THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III

Appellate Case No.: 2014-001296

National Bank of SC..... Respondent,

v.

Thaddeus F. Segars; KCS Investments, LLC; Singleton Place Homeowners Association Inc.; and Suntrust Mortgage Inc.,..... Defendants,

Of Whom Thaddeus F. Segars is the ..... Petitioner.

PETITIONFOR FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

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In The Court of Appeals

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Thaddeus F. Segars (the "petitioner") submits this Petition for Writ of Certiorari to the Honorable Court pursuant to South Carolina Rules of Appellate Procedure 242 on the grounds that there are novel issues of law raised in his appeal which have not been addressed within the opinions of the Court of Appeals or Circuit Court herein, or under South Carolina law.

The undersigned counsel for the Petitioner hereby certifies that a petition for Rehearing was timely made before the Court of Appeals, and that the Rehearing was denied by Order entered September 26, 2016. The Petition for rehearing raised the following issues:

The issues present herein are twofold. First, Petitioner's compulsory / permissive counterclaims filed within the time allowed to file a responsive pleading should not have been dismissed. Second Petitioner had not discovered NBSC's negligence until he had an opportunity to see NBSC's file and reviewed the appraisal. The Statute of Limitations begins to run when petitioner discovered NBSC's negligence.

STATEMENT OF THE CASE

This matter involves a loan made by NBSC to Tad Segars for the purchase of Lot 2 in the Singleton Beach subdivision named Singleton Beach Place. (R. Vol II. P.730). Mr. Segars entered into a contract to purchase lot 2 from the developers of Singleton Beach Place. The developers furnished a plat to Segars showing a, "Future OCRM Baseline" The developer's Plat showed a "Future OCRM Baseline" approximately 30 feet seaward of the existing OCRM (Office of Coastal resource Management) baseline. (R. Vol. II.p.728). The developers, JJ Development and Ed Flynn, used this Plat to market the lots in the subdivision. The Plat was approved by the Town of Hilton Head

Island and recorded in the Register of Deeds. (R. Vol. II p. 671) In addition to the Plat, Declaration of Covenants, Conditions and Restrictions For Singleton Place were also on file in the Register of Deeds. In an effort to market the lots in the subdivision, the Developers also circulated a set of plans for construction of a prospective home on the property. (R. Vol. II pp. 675-683). The plans were prepared using Lot 3, the lot immediately adjacent to Lot 2, as the model for the development. For purpose of the issues material herein, there is, and was, no appreciable difference between lot 2 and Lot 3. The plans depicted a footprint of a 3983 square foot home superimposed on a plat showing Lot 3.

The Contract for Sale incorporated a financing contingency that conditioned Segar's obligation to purchase being subject to him obtaining loan financing in an amount of $1,360,000.00. (R. Vol II p. 742). Thereafter Segars applied for a loan from NBSC to facilitate the purchase of Lot 2 Singleton Beach Place. (R. Vol IIpp. 735-737). NBSC hired the Linsday Company to conduct an appraisal of Lot 2. Linsday prepared an appraisal for NBSC valuing the property at $1.600,000.00. (R. Vol II pp 744-756). Doug Matney with NBSC informed Mr. Segars that NBSC would fund the loan as he was in possession of a favorable appraisal report by the Linsday Company. Mr. Segars obtained a loan from NBSC for $1.360,000.00 and purchased Lot 2. (R. Vol II p. 757)

Mr. Segars entered into a loan agreement with NBSC whereby he borrowed $1.36 million dollars at an interest rate of 3.74 % per annum and funded the purchase of Lot 2 The promissory note was subsequently modified on July 7, 2005 to increase the interest rate to 6.1 % per annum and further modified on January 24, 2007 to amend the interest rate to 6.7% per annum. (R. Vol II p. 769). Subsequent to the amendments, the

loan ultimately fell into default. NBSC brought the underlying action from which appeal follows to foreclose on Lot 2. (R Vol II p. 28). While compiling documents to defend the foreclosure action, Mr. Segars obtained a copy of the appraisal performed by the Linsday Company for NBSC on Lot 2. Linsday did not use the Plat which showed the future OCRM Baseline but the one which clearly showed the original OCRM and thus demonstrated that there was insufficient buildable land on Lot 2 to construct a home larger than approximately 1000 s.f. (R. Vol II p. 750 Yet Linsday appraised the Lot for $1,600,000.00. In reliance on Linsday's appraisal, NBSC funded and Segars closed (R. Vol II p. 744.).

