THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-in-Equity

Case No. 2010-CP-23-10103
Appellate Case No. 2014-000734

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

Of Whom Blalock Investments, LLC, Todd Smith, and Debra Masuga are Appellants,

v.

Peach REO, LLC, a Delaware limited liability company. . . . . .Respondent,

and

Blalock Investments, LLC, Todd Smith, and Debra Masuga. . . . . .Appellants,

v.

Capital Crossing Servicing Company, LLC. . . . . .Respondent.

INTIAL BRIEF OF APPELLANTS

November 28, 2016

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STATEMENT OF THE CASE

Respondent Peach REO, LLC ("Peach REO") brought the instant suit on October 28, 2015 in the Spartanburg County Court of Common Pleas seeking to foreclose on a commercial property located at 2634 Boiling Springs Road, Boiling Springs, South Carolina 29316 (the "Property"). (Compl.). In its amended pleadings filed November 17, 2015, Peach REO alleged three causes of action for foreclosure on a promissory note, collection on a guaranty, and for the appointment of a receiver. (Am. Compl.).

On January 6, 2016, Appellants Blalock Investments, LLC, Todd Smith, and Debra Masuga filed an answer, counterclaims, and third-party complaint against Respondent Capital Crossing Servicing Company, LLC ("Capital Crossing"). (Ans.) Appellants' claims relate to Respondents actions and representations concerning the loan. Specifically, Appellants alleged counterclaims of breach of contract, violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10, *et seq.* ("UTPA"), tortious interference with a contractual relationship, and failure to act in a commercially reasonable manner against Peach REO and the same causes of action (excluding breach of contract) as third-party claims against Capital Crossing. *Id.* at pp. 5-11.

On February 15, 2016, Respondents filed a motion to dismiss Appellants' counterclaims and third-party complaint. (Mot. dated Feb. 15, 2016). Appellants subsequently filed a memorandum in opposition to Respondents' motion. (Mem. dated May 23, 2016). On May 26,

2016, a hearing was held on Respondents' motion before the Honorable Gordon G. Cooper, Master-in-Equity of Spartanburg County. (Hearing Tr. dated May 26, 2016). On June 8, 2016, Judge Cooper granted Respondents' motion and dismissed Appellants' counterclaims and third-party complaint with prejudice. (Order dated June 8, 2016).

On June 15, 2016, Appellants filed a motion for an order amending judgement under Rules 52 and 59, SCRCP, and sought leave to amend their answer, counterclaim, and third-party complaint under Rule 15, SCRCP. (Mot. dated June 15, 2016). The trial judge issued an order denying Appellants' motions on July 29, 2016, which Appellants received on August 1, 2016. (Order dated August 1, 2016). On August 23, 2016, Appellants filed the instant notice of appeal regarding the June 8, 2016 order dismissing Appellants' counterclaims and third-party complaint and August 1, 2016 order denying's Appellants' motion to alter or amend judgment. (Notice of Appeal dated Aug. 23, 2016).

STATEMENT OF FACTS

On October 1, 2008, Blalock and National Bank of South Carolina ("NBSC") executed a $1.9 million promissory note (the "Note") secured by a mortgage on the Property (the "Mortgage"). (Am. Comp., p. 3, ¶ 13). The Note and Mortgage were personally guaranteed by Todd Smith and Debra Masuga, and the Note has a maturity date of October 1, 2013. (Am. Comp., Ex. A). NBSC subsequently sold the Note and Mortgage to Peach REO and, on September 28, 2011, Capital Crossing began servicing of the Note, Mortgage, and Commercial Security Agreement (collectively, the "Loan"). (Ans., p. 5, ¶ 46).

Pursuant to the terms of the Loan, Appellants are required to obtain Peach REO's written consent prior to conveyances or certain leases of the Property. (Am. Comp., Ex. A). Appellants allege that as the maturity date on the Note and Mortgage approached, Respondents exercised

their contractual discretion in bad faith and in a manner that was specifically intended to harm Appellants. (Ans., pp. 5-9). Beginning February 2013, Appellants presented Capital Crossing with multiple proposals from third parties seeking to purchase or lease some or all of the Property, which would have allowed Appellants to either (i) if leased, generate sufficient income from the property to make payments on the Note and Mortgage or (ii) if sold, repay the Note and Mortgage. (*Id.* at p. 6, ¶ 49). Over the next four months, from February 2013 until June 2013, Appellants repeatedly contacted Capital Crossing seeking consent to lease the property, convey the property, restructure the Note and Mortgage, or to deed the property to Respondents in lieu of foreclosure. (*Id.* at p. 7, ¶ 56). Capital Crossing, when it did respond, would ask for financial information indicating that it was considering the various proposals and expressed an interest in working with Appellants, which led Appellants to believe that they did not need to seek refinancing of the Note and Mortgage. (*Id.* at p. 6, ¶ 49; p. 6-7, ¶¶ 53, 56; p. 8, ¶ 59). Appellants' last payment on the Loan was made during February 2013. (*Id.* at p. 8, ¶ 58). On April 17, 2013, Capital Crossing informed Appellants that the Loan was 45 days past due. (*Id.* at p. 6, ¶ 50). Appellants replied that they could not generate any revenue from the Property due to the inability to lease the Property and requested that Capital Crossing respond to their request for a modification of the Loan. (*Id.*). One month later in May 2013, Capital Crossing ordered an appraisal of the Property performed by Joel Norwood and stated it would charge Appellants the costs of the appraisal as collection costs. (*Id.* at p. 6, ¶ 51). Capital Crossing lost this appraisal one year later and ordered a second appraisal, again at Appellants' expense. (*Id.*).

