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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
ALAN D. CLEMMONS, MASTER-IN-EQUITY

Appellate Case No. 2023-001419
Lower Court Case No. 2021-CP-26-00144

United States of America acting through the
Rural Housing Service or successor agency,
United States Department of Agriculture, ...Appellant

v.

Patricia A. White a/k/a Patricia Ann White,
and Family Services, Inc., ...Respondents

FINAL BRIEF OF APPELLANT UNITED STATES OF AMERICA ACTING THROUGH THE RURAL HOUSING SERVICE OR SUCCESSOR AGENCY, UNITED STATES DEPARTMENT OF AGRICULTURE

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in granting Respondent Patricia A. White a/k/a Patricia Ann White ("Respondent") *sua sponte* relief pursuant to the affirmative defenses of estoppel by laches and unclean hands, despite same having been waived because of not being plead, raised, or presented at the final hearing?

2. Did the trial court err in granting Respondent *sua sponte* relief based on public policy, despite same having been waived as a result of not being pled, raised, or presented at the final hearing?

3. Did the trial court err in failing to award all contractually due property maintenance and preservation costs and accrued interest due pursuant to the terms of the Note and Mortgage?

STATEMENT OF THE CASE

This matter involves Appellant United States of America acting through the Rural Housing Service or successor agency, United States Department of Agriculture's ("Appellant") efforts to collect amounts owed under a Promissory Note ("Note") and foreclose a Mortgage of Real Estate ("Mortgage") executed by Respondent. Appellant also seeks to collect amounts owed under a Subsidy Repayment Agreement ("Subsidy") (the Note, Mortgage and Subsidy are sometimes collectively referred to herein as "Loan Documents") Respondent executed contemporaneous with the Note and Mortgage. The Mortgage encumbers real property located in Horry County, South Carolina, has Horry County TMS # 037-00-01-160, and is commonly referred to as 3470 Highway 917, Loris, South Carolina 29569 ("Property"). The Loan Documents were executed as part of Respondent's purchase of the Property.

After Respondent failed to make the payments due under the Note and Mortgage, Appellant held Respondent in default under the terms thereof, accelerated the entire amount and declared the full amount then due and payable at once, and instituted the subject foreclosure action in the Horry County Court of Common Pleas with the same being designated C/A No.: 2021-CP-26-00144. Also, at the time the action was filed, the amounts due under the Loan Documents had matured. Respondent appeared in the action and filed an Answer through her court appointed Guardian *ad Litem* Thomas D. Kilpatrick, Esq. on February 16, 2023. The Answer did not raise the affirmative or other defenses relied upon by the trial court in coming to its decision and contained in the orders on appeal.

A final hearing in this matter took place on May 16, 2023 at which Appellant presented evidence and testimony as to the debt due and owing under the Loan Documents. During the

hearing, the trial court questioned the components of the debt claimed to be owed and other matters, including but not limited to the length of time between Respondent's default to the institution of this matter and the effect same had on the interest and caretaking/property preservation fees claimed to be owed. Respondent presented no defense or challenge to the amount claimed to be owed.

After the May 16, 2023 hearing, a Judgment of Foreclosure and Order for Sale was entered on June 2, 2023 ("Judgment") which granted Appellant foreclosure of the Mortgage, but reduced the debt owed by limiting the amount of interest Appellant could collect to two years from the date of default and reduced the amount of caretaking/property preservation fees by fifty percent (50%). The trial court based its decision to reduce the debt owed on the grounds Appellant sat on its rights and was barred by estoppel by laches.

Appellant timely filed a Motion to Reconsider, Alter or Amend on June 12, 2023 ("Motion to Reconsider"), which went uncontested; however, the trial court denied same by Order Denying Motion for Reconsideration filed on September 8, 2023 ("Order Denying Reconsideration"). However, the trial court changed the reasoning for its decision from estoppel by laches to reasoning grounded in unclean hands and public policy.

