IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2019-001440

Karen K. Baber, ... Appellant,

vs.

Summit Funding, Inc.; Appraisal Innovations, LLC; Brian L. Blue; The Gillen Law Firm, P.A.; Michael F. Gillen; Allen Tate Co., Inc.; Colleen Coesens; Jonathan Garvey; Robert Ouzts; Connie Delaney and Gloria Long-Robinson, ... Defendants,

Of which Summit Funding, Inc.; Allen Tate Co., Inc.; Colleen Coesens; Jonathan Garvey, Robert Ouzts; Connie Delaney; and Gloria Long-Robinson are the Respondents.

INITIAL BRIEF OF SUMMIT FUNDING, INC.

Susan E. Driscoll, S.C. Bar No. 71447
DRISCOLL SHEEDY, P.A.
11520 N. Community House Rd., Ste. 200
Charlotte, N.C. 28277
(704) 341-2101 – Telephone
(704) 341-2015 – Facsimile
sdriscoll@driscollsheedy.com

Attorney for Summit Funding, Inc.

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I.

STATEMENT OF THE CASE

Appellant filed her Verified Complaint on May 29, 2018. The causes of action set forth against Summit Funding, Inc. (Summit) were the fifth cause of action for mutual mistake, the sixth cause of action for unilateral mistake, the seventh cause of action for promissory estoppel, and the tenth cause of action for breach of contract and declaratory relief. On June 28, 2018, Summit filed a Motion to Dismiss under Rule 12(b)(6). On January 31, 2019, the Honorable Tessa Weaver entered an Order Granting in Part and Denying in Part Defendant Summit Funding's Motion to Dismiss. In that Order, the Court dismissed the fifth, sixth and seventh causes of action against Summit, leaving only Appellant's tenth cause of action for breach of contract and declaratory relief.[1] That Order was not appealed.

Summit filed its answer to the remaining cause of action on February 14, 2019. On March 15, 2019, Summit filed its Motion for Summary Judgment, which was supported by the Affidavits of Chris Anderson and Jana Catching, as well as the transcript of the deposition of Appellant. Notice of the hearing on Summit's summary judgment motion was filed and served on March 18, 2019 and after Appellant requesting the hearing be continued, an Amended Notice of Hearing was filed and served on March 29, 2019. On March 29, 219, Appellant filed an affidavit in opposition to Summit's summary judgment motion.[2] On April

[1] It is important to note that the only cause of action against Summit that remained at issue at the time of summary judgment was for breach of contract. Section III of Appellant's initial brief makes reference to a claim of negligence; however, no such negligence cause of action was pled against Summit, so that section of Appellant's brief is inapplicable to Summit.

[2] Although Appellant mentions a single memorandum in opposition to summary judgment in paragraph 6 of her Designation of Matter, there was no such document filed. The only responsive document to the motion for summary judgment was Appellant's affidavit.

3, 2019, Summit filed a Memorandum in Support of Summit's Motion for Summary Judgment. A hearing on the motion for summary judgment was held on April 3, 2019. An Order Granting Summary Judgment in Favor of Summit Funding was filed on May 29, 2019.

Appellant filed a Motion to Reconsider, Alter and Amend Judgment on June 6, 2019. Summit filed a response to the motion to reconsider on July 10, 2019. Appellant filed a Memorandum in Support of Motion to Reconsider, Alter and Amend Judgment on July 10, 2019. Appellant's motion to reconsider was denied by entry of a Form 4 Order on July 29, 2019.

Appellant filed a Notice of Appeal on August 28, 2019[3]; however, Appellant did not include a copy of either the order granting summary judgment in favor of Summit, or the order denying the Rule 59(e) motion filed by Appellant. The Notice of Appeal itself did not identify either order awarded in favor of Summit, but merely stated "Karen K. Baber appeals the orders of the Honorable Daniel D. Hall dated May 29, 2019 and July 29, 2019." The only order attached to the Notice of Appeal was that which awarded summary judgment in favor of Allen Tate Co., Inc., Colleen Coesens, Jonathan Garvey, Robert Ouzts and Connie Delaney (collectively, the "Allen Tate Defendants").

