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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2025-000692
Lower Court Case No. 2023-CP-26-04562

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

v.

James Y Fisher, II, Stacy C. Fisher a/k/a Stacy C. Woodle
a/k/a Stacy C. Contris ..... Respondents

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

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in determining Appellant United States of America, acting through the Rural Housing Service or successor Agency, United States Department of Agriculture ("Appellant") failed to meet its burden of proof concerning the components of the debt owed (specifically charges advanced for real estate property taxes and insurance) in light of uncontested and unobjected to evidence and, in making such a determination, did the trial court employ the incorrect burden of proof?

2. Did the trial court err in granting Respondents James Y Fisher, II ("Fisher") and Stacy C. Fisher a/k/a Stacy C. Woodle a/k/a Stacy C. Contris ("Contris") (Fisher and Contris are sometimes collectively referred to herein as "Respondents") *sua sponte* relief in reducing the debt owed by raising and/or asserting defenses, affirmative or otherwise, such as unclean hands, laches, and/or public policy concerns not raised by Respondents?

3. Did the trial court err in reducing the amount of fees assessed for the payment of real property taxes, insurance premiums and fees associated with caretaking, maintenance, and upkeep under the unambiguous debt instruments described hereinbelow, and does the same constitute an impermissible alteration and/or amendment thereof when the trial court's only duty was to enforce same?

STATEMENT OF THE CASE

This default foreclosure matter brought by Appellant to foreclose a Mortgage of Real Estate ("Mortgage") executed by Respondents. The Mortgage secures amounts owed under a Promissory Note ("Note") and Subsidy Repayment Agreement ("Subsidy") also executed by Respondents contemporaneous with the Mortgage (the Note, Subsidy, and Mortgage are sometimes collectively referred to herein as "Loan Documents"). The Mortgage encumbers real property located in the County of Horry, State of South Carolina, has Horry County TMS # 136-17-01-026 (Horry County PIN 36816020005), and is commonly referred to as 308 Jasmine Drive, Conway, South Carolina 29526.

At the time Appellant instituted the underlying case by filing a Summons and Complaint on July 24, 2023, Respondents had failed and refused to make the monthly payments due under the Note and Mortgage. Appellant had also declared them in default under the terms thereof, accelerated the entire indebtedness owed, and declared the same to be due and immediately payable. Neither Respondents filed an answer or responsive pleading after they were served with the Summons and Complaint. In other words, neither Respondent denied the allegations of Plaintiff's Complaint nor did they assert any defenses, affirmative or otherwise.

Appellant's counsel filed an Affidavit of Default on June 17, 2024., and the matter was referred to the Honorable Alan D. Clemmons, as Master in Equity for Horry County ("Master"), by Order of Referenced filed June 18, 2024.

A final hearing took place on October 8, 2024 before the Master at which Appellant's counsel and Fisher appeared. Appellant presented evidence and testimony as to the Loan Documents, the default thereunder, and the amount due. The Master then questioned the components of the debt, the amount claimed to be due, and other matters, including but not limited

to the length of time between the date of Respondents' default and the institution of this matter, and the effect the same had on the accrued interest, the advances Appellant made for payment of real estate taxes and insurance premiums, and the amount Appellant advanced related to caretaking/property preservation fees. Subsequent to the Master's questioning, Fisher echoed the Master's concern about length of time between Respondents' default under the Loan Documents and institution of the foreclosure matter; although Fisher indicated he or someone with his permission occupied Property until February, 2024. Fisher did not present any evidence he made any payments due under the Loan Documents, paid the taxes and/or insurance advanced by Appellant, or presented any evidence to contest that presented by Appellant. The Master left the hearing open for Appellant provide him with the additional information requested (to include but not be limited to canceled checks and/or invoices for payment of the taxes and insurance). Appellant's counsel provided what he could by correspondence served upon the Master and Respondents on November 8, 2024. At no point during or after the final hearing was Appellant's evidence challenged, and the same was admitted without objection.

