STATE OF SOUTH CAROLINA COUNTY OF OCONEE Federal National Mortgage Association, Plaintiff, v. John D. Dalen, Julie A. Dalen and Wawtockace Hills Property Owners Association, Defendant and Counterclaim Plaintiffs, v. Bank of America, N.A., successor by merger to BAC Home Loans Servicing, L.P. f/k/a Countrywide Home Loans Servicing, L.P., Counterclaim Defendant.	IN THE COURT OF COMMON PLEAS TENTH JUDICIAL CIRCUIT CASE NO.: 2011-CP-37-01056

ORDER GRANTING COUNTERCLAIM DEFENDANT'S
RENEWED MOTION FOR SUMMARY JUDGMENT

This matter came before the Court on March 23, 2016 for hearing on Counterclaim Defendant Bank of America, N.A.'s (hereinafter "Counterclaim Defendant" or "BANA"), Renewed Motion for Summary Judgment as to the counterclaims alleged by Defendants/Counterclaim Plaintiffs John D. Dalen and Julie A. Dalen (hereinafter "Defendants"). Present at the hearing were: Charles S. Gwynne, Jr. of Rogers Townsend & Thomas, PC attorneys for Plaintiff, Federal National Mortgage Association (hereinafter "Plaintiff"), William H. Sloan of Sloan Loan Firm, PA, attorney for Defendants, and Brian A. Calub of McGuireWoods LLP, attorneys for Counterclaim Defendant. Having reviewed all materials filed and submitted to the Court and having heard all oral arguments and materials

the court by the parties, the court finds good cause to grant BANA's Renewed Motion for Summary Judgment as to the counterclaims alleged by Defendants for the following reasons:

FINDINGS OF FACT

1. BANA filed a Complaint to foreclose on real property on or about October 31, 2011 following Defendants' default on their loan obligations.

2. On December 20, 2007, Defendant John Dalen executed and delivered to Quicken Loans Inc. ("Quicken Loans") a promissory note (the "Note") in the amount of $118,750.00. To secure the payment of the Note, both Defendants executed and delivered a mortgage (the "Mortgage") to Mortgage Electronic Registration Systems, Inc. ("MERS"), acting solely as nominee for Quicken Loans, its successors and assigns, covering real property located at 109 Wood Valley Dr., Westminster, South Carolina 29693 (the "Property").

3. Defendants have been in default of the loan obligations since the December 1, 2010 installment.

4. BANA was the holder of the Note, and thereby the Mortgage, at the time it filed the Complaint to foreclose.

5. After the Note was executed, it was indorsed to Countrywide Bank, FSB. The Note was subsequently endorsed in blank. Countywide Bank, FSB received the Note in its possession on January 15, 2008. Countrywide Bank, FSB became the holder of the Note, and thereby the Mortgage, as of that date. On April 27, 2009, Countrywide Bank, FSB converted to a national association and merged into BANA making BANA the noteholder as of April 27, 2009.

6. BANA was also the assignee of the Mortgage at the time the Complaint to foreclose was filed. By Assignment of Mortgage dated May 9, 2011, and recorded May 16, 2011

in the Oconee County real property records, MERS assigned the Mortgage to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP (the "Assignment").

7. BANA is the successor to BAC Home Loans Servicing, LP ("BACHLS") pursuant to a corporate merger. On July 1, 2011 by virtue of the corporate merger, BACHLS merged with and into BANA. BANA and its predecessors in interest held the Mortgage until it was assigned from BANA to Plaintiff on or about April 13, 2015.

8. The Assignment was proper.

9. Defendants were not parties to the Assignment.

10. During the pendency of this foreclosure action, BANA was in possession of the original Note and made the Note available for inspection by Defendants during discovery.

11. BANA was also the servicer of the loan at the time the Complaint was filed. Here the evidence establishes that BANA through its predecessor, BACHLS, serviced the loan before and at the point in time Defendants went into default on their mortgage loan payments.

12. BANA filed a Motion for Summary Judgment regarding the Counterclaims on December 4, 2013. BANA's Motion for Summary Judgment was denied on July 9, 2014. Thereafter, BANA moved to amend the December 9, 2014 Scheduling Order entered in this matter to permit the filing of further dispositive motions.

13. The parties executed a Consent Order Amending Scheduling Order that extended the motions deadline to March 9, 2016. Accordingly, BANA filed its Renewed Summary Judgment Motion on March 9, 2016.

