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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FRON LEXINGTON COUNTY
Court of Common Pleas

Lisa Lee Smith, Special Referee

Appellate Case No. 2026-001142
Case No. 2014-CP-32-02795

Nationstar Mortgage LLC d/b/a Mr. Cooper and Federal National Mortgage Association ("Fannie Mae"), a corporation organized and existing under the laws of the United States of America and its assignee Nationstar Mortgage LLC d/b/a Mr. Cooper,

Respondents,

v.

D. Randolph Whitt and Pearce W. Fleming,

Defendants.

Of whom D. Randolph Whitt is the

Appellant.

APPELLANT'S INITIAL REPLY BRIEF

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August 31, 2026

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IN REPLY TO RESPONDENT'S ARGUMENT 1

Respondent leads off with the assertion that Apellant is not a borrower. However, this assertion ignores the page of the servicing requirements attached to Appellant's affidavit(R. p.__), The exhibit from the servicing requirements contains the following language: "**borrowers** identified in the security instrument "(emphasis added), do not need to sign the note in all cases.

The signature page of the mortgage that is the basis of this action (R. p.__),b is also in the record in this case and expressly identifies Appellant as "borrower". The exhibit from the servicing requirements contains the following language: "borrowers identified in the security instrument "(emphasis added), do not need to sign the note in all cases."

Respondent's focus on the borrower question also does not address the language in South Carolina Supreme Court Order 2011-05-02-01 which states" "Mortgagor" shall include every owner, mortgagor, and debtor under the note and mortgage at issue". Appellant is unquestionably an owner as well as a mortgagor under the mortgage that is the subject of this action.

As noted previously a right to be reviewed for a loss mitigation solution flows from this status and is mandates under our Supreme Court's Administrative order as well as the regulations applicable to Respondents. Respondents failure to honor this obligation is an ongoing default, this ongoing default is also clearly after October 15, 2015 and continues until the present, especially as it has moved ahead with the foreclosure action. Failure to complete loss mitigation efforts before moving forward with a foreclosure is the definition of "dual tracking".

IN REPLY TO RESPONDENT'S ARGUMENT 2

The in discussing *RoTec Svcs., Inc. v. Encompass Svcs. Inc.,* 359 S.C. 467, 597 S.E.2d 881(S.C. App. 2004) Respondent makes the following assertion:"The implied covenant of good faith and fair dealing attaches to the performance and **enforcement** of the contract, not to the conduct of subsequent litigation over the contract."(emphasis added) Respondent concedes that enforcement of the contract is subject to the duty of good faith. However, Respondent somehow, which is not explained, characterizes litigation seeking a remedy under the contract as something other than enforcement and therefore a safe space where bad faith is not actionable.

On the question of prejudice, in both Respondent's second and third arguments, the assertion is made that since respondent's got caught in various lapses and these did not result in in Respondent getting an immediate and total victory, there are no repercussions for their behavior.

This would create a perverse incentive structure where a lender who engages in bad behavior and isn't caught gets the refief they want and benefits. However if they are caught, there is no downside because in Respondent's view there is no prejudice. There is inherent prejudice to both opposing litigants and the court system when a lender engages in behaviors such as submitting multiple affidavits with in accurate debt figures for just a single example of the many that exist in this record.

CONCLUSION

For the foregoing reasons, the Order of the Special Referee should be reversed and the case remanded to Lexington County, with instructions to hear Appellant's Counterclaims and the defense of unclean hands on the merits

Respectfully submitted,

s/D.Randolph Whitt

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