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S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

**Certiorari to the Court of Appeals
APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas**

**Mikell Scarborough
Master-in-Equity**

Supreme Court Case No. 2022-001651

Ditech Financial, LLC Respondent,

v.

**Kevin G. Snyder, individually and
As Personal Representative of the
Estate of Mary Snyder.....Petitioner.**

**APPENDIX
(VOLUME III)
(820-1012)**

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Ditech Financial, LLC, Respondent,

v.

Kevin G. Snyder, individually and as Personal
Representative of the Estate of Mary Snyder, Appellant.

Appellate Case No. 2019-000575

Appeal From Charleston County
Mikell R. Scarborough, Master-in-Equity

Unpublished Opinion No. 2022-UP-308
Heard February 10, 2022 – Filed July 20, 2022

AFFIRMED

Jason Scott Luck, of Luck VI Ltd. Co. d/b/a Jason Scott
Luck, Attorney at Law, of Bennettsville, for Appellant.

George Benjamin Milam and Jonathan Edward Schulz,
both of Bradley Arant Boult Cummings, LLP, of
Charlotte, North Carolina; and Michael Casin Griffin, of
Waxhaw, North Carolina, all for Respondent.

PER CURIAM: In this foreclosure action, Kevin G. Snyder appeals the
master-in-equity's (the master's) orders granting Ditech Financial, LLC's (Ditech's)

motion to amend the case caption, denying his motion to compel discovery, and granting partial summary judgment in favor of Ditech; and the master's order and judgment of foreclosure and sale. Snyder argues the master erred in finding Ditech did not violate the South Carolina Supreme Court's Administrative Order on Mortgage Foreclosure Actions¹ (the Administrative Order); denying Snyder's motion to compel discovery when Ditech waived its objections and the materials sought were discoverable under South Carolina law; granting Ditech's motion to amend when Ditech failed to provide Snyder with notice of the motion and the amendment was unsupported by the record; striking Snyder's attorney preference statute² defense; and, proceeding with the final foreclosure hearing after Snyder filed his initial notice of appeal. We affirm.

FACTS AND PROCEDURAL HISTORY

This case arises out of a mortgage foreclosure action brought by Ditech against Snyder. In April 2005, Snyder executed a promissory note (the Note) payable to Gateway Funding Diversified Mortgage Services L.P. (Gateway) for \$135,000, at an interest rate of 7.5% per annum. Along with the Note, Snyder executed an "Attorney/Insurance Preference Form." The Note was subsequently endorsed to Countrywide Home Loans, Inc. (Countrywide Inc.) and thereafter, endorsed in blank. To secure the Note, Snyder and his wife, Mary Snyder (collectively, the Snyders), executed a real estate mortgage encumbering real property (the Mortgage).³ The Note came into default for Snyder's failure to make any payments in September 2008, and all subsequent months.

In April 2010, BAC Home Loans Servicing, LP (BAC)⁴ sent Snyder a notice of intent to accelerate. Thereafter, in September 2010, BAC filed a foreclosure action against Snyder, alleging the Note and Mortgage came into default in September 2008.⁵ In December 2012, BAC filed and served upon Snyder a notice of

¹ *In re Mortg. Foreclosure Actions*, 396 S.C. 209, 720 S.E.2d 909 (2011).

² S.C. Code Ann. § 37-10-102 (2015) (Attorney Preference Statute).

³ Between 2007 and 2013, the Mortgage was transferred: in September 2007, Gateway assigned it to Countrywide Inc.; in January 2009, Countrywide Inc. attempted to assign it to Countrywide Home Loans Servicing, LP (Countrywide Servicing); and in June 2013, Countrywide Inc. assigned it to Green Tree Servicing LLC (Green Tree).

⁴ Countrywide Servicing became BAC by virtue of a name change.

⁵ BAC amended its complaint in October 2010, to include Mary as a defendant. Mary passed away in November 2015, and the parties consented to substituting

foreclosure intervention pursuant to the Administrative Order. Because Snyder failed to submit the documents BAC required to consider loan modification, BAC filed and served upon Snyder a notice of denial of loan modification or other means of loss mitigation in April 2013.

In May 2013, Snyder's counsel filed and served a notice of appearance directing that all correspondence concerning the foreclosure matter be served at an address in Charleston, South Carolina. Snyder's counsel gave additional notice of two address changes in March 2015 and December 2016.

On June 3, 2013, Snyder filed an answer and counterclaims, asserting several defenses against BAC, including violation of the Administrative Order, violation of the Attorney Preference Statute as to Mary, and claiming BAC lacked standing to bring the foreclosure action. Snyder alleged he was entitled to setoff or recoupment for violation of the Attorney Preference Statute. Snyder asserted several counterclaims, including civil compensatory contempt for failure to comply with the Administrative Order and quiet title, seeking dismissal of the complaint based on civil compensatory contempt and quiet title. Additionally, Snyder alleged BAC engaged in unconscionable conduct that was "both described in [the pleadings] and to be determined after a reasonable period of discovery," and he asserted this barred BAC's claims.

In June 2013, Green Tree notified Snyder that it had assumed the servicing of the Mortgage and the total amount due and owing on the Note was \$204,798.56. Thereafter, Snyder's counsel contacted Green Tree to inquire about Snyder's options for foreclosure modification or intervention. In August 2013, Green Tree's counsel provided Snyder's counsel with a loss mitigation package and gave Snyder thirty days to provide required forms and documents. In October 2013, the master issued an order staying the proceeding pending foreclosure intervention.

In December 2014, Green Tree approved a trial modification plan for Snyder, which he rejected in March 2015. Foreclosure intervention efforts on the part of Snyder, Green Tree, and Ditech⁶ continued through June 2017, when Ditech ultimately determined Snyder was ineligible for loan modification.

In response to Snyder's second set of interrogatories and requests to produce, Green Tree argued, *inter alia*, the requests were overbroad and irrelevant. In

Snyder, individually and as personal representative of the Estate of Mary Snyder, as defendant in December 2018.

⁶ Green Tree and Ditech merged in August 2015, and became known as Ditech.

November 2018, Snyder filed a motion to compel discovery, arguing the materials requested were relevant; obtaining them would not burden Green Tree; and, the requested attorney's fee agreement was not privileged. Snyder sought several documents in connection with a Federal Trade Commission (FTC) action filed against Green Tree in the United States District Court of the District of Minnesota. Specifically, he requested accounting records "showing the revenues from all goods or services sold, all costs incurred in generating those revenues, and the resulting net profit or loss"; personnel records for four specific Green Tree employees, all employees who interacted with the Snyders and their attorneys, and those employees who reviewed the Snyders' loss mitigation applications; and, copies of all scripts and training materials related to Green Tree's collection of debts. The employee records Snyder sought included employees' addresses, telephone numbers, job titles, dates of service, and reasons for termination. After hearing the motion, the master summarily denied the Snyders' motion to compel by order dated March 18, 2019.

In February 2019, Ditech filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of New York. On March 1, 2019, Ditech filed a notice of bankruptcy filing and imposition of automatic stay and amended its filing in May 2019. The bankruptcy court issued an order granting limited relief from the automatic stay to permit actions "for the sole purpose of defending, unwinding, or otherwise enjoining or precluding any foreclosure . . . and [those that] do not have an adverse effect on any of Ditech's assets." The order specifically provided that claims against Ditech seeking monetary relief of any kind were stayed.

On March 11, 2019, Ditech moved for summary judgment in the foreclosure action. As to Snyder's counterclaim for quiet title, Ditech argued that, to the extent Snyder alleged the Mortgage was invalid because Mary did not sign an attorney preference form, the claim failed because Mary was not a "borrower" under section 37-10-102. As to Snyder's claim for civil compensatory contempt, Ditech argued that it complied with the Administrative Order; compliance with the order was a condition precedent to a foreclosure action; and, the Administrative Order did not create a private right of action or form the basis of a counterclaim.

Snyder moved for partial summary judgment as to his claims for civil compensatory contempt and quiet title. He argued Ditech failed to act in good faith in violation of the Administrative Order and requested the master strike Ditech's amended complaint and reply to Snyder's counterclaims. Additionally, Snyder sought relief either by dissolution of Ditech's lien or rescission of the Note and Mortgage. In the alternative, Snyder requested the master strike Ditech's

demand for damages and deficiency judgment due to the unnecessary delay in proceedings resulting from Ditech's consideration of Snyder's loan modification application.

The master heard the motions for summary judgment on March 18, 2019. In its March 27, 2019 order, the master found Snyder's counterclaim for quiet title was not stayed by the bankruptcy filing but his counterclaim for civil compensatory contempt was stayed to the extent it sought a monetary award. The master further found Ditech acted in good faith and complied with the Administrative Order and granted partial summary judgment in favor of Ditech as to the non-stayed portions of Snyder's claim for civil compensatory contempt. Finally, the master struck Snyder's Attorney Preference Statute defense as to Mary, concluding she was not a borrower within the meaning of section 37-10-102. The master scheduled the trial of Ditech's foreclosure claim and Snyder's quiet title claim for April 1, 2019.

Snyder filed a notice of appeal with this court on April 1, 2019, appealing the master's March 12, 2014 order amending the caption, March 18, 2019 order denying Snyder's motion to compel, and March 27, 2019 summary judgment order.

At the foreclosure hearing, Ditech conceded it would be improper for the master to schedule a foreclosure sale before this court determined whether Snyder's appeal could proceed. Ditech emphasized it was only asking the master to decide all of the factual and legal issues that were not determined at the summary judgment stage so that all of the issues could be raised together on appeal.

The master issued an order and judgment of foreclosure and sale on April 26, 2019. The master determined he had the authority to proceed with the foreclosure action because it was not stayed by Snyder's initial notice of appeal. He found his March 12, 18, and 27 orders were interlocutory and therefore Snyder's premature appeal did not stay the foreclosure proceedings. Alternatively, the master determined he retained jurisdiction over matters not affected by the appeal pursuant to Rules 205 and 241, SCACR. The master found the Note was in default as a result of Snyder's failure to make any monthly payments due for September 1, 2008, and all subsequent months. He determined the amount due and owing on the Note totaled \$293,930.69, which included \$137,020.25 in principal; \$109,616.64 in accrued interest; \$39,816.39 in escrow advances; and, \$6,626.25 in attorney's fees. Ditech waived its right to a deficiency judgment. The master concluded Snyder failed to establish he was entitled to the remedy of quiet title because Ditech possessed the Note endorsed in blank. The master reiterated Ditech met the requirements of the Administrative Order and Snyder failed to establish any claims or defenses—legal or equitable—for relief against Ditech.

On May 2, 2019, Snyder filed a motion for supersedeas with the master, seeking to "suspend any and all activity" in the foreclosure action, particularly the sale of the real property. The master granted the supersedeas motion and set the bond at \$25,000. Snyder then filed an amended notice of appeal with this court, appealing the master's April 23, 2019 order and judgment of foreclosure and sale. Subsequently, Snyder filed a petition for a writ of supersedeas to waive the bond or set it at a nominal amount, which this court denied. On November 10, 2021, the master issued an order of sale and disbursement for \$247,104.

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." *U.S. Bank Tr. Nat'l Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009) (quoting *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997)). "The appellate court's standard of review in equitable matters is our own view of the preponderance of the evidence." *Horry County v. Ray*, 382 S.C. 76, 80, 674 S.E.2d 519, 522 (Ct. App. 2009). "A legal question in an equity case receives review as in law." *Sloan v. Greenville County*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). "Because questions of law may be decided with no particular deference to the [master-in-equity], this court may correct errors of law in both legal and equitable actions." *Bell*, 385 S.C. at 373, 684 S.E.2d at 204.

ISSUES ON APPEAL

1. Did the master err in finding Ditech did not violate the Administrative Order when Ditech's and its predecessor's misconduct delayed the foreclosure proceedings?
2. Did the master abuse his discretion in denying Snyder's motion to compel discovery when Ditech waived its objections and the materials sought were discoverable under South Carolina law?
3. Did the master abuse his discretion in granting Ditech's March 20, 2014 motion to amend when Ditech failed to provide Snyder notice of its motion and the motion was unsupported by the record?
4. Did the master err in striking Snyder's Attorney Preference Statute defense?
5. Did the master abuse his discretion in proceeding with the final foreclosure hearing after Snyder filed his initial notice of appeal?

LAW AND ANALYSIS

I. The Administrative Order

Snyder argues the record contained a scintilla of evidence showing Ditech and its predecessors violated the Administrative Order by failing to act in good faith during the foreclosure intervention process. We disagree.

"When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." *Id.*; see also Rule 56(c), SCRPC. "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *David*, 367 S.C. at 247, 625 S.E.2d at 3. "Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). "Once [the] moving party carries its initial burden, [the] opposing party must, under Rule 56(e),[SCRPC,] 'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward with "specific facts showing that there is a *genuine issue for trial*.'" *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

The Administrative Order states in pertinent part:

In all mortgage foreclosure actions . . . before any merits hearing in the case, or if an order of foreclosure has been entered, before any foreclosure sale, the Mortgagee shall, through its attorney of record, file with the court and serve upon every Mortgagor a notice of the Mortgagor's right to foreclosure intervention. All proceedings in the foreclosure action shall be stayed until completion of such foreclosure intervention.

No foreclosure hearing or foreclosure sale may be held in the foreclosure action until the Mortgagee's attorney certifies the following:

- (a) that the Mortgagor has been served with a notice of the Mortgagor's right to foreclosure intervention for the purpose of seeking a resolution of the foreclosure action by loan modification or other means of loss mitigation;
- (b) that the Mortgagee, or its designated agent, has received and examined all documents and records required to be submitted by the Mortgagor to evaluate eligibility for foreclosure intervention;
- (c) that the Mortgagor has been afforded a full and fair opportunity to submit any other information or data pertaining to the Mortgagor's loan or personal circumstances for consideration by the Mortgagee;
- (d) that after completion of the foreclosure intervention process, the Mortgagor does not qualify for loan modification or other means of loss mitigation, in accordance with any standards, rules or guidelines applicable to the mortgage loan, and the parties have been unable to reach any other agreement concerning the foreclosure process; and,
- (e) that notice of the denial of loan modification or other means of loss mitigation has been served on the Mortgagor by mailing such notice to all known addresses of the Mortgagor; provided, that such notice shall also state that the Mortgagor has 30 days from the date of mailing of notice of denial of relief to file and serve an answer or other response to the Mortgagee's summons and complaint.

If within thirty days after having been served with notice of the Mortgagor's rights, the Mortgagor has failed, refused, or voluntarily elected not to participate in any foreclosure intervention process, the Mortgagee, through its attorney, shall certify that fact to the Court, and the foreclosure action may proceed.

In re Mortg. Foreclosure Actions, 396 S.C. at 211-12, 720 S.E.2d at 909. The Administrative Order further provides that in all mortgage foreclosure actions:

Throughout the foreclosure intervention process and the foreclosure action, the Mortgagee shall communicate with and otherwise deal with the Mortgagor through the Mortgagee's attorney, and the Mortgagor shall have the right to deal with the Mortgagee through the Mortgagee's attorney. This includes, without limitation, submission of all required information, negotiations, and consummation of any loan modification or other loss mitigation agreement. If the Mortgagor is represented by an attorney, then the Mortgagee shall communicate with and otherwise deal with the Mortgagor through the Mortgagor's attorney.

....

The Court having jurisdiction over the foreclosure action shall hear and determine any dispute concerning any party's compliance with this order, including without limitation, the failure of any party to act in good faith in complying with the terms of this order. In the event the Court determines that any party to the foreclosure action, or their acting agent, has failed to comply with the terms of this order, or has not attempted to reach an agreement for foreclosure intervention in good faith, *the Court may, in its discretion, impose such sanctions as it determines to be reasonable and just under the circumstances*, including without limitation, the assessment of reasonable attorneys' fees and costs against the culpable party.

Id. at 213-14, 720 S.E.2d 908, 909-10 (emphasis added).

We hold the master did not err in granting summary judgment as to this issue. Viewing the facts in the light most favorable to Snyder, we conclude there was no genuine issue as to any material fact concerning whether Ditech complied with the Administrative Order. Snyder supplied no evidence to show Ditech or its predecessors failed to comply with the Administrative Order. Rather, the record shows BAC filed and served upon the Snyders a notice of foreclosure intervention

and when the Snyders failed to respond to the notice, BAC filed and served the Snyders with a notice of denial of loan modification. These actions complied with the Administrative Order. *See id.* at 211-12, 720 S.E.2d at 909. Subsequently, Snyder's counsel contacted Green Tree in June 2013, inquiring about the Snyders' options for foreclosure modification or intervention. The foreclosure intervention process continued for four years, even after Snyder rejected Ditech's modification terms in March 2015. We acknowledge evidence showed Ditech and its predecessors sent correspondence to the wrong address on five occasions during this period and directly contacted Snyder on one occasion after being notified he was represented by counsel. However, considering Snyder's counsel's three changes of address, Green Tree's merger with Ditech, and the significant amount of correspondence exchanged between the parties during this period, we find the evidence does not demonstrate Ditech's actions constituted a failure to act in good faith during the foreclosure intervention process. In addition, we find Snyder failed to demonstrate how Ditech's improper affidavit of default, which the master subsequently lifted, and alleged spoliation of evidence show Ditech and its predecessors violated the Administrative Order.

Furthermore, the delay in the foreclosure proceeding—which resulted in substantial interest and fees—was at least in part a result of Snyder's own conduct. Snyder, through his counsel, continued to pursue foreclosure intervention of his own volition for four years, during which time Ditech paid all taxes and insurance premiums on the mortgaged property. For the foregoing reasons, we affirm the master's order granting summary judgment in favor of Ditech as to Snyder's non-stayed counterclaim for civil compensatory contempt.⁷

II. Motion to Compel Discovery

Snyder argues the master abused his discretion in denying Snyder's motion to compel discovery because he was entitled to the records Green Tree retained in connection with its settlement with the FTC and Ditech's responses to his second set of interrogatories were impermissibly generic and therefore waived. We disagree.

⁷ Because our decision that no genuine issue of material fact existed as to Snyder's allegation Ditech violated the Administrative Order is dispositive of this issue, we decline to reach the question of whether the Administrative Order created a private cause of action. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

We find the master did not abuse his discretion in denying Snyder's motion to compel because evidence shows the materials Snyder sought were irrelevant and overly broad. *See Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001) ("The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion."); *id.* ("An abuse of discretion occurs when the trial judge's ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support."); *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) ("The burden is upon the party appealing from the order to demonstrate the trial court abused its discretion."); *see also* Rule 26(b)(1), SCRPC ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party"). First, the scope of the accounting records Snyder sought encompassed all of Green Tree's business—not just Snyder's account—and therefore covered an overly-broad amount of information. Further, Snyder failed to show how information pertaining to all of Green Tree's accounts, personal employee information, or general training materials would have been relevant to this case. To support his defenses and counterclaims, Snyder had the burden of demonstrating Ditech engaged in certain acts or omissions in its dealings with Snyder. Conduct Ditech may have engaged in with non-parties was irrelevant to its dealings with Snyder. Finally, as to Ditech's attorney's fee agreements, the information concerning Ditech's attorney's fees would be—and in fact was—provided to the master to determine the appropriate award. Because evidence supports the master's denial of Snyder's motion to compel, we affirm as to this issue.

As to Snyder's argument Ditech waived its objections to the second set of interrogatories, we find this issue is not preserved for appellate review because it was neither raised to nor ruled upon by the master. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [master] to be preserved for appellate review."). Snyder did not include this argument in his motion to compel and, by his own admission, the hearing on the motion to compel was not transcribed by a court reporter. Thus, we find this issue is not preserved.

III. Motion to Amend

As to Snyder's argument the master abused his discretion by granting Green Tree's February 19, 2014 motion to amend the case caption, we find this issue is moot.

See Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 602, 567 S.E.2d 514, 517 (Ct. App. 2002) ("An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." (quoting *Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001))); *see also Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) ("A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court."). On March 12, 2014, the master issued an order amending the caption to name Green Tree as the proper plaintiff. The order provided the action was originally brought in the name of BAC in anticipation of an assignment of the mortgage to that entity but stated no such assignment was recorded, and by virtue of an assignment from Countrywide Inc. to Green Tree, Green Tree was the proper plaintiff. Because Snyder subsequently agreed by consent order to Ditech's 2018 motion to amend the caption to substitute Ditech for Green Tree as plaintiff, we find this issue is moot.

IV. Attorney Preference Statute Defense

Snyder argues the master erred by concluding Mary was not a "borrower" under section 37-10-102(a)⁸ and, accordingly, struck his Attorney Preference Statute defense. Snyder asserts this prejudiced Mary's estate because the defense would have acted as a setoff to Ditech's foreclosure judgment. We find this issue is moot.

Subsequent to the master striking Snyder's Attorney Preference Statute defense, Ditech waived its right to a deficiency judgment. In his brief of appellant, Snyder argues his assertion of a defense for violation of the Attorney Preference Statute would have served as a *setoff* to Ditech's judgment. *See* S.C. Code Ann. § 37-10-105(A) (2015) ("If a creditor violates a provision of this chapter, the debtor has a cause of action . . . to recover actual damages and also a right in an action . . . to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars. . . . This subsection does not bar a

⁸ S.C. Code Ann §-37-10-102(a) ("Whenever the primary purpose of a loan that is secured in whole or in part by a lien on real estate is for a personal, family or household purpose The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction and . . . the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage and comply with such preference.").

debtor from asserting a violation of this chapter in an action to collect a debt which was brought more than three years from the date of the occurrence of the violation *as a matter of defense by recoupment or set-off in such action.*" (emphasis added)). However, he failed to assert any actual damages he or Mary's estate suffered as a result of the alleged violation to the master.⁹ Snyder was required to provide a factual basis for his claim *and* any actual damages suffered as a result of the alleged violation. *See Baughman*, 306 S.C. at 115, 410 S.E.2d at 545 ("Once [the] moving party carries its initial burden, [the] opposing party must, under Rule 56(e), [SCRCP,] 'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward with "specific facts showing that there is a *genuine issue for trial*.'" (quoting *Matsushita Elec. Indus. Co.*, 475 U.S. at 587)). Accordingly, we find Snyder failed to preserve the issue of whether he or Mary's estate was entitled to actual damages. *See Staubes*, 339 S.C. at 412, 529 S.E.2d at 546 ("[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [master] to be preserved for appellate review."). Thus, any penalty amount Snyder may have recovered as a setoff was precluded by Ditech's deficiency waiver. *See Setoff*, *Black's Law Dictionary* (11th ed. 2019) ("A debtor's right to reduce the amount of a debt by any sum the creditor owes the debtor; the counterbalancing sum owed by the creditor."). Therefore, we find the question of whether Mary was a borrower under section 37-10-102(a) is moot. *See Cheap-O's Truck Stop, Inc.*, 350 S.C. at 602, 567 S.E.2d at 517 ("An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." (quoting *Curtis*, 345 S.C. at 567, 549 S.E.2d at 596)); *Sloan*, 369 S.C. at 26, 630 S.E.2d at 477 ("A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court.").

⁹ As to Snyder's assertion during oral argument that Ditech's alleged violation of the Attorney Preference Statute should preclude Mary's estate from being subject to her half-portion of the lien, we find this issue is not properly before this court. *See Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) (noting an appellant may not use oral argument as a vehicle to argue issues not argued in the appellant's brief).

V. Jurisdiction to Proceed with Final Foreclosure Hearing

Snyder argues the master lacked jurisdiction to proceed with the foreclosure action after Snyder filed his initial notice of appeal. Although we find the master erred in proceeding with the foreclosure, we affirm.

In reviewing a master's decision to retain jurisdiction over matters not affected by an appeal, an appellate court applies an abuse of discretion standard. *See Cousar v. New London Eng'g Co.*, 306 S.C. 37, 40, 410 S.E.2d 243, 245 (1991).

Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

Rule 205, SCACR.

As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Rule 241(a), SCACR.

The reference in Rules 205 and 241(a) to the "jurisdiction" of the lower courts does not refer to subject matter jurisdiction. Rather, the rules govern the circumstances under which the exclusive appellate jurisdiction Rule 205 grants to the appellate court deprives the lower court of the power to address a

particular issue, or "matter," during the pendency of the appeal.

Tillman v. Oakes, 398 S.C. 245, 256 n.3, 728 S.E.2d 45, 51 n.3 (Ct. App. 2012).

We find the master erred in ordering the judgment of foreclosure and sale when Ditech conceded at the foreclosure hearing that it would be improper for the master to schedule a foreclosure sale while Snyder's initial appeal was pending with this court. Although the master based his decision in part on whether Snyder's appeal was premature, the correct inquiry should have been whether Snyder's appeal affected the order and judgement of foreclosure and sale. *See Tillman*, 398 S.C. at 254-55, 728 S.E.2d at 50 ("When a party appeals an order, two questions may arise as to the effect of the appeal: (1) what is the effect of the appeal on matters decided in the order, particularly the immediate effectiveness of relief ordered; and (2) what is the effect of the appeal on the power of the lower court to proceed with the underlying action while the appeal is pending."). Snyder's initial appeal challenged the March 12, 2014 order amending the caption, March 18, 2019 order denying Snyder's motion to compel, and March 27, 2019 order granting partial summary judgment. In his order granting partial summary judgment, the master found in favor of Ditech as to Snyder's counterclaim for civil compensatory contempt to the extent Snyder sought a complete bar to foreclosure. Moreover, the master determined Ditech had complied with the Administrative Order, which allowed the master to proceed and adjudicate the foreclosure dispute. *See In re Mortg. Foreclosure Actions*, 396 S.C. at 211-12, 720 S.E.2d at 909. These matters affected the master's order and judgment of foreclosure and sale because, if reversed on appeal, they could have prevented the master from ordering foreclosure. *See* Rule 205, SCACR ("Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal."); Rule 241, SCACR ("The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal."). Accordingly, we conclude the master erred in ordering the judgment of foreclosure and sale while Snyder's appeal was pending.

Nevertheless, because Snyder filed an amended notice of appeal to include the master's order and judgment of foreclosure and sale, this error does not warrant reversal of the foreclosure judgment and sale. As we stated, we affirm the master's order granting partial summary judgment in favor of Ditech as to Snyder's non-stayed counterclaim for civil compensatory contempt. Our decisions as to

these issues are dispositive as to this issue, and we therefore conclude reversal is not warranted notwithstanding this error.

CONCLUSION

For the foregoing reasons, we affirm the master's denial of Snyder's motion to compel discovery, grant of partial summary judgment in favor of Ditech as to the non-stayed portions of Snyder's claim for civil compensatory contempt, and order and judgment of foreclosure and sale, and we find Snyder's appeal of the master's decision to strike his Attorney Preference Statute defense and Ditech's motion to amend the case caption are moot.

AFFIRMED.

WILLIAMS, C.J., and KONDUROS and VINSON, JJ., concur.

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Feb 23 2021

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas**

**Mikell Scarborough
Master-in-Equity**

**Appellate Case No. 2019-000575
Charleston County Case No. 2010-CP-10-7838**

Ditech Financial, LLC Respondent,

v.

**Kevin G. Snyder, individually and
As Personal Representative of the
Estate of Mary Snyder Appellant.**

**BRIEF OF APPELLANT
(AMENDED)**

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ISSUES ON APPEAL

- I. Did the Master-in-Equity err when he found that Ditech's predecessor's conduct complied with the Supreme Court's 2011 administrative order on mortgage foreclosures, when Ditech's predecessors' misconduct delayed foreclosure proceedings?
- II. Did the Master-in-Equity err in refusing to compel the production of a mortgage servicer's records retained pursuant to a 2015 settlement on mortgage practices to a mortgage foreclosure defendant?
- III. Did the Master-in-Equity err in amending the caption of this action when the moving party never provided notice of its motion, and the factual basis for amendment is unsupported by the record?
- IV. Did the Master-in-Equity err in striking the Attorney Preference Statute defense of the Estate of Mary Snyder, despite the Consumer Protection Code's broad applicability?
- V. Did the Master-in-Equity err in proceeding with the final hearing after a notice of appeal had been filed?

STATEMENT OF THE CASE

This is the appeal of a contested residential foreclosure. The Respondent is the purported successor to the original Plaintiff, BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP. The Appellant is Kevin Snyder, in his individual capacity as a mortgagor of the property, and as personal representative of his late wife, who was also a mortgagor.¹ BAC filed the original foreclosure Complaint and Lis Pendens on

¹ During the pendency of this action, Snyder's profoundly disabled daughter died (December 22, 2014), and almost a year later his wife, former Defendant Mary Snyder, died of undiagnosed lung cancer (November 23, 2015).

September 23, 2010, and amended the Complaint and Lis Pendens on October 13, 2010. (R. pp. 35-39, 42, 45-49, 56-57). Kevin and Mary Snyder were served a Notice Foreclosure Intervention on December 17, 2012, which was denied. (R. pp. 59-60, 63). Undersigned counsel appeared for the Snyders on May 3, 2013, filing his notice of appearance with the Clerk of Court and serving it on BAC's counsel. (R. p. 66). BAC purportedly transferred the Snyders' loan at some point shortly thereafter to Green Tree Servicing, LLC,² and on June 17, 2013, the Snyders' counsel sent Green Tree a letter informing it of the Snyders' representation, and enclosing a copy of In re Mortgage Foreclosure Actions, 396 S.C. 209, 720 S.E.2d 908 (2011) (the "Admin Order"). (R. p. 121). The Snyders' counsel followed up this letter with another letter on July 18, 2013, that enclosed a written authorization from the Snyders (requested by Green Tree) and another copy of the Admin Order. (R. pp. 144-45). BAC's attorney was copied on this letter. (R. p. 144). These opening communications inaugurated Green Tree's nearly six year period of bungled communications and foreclosure interventions, presented in detail in Argument I.

Pursuant to a September 30, 2013, status hearing, this action was stayed pending foreclosure intervention. The Snyders' counsel was not provided notice of this hearing or order. (R. p. 4). On March 12, 2014, the Master-in-Equity, without notice or hearing, granted BAC's motion to replace BAC Home Loans Servicing, LP with Green Tree Servicing, LLC as Plaintiff. (R. pp. 9-10, 179-87).

Green Tree substituted counsel on April 9, 2015, and again on July 2, 2018. The parties engaged in discovery, and Snyder filed a motion to compel on November 29, 2018 to compel Green Tree's responses to his discovery. (R. pp. 88-90, 179-87). Pursuant to a

² However, please see Argument III, *infra*.

December 10, 2018, status conference (where the motion to compel was heard without a court reporter), the Master-in-Equity issued a consent scheduling order and a consent order amending the caption to replace Green Tree Servicing, LLC with Ditech Financial, LLC. (R. pp. 13-16).

Ditech filed notice of its bankruptcy on March 1, 2019 (amended May 1, 2019). (R. pp. 199-288). All parties filed motions for summary judgment on March 11, 2019. (R. pp. 291- 433). These motions were heard at a pre-trial hearing on March 18, 2019. (R. pp. 561- 601). The Master-in-Equity denied Snyder's motion, granted Ditech's motion in part, and denied Snyder's motion to compel by order dated March 27, 2019. (R. pp. 19-22). Snyder timely appealed this order on March 29, 2019. Though Snyder argued that the Master-in-Equity lacked jurisdiction due to the appeal (R. pp. 606-22), the Master-in-Equity proceeded with a final hearing. (R. p. 622-60). The Master-in-Equity issued his final order on April 23, 2019, ordering the foreclosure of the mortgage and the sale of 1752 Orange Grove Shores. (R. pp. 23-32). Snyder amended his notice of appeal to include this order and also filed a motion for supersedeas on May 2, 2019. (R. pp. 436-40).

STANDARD OF REVIEW

“It is now well settled that this court has jurisdiction in appeals in equity cases to find the facts in accord with our view of the preponderance or greater weight of the evidence, in the absence of a verdict by a jury; and may reverse a factual finding by the lower court in such cases when the appellant satisfies this court that the finding is against the preponderance of the evidence.” Skipper v. Perrone, 382 S.C. 53, 674 S.E.2d 510 (Ct.App. 2009) (quoting Crowder v. Crowder, 246 S.C. 299, 301, 143 S.E.2d 580, 581 (1965)).

“In reviewing an order for summary judgment, the appellate court applies the same standard which governs the trial court under Rule 56 of the South Carolina Rules of Civil Procedure.” M & M Grp., Inc. v. Holmes, 379 S.C. 468, 473, 666 S.E.2d 262, 264 (Ct. App. 2008). “Summary judgment is appropriate when ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” Id. (quoting Rule 56(c), SCRCp). A material issue is one that constitutes a legal defense or that affects the result of the action. PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr., 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988).

“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 appellant, the non-moving party below.” Id. (quoting Willis v. Wu, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004)). Summary judgment should not be granted if further development of the facts would assist in the application of the law. Mosteller v. Cty. of Lexington, 336 S.C. 360, 362, 520 S.E.2d 620, 621 (1999). A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony. Id.

“[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). The South Carolina Supreme Court has defined a “scintilla” as “‘a gleam,’ ‘a glimmer,’ ‘a spark,’ ‘the least particle,’ ‘the smallest trace.’” Bethea v. Floyd, 177 S.C. 521, 181 S.E. 721, 724 (1935); see also Rogers v. Norfolk Southern Corp., 356

S.C. 85, 588 S.E.2d 87 (2003) (Burnett, J., dissenting) (“A scintilla is defined as ‘a trace’ of evidence.”) (citing Black’s Law Dictionary 1347 (7th ed.1999)). In cases requiring a heightened burden of proof (*e.g.* fraud), the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment. Hancock at 330-31, 673 S.E.2d at 803.

Motions to amend and discovery orders (including discovery sanctions orders) are reviewed under an abuse of discretion standard. Soil & Material Eng’rs, Inc. v. Folly Assocs., 293 S.C. 498, 361 S.E.2d 779 (Ct. App. 1987); Evening Post Pub. Co. v. Berkeley Cty. School. Dist., 392 S.C. 76, 708 S.E.2d 745 (2011); Barnette v. Adams Bros. Logging, Inc., 355 S.C. 588, 586 S.E.2d 572 (2003). A lower court has abused its discretion when its ruling is either controlled by an error of law or based on a factual conclusion lacking evidentiary support. Wilson v. Dallas, 403 S.C. 411, 743 S.E.2d 746 (2013).

ARGUMENT

I. There exists a scintilla of evidence that Ditech, through its predecessors-in-law, violated South Carolina Supreme Court Administrative Order 2011-05-02-01.

