THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Ellis B. Drew, Jr. Master-in-Equity

Case No. 2012-CP-04-1819

First Federal Bank fka First Federal Savings & Loan Association of Charleston,

Respondent,

v.

George A. Shira, III and Betsey R. Shira,

Appellants.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE MASTER CORRECTLY DETERMINE THAT SOUTH CAROLINA SUPREME COURT ADMINISTRATIVE ORDER 2011-05-02-01 DID NOT APPLY IN THIS CASE BECAUSE THE SHIRAS WERE USING THE PROPERTY AS A SECOND HOME RATHER THAN AS A PRINCIPAL RESIDENCE?

STATEMENT OF THE CASE

This appeal stems from an action to foreclose a mortgage given as security for a loan made by First Federal Bank fka First Federal Savings & Loan Association of Charleston ("First Federal") to George A. Shira, III and Betsey R. Shira (collectively, "the Shiras") on April 22, 2008. (R. at 18-54). The mortgage encumbered [redacted] and [redacted] in Townville, South Carolina ("the Property"). (R. at 31-53). The mortgage also included a Second Home Rider on the form provided by Fannie Mae/ Freddie Mac, which required that the Shiras "shall occupy, and shall only use, the Property as Borrower's second home . . . ." (R. at 52-53).

The Shiras stopped making payments on the loan on August 3, 2011. (R. at 71:8-11). On October 3, 2011, First Federal sent the Shiras a Consumer Right to Cure Letter ("right to cure letter") in connection with the loan documents. (R. at 54). The Shiras failed to resume payments or make any additional payments on the loan. (R. at 71:8-11, 80:8-15).

On May 1, 2012, First Federal filed this action seeking to foreclose on the mortgage and demanding recovery for any deficiency following the sale of the Property. (R. at 31-53). The Complaint alleged exemption from the South Carolina Supreme Court Administrative Order 2011-05-02-01 ("Administrative Order") because the Property was not an owner occupied dwelling for purposes of application of the Administrative Order. (*Id.*).

The Shiras answered on June 8, 2012, asserting numerous defenses, including the application of the Administrative Order. (R. at 55-62).

The matter was referred to the Master in Equity for Anderson County (the "Master") on July 16, 2012 and was heard on October 8, 2012. At the hearing, Susan S. Hyde testified on behalf of First Federal as to the amount of the debt. During her testimony, First Federal introduced three exhibits, the note, the mortgage, and the right to cure letter. The Shiras did not present any affidavits or introduce any exhibits at the hearing. Mr. Shira testified that he and his wife owned two properties and they split their time between them. (R. at 82:18-84:20). He did not testify that they resided at the Property the majority of the time.

The Master granted the parties twenty days to brief whether the Property was "owner occupied" for purposes of the Administrative Order. (R. at 92:9-11). After the parties submitted their memoranda, the Master entered two orders on March 14, 2013: one finding the Administrative Order did not apply and a separate order providing a judgment of foreclosure and directing the sale of the Property. (R. at 1-13).

The Shiras filed a notice of appeal on April 16, 2013.

FACTS

It is undisputed that the Shiras owned two residential properties, the Property and a lakefront condominium on Leeward Road in Anderson ("the Condo"). (R. at 82:18-83:3). It is further undisputed that the Shiras were in default on the loan.

The only evidence in the record as to the Shiras' use of the Property comes from the note, the mortgage, the right to cure letter, and the testimony of two witnesses, Ms. Hyde and Mr. Shira. As discussed above, the mortgage includes a Second Home Rider that requires the Shiras to use the property as a second home. (R. at 52-53). Mr. Shira conceded that he signed the loan documents, including the second home rider, and that he

guessed his signature showed that First Federal was aware that he had another home. (R at 81:12-83:7, 83:9-16). The right to cure letter was addressed to the Shiras at the Condo's address. (R. at 54).

