

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Maité Murphy, Circuit Court Judge

Civil Action Case No. 2012-CP-15-00262
Appellate Case No. 2013-002555

RECEIVED

SEP 17 2014

SC Court of Appeals

Melissa Jean Marks,Appellant,

v.

Nationstar Mortgage, LLC,Respondent.

APPELLANT’S REPLY TO RESPONDENT’S RESPONSE IN OPPOSITION TO
APPELLANT’S MOTION FOR LEAVE TO SUBMIT
SUPPLEMENTAL RECORD ON APPEAL

COMES NOW the undersigned pro se Appellant pursuant to Rules 212 and 240(f), SCACR and respectfully submits this Reply to Respondent’s Response in Opposition to Appellant’s Motion for Leave to Submit Supplemental Record on Appeal.

1. Appellant filed and served her motion on Respondent via U.S. Mail and e-mail on August 8th, and pursuant to Rules 240(e) and 263, SCACR, if Respondent wished to submit a return to Appellant’s motion, Respondent was required to file and serve its return 10 days from the date of service of Appellant’s motion, or by August 18th, and did not do so until 23 days later on September 10th, which Appellant did not receive until September 15th.

2. On August 25th, Appellant mailed a letter to the Honorable Jenny Abbott Kitchings, Clerk of Court, notifying this Court that she had not received a return from

Respondent, that she had not received a request for an extension of time from Respondent nor had she consented to an extension. Appellant also mailed copies of this letter to counsel of record on the same date. This letter is attached as Exhibit A and incorporated by reference.

3. Appellant has received nothing indicating that Respondent had requested and received an extension of time from this Court prior to filing its late return or that Respondent made any attempt to show cause why Respondent should be permitted to file a late return, which Appellant finds disrespectful. Therefore, Appellant respectfully requests that this Court set aside Respondent's untimely filed return and grant her motion.

4. In the event this Court denies Appellant's request to set aside the untimely filed return, Appellant is replying further to Respondent's response to her motion as follows.

5. Appellant is not attempting to retry her case because Appellant was denied the opportunity for a trial and to receive a judgment on the merits of the case she had brought against Old South Mortgage. The trial court ignored everything Appellant said and submitted because it mistakenly believed all her causes of action are barred due to her bankruptcy filings just because Respondent intervened and said so with no applicable supporting law or evidence or reasonable basis or just cause to dismiss her case on summary judgment in Respondent's favor.

6. Although the page count is irrelevant, Respondent points out the Record on Appeal is currently over 1,700 pages without putting that number in proper context. Due to the potentially prejudicial impact of that statement on Appellant's case without proper context, the relevant facts are as follows.

7. Respondent required that Appellant include in the Record on Appeal its entire document production, 408 pages (Volume IV), as its production was not in Appellant's initial designation of matter to include in the record because she thinks 98% of it is useless.

8. Respondent's and the trial court's actions caused the proceedings to become multiplied and complicated prior to trial. Because of what they did, Appellant had to litigate diligently and thoroughly seeking to avoid her case from being prematurely dismissed before trial based on errors of law combined with Respondent's misrepresentations and lack of evidence in support of its claims and contentions. This has caused Appellant to suffer over two years of severe hardship and expense, so she pleads for the mercy of this Court.

9. Pursuant to Rule 210(c), SCACR, Appellant was required to produce the pleadings in their entirety and could not redact. In any event, Appellant believes this Court may decide not to spend considerable time scrutinizing a large number of pages for which there are no citations in either party's appellate brief, nor would she expect this Court to do so, and Appellant trusts this Court will understand why she had to provide all those pages nonetheless.

10. Similarly, in an apparent effort to further prejudice Appellant's case before this Court reads her briefs, Respondent claims Appellant suffered no damages, but that conclusion cannot be supported in light of the evidence Appellant submitted, which is in the record.

11. Appellant filed her appeal seeking reversal of the trial court's errors of law, so she does not agree and does not understand why Respondent believes it would be improper for this Court to hear and adjudicate her appeal or to accept and consider her proposed Appendix to the Record on Appeal.