Snyder asserted a counterclaim for Civil Compensatory Contempt in his counterclaims, based on Ditech’s predecessor’s violations the Admin Order. This order states in relevant part:

The Court having jurisdiction over the foreclosure action shall hear and determine any dispute concerning any party’s compliance with this order, including without limitation, the failure of any party to act in good faith in complying with the terms of this order. In the event the Court determines that any party to the foreclosure action, or their acting agent, has failed to comply with the terms of this order, or has not attempted to reach an agreement for foreclosure intervention in good faith, the Court may, in its discretion, impose such sanctions as it determines to be reasonable and just

under the circumstances, including without limitation, the assessment of reasonable attorneys' fees and costs against the culpable party.

In re Mortgage Foreclosure Actions at 213, 720 S.E.2d at 910. Ditech's March 8, 2019, motion for summary judgment sought to dismiss this cause of action. (R. pp. 412-33). Ditech's motion was heard on March 18, 2019, and on March 27, 2019 the Master-in-Equity granted Ditech summary judgment as to the non-stayed portions of Snyder's counterclaim for civil compensatory contempt, but denied it as to Snyder's quiet title counterclaim and Ditech's foreclosure action. (R. pp. 19-22). The Master-in-Equity's order dismissing the counterclaim was in error, as there existed a scintilla of evidence supporting a violation of the Admin Order, as set forth below.

A. There is a scintilla of evidence supporting the argument that Ditech's predecessor did not act in good faith.

"Good faith" is defined as: "honesty in fact and the observance of reasonable commercial standards of fair dealing." S.C. Code § 36-1-201(20).³ Documents authenticated by Ditech's Responses to Snyder's Requests to Admit establish multiple instances where Ditech did not act in good faith:

1. Failure to send correspondence to the correct address after notice.

Throughout the foreclosure intervention process, Ditech and its predecessors repeatedly mailed critical correspondence and documents to the wrong mailing address.⁴ Snyder is aware of the following misdirected documents, but the true amount of lost correspondence is certainly greater:

³ As the note and mortgage in this case are subject to articles 3 & 9 of the Uniform Commercial Code, this definition is appropriately used here.

⁴ Ditech largely admits these mistakes. (R. pp. 103-15).

- a) Green Tree's March 13, 2014, application deficiency letter (R. pp. 152-54) used an incorrect address;
- b) Green Tree's May 7, 2014, August 7, 2014, and September 7, 2014, billing statements (R. pp. 157, 161-62) used an incorrect address;
- c) Green Tree's August 6, 2014 acknowledgement letter (R. p. 160) used an incorrect address;
- d) Green Tree sent an October 2014 foreclosure intervention application to an incorrect address, resulting in denial of a proposed modification (R. p. 163); and
- e) Ditech's April 13, 2016 foreclosure intervention application (R. pp. 168-70) is addressed to the Snyders' counsel's prior address, despite being informed of the new address a year earlier (R. pp. 164, 168-70).

Snyder's counsel placed Ditech and its predecessors on notice of changes of address and/or incorrect addressing on October 22, 2014, March 4, 2015, and March 26, 2015. (R. pp. 163-64, 168). These failures, at a minimum, contributed to the excessive delays in processing the Snyder's multiple applications for foreclosure intervention/mitigation.⁵

⁵ Though more of a technical than substantive violation of the Supreme Court's order, Ditech's predecessors also required the Snyders' counsel to repeatedly submit needless written authorizations. Undersigned counsel appeared of record in this action on May 3, 2013. (R. p. 118). Ditech's predecessor's attorneys were served with this notice of appearance the same day. (R. p. 119). Undersigned counsel informed Green Tree of his retention by letter dated June 17, 2013. (R. p. 121). Green Tree, however, demanded that the Snyders execute a separate authorization form (R. p. 145) before it would discuss this matter with the Snyders' counsel. While the Snyders did execute an authorization on July 9, 2013 (provided July 18, 2013) (R. pp. 143-45), Ditech's predecessor repeatedly demanded it be re-submitted. (R. pp. 142, 147).

2. Failure to timely respond to foreclosure intervention request.

Ditech's predecessor ignored Snyder's June 17, 2013, request for foreclosure intervention until Snyder's counsel repeatedly contacted Ditech's predecessor's counsel in August of 2013. (R. pp. 121, 128, 131-32). Ditech's predecessor's counsel provided the foreclosure intervention application on August 21, 2013. (R. p. 133). This also contributed to delays in foreclosure intervention.

3. Repeated contacts with represented mortgagors.

Ditech and its predecessors consistently, repeatedly, and flagrantly continued to contact Snyder via telephone and/or mail until approximately 2017, when Ditech began mailing all correspondence, including billing statements, to Snyder's counsel. The Admin Order mandates that foreclosure communications shall flow through the Mortgagor's attorney: "...the Mortgagee *shall* communicate with and otherwise deal with the Mortgagor through the Mortgagor's attorney" In re Mortgage Foreclosure Actions at 213, 720 S.E.2d at 909 (emphasis added). On June 17, 2013, Snyder's counsel contacted Ditech's predecessor directly to inform it of Snyder's representation, though Ditech's predecessor's attorney had been notified on May 3, 2013. (R. pp. 118-21). Included in the June 17, 2013, letter was a copy of the Admin Order. The Snyders' counsel notified Ditech and its predecessors on June 17, 2013, July 18, 2013, October 30, 2013, November, 6, 2013, November 12, 2013, June 4, 2014, and August 1, 2014, that the Snyders were represented by counsel and/or to cease communications with the Snyders. (R. p. 121, 137, 139-47, 158). Ditech and its predecessors repeatedly ignored the clear language of the Supreme Court's

order and the repeated requests of Snyder by attempting direct contact.⁶ (*e.g.* R. pp. 136, 139-140).

4. Inappropriate conduct in litigation.

On June 14, 2013, Ditech's predecessor served requests to admit on Snyder. (R. p. 123). Snyder timely served answers to these requests on July 15, 2013 (July 14, 2013 fell on a Sunday). (R. pp. 122-27). On August 13, 2013, Snyder's counsel spoke with Ditech's predecessor's counsel via telephone about the potential for settlement of this matter. (R. pp. 128, 587). On the same day, Ditech's predecessor's counsel executed an Affidavit of Default, stating that Snyder had failed to respond to its Requests to Admit. (R. pp. 129-30, 587). Not only was this affidavit false, it was never served on Snyder's counsel when it was filed with the court.⁷ (R. pp. 129-30, 156). Snyder's counsel did not learn of this affidavit until March 27, 2014, when Snyder's counsel received a notice of the entry of a heretofore-unknown order amending the caption. (R. p. 155). Upon review of the docket online, Snyder's counsel discovered that he had not been informed of: (1) Ditech's predecessor's counsel's filing of the August 13, 2013, affidavit; (2) a September 30, 2013, status conference that Ditech's predecessor's counsel allowed to go forward without notice to Snyder's counsel; (3) a September 30, 2013 order staying this case pending foreclosure intervention; and (4) Ditech's predecessor's counsel's filing of a motion and proposed order to amend on February 20, 2014, which was granted without hearing. (R. pp. 129-30, 134-135, 148-150, 156).

⁶ Because this debt was in dispute, Ditech's predecessors' acts also violated the Fair Debt Collection Practices Act. See 15 U.S.C. § 1692c(c). Because the Bankruptcy Court's order stays any action for damages, any potential action under this statute is stayed.

⁷ Ditech is unable to deny that the affidavit is false, though it does admit it was never served on the Snyders' counsel. (R. p. 106).

Snyder's counsel immediately wrote Ditech's predecessor's counsel and demanded that Ditech's predecessor's counsel request the court strike the August 13, 2013 affidavit. (R. p. 156). Snyder's counsel referenced this request again on March 26, 2015 and April 28, 2015; the affidavit remained part of the record until struck/withdrawn at the motion for summary judgment hearing on March 18, 2019 (R. pp. 156, 168, 172-73, 587-88).

5. Spoliation of evidence.

On March 4, 2015, the Snyder's counsel requested that Ditech's predecessor preserve documents related to this action. (R. p. 164). Ditech, in its responses to Snyder's Third Set of Interrogatories, explains that it could not admit or deny several requests due to a lack of records from its predecessor. (R. pp. 99-101). The loss or destruction of these records have thus frustrated factfinding in this matter and have also contributed to the extreme delay in proceedings. The Master-in-Equity's refusal to sanction Ditech for spoliation (R. pp. 649-53) is reversible error.

B. The Master-in-Equity should have found a violation of the Admin Order at the final hearing.

While this action is subject to the automatic stay of 11 U.S.C. § 362(a), the Southern District of New York Bankruptcy Court has modified the stay to exempt claims that "have the sole purpose of defending, unwinding, or otherwise enjoining or precluding any foreclosure or eviction, and do not have an adverse effect on any of the Debtors' assets." In re Ditech Holding Co., No. 19-10412-jlg (Bankr.S.D.N.Y. Order dated February 13, 2019). Ditech has stipulated that Snyder's counterclaims for civil compensatory contempt and quiet title, and the affirmative defense of rescission, may proceed, provided they only "seek a stay or dismissal of Ditech's foreclosure action or a determination of the validity of Ditech's lien and do not seek [an] award of money damages..." (R. pp. 203-05).

While the Admin Order explicitly allows for awards of attorneys' fees, this relief is prohibited by the automatic stay. With no reported decisions detailing the exact types of other relief available under the Admin Order, this Court must consult analogous law. Snyder believes that case law interpreting violations of discovery orders can provide guidance under these circumstances. When issuing discovery sanctions under Rule 37, SCRCP, a circuit court has the ability to strike the pleadings of a litigant for "bad faith, willfulness, or gross indifference to the rights of other litigants." Karppi v. Greenville Terrazo, Inc., 327 S.C. 538, 489 S.E.2d 679, 682 (Ct. App. 1997). As set forth above, Ditech (through its predecessor) has repeatedly violated the terms of the Admin Order, despite having notice of these violations and of the applicable order. As it is in the business of mortgage servicing, it is fair to assume that Ditech was aware of the consequences of its years-long pattern of conduct (*i.e.* substantial accrued interest and fees), thus making its conduct willful or intentional.⁸ See Restatement (Second) of Torts § 8A (1965) (Acts are intentional when the actor "desires to cause consequences of his act, or...he believes that the consequences are substantially certain to result from it."). Ditech's spoliation of evidence further supports sanctions. E.g. Kershaw County Board of Education v. U.S. Gypsum Co., 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990). Accordingly, the Master-in-Equity should have struck Ditech's Amended Complaint and Ditech's Reply to Defendant's counterclaims. The Master-in-Equity should have further entered default against Ditech and issued a default judgment on Snyder's counterclaims for civil

⁸ If not willful or intentional, Ditech's conduct evidences gross indifference to the Snyders' rights and manifests disregard for Plaintiff's duties under the Supreme Court's order. Cf. Richardson v. Hambright, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988) ("Gross negligence is the intentional, conscious failure to do something which is incumbent upon one to do or the doing of a thing intentionally that one ought not to do.").

compensatory contempt and quiet title ordering either (1) dissolution of Ditech's lien/mortgage on 1752 Orange Grove Shores Drive or (2) rescission of the note and mortgage at issue in this action.

In the alternative, the Master-in-Equity should have struck Ditech's demand for damages of accrued interest, fees (including attorneys' fees), costs, advances, and a deficiency judgment, and barred it from offering any evidence of the same. Cf. Rule 37(b)(2)(B), SCRCF (providing for "[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence."). The chief injury Ditech has caused is the unnecessary delay, for approximately ten years, of the fair consideration of Kevin Snyder's application for modification. As of April 1, 2019, this loan accumulated \$109,616.64 in accrued interest and \$40,000.00 of advances and fees. (R. p. 26). This exceeds the principal balance of \$137,020.25, and leaves a total debt as of April 23, 2019 of \$293,930.69. (R. pp. 23-32). The property at issue in this action has a 2018 tax value of \$152,600.00, but its value ("Zestimate") on the Zillow website on or about March 8, 2019 was \$249,883.00. (R. pp. 427-33). The accrued interest and fees, caused by the acts of Ditech, have resulted in additional costs that will prevent Snyder from realizing any equity in the property. Accordingly, these costs and fees are not properly any part of Ditech's damages.

II. Snyder was entitled to the Green Tree records retained pursuant to its settlement with the Federal Trade Commission.

On or about March 26, 2018, Snyder served Ditech with his second interrogatories and second requests to produce. (R. p. 88). Ditech, under extension, served its responses to these discovery requests on July 23, 2018. (R. pp. 91-94). On or about August 15, 2018,

Snyder's counsel wrote to Ditech's counsel regarding his objections to certain requests, and requesting amended requests. (R. p. 88). Specifically, Snyder's counsel considered the following objections inappropriate:

25. A copy of the records Green Tree is required to keep pursuant to Section XIX, paragraph A of Federal Trade Comm'n v. Green Tree Servicing, LLC, 0:15-cv-02064-SRN-JSM (D. Minn. Order dated April 23, 2015) (the "FTC Order").

RESPONSE: Plaintiff objects to this request on grounds that it is overly broad and seeks information that is not relevant to any cause of action or defense in this action.

26. A copy of the records Green Tree is required to keep pursuant to Section XIX, paragraph B of the FTC Order for the following:
 - a. Cassandra Turner
 - b. Michael Young
 - c. Swarn [last name unknown]
 - d. Xaiver A. (R. p. 96)
 - e. All persons who interacted with Kevin Snyder, Mary Snyder, or their representatives (e.g. their attorney) regarding this loan or its collection
 - f. All persons who reviewed the Snyders' loss mitigation applications

RESPONSE: Plaintiff objects to this request on grounds that it is overly broad and seeks information that is not relevant to any cause of action or defense in this action. Plaintiff objects further as it seeks personally identifiable information of its employees.

29. A copy of the records Green Tree is required to keep pursuant to Section XIX, paragraph E of the FTC Order that would have been used in the collection of the loan at issue in this action.

RESPONSE: Plaintiff objects to this request on grounds that it is overly broad and seeks information that is not relevant to any cause of action or defense in this action.

32. A copy of your fee agreement(s) with all attorneys who were retained to handle this mortgage foreclosure action.

RESPONSE: Plaintiff objects to this request on grounds that this request seeks information protected by the Attorney-Client Privilege. Plaintiff objects to this request on the grounds that it seeks information that is not

relevant to any cause of action or defense in this action. Plaintiff objects to this request as it seeks business confidential and proprietary information.

(R. pp. 91-97).

Ditech's counsel responded to Snyder's counsel's concerns via a letter dated August 31, 2018, stating: "...[Plaintiff] is standing on its objections which I understand will likely lead to a motion to compel." (R. pp. 89, 188-90). Snyder filed a motion to compel Ditech's responses, which was heard on December 10, 2018, at a status conference.⁹ The Master-in-Equity denied this motion via a Form 4 order on March 18, 2019, and in his March 27, 2019 order. (R. pp. 17, 22).

The Master-in-Equity's decision in this matter is an abuse of discretion, as it does not compel the production of materials that are discoverable under South Carolina law. As an initial matter, Ditech's objections are impermissibly generic, and therefore waived. The Delaware Court of Chancery ably sets this concept forth:

...numerous federal decisions made clear that "boilerplate, generalized objections are inadequate and tantamount to not making any objection at all." Summarizing the case law, one commentator observed that "[b]oilerplate objections have been considered prima facie evidence of a Rule 26 violation, which causes the objecting party to waive any legitimate objections that they may or may not have had.

In Re Oxbow Carbon, LLC Unitholder Litig., No. CV 12447-VCL, 2017 WL 959396 (Del. Ch. Order dated March 13, 2017) (footnotes and citations removed) (R. pp. 789-808); Curtis v. Time Warner Entertainment-Advance-Newhouse P'ship, No. 3:12-cv-2370-JFA, 2013 WL 2099496 (D.S.C. May 14, 2013) ("Objections that state that the discovery request is 'vague, overly broad, or unduly burdensome' are, standing alone, meaningless and will be found meritless by this court.") (R. pp. 663-67); Crescom v. Terry, No. 2:12-cv-63-

⁹ There was no court reporter present at this hearing.

PMD, 2017 WL 2880866 (D.S.C. Order dated July 6, 2017) (citing multiple jurisdictions for the same proposition). (R. pp. 809-19). Further:

For an objecting party to carry its burden, the objection must be specific, the party making it must explain why it applies on the facts of the case to the request being made, and if the party is providing information subject to the objection, the party must articulate how it is applying the objection to limit the information it is providing. In short, “[o]bjections should be plain enough and specific enough so that the Court can understand in what way the discovery is] claimed to be objectionable.”

Id. at 5-6 (footnotes and citations removed).

Even if Ditech had not waived its objections, Snyder requested relevant information. The scope of discovery in South Carolina is very broad, allowing inquiry into any matter that “relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party...” Rule 26(b)(1), SCRCF. Snyder’s counterclaims allege a wide variety of misconduct related to the foreclosure and collection of this loan (R. pp. 70-76), and other misconduct has been uncovered as litigation progressed (see Argument I). The personnel records of certain employees (R. p. 96) will provide information on the persons who interacted with the Snyders and their counsel. Likewise, training materials (R. p. 96) will determine how systemic the alleged misconduct is. Accounting records (R. p. 95) are needed to establish damages. Because Plaintiff has denied the allegations of paragraph 21 of the Counterclaims (alleging failure to make good faith efforts, &c.), the materials requested in requests 26 & 29 will be necessary for impeachment. Impeachment evidence is relevant and discoverable. E.g. Newsome v. Penske Truck Leasing Corp., 437 F. Supp.2d 431 (D.Md. 2006) (applying substantially similar federal rule). Ditech has custody of these documents, according to the April 23, 2015 order in a settlement with the Federal Trade Commission over mortgage servicing

practices. See Federal Trade Comm’n v. Green Tree Servicing, LLC, 0:15-cv-02064-SRN-JSM (D. Minn. Complaint filed April 21, 2015); Federal Trade Comm’n v. Green Tree Servicing, LLC, 0:15-cv-02064-SRN-JSM (D. Minn. Order dated April 23, 2015). (R. pp. 668-777). Accessing these documents cannot be a burden. Finally, regarding request 32 (R. p. 97), Ditech has demanded attorneys’ fees and costs as damages in this action, thus making this information relevant, and a fee agreement is not a privileged document. See In re Grand Jury Subpoena, 204 F.3d 516 (4th Cir. 2000); In re Grand Jury Investigation, 631 F.2d 17, 19 (3rd Cir. 1980).

Ditech’s withholding of these materials has prevented Snyder from obtaining evidence relevant to all his causes of action, but particularly for his cause of action for the violation of the Admin Order. A court considering sanctions needs to know whether Ditech and its predecessors’ repeated delays were a systemic problem, or the result of several deficient employees. Accordingly, the Master-in-Equity’s March 27, 2019 and April 26, 2019, orders must be vacated and its March 25, 2019, discovery order reversed.

III. The March 20, 2014, motion to amend in this action was procedurally and substantively defective.

On February 19, 2014, Ditech’s predecessor Green Tree filed a motion to amend the complaint (as a form motion) with an attached proposed “Order Amending Caption”. (R. pp. 6-7). Snyder was never served a copy of this motion; thus it violated the notice provisions of Rule 6, SCRCp. (R. p. 109). This lack of notice prevented Snyder from exercising his right to object to the substitution of a party under Rule 17(a), SCRCp. Had Snyder been allowed to object, he would have, as the factual findings of the resulting order lack evidentiary support. According to the order:

... this action was brought in the name of BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP in anticipation that an assignment into that entity would be placed of record, and it appearing that no such assignment has been placed of record, but by virtue of an assignment recorded September 9, 2013, in Book 0359 at Page 558, the loan was transferred from Countrywide Home Loans, Inc. to Green Tree Servicing, LLC...

(R. pp. 6-7). The public record does not reflect that this loan was actually transferred to Green Tree Servicing, LLC n/k/a Ditech Financial, LLC. The first assignment of this loan took place on September 25, 2007, when Mortgage Electronic Registration Systems, Inc., as nominee for Gateway Funding Diversified Mortgage Services (the originator of the loan) assigned the mortgage¹⁰ to Countrywide Home Loans, Inc. (R. pp. 351-52). The next assignment took place on January 26, 2009, when Countrywide Home Loans, Inc. assigned the mortgage to Countrywide Home Loans Servicing, LP. (R. pp. 422-24). Countrywide Home Loans, Inc. then attempted to assign the mortgage again on September 9, 2013 to Green Tree Servicing, LLC n/k/a Ditech Financial, LLC. (R. pp. 425-26). However, the record reflects that Countrywide Home Loans, **LP** held the mortgage on September 9, 2013, not Countrywide Home Loans, **Inc.**, and therefore Countrywide Home Loans, Inc.'s second assignment had no effect. The record contains no subsequent assignments of the mortgage; therefore, Countrywide Home Loans, LP (now BAC Home Loans Servicing, LP) is the current owner of this mortgage. Accordingly, Green Tree / Ditech lacked the standing¹¹ to pursue this action at the time of the March 12, 2014 order amending the action,

¹⁰ The record contains no evidence of who possessed the note after its initial signature and before the April 1, 2019 final hearing. (R. pp. 642-44). See S.C. Nat'l Bank v. Halter, 293 S.C. 121, 128, 359 S.E.2d 74, 77 (Ct. App. 1987) ("The assignment of a mortgage as distinct from the debt it secures is nugatory and confers no rights upon the transferee absent some indication that the parties also intended to transfer the debt." (internal citations omitted)).

¹¹ Snyder expressly contested standing in this action. (R. p. 71).

and the action should have been dismissed; the Master-in-Equity should be reversed and Ditech's action dismissed.

IV. The Estate of Mary Snyder is entitled to present a defense under the Attorney Preference Statute.

The Master-in-Equity's March 27, 2019, order struck one defense of the Estate of Mary Snyder: "The Court finds that Defendants cannot raise a defense to foreclosure on the basis of alleged noncompliance with S.C. Code § 37-10-102 ("Attorney Preference Statute") as to Mary Snyder, because Mary Snyder was not a "borrower" within the meaning of the statute, and the Court therefore strikes this defense." (R. pp. 21-22). The Answer and Counterclaims of Kevin Snyder and the late Mary Snyder asserted, on behalf of Mary Snyder, a violation of South Carolina's Attorney Preference Statute. See S.C. Code § 37-10-102. Mary Snyder was a signatory to the mortgage securing the loan at issue in this action (she was not a signatory to the note), and she was not given a choice of who to represent her at closing. (R. pp. 71, 188-90, 317-35). South Carolina's Attorney Preference Statute provides:

The creditor must ascertain prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction and except in the case of a loan on property that is subject to the South Carolina Horizontal Property Act (Section 27-31-10, et seq.) the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage and comply with such preference.

S.C. Code § 37-10-102(a). Chapter 22 of South Carolina's Consumer Protection Code ("Mortgage Lending") defines a "borrower" as: "a natural person in whose dwelling a security interest is or is intended to be retained or acquired if that person's ownership interest in the dwelling is or is to be subject to the security interest." S.C. Code § 37-22-

110(7). Because Mary Snyder (now her estate) is a party to this lawsuit and to the mortgage, including her in the definition of “borrower” is consistent with the liberal construction and remedial nature of the Consumer Protection Code. See S.C. Code § 37-1-102 (Purposes; rules of construction). Mary Snyder’s Estate has been prejudiced by not being able to assert this defense, which would have served as a setoff to Ditech’s judgment. See S.C. Code § 37-10-105(A). Accordingly, the striking of this defense was reversible error.

V. The Master-in-Equity lacked jurisdiction over this case after the first notice of appeal.

Generally speaking, an order that affects an interest in property is immediately appealable, especially if there exists a risk that the underlying property could be lost. See Lebovitz v. Mudd, 289 S.C. 476, 347 S.E.2d 94 (1986) (order dissolving lis pendens immediately appealable); Va.-Carolina Chem. Co. v. Wilkins, 105 S.C. 291, 298, 89 S.E. 659, 661 (1916) (order dissolving an attachment to lumber immediately appealable); Kay v. Meadors, 216 S.C. 483, 486, 58 S.E.2d 893, 895 (1950) (order refusing to dissolve an attachment to automobile immediately appealable). Similarly, without an immediate appeal of the March 27, 2019 order, and the consequential automatic stay, the property at issue in this residential foreclosure could be lost at judicial sale and an appeal would not reinstate ownership.¹²

The March 29, 2019, notice of appeal was a valid appeal of an immediately appealable order. Accordingly, the Master-in-Equity lost jurisdiction of this matter and did

¹² This fact distinguishes this case from Link v. Sch. Dist. of Pickens County, 302 S.C. 1, 393 S.E.2d 176 (1990), which did not involve a property interest. Ashenfelder v. City of Georgetown, 389 S.C. 568, 698 S.E.2d 856 (Ct. App. 2010), did involve an interest in real property, but there was no reasonable risk of the real property being lost after a final order.

not have the authority to conduct the April 1, 2019, hearing. Rule 241(a), SCACR; Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 533, 787 S.E.2d 485, 493 (2016) (“Pursuant to Rule 205, the service of a notice of appeal divests the trial court of jurisdiction over matters affected by the appeal...”). Further, the Master-in-Equity’s determination that he did have jurisdiction (R. pp. 606-22) was likewise improper, as only this Court had the authority to determine the extent of the automatic stay. State v. Cooper, 342 S.C. 389, 536 S.E.2d 870 (2000) (citing Kearney v. Allen, 287 S.C. 324, 338 S.E.2d 335 (1985)). Reversal is mandated.

CONCLUSION

For the argument set forth above, Kevin Snyder asks this Court to reverse the decisions of the Charleston County Master-in-Equity, award him the relief requested under the Admin Order, and award him all such other and further relief as this Court deems just and proper.

Dated: February 5, 2021

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**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell Scarborough
Master in Equity**

Appellate Case No. 2019-000575
Circuit Court Case No. 2010-CP-10-7838

RECEIVED

NOV 06 2019

SC Court of Appeals

Ditech Financial, LLC,

Respondent,

v.

Kevin G. Snyder, Individually and
as Personal Representative of the
Estate of Mary Snyder,

Appellant.

BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

1. Whether the Appellant's counterclaim for civil compensatory contempt, premised on violation of Justice Toal's 2011 Administrative Order, was properly dismissed at the summary judgment stage where violation of the 2011 Administrative Order does not provide for a private cause of action, and where Ditech (and its predecessors) fully completed the foreclosure intervention process and certified their compliance with the 2011 Administrative Order.

2. Whether the Appellant satisfied his burden of establishing that the trial court abused its discretion in denying a motion to compel the production of documents where the document requests sought overly broad materials relative to an unrelated FTC enforcement action in Minnesota as well as Ditech's attorney-fee agreements with its legal counsel.

3. Whether the trial court abused its broad discretion in granting a motion to amend the case caption where the Appellant consented to a subsequent change to the case caption (making the issue moot), where Ditech possesses the Note and is clearly the proper plaintiff with standing, and where any error would be harmless.

4. Whether the trial court properly struck the Appellant's affirmative defense for violation of South Carolina's Attorney Preference Statute with regard to Mary Snyder where the statute protects "borrowers" and Mary Snyder borrowed nothing.

5. Whether the trial court abused its discretion in proceeding with the foreclosure hearing despite the Appellant's notice of appeal from the interlocutory summary judgment order where the summary judgment order was not immediately appealable, where the initial notice of appeal (even if proper) did not prevent the trial court from proceeding with separate matters not affected by the appeal, and where the Appellant has suffered no prejudice because he is presently seeking to unwind the foreclosure judgment based on alleged errors made at the summary judgment stage.

STATEMENT OF THE CASE

A. The Promissory Note and the Mortgage.

On or about April 21, 2005, Kevin G. Snyder (“Snyder”) executed and delivered a promissory note (“Note”) in the principal sum of \$135,000.00 in favor of Gateway Funding Diversified Mortgage Services L.P. (R. p. 45, ¶ 4; R. p. 308, ¶ 6). Snyder’s wife at the time, Mary Snyder, was not a signatory to the Note. (R. p. 308, ¶ 6; R. pp. 312–315). To secure payment of the Note, Snyder, together with his then-wife Mary Snyder, made, executed, and delivered a real estate mortgage (“Mortgage”) encumbering real property located at 1752 Orange Grove Shores Drive, Charleston, South Carolina 29407 (the “Property”). (R. pp. 45–46, ¶ 5; R. p. 308, ¶ 7).

In connection with the loan, Snyder executed an Attorney/Insurance Preference Form and an Attorney/Insurance Preference Check List, forms in which Snyder selected – and handwrote in the name – Roy Reynolds as his preferred attorney to handle the closing of the loan. (R. p. 308, ¶ 8; R. pp. 330–332). Snyder also executed two Servicing Disclosure Statements providing notice that the right to collect mortgage loan payments could be transferred. (R. p. 308, ¶ 8; R. pp. 333–335).

B. Notice of Default, Foreclosure Action, and Initial Efforts at Loan Modification and Loss Mitigation.

The Note came into default for failure to make payments on September 1, 2008 and all subsequent payments. (R. p. 47, ¶ 15; R. p. 309, ¶ 12).¹ On April 27, 2010, Ditech Financial LLC’s (“Ditech”) predecessor in interest, BAC Home Loans Servicing, LP,² gave notice to Snyder

¹ Ditech’s predecessor in interest, Bank of America, N.A., filed an initial foreclosure action in 2009, in which the trial court granted a foreclosure judgment. The judgment was subsequently vacated owing to the first South Carolina Supreme Court Administrative Order regarding foreclosure intervention.

² Through various assignments, the mortgage was assigned to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP. (R. p. 46, ¶¶ 7–9).

that the Note was in default and that he had an opportunity to cure the default. (R. pp. 309–310, ¶ 14; R. pp. 376–378). On September 23, 2010,³ with the Note remaining in default, BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP (“BAC”) initiated this foreclosure action against Snyder and filed an appropriate Lis Pendens covering the Property. (R. pp. 35–42). On October 27, 2010, BAC filed an amended complaint (“Complaint”) to add Mary Snyder as a defendant along with Snyder, together with an Amended Lis Pendens. (R. pp. 45–57). On December 16, 2010, the matter was referred to Mikell R. Scarborough, Master in Equity, by order of the trial court. (R. pp. 1–2).

Pursuant to the Administrative Order of the Supreme Court of South Carolina, Re: Mortgage Foreclosure Actions, No. 2011-05-02-01 (May 2, 2011) (hereinafter, the “2011 Order”), Ditech’s predecessor in interest, on December 20, 2012, filed and served on Snyder and Mary Snyder a Notice of Foreclosure Intervention. (R. pp. 59–62). Several months later on April 8, 2013, Ditech’s predecessor in interest filed and served a certificate of compliance with the 2011 Order, which certified that Snyder and Mary Snyder had been served with notice of their rights to foreclosure intervention but had failed to submit required documents to be reviewed for loss mitigation alternatives (resulting in being denied for loss mitigation), and which directed Snyder and Mary Snyder to answer the Complaint. (R. pp. 63–65).

C. Answer and Counterclaims.

On June 3, 2013, Snyder and Mary Snyder filed an answer (“Answer”) to the Complaint. (R. pp. 70–77). The Answer included several affirmative defenses, including that Ditech’s predecessor in interest (a) did not have standing, (b) violated South Carolina’s Attorney Preference Statute, S.C. Code Ann. § 37-10-102(a) (hereinafter, the “Attorney Preference Statute”), with

³ For the sake of clarification, dates of filed documents referenced herein refer to the date of the file-stamp on the document (not the date of the signature of the parties or the Court).

regard to Mary Snyder, and (c) did not comply with the 2011 Order. (R. p. 71, ¶¶ 11, 12, and 14(a)). The Answer also asserted four counterclaims: (1) Civil Compensatory Contempt (for the alleged violation of the 2011 Order); (2) Breach of Contract; (3) Violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*; and (4) Quiet Title. (R. pp. 73–76, ¶¶ 21–34). Ditech’s predecessor in interest timely filed a reply to the Answer. (R. pp. 78–83).

D. Further Efforts Undertaken to Avoid Foreclosure.

Ditech, which was formerly known as Green Tree Servicing, LLC, began servicing the loan effective June 1, 2013. (R. p. 309, ¶ 9). On June 10, 2013 and June 11, 2013, Ditech sent letters to Snyder notifying him of the servicing transfer and providing him with information regarding the loan balance and the identity of the creditor. (R. p. 309, ¶ 9; R. p. 336–344). The Mortgage was assigned to Ditech on June 17, 2013, following assignments from the original beneficiary to Countrywide Home Loans Inc. on September 25, 2007 and Countrywide Home Loans Servicing, LP on January 26, 2009. (R. p. 309, ¶ 10). The Note is endorsed in blank, and it is in Ditech’s possession. (R. p. 309, ¶ 11).

Like its predecessors in interest, Ditech reviewed the Note and Mortgage for alternatives to foreclosure and attempted to resolve the delinquency through loss mitigation.⁴ On December 23, 2014, Ditech approved a trial plan for modification with trial payments in the amount of \$1,131.37. (R. p. 310, ¶ 15; R. pp. 379–385). Snyder, via his counsel, rejected the trial plan, and Ditech, on March 10, 2015, notified Snyder, via his counsel, that a permanent modification would be denied due to failure to complete the trial period plan. (R. pp. 386–391). In a March 25, 2015

⁴ As of March 18, 2019, the total amount due on the Note was \$292,015.44, including the principal sum of \$137,020.25, interest in the amount of \$109,238.89, escrow advances in the amount of \$39,793.89, and corporate advances, late fees, and other charges in the amount of \$5,962.41. (R. p. 309, ¶ 13).

letter, Ditech also provided Snyder's counsel with answers to questions posed concerning its calculation of the trial plan payment amounts. (R. pp. 392–393).

Notwithstanding Snyder's rejection of the trial payment plan, Ditech reviewed Snyder again for a modification. On May 11, 2017, Ditech notified Snyder, via his counsel, that he was ineligible for a modification. (R. p. 310, ¶ 16; R. pp. 396–399). A month later on June 8, 2017, and following an appeal of the determination of ineligibility, Ditech confirmed Snyder's ineligibility. (R. pp. 400–401).

