

**IN THE SUPREME COURT OF MISSISSIPPI
No. 2016-CA-00879**

TONY L. PAGADOR,

APPELLANT

V.

**TRUSTMARK NATIONAL BANK and
JANE AND JOHN DOES 1-100**

APPELLEE

**On Appeal from the Circuit Court of the First
Judicial District, Harrison County, Mississippi
Civil Action No: A2401-14-162; 24CI1:14-cv-00162**

BRIEF OF APPELLANT TONY L. PAGADOR

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

Parties

1. Tony L. Pagador; Harrison County, Mississippi; Plaintiff and Appellant.
2. Trustmark National Bank; Harrison County, Mississippi; Defendant and Appellee.

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Trial Judge

5. Honorable Roger T. Clark, Harrison County Circuit Court, P.O. Box 1461, Gulfport, MS 39502.

So Certified, this the 10th day of October, 2016.

/s/Timothy Brown
Timothy Brown, MSB #104598

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I. STATEMENT OF ISSUES

The general issue presented is whether the Circuit Court erred in dismissing, with prejudice, all of Plaintiff's, Tony Pagador's (hereinafter "Mr. Pagador's"), claims against the Defendant, Trustmark National Bank (hereinafter "Trustmark"). The specific issues presented are:

1. Whether the trial court erred in holding that Mr. Pagador defaulted on his loan prior to foreclosure and thus Trustmark had no duty to refrain from foreclosure or to otherwise extend his forbearance.
2. Whether the trial court erred in holding that Trustmark did not have a duty to comply with VA regulations and guidelines prior to foreclosing on Mr. Pagador's home.
3. Whether the trial court erred in holding that Trustmark did not have to provide Mr. Pagador with written notice of acceleration pursuant to Paragraph 22 of the Deed of Trust or pursuant to the Addendum to the Deed of Trust prior to foreclosing on his home.
4. Whether the trial court erred in holding that Mr. Pagador did not rely on any of Trustmark's representations to his detriment and therefore could not prevail on his misrepresentation, fraud, and/or promissory estoppel claims.
5. Whether the trial court erred in holding that Mr. Pagador's negligence, wrongful foreclosure, negligent infliction of emotional distress, unjust enrichment, good faith and fair dealing, and breach of fiduciary duty claims were barred.
6. Whether the trial court erred in holding that Mr. Pagador waived all of his claims by failing to contemporaneously object to the foreclosure.
7. Whether the trial court erred in holding that all of Mr. Pagador's claims were barred by the statute of limitations.

II. STATEMENT OF THE CASE

This case is about Trustmark's improper and wrongful foreclosure of Mr. Pagador's home and property located at 13429 Libby Lane, Gulfport, Mississippi.

A. Course of Proceedings and Disposition of Circuit Court

On June 23, 2014, following the foreclosure sale of his home, Mr. Pagador, filed suit in the Harrison County Circuit Court. (R. 12-59). In his Complaint, Mr. Pagador asserted Mississippi state law claims of breach of contract, breach of implied covenant of good faith and fair dealing, misrepresentation and deceit, promissory estoppel, fraud, fraudulent misrepresentation and/or omissions, fraudulent inducement, negligence/gross negligence, wrongful foreclosure, negligent infliction of emotional distress, and unjust enrichment against Trustmark as a result of the improper and wrongful foreclosure of his property. (R. 17-26).

On January 26, 2015, Trustmark moved for summary judgment on all of Mr. Pagador's claims against them. Trustmark argued that: 1) as Mr. Pagador was allegedly in default at the time of the foreclosure sale he could not bring a claim for breach of contract (R. 150-151); 2), his misrepresentation, fraud, and promissory estoppel claims failed as a matter of law because he did not rely on any of Trustmark's representations to his detriment (R. 153); 3) his tort based claims (negligence, gross negligence, wrongful foreclosure, negligent infliction of emotional distress, and good faith and fair duty) were derivative of his breach of contract claims and thus were deficient as a matter of law (R. 154-156); 4), Mr. Pagador waived his wrongful foreclosure claim by failing to object to the foreclosure sale (R. 155-156); and, 5) his unjust enrichment claims were deficient as a matter of law because the parties' rights and obligations arose out of the Deed of Trust and Note (R. 156-157). While Mr. Pagador opposed Trustmark's motion (R. 203, 324), the lower court, on May 18, 2016, granted Trustmark's motion, and dismissed all of Mr. Pagador's claims with prejudice. (R. 836).

Mr. Pagador subsequently files this appeal on the grounds that there is a genuine issue of material fact as to whether or not Mr. Pagador was in default at the time Trustmark foreclosed on his home and as to whether or not Trustmark breached the contract between the parties by failing to follow VA regulations and guidelines as well as the conditions precedent to foreclosure specified in the Deed of Trust prior to foreclosing on Mr. Pagador's home.

B. Statement of Facts

In 2006, Mr. Pagador purchased his home at 13429 Libby Lane in Gulfport, Mississippi. (R. 13, 30, 388). To buy the home, Mr. Pagador entered into a Deed of Trust with T. Graham Mortgage, Inc., which was secured with a promissory note and also contained a Department of Veterans Affairs Addendum. (R. 13, 31). T. Graham Mortgage, Inc. later assigned the subject Deed of Trust to Trustmark. (R. 14, 38). Mr. Pagador made timely payments on his loan up until June of 2010, when he became aware that the property contained a significant amount of Chinese Drywall, which posed serious health risks to his family. (R. 14, 389). At that time, he moved his family out of the property and asked Trustmark for forbearance from making monthly loan payments while remediation was being performed on the house. (R. 14, 389). In response, Trustmark offered Mr. Pagador a special Veterans Affairs ("VA") forbearance period lasting until December 2010. (R. 14-15, 51, 389). Mr. Pagador was then, and remains today, an active duty member of the United States Coast Guard. (R. 15, 390). Under the terms of the special VA forbearance, no payments had to be made during the forbearance period, no negative credit rating would be assessed, and a review could take place to extend the forbearance. (R. 14-15, 51, 389). Trustmark also told Mr. Pagador that foreclosure would not occur while the loan was in the special VA forbearance. (R. 389).

By the time the original forbearance period expired, the Chinese Drywall remediation was still not complete. (R. 15, 389). Mr. Pagador requested an extension of the forbearance

period given the circumstances, and also notified Trustmark that contrary to their prior representations, a negative credit report existed for his failure to make payments during forbearance. (R. 15, 389). Eventually, Trustmark confirmed that the forbearance period was extended through the end of August 2011. (R. 15, 389). When it became clear that the Chinese Drywall remediation would still not be completed by the end of 2011, Mr. Pagador requested another extension of the forbearance period, and also sought to arrange a short sale of the property once the remediation was complete. (R. 16, 390). The forbearance period was extended up until on or about March 7, 2012, but Trustmark was simultaneously moving forward with foreclosure. (R. 15, 390, 433). At this time, Mr. Pagador also had a buyer lined up for a short sale of the property, and again received VA approval for a slight extension of the forbearance period in order to finalize the short sale. (R. 390). Nevertheless, Trustmark purportedly purchased Mr. Pagador's property at a foreclosure sale on March 22, 2012. (R. 390).

In violation of the Deed of Trust and the Department of Veterans Affairs Guidelines for Lenders, Mr. Pagador's property was sold to Trustmark on March 22, 2012. (R. 16, 390). Trustmark foreclosed on Mr. Pagador's home despite the fact that Trustmark received permission from the VA to extend Mr. Pagador's special forbearance and to postpone the foreclosure sale.

