

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
SOUTHERN DISTRICT OF MISSISSIPPI**

**IN RE:  
ESSERLENA GASTON PICKENS**

**CHAPTER 7  
CASE NO. 0506610EE**

**ESSERLENA GASTON PICKENS**

**VS.**

**ADVERSARY NO. 060016**

**SOUTHERN MORTGAGE COMPANY, INC.,  
EQUIPRIME, INC., BANK OF AMERICA AS  
SUCCESSOR TO EQUICREDIT CORP. OF  
AMERICA AND SELECT PORTFOLIO  
SERVICES, INC.**

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Select Portfolio Servicing, Inc.

Edward Ellington, Judge

**FINDINGS OF FACT AND CONCLUSIONS OF LAW  
ON THE *MOTION TO DISMISS* FILED BY EQUIPRIME, INC.;  
*MOTION TO DISMISS* FILED BY BANK OF AMERICA CORP., ET. AL.;  
AND THE *MOTION FOR SUMMARY JUDGMENT* FILED BY THE DEBTOR**

**THIS MATTER** came before the Court on the *Motion to Dismiss* filed by Equiprime, Inc.;  
the *Joinder in Motion to Dismiss* filed by Bank of America Corp., EquiCredit Corp. of America and

Select Portfolio Servicing, Inc. (collectively, Bank of America); the *Plaintiff's Response to Motion to Dismiss* filed by the Debtor; the *Motion to Dismiss* filed by Bank of America; the *Motion for Summary Judgment* filed by the Debtor; and the joint *Response to Motion for Summary Judgment* filed by Equiprime, Inc. and Bank of America. After considering Equiprime's motion to dismiss and the joinder, the response and the briefs, the Court finds that Equiprime's motion is well taken and should be granted. Having found that Equiprime's motion to dismiss should be granted, the Court will not consider Bank of America's motion to dismiss or the Debtor's motion for summary judgment.

### **FINDINGS OF FACT**

The matters currently before the Court are another chapter in a long history of litigation between Esserlena G. Pickens and the holders of her mortgage. On April 29, 1999, Esserlena G. Pickens (Debtor) executed a *Promissory Note and Deed of Trust* (Promissory Note and Deed of Trust) in favor of Southern Mortgage Company d/b/a Heritage Mortgage Company (Southern Mortgage). The Deed of Trust was subsequently recorded on May 7, 1999, in the land records of the First Judicial District of Hinds County, Mississippi. On or about May 5, 1999, Southern Mortgage assigned the Deed of Trust to Equiprime, Inc. (Equiprime). The assignment was recorded on May 5, 1999. On or about May 5, 1999, Equiprime, Inc. assigned the Deed of Trust to EquiCredit Corporation of America (EquiCredit),<sup>1</sup> and this assignment was recorded on April 10, 2000.

In 2001, the Debtor and fourteen other mortgagors filed suit against EquiCredit Corporation

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<sup>1</sup>Bank of America is the successor in interest to EquiCredit Corporation of America.

of America in the Chancery Court of the First Judicial District of Hinds County, Mississippi. In the prayer of the amended complaint, the Debtor and the other plaintiffs sought a finding that:

a) the *Deed of Trust* and *Promissory Note* were procured by fraud, gross negligence that amounted to willful conduct so as to be an intentional tort or negligence and should be set aside, cancelled and be declared null, void and of no effect,

b) all documents, instruments of indebtedness, and mortgage evidencing the security interests arising from the subject transaction and all assignments thereof. . .be declared as null, void and of no effect and all clouds arising from said documents be removed from the Plaintiff's title.

*Bolton vs. EquiCredit Corporation of America*, Civil Action No. G-2001-1283, Chancery Court of the First Judicial District of Hinds County, Mississippi, *Amended Complaint*, ¶ 76 (July 31, 2001).

On April 19, 2002, the chancellor entered a judgment against the Debtor in favor of EquiCredit in the amount of the indebtedness evidenced by the Promissory Note and Deed of Trust she had given to Southern Mortgage, which had been assigned to EquiCredit, namely, \$74,403.57. On July 17, 2003, the chancellor entered an order against all of the plaintiffs dismissing the *Amended Complaint*. The plaintiffs appealed these judgments, but the plaintiffs subsequently dismissed their appeal.

