THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-in-Equity

Case No. 2016-001764

Peach REO, LLC, a Delaware limited liability company, Respondent,

v.

Blalock Investments, LLC; Todd Smith; Debra Masuga; Subway Real Estate, LLC; and County of Spartanburg, a political subdivision of the State of South Carolina, Defendants,

Of Whom Blalock Investments, LLC; Todd Smith; and Debra Masuga are the Appellants.

And

Blalock Investments, LLC; Todd Smith; and Debra Masuga, Appellants,
v.

Capital Crossing Servicing Company, LLC, Respondent.

Final Brief of Respondents

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II. Did the master-in-equity properly deny the Borrowers' post-dismissal motion to amend their counterclaims and third-party complaint?

Statement of the Case

Peach REO, LLC ("Peach"), filed an amended foreclosure complaint in circuit court in Spartanburg County on November 17, 2015, against Blalock Investments, LLC; Todd Smith; Debra Masuga; Subway Real Estate, LLC; and the County of Spartanburg, seeking to foreclose on a mortgage on commercial property owned by Blalock Investments. (Am. Compl., R. p. 69). On January 6, 2016, Blalock Investments, Smith, and Masuga (collectively, "the Borrowers") filed an answer, counterclaim, and third-party complaint in which they asserted counterclaims against Peach for breach of contract, unfair trade practices, tortious interference with prospective contractual relations, and failure to act in a commercially reasonable manner, and third-party claims against Capital Crossing Servicing Company, LLC ("Capital Crossing"), for unfair trade practices, tortious interference with prospective contractual relations, and failure to act in a commercially reasonable manner. (Answer, R. p. 118). The circuit court referred the case to a master-in-equity.

On February 6, 2016, Peach and Capital Crossing filed a motion to dismiss the Borrowers' counterclaims and third-party complaint on the ground that the Borrowers failed to state facts sufficient to constitute any cause of action. (Motion to Dismiss, R. p. 135). The Borrowers filed a memorandum in opposition to the motion to dismiss, and on May 26, 2016, the master held a hearing on the motion. (Memo in Opp. to Motion to Dismiss, R. p. 172; May 26, 2016 Hearing Transcript, R. p. 221). The master filed an order granting the motion and dismissing the counterclaims and third-party complaint with prejudice on June 8, 2016. (Order Granting Dismissal, R. p. 1). On June 15, 2016, the Borrowers filed a Rule 59, SCRCP, motion to amend the master's judgment and at the same time sought to amend their answer, counterclaim, and third-party complaint. (Motion to Amend Judgment, R. p. 194). Peach and Capital Crossing filed a

memorandum in opposition to the motion to amend the judgment on July 14, 2016, and the master held a hearing on the motion on July 13, 2016. (Memo in Opp. to Motion to Amend, R. p. 206; July 13, 2016 Hearing Transcript, R. p. 235). The master filed an order denying the Borrowers' motion on August 1, 2016. (Order Denying Amendment, R. p. 8). The Borrowers appealed both orders on August 26, 2016. (Notice of Appeal, R. p. 254).

Statement of Facts

In 2008, the National Bank of South Carolina ("NBSC") loaned Blalock Investments $1,900,000 in exchange for a note and mortgage on commercial property owned by Blalock Investments in Boiling Springs, South Carolina. (Am. Compl. ¶¶ 13-14, R. pp. 80-81; Note p. 1, R. p. 90). At the same time, Blalock Investments entered into a commercial security agreement granting NBSC a security interest in buildings, fixtures, and other personal property located on the Boiling Springs property. (Am. Compl. ¶¶ 14-15, R. pp. 80-82; Security Agreement, R. pp. 95-96). Todd Smith and Debra Masuga—members of Blalock Investments—executed personal guaranties of the loan. (Guaranties, R. pp. 111-114). Capital Crossing began servicing the loan in September 2011. (Answer ¶ 46, R. p. 124). After a series of assignments, Peach became the holder of the note, mortgage, and commercial security agreement in September 2015. (Assignment dated September 29, 2015, R. pp. 53-55). The loan had a maturity date of October 1, 2013. (Note p. 1, R. p. 90).

In their counterclaims, the Borrowers allege they contacted Capital Crossing multiple times from 2012 until June 2013 in an effort to restructure the loan, extend the maturity date, or obtain Capital Crossing's consent to the Borrowers selling or leasing the property to third parties. (Answer ¶¶ 47-55, R. pp. 124-126). The Borrowers allege Capital Crossing requested documents twice in response to the Borrowers' requests but never responded to the Borrowers' proposals.

