

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Apr 18 2024

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Bentley D. Price, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2024-000469
Case No. 2018-CP-10-02762

Wilmington Trust National Association as Successor
Trustee to Citibank N.A. as Trustee of Structured Asset
Mortgage Investments II Inc., Bear Stearns ALT-A Trust
II Mortgage Pass-Through Certificates Series 2007-1, Plaintiff,

v.

Temisan Etikerentse a/k/a Temisan L. Etikerentse,
Ijeoma Etikerentse a/k/a Ijeoma Etkis, Suntrust Mortgage
Inc., Capital Bank Corporation, Bank of America NA,
Keybank National Association, and Olde Park
Homeowners' Association Inc., Defendants.

AND

Temisan Etikerentse a/k/a Temisan L. Etikerentse,
Ijeoma Etikerentse a/k/a Ijeoma Etkis Petitioners,

v.

Specialized Loan Servicing LLC a/k/a SLS, Respondent.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

Blake. T. Williams
Nelson Mullins Riley & Scarborough LLP
Post Office Box 11070
Columbia, SC 29211
(803) 799-2000

Attorney for Respondent

Introduction

Pursuant to Rule 242(f) of the South Carolina Appellate Court Rules, Respondent Specialized Loan Servicing LLC a/k/a SLS (“Respondent”) submits this Return opposing in opposition to the Petition for a Writ of Certiorari seeking review of the decision of the Court of Appeals in the above captioned matter: *Etikerentse v. Select Portfolio Servicing*, Op. No. 2023-UP-346 (S.C. Ct. App. filed Oct. 25, 2023) (“Op. No. 2023-UP-346”). For the reasons stated herein, the Court should deny the Petition and permit the well-reasoned decision of the Court of Appeals to stand. None of the principles contained in Rule 242(b), SCACR exist to justify issuance of the extraordinary writ Petitioners seeks here. This Court has confirmed that “it will grant certiorari to the court of appeals *only where special reasons justify the exercise of that discretion.*” *S.C. Dep’t of Soc. Servs. v. Benjamin*, 430 S.C. 235, 236 (2020) (emphasis added).

To that end:

Rule 242(b), SCACR, emphasizes the discretionary authority of the Court to review decisions of the court of appeals, stating a writ of certiorari will be granted only when there are special and important reasons, such as when there are novel questions of law; a dissent in the decision of the court of appeals; the decision of the court of appeals is in conflict with a prior decision of this Court; substantial constitutional issues are directly involved; or a federal question is included, and the decision of the court of appeals conflicts with a decision of the United States Supreme Court.

Id. Therefore, certiorari is only appropriate in cases of substantial legal importance where review is necessary to preserve the integrity and uniformity of the law of this State. Moreover, certiorari is not expedient where no harmful result is likely to occur. Since the considerations of Rule 242(b) are not implicated here, the petition for a writ of certiorari should be denied.

Counter-Statement of the Case

I. Background regarding the relevant parties.

On June 15, 2007, Temisan Etikerentse and Ijeoma Etikerentse (“Petitioners”) executed a \$1,402,500.00 adjustable-rate note (“Note”) with Countrywide Home Loans, Inc. (*See* Compl. Ex. A – Note; R. 52-55.) This Note was secured by a Mortgage (the “Mortgage” together with the Note, the “Mortgage Loan”) on real property located at 783 Navigators Run, Mount Pleasant, South Carolina given to Mortgage Electronic Registration Systems, Inc. (“MERS”), as nominee for Countrywide Home Loans, Inc. (*See* Compl. Ex. B – Mortgage; R. 56-74.)

On August 31, 2009, MERS assigned the mortgage to Citibank N.A., as Trustee on behalf of the Holders of Bear Stearns Alt-A Trust II, Mortgage Pass-Through Certificates, Series 2007-1 (“Citibank”). (*See* Compl. Ex. B – 8/31/2009 Assignment; R. 75-76.)

On November 4, 2014, Citibank assigned the mortgage to Wilmington Trust, National Association, as Successor Trustee of Structured Asset Mortgage Investments II Inc., Bear Stearns Alt-A Trust II, Mortgage Pass-Through Certificates Series 2007-1 (“Wilmington Trust”). (*See* Compl. Ex. B – 11/4/2014 Assignment; R. 76-77.)

