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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Joseph M. Strickland, Master in Equity

Appellate Case No. 2022-001106
Trial Court Case No. 2018-CP-40-00382

Deutsche Bank National Trust Company
As Trustee for Ameriquest Mortgage
Securities Inc., Asset-Backed Pass-Through
Certificates, Series 2004-R4Respondent,

v.

Butch Johnson a/k/a Butch Johnson Richard; Wildewood V Homeowners Association, Inc.;
Fleetcor Technologies Operating Company, LLC; South Carolina Community Bank; Palmetto
Citizens Federal Credit Union; East Richland County Public Service District; Alcon Action
Agency, II, LLC; T.D. Bank, N.A. Defendants.

Of whom Butch Johnson a/k/a Butch Johnson Richard is the Appellant,

**INITIAL BRIEF OF RESPONDENT DEUTSCHE BANK NATIONAL TRUST
COMPANY AS TRUSTEE FOR AMERIQUEST MORTGAGE SECURITIES INC.,
ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2004-R4**

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Asset-Backed Pass-Through Certificates,
Series 2004-R4

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STATEMENT OF ISSUES ON APPEAL

1. Did the Appellant properly preserve his issues on appeal?
2. Did the Lower Court properly award summary judgment to the Respondent?

STATEMENT OF THE CASE

Respondent Deutsche Bank National Trust Company, as Trustee for Ameriquest Mortgage Securities Inc., Asset-Backed Pass-Through Certificates Series 2004-R4 (“Respondent”) filed a Summons and Complaint on January 18, 2018, asking the Lower Court to foreclose a promissory note and mortgage in the amount of Five Hundred Forty Thousand and 00/100 Dollars (\$540,000.00) given to Ameriquest Mortgage Company dated March 24, 2004 by Butch Johnson (“Appellant”). The property secured by the mortgage and the subject of the foreclosure is known as 321 Oakbrook Drive Columbia, South Carolina (“Property”). On March 6, 2006, Ameriquest Mortgage Company transferred and assigned all its right, title, and interest of the Mortgage to the Respondent by an assignment recorded on March 17, 2006. boundary of the described property. The mortgage loan was modified by Loan Modification Agreement dated December 1, 2015, where by the principal balance was increased from Five Hundred Forty Thousand and 00/100 Dollars (\$540,000.00) to One Million One Hundred Ninety-Nine Thousand Seventy- Eight and 82/100 Dollars (\$1,199,078.82). Appellant conveyed the Property to Alcon Action Agency II LLC by Deed Dated March 27, 2007 and recorded March 27, 2007 in Book 1296 Page 860 in the Register of Deeds office for Richland County. Respondent named Appellant and Alcon Action Agency II LLC as parties to the foreclosure action as the obligor under the note and mortgage and as the owner of the Property.

Throughout February and March 2018, Respondent attempted to serve Appellant personally by service through individual process servers and the Richland County Sheriff’s Department, but Appellant purposefully evaded service. *See* Affidavits of Service dated February 5, 2018; March 28, 2018. As such, on April 12, 2018, in compliance with South Carolina law, Respondent mailed to Appellant, via certified mail, a copy of the Notice of Foreclosure Intervention, Lis Pendens, Summons, and Complaint. *See* Affidavit of Service dated Apr. 12,

2018. In addition to serving Appellant by certified mail, Respondent served him by publication pursuant to that Order of Publication filed April 16, 2018. *See* Order of Publication filed April 16, 2018. Service upon Appellant by publication was completed on May 4, 2018. *See* Affidavit of Service by Publication filed July 23, 2018. Having heard no response from Defendant, on June 22, 2018, Respondent entered an affidavit of default against Appellant. *See* Affidavit of Default dated June 22, 2018. More than three months after service by certified mail and two months after service by publication, Appellant filed a Motion to Set Aside Default and his Answer on July 17, 2018. On October 22, 2018, at a hearing on the Appellant's motion, the Court issued an Order granting the motion to Set Aside Default, striking the Appellant's Counterclaims, and allowing the Answer filed by the Defendant to stand.

Respondent filed its motion for summary judgment, which included an affidavit from the Respondent setting forth the loan documents and the debt owed on the loan, on November 30, 2020. Appellant, appearing *pro se*, responded by filing a reply to motion for summary judgment on December 30, 2020. A hearing on the Respondent's motion for summary judgment was scheduled for June 28, 2022 before the Lower Court. On June 22, 2022, Respondent filed its memo in support of motion for summary judgment.

At the hearing on the motion for summary judgment on June 28, 2022, Appellant did not appear at the hearing, but was represented at that hearing by counsel, William Pyatt, Esq. Mr. Pyatt had indicated to Respondent's counsel that they did not contest the Respondent's motion for summary judgment, but wanted additional time before a foreclosure sale to vacate the Property or perhaps have some time to sell the Property. The foreclosure sale would have been on August 1, 2022; however, the Lower Court pushed the sale back to September 6, 2022. (The regular sales

date would have been Monday, September 5, but due to the Labor Day holiday, the sales date would be September 6, 2022).

