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~~ 2016-002220

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.

APPENDIX

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In The Court of Appeals

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Index

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
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Marvin H. Dukes, III

Case No.: 2009-CP-07-3201
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Thaddeus F. Segars; KCS Investments, LLC; Singleton Place Homeowners Association Inc.; and Suntrust Mortgage Inc.,..... Defendants,

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

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TABLE OF CONTENTS

000002

TABLE OF AUTHORITIES

CASES

RULES

STATUTES

000003

STATEMENT OF ISSUES ON APPEAL

I. Did the lower Court err in granting Summary Judgment to Plaintiff NBSC when Appellant filed a mandatory / /compulsory counterclaim within time allowed for filing.

II. Did the lower Court err by granting Summary Judgment to Plaintiff NBSC holding that the Statute of Limitations had expired when Appellant had no way of discovering Bank's negligence until he saw the appraisal.

000004

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 Segars 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 promissorynote 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 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. Defendants contend 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. VolII p. 780)

Plaintiff 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 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 NBSC 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).

000008

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

STANDARD OF REVIEW

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.

The standard of review for actions at law is de novo with regard to legal conclusions, but factual findings will be overturned only if wholly unsupported by the evidence or controlled by legal error. "In an action at law, tried without a jury, the appellate court's standard of review extends only to the correction of errors of law. In such cases, the trial court' factual findings will not be disturbed unless they are wholly unsupported by the evidence or controlled by an erroneous conception of law." Temple v. Tec-Fab, Inc., 370 S.C. 383, 387,635 S.E. 2d 541, 543 (Ct. App. 2006) (citing Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C. 353 S.C. 327, 334, 577S.E.2d 468, 472 (Ct. App. 2003);

Further, the mere inclusion of a statement in the "Findings of Fact" section of an order does not make the statement a factual finding. The appellate court reviewing an order must determine whether a statement in the order is a finding of fact or a conclusion

of law. Chambers v. Pingree, 351 S.C. 422, 454 n.4, 570 S.E.2d 528, 534 n. 4 (Ct. App. 2002)Where a statement included in the "Findings of Fact" section is in actuality a conclusion of law, the usual denovo standard applicable to legal conclusions applies. Id

I. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO NBSC WHEN APPELLANT FILED COMPULSORY /PERMISSIVE COUNTERCLAIMS WITHIN THE TIME ALLOWED TO FILE A RESPONSIVE PLEADING.

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 LOWER COURT ERRED BY GRANTING SUMMARY JUDGMENT TO PLAINTIFF NBSC ON THE BASIS THE STATUTE OF LIMITATIONS HAD EXPIRED WHEN APPELLANT 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) Here, 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

000017

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 Appellant accordingly respectfully requests that this Court reverse the order issued by the Honorable Marvin Dukes, III and remand this matter back to the lower curt for trial on the merits of the case.

000018

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This 27th day of May, 2015
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000019

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Of Whom Thaddeus F. Segars is the — Appellant

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Appellant Tad Segars, Final Brief complies with Rule 211 (b), of the South Carolina Appellate Court Rules.

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TABLE OF CONTENTS

000024

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

Other Authorities

COUNTER-STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT PROPERLY DETERMINE THAT THE STATUTE OF LIMITATIONS HAD EXPIRED BEFORE SEGARS ASSERTED HIS COUNTERCLAIMS AGAINST NBSC?

II. DID SEGARS' COUNTERCLAIMS REMAIN TIME-BARRED DESPITE HIS NEW ARGUMENTS REGARDING TOLLING OR WAIVER OF THE STATUTE OF LIMITATIONS, AND, EVEN IF THEY WERE NOT TIME-BARRED, WERE SEGARS' NEW ARGUMENTS PRESERVED FOR APPELLATE REVIEW?

III. IS THE CIRCUIT COURT'S RULING IN FAVOR OF NBSC SUPPORTED BY ADDITIONAL SUSTAINING GROUNDS, INCLUDING THAT SEGARS CANNOT ESTABLISH THE ELEMENTS OF HIS COUNTERCLAIMS AS A MATTER OF LAW?

COUNTER-STATEMENT OF THE CASE

This appeal arises out of a case brought by Respondent National Bank of South Carolina ("NBSC") against Appellant Thaddeus F. Segars ("Segars") based on Segars' default on a loan that he entered into with NBSC on June 9, 2004. (Consumer Loan Note/Security Agreement (the "Loan"); R.p. 757.) Segars entered into the Loan for the purpose of purchasing Lot 2 Singleton Beach Place Extension (the "Property"), which is located on Hilton Head Island, South Carolina. (Deposition of Thaddeus F. Segars dated August 4, 2010 ("Segars Dep. I") at 26:9-11; 27:4-9; R.pp. 116:9-11; 117:4-9.) The Property is part of a ten lot subdivision known as Singleton Beach Place Extension (the "Subdivision"). (Segars Dep. I at 11:20-24; R.p. 101:20-24.)

After Segars defaulted on the Loan, NBSC filed and served a Lis Pendens, Summons and Complaint on Segars on July 6, 2009. (NBSC's Summons and Compl. and Lis Pendens; R.pp. 28-53.) Thereafter, NBSC served an Amended Summons and Complaint on August 14, 2009. (NBSC's Am. Summons and Compl.; R.pp. 54-74.)

The Amended Complaint sought foreclosure of the mortgage on the Property. *Id.* Segars served an Answer and Counterclaims on or about September 24, 2009.[1] (Segars' Ans. and Countercl.; R.pp.75-82.) Segars alleged the following counterclaims against NBSC: (i) negligent misrepresentation; (ii) breach of fiduciary duties; and (iii) breach of contract accompanied by a fraudulent act. (*Id.* at pp. 2-7; R.pp. 76-81.) In his Answer and Counterclaim, Segars did not assert affirmative defenses to NBSC's Complaint, and he alleged that he had "suffered damages" in connection with each counterclaim against NBSC. (*Id.* at ¶¶18, 26, 33, Wherefore clause; R.pp. 78, 79, 81.)

In his counterclaims, Segars alleged that the appraiser hired by NBSC to perform an appraisal for the bank erred in his valuation of the Property in that, based upon the applicable baseline[2] and other set back requirements and restrictions, the true value of the Property was a fraction of the estimate given by the appraiser and the price Segars had agreed to pay for the Property. (*Id.* at ¶15; R.p. 77.) Segars further alleged that by transmitting the results of the Appraisal to him, either expressly or by implication, amounted to a negligent misrepresentation by NBSC made to induce him to accept the Loan and borrow money from NBSC. (*Id.* at ¶¶16-18; R.pp. 77-78.)

By Order dated December 16, 2010, the Honorable Carmen T. Mullen granted NBSC summary judgment on its claims and referred the foreclosure action to the Master in Equity while reserving Segars' counterclaims for further hearing. (Judgment

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[1] KCS Investments, LLC ("KCS"), another defendant to the foreclosure action by virtue of its ownership of the Property, joined Segars in the Answer and Counterclaims, which was subsequently filed on September 28, 2009.

[2] The baseline is established by the Office of Ocean and Coastal Resource Management pursuant to the Coastal Zone Management Act, S.C. Code Ann. § 48-39-280, generally prohibiting construction seaward of the line.

of Foreclosure and Sale dated December 16, 2010 at p. 1; R.p. 21.) This Order also granted NBSC's motion to amend its Reply to Segars' Counterclaims to allege the defense that the claims were barred by the applicable statute of limitation (*id.*), which NBSC filed on February 1, 2011. (NBSC's Am. and Restated Ans. and Reply to Countercl.; R.pp. 83-88.) On March 1, 2011, the Master in Equity issued an Order for Deficiency Judgment to NBSC against Segars in the amount of $263,159.58 (the "Deficiency Judgment"). (Deficiency Judgment; R.p. 798-799.) Segars did not appeal the Deficiency Judgment.

NBSC filed its motion for summary judgment on Segars' counterclaims on June 18, 2012, and Segars opposed the motion and filed his own motion for summary judgment on August 16, 2012. (NBSC's Notice of Mot. and Pl.'s Mot. for Summ. J.; R.pp. 628-647; and Segars' Notice of Mot. and Def.'s Mot. for Summ. J.; R.pp. 659-660.) These motions were heard on March 14, 2013. (Hr'g Tr. dated March 14, 2013 ("MSJ Hr'g Tr."); R.pp. 457-590.) During the hearing, Segars' attorney conceded the claims for breach of fiduciary duty and breach of contract accompanied by a fraudulent act. (*Id.* at 82:13-16; 111:18-22; 129:10-15; R.pp. 538:13-16; 567:18-22; 585:10-15.)

The parties subsequently engaged in an unsuccessful mediation, and on November 18, 2013, the Court held a status conference via telephone during which the parties agreed to submit supplemental briefs in December 2013.[3] (*See* MSJ Order at p. 1; R.p.13.) Segars submitted a brief on December 13, 2013. (Email from Finn Law

[3] The Order states that the parties would submit supplemental briefing by December 6, 2012. The year is clearly a typographical error as the letter is dated 2013, and former counsel for NBSC has advised that he believes the date given by the Court during the status conference was December 16, 2013 (and, in fact, both parties submitted their supplemental briefs by that date).

Firm to Honorable Marvin H. Dukes, III dated December 13, 2013 attaching Supplemental Brief; R.pp. 773-779; and Def.s' Brief in Supp. of their Mot. for Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J. dated March 13, 2013; R.pp. 661-669.)[4] NBSC submitted a supplemental brief on December 12, 2013, which was filed on December 16, 2013. (Pl.'s Supplemental Mem. in Supp. of Mot. for Summ. J.; R.pp. 648-658.) Thereafter, the Honorable Marvin H. Dukes, III sent an email to NBSC's counsel requesting a proposed order granting summary judgment to NBSC. By letter dated January 13, 2014, Segars submitted a letter to the Court in response to the Court's email wherein he attempted to raise new arguments related to compulsory counterclaims and recoupment. (Letter from Thomas J. Finn to Honorable Marvin H. Dukes, III dated January 13, 2014 at 1; R.pp. 782-783.) NBSC then submitted a letter in response to Finn's letter on January 15, 2014 and objected to the Court considering the additional untimely briefing submitted by Segars' counsel without permission from the Court. (Letter from Jennie S. Cerrati to Honorable Marvin H. Dukes, III dated January 15, 2014 at 1; R.pp. 784-788.) By separate letter that same day, NBSC submitted the requested proposed Order. (Letter from Jennie S. Cerrati to Honorable Marvin H. Dukes, III regarding proposed Order dated January 15, 2014 at 1; R.pp. 789-791.) One week later, the Court granted NBSC's motion for summary judgment on the basis that Segars failed to assert his claims within the three year statute of limitations. (MSJ Order at 1-6; R.pp. 13-18.)[5] The Court appears to have properly

[4] Segars appears to have resubmitted his earlier briefing of March 13, 2013 as his supplemental brief.

[5] The order was actually entered on February 11, 2014.

excluded the untimely raised claims as it does not reference the new arguments in the MSJ Order. *Id.*

Segars filed a motion for reconsideration on February 27, 2014. (Segars' Notice of Mot. and Mot. to Recons.; R.pp. 718-719.) The Motion mentioned no specific grounds as to why the Court should reconsider its ruling. *Id.* The Court heard this motion on May 14, 2014. (Hr'g Tr. dated May 14, 2014 ("MTR Hr'g Tr."); R.pp. 591-622.) At the hearing, Segars' attorney confirmed that the only remaining claim at issue was negligent misrepresentation. (*Id.* at 14:8-13; R.p. 604:9-13 (wherein Segars' attorney stated: "I think we had three causes of action. . . . . I think we might have dispensed with the other two and might have only been left with negligent misrepresentation in the end.")) He also attempted to argue the new grounds regarding tolling or waiver of the statute of limitations. (*Id.* at 9:19-15:8, R.pp. 599:19-605:8.) The Court denied Segars' motion for reconsideration the next day. (Form 4 Judgment in a Civil Case Order denying Mot. to Recons. dated May 15, 2014; R.pp. 19-20.) This appeal followed.

