THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
Thomas E. Player, Jr., Special Referee

Case No. 2022-000601

John Weible, ... Respondent

v.

Russell Self and Brandy Brunson ..... Appellant.

Final Brief of Respondent

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STATEMENT OF THE CASE

This appeal stems from a foreclosure action commenced October 29, 2018 by John Weible (Weible) against Russell Self and Brandilyn Brunson. The Complaint, per the instruction of Supreme Court Administrative Orders on mortgage foreclosure cases, contained an allegation that the mortgages described in the suit were not subject to HAMP (Home Affordable Modification Program) and that Weible did not participate in such program. (ROA, p. 54, para. 10). Weible is an individual that loaned money to Self and Brunson when they had no ability to borrow through a commercial lender due to financial constraints. The monies loaned from Weible were secured by mortgages on the residence of Self and Brunson.

The Complaint further stated that the mortgages were not insured by any state or federal government agency. (ROA, p. 54, para. 10). Nowhere in the *pro se* Answer of Defendants, or in the Amended Answer filed did Defendants meaningfully contest such allegation or make any defense or raise any question that the mortgages were subject to any type of mandatory review for modification, or that Plaintiff voluntarily participated in any form of loan modification review. (ROA, p. 64, para. 6-8 and ROA, p. 70, para. 11).

This was the second foreclosure action filed between these same parties (Weible and Self and Brunson). A prior foreclosure action was filed on May 21, 2014 seeking foreclosure over these same financial obligations. That Complaint also contained an allegation that the mortgages were not subject to HAMP. (ROA, pp. 42-43, para. 6). The 2014 foreclosure action was settled and a Stipulation of Dismissal was filed on July 11, 2014. (ROA, p.49)

This action filed in 2018 was ultimately tried on September 19, 2019 by a Special Referee. The Special Referee was appointed pursuant to order of reference entered by the Circuit

Court. (ROA, p.7) The order of reference was entered on default after Defendants Self and Brunson failed to file an answer to Weible's 2018 summons and complaint within the period allotted by the summons. However, Self and Brunson did later file an answer pro se on May 23, 2019 (ROA, pp. 63-66) and an amended answer through counsel on June 27, 2019 (ROA, pp.69-72). Ultimately Brunson and Self were allowed to present testimony and evidence establishing their records and calculation as to the debt due to Weible under the mortgage loans, as the debt was not liquidated and had to be proven to the fact finder. Self and Brunson were therefore not prejudiced by the default status in any manner.

From the time of filing of the action until the time of the decision of the Special Referee sixteen (16) months passed (October 2018 to March 2020), during which time the Defendants made no effort to make any payment to the Plaintiff. Further they offered no work out plan or alternative payment arrangement whatsoever.

A hearing was first conducted in the foreclosure action on May 28, 2019 by the Special Referee. At that hearing the matter was continued to secure a court reporter and allow Defendants to support their argument as to any requirement of loan modification or loss mitigation. From this hearing until the next hearing until the March 2020 hearing, a period of more than nine (9) months passed, during which time the Defendants made no effort to make any payment to the Plaintiff. Further they offered no work out plan or alternative payment arrangement whatsoever.

A bankruptcy hearing was held in this matter on November 23, 2021 on Brunson's objection to Weible's proof of claim. The bankruptcy court received extensive testimony over

several hours as to the calculation of the mortgage debt. The bankruptcy court denied relief to Defendant Brunson in the form of recalculation of the debt due to Weible. (ROA, pp. 30-35) This appeal followed and represents a third effort by Self and Brunson to challenge the debt first determined by the Special Referee.

STANDARD OF REVIEW

In an action in equity, tried by a judge, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Townes Associates, Ltd. v. City of Greenville*, 221 S.E.2d 773 (1976). However, this broad scope of review does not require the appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess credibility of witnesses. *Dorchester County Dept. Of Social Services v. Miller*, 477 S.E.2d 476 (Ct.App. 1996). Further, the appellant is not relieved of his burden of convincing the the appellate court that the trial judge committed error in his findings. *Id.*

STATEMENT OF FACTS

Weible loaned money to Self and Brunson over a period of years via three (3) promissory notes.[1] One note was executed by Self and Brunson to Weible on November 5, 2010 for $115,000.00 with zero percent (0%) interest. (ROA, pp.323-324) The term of this loan was seven (7) years and it matured in 2017. A mortgage was executed by Self and Brunson in favor of Weible on November 5, 2010 securing $65,000.00 of the above note and loan. (ROA, pp. 325-328)

[1]Self and Brunson regularly borrowed money from Weible and were familiar with one another for many years.