(Answer ¶¶ 48, 53, R. pp. 125-126). The Borrowers admit they made no payments on the loan after February 2013. (Answer ¶ 58, R. p. 127). In April 2013, Capital Crossing notified the Borrowers that their payments on the loan were forty-five days past due. (Answer ¶ 50, R. p. 125). They allege they responded by informing Capital Crossing that "they could not generate sufficient revenue from leases to pay the [loan] because of the upcoming maturity and requested that Capital [Crossing] respond to their request for modification." (Answer ¶ 50, R. p. 125). According to the pleadings, Capital Crossing ordered two appraisals of the property—one in May 2013 and another approximately one year later—and informed the Borrowers that it would charge them the cost of the appraisals as collection costs. (Answer ¶ 51, R. p. 125).

On May 6, 2013, Capital Crossing offered to extend the term of the loan by six months if the Borrowers brought the loan current and paid $200,000 by the original date of maturity, October 1, 2013, but the Borrowers declined. (Answer ¶ 52, R. p. 125). Instead, the Borrowers offered to deed the property to Capital Crossing in lieu of foreclosure, but Capital Crossing never responded to the offer. (Answer ¶ 53, R. pp. 125-126). The Borrowers contend that in July 2013, they notified Capital Crossing that they owed $36,102.81 in property taxes and the property would be sold at a tax sale if the taxes were not paid. (Answer ¶ 54, R. p. 126). The loan matured without the Borrowers paying the remaining principal and interest as required by the terms of the note. (Answer ¶ 55, R. p. 126). The Borrowers also failed to pay the taxes they owed on the property, and the property was sold at a tax sale in November 2013. (Answer ¶ 55, R. p. 126). Capital Crossing redeemed the property approximately one year later. (Answer ¶ 55, R. p. 126).

In October 2015, Peach foreclosed on the property. (Complaint, R. p. 18). The Borrowers responded to the foreclosure complaint by filing counterclaims against Peach and third-party claims against Capital Crossing. (Answer, R. p. 118). The Borrowers' claims are based on Capital

Crossing's failure to mitigate the amount the Borrowers owed by accepting their proposals to sell or lease the property to a third party. (Answer ¶¶ 56-57, R. pp. 126-127). The Borrowers also asserted Peach and Capital Crossing failed to mitigate by not filing the foreclosure action immediately after the loan matured. (Answer ¶ 58, R. p. 127). Peach and Capital Crossing moved to dismiss the claims on the ground that they were all based on either the failure to mitigate the amounts the Borrowers owed—either by modifying the loan or consenting to the Borrowers' sale or lease of the property—or an alleged breach of the implied duty of good faith and fair dealing. (Motion to Dismiss p. 2, R. p. 137). The master granted the motion and found Peach and Capital Crossing were "entitled to recover the full amount owed on the loan and had no duty to mitigate these damages in any way." (Order Granting Dismissal p. 3, R. p. 3). The master also found Peach and Capital Crossing had no duty to extend or modify the loan, take any immediate action after the Borrowers' default, or approve any sale or lease of the property. (Order Granting Dismissal pp. 4-5, R. pp. 4-5). Further, the master dismissed the Borrowers' claim for breach of the implied covenant of good faith and fair dealing because it is not an independent cause of action in South Carolina. (Order Granting Dismissal p. 6, R. p. 6). The master also dismissed the unfair trade practices, tortious interference, and failure to act in a commercially reasonable manner claims. (Order Granting Dismissal p. 6, R. p. 6).

After the dismissal, the Borrowers filed a "Notice of Motion and Motion to Amend Judgment" in which they asked the master to amend his judgment and to also allow them to amend their answer, counterclaim, and third-party complaint. (Motion to Amend Judgment p. 1, R. p. 195). The Borrowers generally asserted their amended pleading would allege facts sufficient to form causes of action for breach of contract, fraud, and negligent misrepresentation. (Motion to Amend Judgment p. 3, R. p. 197). They did not file a proposed amended pleading. The Borrowers

also requested the master rescind any ruling that a breach of the implied covenant of good faith and fair dealing is not an independent cause of action and amend his order to clarify that the order did not dismiss their affirmative defense of failure to mitigate and address the reasons for his dismissal of the Borrowers' remaining claims. (Motion to Amend Judgment pp. 5-7, R. pp. 199-201).

The master denied the Borrowers' request to alter or amend the judgment and held, in a footnote, that all affirmative defenses asserted by the Borrowers "fail for the same reason" as their counterclaims and third-party claims. (Order Denying Amendment pp. 5-8 & n.2, R. pp. 14-17). The master also denied the Borrowers' improper motion to amend their pleading, holding (1) a request to amend a pleading cannot be raised for the first time in a Rule 59(e) motion; (2) a request to amend cannot be raised for the first time after judgment; (3) the Borrowers' request to amend failed to comply with Rule 15, SCRCP, because they did not file a proposed amended pleading; (4) the Borrowers' request to amend was unduly delayed; and (5) the amendment would be futile. (Order Denying Amendment pp. 3-5, R. pp. 12-14).

