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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Bentley D. Price, Circuit Court Judge

Appellate Case No. 2020-001204
Case No. 2018-CP-10-02762

Wilmington Trust National Association as Successor Trustee to Citibank N.A. as Trustee of Structured Asset Mortgage Investments II Inc., Bear Stearns ALT-A Trust II Mortgage Pass-Through Certificates Series 2007-1, ... Plaintiff,

v.

Temisan Etikerentse a/k/a Temisan L. Etikerentse, Ijeoma Etikerentse a/k/a Ijeoma Etkis, Suntrust Mortgage Inc., Capital Bank Corporation, Bank of America NA, Keybank National Association, and Olde Park Homeowners' Association Inc., ... Defendants.

AND

Temisan Etikerentse a/k/a Temisan L. Etikerentse, Ijeoma Etikerentse a/k/a Ijeoma Etiks ..... Appellants,

v.

Specialized Loan Servicing LLC a/k/a SLS, ... Respondent.

FINAL BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Did the lower court correctly grant summary judgment in SLS's favor where Appellants failed to present even a scintilla of evidence supporting their claims?

2. Did the lower court properly find that it had jurisdiction to consider Appellants' claims and rule on SLS's motion for summary judgment where the jurisdictional provisions cited by Appellants do not apply to this case?

3. Did Appellants fail to preserve their argument that SLS violated the Real Estate Settlement Procedures Act in 2014 where Appellants failed to raise this argument to the lower court and it is unsupported by any record evidence?

4. Did the lower court appropriately find that an alternative ground for granting summary judgment was that Appellants' claims were improperly asserted as Rule 14, SCRCP third party claims?

Introduction

This appeal arises from a contested foreclosure action. The issues before the Court solely concern the lower court's grant of summary judgment on third-party claims brought by the Appellant borrowers against their loan servicer, Specialized Loan Servicing, LLC ("SLS").[1] As detailed below, the lower court properly granted summary judgment because there were no genuine issues of material fact for trial and, alternatively, Appellants' claims were procedurally improper. This Court should affirm.

Counter-Statement of the Case and Facts

I. Background regarding the relevant parties.

On June 15, 2007, Temisan Etikerentse and Ijeoma Etikerentse ("Appellants") executed a $1,402,500.00 adjustable rate note ("Note") with Countrywide Home Loans, Inc. (*See* Compl. Ex. A – Note; R. 52-55.) This Note was secured by a Mortgage (the "Mortgage" together with the Note, the "Mortgage Loan") on real property located at 783 Navigators Run, Mount Pleasant, S.C. (*See* Compl. Ex. B – Mortgage; R. 56-74.) Appellants executed and delivered the Mortgage unto Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Countrywide Home Loans, Inc. (*See id.* at 2; R. 57.)

On August 31, 2009, MERS assigned the mortgage to Citibank N.A., as Trustee on behalf of the Holders of Bear Stearns Alt-A Trust II, Mortgage Pass-Through Certificates, Series 2007-1 ("Citibank"). (*See* Compl. Ex. B – 8/31/2009 Assignment; R. 75-76.)

On November 4, 2014, Citibank assigned the mortgage to Wilmington Trust, National Association, as Successor Trustee of Structured Asset Mortgage Investments II Inc., Bear Stearns Alt-A Trust II, Mortgage Pass-Through Certificates Series 2007-1 ("Wilmington Trust").

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[1] The foreclosure portion of the case and Appellants' counterclaims against the Plaintiff are still pending below.

(*See* Compl. Ex. B – 11/4/2014 Assignment; R. 76-77.) As a result of these valid assignments, Wilmington Trust is the holder-in-due-course of the Mortgage Loan.

Respondent Specialized Loan Servicing, LLC ("SLS") services Appellants' loan on behalf of Wilmington Trust.[2] (*See* SLS Mot. for Summ. J., Ex. A – Affidavit of Mark McCloskey ("McCloskey Aff.") at ¶ 8; R. 235.) SLS's agreement is with the trust. SLS is not, and has never been, a party to the Note or Mortgage and it does not have a contractual relationship with Appellants.

II. Appellants' default and SLS's loss mitigation efforts.

Appellants defaulted on the note on December 1, 2008 and have remained in default through the present date. (*See* Compl. at ¶ 15; Aff. at ¶ 9; R. 49, 236.)

The events forming the basis of Appellants' claims began when they submitted a loss mitigation application to SLS in 2014. In accordance with the Real Estate Settlement Procedures Act ("RESPA"), SLS evaluated the 2014 loss mitigation application for foreclosure intervention options and informed Appellants of its decision. (*See* McCloskey Aff. at ¶¶ 10-11; R. 236.) Via letter dated December 12, 2014, SLS explained that Appellants had been approved for a standard loan modification. (McCloskey Aff., Ex. 2 – Decision Letter dated 12/12/2014; R. 241-47.) SLS evaluated Appellants for several other loss mitigation options, but Appellants were not approved for those because the loan did not meet the necessary criteria. (*See id.*)

Despite SLS's approval of Appellants' loan for a standard modification, the loan was not modified because Appellants did not accept the terms by returning the necessary documents. (*See* McCloskey Aff. at ¶ 11; McCloskey Aff., Ex. 3 – Letter dated 3/16/2015; R. 236, 248-52.)

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[2] Mortgage servicing is "[t]he administration of a mortgage loan, including the collection of payments, release of liens, and payment of property insurance and taxes." *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 221, 746 S.E.2d 478, 481 (Ct. App. 2013) (quoting Black's Law Dictionary 1105 (9th ed. 2009)).

During the latter half of 2016, SLS voluntarily reviewed Appellants for loss mitigation options a second time. Via letter dated December 27, 2016, SLS informed Appellants that they were approved for a standard loan modification. (*See* McCloskey Aff. at ¶ 12; SLS's Mot. for Summ. J., Ex. B – Deposition of Temisan Etikerentse ("Etikerentse Dep."), Ex. 6 – Letter & Ex. 7 – Loan Modification Documents; R. 236, 303-37.) SLS also evaluated Appellants for several other loss mitigation possibilities, but Appellants were not approved for those options because the loan did not meet the necessary criteria. (*See* McCloskey Aff. at ¶ 12; Etikerentse Dep. at Exs. 6 & 7; R. 236, 303-37.)

