

THE STATE OF SOUTH CAROLINA

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In The Court of Appeals

JAN 03 2023

SC Court of Appeals

APPEAL FROM SUMTER COUNTY

Court of Common Pleas

Thomas E. Player, Jr., Special Referee

Appellants Case No. 2022-000601

John WeibleRespondent,

v.

Russell Self and Brandy Brunson Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

The Appellants set forth the history of this case in the Statement of the Case submitted as part of their initial Brief. After Appellants filed their initial Brief and Designation of Matter, the Respondent filed and served on initial Brief and filed a Designation of Matter.

This Brief is submitted in reply. In this reply, Appellants will attempt to respond to matters raised by Respondent in the order in which Respondent raised them in his brief.

ARGUMENTS

Throughout his Brief, Respondent indicates his belief that the main issue raised by Appellants is that the loans made by Respondent to Appellants should have been subject to modification by Respondent as a result of HAMP. As Respondent pointed out in his Brief, both the original counsel of Appellants and the undersigned as substituted counsel acknowledged that HAMP expired in 2016. Thus, Appellants have not indicated that Respondent had a duty to modify the loan, but only that Respondent had a duty to comply with the mandated procedures for a residential mortgage foreclosure, including properly giving notice to Appellants of their right to request foreclosure intervention.

A primary thrust of Appellants' Brief was that Respondent failed to grant to the Appellants the rights and protections of that they were guaranteed as homeowners by the Supreme Court 2011 Administrative Order 2011-05-02-01, hereafter referred to as the 2011 Order. Re: *Mortgage Foreclosure Actions*, 396.S.C. 209, 720 S.E. 2d 908 (2011). As a result, Appellants were prejudiced by the errors committed by the Special Referee.

The Respondent states that the complaint complied with the requirements of the Supreme Court by the language set forth in paragraph 10 of the complaint that "the mortgage involved was

not subject to HAMP” (See Respondent Brief, page 6). The Appellants understand that HAMP expired in 2016. The allegations made in paragraph 10 of the Complaint are requirements as set forth in the Supreme Court 2009 order dated May 22, 2009, as Order 2009-05-22-01, but the Plaintiff’s pleadings did not comply with the requirements of the 2011 Order. That 2011 Order required a separate document explaining Appellants’ right to request foreclosure intervention, because their principle place of residence was the property being foreclosed. That 2011 Order provided homeowners a number of rights which are summarized as follows:

“The terms and conditions of this order shall apply to all mortgage foreclosure proceedings concerning Owner-Occupied dwellings in this State.” It also set forth that “No foreclosure hearing or foreclosure sale may be held in the foreclosure action until the Mortgagee’s attorney certifies the following:”, which can be summarized as follows: a) The “Mortgagor has been served with a notice of the Mortgagor’s right to foreclosure intervention”; b) the Mortgagee has “examined all documents and records required to be submitted by the Mortgagor to evaluate eligibility for foreclosure invention”; c) “the Mortgagor has been afforded a full and fair opportunity to submit any other information ...” ; d) “that after completion of the foreclosure intervention process, the Mortgagor does not qualify ...” ; and, e) “notice of the denial of the loan modification or other means of loss mitigation has been served on 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,” 396 S.C. at 212.

The 2011 Administrative Order thus required Plaintiffs’ counsel to serve with the summons, lis pendens, and complaint, a separate document notifying Defendants of a notice of right to request foreclosure intervention. This would include loan modifications and other cure

remedies for homeowners trying to protect their homes from foreclosure. If, after a review by the mortgage lender, foreclosure intervention was not an available option to the homeowner, then the foreclosing attorney would certify to the homeowner that foreclosure intervention was not an option, and also provide the homeowner with a notice of right to file an Answer to the Summons and Foreclosure Complaint within 30 days. The Plaintiff's attorney must then make a certification to the Court that all of this had been done.

The Respondent failed to comply with the 2011 Supreme Court Order that governs South Carolina residential foreclosures, because he failed to do any of those steps as set forth in detail throughout Appellant's initial brief.

On page 3 of his brief, Respondent stated "Defendants failed to file an answer....within the period allotted by the summons." This is a true statement. However, because Appellants requested foreclosure intervention, Respondent was required to give Defendant 30 days in which to answer after issuing the denial of foreclosure intervention, which Respondent failed to do. The time for Appellants to answer the complaint as set in the summons was modified and extended by the 2011 Order.

