THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early III, Circuit Court Judge

C.A. No. 2015-CP-02-02849

Wells Fargo Bank, N.A. ..... Respondent,

v.

Michael G. Morgan; Margaret H. Fitch, M.D.; Eric J. Olig; South Carolina Department of Revenue; Linda Lawrence Bowen; Defendants,

Of whom Michael G. Morgan is the ..... Appellant.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court correctly dismiss Michael Morgan's counterclaim in this foreclosure action based on the statute of limitations?

2. Did the Circuit Court have jurisdiction to correct an erroneously filed order within four days of the date it was entered by the clerk of court?

STATEMENT OF THE CASE AND FACTS

As alleged in the complaint filed on December 2, 2015, this dispute arises out of Michael Morgan's failure to repay a $1.3 million mortgage loan he obtained from Wachovia Mortgage, FSB in 2008.[1] (R. at 28, ¶ 18; 66, ¶ 18). The loan is secured by a mortgage on Morgan's residence in Aiken. (R. at 25-26, ¶ 5; 65, ¶ 5-6). Morgan has not made any payments on the loan since May 2011. (R. at 28-29, ¶ 23).[2]

Morgan filed an answer and counterclaims on February 4, 2016. (R. at 32-63). At that time, the counterclaims included numerous allegations relating to the "Pick-a-Payment" option contained within the note. Wells Fargo responded with a motion to dismiss the counterclaims, arguing that the issues raised in the counterclaims were all barred by a class action settlement agreement relating to the "Pick-a-Payment" loans. (R. at 70-78). Rather than risking dismissal of the counterclaims, Morgan filed an amended answer and counterclaim on May 10, 2018, omitting any reference to the "Pick-a-Payment" matters and adding new allegations that unidentified loan documents were falsified or forged. (R. at 64-69). The counterclaim was for an alleged violation of the South Carolina Attorney Preference Statute, S.C. Code Ann. § 37-10-102, that occurred at his loan's closing in 2008. (R. at 68, ¶ 39). As Morgan alleged: (1) an unidentified individual "falsified and forged [his] signature" on unspecified "documents relating to the application for and origination" of his loan, (2) an unidentified individual engaged in unspecified acts of "concealment," and (3) he was "depriv[ed] of his right to choose his own, unconflicted counsel to

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[1] Wells Fargo Bank, N.A. ("Wells Fargo") is the successor in interest to Wachovia Mortgage, FSB.

[2] Morgan has gone to great lengths to remain in the residence despite the admitted default. In the period between the default and the filing of this action, the parties discussed a possible loan modification; however, Morgan did not qualify. After that effort failed, Morgan filed a pro se lawsuit in federal court relating to the "Pick-a-Payment" class action settlement: *Michael G. Morgan v. Wells Fargo & Co., et al.*, No. 1:150cv-04032-JFA (D.S.C.). That action was voluntarily dismissed on May 16, 2017. (R. at 115:16-116:8).

represent him at the closing of the mortgage loan" and "no attorney licensed to practice law in South Carolina supervised the closing of the mortgage loan." (*Id.*, ¶¶ 40-41, 43, 45). Morgan sought unspecified damages and attorneys' fees, along with a declaration that his mortgage loan is "void or unenforceable." (R. at 69).

Wells Fargo moved to dismiss the counterclaim on the grounds that it was barred by the three-year statute of limitations contained in S.C. Code Ann. § 37-10-105(A), which runs from the date of the violation. (R. at 79-81). The Circuit Court granted the motion to dismiss the counterclaim on August 24, 2018. (R. at 1-10).

Morgan moved to reconsider. (R. at 82-88). At the hearing on the motion to reconsider, the Circuit Court asked both parties to submit a proposed order, and the parties did so on October 26, 2018. (R. at 119:14-15).

On Monday, October 29, 2018, the Aiken County Clerk of Court erroneously entered an order granting the motion to reconsider and referring the case to the Master in Equity ("October 29 Order"). (R. at 11-16). On Friday, November 2, 2018, the Aiken County Clerk of Court entered an order signed on Tuesday, October 30, 2018 denying the motion to reconsider ("November 2 Order"). (R. at 17). These events all occurred within a five-day period within the same term of court. The Circuit Court's law clerk clarified by email dated November 5, 2018 that the November 2 Order was the correct order. (R. at 145). Morgan filed a notice of appeal from the August 24 and November 2 Orders on November 20, 2018.[3]

[3] Subsequent to the filing of the Notice of Appeal, Morgan filed a "Motion to Determine Validity of Order Subject of Appeal" in which he challenged the substituted order of November 2, 2018. The Court denied the motion, but noted that the parties could raise the issue in their briefs.

