THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-in-Equity

Appellate Case No.: 2012-213632

HSBC Bank USA, National Association as,.....Respondent
Trustee for Wells Fargo Asset Securities
Corporation, Mortgage Pass-Through
Certificates Series 2006-AR18

v.

Kenneth C. Feagin,.....Appellant

INITIAL BRIEF OF APPELLANT

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QUESTIONS PRESENTED

The questions that are presented to this Court are three-fold:

(1) Whether the Lower Court erred in ruling that Respondent was entitled to an Order granting Summary Judgment on the defense of unclean hands, despite the evidence that the closing of the mortgage at issue was not supervised at every point by an attorney who was actually licensed to practice law in South Carolina;

(2) Whether the Lower Court erred in failing to exercise its discretion to deny the Respondent the right to seek a deficiency judgment against Appellant despite the fact that to allow such a judgment would create an inequitable result; and

(3) Whether the Lower Court erred in awarding an unreasonable amount of attorney fees.

STATEMENT OF THE CASE

This is an appeal from the Master-in-Equity's final Order denying the Appellant's Rule 59(e) Motion for Reconsideration, and affirming an earlier Order of the Master-in-Equity dated November 15, 2012, wherein the lower court: affirmed an earlier Order granting partial summary judgment on the Appellants defenses; granted Respondent the right to foreclose upon the underlying mortgage and note; granted the Respondent the right to seek a deficiency judgment against Appellant; and, awarded attorney's fees to Respondent. See Order of Aug. 11, 2012; See also Order of Nov. 15, 2012; Order Granting Summ. J., Mar. 1, 2012.

Respondent, HSBC Bank USA, National Association as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates Series 2006-AR18 (hereinafter "HSBC"), through the law firm of Rogers Townsend & Thomas, PC (hereinafter "Rogers Townsend") in Columbia, South Carolina, filed the original Complaint on March 29, 2010 to initiate the foreclosure.

Critically, in Paragraph 13 of the original Complaint HSBC stated: "Plaintiff's right to a personal or deficiency judgment pursuant to South Carolina Code §§ 29-3-650 and 29-3-660 is expressly waived." See Compl. at ¶ 13. Additionally, in the caption of this pleading, HSBC states "Deficiency Judgment Waived." Travis S. Greene (hereinafter "Greene"), Esquire, filed an Answer on May 14, 2010, on behalf of Appellant, Kenneth C. Feagin (hereinafter "Feagin"), asserting the affirmative defense of Unclean Hands. Answer ¶ 19-23.

On May 17, 2010, Rogers Townsend served notice of a foreclosure hearing scheduled for June 3, 2010 at 9:30 a.m. before the Honorable Gordon G. Cooper, Spartanburg County Master-in-Equity. See Def. Mem. Supp. Def. Mot. Recons. at Ex. 3. In the caption of the Certificate of

Service, HSBC states: "Deficiency Judgment Waived." Id. Rogers Townsend sent a letter on May 28, 2010, giving notice that the hearing had been cancelled. Id. at Ex. 4.

On November 24, 2010, Michael S. Cashman (hereinafter "Cashman"), Esquire, of the Greenville, South Carolina office of Womble Carlyle Sandridge and Rice, PLLC and Rogers Townsend filed a Motion for Substitution of Counsel. See Mot. Sub. Counsel Nov. 24, 2010. An Order for Substitution of Counsel signed by the Honorable J. Derham Cole was filed on December 6, 2010. See Order Dec. 6, 2010.

In a Form 4 order filed on November 5, 2010, the action (2010-CP-42-1689) was stricken from the docket pursuant to Rule 40(j), SCRCP, on the basis the "matter has been placed on hold, pending review by Lender." See 40(j) Order Nov. 5, 2010. Three (3) e-mails from Rogers Townsend indicate that Plaintiff canceled two (2) hearings because the file was contested. See Def. Mem. Supp. Def. Mot. Recons. at Ex. 8.