Thereafter, a Judgment of Foreclosure and Order for Sale was entered on February 10, 2025 ("Judgment") which determined that Appellant failed to provide proof necessary (ie: cancelled checks and insurance declaration pages, and invoices) to satisfy the Master that the advancement of real property taxes and insurance premiums were properly charged to Respondents' account. The Master also determined Appellant sat on its rights and reduced Appellant's recovery on a matter of public policy due to Appellant's delay in initiating and finalizing the foreclosure. As a result, the Master reduced the total debt awarded by $18,516.32. The Judgment did not specify the applicable public policy or explain the ruling further.

Appellant timely filed a Motion to Reconsider, Alter or Amend and Memorandum in Support of Plaintiff's Motion to Reconsider and/or Alter or Amend on February 20, 2025 ("Motion to Reconsider"). The Master summarily denied the Motion to Reconsider by Order Denying Motion to Reconsider, Alter, or Amend ("Order Denying Reconsideration") without hearing, without acknowledging the evidence presented by Appellant at the final hearing was uncontested, and without acknowledging Appellant provided additional uncontested evidence and documentation to support the advancement of taxes and insurance subsequent to the hearing. The Judgment and Order Denying Reconsideration also appears to raise the burden of proof required by Appellant in this matter.

This appeal arises from the Master's reduction of the taxes and insurance advanced by the Appellant and charged to Respondents' account.

STATEMENT OF FACTS

On July 7, 1998, Respondents made, executed and delivered to the Appellant the Note in the original principal amount of One Hundred Nine Thousand One Hundred and 00/100 ($109,100.00) Dollars payable on the terms and conditions contained therein. (Ex. A, Oct. 8, 2024 Record of Hr'g filed Oct. 7, 2024). The Note provides that interest on the principal amount due would accrue interest at the rate of six and 75/100 percent (6.75%) per annum with the full amount due and owing on or before July 7, 2031. Id. Respondents also agreed to repayment of the subsidy granted in the form of payment assistance under Appellant's regulations and as set forth in the Subsidy. Id.

The Note also provides Respondents would be in default if they failed to make the monthly payment described therein, and, upon occurrence of a default, Appellant had the right to accelerate the entire indebtedness then due and require Respondents to immediately pay the full amount of

unpaid principal, all accrued interest, and any late charges then due. Id. Further, the Note states interest will continue to accrue on past due principal, and Appellant could require Respondents to pay all costs and expenses associated with the collection of amounts due thereunder, including reasonable attorney's fees. Id.

As described above, Respondents also executed the Subsidy in which they agreed to repay the subsidy they received as part of the transaction represented by the Note and the Mortgage. (Ex. B, Oct. 8, 2024 Record of Hr'g filed Oct. 7, 2024).

To secure amounts owed under the Note and Subsidy, Respondents also executed the Mortgage. (Ex. C, Oct. 8, 2024 Record of Hr'g filed Oct. 7, 2024). The Mortgage is dated contemporaneous with Note and Subsidy and was recorded in the Office of the Register of Deeds for Horry County July 8, 1998 in Book 2294 at Page 1343. Id. Important to this appeal, the Mortgage specifically provides,

> This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals, extensions modifications of the Note (b) the payment of all other sums, with interest, advanced under paragraph 7 to protect the property covered by this Security instrument; (c) the performance of Borrower's covenants and agreements under this Security Instrument and the Note, and (d) the recapture of any payment assistance and subsidy which may be granted to the Borrower..... Id.

Regarding the payment of taxes and insurance, Mortgage provides, "Borrower shall pay all taxes, assessments, charges, fines and impositions attributable to the Property which may attain priority over this Security Instrument.....if any" and, "Borrower shall keep the improvements now existing and hereafter erected or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage" and any other hazards.....If Borrower fails to maintain coverage described above, at Lender's option, Lender may obtain coverage to protect

Lender's rights in the Property pursuant to paragraph 7." ¶¶ 2 and 5, Oct. 8, 2024 Record of Hr'g filed Oct. 7, 2024Paragraph 7 of the Mortgage states:

> If Borrower fails to perform the covenants and agreements contained in this instrument....then Lender may do and pay whatever is necessary to protect the value of the Property and the Lender's right in the Property. Lender's actions may include paying any sums secured by a lien which has priority over this Security Instrument.....Any amounts disbursed by Lender under this paragraph 7 shall become additional debt of Borrower secured by this Security Instrument. (¶ 7, Ex. C, Oct. 7, 2024 Record of Hr'g).

