

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Gordon G. Cooper, Master in Equity Judge

Case No.: 2013-002811

Bayview Loan Servicing, LLC,

Respondent,

v.

Scott A. Schledwitz, Roxanne J. Schledwitz a/k/a Roxanne Johnson Schledwitz,
Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for Tylor, Bean &
Whitaker Mortgage Corp., The United States of America, by and through its agency, the
Internal Revenue Service, and the South Carolina Department of Revenue,
Defendants,

of whom Schott A. Schledwitz is the

Appellant.

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. THE ISSUES RAISED BY APPELLANTS ARE NOT PRESERVED FOR APPELLATE REVIEW
- II. THERE WAS NO ERROR IN THE LIS PENDENS AND COMPLAINT BEING FILED PRIOR TO THE RECORDING OF THE ASSIGNMENT OF MORTGAGE
- III. THERE WAS NO ERROR IN NOT GRANTING A TRIAL BY JURY IN THE FORECLOSURE ACTION

STATEMENT OF THE CASE

Respondent (hereinafter “Lender”) filed a Lis Pendens, Summons and Complaint on February 24, 2012, seeking to foreclose a mortgage of real property which is located in Spartanburg County, South Carolina. The Summons and Complaint were served and the Appellants (hereinafter “Borrowers”) timely filed and served a *pro se* “Objection to Foreclosure of Real Estate Mortgage.” No counterclaims were asserted by the Borrowers against the Lender.

The matter was referred to the Spartanburg County Master-in-Equity on October 14, 2013.

On July 17, 2013, Lender filed and served a Motion for Summary Judgment supported by an Affidavit and exhibits. No counter-affidavits were filed or served. On November 19, 2013, a hearing was held before on the Master-in-Equity on Plaintiff’s Motion for Summary Judgment. Counsel for the Plaintiff appeared and prosecuted the motion. Defendants did not appear.

On December 3, 2013, an Order for Foreclosure and Sale was filed which is the subject of this appeal.

On or about January 23, 2014, Lender’s counsel received a letter from this Court of the same date to the Borrowers indicating that a Notice of Appeal was received by the Court on December 31, 2013, and informing Borrowers of several deficiencies. At no time has the undersigned counsel for the Lender or his law firm received a Notice of Appeal or the Order/Judgment being appealed from the Appellant.

On or about January 23, 2014, Lender's counsel received a second letter of the same date from this Court to the Borrowers indicating that, among other deficiencies, the Borrowers failed to submit the required filing fee with their Notice of Appeal. Again, neither the undersigned nor his law firm has received any correspondence from the Borrowers to this Court or any of the referenced exhibits.

On or about January 24, 2014, Lender's counsel received a letter from this Court of the same date providing the case caption and other procedural directives. A review of the online docket from the Spartanburg County Clerk of Court's Office indicates that no Notice of Appeal had been filed with the lower court.

On or about February 3, 2014, Respondent's counsel received a letter from this Court of the same date directed to the Appellant and informing him of several deficiencies regarding his Initial Brief. Once again, neither the undersigned nor his law firm have received any documents, correspondence or communication from the Appellant since the December 3, 2013 Order was filed.

On December 10, 2014, Lender filed a Motion to Dismiss the appeal, which was granted by Order filed April 17, 2014. Borrower's filed a Motion for Rehearing on April 21, 2014, which was granted and the appeal reinstated by Order filed September 5, 2014.¹

¹ After receiving this Court's Order reinstating the appeal and directing Lender to file its Initial Brief and Designation of Matter to be included in the Record on Appeal, counsel for Lender obtained all necessary documents from the South Carolina Case Management Public Index via www.sccourts.org.

FACTS

This case involves the foreclosure of a mortgage involving real property located in Spartanburg County. On July 17, 2013, Lender filed and served a Motion for Summary Judgment supported by an Affidavit and exhibits. The Affidavit and exhibits established the following facts:

- 1) The Borrower Scott Schledwitz executed a Note on or about November 23, 2005, to Taylor, Bean & Whitaker Mortgage Corp., in the principal sum of One Hundred Sixty Thousand and 00/100 (\$160,000.00) Dollars, payable in monthly installments of principal and interest of \$1,091.48 commencing January 1, 2006;
- 2) In order to secure the payment of the Note according to the terms and conditions thereof, the Borrowers made, executed and delivered unto Taylor, Bean & Whitaker Mortgage Corp., a certain real estate mortgage covering the following described property:

All that certain piece, parcel or lot of land, situate, lying and being in the State of South Carolina, County of Spartanburg, being shown and designated as Lot No. 25, containing 0.21 acres, more or less and fronting on S. Fairview Avenue Ext., as shown on survey prepared for Phyllis P. McElhaney, dated October 9, 1991 and recorded in Plat Book 114, Page 364, RMC Office for Spartanburg County, SC. For a more complete and particular description, reference is hereby made to the above referred to plat and record thereof.

