

20091

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger Mack Young, Circuit Court Judge

Trial Court Case No. 2011-CP-08-1754

Angela Drexler.....Appellant,

v.

CitiMortgage, Inc., Stonegate Properties, Inc., and
Branch Banking and Trust Company, Inc., ...Defendants.

Of Whom CitiMortgage, Inc. is the Respondent.

Appellate Case No. 2012-211306

RECORD ON APPEAL

TRAYWICK LAW OFFICES, LLC

David P. Traywick
P.O. Box 564
Isle of Palms, SC 29451
843-343-5092

-and-

SMITH, JORDAN, LAVERY & LEE, P.A.

James E. Sterling
14 Halter Drive
Piedmont, SC 29673
864-269-7373
Attorneys for Appellant

NELSON MULLINS RILEY & SCARBOROUGH LLP

Thad H. Westbrook
Sara Beth Nielsen
1320 Main Street / 17th Floor
P.O. Box 11070 (29211-1070)
Columbia, SC 29201
803-799-2000
Attorneys for Respondent

RECORD ON APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger Mack Young, Circuit Court Judge

Case No. Case No.: 2011-CP-08-1754

Angela Drexler.....Appellant,

v.

CitiMortgage, Inc. Respondent.

RECORD ON APPEAL

David P. Traywick
P.O. Box 564
Isle of Palms, SC 29451
843-343-5092

-and-

James E. Sterling
14 Halter Drive
Piedmont, SC 29673
864-269-7373
Attorneys for Appellant

Nelson Mullins Riley & Scarborough
1320 Main Street
Columbia, SC 29201
803-255-9284
Attorneys for Respondent

RECEIVED

DEC 03 2012

SC Court of Appeals

INDEX

1.	Order Denying Appellant's Rule 60(b) Motion - June 10, 2009	1
2.	Order of Disbursement - August 7, 2009.....	7
3.	Judgment of Foreclosure & Sale - October 29, 2008	9
4.	Order Granting Summary Judgment - January 6, 2012.....	17
5.	Order Denying Motion to Reconsider as Moot - March 6, 2012.....	26
6.	Consent Order for Joinder of an Additional Party - January 25, 2012.....	32
7.	Order on Motion to Dismiss Appeal - July 16, 2012	37
8.	Amended Complaint of Foreclosure filed May 21, 2008	38
9.	Lis Pendens, Summons, and Complaint - June 21, 2011	42
10.	Hearing Transcript - October 12, 2011.....	66
11.	Record of Hearing on Foreclosure - October 29, 2008	86
12.	Motion to Vacate Foreclosure Judgment & Master's Sale - February 19, 2009	116
13.	CitiMortgage's Motion to Dismiss Complaint - August 25, 2011.....	125
14.	CitiMortgage's Memorandum in Support of Motion to Dismiss - October 11, 2011.....	177
15.	Appellant's Memorandum in Opposition to Motion to Dismiss - October 12, 2011.....	210
16.	Appellant's Supplement in Opposition to Motion to Dismiss - October 13, 2011.....	230
17.	Motion to Amend Complaint and Proposed Amended Complaint - December 8, 2011....	233
18.	Motion to Reconsider, Alter or Amend Order Granting Summary Judgment in Favor of CitiMortgage - January 17, 2012	262
19.	Memorandum in Opposition to Motion to Reconsider - February 7, 2012.....	267
20.	Notice of Appeal - April 4, 2012	285
21.	Motion to Dismiss Appeal - May 24, 2012	288

22.	Return to Motion to Dismiss Appeal by Appellant - June 15, 2012.....	365
23.	Reply in Support of Motion to Dismiss Appeal - June 22, 2012	369
24.	Notice of Sale - October 29, 2008.....	383
25.	October 13, 2011 E-Mail from Attorney Hamrick to Ms. Ramsay regarding supplement in opposition to motion to dismiss	384
26.	November 21, 2011 E-Mail from Ms. Ramsay to Parties requesting proposed order	385
27.	December 8, 2011 E-Mail from Attorney Hamrick to Ms. Ramsay regarding Motion to Amend Complaint	386
28.	December 9, 2011 E-Mail from Attorney Nielsen to Ms. Ramsay regarding Motion to Amend Complaint	388
29.	January 5, 2012 E-Mail from Ms. Ramsay to Parties informing of signing of Order granting summary judgment	390
30.	February 16, 2012 E-Mail from Ms. Ramsay to Parties regarding ruling on motion to reconsider.....	394
31.	Certificate of Appellant	398

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

CitiMortgage, Inc.,

Plaintiff,

vs.

Angela M. Drexler; and any other Heirs at Law or Devises of Arthur E. Antidel, Deceased, their heirs, Personal Representatives, Administrators, Successors and Assigns, and all other persons entitled to claim through them; all unknown persons with any right, title or interest in the real estate described herein; also any persons who may be in the military service of the United States of America, being a class designated as John Doe; and any unknown minors or persons under a disability being a class designated as Richard Roe; Washington Mutual Home Loans, Inc. f/k/a Fleet Real Estate Funding Corp.,

Defendants.

(511654-01799 JJH)

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2008-CP-08-1258

ORDER

2009 JUN 10 PM 12:21
CLERK OF COURT
BERKELEY COUNTY, SC

This matter came before the undersigned at hearing held on March 18, 2009, at 9:30 a.m. on Defendant Angela M. Drexler's Motion for Relief Pursuant to SCRCP 60, to Vacate Order and Judgment of Foreclosure and Master's Sale and to Reinstate Mortgage, and for Legal Fees and Costs. Present at this hearing were John J. Hearn, Esquire, attorney for the Plaintiff, and Robert L. Papa, Esquire, attorney for Defendant Angela M. Drexler, individually and as heir at law of Arthur Antidel, and Defendant Drexler. After careful consideration of the matter, I make the following combined findings of fact and conclusions of law, and deny Drexler's Motion.

I would note at the outset that counsel for both parties were remarkably well prepared and presented zealous and compelling arguments for their respective clients.

Testimony was taken from Drexler at some length and Drexler entered a number of exhibits by the consent of the parties, including copies of various bank statements, copies of receipts for mailing, and copies of the Plaintiff's customer service records. The court has considered each of these exhibits in reaching its ruling. In reviewing the testimony and exhibits, the court notes that Drexler testified that she made certain payments in 2008, and that those payments were accompanied by a coupon from her payment book issued by the prior loan servicer, ABN AMRO. The coupon book was admitted into evidence without objection. The court further notes that the last coupon used in the book appears to have been from June 2007. The coupons from July 2007 through February 2008—the February coupon being the last in the book—are intact.

The court may relieve a party from a default judgment for mistake, inadvertence, surprise, or excusable neglect. S.C.R. Civ. P. 60(b)(1). As the moving party, Drexler has the burden of proof. *Thompson v. Hammond*, 299 S.C. 116, 119, 382 S.E.2d 900, 903 (1989).

The South Carolina Supreme Court has repeatedly held that a party seeking to have a judgment set aside under Rule 60(b)(1) must show both: (1) mistake, inadvertence, surprise, or excusable neglect; and (2) a meritorious defense. *Tri-County Ice and Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990); *Thompson v. Hammond*, 299 S.C. 116, 119, 382 S.E.2d 900, 903 (1989); *Broughton v. Jaffee*, 275 S.C. 541, 542, 273 S.E.2d 767, 768 (1981); *Tolpa v. Bill Jones Realty of Hilton Head, Inc.*, 275 S.C. 262, 263-64, 270 S.E.2d 622, 622-23 (1980); *Gillespie v. Rowe*, 275 S.C. 98, 99, 267 S.E.2d 535, 536 (1980); and *Stewart v. Floyd*, 274 S.C. 437, 442, 265 S.E.2d 254, 256 (1980). Drexler's testimony—that the payments she made would reinstate her mortgage—are not supported by the record before me.

There being no mistake, inadvertence, surprise, or excusable neglect, the possible

existence of a meritorious defense is irrelevant under Rule 60(b)(1). *Gillespie v. Rowe*, 275 S.C. 98, 99, 267 S.E.2d 535, 536 (1980); *Stewart v. Floyd*, 274 S.C. 437, 442, 265 S.E.2d 254, 256 (1980); and *Rutledge v. Junior Order of United Am. Mechs.*, 193 S.E. 434, 437 (S.C. 1937).

Drexler also argues that the judgment should be set aside pursuant to Rule 60(b)(3), which reads:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... (3) fraud, misrepresentation, or other misconduct of an adverse party

SCRCP 60(b)(3).

Drexler claims that certain allegations of the complaint are untrue. Accordingly, the issue is whether the court may set aside a default judgment under Rule 60(b)(3) if the defaulting party proves that the complaint contained fraudulently made allegations.

For purposes of deciding whether a party is entitled to relief from an adverse final judgment because of fraud, South Carolina courts distinguish between intrinsic and extrinsic fraud. The court will set aside a final judgment rendered because of extrinsic fraud but will not set aside a judgment based on intrinsic fraud. *Bryan v. Bryan*, 66 S.E.2d 609 (S.C. 1951).

Intrinsic fraud is fraud that was presented and considered in the litigation. *Chewning v. Ford Motor Co.*, 579 S.E.2d 605 (S.C. 2003), citing *Hagy v. Pruitt*, 529 S.E.2d 714 (S.C. 2000). This category includes perjury by a witness or the failure to disclose matters that would defeat one's own claim. *Id.*

Extrinsic fraud is fraud that "induces a person not to present a case or deprives a person of the opportunity to be heard." *Chewning*, 579 S.E.2d 605.

The South Carolina Supreme Court reaffirmed the intrinsic/extrinsic distinction in March

of this year in *Raby Construction v. Orr*, 594 S.E.2d 478 (S.C. 2004). There the court held that an allegation that the defendant had presented fraudulent evidence at trial was not sufficient to invoke the protection of Rule 60(b)(3) because the alleged fraud was "merely intrinsic." *Id.*

The Washington Court of Appeals has held, "The rule is aimed at judgments which were unfairly obtained, not at those which are factually incorrect. For this reason, the conduct must be such that the losing party was prevented from fully and fairly presenting its case or defense." *Peoples State Bank v. Hickey*, 777 P.2d 1056 (Wash. Ct. App. 1989). That court went on to say that a mischaracterization in the complaint of the priority of the parties' respective liens on the property did not prevent either side from fully presenting his case. There, as here, statements in the complaint (whether true, innocently false, or outright fraudulent) do not prevent a defendant from presenting his case to the court.

In *Hickey*, as here, the party seeking relief under Rule 60(b)(3) failed to file an answer, and a default judgment was entered. The court noted that, "The misrepresentation having nothing to do with her failure to respond to the summons and complaint, Hickey cannot meet the requirement that the misrepresentation must have operated to prevent her from fully and fairly presenting her case." *Id.*

Here, Plaintiff has not argued that fraudulent or incorrect statements in the complaint prevented it from responding. Indeed, the statement alleged to be fraudulent (*i.e.*, that Drexler was not in default and had somehow been reinstated) should have inspired Drexler to come forward to defend the case and protect her property.

The distinction between the treatment of extrinsic and intrinsic fraud under Rule 60(b)(3) is an extension of the required balancing of the need for finality in judgments versus the desire to ensure that the process is fair. A litigant may receive relief from extrinsic fraud because extrinsic

fraud prevents him from fully presenting or trying his case. In other words, extrinsic fraud precludes the court from conducting a full trial of the subject matter of the action. *Bryan*, 66 S.E.2d 609. Intrinsic fraud, however, does not present the same policy concerns. Intrinsic fraud involves matters (such as perjured testimony or forged documents) that are submitted to the court for consideration, and all parties have an opportunity to expose the fraud during the course of the litigation.

Finally, in addition to proving the successful party's fraud, the defaulting party must establish her own freedom from any fault that contributed to a default judgment being rendered against her. *Hirsch v. Collier*, 104 Ga. App. 271, 121 S.E.2d 318 (1961). Drexler is unable to do that. The record demonstrates that she defaulted and did not timely reinstate.

Moreover, Drexler faces an even higher burden since this property has been sold to a third party purchaser, Stonegate Properties. "Sound public policy demands that judgments and judicial sales be upheld where it can be done without violating any statute or settled principle of law." *Betsill v. Betsill*, 187 S.C. 50, 196 S.E. 381, 384 (1938). "A sound public policy requires that the validity of judicial sales be upheld, if in reason and justice it can be done." *Cumbe v. Newberry*, 251 S.C. 33, 37, 159 S.E.2d 915, 917 (1968).

A judicial sale will be set aside only when either: "(1) the sale price is so gross as to shock the conscience; or (2) the sale is accompanied by other circumstances warranting the interference of the court." *Wells Fargo Bank, NA v. Turner*, 378 S.C. 147, 150, 662 S.E.2d 424, 425 (Ct. App. 2008) (internal quotations omitted) (citing *Poole v. Jefferson Standard Life Ins. Co.*, 174 S.C. 150, 157 (1934)).

Drexler does not base her motion for relief on the sales price. Therefore, the foreclosure sale in this case could only be set aside under the second prong of the *Poole* test—if circumstances exist that warrant the interference of the court.

There are no such circumstances. Drexler has not provided enough evidence to set aside her default, and she has not shown the capacity to reinstate her loan today.

The facts and law are overwhelmingly against Drexler. Her motion is denied, and the court will enforce the Order of Judgment of Foreclosure and Sale and the resulting sale to the third party purchaser.

AND IT IS SO ORDERED.

Robert E. Watson
Robert E. Watson
Master in Equity for Berkeley County

Dated: 6/8, 2009
Moncks Corner, SC

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

CitiMortgage, Inc.,

Plaintiff,

-versus-

Angela M. Drexler,

Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NUMBER: 2008-CP-08-1258

ORDER AND
REPORT ON SALE
AND DISBURSEMENT
OF FUNDS

UNDER AUTHORITY of a Decree dated October 29, 2008, I offered for sale to the highest bidder for cash, at public auction on December 3, 2008, the premises subject to this suit, and I received a high bid of \$87,600.00 from Stonegate Properties / Matt Haynie. I have executed and delivered a Master's deed to Stonegate Properties / Matt Haynie and disbursed the funds as follows:

RECEIPTS

Reference deposit paid by Plaintiff
Bid deposit by Stonegate Properties / Matt Haynie
Bid balance by The Ruple Firm / Stonegate Properties
Interest paid by The Ruple Firm / Stonegate Properties

Total Received by Master

\$ 125.00
4,380.00
83,220.00
673.20
\$ 88,398.20

DISBURSEMENTS

Master's reference fee
County Commission
Paid to Rogers Townsend & Thomas, Attorney for Plaintiff
Proceeds and interest from sale

Total Disbursed by Master

\$ 125.00
876.00
85,556.05
\$ 86,557.05

SURPLUS FUNDS

1,841.15

Any claims for surplus funds should be filed with the Clerk of Court and served on the parties; note in your claims your position of priority and the reasons therefore.

Robert E. Watson
Robert E. Watson
Master-in-Equity, Berkeley County

5 day of January, 2009
Moncks Corner, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

CitiMortgage, Inc.,

Plaintiff,

v.

Angela M. Drexler; and any other Heirs at Law or
Devises of Arthur E. Antisdel, Deceased, their
heirs, Personal Representatives, Administrators,
Successors and Assigns, and all other persons
entitled to claim through them; all unknown
persons with any right, title or interest in the real
estate described herein; also any persons who may
be in the military service of the United States of
America, being a class designated as John Doe;
and any unknown minors or persons under a
disability being a class designated as Richard Roe;
Washington Mutual Home Loans, Inc. f/k/a Fleet
Real Estate Funding Corp.

Defendant(s).

(011654-01799)

Samuel C. Waters, Esquire
Attorney for the Plaintiff

W. Brooks Styles
Guardian ad Litem and/or Attorney pursuant to the Servicemembers Civil Relief Act, 50 U.S.C § 501 et.
seq.

W. Brooks Styles
Guardian ad Litem and/or Attorney pursuant to the Servicemembers Civil Relief Act, 50 U.S.C § 501 et.
seq.

A hearing was held October 29, 2008 at 09:30 AM. The testimony was taken, which is
reported herewith, and from the testimony and evidence, I find and conclude as follows:

FINDINGS OF FACT:

1. The Lis Pendens was filed on May 7, 2008. The amended Lis Pendens was filed
on May 21, 2008.

IN THE COURT OF COMMON PLEAS

DOCKET NO. 08-CP-08-1258

JUDGMENT OF FORECLOSURE AND SALE
Deficiency Judgment Waived

2008 OCT 29 11:13

2. The Summons and Complaint were filed on May 7, 2008. The amended Summons and Complaint were filed on May 21, 2008.

3. Service was made upon the Defendant(s) named in this report as shown by the proof(s) of service filed herein.

4. The Defendant(s) Angela M. Drexler and Washington Mutual Home Loans, Inc. f/k/a Fleet Real Estate Funding Corp are in default as shown by affidavit or order filed herein.

5. The Estate of Arthur E. Antisdel filed an answer through their attorney/guardian, W. Brooks Styles.

6. The Defendant(s) and/or all attorneys of record were notified of the time, date, and place of the hearing in this matter.

7. According to the affidavit filed herein, the Defendant(s) Angela M. Drexler and Washington Mutual Home Loans, Inc. f/k/a Fleet Real Estate Funding Corp are in default and that the Defendant(s) Angela M. Drexler is not in the Military Service of the United States of America, as contemplated under The Servicemembers Civil Relief Act, 50 U.S.C. § 501 et. Seq.

8. For value received, Arthur E. Antisdel and Angela M. Drexler made, executed and delivered a(n) Fixed Rate Note dated July 9, 1998 promising thereby to pay the sum of \$84,850.00 with interest at 8.5% per annum. Other terms and conditions are stated in the Fixed Rate Note, which is of record herein.

9. To better secure the payment of the Fixed Rate Note described above Arthur E. Antisdel and Angela M. Drexler made, executed, and delivered to Compass Mortgage Inc. a certain real estate purchase money first Mortgage in writing, dated July 9, 1998 covering real property in Berkeley County, which is the same as that described in the Complaint. The purchase money first Mortgage was filed on July 13, 1998, and is of record in the Office of RMC/ROD in Book 1379 at Page 57. This mortgage was subsequently assigned to Homestead Funding Corporation by assignment dated July 9, 1998 and recorded July 13, 1998 in Book 1379 at Page 68; subsequently assigned to ABN AMRO Mortgage Group, Inc. by assignment dated March 8, 2001 and recorded on March 26, 2001 in Book 3423 at Page 49. CitiMortgage, Inc. is successor by merger to ABN Amro Mortgage Company, Inc.

10. This purchase money first Mortgage constitutes a purchase money first mortgage lien on the subject property, subject only to ad valorem or other liens/taxes given priority by statute.

11. The Plaintiff in this action is the owner and holder or nominee for the owner and holder of the Fixed Rate Note and purchase money first Mortgage it is seeking to foreclose.

12. Subsequently, Arthur E. Antisdel died intestate on July 14, 2004, leaving the subject property to his/her heirs or devisees.

13. Any notice required by the terms of the purchase money first mortgage or by state or federal statutes has been given to the applicable defendant(s) prior to the commencement of this action.

14. Plaintiff has moved to dismiss the Defendant, Washington Mutual Home Loans, Inc. f/k/a Fleet Real Estate Funding Corp., from its action.

15. Payment due on the Fixed Rate Note has not been made as provided for therein, and the Plaintiff, as the holder or nominee for the holder thereof, has elected to require immediate payment of the entire amount due thereon and has placed the Fixed Rate Note and purchase money first Mortgage in the hands of the attorney herein for collection by foreclosure.

16. W. Brooks Styles, a member of the South Carolina Bar, has been appointed as Guardian ad Litem for any person claiming a right, title or interest in the subject property who is a minor or otherwise under disability. He has filed an Answer, Affidavit of Response, and actively participated herein. The sum of \$150.00 is a reasonable fee to allow for such Guardian ad Litem services rendered and to be rendered herein until final adjudication of the within action.

17. W. Brooks Styles, a member of the South Carolina Bar, has been appointed as attorney for any Defendant who is in the military service within the meaning of the Servicemembers Civil Relief Act, 50 U.S.C. § 501 et. seq., and has filed an Answer, Affidavit of Response, and actively participated herein for such Defendant(s). The sum of \$150.00 is a reasonable fee to allow for such attorney's services rendered herein until final adjudication of the within action. Any Defendants, their heirs, Personal Representatives, Administrators, Successors and Assigns, and all other persons entitled to claim through them; all unknown persons with any right, title or interest in the real estate described herein who are in military service have not been prejudiced of his/her right to present a defense because of his/her military service.

18. The sum of \$4,500.00 is a reasonable fee to allow as attorney fees for Plaintiff's attorney for services performed and anticipated to be performed until final adjudication of the within action, under the terms of the Fixed Rate Note and purchase money first Mortgage. These sums are likewise reasonable based on the time necessarily devoted to representation of the Plaintiff during the several month course of these proceedings. The services of counsel performed for the Plaintiff, including the number and types of pleadings and documents prepared, the incumbent liabilities, and the difficulties involved in this particular case also support the amount awarded. The fees are also reasonable given the professional standing of the Plaintiff's counsel and their experience in handling foreclosure matters. The fees awarded herein are also reasonable in light of the fees customarily awarded by this court for similar services in this locality. Moreover, the efforts of Plaintiff's counsel have had the beneficial result of a prompt foreclosure of the mortgage. Services anticipated to be performed until final adjudication

contemplates completion of this matter within a reasonable time and does not include exceptional circumstances delaying conclusion beyond the normal time.

19. After all payments received by the Plaintiff have been credited to the subject loan, the amount due and owing on the Fixed Rate Note, with interest at the rate provided in the Fixed Rate Note, and other costs and expenses of the within action, including an attorney's fee, secured by the Fixed Rate Note and purchase money first Mortgage, is as follows:

- (a) Principal due December 1, 2007 \$70,581.19
- (b) Interest from November 1, 2007 through
October 29, 2008 at 8.5% per annum \$5,999.40
- (c) Advances (Escrow advances, corporate charges
and other charges) \$648.47
- (d) Costs of collection prior to
hearing (service, filing, etc.) \$1,687.57
- (e) Title Abstract Search \$425.00
- (f) Late Charges \$380.26
- (g) Attorney's fee \$4,500.00

TOTAL debt secured by Fixed Rate Note and purchase money first Mortgage,
including interest to date shown \$84,221.89

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 8.5% per annum (pursuant to the terms of the Fixed Rate Note and purchase money first Mortgage) on the judgment debt should be added to such judgment debt to comprise the amount of Plaintiff's debt secured by the purchase money first Mortgage through the date to which such interest is computed.

20. Plaintiff is seeking the usual foreclosure of the purchase money first mortgage and has in the Complaint (or subsequently thereto in writing) expressly waived the right to a personal or deficiency judgment.

21. The Defendant(s) claim(s) or may claim a lien upon or legal interest in the subject property and in the event there is a surplus from the sale of the subject property, such Defendant(s) may present any such lien or legal interest at a hearing subsequent to the sale, in accordance with Rule 71(c) South Carolina Rules of Civil Procedure. The said Defendant(s) and such liens or legal interests are as follows:

a. Angela M. Drexler, and any unknown Heirs or devisees of Arthur E. Antisdel, Deceased, including any persons who may be in the military service of the United States of America, being a class designated as John Doe; and any unknown minors or persons under a disability being a class designated as Richard Roe, by virtue of any interest claimed under the law of intestate succession (S.C. Code Section 62-2-109) or under decedent's will. heir(s) or devisees of the Estate of Arthur E. Antisdel

IT IS THEREFORE ORDERED:

22. The Defendant, Washington Mutual Home Loans, Inc. d/k/a Fleet Real Estate Funding Corp., is hereby dismissed from this action.

23. There is due on the Fixed Rate Note and purchase money first Mortgage set forth in the Complaint the sum of \$84,221.89, as set out in the Findings of Fact *supra*, together with interest at the rate provided therein on the balance of principal from the date aforesaid to the date hereof.

24. The amount due in the preceding paragraph (the "Final Total Debt" as set out in the Findings of Fact *supra*) shall accrue interest at the rate of the respective note rate(s) per annum and together with such interest shall constitute the total judgment debt due the Plaintiff.

25. The amount of the judgment shall be subject to increase to permit the Plaintiff to recover additional costs, commissions and expenses not included in the minimum deposit previously made in compliance with S.C. Code Ann. §14-11-310 (1976). It may also increase to include supplemental compensation for attorney's services not contemplated by the initial fee award. Jurisdiction over the fee award and total debt is reserved to facilitate the assessment and payment of any such costs and/or supplemental compensation. Such additional costs, commissions and expenses may be established by affidavit and shall be adjudicated by the court without further hearing.

26. The Defendant(s) liable for the aforesaid judgment debt of the Fixed Rate Note and purchase money first Mortgage including interest at the rate of 8.5% per annum shall on or before the date of sale of the property hereinafter described, pay to the Plaintiff, or Plaintiff's attorney the amount of Plaintiff's debt as aforesaid, together with the costs and disbursements of this action.

27. On default of payment at or before the time herein indicated, the mortgaged premises described in the Complaint, as hereinafter set forth, shall be sold by the Master in Equity at public auction, at the Berkeley County Courthouse, in the City of Moncks Corner, County and State aforesaid on December 3, 2008, at 11:00 AM, or 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 the next business day succeeding such holiday), on the following terms, that is to say:

a. For cash: The Master in Equity will require a deposit of 5% on the amount of the

bid (in cash or equivalent) same to be applied to purchase price if compliance is made, but in the event compliance is not made, the deposit may be forfeited without further hearing and applied first to costs of the action and then to plaintiff's debt. Should the successful bidder at the regularly conducted sale fail or refuse to either make the required deposit at time of bid or comply with the other terms of the bid within 30 days, then the property may be re-sold on the same terms and conditions on the same or some subsequent Sales Day, but at the risk of the defaulting bidder(s).

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

c. Purchaser to pay for any statutory commission on sale from the proceeds of the final bid amount.

d. Purchaser to pay for deed preparation, costs of recording the deed and satisfaction of mortgage, and transfer taxes on the deed.

e. Purchaser shall be entitled to possession of the premises only after Purchaser fully complies with the bid amount and a deed is issued by the Court.

28. A personal or deficiency judgment having been waived, the bidding will not remain open after the date of sale and compliance with the bid may be made immediately.

29. Plaintiff may waive any of its rights, including its right to a deficiency judgment in accordance with Rule 71, South Carolina Rules of Civil Procedure, prior to sale.

30. The Master in Equity will, by advertisement according to law, give notice of the time and place of such 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 if, upon such sale being made, the purchaser, or purchasers, should fail to comply with the terms thereof within 30 days after date of sale, then the 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.

31. If Plaintiff be 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 Master in Equity only the amount of the costs and expenses crediting the balance of the bid on Plaintiff's indebtedness.

32. The 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 (including attorney fees) or so much thereof as the purchase money will pay on the same;

NEXT: Any surplus should be held pending further Order of this court.

33. In the event the successful bidder is other than the Defendant(s) in possession herein, the Sheriff of Berkeley 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.

34. In the event the successful bidder is other than the Defendants in possession herein and the occupants have voluntarily vacated the premises or have been ejected from the premises leaving furnishings, fixtures and items not subject to the Plaintiff's Mortgage in said premises, the Purchaser is authorized to remove therefrom all furnishings, fixtures and items not subject to the lien of the Plaintiff's Mortgage, which personal property, being deemed abandoned, shall be removed by the Purchaser or its agents from the subject property by placing said personal property on the public street or highway or by any other means.

35. The Defendant(s) named herein, and all persons whosoever claiming under Defendant(s), are forever barred and foreclosed of all right, title, interest, equity of redemption or lien in the said mortgaged premises so sold, or any part thereof.

36. In accordance with Rule 77(d), SCRPC, the Clerk of Court shall serve a notice of entry of this Judgment of Foreclosure upon all parties not in default for failure to appear herein.

37. The deed of conveyance made pursuant to said sale shall contain the names of only the first-named Plaintiff and the first-named Defendant(s), 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; and the Register of Deeds/Clerk of Court is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deed.

38. The undersigned will retain jurisdiction to do all necessary acts incident to this foreclosure including, but not limited to, the issuance of a Writ of Assistance.

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

All that piece, parcel or lot of land with the buildings and improvements thereon, situate lying and being near Ladson, South Carolina, in Berkeley County, South Carolina, shown and designated as Lot 74, Block F, Tall Pines Plantation Subdivision, Section Three, on a plat dated January 19, 1977 made by Harold J. Leamond, P.E. and L.S., and recorded in the Office of the Clerk of Court for Berkeley County on January 24, 1977 in Plat Book W. Page 153.

This being the identical property conveyed to Arthur E. Antisdel and Angela M. Drexler by deed of Secretary of Housing and Urban Development of Washington D.C. dated July 7, 1998 and recorded July 13, 1998 in Deed Book 1379 at Page 53; subsequently, Arthur E. Antisdel died intestate on July 14, 2004, leaving the subject property to his/her heirs or devisees.

Property Address:

[REDACTED]
LADSON, SC 29456

TMS# 233-14-01-024

Robert E. Watson

Robert E. Watson
Master in Equity

10-29, 2008
Moncks Corner, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Angela Drexler,

Plaintiff,

vs.

CitiMortgage, Inc., Stonegate Properties,
Inc., and Branch Banking and Trust
Company, Inc.,

Defendants.

Civil Action No. 2011-CP-08-1754

**ORDER GRANTING SUMMARY
JUDGMENT IN FAVOR OF
CITIMORTGAGE, INC.**

FILED
2012 JAN -6 PM 12:41
CLERK OF COURT
BERKELEY COUNTY, SC

BEFORE THE COURT is Defendant, CitiMortgage, Inc. (hereinafter "CitiMortgage")'s Motion to Dismiss the Complaint of Plaintiff, Angela Drexler ("Plaintiff") pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. After the hearing held on October 12, 2011, at 10:00 A.M. and consideration of both parties' written briefs, the Court finds that CitiMortgage's Motion is considered as a motion for summary judgment, Plaintiff cannot succeed on any claim against CitiMortgage and, therefore, CitiMortgage is entitled to summary judgment.

BACKGROUND

1. This case arises from a prior action filed by CitiMortgage, against Plaintiff, in May 2008, in the Court of Common Pleas for Berkeley County, South Carolina, C/A No. 2009-CP-08-1258, for the foreclosure and sale of property located at [REDACTED] Ladson, South Carolina 29456.

2. A Judgment of Foreclosure and Sale was entered on October 29, 2008, finding that Plaintiff entered into a Fixed Rate Note on July 9, 1998, which was

11/16

R

secured by a Mortgage, and Plaintiff failed to satisfy her payment obligations. The balance was accelerated and the property was sold at public auction.

3. The property was offered for sale on December 3, 2008, and sold to Defendant Stonegate Properties.

4. Over two months after the sale, on February 19, 2009, Plaintiff filed a Motion to Vacate the Judgment of Foreclosure and Sale pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure. In the motion, Plaintiff sought to set aside and vacate the Master in Equity's Judgment of Foreclosure and Sale, set aside and vacate the Master's Deed, and a declaration that she was current on her payments. A hearing was held on March 18, 2009, where Plaintiff argued that she made her payments and the Mortgage should be reinstated. After hearing the testimony and considering the evidence, the Master in Equity held that the record supported a finding that Plaintiff defaulted on her loan and that she failed to timely submit reinstatement payments. Further, the Master in Equity concluded that there was no fraud under Rule 60(b)(3) sufficient to set aside the foreclosure judgment. The Rule 60(b) Motion was denied and the court enforced the Order of Judgment of Foreclosure and Sale, and resulting sale to the third-party purchaser. Plaintiff failed to appeal that ruling within thirty days.

5. The foreclosure case was closed and final on August 4, 2009, when the surplus sale funds were distributed amongst the parties.

6. Plaintiff filed the instant action on June 21, 2011, against CitiMortgage, seeking to set aside the Master's Sale, void the Master's Deed, cancel the Mortgage Assignment, set aside the Foreclosure Judgment due to alleged lack of standing, quiet title, and recover damages based on negligence, fraud, breach of contract,

breach of the implied covenant of good faith and fair dealing, unjust enrichment, slander of title, negligent misrepresentation, tortious interference with contract, and alleged violation of the South Carolina Unfair Trade Practices Act ("SCUTPA").

7. CitiMortgage filed a Motion to Dismiss Plaintiff's Complaint on August 25, 2011, on the grounds of res judicata since all of the claims related to the servicing of Plaintiff's loan or CitiMortgage's standing to pursue foreclosure and, therefore, should have been pursued as compulsory counterclaims or defenses in the foreclosure action. Further, CitiMortgage argued that Plaintiff's claims related to the foreclosure judgment and servicing of Plaintiff's loan were fully and fairly litigated in the prior foreclosure action by way of the Rule 60(b) Motion and, therefore, are similarly barred by res judicata and collateral estoppel. As additional grounds in the Motion, CitiMortgage argued that Plaintiff's negligence and negligent misrepresentation claims are barred by the economic loss rule and Plaintiff lacked standing to challenge the Mortgage Assignment.

8. A hearing was held on October 12, 2011, where both parties submitted briefing and oral arguments. Based on the briefing provided to the Court and the arguments of both parties at the hearing, this Court finds that there is no genuine issue of material fact and CitiMortgage is entitled to summary judgment on all claims filed against it by Plaintiff.

APPLICABLE LAW

9. CitiMortgage filed its Motion to Dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. Because documents were submitted both

before and after the hearing on the Motion, this Court considered the Motion as one for summary judgment.

10. A motion for summary judgment should be granted where the Court is satisfied that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. A party opposing a motion for summary judgment must "do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial." *Hedgepath v. AT&T Co.*, 348 S.C. 340, 354, 559 S.E.2d 327, 335 (Cl. App. 2001) (quoting *Baughman v. AT&T Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991)) (internal quotes omitted and emphasis in original). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Id.* at 355, 559 S.E.2d at 336. Reliance on allegations in a pleading is insufficient to overcome a motion for summary judgment. Rule 56(e), SCRPC. Further, "[a] party cannot escape summary judgment on the mere hope that something may develop at trial." *Champion Int'l Corp. v. Eubanks*, 291 S.C. 395, 398, 353 S.E.2d 880, 882 (Cl. App. 1987).

ANALYSIS AND CONCLUSIONS

11. Each of the claims related to the servicing of Plaintiff's loan is barred by the doctrine of res judicata because those claims should have been asserted as compulsory counterclaims in the prior foreclosure action. Additionally, each of the claims related to the foreclosure action and CitiMortgage's standing were fully and fairly litigated at the Rule 60(b) stage and are therefore barred by collateral estoppel.

12. In South Carolina, a party must bring as a counterclaim any claim she has against the opposing party if it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim and does not require the presence of additional parties over which the court cannot acquire jurisdiction. See S.C. R. Civ. P. 13(a). Thus, it is well-settled that if a counterclaim is compulsory, but is not raised in the first case, a party is precluded under the doctrine of res judicata from asserting the claim in a subsequent action. See *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997) (stating that "if a counterclaim is compulsory, but not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action"); *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 62, 566 S.E.2d 863, 865 (Ct. App. 2002) ("The South Carolina Reporter's Note following Rule 13 states: '[c]ounterclaims arising out of the same transaction or occurrence that is the subject of the action are 'compulsory' under Rule 13(a) and are barred by res judicata or estoppel by judgment if not asserted.'").

13. The South Carolina Supreme Court has adopted the "logical relationship" test for determining whether a claim is a compulsory counterclaim under Rule 13(a), SCRPC. *N.C. Fed. Savings & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989) ("We hereby adopt the logical relationship test."). Under the logical relationship test, a counterclaim is compulsory if there is any logical relationship between the claim and the counterclaim. See *id.* (finding a logical relationship between the enforceability of a note, which was the subject of a foreclosure action, and the validity of a purported oral agreement which, if performed, would have avoided default on the note).

14. In this case, Plaintiff's claims for negligence, fraud, breach of implied covenant of good faith and fair dealing, breach of contract, unjust enrichment, violation of the SCUTPA, tortious interference with contract, quiet title, and negligent misrepresentation all relate to and arise out of the servicing of Plaintiff's loan and, therefore, bear a logical relationship to the foreclosure action. Plaintiff should have disputed the servicing of her loan, the application of payments, and CitiMortgage's standing to foreclose in the previously-filed foreclosure action.

15. Accordingly, Plaintiff cannot bypass her obligation to raise all compulsory claims in the foreclosure action, as required under Rule 13(a), SCRCF and, therefore, CitiMortgage is entitled to summary judgment on these claims pursuant to the doctrine of res judicata. See *Plott v. Justin Enters.*, 374 S.C. 504, 511, 649 S.E.2d 92, 95 (Ct. App. 2007) ("Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of the prior action between those parties. Under res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.") (internal citations omitted).

16. In addition to being barred by the doctrine of res judicata, Plaintiff's claims as to improper servicing, standing to foreclose, and alleged reinstatement of the loan were all heard and decided by the Master in Equity during the hearing on Plaintiff's Rule 60(b) motion in the foreclosure action.

17. "Collateral estoppel prevents a party from re-litigating an issue in a subsequent suit which was actually and necessarily litigated and determined in the prior action." *Aaron v. Mahl*, 381 S.C. 585, 592, 674 S.E.2d 482, 486 (2009). An issue is

deemed precluded by collateral estoppel when the moving party establishes that "the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). CitiMortgage established each of the elements of collateral estoppel and Plaintiff cannot come forward with any facts to show a genuine issue for trial.

18. In the foreclosure action, Plaintiff filed a Rule 60(b) motion seeking to set aside and vacate the Master's Judgment of Foreclosure and Sale, set aside and vacate the Master's Deed, and seeking a declaration that the loan was current. Likewise, in this action, Plaintiff's Complaint seeks to set aside the Master's Sale, void or cancel the Master's Deed upon sale, and damages, under several claims,¹ related to payments on the loan.

19. As outlined in CitiMortgage's Motion and Supporting Memorandum, the Master in Equity found that the Plaintiff's testimony regarding payments and reinstatement was not supported by the record. Moreover, the Master in Equity held that CitiMortgage had standing to pursue the foreclosure and that any allegedly incorrect statements in the foreclosure Complaint should have been litigated during the foreclosure proceedings. Based on the testimony and documents submitted at the Rule 60(b) hearing, the Master in Equity held that the facts and law are overwhelmingly against Plaintiff and enforced the Order of Judgment of Foreclosure and Sale and the resulting sale to the third party purchaser. Because these issues were previously heard and ruled on by the Master in Equity, the issues were actually litigated,

¹ These theories include: negligence, fraud, breach of contract, breach of implied covenant of good faith and fair dealing, unjust enrichment, violation of the SCUTPA, tortious interference, and negligent misrepresentation.

directly determined, and necessary to support the judgment, thereby satisfying the elements of collateral estoppel.

20. Having found that CitiMortgage satisfied each element of collateral estoppel and Plaintiff has not come forward with sufficient evidence to create a genuine issue of material fact for trial, this Court grants summary judgment in favor of CitiMortgage on all claims. *See State v. Bacote*, 331 S.C. 328; 331, 503 S.E.2d 161, 163 (1998) ("The doctrine of collateral estoppel is intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the notion that it is unfair to permit a party to relitigate an issue that has already been decided.").²

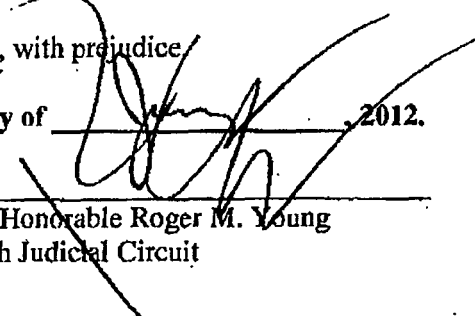
21. The Court finds that all of Plaintiff's claims against CitiMortgage are barred by the doctrine of res judicata because each claim should have been asserted as a compulsory counterclaim or a defense in the foreclosure action. Plaintiff's failure to assert these claims in the prior foreclosure action precludes her from attempting to litigate those same claims in this Court. Additionally, all of Plaintiff's claims are similarly precluded by collateral estoppel. In filing her Rule 60(b) motion in the prior foreclosure action, Plaintiff submitted the underlying issues and claims presently before this Court to the Master in Equity. The Master ruled in CitiMortgage's favor on these issues in an

² The Court also notes that Plaintiff's request for a finding of wrongful foreclosure, cancellation of the Master's Deed, and an order vacating the foreclosure judgment and sale is an improper attempt to appeal the Judgment of Foreclosure and Sale, entered on October 29, 2008, and the ruling on the Rule 60(b) Motion, entered on June 10, 2009. A foreclosure judgment is a final order that may only be appealed to the Court of Appeals, not to this Court. *See Peoples Fed. Sav. & Loan Ass'n v. Edwards*, 286 S.C. 475, 476, 334 S.E.2d 290, 291 (Ct. App. 1985) (noting that "[t]his is a direct appeal from an order of a master in equity in an action to foreclose on a mortgage"); *LaSalle Bank Nat'l Ass'n v. Davidson*, 386 S.C. 276, 277, 688 S.E.2d 121, 121 (2009) (noting that the action began as an "appeal from a judgment in a mortgage foreclosure proceeding"). Further, Plaintiff could have appealed the denial of the Rule 60(b) Motion after receipt of the Order entered on June 10, 2009. *See Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP*, 375 S.C. 423, 425, 653 S.E.2d 274, 275 (2007) (noting that the respondent "filed an appeal on the merits of the 60(b) motion. That appeal has been decided by the Court of Appeals, which affirmed [denial]"). Rule 203(b)(1) of the South Carolina Appellate Court Rules provides that a party must appeal an adverse order within 30 days of receipt of the written notice of the entry of the order. In this case, Plaintiff lost her right to appeal the final order when she failed to file a Notice of Appeal on or before July 10, 2009.

Order dated June 10, 2009. As outlined in the prior order, these underlying issues were previously decided in CitiMortgage's favor and it would be inequitable and improper to relitigate the same issues here.

NOW, THEREFORE, the Court concludes that, under the circumstances in this case and based on the arguments and evidence submitted to the Court, it is appropriate to grant summary judgment in favor of CitiMortgage on all claims asserted against it by Plaintiff. Therefore, the Court hereby **GRANTS** CitiMortgage's Motion and **DISMISSES** Plaintiff's claims against CitiMortgage, with prejudice.

IT IS SO ORDERED, this 16 day of June, 2012.


The Honorable Roger M. Young
Ninth Judicial Circuit

Charleston, South Carolina

1/6, 2012

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) NINTH JUDICIAL CIRCUIT

Angela Drexler,) Civil Action No. 2011-CP-08-1754
)

Plaintiff,)
)

vs.)

CitiMortgage, Inc., Stonegate Properties,)
Inc., and Branch Banking and Trust)
Company, Inc.,)

Defendants.)
)

ORDER DENYING PLAINTIFF'S
MOTION TO RECONSIDER
AS MOOT

FILED
MAR 16 AM 8:58
CLERK OF COURT
BERKELEY COUNTY, SC

BEFORE THE COURT is the Motion to Reconsider, Alter or Amend Judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure served by Plaintiff Angela Drexler ("Plaintiff") on January 17, 2012. Defendant CitiMortgage, Inc. ("Defendant") submitted its opposition on February 6, 2012. After reviewing the submissions of both parties, the Court **DENIES** Plaintiff's Motion to Reconsider, Alter or Amend Judgment as moot because Defendant is no longer a party to this action, as outlined below:

BACKGROUND

1. Plaintiff filed the Complaint that is the subject of this action on June 21, 2011, asserting various causes of action against Defendant that are barred by the doctrines of res judicata and collateral estoppel. On August 25, 2011, Defendant filed a Motion to Dismiss Plaintiff's Complaint, asserting these arguments, which was heard on October 12, 2011. At the hearing, both parties submitted briefing and oral arguments. After considering the briefing and oral arguments, this Court considered the Motion to Dismiss as one for Summary Judgment and found that there was no genuine issue of

Emil
DPT
TWD
35
MPH
COW
CA

R

material fact and Defendant was entitled to summary judgment on all claims filed against it by Plaintiff. The Order was signed on January 6, 2012.

2. On January 17, 2012, Plaintiff served a Motion to Reconsider, Alter or Amend (the "Motion to Reconsider") the Order granting summary judgment in favor of Defendant.

3. While the Motion to Reconsider was pending, Plaintiff submitted a motion sheet and proposed order to the Honorable Deadra L. Jefferson, entitled Consent Order for Joinder of an Additional Defendant ("Consent Order for Joinder"), affirmatively acknowledging that Defendant was dismissed from the case pursuant to the January 6, 2012 Order granting summary judgment and stating, therefore, that Defendant's consent was not necessary to join an additional party.

4. The Consent Order was filed on January 25, 2012, adding an additional Defendant, Mass Mutual Life Insurance Company, to the case without the consent of Defendant on the basis that as of January 6, 2012, Defendant was no longer party to this action.

5. On February 6, 2012, in light of Plaintiff's recognition that Defendant was no longer a party to this action, Defendant submitted its opposition to the Motion to Reconsider, arguing that the actions of Plaintiff demonstrated her voluntary withdrawal of the pending Motion to Reconsider and, therefore, Defendant was finally dismissed from the case by prior court order. In the alternative, Defendant argued that Plaintiff's Motion to Reconsider failed on the merits.

A handwritten signature in black ink, consisting of a large, stylized capital 'P' followed by a horizontal line and a small upward tick.

6. This Court considered the briefing of the parties and issues this Order, without a hearing, in accordance with Rule 59 of the South Carolina Rules of Civil Procedure.

ANALYSIS AND CONCLUSIONS

7. The Court finds that Plaintiff effectively withdrew the Motion to Reconsider when she submitted the motion sheet and proposed Consent Order for Joinder to Judge Jefferson and acknowledged that CitiMortgage was “dismissed” from the case as of the January 6, 2012 Order. *See Koutsogiannis v. BB&T*, 365 S.C. 145, 149, 616 S.E.2d 425, 428–29 (2005) (noting that “clients are generally bound by their attorneys’ acts or omissions during the legal representation”).

8. The representations made by Plaintiff in the Consent Order for Joinder were that Defendant was “dismissed from the action” by the Order dated January 6, 2012 and, since Defendant was “no longer a party to the action,” its “consent [was] no longer required for Joinder.” *See* Consent Order for Joinder at ¶ 4. .

9. Pursuant to Rule 15(a) of the South Carolina Rules of Civil Procedure, Plaintiff must obtain the consent of the adverse parties or leave of court to amend the Complaint. Therefore, if Plaintiff’s Motion to Reconsider was deemed to have remained pending, Defendant would have been a party to the litigation and Defendant’s consent was required for joinder of any additional party. In this case, Plaintiff was not relieved of her obligation to obtain Defendant’s consent to amend the Complaint until the Order granting summary judgment was final. *See Southeastern Hous. Found. v. Smith*, 380 S.C. 621, 640, 670 S.E.2d 680, 690 (Ct. App. 2008) (stating that a Rule 59(e) motion removes the “finality of the challenged judgment”).

A handwritten signature or mark, possibly initials, consisting of a large loop followed by a stylized 'B' or '3'.

6. This Court considered the briefing of the parties and issues this Order, without a hearing, in accordance with Rule 59 of the South Carolina Rules of Civil Procedure.

ANALYSIS AND CONCLUSIONS

7. The Court finds that Plaintiff effectively withdrew the Motion to Reconsider when she submitted the motion sheet and proposed Consent Order for Joinder to Judge Jefferson and acknowledged that CitiMortgage was “dismissed” from the case as of the January 6, 2012 Order. *See Koutsogiannis v. BB&T*, 365 S.C. 145, 149, 616 S.E.2d 425, 428–29 (2005) (noting that “clients are generally bound by their attorneys’ acts or omissions during the legal representation”).

8. The representations made by Plaintiff in the Consent Order for Joinder were that Defendant was “dismissed from the action” by the Order dated January 6, 2012 and, since Defendant was “no longer a party to the action,” its “consent [was] no longer required for Joinder.” *See* Consent Order for Joinder at ¶ 4. .

9. Pursuant to Rule 15(a) of the South Carolina Rules of Civil Procedure, Plaintiff must obtain the consent of the adverse parties or leave of court to amend the Complaint. Therefore, if Plaintiff’s Motion to Reconsider was deemed to have remained pending, Defendant would have been a party to the litigation and Defendant’s consent was required for joinder of any additional party. In this case, Plaintiff was not relieved of her obligation to obtain Defendant’s consent to amend the Complaint until the Order granting summary judgment was final. *See Southeastern Hous. Found. v. Smith*, 380 S.C. 621, 640, 670 S.E.2d 680, 690 (Ct. App. 2008) (stating that a Rule 59(e) motion removes the “finality of the challenged judgment”).



14. The Court finds that Plaintiff's prior position that Defendant is no longer a party to the litigation benefited her in two ways. First, Plaintiff was able to join a new party to the litigation without having to obtain the consent of Defendant in compliance with Rule 15(a) of the South Carolina Rules of Civil Procedure. And, second, Plaintiff avoided an objection to the amendment by Defendant at a hearing on Plaintiff's Motion to Amend that was filed on December 9, 2011.

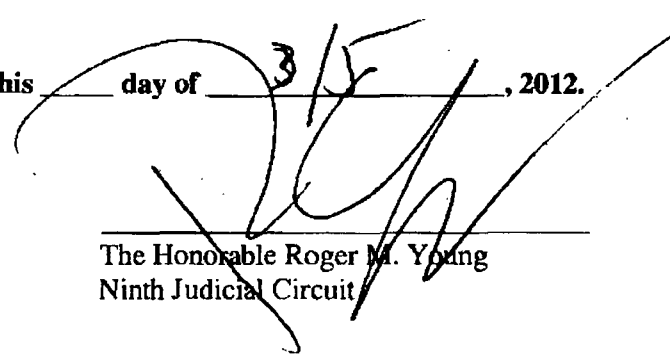
15. Based on the foregoing, Plaintiff is judicially estopped from claiming that Defendant is still a party to the action and, thus, subject to the Motion to Reconsider. Plaintiff elected to effectively withdraw her Motion to Reconsider so that she could submit a Consent Order for Joinder, joining Defendant Mass Mutual as a party to the action, without seeking or receiving the consent of Defendant. *See Hawkins v. Bruno Yacht Sales*, 353 S.C. 31, 43, 577 S.E.2d 202, 208 (2003) ("When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.") (internal citation omitted).

16. Therefore, the Court finds that the Motion to Reconsider was withdrawn by Plaintiff, the Motion to Reconsider is moot, and Defendant was finally dismissed from the case on January 6, 2012.

17. Because Defendant was no longer a party in this action as of January 6, 2012, this Court does not need to reach Defendant's remaining arguments in its opposition to the Motion to Reconsider.

NOW, THEREFORE, the Court concludes that, under the circumstances of this case and based on the briefing submitted to the Court, Plaintiff's Motion to Reconsider was voluntarily withdrawn such that it must be **DENIED** as moot.

IT IS SO ORDERED, this 31 day of May, 2012.



The Honorable Roger M. Young
Ninth Judicial Circuit

Charleston, South Carolina

31, 2012

) IN THE COURT OF COMMON PLEAS

Case No.: 2011-CP-08-1754

1

1

2

1

2

**CONSENT ORDER FOR JOINDER OF
AN ADDITIONAL DEFENDANT
PURSUANT TO RULES 19
AND 15, SCRPC** 8

MARY P. BROOKH
CLERK OF COURT
BERNELEY COUNTY, SC

2012 JAN 25 AM 11:55

7
-
-
-
-

00

IT APPEARING TO THE COURT:

1. That Joinder of an additional Defendant, Massachusetts Mutual Life Insurance Company under Rule 19 is necessary for a just adjudication in this case;
2. That this Joinder conforms to Rule 19(a)(1);
3. That Joinder will not deprive the Court of jurisdiction over the subject matter of the action;
4. That Defendant CitiMortgage, Inc. has been dismissed from the action by Judge Roger Young's Order of January 6, 2012, is no longer party to the action and therefore CitiMortgage Inc.'s consent is no longer required for Joinder;
5. That Defendant Stonegate Properties, Inc. is in default and has not appeared in the action and therefore Stonegate Properties, Inc.'s consent is no longer required for Joinder;
6. That the remaining party consents to the Joinder of Defendant Massachusetts Mutual Life Insurance Company;
7. That a Consent Order for Joinder of a necessary party under SCRCP Rule 19

10/5

implies consent to Amend Plaintiff's Complaint in order to lay causes of action against the necessary party so joined, Massachusetts Mutual Life Insurance Company;

8. That the Parties agree that an Amendment under SCRCR Rule 15 be restricted to adding new causes of action against Massachusetts Mutual Insurance Company;

9. That Rule 15 specifically calls for the relation back of amendments where the party against whom a claim is asserted (1) has received such notice of the action and will not be prejudiced in defending on the merits or (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him;

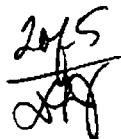
10. That the contents of this Order and the Amended Complaint shall have no force or effect upon the Order granting Summary Judgment and Dismissing Defendant CitiMortgage, Inc.;

11. That the contents of this Order and the Amended Complaint leave unmolested the claims of the original Complaint as brought against Defendant CitiMortgage, Inc. because until such time as all appeals have been exhausted, CitiMortgage, Inc. may be ordered back into this case whereupon that Defendant might be required to Answer the claims originally laid against it; and

12. That the Amended Complaint leaves intact the entirety of the original Complaint and merely supplements it with new claims against the new necessary party, Defendant Massachusetts Mutual Insurance Company.

THEREFORE, it is hereby ordered:

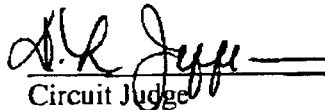
- a. That Plaintiff's Complaint is Amended to add Massachusetts Mutual Life Insurance Company as a defendant;
- b. That Plaintiff's causes of action against Massachusetts Mutual Life Insurance

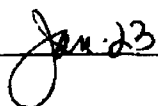


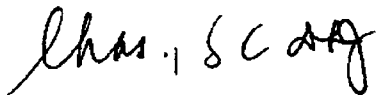
Company relate back to the date of Plaintiff's original Complaint;

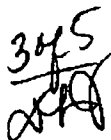
- c. That the Amended Complaint shall have no effect upon Judge Roger Young's January 6, 2012 Order granting Summary Judgment in favor of Defendant CitiMortgage Inc.;
- d. That upon signing of this Order by the Court that such signing shall resolve Plaintiff's pending motion to Amend its Complaint and such motion shall be removed from the schedule; and
- e. That the Amended Complaint, attached hereto, shall be deemed served upon Defendant BB&T by service of this Order; and that Plaintiff shall serve the Amended Complaint upon Defendant Massachusetts Life Insurance Company pursuant to Rule 4, SCRPC.

AND IT IS SO ORDERED


Circuit Judge

Date: , 2012





WE CONSENT



TRAYWICK LAW OFFICES, LLC
P.O. Box 564
Isle of Palms, SC 29451
Telephone: 843-343-5092
Fax: 843-300-1051
Dpt@traywicklaw.com

-and-

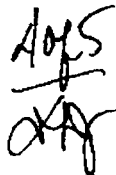
Matthew D. Hamrick
Attorney at Law
875 Lowcountry Blvd., Ste. 206
Mt. Pleasant, SC 29464
(843) 693-4700
matt@matthamricklaw.com

CO-COUNSELS FOR PLAINTIFF

WE CONSENT

Grimsley Law Firm
By Benjamin E. Grimsley
1703 Laurel Street
PO Box 11682
Columbia, SC 29211

ATTORNEY FOR DEFENDANT BB&T



WE CONSENT

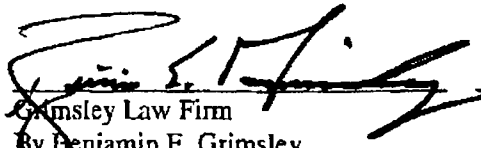

TRAYWICK LAW OFFICES, LLC
P.O. Box 564
Isle of Palms, SC 29451
Telephone: 843-343-5092
Fax: 843-300-1051
Dpt@traywicklaw.com

-and-

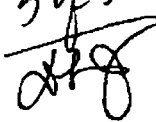
Matthew D. Hamrick
Attorney at Law
875 Lowcountry Blvd., Ste. 206
Mt. Pleasant, SC 29464
(843) 693-4700
matt@matthamricklaw.com

CO-COUNSELS FOR PLAINTIFF

WE CONSENT


Grimsley Law Firm
By Benjamin E. Grimsley
1703 Laurel Street
PO Box 11682
Columbia, SC 29211

ATTORNEY FOR DEFENDANT BB&T

5/15


The South Carolina Court of Appeals

Angela Drexler, Appellant,

v.

CitiMortgage, Inc., Stonegate Properties, Inc., and
Branch Banking and Trust Company, Inc., Defendants,

Of Whom CitiMortgage, Inc. is the Respondent.

Appellate Case No. 2012-211306

ORDER

Respondent's motion to dismiss is denied; however, the parties are ordered to address the issue of timeliness of the notice of appeal in their briefs.

Because the transcript has now been ordered, Appellant's motion for an extension to order the transcript is granted.


FOR THE COURT

Columbia, South Carolina

cc:

David Paul Traywick

Sarah Beth Nielsen

Thad H. Westbrook

FILED

7-16-11 

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

CitiMortgage, Inc.,

Plaintiff,

v.

Angela M. Drexler; and any other Heirs at Law or Devisees of Arthur E. Antisdell, Deceased, their heirs, Personal Representatives, Administrators, Successors and Assigns, and all other persons entitled to claim through them; all unknown persons with any right, title or interest in the real estate described herein; also any persons who may be in the military service of the United States of America, being a class designated as John Doe; and any unknown minors or persons under a disability being a class designated as Richard Roe; Washington Mutual Home Loans, Inc. f/k/a Fleet Real Estate Funding Corp.

Defendant(s).

(011654-01799)

IN THE COURT OF COMMON PLEAS

DOCKET NO. 08-CP-08-1258

FIRST AMENDED COMPLAINT

(NON-JURY)

FORECLOSURE OF REAL ESTATE
MORTGAGE

Deficiency Judgment Waived

21 FEB 2009 12:45

Plaintiff alleges:

1. This is an action for the foreclosure of a mortgage upon certain real estate in Berkeley County, South Carolina.
2. Pursuant to S.C. Code Section 33-15-101, Plaintiff is a corporation or other legal entity doing business in the State of South Carolina.
3. Plaintiff is the owner and holder of the Note and Mortgage described hereafter and the subject of this action.
4. Some lien on or interest in the real estate, the subject of this action, may be claimed by the Defendant(s) herein.
5. The Defendant(s) herein described as judgment creditors have by filing said judgments designated their attorney entering the judgment as their agent for service of process under the

provisions of South Carolina Code Section 15-35-840.

6. Heretofore, on or about July 9, 1998, Arthur E. Antisdel and Angela M. Drexler made, executed and delivered a certain Fixed Rate Note ("Note") in the principal sum of \$84,850.00, payable in monthly installments.

7. In order to secure the payment of the Note according to the terms and conditions thereof, Arthur E. Antisdel and Angela M. Drexler made, executed and delivered unto Compass Mortgage Inc. a certain real estate mortgage ("Mortgage") covering the following described property and any and all improvements to the property, including but not limited to a mobile/manufactured home:

All that piece, parcel or lot of land with the buildings and improvements thereon, situate lying and being near Ladson, South Carolina, in Berkeley County, South Carolina, shown and designated as Lot 74, Block F, Tall Pines Plantation Subdivision, Section Three, on a plat dated January 19, 1977 made by Harold J. Leamond, P.E. and L.S., and recorded in the Office of the Clerk of Court for Berkeley County on January 24, 1977 in Plat Book W. Page 153.

This being the identical property conveyed to Arthur E. Antisdel and Angela M. Drexler by deed of Secretary of Housing and Urban Development of Washington D.C. dated July 7, 1998 and recorded July 13, 1998 in Deed Book 1379 at Page 53; subsequently, Arthur E. Antisdel died intestate on July 14, 2004, leaving the subject property to his/her heirs or devisees.

Property Address:

[REDACTED]
LADSON, SC 29456

TMS# 233-14-01-024

8. The Mortgage was signed, witnessed and probated July 9, 1998; thereafter the Mortgage was recorded in the Office of the RMC/ROD for Berkeley County on July 13, 1998, in Mortgage Book 1379 at Page 57. This mortgage was subsequently assigned to Homestead Funding Corporation by assignment dated July 9, 1998 and recorded July 13, 1998 in Book 1379 at Page 68; subsequently assigned to the Plaintiff herein.

9. The Mortgage evidences and secures the repayment of money advanced by Plaintiff or its predecessor in interest to, or on behalf of, the mortgagor(s) and constitutes a purchase money first lien on the mortgaged premises.

10. Any notice required by the terms of the Mortgage or by state or federal law has been given to the applicable Defendant(s) prior to the commencement of this action.

11. subsequently, Arthur E. Antisdel died intestate on July 14, 2004, leaving the subject property to his/her heirs or devisees.

12. After all payments received by the Plaintiff have been credited to the subject loan, the loan is in default and due for December 1, 2007, and the conditions of the Note and Mortgage

have been broken. Plaintiff elects to and does declare the entire balance of said indebtedness due and payable, and that there is due on the Note and Mortgage as of December 1, 2007, the sum of \$70,581.19, with interest at the rate of 8.5% per annum from November 1, 2007, and also for the costs and disbursements of this action, including attorney's fees.

13. Plaintiff's right to a personal or deficiency judgment pursuant to South Carolina Code Sections 29-3-650 and 29-3-660 is expressly waived.

14. Pursuant to the terms of the Mortgage, Plaintiff has employed counsel to prosecute this action and a reasonable value of services of counsel in this action is the sum as the Court may find appropriate.

15. Plaintiff may be forced to pay sums for taxes and insurance and costs for securing the property, which sums, according to the terms of the Mortgage, should be added to the amount of the debt.

16. Pursuant to the terms of the Mortgage and applicable state law, Plaintiff requests the mortgage be foreclosed and that the property be sold at public auction in accordance with law, subject to any liens for taxes, special assessments of record against such property, and existing easements or restrictions of record.

17. The hereinafter named Defendant(s) may have some interest in or lien upon the premises covered by the Mortgage set forth above, or some part thereof, but that such interests or liens are junior and subsequent to the lien of Plaintiff's Mortgage or, if specified below, have been paid in full and either should be satisfied of record or the lien released from the subject real estate. 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. Washington Mutual Home Loans, Inc. f/k/a Fleet Real Estate Funding Corp. , by virtue of a mortgage given by James F. Cosman to Bankers Trust of South Carolina in the amount of \$51,750.00, dated May 30, 1978, and recorded May 30, 1978 in Book E202 at Page 165. This mortgage was subsequently assigned to Fleet Real Estate Funding Corp. by assignment dated July 14, 1985 and recorded July 14, 1985 in Book 68 at Page 217.

B. Angela M. Drexler and any unknown heirs or devisees of the Estate of Arthur E. Antidel, including any persons who may be in the military service of the United States of America, being a class designated as John Doe, and any unknown minors or persons under a disability being a class designated as Richard Roe, by virtue of any interest claimed under the law of intestate succession (S.C. Code Section 62-2-109) or under decedent's will

WHEREFORE, having fully set forth its Complaint, Plaintiff prays that this Honorable Court inquire into the matters as set forth herein and:

(1) Under the direction of this Court, ascertain and determine the amount due upon the Note and Mortgage held by Plaintiff together with attorney's fees and costs of this action.

(2) Declare Plaintiff's Mortgage a purchase money first lien and render judgment of foreclosure for the amount so found to be due and owing thereon, together with any ad valorem taxes, or insurance premiums, and any other expenses which may be due and have been advanced by Plaintiff, with reasonable attorney's fees, and for the costs of this action.

(3) Order the reimbursement of all costs for inspecting and securing the property incurred by the Plaintiff as a result of the delinquency.

(4) Appoint a Receiver to collect the rents, issues, profits or designated sums from the mortgagor(s), and/or the grantee(s) of the mortgagor(s), and/or tenant(s) occupying or exercising control over the mortgaged premises and hold the same subject to the further order of this Court.

(5) Under the direction of this Court, sell the mortgaged premises, bar any equity of redemption, and apply the proceeds of sale as follows:

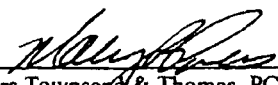
First, to the costs and expenses of the within action and sale;

Second, to the payment and discharge of the amount due on Plaintiff's Note and Mortgage, together with attorney's fees as aforesaid; and

Third, to the distribution of any surplus pursuant to Rule 71, of the South Carolina Rules of Civil Procedure;

(6) Issue an order directing the Sheriff of Berkeley County, South Carolina, to place the successful purchaser at said foreclosure sale in possession of the property should the same become necessary;

(7) Order such other and further relief as may be just and proper.



Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958) Cheryl H. Fisher (SC Bar #15213)
Reginald P. Corley (SC Bar #69453) Jennifer W. Rubin (SC Bar #16727)
Ellie C. Floyd (SC Bar # 68635) Michael P. Morris (SC Bar #73560)
Eve Moredock Stacey (SC Bar # 5300) Mary R. Powers (SC Bar #16534)
Robert P. Davis (SC Bar # 74030) Timothy B. Killen (SC Bar #72501)
220 Executive Center Drive, Suite 109 Post Office Box 100200 (29202)
Columbia, SC 29210 (803) 744-4444

Columbia, South Carolina
May 16, 2008

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Angela Drexler

Plaintiff,

v.

CitiMortgage, Inc.; Stonegate Properties,
Inc.; Branch Banking and Trust Company,
Inc.,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No.: 2011-CP-08-1754

LIS PENDENS
(Jury Trial Demanded)

FILED
2011 JUN 21 PM 3:06
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

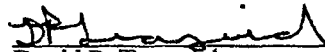
TO WHOM IT MAY CONCERN:

Please take notice that an action has been filed, or will be filed. The subject of this action is real property ("the Property") owned by Branch Banking and Trust Company, Inc., as conveyed by Instrument Number 11-3443 recorded in Book "R", Volume 08832, at Page 130 in the Berkeley County office of the Register of Deeds. The Property is located at [REDACTED] Ladson, South Carolina 29456 in the county of Berkeley, State of South Carolina.

The Property TMS number is: 233-14-01-024

The object of the action is said property and among the purposes of the action is quiet title in favor of Plaintiff.

By:


David P. Traywick
TRAYWICK LAW OFFICES, LLC
P.O. Box 564
Isle of Palms, SC 29451
Telephone: 843-343-5092
Fax: 843-300-1051

Attorney for Plaintiff
Angela Drexler

June 15, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Angela Drexler

Plaintiff,

v.

CitiMortgage, Inc.; Stonegate Properties,
Inc.; Branch Banking and Trust Company,
Inc.,

Defendants.

) IN THE COURT OF COMMON PLEAS

) Case No.: 2011-CP-08-1754

SUMMONS

FILED
2011 JUN 21 PM 3:06
MARY P. BENDISH
CLERK OF COURT
BERKELEY COUNTY, SC

TO: THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the subscribed at his office, P.O. Box 564, Isle of Palms, SC 29451, within thirty (30) days after the service hereof, exclusive of the day of service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

By:


David P. Traywick
TRAYWICK LAW OFFICES, LLC
P.O. Box 564
Isle of Palms, SC 29451
Telephone: 843-343-5092
Fax: 843-300-1051

Attorney for Plaintiff
Angela Drexler

June 15, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Angela Drexler

Plaintiff,

v.

CitiMortgage, Inc.; Stonegate Properties,
Inc.; Branch Banking and Trust Company,
Inc.,

Defendants.

) IN THE COURT OF COMMON PLEAS

) Case No.:2011-CP-08-1754

) **COMPLAINT**
) (Jury Trial Demanded)

FILED
2011 JUN 21 PM 3:06
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

PARTIES AND JURISDICTION

1. Defendant CitiMortgage, Inc. ("Citi") is, and at all times herein mentioned was, a corporation doing business in Berkeley County, South Carolina.

2. Defendant Stonegate Properties, Inc. ("Stonegate") is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of South Carolina.

3. Defendant Branch Banking and Trust Company, Inc. ("BB&T") is, and at all times herein mentioned was, a corporation doing business in Berkeley County, South Carolina.

4. Plaintiff is, and at all times herein mentioned was, a resident of Berkeley County, South Carolina.

5. This Court has jurisdiction over the parties and subject matter of this complaint.

GENERAL ALLEGATIONS

6. On July 7, 1998, Plaintiff purchased certain real property ("Subject Property").

7. On July 7, 1998, Plaintiff executed a promissory note in favor of Compass

Mortgage, Inc. The note was secured by a mortgage with Compass Mortgage, Inc. as mortgagee.

8. Upon information and belief, Citi acquired Plaintiff's previous mortgage servicing company, ABN AMRO Mortgage Group, Inc. Plaintiff continued to make payments but now remitted them to Citi.

9. On December 17, 2007, Plaintiff paid Citi \$1333.51 via that defendant's telephone payment system.

10. On or about February 12, 2008, Citi instructed Plaintiff to send a certified check in the amount of \$2294.73. Citi claimed that amount was past due.

11. On or about February 19, 2008, Plaintiff purchased and mailed to Citi a certified check for \$2294.73.

12. On March 12, 2008, Plaintiff made out check #2300 paid to the order of Citi for \$910.70. This amount represented Plaintiff's ordinary monthly payment.

13. On March 13, 2008, Plaintiff mailed check #2300 to Citi via express mail.

14. On March 14, 2008, Citi received check #2300 and stamped it "too delinquent".

15. Prompted by Citi, on March 31, 2008, Plaintiff sent a facsimile transmission that included a photocopy of both the certified check for \$2294.73 mailed as of February 19 as well check #2300 mailed on March 13.

16. Throughout this period, Citi assured Plaintiff that all would be well, that Citi had simply misplaced the certified check, that it would be found, that there was nothing to worry about, and to proceed with making the \$910.70 April payment in the usual fashion (ie: personal check via regular mail).

17. On April 20, 2008, Plaintiff made out check #2261 paid to the order of Citi for \$910.70.

18. On or about April 21, 2008, Plaintiff mailed check #2261 to Citi via express mail.
19. On May 5, 2008, Citi returned, via regular mail letter, check numbers 2280 and 2261 to Plaintiff. The letter stated that Citi was unable to accept the funds because the amount was insufficient to cure the delinquency. Additionally, the letter states that a certified check is necessary to cure the delinquency.
20. The May 5, 2008 Citi letter to Plaintiff made no mention of the certified check, though Plaintiff was repeatedly assured that the check would be located.
21. On May 7, 2008, Rogers Townsend Thomas ("RTT") filed foreclosure pleadings in Berkeley County.
22. On May 9, 2008, at 7:45 a.m., Pro Vest, LLC served process on Plaintiff at her home.
23. On May 14, 2008, owing to representations appearing in Citi's May 5, 2008 letter, by the lawsuit served on May 9, and by representations made by RTT personnel during calls placed by Plaintiff to RTT, Plaintiff sent a facsimile transmission that included various documents and materials the purpose of which was to dispute the validity of the debt RTT alleged was due and owing in its foreclosure Complaint. Plaintiff's facsimile included compelling proof that all payments had been submitted by Plaintiff to Citi.
22. On May 21, 2008, RTT amended its initial complaint.
23. In early June of 2008, Plaintiff contacted Debra Leonard, a foreclosure prevention counselor with Money Management International, a non-profit consumer credit counseling organization.
24. On June 16, 2008, the certified check Plaintiff mailed to Citi on February 19 was deposited into Plaintiff's bank account. The circumstances of how the deposit was made remain

mysterious.

25. Throughout June and July, 2008, Plaintiff, in conjunction with Debra Leonard, repeatedly attempted to obtain payment instructions from Citi - without success. During that period, Citi failed to return telephone calls, wait times were extraordinary, the process was overwhelmingly tedious, and nobody at Citi was capable of providing useful answers.

26. On August 6, 2008, Angela and Debra Leonard conference called a Citi supervisor. During that conference call, Citi advised that a check for \$8133.35 would bring the account up to date and that upon receipt of that check that the foreclosure Complaint would be dismissed.

27. On August 15, 2008, Plaintiff mailed a check for \$8133.35 to Citi.

28. On August 16, 2008, Citi received the check for \$8133.35.

29. On August 20, 2008, Citi returned the check for \$8133.35.

30. On either September 12 or 13, 2008, following numerous telephone conversations placed by Plaintiff to Citi, Plaintiff mailed a certified check via certified mail with a return receipt requested, to Citi. Citi had assured Plaintiff repeatedly that upon receipt of a certified check for \$9,010.00 that Citi would change Plaintiff's account status to current and that the foreclosure proceedings would be terminated.

31. On September 14, 2008, Citi signed for receipt of the certified check sent by Plaintiff.

32. On September 23, 2008, Citi sent a letter to BB&T explaining that Citi had received a certified check in the amount of \$9,010.00 but that Citi had been unable to match that certified check with any of its accounts.

33. On October 12, 2008, RTT claims to have mailed Plaintiff a Notice of Foreclosure

Hearing scheduled for October 29, 2008.

34. On October 14, 2008, a certified check for 9,010.00 was mysteriously deposited into Plaintiff's account.

35. On October 15 or 16, 2008, Plaintiff mailed, via certified mail with return receipt requested, personal check #2336 for \$876.00 to Citi. This check represented the amount she was instructed to pay by Citi.