The Mortgage further provides that,

> **SHOULD DEFAULT** occur in the performance or discharge of any obligation in this instrument or secured by this instrument.....Lender, at its option, with or without notice, may: (a) declare the entire amount unpaid under the note and any indebtedness to Lender hereby secured immediately due and payable (b) for the account of Borrower incur and pay reasonable expenses for repair or maintenance of the Property....(d) foreclose this instrument as provided herein by law, and (e) enforce any and all rights and remedies provided herein or by present or future law. (¶ 22, Ex. C, Oct 8, 2024 Record of Hr'g filed Oct. 7, 2024).

Thereafter, and despite one or more Respondents occupying the Property until February, 2024, Respondents failed to make their payments under the Note and Mortgage, failed to pay the real property taxes charged against the Property, and failed to keep the same insured. (¶¶ 13, 15 Feb. 10, 2024 Judgment). As a result, Appellant took steps to insure the real property taxes assessed against the Property and the same was insured. (Ex. D, Oct. 7, 2024 Record of Hr'g; ¶¶ 13, 15, Feb. 10, 2025 Judgment). Appellant's records presented at the hearing indicate Respondents are/were delinquent for the payment due October 7, 2012, and Appellant exercised its option to inspect the Property to insure the same was being maintained. Id. As to their occupancy, Mr. Fisher testified that he or one of his children occupied the Property until February, 2024. (ln. 20, p. 12-ln. 14, pg. 14, October 8, 2024 Tr. of Hr'g). He also presented no evidence

Appellant did not pay the real property taxes assessed against the Property or that they failed to insure same nor did he present any evidence that he did the same. (October 8, 2024 Tr. of Hr'g).

Prior to the date by which all amounts were to be paid, Appellant held Respondents in default under the terms of the Loan Documents, accelerated the entire indebtedness, declared the same to immediately due and owing, to include amounts advanced for the payment of taxes and insurance, and brought this action to foreclose the Mortgage. (Feb. 10, 2025 Judgment)

Appellant brought this case on July 24, 2023 by filing a *Lis Pendens*, Summons, and Complaint, and Respondents were served with the same on April 16, 2024 and April 17, 2024, respectively. (July 24, 2023 *Lis Pendens*, Summons, and Compl; Affs. of Service filed April 17, 2024). Neither Respondent served upon Appellant's counsel an answer, motion or other responsive pleading or filed the same within thirty (30) days after service as required by the Summons, and Appellant's counsel filed the Affidavit of Default described above. (July 17, 2024 Aff. of Default) The case was referred to the Master as shown by the Order of Reference. (July 18, 2024 Order of Reference) The final hearing was scheduled for October 8, 2024 at 11:00 A.M. to take place *via* the video conferencing platform Webex.com, and Respondents were sent a copy Notice of Hearing. (Sept 4, 2024, Notice of Hr'g for Oct. 8, 2024 Hr'g).

At the hearing, Appellant presented copies of the Note, Subsidy, Mortgage, and an Affidavit of Debt executed by one of Appellant's records custodian, Angela Woods-Bargney, Foreclosure Specialist, all of which were admitted into evidence without objection. (Exs. A, B, C, and D Oct. 7, 2024 Record of Hr'g) The Affidavit of Debt provides an itemized statement of debt claimed to be owed indicating the escrow fees (taxes and insurance) advanced by Appellant on Respondents' account to protect its interest. Included as an exhibit to the Affidavit of Debt is Appellant's "payoff funds panel" and fee breakdown differentiating advances for "negative escrow",

"caretaking/maintenance", and Appellant's attorneys fees and costs then paid. (Ex. D, Oct. 8, 2024 Record of Hr'g filed Oct. 7, 2024). As discussed above, the Master questioned the components of the debt and the purported delay in the institution of this matter. Fisher echoed these concerns but presented no evidence to contest the Affidavit of Debt. (Oct. 8, 2024 Tr. of Hr'g). The Master kept the hearing open so Appellant could obtain information and documentation he requested as to additional proof or evidence as to the payment of taxes and insurance. Id.