In a letter to Greene dated February 27, 2011, after evidencing his intent to restore the case, Cashman states, "Additionally, in light of your client's unclean hands affirmative defense, we intend to amend the complaint to delete our waiver of a deficiency judgment." Id. at Ex. 9. Cashman attached to this letter a red-lined copy of the proposed Amended Complaint. This red-lined copy deletes Paragraph 13 and deletes the phrase in the caption "Deficiency Judgment Waived." Id. Otherwise, the proposed Amended Complaint is the same as the original Complaint. Critically, no affirmative language was inserted to demand a deficiency judgment.

On March 16, 2011, Cashman filed a motion to restore the case to the docket and amend the Complaint "by deleting any waiver of a deficiency judgment". See Mot. to Restore Mar. 16, 2011. Cashman states in this Plaintiff's Motion to Restore Case to Docket and to Amend Complaint that "[t]his motion shall certify that the undersigned has communicated, orally and in

writing, with Travis S. Greene, Esq., counsel for Defendant Kenneth C. Feagin on March 1, 2011, and opposing counsel has consented to the above-captioned motions to restore this matter to the docket and to amend the plaintiff's complaint." Id. The motion was granted by way of the Order signed by the Honorable J. Mark Hayes, II on March 16, 2011 and filed that same day which states: "Plaintiff is granted leave to Amend its Complaint." See Order Granting Mot. Restore and Amend., Mar. 16, 2011. The Order does not mention deficiency. Id. In the Order, a new case number was assigned to the matter (2011-CP-42-1284). Id.

An Amended Complaint was filed on March 16, 2011. Like the proposed red-lined version, its content is the same as the original Complaint except that Paragraph 13 of the original Complaint was deleted and the phrase in the caption "Deficiency Judgment Waived" was deleted. There is no affirmative language that demands a deficiency judgment. An Answer was filed on March 31, 2011 in response to the Amended Complaint.

On May 18, 2011, Hamilton Osborne, Jr. (hereinafter "Osborne"), Esquire, of the Columbia, South Carolina office of Haynsworth Sinkler Boyd, P.A., filed a Motion for Summary Judgment with respect to Feagin's Second Defense (Unclean Hands). See Pl.'s Mot. Summ. J., May 18, 2011. Max T. Hyde, Jr. (hereinafter "Hyde"), Esquire, filed a Notice of Appearance on August 29, 2011, to join Greene as counsel for Feagin. The Honorable Gordon G. Cooper heard plaintiff's Motion for Partial Summary Judgment on February 14, 2012 at 2:30 p.m. An Order Granting Plaintiff's Motion for Summary Judgment was filed on March 1, 2012.

The final foreclosure hearing was held on Tuesday, July 3, 2012 at 2:30 p.m. before the Honorable Gordon G. Cooper. At this hearing, Feagin's Counsel pointed out that the Amended Complaint does not demand a deficiency. See Final Hr'g Tr. at 9:18-10:16, July 3, 2012. Accordingly, Feagin asked the Court to exercise its discretion and deny any right HSBC might

have to a deficiency. Id. The Court asked the parties to brief the issue of whether the court has discretion to deny a deficiency judgment where the complaint does not ask for one. Id. at 14:18-25.

Following the required briefing by counsel, the Court entered a Final Order on August 10, 2012, which was received by counsel for Feagin on August 15, 2012, wherein the earlier Order granting Partial Summary Judgment was affirmed, and the Respondent was also granted the right to seek a deficiency judgment against Feagin following the foreclosure sale of the property.

Feagin's counsel timely filed and served a Motion for Reconsideration on August 24, 2012, and a hearing was held on November 7, 2012. The lower Court issued its Order denying Feagin's Motion on November 15, 2012. Counsel for Feagin filed and served its Notice of Appeal on all parties and the lower court on December 12, 2012.

