THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2016-001389

Green Tree Servicing, LLC, Respondent,

v.

Jacqueline L. Taylor a/k/a/ Jacqueline Taylor Hendricks, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Respondent commenced a foreclosure action against Appellant by the filing of a Lis Pendens, Summons and Complaint on February 1, 2013. (R. pp. 12-24). The Complaint alleged that Appellant executed a note in the amount of $47,500.00 and corresponding mortgage on March 22, 2004, which were subsequently assigned to Respondent. (R. p. 17, lines 2-9). The Complaint further alleged that Appellant had defaulted on her monthly payments on November 1, 2009. (R. p. 18, line 12). After providing all required notices, Respondent then accelerated the entire balance of the indebtedness pursuant to the terms of the note and mortgage. (R. p. 18, line 12). Appellant filed an Answer and Counterclaim on July 3, 2014, which asserted violations of the Real Estate Settlement Procedures Act, violation of the Truth in Lending Act, breach of contract accompanied by a violation of the covenant of good faith and fair dealing, intentional infliction of emotional distress, negligence, and violation of the 2011 Supreme Court Administrative Order 2011-05-02-01 as counterclaims in addition to affirmative defenses. (R. pp. 25-29). Respondent timely replied on August 8, 2014. (R. pp. 41-16). Appellant then filed an Amended Answer and Counterclaim on August 8, 2014, without leave of the Court or consent of the Respondent. (R. pp. 47-51). Appellant's purported Amended Answer and Counterclaim asserted breach of contract, intentional infliction of emotional distress, negligence, and violation of South Carolina Supreme Court Administrative Order 2011-05-02-01. (R. pp. 47-51). In response, the Respondent filed a Motion to Strike Appellant's Amended Answer and Counterclaim. (R. pp. 36-38). Appellant then filed for relief under Chapter 13 of the U.S. Bankruptcy Code on October 3, 2014. (R. p. 66). During the bankruptcy proceedings, Appellant submitted a Summary of Schedules to the Bankruptcy Court on February 3, 2015 where she represented, under penalty of perjury, that she had no pending claims or counterclaims of any nature. (R. pp. 66- 129 at p. 75, line 21.)

During the pending of the bankruptcy, Appellant received a loan modification from Respondent. (R. p. 151, line 4). Subsequently, Appellant's bankruptcy was dismissed on March 13, 2016. (R. pp. 1-4). Thereafter, Respondent's foreclosure action was dismissed by consent of the parties on August 17, 2015. (R. p. 134). However, Appellant did not consent to a dismissal of the counterclaims and they remained pending. (R. p. 134). Respondent then filed a Motion for Summary Judgment on the grounds that Appellant should be judicially estopped from asserting her counterclaims because she did not disclose them in her bankruptcy proceedings. (R. p. 135). On March 30, 2016, Appellant filed a Memorandum in Opposition of Respondent's Motion for Summary Judgment on Appellant's Counterclaims. (R. pp. 136-149). A hearing was held on April 4, 2016, at which counsel for Appellant and Respondent for present. The trial court then granted Respondent's Motion for Summary Judgment by Order entered April 19, 2016. (R. pp. 5-8). Appellant filed a Motion for Reconsideration, which was denied without oral argument by Order entered May 31, 2016. (R. pp. 9-10). Appellant filed the instant appeal on August 31, 2016. (R. p. 182).

ARGUMENT

I. NO TRIABLE ISSUE OF FACT EXISTS CONCERNING THE APPLICATION OF JUDICIAL ESTOPPEL AGAINST APPELLANT.

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Connor Holdings, LLC. V. Cousins*, 373 S.C. 81, 84, 644 S.E.2d 58, 60 (2007). "If triable issue exists, those issues must go to the jury." *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 611 S.E.2d 485 (2005). "The party seeking summary

judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *Wogan v. Kunze*, 366 S.C. 583, 591, 623 S.E.2d 107, 112 (Ct. App. 2005) (*citing McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004)). The non-moving party must present specific facts showing a genuine issue for trial. *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990); *Moore v. Weinberg*, 373 S.C. 209, 217, 644 S.E.2d 740, 744 (Ct. App. 2007); *Rife v. Hitachi Constr. Mach. Co., Ltd.*, 363 S.C. 209, 241, 609 S.E.2d 565, 568 (Ct. App. 2005).

