

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Charleston County
Mikell Scarborough
Master-in-Equity

Circuit Court Case Number 2011-CP-10-2505

Wells Fargo Bank, N.A., as Trustee for WaMu Mortgage Pass-Through
Certificates Series 2006-PR I Trust

Respondent,

versus

Marvin Smalley, Bay Club Homes Property Owners Association, Inc.

Defendants,

Of Whom

Marvin Smalley is

Appellant.

INITIAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF THE ISSUES ON APPEAL

1. DID THE RESPONDENT MEET ITS BURDEN OF PROOF IN SHOWING ALL OF THE ELEMENTS NECESSARY FOR A FORECLOSURE, INCLUDING THAT THE APPELLANT DEFAULTED.

STATEMENT OF THE CASE

Respondent Wells Fargo Bank, N.A., as Trustee for WaMu Mortgage Pass-Through Certificates Series 2006-PR I Trust claims to be a Florida corporation and the asserted current holder of a note and mortgage alleged secured by property owned by Appellant Marvin Smalley. See Complaint at Exhibit 1. The property is located at 109 Bogard Street in Charleston. Before Smalley answered, the case was administratively stayed per SCRCF Rule 40(j) and reinstated with a new case number. Smalley then answered the complaint, discovery ensued, and the case set for trial. A trial was held before Mikell Scarborough, Master-in-Equity for Charleston County on November 19, 2012. Judge Scarborough granted judgment for the Respondent on December 27, 2012. Appellant timely filed a Motion to Alter or Amend the Judgment on January 14, 2013. A hearing on Smalley's motion was held September 5, 2013. The motion was denied by form order on September 5, 2013. This appeal ensued.

FACTS

This is a residential foreclosure case. Respondent Wells Fargo Bank, N.A., as Trustee for WaMu Mortgage Pass-Through Certificates Series 2006-PR I Trust claims to be a Florida corporation and the asserted current holder of a note and mortgage alleged secured by property owned by Appellant Marvin Smalley. See Complaint at Exhibit 1.

The property is located at 109 Bogard Street in Charleston. After discovery, the case proceeded to trial.

Respondent was represented by counsel and called one witness, Scott Sayre. Sayre represent that he was an employee of J.P. Morgan Chase that, he claimed, was the servicer of the asserted loan. Mr. Sayer testified with great difficulty. His testimony as to the alleged damages was based on the affidavit of someone not in court. He could not testify as to the date of the assignment from the prior holder of the note to the plaintiff. He could not testify as to the interest rate as it adjusted on different dates. And, importantly, the witness could not answer when, if at all, the note was in default:

Q: What's the date this note went into default?

A: I don't have that date in front of me, I'm sorry.

Tr. p. 19, ln. 21-22. The plaintiff asserted an affidavit of debt was the proof of default of the loan. Tr. p. 26, ln. 11-12. However, the Master specifically excluded the affidavit as hearsay. Tr. p. 27, ln. 13-15 ("I agree with everything so far except for your affidavit of debt. I specifically did not include it in evidence."). Instead, this colloquy ensued:

THE COURT: So tell me how you-all get to the point of default.

MR. JACKMAN: Well, I could bring the witness back up, Your Honor, to testify what he's seen in the business records as far as the servicer's record to when the last payment was.

THE COURT: I think you did ask him that at one point in time. I don't remember getting an answer.

(pause)

Tr. p. 27, ln. 22- p. 28, ln. 5. Plaintiff provided no further proof of default other than an excluded affidavit and an unanswered question. Nevertheless, the Master then made the following finding from the bench, “And that’s consistent with what was alleged in the Complaint. The figure is consistent with what was alleged in the Complaint as to the amount due, and that the loan was in default from I think it was September 1 of ’09, if I remember right. Or December 1 of ’09. Its in there somewhere.” Tr. p. 30, ln. 4-9.¹ The judgment simply provides that, “payment on the note has not been made as provided for therein...” Judgment at 3, Exhibit 3. However, there was no testimony at all that supports this finding of fact.

ARGUMENT

- I. BECAUSE THERE WAS NO PROOF THE APPELLANT DEFAULTED ON THE MORTGAGE LOAN, THE RESPONDENT FAILED TO MEET ITS BURDEN OF PROOF ON THE ELEMENTS NECESSARY FOR FORECLOSURE.

“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.” *U.S. Bank & Trust Nat'l Assoc. v. Bell*, 684 S.E.2d 199, 205 (S.C.App. 2009). Respondent failed to offer any evidence of default of the loan; Respondent’s failure of proof is fundamental.

¹ Counsel for the appellant represents that the Master went into the court’s computer file during the “pause” and found the date alleged in the complaint (December 1, 2009) and assigned it as the default, even though there was no testimony or other evidence of this date.

Here, respondent failed to offer any evidence of the mortgagor's default on the debt. The judgment is silent on the date of default or even that Smalley defaulted.

At trial, the Master went into the court's file and read from the complaint after the close of evidence. The Master, in that sense, became an advocate for the Bank and relied on improper assertions that the defendant/appellant was unable to refute. Further, when directly asked, Respondent's witness could not say when or if Smalley default. Respondent's failure to fully meet its burden is a failure of proof for its case.

Q: What's the date this note went into default?

A: I don't have that date in front of me, I'm sorry.

Tr. p. 19, ln. 21-22.

Because Respondent failed to prove default of the note and mortgage, a foreclosure is inappropriate. Accordingly, the Master's judgment should be reversed and judgment entered in favor of the Appellant.

CONCLUSION

The Respondent was not entitled to judgment. To succeed on its foreclosure claim, Respondent was charged with proving ownership of the note and default of the same. It failed to do so by any competent evidence. As a result, the Master's judgment for foreclosure is not supported by the facts heard by him and the judgment should be reversed and entered in favor of the Appellant.

WHEREFORE the Appellant prays for the relief requested herein and for such other relief as the court deems just, prudent, and proper.

HALLER LAW FIRM, P.C.

A handwritten signature in black ink, appearing to read "D. K. Haller", written over a horizontal line.

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Charleston, South Carolina

December 4th, 2013

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APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED
IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

1. Master In Equity's Order and Judgment of Foreclosure and Sale dated December 27, 2012;
2. Order dated September 9, 2013;
3. Complaint;
4. Answer;
5. Motion to Alter or Amend dated January 14, 2013;
6. Transcript of Proceedings.

December 4, 2013



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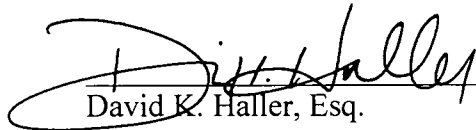
Marvin Smalley is

Appellant.

PROOF OF SERVICE

I certify that I have served the forgoing APPELLANT'S INITIAL BRIEF AND DESIGNATION OF MATTER FOR THE RECORD ON APPEAL on counsel for the respondent on at the address below:

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This 4 day of December, 2013

Charleston, South Carolina