



STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS
CASE NO.: 2011-CP-18-00871

U.S. Bank Trust NA as Trustee for Waterfall
Victoria Grantor Trust II, Series G

**PLAINTIFF’S NOTICE OF MOTION
AND MOTION TO ALTER OR AMEND
JUDGMENT PURSUANT TO
RULE 59(e), SCRPC**

Plaintiff,

v.

Jamie Singleton and Indigo Pointe
Homeowners’ Association,

RECEIVED

Feb 13 2024

Defendant(s).

SC Court of Appeals

PLEASE TAKE NOTICE that U.S. Bank Trust NA as Trustee for Waterfall Victoria Grantor Trust II, Series G (the “Plaintiff”), by and through its undersigned attorneys, hereby moves the Court for an order which reconsiders, alters, and/or amends its *Order Granting Plaintiff’s Motion for Summary Judgment* (the “Order”) entered November 21, 2022, in the above-referenced case. This motion is brought pursuant to Rule 59(e), SCRPC, as well as the relevant statutory and case law.

SCRPC RULE 59(e) MOTIONS

A Rule 59(e) motion serves several purposes. Such a motion is proper when a party “believes the court had misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it.” *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Based upon the facts in the record, Plaintiff respectfully requests that the Court reconsider its ruling on the following grounds: (i) the Court improperly set-off the Plaintiff’s contractual right to interest as permitted under the terms of the Note and Mortgage; (ii) the Court improperly denied Plaintiff’s contractual right to attorney’s fees, escrow charges, and corporate advances as permitted under the terms of

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the Note and Mortgage; and (iii) the Court's demonstrable bias against Plaintiff constitutes an abuse of discretion.

BACKGROUND

On September 16, 2022, Plaintiff filed its *Motion for Summary Judgment and Memorandum in Support Thereof* with exhibits.¹ On October 6, 2022, Defendant Jamie Singleton filed his opposition to Plaintiff's Summary Judgment Motion. Notably, Defendant did not dispute the accuracy of any information contained in the Affidavit² and did not ask the Court to deny any amounts identified therein.³ On October 12, 2022, the Court heard argument of counsel and made its decision. Specifically, the Court ruled that it was inclined to:

exercise my equitable jurisdiction and enter an equitable set-off that would make for a set-off for the cost and expenses that Mr. Singleton⁴ had gone through to be set off against the amount of the debt that the plaintiff is claiming. So what – the set-off amount is the amount of the interest that has accrued since the beginning of the debt or the beginning of the lawsuit. I'm going to offset that amount of interest, equitably, such that the plaintiff is only entitled to recover its principal amount under the note. ... And so my ruling will be that the plaintiff is entitled to summary judgment, but the defendant is entitled to an equitable set-off in the amount of the interest that has allegedly accrued on the debt since the beginning of the lawsuit.

See Hearing Transcript, p. 59-60. *See Exhibit A- Transcript of Hearing attached and incorporated herein.*

¹ Exhibit D is the *Affidavit in Support of Plaintiff's Motion for Summary Judgment* (the "Affidavit"). The Affidavit includes uncontroverted sworn testimony as to the amount of attorneys' fees incurred by Plaintiff: \$16,077.27 (Prior Servicer Attorney Fees and Costs) and \$20,878.32 (Attorney Fees and Costs); Escrow Advances: \$25,073.94; Late Fees: \$5,689.78; Property Inspections: \$499.00; BPO: \$935.00 and a Suspense Balance (\$1,939.75) along with Principal: \$207,389.66 and Interest: \$278,102.34 good through 9/30/2022 at the rate of 10.45% (Per Diem \$59.38) for a total amount due: \$552,705.56.

² The Court noted, "there is no counter affidavit filed by the defendant as to the amount of the debt." *See* Hearing Transcript, p. 58-59.

³ Defendant did not request any reduction in accrued interest, legal fees, escrow charges, or corporate advances at any time during the litigation. The Court's *sua sponte* disallowance of same absent notice and a hearing is an abuse of discretion.

