THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master in Equity

James O. Spence, Master in Equity

Case No. 2011-CP-32-0156
Appellate Case No. 2016-000613

SunTrust Mortgage, Inc., Respondent,

v.

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

of whom Cathy G. Lanier and Randy D. Lanier are the Appellants.

RESPONDENT SUNTRUST MORTGAGE, INC.'S FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF ISSUES ON APPEAL

1. DID THE MASTER ERR IN FINDING APPELLANTS DO NOT HAVE STANDING TO BRING THEIR CLAIMS IN THEIR INDIVIDUAL CAPACITY BECAUSE THEY RELINQUISHED THAT RIGHT WHEN THEY FAILED TO INCLUDE THOSE CLAIMS ON THEIR BANKRUPTCY PETITIONS?

2. DID THE MASTER ERR IN FINDING APPELLANTS' CLAIM FOR VIOLATION OF THE REAL ESTATE SETTLEMENT PROCEDURES ACT AROSE PRIOR TO APPELLANTS' FILING FOR BANKRUPTCY?

3. DID THE MASTER ERR IN FINDING THE STATUTE OF LIMITATIONS RAN ON APPELLANTS' CLAIM FOR VIOLATION OF THE REAL ESTATE SETTLEMENT PROCEDURES ACT BECAUSE APPELLANTS ALLEGED THE VIOLATION OCCURRED MORE THAN TEN YEARS PRIOR TO BRINGING THEIR CLAIM?

4. DID THE MASTER ERR IN FINDING APPELLANTS' CLAIM FOR SLANDER OF TITLE FAILED BECAUSE A LIS PENDENS IS AN ABSOLUTELY PRIVILEGED COMMUNICATION?

5. DID THE MASTER ERR IN FINDING APPELLANTS FAILED TO STATE A CLAIM FOR VIOLATION OF THE FAIR DEBT COLLECTION PRACTICES ACT BECAUSE APPELLANTS FAILED TO PRESENT ANY EVIDENCE IN SUPPORT OF THEIR CLAIM?

6. DID THE MASTER ERR IN SUBSTITUTING SUNTRUST FOR WELLS FARGO WHEN THE EVIDENCE PLAINLY DEMONSTRATED SUNTRUST WAS ASSIGNED THE MORTGAGE?

7. DID THE MASTER ERR IN FAILING TO RULE ON EQUITY ARGUMENTS THAT WERE NOT RAISED BY APPELLANTS?

STATEMENT OF THE CASE

SunTrust Mortgage, Inc. ("SunTrust") respectfully requests the Court affirm Master-in-Equity James O. Spence's (the "Master") order granting summary judgment in its favor because (1) the Master properly found Appellants Cathy G. and Randy D. Lanier ("Appellants") are judicially estopped from asserting their claims against SunTrust and, pursuant to the two issue rule, this unappealed ruling is the law of the case; (2) Appellants lost the right to assert their claims when they failed to list them as an asset on their bankruptcy petition; (3) the issues raised by Appellants on appeal are not preserved for appellate review because they were neither raised to nor ruled upon by the Master; (4) the statute of limitations ran on Appellants' claims for violation of the Real Estate Settlement Procedures Act; (5) Appellants failed to state a claim for violation of the Fair Debt Collection Practices Act; and (6) SunTrust was properly substituted for Wells Fargo Bank, N.A. ("Wells Fargo") as the real party at interest.

This matter commenced when Wells Fargo initiated a foreclosure action against Appellants. During the pendency of the litigation, Wells Fargo transferred the underlying note and mortgage to SunTrust Bank, which then assigned the loan documents to SunTrust. The assignment of the note and mortgage made SunTrust the real party at interest, and pursuant to Rule 25, SCRCP, SunTrust was properly substituted for Wells Fargo.

While the foreclosure action was pending, Appellants petitioned for bankruptcy pursuant to Chapter 13 of the Bankruptcy Code and the foreclosure action was automatically stayed. The bankruptcy court dismissed Appellants' first bankruptcy petition, and the following day Appellants filed a second bankruptcy petition. In their second bankruptcy petition, Appellants stated that they did not possess any outstanding claims or counterclaims. The bankruptcy court subsequently dismissed Appellants' second bankruptcy petition. Appellants' failure to list any claim or counterclaim as an asset on their bankruptcy petitions resulted in Appellants losing the

right to later assert those claims. Appellants are now judicially estopped from asserting those claims, because the nondisclosure of a cause of action as an asset on a bankruptcy petition provides an appropriate basis for the imposition of judicial estoppel.