On September 30, 2019, the Allen Tate Defendants filed a motion to dismiss the appeal. On October 3, 2019, Summit filed a Response to Motion to Dismiss Appeal in support of the motion. On October 3, 2019, Appellant filed a response in opposition to the motion to dismiss the appeal. On October 11, 2019, the Allen Tate Defendants filed a reply

[3] Appellant's notice of appeal was not filed with the trial court until September 30, 2019, which is not in compliance with Rule 203(d)(1)(A), SCACR. When the Notice of Appeal was filed with the trial court, it attached a copy of the January 31, 2019 order partially granting Summit's Rule 12(b)(6) motion to dismiss. It did not attach a copy of the May 29, 2019 order granting summary judgment in favor of Summit.

in support of the motion to dismiss the appeal. On December 20, 2019, the motion to dismiss was denied.

II.

ARGUMENT

A. Any appeal of the grant of summary judgment in favor of Summit is barred by Appellant's failure to comply with applicable appellate rules.

Rule 203(b)(1), SCACR, requires that a notice of appeal be served on all respondents within thirty days after entry of the order or judgment being appealed. This requirement is "a jurisdictional requirement, and [the] Court has no authority to extend or expand the time in which the Notice of Appeal must be served." *Sadisco of Greenville, Inc. v. Greenville County Bd. of Zoning Appeals*, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000). In *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002), the South Carolina Supreme Court made it clear that the failure to serve a party with a notice of appeal naming the party as a respondent within the thirty day time period required by Rule 203(b)(1) is a fatal error that would defeat the appeal. The appellant in *Conner* filed a notice of appeal that named only one of the three defendants in the case. Despite being informed by the office of the clerk that the caption was incorrect, the appellant failed to take action until almost five months later when she submitted a "corrected" notice of appeal then naming all three defendants as respondents. In *Conner*, the Court distinguished between a "clerical error" that misidentified a party and the total failure to name a party in the notice. The Court was "compel[led] under those facts to find [the appellees] were misled into believing they were not part of this appeal by the almost five-month delay in amending the Notice, and therefore, they clearly were prejudiced by the amendment." *Id.* at 462, 560 S.E.2d at 610.

In the instant case, Appellant made a general reference to "orders of the Honorable Daniel D. Hall dated May 29, 2019 and July 29, 2019." (Notice of Appeal, p.1.) The Order Granting Summary Judgment in Favor of Summit Funding was not referenced by name in the Notice. The only attachments to the Notice of Appeal were a copy of the July 29, 2019 order denying Appellant's Rule 59(e) motion (with no notation as to whether it was for Summit's summary judgment motion) and a copy of the Order Granting Motion for Summary Judgment in favor of the Allen Tate Defendants. The Notice was bereft of any mention of the Order Granting Summary Judgment in Favor of Summit Funding.

As noted in Summit's Response to Motion to Dismiss Appeal, counsel for Summit reached out to counsel for Appellant on the date she received the Notice of Appeal. By e-mail, she inquired whether the summary judgment awarded in favor of Summit was being appealed. (Response to Motion to Dismiss, Ex. A.). Counsel for Appellant did not respond to that inquiry. On September 5, 2019, counsel for Summit sent a follow up e-mail, again seeking to determine whether Summit was being named in the appeal. (Response to Motion to Dismiss, Ex. B.). Again, that e-mail went unanswered. Counsel for Summit sent a formal request by mail, setting a September 11, 2019 deadline within which counsel for Appellant had to respond. (Motion to Dismiss, Ex. C.). Again, there was no response.

On September 30, 2019, counsel for Appellant e-filed a copy of the Notice of Appeal with the York County Clerk of Court. That Notice of Appeal did not contain a copy of the Order Granting Summary Judgment in Favor of Summit Funding, but instead had attached to it a copy of the January 31, 2019 Order Granting in Part and Denying in Part Defendant Summit Funding's Motion to Dismiss. (Motion to Dismiss, Ex. D.). Appellant's initial brief in this matter only further confuses the issue, as it contains multiple references to

"Defendant" or "Defendants" and "Motion for Summary Judgment" with no further identification as to which defendant is at issue. (Initial Brief of Appellant, pp. 9-10, 12-16.).