STATEMENT OF THE FACTS

Feagin obtained from an office of Carolina First Bank in Hendersonville, North Carolina, a loan in the principal amount of $1,365,000.00 in June of 2006. See Order Granting Mot. Summ. J., Mar. 1, 2012, page 1; See also Aff. Neill at ¶ 2. The loan was secured by a mortgage encumbering real property that was located in Spartanburg County, South Carolina, that Feagin owned and occupied as his principal residence. In fact, the land which secured the loan was purchased by Feagin in 1999. Id. at ¶ 5. The land consists of 59.91 acres, with part of that land being in Polk County, North Carolina, and part in Spartanburg County, South Carolina. Id. The loan at issue in the case *sub judice* was for the purpose of constructing the home that is located on the South Carolina portion of the land, and the loan was only secured by the land located in Spartanburg County, South Carolina and an easement that provided access to the property. Id. at ¶ 7.

Prior to the actual closing the bank took the liberty of preparing all of the loan documents, including the mortgage. Id. at ¶ 8. The closing of the loan and the accompanying mortgage, all occurred in Hendersonville, North Carolina, and were attended and supervised by D. Samuel Neill (hereinafter "Neill"), Esquire. Neill was at all times the only lawyer that Feagin interacted with as it pertained to the loan and accompanying mortgage. See Feagin Aff. at ¶ 5, 6. However, Mr. Neill was neither at the time of closing nor at any time prior or subsequent to the closing a licensed member of the South Carolina Bar licensed to engage in the practice of law in the state of South Carolina. See Neill Aff. at ¶ 1.[1]

It is uncontested that the closing of the loan physically occurred with only Feagin and Neill, a Non-South Carolina licensed attorney, being present. See Order Granting Mot. Summ. J.,

[1] In fact upon information and belief, Mr. Neill actually had his North Carolina License suspended following the events described herein for unrelated reasons.

Mar. 1, 2012, page 2 at ¶ 2. It is also uncontested that the only supervision that came from a South Carolina attorney throughout the various stages of the closing process of this loan and accompanying mortgage was from Thomas Phillips (hereinafter "Phillips"). Phillips by way of his own affidavit admits that his only involvement in the closing process was to examine the title to the land to be mortgaged; reviewed the mortgage; advised Neill of the proper execution of the mortgage; and, supervised the recording of the mortgage and the satisfaction of the prior mortgage on the property. See Phillips Aff. Critically, all other steps in the closing process, including the disbursement of funds associated with the mortgage, were handled by Neill alone, a lawyer who has never been licensed to practice law in the state of South Carolina. See Order Granting Summ J., Mar. 1, 2012, at page 4 ¶ 11; Neill Aff. ¶ 10. Therefore, if any material questions or concerns arose at the actual closing of the mortgage there would have been no one with a license to practice law in South Carolina who could have accurately addressed the same.

ARGUMENT

THE ORDER GRANTING SUMMARY JUDGEMENT ON THE DEFENSE OF UNCLEAN HANDS WAS IMPROPER WHERE EVIDENCE WAS PRESENTED THAT ALL PHASES OF THE CLOSING OF THE MORTGAGE AND UNDERLYING NOTE WERE NOT PROPERLY SUPERVISED BY A LICENSED SOUTH CAROLINA ATTORNEY.

The trial judge's granting of the Respondent's Motion for Partial Summary Judgment was improper where the evidence presented to the Court clearly showed that a licensed South Carolina lawyer did not supervise and/or participate in each individual phase of the closing of the mortgage and underlying note at issue in the case *sub judice*. Therefore, the lower Court committed reversible error in not finding that the evidence presented showed that as a matter of law Respondent acted with unclean hands by engaging in the unauthorized practice of law in a real estate transaction. Thus, Respondent should be barred from instituting any action for foreclosure on the same.

The doctrine of unclean hands precludes a Plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 74 (Ct. App. 2010) (quoting Fist Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 568 (Ct. App. 1998)). When a Plaintiff, who is a lender, engages in conduct that constitutes the unauthorized practice of law in a real estate transaction, such a Plaintiff is found to have unclean hands. See generally Coffey, 389 S.C. at 76. Further, where a lender has unclean hands, their foreclosure action should be barred as well. Id. Such a finding is

rooted in the notion ". . . that no person be permitted to acquire a right of action from their own unlawful act and that one who participates in an unlawful act cannot recover damages for the consequence of that act." Id.