Once the bankruptcy court dismissed Appellants' bankruptcy petition, the stay on the foreclosure action was lifted and the foreclosure action was allowed to proceed. Appellants then filed a series of motions to amend their answer and added nine previously unasserted counterclaims. SunTrust filed a Memorandum in Opposition to Appellants' Motions to Amend and moved for summary judgment on the newly asserted counterclaims. SunTrust also moved for the Master to substitute it for Wells Fargo, because SunTrust was the real party in interest. Additionally, SunTrust moved to dismiss the foreclosure cause of action, because the underlying note was satisfied by Branch Banking and Trust Company ("BB&T"), which held a second mortgage on the properties.

The Master granted summary judgment in favor of SunTrust and found (1) Appellants' lacked standing to pursue their claims, because they lost the right to assert their claims when they filed for bankruptcy and failed to list the claims as an asset; (2) Appellants' claim for violation of the Real Estate Settlement Procedures Act was barred by the three-year statute of limitations; (3) the lis pendens that was filed with the foreclosure pleadings was an absolutely privileged communication and is not subject to a claim for slander of title; and (4) Appellants failed to allege facts sufficient to state a cause of action for violation of the Fair Debt Collection Practices Act. Additionally, the Master granted summary judgment in favor of SunTrust on Appellants' remaining counterclaims, substituted SunTrust for Wells Fargo as the real party at interest, and dismissed SunTrust's foreclosure claim.[1]

[1] The circuit court previously signed an order substituting SunTrust for Wells Fargo; however, this order was signed after the case was referred to the Master. Therefore, the court's initial order substituting SunTrust for Wells Fargo was made without the proper authority.

Appellants filed a Motion for Reconsideration. The Master denied Appellants' motion for the same reasons it granted summary judgment in favor of SunTrust. Additionally, the Master found Appellants were judicially estopped from raising their counterclaims due to their failure to include those claims on their bankruptcy petition.

Appellants filed this appeal and raised a series of new and unpreserved arguments. Appellants failed to appeal the Master's ruling that they are judicially estopped from asserting their counterclaims. The failure to appeal this ruling is fatal to Appellants' arguments, and SunTrust respectfully requests the Court affirm the Master's order granting summary judgment in its favor because the law of the case is that Appellants are judicially estopped from asserting their counterclaims. The Court may also find the issues raised by Appellants were never raised to or ruled upon by the Master and are not preserved for appellate review. Additionally, the Court should find the new issues raised by Appellants fail as a matter of law and do not warrant a reversal of the Master's order granting summary judgment in SunTrust's favor, because they are unsupported by the facts that are on the record in this case.

FACTS / PROCEDURAL HISTORY

On or about August 11, 1997, Appellants executed and delivered a promissory note (the "Note") secured by a mortgage (the "Mortgage") on three properties to Heritage Federal Savings and Loan Association. Thereafter, through a series of corporate mergers and name changes, Heritage Federal Savings and Loan Association became SunTrust Bank. The Note was endorsed in blank, entitling the holder of the Note to enforce its terms, and transferred to Wells Fargo. (Transcript from November 8, 2013 Hearing 33:2-17; R. 144). Appellants defaulted on the Note in September of 2010. (Transcript from November 8, 2013 Hearing 14:16-19; R. 125).

On January 14, 2011, Wells Fargo initiated a foreclosure action against Appellants. (Complaint p. 1; R. 37). On March 25, 2011, Appellants filed an Answer, and on June 2, 2011,

Appellants filed their First Amended Answer. Wells Fargo moved for the action to be referred to the Master-in-Equity and an Order of Reference was filed on July 12, 2011.

Appellants were previously indebted to Bayview Loan Servicing, LLC and BB&T by virtue of a separate judgment of foreclosure and sale entered on October 7, 2011. As a result of this action, on November 3, 2011, Appellants filed for bankruptcy pursuant to Chapter 13 of the Bankruptcy Code and the instant foreclosure action was automatically stayed. After a hearing on November 7, 2011, Appellants' bankruptcy petition was dismissed.