CONCLUSIONS OF LAW

Summary judgment is warranted when no material facts are in contest and the movant is entitled to judgment as a matter of law. *McNaughten-McKay Elec. v. Andrich*, 324 S.C. 275,

279, 482 S.E.2d 564, 566 (Ct. App. 1997). "Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." *Baughman v. AT&T,* 306 S.C. 101, 115, 410 S.E.2d 537, 546 (1991). "With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility may be discharged by showing— that is, pointing out to the trial court—that there is an absence of evidence to support the nonmoving party's case." *Id.* (internal quotations and brackets omitted). "Once moving party carries its initial burden, opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a *genuine issue for trial.*" *Id.* (emphasis theirs). "Rule 56(e) specifically prohibits the nonmoving party from resting upon the mere allegations or denials of its pleadings." *Id.*

Moreover, the denial of a motion for summary judgment does not bar a party from making a later motion based on matters not involved in the decision on the first motion. If a first motion for summary judgment is unsuccessful, the court has the power to permit a second motion for summary judgment prior to trial. *Crosswell Enter., Inc. v. Arnold*, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct. App. 1992). Therefore, although BANA previously filed a motion for summary judgment that a prior judge denied, the renewed dispositive motion was permissible because BANA raised new issues and evidence that had not been previously addressed by the Court. *See Dorrell v. S.C. DOT*, 362 S.C. 312, 325, 605 S.E.2d 12, 18 (2003) (holding that the fact that a different trial judge previously denied a party's motion for summary judgment did not preclude that party from renewing the motion once new evidence came to light).

Here, BANA met its burden of demonstrating the absence of a genuine issue of material fact with regarding to the Counterclaims. For the following reasons, BANA should be granted summary judgment on all of Defendants' Counterclaims.

I. BANA has standing to pursue foreclosure.

It is undisputed that BANA possessed the Note endorsed first to Countywide and then in blank at the time the foreclosure Complaint was filed on October 31, 2011. The Note was property endorsed. Therefore, BANA had standing to foreclose as holder of the Note.

Under South Carolina law, the holder in possession of a mortgage-backed promissory note may enforce the mortgage without an additional showing that it is the recorded assignee of the mortgage. *See Bank of America, N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013) ("[T]he assignment of a note secured by a mortgage carries with it an assignment of the mortgage . . . ." (*quoting Hahn v. Smith*, 157 S.C. 157, 167, 154 S.E. 112, 115 (S.C. 1930)); *see also Scheider v. Deutsche Bank Nat. Trust Co.*, No. 13-1821, 2014 WL 2109810, at *4 (4th Cir. May 21, 2014) (holding that South Carolina law did not recognize a "split the note" theory because the assignment of a note secured by a mortgage necessarily carries with it the assignment of the mortgage).

Defendants' argument that *Draper* is inapplicable to the present matter because it was not decided until June 5, 2013 is unpersuasive. The *Draper* case recognized and confirmed existing South Carolina law regarding negotiable instruments. A note plainly constitutes a negotiable instruction and "the holder of the instrument" is the party entitled to enforce the instrument. *See* S.C. Code Ann. § 36-3-301. A holder is defined as "a person who is in possession of . . . an instrument . . . drawn, issued, transferred, or indorsed to him or to his order or to bearer or in blank." S.C. Code Ann. § 36-1-201(20). A note endorsed in blank, is bearer paper and

enforceable by whoever possesses it. Here, BANA was the holder of the Note at the time the Complaint was filed and was therefore entitled to enforce the Note.

BANA also had standing to foreclose as loan servicer. It is undisputed that BANA was the servicer of the loan at the time it commenced the foreclosure action. South Carolina law recognizes "that a loan servicer is a 'party in interest' and has standing by virtue of its pecuniary interest in collecting payments under the terms of the note and mortgage." *Bank of America, N.A. v. Draper*, 405 S.C. at 222, 746 S.E.2d at 482. Because a loan servicer is a party in interest, it has standing to initiate a mortgage foreclosure. *Id.* at 223, 746 S.E.2d at 482. There is no dispute that BANA was the loan servicer when it initiated foreclosure proceedings on October 31, 2011 and, therefore, had standing to foreclose.

Based upon the foregoing facts and law, Defendants did not show any valid challenges or defenses to BANA's authority to foreclose.