This appeal arises out of the trial court's reduction of the interest claimed as well as the reduction of the property preservation/caretaking fees.

STATEMENT OF FACTS

On April 26, 1983, Respondent made, executed, and delivered to Appellant, then known as the United States of America, acting through the Farmers Home Administration, United States Department of Agriculture, a Promissory Note ("Note") in the original principal sum of $39,500.00 promising to repay the same based on the terms and conditions contained in said Note. (R. pp.

121-124). Important in this matter is the Note provides the amount due thereunder accrues interest at the rate of ten and 75/100 percent (10.75%) per annum and that the full amount would be paid no later than thirty-three (33) years from the date the Note was executed. Id. The Note also provides Respondent's failure to make payments provided for therein would be considered an event of default at which time Appellant could exercise its option set forth in the Note and declare all amounts owed to be immediately due and payable, as well as collect its attorney's fees and costs associated with the enforcement of the terms thereof. Id.

Contemporaneous with the Note's execution, Respondent executed a Subsidy Repayment Agreement ("Subsidy") in Appellant's favor in which she agreed to repay the subsidy she received as part of the subject loan transaction.[1] (R. pp. 130-134).

To secure the amounts owed under the Note and Subsidy, Respondent made, executed, and delivered to Appellant a Real Estate Mortgage for South Carolina of even date ("Mortgage") that was recorded on April 26, 1983 in the Office of the Register of Deeds for Horry County in Book 827 at Page 761. (R. pp. 125-129).

The Mortgage contains repayment terms like those contained in the Note, namely that the principal amount identified therein and amounts due thereunder would accrue interest at the rate of ten and 75/100 percent (10.75%) per annum with all amounts owed thereunder being due no later than April 26, 2016 or thirty-three (33) years from the date the Loan Documents were executed. Id.

The Mortgage also provides Respondent agreed to pay all advances made under the Mortgage, to keep the Property maintained in good repair, to pay taxes charged against the

[1] Payment subsidies are available for Section 502 loans to provide an interest credit and/or payment assistance based on income eligibility for qualifying borrowers. 7 CFR 3550.68. Subsidies advanced are subject to full recapture in the event of foreclosure. 7 CFR 3550.162.

Property, to keep insurance thereon, and that Appellant could inspect the Property to ascertain whether the terms of the Mortgage were complied with. Id. The Mortgage further provides Respondent is required to reimburse Appellant for expenses reasonably necessary and incidental to the protection of the lien and priority thereof and to the enforcement of or compliance with the Mortgage's terms. Id. Furthermore, under the Mortgage, Appellant, upon Respondent's default and in Appellant's sole discretion, is allowed to incur and pay, for Respondent's benefit, reasonable expenses related to the repair and/maintenance of the Property and take possession of the same. Id. It is worth noting neither the Note nor the Mortgage contain a limitation when interest would stop accruing outside of repayment in full of amounts due under the Note. Id.

Respondent failed to make her payments under the Loan Documents on and after March 26, 2008, and, as a result, Appellant initiated a foreclosure action against Respondent on May 19, 2009 in the Court of Common Pleas for Horry County bearing Civil Action No. 2009-CP-26-05057 which resulted in the entrance of a Master's Order and Judgment for Foreclosure and Sale filed October 29, 2009 ("2009 Judgment") following a final hearing. (R. pp. 135-149).

Thereafter, Respondent availed herself of the administrative process for contesting the acceleration of amounts due and owing under the Loan Documents pursuant to 7 CFR 3550.4 resulting in a delay of enforcement of the 2009 Judgment subject to the Mortgage[2]. (R. pp. 193-194). Appellant then encountered additional delays in bringing the present action from a lack of congressional budgetary funding during which time Note and Mortgage matured on April 26, 2016. Id. The onset of the global health crisis precipitated by the onset of the COVID-19 pandemic

[2] Based on information received from Appellant post hearing at the Court's request.

and emergency moratoriums on foreclosures imposed by the Coronavirus, Aid, Relief and Economic Security Act ("CARES") issued on March 27, 2020 further delayed Appellant.[3] Id.