The Special Referee did not make the Respondent correct those failures to comply with the 2011 Order and thus the Special Referee deprived the Appellants of the rights and protections that the South Carolina Supreme Court had mandated in that 2011 Order. This constitutes error, and the Appellants have had to pay for that error ever since.

The Respondent committed errors, including the following: in the initial pleadings in the case Respondent failed to give Appellants the proper notice of right to request foreclosure intervention; and Respondent made an improper and premature request for a default judgment on February 6, 2019, when in fact Respondent should have given notice to the Appellants that they

would now have an additional thirty days in which to file responsive pleadings. The failure by the Special Referee to require Respondent to comply with the requirements of the 2011 Order and thus provide to Appellants the rights and protections set forth in the 2011 Order constituted error.

Respondent benefited from that error by the Clerk of Court signing an Order granting the default judgment on February 8, 2019. On page 3 of his brief, Respondent also states that Appellants were “not prejudiced by the default status in any manner.” He repeats that on page 12 of the brief where Respondent states that the Appellants “have not been prejudiced by any default status.”

In fact, the Special Referee indicated that because Defendants were in default, the Defendants could not raise other issues regarding the case, TR #1, p 12, line 6-23, except the amount of debt. Therefore, Appellants were prejudiced and penalized because they were not given the right and time to file Responsive Pleadings, beyond the thirty (30) days set forth in the summons, and the Special Referee continued to hold the Appellants in Default, which was error. On page 13 of his Brief, the Respondent points out that “Defendants remain in default and have failed to seek relief from same as provided in the Rules of Civil Procedure.”

That is not correct. The Appellants have asserted that the default was obtained in violation of the 2011 Order. The fact that the order of default was improper was set forth in great detail in the initial Brief filed by the attorney for the Appellants, but also asserted when Appellants retained their initial counsel in the early summer of 2019. Appellants’ then attorney filed a motion to strike, **R. p ____**, seeking to remove the default and require Plaintiff to comply with the 2011 Order. Later, Appellants filed an Amended Answer **R. p ____**. On September 18, 2019, prior to the hearing held by the Special Referee in this matter, Defendants’ counsel filed a memorandum (**R. p. __**) in support of the motion to strike.

Therefore, Appellants submit that they did attempt to obtain relief from default per the South Carolina Rules of Civil Procedure. When the Special Referee refused to grant the requested relief and decided to continue to hold Defendant in default, the Special Referee committed error. The default was incorrectly applied for by Respondent, and granted by the Clerk of Court in the usual course. The Special Referee should have removed the default either at the request of the Defendants, or on his own, but he failed to do so, committing error.

On the top of page 4 of his brief, Respondent states that “The bankruptcy court denied relief to Defendant Brunson in the form of recalculation of the debt due to Weible.” In fact, the bankruptcy court determined not to modify the findings made in state court based on the Rooker-Feldman doctrine, “In the Court’s view, Debtor’s Objection is barred by the Rooker-Feldman doctrine, which divests this Court of jurisdiction since the Debtor is in essence seeking review by this Court of the State Court Order. *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fid. Tr. Co.*, 263 U.S. 413 (1923).” Bankruptcy court order March 30, 2022, **R . p. ____**.

On pages 6 and 7 of his brief, Respondent asserts that “since Weible was not subject to HAMP...(Appellants) were not entitled to any relief and they were required to timely answer the summons.” Appellants dispute that. They were entitled to the right to file an answer 30 days after being given notice of the right to file an answer after being denied the right to foreclosure intervention, as set forth in the 2011 Administrative Order. Respondent failed to give Appellants the required notice that Appellants had 30 days to answer, and Respondent prematurely filed a request for default.

On page 8 of his brief, Respondent asserts that “the Special Referee did not err in any manner related to the” 2011 and 2009 Administrative Orders.

This is not correct. As pointed out throughout Appellants' brief and in this brief above, the Plaintiff failed to comply with the provisions of the 2011 Order, and the Special Referee committed error in failing to require Plaintiff to comply with Supreme Court 2011 Order, and in not setting aside the default. In addition, the Special Referee failed to recognize that he should not have held an evidentiary hearing without the Plaintiff complying with that 2011 Order, thus committing additional error.

