THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master in Equity

Appellate Case No. 2012-213505

Wells Fargo Bank, N.A.,

Respondent,

v.

Lynn D. Simpson; Wells Fargo Bank, NA (Charlotte, NC); The Lofts at Mills Mill Condominium Owners Association, Inc., Defendants,

Of whom Lynn D. Simpson is the

Appellant.

PETITION FOR REHEARING

Appellant, Lynn D. Simpson, ("Appellant"), by and through undersigned counsel, respectfully petitions this Court for rehearing in the above-referenced matter pursuant to Rule 221 of the South Carolina Appellate Court Rules on the grounds the Court misapprehended that Appellant raised the issue of a meritorious defense to the lower court and the lower court ruled upon the issue. In support of said petition, Appellant states as follows:

I. The issue of Appellant's meritorious defense was raised in the lower court.

In this Court's Opinion of December 18, 2013, the Court affirmed the decision of the lower court on the grounds that Appellant had failed to raise the issue of a meritorious defense to

the underlying foreclosure action; however, Appellant raised the issue before the lower court on numerous occasions. The lower court's order of April 14, 2011 makes specific reference to the affirmative defenses raised by Mrs. Simpson at the hearing of March 29, 2011 when the order states "this is a Court of equity. While I find the service was proper, the Court is concerned with the behavior and actions of Plaintiff relative to Ms. Simpson while its attorneys were proceeding, as directed by Wells Fargo, to foreclose." (R. p. 9) In Appellant's Motion for Relief from Order of Foreclosure and Sale filed October 26, 2012, the issue of a meritorious defense was again raised. (R. pp. 39 – 80). Clearly, the issue of Appellant's meritorious defense was raised before the lower court.

II. The lower court's order of November 5, 2012 stated and/ or implied the issue of Appellant's meritorious defenses had been ruled upon.

In the lower court's order of November 5, 2012 the Honorable Charles B. Simmons, Jr. states he "reviewed and considered the motion, the exhibits attached thereto, the record in this case, the law, the equities, and the arguments of counsel for both Defendant Simpson and Plaintiff." (R. p. 15)[1] Based on the language of the November 5, 2012 order, the lower court reviewed and considered Appellant's Motion for Relief from Order of Foreclosure and Sale filed October 26, 2012. As the lower court reviewed and considered Appellant's Motion for Relief from Order of Foreclosure and Sale filed October 26, 2012, and the exhibits attached thereto, the lower court reviewed and considered the issue of Appellant's meritorious defense to the foreclosure action. The lower court's order of November 5, 2012 stated, or at the very least, implied the issue of a meritorious defense had been considered.

Appellant filed her motion for relief from Order of Foreclosure and Sale on October 26, 2012 (R. p. 14) On October 31, 2012, the lower court contacted counsel for the parties and requested the parties be available for a conference call. (Id.) On October 31, 2012, the lower court conducted a telephone hearing on the motion. (Id.) No court reporter was present. (Id.)

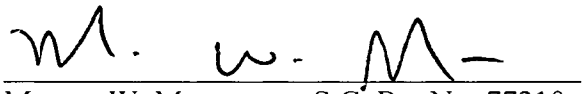
III. By denying Appellant's motions for relief, the lower court ruled on Appellant's meritorious defenses.

By Judgment of Foreclosure and Sale dated December 3, 2010, the lower court found that "The Defendant(s) Lynn D. Simpson, Wells Fargo Bank, NA (Charlotte, NC) and The Lofts at Mills Mill Condominium Owners Association, Inc. are in default as shown by affidavit or order filed herein." (R. p. 1) Appellant sought relief from the Judgment of Foreclosure and Sale dated December 3, 2010 and supplemental orders relating to the foreclosure by filing two (2) separate motions for relief. By denying the motions, the lower court ruled the Appellant was in default and had admitted the allegations of the Complaint. In so ruling, the lower court was in effect ruling on the issue of Appellant's meritorious defenses.

CONCLUSION

For the reasons set forth herein, Appellant respectfully requests rehearing in the above-captioned appeal.

Respectfully submitted,



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Dated: January 2, 2014

EXHIBIT A

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Wells Fargo Bank, N.A., Respondent,

v.

Lynn D. Simpson; Wells Fargo Bank, N.A. (Charlotte, NC); and The Lofts at Mills Mill Condominium Owners Association, Inc., Defendants,

Of whom Lynn D. Simpson is the Appellant.

Appellate Case No. 2012-213505

Appeal From Greenville County
Charles B. Simmons, Jr., Master-in-Equity

Unpublished Opinion No. 2013-UP-474
Submitted November 1, 2013 – Filed December 18, 2013

AFFIRMED

Marcus Wesley Meetze, of the Law Office of Marcus W. Meetze, LLC, of Greenville, for Appellant.

