

**The State of South Carolina**  
**In The Court of Appeals**

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APPEAL FROM FLORENCE COUNTY  
Court of Common Pleas  
Michael G. Nettles, Circuit Court Judge

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Case No. 2018-CP-21-03238

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**No. 2019-000486**

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**NATIONSTAR MORTGAGE, LLC**  
**d/b/a MR. COOPER,**

*Respondent,*

v.

**BARBARA A. GIBBS and**  
**MELVIN E. GIBBS,**

*Appellants*

**APPELLANTS' BRIEF**

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Melvin E. Gibbs, Pro-se  
Barbara A. Gibbs, Pro-se  
3108 Hidden Falls Drive  
Buford, GA 30519  
843-610-0674

Appellants

Brian A. Calub, Esq.  
McGuire Woods LLP  
201 North Tryon Street, Suite 3000  
Charlotte, NC 28202

Attorney for Respondent

January 07, 2020

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**QUESTIONS PRESENTED**

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## I. STATEMENT OF THE CASE

3. *In or about 2005 Appellant Barbara A. Gibbs obtained a construction loan in the amount of \$330,000 to pay one-half of the cost of constructing Appellants retirement “dream” home. In or about January 2006, the construction loan was paid in full. And a 30 yr. mortgage was negotiated by Appellant B. Gibbs. Appellants’ home is 5,500 sq. ft. – built at a cost of \$127 sq. ft. = \$698,500. The balance of \$368,500 was paid by Appellant M. Gibbs.*

4. On or about October 23, 2013 Respondent filed the instant foreclosure alleging Appellants defaulted on August 2013 and Respondent was entitled to declare the entire balance due and payable: Appellants were served November 12, 2013. Respondent’s complaint did not include a copy of the mortgage contract and affidavit of debt. And, Respondent did not serve on Appellants a notice of foreclosure intervention. (R. p. 74)

5. On or about the 19<sup>th</sup> day of November 2013, Appellants filed a Motion to Dismiss and Sanctions – based on Respondent’s failure to comply with pleading, *Rule 12, SCRPC*. (R. p. 46)

6. On or about the 11<sup>th</sup> day of March 2014, this Court administratively stayed Appellants’ Motions to Dismiss and Default Judgment pending foreclosure intervention pursuant to South Carolina Supreme Court Administrative Order 2011-05-02-01.

7. By Order dated July 28, 2015: Judge Nettles referred the case to Master-In Equity Cynthia Howe, Horry County. (R. p. 24)

8. By Order dated March 5, 2018: Judge Howe recused herself and did not refer this case back to Florence County Court of Common Pleas or Horry County Court of Common Pleas! (R. p. 23)

9. By Orders dated October 10, 2018 and December 18, 2018 the Horry County Court of Common Pleas remanded the case back to Florence County.

10. On February 20, 2019 the lower court heard summary judgment motions by both parties. Thereafter, the court ordered each party to submit orders and affidavits, stating one party's order would be signed. (R. p. 17)

11. By Order dated March 4, 2019 pursuant to *Rule 53(b), SCRPC*, the lower court accepted findings of facts and conclusions of law submitted by Respondent and granted Respondent's Motion for Summary Judgment. (R. p. 4)

12. Appellants filed a motion to amend or alter judgment on March 11, 2019. The court denied Appellants' motion on March 14, 2019, *Rule 59, SCRPC*. (R. p. 1)

13. This appeal was filed to challenge said ruling(s): Appellants' notice of appeal was filed on March 22, 2019, without Appellants' signatures. On April 8, 2019, Appellants filed a corrected amended notice of appeal.

## **II. ARGUMENT**

Standard of Review: De Novo

### **(I.) APPELLANTS WERE ENTITLED TO MOTION TO DISMISS.**

14. On or about the 12<sup>th</sup> day of November 2013, Appellants were served with a copy of Respondent's Summons and Complaint; without a copy of the mortgage contract, affidavit of debt and Mortgagor's Right to Foreclosure Intervention.

a. From January 2006 until the relevant time [December 2013] Appellants made each and every mortgage in a timely manner. *Appellants' bank records accurately reflected*

*payment of mortgage to Nationstar Mortgage on July 2, 2013 in the amount of \$2,197.32; August 2, 2013 in the amount of \$2,197.32; September 4, 2013 in the amount of \$2,197.32.* (R. pp. 51-53)

b. Mortgage payment made October 2, 2013 in the amount of \$2,197.32: *mortgage payment returned on October 3, 2013 in the amount of \$2,197.32*, November 5, 2013 in the amount of \$2,197.32: *mortgage payment returned on November 6, 2013 in the amount of \$2,197.32*, and December 3, 2013 in the amount of \$2,197.32: *mortgage payment returned on December 4, 2013 in the amount of \$2,197.32.* (R. pp. 54-56)

15. Respondent failed and neglected to comply with: The Supreme Court of South Carolina, ADMINISTRATIVE ORDER, **2011-05-02-01** Re: Mortgage Foreclosure Actions; in relevant part:

(2) Actions filed after May 9, 2011.