Appellants rejected SLS's offer through their counsel and thus the loan was not modified. (*See id.*)

III. Procedural history.

Wilmington Trust filed this foreclosure action on April 18, 2016. (*See* Compl.; R. 47.) Appellants filed their Answer and asserted counterclaims against Wilmington Trust and third-party claims against SLS on November 17, 2016. (Ans., Countercls. & Third-party Claims; R. 86.) Appellants stated claims for: (1) breach of contract, (2) declaratory judgment, (3) violation of RESPA, and (4) violation of the South Carolina Unfair Trade Practices Act (the "UTPA").

SLS moved for summary judgment on August 30, 2018 relying primarily on a supporting affidavit from a representative of SLS. Discovery was still ongoing at this time and no depositions had been taken. Accordingly, the lower court issued a Form 4 Order denying that motion without prejudice so that the parties could complete discovery. (*See* Order; R. 15-16.)

SLS then proceeded to conduct additional discovery by deposing Appellant Temisan Etikerentse. Appellants did not conduct any further discovery or take any depositions.

On October 17, 2019, after discovery closed, SLS filed a renewed motion for summary judgment. SLS premised its motion on two key arguments. First, SLS contended that Appellants' claims were improperly styled as "third-party" claims asserted pursuant to Rule 14 of the South Carolina Rules of Civil Procedure because they did not assert derivative liability. (*See* SLS's Mot. for Summ. J. at 4-5; R. 220-21.) Second, SLS argued that Appellants failed to produce evidence demonstrating any genuine issues of material fact for trial on any of their claims. Specifically, SLS asserted that each of Appellants' claims failed on the merits because: (1) there was no privity of contract between SLS and Appellants, (2) the declaratory judgment claim was an improper attempt to assert a claim pursuant to the Home Affordable Modification Program ("HAMP"), which lacks a private right of action, (3) there was no evidence of any unfair or deceptive act by SLS, impact on the public interest, or damages, and (4) there was no evidence supporting that SLS violated RESPA or that Appellants suffered any damages as a direct result of any alleged violation. (*See id.* at 6-14; R. 222-30.) Lastly, SLS asserted that to the extent Appellant Temisan Etikerentse sought to assert claims that accrued prior to his bankruptcy, they were barred because they were not disclosed and expressly abandoned by the Bankruptcy Trustee.[3] (*See id.* at 14-15; R. 230-31.)

The lower court scheduled a hearing on SLS's motion for July 13, 2020. Appellants e-filed their response brief on July 10, 2020 and also emailed supporting exhibits to the judge the morning of the hearing.[4] In their response, Appellants contended that confusion at the outset of

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[3] Appellant Temisan Etikerentse filed a voluntary bankruptcy petition pursuant to Chapter 7 of the Bankruptcy Code on August 7, 2014. The Bankruptcy Court entered its Order discharging Etikerentse on November 12, 2014.

[4] The exhibits were: (1) the pooling and servicing agreement for their mortgage, (2) a copy of the affidavit submitted by SLS in support of its motion for summary judgment, (3) an affidavit previously submitted by Attorney Damon Wlodarcyzk (counsel for Wilmington Trust) in support

the case as to whether SLS's counsel would also represent Wilmington Trust in defense of the counterclaims supported derivative liability and meant their claims against SLS were proper Rule 14 claims. (*See* Resp. in Opp'n at 5-6; R. 345-46.) Appellants then asserted that a Consent Order dated May 11, 2020 from an administrative proceeding brought by the Consumer Financial Protection Bureau ("CFPB") against SLS (the "Consent Order")—issued on May 11, 2020—offered evidentiary support for their contentions that SLS violated RESPA. *See* Consent Order, *In re: Specialized Loan Servicing, LLC*, No. 2020-BCFP-0002, 2020 WL 8182145 (May 11, 2020). Appellants argued that, as a result of this Consent Order, there were genuine issues of material fact for trial. (*See* Resp. in Opp'n at 7-10; R. 347-50.) Finally, Appellants argued that the Consent Order supported that SLS was required to undertake certain actions prior to challenging the merits of Appellants' claims, and the lower court lacked subject matter jurisdiction until that was accomplished. (*See id.*)

The lower court heard argument on SLS's motion on July 13, 2020 and again on July 15, 2020. (*See* Tr. of Hrg. dated 7/13/2020; Tr. of Hrg. dated 7/15/2020; R. 370-416.) Appellants reiterated the same arguments from their brief at the hearings. They did not submit any further exhibits or evidence.

The lower court granted SLS's motion via Form 4 Order dated July 22, 2020. (*See* Form 4 Order dated 7/22/2020; R. 26-28.) The Form 4 Order invited the parties to submit formal orders for consideration if they wanted. That same day, counsel for SLS informed the hearing judge's clerk that SLS intended to submit a formal order.

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of a motion for relief from the entry of default, (4) a copy of a Consent Order between SLS and the Consumer Financial Protection Bureau, and (5) the Bankruptcy Trustee's final report from Temisan Etikerentse's bankruptcy.

Appellants proceeded to file a motion to reconsider on July 29, 2020 (prior to the entry of the formal order). (*See* Mot. to Reconsider; R. 354-65.) That motion reiterated the same general arguments that Appellants raised in their response brief and at the hearings. The court denied that motion via Form 4 Order dated August 5, 2020. (*See* Form 4 Order dated 8/5/2020; R. 29-31.)

The lower court then entered the formal order granting summary judgment in SLS's favor on August 17, 2020. (*See* Order dated 8/17/2020; R. 32-43.) The Order held that there were no genuine issues of material fact on the merits of Appellants' claims. The Order also found that, in the alternative, Appellants' claims were not proper Rule 14 third-party claims. This appeal followed.

Standard of Review

This Court applies the same standard as the trial court when reviewing a grant of summary judgment. *Woodson v. DLI Props., LLC*, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *King v. Am. Gen. Fin., Inc.*, 386 S.C. 82, 92, 687 S.E.2d 321, 326 (2009) (quoting *Cafe Assoc., Ltd. v. Gerngross*, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991)). "When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). However, summary judgment is inappropriate where further inquiry into the facts is necessary to "clarify the application of the law." *Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995).

"On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008). However, "[a] party may not create a genuine issue of material fact through speculation or guesswork." *In re Eleanor McCarthy Lenahan Tr. under agreement Dated July 12, 2001*, 428 S.C. 598, 605, 836 S.E.2d 793, 797 (Ct. App. 2019); *see also Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009) ("[A]ssertions as to liability must be more than mere bald allegations made by the non-moving party in order to create a genuine issue of material fact.").