FACTS

A. Background

1. The Singleton Beach Place Extension Subdivision

Segars, who was a real estate agent with over 23 years of experience (Segars Dep. I. at 51:3-4; R.p. 141:3-4), was well acquainted with the Singleton Beach Place Extension Subdivision before he entered into the Loan with NBSC. In 2001, he entered into a contract to purchase three ocean front lots (Lots 1, 2 and 3), which would eventually be combined with other properties to create the Subdivision consisting of ten

lots. (Segars Dep. I at 12:6-19; 16:15-17:19; R.pp. 102:6-19; 106:15-107:19.) However, rather than close on the purchase of the three lots, Segars assigned his contract to Richardson Street Partners ("RSP") and Paul Gaughf ("Gaughf") who closed and took title to these lots. (Segars Dep. I at 12:17-22; R.p. 102:17-22.) RSP later partnered with J.J. Development to develop the Subdivision.

At that time, the location of the baseline set by the South Carolina Department of Health & Environmental Control's ("DHEC") Office of Ocean and Coastal Resource Management ("OCRM") limited the buildable space of the lots in the Subdivision. (Segars Dep. I at 9:13-10:7, R. pp. 99:13-100:7). Thus, RSP and J.J. Development proceeded to determine if the OCRM baseline could be moved seaward to increase the building envelope. (Segars Dep. I at 15:3-17:19; R.p. 105:3-107:19.) Segars testified that he was familiar with the current location of the OCRM baseline, the negative impact of its location on the buildable area of the lots and thus the value of the lots, and the developers' desire to move the location seaward. (Segars Dep. I at 9:13-10:16; 16:2-6; 16:15-17:21; R.pp. 99:13-100:16; 106:2-6; 106:15-107:21.) He further testified that the owner of J.J. Development advised him that OCRM and the Town of Hilton Head Island had subsequently agreed to relocate the OCRM baseline seaward of the existing line. (Segars Dep. I at 15:6-16:13; R.pp. 105:6-106:13.)

2. The Surveys Showing the Location of the OCRM Baseline for all Lots within the Subdivision

A survey of the Subdivision was prepared on November 12, 2002 and recorded in Beaufort County on January 29, 2003 (the "First Survey"). (Boundary Reconfiguration of Singleton Beach Place Extension Survey dated November 12, 2002;

R.p. 728; and Segars Dep. I at 18:12-19:16; R.pp. 108:12-109:16.) It depicts two baselines -- one labeled "Beach Management Act Baseline" and the other labeled "Future Beach Management Act Baseline." (First Survey; R.p. 728.) Segars, who in 2003 was acting as the real estate agent for RSP, testified that he reviewed the survey with RSP's attorney shortly after the First Survey was recorded. (Segars Dep. I at 19:17-20:8; R.pp.109:17-110:8.) Segars' and his client's primary concern with the location of the baseline was to ensure that a house of 4,000 square feet could be constructed on the Property.[6] (Segars Dep. I at 20:12-21:3; 23:11-14; R.pp. 110:12-111:3; 113:11-14.) The First Survey showed that the Town of Hilton Head had approved the survey, but it did not bear a stamp indicating the approval of DHEC-OCRM. (First Survey; R.p.728; and Segars Dep. I at 19:8-16; R.p. 109:8-16.)

On or about December 4, 2003, Sea Island Land Survey, LLC prepared a new survey for the Subdivision for J.J. Partners and RSP, which was recorded in Beaufort County on December 15, 2003 in Plat Book 96 at Page 160 (the "Approved Survey"). (Boundary Reconfiguration of Singleton Beach Place Extension Survey dated December 4, 2003; R.p.729; and Segars Dep. I at 46:17-47:9; R.pp. 136:17-137:9.) The Approved Survey showed the current OCRM baseline only; the line marked "Future Beach Management Act Baseline," i.e. the proposed future baseline that Segars and the developers wanted to increase the buildable space for the lots in the Subdivision, had been removed. (Approved Survey; R.p. 729.) Unlike the First Survey, the Approved

[6] Segars' testimony is that he and RSP's attorney reviewed the survey with respect to Lots 1, 2, 3, as these were the lots RSP would be receiving and placing for resale. (Segars Dep. I at 21:6-8; R.p. 111:6-8.) The lots were contiguous and subject to the same building restrictions, and thus the buildable envelope would be similar for each.

Survey bore a stamp indicating that it had been approved by DHEC-OCRM on November 20, 2003. (*Id.*; and Segars Dep. I at 47:10-48:11; R.pp. 137:10-138:11.) Segars admitted that both surveys showed the actual existing baseline, that only the First Survey shows a "future" baseline, and that the First Survey was not approved by DHEC-OCRM. (Segars Dep. I at 47:22- 48:11; R.pp. 137:22-138:11.) The Approved Survey was recorded in Beaufort County, and thus was a matter of public record before Segars' contract to purchase the Property and prior to NBSC's loan to Segars to purchase the Property. (Approved Survey; R.p. 729; and Segars Dep. I at 18:12-25; 46:12-24; 77:7-12; R.pp. 108:12-25; 136:12-24; 167:7-12.)

Thereafter, Segars, as listing agent for the Property, offered the Property (i.e., Lot 2) for sale at a listing price of approximately $2,000,000.00. (Segars Dep. I at 24:16-25:2; R.pp. 114:16-115:2.)[7] While Segars does not recall if he assisted in arriving at the listing price, he testified that it is his practice to consult and advise his clients as to an appropriate listing price. (Segars Dep. I at 25:2-20; R.p. 115:2-20.)

B. Segars' Purchase of the Property

1. Purchase Contract for the Property

On or about March 15, 2004, Segars entered into a contract to purchase the Property. (Contract of Sale—Offer and Acceptance dated March 15, 2004 (the "Contract"); R.pp. 730-734; and Segars Dep. I at 27:4-9; R.p. 117:4-9.) The Contract's purchase price was $1,600,000.00, and it contained a financing contingency

[7] Segars also listed Lot 1 for sale for approximately $2,000,000.00, but that lot had not sold as of Segars' deposition in August of 2010. (Segars Dep. I at 24:16-23 and 26:3-6; R.pp. 114:16-23; 116:3-6.) Lot 3 sold to another party for approximately $1,400,000.00 in 2003 or 2004, but Segars was not the listing agent. (Segars Dep. I at 23:18- 24:15; R.pp. 113:18-114:15.)

whereby should Segars fail to obtain financing within thirty-five days of the Contract, he could terminate; however, should he fail to take action as required by the terms thereof, the contingency would be deemed waived. (Contract at ¶¶2, 3; R.p. 730; and Segars Dep. I at 27:10-28:23; R.pp. 117:10-118:23.) Additionally, the Contract was contingent upon a due diligence review of the Property and purchase by Segars on or before March 12, 2004. (Contract at ¶6; R.p. 731; and Segars Dep. I at 28:24-29:5; R.pp. 118:24-119:5.) Segars completed his due diligence review of the property without termination of the Contract. (Segars Dep. I at 29:2-10; R.p. 119:2-10.) In addition to being a purchaser, Segars was the listing agent for the Property and drafted the Contract himself. (Contract at p. 5; R.p. 734; and Segars Dep. I at 24:16-25:5; 26:19-21; R.pp. 114:16-115:5; 116:19-21.)

2. Loan from NBSC

Segars applied for the Loan from NBSC to finance the purchase of the Property on May 18, 2004. (Credit Application; R.pp. 735-737; and Segars Dep. I at 38:18-22; R.p. 128:18-22.) At the time of the application, the financing contingency of the Contract had expired. (Contract at ¶3; R.p. 730; and Segars Dep. I at 73:3-9; 75:3-8; R.pp. 163:3-9; 165:3-8.) On June 2, 2004, Segars executed a commitment letter for a loan from NBSC (the "Commitment Letter"). (Commitment Letter from Douglas K. Matney of NBSC to Tad Segars dated May 28, 2004; R.pp. 741-743; and Segars Dep. I at 41:8-13; R.p. 131:8-13.) Among other contingencies, the Commitment Letter was subject to an appraisal of the Property acceptable to NBSC in the amount of $1,600,000 or greater. (Commitment Letter at p. 1; R.p. 742; and Segars Dep. I at 41:23-42:6; R.pp. 131:23-132:6.) As Segars admitted, this contingency was for NBSC's benefit and

protection. (Segars Dep. I at 97:19-21; R.p. 187:19-21.) There was no such contingency for Segars' benefit, and his Contract to purchase the Property likewise had no contingency that the Property be appraised for any particular amount. (Contract; R.pp. 730-734; and Segars Dep. I at 96:19-24; R.p. 186:19-24.) Thus, he was contractually obligated to purchase the Property no matter what value an appraisal provided.

On June 2, 2004, seven days prior to the closing, NBSC obtained an appraisal of the Property from Stephen V. Linsday of the Linsday Company, an independent appraiser licensed by the State of South Carolina, who estimated the value of the Property to be $1,600,000.00. (Appraisal of Stephen V. Linsday (the "Appraisal"); R.pp. 744-756; and Segars Dep. I at 42:7-10; 62:21-63:18; R.pp. 132:7-10; 152:21-153:18.) Segars testified that he did not review the Appraisal prior to closing (Segars Dep. I at 62:5-8, 14-16; R.p. 152:5-8, 14-16.)

On or about June 9, 2004, NBSC made the Loan to Segars in the principal amount of $1,360,000.00 as financing for the purchase of the Property. (Consumer Loan Note/Security Agreement; R.pp. 757-758; and Segars Dep. I at 43:13-18; R.p. 133:13-18.) The Loan was secured by a first priority mortgage on the Property. (Mortgage of Real Property dated June 9, 2004; R.pp. 759-763; and Segars Dep. I at 45:3-12; R.p. 135:3-12.) The deed conveying the Property to Segars specifically referenced the Approved Survey in the legal description and made no reference to the First Survey. (General Warranty Deed signed on May 24, 2004 (the "Deed") at p. 1; R.pp. 738-740; and Segars Dep. I at 49:13-17; R.p. 139:13-17.) Further, the Deed specifically referenced the location of the OCRM baseline as being depicted on the plat

prepared by Sea Island Land Survey, LLC and recorded in the Beaufort County Register of Deeds on December 15, 2003 in Plat Book 96 at Page 160 (i.e. the Approved Survey), and Segars expressly acknowledged receipt of this plat by acceptance of the Deed. (General Warranty Deed at p. 2; R.p. 739; and Segars Dep. I at 50:9-22; R.p. 140:9-22.) Despite this acknowledgment in the Deed, Segars testified that he did not recall seeing the plat and that he probably never read the Deed. (Segars Dep. I at 50:21-51:6; R.pp. 140:21-141:6.) Thereafter, the Loan was renewed and/or modified on two occasions to extend the maturity date. (Consumer Loan Note/Security Agreement dated July 7, 2005; R.pp. 769-770; Consumer Loan Note/Security Agreement dated January 24, 2007; R.pp. 771-772; and Segars Dep. I at 52:5-53:15; R.pp. 142:5-143:15.)

C. Segars' Discovery that the OCRM Baseline Had Not Been Moved and Subsequent Litigation Regarding the Same.

Segars testified that he could not remember when he first learned that the OCRM baseline had not been moved. (Segars Dep. I at 59:5-9; R.p. 149:5-9.) However, he states in his Brief that he "does not deny that he was aware of issues concerning the set back line relating to lot 2 in 2005. . ." (Segars' Br. at p. 13). Additionally, he has been involved in a multitude of lawsuits regarding the failure of OCRM to move the baseline that show that he was indeed aware that it had not been moved at least by March 16, 2005 if not before.

First, Segars testified that sometime in 2005, he, along with a group of other owners, retained the services of C.C. ("Cotton") Harness, III, Esquire ("Harness") to intervene in a case pending against DHEC in the Administrative Law Court of the State of South Carolina (the "ALC Case") that sought to move the baseline seaward.

(Deposition of Thaddeus F. Segars dated January 19, 2011 ("Segars Dep. II") at 20:17-21:17; R.pp. 264:17-265:17.) On March 16, 2005, Harness filed a Motion to Intervene in that case alleging that Segars and other lot owners were adversely affected by DHEC's position refusing to relocate the OCRM baseline. (Mot. to Intervene in case number 04-ALJ07-0304-CC dated March 16, 2005 at p. 2; R.p. 626 (stating that "[t]he parties have standing and meet the grounds for intervention in that: . . . Each lot owner is adversely affected by the position taken by DHEC/OCRM and the Town of Hilton Head Island. Movement of the line allows for highest and best use of their land and failure to move the line materially affects use, enjoyment and value of these lots."); and Segars Dep. II at 22:11-18; R.p. 266:11-18.)

