THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
Apr 10 2023
SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Shannon M. Phillips, Master-in-Equity

Common Pleas Case No. 2019-CP-42-02270
Appellate Case No. 2022-000393

U.S. Bank Trust, N.A., as Trustee for LSF10 Master Participation Trust, ... Respondent,

v.

Austin A. Lowery a/k/a Austin Lowery a/k/a Austin Allen Lowery a/k/a Allen Lowery, individually, and as Heir or Devisee of the Estate of Lisa D. Lowery a/k/a Lisa Marie Davis Lowery, Deceased; South Carolina Department of Revenue; The United States of America acting by and through its agency, Department of the Treasury - Internal Revenue Service; and Elizabeth A. Lowery, ... Defendants,

Of whom Austin A. Lowery a/k/a Austin Lowery a/k/a Austin Allen Lowery a/k/a Allen Lowery, individually, and as Heir or Devisee of the Estate of Lisa D. Lowery a/k/a Lisa Marie Davis Lowery, Deceased, is the ..... Appellant.

BRIEF OF RESPONDENT

J. Derrick Jackson (SC Bar 15192)
Tobias G. Ward, Jr., P.A.
P.O. Box 50124
Columbia, SC 29250
803-708-4200
dj@tobywardlaw.com

Reginald P. Corley (SC Bar 69453)
Scott & Corley, P.A.
2712 Middleburg Drive, Suite 200
Columbia, SC 29204
803-252-3340
reggiec@scottandcorley.com
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF ISSUES ON APPEAL

1. SHOULD THIS COURT AFFIRM THE MASTER IN GRANTING PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY FOR THE FORECLOSURE OF HIS MORTGAGE WHEN THE DEFENDANT ADMITS TO NOT PAYING HIS NOTE SINCE 2004 AND EXECUTING A MORTGAGE OF 5.0 ACRES SECURING PAYMENT OF THE NOTE?

2. SHOULD THIS COURT AFFIRM THE MASTER GRANTING SUMMARY JUDGMENT ON THE AFFIRMATIVE DEFENSES OF RES JUDICATA, UNCONSCIONABILITY AND RELEASE WHEN THE RECORD SHOWS THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT SUCH THAT THE PLAINTIFF IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THESE DEFENSES?

3. SHOULD THIS COURT AFFIRM THE MASTER'S REQUIREMENT THAT BOTH PARTIES FILE AFFIDAVITS THREE DAYS PRIOR TO THE FINAL HEARING TO SIMPLIFY THE ISSUES AND AVOID UNNECESSARY PROOF AND IS THE APPELLANT'S ARGUMENT ABOUT BEING DENIED THE RIGHT TO CROSS-EXAMINE WITNESSES PREMATURE BEING MADE PRIOR TO A FINAL HEARING?

STATEMENT OF FACTS

On or about May 24, 1996, Appellant Austin Lowery ("Lowery") acquired a 53.73-acre tract of land southeast of Woodruff in Spartanburg County. (R. 47-49) Lowery had 5.0 acres of this land surveyed in 1996, (R. 360), and again in 2002, (R. 361). On April 26, 2002, Lowery borrowed $210,000 from SunTrust Bank secured by a mortgage on the 5.0 acres that incorporates by reference the 1996 plat (of the entire 53.73-acre tract of land) in the legal description of the mortgage. (R. 362-64)

According to Lowery, he needed to refinance a construction loan that was about to mature[1], so he and his wife, Lisa, applied for a loan from Household Finance Corporation II ("HFC II"), Plaintiff's predecessor-in-title. (R. 341-45) The mortgage loan was approved, and on September 24, 2002, Lowery and his wife, Lisa, executed a promissory note to HFC II in the principal amount of $304,040.62 (*Id.*). These funds were used to pay off various obligations of

[1] Presumably, this was not the SunTrust loan as it had a maturity date of 2032.

the Lowerys including the SunTrust mortgage which encumbered only the 5.0 acres. The Lowerys also received $13,535 from the closing (R. 346-48). Additionally, the Uniform Residential Appraisal Report, completed on September 19, 2002, for the originating lender and in anticipation of this closing transaction, appraised only the 5.0-acre tract and any improvements located on that 5.0-acre tract. (R. 352-359)

Lowery, who was the sole owner of the 5.0-acre property, also executed a mortgage dated September 24, 2002, to HFC II, securing the promissory note which was duly recorded in REM 2782 at Page 874 on September 26, 2002 (R. 331-35) The legal description of this mortgage referenced the entire 53.73-acre tract, which was in Lowery's deed acquiring the property, rather than the 5.0-acre parcel subsequently surveyed by Lowery (and which also was mortgaged by SunTrust) that all parties agree was the parcel intended to be mortgaged. Lowery admits this 53.73-acre tract mortgage was never valid, (R. 327, para. 23), and that he only intended to mortgage the 5.0-acre tract, (R. 311, para. 9).