As in *Conner*, Appellant was given multiple opportunities to clarify whether Summit was being named as an appellee in this appeal. Appellant failed to respond to any of the three requests seeking confirmation as to what was being appealed. There is not a copy of the Order Granting Summary Judgment in Favor of Summit Funding attached to either the original Notice of Appeal that was filed with this Court, or the separate Notice of Appeal with different attachments that was filed with the trial court.[4] Because Appellant failed to comply with Rule 203(b)(1), SCACR, her appeal as to Summit should be dismissed as untimely.

B. The National Housing Act does not create a private right of action.

"As other courts have observed, the regulations promulgated under the National Housing Act govern relations between the mortgagee and the government, and give the mortgagor no claim for duty owed or for the mortgagee's failure to follow said regulations." *Mitchell v. Chase Home Finance, LLC*, 2008 WL 623395,*3 (N.D. Tex. 2008). "The overall purpose of the FHA mortgage insurance program is to encourage leading lenders, in exchange for a government guarantee of the loan, to extend mortgages to those carrying higher credit risks." *Wells Fargo Home Mortg., Inc. v. Neal*, 398 Md. 705, 719, 922 A.2d 538, 546 (Ct. App. 2007). "Thus, the regulations do not control directly the relationship between mortgagor and mortgagee and *may not be invoked by the mortgagor as a sword in*

[4] This is the opposite of the scenario described in *Weatherford v. Price*, 340 S.C. 572, 532 S.E.2d 310 (Ct. App. 2000), where the appellant saved its appellate rights by attaching a copy of the order when the notice of appeal failed to refer specifically to the order being appealed. Here, there is no reference to the order, nor is there a copy of the order attached to *either* of the Notices of Appeal. *See also Mason v. Mason*, 412 S.C. 28, 770 S.E.2d 405 (Ct. App. 2015).

an offensive cause of action against the mortgagee." *Id.* (Emphasis added.). "[T]he regulations exist primarily to govern the relationship between the government and the mortgagee." *Id.* at 720. "Therefore, it uses the regulations to protect its interests and manage the program." *Id.* "It appears well accepted [] that no private right of action exists under the HUD regulations." *Dixon v. Wells Fargo Bank, N.A.*, 2012 WL 4450502, *6 (E.D. Mich. 2012). *See Federal National Mortgage Ass'n v. LeCrone*, 868 F.2d 190, 193 (6th Cir.1989) ("no express or implied right of action in favor of the mortgagor exists for violation of HUD mortgage servicing policies"). *See also PNC Bank, N.A. v. Van Hoornaar*, 44 F. Supp. 3d 846, 853 (E.D. Wisc. 2014) ("[T]he Court concurs with the courts that have held that such regulations do not confer a private right of action for affirmative relief and damages."); *Collins v. BAC Home Loans*, 2013 WL 2249123, *3 (N.D. Ala. 2013) ("Federal courts throughout the country have repeatedly rejected similar attempts by borrowers to bring claims under the National Housing Act and its implementing regulations."); *Meyer v. Citimortgage, Inc.*, 2012 WL 511995, *3 (E.D. Mich. 2012) ("It is well established that the National Housing Act and attending regulations do not expressly or implicitly create a private right of action to mortgagors for a mortgagee's noncompliance with the Act or regulations"); *Kakarala v. Wells Fargo Bank, N.A.*, 2012 WL 1458235 (D. Ariz. 2012) ("Courts have routinely held that HUD regulations promulgated under the National Housing Act [] do not provide a claim to the mortgagor for duty owed or for the mortgagee's failure to follow the regulations."); *Wells Fargo Bank, N.A. v. Favino*, 2011 WL 1256771, at *12 (N.D. Ohio 2011) (finding no private right of action available to a mortgagor for a mortgagee's noncompliance with the National Housing Act or breach of HUD regulations); *Scocca v. Cendant Mortg. Corp.*, 2004 WL 2536837, at * 1 (E.D. Pa. 2004) ("there is no