III. SUMMARY OF THE ARGUMENT

The lower court erred in granting Trustmark's motion for summary judgment, incorrectly concluding that as Mr. Pagador was in default at the time Trustmark foreclosed on his home and that his wrongful foreclosure and other contract, tort and property claims failed as a matter of law. The record in this case clearly shows that Mr. Pagador was in a special VA forbearance from July 1, 2010 through at least March 7, 2012, and that the VA had specifically requested that Trustmark extend Mr. Pagador's forbearance to allow the remediation of his home to be

completed. Yet, despite the VA's request, Trustmark foreclosed on Mr. Pagador's home. As such, a question of material fact exists as to whether or not Mr. Pagador was actually in default at the time Trustmark foreclosed on his home, making the trial court's granting of summary judgment based on his alleged default improper.

The trial court erred in holding that Trustmark did not have a duty to comply with VA guidelines and regulations prior to foreclosing on Mr. Pagador's home. The VA regulations and guidelines were incorporated into the contract (Deed of Trust) between the parties. Therefore, Trustmark had a contractual duty to comply with these regulations and guidelines and Trustmark breached the contract between the parties by failing to adhere to these regulations and guidelines prior to foreclosing on Mr. Pagador's home. Furthermore, even assuming Mr. Pagador was in default at the time of the foreclosure sale, which Mr. Pagador denies, Trustmark breached the contract between the parties by failing to provide Mr. Pagador with a proper notice of acceleration following his alleged default, as was clearly required by Paragraph 22 of the Deed of Trust. Thus, the trial court's granting of summary judgment based on Trustmark's failure to adhere to VA regulations and guidelines and their failure to comply with Paragraph 22 of the Deed of Trust was improper.

As it pertains to Mr. Pagador's claims against Trustmark for misrepresentation, fraud, and promissory estoppel, the trial court erred in holding that Mr. Pagador's claims failed because he did not rely on Trustmark's representations to his detriment. To the contrary, Mr. Pagador relied on Trustmark's representations that he was in an ongoing special VA forbearance period and that foreclosure would not occur during forbearance, that his credit rating would not be negatively impacted, and that he could arrange for a short sale of his property once the Chinese Drywall remediation was complete. Despite these assurances, Trustmark put Mr. Pagador's loan in default, accelerated his debt, and ultimately foreclosed on his property. As such, the trial court

incorrectly concluded that Mr. Pagador did not rely on any of Trustmark's representations to his detriment.

The facts and law also support Mr. Pagador's negligence, fiduciary duty, wrongful foreclosure, and breach of the implied duty of good faith and fair dealing claims. Trustmark clearly had a duty to act with care in carrying out the foreclosure proceedings of his home and, as noted above, Trustmark breached this duty by falsely representing that Mr. Pagador's credit would not be impaired during the forbearance period, by purportedly putting Mr. Pagador into default and accelerating the loan without notice, and by foreclosing on Mr. Pagador's property despite the fact that the VA had approved a further extension of the forbearance period.

Trustmark also had a contractual duty pursuant to the Deed of Trust to satisfy the conditions precedent to foreclosure and to conduct the foreclosure sale in compliance with applicable law. Trustmark breached these duties by misleading Mr. Pagador concerning the status of his special VA forbearance, by failing to adhere to VA regulations and guidelines prior to foreclosing on his home, and by failing to send Mr. Pagador an acceleration letter as was required by paragraph 22 of the Deed of Trust. As a result of the above breaches by Trustmark, Mr. Pagador lost his home, lost equity in his property, suffered harm to his credit ratings, and suffered emotional distress.

The presence of a legal contract between the parties also did not forestall Mr. Pagador's unjust enrichment claim against Trustmark. In Mississippi, a claim for unjust enrichment depends upon a showing of some legally cognizable wrong by which a defendant has been unjustly enriched at the expense of the plaintiff. Here, Trustmark committed a legally cognizable wrong and was unjustly enriched as a result of the wrongful foreclosure of Mr. Pagador's home. As such, the trial court erred in dismissing Mr. Pagador's unjust enrichment claim.

Finally, the trial court erred in holding that Mr. Pagador waived all of his claims by failing to contemporaneously object to the foreclosure and that his claims were barred by the applicable statute of limitations. In the present case, Mr. Pagador brought his wrongful foreclosure claim, as well as his other contract, property, and tort claims, well within the applicable statute of limitations, Miss. Code Ann. § 15-1-49, which specifically provides that such claims shall be commenced within three years after the cause(s) of action accrue. Here, all of Mr. Pagador's claims accrued on the date his home was sold at foreclosure, March 22, 2012. Mr. Pagador filed his Complaint for damages on June 23, 2014, well within the applicable statute of limitations period. As such, Mr. Pagador's claims are not time barred. Moreover, there is no support in Mississippi jurisprudence for the notion that a homeowner relinquishes his right to state a tort claim for wrongful foreclosure, or any other contract, tort, or property claim, by failing to contemporaneously object to the foreclosure. As such, this Court should reverse the trial court's order dismissing Mr. Pagador's properly brought contract, tort, and property claims based on the above waiver theory.

IV. ARGUMENT

A. Standard of Review

The Mississippi Supreme Court employs a de novo standard of review in analyzing a lower court's grant of summary judgment. *Baptiste v. Jitney Jungle Stores of America, Inc.*, 651 So.2d 1063, 1065 (Miss. 1995) (citing *Short v. Columbus Rubber & Gasket Co.*, 535 So.2d 61, 63 (Miss. 1988)).

B. There is an issue of material fact as to whether or not Mr. Pagador defaulted on his loan because he was either in forbearance or in communication with Trustmark about extending his special VA forbearance during the entire period prior to foreclosure.

The trial court erred in holding that Mr. Pagador defaulted on his loan prior to foreclosure and thus Trustmark had no duty to refrain from foreclosure or to otherwise extend his forbearance. Here, there is a question of fact as to whether Mr. Pagador actually defaulted on his loan prior to Trustmark foreclosing on his home. While Trustmark made much of the fact in the trial court that Mr. Pagador did not make mortgage payments for approximately two years, they glossed over the fact that Mr. Pagador only stopped making payments after he was granted a special VA forbearance due to the presence of Chinese drywall in his home. (R. 14). From the time Mr. Pagador's forbearance first took effect in June 2010, all the way up until the March 22, 2012 foreclosure sale, Mr. Pagador was always either in an active forbearance period or in communication with Trustmark about extending the forbearance. Indeed, numerous email communications from Trustmark during this period indicate that Mr. Pagador was actually in forbearance up until at least March 7, 2012. (R. 443). Mr. Pagador was still working to further extend the forbearance period at that point, and the VA granted permission for another extension on March 21, 2012. (R. 444). Yet, Trustmark carried out a foreclosure sale despite the VA's authorization to extend the forbearance. Even assuming Trustmark did in fact provide Mr. Pagador a document informing him when and how he purportedly defaulted on his loan and that his debt was being accelerated, Trustmark failed to produce any such document in the trial court. Thus, at a minimum, there is a question of material fact as to whether or not Mr. Pagador was ever actually in default under the terms of the Deed of Trust when his special VA forbearance period was repeatedly extended all the way up to the March 22, 2012 foreclosure sale. As such, this Court should reverse the lower court's ruling as it pertains to Mr. Pagador's alleged default.

C. Trustmark breached the contract between the parties by failing to comply with VA regulations and guidelines and by failing to provide Mr. Pagador with a proper notice of acceleration letter prior to foreclosing on his home.