12. In support of its argument, although this is a civil case, Respondent cited to a criminal case in which different procedural rules apply for submitting new evidence after trial, State v. White, 372 S.C 364, 642 S.E.2d 607 (Ct. App. 2007). In that case, this Court opined that ample evidence linked White to the crimes charged, including the victim's testimony, a surveillance videotape that recorded the crime as it unfolded, Roy Wiggins, the driver of the

escape car, testified against White, and other compelling evidence that supported White's conviction, even if the contested pieces of evidence had been admitted or omitted at trial. This Court was not persuaded to allow White to delay justice or avoid following proper criminal procedures in light of the foregoing. This citation is not directly applicable in Appellant's case.

13. Rule 210(c), SCACR provides that, "The Record shall not, however, include **matter** which was not presented to the lower court or tribunal." [Emphasis added.] The Black's Law Dictionary, Sixth Edition, defines "matter" as follows: "Substantial facts forming basis of claim or defense; facts material to issue; substance as distinguished from form; transaction, event, occurrence; subject-matter of controversy." Consequently, Appellant's interpretation of this rule is that "matter" in civil or administrative cases, as opposed to criminal cases, also refers to an issue or fact that must have been presented to the trial court and included in the record.

14. In Zaman v. S.C. State Bd. of Medical Examiners, 305 S.C. 281, 408 S.E.2d 213 (1991), the Supreme Court of South Carolina decided that, "We need not address **this issue** since there is no record of what, if anything, appellant requested, whether it was refused, and if so, why. The first time **this subject** appears in the record is in the exceptions to the Board's final order; the record provides no factual basis for raising **this issue** on appeal." [Emphasis added.]

15. Similarly, in Weston v. Kim's Dollar Store, 385 S.C. 520, 684 S.E.2d 769 (Ct. App. 2009), this Court decided that, "We do not reach **this argument** because we are unable to discern whether Weston raised to the circuit court **the issues** she now appeals. An appellate court's review is limited to **facts** appearing in the record." [Emphasis added.]

16. The facts or issues that were recently adjudicated by the presiding judge in Appellant's pending bankruptcy case are not new matters because Appellant brought those matters before the state trial court before her state case was dismissed, and those matters can be

found by this Court in her appellate briefs and the Record on Appeal she filed. Since the state trial court simply ignored everything she submitted, the bankruptcy court's recent rulings are relevant and material because they confirm Appellant was correct in what she had said to the state trial court in her pleadings before her state case was dismissed.

17. In Appellant's opposition to Respondent's motion for summary judgment dismissal of her state case in the Record on Appeal, this Court will see that Appellant explained to the state trial court why her claims are not barred by *res judicata*, collateral or judicial estoppel due to her bankruptcy filings. (e.g., R. pp. 859-864).

18. In her pleadings in the Record on Appeal, Appellant brought up the facts or issues and argued that a Chapter 13 bankruptcy plan is not a final order and not *res judicata* and not *judicial estoppel* while the bankruptcy case is pending, objections to claims can be filed and considered by the bankruptcy court after the plan's confirmation, and the plan can be amended as many times as necessary during the term of the plan. (e.g., R. pp. 895, 952-956, 1,130-1,132).

19. In her pleadings in the Record on Appeal, Appellant argued before the state trial court that she did not have prior knowledge of sufficient facts and applicable law that she had any valid or reasonable basis to object to Nationstar's proof of claim as a secured creditor prior to the confirmation of her amended Chapter 13 bankruptcy plan or that she had any viable causes of action arising from the mortgage whatsoever. (e.g., R. pp. 1,129-1,130)

20. Back in 2012, in her motion to amend complaint seeking leave from the state trial court to add Fannie Mae as a defendant and dismiss the fictitious defendants, which is included in the Record on Appeal, Appellant reported to the trial court that Respondent admitted in its discovery responses that Fannie Mae is the owner of the note and mortgage and that she had also recently discovered a Fannie Mae Loan Lookup website when and where she first discovered

Fannie Mae's claim that Fannie Mae owns the mortgage as well. (R. pp. 676, 689)

21. In the interests of fairness and justice, this Court should be notified and take into consideration that Fannie Mae is still currently claiming to own the mortgage, that Respondent's counsel recently admitted before the bankruptcy court that he did not know when Respondent became the holder of the mortgage and may be wrong about that, because the reasonable inference to be drawn from that admission is that Respondent is probably not the holder now and never was the holder.