Judicial estoppel is an equitable doctrine applied when one party attempts to assert "a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *Cothran v. Brown*, 357 S.C. 210, 215-16, 592 S.E.2d 629, 631 (2004). The five-pronged test used to determine whether judicial estoppel should apply requires a Court to consider whether:

> (1) two inconsistent positions taken by the same party or parties in privity with one another;
>
> (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other;
>
> (3) the party taking the position must have been successful in maintaining that position and have received some benefit;
>
> (4) the inconsistency must be part of an intentional effort to mislead the court; and
>
> (5) the two positions must be totally inconsistent.

Id. at 215.

It is undisputed that elements one, two and five of judicial estoppel have been satisfied. Appellant, however, contends that elements three and four of the five-prong test have not been established.

a. The third element of judicial estoppel is satisfied because Appellant successfully maintained the abandonment of her counterclaims against Respondent and in turn obtained the benefit of a loan modification.

The main thrust of Appellant's argument that the third prong of judicial estoppel is two-fold: First, Appellant argues that she did not receive any real benefit from her failure to disclose the counterclaims in her Summary of Schedules because the bankruptcy was dismissed. Second, Appellant argues that Respondent had notice of Appellant's counterclaims and, therefore, Respondent did not detrimentally rely on Appellant's omission her claims. Specifically, Appellant argues that Respondent had actual notice of the counterclaims because Respondent was still a party in the underlying state court foreclosure and was listed as a creditor in the bankruptcy proceeding. Both arguments fail to create a genuine issue of material fact because Appellant received a modification offer during the bankruptcy and notice of the claims in the underlying action is irrelevant.

In the instant case, Appellant was both successful in maintaining tow inconsistent positions and received a benefit therefrom. Respondent offered Appellant a loan modification during the bankruptcy (R. p. 151, line 4), in reliance upon the assumption that Appellant had abandoned her counterclaims by not disclosing them in her Summary of Schedules. Had Appellant listed her counterclaims on her schedules, Respondent would likely have made the loan modification contingent upon a full release of any and all claims against Respondent. *See Evans v. Allied Air Enterprises, Inc.*, CA 5:10-2029-MBS, 2011 WL 4548307, at *4 (D.S.C. Sept. 30, 2011) *on reconsideration in part*, CA 5:10-2029-TLW-SVJ, 2012 WL 2572266 (D.S.C.

July 2, 2012) (*quoting In re Coastal Plains, Inc.*, 179 F.3d 197, 208 (5th Cir. 1999) ("The interest of both the creditors, who plan their actions in the bankruptcy proceeding on the basis of information supplied in the disclosure statements, and the bankruptcy court . . . are impaired when the disclosure provided by the debtor is incomplete.")).

Furthermore, Appellant was also successful in failing to disclose her claims because proper disclosure would have resulted in an increase of the bankruptcy estate. The fact that the bankruptcy proceeding was subsequently dismissed is irrelevant, as South Carolina courts have consistently held that a party need not receive a real benefit as long as the non-disclosure of claims ***would have*** benefited the party had he been successful in omitting the claims. *Evans,* 2011 WL 4548307 (emphasis added); *see also Quinn v. Sharon Corp.* 343 S.C. 411, 422, 540 S.E.2d 474, 480 (Ct. App. 2000) ("Any perpetuation of untruth or misrepresentation eviscerates public confidence in the integrity of the judicial system. Accordingly, whether a party was successful or not in propounding the validity of its initial position is immaterial: the party will be judicially estopped from assuming a different stance . . . in subsequent proceedings."); *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1167 (4th Cir. 1982) (stating that the circumstances under which judicial estoppel is property invoked is "perhaps not necessarily confined to situations where the party asserting the earlier contrary position there prevailed . . . .").