On November 8, 2011, Appellants again filed for bankruptcy under Chapter 13 of the Bankruptcy Code. The schedules attached to the bankruptcy petition required Appellants to list all claims of any nature, including counterclaims, as personal assets. Appellants listed "None" on their schedule. (Bankruptcy Petition Schedule B; R. 263). This information was verified when Appellants signed the petition under penalty of perjury. On January 3, 2012, the bankruptcy court dismissed Appellants' second bankruptcy petition with prejudice. Following the resolution of the bankruptcy proceedings, the stay on the foreclosure action was lifted.

During the pendency of the litigation, Wells Fargo transferred the Note and Mortgage to SunTrust Bank. SunTrust Bank then assigned the Note and Mortgage to SunTrust on March 16, 2012, thereby making SunTrust the proper party to proceed with the foreclosure claim. (March 16, 2012 Assignment of Mortgage from SunTrust Bank to SunTrust; R. 267).

On July 12, 2012, Appellants filed a Second Motion to Amend asserting the following counterclaims: (1) violation of the Truth in Lending Act; (2) violation of the Real Estate Settlement Procedures Act ("RESPA"); (3) violation of the Fair Debt Collection Practices Act ("FDCPA"); (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. (Appellants' Second Motion to Amend pp. 1-15; R. 270-284).

On August 7, 2012, Appellants filed a Third Motion to Amend. On August 29, 2012, Wells Fargo moved to substitute SunTrust as the plaintiff and real party at interest, because the underlying loan documents were assigned to SunTrust.

On September 6, 2012, Appellants filed a Fourth Motion to Amend, realleging their counterclaims and opposing the motion to substitute SunTrust for Wells Fargo as the real party in interest. (Appellants' Fourth Motion to Amend p. 1; R. 297). On September 14, 2012, SunTrust filed a Motion for Summary Judgment and a Memorandum in Opposition to Appellants' Motion to Amend. (SunTrust's First Motion for Summary Judgment p. 1; R. 230; 316). On December 10, 2012, Appellants filed a Fifth Motion to Amend. On November 8, 2013, a hearing was held before the Master to address the outstanding motions. (Transcript from November 8, 2013 Hearing 1; R. 112).

On May 20, 2014, Appellants filed their Sixth Motion to Amend, again requesting the Master allow them to assert the aforementioned counterclaims against SunTrust. On July 1, 2014, SunTrust filed another Motion for Summary Judgment and Memorandum in Opposition to Appellants' Motion to Amend. On March 18, 2015, the Master entered an order denying Appellants' Motion to Amend and granting summary judgment in favor of SunTrust as to Appellants' counterclaims. (March 18, 2015 Order Granting Summary Judgment p. 1; R. 4). The Master found (1) Appellants' lacked standing to pursue their claims due to their failure to report the claims on their bankruptcy petitions; (2) Appellants' claim for violation of RESPA was barred by the three-year statute of limitations; (3) the lis pendens was a privileged communication and not subject to a claim for slander of title; and (4) Appellants failed to allege facts sufficient to state a cause of action for violation of FDCPA. (March 18, 2015 Order

Granting Summary Judgment pp. 3-8; R. 6-11). Additionally, the Master granted summary judgment on Appellants' remaining claims, substituted SunTrust for Wells Fargo, and dismissed SunTrust's foreclosure claim. (March 18, 2015 Order Granting Summary Judgment pp. 11-14; R. 14-17).

Appellants filed a Motion for Reconsideration on March 30, 2015. (Appellants' Motion for Reconsideration p. 1; R. 323). A hearing on the motion was held on November 18, 2015. (Transcript from November 18, 2015 Hearing 1; R. 166). On February 17, 2016, the Master issued an order denying Appellants' Motion for Reconsideration for the same reasons it granted summary judgment in SunTrust's favor. (February 17, 2016 Order Denying Appellants' Motion for Reconsideration p. 1; R. 19). In the order denying Appellants' Motion for Reconsideration, the Master also found Appellants were judicially estopped from bringing their claims. (February 17, 2016 Order Denying Appellants' Motion for Reconsideration pp. 6-7; R. 24-25).

This appeal followed.

STANDARD OF REVIEW

"An appellate court reviews a grant of summary judgment under the same standard applied by the [circuit] court pursuant to Rule 56, SCRCP." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). "Pursuant to Rule 56(c), SCRCP, summary judgment may be affirmed if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005) (citation omitted). "On appeal from summary judgment, the reviewing court must consider the facts and inferences in the light most favorable to the nonmoving party." *Cantrell v. Green*, 302 S.C. 557, 559, 397 S.E.2d 777, 778 (Ct. App. 1990). Nevertheless, when an appellate court affirms the grant of summary judgment on a particular

basis, it need not discuss the remaining grounds. *Fuller-Ahrens P'ship v. S.C. Dep't of Highways and Pub. Transp.*, 311 S.C. 177, 182, 427 S.E.2d 920, 923 (Ct. App. 1987).

