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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Honorable James B. Jackson, Jr., Circuit Court Judge

Case No.: 2020-CP-38-00086

Appellate Case No.: 2022-001147

U.S. Bank National Association, as Trustee, as successor to U.S. Bank Trust National Association, as Trustee, for Conseco Finance Home Equity Loan Trust 2001-C .....Respondent,

v.

Frances L. Mack n/k/a Frances L. Mack-Marion…….....Appellant.

FINAL BRIEF OF RESPONDENT

RILEY POPE & LANEY, LLC

DAMON C. WLODARCZYK
S.C. Bar No. 70460
Post Office Box 11412
Columbia, South Carolina 29211
Telephone: (803) 799-9993
Facsimile: (803) 239-1414
Attorney for Respondent

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STATEMENT OF THE CASE

Appellant's brief correctly sets forth the procedural background of this case. Hereinafter Appellant shall be referred to as "Borrower" and Respondent shall be referred to as "Bank."

STATEMENT OF FACTS

This appeal resulted from an Order granting in part Respondent's Rule 12(c), SCRCP, Motion for Judgment on the Pleadings. Accordingly, the only facts before the trial judge were those set forth in the pleadings.

Borrower's Amended Answer and Counterclaim sets forth the following conclusory statements:

> 23. When the loan involved in this case was made, certain disbursements of the loan proceeds to Frances and/or to other on her behalf were not made, though Conseco Finance Servicing Corp. (the trustee's claimed predecessor in interest) and all later servicers of the loan (including any acting on behalf of the trustee) treated the loan balance owed on the mortgage account as though those disbursements had been made and that money had been lent to Frances.
>
> 24. Conseco Finance Servicing Corp. was obligated to make those disbursements.
>
> 25. Conseco Finance Servicing Corp. breached its obligations to Frances.
>
> 26. There has been a failure of consideration with respect to the note and mortgage involved in this case.
>
> 30. The mortgage loan at issue in this case was made illegally.
>
> 31. The mortgage loan at issue in this case is a South Carolina mortgage loan.
>
> 32. The mortgage loan at issue in this case was closed without the supervision of an attorney licensed to practice law in South Carolina.

33. This illegal conduct was done by Conseco Finance Servicing Corp. and people acting on its behalf.

36. Conseco Finance Servicing Corp. (the trustee's claimed predecessor in interest) has engaged in such conduct with respect to the matters subject of his claims as to make its hands unclean with regard to its claims.

37. This conduct includes, but is not necessarily limited to, its conduct in closing the subject mortgage loan through the unauthorized practice of law and its conduct in not making the required disbursements of loan funds to and on behalf of Frances

46. With respect to the closing of the mortgage loan subject of this case, the original creditor did not comply with the attorney preference or insurance preference provisions of S.C. Code Ann. § 37-10-102.

47. The original creditor did not ascertain Frances's preference as to the attorney to represent her in the closing of the mortgage loan.

48. As a proximate result, Frances was not represented by an attorney in the closing of the subject mortgage loan.

51. The subject loan was induced by unconscionable conduct, such conduct including, but not limited to:

a. The unauthorized practice of law; and

b. Lying to Frances by representing to her that certain disbursements of the loan would be made to her and on her behalf.

55. Conseco Finance Servicing Corp. made the loan without receiving written notice that Frances had had counseling by a certified counselor about that particular loan.

56. Before making the loan, Conseco Finance Servicing Corp. did not first determine whether Frances could actually repay the loan.

57. Frances' loan payments, combined with her other monthly debts, exceeded 50 percent of her monthly income.

[R. pp. 33-40].

The above statements were denied in Bank's Reply. [R. pp. 41-43].

What is not factually in dispute based on the pleadings is that Borrower took out a loan with Conseco Finance Servicing Corp. to refinance an existing mortgage loan and HELOC with Advanta Mortgage in March 2001. [R. p. 11, ¶7; p. 30; p. 34, ¶ 7]. The foreclosure action that is the subject of this appeal was filed on January 21, 2020, just shy of nineteen years after the loan was created. [R. pp. 11-15]. The first time any allegations were asserted that certain debts were not satisfied by the refinance of Borrower's previous loan were set forth in her *pro se* Answer dated February 11, 2020. [R. pp. 30-32]. Additionally, the first time any allegation regarding the terms or conditions of the subject loan occurred in the filing of Borrower's *pro se* Answer dated February 11, 2020. [*Id.*].

