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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Kristi F. Curtis, Circuit Court Judge

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Case No. 2019-CP-10-4503
Appellate Case No. 2023-001844

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Deutsche Bank Trust Company Americas, as Trustee for Residential Accredit Loans Inc., Pass-Through Certificates 2007 QH2……Respondent,

v.

Ashley Johnson Beshara as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated the 3rd day of March 2010; Shoreline Farms Community Association, Inc.; Wells Fargo Bank, N.A.; Cadle Rock Joint Venture, L. P. an Ohio Limited Partnership, Curtis Rogers and Julie Rogers, Defendants,

Of whom Curtis Rogers, Julie Rogers and Ashley Johnson Beshara as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated 3rd day of March 2010 are……..Appellants,

AND

Ashley Johnson Beshara as Trustee of the Revocable Trust Agreement for 2235 Shoreline Drive originally dated 3rd day of March 2010, Third-Party Plaintiff,

v.

Nationstar Mortgage, LLC, Curtis Rogers, and Julie Rogers……..……...Third-Party Defendant.

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# FINAL REPLY BRIEF OF APPPELLANT ASHLEY JOHNSON BESHARA AS TRUSTEE IN REPLY TO NATIONSTAR MORTGAGE, LLC'S INITIAL BRIEF

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April 16, 2025.

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## INTRODUCTORY STATEMENT

Respondent, Nationstar Mortgage LLC ("Nationstar") essentially makes only two statements in its brief. First Nationstar asks this Court to incorporate Deutsche Bank Trust Company America's ("Deutsche") initial brief into its own and adopt Deutsche's argument in total as the arguments of Nationstar. Nationstar's only other real statement in brief is "Nationstar did not file the instant case…to the extent Appellants' arguments…are directed at Nationstar, those arguments are improper as Nationstar is not prosecuting the foreclosure in this matter." (Nat. Br) These statements directly contradict the admissions of Nationstar, deemed true by admission, which are the facts of this case.[1]. At the hearing for the order on appeal, Appellant noted to the lower court: "the plaintiff in this case is essentially a securitized stock instrument. Nationstar is the one [whose] been pulling all the strings for many years…" (R.p. 1020).

On or about July 15, 2012, Nationstar sent the Rogers a correspondence stating: "Welcome to Nationstar Mortgage! We looked forward to servicing your loan on behalf of Deutsche Bank, Trustee, Ralie Series 2007-QH2." (R.p. 120-132). A year later, June 12, 2013, Nationstar filed a proposed order substituting Nationstar as plaintiff in Action 2. The order states Nationstar is the proper plaintiff as present lien holder of the note and mortgage (R.pp. 45-46). February 28, 2014, Nationstar served discovery responses upon the Rogers, wherein it admitted there was no assignment of mortgage assigning the mortgage to Nationstar. (R.p. 120-132). March 3, 2014, the Rogers' filed a motion for summary based in part upon that admission as well as other admissions of Nationstar (R.pp. 120-132). Nationstar executed an assignment of mortgage dated March 31, 2014, as an alleged attorney in fact executed (R.pp. 726-728). On June 9, 2014, Nationstar moved

[1] "Nationstar admits only that it filed this foreclosure action against Third-Party Plaintiff on August 27, 2019…Nationstar admits only that Nationstar is the principle contact for Plaintiff's counsel in this matter…" (11/25/21 Nat. Reply ¶¶ 72,74)

to dismiss the second foreclosure action pursuant to Rule 40(J), SCRCP, which was granted by order filed June 24, 2014 (R.p. 32-34). March 13, 2015, Nationstar moved to have the matter restored to the active docket which was done by order filed April 1, 2015 (R.pp. 35-37). On May 12, 2016, the court issued a trial roster notice for the matter. Thereafter the former, but still named, counsel for Nationstar communicated to the court requesting a third order dismissal, stating: "I have been in touch with Nationstar today about this and *they are aware of tomorrow's roster meeting and trial roster next week. I do not know if Nationstar will be retaining our services but would request that the case be struct so that Nationstar can retain new counsel."* The matter was thereafter dismissed (R.pp. 38-43). In 2018, counsel for Nationstar contacted counsel for the Roger's stating that Nationstar wished to restore the matter to the active roster. Counsel for the Roger's informed Nationstar the Rogers would challenge any motion to restore the matter based upon Rule 41, SCRCP (R.pp. 542-550). A year later Nationstar caused this action to be filed on August 27, 2019. In the present action Nationstar elected not to name itself plaintiff instead naming Deutsche Plaintiff. Further instead of naming the Rogers as defendants Nationstar elected to name Appellant as defendant (R.pp. 108; 153-169; R.p. 609 ¶ 72).