ARGUMENT

I. APPELLANTS FAILED TO APPEAL THE MASTER'S RULING THAT THEY ARE JUDICIALLY ESTOPPED FROM ASSERTING THEIR CLAIMS; THEREFORE, PURSUANT TO THE TWO ISSUE RULE, THE LAW OF THE CASE IS THAT APPELLANTS ARE ESTOPPED FROM ASSERTING THEIR CLAIMS.

The Court should affirm the Master's order granting summary judgment in favor of SunTrust because Appellants have not appealed the Master's ruling that they are judicially estopped from asserting their claims.

"Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010).

On appeal, Appellants argue the Master erred in granting summary judgment on their claims for violation of RESPA, violation of FDCPA, and slander of title.[2] The Master found (1) Appellants lacked standing to pursue those claims and (2) Appellants are judicially estopped from pursuing those claims due to their failure to report those claims on their bankruptcy petitions. (March 18, 2015 Order Granting Summary Judgment p. 3-5; R. 6-8); (February 17, 2016 Order Denying Appellants' Motion for Reconsideration pp. 4-7; R. 22-25). Appellants appealed the Master's ruling as it relates to their standing to pursue their claims. Appellants did not appeal the Master's ruling that they are judicially estopped from pursing their claims. Therefore, the two issue rule applies, the Master's unappealed ruling is the law of the case, and this unchallenged ruling requires the Court to affirm the Master's grant of summary judgment in

[2] Appellants do not challenge the Master's decision to grant summary judgment in favor of SunTrust on Appellants' remaining claims.

favor of SunTrust. *See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997) (unappealed ruling is law of the case); *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (an unchallenged ruling, "right or wrong, is the law of this case and requires affirmance.").

II. APPELLANTS RELINQUISHED THE RIGHT TO BRING THEIR CLAIMS WHEN THEY FAILED TO INCLUDE THEM ON THEIR BANKRUPTCY PETITION.

The Master properly found Appellants lacked standing to bring their claims for violation of RESPA, violation of FDCPA, and slander of title, because they relinquished the right to assert those claims when they failed to include them on their bankruptcy petition.

When a Chapter 13 bankruptcy petition is filed, a bankruptcy estate is automatically created. 11 U.S.C. § 541; 11 U.S.C. § 1306. Property of an estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). "Legal or equitable interests" has been broadly defined to include causes of action. *In re Educators Group Health Trust*, 25 F.3d 1281, 1283-84 (5th Cir. 1994) (citation omitted). Therefore, all pre-petition claims are the property of the estate. *See id.*; *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, Appellants 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. Appellants listed "None" on their schedule. (Bankruptcy

Petition Schedule B; R. 263). Appellants verified this information by signing the petition under penalty of perjury. Therefore, Appellants do not have standing to bring any causes of action that existed prior to filing their 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), Appellants 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 (stating the principle that a Chapter 13 debtor lacks standing to pursue an action in his own name).[3]

Accordingly, the Court should affirm the Master's holding that Appellants' claims remain the property of the bankruptcy estate and Appellants lack standing to assert any claim that existed prior to filing for bankruptcy protection.

III. APPELLANTS ALLEGED THEIR CLAIMS AROSE PRIOR TO FILING FOR BANKRUPTCY.

Appellants argue their claims arose after filing for bankruptcy; however, the only claim Appellants' brief specifically argues accrued after filing for bankruptcy is the alleged RESPA violation. Appellants do not argue their other claims arose after their bankruptcy petitions were dismissed. Therefore, the Court should find Appellants abandoned this argument as it relates to their other claims. *See Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented

[3] While not binding precedent because it is an unpublished opinion, SunTrust notes that this Court has previously agreed with this position in *MidFirst Bank v. Brooks*, No. 2008-UP-196, 2008 WL 9841165, at *3 (Ct. App. Mar. 20, 2008) (affirming Master-In-Equity's summary judgment order as properly "based on the determination that [the 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).

for review."); *Brown v. Theos*, 338 S.C. 305, 309 n. 2, 526 S.E.2d 232, 235 n. 2 (Ct. App. 1999), *aff'd*, 345 S.C. 626, 550 S.E.2d 304 (2001) (finding a one sentence paragraph was so conclusory that it may be deemed abandoned).