As a result of these valid assignments, Wilmington Trust is the holder-in-due-course of the Mortgage Loan. Respondent Specialized Loan Servicing, LLC (“SLS”) services Petitioners’ loan on behalf of Wilmington Trust.¹ (*See* SLS Mot. for Summ. J., Ex. A – Affidavit of Mark McCloskey (“McCloskey Aff.”) at ¶ 8; R. 235.)

¹ Mortgage servicing is “[t]he administration of a mortgage loan, including the collection of payments, release of liens, and payment of property insurance and taxes.” *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 221, 746 S.E.2d 478, 481 (Ct. App. 2013) (quoting Black’s Law Dictionary 1105 (9th ed. 2009)).

II. Petitioners' default and SLS's loss mitigation efforts.

Petitioners defaulted on the note on December 1, 2008, and have remained in default for the subsequent sixteen years. (*See* Compl. at ¶ 15; Aff. at ¶ 9; R. 49, 236.)

The events forming the basis of Petitioners' allegations against SLS began when they submitted a loss mitigation application to SLS in 2014. In accordance with the Real Estate Settlement Procedures Act ("RESPA"), SLS evaluated the 2014 loss mitigation application for foreclosure intervention options. (*See* McCloskey Aff. at ¶¶ 10-11; R. 236.) Via letter dated December 12, 2014, SLS explained that Petitioners had been approved for a standard loan modification. (McCloskey Aff., Ex. 2 – Decision Letter dated 12/12/2014; R. 241-47.) SLS evaluated Petitioners for several other loss mitigation options, but they were not approved for those because the loan did not meet the necessary criteria. (*See id.*)

Despite SLS's approval of Petitioners' loan for a standard modification, the loan was not modified because Petitioners did not accept the terms by returning the necessary documents. (*See* McCloskey Aff. at ¶ 11; McCloskey Aff., Ex. 3 – Letter dated 3/16/2015; R. 236, 248-52.)

During the latter half of 2016, SLS voluntarily reviewed Petitioners for loss mitigation options a second time. Via letter dated December 27, 2016, SLS informed Petitioners that they were approved for a standard loan modification. (*See* McCloskey Aff. at ¶ 12; SLS's Mot. for Summ. J., Ex. B – Deposition of Temisan Etikerentse ("Etikerentse Dep."), Ex. 6 – Letter & Ex. 7 – Loan Modification Documents; R. 236, 303-37.) SLS also evaluated Petitioners for other loss mitigation options, but Petitioners were not approved for those options because the loan again did not meet the necessary criteria. (*See* McCloskey Aff. at ¶ 12; Etikerentse Dep. at Exs. 6 & 7; R. 236, 303-37.)

Petitioners rejected SLS's offer through their counsel and thus the loan was not modified. (*See id.*)

III. Procedural history.

Wilmington Trust filed this foreclosure action on April 18, 2016. (*See* Compl.; R. 47.) Petitioners filed their Answer and asserted counterclaims against Wilmington Trust and what were styled as third-party claims against SLS on November 17, 2016. (Ans., Countercls. & Third-party Claims; R. 86.) Petitioners stated claims for: (1) breach of contract, (2) declaratory judgment, (3) violation of RESPA, and (4) violation of the South Carolina Unfair Trade Practices Act (the "UTPA").

After the close of discovery, SLS filed a motion for summary judgment raising two arguments. First, SLS contended that Petitioners' claims were improperly pled as "third-party" claims under Rule 14, SCRPC because they did not assert derivative liability. (*See* SLS's Mot. for Summ. J. at 4-5; R. 220-21.) Second, SLS argued that Petitioners failed to produce evidence demonstrating any genuine issues of material fact for trial on any of their claims. Specifically, SLS asserted that each of Petitioners' claims failed on the merits because: (1) there was no privity of contract between SLS and Petitioners and thus their breach of contract failed as a matter of law, (2) the declaratory judgment claim was an improper attempt to assert a claim pursuant to the Home Affordable Modification Program ("HAMP"), which does not afford a private right of action, (3) there was no evidence of any unfair or deceptive act by SLS, impact on the public interest, or damages that would support a UTPA claim, and (4) there was no evidence supporting that SLS violated RESPA or that Petitioners suffered any damages as a direct result of any alleged violation. (*See id.* at 6-14; R. 222-30.)

