

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger Mack Young, Circuit Court Judge

Circuit Court Case No. 11-CP-08-1754
S.C. Court of Appeals Case No. 2012211306

Angela Drexler.....Appellant,

v.

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

Of Whom CitiMortgage, Inc. isRespondent.

RESPONSE BRIEF OF APPELLANT

David P. Traywick (SC Bar 78502)
Traywick Law Offices, LLC
Post Office Box 564
Isle of Palms, South Carolina 29451
Phone: (843) 343-5092

-and-

James E. Sterling (SC Bar 78489)
Smith, Jordan, Lavery and Lee, P.A.
14 Halter Drive
Piedmont, SC 29673
Phone: (864) 269-7373
ATTORNEYS FOR APPELLANT

RECEIVED

DEC 03 2012

SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities1
Arguments.....2
Conclusion5

TABLE OF AUTHORITIES

CASES

Wilder Corp. v. Wilke,
330 S.C. 71, 497 S.E.2d 731 (1998)3

Judy v. Judy,
393 S.C. 160, 712 S.E.2d 408 (2011)3

McNaughton-McKay Elec. Co. of N.C., Inc. v. Andrich,
324 S.C. 275, 482 S.E.2d 564 (Ct. App. 1997).....3

Pye v. Aycock,
325 S.C. 426, 480 S.E.2d 455 (1997)3

Staubes v. City of Folly Beach,
339 S.C. 406, 529 S.E.2d 543 (2000)4

Spence v. Wingate,
381 S.C. 487, 674 S.E.2d 169 (2009)4

ARGUMENTS

Issue Preservation

Respondent argues that issues 1, 4, 5, 6, 7, 9 and 10 are not preserved for appellate review because “the lower court did not rule on these issues in its Order granting summary judgment and the issues were not included in Appellant’s Motion to Reconsider.” (Resp.’s Initial Br. at p. 14). Appellant disagrees.

The issues in controversy are: 1) the trial court erred in granting summary judgment in favor of respondent based on res judicata because res judicata is an affirmative defense and should have been plead in respondent’s answer; 4) the trial court erred in granting respondent’s motion to dismiss based on collateral estoppel because the basis for respondent’s collateral estoppel defense is an order and not a judgment and because none of the determinations essential to the order were essential to the judgment; 5) the trial court erred in granting summary judgment in favor of respondent based on collateral estoppel because the defense of collateral estoppel does not apply in the context of a default judgment; 6) the trial court erred in granting summary judgment in favor of respondent based on collateral estoppel because the burden of persuasion exception applies in this case; 7) the trial court erred in granting summary judgment in favor of respondent based on res judicata because respondent was a nominal a party in the prior suit; 9) the trial court erred in granting summary judgment in favor of respondent based on res judicata and collateral estoppel because public policy prevents application of the res judicata doctrine; and 10) the trial court erred in granting summary judgment in favor of respondent based on res judicata and collateral estoppel because the fraud exception prevents application of both doctrines.

Appellant concedes that issue 1 was not preserved for appeal. While it was raised to the lower court, it was not specifically ruled upon and therefore was not preserved. *See, Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998).

However, the remaining issues Respondent argues are not preserved for appeal were, in fact, preserved. The remaining issues deal with either the elements or the exceptions to res judicata and collateral estoppel.

The elements of res judicata are: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in a former suit. *See, Judy v. Judy*, 393 S.C. 160, 167, 712 S.E.2d 408, 412 (2011). The elements of collateral estoppel are: “(1) the same issue; (2) was actually litigated; (3) determined by a valid and final judgment; and (4) such determination was essential to the prior judgment.” *McNaughton-McKay Elec. Co. of N.C., Inc. v. Andrich*, 324 S.C. 275, 279, 482 S.E.2d 564, 567 (Ct. App. 1997).

The exceptions to the doctrines of res judicata and collateral estoppel are set forth in the Restatement (Second) of Judgments § 28, as adopted by the South Carolina Court of Appeals in *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (1997), and are as follows:

- (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.

See, Id, 325 S.C. 437-38, 480 S.E.2d 460-61.