In fact, Lot 2 was unbuildable, therefore, of little or no value. Thus, Linsday's appraisal, which was ordered by NBSC and which formed the basis for NBSC's loan commitment which caused Segars to purchase Lot 2, was grossly overinflated. Segars contends that the Linsday Company was negligent in preparation of the appraisal prepared at the request of NBSC. Furthermore, NBSC was negligent in representing to Mr. Segars that lot 2 was worth 1.6 million dollars. Mr. Segars, nor any other reasonable person, would have paid 1.6 million dollars for a lot that at the time of purchase was not buildable and, therefore, of little or no value.

In connection with the underlying foreclosure litigation, Mr. Segars' expert, an appraiser named Dennis Outlaw provided deposition testimony that the Linsday Company had everything at its disposal to prepare an accurate appraisal. If Linsday Company had complied with USPAP the appraisal in question would have revealed that at the time the lot was unbuildable and, as such, of little or no value. (R. Vol I 276). If Linsday had complied with USPAP the appraisal in question would have revealed that at

the time the lot was unbuildable and, as such, of little or no value. Had Linsday not been negligent and the appraisal was accurate Mr. Segars would not have borrowed $1,360,000.00 to purchase the lot. In fact, NBSC would not have legally been able to lend that sum of money.

Segars did not obtain a copy of the Linsday appraisal until approximately April 2009. Mr. Segars requested that Stephen Linsday review the plat, restrictive covenants, OCRM baseline and Town of Hilton Head Island setback requirements. Based upon the Plat used by Linsday for the appraisal as well as other recorded covenants and restrictions primarily the OCRM baseline and Town of Hilton Head Island set back restrictions, Lot 3 was unbuildable and, therefore, not worth $1.6 million. Stephen Linsday, even issued an opinion letter to Mr. Segars verifying this fact. (R. Vol II p. 780)

Plaintiff NBSC filed a Lis Pendens and Summons and Complaint on July 6, 2009 and its Amended Lis Pendens, Amended Summons and Amended Complaint on August 14, 2009. Plaintiff NBSC brought this foreclosure action and sought a deficiency judgment.

Subsequent to the closing Thaddeus Segars conveyed his interest in lot 2 to KCS Investments, LLC who was made a codefendant in this action. Defendants filed and Answer and Counterclaim in response to Plaintiff's original and Amended Pleadings. (R. Vol I p. 75). Defendants counterclaimed alleging causes of action against NBSC for negligent misrepresentation, breach of fiduciary duties and breach of contract accompanied by fraudulent intent. The Foreclosure portion of the case was referred to the Master in Equity for Beaufort County and a Judgment of Foreclosure was ultimately granted. Defendant Segars' counterclaims were held in abeyance pending the outcome of

the foreclosure action. Plaintiff NBSC filed a Motion for Summary Judgment alleging that Segars counterclaims are barred by the applicable Statute of Limitations. (R. Vol IIp. 628). On March 14, 2013 Plaintiff NBSC's Motion for Summary Judgment was heard by the Honorable Marvin H. Dukes, III. At hearing, NBSC argued that the applicable three year statute of limitations had expired prior to Defendant filing his counterclaims on or about August 19, 2009. On February 14, 2014 Judge Dukes granted Plaintiff NBSC's motion for Summary Judgment holding that the applicable three year Statute of Limitations had expired as to Defendant Segars' cross claimes. (R. Vol. I p.13).

SUMMARY OF ARGUMENT

Plaintiff NBSC argued that Segars knew that there were possible issues with what, if anything, could be built on lot 2 shortly after purchase of the lot. Yet Segars' counterclaims are compulsory in nature and as such as long as they are brought in a timely manner they are not time barred. Several States have enacted statutes which specifically address the issue of compulsory counterclaims after the Statute of Limitations has expired. Other States, in fact a majority of States have rendered judicial opinions protecting the parties' rights to bring compulsory counterclaims if done so in a timely manner.

