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| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF BEAUFORT | ) | |
| CIT Bank, N.A. (formerly known as OneWest Bank, N.A.), | ) | Civil Action No. 2012-CP-07-0442 |
| Plaintiff, | ) | |
| vs. | ) | **MASTER'S ORDER GRANTING PLAINTIFF'S SUMMARY JUDGMENT MOTION, DENYING DEFENDANT ROMAR C. FRAZIER'S MOTION FOR SUMMARY JUDGMENT AND JUDGMENT OF FORECLOSURE AND SALE** |
| Romar C. Frazier, Darlene Ellington, Lisa Coakley, Keith Frazier a/k/a Keith W. Frazier, Joe W. Frazier, The United States of America acting by and through its agency the Department of Housing and Urban Development, Ford Motor Credit Company, and The South Carolina Department of Revenue, | ) | (Deficiency Waived) |
| Defendants. | ) | |



This matter came before the Court at 1:30 p.m. on Wednesday, April 12, 2017, for a hearing on: (1) a Motion for Summary Judgment filed by Plaintiff CIT Bank, N.A. (formerly known as OneWest Bank, N.A.) ("Plaintiff") as to its claims against Defendants and the counterclaims asserted against it by Defendant Romar C. Frazier ("Defendant Frazier"); and (2) Defendant Frazier's Motion for Summary Judgment as to his counterclaims and Plaintiff's claims against him. Counsel for Plaintiff and Defendant Frazier were present at the hearing, as was Defendant Keith Frazier a/k/a Keith W. Frazier, who is unrepresented and in default. After a review of this matter and hearing arguments from counsel for Plaintiff and Defendant Frazier, Plaintiff's Motion for Summary Judgment is **GRANTED** in full and Defendant Frazier's Motion for Summary Judgment is **DENIED** in full for the reasons set forth below:[1]

[1] Prior to the hearing, Defendant Frazier also filed written objections to two affidavits submitted by Plaintiff in support of its Motion for Summary Judgment. The Court denies these objections for the reasons set forth herein.

## FACTS[2]

1. On or about September 27, 2004, Rebecca F. Hall made, executed and delivered a certain Adjustable Rate Home Equity Conversion Note ("Note") in the principal sum of $240,000.00, payable in monthly installments of principal and interest to Safeway Mortgage, Inc. ("Safeway").

2. In order to secure the payment of the Note according to the terms and conditions thereof, Rebecca Hall made, executed and delivered unto SafeWay a certain real estate Mortgage covering certain real property in Beaufort County, which is the same as that described in the Amended Complaint as "the Property."

3. The Mortgage from Rebecca Hall to Safeway was signed, witnessed and probated September 27, 2004; thereafter, the Mortgage was recorded in the Office of the RMC/ROD for Beaufort County on October 6, 2004, in Mortgage Book 2032 at Page 361.

4. The Property is a portion of the property conveyed to Rebecca Hall and Julia Frazier by deed of Martha Linen, dated October 13, 1980, and recorded October 13, 1980, in Book 308 at Page 1016.

5. Subsequently, Julia Frazier died and a court order filed May 4, 1989, in Case 88-CP-07-1737, quieted title to a 10-acre parcel in Rebecca Hall, Darlene Ellington, Lisa Coakley, Keith Frazier, and Joe W. Frazier. Pursuant to the court order, their respective interests in the 10-acre parcel were as follows:

Rebecca Hall 50%

[2] Since this order addresses cross-motions for summary judgment, and the Court is granting Plaintiff's Motion for Summary Judgment, the evidence is viewed in the light most favorable to the non-moving party, Defendant Frazier.

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| Darlene Ellington | 12.5% |
| Lisa Coakley | 12.5% |
| Keith Frazier | 12.5% |
| Joe W. Frazier | 12.5% |

6. The Property is a portion of the 10-acre parcel.

7. A plat was prepared for Rebecca Hall, Darlene Ellington, Keith N. Frazier, Joe W. Frazier, and Lisa Coakley by David S. Youmans, R.L.S. dated October 19, 1993, and recorded in the Office of the Beaufort County Register of Deeds in Plat Book 48 at Page 60. This plat subdivided the 10-acre parcel into numerous parcels. On this plat, in the middle of the parcel shown as containing 4.78 acres, and immediately above where it states "4.78 acres," it says "Ellington, Frazier, Frazier, and Coakley." On that same plat, immediately above the designation of a parcel containing 3.434 acres, the name "Rebecca Hall" is listed. The undisputed evidence set forth in the moving papers and below shows the parties intended and agreed Rebecca Hall would be the sole owner of not only the 3.434-acre parcel, but also the .346-acre parcel, and the 1.00-acre parcel (the Property) shown thereon.

8. On November 1, 1993, Rebecca Hall conveyed 4.7 acres of the 10-acre parcel to Darlene Ellington, Lisa Coakley, Keith Frazier, and Joe W. Frazier by deed recorded December 13, 1993, in Book 671 at Page 1170.

9. Through the following deeds executed and recorded on December 13, 1993 (the same day as the deed referenced in the previous paragraph) Lisa Coakley, Keith Frazier, and Joe W. Frazier conveyed 3.434 acres and .346 acres of the 10-acre parcel to Rebecca Hall (collectively, "the 1993 Deeds"):

- Deed dated November 1, 1993, from Joe W. Frazier to Rebecca Hall recorded December 13, 1993, in Book 671 at Page 1178 ("Joe Frazier 1993 Deed").

- Deed dated December 4, 1993, from Darlene Ellington and Keith Frazier recorded December 13, 1993, in Book 671 at Page 1174 ("Ellington and Frazier 1993 Deed").
- Deed dated December 5, 1993, from Lisa Coakley to Rebecca Hall recorded December 13, 1993, in Book 671 at Page 1182 ("Coakley 1993 Deed").

10. The legal descriptions in the 1993 Deeds describe tracts containing 3.434 acres and .346 acres, portions of the 10-acre parcel.

11. Through inadvertence, mutual mistake, or clerical error, the legal descriptions in the 1993 Deeds omitted the Property.