36. On October 17, 2008, Citi signed for receipt of check #2336.

37. On October 22, 2008, Citi returned check #2336 to Plaintiff via regular mail.

38. On October 29, 2008, a foreclosure hearing was held in Berkeley County and a Judgment of Foreclosure entered. Plaintiff was assured at all times that the foreclosure Complaint would be dismissed on condition that Plaintiff complied with payment instructions. Plaintiff at all times complied with Citi's payment instructions. Plaintiff was never notified of the foreclosure hearing nor was she advised that a judgment had been entered.

39. On November 22, 2008, Plaintiff sent, via certified mail with return receipt requested, personal check #2341 for \$900 to Citi.

40. On November 24, 2008, Citi signed for receipt of check #2341 for \$900.

41. On November 29, 2008, Citi returned check #2341 for \$900 to Plaintiff, via regular mail. Citi had stamped the back of check #2341 "Foreclosure".

42. Plaintiff made each payment due on the loan from 1998 until the date her house was sold at public auction pursuant to a court ordered foreclosure.

43. Plaintiff did not receive notice of the time and place of the foreclosure sale.

**FIRST CAUSE OF ACTION
NEGLIGENCE
(AGAINST CITIMORTGAGE)**

44. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 43, inclusive, as though fully set forth herein.

45. At all times relevant herein, Citi, acting as Plaintiff's lender and/or loan servicer, had a duty to exercise reasonable care and skill to maintain proper and accurate loan records and to discharge and fulfill the other incidents attendant to the maintenance, accounting and servicing of loan records, including, but not limited, accurate crediting of payments made by Plaintiffs.

46. In the various particulars alleged, and in failing to take actions reasonably necessary, actions that a reasonable party would have undertaken in order to credit payments submitted by Plaintiff, Citi breached its duty of care and skill to Plaintiff in the servicing of Plaintiff's loan by, among other things, failing to properly and accurately credit payments made by Plaintiff toward the loan, preparing and filing false documents, and foreclosing on the Subject Property without having the legal authority and/or proper documentation to do so.

47. As a direct and proximate result of Citi's negligence and carelessness in carrying out or failing to carry out its duties to be reasonably diligent in servicing Plaintiff's note, as set forth above, Plaintiff suffered general and special damages in an amount to be determined at trial.

**SECOND CAUSE OF ACTION
FRAUD
(AGAINST CITIMORTGAGE)**

48. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 47, inclusive, as though fully set forth herein.

49. Citi engaged in a pattern and practice of defrauding Plaintiffs in that, during the life of the mortgage loan, Citi failed properly to credit payments made and foreclosed on the Subject Property based on Plaintiff's alleged non-payment which they knew to be false.

50. Citi had actual knowledge that the Plaintiff's account, as Citi represented it to Plaintiff and others, was not accurate but that Citi could use the inaccuracy to foreclose on the Subject Property which had substantial equity, to recover its excessive fees, charges and interest. Plaintiff made such payments and provided proof of the payments based on the improper, inaccurate, and fraudulent representations as to her account. Citi also utilized amounts it knew to be inaccurate to determine the amount allegedly due and owing for purposes of foreclosure.

51. Additionally, Citi knowingly concealed material facts from Plaintiff regarding payments, notices, assignments, transfers, late fees and charges with the intent to defraud Plaintiff.

52. Citi made the above-referenced false representations, concealments and non-disclosures with knowledge of the misrepresentations, intending to induce Plaintiff's reliance, which the unsuspecting Plaintiff justifiably relied upon, resulting in damage to her credit standing, costs, and loss of her property. Plaintiff was unaware of the true facts because Citi concealed them. Had Plaintiff known the true facts, Plaintiff, among other things, would have retained counsel upon receipt of the foreclosure Complaint, requested instructions for making payments be reduced to a writing, personally appeared at Citi's offices and made a payment in actual cash, wire transferred the amount required to cure Plaintiff's allegedly delinquent account, and/or taken legal action immediately to save her house.

53. As a result of Citi's fraudulent conduct, Plaintiff has suffered compensatory, general and special damages in an amount to be proven at trial. Additionally, Citi acted with malice, fraud and/or oppression and, thus, Plaintiff is entitled to an award of punitive damages.

**THIRD CAUSE OF ACTION
TO SET ASIDE MASTER'S SALE
(AGAINST CITIMORTGAGE)**

54. Plaintiffs incorporate herein by reference the allegations made in paragraphs 1 through 53, inclusive, as though fully set forth herein.

55. Citi never had the legal authority to foreclose, i.e., the authority to exercise the power of sale as an assignee of the Note and Mortgage, resulting in the judicial foreclosure sale being void ab initio.

56. Citi never had the legal authority to foreclose because the Mortgage instrument upon which it premised foreclosure is void as it was fraudulently assigned/endorsed/transferred. Citi orchestrated the fraudulent assignment/endorsement/transfer. Citi cannot benefit from its own fraudulent conveyance of an interest in real property and any judicial sale premised on a fraudulent document is void ab initio.

57. Accordingly, Plaintiff requests an Order from this Court that the Trustee's Sale was either void, or voidable as to the defrauded party, the Plaintiff, and that the judicial sale premised upon such fraud was without force and effect at least as to this defrauded Plaintiff. The order should further state that neither Citi, or its agents, sought, obtained, and induced a court to conduct a judicial foreclosure absent any legal or equitable right or privilege to do so.

**FOURTH CAUSE OF ACTION
TO VOID OR CANCEL MASTER'S DEED UPON SALE
(AGAINST CITIMORTGAGE, STONEGATE PROPERTIES
AND BRANCH BANKING AND TRUST COMPANY)**

58. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 57, inclusive, as though fully set forth herein.

59. Although Master's deeds upon the two sales of the Subject Property bear the imprimatur of Berkeley County and the State of South Carolina, they are invalid, and of no force and effect, for the reasons set forth above including, inter alia, the fact the Mortgage which purportedly secured the Note, which served as the basis for a claim to have the right to conduct a judicial foreclosure, was void due to a fraudulent assignment/endorsement/transfer to Citi. As noted, such fraudulent assignment/endorsement/transfer was in fact orchestrated by Citi or its agents. Additionally, Plaintiff had submitted all payments due on the Note in a timely fashion and the judicial foreclosure was therefore unjustified.

60. Plaintiff is therefore entitled to an order that the Master's deeds upon the sales are void ab initio and the cancellation of those deeds' force and effect.

**FIFTH CAUSE OF ACTION
TO VOID OR CANCEL ASSIGNMENT OF MORTGAGE
(AGAINST CITIMORTGAGE)**

61. Plaintiffs incorporate herein by reference the allegations made in paragraphs 1 through 60, inclusive, as though fully set forth herein.

62. The assignment of the mortgage, and subsequent recording, is invalid, and of no force and effect, for the reasons set forth above including, inter alia, the fact that Stewart Information Services, Inc. ("Stewart") fraudulently executed an assignment in favor of Citi. Stewart did not have standing or the legal authority to assign the mortgage allegedly securing the

Note that was the basis for Citi's claim to have the right to conduct a judicial foreclosure. Thus, Stewart's fraudulent assignment of the mortgage was at all times void.

63. Plaintiff is therefore entitled to an order that the Assignment of the Mortgage by Stewart in favor of Citi is void ab initio and to an order cancelling the force and effect of such Assignment.

**SIXTH CAUSE OF ACTION
WRONGFUL FORECLOSURE VIA LACK OF STANDING
(AGAINST CITIMORTGAGE)**

64. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 63, inclusive, as though fully set forth herein.

65. Plaintiff is informed and believes and thereon alleges that after the origination and funding of her loan, that the loan was sold to investors as a "mortgage backed security" and that Citi, which claimed authority to foreclose, owned neither the note nor its corresponding mortgage. Moreover, Citi had not been lawfully appointed as trustee or had the original note assigned to it. Accordingly, Citi had no right to foreclose Plaintiffs' interest in its own right and in its own name, which it in fact did. The named Plaintiff in the filed foreclosure action was neither note holder nor beneficiary of the note at the time Citi filed a suit premised on the Plaintiff's note and mortgage.

66. Plaintiff further alleges on information and belief that Citi was neither the note beneficiary nor a representative of the note beneficiary and, if Citi alleged otherwise, it did not possess the original note to prove that it was in fact the party authorized to conduct the foreclosure. No power of attorney to sue on behalf of another party, such as an owner trustee, was ever produced in court. Rather, Citi represented that it, Citi, owned the note.

67. Plaintiff further alleges on information and belief that the loan was sold or transferred without notice having been furnished to the Plaintiff in writing, or in any other fashion.

68. As a result of the above alleged wrongs, Plaintiffs have suffered general and special damages in an amount to be determined at trial.

**SEVENTH CAUSE OF ACTION FOR
BREACH OF CONTRACT
(AGAINST CITIMORTGAGE)**

69. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 68, inclusive, as though fully set forth herein.

70. Plaintiff's original loan agreement set forth dates by which monthly principal and interest payments were due, and when late fees and other charges could be assessed, and how much those late fees and other charges were to be. Citi failed to comply with its obligations to adhere to the terms set forth in the original instruments and repeatedly misallocated payments or failed properly to calculate amounts due and owing under the note and mortgage at various periods.

71. Even assuming the original note and mortgage were properly assigned to Citi, Citi breached the note and mortgage terms that Plaintiff signed on July 7, 1998. The terms of the note and mortgage required payments made by Plaintiff to be applied properly to the note. Additionally, the note and mortgage specified the penalties for any late payments. Citi repeatedly charged in excess of the amounts specified and thereby breached the contract between Plaintiff and Citi.

72. Citi breached the note and mortgage by failing to apply the payments made by Plaintiff in the various particulars described hereinabove the result of which led to the wrongful foreclosing of Plaintiff's property.

73. As a proximate result of Citi's breaches, Plaintiff suffered various damages including expectation, compensatory, and other damages in an amount to be proven at trial.

**EIGHTH CAUSE OF ACTION FOR
BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING
(AGAINST CITI)**

74. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 73, inclusive, as though fully set forth herein.

75. Every contract imposes upon each party a duty of good faith and fair dealing in its performance and in its enforcement. This implied covenant of good faith and fair dealing requires that no party do anything that effectively impairs, destroys, or injures the rights of the other party to receive the benefits of an agreement. The covenant implies that in all contracts each party will do all things reasonably contemplated by the terms of the contract to accomplish its purpose. The covenant protects the respective benefits that the parties reasonably contemplated when entering into the agreement.

76. Citi wielded, or claimed to have the power to wield, substantial discretionary power affecting the rights of Plaintiff during the events alleged in this Complaint. The covenant required Citi to exercise such power in good faith and with an eye toward fair dealing with respect to the contract's counterparty.

77. Citi wielded its discretionary authority in such a manner as to ensure the utter destruction of Plaintiff's rights to the benefits of the bargain she struck, and in such a manner as to defeat the Plaintiff's expectations to be dealt with fairly and reasonably. Citi's conduct

exhibited a determination to drive Plaintiff into foreclosure so that Citi could acquire the large equitable position Plaintiff enjoyed in the Subject Property. Citi's pattern of conduct constitute a bad faith breach of the contract - a breach evidently undertaken with neither mercy nor malice - so cold, impersonal, faithless, and unfair so as to be 'machine-like'.

78. As a result of Citi's breaches of this covenant, Plaintiff has suffered general and special damages in an amount to be determined at trial.

**NINTH CAUSE OF ACTION FOR
UNJUST ENRICHMENT
(AGAINST CITI)**

79. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 78, inclusive, as though fully set forth herein.

80. By its wrongful acts and omissions, Citi has been unjustly enriched at the expense of Plaintiff, and thus Plaintiff has been unjustly deprived.

81. By reason of the foregoing, Plaintiff seeks restitution from Defendant Citi and an order of this Court that Citi disgorge all profits, benefits, and other compensation obtained resulting from the unjust Foreclosing of Plaintiff's property.

**TENTH CAUSE OF ACTION FOR
VIOLATION OF SOUTH CAROLINA'S UNFAIR TRADE PRACTICES ACT
(AGAINST CITIMORTGAGE)**

82. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 81, inclusive, as though fully set forth herein.

83. South Carolina prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.

84. As more fully described above, Citi's acts and practices are likely to deceive, constituting a fraudulent business act or practice. This conduct is ongoing and continues to this date.

85. Specifically, Citi engaged in deceptive business practices with respect to mortgage loan servicing, assignments of notes and mortgages, foreclosure of residential properties and related matters by:

- (a) Assessing improper or excessive late fees;
- (b) Improperly characterizing customers' accounts as being in default or delinquent status to generate unwarranted fees;
- (c) Instituting improper or premature foreclosure proceedings to generate unwarranted fees;
- (d) Misapplying or failing to apply customer payments;
- (e) Failing to provide adequate monthly statement information to customers regarding the status of their accounts, payments owed, and/or basis for fees assessed;
- (f) Seeking to collect, and collecting, various improper fees, costs and charges, that are either not legally due under the mortgage contract or South Carolina law, or that are in excess of amounts legally due;
- (g) Mishandling borrowers' mortgage payments and failing timely or properly to credit payments received, resulting in late charges, delinquencies or default;

- (h) Treating borrowers as in default on their loans even though the borrowers have tendered timely and sufficient payments or have otherwise complied with mortgage requirements or South Carolina law;
- (i) Failing to disclose the fees, costs and charges allowable under the mortgage contract;
- (j) Ignoring grace periods;
- (k) Executing and recording false and misleading documents;
- (l) Acting as beneficiaries and trustees without the legal authority to do so;
- (m) Filing suit against property owners improperly whilst assuring those property owners that the foreclosure suit was a mere formality, that upon receipt of payment Citi would drop the suit;
- (n) Telling property owners who had been served lawsuits that they did not need to hire attorneys to defend themselves in court provided exact payment instructions were followed. For example, Plaintiff was specifically told that if she mailed payments that she should not waste her money hiring a lawyer since her account would no longer be in default. Citi told her this on several different occasions; and
- (o) Misrepresenting the amounts due and owing under the note while at the same time misrepresenting the amount required to bring the account to current.

86. Citi failed to act in good faith as it took fees for services but did not render services competently and in compliance with applicable law and in accordance with applicable standards of care.

87. Moreover, Citi engaged in a uniform pattern and practice of unfair and overly-aggressive servicing that resulted in the assessment of unwarranted and unfair fees against this Plaintiff and other South Carolina consumers and premature default often resulting in unfair and illegal foreclosure proceedings. The scheme implemented by Citi was designed to defraud South Carolina consumers and to enrich Citi.

88. The foregoing acts and practices have caused substantial harm to this Plaintiff and to South Carolina consumers.

89. As a direct and proximate cause of the unlawful, unfair and fraudulent acts and practices of Citi, Plaintiff and South Carolina consumers have suffered and will continue to suffer damages in the form of unfair and unwarranted late fees, other improper fees and charges, as well as improper, unfair, and illegal seizures of real property.

90. By reason of the foregoing, Citi and its agents have been unjustly enriched and should be required to disgorge their illicit profits and/or make restitution to Plaintiff and other South Carolina consumers who have been harmed, and/or be enjoined from continuing in such practices pursuant to South Carolina's Unfair Trade Practices Act. Additionally, Plaintiff is therefore entitled to injunctive relief and attorney's fees and treble damages as available under South Carolina's Unfair Trade Practices Act. Plaintiff also invokes and demands all relief accorded by South Carolina Code sections 39-5-140(a) and 39-5-50 (b).

**ELEVENTH CAUSE OF ACTION FOR
QUIET TITLE
(AGAINST CITIMORTGAGE; STONEGATE; BB&T)**

91. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 90, inclusive, as though fully set forth herein.

92. Plaintiff is the equitable owner of the Subject Property which has the following legal description:

All that piece, parcel or lot of land with the buildings and improvements thereon, situate lying and being near Ladson, South Carolina, in Berkeley County, South Carolina, shown and designated as Lot 74, Block F, Tall Pines Plantation Subdivision, Section Three, on a plat dated January 19, 1977 made by Harold J. Leamond, P.E. and L.S., and recorded in the Office of the Clerk of Court for Berkeley County on January 24, 1977 in Plat Book W. Page 153. Derivation: Book 1379 at Page 53. The address is [REDACTED] [REDACTED] Ladson, SC 29456. TMS #: 233-14-01-024.

93. Plaintiff seeks to quiet title against the claims of Defendants Citi, Stonegate, BB&T, and all other persons unknown claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to Plaintiff's title.

94. Upon information and belief, BB&T holds itself out as entitled to fee simple ownership of the Subject Property by and through its purchase of the property at a master in equity's sale held in 2011.

95. Plaintiff seeks to quiet title as of May 7, 2008, the date Citi filed a lis pendens against the subject property. Plaintiff seeks a judicial declaration that the title to the Subject Property is vested in Plaintiff alone and that any defendant claiming an interest or lien in Subject Property be declared to have no interest estate, right, title or interest in the Subject Property and that the Defendants, their agents and assigns, be forever enjoined from asserting any estate, right title or interest in the Subject Property subject to Plaintiff's rights.

**TWELFTH CAUSE OF ACTION FOR
SLANDER OF TITLE
(AGAINST CITIMORTGAGE AND STONEGATE)**

96. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 95, inclusive, as though fully set forth herein.

97. Defendant Citi fraudulently assigned a mortgage which it filed with the Berkeley County Register of Deeds. Defendant Citi additionally caused to be filed a lis pendens against real property owned by Plaintiff. Defendant Stonegate knew that the Citi foreclosure was unlawful, that the basis of the foreclosure was the result of reckless conduct on the part of Citi, and nevertheless purchased the property at auction and requested, received from the master and subsequently recorded a deed on the basis of the unlawful foreclosure sale.

98. By besmirching Plaintiff's title to real property, Defendants Citi and Stonegate caused Plaintiff to suffer special damages.

99. The invalid liens and or deeds and mortgages were effectively published because they were recorded in Berkeley County and as such is public information freely available.

100. Defendant Citi filed its lis pendens knowing full well that the property that was its subject was owned by Plaintiff and was not subject to foreclosure as payments on the attendant note had been paid.

101. As a result of her besmirched title, via the various invalid mortgages, deeds and lis pendens, Plaintiff's property has been under a cloud since May of 2008 which has undermined her rights to full use and enjoyment of her property.

102. By doing the acts described above, Citi and Stonegate have slandered Plaintiff's title to the Subject Property.

103. The conduct of Citi and Stonegate caused Plaintiff to suffer general and special damages in an amount to be proven at trial.

**THIRTEENTH CAUSE OF ACTION FOR
TORTIOUS INTERFERENCE WITH CONTRACT
(AGAINST CITIMORTGAGE)**

104. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 103, inclusive, as though fully set forth herein.

105. Plaintiff secured a note whereby she agreed to make installment payments to a third party. Plaintiff was certain to realize future economic benefit as a result of the contractual relationship

106. Defendant Citi knew about the existence of the contract between third party and Plaintiff.

107. Defendant Citi, or its agents, intentionally acted in a way designed to disrupt the relationship between Plaintiff and the third party and to interfere with the carrying out of the contract between the Plaintiff and third party.

108. Specifically, Citi refused properly to carry out its task to service the terms of the contract between Plaintiff and third party faithfully, diligently, and fairly. Citi failed to discharge its duty to Plaintiff as well as to third party in taking reasonable steps to ensure that all installment payments were promptly credited to the correct account. Citi failed to take reasonable steps to notify Plaintiff of steps necessary to preserve the expectations of performance held by both the Plaintiff and third party.

109. As a result of the Citi's actions, the contractual relationship between Plaintiff and third party was disrupted catastrophically. Citi's actions or failures to act proximately caused economic damages to Plaintiff in amounts to be proved at trial.

**FOURTEENTH CAUSE OF ACTION FOR
NEGLIGENT MISREPRESENTATION
(AGAINST CITIMORTGAGE)**

110. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 109, inclusive, as though fully set forth herein.

111. Citi, or its agents, instructed Plaintiff on numerous occasions how, when, for what amount and to whom to make payments in order that Plaintiff's account could be brought current. On each occasion, those representations were false and Citi knew or should have known that its representations were false.

112. Citi, or its agents, instructed Plaintiff not to hire a lawyer to defend the lawsuit because Citi represented to Plaintiff that as long as she carried out the instructions regarding how, when, for what amount, and to whom to make payments, that the foreclosure lawsuit would be dismissed. On each occasion, Citi's representations were false and Citi knew or should have known that its representations were false.

113. Citi, or its agents, made these representations, and upon information and belief, other false representations, without any reasonable grounds for believing them to be true.

114. Citi, or its agents, made the various representations intending to prevent Plaintiff from engaging an attorney, from getting her loan current, and in an effort to speed up the foreclosure process so that Citi could seize the equity it knew existed in the Subject Property. Citi's representations were made falsely and with the intent to induce the Plaintiff to rely upon them.

115. Plaintiff did believe the various misrepresentations: that she need not retain counsel and that she need only comply with the instructions given for making payments in order

to cure her delinquent account. Plaintiff did rely on Citi's misrepresentations, Plaintiff's reliance was reasonable and she relied upon Citi's misrepresentations to her detriment.

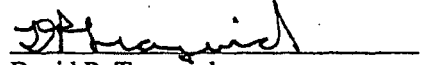
116. As a result of her reliance on the misrepresentations, Plaintiff suffered damages in an amount to be established at trial.

WHEREFORE, Plaintiff prays for judgment against the Defendants as follows:

1. For a declaration of the rights and duties of the parties, specifically that the foreclosure of Plaintiff's residence was wrongful.
2. For issuance of an Order canceling all Master's Deeds Upon Sale.
3. To vacate the Master's Deeds.
4. To vacate and set aside the initial foreclosure sale and any subsequent sales.
5. To quiet title in favor of Plaintiff and against Defendants.
6. For compensatory, special, general and punitive damages according to proof against Citi.
7. For civil penalties pursuant to statute, restitution, injunctive relief and reasonable attorneys fees according to proof against Citi.

8. For reasonable costs of suit and such other and further relief as the Court deems proper.

By:



David P. Traywick
TRAYWICK LAW OFFICES, LLC
P.O. Box 564
Isle of Palms, SC 29451
Telephone: 843-343-5092
Fax: 843-300-1051

Attorney for Plaintiff
Angela Drexler

June 15, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF BERKELEY 2011-CP-08-1754

ANGELA DREXLER,	)	
	)	
Plaintiff,	)	TRANSCRIPT OF RECORD
	)	
-vs-	)	October 12, 2011
	)	
CITIMORTGAGE, INC.,	)	Moncks Corner, SC
STONEGATE PROPERTIES, INC.,	)	
and BRANCH BANKING AND TRUST	)	
COMPANY, Inc.,	)	
	)	
Defendants.	)	

B E F O R E:

The Honorable Roger M. Young, Sr., Judge.

A P P E A R A N C E S:

Matthew Hamrick, Esquire
David Traywick, Esquire
Attorneys for the Plaintiff

Sarah B. Nielsen, Esquire
Attorney for Defendant CitiMortgage

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

1 (October 12, 2011.)

2 MR. HAMRICK: Your Honor, may I approach and
3 hand up a brief?

4 THE COURT: Sure.

5 MR. HAMRICK: There is one for opposing
6 counsel.

7 THE COURT: All right. CitiMortgage has a
8 motion to dismiss; is that what we're here for?

9 MS. NIELSEN: We do, Your Honor, and we filed
10 a memorandum in support of our motion on the 11th. I
11 have copies of that if you don't have a copy in front of
12 you.

13 THE COURT: I guess so. That would be
14 yesterday. Hasn't made its way here, to me, anyway.

15 All right. Tell me what this is about.

16 MS. NIELSEN: Your Honor --

17 THE COURT: Why don't you come over to the
18 microphone. You have a light voice and that might help
19 me hear a little bit.

20 MS. NIELSEN: I'll try to speak up for you.

21 Your Honor, this action is a compliant that
22 was filed against our client, CitiMortgage, that is
23 directly related to a foreclosure action that was filed
24 approximately three years ago, in this Court, that went
25 to judgment.

1 The plaintiff is asserting various causes of
2 action for negligent servicing of the loan, improper
3 application of payments, challenging CitiMortgage's
4 standing to foreclose on the property, challenging the
5 assignment of the report, and various other issues
6 related specifically to the servicing of the loan.

7 THE COURT: Three years ago? Has it already
8 gone through the foreclosure?

9 MS. NIELSEN: It has, Your Honor.

10 THE COURT: And the property has been sold?

11 MS. NIELSEN: Correct. The property was sold
12 in December of 2008. A Rule 60(b) motion was filed in
13 the foreclosure action and was ruled upon by the master
14 in equity, and two years after that ruling, this instant
15 lawsuit was filed.

16 CitiMortgage then filed a motion to dismiss.
17 The bases of our motion are that the claims in
18 plaintiff's complaint are all barred by the doctrine of
19 res judicata due to the ruling in the previous
20 foreclosure action that the issues underlying each of the
21 causes of action are barred by the doctrine of collateral
22 estoppel and therefore all the claims are barred.

23 As to the negligence and the negligent
24 misrepresentation causes of action, additional ground, in
25 addition to the res judicata collateral estoppel argument

1 is that the economic loss rule applies as all of the
2 plaintiff's causes of action relate specifically to a
3 contract, be it the note and mortgage in this instance
4 and therefore they cannot recover in the negligence
5 claim, and, additionally, as to any challenge to the
6 assignment of the mortgage, we argue that the plaintiff
7 does not have standing to challenge that assignment, as
8 it is not a party to the contract nor is it a third party
9 beneficiary.

10 I can go briefly through the background
11 leading up to the cause of action and what was
12 specifically ruled upon in the Rule 60(b) motion.

13 THE COURT: Why don't you do that. I don't
14 know anything about the case.

15 MS. NIELSEN: Okay. In May of 2008,
16 CitiMortgage filed a foreclosure complaint based on the
17 fact that plaintiff defaulted on the note in mortgage.
18 Thereafter, the plaintiff was served. She failed to file
19 an answer or otherwise respond to the complaint.

20 THE COURT: She was properly served?

21 MS. NIELSEN: Yes, Your Honor. She was
22 properly served. She did not respond. An order of
23 default was entered. As a note, plaintiff acknowledges
24 in her pleadings today in paragraph 22 that she didn't
25 respond. She was served and that an order of default was

1 issued by the Court.

2 A hearing was set on the foreclosure
3 judgment, and on October 29th, 2008, again, plaintiff was
4 sent notice which was acknowledged in the foreclosure
5 hearing. The record of that hearing is Exhibit A to the
6 memorandum that I provided to you.

7 Again, she did not appear. A final judgment
8 of foreclosure was issued on the 29th of October 2008.
9 The judgment found that she promised to pay the sum of
10 \$84,850 to CitiMortgage to secure that obligation. She
11 entered into a mortgage covering real property. That
12 mortgage was assigned to an entity that was later a
13 successor by merger to CitiMortgage, and plaintiff failed
14 to satisfy her payments under the note.

15 Therefore, the balance was accelerated and it
16 was to be sold at public auction. On that same day,
17 foreclosure counsel filed a certificate of mailing
18 stating that the notice of sale was being mailed to the
19 plaintiff, informing her that the property would be sold
20 at public auction on December 3rd, 2008. On December
21 3rd, again, plaintiff did not appear and attempt to
22 purchase her property at the public sale, and it was sold
23 to a third party, which is the defendant, Stonegate
24 Properties in this current action.

25 More than two months after the sale, which

1 occurred in December, plaintiff then filed a motion to
2 vacate the judgment of foreclosure and sale and set aside
3 the master sale pursuant to Rule 60(b) of the South
4 Carolina rules of civil procedure. That occurred on
5 February 19th, 2009.

6 The hearing on that motion was held on March
7 18th, 2009, at which time the plaintiff argued that she
8 made payment on her mortgage and that it should be
9 reinstated. The master in equity, Robert Watson, heard
10 the evidence presented by both CitiMortgage and by the
11 plaintiff and found that she in fact defaulted on her
12 loan and failed to timely submit reinstatement payments.

13 This was all presented to the master. He
14 heard the evidence, ruled upon it, and found that there
15 was not enough evidence to set aside her default and she
16 had shown -- she had not shown the capacity to reinstate
17 her loan, and the facts in the law as quoted from the
18 order were overwhelmingly against Drexler, the plaintiff.

19 Therefore, the master denied her Rule
20 60(b) motion and held that the order of judgment and
21 foreclosure and sale must be enforced and a resulting
22 sale would be final.

23 At that time, plaintiff had the opportunity
24 to appeal that order as it is a final order pursuant to
25 the South Carolina appellate rules. She failed to do so

1 within 30 days. It became a final order and was the end
2 of that litigation.

3 She then, two years later, commenced the
4 instant action for which we're here today. Again,
5 plaintiff in her complaint alleges that she made the
6 payments under her loan. The payments were not properly
7 applied and that CitiMortgage should have reinstated her
8 loan.

9 She also claims that CitiMortgage should not
10 have standing to pursue the foreclosure action. She
11 claims that the master's deed was improper and should be
12 voided. She claims that the master sale was improper and
13 should also be set aside and that the foreclosure
14 judgment was a result of fraud due to CitiMortgage not
15 having standing.

16 Based on these allegations, she claims
17 various theories to recover for damages, negligence,
18 fraud, breach of contract, breach of implied covenant of
19 good faith and fair dealing, unjust enrichment violation
20 of the South Carolina unfair trade practices act and
21 slander of title, just to name a few.

22 Each of the above causes of action I just
23 mentioned relate specifically to servicing the
24 plaintiff's loan. All the allegations surround whether
25 or not she made proper payments to reinstate the value of

1 the loan, which was already heard and decided by the
2 master during the Rule 60(b) motion. Based on that
3 information, CitiMortgage then filed this motion to
4 dismiss, which is why we're here in front of you today.

5 THE COURT: All right. Thank you.

6 MS. NIELSEN: Thank you.

7 MR. HAMRICK: Thank you, Your Honor.

8 Matt Hamrick for the plaintiff who's with us,
9 Angela Drexler, who is to my left.

10 Your Honor, this case, when Ms. Drexler first
11 retained counsel to represent her in this case, this
12 collateral attack on prior judgment had a story of what
13 happened that I'll tell Your Honor is, at first blush,
14 unbelievable because it's incredible. It really is.
15 It's crazy.

16 But here's what happened, Your Honor: She
17 made her mortgage payments. She made all of her mortgage
18 payments, and for reasons that she does not know,
19 CitiMortgage couldn't find some of them. They began
20 telling her, you're late on your mortgage payment.

21 She said, What do I do?

22 They said, Send us certified check. She did
23 that. This went on and on for several months. In fact,
24 during the time period that you just heard about, and
25 CitiMortgage was telling her, All you've got to do is do

1 exactly what we tell you, and everything will be fine.
2 Your mortgage will be current.

3 She did everything they told her to do. At
4 some point, about halfway through this, oh, four-, five-,
5 six-month process, they instituted foreclosure
6 proceedings against her. She was served. She knew she
7 was sued. She called Citi and asked, what do I do? Why
8 did you do this? I've sent you all the payments you told
9 me to make.

10 And they said, we can't locate your check
11 that you sent, but just send us another one. She sent
12 faxes to them, copies of the check, of the cover letter
13 and all that, and they said -- and they told her this,
14 and this is important, Your Honor -- they told her, Don't
15 worry about the foreclosure. It will be dismissed as
16 long as you follow our instructions.

17 And she followed their instructions. In
18 fact, they told her that on multiple occasions because it
19 appeared to her that they were not finding her checks.
20 They kept saying, Okay. I mean, they would find some but
21 then they would send them back, but it was a mess, but
22 she kept doing exactly what they told her to say.

23 She disputes that she got any notice of the
24 foreclosure, final foreclosure hearing for the sale and
25 relied, Your Honor -- CitiMortgage induced her to not

1 defend it. She was in default on the case, not on her
2 mortgage, on the foreclosure case. She went into
3 default. She did not defend herself because they told
4 her you would not need to do that as long as you follow
5 our instructions, send us these checks, send us the
6 faxes, send us the certified checks, which she did.

7 THE COURT: Did you tell all this to Judge
8 Watson at the 60(b) motion?

9 MR. HAMRICK: They did, Your Honor.

10 THE COURT: And so why am I hearing this
11 today? You didn't appeal. It's final judgment. All of
12 these are barred by res judicata and collateral estoppel.

13 MR. HAMRICK: Well, Your Honor, here is our
14 argument on that, and I think Your Honor is curious
15 because you asked opposing counsel, you know, why is it
16 now, after all this time? And the answer to that is
17 complicated.

18 It actually is complicated by the fact that
19 the foreclosure sale purchaser, this Stonegate
20 Properties, Inc., who is a defendant in this case, and
21 that company's principal, Kenneth Holmes, actually led
22 her to believe that she had purchased the home from him
23 to get it back, to redeem it. This man, Kenneth Holmes,
24 has now been convicted of all sorts of mortgage fraud and
25 is going to be sentenced soon for multiple instances of

1 defrauding homeowners and banks and so forth.

2 But the more legalistic, I suppose, answer to
3 your question, Your Honor, is that a Rule 60 motion, and,
4 in fact, in Rule 60, Rule 60(b)5 specifically says that a
5 collateral attack, such as this case, is not barred by
6 Rule 60. It says this rule does not limit the power of a
7 Court to entertain an independent action to relieve a
8 party from a judgment order a proceeding or set aside a
9 judgment of fraud upon the Court.

10 Citi, by the way, Your Honor -- and I refer
11 to CitiMortgage as Citi -- never told the master in
12 equity in the foreclosure process about any of these
13 dealings of -- that she had made these payments and that
14 they told her to send the certified checks, none of that,
15 but it was going on during the foreclosure process. In
16 any event --

17 THE COURT: Why didn't she tell the judge
18 about that during the Rule 60 motion?

19 MR. HAMRICK: She did, Your Honor.

20 THE COURT: Well, the judge has ruled on it.

21 MR. HAMRICK: I understand.

22 THE COURT: Well, I understand too, and that
23 is called res judicata. A judge has already ruled on the
24 exact same facts, exact same issues of law. I don't
25 get -- I'm not an appellate Court. I don't set and redo

1 what he has to say. If you didn't like that, they should
2 have appealed.

3 MR. HAMRICK: Your Honor, the res judicata
4 doctrine is complicated in terms of its elements that
5 have to be met, which in the motion we got -- I haven't
6 had an opportunity to read the brief, but there was no
7 discussion of the elements of res judicata. We contend
8 in our brief, contained our argument, that the elements
9 of res judicata are not met, with regard to the identity
10 of the parties, identity of the claims, the
11 adjudication --

12 THE COURT: You can still go forward against
13 Stonegate and any fraud claims you might have against
14 that guy, but you're trying to upset a sale, and it's
15 already taken place. The judge heard these arguments
16 about whether or not she would have made payments and it
17 should have been set aside two years ago, and that's a
18 final order after 30 days.

19 MR. HAMRICK: Yes, Your Honor.

20 THE COURT: As to CitiBank, I don't
21 understand why -- under what possible grounds that I
22 could upset the sale two years later and say Citi -- and
23 rule on any of these issues as it pertains to CitiBank.
24 If CitiBank was the party that brought the foreclosure
25 and you brought all these things to Judge Watson, or she

1 brought all these things to Judge Watson's attention, I'm
2 missing how res judicata isn't designed, exactly, for
3 this situation.

4 MR. HAMRICK: Your Honor, my response would
5 be that the exceptions to res judicata include fraud,
6 intrinsic fraud, extrinsic fraud, intrinsic fraud coupled
7 with the scheme --

8 THE COURT: What did CitiBank do to
9 participate in the fraud?

10 MR. HAMRICK: Told her -- they induced her
11 not to defend herself in the foreclosure action.

12 THE COURT: Didn't she bring that to Judge
13 Watson's attention at the Rule 60 motion?

14 MR. HAMRICK: She did, Your Honor.

15 THE COURT: So a circuit court judge has
16 already ruled on that.

17 MR. HAMRICK: Your Honor, the case, Mr. T --
18 it's a strange case name, but Mr. T vs. Mrs. T case that
19 we've cited in our brief states, The mere presence of the
20 various exceptions, many of which are found in equity
21 principles, exceptions to the res judicata, that is,
22 warrants affording the parties the opportunity to develop
23 the record.

24 There was no record developed below. She
25 didn't defend herself. It wasn't on the merits. It was

1 a default motion in a few minutes' worth of a Rule 60
2 motion that, frankly, all of this went fleshed out well
3 enough, and, Your Honor, the cases, including the
4 Mr. T case say -- in addition, the Evans vs. Gunther case
5 cited in our brief at page eight, and in that case, Your
6 Honor, that was a case of reversal of a 12(b)6 dismissal
7 based on res judicata when the complaint in the second
8 case contained allegations of fraud.

9 And the Mr. T case really lays it out and
10 explains that, you know, when the allegation is that the
11 judgment before was obtained by fraud or for other
12 reasons is inequitable to have it enforced that the
13 parties should be given an opportunity in the second case
14 to develop the record and --

15 THE COURT: Why didn't it get developed in
16 front of Judge Watson? You told me that you did bring
17 these things to Judge Watson's attention. I'm --

18 MR. HAMRICK: Some of them, Your Honor. I
19 mean, the only things at issue in that case were the
20 foreclosure, I mean, so she did -- she showed him -- Your
21 Honor, to be honest with you, I've read his order, and I
22 don't understand why he didn't -- he didn't even refer to
23 what she presented at the hearing.

24 I mean, she showed copies of the fax and the
25 checks and the certified checks and all that, and in his

1 order, he talks about that the coupon book, that the
2 pages hadn't been ripped out of the payment coupon book.
3 It had nothing to do with what she presented.

4 She hasn't had an opportunity to fully
5 present even those claims, but in this case, Your Honor,
6 there are multiple claims asserted against both Citi and
7 the other two defendants that she couldn't have asserted
8 then. I mean, just for example, she had no damages in
9 negligence for the claims -- I mean, for the servicing of
10 this. She had no damages until the sale, until she lost
11 her home, so she couldn't have even brought those as
12 counterclaims in the other action.

13 And, Your Honor, the other reason that we
14 would ask you please to let her develop this record and
15 really defend what Citi is saying is really a public
16 policy argument. Judge Toal's first order about
17 foreclosure procedures came down, I think it was, four
18 months or less after the sale here, I mean, early '09 or
19 spring '09, and then, of course, the more recent order by
20 Judge Toal, the administrative orders demonstrate what
21 the public policy of South Carolina is, with regard to
22 loss mitigation efforts being undertaken on the one hand
23 and foreclosure being pursued at the same time, sort of
24 this dual track, as they call it, and that's what
25 happened to her.

1 I mean, now there is a moratorium in place at
2 this point, and this could not have happened if those
3 orders had been in place at the time. And I don't mean
4 to say those should be retrospectively applied but just
5 that they show what the public policy of the state is,
6 and in the case law, on res judicata, that is one of the
7 main reasons why a 12(b)6 motion based on res judicata
8 should be denied, is on public policy grounds and we have
9 alleged that.

10 I mean, the complaint here contains
11 allegations that, if true, which they have to be assumed
12 true at this point in the proceeding, would entitle
13 Ms. Drexler to relief. And, I mean, just on that basis
14 alone, Your Honor, the 12(b)6 law is clear that the
15 complaint in this case must be liberally construed in her
16 favor and that if any of the facts or inferences from
17 the -- in the complaint entitle her to relief on any
18 theory of the case, even whether it's these theories that
19 she stated or other theories. That is Evans vs. Gunther.

20 The 12(b)6 motion should be denied. The
21 record should be developed, and, Your Honor, perhaps
22 CitiMortgage will be able make a summary judgment at some
23 point and be dismissed that way, but at this stage in the
24 litigation, it hasn't been developed at all, and, I mean,
25 Your Honor, really, she made her mortgage payments and

1 just got jerked around.

2 I mean, I don't know if it was a mistake
3 accompanied by fraud, both on the Court and to her or
4 what, or if it was just outright bad faith and fraud, but
5 she lost her home despite the fact that she has made all
6 the mortgage payments and that they told her, We will
7 dismiss the foreclosure action if you just do what we
8 tell you, and she did it. She did exactly what they told
9 her to do.

10 Your Honor, we would ask you to please
11 consider letting us develop the record in this case and
12 going forward with the claims that are asserted in this
13 case, which are much different than any claim that even
14 could have -- that couldn't have been asserted as
15 counterclaims in that case. That case only involved, you
16 know, a note and a mortgage and the note holder and the
17 mortgage holder.

18 This case really involves those parties, but,
19 more importantly, the servicer, and, of course, the other
20 two parties that aren't --

21 THE COURT: Do you have a copy of Judge
22 Watson's order on the Rule 60 motion?

23 MR. HAMRICK: I do, Your Honor.

24 THE COURT: Let me have a copy of that. It's
25 not attached to your motion, is it?

1 MR. HAMRICK: It's not. It's attached to
2 Citi's motion.

3 THE COURT: All right. If it's in the file,
4 I'll take a look at that time. I'll take it under
5 advisement.

6 My strong feeling is that, you know, if you
7 brought this to Judge Watson's attention and you don't
8 think that he adequately addressed the issues that got
9 raised, then the proper motion was a motion to
10 reconsider, and, you know, depending on how they would
11 have ruled on that could have appealed.

12 As a result, you know, there was no appeal
13 taken from the order, and from what I understand, you
14 know, you're telling me these same issues got raised
15 before him. There is not probably a whole heck of a lot
16 I can do for you, but I'll read through what I have here
17 in the file and let you know what I decide.

18 MR. HAMRICK: Thank you, Your Honor. May I
19 just add, very briefly, to consider, as you read through
20 the file, that in this case, she's not even necessarily
21 asking for the foreclosure sale to be overturned, but,
22 rather, in addition, she's asking for damages in several
23 of the causes of action that she's asserted that don't
24 even necessarily require what's been done to be undone in
25 terms of the foreclosure and sale.

1 Thank you, Your Honor.

2 THE COURT: All right. I'll let y'all know
3 what I decide after I've read through the file.

4 - - -

5 (Whereupon, the proceedings were concluded.)

6 - - -

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

I, the undersigned Amanda K. Haffenden, RPR, CRR, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Berkeley County, South Carolina, on the 12th of October 2011.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

June 17, 2012

A handwritten signature in black ink, appearing to read 'A. Haffenden', written over a horizontal line.

Circuit Court Reporter

1 STATE OF SOUTH CAROLINA

2
3 COUNTY OF BERKELEY

4
5 CitiMortgage, Inc.,

6
7 Plaintiff,

8
9 v.

10
11 Angela M. Drexler; and any other Heirs at Law or
12 devisees of Arthur E. Antisdel, Deceased, their
13 heirs, Personal Representatives, Administrators,
14 Successors and Assigns, and all other persons
15 entitled to claim through them; all unknown
16 persons with any right, title or interest in the real
17 estate described herein; also any persons who may
18 be in the military service of the United States of
19 America, being a class designated as John Doe;
20 and any unknown minors or persons under a
21 disability being a class designated as Richard Roe;
22 Washington Mutual Home Loans, Inc. f/k/a Fleet
23 Real Estate Funding Corp.

24
25 Defendant(s).

26
27 (011654-01799)

IN THE COURT OF COMMON PLEAS

DOCKET NO. 08-CP-08-1258

RECORD OF HEARING
Deficiency Judgment Waived

2008 OCT 29 PM 1:32
CLERK OF COURT

28
29 Pursuant to the Order of Reference granted in the above entitled cause, a reference was
30 held herein on October 29, 2008 at 09:30 AM, before The Honorable Robert E. Watson.

31 Plaintiff's attorney called attention to the filing of the original Summons and Notice and
32 Complaint in the Office of the RMC/ROD for Berkeley County on May 7, 2008. The amended Lis
33 Pendens was filed on May 21, 2008 and an amended Summons and Notice and Complaint on May 21,
34 2008, and to the affidavit(s) of service on the Defendant(s) filed therein.

35 Also called attention to the filing of the original Lis Pendens in said Clerk's Office on
36 May 7, 2008.

37 Also called attention to the filing of the affidavit showing the Defendant(s) Angela M.
38 Drexler and Washington Mutual Home Loans, Inc. f/k/a Fleet Real Estate Funding Corp are in default and
39 that the Defendant(s) Angela M. Drexler is not in the Military Service of the United States of America, as
40 contemplated under The Servicemembers Civil Relief Act, 50 U.S.C. § 501 et. Seq.

41 Also called attention to the Order of Reference of record herein issued in Berkeley
42 County, wherein the above entitled cause was referred to Robert E. Watson, as Master in Equity "to take
43 the testimony arising under the pleadings and to make his findings of fact and conclusions of law and

1 with authority to enter final judgment in the case. An appeal from the final judgment so entered shall be
2 made directly to the South Carolina Court of Appeals pursuant to Rule 203(d) of the SCACR, effective
3 June 1, 1999."

4 The signing of the testimony, as required under Statute, was waived.

5 WHEREUPON The signing of the testimony, as required under Statute, was waived.

6 WHEREUPON, Plaintiff's attorney, being duly sworn, testified as follows:

7 I am one of the attorneys for the Plaintiff in this action.

8 Notice of the hearing has been mailed to all defendants in this action.

9 I offer the Certificate of Service in evidence.

10 Certificate of Mailing identified, offered and received in evidence as Exhibit "1".

11 From the original records in my possession, from the complaint herein and from
12 examination of the records in the office of the Clerk of Court for Berkeley County, I find that on July 9,
13 1998, the Defendant(s) Arthur E. Antisdel and Angela M. Drexler gave a certain written promissory Fixed
14 Rate Note in the principal sum of \$84,850.00 together with interest thereon from date at the rate of 8.5%
15 per annum, said principal and interest being payable as follows: In monthly installments of \$652.42,
16 commencing September 1, 1998.

17 I offer the Fixed Rate Note in evidence.

18 Fixed Rate Note identified, offered and received in evidence as Exhibit "2".

19 I call attention to the provisions of the Fixed Rate Note with reference to default.

20 I also call the Court's attention to the provisions in the Fixed Rate Note with reference to
21 payment of costs and attorney's fees.

22 Arthur E. Antisdel and Angela M. Drexler gave a certain written purchase money first
23 Mortgage unto Compass Mortgage Inc. which purchase money first Mortgage contains the same terms
24 and provisions as the Fixed Rate Note just offered in evidence and conveyed by way of purchase money
25 first Mortgage the identical property described in the complaint in this action, which property is situate in
26 Berkeley County, South Carolina.

27 Thereafter, on July 13, 1998, the purchase money first Mortgage was recorded in the
28 office of the Clerk of Court/RMC for Berkeley County, South Carolina, in Mortgage Book 1379 at Page
29 57. This mortgage was subsequently assigned to Homestead Funding Corporation by assignment dated
30 July 9, 1998 and recorded July 13, 1998 in Book 1379 at Page 68; subsequently assigned to ABN AMRO
31 Mortgage Group, Inc. by assignment dated March 8, 2001 and recorded on March 26, 2001 in Book 3423
32 at Page 49. CitiMortgage, Inc. is successor by merger to ABN Amro Mortgage Company, Inc.
33 Subsequently, Arthur E. Antisdel died intestate on July 14, 2004, leaving the subject property to his/her
34 heirs or devisees.

1 This purchase money first Mortgage constitutes a purchase money first lien covering the
2 property therein described.

3 I offer the purchase money first Mortgage as evidence.

4 Purchase money first Mortgage identified, offered and received in evidence as Exhibit
5 "3".

6 I offer the copy of the Assignment(s) as evidence.

7 Assignment(s) identified, offered and received in evidence as Exhibit "4".

8 Upon examination of the records in said Clerk of Court's/ROD'S office, it appeared there
9 were no persons other than the parties to this action having any liens against the subject property, by way
10 of assessment or otherwise, as of the date of filing the notice of pendency of this action.

11 The monthly installments as provided for in said Fixed Rate Note and purchase money
12 first Mortgage were not paid in accordance with the terms and conditions thereof, and, therefore, the
13 Fixed Rate Note and purchase money first Mortgage are in default; and, as a result thereof, the Plaintiff
14 has elected to declare the entire unpaid amount immediately due and payable.

15 Demand was made upon the Defendants but payment has not been received.

16 After all payments received by the Plaintiff have been credited to the subject loan, there is
17 due and owing on the Plaintiff's Fixed Rate note and purchase money first mortgage as of this date, the
18 principal sum of \$70,581.19, together with interest thereon from November 1, 2007, at the rate of 8.5%
19 per annum as of October 29, 2008, amounting to \$5,999.40, plus advances (escrow advances, corporate
20 charges and other charges) of \$648.47, and late charges in the amount of \$380.26, making the total due
21 Plaintiff in the amount of \$77,609.32, plus costs of collection and attorney fees as provided by the Fixed
22 Rate Note and purchase money first Mortgage.

23 Costs that have been incurred in the litigation of this case are in the amount of \$1,687.57
24 plus a title abstract search in the amount of \$425.00.

25 Plaintiff moves to dismiss the Defendant, Washington Mutual Home Loans, Inc. f/k/a
26 Fleet Real Estate Funding Corp. from its action.

27 The Defendant(s) claim(s) or may claim a lien upon or legal interest in the subject
28 property and in the event there is a surplus from the sale of the subject property, such Defendant(s) may
29 present any such lien or legal interest at a hearing subsequently to the sale, in accordance with Rule 71(c)
30 South Carolina Rules of Civil Procedure. The said Defendant(s) and such liens or legal interest are as
31 follows:

32 a. Angela M. Drexler and any unknown Heirs or Devisees of Arthur E. Antidel,
33 Deceased, including any persons who may be in the military service of the United States of America,
34 being a class designated as John Doe; and any unknown minors or persons under a disability being a

1 class designated as Richard Roe, by virtue of any interest claimed under the law of intestate succession
2 (S.C. Code Section 62-2-109) or under decedent's will.

3 With respect to attorney fees, in view of the potential liabilities inherent in a real property
4 matter, the attendant responsibilities, and the size of the mortgage debt, I think that a reasonable attorney's
5 fee would be \$4,500.00. Representation of the Plaintiff has been undertaken by the firm of Rogers
6 Townsend & Thomas, PC. The attorneys primarily involved in this representation have been Samuel C.
7 Waters, Cheryl H. Fisher, Reginald P. Corley, Jennifer W. Rubin, Ellie C. Floyd, Michael P. Morris, Eve
8 M. Stacey, Mary R. Powers, Robert P. Davis, Timothy B. Killen, and William S. Koehler. Our law firm
9 was engaged by the Plaintiff to foreclose the mortgage as expeditiously as possible, given the detriment to
10 Plaintiff's equity position as a direct result of increasing losses from the running of interest. Plaintiff must
11 also comply with investor requirements, government or private insuring agreements. Upon receipt of the
12 case file, the title was examined to identify all parties having or claiming any interest in the subject real
13 estate. My fellow counsel, our staff, and I have been responsible for the preparation of the following
14 pleadings and other documents:

- 15
- 16 1. Lis Pendens and any amendment thereto
- 17 2. Summons and Complaint and any amendment thereto
- 18 3. Affidavits and proposed Orders for publication
- 19 4. Affidavit of Default
- 20 5. Consent(s) to Order of Reference
- 21 6. Order of Reference
- 22 7. Notice(s) of Hearing
- 23 8. Record (Transcript) of Testimony
- 24 9. Proposed Judgment of Foreclosure and Sale
- 25 10. Notice of Sale
- 26

27 Additionally, we have been responsible for the preparation and service of the pleadings
28 upon each defendant personally or by statutory/substitute service; obtaining reinstatement and payoff
29 figures and payment histories were provided as requested or required; and scheduling and attending the
30 hearing in this matter.

31 Future responsibilities include forwarding copies of the Judgment to appearing
32 defendants, obtaining bidding instructions from Plaintiff or its designee, representing Plaintiff at the sale
33 or arranging for such representation, preparing an Order of Sale or Report on Sale and Disbursements and
34 Order Confirming Sale, and preparing the Foreclosure Deed and any other documents necessary in this
35 particular action.

36 In addition to the time expended to date in prosecution of this action, we anticipate a
37 minimum additional four hours after the hearing. Moreover, depending upon the interest shown by
38 defendants, third parties, or counsel for either and the inherent negotiations required thereby, other time

1 may also be committed to the completion of the case. In that regard, I would reserve the right to re-visit
2 the question of attorney fees should the action proceed in an unexpected way.

3 In regard to the professional standing of counsel, I would call the court's attention to the
4 fact that:

5 I. Mr. Waters concentrates his practice in the areas of foreclosure, bankruptcy and
6 real estate. He was formerly counsel for eight years to the Loan Guaranty Division, Department of
7 Veterans Affairs for the District of South Carolina. Mr. Waters regularly participates as faculty for
8 continuing legal education programs sponsored by the South Carolina Bar and by private organizations.
9 Since 1984, Mr. Waters has been in the private practice of law with an emphasis on foreclosures of
10 residential mortgage loans insured by the Department of Housing and Urban Development, the
11 Department of Veterans Affairs, Federal National Mortgage Association and Federal Home Loan
12 Mortgage Corporation as well as commercial private mortgage insurers.

13 II. Since 1991, Ms. Fisher has concentrated her practice in the areas of foreclosure
14 and real estate. She has presented multiple C.L.E.'s including one entitled "Focusing on Liens Which
15 Affect Real Property.

16 III. Mr. Corley concentrates his practice in the areas of foreclosure and real estate.
17 Since his admission to the bar in 2001, Mr. Corley has represented lenders or servicers in foreclosure and
18 other related actions throughout the state of South Carolina.

19 IV. Ms. Rubin was admitted to the South Carolina Bar in 1999 and served as a law
20 clerk for Circuit Judge H. Dean Hall for one year. Since 2000, Ms. Rubin has been employed with
21 Rogers Townsend & Thomas, P.C., in general litigation, construction law, and mortgage foreclosures
22 throughout South Carolina.

23 V. Ms. Floyd has concentrated her practice in the areas of foreclosure and real estate
24 since her admission to the bar in 2001. Since 2002, she has represented lenders and servicers in
25 foreclosure actions throughout South Carolina.

26 VI. Mr. Morris concentrates his practice in the areas of foreclosure, real estate and
27 bankruptcy. Since his admission to the bar in 2005, Mr. Morris has represented lenders or servicers in
28 foreclosure and other related actions throughout the state of South Carolina.

29 VII. Ms. Stacey was admitted to the South Carolina Bar in 1979. She has spent most
30 of the ensuing years in government relations. She has experience in handling Real Estate title Issues.
31 Since coming to Rogers Townsend & Thomas P.C. she has focused exclusively on representation of
32 lenders and servicers in foreclosure actions throughout South Carolina.

33 VIII. Ms. Powers was admitted to the South Carolina Bar in 2001. After about one
34 year with the SC Employment Security Commission, she then represented creditors in bankruptcy,

1 foreclosure and general collections. She also spent a brief period representing debtors in bankruptcy but
2 now concentrates her practice on representing creditors in foreclosure and bankruptcy matters.

3 IX. Mr. Davis has concentrated his practice in the areas of real estate and foreclosure
4 since his admission to the bar in 2005. His experience includes closing mortgage loan transactions and
5 representing lenders and servicers in foreclosure actions throughout South Carolina.

6 X. Mr. Killen was admitted to the South Carolina Bar in 2004. He concentrates his
7 practice in the areas of foreclosures and real estate. Since 2006, Mr. Killen has represented lenders and
8 servicers in foreclosure and other related actions throughout the state of South Carolina.

9 XI. Mr. Koehler was admitted to the South Carolina bar in 2006. He concentrates his
10 practice in the areas of foreclosures and real estate. Since being admitted to the bar, Mr. Koehler has
11 represented lenders and servicers in foreclosures and related bankruptcies through out the state of South
12 Carolina.

13 Furthermore, this fee is in line with the fee customarily charged by counsel with similar
14 experience in this particular locality. Also, the Plaintiff's attorneys have achieved the beneficial result of
15 a prompt foreclosure of the mortgage. The Plaintiff has specifically waived any right to a personal or
16 deficiency judgment.

17 There are no paving or other special assessments against the subject property. Taxes
18 have been paid through 2007.

19 We would ask that the purchase money first mortgage be foreclosed, that the property be
20 sold at public auction in accordance with law, that the sale be made subject to any liens for taxes and any
21 special assessments of record against such property; also, subject to payment by the purchaser of interest
22 at the respective note rates per annum on the balance of the bid from the date of sale to date of
23 compliance with the bid; also, subject to any existing easements or restrictions of record; and also subject
24 to payment by the purchaser for preparation of the deed and for recording taxes.

25 HEARING ADJOURNED.

26 Moncks Corner, South Carolina

27 October 29, 2008 at 09:30 AM.

28

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

CitiMortgage, Inc.,

Plaintiff,

v.

Angela M. Drexler; and any other Heirs at Law or
Devises of Arthur E. Antisdell, Deceased, their
heirs, Personal Representatives, Administrators,
Successors and Assigns, and all other persons
entitled to claim through them; all unknown
persons with any right, title or interest in the real
estate described herein; also any persons who may
be in the military service of the United States of
America, being a class designated as John Doe;
and any unknown minors or persons under a
disability being a class designated as Richard Roe;
Washington Mutual Home Loans, Inc. f/k/a Fleet
Real Estate Funding Corp.

Defendant(s).

(011654-01799)

IN THE COURT OF COMMON PLEAS

DOCKET NO. 08-CP-08-1258

CERTIFICATE OF MAILING
Deficiency Judgment Waived

2008 OCT 23 PM 1:32
CLERK OF COURT
BERKELEY COUNTY, SC

I am an employee of the law offices of Rogers Townsend and Thomas, PC, attorneys for Plaintiff, do hereby certify that I have mailed a copy of the Notice of Hearing, which is attached hereto and incorporated herein by reference, dated October 12, 2008 and in connection with the above-referenced case, by mailing a copy of the same by United States mail, postage prepaid, to each of the Addressees, listed on the Notice of Hearing and in separate envelopes, at each of their respective addresses shown thereon, this October 13, 2008.



Christina E. Miller
Deloris G. Cotton

NOTICE OF SALE

BY VIRTUE of a decree heretofore granted in the case of: CitiMortgage, Inc. vs. Angela M. Drexler; and any other Heirs at Law or Devisees of Arthur E. Antisdel, Deceased, their heirs, Personal Representatives, Administrators, Successors and Assigns, and all other persons entitled to claim through them; all unknown persons with any right, title or interest in the real estate described herein; also any persons who may be in the military service of the United States of America, being a class designated as John Doe; and any unknown minors or persons under a disability being a class designated as Richard Roe; Washington Mutual Home Loans, Inc. f/k/a Fleet Real Estate Funding Corp. , C/A No. 08-CP-08-1258, The following property will be sold on December 3, 2008, at 11:00 AM at the Berkeley County Courthouse to the highest bidder:

All that piece, parcel or lot of land with the buildings and improvements thereon, situate lying and being near Ladson, South Carolina, in Berkeley County, South Carolina, shown and designated as Lot 74, Block F, Tall Pines Plantation Subdivision, Section Three, on a plat dated January 19, 1977 made by Harold J. Leamond, P.E. and L.S., and recorded in the Office of the Clerk of Court for Berkeley County on January 24, 1977 in Plat Book W. Page 153.

Derivation: Book 1379 at Page 53

[REDACTED] LADSON, SC 29456

233-14-01-024

SUBJECT TO ASSESSMENTS, BERKELEY AD VALOREM TAXES, EASEMENTS AND/OR, RESTRICTIONS OF RECORD, AND OTHER SENIOR ENCUMBRANCES.

TERMS OF SALE: A 5% cash deposit is required. The deposit will be applied towards the purchase price unless the bidder defaults, in which case the deposit will be forfeited. If the successful bidder fails, or refuses, to make the required deposit on the day of sale or fails or refuses to comply with the bid within 30 days, then the property will be resold at the bidder's risk. No personal or deficiency judgment being demanded, the bidding will not remain open after the date of sale, but compliance with the bid may be made immediately. The successful bidder will be required to pay interest on the amount of the bid from date of sale to date of compliance with the bid at the rate of 8.5% per annum. For complete terms of sale, see Judgment of Foreclosure and Sale filed with the Berkeley County Clerk of Court at C/A #08-CP-08-1258.

NOTICE: The foreclosure deed is not a warranty deed. Interested bidders should satisfy themselves as to the quality of title to be conveyed by obtaining an independent title search prior to the foreclosure sale date.

Samuel C. Waters, Esq.
Attorney for Plaintiff
P.O. Box 100200
Columbia, SC 29202-3200
(803) 744-4444
011654-01799

Robert E. Watson
Robert E. Watson
Master in Equity for
Berkeley County

Website: www.rtt-law.com (see link to Resources/Foreclosure Sales)

NOTICE TO PRINTER: Please insert:

____ Once during week commencing _____
____ Once during week commencing _____
____ Once during week commencing _____

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)
CitiMortgage, Inc.)

IN THE COURT OF COMMON PLEAS
DOCKET NO. 08-CP-08-1258

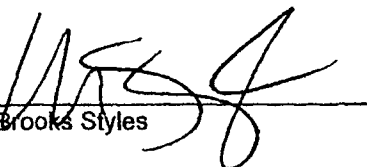
Plaintiff,)
)
)
vs)
)
Angela M. Drexler, et.al.)
)
Defendants)

AFFIDAVIT

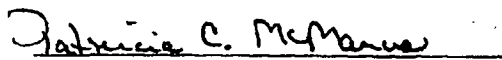
PERSONALLY APPEARED BEFORE ME, W. Brooks Styles, who, being duly sworn, deposes and says:-

1. That he was court appointed as Guardian ad Litem Nisi and also Attorney for Defendants in Military Service.
2. That on June 16, 2008 received information from the office of Mary R. Powers concerning the foreclosure of the Estate of Arthur E. Antisdel.
3. That on June 17, 2008 forwarded correspondence by certified mail to Angela M. Drexler.
4. That the said correspondence was delivered and signed for.
5. No other communication has been received from any party to this matter.

FURTHER AFFIANT SAYETH NOT


W. Brooks Styles

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 16th day of Octoberr, 2008.


Notary Public for South Carolina
My Commission Expires: 2-28-17

SCW
10/16/08

2008 OCT 20 PM 9:49
CLERK OF COURT
BERKELEY COUNTY, SC

13

11694-17
Drexler, Angel
08-08-08-173

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
■ Complete Items 1, 2, and 3. Also complete Item 4 if Restricted Delivery is desired. ■ Print your name and address on the reverse so that we can return the card to you. ■ Attach this card to the back of the mailpiece, or on the front if space permits.		A. Signature x <i>Angela Drexler</i> ☐ Agent ☐ Addressee	
1. Article Addressed to: <i>Angela M. Drexler</i> <i>[REDACTED]</i> <i>Ladson, SC 29456</i>		B. Received by (Printed Name) <i>Angela Drexler</i> C. Date of Delivery <i>7/7/08</i>	
		D. Is delivery address different from Item 1? ☐ Yes If YES, enter delivery address below: ☐ No	
		3. Service Type ☒ Certified Mail ☐ Express Mail ☐ Registered ☐ Return Receipt for Merchandise ☐ Insured Mail ☐ C.O.D.	
		4. Restricted Delivery? (Extra Fee) ☐ Yes	
2 <i>7007 3020 0002 7105 6499</i>		<i>Estate</i> <i>Antioch</i>	

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-15401



ROGERS TOWNSEND & THOMAS, PC

ATTORNEYS AND COUNSELORS AT LAW

Default Services Section Attorneys

Samuel C. Waters
Michael P. Morris

Cheryl H. Fisher
Eve Moredock Stacey

Reginald P. Corley
Mary R. Powers

Jennifer W. Rubin
Robert P. Davis

Ellie C. Floyd
William S. Koshler

October 17, 2008

Mary P. Brown
Clerk of Court for County of Berkeley
P.O. Box 219
Moncks Corner, SC 29461

Re: CitiMortgage, Inc. v. ANGELA DREXLER
Case # 08-CP-08-1258
File # 1119837192
Our file # 011654-01799

Dear Clerk:

Enclosed are an original and one copy of an Affidavit of Guardian ad Litem and Attorney Appointed for Defendants in Military Service in the above referenced case. Please file the original document and return a clocked copy to me in the envelope provided for your convenience.

Sincerely,

Michele Loftis
Paralegal to Samuel C. Waters

/mbf

Enclosure(s)



ROGERS TOWNSEND & THOMAS, PC
ATTORNEYS AND COUNSELORS AT LAW

tel 803-744-4444 mail PO Box 100200 (29202)
fax 803-348-7017 220 Executive Center Drive, Suite 109
web www.rtt-law.com Columbia, South Carolina 29210

October 12, 2008

Angela M. Drexler
[REDACTED]
[REDACTED] 29456

Washington Mutual Home Loans, Inc. f/k/a Fleet Real Estate Funding Corp
1301 - 2Nd Ave
Seattle, WA 98101

W. Brooks Styles
W. Brooks Styles, Esq.
7301 Rivers Avenue, Suite 200
North Charleston, SC 29406
Guardian for Arthur E. Antisdel

W. Brooks Styles
W. Brooks Styles, Esq.
7301 Rivers Avenue, Suite 200
North Charleston, SC 29406
Guardian for Arthur E. Antisdel

Occupant
[REDACTED]

LADSON, SC 29456

Re: CitiMortgage, Inc. vs. ANGELA DREXLER
Case No. 08-CP-08-1258; Berkeley County
Our File No. 011654-01799

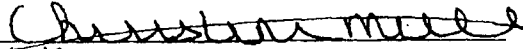
Dear Sir or Madam:

A foreclosure hearing has been set in the above-referenced matter for October 29, 2008 at 09:30 AM before the Honorable Robert E. Watson, Master in Equity for Berkeley County, at:

**Courthouse Annex, 300-B California Avenue
Moncks Corner, SC 29461**

Pursuant to S.C. Code Ann. § 14-11-110 (as amended), the Plaintiff's attorney will submit written testimony on behalf of the Plaintiff at the hearing listed above.

Sincerely,



Paralegal for:

Samuel C. Waters (SC Bar #5958) Cheryl H. Fisher (SC Bar #15213)
Reginald P. Corley (SC Bar #69453) Jennifer W. Rubin (SC Bar #16727)
Ellie C. Floyd (SC Bar # 68635) Michael P. Morris (SC Bar #73560)
Eve Moredock Stacey (SC Bar # 5300) Mary R. Powers (SC Bar #16534)
Robert P. Davis (SC Bar # 74030)
220 Executive Center Drive, Suite 109 Post Office Box 100200 (29202)
Columbia, SC 29210 (803) 744-4444

cc: The Honorable Robert E. Watson

Multistate

NOTE

FHA Case No.

461-3368243-702

July 9, 1998
(Date)

SC 29456

(Property Address)

1. PARTIES

"Borrower" means each person signing at the end of this Note, and the person's successors and assigns. "Lender" means COMPASS MORTGAGE INC.

and its successors and assigns.

2. BORROWER'S PROMISE TO PAY; INTEREST

In return for a loan received from Lender, Borrower promises to pay the principal sum of Eighty Four Thousand Eight Hundred Fifty and no/100

Dollars (U.S. \$ 84,850.00), plus interest, to the order of Lender. Interest will be charged on unpaid principal, from the date of disbursement of the loan proceeds by Lender, at the rate of Eight and One / Half percent (8.5000 %) per year until the full amount of principal has been paid.

3. PROMISE TO PAY SECURED

Borrower's promise to pay is secured by a mortgage, deed of trust or similar security instrument that is dated the same date as this Note and called the "Security Instrument." The Security Instrument protects the Lender from losses which might result if Borrower defaults under this Note.

4. MANNER OF PAYMENT

(A) Time

Borrower shall make a payment of principal and interest to Lender on the first day of each month beginning on September 1, 1998. Any principal and interest remaining on the first day of August 2028, will be due on that date, which is called the "Maturity Date."

(B) Place

Payment shall be made at 1350 ASHLEY RIVER ROAD STE-D, CHARLESTON, SC 29407

or at such place as Lender may designate in writing

by notice to Borrower.

(C) Amount

Each monthly payment of principal and interest will be in the amount of U.S. \$ 652.42. This amount will be part of a larger monthly payment required by the Security Instrument, that shall be applied to principal, interest and other items in the order described in the Security Instrument.

(D) Allonge to this Note for payment adjustments

If an allonge providing for payment adjustments is executed by Borrower together with this Note, the covenants of the allonge shall be incorporated into and shall amend and supplement the covenants of this Note as if the allonge were a part of this Note. [Check applicable box]

☐ Graduated Payment Allonge ☐ Growing Equity Allonge ☐ Other [specify]

5. BORROWER'S RIGHT TO PREPAY

Borrower has the right to pay the debt evidenced by this Note, in whole or in part, without charge or penalty, on the first day of any month. Lender shall accept prepayment on other days provided that Borrower pays interest on the amount prepaid for the remainder of the month to the extent required by Lender and permitted by regulations of the Secretary. If Borrower makes a partial prepayment, there will be no changes in the due date or in the amount of the monthly payment unless Lender agrees in writing to those changes.

FHA Multistate Fixed Rate Note - 10/95
FORM 1001-1R 08/01/01
UNIFORM MORTGAGE FORECLOSURE JUDICIAL FORM 11-7781
Page 1 of 2 NOV 01/98

MADE: AEA
A.M.D.



6. BORROWER'S FAILURE TO PAY

(A) Late Charge for Overdue Payments

If Lender has not received the full monthly payment required by the Security Instrument, as described in Paragraph 4(C) of this Note, by the end of fifteen calendar days after the payment is due, Lender may collect a late charge in the amount of FOUR percent (4.0000 %) of the overdue amount of each payment.

(B) Default

If Borrower defaults by failing to pay in full any monthly payment, then Lender may, except as limited by regulations of the Secretary in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest. Lender may choose not to exercise this option without waiving its rights in the event of any subsequent default. In many circumstances regulations issued by the Secretary will limit Lender's rights to require immediate payment in full in the case of payment defaults. This Note does not authorize acceleration when not permitted by HUD regulations. As used in this Note, "Secretary" means the Secretary of Housing and Urban Development or his or her designee.

(C) Payment of Costs and Expenses

If Lender has required immediate payment in full, as described above, Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys' fees for enforcing this Note to the extent not prohibited by applicable law. Such fees and costs shall bear interest from the date of disbursement at the same rate as the principal of this Note.

7. WAIVERS

Borrower and any other person who has obligations under this Note waive the rights of presentment and notice of dishonor. "Presentment" means the right to require Lender to demand payment of amounts due. "Notice of dishonor" means the right to require Lender to give notice to other persons that amounts due have not been paid.

8. GIVING OF NOTICES

Unless applicable law requires a different method, any notice that must be given to Borrower under this Note will be given by delivering it or by mailing it by first class mail to Borrower at the property address above or at a different address if Borrower has given Lender a notice of Borrower's different address.

Any notice that must be given to Lender under this Note will be given by first class mail to Lender at the address stated in Paragraph 4(B) or at a different address if Borrower is given a notice of that different address.

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety or endorser of this Note is also obligated to do those things. Any person who takes over these obligations, including the obligations of a guarantor, surety or endorser of this Note, is also obligated to keep all of the promises made in this Note. Lender may enforce its rights under this Note against each person individually or against all signatories together. Any one person signing this Note may be required to pay all of the amounts owed under this Note.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Note.

_____ (Seal) -Borrower	_____ (Seal) -Borrower
PAY TO THE ORDER OF	ARTUR E. ANTISDEK
Without Recourse	_____ (Seal) -Borrower
Atlantic Mortgage & Investment Corporation	ANGELA M. DREXLER
_____ (Seal) -Borrower	_____ (Seal) -Borrower
Robin M. Ivey	_____ (Seal) -Borrower
Assistant Vice President	_____ (Seal) -Borrower

1000 - 1R (0401)01

Page 2 of 2

ATLANTIC MORTGAGE & INVESTMENT CORP. WITHOUT RECOURSE
PAY TO THE ORDER OF
THIS DAY OF 10
HOMESTEAD FUNDING CORP.
MELISSA DESARCO OFFICER
Homestead Funding Corporation
COMPISSA MORTGAGE INC.
Jeanne M. Parangona
Vice President

0037484 BK: 1379 Pg: 0067

FROM: HEDDER, DOCK
07/12/1988 11:21:44
To: Felt 37.00 Pt Felt 8.00
By: Felt 6.00 Page: 11
Trans: 0037484
Register of South Carolina Co. SC
Clerk of Court

Return
ROBERT L. LUCK
ATTORNEY AT LAW
P. O. BOX 2327
RNO, SC 29063-7327

(Please Attach This Line For Recording Data)

State of SC
LOAN NO

MORTGAGE

TRUST No.
461-3368243-702

THIS MORTGAGE ("Security Instrument") is given on
the Mortgage is ARTHUR E. ANTISDEL and ANGELA M. DREXLER

July 9, 1988

("Borrower"). This Security Instrument is given to COMPASS MORTGAGE INC

which is organized and existing under the laws of THE STATE OF SOUTH CAROLINA, and
whose address is 1350 ASHLEY RIVER ROAD STE-D, CHARLESTON, SC 29407
("Lender"). Borrower owes Lender the principal sum of
Eighty Four Thousand Eight Hundred Fifty and no/100

Dollars (U.S. \$ 84,850.00).
This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which
provides for monthly payments, with the full debt, if not paid earlier, due and payable on August 1, 2028.
This Security Instrument secures to Lender (a) the repayment of the debt evidenced by the
Note, with interest, and all payments, extensions and modifications of the Note; (b) the payment of all other sums,
with interest, advanced under paragraph 7 to protect the security of this Security Instrument; and (c) the performance

SCA South Carolina Mortgage: 4/84
MORTGAGE 0037484
MORTGAGE 0037484 - 000001-7211
Page 1 of 2 100 South Carolina
AEB.