Upon discovery of the error in the legal description of the recorded mortgage, HFC II requested that Lowery, consistent with his obligation with the originating lender to sign any documents necessary to complete the loan closing transaction, return and sign a new and separate mortgage with the legal description intended by all parties: the 5.0-acre tract. Lowery did so on September 30, 2004, and this mortgage was recorded on October 4, 2002, in the Office of the Register of Deeds for Spartanburg County in Book 2789 at Page 575. (R. 336-40)

The mortgagee title insurance policy insured only the subsequent 5.0-acre mortgage and excluded the invalid mortgage from coverage under Schedule B, Item 10, with the specific mandate from the title insurance company, stating "BRANCH TO RELEASE" the invalid mortgage. (R. 349-51)

Lowery made payments on the promissory note but ultimately defaulted under the terms of the promissory note and mortgage by failing to make payments. Lowery admits that he has not made any payment on the note since prior to April 2004. (R. 77, para. 25) HFC II filed a foreclosure action in 2008, and subsequently amended the pleadings to clarify it was foreclosing the 5.0-acre mortgage. (R. 278-85) In the answer to paragraph 14 of the Amended Complaint filed in the 2008 foreclosure action, the Lowerys admit they executed a mortgage on the 5.0-acre tract, which is the subject of the action. (R. 316) The 2008 foreclosure action was ultimately stricken with leave to restore under Rule 40(j), SCRCP, in 2013. (R. 286-87) That order was not appealed.

On January 11, 2019, and consistent with the mortgage being invalid, the intentions of the parties as admitted in prior pleadings, the discovery responses in this action, the Affidavit of Austin Allen Lowery, and the mandate from the title insurance company in Schedule B of the mortgagee title insurance policy, Respondent U.S. Bank Trust, NA as Trustee for LSF10 Master Participation Trust ("U.S. Bank") filed a release, (R. 146-47), of the invalid mortgage instrument that encumbered the 53.73 acres, (R. 331-35). Thereafter, in June 2019, U.S. Bank filed the present foreclosure which was subsequently amended to clarify the foreclosure of the 5.0-acre mortgage, which was alleged in paragraph 27 of the Amended Complaint. (R. 62, para. 27)

Lowery answered the Second Amended Complaint and pled affirmative defenses of release, unclean hands, the statute of limitations, res judicata, and laches. (R. 93-100) Lowery also pled a defense and counterclaim for violation of the attorney preference statute and alleged the mortgage loan was induced by unconscionable conduct. (R. 98-99)

The parties filed cross-motions for summary judgment which resulted in two orders by the Honorable Gordon G. Cooper,[2] the May 10, 2021, Order denying the Defendant's motions

[2] Judge Cooper retired as master and was succeeded by the Honorable Shannon M. Phillips.

for summary judgment on counterclaims and the Plaintiff's claim, (R. 24-27), and the May 20, 2021, Order granting the Plaintiff's motion for partial summary judgment as to offensive use of the claim of unconscionability and limited use to an affirmative defense and setoff, (R. 28-34).

Subsequent to these orders, the matters remaining for the court were Defendant's affirmative defenses of unconscionability, res judicata, laches, unclean hands and release, the Plaintiff's foreclosure and Defendant's counterclaim based on the alleged violation of the attorney preference statute. U.S. Bank filed a motion for summary judgment as to the issue of liability for the foreclosure and the Defendant's affirmative defenses. The master granted this motion by order dated February 23, 2022. (R. 1-13) Lowery timely filed a motion to reconsider, but then by email requested the master summarily grant or deny the motion without a hearing. (R. 233) This appeal followed.

STANDARD OF REVIEW

In reviewing the grant of a summary judgment motion, this court applies the same standard which governs the trial court: summary judgment is proper when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Baughman v. American Tel. & Tel.* Co., 306 S.C. 101, 114-15, 410 S.E.2d 537, 545 (1991). Under Rule 56(c), SCRCP, the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 130, 558 S.E.2d 271, 273 (Ct. App. 2001). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Rule 56(c), SCRCP; *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990).

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE MASTER'S ORDER GRANTING SUMMARY JUDGMENT AS TO LIABILITY FOR FORECLOSURE OF THE MORTGAGE BECAUSE THERE IS NO GENUINE ISSUE OF MATERIAL FACT THAT LOWERY DEFAULTED ON THE NOTE SECURED BY A MORTGAGE ON 5.0 ACRES.

"Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt. Once the debt and default have been established, the mortgagor has the burden of establishing a defense to foreclosure such as lack of consideration, payment, or accord and satisfaction." *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 221, 746 S.E.2d 478, 481 (Ct. App. 2013) (*Citing U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 374-75, 684 S.E.2d 199, 205 (Ct. App. 2009)).