12. To correct of record the scrivener's error, inadvertence, mutual mistake, or clerical error contained in the 1993 Deeds, and to reflect the true intent of the parties, the following corrective deeds were executed and recorded in 2007 (collectively, "the 2007 Corrective Deeds"):

- Joe Frazier executed a corrective deed to Rebecca Hall recorded October 25, 2007, in Book 2641 at Page 2520 ("Joe Frazier 2007 Corrective Deed"), which referenced the error in the Joe Frazier 1993 Deed and included the Property within the legal description.

- Lisa Coakley executed a corrective deed to Rebecca Hall recorded October 25, 2007, in Book 2641 at Page 2514 ("Coakley 2007 Corrective Deed"), which referenced the error in the Coakley 1993 Deed and included the Property within the legal description.

- Darlene Ellington and Keith Frazier executed a corrective deed to Rebecca Hall recorded October 25, 2007, in Book 2641 at Page 2517 ("Ellington and Frazier 2007 Corrective Deed"), which referenced the error in the Ellington and Frazier 1993 Deed and included the Property within the legal description.

13. Each of the 2007 Corrective Deeds confirms the mistakes made in the 1993 Deeds. The recitals in the 2007 Corrective Deeds state as follows:

> WHEREAS, it was the intent and the desire of the Grantors to convey and transfer to Rebecca Hall **3.434 acres, .346 acre and 1.00 acre** as shown on the plat recorded at Plat Book 90, Page 3; and
>
> WHEREAS, due to an error in the description they only transferred 3.434 acres and .346 acre, respectively.
>
> NOW, THEREFORE, this deed is to correct said error. (emphasis added)[3]

14. Lisa Coakley provided an Affidavit showing the mutual mistake of the parties.

15. Lisa Coakley, Joe Frazier, Darlene Ellington, and Keith Frazier attested to the mutual mistake in the 1993 Deeds, either through affidavit, deposition testimony, and/or the 2007 Corrective Deeds.

16. The Mortgage given by Rebecca Hall to Safeway was subsequently assigned to Financial Freedom Senior Funding Corporation by assignment dated September 27, 2004, and recorded October 6, 2004, in Book 2032 at Page 370. The Mortgage was subsequently assigned to Mortgage Electronic Registration Systems, Inc., as nominee for Financial Freedom Acquisition LLC, its successors and assigns (MIN #100854900070272253) dated September 25, 2009, and recorded October 2, 2009, in Book 2894 at Page 2451. The Mortgage was then assigned to the Plaintiff herein by assignment dated October 3, 2011, and recorded October 19, 2011, in Book 3091 at Page 3163.

17. In the Mortgage, Rebecca Hall covenanted she had good title to the Property and warranted to defend title to the Property.

18. Rebecca Frazier Hall a/k/a Rebecca Hall died intestate on July 11, 2009, leaving the property to her heirs or devisees, namely, Dannette Frazier, Rodney Frazier, Stanley Frazier and Oronda Millidge, as is more fully preserved in the Probate records for Beaufort County, in

[3] Plat Book 90 at Page 3 is another survey of the 10-acre parcel as subdivided.

Case No. 2009ES0700617; also by Deed of Distribution dated August 18, 2010, and recorded August 19, 2010, in Book 2983 at Page 641.

19. Dannette Frazier, Stanley Frazier and Oronda Millidge conveyed their interest in the Property to Defendant Frazier by deed dated August 18, 2010, and recorded August 19, 2010, in Book 2983 at Page 656.

20. Rodney Frazier conveyed his interest in the Property to Defendant Frazier by deed dated August 20, 2010, and recorded August 23, 2010, in Book 2984 at Page 540 and by deed dated October 6, 2010, and recorded November 2, 2010, in Book 3006 at Page 1208.

21. Under the terms of the Note and Mortgage, the death of the mortgagor constitutes a default.

22. Plaintiff elects to and does declare the entire balance of said indebtedness due and payable, and that there is currently due on the Note and Mortgage the principal sum of $196,237.80, plus $103,840.00 for the costs and disbursements of this action, including attorney's fees. The total amount owed to Plaintiff is $300,077.80.

23. Because payment due on the Note has not been made as provided for therein, the Plaintiff, as the holder thereof, has elected to require immediate payment of the entire amount due thereon and has placed the Note and Mortgage in the hands of the attorneys herein for collection.

24. Pursuant to the South Carolina Supreme Court's Administrative Order filed on May 22, 2009, the mortgage loan identified herein is a commercial loan which is not owned, securitized or guaranteed by Fannie Mae or Freddie Mac nor is any servicer of the loan participating in the Home Affordable Modification Program (HMP), as referenced in the above

Administrative Order, and the Administrative Order is not applicable to the loan and mortgage identified herein.

25. Rebecca Hall, as the mortgagor, is deceased and, as such, the loan is not eligible for foreclosure intervention as contemplated by South Carolina Administrative Order 2011-05-02-01. As such, the Administrative Order is not applicable to this foreclosure.

**PROCEDURAL HISTORY**

26. The Lis Pendens was filed on February 3, 2012.

27. The Summons and Complaint were filed on February 3, 2012.

28. The Amended Lis Pendens, Amended Summons and Amended Complaint were filed on March 25, 2016.

29. Service was made upon the Defendants as is shown by the Affidavits of Service filed with the Beaufort County Clerk of Court.

30. Defendant Frazier filed his Answer to Amended Complaint and Counterclaims on April 15, 2016.

31. Defendants South Carolina Department of Revenue, Ford Motor Credit Company, and The United States of America acting by and through its agency the Department of Housing and Urban Development filed timely Answers.

32. Defendants Darlene Ellington, Lisa Coakley, Keith Frazier a/k/a Keith W. Frazier, and Joe W. Frazier did not file timely responsive pleadings and, therefore, are in default.

33. According to the Affidavit filed with the Court, no Defendant in default is in the military service of the United States of America, as contemplated under the Soldiers' & Sailors' Civil Relief Act of 1940, and any amendments thereto.

34. Pursuant to Rule 53, SCRCP, the above-entitled matter was referred to the undersigned to make appropriate findings of fact and conclusions of law with authority to enter a final judgment with any appeal therefrom to be directly to the South Carolina Supreme Court or South Carolina Court of Appeals.

35. Plaintiff filed its Motion for Summary Judgment on February 15, 2017, seeking judgment as a matter of law as to its claims against Defendants and the counterclaims asserted by Defendant Frazier.

