

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master in Equity

Case No. 2010-CP-10-5775

CitiMortgage, Inc.Respondent/Appellant,

v.

Brodie M. Trickey aka Brodie McCary Trickey
and Barberry Woods Property Owners AssociationDefendants,

Of whom Brodie M. Trickey is theAppellant/Respondent.

INITIAL RESPONSE BRIEF OF APPELLANT/RESPONDENT

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June 6, 2014

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STATEMENT OF ISSUES

- I. Whether an Order denying a motion for summary judgment is appealable?**
- II. Whether CitiMortgage, Inc., timely filed its notice of appeal in this matter?**
- III. Whether the Master in Equity erred by denying the motion for summary judgment in part?**

STATEMENT OF THE CASE

On July 19, 2010, CitiMortgage, Inc., (hereinafter "Citi") initiated foreclosure proceedings against Brodie Trickey (hereinafter "Trickey"), the owner of certain real property located in Charleston County. (Amended Lis Pendens, Summons and Complaint). Three (3) days after commencing the action, and prior to a responsive pleading being due, Citi file a Motion and Order for Reference. (Motion for Reference). On August 6, 2010, the Clerk of Court executed the Order of Reference submitted. (Order of Reference).

Trickey filed an Answer and Counterclaim on August 23, 2010, setting forth counterclaims for: (1) breach of contract and of the covenant of good faith and fair dealing; (2) unjust enrichment; and (3) negligent misrepresentation. (Answer and Counterclaim). On September 10, 2010, Trickey filed a Notice of Motion and Motion to Vacate Order of Reference Cancel Foreclosure Hearing. (Motion to Vacate).

On September 20, 2010, the Master in Equity filed a Form 4 Order continuing the case for 60 days and placing the matter on the contested roster. (Form 4 Order, Sept. 20, 2010). On the same day Citi filed a Reply to Trickey's Counterclaims.

On November 1, 2012, Citi filed a Motion for Summary Judgment supported by the Affidavit of a Business Operations Analyst. (Motion for Sum. Judg.). On January 23,

2013, Trickey filed an Affidavit in Opposition to Plaintiff's Motion for Summary Judgment. (Brodie Trickey Affidavit). A hearing was held on January 25, 2013, resulting in an Order being filed on May 8, 2013, granting summary judgment as to all counterclaims asserted by Trickey and denying summary judgment as to Plaintiff's claim for foreclosure of the mortgage. (Order, May 8, 2013). The Order provides in relevant part: "The Court, however, finds there is a genuine issue of fact as to the Plaintiff's claim for foreclosure and denies summary judgment as to that cause of action."

STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment under the same standard required of the circuit court pursuant to Rule 56(c), SCRPC. *Edwards v. Lexington Co. Sheriff's Dep't.*, 386 S.C. 285, 290, 688 S.E.2d 125, 128 (2012). The *de novo* review applies to matters properly preserved and admitted into evidence." *Hansen v. DHL Laboratories, Inc.*, 316 S.C. 505, 510, 450 S.E.2d 624, 627 (Ct. App. 1994), clarified by 319 S.C. 79, 459 S.E.2d 850 (1995).

Summary judgment is available when "there is no genuine issue as to any material fact and...the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRPC. The moving party has the initial burden of demonstrating no issue of material fact exists. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115-117, 410 S.E.2d 537, 545 (1991). Admitted evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). "Thus, the appellate court reviews all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234,

240, 672 S.E.2d 799 (Ct. App. 2009). “Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.” *Koester v. Carolina Rental Center, Inc.*, 443 S.E.2d 392, 394 (1994). Summary judgment is improper when there is an issue as to the construction of a written contract and the contract is ambiguous because the intent of the parties cannot be gathered from the four corners of the instrument.” *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799 (Ct. App. 2009). A “non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment” where the case involves state law claims. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330-331, 673 S.E.2d 801 (2009).