Lowery admits to signing the promissory note. (See R. 94, para. 6) Lowery further admits that he has not made any payments on the note since prior to April 2004. Lowery states that it was his intent to mortgage 5.0 acres and Lowery also admits to giving HFC II a mortgage on the 5.0 acres in his answer to the original foreclosure pleadings brought by HFC II (U.S. Bank's predecessor-in-title). Thus, Respondent U.S. Bank has made out a *prima facie* case for foreclosure subject to a final determination of the debt which the order of the court provided for by affidavit and a final hearing. Therefore, unless Lowery can prove a valid defense, summary judgment for the Respondent as to liability for foreclosure was proper. As set forth in the following argument, Lowery has not raised any valid affirmative defenses as a matter of law.

II. THIS COURT SHOULD AFFIRM THE MASTER'S GRANTING SUMMARY JUDGMENT ON THE AFFIRMATIVE DEFENSES OF RES JUDICATA, UNCONSCIONABILITY AND RELEASE BECAUSE THE RECORD SHOWS THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT SUCH THAT THE PLAINTIFF IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THESE DEFENSES.

It is important for this court to understand the timing and context in which some of these affirmative defenses are raised. The Lowerys executed the promissory note on September 24,

2002. They made payments for almost two years before they stopped making payments in 2004. HFC II filed a foreclosure action in 2008 which it amended to specifically allege foreclosure of the 5.0 acres. In answering that amended complaint, Lowery specifically admitted giving HFC II a mortgage on the 5.0 acres and states, "the Mortgage held by the Plaintiff was a First Mortgage on 5 acres of real property as opposed to the 53.75 acres of land upon which they sought to foreclose." (R. 314, para. 2) Indeed, Lowery even counterclaimed for breach of contract for not satisfying or releasing the mortgage with the invalid legal description. Nowhere in the answer are claims of unconscionability or that the mortgage of the 5.0 acres is somehow the same as the prior mortgage with an invalid description which Lowery wanted released. These defenses appear for the first time in Lowery's answer to the foreclosure filed in June 2019, almost 17 years after signing the note and mortgage.

Defendant's Affirmative Defenses

In his answer and in opposition to summary judgment, Lowery raised several affirmative defenses; however, as set forth below, there are no genuine issues of material fact as to these defenses and the master properly grant U.S. Bank summary judgment as a matter of law.

a. Release

Lowery argues that U.S. Bank's foreclosure action must fail because it released its mortgage. This argument lacks merit and the master correctly granted summary judgment on this issue. On September 24, 2002, Lowery executed a mortgage to HFC II securing the promissory note as part of the closing for refinancing his construction loan with SunTrust Bank. This mortgage was recorded in REM 2782 at Page 874 on September 26, 2002. The legal description of this mortgage mistakenly referenced the entire 53.73-acre tract which was in Lowery's deed acquiring the property, rather than the 5.0-acre parcel subsequently surveyed by Lowery (and which also was mortgaged by SunTrust). Lowery admits this 53.73-acre mortgage was never

valid, (R. 227-28, interrogatory 27), and that he only intended to mortgage the 5.0-acre tract.[3] Upon discovery of the error in the legal description of the recorded mortgage, HFC II requested that Lowery return and sign a mortgage with the correct legal description for the 5.0-acre tract. Lowery did so on September 30, 2002, and this mortgage was recorded on October 4, 2002, in the Office of the Register of Deeds for Spartanburg County in Book 2789 at Page 575.

The master also noted from Exhibit 10 to the Plaintiff's Return to Defendant's Summary Judgment that the tile insurance policy excepted to the first mortgage with an incorrect legal description from coverage in Schedule B and stated it was to be released.

There are no genuine issues of material fact that Lowery intended to and did execute a mortgage on the 5.0-acre tract which is the subject of this foreclosure. Lowery admits that it was always his intent to mortgage the 5.0-acre tract,[4] and Lowery also admits to giving HFC II a mortgage on the 5.0 acres in his answer to the original foreclosure pleadings brought by HFC II (U.S. Bank's predecessor-in-title).[5] Lowery states in his answer to the HFC II complaint, "the Mortgage held by the Plaintiff was a First Mortgage on 5 acres of real property as opposed to the 53.75 acres of land upon which they sought to foreclose."

Having admitted to giving Plaintiff a mortgage on this property, it is incumbent on the Defendant Lowery to prove as an affirmative defense that the 5.0-acre mortgage has been released or satisfied. The only evidence offered by Lowery in response to summary judgment is the recorded release of the prior recorded mortgage which Lowery admits contained an incorrect legal description, that he wanted released and was recorded in error.

[3] See Lowery Affidavit (R. 311, para 9)
[4] See Lowery Affidavit (R. 311, para 9)
[5] See Lowery Answer to HFC II Amended Complaint, (R. 315, para. 3; R. 316, para. 14), and generally, U.S. Bank Return to Lowery Motion for Summary Judgment.