In August of 2008, Segars sued RSP, Gaughf, and Fidelity National Title Insurance Company ("Fidelity"), for fraudulent and negligent misrepresentation, among others, and alleged that "in late 2005 [he] learned of the corrective plat recorded on December 15, 2003, and as a result, the residence represented in the architectural drawing provided to [him] could not be constructed on Lot 2, but that pursuant to said plat only a residence approximately 2,000 square feet could be constructed on Lot 2." (Order Granting Defs. RSP and Gaughf's Mot. to Dismiss in Civil Action No. 2008-CP-07-2791 filed May 20, 2009, Honorable Marvin H. Dukes, III, p. 3 (citing Compl. at ¶ 16); R.pp. 1-5.) The Court ruled that, "Plaintiff admits in his Complaint he was put on notice [in late 2005] that a claim might exist when he discovered the existence of the corrective plat" and dismissed Segars' claims based on the statute of limitations. (Order Granting Defs.' Mot. to Dismiss, filed May 20, 2009, Honorable Marvin H. Dukes, III, p. 4; R.p. 4.)

Segars also commenced a civil action against his lawyer, William Newton, and his firm, Jones, Patterson, Simpson & Newton, P.A., alleging legal malpractice in January of 2009. Segars alleged that "he informed Newton the decision to purchase was based on the enforceability of the 'future' baseline and the ability to build a house of at least 4,000 square feet on the lot" and, further, that "Newton was negligent in advising him the 'future' baseline was enforceable." (Order Granting Summ. J. to Defs., filed July 2, 2010, Honorable Carmen T. Mullen, p. 3; R.p. 8.) The Court found that "by March 2005 at the latest, [Segars] had actual knowledge Newton's alleged advice regarding the enforceability of the 'future' baseline was wrong and, accordingly, should have known a claim against Newton might exist." (*Id.* at 4; R.p. 9.) Further, the Court explained that Segars "was on constructive notice of the plat [recording the DHEC-OCRM Approved Survey] and its contents in October 2004 due to his participation as a party in the plat revocation lawsuit, the very subject of which was the [Approved Survey]" and granted summary judgment to Defendants on the grounds that the statute of limitations had expired before he commenced the action. (*Id.* at 4-5; R.pp. 9-10.)

Finally, Segars filed another action against Fidelity, his title insurance company, on February 24, 2011. (*See* Thaddeus Segars v. Fidelity Nat'l Title Ins. Co., Civil Action No. 2011-CP-07-00931 (S.C.Com.Pl., Beaufort).) This lawsuit asserted claims for breach of contract, among others, based on the fact that on June 23, 2004, Fidelity issued a policy in the amount of $1,600,000.00 on Lot 2 and then failed to cover Segars' damages when he later filed a claim because the land was "unbuildable." The Court held that Segars "discovered or should have discovered the facts underlying his Complaint at the time of the issuance of the title insurance policies, because the matters

of which he now complains were matters of public record at that time." (Order Granting Def.'s Mot. to Dismiss, filed May 24, 2012, Honorable Carmen T. Mullen, p. 2; R.p. 12.) Further, the Court held that "[Segars] is not a bona fide purchaser because sufficient record notice was available as of the date of the issuance of the policies to charge him with a duty to inquire, which if pursued with due diligence, would have supplied him with knowledge of the restrictions and plats." (*Id.*) Accordingly, the Court dismissed Segars' claims because they were all barred by the statute of limitations. (*Id.*)

D. Segars' Default on the Loan

On or about March 24, 2009, over four years after he first learned that the OCRM baseline had not been relocated, Segars defaulted on the Loan. (Segars Dep. I at 53:19-20; R.p. 143:19-20; Am. and Restated Compl. at ¶15; R.p. 60; Ans. & Countercl. at ¶7; R.p. 76.) This litigation followed.

STANDARD OF REVIEW

In reviewing an order granting a motion for summary judgment, the appellate court should apply the same standard as the circuit court. *See Silvester v. Spring Valley Country Club,* 344 S.C. 280, 284-85, 543 S.E.2d 563, 566 (Ct. App. 2001) (citing *McDonnell v. Consol. Sch. Dist. of Aiken,* 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994)). Pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure, summary judgment is appropriate where there is "no genuine issue as to any material fact," and the moving party shows that it is entitled to judgment as a matter of law. S.C. R. Civ. P. 56(c); *see also City of Columbia v. ACLU of South Carolina,* 323 S.C. 384, 386, 475 S.E.2d 747, 748 (1996). In determining whether summary

judgment is proper, the appellate court must view all evidence in the light most favorable to the non-moving party. *Barr v. City of Rock Hill,* 330 S.C. 640, 642, 500 S.E.2d 157, 158 (Ct. App. 1998) (citing *Café Assocs. Ltd. v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991)).

ARGUMENT

Segars' appeal challenges the Circuit Court's MSJ Order, which granted NBSC summary judgment on his counterclaims on the grounds that the statute of limitations had expired before he commenced those claims. MSJ Order at p. 1-2, R.pp. 13-14. The MSJ Order finds that NBSC is entitled to summary judgment as to "all Defendants' counterclaims" (*id.*), but only the counterclaim for negligent misrepresentation should be at issue in this appeal as Segars has previously conceded his other claims.[8] Segars based his counterclaims, which were served on NBSC on or about September 24, 2009, entirely upon an appraisal performed for NBSC's benefit, which he claimed provided an inaccurate value of the Property given the location of the OCRM baseline. Thus, the statute of limitations would bar his claims if he knew or should have known prior to September 24, 2006 that a claim against NBSC regarding the appraisal might exist.

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[8] Segars conceded both the breach of contract accompanied by a fraudulent act and the breach of fiduciary duty claims at the outset of the summary judgment hearing and again at the hearing on his motion to reconsider. For unknown reasons, only the concession regarding the former was captured in the Order granting NBSC summary judgment. (MSJ Order at p.1; R.p. 13; MSJ Hr'g Tr. at 82:13-16; 111:18-22; 129:10-15; R.pp. 538:13-16; 567:18-22; 585:10-15; and MTR Hr'g Tr. at 14:9-13; R.p. 604:9-13.) However, the claim for the latter should be barred as well. *Kirkland v. Allcraft Steel Co., Inc.,* 329 S.C. 389, 392, 496 S.E.2d 624, 626 (1998) (citations omitted)(holding that "[a] stipulation is an agreement, admission or concession made in judicial proceedings by the parties thereto or their attorneys. Stipulations, of course, are binding upon those who make them.").

The Circuit Court correctly determined that Segars had actual or constructive knowledge of facts that would suggest an error in the Appraisal at least by March 16, 2005 as that is when his attorney filed a motion to intervene on his behalf in the ALC case involving DHEC in which he acknowledged that the OCRM baseline had not been moved and alleged that the failure to move it negatively impacted the value of the Property. (Motion to Intervene in case number 04-ALJ07-0304-CC dated March 16, 2005 at p. 2; R.p. 626.) Segars' argument that he was not on notice of a potential claim against NBSC based on the Appraisal until he actually saw it and the appraiser's related file materials is insufficient as a matter of law. As soon as he knew that the OCRM baseline had not been moved (if not before as the location of the baseline was a matter of public record), Segars had notice that the value of his Property was negatively impacted and thus that there might be a problem with the appraisal. Additionally, Segars' arguments that his claims were timely because the statute of limitations was tolled or waived because his claims were compulsory counterclaims or claims of recoupment lack merit and are not preserved for review. Finally, numerous additional sustaining grounds exist to support the Circuit Court's decision granting NBSC summary judgment. Accordingly, this Court should affirm the Circuit Court's MSJ Order.

I. THE CIRCUIT COURT PROPERLY DETERMINED THAT THE STATUTE OF LIMITATIONS HAD EXPIRED BEFORE SEGARS COMMENCED HIS COUNTERCLAIMS AGAINST NBSC.

Segars' counterclaim for negligent misrepresentation is subject to a three year statute of limitations. *See* S.C. Code Ann. § 15-3-530 (5) (which provides for a three-

year limitations period on tort claims).[9] Generally, a cause of action accrues under South Carolina law at the moment a breach of duty occurs. *Grooms v. Med. Soc'y of S.C.*, 298 S.C. 399, 402, 380 S.E.2d 855, 857 (Ct. App. 1989) (citing *Livingston v. Sims*, 197 S.C. 458, 15 S.E.2d. 770 (1941)). However, "the 'discovery rule' provides an exception to the general rule and tolls the statute of limitations until a 'person kn[ows] or by the exercise of reasonable diligence should. . . know[ ] that he ha[s] a cause of action.'" *Barr*, 330 S.C. at 644, 500 S.E.2d at 160 (quoting S.C. Code Ann. § 15-3-535); *see also Bayle v. S.C. Dept. of Transp.*, 344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001). The statute of limitations "starts to run upon discovery of 'such facts, as would have led to the knowledge thereof if pursued with reasonable diligence. . . ." *Id.* at 644-45, 500 S.E.2d at 160 (quoting *Burgess v. Am. Cancer Soc'y,* 300 S.C. 182, 185, 386 S.E.2d 798, 800 (Ct. App. 1989)). A party has constructive notice of a claim if he knows of facts and circumstances of an injury that "'would put a person of common knowledge and experience on notice that some right. . . has been invaded or that some claim against another party might exist.'" *Graniteville Co. v. IH Services, Inc.*, 316 S.C. 146, 148, 447 S.E.2d 226, 228 (Ct. App. 1994) (quoting *Snell v. Columbia Gun Exch., Inc.,* 276 S.C. 301, 278 S.E.2d 333 (1981)) (emphasis omitted). "The date on which discovery should have been made is an objective, not subjective, question." *Kruetner v. David*, 320 S.C. 283, 285, 465 S.E.2d 88, 90 (1995) (citing *Wiggins v. Edwards,* 314 S.C. 126, 442 S.E.2d 169 (1994)).

[9] If not already conceded, Segars' claim for breach of fiduciary duty would be subject to a three year statute of limitations as well.

A. The Circuit Court Correctly Determined that by March 16, 2005, Segars Knew that He Had Been Adversely Affected by DHEC's Refusal to Relocate the OCRM Baseline.

Segars served his counterclaims on NBSC or about September 24, 2009.[10] In order to avoid a statute of limitations defense, he could not have been on actual or constructive notice that some right had been invaded or that some claim against another party might exist prior to September 24, 2006.[11] Segars' claims against NBSC all relate to the Appraisal performed by Linsday, whom NBSC hired to perform an appraisal for the bank. More specifically, Segars alleges that Linsday erred in his valuation of the Property in that, based upon the applicable OCRM baseline and other set back requirements and restrictions, the true value of the Property was a fraction of the estimate Linsday gave because the lot was "unbuildable." (Segars' Ans. and Countercl., R.pp. 75-82.) Segars further alleged that although he did not see the Appraisal before closing, NBSC impliedly transmitted the results to him simply by proceeding with the closing and he alleged that this amounted to a negligent misrepresentation made to induce him to accept the Loan. (*Id.*; R.pp. 75-82.; Segars Dep. I 75:9-12; 88:10-89:11; R.pp.165:9-12; 178:10-179:11.)

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[10] The MSJ Order states that Segars asserted his counterclaims on or about August 19, 2009; however, this appears to be incorrect as the pleading itself indicates that it was served on September 24, 2009 and filed on September 28, 2009. The difference in the dates is immaterial for purposes of this appeal.

[11] An argument could also be made that Segars was on constructive notice as of the date of his loan and the closing on the purchase of the Property (i.e., June 9, 2004) as not only was the Approved Survey recorded and part of the public record, it was referenced on the General Warranty Deed conveying the Property to him. (General Warranty Deed dated May 24, 2004; R.pp. 738-740.)