STANDARD OF REVIEW

A court may dismiss a counterclaim if it fails to allege facts sufficient to constitute a cause of action. *See* Rule 12(b)(6), SCRCP. "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." *Logan v. Cherokee Landscaping and Grading Co.*, 389 S.C. 611, 617, 698 S.E.2d 879, 882 (Ct. App. 2010) (quotations and citation omitted). The Court may sustain the dismissal when "the facts alleged in the complaint do not support relief under any theory of law." *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App. 2003). On appeal, this Court applies the same standard of review as the Circuit Court. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007).

The statute of limitations is an affirmative defense. Generally, an affirmative defense may not be asserted in a motion to dismiss unless the allegations of the complaint demonstrate the existence of the affirmative defense. *See Spence v. Spence*, 368 S.C. 106, 123, 628 S.E.2d 869, 878 (2006). However, "[m]ost courts allow such defenses to be raised in a motion to dismiss under Rule 12(b) when there is no disputed issue of fact raised by an affirmative defense, or the facts are completely disclosed on the face of the pleadings, and realistically nothing further can be developed by pretrial discovery or a trial on the issue raised by the defense." *Id.* at 124, 628 S.E.2d at 878 (quotations and citations omitted).

ARGUMENT

I. The Circuit Court correctly found that Morgan's counterclaim was barred by the applicable statute of limitations.

The Attorney Preference Statute, S.C. Code Ann. § 37-10-102, provides:

> Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose:

> (a) The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction . . . .
>
> The creditor may comply with this section by:
>
> (1) including the preference information on or with the credit application . . . or
>
> (2) providing written notice to the borrower of the preference information with the notice being delivered or mailed no later than three business days after the application is received or prepared. . . . .

Claims under the Attorney Preference Statute are subject to a three-year statute of limitations that begins to run on the date the violation occurred. S.C. Code Ann. § 37-10-105(A) ("No debtor may bring an action for a violation of this chapter more than three years after the violation occurred, except as set forth in subsection (C)."). Because Morgan alleged a violation that occurred no later than his loan's closing in April 2008, any attorney preference claim was time-barred as of April 2011.

In an apparent attempt to avoid the statute of limitations bar, Morgan alleged that his loan "was induced by unconscionable conduct" in violation of S.C. Code Ann. § 37-10-105(C). (R. at 68-69, ¶¶ 45-46). Section 37-10-105(C) provides in pertinent part:

> (C) ***If the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct***, the court may, in an action other than a class action:
>
> (1) refuse to enforce the agreement, or a term, or part of the agreement or transaction that the court determines to have been unconscionable at the time it was made;
> (2) enforce the remainder of the agreement without the unconscionable term or part, or limit the application of the unconscionable term or part to avoid an unconscionable result;
> (3) rewrite or modify the agreement to eliminate an unconscionable term, part, or result and enforce the new agreement; or
> (4) award:

> (a) not more than the total amount of the loan finance charge and allow repayment of the unpaid balance of the loan without any finance charge;
> (b) not more than double the amount of the excess loan finance charge or other charges or fees actually received by the creditor or paid by the debtor to a third party; and
> (c) attorney's fees and costs.
>
> ***An action pursuant to this subsection may not be brought after the original scheduled maturity date of the debt.***

(emphasis added). No South Carolina appellate court has issued a reported opinion on the application of subsection (C) or on the pleading standards required to state a claim thereunder. For that reason, both parties cited unpublished and trial court opinions in their arguments to the Circuit Court, and the Circuit Court considered them as persuasive authority. Wells Fargo concedes these citations are not binding on this Court.

As stated in the statute, Morgan must properly allege a violation of S.C. Code Ann. § 37-5-108 to proceed under § 37-10-105(C), which requires either (1) substantive unconscionability—that the loan transaction itself is unconscionable at the time it was made, or (2) procedural unconscionability—that it was induced by unconscionable conduct.[4] The Fourth Circuit has provided a helpful discussion of these two related concepts, as follows:

> We note in passing that several commentators have drawn distinctions similar to that between what we have called "objective reasonableness" and "conscionability." Most would treat the concepts as variations on the same theme,

[4] S.C. Code Ann. § 37-5-108(1) reads:

> With respect to a transaction that is, gives rise to, or leads the debtor to believe will give rise to, a consumer credit transaction, if the court as a matter of law finds:
> (a) the agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, the court may refuse to enforce the agreement; or
> (b) any term or part of the agreement or transaction to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable term or part, or so limit the application of any unconscionable term or part as to avoid any unconscionable result and award the consumer any actual damages he has sustained.