U.S. Bank recorded a document entitled "RELEASE OF MORTGAGE" in Mortgage/ Record Book 2782 at Page 874. (R. 331-35) In that document, U.S. Bank released the property from "liens under that certain Mortgage dated September 24, 2002, from Austin A. Lowery, recorded in the office of the ROD/RMC/Clerk of Court for Spartanburg County on September 26, 2002, in Mortgage/Record Book 2782 at Page 874 and assigned to U.S. Bank Trust, N.A., as Trustee for LSF10 Master Participation Trust by assignment dated June 26, 2018, and recorded July 3, 2018, in Book 5469 at Page 795." The language used by U.S. Bank is very specific and intentional. This Release by its express language applied to that specific mortgage and no other. Lowery admits that well prior to this release, Lowery executed another mortgage for 5.0 acres, in accordance with the intent of the parties, which was recorded on October 4, 2002, in the Office of the Register of Deeds for Spartanburg County in Book 2789 at Page 575. (R. 336-340) A plain reading of the recorded release shows that it only released the property from the lien of the invalid mortgage dated September 24, 2002, from Austin A. Lowery, recorded in the office of the Register of Deeds for Spartanburg County on September 26, 2002, in Mortgage/Record Book 2782 at Page 874. There is no mention or description of the subsequent mortgage dated September 30, 2002, and recorded on October 4, 2002, in the Office of the Register of Deeds for Spartanburg County in Book 2789 at Page 575, even though it was already filed and of record at the time the release was executed and recorded.

Judge Cooper in his order denying Defendant's motion for summary judgment on the grounds of the release explains, "that there is no genuine issue of material fact as it would, under the facts and circumstances, be inequitable for Defendant to receive $304,040.62 from Plaintiff which funds were in fact used to benefit the Defendant and it being clear that Defendant intended to and did give a mortgage to HFC II on the 5.0 acre parcel." (R. 25)

Lowery tries, but fails, to conflate the two separately executed and recorded mortgages as somehow being the same[6]. First, this argument is not valid as the mortgages were executed on separate days, have different legal descriptions, different witnesses, and were recorded separately. Not to mention that one mortgage was invalid and unintended and the other was valid and intended by the parties (as specifically and continuously admitted to by Lower, as outlined above). However, even if this conflation were somehow proper (which it is not), then Lowery cannot have it both ways. Lowery would have the court draw the subsequent mortgage backward to the invalid and unintended mortgage to be released rather than forward to the valid and intended mortgage, which was subsequently recorded and *not released*, and of which Lowery made timely mortgage payments on for almost two years. If the two separate mortgages are somehow the same (and again, they are not), then their identity should be under the subsequently executed and valid mortgage on the 5.0 acres which was intended by the parties.

It is difficult to see how the release of a mortgage, which Lowery acknowledges was invalid and contrary to the intent of the parties (that 5.0 acres be mortgaged), could somehow result in a release of a subsequently executed mortgage that was valid and consistent with the intent of the parties. Indeed, as noted previously Lowery sued HFC II claiming the first mortgage with the invalid description should be released.

A plain reading of the release shows that the release did not include the 5.0-acre mortgage given by Lowery. Lowery admits that the mortgage actually released by Plaintiff was invalid, contrary to the intention of the parties, and was supposed to be released. Lowery admits giving Plaintiff the mortgage being foreclosed and there is no evidence that it has been released

[6] "The Plaintiff is obviously taking the position that these are two different mortgages, not that the second recorded mortgage document is just a corrected version of the first. Let us be clear: Defendant's position is that the second recorded mortgage document is just a corrected version of the first and that the mortgage was released when the release document was done." Defendant's Memorandum in Opposition to Motion to Dismiss Counterclaim, p. 7. (R. 225)

or otherwise satisfied. It would be inequitable for Lowery to receive and apply the loan proceeds, give Plaintiff a mortgage, fail to repay the loan for over 17 years, and then claim the mortgage he admits he gave was released.

The court properly concluded that there are no genuine issues of material fact that Lowery intended to and did give Plaintiff a mortgage on the 5.0 tract in consideration of the loan and to secure the promissory note. The court also properly concluded that Lowery did not provide sufficient facts to create a genuine issue of material fact that this subsequent mortgage for 5.0 acres was released. Summary judgment on this defense was proper and should be affirmed.[7]

b. Unconscionability

In a prior order, Judge Cooper granted Plaintiff partial summary judgment on the Defendant's claim of unconscionability as it related to the offensive use, to the extent the Defendant sought a money judgment and attorney's fees and costs against Plaintiff as assignee from HFC II. Judge Cooper's order was without prejudice to Lowery's right to raise his counterclaim as an equitable and statutory defense for the purpose of setoff or recoupment.

S.C. Code Ann. §37-5-108(c) allows the court to use its *equitable* powers and discretion if it finds as a matter of law the agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct. Lowery bases his unconscionability argument on several factors which he argues collectively support a finding of unconscionability.