This being the same property conveyed to Scott A. Schledwitz and Roxanne Johnson Schledwitz by Deed of C. Blease Graham, III, dated November 23, 2005 and recorded November 30, 2005 in Deed Book 84M at Page 962 in the ROD Office for Spartanburg County, South Carolina.

TMS No. 7-13-13 016.00

Property Address: 423 S. Fairview Avenue Extension, Spartanburg, SC 29302;

- 3) The Mortgage was signed, witnessed, probated and recorded in the public records of Spartanburg County on November 30, 2005, in Book 3565 at Page 239;
- 4) The Mortgage was assigned unto Lender, which assignment is dated March 12, 2012 and recorded March 26, 2012 in Book 4563 at Page 517.
- 5) The Borrower Scott Schledwitz defaulted on his payments on December 1, 2008. The Lender, as the holder of the Note and Mortgage, declared the entire balance of said principal and interest due and payable at once which was the sum of One Hundred Fifty Five Thousand Seven Hundred Fifty Nine and 84/100 (\$155,759.84) Dollars as of November 1, 2008, together with interest thereon at the rate of 9.5% per annum, with a current rate of 8.500% per annum from November 1, 2008, together with reasonable attorney's fees and the costs and disbursements of this action, plus all moneys advanced by the Lender under the terms of the Note and Mortgage for the payment of ad valorem taxes and/or insurance premiums, property maintenance, and securing thereof or otherwise.
- 6) The Borrowers default on the Note and Mortgage had not been cured, and a Right to Cure Notice was mailed to the Borrower Scott Schledwitz;
- 7) That the amount due on the Note and Mortgage as of December 1, 2008 exclusive of fees and costs was as follows:

Principal amount due as of December 1, 2008	\$155,759.84
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Interest from November 1, 2008 to December 1, 2012 at a current rate of 9.5000%	\$59,318.51
Interest from December 2, 2012 to May 31, 2013 at a current rate of 8.5000%	\$6,604.69
Escrow Advance	\$16,178.20
Suspense	-\$472.58
Recoverable Balance	\$2,859.50

- 8) The total debt would continue to accrue a per diem charge of \$36.27 for interest.

(Plaintiff's Motion for Summary Judgment).

In addition, copies of the Note, Mortgage, Assignment of Mortgage and Notice of Default/Right to Cure were attached to the Affidavit and attested to.

(Plaintiff's Motion for Summary Judgment).

No counter-affidavits were filed or served and the Borrowers did not appear at the summary judgment hearing. (Order for Judgment and Foreclosure of Sale).

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), SCRCP. “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. Id.

ARGUMENT

I. THE ISSUES RAISED BY BORROWERS ARE NOT PRESERVED FOR APPELLATE REVIEW

“At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge.” Malloy v. Thompson, 2012-213385, 2014 WL 4087881 (S.C. Aug. 20, 2014). “The issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge.” Id. “It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” Id.

If an issue is raised to the trial judge but not ruled upon, a party is required to file a Rule 59(e), SCRCP motion or the issue is not preserved for appellate review. Elam v. S. Carolina Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (stating a party *must* file a Rule 59(e), SCRCP, Motion to Alter or Amend

when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review).

Lender contends that the facts and legal arguments presented to this Court in Borrowers' Brief were not raised to the trial judge either by oral argument or counter-affidavit, they were not addressed in the Order for Judgment and Foreclosure of Sale, and they were not raised to the trial judge in a Rule 59(e), SCRCF, Motion to Alter or Amend Judgment. (Motion for Summary Judgment; Order for Judgment of Foreclosure and Sale). As such, Borrowers' arguments are not preserved for appellate review and this appeal should be dismissed.

II. THERE WAS NO ERROR IN THE LIS PENDENS AND COMPLAINT BEING FILED PRIOR TO THE RECORDING OF THE ASSIGNMENT OF MORTGAGE (Borrowers' Issues I & II)

Borrowers allege that it was in error to allow the foreclosure to proceed to judgment since it the Lis Pendens, Summons and Complaint were filed prior to the Assignment of Mortgage being executed and recorded. (Borrowers' Brief at I).

Rule 17(a), SCRCF, provides in part:

. . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

To the extent the Borrowers' pleading response raised an objection to Lender's standing as the real party in interest to prosecute the foreclosure action, the issue was cured by ratification by the real party in interest when the Assignment of Mortgage was recorded and the Motion of Summary Judgment was filed and served

with an Affidavit from a representative of Lender. (Complaint; Motion for Summary Judgment Affidavit and Exhibit Assignment of Mortgage).