Moreover, the third element of judicial estoppel does not require that a party detrimentally rely on an opposing party's inconsistent positions. Instead, the only requirement is that "the party taking the position must have been successful in maintaining that position and have received some benefit." *Cothran*, 592 S.E.2d at 632. Detrimental reliance is not an element of judicial estoppel, therefore Appellant's argument fails on this point as well. *See Thomas v. Palmetto Mgmt. Servs.*, No. 3:05-17-CMC-BM, 2006 WL 2623917, at *5 (D.S.C.

Sept. 11, 2006) (*quoting In re Coastal Plains, Inc.*, 179 F.3d at 205 ("While Plaintiff may argue that the Defendant has suffered no real harm as a result of her failure to disclose these . . . because the doctrine of judicial estoppel 'is intended to protect the judicial system, rather than the litigants, detrimental reliance by the opponent of the party against whom the doctrine is applied is not necessary.'); *see also USinternetworking, Inc. v. General Growth Mgmt., Inc. (In re USinternetworking, Inc.)*, 310 B.R. 274 (Bankr. D. Md. 2004) ("It is not necessary for the court to find that a creditor actually relied on [the debtor's] failure to disclose its claim . . . , because detrimental reliance is not an element of judicial estoppel."). Accordingly, Appellant's argument regarding element three fails.

b. The fourth element of judicial estoppel is satisfied because disclosure of Appellants' counterclaims would have increased the assets of the bankruptcy estate and thus Appellant is deemed to have had a motive to conceal those claims.

The fourth element of judicial estoppel is satisfied where a party acted intentionally in taking inconsistent positions, but will not be applied where the party's inconsistent positions resulted from inadvertence. *See Calafiore v. Werner Enters.*, 418 F. Supp. 2d 795, 798 (D. Md. 2006). A party's duty to disclose is inadvertent when the "debtor lacks knowledge of the undisclosed claims or has no motive for its concealment." *Id.* (citation omitted).

Appellant's argument that she did not intentionally mislead the court by omitting the disclosure of her counterclaims in the bankruptcy is misplaced. Specifically, Appellant cites the *Calafiore* standard in support of her argument that she acted inadvertently upon advice of her bankruptcy counsel to not list the claims. However, the doctrine of judicial estoppel would still apply to Appellant's omission under the standard in *Calafiore*.

Appellant, by her own admission, had full knowledge and understanding of the claims that were omitted from the bankruptcy proceedings. (R. p. 151, line 4). Further, Appellant is

imputed with motive to conceal her claims to the Bankruptcy Court because disclosure would have resulted in an increase in the amount of assets in the bankruptcy estate. *See Calafiore,* 418 F. Supp. 2d at 798 ("If . . . undisclosed claim[s] would have added assets to the bankruptcy estate, [the debtor] will usually be deemed to have had a motive to conceal those claims."); *See also Thomas*, 2006 WL 2623917, at *3 (quoting citation omitted). Thus, Appellant is deemed to have acted intentionally to conceal her claims, regardless of any inadvertence, because motive is established where the bankruptcy assets would have been increased. Importantly, several South Carolina courts have addressed this very issue and held that the debtor was still judicially estopped from pursuing such claims where their counsel had knowledge of the existence of the claims. *See Evans*, 2011 WL 4548307 (holding that Plaintiff was judicially estopped from pursuing the claim regardless of the fact that the debtor's attorney knew of the claim and failed to disclose it where disclosure of the claims would have increased the assets of the bankruptcy estate); *see also Pappacoda v. Palmetto Health*, No. 3:13-cv-01995-JFA, 2014 WL 4417559 (D.S.C. Sept. 8, 2014) (holding that Plaintiff had motive to conceal his potential claims even though Plaintiff disclosed his claims to his attorney and the attorney carelessly failed to list the asset on the appropriate schedule because proper disclosure would have had an impact on the bankruptcy proceedings). Accordingly, Appellant's argument that the fourth prong of judicial estoppel also fails.

c. Appellant is equitably estopped from asserting the counterclaims.