Argument

I. The lower court properly found that there were no genuine issues of material fact for trial on any of Appellants' claims.

The lower court correctly found that SLS was entitled to judgment as a matter of law on each of Appellants' claims. Appellants failed to submit any evidence rebutting the affidavit, supporting exhibits, and deposition testimony presented by SLS. Therefore, the lower court appropriately granted summary judgment in SLS's favor. This Court should affirm.

A. There was no evidence supporting privity of contract between Appellants and SLS.

Appellants did not dispute the lower court's finding of a lack of privity of contract in either their motion to reconsider or their opening brief. This alone warrants affirming the lower court's grant of summary judgment on this claim. *See Jinks v. Richland Cnty.*, 355 S.C. 341, 344 n.3, 585 S.E.2d 281, 283 n.3 (2003) (holding an issue not argued in the appellant's brief is deemed abandoned on appeal).

In any event, Appellants conceded in their response to SLS's motion for summary judgment that they do not have contractual privity with SLS. (Memo in Opp'n at 6-7; R. 346-47.) This is fatal to their claim since the existence of a contract is, of course, a necessary element of a breach of contract claim. *See Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009) ("The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach."). The lower court properly granted summary judgment in SLS's favor on this cause of action and this Court should affirm.[5]

B. Appellants' declaratory judgment claim improperly sought to assert a claim for violation of HAMP.

Appellants' second cause of action purported to state a claim for declaratory judgment. As the lower court found, however, the gravamen of the declaratory relief sought was a declaration that SLS had an obligation to comply with the Home Affordable Modification Program ("HAMP") and failed to do so for Appellants' loan. The lower court properly found that this claim failed as a matter of law because HAMP does not provide a private right of action. *See Carrington v. Mnuchin*, No. 5:13-03422-JM, 2014 WL 4249876, at *10 (D.S.C. Aug. 27, 2014); *see also, e.g., Grenadier v. BWW Law Grp.*, No. 1:14CV827 LMB/TCB, 2015 WL 417839, at *5 (E.D. Va. Jan. 30, 2015) ("Although participating loan servicers are obligated to comply with HAMP guidelines in order to receive servicer benefits, 'HAMP does not create a private right of action for borrowers against lenders and servicers.'"). Litigants cannot evade the lack of a private right of action under HAMP by recharacterizing the claim by another name as Appellants attempted to do here. *See, e.g., Steffens v. Am. Home Mortg. Servicing, Inc.*, No.

[5] In their memorandum in opposition to SLS's motion, Appellants requested leave to amend their complaint to assert tortious interference with a contract instead of breach of contract. The lower court rejected this request as untimely. Appellants did not take issue with this finding in their motion to reconsider or in their opening brief to this Court. Therefore, this argument is also abandoned.

6:10-1788-JMC, 2011 WL 901812, at *2 (D.S.C. Jan. 5, 2011), *report and recommendation adopted* 2011 WL 901179 (D.S.C. Mar. 15, 2011) (dismissing claims due to lack of private right of action under HAMP, explaining that "[d]espite the fact that [plaintiff] did not label her claims as 'HAMP violations,' the underlying factual and legal basis for each [wa]s squarely based on HAMP").

South Carolina law provides that "[a] suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Doe v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 347 S.C. 642, 645, 557 S.Ed.2d 670, 672 (2001); *Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct. App. 2000) (explaining that courts look to the essential character of the cause of action in reviewing declaratory judgment claims). Stripped of its declaratory judgment label, Appellants' claim is no more than an improper attempt to assert a private right of action under HAMP where none exists. *See Spaulding v. Wells Fargo Bank, N.A.*, 714 F.3d 769, 776 n.4 (4th Cir. 2013). Therefore, the lower court properly determined that Appellants' declaratory judgment claim failed as a matter of law.

Regardless, even if Appellants had stated a viable cause of action, SLS's purported noncompliance with HAMP was irrelevant because the unrebutted evidence showed that Appellants' loan ***did not*** qualify for that program. As SLS's decision letters explained, Appellants' loan was not eligible for HAMP because the current unpaid principal balance on the loan was higher than the program limit as defined by the applicable federal guidelines. (*See* McCloskey Aff., Ex. 2 – Decision Letter dated 12/12/2014; McCloskey Aff., Ex. 4 – Decision Letter dated 12/27/2016; R. 241-46, 253-66.) Summary judgment was appropriate for this additional reason.

The lower court properly determined that there were no genuine issues of material fact for trial on Appellants' declaratory judgment claim. This Court should affirm.

C. The evidence before the lower court demonstrated that SLS complied with its obligations under RESPA and Appellants suffered no damages.

The lower court also appropriately granted summary judgment on Appellants' claim for violation of RESPA, 12 C.F.R. § 1024.41. This federal regulation requires a loan servicer to ***review*** a borrower's loan for loss mitigation options if the borrower has properly submitted a complete application for loss mitigation review and complied with the requirements of § 1024.41. *See id.* RESPA, however, does not require a servicer to ***offer*** a borrower a loan modification or any other loss mitigation option, let alone on the terms their choosing. *See* 12 C.F.R. § 1024.41(a) ("Nothing in § 1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option."). Here, the lower court properly found that SLS complied with RESPA.

1. There was no evidence SLS violated RESPA.

The only evidence before the lower court supported that SLS conducted a loss mitigation review of Appellants' loan in 2014 and offered a standard loan modification. (*See* McCloskey Aff., Ex. 2 – Decision Letter dated 12/12/2014; R. 241-46.) This satisfied SLS's obligations under RESPA. Appellants did not submit ***any*** evidence directly rebutting these facts. Rather, Appellants based their argument on the CFPB's administrative Consent Order. As detailed below, however, that Consent Order did not have any findings that involved the facts of ***this*** case and was, therefore, irrelevant—particularly in the face of SLS's evidence directly supporting compliance in this matter.

Section 1024.41(i) explains that "[a] servicer is only required to comply with the requirements of this section for a single complete loss mitigation application for a borrower's

mortgage loan account." *Id.* In other words, where a servicer has complied with its obligations it cannot be liable under this section for any subsequent loss mitigation reviews that it conducts on a voluntary basis. Any subsequent request for review is "duplicative." *See Mangum v. First Reliance Bank*, No. 4:16-CV-02214-RBH, 2017 WL 1062534, at *3 (D.S.C. Mar. 21, 2017) ("A servicer is only required to follow the loss mitigation rule procedures for a single, complete loss mitigation application. . . . In other words, a borrower may not bring an action for violation of the loss mitigation rule if that borrower has previously availed herself of the loss mitigation process."); *see also Lee v. Mortg. Ctr., LLC*, No. 14-CV-14147, 2015 WL 12681314, at *5 (E.D. Mich. May 22, 2015) (noting that the servicer was not required to consider a second loss mitigation application where it had previously evaluated a prior application, thereby discharging its duties under § 1024.41(i)).