Shelton Sterling Laney, III, of Greenville, Jana Bebergal Baker, of Charleston, and Matthew Todd Carroll, of Columbia, all of Womble Carlyle Sandridge & Rice, LLP, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *Degenhart v. Knights of Columbus*, 309 S.C. 114, 118, 420 S.E.2d 495, 497 (1992) ("An issue on which the [lower court] never ruled and which was not raised in post-trial motions is not properly before this [c]ourt."); *Plantation Shutter Co. v. Ezell*, 328 S.C. 475, 481 n.2, 492 S.E.2d 404, 407 n.2 (Ct. App. 1997) (noting issues are not preserved for appellate review when the lower court never ruled on the issues and the appellant never made a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP); *McClurg v. Deaton*, 395 S.C. 85, 86-87, 716 S.E.2d 887, 887-88 (2011) ("A meritorious defense is necessary in order for a judgment to be set aside under Rule 60(b)."); *id.* at 87, 716 S.E.2d at 888 (holding if the meritorious defense factor is not ruled upon by the lower court, the denial of a Rule 60(b) claim is not preserved for appellate review); *id.* (affirming based on preservation because "the issue of a meritorious defense was neither raised to nor ruled upon by the [lower] court"); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (noting a party must file a Rule 59(e), SCRCP, motion "when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review").

AFFIRMED.[1]

HUFF, GEATHERS, and LOCKEMY, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

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Charles B. Simmons, Jr., Master in Equity

Appellate Case No. 2012-213505

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v.

Lynn D. Simpson; Wells Fargo Bank, NA (Charlotte, NC); The Lofts at Mills Mill Condominium Owners Association, Inc., Defendants,

Of whom Lynn D. Simpson is the

Appellant.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

Appellant, Lynn D. Simpson, ("Appellant"), by and through undersigned counsel, respectfully submits this memorandum in support of her petition for rehearing. In support of said petition, Appellant states as follows:

I. The issue of Appellant's meritorious defense was raised in the lower court.

In the Court's Opinion of December 18, 2013 (the "Opinion"), the decision of the lower court was affirmed based on the failure of the Appellant to raise, and for the lower court to rule upon, the issue of a meritorious defense. The Opinion is attached as Exhibit A. The Opinion misapprehends the fact the record establishes Appellant raised the issue of a meritorious defense.

South Carolina courts require a party seeking to set aside a default judgment raise a meritorious defense. See Mitchell Supply Co., Inc. v. Gaffney, 297 S.C. 160, 163, 375 S.E.2d 321, 323 (Ct.App.1988). In Appellant's Motion for Relief from Order of Foreclosure and Sale filed October 26, 2012 (the "Motion"), the issue of a meritorious defense was raised. (R. pp. 39 – 80, Appellant's Motion for Relief from Order of Foreclosure and Sale) Appellant presented substantial evidence as to several meritorious defenses to the foreclosure action, including but not limited to, the defense of payment. The exhibits attached to the Motion included Appellants bank statements and correspondence received by Appellant.[1] (R. pp. 46 – 80).

The Court's Opinion cited McClurg v. Deaton, 716 S.E.2d 887, 395 S.C. 85 (S.C. 2011), as basis for affirming the lower court's decision. In McClurg, the Court of Appeals had upheld the circuit court's denial of petitioners' Rule 60(b), SCRCP, motions based on the failure of the petitioners to argue to the circuit court that they had a meritorious defense. Id. at 887, 85. The Court held that "the issue of a meritorious defense was neither raised to nor ruled upon by the circuit court". Id. at 888, 85.

Unlike the petitioners in McClurg, Appellant did raise the issue of a meritorious defense. The record establishes the Appellant did so on the following occasions:

a. the March 29, 2011 hearing on Appellant's motion for relief from judgment and to vacate judicial sale (R. pp. 8 – 11);

b. Appellant's Motion for Relief from Order of Foreclosure and Sale filed October 26, 2012 (R. pp. 46 – 80); and

[11] It appears from the record that that correspondence attached as exhibits to the Motion had been previously provided to the lower court by Appellant at a hearing on March 29, 2011 but were not formally made a part of the record. (R. pp. 9 -10) (April 14, 2011 Order of the Honorable Charles B. Simmons, Jr. referencing the correspondence).

c. the telephonic hearing conducted on October 31, 2012 at 4:00 p.m.[2]

The lower court's order of April 14, 2011 makes specific reference to the affirmative defenses raised by Mrs. Simpson at the hearing of March 29, 2011 when the order states "this is a Court of equity. While I find the service was proper, the Court is concerned with the behavior and actions of Plaintiff relative to Ms. Simpson while its attorneys were proceeding, as directed by Wells Fargo, to foreclose." (R. p. 9).

The lower court's order of November 5, 2012 makes further reference to the affirmative defenses raised by Appellant. The order provides that Appellant alleged she "was never allowed to present the numerous affirmative defenses and counterclaims she alleges, based on the entry of the Order of Default". (R. p. 15). The order further provided "Plaintiff argued that the basis for Defendant's motion appears to be her allegations that Plaintiff engaged in misconduct and that this alleged misconduct prevented Simpson from presenting her defenses to the foreclosure action." (Id.)

As the Appellant raised the issue of a meritorious defense, the Appellant met the requirement for relief from the order of foreclosure and sale. The facts of this appeal are clearly distinguishable from those of McClurg as the Appellant argued to the Master-in-Equity she had a meritorious defense.