The Circuit Court found that Segars knew that he had been adversely affected by the failure of the OCRM baseline to move by March 16, 2005 at the latest because that is when his attorney, Harness, moved to intervene in the ALC case that sought to have the baseline moved. In that case, Segars and others alleged that the failure of DHEC-OCRM to move the baseline negatively impacted the value of the Property. (Motion to Intervene in case number 04-ALJ07-0304-CC dated March 16, 2005; R.pp. 625-627.) The Court also noted that three other courts had determined that Segars "learned of the location of the OCRM Line in relation to his claimed inability to build on the property" in the 2004-2005 timeframe. (MSJ Order at 3-4; R.pp. 15-16.)[12] The Court then held as follows:

> Based on the evidence and deposition testimony in this matter and the previous findings of this Court, it is clear that, by March 16, 2005 at the latest, Segars had actual knowledge that the OCRM Line was not located where he thought at the time of purchase of the Property and that the actual location affected his ability to build a residence on the Property. This discovery, pursued with reasonable

[12] More specifically, the Court noted the following cases brought by Segars: against his attorney (Civil Action No. 2009-CP-07-00381)(wherein Court found Segars "'was on constructive notice of the [2003 Plat/Approved Survey] and its contents in October 2004 due to his participation as a party in a plat revocation lawsuit against the town of Hilton Head.'"); against the title company and the sellers (Civil Action No. 2008-CP-07-2791)(wherein the Court found that that in late 2005, Segars learned of the Approved Survey/plat and that as a result only a house of 2,000 square feet could be built on lot 2); and against the title company individually (Civil Action No. 2011-CP-07-00931)(wherein the Court found that Segars discovered or should have discovered the facts at issue because they "were matters of public record at that time") (emphasis in original). (MSJ Order at p. 4-5; R.pp. 16-17.) *See also* Order Granting Defs. RSP and Gaughf's Mot. to Dismiss, filed May 20, 2009, Honorable Marvin H. Dukes, III, p. 4; R.p. 4; Order Granting Summ. J. to Defs., filed July 2, 2010, Honorable Carmen T. Mullen, p. 4-5; R.pp. 9-10; and Order Granting Def.'s Mot. to Dismiss, filed May 24, 2012, Honorable Carmen T. Mullen, p. 2; R.p. 12.) All of these lawsuits have been adjudicated and dismissed based on the expiration of the statute of limitations. Segars made no allegation against NBSC or the appraiser in any of the foregoing suits, and he has never made a claim against the appraiser.

> diligence would have led Segars to conclude that [the] appraisal might be in error, and thus, should have known a claim based on the appraisal might exist. I find that Defendants failed to file the counterclaims on the alleged erroneous appraisal within three years.

(MSJ Order at 5; R.p. 17.) Thus, because Segars failed to assert his claims until more than four years later, the Circuit Court properly found that his claims were barred by the statute of limitations. (*Id.* at 3-4; R.pp. 15-16.)

Although even Segars admits in his Brief that he knew that the OCRM baseline had not been moved as of some time in 2005 (*see* Segars' Br. at p. 13), he asserts that this knowledge is irrelevant and that he did not know he had a potential claim against NBSC based on the Appraisal until he obtained a copy of the appraiser's file in 2009 and learned that Linsday had relied upon the Approved Survey (i.e. the survey that showed the actual baseline and not the line marked "Future OCRM Baseline," which was the correct and approved survey of record). (*Id.* at p. 13-17.) This argument has no merit. As soon as Segars knew that the OCRM baseline had not moved to the location of the "Future OCRM Baseline," he had knowledge that the value of the Property may have been negatively impacted as is evidenced by his hiring an attorney to intervene in the ALC Case to make these exact allegations. While he may not have known exactly what the Appraiser relied on to arrive at his estimate,[13] a reasonable person would have investigated that upon learning that the value was less than what the Appraisal stated. Segars was on actual notice (or at a minimum constructive notice) that something might

[13] Ironically, Segars appears to be implying that he did not think he had a claim if the appraiser relied on the incorrect and unapproved survey, which showed the potential "Future Baseline," but that he believed he had a claim once he learned that the appraiser relied on the correct approved survey of public record. This is simply nonsensical.

not be right with the Appraisal, that some right had been invaded and that some claim against another party might exist well prior to September 24, 2006, and thus, his counterclaims are barred by the statute of limitations. *Graniteville Co.*, 316 S.C. at 148, 447 S.E.2d at 228.

II. SEGARS' COUNTERCLAIMS REMAIN TIME-BARRED DESPITE HIS NEW THEORIES REGARDING TOLLING OR WAIVER OF THE STATUTE OF LIMITATIONS, AND THESE NEW ARGUMENTS WERE NOT PRESERVED FOR APPELLATE REVIEW.

A. Segars' Counterclaims Remain Time-Barred.

Segars' new theories regarding the tolling or waiver of the statute of limitations due to his assertion that his counterclaims were compulsory counterclaims or claims of equitable recoupment fail as a matter of law. With regard to counterclaims filed after the statute of limitations has run, some jurisdictions allow the limitations period to be tolled (allowing compulsory counterclaims) or waived (allowing claims asserted defensively as equitable recoupment). Because it is unclear which remedy Segars is seeking in this appeal, NBSC will address both.

1. Segars is Not Entitled to a Tolling of the Statute of Limitations based on his Counterclaims being Compulsory Counterclaims because the Statute of Limitations had already Expired.

Segars is not entitled to tolling because the statute of limitations for his claims expired before NBSC filed its foreclosure action. Segars' statement of the supposed majority rule is not accurate. In cases where the statute of limitations has not already run, the majority view is that the institution of plaintiff's suit tolls or suspends the running of the statute of limitations governing a compulsory counterclaim. § 1419 Compulsory Counterclaims—Statute of Limitations, 6 Fed. Prac. & Proc. Civ. § 1419

(3d ed.); see, e.g., *Burlington Indus. v. Milliken & Co.*, 690 F.2d 380, 389 (4th Cir. 1982) (citation omitted)). However, "tolling [is] immaterial [where] the limitations period [on defendants' compulsory counterclaim] expired before the plaintiff's suit is brought." § 1419 Compulsory Counterclaims—Statute of Limitations, 6 Fed. Prac. & Proc. Civ. § 1419 (3d ed.); *Keckley v. Payton*, 157 F. Supp. 820, (N.D. W. Va. 1958) (stating that "the weight of authority holds that unless a set-off or counterclaim takes the form of recoupment, which is not the case in this tort action, the statute of limitations applies as much to a set-off or counterclaim as to an original action. See an annotation in 1 A.L.R.2d 634, for cases so holding from thirty-six states.")

Additionally, while none of the authority cited by Segars that provides for tolling of the statute of limitations is mandatory or binding in South Carolina, the statute he cites also supports the proposition that compliance with statutes of limitations as to a defendant's counterclaims is required for tolling. *See, e.g.*, Ga. Code Ann. § 9-3-97 (extending the statute of limitations, "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 the commencement of such actions *shall not have expired* prior to filing of the main action.") (emphasis added).

As set forth above, the limitations period on Segars' claims ran at the very latest in March of 2008 and thus expired prior to NBSC's filing its foreclosure action in July of 2009. (*See supra* Argument, I(A) at pp. 18-21.) Accordingly, the statute of limitations cannot be tolled.

2. Segars is Not Entitled to a Waiver of the Statute of Limitations based on Equitable Recoupment because his Counterclaims were Affirmative Claims and not Defensive Claims of Recoupment.

Some courts allow a defendant to assert claims defensively in the form of equitable recoupment where the limitations period on his claims has expired before the plaintiff filed suit. §1419 Compulsory Counterclaims—Statute of Limitations, 6 Fed. Prac. & Proc. Civ. § 1419 (3d ed.). Segars cites to no South Carolina cases allowing recoupment claims after the statute of limitations has expired, and NBSC is not aware of any. However, even in states that have allowed recoupment claims to be brought after the statute of limitations has expired, the defendant cannot seek affirmative relief but rather can only use such claims defensively as the case cited by Segars in his Brief supports. (Segars' Br. at p. 11 (citing *Murray v. Mansheim*, 779 N.W.2d 379, 390 (S.D. 2010).) In *Murray*, the Court held as follows:

> We narrow our holding to disallow compulsory counterclaims seeking affirmative relief when, as here, the limitations period expired after the plaintiff initiated his action by service of summons but before the defendant served his counterclaim. . . . We find persuasive the distinction between compulsory counterclaims seeking recoupment and those seeking affirmative relief. The latter are independent actions subject to statutes of limitation. The former are in the nature of a defense and, as noted by the United States Supreme Court, are "never barred by the statute of limitations so long as the main action itself is timely."

Murray, 779 N.W.2d at 390 (citation omitted). *See also Nalley v. McClements*, 295 F. Supp. 1357, 1360 (D. Del. 1969) (denying defendants' motion for leave to amend their answer to add a counterclaim in the nature of a recoupment and holding that "the counterclaim could not constitute a purely defensive measure by way of recoupment to

reduce or extinguish plaintiffs' claim but is actually a demand for an affirmative judgment"); *Dowell v. G & G Motorcycles, Inc.*, 2014 WL 6712893, No. 3:14CV263, at *3 (E.D. Va. Nov. 26, 2014)(finding defendant was entitled to reduce the purchase price by $118,741.07 for recoupment where defendant asserted recoupment "purely as a defense to [plaintiff's] claim").

In this case, Segars filed his counterclaims after the statute of limitations had expired. *See supra* Argument, I(A) at pp. 18-21. He asserted them not as affirmative defenses or counterclaims of recoupment or set-off but rather as counterclaims for independent causes of action for negligent misrepresentation, breach of fiduciary duty and breach of contract accompanied by a fraudulent act, all of which sought the affirmative relief of money damages. (Ans. and Countercl. at ¶¶18, 26, 33, and "Wherefore" clause; R.pp. 78, 79, 81.)[14] Furthermore, the Court subsequently granted NBSC summary judgment on its foreclosure claim and referred that matter to the Master in Equity (Judgment of Foreclosure; R.pp. 21-27.) This effectively bifurcated Segars' counterclaims from the foreclosure action with the counterclaims to be heard separately as affirmative claims for money damages. *Id.* Segars did not appeal either the Judgment of Foreclosure or the subsequently issued Deficiency Judgment and thus those orders are now final.

Because Segars raised his claims as affirmative counterclaims for money damages and not as affirmative defenses of recoupment to the foreclosure action, the

[14] *See also* MTR Hr'g Tr. 13:16-18; 14:3-13; R.p. 603:16-18; 604:3-13 (wherein at hearing on Segars' motion to reconsider, his attorney stated: "No, Judge. We did not have any affirmative defenses as I recall.")

statute of limitations was not waived and his counterclaims could not be asserted even if South Carolina allowed defensive recoupment claims.

B. Segars' New Theories regarding Tolling or Waiver of the Statute of Limitations Were Not Timely Raised and Thus are Not Preserved for Appellate Review.

Segars' new arguments relating to tolling or waiver of the statute of limitations were not timely raised during NBSC's motion for summary judgment or in Segars' subsequent Rule 59(e) motion. As a result, these new theories have not been preserved for appellate review.

A court may not grant a motion for summary judgment on grounds not included in the notice of motion or argued fully at the hearing. *Turbeville v. Floyd*, 288 S.C. 171, 174, 341 S.E.2d 651, 653 (Ct. App. 1986) (reversing circuit court's order granting summary judgment because the ground upon which the order was based was not included in the motion or argued before the lower court). Here, Segars' arguments regarding tolling or waiver of the statute of limitations based on his assertion that his claims were compulsory counterclaims and/or claims of recoupment were not included in any of his briefing prior to the hearing, nor were they argued at the summary judgment hearing. Segars also did not raise these new theories in the supplemental briefing invited by the Circuit Court after the hearing. (Email from Finn Law Firm to Honorable Marvin H. Dukes, III dated December 13, 2013 attaching Supplemental Brief which was Resubmission of Defendants' Brief in Support of their Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment dated March 13, 2013; R.pp. 773-779.) Thereafter, following all briefing and the Court's request for a proposed order from counsel from NBSC granting the motion,

Segars first raised the new arguments in a letter to the Court mere days before the Court issued its order. (Letter from Thomas J. Finn to Honorable Marvin H. Dukes, III dated January 13, 2014; R.pp. 782-783.) Because Segars neither included his arguments in timely briefing nor argued these issues at the hearing, his arguments were not properly raised and thus are not preserved for review.