Mr. Shira did not testify that he lived at either residence the majority of the time. Instead, he testified that he started staying at the Condo in the spring of 2012. (R. at 83:17-21). He further testified that he continued to maintain the Property while he was staying at the Condo in the form of lawn maintenance, utilities, furnishings, etc. (R. at 83:22-84:13). He also testified that he would have returned to the Property for the winter if the foreclosure action had not been pending. (R. at 84:14-19). On cross examination, Mr. Shira testified that he used both mailing addresses, but that his present address was Leeward Road (the Condo) and that was where he was staying as of the time of the hearing. (R. at 85:20-86:6). The Shiras did not present any additional evidence in connection with the post-hearing briefing relating to the applicability of the Administrative Order.

STANDARD OF REVIEW

This appeal stems from a foreclosure action. As such, it arises in equity. *Dockside Ass'n, Inc. v. Detyens*, 294 S.C. 86, 88, 362 S.E.2d 874, 875 (1987). In equity, this Court may find facts in accordance with its view of the preponderance of evidence. *Townes Assocs. Ltd. v. Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976). However, this broad scope of review does not require this Court to disregard the findings of the trial court that saw and heard the witnesses and was in a better position to judge their credibility. *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543

(1989). With respect to matters of law, the Court takes a de novo review. *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009).

ARGUMENTS

The Shiras argue on appeal that the Master applied the wrong standard to determine the application of the Administrative Order to this case. They further argue that this Court should declare the Administrative Order applies, or in the alternative, that the matter should be remanded for a hearing on the issue. First Federal disagrees on both counts.

I. The definition the Master applied to the term "principal residence" is consistent with South Carolina law and the terms of the Administrative Order.

The Shiras do not contest that they were in default under the terms of their loan with First Federal. Instead, they argue that they were entitled to foreclosure intervention pursuant to the terms of the Administrative Order. The Administrative Order was designed to promote loan modification or other loss mitigation in appropriate cases and makes reference to the federal Home Affordable Modification Program ("HMP"). By its own terms, the Administrative order only applies to "Owner-Occupied dwellings in this State." (R. at 14-17). The Administrative Order defines "Owner-Occupied dwelling" as "mortgaged real property that is the principal residence of any mortgagor." The Administrative Order does not define the term "principal residence", and there is no case law addressing what constitutes a principal residence with respect to the Administrative Order.

South Carolina courts have, however, construed the word "reside" and "residence" in various instances. In *Estate of Nicholson v. S.C. HHS,* 377 S.C. 590, 596,

660 S.E.2d 303, 305 (Ct. App. 2008), the South Carolina Court of Appeals discussed the various definitions as follows:

> "Reside" has been defined as (1) to dwell permanently or continuously; (2) to have a settled abode for a time; or (3) to have one's residence or domicile. Webster's Third New International Dictionary 1931 (1986). However, in the legal field, the term "reside" has been defined as to "[l]ive, dwell, abide, sojourn, stay, remain, [or] lodge." BLACK'S LAW DICTIONARY 1176 (5th ed. 1979). Additionally, the term "residence" has been defined as "[t]he place where one actually lives, as distinguished from a domicile . . . ." BLACK'S LAW DICTIONARY 1050 (7th ed. 2000). "Domicile" has been defined as "[t]he place at which a person is physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." *Id.* at 396.
>
> In light of these definitions, "residence" is a somewhat general and fluid term. When read alone, the word "residence" is susceptible to varying interpretations. *Phillips v. S.C. Tax Comm'n,* 195 S.C. 472, 476, 12 S.E.2d 13, 15 (1940). It may have a restricted or enlarged meaning, and therefore, the precise meaning of the term is dependent upon the explanatory context. *Id.* at 476-77, 12 S.E.2d at 15-16.

First Federal discussed several examples of how the term "residence" has been used in South Carolina in its briefing to the Master.