Nationstar and Deutsche assert "it makes no sense to argue that the filing of a foreclosure action in order to foreclose on a property is an abuse of process because *the litigant is merely using the process as it is designed to be used.*" (Deutsche Br. 15) Filing four distinct foreclosure actions over course of 10 years alleging the same May 2009 default date is not a normal foreclosure process. Moving for second dismissal pursuant to Rule 40(j), SCRCP, shortly after receiving the notice of hearing for the opposing parties motion for summary judgment is not a normal foreclosure process. Thereafter waiting five and a half years prior to taking any further substantive action to prosecute the foreclosure, is not a normal foreclosure process.

The record is clear. Nationstar was on notice the foreclosure was unresolved in 2015, 2016, and 2018, but nonetheless waited until the end of 2019 to make any substantive effort to prosecute the foreclosure action again. Intentionally electing to name a new plaintiff and new defendant in the fourth iteration of the same attempted foreclosure, for same mortgage default. These acts and omissions should not be described as "merely using the process as it is designed to be used." NOTHING ABOUT THIS MATTER IS NORMAL OR TYPICAL.[2] This is Nationstar's intentional, tactical, abusive delay of the process for the collateral objective of achieving its own benefit and the benefit of Deutsche.

## ARUGMENT

### I. RESPONDENT NATIONSTAR'S ASSERTION THAT RULE 40(j), SCRCP AND RULE 41(a), SCRCP, ARE NOT COMPATIBLE WITH ONE ANOTHER AND CANNOT BE READ OR INTREPRETED AS BEING IN HARMONY WITH ONE ANOTHER IS WITHOUT MERIT.

Respondent, Nationstar Mortgage LLC ("Nationstar") in adopting the arguments set forth in Respondent, Deutsche Bank Trust Company America's ("Deutsche") initial brief states:

> "neither the text nor the purpose of Rule 40(j) are consistent with Appellants' contention…Rule 40(j) does not state that, upon a second implementation of this procedure, the action is dismissed with prejudice and a decision on the merits has been entered. Rather, it…*directly implies that a party may implement this procedure more than once* through a motion. Moreover, irrespective of whether a complaint is struck as a matter of right or by motion, the matter may be "restored." Appellants' reading of Rule 40(j) is in direct conflict with the text, which clearly allows multiple orders striking complaints from dockets and subsequent restoration of those complaints…it cannot be credibly asserted that orders dismissing or striking cases from the active docket under Rule 40(j) are somehow subject to the two-dismissal

[2] However, these acts and omissions are also not uncommon for Deutsche and/or Nationstar. *See* the Deutsche as Trustee Case Order in 2012-CP-15-0166 setting forth eerily similar facts and circumstance to those in this case (Beshara Reply Ex 2 filed 6/12/20); *See Also, Deutsche Bank Trust Company Americans, as Trustee for the Trust Know as Residential Accredit Loans Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2006-QS15, vs. Eyal M. Sigler,* 169 N.E. 3d 759, 446 Ill. Dec. 96 (Il. App (1st) 2020) (dismissing an action due to Deutsche violating section 13-217 of the Illinois Code of Civil Procedure (Code), also known as the single re-filing rule.) (Rogers Reply Brief to Nat.)

> rule under Rule 41, which is a completely separate Rule prescribing its own processes." (Resp In. Br. Pg. 6-7)[3]

"In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes. If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26 (2003) "In interpreting a statute and a rule of civil procedure we follow the cardinal rule that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute or rule. The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." *Marichris, LLC v. Derrick,* 384 S.C. 345, 352-53, 682 S.E.2d 301 (Ct. App. 2009) (citations omitted). "The primary rule of statutory construction is to ascertain and give effect to the intent of the General Assembly. Our supreme court has held that a statute shall not be construed by concentrating on an isolated phrase. It is well settled that statutes dealing with the same subject matter are in pari materia and must be construed together, if possible, to produce a single, harmonious result." *Oulla v. Velazques*, 427 S.C 428, 441, 831 S.E.2d 450 (Ct. App. 2019).

The Notes of Rule 40, SCRCP state:

> "a party may strike the case from the docket by agreement under Rule 40(j) which is more restrictive than the former Rule 40(c)(3)… Rule 40(j) is the final section of the rule and substantially revises the procedure *for dismissing a case* previously found in Rule 40(c)(3). Rule 40(j) now requires all adverse parties to consent to the *dismissal* in writing, but, the consent also operates to toll the statute of limitations for one year after the case is stricken from the docket as to each consenting party. Any remaining portion of the statute of limitations begins to run one year after the case was stricken unless the case has previously been restored to the General Docket. A party moving to restore a case must give 10 days notice of

[3] Nationstar and Deutsche also assert Appellants have waived the right to raise issue with the multiple Rule 40(j) motions of Deutsche, Nationstar, and/or its predecessors. Our supreme court addressed this issue in *Maxwell* stating consenting to a Rule 40(j) motion result in waiver of issues subsequently. *See. Maxwell v. Genez, 356 S.C. 617, 620, 591 S.E.2d 26 (2003) (Footnote 2).*

> the motion, and upon being restored the case is placed on the General Docket where it proceeds as a newly filed action on the General Docket. *A case can also be dismissed voluntarily under Rule 41(a).*" Rule 40, SCRCP (Note to 1994 Amendment).