[7] Lowery also argued in his brief that since the mortgage was released the statute of limitation on the note is now three years and the action barred; however, for the reasons just argued, the mortgage was not released and this argument is moot.

First, he asserts that the violation of the attorney preference statute is unconscionable conduct.[8] This same argument was raised and rejected in *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998). In *Lackey*, the trial court held that an arbitration clause included in a retail installment contract for the purchase of a manufactured home was unconscionable and unenforceable, in part, because Green Tree failed to comply with the attorney-preference statute, "tantamount to denying each buyer the right to consult counsel." *Id.* at 398, 498 S.E.2d at 903. The South Carolina Supreme Court rejected this conclusion and stated, "Contrary to the holding of the trial court in this case, we do not read *First Baptist Church of Timmonsville*[9] to establish a bright line test rendering an arbitration clause unenforceable where a contract somehow prevents a party from consulting a lawyer. But even if it did, there is nothing in the contract which prevented respondents from consulting legal counsel." *Lackey* at 399, 498 S.E.2d 904. Furthermore, Lowery has failed to point out which provision or provisions in the promissory note or the mortgage are unconscionable that counsel would have allegedly protected him from. Plaintiff served discovery requesting this information but received no answer or response.

Lowery also argues that the absence of counsel at the closing is unconscionable conduct. While there is no doubt about the benefits of counsel at a closing, the court properly noted the distant closing date and the circumstances of a closing which occurred almost twenty years ago. "In determining unconscionability, courts are limited to considering facts and circumstances existing when the contract was executed." *Hardee v. Hardee*, 348 S.C. 84, 95-96, 558 S.E.2d 264, 269-70 (Ct. App. 2001).

[8] Lowery claims this is a "straw argument," but it is clear from his brief that Lowery claims the violation of the attorney preference statute and lack of counsel is unconscionable conduct presumably excusing him from making payments of any kind or amount on his note since 2004.

[9] *First Baptist Church of Timmonsville v. George A. Creed & Son, Inc.*, 276 S.C. 597, 281 S.E.2d 121 (1981).

Lowery mischaracterizes the point the master was making by noting the distant closing date and stating, "During that time, closings did occur without the presence of counsel." The master, consistent with Supreme Court precedent, observed that *Matrix Fin. Servs. Corp. v. Frazer* was decided almost a decade after the Lowery closing, *prospectively* applying the unclean hands doctrine to potentially preclude equitable remedies to a lender of a loan closed without an attorney. 394 S.C. 134, 140, 714 S.E.2d 532, 535 (2011). Also, again, Lowery fails to show or allege how the absence of counsel materially prejudiced him in the terms of the note or mortgage.

Lowery does claim in his affidavit that HFC II promised he could refinance to a 5% rate if he made his payments for one year. However, the promissory note, which Lowery is charged with reading, provides for a reduction in rate of .50% at the end of the third year (36th month), fourth year (48th month), and fifth year (60th month) if Lowery makes his payments within 30 days of their due date and does not file bankruptcy (Exhibit 3, page 2, "Adjustment to Contract Rate."). Lowery did not make it to 36 months and there is no evidence that he requested the refinance or offered payments at the 5% rate.

Unconscionability is characterized by the "absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 402, 472 S.E.2d 242, 245 (1996) (emphasis added). In this case, Lowery has offered no evidence that he could not have sought a loan elsewhere or that the terms of his loan were "so oppressive that no reasonable person would

make them." Lowery admits as much by failing to respond to the Plaintiff's discovery requests and Requests for Admission concerning these same points, quoted below:[10]

INTERROGATORIES

1. If you contend that the Note and/or Mortgage are unconscionable for any reason, please explain in reasonable detail as to why.

2. If you contend that any specific provisions in the Note and/or Mortgage are unconscionable, please identify each provision and explain why the provision is unconscionable.

…

5. If you contend you were prejudiced from the alleged absence of an attorney at closing, please explain how you were prejudiced and what, if anything you expected an attorney would do differently?

…

REQUESTS FOR PRODUCTION

1. Please provide copies of any documents which you contend support any alleged claim of unconscionability.

…

4. Please provide copies of any documents supporting efforts to refinance.

…

REQUESTS FOR ADMISSION

1. Admit or Deny that you are in default under the terms of the Plaintiff's Note and Mortgage for failing to make the payments when due.

2. Admit or Deny that you could have sought a loan elsewhere from another lender.

3. Admit or Deny that there are no terms in the Plaintiff's Note or Mortgage which are so oppressive no reasonable person would make them.

(R. 126-132)

Lowery did not respond to these requests or offer any discovery responses in support of his opposition to Plaintiff's summary judgment motion. In *Nexstar Media Grp., Inc. v. Davis*

[10] See exhibits to Plaintiff's Motion for Summary Judgment Interrogatories, Requests for Production and Supplemental Requests for Admission served October 5, 2021. (R. 126-132). Lowery claims in his motion to reconsider that Defendant's affidavit contained all the information sought in Plaintiff's discovery requests.