On May 6, 2013, Capital Crossing responded to Appellants' request for a modification and proposed to extend the term of the Loan by six months provided that Appellants bring the Loan current and pay $200,000.00 on the original maturity date of October 1, 2013. (*Id.* at p. 6,

¶ 52). Three days later on May 9, 2013, Appellants replied that the extension was not sufficient to permit them to lease the Property and was not feasible. (*Id.*). On May 20, 2013, Appellants offered to deed the Property to Capital Crossing in lieu of foreclosure to which Capital Crossing never responded other than requesting documents that had already been provided. (*Id.* at pp. 6-7, ¶ 53).

On July 19, 2013, Appellants alerted Capital Crossing that property taxes of $36,102.81 were due to Spartanburg County and, unless the taxes were paid, the Property would be sold at a sax sale in November 2013. (*Id.* at p. 7, ¶ 54). On October 1, 2013, the Loan matured with Appellants owing a balance of $1,756,168.73 on the Loan. (*Id.* at p. 7, ¶ 55).

On November 18, 2013, the Property was sold at a tax sale to Cley Equities, LLC ("Cley") who sent notice that the Property could be redeemed before February 19, 2013 for $62,633.39. (*Id.* at p. 7, ¶ 55). The notice stated the price of redemption would rise to $89,033.39 on March 18, 2014; $125,136.27 on May 19, 2014; and $139,963.47 on August 19, 2014. (*Id.*). Despite the steep escalation in price, Capital Crossing waited until November 17, 2014 to redeem the Property, a mere two days before the redemption rights expired. (*Id.*). Capital Crossing then added the full redemption price to the outstanding balance owed.

Following maturity, Respondents took no action for 25 months, allowing real property taxes to go unpaid and failing to respond to offers from third-parties to purchase or to lease the Property. (*Id.* at p. 8, ¶ 58). During that 25 months, Appellants repeatedly asked Capital Crossing to approve leases that would allow Appellants to generate revenue from the Property, to approve sales of the Property that would have mitigated Respondents' damages, to accept the Property in lieu of foreclosure, or to make some proposal or take any action on the loan. (*Id.* at p. 7, ¶ 56; p. 8, ¶ 59). Capital Crossing either ignored these requests or responded with requests

for information already in its possession. *Id.* Four months before the expiration of the statute of limitations, Peach REO filed the instant foreclosure suit on October 28, 2015. (Comp.).

ARGUMENT

There are two issues before this Court on appeal. Fundamental to both issues, however, is whether a lender owes any duty whatsoever to a debtor to act in good faith, to not tortiously interfere with the debtors' prospective contracts, to not deal deceptively with the debtor, or to mitigate its damages. As argued below, Respondents' position and the lower court's order place no limit on a lender's conduct in dealing with a debtor. Respondents and the trial court are mistaken. While a lender may be entitled to recover all that is owed, a lender is not entitled to exercise contractual discretion in bad faith, deal tortiously or deceptively with a debtor, or fail to take reasonable steps to mitigate its damages.

I. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANTS' REQUEST TO FILE AMENDED COUNTERCLAIMS AND THIRD-PARTY COMPLAINT

After the period for amending his pleading as a matter of course has passed, a party may "amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCP. "When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action...[t]he plaintiff in most cases should be given an opportunity to file and serve an amended complaint." *Spence v. Spence*, 369 S.C. 106, 128, 628 S.E.2d 869, 881 (2006). "Courts have wide latitude in amending pleadings." *Berry v. McLeod*, 328 S.C. 435, 449-50, 492 S.E.2d 794, 802 (S.C. App. 1997). "The trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Id.* "When a plaintiff is not given the opportunity to file and serve an amended complaint, but is left with no choice but to appeal after dismissal of her case with prejudice, an appellate court which

affirms the dismissal may modify the lower court's order to find the dismissal is without prejudice." *Spence*, 369 S.C. at 130, 628 S.E.2d at 882. The appellate court may in its discretion impose a reasonable period of time in which to amend the complaint "when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true well-pleaded complaint, may state a claim upon which relief may be granted." *Id.*

On June 15, 2016, Appellants moved for leave to amend their answer, counterclaims, and third-party complaint under Rule 15(a), SCRCP, and for an order to amending the judgement dismissing their counterclaims and third-party complaint under Rule 59(e). (*See* Mot. dated June 20, 2016). In addition to denying Appellants' motion for a reconsideration, the lower court denied Appellants' request for leave to amend its pleadings, citing that (i) Appellants' request to amend the pleadings could not be raised in a motion under Rule 59(e); (ii) Appellants' motion did not comply with Rule 15(a); (iii) Appellants' motion was unduly delayed; and (iv) Appellants' motion would be futile. (*See* Order dated Aug. 1, 2016, pp. 3-5). Because the lower court's ruling is controlled by a number of errors of law, the order denying Appellants' motion to amend should be overturned.