Therefore, the threshold question here is whether the Appellants submitted a complete loss mitigation package, SLS conducted a review, and SLS notified them of the results of the review. As the lower court properly found, Appellants' claims fail as a matter of law because the unrebutted evidence supported that SLS complied with RESPA's requirements during the 2014 review and offered a standard loan modification. Because SLS satisfied its obligations in connection with this review, SLS's actions during the second loss mitigation review in 2016 are irrelevant and cannot form the basis of claims under § 1024.41.

At the hearings, Appellants largely focused on the fact that SLS proceeded to file the foreclosure suit while the 2016 review was ongoing. However, SLS had no obligation to evaluate Appellants' loan a second time for loss mitigation options. This review was entirely voluntary. After reviewing Appellants for a number of loss mitigation options, SLS offered them a second loan modification. (Etikerentse Dep., Ex. 6 & 7 – Decision Letter and Loan

Modification Documents; R. 303-37.) But because SLS already complied with the loss mitigation regulations in 2014, SLS was entitled to proceed with filing this foreclosure action while continuing to engage in voluntary loss mitigation. *See* 12 C.F.R. § 1024.41(i); *Mangum*, 2017 WL 1062534, at *3 ("In other words, a borrower may not bring an action for violation of the loss mitigation rule if that borrower has previously availed herself of the loss mitigation process."). Appellants arguments about SLS's purported noncompliance with RESPA during the 2016 review are simply not actionable claims. Therefore, the lower court properly granted summary judgment.

2. Appellants also failed to submit evidence supporting any damages suffered as a result of the purported RESPA violations.

To establish a claim for violation of RESPA, a claimant must show damages ***as a result of the violation***. *See Wirtz v. Specialized Loan Servicing, LLC*, 886 F.3d 713, 719 (8th Cir. 2018) (explaining that damages are an essential element and a plaintiff fails to prove actual damages where the failure to comply with RESPA did not cause the purported harm); *see also Mrla v. Fed. Nat'l Mortg. Ass'n*, No. 15-CV-13370, 2016 WL 3924112, at *3 (E.D. Mich. July 21, 2016) (explaining that a RESPA complaint "must allege facts showing that damages occurred as a result of the alleged violations" and "[n]aked claims of damages, unconnected to such facts, are not enough to state a claim").

Here, Appellants did not submit even a scintilla of evidence supporting any damages. In his deposition, Temisan Etikerentse could not explain the substance of his RESPA claim. (*See* Etikerentse Dep. at 52:23-53:12; R. 288-89.) Moreover, he could not identify any injury Appellants suffered as a direct result of any RESPA violation. The only concrete issues he described were credit problems and the uncertainty of the foreclosure. (*See id.* at 47:20-48:21; 50:20-51:18; R. 283-84, 286-87.) However, the undisputed record evidence supported that

Appellants defaulted on the loan in 2008 and have not made a full payment since that date. (*See* McCloskey Aff. at ¶ 9; R. 236.) ***This*** was the cause of the supposed harm, not any purported RESPA violation.[6] Moreover, although Appellants were not entitled to a loan modification, SLS twice offered modifications that were rejected. Therefore, SLS went above and beyond its obligations under REPSA as the lower court correctly determined.

In light of the foregoing, this Court should affirm the grant of summary judgment in SLS's favor on Appellants' RESPA claim.

D. There was no evidence before the lower court supporting that SLS violated the South Carolina Unfair Trade Practices Act.

The lower court also correctly granted summary judgment on this claim. As Appellants' response to SLS's motion explained, this cause of action was also based on the RESPA violations. (*See* Mem. in Opp'n at 4; R. 344.) A UTPA claim requires the Plaintiff show: "(1) that the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act." *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 815-16 (2013).

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[6] Courts have rejected RESPA claims under similar circumstances. *See, e.g., Van Hoose v. Athens First Bank & Tr.*, No. 3:16-CV-50-CDL, 2017 WL 4863236, at *6 (M.D. Ga. Apr. 12, 2017) (finding the plaintiff failed to show how not receiving a letter responding to her loss mitigation application "rather than her own default, caused the foreclosure" and thus plaintiff failed to state a RESPA claim for actual damages); *Collins v. Wickersham*, 862 F. Supp. 2d 649, 659 (E.D. Mich. 2012) (explaining that the plaintiffs' alleged injuries "plainly resulted" from their failure to make loan payments and the ensuing foreclosure, not any actual harm resulting from alleged RESPA violations); *Benford v. CitiMortgage, Inc.*, No. 11-12200, 2011 WL 5525942, at *5 (E.D. Mich. Nov. 14, 2011) ("Citi's alleged failure to provide [the plaintiff] with . . . information did not result in foreclosure. Rather, Plaintiff's failure to make the loan payments triggered this course of events.").

1. SLS did not commit any unfair or deceptive acts.

As the lower court correctly found, Appellants submitted no evidence of any unfair or deceptive action by SLS in its dealings with Appellants. An act is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive." *Gentry v. Yonce*, 337 S.C. 1, 12, 522 S.E.2d 137, 143 (1999). "An act is 'deceptive' when it has a tendency to deceive." *Id.* Here, the unrebutted evidence established that SLS complied with its obligations under RESPA. Since that formed the gravamen of Appellants' UTPA claim, summary judgment was also appropriate on this cause of action.

2. There is no evidence of impact on the public interest.

Appellants also failed to establish any genuine issue of material fact on this element. "To be actionable, under [SC]UTPA, the unfair or deceptive act or practice ***must*** have an impact upon the public interest." *Crary v. Djebelli*, 329 S.C. 385, 387, 496 S.E.2d 21, 22-23 (1998) (emphasis added). "Unfair or deceptive acts or practices have an impact upon the public interest if the acts or practices have the potential for repetition." *Id.* Generally, to establish the potential for repetition requirement, the claimant must make a "(1) showing the same kind of actions occurred in the past, thus making it likely they will occur absent deterrence, or (2) . . . showing the company's procedures create a potential for repetition of the unfair and deceptive acts." *Daisy Outdoor Adver. Co. v. Abbott*, 322 S.C. 489, 496, 473 S.E.2d 47, 51 (1996).