36. Defendant Frazier filed his Motion for Summary Judgment on March 20, 2017, seeking judgment as a matter of law as to his counterclaims and Plaintiff's first-party claims.

37. All parties were notified of the time, date, and place of the hearing in this matter.

38. All parties have had an opportunity to be heard on all issues before the Court, and those matters are now ripe for a final determination.

## CONCLUSIONS OF LAW

39. Plaintiff is entitled to summary judgment on its claims because there is no genuine issue regarding Plaintiff's reformation claims and Plaintiff's standing to enforce the Note in this matter.

40. Plaintiff seeks equitable relief. Defendant Frazier argues Plaintiff has an adequate remedy at law due to the existence of a lender's title insurance policy. The Court rejects this improper argument.

41. The existence of insurance is not relevant and should not be injected in this case. Our courts have consistently held the existence and contents of a party's insurance may not be disclosed to the finder of fact. *See, e.g., Dunn v. Charleston Coca-Cola Bottling Co.*, 311 S.C. 43, 426 S.E.2d 756, 757 (1993) ("[T]he fact that a Defendant is protected from liability in an

action for damages by insurance shall not be made known to the jury."); *Norris v. Ferre*, 315 S.C. 179, 432 S.E.2d 491, 493 (Ct. App. 1993) ("[T]he Supreme Court has been meticulous in keeping the issue of insurance coverage away from the jury.").

42. Moreover, a lender's title insurance policy only benefits the lender, not the borrower, and certainly not Defendant Frazier, who is neither. *See TC X, Inc. v. Commonwealth Land Title Ins. Co.*, 928 F. Supp. 618, 623 n. 4 (D.S.C. 1995) ("In no reported case cited by either party, or discovered by the court, has a non-insured been found to be a third-party beneficiary of a title insurance policy."); *Ortego v. First Am. Title Ins. Co.*, 569 So. 2d 101, 106 (La. Ct. App. 1990) (borrower is not third party beneficiary under loan policy even if borrower pays premium); *Siegel v. Fidelity Nat'l Title Ins. Co.*, 54 Cal.Rptr.2d 84, 90 (Cal. Ct. App. 1996) (if borrower desires insurance coverage, it is that party's obligation to request a policy and pay for it); *Gaines v. American Title Ins. Co.*, 220 S.E.2d 469 (Ga. Ct. App. 1975) (the insurer's duty to use reasonable care in searching and disclosing the status of title extends only to lender named as insured and not to borrower who is not a party to the contract, even though premiums were paid by borrower); 43 Am. Jur. 2d *Insurance* § 518 ("Title insurance issued only to a mortgagee confers no benefits on a mortgagor.").

43. For the Court to even consider this argument, the available "legal remedy must exist against the same person against whom the relief in equity is sought." 30A C.J.S. *Equity* § 22. Here, there is no adequate remedy at law against the parties against whom Plaintiff is seeking equitable relief. The existence of a title insurance policy does not bar an insured lender from seeking equitable relief. *See, e.g., Bank of Am., N.A. v. Diamond Fin., LLC*, 42 N.E.3d 1151, 1154, 1156–1157 (Mass. Ct. App. 2015) (mortgagee's right to make a title insurance claim was not an adequate remedy at law since "would not restore the plaintiff to its rightful senior

position"); *Hicks v. Londre*, 107 P.3d 1009, 1013 (Colo. Ct. App. 2004) (court rejected argument that equitable subrogation claim could not be brought because of the ability to file a legal claim against title insurer: "To bar an equitable remedy, a legal remedy must lie against the opposing party and not against third parties who are not before the court."), *aff'd*, 125 P.3d 452 (Colo. 2005); *Mort v. United States*, 86 F.3d 890 (9th Cir. 1996) (lender may seek equitable remedies although it has adequate remedy at law against its title insurer).

44. A court of equity will reform a written instrument to conform to the real intention of parties where there has been mutual mistake as to terms. *Central Ice Cream & Candy Co. v. Home Ins. Co.*, 171 S.C. 162, 171 S.E. 797 (1933). A "mutual mistake" is one whereby both parties intended a certain thing and by mistake in the drafting did not get what both parties intended. *Sims v. Tyler,* 276 S.C. 640, 281 S.E.2d 229 (1981); *see also Jordan v. Foster,* 264 S.C. 382, 215 S.E.2d 436 (1975) (Supreme Court upheld Master's reformation of option contract due to scrivener's error of attorney drafting the option contract); *Commercial Union Assur. Co. v. Castile*, 283 S.C. 1, 320 S.E.2d 488 (Ct. App. 1984). Parol evidence is admissible to prove mutual mistake as grounds for reformation of an instrument. *Southern Realty and Construction Co. v. Bryan*, 290 S.C. 302, 350 S.E.2d 194 (Ct. App. 1986).

45. Reformation relates back to the execution of the instrument subject to the rights of any bona fide purchasers or creditors for value. *See Lawrence v. Clark*, 115 S.C. 67, 104 S.E. 330, 334 (1920) ("When a court orders the reformation of a deed, the reformed deed necessarily speaks as of the date of its original execution. Equity says that the reformed deed is to be considered as the true deed, subject, of course, to the rights of subsequent creditors and purchasers for value, who may have been misled to their injury"); *see also* 66 Am. Jur. 2d *Reformation of Instruments* § 9 ("The reformation of an instrument relates back to the time the

instrument was originally executed and simply corrects the document's language to read as the instrument should have read all along. A reformed instrument takes effect from the time of its original execution and binds all entities except innocent purchasers for value. The rights of the parties are measured by the instrument as originally intended, and the effect of the reformation, as a whole, is to give all the parties all the rights to which they are equitably entitled under the instrument that they intended to execute.").

46. "Where there is no mistake as to the identity of land intended to be conveyed, but there is a mistake in the description of the land, an equity court may reform the instrument to conform to the true intention of the parties." 66 Am. Jur. 2d *Reformation of Instruments* § 54. "Although a deed in terms expresses the intention of the parties, if there is a material mistake as to the property to which those terms apply, such as to its identity, situation, boundaries, title, amount, value, and the like, a court of equity may grant appropriate relief through reformation." *Id.*

47. Defendant Frazier argues Plaintiff is not entitled to equitable relief, including reformation or the application of the after acquired property doctrine, addressed below, because Defendant Frazier alleges there existed defects on the face of the recorded documents, Plaintiff was a sophisticated party charged with knowing the existence and understanding the implications of clear facial defects such as the one at issue herein, and because Defendant Frazier alleges Plaintiff acted in bad faith.