Next, the Court should find that this issue is not preserved for appellate review, because Appellants previously alleged SunTrust "violated RESPA at the time of closing on the sale of the Properties by failing to correctly and accurately comply with disclosure requirements." (Appellants' Fourth Motion to Amend p. 8; R. 304). Appellants have not previously alleged SunTrust violated section 2605(b) of RESPA by failing to provide notice of the transfer from SunTrust Bank to SunTrust. Appellants had a duty to raise this issue to the Master, and Appellants' failure to do so amounts to a waiver of the argument. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) ("[I]t is a litigant's duty to bring to the court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error."); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (explaining that an issue is not preserved for appeal where one ground is raised below and another ground is raised on appeal); *see also* Jean Hoefer Toal *et al.*, *Appellate Practice in South Carolina* 57 (2d ed. 2002). If Appellants believe they raised this issue to the Master, then they are required to have raised the issue again in their Motion for Reconsideration because the Master did not rule on this issue. *See Chastain v. Hiltabidle*, 381 S.C. 508, 515, 673 S.E.2d 826, 829 (Ct. App. 2009) ("When an issue is raised to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion.").

Accordingly, the Court should find Appellants' argument that SunTrust violated RESPA when it failed to provide notice of the transfer of the Mortgage is not preserved for appellate review.

IV. THE STATUTE OF LIMITATIONS RAN ON APPELLANTS' CLAIM FOR VIOLATION OF RESPA.

A. Appellants failed to preserve their argument that the statute of limitations for their cause of action for violation of RESPA began to run when the Mortgage was transferred to SunTrust.

Appellants contend their cause of action for violation of RESPA arose after their bankruptcy petitions were dismissed and, therefore, the statute of limitations for the alleged RESPA violation did not begin running at closing. As discussed above, the Master did not issue a ruling as to whether Appellants' claim arose after the dismissal of Appellants' bankruptcy petition, because Appellants' argument before the Master was based upon the allegation that SunTrust violated RESPA at closing. Accordingly, Appellants have not preserved this argument for appellate review. *See First Carolina Corp. of S.C.*, 372 S.C. at 301, 641 S.E.2d at 907; *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733; *Freiburger*, 366 S.C. at 134, 620 S.E.2d at 741; *Chastain*, 381 S.C. at 515, 673 S.E.2d at 829.

B. The statute of limitations for Appellants' claim for violation of RESPA began to run in 1997 -- at the time of closing -- because that is when Appellants alleged SunTrust violated RESPA.

If the Court finds Appellants' statute of limitations argument is preserved, then the Court should find Appellants' claim for violation of Section 2605 RESPA is barred by the three-year statute of limitations.

Any claim for a violation of Section 2605 of RESPA must be brought within three (3) years of when the alleged violation occurred. 12 U.S.C.A. § 2614.

Appellants' alleged "Plaintiff(s) violated RESPA at the time of closing," thus, the statute of limitations began to run at the time of closing in 1997. (Appellants' Fourth Motion to Amend

p. 8; R. 304). Appellants' closed on the properties in 1997 and filed their claim for violation of RESPA on July 12, 2012 – approximately fifteen years after the alleged violation occurred. Therefore, the three-year statute of limitations has obviously run on Appellants' claim for violation of RESPA. Accordingly, the Court should affirm the Master's finding that Appellants' claim for violation of RESPA is barred by the three-year statute of limitations.

V. THE MASTER PROPERLY DISMISSED APPELLANTS' CLAIM FOR SLANDER OF TITLE BECAUSE A LIS PENDENS IS A PRIVILEGED COMMUNICATION.

A. Appellants' slander of title argument is not preserved because the Master found SunTrust -- not Wells Fargo -- was shielded from a claim of slander of title because a lis pendens is an absolutely privileged communication.

Appellants argue that Wells Fargo is liable for slander of title because it did not have any relationship with the Mortgage and filed a lis pendens without a "colorable claim." The Master did not rule on whether Wells Fargo is liable for slander of title because Wells Fargo is no longer a party to this action. (March 18, 2015 Order Granting Summary Judgment pp. 7-9; R. 10-12); (February 17, 2016 Order Denying Appellants' Motion for Reconsideration pp. 8-9; R. 26-27). The Master dismissed Appellants' claim for slander of title against SunTrust, and the Master did not issue a ruling as to Wells Fargo because Wells Fargo is no longer a party to this action. Therefore, the Court should find Appellants' slander of title argument related to Wells Fargo is not preserved for appellate review. *See First Carolina Corp. of S.C.*, 372 S.C. at 301, 641 S.E.2d at 907; *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733; *Freiburger*, 366 S.C. at 134, 620 S.E.2d at 741.