⁴ Defendant presented no evidence of any legal fees or costs incurred by Mr. Singleton. Further, the Court made no findings of fact concerning the amount of reasonable attorney's fees and expenses incurred by Defendant during the litigation for the purpose of exercising a set-off.

The Court also concluded, albeit incorrectly, that:

[t]he plaintiff has not presented *any* evidence where it seeks the recovery of attorney’s fees. So therefore, there’s no interest – there’s no issue of attorney’s fees by the plaintiff on this case. (emphasis added).

See Hearing Transcript, p. 60.

In attempting to clarify its ruling on the amount of accrued interest that would be equitably set-off against the mortgage debt, the Court concluded that all of it would be disallowed, stating

[i]nterest accrued since the date of default is gonna be equitably set-off because of what is by Mr. Barnes’ litany of the course of travel that this particular instrument that you’re seeking to enforce has taken over the ten-year period.

See Hearing Transcript, p. 60-61.

Lastly, after determining that Defendant owes Plaintiff \$552,705.56 (Order, ¶ 61) and implementing a set-off of all interest (including interest that accrued before a foreclosure lawsuit was filed) in the amount of \$278,102.34, leaving a balance of \$274,603.22, the Court further reduced the judgment by disallowing \$67,213.56 in “escrow charges” and “corporate advances” because Plaintiff “failed to establish reasonableness of the escrow by failing to itemize what constitutes the escrow charges” and “failed to establish the reasonableness of its ‘corporate advances’”. *See* Order, ¶ 62 – 66.

ARGUMENT

The Court’s denial of all accrued interest, Plaintiff’s legal fees and costs, escrow charges, and corporate advances in the aggregate amount of \$345,315.90 is not supported by the evidence or applicable authority and constitutes an abuse of discretion. “An abuse of discretion occurs when the trial court’s decision is unsupported by the evidence or controlled by an error of law.” *Cty. of Richland v. Simpkins*, 348 S.C. 664, 668, 560 S.E.2d 902 (Ct. App. 2002) (citing *Ledford v. Pennsylvania Life Ins. Co.*, 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976))

Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt. *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009). 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. *Id.* at 374-75, 684 S.E.2d at 205. In the present case, the Court found that Plaintiff met its burden of establishing the existence of the debt and Defendant's default on that debt. The Court further found that the amount of debt owed by Defendant to Plaintiff was \$552,705.56, which included principal, interest, attorney's fees and costs, escrow advances, and other charges.

A. The Court improperly set-off the Plaintiff's contractual right to interest as permitted under the terms of the Note and Mortgage.

The premise for the Court's decision disallowing all accrued interest is that after commencing the foreclosure action, Plaintiff abused statutory privileges under the South Carolina Uniform Commercial Code (UCC) by repeatedly transferring the note, assigning the mortgage, and transferring servicing rights. *See* Order, ¶¶ 19 – 23. The Court reasoned that the underlying purposes and policies of the South Carolina UCC are: (1) to simplify, clarify, and modernize the law governing commercial transactions. *See* Order, ¶ 19 (citing S.C. Code Ann. § 36-1-103).⁵ The Court concluded that Plaintiff's post foreclosure actions "hardly simplified" and "hardly clarified" the purposes and policies of the UCC. *See* Order, ¶¶ 20, 21.

It was an abuse of discretion to rely upon the UCC as a basis for denying all accrued interest because nowhere in the South Carolina UCC is a party restricted from transferring debt

⁵ Ironically, § 36-1-103(2) provides: "to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties". Here, the parties expressly agreed that the loan documents could be transferred by mortgagee, and Plaintiff's post foreclosure case filing transfer of the debt instruments was customary and done in a commercially reasonable manner as authorized by the UCC.

instruments during a pending foreclosure action. Plaintiff's post-foreclosure transfers were not forbidden by the UCC, and certainly not forbidden by any court order. Moreover, Plaintiff's commercial transactions were permitted by the express terms of the loan documents, and conducted in a commercially reasonable manner and pursuant to established practice throughout the State of South Carolina. Notably, the UCC contains no provision authorizing a court to deny payment of non-usurious interest.