AIND

Assignment 0037483 BK: 1379 Pg: 0068

of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to the Lender and Lender's successors and assigns the following described property located in Berkeley County, South Carolina: EXHIBIT A LEGAL DESCRIPTION ATTACHED HERETO AND MADE A PART HEREOF

which has the address of [REDACTED] (Home City, South Carolina 29456 177-7444 ("Property Address"))

TO HAVE AND TO HOLD this property unto Lender and Lender's successors and assigns, forever, together with all the improvements now or hereafter located on the property, and all easements, appurtenances and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seized of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT constitutes uniform covenants for national use and non-uniform covenants with national variation by jurisdiction to constitute a uniform security instrument covering real property.

Borrower and Lender covenant and agree as follows:

UNIFORM COVENANTS

1. **Payment of Principal, Interest and Late Charge.** Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and late charges due under the Note.

2. **Monthly Payment of Taxes, Insurance and Other Charges.** Borrower shall include in each monthly payment, together with the principal and interest as set forth in the Note and any late charges, a sum for (a) taxes and special assessments levied or to be levied against the Property; (b) household payments or ground rents on the Property; and (c) premiums for insurance required under paragraph 4. In any year in which the Lender must pay a mortgage insurance premium to the Secretary of Housing and Urban Development ("Secretary"), or in any year in which such premium would have been required if Lender still held the Security Instrument, such monthly payment shall also include either (i) a sum for the annual mortgage insurance premium to be paid by Lender to the Secretary, or (ii) a monthly charge based on a mortgage insurance premium if this Security Instrument is held by the Secretary, in a reasonable amount to be determined by the Secretary. Except for the monthly charge by the Secretary, these items are called "Escrow Items" and the sums paid to Lender are called "Escrow Funds."

Lender may, at any time, collect and hold amounts for Escrow Items in an aggregate amount not to exceed the minimum amount that may be required by Borrower's escrow account under the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. Section 2601 et seq. and implementing regulations, 24 CFR Part 3500, as they may be amended from time to time ("RESPA"), except that the provision in RESPA for disbursement of disbursements before the Borrower's payments are available in the account may not be based on amounts due for the mortgage insurance premium.

401-401(1) 11-1

11-1

ACA

AmD

If the amounts held by Lender for Escrow Items exceed the amounts permitted to be held by RESPA, Lender shall account to Borrower for the excess funds as required by RESPA. If the amounts of funds held by Lender at any time are not sufficient to pay the Escrow Items when due, Lender may notify the Borrower and require Borrower to make up the shortage as permitted by RESPA.

The Escrow Funds are pledged as additional security for all sums secured by this Security Instrument. If Borrower tender to Lender the full payment of all such sums, Borrower's account shall be credited with the balance remaining for all installment items (a), (b), and (c) and any mortgage insurance premium installment that Lender has not become obligated to pay to the Secretary, and Lender shall promptly refund any excess funds to Borrower, immediately prior to a foreclosure sale of the Property or its acquisition by Lender. Borrower's account shall be credited with any balance remaining for all installment items (a), (b), and (c).

3. Application of Payments. All payments under paragraphs 1 and 2 shall be applied by Lender as follows:

First, to the mortgage insurance premium to be paid by Lender to the Secretary or to the monthly charge by the Secretary instead of the monthly mortgage insurance premium;

Second, to any taxes, special assessments, landlord payments or ground rent, and fire, flood and other hazard insurance premiums, as required;

Third, to interest due under this Note;

Fourth, to amortization of the principal of the Note; and

Fifth, to the charges due under the Note.

4. Fire, Flood and Other Hazard Insurance. Borrower shall insure all improvements on the Property, whether now in existence or subsequently erected, against any hazards, casualties, and perils, including fire, for which Lender requires insurance. This insurance shall be maintained in the amounts and for the periods that Lender requires. Borrower shall also insure all improvements on the Property, whether now in existence or subsequently erected, against loss by floods in the amount required by the Secretary. All insurance shall be carried with companies approved by Lender. The insurance policies and any renewals shall be held by Lender and shall include loss payable clauses in favor of, and in a form acceptable to, Lender.

In the event of loss, Borrower shall give Lender immediate notice by mail. Lender may make proof of loss if not made promptly by Borrower. Each insurance company concerned is hereby authorized and directed to make payment for such loss directly to Lender, instead of to Borrower and to Lender jointly. All or any part of the insurance proceeds may be applied by Lender, at its option, either (a) in the reduction of the indebtedness under the Note and this Security Instrument, first to any delinquent amounts applied in the order in paragraph 3, and then to prepayment of principal, or (b) to the restoration or repair of the damaged Property. Any application of the proceeds on the principal shall not extend or postpone the due date of the monthly payments which are referred to in paragraph 2, or change the amount of such payments. Any excess insurance proceeds over an amount required to pay all outstanding indebtedness under the Note and this Security Instrument shall be paid to the equity legally entitled thereto.

In the event of foreclosure of this Security Instrument or other transfer of title to the Property that extinguishes the indebtedness, all right, title and interest of Borrower in and to insurance policies in force shall pass to the purchaser.

5. Occupancy, Preservation, Maintenance and Protection of the Property. Borrower's Loan Application, Loanholdings. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within sixty days after the execution of this Security Instrument (or within sixty days of a later sale or transfer of the Property) and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender determines this requirement will cause undue hardship for Borrower, or unless extenuating circumstances exist which are beyond Borrower's control. Borrower shall notify Lender of any extenuating circumstances. Borrower shall not commit waste or destroy, damage or substantially change the Property or allow the Property to deteriorate, reasonable wear and tear excepted. Lender may inspect the Property if the Property is vacant or abandoned or the loan is in default. Lender may take reasonable action to protect and preserve such vacant or

0037484 000101

Page 8 of 9

ACA
Amd

abandoned Property Borrower shall also be in default if Borrower, during the loan application process, gave materially false or inaccurate information or statements to Lender (or failed to provide Lender with any material information) in connection with the loan evidenced by the Note, including, but not limited to, representations concerning Borrower's occupancy of the Property as a principal residence. If this Security Instrument is on a leasehold, Borrower shall comply with the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and fee title shall not be merged unless Lender agrees to the merger in writing.

6. **Condemnation.** The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of any part of the Property, or for conveyance in place of condemnation, are hereby assigned and shall be paid to Lender to the extent of the full amount of the indebtedness then remaining unpaid under the Note and this Security Instrument. Lender shall apply such proceeds to the reduction of the indebtedness under the Note and this Security Instrument, first to any delinquent amounts applied in the order provided in paragraph 3, and then to payment of principal. Any application of the proceeds to the principal shall not extend or postpone the due date of the monthly payments, which are referred to in paragraph 2, or change the amount of such payments. Any excess proceeds over an amount required to pay all outstanding indebtedness under the Note and this Security Instrument shall be paid to the entity legally entitled thereto.

7. **Charges to Borrower and Protection of Lender's Rights in the Property.** Borrower shall pay all governmental or municipal charges, taxes and assessments that are not included in paragraph 2. Borrower shall pay these obligations or send directly to the entity which is owed the payment. If failure to pay would adversely affect Lender's interest in the Property, upon Lender's request Borrower shall promptly furnish to Lender receipts evidencing these payments.

If Borrower fails to make these payments or the payments required by paragraph 2, or fails to perform any other covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender's rights in the Property such as a proceeding in bankruptcy, for condemnation or to enforce laws or regulations, then Lender may do and pay whatever is necessary to protect the value of the Property and Lender's rights in the Property, including payment of taxes, hazard insurance and other items mentioned in paragraph 2.

Any amounts disbursed by Lender under this paragraph shall become an additional debt of Borrower and be secured by this Security Instrument. These amounts shall bear interest from the date of disbursement, at the floor rate, and at the option of Lender, shall be immediately due and payable.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender; (b) carries in good faith the lien to, or defends against enforcement of the lien in, legal proceedings which in the Lender's opinion appear to prevent the enforcement of the lien; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which may claim priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Borrower shall satisfy the lien on the one or more of the serious set forth above within 10 days of the giving of notice.

8. **Power.** Lender may collect fees and charges authorized by the Secretary.

9. **Grounds for Acceleration of Debt.**

(a) **Default.** Lender may, except as limited by regulations issued by the Secretary, in the case of payment defaults, require immediate payment in full of all sums secured by this Security Instrument if:
 (i) Borrower defaults by failing to pay in full any monthly payment required by this Security Instrument prior to or on the due date of the next monthly payment, or
 (ii) Borrower defaults by failing, for a period of thirty days, to perform any other obligations contained in this Security Instrument.

(b) **State Without Credit Approval.** Lender shall, if permitted by applicable law including Section 34(d) of the Small Business Lending Act of 1982, 12 U.S.C. 1703-3(d) and with the prior approval of the Secretary, require immediate payment in full of all sums secured by this Security Instrument if:

0037484 Bk: 1379 Pg: 0060

with AEA

AmD

(i) All or part of the Property, or a beneficial interest in a trust owning all or part of the Property, is sold or otherwise transferred (other than by devise or descent), and
 (ii) The Property is not occupied by the purchaser or grantee as his or her principal residence, or the purchaser or grantee does so occupy the Property but his or her credit has not been approved in accordance with the requirements of the Secretary.

(c) No Waiver. If circumstances occur that would permit Lender to require immediate payment in full, but Lender does not require such payment, Lender does not waive its rights with respect to subsequent events.
 (d) Regulations of HUD Secretary. In many circumstances regulations issued by the Secretary will limit Lender's rights, in the case of payment default, to require immediate payment in full and foreclose if not paid. This Security Instrument does not authorize acceleration or foreclosures if not permitted by regulations of the Secretary.

(e) Mortgage Not Insured. Borrower agrees that if this Security Instrument and the Note are not determined to be eligible for insurance under the National Housing Act within 60 days from the date hereof, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. A written statement of any designated agent of the Secretary dated subsequent to 60 days from the date hereof, declining to insure this Security Instrument and the Note, shall be deemed conclusive proof of such ineligibility. Notwithstanding the foregoing, this option may not be exercised by Lender when the unavailability of insurance is solely due to Lender's failure to retain a mortgage insurance premium to the Secretary.

10. **Reinstatement.** Borrower has a right to be reinstated if Lender has required immediate payment in full because of Borrower's failure to pay an amount due under the Note or this Security Instrument. This right applies even if foreclosure proceedings are initiated. To reinstate the Security Instrument, Borrower shall tender in a lump sum all amounts required to bring Borrower's account current including, to the extent they are obligations of Borrower under this Security Instrument, foreclosure costs and reasonable and necessary attorney's fees and expenses properly associated with the foreclosure proceedings. Upon reinstatement by Borrower, this Security Instrument and the obligations that it secures shall remain in effect as if Lender has not required immediate payment in full. However, Lender is not required to permit reinstatement if: (i) Lender has accepted reinstatement after the commencement of foreclosure proceedings within two years immediately preceding the commencement of a current reinstatement will adversely affect the priority of the lien created by this Security Instrument.

11. **Borrower Not Released; Perpetuation By Lender Not a Waiver.** Extension of the time of payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to any successor in interest of Borrower shall not operate to release the liability of the original Borrower or Borrower's successor in interest. Lender shall not be required to commence proceedings against any successor in interest or refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or Borrower's successors in interest. Any forbearance by Lender in exercising any right or remedy shall not be a waiver of or preclude the exercise of any right or remedy.

12. **Successors and Assigns Bound; Joint and Several Liability; Co-Signers.** The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower, subject to the provisions of paragraph 9(b). Borrower's covenants and agreements shall be joint and several. Any Borrower who co-signs this Security Instrument but does not execute the Note (a) is co-signing this Security Instrument only to mortgage, grant and convey the Borrower's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrowers may agree to amend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without that Borrower's consent.

0037464 (0000.01)

Page 6 of 6

www.ACA

Ann D

13. **Notice.** Any notice to Borrower provided for in this Security Instrument shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address Borrower designates by notice to Lender. Any notice to Lender shall be given by first class mail to Lender's address stated herein or any address Lender designates by notice to Borrower. Any notice provided for in this Security Instrument shall be deemed to have been given to Borrower or Lender when given as provided in this paragraph.

14. **Governing Law.** This Security Instrument shall be governed by Federal law and the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Security Instrument or the Note conflict with applicable law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision. To this end the provisions of this Security Instrument and the Note are declared to be severable.

15. **Borrower's Copy.** Borrower shall be given, one conforming copy of the Note and of this Security Instrument.

16. **Hazardous Substances.** Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property that is in violation of any Environmental Law. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential use and in maintenance of the Property.

Borrower shall promptly give Lender written notice of any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge. If Borrower learns, or is notified by any governmental or regulatory authority, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial action in accordance with Environmental Law.

As used in this paragraph 16, "Hazardous Substances" are those substances defined as such in Hazardous Substances by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials. As used in this paragraph 16, "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection.

NON DISCLOSURE COVENANTS. Borrower and Lender further covenant and agree as follows:

17. **Assignment of Rents.** Borrower unconditionally assigns and transfers to Lender all the rents and revenues of the Property. Borrower authorizes Lender or Lender's agents to collect the rents and revenues and hereby directs each tenant of the Property to pay the rents to Lender or Lender's agents. However, prior to Lender's notice to Borrower of Borrower's breach of any covenant or agreement in the Security Instrument, Borrower shall collect and receive all rents and revenues of the Property as trustee for the benefit of Lender and Borrower. This assignment of rents constitutes an absolute assignment and not an assignment for additional security only.

If Lender gives notice of breach to Borrower, all rents received by Borrower shall be held by Borrower as trustee for benefit of Lender only, to be applied to the sums secured by the Security Instrument; (b) Lender shall be entitled to collect and receive all of the rents of the Property, and for each tenant of the Property shall pay all rents due and unpaid to Lender or Lender's agent or Lender's agent assigned to the tenant.

Borrower has no reserved any prior assignment of the rents and has not and will not perform any act that would prevent Lender from exercising its rights under this paragraph 17.

Lender shall not be required to enter upon, take control of or maintain the Property before or after giving notice of breach to Borrower. However, Lender or a judicially appointed receiver may do so at any time there is a breach. Any application of rents shall not cure or waive any default or constitute any other right or remedy of Lender. This assignment of rents of the Property shall terminate when the debt secured by the Security Instrument is paid in full.

RECEIVED 10/16/11

- 20 -

with AEA

AND

0037484 Bks 1379 Pgs 0063

18. **Foreclosure Procedure.** If Lender requires foreclosure pursuant to this paragraph 9, Lender may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this paragraph 18, including, but not limited to, reasonable attorney's fees and costs of title evidence, all of which shall be additional sums secured by this Security Instrument.

If the Lender's interest in this Security Instrument is held by the Secretary and the Secretary requires immediate payment in full under Paragraph 9, the Secretary may exercise the non-judicial power of sale provided in the Single Family Mortgage Foreclosure Act of 1994 ("Act") (12 U.S.C. 3751 et seq.) by requesting a foreclosure commissioner designated under the Act to commence foreclosure and to sell the Property as provided in the Act. Nothing in the preceding sentence shall deprive the Secretary of any rights otherwise available to a Lender under this Paragraph 18 or applicable law.

19. **Release.** Upon payment of all sums secured by this Security Instrument, this Security Instrument shall become null and void. Lender shall release this Security Instrument without charge to Borrower. Borrower shall pay any recording costs.

20. **Waiver.** Borrower waives all rights of homestead exemption in the Property.

21. **Future Advances.** The lien of this Security Instrument shall secure the existing indebtedness under the Note and any future advances made under this Security Instrument up to one hundred fifty percent (150%) of the original principal amount of the Note plus interest thereon, attorneys' fees and court costs.

22. **Riders to this Security Instrument.** If one or more riders are executed by Borrower and recorded together with this Security Instrument, the provisions of each such rider shall be incorporated into and shall extend and supplement the provisions and agreements of this Security Instrument as if the rider(s) were a part of this Security Instrument. (Check applicable box(es).)

☐ Condominium Rider ☐ Growing Equity Rider ☒ Other (specify):
☐ Planned Unit Development Rider ☐ Graduated Payment Rider **REHABILITATION LOAN RIDER**

**** PROVISIONS PERTAINING TO RELEASES ARE CONTAINED IN THE REHABILITATION LOAN RIDER WHICH IS ATTACHED TO THIS MORTGAGE AND MADE A PART HEREOF."**

ACA
 And

BY SIGNING BELOW, Borrower accepts and agrees to the terms contained in this Security Instrument and in any rider(s) executed by Borrower and recorded with it.

[Signature]
[Signature]

Arthur E. Antisoel (Seal)
 ARTHUR E. ANTISOEL
Angela M. Crexler (Seal)
 ANGELA M. CREXLER

(Seal) _____ (Seal)
 Borrower Borrower
 (Seal) _____ (Seal)
 Borrower Borrower
 (Seal) _____ (Seal)
 Borrower Borrower

STATE OF SOUTH CAROLINA, Dorchester County wt
 Personally appeared before me the below signed witness and made oath that
 he/she was the within named Borrower, and that the act and deed, deliver the within written
 Mortgage; and that he/she with the other subscribing witness witnessed the execution thereof.

Sworn before me this 9th day of July 1998

My Commission Expires 0610-2003

(Seal)

[Signature]
 Notary Public for South Carolina

401001-0000-01

Page 8 of 8

EXHIBIT A TO MORTGAGE

LEGAL DESCRIPTION

ALL that piece, parcel or lot of land, with the buildings and improvements thereon, situate, lying and being near Lagoon, South Carolina, in Berkeley County, South Carolina, shown and designated as LOT 74, BLOCK 2, TALL PINES PLANTATION SUBDIVISION, SECTION THREE, on a plat dated January 19, 1977, made by Harold J. Leamond, P.W. and L.S., and recorded in the Office of the Clerk of Court for Berkeley County on January 24, 1977 in Plat Book W, Page 153.

This being the same property conveyed unto the Mortgagor(s) herein, Arthur E. Antisdal and Angela M. Draxler, by Deed of SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON D.C. dated July 7, 1998, and recorded in the Office of the Register of Deeds/RMC/Clerk of Court for Berkeley County simultaneously herewith.

MORTGAGOR: Arthur E. Antisdal and Angela M. Draxler
Summerville, SC 29483

MORTGAGEE: Compass Mortgage Inc.
1350 Ashley River Rd., Suite D
Charleston, SC 29407

PROPERTY ADDRESS: [REDACTED]
Summerville, SC 29483

7422515

ACA
AND

7422515 - RECORDS & L.P.

THIS REHABILITATION LOAN RIDER is made this 8th day of July, 1998, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust and Security Deed ("Security Instrument") of the same date given by the undersigned ("Borrower") to secure Borrower's Note ("Note") to COMPASS MORTGAGE, INC.

LABSON, SC 29456
(Private Address)

A. Loan proceeds are to be advanced for the purposes in accordance with the Rehabilitation Loan Agreement dated July 8, 1988 between Borrower and Lender. This agreement is incorporated by reference and made a part of this Security Instrument. No advances shall be made unless approved by the Secretary of Housing and Urban Development or a Direct Loan Mortgage Underwriter.

B. If the rehabilitation is not properly completed, performed with reasonable diligence, or is discontinued at any time except for strikes or lockouts, the Lender is vested with full authority to take the necessary steps to protect the rehabilitation improvements and property from harm, continue existing contracts or enter new necessary contracts to complete the rehabilitation. All sums expended for such protection, evaluation of the advances of the principal underwritten, shall be added to the principal underwritten, and secured by the Security Instrument and be due and payable on demand with interest as set out in the Note.

C. If Borrower fails to perform any obligation under the Loan, including the commencement, progress and completion performance of the Rehabilitation Loan Agreement, and such failure continues for a period of 30 days, the time shall, at the option of Lender, be in default.

D. The Property covered by this Security Instrument shall include all of Borrower's interest in funds held by Lender in escrow under the Rehabilitation Loan Agreement.

FOIA b(7)(D); b(7)(C); b(7)(B); b(7)(A) - 1045

SECRET

11-11-68

Am. D

BY SIGNING BELOW, Borrower accepts and agrees to the terms and conditions contained in this
Rehabilitation Loan Rider.

_____ (Seal) Borrower	<i>Arthur E. Antisdel</i> ARTHUR E. ANTISDEL _____ (Seal) Borrower
_____ (Seal) Borrower	<i>Angela M. Drexler</i> ANGELA M. DREXLER _____ (Seal) Borrower
_____ (Seal) Borrower	_____ (Seal) Borrower
_____ (Seal) Borrower	_____ (Seal) Borrower

STATE OF SOUTH CAROLINA)
COUNTY OF Dorchester)

ASSIGNMENT OF MORTGAGE

This ASSIGNMENT OF MORTGAGE, executed this 9th day of July, 1998, by and between COMPASS MORTGAGE, INC., Assignor, and HOMESTEAD FUNDING CORPORATION, Shaker Pine Mall, Albany, NY 12212, called Assignee, its successors or assigns, without recourse.

For VALUE RECEIVED, the within named mortgage is hereby transferred, assigned and conveyed to Assignee together with the property described therein and the debt secured thereby, said mortgage being recorded in the public records of Dorchester County, South Carolina and duly identified as follows:

ORIGINAL MORTGAGOR	ORIGINAL LOAN AMOUNT	DATE OF MORTGAGE	BOOK/PAGE NO.
Arthur E. Antisdell & Angela M. Drexler	84,850.00	July 9, 1998	1379 pg. 51

In witness whereof, COMPASS MORTGAGE, INC., by Jeanne M. Marangone, Vice President has caused its corporate seal to be hereunto affixed.

Signed, Sealed and Delivered in the presence of:

COMPASS MORTGAGE, INC.

Wanda Evans
Janet Berry

By: *[Signature]*
Jeanne M. Marangone
Its: Vice President
Corporate Seal

STATE OF SOUTH CAROLINA)
COUNTY OF Charleston)

*1350 Ashley River Road, Suite D
Charleston, S.C. 29407

Personally appeared before me the undersigned, who being duly sworn, says that s/he saw the within named COMPASS MORTGAGE, INC., as Assignors, by the hands of its duly authorized officer, sign, affix its corporate seal and as its act and deed, sign, seal and deliver the within written assignment for the uses and purposes therein mentioned and that s/he with the other witness, witnessed the execution and delivery thereof.

Sworn to before me this 9th day of July, 1998.

Janet Berry *Wanda Evans*
Notary Public for South Carolina
My Commission expires: 12/31/2001

FILED, RECORDED, INDEXED
07/13/1998 11:21:36AM
Rec Fees 6.00 St Fees 0.00
Co Fees 0.00 Pages: 1
Issued to: ROBERT LUCE
Register of Deeds Berkeley Co. SC
Cynthia B. Forta

000021193 Bk:03423 PG:00049

PREPARED BY: SMI
RECORDING REQUESTED BY
AFTER RECORDING RETURN TO:

Stewart Mortgage Information
Attn: Sherry Doza
P.O. Box 540817
Houston, Texas 77254-0817
Tel: (800) 795-3263

Post: 482614X8F Index: 1378

Loan Number:

Homestead Loan

Investor Number

005_2101 01 - 1304

(Space Above This Line For Recorder's Use Only)

FILED, RECORDED, INDEXED
03/26/2001 10:55:47AM
Rec Fees: 6.00 St Fees: 0.00
Co Fees: 0.00 Pages: 1
Issued to: STEWART MORTGAGE INFORMATION
Register of Deeds Berkeley Co., SC
Cynthia B. Forte

FILED, RECORDED, INDEXED
07/15/2003 01:50:29PM
Rec Fees: 6.00 St Fees: 0.00
Co Fees: 0.00 Pages: 1
Issued to: ABN AMRO
Register of Deeds Berkeley Co., SC
Cynthia B. Forte

ASSIGNMENT of MORTGAGE

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

KNOW ALL MEN BY THESE PRESENTS:

That HOMESTEAD FUNDING CORPORATION ("Assignor"), acting herein by and through a duly authorized officer, the owner and holder of one certain promissory note executed by ARTHUR E. ANTISEL AND ANGELA M. ANTISEL ("Borrower(s)") secured by a Mortgage of even date therewith executed by Borrower(s) for the benefit of the holder of the said note, which was recorded on the lot(s), or parcel(s) of land described therein situated in the County of Berkeley, State of South Carolina:

Recording Ref: Book 1379, Page No. ~~1000~~ 1001
For and in consideration of the sum of Ten and No/100 dollars (\$10.00), and other good valuable and sufficient consideration paid, the receipt of which is hereby acknowledged, does hereby transfer and assign, set over and deliver unto ABN AMRO MORTGAGE GROUP, INC., a Delaware Corporation (Assignee) all beneficial interest in and to the said Mortgage, together with the note and all other liens against said property securing the payment thereof, and all title held by the undersigned in and to said land.

TO HAVE AND TO HOLD unto said Assignee said above described Mortgage and note, together with all and singular the liens, rights, equities, title and estate in said real estate therein described securing the payment thereof, or otherwise.

Executed this the 8th day of March A.D. 2001.

HOMESTEAD FUNDING CORPORATION

By:

SHERRY DOZA
VICE PRESIDENT

Attest:

LINDA SHANNON
ASSISTANT SECRETARY

Witness: Constance Bernard
CONSTANCE BERNARD

Witness: Sandy Tooley
SANDY TOOLEY

THE STATE OF TEXAS
COUNTY OF HARRIS

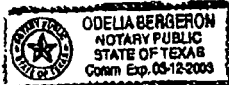
On this the 8th day of March A.D. 2001, before me, a Notary Public, appeared SHERRY DOZA to me personally known, who being by me duly sworn, did say that (s)he is the VICE PRESIDENT of HOMESTEAD FUNDING CORPORATION, and that said Instrument was signed on behalf of said corporation by authority of its Board of Directors, and said SHERRY DOZA acknowledged said Instrument to be the free act and deed of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

Odelia Bergeron

Assignee's Address:
2600 W. BIG BEAVER ROAD
TROY, MI 48064

Assignor's Address:
8 AIRLINE DRIVE
ALBANY, NY 12205



STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

CitiMortgage, Inc.,

Plaintiff,

v.

Angela M. Drexler; and any other Heirs at Law or
Devises of Arthur E. Antisdel, Deceased, their
heirs, Personal Representatives, Administrators,
Successors and Assigns, and all other persons
entitled to claim through them; all unknown
persons with any right, title or interest in the real
estate described herein; also any persons who may
be in the military service of the United States of
America, being a class designated as John Doe;
and any unknown minors or persons under a
disability being a class designated as Richard Roe;
Washington Mutual Home Loans, Inc. f/k/a Fleet
Real Estate Funding Corp.

Defendant(s).

(011654-01799)

IN THE COURT OF COMMON PLEAS

DOCKET NO. 08-CP-08-1258

AFFIDAVIT OF COSTS
Deficiency Judgment Waived

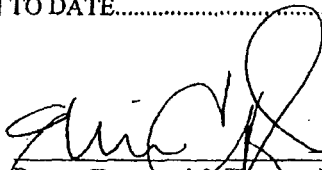
2008 OCT 29 PM 1:32
CLERK OF COURT
BERKELEY COUNTY SC

PERSONALLY appeared before me, the undersigned, who being duly sworn, deposes
and says:

I am one of the attorneys for Plaintiff in the above-captioned action for which the
following costs, which are secured by the mortgage being foreclosed, have been incurred to date and not
reimbursed by the client and reflected as a portion of the corporate advance:

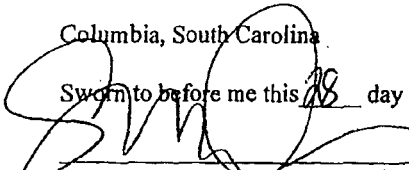
(a)	Filing fees (Lis Pendens, Complaint, etc)	\$150.00
(b)	Service (Personal or Publication)	\$1,012.57
(c)	Master's deposit	\$125.00
(d)	Motion Fee	\$100.00
(e)	Guardian ad Litem	\$150.00
(f)	Soldiers and Sailors Attorney	\$150.00

TOTAL COSTS OF COLLECTION TO DATE..... \$1,687.57


Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5978) Cheryl H. Fisher (SC Bar #15213)
Reginald P. Corley (SC Bar #69453) Jennifer W. Rubin (SC Bar #16727)
Elfie C. Floyd (SC Bar # 68635) Michael P. Morris (SC Bar #73560)
Eve Moredock Stacey (SC Bar # 5300) Mary R. Powers (SC Bar #16534)
Robert P. Davis (SC Bar # 74030) Timothy B. Killen (SC Bar #72501)
William S. Kochler (SC Bar# 74935)
220 Executive Center Drive, Suite 109 Post Office Box 100200 (29202)
Columbia, SC 29210 (803) 744-4444

Columbia, South Carolina


Sworn to before me this 28 day of October, 2008

(L.S.)

Notary Public for South Carolina

My Commission Expires: 9/29/18

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2008-CP-08-1258

CitiMortgage, Inc.,

PLAINTIFF,

vs.

Angela M. Drexler; and any other Heirs at
Law or Devisees of Arthur E. Antisdel,
Deceased, their heirs, Personal
Representatives, Administrators,
Successors and Assigns, and all other
persons entitled to claim through them; all
unknown persons with any rights, title or
interest in the real estate described herein;
also any persons who may be in the
military service of the United States of
America, being a class designated as John
Doe; and any unknown minors or persons
under a disability being a class designated
as Richard Roe; Washington Mutual
Home Loans, Inc. f/k/a Fleet Real Estate
Funding Corp.,

DEFENDANTS.

**[IN THE MASTER-IN-EQUITY'S
COURT]**

**NOTICE OF MOTION AND MOTION
FOR RELIEF PURSUANT TO SCRPC 60,
TO VACATE ORDER AND JUDGMENT OF
FORECLOSURE AND MASTER'S SALE
AND TO REINSTATE MORTGAGE, AND
FOR LEGAL FEES AND COSTS**

PLEASE TAKE NOTICE that Ten (10) days or as soon thereafter as counsel can be heard,
the defendant Angela Drexler (and as heir at law of Arthur Antisdel) will move for an Order:

- a. Setting aside and vacating the Master In Equity's Order and Judgment of
Foreclosure and Sale filed October 29, 2008; and
- b. Setting aside and vacating the Master's Deed selling the subject property; and
- c. Declaring the defendant Angela M. Drexler's mortgage note to be in full force
and effect;
- d. Declaring the defendant Angela M. Drexler's mortgage note to be current;

- e. Dismissing and immediately staying the pending eviction by the plaintiffs, their successors or assigns of the undersigned defendant;
- f. For an award of attorneys fees and costs; and
- g. For such other and further relief as this Honorable Court deems just, wise, and proper.

This Motion will be based upon affidavits or testimony as the court deems proper. Please be present if you are so minded.

Charleston, South Carolina

Feb 13, 2009



ROBERT L. PAPA, ESQUIRE
ATTORNEY FOR ANGELA M. DREXLER
INDIVIDUALLY AND AS HEIR OF
ARTHUR E. ANTISDEL
6 CARRIAGE LANE, STE. A
CHARLESTON, SC 29407
843.571.4611 TEL.
843.571.4602 FAX.

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

CitiMortgage, Inc.,

PLAINTIFF,

vs.

Angela M. Drexler; and any other Heirs at
Law or Devisees of Arthur E. Antisdell,
Deceased, their heirs, Personal
Representatives, Administrators,
Successors and Assigns, and all other
persons entitled to claim through them; all
unknown persons with any rights, title or
interest in the real estate described herein;
also any persons who may be in the
military service of the United States of
America, being a class designated as John
Doe; and any unknown minors or persons
under a disability being a class designated
as Richard Roe; Washington Mutual
Home Loans, Inc. f/k/a Fleet Real Estate
Funding Corp.,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2008-CP-08-1258

[IN THE MASTER-IN-EQUITY'S
COURT]

DEFENDANT'S AFFIDAVIT IN
SUPPORT OF MOTION FOR RELIEF
PURSUANT TO SCRPC 60

HAVING FIRST been duly sworn, your affiants depose and say:

1. That I am the defendant Angela M. Drexler named in the within action.
2. That I am the mortgagor and obligor of the note and mortgage that was the subject of the plaintiff's foreclosure.
3. My late husband was the other obligor. I reside in the subject home with my 14 year old son. I receive social security for myself and my son due to my husband's

untimely death. I last worked at a café on Dorchester Road but was laid off due to the recession.

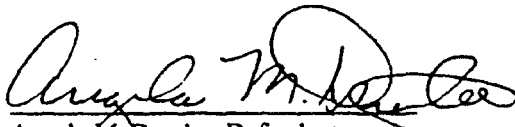
4. This abomination with Citimortgage began in the Spring of 2008.
5. I did get behind on my mortgage. They advised that I needed to send \$2,294.73 which I did and attach as Exhibit #1
6. Citimortgage claimed they never got the \$2,294.73 however they did receive it and eventually sent it back to my bank, BB&T.
7. Because of their internal errors and sloppiness, my house went into foreclosure.
8. I obtained the assistance of a home delinquency counselor at Money Management International to help me out.
9. In August, 2008, Citimortgage advised me that I could reinstate my mortgage upon tender of \$8,133.35. I sent Citimortgage the \$8,133.35.
10. In September, 2008, I noticed that my check had not yet cleared. I called and they then told me that the funds needed to be certified.
11. I then went to BB&T and obtained a certified check for not only the \$8,133.35 but for a total of \$9,010.00 which included the September, 2008 payment. I purchased the certified check on September 12, 2008, and sent it by overnight mail through the post office wherein Citimortgage would have to sign for it. I attach the post office confirmation as Exhibit #2.
12. It was absolutely clear from my conversation with Citimortgage that upon receipt of the certified funds, that they would reinstate my loan and stop the foreclosure.
13. I resumed my protocol of sending monthly payments.

14. Amazingly but not out of character, I subsequently found out that Citimortgage could not match up the \$9,010.00 to my loan despite my cover letter to them that gave them my name, address, and account number.
15. Once again, Citimortgage sent the money back to my bank. They did not send it to me but to my bank. I was not immediately aware of that and continued believing that all was well.
16. Apparently all was not well. Citimortgage did not tell their attorneys that I had sent them the \$9,010.00 to reinstate the mortgage and to stop the foreclosure.
17. Citimortgage's attorneys held the foreclosure hearing, obtained a judgment, had a sale, and a third party bought my house.
18. I became aware of this in December when I received a telephone call from Stonegate Properties, Inc. advising me that they had bought my home. Needless to say, I was in shock. I called Debra Leonard, I called Citimortgage, and I contacted Lindsay Graham's office, my senator, to try to undo this wrong that had taken place.
19. Stonegate offered to sell the house back to me for \$100,000. To my knowledge they had bought it for approximately \$85,000 at the foreclosure sale.
20. I kept trying to talk to Citimortgage to find out why this gross error had occurred but got absolutely nowhere with them.
21. Over the course of the past 9 or 10 months, I did everything that Citimortgage asked me to do. I sent them the \$2,294.73 in certified funds in February, 2008, but they never deposited it. I sent them \$9,010.00 in certified funds in September, 2008, as agreed yet they still proceeded with the foreclosure.

22. I am not a lawyer and believed what they told me. Pay X amount and the mortgage would be reinstated and the foreclosure would be stopped.
23. When I began to understand the disaster that had occurred, I sought legal assistance and hired Mr. Papa. After reviewing my paperwork and the chronology of events, he suggested that we file a motion to set aside the foreclosure and sale based on Citimortgage not communicating with their attorneys and therefore incorrect information being given to the court.
24. I submit that Citimortgage failed to disclose said material facts to the court and defrauded the court.
25. I am requesting the relief set forth in the motion to which this affidavit is affixed.
26. That all documents referred to are attached hereto and incorporated herein by reference.

SWORN TO before me this
15th of February 2009


Notary Public for SC
My comm. Exp: 8/29/13



Angela M. Drexler, Defendant

Date: January 6, 2009

Branch Banking and Trust

Page 2 of 2

Reference: [REDACTED]

THIS MULTITONE AREA OF THE DOCUMENT CHANGES COLOR GRADUALLY AND EVENLY FROM DARK TO LIGHT WITH DARKER AREAS BOTH TOP AND BOTTOM

OFFICIAL CHECK

ISSUING BRANCH 8043914-CHARLESTON - SU **80540463**

DATE FEBRUARY 19, 2008

PAY TO THE ORDER OF **CITI MORTGAGE**

BB&T 52,294.73 TS \$ 52,294.73 DOLLARS

Kell A. Lachon

MEMO TO ORDER ANGELA M ANTISEL

ENCLOSURE HERE

Not Used For Purposes Intended

For Deposit Only

5128247442

DO NOT WRITE ABOVE OR BELOW THIS LINE
RESERVED FOR FINANCIAL INSTITUTION USE

02791 15289

MISSISSAUGA, ONTARIO
1251 ARROWHURST DR. FLOOR 10
CHARLOTTE, NC 28268
7600261169

559621 003 0024 52 02262003

V0006

Date 20080616
Amount 229473
Serial Number 0080540463

Account Number [REDACTED]
CR-DR
Transaction Link 014332760026116816

Exhibit
1

M16779 08116093

THE REPLACEMENT OF THIS DOCUMENT REQUIRED THE COMPLETION OF A BB&T DECLARATION OF LOSS

15000587841

SECRET - CONFIDENTIAL

68-2387514

BB&T

REF ID: A65000

COPY NON NEGOTIABLE

0043713 830697 044/ 00010 11:14 07/12/08
H000000000000 OFFCHECK 19,010.00

CREDIT NEXT BUSINESS DAY

SIGNATURE CONFIRMATION NUMBER:
2305 1590 0000 8548 9159

Postage and Signature Confirmation fees must be paid before mailing.

Postmark Here

POSTAL CUSTOMER:
Keep this receipt. For Inquiries:
Access Internet web site at
www.usps.com •
or call 1-800-222-1811

☐ Priority Mail[®] Service
☐ First-Class Mail[®] parcel
☐ Package Services parcel

SIGNATURE CONFIRMATION NUMBER: 9576 8458 0000 065T 50E3

Postage and Signature Confirmation fees must be paid before mailing.

Postmark Here

POSTAL CUSTOMER:
Keep this receipt. For inquiries:
Access internet web site at
www.usps.com®
or call 1-800-222-1811

CLASSIFICATION

☐ Priority Mail[®] Service
☐ First-Class Mail[®] parcel
☐ Package Services parcel

Exhibit
2

[Home](#) | [Help](#) | [Sign In](#)[Track & Confirm](#)[FAQs](#)

Track & Confirm

Search Results

Label/Receipt Number: 2308 1590 0000 8548 9159
Status: Delivered

Your item was delivered at 10:34 am on September 14, 2008 in COLUMBUS, OH 43218. The item was signed for by M RATLIFF.

Additional information for this item is stored in files offline.

Track & Confirm

Enter Label/Receipt Number.

[Go >](#)[Restore Offline Details >](#) ?[Return to USPS.com Home >](#)

Notification Options

Proof of Delivery

Verify who signed for your item by email, fax, or mail. [Go >](#)

[Site Map](#) [Contact Us](#) [Forms](#) [Gov't Services](#) [Jobs](#) [Privacy Policy](#) [Terms of Use](#) [National & Premier Accounts](#)

Copyright© 1999-2007 USPS. All Rights Reserved. No FEAR Act EEO Data FOIA

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) NINTH JUDICIAL CIRCUIT

Angela Drexler,) Civil Action No. 2011-CP-08-1754

Plaintiff,)

vs.)

MOTION TO DISMISS

CitiMortgage, Inc., Stonegate
Properties, Inc., and Branch Banking
and Trust Company, Inc.,)

Defendants.)

FILED
AUG 25 PM 3:27
CLERK OF COURT
BERKELEY COUNTY, SC

Defendant, CitiMortgage, Inc. (hereinafter "CitiMortgage"), by and through its undersigned counsel and pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, respectfully submits this Motion to Dismiss Plaintiff, Angela Drexler's ("Plaintiff") Complaint.

BACKGROUND

1. On or about July 9, 1998, Plaintiff and Arthur E. Antisdell executed and delivered to Compass Mortgage, Inc. a Fixed Rate Note ("Note") secured by a Mortgage ("Mortgage") on certain real property situated at [REDACTED], Ladson, South Carolina, 29456. Subsequently, the Mortgage was assigned to CitiMortgage. (See First Am. Compl. for Foreclosure, attached hereto as Exhibit "A.")¹

¹ This Court may consider the pleadings and other documents filed in the foreclosure action at the Rule 12(b) stage, without converting this Motion to one for summary judgment, because those documents are part of the public record. See *Moore v. Flagstar Bank*, 6 F. Supp. 2d 496, 500 (E.D. Va. 1997) (noting that in addition to the complaint, the Court may consider "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint") (quoting 5 A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1357 (1990)); *Odom v. McMaster*, No.

2. Plaintiff and Arthur E. Antisdel failed to honor their contractual obligation to CitiMortgage to repay the Note that, as of December 1, 2007, had an outstanding balance of \$70,581.19.

3. Based on Plaintiff's breach of her contractual obligation to repay the Note, CitiMortgage filed a Complaint for Foreclosure on May 7, 2008, followed by a First Amended Complaint for Foreclosure on May 21, 2008.

4. Plaintiff failed to file a response to the First Amended Complaint for Foreclosure and an Order of Default was issued by this Court on September 3, 2008.

5. Counsel for CitiMortgage notified Plaintiff, in writing, on October 12, 2008, that a hearing was to be held before the Honorable Robert E. Watson. Plaintiff failed to attend the hearing and, on October 29, 2008, the Court issued a Judgment of Foreclosure and Sale. (*See* Foreclosure Order, attached hereto as Exhibit "B.").

6. On December 3, 2008, the subject property was sold, in accordance with the terms of the Judgment of Foreclosure and Sale, to Stonegate Properties/Matt Haynie. (*See* Order and Report on Sale and Disbursement, attached hereto as Exhibit "C.").

2:10-cv-00873, 2010 U.S. Dist. LEXIS 80566, at *14-15 (D.S.C. Aug. 6, 2010) ("The Fourth Circuit has recognized that courts can take judicial notice of public information without converting a 12(b)(6) motion into a motion for summary judgment[.]"); *Simpson v. UPS Co.*, No. 3:05-1500, 2005 U.S. Dist. LEXIS 41707, at *6 (D.S.C. Oct. 28, 2005) (stating "the documents which have been submitted in conjunction with Defendant's motion to dismiss are matters of public record, of which the undersigned has taken judicial notice"); *see also Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 404 S.E.2d 200 (1991) (deciding that when no South Carolina cases are directly on point, a court may look to the construction placed on the corresponding federal rules of civil procedure).

7. On February 19, 2009, Plaintiff moved, pursuant to Rule 60(b), for an order vacating the Judgment of Foreclosure and Sale and for reinstatement of the mortgage. (*See* Mot. for Relief, attached hereto as Exhibit “D.”). A hearing was held on that motion on March 19, 2009. In the June 10, 2009 Order, the Court held that Plaintiff’s “testimony—that the payments she made would reinstate her mortgage—are not supported by the record.” (*See* Order, June 10, 2009, p.2., attached hereto as Exhibit “E.”). The Court further held that any alleged incorrect statements in the Complaint for Foreclosure were merely intrinsic and could not support relief under Rule 60(b)(3). (*See id.* at pp.5–6.) Accordingly, the Court denied Plaintiff’s motion and upheld the judgment and resulting sale.

8. On June 21, 2011—over *two years after* the Order was issued in the foreclosure matter—Plaintiff filed the instant action against CitiMortgage, Stonegate Properties, Inc., and Branch Banking & Trust Company, Inc., challenging the servicing of the loan and seeking to set aside the Master’s sale in the foreclosure action. (*See generally* Compl.). Due to the reasons outlined more fully below, all of Plaintiff’s claims fail as a matter of law, entitling CitiMortgage to dismissal of Plaintiff’s Complaint, with prejudice.

STANDARD OF REVIEW

9. A motion to dismiss under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure tests the legal sufficiency of a claim. A motion pursuant to this rule should be granted if the pleading does not set forth sufficient allegations “to state a claim for relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Williams v. Condon*, 347 S.C. 227, 232-33, 553 S.E.2d

496, 499 (Ct. App. 2001).² The court is not to read unalleged facts into the pleadings, *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005), nor need it credit the claimant's legal conclusions or predicate act labels, *Cardwell v. Sears Roebuck & Co.*, 821 F. Supp. 406, 409–10 (D.S.C. 1993). Likewise, the court does not need to accept as true unsubstantiated inferences or unreasonable conclusions. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950, 1951, 173 L. Ed. 2d 868, 884–85, 885–86 (2009) (stating that a formulaic or conclusory allegation—essentially a “bare assertion”—is not entitled to be assumed true); *Francis v. Giacomelli*, 588 F.3d 186 (4th Cir. 2009) (same).

ARGUMENTS

10. All of Plaintiff's claims must be dismissed under the doctrine of *res judicata* because each of the claims asserted in the Complaint should have been asserted as compulsory counterclaims in the prior foreclosure action.

11. In South Carolina, a party must bring as a counterclaim any claim it has against the opposing party if it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim and does not require the presence of additional parties over which the court cannot acquire jurisdiction. *See* S.C. R. Civ. P. 13(a). Thus, if a counterclaim is compulsory, but is not raised in the first case, a party is precluded from asserting the claim in a subsequent action. *See Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997)

² Plaintiff relies on the pleading standard as outlined in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* because when there is no state law directly on point, a Court may look to the construction placed on the corresponding federal rules of civil procedure. *See Gardner*, 304 S.C. at 330–31, 404 S.E.2d at 201.

(stating that “if a counterclaim is compulsory, but not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action”).

12. The South Carolina Supreme Court has adopted the “logical relationship” test for determining whether a claim is a compulsory counterclaim under Rule 13(a). *N.C. Fed. Savings & Loan Ass’n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989) (“We hereby adopt the logical relationship test.”). Under the logical relationship test, a counterclaim is compulsory if there is any logical relationship between the claim and the counterclaim. *See id.* (finding a logical relationship between the enforceability of a note, which was the subject of a foreclosure action, and the validity of a purported oral agreement which, if performed, would have avoided default on the note).

13. Plaintiff’s claims for negligence, fraud, cancellation of mortgage assignment, wrongful foreclosure, breach of contract, breach of implied covenant of good faith and fair dealing, unjust enrichment, alleged violation of the South Carolina Unfair Trade Practices Act (“SCUTPA”), quiet title, and slander of title all relate to the servicing of Plaintiff’s loan, the terms of the Note and Mortgage, or title to the subject property and, therefore, have a logical relationship to the foreclosure action.

14. Accordingly, Plaintiff’s claims should have been asserted as compulsory counterclaims in the foreclosure action and she is precluded from asserting them in the present case under the doctrine of *res judicata*.

15. Additionally, Plaintiff’s negligence claim is barred by the economic loss doctrine. Under South Carolina law, the economic loss rule bars recovery in tort for purely economic losses when the alleged damages arise from the

purported breach of contractual duties. *See Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 347, 384 S.E.2d 730, 737 (1989). In this case, Plaintiff's negligence claim is an improper attempt to disguise a purely contractual dispute as a tort claim. Specifically, the negligence claim outlines "duties" related to the servicing of Plaintiff's loan and CitiMortgage's rights and duties under the Note and Mortgage, *i.e.*, contract rights. Therefore, any dispute related thereto must be addressed in a breach of contract claim and any related negligence claim fails as a matter of law.

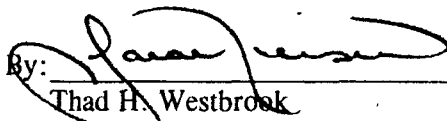
16. As to the cause of action to "void or cancel" the mortgage assignment, (*See* Compl. ¶¶ 61-63), Plaintiff lacks standing to recover because she is not a party to the assignment. *See, e.g., Williams v. U.S. Bank Nat'l Ass'n*, No. 10-14967, 2011 U.S. Dist. LEXIS 62047, at *3-4 (E.D. Mich. June 9, 2011).

17. Finally, Plaintiff's claim to set aside the Master's sale is improper since Plaintiff's appropriate remedy is by way of a Rule 60 motion, which was previously filed and *denied* by this Court in the foreclosure action. *See* S.C. R. Civ. P. 60(b). Because Plaintiff's motion to set aside the Master's sale was previously decided in the foreclosure action, it is inappropriate for Plaintiff to seek to relitigate that issue in this case. Accordingly, CitiMortgage respectfully requests that this Court dismiss Plaintiff's claim to set aside the Master's sale.

CONCLUSION

18. For the reasons stated above, CitiMortgage respectfully requests that this Court dismiss Plaintiff's Complaint. This motion is based on the pleadings and filings in this case, the South Carolina Rules of Civil Procedure, the governing case law and authorities, and such other filings that may be made in support of this motion.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Thad H. Westbrook

SC Bar No. 16635

E-Mail: thad.westbrook@nelsonmullins.com

James H. Burns

SC Bar No. 70313

E-Mail: james.burns@nelsonmullins.com

Sarah B. Nielsen

SC Bar No. 78384

E-Mail: sarah.nielsen@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for CitiMortgage, Inc.

Columbia, South Carolina

8/23, 2011

EXHIBIT A

(First Am. Complaint for Foreclosure)

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

CitiMortgage, Inc.,

Plaintiff,

v.

Angela M. Drexler; and any other Heirs at Law or
Devises of Arthur E. Antisdell, Deceased, their
heirs, Personal Representatives, Administrators,
Successors and Assigns, and all other persons
entitled to claim through them; all unknown
persons with any right, title or interest in the real
estate described herein; also any persons who may
be in the military service of the United States of
America, being a class designated as John Doe;
and any unknown minors or persons under a
disability being a class designated as Richard Roe;
Washington Mutual Home Loans, Inc. f/k/a Fleet
Real Estate Funding Corp.

Defendant(s).

(011654-01799)

IN THE COURT OF COMMON PLEAS

DOCKET NO. 08-CP-08-1258

FIRST AMENDED COMPLAINT

(NON-JURY)

FORECLOSURE OF REAL ESTATE
MORTGAGE

Deficiency Judgment Waived

21 FEB 12 4:45

Plaintiff alleges:

1. This is an action for the foreclosure of a mortgage upon certain real estate in Berkeley County, South Carolina.
2. Pursuant to S.C. Code Section 33-15-101, Plaintiff is a corporation or other legal entity doing business in the State of South Carolina.
3. Plaintiff is the owner and holder of the Note and Mortgage described hereafter and the subject of this action.
4. Some lien on or interest in the real estate, the subject of this action, may be claimed by the Defendant(s) herein.
5. The Defendant(s) herein described as judgment creditors have by filing said judgments designated their attorney entering the judgment as their agent for service of process under the

provisions of South Carolina Code Section 15-35-840.

6. Heretofore, on or about July 9, 1998, Arthur E. Antisdel and Angela M. Drexler made, executed and delivered a certain Fixed Rate Note ("Note") in the principal sum of \$84,850.00, payable in monthly installments.

7. In order to secure the payment of the Note according to the terms and conditions thereof, Arthur E. Antisdel and Angela M. Drexler made, executed and delivered unto Compass Mortgage Inc. a certain real estate mortgage ("Mortgage") covering the following described property and any and all improvements to the property, including but not limited to a mobile/manufactured home:

All that piece, parcel or lot of land with the buildings and improvements thereon, situate lying and being near Ladson, South Carolina, in Berkeley County, South Carolina, shown and designated as Lot 74, Block F, Tall Pines Plantation Subdivision, Section Three, on a plat dated January 19, 1977 made by Harold J. Leamond, P.E. and L.S., and recorded in the Office of the Clerk of Court for Berkeley County on January 24, 1977 in Plat Book W. Page 153.

This being the identical property conveyed to Arthur E. Antisdel and Angela M. Drexler by deed of Secretary of Housing and Urban Development of Washington D.C. dated July 7, 1998 and recorded July 13, 1998 in Deed Book 1379 at Page 53; subsequently, Arthur E. Antisdel died intestate on July 14, 2004, leaving the subject property to his/her heirs or devisees.

Property Address:

[REDACTED]
LADSON, SC 29456

TMS# 233-14-01-024

8. The Mortgage was signed, witnessed and probated July 9, 1998; thereafter the Mortgage was recorded in the Office of the RMC/ROD for Berkeley County on July 13, 1998, in Mortgage Book 1379 at Page 57. This mortgage was subsequently assigned to Homestead Funding Corporation by assignment dated July 9, 1998 and recorded July 13, 1998 in Book 1379 at Page 68; subsequently assigned to the Plaintiff herein.

9. The Mortgage evidences and secures the repayment of money advanced by Plaintiff or its predecessor in interest to, or on behalf of, the mortgagor(s) and constitutes a purchase money first lien on the mortgaged premises.

10. Any notice required by the terms of the Mortgage or by state or federal law has been given to the applicable Defendant(s) prior to the commencement of this action.

11. subsequently, Arthur E. Antisdel died intestate on July 14, 2004, leaving the subject property to his/her heirs or devisees.

12. After all payments received by the Plaintiff have been credited to the subject loan, the loan is in default and due for December 1, 2007, and the conditions of the Note and Mortgage

have been broken. Plaintiff elects to and does declare the entire balance of said indebtedness due and payable, and that there is due on the Note and Mortgage as of December 1, 2007, the sum of \$70,581.19, with interest at the rate of 8.5% per annum from November 1, 2007, and also for the costs and disbursements of this action, including attorney's fees.

13. Plaintiff's right to a personal or deficiency judgment pursuant to South Carolina Code Sections 29-3-650 and 29-3-660 is expressly waived.

14. Pursuant to the terms of the Mortgage, Plaintiff has employed counsel to prosecute this action and a reasonable value of services of counsel in this action is the sum as the Court may find appropriate.

15. Plaintiff may be forced to pay sums for taxes and insurance and costs for securing the property, which sums, according to the terms of the Mortgage, should be added to the amount of the debt.

16. Pursuant to the terms of the Mortgage and applicable state law, Plaintiff requests the mortgage be foreclosed and that the property be sold at public auction in accordance with law, subject to any liens for taxes, special assessments of record against such property, and existing easements or restrictions of record.

17. The hereinafter named Defendant(s) may have some interest in or lien upon the premises covered by the Mortgage set forth above, or some part thereof, but that such interests or liens are junior and subsequent to the lien of Plaintiff's Mortgage or, if specified below, have been paid in full and either should be satisfied of record or the lien released from the subject real estate. 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. Washington Mutual Home Loans, Inc. f/k/a Fleet Real Estate Funding Corp., by virtue of a mortgage given by James F. Cosman to Bankers Trust of South Carolina in the amount of \$51,750.00, dated May 30, 1978, and recorded May 30, 1978 in Book E202 at Page 165. This mortgage was subsequently assigned to Fleet Real Estate Funding Corp. by assignment dated July 14, 1985 and recorded July 14, 1985 in Book 68 at Page 217.

B. Angela M. Drexler and any unknown heirs or devisees of the Estate of Arthur E. Antisdell, including any persons who may be in the military service of the United States of America, being a class designated as John Doe, and any unknown minors or persons under a disability being a class designated as Richard Roe, by virtue of any interest claimed under the law of intestate succession (S.C. Code Section 62-2-109) or under decedent's will

WHEREFORE, having fully set forth its Complaint, Plaintiff prays that this Honorable Court inquire into the matters as set forth herein and:

(1) Under the direction of this Court, ascertain and determine the amount due upon the Note and Mortgage held by Plaintiff together with attorney's fees and costs of this action.

(2) Declare Plaintiff's Mortgage a purchase money first lien and render judgment of foreclosure for the amount so found to be due and owing thereon, together with any ad valorem taxes, or insurance premiums, and any other expenses which may be due and have been advanced by Plaintiff, with reasonable attorney's fees, and for the costs of this action.

(3) Order the reimbursement of all costs for inspecting and securing the property incurred by the Plaintiff as a result of the delinquency.

(4) Appoint a Receiver to collect the rents, issues, profits or designated sums from the mortgagor(s), and/or the grantee(s) of the mortgagor(s), and/or tenant(s) occupying or exercising control over the mortgaged premises and hold the same subject to the further order of this Court.

(5) Under the direction of this Court, sell the mortgaged premises, bar any equity of redemption, and apply the proceeds of sale as follows:

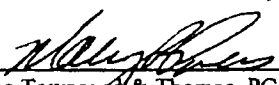
First, to the costs and expenses of the within action and sale;

Second, to the payment and discharge of the amount due on Plaintiff's Note and Mortgage, together with attorney's fees as aforesaid; and

Third, to the distribution of any surplus pursuant to Rule 71, of the South Carolina Rules of Civil Procedure;

(6) Issue an order directing the Sheriff of Berkeley County, South Carolina, to place the successful purchaser at said foreclosure sale in possession of the property should the same become necessary;

(7) Order such other and further relief as may be just and proper.


Rogers Townsend & Thomas, PC
ATTORNEYS FOR PLAINTIFF

Samuel C. Waters (SC Bar #5958) Cheryl H. Fisher (SC Bar #15213)
Reginald P. Corley (SC Bar #69453) Jennifer W. Rubin (SC Bar #16727)
Ellie C. Floyd (SC Bar # 68635) Michael P. Morris (SC Bar #73560)
Eve Moredock Stacey (SC Bar # 5300) Mary R. Powers (SC Bar #16534)
Robert P. Davis (SC Bar # 74030) Timothy B. Killen (SC Bar #72501)
220 Executive Center Drive, Suite 109 Post Office Box 100200 (29202)
Columbia, SC 29210 (803) 744-4444

Columbia, South Carolina
May 16, 2008

EXHIBIT B

(Foreclosure Order)

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

CitiMortgage, Inc.,

Plaintiff,

v.

Angela M. Drexler; and any other Heirs at Law or Devisees of Arthur E. Antisdel, Deceased, their heirs, Personal Representatives, Administrators, Successors and Assigns, and all other persons entitled to claim through them; all unknown persons with any right, title or interest in the real estate described herein; also any persons who may be in the military service of the United States of America, being a class designated as John Doe; and any unknown minors or persons under a disability being a class designated as Richard Roe; Washington Mutual Home Loans, Inc. f/k/a Fleet Real Estate Funding Corp.

Defendant(s).

(011654-01799)

Samuel C. Waters, Esquire
Attorney for the Plaintiff

W. Brooks Styles
Guardian ad Litem and/or Attorney pursuant to the Servicemembers Civil Relief Act, 50 U.S.C § 501 et. seq.

W. Brooks Styles
Guardian ad Litem and/or Attorney pursuant to the Servicemembers Civil Relief Act, 50 U.S.C § 501 et. seq.

A hearing was held October 29, 2008 at 09:30 AM. The testimony was taken, which is reported herewith, and from the testimony and evidence, I find and conclude as follows:

FINDINGS OF FACT:

1. The Lis Pendens was filed on May 7, 2008. The amended Lis Pendens was filed on May 21, 2008.

IN THE COURT OF COMMON PLEAS

DOCKET NO. 08-CP-08-1258

JUDGMENT OF FORECLOSURE AND SALE
Deficiency Judgment Waived

RECEIVED
OCT 31 11 13 AM '08

2. The Summons and Complaint were filed on May 7, 2008. The amended Summons and Complaint were filed on May 21, 2008.
3. Service was made upon the Defendant(s) named in this report as shown by the proof(s) of service filed herein.
4. The Defendant(s) Angela M. Drexler and Washington Mutual Home Loans, Inc. f/k/a Fleet Real Estate Funding Corp are in default as shown by affidavit or order filed herein.
5. The Estate of Arthur E. Antisdell filed an answer through their attorney/guardian, W. Brooks Styles.
6. The Defendant(s) and/or all attorneys of record were notified of the time, date, and place of the hearing in this matter.
7. According to the affidavit filed herein, the Defendant(s) Angela M. Drexler and Washington Mutual Home Loans, Inc. f/k/a Fleet Real Estate Funding Corp are in default and that the Defendant(s) Angela M. Drexler is not in the Military Service of the United States of America, as contemplated under The Servicemembers Civil Relief Act, 50 U.S.C. § 501 et. Seq.
8. For value received, Arthur E. Antisdell and Angela M. Drexler made, executed and delivered a(n) Fixed Rate Note dated July 9, 1998 promising thereby to pay the sum of \$84,850.00 with interest at 8.5% per annum. Other terms and conditions are stated in the Fixed Rate Note, which is of record herein.
9. To better secure the payment of the Fixed Rate Note described above Arthur E. Antisdell and Angela M. Drexler made, executed, and delivered to Compass Mortgage Inc. a certain real estate purchase money first Mortgage in writing, dated July 9, 1998 covering real property in Berkeley County, which is the same as that described in the Complaint. The purchase money first Mortgage was filed on July 13, 1998, and is of record in the Office of RMC/ROD in Book 1379 at Page 57. This mortgage was subsequently assigned to Homestead Funding Corporation by assignment dated July 9, 1998 and recorded July 13, 1998 in Book 1379 at Page 68; subsequently assigned to ABN AMRO Mortgage Group, Inc. by assignment dated March 8, 2001 and recorded on March 26, 2001 in Book 3423 at Page 49. CitiMortgage, Inc. is successor by merger to ABN Amro Mortgage Company, Inc.
10. This purchase money first Mortgage constitutes a purchase money first mortgage lien on the subject property, subject only to ad valorem or other liens/taxes given priority by statute.
11. The Plaintiff in this action is the owner and holder or nominee for the owner and holder of the Fixed Rate Note and purchase money first Mortgage it is seeking to foreclose.
12. Subsequently, Arthur E. Antisdell died intestate on July 14, 2004, leaving the subject property to his/her heirs or devisees.

13. Any notice required by the terms of the purchase money first mortgage or by state or federal statutes has been given to the applicable defendant(s) prior to the commencement of this action.

14. Plaintiff has moved to dismiss the Defendant, Washington Mutual Home Loans, Inc. f/k/a Fleet Real Estate Funding Corp., from its action.

15. Payment due on the Fixed Rate Note has not been made as provided for therein, and the Plaintiff, as the holder or nominee for the holder thereof, has elected to require immediate payment of the entire amount due thereon and has placed the Fixed Rate Note and purchase money first Mortgage in the hands of the attorney herein for collection by foreclosure.

16. W. Brooks Styles, a member of the South Carolina Bar, has been appointed as Guardian ad Litem for any person claiming a right, title or interest in the subject property who is a minor or otherwise under disability. He has filed an Answer, Affidavit of Response, and actively participated herein. The sum of \$150.00 is a reasonable fee to allow for such Guardian ad Litem services rendered and to be rendered herein until final adjudication of the within action.

17. W. Brooks Styles, a member of the South Carolina Bar, has been appointed as attorney for any Defendant who is in the military service within the meaning of the Servicemembers Civil Relief Act, 50 U.S.C. § 501 et. seq., and has filed an Answer, Affidavit of Response, and actively participated herein for such Defendant(s). The sum of \$150.00 is a reasonable fee to allow for such attorney's services rendered herein until final adjudication of the within action. Any Defendants, their heirs, Personal Representatives, Administrators, Successors and Assigns, and all other persons entitled to claim through them; all unknown persons with any right, title or interest in the real estate described herein who are in military service have not been prejudiced of his/her right to present a defense because of his/her military service.

18. The sum of \$4,500.00 is a reasonable fee to allow as attorney fees for Plaintiff's attorney for services performed and anticipated to be performed until final adjudication of the within action, under the terms of the Fixed Rate Note and purchase money first Mortgage. These sums are likewise reasonable based on the time necessarily devoted to representation of the Plaintiff during the several month course of these proceedings. The services of counsel performed for the Plaintiff, including the number and types of pleadings and documents prepared, the incumbent liabilities, and the difficulties involved in this particular case also support the amount awarded. The fees are also reasonable given the professional standing of the Plaintiff's counsel and their experience in handling foreclosure matters. The fees awarded herein are also reasonable in light of the fees customarily awarded by this court for similar services in this locality. Moreover, the efforts of Plaintiff's counsel have had the beneficial result of a prompt foreclosure of the mortgage. Services anticipated to be performed until final adjudication

contemplates completion of this matter within a reasonable time and does not include exceptional circumstances delaying conclusion beyond the normal time.

19. After all payments received by the Plaintiff have been credited to the subject loan, the amount due and owing on the Fixed Rate Note, with interest at the rate provided in the Fixed Rate Note, and other costs and expenses of the within action, including an attorney's fee, secured by the Fixed Rate Note and purchase money first Mortgage, is as follows:

(a)	Principal due December 1, 2007	\$70,581.19
(b)	Interest from November 1, 2007 through October 29, 2008 at 8.5% per annum	\$5,999.40
(c)	Advances (Escrow advances, corporate charges and other charges)	\$648.47
(d)	Costs of collection prior to hearing (service, filing, etc.)	\$1,687.57
(e)	Title Abstract Search	\$425.00
(f)	Late Charges	\$380.26
(g)	Attorney's fee	\$4,500.00

TOTAL debt secured by Fixed Rate Note and purchase money first Mortgage,
including interest to date shown \$84,221.89

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 8.5% per annum (pursuant to the terms of the Fixed Rate Note and purchase money first Mortgage) on the judgment debt should be added to such judgment debt to comprise the amount of Plaintiff's debt secured by the purchase money first Mortgage through the date to which such interest is computed.

20. Plaintiff is seeking the usual foreclosure of the purchase money first mortgage and has in the Complaint (or subsequently thereto in writing) expressly waived the right to a personal or deficiency judgment.

21. The Defendant(s) claim(s) or may claim a lien upon or legal interest in the subject property and in the event there is a surplus from the sale of the subject property, such Defendant(s) may present any such lien or legal interest at a hearing subsequent to the sale, in accordance with Rule 71(c) South Carolina Rules of Civil Procedure. The said Defendant(s) and such liens or legal interests are as follows:

a. Angela M. Drexler, and any unknown Heirs or devisees of Arthur E. Antisdel, Deceased, including any persons who may be in the military service of the United States of America, being a class designated as John Doe; and any unknown minors or persons under a disability being a class designated as Richard Roe, by virtue of any interest claimed under the law of intestate succession (S.C. Code Section 62-2-109) or under decedent's will. heir(s) or devisees of the Estate of Arthur E. Antisdel

IT IS THEREFORE ORDERED:

22. The Defendant, Washington Mutual Home Loans, Inc. f/k/a Fleet Real Estate Funding Corp., is hereby dismissed from this action.

23. There is due on the Fixed Rate Note and purchase money first Mortgage set forth in the Complaint the sum of \$84,221.89, as set out in the Findings of Fact *supra*, together with interest at the rate provided therein on the balance of principal from the date aforesaid to the date hereof.

24. The amount due in the preceding paragraph (the "Final Total Debt" as set out in the Findings of Fact *supra*) shall accrue interest at the rate of the respective note rate(s) per annum and together with such interest shall constitute the total judgment debt due the Plaintiff.

25. The amount of the judgment shall be subject to increase to permit the Plaintiff to recover additional costs, commissions and expenses not included in the minimum deposit previously made in compliance with S.C. Code Ann. §14-11-310 (1976). It may also increase to include supplemental compensation for attorney's services not contemplated by the initial fee award. Jurisdiction over the fee award and total debt is reserved to facilitate the assessment and payment of any such costs and/or supplemental compensation. Such additional costs, commissions and expenses may be established by affidavit and shall be adjudicated by the court without further hearing.

26. The Defendant(s) liable for the aforesaid judgment debt of the Fixed Rate Note and purchase money first Mortgage including interest at the rate of 8.5% per annum shall on or before the date of sale of the property hereinafter described, pay to the Plaintiff, or Plaintiff's attorney the amount of Plaintiff's debt as aforesaid, together with the costs and disbursements of this action.

27. On default of payment at or before the time herein indicated, the mortgaged premises described in the Complaint, as hereinafter set forth, shall be sold by the Master in Equity at public auction, at the Berkeley County Courthouse, in the City of Moncks Corner, County and State aforesaid on December 3, 2008, at 11:00 AM, or 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 the next business day succeeding such holiday), on the following terms, that is to say:

a. For cash: The Master in Equity will require a deposit of 5% on the amount of the

bid (in cash or equivalent) same to be applied to purchase price if compliance is made, but in the event compliance is not made, the deposit may be forfeited without further hearing and applied first to costs of the action and then to plaintiff's debt. Should the successful bidder at the regularly conducted sale fail or refuse to either make the required deposit at time of bid or comply with the other terms of the bid within 30 days, then the property may be re-sold on the same terms and conditions on the same or some subsequent Sales Day, but at the risk of the defaulting bidder(s).

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

c. Purchaser to pay for any statutory commission on sale from the proceeds of the final bid amount.

d. Purchaser to pay for deed preparation, costs of recording the deed and satisfaction of mortgage, and transfer taxes on the deed.

e. Purchaser shall be entitled to possession of the premises only after Purchaser fully complies with the bid amount and a deed is issued by the Court.

28. A personal or deficiency judgment having been waived, the bidding will not remain open after the date of sale and compliance with the bid may be made immediately.

29. Plaintiff may waive any of its rights, including its right to a deficiency judgment in accordance with Rule 71, South Carolina Rules of Civil Procedure, prior to sale.

30. The Master in Equity will, by advertisement according to law, give notice of the time and place of such 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 if, upon such sale being made, the purchaser, or purchasers, should fail to comply with the terms thereof within 30 days after date of sale, then the 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.

31. If Plaintiff be 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 Master in Equity only the amount of the costs and expenses crediting the balance of the bid on Plaintiff's indebtedness.

32. The 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 (including attorney fees) or so much thereof as the purchase money will pay on the same;

NEXT: Any surplus should be held pending further Order of this court.

33. In the event the successful bidder is other than the Defendant(s) in possession herein, the Sheriff of Berkeley 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.

34. In the event the successful bidder is other than the Defendants in possession herein and the occupants have voluntarily vacated the premises or have been ejected from the premises leaving furnishings, fixtures and items not subject to the Plaintiff's Mortgage in said premises, the Purchaser is authorized to remove therefrom all furnishings, fixtures and items not subject to the lien of the Plaintiff's Mortgage, which personal property, being deemed abandoned, shall be removed by the Purchaser or its agents from the subject property by placing said personal property on the public street or highway or by any other means.

35. The Defendant(s) named herein, and all persons whosoever claiming under Defendant(s), are forever barred and foreclosed of all right, title, interest, equity of redemption or lien in the said mortgaged premises so sold, or any part thereof.

36. In accordance with Rule 77(d), SCRPC, the Clerk of Court shall serve a notice of entry of this Judgment of Foreclosure upon all parties not in default for failure to appear herein.

37. The deed of conveyance made pursuant to said sale shall contain the names of only the first-named Plaintiff and the first-named Defendant(s), 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; and the Register of Deeds/Clerk of Court is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deed.

38. The undersigned will retain jurisdiction to do all necessary acts incident to this foreclosure including, but not limited to, the issuance of a Writ of Assistance.

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

All that piece, parcel or lot of land with the buildings and improvements thereon, situate lying and being near Ladson, South Carolina, in Berkeley County, South Carolina, shown and designated as Lot 74, Block F, Tall Pines Plantation Subdivision, Section Three, on a plat dated January 19, 1977 made by Harold J. Leamond, P.E. and L.S., and recorded in the Office of the Clerk of Court for Berkeley County on January 24, 1977 in Plat Book W. Page 153.

This being the identical property conveyed to Arthur E. Antidel and Angela M. Drexler by deed of Secretary of Housing and Urban Development of Washington D.C. dated July 7, 1998 and recorded July 13, 1998 in Deed Book 1379 at Page 53; subsequently, Arthur E. Antidel died intestate on July 14, 2004, leaving the subject property to his/her heirs or devisees.

Property Address:

[REDACTED]
LADSON, SC 29456

TMS# 233-14-01-024

Robert E. Watson

Robert E. Watson
Master in Equity

10-29, 2008
Moncks Corner, South Carolina

EXHIBIT C

(Order and Report on Sale and Disbursement of
Funds)

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NUMBER: 2008-CP-08-1258

CitiMortgage, Inc.,

Plaintiff,

-versus-

Angela M. Drexler,

Defendant.

ORDER AND
REPORT ON SALE
AND DISBURSEMENT
OF FUNDS

UNDER AUTHORITY of a Decree dated October 29, 2008, I offered for sale to the highest bidder for cash, at public auction on December 3, 2008, the premises subject to this suit, and I received a high bid of \$87,600.00 from Stonegate Properties / Matt Haynie. I have executed and delivered a Master's deed to Stonegate Properties / Matt Haynie and disbursed the funds as follows:

RECEIPTS

Reference deposit paid by Plaintiff
Bid deposit by Stonegate Properties / Matt Haynie
Bid balance by The Ruple Firm / Stonegate Properties
Interest paid by The Ruple Firm / Stonegate Properties

2009 JUN 11 11 11 AM
\$ 125.00
4,380.00
83,220.00
873.20
\$ 88,398.20

Total Received by Master

DISBURSEMENTS

Master's reference fee
County Commission
Paid to Rogers Townsend & Thomas, Attorney for Plaintiff
Proceeds and interest from sale

\$ 125.00
876.00
85,556.05

Total Disbursed by Master

\$ 86,557.05

SURPLUS FUNDS

1,841.15

Any claims for surplus funds should be filed with the Clerk of Court and served on the parties; note in your claims your position of priority and the reasons therefore.