In all mortgage foreclosure actions filed after May 9, 2011, the Mortgagee's attorney **shall** serve on the Mortgagor, along with the summons and complaint, a notice of the Mortgagor's right to foreclosure intervention, (*Appellants' Affidavits*). Additionally,

16. On or about the 19<sup>th</sup> day of November 2013, Appellants filed a Motion to Dismiss and Sanctions – based on Respondent's failure to comply with pleading requirements and filing a frivolous complaint, to wit:

a. Respondent failed and neglected to include the Mortgage Contract – citing the terms and conditions; and the specific terms and conditions breached by Appellants.

b. Respondent failed and neglected to include an Affidavit of Debt certifying the amounts due and owed as to the month(s) Defendants failed and neglected to pay. AND, stating a sum Appellants could pay to cure any breach/default.

(1) *Depriving Appellants the ability to articulate their rights to cure prior to foreclosure: setting fort any and all months not paid and the exact amount due and owed; Appellants' rights secured by the mortgage contact based on the alleged section(s) breached; and rights granted by federal law based on the length (months) of the alleged breached.* AND,

(2) Respondent's complaint is deficient in every aspect, *supra*, and deprives Appellants of the ability to secure their rights under the mortgage contact, and do not set forth how or if Respondent is entitled to relief.

17. Respondent did not satisfy the conditions concurrent/precedent in filing the foreclosure suit and, therefore, Appellants' motion to dismiss should have been granted. *See, e.g., Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office, 551 S.E.2d 263, 273 (S.C. 2001).*

a. In evaluating a motion to dismiss the Court must base its decision solely upon the allegations set forth in the complaint, Jarrell v. Petoseed Co., Inc., 331 S.C. 207, 209, 500 S.E.2d 793, 794 (Ct. App. 1998). The motion must be granted if the facts alleged in the complaint and the inferences reasonably deducted there from do not entitle the Plaintiff to relief on any theory of the case. *See also, FOC Lawshe Ltd. P'ship v. Int'l Paper Co., 352 S.C. 408,412. 574 S.E.2d 228,230 (Ct. App. 2002).*

18. On or about the 12<sup>th</sup> day of December 2013, Appellants filed for default judgment in that Respondent failed and neglected to respond or give reason(s) for their failure to respond to Appellants' Motion to Dismiss.

**(II.) RESPONDENT WAS NOT ENTITLED TO SUMMARY JUDGMENT WHERE, AS HERE, EVERY MATERIAL AND RELEVANT ISSUE WAS DISPUTED AND DISCOVERY WAS NOT CONCLUDED.**

19. *The Order dated March 4, 2019 is defective on its face: under SCRCPP, Rule 53(b) the lower court would've been required to enter an order of Reference on motion and hearing: Appellants were not informed a Referee was being considered, provided an opportunity to be heard, and did not consent to Reference; the lower court does not have authority to appoint Respondent as Referee and there isn't a statute whereby the lower court may sua sponte appoint [i]tself as Referee and create an ex-parte ruling, and there wasn't a hearing whereby testimony was taken and/or evidence presented. (R. p. 1)*

a. *Appellant M. Gibbs filed an Answer – DEMANDING A TRIAL BY JURY, Rule 38, SCRCPP, and Appellants' Motion to Dismiss was stayed – dictating Appellant B. Gibbs' Answer would not be due until 30 days thereafter – the motion has not been ruled on (R. pp. 43-45); and the lower court held a hearing on Appellants' and Respondent's motions for summary judgment, but never held an evidentiary hearing:*

On or about February 20, 2019, the lower court heard motions for summary judgment filed by Appellants and Respondent – no testimony given or evidence submitted. At the conclusion of the hearing the lower court requested orders be submitted by both parties; stating one order would be signed. Thereafter, on March 4, 2019, the lower court designated [i]tself and/or Respondent as Referee and determined facts and rules of law not supported by the record. Appellants can find no legal research to support a lower court appointing [i]tself Referee with no notice to Appellants or appointing [i]tself Referee.

20. Summary judgment was not proper under South Carolina law where, as here, Respondent failed to comply with Orders of the South Carolina Supreme Court and the Florence County Court of Common Pleas, to wit:

a. Respondent did not serve on Appellants a notice of the Mortgagor's right to foreclosure intervention.

b. Respondent failed and neglected to engage in modification negotiations in any form. ***Had Respondent conducted foreclosure intervention as ORDERED, Appellants' mortgage payments would have changed from \$2,056.28 to \$1,218.00.*** AND,

21. Respondent alleged Appellants breached their mortgage contract August 2013 and demanded Appellants pay the sum of \$292,519.20. Appellants by affidavits and bank records proved they had not missed a mortgage payment during: January 2012 thru December 2013 and affirmed payments had not been missed during the contract. (R. pp. 46-56) Further,

a. Appellants' bank records proved that after Respondent filed this litigation, Respondent had collected the mortgage payment for August, September, October, November and December 2013. Respondent then reversed accepted mortgage payments for the months of: October, November and December.