E. Relevant Procedural History

1. Amendment of Case Caption

On March 20, 2014, upon the motion of Ditech's predecessor in interest ("Motion to Amend"), "Green Tree Servicing, LLC" replaced BAC as the plaintiff in this lawsuit. (R. p. 7). On or about August 31, 2015, Green Tree Servicing, LLC merged with Ditech Mortgage Group. Shortly thereafter on November 23, 2015, Mary Snyder passed away. As a result, the case caption was further amended via a consent motion of the parties to list the Plaintiff as "Ditech Financial, LLC" and to list the Defendant as "Kevin G. Snyder, individually and as Personal Representative of the Estate of Mary Snyder." (R. pp. 15–16).⁵

2. Denial of Motion to Compel Discovery Responses

On November 29, 2018, Appellant filed a motion to compel responses to four separate document requests. (R. pp. 87–98). Generally speaking, the motion sought to compel Ditech to provide documents related to (a) a Consent Order entered in the United States District Court for the District of Minnesota in a suit brought by the Federal Trade Commission, (b) Ditech's policies and procedures related to loss mitigation evaluation, and (c) the fee agreements between Ditech

⁵ "Kevin G. Snyder, individually and as Personal Representative of the Estate of Mary Snyder" is hereinafter referred to as "Appellant".

and the law firms engaged to handle this lawsuit. Ditech opposed the motion on relevancy grounds. (R. pp. 179–191). The parties discussed this motion at a March 18, 2019 hearing on the parties’ cross-motions for summary judgment, with the trial court orally denying the motion to compel. (R. p. 578, lines 3–18). The trial court subsequently denied the motion to compel in a Form 4 Order, filed March 25, 2019 (R. p. 17), and it denied the motion to compel again in the context of its order on the parties’ motions for summary judgment (hereinafter “Summary Judgment Order”) (R. p. 22, ¶ E).

3. Cross-Motions for Summary Judgment

On March 11, 2019, the parties both filed motions for summary judgment.⁶ The Appellant filed a motion for summary judgment as to the counterclaims for civil compensatory contempt and quiet title. (R. pp. 412–434). Ditech moved for summary judgment on its foreclosure action and on the Appellant’s counterclaims for civil compensatory contempt and quiet title. (R. pp. 290–410). Ditech also moved for summary judgment on the Appellant’s defense alleging violation of the Attorney Preference Statute with regard to Mary Snyder. The trial court held a hearing on March 18, 2019, which was attended by counsel for the parties. (R. pp. 561–601). On March 28, 2019, the trial court entered its Summary Judgment Order denying the Appellant’s motion, granting Ditech’s motion with regard to the civil compensatory contempt counterclaim and the

⁶ Prior to the parties filing motions for summary judgment, Ditech notified the Court of its Chapter 11 bankruptcy filing in the United States District Court for the Southern District of New York, together with the bankruptcy court’s modification order which limited the scope of the automatic stay. (R. pp. 203–289). The parties agree that as a result of the limited automatic stay, the Appellant’s counterclaims for breach of contract, unfair trade practices, and (to the extent it seeks monetary relief) civil compensatory contempt are stayed. Ditech’s foreclosure action and the Appellant’s counterclaims for quiet title and for civil compensatory contempt (to the extent those counterclaims seek only to suspend or stop the foreclosure or seek determination of the validity of Ditech’s lien) are not stayed and were permitted to proceed to judgment.

Attorney Preference Statute defense, and denying Ditech's motion with regard to the foreclosure claim and the quiet title counterclaim. (R. pp. 19–22).

4. Initial Notice of Appeal, Subsequent Trial, Foreclosure Order, and Amended Notice of Appeal

On March 29, 2019, the Appellant filed a notice of appeal, indicating his intent to appeal the following orders: (a) March 20, 2014 Order Amending Caption; (b) March 25, 2019 Form 4 Order Denying Motion to Compel; and (c) March 28, 2019 Order on Motions for Summary Judgment (hereinafter “Initial Notice of Appeal”). (R. pp. 531–533).⁷

On April 1, 2019, the trial proceeded. (R. pp. 602–662). At the inception of the trial, counsel for the Appellant objected to the trial going forward, arguing that the Initial Notice of Appeal deprived the trial court of jurisdiction. (R. p. 606, lines 12–p. 621, line 25). The trial court determined it had jurisdiction and proceeded. At the trial, Ditech produced the original Note for the trial court's inspection, and the trial court noted that it was endorsed in blank and was in Ditech's possession. (R. p. 24, ¶ 10). The trial court found that Ditech was entitled to foreclose and had complied with the 2011 Order, and it therefore entered judgment in Ditech's favor. (R. pp. 27–32). Consistently, the trial court concluded that the Appellant was not entitled to the remedy of quiet title. (R. p. 27, ¶ 3).

On May 2, 2019, the Appellant filed an amended notice of appeal (hereinafter “Amended Notice of Appeal”). (R. pp. 536–537). In addition to appealing the three orders referenced in the Initial Notice of Appeal, the Appellant indicated his intent to also appeal the April 26, 2019 Master

⁷ Referencing the date on which the trial court signed these orders, the Appellant refers to them as the orders “dated March 12, 2014, March 18, 2019, March 18, 2019, and March 27, 2019.” (R. p. 531). The Appellant seems to have erroneously listed March 18, 2019 twice on the Initial Notice of Appeal. Although not expressly referenced in the Initial Notice of Appeal, the Initial Notice of Appeal also attaches a March 25, 2019 Form 4 Order (signed by the trial court on March 20, 2019) denying the Appellant's Motion for Partial Summary Judgment. (R. p. 18).

in Equity's Order and Judgment of Foreclosure and Sale (referred to by the Appellant as the "April 23, 2019" order). (R. p. 536).

SUMMARY OF THE ARGUMENT

The trial court properly dismissed the Appellant's counterclaim for civil compensatory contempt at the summary judgment stage. The civil compensatory contempt counterclaim was premised exclusively on an alleged violation of the 2011 Order. However, that 2011 Order does not provide for a private cause of action. In any event, Ditech (and its predecessors) fully complied with the 2011 Order. The Appellant was served with a notice of foreclosure intervention, and prior counsel also filed and served a certificate of compliance with the 2011 Order. Ditech subsequently reviewed the Appellant for a loan modification and offered a trial period plan. When the Appellant rejected the trial payment plan, Ditech still reviewed the Appellant again for modification but ultimately determined that the Appellant was no longer eligible. Thus, even if the 2011 Order provided a private cause of action, which it does not, Ditech fully complied with the 2011 Order.

The Appellant's other challenges to various orders in this proceedings below are without merit. The trial court did not abuse its discretion in denying a motion to compel the production of materials from an unrelated FTC enforcement action that proceeded in federal court in Minnesota back in 2015. This request – which sought all accounting records, home addresses and telephone numbers of Ditech employees, and information about Ditech's interactions with borrowers other than Snyder – was plainly overbroad. Similarly overbroad was the Appellant's request for Ditech's attorney-fee agreements with the various counsel it has used in these proceedings.

The trial court also did not abuse its broad discretion in granting a motion to amend the case caption, which replaced BAC with "Green Tree Servicing LLC" (now known as Ditech). Ditech possesses the Note endorsed in blank. Because a mortgage follows a note, Ditech is the real party in interest with standing to enforce the Mortgage. Furthermore, the Appellant subsequently agreed to an amendment of the case caption, rendering moot any dispute over the

prior amendment. In any event, any error is harmless because the Appellant never had a basis to oppose the amendment of the caption.

And finally, the trial court properly struck the Appellant's affirmative defense under the Attorney Preference Statute with regard to Mary Snyder. Mary Snyder was not a signatory to the Note. Therefore, she borrowed nothing and is not a "borrower." Because the Attorney Preference Statute required Ditech to ascertain the attorney preference of the borrower only (and not others), and because Ditech complied with the statute by ascertaining the attorney preference of Snyder (the only signatory to the Note and, therefore, the only "borrower"), the trial court did not err in giving the statutory text its plain and ordinary meaning and striking the Attorney Preference Statute defense.

The Appellant's only remaining argument is that the Initial Notice of Appeal from the Summary Judgment Order deprived the trial court of jurisdiction and should have precluded the trial court from proceeding with the foreclosure hearing. The Summary Judgment Order was not immediately appealable under S.C. Code Ann. § 14-3-330, which moots the Appellant's entire argument about the trial court's continued jurisdiction. Even if the Summary Judgment Order was immediately appealable, the South Carolina Rules of Appellate Procedure permitted the trial court to retain jurisdiction over matters not affected by the appeal – and proceed with the foreclosure hearing – during the pendency of the appeal from the Summary Judgment Order.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DISMISSING THE APPELLANT'S COUNTERCLAIM FOR CIVIL COMPENSATORY CONTEMPT.

A. Violation of the 2011 Order does not create a private cause of action.

The Appellant's counterclaim for civil compensatory contempt was premised exclusively on the alleged violation of the 2011 Order. (R. pp. 73–74, ¶¶ 21–23). However, “[t]he Toal Administrative Order, on its face, does not create a private cause of action.” *Weber v. Bank of Am. NA*, 2013 WL 4820446, at *3 (D.S.C. Sept. 10, 2013). The Appellant has failed to direct this Court to any case identifying violation of the 2011 Order as an independent cause of action.⁸ For this reason alone, the Appellant's counterclaim for civil compensatory contempt was appropriately dismissed at the summary judgment stage.

B. Even if the Appellant pleaded an actionable claim, it was properly dismissed at the summary judgment stage because Ditech (and its predecessors) fully complied with the 2011 Order.

Prior counsel for the original underlying plaintiff in this action served Snyder with a notice of foreclosure intervention on December 17, 2012. (R. pp. 59–62). When Snyder failed to complete a loss mitigation application in response to the notice of foreclosure intervention, prior counsel also served and filed a certificate of compliance with the 2011 Order on April 8, 2013. (R. pp. 63–65).

Subsequent to the appearance of counsel for the Appellant, Ditech also reviewed the Appellant for a loan modification. Ditech offered the Appellant a trial period plan for a permanent

⁸ During the summary judgment hearing, the Appellant directed the trial court to *Jarrell v. Petoseed Co., Inc.*, 331 S.C. 207, 500 S.E.2d 793 (Ct. App. 1998), to support his argument that this claim is actionable. (R. p. 577, lines 4–9). *Jarrell* involves the sale of contaminated watermelon seeds; it has nothing to do with residential foreclosures. The issue of whether civil compensatory contempt is a viable cause of action under South Carolina law is separate and apart from the issue of whether a violation of the 2011 Order provides for a private cause of action, regardless of how the action is captioned.

modification in 2014, but the Appellant rejected the trial period plan on the grounds that the modification terms of the plan were not sufficiently favorable, even though the plan contemplated a reduction in the Appellant's monthly payments. (R. p. 310, ¶ 15). Ditech again reviewed the Appellant for a modification in 2017 and determined that the Appellant was no longer eligible for a loan modification. (R. p. 310, ¶ 16).

The 2011 Order provides that “[n]o foreclosure hearing may be held in the foreclosure action until the Mortgagee’s attorney certifies that the Mortgagee has complied with the requirements” set forth in the 2011 Order. Administrative Order of the Supreme Court of South Carolina, Re: Mortgage Foreclosure Actions, No. 2011-05-02-01 (May 2, 2011). Those requirements include that the mortgagor has been served with the notice of right to foreclosure intervention, that the lender has received and examined all documents submitted by the borrower, and that the borrower has been afforded a full and fair opportunity to submit documents and information, but that either the mortgagor does not qualify for loss mitigation and has been so informed, or the mortgagor has failed to participate in foreclosure intervention. As set forth above, both the prior servicer and Ditech complied with the requirements of the 2011 Order. Therefore, the Appellant’s counterclaim for violation of the 2011 Order is without merit, and the trial court did not err in dismissing the counterclaim at the summary judgment stage.

C. The Appellant’s myriad complaints about Ditech’s compliance with the 2011 Order fail both individually and collectively.

Despite the Appellant’s “kitchen sink” argumentation about the foreclosure intervention process (Brief at pp. 7–11), an assessment of each of the Appellant’s individual complaints reveals them to be immaterial and without merit, both individually and collectively. In the very least, and even assuming the Appellant could assert a viable cause of action for violation of the 2011 Order (which Ditech denies), Ditech complied with its foreclosure intervention obligations in good faith.

Although the Appellant complains that correspondence was not always sent to the correct address (Brief at pp. 7–8), the Appellant’s counsel acknowledges not only that he has changed offices twice since appearing in this case (making for three separate office addresses) (R. p. 585, lines 10–18), but also that his office moves “may have disrupted normal mail service.” (R. p. 387). The important point is that the Appellant’s counsel received the December 23, 2014 trial payment plan terms. (R. p. 310, ¶ 15; R. pp. 381–385). Indeed, he responded to the payment plan terms and rejected them. (R. pp. 386–387).

In an effort to ascribe bad faith to Ditech, the Appellant acknowledged in the proceedings below that the gist of his complaints relates to delays (as there is no real dispute that the foreclosure intervention process was completed by the parties). (R. p. 574, line 24–p. 575, line 24). As the trial court noted, however, the mere delay (and any associated frustrations) does not amount to bad faith. (R. p. 596, line 23–p. 597, line 3 (“I find that they did – they have acted in good faith in attempting to [comply with the 2011 Order]. It has been slow and arduous and I understand the Defendant’s frustration with the process. I find that there’s no lack of good faith in what they have done.”)).⁹

The Appellant’s second argument, titled “Failure to timely respond to foreclosure intervention request,” similarly complains about delays, contending that it took Ditech’s predecessor two months after a request to provide a foreclosure intervention application. (Brief at

⁹ If the Appellant were truly concerned about avoiding delays and moving the foreclosure process along, he could have filed an answer admitting the material allegations of foreclosure without giving up his counterclaims. Similarly, and as discussed *infra*, if the Appellant wanted to avoid delays, he could have waited for a final judgment before attempting to appeal the interim Summary Judgment Order (and making the associated argument that the foreclosure hearing was stayed).

p. 8). This does not amount to bad faith, and the Appellant has identified no basis to make that argument.

Although the Appellant's third argument notes "repeated[]" and "flagrant[]" contact directly with the borrowers (Brief at p. 8), a review of the purported evidence of this claim cited by the Appellant reveals only a single instance in which Ditech inadvertently sent correspondence to the borrower directly. This single instance was inadvertent – and therefore not in bad faith – and unquestionably did not prevent the foreclosure intervention process from proceeding to completion.

The Appellant's two remaining arguments can be addressed summarily. Though the Appellant complains about the filing of an affidavit of default, he also notes that the affidavit of default was stricken from the record by the trial court. (Brief at p. 10; *see* R. p. 17). As such, the affidavit of default had nothing to do with the underlying foreclosure judgment. The Appellant lastly accuses Ditech of alleged spoliation of evidence (Brief at pp. 10–11) based on Ditech's inability to confirm the existence of certain documents not contained within Ditech's business records. The fact that certain documents may be in the hands of a prior loan servicer does not amount to spoliation because nothing was destroyed or lost. *See* Black's Law Dictionary 1169 (8th ed. 2005) (defining "spoliation" as the "intentional destruction, mutilation, alteration, or concealment of evidence"). At bottom, as the Appellant's counsel admitted, this issue relates only to Ditech being "unable to admit or deny certain facts" due to lack of documentation. (R. p. 650, line 24). This does not amount to reversible error.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE APPELLANT'S MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS.

The Appellant additionally seeks to unwind the foreclosure by complaining about the denial of his motion to compel the production of the following documents:

- “A copy of the records Green Tree is required to keep pursuant to Section XIX, paragraph A of Federal Trade Comm’n v. Green Tree Servicing, LLC, 0:15-cv-02064-SRN-JSM (D. Minn. Order dated April 23, 2015) (the ‘FTC Order’)”;
- “A copy of the records Green Tree is required to keep pursuant to Section XIX, paragraph B of the FTC Order for the following:
 - a. Cassandra Turner
 - b. Michael Young
 - c. Swarn [last name unknown]
 - d. Xaiver A. (See Ex. A to Responses to 02/13/18 Interrogatories p. 22)
 - e. All persons who interacted with Kevin Snyder, Mary Snyder, or their representatives (e.g., their attorney) regarding this loan or its collection
 - d. All persons who reviewed the Snyders’ loss mitigation applications”;
- A copy of the records Green Tree is required to keep pursuant to Section XIX, paragraph E of the FTC Order that would have been used in the collection of the loan at issue in this action.”; and
- “A copy of your fee agreement(s) with all attorneys who were retained to handle this mortgage foreclosure action.”

(R. pp. 95–97, Nos. 25, 26, 29, and 32).¹⁰ The Appellant has not satisfied his burden of establishing that the trial court clearly abused its discretion in denying the Appellant’s motion to compel with regard to these overly broad document requests seeking the production of irrelevant documents.

¹⁰ For the Court’s reference, Paragraphs A, B, and E of Section XIX of the FTC Order refer to the following documents:

“A. Accounting records maintained in accordance with generally accepted accounting principles in effect from time to time in the United States of America, including records showing the revenues from all goods or services sold, all costs incurred in generating those revenues, and the resulting net profit or loss;

B. Personnel records showing, for each person providing services, whether as an employee or otherwise, that person’s: name, address, and telephone numbers; job title or position; dates of service; and, if applicable, the reason for termination;

...

E. Copies of all scripts and other training materials related to the collection of debts.”

Stipulated Order for Permanent Injunction and Monetary Judgment, *FTC v. Green Tree Servicing LLC*, No. 0:15-cv-02064 (D. Minn. April 23, 2015), ECF No. 5.

(R. p. 578, lines 3–18; R. p. 17; R. p. 22, ¶ E). *See Bayle v. S.C. Dep’t of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001) (“The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion.”); *see also Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 353, 559 S.E.2d 327, 334 (Ct. App. 2001) (“An abuse of discretion occurs when there is no evidence to support the trial judge’s factual conclusion or when the ruling is based upon an error of law.”); *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) (“The burden is upon the party appealing from the order to demonstrate the trial court abused its discretion.”).

The FTC Order has nothing to do with this case, and all of the requests for documents in connection with that unrelated FTC action from the United States District Court of the District of Minnesota are overly broad and seek irrelevant information.¹¹ None of the Appellant’s arguments about relevance pass muster. In the very least, the trial court did not abuse its discretion.

The Appellant claims relevance with regard to Request No. 25 (FTC Order Section XIX, ¶ A) by arguing that “[a]ccounting records . . . are needed to establish damages.” (Brief at p. 16). However, Request No. 25 seeks *all* records of *all* revenues from *all* goods or services sold, including *all* associated costs, and *all* resulting profits and losses. It is plain that this request is overly broad for the purpose of establishing purported damages vis-à-vis Snyder.

Although Request No. 26 (FTC Order Section XIX, ¶ B) at least limits the scope of documents sought to certain individuals, it is also overly broad. With regard to Request No. 26, the Appellant argues that personnel records “will provide information on the persons who

¹¹ Whether Ditech has custody of the documents sought, and whether it would be burdensome for Ditech to produce them (Brief at pp. 16–17), is separate and apart from whether the documents are relevant to this case and whether Ditech has an obligation to produce them. Ditech did not object to the document requests at issue on the grounds of undue burden.

interacted with the Snyders and their counsel.” (Brief at p. 16). However, Request No. 26 seeks documents well beyond this purported need, including home addresses and telephone numbers of employees and information about employee terminations.

Finally, via Request No. 29 (FTC Order, Section XIX, ¶ E), the Appellant seeks Ditech’s training materials under the guise of “determin[ing] how systemic the alleged misconduct is.” (Brief at p. 16). This is a textbook example of an improper fishing expedition. Whether any of the alleged misconduct set forth in the Appellant’s counterclaims is “systemic” has no bearing on Ditech’s dealings with the Appellant. Moreover, the Appellant’s counterclaims – purportedly serving as a basis for these document requests – were filed approximately two years *prior* to the FTC Order. Therefore, the FTC Order (and the documents referenced therein) could not possibly be relevant to the alleged actions forming the basis of the Appellant’s counterclaims. Indeed, the Appellant signaled his intent to “fish” for evidence in support of his counterclaims by alleging in his affirmative defenses and counterclaims that said defenses and claims would be supported by *future* acts or omissions of Ditech. (R. pp. 72–75, ¶¶ 14(c)–20, 22, 24(c), and 27(c)).¹²

Apart from documents referenced in the FTC Order, the Appellant also challenges the denial of his motion to compel the production of Ditech’s “fee agreement(s) with all attorneys who were retained to handle this mortgage foreclosure action.” (R. p. 97, No. 32). Ditech objected on the grounds of privilege, relevance, and confidentiality. On appeal, as he did below, the Appellant argues that Ditech’s fee agreements are relevant because Ditech sought its attorneys’ fees and

¹² The Appellant’s contention that personnel records and training materials are relevant for impeachment purposes in light of Ditech’s denial of certain allegations (Brief at p. 16) similarly misses the point. The requests are overly broad. Whether Ditech complied with the 2011 Order vis-à-vis other borrowers has no bearing on whether Ditech complied with the 2011 Order with regard to the Appellant, which is the only relevant issue here. Neither training materials nor personnel records make that fact any more or less probable.

costs, and because attorney-fee agreements are not privileged. (Brief at p. 17). The terms of Ditech's fee agreements with its counsel go far beyond what might be needed to calculate an attorney fee award. If the trial court awarded attorneys' fees, Ditech would – as is customary – file an affidavit of the amount and reasonableness of its fees, which would provide the Appellant all the information he might need to evaluate the request.¹³ Even if this Court disagrees with Ditech's arguments about the relevance of these documents, the trial court made no errors of law and denied the motion to compel based on evidence in the record, meaning the Appellant has not established an abuse of discretion. *See Hedgepath.*, 348 S.C. at 353, 559 S.E.2d at 334.

Lastly, although the Appellant challenges the sufficiency of Ditech's written objections to these document requests and argues that the objections are waived (Brief at p. 15–16), he cites only to Delaware law and federal law to support his argument. By failing to cite to any South Carolina authority, the Appellant fails to satisfy his burden of establishing that the trial court abused its discretion.

III. THE GRANTING OF THE MOTION TO AMEND THE CASE CAPTION DOES NOT CONSTITUTE AN ABUSE OF DISCRETION.

Although the Appellant is technically arguing that the trial court abused its discretion in granting the Motion to Amend, the Appellant is expressly contending that Ditech (and its predecessors in interest) did not have standing to foreclose and that “the action should have been

¹³ Even if the fee agreements were relevant (which they are not), they are still privileged. Although the Appellant cites to two federal cases to argue the contrary point (Brief at p. 17), he has failed to cite to any controlling South Carolina law and, therefore, falls far short of carrying his burden of establishing an abuse of discretion. In any event, the federal criminal cases on which the Appellant relies concern themselves primarily with disclosure of the identity of a client as opposed the fee agreement or retainer agreement more generally. *See In re Grand Jury Subpoena*, 204 F.3d 516, 518 (4th Cir. 2000) (“The United States served a grand jury subpoena on an attorney commanding him to testify and produce documents concerning the identity of a client.”); *In re Grand Jury Investigation*, 631 F.2d 17, 19 (3d Cir. 1980) (“Therefore, disclosure of the names of any third parties would not disrupt any other attorney-client relationship.”).

dismissed; the Master-in-Equity should be reversed and Ditech's action dismissed." (Brief at p. 19).

"It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice." *Brown v. James*, 389 S.C. 41, 59, 697 S.E.2d 604, 614 (2010) (internal quotation marks omitted). In light of the broad discretion afforded a trial judge in this area, an order on a motion to amend a pleading "will rarely be disturbed on appeal." *Id.* at 61, 697 S.E.2d at 614 (internal quotation marks omitted). The trial court did not abuse its discretion by granting the Motion to Amend. This issue is moot, Ditech's possession of the Note means it has standing to foreclose, and any error made by the trial court is harmless and cannot serve as a basis to reverse any trial court ruling.

On or around December 18, 2018, the Appellant consented to an amendment of the case caption to replace Green Tree Servicing LLC with Ditech. (R. pp. 15–16). The Appellant is complaining about a prior amendment of the case caption, which replaced BAC with Green Tree Servicing LLC. (R. p. 7). Because the Appellant consented to the subsequent amendment – which named the current, real party in interest as the Plaintiff – any ruling on the earlier Motion to Amend is now moot.

Although the Appellant is making a standing argument, Ditech possesses the original Note endorsed in blank, as the trial court acknowledged, which gives Ditech standing to foreclose. (R. p. 24, ¶ 10; R. p. 6, ¶ 5). "Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Bank of Am., NA v. Draper*, 405 S.C. 214, 219, 746 S.E.2d 478, 481 (Ct. App. 2013) (internal quotation marks omitted). A party in possession of a negotiable instrument payable to "bearer" is entitled to enforce the negotiable instrument. *See* S.C. Code Ann. §§ 36-1-201(b)(21)(A), 36-3-301. Because a mortgage follows a note, a party in possession

of a note with the right to enforce it may also enforce the mortgage. *See Draper*, 405 S.C. at 220, 746 S.E.2d at 481 (“[T]he assignment of a note secured by a mortgage carries with it an assignment of the mortgage”); *see also U.S. Bank Tr. Nat’l Ass’n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009) (“A mortgage and a note are separate securities for the same debt, and a mortgagee who has a note and a mortgage to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action.”). Ditech unquestionably had standing to enforce the terms of the Note and Mortgage via the foreclosure process. The trial court’s order granting the Motion to Amend is supported by record evidence and is not an error of law, meaning there is no abuse of discretion. *Cf. Bayle v. S.C. Dep’t of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001) (“An abuse of discretion occurs when the trial judge’s ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support.”).¹⁴

IV. THE TRIAL COURT PROPERLY STRUCK THE ATTORNEY PREFERENCE DEFENSE BECAUSE MARY SNYDER WAS NOT A BORROWER ENTITLED TO THE PROTECTIONS OF THE STATUTE.

The Attorney Preference Statute required the originating lender to “ascertain prior to closing the preference of the *borrower* as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction.” S.C. Code Ann. § 37-10-102(a) (emphasis added). The lender fully complied with this statute by ascertaining the preference of Snyder, the only borrower under the Note. (R. pp. 331–332). Because Mary Snyder

¹⁴ In any event, any abuse of discretion by the Master in Equity in granting the Motion to Amend is mere harmless error because Ditech – the undisputed real party in interest based on its possession of the Note endorsed in blank, which gave it the right to enforce the Mortgage – subsequently became the Plaintiff in this lawsuit. Although the Appellant seeks to unwind the foreclosure and completely dismiss Ditech’s action on the basis of this alleged error, “[a] judgment will not be reversed for insubstantial errors not affecting the result.” *Jensen v. Conrad*, 292 S.C. 169, 172, 355 S.E.2d 291, 293 (Ct. App. 1987); *see Stevenson v. Emerson Elec. Corp.*, 286 S.C. 331, 336, 333 S.E.2d 355, 358 (Ct. App. 1985) (“The Court will not reverse a judgment on the basis of harmless error.”).

was not a signatory to the Note – a fact the Appellant does not dispute (Brief at p. 19) – she was not a “borrower” under the Note, and the Attorney Preference Statute, therefore, did not obligate Ditech to also ascertain her preference of a closing attorney. Even if Mary Snyder’s signature had been required on the Attorney/Insurance Preference Form, the Appellant presented no facts to the trial court that would have supported the extraordinary remedy of denying enforcement of the Mortgage. Accordingly, the trial court did not err in reaching this conclusion and striking the Attorney Preference Statute argument with regard to Mary Snyder. (R. pp. 21–22, ¶ 12).

“The cardinal rule of statutory interpretation is to determine the intent of the legislature.” *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct. App. 2005). “Words in [a] statute should be given their plain and ordinary meaning without resort to forced or subtle construction.” *Original Blue Ribbon Taxi Corp. v. S.C. Dep’t of Motor Vehicles*, 380 S.C. 600, 608, 670 S.E.2d 674, 678 (Ct. App. 2008). Here, the Attorney Preference Statute is unambiguously limited to ascertaining preferences of a “borrower” as to the lawyer who will represent the “debtor” at closing. S.C. Code Ann. § 37-10-102. Although the word “borrower” is not defined in S.C. Code Ann. § 37-1-301 – which is the statute that defines words for purposes of the Consumer Protection Code – the word “debtor” is defined, and the Attorney Preference Statute uses those words interchangeably. “Debtor” is defined as “any person who is an obligor in a credit transaction, including any cosigner, comaker, guarantor, endorsee or surety, and the assignee of any obligor, and also includes any person who agrees to assume the payment of a credit obligation.” S.C. Code Ann. § 37-1-301(14). Mary Snyder is not a debtor under this definition (and is therefore not a borrower) because she is not an obligor, cosigner, comaker, guarantor, endorsee, surety, or assignee of the subject Note.

The plain and ordinary meaning of “borrower” is “[a] person or thing to whom money or something else is lent.” Black’s Law Dictionary 153 (8th ed. 2005). No money was lent to Mary Snyder under the Note. As a result, the Attorney Preference Statute did not require the lender to ascertain Ms. Snyder’s attorney preference as a mere signatory to the Mortgage. This Court should not utilize the “forced or subtle construction” for which the Appellant is advocating. *Original Blue Ribbon Taxi Corp.*, 380 S.C. at 608, 670 S.E.2d at 678.

Although the Appellant asks this Court to apply the definition of “borrower” found in S.C. Code Ann. § 37-22-110(7) (Brief at p. 19), the Legislature made clear its intent for that definition to “apply in this chapter,” i.e., Chapter 22 of the Consumer Protection Code. Because the Attorney Preference Statute is not contained within Chapter 22 of the Consumer Protection Code, the legislature did not intend for that definition to apply. The Appellant also argues that the Court should be guided by the remedial purposes of the Consumer Protection Code. (Brief at p. 20 (citing S.C. Code Ann. § 37-1-102)). However, the Court should not resort to this interpretive gloss because the plain and ordinary meaning of the word “borrower” is clear, and “[c]lear and unambiguous statutes require no statutory construction and must be applied according to the literal meaning of their terminology.” *Original Blue Ribbon Taxi Corp.*, 380 S.C. at 607, 670 S.E.2d at 678.

Even if the lender had been required to obtain Mary Snyder’s signature on the Attorney/Insurance Preference Form, this would not support an affirmative defense to the foreclosure. A court may deny enforcement of an agreement for violations of the Attorney Preference Statute only “[i]f the court finds as a matter of law that the agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct.” S.C. Code Ann. § 37-10-105(C). No facts were either pleaded or

presented as evidence to show that the Mortgage was unconscionable or induced by unconscionable conduct. The trial court did not err in granting summary judgment in favor of Ditech and striking the Appellant's Attorney Preference Statute defense.

V. THE MASTER IN EQUITY HAD JURISDICTION TO PROCEED WITH THE FORECLOSURE HEARING.

The Appellant's last argument is that the trial court did not have jurisdiction to proceed with the foreclosure hearing in light of the Initial Notice of Appeal from the Summary Judgment Order. (Brief at p. 20–21). A trial court's decision to retain jurisdiction following a notice of appeal is reviewed for an abuse of discretion. *See Cousar v. New London Eng'g Co., Inc.*, 306 S.C. 37, 40, 410 S.E.2d 243, 245 (1991).

The Appellant sets forth this argument as three sub-arguments, as follows: (1) the Summary Judgment Order was immediately appealable, (2) upon the filing of the Initial Notice of Appeal, "the Master-in-Equity lost jurisdiction of this matter and did not have the authority to conduct the [foreclosure hearing]," and (3) the trial court did not even have jurisdiction to determine to scope of any applicable automatic stay resulting from the Initial Notice of Appeal. Because the Summary Judgment Order was not immediately appealable (sub-argument (1)), the Court need not consider the Appellant's remaining arguments (sub-arguments (2) & (3)). In any event, all of the Appellant's arguments are without merit. In the very least, the trial court did not abuse its discretion.

A. The Summary Judgment Order was not immediately appealable.

"The right of appeal arises from and is controlled by statutory law." *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006). Specifically, "[a]bsent a specialized statute, an order must fall into one of several categories set forth in Section 14-3-330 in order to

be immediately appealable.” *Id.* at 7, 630 S.E.2d at 467.¹⁵ S.C. Code Ann. § 14-3-340 enumerates

four categories of claims that are immediately appealable, as follows:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code Ann. § 14-3-330. The Summary Judgment Order was neither a “final order” nor an order relating to an injunction or a receiver; therefore, subsections (3) and (4) are inapplicable.

The Summary Judgment Order likewise does not satisfy subsections (1) or (2).

1. The Summary Judgment Order does not “involve the merits” under Subsection (1).

“The phrase ‘involving the merits’ is narrowly construed in modern precedent.” *U-Drive-It, Inc.*, 369 S.C. at 7, 630 S.E.2d at 467. “An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties’ rights.” *Watson v. Underwood*, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014). The policy behind limiting the scope of interlocutory appeals is to avoid

¹⁵ The Appellant does not cite this statute in his brief, much less explain the subsection on which he relies to support his argument about the immediate appealability of the Summary Judgment Order. For this reason alone, the Appellant fails to establish an abuse of discretion.

piecemeal litigation. *See Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 94, 529 S.E.2d 11, 13 (2000). Here, following the Summary Judgment Order, the foreclosure hearing – where the parties’ rights would ultimately be determined – had yet to be held. And nothing prevented the Appellant from opposing the foreclosure at the foreclosure hearing. In this respect, the Summary Judgment Order was not immediately appealable under subsection (1).

2. The Summary Judgment Order does not “affect a substantial right” under Subsection (2).

“Immediate appeals under subsection (2) have been allowed in situations where the substantial right could not be vindicated on appeal after the case.” *Breland*, 339 S.C. at 93, 529 S.E. at 13. When an alleged “error in [an] order can be corrected on appeal following the trial,” it has generally been held to not affect a substantial right. *See id.*; *see generally Watson v. Underwood*, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014) (“Piecemeal appeals should be avoided and most errors can be corrected by the remedy of a new trial.” (internal quotation marks omitted)). Nothing prevents the Appellant from challenging the Summary Judgment Order on appeal after a final judgment, *just as he is doing in this proceeding*. Therefore, subsection (2) is not satisfied.

Although subsection (2)(c) refers to “striking out an answer or any part thereof or any pleading in any action,” the question of “whether an order is immediately appealable is determined on a case-by-case basis.” *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015). Stated differently, “[a]n appellate court should look to the effect of an interlocutory order to determine its appealability under section 14-3-330(2)(c).” *Dorn v. Cohen*, 418 S.C. 126, 138, 791 S.E.2d 313, 319 (Ct. App. 2016) (internal quotation marks omitted). “An order affects a substantial right by striking a pleading” only if the order “prevent[s] the [aggrieved] party from seeking to correct any errors in the order during or after trial.” *Thornton*

v. S.C. Elec. & Gas Corp., 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011); *see Harbath v. Sanders*, No. 2017-UP-465, 2017 WL 6513257, at *1 (Ct. App. Dec. 20, 2017) (per curiam) (unpublished disposition) (same). The Appellant is, in fact, seeking to correct alleged errors made in the Summary Judgment Order in this very appeal, and nothing prevents him from doing so. Therefore, the interlocutory Summary Judgment Order does not affect a substantial right under S.C. Code Ann. § 14-3-330(2)(c).