> however, and denominate them "subspecies" of "general unconscionability." White and Summers, for example, distinguish between "procedural" and "substantive" unconscionability.
>
> Substantive unconscionability involves those one-sided terms of a contract from which a party seeks relief (for instance, "I have the right to cut off one of your child's fingers for each day you are in default"), while procedural unconscionability deals with the process of making a contract—"bargaining naughtiness" (for instance, "Just sign here; the small print on the back is only our standard form"). Each of these branches of unconscionability has common-law cousins; procedural unconscionability looks much like fraud or duress in contract formation, and substantive unconscionability reminds us of contracts or clauses contrary to public policy or illegal.
>
> J. White & R. Summers, *Uniform Commercial Code* § 4–3, at 186 (3d ed.1988) (footnote omitted).

Carlson v. Gen. Motors Corp., 883 F.2d 287, 296 n.12 (4th Cir. 1989).

With respect to substantive unconscionability, courts consider whether there are "terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996). Here, Morgan did not make any allegations with respect to the loan's terms, much less that any particular terms were so oppressive that no reasonable person would have accepted the agreement. Thus, he did not state a claim that the loan agreement itself was substantively unconscionable at the time it was made.

Instead, Morgan alleged problems with the loan process, or rather, that the loan was "induced by unconscionable conduct." For conduct to qualify as unconscionable inducement, it must be an "affirmative misrepresentation[] or active deceit." *McFarland v. Wells Fargo Bank, N.A.*, 810 F.3d 273, 286 (4th Cir. 2016).

As an initial matter, Morgan's procedural unconscionability claim failed because he did not allege that any of the conduct at issue induced him to enter the loan. He did not make any allegations that he chose to apply for or accept his loan based on anything Wells Fargo or its

predecessors did or did not do. *See, e.g., Boone v. Quicken Loans, Inc.*, No. 5:15-cv-04772-JMC, 2016 WL 3552025, at *5 (D.S.C. June 30, 2016) ("The facts as alleged indicate that Plaintiff applied for the loan with Defendant. There is no allegation that Plaintiff chose to apply for the loan based on statements made, or conduct, by Defendant regarding Plaintiff's ability to choose an attorney for closing. Therefore, Plaintiff has not stated a claim for unconscionable inducement.").

In addition, Morgan's conclusory allegations of forgery by an unidentified individual on unspecified loan documents, and of unidentified acts of "concealment," were insufficiently pled as a matter of law. *See Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986) (a mere conclusory allegation, unsupported by any particularized allegations of fact, is insufficient); *see also Hartsel v. Selective Ins. Co. of S.C.*, No. 2011-UP-226, 2011 WL 11734337, at *3 (Ct. App. May 18, 2011) (rejecting conclusory allegations in support of breach of fiduciary duty claim). Given that procedural unconscionability is akin to fraud or duress occurring in connection with contract formation, these allegations should be subject to the pleading requirements of Rule 9(b), SCRCP, which provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." *See Chewning v. Ford Motor Co.*, 346 S.C. 28, 36, 550 S.E.2d 584, 588 (Ct. App. 2001).

In order to allege fraud, the following elements must be alleged with particularity: "(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." *King v. Oxford*, 282 S.C. 307, 311, 318 S.E.2d 125, 127 (Ct. App. 1984). "A complaint is fatally defective if it fails to allege all nine

elements of fraud. Where the complaint omits allegations on any element of fraud, the trial court should grant the defendant's motion to dismiss the claim." *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993) (citation omitted). Here, among other things, Morgan's amended answer and counterclaim did not identify (1) the person who allegedly forged documents or "concealed" information from him; or (2) the particular documents he claims were forged.[5] Moreover, because Morgan did not make any allegations that he chose to apply for or accept his loan based on anything Wells Fargo did or did not do, he did not allege reliance. Thus, his allegations of forgery and concealment were insufficient to bring his claim within S.C. Code Ann. § 37-10-105(C).

