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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Marvin H. Dukes, III, Circuit Court Judge

Case No. 2009-CP-07-03201

Appellate Case No. 2016-002220

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, Petitioner.

**RESPONDENT NATIONAL BANK OF SOUTH CAROLINA'S RETURN IN
OPPOSITION TO THADDEUS F. SEGARS' PETITION FOR WRIT OF CERTIORARI**

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INTRODUCTION

In Opinion No. 2016-UP-325 (S.C. Ct. App. filed June 22, 2016) (Shearouse Adv. Sh. No. 25 at 5) (the "Opinion"), a Panel of the South Carolina Court of Appeals affirmed the judgment below granting Respondent National Bank of South Carolina's ("NBSC") motion for summary judgment. Petitioner Thaddeus Segars ("Segars" or "Petitioner") now petitions this Court for a writ of certiorari (the "Certiorari Petition"). As shown herein, Segars has failed to offer this Court any grounds that warrant certiorari as provided by Rule 242(b) of the South Carolina Appellate Court Rules. There is no Court of Appeals dissent, no constitutional issue, no federal question, no novel question of law, and no other "special and important" reasons that would support granting certiorari. Instead, Segars seeks for this Court to simply revisit the same statute of limitations issues accurately decided by the Court of Appeals. Accordingly, Segars' Certiorari Petition should be denied.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

- I. Did the Court of Appeals correctly affirm the trial 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?
- II. Did the Court of Appeals correctly affirm the trial court's ruling 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?

COUNTER-STATEMENT OF THE CASE

Segars' Certiorari Petition 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 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

¹ For ease of reference, NBSC will maintain the document abbreviations and record citations used in NBSC's Final Brief. (*See* App. 21-63.)

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 were not at issue in his 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 of the Court of Appeals at 2; App. 65.

baseline³ 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.)

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.)

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 and generally prohibits construction seaward of the line.

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 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.)

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).

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, the Court of Appeals issued its Opinion affirming the MSJ Order on or about June 22, 2016. (*See* Opinion of the Court of Appeals; App. 64-66.) The Court of Appeals 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. (Opinion at 3; App. 66.) Accordingly, the Court of Appeals held that the statute of limitations for his counterclaim for negligent misrepresentation expired on March 16, 2008. *Id.* The Court of Appeals 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 a Petition for Rehearing. (*See* Appellant's Pet. for Reh'g; App. 67-74.) 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, the

Court of Appeals 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, and it filed its Return on August 25, 2016. (*See Resp.'t Return*; App. 75-90.) On September 26, 2016, the Court of Appeals issued and filed an Order denying Segars' Petition for Rehearing (*See Order Denying Pet. for Reh'g*; App. 91-92.)

On October 31, 2016, Segars filed an untimely Motion to File Petition for Certiorari Out of Time and a Petition for Writ of Certiorari with this Court. On November 10, 2016, NBSC filed its Response opposing Petitioner's Motion to File Petition for Certiorari Out of Time. On December 19, 2016, this Court issued an order allowing Segars to file his Petition and providing NBSC thirty days to submit its Return, which NBSC now timely files.

ARGUMENT

The South Carolina Appellate Court Rules provide that a "writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR; *see also State v. Lyles*, 381 S.C. 442, 443, 673 S.E.2d 811, 812 (2009) (holding that the Court will grant certiorari "only where special reasons justify the exercise of that power.") (citations omitted). Typically, the granting of certiorari is limited to cases where (1) there are novel questions of law; (2) there is a dissent in the decision of the Court of Appeals; (3) the decision by the Court of Appeals is in conflict with a prior decision of this Court; (4) substantial constitutional issues are directly involved; or (5) a federal question is included, and the decision by the Court of Appeals conflicts with a decision of the Supreme Court of the United States. Rule 242(b), SCACR; *see also Lyles*, 381 S.C. at 444 n. 2, 673 S.E.2d at 812 n. 2. As will be discussed below, none of the grounds for granting certiorari are present in this case. Moreover, Segars' arguments lack any merit, and

the Court of Appeals properly rejected them. Additionally, portions of Segars' argument were not preserved for appeal. Accordingly, Segars' Certiorari Petition should be denied.