A second mortgage was executed by Self and Brunson on July 2, 2010 securing $50,000.00 of indebtedness to Weible, bringing the total of those two (2) mortgages in favor of Weible to the $115,000.00. (ROA, pp. 318-322)

A second note was executed by Self and Brunson to Weible on May 25, 2011 in the amount of $60,000.00. (ROA, pp.332-333) This note had an interest rate of 8% and matured in two (2) years, or 2013.[2]

On July 3, 2014 Self and Brunson executed a mortgage to Weible for $48,923.00, bringing the total of Weible's three (3) mortgages from Self and Brunson to $163,923.00. (ROA, pp. 337-340) This was the result of settlement of a pending foreclosure action between Weible and Self and Brunson. A mortgage executed May 25, 2011 for $60,000.00 was satisfied and this mortgage for $48,923.00 was recorded. The amount of this mortgage was determined by the outstanding amount of indebtedness on the May 25, 2011 note. Thus, the mortgage secured the same original indebtedness, but for a lower amount recognizing that the principal had been reduced.

On June 13, 2018 a demand letter was mailed to Self and Brunson explaining the amounts due on the above, plus an additional indebtedness of $20,000 on a note executed by Self and Brunson to Weible in 2014 for $20,000.00. (ROA, pp. 343-344) The total demand for payment was $175,444.60 to avoid foreclosure on the above mortgages. Notwithstanding the demand letter, no payment was made by Self and Brunson and this foreclosure action was commenced October 29, 2018.

[2]This debt was secured by a mortgage, which was later satisfied as a result of settlement of a pending foreclosure action between the parties.

This was the second foreclosure action filed against Self and Brunson by Weible. A prior foreclosure action was filed on May 21, 2014 seeking foreclosure of the May 25, 2011 note, which was then secured by a mortgage. (ROA, pp. 39-48) That action was settled and a Stipulation of Dismissal was filed on July 11, 2014. (ROA, p. 49)

The Complaint filed in this action provides in paragraph 10 that the mortgages involved are not subject to HAMP[3] and that Weible does not participate in in such program, nor are the mortgages insured by any state or federal agency. (ROA, p. 54, para. 10) This language is contemplated by the 2009 and 2011 Supreme Court administrative orders regarding mortgage foreclosures. Self and Brunson were each personally served with the Summons, Complaint and Lis Pendens filed on October 31, 2018. On November 13, 2018 they filed an unsigned document captioned, Acceptance of Foreclosure Intervention. (ROA, p. 59) There is no proof of service for this document contained in the clerk of court's file. Nonetheless, on February 5, 2019 Self and Brunson were served with an Affidavit of Non-Eligibility under HAMP indicating the mortgage loan was not owned, securitized or guaranteed by Fannie Mae or Freddie Mac and that the servicer (Weible) had not executed any agreement under HAMP. (ROA, pp. 60-61) Self and Brunson made no counter affidavit contesting same or explaining how they are entitled to intervention in the form of mortgage modification or loss mitigation under HAMP.

On February 6, 2019 an Affidavit of Default was filed as neither Self nor Brunson had filed and served an answer as required by the summons. (ROA, p. 62) Again since Weible was not subject to HAMP and did not participate in loan modification, Self and brunson were not

[3]HAMP expired December 31, 2016 which was twenty-two (22) months before this action was filed.

entitled to any relief and they were required to timely answer the summons. Three months later, on May 16, 2019 Self and Brunson, acting pro se, filed an Answer alleging: (1) the mortgage loan may be subject to HAMP (ROA, p. 64, para. 6); (2) the mortgage laon should be evaluated for participation in HAMP and the action should be stayed pending review under HAMP (ROA, p.64, para. 7); (3) Self and Brunson did not receive notice or time to respond to denial of foreclosure intervention (ROA, p. 64, para. 8); (4) Weible failed to maintain accurate records (ROA, p. 64, para. 10); (5) Brunson and Self timely made all payments (ROA, p.64, para. 11); (6) Weible did not properly process all payments (ROA, p. 64, para. 12); (7) Weible had been paid in full all amounts due (ROA, p.65, para. 14). As set forth below, each of these allegations were dealt with in the hearing and order by the Special Referee and no prejudice was suffered by Self or Brunson as a result of the default status.

A hearing was scheduled, noticed and held on May 28, 2019 before a Special Referee. That hearing resulted in a continuance by the Special Referee to secure a court reporter to allow additional time for Self and Brunson to prepare. The hearing was re-scheduled and noticed for September 19, 2019, a period exceeding ninety (90) days from the original hearing date. During this period, an Amended Answer was filed by Brunson via counsel, without benefit of consent or court order (ROA, pp. 69-72). This Amended Answer alleged execution of instruments under duress and unclean hands, but made no mention of foreclosure intervention and Brunson's entitlement to same.

The matter was tried by the Special Referee on September 19, 2019 and his foreclosure order was signed on March 17, 2020. (ROA, pp. 10-21) The same day Self and Brunson filed a Motion to Reconsider. (ROA, pp. 85-88) That motion was heard and an Order entered on

August 18, 2021. (ROA, pp. 22-27) Both the foreclosure order and the order on reconsideration denied any relief to Self and Brunson.

