

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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 Association.....Defendants,

Of whom Brodie M. Trickey is the.....Appellant Respondent.

FINAL BRIEF OF CROSS-APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT AS TO THE FORECLOSURE AS THERE WERE NO ISSUES OF FACT TO BE RESOLVED

STATEMENT OF THE CASE

This matter involves the foreclosure of a mortgage secured by real property owned by the Cross-Respondent (hereinafter "Borrower"), which is located in Charleston County. Cross-Appellant (hereinafter "Lender") counsel filed an Amended *Lis Pendens*, Summons and Complaint on July 19, 2010. Borrower, through his undersigned counsel, filed and timely served an Answer and Counterclaims.

On or about June 24, 2011, Borrower's counsel filed with the Court a request to be considered for foreclosure intervention as provided for by the May 2011 S.C. Supreme Court's Administrative Order. As a result, this Court issued an Order filed June 30, 2011, staying the matter pending a decision regarding foreclosure intervention. [R. p. 5]

On August 25, 2011, Lender's counsel filed with the Court a Certification of Non-Compliance regarding the request for foreclosure intervention in which counsel asserted that Borrower failed to produce documents despite several written requests. [R. pp. 73-83].

On October 4, 2011, Borrower's counsel filed with the Court an objection to the Certification of Non-Compliance asserting that borrower could not produce requested tax records because borrower had not filed taxes for the past four years and that borrower did not receive paystubs and, therefore, could not produce the same. [R. pp. 84-92].

A hearing was held on December 7, 2011, regarding the Borrower's objection to Plaintiff's Certification of Non-Compliance. Following oral

arguments, the Court issued an Order filed December 9, 2011, providing Lender would re-consider borrower for a loan modification after borrower submitted to Lender's counsel his 2011 Form 1099 proof of income. The Court provided that Borrower would supply his proof of 2011 income by January 31, 2012.

On November 2, 2012, Lender's counsel filed a Motion for Summary Judgment with supporting affidavit and exhibits. [R. pp. 93-222]. On January 23, 2013, Borrower's counsel filed a counter-affidavit and exhibits. [R. pp. 223-253]. A hearing was held on Lender's summary judgment motion on January 25, 2013. 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. [R. pp. 8-15].

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. [R. pp. 16-19]. Borrower filed a Notice of Appeal on November 8, 2013 and Lender filed its Notice of Cross-Appeal on November 14, 2013.

FACTS

This case involves the foreclosure of a mortgage involving real property located in Charleston County. Borrower entered into a debt with Respondent (hereinafter "Lender") in the amount of \$255,575 on or about September 26, 2007, for the purpose of refinancing a pre-existing mortgage loan as well as paying off additional debt. [R. pp. 296-301; R. pp. 325-327]. The debt was secured by both a Note and a Mortgage on residential real estate located at 1759 Hickory Knoll, Johns

Island, SC 29455 (hereinafter “the Loan”). [Id.; R. pp. 302-302; R. pp. 328-346]. The Mortgage was recorded with the Charleston County Clerk of Court on October 2, 2007 in Book G640 at Page 829. [R. p. 328-346].

Borrower testified that at the time he refinanced his previous loan with Lender, it was his intent to refinance the Loan once again in approximately six (6) months once his credit score improved. [R. pp. 304-305]. However, Borrower conceded that at the time he entered into the Loan, he did not have any representations from Lender that it would either refinance the Loan or give Borrower a new loan at better terms at any time in the future. [Id.].

It is uncontested that by February 25, 2009, Borrower had defaulted on the terms and conditions of the Note and Mortgage by failing to make the required monthly payments to Lender. [R. pp. 309-311]. In fact, the record reflects that Borrower first became delinquent on the account as of March 18, 2008. [R. pp. 223-253]. As a result of the default, Borrower and Lender entered into an extension agreement dated February 25, 2009, whereby Borrower acknowledged that he was delinquent in payments to Lender for the Loan; that Borrower reaffirmed all of the terms and conditions of the Note and Mortgage for the Loan except as specifically provided for in the extension agreement; and Lender, subject to final approval, agreed to defer all unpaid interest accrued to-date on the Loan to be collected and paid at the time of payoff on the Loan. [R. pp. 361-362]. The extension agreement was entered into prior to any proposed modification of the Loan. [R. p. 310].