A. The South Carolina Rules of Civil Procedure Permit the Consideration of Concurrent Motions for Reconsideration and to Amend

The lower court erred when found that Appellants sought to amend their pleadings through their motion for reconsideration. The lower court's order appears to be premised upon a misunderstanding of the motions filed by Appellants and mistakenly indicates that Appellants filed a single motion pursuant to Rule 59(e), SCRCP, "which is the legal basis for the Debtors' Motion, is not the appropriate avenue for raising issues for the first time." (Order filed Aug. 1, 2016, p. 3, ¶ 2). However, Appellants did not file a single motion or move for leave to file amended pleadings pursuant to Rule 59(e). Instead, Appellants filed a motion for leave to file

amended pleadings under Rule 15(a) concurrently with a motion to alter or amend the court's order under Rule 59(e). (*See* Defs.' Mot. filed June 20, 2016). For example, page one of Appellants' motion requested "an order amending [the court's] judgment pursuant to Rules 52 and 59...and granting leave to amend their answer, counterclaim, and third-party complaint pursuant to Rule 15, SCRCP." *Id.*, p. 1 (emphasis added). Thus, Rule 59's prohibition of raising novel issues on reconsideration does not apply to Appellants' request to file amended pleadings because this request was brought as a separate motion under Rule 15(a).

Appellants joined their motions this way because the trial court's dismissal order must be amended to permit amendment of Appellants' counterclaim and third-party claim. Since the South Carolina Rules of Civil Procedure are based on the Federal Rules of Civil Procedure, this Court may look to federal law for guidance. *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) ("Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure."). Under Rule 15(a), Fed R. Civ. P., not only may accompanying motions under Rules 15(a) and 59(e) be considered together, a post-judgment motion to amend the pleadings must be preceded by a motion for reconsideration. *See Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006) ("There is one difference between a pre— and a post-judgment motion to amend: the district court may not grant the post-judgment motion unless the judgment is vacated pursuant to Rule 59(e) or Fed.R.Civ.P. 60(b)."); *Cooper v. Shumway*, 780 F.2d 27, 29 (10th Cir. 1985) ("[O]nce judgment is entered the filing of an amended complaint is not permissible until judgment is set aside or vacated pursuant to Fed. R. Civ. P. 59(e) or 60(b)."). "The rationale for the principle is unassailable: once judgment has entered, the case is a dead letter, and the [trial] court is without power to allow an amendment to the complaint

because there is no complaint left to amend." *Fisher v. Kadant, Inc.*, 589 F.3d 505, 509 (1st Cir. 2009).

There is no published opinion in South Carolina rejecting the notion that a motion to amend the pleadings may not be considered in conjunction with a motion for reconsideration. The only South Carolina case on point consists of a memorandum opinion where the South Carolina Supreme Court unanimously ruled that a litigant's failure to obtain a ruling on his motion to amend the pleadings that accompanied his motion for reconsideration was fatal to his appeal. *See Broom v. Ten State St., LLP*, Op. No. 2015-MO-057, at *2 (S.C. Sup. Ct. filed Sept. 22, 2015) ("We find the Court of Appeals erred in remanding the case for a ruling on respondent's Rule 15, SCRCP, motion because the issue on appeal—whether the trial judge erred in dismissing respondent's counterclaims without allowing respondent to amend his pleadings—was not preserved for review...Because respondent did not seek a ruling on the motion to amend, the Court of Appeals should not have addressed the motion, even if only for the sole purpose of remanding for a ruling."). Rather than rejecting the counterclaimant's Rule 15(a) motion as procedurally ineffective, as the lower court did in this matter, the South Carolina Supreme Court unanimously ruled that a ruling on both motions was required to adequately preserve the issue of amendment of the pleading. *Id.*

Next, the order declares that a request to amend pleadings post-judgment "cannot be done." (Order filed Aug. 1, 2016, p. 3, ¶ 3). Neither the Rules nor case law prohibit the filing of a motion to amend the pleadings after judgment. Instead, the text of Rule 15(b) specifically provides for amendment following judgment. *See* Rule 15(b), SCRCP ("[s]uch amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these

issues may be made upon motion of any party at any time, *even after judgment.*") (emphasis added).

Similarly, Rule 15(a) contains no limitation on the timing of its filing other than stating that "leave shall be freely given when justice so requires and does not prejudice any other party." South Carolina courts take a liberal stance to Rule 15(a) allowing amended pleadings at any time short of prejudice to the non-moving party. "[T]here is no limit for making a motion to amend...In fact, amendments may be offered at trial." *Potomac Leasing Co. v. Bone*, 294 S.C. 494, 497, 366 S.E.2d 26, 28 (Ct. App. 1988) (citing H. Lightsey, J. Flanagan, *South Carolina Civil Procedure*, at 288 (1985); J. Moore, *Moore's Federal Practice*, 15.08[4] at 15-76 (2d ed. 1987)).

Accordingly, there is no authority for the proposition that South Carolina courts cannot consider dual motions for a reconsideration and to amend under Rules 15(a) and 59(e), SCRCP, in the same stroke. To the contrary, such a procedure is desirable and, as explained by federal courts, necessary where there has already been a dismissal of the original pleading. The same principles apply in South Carolina civil practice as accompanying motions under Rules 15(a) and 59(e) promote the efficient disposition of the validity of a counterclaimant's causes of action. Moreover, the consolidation of motions streamlines the preservation of issues for appeal. When both motions are filed at the same time, the litigants and reviewing appellate courts can deal with both the dismissal and whether a litigant should have an opportunity to amend together rather than dealing with these two interrelated issues piecemeal.