Rule 40(J), SCRCP, and Rule 41(a), SCRCP deal with the same subject matter, namely dismissal of actions, the two rules should be read together to produce a single harmonious result. The Note to the 1994 Amendment emphasizes this legislative intent, by clearly stating the Rule 40(J) is a "procedure for dismissing a case" and goes on to state that where a matter is restored to the general docket by motion "it proceeds as a newly filed action" The note then goes on to note the rule effect is analogous to Rule 41(a), by stating in the next sentence "A case can also be dismissed voluntarily under Rule 41(a)."

In this case Deutsche's and Nationstar's assertion in its brief that "it cannot be credibly asserted that orders dismissing or striking cases from the active docket under Rule 40(j) are somehow subject to the two-dismissal rule under Rule 41, which is a completely separate Rule prescribing its own processes." Ignores the express language of the Note to the 1994 Amendment of Rule 40, SCRCP; the Deutsche's and Nationstar's assertion conflicts with our rules of construction and interpretation regarding the Rules of Civil Procedure and ignores legislative intent.

Nationstar, who adopts the arguments of Deutsche pursuant to Rule 208(b)(6), SCACR, waives certain issues by doing so. *See Amick v. Hagler*, 286 S.C. 481, 486, 334 S.E.2d 525, 528 (Ct. App. 1985) (finding the appellant waived an argument because she "did not take exception to [a certain] aspect of the order [on appeal] or mention it in her brief"); and, *see Ellie, Inc. v. Miccichi*, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004) ("Numerous cases have held that where an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal.").

Appellants argue the trial committed error through its construction of Rule 40(j), asserting that the language of Rule 40(j), SCRCP, permits only one voluntary dismissal. (Beshara Initial Brief, pp. 34-35). Respondents, Deutsche and Nationstar did not address these arguments. The construction of the language of the Rule is not addressed by Respondents. Respondents do not mention the law of construction of statutes and rules. The failure to address the law relating to the construction of the Rules, is a waiver of the arguments presented by Appellants. Likewise, Respondents failure to address the concept res judicata and of collateral estoppel precluding repetitive filing is a waiver of the argument addressed by Appellant. (Beshara Initial Brief)

**II. The Court Erred in Finding All of Appellant's Third-Party Claims As to Nationstar were Barred by the Statute of Limitations.**

Pursuant to Rule 208(b)(6) of the South Carolina Appellate Court Rules, Appellant Beshara adopts relevant arguments presented in the Initial Brief of Appellant, Appellant's Initial Brief in Reply to Respondent Deutsche, as well as the initial brief and reply brief of Appellants Curtis and Julie Rogers. Appellant further states Appellant the following causes of action:

- Accounting;
- Declaratory Judgment.
- Abuse of Process;
- Malicious Prosecution;
- Violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"); and
- Negligent Misrepresentation;

Nationstar through its adoption of Deutsche's argument in total, asserts Appellant's claims and causes of action were previously alleged by the Rogers and that Appellant does not dispute this. This statement is patently false.[4] The Rogers did not assert abuse of process, nor malicious

[4] Deutsche in Footnote 6 of its brief also states falsely that Nationstar has not communicated to Appellant. The statement conflicts directly with Appellant Beshara's deposition testimony, a subject which she addressed

prosecution in the prior foreclosure actions (R.p. 87-103). Moreover, the facts complained of by Appellant in her pleadings in this action differ significantly in content, subject matter, time period and effect, to those alleged by the Rogers in the previous actions (R.pp. 87-103, R.pp. 153-169). Nationstar by adopting Deutsche's argument asserts the court found Appellant made "no allegations of any kind regarding conduct or injury transpiring between…May 16, 2016, and the filing of Appellants' claims in this action." (Deutsche Br) This statement is also a misrepresentation. The lower court stated: "Beshara's and Rogers' claims arise ***largely*** from events that transpired in the litigation of this matter between 2009 and 2016…" (R.p. 8). Nationstar's and Deutsche's assertion contradicts allegations and evidence which Appellant presented to the court as set forth in her deposition testimony, at the hearing, within Appellant's initial pleadings and exhibits thereto (R.pp. 314-325; 1019-1037; 141; 148; 131; 536-556).