22. Appellant M. Eugene Gibbs filed his answer on the 18<sup>th</sup> day March 2014, and ***DEMANDED A TRIAL BY JURY ON ALL ISSUES, Rule 38, SCRCP.*** Because a motion to dismiss is not a responsive pleading, Appellant M. Eugene Gibbs filed his Answer to force Respondent to seek leave of the court to amend/supplement their pleadings – Respondent did not seek leave to amend/supplement their pleadings. (R. pp. 43-45)

23. The lower court stayed Appellants' motion to dismiss and ordered foreclosure intervention, by Order dated the 11<sup>th</sup> day of March 2014. Respondent refused and neglected to engage in the ordered foreclosure intervention, and the lower court did not vacate the ordered stay. Because the stay was not vacated, Appellant Barbara A. Gibbs' Answer was not due.

a. When a motion to dismiss is ruled on Appellant Barbara A. Gibbs would have fifteen (15) days to file her Answer. AND,

24. Where, as here, Appellant Barbara A. Gibbs was not afforded an opportunity to file an Answer and engage in discovery, summary judgment was not proper, (*Appellants' Affidavits & Opposition to Summary Judgment*).

25. Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery, **Dawkins v. Fields**, 354 S.C. 58, 69, 580 S.E. 2d 433, 439 (2003).

***MERE SCINTILLA OF EVIDENCE!***

26. In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party. **Baughman v. American Telephone and Telegraph Company**, 306 S.C. 101, 410 S.E.2d 537 (1991). In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, *the non-moving party is only required to submit a mere scintilla of evidence*, **Hancock v. Mid-South Mgmt Co., Inc.**, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). (*Appellants' Motion for Summary Judgment & Affidavits*)

**(III.) THE LOWER COURT DID NOT HAVE JURISDICTION WHERE THE MASTER-IN-EQUITY RECUSED WITHOUT REMANDING THE CASE BACK TO THE LOWER COURT.**

27. On the 28<sup>th</sup> day of July 2015 Respondent's motion for substitution of counsel and Reference was granted whereby Butler & Hosch became the attorney of record; the Korn Law Firm was the attorney of record.

28. The Order dated the 11<sup>th</sup> day of March 2014; the lower court administratively stayed Appellants' Motions to Dismiss and Default Judgment pending foreclosure intervention pursuant to South Carolina Supreme Court Administrative Order 2011-05-02-01, *infra*, p. 12, and referred the case to a Special Referee.

29. By Order dated March 5, 2018: Judge Howe recused herself and did not remand the case back to Florence County Court of Common Pleas or Horry County Court of Common Pleas – the action by Judge Howe deprived the lower court of jurisdiction! (R. p. 20)

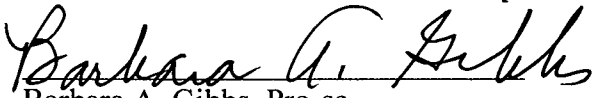
30. The Orders dated October 10, 2018 and December 18, 2018 remanding this case back to Florence County was defective in that the court lacked jurisdiction. The Horry County court did not have jurisdiction in that a foreclosure action may only be had in the county of the property; and Master in Equity Cynthia Howe did not transfer the case to the Horry County Court of Common Pleas, S.C. Code Ann. §15-7-10 (1990). (R. pp. 17-22)

### III. CONCLUSION

The lower court must rule on Defendants' Motions to Dismiss and Default, and pursuant to Rules allow Appellant Barbara A. Gibbs 30 days to file her answer. Appellants by affidavits, empirical evidence and pleadings have disputed each and every relevant and material issue; and summary judgment is not proper. AND, Respondent cannot survive Appellants' Motion to Dismiss.

**WHEREFORE**, Defendants pray this Honorable Court reverse the lower court's grant of Respondent's Motion for Summary Judgment, rule the lower court does not have jurisdiction in this case – dismissing said case, grant Appellants' Motion to Dismiss and grant such other and further relief, at law and equity, general or special, to which Appellants have shown themselves justly entitled.

Respectfully Submitted,



Barbara A. Gibbs, Pro-se  
3108 Hidden Falls Drive  
Buford, Georgia 30519  
(843) 610-0674  
mgibbs70@aol.com



M. Eugene Gibbs, Pro-se  
3108 Hidden Falls Drive  
Buford, Georgia 30519  
(843) 610-0674  
mgibbs70@aol.com