After the dismissal of her chancery court suit, the Debtor and forty-one other mortgagors filed suit in the Circuit Court of the First Judicial District of Hinds County, Mississippi, against Equiprime, as well as several individuals.<sup>2</sup> The prayer in the circuit court amended complaint contains the identical language as quoted above from the chancery court amended complaint. (*See Bolton vs. McNeal*, Civil Action No. 251-03-887-CIV, Circuit Court of the First Judicial District of

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<sup>2</sup>An *Amended Complaint* was filed on November 12, 2003. The record before the Court is not clear as to when the original complaint was filed in the circuit court.

Hinds County, Mississippi, *Amended Complaint*, p. 21 (November 12, 2003)).

The circuit judge entered an order dismissing the Debtor's amended complaint on November 2, 2004. In dismissing the amended complaint, the circuit judge found that the Debtor's claims were barred by the statute of limitation as set forth in Mississippi Code Annotated § 15-1-49 (1972) because her cause of action accrued more than three years prior to the filing of the suit. The circuit judge further found:

(the) plaintiffs' claims are barred by the doctrine of collateral estoppel and/or res judicata. Final judgment was rendered in the Chancery Court in favor of the defendants on virtually the same claims that are made in this suit. The four required identities between the Chancery suit and this cause of action are present. The Court finds specifically that Equiprime, Inc., is in privity with the defendant in the Chancery action because the Chancery defendant was an assignee from Equiprime of the notes and mortgages contested in the Chancery suit and also in this suit. The Court further finds that plaintiffs here are also barred from bringing claims against Equiprime that could have been raised in the Chancery action.

DeLaughter, B., *Bolton vs. McNeal*, Civil Action No. 251-03-887-CIV, Circuit Court of the First Judicial District of Hinds County, Mississippi, *Order Granting Motion to Dismiss*, p. 2 (November 2, 2004).

The plaintiffs in the circuit court suit appealed Judge DeLaughter's order of dismissal, and on March 27, 2007, the Court of Appeals for the State of Mississippi affirmed Judge DeLaughter's dismissal of the plaintiffs' amended complaint.

While the appeal of the circuit court's ruling was pending, the Debtor filed a petition for relief under Chapter 13 of the United States Bankruptcy Code<sup>3</sup> on October 14, 2005. On January 20, 2006, the Debtor filed the above styled adversary proceeding against Southern Mortgage,

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<sup>3</sup>The Debtor converted to a Chapter 7 on May 19, 2006.

Equiprime, Inc., Bank of America, and Select Portfolio Services, Inc. In her complaint, the Debtor prays that the Court declare that

- a) the *Deed of Trust* and *Promissory Note* were procured by fraud, gross negligence that amounted to willful conduct so as to be an intentional tort or negligence and should be set aside, cancelled and be declared null, void and of no effect,
- b) all documents, instruments of indebtedness, and mortgage evidencing the security interests arising from the subject transaction and all assignments thereof. . be declared as null, void and of no effect and all clouds arising from said documents be removed from the Plaintiff's title, and
- c) the Proof of claim of Select Portfolio Servicing, Inc. be stricken from the record of the bankruptcy case.

*In re Pickens*, Case No. 0506610EE, Adversary No. 060016, *Complaint*, pp. 11-12 (January 20, 2006).

Subsequently, Equiprime filed its *Motion to Dismiss* on May 5, 2006. Equiprime alleges that the complaint should be dismissed based on the doctrine of res judicata. Bank of America filed its *Joinder In Motion to Dismiss* on August 24, 2006.

On June 20, 2006, Bank of America filed its *Motion to Dismiss*. The Debtor filed her *Motion for Summary Judgment* on December 4, 2006. Equiprime and Bank of America jointly filed a response in opposition to the Debtor's motion on January 5, 2007.

## CONCLUSIONS OF LAW

### I.

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This adversary is a core proceeding as defined in

28 U.S.C. § 157(b)(2)(A), (K) and (O).

## II.

### A.

The Court will first address Equiprime's *Motion to Dismiss* and the joinder thereto by Bank of America.<sup>4</sup> Equiprime asserts that the above styled adversary proceeding should be dismissed based on the doctrine of collateral estoppel/res judicata. "When giving preclusive effect to a state court judgment, th(e) court must apply the issue preclusion rules of that state." *Raspanti v. Keaty (In re Keaty)*, 397 F.3d 264, 270 (5th Cir. 2005)(citations omitted). Therefore, the Court will look to Mississippi issue preclusion rules.