Notwithstanding that Appellant is judicially estopped from asserting her counterclaims, she is also equitably estopped for the reasons set forth below.

The doctrine of estoppel applies if a person, by his actions, conduct, words or silence which amounts to a representation, or a concealment of material facts, causes another to alter his

position to his prejudice or injury." *Rushing v. McKinney,* 370 S.C. 280, 293, 633 S.E.2d 917, 924 (Ct. App. 2006). The elements of equitable estoppel as to the party estopped are: "(1) conduct by the party estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts." *Zabinski v. Bright Acres Assocs.,* 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001) (internal citations omitted). The party asserting estoppel must show: "(1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position." *Id.* The "[a]pplication of equitable estoppel does not require an intentional misrepresentation." *Regions Bank v. Schmauch*, 354 S.C. 648, 676, 582 S.E.2d 432, 446 (Ct. App. 2003). *See also S. Dev. Land & Golf Co., v. S.C. Pub. Serv. Auth.,* 311 S .C. 29, 33, 426 S.E.2d 748, 751 (1993) (citations omitted) ("Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel.").

In the instant case, Appellant has clearly made a false representation, i.e., informing the Bankruptcy Court that she did not have any claims against any entities as part of the disclosure of her assets. (R. pp. 66-129). Appellant was also aware that the representations made during her bankruptcy proceeding would be made available and relied upon by her creditors, including Respondent. (R. p. 151 at line 4). Finally, Appellant admits that she had actual knowledge of the claims omitted from the bankruptcy proceeding. (R. p. 151 at lines 4-5). Therefore, the elements of equitable estoppel as to Appellant are satisfied.

The elements of equitable estoppel as they apply to Respondent are also established. Appellant represented to the Bankruptcy Court under penalty of perjury that she did not possess any counterclaims or rights of setoff. *See Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1047

(8th Cir. 2006) ("a debtor's failure to list a claim in the mandatory bankruptcy filings is tantamount to a representation that no such claim existed."). Respondent, therefore, relied upon the reasonable assumption that Appellant had waived her counterclaims when it offered Appellant a loan modification. *See Lyles v. BMI, Inc.*, 292 S.C. 153, 158–59, 355 S.E.2d 282, 285 (Ct. App. 1987) ("An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable."). Respondent was prejudiced in so doing because Respondent likely would have conditioned the modification offer upon a full release of any and all claims against Respondent. Accordingly, Appellant is equitably estopped from asserting the counterclaims.

II. THE REMAINDER OF APPELLANT'S ARGUMENTS WERE NOT PROPERLY BEFORE THE LOWER COURT, AND THUS ARE NOT GROUNDS FOR APPEAL.

Appellant's remaining argument was not before the lower court and is thus not properly before this Court. Appellant, both at the summary judgment stage and in her initial brief, attempts to address the merits of any purported claims and defenses raised in response to the foreclosure. However, the sole issue decided by the trial court was whether Appellant should be judicially estopped from asserting her counterclaims and upon its finding that judicial estoppel applied never addressed Appellant's remaining arguments. *See Wachovia Bank, N.A. v. Coffey,* 389 S.C. 68, 77, 698 S.E.2d 244, 248 (Ct. App. 2010) ("In view of our disposition of this issue, we need not address Wachovia's remaining arguments."); *see also Whiteside v. Cherokee Cnty. Sch. Dist. No. One,* 311 S.C. 335, 428 S.E.2d 886 (1993) (appellate court need not address remaining issues when disposition of a prior issue is dispositive). Accordingly, the question before this Court is whether the trial court erred in finding that the circumstances present in this case met South Carolina's judicial estoppel requirements and any remaining issues raised by