Argument

I. The master-in-equity properly dismissed the Borrowers' counterclaims and third-party claims with prejudice because the Borrowers failed to state a claim for relief against either Peach or Capital Crossing

In an appeal from an order dismissing a case pursuant to Rule 12(b)(6), SCRCP, an appellate court applies the same standard of review as the trial court. *Grimsley v. S.C. Law Enf't Div.*, 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012). This court must "construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the

case." *Id.* The dismissal under Rule 12(b)(6) is proper unless the facts and inferences would entitle the plaintiff to relief. *Id.*

A. Peach and Capital Crossing had no duty to mitigate the amount owed by the Borrowers.

Each of the Borrowers' claims is based on Peach and Capital Crossing's alleged failure to assist the Borrowers in conveying the property to a third party or to mitigate the amount the Borrowers owed. In their brief, the Borrowers argue Peach and Capital Crossing "refused to respond to third-parties' offers to lease or purchase the Property, refused to permit [the Borrowers] to sell or lease the Property, failed to timely communicate offers to purchase or lease the Property, [and] deliberately acted to prevent [the Borrowers] from selling or leasing the Property." (App. Br. 15-16). In their breach of contract counterclaim, the Borrowers alleged Capital Crossing failed to respond to proposals that would "reduce or eliminate the amount owed by the [Borrowers]." (Answer ¶ 56, R. p. 126).

Such contentions suggest Peach and Capital Crossing owed a duty to mitigate the amount of the loan by selling or leasing the property or consenting to the Borrowers' plans to sell or lease the property. Assuming arguendo, had Peach and Capital Crossing considered the Borrowers' proposals and notified the Borrowers that they declined to consent to the proposals—which the Borrowers allege they did not do—the Borrowers would be in the same position they are in now. Thus, what the Borrowers assert in their counterclaims and third-party claims is that Peach and Capital Crossing were required to consent to a sale or lease of the property or to otherwise let the Borrowers out of their obligation to pay off the loan. The loan documents expressly provide otherwise, as does South Carolina law.

Peach and Capital Crossing have no duty under South Carolina law or the terms of the loan documents to mitigate the amount of the debt owed by the Borrowers. In *Cisson Construction,*

Inc. v. Reynolds & Associates, Inc., 311 S.C. 499, 429 S.E.2d 847 (Ct. App. 1993), this court considered similar mitigation claims. The borrower in *Cisson* defaulted on a commercial real estate loan. *Id.* at 500, 429 S.E.2d at 848. A mortgagee foreclosed, and the borrower argued the mortgagee failed to mitigate its damages by not collecting rent from the borrower's tenants. *Id.* at 501, 429 S.E.2d at 848. A master-in-equity found the mortgagee's failure to collect rents from the tenants was justified. *Id.* at 502, 429 S.E.2d at 849. On appeal, this court held the master erred in suggesting the mortgagee owed the borrower a duty to mitigate. *Id.* at 503, 429 S.E.2d at 849. The court explained the note and guaranty at issue in the case provided remedies to the mortgagee at default and provided that the mortgagee could enforce the note in its full amount against any party to the note or guaranty. *Id.* at 503, 429 S.E.2d at 850. The court found the guaranty did not require the mortgagee to preserve the collateral given by the borrower, to pursue or exhaust any particular remedy, or to take any action before seeking full payment of the note. *Id.* at 504, 429 S.E.2d at 850. Therefore, because the terms of the agreements did not require the mortgagee to take any action to mitigate the amount owed by the borrower, the court held the borrower—"a sophisticated party to the[] agreements"—was precluded from asserting the mortgagee owed him a duty to mitigate. *Id.*

Similarly, the Borrowers in this case are sophisticated parties—Smith and Masuga are members of Blalock Investments, which owns a commercial retail center and restaurant—and the note, mortgage, and commercial security agreement expressly allow Peach and Capital Crossing to choose whether to pursue any remedy available to them to enforce the agreements. (Note p. 1-2, R. pp. 90-91; Mortgage p. 2-3, R. pp. 93-94; Security Agreement p. 2, R. p. 96). The note provides that in the event of default, Peach may "use any remedy available to [it] under state or federal law" and "[b]y selecting one or more . . . remedies [it] do[es] not give up [its] right to later

use any other remedy." (Note p. 2, R. p. 91). The note also provides that Peach "may *at [its] option* extend this note or the debt represented by this note, or any portion of the note or debt." (Note p. 2, R. p. 91) (emphasis added). The mortgage provides that if the Borrowers sell or transfer the property without Peach's prior written consent, Peach may "*at [its] option for any reason*" declare the loan due and payable. (Mortgage p. 2, R. p. 93). The commercial security agreement prohibits the Borrowers from selling, leasing, or transferring the property without written consent from the secured party, Peach. (Security Agreement p. 2, R. p. 96). It also provides that, "[b]y choosing any one or more . . . remedies, [Peach] does not give up the right to use any other remedy" and Peach "does not waive a default by not using a remedy." (Security Agreement p. 2, R. p. 96).