Furthermore, Segars' new theories were not preserved for appellate review in the motion to reconsider. "[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." *Stevens & Wilkinson of S. Carolina, Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) (citing *Hickman v. Hickman,* 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990)). Where an argument was "never presented to the trial court before the filing of the Motion to Alter or Amend," it is not preserved for appellate review. *Brailsford v. Brailsford,* 380 S.C. 443, 448, 669 S.E.2d 342, 345 (Ct. App. 2008); *see also Poch v. Bayshore Concrete Products/S. Carolina, Inc.*, 386 S.C. 13, 31, 686 S.E.2d 689, 699 (Ct. App. 2009) *aff'd as modified*, 405 S.C. 359, 747 S.E.2d 757 (2013) (appellant's argument not preserved for appellate review where raised in Rule 59(e) motion on basis that "[a] party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not.").

As discussed above, Segars' tolling and waiver of the statute of limitations theories were not properly raised via a letter after all briefing deadlines had passed and after the Court had advised that it would rule in NBSC's favor and thus were effectively raised for the first time in his motion to reconsider. Because new theories may not be

raised on a motion to reconsider, Segars' arguments are not preserved for appellate review. These arguments could have and should have been raised prior to the expiration of the briefing deadlines and prior to the Court advising the parties of its ruling. Accordingly, Segars' new theories are not preserved for review and should not be considered.

III. Several Additional Sustaining Grounds Support the Circuit Court's Ruling in Favor of NBSC.

Several additional sustaining grounds support the Circuit Court's MSJ Order dismissing Segars' counterclaims, which would require the affirmance thereof. *See I'on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419-20, 526 S.E.2d 716, 723 (2000) (holding that the appellate court may affirm for any ground appearing in the record because "a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court."). First, Segars fails to meet the essential elements of the causes of action for his sole remaining counterclaim for negligent misrepresentation. In addition, although NBSC believes that Segars has conceded his claim for breach of a fiduciary duty against NBSC (*see supra* Counter-Statement of the Case at pp. 3 and 5), even if that claim was considered by this Court, it cannot survive summary judgment as Segars cannot establish that NBSC owed him a fiduciary duty.

A. Segars Cannot Establish the Elements of his Counterclaim for Negligent Misrepresentation as a Matter of Law.

Segars' first counterclaim against NBSC is for negligent misrepresentation stemming from the Appraisal by Mr. Linsday. Even if the Appraisal in question was

prepared in error, Segars' claim must fail because he cannot demonstrate any false representation by NSBC and he cannot show that he was entitled to rely on the Appraisal.

1. NBSC is entitled to summary judgment on Segars' counterclaim for negligent misrepresentation because he cannot demonstrate that NBSC made any false representation regarding the Appraisal.

To establish liability for negligent misrepresentation, Segars must show that: (1) NBSC made a false representation to Segars, (2) NBSC had a pecuniary interest in making the representation, (3) NBSC owed a duty of care to see that it communicated truthful information to Segars, (4) NBSC breached that duty by failing to exercise due care, (5) Segars justifiably relied on the representation, and (6) Segars suffered a pecuniary loss as the proximate result of his reliance upon the representation. *Sauner v. Pub. Serv. Auth. of S. Carolina*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003); *Quail Hill, LLC v. County of Richland, South Carolina*, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010).

In this case, Segars cannot say that NBSC made *any* representation to him regarding the Appraisal. He testified that he never reviewed or saw the Appraisal prior to the closing. (Segars Dep. I 62:5-8; R.p. 62:5-8.) Further, he could not recall if NBSC ever advised him of the amount of the Appraisal other than to say it was generally his practice to inquire prior to closing as to the amount of an appraisal, and that he *probably* asked Doug Matney what the lot appraised for prior to closing. (Segars Dep. I 73:24-74:14; R.pp. 163:24-164:14.) Thus, there is no evidence in the record that NBSC made any representation to Segars regarding the Appraisal or the appraised value of the Property.

Even assuming that Segars did inquire as to the amount of the Appraisal, a response by NBSC as to what the Property appraised for would be an accurate and truthful statement of fact as to what the Appraisal stated. There is no dispute that the final estimate of value as described by the Appraisal was $1,600,000.00. (Appraisal dated June 2, 2004, R.pp. 744-756.) Accordingly, Segars cannot demonstrate that NBSC made a false representation to him.

2. Segars' claim for negligent misrepresentation also fails because he was not entitled to rely on the Appraisal as a matter of law.

Furthermore, Segars could not have relied upon the Appraisal as a matter of law because he was contractually committed to purchase the Property regardless of the amount of the Appraisal and because there is no question that the plat depicting the DHEC-OCRM approved baseline, i.e. the Approved Survey, was recorded and thus a matter of public record prior to his closing on the Property.

In a remarkably similar case, mortgagors sued a lending bank and appraiser claiming that they were harmed by entering into a mortgage agreement with a bank secured by property with an overestimated appraisal value. *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 565 S.E.2d 309 (Ct. App. 2002). The Court granted the defendants' motions for summary judgment on the claims for fraud, conspiracy, negligent representation and unfair trade practices, stating that the mortgagor's "lack of reliance [was] glaringly absent" because "[t]he purchase price for the commercial property was already agreed upon before [the mortgagor] approached Bank for a loan." *Id.* at 348, 565 S.E.2d at 314. The Court held that the mortgagor's negligent misrepresentation claim failed because they failed to prove reliance on the 1993 appraisal. *Id.* at 350, 565 S.E.2d at 315. Further, the Court found that it was

undisputed that the parties agreed to a contract price without seeing an appraisal, and the Bank's commitment letter before the appraisal was made was nothing more than a promise to finance. *Id.*

Here, not only did Segars agree to a price and enter into the Contract to purchase the Property without seeing the Appraisal, he allowed his financing contingency and due diligence period expire before applying for the Loan from NBSC. (Contract of Sale—Offer and Acceptance at ¶6; R.p. 731; and Segars Dep. I at 27:10-29:10; R.pp. 117:10-119:10.) Thus, Segars was contractually committed to purchase the property for $1,600,000.00 at the time he applied for the Loan regardless of the amount of the Appraisal. Accordingly, Segars could not have relied upon the Appraisal in moving forward with the purchase of the Property and the Loan.

Segars' negligent misrepresentation claim must also fail because he could not justifiably have relied on the Appraisal when the actual OCRM baseline, knowledge of which per his own testimony and actions show would provide notice that the Property was not worth $1.6 Million, was a matter of public record. "'There is no liability for casual statements, representations as to matters of law, or matters which [the claimant] could ascertain on his own in the exercise of due diligence.'" *Quail Hill*, 387 S.C. at 240, 692 S.E.2d at 508 (quoting *AMA Mtg. Corp. v. Strasburger*, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992)). In addition, in determining the issue of justifiable reliance in the context of a negligent misrepresentation claim, South Carolina courts have consistently held that "while issues of reliance are ordinarily resolved by the finder of fact, there can be no reasonable reliance on a misstatement if the plaintiff

knows the truth of the matter." *Id.* (quoting *McLaughlin v. Williams*, 379 S.C. 451, 457-58, 665 S.E.2d 667, 671 (Ct. App. 2008) (citations omitted)).

In *Quail Hill*, the plaintiff, a real estate developer, retained a licensed real estate broker to represent his interest in the purchase of a 72.5 acre parcel for development as a manufactured-home subdivision. *Id.* at 227, 692 S.E.2d at 501.The agent met with the Richland County Subdivision Coordinator who advised that the applicable zoning would allow for intended use; however, after the property was purchased and during the development phase, the plaintiff learned that the zoning advice had been erroneous. *Id.* at 227-28, 692 S.E.2d at 501-02. The Supreme Court found the claim to be controlled by the question of whether the plaintiff could have justifiably relied on the representation of the County staff and reasoned that the alleged reliance was not justified because a review of the official Richland County Zoning Map by Quail or its agent would have revealed the true zoning classification. *Id.* at 241, 692 S.E.2d at 509. *See also Schnellmann v. Roettger*, 368 S.C. 17, 21, 627 S.E.2d 742, 746 (Ct. App. 2006) (holding that Plaintiffs' claim that they relied on the square footage in the MLS listing, despite having an inspection clause in their contract and despite a summary appraisal conducted prior to closing that listed the lesser square footage but was not reviewed by Plaintiffs, was "unreasonable as a matter of law.")

Here, Segars alleges that the appraiser erred in failing to consider the impact of the then existing OCRM baseline and the effect thereof on the potential construction on the Property, which he claims negatively impacted the value of the Property. As explained above, there is no question that the Approved Survey depicting the DHEC-OCRM Approved baseline was recorded in the Beaufort County records prior to Segars

contracting to purchase the Property and that he closed in the face of such public records. (Approved Survey; R.pp. 728-729; and Segars Dep. I at 18:12-25; 46:12-24; 77:7-12; R.pp. 108:12-25; 136:12-24; 167:7-12). As such, the location of the baseline was easily discoverable by Segars through his own due diligence. Thus, because he had access to records showing the true location of the OCRM baseline prior to closing, Segars cannot meet the burden of proving the element of reliance and his counterclaim for negligent misrepresentation fails as a matter of law.

For the foregoing reasons, Segars' counterclaim for negligent misrepresentation fails as a matter of law.

B. Segars' Counterclaim for Breach of Fiduciary Duty also Fails as a Matter of Law because He Cannot Establish the Existence of a Fiduciary Relationship with NBSC.

Even assuming that Segars did not already concede his second counterclaim for breach of fiduciary duty (*see supra* Counter-Statement of Case at pp. 3 and 5 and Argument at p. 15, n. 8), it must fail because he cannot establish the existence of a fiduciary duty. "A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one reposing confidence." *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992) (citing *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987)). South Carolina has consistently held that the normal relationship between a bank and its customer is one of creditor-debtor and is not fiduciary in nature. *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986); *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 220 S.E.2d 116 (Ct. App. 1976); *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d

432 (Ct. App. 2003). A bank may be held to a fiduciary duty if it "undertakes to advise the customer as a part of services the bank offers. *Id.* (emphasis added). However, no duty exists between a bank and its depositor when the bank is unaware of any special trust reposed on it. *Id.* at 41, 340 S.E.2d at 790; *see also Steele v. Victory Savings Bank*, 295 S.C. 290, 294, 368 S.E.2d 91, 93 (Ct. App. 1988).

To prove the existence of a fiduciary relationship between NBSC and Segars, Segars, at a minimum, must allege and demonstrate that NBSC undertook to advise him as part of a service that NBSC offers. Segars did not allege such advice nor did he testify that any such advice was given. Instead, an independent third party appraiser performed the Appraisal, not NBSC or any agent thereof. (Appraisal dated June 2, 2004; R.pp. 744-756.) Accordingly, there is no allegation or evidence in the record that NBSC at any time undertook to advise Segars as part of the services it offers, and, thus, no fiduciary relationship existed between the parties. As such, Segars' counterclaim for breach of fiduciary duty fails as a matter of law, and NBSC is entitled to summary judgment as to this claim.

CONCLUSION

As set forth above, this Court should affirm the Circuit Court's decision to dismiss Segars' counterclaims against NBSC because he failed to assert them before the expiration of the statute of limitations. In addition, Segars' counterclaims remain time-barred despite his new theories regarding tolling or waiver of the statute of limitations because the statute of limitations expired prior to NBSC filing its foreclosure suit and because Segars brought his claims as affirmative claims, and not defensive claims of recoupment. Finally, numerous additional sustaining grounds support affirmance of the

MSJ Order, including that Segars cannot establish the elements required for either a negligent misrepresentation claim or a breach of fiduciary duty claim. Accordingly, this Court should affirm the decision of the Circuit Court that there is no genuine issue of material fact and that NBSC is entitled to judgment as a matter of law as to all of Segars' counterclaims.

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June 18, 2015
~#4845-4270-6979 v.3 - 00325/02009~

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge

Case No. 2009-CP-07-03201
Appellate Case No. 2014-001296

National Bank of South Carolina, ... 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, ... Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent National Bank of South Carolina complies with Rule 211(b), SCACR.

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APPEAL FROM BEAUFORT COUNTY
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National Bank of South Carolina, ... 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, ... Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: FINAL BRIEF OF RESPONDENT NATIONAL BANK OF SOUTH CAROLINA

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June 22, 2015

Donna Horn, Administrative Assistant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

National Bank of South Carolina, 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 Appellant.

