THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Shannon M. Phillips, Master-in-Equity

Appellate Case No. 2022-000393

U.S. Bank Trust, N.A. as Trustee for LSF10 Master Participation Trust,……...…….Respondent,

v.

Austin A. Lowery a/k/a Austin Lowery a/k/a Austin Allen Lowery a/k/a Allen Lowery, individually, and as Heir or Devisee of the Estate of Lisa D. Lowery a/k/a Lisa Marie Davis Lowery, Deceased; South Carolina Department of Revenue; The United States of America acting by and through its agency, Department of the Treasury - Internal Revenue Service; and Elizabeth A. Lowery,.……Defendants,

Of whom Austin A. Lowery a/k/a Austin Lowery a/k/a Austin Allen Lowery a/k/a Allen Lowery, individually, and as Heir or Devisee of the Estate of Lisa D. Lowery a/k/a Lisa Marie Davis Lowery, Deceased, is the…….....Appellant.

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

COURT RULES

OTHER SOURCES

STATEMENT OF ISSUES

I. Did the lower court err reversibly in granting summary judgment on liability to Respondent?

II. Did the lower court err reversibly in prospectively permitting Respondent to use affidavits rather than live testimony at trial?

ARGUMENT

The Respondent, U.S. Bank Trust, N.A. as Trustee for LSF10 Master Participation Trust (hereinafter "U.S. Bank"), argues that the version of the factual record it offers, including inferences in U.S. Bank's favor it asks this court to draw, is the only way the record can be seen. U.S. Bank is wrong about that, and Appellant, Austin A. Lowery a/k/a Austin Lowery a/k/a Austin Allen Lowery a/k/a Allen Lowery, individually and as heir or devisee of the Estate of Lisa D. Lowery (hereinafter "Lowery"), is entitled to have the record seen in the light most favorable to him. Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008). U.S. Bank is also wrong on some key matters of law, wrong in areas where the lower court erred in assessing what the law is. Summary judgment for U.S. Bank could never have been proper on this record.

I. U.S. Bank is wrong on the law about whether an order striking an action under Rule 40(j) is a dismissal.

U.S. Bank contends that because the last order in the 2008 action does not use the word *dismissed* and instead states that the action was "stricken from the active roster for failure to prosecute, pursuant to Rule 40(j)," that order was not a dismissal. (Initial Brief of Respondent pp. 15-17; R. p. 286.). Existing case law is against U.S. Bank's position. This court has previously explained that "striking a case under Rule 40(j) is the equivalent of dismissing the case" and that "the procedural posture" of a case that has been stricken under Rule 40(j), SCRCP, is "dismissed." Personal Care, Inc. v. Theos, 825 S.E.2d 281, 285 (S.C. App. 2019) (internal quotation marks omitted; citing Goodwin v. Landquest Development, LLC, 414 S.C. 623, 630-32, 779 S.E.2d 826, 830-31 (Ct. App. 2015)).

This court has explored in some depth whether an order that strikes a case from the active docket per Rule 40(j) is a dismissal, and this court has concluded that it is. Goodwin,

414 S.C. at 630-32. "[T]he term 'stricken' . . . equates to 'dismissed' under Rule 40(j)." Id. at 633. The Goodwin opinion sets out the following analysis of whether an order under Rule 40(j) is a dismissal:

> [T]he requirement of complying with the statute of limitations after a case is stricken pursuant to Rule 40(j) depends on the event of "striking" being considered a dismissal. While our rules do not clearly provide that striking a case pursuant to Rule 40(j) is a dismissal, there is a basis in our law for considering a case stricken pursuant to the rule as the equivalent of dismissed. In the notes to the 1994 amendments to the South Carolina Rules of Civil Procedure, Rule 40(j) is described as "substantially revis[ing] the procedure for *dismissing* a case previously found in Rule 40(c)(3)." Rule 40, SCRCP Notes, Notes to 1994 Amendments (emphasis added). The notes go on to state, "Rule 40(j) now requires all adverse parties to consent to the dismissal in writing, but, the consent also operates to toll the statute of limitations for one year after the case is stricken. . . . Any remaining portion of the statute of limitations begins to run one year after the case was stricken unless the case has previously been restored. . . ." Id.; see also Maxwell, 356 S.C. at 621, 591 S.E.2d at 28 (relying on the notes in interpreting Rule 40(j)).
>
> Moreover, the tolling period would not be necessary if striking the case pursuant to Rule 40(j) were not the equivalent of a dismissal. See Maxwell, 356 S.C. at 620, 591 S.E.2d at 27 ("In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes."); State v. Sweat, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous."); Nucor Steel, a Div. of Nucor Corp. v. S.C. Pub. Serv. Comm'n, 310 S.C. 539, 545, 426 S.E.2d 319, 323 (1992) ("[W]here possible, all provisions of a statute must be given full force and effect.").
>
> There is also an historical basis for considering a case stricken pursuant to Rule 40(j) as the equivalent of dismissed. We adopted our Rules of Civil Procedure in 1985. See Rule 86(a), SCRCP ("These rules shall take effect on July 1, 1985."). Before then, the circuit court had the power to dismiss an action without prejudice if it was called for trial and the parties were not ready to proceed. See Small v. Mungo, 254 S.C. 438, 441, 443, 175 S.E.2d 802, 803, 804 (1970) (holding the inability of counsel "to

contact plaintiff and his witnesses and be ready for trial" and "the failure of plaintiff and his counsel to appear when the case was called for trial constituted a failure to proceed with the cause . . . and a ground for dismissal of the action"). When the supreme court decided Small, former Circuit Court Rule 81 was in effect. The rule provided, "When a case is reached on the Common Pleas trial roster and is called for trial, . . . if counsel are not ready to go forward with the case it shall be placed . . . at the foot of the Calendar." S.C. Code Ann. vol. 22, Circuit Court Rule 81 (Supp. 1984) (repealed 1985). In 1985, former Rule 40(c)(3), SCRCP, took effect. Similar to the procedure described in Small, Rule 40(c)(3) applied only if the parties were not prepared to proceed when the case was called for trial. However, the rule allowed the circuit court to "strike" the action. The rule provided:

> When an action is reached on the trial roster and is called for trial, it shall not be continued by consent, and if counsel are not ready to go forward the court shall strike the action from the calendar (file book) with leave to restore, unless continuance is granted for good cause shown.

Rule 40(c)(3), SCRCP (West 1994) (repealed 1995).

The rule did not use the word "dismissed," but tracking the language of former calendar "(file book) and a new case number assigned." Rule 40(c)(3); see Rule 40(c)(3), Notes ("This Rule 40 is substantially a compendium of present Circuit Court Rules. . . ."). Our law treated the striking of a case pursuant to Rule 40(c)(3) as the equivalent of a dismissal, and our courts required the plaintiff to comply with the statute of limitations upon restoring the case. See Graham v. Dorchester Cnty. Sch. Dist., 339 S.C. 121, 122, 125 n. 1, 528 S.E.2d 80, 81, 82 n. 1 (Ct. App. 2000) (stating in a case "struck . . . from the trial roster . . . pursuant to former Rule 40(c)(3), SCRCP" that "the statute of limitations clearly expired" before the motion to restore was filed). But see Robinson v. J.F. Cleckley & Co., 751 F.Supp. 100, 105 (D.S.C. 1990) (stating for purposes of calculating timely removal pursuant to 28 U.S.C. § 1446(b) (2012), "an action which has been removed from the docket pursuant to [Rule] 40(c)(3) is pending while it is off of the docket" and is not "commenced when it is restored to the calendar").

Goodwin, 414 S.C. at 630-32 (footnote omitted, emphasis in original).