Again, the unrebutted evidence supported that SLS complied with its obligations under RESPA. However, even if Appellants produced evidence that SLS violated RESPA, they failed to establish an impact on the public interest. Appellants did not identify any procedures of SLS which could lead to repetition. Moreover, in his deposition Temisan Etikerentse was unable to articulate how SLS's actions went beyond the present matter. He acknowledged he does not

know anybody else with a loan serviced by SLS, anyone that is suing SLS, or anyone that has any other specific claims against SLS. (*See* Etikerentse Dep. at 52:14-22; R. 288.) Therefore, at most, Appellants allegations solely involved the parties to this commercial transaction, which is insufficient to support a UTPA claim. *See Ardis v. Cox*, 314 S.C. 512, 519, 431 S.E.2d 267, 271 (Ct. App. 1993) ("An unfair or deceptive act or practice that affects only the parties to a trade or commercial transaction is beyond the Act's embrace.").[7]

3. Appellants suffered no ascertainable damages and identified no pecuniary harm as a result of the purported UTPA violation.

Finally, Appellants did not provide any evidence of damages supporting this claim. To establish a claim under the UTPA, a claimant must allege and prove an "***ascertainable*** loss of money or property" that is causally connected to purported unfair or deceptive act. *See* S.C. Code Ann. § 39-5-140(a) (emphasis added). "SCUTPA requires that a private claimant suffer an actual loss, injury, or damage, and requires a causal connection between the injury-in-fact and the complained of unfair or deceptive acts or practices." *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 57-58, 777 S.E.2d 176, 189 (2015). Moreover, damages may not be awarded based on speculative proof. *See Woodson v. DLI Props., LLC*, 406 S.C. 517, 531, 753 S.E.2d 428, 435 (2014). Summary judgment is appropriate where the claimant has not demonstrated that he has suffered any actual loss. *See Wogan v. Kunze*, 366 S.C. 583, 609, 623 S.E.2d 107, 121 (Ct. App. 2005).

Appellants' pleading did not identify any specific loss of money or property, but rather broadly stated that they have suffered "an ascertainable loss of money." (Ans., Countercls. & Third-party Claims at ¶ 94; R. 102.) Moreover, in his deposition, Temisan Etikerentse did not

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[7] Appellants relied on the CFPB Consent Order to support impact on the public interest. However, as detailed in Section I.E. below, that order is entirely irrelevant to this case and is not evidence.

identify any ascertainable loss or pecuniary harm. When asked if he was seeking money from SLS, he responded that "[m]y main goal is [keeping] the house." (*See* Etikerentse Dep. at 48:1-11; R. 284.) Appellants did not submit any affidavits, testimony, or other evidence supporting their claimed damages to the lower court. Therefore, the court properly found that there were no genuine issues of material fact on this element as well.

For all these reasons, the Court should affirm the lower court's grant of summary judgment on Appellants' RESPA claim.

E. The administrative proceeding Consent Order between SLS and the CFPB does not constitute evidence supporting Appellants' claims.

Appellants' response to SLS's motion and their brief largely focused on the contents of a Consent Order from an administrative proceeding brought by the CFPB against SLS. The lower court properly rejected Appellants' reliance on the Consent Order as "evidence" supporting their claims.

Although Appellants contend that SLS "admitted" violations of RESPA in the Consent Order, they conveniently omit that the Consent Order expressly states that SLS has consented to its issuance "***without admitting or denying any of the findings of fact or conclusions of law***." *See* Consent Order, 2020 WL 8182145. Therefore, Appellants are simply not correct that SLS "admitted" certain law violations in the Consent Order. Moreover, the lower court correctly found that the Consent Order had no relationship to the facts of this case. Here, the unrebutted evidence showed that SLS complied with its obligations under RESPA in servicing Appellants' loan. General allegations of purported RESPA violations in unrelated matters are entirely immaterial to this case. There is nothing in the Consent Order tying its contents to the facts of ***this*** case.

Additionally, courts have rejected similar attempts by plaintiffs to rely on analogous orders. For example, in *Loughlin v. Amerisave Mortg. Corp.*, the court explained that it could not take judicial notice of a consent order between the CFPB and defendants since the defendants had expressly refused to admit the its findings of fact and conclusions of law. No. 1:14-CV-3497-LMM-LTW, 2019 WL 8375920, at *17 (N.D. Ga. Nov. 12, 2019), *report and recommendation adopted*, No. 1:14-CV-3497-LMM-LTW, 2020 WL 1809362 (N.D. Ga. Feb. 3, 2020). Moreover, as the *Laughlin* court reasoned, under Rule 408 the consent order was not admissible to prove the underlying facts on which the compromise between the CFPB and defendants was made. *See id.* The same applies for the Consent Order at issue here.[8]

Phillips v. Ocwen Loan Servicing, LLC, 92 F. Supp. 3d 1255 (N.D. Ga. 2015) held similarly. The *Phillips* court found that a consent judgment from a separate administrative matter was not evidence supporting the plaintiff's claim. *See id.* at 1293 (explaining that the defendant having "entered into a settlement agreement in another case in which it was also accused of committing alleged errors in the servicing of mortgage loans is not evidence that it committed errors with respect to the Plaintiff's Loan in this case"); *see also, e.g.*, *Faiella v. Fed. Nat'l Mortg. Ass'n*, No. 16-CV-088-JD, 2017 WL 6375600, at *7 (D.N.H. Dec. 13, 2017), *aff'd*, 928 F.3d 141 (1st Cir. 2019) (finding that a consent decree between the defendant and the CFPB should not be credited as any evidence of wrongdoing on the part of the defendant who neither admitted nor denied the allegations therein); *Castellanos v. Portfolio Recovery Assocs., LLC*, No. 1:17-CV-20593-UU, 2017 WL 7796303, at *3 (S.D. Fla. Oct. 31, 2017) (granting a motion in

[8] As the Fourth Circuit has explained, it would violate Rule 408 (which prohibits the admissibility of evidence of compromise offers and negotiations to prove or disprove the validity of a disputed claim) to admit a consent order for purposes of proving the truth of the matters on which compromise had been reached. *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1413 (4th Cir. 1992).

limine prohibiting plaintiff from introducing any evidence regarding a consent order between the defendant and the CFPB entered in a separate matter).