As in *Cisson*, the note, mortgage, guaranties, and commercial security agreement in this case do not require Peach or Capital Crossing to mitigate the amount owed by the Borrowers or approve any transaction that releases the Borrowers from their obligation to pay the full amount of the loan. To the contrary, the operative documents expressly allow Peach and Capital Crossing to use a remedy provided in the documents, use any other remedy provided by law, or use no remedy at all without waiving the Borrowers' default. (Note p. 2, R. p. 91; Mortgage p. 2-3, R. pp. 93-94; Security Agreement p. 2, R. p. 96; Guaranty p. 2, R. p. 112). Moreover, the documents permit Peach and Capital Crossing to withhold consent to any lease, sale, or transfer.

As a matter of law and contract, Peach and Capital Crossing had no obligation to mitigate the amount owed by the Borrowers. *See* 22 Am. Jur. 2d Damages § 362 ("An obligation to minimize avoidable consequences does not exist if the plaintiff has a vested contract right to recover the amount sought."). Capital Crossing in fact offered to extend the term of the loan by six months, but the Borrowers declined the offer. (Answer ¶ 52, R. p. 125). Thus, Peach and

Capital Crossing communicated with the Borrowers as a matter of fact—just not to their liking. The master did not err in dismissing the Borrowers' claims.[1]

B. The Borrowers' breach of contract claim is based solely on an alleged breach of the implied covenant of good faith and fair dealing, which is not an independent cause of action.

The Borrowers did not allege in their counterclaims and third-party claims that Peach or Capital Crossing breached an express term of their contracts with the Borrowers. *See* (Answer ¶¶ 44-60, R. pp. 124-128). Instead, the Borrowers' breach of contract claim is based solely on Peach and Capital Crossing's alleged breach of an implied covenant of good faith and fair dealing. (Answer ¶ 59, R. pp. 127-128). Under South Carolina law, however, a breach of the implied covenant of good faith and fair dealing is not an independent cause of action. *RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004). Therefore, the master properly dismissed the Borrowers' breach of contract claim.

First, a party who is in default or has not performed its obligation under a contract cannot recover for the other party's breach of the implied covenant of good faith and fair dealing. *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999); *see also Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 594, 658 S.E.2d 539, 543 (Ct. App. 2008) ("Where a contract is not performed, the party who is guilty of the first breach is generally the one upon whom all liability for the nonperformance rests."). The Borrowers admit they defaulted on their required loan payments, failed to pay the loan upon its maturity, and failed to pay property taxes as required by the loan documents. (Answer ¶¶ 50-58, R. pp. 125-127; App.

[1] Because Peach and Capital Crossing had no duty to mitigate the amount owed by the Borrowers, the master also properly ruled that their affirmative defense of failure to mitigate fails for the same reason as their claims based on a failure to mitigate. *See* (Order Denying Amendment p. 6 n.2, R. p. 15).

Br. 3-4). The Borrowers cannot recover on their breach of the implied covenant claim regardless of whether a breach of the implied covenant can stand as an independent cause of action.

Second, the Borrowers seem to argue in their brief that because every contract in South Carolina includes an implied covenant of good faith and fair dealing, a breach of the implied covenant is itself a breach of contract and can therefore be the subject of a breach of contract action. (App. Br. 17-18). In support of this argument, the Borrowers quote several of this court's past decisions (one unpublished). *See RoTec*, 359 S.C. at 472, 597 S.E.2d at 884; *Williams v. Riedman*, 339 S.C. 251, 274, 529 S.E.2d 28, 40 (Ct. App. 2000); *Carpenter v. Measter*, No. 2013-UP-066, 2013 WL 8482282, at *2 (S.C. Ct. App. Feb. 6, 2013). The Borrowers misinterpret the cases on which they rely, and all of the cases are distinguishable. In each of those cases, the defendant who breached the implied covenant *also* breached an express term of the contract. For example, in *RoTec*, this court reviewed the dismissal of a counterclaimant's cause of action for breach of the implied covenant of good faith and fair dealing. 359 S.C. at 469, 597 S.E.2d at 882. The counterclaimant in *RoTec* alleged the plaintiff "failed to perform under the contract" and breached the implied covenant. *Id.* at 469, 597 S.E.2d at 882. In *RoTec*—relying primarily on *Stuart Enterprises International, Inc. v. Peykan, Inc.*, 555 S.E.2d 881, 882 (Ga. App. 2001), and *Boddie-Noell Properties, Inc. v. 42 Magnolia Partnership*, 344 S.C. 474, 485, 544 S.E.2d 279, 285 (Ct. App. 2000), *aff'd as modified sub nom. Boddie Noell Properties, Inc. v. 42 Magnolia Partnership*, 352 S.C. 437, 574 S.E.2d 726 (2002)—the court held a breach of the implied covenant of good faith and fair dealing is not an independent cause of action separate from a claim for breach of contract. *RoTec*, 359 S.C. at 473, 597 S.E.2d at 884.