NBSC also relies on the discovery rule to assert that Segars' counterclaims are barred by the Statute of Limitations. NBSC cites a number of separate cases in which Segars was involved which relate to the possible building restrictions applicable to Lot 2. In fact, none of these cases provided knowledge, express or implied, that the NBSC appraisal was erroneous. As set forth below, Segars had filed a lawsuit against the attorney that represented Segars in the closing on Lot 2. In the second case, Segars made

an appearance in an Administrative law case regarding various restrictive limitations concerning lot 2. In the third case, Segars was involved in a lawsuit against the Seller of Lot 2 and the title insurance company that issued a title insurance policy on Lot 2. Since all of these matters were initiated more than three years prior to Segars asserting his counterclaims NBSC argued that the Statute of Limitations had expired based on Segars' knowledge of issues involving Lot 2's development potential. Segars was, in fact, not aware of any potential claims against NBSC as a result of the appraiser that NBSC hired to appraise lot 2. It was not until April 2009 that Segars received a copy of the appraisal and realized that NBSC's appraiser had used the plat which showed the restrictions on lot 2. As such the appraiser should have known and conveyed to NBSC that the restrictions on the lot would not permit development. (R. VolII p. 744).

ARGUMENTS

The Appellant appeals the Master In Equity's granting Plaintiff's Motion for Summary Judgment on the basis that the applicable three year Statute of Limitations expired as to the Defendant's counterclaims.

I. PETITITONER'S COMPULSORY /PERMISSIVE COUNTERCLAIMS FILED WITHIN THE TIME ALLOWED TO FILE A RESPONSIVE PLEADING SHOULD NOT HAVE BEEN DISMISSED.

When a Plaintiff files a claim against the Defendant, the majority of courts addressing the issue, hold that the statute of limitations ceases to run on any counterclaims, permissive or compulsory, that the defendant later imposes in its first responsive pleading providing that pleading is timely. The rationale is that the courts do not want to force the defendant to rush to file an answer simply because the statutory

period is about to expire. The situation complicates, however, when the plaintiff commences the action after the statute of limitations on the counterclaim has already run. The majority rule appears to be that compulsory counterclaims be maintained in such a situation. In some states, specific statutes provide that the a defendant's claim for money damages (ie Georgia, New York and California) even though barred when the Plaintiff's suit was filed, may be asserted as an offset to any damages awarded to the Plaintiff. For example, please see OCGA Section 9-3-97. That statute extends the statute of limitations for counterclaims "so as to allow parties, up to and including the last day upon which the answer or defensive pleadings should have been filed... provided that the final date allowed by such limitations for commencement of such actions shall not have expired prior to the filing of the main action."

In addition, the Supreme Court has held that a defendant may raise a claim by recoupment even when the claim, if brought, independently, would be barred by the applicable statute of limitations unless Congress has clearly and expressly provided otherwise. The Wright, Miller, Kane approach, tolling the statute of limitations, is almost entirely premised on the lack of prejudice to the plaintiff and the prevention of delaying weak claims until the statute has almost run. The latter concern is neutralized by counterclaims in the form of recoupment; claims that arise out of the Same transaction or occurrence, but are defensive in nature and seek no affirmative relief. *See Bull v. United States,* 295 U.S. 247, 262, 55 S.Ct. 695, 700-701, 79 L.Ed 1421 (1935) (holding that a counterclaim for recoupment is never barred by the statute of limitations so long as the main action itself is timely"). Therefore, any weak claim brought late in the limitations period will nevertheless have to overcome the claim for recoupment. See also eg

Meriano Azada and Carmen Azada v. Roger Carson, 252 F.Supp. 988 (U.S.D Hawaii, 1966) ("Statues of limitations are statutes of repose - they are designed to bar stale claims. Where as in this case, the counterclaim arises from the same incident as the complaint, the counterclaim is no more stale than the complaint.")

The dissent in Murray v. Mansheim, 779 N.W. 2d 739 (SD2010) is instructive and seems to follow the majority rule of appellate courts that have opined on this subject. "The very purposes of statutes of limitations do not require the position the majority embraces. The majority correctly observes that "Statutes of limitation are in place to prevent the prosecution of stale claims and to punish litigants who sleep on their rights." *Moore, 1999 SD 152, 25, 603 N.W. 2d at 521 (citations omitted).* However, a compulsory counterclaim is one that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." SDCL 15-6-13(a). Because they arise from the same incident, the compulsory counterclaim is no staler than the initial action. The "necessarily close relationship between the timely claim and untimely claim should insure that the latter is not 'stale' in the sense of evidence and witnesses no longer being available." 6 Wright Miller & Kane, Section 1419 at 152-153. The evidence and witnesses are as accessible for adjudicating the compulsory counterclaim as they are for the initial action. *Id.* " Simple justice dictates that if the plaintiffs are given an opportunity to present a claim for relief based upon a [transaction or occurrence], the defendant should not be prevented from doing so." *Armstrong, 469 S.W.2d at 343.*