B. Appellants' Motion to Amend Complies with the Requirements of Rule 15

The lower court erred when it held that Appellants' request to amend should be denied because (i) Appellants failed to file a motion to amend under Rule 15; and (ii) Appellants failed

to attach a proposed pleading to their motion. (Order filed Aug. 1, 2016, pp. 3-4, ¶¶ 4-5). As to the first point, the language of Appellants' filing makes clear that such a motion was made under Rule 15(a) SCRCP. *See supra*, at pp. 6-7 ; *see also* Defs.' Mot. filed June 20, 2016 (requesting "an order amending [the court's] judgment pursuant to Rules 52 and 59...and granting leave to amend their answer, counterclaim, and third-party complaint pursuant to Rule 15, SCRCP.") (emphasis added).

Further, the Rule contains no requirement for attaching an amended pleading to the motion and there is no South Carolina case imposing such a requirement. *See* Rule 15(a), SCRCP. Similarly, the corresponding federal rule does not require the attachment of a proposed pleading. *See, e.g., In re MCG LP*, 545 B.R. 74, 84 (Bankr. D. Del. 2016) ("Rule 15 does not require a proposed amended complaint to be submitted with the briefs supporting the motion requesting leave to amend.); *Gardin v. Hi-Tex, Inc.*, 3:14-CV-494, 2015 WL 127868, at *2 (W.D.N.C. Jan. 8, 2015) ("Defendant acknowledges that failing to attach the proposed complaint is not technically a violation of the Rules of Civil Procedure or the Local Rules."). Here, Appellants described the proposed amended allegations in their motion instead of filing a proposed amended complaint.

C. Appellants' Motion to Amend Is Not Unduly Delayed

The lower court erred in finding that Appellants' request to amend is "unduly delayed." Rule 15 "evinces a bias in favor" of granting amendments and "unless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial." *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988). Its only limitation as to the filing of amended pleadings is that "leave shall be freely given when justice so quires and does not prejudice any other party." Rule 15(a), SCRCP. As

this Court has held, "[u]nder this rule, as under Rule 15 of the Federal Rules of Civil Procedure, delay alone, regardless of its length, is not enough to bar a proposed amendment if the other party is not prejudiced." *Potomac*, 294 S.C. at 497, 366 S.E.2d at 28 (citing J. Moore, *Moore's Federal Practice*, 15.08[4] at 15-76 (2d ed. 1987) (internal quotation marks omitted).

In the instant case, the lower court based its ruling on the fact that six months elapsed between the filing of Appellants' initial counterclaims and request to file amended pleadings. (Order filed Aug. 1, 2016, p. 3, ¶ 5). The law is well-settled that the mere passage of time is not a sufficient basis to deny a motion to amend. Thus, the passage of six months has little bearing on whether Appellants' motion was unduly delayed.

Importantly, the order is devoid of any reference to prospective prejudice such as "a lack of notice that the new issue is to be tried and a lack of opportunity to refute it." *Collins Ent., Inc. v. White*, 363 S.C. 546, 563, 611 S.E.2d 262, 270 (Ct. App. 2005). The amended allegations contain no new issues. Even if the amended allegations did introduce new issues, the case has just begun. Excluding the instant motions on appeal and written discovery, no depositions, motion hearings, mediations, or other proceedings have taken place, and the case has not yet been set for trial. If Appellants' causes of action were added, Respondents would have ample opportunity to engage in the appropriate discovery and file any necessary motions. Given these facts, delay alone is insufficient because Respondents can point to no prejudice that would result from the inclusion of Appellants' additional causes of action. *See Forrester,* 295 S.C. at 507, 369 S.E.2d at 158 (Ct. App. 1988) ("In the absence of a proper reason, such as bad faith, undue delay, or prejudice, a denial of leave to amend is an abuse of discretion...It is the responsibility of a party opposing an amendment to establish prejudice."); *Johnson v. Oroweat Foods Co.,* 785 F.2d 503, 510 (4th Cir. 1986) ("The Fourth Circuit has held, as have a number of other circuits,

that delay alone is not sufficient reason to deny leave to amend. The delay must be accompanied by prejudice, bad faith, or futility.").

D. Appellants' Motion to Amend is Not Futile

The lower court erred when it found that Appellants' motion to amend should be barred as its amended counterclaims and third-party complaint would be futile. "Although leave to amend should generally be freely given, this court has held that it may be denied where the proposed amendment would be futile." *Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) *rev'd on other grounds*, 401 S.C. 1, 736 S.E.2d 242 (2012).

Appellants' new claims present "additional factual allegations [and] a different theory of recovery which may give rise to a claim upon which relief may be granted." *See Spence*, 368 S.C. at 131, 628 S.E.2d at 882. Appellants first seek to allege additional factual allegations supporting their original counterclaims and third-party claims. For example, Appellants would allege that Respondents failed to honestly communicate with Appellants regarding their intentions for the Loan following maturity, that Respondents misled Appellants into believing Respondents would accept a third-party's offer to purchase or lease the Property prior to maturity, that Respondents misled Appellants into believing Respondents were responsible for the payment of property taxes, and other allegations. Each of these allegations is sufficient to constitute (i) a breach of the contract and its implied covenants of good faith and fair dealing; (ii) an unfair or deceptive act in commerce capable of repetition; and (iii) interference with Appellants' efforts to enter into an agreement with a third party, all of which constitute compensable claims for relief.