48. Our courts have reformed recorded documents even though defects appeared on the face of the recorded documents. *See, e.g., In Mathis v. Hair*, 112 S.C. 320, 99 S.E. 810 (1919) (a deed that did not contain the word "heirs" in the habendum clause was reformed so as to make the conveyance a fee); *Austin v. Hunter*, 85 S.C. 472, 67 S.E. 472 (1910) (plaintiff

brought an action to recover possession of real property claiming a deed did not contain the appropriate words of inheritance; the court found defendants were entitled to have the deed reformed into a conveyance of fee-simple title); *Timms v Timms*, 290 S.C. 133, 348 S.E.2d 386 (Ct. App. 1986) (deed purported to convey 121 acres, but was reformed to convey only 87 acres).

49. Similarly, our courts have granted relief under the after acquired property doctrine even though an error was apparent in the chain of title. *See Groce v. Benson*, 168 S.C. 145, 167 S.E. 151 (1933) (holding that a mortgage covered not only a life estate acquired by the mortgagor by deed, but also other interests in the property acquired by purchase or inheritance subsequent to the mortgage).

50. Moreover, a plaintiff's failure "to examine the public records of real estate transactions or the tax records is not such negligence as will bar reformation to correct an error of description." 66 Am. Jur. 2d *Reformation of Instruments* § 85. As a result, "a mortgagee cannot be said, as a matter of law, to have been guilty of such negligence as will debar him or her from the right to have the mortgage reformed in failing to discover by an examination of maps and public records that the property described in the mortgage was not that which he or she supposed it to cover." *Id.* "Negligence is no bar to an action to reform a written instrument." *Hellams v. Harnist*, 284 S.C. 256, 325 S.E.2d 569 (Ct. App. 1985).

51. Defendant Frazier has provided no evidence that Plaintiff or the original lender did not exercise due care. The closing attorney, Louis Dore, testified in his deposition that he had a title search performed. There is no evidence Plaintiff or its predecessor in interest did anything other than protect itself by having a closing attorney involved in this transaction.

52. There are no genuine issues of material fact as to Plaintiff's reformation claims. The 1993 Deeds were infected with the mutual mistake of the parties. The parties intended to

include the Property in these conveyances to Rebecca Hall. The Court need go no further than review the 2007 Corrective Deeds which affirmatively show the 1993 Deeds contained mistakes and should have described and conveyed the Property. There is no evidence to the contrary.

53. In addition to the conclusive evidence provided by the 2007 Corrective Deeds, Lisa Coakley has provided an affidavit outlining in detail the mutual mistake of the parties. While Defendant Frazier objected to the form and content of Ms. Coakley's affidavit[4], this Court finds it is proper and consistent with affidavits submitted for consideration of similar dispositive motions and, therefore, denies the objection. Also, Keith Frazier testified the land he intended to convey to Rebecca Hall included a log cabin on the Property. *Keith Frazier Dep.* 26-27. Darlene Ellington testified she intended Rebecca Hall be conveyed property including the Property. *Ellington Dep.* 31-33. There is no evidence to the contrary.

54. Plaintiff is entitled to an order (a) reforming the 1993 Deeds, as of the dates they were executed, so that the legal description in each of these deeds includes the Property to reflect the true intent of the parties; (b) declaring the Property was conveyed to Rebecca Hall in the 1993 Deeds on the day those deeds were executed; and (c) declaring Rebecca Hall held title to the Property when the 1993 Deeds were executed.

55. Plaintiff further argues that, to the extent the Court does not reform the deeds, Plaintiff's Mortgage encumbers the Property under the after acquired property doctrine. The Court concurred with Plaintiff.

56. When Rebecca Hall executed the Mortgage, she owned at the very least an undivided one-half interest in the Property on the date the Mortgage was given; however, she

[4] Specifically, Frazier argued that the affidavit contained speculation, was not based upon personal knowledge, was hearsay, stated other inadmissible facts, and did not establish competency of the affiant to make the affidavit or to offer the facts presented therein.

acquired title to the remaining undivided one-half interest in the Property by virtue of the 2007 Corrective Deeds.

57. The after acquired property doctrine applies in this case. Once the 2007 Corrective Deeds were recorded, the Mortgage attached to the Property under the after-acquired property doctrine. *See Groce v. Benson*, 168 S.C. 145, 167 S.E. 151 (1933) (holding that a mortgage covered not only a life estate acquired by the mortgagor by deed, but also other interests in the property acquired by purchase or inheritance subsequent to the mortgage); *Richardson v. Atlantic Coast Lumber Corp.*, 93 S.C. 254, 258, 75 S.E. 371, 372 (1912) ("The principle is settled beyond controversy in this state that if a grantor conveys land, with the usual covenants of warranty, to which at that time he has no title, but afterwards acquires a title, he is estopped from claiming that he did not have title at the time of the sale; and the after-acquired title inures to the benefit of his grantee."); 1 Robert Wilcox, *Patton and Palomar on Land Titles* § 219 (3d ed. 2009) (observing that "[i]f, at the time of a conveyance, a grantor does not own all or part of the interest that the grantor purports to convey, but the grantor later acquires the interest that was the subject of the earlier conveyance, the grantor may be estopped from denying the claim of the grantee to the after-acquired title" and further acknowledging that the after-acquired property doctrine applies also to mortgages and gives a mortgagee an interest in after-acquired land that is described in the mortgage).

58. Although it is not necessary for the Court to make this ruling since it has reformed the deeds as referenced above, under the after acquired property doctrine, the lien of the Mortgage attached to the other undivided one-half interest in the Property when Rebecca Hall acquired those interests by way of the 2007 Corrective Deeds.

59. There are no genuine issues of fact. Plaintiff is entitled to an order of declaratory relief finding the Mortgage is a first mortgage lien on the Property.