The Court noted that Plaintiff's predecessor had transferred the loan just prior to trial in 2016, but the Court made no express findings of fact that the 2016 loan transfer constitutes bad faith conduct on the part of Plaintiff's predecessors. There is no finding that any loan transfer was done for purposes of hindrance or delay or without any reasonable basis. In fact, there is zero evidence in the ten-year record of the Court finding that Plaintiff or its predecessor acted in bad faith.⁶ The Court has made no findings that a pleading, motion, argument, brief, document, or record filed in the case or any testimony presented in the case was grossly lacking in the requirements of propriety, violated court rules, or grossly disregarded the requirements of a fair presentation of the issues to the Court. Plaintiff did not present false evidence, false testimony or violate any court orders.

The Findings of Fact in the Order concerning the Court's decision to deny Plaintiff all interest are without sufficient evidentiary support, include vague generalizations, and lack specificity required to harshly penalize a litigant by disallowing all accrued interest. For example, the Order provides that Plaintiff "unnecessarily protracted this litigation" by multiple allonges of the note, multiple assignments of the mortgage, and multiple substitutions of counsel

⁶ The Court is unable to find that Plaintiff acted in "bad faith" by transferring debt instruments during a foreclosure case because the UCC contains no prohibition. Further, S.C. Code Ann. § 36-1-201(20) defines good faith as "except as otherwise provided in Chapter 5, means honesty in fact and the observance of reasonable commercial standards of fair dealing."

after the foreclosure suit began (paras. 13-16),⁷ “practiced unfair business policies” by changing the holder of the note and transferring servicing rights to the note (paras. 17-18),⁸ abused statutory privileges under the South Carolina UCC (para. 19), failed to exhibit good faith (para. 26)⁹ and failed to exhibit fair dealing (para. 27).

The preponderance of evidence shows that Plaintiff did not act in bad faith. At no point did Plaintiff, its predecessors, or any of their attorneys willfully or intentionally violate a Court order. If the Court had any concerns with Plaintiff or its predecessors’ conduct during the foreclosure case or wanted to limit Plaintiff’s ability to transfer the debt instruments, orders could have been entered. But none were. Plaintiff and its predecessors continuously operated within the confines of court procedures and commercial law and, therefore, should not be penalized for lawful conduct where no express findings of *bad faith* conduct exists. South Carolina courts hold that “[t]he Plaintiff has the burden of prosecuting his action, and the trial

⁷ The Court made no specific findings concerning (1) the actual number of allonges, assignments, and counsel substitutions, (ii) how those events protracted the litigation and for how long, and (iii) how those events increased Defendant’s legal fees. Notably, none of these acts occurred in contravention of a court order or contractual rights of the Defendant. The record is clear, however, that litigation was protracted by Defendant’s assertion of several spurious affirmative defenses requiring extensive discovery, each of which was rejected by the Court. *See* Order, ¶ 36 (“Defendant failed to provide any material facts in support of any defense”)(emphasis added).

⁸ The Court made no specific findings of (i) how many times Plaintiff and its predecessors transferred the note and servicing rights, (ii) what “business policies” were violated, and (iii) how the lawful transfers authorized by the loan documents were unfair and rose to the egregious level of bad faith conduct.

⁹ The definition of “good faith” has changed over time under the UCC. Today, the definition of “good faith” requires not only honesty in fact but also “observance of reasonable commercial standards of fair dealing.” Although “fair dealing” is a broad term that must be defined in context, it is concerned with the fairness of conduct rather than the care with which an act is performed. This is an entirely different concept than whether a party exercised ordinary care in conducting a transaction. Both concepts are to be determined in the light of reasonable commercial standards, but those standards in each case are directed to different aspects of commercial conduct. *See e.g.*, Sections 3-103(a)(9) and 4-104(c) and Comment 4 to Section 3-103. Accordingly, Plaintiff has exhibited good faith and fair dealing to Defendant, the Court, and all “third parties” because all UCC transactions were performed under the express terms of the loan documents, not in contravention of any Court order, and in compliance with the UCC.

court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with her cause." *McComas v. Ross*, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006). The Court controlled its own docket in this case and could have put Plaintiff and its predecessors on notice that its conduct was abusive. That never happened. Therefore, it's unreasonable to punish Plaintiff at this stage and to this magnitude when there has never been willful disobedience of a court order.