Appellants additionally seek to allege a distinct class of fraud and negligent misrepresentation claims separate from their breach of contract, violations of the UTPA, tortious

interference with a contractual relationship, and failure to act in a commercially reasonable manner claims. (*See* Mot. dated June 15, 2016, pp. 2-3). For example, Respondents made fraudulent misrepresentations about their consideration of third-parties' offers to lease and/or purchase the Property. As part of their burden to demonstrate such claims at trial, Appellants would be required to prove separate factual allegations that Respondents intentionally made a material and fraudulent misrepresentation to Appellants who suffered damages as a result of their reliance thereupon. In contrast, none of these facts would be required to prove Appellants' breach of contract, and Appellants could not recover punitive damages under a mere breach of contract theory. Regardless whether the lower court believes that Appellants are likely to prevail on the merits of their fraud claims, Respondents' motion to dismiss is improper because the "facts alleged and inferences reasonably deducible therefrom would entitle the [claimants] to any relief on any theory of the case." *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987).

Furthermore, the order erroneously states that Appellants' proposed amendments would be futile as they advance "the same arguments that this Court has already considered and rejected...that Lender wrongfully refused to modify, settle, or accept less than the full balance owed on the subject loan." (*See* Order dated Aug. 1, 2016, p. 4, ¶ 6). This statement is premised upon two fundamental misstatements of law and fact: (i) that Appellants' additional claims are the same as those originally alleged and (ii) that Appellants' additional claims would also be subject to dismissal under *Cisson Const., Inc. v. Reynolds & Associates, Inc.*, 311 S.C. 499, 429 S.E.2d 847 (Ct. App. 1993). As to the first point, the order appears to distill all of Appellants' causes of action into a simple breach of contract action. To the contrary, the legal elements and evidentiary proof required for recovery at trial varies considerably between the breach of contract, UTPA violations, tortious interference, and failure to act in a commercial reasonably

manner claims alleged by Appellants and the fraud and negligent misrepresentation claims that Appellants seek to assert. For example, allegations that Appellants relied upon Respondents' fraudulent representations concerning a potential lessee rest upon an entirely separate legal theory and evidentiary burden apart from allegations that Respondents failed to honestly communicate their intentions for the Loan following maturity.

Further, Appellants are entitled to discovery on whether Respondents breached the implied covenant of good faith and fair dealing by misusing the terms of the Loan to deliberately injure Appellants. *See infra.*, at pp. 15-18. Similarly, Respondents' entitlement to foreclose on the full balance of the loan does not immunize them from distinct claims of fraud or negligent misrepresentation.

As to the second point, the lower court's reliance upon *Cisson*, 311 S.C. at 499, 429 S.E.2d at 847, is misplaced. As discussed extensively *infra.*, at pp. 16, 23-24, the *Cisson* decision does not stand for the proposition that a lender owes no duties to a debtor. Rather, *Cisson* found that under "the terms of the note and guaranty" at issue in that case, the debtor was precluded from asserting a duty to mitigate. This does not mean that a lender owes no duties in dealing with a debtor.

II. THE TRIAL COURT ERRED WHEN IT DISMISSED APPELLANTS' COUNTERCLAIMS AND THIRD-PARTY COMPLAINT

An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Id.* The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for

relief. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). Dismissal under Rule 12(b)(6) is improper if the facts alleged and inferences reasonably deducible from them, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory. *Doe*, 373 S.C. at 395, 645 S.E.2d at 247. Moreover, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Id.* at 395, 645 S.E.2d at 248. The trial court's grant of a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law. *Ashley River Props. I, LLC v. Ashley River Props. II, LLC*, 374 S.C. 271, 648 S.E.2d 295 (Ct. App. 2007).

On June 8, 2016, the lower court dismissed Appellants' counterclaims and third-party complaint which alleged claims of (i) breach of contract and the implied covenant of good faith and fair dealing, (ii) violations of the UTPA, (iii) tortious interference with contractual rights, and (iv) failure to act in a commercially reasonable manner. The lower court echoed its findings in its order denying Appellants' motion to alter or amend on August 1, 2016. For the reasons set forth below, the trial judge's order should be overturned.

A. The Lower Court Erred in Dismissing Appellants' Claims for Breach of Contract

In finding that Appellants' claims of breach of contract should be dismissed, the lower court concluded that Appellants' claims were based on the assertion that Respondents "should have allowed them to mitigate its damages or eliminate the amount owed by the Debtors following their default." (Order dated June 8, 2016, pp. 2-3, ¶5). However, this interpretation of Appellants' claims is mistaken. As alleged in their responsive pleadings, Appellants generally allege that Peach REO breached the contract and implied covenant of good faith and fair dealing by misusing various contractual provisions prior to maturity to inflict damages upon Appellants. (Ans., pp. 8-9, ¶ 59). Specifically, Appellants allege that Peach REO, through Capital Crossing

its servicing agent, refused to respond to third-parties' offers to lease or purchase the Property, refused to permit Appellants to sell or lease the Property, failed to timely communicate regarding offers to purchase or lease the Property, deliberately acted to prevent Appellants from selling or leasing the Property, and other allegations. *Id.*

Next, the lower court erred in finding that Appellants' breach of contract claims should be dismissed pursuant to *Cisson*, 311 S.C. at 499, 429 S.E.2d at 847. However, *Cisson* is easily distinguished from the matter at hand. In *Cisson*, the debtor argued that summary judgment in favor of a foreclosing lender for the full amount of the loan was improper because the lender refused a post-default settlement offer and subsequently delayed appointing a receiver and collecting rent, thereby failing to mitigate its damages. *Id.* at 502, 429 S.E.2d at 849. Noting that a lender could jeopardize its right to foreclose by accepting a post-default payment, the *Cisson* court held that the lender's refusal of the post-default settlement was justified. *Id.* at 503, 429 S.E.2d at 849. The court in *Cisson* did not, however, hold that a lender owes no duties to a debtor, is not subject to the obligations of good faith and fair dealing, can mislead a debtor, or act in bad faith with regard to its contractual duties.