60. Plaintiff is entitled to summary judgment on its first-party claims because there is no genuine issue regarding Plaintiff's standing to enforce the Note in this matter.

61. At the hearing, counsel for Plaintiff presented the *original* Note to the Court. Counsel for Defendant Frazier did not dispute the authenticity of the original Note, though they did challenge the authority of the endorser and the absence of an original allonge.

62. Defendant Frazier argues that certain defects in earlier assignments of the Note preclude Plaintiff from enforcing the Note and/or Mortgage. However, the facts and law do not support this position.

63. S.C. Code Ann. § 36-3-203(b) provides that the "[t]ransfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course . . . ." *See also In re Neals*, 459 B.R. 612, 618-19 (Bankr. D.S.C. 2011) (finding that a plaintiff had a right to enforce a promissory note where it presented the original note); *see also Schneider v. Deutsche Bank Nat. Trust Co.*, 572 Fed. Appx. 185, 190 (D.S.C. 2014) (finding that "the assignment of a note secured by a mortgage carries with it an assignment of the mortgage," and because the creditor was the proper holder of the note, it was also the holder of the mortgage). Accordingly, the Court finds that Plaintiff is the current holder of the Note and Mortgage and is the proper party in interest to enforce their respective terms.

64. Moreover, this Court finds that Defendant Frazier – who is not a party to the Note or Mortgage – does not have standing to object to the validity of the assignments of the Note or Mortgage. *In re: Guy*, 552 B.R. 89, 99 (Bankr. D.S.C. 2016) ("This Court has previously

recognized that an assignment of a mortgage is a separate contract to which the borrower is not a party and thus found that a borrower lacks standing to attack assignments or question their validity.") *see also, In re McFadden*, 471 B.R. 136, 161–62 (Bankr. D.S.C. 2012) ("Courts addressing the standing of a borrower to object to the validity of assignments of his loan have found that a borrower lacks standing to attack assignments due to his status as a third party."). Frazier attempted to present evidence that the assignments failed because they failed to follow the form and process set out in agreements between the FDIC and Freedom Acquisition, Inc. or other financial institution(s) and/or were not validly executed or assigned. Such was expressed in the Affidavit of Terence A. Willis, which supported Frazier's Motion for Summary Judgment and opposed Plaintiff's Motion for Summary Judgment. Plaintiff's counsel objected to the introduction of Exhibits I through N of said Affidavit on hearsay grounds, which this Court sustained. Frazier also attacked the admissibility and self-authentication of such assignments and affidavits, arguing that the declarant was absent and the form was improper, both of which this Court rejects. The remainder of the exhibits to Terence Willis' Affidavit were admitted. This Court rejects Frazier's arguments.

65. Defendant Frazier also argues that because there is no evidence that the originator of the Note complied with S.C. Code Ann. § 29-4-60(A) and (B), a condition precedent of the reverse mortgage was not met and, therefore, Plaintiff cannot enforce the Note. However, because the South Carolina Reverse Mortgage Act does not provide a private right of action, this defense must fail.

66. Defendant Frazier asserted various other defenses in its Answer to Amended Complaint and Counterclaims. More specifically, Defendant Frazier asserted counterclaims against Plaintiff for: (1) declaratory relief that Plaintiff is not entitled to recover under its legal

and equitable first-party claims, and that Defendant Frazier is entitled to certain legal and equitable recovery under his counterclaims; (2) wrongful attempted foreclosure; (3) slander of title; (4) breach of contract; (5) breach of contract accompanied by a fraudulent act; (6) violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"); and (7) negligence. However, I find that Defendant Frazier's counterclaims and remaining defenses fail as a matter of law and must be dismissed.

67. In the first instance, all of Defendant Frazier's counterclaims against Plaintiff fail as a matter of law because when Plaintiff acquired its interest in the Note and Mortgage from the FDIC, it did not acquire any liability for acts that arose before its assignment. The only evidence in the record is that all of the documents comprising the purchase agreement relevant to the subject Note and Mortgage expressly excluded any and all liability for earlier acts by the originating lender and subsequent assignees.[5]

68. FIRREA is the congressional scheme that governs the transfer of assets from a failed institution. Pub. L. No. 101–73, 103 Stat. 183 *et seq.* "In short, FIRREA provides that the FDIC, *and not a subsequent purchaser of assets*, is the successor to a failed thrift's liabilities unless the relevant purchase agreements expressly provide otherwise." *OneWest Bank, FSB v. Little, et al.*, CA No. 09-CP-26-6934, Order Partially Granting Plaintiff's Motion for Summary Judgment at 4 (Horry County Court of Common Pleas, December 18, 2011) (emphasis added).

69. Courts strictly enforce the allocation of liability set forth in FDIC purchase agreement not only as a matter of contract law, but also because of the strong public policy supporting the authority and ability of the FDIC to enter into these agreements to maximize protection for depositors and avoid panic in financial markets. The closing of a bank, even an

[5] The records evidencing the Plaintiff's acquisition of the subject Note and Mortgage were submitted and/or identified to the Court without objection by Defendant Frazier.

insured one, does not promote the utmost confidence in the nation's banking system, and one of the policies behind the creation of the FDIC is to promote the stability of and confidence in that banking system. *Gunter v. Hutcheson*, 674 F.2d 862, 865-870 (11th Cir. 1982), *overruled on other grounds by Langley v. F.D.I.C.*, 484 U.S. 86 (1987). Absent contractual language to the contrary, courts presume that no liabilities were transferred to the acquiring bank. *See Payne v. Security Sav. & Loan Ass'n*, 924 F.2d 109, 111 (7th Cir. 1991) ("Absent an express transfer of liability . . . and an express assumption of liability by [the transferee institution], FIRREA directs that [the receiver] is the proper successor to the liability at issue here."); *Kennedy v. Mainland Sav. Ass'n*, 41 F.3d 986, 990-91 (5th Cir. 1994) ("The federal receiver has the power to sell an asset . . . while retaining a related liability, and no liability is transferred to an assuming institution . . . absent an express transfer.").