22. In the interests of fairness and justice, this Court should be notified and take into consideration that Respondent by and through its counsel changed the position it argued before the state trial court and recently agreed before the bankruptcy court that Appellant did not know she might have a claim until after confirmation of her prior Chapter 13 bankruptcy plan because admitting that material fact changes the operation of applicable laws in her state case.

23. In the interests of fairness and justice, this Court should be notified and take into consideration that the bankruptcy court agreed with Appellant and granted her a court order and ruling that res judicata and judicial estoppel cannot be rightly or fairly applied to foreclose her claims in state court. In addition, just as Appellant had said to the state trial court, the bankruptcy court permitted Appellant to state on the record her objection to Respondent's claims in her pending bankruptcy case and to amend her Chapter 13 plan and bankruptcy Schedules B and C accordingly post confirmation of her originally confirmed plan.

24. Pursuant to Rule 60(b)(5), SCRCPP, a party may move for relief from judgment or order on the ground of "a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." This is exactly what has recently happened in Appellant's case and why she is seeking leave to inform

this Court by submitting her proposed Appendix to the Record on Appeal.

25. The timing of filing and receiving the bankruptcy court's ruling after her state court action was dismissed and after she had already filed an appeal to this Court was never in Appellant's control, rather, that was under the control of her bankruptcy counsel, as Appellant could not force her bankruptcy counsel to act any sooner than she was willing or able to do so.

26. Appellant included in her proposed Appendix to the Record on Appeal the state trial court's order denying her motion for stay to demonstrate to this Court that she is not attempting to do anything unfair or underhanded here. Respondent refused to listen to Appellant, presumably because the state trial court refused to listen to Appellant and would not even allow her some time to obtain clarification from the bankruptcy court that she was right all along.

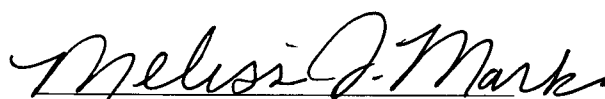
27. Appellant is certainly not making payments to Respondent because she wants to do so; she does not and is doing so against her will. Rather, Appellant is being constrained by her bankruptcy counsel to follow proper legal procedures in proper order as a result of the state trial court's prejudicial rulings that have foreclosed her legal rights and remedies as to causes of actions arising from the subject note and mortgage in both the federal and state courts. Those prejudicial rulings would need to be overturned by this Court first before Appellant can successfully pursue her legal rights and remedies, and that is why Appellant is here.

[This space intentionally left blank.]

WHEREFORE, Appellant respectfully requests that Respondent's opposition be denied and her request for leave to submit her proposed Appendix to the Record on Appeal be granted.

Respectfully submitted,

September 16, 2014



Melissa Jean Marks
209 Presidential Court
Round O, SC 29474
(843) 599-3156
mjmarks68@hotmail.com

Appellant/Plaintiff *Pro Se*

EXHIBIT A

Melissa J. Marks
209 Presidential Court
Round O, SC 29474
(843) 599-3156
mjmarks68@hotmail.com

File copy

August 25, 2014

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Melissa Jean Marks v. Old South Mortgage Corporation, et al.
~~Colleton County Court of Common Pleas~~
Civil Action No. 2012-CP-15-00262
Appellate Case No. 2013-002555

Dear Ms. Kitchings:

I am writing regarding my pending Motion for Leave to Submit Supplemental Record and Memorandum in Support that I filed and served on August 8, 2014, to notify you that, as of the early morning of the date of this letter, I have not received a response from the Respondent Nationstar Mortgage, LLC.

I mailed via U.S. Mail and e-mailed my motion and proposed Appendix to the Record on Appeal to Respondent's counsel on Friday, August 8th, so if Respondent was going to timely file and serve a return to my motion by Monday, August 18th, I was expecting to receive that by Saturday, August 23rd, at the latest but did not. A copy of my e-mail is enclosed for the record. I am aware that if Respondent did not timely file and serve a return to my motion, the Court may deem that as consent to the relief I requested therein pursuant to Rule 240(e), SCACR. Respondent's counsel did not request my consent to an extension of time to file a return to my motion, so I have not consented to an extension.

Since I do not have the written consent of the Respondent, I believe pursuant to Rule 212(b), SCACR, I must wait to receive the Court's permission prior to submitting 15 bound copies of my Appendix to the Record on Appeal for the Court's consideration.