Within the statutory time for enforcement of its rights under the Mortgage, Appellant commenced this action against Respondent and Family Services, Inc. ("Family Services") by the filing of a Lis Pendens, Summons and Complaint in the Office of the Clerk of Court for Horry County on January 12, 2021 and subsequently amended on July 13, 2021 ("2021 Foreclosure") (R. pp. 23-46). The Complaint indicates Appellant was waiving its right to a deficiency judgment. Id. White and Family Services were properly served as identified on the Affidavits of Service. (R. pp. 73-74). Family Services failed to file an answer and is in default (R. p. 90). An Amended Summons and Amended Complaint were filed on July 13, 2021. (R. pp. 55-72).

Appellant then moved to appoint Thomas D. Kilpatrick, Esquire, as Respondent's Guardian *ad Litem* based information received related to her alleged incapacity. (R. pp. 75-78). Appellant's motion was granted, and Mr. Kilpatrick was appointed as Respondent's Guardian *ad Litem* on June 15, 2022. (R. pp. 84-86). An Answer on behalf of Respondent was filed February 16, 2023. (R. pp. 94-95). The Answer contained general denials of Appellant's allegations and/or indicated a lack of information to form a belief to admit or deny the allegations of the Amended Complaint. Id.

The case was then referred to the Honorable Alan D. Clemmons, as Master in Equity for Horry County ("Master"), by Order of Reference filed September 16, 2022 (R. pp. 87-89). A final foreclosure hearing was held May 16, 2023 as indicated above for which the parties received due and proper notice. (R. pp. 115-117).

[3] Based on information received from Appellant post hearing at the Court's request.

At the final hearing, Appellant submitted an Affidavit of Debt and Authority to Testify ("Affidavit of Debt"), which had attached thereto a payoff statement, breakdown of fees assessed, including expenses related to property preservation and/or caretaking, property taxes, and insurance, and Mortgage Contracting Services, LLC's[4] summary of invoices as evidence of the calculations of the outstanding debt due and owing under the Loan Documents. (R. pp. 135-149). The evidence and testimony were not contested by Respondent, her Guardian *ad Litem* or any other party. (R. p. 193, R. p. 168, line 20 – p. 171, line 1). Notwithstanding that fact, the Master took the matter under advisement to allow Appellant time to answer questions the Master had about the components of the debt owed. (R. p. 171, line 25 – p. 172 line 6).

Thereafter, the Master issued the Judgment which, despite a finding Appellant had proved its debt, limited the Appellant's interest recovery from the date of default[5] and reduced its recovery for its property maintenance and other preservation costs by fifty percent (50%) based upon a finding Appellant sat upon its rights to commence and finalize its foreclosure action under a balancing test and other certain equitable principals including, but not limited to estoppel by laches. (R. pp. 008-009, ¶¶ 22-27).

Thereafter, Appellant filed the Motion to Reconsider. (R. pp. 150-152). A Memorandum in Support of the Motion to Reconsider, Alter or Amend was filed on June 30, 2023. (R. pp. 153-161). The Master denied the Motion to Reconsider by Order Denying Reconsideration based upon weighing the equitable rights of the parties, addressed the issues of Appellant's interest claimed and caretaking/property preservation fees *sua sponte* on the grounds of public policy, and added

[4] Mortgage Contracting Services, LLC is the vendor with whom Appellant has engaged and/or contracted to perform property preservation and/or caretaking services related to the property subject of the Mortgage.
[5] Based on the events at the hearing, this appears to be the Master's "general rule of thumb". (R. p. 168, lines 1-19).

the affirmative defense doctrine of unclean hands as reasons for denial. (R. pp. 20-22). The explanation of public policy contained little analysis or explanation. Id. This appeal followed.