Roofing Grp., LLC, the South Carolina Court of Appeals wrote, "This court has affirmed the seriousness of the ramifications for a failure to respond to requests in a timely matter. 431 S.C. 593, 602-03, 484 S.E.2d 597 (Ct. App. 2020). In *Scott v. Greenville Hous. Auth.*, this court stated, "South Carolina has long had the discovery rule that failure to respond to requests for admissions renders any matter listed in the request conclusively admitted for trial." 353 S.C. 639, 645, 579 S.E.2d 151, 154 (Ct. App. 2003). The *Scott* court further noted: "Our courts have repeatedly found that failure to respond to requests for admissions deems matters contained therein admitted for trial, regardless of whether the admission concerns a matter responded to in a party's pleadings." *Id.* at 646, 579 S.E.2d at 154-55.

Furthermore, S.C. Code Ann. §37-5-108(c) is subject to the equitable powers and discretion of the court. Lowery made payments for a little over 18 months on the promissory note and the mortgage. The HUD-1 Closing Statement reflects that Lowery received $304,040.62 and had several debts paid and walked away from closing with $13,535. (R. 143-45) It would be inequitable to allow Lowery to receive this benefit, fail to make payments since 2004, and then argue his note and mortgage are unenforceable because of unconscionability based on alleged fraud in the inducement which he raises for the first time almost 17 years after signing the note and mortgage.

Lowery implies unconscionability and evil intent in HFC II's mistaken recording of a mortgage with the incorrect legal description. However, it is undisputed this was quickly corrected (within a week) by recording a mortgage with the proper legal description and Lowery admits that the 5.0-acre mortgage which is being foreclosed is what he intended and did execute. The other mortgage with the incorrect description was released.

As quoted by Lowery in his appellate brief, "Unconscionability simply means "[e]xtreme unfairness." Black's Law Dictionary, 1663 (9th ed. 2009). There is no evidence of extreme

unfairness in Lowery's loan or closing. The extreme unfairness here is to the Plaintiff who has loaned Lowery $304,040.62 with no repayment since 2004. In short, Lowery failed to come forward with sufficient facts which would create a genuine issues of *material* fact to lead the court to conclude that the agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct. Therefore, U.S. Bank was entitled to summary judgment as a matter of law.

c. Res Judicata

Lowery argues that the bank is barred from filing the present foreclosure by the doctrine of res judicata. Lowery contends that the court's prior striking of a foreclosure action filed by Household Finance Corporation, II[11] (HFC II) filed July 26, 2013, precludes the bank from bringing the current foreclosure action. This contention lacks merit as can be seen from the face of the Form 4 Order striking the prior foreclosure action. (R. 286-87) Under the doctrine of res judicata, a litigant is barred from raising issues previously adjudicated between the parties in a subsequent action. *See Hilton Head Ctr. of S.C., Inc. v. Public Serv. Comm'n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). Res judicata requires three elements: "(1) a judgment that is final, valid, and on the merits; (2) the parties in the second action are identical to those in the first; and (3) the subsequent action must involve a subject matter properly included in the first action." *Owenby v. Owens Corning Fiberglas*, 313 S.C. 181, 183, 437 S.E.2d 130, 132 (Ct. App. 1993).

In this case, while it may be debatable whether the parties and the subject matter are identical[12], assuming arguendo these elements are satisfied, there never was an adjudication on the merits or final judgment in the first foreclosure. On its face, the Form 4 order strikes (but

[11] U.S. Bank's predecessor-in-title and assignor.
[12] Arguably, Household Finance Corp, II and U.S. Bank are not identical, although U.S. Bank is a successor by assignment and arguably payments accruing after the case was dismissed are different.

does not dismiss) the case pursuant to Rule 40(j), SCRCP for failure to prosecute. Defendant argues this order is equivalent to an order of dismissal under Rule 41(b), SCRCP "for other reasons" because the parties did not consent and therefore was with prejudice and adjudication on the merits. However, it was obvious the court did not intend for the dismissal to be under Rule 41 or with prejudice. The court could have checked the boxes for dismissal and for Rule 41 but did not. More importantly, *the order expressly provided for the parties to be able to restore the action when they were ready to proceed*. Thus, the order could not have been a final judgment on the merits for res judicata purposes. This order was not appealed and is the law of the case. If Lowery had wanted to contend that the dismissal had preclusive effect, he should have raised that issue with the judge who signed the order.

The court should further note the context of the order, the court struck this case *sua sponte* without notice or a hearing. It was clearly intended to be an administrative action until the parties were ready to proceed. "Restraint is particularly warranted when the prior action was dismissed on procedural grounds. *Garris v. Governing Bd. of S.C. Reinsurance*, 333 S.C. 432, 450, 511 S.E.2d 48, 57 (1998) (*quoting Kearns v. General Motors Corp.*, 94 F.3d 1553, 1556 (Fed. Cir. 1996).