The trial court, in its Order Granting Summary Judgment in Favor of CitiMortgage, Inc., ruled that all of Appellant's claims were barred by both res judicata and collateral estoppel. [R. pp. 20, 24; Order Granting Summary Judgment in Favor of CitiMortgage, Inc., ¶¶ 11, 20, 21). The trial court's ruling that Appellant's claims were barred by both res judicata and collateral estoppel necessarily entails a ruling that the elements of each defense were met and that no exception applied. Accordingly, Appellant's issues numbered 4, 5, 6, 7, 9 and 10 are preserved. *See, e.g., Staubes v. City of Folly Beach*, 339 S.C. 406, 414, 529 S.E.2d 543, 547 (2000) (holding an issue to be preserved for appeal where an appellant did not obtain an "express" ruling on appellant's motion to amend the complaint, but the trial court denied relief based on the proposed amendment and therefore "obviously treated the complaint as if it had been amended."). Further, it is not necessary that the trial court "restate the ground on which petitioner opposed [the order] . . . the order explicitly addresses that argument by ruling [collateral estoppel and res judicata applied]." *Spence v. Wingate*, 381 S.C. 487, 489, 674 S.E.2d 169, 170 (2009).

Economic Loss Doctrine and Additional Sustaining Grounds

Respondent argues that Appellant's negligence and negligent misrepresentation causes of action are barred by the economic loss doctrine. Respondent argues that Appellant may not recover purely economic damages for wrongs that arise from the breach of contractual duties. [Resp.'s Initial Br. at p. 58]. Appellant has argued that she was not contractually bound to Respondent. [R. p. 53; Compl. ¶ 65]. Consequently, the economic loss doctrine does not apply.

Appellant does not dispute Respondent's position on the statute of limitations argument nor does Appellant contest Respondent's position on standing to contest the assignment of the mortgage.

CONCLUSION

Based on the foregoing arguments, Appellant requests the Court remand the case back to the Trial Court so that the record can be developed on all of the bases requested.

Respectfully submitted,



David P. Traywick (SC Bar 78502)
Traywick Law Offices, LLC
Post Office Box 564
Isle of Palms, South Carolina 29451
Phone: (843) 343-5092

-and-

James E. Sterling (SC Bar 78489)
Smith, Jordan, Lavery and Lee, PA
14 Halter Drive
Piedmont, SC 29673
Phone: (864) 269-7373
ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger Mack Young, Circuit Court Judge

Circuit Court Case No. 11-CP-08-1754
S.C. Court of Appeals Case No. 2012211306


Angela Drexler. Appellant,

v.

CitiMortgage, Inc. Stonegate Properties, Inc., and Branch Banking and
Trust Company, Inc., Defendants,
Of Whom CitiMortgage, Inc. is Respondent.

CERTIFICATE OF COMPLIANCE OF FINAL BRIEF

The undersigned certifies that the Appellant's Reply Brief complies with rule 211(b),
SCACR.



David P. Traywick (SC Bar 78502)
Traywick Law Offices, LLC
Post Office Box 564
Isle of Palms, South Carolina 29451
Phone: (843) 343-5092

-and-

James E. Sterling (SC Bar 78489)
Smith, Jordan, Lavery and Lee, PA
14 Halter Drive
Piedmont, SC 29673
Phone: (864) 269-7373
ATTORNEYS FOR APPELLANT

RECEIVED

DEC 03 2012

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger Mack Young, Circuit Court Judge

Circuit Court Case No. 11-CP-08-1754
S.C. Court of Appeals Case No. 2012211306

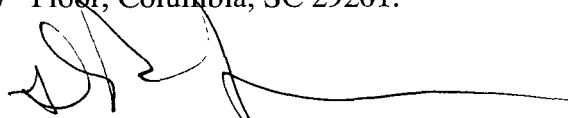
Angela Drexler. Appellant,

v.

CitiMortgage, Inc. Stonegate Properties, Inc., and Branch Banking and
Trust Company, Inc., Defendants,
Of Whom CitiMortgage, Inc. is Respondent.

PROOF OF SERVICE OF APPELLANT'S FINAL RESPONSE BRIEF

The undersigned certifies that I have, on this 30th day of November, 2012, served the Appellant's Final Reply Brief upon Respondent by depositing copies of said documents in the US Mail, First Class, postage prepaid and addressed to their attorneys of record: Nelson Mullins, Attn.: Sarah Nielsen, 1320 Main Street, 17th Floor, Columbia, SC 29201.



David P. Traywick (SC Bar 78502)
Traywick Law Offices, LLC
Post Office Box 564
Isle of Palms, South Carolina 29451
Phone: (843) 343-5092

-and-

James E. Sterling (SC Bar 78489)
Smith, Jordan, Lavery and Lee, PA
14 Halter Drive
Piedmont, SC 29673
Phone: (864) 269-7373
ATTORNEYS FOR APPELLANT

RECEIVED

DEC 03 2012

SC COURT OF APPEALS