II. The lower court's order of November 5, 2012 stated and/or implied the lower court ruled upon issue of Appellant's meritorious defense.

In the lower court's order of November 5, 2012 the Honorable Charles B. Simmons, Jr. states he "reviewed and considered the motion, the exhibits attached thereto, the record in this

[2] Appellant filed her motion for relief from Order of Foreclosure and Sale on October 26, 2012 (R. p. 14) On October 31, 2012, the lower court contacted counsel for the parties and requested the parties be available for a conference call. (Id.) On October 31, 2012, the lower court conducted a telephone hearing on the motion. (Id.) No court reporter was present. (Id.)

case, the law, the equities, and the arguments of counsel for both Defendant Simpson and Plaintiff." (R. p. 15)[3] Based on the language of the November 5, 2012 order, the lower court reviewed and considered Appellant's Motion for Relief from Order of Foreclosure and Sale filed October 26, 2012. As the lower court reviewed and considered Appellant's Motion for Relief from Order of Foreclosure and Sale filed October 26, 2012 and the exhibits attached thereto, the lower court reviewed and considered the issue of Appellant's meritorious defense to the foreclosure action. By denying Appellant's motion, the lower court's ruling stated, or at the very least implied, the issue of a meritorious defense had been raised and considered.

III. By denying Appellant's motions for relief, the lower court ruled on Appellant's meritorious defenses.

By Judgment of Foreclosure and Sale dated December 3, 2010, the lower court found that "The Defendant(s) Lynn D. Simpson, Wells Fargo Bank, NA (Charlotte, NC) and The Lofts at Mills Mill Condominium Owners Association, Inc. are in default as shown by affidavit or order filed herein." (R. p. 1) Appellant sought relief from the Judgment of Foreclosure and Sale dated December 3, 2010 and supplemental orders relating to the foreclosure by filing two (2) separate motions for relief. By denying the motions, the lower court ruled the Appellant was in default and had admitted the allegations of the Complaint. In so ruling, the lower court was in effect ruling on the issue of Appellant's meritorious defenses.

[3] Appellant filed her motion for relief from Order of Foreclosure and Sale on October 26, 2012 (R. p. 14) On October 31, 2012, the lower court contacted counsel for the parties and requested the parties be available for a conference call. (Id.) On October 31, 2012, the lower court conducted a telephone hearing on the motion. (Id.) No court reporter was present. (Id.)

IV. As the issue of a meritorious defense was raised and ruled upon by the lower court, Appellant was not required to file a motion pursuant to Rule 59(e), SCRCP.

In Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004), the Court provided direction as to when a party should file a Rule 59(e) motion. The Court stated:

> our rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. (Id. at 780)

As the issue of a meritorious defense was raised in the pleadings, and exhibits attached thereto, and the oral arguments of Appellant's counsel during the October 31, 2012 telephone hearing and the motion was denied, the lower ruled upon the issue of a meritorious defense. While Appellant may have filed a Rule 59(e) motion, she was not required to pursuant to the Court's instructions in Elam.

The the lower court's order of November 5, 2012 incorporated the terms of the Judgment of Foreclosure and Sale dated December 3, 2010. As stated above, Judgment of Foreclosure and Sale dated December 3, 2010 found Appellant in default. "Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it." Wilder Corp. v. Wilke, 497 S.E.2d 731, 330 S.C. 71 (1998)(citing Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939)).

CONCLUSION

For the reasons set forth herein, Appellant respectfully requests rehearing in the above-captioned appeal.

Respectfully submitted,

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Dated: January 2, 2014

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Charles B. Simmons, Jr., Master in Equity

Appellate Case No. 2012-213505

Wells Fargo Bank, N.A.,

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Defendants,

Of whom Lynn D. Simpson is the

Appellant.

PROOF OF SERVICE

I hereby certify that, on this 2nd day of January, 2014 a copy of ***Appellant's Petition for Rehearing and Memorandum in Support of Petition for Rehearing*** was served upon the below stated parties via United States Postal Service, priority delivery, with sufficient first class postage affixed thereto and addressed as follows:

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Attorneys for Respondent

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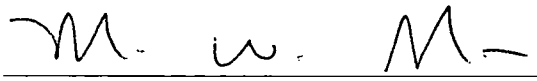

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January 2, 2014

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *Lynn D. Simpson vs. Wells Fargo Bank, N.A.*
Court of Appeals Number: 2012-213505

Dear Mrs. Kitchings:

Enclosed for filing please find an original plus six (6) copies of a ***Appellant's Petition for Rehearing, Memorandum in Support of Petition for Rehearing and related Proof of Service*** in the referenced matter. Also enclosed is my firm's check in the amount of $25.00 to cover the filing fee. Please return a stamped filed copy with our courier.

Please be advised that by copy of this letter, I am serving all parties with a copy of the same. If you have any questions, please do not hesitate to call.

With kind regards,

M. W. M.

Marcus W. Meetze

Enclosure(s)

cc: S. Sterling Laney, III, Esquire (via U.S. Mail)
Lynn D. Simpson