This court's reasoning in Goodwin is well grounded. Id. Consistently with Goodwin, id., the Supreme Court has repeatedly referred to a case being stricken under Rule 40(j) as a "dismissal" under Rule 40(j), SCRCP. In re Norton, 433 S.C. 115, 118, 857 S.E.2d 1, 2 (2021); In re Stockholm, 415 S.C. 645, 648, 785 S.E.2d 361, 362, 363 (2016); In re Moody, 410 S.C. 334, 339, 764 S.E.2d 519, 522 (2014); In re Gorski, 635 S.E.2d 95, 96 (S.C. 2006); Maxwell v. Genez, 356 S.C. 617, 621, 591 S.E.2d 26, 28 (2003); In re Weinberg, 355 S.C. 649, 651, 587 S.E.2d 101 (2003); Olmstead v. Shakespeare, 354 S.C. 421, 422, 581 S.E.2d 483 (2003).

As "the term 'stricken' . . . equates to 'dismissed' under Rule 40(j)[,]" Goodwin, 414 S.C. at 633, and the court struck the 2008 action without the parties' consent, that was a kind of dismissal that is not provided for under the South Carolina Rules of Civil Procedure, including one not provided for in Rule 41, SCRCP. (R. pp. 286-87, 296, 302.)

Further, that order expressly stated that its basis was Household Finance Corporation II (hereinafter "Household")'s "failure to prosecute[.]" (R. p. 286.) Rule 41(b) could not be plainer that a dismissal "[f]or failure of the plaintiff to prosecute[,]" as well as any "dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for failure to join a party under Rule 19, operates as an adjudication upon the merits." Rule 41(b), SCRCP.

U.S. Bank itself observes that Household is its "predecessor-in-title and assignor" and that U.S. Bank is "successor by assignment" to Household. (Initial Brief of Respondent p. 15 n. 13, p. 16 n. 14.) U.S. Bank is the privy of Household, the party "so identified in interest with [Household] that [U.S. Bank] represents the same legal right." Roberts v. Recovery Bureau, Inc., 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994). U.S. Bank certainly asserts no interest in this matter other than what it acquired from Household. (R. pp. 35-46,

55-65, 84-90, 278-85.) U.S. Bank sues on the same default of the same note as Household sued Lowery in 2008. (R. pp. 35-46, 55-65, 84-90, 278-85.)

"General rules governing the conclusiveness of judgments and decrees ordinarily apply" to mortgage foreclosures. 59A C.J.S. Mortgages § 1051 (2009). Res judicata applies to mortgage foreclosure cases. Id. The Supreme Court has applied res judicata to a mortgage foreclosure claim. Columbia Natl. Bank of Columbia v. Arthur, 151 S.E. 274, 275, 276 (S.C. 1930). "In order for res judicata to apply, the parties—or their privies—and subject matter must be identical, and the prior suit adjudicated the issue." Equivest Fin., LLC v. Ravenel, 422 S.C. 499, 507, 812 S.E.2d 438, 442 (Ct. App. 2018). Here, all of that is present.

If an order that strikes an action under Rule 40(j) without the parties' consent does *not* constitute a dismissal, the words of Rule 41(b) and the requirements of Rule 40(j) effectively mean nothing. This court has already rejected that notion. Goodwin, 414 S.C. at 630-32, 633.

On this record, there is at least a genuine issue of material fact to the effect that res judicata bars the foreclosure claim.

II. The attorney preference violation and the unauthorized practice of law, though linked in the facts of this case, are not the same thing. Unconscionable terms and unconscionable conduct are also not the same thing.

U.S. Bank claims Lowery "asserts that the violation of the attorney preference statute is unconscionable conduct." (Initial Brief of Respondent p. 11.) Again, U.S. Bank makes the same straw man argument of which it convinced the lower court. (R. p. 7); see State v. Smith, 298 P.3d 1138 (Kan. App. 2013) ("straw man argument is where the arguer wishes to respond to an argument of his or her choosing and not one that is actually presented"). This has never been Lowery's argument.