Brunson filed bankruptcy on September 27, 2021.

ARGUMENT

I. THE SPECIAL REFEREE DID NOT ERR IN ANY MANNER RELATED TO THE DIRECTIVES OF THE SUPREME COURT ADMINISTRATIVE ORDERS 2011-05-02-01AND 2009-05-22-01.

On May 22, 2009 the South Carolina Supreme Court issued its Administrative Order (2009-05-22-01) providing that all foreclosure actions filed after May 4, 2009 must contain a short, plain statement facts regarding applicability of Home Affordable Modification Program (HAMP). HAMP expired on December 31, 2016 and thus this Administrative Order 2009-05-22-01 has limited applicability and mortgage lenders may voluntarily offer loan modification to borrowers, but are not required to do so. The notes to the administrative order set forth that the complaint could simply allege HAMP is inapplicable. The complaint in the instant action contained such a statement in paragraph 10. (ROA, p. 54, para. 10) Petitioners have not and cannot now show that any intervention or relief under HAMP is available to them.

The Complaint in his matter was filed in October 2019 and alleged in paragraph 10 that the mortgages are not subject to HAMP and are not insured by any federal agency (Fannie Mae or Freddie Mac). Further said paragraph of the Complaint alleged that Respondent (Plaintiff) does not participate in the HAMP program. This constitutes compliance with the administrative order dated May 22, 2009. The administrative order goes on to provide that if allegations as to non-eligibility are contested by the answer, or if the judge allows the issue to become contested at

some later stage in the proceeding, then any dispute regarding eligibility of the mortgage loan for modification under HAMP or satisfaction of such HAMP requirements if it applies, shall be resolved like any other contested issue in a mortgage foreclosure case. Petitioners have had every opportunity to provide evidence and argument that these loans were subject to HAMP and they have not done so. As a non-commercial lender, with no loans guaranteed or secured by Fannie Mae, Freddie Mac, HUD, or VA the Respondent is not subject to HAMP and he must agree to offer mortgage modification for the same to apply.

Petitioners have not offered any evidence at any stage of the proceedings, nor presented any argument at any stage of the proceedings that Respondent, an individual non-commercial lender, was subject to HAMP, either by having his loans secured by governmental agency or by voluntary participation. Petitioners have shown no applicability of HAMP whatsoever to these loans and these proceedings. In fact, Petitioners prior counsel acknowledged at the hearing before the Special Referee that HAMP had expired in 2016. (ROA, p.123, l. 23) Accordingly, no loan modification or other form of mitigation is or was available to Petitioners on the loans made to them by Respondent based on HAMP.

The administrative order provides for filing of counter affidavits in the event a debtor party believes the loans are eligible for HAMP. This makes clear that the debtor party has an obligation to support his or her claim that he or she is entitled to mortgage modification. Petitioners at no time submitted such an affidavit, nor did they offer any argument that HAMP applied to them. In their brief Petitioners have failed to make any showing that HAMP applied to them, or to counter Weible's affidavit that HAMP did not apply.

The administrative order provides that if a judge determines HAMP is not applicable to the mortgage loan, then the foreclosure action may continue. In the instant action the Special Referee determined HAMP did not apply and proceeded with determination as to the amount of mortgage loan debt and foreclosure proceedings. This determination by the Special Referee has never been challenged on any substantive level and the Petitioners' claims of violation of the administrative orders are without any support as discussed herein.

On May 2, 2011 the South Carolina Supreme Court issued its Administrative Order (2011-05-02-01) providing that HAMP is only applicable to residential mortgage loans not owned, secured or guaranteed by Fannie Mae or Freddie Mac if the servicer has agreed to participate in HAMP. The administrative order refers to the prior administrative order 2009-05-22-01 so the orders have to be read together for clarity. The administrative order states that its focus is loss mitigation efforts which have failed or stalled between lender-servicers and mortgagor-debtors The administrative order defines foreclosure intervention to include resolution of foreclosure actions by loan modification or other loss mitigation.

The administrative order provides that foreclosure actions filed after May 9, 2011 shall include a notice of the Mortgagor's right to foreclosure intervention. It further provides that no foreclosure hearing could be held until compliance with the order. Upon certification of compliance with the above the foreclosure action could proceed.

As set forth above the notes to the administrative order (2009-05-22-01) provide that the complaint could simply allege HAMP is inapplicable. The complaint in the instant action contained such a statement in paragraph 10. The 2014 mortgage foreclosure action also contained a similar statement. Petitioners have not and cannot now show that any intervention or

relief under HAMP is available to them. Accordingly, their argument that they are entitled to mortgage intervention under HAMP and relief from default are misplaced. They have simply avoided the substantive aspects of the administrative order and the inapplicability of HAMP in an effort to obtain multiple hearings at reducing the determination of debt owed on their mortgage loans. This is emphasized in their breif requesting that this court determine the mortgage debt de novo abd ignore the determination made by the Special Referee.