Under the Homestead exemption, S.C. Code Ann § 15-41-30(1), a debtor is entitled to exempt certain equity in real property from collection by creditors if the debtor uses that real property "as a residence." In determining whether a debtor is entitled to this exemption for real property as a debtors "residence", the South Carolina Bankruptcy Court defined a residence as a "'[p]lace where one actually lives or has his home; a person's dwelling place or place of habitation; an abode; house where one's home is; a dwelling house.'" *In re Jones*, 397 B.R. 765, 770 (Bankr. D.S.C. Nov. 26, 2008) (quoting Black's Law Dictionary 1309 (7th ed. 1999)). In *Jones,* the Bankruptcy Court

found that the debtors' testimony established that they had made the house at issue their "home" prior to filing bankruptcy. Pictures introduced into evidence showed that the house in that case was maintained and contained "all the appointments necessary for comfortable living." *Id.* at 771. The Bankruptcy Court also noted that the Debtors had used the house at issue as their home for a number of years. *Id.*

In G.*A.C. Finance Corp. v. Citizens & Southern National Bank,* 234 S.C. 205, 211, 107 S.E.2d 315, 318 (1959), the court defined the term residence in connection with the recording statutes at that time to mean "something more than a mere physical presence in a place, and something less than a domicile. The term clearly imports a fixed abode for the time being." There, the Court heard testimony on declarations and statements made by the mortgagor as to his place of residence, however, the Court found that his declarations were "not conclusive," and submitted the issue of residency to the jury. *Id.*

In *Miller v. Miller,* 248 S.C. 125, 129, 149 S.E.2d 336, 338 (1966), the Court determined residency under the venue statues then applicable. The Court stated that the question of a person's place of residence is largely one of intent to be determined under the facts and circumstances of each case. In deciding the defendant was a non-resident for venue purposes, the court noted that "the act and intent as to domicile and not the duration of residence, [were] the determining factors" in making its decision.

Here, the context in which "principal residence" is used in the Administrative Order indicates the phrase has a restricted meaning of physical presence at the property which is being foreclosed, rather than a broader meaning of domicile. The requirement that a mortgagor must actually be living in the property for the Administrative Order to

apply is in line with its underlying policy, namely, to "insure that eligible homeowners and lender-servicers have been afforded the benefits of loan modification or other loss mitigation where possible."

This analysis is consistent with the approach urged by the Shiras. The Shiras look to the HMP for guidance. The Treasury Department has set up a website to help homeowners determine whether they may be entitled to HMP relief, *MakingHomeAffordable.gov*. The glossary defines "Primary or Principal Residence" as the property in which the homeowner will live most of the time, as distinct from a second home or an investor property that will be rented. *MakingHomeAffordable.gov* at http://www.makinghomeaffordable.gov/learning-center/glossary/Pages/default.aspx (last visited July 26, 2013). This definition makes clear that the relief provided by the HMP was only intended to apply to one residence per borrower.

By extension, the Administrative Order should only apply to one residence per borrower. Such a construction preserves the goal of the Administrative Order, allowing South Carolinians to take advantage of these Federal programs as to their principal residence. However, this relief is inapplicable to second homes, such as the Property here.

The Master determined the Shiras were not living in the Property and further found they intended to use the property as a second home at the time the loan was made. His requirement that there by a physical presence in the property that is being foreclosed for the Administrative Order to apply is a natural extension of the rule proposed by the Shiras that that a principal residence should be the property in which the homeowner spends most of his or her time. Therefore, the Master did not commit an error of law in

finding the property was not the Shiras' principal residence for purposes of the Administrative Order.

II. Even if the Court accepts the Shiras' proposed definition of "principal residence", the preponderance of the evidence supports the Master's ruling that the Property was not owner occupied for purposes of the Administrative Order.

This Court may affirm for any reason appearing in the record as allowed by Rule 220, SCACR. Therefore, even if the Court disagrees with the Master's reasoning as to the definition of "principal residence", it still may affirm if it finds that the preponderance of the evidence in the Record supports the Master's ruling that the Property was not subject to the Administrative Order.