private right of action against a mortgagee based on alleged violations of [HUD rules]"). The "National Housing Act and the regulations promulgated thereunder deal only with the relations between the mortgagee and the government, and give the mortgagor no claim to duty owed nor remedy for failure to follow." *Roberts v. Cameron–Brown Co.*, 556 F.2d 356, 360 (5th Cir. 1977), *citing Baker v. Northland Mortgage Co.,* 344 F. Supp. 1385 (N.D. Ill. 1972).

The only remaining cause of action against Summit is based solely upon Summit's alleged failure to "obtain a CL-100 and home inspection report" for the property that is the subject of this action (Verified Complaint, p. 34, ¶ 174) and that such failure was a violation of applicable FHA guidelines. (Verified Complaint, p. 34, ¶ 175.).[5] Even if Summit were required under applicable regulations to obtain such reports, its alleged failure to do so does not create a private right of action upon any borrower for affirmative relief and damages. The power to address any alleged noncompliance on the part of Summit rests with the federal government, not private citizens. Because there is no private right of action, the trial

[5] Appellant refers to the fact that she had "outstanding discovery relate[d] to the FHA requirement that a home appraisal and CL-100 Wood Infestation Report (termite inspection) be performed for purchases of existing homes with a mortgage insured by the FHA *and whether Summit complied with FHA requirements.*" (Appellant's Initial Brief, p. 10. (Emphasis added.)). Because there is no private right of action based upon any alleged failure on the part of Summit to abide by FHA requirements, completion of discovery will not aid her case. She has no right to inquire into that aspect of the transaction, because she has no viable cause of action based on any such alleged failure. Further, Appellant fails to raise by specific exception the question of whether the trial court erred in its finding that there is no private right of action under the National Housing Act, nor did she include that in her brief. Her failure to do so constitutes a waiver thereof. *Amick v. Hagler*, 286 S.C. 481, 334 S.E.2d 525 (Ct. App. 1985). *See also First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting an issue that is not argued in the brief is deemed abandoned and precludes consideration on appeal); Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.").

court was correct in its decision to grant Summit summary judgment as to Appellant's last remaining cause of action.[6]

C. The Statute of Limitations is expired as to Appellant's alleged cause of action against Summit.

Under S.C. Code Ann. § 15-3-530(1) (2005), the statute of limitations for a breach of contract action is three years. "Pursuant to the discovery rule, a breach of contract action accrues not on the date of the breach, but rather on the date the aggrieved party either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence." *CoastalStates Bank v. Hanover Homes of South Carolina, LLC*, 408 S.C. 510, 517, 759 S.E.2d 152, 156 (Ct. App. 2014).

On May 27, 2015, Appellant confirmed through e-mail traffic with the Gillen Law Firm, she knew a termite inspection had not been done and the only home inspection that had been performed was the appraisal. (Baber Depos. Tr., Ex. 14.) That same date, her selected closing attorney contacted Summit with a draft HUD-1 that had no reference to any fees incurred or paid for either a separate home inspection, or termite inspection. (Anderson Affidavit, Ex. A.) Summit responded that the lines related to the termite and home inspection should be deleted, as no charges for either had been incurred. (Anderson

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[6] Even if there were a private right of action, Appellant failed to come forward with any specific regulation requiring Summit to provide either a CL-100, or a home inspection separate and apart from the appraisal performed by Appraisal Innovations, LLC. Under the Single Family Housing Policy Handbook 4000.1, the mortgagee is only required to obtain an "appraisal to verify the value of the Property and the Property's compliance with HUD's Minimum Property Standards." (Handbook, Section II, Subsection A, Paragraph 1(b), Subparagraph iv(C).) Unless that appraisal discloses defective conditions, or the appraiser cannot determine whether the property meets those standards, there is no obligation on the part of the mortgagee to obtain any further inspections. (Handbook, Section II, Subsection A, Paragraph 3(a)(ii).) Here, the appraisal stated specifically that the requisite HUD guidelines had been satisfied. (Verified Complaint, p. 9, ¶ 36.) The appraiser did not note any necessary repairs that were required to have the property comply with the guidelines, nor did he note any termite damage or that the appraisal was made subject to an inspection by a qualified pest control specialist. (Baber Depos. Tr., Ex. 16.) Based upon the appraisal performed in this case, Summit had no obligation under any regulation to have any additional inspections performed on the property.