The circuit court scheduled a hearing on SLS's motion for July 13, 2020. Petitioners e-filed their response brief on July 10, 2020 and also emailed supporting exhibits to the judge the morning of the hearing.² In their response, Petitioners contended that confusion at the outset of the case as to whether SLS's counsel would also represent Wilmington Trust in defense of the counterclaims supported derivative liability and meant their claims against SLS were proper Rule 14 claims. (*See Resp. in Opp'n* at 5-6; R. 345-46.) Petitioners then asserted that a Consent Order dated May 11, 2020 from an administrative proceeding brought by the Consumer Financial Protection Bureau ("CFPB") against SLS (the "Consent Order") offered evidentiary support for their contentions that SLS violated RESPA. *See Consent Order, In re: Specialized Loan Servicing, LLC*, No. 2020-BCFP-0002, 2020 WL 8182145 (May 11, 2020). Petitioners argued that, as a result of this Consent Order, there were genuine issues of material fact for trial. (*See Resp. in Opp'n* at 7-10; R. 347-50.) Finally, Petitioners argued that the Consent Order supported that SLS was required to undertake certain actions prior to challenging the merits of Petitioners' claims, and the circuit court lacked subject matter jurisdiction until that was accomplished. (*See id.*)

Following two hearings on July 13, 2020 and July 15, 2020, (*see Tr. of Hrg.* dated 7/13/2020; *Tr. of Hrg.* dated 7/15/2020; R. 370-416), the circuit court granted SLS's motion via Form 4 Order dated July 22, 2020 and invited SLS to submit a proposed formal order, (*see Form 4 Order* dated 7/22/2020; R. 26-28).

² The exhibits were: (1) the pooling and servicing agreement for their mortgage, (2) a copy of the affidavit submitted by SLS in support of its motion for summary judgment, (3) an affidavit previously submitted by Attorney Damon Wlodarczyk (counsel for Wilmington Trust) in support of a motion for relief from the entry of default, (4) a copy of a Consent Order between SLS and the Consumer Financial Protection Bureau, and (5) the Bankruptcy Trustee's final report from Temisan Etikerentse's bankruptcy.

Petitioners proceeded to file a motion to reconsider on July 29, 2020 (prior to the entry of the formal order) reiterating the same general arguments that Petitioners raised in their response brief and at the hearings. (*See* Mot. to Reconsider; R. 354-65.) The circuit court denied that motion via Form 4 Order dated August 5, 2020. (*See* Form 4 Order dated 8/5/2020; R. 29-31.)

The circuit court entered its formal order granting summary judgment in SLS's favor on August 17, 2020. (*See* Order dated 8/17/2020; R. 32-43.) The Order held that there were no genuine issues of material fact on the merits of Petitioners' claims and, in the alternative, Petitioners' claims were not proper Rule 14 third-party claims. (*Id.*) This appeal followed.³

IV. The Court of Appeals' Opinion.

After briefing and oral argument, the Court of Appeals affirmed the circuit court via a unanimous per curiam Opinion issued on October 25, 2023. The Court of Appeals held that Petitioners' Issues I and II, asserting that South Carolina courts lacked jurisdiction over their claims, were abandoned. Moreover, as to Petitioners' Issue III, the Court of Appeals agreed with the circuit court that there were no genuine issues of material fact and thus SLS was entitled to summary judgment. Alternatively, the Court of Appeals found that the circuit court correctly held that Petitioners' claims were not proper Rule 14, SCRPC claims, which constituted an additional basis for granting summary judgment.

The Court of Appeals denied Petitioners' untimely⁴ petition for rehearing via Order dated February 23, 2024. Petitioners then submitted a petition for a writ of certiorari to this Court.

³ The foreclosure claim brought by the Plaintiff mortgage holder (Wilmington Trust) against Petitioners associated with their 2008 default on their obligations under their mortgage, as well as Petitioners' counterclaims and affirmative defenses, remain pending before the circuit court and awaiting adjudication.