Segars counterclaims against Plaintiff are claims for recoupment of losses suffered as a result of the same contract and default that NBSC sued him over. He is seeking recovery of amounts lost as a direct result of plaintiff's foreclosure action. Under

Bull, and the rational of the other cases cited herein which address the subject, Segars Counterclaims, are not stale and were timely filed as a first responsive pleading to the lawsuit herein. Defendant therefore, requests that the Court consider these factors prior to affirming the order granting summary judgment in favor to the Plaintiff.

II. THE STATUTE OF LIMITATIONS HAD NOT EXPIRED BECAUSE PETITIONER HAD NO WAY OF DISCOVERING NBSC'S NEGLIGENCE UNTIL HE OBTAINED A COPY OF THE APPRAISAL.

The crux of this matter lies with the various setback lines applicable to the property which dictate the size of a home and where it could be built. NBSC argues that the Segars Statute of Limitations began to run in this case when Segars first became aware that there may be impaired in such a way as to limit construction. NBSC cites an Administrative Law Court case which Segars intervened in against the South Carolina Department of Health and Environmental Control ("DHEC") on March 16, 2005 as the alleged basis for his knowledge. At issue in that matter was DHEC's position as to the correct location of the OCRM line. NBSC argued that by virtue of his involvement in the Administrative Law Court case Segars concerning the OCRM line. Segars does not deny he was aware of issues concerning the set back line relating to lot 2 in 2005, however, this knowledge could hardly put Segars on notice that the appraiser hired by NBSC was negligent in preparing the appraisal. Segars was not aware at that time, or any time until august 2009, what information the appraiser used to prepare the appraisal.

In addition, NBSC argued below that Segars appearance in three other lawsuits involving his ownership at Singleton Beach Place establish Segars was aware of issues relating to limitations on the lots. NBSC cites the fact that Segars sued (i) the closing

attorney representing Segars in the purchase of the property (2009-CP-07-00381) (R. Vol. I p.6) ; (ii) the title insurance company (who issued Segars title insurance on the property (2008-CP-07-2791) (R. Vol I. p.1). and (iii) against the title insurance company individually (2011-CP-07-00931) (R. Vol I. p. 11).. NBSC notes that all of these cases were dismissed based on the Statute of Limitations and thus the NBSC case should also be dismissed. These cases are all distinguishable from the present case. The closing

attorney was sued because he incorporated the plats of record in his title commitment and closing package but failed to explain to his client(s) the restrictions on the lot imposed by 2002 reconfiguration plat(s) which essentially eliminated development. With respect to the case against the Seller of lot 2, the trial court determined that Segars' knowledge as to the existence of the reconfiguration plat ultimately triggered the date where the limitations period began to run. In the present case, Segars allegedly learned that the reconfiguration plats caused the OCRM line to remain in its then exisiting position. Segars did not, and in fact could not have known, which plat the appraiser used and purportedly did not appreciate the restrictions on the lot. In the present case, Segars did not and in fact could not know what documents the appraiser relied upon to complete his appraisal. He did and could have rightfully assumed that the Appraiser, a licensed professional with all relevant information before him , based his appraisal on the correct state of the land use restrictions and set back lines. It was only in April 2009 that Segars discovered that the appraiser in fact had at his disposal, and relied upon, the appraisal which in fact showed the restrictions on the property and was, therefore, negligent in his valuation of the property (R. Vol II p.744).

