RECEIVED
Apr 24 2024
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. 2023-001416
Lower Court Case No. 2021-CP-26-00252

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

v.

Ginger S. Smith, As Personal Representative of The Estate of Yvonne Curtis Ingram, Deceased; Charles Curtis Ingram; Chadwick Benjamin Ingram, and any other Heirs-at-Law or Devisees of Yvonne Curtis Ingram, deceased, their heirs, Personal Representatives, Administrators, Successors and Assigns, and all other persons entitled to claim through them; all unknown persons with any right, title or interest in the property subject of this matter; also any persons who may be in the military service of the United States of America, being a class designated as John Doe; and any unknown minors or persons under a disability being a class designated as Richard Roe .... Respondents

---

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

Taylor A. Peace, Esq., S.C. Bar #100206
Jamie Anna Weller, Esq., S.C. Bar #105548
HARRELL, MARTIN & PEACE, P.A.
135 Columbia Avenue (Physical Address)
P.O. Box 1000 (Mailing Address)
Chapin, South Carolina 29036
Phone: (803) 345-3353
tpeace@hmp-law.com
jweller@hmp-law.com
Attorneys for Appellant United
States of America acting through the
Rural Housing Service or successor agency,
United States Department of Agriculture

CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 4

STANDARD OF REVIEW 9

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 by not being plead, raised, or presented at the final hearing. 10

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. 12

III. The trial judge erred in failing to award all contractually due and owing property maintenance and preservation costs and accrued interest pursuant to the terms of the Note and Mortgage. 14

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Allendale County Bank v. Cadle,
348 S.C. 367, 377-78, 559 S.E. 2d 342, 347-348 (Ct. App. 2001) 11

Emery v. Smith,
361 S.C. 207, 216 603 S.E.2d 598, 602 (Ct. App. 2004) 11

Fibkins v. Fibkins,
303 S.C. 112, 115, 399 S.E.2d 158, 160 (Ct.App.1990) 9

Frazier v. Frazier,
228 S.C. 149, 89 S.E. 2d 225 (1955). 15

Heins v. Heins,
344 S.C. 146, 152, 543 S.E.2d 224, 227 (Ct.App.2001) 11

I'On, LLC v. Town of Mt. Pleasant,
338 S.C. 406, 411, 526 S.E.2d (citing S.C. Code Ann. § 14–8–200 (Supp.1998) 10

Mears Group, Inc. v. Kiawah Island Utility, Inc.,
372 F. Supp. 3d 363, 373 (D.S.C. 2019) 14, 15

Pinckney v. Warren,
344, S.C. 282, 387, 544 S.E. 2d 620, 623 (2001) 9

Rhodus v. Goins,
129 S.C. 40, 41, 123 S.E. 645, 645-46 (1924). 15

RIM Assocs. v. Blackwell,
359 S.C. 170, 597 S.E.2d 152 (Ct. App. 2004) 11

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). 14

Silver v. Abstract Pools & Spas, Inc.,
376 S.C. 585, 591, 658 S.E. 2d 539, 542 (Ct. App. 2008) 14

Sloan v. Greenville County,
356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct.App.2003) 9

Southern Atlantic Fin. Services, Inc. v. Middleton,
349 S.C. 77, 562 S.E. 2d 482 (Ct. App. 2002) 14

U.S. Bank Trust Nat. Ass'n v. Bell,
385, S.C. 364, 373, 684 S.E. 2d 199, 204 (Ct. App. 2009) 9, 15

Williams v. Wilson,
349 S.C. 336, 339–40, 563 S.E.2d 320, 322 (2002) 10

Wright v. Craft,
372 S.C. 1, 21 640 S.E.2d 486, 497 (Ct. App. 2006) 11

Rules

Rule 12(b), SCRCP 10
Rule 8(c), SCRCP 11

Regulations

7 CFR 3550.162 5
7 CFR 3550.68 5

Other Authorities

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

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in granting Respondents Ginger S. Smith, As Personal Representative of The Estate of Yvonne Curtis Ingram, Deceased; Charles Curtis Ingram; Chadwick Benjamin Ingram, and any other Heirs-at-Law or Devisees of Yvonne Curtis Ingram, deceased, their heirs, Personal Representatives, Administrators, Successors and Assigns, and all other persons entitled to claim through them; all unknown persons with any right, title or interest in the property subject of this matter; also any persons who may be in the military service of the United States of America, being a class designated as John Doe; and any unknown minors or persons under a disability being a class designated as Richard Roe ("Respondents") *sua sponte* relief pursuant to the affirmative defenses of estoppel by laches and unclean hands despite the same having been waived by not being pled, raised, or presented at the final hearing?