In August 2009, Borrower provided to Lender financial information over the telephone in an attempt to seek a modification of the terms of the Loan. [R. pp.

223-253]. Borrower represented that his monthly income was \$4,000.00 (\$48,000 annual) and that his monthly expenses totaled \$4,437.20. [Id.]. Borrower was informed that based upon the information provided, he would be eligible to participate in the Home Affordable Modification Program (hereinafter “HAMP”) and that a loan modification package would be sent to him to complete. Borrower was informed that “all figures are estimates & not guaranteed, final numbers & approval may change.” [Id.]. Borrower was further advised that he had thirty (30) days from the date the loan modification package was received to return the completed package, completed hardship affidavit, *income documentation* and any required disclosures or the *offer is void*. [Id.] (emphasis added).

In September 2009, Borrower contacted Lender via telephone and acknowledged receiving the loan modification package but informed Lender that he was “waiting on some information from his attorney . . . [and] may need an extension on the package retu [sic] date.” [Id.]. On September 29, 2009, Borrower contacted Lender to inform Lender that he would be mailing the loan modification documents by October 6, 2009. [Id.]. On October 19, 2009, Lender received signed documents, a hardship affidavit, a partially completed IRS Form 4506-T, Borrower’s 2008 Federal Tax Return, proof of Homeowner’s Insurance; a property tax statement and bank statements. [Id.]. No income information was received.

The HAMP Trial Period Plan (hereinafter “the Plan”) had an effective date of October 1, 2009, and was signed by Borrower on September 24, 2009. [R. pp. 347-360]. The Plan plainly set forth, “(Step One of Two-Step Documentation Process)”. [Id.] The Plan contained the following provisions:

A. TIME IS OF THE ESSENCE under this Plan; . . .

D. The Lender will hold payments received during the Trial Period in a non-interest bearing account until they total an amount that is enough to pay my oldest delinquent monthly payment on my loan in full. If there is any remaining money after such payment is applied, such remaining funds will be held by the Lender and not posted to my account until they total an amount that is enough to pay the next oldest delinquent monthly payment in full; . . .

E. When the Lender accepts and posts a payment during the Trial Period it will be without prejudice to, and will not be deemed a waiver of, the acceleration of the loan or foreclosure action and related activities and shall not constitute a cure of my default under the Loan Documents unless such payments are sufficient to completely cure my entire default under the Loan Documents;

F. If prior to the Modification Effective Date, (i) the Lender does not provide me a fully executed copy of this Plan and the Modification Agreement; (ii) I have not made the Trial Period payments required under Section 2 of this Plan; or (iii) the Lender determines that my representations in Section 1 are no longer true and correct, the Loan Documents will not be modified and this Plan will terminate. In this event, the Lender will have all of the rights and remedies provided by the Loan Documents, and any payment I make under this Plan shall be applied to amounts I owe under the Loan Documents and shall not be refunded to me; and

G. I understand that the Plan is not a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (i) I meet all of the conditions required for modification, (ii) I receive a fully executed copy of the Modification Agreement, and (iii) the Modification Effective Date has passed. I further understand and agree that the Lender will not be obligated or bound to make any modification of the Loan Documents if I fail to meet any one of the requirements under this Plan. . . .

(Id.)

The Plan also contained a document titled **“INTERIM FORBEARANCE AGREEMENT”** which stated in part the following:

The Mortgage and Note together, as they may previously have been amended, are referred to as the "Loan Documents." . . .

This interim Forbearance Agreement is granted to Borrower during the review by Lender of Borrower's eligibility for a Trial Period Plan (the "Trial Plan") under the Federal Government's Home Affordable Modification Program. The Trial Plan is a preliminary step to entering into a modification agreement under such Program.

Lender agrees to suspend all collection activity, including any scheduled foreclosure sale of the Property, for seventy-five (75) days from the Effective Date or the execution of the Trial Plan, whichever is sooner, subject to the following conditions:

- i) Borrower provides the documents and satisfies all other obligations in connection with processing a Trial Plan; . . .

This Interim Forbearance Agreement shall immediately terminate and be of no further force or effect on the earlier of seventy-five (75) days from the Effective Date or if and when Lender and Borrower execute a Trial Plan, which Trial Plan upon being effective shall in all respects replace this Interim Forbearance Agreement.