Unlike *RoTec* and the cases cited in *RoTec*, the Borrowers in this case did not allege Peach or Capital Crossing breached the express terms of the mortgage, note, commercial security

agreement, or guaranties. Instead, the Borrowers alleged only a breach of the implied covenant, which cannot stand alone as a cause of action.

The remaining cases on which the Borrowers rely are also distinguishable from the present case. In *Williams*, this court noted a breach of the implied covenant of good faith and fair dealing "has been recognized as a cause of action *in the employment context* in South Carolina." 339 S.C. at 267, 529 S.E.2d at 36 (emphasis added). This case is not an employment case. Moreover, the plaintiff in *Williams* also asserted a breach of the terms of the employment contract. *Id.* at 260, 262, 529 S.E.2d at 32, 33. The court noted the implied covenant "is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purposes." *Id.* at 272, 529 S.E.2d at 38-39 (quoting *Foley v. Interactive Data Corp.*, 765 P.2d 373, 394 (Cal. 1988)). In *Carpenter*, 2013 WL 8482282—an unpublished[2] Georgia-style opinion with little analysis—the plaintiffs asserted an actual breach of contract claim in addition to their breach of the implied covenant claim. *See Carpenter*, Case No. 2008-CP-10-69 (Charleston County) (Complaint filed Jan. 7, 2008) (alleging the sellers of a home breached their contractual obligation to disclose major structural repairs they were making to the home).

Under South Carolina law, therefore, a cause of action for breach of the implied covenant cannot stand on its own. A breach of the implied covenant can only be alleged if a party's conduct in breaching the implied covenant is also a breach of the express terms. If a party's conduct is a breach of only the implied covenant, but is not a breach of the express terms—like the alleged conduct of Peach and Capital Crossing—then it cannot be the basis for a breach of contract claim.

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[2] Further, pursuant to Rule 268(d)(2) of the South Carolina Appellate Court Rules, "[m]emorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved."

Here, the Borrowers allege only that Peach and Capital Crossing did not consent to the Borrowers' plans to sell or lease the property. The note, mortgage, and commercial security agreement expressly provided that Peach and Capital Crossing had a right to consent—or not consent—to a conveyance of the property to a third party. (Note p. 2, R. p. 91; Mortgage p. 2, R. p. 93; Security Agreement p. 2, R. p. 96). A party cannot be liable for a breach of the implied covenant of good faith and fair dealing for doing "what provisions of the contract expressly gave him the right to do." *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995). Because the Borrowers have alleged only a breach of the implied covenant, the master properly dismissed their claim.

C. The Borrowers failed to state a claim for relief on their claims of unfair trade practices, tortious interference with prospective contractual relations, and failure to act in a commercially reasonable manner.

The Borrowers' remaining claims share the same flaw as the breach of contract claim—each is based solely on Capital Crossing's exercise of its contractual right *not* to reduce the amount the Borrowers owed or release the Borrowers from their obligation to pay off the loan. Thus, each claim is based on Capital Crossing's lawful action, and the master properly dismissed all of the claims.

i. South Carolina Unfair Trade Practices Act.

To recover in an action under the South Carolina Unfair Trade Practices Act ("SCUTPA"), the Borrowers must show (1) Peach and Capital Crossing engaged in an unfair or deceptive act in the conduct of trade or commerce, (2) the unfair or deceptive act affected the public interest, and (3) the Borrowers suffered monetary or property loss as a result of the unfair or deceptive act. *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006); *see also* S.C. Code Ann. § 39-5-20. The Borrowers have not alleged facts sufficient to constitute a SCUTPA violation.

First, the Borrowers have not alleged Peach or Capital Crossing engaged in any unfair or deceptive acts. The Borrowers alleged that Capital Crossing requested documents related to the Borrowers' proposed sale or lease of the property—which the Borrowers allege was an indication that Capital Crossing was considering the Borrowers' proposal—but never accepted the proposals. Capital Crossing had a contractual right to request documents and financial information from the Borrowers and had no legal or contractual obligation to consider or accept the Borrowers' proposals. *See* (Note p. 2, R. p. 91; Security Agreement p. 2, R. p. 96). Therefore, Capital Crossing's action in requesting documents but not accepting the proposals cannot be considered unfair or deceptive. In addition, the Borrowers' argument that Peach and Capital Crossing engaged in unfair trade practices by "failing to take any action with respect to the Property for thirty-four months," (App. Br. 20), is without merit. The note and commercial security agreement provide that Peach and Capital Crossing may use any remedy available under state or federal law, and they do not waive a default or any rights by taking no action. (Note p. 2, R. p. 91; Security Agreement p. 2, R. p. 96). Peach filed the foreclosure action within the statute of limitations, which is all that the law requires. Consequently, Peach and Capital Crossing did not engage in unfair or deceptive practices as a matter of law.