B. The Master did not err in finding the lis pendens was an absolutely privileged communication.

The Master properly found SunTrust did not disparage Appellants' title by filing the foreclosure complaint and lis pendens, because a lis pendens is an absolutely privileged communication.

"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 Master properly found Appellants' slander of title claim was derived from the foreclosure complaint and the accompanying lis pendens, and those documents are absolutely privileged communications. (March 18, 2015 Order Granting Summary Judgment pp. 7-9; R. 10-12); (February 17, 2016 Order Denying Appellants' Motion for Reconsideration pp. 8-9; R. 26-27); Moreover, the only South Carolina authority cited by Appellants in support of their argument is *Pond Place Partners, Inc. v. Poole*, which held "the filing of a lis pendens ***CANNOT*** form the basis of an action for slander of title." 351 S.C. at 32, 567 S.E.2d at 897 (emphasis in original). Therefore, the Master properly dismissed Appellants' slander of title cause of action on the grounds that the pleadings -- including the lis pendens -- were absolutely privileged and no action could lie in the publication of an absolutely privileged communication.

Accordingly, the Court should find the Master properly found the lis pendens was an absolutely privileged communication that cannot form the basis of an action for slander of title.

VI. THE MASTER PROPERLY FOUND APPELLANTS FAILED TO STATE A CLAIM FOR VIOLATION OF FDCPA.

A. Appellants' argument is not preserved for appellate review, because it raises new issues against a dismissed party.

Appellants argue their claim for violation of FDCPA was improperly dismissed because they stated facts sufficient to constitute a cause of action. On appeal, Appellants allege the following evidence sufficiently states a claim for violation of FDCPA:

1. "Wells Fargo did not have any legal claim to this debt";
2. "Plaintiff has also alleged that the amount of debt is mischaracterized or incorrect"; and
3. "Wells Fargo does not have payment records to substantiate the existence of debt."

(Appellants' Initial Brief p. 8). The Master did not rule on whether these assertions against Wells Fargo sufficiently stated a claim, because Wells Fargo was dismissed as a party. SunTrust remains a party to this action, and Appellants never challenged the Master's ruling that they failed to sufficiently allege a cause of action for violation of FDCPA by SunTrust. Therefore, the argument that Appellants' properly stated a claim against Wells Fargo is both inappropriate and unpreserved. *See Chastain v. Hiltabidle*, 381 S.C. 508, 515, 673 S.E.2d 826, 829 (Ct. App. 2009) ("When an issue is raised to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion."). Accordingly, the Court should find this issue is not preserved for appellate review.

B. Appellants failed to allege any facts to support their claim for violation of FDCPA.

The Master properly found Appellants failed to state a claim for violation of FDCPA. Appellants' counterclaim for violation of FDCPA merely alleges that SunTrust violated FDCPA by making false representations; however, no facts were alleged and no evidence has been produced in support of Appellants' allegations.

In their Amended Answers, Appellants alleged (1) SunTrust engaged in the false representation of the character, amount, or legal status of any debt; (2) SunTrust engaged in the false representation of any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt; (3) SunTrust threatened to take an action that cannot legally be taken; (4) SunTrust failed to divulge the true name of the organization collecting the debt, or the owner of the debt; and (6) SunTrust failed to provide verification and validation of the debt they claimed to be owed to them. (Appellants' Fourth Motion to Amend pp. 8-9; R. 304-305). SunTrust argued that Appellants failed to present evidence to support these allegations, and the Master correctly agreed with SunTrust and granted summary judgment in its favor. *See Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004) (finding a party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact; "[w]ith respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility 'may be discharged by 'showing'—that is, pointing out to the [trial] court—that there is an absence of evidence to support the nonmoving party's case." (alteration in original) (citation omitted)).