(Id.).

On November 2, 2009, after a review of the documents received by Borrower, Lender identified that the loan modification package was incomplete and that borrower would need to submit the following information: IRS Form 1099, profit and loss statement, 2007 income taxes, signed and dated schedules for his 2008 Federal Income taxes and a running bank statement for thirty (30) consecutive days showing the borrower's name and financial institution's name as well as all pages of the statement even if blank. A text message and HAMP additional documentation letter were sent to Borrower on November 11, 2009. [R. pp. 225-253].

On November 14, 2009, Borrower contacted Lender to check on his file status at which time he was informed of the additional documents needed to complete the HAMP application. Borrower indicated that he would provide signed 2008 tax information, that he *was not* self-employed¹ but a 1099 employee, and that he would “*get an earnings statement.*” [Id.]

On December 28, 2009, Borrower was contacted by Lender regarding the missing documents and advised “he will fax additional docs today 12-28-09.” [Id.]. On January 14, 2010, Borrower was contacted by Lender regarding the missing documents and advised to fax to Borrower. [Id.]

On February 1, 2010, Lender again mailed a HAMP additional documentation required letter to Borrower. E-mails and text messages were also sent to Borrower regarding missing/incomplete documentation. At this time, so documentation regarding income verification had been received and no counter-signed Plan was entered into. Accordingly, by the terms of the Plan and Interim Forbearance Agreement, more than 75 days had passed since the October 1, 2009 effective date and, the Plan automatically terminated. [Id.; R. p. 347].

On February 25, 2010, Borrower contacted Lender to check the status of the modification. Lender acknowledged receiving additional documents on February 25, 2010, and forwarded the documents for review. [Id.]. On March 31, 2010, Borrower was contacted concerning the handwritten profit and loss statement

¹ Presumably Borrower informed Lender that he was not self-employed in order to avoid having to produce a profit and loss statement which is required of self-employed borrowers.

provided (even though Borrower claimed to be a 1099 employee) and handwritten pay stubs which did not show year-to-date earnings and deductions. [Id.].

On April 1, 2010, Borrower determined that the Loan failed to meet HAMP requirements for not receiving documents. Borrower was then evaluated for a First Lien Supplemental Modification offer. [Id.].

On April 6 and 9, 2010, Borrower was contacted by Lender regarding missing income documentation. [Id.]. On April 19, 2010, Borrower informed Lender that he “is going to draw up a P&L [profit & loss statement] and fax it to [Lender] tomorrow.” [Id.]. On May 3, 2010, Borrower contact Lender to inform Lender that “his accountant is finishing up the P&L” and would be faxing it to Lender in the next day. [Id.].

On May 10, 2010, Lender determined that Borrower was not eligible for the First Lien Supplemental Modification as the accrued amount past due exceeded the program forbearance amount. [Id.]. On May 17, 2010, Borrower was advised about a traditional modification in which he would have to make regular payments during the traditional modification review. Borrower advised Lender that “he cannot make his payments at all.” [Id.].

On May 25, 2010, Borrower contacted Lender and was advised that he was denied for both HAMP and supplemental modification. Borrower informed lender that his “briefcase was stolen” with all of the copies of what was sent in. [Id.].

The record before the lower court reflects that the only documentation of verifiable income that the Borrower could produce relative to his 2009 application for a loan modification was a single 1099-MISC form from 2009 from the Fielding

Group. The document reflects total non-employee compensation in the amount of \$23,850. In fact, Borrower testified that the \$25,000.00 evidence by his 1099-MISC was an accurate representation of his 2009 income and that Borrower did not think his “income was much more than that.” [R. pp. 306-318; R. p. 324; R. p. 363]. This amount is less than half of the \$48,000.00 in annual income that he informed Lender he earned in 2009 as part of his HAMP loan modification application discussed above.

Borrower maintains that he completed two (2) complete loan modification applications and sent all requested documents to Lender. [R. pp. 322-324]. Borrower further maintains that he does not have any copies of what was sent to Lender because his briefcase was stolen which contained his laptop. [Id.]. Contrary to Borrower’s claims that he could not reproduce documents sent to Lender, the Fielding Group is still in business and Borrower allegedly used an account to prepare “something.” [R. pp. 319-320]. Moreover, as stated above, as of May 3, 2010, Borrower was informing Lender that “his accountant” was still finishing up the profit and loss statement.