I. NO NOVEL ISSUES OF LAW ARE AT ISSUE IN THIS APPEAL.

In his Certiorari Petition, Segars appears to claim that novel issues of law justify a writ of certiorari in this case. (*See* Segars' Pet. for Writ of Cert. at 2 (asserting that two issues purportedly justify a writ of certiorari because they are "novel issues of law . . . which have not been addressed within the Court of Appeals or Circuit Court herein, or under South Carolina law.")). The two allegedly novel issues are: (1) that Segars' 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 (*id.*); and (2) that Segars' negligent misrepresentation counterclaim was a compulsory/permissive counterclaim that arose out of NBSC's foreclosure action and was timely filed in response to that action. (*Id.*)

Neither of Segars' issues is novel. Both were squarely addressed and rejected by the lower court as well as the Court of Appeals. (*See* MSJ Order at 1-6; R.pp. 13-18; *see also* Opinion of the Court of Appeals; App. 64-66.) In fact, the introductory paragraph of the Court of Appeals' 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 2; App. 65.) This is exactly the same description of the issues that Segars himself provided in his Petition for Rehearing and again in his Petition for Writ of Certiorari. (Pet. for

Reh'g 2-4; App. 70-72⁵; *see also* Segars' Pet. for Writ of Cert. at 2.) Segars also fails to identify any sub-points related to these issues that are "novel issues of law . . . which have not been addressed within the opinions of the Court of Appeals" and again seeks to retry these issues which have already been reviewed and addressed by the Court of Appeals.⁶

Additionally, the first issue relating to the triggering of the statute of limitations has been addressed by many South Carolina cases and is in no way novel. The Court of Appeals' ruling on this issue is consistent with longstanding South Carolina precedent regarding the statute of limitations for an action based upon a contract, obligation, or liability, and tort claims as set forth in S.C. Code Ann. §§15-3-530(1) and (5). *See infra* § II(A). The second issue related to tolling, while not directly addressed in South Carolina case law, is basic black letter law, and Segars cites no law from any jurisdiction that would support his position in this case unless he had brought a claim for recoupment, which he did not. *See infra* § II(B).

Segars does not argue that any of the other grounds for granting certiorari apply in this case, and none are applicable. Accordingly, because there is no novel issue of law (nor any of the other grounds for granting a writ of certiorari), Segars' Petition for Writ of Certiorari should be denied.

⁵ The Appendix includes two pages labeled "000070"; this reference refers to the second page labeled "000070."

⁶ *See infra* § III.

II. THE TWO ISSUES SEGARS RAISES WERE PROPERLY DECIDED BY THE COURT OF APPEALS.

A. The Court of Appeals 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, the Court of Appeals 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. (Opinion at 3; App. 66.) Segars, however, again argues in his Certiorari Petition that his knowledge of an issue with the OCRM line could not have put him on notice that NBSC made a negligent misrepresentation. (See Segars' Pet. for Writ of Cert. at 10; 12-14.) As explained below and in the Court of Appeals' Opinion, Segars' argument has no merit and, thus, was properly rejected by the Court of Appeals.

Segars' counterclaim for negligent misrepresentation against NBSC relates to the Appraisal performed by Lindsay, whom NBSC hired to perform an appraisal for the bank. More specifically, Segars alleges that Lindsay 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 Lindsay 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.⁷ In the 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.)⁸ The circuit court then held as follows:

⁷ 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 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.)

⁸ 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

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 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 the Court of Appeals did not err in affirming the circuit court's ruling.⁹

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 14; App. 14), he asserts in his Certiorari Petition that this knowledge is irrelevant and that he did not know he had a potential

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.

⁹ 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; App. 66.

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 13-17; App. 13-17.) As the Court of Appeals 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 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,¹⁰ a reasonable person would have investigated that upon learning that the value was less than what the Appraisal stated.¹¹ *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

¹⁰ 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.

¹¹ Furthermore, the Panel correctly affirmed the circuit court's ruling for additional reasons as set forth in NBSC's Final Brief. (Opinion at 2; App. 66.) 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; App. 56.) 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.

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 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, the Court of Appeals correctly ruled that the circuit court did not err in granting summary judgment to NBSC on the basis the statute of limitations had expired.