This Administrative Order is procedural in nature. The Administrative Order makes clear that failure to issue the Affidavit only works to stay the action, not as a dismissal. At the time of issuance of this Administrative Order, HAMP was still in effect. However, as stated above HAMP has expired, and thus the underlying purpose of the Administrative order has been impacted.

Notwithstanding the allegations of the complaint that HAMP did not apply, Respondent served and filed an Affidavit of Non-Eligibility for loan modification on February 5, 2019 (ROA, pp.60-61) again indicating that the loan was not eligible as the service (Plaintiff) had not executed an agreement under HAMP. The merits hearing in this matter was held on September 19, 2019 which was seven (7) months after Plaintiff served the Affidavit of Non-Eligibility for loan modification. The Defendants filed no counter affidavit as to contest eligibility for loan modification. They made no argument as to entitlement for loan modification. In their Pro Se Answer filed May 16, 2019 the Defendants raised the issue of loan modification, stating they may be entitled to same under HAMP, which as set forth above had already expired. However, in the Amended Answer filed June 27, 2019 by counsel, the Defendants (or at least Defendant Brandilyn Self) abandoned their allegations as to potential loan modification under HAMP,

obviously recognizing that HAMP had expired and offered them no relief. This Answer raised no substantive issue over the right to foreclosure intervention or mortgage modification. (ROA, pp. 69-72)

The only loan modification for borrowers available at this time is optional through lenders that voluntarily participate in same and Plaintiff does not so participate. Plaintiff is not a commercial lender. Petitioners' efforts to characterize Plaintiff as such are not supported by any credible evidence or legal argument. The mortgage loan through non commercial non tradition means, is supported in the law. It has been referred to a poor man's mortgage. See *Lewis v Premium Investment*, 568 S.E.2d 361 (2002). It offers those persons who do not qualify for loans through commercial lenders the opportunity to borrow money at reduced costs.

Self and Brunson have had every opportunity to argue why Weible was legally obligated to offer them modification on a fully matured loan obligation and they have failed to make any showing of HAMP applicability. Thus they have not been prejudiced by any default status. They have been able to submit testimony and evidence as to their original answer that: (1) the mortgage loan may be subject to HAMP; (2) the mortgage laon should be evaluated for participation in HAMP and the action should be stayed pending review under HAMP; (3) Self and Brunson did not receive notice or time to respond to denial of foreclosure intervention;

The Defendants argue that they are not in default in this foreclosure action as the same is stayed by the requirements of Administrative Order 2011-05-02-01 (and 2009-05-22-01) until loan modification has been attempted. However, the Defendants do not contest that HAMP has expired and review for loan modification and loan modification is purely voluntarily by

commercial lenders at this time. In fact, in the Amended Answer no reference is made to loan modification as being an issue and the same appears to have been abandoned and waived from the Answer filed pro se by Defendants. Nor can Petitioners contest that the complaint contained a statement that the loans in issue were not subject to HAMP and the Respondent did not participate in loan modification

The Special Referee found that Plaintiff does not participate in loan modification, nor is he required to do so. (ROA, p. 25) Having decided that loan modification is not available and not required, this issue is resolved in compliance with Administrative Order 2011-05-02-01 and Defendants remain in default and have failed to seek relief from same as provided in the Rules of Civil Procedure.

Self and Brunson have had every opportunity to argue why Weible's calculation of the debt was not accurate. Thus they have not been prejudiced by any default status. They have been able to submit testimony and evidence as to their original answer that: (4) Weible failed to maintain accurate records; (5) Brunson and Self timely made all payments; (6) Weible did not properly process all payments; (7) Weible had been paid in full all amounts due.

Brunson has contested the amount of the debt before two separate judges, the Special Referee and the bankruptcy judge with the same result each time. It is clear that the only relief sought by Self and Brunson is a recalculation of the debt due to Weible to a lesser amount because they believe the debt is not correct. This is amplified in their brief which requests the appellate court to determine de novo the amount of their debt to Weible.

Self and Brunson have offered nothing substantive to indicate that they are entitled to

HAMP relief in the form of loan modification, nor foreclosure intervention. Their argument is repeatedly the debt determination is wrong. Their argument is that they could never be foreclosed on, and that loan modification had to be offered. This is without merit and Defendants can show no prejudice as they are not entitled to relief under HAMP or the Supreme Court's administrative orders.

II. THE SPECIAL REFEREE DID NOT ERR IN ANY MANNER RELATED TO THE DEFAULT STATUS OF PETITIONERS AS MORTGAGE MODIFICATION WAS NOT AVAILABLE TO PETITIONERS UNDER HAMP.