3. The Appellant's general arguments about orders affecting property interests are not determinative.

In lieu of citing any statutory basis for his purported right to immediately appeal the Summary Judgment Order (prior to the foreclosure hearing), much less making any statutory argument, the Appellant argues that an immediate appeal was necessary because “there exists a risk that the underlying property could be lost.” (Brief at p. 20). But that is plainly inaccurate, as Ditech made very clear to the trial court at the beginning of the foreclosure hearing, when the issue of the trial court’s jurisdiction to proceed was raised:

We’re not asking the Court to schedule a foreclosure sale today. What we are asking the Court is to decide all of the factual and legal issues that were not determined at Summary Judgment so that the entire case can – should Defendants choose to appeal from anything else, all that can go up on appeal and be decided at the same time.

(R. p. 612, lines 15–22). It is not accurate for the Appellant to contend that absent an immediate appeal “and the consequential automatic stay, the property at issue in this residential foreclosure could be lost at judicial sale and an appeal would not reinstate ownership.” (Brief at p. 20). Following a foreclosure judgment, the Appellant could appeal that order and file a motion for supersedeas, asking the trial court to stay the foreclosure sale pending appeal. Indeed, *this is exactly what the Appellant is doing*. (R. pp. 435–440).

- B. Even if the Summary Judgment Order was immediately appealable, which Ditech denies, the Initial Notice of Appeal did not prevent the trial court from proceeding with the foreclosure hearing.

Assuming, *arguendo*, that the Summary Judgment Order was immediately appealable, the question before the Court is whether that Initial Notice of Appeal operated to stay the foreclosure hearing pending the outcome of that appeal. Under SCRAP 241, with certain exceptions, a notice of appeal “automatically stay[s] matters decided in the order, judgment, decree or decision on appeal,” but “[t]he lower court . . . retains jurisdiction over matters *not affected by the appeal*.” SCRAP 241(a) (emphasis added). SCRAP 205 similarly notes that this Court has exclusive jurisdiction over any appeal, but it expressly provides that “[n]othing in [the South Carolina Rules of Appellate Procedure] shall prohibit the lower court . . . from proceeding with matters *not affected by the appeal*.” SCRAP 205.

The trial court’s ability to decide all of the remaining facts and legal issues (not decided at the summary judgment stage) relative to Ditech’s foreclosure action was “not affected” by the Initial Notice of Appeal. As the plaintiff in a foreclosure action, Ditech had the burden of establishing the existence of a debt secured by a mortgage and the mortgagor’s default on that debt. *See Draper*, 405 S.C. at 221, 746 S.E.2d at 481. Ditech’s ability to establish these elements was unaffected by peripheral challenges relating to compliance with the 2011 Order. Therefore, the trial court properly proceeded with the foreclosure hearing.

Although the Appellant makes a last ditch argument that the trial court could not determine the scope of any applicable automatic stay (Brief at p. 21), that principle would altogether swallow the rule. In other words, even though a lower court “retains jurisdiction” over matters not affected by the appeal under SCRAP 205 and 241(a), the rule advocated by the Appellant would have the trial court do nothing upon the filing of a notice of appeal unless and until this Court – the Court of Appeals – instructed the trial court regarding the scope of the trial court’s continued jurisdiction.

And because the Court of Appeals does not, *sua sponte*, provide this instruction to every trial court in response to each notice of appeal of an interlocutory, non-final order, the Appellant's argument would completely envelope (and negate) the trial court's retained jurisdiction expressly carved out in Rules 205 and 241(a). Stated differently, although the rules provide that the trial court "retains jurisdiction" in certain circumstances, the Appellant's approach would write that provision out of the rules.

In *Metts v. Mims*, 384 S.C. 491, 682 S.E.2d 813 (2009), an intermediate order was followed by an initial notice of appeal. *Id.* at 496, 682 S.E.2d at 816. Despite the initial notice of appeal, the trial court proceeded to hear summary judgment motions, a party appealed from the subsequent summary judgment order, and the two appeals were consolidated. *See id.* Because the summary judgment motion in that case was "not affected" by the claims at issue in the initial notice of appeal, the Supreme Court concluded that "the trial court properly proceeded on the summary judgment motion, despite the pending appeal." *Id.* at 498, 682 S.E.2d at 817. And the trial court in *Metts* proceeded with summary judgment *without first getting the Court of Appeals' approval*. Here, the trial court was likewise entitled to proceed with the foreclosure hearing because it retained jurisdiction to address matters not affected by the Initial Notice of Appeal. The trial court's determination in that respect was not an abuse of discretion.

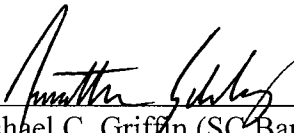
The Appellant's reliance on *State v. Cooper*, 342 S.C. 389, 536 S.E.2d 870 (2000), is misplaced. (Brief at p. 21). In that criminal case, the appellant first moved the trial court for a stay, just as the rules require. *See Cooper*, 342 S.C. at 396, 536 S.E.2d at 874; *see also* SCRAP 241(d) (issues relating to lifting or supersedeas of stay must first be made to trial court). *Cooper* was just clarifying that a party can petition the Court of Appeals (and not the Supreme Court) to review the trial court's initial stay decision. *See Gaddy v. Douglass, III*, No. 99 CP 20-76, 2001

WL 36215944 (S.C. Com. Pl. Sept. 22, 2001); *see also* SCRAP 241(d)(2).¹⁶ *Cooper* does not stand for the proposition that “only this Court had the authority to determine the extent of the automatic stay.” (Brief at p. 21).

CONCLUSION

For the foregoing reasons, Ditech respectfully requests that the underlying decisions be affirmed.

This 4th day of November 2019.



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¹⁶ In this sense, if the Appellant were concerned about the trial court’s ability to proceed with the foreclosure hearing in light of the Initial Notice of Appeal, he could have filed a motion for supersedeas under SCRAP 241 in the trial court in the first instance, with a ruling on that motion reviewable by this Court. The Appellant did not file any such motion at the time in the trial court.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell Scarborough
Master-in-Equity

Appellate Case No. 2019-000575
Charleston County Case No. 2010-CP-10-7838

Ditech Financial, LLC Respondent,

v.

Kevin G. Snyder, individually and
As Personal Representative of the
Estate of Mary Snyder Appellant.

REPLY BRIEF OF APPELLANT
(AMENDED)

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Feb 23 2021

SC Court of Appeals

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ARGUMENT IN REPLY

I. Snyder has set forth a cause of action for Civil Compensatory Contempt and has likewise set forth a scintilla of evidence supporting it.

In re Mortgage Foreclosure Actions specifically provides for relief for violation of that order:

The Court having jurisdiction over the foreclosure action shall hear and determine any dispute concerning any party's compliance with this order, including without limitation, the failure of any party to act in good faith in complying with the terms of this order. In the event the Court determines that any party to the foreclosure action, or their acting agent, has failed to comply with the terms of this order, or has not attempted to reach an agreement for foreclosure intervention in good faith, the Court may, in its discretion, impose such sanctions as it determines to be reasonable and just under the circumstances, including without limitation, the assessment of reasonable attorneys' fees and costs against the culpable party.

396 S.C. 209, 213, 720 S.E.2d 908, 910 (2011). Civil contempt is defined as: "The failure to obey a court order that was issued for another party's benefit." Black's Law Dictionary 336 (8th ed. 2004). South Carolina recognizes a cause of action for Civil Compensatory Contempt. Jarrell v. Petoseed Co., Inc., 331 S.C. 207, 500 S.E.2d 793 (Ct. App. 1998). The fact that, as Ditech points out in its brief, Jarrell involves the sale of contaminated watermelon seeds is completely irrelevant to the fact that a cause of action exists.¹

Ditech does not dispute that the acts Snyder complains of (see Snyder Principal Brief Argument I) occurred. Ditech argues that these errors "individually and collectively" do not amount to bad faith. While Ditech does attempt to minimize its acts on an individual

¹ Even if, contrary to Jarrell, Civil Compensatory Contempt is found to not be a valid cause of action, Snyder's motion for summary judgment requested alternatively that it be treated as a motion for sanctions under In re Mortgage Foreclosure Actions. (R. p. 412).

basis, Ditech's acts speak for themselves.² Further, while Ditech's predecessor's false affidavit was eventually stricken (after almost six years), false swearing is nonetheless an abuse of the judicial process that may constitute contempt of court. See State v. Stanley, 365 S.C. 24, 615 S.E.2d 455 (2005). Finally, Ditech's never fully addresses how the collective effect of all its bad acts do not constitute a violation of the 2011 Administrative Order. On the contrary, the "death by a thousand cuts" Kevin Snyder and his late wife have been subjected to the past 9-10 years speaks to a fundamental failure of the intervention process. Cf. State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995) (cumulative error doctrine); Tennant v. Marion Health Care Foundation, 459 S.E.2d 374, n.28 (W.Va. 1995) (same); U.S. v. Basham, 561 F.3d 302, 330 (4th Cir. 2009) (same). As a result of this fundamental failure, interest and other fees due and owing in this loan exceed the principal balance. The correct method by which this wrong can be remedied is the 2011 Administrative Order, and Snyder's requested relief must be granted.

II. The March 12, 2014 order amending the caption was an abuse of discretion because Ditech's predecessor did not have standing to pursue this action.

Ditech contends that the Master-in-Equity's March 12, 2014 order amending the caption was supported by unspecified "record evidence". Ditech is correct that it possessed at trial the original Note endorsed in blank. The record only establishes that this Note was in the possession of Ditech at trial; Ditech's witness was unable to testify as to its possessor (*i.e.* its chain of title) prior to trial, which includes February 19, 2014, when the motion to amend the caption was made. (R. pp. 642-44). While lack of evidence may not be relevant to the owner of the Note (which was endorsed in blank) it is relevant to the owner of the

² Ditech emphasizes the low number of acts of alleged misconduct, but Snyder was denied his discovery to further develop this cause of action. (See Argument III).

mortgage. While it is the law that the assignment of the Note includes an assignment of the mortgage, there is no evidence in the record of any of the assignments of the Note preceding the April 1, 2019 trial of this matter. The record does establish that the current owner of the mortgage is Countrywide Home Loans, LP. (Snyder Brief Arg. III). Ditech never established that any entity that assigned the note was also an owner of the mortgage, and therefore it lacks standing to pursue this action.

III. The Master-in-Equity abused his discretion by refusing to compel the production of documents plainly relevant under South Carolina law that Ditech did not properly object to.

Snyder's motion to compel was denied by a Form 4 order and a single line in the subsequent order granting partial summary judgment. (R. pp. 17, 19-22). Neither of these orders provide an explanation for the denial. Ditech attempts to cast Snyder's requests as overbroad by claiming that they request documents from Federal Trade Comm'n v. Green Tree Servicing, LLC litigation in the District of Minnesota. This is not correct. The relevant order in this case requires that Green Tree (now Ditech) preserve and maintain certain records relating to all of the loans it serviced, which would include Snyder's loan. Federal Trade Comm'n v. Green Tree Servicing, LLC, 0:15-cv-02064-SRN-JSM (D. Minn. Order dated April 23, 2015). Snyder's discovery requests referenced this order to provide a clear and unambiguous request for documents Snyder knows that Green Tree, now Ditech, must possess. All of Snyder's requests are limited to information related to the loan at issue in this action and to people related to the alleged bad faith conduct. To the extent that Ditech contends that certain requests require the production of home addresses, phone numbers, &c. of Ditech employees, this is information that could easily be redacted. While Snyder would consent to such redactions, Ditech never attempted to negotiate a limited response

(“...Ditech is standing on its objections which I understand will likely lead to a motion to compel.”). (R. p. 189).

Ditech dismisses Snyder’s citation of In re Oxbow Carbon, LLC Unitholder Litig., No. CV 12447-VCL, 2017 WL 959396 (Del. Ch. Order dated March 13, 2017); Curtis v. Time Warner Entertainment-Advance-Newhouse P’ship, No. 3:12-cv-2370-JFA, 2013 WL 2099496 (D.S.C. May 14, 2013); Crescom v. Terry, No. 2:12-cv-63-PMD, 2017 WL 2880866 (D.S.C. Order dated July 6, 2017) as not “South Carolina authority”. Ditech is correct that these are not South Carolina decisions, but they are very persuasive opinions applying substantially the same discovery rules. In re Oxbow, which cites numerous nationwide authorities, is significant enough that Judge Roger Young of the Ninth Judicial Circuit attached the entire opinion to a recent memorandum to the bar:

- **Discovery Abuse.** In my 22 years as a judge I have grown to truly loathe discovery motion hearings. Both sides are guilty, as are large and small firms. Computers have made it simple to cut and past stock objections. The result is a non-jury docket cluttered with motions to compel, a large number of which are settled last-minute. However, a number of them do not, and judges have to sift through some of the most tedious objections you can imagine. It’s the only time I ever seriously consider retirement. However, I have discovered I am not alone! The trend is that courts around the country increasingly require litigants provide more than stock objections to discovery requests.
- I draw the reader’s attention to an attached unpublished Delaware Chancery Court order [In re Oxbow] of which I have become very fond. The Delaware court bares its judicial teeth at the loathsome practice of responding to discovery requests with boilerplate, generalized objections. The court calls these “inadequate and tantamount to not making an objection at all.” The court also harshly criticizes the pervasive practice of asserting privilege without any factual support or privilege log. I read it and am reminded of the scene in the movie “Patton” where Patton overlooks the battlefield action and says, “God help me I do love it so.” Please ready the attached case before your next appearance in motions week.

Judge Roger Young, Memorandum to Members of the Charleston County Bar (July 2, 2018); see also Judge Mikell Scarborough, Notice Regarding all Motions to Compel (Sept. 19, 2018). Curtis and Crescom are opinions of Judge Joseph Anderson and Judge Patrick Duffy of South Carolina's District Court. Both of these seasoned and well-regarded judges apply the same principles of discovery to the federal rules, which are substantially similar to South Carolina's. The consistent position of all of these cases, and ever-growing body of case law like them, is that boilerplate, generalized objections like those employed by Ditech in this case are a form of discovery abuse that must be dealt with harshly.³

IV. The Attorney Preference Statute applies to persons whose ownership interest will be encumbered by the debt.

The relevant language of the Attorney Preference Statute, quoted in part by Ditech in its brief, is:

The creditor must ascertain prior to closing the preference of the **borrower** as to the legal counsel that is employed to represent the **debtor** in all matters of the transaction relating to the closing of the transaction and except in the case of a loan on property that is subject to the South Carolina Horizontal Property Act (Section 27-31-10, et seq.) the insurance agent to furnish required hazard and flood property insurance in connection with the mortgage and comply with such preference.

S.C. Code § 37-10-102(a). The words “borrower” and “debtor” are used in the same statute; if the legislature intended for “borrower” to be equivalent to “debtor”, it would have used the word “debtor”. Accordingly, “borrower” must have a different meaning under this statute. It is reasonable to include non-debtor signatories to the mortgage in the definition

³ A reversal of this discovery order will necessarily require re-litigation of the motions for summary judgment and the final hearing, with all the attendant costs to Snyder. Therefore, Snyder would ask this Court to consider the sanctions detailed in Argument I.B of Snyder's Principal Brief in response to Ditech's conduct. The sanctions detailed in that argument are the harshest sanctions possible under Rule 37, SCRCP, that comply with the Southern Bankruptcy District of New York's automatic stay.

of “borrower”, as that person’s ownership interest will be encumbered by the debtor’s transaction, as has occurred in this case. Accordingly, it is appropriate to consider the late Mary Snyder a “borrower” under the Attorney Preference Statute by virtue of her ownership of the property and being party to the mortgage that encumbers it.

V. The Master-in-Equity lost jurisdiction over this matter upon the service of the original Notice of Appeal on March 29, 2019.

Ditech’s argument on appealability takes a different tack than its argument in its May 16, 2019, Memorandum on Appealability, which stated: “Respondent does not dispute the immediate appealability of the portion of the Court’s March 27, 2019 Order granting Ditech partial summary judgment and striking Appellant’s defense...” (R. pp. 541-43, 549). If the striking of the Attorney Preference Statute defense was immediately appealable, then the foreclosure action is stayed pending its appeal. The Attorney Preference Statute has a direct effect on the foreclosure action, as should the Estate of Mary Snyder prevail, it would be entitled to a setoff. See Deutsche Bank Nat. Trust Co. v. Booms, Op. No. 2015-UP-097 (S.C. Ct. App. Feb. 25, 2015) (citing S.C. Code § 37-10-105(A)). Further, the immediate appeal of the striking of the Attorney Preference Statute also allows for the consideration of any prior interlocutory orders. See Cox v. Woodmen of the World Ins. Co., 347 S.C. 460, 469, 556 S.E.2d 397, 402 (Ct. App. 2001) (“...an order that is not directly appealable will be considered if there is an appealable issue before the court.”). Thus, the Master-in-Equity’s March 12, 2014 order amending the caption and March 18, 2019 order denying Snyder’s motion to compel were also before the Court of Appeals. As both of these orders have an effect on the foreclosure action as a whole, the Master-in-Equity was divested of jurisdiction upon the service of the first Notice of Appeal on March 29, 2019.

The Master-in-Equity's March 27, 2019, order granting summary judgment does not fall within any of the recognized exceptions in Rule 241(b), SCACR. Therefore, the March 27, 2019, order falls under the "general rule" of Rule 241(a), where "the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal". Ditech should have then sought relief from the automatic stay under Rule 241(c), SCRCR. None of this occurred, and the trial of this matter went forward, over Snyder's objection, on April 1, 2019.

CONCLUSION

For the argument set forth above and in his Principal Brief, Kevin Snyder asks this Court to reverse the decisions of the Charleston County Master-in-Equity, award him the relief requested under the Admin Order, and award him all such other and further relief as this Court deems just and proper.

Dated: February 5, 2021

/s/ Jason Scott Luck
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Attorney for Appellant

91302

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell Scarborough
Master-in-Equity

Appellate Case No. 2019-000575

RECEIVED
OCT 30 2019
SC Court of Appeals

Ditech Financial, LLC.....Respondent,

v.

Kevin G. Snyder, individually and
as Personal Representative of the
Estate of Mary Snyder Appellant.

PETITION FOR A WRIT OF SUPERSEDEAS

Appellant Kevin G. Snyder submits this Petition for Supersedeas, pursuant to Rule 241, SCACR, requesting a writ of supersedeas to suspend proceedings in the lower court. Snyder would show this Court the following¹ in support of his petition:

¹ Also attached, pursuant to Rule 241(d)(4)(C), SCACR, are certified copies of:

09/27/19 Order denying supersedeas (Exhibit A)

10/18/19 Order denying supersedeas (Exhibit B)

Snyder's motion for supersedeas before the Master-in-Equity is located in the Record on Appeal (R. pp. 435-440), as is Ditech's response (R. pp. 554-560). The Record on Appeal and final briefs were filed of record with this Court on October 18, 2019.

BACKGROUND

This is the appeal of a contested residential foreclosure. The Respondent is the purported successor to the original Plaintiff, BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP. The Appellant is Kevin Snyder, in his individual capacity as a mortgagor of the property, and as personal representative of his late wife, who was also a mortgagor.² BAC filed the original foreclosure Complaint and Lis Pendens on September 23, 2010, and amended the Complaint and Lis Pendens on October 13, 2010. (R. pp. 35-39, 42, 45-49, 56-57). Kevin and Mary Snyder were served a Notice Foreclosure Intervention on December 17, 2012, which was denied. (R. pp. 59-60, 63). Undersigned counsel appeared for the Snyders on May 3, 2013, filing his notice of appearance with the Clerk of Court and serving it on BAC's counsel. (R. p. 66). BAC purportedly transferred the Snyders' loan at some point shortly thereafter to Green Tree Servicing, LLC,³ and on June 17, 2013, the Snyders' counsel sent Green Tree a letter informing it of the Snyders' representation, and enclosing a copy of In re Mortgage Foreclosure Actions, 396 S.C. 209, 720 S.E.2d 908 (2011) (the "Admin Order"). (R. p. 121). The Snyders' counsel followed up this letter with another letter on July 18, 2013, that enclosed a written authorization from the Snyders (requested by Green Tree) and another copy of the Admin Order. (R. pp. 144-45). BAC's attorney was copied on this letter. (R. p. 144). These opening communications inaugurated Green Tree's nearly six year period of bungled communications and foreclosure interventions, presented in detail in Argument I of Snyder's Principal Brief.

² During the pendency of this action, Snyder's profoundly disabled daughter died (December 22, 2014), and almost a year later his wife, former Defendant Mary Snyder, died of undiagnosed lung cancer (November 23, 2015).

³ However, please see Argument III of Snyder's Principal Brief, which argues that BAC (and ultimately Ditech) did not have the standing to pursue this action.

Pursuant to a September 30, 2013, status hearing, this action was stayed pending foreclosure intervention. The Snyders' counsel was not provided notice of this hearing or order. (R. p. 4). On March 12, 2014, the Master-in-Equity, without notice or hearing, granted BAC's motion to replace BAC Home Loans Servicing, LP with Green Tree Servicing, LLC as Plaintiff. (R. pp. 9-10, 179-87).

Green Tree substituted counsel on April 9, 2015, and again on July 2, 2018. The parties engaged in discovery, and Snyder filed a motion to compel on November 29, 2018 to compel Green Tree's responses to his discovery. (R. pp. 88-90, 179-87). Pursuant to a December 10, 2018, status conference (where the motion to compel was heard without a court reporter), the Master-in-Equity issued a consent scheduling order and a consent order amending the caption to replace Green Tree Servicing, LLC with Ditech Financial, LLC. (R. pp. 13-16).

Ditech filed notice of its bankruptcy on March 1, 2019 (amended May 1, 2019). (R. pp. 199-288). All parties filed motions for summary judgment on March 11, 2019. (R. pp. 291-433). These motions were heard at a pre-trial hearing on March 18, 2019. (R. pp. 561-601). The Master-in-Equity denied Snyder's motion, granted Ditech's motion in part, and denied Snyder's motion to compel by order dated March 27, 2019. (R. pp. 19-22). Snyder timely appealed this order on March 29, 2019. (R. pp. 531-33). Though Snyder argued that the Master-in-Equity lacked jurisdiction due to the appeal (R. pp. 606-22), the Master-in-Equity proceeded with a final hearing on April 1, 2019. (R. pp. 622-60). The Master-in-Equity issued his final order on April 23, 2019, ordering the foreclosure of the mortgage and the sale of 1752 Orange Grove Shores. (R. pp. 23-32). Snyder amended his notice of

appeal to include this order and also filed a motion for supersedeas on May 2, 2019. (R. pp. 436-40). Ditech filed its response to the motion on June 3, 2019. (R. pp. 554-560).

The Clerk of Court scheduled the supersedeas motion to be heard before Judge Deadra Jefferson on September 27, 2019; at hearing, Judge Jefferson denied the motion for being filed with the “wrong Court”.⁴ (Exhibit A). The Master-in-Equity subsequently heard the motion without hearing, with the consent of the parties, and granted the motion on October 18, 2019, setting the supersedeas bond at \$25,000.00. (Exhibit B).

ARGUMENT

A writ of supersedeas must be issued if “such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” Rule 241(c)(2), SCACR. The parties agree that such a writ is proper under the circumstances of this case, as the judicial sale of Snyder’s property would moot some or all of the issues of this appeal. Snyder takes issue with the amount of the bond, which he believes should be nominal. While the amount of an appeal bond is committed to the sound discretion of the court below, United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992), the appellate court has the authority to reduce the amount of a bond. See e.g. Bunkum v. Manor Props., 321 S.C. 95, 467 S.E.2d 758 (Ct. App. 1996) (Supreme Court reduced the amount of appeal bond upon a petition for supersedeas).

⁴ This is incorrect. Snyder’s counsel properly filed the motion with the Charleston County Clerk of Court, as he has done for his entire fourteen years of practice; the Master-in-Equity’s office does not accept written motions for filing. After the September 27, 2019 hearing the parties’ counsel provided written copies of the motion and response to the Master-in-Equity’s office, who agreed to consider the motion without re-filing and without a hearing.

In its response before the Master-in-Equity, Ditech requested a bond of \$25,134.48, which represented the monthly mortgage payment of \$1,396.36 multiplied by eighteen months; this bond would increase if the appeal lasted longer than eighteen months. (R. pp. 557-58). A supersedeas or appeal bond is intended to indemnify the respondent for the value of the judgment if it is affirmed. See generally Jerome v. McCarter, 88 U.S. (21 Wall) 17, 30 (1874); Catlett v. Brodie, 22 U.S. 553, 554 (1824). Ditech has waived its right to pursue a deficiency judgment in this matter, limiting its recovery on its \$249,883.00 judgment to the assets obtained from the sale of the residence at 1752 Orange Grove Shores. (R. pp. 27-28, 659). This property is worth perhaps \$249,883.00. (R. p. 248). Ditech holds a judgment for \$293,930.69. (R. p. 28). As Ditech has voluntarily limited its harm to the value of the property at issue in this action (which will never conceivably satisfy or exceed Ditech's judgment), it cannot be harmed by this appeal, and bond is not necessary. Cf. Urbain v. Knapp Bros. Mfg. Co., 217 F.2d 810, 815-16 (7th Cir. 1954) (no security necessary for a preliminary injunction when no material harm can come to the party restrained).

A bond is also not necessary because the Master-in-Equity lost jurisdiction over this matter on March 29, 2019, when Snyder appealed the Master-in-Equity's March 27, 2019, order granting, in part, Ditech's motion for summary judgment. (R. pp. 19-22, 531-33). Assuming, *arguendo*, the March 27, 2019, order was not final,⁵ it nonetheless affects

⁵ In the alternative, Snyder would submit that the March 27, 2019, order was a "final" order under South Carolina law. South Carolina law defines a final judgment/order as: "one which operates to divest some right in such a manner as to put it beyond the power of the Court making the order to place the parties in their original condition after the expiration of the term". Good v. Hartford Accident & Indem. Co., 201 S.C. 32, 21 S.E. 2d 209 (1942); S.C. Code § 14-3-330(3) (final orders appealable). If the March 27, 2019 order is treated as interlocutory, this Court will not be able to place the parties in their original condition

a substantial right, as it effectively strikes Snyder's cause of action for civil compensatory contempt, and strikes the Estate of Mary Snyder's defense of the Attorney Preference Statute. See S.C. Code § 14-3-330(2) (interlocutory order affecting a substantial right immediately appealable). Snyder was unable to fully contest Ditech's case at the final hearing; a substantial right was affected. See McLaughlin v. Strickland, 279 S.C. 513, 309 S.E.2d 787 (Ct. App. 1983); see also Breland v. Love Chevrolet Olds, Inc., 339 S.C. 89, 529 S.E.2d 11 (2000) (immediate appeals under section 14-3-330(2) have been allowed in situations where the substantial right could not be vindicated on appeal after the case). Ditech appears to agree with Snyder's position: **"Respondent does not dispute the immediate appealability of the portion of the Court's March 27, 2019 Order granting Ditech partial summary judgment and striking Appellant's defense..."** (R. p. 549) (emphasis added).

As the March 27, 2019, order was immediately appealable (even in part), the effect of the March 29, 2019, notice of appeal was to divest the Master-in-Equity of jurisdiction.

after trial. The April 23, 2019, final order in this matter directs the sale of the property in question. (03/23/19 order p. 6). Orders directing the sale of property are not subject to the automatic stay of an appeal. Rule 241(b)(4), SCACR. Should Snyder prevail on his appeal of the March 27, 2019, order, the Master-in-Equity's order of foreclosure and sale would be reversed. However, by this time this Court issues an opinion, the property in question will have been sold via judicial sale. Without an immediate appeal of the March 27, 2019 order, and the consequential automatic stay, the property at issue could be lost and an appeal would not reinstate ownership.

The immediate appealability of the March 27, 2019, order is consistent with other South Carolina decisions, which generally hold that an order that affects an interest in property is immediately appealable, especially if there exists a risk that the underlying property could be lost. See Lebovitz v. Mudd, 289 S.C. 476, 347 S.E.2d 94 (1986) (order dissolving lis pendens immediately appealable); Va.-Carolina Chem. Co. v. Wilkins, 105 S.C. 291, 298, 89 S.E. 659, 661 (1916) (order dissolving an attachment to lumber immediately appealable); Kay v. Meadors, 216 S.C. 483, 486, 58 S.E.2d 893, 895 (1950) (order refusing to dissolve an attachment to automobile immediately appealable).

“As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision.” Rule 241(a), SCACR. Upon the service of the Notice of Appeal, Rule 205, SCACR, divests the lower court of jurisdiction in matters “affected by the appeal”. Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 534, 787 S.E.2d 485, 494 (2016). According to the South Carolina Supreme Court, to “affect” a matter is “to produce an effect on; to influence in some way”. Id. (quoting Black’s Law Dictionary 68 (10th ed. 2014)). This is a broad definition – the Stokes-Craven court held that even issues in other cases may be stayed if the issues in those cases depend in some way on the case appealed. Id.

Snyder requested the following relief⁶ in his civil compensatory contempt cause of action:

...Defendants request that this Court strike Plaintiff’s Amended Complaint and Plaintiff’s Reply to Defendant’s counterclaims. Defendants would further request that this Court enter default against the Plaintiff and issue a default judgment on Defendants’ counterclaims for civil compensatory contempt and quiet title ordering either (1) dissolution of Plaintiff’s lien on 1752 Orange Grove Shores Drive or (2) rescission of the note and mortgage at issue in this action.

In the alternative, Defendants would ask that Plaintiff’s demand for damages of accrued interest, fees (including attorneys’ fees), costs, advances, and a deficiency judgment be struck from Plaintiff’s Amended Complaint and it be barred from offering any evidence of the same.

(R. p. 419). This cause of action was effectively struck by the Master-in-Equity’s March 27, 2019 order (“Plaintiff’s Motion for Summary Judgment is GRANTED as to the non-

⁶ While this language is from Snyder’s motion for summary judgment (which was denied), it shows the scope of relief possible under the current orders from the bankruptcy court.

stayed portions of Defendants' counterclaim for Civil Compensatory Contempt"). (R. p. 22). Should Snyder prevail on appeal and obtain this requested relief, Ditech will have had no right to proceed with its foreclosure action and Snyder's property would no longer be encumbered by the mortgage at issue. Should Snyder prevail on appeal and obtain his alternative relief, Ditech would not be able to claim a significant amount of damages (in excess of \$150,000.00). Either circumstance "produce[s] an effect on" or "influence[s]" the underlying action; therefore, this action should have been stayed in its entirety on March 29, 2019. Likewise, the striking of the Attorney Preference Statute defense (R. p. 22) has a direct effect on the foreclosure action, as if the Estate of Mary Snyder were to prevail on this defense, it would be entitled to a setoff. See Deutsche Bank Nat. Trust Co. v. Booms, Op. No. 2015-UP-097 (S.C. Ct. App. Feb. 25, 2015) (citing S.C. Code § 37-10-105(A)).

The Master-in-Equity's March 27, 2019, order granting summary judgment does not fall within any of the recognized exceptions in Rule 241(b), SCACR. Therefore, the March 27, 2019, order falls under the "general rule" of Rule 241(a), where "the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal". The action below should have been stayed without bond on March 29, 2019; accordingly, any supersedeas issued by this Court should likewise be issued without bond (or alternatively, a nominal bond).

CONCLUSION

The petition for supersedeas should be granted and bond be waived or set at a nominal amount (e.g. \$100.00).

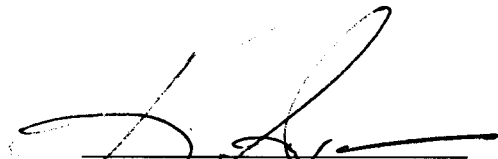
Dated: 10/28/2019



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Attorney for Appellant

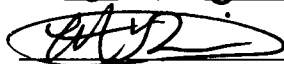
VERIFICATION

Personally appeared before me, Kevin G. Snyder, who being duly sworn does state as follows: I am the Appellant in this case, I have read the Petition for a Writ of Supersedeas and can and do verify under oath that to the best of my knowledge, the facts stated therein are true.



Kevin G. Snyder

SWORN TO AND SUBSCRIBED BEFORE ME
this 28th Day of October, 2019



(SEAL)
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 10/25/2028

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASECASE NO.: **2010-CP-10-07838**

Ditech Financial, LLC,

v.

Kevin G. Snyder, et al.,

PLAINTIFF

DEFENDANT

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
 NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☐ See attached order. (Formal order to follow)
☒ Statement of Judgment by the Court:

This case came before the Court on September 27, 2019 for a hearing on Defendant's Motion for Supersedeas, filed May 2, 2019. At the call of the case, Jason S. Luck, Esq. withdrew the Motion, as Mr. Luck filed this Motion with the wrong Court. This case was referred to the Master in Equity on December 16, 2010 by the Clerk of Court. Accordingly, the Master in Equity has continuing exclusive jurisdiction over this case, as the case has not been remanded back to the Circuit Court. Mr. Luck advised the Court that he will file this Motion with the Master in Equity.

ORDER INFORMATIONThis order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**


Circuit Court Judge

2128
Judge Code

9/27/2019
Date

For Clerk of Court Office Use Only

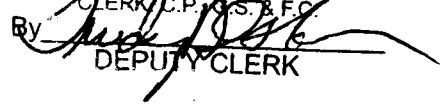
This judgment was entered on the _____ day of _____, 20__ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20__ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY FOR PLAINTIFF

ATTORNEY FOR DEFENDANT

CLERK OF COURT

Court Reporter:

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., S. & F.C.
By 
DEPUTY CLERK

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2010 CP-10-7838

Ditech Financial, LLC

Kevin G. Snyder, individually and as

Personal Representative of the Estate of Mary Snyder

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Master in Equity

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Defendant Snyder has filed a Motion for Supersedeas and, in order to stay the sale of the property, is required to post a bond pursuant to statute, S.C. Code 18-9-170. The parties have requested the Court set a bond without a hearing. The Court hereby sets the bond in the amount of \$25,000.00 to be posted with the Charleston County Clerk of Court to stay the sale pending the appellate process.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

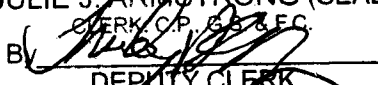
Master In Equity

3062

Judge Code

10/16/19

Date

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P. & C.E.C.
By  DEPUTY CLERK

0916

EXHIBIT
B

The South Carolina Court of Appeals

Ditech Financial, LLC, Respondent

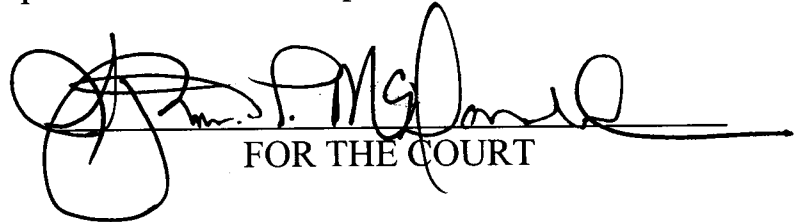
v.