Borrowers also argue that they challenge the validity of the Assignment of Mortgage and that there were discrepancies with the Note attached to the Complaint. (Borrowers' Brief at II(C)). As set forth in Issue I above, these arguments were not presented to the trial judge for consideration at the summary judgment hearing and, therefore, those issues are not preserved for appellate review. Moreover, there is no evidence in the Record on Appeal to dispute the uncontradicted evidence before the trial judge that 1) a copy of the Note was attested to by Plaintiff's authorized representative and attached to the Motion for Summary Judgment; and 2) that the Note and Mortgage were assigned to Lender. (Motion for Summary Judgment Affidavit). Accordingly, there was no error in granting Lender and Order for Foreclosure and Sale and this appeal should be dismissed.

III. THERE WAS NO ERROR IN NOT GRANTING A TRIAL BY JURY IN THE FORECLOSURE ACTION (Borrowers' Issue III).

Borrowers argue that it was error to have this foreclosure action referred to the Master-in-Equity for a bench trial when the Borrowers made a jury trial demand. (Borrowers' Brief at III).

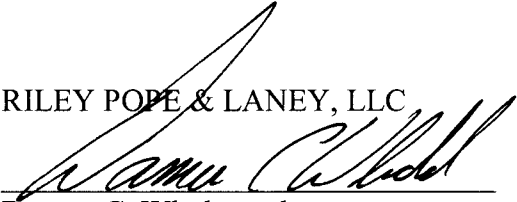
"Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). "Actions for foreclosure . . . are actions in equity." Wilder Corp. v. Wilke, 324 S.C. 570, 576, 479 S.E.2d 510, 513 (Ct. App. 1996) aff'd, 330 S.C. 71, 497 S.E.2d 731 (1998).

As the Complaint was solely an action to foreclose a mortgage and the Borrowers did not allege any counterclaims giving rise to a trial by jury, it was proper for the case to be referred to the Master-in-Equity for non-jury disposition. Therefore, the appeal should be dismissed.

CONCLUSION

Respondent respectfully requests that this Court find facts in accordance with its own view of the preponderance of the evidence and affirm the trial judge's Order for Foreclosure and Sale and dismiss the present appeal.

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September 26, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Gordon G. Cooper, Master in Equity Judge

Case No.: 2013-002811

Bayview Loan Servicing, LLC,

Respondent,

v.

Scott A. Schledwitz, Roxanne J. Schledwitz a/k/a Roxanne Johnson Schledwitz, Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for Tylor, Bean & Whitaker Mortgage Corp., The United States of America, by and through its agency, the Internal Revenue Service, and the South Carolina Department of Revenue,
Defendants,

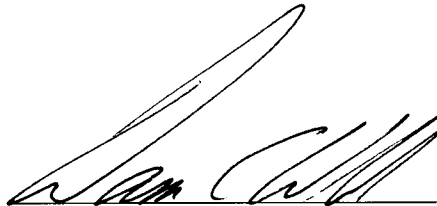
of whom Schott A. Schledwitz is the

Appellant.

CERTIFICATE OF SERVICE

I do hereby certify that I served the Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal upon the parties below herein by depositing a copy of same, this date, in the U.S. Mail, first class postage prepaid, and addressed as follows:

Scott Allen Schledwitz
13118 Sunkiss Loop
Windermere, FL 34786



Damon C. Wlodarczyk

Columbia, SC
September 26, 2014

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September 26, 2014

Ms. Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Bayview Loan Servicing, LLC, Respondent,
vs.

Scott A. Schledwitz, Roxanne J. Schledwitz aka Roxanne Johnson Schledwitz, Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for Taylor, Bean & Whitaker Mortgage Corp., The United States of America, by and through its agency, the Internal Revenue Service, and The South Carolina Department of Revenue, Defendants

Of whom

Scott A. Schledwitz is the Appellant

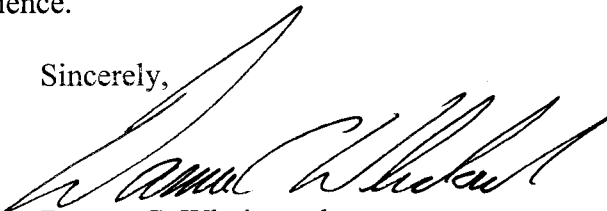
Appeal No.: 2013-002811

Our File No. 4028.02911

Dear Ms. Kitchings:

Enclosed please find an original and one (1) copy each of the Respondent's Initial Brief, Designation of Matter to be Included in the Record on Appeal, and proof of service. Please file the enclosed documents and return the clocked copy to me in the self-addressed, postage paid envelope I have included for your convenience.

Sincerely,



Damon C. Wlodarczyk

DCW/
Enclosures

cc: Mr. and Mrs. Schledwitz

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SEP 29 2014

SC Court of Appeals

Riley Pope
& Laney, LLC | ATTORNEYS AND COUNSELORS AT LAW

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