For a majority of consumer mortgage loans, the servicer of the loan has an obligation to review the borrower for loss mitigation eligibility. The servicer is a separate company that serves as the mortgage creditor's agent to collect on the loans, including collecting payments, bringing foreclosure actions and conducting loss mitigation reviews. Most of these loans are either guaranteed by or backed by Fannie Mae, Freddie Mac, Federal Housing Administration and are obligated by those entities' requirements to consider loss mitigation. Some mortgage providers voluntarily participate. *Any Portal in a Storm Refining Loss Mitigation Through Technology,* by John Waites and Andrew Powell, SC Lawyer September 2016.

III. THE SPECIAL REFEREE DID NOT ERR IN ANY MANNER RELATED TO THE DENIAL OF PETITIONERS' MOTION TO RECONSIDER HIS ORDER OF FORECLOSURE AS MORTGAGE MODIFICATION WAS NOT AVAILABLE TO PETITIONERS UNDER HAMP.

A survey of caselaw reveals four (4) unpublished opinions and a memorandum opinion involving this issue. None of those opinions have held that the foreclosure process was fatally flawed and that the borrower was entitled to a recalculation of the debt owed.

In *Ditech v. Snyder*, Unpublished Opinion No. 2022-UP-308 (Ct.App. 2022) Snyder made an argument that Ditech violated the administrative order on foreclosure actions. The lower court found that Ditech met the requirements and that Snyder failed to establish his claims for relief against Ditech. The Court of Appeals affirmed holding that, "Snyder supplied no evidence to show that Ditech or its predecessors failed to comply with the Administrative Order." The court further found that the "evidence does not demonstrate Ditech's actions consituted a failure to act in good faith during the foreclosure intervention process" and 'Snyder failed to demonstrate how Dittech's improper affidavit of default, which the master subsequently lifted, and alleged spoliation of evidence show Ditech and its predecessors violated the Administrative Order." Here, as in *Ditech v. Snyder*, petitioners have failed to show entitlement to any relief under HAMP by challenging through documents and evidence presented that Weible is subject to HAMP contrary to the allegations of his complaint and the determination by the Special Referee that Weible is not subject to HAMP.

In *JP Morgan Chase Bank v. Tucker, et al.*, Unpublished Opinion No. 2013-UP-292 (Ct.App. 2013) the Court of Appeals affirmed the decision of the Master granting foreclosure and as to foreclosure intervention, stated "the appellate court will not consider any fact which does not appear in the Record on Appeal" and "appellant has the burden of providing an adequate record on appeal". Here, as in *JP Morgan Cahse Bank v. Tucker*, petitioners have failed to show entitlement to any relief under HAMP by challenging through documents and evidence presented

that Weible is subject to HAMP contrary to the allegations of his complaint and the determination by the Special Referee that Weible is not subject to HAMP.

In *Nationstar Mortgage LLC v. Gibbs, et al.*, Unpublished Opinion No. 2022-UP-000486 (Ct.App. 2022) the Court of Appeals affirmed the grant of summary judgment to Nationstar Mortgage by the circuit court, holding "we find there were facts alleged that entitled Nationstar to relief, including service of the right to foreclosure interevntion, thus the circuit court did not err in declining to grant the motion to dismiss."

In *CitiMortgage v. Smith, et al.*, Memorandum Opinion No. 2014-MO-006 (2014) the Supreme Court affirmed *per curiam* the Master's dismissal of an answer and counterclaim filed after entry of default in a foreclosure action because the Master relied on letter from Court Administration and Respondent waived the default. This is similar to the case at bar. Petitioners suffered no prejudice as a result of the default. In fact they filed an answer and an amended answer. The amended answer abandoned the allegation that HAMP was applicable. Petitioners presented their testimony and records in support of their determination of the mortgage debt, so no prejudice was suffered.

In *Wells Fargo v. Hodges, et al.*, Unpublished Opinion No. 2022-UP-326 (Ct.App. 2022) the Court of Appeals affirmed the decision of the circuit court granting summary judgment to Wells Fargo Bank. Hodges made arguments as to error including foreclosure intervention, however Hodges failed to raise the issues before the lower court. In the case at bar, Slef and brunson have made no showing that HAMP applies to them. Therefore, the issue is not preserved.

South Carolina law has a history with recognizing owner financing and mortgage loans from sources other than a traditional commercial bank or lender. The advantages are lower costs and oftentimes better rates. Petitioner urges the court to consider allowing borrowers like the Petitioners to take advantage of a poor man's mortgage while suffering none of the disadvantages associated with lack of government oversight and control as is the case with government backed or insured mortgage loans. See *Lewis v Premium Investment*, 568 S.E.2d 361 (2002) stating in dicta that ... a poor man's mortgage... because the vendor, as with a mortgage, finances the purchaser... but the purchaser does not receive the benefit of remedial statutes protecting rights of mortgagors.