The South Carolina Supreme Court has the duty to regulate the practice of law in this state and, accordingly, has the authority to define what constitutes the unauthorized practice of law. Hambrick v. GMAC Mortg. Corp., 370 SC 118, 120 (Ct. App. 2006). South Carolina Code § 40-5-10 expressly states: "The inherent power of the Supreme Court with respect to regulating the practice of law, determining the qualifications for admission to the bar and disciplining, suspending and disbarring attorneys is hereby recognized and declared." S.C. Code § 40-5-10 (2001). The purpose behind laws prohibiting the unauthorized practice of law is to protect the public from incompetent, unethical, or irresponsible representation. See Hambrick, 370 SC at 120 (quoting Renaissance Enters. Inc. v. Summit Teleservices, Inc., 334 SC 649, 652 (1999)).

Additionally, the South Carolina Supreme Court has held that an attorney must supervise all real estate and mortgage loan closings. See Doe v. McMaster, 355 SC 306 (2003); State v. Buyers Serv. Co., 292 SC 426 (1987). The Buyers Court, stated in pertinent part: "performing a title search, preparing title and loan documents, and closing a loan without the supervision of an attorney constitutes the unauthorized practice of law." Buyers Serv.Co., 292 SC at 430-34.

There are four stages of a real estate closing which involve the practice of law: (1) the title search; (2) the loan documents; (3) the closing itself; and, (4) the recordation of documents. Doe Law Firm v. Richardson, 371 SC 14, 17 (2006).[2] As to the loan documents themselves, "[A] lender may prepare legal documents for use in financing or refinancing a real property loan so long as an independent attorney reviews them and makes any correction necessary to ensure their compliance with the law." Id (internal quotations omitted). Further it has clearly been held

[2] The Supreme Court made sure to include a description of what encompasses each stage.

that, "[R]eal estate closings and mortgage loan closings should be conducted only under an attorney's supervision." Id.

Implicit in the Supreme Court's holding in Richardson *supra.*, as well as other cases involving real estate transactions, is that any step of a closing that must be accomplished by an attorney should be completed by an attorney who is licensed in the state of South Carolina. This implication is clear from the Court's discussion of the relevant facts that surround Richardson. Namely, the Richardson Court noted that the lender was an out of state lender offering loans and mortgages to people in South Carolina, and the law firm in that case was a South Carolina law firm which employed South Carolina licensed attorneys. Id. Critically the Richardson Court says of these South Carolina licensed attorneys, that their involvement at the closing stage is to be present at the closing, to explain the loan documents to the borrower and to supervise the execution of the documents, including the HUD statements, as required by state law. Id. at 16.

a. The loan documents in the instant case at bar were not properly prepared and/or supervised by a South Carolina attorney and a South Carolina licensed attorney did not properly close the loan.

The fact that the loan documents in question were prepared solely by the bank and its agents is an undisputed fact. See Order Granting Summ. J. at page 4 ¶ 8. Respondent by way of all of its pleadings, motions, memoranda, and supporting affidavits, has clearly established that the loan documents were drafted and prepared directly by the bank, without the input or supervision of a licensed South Carolina attorney. In its Order granting Partial Summary Judgment for the Respondent, the Lower Court stated that the loan documents were properly prepared and/or supervised because those documents were reviewed by Neill, who was not licensed in South Carolina, but was nonetheless an attorney.[3] Id. at pages 8-9. Further, the Lower Court implied that because Mr. Phillips, who is a licensed South Carolina attorney, had

[3] This interpretation would seem to be at odds with the implication in Richardson.

been involved in the transaction, even to the slightest degree, then the loan was properly closed. Id. In making such a ruling the Lower Court has run afoul of the implication that a South Carolina lawyer must be the one to supervise the closing in all aspects. Based on the deficiencies that exist from the failure to properly close the loan, the Respondent should have been estopped by the doctrine of unclean hands from foreclosing upon the property.