Under South Carolina law, there exists in every contract an implied covenant of good faith and fair dealing. *Parker v. Byrd*, 309 S.C. 189, 420 S.E.2d 850, 853 (1992). Since its application in this state, South Carolina courts have consistently given credence to the underlying purpose of the doctrine of good faith and fair dealing by using it to protect the intentions of the parties to the contract. *Williams v. Riedman*, 339 S.C. 251, 273, 529 S.E.2d 28 (Ct. App.2000). "[T]erms which may clearly be implied from a consideration of the entire contract are as much a part thereof as though plainly written on its face." *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 367, 147 S.E.2d 481, 484 (1966). In the absence of an expression provision,

"the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made." *Id.*

The implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract. *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 597 S.E.2d 881, 884 (2004). Instead, the implied covenant of good faith and fair dealing should be viewed "as merely another term of the contract at issue." *Id.* at 472, 597 S.E.2d at 884 (internal citation omitted). "[T]he covenant has been utilized to allow redress for the bad faith performance of an agreement even when the defendant has not breached any express term." *Seidenberg v. Summit Bank*, 791 A.2d 1068, 1076 (N.J. Super. App. Div. 2002). "[T]he covenant has been held, in more recent cases, to permit inquiry into a party's exercise of discretion expressly granted by a contract's terms." *Id.*

The lower court's order states that Appellants' breach of contract claims should be dismissed because South Carolina does not recognize it as an independent cause of action and Appellants failed to allege any specific contractual provision that Respondents violated. (*See* Order dated June 8, 2016, p. 6, ¶ 26-p. 7, ¶ 30). However, the court's analysis is misguided. Under *RoTec*, "the implied covenant of good faith as merely another term of the contract at issue." 359 S.C. at 472, 597 S.E.2d at 884. Thus, the proper procedure is to assert a cause for "breach of contract, and [the counterclaim defendant's] liability may be based on a breach of any of the contract's terms, including the implied covenant of good faith, as long as the breach caused damage to [the counterclaimant]." *Carpenter v. Measter*, 2013-UP-066, 2013 WL 8482282, at *2 (S.C. Ct. App. filed Feb. 6, 2013) ((citing *Williams*, 339 S.C. at 274, 529 S.E.2d at 40) ("[T]he implied covenant of good faith and fair dealing has been viewed as *another contract*

term.") (emphasis added)). If litigants could not bring suit until the violation of an express contractual provision, the implied covenant of good faith and fair dealing would be entirely superfluous as the litigant could simply prosecute the violation of the express provision.

In accordance with prevailing law in South Carolina, Appellants have framed their breach of contract claim against Peach REO as breach of the covenant of good faith and fair dealing. Rather than alleging a breach of an express contractual provision, Appellants properly alleged that Peach REO violated the implied covenant of good faith and fair dealing, which is "another contract term." *Williams*, 339 S.C. at 273, 529 S.E.2d at 40. Just as if it were an express contractual provision, Peach REO was required to use its discretion under the contract in good faith in accordance with the intentions of the parties. *See Team Nursing Servs., Inc. v. Evangelical Lutheran Good Samaritan Soc.,* 433 F.3d 637, 641-42 (8th Cir. 2006) ("The implied covenant of good faith and fair dealing requires that no party to a contract unjustifiably hinder the other party's performance of the contract" and "prohibits a party from failing to perform for the purpose of thwarting the other party's rights under the contract."). Peach REO violated this implied contractual provision when it acted in bad faith by refusing to respond to third-parties' offers to lease or purchase the Property, refusing to permit Appellants to sell or lease the Property, failing to timely communicate regarding offers to purchase or lease the Property, deliberately acting to prevent Appellants from selling or leasing the Property, and taking other actions in contravention of the parties' intentions. (Ans., pp. 8-9, ¶ 59). At this stage, in the light most favorable to Appellants, it is clear that Appellants' counterclaims and third-party complaint state a valid claim for relief sufficient to defeat Respondents' motion under Rule 12(b)(6), SCRCP.

B. The Lower Court Erred in Dismissing Appellants' Claims for Violations of the UTPA, Tortious Inference with Contractual Rights, and Failure to Act in a Commercially Reasonable Manner

In addition to dismissing Appellants' claims of breach of contract against Peach REO, the court also dismissed Appellants' remaining claims for violations of the UTPA, tortious interference with contractual rights, and failure to act in a commercially reasonable manner. The lower court's order issued June 8, 2016 contains no mention of such claims other than a finding that "the Court has considered all other arguments in opposition to this Motion advanced by Debtors and found them to be without merit." (Order dated June 8, 2016, p. 7, ¶ 31). With respect to Appellants' remaining claims, the court's subsequent order on July 1, 2016 addresses only Appellants' UTPA claim, holding that the parties' conduct did not implicate any public interest beyond the parties to the contract and that no wrongdoing occurred with respect to any unfair or deceptive act. (Order dated Aug. 1, 2016, pp. 6-7, ¶¶ 12-13).