In addition, Borrower testified that he has not filed income tax returns since 2009, which would have been reflective of his 2008 income. [R. p. 319]. Borrower further testified that he has not made a payment on the Loan since the inception of this lawsuit and that he only had at the time of his deposition on June 1, 2012, less than \$1,000.00 in his account and \$2,000.00 cash on hand. [R. pp. 320-321]. However, Borrower has used the opportunity to help his fiancé with “numerous things” and reduce “a lot of debt.” [R. p. 321].

STANDARD OF REVIEW

“A mortgage foreclosure is an action in equity.” U.S. Bank Trust Nat’l Ass’n V. Bell, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct.App. 2009). “In an appeal from an action in equity, tried by a judge alone, [the appellate court] may find facts in accordance with [its] own view of the preponderance of the evidence.” Id. Moreover, the appellate court “may correct errors of law in both legal and equitable actions[,]” with no particular deference to the trial court. Id.

Summary Judgment is warranted only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC. “In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party.” Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000). The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. However, once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent must come forward with specific facts showing there is a genuine issue for trial.” Garvin v. Bi-Lo, Inc., 337 S.C. 436, 523 S.E.2d 481 (Ct. App. 1999). The opponent cannot merely rely upon the pleadings, but must submit some additional evidence creating a genuine issue of material fact.

“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.” Bell, 385 S.C. at 374-75, 684 S.E.2d at 205 (internal citations omitted).

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT AS TO THE FORECLOSURE AS THERE WERE NO ISSUES OF FACT TO BE RESOLVED

In support of its motion for summary judgment, Lender submitted an Affidavit of its business records custodian. The Affidavit and attachments thereto presented evidence as follows:

1. That the Lender is the owner and holder of a Note and Mortgage securing real property as issue in this action between borrower and Lender;
2. That the Borrower defaulted on the terms of the Note and Mortgage as of March 1, 2010;
3. The Borrower had applied for relief under HMP prior to the filing of the current action but was declined for HMP and Supplemental Modification in May 2010;
4. That a Notice of Right to Cure and Acceleration of Debt letter was mailed to the Borrower on May 5, 2010;
5. That Borrower applied for relief under the May 2011 S.C. Supreme Court Administrative Order regarding foreclosure intervention but was denied for that relief for failing to cooperate as evidenced by the Notice of Denial on record with the Court;

6. The amounts due and collectable under the Note and Mortgage as of September 22, 2012, exclusive of court costs and attorney fees totals \$338,721.65, along with a *per diem* interest rate of \$65.99.

[R. p. 93-221].

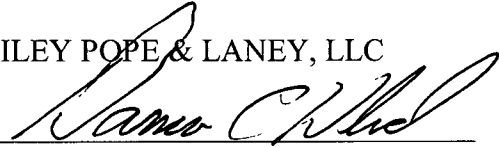
Although Borrower submitted a counter-affidavit and exhibits in opposition to the motion for summary judgment as to the counterclaims, the affidavit did not address or contest the existence of the Note and Mortgage, Borrower's default on the Loan, Lender's notice of the default and acceleration of the debt, compliance with the HAMP certification, compliance with the S.C. Supreme Court Administrative Order regarding foreclosure intervention, or the debt figures. [R. pp. 223-253]. Moreover, no objections were made prior to or at the motion hearing regarding the admissibility of the affidavit. Holroyd v. Requa, 361 S.C. 43, 60, 603 S.E.2d 417, 426 (Ct. App. 2004) (failure to object to the introduction of evidence at the time the evidence is offered constitutes a waiver of the right to have the issue considered on appeal).

Based upon the lack of a counter-affidavit or any other evidence disputing or creating an issue of fact as to any of the matters set forth above, the lower court erred in denying Lender's motion for summary judgment as to the foreclosure. Garvin, 337 S.C. 436, 523 S.E.2d 481 (stating once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent must come forward with specific facts showing there is a genuine issue for trial).

CONCLUSION

Cross-Appellant respectfully requests that this Court find Cross-Appellant met its burden of proof in a foreclosure action, that Cross-Appellant 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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