Robert E. Watson
Robert E. Watson
Master-in-Equity, Berkeley County

5 day of January 2009
Moncks Corner, South Carolina

EXHIBIT D

(Motion for Relief February 19, 2009)

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

CitiMortgage, Inc.,

PLAINTIFF,

vs.

Angela M. Drexler; and any other Heirs at Law or Devisees of Arthur E. Antidel, Deceased, their heirs, Personal Representatives, Administrators, Successors and Assigns, and all other persons entitled to claim through them; all unknown persons with any rights, title or interest in the real estate described herein; also any persons who may be in the military service of the United States of America, being a class designated as John Doe; and any unknown minors or persons under a disability being a class designated as Richard Roe; Washington Mutual Home Loans, Inc. f/k/a Fleet Real Estate Funding Corp.,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2008-CP-08-1258

[IN THE MASTER-IN-EQUITY'S COURT]

NOTICE OF MOTION AND MOTION
FOR RELIEF PURSUANT TO SCRPC 60,
TO VACATE ORDER AND JUDMENT OF
FORECLOSURE AND MASTER'S SALE
AND TO REINSTATE MORTGAGE, AND
FOR LEGAL FEES AND COSTS

PLEASE TAKE NOTICE that Ten (10) days or as soon thereafter as counsel can be heard, the defendant Angela Drexler (and as heir at law of Arthur Antidel) will move for an Order:

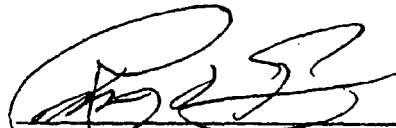
- a. Setting aside and vacating the Master In Equity's Order and Judgment of Foreclosure and Sale filed October 29, 2008; and
- b. Setting aside and vacating the Master's Deed selling the subject property; and
- c. Declaring the defendant Angela M. Drexler's mortgage note to be in full force and effect;
- d. Declaring the defendant Angela M. Drexler's mortgage note to be current;

- e. Dismissing and immediately staying the pending eviction by the plaintiffs, their successors or assigns of the undersigned defendant;
- f. For an award of attorneys fees and costs; and
- g. For such other and further relief as this Honorable Court deems just, wise, and proper.

This Motion will be based upon affidavits or testimony as the court deems proper. Please be present if you are so minded.

Charleston, South Carolina

July 13, 2009



ROBERT L. PAPA, ESQUIRE
ATTORNEY FOR ANGELA M. DREXLER
INDIVIDUALLY AND AS HEIR OF
ARTHUR E. ANTISDEL
6 CARRIAGE LANE, STE. A
CHARLESTON, SC 29407
843.571.4611 TEL.
843.571.4602 FAX.

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

CitiMortgage, Inc.,

PLAINTIFF,

vs.

Angela M. Drexler; and any other Heirs at
Law or Devisees of Arthur E. Antisdell,
Deceased, their heirs, Personal
Representatives, Administrators,
Successors and Assigns, and all other
persons entitled to claim through them; all
unknown persons with any rights, title or
interest in the real estate described herein;
also any persons who may be in the
military service of the United States of
America, being a class designated as John
Doe; and any unknown minors or persons
under a disability being a class designated
as Richard Roe; Washington Mutual
Home Loans, Inc. f/k/a Fleet Real Estate
Funding Corp.,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2008-CP-08-1258

FILED
FEB 19 PM 4:44
CLERK OF COURT

[IN THE MASTER-IN-EQUITY'S
COURT]

DEFENDANT'S AFFIDAVIT IN
SUPPORT OF MOTION FOR RELIEF
PURSUANT TO SCRPC 60

HAVING FIRST been duly sworn, your affiants depose and say:

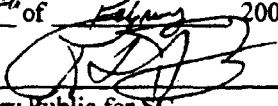
1. That I am the defendant Angela M. Drexler named in the within action.
2. That I am the mortgagor and obligor of the note and mortgage that was the subject of the plaintiff's foreclosure.
3. My late husband was the other obligor. I reside in the subject home with my 14 year old son. I receive social security for myself and my son due to my husband's

untimely death. I last worked at a café on Dorchester Road but was laid off due to the recession.

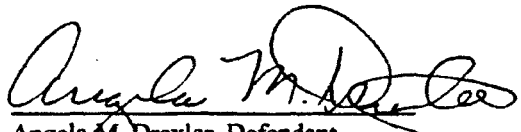
4. This abomination with Citimortgage began in the Spring of 2008.
5. I did get behind on my mortgage. They advised that I needed to send \$2,294.73 which I did and attach as Exhibit #1
6. Citimortgage claimed they never got the \$2,294.73 however they did receive it and eventually sent it back to my bank, BB&T.
7. Because of their internal errors and sloppiness, my house went into foreclosure.
8. I obtained the assistance of a home delinquency counselor at Money Management International to help me out.
9. In August, 2008, Citimortgage advised me that I could reinstate my mortgage upon tender of \$8,133.35. I sent Citimortgage the \$8,133.35.
10. In September, 2008, I noticed that my check had not yet cleared. I called and they then told me that the funds needed to be certified.
11. I then went to BB&T and obtained a certified check for not only the \$8,133.35 but for a total of \$9,010.00 which included the September, 2008 payment. I purchased the certified check on September 12, 2008, and sent it by overnight mail through the post office wherein Citimortgage would have to sign for it. I attach the post office confirmation as Exhibit #2.
12. It was absolutely clear from my conversation with Citimortgage that upon receipt of the certified funds, that they would reinstate my loan and stop the foreclosure.
13. I resumed my protocol of sending monthly payments.

14. Amazingly but not out of character, I subsequently found out that Citimortgage could not match up the \$9,010.00 to my loan despite my cover letter to them that gave them my name, address, and account number.
15. Once again, Citimortgage sent the money back to my bank. They did not send it to me but to my bank. I was not immediately aware of that and continued believing that all was well.
16. Apparently all was not well. Citimortgage did not tell their attorneys that I had sent them the \$9,010.00 to reinstate the mortgage and to stop the foreclosure.
17. Citimortgage's attorneys held the foreclosure hearing, obtained a judgment, had a sale, and a third party bought my house.
18. I became aware of this in December when I received a telephone call from Stonegate Properties, Inc. advising me that they had bought my home. Needless to say, I was in shock. I called Debra Leonard, I called Citimortgage, and I contacted Lindsay Graham's office, my senator, to try to undo this wrong that had taken place.
19. Stonegate offered to sell the house back to me for \$100,000. To my knowledge they had bought it for approximately \$85,000 at the foreclosure sale.
20. I kept trying to talk to Citimortgage to find out why this gross error had occurred but got absolutely nowhere with them.
21. Over the course of the past 9 or 10 months, I did everything that Citimortgage asked me to do. I sent them the \$2,294.73 in certified funds in February, 2008, but they never deposited it. I sent them \$9,010.00 in certified funds in September, 2008, as agreed yet they still proceeded with the foreclosure.

22. I am not a lawyer and believed what they told me. Pay X amount and the mortgage would be reinstated and the foreclosure would be stopped.
23. When I began to understand the disaster that had occurred, I sought legal assistance and hired Mr. Papa. After reviewing my paperwork and the chronology of events, he suggested that we file a motion to set aside the foreclosure and sale based on Citimortgage not communicating with their attorneys and therefore incorrect information being given to the court.
24. I submit that Citimortgage failed to disclose said material facts to the court and defrauded the court.
25. I am requesting the relief set forth in the motion to which this affidavit is affixed.
26. That all documents referred to are attached hereto and incorporated herein by reference.

SWORN TO before me this
18th of February 2009


Notary Public for SC
My comm. Exp: 9/29/13



Angela M. Drexler, Defendant

Date: January 6, 2009

Branch Banking and Trust

Page 2 of 2

Reference: [REDACTED]

THIS MULTI-TONE AREA OF THE DOCUMENT CHANGES COLOR GRADUALLY AND EVENLY FROM DARK TO LIGHT WITH DARKER AREAS BOTH TOP AND BOTTOM

OFFICIAL CHECK

ISSUING BRANCH 8043914-CHARLESTON - SU **80540463**

DATE FEBRUARY 19, 2008

PAY TO THE CITI MORTGAGE

ORDER OF BB&T \$2,294.73 **73 CTS** — \$ **2,294.73**

BB&T

MEMO PAYEE ANGELA M ANTISSEL

[Signature]

[REDACTED]

ENCLOSURE HERE

Not Used For Purposes Intended

For Deposit Only

612227442

DO NOT WRITE, STAMP OR SIGN BELOW THIS LINE
RESERVED FOR FINANCIAL INSTITUTION USE

02791 15289

750026169

03

559621 003 0029 52 02262003

V0006

Date 20080616
Amount 229473
Serial Number 0080540463

Account Number [REDACTED]
CR-DR D
Transaction Link 014332760026116816

Exhibit
1

M16779 08116083

THE REPLACEMENT OF THIS DOCUMENT REQUIRES COMPLETION OF A BB&T DECLARATION OF LOSS

5000587841

3472-55 2 2918

68-238514

BB&T

BEST 19.010 NEWS OCT 6

COPY NON NEGOTIABLE

17:14 07/12/08
1100000000000000 OFFCHECK \$9,010.00

CREDIT NEXT BUSINESS DAY

SIGNATURE CONFIRMATION NUMBER:
22305 1590 0000 8548 975

Postage and Signature Confirmation fees must be paid before mailing.

FROM FBI CHICAGO

Postmark
Here

POSTAL CUSTOMER:

Keep this receipt. For inquiries:
Access Internet web site at
www.usps.com®
or call 1-800-222-1811

☐ Priority Mail[™] Service
☐ First-Class Mail[®] parcel
☐ Package Services parcel

SIGNATURE CONFIRMATION NUMBER:
2305 2590 0000 8548 975

Postage and Signature Confirmation fees must be paid before mailing.

Paper Pass Check

Postmark
Here

POSTAL CUSTOMER:

Keep this receipt. For inquiries:
Access Internet web site at
www.usps.com •
or call 1-800-222-1811

☐ Priority Mail[®] Service
☐ First-Class Mail[®] parcel
☐ Package Services parcel

PS Form 153, January 2005

USERS' STORIES

Exhibit
2

[Home](#) | [help](#) | [Sign In](#)[Track & Confirm](#) [FAQs](#)

Track & Confirm

Search Results

Label/Receipt Number: 2305 1590 0000 8548 9159
Status: **Delivered**

Your item was delivered at 10:34 am on September 14, 2008 in COLUMBUS, OH 43218. The item was signed for by M RATLIFF.

Additional information for this item is stored in files offline.

[Restore Offline Details >](#) [Return to USPS.com Home >](#)

Track & Confirm

Enter Label/Receipt Number.

[Go >](#)

Notification Options

Proof of Delivery

Verify who signed for your item by email, fax, or mail. [Go >](#)

[Site Map](#) [Contact Us](#) [Forms](#) [Gov't Services](#) [Jobs](#) [Privacy Policy](#) [Terms of Use](#) [National & Premier Accounts](#)

Copyright© 1999-2007 USPS. All Rights Reserved. No FEAR Act EEO Data FOIA

EXHIBIT E

(Order June 10, 2009)

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

CitiMortgage, Inc.,

Plaintiff,

vs.

Angela M. Drexler; and any other Heirs at Law or Devises of Arthur E. Antisdel, Deceased, their heirs, Personal Representatives, Administrators, Successors and Assigns, and all other persons entitled to claim through them; all unknown persons with any right, title or interest in the real estate described herein; also any persons who may be in the military service of the United States of America, being a class designated as John Doe; and any unknown minors or persons under a disability being a class designated as Richard Roe; Washington Mutual Home Loans, Inc. f/k/a Fleet Real Estate Funding Corp.,

Defendants.

(511654-01799 JJH)

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2008-CP-08-1258

ORDER

2009 JUN 10 PM 12:21
CLERK OF COURT
BERKELEY COUNTY, SC

This matter came before the undersigned at hearing held on March 18, 2009, at 9:30 a.m. on Defendant Angela M. Drexler's Motion for Relief Pursuant to SCRCP 60, to Vacate Order and Judgment of Foreclosure and Master's Sale and to Reinstate Mortgage, and for Legal Fees and Costs. Present at this hearing were John J. Hearn, Esquire, attorney for the Plaintiff, and Robert L. Papa, Esquire, attorney for Defendant Angela M. Drexler, individually and as heir at law of Arthur Antisdel, and Defendant Drexler. After careful consideration of the matter, I make the following combined findings of fact and conclusions of law, and deny Drexler's Motion.

I would note at the outset that counsel for both parties were remarkably well prepared and presented zealous and compelling arguments for their respective clients.

Testimony was taken from Drexler at some length and Drexler entered a number of exhibits by the consent of the parties, including copies of various bank statements, copies of receipts for mailing, and copies of the Plaintiff's customer service records. The court has considered each of these exhibits in reaching its ruling. In reviewing the testimony and exhibits, the court notes that Drexler testified that she made certain payments in 2008, and that those payments were accompanied by a coupon from her payment book issued by the prior loan servicer, ABN AMRO. The coupon book was admitted into evidence without objection. The court further notes that the last coupon used in the book appears to have been from June 2007. The coupons from July 2007 through February 2008—the February coupon being the last in the book—are intact.

The court may relieve a party from a default judgment for mistake, inadvertence, surprise, or excusable neglect. S.C.R. Civ. P. 60(b)(1). As the moving party, Drexler has the burden of proof. *Thompson v. Hammond*, 299 S.C. 116, 119, 382 S.E.2d 900, 903 (1989).

The South Carolina Supreme Court has repeatedly held that a party seeking to have a judgment set aside under Rule 60(b)(1) must show both: (1) mistake, inadvertence, surprise, or excusable neglect; and (2) a meritorious defense. *Tri-County Ice and Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990); *Thompson v. Hammond*, 299 S.C. 116, 119, 382 S.E.2d 900, 903 (1989); *Broughton v. Jaffee*, 275 S.C. 541, 542, 273 S.E.2d 767, 768 (1981); *Tolpa v. Bill Jones Realty of Hilton Head, Inc.*, 275 S.C. 262, 263-64, 270 S.E.2d 622, 622-23 (1980); *Gillespie v. Rowe*, 275 S.C. 98, 99, 267 S.E.2d 535, 536 (1980); and *Stewart v. Floyd*, 274 S.C. 437, 442, 265 S.E.2d 254, 256 (1980). Drexler's testimony—that the payments she made would reinstate her mortgage—are not supported by the record before me.

There being no mistake, inadvertence, surprise, or excusable neglect, the possible

existence of a meritorious defense is irrelevant under Rule 60(b)(1). *Gillespie v. Rowe*, 275 S.C. 98, 99, 267 S.E.2d 535, 536 (1980); *Stewart v. Floyd*, 274 S.C. 437, 442, 265 S.E.2d 254, 256 (1980); and *Rutledge v. Junior Order of United Am. Mechs.*, 193 S.E. 434, 437 (S.C. 1937).

Drexler also argues that the judgment should be set aside pursuant to Rule 60(b)(3), which reads:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... (3) fraud, misrepresentation, or other misconduct of an adverse party

SCRCP 60(b)(3).

Drexler claims that certain allegations of the complaint are untrue. Accordingly, the issue is whether the court may set aside a default judgment under Rule 60(b)(3) if the defaulting party proves that the complaint contained fraudulently made allegations.

For purposes of deciding whether a party is entitled to relief from an adverse final judgment because of fraud, South Carolina courts distinguish between intrinsic and extrinsic fraud. The court will set aside a final judgment rendered because of extrinsic fraud but will not set aside a judgment based on intrinsic fraud. *Bryan v. Bryan*, 66 S.E.2d 609 (S.C. 1951).

Intrinsic fraud is fraud that was presented and considered in the litigation. *Chewning v. Ford Motor Co.*, 579 S.E.2d 605 (S.C. 2003), citing *Hagy v. Pruitt*, 529 S.E.2d 714 (S.C. 2000). This category includes perjury by a witness or the failure to disclose matters that would defeat one's own claim. *Id.*

Extrinsic fraud is fraud that "induces a person not to present a case or deprives a person of the opportunity to be heard." *Chewning*, 579 S.E.2d 605.

The South Carolina Supreme Court reaffirmed the intrinsic/extrinsic distinction in March

of this year in *Raby Construction v. Orr*, 594 S.E.2d 478 (S.C. 2004). There the court held that an allegation that the defendant had presented fraudulent evidence at trial was not sufficient to invoke the protection of Rule 60(b)(3) because the alleged fraud was "merely intrinsic." *Id.*

The Washington Court of Appeals has held, "The rule is aimed at judgments which were unfairly obtained, not at those which are factually incorrect. For this reason, the conduct must be such that the losing party was prevented from fully and fairly presenting its case or defense." *Peoples State Bank v. Hickey*, 777 P.2d 1056 (Wash. Ct. App. 1989). That court went on to say that a mischaracterization in the complaint of the priority of the parties' respective liens on the property did not prevent either side from fully presenting his case. There, as here, statements in the complaint (whether true, innocently false, or outright fraudulent) do not prevent a defendant from presenting his case to the court.

In *Hickey*, as here, the party seeking relief under Rule 60(b)(3) failed to file an answer, and a default judgment was entered. The court noted that, "The misrepresentation having nothing to do with her failure to respond to the summons and complaint, Hickey cannot meet the requirement that the misrepresentation must have operated to prevent her from fully and fairly presenting her case." *Id.*

Here, Plaintiff has not argued that fraudulent or incorrect statements in the complaint prevented it from responding. Indeed, the statement alleged to be fraudulent (*i.e.*, that Drexler was not in default and had somehow been reinstated) should have inspired Drexler to come forward to defend the case and protect her property.

The distinction between the treatment of extrinsic and intrinsic fraud under Rule 60(b)(3) is an extension of the required balancing of the need for finality in judgments versus the desire to ensure that the process is fair. A litigant may receive relief from extrinsic fraud because extrinsic

fraud prevents him from fully presenting or trying his case. In other words, extrinsic fraud precludes the court from conducting a full trial of the subject matter of the action. *Bryan*, 66 S.E.2d 609. Intrinsic fraud, however, does not present the same policy concerns. Intrinsic fraud involves matters (such as perjured testimony or forged documents) that are submitted to the court for consideration, and all parties have an opportunity to expose the fraud during the course of the litigation.

Finally, in addition to proving the successful party's fraud, the defaulting party must establish her own freedom from any fault that contributed to a default judgment being rendered against her. *Hirsch v. Collier*, 104 Ga. App. 271, 121 S.E.2d 318 (1961). Drexler is unable to do that. The record demonstrates that she defaulted and did not timely reinstate.

Moreover, Drexler faces an even higher burden since this property has been sold to a third party purchaser, Stonegate Properties. "Sound public policy demands that judgments and judicial sales be upheld where it can be done without violating any statute or settled principle of law." *Betsill v. Betsill*, 187 S.C. 50, 196 S.E. 381, 384 (1938). "A sound public policy requires that the validity of judicial sales be upheld, if in reason and justice it can be done." *Cumby v. Newberry*, 251 S.C. 33, 37, 159 S.E.2d 915, 917 (1968).

A judicial sale will be set aside only when either: "(1) the sale price is so gross as to shock the conscience; or (2) the sale is accompanied by other circumstances warranting the interference of the court." *Wells Fargo Bank, NA v. Turner*, 378 S.C. 147, 150, 662 S.E.2d 424, 425 (Ct. App. 2008) (internal quotations omitted) (citing *Poole v. Jefferson Standard Life Ins. Co.*, 174 S.C. 150, 157 (1934)).

Drexler does not base her motion for relief on the sales price. Therefore, the foreclosure sale in this case could only be set aside under the second prong of the *Poole* test—if circumstances exist that warrant the interference of the court.

There are no such circumstances. Drexler has not provided enough evidence to set aside her default, and she has not shown the capacity to reinstate her loan today.

The facts and law are overwhelmingly against Drexler. Her motion is denied, and the court will enforce the Order of Judgment of Foreclosure and Sale and the resulting sale to the third party purchaser.

AND IT IS SO ORDERED.

Robert E. Watson
Robert E. Watson
Master in Equity for Berkeley County

Dated: 6/8, 2009
Moncks Corner, SC

EXHIBIT F

(UnPublished Opinions)



Analysis
As of: Aug 24, 2011

Anthony Odom, Plaintiff, vs. Henry D. McMaster, in his official capacity as the Attorney General of the State of South Carolina; David Pascoe; J. Strom Thurmond, Jr.; C. Kelly Jackson; William B. Rogers, Jr.; W. Barney Giese; Douglas A. Barfield, Jr.; Trey Gowdy, III; Jerry W. Peace; Scarlett Wilson; Christina T. Adams; Donald V. Myers; Edgar L. Clements, III; Robert M. Ariail; I. McDuffie Stone, III; Gregory Hembree; and Kevin S. Brackett, in their official capacities as South Carolina Circuit Solicitors, Defendants.

C.A. No. 2:10-cv-00873-MBS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, CHARLESTON DIVISION

2010 U.S. Dist. LEXIS 80566

**August 6, 2010, Decided
August 6, 2010, Filed**

PRIOR HISTORY: State v. Odom, 2009 S.C. LEXIS 510 (S.C., May 13, 2009)

CORE TERMS: abstention, prong, vindictive, bad faith, discovery, criminal proceedings, ongoing, indictment, internet, state interests, state proceeding, public record, criminal solicitation, criminal cases, federal constitutional, judicial proceeding, judicial notice, summary judgment, harassment, abstain, enjoin, vital, grand jury, prosecutorial, undercover, procedural law, injunctive relief, right to discovery, adequate opportunity, declaratory

COUNSEL: [*1] For Anthony C Odom, Plaintiff: Brian D McDaniel, LEAD ATTORNEY, McDaniel and Gess, Beaufort, SC.

For Henry D McMaster in his official capacity as Attorney General of the State of South Carolina, Defendant: James Emory Smith, Jr, Robert Dewayne Cook, LEAD ATTORNEYS, Deborah RJ Shupe, SC Attorney General's Office, Columbia, SC.

For David Pascoe, J Strom Thurmond, Jr, C Kelly Jackson, W Barney Giese, Douglas A Barfield, Jr, Trey Gowdy, III, Jerry W Peace, Scarlett Wilson, Christina T Adams, Donald V Myers, Edgar L Clements, III, Robert M Ariail, I McDuffie Stone, III, Kevin S Brackett, in their

official capacities as South Carolina Circuit Solicitors, Defendants: Deborah RJ Shupe, Henry Dargan McMaster, James Emory Smith, Jr, Robert Dewayne Cook, LEAD ATTORNEYS, SC Attorney General's Office, Columbia, SC.

For William B Rogers, Jr, Gregory Hembree, Defendants: James Emory Smith, Jr, LEAD ATTORNEY, SC Attorney General's Office, Columbia, SC.

JUDGES: The Honorable Margaret B. Seymour, District Court Judge.

OPINION BY: Margaret B. Seymour

OPINION

ORDER AND OPINION

BACKGROUND

This is an action for declaratory and injunctive relief. Plaintiff filed the within action on April 7, 2010, against Defendants Henry D. McMaster ("McMaster"), [*2] in his capacity as Attorney General of the State of South Carolina; and David Pascoe; J. Strom Thurmond, Jr.; C. Kelly Jackson; William B. Rogers, Jr.; W. Barney Giese;

Douglas A. Barfield, Jr.; Trey Gowdy, III; Jerry W. Peace; Scarlett Wilson; Christina T. Adams; Donald V. Myers; Edgar L. Clements, III; Robert M. Ariail; I. McDuffie Stone, III; Gregory Hembree; and Kevin S. Brackett; in their official capacities as South Carolina Circuit Solicitors. Plaintiff alleges a claim for vindictive prosecution in violation of his due process rights under the Fifth and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983. Plaintiff seeks declaratory and injunctive relief to prevent or discontinue state criminal proceedings against him for criminal solicitation of a minor in violation of S.C. Code § 16-15-342. Plaintiff filed a motion for a Temporary Restraining Order (TRO) on April 7, 2010. An emergency TRO hearing was held on April 9, 2010. The court denied Plaintiff a TRO because he failed to make the necessary showing on all four prongs of the test set out by the Supreme Court in Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 129 S. Ct. 365, 374-76, 172 L. Ed. 2d 249 (2008). The [*3] Summons and Complaint were served on McMaster on April 15, 2010.

The case is before the court on McMaster's Motion To Dismiss, which was filed April 30, 2010. Plaintiff filed its response on May 12, 2009. McMaster filed a reply memorandum on May 28, 2010.

FACTS

The facts in the light most favorable to Plaintiff are as follow. Plaintiff was arrested in May 2006, and charged in Spartanburg County, South Carolina, with one count of criminal solicitation of a minor (hereinafter "Spartanburg Indictment"). This count is based on internet communications from March 2006 to May 4, 2006, between Plaintiff and a Spartanburg County law enforcement officer who was acting in an undercover capacity (hereinafter "Spartanburg Communications"). Plaintiff's license to practice law in South Carolina was suspended on May 17, 2006 as a result of these charges.

The trial on the Spartanburg Communications (hereinafter "Spartanburg Trial") was originally set for May 2007 but was continued until July 2007 to allow Plaintiff's counsel an opportunity to review evidence of additional internet communications dated May 4, 5, and 6, 2006 between Plaintiff and a Westminster (Oconee County, South Carolina) law enforcement [*4] officer, who was also acting in an undercover capacity (hereinafter "Oconee County Communications"). The Oconee County Communications were not part of the Spartanburg Indictment. In July 2007, before the swearing of the selected jury in the Spartanburg Trial, the trial court granted Plaintiff's motion to suppress evidence the state deemed crucial to its case. The State appealed. On March 30, 2009 the South Carolina Supreme Court reversed the suppression order, and the case proceeded to trial.

The Spartanburg trial began on February 22, 2010 and ended on March 2, 2010. The Oconee County Communications were not introduced at the Spartanburg Trial. At the end of the Spartanburg Trial, the court declared a mistrial due to a deadlocked jury. Shortly after the mistrial, the State submitted the Oconee County Communications charges to a grand jury. On April 12, 2010, the grand jury returned two indictments for criminal solicitation of a minor: one for internet communications dated May 4 and 5, 2006, and a second for communications on May 6, 2006.

Plaintiff alleges that he was told that the Oconee County Communications would not be prosecuted. Plaintiff contends that the State's decision to submit [*5] the Oconee County Communications to the grand jury was a reaction to Plaintiff's attempt to gain information in support of his defense in the Spartanburg Trial. Specifically, Plaintiff sought to discover the details surrounding the Oconee County undercover officer's arrest and subsequent termination from the force. Plaintiff also contends that two separate indictments for three communications in Oconee County over only three days, when compared with the single indictment in the Spartanburg Trial which covered seventeen separate communications over a two-month time period, is evidence of vindictive prosecution. Plaintiff argues that the nearly four years between the charged conduct and the actual charges for the Oconee County Communications is unusually long for this type of crime, also evidencing vindictive prosecution.

Plaintiff seeks: (1) a declaration that the prosecution for the Oconee County Communications is impermissible as a violation of due process; (2) to permanently enjoin Defendants from prosecuting Plaintiff for the Oconee County Communications; and, (3) full discovery on his vindictive prosecution claim.

DISCUSSION

Younger Abstention

Defendant argues that the court should [*6] dismiss this case based on the *Younger* abstention doctrine. It is well established that, except under certain narrow circumstances, a federal district court should abstain from hearing a case to enjoin or stay an ongoing state court proceeding. The United States Supreme Court, in *Younger v. Harris*, recognized a "national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances." 401 U.S. 37, 41, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). The recognized three-prong test for *Younger* abstention is: "(1) an ongoing state judicial proceeding, instituted prior to any substantial progress [on the merits] in the federal proceeding; that (2) implicates important, substantial, or vital state interests; and, (3) provides an adequate opportunity for

the plaintiff to raise the federal constitutional claim advanced in the federal lawsuit." *Nivens v. Gilchrist*, 319 F.3d 151 (4th Cir. 2003) (citing *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982)).

The first prong of the *Younger* abstention doctrine requires that there be an ongoing state judicial proceeding. In *Hicks v. Miranda*, 422 U.S. 332, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975), the Supreme Court found that the ongoing [*7] state judicial proceeding prong was met in a case where the federal suit was filed before the state criminal proceedings began. In *Hicks*, Miranda filed suit in federal court seeking to prevent the enforcement of an obscenity statute. 422 U.S. at 337. The district court denied Miranda's request for a TRO, but ordered a three-judge panel to review the constitutionality of the statute. *Id.* at 338. Before the panel considered the constitutionality question, Miranda was added to a state criminal proceeding for violation of the obscenity statute. *Id.* at 339. The federal panel subsequently declared the California statute unconstitutional. *Id.* at 341. On certiorari, the United States Supreme Court held that the district court should have abstained "where state criminal proceedings are begun against the federal plaintiff [Miranda] after the federal complaint is filed[,] but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force." *Id.* at 349.

Hicks indicates that in cases where state criminal proceedings are instituted after a plaintiff's federal complaint was filed and TRO hearing held, [*8] there is an ongoing state proceeding for the purposes of the first prong of the *Younger* abstention doctrine. 422 U.S. at 349. Because a TRO hearing is not a proceeding of substance on the merits and no other proceedings have taken place in this case, the first prong of the *Younger* abstention doctrine has been met.

The second prong of the *Younger* abstention doctrine requires that the state proceeding implicate important, substantial, or vital state interests. The Fourth Circuit has recognized the efficient operations of a state's criminal justice system as an important, substantial, or vital state interest. *Nivens*, 319 F.3d at 154 (citing *Cooper v. Oklahoma*, 517 U.S. 348, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996)). Moreover, protecting minors from sexual predators is an important state interest. See *State v. Reid*, 383 S.C. 285, 679 S.E.2d 194, 201 n.6 (S.C. Ct. App. 2009) (discussing South Carolina's important public policy of protecting minors from harm in the context of an internet solicitation of a minor case). Thus, the second prong of the *Younger* abstention doctrine has been met.

The third prong of the *Younger* abstention doctrine requires that the state proceeding provide an adequate

opportunity for the plaintiff to advance his [*9] federal constitutional claim. With regard to this prong, the Supreme Court has placed the burden on the federal plaintiff to show that state procedural law bars the presentation of his claim. *Pennzoil Co. v. Texaco*, 481 U.S. 1, 14, 107 S. Ct. 1519, 95 L. Ed. 2d 1 (1987). The Supreme Court stated: "when a litigant has not attempted to present his federal claim in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Id.* at 15. The Fourth Circuit, in applying *Younger*, explained that: "a federal court *must* abstain from interfering with an ongoing state proceeding where a litigant has an 'opportunity to raise and have timely decided by a competent state tribunal the federal issues involved' and . . . no bad faith, harassment, or other exceptional circumstances dictate to the contrary." *Nivens*, 319 F.3d at 154 (citing *Middlesex*, 457 U.S. at 437) (emphasis added).

Plaintiff argues that his claim of vindictive prosecution cannot be adequately raised in state court because in a South Carolina criminal proceeding there is no right to discovery. The court disagrees. Both of the cases Plaintiff cites in support [*10] of his argument were decided prior to the creation of Rule 5 of the South Carolina Rules of Criminal Procedure, governing disclosure in criminal cases. S.C.R. Crim. P. 5. Rule 5 permits discovery in criminal cases:

[u]pon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

S.C.R. Crim. P. 5(a)(1)(C). Rule 5 also gives courts discretion to permit discovery if a party has refused to comply with a discovery request. S.C.R. Crim. P. 5(a)(2). The South Carolina Supreme Court has recognized the right to discovery for state criminal defendants. *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873, 878 (S.C. 2007) (recognizing that Rule 5 creates a right to reciprocal discovery but does not compel defense experts to create written reports for the opposing side). Plaintiff cites no authority, nor provides examples, [*11] to support the proposition that his right of discovery under Rule 5 will be

insufficient to adequately develop his vindictive prosecution claim. Plaintiff has failed to meet his burden of proving that state procedural law bars his federal constitutional claim.

In addition, in *State v. Fletcher*, 322 S.C. 256, 471 S.E.2d 702 (S.C. Ct. App. 1996) a criminal defendant was permitted to present a vindictive prosecution claim in that proceeding. *Id.* at 703. This case demonstrates that South Carolina courts are capable of hearing allegations of vindictive prosecution in criminal cases and indicates that state procedures are adequate to address Plaintiff's claim. Thus, the third prong of the *Younger* abstention doctrine has been met. Based on the foregoing, the court finds that *Younger* abstention is appropriate in this case unless one of the exceptions applies.

Exceptions to *Younger* Abstention

Courts have recognized exceptions to the *Younger* abstention doctrine where a state prosecution is: "(1) commenced in bad faith or to harass, (2) based on a flagrantly and patently unconstitutional statute, or (3) related to any other such extraordinary circumstances creating a threat of 'irreparable injury' both great [*12] and immediate." *Phelps v. Hamilton*, 59 F.3d 1058, 1063-64 (10th Cir. 1995) (citing *Younger*, 401 U.S. at 53-54). Plaintiff advances the bad faith exception to argue against the application of *Younger*.

The three factors courts use to evaluate the bad faith exception are:

- (1) [W]hether it was frivolous or undertaken with no reasonably objective hope of success; (2) whether it was motivated by the defendant's suspect class or in retaliation for the defendant's exercise of constitutional rights; and, (3) whether it was conducted in such a way as to constitute harassment and an abuse of prosecutorial discretion, typically through the unjustified and oppressive use of multiple prosecutions.

Phelps, 59 F.3d at 1064-65 (citing *Kugler v. Helfant*, 421 U.S. 117, 126 n.6, 95 S. Ct. 1524, 44 L. Ed. 2d 15; *Younger*, 401 U.S. at 48). Mere allegations of bad faith do not suffice; a plaintiff "must prove bad faith or harassment before intervention is warranted." *Id.* at 1066 (citing *Perez v. Ledesma*, 401 U.S. 82, 85, 91 S. Ct. 674, 27 L. Ed. 2d 701 (1971); *Judice v. Vail*, 430 U.S. 327, 338, 97 S. Ct. 1211, 51 L. Ed. 2d 376 (1977)).

Plaintiff submits that his prosecution for the Oconee County Communications constitutes retaliation for the

exercise of his constitutional rights in defending himself at the [*13] Spartanburg Trial. Plaintiff contends that his prosecution for the Oconee County Communications constitutes abuse of prosecutorial discretion due to the oppressive use of multiple prosecutions. Additionally, Plaintiff argues that this case should be allowed to move forward simply because bad faith is an inherent element of his vindictive prosecution claim. McMaster disputes Plaintiff's allegations of prosecutorial misconduct and motivation for bringing charges on the Oconee County Communications, contending that this was a strategic decision. During the pendency of the Spartanburg trial, the position of Chief Prosecutor for the South Carolina Internet Crimes Against Children Task Force changed from David Stumbo to Megan Wines. Because prosecutors have discretion to decide which crimes to prosecute, this personnel change lends support to McMaster's strategy explanation. The court finds that Plaintiff has failed to prove bad faith. Therefore, abstention under the *Younger* abstention doctrine is appropriate.

Rule 12(b)(6) Motion

Plaintiff argues that if this court looks outside the pleadings to decide the motion to dismiss, the Rule 12(b)(6) motion is converted into a motion for summary judgment [*14] judgment, entitling Plaintiff to discovery. The Fourth Circuit has recognized that courts can take judicial notice of public information without converting a 12(b)(6) motion into a motion for summary judgment stating: "[i]n reviewing the dismissal of a complaint under Rule 12(b)(6), we may properly take judicial notice of matters of public record." *Sec'y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007) (citing *Hall v. Virginia*, 385 F.3d 421, 424 (4th Cir. 2004)). This court has routinely allowed reference to public records in 12(b)(6) motions to dismiss. See *Cobin v. Hearst-Argyle Television, Inc.*, 561 F. Supp. 2d 546, 550-51 (D.S.C. 2008) (explaining that a police report may be considered by the court in a 12(b)(6) motion as a matter of public record); *Tobin v. Bodman*, No. 1:06-492-RBH, 2007 U.S. Dist. LEXIS 23978, 2007 WL 1068253, at *2, *4 (D.S.C. Mar. 29, 2007) (allowing proof of plaintiff's earlier conviction to bar a current claim of illegal arrest); *Larch v. Gintoli*, No. 8:04-1962CMBH, 2006 WL 895019, at *2 (D.S.C. Mar. 31, 2006) (permitting exhibits attached to defendant's 12(b)(6) motion to be considered by the court because the exhibits were public records from an earlier [*15] state court action).

Thus, the court may take judicial notice of the state court indictments without converting McMaster's 12(b)(6) motion into a motion for summary judgment.

CONCLUSION

McMaster's motion to dismiss is **granted**. (Entry 11). The court will abstain from exercising jurisdiction in this case under the *Younger* abstention doctrine. Therefore, the entire case is dismissed without prejudice. Defendants Edgar L. Clements; C. Kelly Jackson; Gregory Hembree; William B. Rogers, Jr.; Christina T. Adams; Trey Gowdy, III; J. Strom Thurmond, Jr.; Robert M. Ariail; Douglas A. Barfield, Jr.; Kevin S. Brackett; David Pascoe; I. McDuffie Stone, III; Scarlett Wilson; W. Barney Giese; Donald V. Myers; and Jerry W. Peace have also filed motions to dismiss this case under the *Younger* abstention doctrine. These motions are now **moot**. (Entries 19, 20,

39, 40, and 41). Edgar L. Clement, III and C. Kelly Jackson's motion to amend or correct their motion to dismiss is also moot. (Entry 42).

IT IS SO ORDERED.

/s/ Margaret B. Seymour

The Honorable Margaret B. Seymour

District Court Judge

Columbia, South Carolina

August 6, 2010



Positive
As of: Aug 24, 2011

DEBBIE L. SIMPSON, Plaintiff v. UNITED PARCEL SERVICE COMPANY, Defendant

Civil Action No. 3:05-1500-CMC-BM

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

2005 U.S. Dist. LEXIS 41707

**October 28, 2005, Decided
October 28, 2005, Filed**

SUBSEQUENT HISTORY: Adopted by, Motion denied by, Dismissed by Simpson v. UPS Co., 2005 U.S. Dist. LEXIS 31130 (D.S.C., Nov. 21, 2005)

CORE TERMS: res judicata, claim preclusion, cause of action, lawsuit, retaliation, amend, summary judgment, subject matter, undersigned, claims asserted, sex discrimination, factual allegations, matters of public record, judicial notice, final determination, former proceeding, series of transactions, asserting, litigated, notice, privies, sex, new counsel, discriminated

COUNSEL: [*1] Debbie L Simpson, Plaintiff, Pro se, Lexington, SC

For United Parcel Service Company, Defendant: Susan Pedrick McWilliams, Nexsen Pruet Jacobs and Pollard, Columbia, SC

JUDGES: Bristow Marchant, United States Magistrate Judge

OPINION BY: Bristow Marchant

OPINION

REPORT AND RECOMMENDATION

This action was filed by the Plaintiff pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Shortly after filing, a motion to dismiss was filed by the Defendant, asserting that this action is barred by the doc-

trine of *res judicata*. Plaintiff responded by filing a motion to amend and/or correct her Complaint, which was denied because of numerous typographical and other errors in the proposed amended Complaint. However, leave was granted to the Plaintiff to refile her motion, and she filed a second motion to amend and/or correct her Complaint with a proposed amended Complaint on July 19, 2005. Plaintiff also filed a memorandum in opposition to the Defendant's motion to dismiss on July 18, 2005. Defendant filed a reply memorandum in support of its motion to dismiss on July 28, 2005, and a response in opposition to Plaintiff's motion to amend and/or correct [*2] her Complaint on August 8, 2005.

On August 26, 2005, Plaintiff's attorney filed a motion to withdraw as counsel in the case. An order granting counsel's motion was entered on August 30, 2005, and Plaintiff was given thirty (30) days to secure new counsel. The Court thereafter received a letter from the Plaintiff dated September 22, 2005, asking for a thirty (30) day extension of time to obtain an attorney. That letter (treated as a motion) was granted, and Plaintiff's time to obtain new counsel in the case was extended to Friday, October 21, 2005.

Plaintiff has now advised the Court by letter that she will henceforth represent herself in the case *pro se*. The pending motions in this case are now therefore before the Court for disposition.¹

¹ This case was automatically referred to the undersigned United States Magistrate Judge for all pretrial proceedings pursuant to the provisions of

28 U.S.C. § 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(e) and (g), D.S.C. The Defendant has filed a motion to dismiss. As this is a dispositive motion, this Report and Recommendation is entered for review by the Court.

[*3] Background

The underlying facts on which Defendant bases its claim for *res judicata* are not in dispute. Plaintiff previously filed a lawsuit in this Court on November 7, 2003, asserting a discrimination claim against this same Defendant. *Simpson v. United Parcel Service Co.*, C/A No. 3:03-3538-22BC (hereinafter "*Simpson I*"). In that case, Plaintiff alleged that she had been discriminated against on the basis of her gender in violation of Title VII; see *Defendant's Exhibit A*, at PP 6-10, 14, 19-20; and that the Defendant had breached her employment contract. *Id.* at PP 22-26. Defendant filed a motion for summary judgment in *Simpson I* on November 30, 2004, and on June 22, 2005 the Honorable Cameron McGowan Currie, United States District Judge, granted the motion for summary judgment, having adopted the findings of the Honorable Joseph R. McCrorey, United States Magistrate Judge, set forth in a Report and Recommendation issued May 24, 2005. See *Defendant's Exhibits B & C*. Defendant asserts that Plaintiff's current Complaint is essentially identical to the Complaint filed in *Simpson I*, that the doctrine of *res judicata* prohibits relitigation [*4] of these issues, and that this case should therefore be dismissed with prejudice.

In her response to the Defendant's motion Plaintiff argues that the wrong Complaint was initially filed in this action, but that Plaintiff should be allowed to file an amended Complaint and proceed with this case. In her proposed second amended Complaint, Plaintiff alleges that she was terminated by the Defendant, following which she filed a complaint for sexual discrimination. Plaintiff alleges that she subsequently returned to work for the Defendant on September 17, 2003, and that since her return to work, she has continued to be discriminated against on the basis of her sex by her supervisor, Rock Underwood. In support of this claim, Plaintiff sets out numerous incidents of alleged discrimination which have occurred from when she was rehired through April 2004. Plaintiff alleges in her first cause of action that this conduct constitutes illegal sex discrimination². Plaintiff also asserts a claim for retaliation in a second cause of action. See generally, *Second Amended Complaint*.

² The actual heading under Plaintiff's first cause of action reads: "42 U.S.C. 2000e -- Discrimination on the Basis are stuff of Sex". Although confusing, presumably this is a disparate treatment claim.

[*5] Defendant argues that the allegations contained in Plaintiff's proposed second amended Complaint remain subject to dismissal under the doctrine of *res judicata*, and therefore opposes Plaintiff's pending motion to amend and/or correct. When considering a motion to dismiss pursuant to Rule 12(b), the Court is required to "accept the allegations in the complaint as true, and draw all reasonable factual inferences in favor of the Plaintiff. [The motion can be granted] only if no relief could be granted under any set of facts that could be proved." *Southmark Prime Plus L.P. v. Falzone*, 776 F.Supp. 888, 890 (D.Del. 1991); (quoting *Turbe v. Government of Virgin Islands*, 938 F.2d 427, 428 (3rd Cir. 1991)). While consideration of matters outside the pleadings will normally serve to convert the motion to a Rule 56 motion for summary judgment, that is not the case where the matters considered are matters of public record. *Briggs v. Newberry County Sch. District*, 838 F.Supp. 232, 233-234 (D.S.C. 1992) ["When entertaining a motion to dismiss on the ground of *res judicata* or collateral estoppel, a court may judicially notice facts from a [*6] prior judicial proceeding."], *aff'd*, 989 F.2d 491 (4th Cir. 1993). Here, the documents which have been submitted in conjunction with Defendant's motion to dismiss are matters of public record, of which the undersigned has taken judicial notice. *Aloe Creme Laboratories, Inc. v. Francine Co.*, 425 F.2d 1295, 1296 (5th Cir. 1970) [This Court may take judicial notice of its own records.]. Defendant's motion has therefore been considered pursuant to the standards of Rule 12.

Discussion

"Under the doctrine of *res judicata*, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action". *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, n. 5, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979). Defendant's motion involves the issue of claim preclusion, which is part of the doctrine of *res judicata*, and which refers to the preclusive effect of a judgment in foreclosing litigation of matters which were or should have been raised in an earlier lawsuit. *Briggs*, 838 F.Supp. at 233-234. Defendant asserts that the claims set forth in the Plaintiff's proposed second amended Complaint [*7] were or could have been presented in *Simpson I*, and that the dismissal of *Simpson I* on the merits therefore precludes the litigation of Plaintiff's claims in this case.

In order for claim preclusion to apply, three elements must be shown: 1) identity of the parties or their privies; 2) identity of the subject matter of the litigation; and 3) a final determination on the merits of the claim in the former proceeding. *Briggs*, 838 F.Supp. at 235; *Board of County Rd. Com'rs v. Shultz*, 205 Mich. App. 371, 521 N.W.2d 847, 850 (Mich.App. 1994). Here, the identity of

the parties in the litigation is the same, and there was obviously a final determination on the merits in the former proceeding. Therefore, the only question is whether there is identity of the subject matter of the two litigations such as to bar this action. After careful consideration of the arguments and materials before this Court, the undersigned finds and concludes that there is an identity of the subject matter in *Simpson I* and the case at bar, and that *res judicata* therefore applies.

First, Plaintiff's claims in her proposed amended Complaint are for sex discrimination under Title VII, the [*8] same claim brought by her in *Simpson I*. Further, Defendant correctly points out that some of the factual allegations in Plaintiff's proposed second amended Complaint arose before *Simpson I* was even filed, and that all of these factual allegations took place more than six (6) months before discovery closed in *Simpson I*. Therefore, these claims obviously could have been litigated with the Title VII claims asserted by Plaintiff in that case. Even her new claim for retaliation is asserted under Title VII, and arises out of the same conduct complained about in *Simpson I*.³ See *Pittston Co. v. United States*, 199 F.3d 694, 704 (4th Cir. 1999) ["The appropriate inquiry to determine whether causes of action are identical for claim preclusion purposes is whether the claim presented in the new litigation 'arises out of the same transaction or series of transactions as the claim resolved in the prior judgment'"] (quoting *Harnett v. Billman*, 800 F.2d 1308, 1313 (4th Cir. 1986).

3 Plaintiff was not required to separately exhaust administrative remedies prior to pursuing a claim for retaliation under Title VII. See *Nealon v. Stone*, 958 F.2d 584 (4th Cir. 1992). Therefore, she could have pursued this claim as part of her litigation in *Simpson I*, even if it occurred during the course of that litigation. *Faggiano v. Eastman Kodak Company*, 378 F.Supp.2d 292, 303-304 (W.D.N.Y. 2005) [Finding *res judicata* where Plaintiff "could have included a retaliation claim in his first lawsuit, which was still pending when he filed his second suit against the same party, alleging the same causes of action based on discrimination along with the additional retaliation claim."].

[*9] It is appropriate to consider causes of action as identical for claim preclusion purposes when they are related "in time, space, origin, or motivation, and [when] taken together they form a convenient unit for trial purposes." *Pittston Co.*, 199 F.3d at 704. Such is obviously the case here. *Wilkes v. Wyoming Dep't of Employment, Div. of Labor Standards*, 314 F.3d 501, 504 (10th Cir. 2003) ["All claims arising from the same employment relationship constitute the same transaction or series of transactions for claim preclusion purposes"] (quoting *Mitchell v. City of Moore*, 218 F.3d 1190, 1202 (10th Cir. 2000), cert. denied, 540 U.S. 826, 124 S. Ct. 181, 157 L. Ed. 2d 48 (2003); *Puegot Motors of Am., Inc. v. Eastern Auto Distributors, Inc.*, 892 F.2d 355, 359 (4th Cir. 1989) ["not only does *res judicata* bar claims that were raised and fully litigated, it 'prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding'"] (quoting *Brown v. Felsen*, 442 U.S. 127, 131, 99 S. Ct. 2205, 60 L. Ed. 2d 767 (1979); see also *Davis v. Dallas Area Rapid Transit*, 383 F.3d 309, 314 (4th Cir. 2004) [*10] [finding that *res judicata* barred claims in plaintiffs' subsequent litigation because they were based on conduct that predated the filing of their lawsuit, and thus, could have been included in the earlier lawsuit]. Therefore, claim preclusion bars litigation of the claims asserted in this lawsuit.

Conclusion

Based on the foregoing, it is recommended that Plaintiff's motion to be allowed to amend her Complaint be **denied**, that Defendant's motion to dismiss be **granted**, and that this case be **dismissed**, with prejudice, on the grounds of *res judicata* claim preclusion.

The parties are referred to the Notice Page attached hereto.

Bristow Marchant

United States Magistrate Judge

Columbia, South Carolina

October 28, 2005



Positive
As of: Aug 24, 2011

**RONALD D. WILLIAMS and BRENDA R. WILLIAMS, Plaintiffs, v. U.S. BANK
NATIONAL ASSOCIATION, Defendant.**

Case No. 10-14967

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
MICHIGAN, SOUTHERN DIVISION**

2011 U.S. Dist. LEXIS 62047

June 9, 2011, Decided
June 9, 2011, Filed

CORE TERMS: foreclosure, redemption, financial institution, accommodation, period expired, waive, oral promise, extension of credit, advertisement, extinguished, indebtedness, repayment, mortgage, modify, email, causes of action, constructive trust

COUNSEL: [*1] For Ronald D. Williams, Brenda R. Williams, formerly known as, Brenda R. Guynes, Plaintiffs: Darwyn P. Fair, Detroit, MI.

For U.S. Bank, N.A., Defendant: Davidde A. Stella, Edward C. Cutlip, Jr., Kerr, Russell, Detroit, MI.

JUDGES: Honorable John Corbett O'Meara, United States District Judge.

OPINION BY: John Corbett O'Meara

OPINION

This matter came before the court on defendant U.S. Bank National Association's April 1, 2011 motion for judgment on the pleadings. Plaintiffs Ronald and Brenda Williams filed a late response brief May 25, 2011; and Defendant filed a reply May 27, 2011. The court heard oral argument on the motion June 2, 2011. For the reasons set forth below, the court will grant Defendant's motion.

BACKGROUND FACTS

Plaintiffs Ronald and Brenda Williams defaulted on a mortgage loan for a residential property in Oak Park, Michigan. On March 2, 2010, the property was sold at a

sheriff's auction to defendant U.S. Bank National Association ("U.S. Bank"). The redemption period expired September 2, 2010; and Plaintiffs failed to redeem the property. Defendant filed an eviction action against Plaintiffs on October 4, 2010. On November 15, 2010, Plaintiffs filed this six-count complaint alleging the following causes [*2] of action: 1) Count I, quiet title; 2) Count II, unjust enrichment; 3) Count III, innocent/negligent misrepresentation; 4) Count IV, fraud based upon silent fraud and bad faith promises; 5) Count V, constructive trust; and 6) Count VI, deceptive act and/or an unfair practice. Defendant filed timely notice of removal based on diversity of citizenship.

LAW AND ANALYSIS

Under Michigan law, in order to have standing, a party must have "a legal or equitable right, title or interest in the subject matter of the controversy." MOSES, Inc. v. Southeast Michigan Council of Gov'ts, 270 Mich. App. 401, 414, 716 N.W.2d 278 (2006). Once the redemption period following foreclosure of property has expired, the former owner's rights in and title to the property are extinguished. Piotrowski v. State Land Office Bd., 302 Mich. 179, 187, 4 N.W.2d 514 (1942). As explained recently by the Michigan Court of Appeals:

Plaintiffs' suit did not toll the redemption period. Plaintiff is simply trying to wage a collateral attack on the foreclosure of the property. . . . [P]laintiff was required to raise the arguments when the foreclo-

sure proceedings began. Plaintiff made no attempt to stay or otherwise challenge the foreclosure and redemption [*3] sale. . . . Once the redemption period expired, all of plaintiff's rights in and title to the property were extinguished.

Overton v. Michigan Elec. Reg. Sys., 2009 Mich. App. LEXIS 1209, *3-4 (May 28, 2009). See also Smith v. Wells Fargo Home Mortg., Inc., 2010 U.S. Dist. LEXIS 133957 *6-9 (E.D. Mich. Aug. 16, 2010). In this case, the redemption period expired on September 2, 2010; therefore, Plaintiffs lack standing to challenge the foreclosure absent a showing of fraud or irregularity, neither of which Plaintiffs have shown.

In their response brief, Plaintiffs argue that the Michigan Court of Appeals recently held that Mortgage Electron Registration System ("MERS") was not the owner of the indebtedness nor had an interest in the indebtedness and therefore could not foreclose on the property by advertisement against the homeowner. Residential Funding Co., L.L.C. v. Saurman, Mich. App. , 2011 Mich. App. LEXIS 719 (Mich. Ct. App. Apr. 21, 2011). However, Saurman does not apply here. In this case U.S. Bank, not MERS, initiated the foreclosure by advertisement. To the extent Plaintiffs challenge any assignment from MERS to U.S. Bank, Plaintiffs lack standing to do so because they [*4] were not a party to those assignments. See Livonia Props. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC, 399 Fed. Appx. 97, 102-03 (6th Cir. 2010).

Michigan's Statute of Frauds also bars Counts I-V of the complaint, in which Plaintiffs allege that Defendant breached an oral promise to negotiate a loan modification and to halt the sheriff's sale of the property. Plaintiffs have failed to produce a writing signed by U.S. Bank that shows such an agreement. Michigan's Statute of Frauds provides,

(2) An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution:

(a) a promise or commitment to lend money, grant or extend credit, or make any other financial accommodation;

(b) a promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation.

(c) a promise or commitment to waive a provision of a loan, extension of credit, or other financial accommodation.

Mich. Comp. Laws Ann. § 566.132.

The pertinent [*5] language is "unambiguous. It plainly states that a party is precluded from bringing a claim-no matter what its label-against a financial institution to enforce the terms of an oral promise to waive a loan provision." Crown Tech. Park v. D&N Bank, FSB, 242 Mich. App. 538, 550, 619 N.W.2d 66 (2000). In this case Plaintiffs allege that U.S. Bank promised to "delay" the repayment of the loan or "waive" or "modify" a provision of the loan and/or make "financial accommodations." To enforce such a promise under Michigan law, the promise(s) must be in writing and signed by the bank. Plaintiffs claim that an email exchange between Bloomfield Financial Services and Paula Martin of U.S. Bank constitutes the requisite signed writing. However, at best the email message is evidence of a previous "verbal promise" and insufficient to satisfy the statute of frauds. See Williams v. JP Morgan Mortgage Acquisition Corp., 2010 U.S. Dist. LEXIS 25936, *9 (E.D. Mich. Mar. 19, 2010).

In addition, Count V alleges a claim for "constructive trust," which is a remedy, not a cause of action. Count VI regarding "robo-signing" fails to state a claim.

ORDER

It is hereby **ORDERED** that defendant U.S. Bank's April 1, 2011 motion for judgment [*6] on the pleadings is **GRANTED**.

Date: June 9, 2011

/s/ John Corbett O'Meara

United States District Judge

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY) IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Angela Drexler,) Civil Action No. 2011-CP-08-1754
)

Plaintiff,)
)

vs.)

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

CitiMortgage, Inc., Stonegate Properties,)
Inc., and Branch Banking and Trust)
Company, Inc.,)

Defendants.)
)

FILED
2011 OCT 11 PM 4:22
MARY P. BERNARD
CLERK OF COURT
BERKELEY COUNTY

Defendant, CitiMortgage, Inc. (hereinafter "CitiMortgage"), by and through its undersigned counsel and pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, respectfully submits this Memorandum in Support of its Motion to Dismiss Plaintiff, Angela Drexler's (hereinafter "Plaintiff") Complaint.

BACKGROUND

Prior to Plaintiff instituting the current litigation, CitiMortgage filed a Complaint for Foreclosure on May 7, 2008, followed by a First Amended Complaint for Foreclosure on May 21, 2008 ("Foreclosure Complaint"), in the Court of Common Pleas for Berkeley County, South Carolina, C/A No. 2008-CP-08-1258, against Plaintiff for the foreclosure and sale of property located at [REDACTED] Ladson, South Carolina 29456. (See Compl. ¶¶ 21-22.) While Plaintiff acknowledges that she was properly served with the foreclosure pleadings, she failed to file a response and an Order of Default was issued against her by the court. (See *id.* ¶ 22.) A hearing was set for October 29, 2008, and Plaintiff was sent notice of the same. (See Record Hearing, attached hereto as Exhibit

“A.”)¹ Again, Plaintiff failed to appear at the hearing and a Judgment of Foreclosure and Sale was entered on October 29, 2008. (See Ex. B to Def.’s Mot.) The Judgment of Foreclosure and Sale held the following:

- Plaintiff entered into a Fixed Rate Note dated July 9, 1998, promising to pay the sum of \$84,850.00 with interest at 8.5% per annum (See *id.* at ¶ 8);
- To secure the obligation, she executed a Mortgage covering the real property described above (See *id.* at ¶ 9);
- The Mortgage was assigned to ABN AMRO Mortgage Group, Inc., whose successor by merger is CitiMortgage, Inc. (See *id.*); and
- Plaintiff failed to satisfy her payment obligations under the Note, CitiMortgage accelerated the balance, and the property was to be sold at a public auction (See *id.* at ¶¶ 15, 19–21.).

On that same day, foreclosure counsel filed a Certificate of Mailing, certifying that a copy of the Notice of Sale was mailed to Plaintiff, informing her that the property would be sold at public auction on December 3, 2008. (See Notice of Sale, attached hereto as Exhibit “B.”). The property was offered for sale on December 3, 2008, and was

¹ Plaintiff relies on the prior foreclosure proceedings in her Complaint, and, therefore, this Court may consider the documents submitted in that action when deciding this motion to dismiss. See *Brazell v. Windsor*, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009) (“In our view, allowing a trial court to consider documents that are incorporated by reference in the complaint but not actually attached thereto prevents a plaintiff from benefiting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based.”). Additionally, this court may consider the Record of Hearing, Judgment of Foreclosure and Sale, and Motion to Vacate at the motion to dismiss stage because these documents are part of the public record. See *Moore v. Flagstar Bank*, 6 F. Supp. 2d 496, 500 (E.D. Va. 1997) (noting that in addition to the complaint, the court may consider “matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint.”) (quoting 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1357 (1990)); *Odom v. McMaster*, No. 2:10-cv-00873, 2010 U.S. Dist. LEXIS 80566, at *14–15 (D.S.C. Aug. 6, 2010) (“The Fourth Circuit has recognized that courts can take judicial notice of public information without converting a 12(b)(6) motion into a motion for summary judgment[.]”); *Simpson v. UPS Co.*, No. 3:05-1500, 2005 U.S. Dist. LEXIS 41707, at *6 (D.S.C. Oct. 28, 2005) (stating “the documents which have been submitted in conjunction with Defendant’s motion to dismiss are matters of public record, of which the undersigned has taken judicial notice”); see also *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 404 S.E.2d 200 (1991) (deciding that when no South Carolina cases are directly on point, a court may look to the construction placed on the corresponding Federal Rules of Civil Procedure).

purchased by Defendant Stonegate Properties ("Stonegate"). More than two months after the sale, on February 19, 2009, Plaintiff filed a Motion to Vacate the Judgment of Foreclosure and Master's Sale pursuant to Rule 60(b), SCRPC. (*See* Ex. D to Def.'s Mot.) A hearing on the motion was held on March 18, 2009. At the hearing, Plaintiff argued that she made her payments and that her mortgage should be reinstated. (*See* Ex. E to Def.'s Mot.). The Master in Equity, Robert E. Watson (the "Master"), disagreed, finding that the record supported a finding that Plaintiff defaulted on her loan and failed to timely submit reinstatement payments. (*See id.* at p.5.) Further, the Master noted that the "foreclosure sale in this case could only be set aside . . . if circumstances exist that warrant the interference of the court." (*Id.* at p.6.) Because Plaintiff failed to provide "enough evidence to set aside her default, and she [had] not shown the capacity to reinstate her loan," the "facts and law [were] *overwhelming against* Drexler [Plaintiff]." (*Id.* (emphasis added).) Thus, the Master denied Plaintiff's Rule 60(b) motion and enforced the Order of Judgment of Foreclosure and Sale. (*See id.*) Plaintiff never appealed the Master's ruling on the Rule 60(b) motion.

Thereafter, a notice of hearing on Surplus Funds was held on August 4, 2009, and each of the parties, including Plaintiff, was given notice of the same. (*See* Am. Notice of Surplus Funds Hearing, attached hereto as Exhibit "C."). After the hearing, CitiMortgage was granted \$737.39 in surplus funds, Plaintiff was awarded \$1,103.76 in surplus funds, and the Master ordered the "case ended and the file closed." (*See* Order of Disbursement of Surplus Funds, attached hereto as Exhibit "D.").

Almost two years later, Plaintiff filed the instant action against CitiMortgage, Stonegate, and Branch Banking and Trust Company, Inc. ("BB&T"), seeking to set aside

the Master's Sale, void the Master's Deed, cancel the Mortgage Assignment, and set aside the Foreclosure Judgment. (*See generally* Compl.) Additionally, Plaintiff seeks damages under various theories, including:

- Negligence;
- Fraud;
- Breach of Contract;
- Breach of the Implied Covenant of Good Faith and Fair Dealing;
- Unjust Enrichment;
- Violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"); and
- Slander of Title.

Each of the above causes of action relate to the servicing of Plaintiff's loan, the terms of the Note and Mortgage, or title to the subject property, and, therefore, should have been pursued as compulsory counterclaims in the foreclosure action. Due to the reasons outlined more fully below and in CitiMortgage's motion, all of Plaintiff's claims fail as a matter of law, entitling CitiMortgage to dismissal of Plaintiff's Complaint, with prejudice.

STANDARD OF REVIEW

Each of Plaintiff's claims against CitiMortgage must be dismissed under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure because, as a matter of law, there is no conceivable set of circumstances under which Plaintiff is entitled to judgment. A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint and should be granted if the complaint does not set forth sufficient allegations entitling the plaintiff to relief. *Williams v. Condon*, 347 S.C. 227, 232–33, 553 S.E.2d 496, 499 (Ct. App. 2001). Although the court must accept the allegations of the complaint, it is not permitted to read into the complaint unalleged facts. *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). Rather, the "motion must be granted if

the facts and inferences reasonably deducible from them show that the plaintiff could not prevail on any theory of the case.” *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 650–51, 492 S.E.2d 272, 274–75 (Ct. App. 1997).

ARGUMENTS

I. Plaintiff’s Claims are Barred by the Doctrine of *Res Judicata*.

Each of the claims in Plaintiff’s Complaint is barred by the doctrine of *res judicata* because those claims should have been asserted as compulsory counterclaims in the previously-litigated foreclosure action. As recognized by the South Carolina Supreme Court, where a court enters a Judgment of Foreclosure and Sale, the foreclosed property goes to sale, and a deed is issued, it serves as *res judicata* on a later-filed action. *See Robinson v. Estate of Harris*, 378 S.C. 140, 145, 662 S.E.2d 420, 423 (Ct. App. 2008), *aff’d*, 2010 WL 4188299, at *1 (S.C. Oct. 25, 2010). In this case, the claims asserted relate directly to the servicing of the loan or contemplate defenses that should have been raised in response to the Foreclosure Complaint. Specifically, Plaintiff asserts that CitiMortgage “never had the legal authority to foreclose” (*See* Compl. ¶¶ 54–57), it executed an improper mortgage assignment (*See id.* ¶¶ 58–63), and it lacked standing to pursue the foreclosure (*See id.* ¶¶ 64–68). Each of the above-referenced “claims,” should have been asserted as affirmative defenses to the foreclosure action. *See, e.g.*, S.C. R. Civ. P. 8. As noted above, Plaintiff defaulted in that action and failed to raise *any* defenses to the foreclosure. Therefore, CitiMortgage’s standing to pursue the foreclosure, its legal authority to foreclose, and the validity of the mortgage assignment, were all conclusively established in CitiMortgage’s favor. *See Gadsden v. Home Fertilizer & Chem. Co.*, 89 S.C. 483, 72 S.E. 15, 17 (1911) (“The defendant, by waiving

a contest and suffering a default to be taken against him, admits the truth of the allegations set out in the plaintiff's declaration or complaint. . . . Hence the default authorizes the entry of any judgment warranted by the facts alleged.").

Additionally, in this action, Plaintiff asserts independent claims that should have been brought as counterclaims in the foreclosure action. The litany of claims includes allegations of negligence in the servicing of plaintiff's loan, fraud "during the life of the loan" by failing to properly credit payments, breach of contract by alleged "misallocation of payments," breach of the implied covenant of good faith and fair dealing, unjust enrichment, violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), tortious interference with contract, quiet title, and negligent misrepresentation. (*See id.* ¶¶ 44-47, 48-53, 69-73, 74-78, 79-81, 82-90, 91-95, 104-109, 110-116.) Rather than raising these claims in the present action as counterclaims in the foreclosure action, Plaintiff defaulted in that action and brought this independent lawsuit two years later. This procedural gamesmanship results in a waste of judicial resources, is inherently inequitable and, if allowed to proceed, is in direct contravention of the doctrine of *res judicata*. Plaintiff cannot bypass her obligation to raise all compulsory claims in the foreclosure action, as required under Rule 13(a), SCRCP, and seek relief from the same court in an independent action filed two years later. Accordingly, CitiMortgage seeks dismissal of the Complaint, with prejudice, pursuant to the doctrine of *res judicata*.

In South Carolina, a party must bring as a counterclaim any claim it has against the opposing party if it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim and does not require the presence of additional parties over which the court cannot acquire jurisdiction. *See* S.C. R. Civ. P. 13(a). Thus,

if a counterclaim is compulsory, but is not raised in the first case, a party is precluded under the doctrine of *res judicata* from asserting the claim in a subsequent action. See *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997) (stating that “if a counterclaim is compulsory, but not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action”); *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 62, 566 S.E.2d 863, 865 (Ct. App. 2002) (“The South Carolina Reporter’s Note following Rule 13 states: ‘[c]ounterclaims arising out of the same transaction or occurrence that is the subject of the action are ‘compulsory’ under Rule 13(a) and are barred by *res judicata* or estoppel by judgment if not asserted.’”).

As outlined below, the claims asserted in Plaintiff’s Complaint are all unmistakably compulsory and should have been asserted in the foreclosure action as counterclaims, but are now improper. The South Carolina Supreme Court has adopted the “logical relationship” test for determining whether a claim is a compulsory counterclaim under Rule 13(a), SCRCP. *N.C. Fed. Savings & Loan Ass’n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989) (“We hereby adopt the logical relationship test.”). Under the logical relationship test, a counterclaim is compulsory if there is *any* logical relationship between the claim and the counterclaim. See *id.* (finding a logical relationship between the enforceability of a note, which was the subject of a foreclosure action, and the validity of a purported oral agreement which, if performed, would have avoided default on the note). In this case, Plaintiff outlines an exhaustive list of allegations discussing payments made by Plaintiff during the life of the loan, circumstances surrounding the foreclosure, and alleged improper servicing and

accounting of loan records, all of which bear a logical relationship to the circumstances surrounding the foreclosure.

The specifics of Plaintiff's allegations are as follows:

- CitiMortgage allegedly "breached its duty of care and skill to Plaintiff in the servicing of Plaintiff's loan" (Compl. ¶ 46 [Negligence]);
- CitiMortgage allegedly "engaged in a pattern and practice of defrauding Plaintiff in that, during the life of the mortgage loan, Citi failed properly to credit payments made" (*Id.* at ¶ 49 [Fraud]);
- CitiMortgage allegedly "failed to comply with its obligations to adhere to the terms set forth in the original instruments and repeatedly misallocated payments or failed properly to calculate amounts due and owing under the note and mortgage at various periods" (*Id.* at ¶ 70 [Breach of Contract]);
- CitiMortgage allegedly sought to acquire "the large equitable position Plaintiff enjoyed in the Subject Property" (*Id.* at ¶ 77 [Breach of Implied Covenant of Good Faith and Fair Dealing]);
- CitiMortgage allegedly "engaged in deceptive business practices with respect to mortgage loan servicing, assignments of notes and mortgages, [and] foreclosure of residential properties" (*Id.* at ¶ 85 [SCUTPA]); and
- CitiMortgage allegedly misrepresented "instructions regarding how, when, for what amount, and to whom to make payments" (*Id.* at ¶ 112 [Negligent Misrepresentation]).

Undoubtedly, each of the above claims relate specifically to the servicing of Plaintiff's loan, specific duties and obligations under the Note and Mortgage, and CitiMortgage's authority to foreclose. Accordingly, each claim asserted in Plaintiff's Complaint bears a logical relationship to the foreclosure and, thus, is a compulsory counterclaim under the logical relationship test. *See, e.g., Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 614, 682 S.E.2d 498, 502 (Ct. App. 2009) (holding that the "fraud counterclaim arises out of the same mortgage transaction," and, therefore "the Whites' [defendants] fraud counterclaim is compulsory"). As stated by the Master in the Order denying Plaintiff's Rule 60(b) motion, any "statement allegedly to be fraudulent (*i.e.*, that Drexler was not in

default and had somehow reinstated) should have inspired Drexler to come forward to defend the case and protect her property.” (Ex. E to Def.’s Mot. at p.4.) Therefore, Plaintiff was required to dispute the servicing of her loan, the application of payments, and CitiMortgage’s standing to foreclose in the previously-filed foreclosure action.

Plaintiff’s failure to assert the compulsory claims in the foreclosure action should not be rewarded by this Court, but instead, the Court should apply the doctrine of *res judicata* and bar her claims. *Res judicata* applies where there is “1) a final, valid judgment on the merits; 2) identity of the parties; and 3) the second action must involve matters properly included in the first suit.” *Stone v. Roadway Express, Employer*, 367 S.C. 575, 580, 627 S.E.2d 695, 697–98 (2006). Each of these elements is met in this case. First, Plaintiff admits that a Judgment of Foreclosure and Sale was issued in the foreclosure action. (See Compl. ¶ 38.) Further supporting the first element, the Order for Disbursement of Surplus Funds specifically states that the case is “ended and the file closed.” (Ex. D, ¶ 3.) Therefore, a final, valid judgment on the merits existed in the foreclosure action. Second, there is identity of the parties, as CitiMortgage instituted the foreclosure action against Plaintiff and she now seeks to bring what should have been compulsory counterclaims against CitiMortgage, joining the third-party purchaser of the property and BB&T. Third, the current litigation, as described above, includes claims that Plaintiff could have and should have raised in the prior foreclosure action. Thus, all of the elements of *res judicata* are met in this case and Plaintiff’s Complaint should be dismissed, with prejudice.

Essentially, to allow Plaintiff to proceed on the claims outlined in the Complaint would usurp the policy and judicial efficiency behind Rule 13(a), SCRPC and reward

Plaintiff for her dilatory conduct in the foreclosure action. Accordingly, under Rule 13(a) and the doctrine of *res judicata*, Plaintiff's failure to raise the defenses and compulsory claims in the foreclosure action bars her from recovering under the same claims in the present action. *See Plott v. Justin Enters.*, 374 S.C. 504, 511, 649 S.E.2d 92, 95 (Ct. App. 2007) ("*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of the prior action between those parties. Under *res judicata*, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues *which might have been raised* in the former suit.") (internal citations omitted, emphasis added).

II. Plaintiff's Claims Relying on Allegations of Improper Application of Payments, Alleged Reinstatement of the Loan, and CitiMortgage's Standing to Foreclose are Barred by Collateral Estoppel.

In addition to being barred by the doctrine of *res judicata*, Plaintiff's claims as to improper servicing, standing to foreclose, and alleged reinstatement of the loan were all heard and decided by the Master during the hearing on Plaintiff's Rule 60(b) motion in the foreclosure action. "Collateral estoppel prevents a party from re-litigating an issue in a subsequent suit which was actually and necessarily litigated and determined in the prior action." *Aaron v. Mahl*, 381 S.C. 585, 592, 674 S.E.2d 482, 486 (2009). An issue is deemed precluded by collateral estoppel when the moving party establishes that "the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). Each of the above-listed elements is satisfied in this case as to each claim.

First, Plaintiff's Rule 60(b) motion sought to set aside and vacate the Master's Judgment of Foreclosure and Sale, set aside and vacate the Master's Deed, and a declaration that the loan is current. (*See* Ex. D to Def.'s Mot.) Likewise, in this action, Plaintiff seeks to set aside the Master's Sale (Compl. ¶¶ 54–57), void or cancel the Master's Deed upon sale (*Id.* at ¶¶ 58–60), and damages, under various theories, for CitiMortgage's alleged failure to properly credit payments to the loan (*Id.* at ¶¶ 44–47[Negligence], 48–53[Fraud], 69–73[Breach of Contract], 74–78 [Implied Covenant of Good Faith and Fair Dealing], 79–81[Unjust Enrichment], 82–90 [SCUTPA], 91–95 [Quiet Title], 96–103 [Slander of Title], 104–109 [Tortious Interference], 110–116[Negligent Misrepresentation]). Those issues related to CitiMortgage's alleged failure to properly credit payments form the bases for all claims asserted by Plaintiff in the Complaint. However, the Master found that “Drexler's testimony—that the payments made would reinstate her mortgage—are not supported by the record.” (Ex. E to Def.'s Mot. at p.2.) Further, the Master held that CitiMortgage had standing to pursue the foreclosure and that any allegedly incorrect statements in the Foreclosure Complaint should have been litigated during the foreclosure proceedings. (*See id.* at p.4–5.) Ultimately, the Master held that the “facts and law are overwhelmingly against Drexler” and enforced the “Order of Judgment of Foreclosure and Sale and the resulting sale to the third party purchaser.” (*Id.* at p.6.) Because these issues were previously heard and ruled on by the Master, the issues were “actually litigated in the prior action,” thereby satisfying the first element of collateral estoppel.