STANDARD OF REVIEW

"A motion for judgment on the pleadings will be sustained only where the pleadings are so defective that, taking all the facts alleged in the pleadings as admitted, no cause of action or defense is stated." *Diminich v. 2001 Enterprises, Inc.*, 292 S.C. 141, 142, 355 S.E.2d 275, 275 (Ct. App. 1987) (internal citations omitted).

ARGUMENTS

THE TRIAL COURT CORRECTLY GRANTED BANK'S MOTION FOR JUDGMENT ON THE PLEADINGS.

A. The trial court correctly determined Borrower's counterclaim for declaratory relief was barred by this Court's prior rulings.

Borrower's third counterclaim sought declaratory relief in the form of a judgment that the subject mortgage loan was unenforceable due to the unauthorized practice of law.

[R. p. 39, ¶ 61]. More specifically, Borrower contends that because the mortgage loan was closed without attorney supervision, the mortgage is void and unenforceable.

Bank's Motion for Judgment on the Pleadings sought to dismiss the third counterclaim on the ground that even if the loan was closed without an attorney,[1] because the loan closed prior to 2011, this Court's ruling that a mortgage loan closed without an attorney is void did not apply. *BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 624, 731 S.E.2d 547, 550 (2012) (clarifying that the prospective "filing" date referenced in *Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 134, 139, 714 S.E.2d 532, 534 (2011) was any document sought to be enforced filed *after* August 8, 2011). The trial court agreed and dismissed Borrower's counterclaim finding the mortgage was recorded prior to 2011. [R. pp. 3-4].

"A mortgage foreclosure is an action in equity." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). It is undisputed that in South Carolina, "[a]ll real estate and mortgage loan closings must be supervised by an attorney." *Matrix*, 394 S.C. at 138, 714 S.E.2d at 534 *citing State v. Buyers Serv. Co.*, 292 S.C. 426, 357 S.E.2d 15 (1987).

However, as correctly stated by Borrower in her brief, prior to the *Matrix* decision, there was no precedent holding that a mortgage was *void* if closed without an attorney.[2] [App. Brief, pp. 7-8].

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[1] If Bank's motion had been denied on this issue there is evidence Borrower signed two (2) attorney preference forms indicating the closing attorney first would be Jack Shore in Lexington, SC, and then changing the preference to Tom Hall in Lexington, SC.

[2] Notably in *Buyers Serv.*, while this Court affirmed a trial order enjoining "Buyers Service from the preparation of deeds, mortgages, notes and other legal instruments

Borrower's extensive discussion in her brief and cases cited therein is simply a plea for this Court to issue an opinion reversing almost twelve years of binding precedent in the State of South Carolina established by the *Matrix* decision without any grounds as to why the *Matrix* court decided to make the decision prospective in nature.

Matrix is factually a simple case. Buyers purchased a home in 2001 that was mortgaged. The mortgage was assigned to Matrix. Buyers then refinanced the loan with Matrix, which did not use an attorney to close the loan. The refinanced mortgage was not recorded until 2002, but in the interim, a judgment was obtained against Buyers. When buyers filed bankruptcy, Matrix sought to foreclose its mortgage and judgment holder challenged Matrix's priority to the sale proceeds because the refinanced loan was not closed by an attorney. *Id*.

The *Matrix* court issued the following decision:

> This Court has previously held the presence of attorneys in real estate loan closings is for the protection of the public and that "protection of the public is of paramount concern" in loan closings. *Buyers Serv.*, 292 S.C. at 433, 357 S.E.2d at 19. Enforcing this requirement will come as no surprise to any lender. Lenders cannot ignore established laws of this state and yet expect this Court to overlook their unlawful disregard. We take this opportunity to definitively state that a lender may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as required by our law. ***We apply this ruling to all filing dates after the issuance of this opinion.***

Matrix, 394 S.C. at 140, 714 S.E.2d at 535 (emphasis added).

The decision benefited a junior judgment lien holder to the detriment of the lender, Matrix, which not only refinanced the loan, closed its own loan

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related to mortgage loans and transfers of real property[,]" the Court *did not* hold or otherwise imply that all the loans improperly closed by Buyers Service were void.

without an attorney, but then sought to foreclosure and benefit from its own actions in closing the loan without an attorney.

Of significant importance of this novel ruling that a mortgage is *void* if not closed by an attorney is (1), the opinion specifically states it offers prospective relief only and (2) Justice Kittredge in a concurring result opinion stated that "I only join in today's result because of its prospective-only application." Justice Pleicones dissented stating in part the decision which would deny all equitable relief to any "lender who fail[s] to have attorney supervision during the loan process as required by our law ... [in] all filing dates[6] after the issuance of this opinion." *Matrix*, 394 S.C. at 143, 714 S.E.2d at 536.