TRIAL TRANSCRIPT

Issues not raised at the hearing cannot be raised for the first time on appeal. At the beginning of the hearing the Special Referee recognized Plaintiff's counsel to summarize the issues before the court. Following Plaintiff's recitation, the Special Referee recognized Defendants' counsel to summarize or add any additional issues before the court. Counsel said there were no other issues. (ROA, p. 112, ll. 4-7) Defendants' Counsel admitted HAMP ended in 2016 and thus modification was not required (ROA, p123, ll. 23-24). At no time did Defendants offer evidence in support of their entitlement to mandatory modification or intervention. (ROA, pp. 112-125)

Defendant's counsel stipulated that the debt was at least $115,000.00. (ROA, p. 128, ll. 2-10) This further undermines any argument in Petitioner's brief that the debt due is now much less than that amount.

The Special Referee took testimony on the debt from the Plaintiff and from Defendant Russell Self. (ROA, pp. 129-190) Defendant Brandilyn Brunson indicated that she did not wish to testify. (ROA, p 188, ll. 24-25) Weible testified that he knew Self over fifty (50) years and had loaned Self and Brunson money over years for various purposes with mortgages securing those loans. (ROA, p. 130, l. 10 - p.131, l.3) The purposes included flipping houses and investment property, vehicle purchases and to establish business ventures. (ROA, p. 131, ll. 1-21) Weible testified that the loans were probably three or four hundred thousand in total over the years. (ROA, p. 131, ll. 22-23) Weible testified that he had previously brought foreclosure proceedings against Self (and Brunson) in 2014 for non-payment and that the loans were modified as a result of that suit. (ROA, p. 132, ll. 5-16) Weible went on to state that all but one of the loans were for business purposes or investment purposes and that the home was used as collateral and that Self did not have a job in 2015. (ROA, p. 135, l. 10 - p.138, l. 11) The one loan for residential purposes was for a house that burned down. (ROA, p. 147, l. 22 - p. 148, l.15) Weible testified that the debt due was $179,832.00 and that he had not received anything from Self or Brunson to dispute that amount. (ROA, p.144, ll. 12-22; p.146, ll. 1-12; p. 156, ll. 1-8) Further the debts had fully matured and were due in full. (ROA, p.157, ll.10-13)

On cross examination, Weible testified that a portion of the debt owed came from a $115,000.00 note over seven years at zero percent (0%) interest. (ROA, p. 158, ll. 9-13)

Self testified that he attempted to refinance the $115,000.00 loan with a commercial lender. (ROA, p. 165, ll. 18-25) He thus admitted that such amount was due and owing to Weible. Self stated Weible would not provide a payoff, however as testified to by Weible the

note did not bear any interest, so the payoff would be $115,000.00. (ROA, p. 165, ll. 18-25) Self admitted that he had poor credit and could not qualify for another lender. (ROA, p. 168, ll. 10-14) Self further admitted that he had prior counsel working on the loans and foreclosure suit, but he went on to state that all numbers by his prior counsel were fraudulent. (ROA, p. 170, l.12 - p. 171, l. 5) Finally Self admitted under cross examination that no payments were made on the $115,000.00 to Weible. (ROA, p. 172, ll.6-25) He further admitted he owed Weible, but did not agree with the amount. (ROA, p. 173, l. 8 - p. 174, l. 7) He could not say what amount was owed and admitted he did not have calculations. (ROA, p. 173, l. 8 - p. 174, l. 7) Self admitted he borrowed from Weible instead of a commercial lender and that he did not have credit for a commercial lender. (ROA, p. 177, ll. 16-25) Self admitted that he did not keep records as to the loans and payments made. (ROA, p. 180, l. 23 - p. 181, l. 9) Self testified under oath that he asked for the Court to come up with an amount that it thought was fair and that was owed. (ROA, p. 181, ll. 12-17) However, when the Special Referee did so, Self claims the amount determined was wrong and he has appealed and contested the amount determined, to include challenging the debt in the bankruptcy court.

Self admitted he was not making payments on the $115,000.00 loan and that Weible frustrated any refinance effort by Self and Brunson and (Weible) was 100% at fault in his opinion. (ROA, p. 184, l. 6 - p. 185, l. 12)

BANKRUPTCY TRANSCRIPT

Weible testified as to the amount of time he had known Self and Brunson and the loans he (Weible) had extended to Self and Brunson, which included a loan to Self to stop a foreclosure proceeding against him back in 2009. (ROA, p. 198, l. 14 - p. 199, l. 6) According to

Weible, Self could not go to a regular bank or lender to borrow money due to employment and income issues. (ROA, p. 199, ll.7-10) Weible again testified that he loaned Self between $370,000.00 and $380,000.00 over a period of many years since 2009. (ROA, p. 200, ll. 12-17) Weible explained his calculation and included how he handled Self's payments on the loans. (ROA, p. 200, l. 18 - p. 212, l. 1) By the time of this hearing, Self (through Brunson) had supplied his (her) various documentation on payments and credits which they believed were not properly credited against the balance calculated by Weible. (ROA, p. 404) Of course, this hearing in bankruptcy court in February 2022 is now over two years later after the hearing before the Special Referee on September 2019 during which time the Defendants made no effort to make any payment to the Plaintiff. Further they offered no work out plan or alternative payment arrangement whatsoever.