1. Trustmark had a duty to comply with VA regulations and guidelines prior to foreclosing on Mr. Pagador's home.

The trial court erred in holding that Trustmark did not have a duty to extend Mr. Pagador's special forbearance period. As evidenced by the plain language of the Deed of Trust, Trustmark had a duty to comply with VA regulations and guidelines prior to foreclosing on Mr. Pagador's home. The loan agreement (Deed of Trust) and the VA Servicing Guide required that Trustmark comply with the VA's request to extend the time period for foreclosure. Therefore, a question of material fact exists as to whether or not Trustmark complied with these regulations and guidelines prior to foreclosing on Mr. Pagador's home, making summary judgment improper as to Mr. Pagador's breach of contract claims.

While Mississippi courts have not yet addressed the issue of whether or not VA regulations and guidelines can be incorporated into a mortgage, the United States District Court for the Southern District of West Virginia in *Ranson v. Bank of America, N.A.*, 2013 WL 1077093 *3-5 (S.D.W.Va. Mar. 14, 2013) recently allowed a borrower's breach of contract claim to survive a motion to dismiss wherein the borrower's breach of contract claims were based on the lender's failure to follow VA regulations regarding loss mitigation procedures for a mortgage loan in default. (R. 510-518). Here, the Rider to Mr. Pagador's Deed of Trust contained the exact same language incorporating the VA regulations as did the Rider in *Ranson*. Specifically, the Rider to Mr. Pagador's loan provided that:

If the indebtedness secured hereby be guaranteed or insured under Title 38, United States Code, such Title and Regulations issued thereunder and in effect on the date hereof shall govern the rights, duties and liabilities of Mortgagor(s) and Mortgagee. Any provisions of the Security Instrument or other instruments executed in connection with said indebtedness which are inconsistent with said Title or Regulations, including, but not limited to the provision for payment of any sum in connection with prepayment of the secured indebtedness and the provision that the Mortgagee may accelerate payment of the secured indebtedness pursuant to Covenant 18 of the Security Instrument, are hereby amended or

negated to the extent necessary to conform such instruments to said Title or Regulations.

(R. 118).

As was the case in *Ranson*, this language is included in the contract between the parties because Mr. Pagador's contract was originated pursuant to the Department of Veterans Affairs Home Loan Guaranty Program, which was established "to enable veterans to obtain loans and to obtain them with the least risk of loss upon foreclosure, to both the veteran and the Veterans' Administration." *United States v. Shimer*, 367 U.S. 374, 383 (1961). Accordingly, the VA has promulgated regulations to limit foreclosures on VA guaranteed loans. Specifically, the VA requires that when a borrower falls behind on a loan the servicer is required to reach out to the borrower, including through a face to face meeting and a letter outlining loss mitigation options, and discuss and evaluate loss mitigation options. 38 C.F.R. § 36.4350(f), (g), (h). The VA also provides incentives for servicers to engage in considering borrowers for loss mitigation options, including a repayment plan, loan modification, special forbearance¹, compromise sale, or deed in lieu of foreclosure. 38 C.F.R. § 36.4319. Moreover, the VA permits any modification of a loan, if "the modification is in the best interests of the veteran and the Government." 38 C.F.R. § 36.4315.

The VA has further clarified the regulations in a Servicer Guide for VA guaranteed loans. *See* U.S. Dept. of Veterans Affairs, VA Servicer Guide 6 (July 2009). (R. 519–835). The Servicer Guide explains: "The VA Home Loan Program is a Federal benefit program. Specific benefits to the veteran borrower include . . . [a]ssistance to veteran borrowers in default due to temporary financial difficulty." (R. 536-537). The loan servicer has responsibility for loss mitigation activities, and is required to "[r]espond timely to veteran and VA requests" and

¹ The VA servicing guidelines further provide that "special forbearance plans have no maximum duration....". (R. 608).

“[a]ggressively pursue collection and loss mitigation efforts with a focus on home retention.” (R. 538). For this reason, servicers are required to send a loss mitigation letter to the borrower upon default and work with the borrower to establish a repayment plan or other loss mitigation option to bring the loan current. (R. 591-592, 599, 604-606). A foreclosure may only be considered “[w]hen a delinquent loan cannot be cured through a loss mitigation option.” (R. 626). The servicing guidelines require the lender to pursue loss mitigation options even after initiating the foreclosure process, and, if a mitigation option looks promising, to postpone the foreclosure. (R. 605). The servicing guidelines also state that failure to consider or complete loss mitigation options qualifies as inadequate servicing. (R. 631).

As stated above, these requirements are incorporated into the contract between the parties, as set forth in Mr. Pagador’s Complaint. (R. 18). Mr. Pagador contends that Trustmark breached the contract between the parties by failing to adhere to the VA servicing guidelines. Specifically, Trustmark breached the contractual requirements by failing to extend Mr. Pagador’s special forbearance, although the VA specifically requested that they do so. (R. 444). Trustmark also breached the contractual requirements by neither evaluating Mr. Pagador for alternative loss mitigation options, nor engaging in a timely evaluation of his loan, and instead placing him in foreclosure.² Finally, Trustmark breached the VA requirements by refusing to allow Mr. Pagador to apply for a compromise sale or deed in lieu of foreclosure because the home was already in foreclosure, despite the fact that the guidelines require a servicer to continue evaluating loss mitigation after foreclosure has started. (R. 336, 605, 631).

Moreover, a material question of fact exists regarding the extent of the VA’s involvement in and/or control over a lender’s lawful authority to approve/extend forbearance periods, and

² Trustmark failed to present any extenuating circumstances that would have prevented them from extending Mr. Pagador’s special forbearance.

over the lender's ability to foreclose on a borrower's property. For example, on January 31, 2012, Trustmark's employee and Loss Mitigation Supervisor, Calvin Murrell, expressly represented in writing that Trustmark was waiting for the VA's "permission" to extend Plaintiff's forbearance period: "Yes, I received your email. We are **waiting on written permission** from Mr. Hodges – VA right now on what the extended time will be." (R. 441). The few documents in Mr. Pagador's possession raise a question of fact regarding the lender's authority to foreclose under a VA-guaranteed mortgage absent VA approval—Trustmark failed to produce any documentation with its Motion for Summary Judgment to refute Mr. Pagador's assertion that they wrongfully foreclosed despite the VA's authorization to extend Mr. Pagador's special VA forbearance period. Mr. Pagador should be given the opportunity to receive the documents he requested from Trustmark directly pertaining to this issue—i.e. the policies and procedures governing Trustmark's servicing of VA-guaranteed mortgages, particularly with respect to forbearance periods and foreclosure.