STANDARD OF REVIEW

An action to foreclose a mortgage is an action in equity. Fibkins v. Fibkins, 303 S.C. 112, 115, 399 S.E.2d 158, 160 (Ct.App.1990) (internal citations omitted). "In an appeal from an action in equity, tried by a judge alone, the appellate court may find facts in accordance with our own view of the preponderance of the evidence." U.S. Bank Trust Nat. Ass'n v. Bell, 385, S.C. 364, 373, 684 S.E. 2d 199, 204 (Ct. App. 2009) (internal citations omitted). "However, this bR.d scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in a better position to assess the credibility of the witnesses." Pinckney v. Warren, 344, S.C. 282, 387, 544 S.E. 2d 620, 623 (2001). "Moreover, the appellant is not relieved of the burden of convincing the appellate court the trial judge committed error in his findings. Id. at 387-88, 544 S.E. 2d at 623. Additionally, "[a] legal question in an equity case receives review as in law." Sloan v. Greenville County, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct.App.2003). Because questions of law may be decided with no deference to the trial court, this court may correct errors of law in both legal and equitable actions. I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 718-719 (2000). The appellate court's standard of review in equitable matters is the preponderance of the evidence. Williams v. Wilson, 349 S.C. 336, 339–40, 563 S.E.2d 320, 322 (2002).

ARGUMENTS

In this matter, the Master erred by reducing the interest owed and the caretaking/property preservation fees incurred and charged to Respondent's account as Appellant met its burden of

proof related to the debt owed and Respondent waived the affirmative defenses relied upon by the Master by failing to plead or assert same. Similarly, the Master committed error as his actions have the effect of altering the terms of the Loan Documents, which are clear and unambiguous, in Respondent's favor to Appellant's detriment.

I. The Master erred in granting *sua sponte* relief pursuant to the affirmative defenses of estoppel by laches and unclean hands, despite same having been waived because of not being plead, raised, or presented at the final hearing.

In the Judgement and Order Denying Reconsideration, the Master asserted, considered and relied on various defenses, affirmative or otherwise, to reduce the debt Respondent owed under the Loan Documents. (R. pp. 4-19, R. pp. 20-22). Respondent did raise these defenses in her Answer, at the final hearing, or otherwise. In fact, Respondent acknowledged there did not appear to be any defense to the debt claimed by Appellant (R. p. 193, R. p. 8, ¶21). Accordingly, it was error for the Master to raise and consider them *sua sponte* and rely on them to reduce the debt owed.

Under Rule 12, SCRCP, "Every defense, in law or in fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third party claim, shall be asserted in the responsive pleading if one is required…." Rule 12(b), SCRCP. "In pleading to a preceding pleading, a party shall set forth affirmatively the defenses: accord and satisfaction, arbitration and award, assumption of risk, condonation, contributory negligence, discharge in bankruptcy…..*laches*….waiver, and *any other matter constituting an avoidance or affirmative defense*." Rule 8(c), SCRCP (emphasis added). Laches is an affirmative defense and must be pled. Emery v. Smith, 361 S.C. 207, 216 603 S.E.2d 598, 602 (Ct. App. 2004). Similarly, estoppel must be pled as a defense and cannot be bootstrapped on another claim. Wright v. Craft, 372 S.C.

1, 21 640 S.E.2d 486, 497 (Ct. App. 2006). Further, unclean hands must also be pled in order to be asserted as a defense, affirmative or otherwise. See Allendale County Bank v. Cadle, 348 S.C. 367, 377-78, 559 S.E. 2d 342, 347-348 (Ct. App. 2001). This is consistent with the concept, "An affirmative defense is waived if not pled." RIM Assocs. v. Blackwell, 359 S.C. 170, 597 S.E.2d 152 (Ct. App. 2004). Also, it is well settled that ordinarily a party may not receive relief not contemplated in his or her pleadings. Heins v. Heins, 344 S.C. 146, 152, 543 S.E.2d 224, 227 (Ct.App.2001).