The South Carolina General Assembly has provided that S.C. Code Ann. § 37-10-105(C) applies where 1) there has been a violation of the attorney preference statute and 2) the "agreement or transaction is unconscionable pursuant to Section 37-5-108 at the time it was made, or was induced by unconscionable conduct[.]" S.C. Code Ann. § 37-10-105(C) (emphasis added).

While the violation of the attorney preference statute and the unconscionable conduct here are certainly both part of the same factual background, they are different things. The attorney preference statute violation occurred when Household closed the loan without having "ascertain[ed] prior to closing the preference of the borrower as to the legal counsel that is employed to represent the debtor in all matters of the transaction relating to the closing of the transaction[.]" S.C. Code Ann. § 37-10-102(a). That was not the unconscionable conduct.

The record contains much more than a scintilla of evidence of unconscionable conduct: hiding the 53-acre vs. five-acre property description discrepancy, the false promise to refinance or modify the loan, the discrepancy between the loan documents and the deal as Household said it would be[1], Household closing the mortgage loan through the unauthorized practice of law, and depriving Lowery of his right to be represented by a lawyer, who would likely have helped him head these things off at the pass. (R. pp. 310-13.)

And what is at issue here is whether the *conduct* was unconscionable, not the *terms* of the mortgage loan. S.C. Code Ann. § 37-10-105(C). U.S Bank has a strong position that the *terms* of the transaction, in the abstract, were not unconscionable, as there is nothing

[1] U.S. Bank seems to argue that loan terms that promised a small interest reduction after three years of payments excuse its predecessor's misrepresentations that Household would refinance or modify the loan to a much lower rate if payments were made for one year. (R. pp. 311-12, 343.) U.S. Bank has only underscored the differences in the loan document and the promise. (R. pp. 311-12, 343.)

particularly onerous about the rate or note terms here. (R. pp. 342-44.) That does not speak to whether the *conduct* that induced the transaction was unconscionable. U.S. Bank, like the lower court, has conflated *conduct* with *terms*, two things the legislature treats distinctly in S.C. Code Ann. § 37-10-105(C). (R. pp. 7-10.) In contending the terms of the transaction were not unconscionable, U.S. Bank again argues with a straw man. Smith, 298 P.3d at 1138.

In S.C. Code Ann. § 37-10-105(C), the General Assembly "authoriz[ed] a claim for unconscionable inducement that does not require a showing of substantive unconscionability." McFarland v. Wells Fargo Bank, N.A., 810 F.3d 273, 284 (4th Cir. 2016). This necessitates a focus on process rather than substantive transaction terms. S.C. Code Ann. § 37-10-105(C); cf. McFarland, 810 F.3d at 284. The court looks to the conduct surrounding the transaction and determines whether there has been extreme unfairness in that conduct. See McFarland, 810 F.3d at 284; S.C. Code Ann. § 37-10-105(C).

U.S. Bank characterizes Household's conduct as a set of unintentional, innocent mistakes, echoing the lower court's reasoning that the conduct at issue here could not be unconscionable because, at the time this mortgage loan was closed, frequently "closings did occur without the presence of counsel." (R. p. 8.) At the time of this closing, 15 years had passed since our Supreme Court had held that mortgage loan closings are required to be supervised by a licensed attorney. State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987). Closing the loan without a lawyer was no good faith error; it was part of this lender's routine process of conducting closings without attorney involvement. (R. p. 311.)

III. Nothing was decided by Judge Cooper's order that denied summary judgment to Lowery.

At times, U.S. Bank seems to attribute some binding effect to a remark made by Judge Cooper – not part of his ruling – in his order that denied Lowery's motion for summary

judgment earlier in the case. (R. p. 25.) The statement that it would be inequitable for Lowery to have received funds from the loan comes in an order that *denied* summary judgment. (R. p. 25.) "The denial of summary judgment does not finally determine anything about the merits of the case." Ballenger v. Bowen, 313 S.C. 476, 477-78, 443 S.E.2d 379, 380 (1994). It has no preclusive effect. Id. It has determined nothing. Id.