If the order was truly intended to be an order of dismissal with prejudice for lack of prosecution, a lot more due process is required. *McComas v. Ross*, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006) ("In those cases where our supreme court has affirmed dismissal of actions based on a failure to prosecute, the dismissals were imposed to maintain the orderly disposition of cases in the face of repeated warnings to the offending party or multiple opportunities to proceed with trial, and only then upon a finding of unreasonable neglect."). The master properly granted summary judgment on this issue.

d. Laches[13]

The party seeking to establish laches must show (1) delay, (2) that was unreasonable under the circumstances, and (3) prejudice. *Kelley v. Kelley*, 368 S.C. 602, 606, 629 S.E.2d 388, 391 (Ct. App. 2006). To establish laches as a defense, *the defendant must show* the complaining party unreasonably delayed its assertion of a right, thereby prejudicing the defendant. *Id.* "The determination of whether laches has been established is largely within the discretion of the trial court." *Id.* at 607, 629 S.E.2d at 391. Additionally, for the defense of laches to be sustained, "the circumstances must have been such as to import that the complainant had abandoned or surrendered the claim or right which he now asserts." *Id.* (*quoting Byars v. Cherokee County*, 237 S.C. 548, 560, 118 S.E.2d 324, 330 (1961)); *see also Jones v. Leagan*, 384 S.C. 1, 20, 681 S.E.2d 6, 16 (Ct. App. 2009).

"Delay alone is not enough to constitute laches; it must be unreasonable, and the party asserting laches must show prejudice." *Gordon v. Drews*, 358 S.C. 598, 612, 595 S.E.2d 864, 871 (Ct. App. 2004) (*quoting Brown v. Butler*, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001)).

In this case, U.S. Bank's predecessor, HFC II, filed a previous foreclosure suit which was stricken pursuant to Rule 40(j), SCRCP and then after the paper changed hands, U.S. Bank brought the present suit within the statute of limitations period. The Defendant fails to articulate how the delay prejudiced him as he was always free to assert his claims in a lawsuit filed by him at any time. In his brief, Lowery argues the accumulation of interest, but of course this stems from his lack of payment and he could have challenged the interest rate or the loan at any time.

[13] Lowery pled laches as an affirmative defense, but the master did not rule upon this issue in the order. Lowery raised this issue in the motion to reconsider but then asked the master to issue a form order summarily granting or denying the motion without a hearing. The master granted his request and filed a form order denying the motion. Respondent addressed the issue in the return to the motion to reconsider.

Furthermore, Laches is an equitable defense, and the Defendant has been inequitable. This court notes in the order the comment from Judge Cooper, "that there is no genuine issue of material fact as it would, under the facts and circumstances, be inequitable for Defendant to receive $304,040.62 from Plaintiff which funds were in fact used to benefit the Defendant and it being clear that Defendant intended to and did give a mortgage to HFC II on the 5.0-acre parcel." Also, the Defendant stopped making payments in 2004. If anything, U.S. Bank could claim laches against the Defendant for not making alleged claims concerning the closing of his mortgage loan sooner.

Finally, there is no evidence from Lowery that U.S. Bank or its predecessor HFC II suggested that it had abandoned or surrendered its claims to enforce the note and mortgage by foreclosure. The court should hold that Lowery's laches defense lacks merit and affirm the master's order.

e. Unclean Hands[14]

The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998). "The expression 'clean hands' means a clean record with respect to the transaction with the defendants themselves and not with respect to others." *Arnold v. City of Spartanburg*, 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943). The rule must be understood to refer to some misconduct concerning the matter in litigation of which the opposing party can, in good conscience,

[14] This also was raised as an affirmative defense but not directly ruled upon by the master in the order; however, in granting summary judgment for foreclosure and against unconscionability the master necessarily decided U.S. Bank did not have unclean hands. Lowery did not directly raise the defense of unclean hands as a separate issue in the motion to reconsider but did incorporate by reference "all the Defendant's filings in this action."

complain in a court of equity. *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010). This defense is not valid in this case for several reasons.

First, the master already considered the same allegations of "unclean hands" in granting summary judgment to U.S. Bank on the foreclosure and unconscionability claims. Second, as it is an equitable doctrine, it is intended to prevent *a party who acted unfairly in a matter that is the subject matter of the litigation* from recovering under an equitable remedy. Here, there is no evidence that U.S. Bank acted unfairly in this matter, so it should not be denied equitable remedies.[15] Indeed, Judge Cooper in his order denying Defendant's motion for summary judgment on the grounds of the release, explains, "that there is no genuine issue of material fact as it would, under the facts and circumstances, be inequitable for Defendant to receive $304,040.62 from Plaintiff which funds were in fact used to benefit the Defendant and it being clear that Defendant intended to and did give a mortgage to HFC II on the 5.0 acre parcel." It is inequitable that Lowery has failed to make any payments since before April 2004. Thus, the equities favor U.S. Bank instead of Lowery. Finally, the principal argument Lowery makes as to unclean hands is that his loan was closed without counsel. It is undisputed that the 5.0-acre mortgage being foreclosed was dated September 30, 2002, and recorded on October 4, 2002, *Matrix* was decided in an opinion issued on rehearing on August 11, 2011. *See BAC Home Loan Servicing, L.P. v. Kinder*, 398 S.C. 619, 624, 731 S.E.2d 547, 550 (2012) ("we clarify now that it is the date the document a party seeks to enforce was filed. Here, Systems' mortgage was recorded on April 20, 2007, well before the issuance of *Matrix Fin. Servs. Corp. v. Frazer*, 394