As applied to this case, the Master, in the Judgment, used a balancing test to weigh the equitable rights of the parties and the equitable theory of estoppel by laches to limit Appellant's recovery of interest to two years from the date of default and reduced the caretaking/property preservation costs by fifty percent (50%) of amounts indicated in the Affidavit of Debt, which went uncontested. (R. pp. 8-9, ¶¶ 21-27). In the Order Denying Reconsideration, the Master, then changed course, however, and affirmed based upon relatively unexplained public policy considerations and the doctrine of unclean hands although the facts, including those alleged in the pleadings, had not changed[6]. (R. pp. 20-21).

However, as mentioned above, Respondent failed to assert or plead any of these defenses, affirmative or otherwise, in her Answer. (R. pp. 94-95). To be sure, at the final hearing, the Guardian *ad Litem* indicated he knew of no defenses or objections to the debt claimed to be owed, which the Court indicated in the Judgment. (R. p. 193, R. 170, lines 18-24, R. 008, ¶21). Respondent also did not oppose Appellant's Motion for Reconsideration signaling a consent to the

[6] It is worth noting that the Master's concerns regarding public policy and unclean hands were only cited as justification in the Order Denying Reconsideration after Appellant indicated the Respondent had not previously raised the laches or estoppel as defenses to the action.

amendment of the Judgment based on Appellant's arguments that the defenses asserted and relied upon in the Judgment were waived. As a result, these defenses, affirmative or otherwise, must be considered waived as a matter of law, and the Master's reliance upon them to reduce the debt owed under the Loan Documents was in error.

II. The trial judge erred in granting *sua sponte* relief based on public policy, despite same having been waived as a result of not being pled, raised, or presented at the final hearing.

The Master also cited public policy concerns in limiting Appellant's recovery of interest to two (2) years from the date of default and reducing the property maintenance and other property preservation costs by fifty percent (50%) of the amounts indicated in the Affidavit of Debt based on a purported significant delay in initiating and finalizing the foreclosure. (R. pp. 20-21) In support thereof, the Master found the record reflects Appellant had possession of the Property for many years as indicated by Appellant's submitted documentation for monthly caretaking/property preservation expenses beginning February, 2008, found that Appellant's hands were unclean, and it would be against public policy to allow Appellant to collect and/or be reimbursed for same. Id. In other words, it appears the Master replaced an unpled affirmative defense for two others indicating the arbitrariness of the findings. Id.

However, while the Master heard uncontroverted testimony surrounding the purported delay in bringing this foreclosure, the Master appears to have ignored and/or discarded same without justification or indicated same was not considered. (R. pp. 163-187, R. pp. 188-195, R. pp. 196-237). In particular, the Master appears to have disregarded testimony that this is the second foreclosure action brought by Appellants, and, that, after entry of the 2009 Judgment and due to Respondent's exercise of her rights under Appellant's internal administrative appeal process

pursuant to 7 CFR 3550.4[7], Appellant could not proceed with enforcing its rights under the 2009 Judgment or complete the foreclosure of the Mortgage. (R. pp. 214-237, R. p. 008). During this time, the Loan Documents matured on April 23, 2016. Then, Appellant, through no fault of its own, encountered additional delays in bringing this matter due to a lack of congressional budgetary funding and was only able to bring this matter after receiving same. (R. p. 008). The onset of the global health crisis precipitated by the onset of the COVID19 pandemic and emergency moratoriums on foreclosures imposed by the Coronavirus, Aid, Relief and Economic Security Act ("CARES") issued on March 27, 2020 further delayed Appellant. Id.

The Master similarly appears to have ignored the fact that, between the date of default and the commencement of the within action, Respondent was entitled to enjoy the benefit of the loan (i.e. ownership of the property) and possession of the Property without meeting her contractual obligations, including but not limited to not making monthly mortgage payments, maintaining insurance, paying property taxes, and upkeep and general maintenance. These are actions she could have taken to mitigate the amount owed, but she simply chose not to do so. Respondent's failure to comply with her contractual obligations should not redound to her benefit and create a penalty for Appellant, which is the effect of the Master's findings.