Prior to entry of the Order, not a single sanction or order to show cause had been entered against Plaintiff in this case. On the contrary, Defendant defaulted under the note and refused to make any mortgage payments since January 2010 claiming that he did not know who he had to make payments to. Reducing Defendant's contractual debt obligation by \$345,315.90 is an undue windfall and an unreasonably harsh punishment imposed upon Plaintiff.

Lastly, the Court's denial of interest provided for under enforceable loan documents, and where such interest was not disputed by Defendant, contravenes South Carolina case law. In *U.S. Bank Trust N.A. v. Bell*, 385 S.C. 364, 378-79, 684 S.E.2d 199 (Ct. App. 2009), the Master-in-Equity erred in ruling that the Bank was not entitled to collect interest accrued on the loan. The *Bell* Court ruled that the underlying note controlled the issue of interest. *Id.* at 379. The *Bell* Court reasoned that the construction of a clear and unambiguous contract presents a question of law for the court. *Id.* fn. 9 (citing *Ward v. West Oil Co.*, 379 S.C. 225, 238, 665 S.E.2d 618, 625 (Ct. App. 2008); see also *Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001)).

Significantly, the *Bell* Court recognized that it was without authority to alter an unambiguous contract by construction or to make new contracts for the parties. *Id.* fn. 9 (citing *C.A.N. Enterprises, Inc. v. South Carolina Health & Human Services Finance Com.*, 296

S.C. 373, 378, 373 S.E.2d 584, 587 (1988). “A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties’ failure to guard their rights carefully.” *S.C. Dept. of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008)).

In the instant case, the Court should follow the *Bell* court’s reasoning, acknowledge the plain and unambiguous terms of the Note, and award Plaintiff interest accrued on the unpaid principal.

B. The Court improperly denied Plaintiff’s contractual right to attorney’s fees, escrow charges, and corporate advances (late fees, Broker Price Opinion, etc.) as permitted under the terms of the Note and Mortgage.

South Carolina courts hold “[t]he general rule is that attorney’s fees are not recoverable unless authorized by contract or statute.” *U.S. Bank Trust NA v. Bell*, 385 S.C. 364, 379 (Ct. App. 2009)(citations omitted). “Where there is a contract, the award of attorney’s fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown.” *Id.* Here, the loan documents provide for attorney’s fees and costs in the event of borrower’s default. Indeed, this Court acknowledged that it has no authority to modify an agreement.¹⁰ Notwithstanding Defendant’s default, the Court denied all of Plaintiff’s legal fees and costs on the erroneous conclusion that Plaintiff did not provide any evidence. The Court’s failure to accept Plaintiff’s evidence, an uncontroverted Affidavit, was clearly erroneous and amounts to a denial of due process.

Further, the Court’s rejection of \$67,213.56 in “escrow charges” and “corporate advances” identified in the Affidavit on the basis that Plaintiff “failed to establish reasonableness of the

¹⁰ See Hearing Transcript, p. 59 (“I have no authority as a court to modify an agreement.”).

escrow by failing to itemize what constitutes the escrow charges” and “failed to establish the reasonableness of its ‘corporate advances’” (see Order, ¶¶ 62 – 66) is an abuse of discretion because (1) there is no “reasonableness” standard required under the loan documents for such items paid by a mortgagee and the Court’s imposition of same is an improper re-writing of the parties’ contract, and (2) the Court’s process for adjudicating the allowance of these charges without providing Plaintiff notice and an opportunity to be heard deprived Plaintiff of fundamental procedural rights.