Kevin G. Snyder, individually and as Personal
Representative of the Estate of Mary Snyder, Appellant.

Appellate Case No. 2019-000575

ORDER

After careful consideration, the petition for writ of supersedeas is denied.



FOR THE COURT

Columbia, South Carolina

cc:

Michael Casin Griffin, Esquire
George Benjamin Milam, Esquire
Jason Scott Luck, Esquire
Jonathan Edward Schulz, Esquire

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell Scarborough
Master in Equity

Appellate Case No. 2019-000575
Circuit Court Case No. 2010-CP-10-7838

Ditech Financial, LLC,

v.

Kevin G. Snyder, Individually and
as Personal Representative of the
Estate of Mary Snyder,

Respondent.

Appellant.

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SC Court of Appeals

**DITECH FINANCIAL, LLC'S RESPONSE TO
APPELLANT'S PETITION FOR A WRIT OF SUPERSEDEAS**

Respondent Ditech Financial, LLC ("Ditech") hereby responds to the Appellant's Petition for Supersedeas and states as follows:

PROCEDURAL BACKGROUND

1. Ditech's predecessor-in-interest filed a foreclosure action against Appellant on September 23, 2010. The complaint was subsequently amended October 27, 2010.

2. The Appellant ultimately answered the amended pleading and asserted the following four counterclaims: (1) civil compensatory contempt (for alleged violations of South

Carolina Supreme Court Administrative Order 2011-05-02-01), (2) breach of contract, (3) unfair trade practices, and (4) quiet title.

3. In March 2019, after a period of discovery, the parties filed cross motions for summary judgment.

a. Ditech moved for summary judgment on its foreclosure action and on the Appellant's counterclaims for civil compensatory contempt and to quiet title. (The other counterclaims – breach of contract and unfair trade practices – were stayed in light of Ditech's bankruptcy.)

b. The Appellant moved for summary judgment on its counterclaims for civil compensatory contempt and to quiet title.

4. In a March 20, 2019 Order, the trial court denied the Appellant's motion for summary judgment.

5. The trial court granted Ditech's motion with regard to the counterclaim for civil compensatory contempt, but it denied Ditech's motion on its foreclosure claim and on the Appellant's quiet title counterclaim.

6. Before trial, the Appellant filed his first Notice of Appeal, seeking interlocutory appellate review of, *inter alia*, the summary judgment ruling (hereinafter, the "First Notice of Appeal").

7. A bench trial proceeded, resulting in a Judgment of Foreclosure and Sale dated April 23, 2019.

8. Thereafter, the Appellant amended his notice of appeal to include the Judgment of Foreclosure and Sale (hereinafter, the "Second Notice of Appeal").

9. On May 2, 2019, the Appellant filed a Motion for Supersedeas with the trial court, asking the trial court to “suspend[] any and all activity in this case until the appeal is resolved.”

10. Ditech submitted a response brief on June 3, 2019 requesting as follows:

- a. A bond in the amount of \$25,134.48 to stay the underlying foreclosure for a period of 18 months (calculated by multiplying the monthly mortgage payment the Appellant should be paying (\$1,396.36) by 18 months (the average length of an appeal before the South Carolina Court of Appeals)); and
- b. An additional \$1,396.36 for each additional month (beyond 18 months) that the appeal remains pending without resolution (as a condition of the continued stay).

11. On October 16, 2019, the trial court granted the Appellant’s motion conditioned on the posting of a bond in the amount of \$25,000.

12. Pursuant to SCACR 241(d)(2), the Appellant now seeks review of the order on its previously filed Motion for Supersedeas. Specifically, the Appellant seeks to have the bond “waived or set at a nominal amount.” (Petition at p. 9).

LEGAL STANDARD

13. Because the Judgment of Foreclosure and Sale directs the sale of real property, that order is not automatically stayed by Appellant’s appeal. *See* SCACR 241(b)(4) (listing as an exception to the automatic stay rule any “Judgments directing the sale or delivery of possession of real property as provided in S.C. Code Ann. § 18-9-170”); *see also C-Sculptures, LLC, No. 3 v. Brown*, 393 S.C. 27, 32, 709 S.E.2d 705, 708 (2011) (“The foreclosure decree would be the type of order covered by section 18-9-170 . . .”).

14. “In a case subject to an exception [set forth in SCACR 241(b)], any party may move for an order imposing supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal.” SCACR 241(c)(1).

15. “Except where extraordinary circumstances make it impracticable, an application . . . for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal.” SCACR 241(d)(1).

16. “After the lower court or administrative tribunal has ruled, any party may petition the appellate court where the appeal is pending” to review the trial court’s order. SCACR 241(d)(2).

ARGUMENT

17. This Court is the proper Court to address the Appellant’s Petition for Supersedeas because the Appellant previously filed a motion for supersedeas in the trial court, and the Appellant now seeks review of that order in this court, where the underlying appeal is pending.

18. Although the Appellant asks this Court to waive the bond requirement, the Appellant must “giv[e] a supersedeas bond” in order to obtain a stay, and the stay is not effective until “the supersedeas bond is approved by the court.” S.C.R. Civ. P. 62(d).

19. S.C. Code Ann. § 18-9-170 makes this point clear and explains how the Court should calculate an appropriate bond amount:

If the judgment appealed from direct[s] the sale or delivery of possession of real property, the execution of the judgment shall not be stayed unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon and that ***if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the execution of the undertaking until the delivery of possession thereof*** pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which shall be specified in the undertaking.

(emphasis added); *see also Wachesaw Plantation E. Cmty. Serv. Ass'n, Inc. v. Alexander*, 414 S.C. 355, 362 n.6, 778 S.E.2d 898, 902 n.6 (2015) (Pleicones, J., concurring) (noting “the statutory bond *required* by § 18-9-170” (emphasis added)); *Carsten v. Wilson*, 241 S.C. 516, 522, 129 S.E.2d 431, 435 (1963) (construing predecessor statute to § 18-9-170, and finding appeal did not stay “order of sale in foreclosure” since the appellant “did not give such a bond”).

20. Ditech acknowledges that an order for supersedeas may be “necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” SCACR 241(c)(2). However, no such order should issue without the posting of an appropriate supersedeas bond.

21. As noted above, S.C. Code Ann. § 18-9-170 instructs courts to calculate an appropriate bond amount as follows: “the value of the use and occupation of the property from the time of the execution of the undertaking until the delivery of possession thereof pursuant to the judgment.”

22. Here, the value of the use and occupation of the property from Ditech’s perspective is the monthly mortgage payment it should be, but is not, receiving. The current monthly mortgage amount is \$1,396.36.

23. In undersigned counsel’s experience, a typical appeal before the South Carolina Court of Appeals lasts 1.5 years. However, this appeal could certainly last longer.

24. Therefore, Ditech requests that this Court condition an order for supersedeas on the Appellant posting a bond equaling the monthly mortgage amount (\$1,396.36), multiplied by the anticipated life of the appeal (18 months), which equals \$25,134.48.

25. In the event that the appeal lasts longer than 18 months, Ditech request that the Court condition a continued stay on the posting of an additional \$1,396.36 for each additional month (beyond 18 months) that the appeal remains pending without resolution.

26. The Appellant does not even mention S.C. Code Ann. § 18-9-170, the statute that controls the calculation of an appropriate bond amount in this case. *See Brown*, 393 S.C. at 32, 709 S.E.2d at 708 (“The foreclosure decree would be the type of order covered by section 18-9-170 . . .”). Instead, the Appellant cites to two cases from the 1800’s which are not cases from South Carolina courts. (Petition at p. 5).

27. Rather than operating within the proper framework, the Appellant also argues the underlying merits of the pending appeal and contends that a bond is not necessary because of those arguments. That is not how this Court should calculate an appropriate bond amount. Indeed, this Court will determine the merits of the appeal based on the parties’ written briefs. A supersedeas bond, on the other hand, should be calculated based on “the value of the use and occupation of the property from the time of the execution of the undertaking until the delivery of possession thereof.” S.C. Code Ann. § 18-9-170. That determination has nothing to do with the underlying merits of the appeal.

28. Nevertheless, Ditech would be remiss not to address the Appellant’s contentions.

- a. Ditech expressly denies and refutes any characterization of “bungled communications.” (Petition at p. 2). Communications between the parties in the course of foreclosure intervention are outlined at length in the parties’ merits briefs filed with this Court. (*See, e.g.*, R. pp. 387, 585 (noting that Appellant’s counsel has had three separate offices throughout this case and acknowledging that the moves may have disrupted the Appellant’s counsel’s mail service)).
- b. The Appellant complains about the amendment of the case caption (Petition at p. 3), but the Appellant consented to a subsequent amendment of the case

caption (R. pp. 15-16), making the argument moot, even if it were relevant, which it is not.

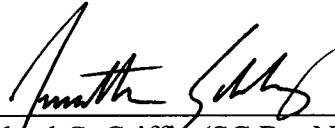
- c. It is unclear how Ditech is not being “harmed by this appeal.” (Petition at p. 5). The requested bond is based on the payments that the Appellant originally agreed to make (but is not making) to obtain the underlying mortgage. This is the value of the use and occupation of the property from Ditech’s perspective. For every month that the Appellant delays the inevitable foreclosure in this case through the present appeal, Ditech is not receiving those amounts.
- d. The Appellant’s arguments about the immediate appealability of certain orders and the jurisdiction of the trial court (Petition at pp. 5-8) have absolutely nothing to do with determining an appropriate supersedeas bond amount. Those are the claims at issue in the appeal, which are argued at length in the parties’ briefs.

CONCLUSION

29. For the foregoing reasons, Ditech does not necessarily oppose the issuance of an order for supersedeas. However, that order should be conditioned on the following:

- a. The posting of a supersedeas bond in the amount of \$25,134.48, which will stay the underlying foreclosure for a period of 18 months;
- b. An extension of the bond in the amount of \$1,396.36 per month for each additional month (beyond 18 months) that the appeal remains pending; and
- c. Such other and further relief as the Court deems just and appropriate.

This 8th day of November 2019.



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Attorneys for Ditech Financial, LLC



The South Carolina Court of Appeals

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V. CLAIRE ALLEN
DEPUTY CLERK

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November 12, 2019

Mr. Michael Casin Griffin, Esquire
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Re: Ditech Financial, LLC v. Kevin Snyder
Appellate Case No. 2019-000575

Dear Counsel:

We are in receipt of your return to the petition for writ of supersedeas. Please be advised that the petition for writ of supersedeas was denied by this Court's order dated November 9, 2019. Therefore, no further action will be taken on your return.

Very truly yours,


CLERK

cc: Jason Scott Luck, Esquire

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**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas**

**Mikell Scarborough
Master-in-Equity**

Appellate Case No. 2019-000575

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SC Court of Appeals

Ditech Financial, LLC.....Respondent,

v.

**Kevin G. Snyder, individually and
as Personal Representative of the
Estate of Mary Snyder Appellant.**

PETITION FOR REHEARING

Appellant Kevin G. Snyder submits this petition, pursuant to Rules 240(j) & 241(d)(7), SCACR, requesting review of Judge McDonald's denial of his petition for supersedeas. Snyder submits the following in support of his petition:

BACKGROUND

This is the appeal of a contested residential foreclosure. The Respondent is the purported successor to the original Plaintiff, BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP. The Appellant is Kevin Snyder, in his individual capacity as a mortgagor of the property, and as personal representative of his late wife, who

was also a mortgagor.¹ BAC filed the original foreclosure Complaint and Lis Pendens on September 23, 2010, and amended the Complaint and Lis Pendens on October 13, 2010. (R. pp. 35-39, 42, 45-49, 56-57). Kevin and Mary Snyder were served a Notice Foreclosure Intervention on December 17, 2012, which was denied. (R. pp. 59-60, 63). Undersigned counsel appeared for the Snyders on May 3, 2013, filing his notice of appearance with the Clerk of Court and serving it on BAC's counsel. (R. p. 66). BAC purportedly transferred the Snyders' loan at some point shortly thereafter to Green Tree Servicing, LLC,² and on June 17, 2013, the Snyders' counsel sent Green Tree a letter informing it of the Snyders' representation, and enclosing a copy of In re Mortgage Foreclosure Actions, 396 S.C. 209, 720 S.E.2d 908 (2011) (the "Admin Order"). (R. p. 121). The Snyders' counsel followed up this letter with another letter on July 18, 2013, that enclosed a written authorization from the Snyders (requested by Green Tree) and another copy of the Admin Order. (R. pp. 144-45). BAC's attorney was copied on this letter. (R. p. 144). These opening communications inaugurated Green Tree's nearly six year period of bungled communications and foreclosure interventions, presented in detail in Argument I of Snyder's Principal Brief.

Pursuant to a September 30, 2013, status hearing, this action was stayed pending foreclosure intervention. The Snyders' counsel was not provided notice of this hearing or order. (R. p. 4). On March 12, 2014, the Master-in-Equity, without notice or hearing, granted BAC's motion to replace BAC Home Loans Servicing, LP with Green Tree Servicing, LLC as Plaintiff. (R. pp. 9-10, 179-87).

¹ During the pendency of this action, Snyder's profoundly disabled daughter died (December 22, 2014), and almost a year later his wife, former Defendant Mary Snyder, died of undiagnosed lung cancer (November 23, 2015).

² However, please see Argument III of Snyder's Principal Brief, which argues that BAC (and ultimately Ditech) did not have the standing to pursue this action.

Green Tree substituted counsel on April 9, 2015, and again on July 2, 2018. The parties engaged in discovery, and Snyder filed a motion to compel on November 29, 2018 to compel Green Tree's responses to his discovery. (R. pp. 88-90, 179-87). Pursuant to a December 10, 2018, status conference (where the motion to compel was heard without a court reporter), the Master-in-Equity issued a consent scheduling order and a consent order amending the caption to replace Green Tree Servicing, LLC with Ditech Financial, LLC. (R. pp. 13-16).

Ditech filed notice of its bankruptcy on March 1, 2019 (amended May 1, 2019). (R. pp. 199-288). All parties filed motions for summary judgment on March 11, 2019. (R. pp. 291- 433). These motions were heard at a pre-trial hearing on March 18, 2019. (R. pp. 561- 601). The Master-in-Equity denied Snyder's motion, granted Ditech's motion in part, and denied Snyder's motion to compel by order dated March 27, 2019. (R. pp. 19-22). Snyder timely appealed this order on March 29, 2019. (R. pp. 531-33). Though Snyder argued that the Master-in-Equity lacked jurisdiction due to the appeal (R. pp. 606-22), the Master-in-Equity proceeded with a final hearing on April 1, 2019. (R. pp. 622-60). The Master-in-Equity issued his final order on April 23, 2019, ordering the foreclosure of the mortgage and the sale of 1752 Orange Grove Shores. (R. pp. 23-32). Snyder amended his notice of appeal to include this order and also filed a motion for supersedeas on May 2, 2019. (R. pp. 436-40). Ditech filed its response to the motion on June 3, 2019. (R. pp. 554-560).

The Clerk of Court scheduled the supersedeas motion to be heard before Judge Deadra Jefferson on September 27, 2019; at hearing, Judge Jefferson denied the motion for

being filed with the “wrong Court”.³ (Ex. A to Pet. for Supersedeas). The Master-in-Equity subsequently heard the motion without hearing, with the consent of the parties, and granted the motion on October 18, 2019, setting the supersedeas bond at \$25,000.00.⁴ (Ex. B to Pet. for Supersedeas).

On October 30, 2019, Snyder filed a petition for supersedeas with this Court, which was denied on November 7, 2019, by order of Judge McDonald. This petition follows.

JURISDICTIONAL STATEMENT

This is a petition for review of a decision of a single judge of this Court on a petition for supersedeas. “[A]n individual judge or justice may grant or deny any motion or petition on behalf of the court. Any review of an order issued by an individual judge or justice shall be by petition for rehearing.” Rule 240(j), SCACR. “Any party aggrieved by the decision of...an individual judge or justice [on a petition for supersedeas] may petition under this Rule for a review of that decision.” Rule 241(d)(7), SCACR.

STANDARD OF REVIEW

“The purpose of a writ of supersedeas is to preserve the jurisdiction of the court or to prevent a contested matter from becoming moot by preserving the status quo.” S.C. High School League v. Richland County School District One, No. 2003-02-25-01 (S.C. Sup. Ct. Order dated Feb. 25, 2003) (citing Melton v. Walker, 209 S.C. 330, 40 S.E.2d 161 (1946)).

³ This is incorrect. Snyder’s counsel properly filed the motion with the Charleston County Clerk of Court, as he has done for his entire fourteen years of practice; the Master-in-Equity’s office does not accept written motions for filing. After the September 27, 2019 hearing the parties’ counsel provided written copies of the motion and response to the Master-in-Equity’s office, who agreed to consider the motion without re-filing and without a hearing.

⁴ Ditech’s proposed supersedeas bond was based on Snyder’s monthly mortgage payment of \$1,396.36 multiplied by eighteen months (\$25,134.48); this bond would increase if the appeal lasted longer than eighteen months. (R. pp. 557-58).

“Supersedeas is usually granted only when necessary to avoid irreparable injury or a miscarriage of justice and only in cases where it is likely that the appellant will succeed on the merits of the case.” Id. (citing 4 C.J.S. Appeal and Error § 417 (1993)). “In order to obtain an injunction, the moving party must show that the conduct sought to be enjoined threatens the moving party with irreparable injury⁵ for which there is no adequate remedy at law.” Id. (citing Thornton v. Arnold, 274 S.C. 1, 260 S.E.2d 179 (1979)).

ARGUMENT

I. Snyder is likely to prevail on appeal.

One of the issues before this Court is whether the Master-in-Equity properly granted summary judgment for Ditech. (App. Brief pp. 5-10). “In reviewing an order for summary judgment, the appellate court applies the same standard which governs the trial court under Rule 56 of the South Carolina Rules of Civil Procedure.” M & M Grp., Inc. v. Holmes, 379 S.C. 468, 473, 666 S.E.2d 262, 264 (Ct. App. 2008). “[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). The South Carolina Supreme Court has defined a “scintilla” as “‘a gleam,’ ‘a glimmer,’ ‘a spark,’ ‘the least particle,’ ‘the smallest trace.’” Bethea v. Floyd, 177 S.C. 521, 181 S.E. 721, 724 (1935); see also Rogers v. Norfolk Southern Corp., 356 S.C. 85, 588 S.E.2d 87 (2003)

⁵ A foreclosure sale constitutes irreparable injury. See e.g. Patriot-BSP City Ctr. II v. U.S. Bank Nat. Ass'n, 715 F.Supp.2d 91, 95-96 (D.D.C. 2010) (holding that a foreclosure sale was an irreparable injury); Peterson v. D.C. Lottery & Charitable Games Control Bd., No. 94-1643, 1994 WL 413357, at *4 (D.D.C. July 28, 1994) (“It is settled beyond the need for citation...that a given piece of property is considered to be unique, and its loss is always an irreparable injury.”).

(Burnett, J., dissenting) (“A scintilla is defined as ‘a trace’ of evidence.”) (citing Black’s Law Dictionary 1347 (7th ed.1999)).

On March 11, 2019, Ditech filed a motion for summary judgment requesting, *inter alia*, the Master-in-Equity dismiss his counterclaim for civil compensatory contempt. (R. pp. 290-410). Snyder’s counterclaim was based on the South Carolina Supreme Court’s Administrative Order 2011-05-02-01, which specifically allows for the court entertaining the foreclosure action to award sanctions:

The Court having jurisdiction over the foreclosure action shall hear and determine any dispute concerning any party's compliance with this order, including without limitation, the failure of any party to act in good faith in complying with the terms of this order. In the event the Court determines that any party to the foreclosure action, or their acting agent, has failed to comply with the terms of this order, or has not attempted to reach an agreement for foreclosure intervention in good faith, the Court may, in its discretion, impose such sanctions as it determines to be reasonable and just under the circumstances, including without limitation, the assessment of reasonable attorneys' fees and costs against the culpable party.

In re Mortgage Foreclosure Actions, 396 S.C. 209, 213, 720 S.E.2d 908, 910 (2011). Due to Ditech’s bankruptcy, Snyder requested the sanction of striking Ditech’s reply and issuing a default judgment against it, or in the alternative, to strike Ditech’s demand for damages of accrued interest, fees, costs, advances, and a deficiency judgment. (R. p. 419-20). The Master-in-Equity dismissed this cause of action by order dated March 27, 2019. (R. pp. 19-22).

The Master-in-Equity’s grant of summary judgment was in error. Snyder presented the Master-in-Equity with considerable evidence of Ditech’s bad faith conduct (primarily, though not exclusively, through its legal predecessors); this evidence is reproduced in the Record on Appeal. (App. Brief pp. 5-10; R. pp. 103-178). Viewing this evidence in a light most favorable to Snyder, Snyder has made the minimal showing of a scintilla of evidence

that Ditech did not comply in good faith with Administrative Order 2011-05-02-01. The Master-in-Equity will be reversed on this issue, and therefore Snyder has made an adequate showing of likelihood of success on the merits.

II. A bond of any amount does not serve any purpose and serves as a windfall to Ditech.

A supersedeas or appeal bond is intended to indemnify the respondent for the value of the judgment if it is affirmed. See generally Jerome v. McCarter, 88 U.S. (21 Wall) 17, 30 (1874); Catlett v. Brodie, 22 U.S. 553, 554 (1824). Ditech has waived its right to pursue a deficiency judgment⁶ in this matter, limiting its recovery on its \$293,930.69 judgment to the assets obtained from the sale of the residence at 1752 Orange Grove Shores. (R. pp. 27-28, 659). This property is worth perhaps \$249,883.00. (R. p. 248). Any additional damages Ditech will incur during the pendency of this appeal will be uncollectable. As Ditech has voluntarily limited its recovery to the value of the property at issue in this action (which will never conceivably satisfy or exceed Ditech's judgment), it cannot be harmed by this appeal, and bond is not necessary. Cf. Urbain v. Knapp Bros. Mfg. Co., 217 F.2d 810, 815-16 (7th Cir. 1954) (no security necessary for a preliminary injunction when no material harm can come to the party restrained).

Further, requiring Snyder to post a bond for supersedeas creates new liability for Snyder under the bond's terms and allows Ditech to collect damages via the bond that it

⁶ See S.C. Code § 29-3-660 (2007) (authorizing the court to direct the payment by the mortgagor of any remaining balance of the mortgage debt left unsatisfied after a sale of the mortgaged property); see also Am. Gen. Fin. Servs., Inc. v. Brown, 376 S.C. 580, 583, 658 S.E.2d 99, 100 (2008) ("[T]he general rule is that if the mortgaged premises are sold under a foreclosure decree and fail to bring a sufficient amount to satisfy the debt, the mortgagee is entitled, absent any statutory limitation or waiver on his part, to a personal judgment for the remaining deficiency." (internal quotation marks omitted)).

has previously waived. This is an impermissible windfall.

III. The underlying action was subject to an automatic stay on March 29, 2019.

Snyder timely appealed the Master-in-Equity's March 27, 2019, order granting summary judgment on March 29, 2019. (R. p. 531). As the March 27, 2019 order strikes Snyder's counterclaim for civil compensatory contempt and the Estate of Mary Snyder's attorney preference statute defense, it is immediately appealable. S.C. Code § 14-3-330(2)(c). Ditech apparently agrees: "Respondent does not dispute the immediate appealability of the portion of the Court's March 27, 2019 Order granting Ditech partial summary judgment and striking Appellant's defense..." (R. p. 549).

"As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision." Rule 241(a), SCACR. Upon the service of the Notice of Appeal, Rule 205, SCACR, divests the lower court of jurisdiction in matters "affected by the appeal". Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 534, 787 S.E.2d 485, 494 (2016). According to the South Carolina Supreme Court, to "affect" a matter is "'to produce an effect on; to influence in some way'". Id. (quoting Black's Law Dictionary 68 (10th ed. 2014)). This is a broad definition – the Stokes-Craven court held that even issues in other cases may be stayed if the issues in those cases depend in some way on the case appealed. Id.

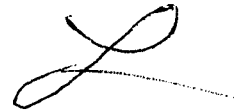
Snyder's civil compensatory contempt counterclaim sought to strike Ditech's pleadings or limit its recovery (R. p. 419-20), and the Estate of Mary Snyder's attorney preference defense would have resulted in a setoff of Ditech's judgment. See Deutsche

Bank Nat. Trust Co. v. Booms, Op. No. 2015-UP-097 (S.C. Ct. App. Feb. 25, 2015) (citing S.C. Code § 37-10-105(A)). This counterclaim and defense would “affect” the underlying foreclosure action; therefore, the Master-in-Equity lost jurisdiction over the foreclosure action upon service of the March 29, 2019, notice of appeal. The underlying action should have been stayed as of that date, and this Court should enforce it by ordering the proceedings below be stayed pending appeal, without bond.

CONCLUSION

The petition for supersedeas should be granted upon reconsideration and bond be waived or set at a nominal amount (*e.g.* \$100.00).

Dated: 11/18/2019



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Attorney for Appellant

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell Scarborough
Master in Equity**

**Appellate Case No. 2019-000575
Circuit Court Case No. 2010-CP-10-7838**

RECEIVED
NOV 25 2019
SC Court of Appeals

Ditech Financial, LLC,

Respondent,

v.

**Kevin G. Snyder, Individually and
as Personal Representative of the
Estate of Mary Snyder,**

Appellant.

**DITECH FINANCIAL, LLC'S OPPOSITION TO
APPELLANT'S PETITION FOR REHEARING**

Respondent Ditech Financial, LLC ("Ditech") hereby responds to the Appellant's Petition for Rehearing and states as follows:

PROCEDURAL BACKGROUND

1. Ditech's predecessor-in-interest filed a foreclosure action against Appellant on September 23, 2010. The complaint was subsequently amended October 27, 2010.
2. The Appellant ultimately answered the amended pleading and asserted the following four counterclaims: (1) civil compensatory contempt (for alleged violations of South

Carolina Supreme Court Administrative Order 2011-05-02-01), (2) breach of contract, (3) unfair trade practices, and (4) quiet title.

3. In March 2019, after a period of discovery, the parties filed cross motions for summary judgment.

a. Ditech moved for summary judgment on its foreclosure action and on the Appellant's counterclaims for civil compensatory contempt and to quiet title. (The other counterclaims – breach of contract and unfair trade practices – were stayed in light of Ditech's bankruptcy.)

b. The Appellant moved for summary judgment on its counterclaims for civil compensatory contempt and to quiet title.

4. In a March 20, 2019 Order, the trial court denied the Appellant's motion for summary judgment.

5. The trial court granted Ditech's motion with regard to the counterclaim for civil compensatory contempt, but it denied Ditech's motion on its foreclosure claim and on the Appellant's quiet title counterclaim.

6. Before trial, the Appellant filed his first Notice of Appeal, seeking interlocutory appellate review of, *inter alia*, the summary judgment ruling (hereinafter, the "First Notice of Appeal").

7. A bench trial proceeded, resulting in a Judgment of Foreclosure and Sale dated April 23, 2019.

8. Thereafter, the Appellant amended his notice of appeal to include the Judgment of Foreclosure and Sale (hereinafter, the "Second Notice of Appeal").

9. On May 2, 2019, the Appellant filed a Motion for Supersedeas with the trial court, asking the trial court to “suspend[] any and all activity in this case until the appeal is resolved.”

10. Ditech submitted a response brief on June 3, 2019 requesting as follows:

- a. A bond in the amount of \$25,134.48 to stay the underlying foreclosure for a period of 18 months (calculated by multiplying the monthly mortgage payment the Appellant should be paying (\$1,396.36) by 18 months (the average length of an appeal before the South Carolina Court of Appeals)); and
- b. An additional \$1,396.36 for each additional month (beyond 18 months) that the appeal remains pending without resolution (as a condition of the continued stay).

11. On October 16, 2019, the trial court granted the Appellant’s motion conditioned on the posting of a bond in the amount of \$25,000.

12. Pursuant to SCACR 241(d)(2), in a filing styled “Petition for a Writ of Supersedeas,” the Appellant sought review in this Court of the trial court order on the Appellant’s previously filed Motion for Supersedeas. Specifically, the Appellant sought to have the bond “waived or set at a nominal amount.” The Petition for a Writ of Supersedeas did not indicate that it was directed to an individual judge of this Court.

13. On November 7, 2019, this Court denied the Appellant’s Petition for Writ of Supersedeas. Although the November 7, 2019, Order was signed by Judge McDonald, the Order indicated it was being filed “For the Court.” The effect of this Order is that the trial court order – imposing a bond requirement in the amount of \$25,000 – stands and is the controlling law of this case.

14. Now, in a filing styled “Petition for Rehearing,” the Appellant, purportedly pursuant to SCACR 241(d)(7), seeks a further review of the Court’s November 7, 2019 Order denying the Appellant’s Petition for Writ of Supersedeas.

LEGAL STANDARD

15. Because the Judgment of Foreclosure and Sale directs the sale of real property, that order is not automatically stayed by Appellant’s appeal. *See* SCACR 241(b)(4) (listing as an exception to the automatic stay rule any “Judgments directing the sale or delivery of possession of real property as provided in S.C. Code Ann. § 18-9-170”); *see also C-Sculptures, LLC, No. 3 v. Brown*, 393 S.C. 27, 32, 709 S.E.2d 705, 708 (2011) (“The foreclosure decree would be the type of order covered by section 18-9-170 . . .”).

16. “In a case subject to an exception [set forth in SCACR 241(b)], any party may move for an order imposing supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal.” SCACR 241(c)(1).

17. “Except where extraordinary circumstances make it impracticable, an application . . . for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal.” SCACR 241(d)(1).

18. “After the lower court or administrative tribunal has ruled, any party may petition the appellate court where the appeal is pending” to review the trial court’s order. SCACR 241(d)(2).

19. “Any party aggrieved by the decision of the lower court, the administrative tribunal, or an individual judge or justice may petition under this Rule for a review of that decision.” SCACR 241(d)(7).

ARGUMENT

20. As an initial matter, the Appellate Court Rules do not permit the filing that the Appellant has made.

- a. The rules make clear that this Court “will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding the party’s appeal.” SCACR 221(c).
- b. Because the November 7, 2019 Order denying the Appellant’s Petition for Writ of Supersedeas does not have “the effect of dismissing or finally deciding the party’s appeal,” this Court should not entertain the Appellant’s attempt to petition for a rehearing of that ruling. *See Owens v. Owens*, 278 S.C. 356, 356, 296 S.E.2d 338, 338 (1982) (denying petition for rehearing of petition for writ of supersedeas without considering the merits, and explaining: “We do not recognize this procedure nor do the Rules of Practice of the Supreme Court provide for a motion to rehear a supersedeas.”).

21. Even if the Appellant’s Petition for Rehearing were a proper filing – which it is not – the Petition for Rehearing should be denied.

22. Although the Appellant asks this Court to waive the bond requirement, the Appellant must “giv[e] a supersedeas bond” in order to obtain a stay, and the stay is not effective until “the supersedeas bond is approved by the court.” S.C.R. Civ. P. 62(d).

23. S.C. Code Ann. § 18-9-170 makes this point clear and explains how the Court should calculate an appropriate bond amount:

If the judgment appealed from direct[s] the sale or delivery of possession of real property, the execution of the judgment shall not be stayed unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon and that ***if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the execution of the undertaking until the delivery of possession thereof*** pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which shall be specified in the undertaking.

(emphasis added); *see also Wachesaw Plantation E. Cmty. Serv. Ass'n, Inc. v. Alexander*, 414 S.C. 355, 362 n.6, 778 S.E.2d 898, 902 n.6 (2015) (Pleicones, J., concurring) (noting “the statutory bond *required* by § 18-9-170” (emphasis added)); *Carsten v. Wilson*, 241 S.C. 516, 522, 129 S.E.2d 431, 435 (1963) (construing predecessor statute to § 18-9-170, and finding appeal did not stay “order of sale in foreclosure” since the appellant “did not give such a bond”).

24. Ditech acknowledges that an order for supersedeas may be “necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” SCACR 241(c)(2). However, no such order should issue without the posting of an appropriate supersedeas bond.

25. As noted above, S.C. Code Ann. § 18-9-170 instructs courts to calculate an appropriate bond amount as follows: “the value of the use and occupation of the property from the time of the execution of the undertaking until the delivery of possession thereof pursuant to the judgment.”

26. Here, the value of the use and occupation of the property from Ditech’s perspective is the monthly mortgage payment it should be, but is not, receiving. The current monthly mortgage amount is \$1,396.36.

27. In undersigned counsel’s experience, a typical appeal before the South Carolina Court of Appeals lasts 1.5 years. However, this appeal could certainly last longer.

28. Therefore, Ditech requests that this Court condition an order for supersedeas on the Appellant posting a bond equaling the monthly mortgage amount (\$1,396.36), multiplied by the anticipated life of the appeal (18 months), which equals \$25,134.48. (By imposing a bond requirement in the amount of \$25,000, the trial court appears to have agreed with this approach and to have found it reasonable.)

29. In the event that the appeal lasts longer than 18 months, Ditech request that the Court condition a continued stay on the posting of an additional \$1,396.36 for each additional month (beyond 18 months) that the appeal remains pending without resolution.

30. The Appellant continues to not even mention S.C. Code Ann. § 18-9-170, the statute that controls the calculation of an appropriate bond amount in this case. *See Brown*, 393 S.C. at 32, 709 S.E.2d at 708 (“The foreclosure decree would be the type of order covered by section 18-9-170 . . .”). Instead, the Appellant cites to two cases from the 1800’s which are not cases from South Carolina courts. (Petition at p. 7).

31. Rather than operating within the proper framework, the Appellant also argues the underlying merits of the pending appeal and contends that a bond is not necessary because of those arguments. That is not how this Court should calculate an appropriate bond amount. Indeed, this Court will determine the merits of the appeal based on the parties’ written briefs. A supersedeas bond, on the other hand, should be calculated based on “the value of the use and occupation of the property from the time of the execution of the undertaking until the delivery of possession thereof.” S.C. Code Ann. § 18-9-170. That determination has nothing to do with the underlying merits of the appeal.