Appellant are not before the Court. *See Mackey v. Kerr-McGee Chemical Co.,* 280 S.C. 265, 312 S.E.2d 565 (Ct. App. 1984) (finding that Appellant's argument was not before the trial court and thus could not be raised for the first time on appeal); *Whittington v. Ranger Ins., Co.*, 261 S.C. 582, 201 S.E.2d 620 (1973); *Futch v. McAllister Towing of Georgetown, Inc.,* 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

As stated previously, it is undisputed that elements one, two, and five of judicial estoppel have been satisfied. The third element is also satisfied because Appellant successfully maintained the abandonment of her counterclaims against Respondent and, in, turn obtained the benefit of a loan modification. Lastly, the fourth element is satisfied because the disclosure of Appellant's counterclaims would have increased the assets of the bankruptcy estate. Thus Appellant is deemed to have had a motive to conceal those claims.

During the lower court proceedings Appellant merely opposed Respondent's Motion for Summary Judgment, and did not file any separate motion through which the merits of her purported claims would have been before the lower court. The trial court, therefore, correctly determined that Appellant is judicially estopped from asserting those counterclaims and declined to address their validity, if any. The merits of Appellant's purported counterclaims were not property before the trial court and, consequently, cannot serve as grounds for the instant appeal. Therefore, the Court should deny these issues.

Notwithstanding the foregoing, Respondent complied with all the requirements under the 2011 Administrative Order of the S.C. Supreme Court and continued loss mitigation efforts after the denial of foreclosure intervention to Appellant. (R. p. 11). Appellant contends that Respondent did not act in good faith under the 2011 Administrative Order and thus has unclean hands. However, the record plainly shows that Appellant was reviewed for foreclosure

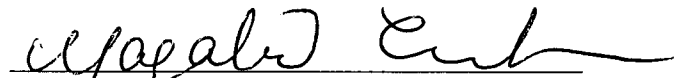
intervention, and denied based upon her failure to submit the requested information. (R. p. 11). Respondent thus concluded its obligations under the Administrative Order. Loss mitigation efforts subsequently resumed, during which Appellant was offered a loan modification. (R. p. 151, line 4). Therefore, this issue should be denied to the extent that the Court deems it appropriate for consideration herein.

CONCLUSION

For all the reasons set for herein, this Court should affirm the trial court's order granting Summary Judgment in favor of Respondent.

Respectfully submitted,

FINKEL LAW FIRM LLC



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February 28, 2017

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CERTIFICATE OF COUNSEL

I certify that *Respondent's Final Brief* complies with Rule 211(b), SCACR.

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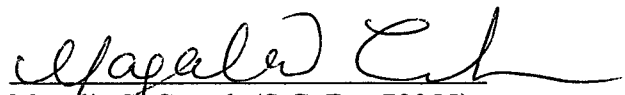
PROOF OF SERVICE

I certify that I have served the *Respondent's Final Brief* and *Certificate of Counsel* by depositing a copy of same in the United States Mail, postage prepaid, on February 28, 2017, addressed to Appellant's counsel of record, William H. Edwards, Esquire, P.O. Box 5709, West Columbia, South Carolina 29171.

FINKEL LAW FIRM LLC



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February 28, 2017

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REPLY TO:
CHARLESTON LITIGATION

February 28, 2017

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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Columbia, South Carolina 29211

RE: Green Tree Servicing, LLC v. Jacqueline L. Taylor
Appellate Case No.: 2016-001389
Our File No.: 60440.48491

Dear Ms. Kitchings:

Enclosed for filing is the *Respondent's Final Brief, Certificate of Counsel,* and related *Proof of Service* in the above-referenced case.

Should you have any questions concerning this matter, please do not hesitate to contact our office at your earliest convenience.

With kind personal regards, we are

Yours very truly,

FINKEL LAW FIRM

Magalie A. Creech

CC: William H. Edwards, Esquire