A review of the Master's Order reveals that he carefully considered all of the evidence presented by the parties in reaching his decision. Based on that review and his assessment of the witnesses at the hearing, the Master determined that the Shiras were not living at the Property as their principal residence at the time of the hearing. (R. at 4-5). The Master further found that the Shiras represented to First Federal at the time of application that they intended to use the Property as a second home. (*Id.*). The evidence in the Record is perfectly consistent with these findings.

On the other hand, there is no evidence that the Shiras spent the majority of the year residing at the Property. Mr. Shira testified only that the Shiras alternated between the Property and the Condo seasonally. (R. at 82:18-84:19). Nothing in his testimony gets the Shiras past the 50% mark suggested by the Shiras in their brief. He did not provide testimony regarding specific dates of occupancy or percentages of time, nor did he seek to introduce evidence that might have bolstered his argument, such as instances where he may have listed the property as a home address or utility bills showing usage

over time. In addition, the Shiras were living at the Condo at the time of the hearing. (R. at 86:3-6). Therefore, even if the Court accepts the definition of "principal residence" proposed by the Shiras, there is no evidence showing the Shiras met that definition with respect to the Property, much less a preponderance of the evidence.

In addition to Mr. Shiras testimony about his use of the Property and contrary to the argument raised in the Shiras' brief, the mortgage makes clear that the Shiras were required to use the Property as a second home rather than a principal residence. The first sentence of the provision quoted by the Shiras from the second home rider specifies, "Borrower shall occupy, and shall only use, the Property as Borrower's second home." (R. at 52-53). This provision replaces Paragraph 6 of the mortgage which provided:

> 6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy this Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonable withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

(R. at 37). Therefore, a review of the mortgage as a whole shows that the terms "second home" and "principal residence" are not interchangeable and are mutually exclusive. Given the plain language of these provisions, any use of the Property other than as a second home would constitute a breach of the parties' agreement. Therefore, the Master's Order properly characterizes the second home rider as evidence supporting his ruling that the Administrative Order did not apply in this case.

For all of these reasons, there is plentiful evidence on the issue of whether the Property was the Shiras' primary residence, the clear preponderance of which supports

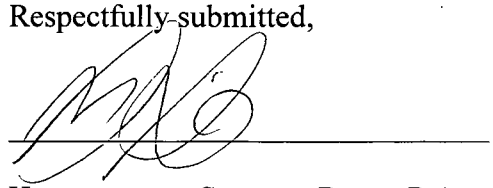
the Master's ruling that it was not. As such, the Court should affirm the result reached by the Master.

Remand in this case is improper because the Shiras had every opportunity to present evidence relating to their use of the Property by affidavit, exhibits, or testimony; however, they failed to do so either at the time of the hearing or in the post-trial briefing. This issue was not a surprise to the Shiras. It was included in the pleadings, was argued at the hearing, and was fully briefed by the parties following the hearing. Moreover, there is ample evidence supporting the Master's determination. Given this background, the Shiras should not be given a second bite at the apple simply because they are unhappy with the results.

CONCLUSION

For all of the foregoing reasons, this Court must affirm the Master's determination that the Administrative Order is inapplicable in this case.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

I certify that the Final Brief of Respondent in this matter complies with Rule 211(b), SCACR and the August 13, 2007 Order of the South Carolina Supreme Court relating to personal data identifiers.

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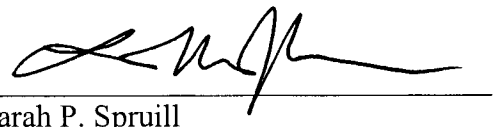

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PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent and Certificate of Compliance by depositing a copy of it in the U.S. Mail on September 4, 2013, addressed to the attorneys of record for Respondents: Daniel L. Draisen, Esq. and Timothy A. Nowacki, Esq., Krouse, Moorhead, and Draisen, P.A., 207 East Calhoun Street, Anderson, South Carolina 29621.

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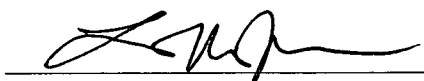

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