For the Master to ignore or discard this uncontroverted testimony and/or evidence was error as was it error for the Court to use public policy considerations and/or unclean hands (with limited justification or analysis) as a basis to limit Appellant's ability to collect the interest and caretaking/property preservation fees owed as allowed under the Note and Mortgage.

[7] Pursuant to 7 CFR 3550.4 "Whenever RHS makes a decision that is adverse to a participant, RHS will provide the participant with written notice of such adverse decision and the participant's rights to a USDA National Appeals Division hearing in accordance with 7 CFR part 11. Any adverse decision, whether appealable or non-appealable may be reviewed by the next-level RHS supervisor." 7 CFR part 11 provides the National Appeals Division Rules of Procedures for administrative appeals.

III. The trial judge erred in failing to award all contractually due property maintenance and preservation costs and accrued interest due pursuant to the terms of the Note and Mortgage.

In addition to the above, the Master's limitation of the debt owed under the Loan Documents constitutes a change in the terms thereof, which is impermissible, as the same are clear and unambiguous. The Master was not at liberty to alter or amend same.

Under South Carolina law, promissory notes and mortgages are considered contracts governed by the rules of contract construction. See Southern Atlantic Fin. Services, Inc. v. Middleton, 349 S.C. 77, 562 S.E. 2d 482 (Ct. App. 2002). Accordingly, "The primary objective is to ascertain and give effect to the intentions of the parties." Id. 349 S.C. at 80, 562 S.E. 2d 484 (internal citations omitted). "The parties' intentions are governed by looking at the language of the contract." Id. If the language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect unless an ambiguity exists. 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). A contract is ambiguous when its terms are susceptible of more than one interpretation. Southern Atlantic Financial Services, Inc., 349 S.C. at 81, 562 S.E. 2d 464 (Ct. App. 2002). "Whether a contract is ambiguous is to be determined from the entire contract and not from isolated portions of the contract." Silver v. Abstract Pools & Spas, Inc., 376 S.C. 585, 591, 658 S.E. 2d 539, 542 (Ct. App. 2008) (citing Farr v. Duke Power Co., 265 S.C. 356, 362, 218 S.E. 2d 431, 433 (1975)). "Hence, words cannot be reads into a contract which import an intent wholly unexpressed when the contract was executed." Id. (citing McPherson v. J.E. Sirrine & Co., 206, S.C. 183, 204, 33 S.E. 2d 501, 509 (1945)). "If a contract is unambiguous, a court must enforce it 'according to its terms regardless of its wisdom or folly,

apparent unreasonableness, or the parties' failure to guard their rights carefully.'" Mears Group, Inc. v. Kiawah Island Utility, Inc., 372 F. Supp. 3d 363, 373 (D.S.C. 2019) (citing S.C. Dep't of Transp. v. M&T Enterprises of Mt. Pleasant, LLC, 370, S.C. 465, 667 S.E. 2d 7, 13 (S.C. Ct. App. 2008)).

In this matter, Respondent did not nor has she alleged an ambiguity exists in the Loan Documents nor does it appear the Master determined the same to be ambiguous such that the Court must consider the same to be clear and unambiguous. (R. pp. 94-95). As a result, the Master's only role in this matter was to enforce Loan Documents' terms according to the plain and unambiguous meaning. As noted above, the Note and Mortgage are written instruments, and, as a result, and in determining the amount of principal and interest due thereon, the computation must be made in accordance with the terms of said Note and Mortgage. See Rhodus v. Goins, 129 S.C. 40, 41, 123 S.E. 645, 645-46 (1924).[8]