In *Sauner v. Public Service Authority of South Carolina*, the court found the appellants failed to state a claim for negligent misrepresentation because the appellants' "brief failed to analyze the elements of this cause of action or apprise the Court of how the facts of their case satisfy the elements" of their claim. 354 S.C. 397, 406-07, 581 S.E.2d 161, 166 (2003). The court found the appellants' claim failed because they simply asserted the representations by the defendant were "negligent misrepresentations" and on appeal the appellants only argued that the trial court erred in finding there was no genuine issue of material fact to support their cause of action. *Id.*

Similar to the appellants in *Sauner*, Appellants here merely assert that SunTrust made false representations, but do not provide any evidence in support of their claim. Like the court in *Sauner*, this Court should find there is no issue of fact because only unsupported allegations have been made against SunTrust and summary judgment is appropriate. Accordingly, the Court should find the Master did not err in granting summary judgment in SunTrust's favor.

VII. THE MASTER PROPERLY SUBSTITUTED SUNTRUST FOR WELLS FARGO.

A. Appellants failed to preserve their argument that Wells Fargo was improperly dismissed.

Appellants argue the Master erred in dismissing Wells Fargo pursuant to Rule 25, SCRCP, because Wells Fargo did not have a transferable interest.

Wells Fargo was dismissed from this action. Wells Fargo is not a party to this appeal. SunTrust's counsel does not represent Wells Fargo in this matter. Therefore, this issue is not properly before the Court.

Additionally, when SunTrust moved to substitute pursuant to Rule 25(c), SCRCP, Appellants argued that substitution was improper because the action must be commenced by the "real party in interest." Now, Appellants argue that Wells Fargo was improperly dismissed because there is no evidence of a merger between Wells Fargo and SunTrust. This argument was not previously raised or ruled upon and, therefore, the Court should find this issue was not properly preserved for appellate review. *See First Carolina Corp. of S.C.*, 372 S.C. at 301, 641 S.E.2d at 907; *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733; *Freiburger*, 366 S.C. at 134, 620 S.E.2d at 741.

B. The Master did not abuse its discretion in substituting SunTrust for Wells Fargo.

The Master properly substituted SunTrust for Wells Fargo, because SunTrust was assigned the Mortgage.

The Master's decision to substitute SunTrust for Wells Fargo should not be reversed absent an abuse of discretion. *Bryant v. Waste Mgmt., Inc.*, 342 S.C. 159, 165, 536 S.E.2d 380, 383 (Ct. App. 2000) ("A trial court has the sound discretion to substitute parties when some act has affected the capacity of a named party to be sued, and its decision will not be reversed on appeal absent a showing of an abuse of discretion."). "An abuse of discretion occurs when the judge's ruling is based upon an error of law or, when based upon factual conclusions, is without evidentiary support." *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) (citation omitted).

SunTrust was assigned the Mortgage on March 16, 2012. (March 16, 2012 Assignment of Mortgage from SunTrust Bank to SunTrust; R. 267). Therefore, SunTrust is the real party in interest in the foreclosure action. Accordingly, the record clearly demonstrates that SunTrust is the real party in interest and the Court should find the Master did not abuse his discretion in substituting SunTrust for Wells Fargo.

VIII. APPELLANTS' EQUITY ARGUMENTS ARE NOT PRESERVED FOR APPELLATE REVIEW BECAUSE THEY WERE NEITHER RAISED TO NOR RULED UPON BY THE MASTER.

Appellants argue SunTrust profited at their expense, and equity requires proof of the debt from SunTrust Mortgage to avoid injustice. Appellants have not previously made this argument, and therefore this argument is clearly not preserved for appellate review. *See First Carolina Corp. of S.C.*, 372 S.C. at 301, 641 S.E.2d at 907; *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733; *Freiburger*, 366 S.C. at 134, 620 S.E.2d at 741. Moreover, this argument is wholly without merit and need not be addressed by the Court, as the argument is completely void of any evidentiary support in the record. *See* Rule 220(b)(2), SCACR (stating that a point that is manifestly without merit need not be addressed).

CONCLUSION

For the foregoing reasons, the Court should **AFFIRM** the Master's order substituting SunTrust for Wells Fargo, dismissing the foreclosure cause of action, and granting summary judgment in favor of SunTrust as to Appellants' claims.

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September 12, 2016
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Master in Equity

James O. Spence, Master in Equity

Case No. 2011-CP-32-0156
Appellate Case No. 2016-000613

SunTrust Mortgage, Inc., Respondent,

v.

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

of whom Cathy G. Lanier and Randy D. Lanier are the Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Brief of Respondents complies with Rule 211(b) SCACR.

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