Therefore, the lower court correctly found that the Consent Order was not admissible evidence supporting any wrongful act committed by SLS.[9] Regardless, even if the Consent Order could be considered evidence of generalized wrongful acts committed by SLS, Appellants still did not submit any evidence of any impropriety by SLS ***in this case***—nor could they since SLS in fact complied with its obligations under RESPA.[10] The lower court properly granted summary judgment and this Court should affirm.

F. Appellants' brief fails to confront that their claims failed on the merits due to a dearth of supporting evidence.

The arguments Appellants raise to this court are largely procedural issues that either were not raised to the lower court or were tangential and properly rejected by the court. SLS addresses those arguments in turn below. However, the overarching reason for affirming the lower court is Appellants' failure to submit even a scintilla of any ***evidence*** to the lower court in support of their claims.

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[9] Appellants' brief asserts that the Consent Order caused a "shifting of the burden" requiring ***SLS*** to determine the damages it caused to ***Appellants***. This argument was not raised to the lower court and is unpreserved. Moreover, Appellants offer no support for this proposition and, in practice, it would lead to an absurd result. Appellants are, in essence, saying that it is incumbent on SLS to provide evidence supporting their claims despite being unable to produce any themselves. The Supreme Court case Appellants cite does not support their position. *See generally Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 38 (1991).

[10] Appellants' brief also asserts that the CFPB Consent Order constitutes "prima facie" evidence of a UTPA claim pursuant to S.C. Code Ann. § 39-5-140(c). This argument is also unpreserved and without merit. The portion of § 39-5-140(c) quoted by Appellants provides that injunctions, judgments, or court orders made pursuant S.C. Code Ann. § 39-5-50 shall constitute prima facie evidence that the respondent employed an unlawful method. *See* S.C. Code Ann. § 39-5-140(c). However, § 39-5-50 solely relates to ***actions brought by the Attorney General of South Carolina*** for an injunction against violation of the UTPA. *See* S.C. Code Ann. § 39-5-50(a). Thus, that provision has no applicability here.

It is axiomatic that if a party "files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the [lower] court is ***required*** under Rule 56, to grant summary judgment" if the facts presented by the defendant support that it is entitled to judgment as a matter of law. *Higgins v. Med. Univ. of S.C.*, 326 S.C. 592, 598-99, 486 S.E.2d 269, 272 (Ct. App. 1997) (emphasis added) (quoting *Humana Hospital-Bayside v. Lightle*, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991)). "When a non-movant fails to cite materials in the record to support her assertion that an issue of fact is genuinely disputed, the court is under no obligation to 'scour the record in search of evidence to defeat a motion for summary judgment.'" *Hickerson v. Yamaha Motor Corp.*, No. 8:13-CV-02311-JMC, 2016 WL 7324684, at *12 (D.S.C. Dec. 16, 2016) (quoting *Ritchie v. Glidden Co.*, 242 F.3d 713, 723 (7th Cir. 2001)).

Here, the lower court properly granted summary judgment because the evidentiary record conclusively established that there were no genuine issues of material fact for trial. This Court should affirm.

II. The CFPB Consent Order did not strip South Carolina courts of jurisdiction.

Appellants next argue that the lower court did not have jurisdiction or authority to proceed with hearing SLS's motion for summary judgment in light of the Consent Order. Appellants argue that because the Consent Order provided that SLS must undertake certain corrective actions, SLS was required to do so prior to pursuing disposition of Appellants' claims on the merits.

A. Appellants lack the power to seek enforcement of the Consent Order.

It is well-established that nonparties to an administrative consent order do not have a right of action to seek enforcement of its terms. The Fifth Circuit addressed this very issue last year. *See Willis v. Portfolio Recovery Assocs., L.L.C.*, 803 F. App'x 761, 764 (5th Cir. 2020).

As the court explained, "private persons may not bring actions to enforce violations of consent decrees to which they are not a party." *Id.* Only Congress may craft a private right of action, and this limitation applies to regulatory rulings like CFPB consent orders. *See id.* Where the consent order at issue specifies that the CFPB is the enforcer, it does not invoke a private right of action. *See id.*

The Third Circuit rejected a similar argument in *Conway v. U.S. Bank Nat'l Ass'n as trustee for structured asset securities corporation, structured asset investment loan trust, mortgage pass-through certificates, series 2005-2*, 804 F. App'x 120, 122-23 (3d Cir. 2020). The plaintiff in *Conway* argued that the defendant violated a consent judgment with the CFPB and that it related to his state law claims. The court, however, rejected this argument and explained that the plaintiff "has neither argued nor shown that the consent judgment created rights that could be enforced by third parties." *Id.* This rule applies even where nonparties are intended beneficiaries of the consent order. *See id.*; *see also Benjamin v. Fremont Inv. & Loan*, No. 17-11727-PBS, 2018 WL 4017595, at *10 (D. Mass. Aug. 22, 2018) (explaining that a plaintiff who was not a party to a consent judgment "has no standing to enforce ***any obligation*** imposed on the parties to the consent judgment").

By asserting that SLS was required to undertake certain affirmative acts pursuant to the Consent Order before the court could proceed with considering its motion for summary judgment, Appellants indirectly sought enforcement of the Consent Order's terms. The lower court correctly determined that Appellants lacked standing to assert any such claims.

B. South Carolina courts continue to have jurisdiction over this case.

Appellants also asserted that the jurisdictional provision under which the CFPB issued the order, 12 U.S.C. § 5563(d)(2), deprived South Carolina courts of jurisdiction.[11] This statute, however, details the enforcement powers of the CFPB and its hearing and adjudication process. *See id.* The subsection cited by Appellants details special rules for the enforcement of CFPB orders ***by the CFPB*** and notes that except as otherwise provided "no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order or to review, modify, suspend, terminate, or set aside any such notice or order" issued pursuant to this statute. *Id.*

The lower court correctly found that this statute had no impact on its ability to hear and rule on SLS's motion or the merits of Appellants' claims. As the lower court explained, § 5563(d)(2) is in the CFPB's enabling legislation and concerns the CFPB's own enforcement powers. *See generally* 12 U.S.C. § 5563. Subsection (d) simply gives the ***CFPB*** the power to seek enforcement of its orders through the court system but provides that otherwise no court has jurisdiction to affect the issuance or enforcement of the Consent Order or alter its terms. *See id.*

Appellants nevertheless contend that the CFPB order and enabling statute stripped South Carolina courts of subject matter jurisdiction. Subject matter jurisdiction concerns the "court's constitutional or statutory power to adjudicate a case." *Johnson v. S.C. Dep't of Prob., Parole,*

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[11] Appellants also describe this argument as raising "pre-emption" of South Carolina's regulatory or adjudicatory powers. Preemption is not discussed in any detail in Appellants' brief. Moreover, Appellants did not argue preemption below aside from a passing reference in their motion to reconsider to the terms of the Note being governed by the Home Ownership Lending Act, which they assert preempts South Carolina law defining "default." (Mot. to Reconsider at 5; R. 358.) Therefore, to the extent Appellants purport to raise "preemption" this argument is not preserved. *See Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 645 (2011) (holding that the issue preservation principles applied to Appellant's preemption argument and finding the issue unpreserved).