In addition, Morgan argues that his claim comes within the exception set forth in S.C. Code Ann. § 37-10-105(C) because his loan was closed without an attorney and because he was "depriv[ed] of [his] right to choose his own, unconflicted counsel to represent him in the closing of the mortgage loan at issue." (R. at 68, ¶ 45). Essentially, Morgan argues that the alleged violation of the Attorney Preference Statute, standing alone, rendered his loan unconscionable and unenforceable. He is wrong.

First, the South Carolina Supreme Court has been clear that the alleged unauthorized practice of law does not give rise to a private right of action. *See, e.g., Franklin v. Chavis*, 371 S.C. 527, 535, 640 S.E.2d 873, 877 (2007). Accordingly, any claims based on such an allegation necessarily fail as a matter of law. *See id.* (affirming dismissal of breach of fiduciary duty claim based upon the alleged unauthorized practice of law); *see also Hambrick v. GMAC Mortg. Corp.*,

[5] In a tacit admission that his allegations were insufficient, Morgan attempts to amend them through the "Statement of Facts" in his brief, which does not cite a single allegation from his amended answer and counterclaim but instead makes entirely new allegations he never made below. The Court should reject Morgan's improper attempt to amend his allegations through his brief on appeal.

370 S.C. 118, 123-25, 634 S.E.2d 5, 8-9 (Ct. App. 2006) (affirming dismissal of complaint when charges of unauthorized practice of law were the basis for alleged causes of action because only the South Carolina Supreme Court can determine what constitutes the unauthorized practice of law).

Second, the South Carolina Supreme Court has held that the alleged unauthorized practice of law does not render a mortgage unenforceable unless that mortgage was recorded after August 8, 2011. *See BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 624, 731 S.E.2d 547, 550 (2012); *Matrix Fin. Servs. Corp. v. Frazier*, 394 S.C. 134, 140, 714 S.E.2d 532, 535 (2011). Here, it is undisputed that the mortgage at issue was recorded in 2008. (R. at 28, ¶ 18; 66, ¶ 18). Thus, as a matter of law, the alleged unauthorized practice of law cannot support Morgan's counterclaim, which sought to prohibit Wells Fargo from enforcing the mortgage. *See Deutsche Bank Nat'l Trust Co. v. Booms*, No. 2015-UP-097, 2015 WL 793201, at *1 (Ct. App. Feb. 25, 2015) (affirming circuit court's rejection of unclean hands defense based upon alleged unauthorized practice of law because the subject mortgage was recorded before August 8, 2011).

Third, an alleged violation of the Attorney Preference Statute cannot support an unconscionability claim. This conclusion is compelled by the plain language of S.C. Code Ann. §§ 37-10-105(A) and (C), which demonstrates that each subsection provides distinct remedies. S.C. Code Ann. § 37-10-105(A) provides a remedy for actual damages and penalties "[if] a creditor violates a provision ***of this chapter***." (Emphasis added). The Attorney Preference Statute is part of "this chapter," namely, Chapter 10, Title 37. In contrast, S.C. Code Ann. § 37-10-105(C) is not available "[if] a creditor violates a provision of this chapter." Instead, it provides: "If the court finds as a matter of law that the agreement or transaction is unconscionable . . . the court may . . . refuse to enforce the agreement." S.C. Code Ann. § 37-10-105(C). It is axiomatic that an attorney

preference form is not an agreement. Nor is it a transaction. Thus, the exclusive remedy for a violation of the Attorney Preference Statute is contained in S.C. Code Ann. § 37-10-105(A).

This conclusion is also borne out by the case law. Indeed, Morgan presented the Circuit Court with only one decision, from the Court of Common Pleas for Lexington County, permitting such a claim to proceed under S.C. Code Ann. § 37-10-105(C). *Nationstar Mortg. LLC v. Fowler*, No. 2013-CP-32-1482, Order Denying Motion to Dismiss Cross-Claim and Third-Party Complaint (Lexington Cty. Dec. 12, 2013). On the other hand, Wells Fargo cited numerous decisions from the U.S. District Court for the District of South Carolina rejecting procedural unconscionability claims based upon alleged violations of the Attorney Preference Statute. *See, e.g., Mosley v. Quicken Loans, Inc.*, No. 1:16-cv-00384-JMC, 2016 WL 3551999, at *3-4 (D.S.C. June 30, 2016) (rejecting the argument that a loan was induced by unconscionable conduct simply because the lender allegedly violated the Attorney Preference Statute); *Boone v. Quicken Loans, Inc.*, No. 5:15-cv-04772-JMC, 2016 WL 3552025, at *5 (D.S.C. June 30, 2016) (same, and applying the three-year statute of limitations to the claim). Wells Fargo also pointed to *Booms*. There, although this Court did not directly address the issue, it held that the circuit court did not err in holding that the subject note and mortgage were not unconscionable, even though the lender violated the Attorney Preference Statute. *Booms*, 2015 WL 793201, at *2. Again, Wells Fargo concedes these authorities are not binding, but they are persuasive and should be applied in this case.