Appellate Case No. 2014-001296

Appeal From Beaufort County
Marvin H. Dukes, III, Special Circuit Court Judge

Unpublished Opinion No. 2016-UP-325
Submitted April 1, 2016 – Filed June 22, 2016

AFFIRMED

Thomas Justin Finn, of Finn Law Firm, PC, of Hilton Head Island, for Appellant.

Bryson Moore Geer, Merritt Gordon Abney, and Erika Jensene Karnaszewski, all of Nelson Mullins Riley & Scarborough, LLP, of Charleston; and Daniel Allen

Saxon, of Novit & Scarminach, PA, of Hilton Head Island, for Respondent.

PER CURIAM: Tad Segars appeals from the circuit court's order granting National Bank of South Carolina's (NBSC's) motion for summary judgment on the basis that the applicable three-year statute of limitations expired on Segars' counterclaims. Segars argues the master erred in granting summary judgment to NBSC (1) when Segars filed compulsory counterclaims within the time allowed to file a responsive pleading and (2) on the basis the statute of limitations had expired when Segars had no way of discovering NBSC's negligence until Segars obtained a copy of the appraisal. We affirm.

1. Segars argues the master erred in granting summary judgment to NBSC when he filed compulsory counterclaims within the time allowed to file a responsive pleading. Sections 15-3-530(1) and (5) of the South Carolina Code (2005) provide a three-year statute of limitations for an action upon a contract, obligation, or liability, and tort claims. "Under 'the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered.'" *CoastalStates Bank v. Hanover Homes of S.C., LLC*, 408 S.C. 510, 517, 759 S.E.2d 152, 156 (Ct. App. 2014) (quoting *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996)). "By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim." *First-Citizens Bank & Trust Co. of S.C. v. Hucks*, 305 S.C. 296, 298, 408 S.E.2d 222, 223 (1991); *see also* Rule 13(a), SCRCP. Our supreme court has held a counterclaim is compulsory "if there is a 'logical relationship' between the claim and the counterclaim." *Mullinax v. Bates*, 317 S.C. 394, 396, 453 S.E.2d 894, 895 (1995) (citation omitted). During the hearing on the motion for summary judgment, Segars conceded his counterclaims for breach of fiduciary duty and breach of contract accompanied by a fraudulent act. Therefore, the only remaining counterclaim for the master to consider was Segars' claim for negligent misrepresentation. Segars filed his counterclaims on September 28, 2009; however, the master's order erroneously stated they were filed on August 19, 2009. The master determined the statute of limitations barred Segar's counterclaims if he knew or should have known prior to August 19, 2006, that the

claim against NBSC might exist.[1] The master also held that by March 16, 2005, at the latest, Segars had actual knowledge the Office of Coastal Resource Management (OCRM) line was not located where he thought it was at the time of purchase and the line's location would affect his ability to build a residence on Lot 2. We find Segars was not entitled to a tolling of the statute of limitations for his remaining counterclaim for negligent misrepresentation because the statute of limitations for his claim expired on March 16, 2008, before NBSC filed its foreclosure action on July 6, 2009.

2. Segars argues the master erred in granting summary judgment to NBSC on the basis the statute of limitations had expired when he had no way of discovering NBSC's negligence until he obtained a copy of the appraisal. NBSC's appraisal of Lot 2 was prepared on June 2, 2004, seven days before the closing, and Segars testified he did not review the appraisal prior to closing. We find that once Segars had notice the OCRM baseline had not been moved, which the trial court determined was by March 16, 2005, at the latest, he had notice that the value of Lot 2 was negatively impacted and there might be a problem with the appraisal. Further, Segars testified the contingency that Lot 2 be appraised for $1.6 million or greater was for NBSC's benefit and protection. There was no such contingency for Segars' benefit, and the contract to purchase Lot 2 had no contingency that the property be appraised for a specific amount. In fact, at the time of NBSC's appraisal, the financing contingency of Segars' contract to purchase Lot 2 had expired, so he was required to purchase the property regardless of NBSC's appraisal of the property. Finally, the deed conveying Lot 2 to Segars specifically referenced the second OCRM-approved plat, and Segars acknowledged receipt of the plat by acceptance of the deed. Therefore, we find the master did not err in granting summary judgment to NBSC on the basis the statute of limitations had expired.

AFFIRMED.[2]

SHORT and THOMAS, JJ., and CURETON, A.J., concur.

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[1] The corrected date for the statute of limitations would have been September 28, 2006.

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III

Case No.: 2009-CP-07-3201
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 ..... Appellant.

PETITIONFOR REHEARING

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TABLE OF CONTENTS

Table of Authorities

CASES

RULES

STATUTES

INTRODUCTION

Pursuant to Rule 221(a) and Rule 240(i), SCACR the Appellant, Thaddeus Segars respectfully petitions this Court for a rehearing of Unpublished Opinion No. 2016-UP-325 dated June 22, 2016.

ARGUMENT

The main point which must be addressed is whether the applicable Statute of Limitations expired prior to Segars initiating his counterclaims. Sections 15-3-530(1) and (5) of the South Carolina Code (2005) provide a three year statute of limitations for an action upon a contract, obligations, or liability, and tort claims. "Under the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered." *Coastal States Bank v. Hanover Homes of S.C. LLC*, 408 S.C. 510, S.C. 360, 363, 468 S.E. 2d 645, 647 (1996)). Therefore, the question must be when did Segars know or reasonably should he have known he had a cause of action against NBSC for negligent misrepresentation. The misrepresentation was, of course, that Lot 2 was worth $1.6 million dollars. The cause of action for negligent misrepresentation could only have occurred when NBSC took some action which involved the transaction with Segars. Appellant contends that NBSC made a negligent misrepresentation as to the value of Lot 2. The only representation NBSC made with regards to the value of Lot 2 was based upon the appraisal performed by the bank's appraiser Steve Linsday. When NBSC agreed to loan Segars the funds, NBSC was confirming that Lot 2 was indeed valued at $1.6 million. The question becomes how, or why, was NBSC's representation as to the value of the Lot 2 inaccurate. The answer is that NBSC accepted an appraised value on Lot 2 of 1.6 million dollars despite the fact that the lot was unbuildable. Despite

having the 2004 plat in hand Linsday valued the property at $1.6 million. Since the 2003 plat clearly showed the limitations on Lot 2 which would make it unbuildable the appraisal was gross misrepresentation. When NBSC adopted that appraisal and represented to Segars that Lot 2 was worth $1.6 million it too was in error and thus gave rise to Appellant's cause of action for negligent misrepresentation NBSC's negligent misrepresentation took place when it confirmed the value of Lot 2 to be $1.6 million in it's Commitment letter from Doug Matney. (R 741). The next question the court needs to address is when Segars knew, or reasonably should have known, that the appraisal was in error and thus the Bank's represented value of Lot 2 was wrong. NBSC hired the Linsday Group to provide NBSC an appraisal. While Segars was billed for the appraisal he was not provided a copy. NBSC procured the appraisal for its own purposes. T here was nothing which would have prompted Segars to request a copy of the appraisal. Without the appraisal Segars could not have known what plat was used. The discovery as to what plat was used is the trigger for the Statute of Limitations to begin. Segars was only made aware the 2004 plat was used when he received a copy of the appraisal in 2009. Segars attempted to refinance Lot 2 with NBSC in 2009. NBSC required that a new appraisal had to be performed. When the 2009 appraisal came back with an appraised value of $1.3 million Segars requested to see a copy of the 2004 appraisal that valued the property at $1.6 million. It was only then that Segars discovered what plat was used by Linsday.

This Court affirms the Master's ruling that "Segars had actual knowledge the Office of Coastal Resource Management (OCRM) line was not located where he thought it was at the time of purchase and the line's location would affect his ability to build a

residence on Lot 2. Moreover, this Court adopts the Master's finding that Segars had knowledge of an issue with the OCRM line. Specifically this Court adopts the Master's finding that "However, by March 16, 2005, Segars had retained an attorney to represent him to intervene in a pending Administrative Law Court case against the South Carolina department of Health and Environmental Control ("DHEC") wherein he alleged that he was adversely affected by DHEC's position refusing to relocate the OCRM Line. Thus, at least by March 16, 2005, Segars knew of the correct location of the OCRM Line." (R723). The Master and this Court both take the position that Segar's cause of action for negligent misrepresentation against NBSC begin to run on March 16, 2005. The fact that he used the 2004 plat to formulate his appraisal causes the appraisal to be wrong and NBSC's valuation of the property a negligent misrepresentation. The fact that Segars knew of an issue with the OCRM line on March 16, 2005 does not put him on notice that NBSC's appraisal was inaccurate. It is only when Segars learns what plat was used does his cause of action arise. Segars knowledge of an issue with the OCRM line simply cannot trigger an awareness of a cause of action against NBSC? The fact that there was an issue regarding the OCRM line would not put someone on notice that NBSC had made a negligent misrepresentation. Segars did not obtain a copy of the Linsday appraisal until approximately April 2009. It was only when Segars realized the appraiser used the 2004 plat that he knew the appraiser and, therefore, NBSC were wrong. Segars only discovered what plat was used when he demanded and received the appraisal after NBSC commenced its foreclosure action July 6, 2009.

This Court also bases its ruling that "Segars is not entitled to a tolling of the statute of limitations because the statute of limitations for his claim expired on March 16,

2008, before NBSC filed its foreclosure action on July 6, 2009. " The Court's position is entirely based upon the Master's determination that Segars knew of an issue with the OCRM line when he retained counsel to represent him in a Administrative Law Action. NBSC's foreclosure action only accrued after Segars failed to make monthly payments in 2009. Up until that time Segars was current and the bank had no cause of action for foreclosure. When NBSC brought their foreclosure action Segars counterclaimed as to the valuation NBSC put on Lot 2. Segars compulsory counterclaims were brought within time allowed and in response to NBSC's action. The counterclaims arise out of the same transaction and occurrence (the loan). As Appellate courts of other States have pointed out if the counterclaims arise out of the same transaction or occurrence as the underlying claims they are no staler than the initial action.

As set forth above Segars' knowledge of an issue with the OCRM line could not have put him on notice that NBSC had made a negligent misrepresentation. The March 16, 2005 date selected by the Master and adopted in its ruling by this court has nothing to do with NBSC's negligent misrepresentation. Since the March 16, 2005 date is incorrect the statute of limitations on Appellant's cause of action for negligent misrepresentation as set forth in his counterclaims should arguably be tolled.

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Appellant, Thaddeus F. Segars, seeks an Order granting rehearing.

Dated July 6, 2016

Respectfully Submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge

Case No. 2009-CP-07-03201

Appellate Case No. 2014-001296

National Bank of South Carolina, ... 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, ... Appellant.

RESPONDENT NATIONAL BANK OF SOUTH CAROLINA'S RETURN TO APPELLANT'S PETITION FOR REHEARING

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Pursuant to Rule 240(e) of the South Carolina Appellate Court Rules ("SCACR") and this Court's August 3, 2016 letter request, Respondent National Bank of South Carolina ("NBSC") files this Return to Appellant Thaddeus Segars' ("Segars") Petition for Rehearing (the "Petition") in this matter involving Op. No. 2016-UP-325 (S.C. Ct. App. filed June 22, 2016) (Shearouse Adv. Sh. No. 25 at 5) (the "Opinion"). As explained more fully below, the Petition should be denied. Segars' Petition fails to identify any points of fact or law in the Opinion that the Court overlooked or misapprehended as required by SCACR Rule 221(a) and South Carolina case law and instead simply rehashes two arguments previously presented to this Court, both of which were properly rejected in the Opinion. This Court correctly affirmed the decision below, and, thus, Segars' Petition should be denied.

PROCEDURAL AND FACTUAL BACKGROUND

As this Court will recall, this appeal arises out of a case brought by NBSC against Segars based on his default on a loan that he entered into with NBSC on June 9, 2004. (Consumer Loan Note/Security Agreement (the "Loan"); R.p. 757.)[1] Segars entered into the Loan for the purpose of purchasing a lot in a ten lot subdivision known as Singleton Beach Place Extension (the "Property"), which is located on Hilton Head Island, South Carolina. (Deposition of Thaddeus F. Segars dated August 4, 2010 ("Segars Dep. I") at 11:20-24;26:9-11; 27:4-9; R.pp. 101:20-24; 116:9-11; 117:4-9.)