Thereafter, on November 8, 2024, Appellant's counsel sent the Master and Respondents additional evidence of the payment of real estate taxes and escrow payments advanced by Appellant, which went uncontested. (Nov. 8, 2024 Correspondence from Taylor A. Peace, Esq. to the Office of the Master in Equity for Horry County).

Subsequent thereto, the Office of the Master in Equity for Horry County issued an Administrative Memorandum dated February 21, 2025 ("Administrative Memorandum") indicating:

> miscellaneous costs associated with the foreclosure, including but not limited to, preservation costs, inspection costs, repair costs, penalty interest, deferred principal balance, escrow and other cost advances, interest charged on costs, etc. must be supported by invoices, by authorized by the loan documents and readily available for the court's review upon request. The Court generally will not consider costs that cannot be substantiated with supporting documents. (emphasis added). (Feb. 21, 2025 Admin. Memo.)

The Administrative Memorandum provides no delineation between a default matter when no Defendant appears, a default matter where a Defendant appears and presents not contest, or a contested matter.[1] Id.

[1] While not specifically at issue in this appeal, Appellant notes the Administrative Memorandum also provides, "If the date of default if more than two years prior to the filing of the foreclosure, please file a Certificate of Non-Owner Occupancy if applicable. It is the expectation of the court that counsel be prepared to explain any delays in the filing of the foreclosure after default." (emphasis added). Appellant argues this language is a formalization of a policy reducing collectible accrued interest to two (2) years from the date of default if the Horry County Master in Equity is not satisfied with the explanation of a delay, thereby, *sua sponte*, altering the agreed upon terms of the debt instruments sought to be enforced when no such relief may be sought by a Defendant/borrower.

Despite Respondents lack of objection, contest, or defense to the evidence presented by Appellant, Master reduced the "escrow" fees by the amount set forth in the Judgment and Order Reconsideration relying on Appellant's purported inability to produce cancelled checks and invoices related to the payment of uncontested "escrow" fees, the expense of which was to Respondents' benefit. (March 12, 2025 Order Denying Recons.)

Appellant timely filed this appeal on April 10, 2025.

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

Appellant argues it met its burden of proof as to the debt (total and components thereof) owed under the Loan Documents by evidence that was both uncontested and unobjected. Accordingly, Appellant argues it was error and an abuse of discretion for the trial court to require Appellant to produce further and additional evidence of the same. By placing such an additional requirement on Appellant in light of Respondents' lack of contest, Appellant argues the trial court changed the burden of proof and committed error when it reduced the debt owed. Appellant additionally argues any alteration of the debt based on the trial court's *sua sponte* assertion of affirmative or other defenses when Respondents did not raise the same constitutes reversible error.

I. At the final hearing, Appellant established its debt in full by the preponderance of the evidence and a finding to the contrary is an abuse of discretion tantamount to an alteration of the burden of proof.

In this matter, Appellant proved its debt in full by the preponderance of the evidence and the trial court's ruling otherwise in the Judgment constitutes and abuse of discretion and application of a higher burden of proof.

As mentioned above, 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). To make out its *prima facie* case, the foreclosing party has to prove by the preponderance of the evidence that it is the owner of the note and mortgage and that the defendant has defaulted on the note. U.S. Bank Tr. Nat. Ass'n v. Bell, 385 S.C. 364, 684 S.E.2d 199 (Ct. App. 2009). To establish the prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage note, ownership of the mortgage, and the defendants' default in payment. Id. at n.9 In making findings of fact, the Court must determine whether the Plaintiff has met their burden by the preponderance of evidence, simply meaning that the evidence presented by the Plaintiff as