70. The acts and omissions upon which Defendant Frazier's counterclaims are based occurred prior to Plaintiff's assignment of interest in the Note and Mortgage. The only evidence before the Court is that the FDIC sold Plaintiff only certain assets – including an interest in the subject Note and Mortgage – but did **not** transfer any liabilities to Plaintiff. Therefore, because Defendant Frazier's counterclaims are based on acts or omissions that occurred prior to its assignment of the Note and Mortgage from the FDIC, the counterclaims fail as a matter of law.

71. In addition, each of Defendant Frazier's seven counterclaims fails for separate, independent reasons that entitle Plaintiff to summary judgment:

- Request for Declaratory Relief: The Court finds that there is no basis in law or fact for, and no evidence in the record to support, this cause of action. Each of the declarations sought are refuted by the detailed findings of fact and

conclusions of law discussed above regarding Plaintiff's equitable claims and Plaintiff's acquisition of assets but not liabilities from the FDIC;

- Wrongful Attempted Foreclosure: Because South Carolina does not recognize this cause of action, it must be dismissed;

- Slander of Title: It is unclear whether this counterclaim is based on Plaintiff's filing of the Lis Pendens or the Mortgage. To the extent it is based on Plaintiff's Lis Pendens, it is barred on the basis of absolute judicial privilege. *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 32, 567 S.E.2d 881, 897 (Ct.App. 2002) ("we find the filing of a lis pendens is ***ABSOLUTELY*** privileged in South Carolina ... [T]he filing of a lis pendens ***CANNOT*** form the basis of an action for slander of title.") (emphasis in original). To the extent this claim is based on Plaintiff's filing of the Mortgage, it is barred by the two-year statute of limitations for slander of title. The Mortgage was filed on October 4, 2004, and any claim filed after October 4, 2006 would be time-barred. However, Defendant Frazier first asserted this claim on March 3, 2012, several years after the expiration of the statute of limitations;

- Breach of Contract: The basis of this counterclaim is that at some time before the initial closing on September 27, 2004, the originating lender – SafeWay – offered Rebecca Hall a life insurance policy that would satisfy the Mortgage if she passed away before it was repaid.[6] Defendant Frazier argues that SafeWay and Plaintiff breached this alleged insurance contract by not satisfying the Mortgage upon the death of Rebecca Hall. However, this claim fails for

[6] No evidence of this alleged policy has been presented to the Court.

several reasons. First, there is no evidence of the existence of a contract of insurance. Second, as discussed above, Plaintiff is not liable for the acts or omissions of the original noteholder as a matter of law. Third, Defendant Frazier was not a party to any alleged insurance contract and does not have standing to assert this claim. Lastly, this claim is barred by the three-year statute of limitations. Even if such a contract existed, Rebecca Hall would have known a policy was not issued no later than the September 27, 2004 closing. Because Defendant Frazier's breach of contract claim was not raised until March 3, 2012, it is time-barred as a matter of law;

- Breach of Contract Accompanied by a Fraudulent Act: This counterclaim fails for the same reasons discussed above in regard to the Breach of Contract claim. Moreover, there is no evidence in the record of any fraudulent conduct on the part of Plaintiff;

- Violation of the SCUTPA: This counterclaim fails for several reasons. First, there is no evidence before the Court that Plaintiff has committed any unfair or deceptive acts. Second, Defendant Frazier has failed to demonstrate that he has standing to assert the SCUTPA claim. He is not a party to any transaction with the Plaintiff or its predecessors in interest. Third, Defendant Frazier has failed to present any evidence that any alleged conduct by the Plaintiff had any impact on the public interest as required by the SCUTPA. *See Daisy Outdoor Adver. Co, Inc. v. Abbott*, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996). Lastly, most, if not all, of Defendant Frazier's SCUTPA claim is barred by the three-year statute of limitations found in S.C. Code Ann. § 39-5-150. The acts complained of would

have been evident to Rebecca Hall and/or Defendant Frazier well before the expiration of the statute of limitations. For these reasons, Defendant Frazier's SCUTPA counterclaim must be dismissed.

- Negligence: This final claim also suffers from several fatal defects. First, there is no evidence in the record that Defendant Frazier has any standing to assert such a claim. Second, there is no evidence before the Court that Plaintiff owes any duty to Frazier. South Carolina courts have specifically recognized that "a bank neither owes a duty of care to customers or non-customers; nor should it be relied upon for information regarding the financial condition of others." *Midland Mortgage Corp. v. Wells Fargo Bank, N.A.*, 926 F. Supp. 780, 792 (D.S.C. 2013); *see also Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220, 227 (4th Cir. 2002) (holding that banks do not owe non-customers a duty of care). If a bank is not even held to have a duty of care towards its own customers, it certainly does not have a duty to non-customers such as Defendant Frazier. Accordingly, Defendant Frazier's negligence counterclaim must be dismissed.

72. Because each of Defendant Frazier's seven counterclaims fail for separate and independent reasons, Plaintiff is entitled to summary judgment as to all counterclaims asserted against it in the Answer to Amended Complaint and Counterclaims.

73. The two law firms representing Plaintiff filed separate affidavits of attorney's fees and costs. Having considered the nature, extent and difficulty of the services rendered, the time involved in preparing the pleadings, defending the claims asserted by Defendant Frazier, defending the numerous motions filed by Defendant Frazier, prosecuting motions Plaintiff filed, the professional standing of counsel, the fee customarily charged for similar services, and the

beneficial results obtained for Plaintiff, I find that the sum of $107,967.04 is a reasonable amount of attorney's fees and costs for services performed and costs incurred, especially considering the arguments and counterclaims raised by Defendant Frazier, the numerous hearings required, and other factors addressed herein.

74. The amount due and owing on the Note, secured by the above-referenced Mortgage, with interest at the rate provided in the Note and other costs and expenses of collection, including an attorney's fee, is as follows:

| | | |
|---|---|---|
| (A) | Principal Due | $128,173.54 |
| (B) | Accrued Interest to December 28, 2016 | $45,800.06 |
| (C) | Initial Mortgage Insurance Premium | $3,200.00 |
| (D) | Monthly Mortgage Insurance Premium | $8,486.95 |
| (E) | Monthly Servicing Fees | $4,410.00 |
| (F) | Servicing Advances | $7,997.00 |
| (G) | Attorneys' Fees and Costs | $107,967.04 |
| (H) | Insurance Loss Credit | <$1,829.75> |
| Total debt secured by Note and Mortgage, including interest to December 28, 2016. | | **$304,204.84** |

Interest for the period from the date shown in (B) above through the date of this judgment at above stated rate to be added to the above stated "Total Debt" to comprise the amount of the judgment debt entered herein and interest after the date of judgment at the rate of 7.75% per annum on the judgment debt should be added to such judgment debt to comprise the amount of Plaintiff's debt secured by the Mortgage through the date to which such interest is computed.