Neill's own affidavit supports the Appellant's position when he states that he "personally conducted the closing and supervised the execution of the loan documents." See Neill Aff. at ¶ 2. Taking that statement in combination with the affidavits of Phillips and Feagin, it is clear that there was no South Carolina lawyer who was actually physically present at the closing of the loan, and supervised the execution of the loan documents at issue, even though this was a loan that was issued directly pertaining to property that is located in South Carolina. See generally Phillips Aff.; Feagin Aff.

While the trial court has stated that Phillip's involvement would moot any issue of the unauthorized practice of law the undisputed facts indicate that Phillip's involvement in this transaction was minimal at best, and he was by all accounts not present for each one of the stages of the transaction, to insure their compliance with South Carolina law. See generally Phillips Aff. It is undisputed that Phillips claims to have only recorded the documents and to have done the title search. However, there is no indication or assertion by Respondent, Neill, or Phillips himself that he ever took any action to supervise the drafting of the documents at issue, or to supervise the actual closing and execution of said documents. As such, Mr. Phillips did not participate in each of the four stages of the transaction as laid out in Richardson, *supra*. Thus, there was no involvement from a South Carolina licensed attorney during several of the critical stages of the instant transaction, which under the law require legal supervision.

In reaching its conclusion that the documents were properly prepared, and that the closing was properly conducted, the Lower Court erroneously overlooked the underlying policy of each of the South Carolina Supreme Court's decisions on these very issues. Each case that has been decided by the South Carolina Appellate Courts regarding the unauthorized practice of law in real estate/mortgage closing matter contains an underlying policy rationale that there is a need for an attorney who is licensed and subject to discipline for misconduct in South Carolina to be involved in certain aspects of those transactions. Nowhere is this policy implication stronger than in the Richardson decision, *supra*. Like the case *sub judice*, the Richardson Court was examining what supervision must be given in real estate transactions that involved out of state lenders who were engaging in real estate transactions within South Carolina relating to property located within the borders of South Carolina. The Richardson Court clearly spelled out that the law firm at issue there was a South Carolina law firm, which employed South Carolina attorneys. This point cannot be understated.

It is axiomatic that the supervision envisioned in Richardson, as well as all of the other South Carolina decisions on this topic, come from a South Carolina licensed attorney, rather than simply any attorney licensed anywhere. Such a policy exists because the South Carolina Supreme Court has sought to protect the general public of the state in matters relating to real estate transactions, as declared by the Court in Hambrick, *supra*. Clearly, if the supervising attorney was not impliedly required to be licensed in South Carolina then the South Carolina Supreme Court would have little to no way to regulate the conduct of that attorney. If the attorney performing the closing is not subject to discipline by the Supreme Court of South Carolina then the general public of South Carolina cannot be adequately protected.

Therefore, the Master-in-Equity was incorrect when it stated in its Order granting partial summary judgment to HSBC that, "[T]he Courts of South Carolina do not have jurisdiction to regulate the practice of law in other states, and a refusal by this court to enforce the terms of the mortgage securing the Loan would conflict with the doctrine of *lex locus contractus*, which permits a contract to be enforced in this state if it is enforceable under the law of the state where the contract was executed." See Order Granting Summ. J. at page 9. Clearly, based on the holding in Richardson, *supra.*, the Courts of South Carolina have the jurisdiction to regulate the practice of law in matters that concern real estate transactions that relate to land within the borders of this state, and the South Carolina Supreme Court has expressly done so as it pertains to out of state lenders and loans within the state. E.g. Richardson, *supra.*

It is critical that this tribunal reverse the Lower Court's erroneous finding that the conduct of the Respondent, as it relates to the closing of the note and mortgage in dispute in the present case, rises to the level of unclean hands as the same instruments were not properly closed under the supervision of a South Carolina licensed attorney.

b. The Lower Court erred in its interpretation and application of the holding in Wachovia Bank, N.A. v. Coffey, which would bar the Respondents foreclosure action based on the doctrine of unclean hands.