Affidavit, Ex. A.) Those lines were deleted and the HUD-1 was finalized with no reference to a termite or home inspection. (Anderson Affidavit, Ex. A.)

The Gillen Law Firm was the closing attorney Appellant chose. As such, any communication to the Firm was tantamount to a communication to Appellant.[7] On May 27, 2015, Summit, through the e-mail traffic regarding the HUD-1, informed Appellant through her counsel that there was neither a home inspection, nor a termite inspection that had been performed at the direction or cost of Summit. Appellant acknowledged on May 27, 2015 that there had been no termite inspection on the Property.

The statute of limitations began to run on Appellant's alleged breach of contract action on the date she knew or should have known of the breach.[2] That date was May 27, 2015. Plaintiff did not file this action until May 29, 2018, which is outside the three year statute. The trial court's award of summary judgment in favor of Summit was correct and should be upheld.

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[7] "There is no doubt that the general rule is that notice to the attorney is notice to the client, but the knowledge of the attorney must be acquired while acting for the principal, and the information must relate to a matter within the scope of his agency; the theory of the law being that the agent is presumed to have communicated to his principal knowledge which it was his duty to have communicated and which it is reasonable to suppose he did actually communicate." *Strickland v. Capital City Mills*, 74 S.C. 16, 54 S.E. 220, 223 (1906). It was reasonable for Summit to assume that any communications it made to Appellant's attorney would then be shared with Appellant by her attorney.

[2] The twenty year statute of limitations in S.C. Code Ann. § 15-3-520 is inapplicable. The contract *secured* by the mortgage is the note executed by Appellant, which has no requirement of a CL-100 or a home inspection. The twenty year statute applies only to enforcement of the note and mortgage, not Appellant's claims against Summit.

To the extent Appellant attempts to claim the document labeled Itemization of Amount Financed stands as the basis for her claim against Summit, that claim is subject to a one year statute of limitations that began to run on the date of the loan closing. *See Harris v. Sand Canyon Corp.*, 274 F.R.D. 556 (D.S.C. 2010), *citing* 15 U.S.C. § 1640(e) (2005).

D. Summit did not breach its contractual obligations to Appellant.

"In South Carolina, the formation of a contract is governed by well-settled principles. Quite simply a contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act." *Carolina Amusement Co., Inc. v. Connecticut Nat. Life Ins. Co.*, 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993). "[T]here must be an offer and an acceptance accompanied by valuable consideration." *Id.*

In her Verified Complaint, Appellant alleged that by not getting either a home inspection or a CL-100, Summit failed to comply with the terms of the "loan agreement". (Verified Complaint, p. 34, ¶ 175.) She failed to provide a copy of the alleged loan agreement and has not produced any document executed by both parties through which Summit agreed, at no cost to Appellant, to provide both a home inspection and a CL-100.

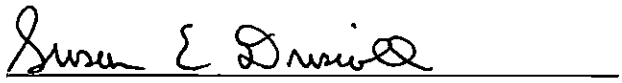
The contractual relationship between Summit and Appellant began with a pre-approval letter, which contained certain conditions. (Baber Depos. Tr., Ex. 10.) If those conditions were satisfied by Appellant, Summit would fund the loan. As evidenced by the Direct Endorsement Approval for a HUD/FHA-Insured Mortgage, Plaintiff satisfied the conditions of the pre-approval letter and final approval of the loan was issued. (Baber Depos. Tr., Ex. 26.) The loan was funded and Appellant acquired the Property. (Baber Depos. Tr., pp. 196-197.) Because Summit complied with its contractual obligations, there was no breach of contract. The trial court was correct in granting summary judgment in favor of Summit.