It is undoubtedly clear the *Matrix* court was aware of prior rulings holding that mortgage loans needed to be closed by an attorney, but applying equitable principles, determined that its decision voiding mortgages that were not closed by an attorney would only apply prospectively from the decision date.

In 2012, this Court had the opportunity to revisit the issue in *BAC Home Loan Servicing.* In *BAC Home Loan*, a junior mortgagee sought to recover surplus funds from the proceeds of the sale of a first lien mortgage. The trial court ruled in part that BAC could not recover because there was no evidence the loan was closed by an attorney and, therefore, its mortgage was illegal.

In reversing the trial judge, this Court reaffirmed its prior opinion as follows:

> In *Matrix* we reiterated that the closing of a loan without attorney supervision constitutes the unauthorized practice of law. Furthermore, we held that engaging in this unlawful behavior would preclude a lender from obtaining equitable relief. However, in a substitute opinion issued on

> rehearing, we explained that this holding would be prospective only, stating we would "apply this ruling to all filing dates after the issuance of this opinion," which was August 8, 2011. *Id.* To the extent some confusion apparently exists as to what filing date *Matrix* referred to, we clarify now that it is the date the document a party seeks to enforce was filed. *Here, Systems' mortgage was recorded on April 20, 2007, well before the issuance of* Matrix. *Thus, regardless of whether an attorney participated in the closing of Mortgage 2, BAC would not be barred from recovery by the illegality.*

BAC Home Loan Servicing, L.P., 398 S.C. at 624, 731 S.E.2d at 549–50 (internal citations omitted) (emphasis added).

In 2013, this Court had a third opportunity to revisit its *Matrix* decision in *Wachovia Bank, N.A., v. Coffey*, 404 S.C. 421, 746 S.E.2d 35 (2013). In *Wachovia*, the Court of Appeals ruled that the bank's attempt to foreclosure its mortgage was precluded because the loan was closed without an attorney which constituted the unauthorized practice of law. This Court granted certiorari to review the decision. *Id*.

This Court simply could have affirmed the Court of Appeals' opinion or dismissed the petition as improvidently granted. Instead, this Court issued an opinion stating in part that the petitioner's arguments centered on whether the alleged unauthorized practice of law bars equitable relief. However, this Court stated that "this is not the dispositive question in this case. Instead, the pertinent inquiry is whether Petitioner may foreclose on an invalid mortgage." *Wachovia Bank, N.A.*, 404 S.C. at 425, 746 S.E.2d at 38.

In modifying the Court of Appeals' opinion, this Court determined the mortgage was never valid because the mortgagor was not the owner of record of the mortgaged property. It affirmed the trial court's granting of summary judgment and dispensed with addressing the unauthorized practice of law and legal issues. *Id*.

As stated by Borrower, the prospective relief decision in *Matrix* as affirmed by the decision in *BAC Home Loan* has not been revisited by this Court but has been consistently applied since 2011 in both state and federal courts. *See JP Morgan Chase Bank, Nat'l Ass'n v. Acheson*, No. 2016-000028, 2018 WL 776629, at *1 (Ct. App. Feb. 7, 2018) (stating because the mortgage closed before the effective date of *Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011), the closing of the loan without a lawyer present does not, by itself, bar foreclosure); *Deutsche Bank Nat. Tr. Co. v. Booms*, No. 2015-UP-097, 2015 WL 793201, at *1 (Ct. App. Feb. 25, 2015) (affirming in part citing *Matrix*); *Deutsche Bank Nat. Tr. Co. v. Wilks*, No. 2015-UP-110, 2015 WL 904870, at *1 (Ct. App. Mar. 4, 2015) (affirming in part noting "[A] lender may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as required by our law" but "apply this ruling to all filing dates after the issuance of this opinion"); *In re Travers*, 635 B.R. 273, 282 (Bankr. D.S.C. 2021) (stating the South Carolina Supreme Court has explicitly limited the application of its *Matrix* decision to mortgage loans closed after August 8, 2011, in *Kinder*); *Crop Prod. Servs., Inc. v. SCBT, N.A.*, No. CIV.A. 5:13-02841, 2014 WL 1796345, at *8 (D.S.C. May 6, 2014) (stating the court finds that the following statement from the South Carolina Supreme Court explains that *Matrix* does not have retroactive application).