75. The above costs and expenses are based on the affidavit of Timothy Todd, a representative of the Plaintiff. Defendant Frazier objected to the form and content of Mr. Todd's affidavit and alleges it should not be considered. Specifically, Frazier argues that Todd failed to base his affidavit upon personal knowledge, set forth admissible facts, and show competency to testify. Further, Frazier argued that Todd failed to lay a foundation sufficient to show sufficient familiarity with the subject matter, history, and documents, all in accordance with Rule 803(6) SCRE, and that it was hearsay. However, Mr. Todd's affidavit is both proper under the Rules and consistent with other affidavits describing a borrower's debt to a lender submitted in support of similar summary judgment motions. Therefore, the Court denies Defendant Frazier's objection.

76. The Plaintiff is seeking the usual foreclosure of the Mortgage and has waived the right to a deficiency judgment

77. Accordingly, the Court holds that the Plaintiff should have judgment of foreclosure of the Mortgage and the mortgaged property should be ordered sold at public auction after due advertisement.

78. The hereinafter named Defendant(s) may have some interest in or lien upon the Property, or some part thereof, but that such interests or liens are junior and subsequent to the lien of the Plaintiff's Mortgage. Said liens or interests are of record in the Office of the RMC or Clerk of Court of the aforesaid county and are described as follows:

(a) The United States of America acting by and through its agency the Department of Housing and Urban Development, by virtue of a mortgage given by Rebecca Hall in the amount of $240,000.00, dated September 27, 2004, and recorded October 6, 2004, in Book 2032 at Page 372.

(b) Ford Motor Credit Company, by virtue of a judgment against Romar Frazier in the amount of $8,640.60, dated October 16, 2003, and recorded on October 20, 2003, in Judgment Roll No. 122242.

(c) The South Carolina Department of Revenue by virtue of a Tax Lien, including but not limited to, a lien against Eugene Milledge and Oronda Millidge; Tax Lien No.: 3-50833272-9; Dated: July 6, 2007; Recorded: July 20, 2007; in the amount of $22,794.96; in Book 33 at Page 684.

**JUDGMENT OF FORECLOSURE AND SALE**

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

1. Pursuant to the South Carolina Supreme Court's Administrative Order filed on May 22, 2009, the mortgage loan identified herein is a commercial loan which is not owned, securitized or guaranteed by Fannie Mae or Freddie Mac nor is any servicer of the loan participating in the Home Affordable Modification Program (HMP), as referenced in the above Administrative Order, and the Administrative Order is not applicable to the loan and mortgage identified herein.

2. Pursuant to the South Carolina Supreme Court's Administrative Order filed on May 2, 2011, the real property involved herein is commercial property and is not an "Owner-Occupied Dwelling" as defined in that Order. As such, the Administrative Order is not applicable to this foreclosure.

3. Plaintiff's Motion for Summary Judgment is granted in full.

4. Defendant Frazier's Motion for Summary Judgment is denied in full.

5. The 1993 Deeds are reformed, as of the dates they were executed, so that the legal description in each of these deeds includes the Property to reflect the true intent of the parties;

the Property was conveyed to Rebecca Hall in the 1993 Deeds on the day those deeds were executed; and Rebecca Hall held title to the Property when the 1993 Deeds were executed.

6. The Mortgage is a first lien on the Property.

7. That there is due to the Plaintiff on the Note and Mortgage, as set forth in the Complaint, the sum of one hundred ninety-six thousand two-hundred thirty-seven dollars and 80/100 ($196,237.80), plus one hundred seven thousand nine-hundred and sixty-seven dollars and 04/100 ($107,967.04) in attorneys' fees and costs, for a total due to Plaintiff of three-hundred four thousand two hundred four dollars and 84/100 ($304,204.84) (the "Total Debt"), as set out in Paragraph 75, *supra*, together with interest at the rate provided therein on the balance of principal from the date aforesaid to the date hereof.

8. The Total Debt shall constitute the total judgment debt due the Plaintiff and shall bear interest hereafter at the rate of 7.75% per annum.

9. That the Defendants liable for the aforesaid debt on the Mortgage shall on or before the date of sale of the Property hereinafter described, pay to the Plaintiff, or Plaintiff's attorney the Total Debt.

10. That on default of payment at or before the time herein indicated, the mortgaged premises described in the Amended Complaint, as hereinafter set forth, be sold by the undersigned Master-in-Equity at public auction, at Beaufort County and State aforesaid, on some convenient sales day hereafter (and should the regular day of judicial sales fall on a legal holiday, then and in such event, the sales day shall be on Tuesday next succeeding such holiday), on the following terms, that is to say:

(a) The undersigned Master-in-Equity will require a deposit of 5% on the amount of the bid (in cash or equivalent) same to be applied on the purchase price only upon

compliance with the bid, but in case of non-compliance within thirty (30) days same to be forfeited and applied to the costs and Plaintiff's debt.

(b) Interest on the balance of the bid shall be paid to the day of compliance at the rate of 7.75% as to the Note.

(c) The sale shall be subject to taxes and assessments, existing easements and easements and restrictions of record, and any other senior encumbrances.

(d) Purchaser to pay for deed stamps and cost of recording the deed.

11. Should the Plaintiff or Plaintiff's agent fail to appear at the time of the sale, the within property shall be withdrawn from sale and sold at the next available sales day upon the terms and conditions as set forth in this Judgment of Foreclosure and Sale.

12. If Plaintiff is the successful bidder at the said sale, for a sum not exceeding the amount of costs, expenses and the indebtedness of Plaintiff in full, Plaintiff may pay to the undersigned Master-in-Equity only the amount of the costs and expenses crediting the balance of the bid on Plaintiff's indebtedness.