2. Did the trial court err in granting Respondents *sua sponte* relief based on public policy despite the 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 and owing accrued interest and property maintenance and preservation costs 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 William T. Ingram ("W. Ingram") and Yvonne C. Ingram ("Y. Ingram")(W. Ingram and Y. Ingram are collectively hereinafter referred to as "Borrowers"), now deceased. 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") executed by Borrowers contemporaneous with the Note and Mortgage. The Mortgage encumbers real property located in Horry County, South Carolina, has Horry County TMS # 179-221-1004, and is commonly referred to as 507 Sims Drive, Myrtle Beach, South Carolina 29577 ("Property"). The Loan Documents were executed as part of Borrowers purchase of the Property.

W. Ingram died intestate on February 13, 1996 and the Estate of W. Ingram was probated and/or administered in the Probate Court of Horry County under Estate No. 1996-ES-26-00386. All of W. Ingram's right, title and interest in the Property transferred to Y. Ingram by operation of law as Y. Ingram and W. Ingram held title to the Property as joint tenants with rights of survivorship.

Thereafter, Y. Ingram died intestate on October 15, 2016, and the Estate of Y. Ingram is being probated and/or administered in the Probate Court of Horry County under Estate No. 2016-ES-26-02358 (the "Estate of Yvonne"). Respondent Ginger S. Smith was appointed as the Personal Representative of the Estate of Yvonne, and Respondents Charles Curtis Ingram and

Chadwick Benjamin Ingram were identified as heirs and/or devisees of Y. Ingram. The Estate was still open as of the date of the final foreclosure hearing and no deed of distribution had been issued.

Payment due under the Note and Mortgage then went unpaid as required by the terms thereof, Appellant held the account in default as of September 2, 2016, accelerated the entire amount owed and declared same 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-26-00252. Respondents all unknown persons with any right, title or interest in the property described herein, any persons who may be in the military service of the United States of America being a class designated as John Doe, and any unknown minors or persons under a disability being a class designated as Richard Roe (hereinafter "John Doe and Richard Roe") appeared in the action and filed an Answer through their court appointed Guardian *ad Litem* Thomas D. Kilpatrick, Esq. on February 27, 2023. The Answer did not raise the affirmative or other defenses relied upon by the trial court in coming to its decisions and orders on appeal. All the other Respondents named in the case were properly served, failed and refused to file an answer or otherwise appear, and were held in default.

After the case was referred to the Honorable Alan D. Clemmons, as Master-in-Equity for Horry County ("Master"), a final hearing took place on May 16, 2023 at which Appellant presented evidence and testimony as to the debt due and owing under the Loan Documents. The only party(ies) that appeared were John Doe and Richard Roe through Mr. Kilpatrick.

During the hearing, the Master questioned components of the debt claimed to be owed and other matters, including but not limited to, the length of time between the date of default to the institution of this matter and the effect same had on the interest and caretaking/property preservation fees claimed to be owed.

After the May 16, 2023 hearing, a Judgment of Foreclosure and Order for Sale ("Judgment") was entered on June 2, 2023 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 the doctrine of 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"). The trial court changed the reasoning for its decision from estoppel by laches to ones 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, Borrowers, both now deceased, 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 $46,400.00 promising to repay the same based on the terms and conditions contained therein. (R pp. 148-151). Important to this matter is the Note provides the amount due thereunder accrues interest at the rate of eight percent (8%) per annum and that the full amount was to be paid no later than thirty-three (33) years from the date the Note was executed. Id. The Note also provides Borrowers' failure to make the payments provided for therein would be considered a 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, Borrowers executed a Subsidy Repayment Agreement ("Subsidy") in Appellant's favor in which they agreed repay the subsidy[1] they received as part of the subject loan transaction. (R pp. 157-161).