Weible went on to testify that his review of Self and Brunson's documentation revealed items from before 2014 and the settlement of the earlier 2014 foreclosure, thus trying to go behind the agreement that was reached between the parties and counsel at that time. (ROA, p. 209, l. 19 - p. 210, l. 12) Again making clear that Self does not accept any outcome or any determination of debt that is not a zero balance or negligible amount, despite his sworn testimony to the contrary.

Weible testified that all loans were fully matured and due and payable, therefore Self and Brunson argue they are entitled to modification of loans that are fully matured, past due, no recent payments made and again not subject to modification through HAMP or other voluntary program. (ROA, p. 201, ll. 11-19; p. 210, l. 17 - p. 211, l. 23)

Weible testified further that Self and Brunson wanted credit against their loan balance for services for carpet cleaning. (ROA, p. 209, l. 21 - p. 210, l. 3; p. 218, l.17 - p. 219, l. 6) There was never any agreement to reduce the balance on the loans for such services. He also testified that Self was not entitled to credit by way of a commission for sale of gold jewelry by Weible to a third party, or for interest earned on the redemption of a golf course purchased by Self at a tax sale using Weible's money. (ROA, p. 228, l. 9 -20; p. 2292, l. 22 - p.323, l. 6)

Self testified that he was not prepared at the foreclosure hearing to establish what he believed was the amount due on the mortgage loans to Weible. (ROA, p. 238, l. 20 - p. 239, l.17) He testified that some of the same documents in the form of canceled checks may have been submitted at the foreclosure hearing, but he could not specifically recall. (ROA, p. 239, l.18 - p. 240, l. 4) Self confirmed his prior testimony that he owes Weible money, just not all of it. (ROA, p. 242, ll. 10-15) Self was asked about the amount determined owed on the loans by the Special Referee and he (Self) answered he was not able to submit all of the evidence that he had today, meaning now at the bankruptcy hearing versus the date of the foreclosure hearing. (ROA, p. 242, l.20 - p.244, l. 15)

Brunson testified that she chose not to testify at the foreclosure hearing, but that she had all of the same information available at the time of the foreclosure hearing. (ROA, p. 294, l. 24 - p. 295, l. 8) Brunson admitted that there was no written agreement regarding credit against the mortgage indebtedness due to Weible from sales commissions on gold and silver (ROA, p. 297, l17-23), or the interest earned on the tax sale purchase and redemption of the golf course (ROA, p. 298, l. 2-5), the carpet cleaning services (ROA, p. 298, ll. 13-16), Brunson admits that she should ave kept better records as to the payments made and credits received for payments

against the loans. (ROA, p. 302, ll. 9-14) Brunson agreed that she (with Self) had borrowed over $370,000.00 from Weible over time. (ROA, p. 320, l. 25 - p. 323, l. 2) Brunson also admitted that she could repay the loans. (ROA, p. 303, l. 24 - p.304, l. 1)

Instead, Defendants argue that the Supreme Court's order on notice of 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, despite the fact that the have offered no evidence or offered any argument that they are legally entitled to relief by way of foreclosure loss mitigation or loan modification.

Self himself testified under oath at the March 2020 hearing before the Special Referee that he wanted the court to determine the proper amount of the debt that was owed to Weible. Clearly Self only wants a determination that there is little or no debt and he will not accept any decision of the court to the contrary, despite his sworn testimony.

IV. PETITIONERS ARE NOT ENTITLED TO RELIEF UNDER HAMP AND THEY HAVE ASSERTED NO VALID DEFENSE TO THE FORECLOSURE ACTION, THEREFORE ATTORNEYS FEES AND COSTS ARE PROPERLY RECOVERABLE

This argument is cased on the above analysis regarding inapplicability of HAMP to Petitioners. Attorney's fees have been properly assessed in this matter based on the language of the notes and mortgages and *Dedes v. Strickland*, 414 S.E.2d 134 (1992). *Dedes* held that the trial court should consider, among other factors, time and labor necessarily devoted to the case. This case has been prosecuted over an extended period of four (4) years, involving the circuit court, the bankruptcy court and the appeals court. Attorney's fees have been properly assessed

and should not be disturbed.

V. THERE IS NO BASIS TO DISMISS THE CASE OR CHANGE THE DETERMINATION OF PETITIONERS' DEBT BY THE SPECIAL REFEREE.

As Petitioner's have failed to show that they are entitled to relief under HAMP, and since the complaint in this action set forth an allegation that HAMP did not apply in accordance with the Supreme Court administrative orders, the appeal should be dismissed and the court should not grant relief in the form of recalculation of the debt owed under the loans to Weible.