2. Trustmark had a duty to comply with Paragraph 22 of the Deed of Trust prior to foreclosing on Mr. Pagador's home.

Assuming *arguendo* that Mr. Pagador somehow defaulted on his loan while it was in forbearance, it makes little sense that Trustmark was relieved of their contractual obligation to provide Mr. Pagador a proper notice of acceleration letter following his default because he allegedly defaulted. The clear language of the Deed of Trust at Paragraph 22 refutes this argument: "Lender shall give notice to Borrower prior to acceleration **following Borrower's breach** of any covenant or agreement in this Security Instrument." (R. 42). Thus, the Deed of Trust explicitly provides that the lender's obligation to give notice of acceleration only arises following the borrower's alleged breach, i.e. default. While Mississippi state courts have not addressed this issue, the Supreme Court of Virginia recently held:

A trustee's power to foreclose is conferred by the deed of trust. *Fairfax County Redevelopment & Hous. Auth. v. Riekse*, 281 Va. 441, 445–46, 707 S.E.2d 826, 829 (2011). That power does not accrue until its conditions precedent have been fulfilled. *See Bayview*, 275 Va. at 121, 654 S.E.2d at 901. **The fact that a borrower is in arrears does not allow the trustee to circumvent the conditions precedent.** However, if the general rule of contract enforcement enunciated in *Horton* and *Countryside Orthopaedics* applied to deeds of trust, a trustee could not be held accountable for exercising his latent power to foreclose before it actually had accrued, for two reasons. First, the borrower is the only party with standing to bring an action, whether for damages after the fact of the improper sale or to bar the improper sale in equity before it occurs. Second, the paramount prerequisite to foreclosure is some breach of the deed of trust by the borrower—a trustee under a deed of trust cannot commence foreclosure proceedings on the parcel of a borrower who has not first breached the deed of trust in some way. The conditions precedent in the deed of trust which govern the accrual of his latent power to foreclose are irrelevant before such a breach.³

For the same reasons articulated by the Supreme Court of Virginia and the Florida District Court of Appeals (*see* footnote number 3, *supra*), there is no sound basis for the trial court's holding that Mr. Pagador's alleged default excused Trustmark from satisfying its own obligations under the terms of the parties' contract. The Deed of Trust was still a valid, binding contract following any alleged default by Mr. Pagador, and Trustmark remained bound to fulfill its terms. The Deed of Trust required Trustmark to provide Mr. Pagador with a proper notice of acceleration letter. Trustmark violated that contractual obligation under the Deed of Trust, and Mr. Pagador therefore stated a valid breach of contract claim.

³ *Mathews v. PHH Mortg. Corp.*, 724 S.E.2d 196, 199 (Va. 2012) (emphasis supplied); *see also Pfeifer v. Countrywide Home Loans, Inc.*, 211 Cal.App.4th 1250, 1279 (Cal. Ct. App. 2012) ("prohibiting the borrower who has breached from bringing an action to enforce the conditions precedent in a deed of trust would nullify such conditions. The mere fact of the borrower's breach alone would become, *de facto*, the only condition precedent to foreclosure... We agree with the reasoning of the *Mathews*' court and hold that the Pfeifers' default does not bar their claim that the lenders cannot proceed with the foreclosure prior to complying with the HUD servicing requirements."); *see also Suarez v. Wells Fargo Bank, N.A.*, No. 4D15-2541, 2016 WL 4468174, at *1, *2 (Fla. Dist. Ct. App. Aug. 24, 2016) (holding that the appellees (Wells Fargo) were not entitled to summary judgment where they failed to prove that they complied with the notice requirements of paragraph 22 of the subject mortgage prior to foreclosing on appellants home).

Further, while one party's *material* breach of a bilateral contract excuses further performance by the other party, the order issued by the trial court does not address whether a borrower's default under the Deed of Trust actually qualifies as a material breach that excuses the lender from complying with the foreclosure process requirements in the Deed of Trust. *Favre Property Management, LLC v. Cinque Bambini*, 863 So.2d 1037, 1044 (Miss. Ct. App. 2004), citing *UHS-Qualicare, Inc. v. Gulf Coast Cmty Hosp., Inc.*, 525 So.2d 746, 756 (Miss. 1987); *Gulf South Capital Corp. v. Brown*, 183 So.2d 802, 804-05 (Miss. 1966). The termination of a contract because of one party's material breach is "viewed as an extreme remedy and should be granted sparingly" under Mississippi law. *Ferrara v. Walters*, 919 So.2d 876, 886 (Miss. 2005); *UHS-Qualicare*, 525 So.2d at 756. The trial courts order dismissing Mr. Pagador's breach of contract claim based on his alleged default apparently assumes that a borrower's default constitutes a material breach and invalidates the Deed of Trust altogether. But, if this was true, there would be no reason to include conditions precedent to foreclosure in the Deed of Trust because the lender would be allowed to foreclose *immediately* once the borrower defaults.

A lender's contractual obligations under the Deed of Trust are the primary bulwark against the threat of wrongful, fraudulent foreclosures in Mississippi; holding lenders responsible when they fail to honor those obligations is vital to protecting the interests of Mississippi homeowners in the non-judicial foreclosure process. It is a slippery slope to hold that the Deed of Trust is invalid as soon as a borrower defaults (as determined by the lender), relieving the lender of any obligations under the Deed of Trust and barring the borrower from stating a claim for the breach of the contractual terms. The foreclosure process is almost always initiated by the borrower's alleged default; thus, by holding that a borrower in default cannot state a breach of contract claim for the lender's violation of its foreclosure-related contractual obligations, the trial court was essentially concluding that the conditions precedent to foreclosure in the Deed of Trust

had no real meaning and were ultimately unenforceable in nearly every case. This cannot be true—there is no discernible reason for the regulations to be included in the Deed of Trust if the lender is not required to obey the regulations once the foreclosure process commences following an alleged default. For this reason, Mr. Pagador respectfully asks this Court to reverse the lower court’s dismissal of his breach of contract claim based on the misguided theory that Trustmark was somehow relieved of their contractual obligation to provide Mr. Pagador a proper notice of acceleration letter following his default because he allegedly defaulted.

3. Trustmark was required to provide Mr. Pagador with a proper notice of acceleration letter pursuant to the Addendum to the Deed of Trust.

In addition to holding that Mr. Pagador’s breach of contract claim failed based on his alleged default prior to Trustmark foreclosing on his home, the lower court also held that Mr. Pagador’s breach of contract claim failed based on the language in the Addendum to the Deed of Trust. As stated by the trial court, under the addendum, “[t]he Borrower agrees that the lender or its assignee may at anytime without prior notice accelerate all payments under the Deed to Secure Debt and exercise any remedy allowed by law, including foreclosure, for breach of the Deed to Secure Debt or Note” (R. 47). The addendum further provided that “[i]n the event of any conflict between the provisions of this Rider and the provisions of the Deed to Secure Debt or Note, the provision of this Rider shall control.” (R. 47). However, the Addendum further provided, and the trial court failed to note, that Trustmark was only excused from complying with Paragraph 22 of the Deed of Trust, if Mr. Pagador breached the Deed by “[renting] the property without prior written approval of the Mississippi Home Corporation (MHC), and then only for the time period prescribed by MHC or, for a period of more than six months, fails to

occupy the property;⁴ or . . . [by failing] to abide by the agreements contained in the Mortgagors Affidavit, or if the Lender or MHC finds any statement contained in the Affidavit to be untrue when made; or . . . [by] sell[ing], assign[ing] or transfer[ing] the property or interest therein . . . without the Lenders and MHC prior written consent” (R. 47). None of these scenarios existed in the present case. Thus, the trial court erred in dismissing Mr. Pagador’s breach of contract claim based on the language in the Addendum to the Deed of Trust.