"Where conflicting decisions appear to have been made by inadvertence or otherwise, and the position of the Court is thereby rendered uncertain, the rule of stare decisis does not necessarily apply. *Coleman v. Page's Est.*, 202 S.C. 486, 25 S.E.2d 559, 560 (1943). "A decision which is to overrule all former precedents and to establish a

principle never before recognized should either contain some internal evidence that the prevailing law is to be overthrown, or else be founded upon reasoning far stronger than that comprehended in the previous decisions which by implication it would set aside." *Id.*

As previously stated, prior to *Matrix,* this Court had never issued an opinion that the unauthorized practice of law regarding the closing of a mortgage loan would void the mortgage. As the foreclosure of a mortgage is equitable in nature, so was the remedy issued by the *Matrix* court; specifically, that voiding a mortgage used to secure a loan would only be applied prospectively from the date of the *Matrix* decision. This balancing of equities was affirmed in 2012 and again in 2013 as stated above. There are no "conflicting decisions" on this issue and, the holding as been broadly applied by state and federal courts.[3]

To the extent Borrower has argued in her brief that the prospective application of *Matrix* should be reversed, there are no sufficient grounds presented. If the *Matrix* decision is properly upheld, contrary to Borrower's arguments, she still has affirmative defenses pleaded available to her.

[3] Borrower cites to several cases in her brief for the proposition that lenders should be expected to know that there would be some remedy for "their unauthorized practice of law." [App. Brief pp. 8-9]. However, the cases cited sounded in law and would not apply to equitable actions and, therefore, are distinguishable to the case at hand and the *Matrix* decision. *See also Franklin v. Chavis*, 371 S.C. 527, 535, 640 S.E.2d 873, 877 (2007) (refusing to void a will drafted by a nonlawyer citing *In re: Peterson's Estate,* 230 Minn. 478, 42 N.W.2d 59 (1950) (refusing to void a will whose validity was challenged on the ground it was drafted by a nonlawyer because testator should not be penalized by having his will declared void).

Borrower still has the affirmative defense of lack of consideration supporting the mortgage loan, unconscionability in violation of the S.C. Attorney Preference Statute, and the equitable defense of unclean hands. Accordingly, Borrower has not been "robbed" of her opportunity to present and prove valid defenses to this foreclosure action even if this Court affirms the trial court.

Based on the above argument, the doctrine of stare decisis should apply and this Court should abstain from revisiting the clear and unambiguous decision set forth in *Matrix* and confirmed in subsequent decisions.

The trial court clearly did not err in applying the well-settled holding in *Matrix* in this case as Borrower's loan originated long before 2011.

B. The trial court correctly determined that it did not have subject matter jurisdiction to address whether Bank engaged in the unauthorized practice of law.

Borrower argues that this Court's exclusive original jurisdiction to determine what constitutes the unauthorized practice of law is unjust, unfair, and should be reversed.

"The Constitution commits to this Court the duty to regulate the practice of law in South Carolina. *In re Unauthorized Prac. of L. Rules Proposed by S.C. Bar*, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992) (internal citations omitted).

This Court has concluded that "[t]here is no private right of action in South Carolina for the unauthorized practice of law." *Franklin v. Chavis*, 371 S.C. at 535, 640 S.E.2d at 877 citing *Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 96–97, 560 S.E.2d 612, 622–23 (2002) (holding petitioners' claim for restitution was based on an

alleged breach of fiduciary duty and was not appropriate relief in an action based on the unauthorized practice of law).

Regardless, Borrower was not prejudiced by the trial court's Order stating it did not have subject matter jurisdiction to determine if the unauthorized practice of law occurred. If the matter proceeded, presuming arguendo the claim was not barred by *Matrix*, the trial court need only determine if based upon the facts at trial, was the loan closed by an attorney. If the trial judge determines the loan was not closed by an attorney, this Court has already established that said closing constitutes the unauthorized practice of law and the trial court need only to apply the relief already afforded in *Matrix*.

CONCLUSION

For the reasons set forth, the trial judge's Order should be affirmed, and this appeal dismissed.

RILEY POPE & LANEY, LLC

s/Damon C. Wlodarczyk
Damon C. Wlodarczyk
S.C. Bar No. 70460
Post Office Box 11412
Columbia, South Carolina 29211
Telephone: (803) 799-9993
Facsimile: (803) 239-1414
Attorney for Respondent

Columbia, South Carolina

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