After Segars defaulted on the Loan, NBSC filed and served a Lis Pendens, Summons and Complaint on Segars on July 6, 2009 and an Amended Summons and

[1] For ease of reference, NBSC will maintain the document abbreviations and record citations used in NBSC's Final Brief.

Complaint on August 14, 2009. (NBSC's Summons and Compl. and Lis Pendens dated July 6, 2009; R.pp. 28-53; and NBSC's Am. Summons and Compl. dated Aug. 14, 2009; R.pp. 54-74.) The Complaint and Amended Complaint sought foreclosure of the mortgage on the Property. *Id.* On or about September 24, 2009, Segars served an Answer and Counterclaims, in which he alleged, *inter alia*, a counterclaim of negligent misrepresentation against NBSC and alleged that he had "suffered damages."[2] ((Segars' Ans. and Countercl.; R.pp.75-82.)

In his counterclaims, Segars alleged that the appraiser hired by NBSC to perform an appraisal for the bank erred in his valuation of the Property in that, based upon the applicable baseline[3] and other set back requirements and restrictions, the true value of the Property was a fraction of the estimate given by the appraiser and the price Segars had agreed to pay for the Property. (*Id.* at ¶15; R.p. 77.) Segars further alleged that transmitting the results of the Appraisal to him, either expressly or by implication, amounted to a negligent misrepresentation by NBSC made to induce him to accept the Loan and borrow money from NBSC. (*Id.* at ¶¶16-18; R.pp. 77-78.)

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[2] Segars also filed counterclaims alleging breach of contract accompanied by a fraudulent act and breach of fiduciary duty. *See* Answer and Counterclaims at R.pp. 78-81. However, he later abandoned those claims during the motion for summary judgment hearing, and, thus, those counterclaims are not at issue in this appeal. ((Hr'g Tr. dated March 14, 2013 ("MSJ Hr'g Tr."); R.pp. 82:13-16; 111:18-22; 129:10-15; R.pp. 538:13-16; 567:18-22; 585:10-15); ((Hr'g Tr. dated May 14, 2014 ("MTR Hr'g Tr.") at 14:8-13; R.p. 604:9-13 (confirming same at hearing on Segars' motion for reconsideration). *See also* Opinion at p. 2.

[3] The baseline is established by the Office of Ocean and Coastal Resource Management pursuant to the Coastal Zone Management Act, S.C. Code Ann. § 48-39-280, generally prohibiting construction seaward of the line.

By Order dated December 16, 2010, the Honorable Carmen T. Mullen granted NBSC summary judgment on its claims and referred the foreclosure action to the Master-in-Equity while reserving Segars' counterclaims for further hearing. (Judgment of Foreclosure and Sale dated December 16, 2010 at p. 1; R.p. 21.) This Order also granted NBSC's motion to amend its Reply to Segars' Counterclaims to allege the defense that the claims were barred by the applicable statute of limitation (*id.*), and NBSC filed this amended Reply on February 1, 2011. (NBSC's Am. and Restated Ans. and Reply to Countercl.; R.pp. 83-88.) On March 1, 2011, the Master-in-Equity issued an Order for Deficiency Judgment (the "Deficiency Judgment") to NBSC against Segars in the amount of $263,159.58. (Deficiency Judgment; R.p. 798-799.) Segars did not appeal the Deficiency Judgment.

NBSC filed its motion for summary judgment on Segars' counterclaims on June 18, 2012, and Segars opposed the motion and filed his own motion for summary judgment on August 16, 2012. (NBSC's Notice of Mot. and Pl.'s Mot. for Summ. J.; R.pp. 628-647; and Segars' Notice of Mot. and Def.'s Mot. for Summ. J.; R.pp. 659-660.) These motions were heard on March 14, 2013. (MSJ Hr'g Tr.; R.pp. 457-590.)

After an unsuccessful mediation, the Court held a status conference via telephone on November 18, 2013 during which the parties agreed to submit supplemental briefs in December 2013.[4] (*See* MSJ Order at p. 1; R.p.13.) Segars submitted a brief on December 13, 2013. (Email from Finn Law Firm to Honorable

[4] The Order states that the parties would submit supplemental briefing by December 6, 2012. The year is clearly a typographical error as the letter is dated 2013, and former counsel for NBSC has advised that he believes the date given by the Court during the status conference was December 16, 2013 (and, in fact, both parties submitted their supplemental briefs by that date).

Marvin H. Dukes, III dated December 13, 2013 attaching Supplemental Brief; R.pp. 773-779; and Def.s' Brief in Supp. of their Mot. for Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J. dated March 13, 2013; R.pp. 661-669.) NBSC submitted a supplemental brief on December 12, 2013, which was filed on December 16, 2013. (Pl.'s Supplemental Mem. in Supp. of Mot. for Summ. J.; R.pp. 648-658.) Thereafter, the Honorable Marvin H. Dukes, III sent an email to NBSC's counsel requesting a proposed order granting summary judgment to NBSC. On January 13, 2014, Segars responded to the Court's email requesting a proposed order and attempted to raise new arguments related to compulsory counterclaims and recoupment. (Letter from Thomas J. Finn to Honorable Marvin H. Dukes, III dated January 13, 2014 at 1; R.pp. 782-783.) NBSC responded to this letter and objected to the Court considering the additional untimely briefing submitted by Segars' counsel without permission from the Court. (Letter from Jennie S. Cerrati to Honorable Marvin H. Dukes, III dated January 15, 2014 at 1; R.pp. 784-788.) By separate letter that same day, NBSC submitted the requested proposed Order. (Letter from Jennie S. Cerrati to Honorable Marvin H. Dukes, III regarding proposed Order dated January 15, 2014 at 1; R.pp. 789-791.)

Thereafter, the Court granted NBSC's motion for summary judgment on the basis that Segars failed to assert his claims within the three year statute of limitations, and this Order was entered on February 11, 2014. (MSJ Order at 1-6; R.pp. 13-18.) The Court appears to have properly excluded the untimely raised claims as it does not reference the new arguments in the MSJ Order. *Id.* Segars then filed a motion for reconsideration on February 27, 2014. (Segars' Notice of Mot. and Mot. to Recons.; R.pp. 718-719.) The Motion mentioned no specific grounds as to why the Court should

reconsider its ruling. *Id.* Following a hearing, the Court denied Segars' motion. (Form 4 Judgment in a Civil Case Order denying Mot. to Recons. dated May 15, 2014; R.pp. 19-20.) Segars then filed a timely appeal of the MSJ Order on or about June 12, 2014.

After full briefing by the parties, this Court issued its Opinion affirming the MSJ Order on or about June 22, 2016. This Court correctly held that based on the evidence in the record, Segars had notice that the OCRM baseline had not been moved by March 16, 2005 at the latest. Accordingly, this Court held that the statute of limitations for his counterclaim for negligent misrepresentation expired on March 16, 2008. Opinion at p. 3. This Court also correctly held that Segars was not entitled to a tolling of the statute of limitations for his counterclaim for negligent misrepresentation because his claim expired before NBSC filed its foreclosure action on July 6, 2009 and before Segars filed his counterclaims on September 28, 2009. *Id.*

Segars then timely filed the instant Petition for Rehearing. Pursuant to SCACR Rule 240(e), NBSC did not file a formal return but submitted a letter advising that it would file one upon request by the Court. Thereafter, this Court requested that NBSC do so by August 15, 2016. NBSC then requested and received a ten-day extension of this deadline such that the Return would be due on or before August 25, 2016.

ARGUMENT

As will be discussed below, Segars' Petition for Rehearing should be denied. Rule 221(a) of the South Carolina Rules of Appellate Procedure requires that a party submitting a Petition for Rehearing "state with particularity the points supposed to have been overlooked or misapprehended by the court." *See also Kennedy v. South Carolina*

Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (stating that "[i]n order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument."). The purpose of a petition for rehearing is not "to have the case tried in the appellate court a second time." *See Kennedy v. South Carolina Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). Both arguments raised in Segars' Petition were squarely addressed and rejected by this Court in its Opinion, and, moreover, neither argument has any merit. Accordingly, Segars' Petition should be denied.

I. THIS COURT DID NOT OVERLOOK OR MISAPPREHEND ANY OF SEGARS' ARGUMENTS.

Segars raises two claims in his Petition. First, he claims that his cause of action for negligent misrepresentation against NBSC only arose when he obtained a copy of the appraisal in April of 2009 and learned which plat the appraiser had relied upon. Petition at p. 2. Second, Segars argues that his negligent misrepresentation counterclaim arose out of NBSC's foreclosure action and was timely filed in response to that action, and therefore, the statute of limitations should be tolled. *Id.* at p. 4. Both of these arguments were squarely addressed and rejected by this Court in its Opinion. In fact, the introductory paragraph of the Opinion describes the issues on appeal as follows:

> Segars argues the master erred in granting summary judgment to NBSC (1) when Segars filed compulsory counterclaims within the time allowed to file a responsive pleading and (2) on the basis that the statute of limitations had expired when Segars had no way of discovering NBSC's negligence until Segars obtained a copy of the appraisal.

Opinion at p. 2. This is exactly the same description of the issues that Segars himself provides in his Petition. Petition at pp. 2-4. Segars also fails to identity any sub-points related to these issues that have been "overlooked or misapprehended by the court" and instead seeks to retry these issues, which have already been reviewed and addressed by this Court. Accordingly, this Court should deny Segars' Petition.

II. EVEN IF SEGARS HAD PROPERLY IDENTIFIED POINTS THAT HAD BEEN OVERLOOKED OR MISAPPREHENDED BY THIS COURT, THE TWO ISSUES RAISED IN SEGARS' PETITION ARE WITHOUT MERIT.

The two issues raised by Segars in his Petition, i.e. that the statutes of limitations did not start to run until he received the appraisal and that the statute should have been tolled, are without merit, and, thus, the Petition should be denied.[5]

A. This Court Correctly Affirmed the Circuit Court's Determination that by March 16, 2005 at the Latest, Segars Knew He Had Been Adversely Affected by DHEC's Refusal to Relocate the OCRM Baseline, and thus, the Statute of Limitations Expired on March 16, 2008.

In its Opinion, this Court correctly held that once Segars had notice that the OCRM baseline had not been moved, which was by March 16, 2005 at the latest, he had notice that the value of Lot 2 was negatively impacted and there might be a problem with the appraisal, and therefore that the statute of limitations expired on March 16, 2008. Segars argues in his Petition that "[t]he March 16, 2005 date elected by the Master and adopted in its ruling by this court has nothing to do with NBSC's negligent misrepresentation" (*see* Petition at 4) because his knowledge of an issue with

[5] In his Final Brief, Segars argued additional grounds in support of his contention that the circuit court erred in granting summary judgment to NBSC; however, Segars did not raise those issues in his Petition for Rehearing so they are not at issue here.

the OCRM line could not have put him on notice that NBSC made a negligent misrepresentation. *See* Petition at 3. As explained below and in this Court's Opinion, Segars' argument has no merit and, thus, was properly rejected by this Court.

Segars' counterclaim for negligent misrepresentation against NBSC relates to the Appraisal performed by Linsday, whom NBSC hired to perform an appraisal for the bank. More specifically, Segars alleges that Linsday erred in his valuation of the Property in that, based upon the applicable OCRM baseline and other set back requirements and restrictions, the true value of the Property was a fraction of the estimate Linsday gave because the lot was "unbuildable." (Segars' Ans. and Countercl., R.pp. 75-82.) Segars further alleged that although he did not see the Appraisal before closing, NBSC impliedly transmitted the results to him simply by proceeding with the closing, and he alleged that this amounted to a negligent misrepresentation made to induce him to accept the Loan. (*Id.*; R.pp. 75-82.; Segars Dep. I 75:9-12; 88:10-89:11; R.pp. 165:9-12; 178:10-179:11.)