32. Nevertheless, Ditech would be remiss not to address the Appellant’s contentions.

- a. Ditech expressly denies and refutes any characterization of “bungled communications.” (Petition at p. 2). Communications between the parties in the course of foreclosure intervention are outlined at length in the parties’ merits briefs filed with this Court. (*See, e.g.*, R. pp. 387, 585 (noting that Appellant’s counsel has had three separate offices throughout this case and acknowledging that the moves may have disrupted the Appellant’s counsel’s mail service)).
- b. The Appellant complains about the amendment of the case caption (Petition at p. 2), but the Appellant consented to a subsequent amendment of the case caption (R. pp. 15-16), making the argument moot, even if it were relevant, which it is not.
- c. Ditech strongly disputes that Snyder is likely to prevail on appeal. (Petition at pp. 5-7). However, Ditech does not dispute that a stay of the foreclosure judgment is necessary to “prevent a contested issue from becoming moot.” SCACR 241(c)(2). For this reason, as noted, Ditech does not necessarily oppose the issuance of an order for supersedeas. However, any such order must be accompanied by the posting of an appropriate bond.
- d. It is unclear how Ditech is not being “harmed by this appeal.” (Petition at p. 7). The requested bond is based on the payments that the Appellant originally agreed to make (but is not making) to obtain the underlying mortgage. This is the value of the use and occupation of the property from Ditech’s perspective. For every month that the Appellant delays the inevitable foreclosure in this case through the present appeal, Ditech is not

receiving those amounts. If anyone is getting a windfall, it is the Appellant, who has lived in a home for years without making a mortgage payment.

- e. It is also unclear how the posting of a bond “creates new liability for Snyder.” (Petition at p. 7). By electing to file an appeal, the Appellant (not Ditech) made it necessary to post an appeal bond in order to prevent the appeal from becoming moot. If the Appellant is so sure that he is likely to prevail on appeal (Petition at pp. 5-7), then the posting of a bond will not “allow[] Ditech to collect damages via the bond.” (Petition at p. 7). In any event, Ditech would only be collecting that to which it is entitled, namely the monthly mortgage payments that the Appellant should be, but is not, paying.
- f. Finally, the Appellant’s arguments about the immediate appealability of certain orders and the jurisdiction of the trial court (Petition at pp. 8-9) have absolutely nothing to do with determining an appropriate supersedeas bond amount. Those are the claims at issue in the appeal, which are argued at length in the parties’ briefs. Specifically, the Appellant contends – just as he does in the merits briefs pending before the Court – that the First Notice of Appeal should have operated to stay the trial proceedings and that “this Court should enforce it by ordering the proceedings below be stayed pending appeal, without a bond.” (Petition at p. 9). While this statement is confusing, the Appellant, in effect, appears to be asking the Court to agree with the merits of his appeal as a precondition to ruling on the improperly filed Petition for Rehearing. This Court should not foray into the merits of

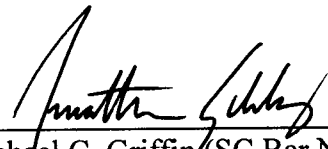
the appeal in the context of the present petition. Rather, the Court should do nothing more than calculate and impose a bond consistent with the dictates of S.C. Code Ann. § 18-9-170.

CONCLUSION

33. For the foregoing reasons, the Petition for Rehearing should be denied. Ditech does not necessarily oppose the issuance of an order for supersedeas. However, that order should be conditioned on the following:

- a. The posting of a supersedeas bond in the amount of \$25,134.48, which will stay the underlying foreclosure for a period of 18 months;
- b. An extension of the bond in the amount of \$1,396.36 per month for each additional month (beyond 18 months) that the appeal remains pending; and
- c. Such other and further relief as the Court deems just and appropriate.

This 22nd day of November 2019.



Michael C. Griffin (SC Bar No. 72868)
G. Benjamin Milam (SC Bar No. 80311)
Jonathan E. Schulz (SC Bar No. 79850)
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Attorneys for Ditech Financial, LLC

The South Carolina Court of Appeals

Ditech Financial, LLC, Respondent

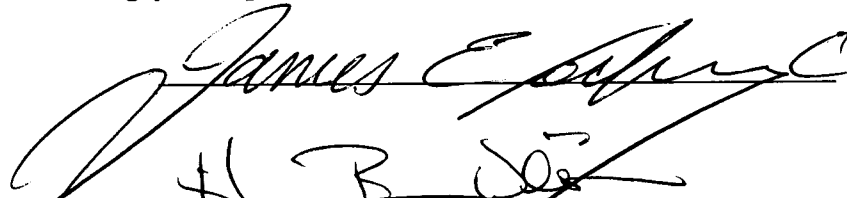
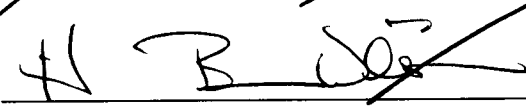
v.

Kevin G. Snyder, individually and as Personal
Representative of the Estate of Mary Snyder, Appellant.

Appellate Case No. 2019-000575

ORDER

This court construes Appellant's motion as a petition for review of the denial of Appellant's petition for supersedeas. *See* Rule 241(d)(7), SCACR. After careful consideration, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting the petition. Accordingly, the petition is denied.

 J.
 J.
 J.

Columbia, South Carolina

cc:

Michael Casin Griffin, Esquire
George Benjamin Milam, Esquire
Jason Scott Luck, Esquire
Jonathan Edward Schulz, Esquire

FILED

December 17, 2019

Jonathan E. Schulz

Attorney
jschulz@bradley.com
704.338.6127 direct

Bradley

January 18, 2022

VIA E-MAIL

South Carolina Court of Appeals
Attn: Ms. Jenny Abbott Kitchings, Clerk of Court
1220 Senate Street
Columbia, SC 29201
ctappfilings@sccourts.org

RECEIVED

Jan 18 2022

SC Court of Appeals

Re: *Ditech Financial, LLC v. Kevin G. Snyder, Individually and as Personal Representative of the Estate of Mary Snyder*, Appellate Case No. 2019-000575

Dear Ms. Kitchings:

In connection with the above appeal, which is currently scheduled for oral argument on February 10, 2022, Respondent Ditech Financial, LLC (“Ditech”), pursuant to South Carolina Rule of Appellate Procedure 208(b)(7), submits the following supplemental authority.

Specifically, on November 10, 2021, during the pendency of this appeal,¹ the Master in Equity in this matter issued his Master’s Order of Sale and Disbursement (the “Master’s Order”). The Master’s Order does not appear to be available on any electronic research service (*e.g.*, Westlaw or LexisNexis); therefore, Ditech attaches the Master’s Order hereto as Exhibit A.

The Master’s Order provides that the Master in Equity “offered for sale to the highest bidder for cash, at public auction on October 6, 2021, the premises subject to this suit”; that he “received a high bid of \$249,600.00” from a third party; and that he “executed and delivered a Master’s deed to [the buyer].” The Master’s Order concludes by stating: “All of the funds having been disbursed, I hereby ORDER the file closed and the case ended.”

In this appeal, Kevin G. Snyder, Individually and as Personal Representative of the Estate of Mary Snyder (“Snyder”) appeals from a foreclosure judgment following a bench trial. Snyder also appeals from three interlocutory orders leading up to the foreclosure judgment, including a summary judgment order dismissing Snyder’s defenses to foreclosure and counterclaims related to Ditech’s foreclosure. The Master’s Order, therefore, directly impacts Snyder’s arguments on appeal.

¹ Appellant had the opportunity to stay proceedings in the trial court pending appeal by posting a bond, but he failed to do so.

Ms. Jenny Abbott Kitchings

January 18, 2022

Page 2 of 2

As required by Rule 208(b)(7), but without advancing any argument, Ditech submits this supplemental authority because it believes the Master's Order raises issues of mootness and impacts this Court's jurisdiction over the appeal.

Should you have any questions or concerns, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink, appearing to read "Jonathan Schulz", written in a cursive style.

Jonathan Schulz

Enclosure

cc: Jason Scott Luck (via e-mail)
George Benjamin Milam (via e-mail)

Exhibit A

STATE OF SOUTH CAROLINA
COUNTY OF Charleston

IN THE COURT OF COMMON
PLEAS

Green Tree Servicing, LLC,

Case Number: 2010-CP-10-07838

Plaintiff,

**MASTER'S ORDER OF SALE
AND
DISBURSEMENT**

-v.-

Kevin G. Snyder, et al.,

Defendant.

UNDER AUTHORITY of a Decree herein dated April 26, 2019, I offered for sale to the highest bidder for cash, at public auction on October 6, 2021, the premises subject to this suit, and I received a high bid of \$249,600.00 from A&M Real Estate, LLC; and I executed and delivered a Master's deed to **A&M Real Estate, LLC** and I have disbursed the funds as follows:

CONSIDERATION	\$249,600.00
----------------------	---------------------

Deposit (Order of Reference)	\$125.00
------------------------------	----------

Total Received by Master	\$249,725.00
--------------------------	--------------

DISBURSEMENTS

Master's Fees	\$100.00
---------------	----------

County Commission	\$2,496.00
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Master's Deed	\$25.00
---------------	---------

Total of Master's Costs	\$2,621.00
--------------------------------	-------------------

Check # 31222 – Issued to Scott & Corley, Atty for Green Tree Servicing	\$247,104.00
--	---------------------

All of the funds having been disbursed, I hereby ORDER the file closed and the case ended.

November 10, 2021
Charleston, SC

Mikell R. Scarborough
Master-in-Equity, Charleston County



Charleston Common Pleas

Case Caption: Ditech Financial LLC , plaintiff, et al VS Kevin G Snyder , defendant,
et al

Case Number: 2010CP1007838

Type: Master/Master's Report of Sale

So Ordered

s/Mikell R. Scarborough 3062

Electronically signed on 2021-11-10 14:39:51 page 2 of 2

JASON SCOTT LUCK
ATTORNEY AT LAW

P.O. BOX 47 (107 S. PARSONAGE ST.)
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843.479.6863

RECEIVED

Jan 19 2022

SC Court of Appeals

19 January 2022

Via Email Only

Jenny Abbot Kitchings, Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
ctappfilings@sccourts.org

Re: *Ditech Financial, LLC v. Snyder*, 2019-000575

Dear Ms. Kitchings:

I am in receipt of the Respondent's attorney's January 18, 2022 letter. While Appellant has no objection to this Court considering the Master-in-Equity's November 10, 2021, order in the action below, Appellant believes this order would be more properly considered as a supplement to the Record on Appeal, or as a judicially noticed document. *See* Rule 212, SCACR (supplemental record); *Masters v. Rodgers Dev. Group*, 283 S.C. 251, 321 S.E.2d 194 (Ct. App. 1984) (appellate judicial notice).

The January 18, 2022 letter also advances a (new) mootness argument, in violation of Rule 208(b)(7), SCACR. While Appellant will address mootness at the February 10, 2022, oral arguments, please allow the following to serve as an informal response:

The Master-in-Equity's November 10, 2021, order proves the feasibility, not the mootness, of the alternative relief requested in Argument I of Appellant's brief (p. 12). According to this order, the proceeds of the sale of Appellant's home were provided to the law firm of Scott & Corley. If this Court finds the Respondent was not entitled to accrued interest and fees, then this Court can modify the Master-in-Equity's order and Scott & Corley can release proceeds to the Appellant. *See* Rule 220(a), SCACR (Court can modify order below).

Please do not hesitate to contact me with any questions.

With Highest Regards,

/s/ *Jason Scott Luck*

/JSL

RECEIVED

Aug 03 2022

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas**

**Mikell Scarborough
Master-in-Equity**

**Appellate Case No. 2019-000575
Charleston County Case No. 2010-CP-10-7838**

Ditech Financial, LLC Respondent,

v.

**Kevin G. Snyder, individually and
As Personal Representative of the
Estate of Mary Snyder.....Appellant.**

**PETITION FOR REHEARING
AND REHEARING *EN BANC***

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Attorney for Appellant**

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BACKGROUND

This is the appeal of a contested residential foreclosure of Kevin, Mary, and Faith Snyder's (now former) home located at 1753 Orange Grove Shores Drive, Charleston, SC. The Appellant is Kevin Snyder, in his individual capacity as a mortgagor of the property, and as personal representative of his late¹ wife Mary Snyder, who was also a mortgagor. The Respondent is the purported successor to the original Plaintiff loan servicer, BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP. BAC filed the original foreclosure Complaint and Lis Pendens on September 23, 2010, and amended the Complaint and Lis Pendens on October 13, 2010. (R 35-39, 42, 45-49, 56-57). Kevin and Mary Snyder were served a Notice of Foreclosure Intervention on December 17, 2012, which BAC denied on or about April 4, 2013. (R 59-60, 63-64). Undersigned counsel appeared for the Snyders on May 3, 2013, filing his notice of appearance with the Clerk of Court and serving it on BAC's counsel. (R 66). BAC purportedly transferred the Snyders' loan at some point shortly thereafter to Green Tree Servicing, LLC, and on June 17, 2013, undersigned counsel sent Green Tree a letter informing it of the Snyders' representation, and enclosing a copy of *In re Mortgage Foreclosure Actions*, 396 S.C. 209, 720 S.E.2d 908 (2011) (the "Admin Order"). (R 121). Undersigned counsel followed up this letter with another letter on July 18, 2013, enclosing a written authorization from the Snyders (requested by Green Tree) and another copy of the Admin Order. (R 144-145). Green Tree's attorney was copied on this letter. (R 144). These June and July letters inaugurated a nearly six year ordeal of bungled foreclosure interventions by Ditech and its predecessors, set forth in greater detail in Argument III.

¹ Faith Noel Snyder, who was profoundly disabled, died on December 2, 2013. Mary Snyder died unexpectedly of lung cancer on November 23, 2015.

The Master-in-Equity stayed this action pending foreclosure intervention at a September 30, 2013, status conference. Undersigned counsel was never notified of this hearing, and was never served with a copy of the resulting order staying the action. (R 4). On March 12, 2014, the Master-in-Equity, again without notice to undersigned counsel or a hearing, granted BAC's motion to replace BAC Home Loans Servicing, LP with Green Tree Servicing, LLC as Plaintiff. (R 9-10, 179-187).

Green Tree substituted counsel on April 9, 2015, and again on July 2, 2018. The parties engaged in discovery, and Snyder filed a motion to compel on November 29, 2018 to compel Green Tree's responses to his discovery. (R 88-90, 179-187). Pursuant to a December 10, 2018, status conference (where the motion to compel was heard without a court reporter), the Master-in-Equity issued a consent scheduling order and a consent order amending the caption to replace Green Tree Servicing, LLC with Ditech Financial, LLC. (R 13-16).

Ditech filed for bankruptcy in the United States Bankruptcy Court for the Southern District of New York on February 11, 2019, and filed notice in this action on March 1, 2019 (amended May 1, 2019). (R 199-288). All parties filed motions for summary judgment on March 11, 2019. (R 291-433). These motions were heard at a pre-trial hearing on March 18, 2019. (R 561-601). The Master-in-Equity denied Snyder's motion, granted Ditech's motion in part, and denied Snyder's motion to compel by order dated March 27, 2019. (R 19-22). Snyder timely served a notice of appeal on March 29, 2019. Though Snyder argued that the Master-in-Equity lacked jurisdiction due to the pending appeal (R 606-622), the Master-in-Equity proceeded with a final hearing. (R 622-660). The Master-in-Equity issued his final order on April 23, 2019, ordering the foreclosure of the mortgage and the sale of 1752 Orange Grove Shores. (R 23-32).

Snyder amended his notice of appeal to include this order and also filed a motion for supersedeas before the Master-in-Equity on May 2, 2019. (R 436-440). Ditech filed its response to the motion on June 3, 2019. (R 554-560). After being heard (and denied) by the Circuit Court, this motion was heard by the Master-in-Equity. (10/28/2019 Pet. for Supersedeas, Ex. A & B). The Master-in-Equity granted Snyder's motion on October 18, 2019, setting the supersedeas bond at \$25,000.00. (10/28/2019 Pet. for Supersedeas, Ex. B). Unable to afford this bond, Snyder petitioned this Court for a writ of supersedeas on October 28, 2019, requesting bond be waived or set at a nominal amount; said petition was denied on November 7, 2019. On November 18, 2019, Snyder petitioned for panel rehearing of the petition under Rule 241(d)(7), SCACR; this petition was denied on December 17, 2019.

On October 21, 2021, the Master-in-Equity sold 1752 Orange Grove Shores at judicial sale for \$249,600.00. (01/18/2022 Supp. Citation letter, Ex. A). This Court entertained oral arguments on February 10, 2022. (Unofficial transcript).² On July 20, 2022, this Court issued its opinion affirming the Master-in-Equity (the "Opinion"). This petition follows.

² An unofficial transcript of the oral arguments is attached to this petition as an exhibit. Please note this transcript, prepared by a vendor in the United Kingdom, contains errors.

SUGGESTION TO GRANT *EN BANC* REHEARING

Snyder suggests, pursuant to Rule 219(b), SCACR, the following grounds for rehearing render this decision appropriate for rehearing *en banc*:

- A. **This Court applies a harmless error analysis to an order that was structurally erroneous and void for lack of jurisdiction, contradicting this Court’s prior decisions, South Carolina Supreme Court precedent, and United States Supreme Court precedent.**

Snyder timely and properly served a notice of appeal of the Master-in-Equity’s order dismissing his counterclaims and striking an affirmative defense to the mortgage foreclosure. “Pursuant to Rule 205, the service of a notice of appeal divests the trial court of jurisdiction over matters affected by the appeal...” *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 532, 787 S.E.2d 485, 493 (2016). Further, a judgment of a court without jurisdiction is void. *Thomas & Howard Co. v. T.W. Graham and Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). Even though the Master-in-Equity did not have the jurisdiction to proceed with a final foreclosure hearing, this Court’s opinion allowed the final order of foreclosure and sale to stand, effectively applying a harmless error analysis to a judgment that was void for want of jurisdiction. Lack of jurisdiction is a “structural error” not susceptible to harmless error analysis. *See Arizona v. Fulminate*, 499 U.S. 279 (1991); *State v. Wright*, 432 S.C. 365, 852 S.E.2d 468 (Ct. App. 2020) (structural error not subject to harmless error analysis).

The issue of continued jurisdiction after an interlocutory appeal is also a matter of extreme importance. The appeal of an interlocutory order that is immediately appealable can effectively shut down a proceeding before the trial court. Uniformity in the law in considering interlocutory appeals is critical for this Court, which handles the majority of appeals in this state, making it the front line of the battle to preserve the constitutional right to a speedy civil trial. *See S.C. Const.*

Art. I Sec. 9 (“All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained.”).

B. This Court’s interpretation of South Carolina’s Attorney Preference Statute conflicts with the decisions of this Court and the plain text of the Consumer Protection Code.

The Opinion holds proof of actual damages is necessary for a party to avail himself of the penalty provision of S.C. Code § 37-10-105, which provides a remedy for violations of S.C. Code § 37-10-102 (the “Attorney Preference Statute”). (Opinion pp. 12-13). No case law, including case law of this Court, supports this interpretation. *See, e.g., Wells Fargo Bank, Nat’l Ass’n v. Smith*, 398 S.C. 487, 730 S.E.2d 328 (Ct. App. 2012). Further, the plain language of the statute does not require proof of actual damages for a party to seek a penalty against a creditor:

If a creditor violates a provision of this chapter, the debtor has a cause of action, other than in a class action, to recover actual damages and also a right in an action, other than in a class action, to recover from the person violating this chapter a penalty in an amount determined by the court of not less than one thousand five hundred dollars and not more than seven thousand five hundred dollars...

S.C. Code § 37-10-105(A).

The interpretation of the Attorney Preference Statute is also a matter of extreme importance. The right to be represented by an attorney of one’s own choice is a substantial right. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005). This right is not diminished simply because representation is in the context of the closing of a mortgage.

REASONS TO GRANT REHEARING

I. This Court misapprehended the applicability of harmless error analysis to a void order.

On March 27, 2019, the Master-in-Equity granted Ditech's motion for summary judgment, dismissing Snyder's counterclaim for civil compensatory contempt and the Estate of Mary Snyder's attorney preference statute defense. (R 19-22). Snyder served a notice of appeal of this order on March 29, 2019. This Court correctly noted this notice of appeal was a valid appeal of an immediately appealable order. (Opinion pp. 14-16). This Court also correctly found "the master erred in proceeding with the foreclosure". (Opinion p. 14).

However, this Court misapprehended and overlooked the law regarding a trial court's jurisdiction after a notice of appeal is served, and ultimately applied a "harmless error" analysis to the Master-in-Equity's April 23, 2019, final order (R 23-32), which was void for lack of jurisdiction. The dicta of *Tillman*, cited in the Opinion (pp. 14-15), contends this lack of jurisdiction is not subject matter jurisdiction, but "the power to address a particular issue", which is merely subject matter jurisdiction by another name. *See Dove v. Gold Kist*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (subject matter jurisdiction is "the power of a court to hear and determine cases of the general class to which the proceedings in question belong"). Upon the service of Snyder's March 29, 2019, notice of appeal, the Master-in-Equity lost the power to consider matters affected by the March 27, 2019 order granting summary judgment (*i.e.*, he lost jurisdiction over these matters). Rule 241(a), SCACR; *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 533, 787 S.E.2d 485, 493 (2016) ("Pursuant to Rule 205, the service of a notice of appeal divests the trial court of jurisdiction over matters affected by the appeal...").

A judgment of a court without jurisdiction is void. *Thomas & Howard Co. v. T.W. Graham and Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). Further, a court acting outside of its

authority represents a structural error in the mechanism of the trial. *See State v. Harrison*, 432 S.C. 448, 473, 854 S.E.2d 468 (2021). “The finding of a structural error simply renders the harmless error doctrine unavailable on appellate review.” *State v. Rivera*, 402 S.C. 225, n.4, 741 S.E.2d 694, n.4 (2013). Though this Court did not use the exact phrase “harmless error”, its relief was, in form and effect, a finding of harmless error. This matter must be reheard to correct this misapprehension.

II. This Court misapprehended the intent and effect of South Carolina’s Attorney Preference Statute.

The Master-in-Equity’s March 27, 2019, order struck one defense of the Estate of Mary Snyder: “The Court finds that Defendants cannot raise a defense to foreclosure on the basis of alleged noncompliance with S.C. Code § 37-10-102 (“Attorney Preference Statute”) as to Mary Snyder, because Mary Snyder was not a “borrower” within the meaning of the statute, and the Court therefore strikes this defense.” (R 21-22). While this Court describes this argument as moot³ and unpreserved, finding the Estate of Mary Snyder did not provide evidence of actual damages and Ditech’s waiver of a deficiency judgment prevented a setoff of any judgment. (Opinion pp.12-13). This finding misapprehends and overlooks both the intent and effect of the Attorney Preference Statute.

At issue in this appeal is a South Carolina mortgage loan. (R 316-329). Under South Carolina law, a person has the right to be represented by an attorney of his own choice, without conflicts of interest, in a mortgage closing. *See Doe v. McMaster*, 355 S.C. 306, 585 S.E.2d 773, 777-778 (2003); *State v. Buyers Service Co., Inc.*, 292 S.C. 426, 357 S.E.2d 15 (1987). A South Carolina mortgage loan closing, including a refinance, must be supervised by an attorney licensed to practice law in South Carolina. *Id.* In *Wachovia Bank, N.A. v. Coffey*, this Court observed that

³ While the Opinion (p.13) found the issue as to whether Mary Snyder was a “borrower” under S.C. Code § 37-10-102(a) as moot, it nonetheless analyzed the issue as if she were a “borrower”.

“[t]he unauthorized practice of law is inherently prejudicial to not only the parties involved in the instant transaction but also the public at large[.]” 389 S.C. 68, 698 S.E.2d 244, 248 (Ct. App. 2010), *aff’d as modified* 404 S.C. 421, 746 S.E.2d 35, 76 (2013). The purpose behind this requirement is “the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law.” *Id.* (quoting *Buyers Service*, 292 S.C. at 431).

The right to be represented by an attorney of one’s own choice is a substantial right. *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005). This right is not diminished simply because representation is in the context of the closing of a mortgage. South Carolina’s Attorney Preference Statute recognizes and protects this substantial right by penalizing an institution who does not provide a borrower his choice of attorney (\$1,500.00 to \$7,500.00), and also allowing the borrower to recover his actual damages arising from the transaction. S.C. Code § 37-10-105(A). The Attorney Preference Statute explicitly provides it may be asserted as a defense “by recoupment or set-off”. S.C. Code § 37-10-105(A). The statute does not require a showing of actual damages in order to trigger its penalty; the Opinion’s requirement of a showing of actual damages misapprehends this aspect of the Attorney Preference Statute.

III. This Court overlooked the scintilla of evidence in the record supporting Snyder’s counterclaim for civil compensatory contempt.

Snyder asserted a counterclaim for Civil Compensatory Contempt in his counterclaims, based on Ditech’s predecessor’s violations of the Admin Order (R 73-74), which provides for sanctions for failure to “act in good faith in complying with the terms of [the Admin Order].” *In re Mortgage Foreclosure Actions* at 213, 720 S.E.2d at 910. This Court affirmed the Master-in-Equity’s dismissal of this counterclaim via summary judgment, concluding “there was no genuine issue as to any material fact concerning whether Ditech complied with the Administrative Order.”

(Opinion p. 9). This holding overlooks *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009), which provides Snyder could proceed with his counterclaims (and his affirmative defenses) if he could make a showing of a scintilla of evidence Ditech, or its predecessors, did not act in good faith. “Good faith” is defined as: “honesty in fact and the observance of reasonable commercial standards of fair dealing.” S.C. Code § 36-1-201(20).⁴ A “scintilla” is “‘a gleam,’ ‘a glimmer,’ ‘a spark,’ ‘the least particle,’ ‘the smallest trace.’” *Bethea v. Floyd*, 177 S.C. 521, 181 S.E. 721, 724 (1935); *see also Rogers v. Norfolk Southern Corp.*, 356 S.C. 85, 588 S.E.2d 87 (2003) (Burnett, J., dissenting) (“A scintilla is defined as ‘a trace’ of evidence.”) (citing *Black’s Law Dictionary* 1347 (7th ed.1999)). This Court implicitly recognized Ditech’s violation of the Admin order by recognizing the delay in the foreclosure proceeding resulted in “substantial interest and fees”, and recognizing this delay was “at least in part a result of Snyder’s own conduct”, which implies the existence of fault on the part of Ditech or its predecessors. (Opinion p. 10).

This Court also overlooked the following evidence, which constitutes, at a minimum, the scintilla sufficient to defeat a motion for summary judgment:

1. Failure to send correspondence to the correct address after notice.

Throughout the foreclosure intervention process, Ditech and its predecessors repeatedly mailed critical correspondence and documents to the wrong mailing address. By and large, Ditech has conceded these mistakes. (R 103-115). Snyder is aware of the following misdirected documents, but the true amount of lost correspondence is certainly greater:

⁴ As the note and mortgage in this case are subject to articles 3 & 9 of the Uniform Commercial Code, this definition is appropriately used here.

- a) Green Tree's March 13, 2014, application deficiency letter (R 152-154) used an incorrect address;
- b) Green Tree's May 7, 2014, August 7, 2014, and September 7, 2014, billing statements (R 157, 161-162) used an incorrect address;
- c) Green Tree's August 6, 2014 acknowledgement letter (R 160) used an incorrect address;
- d) Green Tree sent an October 2014 foreclosure intervention application to an incorrect address, resulting in denial of a proposed modification (R 163); and
- e) Ditech's April 13, 2016 foreclosure intervention application (R 168-170) is addressed to the Snyders' counsel's prior address, despite being informed of the new address a year earlier (R 164, 168-170).

Snyder's counsel placed Ditech and its predecessors on notice of changes of address and/or incorrect addressing on October 22, 2014, March 4, 2015, and March 26, 2015. (R 163-164, 168). These failures, at a minimum, contributed to the excessive delays in processing the Snyder's multiple applications for foreclosure intervention/mitigation.⁵

2. Failure to timely respond to foreclosure intervention request.

Ditech's predecessor ignored Snyder's June 17, 2013, request for foreclosure intervention until Snyder's counsel repeatedly contacted Ditech's predecessor's counsel in August of 2013. (R

⁵ Though more of a technical than substantive violation of the Supreme Court's order, Ditech's predecessors also required the Snyders' counsel to repeatedly submit needless written authorizations. Undersigned counsel appeared of record in this action on May 3, 2013. (R 118). Ditech's predecessor's attorneys were served with this notice of appearance the same day. (R 119). Undersigned counsel informed Green Tree of his retention by letter dated June 17, 2013. (R 121). Green Tree, however, demanded that the Snyders execute a separate authorization form (R 145) before it would discuss this matter with the Snyders' counsel. While the Snyders did execute an authorization on July 9, 2013 (provided July 18, 2013) (R 143-145), Ditech's predecessor repeatedly demanded it be re-submitted. (R 142, 147).

121, 128, 131-132). Ditech's predecessor's counsel provided the foreclosure intervention application on August 21, 2013. (R 133). This also contributed to delays in foreclosure intervention.

3. Repeated contacts with represented mortgagors.

Ditech and its predecessors consistently, repeatedly, and flagrantly continued to contact Snyder via telephone and/or mail until approximately 2017, when Ditech began mailing all correspondence, including billing statements, to Snyder's counsel. The Admin Order mandates that foreclosure communications shall flow through the Mortgagor's attorney: "...the Mortgagee *shall* communicate with and otherwise deal with the Mortgagor through the Mortgagor's attorney" *In re Mortgage Foreclosure Actions* at 213, 720 S.E.2d at 909 (emphasis added). On June 17, 2013, Snyder's counsel contacted Ditech's predecessor directly to inform it of Snyder's representation, though Ditech's predecessor's attorney had been notified on May 3, 2013. (R 118-121). Included in the June 17, 2013, letter was a copy of the Admin Order. The Snyders' counsel notified Ditech and its predecessors on June 17, 2013, July 18, 2013, October 30, 2013, November, 6, 2013, November 12, 2013, June 4, 2014, and August 1, 2014, that the Snyders were represented by counsel and/or to cease communications with the Snyders. (R 121, 137, 139-147, 158). Ditech and its predecessors repeatedly ignored the clear language of the Supreme Court's order and the repeated requests of Snyder by attempting direct contact.⁶ (e.g. R 136, 139-140).

4. Inappropriate conduct in litigation.

On June 14, 2013, Ditech's predecessor served requests to admit on Snyder. (R 123). Snyder timely served answers to these requests on July 15, 2013 (July 14, 2013 fell on a Sunday).

⁶ Because this debt was in dispute, Ditech's predecessors' acts also violated the Fair Debt Collection Practices Act. *See* 15 U.S.C. § 1692c(c). Because the Bankruptcy Court's order stays any action for damages, any potential action under this statute is stayed.

(R 122-127). On August 13, 2013, Snyder's counsel spoke with Ditech's predecessor's counsel via telephone about the potential for settlement of this matter. (R 128, 587). On the same day, Ditech's predecessor's counsel executed an Affidavit of Default, stating that Snyder had failed to respond to its Requests to Admit. (R 129-130, 587). Not only was this affidavit false, it was never served on Snyder's counsel when it was filed with the court.⁷ (R 129-130, 156). Snyder's counsel did not learn of this affidavit until March 27, 2014, when Snyder's counsel received a notice of the entry of a heretofore-unknown order amending the caption. (R 155). Upon review of the docket online, Snyder's counsel discovered that he had not been informed of: (1) Ditech's predecessor's counsel's filing of the August 13, 2013, affidavit; (2) a September 30, 2013, status conference that Ditech's predecessor's counsel allowed to go forward without notice to Snyder's counsel; (3) a September 30, 2013 order staying this case pending foreclosure intervention; and (4) Ditech's predecessor's counsel's filing of a motion and proposed order to amend on February 20, 2014, which was granted without hearing. (R 129-130, 134-135, 148-150, 156).

Snyder's counsel immediately wrote Ditech's predecessor's counsel and demanded that Ditech's predecessor's counsel request the court strike the August 13, 2013 affidavit. (R 156). Snyder's counsel referenced this request again on March 26, 2015 and April 28, 2015; the affidavit remained part of the record until struck/withdrawn at the motion for summary judgment hearing on March 18, 2019 (R 156, 168, 172-173, 587-588).

This Court noted in the Opinion (p. 10) Snyder "failed to demonstrate" how this affidavit violated the Admin Order. As set forth above, this affidavit did not represent "honesty in fact", which is an element of good faith.

⁷ Ditech denied the affidavit is false, though it does admit it was never served on the Snyders' counsel. (R 106).

5. Spoliation of evidence.

On March 4, 2015, the Snyder's counsel requested that Ditech's predecessor preserve documents related to this action. (R 164). Ditech, in its responses to Snyder's Third Set of Interrogatories, explains that it could not admit or deny several requests due to a lack of records from its predecessor. (R 99-101). The loss or destruction of these records have thus frustrated factfinding in this matter and have also contributed to the extreme delay in proceedings.

This Court noted in the Opinion (p. 10) Snyder "failed to demonstrate" how this conduct violated the Admin Order. Spoliation of evidence does not represent "honesty in fact" or "fair dealing", which are elements of good faith.

IV. This Court overlooked the case law supporting Snyder's motion to compel.

On or about March 26, 2018, Snyder served Ditech with his second interrogatories and second requests to produce. (R 88). Ditech, under extension, served its responses to these discovery requests on July 23, 2018. (R 91-94). On or about August 15, 2018, Snyder's counsel wrote to Ditech's counsel regarding his objections to certain requests, and requesting amended requests. (R 88). Specifically, Snyder's counsel considered the following objections inappropriate:

25. A copy of the records Green Tree is required to keep pursuant to Section XIX, paragraph A of Federal Trade Comm'n v. Green Tree Servicing, LLC, 0:15-cv-02064-SRN-JSM (D. Minn. Order dated April 23, 2015) (the "FTC Order").

RESPONSE: Plaintiff objects to this request on grounds that it is overly broad and seeks information that is not relevant to any cause of action or defense in this action.

26. A copy of the records Green Tree is required to keep pursuant to Section XIX, paragraph B of the FTC Order for the following:
- a. Cassandra Turner
 - b. Michael Young
 - c. Swarn [last name unknown]
 - d. Xaiver A. [Referenced in a Nov. 21, 2013 letter (R 138)]
 - e. All persons who interacted with Kevin Snyder, Mary Snyder, or their representatives (e.g. their attorney) regarding this loan or its collection

f. All persons who reviewed the Snyders' loss mitigation applications

RESPONSE: Plaintiff objects to this request on grounds that it is overly broad and seeks information that is not relevant to any cause of action or defense in this action. Plaintiff objects further as it seeks personally identifiable information of its employees.

29. A copy of the records Green Tree is required to keep pursuant to Section XIX, paragraph E of the FTC Order that would have been used in the collection of the loan at issue in this action.

RESPONSE: Plaintiff objects to this request on grounds that it is overly broad and seeks information that is not relevant to any cause of action or defense in this action.