From page 8 to 13 of his brief, Respondent discusses how Defendants are not entitled to loan modification pursuant to HAMP. Defendants have acknowledged that HAMP expired at the end of 2016.

On the top of page 14 of his brief, Respondent claims that Appellants argue "that they could never be foreclosed on, and that loan modification had to be offered." Then on page 21, Respondent attempts to characterize the Appellants' arguments regarding the 2011 Order as stating that "foreclosure intervention, which is procedural in nature, prohibits any determination of the debt they owe to the Plaintiff and further prevents the lower court from entering any order of foreclosure against them." That is not a correct characterization of Appellants' position.

Appellants believe that the Special Referee had the authority to determine the debt, and to enter an order regarding the foreclosure, but only after the correct procedures had been followed by the Respondent in order to get the matter referred to the Special Referee. That was not done. The Respondent improperly obtained an Order of Default and Reference on February 8, 2019. The Respondent then obtained a new Order of Default and Reference on May 24, 2019, both in violation of the 2011 Order. The first order was requested a day after the Respondent issued a Denial of Foreclosure Intervention, instead of providing to Appellants 30 days in which to file an Answer. The second order was obtained about a week after Appellants actually filed a pro se Answer, but

the Respondent submitted his new request alleging that the Appellants were in default, failing to give any consideration or mention to the pro se answer.

Therefore, Appellants position is that the Special Referee did not properly receive jurisdiction over the case, and therefore could not determine the amount of debt until he did receive proper jurisdiction over the case. In addition, the Special Referee could not enter an order directing foreclosure until he had received proper jurisdiction over the case. Therefore, the hearing on the merits held on September 19, 2019, was not properly held, and the order finding an amount of debt due, and the order of sale arising from that hearing were also not proper. The Special Referee holding the hearing, finding an amount of debt due, and scheduling a sale each constituted error.

On page 14 of his brief, Respondent states as issue II that “the Special Referee did not err” in regard to default because “modification was not available... under HAMP.” He then discussed loan servicing, but did not address the issue that he raised.

Appellants assert that the issue of an improper default obtained by Respondent has nothing to do with the availability of loan modification under the expired HAMP. The defaults were not properly requested or entered, and for the Special Referee not to have vacated the defaults constituted error.

Then the Respondent raises issue III that “the Special Referee did not err” in his reconsideration because “modification was not available... under HAMP.” He then set forth four unpublished opinions and a memorandum opinion to support his argument.

Each of those five cases at the beginning thereof contain the statement “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.”

Rule 268 (d)(2) SCACR provides in part as follows: “Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved.”

Appellants believe that the opinions cited by Respondent were issued for cases that all totally unrelated to this case that is before the Court and therefore have “no precedential value and should not be cited.”

In addition, those cases relied on by Respondent, to the extent that they set forth a factual background, are easily distinguishable from the facts of this case and the issues before the Court as raised by Appellants. Because Rule 268 (d)(2) states that such cases should not be cited, Appellants will not cite, brief, or otherwise address them in this reply brief, but counsel is available to address them if requested by the Court.

Beginning on page 17, the Respondent in his initial brief summarized the evidence, included in several paragraphs. After each paragraph, he then made reference to large portions of a transcript, apparently indicating that the information in that paragraph may be a summary of that portion of the transcript. Respondent stated one paragraph was a summary of about 14 pages of a transcript, (Respondent’s brief p. 17), and others were 28 pages (brief p. 18), 41 pages (brief p. 20), 24 pages (brief p. 19), 28 pages (brief p. 21), and 37 pages (brief p. 21). Respondent did this instead of pointing to specific pages and lines in each transcript. Respondent seems to be inviting the court to glean that information that Respondent sets forth from large portions of the transcripts by anticipating that the court will read the entire transcript, instead of having to read specific lines or quotes from each transcript. Appellant does not believe that this manner of referencing whole sections of transcripts comports with the intent of Rule 208 (b)(4), and Rule 211 (b) (1), Appellate Court Rules. (SCACR).

The problem with all of the testimony received by the Special Referee at the September 19, 2019, hearing and the findings as set forth in his orders, is that the receipt of testimony at that hearing was in violation of the 2011 Administrative Order. This is because the orders of default and reference referring the case were improperly entered, and the Respondent failed to make the certification to the court that the requirements set forth in the 2011 Order had been complied with. Those failures were raised in the lower court and in the Rule 59 SCRCPC motion (**R. p. ____**) and the memorandum in support of that motion (**R. p. ____**), as has been shown in detail in Appellants' initial brief.