The circuit court found that Segars knew he had been adversely affected by the failure of the OCRM baseline to move by March 16, 2005 at the latest because that is when his attorney, C.C. ("Cotton") Harness, III, Esquire ("Harness") moved to intervene in a case pending against DHEC in the Administrative Law Court of the State of South Carolina (the "ALC Case") that sought to move the baseline seaward.[6] In the

[6] Segars testified that sometime in 2005, he, along with a group of other owners, retained the services of Harness to intervene in a case pending against DHEC in the ALC Case that sought to move the baseline seaward. (Deposition of Thaddeus F. Segars dated January 19, 2011 ("Segars Dep. II") at 20:17-21:17; R.pp. 264:17-265:17.) On March 16, 2005, Harness filed a Motion to Intervene in that case alleging that Segars and other lot owners were adversely affected by DHEC's position refusing to relocate the OCRM baseline. (Mot. to Intervene in case number 04-ALJ07-0304-CC

ALC Case, Segars and others alleged that the failure of DHEC-OCRM to move the baseline negatively impacted the value of the Property. (Motion to Intervene in Case No. 04-ALJ07-0304-CC dated March 16, 2005; R.pp. 625-627.) The circuit court also noted that three other courts had determined that Segars "learned of the location of the OCRM Line in relation to his claimed inability to build on the property" in the 2004-2005 timeframe. (MSJ Order at 3-4; R.pp. 15-16.)[7] The circuit court then held as follows:

> Based on the evidence and deposition testimony in this matter and the previous findings of this Court, it is clear that, by March 16, 2005 at the latest, Segars had actual knowledge that the OCRM Line was not located where he thought at the time of purchase of the Property and that

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dated March 16, 2005 at p. 2; R.p. 626 (stating that "[t]he parties have standing and meet the grounds for intervention in that: . . . Each lot owner is adversely affected by the position taken by DHEC/OCRM and the Town of Hilton Head Island. Movement of the line allows for highest and best use of their land and failure to move the line materially affects use, enjoyment and value of these lots."); and Segars Dep. II at 22:11-18; R.p. 266:11-18.)

[7] More specifically, the circuit court noted the following cases brought by Segars: against his attorney (Civil Action No. 2009-CP-07-00381)(wherein the Court found Segars "'was on constructive notice of the [2003 Plat/Approved Survey] and its contents in October 2004 due to his participation as a party in a plat revocation lawsuit against the town of Hilton Head.'"); against the title company and the sellers (Civil Action No. 2008-CP-07-2791)(wherein the Court found that in late 2005, Segars learned of the Approved Survey/plat and that as a result only a house of 2,000 square feet could be built on lot 2); and against the title company individually (Civil Action No. 2011-CP-07-00931)(wherein the Court found that Segars discovered or should have discovered the facts at issue because they "were matters of public record at that time") (emphasis in original). (MSJ Order at p. 4-5; R.pp. 16-17.) *See also* Order Granting Defs. RSP and Gaughf's Mot. to Dismiss, filed May 20, 2009, Honorable Marvin H. Dukes, III, p. 4; R.p. 4; Order Granting Summ. J. to Defs., filed July 2, 2010, Honorable Carmen T. Mullen, p. 4-5; R.pp. 9-10; and Order Granting Def.'s Mot. to Dismiss, filed May 24, 2012, Honorable Carmen T. Mullen, p. 2; R.p. 12.) All of these lawsuits have been adjudicated and dismissed based on the expiration of the statute of limitations. Segars made no allegation against NBSC or the appraiser in any of the foregoing suits, and he has never made a claim against the appraiser.

> the actual location affected his ability to build a residence on the Property. This discovery, pursued with reasonable diligence would have led Segars to conclude that [the] appraisal might be in error, and thus, should have known a claim based on the appraisal might exist. I find that Defendants failed to file the counterclaims on the alleged erroneous appraisal within three years.

(MSJ Order at 5; R.p. 17.) Thus, because Segars failed to assert his claims until more than four years later, the circuit court properly found that his claims were barred by the statute of limitations (*Id.* at 3-4; R.pp. 15-16.), and this Court did not err in affirming the circuit court's ruling.[8]

Although even Segars admits in his Final Brief that he knew that the OCRM baseline had not been moved as of some time in 2005 (*see* Segars' Br. at p. 13), he asserts in his Petition that this knowledge is irrelevant and that he did not know he had a potential claim against NBSC based on the Appraisal until he obtained a copy of the appraiser's file in 2009 and learned that Linsday had relied upon the Approved Survey (i.e. the survey that showed the actual baseline and not the line marked "Future OCRM Baseline," which was the correct and approved survey of record). (*Id.* at p. 13-17.) As this Court previously held after reviewing the briefing and the record, this argument has no merit. As soon as Segars knew that the OCRM baseline had not moved to the location of the "Future OCRM Baseline," he had knowledge that the ability to build on the lot would be affected and that the value of the Property would be negatively

[8] In addition, an argument could also be made that Segars was on constructive notice as of the date of his loan and the closing on the purchase of the Property (i.e., June 9, 2004) as not only was the Approved Survey recorded and part of the public record, it was referenced on the General Warranty Deed conveying the Property to him. (General Warranty Deed dated May 24, 2004; R.pp. 738-740.) Segars acknowledged receipt of the OCRM-approved plat by acceptance of the deed. (General Warranty Deed at p. 2; R.p. 739; and Segars Dep. I at 50:9-22; R.p. 140:9-22.) *See also* Opinion at 2.

impacted as is clearly evidenced by his hiring an attorney to intervene in the ALC Case to make these exact allegations. While Segars may not have known exactly what the Appraiser relied on to arrive at his estimate,[9] a reasonable person would have investigated that upon learning that the value was less than what the Appraisal stated.[10] *See, e.g., Gibson v. Bank of America, N.A.*, 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009) (The limitations period of S.C. Code Ann. § 15-3-530(5) "begins to run when a person *could or should have known*, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto.") (internal citations omitted); *see also Grillo v. Speedrite Products, Inc.*, 340 S.C. 498, 503, 532 S.E.2d 1, 3 (Ct. App. 2000) (stating that the fact that an injured party may not comprehend the full extent of the damage is immaterial and that the

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[9] Ironically, Segars appears to be implying that he did not think he had a claim if the appraiser relied on the incorrect and unapproved survey, which showed the potential "Future Baseline," but that he believed he had a claim once he learned that the appraiser relied on the correct approved survey of public record. This is simply nonsensical.

[10] Furthermore, the Panel correctly affirmed the circuit court's ruling for additional reasons as set forth in NBSC's Final Brief. *See* Opinion at 2. Segars could not have relied upon the Appraisal as a matter of law because he was contractually committed to purchase the Property regardless of the amount of the Appraisal and because there is no question that the plat depicting the DHEC-OCRM approved baseline, i.e. the Approved Survey, was recorded and thus a matter of public record prior to his closing on the Property. (*See* NBSC's Br. p. 29.) Moreover, not only did Segars agree to a price and enter into the Contract to purchase the Property without seeing the Appraisal, he allowed his financing contingency and due diligence period to expire before applying for the Loan from NBSC. (Contract of Sale—Offer and Acceptance at ¶6; R.p. 731; and Segars Dep. I at 27:10-29:10; R.pp. 117:10-119:10.) Accordingly, Segars could not have relied upon the Appraisal in moving forward with the purchase of the Property and the Loan.

statute of limitations is triggered by knowledge of facts, diligently acquired, sufficient to put a person on notice of the existence of a claim).

In short, Segars was on actual notice (or, at a minimum, constructive notice) that something might not be right with the Appraisal, that some right had been invaded and that some claim against another party might exist by March 16, 2005 at the latest. Accordingly, this Court correctly ruled that the master did not err in granting summary judgment to NBSC on the basis the statute of limitations had expired.

B. This Court Correctly Held that Segars was Not Entitled to a Tolling of the Statute of Limitations for his Negligent Misrepresentation Counterclaim because the Statute Expired before NBSC Filed its Foreclosure Action.

In his Petition for Rehearing, Segars argues that this Court erred by ruling that he was not entitled to a tolling of the statute of limitations. *See* Petition at pp. 3-4. In support of this argument, he claims that this Court erred by failing to find that his counterclaims arose out of the same transaction and occurrence (i.e. the loan) as NBSC's foreclosure action and, thus, that his compulsory counterclaims were brought within the time allowed and in response to NBSC's action.[11] *See* Petition at 4.

As explained in NBSC's Final Brief, in cases where the statute of limitations has not already run, the majority view is that the institution of a plaintiff's suit tolls or suspends the running of the statute of limitations governing a compulsory counterclaim. § 1419 Compulsory Counterclaims—Statute of Limitations, 6 Fed. Prac. & Proc. Civ. § 1419 (3d ed.); *see, e.g., Burlington Indus. v. Milliken & Co.*, 690 F.2d 380, 389 (4th

[11] Regardless, Segars' argument regarding tolling of the statute of limitations based on his assertion that his claims were compulsory was not timely raised during NBSC's motion for summary judgment or in Segars' subsequent Rule 59(e) motion. As a result, that new theory was not preserved for appellate review. *See* NBSC's Br. at pp. 25-27.

Cir. 1982) (citation omitted)). However, where the statute has expired *before* the plaintiff's suit is initiated, the majority rule is that the statute is *not* tolled. *See* 6 Fed. Prac. & Proc. Civ. § 1419 (3d ed.) (stating that "tolling [is] immaterial [where] the limitations period [on defendants' compulsory counterclaim] expired before the plaintiff's suit is brought."); Ga. Code Ann. § 9-3-97 (extending the statute of limitations, "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 the commencement of such actions *shall not have expired* prior to filing of the main action.") (emphasis added); *Keckley v. Payton*, 157 F. Supp. 820, (N.D. W. Va. 1958) (stating that "the weight of authority holds that unless a set-off or counterclaim takes the form of recoupment, which is not the case in this tort action, the statute of limitations applies as much to a set-off or counterclaim as to an original action. See an annotation in 1 A.L.R.2d 634, for cases so holding from thirty-six states.").[12]

This Court correctly held that Segars had actual knowledge by March 16, 2005 at the latest that the OCRM line was not located where he thought it was at the time of purchase and that the line's location would affect his ability to build a residence on Lot

[12] Some states (although South Carolina is not one of them) have held that there can be an exception to this general rule where the counterclaim is one for recoupment. *See* NBSC's Final Br. at 23-25. However, Segars asserted claims against NBSC not as affirmative defenses, counterclaims of recoupment or set-off but rather as counterclaims for independent causes of action for negligent misrepresentation, breach of fiduciary duty and breach of contract accompanied by a fraudulent act, all of which sought the affirmative relief of money damages. (Ans. and Countercl. at ¶¶18, 26, 33, and "Wherefore" clause; R.pp. 78, 79, 81.) Therefore, even if South Carolina had adopted this exception, it would not apply in this case. *See* NBSC's Final Br. at 23-25 (for full discussion). And, in any event, Segars has not raised the issue of a claim of recoupment in his Petition, and therefore, it is not at issue here.

2. Accordingly, this Court properly found that Segars was not entitled to a tolling of the statute of limitations because the limitations period on his negligent misrepresentation counterclaim ran at the very latest in March of 2008, which was over one year prior to the filing of NBSC's foreclosure action in July of 2009.

CONCLUSION

This Court did not overlook or misapprehend any arguments or points made by Segars and correctly affirmed the circuit court's ruling in favor of NBSC, and thus, this Court should deny Segars' Petition for Rehearing. NBSC presents this Return, the briefing before the Court, and the Record as additional support as to why the Petition should be denied.

Respectfully submitted,

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Charleston, South Carolina
August 24, 2016

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge

Case No. 2009-CP-07-03201

Appellate Case No. 2014-001296

National Bank of South Carolina, ... 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, ... Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: RESPONDENT NATIONAL BANK OF SOUTH CAROLINA'S RETURN TO APPELLANT'S PETITION FOR REHEARING

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August 25, 2016

Donna Horn, Administrative Assistant

000090

The South Carolina Court of Appeals

National Bank of South Carolina, 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 Appellant.

Appellate Case No. 2014-001296

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

James E. Kittredge C.J.

Paul G. Short, Jr. J.

Paul D. Thomas J.

Columbia, South Carolina

FILED

September 26, 2016

cc:
Daniel Allen Saxon, Esquire
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Erika Jensene Karnaszewski Fedelini, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III

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S.C. SUPREME COURT

Case No.: 2009-CP-07-3201
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.

CERTIFICATE OF SERVICE

I, Thomas J. Finn, do hereby certify that on November 5, 2016, I served a true and accurate copy of the Petitioner's Appendix 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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