In its Order granting partial Summary Judgment to the Plaintiffs, this Court stated that Feagin's defense of unclean hands should fail because South Carolina law does not allow it to proceed based on the opinion in Matrix v. Fin Servs. Corp. v. Frazer, 393 SC 134 (2011). See Order Granting Summ. J. at page 10. However, such a holding by the Lower Court was in error because the Matrix opinion, *supra.*, does not expressly subsume the South Carolina Court of Appeals' holding in Wachovia Bank, N.A. v. Coffey, 389 S.C. 68 (Ct. App. 2010).[4]

[4] Importantly, the South Carolina Supreme Court has heard oral arguments in Coffey, but has not yet issued an opinion to date on this very important issue facing foreclosure litigation.

Specifically, had the South Carolina Supreme Court intended for Matrix to supplement and/or subsume Coffey, then surely the Court would have stated expressly such in their opinion, and the Court would have not taken the time to grant cert. in Coffey.

Therefore, the holding in Coffey[5], is still valid and applicable law as it relates to the case at bar. Importantly, should this Court embrace the holding of Coffey, and apply it to the actions of the Respondent, this tribunal would be embracing the most equitable of solutions in light of all the facts presented. Based on Coffey's lack of restrictive language as to the application of its holding the Lower Court should have found that the Respondent's foreclosure action was barred by its conduct of coming before the Lower Court with unclean hands.

THE LOWER COURT ERRED IN FAILING TO EXERCISE ITS DISCRETION TO DENY THE RESPONDENT THE RIGHT TO SEEK A DEFICIENCY JUDGMENT AGAINST APPELLANT.

The Lower Court committed reversible error when it failed to exercise its discretion to deny the Respondent the right to seek a deficiency Judgment against the Appellant despite the facts and equities presented.

As to deficiency judgments South Carolina Code § 29-3-660 clearly states:

> "In actions to foreclose mortgages the court ***may*** adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that ***may remain unsatisfied after a sale of the mortgaged premises*** in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases."

[5] That where a lender has acted in such a way that it constitutes the unauthorized practice of law, then such a lender has come to the Court with unclean hands, and they should be barred from recovering on an action for foreclosure.

S.C. Code § 29-3-660 (1976) (emphasis added).

Further, the South Carolina Supreme Court has stated, "[T]he rendition of a personal judgment in mortgage foreclosure proceedings is thus discretionary with the court." *See* Perpetual Bldg. and Loan Ass'n of Anderson v. Braun, 270 S.C. 338, 343 (1978) (citing Berry v. Caldwell et al., 121 S.C. 418 (1922)). In reaching its ultimate holding, that the trial judge did not abuse his discretion in entering a deficiency, the Braun court indicated that the United States Supreme Court had noted that a lower court's decision to render a personal decree for a deficiency under a general prayer for relief in a bill of equity was within the judge's discretion. *See* Id. at 341 (citing Shepherd v. Pepper, 133 U.S. 626 (1890)). Additionally, the Braun court goes on to quote South Carolina Code § 29-3-660 in pertinent part: "In actions to foreclose mortgages the court ***may*** adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises. . ." Id. at 343 (emphasis added) (quoting S.C. Code § 29-3-660 (1976)). Critically, in Braun, the "sole matter for review [was] the propriety of granting a deficiency judgment when it was not specifically demanded in the foreclosure complaint." Id. at 339.

In expanding upon the principles espoused in Braun, this Court has previously held that discretion to cut off the right to a deficiency in a foreclosure action exists unless: "(1) the complaint in the foreclosure action asks for personal judgment, (2) the amount of the debt is fixed in the foreclosure decree, and (3) the sale is insufficient to satisfy the entire debt." See generally Bartles v. Livingston, 282 S.C. 448, 461 (Ct. App. 1984).

In the present litigation the silence of the Amended Complaint as to the seeking of a deficiency, vested the Lower Court with the discretion to determine whether or not the equitites would best be served by waiving the deficiency. Further, because Respondent did not originally

seek a deficiency and only wanted to assert such at a later date, as a punishment for Feagin's assertion of the affirmative defense of Unclean Hands, equity should require that this Court remand the instant case so that the Lower Court can issue an Order addressing such inequitable behavior on the part of the Respondent and deny Respondent the ability to seek a deficiency against the Appellant.

