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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas 2012-CP-15-00262
The Honorable Maité Murphy

APPELLATE CASE NO. 2013-002555

MELISSA JEAN MARKS,Appellant,

v.

NATIONSTAR MORTGAGE, LLC,Respondent.

**NATIONSTAR MORTGAGE, LLC'S RESPONSE IN OPPOSITION TO
APPELLANT'S MOTION FOR LEAVE TO SUBMIT SUPPLEMENTAL
RECORD ON APPEAL**

Respondent Nationstar Mortgage, LLC ("Nationstar"), by and through counsel, pursuant to Rules 210 and 212 of the South Carolina Appellate Court Rules, respectfully submits this Response in Opposition to Appellant Melissa Jean Marks's ("Plaintiff") Motion for Leave to Submit Supplemental Record on Appeal. In support of this Motion, Nationstar states as follows:

I. Introduction

1. In an effort to retry her case before this Court, Plaintiff seeks to add to the Record on Appeal documents that did not exist until after she filed her Notice of Appeal. The Court should deny Plaintiff's Motion for Leave to Submit Supplemental Record on Appeal because the Trial Court did not consider these materials, the current Record already exceeds 1,700 pages, and the proper role of this Court is not to re-litigate issues already tried before the lower court.

The Initial Bankruptcy Proceedings

2. On or about April 20, 2011, Plaintiff filed a Chapter 13 bankruptcy petition in the United States Bankruptcy Court for the District of South Carolina (the "Bankruptcy Proceeding") (R. p. 44 ¶ 34); *In re Marks*, No. 11-02169-jw, Doc. 1, Vol. Pet. & Sch. (Bankr. D.S.C. Apr. 20, 2011).

3. This petition and its associated schedules named Nationstar as a secured creditor and the servicer of Ms. Marks' home mortgage. *In re Marks*, No. 11-02169-jw, Doc. 1.

4. On June 21, 2011, the Bankruptcy Court issued an order confirming the Chapter 13 Bankruptcy Plan. *Id.*, Doc. 12, Order Conf. Plan (Jun. 21, 2011). The confirmed Chapter 13 Plan requires Plaintiff to continue to make mortgage payments to Nationstar *Id.*, Doc. 9, Notice of Plan Modification, p 3 (Jun. 8, 2011).

The Trial Court Proceedings

5. Without prior notice to the Bankruptcy Court or Nationstar, on April 6, 2012, Plaintiff filed a Complaint in the Colleton County Court of Common Pleas (the "Trial Court") alleging fraudulent misrepresentation and unconscionability, and seeking to invalidate her home Mortgage (the "State-Court Action"). (R. pp. 35-78) While the Complaint does not name Nationstar as a defendant, on or about August 2, 2012, the Trial Court granted Nationstar's Motion to Intervene. (R. p. 5)

6. On March 25, 2013, Nationstar filed a Motion for Judgment on the Pleadings or, in the alternative, a Motion for Summary Judgment. (R. pp. 776-82) On June 26, 2013, Plaintiff filed a Motion to Dismiss Defendant as Intervening Party, contending that Nationstar was not a proper party to the State-Court Action. (R. pp. 883-908)

7. On October 9, 2013, the Trial Court granted Nationstar's Motion for Summary Judgment on the grounds that res judicata and judicial estoppel bar Plaintiff's claims, that she cannot show any damages to support her fraud claims, and that the Note and Mortgage are enforceable as a matter of law. (R. pp. 21–28) The Court denied Plaintiff's Motion to Dismiss Defendant as Intervening Party, holding that Nationstar is a necessary party to the State-Court Action. (R. pp. 29–32) Plaintiff filed a Motion to Reconsider both of these rulings, which the Trial Court denied on November 6, 2013. (R. pp. 1117–37; R. pp. 33–34)

8. On, November 21, 2013, Plaintiff filed a Notice of Appeal from the Orders Granting Summary Judgment, Denying the Motion to Dismiss Defendant as Intervening Party, and Denying the Motion to Reconsider. (R. pp. 1201–06)

9. Plaintiff filed her Final Brief, Final Reply Brief, and the final Record on Appeal (the "Record") with this Court on March 19, 2014. Nationstar filed its Final Brief on April 8, 2014.

Plaintiff's Motion for Leave to Submit Supplemental Record on Appeal

10. On August 8, 2014, Plaintiff filed a Motion for Leave to Submit Supplemental Record on Appeal (the "Motion"), which includes a proposed Appendix to the Record on Appeal.