32. A copy of your fee agreement(s) with all attorneys who were retained to handle this mortgage foreclosure action.

RESPONSE: Plaintiff objects to this request on grounds that this request seeks information protected by the Attorney-Client Privilege. Plaintiff objects to this request on the grounds that it seeks information that is not relevant to any cause of action or defense in this action. Plaintiff objects to this request as it seeks business confidential and proprietary information.

(R 91-97).

Ditech's counsel responded to Snyder's counsel's concerns via a letter dated August 31, 2018, stating: "...[Plaintiff] is standing on its objections which I understand will likely lead to a motion to compel." (R 89, 188-90). Snyder filed a motion to compel Ditech's responses, which was heard on December 10, 2018, at a status conference (no court reporter was present). The Master-in-Equity denied this motion via a Form 4 order on March 18, 2019, and in his March 27, 2019 order. (R 17, 22).

This Court found Snyder did not preserve his argument that Ditech's generic objections waived its right to object. (Opinion p. 11). This holding overlooks the record evidence the cases underpinning this argument were presented to the Master-in-Equity. While the December 10, 2018, status conference was conducted without the benefit of a court reporter, less than three months earlier this very Master-in-Equity issued a "NOTICE REGARDING ALL MOTIONS TO

COMPEL” (R 778) that references an earlier memorandum of the then-Chief Administrative Judge Roger Young incorporating all of Snyder’s waiver arguments and including a copy of *In Re Oxbow Carbon, LLC Unitholder Litig.*, No. CV 12447-VCL, 2017 WL 959396 (Del. Ch. Order dated March 13, 2017) (R 779-808). Ditech has never argued Snyder’s argument was not presented to the Master-in-Equity (Resp. Brief p. 18), and Ditech never objected to the inclusion in the Record on Appeal of the Master-in-Equity’s notice (R 778); Judge Young’s memorandum (R 779-788); *In Re Oxbow Carbon, LLC* (R 789-808); *Crescom v. Terry*, No. 2:12-cv-63-PMD, 2017 WL 2880866 (D.S.C. Order dated July 6, 2017) (R 809-819); and *Curtis v. Time Warner Entertainment-Advance-Newhouse P’ship*, No. 3:12-cv-2370-JFA, 2013 WL 2099496 (D.S.C. May 14, 2013) (R 663-667). *See* Rule 210(b), SCACR (“The Record [on Appeal] shall not...include matter which was not presented to the lower court or tribunal.”).

Accordingly, the argument Ditech’s objections were impermissibly generic, and therefore waived, was before the Master-in-Equity. According to the Delaware Court of Chancery:

...numerous federal decisions made clear that “boilerplate, generalized objections are inadequate and tantamount to not making any objection at all.” Summarizing the case law, one commentator observed that “[b]oilerplate objections have been considered prima facie evidence of a Rule 26 violation, which causes the objecting party to waive any legitimate objections that they may or may not have had.

In Re Oxbow Carbon, LLC, supra. (footnotes and citations removed) (R 789-808); *see also Curtis, supra.* (“Objections that state that the discovery request is ‘vague, overly broad, or unduly burdensome’ are, standing alone, meaningless and will be found meritless by this court.”) (R 663-667); *Crescom, supra.* (citing multiple jurisdictions for the same proposition). (R 809-19). Further:

For an objecting party to carry its burden, the objection must be specific, the party making it must explain why it applies on the facts of the case to the request being made, and if the party is providing information subject to the objection, the party must articulate how it is applying the objection to limit the information it is providing. In short, “[o]bjections should be plain enough and specific enough so

that the Court can understand in what way the discovery is] claimed to be objectionable.”

Id. at 5-6 (footnotes and citations removed). Snyder would ask this Court to reconsider its finding regarding this important issue, which is faced by litigants nearly every day in South Carolina trial courts.

CONCLUSION

The petition should be granted.

Dated: August 3, 2022

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell Scarborough
Master-in-Equity

Appellate Case No. 2019-000575
Charleston County Case No. 2010-CP-10-7838

Ditech Financial, LLC Respondent,

v.

Kevin G. Snyder, individually and
As Personal Representative of the
Estate of Mary Snyder Appellant.

EXHIBIT TO PETITION FOR REHEARING
(UNOFFICIAL TRANSCRIPT OF ORAL ARGUMENTS)

Note: this transcript is presented exactly as received,
including all errors



[pause 00:00:10]

Madam Clerk: Okay. Due when you are ready? All up in there.

Judge Vincent: Sure. I'm ready whenever you're.

Madam Clerk: Okay.

[pause 00:00:40]

Madam Clerk: Be upstanding for the court.

Judge Vincent: Thank you. Please be seated. Thank you. Madam Clerk?

Madam Clerk: Our next case is number 2019000575, Ditech Financial versus Kevin Snyder.

Judge Vincent: All right. Thank you. Mr. Luck, it'll be glad to hear from you, sir.

Luck: May it please the court. This case is, uh, procedurally and jurisdictionally complex, so I want to start really at the end. I wanna start at the relief. So I want to tell this court that, practically speaking, the only relief that, well, again, the only relief that is practical, uh, in this matter would be a modification of the lien that Ditech holds and a reallocation of the sales proceeds.

That is in light of the unique circumstances of, uh, one having a sale of the home in question that has taken place and is finished, and that party is not- the buyer is not a party to this action or this appeal. And also, pending bankruptcy action, uh, before the Southern District of New York, which has carved off certain aspects of this case that I am dealing with in that court, in that jurisdiction, but does leave here a certain sort of romp counterclaim of Mr. Snyder, that would be part of this appeal, and other issues of equity, not in the issues of money damages, but issues of equity.

Judge Vincent: Is the bankruptcy stay lifted, or it still in place.

Luck: It is still in place, Your Honor. And regarding that automatic stay, that was an issue early on in this case, especially before we went to the trial. And so, uh, for your, I guess for your review later, uh, I would direct you to the record in page 505 of the record, and also page 204 of the record. If you want to see some, uh, sort of some descriptions of, not just from the respondent, but also from the bankruptcy court itself of permissible relief that is available under these circumstances by the State Court, because we are constrained here.

Uh, and when I mentioned earlier, we start at the end here, the relief that we are asking for is where we le- is where we end up no matter what theory of recovery we decide to take to get there. And so, looking at those sections in the record, we, uh, the bankruptcy court and the re- the respondent have both noted that each issue such as rescission and modification, basically, equitable, equitable, equitable relief is

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what's available here, and what can be re-ordered here. We cannot ask for money damages. We cannot ask for attorneys' fees, we, being the Snyders.

What we can do, what we really- only thing we can do is to ask that the lien that was imposed on this property be modified under principles of equity, which this court can consider and make its own decision under our, under our appellate rules. It may review and issue its own modified ruling, or it may remand for a hearing de novo on those issues. But I would argue that, of the \$247,104, that some portion of it should be returned to the homeowner as, again, a matter of equity.

Judge Konduros: Because did he make any house payments?

Luck: He did Your Honor, but that was early on, and that was-

Judge Konduros: To what- to what amount?

Luck: Your Honor, I don't have that in before me, but it's- it would be in the record and it's not substantial. And so-

Judge Vincent: So what portion of this 247,000 would you suggest be returned?

Luck: Well, obviously, you know, advocating for my client, I would say 100% of it.

Judge Vincent: That's my question too, you're asking for it, so tell me how much that is.

Luck: So, the \$247,104, of that, I can break it down somewhat.

Judge Vincent: I'm-I'm specifically asking for a number, so just--

Judge Konduros: You're looking de-de novo overview.

Luck: De novo overview. Well, Your Honor, if we were to award the homeowner, my client-clients, because I also represent the estate, the entire amount, it's that-that is the value of what the property was sold for. And that would--

Judge Vincent: It's your position today that you're asking this court to return \$247,000?

Luck: It is, Your Honor, but I have an alternative position as well.

Judge Vincent: And when you say return, is that re-return because money was- that amount of money was paid?

Luck: No, Your Honor, because that was the value of the home though. That was the value of the property that was owned by Mr. and Mrs. Snyder, and that was what was sold. This is a lien state, and so.



Judge Vincent: How much money was paid? Just refresh my memory with that? How much money was actually paid by your client?

Luck: And that's, uh, I don't actually have that number, Your Honor, but like I told, uh, Judge Konduros, it was, it was not substantial. And so it can be--

Judge Vincent: What would be- what would be not substantial?

Luck: It-it can only be several thousand dollars. We're not talking tens or twenties or thirties, we're talking just thousands of dollars. So, and that's, I can't- I can't deny what the record says.

Judge Vincent: Yes, right. You- just like you said, using our equity- sorry, I just was curious what your thought of equity we- might be in this circumstance?

Luck: I understand, Your Honor. So, but even if that 247,000, if you wanna break that down a little bit, we do know that 109,000 and some other, \$109,606, that's- that's interest. That's money that was- that is cost that accrued during the pendency of this matter, which has been pending for quite a long time.

Judge Vincent: So that also includes paying for the insurance on the house and paying the taxes that were due each year on the house. Is that correct?

Luck: Your Honor, that's actually an additional \$40,000 of advances.

Judge Vincent: So you're talking about above the 109, just in interest?

Luck: It would be those interests, costs. Uh, this is in the brief, but their interest, advances. It would be 149,000 and some other 149,606.64 cents. Uh.

Judge Vincent: If we were to consider awarding anything, we should also consider backing out all the money the bank paid for these costs, such as insurance and homeowners, and, uh, the taxes that were paid for all the time that your clients resided in that home?

Luck: That is something that can be considered, Your Honor. Absolutely. Now, do I believe that it should occur? No, but, uh, it is- it should be considered, Your Honor.

Judge Vincent: Well, let me get beyond where we are in terms of talking about, uh, just the pure money for just a few moments. And help me understand how, uh, the Supreme Court's Administrative Orders for foreclosure actions creates this- creates any kind of private call cause of action.

Luck: Well, Your Honor, when we talk about a private cause of action, we talk about- when I say a cause of action, here is a cause of action for contempt. It is a contempt action. And so-



Judge Vincent: So why wasn't it brought as a rule to show cause during the pendency of the action? That's what I would think most people would do with an Administrative Orders, is as the, uh, as the action is progressing, if there's something that seemed to be in violation of a court's order is brought attention- brought to the attention of the trial court by way of a rule to show cause, and you say, "I wanna hold them in content because they haven't done this.

And then you can ask for attorney's fees and compensatory damages related to that and-and get the court to do something that you can feel like they need to do to move that forward because that's the purpose of the administrative is- order is to facilitate these, uh, processes of foreclosure. Is that correct?

Luck: That's correct, Your Honor. But we'd also look at the substance of these requests to the court rather than just the form. And so, a request was made, so it wasn't made in the form of the rule to show cause, it was nonetheless presented to the court with proof in writing for the court to consider. Now, was it ca- if it's called a cause of action instead of a rule to show cause, okay, there's a issue of form, but is not an issue of substance though.

Judge Vincent: Well, it is to the extent that you're asking the court to hold somebody in contempt. And-and aren't you bound by what's in your complaint that you filed in 2013, so that any acts subsequent to that, this court could not consider and the lower court could not consider because they're not on- the-the, uh, uh, contempt nor is not on notice of what contempt you're alleging?

Luck: Well, Your Honor, the-the acts- subsequent acts were nonetheless presented to the other side and to the court. And so, I understand your argument, however, I would note that the, uh, the respondent has an object to the consideration of those acts. At least the consideration in that- under that context. Of course, they object to it, but they do not object to it as something they didn't receive notice of, they receive notice it's been argued. It's been tried by consent in effect.

Judge Konduros: Do you wanna speak to the attorney preference, defense?

Luck: Yeah, Your Honor, that's an interesting issue in that the term "borrower" within that section of the *Consumer Protection Code*, isn't really defined at least in that chapter. So you can look in the def- the definition section. I was looking at it this morning, the beginning of that title, the definition section doesn't define what a borrower is. The particular section that describes the attorney preference statute, it doesn't describe what a borrower is.

But a subsequent section that discusses mortgage loans, I believe that it's actually the name of the chapter, mortgage loans, does describe what a borrower is and describes it in a relatively broad- relatively broad terms. And it becomes the- whoever's property is burdened by this, uh, security interest. And so that's not just the person who puts his or her ink on paper, on the loan application. It's-in this case, it's the other owner of the property. It's the mortgages on her interest as well.

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Judge Vincent: Well, I look at *Section 37-10102* compliance, uh, with that section requires that they provide the information at the ti- with the credit application or that they send notice to the borrower within three days after the credit application has been completed. Uh-uh, your client's, uh-uh, deceased wife was not borrowing money on that credit application. Was she?

Luck: No, Your Honor.

Judge Vincent: So it was just him.

Luck: It was just him, Your Honor.

Judge Vincent: And so, how would the bank have known- how would the bank have complied? I mean, they did exactly what they were supposed to do pursuant to the statute. Do you disagree with that?

Luck: Well, Your Honor, if they were to provide a choice to someone whose ownership interest will be burdened by the security interest, no, they did not comply with it.

Judge Vincent: Where does it say they have to do that though in *Section 37-10102*, which is the-is the compliance section?

Luck: Well, we have to read these sections in harmony with one another as well though. And so we can't und- we cannot create a definition of borrower that in this case, sort of, implicitly repeals the definition of borrower and other chapters here. We need to- the-the entire consumer protection title needs to work together. The parts need to look in--

Judge Vincent: Can I just follow the plain language of the statute though, the plain language of the requirement- the compliance requirement.

Luck: Yeah, but Your Honor, even in most closings, the application's still presented to- or most- every closing, the application's still presented to the persons at the closing table. And so, there's going to be a signature. The application is presented to all parties involved. And so, every person must see the application. I see where you're- what you're talking about, Your Honor.

Judge Vincent: I'm-I'm-I'm trying to figure out how the bank was supposed to comply with that provision, the *Attorney Preference Statute Provision* when they sent or provided that information to the borrower on the credit application. That's what the statute requires. It doesn't say to the borrower and anybody who might be on a mortgage with the borrower. Um, it just says, "the borrower" and that's the- and by- by direct inference, I mean, it's not really an inference. It says, "Send it to the- with the credit application, or immediately afterwards to the person who signed the credit application."



Luck: I hear, Your Honor, and that may be something that, uh, I'm going to have to look in the record and see if the application itself is part of the record, because that's raising an interesting question I want to look at myself.

Judge Vincent: Okay. And-and really what you're asking for under that particular defense is, uh, recoupment or set-off, is that correct?

Luck: Correct, Your Honor.

Judge Vincent: And so, how would that, if-if would the waiver of deficiency in any way affect your claim for recoupment?

Luck: Your Honor, I do not think so. I think in this case, the- in this- when we talk about a set-off for recoupment. She owned half the property, you know, I'm trying to keep, you know, basically, keep this as simple as possible. If she owned half the property, then half the property would not be subject to the, uh, the lien. That's the way I would look at it, Your Honor.

Judge Vincent: So are you pleading this recoupment or set-off as, uh, a defense or as a counterclaim?

Luck: Is-is it a defense, Your Honor?

Judge Vincent: Okay.

Luck: I see my time is up, so.

Judge Vincent: Thank you. We're going to reply. Thank you, sir.

Luck: Thank you.

Judge Vincent: Thank you. Mr. Schulz, be glad to hear from you, sir.

Jonathan Schulz: Thank, Your Honors. And may it please the court, um, Jonathan Schulz on behalf of respondent, Ditech Financial LLC. Um, Mr. Luck described this case as procedurally and jurisdictionally complex. Um, I think that may have been by design at-at bottom. This is a routine residential foreclosure action. There's no dispute about the following facts. The note, uh-uh, came into default in 2008. Uh, it was in default at the time, uh, Ditech's predecessor and interest sued for foreclosure. The appellant declined, uh, loan modification offers and lost mitigation options. Um-

Judge Konduros: Did they qualify for the loan obligation? Uh, modifications?

Jonathan: Did-did they qualify for it? I'm-I'm not sure what I under- what-what you mean by that, Your Honor.



Judge Konduros: Well, I thought at one point it said that he did and she didn't, or there was some-- Was there some issue about loan modification? They were never given one. Were they?

Jonathan: The-- Y-yes. They were, your Honor. Um, and it's-and it's sort of a- it's a long about, you know, seven, eight year history of this, uh, um, foreclosure intervention process and I'm-I'm happy to-to--

Judge Konduros: That's fine.

Jonathan: Yeah, but-but I think-I think the, uh, the degree to which Ditech and its predecessors and interest did try to work with, uh, with Mr. Snyder, sort of, gets to the-the underlying point I wanted to raise, which is all this discussion about, um, about recouping some of the interest or some of the cost. I think there needs to be a preliminary question about why. Wh-why would his clients be entitled to that?

The-the only-the only, sort of, procedural mechanism through which they could obtain that relief is as a sanction under Justice Saul's 2011 Administrative Order. Um, and, uh, as Judge Vincent already mentioned, um, there was never any motion to show cause to try to seek that relief. So I'm not even sure what the- what the, sort of, predicate order would be, uh, in order to obtain that relief.

Um, but i-i-in all events, uh, again, Ditech and its predecessors interest fully complied with the foreclosure intervention process. So there's no real basis to make that claim. I-I-I think at bottom, what the appellants complain mostly about is the, uh, alleged delays in that process. Um, and, and I guess what I would point out is, um, it-it-it's not just on Ditech for any delays in that process. At-at any point in time, the Snyders could have agreed to proceed to an uncontested foreclosure hearing and asserted all these counterclaims.

They-they don't dispute that they were in default. And I suppose of all, they have some sort of standing argument, Ditech showed up at the hearing with the, you know, a note endorsed to bearer. So they're entitled to enforce it. And the mortgage follows the- they're entitled to enforce that. So the-there's no real dispute about, sort of, those elements that, uh, a lender would have to establish for foreclosure.

So at, you know, at-at any point in this process, so, um, you know, in-in-in 2013, a Certificate of Compliance with the 2011 order, uh, was filed. At that point, they could have proceeded to an uncontested foreclosure hearing. They could have asserted whatever defenses they wanted to assert under Justice Saul's 2011 order, which I guess they claimed to have had at the time they filed their answer and counterclaims.

Um, and-and that could have short circuited, any type of delay. So-so when-when we're looking at, uh, delays, I-I think it really cuts both ways. Um, but again, there-there's this-there's this predicate issue of, I-I'm not sure what the basis would be, uh, for any set-off or recoupment. And-and relatedly, I-I'm not sure that relief could even

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be, uh, had, and-and I'd like to sort of address the, uh, the jurisdictional issue that I raised by way of supplemental authority in light of the November, 2021, sale of the property.

Um, the appellant could have stayed that sale, uh, by posting a bond. In fact, we litigated his motion for supersedeas at the trial level, uh, here at the court of appeals, and then also on a motion to reconsider. And, ultimately, he could have stayed, uh, that sale by posting a bond. He decided not to do so therefore the sale has gone through, therefore the case is closed.

Um, and I-I-I understand the argument that-that he's making. He's not trying to say, "Well, I-I can- I can unwind that sale at this point." Instead, he's trying to nibble around the edges and say, "Well, I-I think I can sort of cut into some of that, uh, uh, money that was disbursed ultimately through-through counsel, to the mortgage service lender. And then it's probably with the investors at this point."

Um, but there's the- there's a host of problems with that argument. Um, first and foremost, it-it's an end runaround, uh, *Rule 241*, which-which provides the, uh, a foreclosure is an exception to the automatic stay. I think the-the wisdom behind that is to bring finality to a foreclosure. Uh, and if a borrower like, uh, Mr. Snyder is able now, after not posting a bond to stay the hearing, the-the, I'm sorry, to-to stay the trial proceedings pending appeal, um, the-the foreclosure sale occurs and to now in have the court of appeals weigh in and change around on some of that disbursement order that the master and equity, um, decided to allocate. I think that would really undermine, uh, the finality of foreclosures and really the purpose behind, uh, foreclosure sales being an exception to the automatic stay. Um, and then I guess, you know, also to the-to the point where, I'm not even sure how-how this court or even the trial court would go about trying to calculate what that is because again, I think he's making arguments about-about delays.

But, um, but-but ultimately because I don't think that relief is available. I mean, I, I-I think I-I think that the current posture of the case, uh, the-the issues are moot. I-I-I'm not sure what if any relief he can get and as the court is well aware, it doesn't have jurisdiction or render advisory opinion. So-so, I-I-I, we would ask the court just to dismiss the appeal for lack of jurisdiction, um, because the-the issues have-have come to finality.

The master in equity made clear in his, uh, disbursement order that the matter is closed. Um, so-so I'm not sure what-what more could be done at this point. Um, of-of course, we'd-we'd ask the court to on alternative grounds to affirm all the rulings below. Uh, but I think my primary request of this court would be just to dismiss the appeal as moot at this point, for lack of jurisdiction.

Judge Vincent: What about the things that were not ruled on are dealt with because of the stay at the trial level?

Jonathan: Well, uh--

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Judge Vincent: Some things that were not addressed, obviously, because of the stay and-and, um, and I don't know if any of those things, uh, are-are still, um, something that the parties want to litigate. But, uh, I, I'm trying to figure out if that if we can actually consider doing in what you're doing if there's still issues that were unresolved by the lower courts, uh, uh, order in this matter because they were stayed.

Jonathan: Right. Your Honor, the-the, the-the claims that were stayed were certain counterclaims of, uh, of the appellants, uh, uh, to degree that they were seeking money damages. Uh, it's my understanding that he has filed claims with the bankruptcy court. Uh, and so I-I think that those would get adjudicated, and-and I'm-I'm not a bankruptcy expert.

But it's my understanding that those claims would get adjudicated in the context of the-of the bankruptcy proceeding in the Southern District of New York, as opposed to, you know, many years down the line, somehow the, the-the matter at the trial level will being reopened to adjudicate these counterclaims. I-I-I-I think that is the way that it would work, so I-I don't view that as an impediment to-to dismissing this matter on-on jurisdictional grounds. Um, but,

Judge Vincent: Are there any- he-he mentioned the- pending bankruptcy as-as well. Uh, the-the pending bankruptcy, what limitations do- does this court have as a result of that pending bankruptcy?

Jonathan: Well, it's my understanding Your Honor, that as a result of the bankruptcy, the-the relief to which the appellant could be afforded is-is limited to non-monetary sort of injunctive, uh, equitable type of relief. I-I, I-I frankly don't think, uh, the stay would allow for the-the-the money damage claim that he's asserting.

Now-now, the appellant has captured it in terms of a-a recoupment or a set-off, but at bottom what he would be seeking is a monetary sanction under justice Saul's order, and I think any type of monetary remedy is stayed by the bankruptcy order. So I-I-I don't even think, uh, that's sort of an additional reason why I-I don't think he would be entitled to that even if there were a-a basis for it, uh, which there is not.

Judge Vincent: Well, the-the recoupment, um, and set-off were raised under the Attorney Preference, uh, Statute not under the-the claim for compensatory contempt. That's-that's been one of the-one of the, uh, issues that have, uh, troubled, uh, me as I've looked at this case, is exactly how to deal with that recoupment and set-off issue under the- under that statute, and it was raised as a-a defense, obviously, too.

Jonathan: It-it-it was, Your Honor, and-and the- it-it was dismissed at the summary judgment stage. And, uh, you know, I-I, I-I think Judge Konduros was-was sort of and you were as well, kind of, asking the-the right questions. I mean, I-I think it's-it's just clear from the plain language of the statute and-and forgive me if I'm not answering your question directly, but, uh, the-the under the attorney preference statute, it's-it's the borrower, uh, that we're concerned about?

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Um, I'm not sure what-what type of, uh, you know, analysis or creative argumentation one would have to go through to say that somehow a borrower includes people who didn't borrow anything. Um, so if-if that, Your Honor, is the- is the sole basis for a recoupment claim, I-I think- I think, uh, uh, the decision by the master in equity to dismiss that claim should be affirmed just based on the plain language of the contract, uh, plain language of the statute. Um, and-and that should deal with the-the recoupment or set-off.

And-and I, when I used recoupment set-off perhaps I was using the wrong sort of language. I was trying to refer to the-the claim he is making to, uh, to-to set-off or to get back some of the accrued interests that he claims, uh, uh, accrued during the pendency of the foreclosure intervention process, but, uh, again, I-I'm not sure what the- what the factual predicate would be for that in the first instance so. Um, um, I see that my time is up unless the court has any questions, I'll rest on my briefs.

Judge Vincent: Thank you, sir.

Jonathan: Thank you.

Judge Vincent: Mr. Luck?

Luck: Thank you. Uh, addressing this mootness issue, let me get that out of the way right now, I would direct the court's attention to, uh, Wachesaw Plantation east versus Alexander, the case number is 414 S.C 355. And that's very explicitly holds that, "even though the property has been sold as a judicial-judicial sale, the appeal is not moot".

Now, footnote six of that opinion also has some additional, uh, authority for his old authority but good authority from the 1930s that also authorizes the sort of relief that I am talking about today. So I would commend to both that case and the case cited in footnote six which is Nichols versus Andrews 154 Southeast, not Southeast second, Southeast 305, from 193-1930. Those--

Judge Konduros: If I may- if I may just focus you in as clearly as you can. What, under-under what theory would your clients be entitled to any money back? Would they be, uh, uh, either Wachesaw, or Nichols, or anything else, I mean, what-what have they put in that they would get out other than if you get something under, uh, Justice Sul's sanction letters, which, obviously, your opponent has said you wouldn't be entitled to what? "They would get this money because of X," if you could just fill in those two blanks for me?

Jonathan: Understand, Your Honor. Uh, the, when we talk about, again, we're talking about equity here, and I understand, uh, what you're looking at just purely the dollars put into it, but keep in mind this was their home. This is where they live. This is where their daughter died. This is where, uh, Mr. Mrs. Snyder almost, well, she began dying. This is their home. That is what they put into it. They put their lives into it and so, yes, that has a value of some sort.

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Now, do we have to quantify that we may have to in some way? We do that all the time in many other cases. Now, what other- what other rights? So we-we talk about, you know, violations of this Administrative Order. Yes, and that's detailed in the brief, there's this, isn't the only wrongful act here that the-the Ditech or its predecessors have engaged in.

Again, it's all in the brief there. You know, there is not, there's been a number of acts that I, you know, I- don't wanna sound- use a lot of hyperbole here, but you know, that do sort of attack the dignity of the court, that are disrespectful to the court. And that goes from the-the-the affi, you know, the affidavit to the discovery abuse. Those-the-the spoliation of evidence, all of these things accumulate. There it's--

Judge Vincent: That doesn't give you necessarily a private cause of action or lead to a counterclaim. That's something that we deal with as, uh, trial courts. And we s- we sanction the-the parties, we sanction the, uh, the-the- for the conduct and award fees and deal with any other, uh, damages it might result, but I don't see how it gives you a-a-a private cause of action at this point in time under that order.

And-and when I read the relief that you're in-in essence seeking for, what- well, I guess, a better way of what-what damage was caused by the- this- the alleged violations, they all have to do with delay. And yet, this very delay allowed your clients to live in that home at no cost to them from 2008, until they left. I don't even know exactly when they left. I'm assuming sometime in 2020. And so they lived there for, uh, 11 or 12 years at no cost to them because of these delays, so I can't- I'm having difficulty understanding what the damage to them is when they've lived there, uh, at no cost for that length of time.

Luck: Lived there with the threat of eviction hanging over their heads the entire time, and so it has been told or it has been said that they could've just consented to this, right? I don't think that's really very, it doesn't make a lot of sense to me. Why would anyone consent to begin the process of being evicted from your home, the foreclosure process and then eviction afterwards? Why would they do that? Why would they ask to be removed from their home?

So you talk-talk about what's these-- you said these are issues of sanctions. Yes. Well, we are asking for sanctions. And so these are sanctionable acts. We are asking for sanctions and sanctions are appropriate. And so that's-that's how we get to the end here. There's a lot of routes to get here.

Judge Vincent: And the trial judge denied those. Is that correct?

Luck: Correct, Your Honor. There's a- I could go into a little more detail about some of the orders. Bear in mind, there's not just a foreclosure order on appeal here. There was also an order granting summary judgment, striking a-an affirmative defense, which in my opinion, no one agreed with me, but in my opinion, should have been immediately appealable and issued an automatic stay. But that's another debate for another time perhaps.

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Judge Vincent: Well, I-I suppose, I-I-I'd see what you're saying in terms of, uh, the delays and them wanting to remain in the home and not be there under this cloud the whole time, but couldn't, they just as easily have done as your, as-as opposing counsel has suggested? And that is to assert all of these counterclaims as a part of the foreclosure action go ahead and try it and move on. If they had been successful on any of these, it may have provided them with the-the funds to buy another house and they wouldn't have had to live under a cloud or-or in this discomfort for, uh, 11 or 12 years.

Luck: Well, Your Honor, that's a strategy concern or strategy question. And, do you proceed with-- do-do you gamble or do you know- do you go with what you know you have in hand? I mean, I think that's kind of a human concern that we have where we tend to want to take the path of less risk, take the path of where we- what go with what we have, not what we could have. These are not gamblers, these are just ordinary people. I see my time's up.

Judge Vincent: Thank you.

Luck: Thank you, Your Honors.

Judge Vincent: Thank you both. Very fine arguments. Have a good- have a good day

Madam Clerk: Be upstanding for the court.

[00:42:34] [END OF AUDIO]

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell Scarborough
Master in Equity

RECEIVED
Aug 12 2022
SC Court of Appeals

Appellate Case No. 2019-000575
Circuit Court Case No. 2010-CP-10-7838

Ditech Financial, LLC,

Respondent,

v.

Kevin G. Snyder, Individually and
as Personal Representative of the
Estate of Mary Snyder,

Appellant.

RETURN TO PETITION FOR REHEARING
AND REHEARING *EN BANC*

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INTRODUCTION

This is an appeal from a residential foreclosure action that follows a fact pattern all too commonly presented to this Court: borrower admittedly fails to make mortgage payments, borrower defaults on loan obligations, mortgagee initiates foreclosure, and borrower asserts all counterclaims and defenses he or she can creatively manufacture to delay the inevitable foreclosure. Despite the procedural complexity the Appellant, Kevin G. Snyder (“Appellant” or “Snyder”) has strategically injected into this case, this appeal is straightforward.

Ironically, in an appeal in which Snyder complains primarily about delays, his Petition for Rehearing and Rehearing *En Banc* (“Petition”) represents yet another attempt to prolong this litigation. In addition to utilizing the limited time and resources of the parties and this Court to complain (again) about the routine denial of a motion to compel discovery (Petition at 13–16), Snyder advances other arguments in a catchall fashion that is commonplace in foreclosure appeals. Snyder’s arguments are wrong and misleading. Snyder not only mischaracterizes the Court’s July 20, 2022 Opinion (“Opinion”) regarding his setoff defense under South Carolina’s Attorney Preference Statute, S.C. Code Ann. § 37-10-102(a) (the “Attorney Preference Statute”), he also advances jurisdictional arguments using only the general term “jurisdiction” in circumstances that otherwise require him to clarify the type of jurisdiction to which he is referring.

As requested by the Court, Respondent submits this Return to Snyder’s Petition. Snyder’s arguments, individually and collectively, do not warrant additional time or attention, much less a rehearing. The Court should summarily deny the Petition.

BACKGROUND

A. The Promissory Note and the Mortgage.

On or about April 21, 2005, Snyder executed and delivered a promissory note (“Note”) in the principal sum of \$135,000.00 in favor of Gateway Funding Diversified Mortgage Services L.P. (R. p. 45, ¶ 4; R. p. 308, ¶ 6). Snyder’s wife at the time, Mary Snyder, was not a signatory to the Note. (R. p. 308, ¶ 6; R. pp. 312–315). To secure payment of the Note, Snyder, together with his then-wife Mary Snyder, made, executed, and delivered a real estate mortgage (“Mortgage”) encumbering real property located at 1752 Orange Grove Shores Drive, Charleston, South Carolina 29407 (the “Property”). (R. pp. 45–46, ¶ 5; R. p. 308, ¶ 7).

Snyder executed an Attorney/Insurance Preference Form and an Attorney/Insurance Preference Check List, forms in which Snyder selected – and handwrote in the name – Roy Reynolds as his preferred closing attorney. (R. p. 308, ¶ 8; R. pp. 330–332). Snyder also executed two Servicing Disclosure Statements providing notice that the right to collect mortgage loan payments could be transferred. (R. p. 308, ¶ 8; R. pp. 333–335).

B. Notice of Default, Foreclosure Action, and Initial Efforts at Loan Modification and Loss Mitigation.

The Note came into default for failure to make payments on September 1, 2008 and all subsequent payments. (R. p. 47, ¶ 15; R. p. 309, ¶ 12).¹ On April 27, 2010, Ditech Financial LLC’s (“Ditech”) predecessor in interest, BAC Home Loans Servicing, LP (“BAC”),² gave notice to Snyder that the Note was in default and that he had an opportunity to cure the default. (R. pp.

¹ Ditech’s predecessor in interest, Bank of America, N.A., filed an initial foreclosure action in 2009, in which the trial court granted a foreclosure judgment. The judgment was subsequently vacated owing to the first South Carolina Supreme Court Administrative Order regarding foreclosure intervention.

² Through various assignments, the mortgage was assigned to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing LP. (R. p. 46, ¶¶ 7–9).

309–310, ¶ 14; R. pp. 376–378). On September 23, 2010,³ with the Note remaining in default, BAC initiated this foreclosure action against Snyder and filed an appropriate Lis Pendens. (R. pp. 35–42). On October 27, 2010, BAC filed an amended complaint (“Complaint”) to add Mary Snyder as a defendant along with Snyder, together with an Amended Lis Pendens. (R. pp. 45–57). On December 16, 2010, the matter was referred to Mikell R. Scarborough, Master in Equity, by order of the trial court. (R. pp. 1–2).

Pursuant to the Administrative Order of the Supreme Court of South Carolina, Re: Mortgage Foreclosure Actions, No. 2011-05-02-01 (May 2, 2011) (the “2011 Order”), Ditech’s predecessor in interest, on December 20, 2012, filed and served on Snyder and Mary Snyder a Notice of Foreclosure Intervention. (R. pp. 59–62). Several months later on April 8, 2013, Ditech’s predecessor in interest filed and served a certificate of compliance with the 2011 Order, which certified that Snyder and Mary Snyder had been served with notice of their rights to foreclosure intervention but had failed to submit required documents to be reviewed for loss mitigation alternatives (resulting in being denied for loss mitigation), and which directed Snyder and Mary Snyder to answer the Complaint. (R. pp. 63–65).

C. Answer and Counterclaims.

On June 3, 2013, Snyder and Mary Snyder filed an Answer to the Complaint (“Answer”). (R. pp. 70–77). The Answer included several affirmative defenses, including (a) lack of standing, (b) violation the Attorney Preference Statute with regard to Mary Snyder, and (c) noncompliance with the 2011 Order. (R. p. 71, ¶¶ 11, 12, and 14(a)). The Answer also asserted four counterclaims: (1) civil compensatory contempt (for the alleged violation of the 2011 Order); (2) breach of contract; (3) violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann.