On pages 23 and 24 of his brief, the Respondent again attempts to argue that the appeal was not timely. In August 2021, the Special Referee sent notice to the parties of his intent to sign an Order denying Appellants' motion for reconsideration of his prior Order, the basis of which motion was that the Order was improperly issued because Plaintiff had failed to comply with the 2011 Order. The Special Referee directed Respondent to have the Order filed by the Clerk of Court. But signing the Order is not the same as filing of the Order. The Order is considered to still be in the hands of the Judge, who retains the ability to change his mind until the Order is filed, and the time to appeal in the case does not begin until after the Order was actually entered in the case. *Upchurch v. Upchurch*, 367 S.C. 16, S.E. 2d 643 (2006). See also *Turner v. Turner*, 286 S.C. 294, 333 S.E.2d 76 (1985). The Order was not filed by the clerk in the case. Appellants' counsel had been retained to file an appeal of the anticipated Order, and checked the case filing about every other day to see if the Clerk had in fact filed the Order.

The August 2021 order of the Special Referee was not filed by the clerk in the foreclosure case until after the Appellant Brandy Brunson had filed a Chapter 13 Bankruptcy to stop the foreclosure sale that was scheduled for the October 2021 sales day. As a result of a brief (Debtor's

Response to Creditor's Return to Debtor's objection to Claim) filed on behalf of the Debtor (Appellant) in the Bankruptcy Court. **R. p. ___**, in support of her objection to a claim filed by the Plaintiff, apparently the Respondent for the first time realized that the Order had not been filed in the foreclosure case, but had been filed by the clerk in some other totally unrelated case. Respondent's counsel then contacted the Sumter Clerk of Court office and requested that the Order be filed in the correct case, but did so in violation of the automatic stay granted by the Bankruptcy Court, as had been pointed out by Appellants in that brief. **R. p. ___**.

This placed the Appellants' counsel in the position of having to wonder if the improper filing of the Order in the Clerk's office while the Defendant was in a bankruptcy would constitute the start of the time to appeal. Appellants' counsel did not believe so, but believed it was prudent to file something into the record in case the Court of Appeals disagreed, and obtained permission from the Bankruptcy Court to do so. Appellants thus filed a Rule 59 motion **R. p. ___**, asking the Special Referee to detail in what manner the 2011 Order "had been impacted," and other issues.

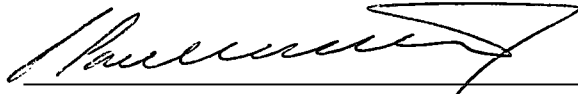
The Bankruptcy Court issued its order on March 30, 2022 (**R. p. ___**), and in the order, Judge Duncan set forth his opinion that the date from which the time to appeal should begin would be 30 days from the date of his order. **R. p. ___**.

Appellants believe that this issue was addressed by the Court when the Court requested briefs from the parties on the issue of appeal in May of 2022. Each party addressed that issue at the time. (See Appellants' Memorandum Addressing the Issue of Appealability, dated June 6, 2022, and filed with the Court on June 8, 2022, which sets forth in detail why Appellants believe that their filing of the appeal was timely.) Apparently, the Court determined that the appeal was timely and directed that the appeal should go forward. See Court of Appeals letter dated July 29, 2022.

CONCLUSION

For the reasons set forth herein, the Appellants believe that the relief sought by the Appellants in their initial Brief was appropriate and that either the case filed by Respondent should be dismissed or that the relief that Appellants requested in the initial Brief should be granted to the Appellants.

RESPECTFULLY SUBMITTED:



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December 28, 2022
Sumter, SC

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM SUMTER COUNTY

Court of Common Pleas

Thomas E. Player, Jr., Special Referee

Appellants Case No. 2022-000601

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SC Court of Appeals

John Weible

Respondent,

v.