D. Mr. Pagador properly asserted claims against Trustmark for misrepresentation, fraud and promissory estoppel.

The trial court held that Mr. Pagador could not prevail on his claims for misrepresentation, fraud, and/or promissory estoppel because he did not rely on any of Trustmark’s representations to his detriment. To the contrary, Mr. Pagador alleged that he detrimentally relied on Trustmark’s representations that he was in an ongoing special VA forbearance period and that foreclosure would not occur during forbearance, that his credit would not be negatively impaired during forbearance, and that he could arrange a short sale of the property once the Chinese Drywall remediation was complete. (R. 388-391). At the same time, and unbeknownst to Mr. Pagador, Trustmark put Mr. Pagador’s loan in default, accelerated the debt, and commenced foreclosure proceedings on the subject property. Indeed, Trustmark was still communicating with Mr. Pagador about the short sale process and making references to getting VA “permission” to extend the forbearance period in the weeks leading up to the March 22, 2012 foreclosure. (R. 320). Trustmark then foreclosed on Mr. Pagador’s property despite receiving VA approval to extend the forbearance again. (R. 323).

⁴ Although Trustmark may argue that notice was not required based on Mr. Pagador’s failure to occupy the property for a period of six months, Mr. Pagador only moved himself and his family out of the property based on the presence of Chinese Drywall in the home, and only for a period of time needed to properly remediate the property, which never occurred as Trustmark foreclosed on his home prior to the remediation being completed.

Mr. Pagador reasonably relied on Trustmark's fraudulent and/or negligent misrepresentations to his detriment. Mr. Pagador only requested forbearance in the first place because his home was unlivable due to the presence of Chinese Drywall. (R. 268). He trusted Trustmark's representations that foreclosure would not occur during forbearance, and also trusted that he would have the opportunity to sell the property once the remediation was finally complete. By relying on Trustmark's ongoing representations regarding forbearance and foreclosure, Mr. Pagador did not take the opportunity to explore other ways to avoid foreclosure. For example, even as the foreclosure date drew near, Trustmark did not give Mr. Pagador a fair opportunity to execute a deed in lieu of foreclosure. (R. 605, 631). Trustmark's misrepresentations ensured that Mr. Pagador's home would be lost to foreclosure as opposed to a less damaging alternative.

With respect to Mr. Pagador's promissory estoppel claim, the failure to enforce Trustmark's representations that they would not foreclose while he was in forbearance amounted to sanctioning a perpetuation of fraud that resulted in injustice.⁵ The trial court noted that such a promise would not provide a basis for a promissory estoppel claim because Mr. Pagador was behind on his mortgage payments. (R. 844). However, the trial court failed to note, as the record clearly reflects, that Mr. Pagador only stopped making payments *when he received forbearance* from Trustmark, and he only asked for forbearance because of the presence of Chinese Drywall in his home. (R. 14, 389). Mr. Pagador was not struggling to make his payments when he requested the forbearance—he was at that time, and remains today, gainfully employed in the United States Coast Guard. (R. 390).

⁵ “[E]stoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise should be relied upon and in fact was relied upon, and if a refusal to enforce it would be virtually to sanction the perpetuation of fraud or would result in other injustice.” *Mississippi Dept. of Environmental Quality v. Pacific Chlorine, Inc.*, 100 So.3d 432, 442 (Miss. 2012) (citing *C.E. Frazier Constr. Co. v. Campbell Roofing & Metal Works, Inc.*, 373 So.2d 1036, 1038 (Miss. 1979)).

In other words, Mr. Pagador's reliance on Trustmark's instructions, representations, and promises throughout the forbearance period ensured that he would fall far behind on the loan. When the Chinese Drywall remediation took substantially longer than originally anticipated, Mr. Pagador planned to arrange a short sale of the property once the remediation was complete. (R. 390). Trustmark did not give Mr. Pagador the opportunity to do a deed in lieu of foreclosure, a right clearly afforded Mr. Pagador by the VA Servicing Guidelines, which Trustmark choose to ignore. This Court should not sanction Trustmark's misrepresentations regarding the forbearance process and foreclosure. Furthermore, Trustmark failed to provide any evidence rebutting the allegations in Mr. Pagador's affidavit and Complaint, and as such the trial court's order granting summary judgment on this claim should be reversed.

E. Mr. Pagador's remaining claims were improperly dismissed.

1. Negligence and Breach of Fiduciary Duty

The trial court dismissed Mr. Pagador's negligence claims on the basis that Trustmark did not have a legal duty to "regularly update [Plaintiff] on the status of his special VA forbearance program." (R. 845). However, Mr. Pagador also alleged in his Complaint that Trustmark had a duty to act with care in carrying out the foreclosure proceedings on his home and that Trustmark breached that duty by falsely representing that Mr. Pagador's credit would not be impaired during the forbearance period, by purportedly putting Mr. Pagador into default and accelerating the loan without notice, and by foreclosing on Mr. Pagador's property despite the fact that the VA had approved a further extension of the forbearance period. (R. 388-391). Trustmark's negligent and/or grossly negligent behavior directly and proximately caused injury to Mr. Pagador, and he suffered damages—including harm to his credit rating, the loss of equity in his home, the loss of the home itself, and emotional harm—as a result of Trustmark's negligence. (R. 388-391).

Furthermore, Trustmark had a contractual duty pursuant to the Deed of Trust to satisfy the conditions precedent to foreclosure and to conduct the foreclosure sale in compliance with all applicable law. (R. 31-47). In addition, Trustmark breached its duty to act reasonably toward Mr. Pagador. *See Montgomery v. CitiMortgage, Inc.*, 2013 WL 3421987, at *5 (S.D. Miss. July 8, 2013). “A duty to act reasonably toward another may also arise by virtue of some undertaking regardless of the existence of a legal contract. ‘[C]ontracts are not the only way in which the law imposes a duty of a care. Whenever a person does some act, the law imposes a duty upon that person to take reasonable care in performing that act.’” *River Prod. Co. v. Baker Hughes Prod. Tools, Inc.*, 98 F.3d 857, 859 (5th Cir.1996) (citing *Dr. Pepper Bottling Co. of Miss. v. Bruner*, 245 Miss. 77, 148 So.2d 199, 201 (Miss. 1962)); *see also George B. Gilmore Co. v. Garrett*, 582 So.2d 387, 391 (Miss. 1991) (A duty of care may arise by operation “of the basic rule of the common law which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to endanger the person or property of others.”). As discussed above, Trustmark breached that duty to act reasonably by, among other things: 1) failing to clearly and regularly update Mr. Pagador on his status in the special VA forbearance program; 2) by falsely representing that Mr. Pagador’s credit would not be negatively impacted during the forbearance period; 3) by purportedly putting Mr. Pagador in default and accelerating his loan without notice; and 4) by foreclosing on Mr. Pagador’s property despite the fact that the VA had approved a further extension of his ongoing forbearance period. (R. 388-391).

Trustmark also owed a fiduciary duty to Mr. Pagador because their interactions in the forbearance and foreclosure processes went beyond a typical “arms-length” debtor-creditor relationship. Mr. Pagador and Trustmark communicated repeatedly regarding his forbearance status and foreclosure. (R. 441-444). For example, the Supreme Court of Montana recently held

that certain circumstances could create a fiduciary duty owed by lender to borrower where “Defendant went beyond its conventional role as a loan servicer by soliciting Plaintiffs to apply for a loan modification and by engaging with them for several months.” *Morrow v. Bank of America, N.A.*, 2014 WL 1815606, at *8 (Mont. May 7, 2014). In *Morrow*, the bank “owed a duty to manage the modification process in a manner that would not cause the Morrows to suffer loss or injury by reason of its negligence...While HAMP does not provide a private right of action and does not itself create a duty of care, reference to its provisions may provide evidence of a breach of an already existing duty.” *Id.* The Montana Supreme Court concluded that the plaintiffs could proceed to trial on “the theory that Bank of America owed them a fiduciary duty in the processing of their application for a loan modification.” *Id.* Similarly, Mr. Pagador submits that Trustmark owed him a fiduciary duty in handling his special VA forbearance, particularly with respect to timely notifying him of a purported default, acceleration of the loan, and foreclosure.