II. BANA is not a debt collector subject to the provisions of the Fair Debt Collection Practices Act ("FDCPA").

Defendants' first Counterclaim alleges BANA violated numerous provisions of the FDCPA. The FDCPA only applies to a "debt collector" and specifically excludes the consumer's creditors, mortgage servicing companies, and assignees of debt, provided that the debt was not in default when assigned. *See* 15 U.S.C. § 1692a(6)(A), (F); *see also Scott v. Wells Fargo Home Mortg., Inc.* 326 F. Supp. 2d 709, 717 (E.D. Va 2003) aff'd, 67 Fed. App'x 238 (4th Cir. 2003) (holding that "creditors are not liable under the FDCPA").

Here, Defendants fail to present any evidence demonstrating that BANA meets the definition of debt collector provided by 15 U.S.C. § 1692a(6). Moreover, the evidence presented in this case shows that BANA serviced the Defendants' mortgage loan through its predecessor in

interest, BACHLS, before the loan went into default on December 1, 2010. In the absence of any evidence establishing that the definition of debt collector provided by the FDCPA applies to BANA and because the undisputed evidence establishes that BANA acted as a mortgage servicing company, Defendants have failed to show that BANA can be treated as a debt collector subject to liability under the FDCPA. Based upon the foregoing facts and law, Defendants' claim under the FCDPA fails as a matter of law.

III. Defendants have not suffered any actual damages as a result of any alleged violation of the Real Estate Settlement Practice Act ("RESPA) by BANA.

Defendants' second Counterclaim alleges violations of RESPA based on BANA's alleged failure to inform Defendants of certain appointments, assignments and transfers of the mortgage and provide evidence of standing to foreclosure to Defendants. In order to state a claim under RESPA, the claimant must allege actual damages resulting from or related to the RESPA violation. *Bartley v. Wells Fargo Bank, N.A.*, 2015 U.S. Dist LEXIS 117746 (D.S.C. July 17, 2015)

Defendants did not suffer any actual damages as a result of any purported RESPA violation by BANA. Based upon the foregoing facts and law, Defendants' claim under RESPA fails as a matter of law.

IV. BANA did not make any false statement as required to maintain a claim for slander of title/petition to quiet title.

Defendants' third Counterclaim alleges that BANA knowingly and maliciously communicated in writing false statements affecting Defendants' title to the Property. BANA did not make any false statements. "[T]o maintain a claim for slander of title, the plaintiff must establish (1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff's title and (5) causes special damages (6) as a result of diminished value of the property

in the eyes of third parties." *Huff v. Jennings*, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (S.C. Ct. App. 1995). "A publication is derogatory to the plaintiff's title if the publication disparages or diminishes the quality, condition, or value of the property." *Id.* at 150, 459 S.E.2d at 891. In an action for slander of title, "the malice requirement may be satisfied by showing the publication was made in reckless or wanton disregard to the rights of another, or without legal justification." *Id.*

Moreover, "South Carolina has long recognized that relevant pleadings, even if defamatory, are absolutely privileged." *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 23, 567 S.E.2d 881, 893 (Ct. App. 2002). "The filing of a lis pendens enjoys the absolute privilege accorded to judicial proceedings. Because the recording of a lis pendens is specifically authorized by statute and has no existence separate and apart from the litigation of which it gives notice, the filing of a lis pendens CANNOT form the basis of an action for slander of title." *Id.* at 32, 567 S.E.2d at 897 (emphasis in original).

There is no evidence that any statement published by BANA reflecting its interest in the Property as Noteholder, Assignee of the Mortgage, or loan servicer was false. There is no evidence that BANA made any false statement regarding the status of the Property in foreclosure. By filing the Complaint to foreclose on the Property in October 2011 with the accompanying lis pendens, BANA did not publish a false statement. Based upon the foregoing facts and law, Defendants' claim for slander of title fails as a matter of law.

V. BANA did not engage in any unfair acts or practices affecting the public interest in violation of the South Carolina Unfair Trade Practices Act ("SCUTPA").

Defendants' fourth Counterclaim alleges that BANA violated the SCUPTA by instituting an "unlawful" foreclosure action based upon allegedly fraudulent documents and making

purportedly fraudulent misrepresentations regarding the true identity of the Lender and Mortgagee. Defendants did not establish that BANA engaged in any unfair acts or practices affecting the public interest or that they suffered monetary or property loss as a result.