⁴ The Court of Appeals issued its Opinion on October 25, 2023, and the clerk's office emailed it to parties that same day. Pursuant to Rule 221(a), Petitioners' petition for rehearing was due on

Argument

The Court of Appeals correctly affirmed the circuit court's order granting summary judgment in favor of Respondent Specialized Loan Servicing LLC ("SLS") on Petitioners' third-party claims. Petitioners' petition does not identify any grounds that would warrant this Court's issuance of a writ of certiorari and, therefore, should be denied. Moreover, several of Petitioners' arguments are based on materials that were properly stricken from the record on appeal because they were never presented to the circuit court, and thus should not be considered.⁵

I. The Court of Appeals properly affirmed the circuit court.

As noted, this is an appeal from the circuit court's grant of summary judgment to SLS on third party claims asserted by Petitioners against SLS complaining of alleged issues associated with SLS's servicing of their loan. Petitioners' third-party claims sought monetary damages from SLS for alleged regulatory and statutory violations. The circuit court properly determined that Petitioners failed to present even a scintilla of evidence which would demonstrate a genuine issue of material fact for trial and, even if they had, Petitioners' claims against SLS were not proper "third party" claims. The Court of Appeals correctly affirmed the circuit court. Therefore, certiorari should be denied.

November 9, 2023. However, Petitioners did not serve and file their Petition for Rehearing until November 10, 2023, and did not move for leave to submit a Petition out of time.

⁵ The Court of Appeals' Order struck the following items identified on Petitioners' designation of matter: (1) 2009 Foreclosure Complaint; (2) Chapter 7 Bankruptcy Petition; (3) Bankruptcy ECF No. 24-1; (4) Bankruptcy ECF No. 24-2; (5) Copy of Bankruptcy ECF Records (List); (6) Bankruptcy ECF No. 36; (7) Bankruptcy ECF No. 37; and (8) LPS 7907-7954. It is undisputed that these materials were never submitted to the circuit court.

A. Petitioners did not present any evidence in support of their claims to the circuit court.

In support of its motion for summary judgment, SLS submitted affidavit and deposition testimony as well as supporting exhibits. Petitioners did not submit even a scintilla of *evidence* to the circuit court to support their claims that SLS improperly serviced their loan. Instead, Petitioners' arguments to the circuit court and on appeal focused on attacking the sufficiency of SLS's evidence (without producing any opposing evidence) and legally incorrect procedural arguments.

It is axiomatic that if a party "files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the [lower] court is *required* under Rule 56, to grant summary judgment" if the facts presented by the defendant support that it is entitled to judgment as a matter of law. *Higgins v. Med. Univ. of S.C.*, 326 S.C. 592, 598-99, 486 S.E.2d 269, 272 (Ct. App. 1997) (emphasis added) (quoting *Humana Hospital-Bayside v. Lightle*, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991)). "When a non-movant fails to cite materials in the record to support her assertion that an issue of fact is genuinely disputed, the court is under no obligation to 'scour the record in search of evidence to defeat a motion for summary judgment.'" *Hickerson v. Yamaha Motor Corp.*, No. 8:13-CV-02311-JMC, 2016 WL 7324684, at *12 (D.S.C. Dec. 16, 2016) (quoting *Ritchie v. Glidden Co.*, 242 F.3d 713, 723 (7th Cir. 2001)). Moreover, "[a]rguments made by counsel are not evidence." *S.C. Dep't of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003).

SLS detailed the deficiencies with each of Petitioners' cause of action in its merits briefing to the Court of Appeals and reasserts those arguments in full herein. The circuit court properly granted summary judgment because the evidentiary record conclusively established that there were no genuine issues of material fact for trial. Petitioners' Petition continues to attack

the sufficiency of SLS's evidence while glossing over the fact that they never submitted any *contra* affidavits, deposition testimony, or other supporting evidence. At the end of the day, Petitioners bore the burden of proving their claims and the Court of Appeals correctly affirmed the circuit court's finding that they failed to show any genuine issues of material fact.

B. Petitioners' claims were improperly pled as "third party" claims.

The circuit court also correctly determined that Petitioners' claims were not proper "third-party" claims against SLS, and the Court of Appeals appropriately affirmed on this alternative basis. As the Court noted, either the lack of evidence or the improper nature of the claims would have independently been sufficient to affirm the circuit court.