Second, even if Capital Crossing's actions are deemed to sufficiently allege unfair or deceptive acts, those acts did not affect the public interest, which also dooms the claim. The Borrowers contend the actions affect the public interest because they have the potential for repetition. *See Daisy Outdoor Advert. Co. v. Abbott*, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996) (providing a plaintiff may prove an adverse effect on the public interest by demonstrating the potential for repetition of the defendant's actions). In their counterclaims and third-party complaint, however, they made no allegations that Capital Crossing's actions in this case are part

of any routine practice or that Capital Crossing has a propensity to repeat these actions. In fact, the Borrowers alleged Capital Crossing engaged in a course of conduct designed specifically to inflict damages upon these Borrowers. *See* (App. Br. 15). The Borrowers, therefore, have alleged a "private wrong where the public interest is unaffected." *Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 479, 351 S.E.2d 347, 350 (Ct. App. 1986).

Finally, even if the Borrowers are deemed to have sufficiently alleged that Capital Crossing misled them into believing it was considering their proposals to sell or lease the property, they have not alleged that they suffered monetary or property loss caused by Capital Crossing's conduct. *See Wright*, 372 S.C. at 23, 640 S.E.2d at 498 (requiring a party asserting an unfair trade practices claim to show monetary or property loss as a result of the unfair or deceptive act). The Borrowers' monetary and property loss was caused by their own failure to make required payments on the loan or pay property taxes they owed to Spartanburg County.[3] Capital Crossing did not cause any loss by the Borrowers; it merely exercised its legal and contractual option not to accept a sale, lease, or transfer of the property or allow the Borrowers to pay less than the full amount of the loan. *See Cisson*, 311 S.C. at 503, 429 S.E.2d at 850. If Capital Crossing was required to engage in some heightened consideration of the proposals—as the Borrowers contend it had a duty to do—but nonetheless rejected the proposals, the Borrowers would be in the same position they are in under the circumstances alleged. Therefore, even if the Borrowers alleged conduct sufficient to satisfy the first two elements of a SCUTPA claim, they have not alleged any loss caused by that conduct.

[3] The mortgage expressly requires Blalock Investments to pay all taxes on the property. (Mortgage p. 2 ¶ 2, R. p. 93).

Accordingly, this court should affirm the master's dismissal of the Borrowers' SCUTPA claim. *See* Rule 220(c), SCACR (providing this court may affirm for any reason appearing in the record); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (explaining "a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court").

ii. Tortious interference with prospective contractual relations

The Borrowers cannot state a cause of action for tortious interference with a prospective contractual relationship because they have not alleged that Peach or Capital Crossing engaged in any act that interfered with a potential contract. To recover under this theory, the Borrowers must show Peach or Capital Crossing (1) intentionally interfered with the Borrowers' potential contractual relations (2) for an improper purpose or by improper methods and (3) caused injury to the Borrowers. *Crandall Corp. v. Navistar Int'l Transp. Corp.*, 302 S.C. 265, 266, 395 S.E.2d 179, 180 (1990).

The Borrowers have alleged only that Peach and Capital Crossing did not consider or consent to the Borrowers' plans to sell or lease the property. The note, mortgage, guaranties, and commercial security agreement provide that the Borrowers may not sell or lease the property without Peach or Capital Crossing's consent. (Note p. 2, R. p. 91; Mortgage p. 2, R. p. 93; Guaranty p. 2, R. p. 112; Security Agreement p. 2, R. p. 96). The terms of the agreements do not require Peach or Capital Crossing to take any action when presented with a plan to sell or lease the property. Thus, the Borrowers have not alleged Peach or Capital Crossing did anything to interfere with the Borrowers' potential contracts other than act within their contractual rights in not accepting the Borrowers' proposals.

Peach and Capital Crossing's exercise of their legal and contractual rights cannot be a basis for a tortious interference claim. *See Brown v. Stewart*, 348 S.C. 33, 55-56, 557 S.E.2d 676, 688 (Ct. App. 2001) (affirming a trial court's decision to direct a verdict on a tortious interference with prospective contractual relations claim "on the basis that a party's exercise of a legal right does not constitute an improper motive or an improper purpose"); *Webb v. Elrod*, 308 S.C. 445, 448, 418 S.E.2d 559, 561 (Ct. App. 1992) ("The exercise in good faith of a legal right by a party to a contract affords no basis for an action by the second party for intentional interference with a contract even though the consequence of the exercise of the legal right by the first party is to cause a third party not to perform another contract with the second party."). Accordingly, the master properly dismissed the Borrowers' tortious interference claim.[4]

II. The master-in-equity did not abuse his discretion in denying the Borrowers' post-dismissal motion to amend their counterclaims and third-party claims

This court reviews the denial of a motion to amend pleadings under an abuse of discretion standard. *See Duncan v. CRS Sirrine Engineers, Inc.*, 337 S.C. 537, 542, 524 S.E.2d 115, 118 (Ct. App. 1999). Trial courts have wide latitude in deciding whether to allow amendment of pleadings, and "[w]hile this power should not be used indiscriminately or to prejudice or surprise another party, the decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal." *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997). A trial court does not abuse its discretion in denying a motion to amend if the amendment would be futile. *See Higgins v. Med. Univ. of S.C.*, 326 S.C. 592, 604, 486 S.E.2d