The loan documents contain no requirement that any escrow charges or corporate advances made by the mortgagee must be “reasonable” as a condition precedent before the mortgagor is obligated to reimburse the mortgagee. Contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement. When parties do contract, courts do not have the right nor ability to substitute their judgment for that of the parties. When a contract is clear and unambiguous, like the loan documents in the instant case, a Court’s role is to apply the parties’ contract as written and not rewrite the contract. *See generally U.S. Bank Trust Nat’l Ass’n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009).

Defendant did not oppose the Affidavit, but if he did the Court could have set an evidentiary hearing. Consistent with established South Carolina foreclosure practice, Plaintiff provided an affidavit identifying amounts borrower owed under the loan documents. At no time was Plaintiff on notice that the Affidavit would be treated like a final fee application requiring detailed itemization, or run the risk of denial. If the Court, *sua sponte*, requires a mortgagee to itemize expenses for purposes of making a reasonableness determination, Plaintiff must be on notice and

deserves a full and fair opportunity to be heard on all issues concerning the amounts identified in the Affidavit.

C. The Court’s demonstrable bias against Plaintiff constitutes an abuse of discretion.

Proper grounds for denying a mortgagee its interest under enforceable loan documents includes “unclean hands.” Here, the Court did not find that Plaintiff had “unclean hands.” Instead, the Court provided its opinion on the state of the mortgage loan industry and how legislatures develop uniform codes that always favor the “big guy.” *See* Transcript, p. 57. The Court’s bias favoring Defendant, a small guy, over Plaintiff, a big guy, is shown as follows:

The small people of the world, such as Mr. Singleton, aren’t really at the table, in my opinion, on legislation that adopts uniform codes. And for that reason we see a lot of – very difficult situations arise where the Court has to really go back to the legislature and say what did the legislature pass in this state as to the rule that we’re supposed to follow ...

And if there is ever a case where a legislature should see the abuses that go one [sic] in the transfers of notes and mortgages, this case is, in my opinion, a perfect example of how abusive that can be. Unfortunately, the law is what the statute says it is. I have no choice but to enforce the note, ..., and foreclose the mortgage. My only avenue of explaining how distasteful this process has been is to set-off the amount of the interest that’s been accruing by virtue of the good work that Mr. Barnes and Mr. Sloan have done during the process of this entire – the life of this case. So that I think is a proper remedy under the circumstances, and that’s what I will order.

See Transcript, p. 57 – 62.

The Court’s bias is highlighted by ignoring the enforceable loan documents and the UCC, and creating a judicial “avenue” so that it can “explain” how “distasteful”, in the Court’s opinion, the foreclosure process was. In the absence of any court order violations and any proscribed law that allows for a denial of interest, it is pure bias to penalize Plaintiff under these circumstances.

Lastly, footnote 2 of the Order not only affronts the constitutional principle of church-state separation, but it further illustrates the Court's bias against Plaintiff by instructing the "decision-makers who work for the entities such as the Plaintiff" to "take heed of the Biblical principal [sic] found in Luke 12:48" The message is clear that the Court believes that Plaintiff did wrong and should be punished.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully submits that the Court should reconsider the Order and alter or amend it to grant judgment against the Defendant in the amount of \$552,705.56, which includes principal, interest, escrow advances, late fees, property inspections, BPO, and reasonable attorneys' fees and cost or in the alternative, allow the Plaintiff to submit additional evidence as necessary to confirm the reasonableness of any amounts included in the Plaintiff's request for judgment.

Dated: December 1, 2022

Respectfully submitted,

By /s/ January N. Taylor
McMichael Taylor Gray, LLC
S.C. Bar No. 80069
jtaylor@mtglaw.com
3550 Engineering Drive, Suite 260
Peachtree Corners, GA 30092
Telephone: (404) 474-7149
Facsimile: (404) 745-8121
Attorneys for Plaintiff