& Pardon Servs., 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007). In other words, it involves the court's "power to hear and determine cases of the general class to which the proceedings in question belong.'" *Id.* (quoting *State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005)). Here, Appellants have not argued that the lower court lacked the ***power*** to hear this general class of case. This case began with Wilmington Trust asserting the foreclosure claim against Appellants in 2016. Appellants asserted counterclaims against Wilmington Trust and then willingly opted to assert "third-party" claims in this forum against SLS for issues related to SLS's servicing of their loan. Appellants have not contended that the court of common pleas lacked the ability to hear the types of claims they asserted against SLS. Therefore, their "subject matter" jurisdiction argument is without merit.

Appellants only complained of the court's "jurisdiction" to proceed on the eve of the summary judgment hearing after they failed to come forward with any specific evidence supporting that SLS acted improperly. Appellants' position is more appropriately characterized as an assertion that SLS failed to comply with administrative conditions precedent (which, as detailed above, they have no authority to enforce) rather than a "subject matter jurisdiction" argument. The lower court properly rejected Appellants' argument that § 5563(d)(2) deprived it of subject matter jurisdiction. This Court should affirm.

III. Appellants' argument that SLS failed to comply with RESPA during its 2014 loss mitigation review is not preserved and is without merit.

As detailed above, Appellants' claims each related to SLS's purported violation of RESPA's loss mitigation procedures. Appellants' pleading and arguments to the lower court largely centered on SLS's actions in connection with the 2016 loss mitigation review. For the first time on appeal, however, Appellants argue that certain filings and communications by SLS during Temisan Etikerente's bankruptcy support that SLS violated RESPA in connection with its

2014 loss mitigation review.[12] Specifically, Appellants contend that SLS did not actually offer a loan modification in 2014 because there was no record of any modification in the bankruptcy court records. Appellants also cite to emails from SLS's bankruptcy which they contend circumstantially support that Etikerentse and/or his counsel did not receive the 2014 loan modification documents. ***None*** of the materials relied on by Appellants to support this argument were submitted to the lower court. Therefore, the materials and references thereto were stricken via the Court's order partially granting SLS's motion to strike.

This argument was not presented to the lower court as a ground for denying SLS's motion for summary judgment. Therefore, the Court should refuse to consider this argument in light of Appellants' failure to previously raise it and properly preserve it for review. "It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (citing *Creech v. South Carolina Wildlife and Marine Res. Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997)). Where a party fails to raise the issue in its briefing and argument to the trial court, that party is precluded from raising that issue on appeal. *Easterling v. Burger King Corp.*, 416 S.C. 437, 452-53, 786 S.E.2d 443, 451-452 (Ct. App. 2016). As the Supreme Court explained in *Herron v. Century BMW*, the issue preservation rules are "designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." 395 S.C. 461, 465, 719 S.E.2d 640, 642

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[12] SLS filed a motion to strike both this unpreserved argument, found on pages 17 to 20 of Appellants' brief, and improperly designated materials that were not presented to the lower court. The Court granted that motion in part via Order dated March 24, 2021. The Court provided that it would consider preservation of the challenged argument along with the merits. However, the Court granted SLS's motion to strike the improperly designated documents and provided that they shall not be referenced in Appellants' brief. The effect of the Order was to largely excise this argument since it was almost entirely based on the stricken documents.

(2011). "The requirement also . . . prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Because the lower court never had an opportunity to consider or rule on the argument raised on pages 17 through 20 of Appellants' brief, it should not be considered by this Court. Moreover, even if the Court could consider this argument, the only evidence presented to the lower court established that SLS conducted a loss mitigation review of Appellants' loan in 2014 and offered a standard loan modification. SLS submitted sworn affidavit testimony and supporting exhibits establishing this fact. (McCloskey Aff. at ¶ 10 & Ex. 2 – Approval Decision Letter dated 12/12/2014; R. 236, 241-47.) Appellants did not submit an affidavit, deposition testimony, or any other supporting evidence rebutting this evidence to the lower court. Therefore, this argument is without merit.

IV. Appellants' Rule 14 argument is based on a fundamentally flawed understanding of the Rule and the proper basis for "third-party" claims.

SLS's Rule 14 argument represented an additional, alternative ground for granting summary judgment. As detailed above, the primary basis for the lower court's ruling was the lack of any evidence presented by Appellant contradicting SLS's arguments. However, as the lower court's order explained, summary judgment was also appropriate because Appellants' claims were improperly pled as "third-party" claims against SLS.

Pursuant to Rule 14(a), "a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action ***who is or may be liable to him for all or part of the plaintiff's claim against him.***" Rule 14(a), SCRCP (emphasis added). Thus, "[u]nder Rule 14, the third-party plaintiff must have a substantive claim against

the third-party defendant founded upon ***derivative*** liability," meaning the "outcome of the princi[pal] claim must impact the third-party defendant's liability." *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (1994) (emphasis added). In other words, would the claim of the third-party plaintiff "impose liability upon [the third-party defendant] for all or part of [the plaintiff's] claim." *Id.*

In interpreting the analogous federal rule, the District of South Carolina has explained that a "third party" claim is "viable only where a proposed third party plaintiff says, in effect, 'If I am liable to plaintiff, then my liability is only technical or secondary or partial, and the third party defendant is derivatively liable and must reimburse me for all or part . . . of anything I must pay plaintiff.'" *Michelin N. Am., Inc. v. Klinger Ents., Inc.*, No. CV 6:18-518-HMH, 2018 WL 9988509, at *3 (D.S.C. Aug. 13, 2018) (quoting *Watergate Landmark Condo. Unit Owners' Ass'n. v. Wiss, Janey, Elstner Assocs., Inc.*, 117 F.R.D. 576, 578 (E.D. Va. 1987)). Derivative liability "usually arises in cases involving indemnification, joint tortfeasors, or contribution" and typically such claims "involve one joint tortfeasor impleading another, an indemnitee impleading an indemnitor, or a secondarily liable party impleading one who is primarily liable." *Id.* (quoting *AIG Eur. Ltd. v. Gen. Sys., Inc.*, No. RDB-13-0216, 2013 WL 6654382, at *2 (D. Md. Dec. 16, 2013).