To secure amounts owed under the Note and Subsidy, Borrowers 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. 152-156).

The Mortgage contains repayment terms like those identified in the Note namely that the principal amount identified therein and amounts due thereunder would accrue interest at the rate of eight percent (8%) per annum with all amounts owed thereunder being due no later than September 22, 2027 or thirty-three (33) years from the date the Loan Documents were executed. Id.

The Mortgage also provides Borrowers agreed to pay all advances made under the Mortgage, to keep the Property maintained in good repair, to pay taxes charged against the 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 the Borrowers are 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 Borrowers' default and

[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.

in Appellant's sole discretion, is allowed to incur and pay, for Borrowers' benefit, reasonable expenses related to the repair and/maintenance of the Property and take possession of the same. Id. Neither the Note nor the Mortgage contain a limitation on when interest would stop accruing outside of repayment in full of amounts due under the Note. Id.

Thereafter, W. Ingram died intestate on February 13, 1996 and the Estate of W. Ingram was administered in the Probate Court for Horry County under Estate No. 96-ES-26-386, and all of his right, title and/or interest in the Property transferred to Y. Ingram by operation of law as they held title as joint tenants with rights of survivorship as shown on a Quit Claim Deed recorded in the Office of the Register of Deeds for Horry County on September 22, 1994 in Book 1759 at Page 600. (R. pp. 162-166).

Subsequent thereto, Y. Ingram died intestate on October 15, 2016, and the Estate of Yvonne is and/or was being probated and/or administered in the Probate Court for Horry County under Estate No.: 2016-ES-26-02358. Id. As of the date of the final hearing in this matter, the Estate of Yvonne was still open and no Deed of Distribution was filed. (R pp. 10, 241). Within the context of the Estate, Respondent Ginger S. Smith was appointed as Personal Representative thereof and Respondents Charles Curtis Ingram and Chadwick Benjamin Ingram were identified as Y. Ingram's intestate heirs. (R. pp. 167-175).

Thereafter, payment due under the Note and Mortgage went unpaid as required by the terms thereof, Appellant held the account in default as of September 2, 2016, accelerated the entire amount due and owing and declared it 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-26-00252. (R pp. 242-243). The Complaint indicates Appellant waived its right to a deficiency judgment. (R p. 11).

Subsequent to the institution of the case and after due and proper service upon Respondents Ginger S. Smith, as Personal Representative of the Estate of Yvonne, Charles Curtis Ingram, and Chadwick Benajmin Ingram, the case was referred to the Honorable Alan D. Clemmons, as Master-in-Equity for Horry County, by Order of Reference filed February 16, 2022. (R pp. 56-58, 63-65).

Appellant was then granted leave to amend the pleadings which resulted in Respondents any other Heirs-at-Law or Devisees of Yvonne Curtis Ingram, deceased, their heirs, Personal Representatives, Administrators, Successors and Assigns, and all other persons entitled to claim through them; all unknown persons with any right, title or interest in the property subject of this matter; also any persons who may be in the military service of the United States of America, being a class designated as John Doe; and any unknown minors or persons under a disability being a class designated as Richard Roe being made parties hereto. (R pp. 69-133).

Respondents all unknown persons with any right, title or interest in the property described herein, any persons who may be in the military service of the United States of America being a class designated as John Doe, and any unknown minors or persons under a disability being a class designated as Richard Roe (hereinafter "John Doe and Richard Roe") appeared in the action and filed an Answer through their court appointed Guardian *ad Litem* Thomas D. Kilpatrick, Esq. on February 27, 2023. (R pp. 135-139). The Answer did not raise the affirmative or other defenses relied upon by the trial court in coming to its decisions and orders that are on appeal. Id. All of the other Respondents named in the case were properly served, failed and refused to file an answer or otherwise appear, and were held in default. (R p. 61).

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. (R pp. 148-192;

237-245). In support thereof, 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[2] summary of invoices as evidence of the calculations of the outstanding debt due and owing under the Loan Documents. (R pp. 176-192). The evidence and testimony were not contested by John Doe and Richard Roe, their Guardian *ad Litem* nor any other party. (R pp. 243, 193-196).