At a minimum, there is a genuine question of material fact as to whether or not Trustmark breached a duty—contractual, fiduciary, duty of care, or otherwise—toward Mr. Pagador, and Trustmark failed to produce any competent evidence in the trial court to rebut Mr. Pagador’s allegations.

2. Wrongful Foreclosure

To prevail on a wrongful foreclosure claim, a plaintiff must demonstrate that the foreclosure was “attempted solely from a malicious desire to injure mortgagor; or...where the foreclosure sale is conducted negligently or in bad faith to his detriment.” *Nat’l Mortgage Co. v. Williams*, 357 So.2d 934, 935-36 (Miss. 1978). A foreclosure is only lawfully conducted if the constitutional, statutory, and contractual requirements entered into by the parties are met. *Lake Hillside Estates, Inc. v. Galloway*, 473 So.2d 461, 465 (Miss. 1985) (citing *Peoples Bank &*

Trust Company v. L. & T. Developers, 434 So.2d 699 (Miss. 1983)). A sale conducted without statutory authority is void. *Chase Home Finance L.L.C. v. Hobson*, 81 So.3d 1097, 1101 (Miss. 2012). The mortgagor's remedy for a wrongful, void foreclosure sale is a choice between having the sale set aside and recovering the damages suffered as a result of the wrongful foreclosure. *National Mortgage Co.*, 357 So.2d at 936.

In the present case, Mr. Pagador alleged that the foreclosure sale was conducted negligently and/or in bad faith to his detriment. (R. 388-391). As discussed above in reference to his negligence claims, Trustmark had a contractual duty toward Mr. Pagador under the Deed of Trust, a duty to act reasonably toward him under Mississippi law, and a fiduciary duty under Mississippi law because the parties' dealings with one another in the forbearance process exceeded the typical "arms-length" debtor-creditor relationship. Trustmark breached the duties owed to Mr. Pagador by: 1) failing to clearly and regularly update Mr. Pagador on the status in the special VA forbearance program; 2) falsely representing that Mr. Pagador's credit would not be negatively impacted during the forbearance period; 3) purportedly putting Mr. Pagador in default and accelerating his loan without notice; and 4) foreclosing on Mr. Pagador's property despite the fact that the VA had approved a further extension of his ongoing forbearance period. (R. 388-391). Mr. Pagador was injured by Trustmark's negligent and/or bad faith behavior, including the loss of his home, lost equity in his property, harm to his credit ratings, and resulting emotional distress.

3. Negligent Infliction of Emotional Distress

To prevail on his claim for negligent infliction of emotional distress, Mr. Pagador was required to prove that: 1) he actually suffered mental anguish and/or emotional distress, and; 2) the mental anguish and/or emotional distress was a reasonably foreseeable consequence of the defendant's wrongful behavior. *University of Southern Mississippi v. Williams*, 891 So.2d 160,

173 (Miss. 2004) (citing *Adams v. U.S. Homecrafters, Inc.*, 744 So.2d 736, 743 (Miss. 1999)). Here, the record clearly shows that Mr. Pagador suffered emotional distress and mental anguish as a result of the Trustmark's negligent behavior. (R. 390). As numerous studies have shown, Mr. Pagador's distress and anguish were reasonably foreseeable consequences of that negligent behavior. (R. 445-463). Trustmark produced no evidence to rebut the evidence presented by Mr. Pagador, and thus summary judgment on this claim was not warranted.

Moreover, any contention by Trustmark that Mr. Pagador's emotional distress was not a reasonably foreseeable consequence of its actions is wholly without merit. In *Universal Life Insurance Co. v. Veasley*, the plaintiff suffered emotional distress due to her insurance company's negligent handling of the life insurance claim plaintiff filed soon after the death of her mother. 610 So.2d 290 (Miss. 1992). The Mississippi Supreme Court upheld the plaintiff's damages award for her emotional distress claim, reasoning:

Applying the familiar tort law principle that one is liable for the full measure of the reasonably foreseeable consequences of her actions, it is entirely foreseeable by an insurer that the failure to pay a valid claim through the negligence of its employees should cause some adverse result to the one entitled to payment. Some anxiety and emotional distress would ordinarily follow, especially in the area of life insurance where the loss of a loved one is exacerbated by the attendant financial effects of that loss.⁶

Similarly, it was entirely foreseeable to Trustmark that its failure to abide by the terms of Mr. Pagador's Deed of Trust, failure to keep Mr. Pagador informed of his status in the special VA forbearance period, failure to timely notify Mr. Pagador of his alleged default and the acceleration of his loan, and wrongful foreclosure of Mr. Pagador's home despite the VA's approval of an extension of the forbearance period, would cause Mr. Pagador to suffer mental anguish and emotional distress. (R. 445-463).

⁶ *Id.* at 295.

At a minimum, there is a genuine issue of material fact as to the foreseeability of Mr. Pagador's injuries, thus making summary judgment improper.

4. Unjust Enrichment

The trial court held that Mr. Pagador's unjust enrichment claim failed based on the presence of a legal contract between the parties. (R. 846). However, in Mississippi a claim for unjust enrichment depends upon a showing of some legally cognizable wrong by which a defendant has been unjustly enriched at the expense of the plaintiff. *Cole v. Chevron USA, Inc.*, 554 F.Supp.2d 655, 673 (S.D. Miss. 2007) (citing *Estate of Johnson v. Adkins*, 513 So.2d 922, 926 (Miss. 1987)). In the present case, Mr. Pagador demonstrated that Trustmark committed a legally cognizable wrong and was unjustly enriched as a result at Mr. Pagador's expense. Trustmark was unjustly enriched in the course of its wrongful foreclosure proceedings and the sale of Mr. Pagador's property. (R. 26, 388-391). Mr. Pagador is therefore entitled to judgment of disgorgement from Trustmark of its unconstitutional, illegal, and unjust enrichment, including, but not limited to, the sales price of Mr. Pagador's home purportedly sold at foreclosure on March 22, 2012.

Mississippi law provides that in an action for unjust enrichment, "the plaintiff need only allege and show that the defendant holds money which in equity and good conscience belongs to the plaintiff." *Fordice Construction Co. v. Central States Dredging Co.*, 631 F.Supp. 1536, 1538 (S.D. Miss. 1986) (citing *Dorsey Mississippi Sales, Inc. v. Newell*, 245 Miss. 276, 168 So.2d 645, 651 (Miss. 1964)). In *Fordice Construction Co.*, the Court held that the plaintiff could state a claim for unjust enrichment on the basis that the defendants were unjustly enriched because they received the profits from the performance of a government contract which they should not have been permitted to perform. *Id.* at 1538-39. Similarly, when Trustmark enriched itself through the wrongful foreclosure of Mr. Pagador's property, it was without contractual authority to do so

under the Deed of Trust. Like the *Fordice* defendants, Trustmark herein was not “permitted to perform” under the terms of the parties’ contract or under Mississippi law.

At a minimum, there is a genuine issue of material fact as to whether Trustmark received profits through the wrongful foreclosure sale of Mr. Pagador’s property, which occurred in violation of the terms of the Deed of Trust and Mississippi law. As such, the trial courts granting of summary judgment on this claim was improper.