³ For the sake of clarification, dates of filed documents refer to the date of the Court’s file-stamp on the document.

§ 39-5-10, *et seq.*; and (4) quiet title. (R. pp. 73–76, ¶¶ 21–34). Ditech’s predecessor in interest timely filed a Reply to the Answer. (R. pp. 78–83).

D. Further Efforts Undertaken to Avoid Foreclosure.

Ditech, f/k/a Green Tree Servicing, LLC, began servicing the loan effective June 1, 2013. (R. p. 309, ¶ 9). On June 10 and 11, 2013, Ditech sent letters to Snyder notifying him of the servicing transfer and providing him with information regarding the loan balance and the identity of the creditor. (R. p. 309, ¶ 9; R. pp. 336–344). The Mortgage was assigned to Ditech on June 17, 2013, following assignments from the original beneficiary to Countrywide Home Loans Inc. on September 25, 2007 and Countrywide Home Loans Servicing, LP on January 26, 2009. (R. p. 309, ¶ 10). The Note is endorsed in blank, and it is in Ditech’s possession. (R. p. 309, ¶ 11).

Like its predecessors in interest, Ditech reviewed the Note and Mortgage for alternatives to foreclosure and attempted to resolve the delinquency through loss mitigation. On December 23, 2014, Ditech approved a trial plan for modification with monthly trial payments in the amount of \$1,131.37. (R. p. 310, ¶ 15; R. pp. 379–385). Snyder rejected the trial plan, and Ditech, on March 10, 2015, notified Snyder that a permanent modification would be denied due to failure to complete the trial period plan. (R. pp. 386–391). In a March 25, 2015 letter, Ditech also provided Snyder’s counsel with answers to questions posed concerning its calculation of the trial plan payment amounts. (R. pp. 392–393).

Notwithstanding Snyder’s rejection of the trial payment plan, Ditech reviewed Snyder again for a modification. On May 11, 2017, Ditech notified Snyder that he was ineligible for a modification. (R. p. 310, ¶ 16; R. pp. 396–399). A month later on June 8, 2017, and following an appeal of the determination of ineligibility, Ditech confirmed Snyder’s ineligibility. (R. pp. 400–401).

E. Relevant Procedural History

1. Denial of Motion to Compel Discovery Responses

On November 29, 2018, Appellant filed a motion to compel responses to four separate document requests (R. pp. 87–98), which sought to compel production of (a) a Consent Order entered in the United States District Court for the District of Minnesota in a suit brought by the Federal Trade Commission, (b) Ditech’s policies and procedures related to loss mitigation evaluation, and (c) fee agreements between Ditech and the law firms engaged to handle this lawsuit. Ditech opposed the motion on relevancy grounds. (R. pp. 179–191). The parties discussed this motion at a March 18, 2019 hearing on the parties’ cross-motions for summary judgment, with the trial court orally denying the motion to compel. (R. p. 578, lines 3–18). The trial court subsequently denied the motion to compel in a Form 4 Order (R. p. 17), and it denied the motion to compel again when ruling on the parties’ motions for summary judgment (hereinafter “Summary Judgment Order”) (R. p. 22, ¶ E).

2. Cross-Motions for Summary Judgment

On March 11, 2019, the parties both filed motions for summary judgment.⁴ The Appellant moved for summary judgment as to his counterclaims for civil compensatory contempt and quiet title. (R. pp. 412–434). Ditech moved for summary judgment on its foreclosure action and on the Appellant’s counterclaims for civil compensatory contempt and quiet title. (R. pp. 290–410).

⁴ Prior to the parties filing motions for summary judgment, Ditech notified the Court of its Chapter 11 bankruptcy filing in the United States District Court for the Southern District of New York, together with the bankruptcy court’s modification order which limited the scope of the automatic stay. (R. pp. 203–289). The parties agree that as a result of the limited automatic stay, the Appellant’s counterclaims for breach of contract, unfair trade practices, and (to the extent it seeks monetary relief) civil compensatory contempt are stayed. Ditech’s foreclosure action and the Appellant’s counterclaims for quiet title and for civil compensatory contempt (to the extent those counterclaims seek non-monetary relief) are not stayed and were permitted to proceed to judgment.

Ditech also moved for summary judgment on the Appellant's defense alleging violation of the Attorney Preference Statute with regard to Mary Snyder. The trial court held a hearing on March 18, 2019, which was attended by counsel for the parties. (R. pp. 561–601). On March 28, 2019, the trial court entered its Summary Judgment Order denying the Appellant's motion, granting Ditech's motion with regard to the civil compensatory contempt counterclaim and the Attorney Preference Statute defense, and denying Ditech's motion with regard to the foreclosure claim and the quiet title counterclaim. (R. pp. 19–22).

3. Initial Notice of Appeal, Subsequent Trial, Foreclosure Order, and Amended Notice of Appeal

On March 29, 2019, the Appellant filed a notice of appeal, indicating his intent to appeal the following orders: (a) March 20, 2014 Order Amending Caption; (b) March 25, 2019 Form 4 Order Denying Motion to Compel; and (c) March 28, 2019 Order on Motions for Summary Judgment (hereinafter “Initial Notice of Appeal”). (R. pp. 531–533).⁵

On April 1, 2019, the trial proceeded. (R. pp. 602–662). At the inception of the trial, counsel for the Appellant objected to the trial going forward, arguing that the Initial Notice of Appeal deprived the trial court of jurisdiction. (R. p. 606, lines 12–p. 621, line 25). The trial court determined it had jurisdiction and proceeded. At the trial, Ditech produced the original Note for the trial court's inspection, and the trial court noted that it was endorsed in blank and was in Ditech's possession. (R. p. 24, ¶ 10). The trial court found that Ditech was entitled to foreclose and had complied with the 2011 Order, and it therefore entered judgment in Ditech's favor. (R.

⁵ Referencing the date on which the trial court signed these orders, the Appellant refers to them as the orders “dated March 12, 2014, March 18, 2019, March 18, 2019, and March 27, 2019.” (R. p. 531). The Appellant seems to have erroneously listed March 18, 2019 twice on the Initial Notice of Appeal. Although not expressly referenced therein, the Initial Notice of Appeal also attaches a March 25, 2019 Form 4 Order (signed by the trial court on March 20, 2019) denying the Appellant's Motion for Partial Summary Judgment. (R. p. 18).

pp. 27–32). Consistently, the trial court concluded the Appellant was not entitled to the remedy of quiet title. (R. p. 27, ¶ 3).

On May 2, 2019, the Appellant filed an amended notice of appeal (hereinafter “Amended Notice of Appeal”). (R. pp. 536–537). In addition to appealing the three orders referenced in the Initial Notice of Appeal, the Appellant indicated his intent to also appeal the April 26, 2019 Master in Equity’s Order and Judgment of Foreclosure and Sale (referred to by the Appellant as the “April 23, 2019” order). (R. p. 536). Thus, all of Snyder’s appellate issues were consolidated in this appeal.

4. Court of Appeals’ Decision Affirming the Trial Court

Following oral argument, this Court affirmed the trial court. As to summary judgment in Ditech’s favor on Snyder’s counterclaim for civil compensatory contempt, this Court found that Ditech fully complied with the 2011 Order. As to the denial of Snyder’s motion to compel discovery, the Court concluded the trial court did not abuse its discretion and that Ditech did not waive its objections. The Court further found that Snyder’s challenge to an order granting a motion to amend a case caption was moot and that the trial court properly dismissed Snyder’s setoff defense pursuant to the Attorney Preference Statute. And finally, although this Court found that the trial court erred in proceeding with the foreclosure hearing during the pendency of Snyder’s initial appeal, the Court nevertheless found any such error to be harmless.

In response to the Opinion, Snyder filed his Petition. As requested by the Court, Ditech submits this Return.

ARGUMENT

I. STANDARD OF REVIEW.

“The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (internal quotation marks omitted). In order to prevail on a petition for rehearing, the Appellant must demonstrate the Court overlooked or misapprehended their argument or some material fact or principle of law. SCACR 221(a); *Goodwine v. Dorchester Dep’t of Social Serv.*, 336 S.C. 413, 415–16, 519 S.E.2d 116, 117 (Ct. App. 1999) (per curiam). The Appellant “shall state with particularity the points supposed to have been overlooked or misapprehended by the Court.” SCACR 221(a).

A rehearing *en banc* is “not favored and ordinarily will not be ordered” unless it is “necessary to secure or maintain uniformity” in the Court’s decisions or “the proceeding involves a question of exceptional importance.” SCACR 219(b).

II. THE COURT OF APPEALS DID NOT OVERLOOK OR MISAPPREHEND THE APPELLANT’S ARGUMENTS REGARDING THE TRIAL COURT’S JURISDICTION TO PROCEED WITH THE FORECLOSURE HEARING.

Ditech disagrees with the Court’s conclusion that “the master erred in proceeding with the foreclosure.” (Opinion at 14). As threshold matters, and as set out in Ditech’s Respondent’s Brief, (a) the summary judgment Order was not immediately appealable because it does not satisfy any subsection of S.C. Code Ann. § 14-3-340, and (b) even if the summary judgment Order were immediately appealable, Snyder’s Initial Notice of Appeal did not prevent the trial court from proceeding with the foreclosure because the trial court’s ability to decide all remaining facts and legal issues (not decided at the summary judgment stage) relative to Ditech’s foreclosure was “not affected” by the initial interlocutory appeal. SCRAP 241(a).

Assuming, *arguendo*, that the trial court erred in proceeding with the foreclosure while Snyder's initial appeal remained pending, this Court correctly concluded that any such error was harmless. As this Court noted, "Snyder filed an amended notice of appeal to include the master's order and judgment of foreclosure and sale" and, in any event, the Court "affirm[ed] the master's order granting partial summary judgment in favor of Ditech as to Snyder's non-stayed counterclaim for civil compensatory contempt." (Opinion at 15).⁶ Thus, all of Snyder's appellate arguments were adjudicated on appeal, and a stay of the trial court proceedings pending resolution of Snyder's initial appeal would have made no difference whatsoever. For these reasons, to the extent the trial court erred, any error was harmless.

Snyder makes no argument disputing that any such error was harmless.⁷ Instead, he argues only that the Court should not have applied harmless error analysis in the first place. Specifically, Snyder argues that the trial court's alleged lack of subject matter jurisdiction constituted a "structural error," and that harmless error analysis cannot be used to cure structural errors. (Petition at 4, 6). Snyder's use of the word "jurisdiction" throughout his Petition—without clarifying the type of jurisdiction to which he is referring—is misleading. Because the initial interlocutory appeal did not deprive the trial court of *subject matter* jurisdiction, Snyder's entire argument falls apart.

It is true that Rules 205 and 241(a) speak in terms of "jurisdiction." *See* SCACR 205 ("Upon service of the notice of appeal, the appellate court shall have exclusive jurisdiction . . .");

⁶ In addition, the Appellant could have paid a supersedeas bond to stay the foreclosure sale pending appeal. He simply chose not to do so.

⁷ It is telling that Snyder makes no effort to even attempt to dispute that any error was completely harmless in the context of this case. Snyder recognizes any error was harmless since he was able to consolidate his two appeals. He is simply frustrated that his procedural ploy to delay foreclosure with an interlocutory appeal was unsuccessful.

SCACR 241(a) (“The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal . . .”). But as this Court correctly recognized: “The reference in Rules 205 and 241(a) to the ‘jurisdiction’ of the lower courts does not refer to subject matter jurisdiction.” (Opinion at 14–15 (quoting *Tillman v. Oakes*, 398 S.C. 245, 255 n.3, 728 S.E.2d 45, 51 n.3 (2012))).

Recognizing this is fatal to his argument, Snyder attempts to distinguish this language in *Tillman*, calling it “dicta” and suggesting this Court in *Tillman* merely describes “subject matter jurisdiction by another name.” (Petition at 6). But if this Court in *Tillman* was somehow ambivalent, the South Carolina Supreme Court in *Metts v. Mims*, 384 S.C. 491, 682 S.E.2d 813 (2009), was not. In that case, as here, a party challenged a trial court’s *subject matter* jurisdiction to consider a motion because that party had previously noticed an interlocutory appeal. *Id.* at 497, 682 S.E.2d at 816. Finding that the trial court retained subject matter jurisdiction despite the notice of appeal, the South Carolina Supreme Court explained:

Initially, we note that petitioner couches this argument as one involving the trial court’s subject matter jurisdiction. Generally speaking, subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. Circuit courts have jurisdiction over general tort cases, such as the instant defamation case. Accordingly, petitioner’s ‘subject matter’ jurisdiction claim is inapposite.

Id. at 498, 682 S.E.2d at 817 (internal citations omitted).

There is no dispute that South Carolina circuit courts have subject matter jurisdiction over foreclosure actions, which are typically referred to a master. *See* S.C.R. Civ. P. 71. And as *Metts* and *Tillman* make clear, a notice of appeal does not deprive the circuit courts of *subject matter* jurisdiction, despite the use of the word “jurisdiction” in Rules 205 and 241(a) of the South Carolina Rules of Appellate Procedure.

Even though the Appellant made an affirmative decision and choice to *not* clarify the type of jurisdiction to which he was referring, *all* of his arguments are about lack of *subject matter*

jurisdiction. For instance, Snyder cites *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995), for the proposition that “a judgment of a court without jurisdiction is void.” (Petition at 4). But that case evaluated whether a judgment was “void” for purposes of a motion for relief from judgment under S.C.R. Civ. P. 60(b)(4), and “[t]he definition of void under th[at] rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked *subject matter jurisdiction* or personal jurisdiction,”⁸ *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002) (emphasis added) (internal quotation marks omitted).⁹ Because the trial court at all times retained *subject matter* jurisdiction, the trial court’s foreclosure judgment was not void.¹⁰ Because the trial court’s foreclosure judgment was not void, this Court did not “apply[] a harmless error analysis to a judgment that was void for want of jurisdiction.” (Petition at 4). That statement by Snyder is plainly inaccurate.

Snyder further argues that “[l]ack of jurisdiction is a ‘structural error’ not susceptible to harmless error analysis.” (Petition at 4). But the cases on which he relies stand only for the proposition that harmless error analysis is inapplicable to structural errors. (*Id.* (citing *Arizona v. Fulminate*, 499 U.S. 279 (1991); *State v. Wright*, 432 S.C. 365, 852 S.E.2d 468 (Ct. App. 2020))). These cases do not even address or concerns themselves with whether “[l]ack of jurisdiction is a ‘structural error.’” (See Petition at 4; see also *Fulminante*, 499 U.S. at 309–12 (evaluating whether

⁸ Ditech presumes Snyder is not making an argument premised on lack of *personal* jurisdiction.

⁹ Further, the case on which *Thomas & Howard Co.* relies for this proposition concerned whether “Richland County Court” had subject matter jurisdiction over a state agency. See 318 S.C. at 291, 457 S.E.2d at 343 (citing *Ross v. Richland Cnty.*, 270 S.C. 100, 240 S.E.2d 649 (1978)).

¹⁰ This conclusion comports with the applicable standard of review on appeal, whereby a trial court’s decision to retain jurisdiction following a notice of appeal is reviewed for only an abuse of discretion. See *Cousar v. New London Eng’g Co., Inc.*, 306 S.C. 37, 40, 410 S.E.2d 243, 245 (1991).

admission of coerced confessions is a structural error or trial error, and nevertheless finding it to be a trial error subject to harmless error analysis); *Wright*, 432 S.C. at 370–71, 852 S.E.2d at 471 (evaluating whether denial of a jury poll request is a structural error versus a trial error)).

The direct question at issue—which Snyder altogether fails to address—is whether the trial court’s exercise of discretion, *see Cousar*, 306 S.C. at 40, 410 S.E.2d at 245, in proceeding at the trial level following Snyder’s Initial Notice of Appeal constitutes a “structural error” to which harmless error is inapplicable. The answer is no; it does not even come close to the types of errors South Carolina courts have deemed structural.

“Most trial errors, even those which violate a defendant’s constitutional rights, are subject to harmless-error analysis.” *State v. Rivera*, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013).¹¹ “The Supreme Court has found an error to be structural, and thus subject to automatic reversal only in a very limited class of cases.” *Id.* at 247, 741 S.E.2d at 705 (collecting cases concerning disqualification of counsel of choice, defective reasonable-doubt instruction, racial discrimination in selection of grand jury, denial of public trial, denial of self-representation at trial, complete denial of counsel, and biased trial judge).¹² Stated differently, “[t]here is a strong presumption any error can be categorized as a trial error” and subjected to harmless-error analysis. *States v. Mouzon*, 326 S.C. 199, 204, 326 S.E.2d 918, 921 (1997).

¹¹ Even the United States Supreme Court in *Fulminante* reached this conclusion. *See* 499 U.S. at 306–07 (noting that “a constitutional error does not automatically require reversal” and explaining that “most constitutional errors can be harmless”).

¹² Trial errors, which are subject to harmless-error analysis, occur “‘during the presentation of the case to the jury’ and ‘may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.’” *States v. Mouzon*, 326 S.C. 199, 204, 485 S.E.2d 918, 921 (1997) (quoting *Fulminante*, 499 U.S. at 307–08). On the other hand, structural errors, to which harmless-error analysis is inapplicable, “affect the ‘entire conduct of trial from beginning to end.’” *Id.* (quoting *Fulminante*, 499 U.S. at 309).

Assuming that the concept of “structural errors” is even applicable in the civil context,¹³ it should be apparent that the trial court’s discretionary decision to enter a foreclosure judgment during the pendency of an interlocutory appeal of a summary judgment order is not in the same universe as the grave constitutional errors mentioned in *Rivera* above that typify structural defects. To the extent the trial court erred, it was not a structural error. Therefore, nothing prevents this Court from applying a harmless-error analysis.

III. THE COURT OF APPEALS DID NOT OVERLOOK OR MISAPPREHEND THE APPELLANT’S ARGUMENTS IN AFFIRMING THE TRIAL COURT’S DECISION TO STRIKE THE APPELLANT’S DEFENSE UNDER THE ATTORNEY PREFERENCE STATUTE.

The Appellant’s entire argument regarding the Attorney Preference Statute is premised on an apparent misunderstanding of the term “setoff” and a misreading of the Court’s Opinion. Contrary to the Appellant’s argument, this Court did not conclude that “proof of actual damages is necessary for a party to avail himself of the penalty provision of S.C. Code § 37-10-105.” (Petition at 5). Rather, the Court rested its affirmance of the dismissal of Snyder’s affirmative defense based on the more basic concept that a debtor can only “setoff” from monies that it affirmatively owes to a creditor. Because, as this Court acknowledged, “Ditech waived its right to a deficiency judgment” (Opinion at 12), Snyder did not owe Ditech any monetary judgment, meaning there was nothing from which Snyder could assert a setoff. Thus, as the Court correctly

¹³ The Court will note that the cases on which Snyder relies to advance his structural-error argument are all criminal cases. It is doubtful whether this paradigm—distinguishing structural from trial errors—is even applicable in the context of a South Carolina civil case. *See United States v. Maritime Life Caribbean Ltd.*, 913 F.3d 1027, 1036 (11th Cir. 2019) (explaining that the concept of structural error does not apply to an ancillary third-party forfeiture proceeding “because such a proceeding is civil in nature”); *Al Haramain Islamic Found., Inc. v. U.S. Dep’t of Treasury*, 686 F.3d 965, 988 (9th Cir. 2012) (“The Supreme Court has never held that an error in the *civil* context is structural.” (emphasis in original)); *Maldonado-Velasquez v. Moniz*, 274 F. Supp. 3d 11, 14 (D. Mass. 2017) (noting that “structural error is a concept that attaches only in criminal proceedings”).

concluded: “any penalty amount Snyder may have recovered as a setoff was precluded by Ditech’s deficiency waiver.” (Opinion at 13).

The Court’s discussion of Snyder’s obligation and associated failure to present evidence of actual damages merely related to his burden of proof on his affirmative defense. The Appellant glosses over the fact that he asserted the Attorney Preference Statute as an affirmative defense only, and not as an affirmative cause of action. (R. p. 71–72, ¶ 14). But “[i]t is well established that a party pleading an affirmative defense has the burden of proving it.” *Dawkins v. Sell*, 434 S.C. 572, 591, 865 S.E.2d 1, 11 (Ct. App. 2021) (internal quotation marks omitted). A party claiming a set-off has the burden of proof to establish actual damages with reasonable certainty. *Diamond Swimming Pool Co. v. Broome*, 252 S.C. 379, 386, 166 S.E.2d 308, 312 (1969). The Court was thus correct—and overlooked no law, facts, or arguments—when it stated, “Snyder was required to provide a factual basis for his claim *and* any actual damages suffered as a result of the alleged violation.” (Opinion at 13 (emphasis in original)). Based on this unremarkable and straightforward conclusion, there is no basis for a rehearing or rehearing *en banc*.¹⁴

¹⁴ If the Court has any concerns about the propriety of its affirmance of the dismissal of this defense (which it should not), it can withdraw its prior Opinion and affirm the dismissal of the defense because Mary Snyder was not a signatory to the Note and was, therefore, not a “borrower” within the meaning of the Attorney Preference Statute. This Court declined to rule on that issue, deeming it “moot” in light of its conclusion that Snyder presented no evidence in support of his affirmative defense. (Opinion at 13 n.7). But this Court can affirm based on any reason appearing in the record. *See Brading v. Cnty. of Georgetown*, 327 S.C. 107, 113 n.4, 490 S.E.2d 4, 7 n.4 (1997); *cf. Ex parte S.C. Dep’t of Health & Human Serv.*, 364 S.C. 527, 529, 614 S.E.2d 609, 610 (2005) (affirming on rehearing “[f]or a different reason than in our prior opinion”).

IV. THE APPELLANT'S REMAINING ARGUMENTS DO NOT WARRANT A REHEARING.

The Appellant makes two last-ditch arguments, contending the Court overlooked evidence when (a) affirming dismissal of his counterclaim for civil compensatory contempt and (b) affirming the denial of a motion to compel discovery. Neither argument warrants a rehearing.

A. No arguments were overlooked or misapprehended with respect to summary judgment dismissing the Appellant's counterclaim for civil compensatory contempt.

The Appellant first contends this Court misapprehended the scintilla-of-evidence standard in affirming dismissal of his civil compensatory contempt counterclaim at summary judgment. By advancing the same arguments he asserted in his appellate briefing, the Appellant is merely trying to “have the case tried in the appellate court a second time.” *Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322. Indeed, the specific instances of alleged violations of the 2011 Order raised by the Appellant in his Petition were all previously raised to and addressed by this Court. Nothing was overlooked or misapprehended.

1. Ditech (and its predecessors) fully complied with the 2011 Order.

As a threshold matter, a review of Ditech's (and its predecessors') engagement with the Appellant in the foreclosure intervention process makes clear that Ditech fully complied with the 2011 Order.

- Prior counsel for the original underlying plaintiff in this action served Snyder with a notice of foreclosure intervention on December 17, 2012. (R. pp. 59–62);
- Snyder failed to complete a loss mitigation application in response to the notice of foreclosure intervention; therefore, prior counsel served and filed a certificate of compliance with the 2011 Order on April 8, 2013. (R. pp. 63–65);
- After counsel appeared for the Appellant, Ditech also reviewed him for a loan modification. Ditech then offered the Appellant a trial period plan for a permanent modification in 2014, which contemplated a reduction in the Appellant's monthly payments. However, the Appellant rejected the trial period plan, deciding that the terms offered were not sufficiently favorable in his view. (R. p. 310, ¶ 15); and

- Ditech reviewed the Appellant for another loan modification in 2017, but it determined he was no longer eligible. (R. p. 310, ¶ 16).

The 2011 Order provides that “[n]o foreclosure hearing may be held in the foreclosure action until the Mortgagee’s attorney certifies that the Mortgagee has complied with the requirements” set forth in the 2011 Order. Those requirements include that the mortgagor has been served with the notice of right to foreclosure intervention, that the lender has received and examined all documents submitted by the borrower, and that the borrower has been afforded a full and fair opportunity to submit documents and information, but that either the mortgagor does not qualify for loss mitigation and has been so informed, or the mortgagor has failed to participate in foreclosure intervention.

As set forth above, both the prior servicer and Ditech complied with the requirements of the 2011 Order. This Court neither misapprehended arguments nor overlooked facts or law in concluding the trial court properly dismissed the counterclaim at the summary judgment stage.

2. This Court did not overlook or misapprehend the Appellant’s myriad complaints about Ditech’s compliance with the 2011 Order; instead, this Court considered them and concluded they did not constitute bad faith.

In seeking a rehearing, the Appellant advances the same “kitchen-sink” argumentation about the foreclosure intervention process, hoping that the Court will latch onto at least one of his myriad complaints. This Court properly determined each complaint was immaterial or without merit or both.

As to the Appellant’s arguments about sending correspondence to the wrong address and contacting the mortgagors directly, this Court concluded:

[C]onsidering Snyder’s counsel’s three changes of address, Green Tree’s merger with Ditech, and the significant amount of correspondence exchanged between the parties during this period, we find the evidence does not demonstrate Ditech’s actions constituted a failure to act in good faith during the foreclosure intervention process.

(Opinion at 10). Indeed, the Appellant’s counsel admitted his office moves “may have disrupted normal mail service.” (R. p. 387). In any event, it is undisputed that the Appellant’s counsel received the December 23, 2014 trial payment plan terms (*see* R. p. 310, ¶ 15; R. pp. 381–385) because he rejected them (R. pp. 386–387). Moreover, the Appellant’s briefing to the Court identified only a single instance in which Ditech inadvertently sent correspondence to the borrower directly.

As to the Appellant’s arguments about delays in responding to foreclosure intervention requests, this Court noted that “Snyder’s own conduct” caused some of the delay and that “Snyder, through his counsel, continued to pursue foreclosure intervention of his own volition for four years, during which time Ditech paid all taxes and insurance premiums on the mortgaged property.” (Opinion at 10). There is no real dispute that the foreclosure intervention process was completed by the parties. In any event, mere delays do not amount to bad faith.¹⁵

And finally, as to the Appellant’s accusations about destruction of evidence and the filing of an affidavit of default, this Court noted: “We find Snyder failed to demonstrate how Ditech’s improper affidavit of default, which the master subsequently lifted, and alleged spoliation of evidence show Ditech and its predecessors violated the Administrative Order.” (Opinion at 10). The Court no doubt reached this conclusion because (a) the affidavit of default was stricken from the record (*see* R. p. 17), meaning it had nothing to do with the underlying foreclosure judgment, and (b) Ditech did not destroy any documents, it was only “unable to admit or deny certain facts” (R. p. 650, line 24) because certain documents in the possession of a prior loan servicer were not

¹⁵ The Appellant seems to suggest that any delay attributable to Ditech constitutes evidence of bad faith. This Court properly disagreed with that false equivalence. (Opinion at 10).

within Ditech's business records. Snyder's persistent use of the inflammatory term "spoliation" does not mean that any such action occurred. It did not.

The Court acknowledged and addressed each of the Appellant's contentions. The Appellant just disagrees with the Court's views, which is not grounds for rehearing.¹⁶

B. No arguments were overlooked or misapprehended with respect to the routine denial of the Appellant's motion to compel discovery.

Finally, the Appellant seeks a rehearing of the Court's conclusion that the trial court did not abuse its discretion in denying requests for production. *See Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001) ("The rulings of a trial judge in matters involving discovery will not be disturbed on appeal absent a clear showing of an abuse of discretion."); *see also Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 353, 559 S.E.2d 327, 334 (Ct. App. 2001) ("An abuse of discretion occurs when there is no evidence to support the trial judge's factual conclusion or when the ruling is based upon an error of law.").

This Court affirmed based on its unremarkable conclusion that "evidence supports the master's denial of Snyder's motion to compel," namely "evidence shows the materials Snyder sought were irrelevant and overly broad." (Opinion at 11). The Appellant does not challenge this routine conclusion. Instead, he seeks rehearing only on the Court of Appeals' conclusion that a particular argument was unpreserved, namely whether Ditech's written objections were too generic and therefore waived. (Petition at 14). By making reference to out-of-state and federal

¹⁶ If the Court has any concerns about the propriety of its affirmance of the dismissal of the civil compensatory contempt counterclaim (which it should not), it can withdraw its prior Opinion and affirm the dismissal of the counterclaim in light of the fact that "[t]he Toal Administrative Order, on its face, does not create a private cause of action." *Weber v. Bank of Am. NA*, 2013 WL 4820446, at *3 (D.S.C. Sept. 10, 2013). This Court declined to rule on this issue. (Opinion at 10 n.7). But this Court can affirm based on any reason appearing in the record. *See Brading*, 327 S.C. at 113 n.4, 490 S.E.2d at 7 n.4; *cf. Ex parte S.C. Dep't of Health & Human Serv.*, 364 S.C. at 529, 614 S.E.2d at 610.

court opinions (R. pp. 663–667, 789–819) and a generic Bar Memorandum from Judge Roger Young, unrelated to this case and apparently distributed to members of the Charleston Bar (R. pp. 779–788), the Appellant seems to be arguing that there is evidence in the Record on Appeal that—according to some courts and some judges—boilerplate objections to discovery may be deemed waived. The significance or import of those arguments and associated authorities, in the context of this Petition, is unclear. In any event, the Court of Appeals correctly noted that the Appellant did not raise this argument in his underlying motion to compel (*see* R. pp. 88–90), and there is no transcription of the hearing on the motion to compel. Nothing has been overlooked or misapprehended.

CONCLUSION

For the foregoing reasons, Appellant’s Petition for Rehearing and Rehearing *En Banc* should be denied.

This 12th day of August, 2022.

/s/ Jonathan E. Schulz

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Aug 15 2022

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas**

**Mikell Scarborough
Master-in-Equity**

**Appellate Case No. 2019-000575
Charleston County Case No. 2010-CP-10-7838**

Ditech Financial, LLC Respondent,

v.

**Kevin G. Snyder, individually and
As Personal Representative of the
Estate of Mary Snyder Appellant.**

**REPLY
TO RESPONDENT'S RETURN TO
APPELLANT'S PETITION FOR REHEARING
AND REHEARING *EN BANC***

1. Ditech characterizes this petition as “yet another attempt to prolong this litigation”. (Ret. p. 1). Ditech is mistaken - this petition represents “yet another attempt” to address reversible error, and it is mandated by South Carolina’s appellate court rules. *See* Rule 242(c), SCACR (decision on petition for rehearing required to file petition with the Supreme Court for a writ of *certiorari*).

2. Ditech downplays the significance of the August 3, 2013, Affidavit of Default. (Ret. p. 17). The fact that Ditech withdrew¹ this affidavit does not make it any less false, and thus violating

¹ Despite repeated requests to Ditech’s predecessors to withdraw this affidavit, Ditech did not agree to strike it until Snyder’s counsel raised the issue at a March 18, 2019, motion hearing. (R 156, 168, 172-173, 587-588).

Ditech's requirement to act in good faith under the Admin Order. *See* S.C. Code § 36-1-201(20) ("good faith" is, among other things, "honesty in fact"). It also does not change the fact Ditech, through its predecessors, refused to address the affidavit for over five years. Snyder would note the Admin Order only requires a "failure of any party to act in good faith in complying with the terms of this order" to trigger sanctions. *In re Mortgage Foreclosure Actions*, 396 S.C. 209, 214, 720 S.E.2d 908 (2011). The violation itself is an injury to the dignity of the courts, which is an interpretation consistent with South Carolina courts' inherent power to preserve order in judicial proceedings. *See e.g. Miller v. Miller*, 375 S.C. 443, 453-455, 652 S.E.2d 754 (Ct. App. 2007).

3. Ditech now appears to dispute Snyder presented the *Oxbow Carbon*, *Crescom*, and *Curtis* arguments² at the December 10, 2018 status conference / motion hearing. (Ret. p. 19). Until now, Ditech has never disputed these arguments were presented to the Master-in-Equity (Resp. Brief p. 18). Ditech is estopped from taking this new position. *See Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997) (judicial estoppel precludes party from adopting position in conflict with one earlier taken in same or related litigation).

4. Ditech's repeated entreaties to affirm on alternative grounds (Ret. p. 14 n. 14, p. 18 n. 16) belie Ditech's concern with the reasoning of the Opinion and support rehearing of this matter. An argument that requires this much buttressing is an argument that demands further scrutiny. Similarly, Ditech's professed confusion regarding jurisdiction and this Court's affirmance of a void order (Ret. pp. 8-13) also argues in favor of further scrutiny of Part V of the Opinion.

² These arguments are matters of law, which are reviewed *de novo* by this Court. *E.g., State v. Adams*, 409 S.C. 641, 763 S.E.2d 341 (2014); *State v. Bash*, 412 S.C. 420, 772 S.E.2d 537 (Ct. App. 2015).

CONCLUSION

The petition should be granted.

Dated: August 15, 2022

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The South Carolina Court of Appeals

Ditech Financial, LLC, Respondent

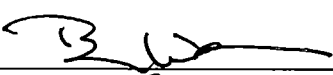
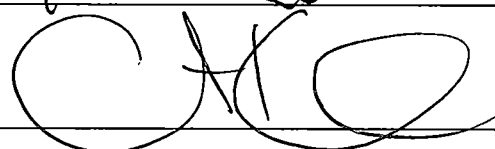
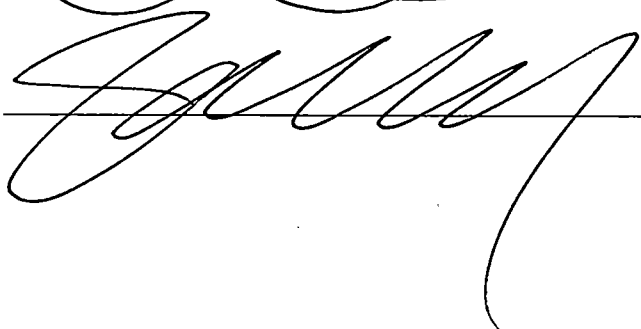
v.

Kevin G. Snyder, individually and as Personal
Representative of the Estate of Mary Snyder, Appellant.

Appellate Case No. 2019-000575

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing.¹ Accordingly, the petition for rehearing is denied.

41  C.J.
 J.
 J.

Columbia, South Carolina

cc:

Michael Casin Griffin, Esquire
George Benjamin Milam, Esquire

¹ Appellant submitted an unofficial transcript of oral argument held by the Court as an exhibit to his petition for rehearing. The court cannot consider an unofficial transcript in consideration of the petition for rehearing.

Jason Scott Luck, Esquire
Jonathan Edward Schulz, Esquire