Court.

b. Respondent was on notice of the counterclaim during the bankruptcy proceeding, as Respondent was still a party in the underlying state court case, was listed as a creditor in the bankruptcy proceeding and knew the counterclaim had not been dismissed.

Respondent had actual notice of the claims due to its involvement in the foreclosure proceedings. When Respondent filed its foreclosure action, Appellant timely

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[5] *Calafiore v. Werner Enterprises, Inc.*, 418 F.Supp.2d 795, 798 (D. Md. 2006).
[6] *Id.* (discussing *Kamont v. West,* 258 F.Supp.2d 495, 500 (S.D. Miss. 2003) ("if a debtor had full knowledge of a potential claim, the failure to disclose that claim in a bankruptcy petition could nonetheless be deemed inadvertent where he lacked a motive for concealment").

filed an Answer and Counterclaim. Therefore Respondent was aware of Appellant's counterclaim at the time of the bankruptcy filing.

A debtor can generally receive the benefit of stopping a foreclosure action by filing for relief under Chapter 13 of the U.S. Bankruptcy Code,[7] which allows the debtor to reorganize any secured debts instead of potentially liquidating assets.[8] Additionally, a debtor has the duty of providing and filing a list of creditors.[9] When Appellant filed for Chapter 13 relief of the U.S. Bankruptcy Code, Appellant listed Respondent as a creditor on her summary of schedules. Respondent was fully aware that the counterclaim against it had not been dismissed. When the bankruptcy proceeding was dismissed on March 13, 2016, Appellant did not receive a benefit from that proceeding. Although Appellant reached an agreement for a loan modification with Respondent during the bankruptcy proceeding, Respondent never followed through with Appellant on the agreed loan modification.

c. Respondent failed to demonstrate a detriment or prejudice against itself based upon Appellant's omission of the counterclaim.

Respondent did not detrimentally rely on the Defendant's omission of the counterclaims. In its Memorandum in Opposition of Motion to Alter or Amend, Respondent relies on language set forth in *Evans v. Allied Air Enterprises, Inc.* to show how judicial estoppel still applies when a debtor omits a claim inadvertently. Respondent relies on the statement that "courts will not permit a debtor to obtain relief from the bankruptcy court by representing that no claims exist and then subsequently to assert

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[7] *See* 11 U.S.C. § 1301(a).
[8] *See generally Caroll v. Logan,* 735 F.3d 147, 149 (4th Cir. 2013).
[9] *See* 11 U.S.C. § 521(a)(1)(A).

those claims for his own benefit in a separate proceeding."[10] Unlike the facts set forth in *Evans*, Respondent was fully aware of Appellant's counterclaim and knew that the counterclaim was still pending during the bankruptcy proceeding. Finally, other courts have held that "...[a debtor], who failed to list a negligence claim on a Chapter 13 bankruptcy petition, was not judicially estopped from pursuing that claim" due to a lack of evidence that the non-disclosure on the bankruptcy schedule of assets prejudiced the Defendant.[11]

Respondent cannot therefore claim it was unaware of any counterclaim at the time of the bankruptcy proceeding or that it was somehow prejudiced by the omission of the counterclaim from the bankruptcy schedule.

2. THE TRIAL COURT ERRED IN FAILING TO FIND THE RESPONDENT HAS UNCLEAN HANDS.

Respondent has unclean hands by failing to wholly comply with the loan modification requirements set forth in the administrative order. The doctrine of Unclean Hands is an equitable defense for a Respondent seeking an equitable remedy by

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[10] *Evans v. Allied Air Enterprises, Inc.*, CA 5:10-2029-MBS, 2011 WL 4548307 (D.S.C. Sept. 30, 2011) *on reconsideration in part*, CA 5:10-2029-TLW-SVJ, 2012 WL 2572266 (D.S.C. July 2, 2012); *see also Thomas v. Palmetto Management Services,* No. 3:05-cv-17-CMC-BM, 2006 WL 2623917, at *3 (D.S.C. Sept. 11, 2006) (quoting *Ryan Operations, G.P. v. Santiam-Midwest Lumber Co., et al.,* 81 F.3d 355, 362-363 (3rd Cir. 1996) ("[w]hile the doctrine of judicial estoppel does not generally apply when a prior position was taken because of a good faith mistake or genuine inadvertence...in the context of bankruptcy proceeding, a debtor's failure to satisfy their statutory disclosure duty is inadvertent 'only when, in general, the debtor either lacks knowledge of the undisclosed claims or has no motive for concealment'")).

[11] Benjamin J. Vernia, Annotation, *Judicial Estoppel of Subsequent Action Based on Statements, Positions, or Omissions as to Claim or Interest in Bankruptcy Proceeding,* 85 A.L.R.5th 353 (2001) (quoting *Jones v. Lanthrip,* 765 So.2d 682 (Ala. Ct. App. 2000).

"preclud[ing] a Respondent from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the Appellant."[12]

Additionally, "[h]e who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief." *Mason*, 412 S.C. 54-55, 770 S.E.2d at 419 (quoting *Emery v. Smith*, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct. App. 2004)). As a result of Respondent's failure to provide the loan modification under the South Carolina Supreme Court's Administrative Order, Appellant was forced to file bankruptcy. Eventually, Respondent issued the loan modification shortly after Appellant filed for bankruptcy. This form of business practice by Respondent has recently been investigated by the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau (CFPB).

Specifically, Respondent is under an order with the Federal Trade Commission and the Consumer Financial Protection Bureau from a lawsuit, which alleged multiple instances of misconduct similar to that complained of by Appellant. In those cases, Respondent was found to have violated its in-process loan modification requirements. In its action against Green Tree Servicing, LLC, the FTC stated "Green Tree has unilaterally breached contracts that consumers negotiated with the prior servicers of their loans by not honoring In-Process Loan Modifications that consumers had obtained from their prior servicers."[13] The United States District Court for the District of Minnesota ordered Green

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[12] *Mason v. Mason*, 412 S.C. 28, 54, 770 S.E.2d 405, 419 (Ct. App. 2015).
[13] *Fed. Trade Comm'n. v. Green Tree Servicing, LLC*, No. 15-2064 (D. Minn. April 21, 2015) (complaint for permanent injunction and other relief).

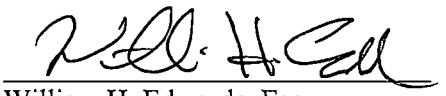
Tree Servicing, LLC to pay the FTC and CFPB $30,000,000 for misconduct related to "short sales and in-process loan modifications."[14]

Respondent cannot seek equitable relief because of its bad faith involving Appellant's mortgage modification.

CONCLUSION

For the above reasons, the decision of the trial court should be overturned.

MOORE TAYLOR LAW FIRM

By: 

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[14] *Fed. Trade Comm'n. v. Green Tree Servicing, LLC*, No. 15-2064 (D. Minn. April 23, 2015) (stipulated order for permanent injunction and monetary judgment).

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PROOF OF SERVICE

I, Tracy W. Moore, an employee with the Moore Taylor Law Firm, P.A., certify that I have served the Initial Brief of Appellant on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on August 30, 2016, addressed to their attorneys of record, or them personally as follows:

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Initial Brief of Appellant

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