Second, the issues addressed in the second action must be “directly determined” by the court in the prior action. As noted above, Plaintiff already challenged the

servicing of the loan, the application of payments, the validity of the foreclosure judgment, and CitiMortgage's standing to foreclose by way of her Rule 60(b) motion. The Master heard her arguments, directly determined that the "record demonstrates that she defaulted and did not timely reinstate," and ruled in CitiMortgage's favor. (*Id.* at p.5.) Accordingly, these issues raised for a second time in the current litigation were directly determined by the Master.

Finally, the issues determined were necessary to support the judgment, thereby satisfying the third element of collateral estoppel. Plaintiff challenged the foreclosure judgment, the resulting sale, and CitiMortgage's standing to foreclose, claiming she timely made her payments and the loan was reinstated. The Master heard these arguments and ruled that the "Order of Judgment of Foreclosure and Sale and the resulting sale to the third party purchaser" must be enforced. (*Id.* at p.6.) If the Master ruled that the evidence supported Plaintiff's argument that her loan should have been reinstated or that CitiMortgage lacked standing to pursue foreclosure, the foreclosure judgment would have been reversed. It is axiomatic then that the issues litigated before the Master were necessary to support the judgment.

Having satisfied each element of collateral estoppel, CitiMortgage requests dismissal of all of Plaintiff's claims since the claims stem from improper servicing, standing to foreclose, and alleged reinstatement of the loan. These issues were actually litigated and directly determined in CitiMortgage's favor in the previous foreclosure action. *See Carolina Renewal*, 385 S.C. at 554, 684 S.E.2d at 782. Therefore, Plaintiff cannot now pursue her claims related to these previously-decided issues in this Court. *See State v. Bacote*, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998) ("The doctrine of

collateral estoppel is intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the notion that it is unfair to permit a party to relitigate an issue that has already been decided.”).

III. Plaintiff's Claims are an Improper Attempt to Relitigate the Judgment of Foreclosure and Sale in the Court of Common Pleas for the Ninth Judicial Circuit.

Plaintiff seeks a declaration from this Court that “the foreclosure of Plaintiff’s residence was wrongful,” issuance of an “[o]rder cancelling all Master’s Deeds Upon Sale,” an order “vacat[ing] the Master’s Deeds,” and an order to “vacate and set aside the initial foreclosure sale and any subsequent sales.” (Compl. WHEREFORE clause, ¶¶ 1–4.) Essentially, this requested relief and the corresponding claims establish a misguided attempt by Plaintiff to appeal a final foreclosure order to this Court in a second effort to set aside the foreclosure judgment and sale. This is clearly an improper effort by Plaintiff to sidestep the foreclosure court’s Judgment of Foreclosure and Sale and its prior ruling on her Rule 60(b) motion. As such, Plaintiff’s Complaint should be dismissed.

In the prior foreclosure action, a Judgment of Foreclosure and Sale was entered on October 29, 2008, and the property sold on December 3, 2008. A foreclosure judgment is a final order that may only be appealed to the Court of Appeals. *See Peoples Fed. Sav. & Loan Ass’n v. Edwards*, 286 S.C. 475, 476, 334 S.E.2d 290, 291 (Ct. App. 1985) (noting that “[t]his is a direct appeal from an order of a master in equity in an action to foreclose on a mortgage”); *LaSalle Bank Nat’l Ass’n v. Davidson*, 386 S.C. 276, 277, 688 S.E.2d 121, 121 (2009) (noting that the action began as an “appeal from a judgment in a mortgage foreclosure proceeding”). In direct contravention of this well-established rule, Plaintiff attempts to use her Complaint, filed *two years after* the foreclosure judgment, to

“appeal” the final Judgment of Foreclosure and Sale to this Court. This is patently improper. Plaintiff cannot supersede the former adjudication of the foreclosure action by filing suit in this court. Therefore, these claims must be dismissed.

Additionally, as noted above, Plaintiff moved to set aside the foreclosure judgment and sale in the prior action by filing a Rule 60(b) motion. (*See* Ex. D to Def.’s Mot.) That motion was heard and *denied* by the Master in the foreclosure action. In her affidavit in support of the motion, Plaintiff made identical arguments to those she is making in the current litigation: alleged erroneous servicing and application of payments for reinstatement. These arguments were heard and *rejected* by the Master at a hearing on March 18, 2009. In the Order, filed on June 10, 2009, the Master held that “Drexler’s testimony—that the payments she made would reinstate her mortgage—are not supported by the record[.]” (Ex. E to Def.’s Mot. at p.2.) Further, as to Plaintiff’s allegations that the Foreclosure Complaint included erroneous statements, the Master noted that any erroneous allegations in the Foreclosure Complaint, *if any existed*, resulted in only intrinsic fraud for which Rule 60(b)(3) does not provide relief. (*See id.* at pp.3–4.) The order stated that any alleged misstatement related to her default on the loan “should have inspired Drexler to come forward to defend the case and protect her property.” (*Id.* at p.4.) However, not only did she fail to appear, the “record demonstrates that she *defaulted [on her loan] and did not timely reinstate.*” (*Id.* at p.5 (emphasis added).) Thus, the Master held that the “facts and the law are overwhelmingly *against* Drexler,” denied her motion, and enforced the Order of Judgment of Foreclosure and Sale and the resulting sale to Stonegate. (*Id.* at p.6 (emphasis added).) The foreclosure action was

ultimately disposed of on August 7, 2009, when the surplus funds were disbursed and the Master ordered the “case ended and the file closed.” (Ex. D, ¶ 3.)

Plaintiff now seeks the same relief, and relies on the same arguments that were rejected by the Master, to support her claim to set aside the judgment and sale and request for damages. Plaintiff’s appropriate course of action to dispute the foreclosure judgment and sale was by way of a Rule 60(b) motion, which was previously heard and *denied* by the Master. Because Plaintiff’s motion to set aside the Master’s sale was previously decided in the foreclosure action, it is inappropriate for Plaintiff to seek to relitigate that issue in this case.² Accordingly, CitiMortgage respectfully requests that this Court dismiss Plaintiff’s claim to set aside the Master’s sale.

IV. Plaintiff’s Negligence and Negligent Misrepresentation Claims are Barred by the Economic Loss Rule.

In addition to being barred by the doctrine of *res judicata*, and collateral estoppel, Plaintiff’s claims for negligence and negligent misrepresentation are also barred by the economic loss rule. Plaintiff alleges that CitiMortgage owed a duty to Plaintiff “to exercise reasonable care and skill to maintain proper and accurate loan records and to discharge and fulfill other incidents attendant to the maintenance, accounting and servicing of loan records, including, but not limited [to], accurate crediting of payments

² Plaintiff could have appealed the denial of the Rule 60(b) Motion after receipt of the Order entered on June 10, 2009. See *Stearns Bank Nat’l Ass’n v. Glenwood Falls, LP*, 375 S.C. 423, 425, 653 S.E.2d 274, 275 (2007) (noting that the respondent “filed an appeal on the merits of the 60(b) motion. That appeal has been decided by the Court of Appeals, which affirmed [denial]”). Rule 203(b)(1) of the South Carolina Appellate Court Rules provides that a party must appeal an adverse order *within 30 days* of receipt of the written notice of the entry of the order. In this case, Plaintiff lost her right to appeal the final order when she failed to file a Notice of Appeal on or before July 10, 2009. She is now attempting to circumvent the appellate court rules and the authority of the Court of Appeals and relitigate the same issues here, *two years later*. Plaintiff should not be rewarded for failing to timely file a Notice of Appeal and continue with this action. If this Court allows Plaintiff to proceed with this litigation, it is opening the door for all individuals who sit on their rights and fail to defend a foreclosure action, fail to timely file a notice of appeal following an adverse ruling, or both, to continue litigation that was fully and fairly litigated to judgment in the first instance.

made by Plaintiffs [sic].” (Compl. ¶ 45.) Plaintiff further alleges that CitiMortgage made certain negligent representations to her regarding “what amount and to whom to make payments.” (*Id.* at ¶ 111.) Pursuant to the economic loss rule, these claims fail.

Under South Carolina law, the economic loss rule bars recovery in tort for purely economic losses when the alleged damages arise from the purported breach of contractual duties. *See Kennedy v. Columbia Lumber & Mfg. Co.*, 299 S.C. 335, 347, 384 S.E.2d 730, 737 (1989). “The purpose of the doctrine is to stem not only unlimited liability by limiting parties to the terms of their agreements, but also to serve as a demarcation line between contract and tort.” *Myrtle Beach Pipeline Corp. v. Emerson Elec. Co.*, 843 F. Supp. 1027, 1049 (D.S.C. 1993), *aff’d*, 46 F.3d 1125 (4th Cir. 1995). In this action, Plaintiff’s negligence and negligent misrepresentation claims are improper attempts to disguise a purely contractual dispute—allegedly improper servicing—as tort claims.

In this case, the parties contracted together in the Note and Mortgage to differentiate between the duties and responsibilities of the Plaintiff and those of CitiMortgage relating to payments on the loan. Because Plaintiff cannot establish a duty owed by CitiMortgage arising outside the contractual relationship, the negligence claim fails as a matter of law. *See Simmons v. Danhauer & Assocs., LLC*, No. 8:08-03819, 2010 U.S. Dist. LEXIS 112483, at *6 (D.S.C. Oct. 21, 2010) (“A breach of a duty which arises under a contract must be redressed under contract, and a tort claim will not lie unless there is a breach of a duty arising independently of any contract duties between the parties.”); *Eaton Corp. v. Trane Carolina Plains*, 350 F. Supp. 2d 699, 701 (D.S.C. 2004) (holding that the “economic loss rule bars a negligence action ‘where duties are created solely by contract’”); *see also Sharpe v. Household Fin. Corp. II*, No. 8:09-cv-02784,

2010 U.S. Dist. LEXIS 105235, at *8–9 (D.S.C. Sept. 30, 2010) (dismissing a negligence claim as “barred by the economic loss doctrine because they [Plaintiffs] have not alleged the existence of any duty that did not arise from their contractual relationship”); *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 55, 463 S.E.2d 85, 88 (1995) (stating “a negligence action will not lie when the parties are in privity of contract”). Based on the foregoing, the economic loss rule clearly bars Plaintiff’s negligence and negligent misrepresentation causes of action and the claims should be dismissed, with prejudice.

V. Plaintiff Lacks Standing to Challenge the Mortgage Assignment.

Plaintiff seeks to “void or cancel” the mortgage assignment, claiming it was “fraudulently executed.” (Compl. ¶¶ 61–63.) This claim, in addition to being barred by the doctrine of *res judicata*, also fails because Plaintiff is the borrower, not a party to the assignment and, therefore, lacks standing to challenge the same.

It is well-established that to have standing, a party “generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975). Mortgage assignments are, essentially, contracts between the prior mortgagee and the current mortgagee. The borrower is not a party, nor a third-party beneficiary to the mortgage assignment. The borrower’s interest is limited to the debt, which is evidenced by the Note and secured by the Mortgage. Even in light of these facts, Plaintiff seeks to have the assignments declared void.

Courts considering this issue have consistently held that a borrower lacks standing to challenge the assignment. *See, e.g., Williams v. U.S. Bank Nat’l Ass’n*, No. 10-14967,

2011 U.S. Dist. LEXIS 62047, at *3-4 (E.D. Mich. June 9, 2011) (“To the extent Plaintiffs challenge any assignment from MERS to U.S. Bank, Plaintiffs lack standing to do so because they were not a party to those assignments.”); *Livonia Props. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC*, 339 Fed. Appx. 97, 102 (6th Cir. 2010) (stating that “even if there were a flaw in the assignment, Livonia [the borrower] would not have standing to raise that flaw to challenge Farmington’s chain of title. As recognized by the district court, there is ample authority to support the proposition that a litigant who is not a party to an assignment lacks standing to challenge that assignment”) (internal citation omitted); *Blackford v. Westchester F. Ins. Co.*, 101 F. 90, 91 (8th Cir. 1900) (“As long as no creditor of the assignor questions the validity of the assignment, a debtor of the assignor cannot do so.”). Additionally, the assignment does not impact the rights and duties under the Note. See *Livonia Prop. Holdings, LLC v. 12840-12976 Farmington Rd., LLC*, 717 F. Supp. 2d 724, 737 (E.D. Mich. 2010) (“After the assignments, Borrower’s rights and duties under the Loan Documents remain the same, the only change being to whom those duties are owed.”). Thus, the “[b]orrower cannot [] step into the shoes of an assignor to assert its contract rights.” *Id.*

Based on the foregoing, Plaintiff lacks standing to pursue her claim to void or cancel the mortgage assignment. Therefore, CitiMortgage requests dismissal of his cause of action, with prejudice.

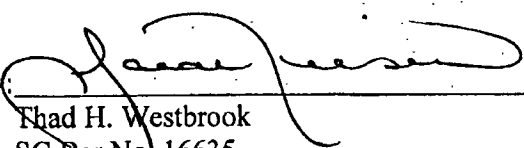
CONCLUSION

All of Plaintiff’s claims are barred by the doctrine of *res judicata*. As noted above, each claim should have been asserted as a compulsory counterclaim or a defense in the foreclosure action because the current claims relate directly to the servicing of the

loan, the terms of the Note and Mortgage, and CitiMortgage's authority to foreclose on the property. Accordingly, Plaintiff's failure to assert these claims and defenses in the prior foreclosure action precludes her from litigating the same claims in this Court. Additionally, all of Plaintiff's claims are similarly precluded by collateral estoppel. In filing her Rule 60(b) motion in the prior foreclosure action, Plaintiff submitted the underlying issues and claims presently before this Court to the Master. The Master ruled in CitiMortgage's favor on these issues in an Order issued on June 10, 2009. Therefore, each claim which relies on improper servicing or contesting the Judgment of Foreclosure and resulting sale, is precluded under collateral estoppel. These underlying issues were previously decided in CitiMortgage's favor and it would be inequitable and improper to relitigate the same issues here.

Moreover, several of Plaintiff's claims fail for independent reasons in addition to being barred by *res judicata* and precluded by collateral estoppel. First, Plaintiff's claims to set aside the Master's Sale and Judgment of Foreclosure and Sale should be dismissed because Plaintiff's proper avenue for review of the foreclosure judgment and resulting sale was by appeal to the South Carolina Court of Appeals, not to this court. Second, Plaintiff's claims for negligence and negligent misrepresentation are additionally barred by the economic loss rule, and are not proper in this purely contractual dispute. Finally, Plaintiff's claim to void the mortgage assignment fails because Plaintiff lacks standing to challenge a mortgage assignment since she is neither a party to the contract, nor a third-party beneficiary. Thus, for the reasons stated above and those outlined in its Motion, CitiMortgage respectfully requests that this Court dismiss Plaintiff's Complaint, with prejudice.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Thad H. Westbrook

SC Bar No. 16635

E-Mail: thad.westbrook@nelsonmullins.com

Sarah B. Nielsen

SC Bar No. 78384

E-Mail: sarah.nielsen@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for CitiMortgage, Inc.

Columbia, South Carolina

10/10, 2011

EXHIBIT A

1 STATE OF SOUTH CAROLINA

2

3 COUNTY OF BERKELEY

4

5 CitiMortgage, Inc.,

6

7

Plaintiff,

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

IN THE COURT OF COMMON PLEAS

DOCKET NO. 08-CP-08-1258

RECORD OF HEARING

Deficiency Judgment Waived

Angela M. Drexler; and any other Heirs at Law or
Devises of Arthur E. Antisdel, Deceased, their
heirs, Personal Representatives, Administrators,
Successors and Assigns, and all other persons
entitled to claim through them; all unknown
persons with any right, title or interest in the real
estate described herein; also any persons who may
be in the military service of the United States of
America, being a class designated as John Doe;
and any unknown minors or persons under a
disability being a class designated as Richard Roe;
Washington Mutual Home Loans, Inc. f/k/a Fleet
Real Estate Funding Corp.

Defendant(s).

(011654-01799)

Pursuant to the Order of Reference granted in the above entitled cause, a reference was
held herein on October 29, 2008 at 09:30 AM, before The Honorable Robert E. Watson.

Plaintiff's attorney called attention to the filing of the original Summons and Notice and
Complaint in the Office of the RMC/ROD for Berkeley County on May 7, 2008. The amended Lis
Pendens was filed on May 21, 2008 and an amended Summons and Notice and Complaint on May 21,
2008, and to the affidavit(s) of service on the Defendant(s) filed therein.

Also called attention to the filing of the original Lis Pendens in said Clerk's Office on
May 7, 2008.

Also called attention to the filing of the affidavit showing the Defendant(s) Angela M.
Drexler and Washington Mutual Home Loans, Inc. f/k/a Fleet Real Estate Funding Corp are in default and
that the Defendant(s) Angela M. Drexler is not in the Military Service of the United States of America, as
contemplated under The Servicemembers Civil Relief Act, 50 U.S.C. § 501 et. Seq.

Also called attention to the Order of Reference of record herein issued in Berkeley
County, wherein the above entitled cause was referred to Robert E. Watson, as Master in Equity "to take
the testimony arising under the pleadings and to make his findings of fact and conclusions of law and

1 with authority to enter final judgment in the case. An appeal from the final judgment so entered shall be
2 made directly to the South Carolina Court of Appeals pursuant to Rule 203(d) of the SCACR, effective
3 June 1, 1999."

4 The signing of the testimony, as required under Statute, was waived.

5 WHEREUPON The signing of the testimony, as required under Statute, was waived.

6 WHEREUPON, Plaintiff's attorney, being duly sworn, testified as follows:

7 I am one of the attorneys for the Plaintiff in this action.

8 Notice of the hearing has been mailed to all defendants in this action.

9 I offer the Certificate of Service in evidence.

10 Certificate of Mailing identified, offered and received in evidence as Exhibit "1".

11 From the original records in my possession, from the complaint herein and from
12 examination of the records in the office of the Clerk of Court for Berkeley County, I find that on July 9,
13 1998, the Defendant(s) Arthur E. Antisdel and Angela M. Drexler gave a certain written promissory Fixed
14 Rate Note in the principal sum of \$84,850.00 together with interest thereon from date at the rate of 8.5%
15 per annum, said principal and interest being payable as follows: In monthly installments of \$652.42,
16 commencing September 1, 1998.

17 I offer the Fixed Rate Note in evidence.

18 Fixed Rate Note identified, offered and received in evidence as Exhibit "2".

19 I call attention to the provisions of the Fixed Rate Note with reference to default.

20 I also call the Court's attention to the provisions in the Fixed Rate Note with reference to
21 payment of costs and attorney's fees.

22 Arthur E. Antisdel and Angela M. Drexler gave a certain written purchase money first
23 Mortgage unto Compass Mortgage Inc. which purchase money first Mortgage contains the same terms
24 and provisions as the Fixed Rate Note just offered in evidence and conveyed by way of purchase money
25 first Mortgage the identical property described in the complaint in this action, which property is situate in
26 Berkeley County, South Carolina.

27 Thereafter, on July 13, 1998, the purchase money first Mortgage was recorded in the
28 office of the Clerk of Court/RMC for Berkeley County, South Carolina, in Mortgage Book 1379 at Page
29 57. This mortgage was subsequently assigned to Homestead Funding Corporation by assignment dated
30 July 9, 1998 and recorded July 13, 1998 in Book 1379 at Page 68; subsequently assigned to ABN AMRO
31 Mortgage Group, Inc. by assignment dated March 8, 2001 and recorded on March 26, 2001 in Book 3423
32 at Page 49. CitiMortgage, Inc. is successor by merger to ABN Amro Mortgage Company, Inc.
33 Subsequently, Arthur E. Antisdel died intestate on July 14, 2004, leaving the subject property to his/her
34 heirs or devisees.

1 This purchase money first Mortgage constitutes a purchase money first lien covering the
2 property therein described.

3 I offer the purchase money first Mortgage as evidence.

4 Purchase money first Mortgage identified, offered and received in evidence as Exhibit
5 "3".

6 I offer the copy of the Assignment(s) as evidence.

7 Assignment(s) identified, offered and received in evidence as Exhibit "4".

8 Upon examination of the records in said Clerk of Court's/ROD'S office, it appeared there
9 were no persons other than the parties to this action having any liens against the subject property, by way
10 of assessment or otherwise, as of the date of filing the notice of pendency of this action.

11 The monthly installments as provided for in said Fixed Rate Note and purchase money
12 first Mortgage were not paid in accordance with the terms and conditions thereof, and, therefore, the
13 Fixed Rate Note and purchase money first Mortgage are in default; and, as a result thereof, the Plaintiff
14 has elected to declare the entire unpaid amount immediately due and payable.

15 Demand was made upon the Defendants but payment has not been received.

16 After all payments received by the Plaintiff have been credited to the subject loan, there is
17 due and owing on the Plaintiff's Fixed Rate note and purchase money first mortgage as of this date, the
18 principal sum of \$70,581.19, together with interest thereon from November 1, 2007, at the rate of 8.5%
19 per annum as of October 29, 2008, amounting to \$5,999.40, plus advances (escrow advances, corporate
20 charges and other charges) of \$648.47, and late charges in the amount of \$380.26, making the total due
21 Plaintiff in the amount of \$77,609.32, plus costs of collection and attorney fees as provided by the Fixed
22 Rate Note and purchase money first Mortgage.

23 Costs that have been incurred in the litigation of this case are in the amount of \$1,687.57
24 plus a title abstract search in the amount of \$425.00.

25 Plaintiff moves to dismiss the Defendant, Washington Mutual Home Loans, Inc. f/k/a
26 Fleet Real Estate Funding Corp. from its action.

27 The Defendant(s) claim(s) or may claim a lien upon or legal interest in the subject
28 property and in the event there is a surplus from the sale of the subject property, such Defendant(s) may
29 present any such lien or legal interest at a hearing subsequently to the sale, in accordance with Rule 71(c)
30 South Carolina Rules of Civil Procedure. The said Defendant(s) and such liens or legal interest are as
31 follows:

32 a. Angela M. Drexler and any unknown Heirs or Devisees of Arthur E. Antisdel,
33 Deceased, including any persons who may be in the military service of the United States of America,
34 being a class designated as John Doe; and any unknown minors or persons under a disability being a

1 class designated as Richard Roe, by virtue of any interest claimed under the law of intestate succession
2 (S.C. Code Section 62-2-109) or under decedent's will.

3 With respect to attorney fees, in view of the potential liabilities inherent in a real property
4 matter, the attendant responsibilities, and the size of the mortgage debt, I think that a reasonable attorney's
5 fee would be \$4,500.00. Representation of the Plaintiff has been undertaken by the firm of Rogers
6 Townsend & Thomas, PC. The attorneys primarily involved in this representation have been Samuel C.
7 Waters, Cheryl H. Fisher, Reginald P. Corley, Jennifer W. Rubin, Ellie C. Floyd, Michael P. Morris, Eve
8 M. Stacey, Mary R. Powers, Robert P. Davis, Timothy B. Killen, and William S. Koehler. Our law firm
9 was engaged by the Plaintiff to foreclose the mortgage as expeditiously as possible, given the detriment to
10 Plaintiff's equity position as a direct result of increasing losses from the running of interest. Plaintiff must
11 also comply with investor requirements, government or private insuring agreements. Upon receipt of the
12 case file, the title was examined to identify all parties having or claiming any interest in the subject real
13 estate. My fellow counsel, our staff, and I have been responsible for the preparation of the following
14 pleadings and other documents:

- 15 1. Lis Pendens and any amendment thereto
- 16 2. Summons and Complaint and any amendment thereto
- 17 3. Affidavits and proposed Orders for publication
- 18 4. Affidavit of Default
- 19 5. Consent(s) to Order of Reference
- 20 6. Order of Reference
- 21 7. Notice(s) of Hearing
- 22 8. Record (Transcript) of Testimony
- 23 9. Proposed Judgment of Foreclosure and Sale
- 24 10. Notice of Sale
- 25
- 26

27 Additionally, we have been responsible for the preparation and service of the pleadings
28 upon each defendant personally or by statutory/substitute service; obtaining reinstatement and payoff
29 figures and payment histories were provided as requested or required; and scheduling and attending the
30 hearing in this matter.

31 Future responsibilities include forwarding copies of the Judgment to appearing
32 defendants, obtaining bidding instructions from Plaintiff or its designee, representing Plaintiff at the sale
33 or arranging for such representation, preparing an Order of Sale or Report on Sale and Disbursements and
34 Order Confirming Sale, and preparing the Foreclosure Deed and any other documents necessary in this
35 particular action.

36 In addition to the time expended to date in prosecution of this action, we anticipate a
37 minimum additional four hours after the hearing. Moreover, depending upon the interest shown by
38 defendants, third parties, or counsel for either and the inherent negotiations required thereby, other time

1 may also be committed to the completion of the case. In that regard, I would reserve the right to re-visit
2 the question of attorney fees should the action proceed in an unexpected way.

3 In regard to the professional standing of counsel, I would call the court's attention to the
4 fact that:

5 I. Mr. Waters concentrates his practice in the areas of foreclosure, bankruptcy and
6 real estate. He was formerly counsel for eight years to the Loan Guaranty Division, Department of
7 Veterans Affairs for the District of South Carolina. Mr. Waters regularly participates as faculty for
8 continuing legal education programs sponsored by the South Carolina Bar and by private organizations.
9 Since 1984, Mr. Waters has been in the private practice of law with an emphasis on foreclosures of
10 residential mortgage loans insured by the Department of Housing and Urban Development, the
11 Department of Veterans Affairs, Federal National Mortgage Association and Federal Home Loan
12 Mortgage Corporation as well as commercial private mortgage insurers.

13 II. Since 1991, Ms. Fisher has concentrated her practice in the areas of foreclosure
14 and real estate. She has presented multiple C.L.E.'s including one entitled "Focusing on Liens Which
15 Affect Real Property.

16 III. Mr. Corley concentrates his practice in the areas of foreclosure and real estate.
17 Since his admission to the bar in 2001, Mr. Corley has represented lenders or servicers in foreclosure and
18 other related actions throughout the state of South Carolina.

19 IV. Ms. Rubin was admitted to the South Carolina Bar in 1999 and served as a law
20 clerk for Circuit Judge H. Dean Hall for one year. Since 2000, Ms. Rubin has been employed with
21 Rogers Townsend & Thomas, P.C., in general litigation, construction law, and mortgage foreclosures
22 throughout South Carolina.

23 V. Ms. Floyd has concentrated her practice in the areas of foreclosure and real estate
24 since her admission to the bar in 2001. Since 2002, she has represented lenders and servicers in
25 foreclosure actions throughout South Carolina.

26 VI. Mr. Morris concentrates his practice in the areas of foreclosure, real estate and
27 bankruptcy. Since his admission to the bar in 2005, Mr. Morris has represented lenders or servicers in
28 foreclosure and other related actions throughout the state of South Carolina.

29 VII. Ms. Stacey was admitted to the South Carolina Bar in 1979. She has spent most
30 of the ensuing years in government relations. She has experience in handling Real Estate title Issues.
31 Since coming to Rogers Townsend & Thomas P.C. she has focused exclusively on representation of
32 lenders and servicers in foreclosure actions throughout South Carolina.

33 VIII. Ms. Powers was admitted to the South Carolina Bar in 2001. After about one
34 year with the SC Employment Security Commission, she then represented creditors in bankruptcy,

1 foreclosure and general collections. She also spent a brief period representing debtors in bankruptcy but
2 now concentrates her practice on representing creditors in foreclosure and bankruptcy matters.

3 IX. Mr. Davis has concentrated his practice in the areas of real estate and foreclosure
4 since his admission to the bar in 2005. His experience includes closing mortgage loan transactions and
5 representing lenders and servicers in foreclosure actions throughout South Carolina.

6 X. Mr. Killen was admitted to the South Carolina Bar in 2004. He concentrates his
7 practice in the areas of foreclosures and real estate. Since 2006, Mr. Killen has represented lenders and
8 servicers in foreclosure and other related actions throughout the state of South Carolina.

9 XI. Mr. Koehler was admitted to the South Carolina bar in 2006. He concentrates his
10 practice in the areas of foreclosures and real estate. Since being admitted to the bar, Mr. Koehler has
11 represented lenders and servicers in foreclosures and related bankruptcies through out the state of South
12 Carolina.

13 Furthermore, this fee is in line with the fee customarily charged by counsel with similar
14 experience in this particular locality. Also, the Plaintiff's attorneys have achieved the beneficial result of
15 a prompt foreclosure of the mortgage. The Plaintiff has specifically waived any right to a personal or
16 deficiency judgment.

17 There are no paving or other special assessments against the subject property. Taxes
18 have been paid through 2007.

19 We would ask that the purchase money first mortgage be foreclosed, that the property be
20 sold at public auction in accordance with law, that the sale be made subject to any liens for taxes and any
21 special assessments of record against such property; also, subject to payment by the purchaser of interest
22 at the respective note rates per annum on the balance of the bid from the date of sale to date of
23 compliance with the bid; also, subject to any existing easements or restrictions of record; and also subject
24 to payment by the purchaser for preparation of the deed and for recording taxes.

25 HEARING ADJOURNED.

26 Moncks Corner, South Carolina

27 October 29, 2008 at 09:30 AM.

28

EXHIBIT B

NOTICE OF SALE

BY VIRTUE of a decree heretofore granted in the case of: CitiMortgage, Inc. vs. Angela M. Drexler; and any other Heirs at Law or Devisees of Arthur E. Antidel, Deceased, their heirs, Personal Representatives, Administrators, Successors and Assigns, and all other persons entitled to claim through them; all unknown persons with any right, title or interest in the real estate described herein; also any persons who may be in the military service of the United States of America, being a class designated as John Doe; and any unknown minors or persons under a disability being a class designated as Richard Roe; Washington Mutual Home Loans, Inc. f/k/a Fleet Real Estate Funding Corp. , C/A No. 08-CP-08-1258, The following property will be sold on December 3, 2008, at 11:00 AM at the Berkeley County Courthouse to the highest bidder:

All that piece, parcel or lot of land with the buildings and improvements thereon, situate lying and being near Ladson, South Carolina, in Berkeley County, South Carolina, shown and designated as Lot 74, Block F, Tall Pines Plantation Subdivision, Section Three, on a plat dated January 19, 1977 made by Harold J. Leamond, P.E. and L.S., and recorded in the Office of the Clerk of Court for Berkeley County on January 24, 1977 in Plat Book W. Page 153.

Derivation: Book 1379 at Page 53

LADSON, SC 29456

233-14-01-024

SUBJECT TO ASSESSMENTS, BERKELEY AD VALOREM TAXES, EASEMENTS AND/OR RESTRICTIONS OF RECORD, AND OTHER SENIOR ENCUMBRANCES.

TERMS OF SALE: A 5% cash deposit is required. The deposit will be applied towards the purchase price unless the bidder defaults, in which case the deposit will be forfeited. If the successful bidder fails, or refuses, to make the required deposit on the day of sale or fails or refuses to comply with the bid within 30 days, then the property will be resold at the bidder's risk. No personal or deficiency judgment being demanded, the bidding will not remain open after the date of sale, but compliance with the bid may be made immediately. The successful bidder will be required to pay interest on the amount of the bid from date of sale to date of compliance with the bid at the rate of 8.5% per annum. For complete terms of sale, see Judgment of Foreclosure and Sale filed with the Berkeley County Clerk of Court at C/A #08-CP-08-1258.

NOTICE: The foreclosure deed is not a warranty deed. Interested bidders should satisfy themselves as to the quality of title to be conveyed by obtaining an independent title search prior to the foreclosure sale date.

Samuel C. Waters, Esq.

Attorney for Plaintiff

P.O. Box 100200

Columbia, SC 29202-3200

(803) 744-4444

011654-01799

Website: www.rtt-law.com (see link to Resources/Foreclosure Sales)

Robert E. Watson
Robert E. Watson

Master in Equity for

Berkeley County

NOTICE TO PRINTER: Please insert:

____ Once during week commencing _____
____ Once during week commencing _____
____ Once during week commencing _____

EXHIBIT C

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
CITIMORTGAGE, INC.,

PLAINTIFF,

-VERSUS-

ANGELA M. DREXLER, et al.

DEFENDANT.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NUMBER: 2008-CP-08-1254

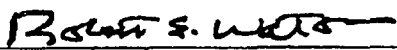
AMENDED NOTICE OF
SURPLUS FUNDS HEARING

2009 JUN 18 PM 12:35
CLERK OF COURT
BERKELEY COUNTY, SC

TO: ROGERS TOWNSEND & THOMAS
WASHINGTON MUTUAL HOME LOANS, INC.
W. BROOK STYLES, ESQUIRE

Please take notice that the Court is holding Surplus Funds in the amount of **\$1,841.15** in the above referenced action. A hearing to determine the order of priorities has been scheduled for **August 4, 2009 at 2:30 p.m.**, before the Master in Courtroom B of the Berkeley County Courthouse, 300-B California Avenue, Moncks Corner, South Carolina 29461. Pursuant to Rule 71 (c) of the South Carolina Rules of Civil Procedure, any party to the action, or any person who had a lien on the mortgaged premises at the time of the sale, may have a hearing to determine a claim of entitlement to the Surplus Fund. All such claims must be verified or supported by affidavit and must be filed with the Master within forty-five (45) days from the date of the attached statement of receipts and disbursements. If a claim is not filed within the said forty-five (45) day period, the same shall be considered abandoned and waived as to such surplus. The claim must contain the name of the claimant, the nature of the claim, the date the claim arose and a calculation for the amount claimed.

FURTHER, counsel for Plaintiff will notify all parties of record and file the notice.


Robert E. Watson
Berkeley County Master-in-Equity

Moncks Corner, South Carolina

6/17, 2009

EXHIBIT D

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

CitiMortgage, Inc.,

Plaintiff

-versus-

Angela M. Drexler, et al.

Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NUMBER: 2008-CP-08-1258

ORDER FOR
DISBURSEMENT
OF SURPLUS FUNDS

FILED
AUG -7 AM 10:12
CLERK OF COURT
BERKELEY COUNTY, S.C.

THE Order and Report of Receipts and Disbursements filed in this case on January 8, 2009, showed there were surplus funds in the amount of \$1,841.15. Pursuant to Rule 71(C) of the South Carolina Rules of Civil Procedure and after due notice of hearing, a hearing on surplus funds was held on August 4, 2009. A claim of entitlement to surplus funds was filed by Rogers Townsend & Thomas, in the amount of \$737.39.

UPON reviewing the evidence in this action, and for good cause shown:

IT IS HEREBY ORDERED:

1. The Plaintiff is entitled to \$737.39.
2. The Defendant, Angela M. Drexler, is hereby awarded the amount of \$1,103.76.
3. All the funds having been disbursed, I hereby Order the case ended and the file closed.

Robert E. Watson

Robert E. Watson
Master in Equity for
Berkeley County

Moncks Corner, South Carolina

5 day of August 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	CASE NO.: 2011-CP-08-1754
Angela Drexler,	)	
	)	
Plaintiff,	)	PLAINTIFF'S MEMORANDUM
v.	)	IN OPPOSITION TO
	)	CITIMORTGAGE, INC.'S
CitiMortgage, Inc., et al.,	)	MOTION TO DISMISS
	)	PURSUANT TO
Defendants.	)	RULE 12(b)(6), SCRCF
	)	

Plaintiff, Angela Drexler ("Drexler"), by and through her undersigned attorneys, in opposition to CitiMortgage, Inc. ("Citi")'s motion to dismiss pursuant to Rule 12(b)(6), SCRCF, states the following:

INTRODUCTION AND BACKGROUND

As set forth in great detail in Drexler's Complaint, she made all her mortgage payments, yet Citi pursued a foreclosure action against her. Then, despite telling Drexler the foreclosure action would be dismissed if she followed further instructions about making payments, which she did, Citi continued to pursue the foreclosure action and failed to give Drexler notice of the foreclosure hearing. Upon being told, by the winning foreclosure sale bidder, the shocking news that her home had been sold at a foreclosure sale Drexler immediately retained counsel to challenge the foreclosure by way of a motion pursuant to Rule 60(b), SCRCF. As specifically allowed by Rule 60(b) Drexler now brings this independent action to attack the validity of the foreclosure and for damages and other relief pursuant to the multiple causes of action set forth in her Complaint. Citi has not answered the Complaint but instead filed its motion to dismiss pursuant to 12(b)(6) on the purported basis that Drexler's claims in the instant suit were

compulsory counterclaims in the foreclosure action and that therefore the doctrine of *res judicata* bars this suit. The doctrine of *res judicata* does not bar Drexler's suit because the elements of *res judicata* are not met, exceptions to the *res judicata* doctrine apply, and the facts alleged in Drexler's Complaint would entitle her to relief. Citi's motion to dismiss should be denied.

STANDARD OF REVIEW

Citi asks this Court to dismiss Drexler's Complaint pursuant to Rule 12(b)(6), SCRPC. Contrary to Citi's statement that "there is no state law directly on point,"¹ the standard by which South Carolina courts review a 12(b)(6) motion has been explained in numerous cases and is well settled:

Under Rule 12(b)(6), SCRPC, a defendant may make a motion to dismiss based upon the plaintiff's failure to state a claim constituting a cause of action. *Bergstrom v. Palmetto Health Alliance*, 352 S.C. 221, 573 S.E.2d 805 (Ct.App.2002). The trial judge may dismiss the claim if the defendant demonstrates the plaintiff has failed "to state facts sufficient to constitute a cause of action" in the pleadings filed with the court. *Williams v. Condon*, 347 S.C. 227, 232-33, 553 S.E.2d 496, 499 (Ct.App.2001) (quoting Rule 12(b)(6), SCRPC). When considering the motion to dismiss for failure to state a claim, the trial court must base its ruling solely upon the allegations made on the face of the complaint. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995). If the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987); *McCormick v. England*, 328 S.C. 627, 494 S.E.2d 431 (Ct.App.1997). The facts and inferences alleged on the complaint are viewed in the light most favorable to the plaintiff. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987); *Cowart v. Poore*, 337 S.C. 359, 523 S.E.2d 182 (Ct.App.1999); *Mr. G. v. Mrs. G.*, 320 S.C. 305, 465 S.E.2d 101 (Ct.App.1995).

¹ See Citi's Motion to Dismiss at p. 4, n. 2. Citi states that "there is no state law directly on point[]" and therefore "relies on the pleading standard as outlined in..." the federal cases *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Although it would not lead to a different result in this case, the Court should not and need not employ the federal pleading standard announced in the *Twombly* and *Iqbal* cases. South Carolina's pleading standard for purposes of a 12(b)(6) motion is well settled.

Nelson v. QHG of South Carolina, Inc., 354 S.C. 290, 580 S.E. 2d 171, 176 (Ct. App. 2003) *rev'd in part*, 362 S.C. 421, 608 S.E.2d 855 (2005).

"The complaint of a plaintiff 'must be liberally construed in favor of the pleader and sustained if the facts alleged, and the inferences reasonably deducible therefrom, entitle plaintiffs to relief on any theory of the case, even though different from that on which they may have supposed themselves entitled to recover.'" *Evans v. Gunter*, 294 S.C. 525, 528, 366 S.E. 2d 44 (Ct. App. 1988) (quoting *Springfield v. Williams Plumbing Supply Co.*, 249 S.C. 130, 153 S.E.2d 184 (1967) and reversing 12(b)(6) dismissal based on *res judicata* when complaint contained allegations of fraud). *See also Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995) (stating that a 12(b)(6) motion must be denied if the "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case."); *Sloan Constr. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 112-113, 659 S.E.2d 158, 161 (2008) ("The question for the court is whether in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the allegations set forth on the face of the complaint state any valid claim for relief.").

The facts alleged in Drexler's Complaint and inferences drawn therefrom, viewed in the light most favorable to Drexler, would entitle her to relief. Citi does not dispute this. Rather, Citi argues that the doctrine of *res judicata* should bar Drexler's claim. For the reasons discussed below *res judicata* should not bar Drexler's claims and Citi's motion to dismiss should be denied.

THE RES JUDICATA DOCTRINE IS AN AFFIRMATIVE DEFENSE

Citi's motion to dismiss is improper because *res judicata* is an affirmative defense and as such ought to have been pled in Citi's Answer to Plaintiff's Complaint. *See* Rule 8(c), SCRPC (listing affirmative defenses required to be included in a responsive pleading if applicable and designating *res judicata* as such). Citi has failed to Answer and instead filed a 12(b)(6) motion for failure to state a claim. Such a motion is improper insofar as its basis is *res judicata*, an affirmative defense. Furthermore, Citi's motion presents evidence beyond the parties' pleadings, which is improper because Rule 12(b)(6) confines this Court's inquiry to the allegations appearing in the Complaint. "A ruling on a motion to dismiss a claim pursuant to Rule 12(b)(6), SCRPC, must be based solely on the allegations set forth on the face of the complaint." *United Educational Distributors, LLC v. Educational Testing Services*, 350 S.C. 7, 564 S.E.2d 324, 327 (Ct. App. 2002). Plaintiff requests that this Court deny Citi's motion, direct Citi to answer the Complaint, and thereby permit this Plaintiff an opportunity to develop the record through discovery.

THE RES JUDICATA DOCTRINE DOES NOT BAR DREXLER'S CLAIMS

The doctrine of *res judicata*, including its required elements and its exceptions, is complex. It should be noted that in its motion and memorandum incorporated therein Citi does not even cite a single case discussing *res judicata*, offers no discussion of the *res judicata* doctrine whatsoever, makes no attempt to show that the required elements of *res judicata* are met, and offers no analysis of whether the doctrine's exceptions apply. Citi merely makes the bare, conclusory assertion that "[a]ll of Plaintiff's claims must be dismissed under the doctrine of *res judicata* because each of the claims asserted in the Complaint should have been asserted as compulsory counterclaims in the prior

foreclosure action." Citi's Motion to Dismiss at ¶ 10. *See also* Citi's Motion to Dismiss at ¶ 14 ("Plaintiff's claims should have been asserted as compulsory counterclaims in the foreclosure action and she is precluded from asserting them in the present case under the doctrine of *res judicata*.").

Although it may seem counterintuitive to begin with a discussion of the exceptions to the *res judicata* doctrine before discussing the doctrine's required elements, Plaintiff does so because the exceptions are particularly pertinent in this case.

Exceptions to the *Res Judicata* Doctrine

As discussed below, the elements of *res judicata* are not met. But even if the elements of *res judicata* could be met Citi's motion should be denied because this case falls within recognized exceptions to the *res judicata* doctrine. "The application of *res judicata* and collateral estoppel 'may be precluded where unfairness or injustice results, or public policy requires it.'" *Mr. T. v. Ms. T.*, 378 S.C. 127, 138, 662 S.E.2d 413, (Ct. App. 2008) (quoting *Nelson v. QHG*, 354 S.C. 290, 315, 580 S.E.2d 171, 184 (Ct.App.2003) *rev'd in part*, 362 S.C. 421, 608 S.E.2d 855 (2005) citing *State v. Bacote*, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998); *Carrigg v. Cannon*, 347 S.C. 75, 552 S.E.2d 767 (Ct.App.2001)).

The *Nelson* court explained:

There are numerous exceptions to the application of *res judicata* and collateral estoppel. In *Pye*, this court adopted the Restatement (Second) of Judgments section 28, which states:

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

- (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or
- (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
- (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or
- (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or
- (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Nelson v. QHG of South Carolina, Inc., 354 S.C. 290, 580 S.E. 2d 171, 179-80 (Ct. App. 2003) *rev'd in part*, 362 S.C. 421, 608 S.E.2d 855 (2005) (quoting *Pye v. Aycock*, 325 S.C. 426, 437-38, 480 S.E.2d 455, 460-61 (Ct.App.1997)).

Of the exceptions listed above, (2)(b) and (5)(c) are particularly applicable in this case. It would be improper to grant Citi's 12(b)(6) motion because "[t]he mere presence of the various exceptions, many of which are founded in equity principles, warrants affording the parties the opportunity to develop the record." *Mr. T. v. Ms. T.*, 378 S.C. 127, 137, 662 S.E.2d 413, (Ct. App. 2008).

First, as discussed more fully below, a new determination is warranted to take account of the intervening change in the legal context, as announced in the South Carolina Supreme Court's recent Administrative Orders regarding procedures to be followed in foreclosure cases, and to avoid inequitable administration of the mortgage foreclosure laws and procedures. *See* Administrative Order No. 2009-05-22-01; Administrative Order No. 2011-05-02-01. Second, because of the conduct of Citi and the circumstances by which Citi pursued foreclosure while telling Drexler foreclosure would not be pursued if she followed Citi's instructions in making the mortgage payments, which she did, Drexler did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the prior action. Indeed, she relied on Citi's false assurances that the foreclosure action would be dismissed and unknowingly went into default, leading to a default foreclosure judgment instead of a judgment on the merits.

As set forth in great detail in Drexler's Complaint, she followed all of Citi's instructions and made all of her mortgage payments. *See* Complaint at ¶¶ 9-42. Citi told Drexler that the foreclosure action would be dismissed if she complied with Citi's instructions regarding delivery of certain mortgage payments. *See* Complaint at ¶¶ 26, 30, 38. Drexler relied on Citi's assurances that the foreclosure action would be dismissed but, unbeknownst to Drexler, Citi continued to pursue the foreclosure action without providing Drexler notice of the foreclosure hearing or sale. *See* Complaint at ¶¶ 26-43. Citi falsely asserted in the foreclosure proceedings that Drexler was delinquent in her mortgage payments, and apparently never informed the Master-in-Equity that Drexler had in fact made her payments exactly as Citi instructed. Citi's conduct, as alleged in Drexler's Complaint, precludes the application of *res judicata*. "The doctrines of *res*

judicata and collateral estoppel do not bar collateral attack of a judgment based on fraud." *Evans v. Gunter*, 294 S.C. 525, 366 S.E. 2d 44 (Ct. App. 1988) (reversing 12(b)(6) dismissal based on *res judicata* when complaint contained allegations of fraud) citing *Arnold v. Arnold*, 285 S.C. 296, 328 S.E.2d 924 (Ct.App.1985). Drexler's Complaint, which is a collateral attack on the foreclosure judgment and also seeks damages and other relief pursuant to the multiple causes of action set forth therein, contains numerous allegations of Citi's fraud. Therefore, a 12(b)(6) dismissal on *res judicata* grounds is improper and Citi's motion should be denied.

Citi incorrectly argues that Drexler's sole remedy was by way of her Rule 60(b) motion in the foreclosure action. *See* Citi's Motion to Dismiss at ¶ 17. The South Carolina Court of Appeals addressed this issue in *Mr. T. v. Ms. T.*, 378 S.C. 127, 134-36, 662 S.E.2d 413, (Ct. App. 2008) and explained (with emphasis in original):

Rule 60(b), SCRCP states, in part:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud, misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, *or it is no longer equitable that the judgment should have prospective application. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or*

taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. *This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, "or" to set aside a judgment for fraud upon the court.* During the pendency of an appeal, leave to make the motion must be obtained from the appellate court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. (emphasis added).

The language of Rule 60 specifically excludes motions under Rule 60(b)(4) and (5) from the one year limitation within which prior judgments may be attacked and indicates these motions must be brought within a reasonable time. Furthermore, Rule 60(b)(5) allows the court to entertain motions to relieve a party from a prior judgment based on the competing equities of the circumstances that establish the judgment's prospective application is no longer equitable.

Finally, aside from the five subsections mentioned above, Rule 60 explicitly indicates that it in no way limits the court's power to entertain an independent action "to relieve a party from a judgment . . . 'or' to set aside a judgment for fraud upon the court." (emphasis added). While the most common ground for an independent action is for fraud, the rule is not restricted to only that ground. The structure of this rule and its use of the word "or" indicate to this court two potential independent action attacks on a judgment, order or proceeding: 1) one based on such rare, special, exceptional or unusual circumstances that may warrant equitable relief, including accident or mistake or 2) one based in equity for fraud upon the court. See, 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE. & PROCEDURE § 2868 (2d ed.1995).

The Eighth Circuit characterized the independent action as follows:

The indispensable elements of such a cause of action are 1) a judgment which ought not, in equity and good conscience, to be enforced; 2) a good defense to the alleged cause of action on which the judgment is founded; 3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; 4) the absence of fault or negligence on the part of the defendant; and 5) the absence of any adequate remedy at law.

Nat'l Sur. Co. v. State Bank of Humboldt, 120 F. 593 (8th Cir.1903). In essence, the rule merely reflects many of the considerations attendant to an equitable analysis. Further, since the independent action referenced in the rule is one in equity, the court may consider equitable defenses such as laches, unclean hands, and whether an adequate legal remedy exists. The court may also consider other policy doctrines such as *parens patriae*; we do not suggest this list is exclusive. However, what we do suggest is that equity only intervenes when the circumstances so require, but to do so, a court must be aware of all of the circumstances before it acts. Thus, the parties must be allowed to develop the record accordingly.

Mr. T. v. Ms. T., 378 S.C. 127, 134-36, 662 S.E.2d 413, (Ct. App. 2008) (emphasis in original).

As shown above, Drexler's Rule 60(b) motion was not her sole remedy because Rule 60(b)(5) specifically states that Rule 60 does not preclude the Court from considering whether it would be inequitable to give the prior judgment prospective application, entertaining this independent action seeking relief from the prior foreclosure judgment, or setting aside the prior judgment based on fraud. The Court should deny Citi's 12(b)(6) motion because, as stated in *Mr. T.*, the Court should allow the parties to develop the record so that it can determine whether the circumstances support allowing this independent action and relieving Drexler from the prior judgment.

Application of Res Judicata Would Contravene Public Policy

As discussed below, the elements of *res judicata* are not met and, as discussed above, this case fits within recognized exceptions to the *res judicata* doctrine. The application of *res judicata* in this case would also contravene the stated public policy of South Carolina. "Even when the defendant meets all of the required elements, *res judicata* will not be applied 'where it will contravene other important public policies; the courts must weigh the competing public policies.'" *Nelson v. QHG of South Carolina*,

Inc., 354 S.C. 290, 580 S.E. 2d 171, 178 (Ct. App. 2003) *rev'd in part*, 362 S.C. 421, 608 S.E.2d 855 (2005) (quoting *Johns v. Johns*, 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct.App.1992)). The purpose of *res judicata* is “to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters.” *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 61, 566 S.E.2d 863, 865 (Ct. App. 2002). This policy is sound, but this Court must not apply the doctrine “rigidly so as to defeat the ends of justice.” *Johns v. Johns*, 420 SE 2d 856 (Ct. App. 1992). The dismissal of Drexler's case on *res judicata* grounds would contravene two stated South Carolina public policy goals.

First, the public policy expressed in S.C. Code §37-22-190 and elsewhere in South Carolina's Consumer Protection Code, overrides the policy supporting *res judicata*. The S.C. Code section referenced proscribes the following conduct: “a transaction, practice, or course of business in connection with the . . . servicing of . . . a mortgage loan that is not in good faith or fair dealing, that is unconscionable or that constitutes a fraud upon a person[.]” *See* S.C. Code §37-22-190(A)(8). This statutorily-expressed public policy proscribing unfair conduct by mortgage servicers outweighs the policy underlying *res judicata* for the following reasons: hundreds of thousands of South Carolina residents own homes with mortgages. *Res judicata* is applied in very few cases each year in this State and its application here would defeat the ends of justice.

Most South Carolina mortgages are serviced by parties other than the owner of the corresponding notes. Many of these servicers have been accused of misconduct. Citi is among the parties currently being investigated by the Attorney General of South Carolina – a fact of which this Court may take judicial notice. The State has a paramount

interest, particularly at this time of uncertainty in real estate valuations, stringent lending practices, known bad acts by all of the largest loan servicers in the United States, and thousands of South Carolinians losing their homes, in enforcing its policies forbidding misconduct by loan servicers when the countervailing policy argument is entirely theoretical in this particular case. To wit, this Court allocated, at most, a few hours of its time to hearing matters in the previous foreclosure suit – compared to Drexler’s loan servicer getting away with fraud, negligence, and other outrageous conduct that resulted in the loss of Drexler’s access to the American Dream, home ownership, should the Court grant Citi’s 12(b)(6) motion. This Plaintiff regards her request that this Court permit a full examination of all matters and an opportunity to develop the record in full, under this Court’s supervision, in light of a State policy, cited hereinabove, that is directly on point, as reasonable, in light of the competing policy goals.

The second South Carolina policy which outweighs the policy underlying *res judicata* is the policy broadly encompassed by Chief Justice Toal’s two administrative Orders regarding foreclosures in this State. *See* Administrative Order No. 2009-05-22-01; Administrative Order No. 2011-05-02-01. Those Orders are premised on the existence of federal loss mitigation programs in which all TARP lenders and servicers were required to participate. Citi is a TARP servicer, having received tens of billions of dollars in federal taxpayer money. Chief Justice Toal’s Administrative Orders implicate confusion among servicers, difficulty communicating with servicers by homeowners, errant foreclosures, sloppy foreclosure practices, and dual tracking (wherein the servicer dangles a carrot of foreclosure alternatives whilst simultaneously pressing foreclosure to conclusion as rapidly as possible, often resorting to outright fraud in pursuit of

foreclosure, such as “robo-signing” and otherwise manufacturing documents). Chief Justice Toal’s 2011 Order, Administrative Order No. 2011-05-02-01, was in fact a moratorium on foreclosures as long as alternative mitigation discussions were ongoing between the borrower and their servicer.

The simple fact of the matter is this: had either of Chief Justice Toal’s Administrative Orders been in effect at any time prior to the sale of her property at auction, Drexler would not have been defrauded out of her property. The fact that Drexler’s alleged default occurred prior to the entire world’s becoming aware of outrageous conduct by Citi and other loan servicers meant that Citi’s blatant lies to Drexler and to this Court, fraudulent documents, and its outrageous equity-stripping scheme received little to no scrutiny, none of which would occur if Citi had brought the prior suit at any time after Chief Justice Toal’s first Administrative Order in the Spring of 2009. The Administrative Orders, the first of which was issued shortly after the wrongful foreclosure upon Drexler’s home, support the argument that the application of *res judicata* in this case would contravene the public policy of South Carolina. Citi’s motion to dismiss should be denied.

THE ELEMENTS OF RES JUDICATA ARE NOT MET

In addition to the arguments above, Citi’s motion to dismiss should be denied because the elements of *res judicata* are not met in this case. In order to sustain an affirmative defense of *res judicata*, Citi must establish all three elements of that defense: 1) identity of the parties to that of the prior litigation; 2) identity of subject matter to that of the prior litigation; 3) the existence of a prior adjudication. *Johnson v. Greenwood*

Mills, Inc., 317 S.C. 248, 452 S.E.2d 832 (1994). Plaintiff disputes that *res judicata* applies for the following reasons:

Identity of the Parties

Third Party Issues

In Drexler's Sixth Cause of Action, Plaintiff alleges facts sufficient to raise the question whether Citi's claims in the prior suit were its own. Specifically, Paragraph 65 of the Complaint asserts, *inter alia*: that after origination, Plaintiff's loan was sold on the secondary market; that Citi was not an owner trustee of the corresponding investment conduit; and that Citi was neither holder nor beneficiary of the note in question.

Assuming, *arguendo*, Citi relied on a power of attorney, or other document sufficient to establish legal authority to assert the claims of the real party in interest, such a document would establish precisely that Citi's claim was not its own and that the case caption in the prior suit was a legal fiction. "Citi had no right to foreclose Plaintiff's interest in its own right and in its own name" Complaint, ¶ 65.

If Citi brought another's claims in the prior suit, this Court should characterize Citi as having done so for all purposes – such as for the purpose of this Court's determination whether Citi constituted a third party in the prior suit. In making that determination, this Court should ignore the case caption in the prior suit and focus on determining whose claim was actually pressed. If this Court determines that Citi pressed a claim other than its own—and for the purposes of Citi's motion to dismiss this Court must assume that it did, as pled in the Complaint—then Citi's motion must be denied because no claim against a third party who was not a party to a prior suit is compulsory in

the prior suit. See *Condon v. Best View Cablevision, Inc.*, 292 S.C. 117, 123, 355 S.E.2d 7, 10 (Ct. App. 1987).

Drexler's Complaint alleges that Citi's claims were not its own (*see* Complaint, ¶¶ 64-7, challenging Citi's ownership of and rights to enforce the provisions of her promissory note), that Citi stood in the shoes of another, and that Citi was a third party in the prior suit, despite Citi's name appearing as plaintiff in the prior suit's case caption. If these allegations are true—and this Court must presume that they are in the context of a 12(b)(6) motion—then Citi was no more a party to the prior suit, at least for the purposes of compulsory counterclaims, than would a guardian acting on behalf of a ward would be. It is Drexler's contention that Citi attempted to escape third party status in the prior suit solely through its own schemes and artifices, such as having designated itself as Plaintiff. Were the record permitted to be developed, this Court would find: that after the sale at auction of Drexler's property, the proceeds received by Citi, if received by it at all, were soon thereafter forwarded to the real party in interest (likely a Government Sponsored Enterprise or a Real Estate Mortgage Investment Conduit); that Citi's authority to press the real party in interest's claims specified that Citi bring the suit in the name of the real party in interest, not Citi's; that Citi, if it ever owned the promissory note in question, assigned all rights and title thereto in favor of an as yet unknown third party, the real party in interest; that Citi was contractually obligated to the real party in interest; that Plaintiff was contractually obligated, not to Citi, but to the as-yet-unknown real party in interest; and that Citi's duties to Drexler sound in tort. Consequently, this Court should

not bar Drexler's claims on a *res judicata* theory because the identity of parties element cannot be established in this suit as against the prior suit.²

Agency Issues

Citi acted as an agent of the real party in interest. Drexler opposes the application of *res judicata* until such time as the effect of that agency has been fully developed in the record through discovery in this case.

Citi was contractually obligated to act on behalf of the real party in interest. Not all contractual relationships establish privity for the purposes of *res judicata* party identity.³

Citi was not in privity with the real party in interest for the purposes of *res judicata* party identity. The test for establishing privity for the purposes of *res judicata* is an all circumstances test and, therefore, a fully developed record through discovery in this case is necessary before ruling on this issue.⁴

Identity of Subject Matter

In order to establish an identity of subject matter for the purposes of sustaining a defense of *res judicata*, Citi must establish that the combination of facts giving rise to the claims in Drexler's Complaint and the claims Citi says she ought to have brought in the

² "Rule 13(a) and (b) speak of counterclaims as claims against an opposing party. Claims asserted against a party not already in the action are not counterclaims, but independent causes of action. Nothing would be gained by adding parties for the sole purpose of adjudicating additional claims." *Condon v. Best View Cablevision, Inc.*, 292 S.C. 117, 123, 355 S.E.2d 7, 10 (Ct. App. 1987).

³ "It is well settled that the lessor, the owner of a railroad, and the lessee, operating it, are both liable for the torts of the lessee committed in the operation of the road. * * * While both are liable, and while they may be sued jointly, or severally, still there is no such privity between them as makes their interests in action arising out of the torts of the agent identical. * * * "The fact that two parties as litigants in two different suits happen to be interested in proving or disproving the same facts creates no privity between them." 65 S.E. at 1047.

⁴ "The State Court has decided that there is no generally prevailing definition of privity which can be automatically applied to all cases involving the doctrine of *res judicata*. Who are privies requires careful examination into the circumstances of each case as it arises." *First National Bank of Greenville v. United States Fidelity & Guaranty Co.*, 207 S.C. 15, at page 26, 35 S.E.2d 47, 162 A.L.R. 1003.

prior suit are the same.⁵ Citi correctly states the test for determining compulsory counterclaims in the prior suit as the "logical relationship" test (*See* Citi's Motion to Dismiss, ¶ 12). However, this Court should apply a two pronged inquiry: first, it should determine which of Drexler's current claims were compulsory in the prior suit, and then the court should determine if the facts necessary to prove any remaining claims are identical to the subject matter of the prior suit.

The essential facts necessary to the maintenance of Drexler's claims in the instant action and the essential facts necessary to the maintenance of all compulsory counterclaims required to be brought in the prior action are different: For example, Drexler's Complaint alleges violations of South Carolina's Unfair Trade Practices Act ("SCUTPA"). *See* Complaint ¶ 82-90. Violations of the SCUTPA require Drexler to prove that Citi's pattern of conduct violated one or more statutes and/or is unfair or deceptive. Furthermore, the SCUTPA requires Drexler to demonstrate that such pattern of conduct has impacted not only her, but that such conduct is also capable of repetition or likely to impact others. Such an inquiry is not limited to the discrete facts concerning Citi's and Drexler's dealings regarding her note and mortgage.

Citi's prior lawsuit was an *in rem* action, sounding in equity.⁶ Drexler's current claims include legal and equitable claims, some in tort, others in contract, some are *in rem*, others *in personam*.

Drexler alleges Citi tortuously interfered with a contract that existed between her and an unknown third party. *See* Complaint, Thirteenth Cause of Action, ¶ 104-109.

⁵ "If it is doubtful whether a second action is for the same cause of action as the first, the test generally applied is to consider the identity of facts essential to their maintenance, or whether the same evidence would sustain both." *Griggs v. Griggs*, 214 S.C. 177, 51 S.E.2d 622 (1949)

⁶ "An action to foreclose a real estate mortgage is an action in equity." *BB&T of S.C. v Kidwell*, 350 S.C. 382, 387, 565 S.E.2d 316, 319 (Ct. App. 2002).

That party was the real party in interest in the prior suit which Citi brought, improperly, in its own name.

Drexler alleges Citi negligently misrepresented information as part of a scheme to seize Drexler's property improperly. *See* Complaint ¶ 110-116. The negligent misrepresentation occurred after the lawsuit had been filed, or if not, after the case had been referred to a foreclosure mill for "processing."

Actions in tort and contract are separate claims and in this case, such claims do not arise out of the same nucleus of facts, nor is there, necessarily, a logical relationship between Citi's tortious conduct and its breaches of Drexler's rights with respect to the contract documents.

Citi argues that all claims brought by Drexler were compulsory at the time of the prior suit. Drexler opposes the dismissal of all of her claims on that basis insofar as the law in South Carolina forbids a plaintiff from bringing claims until all elements of a claim have ripened.⁷ Drexler alleges negligence by Citi in its servicing of her loan. *See* Complaint, First Cause of Action, ¶ 44-47. In order to sustain a claim for negligence, Drexler would have had to demonstrate damages. Citi's negligence as alleged in paragraphs 44-47 of the Complaint did not damage Drexler until her house was wrongfully foreclosed and sold at auction. The same logic applies to the Complaint's Third, Fourth, and Ninth causes of action.

⁷ "Generally, an action cannot properly be commenced until all of the essential elements of the cause of action are in existence ... the subsequent occurrence of a material fact will not avail in maintaining it." *American Agricultural Chemical Co. v. Thomas*, 206 S.C. 355, 34 S.E. (2d) 592 (1945).

Prior Adjudication

Subject Matter Jurisdictional Defect

Plaintiff opposes the application of *res judicata* as a defense to her claims because among the elements necessary to establish that defense is a prior adjudication. *Johnson v. Greenwood Mills, Inc.*, 317 S.C. 248, 452 S.E.2d 832 (1994). A prior adjudication must be valid in order for *res judicata* to apply as a defense. *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 329 S.C. 414, 496 S.E.2d 637, 640 (Ct. App. 1997, *clarified*, 388 S.C. 171, 528 S.E.2d 869, 872 (2000)). A judgment is not valid where it is void⁸ or where the judgment has jurisdictional defects or due process defects. *McDaniel v. US Fidelity & Guaranty Co.*, 324 S.C. 639, 478 S.E.2d 868, 871 (Ct. App. 1996).

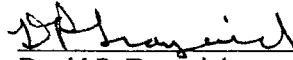
In this case, the prior adjudication is invalid because of subject matter jurisdictional defects. The Complaint alleges that Citi lacked standing to sustain claims in the prior suit. See Complaint at ¶¶ 46, 64-8. Standing is a component of subject matter jurisdiction. If Drexler's allegations of fact are true—and for the purposes of Citi's 12(b)(6) motion this Court must presume that they are—then the final judgment in the prior suit cannot be a prior adjudication as such judgment contains a jurisdictional defect as to subject matter jurisdiction. Subject matter jurisdiction is never waived and can be raised at any time. See generally *Eldridge v. City of Greenwood*, 331 S.C. 398, 503 S.E.2d 191, 196 (Ct. App. 1998).

CONCLUSION

For the reasons discussed above, Drexler respectfully requests that the Court deny Citi's Motion to Dismiss.

⁸ See, e.g., Rule 60, SCRPC.

Respectfully submitted,

 Date: 10-12-11
David P. Traywick
TRAYWICK LAW OFFICES, LLC
P.O. Box 564
Isle of Palms, SC 29451
Telephone: 843-343-5092
Fax: 843-300-1051

-and-

Matthew D. Hamrick
Attorney at Law
875 Lowcountry Blvd., Ste. 201
Mt. Pleasant, SC 29464
(843) 693-4700
matt@matthamricklaw.com

CO-COUNSEL FOR PLAINTIFF

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	CASE NO.: 2011-CP-08-1754
Angela Drexler,	)	
	)	
Plaintiff,	)	PLAINTIFF'S SUPPLEMENT
	)	TO MEMORANDUM
v.	)	IN OPPOSITION TO
	)	CITIMORTGAGE, INC.'S
CitiMortgage, Inc., et al.,	)	MOTION TO DISMISS
	)	PURSUANT TO
Defendants.	)	RULE 12(b)(6), SCRCF
	)	

Plaintiff, Angela Drexler ("Drexler"), by and through her undersigned attorneys,
in opposition to CitiMortgage, Inc. ("Citi")'s motion to dismiss pursuant to Rule 12(b)(6),
SCRCF, states the following:

SUPPLEMENTAL MATERIAL IN OPPOSITION

Plaintiff filed a memorandum in opposition on October 12, 2011. The following
material is intended to supplement that memorandum and to provide further bases to deny
Defendant Citi's Motion to Dismiss.

THE ECONOMIC LOSS DOCTRINE IS INAPPLICABLE

Citi asserts that the Economic Loss Doctrine prevents Plaintiff from asserting a
claim on a negligence theory because Citi claims that its duties to Plaintiff arise out of
contract rather than tort. Plaintiff denies it was contractually bound to Citi and her
Complaint specifically alleges that Citi was not a counterparty on the note. Plaintiff's
Complaint alleges that Citi merely serviced the note in question on behalf of the real
party in interest. Consequently, Citi's obligations and duties to Plaintiff arise from
common law and statute; these are duties sounding in tort, not contract. Consequently, the
motion to dismiss should be denied.

PLAINTIFF HAS STANDING TO CONTEST FRAUDULENT ASSIGNMENT

Citi's Motion asserts that Plaintiff has no standing to challenge a fraudulent assignment of the mortgage. Such contention is patently absurd. Plaintiff is a counterparty of the mortgage itself, owns the property to which the foreclosure appointment within that mortgage is directed, and was victimized by a power claimed by Citi that arose directly as a result of the fraud. Furthermore, the fraudulent assignment constitutes merely a part of a scheme developed by Citi to strip equity from this Plaintiff, as alleged in the Complaint. Consequently, the motion to dismiss should be denied.

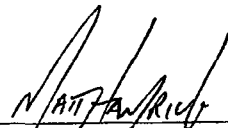
COLLATERAL ESTOPPEL IMPROPERLY INTRODUCED AT HEARING

Citi's Motion to Dismiss did not give Plaintiff notice that issue preclusion (*i.e.*, collateral estoppel, as opposed to claim preclusion or *res judicata*) was a basis for its Motion. Additionally, issue preclusion is not a proper basis for a Motion to Dismiss all claims. Nor were any of the matters appearing in the Complaint actually litigated in the prior suit. Consequently, the motion to dismiss should be denied as to that basis.

CONCLUSION

For the reasons discussed above, as well as the reasons advanced in Plaintiff's initial Memorandum in Opposition and at the October 12, 2011 hearing, Drexler respectfully requests that the Court deny Citi's Motion to Dismiss.

Respectfully submitted,



David P. Traywick
TRAYWICK LAW OFFICES, LLC
P.O. Box 564
Isle of Palms, SC 29451
Telephone: 843-343-5092

Date: 10/13/11

Fax: 843-300-1051

-and-

Matthew D. Hamrick
Attorney at Law
875 Lowcountry Blvd., Ste. 201
Mt. Pleasant, SC 29464
(843) 693-4700
matt@matthamricklaw.com

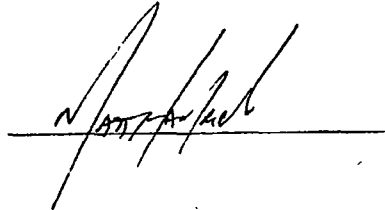
CO-COUNSEL FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that I have this 13th day of October served all parties who have appeared in this action with a copy of the foregoing document to which this Certificate is attached by mailing a copy of the same by US mail, first class and postage prepaid, and addressed as follows:

Benjamin E. Grimsley, Esq.
1703 Laurel Street
PO Box 11682
Columbia, SC 29211

Thad H. Westbrook, Esq.
Sarah B. Nielsen, Esq.
Nelson Mullins Riley & Scarborough LLP
PO Box 11070
Columbia, SC 29211-1070



STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Angela Drexler,

Plaintiff,

v.

CitiMortgage, Inc.; Stonegate Properties,
Inc.; Branch Banking and Trust Company,
Inc.,

Defendants.

) IN THE COURT OF COMMON PLEAS

) Case No.:2011-CP-08-1754

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

**NOTICE AND MOTION TO AMEND
COMPLAINT**

TO THE COURT AND ALL INTERESTED PARTIES, PLEASE TAKE NOTICE:

Plaintiff will, as soon as counsels may be heard, move the court pursuant to Rule 15, SCRCP, for an order allowing Plaintiff to amend her pleading in accordance with the attached proposed Amended Complaint, providing that the amendment shall relate back to the date of the original pleading, and further providing that the filing and serving of the instant motion with the attached already signed copy of such Amended Complaint, shall constitute service and filing of the amended pleading as of the date the motion is granted as to existing parties, but not constituting service upon Defendant Massachusetts Mutual Life Insurance Company - who shall be served a copy of the Amended Complaint, according to SCRCP along with a Summons, Civil Action Cover Sheet, and Lis Pendens, also attached hereto as part of the moved for Amended Complaint.

The grounds for this motion are that leave to amend is requested, justice so requires, and leave to amend will not prejudice any other party. The amendment is needed so as to clarify the

identities of the parties in the prior suit. Plaintiff's motion is based upon the pleadings and other filings in this action, the substantive law and procedural rules of the State of South Carolina and the United States of America, and such supporting memorandum, affidavits and additional evidence as may be timely submitted for consideration by this Court

The undersigned certifies that he has consulted with opposing parties, through their respective counsels, regarding this motion.

Respectfully submitted,


TRAYWICK LAW OFFICES, LLC
P.O. Box 564
Isle of Palms, SC 29451
Telephone: 843-343-5092
Fax: 843-300-1051
Dpt@traywicklaw.com

-and-

Matthew D. Hamrick
Attorney at Law
875 Lowcountry Blvd., Ste. 206
Mt. Pleasant, SC 29464
(843) 693-4700
matt@matthamricklaw.com

CO-COUNSELS FOR PLAINTIFF

Charleston, South Carolina
December 8, 2011

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Angela Drexler,

Plaintiff,

v.

CitiMortgage, Inc.; Stonegate Properties,
Inc.; Branch Banking and Trust Company,
Inc., and Massachusetts Mutual Life
Insurance Company,

Defendants.

) IN THE COURT OF COMMON PLEAS

Case No.:2011-CP-08-1754

LIS PENDENS

(Jury Trial Demanded)

TO WHOM IT MAY CONCERN:

Please take notice that an action has been filed, or will be filed. The subject of this action is real property ("the Property") owned by Branch Banking and Trust Company, Inc., as conveyed by Instrument Number 11-3443 recorded in Book "R", Volume 08832, at Page 130 in the Berkeley County office of the Register of Deeds. The Property is located at [REDACTED] Ladson, South Carolina 29456 in the county of Berkeley, State of South Carolina.

The Property TMS number is: 233-14-01-024

The object of the action is said property and among the purposes of the action is quiet title in favor of Plaintiff.

By:


David P. Traywick
TRAYWICK LAW OFFICES, LLC
P.O. Box 564
Isle of Palms, SC 29451
Telephone: 843-343-5092
Fax: 843-300-1051

Attorney for Plaintiff
Angela Drexler

December 8, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

) Case No.:2011-CP-08-1754

COUNTY OF BERKELEY

Angela Drexler,

Plaintiff,

SUMMONS

v.

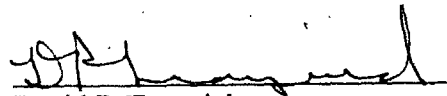
CitiMortgage, Inc.; Stonegate Properties,
Inc.; Branch Banking and Trust Company,
Inc.; and Massachusetts Mutual Life
Insurance Company,

Defendants.