Finally, and as a practical matter, Morgan's argument with respect to the alleged attorney preference violation would eviscerate the three-year statute of limitations generally applicable to attorney preference violations. If Morgan is correct, then every loan with an attorney preference violation is necessarily unconscionable and thereby subject to the longer limitations period in S.C. Code Ann. § 37-10-105(C). This cannot be the result intended by the General Assembly, and

South Carolina courts "will not construe a statute in a way which leads to an absurd result or renders it meaningless." *Florence Cnty. Democratic Party v. Florence Cnty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012). Thus, the Circuit Court's ruling on this point should be affirmed.

II. The Circuit Court denied the Motion to Reconsider in a valid order dated November 2, 2018.

At the end of the hearing on the motion to reconsider, the Circuit Court indicated to both parties that they could submit a proposed order within ten days. (R. at 119: 14-15). As discussed above, the clerk's office entered the wrong order on October 29, 2018. The Circuit Court realized the wrong order had been entered and corrected the error on its own initiative within five days and prior to the expiration of the term of court. As of the law clerk's email of November 5, 2018, it should have been clear to all parties that the Circuit Court's intended ruling was that in the November 2 Order.

In his Brief, Morgan discusses at length the powers of a master in equity following an order of reference. These general statements are not applicable to the procedural issue Morgan presents in his brief.

First, Morgan fails to acknowledge that traditionally, South Carolina judges retain jurisdiction to modify decisions within a term of court. *See Doran v. Doran*, 288 S.C. 477, 478, 343 S.E.2d 618, 619 (1986) ("A trial judge loses jurisdiction to modify an order after the term at which it is issued, except for the correction of clerical orders. Once the term ends, the order is no longer subject to any amendment or modification which involves the exercise of judgment or discretion on the merits of the action." (citations and footnote omitted)). Here, there is no question that the Circuit Court entered the November 2 Order during the same term of court.

Moreover, the Circuit Court entered the November 2 Order just four days after it issued the October 29 Order. As the South Carolina Supreme Court has held, "[u]nder Rule 59(e), SCRCP, the trial judge has only ten days from entry of judgment to alter or amend an earlier order on his own initiative . . . ." *Leviner v. Sonoco Prods., Inc.*, 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000); *see also Heins v. Heins*, 344 S.C. 146, 157, 543 S.E.2d 224, 229 (Ct. App. 2001) ("We rule a Family Court judge does not have the authority to alter or amend a judgment, *sua sponte*, once the judgment is more than 10-days-old."). The South Carolina Supreme Court recently reiterated this rule. *See Overland, Inc. v. Nance*, 423 S.C. 253, 256, 815 S.E.2d 431, 433 (2018) ("A trial court does not have the power to alter or amend a final order if more than ten days passes and no Rule 59(e) motion has been served[.]") (citing *Leviner*, 339 S.C. at 494, 530 S.E.2d at 128); *see also Suntrust Mortg. v. Gobbi*, No. 2006-UP-243, 2006 WL 7286028, at *2 (Ct. App. May 16, 2006) (in a case where no intervening Rule 59(e), SCRCP motion had been filed, the trial judge had jurisdiction to *sua sponte* change an order regarding *in forma pauperis* status because he *sua sponte* reversed his order granting that status within three days after its issuance). Accordingly, a circuit judge retains jurisdiction to *sua sponte* alter or amend a prior judgment during the ten-day period following the entry of that judgment, regardless of whether a Rule 59(e),SCRCP motion has been filed.

Here, there is no question that the November 2 Order—which reflected the will of the Circuit Court—was entered just four days after the October 29 Order. Given this short period within the same term of court, the Circuit Court retained jurisdiction, and the November 2 Order is valid.

III. Morgan's arguments relating to whether his counterclaim could be properly asserted as defenses are not preserved and fail on their merits.