The Court did not find Appellant's cause of action for accounting was time barred. As Appellant stated in her initial brief, Appellant's cause of action for Declaratory Judgment sounds in equity, the statute of limitations does not apply (App. In. Brief. Pgs. 12-13). With regard to Appellant's causes of action for Abuse of Process and Malicious Prosecution, Nationstar and Deutsche now both acknowledge that Appellant has asserted facts and allegations which primarily address a continuation of intentional, tactical, acts and omissions on the part of Nationstar and Deutsche, which though beginning during prior actions, Appellant has alleged said acts and omissions have continued after 2016 through 2019. Appellant has alleged the principle component of the acts and/or omissions complained of have occurred within three years prior to Appellant

directly before the lower court during the hearing on Nationstar's Motion for Summary Judgment. Appellant noted that contemporaneous with filing the present foreclosure action against Appellant, Nationstar began mailing the monthly mortgage statements addressed to Beshara instead of mailing said monthly statements to the Rogers. Appellant alleges those statements contain false statements. (R.pp. 317-322; 1023-24, 1030-32.)

filing responsive pleadings in this matter.[5] (R.pp. 148, 1023-24; 1030-32; Deutche Br; Nats. Br. pg. 6). [6]

## III. Appellant Alleged All Necessary Elements as to Each of Her Third-Party Claims and Evidence in the Record Presents Genuine Issues of Fact Precluding the Court's Grant of Summary Judgment as to Each of Appellant's Causes of Action.

Pursuant to Rule 208(b)(6) of the South Carolina Appellate Court Rules, Appellant Beshara adopts relevant arguments presented in the Initial Brief of Appellant, Appellant's Initial Brief in Reply to Respondent Deutsche, as well as the initial brief and reply brief of Appellants Curtis and Julie Rogers.

## IV. Respondents failed to put forth any evidence to support their motion for summary judgment therefore the court erred in granting the motion.

Pursuant to Rule 208(b)(6) of the South Carolina Appellate Court Rules, Appellant Beshara adopts relevant arguments presented in the Initial Brief of Appellant, Appellant's Initial Brief in Reply to Respondent Deutsche, as well as the initial brief and reply brief of Appellants Curtis and Julie Rogers.

The only alleged evidence Respondents put forth in support of their motion for summary judgment was the affidavit of Alan Blunt. Affidavit provides no testimony

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[5] Further to the extent this Court would find the statute of limitations applicable, which Appellant affirmatively denies, as set forth in Appellant's Initial brief the statute of limitations should be equitably tolled as to each cause, as Appellant has alleged that Nationstar was intentional in its omission to prosecute foreclose of the between June of 2014 and August of 2019. (Deutsch Reply to Beshara Mtn Dismiss; Nationstar and Deautsche Mtn Dismiss; Nationstar and Deutsche Memo and Mtn SJ). Equity should bar Nationstar and Deutsche from receiving any benefit as a result of its intentional delays.

Additionally, the lower court in its order appears to assert that 2020 filing date of Appellants' answer and counterclaim is relevant for determining the statutory time period (R.p. 8). Though Appellant affirmatively asserts the statute of limitations does not apply, if it were to apply Appellant feels it necessary to raise the point that the statute of limitations would be tolled from the date of Appellant filing her motion to dismiss in October of 2019 through to Appellant asserting allegations in counterclaims and third-party claims in 2020, because said allegations set forth in the later claims arose out of the conduct, transactions, occurrences and omissions set forth in the original motion to dismiss and supporting memoranda. *Whitfield Const. v. Bank of Tokyo Trust*, 338 S.C. 207, 222, 525 S.E.2d 888(Ct. App. 1999).

[6] With regard to Appellant's causes of action for Negligent Misrepresentation and SCUPTA, Appellant adopts her arguments as set forth in her initial brief.

addressing the allegations Appellants have asserted in their counterclaims, third-party claims, and cross-claims. The Blunt Affidavit appears to be a generic form affidavit that foreclosure counsel would typically submit for a final hearing of uncontested foreclosure. The Blunt affidavit provides zero affidavit testimony which would assist Deutsche and Nationstar in meeting their initial burden of proving there is no genuine issue of material fact as to any of Appellant's counterclaims or third-party claims such that the court should have granted summary judgment as a matter of law. The court erred in granting summary judgment as to all of Appellant's causes of action asserted against Deutsche and Nationstar because Deutsche and Nationstar failed to meet their initial burden of showing there is no genuine issue of material fact with regard to each of Appellant's asserted causes of action.

## CONCLUSION

Based upon the allegations, facts and arguments set forth herein above, as well as Appellant's initial briefs and the Rogers' Initial Brief and Reply Briefs Appellant respectfully requests this Court issue a decision reversing the findings and rulings of the circuit court found in the July 10, 2023, Order which granted Deutsche and Nationstar's Motion for Summary Judgment as to all of Appellant's counterclaims asserted against Deutsche and third-party claims asserted against Nationstar.

RESPECTUFLLY SUBMITTED,

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