First, the lower court erred when it found that Appellants failed to allege facts sufficient to constitute a cause of action under the UTPA. Section 39-5-20 of the UTPA declares illegal any "[u]nfair method of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s). S.C. Code Ann. §§ 39-5-10 to -560.

Appellants have properly pleaded an unfair or deceptive act in the conduct of trade or commerce. The terms "unfair" and "deceptive" are not defined in the UTPA, however case law instructs that a deceptive act is any act which has a "tendency to deceive." *See deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct. App. 2000). "Even a

truthful statement may be deceptive if it has a capacity or tendency to deceive." *Wogan v. Kunze*, 366 S.C. 583, 606, 623 S.E.2d 107, 120 (Ct. App. 2005). An act is "unfair" when it is "offensive to public policy or when it is immoral, unethical, or oppressive." *Bessinger v. BI-LO, Inc.*, 366 S.C. 426, 432, 622 S.E.2d 564, 567 (Ct. App. 2005).

The trial court erroneously concluded that Appellants' UTPA claims were based upon an alleged breach of contract. This assertion is incorrect as Appellants' pleadings contain numerous allegations apart from a breach of the contract which, if proven at trial, would have a tendency to deceive and could be considered immoral, unethical, or oppressive. For example, Appellants assert that Respondents offered to deed the Property to Respondents in lieu of foreclosure. (*See* Ans., p. 6, ¶ 53). However, after first appearing to entertain the solution by requesting documentation, Respondents never responded to the offer, forcing Appellants to locate suitable lessees to generate revenue from the Property. *Id.* When suitable tenants or purchasers were found by Appellants, Respondents either failed to respond to these offers despite their time-sensitive nature or refused to consider the offers until Appellants would agree to enter into a pre-negotiation agreement waiving certain defenses and rights. (*See id.* at p. 7, ¶ 56). After failing to take any action with respect to the Property for thirty-four months, Respondents finally brought suit shortly before the expiration of the statute of limitations in an effort to maximize their potential damages against Appellants. (*See id.* at p. 8, ¶ 58). Any of these allegations, if proven at trial, have a tendency to deceive and could be considered immoral, unethical, or oppressive.

The alleged conduct of Respondents also affects the public interest because it is capable of repetition against both Appellants and members of the public. The unfair or deceptive act or practice must affect the public interest. *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 595

S.E.2d 461 (2004). An impact on the public interest may be shown if the acts or practices have the potential for repetition. *Id.* "[A]fter alleging and proving facts demonstrating the potential for repetition of the defendant's actions, the plaintiff has proven an adverse effect on the public interest. The plaintiff need not allege or prove anything further in relation to the public interest requirement." *Daisy Outdoor Advert. Co., Inc. v. Abbott*, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996). Here, Appellants have clearly alleged deceptive conduct that not only has the potential for repetition against other members of the public but conduct that was indeed repeated time and again against Appellants. Among other claims, Appellants allege that they "repeatedly" contacted Respondents to no avail and requested an extension because the maturity of the Loan prevented potential leasing of the Property; that Respondents continually failed to respond or refused to consider offers from third-parties to lease or purchase the Property unless Appellants waived certain rights and defenses; and that Respondents "[r]epeatedly" requested documentation already in their possession from Appellants before responding to time-sensitive offers to sell or lease the Property. (Ans., p. 6, ¶ 49; p. 7, ¶ 56; pp. 8-9, ¶ 59).

Contrary to the lower court's finding, South Carolina courts have readily found an impact on the public interest beyond the parties' individual transaction where the deceptive acts have the potential for repetition. *See, e.g., Dowd v. Imperial Chrysler-Plymouth, Inc.*, 298 S.C. 439, 381 S.E.2d 212 (Ct. App. 1989) (finding public interest affected by dealership's deceptive sales practices apart from the transaction with the plaintiff); *Barnes v. Jones Chevrolet Co.*, 292 S.C. 607, 358 S.E.2d 156 (Ct. App. 1987) (reversing trial court's decision that the defendant automotive repair shop alleged padding of the plaintiff's bill did not adversely affect the public and its exclusion of two similar instances of bill padding). Furthermore, Appellants are not required to allege that other public members of the public have been subjected to Respondents'

deceptive acts. Rather, especially given that the early stage of litigation, Appellants are required only to plead acts which, if proven at trial, would demonstrate the potential for repetition. *See Daisy*, 322 S.C. at 493, 473 S.E.2d at 49. Lastly, Appellants have sufficiently alleged that they have suffered damages as a result of Respondents' unfair and deceptive acts, and the lower court did not find otherwise.