Pursuant to Rule 14(a), "a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to him for all or part of the plaintiff's claim against him.*" Rule 14(a), SCRPC (emphasis added). Thus, "[u]nder Rule 14, the third-party plaintiff must have a substantive claim against the third-party defendant founded upon *derivative* liability," meaning the "outcome of the princi[pal] claim must impact the third-party defendant's liability." *First Gen. Servs. of Charleston, Inc. v. Miller*, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (1994) (emphasis added). In other words, the key question is would the claim of the third-party plaintiff "impose liability upon [the third-party defendant] for all or part of [the plaintiff's] claim." *Id.*

In interpreting the analogous federal rule, the District of South Carolina has explained that a "third party" claim is "viable only where a proposed third party plaintiff says, in effect, 'If I am liable to plaintiff, then my liability is only technical or secondary or partial, and the third party defendant is derivatively liable and must reimburse me for all or part . . . of anything I must pay plaintiff.'" *Michelin N. Am., Inc. v. Klinger Ents., Inc.*, No. CV 6:18-518-HMH, 2018 WL

9988509, at *3 (D.S.C. Aug. 13, 2018) (quoting *Watergate Landmark Condo. Unit Owners' Ass'n. v. Wiss, Janey, Elstner Assocs., Inc.*, 117 F.R.D. 576, 578 (E.D. Va. 1987)). Derivative liability “usually arises in cases involving indemnification, joint tortfeasors, or contribution” and typically such claims “involve one joint tortfeasor impleading another, an indemnitee impleading an indemnitor, or a secondarily liable party impleading one who is primarily liable.” *Id.* (quoting *AIG Eur. Ltd. v. Gen. Sys., Inc.*, No. RDB-13-0216, 2013 WL 6654382, at *2 (D. Md. Dec. 16, 2013)).

SLS has never been a proper third-party defendant under Rule 14(a), and Petitioners’ briefing throughout this case has continued to misunderstand this argument. The genesis of this case was the foreclosure claim filed by the mortgage holder, Wilmington Trust, against Petitioners for their 2008 default on their obligations under their mortgage. SLS cannot possibly be secondarily liable, in whole or in part, for the *foreclosure* claim. Petitioners’ claims do not contend as much; instead, their claims seek monetary damages against SLS for alleged violations of various statutes and regulations in the servicing of their loan.

The District of South Carolina addressed this exact issue in *Deutsche Bank National Trust Co. v. Stevenson*, No. 2:12-1854-CWH, 2013 WL 12241630, at *3 (D.S.C. Jan. 30, 2013) under the nearly identical federal Rule 14(a). In *Stevenson*, the defendant asserted third-party claims against its loan servicer for violation of the UTPA and breach of the duty of good faith premised on the servicer’s failure to meaningfully engage in loss mitigation. *See id.* The District Court agreed with the servicer that “[t]he outcome of [plaintiff’s] foreclosure claim would not impact the liability of [the servicer].” *Id.* Thus, the third-party complaint was not valid as it “seeks no indemnification, and there is no relationship to the plaintiff’s claim against the third-party plaintiff.” *Id.* The same is true here.

As SLS has maintained, Petitioners' claims were not asserted through the correct procedural vehicle. Petitioners should have either joined SLS as a counterclaim defendant under Rule 13(h) *or* brought a separate suit against SLS. *See U.S. Bank Nat'l Ass'n v. Kahn Prop. Owner, LLC*, 64 Misc. 3d 1236(A), 118 N.Y.S.3d 369 (N.Y. Sup. Ct. 2019). Petitioners were masters of their pleading, however, and willfully chose to improperly state their claims without ever seeking to correct that error.

Therefore, for all these reasons, this Court properly affirmed the circuit court's grant of summary judgment on this basis.

II. The arguments raised in Petitioners' Petition for a Writ of Certiorari are without merit.

Faced with the clear deficiencies with their claims, Petitioners resorted to contending that the circuit court lacked the power to rule on SLS's motion. The Court of Appeals correctly found that these arguments were without merit.

