

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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JUN 3 0 2014

Mikell R. Scarborough, Master-in-Equity

SC Court of Appeals

Case No.: 2010-CP-10-5775

CitiMortgage, Inc.,.....Respondent/Cross-Appellant,

v.

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

Of whom Brodie M. Trickey is the.....Appellant/Cross-Respondent.

REPLY OF CROSS-APPELLANT

RILEY, POPE & LANEY, LLC

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ARGUMENT

A. **THE ORDER DENYING SUMMARY JUDGMENT IS APPEALABLE AND REVIEWABLE**

Cross-Respondent (hereinafter “Borrower”) correctly cites to the well-established case law of the state that holds the denial of a motion for summary judgment is not directly appealable. (Borrower’s Initial Brief, pp. 3-4). The S.C. Supreme Court “adopted the *general rule* that an order denying a motion for summary judgment is an interlocutory decision which is not directly appealable.” Greenwich Sav. Bank v. Jones, 261 S.C. 515, 516, 201 S.E.2d 244, 245 (1973) (emphasis added). However, the underlying rationale for the general rule, “since such a denial is not an adjudication on the merits against the movant and he is not thereby foreclosed from the possibility of prevailing in the case when the facts are developed,” is not applicable here. Geiger v. Carolina Pool Equip. Distributors, Inc., 257 S.C. 112, 114, 184 S.E.2d 446, 447 (1971).

In the present case, Borrower filed the initial appeal arguing the lower court erred in dismissing his counterclaims. Only after the initial appeal was filed by Borrower did Cross-Appellant (hereinafter “Lender”) file its notice of appeal. The case has been pending since 2011, documents were presented to the court both in support and in opposition to summary judgment. Yet, Borrower presented no evidence to the lower court to create an issue of fact as to any of the elements of a foreclosure. Accordingly, there are no additional facts that can be developed. Moreover, Borrower has presented no evidence in his brief other than conclusory statements that there were genuine issues of fact.

This Court is not jurisdictionally prohibited from hearing the cross-appeal. See S.C. Code § 14-8-200. Accordingly, Lender would respectfully request that this Court exercise its jurisdiction to review the allegations of error in this cross-appeal and not apply the general rule as the exercise of said review will not prejudice the parties and may result in overall judicial economy.

Borrower also contends that the denial of summary judgment is not reviewable even in an appeal from a final judgment. (Borrower's Initial Brief, p.

4). However, the bases for the rule cited by Borrower is

“the denial of a motion for summary judgment before trial is not reviewable after a trial of a case on its merits . . . [because] [a]ppellate review of orders denying motions for summary judgment could lead to an absurd result: one who has sustained his position after a full trial and a more complete presentation of the evidence might nevertheless find himself losing on appeal because he failed to prove his case fully at the time of the motion

Holloman v. McAllister, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986)

In the present case, there has been no trial on the merits to the law cited by Borrower does not apply.

III. LENDER'S APPEAL WAS TIMELY

Borrower alleges the cross-appeal was untimely as the Order being appealed was filed May 8, 2013 and the Notice of Appeal was filed November 13, 2013.

“A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCPP, stays the time for an appeal *for all parties* until receipt of written notice of entry of the order granting or denying such motion.” Elam v. S. Carolina Dep't of Transp., 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004) (emphasis added). Rule 203(c), SCACR, provides that a cross-appeal may

be filed by serving a notice of appeal on all adverse parties within five (5) days after receiving appellant's notice of appeal.

As set forth in the factual recitation in Lender's Initial Brief On May 8, 2013, the lower court issued an Order granting summary judgment in favor of Lender as to the counter-claims but denying summary judgment as to the foreclosure finding there were issues of fact. On May 24, 2013, Borrower filed and served a Motion for Reconsideration. On July 19, 2013, a hearing was held before the lower court. On October 8, 2013, the lower court issued an Order denying the motion to reconsider. [Order dated October 8, 2013]. Borrower filed a Notice of Appeal on November 8, 2013, which was received on November 13, 2013 and Lender filed its Notice of Cross-Appeal on November 14, 2013.

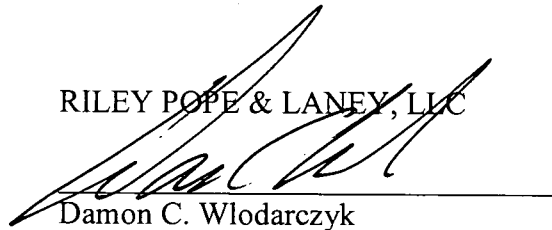
As Borrower's filing of his Rule 59(e), SCRCP, stayed the time to appeal for all parties until the Court's ruling on the motion dated October 8, 2013, and taking into account the five (5) day rule provided by Rule 203(c), SCACR, Lender's Notice of Appeal was timely.

CONCLUSION

Lender respectfully requests that this Court find Lender met its burden of proof in a foreclosure action, that Lender was entitled to an Order for Foreclosure and Sale, to remand this case to the trial court to supplement and update the debt figures and to issue an Order for Foreclosure and Sale.

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June 26, 2014



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v.

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CERTIFICATE OF SERVICE BY MAIL

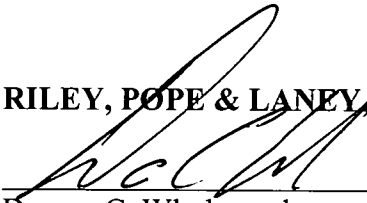
I, the undersigned, hereby certify that on the date shown below, I served the **CROSS-APPELLANT'S REPLY** on the parties listed below by depositing copies of same into the United States Mail, first class postage prepaid, addressed as shown.

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The Honorable Jenny Abbott Kitchings
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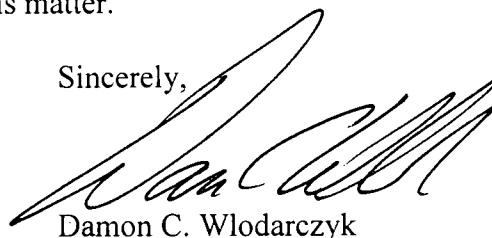
Re: CitiMortgage, Inc. vs. Brodie M. Trickey aka Brodie McCary Trickey and Barberry
Woods Property Owners Association
Common Pleas No.: 2010-CP-10-5775
Our File No.: 4008.72610

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of Cross-Appellant's Reply Brief along with proof of service. Please return one filed, clocked copy to me in the enclosed, postage-prepaid envelope provided for your convenience. Please do not hesitate to contact me with questions.

Thank you for your kind assistance in this matter.

Sincerely,



Damon C. Wlodarczyk

DCW/mwt
Enclosures

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