III.

CONCLUSION

At the end of her initial brief, Appellant attempts to mischaracterize Rule 220(c), SCACR. That rule allows the Court to "*affirm* any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." *Id.* It does not, as Appellant states, allow this Court to reverse an order of the trial court based upon any grounds appearing in the record. Appellant has a duty to raise specific issues to this Court, which may then be ruled upon. Based upon her failure to timely appeal any issues as to Summit, as well as the additional the reasons stated above, the Court should affirm the trial court order granting summary judgment in favor of Summit.

Respectfully submitted,



Date: February 20, 2020

Susan E. Driscoll, S.C. Bar No. 71447
Driscoll Sheedy, P.A.
11520 N. Community House Road
Suite 200
Charlotte, N.C. 28277
(704) 341-2101 - Telephone
(704) 341-2015 - Facsimile
sdriscoll@driscollsheedy.com

Attorneys for Summit Funding, Inc.

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Of which Summit Funding, Inc.; Allen Tate Co., Inc.; Colleen Coesens; Jonathan Garvey, Robert Ouzts; Connie Delaney; and Gloria Long-Robinson are the Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated below she served the following counsel with a copy of the *Initial Brief of Summit Funding, Inc. and Designation of Matter to be Included in the Record on Appeal* by mailing a copy of the same via First Class, U.S. Mail to the addresses shown below.

Glenn E. Bowens
The Bowens Law Firm, P.C.
P.O. Box 424
Winnsboro, S.C. 29180

Creighton B. Coleman
Coleman & Tolen, LLC
120 West Washington Street
Winnsboro, S.C. 29180

Thomas L. Ogburn, III
Poyner Spruill, LLP
301 S. College St.
Ste. 2900
Charlotte, N.C. 28202

Russell M. Racine
Cranfill Sumner & Hartzog, LLP
2907 Providence Road, Suite 200
Charlotte, N.C. 28211

Respectfully submitted,

Date: 02/20/2020

Susan E. Driscoll, S.C. Bar No. 71447
Driscoll Sheedy, P.A.
11520 N. Community House Road
Suite 200
Charlotte, N.C. 28277
(704) 341-2101 - Telephone
(704) 341-2015 - Facsimile
sdriscoll@driscollsheedy.com

Attorneys for Summit

Driscoll SHEEDY

A PROFESSIONAL ASSOCIATION | ATTORNEYS AT LAW

Susan E. Driscoll
Lic. in NC & SC
Direct: 704 341 2103
Fax: 704 341 2105
sdriscoll@driscollsheedy.com

Ballantyne: 11520 N. Community House Road
Suite 200 | Charlotte, NC 28277
South Carolina Office: 331 E. Main Street
Fountain Park Business Center
Suite 235 | Rock Hill, SC 29730
PO Box 4589 | Rock Hill, SC 29732
www.driscollsheedy.com

February 20, 2020

Honorable Jenny Abbot Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, S.C. 29201

Re: Karen K. Baber v. Summit Funding, Inc., et al.
Appellate Case No. 2019-001440

Dear Ms. Kitchings:

Enclosed please find the original and two (2) copies of the Initial Brief of Summit Funding, Inc., Designation of Matter to be Included in the Record on Appeal and a Certificate of Service in the above captioned matter. Please return filed copies to me in the enclosed envelope.

With kindest regards, I remain

Respectfully,

DRISCOLL SHEEDY, P.A.

Susan E. Driscoll

cc: Scott Bruggemann, Esq.
Thomas L. Ogburn, III, Esq.
Creighton B. Coleman, Esq.
Glenn E. Bowens, Esq.
Russell Racine, Esq.

ORIGIN ID:MEOA (704) 341-2101
JAMES W. SHEEDY
DRISCOLL SHEEDY, P.A.
11520 NORTH COMMUNITY HOUSE ROAD
SUITE 200
CHARLOTTE, NC 28277
UNITED STATES US

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1015 SUMTER ST

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