A. Petitioners' petition asserts vague, illogical arguments that are unsupported by any applicable law.

Petitioners' Petition begins by discussing preemption, contending that unspecified federal matters preempted South Carolina's "regulatory or adjudicatory powers" over the claims they chose to assert in the circuit courts of this State. (Pet. at 2.) Preemption was not discussed in any detail in Petitioners' merits brief to the Court of Appeals. Moreover, Petitioners did not argue preemption to the circuit court aside from a passing reference in their motion to reconsider contending that the Home Ownership Lending Act preempts South Carolina law defining "default." (Mot. to Reconsider at 5; R. 358.) Preemption is a distinct doctrine from subject matter jurisdiction and must be raised to and ruled upon to be preserved. *See Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 645 (2011) (holding that the issue preservation

principles applied to Appellant’s preemption argument and finding the issue unpreserved). And, of course, “[a] party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not.” *Dixon v. Dixon*, 362 S.C. 388, 608 S.E.2d 849 (2005).

Any “preemption” argument was not preserved to the extent Petitioners are contending that the circuit court erred by failing to find preemption. Regardless, it is unclear why Petitioners are attempting to make such an argument considering preemption, if anything, would be a *defense* raised in response to causes of action brought against a party. *See, e.g., Burrell v. Bayer Corp.*, 918 F.3d 372, 382 (4th Cir. 2019) (“It is well established, of course, that preemption is an affirmative defense.”). Petitioners appear to be asserting that the very claims they decided to assert in this forum cannot, in fact, be heard by that forum, which is nonsensical.

B. The Court of Appeals properly granted SLS’s motion to strike.

Petitioners then take issue with the Court of Appeals’ grant of SLS’s motion to strike certain matters from the Record on Appeal. Petitioners contend that SLS asked the Court to “exclude evidence” through its motion, but this is a fundamental mischaracterization of SLS’s motion. The basis of the motion was Petitioners’ *attempt to include materials in the record on appeal that were never presented to the circuit court*. The appellate courts are not the stage to produce new materials to support new arguments that the circuit court never had the opportunity to consider in ruling on the issues before it.⁶ Vague assertions of “preemption” or “subject matter jurisdiction” do not allow a party to hand-wave away the requirements for developing the record at the circuit court level.

⁶ Petitioners are correct that subject matter jurisdiction may be raised at any time. However, this does not permit a party to shoe-horn improper materials into the Record on Appeal. Rule 210(c)’s directive is clear, providing that the Record “shall not . . . include matter which was not presented to the lower court or tribunal.” Rule 210(c), SCACR.

Moreover, contrary to what Petitioners seem to imply, the Court of Appeals did not preclude Petitioners from making any arguments in its Order granting SLS's motion to strike, and expressly stated that it was not making any rulings regarding issue preservation. The Court's order merely struck materials from Petitioners' designation of matter that were never presented to the circuit court and prevented reference to those stricken materials in accordance with the well-established rules. Much of Petitioners' Petition is an effort to raise improper arguments based on these properly excluded materials and are not an appropriate basis for demonstrating that a writ of certiorari should issue.

C. Petitioners' arguments about Temisan Etikerentse's bankruptcy proceedings are improper and without merit.

Despite the Court of Appeals' Order, the Petition raises several points relying on the materials stricken by the Court of Appeals regarding Temisan Etikerentse's bankruptcy. These arguments should be disregarded on this basis alone. However, they should also be rejected because they lack merit.

Petitioners appear to contend that the bankruptcy court is the only court that has jurisdiction to adjudicate the issues raised by the claims that *they chose to bring in circuit court*. They assert that they have raised a question as to whether the circuit court "has appellate jurisdiction" over "a final unappealed order of the bankruptcy court." (Pet. at 3.) It is unclear exactly what Petitioners are trying to argue about Temisan Etikerentse's bankruptcy or how this supposedly impacted the circuit court's power to hear their claims, but SLS will briefly address this issue out of an abundance of caution.