VI. THE NOTICE OF APPEAL IS UNTIMELY AS THE SPECIAL REFEREE GAVE EMAIL NOTICE OF HIS DECISION TO DENY THE MOTION TO RECONSIDER MORE THAN 30 DAYS BEFORE BANKRUPTCY

A relevant procedural time line is as follows:

March 16, 2020	Foreclosure Order signed by Special Referee
March 17, 2020	Foreclosure Order filed electronically by Clerk of Court's office
March 17, 2020	Motion for Reconsideration under Rule 59, SCRCP filed electronically by Brunson's prior counsel
November 24, 2020	Consent Order for Substitution of Counsel filed electronically by Clerk of Court's office
June 30, 2021	Memorandum in Support emailed to Special Referee and Michael Jordan, Esq., by Paul Weissenstein, Esq.

July 10, 2021	Special Referee emails notice of his decision Denying Motion for Reconsideration to Michael Jordan, Esq., and Paul Weissenstein, Esq., and requests Michael Jordan, Esq., to prepare formal order as to same
August 3, 2021	Paul Weissenstein, Esq., acknowledges Special Referee has denied Motion for Reconsideration via email to Michael Jordan, Esq.
August 19, 2021	Special Referee advises that Order Denying Motion has been signed via email to Michael Jordan, Esq., and Paul Weissenstein, Esq.
August 19, 2021	Signed Order and Signed Notice of Sale are emailed to Clerk of Court's office for filing with copy to Paul Weissenstein, Esq.
August 20, 2021	Clerk of Court's office advises attorneys and Special Referee via email that Signed Order and Signed Notice of Sale will be filed electronically
August 20, 2021	Order Denying Motion to Reconsider electronically filed under incorrect case number 2018CP432004 instaed of 2005.
September 27, 2021	Brunson files bankruptcy
January 20, 2022	Self and Brunson file second Motion to Reconsider

On March 16, 2020, a Foreclosure Order was signed in the above matter by the Special Referee, and on March 17, 2020 it was filed electronically by Clerk of Court's office. Also on March 17, 2020, a Motion for Reconsideration under Rule 59, SCRCP was filed electronically by

Defendant Brunson's prior counsel. On November 24, 2020, a Consent Order for Substitution of Counsel was filed electronically in the Clerk of Court's office. On July 10, 2021, the Special Referee emailed notice of his decision denying the Motion for Reconsideration to counsel for both Plaintiff and Defendants. The Special Referee asks Plaintiff's counsel to prepare a written order as to same. On August 3, 2021, Defendants' counsel acknowledges that the Special Referee has denied the Motion for Reconsideration via email to Plaintiff's counsel. On August 19, 2021, the Special Referee advises that the written Order Denying Motion has been signed via email to counsel for Plaintiff and Defendants. On September 27, 2021, Defendant Brandilyn Brunson filed for bankruptcy protection. Rules 201 and 203, SCACR provide the right for a party to appeal a judgment from the Court of Common Pleas. The notice of appeal must be served within thirty (30) days after receipt of written notice of entry of the order. In this matter Brunson's counsel received an email with a copy of the Order Denying Motion to Reconsider. Email notice of entry of an Order by Court has been held to trigger the running of time for appeal. *Wells Fargo Bank, NA v. Fallon Properties South Carolina, LLC,* 776 S.E.2d 575 (Ct.App. 2015). *Lemmons v. Macedonia Water Works, Inc.,* (847 S.E.2d 471 (Ct.App. 2020). Thirty days from the date of the email to Defendant's counsel giving notice of the order ended on September 20, 2021. Brunson's bankruptcy case was not filed until September 27, 2022 and notice of this appeal was not served until April 27, 2022. Therefore, the automatic stay did not serve to protect Brunson's time limit to appeal which began before the bankruptcy was filed. It should also be noted that the Supreme Court's Order regarding Operation of the Trial Courts During the Coronavirus Emergency (2020-000447) allows for service upon counsel via email. Documents must be attached in PDF and service is complete upon transmission.

Accordingly, the notice of appeal is not timely and the appeal should be dismissed. As to the second successive Rule 59 Motion the same does not serve to extend the time to appeal. *Coward Hund Const. Co., Inc. v. Ball Corp.,* 518 S.E.2d 56 (Ct.App. 1999).

Conclusion.

For the foregoing reasons the orders of the Special Referee should be affirmed.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM SUMTER COUNTY
COURT OF COMMON PLEAS

THOMAS E. PLAYER, JR., SPECIAL REFEREE

CASE NO.: 2022-000601

John Weible, Respondent,

Russell Self and Brandy Brunson, Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that that this Final Brief complies with Rule 211(b), SCACR.

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