5. Breach of the Implied Duty of Good Faith and Fair Dealing

“All contracts contain an implied covenant of good faith and fair dealing in performance and enforcement.” *Limbert v. Mississippi University for Women Alumnae Ass’n, Inc.*, 998 So.2d 993, 998 (Miss. 2008) (citing *Morris v. Macione*, 546 So.2d 969, 971 (Miss. 1989)). Good faith is defined as “the faithfulness of an agreed purpose between two parties, a purpose which is consistent with justified expectations of the other party.” *Limbert*, 998 So.2d at 998 (citing *Cenac v. Murry*, 609 So.2d 1257, 1272 (Miss. 1992)). The implied covenant holds that “neither party will do anything which injures the right of the other to receive the benefits of the agreement. The implied covenant operates only where there is already an existing contract.” *Cothorn v. Vickers, Inc.*, 759 So.2d 1241, 1248 (Miss. 2000).

The Deed of Trust was a valid, binding contract, and Trustmark failed to produce any evidence to the contrary in the court below. Trustmark breached its duty of good faith and fair dealing under the contract by foreclosing on Mr. Pagador’s home after improperly putting him in default and accelerating his loan without notice while he was in a special VA forbearance period. (R. 390). Trustmark acted in bad faith by falsely representing that Mr. Pagador’s credit would not be negatively affected during the forbearance period, and by falsely representing that the foreclosure process would not commence during forbearance.

Based on the only evidence presented in the trial court, Mr. Pagador's affidavit (R. 388-391), there is, at a minimum, a genuine question of material fact as to whether or not Trustmark acted faithfully with respect to the express and agreed purpose between the parties regarding the special VA forbearance process and foreclosure. Mr. Pagador was justified in expecting Trustmark to comply with the requirements of the Deed of Trust, Mississippi law, and its own representations regarding forbearance and foreclosure. As such, the trial court erred in granting Trustmark's motion for summary judgment as it pertains to Mr. Pagador's claim for breach of the implied covenant of good faith and fair dealing.

F. Waiver: Mr. Pagador did not waive his wrongful foreclosure claim or any of his other contract, tort, and property claims.

A plaintiff can prevail on a wrongful foreclosure tort claim in Mississippi by demonstrating that the foreclosure was "attempted solely from a malicious desire to injure mortgagor; or...where the foreclosure sale is conducted negligently or in bad faith to his detriment." *Nat'l Mortgage Co. v. Williams*, 357 So.2d 934, 935-36 (Miss. 1978). The well-established statute of limitations for a wrongful foreclosure claim in Mississippi is three years. *Tennessee Properties, Inc. v. Gillentine*, 66 So.3d 695, 698 (Miss. Ct. App. 2011) ("The Mississippi Supreme Court has held that the general, three-year statute of limitations applies to actions for wrongful or fraudulent foreclosure.") (citing *S. Land & Res. Co. v. Dobbs*, 467 So.2d 652, 655 (Miss. 1985)). Mr. Pagador specifically alleged that the March 22, 2012 foreclosure sale was wrongful because it was conducted "fraudulently, negligently, and/or in bad faith," he averred that Trustmark did not provide the required notice of acceleration, misrepresented his forbearance status, and misrepresented that foreclosure would not occur during forbearance. (R. 24, 388-391). Mr. Pagador filed his Complaint setting forth the wrongful foreclosure claim on June 23, 2014, well within the expiration of the applicable three-year statute of limitations

period. *See Comm. v. Servs. Of Perry, Inc. v. FDIC*, 199 F.3d 778, 780 (5th Cir. 2000) (holding that a wrongful foreclosure claim accrues on the date of the disputed foreclosure).

The trial court's reliance on *Jackson v. Bank of America, N.A.*, 2014 WL 5511017 (S.D. Miss. Oct. 31, 2014) to support its waiver theory is misplaced. In *Jackson*, the crux of the plaintiff's case was a request to void the foreclosure sale based on a failure of the defendants to comply with the automatic bankruptcy stay. In dismissing the *Jackson* plaintiff's wrongful foreclosure claim on the basis of waiver, the court noted that the plaintiff had waived his claim to set the sale aside by failing to protest the violation of the automatic stay while his bankruptcy case was still open. In contrast, in Mr. Pagador's case, there was no bankruptcy-imposed automatic stay in place at the time of the subject foreclosure sale, and the method of objection available to the *Jackson* plaintiff was not available to Mr. Pagador. Rather, Mr. Pagador properly filed his civil complaint for damages within the applicable three-year statute of limitations period.

Moreover, there is no support in Mississippi jurisprudence for the notion that a homeowner relinquishes his right to state a tort claim for wrongful foreclosure if he fails to contemporaneously object to the foreclosure. Other than the *Jackson* opinion, which is not binding on this Court, the trial court failed to cite to any case law supporting this proposition in its opinion granting summary judgment. Furthermore, the trial court's opinion suggests that Mr. Pagador was required to file his wrongful foreclosure tort claim earlier in the three year statutory period, and waived the claim by not meeting the unspecified earlier deadline. This vague standard imposes a serious burden on claimants as it essentially means they can no longer rely on the authority of the unambiguous three-year statutory period for wrongful foreclosure claims. The Mississippi Supreme Court has clearly stated: "[w]hat time limitations should be imposed on litigants filing suit in courts of this state embraces broad matters of public policy, which clearly

are matters for the Legislature to decide, as indeed they have throughout history.” *Superfos Investments Ltd. v. FirstMiss Fertilizer, Inc.*, 809 F.Supp. 450, 454 (S.D. Miss. 1992) (quoting *Shewbrooks v. A.C. & S., Inc.*, 529 So.2d 557, 568 (Miss. 1988)). The Legislature has set a general three-year statute of limitations, and the Mississippi Supreme Court has held that the three-year limitation period applies to wrongful foreclosure claims. The Mississippi Legislature has not reversed the Supreme Court’s holding on this issue. Therefore, Mr. Pagador’s claim was timely filed within the well-established statutory period.

The trial also dismissed Mr. Pagador’s breach of contract, negligence, unjust enrichment, and fraudulent conveyance claims, holding that Mr. Pagador “waived his claims by failing to object to the foreclosure.” (R. 846). For the reasons discussed in detail above with respect to the wrongful foreclosure claim, the *Jackson* case is legally and factually distinguishable from Mr. Pagador’s case, and does not support the proposition that Mr. Pagador waived his right to recover for his timely filed contract, tort, and property claims.

Mr. Pagador’s negligence/gross negligence claims do not seek to have the sale voided or set aside for irregularities in the foreclosure sale. Rather, Mr. Pagador alleges that Trustmark is “liable to Plaintiff for actual monetary damages in the loss of his home, general damages, special damages, punitive damages, and legal fees.” (R. 24). To be clear, Mr. Pagador seeks damages for Trustmark’s negligent and/or grossly negligent behavior which resulted in the loss of his home. Likewise, Mr. Pagador’s unjust enrichment claim seeks damages exclusively—specifically, the “disgorgement from the Defendant of the unconstitutional and unjust enrichment, including, but not limited to, the sales price of Plaintiff’s home sold at foreclosure sale on March 22, 2012.” (R. 26). Mr. Pagador did not ask the trial court to void the sale as a remedy for negligence/gross negligence or unjust enrichment, and the trial court erred in dismissing the two claims on this

basis alone. Mr. Pagador accordingly asks this Court to reverse the trial court's dismissal of both the negligence/gross negligence and unjust enrichment claims.