compared with that opposed to it has more convincing force and is more than likely true than not true. See Pascoe v. Wilson, 416 S.C. 628, 788 S.E. 2d 686 (2016) ("A preponderance of the evidence is evidence which convinces the fact finder as to its truth.); Ralph King Anderson Jr., Requests to Charge -Civil, 2002 §1-3A(1) ("...the plaintiff has the burden of proving her case by what is known in the law as the greater weight or the preponderance of the evidence. When we say that a party must prove a proposition by the greater weight or the preponderance of the evidence, we mean that the evidence on that proposition must be more convincing on that party's side than the other.....When the case ends after all the evidence is presented....if those scales remain evenly balanced or if those scales tip ever so slightly in the defendant's favor, then the plaintiff has not met the required burden of proof....If, on the other hand, those scales tip ever so slightly in Plaintiff's favor, then the plaintiff has me the required burden...."). If Plaintiffs have met their burden of proof, the burden shifts to the Defendants to prove their defenses, if any. See U.S. Bank Tr. Nat. Ass'n v. Bell, 385 S.C. 364, 684 S.E. 2d 1999 (Ct. App. 2009) Once the debt has been established, the mortgagor has the burden of establishing a defense to foreclosure such as lack of consideration, payment or accord. Id. As to the debt, under Rule 71(a), SCRCP,

> In foreclosure actions the judge or master shall compute the amounts due the plaintiff and any other claimants, which amounts when determined shall be the total debt due to each. The total debt shall at a minimum set forth clearly the principal due upon default, the rate of interest and interest from date of default to hearing date, any other relevant interest charged, any amounts due or to be credited on escrow items, the taxable costs of collection prior to hearing, and the amount of allowable attorneys fees due and anticipated through conclusion of the action. Also included shall be the rate of interest to accrue until the date of the judgment and the post judgment interest rate. Rule 71(a), SCRCP.

As applied to this matter, Appellant presented the Master with copies of the Note, Subsidy, Mortgage, and an Affidavit of Debt with supporting documentation from a custodian of records which itemized the debt owed at the Final Hearing. (Exs. A, B, C, and D, Oct. 8, 2024 Record of

Hr'g filed Oct. 7, 2024). This is all that a plaintiff is required to do in a mortgage foreclosure matter to satisfy its initial burden of proof, and, as a result, Appellant satisfied the same. Upon Appellant satisfying its burden of proof, Respondents were then required to present evidence of any defenses that they have or may have had concerning the debt to be owed, to include but not be limited to any evidence of payments made or credits due[2]. See Rule 55, SCRCP. This would also include evidence to rebut Appellant's claims it paid the real property taxes due, paid to insure the Property, and paid to maintain and/or inspect same Neither Respondent provided any such evidence of the same. (Oct. 8, 2024 Tr. of Hr'g.) The only evidence and/or testimony presented by Fisher was general questioning as to the length of time it took Appellant to institute the matter, which, considering Fisher was residing at the Property, redounded to his benefit at Appellant's cost. Id. In other words, there was no evidence before the Master indicating Appellant did not pay the real property taxes or insurance for the Property for the Master to determine Appellant did not meet its burden of proof related thereto. Id.

As a result, any finding or determination by the Master that Appellant did not meet its burden of proof regarding payment of real property taxes and insurance or other components of the debt, that the same were properly charged to Respondents' account, and its request for more information or documentation is the application of an undefined higher standard of proof more akin to the clear and convincing evidence standard that is an abuse of discretion and error of law. (October 8, 2024 Tr. of Hr'g; Feb. 10, 2024 Judgment; March 10, 2025 Order Denying

[2] As Respondents in the underlying case are in default under Rule 55, SCRCP, as evidenced by the Affidavit of Default referenced herein, they are deemed to have admitted the admitted the material allegations of the Complaint (ie: 1) their execution and existence of the Note, Subsidy, and Mortgage at issue, 2) their default in the payment thereunder, 3) the principle due, and 4) Appellant's entitlement to foreclosure.) The only matter to be taken up by the trial court is and/or should have been the amount of the debt. See Rule 55, SCRCP.

Recons.)Accordingly, the Judgment should be amended to remove any reduction in the debt owed as a result.[3]

II. Aside from the Appellant meeting its burden of proof and Respondents' failing to present any evidence to rebut the same, it is/was error of law for the trial court, *sua sponte*, to raise and rely defenses, affirmative or otherwise, not raised by Respondents in reducing the debt owed.

In addition to the other errors of law by the Master identified herein, it was also error for the Master to, *sua sponte*, raise and rule upon certain defenses, affirmative or otherwise, when the same were waived by Respondents by their file to file an answer or other responsive pleading.