Neither the Respondent, nor his attorney, submitted an affidavit in reply to the Affidavit filed by the Respondent in support of its motion for summary judgment. Additionally, the Appellant did not appear at the June 28 hearing to object to the relief sought by the Respondent and no objection was entered by his attorney, Mr. Pyatt. On July 19, 2022, the Lower Court entered a Master's Order and Judgment of Foreclosure and Sale granting the Respondent's motion for summary judgment on the foreclosure matter.

On July 20, 2022, almost a month after the Appellant failed to appear at the June 28, 2022 summary judgment motion hearing, the Respondent filed a Reply to the Plaintiff Motion for Summary Judgment. On July 22, 2022, Appellant filed a document entitled Defendant's Motion for Reconsideration. However, this document asks that the Court reconsider "...its December 20, 2021 Order", and not the July 19, 2022 Master's Order which granted Respondent summary judgment on the foreclosure. The July 22, 2022 Motion to Reconsider also requested that the Defendant Sammie L. Goodwin be granted relief from the Master's Order. Respondent has no idea who "Sammie L. Goodwin" might be. On July 26, 2022, Appellant filed a Motion for Continuance seeking continuance of a scheduled hearing; however, no hearing was scheduled at that time. On July 28, 2022, the Lower Court issued an Order denying the Appellant's motion for reconsideration, reply to Plaintiff's motion for Summary Judgment, and motion for continuance. On July 29, 2022, Appellant filed an amended motion for reconsideration which removed some of the extraneous matter from the original motion for reconsideration, but did not include any new arguments or issues. The amended motion for reconsideration was denied by Order of the Lower Court issued on August 2, 2022. This appeal then followed.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite dispositions of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). A motion for summary judgment must be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Standard Fire v. Marine Contracting, 301 S.C. 418, 421, 392 S.E.2d 460, 462; Rule 56(c), SCRPC. If the non-moving party has not shown a genuine issue of material fact, "summary judgment, if appropriate, shall be entered against him." Rule 56(e), SCRPC.

"Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." Regions Bank v. Schmauch, 354 S.C. 648, 660, 582 S.E.2d 432, 438, (Ct. App. 2003) (citing Rule 56(c), SCRPC; SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990); Peterson v. W. Am. Ins. Co., 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999)). "Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." *Id.* To avoid the granting of a Motion for Summary Judgment by Plaintiff, "[i]t is not sufficient that one create an inference which is not reasonable. Similarly, it is not sufficient that one create an issue of fact that is not genuine." Main v. Corley, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984). "The trial court should grant summary judgment against a party who has failed to make a showing sufficient to establish the existence of an essential element of that party's case." Harris v. Rose's Stores, 315 S.C. 344, 346, 433 S.E.2d 905, 906, (Ct. App. 1993) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

ARGUMENT

1. The Appellant failed to preserve his issues for appeal.

Appellant raises several issues that were not raised or ruled on by the Lower Court. Appellant states the following issues and/or arguments, which were not raised or ruled upon by the Master in Equity:

- A. There were genuine issues of material fact.
- B. The Appellant needed more time for discovery.
- C. The Respondent lacked standing and failed to produce the original Note and evidence of assignment.

Appellant Initial Br. at pp 3-5.

“It is an axiomatic rule of law that issues may not be raised for the first time on appeal.” *State ex rel. Wilson v. Ortho-Mcneil-JanssenPharms.*, 414 S.C. 33, 83 n.33, 777 S.E.2d 176, 202 n.33 (2015) (quoting *Talley v. South Carolina Higher Educ. Tuition Grants Comm.*, 289 S.C. 483, 487, 347 S.E.2d 99, 101 (1986)). Each issue ““must have been raised to and ruled upon by the trial court to be preserved.”” *Buist v. Buist*, 410, S.C. 569, 574, 766 S.E.2d 381, 383 (2014) (quoting *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006)). “Prohibiting an appellant from raising an issue for the first time on appeal insures the trial court is able ‘to rule properly after it has considered all relevant facts, law, and arguments.’” *State v. Cope*, 405 S.C. 317, 339, 748 S.E.2d 194, 205 (2013) (quoting *Herron v. Century BMW* 395 S.C. 461,465, 719 S.E.2d 640, 642 (2012)).

The Appellant’s appeal raises several issues, which even when liberally construed, were neither presented before nor ruled on by the Master in Equity. In addition, the Appellant had over four years to complete discovery and did not do so. The Appellant states that there are “issues”, but fails to state what those issues are. The Appellant argues that there were genuine

facts in dispute, but never states what those facts are and did not do so at the motion hearing on June 28, 2022.