Second, the lower court erred when it dismissed Appellants' claims for tortious interference with prospective contractual relationships. To recover on a cause of action for intentional interference with prospective contractual relations, the plaintiff must prove: (1) the defendant intentionally interfered with the plaintiff's potential contractual relations; (2) for an improper purpose or by improper methods; (3) causing injury to the plaintiff. *Crandall Corp. v. Navistar Int'l Transp.* Corp., 302 S.C. 265, 266, 395 S.E.2d 179 (1990). "As an alternative to establishing an improper purpose, the plaintiff may prove the defendant's method of interference was improper under the circumstances." *Id.* at 266, 395 S.E.2d at 180. "The plaintiff must actually demonstrate, at the outset, that he had a truly prospective (or potential) contract with a third party." *United Educ. Distrib., LLC v. Educational Testing Serv.*, 350 S.C. 7, 15, 564 S.E.2d 324, 329 (Ct. App. 2002). "This does not require plaintiff to prove the tort in his initial pleadings; rather, the allegations must present facts that give rise to some reasonable expectation of benefits from the alleged lost contracts." *Id.*

Here, Appellants allege that they lost numerous contracts with third-parties to lease or purchase the Property due to Respondents improper conduct. For example, Appellants allege that they received multiple offers from third-parties to purchase or lease all or part of the Property, which would have enabled Appellants to pay down some of the debt and reduced Respondents' damages. (Ans., p. 7, § 56). With full knowledge that each prospective contract

was time-sensitive and vital for Appellants' chances to avoid default, Respondents misled Appellants by initially indicating their desire to pursue proposals by requesting the necessary documentation but would invariably either refuse the offer unless Appellants entered into a pre-negotiation agreement waiving certain defenses or fail to respond entirely. *Id.* at p. 7, ¶ 56; p. 8-9, ¶ 59. After Respondents' dilatory tactics, each prospective lessee or purchaser lost interest and moved on. *Id.* Thus, Appellants sufficiently alleged numerous identifiable and non-speculative prospective contracts to sell or lease the Property. Appellants also alleged that they have suffered damages because each contract was lost due to Respondents' dilatory tactics which were improper under the circumstances.

C. To the Extent the Lower Court's Order Struck Appellants' Affirmative Defense of Failure to Mitigate, that Ruling was in Error

Although Respondents' motion to dismiss did not seek to strike Appellants' affirmative defense of failure to mitigate, the lower court's order contained the following language, "Lender...had no duty to mitigate these damages in any way." (Order dated June 8, 2016, p. 3, ¶ 6). It is not clear from the lower court's order whether Appellants' affirmative defense of failure to mitigate was struck by this language. To the extent it was, the lower court is in error and Appellants' should be allowed to prove their affirmative defense of failure to mitigate for the reasons discussed above. *See supra.* at 16.

The *Cisson* court also did not hold that a lender has no duty to mitigate, only that the alleged failure to mitigate in that case could not succeed because the supposed failure to mitigate was actions the lender had the right to take under the contract. In fact, the *Cisson* court expressly acknowledged that lenders owed have a duty to mitigate losses. 311 SC. 499, 502-4, 429 S.E.2d 847, 849-50. Whether a lender has reasonably mitigated its damages is a question of fact, which the court resolved against the debtor in the *Cisson* case. *Id.* Put simply, because the court found

against the debtor in *Cisson* does not mean the duty does not exist for lenders. A loan contract is subject to the same obligation to mitigate damages as any other agreement and South Carolina courts have found a duty to mitigate when considering a host of other contracts. *See, e.g., U.S. Rubber Co. v. White Tire Co.,* 231 S.C. 84, 97 S.E.2d 403 (1956) (finding duty to mitigate damages suffered in breach of lease); *Collins Entertainment*, 629 S.E.2d at 638 (duty to mitigate applies to Article 2 sales); *McClary v. Massey Ferguson, Inc.*, 291 S.C. 506, 354 S.E.2d 405 (Ct. App. 1987) (duty to mitigate applies to installment sales agreement).

CONCLUSION

For the reasons stated above, this Court should overturn the trial judge's ruling denying Appellants' motion to amend under Rule 15(a), SCRCP, and granting Respondents' motion to dismiss Appellants' counterclaims and third-party complaint pursuant to Rule 12(b)(6), SCRCP.

November 28, 2016

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-in-Equity

Case No. 2010-CP-23-10103
Appellate Case No. 2014-000734

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

Of Whom Blalock Investments, LLC, Todd Smith, and Debra Masuga are Appellants,

v.

Peach REO, LLC, a Delaware limited liability company. . . . . .Respondent,

and

Blalock Investments, LLC, Todd Smith, and Debra Masuga. . . . . .Appellants,

v.

Capital Crossing Servicing Company, LLC. . . . . .Respondent.

PROOF OF SERVICE

The undersigned certifies that he served Appellants' Initial Brief and Designation of Matter on the Respondents by depositing a copy of same in the United States Mail, postage prepaid, on this the 28th day of November, 2016, addressed to the attorney of record at the address listed below:

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November 28, 2016

The Honorable Jenny Abbott Kitchings
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Re: *Peach REO, LLC, a Delaware limited liability company vs. Blalock Investments, LLC; Todd Smith; Debra Masuga; Subway Real Estate, LLC and County of Spartanburg, a political subdivision of the State of South Carolina, et al*
C. A. No. 2015-CP-42-04448
Appellate Case No.: 2016-001764

Dear Ms. Kitchings:

Enclosed please find the original and one copy of appellants' initial brief and designation of matter to be included in the record on appeal in the above-referenced case. Also enclosed is a proof of service for the same. We would appreciate your filing the original and returning a clocked copy to us in the envelope provided.

Thank you for your assistance, and please let us know if we may provide any additional information to you at this time.

Sincerely,

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Enclosures
cc: Attorneys for Respondents:
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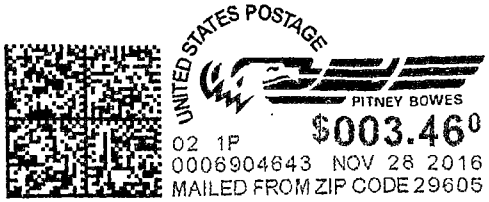

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