13. That the undersigned Master-in-Equity will, by advertisement according to law, give notice of the time and place of sale and the terms thereof, and will execute to the Purchaser, or Purchasers, a deed to the premises sold. The Plaintiff, or any other party to this action, may become a purchaser at such sale, and that if upon such sale being made, the Purchaser, or Purchasers, should fail to comply with the terms thereof within thirty (30) days after date of sale, then the undersigned Master-in-Equity may advertise the said premises for sale on the next, or some other subsequent sales day, at the risk of the highest bidder and so from time to time thereafter until a full compliance shall be secured.

14. That the undersigned Master-in-Equity will apply the proceeds of the sale as follows:

FIRST: To the payment of the amount of the costs and expenses of this action, including any Guardian Ad Litem fee or fees of attorneys appointed under Order of Court;

NEXT:To the payment to the Plaintiff or Plaintiff's attorney, of the amount of Plaintiff's debt and interest or so much thereof as the purchase money will pay on the same; if the proceeds of the sale be insufficient to pay the amounts hereinbefore authorized to be paid out of said proceeds, with the costs and expense, the Plaintiff's debt and interest, the parties hereto entitled to such deficiency shall have monetary judgment therefore against the named Defendants pursuant to S.C. Code Ann. Sec. 29-3-660 (1976) and any amendments thereto, and such judgment will be entered without further notice or hearing.

NEXT:Any surplus will be held pending further Order of this Court.

15. It is further ORDERED, ADJUDGED AND DECREED that in the event the successful bidder is other than the Defendants in possession herein, the Defendants shall immediately vacate the property or cause the property to be vacated, and if Defendants fail to do so, the Sheriff of Beaufort County is ordered and directed to eject and remove from the premises the occupant(s) of the property sold, together with all personal property located thereon, and put the successful bidder or his assigns in full, quiet and peaceable possession of said premises without delay, and to keep said successful bidder or his assigns in such peaceable possession.

16. And it is further ORDERED, ADJUDGED AND DECREED that the Defendants named herein and all persons whosoever claiming under him, them or it, be forever barred and

foreclosed of all right, title, interest, and equity of redemption in the said mortgaged premises so sold, or any part thereof.

17. IT IS FURTHER ORDERED that, pursuant to S.C. Code Ann. § 30-9-31 (Supp. 1987), the deed of conveyance made pursuant to said sale shall contain the names of only the first-named Plaintiff and the first-named Defendant, and the Defendant(s) who was/were the titleholder(s) of the mortgaged property at the time of the filing of the notice of pendency of the within action, and the name of the grantee. Said deed of conveyance shall be indexed in the grantor index by the Beaufort County Register of Deeds in the name of the owner of record of subject property immediately prior to execution of the deed, as well as in the name of the undersigned Master-in-Equity who executes such deed as grantor.

18. The undersigned Master-in-Equity will retain jurisdiction to do all necessary acts incident to this foreclosure including, but not limited to, the issuance of a Writ of Assistance, any issues concerning the appraisal statutes, and disposing of any surplus funds pursuant to Rule 71(c), S.C.R.Civ.P.

19. The following is a description of the premises herein ordered to be sold:

All that certain piece, parcel or lot of land, situate, lying and being a portion of Lot 8, Section 32, 1N2W, Port Royal Island, Beaufort County, South Carolina, and containing 1.00 acres, more or less and shown on that certain plat prepared for Rebecca Hall by David S. Youmans, R.L.S., dated December 20, 1993 and recorded February 24, 1995 in the RMC Office for Beaufort County, South Carolina in Plat Book 52 at Page 33.

This being a portion of the same property conveyed to Rebecca Hall and Julia Frazier by deed of Martha Linen, dated October 13, 1980 and recorded October 13, 1980 in Book 308 at Page 1016. Subsequently, Julia Frazier died and a court order filed May 4, 1989, in Case 88-CP-07-1737, quieted title to the subject property in Rebecca Hall, Darlene Ellington, Lisa Coakley, Keith Frazier, and Joe W. Frazier. Subsequently conveyed to Rebecca Hall by deed of Darlene Ellington and Keith Frazier recorded December 13, 1993 in Book 671 at Page 1174; also by Corrective Deed of Darlene Ellington and Keith Frazier recorded March 9, 2004

in Book 1920 at Page 2353; also by Corrective Deed of Darlene Ellington and Keith Frazier recorded October 25, 2007 in Book 2641 at Page 2517. Also conveyed to Rebecca Hall by deed of Joe W. Frazier recorded December 13, 1993 in Book 671 at Page 1178; also by Corrective Deed of Joe W. Frazier recorded March 9, 2004 in Book 1920 at Page 2357; also by Corrective Deed of Joe W. Frazier recorded October 25, 2007 in Book 2641 at Page 2520. Also conveyed to Rebecca Hall by deed of Lisa Coakley recorded December 13, 1993 in Book 671 at Page 1182; also by Corrective Deed of Lisa Coakley recorded March 9, 2004 in Book 1920 at Page 2361; also by Corrective Deed of Lisa Coakley recorded October 25, 2007 in Book 2641 at Page 2514. Subsequently, Rebecca Frazier Hall a/k/a Rebecca Hall died intestate on July 11, 2009, leaving the subject property to her heirs or devisees, namely, Dannette Frazier, Rodney Frazier, Stanley Frazier and Oronda Millidge, as is more fully preserved in the Probate records for Beaufort County, in Case No. 2009ES0700617; also by Deed of Distribution dated August 18, 2010 and recorded August 19, 2010 in Book 2983 at Page 641. Subsequently, Dannette Frazier, Stanley Frazier and Oronda Millidge conveyed their interest in the subject property to Romar C. Frazier by deed dated August 18, 2010 and recorded August 19, 2010 in Book 2983 at Page 656; subsequently, Rodney Frazier conveyed his interest in the subject property to Romar C. Frazier by deed dated August 20, 2010 and recorded August 23, 2010 in Book 2984 at Page 540 and by deed dated October 6, 2010 and recorded November 2, 2010 in Book 3006 at Page 1208.

Property Address: 264 Bay Pines Road, Beaufort, SC 29906
TMS# R100-024-000-0043-0000

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The Honorable Marvin Dukes
Master-in-Equity for Beaufort County

Beaufort, South Carolina

_____, 2017.