TO: THE DEFENDANT, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the subscribed at his office, P.O. Box 564, Isle of Palms, SC 29451, within thirty (30) days after the service hereof, exclusive of the day of service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

By:



David P. Traywick
TRAYWICK LAW OFFICES, LLC
P.O. Box 564
Isle of Palms, SC 29451
Telephone: 843-343-5092
Fax: 843-300-1051

Attorney for Plaintiff
Angela Drexler

December 8, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	CASE NO.: 2011-CP-08-1754
Angela Drexler,	)	
	)	
Plaintiff,	)	AMENDED COMPLAINT
v.	)	(Jury Trial Demanded)
	)	
CitiMortgage, Inc.; Stonegate Properties, Inc.;	)	
Branch Banking and Trust Company, Inc.; and	)	
Massachusetts Mutual Life Insurance Company,	)	
	)	
Defendants.	)	
	)	

PARTIES AND JURISDICTION

1. Defendant CitiMortgage, Inc. ("Citi") is, and at all times herein mentioned was, a corporation doing business in Berkeley County, South Carolina and is, and at all times herein mentioned was, the agent of Massachusetts Mutual Life Insurance Company.

2. Defendant Stonegate Properties, Inc. ("Stonegate") is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of South Carolina.

3. Defendant Branch Banking and Trust Company, Inc. ("BB&T") is, and at all times herein mentioned was, a corporation doing business in Berkeley County, South Carolina.

4. Defendant Massachusetts Mutual Life Insurance Company ("MassMutual") is a business entity organized and existing under the laws of the State of Delaware and is, and at all times herein mentioned was, a corporation doing business in Berkeley County, South Carolina and is, and at all times herein mentioned was, the principal of its agent Citi. Upon information and belief, MassMutual is, and at all times herein mentioned was, the investor or beneficial

owner or owner trustee or trustee or holder or owner or counterparty or lender with respect to the note and/or mortgage from which this suit arises.

5. Plaintiff is, and at all times herein mentioned was, a resident of Berkeley County, South Carolina.

6. This Court has jurisdiction over the parties and subject matter of this complaint.

GENERAL ALLEGATIONS

7. On July 7, 1998, Plaintiff purchased certain real property ("Subject Property").

8. On July 7, 1998, Plaintiff executed a promissory note in favor of Compass Mortgage, Inc. The note was secured by a mortgage with Compass Mortgage, Inc. as mortgagee. Upon information and belief, the note and mortgage were thereafter assigned or otherwise transferred one or more times and ultimately were assigned or otherwise transferred to MassMutual.

9. Upon information and belief, Citi acquired Plaintiff's previous mortgage servicing company, ABN AMRO Mortgage Group, Inc. Plaintiff continued to make payments but now remitted them to Citi.

10. On December 17, 2007, Plaintiff paid Citi \$1333.51 via that defendant's telephone payment system.

11. On or about February 12, 2008, Citi instructed Plaintiff to send a certified check in the amount of \$2294.73. Citi claimed that amount was past due.

12. On or about February 19, 2008, Plaintiff purchased and mailed to Citi a certified check for \$2294.73.

13. On March 12, 2008, Plaintiff made out check #2300 paid to the order of Citi for \$910.70. This amount represented Plaintiff's ordinary monthly payment.

14. On March 13, 2008, Plaintiff mailed check #2300 to Citi via express mail.
15. On March 14, 2008, Citi received check #2300 and stamped it "too delinquent".
16. Prompted by Citi, on March 31, 2008, Plaintiff sent a facsimile transmission that included a photocopy of both the certified check for \$2294.73 mailed as of February 19 as well check #2300 mailed on March 13.
17. Throughout this period, Citi assured Plaintiff that all would be well, that Citi had simply misplaced the certified check, that it would be found, that there was nothing to worry about, and to proceed with making the \$910.70 April payment in the usual fashion (ie: personal check via regular mail).
18. On April 20, 2008, Plaintiff made out check #2261 paid to the order of Citi for \$910.70.
19. On or about April 21, 2008, Plaintiff mailed check #2261 to Citi via express mail.
20. On May 5, 2008, Citi returned, via regular mail letter, check numbers 2280 and 2261 to Plaintiff. The letter stated that Citi was unable to accept the funds because the amount was insufficient to cure the delinquency. Additionally, the letter states that a certified check is necessary to cure the delinquency.
21. The May 5, 2008 Citi letter to Plaintiff made no mention of the certified check, though Plaintiff was repeatedly assured that the check would be located.
22. On May 7, 2008, Rogers Townsend Thomas ("RTT") filed foreclosure pleadings in Berkeley County.
23. On May 9, 2008, at 7:45 a.m., Pro Vest, LLC served process on Plaintiff at her home.

24. On May 14, 2008, owing to representations appearing in Citi's May 5, 2008 letter, by the lawsuit served on May 9, and by representations made by RTT personnel during calls placed by Plaintiff to RTT, Plaintiff sent a facsimile transmission that included various documents and materials the purpose of which was to dispute the validity of the debt RTT alleged was due and owing in its foreclosure Complaint. Plaintiff's facsimile included compelling proof that all payments had been submitted by Plaintiff to Citi.

25. On May 21, 2008, RTT amended its initial complaint.

26. In early June of 2008, Plaintiff contacted Debra Leonard, a foreclosure prevention counselor with Money Management International, a non-profit consumer credit counseling organization.

27. On June 16, 2008, the certified check Plaintiff mailed to Citi on February 19 was deposited into Plaintiff's bank account. The circumstances of how the deposit was made remain mysterious.

28. Throughout June and July, 2008, Plaintiff, in conjunction with Debra Leonard, repeatedly attempted to obtain payment instructions from Citi - without success. During that period, Citi failed to return telephone calls, wait times were extraordinary, the process was overwhelmingly tedious, and nobody at Citi was capable of providing useful answers.

29. On August 6, 2008, Angela and Debra Leonard conference called a Citi supervisor. During that conference call, Citi advised that a check for \$8133.35 would bring the account up to date and that upon receipt of that check that the foreclosure Complaint would be dismissed.

30. On August 15, 2008, Plaintiff mailed a check for \$8133.35 to Citi.

31. On August 16, 2008, Citi received the check for \$8133.35.

32. On August 20, 2008, Citi returned the check for \$8133.35.
33. On either September 12 or 13, 2008, following numerous telephone conversations placed by Plaintiff to Citi, Plaintiff mailed a certified check via certified mail with a return receipt requested. to Citi. Citi had assured Plaintiff repeatedly that upon receipt of a certified check for \$9,010.00 that Citi would change Plaintiff's account status to current and that the foreclosure proceedings would be terminated.
34. On September 14, 2008, Citi signed for receipt of the certified check sent by Plaintiff.
35. On September 23, 2008, Citi sent a letter to BB&T explaining that Citi had received a certified check in the amount of \$9,010.00 but that Citi had been unable to match that certified check with any of its accounts.
36. On October 12, 2008, RTT claims to have mailed Plaintiff a Notice of Foreclosure Hearing scheduled for October 29, 2008.
37. On October 14, 2008, a certified check for 9,010.00 was mysteriously deposited into Plaintiff's account.
38. On October 15 or 16, 2008, Plaintiff mailed, via certified mail with return receipt requested, personal check #2336 for \$876.00 to Citi This check represented the amount she was instructed to pay by Citi.
39. On October 17, 2008, Citi signed for receipt of check #2336.
40. On October 22, 2008, Citi returned check #2336 to Plaintiff via regular mail.
41. On October 29, 2008, a foreclosure hearing was held in Berkeley County and a Judgment of Foreclosure entered. Plaintiff was assured at all times that the foreclosure Complaint would be dismissed on condition that Plaintiff complied with payment instructions.

Plaintiff at all times complied with Citi's payment instructions. Plaintiff was never notified of the foreclosure hearing nor was she advised that a judgment had been entered.

42. On November 22, 2008, Plaintiff sent, via certified mail with return receipt requested, personal check #2341 for \$900 to Citi.

43. On November 24, 2008, Citi signed for receipt of check #2341 for \$900.

44. On November 29, 2008, Citi returned check #2341 for \$900 to Plaintiff, via regular mail. Citi had stamped the back of check #2341 "Foreclosure".

45. Plaintiff made each payment due on the loan from 1998 until the date her house was sold at public auction pursuant to a court ordered foreclosure.

46. Plaintiff did not receive notice of the time and place of the foreclosure sale.

**FIRST CAUSE OF ACTION
NEGLIGENCE
(AGAINST CITIMORTGAGE AND MASSMUTUAL)**

47. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 46, inclusive, as though fully set forth herein.

48. At all times relevant herein, Citi and MassMutual, acting as Plaintiff's lender and/or loan servicer, had a duty to exercise reasonable care and skill to maintain proper and accurate loan records and to discharge and fulfill the other incidents attendant to the maintenance, accounting and servicing of loan records, and Citi and MassMutual breached those duties by their conduct including, but not limited to, the failure to accurately credit payments made by Plaintiff and the following:

- (a) Assessing improper or excessive late fees;
- (b) Improperly characterizing customers' accounts as being in default or delinquent status to generate unwarranted fees;

- (c) Instituting improper or premature foreclosure proceedings to generate unwarranted fees;
- (d) Misapplying or failing to apply customer payments;
- (e) Failing to provide adequate monthly statement information to customers regarding the status of their accounts, payments owed, and/or basis for fees assessed;
- (f) Seeking to collect, and collecting, various improper fees, costs and charges, that are either not legally due under the mortgage contract or South Carolina law, or that are in excess of amounts legally due;
- (g) Mishandling borrowers' mortgage payments and failing timely or properly to credit payments received, resulting in late charges, delinquencies or default;
- (h) Treating borrowers as in default on their loans even though the borrowers have tendered timely and sufficient payments or have otherwise complied with mortgage requirements or South Carolina law;
- (i) Failing to disclose the fees, costs and charges allowable under the mortgage contract;
- (j) Ignoring grace periods;
- (k) Executing and recording false and misleading documents;
- (l) Acting as beneficiaries and trustees without the legal authority to do so;
- (m) Filing suit against property owners improperly whilst

assuring those property owners that the foreclosure suit was a mere formality, that upon receipt of payment Citi would drop the suit;

(n) Telling property owners who had been served lawsuits that they did not need to hire attorneys to defend themselves in court provided exact payment instructions were followed. For example, Plaintiff was specifically told that if she mailed payments that she should not waste her money hiring a lawyer since her account would no longer be in default. Citi told her this on several different occasions; and

(o) Misrepresenting the amounts due and owing under the note while at the same time misrepresenting the amount required to bring the account to current.

(p) As to MassMutual, negligently and recklessly giving authority to Citi to service the mortgage loan account and failing to supervise Citi in the servicing of the account.

49. In the various particulars alleged, and in failing to take actions reasonably necessary, actions that a reasonable party would have undertaken in order to credit payments submitted by Plaintiff, Citi and MassMutual breached their duty of care and skill owed to Plaintiff in the servicing of Plaintiff's loan by, among other things, failing to properly and accurately credit payments made by Plaintiff toward the loan, preparing and filing false documents, and foreclosing on the Subject Property without having the legal authority and/or proper documentation to do so.

50. As a direct and proximate result of Citi's and MassMutual's negligence, recklessness, wilfulness, and/or wantonness in carrying out or failing to carry out its duties to be

reasonably diligent in servicing Plaintiff's mortgage loan, as set forth above, Plaintiff suffered general and special damages in an amount to be determined at trial.

**SECOND CAUSE OF ACTION
FRAUD
(AGAINST CITIMORTGAGE AND MASSMUTUAL)**

51. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 50, inclusive, as though fully set forth herein.

52. Citi and MassMutual engaged in a pattern and practice of defrauding Plaintiff in that, during the life of the mortgage loan, Citi and MassMutual failed properly to credit payments made and foreclosed on the Subject Property based on Plaintiff's alleged non-payment which they knew to be false.

53. Citi and MassMutual had actual knowledge that the Plaintiff's account, as Citi and MassMutual represented it to Plaintiff and others, was not accurate but that Citi and MassMutual could use the inaccuracy to foreclose on the Subject Property which had substantial equity, to recover its excessive fees, charges and interest. Plaintiff made such payments and provided proof of the payments based on the improper, inaccurate, and fraudulent representations as to her account. Citi and MassMutual also utilized amounts it knew to be inaccurate to determine the amount allegedly due and owing for purposes of foreclosure.

54. Additionally, Citi and MassMutual knowingly concealed material facts from Plaintiff regarding payments, notices, assignments, transfers, late fees and charges with the intent to defraud Plaintiff.

55. Citi and MassMutual made the above-referenced false representations, concealments and non-disclosures with knowledge of the misrepresentations, intending to induce

Plaintiff's reliance, which the unsuspecting Plaintiff justifiably relied upon, resulting in damage to her credit standing, costs, and loss of her property. Plaintiff was unaware of the true facts because Citi and MassMutual concealed them. Had Plaintiff known the true facts, Plaintiff, among other things, would have retained counsel upon receipt of the foreclosure Complaint, requested instructions for making payments be reduced to a writing, personally appeared at Citi's and/or MassMutual's offices and made a payment in actual cash, wire transferred the amount required to cure Plaintiff's allegedly delinquent account, and/or taken legal action immediately to save her house.

56. As a result of Citi's and MassMutual's fraudulent conduct, Plaintiff has suffered compensatory, general and special damages in an amount to be proven at trial. Additionally, Citi and MassMutual acted with malice, fraud and/or oppression and, thus, Plaintiff is entitled to an award of punitive damages.

**THIRD CAUSE OF ACTION
TO SET ASIDE MASTER'S SALE
(AGAINST CITIMORTGAGE)**

57. Plaintiffs incorporate herein by reference the allegations made in paragraphs 1 through 56, inclusive, as though fully set forth herein.

58. Citi never had the legal authority to foreclose, i.e., the authority to exercise the power of sale as an assignee of the Note and Mortgage, resulting in the judicial foreclosure sale being void ab initio.

59. Citi never had the legal authority to foreclose because the Mortgage instrument upon which it premised foreclosure is void as it was fraudulently assigned/endorsed/transferred. Citi orchestrated the fraudulent assignment/endorsement/transfer. Citi cannot benefit from its

own fraudulent conveyance of an interest in real property and any judicial sale premised on a fraudulent document is void ab initio.

60. Accordingly, Plaintiff requests an Order from this Court that the Trustee's Sale was either void, or voidable as to the defrauded party, the Plaintiff, and that the judicial sale premised upon such fraud was without force and effect at least as to this defrauded Plaintiff. The order should further state that Citi and/or its agent(s) and/or principal(s), sought, obtained, and induced a court to conduct a judicial foreclosure absent any legal or equitable right or privilege to do so.

**FOURTH CAUSE OF ACTION
TO VOID OR CANCEL MASTER'S DEED UPON SALE
(AGAINST CITIMORTGAGE, MASSMUTUAL, STONEGATE PROPERTIES
AND BRANCH BANKING AND TRUST COMPANY)**

61. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 60, inclusive, as though fully set forth herein.

62. Although Master's deeds upon the two sales of the Subject Property bear the imprimatur of Berkeley County and the State of South Carolina, they are invalid, and of no force and effect, for the reasons set forth above including, inter alia, the fact the Mortgage which purportedly secured the Note, which served as the basis for a claim to have the right to conduct a judicial foreclosure, was void due to a fraudulent assignment/endorsement/transfer to Citi and/or MassMutual. As noted, such fraudulent assignment/endorsement/transfer was in fact orchestrated by Citi and/or MassMutual and/or its/their agent(s) and/or principal(s). Additionally, Plaintiff had submitted all payments due on the Note in a timely fashion and the judicial foreclosure was therefore unjustified.

63. Plaintiff is therefore entitled to an order that the Master's deeds upon the sales are void ab initio and the cancellation of those deeds' force and effect.

**FIFTH CAUSE OF ACTION
TO VOID OR CANCEL ASSIGNMENT OF MORTGAGE
(AGAINST CITIMORTGAGE)**

64. Plaintiffs incorporate herein by reference the allegations made in paragraphs 1 through 63, inclusive, as though fully set forth herein.

65. The assignment of the mortgage, and subsequent recording, is invalid, and of no force and effect, for the reasons set forth above including, inter alia, the fact that Stewart Information Services, Inc. ("Stewart") fraudulently executed an assignment in favor of Citi. Stewart did not have standing or the legal authority to assign the mortgage allegedly securing the Note that was the basis for Citi's claim to have the right to conduct a judicial foreclosure. Thus, Stewart's fraudulent assignment of the mortgage was at all times void.

66. Plaintiff is therefore entitled to an order that the Assignment of the Mortgage by Stewart in favor of Citi is void ab initio and to an order cancelling the force and effect of such Assignment.

**SIXTH CAUSE OF ACTION
WRONGFUL FORECLOSURE VIA LACK OF STANDING
(AGAINST CITIMORTGAGE)**

67. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 66, inclusive, as though fully set forth herein.

68. Plaintiff is informed and believes and thereon alleges that after the origination and funding of her loan, the loan was sold to investors as a "mortgage backed security" and that Citi, which claimed authority to foreclose, owned neither the note nor its corresponding mortgage. Moreover, Citi had not been lawfully appointed as trustee or had the original note assigned to it. Accordingly, Citi had no right to foreclose Plaintiff's interest in its own right and in its own name, which it in fact did. The named Plaintiff in the filed foreclosure action was neither note

holder nor beneficiary of the note at the time Citi filed a suit premised on the Plaintiff's note and mortgage.

69. Plaintiff further alleges on information and belief that Citi was neither the note beneficiary nor a representative of the note beneficiary and, if Citi alleged otherwise, it did not possess the original note to prove that it was in fact the party authorized to conduct the foreclosure. No power of attorney to sue on behalf of another party, such as an owner trustee, was ever produced in court. Rather, Citi represented that it, Citi, owned the note.

70. Plaintiff further alleges on information and belief that the loan was sold or transferred without notice having been furnished to the Plaintiff in writing, or in any other fashion.

71. As a result of the above alleged wrongs, Plaintiffs have suffered general and special damages in an amount to be determined at trial.

**SEVENTH CAUSE OF ACTION FOR
BREACH OF CONTRACT
(AGAINST CITIMORTGAGE AND MASSMUTUAL)**

72. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 71, inclusive, as though fully set forth herein.

73. Plaintiff's original loan agreement set forth dates by which monthly principal and interest payments were due, and when late fees and other charges could be assessed, and how much those late fees and other charges were to be. Citi and/or MassMutual failed to comply with its/their obligations to adhere to the terms set forth in the original instruments and repeatedly misallocated payments or failed properly to calculate amounts due and owing under the note and mortgage at various periods.

74. Even assuming the original note and mortgage were properly assigned to Citi and/or MassMutual, Citi and/or MassMutual breached the note and mortgage terms that Plaintiff signed on July 7, 1998. The terms of the note and mortgage required payments made by Plaintiff to be applied properly to the note. Additionally, the note and mortgage specified the penalties for any late payments. Citi and/or MassMutual charged in excess of the amounts specified and thereby breached the contract between Plaintiff and Citi and/or MassMutual.

75. Citi and/or MassMutual breached the note and mortgage by failing to apply the payments made by Plaintiff in the various particulars described hereinabove the result of which led to the wrongful foreclosing of Plaintiff's property.

76. As a proximate result of Citi's and/or MassMutual's breaches, Plaintiff suffered various damages including expectation, compensatory, and other damages in an amount to be proven at trial.

**EIGHTH CAUSE OF ACTION FOR
BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING
(AGAINST CITI AND MASSMUTUAL)**

77. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 76, inclusive, as though fully set forth herein.

78. Every contract imposes upon each party a duty of good faith and fair dealing in its performance and in its enforcement. This implied covenant of good faith and fair dealing requires that no party do anything that effectively impairs, destroys, or injures the rights of the other party to receive the benefits of an agreement. The covenant implies that in all contracts each party will do all things reasonably contemplated by the terms of the contract to accomplish its purpose. The covenant protects the respective benefits that the parties reasonably contemplated when entering into the agreement.

79. Citi and/or MassMutual wielded, or claimed to have the power to wield, substantial discretionary power affecting the rights of Plaintiff during the events alleged in this Complaint. The covenant required Citi and/or MassMutual to exercise such power in good faith and with an eye toward fair dealing with respect to the contract's counterparty.

80. Citi and/or MassMutual wielded its/their discretionary authority in such a manner as to ensure the utter destruction of Plaintiff's rights to the benefits of the bargain she struck, and in such a manner as to defeat the Plaintiff's expectations to be dealt with fairly and reasonably. Citi's and/or MassMutual's conduct exhibited a determination to drive Plaintiff into foreclosure so that Citi and/or MassMutual could acquire the large equitable position Plaintiff enjoyed in the Subject Property. Citi's and/or MassMutual's pattern of conduct constitute a bad faith breach of the contract - a breach evidently undertaken with neither mercy nor malice - so cold, impersonal, faithless, and unfair so as to be 'machine-like'.

81. As a result of Citi's and/or MassMutual's breaches of this covenant, Plaintiff has suffered general and special damages in an amount to be determined at trial.

**NINTH CAUSE OF ACTION FOR
UNJUST ENRICHMENT
(AGAINST CITI AND MASSMUTUAL)**

82. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 81, inclusive, as though fully set forth herein.

83. By its wrongful acts and omissions, Citi and/or MassMutual has/have been unjustly enriched at the expense of Plaintiff, and thus Plaintiff has been unjustly deprived.

84. By reason of the foregoing, Plaintiff seeks restitution from Defendant Citi and/or MassMutual and an order of this Court that Citi and MassMutual disgorge all profits, benefits, and other compensation obtained resulting from the unjust Foreclosing of Plaintiff's property.

**TENTH CAUSE OF ACTION FOR
VIOLATION OF SOUTH CAROLINA'S UNFAIR TRADE PRACTICES ACT
(AGAINST CITIMORTGAGE AND MASSMUTUAL)**

85. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 84, inclusive, as though fully set forth herein.

86. South Carolina prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.

87. As more fully described above, Citi's and MassMutual's acts and practices are likely to deceive, constituting a fraudulent business act or practice. This conduct is ongoing and continues to this date.

88. Specifically, Citi and MassMutual engaged in deceptive business practices with respect to mortgage loan servicing, assignments of notes and mortgages, foreclosure of residential properties and related matters by:

- (a) Assessing improper or excessive late fees;
- (b) Improperly characterizing customers' accounts as being in default or delinquent status to generate unwarranted fees;
- (c) Instituting improper or premature foreclosure proceedings to generate unwarranted fees;
- (d) Misapplying or failing to apply customer payments;
- (e) Failing to provide adequate monthly statement information to customers regarding the status of their accounts, payments owed, and/or basis for fees assessed;
- (f) Seeking to collect, and collecting, various improper fees, costs and charges, that are either not legally due under the mortgage

contract or South Carolina law, or that are in excess of amounts legally due;

(g) Mishandling borrowers' mortgage payments and failing timely or properly to credit payments received, resulting in late charges, delinquencies or default;

(h) Treating borrowers as in default on their loans even though the borrowers have tendered timely and sufficient payments or have otherwise complied with mortgage requirements or South Carolina law;

(i) Failing to disclose the fees, costs and charges allowable under the mortgage contract;

(j) Ignoring grace periods;

(k) Executing and recording false and misleading documents;

(l) Acting as beneficiaries and trustees without the legal authority to do so;

(m) Filing suit against property owners improperly whilst assuring those property owners that the foreclosure suit was a mere formality, that upon receipt of payment Citi would drop the suit;

(n) Telling property owners who had been served lawsuits that they did not need to hire attorneys to defend themselves in court provided exact payment instructions were followed. For example, Plaintiff was specifically told that if she mailed payments that she should not waste her money hiring a lawyer since her account would no longer be in default. Citi told her this on several different occasions; and

(o) Misrepresenting the amounts due and owing under the note while at the same time misrepresenting the amount required to bring the account to current.

89. Citi and MassMutual failed to act in good faith as it took fees for services but did not render services competently and in compliance with applicable law and in accordance with applicable standards of care.

90. Moreover, Citi and MassMutual engaged in a uniform pattern and practice of unfair and overly-aggressive servicing that resulted in the assessment of unwarranted and unfair fees against this Plaintiff and other South Carolina consumers and premature default often resulting in unfair and illegal foreclosure proceedings. The scheme implemented by Citi and MassMutual was designed to defraud South Carolina consumers and to enrich Citi and MassMutual.

91. The foregoing acts and practices have caused substantial harm to this Plaintiff and to South Carolina consumers.

92. As a direct and proximate cause of the unlawful, unfair and fraudulent acts and practices of Citi and MassMutual, Plaintiff and South Carolina consumers have suffered and will continue to suffer damages in the form of unfair and unwarranted late fees, other improper fees and charges, as well as improper, unfair, and illegal seizures of real property.

93. By reason of the foregoing, Citi and MassMutual and/or its/their agent(s) and/or principal(s) have been unjustly enriched and should be required to disgorge their illicit profits and/or make restitution to Plaintiff and other South Carolina consumers who have been harmed, and/or be enjoined from continuing in such practices pursuant to South Carolina's Unfair Trade Practices Act. Additionally, Plaintiff is therefore entitled to injunctive relief and attorney's fees

and treble damages as available under South Carolina's Unfair Trade Practices Act. Plaintiff also invokes and demands all relief accorded by South Carolina Code sections 39-5-140(a) and 39-5-50 (b).

**ELEVENTH CAUSE OF ACTION FOR
QUIET TITLE
(AGAINST CITIMORTGAGE; MASSMUTUAL; STONEGATE; BB&T)**

94. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 93, inclusive, as though fully set forth herein.

95. Plaintiff is the equitable owner of the Subject Property which has the following legal description:

All that piece, parcel or lot of land with the buildings and improvements thereon, situate lying and being near Ladson, South Carolina, in Berkeley County, South Carolina, shown and designated as Lot 74, Block F, Tall Pines Plantation Subdivision, Section Three, on a plat dated January 19, 1977 made by Harold J. Leamond, P.E. and L.S., and recorded in the Office of the Clerk of Court for Berkeley County on January 24, 1977 in Plat Book W. Page 153. Derivation: Book 1379 at Page 53. The address is [REDACTED] [REDACTED] Ladson, SC 29456. TMS #: 233-14-01-024.

96. Plaintiff seeks to quiet title against the claims of Defendants Citi, MassMutual, Stonegate, BB&T, and all other persons unknown claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to Plaintiff's title.

97. Upon information and belief, BB&T holds itself out as entitled to fee simple ownership of the Subject Property by and through its purchase of the property at a master in equity's sale held in 2011.

98. Plaintiff seeks to quiet title as of May 7, 2008, the date Citi filed a lis pendens against the subject property. Plaintiff seeks a judicial declaration that the title to the Subject Property is vested in Plaintiff alone and that any defendant claiming an interest or lien in Subject Property be declared to have no interest estate, right, title or interest in the Subject Property and

that the Defendants, their agents and assigns, be forever enjoined from asserting any estate, right title or interest in the Subject Property subject to Plaintiff rights.

**TWELFTH CAUSE OF ACTION FOR
SLANDER OF TITLE
(AGAINST CITIMORTGAGE, MASSMUTUAL, AND STONEGATE)**

99. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 98, inclusive, as though fully set forth herein.

100. Defendant Citi and/or MassMutual fraudulently assigned a mortgage which it filed with the Berkeley County Register of Deeds. Defendant Citi and/or MassMutual additionally caused to be filed a lis pendens against real property owned by Plaintiff. Defendant Stonegate knew that the Citi and/or MassMutual foreclosure was unlawful, that the basis of the foreclosure was the result of negligent, reckless, wilfull, and/or wanton conduct on the part of Citi and/or MassMutual and nevertheless purchased the property at auction and requested, received from the master and subsequently recorded a deed on the basis of the unlawful foreclosure sale.

101. By besmirching Plaintiff's title to real property, Defendants Citi, MassMutual, and Stonegate caused Plaintiff to suffer special damages.

102. The invalid liens and or deeds and mortgages were effectively published because they were recorded in Berkeley County and as such is public information freely available.

103. Defendant Citi and/or MassMutual filed its lis pendens knowing full well that the property that was its subject was owned by Plaintiff and was not subject to foreclosure as payments on the attendant note had been paid.

104. As a result of her besmirched title, via the various invalid mortgages, deeds and lis pendens, Plaintiff's property has been under a cloud since May of 2008 which has undermined her rights to full use and enjoyment of her property.

105. By doing the acts described above, Citi, MassMutual, and Stonegate have slandered Plaintiff's title to the Subject Property.

106. The conduct of Citi, MassMutual, and Stonegate caused Plaintiff to suffer general and special damages in an amount to be proven at trial.

**THIRTEENTH CAUSE OF ACTION FOR
TORTIOUS INTERFERENCE WITH CONTRACT
(AGAINST CITIMORTGAGE AND MASSMUTUAL)**

107. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 106, inclusive, as though fully set forth herein.

108. Plaintiff secured a note whereby she agreed to make installment payments to a third party. Plaintiff was certain to realize future economic benefit as a result of the contractual relationship

109. Defendants Citi and MassMutual knew about the existence of the contract between third party and Plaintiff.

110. Defendants Citi and/or MassMutual, and/or its/their agent(s) and/or principal(s), intentionally acted in a way designed to disrupt the relationship between Plaintiff and the third party and to interfere with the carrying out of the contract between the Plaintiff and third party.

111. Specifically, Citi and/or MassMutual refused properly to carry out its task to service the terms of the contract between Plaintiff and third party faithfully, diligently, and fairly. Citi and/or MassMutual failed to discharge its duty to Plaintiff as well as to third party in taking reasonable steps to ensure that all installment payments were promptly credited to the correct

account. Citi and/or MassMutual failed to take reasonable steps to notify Plaintiff of steps necessary to preserve the expectations of performance held by both the Plaintiff and third party.

112. As a result of Citi's and/or MassMutual's actions, the contractual relationship between Plaintiff and third party was disrupted catastrophically. Citi's and/or MassMutual's actions or failures to act proximately caused economic damages to Plaintiff in amounts to be proved at trial.

**FOURTEENTH CAUSE OF ACTION FOR
NEGLIGENT MISREPRESENTATION
(AGAINST CITIMORTGAGE AND MASSMUTUAL)**

113. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 112, inclusive, as though fully set forth herein.

114. Citi and/or MassMutual and/or its/their agent(s) and/or principal(s), instructed Plaintiff on numerous occasions how, when, for what amount and to whom to make payments in order that Plaintiff's account could be brought current. On each occasion, those representations were false and Citi and/or MassMutual knew or should have known that its representations were false.

115. Citi and/or MassMutual and/or its/their agent(s) and/or principal(s) instructed Plaintiff not to hire a lawyer to defend the lawsuit and represented to Plaintiff that as long as she carried out the instructions regarding how, when, for what amount, and to whom to make payments, that the foreclosure lawsuit would be dismissed. On each occasion, Citi's and/or MassMutual's representations were false and Citi and/or MassMutual knew or should have known that its representations were false.

116. Citi and/or MassMutual and/or its/their agent(s) and/or principal(s), made these representations, and upon information and belief, other false representations, without any reasonable grounds for believing them to be true.

117. Citi and/or MassMutual and/or its/their agent(s) and/or principal(s) made the various representations intending to prevent Plaintiff from engaging an attorney, from getting her loan current, and in an effort to speed up the foreclosure process so that Citi and/or MassMutual could seize the equity it knew existed in the Subject Property. Citi's and/or MassMutual's representations were made falsely and with the intent to induce the Plaintiff to rely upon them.

118. Plaintiff did believe the various misrepresentations: that she need not retain counsel and that she need only comply with the instructions given for making payments in order to cure her delinquent account. Plaintiff did rely on Citi's and/or MassMutual's misrepresentations, Plaintiff's reliance was reasonable and she relied upon Citi's and/or MassMutual's misrepresentations to her detriment.

119. As a result of her reliance on the misrepresentations, Plaintiff suffered damages in an amount to be established at trial.

**FIFTEENTH CAUSE OF ACTION FOR
OUTRAGE--INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS
(AGAINST CITIMORTGAGE AND MASSMUTUAL)**

120. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 119, inclusive, as though fully set forth herein.

121. Plaintiff has suffered severe emotional distress and anxiety as a direct result of Citi's and/or MassMutual's actions alleged herein.

122. Citi and/or MassMutual intentionally or recklessly inflicted severe emotional distress, or was/were certain, or substantially certain, that such distress would result from its/their conduct.

123. Citi's and/or MassMutual's conduct alleged herein was so extreme and outrageous so as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community.

124. The actions of Citi and/or MassMutual caused Plaintiff's emotional distress.

125. The emotional distress suffered by the Plaintiff was severe such that no reasonable person could be expected to endure it.

**SIXTEENTH CAUSE OF ACTION FOR
DEFAMATION
(AGAINST CITIMORTGAGE AND MASSMUTUAL)**

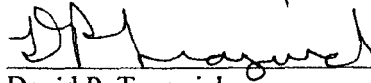
126. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 125, inclusive, as though fully set forth herein.

127. Upon information and belief, Citi and/or MassMutual have falsely reported to credit reporting/ratings agencies that Plaintiff failed to make mortgage payments.

128. These false reports of missed mortgage payments were defamatory, were unprivileged publications to a third party, were the fault of Citi and/or MassMutual, were libelous *per se* and caused Plaintiff general and special damages in that the false reports of missed mortgage payments harmed Plaintiff's reputation as to lower her in estimation of the community or to deter third persons from associating or dealing with him.

WHEREFORE, Plaintiff prays for judgment against the Defendants as follows:

1. For a declaration of the rights and duties of the parties, specifically that the foreclosure of Plaintiff's residence was wrongful.
2. For issuance of an Order canceling all Master's Deeds Upon Sale.
3. To vacate the Master's Deeds.
4. To vacate and set aside the initial foreclosure sale and any subsequent sales.
5. To quiet title in favor of Plaintiff and against Defendants.
6. For compensatory, special, general and punitive damages according to proof against Citi and MassMutual.
7. For civil penalties pursuant to statute, restitution, injunctive relief and reasonable attorneys fees according to proof against Citi and MassMutual.
8. For reasonable costs of suit and such other and further relief as the Court deems proper.

 Date: Dec. 8, 2011

David P. Traywick
TRAYWICK LAW OFFICES, LLC
P.O. Box 564
Isle of Palms, SC 29451
Telephone: 843-343-5092
Fax: 843-300-1051

-and-

Matthew D. Hamrick
Attorney at Law
875 Lowcountry Blvd., Ste. 206
Mt. Pleasant, SC 29464
tel. (843) 693-4700
fax: (877) 524-5023
matt@matthamricklaw.com

CO-COUNSEL FOR PLAINTIFF

) IN THE COURT OF COMMON PLEAS
)
) CASE NO.: 2011-CP-08-1754

Defendants.

**PLAINTIFF'S MOTION TO
RECONSIDER, ALTER, OR
AMEND ORDER
GRANTING SUMMARY
JUDGMENT IN FAVOR OF
CITIMORTGAGE, INC.**

The grounds for this motion are: 1) the discovery of the existence and identity of the actual mortgage lender, Massachusetts Mutual Life Insurance Company ("MassMutual") on December 8, 2011; and 2) the Court treated Citi's motion to dismiss as a motion for summary judgment despite Citi's arguing that the Court should not and need not do so, and the Court granted summary judgment without first giving the Plaintiff the opportunity to engage in discovery.

0262

lender, MassMutual, and therefore claims related to loan servicing practices could not have been compulsory counterclaims in the prior foreclosure suit and the requirement of identity of the parties for purposes of *res judicata* is lacking.

Also, the Court *sua sponte* treated Citi's motion to dismiss as a motion for summary judgment, despite Citi's arguing that the Court should not and need not do so. (See Memorandum in Support of Motion to Dismiss at p. 2, n. 1). Consequently, the Court has improperly granted summary judgment when summary judgment was not requested and before Plaintiff had an opportunity to develop the record through discovery. Discovery should be allowed to proceed. At the very least, Citi's motion to dismiss should not be converted into a motion for summary judgment, and the decision whether to grant summary judgment should be stayed, until the parties have had a full opportunity to conduct discovery. The Court of Appeals of South Carolina has explained that:

summary judgment is a "drastic remedy" which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Cunningham v. Helping Hands, Inc.*, 352 S.C. 485, 575 S.E.2d 549 (2003); *Lanham v. Blue Cross & Blue Shield*, 349 S.C. 356, 563 S.E.2d 331 (2002); *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002); *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 581 S.E.2d 496 (Ct.App.2003); *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 573 S.E.2d 830 (Ct.App.2002); *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 558 S.E.2d 271 (Ct.App.2001); *Murray v. Holnam, Inc.*, 344 S.C. 129, 542 S.E.2d 743 (Ct.App.2001); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct.App.1998). Because summary judgment is a drastic remedy, it **must not be granted until the opposing party has had a "full and fair opportunity to complete discovery."** *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003); *Lanham*, 349 S.C. at 363, 563 S.E.2d at 334; *Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001); *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999); *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326, 331 (Ct. App. 2003) (emphasis added). The court in *Schmidt* went on to explain:

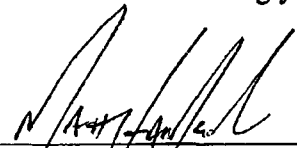
Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333; *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000); *Mosteller v. County of Lexington*, 336 S.C. 360, 520 S.E.2d 620 (1999); *Redwend Ltd. P'ship*, 354 S.C. at 468, 581 S.E.2d at 501; *Baril*, 352 S.C. at 280, 573 S.E.2d at 835; *Trivelas*, 348 S.C. at 130, 558 S.E.2d at 273; *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct.App.2002); *Hedgepath v. American Tel. & Tel. Co.*, 348 S.C. 340, 559 S.E.2d 327 (Ct.App.2001); *Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001); *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct.App.1999); *Middleborough Horizontal Prop. Regime Council v. Montedison*, 320 S.C. 470, 465 S.E.2d 765 (Ct.App.1995). "Summary judgment is inappropriate when further development of the facts is desirable to clarify the application of the law." *Lee v. Kelley*, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct.App.1989). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Redwend Ltd. P'ship*, 354 S.C. at 468, 581 S.E.2d at 501; *Baril*, 352 S.C. at 280, 573 S.E.2d at 835; *Hall*, 349 S.C. at 173-74, 561 S.E.2d at 656; *Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct.App.2001); *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597 (Ct.App.2000); see also *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003) (noting that summary judgment should not be granted even when there is no dispute as to evidentiary facts, if there is dispute as to conclusions to be drawn therefrom).

Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326, 331 (Ct. App. 2003). The Court of Appeals held that summary judgment should have been denied in the *Schmidt* case because the question of law in that case was a novel one, and the application of the law to the facts was in dispute. As in the *Schmidt* case, the question of law in this case (whether *res judicata* applies in a suit complaining of mortgage servicing practices when the actual lender and real party in interest in the prior mortgage foreclosure suit was not the mortgage servicer) is a novel question, and the application of the law to the facts of this

case is in dispute. Additionally, further inquiry into the facts is necessary to clarify the application of the law. Therefore, summary judgment is inappropriate and should be denied. At a minimum, the decision on Citi's motion to dismiss should be stayed until the parties have had a full opportunity to conduct discovery if the motion is to be converted into a motion for summary judgment.

For the foregoing reasons, Plaintiff respectfully requests that the Court reconsider, alter, or amend its Order granting summary judgment in favor of Citi accordingly.

Respectfully submitted,



Matthew D. Hamrick
Attorney at Law
875 Lowcountry Blvd., Ste. 206
Mt. Pleasant, SC 29464
Phone: (843) 693-4700
Fax: (877) 524-5023
matt@matthamricklaw.com

-and-

David P. Traywick
TRAYWICK LAW OFFICES, LLC
P.O. Box 564
Isle of Palms, SC 29451
Phone: (843) 343-5092
Fax: (843) 300-1051
dpt@traywicklaw.com

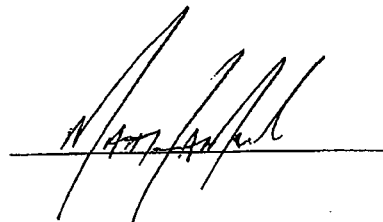
ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of January, 2012 served all parties who have appeared in this action with a copy of pleading or paper to which this Certificate is attached by mailing a copy of the same by US mail, first class and postage prepaid, and addressed as follows:

Benjamin E. Grimsley, Esq.
1703 Laurel Street
PO Box 11682
Columbia, SC 29211

Thad H. Westbrook, Esq.
Sarah B. Nielsen, Esq.
Nelson Mullins Riley & Scarborough LLP
PO Box 11070
Columbia, SC 29211-1070

A handwritten signature in black ink, appearing to read "Sarah B. Nielsen", is written over a horizontal line.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY	)	NINTH JUDICIAL CIRCUIT
Angela Drexler,	)	Civil Action No. 2011-CP-08-1754
	)	
Plaintiff,	)	
	)	<u>DEFENDANT CITIMORTGAGE,</u>
vs.	)	<u>INC.'S OPPOSITION TO</u>
	)	<u>PLAINTIFF'S MOTION TO</u>
CitiMortgage, Inc., Stonegate	)	<u>RECONSIDER, ALTER OR AMEND</u>
Properties, Inc., and Branch Banking	)	<u>JUDGMENT</u>
and Trust Company, Inc.,	)	
	)	
Defendants.	)	
	)	

2012 FEB -7 PM 1:25
 BERKELEY COUNTY, S.C.
 FILED

Defendant CitiMortgage, Inc. ("CitiMortgage") respectfully submits this opposition to Plaintiff Angela Drexler ("Plaintiff")'s Motion to Reconsider, Alter or Amend ("Motion to Reconsider") this Court's Order granting summary judgment in favor of CitiMortgage. Due to a recent filing in this matter by Plaintiff, CitiMortgage asks that the Court find the Motion to Reconsider has been voluntarily withdrawn by Plaintiff and, therefore, no ruling is necessary. As explained below, CitiMortgage has already been found by court order, at Plaintiff's request, to be finally dismissed from the case.

Plaintiff effectively withdrew the Motion to Reconsider when she submitted a motion sheet and proposed order to the Honorable Deadra L. Jefferson, entitled Consent Order for Joinder of an Additional Defendant ("Consent Order for Joinder"), stating that CitiMortgage was "*dismissed*" from the case pursuant to Judge Young's order granting summary judgment on January 6, 2012. See Consent Order for Joinder of an Additional Defendant, ¶ 4 (attached hereto as Exhibit "A"). Based on

that representation by Plaintiff in the motion and proposed order, Judge Jefferson found that Plaintiff did not need to obtain the consent of CitiMortgage to the Consent Order for Joinder, which permitted her to avoid a hearing or any objection from CitiMortgage to adding a new party to this case. Therefore, in accordance with Plaintiff's representations embodied in the Consent Order for Joinder, as outlined more fully below, the Motion to Reconsider cannot exist, it should not be ruled upon, and CitiMortgage has already been finally dismissed from the litigation effective January 6, 2012. *See Koutsogiannis v. BB&T*, 365 S.C. 145, 149, 616 S.E.2d 425, 428-29 (2005) (finding the submission of a proposed summary judgment order to the trial court an act within the scope of representation and noting that "clients are generally bound by their attorneys' acts or omissions during the legal representation").

I. Based on Plaintiff's Actions in the Litigation, Her Motion to Reconsider Has Been Voluntarily Withdrawn and Does Not Require a Ruling from the Court.

As noted above, CitiMortgage recently discovered that Plaintiff submitted a Consent Order for Joinder to the Court on or about January 25, 2012, pursuant to Rules 15 and 19 of the South Carolina Rules of Civil Procedure, and representing that the

Defendant CitiMortgage, Inc. has been dismissed from the action by Judge Roger Young's Order of January 6, 2012, is no longer a party to the action and therefore CitiMortgage Inc.'s consent is no longer required for Joinder.

See Ex. A, Consent Order for Joinder at ¶ 4. The necessary effect of this representation in the Consent Order for Joinder is that CitiMortgage is finally dismissed from the action and Plaintiff's Motion to Reconsider must be deemed as having been

voluntarily withdrawn. Plaintiff cannot maintain that there is a pending Motion to Reconsider now, after she previously represented to Judge Jefferson that CitiMortgage is no longer a party to the litigation.

A. The Consent Order for Joinder does not reference the pending Motion to Reconsider and, accordingly, it is withdrawn.

A review of the Consent Order for Joinder evidences that Plaintiff obtained the consent of Defendant Branch Banking and Trust Company, Inc., but affirmatively stated that CitiMortgage was dismissed from the action and, therefore, its consent to joinder was not required. *See id.* Implicit in this statement is the recognition that the Order granting summary judgment in favor of CitiMortgage is **final** and, on that basis, CitiMortgage is no longer a party to the litigation. Only when the Order granting summary judgment in favor of CitiMortgage is final is Plaintiff then relieved of her obligation to obtain CitiMortgage's consent when submitting a Consent Order for Joinder to the Court.¹ Thus, based on Plaintiff's own representations to Judge Jefferson, the Order granting summary judgment in favor of CitiMortgage is final and the Motion to Reconsider is necessarily withdrawn. Any contrary conclusion would conflict with Plaintiff's own representations in the Consent Order for Joinder.

This conclusion is further bolstered by the lack of any reference to the pending Motion to Reconsider and its impact on CitiMortgage in the Consent Order for Joinder.² *See generally, id.* If the Motion to Reconsider was still pending then

¹ Pursuant to Rule 15(a) of the South Carolina Rules of Civil Procedure, Plaintiff must obtain the consent of the adverse parties or leave of court to amend the Complaint.

² Additionally, Plaintiff failed to even serve or otherwise give notice to CitiMortgage of the Motion for Consent Order for Joinder, further evidencing Plaintiff's position that CitiMortgage is no longer a party to this case.

CitiMortgage remains a party to the litigation during its pendency and, accordingly, its consent was required for joinder of any additional party. *See Southeastern Hous. Found. v. Smith*, 380 S.C. 621, 640, 670 S.E.2d 680, 690 (Ct. App. 2008) (stating that a Rule 59(e) motion removes the “finality of the challenged judgment”). By making the representation to the Court that CitiMortgage was dismissed and did not need to consent to the joinder, Plaintiff withdrew her Motion to Reconsider.³ Therefore, Plaintiff’s prior representation to Judge Jefferson about the procedural posture of the case and her finding that CitiMortgage has been dismissed such that its consent is not needed for amending Plaintiff’s Complaint requires a finding by this Court that her Motion to Reconsider has been withdrawn and no further ruling is required on this matter. Any other conclusion would be inconsistent with the binding representations of Plaintiff to Judge Jefferson and her findings in the Consent Order for Joinder.

B. Plaintiff is estopped from arguing that the Motion to Reconsider has not been withdrawn.

Further, Plaintiff is judicially estopped from pursuing the Motion to Reconsider because she affirmatively states in the Consent Order for Joinder that CitiMortgage is “dismissed” and no longer a party to the action. In order to now proceed with her Motion to Reconsider, she would have to take a contrary legal and factual position that CitiMortgage is not dismissed and that, in fact, it is still a party to the litigation. *See Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004) (“Judicial estoppel is an equitable concept that prevents a litigant from asserting a

³ The Plaintiff’s Consent Order for Joinder references a possible appeal of this Court’s order granting summary judgment, but it does not refer to the Motion to Reconsider in the proposed order or motion.

position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding.”). Plaintiff’s position that CitiMortgage is no longer a party to the litigation benefits her because she was able to join a new party to the litigation without having to obtain the consent of CitiMortgage in compliance with the South Carolina Rules of Civil Procedure.

As the Court is aware, Plaintiff previously filed a Motion to Amend the Complaint on December 9, 2011, that was contested by CitiMortgage.⁴ However, she has now avoided any objection to an amendment by CitiMortgage by declaring to the Court that CitiMortgage is no longer a party to the case and, thereby, receiving a Consent Order joining Mass Mutual as a party in this action. Accordingly, Plaintiff is barred from reversing course now and claiming that CitiMortgage is still a party to the action and subject to a pending Motion to Reconsider or any other motion. Those positions are inherently inconsistent—either CitiMortgage is a party to the litigation because the judgment is not final or CitiMortgage is not a party to the litigation because Plaintiff concedes that her Motion to Reconsider is withdrawn. Plaintiff elected to effectively withdraw her Motion to Reconsider so that she could submit a Consent Order joining Mass Mutual as a party to the action without seeking and receiving the consent of CitiMortgage.

Consequently, having submitted the Consent Order for Joinder to Judge Jefferson stating that CitiMortgage is “dismissed” and “no longer a party to the action,” she cannot now take the contrary position that CitiMortgage is a party to the

⁴ The Motion to Amend Complaint sought to add Mass Mutual Life Insurance Company as a party to the litigation and assert claims against it that relate to the prior foreclosure action—claims that are similarly barred by the doctrine of res judicata.

litigation for purposes of the Motion to Reconsider. *See Wright v. Hiester Constr. Co.*, 389 S.C. 504, 519, 698 S.E.2d 822, 830 (Ct. App. 2010) (“Judicial estoppel comes into play when the court is forced to take a position based on a factual assertion.”); *Hawkins v. Bruno Yacht Sales*, 353 S.C. 31, 43, 577 S.E.2d 202, 208 (2003) (“When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.”) (internal citation omitted). Based on the foregoing, Plaintiff is judicially estopped from pursuing her Motion to Reconsider. *See Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251–52, 489 S.E.2d 472, 477 (1997) (“In order for the judicial process to function properly, litigants must approach it in a truthful manner. Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. The doctrine punishes those who take the truth-seeking function of the system lightly.”). Therefore, the Court must find that the Motion to Reconsider is withdrawn and no ruling is necessary because CitiMortgage was finally dismissed from the case on January 6, 2012.

II. Alternatively, if the Court Entertains Plaintiff’s Motion to Reconsider, the Motion Fails on the Merits.

Even if this Court considers Plaintiff’s Motion to Reconsider, it should be denied on the merits. Pursuant to the South Carolina Rules of Civil Procedure, a party may file a motion to dismiss pursuant to Rule 12(b)(6) “before pleading if a further pleading is permitted.” S.C. R. Civ. P. 12(b). When “matters outside the pleadings are presented to and not excluded by the Court,” the Court may treat the motion as “one for summary judgment and [be] disposed of as provided in Rule 56.”

Id. Further, the rules specifically allow a party to move and the court to grant a motion for summary judgment “at any time.” *See* S.C. R. Civ. P. 56(a).

Moreover, the “purpose of summary judgment is to obviate delay where there is no material issue of fact.” *Loyd’s Inc. v. Good*, 306 S.C. 450, 454–55, 412 S.E.2d 441, 444 (Ct. App. 1991). “A party cannot escape summary judgment on the mere hope that something may develop at trial.” *Champion Int’l Corp. v. Eubanks*, 291 S.C. 395, 398, 383 S.E.2d 880, 882 (Ct. App. 1987) (quoting *Hammond v. Scott*, 268 S.C. 137, 143, 232 S.E.2d 336, 339 (1977)). While Plaintiff argues that this Court should deny summary judgment “until the parties have had a full opportunity to conduct discovery,” (Pl.’s Mot. to Alter or Amend at p.4), she has failed to “demonstrate the likelihood that further discovery will uncover additional relevant evidence and that [she] is not merely engaged in a fishing expedition.” *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) (internal citation omitted); *CEL Prods., L.L.C. v. Rozelle*, 357 S.C. 125, 131, 591 S.E.2d 643, 646 (Ct. App. 2004) (holding “summary judgment was warranted to avoid prolonging litigation based upon a mere possibility that Rozelle might obtain some helpful information from a deposition”); *see also Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659, 660 (Ct. App. 1994) (affirming summary judgment despite plaintiff’s claim that discovery was not completed and noting that “a defending party may move for summary judgment at any time”).

Further, Plaintiff has failed to come forward with an affidavit or some other form of declaration identifying why she needs additional time for discovery, pursuant to Rule 56(f). *See* S.C. R. Civ. P. 56(f). In support of the Motion to

Reconsider and in opposition to summary judgment, Plaintiff was required to submit an affidavit, declaration, or some other form of evidence similar to an affidavit provided in accordance with Rule 56(f) of the South Carolina Rules of Civil Procedure, identifying why she needs more time for discovery, what additional discovery is needed, and why this discovery impacts summary judgment as it relates to CitiMortgage. *See, e.g., John Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001) (“Rule 56(f) requires the party opposing summary judgment to at least present affidavits explaining why [s]he needs more time for discovery.”). Instead, Plaintiff filed the Motion to Reconsider making conclusory statements that the motion to dismiss should be stayed until the parties have had a “full opportunity” to conduct discovery generally. The identification of the investor by Plaintiff is not a reason to forego summary judgment and proceed with discovery.⁵ *See West v. Gladney*, 341 S.C. 127, 135, 533 S.E.2d 334, 338 (Ct. App. 2000) (“[T]his court ordinarily will not consider statements of fact presented only in an attorney’s argument in determining whether a genuine issue of material fact exists sufficient to preclude summary judgment.”).

The material facts in this case remain undisputed as to whether the doctrines of res judicata and collateral estoppel apply. The undisputed facts demonstrate that CitiMortgage filed a Complaint for Foreclosure against Plaintiff on May 7, 2008, followed by an Amended Complaint for Foreclosure on May 21, 2008. Plaintiff failed to file a response to the First Amended Complaint for Foreclosure, an Order of Default was issued on September 3, 2008, and a Judgment of Foreclosure and

⁵ As noted above, Plaintiff has already sought and received a Consent Order from Judge Jefferson adding the investor, Mass Mutual, to this action so that she can attempt to pursue claims against it.

Sale filed on October 29, 2008. In that previous action, on February 19, 2009, Plaintiff moved pursuant to Rule 60(b) for an order vacating the Judgment of Foreclosure and Sale and for reinstatement of the mortgage, which was denied. Plaintiff never appealed the Master in Equity's ruling and, consequently, the time for appeal has since expired. It was not until two years later, on June 21, 2011, that Plaintiff filed the instant action against CitiMortgage, *again* challenging the servicing of the loan and seeking to set aside the Master in Equity's sale in the foreclosure action.

Any challenge related to CitiMortgage's authority to foreclose as the real party in interest could have and should have been raised in the prior foreclosure action. As noted above, Plaintiff could have raised the argument by filing an Answer, but instead, she was dilatory and defaulted in the foreclosure action. While waiving her first opportunity to present this argument, Plaintiff later filed the Rule 60(b) motion in the foreclosure action, which was considered and ruled upon. At that point, the Master in Equity considered Plaintiff's current arguments and held that CitiMortgage had standing to pursue foreclosure. Plaintiff failed to appeal that ruling. Accordingly, Plaintiff cannot now challenge CitiMortgage's standing in a separate, independent action without running afoul of the doctrines of res judicata and collateral estoppel. As outlined in this Court's January 6, 2102 Order, all of Plaintiff's claims are barred by the doctrines of collateral estoppel and res judicata. *See, e.g., Plott v. Justin Enters.*, 374 S.C. 504, 511, 649 S.E.2d 92, 95 (Ct. App. 2007) ("*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of the prior action between those parties. Under *res judicata*, a litigant is barred from raising any issues which were adjudicated in the

former suit and any issues *which might have been raised* in the former suit.”) (internal citations omitted, emphasis added). The arguments in Plaintiff’s Motion to Reconsider do not change this result.

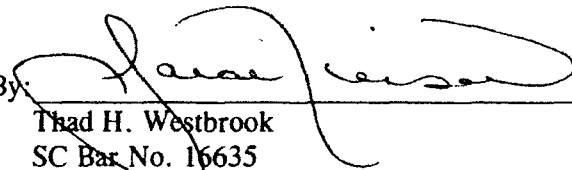
For all the reasons outlined herein, if this Court considers Plaintiff’s Motion to Reconsider, it should be denied on the merits. Plaintiff’s attempt to continue to reargue an issue that was previously litigated and determined multiple times, and profit from her own dilatory actions in the foreclosure matter, is an inefficient use of judicial resources and an inappropriate application of Rule 59(e).

III. Conclusion.

Based on Plaintiff’s own representations to the Court and the Consent Order for Joinder, CitiMortgage is no longer a party to this litigation and Plaintiff’s Motion to Reconsider has therefore been voluntarily withdrawn such that no pending motion exists for this Court to rule on. Should this Court determine that Plaintiff’s Motion to Reconsider has not been withdrawn in light of the representation to Judge Jefferson that CitiMortgage is “dismissed” and longer a party to the litigation, CitiMortgage argues in the alternative that Plaintiff’s Motion to Reconsider fails on the merits and should be denied.

SIGNATURE PAGE ATTACHED

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Thad H. Westbrook

SC Bar No. 16635

E-Mail: thad.westbrook@nelsonmullins.com

Sarah B. Nielsen

SC Bar No. 78384

E-Mail: sarah.nielsen@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for CitiMortgage, Inc.

Columbia, South Carolina

2/16, 2012

EXHIBIT A
(Consent Order for Joinder)

file copy

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

COUNTY OF BERKELEY

CASE NO.: 2011-CP-08-1754

Angela Drexler

Plaintiff,

MOTION AND ORDER INFORMATION
FORM AND COVERSHEET

vs.

CitiMortgage; Stonegate; BB&T.

Defendant.

Plaintiff's Attorney:

David P. Traywick, Bar No. 78502

Address:

PO Box 564 IOP SC 29451

Phone: 843 343 5092 Fax 843 300 1051

E-mail: dpt@traywicklaw.com Other:

Defendant's Attorney:

_____, Bar No. _____

Address:

Phone: _____ Fax _____

E-mail: _____ Other: _____

☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Amend Complaint

Estimated Time Needed: 30

Court Reporter Needed: ☒ YES ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☐ Defendant Date submitted _____

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$ 25⁰⁰

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED - AMOUNT DUE: \$ _____

SCCA 233 (11/2003)

2012 JAN 25 AM 11:54
CLERK OF COURT
BERKELEY COUNTY, SC

LED

mdx

B

) IN THE COURT OF COMMON PLEAS

Case No.: 2011-CP-08-1754

1

1

2

2

—

**CONSENT ORDER FOR JOINDER OF
AN ADDITIONAL DEFENDANT
PURSUANT TO RULES 19
AND 15, SCRPC** 8

MARY P. BROOKS
CLERK OF COURT
BENNELEY COUNTY, SC

2012 JAN 25 AM 11:55

四四

IT APPEARING TO THE COURT:

1. That Joinder of an additional Defendant, Massachusetts Mutual Life Insurance Company under Rule 19 is necessary for a just adjudication in this case;
2. That this Joinder conforms to Rule 19(a)(1);
3. That Joinder will not deprive the Court of jurisdiction over the subject matter of the action;
4. That Defendant CitiMortgage, Inc. has been dismissed from the action by Judge Roger Young's Order of January 6, 2012, is no longer party to the action and therefore CitiMortgage Inc.'s consent is no longer required for Joinder;
5. That Defendant Stonegate Properties, Inc. is in default and has not appeared in the action and therefore Stonegate Properties, Inc.'s consent is no longer required for Joinder;
6. That the remaining party consents to the Joinder of Defendant Massachusetts Mutual Life Insurance Company;
7. That a Consent Order for Joinder of a necessary party under SCRCP Rule 19

105

implies consent to Amend Plaintiff's Complaint in order to lay causes of action against the necessary party so joined, Massachusetts Mutual Life Insurance Company;

8. That the Parties agree that an Amendment under SCRCR Rule 15 be restricted to adding new causes of action against Massachusetts Mutual Insurance Company;

9. That Rule 15 specifically calls for the relation back of amendments where the party against whom a claim is asserted (1) has received such notice of the action and will not be prejudiced in defending on the merits or (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him;

10. That the contents of this Order and the Amended Complaint shall have no force or effect upon the Order granting Summary Judgment and Dismissing Defendant CitiMortgage, Inc.;

11. That the contents of this Order and the Amended Complaint leave unmolested the claims of the original Complaint as brought against Defendant CitiMortgage, Inc. because until such time as all appeals have been exhausted, CitiMortgage, Inc. may be ordered back into this case whereupon that Defendant might be required to Answer the claims originally laid against it; and

12. That the Amended Complaint leaves intact the entirety of the original Complaint and merely supplements it with new claims against the new necessary party, Defendant Massachusetts Mutual Insurance Company.

THEREFORE, it is hereby ordered:

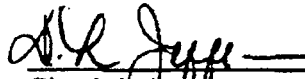
- a. That Plaintiff's Complaint is Amended to add Massachusetts Mutual Life Insurance Company as a defendant;
- b. That Plaintiff's causes of action against Massachusetts Mutual Life Insurance



Company relate back to the date of Plaintiff's original Complaint:

- c. That the Amended Complaint shall have no effect upon Judge Roger Young's January 6, 2012 Order granting Summary Judgment in favor of Defendant CitiMortgage Inc.;
- d. That upon signing of this Order by the Court that such signing shall resolve Plaintiff's pending motion to Amend its Complaint and such motion shall be removed from the schedule; and
- e. That the Amended Complaint, attached hereto, shall be deemed served upon Defendant BB&T by service of this Order; and that Plaintiff shall serve the Amended Complaint upon Defendant Massachusetts Life Insurance Company pursuant to Rule 4, SCRCP.

AND IT IS SO ORDERED


Circuit Judge

Date: Jan 23, 2012

Chas. S. C. [Signature]

*345
[Signature]*

WE CONSENT

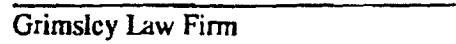

TRAYWICK LAW OFFICES, LLC
P.O. Box 564
Isle of Palms, SC 29451
Telephone: 843-343-5092
Fax: 843-300-1051
Dpt@traywicklaw.com

-and-

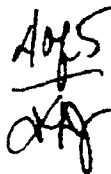
Matthew D. Hamrick
Attorney at Law
875 Lowcountry Blvd., Ste. 206
Mt. Pleasant, SC 29464
(843) 693-4700
matt@matthamricklaw.com

CO-COUNSELS FOR PLAINTIFF

WE CONSENT


Grimsley Law Firm
By Benjamin E. Grimsley
1703 Laurel Street
PO Box 11682
Columbia, SC 29211

ATTORNEY FOR DEFENDANT BB&T



WE CONSENT


TRAYWICK LAW OFFICES, LLC
P.O. Box 564
Isle of Palms, SC 29451
Telephone: 843-343-5092
Fax: 843-300-1051
Dpt@traywicklaw.com

-and-

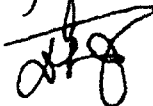
Matthew D. Hamrick
Attorney at Law
875 Lowcountry Blvd., Ste. 206
Mt. Pleasant, SC 29464
(843) 693-4700
matt@matthamricklaw.com

CO-COUNSELS FOR PLAINTIFF

WE CONSENT


Grimsley Law Firm
By Benjamin E. Grimsley
1703 Laurel Street
PO Box 11682
Columbia, SC 29211

ATTORNEY FOR DEFENDANT BB&T

5815


THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Roger Mack Young, Circuit Court Judge

Case No. 11-CP-08-1754

Angela Drexler. Appellant,

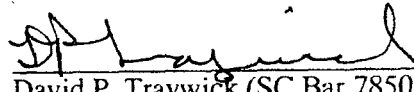
v.

CitiMortgage, Inc., Stonegate Properties, Inc., and Branch Banking and Trust Company, Inc.,
Massachusetts Mutual Life Insurance Company Defendants,

of whom CitiMortgage, Inc. is Respondent.

NOTICE OF APPEAL

Angela Drexler appeals the Order of the Honorable Roger Mack Young dated January 6, 2012 and entered January 6, 2012. Appellant received written notice of entry of the Order on January 6, 2012. Appellant also appeals the Order of the same honorable judge dated March 5, 2012 and entered March 6, 2012 (same being a ruling on a motion to reconsider). Appellant received written notice of entry of said order on March 7, 2012.


David P. Traywick (SC Bar 78502)
Attorney for Appellant

Post Office Box 564
Isle of Palms, South Carolina 29451
Phone: (843) 343-5092
Fax: (843) 300-1051
Dpt@traywicklaw.com

Charleston, South Carolina

Date: April 4, 2012

Other Counsel of Record:

Sarah B. Nielsen
Nelson Mullins Riley & Scarborough LLP
Meridian, 17th Floor
1320 Main Street, Columbia, SC 29201
Phone: 803-255-9284
Fax: 803-255-5943
Attorney for CitiMortgage, Inc., RESPONDENT

Benjamin E. Grimsley
Grimsley Law Firm, LLC
PO Box 11682
Columbia, SC 29211
Phone: 803-233-1177
Fax: 803-233-0798
Attorney for Branch Banking & Trust Company

Alana Williams
Nelson Mullins Riley & Scarborough LLP
Meridian, 17th Floor
1320 Main Street, Columbia, SC 29201
Phone: 803-255-9284
Fax: 803-255-5943
Attorney for Massachusetts Mutual Life Insurance Company

Other Defendants / Respondents:

Stonegate Properties, Inc.
619 Chatham Avenue
Columbia, SC 29205

The Honorable Mary Brown
Berkeley County Clerk of Court
PO Box 219
Moncks Corner, SC 29461
Phone: 843-719-4400

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Roger Mack Young, Circuit Court Judge

Case No. 11-CP-08-1754

Angela Drexler. Appellant,

v.

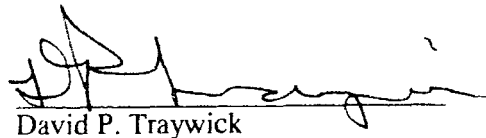
CitiMortgage, Inc., Stonegate Properties, Inc., and Branch Banking and Trust Company, Inc.,
Massachusetts Mutual Life Insurance Company Defendants,

of whom CitiMortgage, Inc. is Respondent.

PROOF OF SERVICE

I, David P. Traywick, do hereby certify that I have, on April 4, 2012, served the foregoing
Notice of Appeal upon the Respondent or attorney(s) for the Respondent by causing a copy thereof
to be mailed with proper postage to the address(es) indicated below:

Nelson Mullins Riley & Scarborough LLP
Attn.: Sarah B. Nielsen
Meridian, 17th Floor
1320 Main Street, Columbia, SC 29201


David P. Traywick

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
MAY 24 2012
SC Court of Appeal

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger Mack Young, Circuit Court Judge

Case No. 2011-CP-08-1754

CitiMortgage, Inc., ... Respondent,

v.

Angela Drexler, ... Appellant.

MOTION TO DISMISS

Pursuant to Rules 260(a) and 240(a) of the South Carolina Appellate Court Rules, Respondent CitiMortgage, Inc. ("CitiMortgage"), hereby moves this Court for an order dismissing the appeal served on April 4, 2012 and filed on April 13, 2012 by Appellant Angela Drexler ("Appellant"). The ground for this motion is that this Court lacks jurisdiction over this appeal because Appellant failed to timely serve her notice of appeal after voluntarily withdrawing her Motion to Reconsider pursuant to Rule 59(e), SCRCP.

Following the lower court's order granting CitiMortgage's dispositive motion, Appellant filed a Motion to Reconsider pursuant to Rule 59(e), SCRCP. While the Motion to Reconsider was pending, Appellant continued to litigate her case and submitted a motion coversheet and proposed "consent" order joining a new party by

representing to a different circuit court judge that CitiMortgage had been dismissed from the action, was no longer a party to the litigation, and its consent was not required to add Defendant Mass Mutual Life Insurance Company as a party to the litigation. With the Motion to Reconsider pending, CitiMortgage should have been consulted regarding the request and its consent obtained for the joinder of an additional party. Because Appellant affirmatively represented to the court through her motion coversheet and proposed order that CitiMortgage was “dismissed from the action by Judge Roger Young’s Order of January 6, 2012, [and] is no longer a party to the action,” she necessarily and effectively must have withdrawn the Motion to Reconsider when she made that representation to the lower court. Judge Young agreed with CitiMortgage’s position, deeming Appellant’s Motion to Reconsider moot. By failing to serve her Notice of Appeal on or before February 6, 2012, Appellant’s appeal is untimely. As a result, this jurisdictional defect requires this Court to dismiss Appellant’s appeal in its entirety.

PROCEDURAL HISTORY & BACKGROUND

A brief overview of the procedural history of this action establishes that Appellant’s Notice of Appeal is untimely. This litigation began on June 21, 2011, when Appellant filed a Complaint against CitiMortgage, Stonegate Properties, Inc. and Branch Banking and Trust Company, Inc. seeking to set aside a Master’s Sale, void a Master’s Deed, cancel a Mortgage Assignment, set aside a foreclosure judgment, and recover damages from CitiMortgage on the basis of negligence, fraud, breach of contract, breach of implied covenant of good faith and fair dealing, unjust enrichment, slander of title, negligent misrepresentation, tortious interference with contract, and

alleged violation of the South Carolina Unfair Trade Practices Act (“SCUTPA”)—all related to the servicing or origination of her loan. On August 25, 2011, CitiMortgage filed a Motion to Dismiss Appellant’s Complaint on the basis of res judicata and collateral estoppel¹ since all of the claims were compulsory counterclaims or defenses that should have been raised in a prior foreclosure action.

The prior foreclosure action was filed by CitiMortgage on May 7, 2008, followed by an amended Complaint on May 21, 2008 in the Court of Common Pleas for Berkeley County, Civil Action No. 2008-CP-08-1258. Appellant failed to respond to the foreclosure pleadings and the court entered an Order of Default. A hearing was held on October 29, 2008 and, again, Appellant failed to appear. Thereafter, the court entered a Judgment of Foreclosure and Sale on October 29, 2008. The property was subsequently sold to Stonegate Properties, a defendant in the instant litigation. On February 19, 2009, Appellant filed a Motion to Vacate the Judgment of Foreclosure and Sale (“Motion to Vacate”) pursuant to Rule 60(b), SCRCF. A hearing was held on March 18, 2009, at which time the Master in Equity heard the arguments of Appellant and denied the motion. An appeal was never taken from the denial of the Motion to Vacate.

The foregoing events form the basis of CitiMortgage’s Motion to Dismiss filed in the action that is the subject of this appeal—a separate action filed almost two years after the Master-in-Equity denied Appellant’s Motion to Vacate on March 18, 2009. In fact, rather than pursue the proper course provided to her under the South Carolina

¹ CitiMortgage also raised arguments that Appellant’s negligence and negligent misrepresentation claims are barred by the economic loss rule, and that Appellant lacks standing to challenge the mortgage assignment.

Appellate Court Rules and file an appeal from the Master-in-Equity's ruling, Appellant initiated a new action on June 21, 2011, against CitiMortgage asserting the same arguments and theories that she asserted in her Rule 60 motion before the Master in Equity in 2009. In this case, all of Appellant's claims relate to the servicing of the loan, title to the subject property, or the terms of the Note and Mortgage and, therefore, should have been asserted as compulsory counterclaims in the May 2008 foreclosure action. Moreover, many of these issues were considered and decided by the Master-in-Equity in the prior action. Based on the foregoing, CitiMortgage argued in its Motion to Dismiss that the claims were barred by res judicata or collateral estoppel.

A hearing on CitiMortgage's Motion to Dismiss was held on October 12, 2011. After reading the briefing submitted by the parties and hearing the arguments presented at the hearing, The Honorable Roger M. Young treated the Motion to Dismiss as a Motion for Summary Judgment and ruled in favor of CitiMortgage on all claims. After receiving notice from Judge Young's law clerk that Judge Young was ruling in favor of CitiMortgage, Appellant filed a Motion to Amend Complaint on December 8, 2011 to add Mass Mutual Life Insurance Company as a party to the litigation. See 11/21/11 E-mail from Law Clerk of Judge Roger M. Young, attached hereto as Exhibit "A." Additionally, counsel for Appellant sent an e-mail asking Judge Young to defer signing an Order dismissing CitiMortgage until after a hearing could be scheduled on the Motion to Amend Complaint. See 12/8/11 E-mail from Attorney Matthew D. Hamrick, attached hereto as Exhibit "B." On January 9, 2012, Judge Young's law clerk informed the parties that he was signing the Order Granting Summary Judgment

in favor of CitiMortgage and that a hearing would need to be scheduled with the Clerk of Court's office for the Appellant's pending Motion to Amend Complaint. See 1/5/12 E-mail from Law Clerk of Judge Roger M. Young, attached hereto as Exhibit "C." The parties were notified on January 5, 2012, that Judge Young was granting CitiMortgage's dispositive motion and the Order Granting Summary Judgment was entered on January 6, 2012. See Order Granting Summary Judgment, attached hereto as Exhibit "D."

On January 17, 2012, Appellant filed a Motion to Reconsider, Alter or Amend the Order Granting Summary Judgment pursuant to Rule 59(e), SCRCPP ("Motion to Reconsider"). See Mot. to Reconsider, Alter or Amend, attached hereto as Exhibit "E." Rather than pursuing either the Motion to Amend Complaint or the Motion to Reconsider, Appellant then submitted a motion cover sheet and Consent Order for Joinder of an Additional Defendant to The Honorable Deadra L. Jefferson, pursuant to Rules 15 and 19, SCRCPP, but did not obtain CitiMortgage's consent to the joinder. See Consent Order for Joinder, attached hereto as Exhibit "F." Instead, Appellant represented through the Consent Order for Joinder that CitiMortgage was "dismissed from the action by Judge Roger Young's Order of January 6, 2012, is no longer a party to the action and therefore [its] consent is no longer required for Joinder." See id. at ¶ 4. Appellant further represented that the contents of the order and the Amended Complaint has "no force or effect upon the Order granting Summary Judgment and Dismissing Defendant CitiMortgage, Inc." Id. at ¶ 10. Thus, Appellant avoided a hearing on the Motion to Amend and sidestepped obtaining CitiMortgage's consent to amend the Complaint to add an additional party.