Such a determination is warranted in a situation such as the case *sub judice* based on the fact that the Respondent has admitted that it is only seeking a deficiency judgment under a general prayer for relief. See Pl.'s Mem. Opp'n. Def. Mot. Strike Deficiency, July 13, 2012 at page 4. In fact, the Amended Complaint, which Respondent has craved reference throughout the course of the instant litigation, is devoid of any mention of the word "deficiency" within the body of the pleading. As such, the three prong test of Bartles cannot restrict the Lower Court from exercising its discretion in determining whether a deficiency judgment should be entered. Additionally, the Lower Court clearly should have found that discretion to deny the deficiency judgment was available pursuant to the holdings of the South Carolina Supreme Court in Braun, *supra*, and the United States Supreme Court in Shepherd, *supra*, as well as the plain reading of South Carolina Code § 29-3-660.

A seminal distinction should have been drawn by the Lower Court between the underlying litigation and the South Carolina Supreme Court's holding in Braun, *supra.* Here, the Respondent originally waived any deficiency against Feagin but now seeks the same as a form of punishment against Feagin simply because he exercised his right to raise an affirmative defense.[6] In Braun, however, the plaintiff never expressly waived a demand for a deficiency and never sought to enter a deficiency judgment as a form of punishment. The Lower Court, then, was not

[6] Based on the express language of Respondent's Counsel it would appear that had Feagin not raised any affirmative defenses, but simply acquiesced to the Respondent's foreclosure action then a deficiency would not have been sought.

obligated to exercise its discretion in favor of granting Respondent a deficiency judgment. Instead, the Lower Court should have found as a matter of law that it could have exercised its discretion to deny a deficiency judgment as the equities presented should require.

Inherent in each of the cases that are applicable to this issue is the underlying concept that in certain circumstances a trial court has the discretion to grant a deficiency judgment against a defendant in a foreclosure action. Necessarily, if a court has the discretion to determine whether a deficiency judgment should be granted, then it reasonably follows that a court has the discretion to determine whether a deficiency judgment should be denied. As such, the Lower Court erred in finding that it did not have the discretion to deny the relief that Respondent sought in the form of the deficiency.

If this Court reverses the Lower Court and precludes the entry of a deficiency judgment, this Court would embrace the equitable principle that a litigant should not be punished for raising an affirmative defense available under the law. Allowing a deficiency in light of Respondent's actions in the present case would establish a dangerous precedent. Foreclosure plaintiffs would be encouraged to mobilize the deficiency judgment not as a mechanism to recoup potential losses but as a weapon to punish and deter Defendants from raising defenses afforded to them under the law.

Thus, the case law is clear that where equitable a Court should exercise its discretion to deny the entry of a deficiency judgment against a defendant, where the operative pleading is silent on the matter. Therefore, the Lower Court erred in its findings and should have determined that under the law it had the discretion to deny the Respondents the right to seek a deficiency judgment against the Appellant where the complaint was silent on the issue, and where the equities presented would require the same.

THE LOWER COURT ERRED IN AWARDING RESPONDENT AN UNREASONABLE AMOUNT OF ATTORNEY FEES.

The Lower Court committed reversible error in its Final Order of Aug. 12, 2012, when it awarded Respondent attorney fees in an amount that rose to an unreasonable level. It has been traditionally held, "that attorney fees are not recoverable unless authorized by contract or statute." See Global Prot. Corp. v. Halbersberg, 332 S.C. 149, 160 (Ct. App. 1998) (quoting Hegler v. Gulf Ins. Co., 270 S.C. 548 (1978)). Additionally, in examining the reasonableness of attorney fees the Court should consider, "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." Id.

In its Order of August 10, 2012, the Lower Court summarily stated that it was granting an award to the Respondent of its attorney fees, without ever delving into whether or not such fees were reasonable in the instant case, or if each of the factors espoused under Hegler, *supra.*, were met. See Order Aug. 10, 2012 at page 8 ¶ 18. To summarily accept the attorney fees as offered by the Respondent, without any examination was reversible error by the Lower Court.