Appellant Temisan Etikerentse filed a voluntary bankruptcy petition pursuant to Chapter 7 of the Bankruptcy Code on August 7, 2014. The Bankruptcy Court entered its Order discharging Etikerentse on November 12, 2014. The mortgage held by Wilmington Trust was

not discharged through the bankruptcy. Petitioners' counsel acknowledged this at the hearing below. The circuit court asked if the bankruptcy discharged any of the mortgage, and counsel conceded that their position was the bankruptcy "**discharged everything but the mortgage**" and that the mortgagor could "go after the mortgage." (Tr. of 7/13/2020 Hrg. 22:5-17; R. 394 (emphasis added).)

As noted, this case began as a standard foreclosure case brought by the mortgage holder. Petitioners then asserted their third-party claims contending SLS engaged in improper servicing practices and sought monetary damages. SLS did not ask the circuit court to review or contradict the bankruptcy court's rulings in seeking summary judgment.⁷ Temisan Etikerentse's bankruptcy simply has nothing to do with this appeal.

D. South Carolina courts continue to have jurisdiction over this case.

Petitioners next reassert their meritless argument that a consent order between SLS and the Consumer Financial Protection Bureau ("CFPB") deprived the state courts of jurisdiction. The circuit court and the Court of Appeals properly rejected this argument.

Petitioners are not parties to the Consent Order and, as SLS detailed in its merits brief, lack the ability to seek enforcement of its terms. Nevertheless, Petitioners contend that the CFPB order and enabling statute stripped South Carolina courts of subject matter jurisdiction. Subject matter jurisdiction concerns the "court's constitutional or statutory power to adjudicate a case." *Johnson v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007). In other words, it involves the court's "power to hear and determine cases of

⁷ The only reference SLS made to Temisan Etikerentse's bankruptcy was to raise as an additional, alternative ground that to the extent Etikerentse sought to assert causes of action that accrued prior to his bankruptcy, they were barred because they were not disclosed on the asset schedules and expressly abandoned by the Bankruptcy Trustee. (*See id.* at 14-15; R. 230-31.) However, this did not form a basis of the circuit court's summary judgment order and SLS has not raised it as an additional sustaining ground on appeal.

the general class to which the proceedings in question belong.’” *Id.* (quoting *State v. Gentry*, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005)). Petitioners only complained of the court’s “jurisdiction” to proceed on the eve of the summary judgment hearing after they failed to come forward with any specific evidence supporting that SLS acted improperly. Again, this is a bizarre scenario where Appellants appear to contend the claims that they chose to assert in state circuit court are improper in the very forum where they opted to litigate.

Regardless, however, the Consent Order did not deprive the circuit court (or the appellate courts) of jurisdiction. The CFPB issued the subject Consent Order under 12 U.S.C. § 5563(d)(2). *See* Consent Order, *In re: Specialized Loan Servicing, LLC*, No. 2020-BCFP-0002, 2020 WL 8182145 (May 11, 2020). 12 U.S.C. § 5563 details the enforcement powers of the CFPB and its hearing and adjudication process. *See id.* The subsection cited by Petitioners, (d)(2), details special rules for the enforcement of CFPB orders *by the CFPB* and notes that except as otherwise provided “no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order or to review, modify, suspend, terminate, or set aside any such notice or order” issued pursuant to this statute. *Id.*

The circuit court correctly found that this statute had no impact on its ability to hear and rule on SLS’s motion or the merits of Petitioners’ claims. As the circuit court explained, § 5563(d)(2) is in the CFPB’s enabling legislation and concerns the CFPB’s own enforcement powers. *See generally* 12 U.S.C. § 5563. Subsection (d) simply gives the *CFPB* the power to seek enforcement of its orders through the court system but provides that otherwise no court has jurisdiction to affect the issuance or enforcement of the Consent Order or alter its terms. *See id.*

Therefore, the circuit court properly rejected Petitioners’ argument that § 5563(d)(2) deprived it of subject matter jurisdiction and this Court correctly concluded the same.

E. The CFPB Consent Order was not evidence.

Finally, Petitioners revisit the CFPB Consent Order, contending that it constitutes evidence in support of their claims. However, although Petitioners assert that SLS “admitted” certain violations of the law in the Consent Order, they conveniently omit that the Consent Order expressly states the exact opposite, providing that SLS has consented to its issuance “*without admitting or denying any of the findings of fact or conclusions of law.*” See Consent Order, 2020 WL 8182145.