During the hearing, the Master questioned components of the debt claimed to be owed and other matters, including but not limited to the length of time between the date of default to the institution of this matter and the affect same has on the interest and caretaking/property preservation fees claimed to be owed. (R p. 245). The Master appeared concerned about the effect of Appellant's delay in instituting the matter would affect the generation of surplus funds and Respondents' rights to claim same. (R p. 229). The Respondents presented no defense or challenge to the amount claimed to be owed. (R pp. 225, 193-196). The Master took the matter under advisement and subsequently received information from Appellant that it delayed in bringing this matter to allow one or more of the Respondents to complete the Estate of Yvonne, that Appellant lacked congressional funding to foreclose the Note and Mortgage, and the moratoriums on foreclosures pursuant to the Coronavirus, Aid, relieve and Economic Security Act issued on March 27, 2020 further delayed matters. (R pp. 243, 258).

However, the Judgment, despite finding Appellant had proved its debt, limited the Appellant's interest recovery to two years from the date of default and reduced Appellant's recovery for its property maintenance and other preservation costs by fifty percent (50%) based

[2] 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.

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. 10-13).

Appellant then filed the Motion to Reconsider. (R. pp. 197-200). A Memorandum in Support of the Motion to Reconsider, Alter or Amend was filed on June 30, 2023. (R. pp. 201-210). The Master denied the Motion to Reconsider by the 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 the affirmative defense of unclean hands as reasons for denial. (R pp. 22-24). The explanation of public policy concerns in the Order Denying Reconsideration contains 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 broad 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 Borrowers' account as Appellant met its burden of proof related to the debt owed, and Respondents 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 Respondents' 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 by 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 Respondents owe under the Loan Documents. (R pp. 5-21; 22-24). Respondents did raise these defenses at the final hearing or otherwise. In fact, Respondents did not raise any defenses to the debt owed (R pp. 10, 193-196, 225, 243). 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. See 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 the amounts indicated in the Affidavit of Debt, which went uncontested. (R pp. 9-13). In the Order Denying Reconsideration, the Master 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[3]. (R pp. 22-24).

[3] 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 laches or estoppel as defenses to the action.

However, as mentioned above, John Doe and Richard Roe failed to assert or plead any of these defenses, affirmative or otherwise, in their Answer and the other Respondents failed to appear (R pp. 138-139). To be sure, at the final hearing, Mr. Kilpatrick indicated he had not heard from anyone who he might represent in this matter and none of the other Respondents appeared (ie: no one contested the debt owed), which the Court indicated in the Judgment. (R pp. 10, 193-196, 225, 243). There was also no opposition to Appellant's Motion for Reconsideration. 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. 9-13). 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 of monthly caretaking/property preservation fees, that Appellant's hands were unclean, and that it would be against public policy to allow Appellant to collect and/or be reimbursed for same. (R. pp. 22-24). Of particular concern to the Master appeared to be the effect of Appellant's actions relative to the chances of surplus funds being produced from any foreclosure sale and Respondents' opportunity to collect same. (R pp. 228-229). In other words, the Master replaced one unpled affirmative defense for two others indicating the arbitrariness of the findings in the Judgment.

However, while the Master heard uncontroverted testimony surrounding the purported delay in bringing the foreclosure (which benefitted Respondents), the Master appears to have ignored and/or discarded same without justification or indicated the same were not considered in favor of concerns about surplus funds which no party raised.

The Master similarly appears to have ignored the fact that, between the date of default and the commencement of the within action, Respondents were entitled to enjoy the benefit of the loan (i.e. ownership of the property) and possession of the Property without meeting the contractual obligations, including but not limited to not taking steps to assume the loan, making monthly mortgage payments, maintaining insurance, paying property taxes, and upkeep and general maintenance. These are actions Respondents could have taken to mitigate the amount owed but they simply chose not to do so. Their failure to comply to take steps to keep or maintain the Property should not redound to their 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 also 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.