IV. U.S. Bank released the whole property – including the five acres – from the mortgage.

The mortgage document containing the 53.73-acre description remained in the land records for over 16 years, which kept Lowery from refinancing the mortgage and getting out of the mortgage relationship Household created. (R. pp. 116-17, 312, 331-35.) When U.S. Bank recorded a mortgage release document, *it did **not** release the property **except for the five acres intended to be mortgaged***; rather, *it **released the entire property*** from the lien of the mortgage. (R. pp. 116-17.)

U.S. Bank also beats loudly the drum that there were two mortgages here. That is belied by the evidence. (R. pp. 311-12, 331-46.) The evidence is that there has only ever been one mortgage here – the document for it was just signed twice. (R. pp. 311-12, 331-46.)

An absurd example illustrates the error in U.S. Bank and the lower court's thinking. If Jenny and Jack have a contract, and they use 100 writings to memorialize that contract, do they have 100 contracts, or do they have one contract evidenced by 100 writings? The contract is not the paper; it is the agreement, the arrangement between Jenny and Jack. See Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893-94 (1989) (contract is agreement that has essential contract terms).

The same is true of a mortgage, which is a contractual relationship that constitutes a lien on real property, not a piece of paper. Lever v. Lighting Galleries, Inc., 374 S.C. 30, 647

S.E.2d 214, 216, 218 (2007); Resolution Trust Corp. v. Eagle Lake and Golf Condominiums, 310 S.C. 473, 476, 427 S.E.2d 646, 648 (1993); Manning v. Screven, 56 S.C. 78, 34 S.E. 22, 25 (1899); Wallace v. Craig, 27 S.C. 514, 4 S.E. 74, 80 (1887); Blackwell v. Blackwell, 289 S.C. 470, 472, 346 S.E.2d 731, 732 (Ct. App. 1986). Here, the real property was released from that arrangement. (R. pp. 116-17.)

There is at least a fact issue here about whether the mortgage has been released. Summary judgment was not proper.

V. Under the process outlined by the lower court, there is no time, place, or procedure for cross-examination to occur.

U.S. Bank contends that the lower court's order does not deprive Lowery of his right to cross-examine witnesses because it does not expressly say "no cross-examination" but merely provides for the submission of affidavits at trial of the few remaining issues. (Initial Brief of Respondent pp. 20-21.) On this point, U.S. Bank fails to supply answers to basic questions about the opportunity for cross-examination in the procedure ordered here. When, where, or how is cross-examination supposed to happen under the appealed order? There is no room for cross-examination under the existing order, no chance for it to occur, no situation in which cross-examination of U.S. Bank's affiants might be had. (R. p. 11.) U.S. Bank does not have to bring their witnesses to the courtroom or present them live to Lowery in any way. (R. p. 11.) At what point would some cross-examination take place?

Lowery has a due process right to cross-examination. E.g., Moore v. Moore, 376 S.C. 467, 472, 657 S.E.2d 743, 746 (2008). The lower court's prevention of cross-examination is not made proper simply because, in setting up a situation in which it is impossible for cross-examination to occur, its order never mentions denying cross-examination. See id.; (R. pp. 1-13.)

CONCLUSION

Respectfully, the lower court erred reversibly and prejudicially in granting summary judgment here. This court should reverse and remand this case for a trial in which the facts may be explored and weighed, rather than allowing their existence to continue to be ignored.

Respectfully submitted,

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CERTIFICATE OF COUNSEL
REGARDING COMPLIANCE WITH RULE 211(b), SCACR

I certify that the foregoing final brief complies with Rule 211(b), SCACR.

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I certify that I have served the foregoing final brief on the date given below by emailing it to counsel for the Respondent at the address(es) noted below.

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