On the breach of contract claim, Mr. Pagador asked for "damages from Defendants...including, but not limited to, monetary damages and the restoration of his credit score." (R. 18-19). As with this wrongful foreclosure claim, even assuming that the waiver argument in *Jackson* is applicable to this case, which Mr. Pagador denies, at most the case would bar Mr. Pagador from voiding the sale—the case does not support the proposition that Mr. Pagador cannot recover monetary damages for his properly stated and timely filed breach of contract claim. Thus, Mr. Pagador also asks this Court to reverse the trial court's dismissal of his breach of contract claim based on the inapplicable waiver theory.

G. Statute of Limitations: Mr. Pagador properly filed all of his claims within the applicable three-year statute of limitations.

The trial court also held, without any legal support whatsoever, that Mr. Pagador's claims were barred by the statute of limitations because he discovered his negative credit rating in February 2011 but did not file suit until June 23, 2014. (R. 840). However, all of Mr. Pagador's claims are governed by Miss. Code Ann. § 15-1-49, which specifically provides that "[a]ll actions for which no other period of limitation is prescribed shall be commenced with three (3) years next after the cause of action accrued, and not after." *Anderson v. LaVere*, 2014 WL 657395, at *5 (Miss. Feb. 20, 2014); *see also Tennessee Properties, Inc. v. Gillentine*, 66 So.3d 695, 698 (Miss. Ct. App. 2011) (holding that Miss. Code Ann. § 15-1-49(1) applies to actions for wrongful or fraudulent foreclosure); *Alston v. Pope*, 112 So.3d 422, 424 n. 3 (Miss. 2013) (holding Miss. Code Ann. § 15-1-49(1) applied to plaintiff's negligence claims); *Fletcher v. Lyles*, 999 So.2d 1271, 1276 (Miss. 2009) (holding that Miss. Code Ann. § 15-1-49(1) applied to plaintiff's claims for breach of the duty of good faith and fair dealing); *Stephens v. Equitable Life*

Assur. Soc’y of the U.S., 850 So.2d 78, 82 (Miss. 2003) (holding that Miss. Code Ann. § 15-1-49(1) applied to plaintiff’s fraud claims); *Hooker v. Greer*, 81 So.3d 1103, 1111 (Miss. 2012) (holding that Miss. Code Ann. § 15-1-49(1) applied to plaintiff’s unjust enrichment claims for money damages); *Smith v. Antler Insanity, LLC*, 58 F.Supp.3d 716, 727 (S.D. Miss. 2014) (holding that Miss. Code Ann. § 15-1-49(1) applied to plaintiff’s claims for negligent infliction of emotional distress). Under Miss. Code Ann. § 15-1-49, the three-year statute of limitations begins to run when a cause of action accrues. *Anderson*, 2014 WL 657395, at *6. For purposes of a statute of limitations, “a cause of action accrues when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested.” *Fletcher v. Lyles*, 999 So.2d 1271, 1277 (Miss. 2009); *see also Bullard v. Guardian Life Ins. Co. of Am.*, 941 So.2d 812, 815 (Miss. 2006) (internal citations omitted). A cause of action does not accrue until the claimant suffers actual damages—“in the absence of damage, no litigable event arose.” *Fletcher*, 999 So.2d at 1277 (citing *Bullard*, 941 So.2d at 815); *see also Sills v. Beal Bank, SSB*, 2015 WL 5642913 (S.D. Miss. Sept. 24, 2015) (holding that plaintiff’s wrongful foreclosure, negligence, breach of the duty of good faith and fair dealing, fraud, unjust enrichment, and negligent infliction of emotional distress claims did not accrue until the date of foreclosure).

Here, Mr. Pagador’s claims against Trustmark did not accrue until March 22, 2012, the day his property was sold at a foreclosure sale. Mr. Pagador could not have stated his wrongful foreclosure claim, or any of his other contract, tort, and property claims, against Trustmark prior to March 22, 2012, because no foreclosure sale had occurred, and Mr. Pagador had not yet suffered a concrete injury or calculable damages. The claims against Trustmark accrued on March 22, 2012; Mr. Pagador filed his Complaint for Damages on June 23, 2014, well within the applicable three-year statute of limitations. Thus, the trial court erred in holding that all of Mr. Pagador’s claims were barred based on the three-year statute of limitations.

Even assuming *arguendo* that the statute of limitations on Mr. Pagador’s claims against Trustmark began to run prior to the foreclosure sale, Trustmark’s failure to abide by the terms of the Deed of Trust constituted a *continuing* tort. The Mississippi Supreme Court has long recognized the continuing tort doctrine, described as follows:

Where a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury, or when the tortious acts cease. Where the tortious act has been completed, or the tortious acts have ceased, the period of limitations will not be extended on the ground of continuing wrong.

A “continuing tort” is one inflicted over a period of time; it involves a wrongful conduct that is repeated until desisted, and each day creates a separate cause of action. *A continuing tort sufficient to toll a statute of limitations is occasioned by continual unlawful acts, not by continual ill effects from an original violation.*⁷

By way of example, Courts have found that Mississippi law supports the existence of a continuing breach of contract claim, specifically in the context of rejecting a statute of limitations defense.⁸ In *Singing River Elec. Power Ass’n*, Chief Judge Guirola of the U.S. District Court for the Southern District of Mississippi found the Mississippi Supreme Court’s description of the continuing tort doctrine persuasive in holding that the defendant’s “repeated and continuous acts of alleged wrongful conduct” extended the statute of limitations on a breach of contract claim. 2011 WL 5082235 at *7-8; *see also Howard, et al. v. CitiMortgage, Inc., et al.*, 2004 WL 6802550, at *6-7 (S.D. Miss. Dec. 2, 2014).

⁷ *Stevens v. Lake*, 615 So.2d 1177, 1183 (Miss. 1993) (citations omitted) (emphasis supplied).

⁸ *See Singing River Elec. Power Ass’n v. Bellsouth Telecommunications, Inc.*, 2011 WL 5082235 at *7 (S.D. Miss. Oct. 26, 2011) (citing *Merchants & Marine Bank v. Douglas-Guardian Warehouse Corp.*, 801 F.2d 742, 745 (5th Cir. 1986); *see also Provena v. Stamps*, 2010 WL 706480 at *2 (S.D. Miss. Feb. 22, 2010). Every step Trustmark took in the foreclosure process constituted “repeated and continuous acts of...wrongful conduct,” in violation of the terms of the Deed of Trust. *Singing River Elec. Power Ass’n*, 2011 WL 5082235 at *8. Therefore, the statute of limitations period for the breach of contract claim began anew each time the sale was published, and again on the day the foreclosure sale was conducted, March 22, 2012.

Thus, Trustmark not only violated the terms of the Deed of Trust by failing to provide the required notice of acceleration, but again when they foreclosed on the property on March 22, 2012. Every action Trustmark took in furtherance of the foreclosure, including the act of conducting a foreclosure sale on March 22, 2012, violated the express terms of the Deed of Trust, because no notice of acceleration was ever provided. Therefore, Mr. Pagador's claims are not time-barred.

V. CONCLUSION

For all the reasons stated above, this Court should reverse the trial court's May 18, 2016 Order which granted Trustmark's Motion for Summary Judgment and remand the case to the trial court for further proceedings consistent with this Court's Order on appeal.

Respectfully submitted, this 10th day of October, 2016.

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CERTIFICATE OF SERVICE

I, Timothy Brown, hereby certify that on October 10, 2016, I electronically filed the foregoing with the Clerk of Court using the MEC system which sent notification of such filing to the following:

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And I hereby certify that I have mailed by United States Postal Service the document to the following non-ECF participants:

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