Russell Self and Brandy Brunson

Appellants.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Appellants, Russell Self and Brandy Brunson propose that the following be included in the Record on Appeal:

APPELLANT'S
DESIGNATION OF MATTER
BRIEF AND REPLY BRIEF

Summons, Lis Pendens, and Complaint filed October 29, 2018

Request for Foreclosure Intervention filed November 13, 2018
(Styled: Acceptance of Foreclosure Intervention)

Denial of Foreclosure Intervention February 5, 2019
(Styled: Affidavit of Non-Eligibility Under the Home Affordable Modification Program)

Affidavit of Default February 6, 2019

Motion and Order for Default and Reference dated February 8, 2019

Answer (Pro Se) May 16, 2019

Motion to Strike May 23, 2019

Motion and Order of Default and Reference dated May 24, 2019

Amended Answer filed June 27, 2019

Memorandum of Law dated September 18, 2019

Memorandum in Support filed October 3, 2019

Order for Judgment of Thomas E. Player, Jr. as Special Referee dated March 17, 2020

Rule 59 Motion for Reconsideration March 17, 2020

Memorandum of Law dated June 30, 2021

Debtor's Response to Creditor's Return entered January 6, 2022

Order of Thomas E. Player, Jr. dated August 18, 2021, filed January 10, 2022

Rule 59 Motion filed January 20, 2022

Order of Bankruptcy Court, March 30, 2022

Order of Thomas E. Player, Jr. as Special Referee dated April 26, 2022

Transcripts of Proceedings

a) State Court hearing held on September 19, 2019 (shown as TR #1)

- p. 6 line 3 - 6
- p. 9 line 2 - p. 10 line 25
- p. 11 line 12 - p. 20 line 25
- p. 37 line 20 - 25
- p. 39 line 9 - p. 40 line 4
- p. 52 line 19 - p. 64 line 20
- p. 68 line 8 - 24
- p. 78 line 20 - p. 80 line 25
- p. 95 line 6 - 25

b) Bankruptcy Court hearing held on January 10, 2022 (shown on TR #2)

- p. 11 line 1 - 14
- p. 13 line 7 - 20
- p. 32 line 15 - p. 34 line 13

c) Bankruptcy Court hearing held on February 9, 2022 (shown as TR #3)

- p. 24 line 3 - 7
- p. 26 line 14 - 22
- p. 44 line 22 - p. 47 line 21
- p. 52 line 1 - 7
- p. 53 line 18 - p. 55 line 4
- p. 64 line 2 - 6
- p. 65 line 7 - 10
- p. 66 line 3 - p. 67 line 8
- p. 70 line 13 - p. 73 line 10
- p. 74 line 19 - 24
- p. 83 line 7 - p. 124 line 3
- p. 127 line 4 - p. 131 line 23

Defendant's Exhibits

1-13 (February 9, 2022 hearing)

I certify that this designation contains no matter which is not relevant to this appeal.

RESPECTFULLY SUBMITTED:

A handwritten signature in cursive script, appearing to read "A. Paul Weissenstein, Jr.", written over a horizontal line.

December 28, 2022
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THE STATE OF SOUTH CAROLINA
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SC Court of Appeals

Case No: 2018-CP-43-02005

John Weible

Respondent,

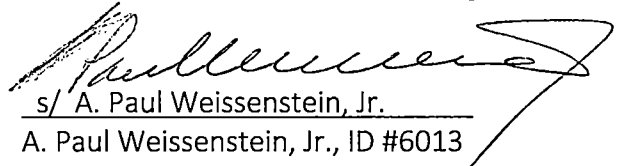
Russell Self and Brandilyn Brunson

Appellants.

PROOF OF SERVICE

I certify that I have served the Initial Reply Brief, Designation of Matter and Certificate of Service on John Weible by personally delivering a copy of it, on December 28, 2022, to his attorney of record, Michael M. Jordan, at his office located at 10 Law Range, Sumter, South Carolina 29150.

December 28, 2022



s/ A. Paul Weissenstein, Jr.

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December 28, 2022

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

IN RE: John Weible vs Russell Self and Brandy Brunson
Case No: 2018-CP-43-02005

Dear Ms. Kitchings,

There are enclosed and presented to you for filing the Initial Reply Brief, Designation of Matter and Certificate of Service for the Appellants. Also enclosed is a copy of the cover page of each of those items with a postage paid envelope for you to acknowledge receipt of the documents and have filed same.

Yours very truly,

A handwritten signature in black ink, appearing to read 'A. Paul Weissenstein, Jr.', written over a large, stylized flourish.

A. Paul Weissenstein, Jr.

APWjr/mah
Enclosure

cc: Michal Jordan

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