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, SCRCP. "Under Rule 8(c), SCRCP, "In a 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. 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. Allendale County Bank v. Cadle, 348 S.C. 367, 377-78, 559 S.E. 2d 342, 347-348 (Ct. App. 2001) "An affirmative defense is waived if not pled." RIM Associates v. Blackwell, 359 S.C. 170, 597 S.E. 2d 152 (Ct. App. 2004). It is also well settled

[3] Clear and convincing evidence is that "degree of proof which will produce in the [fact finder] a firm belief as to the allegations sought to be established. Such measure of proof is intermediate, more than a preponderance but less than is required for proof beyond a reasonable doubt; it does not clear and unequivocal." Satcher v. Satcher, 351 S.C. 477, 483, 570 S.E. 2d 535, 539 (Ct. App. 2002) (citing Anonymous v. State Bd. Of Med. Exam'rs, 329 S.C. 371, 374 n. 2, 496 S.E. 2d 17, 18 n. 2 (1998)).

that ordinarily a party may not receive relief not contemplated in his or her pleadings. Heins v. Heins, 344 S.C. 146, 152, 543 S.E.2d 224, 227 (Ct.App.2001). Additionally, it is well settled the failure to plead an affirmative defense is deemed a waiver of the right to assert it. Collins Entertainment, Inc. v. White, 363 S.C. 546, 563, 611 S.E.2d 262, 270 (Ct.App.2005). When a defendant asserts an affirmative defense, he becomes the actor in the suit as to that matter, therefore, he has the burden of providing it by a preponderance of the evidence. The doctrine of unclean hands must be pled in an answer or other responsive pleading or waived. Cole v. S.C. Electric and Gas, 355 S.C. 183, 195, 584 S.E.2d 405, 412 (Ct. App. 2003). See also Allendale Cnty. Bank v. Cadle, 348 S.C. 367, 377, 559 S.E.2d 342, 347-48 (Ct. App. 2001) (noting an argument about the doctrine of unclean hands was not properly before the court for review because the appellants did not plead the doctrine "as an affirmative defense in their answers").

In this matter, it is uncontested neither Respondent filed an answer or other responsive pleadings or served the same upon Appellant's counsel within thirty (30) days of service of the Summons and Complaint upon them. (June 17, 2024 Aff. of Default.) Respondents were held in default under Rule 55, SCRCP, as a result, and, despite Fisher's appearance at the hearing, no motion or order to be relieved from default or late answer was filed in an attempt to relieve Respondents of the default. (Jun1 17, 2024 Aff. of Default; October 8, 2024 Tr. of Hr'g.) Accordingly, they have waived the affirmative defenses raised and ruled upon by the Master in this matter, including the doctrine of unclean hands, and it is and/was improper for him to raise and rule upon the same. (Feb. 10, 2025 Judgment.) It was also improper for the Master to determine Appellant sat on its rights regarding the commencement of the mortgage foreclosure and reduce the debt owed based on unexplained/unjustified public policy concerns. Id. To allow

the Master to raise, rule upon, and rely on such defenses in making its ruling when Respondents chose not to assert the same removes him from his role of an impartial finder of fact to one of advocate.

As a result, it was improper for the Master to raise and rule upon affirmative defenses and/or to rely on the same when reducing the debt owed under the Loan Documents and the Judgment should be amended as a result.

III. The trial court's reduction in the debt owed constitutes an alteration and/or amendment of the Loan Documents, which are, clear and unambiguous and it was impermissible for him to do the same when his only duty is/was to enforce their terms.

Further, the Master's reduction of the debt owed constitutes an improper amendment and/or alteration of the Loan Documents that are clear and unambiguous.

As identified *supra*, the debt owed is determined by looking at the facts and evidence presented. See Rule 71(a), SCRCP. The includes the terms of the Promissory Note, Subsidy, and Mortgage, which are contracts and must be governed by rules of contract construction. See Southern Atlantic Fin. Services, Inc. v. Middleton, 349 S.C. 77, 562 S.E. 2d 482 (Ct. App. 2002)

"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)).