Defendants asserted three counterclaims against NBSC; (1) negligent misrepresentation, (2) breach of fiduciary duties and (3) breach of contract accompanied by fraudulent act all based upon the appraisal procured by the Plaintiff NBSC and subsequent actions of the Plaintiff. Generally, a cause of action accrues at the moment a breach of duty occurs. *Grooms vs. Medical Soc'y of S.C.* 289 S.C. 399 380 S.E. 2d 855 (Ct. App. 1989). However, the "discovery rule" provides an exception to the general rule and tolls the statute of limitations until a person knows or by the exercise of reasonable diligence should know that he has a cause of action. Under the discovery rule, the statute starts to run upon the discovery of such facts as would have led to the knowledge thereof if pursued with reasonable diligence. Plaintiff argues that shortly after the closing on the property the Town of Hilton Head revoked the approved plat. Fidelity Title Insurance Company retained an attorney to represent Segars and other lot owners to cure the plat revocation by the Town in September or October of 2004. In addition Plaintiff points out that Segars and others retained the services of Cotton Harness and joined the Administrative Law Case regarding the movement of the OCRM baseline sometime in 2005. It is upon these facts that Plaintiff claims Segars was aware of a potential cause of action as he was aware of a problem with the OCRM baseline. **Segars claims in the present case did not arise out of a knowledge of the placement of the OCRM baseline but the negligence of the appraiser discovered in 2009 well after the closing on the lot. (emphasis added)**

The Plaintiff's argument on the statute of limitations is based upon a faulty premise. The Plaintiff submits that the question as to when the statute of limitations began to run relates to the time period during which Segars learned of the facts which

would have put him on notice of the true location of the OCRM baseline. The counterclaims against the bank, based in part on the actions of their appraisal agent, are not based upon the issues of the location of the OCRM line. Clearly Segars knew there was an issue with the location of the OCRM line in 2005. **What Segars did not know and, in fact had no way of knowing, was which plat the bank's appraiser used in preparing the appraisal that valued the subject lot at $1.6 million. (emphasis added) H**ere, NBSC's appraiser used the plat which showed the original OCRM baseline which would show the lot to be of insufficient size to build a home which would have complied with the covenants and restrictions of the neighborhood. If, in preparing the appraisal, the appraiser used the plat which showed the future OCRM baseline it would have, or should have been readily apparent that the lot could accommodate a home which would be in compliance with the covenants and restrictions of the neighborhood which require all homes to be 2500s.f.. Only after the Plaintiff instituted the present action did Segars request a copy of the appraisal report from the bank. When Segars looked at the appraisal report for the first time he learned that the appraiser used the plat which did not have the future OCRM baseline but the original OCRM baseline which limited the size of the home one could build. Therefore the "discovery" which gives rise to Segars counterclaims is not whether there were issues with the OCRM baseline but when Segars discovered that the appraiser used the original plat. Segars only received the appraisal report after this suit was commenced and alleged the counterclaims within three months thereafter certainly well within three years of. Prior to that it was represented to Segars that the appraisal report valued the property at $1.6 million dollars. In addition, as Plaintiff has pointed out, the appraisal was undertaken by the bank for

their protection. It is also clear that Segars was charged for the appraisal, relied on the valuation set by the appraisal and had a right under South Carolina law to rely on the appraisal.

S.C. Code § 15-3-535 states that all actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have know that he had a cause of action statute starts to run upon the discovery of such facts, as would have led to the knowledge thereof if pursued with reasonable diligence. The question in this instance becomes when did Segars know or reasonably should have known that he had a cause of action against the Plaintiff? The answer is that **Segars could only have known of a potential claim against the Plaintiff when came into possession of the appraisal report not when an issue of the OCRM baseline was raised. (emphasis added)** Segars did not know, nor should he have known, what plat the appraiser used in preparing the appraisal. The Plaintiff bank had nothing to do with the placement of the OCRM baseline and thus would not have drawn scrutiny from Segars, or apparently nay of his attorneys. However, when Segars saw the appraisal and realized that the appraiser used the plat which showed the original OCRM baseline he had reason to question the appraisal and consequently the Plaintiff.

CONCLUSION

For the reasons explained herein, the lower court erroneously granted NBSC Summary Judgment against Thaddeus Segars on the basis that the applicable Statute of Limitations had run on the time available for Segars to assert his counterclaims. The Petitioner accordingly respectfully requests that this Court grant his petition for Writ of Certiorari.

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This 31st day of October, 2016
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CERTIFICATE OF SERVICE

I, Thomas J. Finn, do hereby certify that on October 31,2016, I served a true and accurate copy of the Appellant's Petition for Writ of Certiorari in the above matter, by depositing a copy of the same in the U.S. Mail, first class postage prepaid, and addressed to:

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October 31, 2016

Respectfully Submitted

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