A party seeking to recover under SCUTPA 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 [the] public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s).'" *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013) (quoting *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006)); S.C. CODE ANN. § 39-5-140(a) (2014). Because of the requirement that the act affect the public interest, conduct that affects only the parties cannot form the basis of a SCUTPA claim. *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 350, 565 S.E.2d 309, 315 (2002) (citing *Jeffries v. Phillips*, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994)); *see also Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 478–79, 351 S.E.2d 347, 349–50 (Ct. App. 1986) (emphasizing that act must affect the public interest). "[A] plaintiff bringing a private cause of action under SCUTPA must allege and prove that the defendant's actions adversely affected the public interest." *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 350, 565 S.E.2d 309, 315 (S.C. 2002).

The unsubstantiated conduct claimed by Defendants, the actions of BANA in instituting allegedly "unlawful" foreclosure action, only affects the parties to this action. In addition, to succeed on a claim under SCUTPA, a party must show that she "suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s).'" *Health Promotion Specialists*, 403 S.C. at 638, 743 S.E.2d at 816; S.C. CODE ANN. § 39-5-140(a). Defendants have not sustained a

monetary or property loss. Based upon the foregoing facts and law, Defendants' claim under the SCUTPA fails as a matter of law.

VI. Defendants are not entitled to the remedies pursuant to § 15-75-60 as there is no evidence of a criminal violation of § 16-17-735 by BANA.

Defendants' fifth Counterclaim alleges that BANA engaged in wrongful conduct pursuant to S.C. Code. Ann. § 15-75-60 by falsely asserting authority of law to foreclose and filing false and misleading documents in the public record. Defendants are not entitled to any of the remedies available pursuant to § 15-75-60 as there is no evidence of a violation of § 16-17-735 by BANA.

South Carolina Code. Ann. § 15-75-60 does not provide an affirmative claim for relief. Rather, S.C. Code. Ann § 15-75-60 provides the civil remedies available to a person who is injured by a "sham legal process involving a violation of Section 16-17-735." A violation of Section 16-17-735, a criminal statute, is a perquisite to seeking available civil remedies pursuant to Section 15-75-70. South Carolina Code Ann. § 16-17-735(B) provides that "it is unlawful for a person falsely to assert authority of state law in connection with a sham legal process."

Defendants did not establish that BANA violated § 16-17-735(B). Based upon the foregoing facts and law, Defendants' claim under the SCUTPA fails as a matter of law.

VI. BANA did not owe a duty of care to Defendants to maintain a claim for negligent supervision, and Defendants have failed to prove a critical element of their negligent supervision claim.

Defendants' sixth Counterclaim alleges that BANA had a duty to supervise its employees and/or agents who engaged in unlawful conduct that violated Defendants' property rights and proximately caused them injury. BANA did not owe a special duty of care as lender or servicer of Defendants' loan.

To recover in a negligence action, "a plaintiff must show: (1) the defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligence act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and plaintiff suffered an injury or damages. *Stalvey v. America Bank Holdings, Inc.*, 2013 U.S. Dist. LEXIS 161634 (D.S.C. November 13, 2013). "If the law does not recognize a particular duty, then the defendant is entitled to judgment as a matter of law." *Stalvey*, 2013 U.S. Dist. LEXIS 161634 at * 16.

BANA and Defendants entered into a simple lender-borrower transaction, which does not create a "special duty of care." Defendants have not presented any evidence establishing that BANA owed them an independent duty of care and Defendants' sixth Counterclaim fails as a matter of law on this basis.

Nevertheless, Defendants also fail to present any evidence to establish supervisory liability. Supervisory liability requires the court to focus specifically on what the employer knew or should have known about the specific conduct of the employee in question. The standard is whether the employer knew the offending employee was in the habit of misconducting himself in a matter dangerous to others. *Land v. Green Tree Servicing, LLC*, 2014 U.S. Dist. LEXIS 154879, *14-15 (D.S.C October 31, 2014) (dismissing negligent supervision claim based on employees sending threatening letters regarding foreclosure and driving by plaintiffs' property as there were no allegations that defendant knew or should have known its employees were committing misconduct or of the need for exercising control over the employees).

Defendants did not present any evidence that BANA knew or should have known that any of its employees were committing misconduct or that BANA knew or should have known of the necessity for exercising control over any specific employees. In fact, there is no evidence

that BANA's employee actually committed misconduct. Based upon the foregoing facts and law, Defendants' claim for negligent supervision fails as a matter of law.