As applied to this matter, when he signed the Note, Respondents agreed to repay One Hundred Nine Thousand One Hundred and 00/100 ($109,100.00.00) Dollars, plus interest at the rate of Six and 75/100 percent (6.750%) until the full amount has been paid according to the terms of the Note. (Ex. A., Oct. 8, 2024 Record of Hr'g filed Oct 7, 2024). They also agreed to pay that interest rate both before and after any event of default. Id. They additionally agreed to repayment of the subsidy and that, if he failed to make the payments when due, Appellant had the ability to declare him in default, accelerate all amounts due, and require him to immediately pay all unpaid principal, all interest that he owes, and any late charges. Id. They further agreed that interest would continue to accrue on any past due principal and interest. Id. These are clear and unambiguous terms and Respondent did not appear and interject or appear to interject an ambiguity in them.

Regarding the Mortgage, Respondents agreed,

> This Security Instrument secures to Lender: (a) the repayment of the debt evidenced by the Note, with interest, and all renewals, extensions and modifications of the Note; (b) the payment of all other sums, with interest, advanced under paragraph 7 to protect the property covered by this Security Instrument; (c) the performance of

> Borrower's covenants and agreements under this Security Instrument and the Note, and (d) recapture of any payment assistance and subsidy….. (Ex. C, Oct. 8, 2024 Record of H'rg filed Oct 7, 2024).

They also agreed, "Borrower shall promptly pay when due the principal and interest on the debt evidenced by the Note and any prepayment of any prepayment and late charges due under the Note."

They further agreed "…Borrower shall pay to Lender on the day monthly payments are due under the Note, a sum for (a) yearly taxes and assessments….(c) yearly hazard or property insurance premiums, and (d) yearly flood insurance premiums…." and Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property….",

> Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term 'extended coverage' and any other hazards, including floods or flooding….If Borrower fails to maintain coverage described above, at Lender's option Lender may obtain coverage to protect Lender's rights in the Property pursuant to Paragraph 7…,

and

> If Borrower fails to perform the covenants and agreements contained in this Security Instrument,….then Lender may do or pay whatever is necessary to protect the value of the Property and Lender's rights in the Property….Although Lender may take action under this paragraph 7, Lender is not required to do so…..Any amounts disbursed under this paragraph 7 shall become additional debt of Borrower secured by this Security Instrument. Unless Borrower and Lender agree to other terms, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

(¶¶2, 5, and 7, Ex. C, Oct. 8, 2024 Record of Hr'g.filed Oct 7, 2024)

These terms and provisions of the Mortgage are clear and unambiguous and provide no limitation as to what could be spent our expended regarding the payment of real estate taxes and insurance, and there is no limitation as to the amount Appellant could expend for upkeep, maintenance, and property preservation fees, the payment of which redounds to Respondents'

benefit. Id. It also does not appear the Master considered them ambiguous such that they must be considered clear and ambiguous. (Tr. of Oct. 8, 2024 Hr'g.)

As a result, the Master's only duty was to enforce terms of the Note and Mortgage according to their terms, and it did not do so in this matter. See Rhodus v. Goins, 129 S.C. 40, 41, 123 S.E. 645, 645-46 (1924). [4] Rather, the Master, through the Judgment and the Order Denying Reconsideration, created an artificial and arbitrary cutoff date regarding the collection of funds advanced for payment of property taxes and insurance, and property preservation/caretaking fees, none of which appears to have been agreed to by Appellant and Respondent at the time they Loan Documents were executed. (Feb. 20, 2025 Judgment; March 12, 2025 Order Denying Recons.) In other words, the Master re-wrote them in Respondents' favor without them asking him to do same. This is an action the Master cannot do and should not have taken. See 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)).

Accordingly, it was error for the trial court to alter the calculation of the debt owed and reduce the same considering the same is/was not allowed by the Note, Mortgage or any of the evidence presented at the final hearing.

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

CONCLUSION

For the forgoing reasons, the Judgment and Order Denying Reconsideration should be amended and/or revised to determine Appellant met its burden of proof as to the fullness the debt Respondents owe under the Loan Documents, for related findings of fact and conclusions, and/or the reversal of other errors of law.

Respectfully Submitted,

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July 24, 2025
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