However, by representing to the Court of Common Pleas that CitiMortgage was dismissed from the action, Appellant also necessarily withdrew her Motion to Reconsider. Appellant is not permitted to maintain CitiMortgage as a party through her Motion to Reconsider and argue that CitiMortgage's consent is not needed to amend her Complaint to join a new party pursuant to Rules 15 and 19, SCRCP. Judge Young ruled accordingly on March 6, 2012. See Order Denying Mot. to Reconsider, Alter or Amend, attached hereto as Exhibit "G." Based on the foregoing, Appellant's Motion to Reconsider Notice of Appeal served on April 4, 2012 is untimely.

STANDARD OF REVIEW

Rule 203 of the South Carolina Appellate Court Rules controls the timely filing of a notice of appeal. When a notice of appeal is not timely filed by an appellant, the Court of Appeals lacks jurisdiction to hear the appeal. See Canal Ins. Co. v. Caldwell, 338 S.C. 1, 5, 524 S.E.2d 416, 418 (Ct. App. 1999) ("Rule 203(b), SCACR, requires a party to serve his notice of appeal within thirty days after receiving written notice of the entry of a final order or judgment, and failure to do so divests this court of subject matter jurisdiction and results in dismissal of the appeal."). Specifically, Rule 203 provides, in relevant part, that:

A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.

Rule 203(b)(1), SCACR. While the rule allows the filing of a timely post-trial motion to toll the thirty-day time limit to serve the notice of appeal, Appellant's Rule 59(e) motion fails to satisfy that requirement because it was voluntarily withdrawn by Appellant. Once Appellant voluntarily withdrew the Motion to Reconsider, the time for appeal began running. Therefore, as outlined below, Appellant's Notice of Appeal in this matter is untimely.

ARGUMENT

This Court lacks the jurisdiction necessary to address Appellant's appeal because the Notice of Appeal was not timely served. Here, Appellant's Motion to Reconsider stopped tolling the time for appeal when she presented a Consent Order for Joinder to the Court of Common Pleas on January 25, 2012, representing that CitiMortgage was finally dismissed from the matter on January 6, 2012—a statement that is erroneous unless she withdrew the pending Motion to Reconsider. Accordingly, Appellant acknowledged that the January 6, 2012 summary judgment Order was final and relied on this assertion to obtain an advantage in the pending litigation, thereby voluntarily withdrawing the Motion to Reconsider. Further, by making the representations in the Consent Order for Joinder, Appellant was judicially estopped from taking a contrary position and pursuing the Motion to Reconsider. Due to these representations, as outlined further below, Appellant's thirty-day period in Rule 203(b)(1), SCACR was not tolled and, therefore, began running on January 6, 2012. To the extent any tolling occurred in this case, the tolling period ended no later than January 25, 2012, when Appellant submitted the Consent Order for Joinder to Judge Jefferson and necessarily withdrew her pending Motion to Reconsider. In either

instance, the thirty-day period outlined in Rule 203(b)(1), SCACR has run. Appellant failed to appeal in a timely fashion and, therefore, this appeal must be dismissed.

Specifically, in the Order denying Appellant's Motion to Reconsider as moot, the Court held that "Plaintiff effectively withdrew the Motion to Reconsider when she submitted the motion sheet and proposed Consent Order for Joinder to Judge Jefferson and acknowledged CitiMortgage was 'dismissed' from the case as of the January 6, 2012 Order." Ex. D, at ¶ 7. Judge Young noted that Appellant made a representation to the Court in the Consent Order for Joinder that she did not have to obtain CitiMortgage's consent to add an additional party to the litigation because CitiMortgage was "dismissed" and "no longer a party" to the action. See id. at ¶ 8. However, Appellant's representation to the Court in the Consent Order for Joinder is only true if Appellant withdrew her Motion to Reconsider. Certainly counsel for Appellant would not make a false representation to the Court in violation of Rule 11, SCRCF and, therefore, there is no other conclusion to draw from Appellant's actions other than she necessarily withdrew the pending Motion to Reconsider. Judge Young agreed. See id. at ¶ 15 ("Plaintiff elected to effectively withdraw her Motion to Reconsider so that she could submit a Consent Order for Joinder, joining Defendant Mass Mutual as a party to the action, without seeking or receiving the consent of Defendant.").

As noted in CitiMortgage's Opposition to Motion to Reconsider, South Carolina law is clear that a pending Rule 59(e) motion removes the finality of a judgment. See, e.g., Southeastern Hous. Found. v. Smith, 380 S.C. 621, 640, 670 S.E.2d 680, 690 (Ct. App. 2008). By removing the finality of the judgment, CitiMortgage remained a party to the litigation and Appellant was obligated by Rule 15(a), SCRCF to either

obtain CitiMortgage's consent to amend the pleading or proceed with a hearing on the Motion to Amend Complaint. Appellant did not obtain CitiMortgage's consent to the amendment and apparently did not contact the Clerk of Court to schedule a hearing on the pending Motion to Amend filed in December 2011. Instead, because Appellant represented to the Court that CitiMortgage was "no longer a party" to the litigation, she necessarily withdrew her Motion to Reconsider. See Ex. D, at ¶ 10 ("[B]ased on Plaintiff's own representations to Judge Jefferson, the Order granting summary judgment in favor of Defendant is final as of January 6, 2012, and the Motion to Reconsider is necessarily withdrawn."). By withdrawing her Motion to Reconsider, Appellant's statutory time for appeal began to run on January 6, 2012.² See id. at ¶ 16 ("Therefore, the Court finds that the Motion to Reconsider was withdrawn by Plaintiff, the Motion to Reconsider is moot, and Defendant was finally dismissed from the case on January 6, 2012.").

Although the South Carolina Supreme Court has not previously had occasion to consider whether a voluntarily withdrawn Rule 59(e) motion tolls the time in which a party must appeal, it has held in analogous situations that an ineffectual Rule 59(e) motion does not toll the time to appeal. See, e.g., Robinson v. Robinson, 365 S.C. 583, 586, 619 S.E.2d 425, 426 (2005) (holding that an inappropriate post-trial motion does not toll the time for appeal); Quality Trailer Prods., Inc. v. CSL Equip. Co., Inc., 349 S.C. 216, 219, 562 S.E.2d 615, 617 (2002) (holding that the filing of successive

² As noted above, even if Appellant attempts to argue that the statutory time for appeal was tolled due to the pending Motion to Reconsider, the tolling necessarily ended when Appellant submitted the motion coversheet and proposed order to Judge Jefferson representing that CitiMortgage was finally dismissed from the case as of January 6, 2012. Therefore, at most, the statutory time for appeal was tolled between January 6, 2012 and January 25, 2012 and Appellant's Notice of Appeal is still untimely.

post-trial motions raising issues already raised to and ruled upon by the trial court does not toll the time to serve a notice of appeal). This same reasoning applies here. Specifically, Appellant's Motion to Reconsider became "inappropriate" once she represented to the Court in the subsequently filed Consent Order for Joinder that CitiMortgage was no longer a party to the litigation and, therefore, she did not have to obtain its consent to amend the Complaint. Just as the motions were ineffectual to toll the time for appeal in Robinson and Quality Trailer, Appellant's Motion to Reconsider became ineffectual on January 25, 2012 when the Consent Order for Joinder was presented and, therefore, the Motion did not toll or, at the very least, no longer tolled the thirty-day time period for appeal.

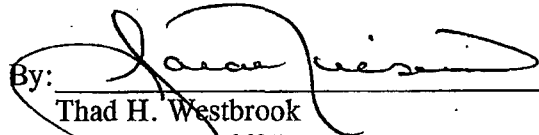
In accordance with the foregoing, other courts have held that a withdrawn Motion to Reconsider or other post-trial motion does not toll the time to appeal. See, e.g., Vanderwerf v. SmithKline Beecham Corp., 603 F.3d 842 (10th Cir. 2010) (holding appeal untimely where plaintiff voluntarily withdrew Rule 59 motion and thus the order being appealed from was the prior summary judgment ruling that was seven months old); Copar Pumice Co. v. Morris, 639 F.3d 1025 (10th Cir. 2011) (holding a voluntarily withdrawn motion did not toll time to appeal because "a withdrawn motion is treated as though the motion had never been made for purposes of [rule tolling time to appeal]"). Additionally, some courts have noted that this result is particularly appropriate where the withdrawal of the motion was a result of "hardball litigation strategy." United States v. Rodriguez, 892 F.2d 233 (2d Cir. 1989) (finding that a withdrawn 59(e) motion sufficed to toll time for appeal but noted that the result may be different if there was "evidence that the government filed and then withdrew its motion

for reconsideration in bad faith, as part of some sort of hardball litigation strategy"). In line with the foregoing cases, this Court should deny Appellant's Notice of Appeal as untimely.

CONCLUSION

Based on the above arguments and authorities, CitiMortgage asks that this Court dismiss the appeal in this matter. Appellant failed to perfect a timely appeal from the Order Granting Summary Judgment in this case. Most notably counsel for Appellant appears to be relying on her Motion to Reconsider to toll the time to appeal, when the Motion to Reconsider was declared moot and voluntarily withdrawn due to Appellant's actions and representations to the court in the case. Therefore, the appeal as to the underlying Order was not timely filed and Respondent respectfully requests dismissal of the Notice of Appeal.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 
Thad H. Westbrook
SC Bar No. 16635
E-Mail: thad.westbrook@nelsonmullins.com
Sarah B. Nielsen
SC Bar No. 78384
E-Mail: sarah.nielsen@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Attorneys for CitiMortgage, Inc.

Columbia, South Carolina

5/24, 2012

EXHIBIT A

11/21/11 E-mail from Law Clerk of Judge Roger M. Young

Sarah Nielsen

From: Young, Roger Law Clerk (Mary B. Ramsay) [ryounglc@sccourts.org]
Sent: Monday, November 21, 2011 10:47 AM
To: Thad Westbrook; Sarah Nielsen; dpt@traywicklaw.com; matt@matthamricklaw.com
Subject: Drexler v. Citimortgage et al 2011CP081754

Counsel,

As you are aware, Judge Young held a hearing on October 12 in Berkeley County on Defendant Citimortgage's Motion for Dismiss in the above referenced case. At the hearing, he took the Matter Under Advisement.

After reviewing the briefs and supporting case law, Judge Young has decided to grant Defendant's Motion based on Res Judicata and Collateral Estoppel.

He has requested that Mr. Westbrook prepare a proposed order for his consideration. Please note, given that the arguments presented considered evidence outside of the pleadings, this Motion was considered as a Motion for Summary Judgment. Please draft an order Granting Defendant's Motion for Summary Judgment based on Res Judicata and Collateral Estoppel.

Please submit a proposed order to me via email by Friday, Dec. 9 and copy opposing counsel.

Feel free to contact me should you have any questions. Also, please take a moment to ensure all necessary parties are copied on this email, and please let me know if someone should be added.

All the best,

Mary

Mary B. Ramsay, Esq.
Law Clerk to Judge Roger M. Young
Ninth Judicial Circuit
100 Broad Street, Suite 368
Charleston, SC 29401
Tel: (843) 958-2015
Fax: (843) 958-5108

EXHIBIT B

12/8/11 E-mail from Attorney Matthew D. Hamrick

Sarah Nielsen

From: Matt Hamrick [matt@matthamricklaw.com]
Sent: Thursday, December 08, 2011 4:36 PM
To: 'Young, Roger Law Clerk (Mary B. Ramsay)'
Cc: Thad Westbrook; Sarah Nielsen; dpt@traywicklaw.com; bgrimsley@grimsleylaw.com
Subject: RE: Drexler v. Citimortgage et al 2011CP081754
Attachments: 030340.PDF

Dear Judge Young and Ms. Ramsay:

We alleged in the Complaint and argued in our briefing and at the hearing that CitiMortgage at all times in the prior foreclosure suit acted as an agent of its principal. Today we confirmed the identity of that principal: Massachusetts Mutual Life Insurance Company ("MassMutual"). Accordingly, we have today filed and served the attached Motion to Amend Complaint, which seeks to add MassMutual as a defendant.

We request a hearing on our motion to amend. A hearing on the motion to amend is essential prior to the signing of the order dismissing CitiMortgage because either the principal or the agent may be entitled to dismissal on the grounds of res judicata—but not both (it is impossible for two people simultaneously to wear the same hat).

Until MassMutual has had an opportunity to serve a responsive pleading and clarify the nature of its relationship to CitiMortgage with respect to this transaction, a dismissal in favor of CitiMortgage potentially prejudices MassMutual. On the other hand, delaying decision on the motion to dismiss until MassMutual appears costs CitiMortgage nothing.

Respectfully,

Matthew D. Hamrick
Attorney at Law
875 Lowcountry Blvd., Ste. 206
Mt. Pleasant, SC 29464
tel. (843) 693-4700
fax (877) 524-5023
matt@matthamricklaw.com

This communication may be attorney-client privileged or otherwise confidential. If you are not the intended recipient, please delete this message and notify the sender of this error.

From: Young, Roger Law Clerk (Mary B. Ramsay) [mailto:ryounglc@sccourts.org]
Sent: Monday, November 21, 2011 10:47 AM
To: thad.westbrook@nelsonmullins.com; sarah.nielsen@nelsonmullins.com; dpt@traywicklaw.com; matt@matthamricklaw.com
Subject: Drexler v. Citimortgage et al 2011CP081754

Counsel,

As you are aware, Judge Young held a hearing on October 12 in Berkeley County on Defendant Citimortgage's Motion for Dismiss in the above referenced case. At the hearing, he took the Matter Under Advisement.

After reviewing the briefs and supporting case law, Judge Young has decided to grant Defendant's Motion based on Res Judicata and Collateral Estoppel.

He has requested that Mr. Westbrook prepare a proposed order for his consideration. Please note, given that the arguments presented considered evidence outside of the pleadings, this Motion was considered as a Motion for Summary Judgment. Please draft an order Granting Defendant's Motion for Summary Judgment based on Res Judicata and Collateral Estoppel.

Please submit a proposed order to me via email by Friday, Dec. 9 and copy opposing counsel.

Feel free to contact me should you have any questions. Also, please take a moment to ensure all necessary parties are copied on this email, and please let me know if someone should be added.

All the best,

Mary

Mary B. Ramsay, Esq.
Law Clerk to Judge Roger M. Young
Ninth Judicial Circuit
100 Broad Street, Suite 368
Charleston, SC 29401
Tel: (843) 958-2015
Fax: (843) 958-5108

) IN THE COURT OF COMMON PLEAS
) Case No.:2011-CP-08-1754

)

)

)

)

)

5

**NOTICE AND MOTION TO AMEND
COMPLAINT**

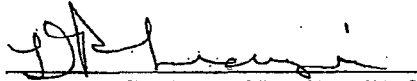
Plaintiff will, as soon as counsels may be heard, move the court pursuant to Rule 15, SCRCPP, for an order allowing Plaintiff to amend her pleading in accordance with the attached proposed Amended Complaint, providing that the amendment shall relate back to the date of the original pleading, and further providing that the filing and serving of the instant motion with the attached already signed copy of such Amended Complaint, shall constitute service and filing of the amended pleading as of the date the motion is granted as to existing parties, but not constituting service upon Defendant Massachusetts Mutual Life Insurance Company - who shall be served a copy of the Amended Complaint, according to SCRCPP along with a Summons, Civil Action Cover Sheet, and Lis Pendens, also attached hereto as part of the moved for Amended Complaint.

The grounds for this motion are that leave to amend is requested, justice so requires, and leave to amend will not prejudice any other party. The amendment is needed so as to clarify the

identities of the parties in the prior suit. Plaintiff's motion is based upon the pleadings and other filings in this action, the substantive law and procedural rules of the State of South Carolina and the United States of America, and such supporting memorandum, affidavits and additional evidence as may be timely submitted for consideration by this Court

The undersigned certifies that he has consulted with opposing parties, through their respective counsels, regarding this motion.

Respectfully submitted,


TRAYWICK LAW OFFICES, LLC
P.O. Box 564
Isle of Palms, SC 29451
Telephone: 843-343-5092
Fax: 843-300-1051
Dpt@traywicklaw.com

-and-

Matthew D. Hamrick
Attorney at Law
875 Lowcountry Blvd., Ste. 206
Mt. Pleasant, SC 29464
(843) 693-4700
matt@matthamricklaw.com

CO-COUNSELS FOR PLAINTIFF

Charleston, South Carolina
December 8, 2011

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Angela Drexler,

Plaintiff,

v.

CitiMortgage, Inc.; Stonegate Properties,
Inc.; Branch Banking and Trust Company,
Inc., and Massachusetts Mutual Life
Insurance Company,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No.:2011-CP-08-1754

LIS PENDENS
(Jury Trial Demanded)

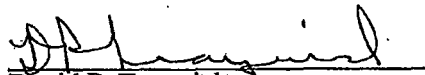
TO WHOM IT MAY CONCERN:

Please take notice that an action has been filed, or will be filed. The subject of this action is real property ("the Property") owned by Branch Banking and Trust Company, Inc., as conveyed by Instrument Number 11-3443 recorded in Book "R", Volume 08832, at Page 130 in the Berkeley County office of the Register of Deeds. The Property is located at [REDACTED] Ladson, South Carolina 29456 in the county of Berkeley, State of South Carolina.

The Property TMS number is: 233-14-01-024

The object of the action is said property and among the purposes of the action is quiet title in favor of Plaintiff.

By:


David P. Traywick
TRAYWICK LAW OFFICES, LLC
P.O. Box 564
Isle of Palms, SC 29451
Telephone: 843-343-5092
Fax: 843-300-1051

Attorney for Plaintiff
Angela Drexler

December 8, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Angela Drexler,

Plaintiff,

v.

CitiMortgage, Inc.; Stonegate Properties,
Inc.; Branch Banking and Trust Company,
Inc., and Massachusetts Mutual Life
Insurance Company,

Defendants.

) IN THE COURT OF COMMON PLEAS

) Case No.:2011-CP-08-1754

SUMMONS

TO: THE DEFENDANT, MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the subscribed at his office, P.O. Box 564, Isle of Palms, SC 29451, within thirty (30) days after the service hereof, exclusive of the day of service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

By:


David P. Traywick
TRAYWICK LAW OFFICES, LLC
P.O. Box 564
Isle of Palms, SC 29451
Telephone: 843-343-5092
Fax: 843-300-1051

Attorney for Plaintiff
Angela Drexler

December 8, 2011
Charleston, South Carolina

) IN THE COURT OF COMMON PLEAS

3). CASE NO.: 2011-CP-08-1754

:

3

;

3

;

1

...

1

...

R

)

0.

t

fe

owner or owner trustee or trustee or holder or owner or counterparty or lender with respect to the note and/or mortgage from which this suit arises.

5. Plaintiff is, and at all times herein mentioned was, a resident of Berkeley County, South Carolina.

6. This Court has jurisdiction over the parties and subject matter of this complaint.

GENERAL ALLEGATIONS

7. On July 7, 1998, Plaintiff purchased certain real property ("Subject Property").

8. On July 7, 1998, Plaintiff executed a promissory note in favor of Compass Mortgage, Inc. The note was secured by a mortgage with Compass Mortgage, Inc. as mortgagee. Upon information and belief, the note and mortgage were thereafter assigned or otherwise transferred one or more times and ultimately were assigned or otherwise transferred to MassMutual.

9. Upon information and belief, Citi acquired Plaintiff's previous mortgage servicing company, ABN AMRO Mortgage Group, Inc. Plaintiff continued to make payments but now remitted them to Citi.

10. On December 17, 2007, Plaintiff paid Citi \$1333.51 via that defendant's telephone payment system.

11. On or about February 12, 2008, Citi instructed Plaintiff to send a certified check in the amount of \$2294.73. Citi claimed that amount was past due.

12. On or about February 19, 2008, Plaintiff purchased and mailed to Citi a certified check for \$2294.73.

13. On March 12, 2008, Plaintiff made out check #2300 paid to the order of Citi for \$910.70. This amount represented Plaintiff's ordinary monthly payment.

14. On March 13, 2008, Plaintiff mailed check #2300 to Citi via express mail.
15. On March 14, 2008, Citi received check #2300 and stamped it "too delinquent".
16. Prompted by Citi, on March 31, 2008, Plaintiff sent a facsimile transmission that included a photocopy of both the certified check for \$2294.73 mailed as of February 19 as well check #2300 mailed on March 13.
17. Throughout this period, Citi assured Plaintiff that all would be well, that Citi had simply misplaced the certified check, that it would be found, that there was nothing to worry about, and to proceed with making the \$910.70 April payment in the usual fashion (ie: personal check via regular mail).
18. On April 20, 2008, Plaintiff made out check #2261 paid to the order of Citi for \$910.70.
19. On or about April 21, 2008, Plaintiff mailed check #2261 to Citi via express mail.
20. On May 5, 2008, Citi returned, via regular mail letter, check numbers 2280 and 2261 to Plaintiff. The letter stated that Citi was unable to accept the funds because the amount was insufficient to cure the delinquency. Additionally, the letter states that a certified check is necessary to cure the delinquency.
21. The May 5, 2008 Citi letter to Plaintiff made no mention of the certified check, though Plaintiff was repeatedly assured that the check would be located.
22. On May 7, 2008, Rogers Townsend Thomas ("RTT") filed foreclosure pleadings in Berkeley County.
23. On May 9, 2008, at 7:45 a.m., Pro Vest, LLC served process on Plaintiff at her home.

24. On May 14, 2008, owing to representations appearing in Citi's May 5, 2008 letter, by the lawsuit served on May 9, and by representations made by RTT personnel during calls placed by Plaintiff to RTT, Plaintiff sent a facsimile transmission that included various documents and materials the purpose of which was to dispute the validity of the debt RTT alleged was due and owing in its foreclosure Complaint. Plaintiff's facsimile included compelling proof that all payments had been submitted by Plaintiff to Citi.

25. On May 21, 2008, RTT amended its initial complaint.

26. In early June of 2008, Plaintiff contacted Debra Leonard, a foreclosure prevention counselor with Money Management International, a non-profit consumer credit counseling organization.

27. On June 16, 2008, the certified check Plaintiff mailed to Citi on February 19 was deposited into Plaintiff's bank account. The circumstances of how the deposit was made remain mysterious.

28. Throughout June and July, 2008, Plaintiff, in conjunction with Debra Leonard, repeatedly attempted to obtain payment instructions from Citi - without success. During that period, Citi failed to return telephone calls, wait times were extraordinary, the process was overwhelmingly tedious, and nobody at Citi was capable of providing useful answers.

29. On August 6, 2008, Angela and Debra Leonard conference called a Citi supervisor. During that conference call, Citi advised that a check for \$8133.35 would bring the account up to date and that upon receipt of that check that the foreclosure Complaint would be dismissed.

30. On August 15, 2008, Plaintiff mailed a check for \$8133.35 to Citi.

31. On August 16, 2008, Citi received the check for \$8133.35.

32. On August 20, 2008, Citi returned the check for \$8133.35.
33. On either September 12 or 13, 2008, following numerous telephone conversations placed by Plaintiff to Citi, Plaintiff mailed a certified check via certified mail with a return receipt requested. to Citi. Citi had assured Plaintiff repeatedly that upon receipt of a certified check for \$9,010.00 that Citi would change Plaintiff's account status to current and that the foreclosure proceedings would be terminated.
34. On September 14, 2008, Citi signed for receipt of the certified check sent by Plaintiff.
35. On September 23, 2008, Citi sent a letter to BB&T explaining that Citi had received a certified check in the amount of \$9,010.00 but that Citi had been unable to match that certified check with any of its accounts.
36. On October 12, 2008, RTT claims to have mailed Plaintiff a Notice of Foreclosure Hearing scheduled for October 29, 2008.
37. On October 14, 2008, a certified check for 9,010.00 was mysteriously deposited into Plaintiff's account.
38. On October 15 or 16, 2008, Plaintiff mailed, via certified mail with return receipt requested, personal check #2336 for \$876.00 to Citi This check represented the amount she was instructed to pay by Citi.
39. On October 17, 2008, Citi signed for receipt of check #2336.
40. On October 22, 2008, Citi returned check #2336 to Plaintiff via regular mail.
41. On October 29, 2008, a foreclosure hearing was held in Berkeley County and a Judgment of Foreclosure entered. Plaintiff was assured at all times that the foreclosure Complaint would be dismissed on condition that Plaintiff complied with payment instructions.

Plaintiff at all times complied with Citi's payment instructions. Plaintiff was never notified of the foreclosure hearing nor was she advised that a judgment had been entered.

42. On November 22, 2008, Plaintiff sent, via certified mail with return receipt requested, personal check #2341 for \$900 to Citi.

43. On November 24, 2008, Citi signed for receipt of check #2341 for \$900.

44. On November 29, 2008, Citi returned check #2341 for \$900 to Plaintiff, via regular mail, Citi had stamped the back of check #2341 "Foreclosure".

45. Plaintiff made each payment due on the loan from 1998 until the date her house was sold at public auction pursuant to a court ordered foreclosure.

46. Plaintiff did not receive notice of the time and place of the foreclosure sale.

**FIRST CAUSE OF ACTION
NEGLIGENCE
(AGAINST CITIMORTGAGE AND MASSMUTUAL)**

47. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 46, inclusive, as though fully set forth herein.

48. At all times relevant herein, Citi and MassMutual, acting as Plaintiff's lender and/or loan servicer, had a duty to exercise reasonable care and skill to maintain proper and accurate loan records and to discharge and fulfill the other incidents attendant to the maintenance, accounting and servicing of loan records, and Citi and MassMutual breached those duties by their conduct including, but not limited to, the failure to accurately credit payments made by Plaintiff and the following:

- (a) Assessing improper or excessive late fees;
- (b) Improperly characterizing customers' accounts as being in default or delinquent status to generate unwarranted fees;

- (c) Instituting improper or premature foreclosure proceedings to generate unwarranted fees;
- (d) Misapplying or failing to apply customer payments;
- (e) Failing to provide adequate monthly statement information to customers regarding the status of their accounts, payments owed, and/or basis for fees assessed;
- (f) Seeking to collect, and collecting, various improper fees, costs and charges, that are either not legally due under the mortgage contract or South Carolina law, or that are in excess of amounts legally due;
- (g) Mishandling borrowers' mortgage payments and failing timely or properly to credit payments received, resulting in late charges, delinquencies or default;
- (h) Treating borrowers as in default on their loans even though the borrowers have tendered timely and sufficient payments or have otherwise complied with mortgage requirements or South Carolina law;
- (i) Failing to disclose the fees, costs and charges allowable under the mortgage contract;
- (j) Ignoring grace periods;
- (k) Executing and recording false and misleading documents;
- (l) Acting as beneficiaries and trustees without the legal authority to do so;
- (m) Filing suit against property owners improperly whilst

assuring those property owners that the foreclosure suit was a mere formality, that upon receipt of payment Citi would drop the suit;

(n) Telling property owners who had been served lawsuits that they did not need to hire attorneys to defend themselves in court provided exact payment instructions were followed. For example, Plaintiff was specifically told that if she mailed payments that she should not waste her money hiring a lawyer since her account would no longer be in default. Citi told her this on several different occasions; and

(o) Misrepresenting the amounts due and owing under the note while at the same time misrepresenting the amount required to bring the account to current.

(p) As to MassMutual, negligently and recklessly giving authority to Citi to service the mortgage loan account and failing to supervise Citi in the servicing of the account.

49. In the various particulars alleged, and in failing to take actions reasonably necessary, actions that a reasonable party would have undertaken in order to credit payments submitted by Plaintiff, Citi and MassMutual breached their duty of care and skill owed to Plaintiff in the servicing of Plaintiff's loan by, among other things, failing to properly and accurately credit payments made by Plaintiff toward the loan, preparing and filing false documents, and foreclosing on the Subject Property without having the legal authority and/or proper documentation to do so.

50. As a direct and proximate result of Citi's and MassMutual's negligence, recklessness, wilfulness, and/or wantonness in carrying out or failing to carry out its duties to be

reasonably diligent in servicing Plaintiff's mortgage loan, as set forth above, Plaintiff suffered general and special damages in an amount to be determined at trial.

**SECOND CAUSE OF ACTION
FRAUD
(AGAINST CITIMORTGAGE AND MASSMUTUAL)**

51. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 50, inclusive, as though fully set forth herein.

52. Citi and MassMutual engaged in a pattern and practice of defrauding Plaintiff in that, during the life of the mortgage loan, Citi and MassMutual failed properly to credit payments made and foreclosed on the Subject Property based on Plaintiff's alleged non-payment which they knew to be false.

53. Citi and MassMutual had actual knowledge that the Plaintiff's account, as Citi and MassMutual represented it to Plaintiff and others, was not accurate but that Citi and MassMutual could use the inaccuracy to foreclose on the Subject Property which had substantial equity; to recover its excessive fees, charges and interest. Plaintiff made such payments and provided proof of the payments based on the improper, inaccurate, and fraudulent representations as to her account. Citi and MassMutual also utilized amounts it knew to be inaccurate to determine the amount allegedly due and owing for purposes of foreclosure.

54. Additionally, Citi and MassMutual knowingly concealed material facts from Plaintiff regarding payments, notices, assignments, transfers, late fees and charges with the intent to defraud Plaintiff.

55. Citi and MassMutual made the above-referenced false representations, concealments and non-disclosures with knowledge of the misrepresentations, intending to induce

Plaintiff's reliance, which the unsuspecting Plaintiff justifiably relied upon, resulting in damage to her credit standing, costs, and loss of her property, Plaintiff was unaware of the true facts because Citi and MassMutual concealed them. Had Plaintiff known the true facts, Plaintiff, among other things, would have retained counsel upon receipt of the foreclosure Complaint, requested instructions for making payments be reduced to a writing, personally appeared at Citi's and/or MassMutual's offices and made a payment in actual cash, wire transferred the amount required to cure Plaintiff's allegedly delinquent account, and/or taken legal action immediately to save her house.

56. As a result of Citi's and MassMutual's fraudulent conduct, Plaintiff has suffered compensatory, general and special damages in an amount to be proven at trial. Additionally, Citi and MassMutual acted with malice, fraud and/or oppression and, thus, Plaintiff is entitled to an award of punitive damages.

**THIRD CAUSE OF ACTION
TO SET ASIDE MASTER'S SALE
(AGAINST CITIMORTGAGE)**

57. Plaintiffs incorporate herein by reference the allegations made in paragraphs 1 through 56, inclusive, as though fully set forth herein.

58. Citi never had the legal authority to foreclose, i.e., the authority to exercise the power of sale as an assignee of the Note and Mortgage, resulting in the judicial foreclosure sale being void ab initio.

59. Citi never had the legal authority to foreclose because the Mortgage instrument upon which it premised foreclosure is void as it was fraudulently assigned/endorsed/transferred. Citi orchestrated the fraudulent assignment/endorsement/transfer. Citi cannot benefit from its

own fraudulent conveyance of an interest in real property and any judicial sale premised on a fraudulent document is void ab initio.

60. Accordingly, Plaintiff requests an Order from this Court that the Trustee's Sale was either void, or voidable as to the defrauded party, the Plaintiff, and that the judicial sale premised upon such fraud was without force and effect at least as to this defrauded Plaintiff. The order should further state that Citi and/or its agent(s) and/or principal(s), sought, obtained, and induced a court to conduct a judicial foreclosure absent any legal or equitable right or privilege to do so.

**FOURTH CAUSE OF ACTION
TO VOID OR CANCEL MASTER'S DEED UPON SALE
(AGAINST CITIMORTGAGE, MASSMUTUAL, STONEGATE PROPERTIES
AND BRANCH BANKING AND TRUST COMPANY)**

61. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 60, inclusive, as though fully set forth herein.

62. Although Master's deeds upon the two sales of the Subject Property bear the imprimatur of Berkeley County and the State of South Carolina, they are invalid, and of no force and effect, for the reasons set forth above including, inter alia, the fact the Mortgage which purportedly secured the Note, which served as the basis for a claim to have the right to conduct a judicial foreclosure, was void due to a fraudulent assignment/endorsement/transfer to Citi and/or MassMutual. As noted, such fraudulent assignment/endorsement/transfer was in fact orchestrated by Citi and/or MassMutual and/or its/their agent(s) and/or principal(s). Additionally, Plaintiff had submitted all payments due on the Note in a timely fashion and the judicial foreclosure was therefore unjustified.

63. Plaintiff is therefore entitled to an order that the Master's deeds upon the sales are void ab initio and the cancellation of those deeds' force and effect.

**FIFTH CAUSE OF ACTION
TO VOID OR CANCEL ASSIGNMENT OF MORTGAGE
(AGAINST CITIMORTGAGE)**

64. Plaintiffs incorporate herein by reference the allegations made in paragraphs 1 through 63, inclusive, as though fully set forth herein.

65. The assignment of the mortgage, and subsequent recording, is invalid, and of no force and effect, for the reasons set forth above including, inter alia, the fact that Stewart Information Services, Inc. ("Stewart") fraudulently executed an assignment in favor of Citi. Stewart did not have standing or the legal authority to assign the mortgage allegedly securing the Note that was the basis for Citi's claim to have the right to conduct a judicial foreclosure. Thus, Stewart's fraudulent assignment of the mortgage was at all times void.

66. Plaintiff is therefore entitled to an order that the Assignment of the Mortgage by Stewart in favor of Citi is void ab initio and to an order cancelling the force and effect of such Assignment.

**SIXTH CAUSE OF ACTION
WRONGFUL FORECLOSURE VIA LACK OF STANDING
(AGAINST CITIMORTGAGE)**

67. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 66, inclusive, as though fully set forth herein.

68. Plaintiff is informed and believes and thereon alleges that after the origination and funding of her loan, the loan was sold to investors as a "mortgage backed security" and that Citi, which claimed authority to foreclose, owned neither the note nor its corresponding mortgage. Moreover, Citi had not been lawfully appointed as trustee or had the original note assigned to it. Accordingly, Citi had no right to foreclose Plaintiff's interest in its own right and in its own name, which it in fact did. The named Plaintiff in the filed foreclosure action was neither note

holder nor beneficiary of the note at the time Citi filed a suit premised on the Plaintiff's note and mortgage.

69. Plaintiff further alleges on information and belief that Citi was neither the note beneficiary nor a representative of the note beneficiary and, if Citi alleged otherwise, it did not possess the original note to prove that it was in fact the party authorized to conduct the foreclosure. No power of attorney to sue on behalf of another party, such as an owner trustee, was ever produced in court. Rather, Citi represented that it, Citi, owned the note.

70. Plaintiff further alleges on information and belief that the loan was sold or transferred without notice having been furnished to the Plaintiff in writing, or in any other fashion.

71. As a result of the above alleged wrongs, Plaintiffs have suffered general and special damages in an amount to be determined at trial.

**SEVENTH CAUSE OF ACTION FOR
BREACH OF CONTRACT
(AGAINST CITIMORTGAGE AND MASSMUTUAL)**

72. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 71, inclusive, as though fully set forth herein.

73. Plaintiff's original loan agreement set forth dates by which monthly principal and interest payments were due, and when late fees and other charges could be assessed, and how much those late fees and other charges were to be. Citi and/or MassMutual failed to comply with its/their obligations to adhere to the terms set forth in the original instruments and repeatedly misallocated payments or failed properly to calculate amounts due and owing under the note and mortgage at various periods.

74. Even assuming the original note and mortgage were properly assigned to Citi and/or MassMutual, Citi and/or MassMutual breached the note and mortgage terms that Plaintiff signed on July 7, 1998. The terms of the note and mortgage required payments made by Plaintiff to be applied properly to the note. Additionally, the note and mortgage specified the penalties for any late payments. Citi and/or MassMutual charged in excess of the amounts specified and thereby breached the contract between Plaintiff and Citi and/or MassMutual.

75. Citi and/or MassMutual breached the note and mortgage by failing to apply the payments made by Plaintiff in the various particulars described hereinabove the result of which led to the wrongful foreclosing of Plaintiff's property.

76. As a proximate result of Citi's and/or MassMutual's breaches, Plaintiff suffered various damages including expectation, compensatory, and other damages in an amount to be proven at trial.

**EIGHTH CAUSE OF ACTION FOR
BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING
(AGAINST CITI AND MASSMUTUAL)**

77. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 76, inclusive, as though fully set forth herein.

78. Every contract imposes upon each party a duty of good faith and fair dealing in its performance and in its enforcement. This implied covenant of good faith and fair dealing requires that no party do anything that effectively impairs, destroys, or injures the rights of the other party to receive the benefits of an agreement. The covenant implies that in all contracts each party will do all things reasonably contemplated by the terms of the contract to accomplish its purpose. The covenant protects the respective benefits that the parties reasonably contemplated when entering into the agreement.

79. Citi and/or MassMutual wielded, or claimed to have the power to wield, substantial discretionary power affecting the rights of Plaintiff during the events alleged in this Complaint. The covenant required Citi and/or MassMutual to exercise such power in good faith and with an eye toward fair dealing with respect to the contract's counterparty.

80. Citi and/or MassMutual wielded its/their discretionary authority in such a manner as to ensure the utter destruction of Plaintiff's rights to the benefits of the bargain she struck, and in such a manner as to defeat the Plaintiff's expectations to be dealt with fairly and reasonably. Citi's and/or MassMutual's conduct exhibited a determination to drive Plaintiff into foreclosure so that Citi and/or MassMutual could acquire the large equitable position Plaintiff enjoyed in the Subject Property. Citi's and/or MassMutual's pattern of conduct constitute a bad faith breach of the contract - a breach evidently undertaken with neither mercy nor malice - so cold, impersonal, faithless, and unfair so as to be 'machine-like'.

81. As a result of Citi's and/or MassMutual's breaches of this covenant, Plaintiff has suffered general and special damages in an amount to be determined at trial.

**NINTH CAUSE OF ACTION FOR
UNJUST ENRICHMENT
(AGAINST CITI AND MASSMUTUAL)**

82. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 81, inclusive, as though fully set forth herein.

83. By its wrongful acts and omissions, Citi and/or MassMutual has/have been unjustly enriched at the expense of Plaintiff, and thus Plaintiff has been unjustly deprived.

84. By reason of the foregoing, Plaintiff seeks restitution from Defendant Citi and/or MassMutual and an order of this Court that Citi and MassMutual disgorge all profits, benefits, and other compensation obtained resulting from the unjust Foreclosing of Plaintiff's property.

**TENTH CAUSE OF ACTION FOR
VIOLATION OF SOUTH CAROLINA'S UNFAIR TRADE PRACTICES ACT
(AGAINST CITIMORTGAGE AND MASSMUTUAL)**

85. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 84, inclusive, as though fully set forth herein.

86. South Carolina prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.

87. As more fully described above, Citi's and MassMutual's acts and practices are likely to deceive, constituting a fraudulent business act or practice. This conduct is ongoing and continues to this date.

88. Specifically, Citi and MassMutual engaged in deceptive business practices with respect to mortgage loan servicing, assignments of notes and mortgages, foreclosure of residential properties and related matters by:

- (a) Assessing improper or excessive late fees;
- (b) Improperly characterizing customers' accounts as being in default or delinquent status to generate unwarranted fees;
- (c) Instituting improper or premature foreclosure proceedings to generate unwarranted fees;
- (d) Misapplying or failing to apply customer payments;
- (e) Failing to provide adequate monthly statement information to customers regarding the status of their accounts, payments owed, and/or basis for fees assessed;
- (f) Seeking to collect, and collecting, various improper fees, costs and charges, that are either not legally due under the mortgage

contract or South Carolina law, or that are in excess of amounts legally due;

(g) Mishandling borrowers' mortgage payments and failing timely or properly to credit payments received, resulting in late charges, delinquencies or default;

(h) Treating borrowers as in default on their loans even though the borrowers have tendered timely and sufficient payments or have otherwise complied with mortgage requirements or South Carolina law;

(i) Failing to disclose the fees, costs and charges allowable under the mortgage contract;

(j) Ignoring grace periods;

(k) Executing and recording false and misleading documents;

(l) Acting as beneficiaries and trustees without the legal authority to do so;

(m) Filing suit against property owners improperly whilst assuring those property owners that the foreclosure suit was a mere formality, that upon receipt of payment Citi would drop the suit;

(n) Telling property owners who had been served lawsuits that they did not need to hire attorneys to defend themselves in court provided exact payment instructions were followed. For example, Plaintiff was specifically told that if she mailed payments that she should not waste her money hiring a lawyer since her account would no longer be in default. Citi told her this on several different occasions; and

(o) Misrepresenting the amounts due and owing under the note while at the same time misrepresenting the amount required to bring the account to current.

89. Citi and MassMutual failed to act in good faith as it took fees for services but did not render services competently and in compliance with applicable law and in accordance with applicable standards of care.

90. Moreover, Citi and MassMutual engaged in a uniform pattern and practice of unfair and overly-aggressive servicing that resulted in the assessment of unwarranted and unfair fees against this Plaintiff and other South Carolina consumers and premature default often resulting in unfair and illegal foreclosure proceedings. The scheme implemented by Citi and MassMutual was designed to defraud South Carolina consumers and to enrich Citi and MassMutual.

91. The foregoing acts and practices have caused substantial harm to this Plaintiff and to South Carolina consumers.

92. As a direct and proximate cause of the unlawful, unfair and fraudulent acts and practices of Citi and MassMutual, Plaintiff and South Carolina consumers have suffered and will continue to suffer damages in the form of unfair and unwarranted late fees, other improper fees and charges, as well as improper, unfair, and illegal seizures of real property.

93. By reason of the foregoing, Citi and MassMutual and/or its/their agent(s) and/or principal(s) have been unjustly enriched and should be required to disgorge their illicit profits and/or make restitution to Plaintiff and other South Carolina consumers who have been harmed, and/or be enjoined from continuing in such practices pursuant to South Carolina's Unfair Trade Practices Act. Additionally, Plaintiff is therefore entitled to injunctive relief and attorney's fees

and treble damages as available under South Carolina's Unfair Trade Practices Act. Plaintiff also invokes and demands all relief accorded by South Carolina Code sections 39-5-140(a) and 39-5-50 (b).

**ELEVENTH CAUSE OF ACTION FOR
QUIET TITLE
(AGAINST CITIMORTGAGE; MASSMUTUAL; STONEGATE; BB&T)**

94. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 93, inclusive, as though fully set forth herein.

95. Plaintiff is the equitable owner of the Subject Property which has the following legal description:

All that piece, parcel or lot of land with the buildings and improvements thereon, situate lying and being near Ladson, South Carolina, in Berkeley County, South Carolina, shown and designated as Lot 74, Block F, Tall Pines Plantation Subdivision, Section Three, on a plat dated January 19, 1977 made by Harold J. Leamond, P.E. and L.S., and recorded in the Office of the Clerk of Court for Berkeley County on January 24, 1977 in Plat Book W. Page 153, Derivation: Book 1379 at Page 53. The address is [REDACTED] [REDACTED] Ladson, SC 29456. TMS #: 233-14-01-024.

96. Plaintiff seeks to quiet title against the claims of Defendants Citi, MassMutual, Stonegate, BB&T, and all other persons unknown claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to Plaintiff's title.

97. Upon information and belief, BB&T holds itself out as entitled to fee simple ownership of the Subject Property by and through its purchase of the property at a master in equity's sale held in 2011.

98. Plaintiff seeks to quiet title as of May 7, 2008, the date Citi filed a lis pendens against the subject property. Plaintiff seeks a judicial declaration that the title to the Subject Property is vested in Plaintiff alone and that any defendant claiming an interest or lien in Subject Property be declared to have no interest estate, right, title or interest in the Subject Property and

that the Defendants, their agents and assigns, be forever enjoined from asserting any estate, right title or interest in the Subject Property subject to Plaintiff rights.

**TWELFTH CAUSE OF ACTION FOR
SLANDER OF TITLE
(AGAINST CITIMORTGAGE, MASSMUTUAL, AND STONEGATE)**

99. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 98, inclusive, as though fully set forth herein.

100. Defendant Citi and/or MassMutual fraudulently assigned a mortgage which it filed with the Berkeley County Register of Deeds. Defendant Citi and/or MassMutual additionally caused to be filed a lis pendens against real property owned by Plaintiff. Defendant Stonegate knew that the Citi and/or MassMutual foreclosure was unlawful, that the basis of the foreclosure was the result of negligent, reckless, wilful, and/or wanton conduct on the part of Citi and/or MassMutual and nevertheless purchased the property at auction and requested, received from the master and subsequently recorded a deed on the basis of the unlawful foreclosure sale.

101. By besmirching Plaintiff's title to real property, Defendants Citi, MassMutual, and Stonegate caused Plaintiff to suffer special damages.

102. The invalid liens and or deeds and mortgages were effectively published because they were recorded in Berkeley County and as such is public information freely available.

103. Defendant Citi and/or MassMutual filed its lis pendens knowing full well that the property that was its subject was owned by Plaintiff and was not subject to foreclosure as payments on the attendant note had been paid.

104. As a result of her besmirched title, via the various invalid mortgages, deeds and lis pendens, Plaintiff's property has been under a cloud since May of 2008 which has undermined her rights to full use and enjoyment of her property.

105. By doing the acts described above, Citi, MassMutual, and Stonegate have slandered Plaintiff's title to the Subject Property.

106. The conduct of Citi, MassMutual, and Stonegate caused Plaintiff to suffer general and special damages in an amount to be proven at trial.

**THIRTEENTH CAUSE OF ACTION FOR
TORTIOUS INTERFERENCE WITH CONTRACT
(AGAINST CITIMORTGAGE AND MASSMUTUAL)**

107. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 106, inclusive, as though fully set forth herein.

108. Plaintiff secured a note whereby she agreed to make installment payments to a third party. Plaintiff was certain to realize future economic benefit as a result of the contractual relationship

109. Defendants Citi and MassMutual knew about the existence of the contract between third party and Plaintiff.

110. Defendants Citi and/or MassMutual, and/or its/their agent(s) and/or principal(s), intentionally acted in a way designed to disrupt the relationship between Plaintiff and the third party and to interfere with the carrying out of the contract between the Plaintiff and third party.

111. Specifically, Citi and/or MassMutual refused properly to carry out its task to service the terms of the contract between Plaintiff and third party faithfully, diligently, and fairly. Citi and/or MassMutual failed to discharge its duty to Plaintiff as well as to third party in taking reasonable steps to ensure that all installment payments were promptly credited to the correct

account. Citi and/or MassMutual failed to take reasonable steps to notify Plaintiff of steps necessary to preserve the expectations of performance held by both the Plaintiff and third party.

112. As a result of Citi's and/or MassMutual's actions, the contractual relationship between Plaintiff and third party was disrupted catastrophically. Citi's and/or MassMutual's actions or failures to act proximately caused economic damages to Plaintiff in amounts to be proved at trial.

**FOURTEENTH CAUSE OF ACTION FOR
NEGLIGENT MISREPRESENTATION
(AGAINST CITIMORTGAGE AND MASSMUTUAL)**

113. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 112, inclusive, as though fully set forth herein.

114. Citi and/or MassMutual and/or its/their agent(s) and/or principal(s), instructed Plaintiff on numerous occasions how, when, for what amount and to whom to make payments in order that Plaintiff's account could be brought current. On each occasion, those representations were false and Citi and/or MassMutual knew or should have known that its representations were false.

115. Citi and/or MassMutual and/or its/their agent(s) and/or principal(s) instructed Plaintiff not to hire a lawyer to defend the lawsuit and represented to Plaintiff that as long as she carried out the instructions regarding how, when, for what amount, and to whom to make payments, that the foreclosure lawsuit would be dismissed. On each occasion, Citi's and/or MassMutual's representations were false and Citi and/or MassMutual knew or should have known that its representations were false.

116. Citi and/or MassMutual and/or its/their agent(s) and/or principal(s), made these representations, and upon information and belief, other false representations, without any reasonable grounds for believing them to be true.

117. Citi and/or MassMutual and/or its/their agent(s) and/or principal(s) made the various representations intending to prevent Plaintiff from engaging an attorney, from getting her loan current, and in an effort to speed up the foreclosure process so that Citi and/or MassMutual could seize the equity it knew existed in the Subject Property. Citi's and/or MassMutual's representations were made falsely and with the intent to induce the Plaintiff to rely upon them.

118. Plaintiff did believe the various misrepresentations: that she need not retain counsel and that she need only comply with the instructions given for making payments in order to cure her delinquent account. Plaintiff did rely on Citi's and/or MassMutual's misrepresentations, Plaintiff's reliance was reasonable and she relied upon Citi's and/or MassMutual's misrepresentations to her detriment.

119. As a result of her reliance on the misrepresentations, Plaintiff suffered damages in an amount to be established at trial.

**FIFTEENTH CAUSE OF ACTION FOR
OUTRAGE--INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS
(AGAINST CITIMORTGAGE AND MASSMUTUAL)**

120. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 119, inclusive, as though fully set forth herein.

121. Plaintiff has suffered severe emotional distress and anxiety as a direct result of Citi's and/or MassMutual's actions alleged herein.

122. Citi and/or MassMutual intentionally or recklessly inflicted severe emotional distress, or was/were certain, or substantially certain, that such distress would result from its/their conduct.

123. Citi's and/or MassMutual's conduct alleged herein was so extreme and outrageous so as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community.

124. The actions of Citi and/or MassMutual caused Plaintiff's emotional distress.

125. The emotional distress suffered by the Plaintiff was severe such that no reasonable person could be expected to endure it.

**SIXTEENTH CAUSE OF ACTION FOR
DEFAMATION
(AGAINST CITIMORTGAGE AND MASSMUTUAL)**

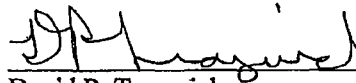
126. Plaintiff incorporates herein by reference the allegations made in paragraphs 1 through 125, inclusive, as though fully set forth herein.

127. Upon information and belief, Citi and/or MassMutual have falsely reported to credit reporting/ratings agencies that Plaintiff failed to make mortgage payments.

128. These false reports of missed mortgage payments were defamatory, were unprivileged publications to a third party, were the fault of Citi and/or MassMutual, were libelous *per se* and caused Plaintiff general and special damages in that the false reports of missed mortgage payments harmed Plaintiff's reputation as to lower her in estimation of the community or to deter third persons from associating or dealing with him.

WHEREFORE, Plaintiff prays for judgment against the Defendants as follows:

1. For a declaration of the rights and duties of the parties, specifically that the foreclosure of Plaintiff's residence was wrongful.
2. For issuance of an Order canceling all Master's Deeds Upon Sale.
3. To vacate the Master's Deeds.
4. To vacate and set aside the initial foreclosure sale and any subsequent sales.
5. To quiet title in favor of Plaintiff and against Defendants.
6. For compensatory, special, general and punitive damages according to proof against Citi and MassMutual.
7. For civil penalties pursuant to statute, restitution, injunctive relief and reasonable attorneys fees according to proof against Citi and MassMutual.
8. For reasonable costs of suit and such other and further relief as the Court deems proper.

 Date: Dec. 8, 2011
David P. Traywick
TRAYWICK LAW OFFICES, LLC
P.O. Box 564
Isle of Palms, SC 29451
Telephone: 843-343-5092
Fax: 843-300-1051

-and-

Matthew D. Hamrick
Attorney at Law
875 Lowcountry Blvd., Ste. 206
Mt. Pleasant, SC 29464
tel. (843) 693-4700
fax: (877) 524-5023
matt@matthamricklaw.com

CO-COUNSEL FOR PLAINTIFF

EXHIBIT C

1/5/12 E-mail from Law Clerk of Judge Roger M. Young

Sarah Nielsen

From: Young, Roger Law Clerk (Mary B. Ramsay) [ryounglc@sccourts.org]
Sent: Thursday, January 05, 2012 11:07 AM
To: Sarah Nielsen
Cc: Thad Westbrook; dpt@traywicklaw.com; bgrimsley@grimsleylaw.com; Matt Hamrick
Subject: RE: Drexler v. Citimortgage et al 2011CP081754

Counsel,

I appreciate your patience and hope y'all had a wonderful holiday.

After reviewing both positions, Judge Young has decided to proceed with signing the order which reflects his ruling on Citimortgage's Motion for Summary Judgment. The order was signed today and mailed to Berkeley County for filing.

As for the pending Motion to Amend, a hearing on that motion will need to be scheduled by the Berkeley County Clerk's Office.

All the best,

Mary

Mary B. Ramsay, Esq.
Law Clerk to Judge Roger M. Young
Ninth Judicial Circuit
100 Broad Street, Suite 368
Charleston, SC 29401
Tel: (843) 958-2015
Fax: (843) 958-5108

EXHIBIT D

Order Granting Summary Judgment

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) NINTH JUDICIAL CIRCUIT

Angela Drexler,) Civil Action No. 2011-CP-08-1754
)

Plaintiff,)
)

vs.)

CitiMortgage, Inc., Stonegate Properties,)
Inc., and Branch Banking and Trust)
Company, Inc.,)

Defendants.)
)

ORDER GRANTING SUMMARY
JUDGMENT IN FAVOR OF
CITIMORTGAGE, INC.

FILED
2012 JAN - 6 PM 12:41
TERRY P. FROMM
CLERK OF COURT
BERKELEY COUNTY, SC

BEFORE THE COURT is Defendant, CitiMortgage, Inc. (hereinafter "CitiMortgage")'s Motion to Dismiss the Complaint of Plaintiff, Angela Drexler ("Plaintiff") pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. After the hearing held on October 12, 2011, at 10:00 A.M. and consideration of both parties' written briefs, the Court finds that CitiMortgage's Motion is considered as a motion for summary judgment, Plaintiff cannot succeed on any claim against CitiMortgage and, therefore, CitiMortgage is entitled to summary judgment.

BACKGROUND

1. This case arises from a prior action filed by CitiMortgage, against Plaintiff, in May 2008, in the Court of Common Pleas for Berkeley County, South Carolina, C/A No. 2009-CP-08-1258, for the foreclosure and sale of property located at [REDACTED] Ladson, South Carolina 29456.

2. A Judgment of Foreclosure and Sale was entered on October 29, 2008, finding that Plaintiff entered into a Fixed Rate Note on July 9, 1998, which was

11/16

R

secured by a Mortgage, and Plaintiff failed to satisfy her payment obligations. The balance was accelerated and the property was sold at public auction.

3. The property was offered for sale on December 3, 2008, and sold to Defendant Stonegate Properties.

4. Over two months after the sale, on February 19, 2009, Plaintiff filed a Motion to Vacate the Judgment of Foreclosure and Sale pursuant to Rule 60(b) of the South Carolina Rules of Civil Procedure. In the motion, Plaintiff sought to set aside and vacate the Master in Equity's Judgment of Foreclosure and Sale, set aside and vacate the Master's Deed, and a declaration that she was current on her payments. A hearing was held on March 18, 2009, where Plaintiff argued that she made her payments and the Mortgage should be reinstated. After hearing the testimony and considering the evidence, the Master in Equity held that the record supported a finding that Plaintiff defaulted on her loan and that she failed to timely submit reinstatement payments. Further, the Master in Equity concluded that there was no fraud under Rule 60(b)(3) sufficient to set aside the foreclosure judgment. The Rule 60(b) Motion was denied and the court enforced the Order of Judgment of Foreclosure and Sale, and resulting sale to the third-party purchaser. Plaintiff failed to appeal that ruling within thirty days.

5. The foreclosure case was closed and final on August 4, 2009, when the surplus sale funds were distributed amongst the parties.

6. Plaintiff filed the instant action on June 21, 2011, against CitiMortgage, seeking to set aside the Master's Sale, void the Master's Deed, cancel the Mortgage Assignment, set aside the Foreclosure Judgment due to alleged lack of standing, quiet title, and recover damages based on negligence, fraud, breach of contract,

breach of the implied covenant of good faith and fair dealing, unjust enrichment, slander of title, negligent misrepresentation, tortious interference with contract, and alleged violation of the South Carolina Unfair Trade Practices Act ("SCUTPA").

7. CitiMortgage filed a Motion to Dismiss Plaintiff's Complaint on August 25, 2011, on the grounds of res judicata since all of the claims related to the servicing of Plaintiff's loan or CitiMortgage's standing to pursue foreclosure and, therefore, should have been pursued as compulsory counterclaims or defenses in the foreclosure action. Further, CitiMortgage argued that Plaintiff's claims related to the foreclosure judgment and servicing of Plaintiff's loan were fully and fairly litigated in the prior foreclosure action by way of the Rule 60(b) Motion and, therefore, are similarly barred by res judicata and collateral estoppel. As additional grounds in the Motion, CitiMortgage argued that Plaintiff's negligence and negligent misrepresentation claims are barred by the economic loss rule and Plaintiff lacked standing to challenge the Mortgage Assignment.

8. A hearing was held on October 12, 2011, where both parties submitted briefing and oral arguments. Based on the briefing provided to the Court and the arguments of both parties at the hearing, this Court finds that there is no genuine issue of material fact and CitiMortgage is entitled to summary judgment on all claims filed against it by Plaintiff.

APPLICABLE LAW

9. CitiMortgage filed its Motion to Dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. Because documents were submitted both

before and after the hearing on the Motion, this Court considered the Motion as one for summary judgment.

10. A motion for summary judgment should be granted where the Court is satisfied that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. A party opposing a motion for summary judgment must "do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial." *Hedgepath v. AT&T Co.*, 348 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct. App. 2001) (quoting *Baughman v. AT&T Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991)) (internal quotes omitted and emphasis in original). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Id.* at 355, 559 S.E.2d at 336. Reliance on allegations in a pleading is insufficient to overcome a motion for summary judgment. Rule 56(e), SCRCP. Further, "[a] party cannot escape summary judgment on the mere hope that something may develop at trial." *Champion Int'l Corp. v. Eubanks*, 291 S.C. 395, 398, 353 S.E.2d 880, 882 (Ct. App. 1987).

ANALYSIS AND CONCLUSIONS

11. Each of the claims related to the servicing of Plaintiff's loan is barred by the doctrine of res judicata because those claims should have been asserted as compulsory counterclaims in the prior foreclosure action. Additionally, each of the claims related to the foreclosure action and CitiMortgage's standing were fully and fairly litigated at the Rule 60(b) stage and are therefore barred by collateral estoppel.

12. In South Carolina, a party must bring as a counterclaim any claim she has against the opposing party if it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim and does not require the presence of additional parties over which the court cannot acquire jurisdiction. See S.C. R. Civ. P. 13(a). Thus, it is well-settled that if a counterclaim is compulsory, but is not raised in the first case, a party is precluded under the doctrine of res judicata from asserting the claim in a subsequent action. See *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 217, 493 S.E.2d 826, 835 (1997) (stating that "if a counterclaim is compulsory, but not raised in the first action, a defendant is precluded from asserting the claim in a subsequent action"); *Beach Co. v. Twillman, Ltd.*, 351 S.C. 56, 62, 566 S.E.2d 863, 865 (Ct. App. 2002) ("The South Carolina Reporter's Note following Rule 13 states: '[c]ounterclaims arising out of the same transaction or occurrence that is the subject of the action are 'compulsory' under Rule 13(a) and are barred by res judicata or estoppel by judgment if not asserted.'").

13. The South Carolina Supreme Court has adopted the "logical relationship" test for determining whether a claim is a compulsory counterclaim under Rule 13(a), SCRC.P. *N.C. Fed. Savings & Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989) ("We hereby adopt the logical relationship test."). Under the logical relationship test, a counterclaim is compulsory if there is any logical relationship between the claim and the counterclaim. See *id.* (finding a logical relationship between the enforceability of a note, which was the subject of a foreclosure action, and the validity of a purported oral agreement which, if performed, would have avoided default on the note).

14. In this case, Plaintiff's claims for negligence, fraud, breach of implied covenant of good faith and fair dealing, breach of contract, unjust enrichment, violation of the SCUTPA, tortious interference with contract, quiet title, and negligent misrepresentation all relate to and arise out of the servicing of Plaintiff's loan and, therefore, bear a logical relationship to the foreclosure action. Plaintiff should have disputed the servicing of her loan, the application of payments, and CitiMortgage's standing to foreclose in the previously-filed foreclosure action.

15. Accordingly, Plaintiff cannot bypass her obligation to raise all compulsory claims in the foreclosure action, as required under Rule 13(a), SCRPC and, therefore, CitiMortgage is entitled to summary judgment on these claims pursuant to the doctrine of res judicata. See *Plott v. Justin Enters.*, 374 S.C. 504, 511, 649 S.E.2d 92, 95 (Ct. App. 2007) ("Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of the prior action between those parties. Under res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.") (internal citations omitted).

16. In addition to being barred by the doctrine of res judicata, Plaintiff's claims as to improper servicing, standing to foreclose, and alleged reinstatement of the loan were all heard and decided by the Master in Equity during the hearing on Plaintiff's Rule 60(b) motion in the foreclosure action.

17. "Collateral estoppel prevents a party from re-litigating an issue in a subsequent suit which was actually and necessarily litigated and determined in the prior action." *Aaron v. Mahl*, 381 S.C. 585, 592, 674 S.E.2d 482, 486 (2009). An issue is

deemed precluded by collateral estoppel when the moving party establishes that "the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). CitiMortgage established each of the elements of collateral estoppel and Plaintiff cannot come forward with any facts to show a genuine issue for trial.

18. In the foreclosure action, Plaintiff filed a Rule 60(b) motion seeking to set aside and vacate the Master's Judgment of Foreclosure and Sale, set aside and vacate the Master's Deed, and seeking a declaration that the loan was current. Likewise, in this action, Plaintiff's Complaint seeks to set aside the Master's Sale, void or cancel the Master's Deed upon sale, and damages, under several claims,¹ related to payments on the loan.

19. As outlined in CitiMortgage's Motion and Supporting Memorandum, the Master in Equity found that the Plaintiff's testimony regarding payments and reinstatement was not supported by the record. Moreover, the Master in Equity held that CitiMortgage had standing to pursue the foreclosure and that any allegedly incorrect statements in the foreclosure Complaint should have been litigated during the foreclosure proceedings. Based on the testimony and documents submitted at the Rule 60(b) hearing, the Master in Equity held that the facts and law are overwhelmingly against Plaintiff and enforced the Order of Judgment of Foreclosure and Sale and the resulting sale to the third party purchaser. Because these issues were previously heard and ruled on by the Master in Equity, the issues were actually litigated,

¹ These theories include: negligence, fraud, breach of contract, breach of implied covenant of good faith and fair dealing, unjust enrichment, violation of the SCUTPA, tortious interference, and negligent misrepresentation.

directly determined, and necessary to support the judgment, thereby satisfying the elements of collateral estoppel.

20. Having found that CitiMortgage satisfied each element of collateral estoppel and Plaintiff has not come forward with sufficient evidence to create a genuine issue of material fact for trial, this Court grants summary judgment in favor of CitiMortgage on all claims. See *State v. Bacote*, 331 S.C. 328; 331, 503 S.E.2d 161, 163 (1998) ("The doctrine of collateral estoppel is intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the notion that it is unfair to permit a party to relitigate an issue that has already been decided.").²

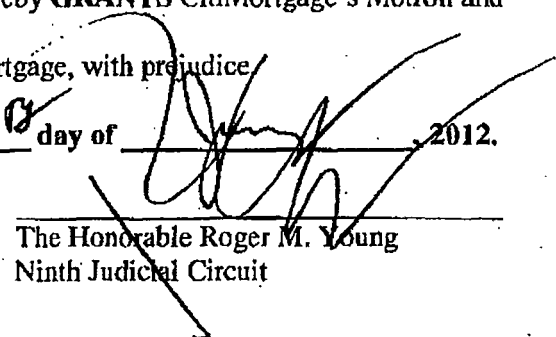
21. The Court finds that all of Plaintiff's claims against CitiMortgage are barred by the doctrine of res judicata because each claim should have been asserted as a compulsory counterclaim or a defense in the foreclosure action. Plaintiff's failure to assert these claims in the prior foreclosure action precludes her from attempting to litigate those same claims in this Court. Additionally, all of Plaintiff's claims are similarly precluded by collateral estoppel. In filing her Rule 60(b) motion in the prior foreclosure action, Plaintiff submitted the underlying issues and claims presently before this Court to the Master in Equity. The Master ruled in CitiMortgage's favor on these issues in an

² The Court also notes that Plaintiff's request for a finding of wrongful foreclosure, cancellation of the Master's Deed, and an order vacating the foreclosure judgment and sale is an improper attempt to appeal the Judgment of Foreclosure and Sale, entered on October 29, 2008, and the ruling on the Rule 60(b) Motion, entered on June 10, 2009. A foreclosure judgment is a final order that may only be appealed to the Court of Appeals, not to this Court. See *Peoples Fed. Sav. & Loan Ass'n v. Edwards*, 286 S.C. 475, 476, 334 S.E.2d 290, 291 (Ct. App. 1985) (noting that "[t]his is a direct appeal from an order of a master in equity in an action to foreclose on a mortgage"); *LaSalle Bank Nat'l Ass'n v. Davidson*, 386 S.C. 276, 277, 688 S.E.2d 121, 121 (2009) (noting that the action began as an "appeal from a judgment in a mortgage foreclosure proceeding"). Further, Plaintiff could have appealed the denial of the Rule 60(b) Motion after receipt of the Order entered on June 10, 2009. See *Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP*, 375 S.C. 423, 425, 653 S.E.2d 274, 275 (2007) (noting that the respondent "filed an appeal on the merits of the 60(b) motion. That appeal has been decided by the Court of Appeals, which affirmed [denial]"). Rule 203(b)(1) of the South Carolina Appellate Court Rules provides that a party must appeal an adverse order within 30 days of receipt of the written notice of the entry of the order. In this case, Plaintiff lost her right to appeal the final order when she failed to file a Notice of Appeal on or before July 10, 2009.

Order dated June 10, 2009. As outlined in the prior order, these underlying issues were previously decided in CitiMortgage's favor and it would be inequitable and improper to relitigate the same issues here.

NOW, THEREFORE, the Court concludes that, under the circumstances in this case and based on the arguments and evidence submitted to the Court, it is appropriate to grant summary judgment in favor of CitiMortgage on all claims asserted against it by Plaintiff. Therefore, the Court hereby **GRANTS** CitiMortgage's Motion and **DISMISSES** Plaintiff's claims against CitiMortgage, with prejudice.

IT IS SO ORDERED, this 6th day of July, 2012.


The Honorable Roger M. Young
Ninth Judicial Circuit

Charleston, South Carolina

11/6, 2012



State of South Carolina
The Circuit Court of the Ninth Judicial Circuit

ROGER M. YOUNG
JUDGE

100 BROAD STREET, SUITE 368
CHARLESTON, SOUTH CAROLINA 29401
TELEPHONE: (843) 958-2015
FAX: (843) 958-5108
E-MAIL: ryoung@sccourts.org

January 5, 2012

Clerk of Court, Berkeley County
300-B California Avenue
Moncks Corner, South Carolina 29461

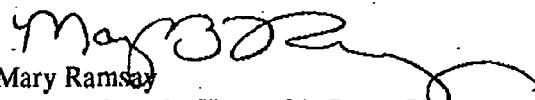
RE: Signed Order: 2011-CP-08-1754

Dear Valerie:

Please find enclosed signed order from the CPNJ docket week of October 10, 2011 to be filed with the Berkeley County Clerk's Office.

If you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,


Mary Ramsay
Law Clerk to the Honorable Roger Young

Enclosure

EXHIBIT E

Mot. to Reconsider, Alter or Amend

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

) IN THE COURT OF COMMON PLEAS
)
) CASE NO.: 2011-CP-08-1754

Angela Drexler,

Plaintiff,

CitiMortgage, Inc., et al.,

Defendants.

)
)
) PLAINTIFF'S MOTION TO
) RECONSIDER, ALTER, OR
) AMEND ORDER
) GRANTING SUMMARY
) JUDGMENT IN FAVOR OF
) CITIMORTGAGE, INC.
)
)
)

Plaintiff, Angela Drexler ("Drexler"), by and through her undersigned attorneys, hereby gives notice of its motion and moves the Court, pursuant to Rule 59(e), SCRPC to reconsider, alter, or amend its January 6, 2012 Order Granting Summary Judgment in Favor of CitiMortgage, Inc. ("Citi"). Plaintiff's counsel received written notice of the entry of the Order, by email, on January 6, 2012.

The grounds for this motion are: 1) the discovery of the existence and identity of the actual mortgage lender, Massachusetts Mutual Life Insurance Company ("MassMutual") on December 8, 2011; and 2) the Court treated Citi's motion to dismiss as a motion for summary judgment despite Citi's arguing that the Court should not and need not do so, and the Court granted summary judgment without first giving the Plaintiff the opportunity to engage in discovery.

After the October 12, 2011 hearing on Citi's motion to dismiss but before the Court granted its January 6, 2012 Order, Plaintiff learned, on December 8, 2011, that MassMutual is actually Ms. Drexler's mortgage lender, not Citi. This new evidence establishes that Plaintiff was correct in its argument that *res judicata* is not applicable because the real party in interest in the previous mortgage foreclosure action was the

lender, MassMutual, and therefore claims related to loan servicing practices could not have been compulsory counterclaims in the prior foreclosure suit and the requirement of identity of the parties for purposes of *res judicata* is lacking.

Also, the Court *sua sponte* treated Citi's motion to dismiss as a motion for summary judgment, despite Citi's arguing that the Court should not and need not do so. (See Memorandum in Support of Motion to Dismiss at p. 2, n. 1). Consequently, the Court has improperly granted summary judgment when summary judgment was not requested and before Plaintiff had an opportunity to develop the record through discovery. Discovery should be allowed to proceed. At the very least, Citi's motion to dismiss should not be converted into a motion for summary judgment, and the decision whether to grant summary judgment should be stayed, until the parties have had a full opportunity to conduct discovery. The Court of Appeals of South Carolina has explained that:

summary judgment is a "drastic remedy" which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Cunningham v. Helping Hands, Inc.*, 352 S.C. 485, 575 S.E.2d 549 (2003); *Lanham v. Blue Cross & Blue Shield*, 349 S.C. 356, 563 S.E.2d 331 (2002); *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002); *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 581 S.E.2d 496 (Ct.App.2003); *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 573 S.E.2d 830 (Ct.App.2002); *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 558 S.E.2d 271 (Ct.App.2001); *Murray v. Holnam, Inc.*, 344 S.C. 129, 542 S.E.2d 743 (Ct.App.2001); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct.App.1998). Because summary judgment is a drastic remedy, **it must not be granted until the opposing party has had a "full and fair opportunity to complete discovery."** *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003); *Lanham*, 349 S.C. at 363, 563 S.E.2d at 334; *Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001); *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999); *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326, 331 (Ct. App. 2003) (emphasis added). The court in *Schmidt* went on to explain:

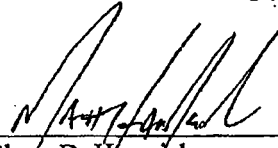
Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333; *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (2000); *Mosteller v. County of Lexington*, 336 S.C. 360, 520 S.E.2d 620 (1999); *Redwend Ltd. P'ship*, 354 S.C. at 468, 581 S.E.2d at 501; *Baril*, 352 S.C. at 280, 573 S.E.2d at 835; *Trivelas*, 348 S.C. at 130, 558 S.E.2d at 273; *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct.App.2002); *Hedgepath v. American Tel. & Tel. Co.*, 348 S.C. 340, 559 S.E.2d 327 (Ct.App.2001); *Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001); *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct.App.1999); *Middleborough Horizontal Prop. Regime Council v. Montedison*, 320 S.C. 470, 465 S.E.2d 765 (Ct.App.1995). "Summary judgment is inappropriate when further development of the facts is desirable to clarify the application of the law." *Lee v. Kelley*, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct.App.1989). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Redwend Ltd. P'ship*, 354 S.C. at 468, 581 S.E.2d at 501; *Baril*, 352 S.C. at 280, 573 S.E.2d at 835; *Hall*, 349 S.C. at 173-74, 561 S.E.2d at 656; *Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct.App.2001); *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597 (Ct.App.2000); see also *Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 584 S.E.2d 375 (2003) (noting that summary judgment should not be granted even when there is no dispute as to evidentiary facts, if there is dispute as to conclusions to be drawn therefrom).

Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326, 331 (Ct. App. 2003). The Court of Appeals held that summary judgment should have been denied in the *Schmidt* case because the question of law in that case was a novel one, and the application of the law to the facts was in dispute. As in the *Schmidt* case, the question of law in this case (whether *res judicata* applies in a suit complaining of mortgage servicing practices when the actual lender and real party in interest in the prior mortgage foreclosure suit was not the mortgage servicer) is a novel question, and the application of the law to the facts of this

case is in dispute. Additionally, further inquiry into the facts is necessary to clarify the application of the law. Therefore, summary judgment is inappropriate and should be denied. At a minimum, the decision on Citi's motion to dismiss should be stayed until the parties have had a full opportunity to conduct discovery if the motion is to be converted into a motion for summary judgment.

For the foregoing reasons, Plaintiff respectfully requests that the Court reconsider, alter, or amend its Order granting summary judgment in favor of Citi accordingly.