[4] Although the Borrowers asserted a counterclaim and third-party claim alleging Peach and Capital Crossing failed to act in a commercially reasonable manner, (Answer ¶¶ 71-73, R. p. 130), they did not raise the master's dismissal of that claim in their brief. Therefore, the Borrowers have abandoned the claim. *See Tirado v. Tirado*, 339 S.C. 649, 655, 530 S.E.2d 128, 131 (Ct. App. 2000) (noting an issue that is not argued in an appellant's brief is abandoned).

269, 275 (Ct. App. 1997); *Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010), *rev'd on other grounds,* 401 S.C. 1, 736 S.E.2d 242 (2012).

A. The Borrowers' proposed amendment would be futile.

The Borrowers argue in their brief that the master had no discretion to deny the motion to amend because Peach and Capital Crossing did not demonstrate they would suffer prejudice if the motion to amend was granted. (App. Br. 10-12). This court need not consider whether an amendment would be prejudicial to Peach and Capital Crossing because the amendment would be futile. *See Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 632, 743 S.E.2d 808, 813 (2013) (affirming the denial of a motion to amend a complaint because "there were no significant factual developments that warranted the untimely amendment" and even if the amendment had been permitted, it would not have affected the trial court's ruling); *see also City of Charleston v. Hotels.com, LP*, 520 F. Supp. 2d 757, 775 (D.S.C. 2007) (explaining that in assessing futility, a court applies the same standard that applies to motions to dismiss under Rule 12(b)(6)).

The allegations in the original pleading and the allegations the Borrowers suggest they would include in an amended pleading are substantially the same. The Borrowers alleged in both their original pleading and in their memorandum in opposition to Peach and Capital Crossing's motion to dismiss that Capital Crossing misled the Borrowers into believing it would consider their sale and lease proposals. (Answer, ¶¶ 45-73, R. pp. 124-131; Motion to Amend Judgment pp. 2-3, R. pp. 196-197). Those allegations are also the basis for their proposed fraud and negligent misrepresentation claims. (Motion to Amend Judgment pp. 2-3, R. pp. 196-197). Therefore, the Borrowers' summarized amended counterclaims and third-party complaint would not include different allegations than the original pleading. In fact, the Borrowers admitted in their brief that

the amended pleading would not raise different issues than the original pleading: "The amended allegations contain no new issues." (App. Br. 11). This admission is dispositive.

As detailed herein, the master properly dismissed the Borrowers' original counterclaims and third-party complaint because the Borrowers failed to allege any wrongdoing by Peach or Capital Crossing. The suggested new counterclaims are no different and would change the Borrowers' causes of action in name only. The Borrowers admittedly would not allege any new facts and, therefore, the ruling that the Borrowers failed to allege any wrongdoing by Peach or Capital Crossing would not change.

Moreover, even if the Borrowers' allegations that Capital Crossing misrepresented its intent to consider the Borrowers' proposals are true, the Borrowers still cannot state a viable cause of action because Capital Crossing acted within its contractual rights in not accepting the proposals and did not cause the Borrowers any damages in declining to modify the loan or reduce the Borrowers' obligation. Consequently, the Borrowers cannot show that "justice so requires" an amendment, and the master did not abuse his discretion in ruling that the amendment would be futile. *See Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716 (Ct. App. 2005); *see also Woods v. Boeing Co.*, 841 F. Supp. 2d 925, 930 (D.S.C. 2012) ("If an amendment would fail to withstand a motion to dismiss, it is futile.").

Further, the Borrowers failed to file a proposed amended pleading or properly give notice to the circuit court and opposing parties of the substance of their proposed amendment. When interpreting the South Carolina Rules of Civil Procedure, South Carolina courts look "for guidance to cases interpreting the federal rules." *Maybank v. BB&T Corp.*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016). The language of Rule 15(a) of the Federal Rules of Civil Procedure closely mirrors the language of Rule 15(a) of the South Carolina Rules of Civil Procedure. Although

neither rule expressly requires a party to file a proposed amended pleading, federal courts have held a party seeking leave to amend "must either attach a copy of the proposed amendment to the motion or set forth the substance thereof." *U.S. ex rel. Atkins v. McInteer*, 470 F.3d 1350, 1362 (11th Cir. 2006); *see also Roskam Baking Co. v. Lanham Mach. Co.*, 288 F.3d 895, 906 (6th Cir. 2002) (holding a court must be able to determine whether "justice so requires" an amendment, "and in order to do this, the court must have before it the substance of the proposed amendment"). In addition, a party "should not be allowed to amend [his] complaint without showing how the complaint could be amended to save the meritless claim." *Atkins*, 470 F.3d at 1362 (alteration in original) (citing *Wisdom v. First Midwest Bank*, 167 F.3d 402, 409 (8th Cir. 1999)). Thus, the Borrowers must provide the court with the substance of their amendment for the court to determine whether it should grant the motion, and they must demonstrate that the amended pleading would withstand a motion to dismiss. This notice failure is prejudicial. The Borrowers did not file a proposed amended pleading, and although they suggested in their motion some of the general allegations they might include in an amended pleading, they did not include the substance of their amended claims. *See* (Motion to Amend Judgment pp. 2-3, R. pp. 196-197). Thus, they fail to meet the notice requirements of Rule 15, too.