The Court should deny Appellant's appeal based on his failure to sufficiently argue or cite legal authority in support of his position. Where an "appellant fails to provide arguments or supporting authority for his assertions," "he is deemed to have abandoned this issue." *First Sav. Bank v. McLean*, 316 S.C. 361.363, 444 S.E.2d 513, 514 (1994). "Mere allegations of error are not sufficient to demonstrate an abuse of discretion. On appeal the burden of showing abuse of discretion is on the party challenging the trial court's ruling." *Id.*; *Tirado v. Tirado*, 339 S.C. 649, 655, 530 S.E.2d 128, 131 (Ct. App. 2000) (holding that an issue which is not supported by authority or sufficiently argued is not preserved for appellate review).

In his Amended Motion for Reconsideration, Appellant raises issues regarding the Respondent's Note, service of process, and makes allegations of a meritorious defense. However, these issues were not raised at the hearing on the Respondent's motion for summary judgment, so, these issues are not preserved for appellate review. *Lyons v. Fid. Nat'l Title Ins. Co.*, 415 S.C. 115, 781 S.E.2d 126 (Ct. App. 2015).

Appellant fails to cite to any authority in support of his arguments on appeal. He cites cases that set forth the standard for the granting or denial of a motion for summary judgment under Rule 56 SCRPC; however he fails to cite any facts or authority for his assertion that the granting of summary judgment to the Respondent by the Master inequity was improper or an abuse of discretion. Appellant cites *Doe v. Batson*, 345 S.C. 316, 221 548 S.E.2d 854,857 (2001) for the proposition that "once a motion for summary judgment is filed along with a supporting affidavit, the opposing party, if it wishes to have more time for discovery, is required under Rule 56(f) SCRPC, to file an opposing affidavit to explain why more time is necessary." See Appellant Initial

Br. at p. 3,4. However, the Appellant did not file an appropriate motion under Rule 56(f), SCRCPC and did not raise the discovery issue at the trial court. Although Appellant appears *pro se*, he is held to the same standard as an attorney licensed to practice before this Court. *Rouvet v. Rouvet*, 388 S.C. 301, 696 S.E. 2d 204 (Ct. App. 2010).

It is clear that the Appellant did not raise his appellate issues at the hearing on the summary judgment motion, likewise, he has not provided any argument in his initial brief to sustain his allegations. Therefore, the Court should deny the appeal.

2. Did the Master in Equity properly grant summary judgment to the Respondent?

Respondent established in the Lower Court that it was entitled to relief through the provision of accurate and indisputable facts necessary to prove its right to foreclose on the Property. Respondent proved the existence of the Note, Mortgage and assignment and that it is the holder of the Note with the right to bring the within action through the Affidavit submitted to the Court in support of the motion for summary judgment. Respondent has also proven that the Appellant is in default on the subject loan and was due for the December 1, 2015 payment and all subsequent monthly installments. Appellant failed to provide any evidence showing that Respondent's allegations were inaccurate. Appellant set forth no facts controverting the existence of the Note and Mortgage, that Respondent was the holder of the Note in the within action, and that Respondent was in default on the loan payments prior to the filing of the action. The loan in question was originated in March of 2004 and due to previous defaults, the loan was modified in December, 2015 to increase the principal balance by over \$650,000.00. No payments were made after the 2015 loan modification and the loan is due for the December 1, 2015 installment – the loan has been in default for 9 years since the loan modification. The Appellant

has taken advantage of the legal system to unreasonably delay the Respondent's attempt to foreclose the loan.

Appellant has failed to meet the burden of establishing a defense to the foreclosure. "Once the debt and default have been established, the mortgagor has the burden of establishing a defense to foreclosure such as lack of consideration, payment, or accord and satisfaction." U.S. Bank Trust National Association v. Bell, 385 S.C. 364, 684 S.E.2d 199, 205 (S.C. Ct. App. 2009) (quoting Bandy v. Bandy, 187 S.C. 410, 413, 197 S.E. 396, 397 (1938)) As a result, there is no dispute as to the fact that Appellant entered into a binding contract and failed to perform under, and breached said contract by failing to make monthly payments on the subject loan as they became due and that Respondent sustained damages as a direct and proximate result of appellant's breach. The Appellant has not brought forth any arguments to the contrary either at the hearing on the motion for summary judgment or in this appeal.

The Respondent also requests that the Court affirm the decision of the Lower Court for any ground appearing on the record as provided by Rule 220(c) of the SCACR.

CONCLUSION

The appeal sought by the Appellant is the latest in numerous attempts to stop the Plaintiff from exercising its rights under the contract between the Appellant and the Respondent. The Appellant did not raise any objection to the motion for summary judgment and only requested that the foreclosure sale be delayed until the end of September, 2023. As such, the Appellant cannot raise those issues now. In this appeal, the Appellant has failed to cite any authority for why his

appeal should be granted. Respondent requests this Court affirm the decision of the Lower Court for the reasons cited in the Respondent's Brief, or for any ground appearing on the record.

Respectfully submitted,

October 11, 2023

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PROOF OF SERVICE

I certify that I have served the Initial Brief of the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on October 11, 2023 addressed to the Appellant, Butch Johnson, as follows:

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October 11, 2023

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