[15] *See Matrix Fin. Servs. Corp. v. Frazer*, 394 S.C. 134, 714 S.E.2d 532 (2011) (holding "that a lender may not enjoy the benefit of equitable remedies **when that lender** failed to have attorney supervision during the loan process as required by our law." The Respondent notes that in both *Wachovia Bank, N.A. v. Coffey*, 389 S.C. 68, 75 (Ct. App. 2010) and *Matrix*, those lenders directly participated in the alleged misconduct and were not assignees.

S.C. 134, 714 S.E.2d 532 (2011). Thus, regardless of whether an attorney participated in the closing of Mortgage 2, BAC would not be barred from recovery by the illegality.").

For all these reasons, the court should hold that Lowery's defense of unclean hands is not a bar to U.S. Bank's foreclosure.

III. THE MASTER DID NOT DENY LOWERY THE RIGHT TO CROSS-EXAMINE WITNESSES AND PROPERLY EXERCISED HER DISCRETION TO SIMPLIFY THE ISSUES AND AVOID UNNECESSARY PROOF WHEN SHE REQUIRED BOTH PARTIES TO SUBMIT AFFIDAVITS THREE DAYS PRIOR TO A FINAL HEARING.

In the master's order granting summary judgment, the master ordered the following:

> Plaintiff is granted summary judgment as to Defendant's liability for foreclosure subject to submitting by affidavit appropriate documentation supporting the amount of the debt at least three days prior to a final hearing;
>
> Defendant is granted judgment by way of offset only for an attorney preference violation subject to submitting the amount claimed for the offset by way of affidavit at least three days prior to a final hearing.

(R. 11)

Lowery is guilty of the same tactic he accuses U.S. Bank of in his brief: using a straw man argument. Lowery's straw man is that "the lower court has stripped Lowery of his right to cross-examine U.S. Bank's witnesses at trial." However, nothing in the court's order states Lowery could not cross-examine witnesses, if needed, at the final hearing, and the argument is being made prematurely and without proof prior to the final hearing called for in the order[16].

The master requiring both parties to file affidavits prior to the final hearing is nothing more than an attempt to simplify the remaining issues and avoid unnecessary proof under Rule 16, SCRCP. The only issues remaining after this master's order granting summary judgment are the amount of the Plaintiff's debt and the amount of the Defendant's offset for the attorney

[16] U.S. Bank filed a motion to dismiss this appeal as being interlocutory as a final hearing had not yet taken place.

preference violation. The court should note that in some ways this is an academic exercise because U.S. Bank waived a deficiency judgment and Lowery's offset for attorney's fees would never exceed the amount due under the mortgage.

Since Lowery admitted to failing make payments since before April 2004, then the amount of the debt should not be the subject of genuine dispute. However, should the Defendant's counsel have a *genuine, material dispute* with the amount of the debt set forth in the affidavit which cannot be resolved pretrial, then the court can address the issue at a pretrial conference or at the final hearing. Nothing in the master's order on appeal suggests otherwise.

CONCLUSION

The master's order should be affirmed. Lowery admits executing a promissory note for $304,040.62 secured by a 5.0-acre mortgage to HFC II (and U.S. Bank its assignee). Lowery used the loan proceeds for his own benefit. Lowery further admits (by admission) to defaulting on his loan, and to failing to make any payments since before April 2004. As argued herein, Lowery's affirmative defenses lack merit. The master properly granted summary judgment on these defenses and required affidavits from both parties to simplify the issues and avoid unnecessary proof prior to a final hearing. This court should affirm the master and remand this case to proceed to a final hearing.

Respectfully submitted,

TOBIAS G. WARD, JR., PA

s/J. Derrick Jackson
J. Derrick Jackson, SC Bar 15192
Post Office Box 50124
Columbia, SC 29250
803-708-4200
dj@tobywardlaw.com

SCOTT AND CORLEY, P.A.

s/Reginald P. Corley

Reginald P. Corley, SC Bar 69453
H. Guyton Murrell, SC Bar 64134
2712 Middleburg Drive, Suite 200
Columbia, SC 29204
803-252-3340
reggiec@scottandcorley.com
guytonm@scottandcorley.com
Attorneys for Respondent

April 10, 2023