In Mississippi, in order for res judicata to apply, four identities must be present: "(1) identity of the subject matter of the action; (2) identity of the cause of action; (3) identity of the parties to the cause of action; and (4) identity of the quality or character of a person for or against whom the claim is made. When these four elements are present a party will be barred from relitigating issues decided in a prior action or those that should have been litigated." *Williams v. Vintage Petroleum, Inc.*, 825 So2d 685, 688 (Miss. App. 2002)(citations omitted). In other words, the doctrine of res judicata will bar further claims by the parties or their privies when a final judgment on the merits has been entered on the identical cause of action.

The Supreme Court of Mississippi addressed the doctrine of res judicata in *Franklin Collection Service v. Stewart*, 863 So.2d 925 (Miss. 2003). The court found that

(t)he doctrine of res judicata reflects the refusal of the law to tolerate a multiplicity of litigation. *Little v. V & G Welding Supply, Inc.*, 704

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<sup>4</sup>For purposes of this opinion, the Court will collectively refer to the motion and joinder as Equiprime's Motion.

So.2d 1336, 1337 (Miss. 1997). Res judicata bars all issues that might have been (or could have been) raised and decided in the initial suit, in addition to all issues that were actually decided in the first action. It is a doctrine of public policy “designed to avoid the ‘expense and vexation attending multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibilities of inconsistent decisions.’” *Id.*

*Franklin Collection Service*, 863 So.2d at 929.

This adversary proceeding is the Debtor’s third proverbial “bite at the apple” involving the Deed of Trust and Promissory Note she executed on her home. The Debtor filed her first lawsuit in the Chancery Court of Hinds County, Mississippi. The chancery court amended complaint listed EquiCredit as the defendant. After the chancellor dismissed that suit, the Debtor then filed the exact same suit in the Circuit Court of Hinds County, Mississippi, against Equiprime and several individuals. In its finding that the four identities of the doctrine of res judicata were present, the circuit court specifically found “that Equiprime, Inc., is in privity with the defendant in the Chancery action because the Chancery defendant was an assignee from Equiprime of the notes and mortgages contested in the Chancery suit and also in this suit.” DeLaughter, B., *Bolton vs. McNeal*, Civil Action No. 251-03-887-CIV, Circuit Court of the First Judicial District of Hinds County, Mississippi, *Order Granting Motion to Dismiss*, p. 2 (November 2, 2004). The circuit court then dismissed the Debtor’s amended complaint. The Court of Appeals for the State of Mississippi subsequently affirmed the dismissal by the circuit court.

The Debtor has now filed an almost identical lawsuit here in the bankruptcy court against the current holders of the Deed of Trust and Promissory Note on her home, namely Equiprime and the successor to EquiCredit, Bank of America. This complaint is against the same parties, or their successors in interest, as in the chancery court amended complaint and the circuit court amended

complaint. As recited above, except for the language regarding Equiprime's proof of claim, the prayer in the adversary complaint is identical to the language contained in the chancery court amended complaint. "When an issue . . .has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Rain Bird Corp. v. Salisbury (In re Salisbury)*, 331 B.R. 682, 685 (Bankr. N.D.Miss. 2005)(citations omitted). Therefore, as found by the Circuit Court of the First Judicial District of Hinds County, Mississippi, and the Court of Appeals for the State of Mississippi, this Court finds that the four elements of res judicata are present and that the above styled adversary complaint should be dismissed.

In its motion, Equiprime requested the Court to order the Debtor and/or her attorney to pay Equiprime's reasonable attorney fees and expenses. The Court will note that the Debtor's attorney, R. Charles Robb, passed away on Sunday, June 3, 2007, and it appears that the Debtor is insolvent. Therefore, the Court will deny the request for attorney fees and expenses.

## **B.**

As this Court has found that the above styled adversary proceeding should be dismissed on Equiprime's *Motion to Dismiss*, the Court will not address the *Motion to Dismiss* filed by Bank of America nor the *Motion for Summary Judgment* filed by the Debtor.

## **CONCLUSION**

For approximately six years, the Debtor has been in litigation in three different courts with the holders of the Promissory Note and Deed of Trust on her home. The Chancery Court of the First Judicial District of Hinds County, Mississippi, the Circuit Court of the First Judicial District of Hinds County, Mississippi, and the Court of Appeals for the State of Mississippi have all dismissed the Debtor's claims against Equiprime. Thus the doctrine of res judicata should apply and the



Debtor's complaint in the above styled adversary proceeding also should be dismissed.

A separate judgment consistent with this opinion will be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

This the 19th day of June, 2007.

          /S/ EDWARD ELLINGTON            
**EDWARD ELLINGTON**  
**UNITED STATES BANKRUPTCY JUDGE**