Furthermore, the circuit court correctly found that there is nothing in the Consent Order tying its contents to the facts of *this* case. The unrebutted evidence here showed that SLS complied with its obligations in servicing Petitioners’ loan.

In any event, courts have rejected similar attempts by plaintiffs to rely on analogous orders as evidence. For example, in *Loughlin v. Amerisave Mortg. Corp.*, the court explained that it could not take judicial notice of a consent order between the CFPB and defendants since the defendants had expressly refused to admit its findings of fact and conclusions of law. No. 1:14-CV-3497-LMM-LTW, 2019 WL 8375920, at *17 (N.D. Ga. Nov. 12, 2019), *report and recommendation adopted*, No. 1:14-CV-3497-LMM-LTW, 2020 WL 1809362 (N.D. Ga. Feb. 3, 2020). Moreover, as the *Laughlin* court reasoned, under Rule 408 the consent order was not admissible to prove the underlying facts on which the compromise between the CFPB and defendants was made. See *id.* The same applies for the Consent Order at issue here.⁸

⁸ As the Fourth Circuit has explained, it would violate Rule 408 (which prohibits the admissibility of evidence of compromise offers and negotiations to prove or disprove the validity of a disputed claim) to admit a consent order for purposes of proving the truth of the matters on which compromise had been reached. *Johnson v. Hugo’s Skateway*, 974 F.2d 1408, 1413 (4th Cir. 1992).

Phillips v. Ocwen Loan Servicing, LLC, 92 F. Supp. 3d 1255 (N.D. Ga. 2015) held similarly. The *Phillips* court found that a consent judgment from a separate administrative matter was not evidence supporting the plaintiff’s claim. *See id.* at 1293 (explaining that the defendant having “entered into a settlement agreement in another case in which it was also accused of committing alleged errors in the servicing of mortgage loans is not evidence that it committed errors with respect to the Plaintiff’s Loan in this case”); *see also, e.g., Faiella v. Fed. Nat’l Mortg. Ass’n*, No. 16-CV-088-JD, 2017 WL 6375600, at *7 (D.N.H. Dec. 13, 2017), *aff’d*, 928 F.3d 141 (1st Cir. 2019) (finding that a consent decree between the defendant and the CFPB should not be credited as any evidence of wrongdoing on the part of the defendant who neither admitted nor denied the allegations therein); *Castellanos v. Portfolio Recovery Assocs., LLC*, No. 1:17-CV-20593-UU, 2017 WL 7796303, at *3 (S.D. Fla. Oct. 31, 2017) (granting a motion in limine prohibiting plaintiff from introducing any evidence regarding a consent order between the defendant and the CFPB entered in a separate matter).

Therefore, the circuit court correctly found that the Consent Order was not admissible evidence supporting any wrongful act committed by SLS.⁹ Regardless, even if the Consent Order could be considered evidence of generalized wrongful acts committed by SLS, Petitioners still did not submit any evidence of any impropriety by SLS *in this case*—nor could they since the unrebutted evidence supported that SLS complied with all regulatory obligations. Again, the

⁹ Petitioners’ repeat their contention that the Consent Order caused a “shifting of the burden,” (Pet. p. 13), requiring *SLS* to determine the damages it caused to *Petitioners*. As SLS noted, this was not raised to the circuit court and is unpreserved. Moreover, it would lead to an absurd result if this was correct. Petitioners are, in essence, saying that it is incumbent on SLS to provide evidence supporting their claims despite being unable to produce any themselves. The Supreme Court case Petitioners cite does not support their position in any way. *See generally Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 38 (1991).

circuit court properly granted summary judgment and the Court of Appeals did not overlook or misapprehend any argument in affirming that order.

CONCLUSION

The circuit court correctly granted summary judgment to SLS on Petitioners' third-party claims and the Court of Appeals issued a well-reasoned, correct Opinion affirming that judgment. Petitioners' petition for a writ of certiorari does not identify any grounds that would warrant the extraordinary remedy of a writ of certiorari and should therefore be denied.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ Blake T. Williams

Blake T. Williams
SC Bar No. 100794
E-Mail: blake.williams@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

*Attorney for Respondent Specialized Loan Servicing LLC a/k/a
SLS*

Columbia, South Carolina

April 18, 2024