11. Through this Motion, Plaintiff seeks to include in the Record all of the materials from the Bankruptcy Court, documents which were not before the Bankruptcy Court. (Pl.'s Mot. for Leave to Submit Supp. Record on Appeal, Ex. A.) Plaintiff's Motion also seeks to add materials from the Bankruptcy Court created after filing her Appeal. (*Id*)

II. Argument

12. “Because court rules require the appealing party to prepare the record on appeal, *see* Rule 210(a), SCACR, South Carolina courts have traditionally held the appealing party accountable for failing to present the court with an adequate record on appeal for review.” *Johnson v S C Dep’t of Prob*, 372 S.C. 279, 283, 641 S.E.2d 895, 897 (2007).

13. Rule 210(c) of the South Carolina Appellate Court Rules provides that “[t]he Record on Appeal . . . shall not . . . include matter which was not presented to the lower court or tribunal.” Rule 210(c), SCACR. Thus, by its plain terms, Rule 210(c) prohibits the inclusion of any matter that did not exist at the time the trial court issued the order that is the subject of the appeal. *See State v White*, 372 S.C. 364, 387, 642 S.E.2d 607, 618–19 (Ct. App. 2007) (refusing to consider witness’s post-trial retraction of testimony because the retraction “was not presented to the lower court”).

14. With the exception of a May 9, 2013 Order of the Trial Court denying her Motion to Stay, all of the materials Plaintiff seeks to add to the Record post-date her Notice of Appeal to this Court. (*Id*)

15. Thus, all but one of the documents Plaintiff seeks to include in her Appendix to the Record on Appeal did not exist until after the Trial Court issued the Orders that Plaintiff appealed to this Court. Therefore, these materials could not have formed the basis for the Orders Plaintiff appealed, and the Court must exclude these materials from the Record.

16. The only document in Plaintiff’s proposed Appendix to the Record that predates her Notice of Appeal is the Trial Court’s May 9, 2013 Order. Plaintiff is not appealing this May 9, 2013 Order, and Plaintiff had the opportunity to include this Order

in the original Record on Appeal, but did not do so. Nationstar objects that this Order is extraneous and irrelevant to the matters before this Court, and that Plaintiff has not presented any reason why she chose not to include this Order in the Record when she had the opportunity to do so. Therefore, the Court should also exclude the Trial Court's May 9, 2013 Order from the Record.¹

17. Finally, Nationstar submits that the existing Record on Appeal, which already exceeds 1,700 pages, is more than sufficient for the Court to decide the matters before it

Conclusion

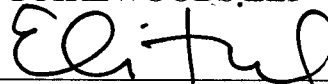
For the reasons set forth above, Nationstar respectfully requests that this Court deny Plaintiff's Motion for Leave to Submit Supplemental Record on Appeal, and exclude from its consideration all evidence included in Plaintiff's proposed Appendix to the Record on Appeal.

¹ To the extent the Court determines that the May 9, 2013 Order should form a part of the Record, Nationstar respectfully requests that the Court exclude the remainder of Plaintiff's Proposed Appendix to the Record on Appeal

This the 10th day of September, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *NATIONSTAR MORTGAGE, LLC'S RESPONSE IN OPPOSITION TO APPELLANT'S MOTION FOR LEAVE TO SUBMIT SUPPLEMENTAL RECORD ON APPEAL* has been served upon the parties in this action by mailing a copy thereof, postage prepaid, to the following:

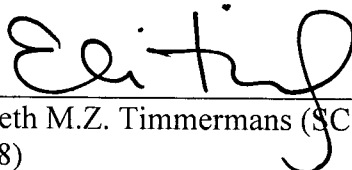
Melissa J. Marks
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Round O, SC 29474

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Attorney for Old South Mortgage Corporation

This the 10th day of September, 2014.


Elizabeth M.Z. Timmermans (SC Bar #
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The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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Columbia, South Carolina 29201

**RE: Melissa Jean Marks v. Old South Mortgage Corporation and Nationstar
Mortgage, LLC; Case No. 2013-002555**

Dear Ms. Abbott Kitchings:

Enclosed please find the original and one copy of Nationstar Mortgage, LLC's Response in Opposition to Appellant's Motion for Leave to Submit Supplemental Record on Appeal in the above captioned matter.

Please file the original with the Court and return a conformed copy to me in the enclosed self-addressed, stamped envelope

Thank you for your attention to this matter. Please do not hesitate to contact me should you have any questions.

Very truly yours,



Susan B. Chapel
Assistant to Elizabeth M.Z. Timmermans

/sc
Enclosure

cc: Melissa Jean Marks (w/encl)
John F. Knobloch, Esq. (w/encl)

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