Respectfully submitted,



Matthew D. Hamrick
Attorney at Law
875 Lowcountry Blvd., Ste. 206
Mt. Pleasant, SC 29464
Phone: (843) 693-4700
Fax: (877) 524-5023
matt@matthamricklaw.com

-and-

David P. Traywick
TRAYWICK LAW OFFICES, LLC
P.O. Box 564
Isle of Palms, SC 29451
Phone: (843) 343-5092
Fax: (843) 300-1051
dpt@traywicklaw.com

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of January, 2012 served all parties who have appeared in this action with a copy of pleading or paper to which this Certificate is attached by mailing a copy of the same by US mail, first class and postage prepaid, and addressed as follows:

Benjamin E. Grimsley, Esq.
1703 Laurel Street
PO Box 11682
Columbia, SC 29211

Thad H. Westbrook, Esq.
Sarah B. Nielsen, Esq.
Nelson Mullins Riley & Scarborough LLP
PO Box 11070
Columbia, SC 29211-1070

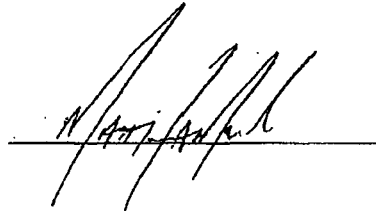
A handwritten signature in dark ink, appearing to read "Sarah B. Nielsen", is written over a horizontal line.

EXHIBIT F

Consent Order for Joinder

) IN THE COURT OF COMMON PLEAS

Case No.: 2011-CP-08-1754

i

)

)

)

)

**) CONSENT ORDER FOR JOINDER OF
) AN ADDITIONAL DEFENDANT
) PURSUANT TO RULES 19
) AND 15, SCRPC** **8**

MARY P. BROOKH
CLERK OF COURT
BERKELEY COUNTY, SC

2012 JAN 25 AM 11:55

三三三

IT APPEARING TO THE COURT:

1. That Joinder of an additional Defendant, Massachusetts Mutual Life Insurance Company under Rule 19 is necessary for a just adjudication in this case;
2. That this Joinder conforms to Rule 19(a)(1);
3. That Joinder will not deprive the Court of jurisdiction over the subject matter of the action;
4. That Defendant CitiMortgage, Inc. has been dismissed from the action by Judge Roger Young's Order of January 6, 2012, is no longer party to the action and therefore CitiMortgage Inc.'s consent is no longer required for Joinder;
5. That Defendant Stonegate Properties, Inc. is in default and has not appeared in the action and therefore Stonegate Properties, Inc.'s consent is no longer required for Joinder;
6. That the remaining party consents to the Joinder of Defendant Massachusetts Mutual Life Insurance Company;
7. That a Consent Order for Joinder of a necessary party under SCRCF Rule 19

10/5
2/4

implies consent to Amend Plaintiff's Complaint in order to lay causes of action against the necessary party so joined, Massachusetts Mutual Life Insurance Company;

8. That the Parties agree that an Amendment under SCRCP Rule 15 be restricted to adding new causes of action against Massachusetts Mutual Insurance Company;

9. That Rule 15 specifically calls for the relation back of amendments where the party against whom a claim is asserted (1) has received such notice of the action and will not be prejudiced in defending on the merits or (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him;

10. That the contents of this Order and the Amended Complaint shall have no force or effect upon the Order granting Summary Judgment and Dismissing Defendant CitiMortgage, Inc.;

11. That the contents of this Order and the Amended Complaint leave unmolested the claims of the original Complaint as brought against Defendant CitiMortgage, Inc. because until such time as all appeals have been exhausted, CitiMortgage, Inc. may be ordered back into this case whereupon that Defendant might be required to Answer the claims originally laid against it; and

12. That the Amended Complaint leaves intact the entirety of the original Complaint and merely supplements it with new claims against the new necessary party, Defendant Massachusetts Mutual Insurance Company.

THEREFORE, it is hereby ordered:

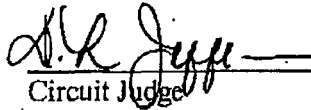
- a. That Plaintiff's Complaint is Amended to add Massachusetts Mutual Life Insurance Company as a defendant;
- b. That Plaintiff's causes of action against Massachusetts Mutual Life Insurance

2015
JAY

Company relate back to the date of Plaintiff's original Complaint;

- c. That the Amended Complaint shall have no effect upon Judge Roger Young's January 6, 2012 Order granting Summary Judgment in favor of Defendant CitiMortgage Inc.;
- d. That upon signing of this Order by the Court that such signing shall resolve Plaintiff's pending motion to Amend its Complaint and such motion shall be removed from the schedule; and
- e. That the Amended Complaint, attached hereto, shall be deemed served upon Defendant BB&T by service of this Order; and that Plaintiff shall serve the Amended Complaint upon Defendant Massachusetts Life Insurance Company pursuant to Rule 4, SCRCP.

AND IT IS SO ORDERED


Circuit Judge

Date: Jan 23, 2012

Chas. S. C. J.

345
AK

WE CONSENT


TRAYWICK LAW OFFICES, LLC
P.O. Box 564
Isle of Palms, SC 29451
Telephone: 843-343-5092
Fax: 843-300-1051
Dpt@traywicklaw.com

-and-

Matthew D. Hamrick
Attorney at Law
875 Lowcountry Blvd., Ste. 206
Mt. Pleasant, SC 29464
(843) 693-4700
matt@matthamricklaw.com

CO-COUNSELS FOR PLAINTIFF

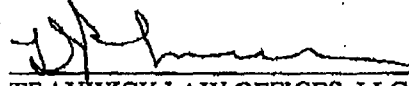
WE CONSENT

Grimsley Law Firm
By Benjamin E. Grimsley
1703 Laurel Street
PO Box 11682
Columbia, SC 29211

ATTORNEY FOR DEFENDANT BB&T

AMS
OK

WE CONSENT


TRAYWICK LAW OFFICES, LLC
P.O. Box 564
Isle of Palms, SC 29451
Telephone: 843-343-5092
Fax: 843-300-1051
Dpt@traywicklaw.com

-and-

Matthew D. Hamrick
Attorney at Law
875 Lowcountry Blvd., Ste. 206
Mt. Pleasant, SC 29464
(843) 693-4700
matt@matthamricklaw.com

CO-COUNSELS FOR PLAINTIFF

WE CONSENT


Grimsley Law Firm
By Benjamin E. Grimsley
1703 Laurel Street
PO Box 11682
Columbia, SC 29211

ATTORNEY FOR DEFENDANT BB&T

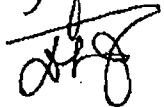
5815


EXHIBIT G

Order Denying Mot. to Reconsider, Alter or Amend

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY) NINTH JUDICIAL CIRCUIT

Angela Drexler,) Civil Action No. 2011-CP-08-1754
)

Plaintiff,)

vs.)

CitiMortgage, Inc., Stonegate Properties,)
Inc., and Branch Banking and Trust)
Company, Inc.,)

Defendants.)

**ORDER DENYING PLAINTIFF'S
MOTION TO RECONSIDER**

AS MOOT

CLERK OF COURT
BERKELEY COUNTY, SC

12 MAR 16 AM 8:58

FILED

BEFORE THE COURT is the Motion to Reconsider, Alter or Amend

Judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure served by Plaintiff Angela Drexler ("Plaintiff") on January 17, 2012. Defendant CitiMortgage, Inc. ("Defendant") submitted its opposition on February 6, 2012. After reviewing the submissions of both parties, the Court **DENIES** Plaintiff's Motion to Reconsider, Alter or Amend Judgment as moot because Defendant is no longer a party to this action, as outlined below:

BACKGROUND

1. Plaintiff filed the Complaint that is the subject of this action on June 21, 2011, asserting various causes of action against Defendant that are barred by the doctrines of res judicata and collateral estoppel. On August 25, 2011, Defendant filed a Motion to Dismiss Plaintiff's Complaint, asserting these arguments, which was heard on October 12, 2011. At the hearing, both parties submitted briefing and oral arguments. After considering the briefing and oral arguments, this Court considered the Motion to Dismiss as one for Summary Judgment and found that there was no genuine issue of

R

*Emil
DPT
TWO
36
MOH
COW
10*

material fact and Defendant was entitled to summary judgment on all claims filed against it by Plaintiff. The Order was signed on January 6, 2012.

2. On January 17, 2012, Plaintiff served a Motion to Reconsider, Alter or Amend (the "Motion to Reconsider") the Order granting summary judgment in favor of Defendant.

3. While the Motion to Reconsider was pending, Plaintiff submitted a motion sheet and proposed order to the Honorable Deadra L. Jefferson, entitled Consent Order for Joinder of an Additional Defendant ("Consent Order for Joinder"), affirmatively acknowledging that Defendant was dismissed from the case pursuant to the January 6, 2012 Order granting summary judgment and stating, therefore, that Defendant's consent was not necessary to join an additional party.

4. The Consent Order was filed on January 25, 2012, adding an additional Defendant, Mass Mutual Life Insurance Company, to the case without the consent of Defendant on the basis that as of January 6, 2012, Defendant was no longer party to this action.

5. On February 6, 2012, in light of Plaintiff's recognition that Defendant was no longer a party to this action, Defendant submitted its opposition to the Motion to Reconsider, arguing that the actions of Plaintiff demonstrated her voluntary withdrawal of the pending Motion to Reconsider and, therefore, Defendant was finally dismissed from the case by prior court order. In the alternative, Defendant argued that Plaintiff's Motion to Reconsider failed on the merits.

6. This Court considered the briefing of the parties and issues this Order, without a hearing, in accordance with Rule 59 of the South Carolina Rules of Civil Procedure.

ANALYSIS AND CONCLUSIONS

7. The Court finds that Plaintiff effectively withdrew the Motion to Reconsider when she submitted the motion sheet and proposed Consent Order for Joinder to Judge Jefferson and acknowledged that CitiMortgage was “dismissed” from the case as of the January 6, 2012 Order. See *Koutsogiannis v. BB&T*, 365 S.C. 145, 149, 616 S.E.2d 425, 428–29 (2005) (noting that “clients are generally bound by their attorneys’ acts or omissions during the legal representation”).

8. The representations made by Plaintiff in the Consent Order for Joinder were that Defendant was “dismissed from the action” by the Order dated January 6, 2012 and, since Defendant was “no longer a party to the action,” its “consent [was] no longer required for Joinder.” See Consent Order for Joinder at ¶ 4.

9. Pursuant to Rule 15(a) of the South Carolina Rules of Civil Procedure, Plaintiff must obtain the consent of the adverse parties or leave of court to amend the Complaint. Therefore, if Plaintiff’s Motion to Reconsider was deemed to have remained pending, Defendant would have been a party to the litigation and Defendant’s consent was required for joinder of any additional party. In this case, Plaintiff was not relieved of her obligation to obtain Defendant’s consent to amend the Complaint until the Order granting summary judgment was final. See *Southeastern Hous. Found. v. Smith*, 380 S.C. 621, 640, 670 S.E.2d 680, 690 (Ct. App. 2008) (stating that a Rule 59(e) motion removes the “finality of the challenged judgment”).

10. By failing to acknowledge in the Consent Order for Joinder that she had a Motion to Reconsider pending before this Court and failing to seek the consent of Defendant, Plaintiff necessarily admits that this Court's January 6, 2012 Order granting summary judgment in favor of Defendant was final, at that time. On that basis, Defendant is no longer a party to the litigation. Accordingly, the Court finds that, based on Plaintiff's own representations to Judge Jefferson, the Order granting summary judgment in favor of Defendant is final as of January 6, 2012, and the Motion to Reconsider is necessarily withdrawn.

11. Having found that Plaintiff's Motion to Reconsider is withdrawn, this Court denies the pending Motion to Reconsider as moot.

12. Further, this Court finds that Plaintiff is judicially estopped from proceeding on the Motion to Reconsider based on her affirmative representations to Judge Jefferson in the Consent Order for Joinder that Defendant is no longer a party to the action.

13. Judicial estoppel prevents a party from taking a contrary position that is inconsistent with one previously asserted in the same proceeding. *See Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004) ("Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding."). In this case, in order for Plaintiff to proceed with the Motion to Reconsider, she would have had to take a contrary legal and factual position that Defendant is not dismissed and that, in fact, Defendant is still a party to the litigation—a position directly contradictory to her position in the Consent Order for Joinder.

14. The Court finds that Plaintiff's prior position that Defendant is no longer a party to the litigation benefited her in two ways. First, Plaintiff was able to join a new party to the litigation without having to obtain the consent of Defendant in compliance with Rule 15(a) of the South Carolina Rules of Civil Procedure. And, second, Plaintiff avoided an objection to the amendment by Defendant at a hearing on Plaintiff's Motion to Amend that was filed on December 9, 2011.

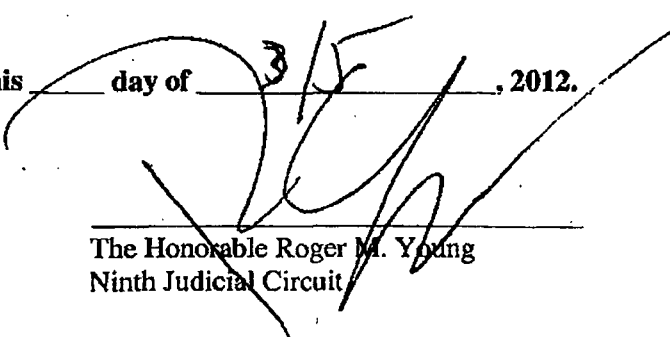
15. Based on the foregoing, Plaintiff is judicially estopped from claiming that Defendant is still a party to the action and, thus, subject to the Motion to Reconsider. Plaintiff elected to effectively withdraw her Motion to Reconsider so that she could submit a Consent Order for Joinder, joining Defendant Mass Mutual as a party to the action, without seeking or receiving the consent of Defendant. *See Hawkins v. Bruno Yacht Sales*, 353 S.C. 31, 43, 577 S.E.2d 202, 208 (2003) ("When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.") (internal citation omitted).

16. Therefore, the Court finds that the Motion to Reconsider was withdrawn by Plaintiff, the Motion to Reconsider is moot, and Defendant was finally dismissed from the case on January 6, 2012.

17. Because Defendant was no longer a party in this action as of January 6, 2012, this Court does not need to reach Defendant's remaining arguments in its opposition to the Motion to Reconsider.

NOW, THEREFORE, the Court concludes that, under the circumstances of this case and based on the briefing submitted to the Court, Plaintiff's Motion to Reconsider was voluntarily withdrawn such that it must be **DENIED** as moot.

IT IS SO ORDERED, this 3/5 day of March, 2012.



The Honorable Roger M. Young
Ninth Judicial Circuit

Charleston, South Carolina

2/3, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Roger Mack Young, Circuit Court Judge

Case No. 11-CP-08-1754

Angela Drexler.....Appellant,

v.

CitiMortgage, Inc. Respondent.

RETURN ON MOTION TO DISMISS

Respondent argues that this Court does not have jurisdiction to hear this appeal because the appeal was not timely filed. Respondent bases its conclusion on the argument that because Appellant's Motion to Reconsider, Alter or Amend (hereinafter, "Rule 59 Motion") was deemed by the Circuit Court to have been voluntarily withdrawn in the Order Denying Plaintiff's Motion to Reconsider as Moot, which is dated March 6, 2012. At no time prior to the March 6, 2012 Order did Appellant affirmatively withdraw its Motion to Reconsider.

Respondent asserts this appeal is not timely despite the following facts: Respondent does not dispute that Appellant's Rule 59 Motion to Reconsider, Alter or Amend was timely filed; Respondent cannot dispute that the Circuit Court's March 6, 2012 Order (hereinafter, "March 6 Order") denied the Rule 59 Motion; Respondent does not dispute that Appellant's Notice of

Appeal was filed within 30 days of Respondent's receipt of written notice of entry of the March 6 Order. Appellant, for her part, does not dispute that her attorneys served the Rule 59 Motion on Respondent on January 17, 2012. Appellant also concedes that on January 19, 2012, her attorneys hand delivered a consent order (hereinafter, "Consent Order") to the Chief Administrative Law Judge for the Ninth Circuit.

Respondent argues that Appellant affirmatively represented to the Court that CitiMortgage, Inc. was "finally dismissed from the matter on January 6, 2012." [Respondent's Brief, 7]. Appellant never represented to any Court or other party in the litigation underlying this appeal that Respondent was "finally dismissed". Respondent's Motion to Dismiss fails to mention that the language of the Consent Order contains clear notice to the Circuit Court that Appellant contemplated taking measures to bring Respondent back into the litigation:

[T]he contents of this Order and the Amended Complaint leave unmolested the claims of the original Complaint as brought against Defendant CitiMortgage, Inc. because until such time as all appeals have been exhausted, CitiMortgage, Inc. may be ordered back into this case whereupon that Defendant might be required to Answer the claims originally laid against it....

[Consent Order, ¶ 11]. Appellant, in submitting the Consent Order to the Court, was not attempting to deprive Respondent of the opportunity to refuse to provide consent for some subversive purpose or engaging in what Respondent characterizes as "harball litigation strategy." [Respondent's Brief, 10] Appellant had absolutely no reason to fear Respondent's arguments, whatever they might have been, in opposition to Appellant's motion to join a third party for two reasons: first, the Circuit Court would almost certainly have granted the motion, and second, the Circuit Court would almost certainly have denied Appellant's Rule 59 Motion regardless of the existence or non-existence of any Consent Order, in which case Respondent would not have had standing or cause to contest such a motion. Although the attempt was bungled, Appellant's

attorneys attempted to add a necessary third party quickly and efficiently by consent in the interval between Appellant's receipt of notice of entry of the Order Granting Summary Judgment on January 7th and Appellant's service on Respondent of the Rule 59 Motion on January 17th. Appellant's attorneys concluded that a consent order obtained within that ten day window would be proper pursuant to Rule 5, SCRCF. Appellant concedes that her attorneys failed to effect the Consent Order within the ten day window and that, consequently, Respondent's consent was necessary. Appellant concedes that her attorneys' failure to seek Respondent's consent was improper. Appellant does not, however, concede that the proper consequence of her attorneys' oversight and procedural error is an ex post facto destruction of her right to appeal from the March 6 Order, irrespective of the basis on which said Order denied the Rule 59 Motion.

The issue, then, is what effect should Appellant's failure to obtain Respondent's consent to the Consent Order submitted to the Circuit Court have on the Appellant's right to an appeal? Respondent argues that the findings in the March 6 Order prohibit the application of the tolling provision found in Rule 203(b)(1), SCACR. Appellant disagrees, and argues that this Court should find that since the March 6 Order denied the Rule 59 Motion, all requirements of the tolling provision of Rule 203(b)(1), SCACR are met, and therefore the time for appeal was stayed during the period between the service of the timely Rule 59 Motion and Appellant's receipt of written notice of entry of the March 6 Order. The rule states:

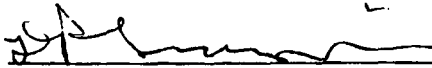
When a timely motion . . . to alter or amend the judgment . . . has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.

Rule 203(b)(1), SCACR.

Respondent's Motion to Dismiss incorrectly characterizes Appellant's Rule 59 Motion as one voluntarily withdrawn. [See Respondent's Motion to Dismiss, Page 9 ("Although the South

Carolina Supreme Court has not yet previously had occasion to consider whether a voluntarily withdrawn Rule 59(e) motion tolls the time in which a party must appeal”)]. At no time prior to the March 6 Order did Appellant voluntarily withdraw her Rule 59 Motion, a fact underscored by the existence of the March 6 Order, wherein Appellant’s Rule 59 Motion is denied. Appellant’s withdrawal, therefore, was judicially imposed by virtue of the March 6 Order and Appellant did not become aware that she had withdrawn her Rule 59 Motion until she received the March 6 Order.

In order for this Court to rule in favor of Respondent it would have to find that the March 6 Order denied the Appellant’s Rule 59 Motion, contained findings of fact, made conclusions of law, terminated Appellant’s rights to appeal any previous order and accomplished all of that while deeming itself impervious to attack on appeal. Appellant did not learn that her Rule 59 Motion was withdrawn until she received the March 6 Order. Accordingly it would be unfair to impose an ex post facto deadline to file her appeal. Accordingly, Appellant’s appeal was timely filed and perfected and this Court must deny Respondent’s Motion to Dismiss.


David P. Traywick (S.C. Bar # 78502)
TRAYWICK LAW OFFICES, LLC
P.O. Box 564
Isle of Palms, SC 29451
Telephone: 843-343-5092
Fax: 843-300-1051
DPT@Traywicklaw.com

Attorney for Appellant

Charleston, South Carolina
June 15, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger Mack Young, Circuit Court Judge

Case No. 2011-CP-08-1754

RECEIVED

JUN 22 2012

SC Court of Appeals

CitiMortgage, Inc., ... Respondent,

v.

Angela Drexler, ... Appellant.

REPLY IN SUPPORT OF MOTION TO DISMISS

Pursuant to Rule 240(f) of the South Carolina Appellate Court Rules, Respondent CitiMortgage, Inc. ("CitiMortgage"), hereby files its Reply in Support of Motion to Dismiss Appellant Angela Drexler's ("Appellant") appeal. While Appellant's attorney now attempts to "fall on the sword" in the Return to the Motion to Dismiss and claims that the Motion to Reconsider was not withdrawn, this fails to change the fact that the trial court ruled that the Motion to Reconsider was voluntarily and necessarily withdrawn through Appellant's own conduct and that this Court lacks jurisdiction over the appeal due to Appellant's failure to timely serve the notice of appeal.

Appellant's Return to the Motion to Dismiss serves as only another example of Appellant contorting this litigation to suit her needs, while ignoring the rules applicable

to the action, and ignoring the prior rulings by Judge Young at the trial court level. Rather than accepting the consequences of the actions taken thus far, Appellant now “concedes¹ that her attorneys’ failure to seek Respondent’s consent [for joinder] was improper,” yet still claims her appeal is timely. (Return to Mot. to Dismiss at p.3.) Accordingly, if Appellant succeeds in her position, she will benefit from her attorney’s admittedly improper conduct by having a third-party² joined as a defendant in the action without CitiMortgage’s consent and appealing an order that was final as of January 6, 2012. This cannot be the rule or appropriate conduct in South Carolina’s courts. Appellant’s actions in submitting a Consent Order for Joinder to another judge, in an effort to avoid obtaining the consent of CitiMortgage, necessarily resulted in the pending Motion to Reconsider being withdrawn. Appellant’s failure to timely serve a notice of appeal following that action cannot be rewarded. Judge Young ruled accordingly and, on that basis, this Court lacks jurisdiction to hear this appeal.

¹ Appellant also appears to concede that Judge Young’s Order Granting Summary Judgment is proper and that this appeal is futile when she states that “the Circuit Court would almost certainly have denied Appellant’s Rule 59 Motion regardless of the existence or non-existence of any Consent Order.” (Return to Mot. to Dismiss at p.2 (emphasis added)).

² CitiMortgage notes that while Appellant claims she had “absolutely no reason to fear Respondent’s arguments” in response to the Motion to Amend in order to join an additional party because “the Circuit Court would have almost certainly have granted the motion,” Appellant very well should have since the amendment to her pleading was futile. While neither party can predict how Judge Young would have ruled on the Motion to Amend to join Mass Mutual Life Insurance Company (“Mass Mutual”) as a party to the action, CitiMortgage certainly would have argued that the amendment is entirely futile considering Mass Mutual was purported to be joined due to it being the investor related to Appellant’s loan. As the investor, Mass Mutual would have been in privity with CitiMortgage and, therefore, any claims against Mass Mutual would have also been barred by res judicata/collateral estoppel; thereby making any amendment to the pleading to add Mass Mutual as a party, futile. CitiMortgage also notes that the Public Case Index evidences that Appellant signed a voluntary Stipulation of Dismissal, without a settlement, at the trial court level related to those new claims asserted against Mass Mutual when faced with a hearing on a pending motion to dismiss filed by Mass Mutual.

I. Appellant is Bound by the Prior Representations and Prior Actions of her Attorney in the Litigation.

It is well-established that a client is bound by the actions and representations of her attorney in litigation. See Koutsogiannis v. BB&T, 365 S.C. 145, 149, 616 S.E.2d 425, 428-29 (2005) (finding the submission of a proposed summary judgment order to the trial court an act within the scope of representation and noting that “clients are generally bound by their attorneys’ acts or omissions during the legal representation”); Williams v. Williams, 335 S.C. 386, 391, 517 S.E.2d 689, 691 (1999) (“[A]n attorney is the alter-ego of his client and the attorney stands in the place of the client.” (internal citations omitted)); Peterson v. Atl. Coast Line R. Co., 112 S.C. 89, 98 S.E. 848, 849 (1919) (holding that clients are bound by the trial strategy decisions of their attorneys); United States v. Taylor, 659 F.3d 339, 348 (4th Cir. 2011) cert. denied, 132 S. Ct. 1817 (U.S. 2012) (“‘As to many decisions pertaining to the conduct of the trial, the defendant is deemed bound by the acts of his lawyer-agent.’” (quoting New York v. Hill, 528 U.S. 110, 115, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000))).

In this case, Appellant’s attorney made the strategic decision to submit a motion sheet and proposed order to the Honorable Deadra L. Jefferson, entitled Consent Order for Joinder of an Additional Defendant representing to the Court that CitiMortgage was “*dismissed*” from the case pursuant to Judge Young’s order granting summary judgment on January 6, 2012. See Mot. to Dismiss, Ex. E at ¶ 4. By taking that action and making that representation to the trial court, the necessary effect was that Judge Jefferson relied on the representation of Appellant and did not require CitiMortgage’s consent before signing the Consent Order for Joinder. As a result,

CitiMortgage was finally dismissed from the action and the Motion to Reconsider was deemed as having been voluntarily withdrawn. Judge Young ruled accordingly. See Mot. to Dismiss, Ex. G, Order Denying Mot. to Reconsider as Moot at ¶ 7 (“The Court finds that Plaintiff effectively withdrew the Motion to Reconsider when she submitted the motion sheet and proposed Consent Order for Joinder to Judge Jefferson and acknowledge that CitiMortgage was ‘dismissed’ from the case as of the January 6, 2012 Order.”).

While Appellant now claims she was unaware³ that her Motion to Reconsider was withdrawn until issuance of the Order denying the Motion to Reconsider as moot, she effectively concedes that the Motion to Reconsider was ineffectual as outlined in CitiMortgage’s Motion to Dismiss. See Mot. to Dismiss at p. 9. Appellant does not challenge or distinguish any of the cases cited by CitiMortgage for the proposition that the South Carolina Supreme Court has held that an ineffectual Rule 59(e) motion does not toll the time for appeal. Instead, Appellant is determined to emphasize that the withdrawal of the Motion to Reconsider was not voluntary—a fact already decided by

³ Appellant’s argument that she was unaware that her Motion to Reconsider was withdrawn until Judge Young’s Order was issued on March 6, 2012, is disingenuous at best. Following Appellant’s submission of the Consent Order for Joinder to Judge Jefferson, CitiMortgage made the trial court aware of this event and its impact on the pending Motion to Reconsider when it submitted its Response in Opposition to Motion to Reconsider on February 6, 2012—one whole month before the Order was issued. Moreover, Judge Young’s law clerk notified the parties on February 16, 2012, that Judge Young was ruling in favor of CitiMortgage based on the “issues outlined in [the] Memo in Opposition to the Motion to Reconsider.” See 2/16/12 Email from Judge Young’s Law Clerk, attached hereto as Exhibit “A.” Therefore, Appellant was very much aware that her Motion to Reconsider was withdrawn as early as February. Not to mention that she should have known the same when she submitted the Consent Order for Joinder to Judge Jefferson stating CitiMortgage was dismissed as of January 6, 2012. In light of the arguments made by CitiMortgage regarding the impropriety of Appellant’s conduct in submitting the Consent Order for Joinder to Judge Jefferson without CitiMortgage’s consent, Appellant could have and should have filed her Notice of Appeal even while the Motion to Reconsider was pending. Even if this Court finds that the Motion to Reconsider was tolled until the submission of the Consent Order for Joinder on January 25, 2012, Appellant would have had nine days following the email from Judge Young’s law clerk to timely serve her Notice of Appeal.

Judge Young. Accordingly, Appellant does not appear to dispute that her Motion to Reconsider became ineffectual⁴ upon the submission of the Consent Order of Joinder to Judge Jefferson on January 25, 2012. Therefore, the time for appeal was not tolled pursuant to Rule 203, SCACR, and it expired prior to Appellant serving her Notice of Appeal. On that basis, this Court lacks jurisdiction to hear the appeal.

II. A Court Following Appellant's Logic Runs Afoul of the Principle of Judicial Estoppel.

As outlined by Judge Young, Appellant appears to be again in conflict with the principle of judicial estoppel. In the Order denying Appellant's Motion to Reconsider as moot, Judge Young noted that Appellant was "judicially estopped from proceeding on the Motion to Reconsider based on her affirmative representations to Judge Jefferson in the Consent Order for Joinder that Defendant is no longer a party to the action." Mot. to Dismiss, Ex. G, Order Denying Mot. to Reconsider as Moot at ¶ 12. Now facing a Motion to Dismiss the appeal, Appellant attempts to argue that CitiMortgage remained a party to the litigation and, on that basis, her "failure to seek Respondent's consent was improper." (Return to Mot. to Dismiss at p.3.) Appellant feels free to make these arguments at this stage because she already dismissed the futile claims against Mass Mutual and now has nothing to lose by arguing CitiMortgage should have been consulted. Thus, when it was convenient for Appellant to disregard CitiMortgage as a party to the litigation in order to join an additional defendant to the action without seeking CitiMortgage's consent or facing a hearing, she did so.

⁴ As noted above, Appellant concedes that her attorneys' failure to obtain the consent of CitiMortgage to join a party was improper. (See Return to Mot. to Dismiss at p.3.)

However, now that it is inconvenient to take this position, Appellant claims CitiMortgage was a party, her attorneys' actions were improper, and that dismissal of her appeal would be "unfair." Id. at p.4. The only unfairness that would result in this case is if Appellant is allowed to continue to steer this litigation in her direction through manipulation of the rules and conveniently changing positions when it suits her. "When a party has formally asserted a certain version of the facts in litigation, [s]he cannot later change those facts when the initial version no longer suits [her]." Hawkins v. Bruno Yacht Sales, 353 S.C. 31, 43, 577 S.E.2d 202, 208 (2003) (internal citation omitted). As succinctly stated by the South Carolina Supreme Court in Hayne Federal Credit Union v. Bailey:

In order for the judicial process to function properly, litigants must approach it in a truthful manner. Although parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process. The doctrine punishes those who take the truth-seeking function of the system lightly.

327 S.C. 242, 251-52, 489 S.E.2d 472, 477 (1997). Appellant chose her path and must now face the consequences. The Motion to Reconsider was effectively withdrawn, it did not toll the time for appeal and, on that basis, Appellant's Notice of Appeal is untimely.

III. Failing to Timely Serve a Notice of Appeal is Jurisdictional And Cannot Be Overcome by Appellant's Arguments.

Finally, Appellant's failure to concede "that the proper consequence of her attorneys' oversight and procedural error is an ex post facto destruction of her right to appeal" is irrelevant. (Return to Mot. to Dismiss at p.3.) As outlined above, Appellant is bound by the actions of her attorney and the ruling of Judge Young

denying the Motion to Reconsider as moot. The consequence of Appellant's actions was outlined by Judge Young in the Order. Specifically, he held as follows:

By failing to acknowledge in the Consent Order for Joinder that she had a Motion to Reconsider pending before this Court and failing to seek the consent of Defendant, Plaintiff necessarily admits that this Court's January 6, 2012 Order granting summary judgment in favor of Defendant was final, at that time. On that basis, Defendant is no longer a party to the litigation. Accordingly, the Court finds that, based on Plaintiff's own representations to Judge Jefferson, the Order granting summary judgment in favor of Defendant is final as of January 6, 2012, and the Motion to Reconsider is *necessarily withdrawn*.

Mot. to Dismiss, Ex. G, Order Denying Mot. to Reconsider as Moot at ¶ 10 (emphasis added).

Further, while noting that Appellant was judicially estopped from proceeding with the Motion to Reconsider, Judge Young held that "Plaintiff elected to effectively withdraw her Motion to Reconsider so that she could submit a Consent Order for Joinder, joining Defendant Mass Mutual as a party to the action, without seeking or receiving the consent of Defendant." *Id.* at ¶ 15. Thus, it is very clear that the actions of Appellant resulted in the Motion to Reconsider being withdrawn, despite Appellant's assertions that are now to the contrary.

Because the Motion to Reconsider was withdrawn, the time for appeal was not tolled and the Notice of Appeal is untimely. *See, e.g., Copar Pumice Co. v. Morris*, 639 F.3d 1025 (10th Cir. 2011) (noting that "a withdrawn motion is treated as though the motion had never been made for purposes of [rule tolling time to appeal]"). It has long been established that when a notice of appeal is not timely served, the appellate

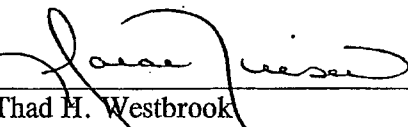
court is deprived of jurisdiction to hear the appeal. Whetstone v. Livingston, 54 S.C. 539, 543, 32 S.E. 561, 562 (1899) ("If the notice of appeal to the Circuit Court was not given within the notice prescribed by statute, then that Court could not take jurisdiction of the appeal."); Sadisco of Greenville, Inc. v. Greenville County Bd. of Zoning Appeals, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000) ("This Court has consistently stated that service of the Notice of Appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the Notice of Appeal must be served."); Dunn v. Dunn, 1996 S.C. App. LEXIS 147, at *2 (Ct. App. Oct. 9, 1996) ("Timely service of a notice of appeal is a jurisdictional requirement. If the notice of appeal is not timely served, jurisdiction is never vested in this court and the appeal must be dismissed."). As outlined above, the appeal was not timely served and, despite Appellant's pleas to the contrary in her Return, this Court lacks jurisdiction to hear the appeal.

CONCLUSION

Based on the above arguments and authorities, CitiMortgage asks that this Court dismiss the appeal in this matter. Appellant failed to perfect a timely appeal from the Order Granting Summary Judgment in this case. Most notably counsel for Appellant appears to be relying on her Motion to Reconsider to toll the time to appeal, when the Motion to Reconsider was declared moot and voluntarily withdrawn due to Appellant's actions and representations to the lower court in this case. Therefore, the appeal as to the underlying Order was not timely filed and Respondent respectfully requests dismissal of the Notice of Appeal.

SIGNATURE PAGE ATTACHED

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Thad H. Westbrook

SC Bar No. 16635

E-Mail: thad.westbrook@nelsonmullins.com

Sarah B. Nielsen

SC Bar No. 78384

E-Mail: sarah.nielsen@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, SC 29201

(803) 799-2000

Attorneys for CitiMortgage, Inc.

Columbia, South Carolina

6/22, 2012

Exhibit A

Sarah Nielsen

From: Young, Roger Law Clerk (Mary B. Ramsay) [ryounglc@sccourts.org]
Sent: Thursday, February 16, 2012 10:58 AM
To: Sarah Nielsen
Cc: Thad Westbrook; dpt@traywicklaw.com; bgrimsley@grimsleylaw.com; Matt Hamrick
Subject: RE: Drexler v. Citimortgage et al 2011CP081754

Counsel,

After reviewing all materials, Judge Young has decided to deny Plaintiff's Motion to Reconsider.

He has asked Ms. Nielsen to prepare a proposed order in accordance with the issues outlines in her Memo in Opposition to the Motion to Reconsider.

Please email a proposed order to me by Friday, March 2.

All the best,

Mary

Mary B. Ramsay, Esq.
Law Clerk to Judge Roger M. Young
Ninth Judicial Circuit
100 Broad Street, Suite 368
Charleston, SC 29401
Tel: (843) 958-2015
Fax: (843) 958-5108

From: Sarah Nielsen [mailto:Sarah.Nielsen@nelsonmullins.com]
Sent: Monday, February 06, 2012 4:55 PM
To: Young, Roger Law Clerk (Mary B. Ramsay)
Cc: Thad Westbrook; dpt@traywicklaw.com; bgrimsley@grimsleylaw.com; Matt Hamrick
Subject: RE: Drexler v. Citimortgage et al 2011CP081754

Ms. Ramsay,

In accordance with the below, please find attached CitiMortgage's Opposition to Plaintiff's Motion to Reconsider, Alter or Amend. If you need anything else, please let us know.

Thank you,
Sarah

Sarah B. Nielsen
Attorney at Law
sarah.nielsen@nelsonmullins.com

Nelson Mullins Riley & Scarborough LLP
Meridian, 17th Floor
1320 Main Street, Columbia, SC 29201
Tel: 803.255.9284 Fax: 803.255.5943
www.nelsonmullins.com

From: Young, Roger Law Clerk (Mary B. Ramsay) [mailto:ryounglc@sccourts.org]
Sent: Friday, January 27, 2012 11:22 AM
To: Sarah Nielsen
Cc: Thad Westbrook; dpt@traywicklaw.com; bgrimsley@grimsleylaw.com; Matt Hamrick
Subject: RE: Drexler v. Citimortgage et al 2011CP081754

Counsel,

Judge Young received Plaintiff's Motion to Reconsider the Order Granting Defendant Motion to Dismiss.

He will give the Defendant's 10 days to submit a Reply if they wish to do so.

Please email me a copy of any Reply by Feb. 8.

Also, please take a moment to ensure all necessary parties are copied on this email, and let me know if someone should be added.

All the best,

Mary

Mary B. Ramsay, Esq.
Law Clerk to Judge Roger M. Young
Ninth Judicial Circuit
100 Broad Street, Suite 368
Charleston, SC 29401
Tel: (843) 958-2015
Fax : (843) 958-5108

From: Sarah Nielsen [mailto:Sarah.Nielsen@nelsonmullins.com]
Sent: Friday, December 09, 2011 11:21 AM
To: Young, Roger Law Clerk (Mary B. Ramsay)
Cc: Thad Westbrook; dpt@traywicklaw.com; bgrimsley@grimsleylaw.com; Matt Hamrick
Subject: RE: Drexler v. Citimortgage et al 2011CP081754

Judge Young and Ms. Ramsay,

We have reviewed Plaintiff's email below and the attached documents. As Plaintiff's counsel acknowledges in the first sentence, this issue has already been addressed in both Plaintiff's briefing and arguments before this Court and, therefore, there is no reason to delay entry of the summary judgment order in favor of CitiMortgage. The court determined that all claims are barred by res judicata and collateral estoppel and the information provided by Plaintiff below does not change that determination.

To the extent Plaintiff claims that CitiMortgage will not be prejudiced by the Motion to Amend or additional delay, she is incorrect. By requiring CitiMortgage to address an additional motion and possibly appear at a hearing, it would require CitiMortgage to expend additional resources in a matter that the Court has determined is absolutely barred by the doctrines of res judicata and collateral estoppel. If the Plaintiff believes that she has claims against another entity, she can address those in another forum.

Therefore, we respectfully request that the Court sign the proposed order that we submitted yesterday, and deny Plaintiff's Motion to Amend.

Thank you,
Sarah

Sarah B. Nielsen
Attorney at Law
sarah.nielsen@nelsonmullins.com

Nelson Mullins Riley & Scarborough LLP

Meridian, 17th Floor
1320 Main Street, Columbia, SC 29201
Tel: 803.255.9284 Fax: 803.255.5943
www.nelsonmullins.com

From: Matt Hamrick [mailto:matt@matthamricklaw.com]
Sent: Thursday, December 08, 2011 4:36 PM
To: 'Young, Roger Law Clerk (Mary B. Ramsay)'
Cc: Thad Westbrook; Sarah Nielsen; dpt@traywicklaw.com; bgrimsley@grimsleylaw.com
Subject: RE: Drexler v. Citimortgage et al 2011CP081754

Dear Judge Young and Ms. Ramsay:

We alleged in the Complaint and argued in our briefing and at the hearing that CitiMortgage at all times in the prior foreclosure suit acted as an agent of its principal. Today we confirmed the identity of that principal: Massachusetts Mutual Life Insurance Company ("MassMutual"). Accordingly, we have today filed and served the attached Motion to Amend Complaint, which seeks to add MassMutual as a defendant.

We request a hearing on our motion to amend. A hearing on the motion to amend is essential prior to the signing of the order dismissing CitiMortgage because either the principal or the agent may be entitled to dismissal on the grounds of res judicata—but not both (it is impossible for two people simultaneously to wear the same hat).

Until MassMutual has had an opportunity to serve a responsive pleading and clarify the nature of its relationship to CitiMortgage with respect to this transaction, a dismissal in favor of CitiMortgage potentially prejudices MassMutual. On the other hand, delaying decision on the motion to dismiss until MassMutual appears costs CitiMortgage nothing.

Respectfully,

Matthew D. Hamrick
Attorney at Law
875 Lowcountry Blvd., Ste. 206
Mt. Pleasant, SC 29464
tel. (843) 693-4700
fax (877) 524-5023
matt@matthamricklaw.com

This communication may be attorney-client privileged or otherwise confidential. If you are not the intended recipient, please delete this message and notify the sender of this error.

From: Young, Roger Law Clerk (Mary B. Ramsay) [mailto:ryounglc@sccourts.org]
Sent: Monday, November 21, 2011 10:47 AM
To: thad.westbrook@nelsonmullins.com; sarah.nielsen@nelsonmullins.com; dpt@traywicklaw.com; matt@matthamricklaw.com
Subject: Drexler v. Citimortgage et al 2011CP081754

Counsel,

As you are aware, Judge Young held a hearing on October 12 in Berkeley County on Defendant Citimortgage's Motion for Dismiss in the above referenced case. At the hearing, he took the Matter Under Advisement.

After reviewing the briefs and supporting case law, Judge Young has decided to grant Defendant's Motion based on Res Judicata and Collateral Estoppel.

He has requested that Mr. Westbrook prepare a proposed order for his consideration. Please note, given that the arguments presented considered evidence outside of the pleadings, this Motion was considered as a Motion for Summary Judgment. Please draft an order Granting Defendant's Motion for Summary Judgment based on Res Judicata and Collateral Estoppel.

Please submit a proposed order to me via email by Friday, Dec. 9 and copy opposing counsel.

Feel free to contact me should you have any questions. Also, please take a moment to ensure all necessary parties are copied on this email, and please let me know if someone should be added.

All the best,

Mary

Mary B. Ramsay, Esq.
Law Clerk to Judge Roger M. Young
Ninth Judicial Circuit
100 Broad Street, Suite 368
Charleston, SC 29401
Tel: (843) 958-2015
Fax: (843) 958-5108

Confidentiality Notice

This message is intended exclusively for the individual or entity to which it is addressed. This communication may contain information that is proprietary, privileged, confidential or otherwise legally exempt from disclosure.

If you are not the named addressee, you are not authorized to read, print, retain, copy or disseminate this message or any part of it. If you have received this message in error, please notify the sender immediately either by phone (800-237-2000) or reply to this e-mail and delete all copies of this message.

To ensure compliance with the requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including the attachments) is not intended or written to be used, for the purpose of (a) avoiding penalties under the Internal Revenue Code or (b) promoting, marketing or recommending to another party any transaction or tax-related matter[s]. To provide you with a communication that could be used to avoid penalties under the Internal Revenue Code will necessarily entail additional investigations, analysis and conclusions on our part.

NOTICE OF SALE

BY VIRTUE of a decree heretofore granted in the case of: CitiMortgage, Inc. vs. Angela M. Drexler; and any other Heirs at Law or Devisees of Arthur E. Antidel, Deceased, their heirs, Personal Representatives, Administrators, Successors and Assigns, and all other persons entitled to claim through them; all unknown persons with any right, title or interest in the real estate described herein; also any persons who may be in the military service of the United States of America, being a class designated as John Doe; and any unknown minors or persons under a disability being a class designated as Richard Roe; Washington Mutual Home Loans, Inc. f/k/a Fleet Real Estate Funding Corp., C/A No. 08-CP-08-1258, The following property will be sold on December 3, 2008, at 11:00 AM at the Berkeley County Courthouse to the highest bidder:

All that piece, parcel or lot of land with the buildings and improvements thereon, situate lying and being near Ladson, South Carolina, in Berkeley County, South Carolina, shown and designated as Lot 74, Block F, Tall Pines Plantation Subdivision, Section Three, on a plat dated January 19, 1977 made by Harold J. Leamond, P.E. and L.S., and recorded in the Office of the Clerk of Court for Berkeley County on January 24, 1977 in Plat Book W. Page 153.

Derivation: Book 1379 at Page 53

[REDACTED], LADSON, SC 29456

233-14-01-024

SUBJECT TO ASSESSMENTS, BERKELEY AD VALOREM TAXES, EASEMENTS AND/OR, RESTRICTIONS OF RECORD, AND OTHER SENIOR ENCUMBRANCES.

TERMS OF SALE: A 5% cash deposit is required. The deposit will be applied towards the purchase price unless the bidder defaults, in which case the deposit will be forfeited. If the successful bidder fails, or refuses, to make the required deposit on the day of sale or fails or refuses to comply with the bid within 30 days, then the property will be resold at the bidder's risk. No personal or deficiency judgment being demanded, the bidding will not remain open after the date of sale, but compliance with the bid may be made immediately. The successful bidder will be required to pay interest on the amount of the bid from date of sale to date of compliance with the bid at the rate of 8.5% per annum. For complete terms of sale, see Judgment of Foreclosure and Sale filed with the Berkeley County Clerk of Court at C/A #08-CP-08-1258.

NOTICE: The foreclosure deed is not a warranty deed. Interested bidders should satisfy themselves as to the quality of title to be conveyed by obtaining an independent title search prior to the foreclosure sale date.

Samuel C. Waters, Esq.

Attorney for Plaintiff

P.O. Box 100200

Columbia, SC 29202-3200

(803) 744-4444

011654-01799

Website: www.rtt-law.com (see link to Resources/Foreclosure Sales)

Robert E. Watson

Robert E. Watson

Master in Equity for

Berkeley County

NOTICE TO PRINTER: Please insert:

____ Once during week commencing _____
____ Once during week commencing _____
____ Once during week commencing _____

Sarah Nielsen

From: Matt Hamrick [matt@matthamricklaw.com]
Sent: Thursday, October 13, 2011 7:39 PM
To: ryounglc@sccourts.com
Cc: Sarah Nielsen; info@grimsleylaw.com
Subject: Drexler v. CitiMortgage, Inc., et al. (2011-CP-08-1754)
Attachments: CCE10132011_0000.jpg; CCE10132011_0001.jpg; CCE10132011_0002.jpg

Dear Ms. Ramsay:

Please find attached for Judge Young's consideration Plaintiff's Supplement to Memorandum in Opposition to CitiMortgage, Inc.'s Motion to Dismiss Pursuant to Rule 12(b)(6), SCRCp. I have mailed this for filing and service today as well, and I have copied opposing counsel on this email. I apologize that this three-page document is attached as three separate image files. I was having problems scanning to .pdf today. If you have any problems viewing the attachments please let me know and I will re-send. Thank you.

Matthew D. Hamrick
Attorney at Law
875 Lowcountry Blvd., Ste. 201
Mt. Pleasant, SC 29464
(843) 693-4700
matt@matthamricklaw.com

This communication may be attorney-client privileged or otherwise confidential. If you are not the intended recipient, please delete this message and notify the sender of this error.

-----Original Message-----

From: Matt Hamrick [mailto:matt@matthamricklaw.com]
Sent: Thursday, October 13, 2011 7:26 PM
To: 'Matt Hamrick'
Subject:

Sarah Nielsen

From: Young, Roger Law Clerk (Mary B. Ramsay) [ryounglc@sccourts.org]
Sent: Monday, November 21, 2011 10:47 AM
To: Thad Westbrook; Sarah Nielsen; dpt@traywicklaw.com; matt@matthamricklaw.com
Subject: Drexler v. Citimortgage et al 2011CP081754

Counsel,

As you are aware, Judge Young held a hearing on October 12 in Berkeley County on Defendant Citimortgage's Motion for Dismiss in the above referenced case. At the hearing, he took the Matter Under Advisement.

After reviewing the briefs and supporting case law, Judge Young has decided to grant Defendant's Motion based on Res Judicata and Collateral Estoppel.

He has requested that Mr. Westbrook prepare a proposed order for his consideration. Please note, given that the arguments presented considered evidence outside of the pleadings, this Motion was considered as a Motion for Summary Judgment. Please draft an order Granting Defendant's Motion for Summary Judgment based on Res Judicata and Collateral Estoppel.

Please submit a proposed order to me via email by Friday, Dec. 9 and copy opposing counsel.

Feel free to contact me should you have any questions. Also, please take a moment to ensure all necessary parties are copied on this email, and please let me know if someone should be added.

All the best,

Mary

Mary B. Ramsay, Esq.
Law Clerk to Judge Roger M. Young
Ninth Judicial Circuit
100 Broad Street, Suite 368
Charleston, SC 29401
Tel: (843) 958-2015
Fax: (843) 958-5108

Sarah Nielsen

From: Matt Hamrick [matt@matthamricklaw.com]
Sent: Thursday, December 08, 2011 4:36 PM
To: 'Young, Roger Law Clerk (Mary B. Ramsay)'
Cc: Thad Westbrook; Sarah Nielsen; dpt@traywicklaw.com; bgrimsley@grimsleylaw.com
Subject: RE: Drexler v. Citimortgage et al 2011CP081754
Attachments: 030340.PDF

Dear Judge Young and Ms. Ramsay:

We alleged in the Complaint and argued in our briefing and at the hearing that CitiMortgage at all times in the prior foreclosure suit acted as an agent of its principal. Today we confirmed the identity of that principal: Massachusetts Mutual Life Insurance Company ("MassMutual"). Accordingly, we have today filed and served the attached Motion to Amend Complaint, which seeks to add MassMutual as a defendant.

We request a hearing on our motion to amend. A hearing on the motion to amend is essential prior to the signing of the order dismissing CitiMortgage because either the principal or the agent may be entitled to dismissal on the grounds of res judicata—but not both (it is impossible for two people simultaneously to wear the same hat).

Until MassMutual has had an opportunity to serve a responsive pleading and clarify the nature of its relationship to CitiMortgage with respect to this transaction, a dismissal in favor of CitiMortgage potentially prejudices MassMutual. On the other hand, delaying decision on the motion to dismiss until MassMutual appears costs CitiMortgage nothing.

Respectfully,

Matthew D. Hamrick
Attorney at Law
875 Lowcountry Blvd., Ste. 206
Mt. Pleasant, SC 29464
tel. (843) 693-4700
fax (877) 524-5023
matt@matthamricklaw.com

This communication may be attorney-client privileged or otherwise confidential. If you are not the intended recipient, please delete this message and notify the sender of this error.

From: Young, Roger Law Clerk (Mary B. Ramsay) [<mailto:ryounglc@sccourts.org>]
Sent: Monday, November 21, 2011 10:47 AM
To: thad.westbrook@nelsonmullins.com; sarah.nielsen@nelsonmullins.com; dpt@traywicklaw.com; matt@matthamricklaw.com
Subject: Drexler v. Citimortgage et al 2011CP081754

Counsel,

As you are aware, Judge Young held a hearing on October 12 in Berkeley County on Defendant Citimortgage's Motion for Dismiss in the above referenced case. At the hearing, he took the Matter Under Advisement.

After reviewing the briefs and supporting case law, Judge Young has decided to grant Defendant's Motion based on Res Judicata and Collateral Estoppel.

He has requested that Mr. Westbrook prepare a proposed order for his consideration. Please note, given that the arguments presented considered evidence outside of the pleadings, this Motion was considered as a Motion for Summary Judgment. Please draft an order Granting Defendant's Motion for Summary Judgment based on Res Judicata and Collateral Estoppel.

Please submit a proposed order to me via email by Friday, Dec. 9 and copy opposing counsel.

Feel free to contact me should you have any questions. Also, please take a moment to ensure all necessary parties are copied on this email, and please let me know if someone should be added.

All the best,

Mary

Mary B. Ramsay, Esq.
Law Clerk to Judge Roger M. Young
Ninth Judicial Circuit
100 Broad Street, Suite 368
Charleston, SC 29401
Tel: (843) 958-2015
Fax: (843) 958-5108

Sarah Nielsen

From: Sarah Nielsen
Sent: Friday, December 09, 2011 11:21 AM
To: 'Young, Roger Law Clerk (Mary B. Ramsay)'
Cc: Thad Westbrook; dpt@traywicklaw.com; bgrimsley@grimsleylaw.com; 'Matt Hamrick'
Subject: RE: Drexler v. Citimortgage et al 2011CP081754

Judge Young and Ms. Ramsay,

We have reviewed Plaintiff's email below and the attached documents. As Plaintiff's counsel acknowledges in the first sentence, this issue has already been addressed in both Plaintiff's briefing and arguments before this Court and, therefore, there is no reason to delay entry of the summary judgment order in favor of CitiMortgage. The court determined that all claims are barred by res judicata and collateral estoppel and the information provided by Plaintiff below does not change that determination.

To the extent Plaintiff claims that CitiMortgage will not be prejudiced by the Motion to Amend or additional delay, she is incorrect. By requiring CitiMortgage to address an additional motion and possibly appear at a hearing, it would require CitiMortgage to expend additional resources in a matter that the Court has determined is absolutely barred by the doctrines of res judicata and collateral estoppel. If the Plaintiff believes that she has claims against another entity, she can address those in another forum.

Therefore, we respectfully request that the Court sign the proposed order that we submitted yesterday, and deny Plaintiff's Motion to Amend.

Thank you,
Sarah

Sarah B. Nielsen
Attorney at Law
sarah.nielsen@nelsonmullins.com

Nelson Mullins Riley & Scarborough LLP

Meridian, 17th Floor
1320 Main Street, Columbia, SC 29201
Tel: 803.255.9284 Fax: 803.255.5943

www.nelsonmullins.com

From: Matt Hamrick [<mailto:matt@matthamricklaw.com>]
Sent: Thursday, December 08, 2011 4:36 PM
To: 'Young, Roger Law Clerk (Mary B. Ramsay)'
Cc: Thad Westbrook; Sarah Nielsen; dpt@traywicklaw.com; bgrimsley@grimsleylaw.com
Subject: RE: Drexler v. Citimortgage et al 2011CP081754

Dear Judge Young and Ms. Ramsay:

We alleged in the Complaint and argued in our briefing and at the hearing that CitiMortgage at all times in the prior foreclosure suit acted as an agent of its principal. Today we confirmed the identity of that principal: Massachusetts Mutual Life Insurance Company ("MassMutual"). Accordingly, we have today filed and served the attached Motion to Amend Complaint, which seeks to add MassMutual as a defendant.

We request a hearing on our motion to amend. A hearing on the motion to amend is essential prior to the signing of the order dismissing CitiMortgage because either the principal or the agent may be entitled to dismissal on the grounds of res judicata—but not both (it is impossible for two people simultaneously to wear the same hat).

Until MassMutual has had an opportunity to serve a responsive pleading and clarify the nature of its relationship to CitiMortgage with respect to this transaction, a dismissal in favor of CitiMortgage potentially prejudices MassMutual. On the other hand, delaying decision on the motion to dismiss until MassMutual appears costs CitiMortgage nothing.

Respectfully,

Matthew D. Hamrick
Attorney at Law
875 Lowcountry Blvd., Ste. 206
Mt. Pleasant, SC 29464
tel. (843) 693-4700
fax (877) 524-5023
matt@matthamricklaw.com

This communication may be attorney-client privileged or otherwise confidential. If you are not the intended recipient, please delete this message and notify the sender of this error.

From: Young, Roger Law Clerk (Mary B. Ramsay) [<mailto:ryounglc@sccourts.org>]
Sent: Monday, November 21, 2011 10:47 AM
To: thad.westbrook@nelsonmullins.com; sarah.nielsen@nelsonmullins.com; dpt@traywicklaw.com; matt@matthamricklaw.com
Subject: Drexler v. Citimortgage et al 2011CP081754

Counsel,

As you are aware, Judge Young held a hearing on October 12 in Berkeley County on Defendant Citimortgage's Motion for Dismiss in the above referenced case. At the hearing, he took the Matter Under Advisement.

After reviewing the briefs and supporting case law, Judge Young has decided to grant Defendant's Motion based on Res Judicata and Collateral Estoppel.

He has requested that Mr. Westbrook prepare a proposed order for his consideration. Please note, given that the arguments presented considered evidence outside of the pleadings, this Motion was considered as a Motion for Summary Judgment. Please draft an order Granting Defendant's Motion for Summary Judgment based on Res Judicata and Collateral Estoppel.

Please submit a proposed order to me via email by Friday, Dec. 9 and copy opposing counsel.

Feel free to contact me should you have any questions. Also, please take a moment to ensure all necessary parties are copied on this email, and please let me know if someone should be added.

All the best,

Mary

Mary B. Ramsay, Esq.
Law Clerk to Judge Roger M. Young
Ninth Judicial Circuit
100 Broad Street, Suite 368
Charleston, SC 29401
Tel: (843) 958-2015
Fax: (843) 958-5108

Sarah Nielsen

From: Young, Roger Law Clerk (Mary B. Ramsay) [ryounglc@sccourts.org]
Sent: Thursday, January 05, 2012 11:07 AM
To: Sarah Nielsen
Cc: Thad Westbrook; dpt@traywicklaw.com; bgrimsley@grimsleylaw.com; Matt Hamrick
Subject: RE: Drexler v. Citimortgage et al 2011CP081754

Counsel,

I appreciate your patience and hope y'all had a wonderful holiday.

After reviewing both positions, Judge Young has decided to proceed with signing the order which reflects his ruling on Citimortgage's Motion for Summary Judgment. The order was signed today and mailed to Berkeley County for filing.

As for the pending Motion to Amend, a hearing on that motion will need to be scheduled by the Berkeley County Clerk's Office.

All the best,

Mary

Mary B. Ramsay, Esq.
Law Clerk to Judge Roger M. Young
Ninth Judicial Circuit
100 Broad Street, Suite 368
Charleston, SC 29401
Tel: (843) 958-2015
Fax: (843) 958-5108

From: Sarah Nielsen [mailto:Sarah.Nielsen@nelsonmullins.com]
Sent: Friday, December 09, 2011 11:21 AM
To: Young, Roger Law Clerk (Mary B. Ramsay)
Cc: Thad Westbrook; dpt@traywicklaw.com; bgrimsley@grimsleylaw.com; Matt Hamrick
Subject: RE: Drexler v. Citimortgage et al 2011CP081754

Judge Young and Ms. Ramsay,

We have reviewed Plaintiff's email below and the attached documents. As Plaintiff's counsel acknowledges in the first sentence, this issue has already been addressed in both Plaintiff's briefing and arguments before this Court and, therefore, there is no reason to delay entry of the summary judgment order in favor of CitiMortgage. The court determined that all claims are barred by res judicata and collateral estoppel and the information provided by Plaintiff below does not change that determination.

To the extent Plaintiff claims that CitiMortgage will not be prejudiced by the Motion to Amend or additional delay, she is incorrect. By requiring CitiMortgage to address an additional motion and possibly appear at a hearing, it would require CitiMortgage to expend additional resources in a matter that the Court has determined is absolutely barred by the doctrines of res judicata and collateral estoppel. If the Plaintiff believes that she has claims against another entity, she can address those in another forum.

Therefore, we respectfully request that the Court sign the proposed order that we submitted yesterday, and deny Plaintiff's Motion to Amend.

Thank you,
Sarah

Sarah B. Nielsen
Attorney at Law
sarah.nielsen@nelsonmullins.com

Nelson Mullins Riley & Scarborough LLP
Meridian, 17th Floor
1320 Main Street, Columbia, SC 29201
Tel: 803.255.9284 Fax: 803.255.5943
www.nelsonmullins.com

From: Matt Hamrick [mailto:matt@matthamricklaw.com]
Sent: Thursday, December 08, 2011 4:36 PM
To: 'Young, Roger Law Clerk (Mary B. Ramsay)'
Cc: Thad Westbrook; Sarah Nielsen; dpt@traywicklaw.com; bgrimsley@grimsleylaw.com
Subject: RE: Drexler v. Citimortgage et al 2011CP081754

Dear Judge Young and Ms. Ramsay:

We alleged in the Complaint and argued in our briefing and at the hearing that CitiMortgage at all times in the prior foreclosure suit acted as an agent of its principal. Today we confirmed the identity of that principal: Massachusetts Mutual Life Insurance Company ("MassMutual"). Accordingly, we have today filed and served the attached Motion to Amend Complaint, which seeks to add MassMutual as a defendant.

We request a hearing on our motion to amend. A hearing on the motion to amend is essential prior to the signing of the order dismissing CitiMortgage because either the principal or the agent may be entitled to dismissal on the grounds of res judicata—but not both (it is impossible for two people simultaneously to wear the same hat).

Until MassMutual has had an opportunity to serve a responsive pleading and clarify the nature of its relationship to CitiMortgage with respect to this transaction, a dismissal in favor of CitiMortgage potentially prejudices MassMutual. On the other hand, delaying decision on the motion to dismiss until MassMutual appears costs CitiMortgage nothing.

Respectfully,

Matthew D. Hamrick
Attorney at Law
875 Lowcountry Blvd., Ste. 206
Mt. Pleasant, SC 29464
tel. (843) 693-4700
fax (877) 524-5023
matt@matthamricklaw.com

This communication may be attorney-client privileged or otherwise confidential. If you are not the intended recipient, please delete this message and notify the sender of this error.

From: Young, Roger Law Clerk (Mary B. Ramsay) [mailto:ryounglc@sccourts.org]
Sent: Monday, November 21, 2011 10:47 AM
To: thad.westbrook@nelsonmullins.com; sarah.nielsen@nelsonmullins.com; dpt@traywicklaw.com; matt@matthamricklaw.com
Subject: Drexler v. Citimortgage et al 2011CP081754

Counsel,

As you are aware, Judge Young held a hearing on October 12 in Berkeley County on Defendant Citimortgage's Motion for Dismiss in the above referenced case. At the hearing, he took the Matter Under Advisement.

After reviewing the briefs and supporting case law, Judge Young has decided to grant Defendant's Motion based on Res Judicata and Collateral Estoppel.

He has requested that Mr. Westbrook prepare a proposed order for his consideration. Please note, given that the arguments presented considered evidence outside of the pleadings, this Motion was considered as a Motion for Summary Judgment. Please draft an order Granting Defendant's Motion for Summary Judgment based on Res Judicata and Collateral Estoppel.

Please submit a proposed order to me via email by Friday, Dec. 9 and copy opposing counsel.

Feel free to contact me should you have any questions. Also, please take a moment to ensure all necessary parties are copied on this email, and please let me know if someone should be added.

All the best,

Mary

Mary B. Ramsay, Esq.
Law Clerk to Judge Roger M. Young
Ninth Judicial Circuit
100 Broad Street, Suite 368
Charleston, SC 29401
Tel: (843) 958-2015
Fax: (843) 958-5108

Confidentiality Notice

This message is intended exclusively for the individual or entity to which it is addressed. This communication may contain information that is proprietary, privileged, confidential or otherwise legally exempt from disclosure.

If you are not the named addressee, you are not authorized to read, print, retain, copy or disseminate this message or any part of it. If you have received this message in error, please notify the sender immediately either by phone (800-237-2000) or reply to this e-mail and delete all copies of this message.

To ensure compliance with the requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including the attachments) is not intended or written to be used, for the purpose of (a) avoiding penalties under the Internal Revenue Code or (b) promoting, marketing or recommending to another party any transaction or tax-related matter[s]. To provide you with a communication that could be used to

avoid penalties under the Internal Revenue Code will
necessarily entail additional investigations, analysis and
conclusions on our part.

Sarah Nielsen

From: Young, Roger Law Clerk (Mary B. Ramsay) [ryounglc@sccourts.org]
Sent: Thursday, February 16, 2012 10:58 AM
To: Sarah Nielsen
Cc: Thad Westbrook; dpt@traywicklaw.com; bgrimsley@grimsleylaw.com; Matt Hamrick
Subject: RE: Drexler v. Citimortgage et al 2011CP081754

Counsel,

After reviewing all materials, Judge Young has decided to deny Plaintiff's Motion to Reconsider.

He has asked Ms. Nielsen to prepare a proposed order in accordance with the issues outlines in her Memo in Opposition to the Motion to Reconsider.

Please email a proposed order to me by Friday, March 2.

All the best,

Mary

Mary B. Ramsay, Esq.
Law Clerk to Judge Roger M. Young
Ninth Judicial Circuit
100 Broad Street, Suite 368
Charleston, SC 29401
Tel: (843) 958-2015
Fax: (843) 958-5108

From: Sarah Nielsen [mailto:Sarah.Nielsen@nelsonmullins.com]
Sent: Monday, February 06, 2012 4:55 PM
To: Young, Roger Law Clerk (Mary B. Ramsay)
Cc: Thad Westbrook; dpt@traywicklaw.com; bgrimsley@grimsleylaw.com; Matt Hamrick
Subject: RE: Drexler v. Citimortgage et al 2011CP081754

Ms. Ramsay,

In accordance with the below, please find attached CitiMortgage's Opposition to Plaintiff's Motion to Reconsider, Alter or Amend. If you need anything else, please let us know.

Thank you,
Sarah

Sarah B. Nielsen
Attorney at Law
sarah.nielsen@nelsonmullins.com

Nelson Mullins Riley & Scarborough LLP
Meridian, 17th Floor
1320 Main Street, Columbia, SC 29201
Tel: 803.255.9284 Fax: 803.255.5943
www.nelsonmullins.com

From: Young, Roger Law Clerk (Mary B. Ramsay) [mailto:ryounglc@sccourts.org]
Sent: Friday, January 27, 2012 11:22 AM
To: Sarah Nielsen
Cc: Thad Westbrook; dpt@traywicklaw.com; bgrimsley@grimsleylaw.com; Matt Hamrick
Subject: RE: Drexler v. Citimortgage et al 2011CP081754

Counsel,

Judge Young received Plaintiff's Motion to Reconsider the Order Granting Defendant Motion to Dismiss.

He will give the Defendant's 10 days to submit a Reply if they wish to do so.

Please email me a copy of any Reply by Feb. 8.

Also, please take a moment to ensure all necessary parties are copied on this email, and let me know if someone should be added.

All the best,

Mary

Mary B. Ramsay, Esq.
Law Clerk to Judge Roger M. Young
Ninth Judicial Circuit
100 Broad Street, Suite 368
Charleston, SC 29401
Tel: (843) 958-2015
Fax: (843) 958-5108

From: Sarah Nielsen [mailto:Sarah.Nielsen@nelsonmullins.com]
Sent: Friday, December 09, 2011 11:21 AM
To: Young, Roger Law Clerk (Mary B. Ramsay)
Cc: Thad Westbrook; dpt@traywicklaw.com; bgrimsley@grimsleylaw.com; Matt Hamrick
Subject: RE: Drexler v. Citimortgage et al 2011CP081754

Judge Young and Ms. Ramsay,

We have reviewed Plaintiff's email below and the attached documents. As Plaintiff's counsel acknowledges in the first sentence, this issue has already been addressed in both Plaintiff's briefing and arguments before this Court and, therefore, there is no reason to delay entry of the summary judgment order in favor of CitiMortgage. The court determined that all claims are barred by res judicata and collateral estoppel and the information provided by Plaintiff below does not change that determination.

To the extent Plaintiff claims that CitiMortgage will not be prejudiced by the Motion to Amend or additional delay, she is incorrect. By requiring CitiMortgage to address an additional motion and possibly appear at a hearing, it would require CitiMortgage to expend additional resources in a matter that the Court has determined is absolutely barred by the doctrines of res judicata and collateral estoppel. If the Plaintiff believes that she has claims against another entity, she can address those in another forum.

Therefore, we respectfully request that the Court sign the proposed order that we submitted yesterday, and deny Plaintiff's Motion to Amend.

Thank you,
Sarah

Sarah B. Nielsen
Attorney at Law
sarah.nielsen@nelsonmullins.com

Nelson Mullins Riley & Scarborough LLP

Meridian, 17th Floor
1320 Main Street, Columbia, SC 29201
Tel: 803.255.9284 Fax: 803.255.5943
www.nelsonmullins.com

From: Matt Hamrick [<mailto:matt@matthamricklaw.com>]
Sent: Thursday, December 08, 2011 4:36 PM
To: 'Young, Roger Law Clerk (Mary B. Ramsay)'
Cc: Thad Westbrook; Sarah Nielsen; dpt@traywicklaw.com; bgrimsley@grimsleylaw.com
Subject: RE: Drexler v. Citimortgage et al 2011CP081754

Dear Judge Young and Ms. Ramsay:

We alleged in the Complaint and argued in our briefing and at the hearing that CitiMortgage at all times in the prior foreclosure suit acted as an agent of its principal. Today we confirmed the identity of that principal: Massachusetts Mutual Life Insurance Company ("MassMutual"). Accordingly, we have today filed and served the attached Motion to Amend Complaint, which seeks to add MassMutual as a defendant.

We request a hearing on our motion to amend. A hearing on the motion to amend is essential prior to the signing of the order dismissing CitiMortgage because either the principal or the agent may be entitled to dismissal on the grounds of res judicata—but not both (it is impossible for two people simultaneously to wear the same hat).

Until MassMutual has had an opportunity to serve a responsive pleading and clarify the nature of its relationship to CitiMortgage with respect to this transaction, a dismissal in favor of CitiMortgage potentially prejudices MassMutual. On the other hand, delaying decision on the motion to dismiss until MassMutual appears costs CitiMortgage nothing.

Respectfully,

Matthew D. Hamrick
Attorney at Law
875 Lowcountry Blvd., Ste. 206
Mt. Pleasant, SC 29464
tel. (843) 693-4700
fax (877) 524-5023
matt@matthamricklaw.com

This communication may be attorney-client privileged or otherwise confidential. If you are not the intended recipient, please delete this message and notify the sender of this error.

From: Young, Roger Law Clerk (Mary B. Ramsay) [<mailto:ryounglc@sccourts.org>]
Sent: Monday, November 21, 2011 10:47 AM
To: thad.westbrook@nelsonmullins.com; sarah.nielsen@nelsonmullins.com; dpt@traywicklaw.com; matt@matthamricklaw.com
Subject: Drexler v. Citimortgage et al 2011CP081754

Counsel,

As you are aware, Judge Young held a hearing on October 12 in Berkeley County on Defendant Citimortgage's Motion for Dismiss in the above referenced case. At the hearing, he took the Matter Under Advisement.

After reviewing the briefs and supporting case law, Judge Young has decided to grant Defendant's Motion based on Res Judicata and Collateral Estoppel.

He has requested that Mr. Westbrook prepare a proposed order for his consideration. Please note, given that the arguments presented considered evidence outside of the pleadings, this Motion was considered as a Motion for Summary Judgment. Please draft an order Granting Defendant's Motion for Summary Judgment based on Res Judicata and Collateral Estoppel.

Please submit a proposed order to me via email by Friday, Dec. 9 and copy opposing counsel.

Feel free to contact me should you have any questions. Also, please take a moment to ensure all necessary parties are copied on this email, and please let me know if someone should be added.

All the best,

Mary

Mary B. Ramsay, Esq.
Law Clerk to Judge Roger M. Young
Ninth Judicial Circuit
100 Broad Street, Suite 368
Charleston, SC 29401
Tel: (843) 958-2015
Fax: (843) 958-5108

Confidentiality Notice

This message is intended exclusively for the individual or entity to which it is addressed. This communication may contain information that is proprietary, privileged, confidential or otherwise legally exempt from disclosure.

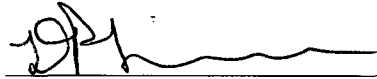
If you are not the named addressee, you are not authorized to read, print, retain, copy or disseminate this message or any part of it. If you have received this message in error, please notify the sender immediately either by phone (800-237-2000) or reply to this e-mail and delete all copies of this message.

To ensure compliance with the requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including the attachments) is not intended or written to be used, for the purpose of (a) avoiding penalties under the Internal Revenue Code or (b) promoting, marketing or recommending to another party any transaction or tax-related matter[s]. To provide you with a communication that could be used to avoid penalties under the Internal Revenue Code will necessarily entail additional investigations, analysis and conclusions on our part.

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

November 11, 2012



David P. Traywick (SC Bar 78502)
Post Office Box 564
Isle of Palms, South Carolina 29451
Phone: (843) 343-5092
Fax: (843) 300-1051
Dpt@traywicklaw.com
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Honorable Roger Mack Young, Circuit Court Judge

Case No. 11-CP-08-1754

Angela Drexler. Appellant,

v.

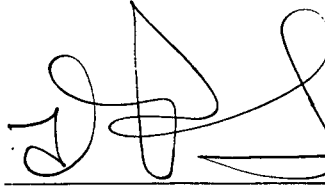
CitiMortgage, Inc., Stonegate Properties, Inc., and Branch Banking and Trust Company, Inc.,
Massachusetts Mutual Life Insurance Company Defendants,

of whom CitiMortgage, Inc. is Respondent.

PROOF OF SERVICE

I, David P. Traywick, do hereby certify that I have, on November 13, 2012, served the
foregoing **Record on Appeal** upon the Respondent or attorney for the Respondent by causing a
copy thereof to be mailed with proper postage to the address indicated below:

Nelson Mullins Riley & Scarborough LLP
Attn.: Sarah Nielsen
Meridian, 17th Floor
1320 Main Street
Columbia, SC 29201


David P. Traywick

NOV 15 2012

SC Court of Appeals