VII. BANA did not make any fraudulent or false representations to Defendants.

Defendants' seventh Counterclaim alleges that BANA prepared a fraudulent Assignment using the MERS system and that BANA filed a false Assignment enabling BANA to perpetrate the supposed fraudulent foreclosure. Defendants also allege that BANA made untrue statements that it owned the Note and Mortgage and therefore had the ability to enforce them. BANA made no false representations concerning the Assignment or its ability to foreclose.

In order to plead fraud, plaintiff must state with sufficient particularity the circumstances constituting fraud. Rule 9(b), SCRCP. Under South Carolina law, to maintain an action for fraud, a plaintiff must demonstrate by clear and convincing evidence the following elements: (1) a representation; (2) its falsity; (3) its materiality; (4) knowledge of its falsity or a reckless disregard for its truth or falsity; (5) intent that the plaintiff act upon the representation; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Hendricks v. Hicks*, 374 S.C. 616, 620, 649 S.E.2d 151, 152-153 (S.C. Ct. App. 2007). "Failure to prove any one of these elements is fatal." *Id.* Furthermore, in order to plead fraud, a party must state with sufficient particularity the circumstances constituting fraud. S.C. R. Civ. P. 9(b) (2011).

The alleged representations regarding the Assignment or BANA's ability to enforce the Note and Mortgage were not false. The Assignment was neither improper nor defective. In loan transactions involving MERS, South Carolina courts have recognized MERS's authority to act as a nominee. *See, e.g., Kotsopoulos v. Mortgage Electronic Registration Systems, Inc.*, 2007 WL 905094 (D.S.C. March 22, 2007) (dismissing borrower's allegations that MERS had no legal or

equitable interest in the note and mortgage). BANA had ability to enforce the Note as both the noteholder and loan servicer as discussed more fully above. Defendants have fallen short of the necessary standard to state any claim for fraud against BANA. Based upon the foregoing facts and law, Defendants' claim for fraud and injurious falsehood fails as a matter of law.

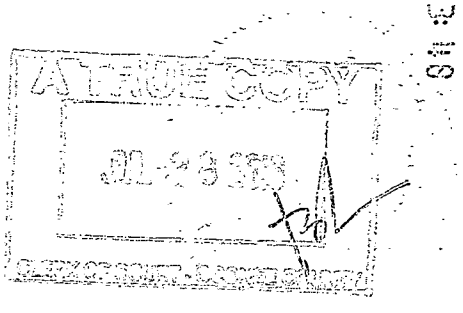
CONCLUSION

Because the foregoing findings of fact and conclusions of law, **IT IS THEREFORE ORDERED** that Counterclaim Defendant's Renewed Motion for Summary Judgment as to Defendants' Counterclaims is **GRANTED**, and the Counterclaims are hereby dismissed with prejudice.

~~Ellis B. Drew, Jr.~~ Steven C. Kirven
Master-in-Equity for Oconee County

Oconee, South Carolina

July 25, 2016



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LETTER TO THE APPELLATE COURT CLERK
FILING THE NOTICE OF APPEAL

November 14, 2016

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Federal National Mortgage Assoc. and Bank of America, N.A., Respondents v. John D. Dalen and Julie A. Dalen, Appellants Case No. 2011-CP-37-01056

Dear Ms. Kitchings:

Included with my notice of appeal were two orders. One was an order denying my motion to reconsider. I believe I should have included the Judge's order granting summary judgment which was the subject of the motion to reconsider. I called your office and I was told to just mail it in. Therefore it is included with this letter for filing.

Please call me (864 647 4705) if there are any problems that I need to tend to. Thanks!

Sincerely,

John D. Dalen
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Ph. 864 647 4705
Appearing Pro Se

Encl. Order granting summary judgment

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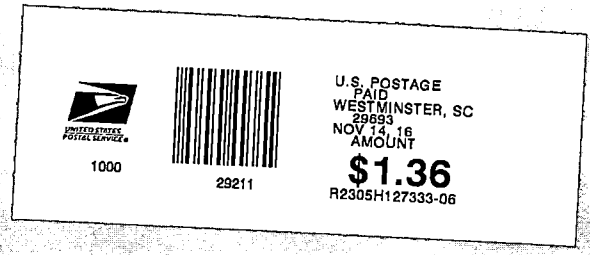

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