ARGUMENT

I. THE ORDER DENYING SUMMARY JUDGMENT IS NOT APPEALABLE.

The South Carolina Supreme Court “has repeatedly held that the denial of summary judgment is not directly appealable.” *See Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 167, 580 S.E.2d 440, 443 (2003); *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994); *Willis v. Bishop*, 276 S.C. 156, 276 S.E.2d 310 (1981); *Mitchell v. Mitchell*, 276 S.C. 44, 275 S.E.2d 1 (1981); *Neal v. Carolina Power and Light*, 274 S.C. 552, 265 S.E.2d 681 (1980); *United States Fidelity & Guaranty Co. v. City of Spartanburg*, 267 S.C. 210, 227 S.E.2d 188 (1976); *Medlin v. W.T. Grant, Inc.*, 262 S.C. 185, 203 S.E.2d 426 (1974); *Greenwich Savings Bank v. Jones*, 261 S.C. 515, 201 S.E.2d 244 (1973); *Geiger v. Carolina Pool Equipment Distributors, Inc.*, 257 S.C. 112, 184 S.E.2d 446 (1971); *see also Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180 (Ct.App.1986); *Associates Financial Services Co. of South Carolina, Inc. v. Gordon Auto Sales*, 283 S.C.

53, 320 S.E.2d 501 (Ct.App.1984). Like the South Carolina appellate courts, a majority of the other jurisdictions have determined the denial of summary judgment is not immediately appealable. See 4 C.J.S. *Appeal and Error*, § 98 (1993); 4 Am.Jur.2d *Appeal and Error*, § 104 (1962 & Supp.1993); 15 A.L.R. 3d 899 (1967 & Supp.1993). Furthermore, the South Carolina Supreme Court has held that the denial of summary judgment is not reviewable even in an appeal from final judgment. *Raino v. Goodyear Tire*, 309 S.C. 255, 422 S.E.2d 98 (1992); *Holloman v. McAllister*, 289 S.C. 183, 345 S.E.2d 728 (1986).

Here, Citi's cross appeal is an appeal of an order denying its motion summary judgment on its cause of action for foreclosure. The Master's denial of summary judgment is not subject to review. *Id.* The cross appeal should be dismissed or alternatively the Master's decision should be affirmed.

II. CITIMORTGAGE FAILED TO TIMELY FILE ITS NOTICE OF APPEAL.

"The notice of appeal in a case appealed from the Court of Common Pleas must be served on all respondents within thirty days after receipt of written notice of entry of the order or judgment." Rule 203(b)(1), SCACR. The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to "rescue" the delinquent party by extending or ignoring the deadline for service of the notice." *Hattie Rose Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004). Rule 2003 (b) (4), SCACR, states: "The Notice of appeal from an order or judgment issued by a master or special referee shall be served in the same manner as provided by Rule 203(b) (1)."

In this case the Citi seeks to appeal an Order issued by the Master on May 8, 2013. However, Citi never filed a motion to reconsider or any other motion which would preserve the issue for appeal, and thereafter filed its notice of Appeal on November 13, 2013, more than six months after the Master issued the Order. This Court lacks the Jurisdiction to here Citi's Appeal.

III. ISSUES OF FACT EXIST THEREFORE THE MASTER IN EQUITY CORRECTLY DENIED THE MOTION FOR SUMMARY JUDGMENT.

If the Master in Equity's denial of summary judgment was subject to review, the decision should be affirmed. Clearly issues of fact exists relating to the Citi's right to foreclose and whether Citi can properly establish all necessary elements of foreclosure taking into consideration the asserted defenses. Summary Judgment was properly denied as to Citi's cause of action for foreclosure and should have been denied as to Trickey's counterclaims as set forth in Trickey's Initial Brief filed in the within matter.

CONCLUSION

For the reason stated above Brodie M. Trickey respectfully requests that this Court deny, CitiMortgage, Inc.'s, Appeal, dismiss this matter for lack of jurisdiction, and award Brodie M. Trickey costs and attorney's fees for the time and expense of responding to this appeal.

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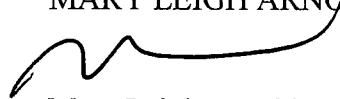
Of whom Brodie M. Trickey is theAppellant/Cross-Respondent

PROOF OF SERVICE

I certify that on this ___ day of June 2014, I have served the Initial Response Brief of Appellant/Cross-Respondent on all counsel of record by depositing a copy a in the United States Mail, postage prepaid, addressed as follows:

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RE. Citimortgage Inc v.. Brodie M. Trickey, et al.
Appellate Case No. 2013-002437

Ms. Kitchings:

Please find enclosed with regards to the above referenced matter, the Appellant/Respondent Brodie M. Trickey's Initial Response Brief. I would kindly request that you file the same.

By copy of this letter I am service counsel of record with the same.

With kind regards,

MARY LEIGH ARNOLD, PA



Mary Leigh Arnold

CC:
Damon C. Wlodarczyk

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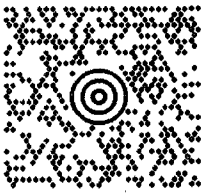
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