Morgan did not argue below that what he labeled a "counterclaim" was actually a "defense by recoupment or set-off" that was not time-barred under S.C. Code Ann. § 37-10-105(A) until his motion for reconsideration. (R. at 83-84, ¶¶ 2-4). As such, this argument is not preserved for this Court's review. *See Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider."); *Brailsford v. Brailsford*, 380 S.C. 443, 448, 669 S.E.2d 342, 344 (Ct. App. 2008) ("a party cannot use a motion to alter or amend a judgment to present an issue that could have been raised prior to judgment but was not"); *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (stating issues must be properly raised to and ruled upon by the trial court to be preserved for appellate review).

In any event, the Court should reject Morgan's attempt to rewrite his pleading in order to avoid a plain limitations bar. Morgan's amended answer and counterclaim included the following:

FOR A FIRST COUNTERCLAIM
(Violation of Attorney Preference Statute with Unconscionability)

In that counterclaim, Morgan sought the following affirmative relief: "damages, attorney's fees, and penalties as provided in the South Carolina Consumer Protection Code" and "all relief available under S.C. Code Ann. § 37-10-105"—including a declaration that his mortgage loan is "void or unenforceable." (R. at 69, ¶ 46).

As the South Carolina Supreme Court has explained, "recoupment" and "set-off" are distinct from counterclaims. "Recoupment" and "set-off" are equitable defenses that can only result in the reduction of the plaintiff's claims—not an affirmative judgment for money or other relief for the defendant. *See Brasington Tile Co., Inc. v. Worley*, 327 S.C. 280, 284, 491 S.E.2d 244, 246 (1997), *superseded by statute on other grounds, JRS Builders, Inc. v. Neunsinger*, 364

S.C. 596, 614 S.E.2d 629 (2005) (recognizing that a set-off and a counterclaim are distinct and have different mutuality requirements); *W.M. Kirkland, Inc. v. Providence Washington Ins. Co.*, 264 S.C. 573, 580, 216 S.E.2d 518, 521 (1975) ("It is essential to remember, however, that a counterclaim is distinguishable from a set-off, a counterclaim being statutory while set-off belongs to the inherent power of a court in the exercise of its equitable jurisdiction."); *Mullins Hosp. v. Squires*, 233 S.C. 186, 197, 104 S.E.2d 161, 166 (1958), *overruled on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) ("Recoupment, unlike counterclaim, may result only in the reduction of the plaintiff's claim, and not in affirmative money judgment"). Here, Morgan's belated attempt to recast what he labeled a "First Counterclaim" as "as a matter of defense by way of recoupment or set-off" was belied by his own pleading, which sought significant monetary relief from Wells Fargo and an order declaring his $1.3 million mortgage loan unenforceable.[6]

IV. Morgan had previously amended his answer and counterclaim and did not ask for leave to do so a second time.

Again, this issue was not raised until Morgan filed his motion to reconsider. As such, it should be subject to the normal rules of error preservation cited above. In addition, Morgan had already amended his answer and counterclaim once to avoid dismissal. Nothing in the rules or precedent gives a party unlimited opportunities to replead a matter until he or she can survive a motion to dismiss.

In addition, "[w]hen the complaint shows affirmatively that plaintiff is not entitled to relief in any view of the case," dismissal with prejudice is proper. *Portman v. Garbade*, 337 S.C. 186,

[6] Wells Fargo disputes that a foreclosure, which seeks to enforce a security interest, qualifies as "debt collection" under S.C. Code Ann. § 37-10-105(A). If a foreclosure is not "debt collection," then Morgan cannot take advantage of § 37-10-105(A) in any event. In the event this Court is inclined to agree, this argument presents an additional sustaining ground and is an independent basis to affirm pursuant to Rule 220, SCACR.

190-91, 522 S.E.2d 830, 833 (1999). Here, for the reasons above, the counterclaim in question is time barred under any view of the case and therefore the dismissal with prejudice was proper.

CONCLUSION

For all of these reasons, Wells Fargo asks that this Court affirm the Circuit Court and remand this matter for a determination on the merits of the underlying foreclosure action.

Respectfully submitted,

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Dated: January 8, 2020

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APPEAL FROM AIKEN COUNTY
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Doyet A. Early III, Circuit Court Judge

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Of whom Michael G. Morgan is the ..... Appellant.

CERTIFICATE OF COMPLIANCE

I certify that the Final Brief of Respondent Wells Fargo Bank, N.A., in this matter complies with Rule 211(b), SCACR.

(Signature Page Follows)

Respectfully submitted,

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