In doing so, and in making its findings of facts, the Court must determine whether Appellant met its burden of proof by the preponderance of evidence, simply meaning that the evidence presented by the Appellant as compared with that opposed to it, has more convincing force and is more than likely true than not true. Frazier v. Frazier, 228 S.C. 149, 89 S.E. 2d 225 (1955). Once the debt and default had been established, the mortgagor (ie: Respondent) has the burden of establishing a defense to the foreclosure such as lack of consideration, payment, or accord and satisfaction. U.S. Bank Trust Nat'l Ass'n v. Bell, 385 S.C. 364, 375, 684 S.E.2d 199, 375 (Ct. App. 2009). The Court does not have the liberty to alter or amend the terms of the

[8] See also Wilmington Sav. Fund Soc'y v. Furmanchik, No. 2015-UP-353, 2015 WL 4275455 (S.C. Ct. App. July 15, 2015)

contract. Mears Group, Inc. v. Kiawah Island Utility, Inc., 372 F. Supp. 3d 363, 373 (D.S.C. 2019) (internal citations omitted).

Accordingly, the Note provides Respondent promis[ed] to pay the principal sum of $39,500.00 plus interest on the unpaid principal of 10.75% per annum with a final payment due in thirty-three (33) years. (R. pp. 121-124). The Mortgage also provides Respondent covenanted and agreed the Appellant may at any time pay any other amounts as required therein to be paid by Respondent and not paid by Respondent when due, as well as any costs and expenses for the preservation, protection or enforcement of this lien, as advances for the account of Respondent. (R. pp. 125-129). All such advances shall bear interest at the rate born by the note which has the highest interest rate. (R. p. 127, ¶5). Respondent further agreed that Appellant may incur and pay reasonable expenses for repair and maintenance of the Property and take possession of the same should an event of default occur. (R. p. 127, ¶9). Respondent did not object to, dispute, or contest any terms of the Loan Documents or claim the same to ambiguous and, accordingly, they are unambiguous contracts and must be enforced pursuant to their contractual terms.

This means the terms of the repayment are clear and unambiguous on their face and capable of only one interpretation being that Respondent promised to pay interest on the principal amount owed at the rate of 10.75% and to repay advances expended by Appellant attributable to the preservation and maintenance of the Property. To artificially create a cutoff date regarding the collection of interest and property preservation fees by a specific time period or percentage while Respondent had the opportunity to protect her own rights and had the benefit and opportunity of the use of the Property is to arbitrarily insert a term in the Note and Mortgage thereby re-writing same in Respondent's favor for which there is no evidence that is what either Appellant or Respondent intended. Accordingly, the Master's actions should not have been taken, especially

regarding the calculation of interest which can be computed by calculation and constitute liquid damages.

Furthermore, and regarding the burden of proof, Appellant presented in support of and as evidence of its calculation of the debt owed, the Affidavit of Debt which calculated the interest from March 26, 2008 through the date of the final hearing and attached thereto a payoff statement and fee breakdown from Mortgage Contracting Services, LLC indicating the caretaking and property preservation fees and charges Appellant incurred related to the Property. (R. pp. 135-149). Respondent did not dispute the default, object to the calculation of interest, the interest terms, the property preservation costs or dispute the total amount of debt secured by the Mortgage. (R. pp. 168-171). Rather, Respondent's Guardian *ad Litem* informed the Master Respondent did not have any defenses to the foreclosure action or the debt claimed to be due. Id.

Accordingly, Appellant established the debt and default by the Affidavit of Debt by the preponderance of the evidence without opposition from Respondent, and, as a result, the reduction in the debt owed under the Loan Documents was in error.

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CONCLUSION

Based on the above, Appellant is entitled to have the Judgement and Order Denying the Motion for Reconsideration reversed to the extent required to allow Appellant the full amount of the debt claimed to be owed and uncontested under the Loan Documents.

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CERTIFICATE OF COUNSEL

Undersigned counsel certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material, pursuant to Rule 211(b), SCACR.

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