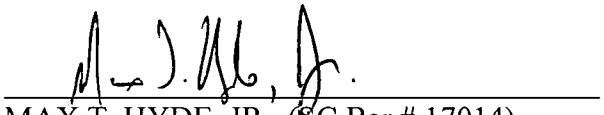
Respondent's Counsel has submitted a petition for fees, which are in excess of forty thousand dollars ($40,000.00). Such an amount is clearly outside of the bounds of reason for a case of this nature. In the Lower Court's Order denying Appellant's Motion for Reconsideration the Court merely stated that, "the Court recognizes the number of the pre-trial motions made in this case, as well as the complexity of the issues involved and the amount at stake in this controversy." See Order Denying Def. Mot. Recons. Nov. 15, 2012, page 3.

While the Court made some small basis for its award the Appellant would assert that the Lower Court still did not adequately take the time to examine the Respondent's petition for fees in light of all the circumstances and facts surrounding the instant litigation. Furthermore, Appellant would assert that the customary fees that are earned in a similar matter through the trial phase are less than the amounts submitted by the Respondent. Therefore, the cursory Orders awarding attorney fees to Respondent should be overturned and the instant action remanded for a the Lower Court's renewed consideration on the issue of attorney fees.

CONCLUSION

For the foregoing reasons, the Appellant would respectfully submit that this Court should reverse the judgment of the Master-in-Equity for Spartanburg County in the instant litigation, and should Order a new trial in light of the fact that a South Carolina lawyer did not supervise every phase of the closing of the mortgage and underlying note at issue. Further, this Court should remand the instant case for a new trial in light of the Master-in-Equity's error in granting the Respondent the right to a deficiency judgment against the Appellant. Finally, this Court should remand the instant case for a new trial in light of the Master-in-Equity's error in awarding Respondent an unreasonable amount of attorney fees.

RESPECTFULLY SUBMITTED,



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June 10, 2013
Spartanburg, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-in-Equity

Appellate Case No.: 2012-213632

HSBC Bank USA, National Association as,.....Respondent
Trustee for Wells Fargo Asset Securities
Corporation, Mortgage Pass-Through
Certificates Series 2006-AR18

v.

Kenneth C. Feagin,.....Appellant

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

1. Order of November 15, 2012;
2. Order of August 10, 2012;
3. Order of March 1, 2012;
4. Order of December 10, 2010;
5. Complaint;
6. Answer;
7. Amended Complaint;
8. Amended Answer;
9. Plaintiff's Motion for Substitution of Counsel;
10. Plaintiff's Motion to Restore Case to Docket and to Amend Complaint;
11. Plaintiff's Motion for Summary Judgment;
12. Defendant's Motion for and Memorandum in Support of Reconsideration;
12. Affidavit of Samuel Neill;
13. Affidavit of Thomas Phillips;
14. Affidavit of Kenneth Feagin;

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15. Memorandum in Support of Plaintiff's Motion for Summary Judgment;
16. Memorandum in Opposition to Plaintiff's Motion for Summary Judgment;
17. Memorandum in Support of Defendant's Motion to Preclude Entry of a Deficiency;
18. Transcript of Proceedings of February 14, 2012 pp. 2-16;
19. Transcript of Proceedings of July 3, 2012 pp. 9-15;
20. Transcript of Proceedings of November 7, 2012 pp. 4-13;
21. Plaintiff's Petition for Attorney Fees.

I certify that this designation contains no matter which is irrelevant to this appeal.

June 10, 2013

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master In Equity

Appellate Case No.: 2012-213632

HSBC Bank USA, National Association as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates Series 2006-AR18, ...Respondent

v.

Kenneth C. Feagin .....Appellant

PROOF OF SERVICE

I certify that I have served the Initial Brief of the Appellant and the Designation of Matter of Kenneth C. Feagin on HSBC Bank USA, National Association as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates Series 2006-AR18, by depositing a copy of it in the United States Mail, postage prepaid, on June 10, 2013, addressed to its attorneys of record:

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