The Borrowers also suggested in their motion that they would add a fraud claim in an amended pleading, but they failed to demonstrate their ability to meet the heightened pleading standard required for fraud claims. Rule 9(b), SCRCP; *see also Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993) (noting "[a] complaint is fatally defective if it fails to allege all nine elements of fraud" and affirming summary judgment against a plaintiff because it failed to allege two elements: "(1) intent that the representation be acted upon or (2) the hearer's right to

rely"). The Borrowers did not set forth allegations that would satisfy each of the elements of fraud, and they did not suggest to the circuit court that they were capable of doing so.

Therefore, in all respects, the Borrowers failed to meet their burden of proving that the amended pleading would state a claim upon which relief may be granted. *See Health Promotion*, 403 S.C. at 632, 743 S.E.2d at 813 (finding a proposed amendment futile because it would not allow the party seeking amendment to avoid summary judgment).

B. The Borrowers did not move to amend their pleading in a timely manner.

The Borrowers' motion to amend their counterclaims and third-party complaint was untimely for two reasons. First, the Borrowers raised their request to amend for the first time in a post-judgment "Motion to Amend Judgment" under Rule 59(e), SCRCP. "A party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014).

Second, even if the court accepts the Borrowers' argument that they filed a concurrent Rule 15 motion, (App. Br. 6-9), the court should find the Borrowers' request to amend was untimely. The South Carolina Rules of Civil Procedure allow a party to amend a pleading as a matter of course within thirty days of the filing of a response to the pleading. Rule 15(a), SCRCP. If a party does not amend the pleading within that thirty-day window, it cannot amend without leave of court or written consent of the adverse party. *Id.* The Borrowers failed to amend their counterclaims and third-party complaint within the timeframe provided by Rule 15(a). Instead, they moved to amend six months after they filed the pleading and only after the master dismissed their claims. (Motion to Amend Judgment, R. p. 195; Answer p. 12, R. p. 131). Therefore, this court should affirm the master's finding that the request to amend was untimely.

The Borrowers' reliance on Rule 15(b), SCRCP, to support their argument that the master should have allowed a post-judgment amendment is misplaced. *See* (App. Br. 8-9). Rule 15(b) applies to post-judgment amendments only after the parties have tried issues by express or implied consent. Rule 15(b), SCRCP. The parties did not try the case and no consent has been given on any issues. Rather, Peach and Capital Crossing objected to the issues raised by the Borrowers—both in their original counterclaims and third-party complaint and in their suggested amendment—by filing a motion to dismiss and contesting the Borrowers' Rule 59 motion. Rule 15(b), therefore, has no application to this case.

C. This court should not find the dismissal to be without prejudice.

Finally, this court should not alter the master's ruling to construe the dismissal to be without prejudice and thus allow amendment. *See* (App. Br. 5-6). The Borrowers cannot present additional factual allegations or an alternative theory of recovery that would state a claim upon which relief may be granted. Therefore, the master properly denied their motion to amend the pleading and dismissed the claims with prejudice. *See Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 153, 723 S.E.2d 835, 840 (Ct. App. 2012) (allowing an appellate court affirming a dismissal to modify the order to find the dismissal is without prejudice if the plaintiff shows "additional factual allegations or an alternative theory of recovery, which taken as true in a well-pleaded complaint may state a claim upon which relief may be granted").

Conclusion

For the foregoing reasons, this court should affirm the master's dismissal of each of the Borrowers' counterclaims and third-party claims and the master's denial of the Borrowers' request to amend their pleading.

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March 13, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Gordon G. Cooper, Master-in-Equity

Appellate Case No. 2016-001764

Peach REO, LLC, a Delaware limited liability company,..... Respondent,

v.

Blalock Investments, LLC; Todd Smith; Debra Masuga; Subway Real Estate, LLC; and County of Spartanburg, a political subdivision of the State of South Carolina, ... Defendants,

Of Whom Blalock Investments, LLC; Todd Smith; and Debra Masuga are the ..... Appellants

And

Blalock Investments, LLC, Todd Smith; and Debra Masuga, Third Party Plaintiffs v. Capital Crossing Servicing Company, LLC..... Respondent.

CERTIFICATE OF COUNSEL

I the undersigned hereby certify that this Final Brief complies with Rule 211(b), SCACR.

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