The Honorable Jenny Abbott Kitchings

August 25, 2014

Page 2 of 2

Therefore, I would very much appreciate the Court contacting me at the Court's convenience to let me know whether I have the Court's permission to file and serve the Appendix, and if so, I will be happy to do so as soon as possible thereafter.

Thank you for your time and assistance with this matter.

Sincerely,

A handwritten signature in cursive script that reads "Melissa J. Marks".

Melissa J. Marks

Appellant/Plaintiff *Pro Se*

Enclosure

cc: Robert A. Muckenfuss, Esq., Attorney for Respondent Nationstar Mortgage, LLC
John F. Knobloch, Esq., Attorney for Defendant Old South Mortgage Corp.

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Marks v Nationstar Mortgage LLC

From: **Melissa Marks** (mjmarks68@hotmail.com)

Sent: Fri 8/08/14 12:42 PM

To: rmuckenfuss@mcguirewoods.com (rmuckenfuss@mcguirewoods.com)

Cc: eztimmermans@mcguirewoods.com (eztimmermans@mcguirewoods.com);
jyedor@mcguirewoods.com (jyedor@mcguirewoods.com); docs@kingknob.com
(docs@kingknob.com)

1 attachment

Appendix.pdf (3.6 MB)

Dear Mr. Muckenfuss,

Attached is a courtesy advance copy of my Motion for Leave to Submit Supplemental Record on Appeal and Memorandum in Support and related documents that I mailed to the court, to you and to Mr. Knobloch today.

Please let me know if you have any questions or would like any additional information in this regard.

I hope that you all will have a pleasant weekend. I thank you and appreciate your time and attention to my case.

Sincerely,
Melissa J. Marks
209 Presidential Court
Round O, SC 29474
(843) 599-3156

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Melissa Jean Marks, Appellant,

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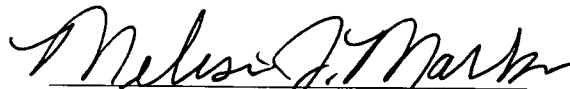
Nationstar Mortgage, LLC, Respondent.

PROOF OF SERVICE

I certify that I have served Appellant's Reply to Respondent's Response in Opposition to Appellant's Motion for Leave to Submit Supplemental Record on Appeal, on the Respondent, Nationstar Mortgage, LLC, by depositing a copy of it in the United States Mail, postage prepaid, on September 16, 2014, addressed to its attorneys of record, Robert A. Muckenfuss, Esq., McGuireWoods LLP, 201 North Tryon Street, Suite 3000, Charlotte, NC 28202, and Elizabeth M.Z. Timmermans, Esq., McGuireWoods LLP, 434 Fayetteville Street, Suite 2600, Raleigh, NC 27608, and on Old South Mortgage Corporation, by depositing a copy of it in the United States Mail, postage prepaid, on September 16, 2014, addressed to its attorney of record, John F. Knobloch, Esq., King & Knobloch, P C., 808 Johnnie Dodds Blvd , Mt. Pleasant, SC 29464.

Respectfully submitted,

September 16, 2014



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SC Court of Appeals

Re: Melissa Jean Marks v. Old South Mortgage Corporation, et al.
Colleton County Court of Common Pleas
Civil Action No. 2012-CP-15-00262
Appellate Case No. 2013-002555

Dear Ms. Kitchings:

Enclosed please find for filing an original and six copies of Appellant's Reply to Respondent's Response in Opposition to Appellant's Motion for Leave to Submit Supplemental Record on Appeal and Proof of Service. In addition, I am enclosing an extra copy of just the pleading and Proof of Service and request that you please file-stamp them and return them to me in the enclosed self-addressed, stamped envelope for my records.

I thank you and appreciate your assistance with this matter.

Sincerely,

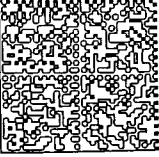


Melissa J. Marks
Appellant/Plaintiff *Pro Se*

cc: Robert A. Muckenfuss, Esq., Attorney for Respondent Nationstar Mortgage, LLC
Elizabeth M.Z Timmermans, Esq., Attorney for Respondent Nationstar Mortgage, LLC
John F. Knobloch, Esq., Attorney for Defendant Old South Mortgage Corp.

Melissa J. Marks
209 Presidential Ct
Round O, SC 29474

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SC Court of Appeals

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