III. The trial judge erred in failing to award all contractually due and owing property maintenance and preservation costs and accrued interest 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 of the Note and Mortgage, which is impermissible, as the same are clear and unambiguous and 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 at 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 read 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, none of the Respondents alleged an ambiguity exists in the Loan Documents nor does it appear the Master determined the same to be ambiguous, as such the Court must consider the same to be clear and unambiguous. (R. pp. 138-139, 193-196). 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 the Note and Mortgage are written instruments and in determining the amount of principal and interest due thereon, the computation must be made in accordance with the terms of said Note. See Rhodus v. Goins, 129 S.C. 40, 41, 123 S.E. 645, 645-46 (1924).[4]

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

In this matter, the Note provides the Borrowers promis[ed] to pay the principal sum of $44,400.00 plus interest on the unpaid principal of 8.00% per annum with a final payment due in

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

thirty-three (33) years. (R pp. 148-151). The Mortgage also provides the Borrowers covenanted and agreed the Appellant may at any time pay any other amounts as required therein to be paid by Borrowers and not paid by Borrowers when due, as well as any costs and expenses for the preservation, protection or enforcement of this lien, as advances for the account of the Borrowers. (R pp. 152-156). All such advances will bear interest at the rate born by the Note. Id. Borrowers 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. Id. Respondents did not object to, dispute, or contest any terms of the Loan Documents or claim the same to be 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 Borrowers promised to pay interest on the principal amount owed at the rate of eight and 00/100 percent (8.00%) per annum 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 Respondents had the opportunity to protect their 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 Respondents' favor for which there is no evidence that is what either Appellant or Borrowers' intended. Accordingly, the Master's actions should not have been taken, especially with regard to 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 September 2, 2016 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. 176-192). Respondents 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. 10, 193-196, 225, 243). Rather, the Guardian *ad Litem* informed the Master he knew of no defenses to the debt claimed and none of the other Respondents appeared. Id.

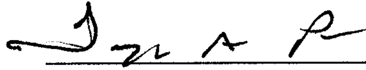
Accordingly, Appellant established the debt and default by the Affidavit of Debt by the preponderance of the evidence without opposition from Respondents, and, as a result, the reduction in the debt owed under the Loan Documents was in error.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

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.

HARRELL, MARTIN & PEACE, P.A.



Taylor A. Peace, Esq., S.C. Bar #100206
Jamie Anna Weller, Esq., S.C. Bar #105548
135 Columbia Avenue (Physical Address)
P.O. Box 1000 (Mailing Address)
Chapin, South Carolina 29036
Phone: (803) 345-3353
tpeace@hmp-law.com
jweller@hmp-law.com
Attorneys for Appellant United States of America acting through the Rural Housing Service or successor agency, United States Department of Agriculture

April 24, 2024
Chapin, South Carolina

RECEIVED
Apr 24 2024
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. 2023-001416
Lower Court Case No. 2021-CP-26-00252

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

v.

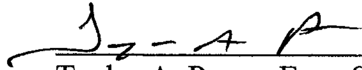
Ginger S. Smith, As Personal Representative of The Estate of Yvonne Curtis Ingram, Deceased; Charles Curtis Ingram; Chadwick Benjamin Ingram, and any other Heirs-at-Law or Devisees of Yvonne Curtis Ingram, deceased, their heirs, Personal Representatives, Administrators, Successors and Assigns, and all other persons entitled to claim through them; all unknown persons with any right, title or interest in the property subject of this matter; also any persons who may be in the military service of the United States of America, being a class designated as John Doe; and any unknown minors or persons under a disability being a class designated as Richard Roe .... Respondents

---

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that Appellant's Final Brief complies with Rule 211(b), SCACR.

{ATTORNEY'S SIGNATURE APPEARS ON NEXT PAGE}



Taylor A. Peace, Esq., S.C. Bar# 100206
Jamie Anna Weller, Esq., S.C. Bar# 105548
HARRELL, MARTIN & PEACE, P.A.
135 Columbia Avenue (Physical Address)
PO Box 1000 (Mailing Address)
Chapin, South Carolina 29036
Phone: (803) 345-3353
tpeace@hmp-law.com
jweller@hmp-law.com
Attorneys for Appellant United
States of America acting through the
Rural Housing Service or successor agency,
United States Department of Agriculture

April 24, 2024