B. The Court of Appeals 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 Certiorari Petition, Segars argues that the Court of Appeals erred by ruling that he was not entitled to a tolling of the statute of limitations. (*See Segars' Pet. for Writ of Cert. at 7-8.*) In support of this argument, he claims that the Court of Appeals 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. (*See Segars' Pet. for Writ of Cert at 7-10.*)

As explained in NBSC's Final Brief (pp. 21-22; App. 48-49), in cases where the statute of limitations has *not* already run, the general 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 Cir. 1982) ("[T]he institution of plaintiff's suit tolls or suspends the running of the statute of limitations governing a compulsory counterclaim.")). However, where the statute has expired *before* the plaintiff's suit is initiated, as is the case here, the general 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.").

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; App. 50-52. 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; App. 50-52 (for full discussion).

The Court of Appeals 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 2. Because the statute of limitations on Segars' counterclaim expired prior to the filing of NBSC's foreclosure action, the statute of limitations cannot be tolled or suspended. Moreover, Segars does not cite a case or statute from any jurisdiction, and NBSC is not aware of any, that would allow the statute of limitations to be tolled for an affirmative claim for relief (and not for set-off or recoupment) when the statute has already run prior to the filing of the original suit. Accordingly, the Court of Appeals 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.

III. SEGARS' THEORIES REGARDING TOLLING OR WAIVER OF THE STATUTE OF LIMITATIONS BASED ON RECOUPMENT WERE NOT TIMELY RAISED AND THUS ARE NOT PRESERVED FOR APPELLATE REVIEW.

Under Rule 242(d)(2), SCACR, "[o]nly those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." See *Mazloom v. Mazloom*, 392 S.C. 403, 709

S.E.2d 661 (2011); *Kleckley v. Nw. Nat. Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000). In his Certiorari Petition, Segars argues additional grounds in support of his contention that the circuit court erred in granting summary judgment to NBSC related to tolling or waiver of the statute of limitations based on his assertion that his counterclaims were claims for recoupment. (See Segars' Pet. for Writ of Cert. at 7-10.) However, Segars did not raise those issues in his Petition for Rehearing. (See Appellant's Pet. for Reh'g; App. 67-74.) Moreover, even if Segars has properly raised this issue, his claims for affirmative relief in the form of counterclaims for monetary damages are not claims of recoupment. See, e.g., *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.") In addition, 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 raised during NBSC's motion for summary judgment or in Segars' subsequent Rule 59(e) motion. As a result, those arguments were not properly raised or preserved for appellate review. (See NBSC's Final Brief at pp. 25-27; App. 52-54.)

CONCLUSION

For the foregoing reasons, the Court of Appeals' decision in this appeal was correctly decided, and Segars has not established any of the grounds that would justify granting a writ of certiorari. Accordingly, this Court should deny Segars' Petition for Writ of Certiorari.

Respectfully submitted,

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January 13, 2016

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SC Court of Appeals

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.

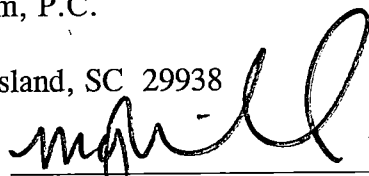
PROOF OF SERVICE

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 IN OPPOSITION TO
PETITIONERS'S PETITION FOR WRIT OF
CERTIORARI

Counsel Served: Thomas J. Finn, Esq.
Finn Law Firm, P.C.
PO Box 6003
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January 13, 2017


Grace Namill, Administrative Assistant

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JAN 17 2017
SC Court of Appeals

January 13, 2017

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: 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
Case No. 2009-CP-07-3201
Court of Appeals Case No. 2014-001296
NMRS File No.: 00325/02009

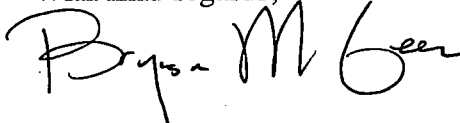
Dear Ms. Kitchings:

Enclosed for filing in the above matter are the original and seven copies of Respondent National Bank of South Carolina's Return in Opposition to Petitioner's Petition for Writ of Certiorari. Please return a clocked in copy to us via the self-addressed, postage paid envelope provided.

By copy of this letter, we are serving this Response on counsel for Petitioner.

Thank you for your assistance.

With kind regards,



Bryson M. Geer

BMG:ghamill
Enclosure

cc: Thomas J. Finn, Esquire (w/enclosure)

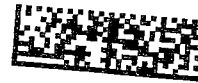
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SC Court of Appeals

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