SLS, therefore, is not a proper third-party defendant under Rule 14(a). The genesis of this case was the foreclosure action filed by Wilmington Trust against Appellants for their failure to satisfy their obligations under the Mortgage Loan. SLS is not, and cannot possibly be, liable in whole or in part, for Wilmington's ***foreclosure*** claim against Appellants. The District of South Carolina addressed this exact issue in *Deutsche Bank National Trust Co. v. Stevenson*, No. 2:12-1854-CWH, 2013 WL 12241630, at *3 (D.S.C. Jan. 30, 2013) under the nearly identical

federal Rule 14(a). In *Stevenson*, the defendant asserted third-party claims against its loan servicer for violation of the UTPA and breach of the duty of good faith premised on the servicer's failure to meaningfully engage in loss mitigation. *See id.* The District Court agreed with the servicer that "[t]he outcome of [plaintiff's] foreclosure claim would not impact the liability of [the servicer]." *Id.* Thus, the third-party complaint was not valid as it "seeks no indemnification, and there is no relationship to the plaintiff's claim against the third-party plaintiff." *Id.* The same is true here—Wilmington Trust's foreclosure claim would not impact SLS's liability to Appellants' for their claims based on SLS's servicing off their loan.

Appellants' argument misconstrues the purpose of Rule 14 and SLS's position. Appellants have consistently mischaracterized SLS's argument as asserting that SLS cannot be sued ***at all*** for the alleged improprieties in servicing their loan.[13] SLS has never made that assertion. Rather, SLS's argument has consistently been that the claims were not asserted through the correct procedural vehicle as they were not third-party claims. Appellants should have either joined SLS as a counterclaim defendant under Rule 13(h) ***or*** brought a separate suit against SLS. *See U.S. Bank Nat'l Ass'n v. Kahn Prop. Owner, LLC*, 64 Misc. 3d 1236(A), 118 N.Y.S.3d 369 (N.Y. Sup. Ct. 2019). A number of courts have recognized the interplay between Rule 13(h) and Rule 14. *See, e.g., Bank of New York Mellon Tr. Co. v. Prefco Nineteen Ltd.*

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[13] Appellants have implied on several occasions that SLS is attempting to escape liability in this matter through obfuscation about its role in the case. SLS has never disputed that it is an agent of Wilmington Trust (the mortgage trust that holds Appellants' loan), and services Appellants' loan on its behalf. In that capacity, SLS retained counsel to file a foreclosure suit on behalf of the trust due to Appellants' default. Wilmington Trust was the named plaintiff since it holds the note and mortgage. Confusion arose when Appellants asserted both counterclaims against Wilmington Trust and "third-party" claims against SLS. SLS retained additional counsel to defend those claims and there was a miscommunication between counsel about who would handle which portion of the case. This misunderstanding was not an effort to avoid liability. SLS has never asserted that it cannot be sued as Appellants seem to suggest—SLS simply argued that Appellants did not sue SLS the correct way.

P'ship, No. 4:09-CV-0175-HLM, 2010 WL 11603087, at *4-5 (N.D. Ga. Feb. 18, 2010) (noting that although Rule 14 did not apply, the defendant could join another party as a counterclaim defendant under Rule 13(h) "as long as either Rule 19 or Rule 20 are satisfied"); *Konica Minolta Business Solutions, U.S.A., Inc. v. Allied Office Products, Inc.,* No. 2:06-cv-71, 2006 WL 3827461, *5 (S.D. Ohio Dec. 27, 2006) ("When defendants wish to assert a counterclaim against both the original plaintiff and a nonparty, the correct procedure is not a counterclaim and third-party complaint under Rule 14(a), but rather a counterclaim and a Rule 13(h) motion to join additional parties to a counterclaim.").[14]

Therefore, the lower court correctly determined that SLS was entitled to summary judgment on the alternative ground that Appellants' claims were not procedurally proper under Rule 14. This represents an additional sustaining ground for affirming the lower court. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). But even if the Court finds that the claims were appropriately asserted under Rule 14, summary judgment was appropriate for the reasons detailed above in Sections I-III.

CONCLUSION

For the reasons detailed above, SLS respectfully requests that this Court affirm the lower court's grant of summary judgment in its favor.

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[14] The court may rectify improper joinder under Rule 14 where the pleading party timely requests that the court amend their pleading to join the improperly identified "third party defendant" as a counterclaim defendant. *See Kraus USA, Inc. v. Magarik*, No. 17 CIV. 6541 (ER), 2018 WL 4682016, at *11 (S.D.N.Y. Sept. 28, 2018) (finding that the defendant's request for leave to file a proposed third-party complaint incorrectly sought to assert claims under Rule 14(a), but permitting the defendant to replead its counterclaim to join a party under Rule 13(h)). In this case, SLS made Appellants aware of the procedural defects when it filed its initial motion for summary judgment filed on August 28, 2018, yet Appellants inexplicably never requested leave to remedy the procedural issue.

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July 28, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
Jul 28 2021
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Bentley D. Price, Circuit Court Judge

Appellate Case No. 2020-001204
Case No. 2018-CP-10-02762

Wilmington Trust National Association as Successor Trustee to Citibank N.A. as Trustee of Structured Asset Mortgage Investments II Inc., Bear Stearns ALT-A Trust II Mortgage Pass-Through Certificates Series 2007-1, ... Plaintiff,

v.

Temisan Etikerentse a/k/a Temisan L. Etikerentse, Ijeoma Etikerentse a/k/a Ijeoma Etkis, Suntrust Mortgage Inc., Capital Bank Corporation, Bank of America NA, Keybank National Association, and Olde Park Homeowners' Association Inc., ... Defendants.

AND

Temisan Etikerentse a/k/a Temisan L. Etikerentse, Ijeoma Etikerentse a/k/a Ijeoma Etiks ..... Appellants,

v.

Specialized Loan Servicing LLC a/k/a SLS, ... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

Signature on Following Page

Respectfully submitted,

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