

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Robert W. Davis, Special Referee

Case No. 2014-CP-12-00134

Founders Federal Credit
Union,

Respondent,

v.

Kay S. Cassells Hoag,

Appellant.

[INITIAL] BRIEF OF APPELLANT

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SC Court of Appeals

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OTHER AUTHORITIES

May 2, 2011 Administrative Order of the South Carolina Supreme Court, 2011-05-02-01

Letter dated June 7, 2011 from South Carolina Court Administration referencing Order 2011-05-02-01.

STATEMENT OF ISSUES ON APPEAL

The trial court erred in refusing to vacate Hoag's default based on a finding that respondent did not have to offer foreclosure intervention to Hoag.

STATEMENT OF THE CASE

This foreclosure action was filed on March 17, 2014. An amended complaint was filed on April 9, 2014. The amended filing included an Attorney's Certification Regarding Foreclosure Intervention was served on Kay S. Hoag (hereinafter Hoag) on April 28, 2014. Hoag did not file an answer or other responsive pleading before May 28, 2014. An affidavit of default was filed by Respondent on June 5, 2014. Hoag served a motion to require foreclosure intervention and vacate default on July 28, 2014. That motion was filed on July 30, 2014. A hearing was held before Special Referee Robert W. Davis. The Special Referee denied Hoag's motion. The Special Referee granted the foreclosure with a sale date of November 3, 2014. The Notice of Sale and Order and Judgment of Foreclosure was signed on September 8, 2014 and filed on September 25, 2014. The written order denying Hoag's motion was signed on September 30, 2014 and filed on October 26, 2014. Hoag served the notice of appeal on October 10, 2014.

ARGUMENTS

I THE TRIAL COURT ERRED IN REFUSING TO VACATE HOAG'S DEFAULT BASED ON A FINDING THAT RESPONDENT DID NOT HAVE TO OFFER FORECLOSURE INTERVENTION TO HOAG.

The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the circuit court. *Harbor Island Owners' Ass'n v. Preferred Island Props., Inc.*, 369 S.C. 540, 544, 633 S.E.2d 497, 499 (2006). The circuit court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion. *Mitchell Supply Co. v. Gaffney*, 297 S.C. 160, 163, 375 S.E.2d 321, 322 (Ct. App. 1988). An abuse of discretion occurs when the judgment is controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. *In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997).

The South Carolina Supreme Court issued order No. 2011-05-02-01 on May 2, 2011. That order required anyone filing a foreclosure to provide a notice to the Mortgagor that the Mortgagor could participate in a foreclosure intervention process. The property subject to that foreclosure had to be owner-occupied. A foreclosure hearing could not be held until the Mortgagee's attorney filed a certification that the notice of foreclosure intervention had been served on the Mortgagor and the Mortgagor had failed to participate in the intervention process or the Mortgagor did not qualify for a loan modification or other loss mitigation program.

The process provided for in that order is as follows:

Mortgagee files a foreclosure action including the notice of intervention;

Mortgagor participates in the intervention process;

The process leads to a settlement and the foreclosure is dismissed;

Mortgagee denies a loan modification or any other loss mitigation relief;

Or, Mortgagor fails to participate in the foreclosure process;

Mortgagee's attorney files a certification that the process was completed without success or Mortgagor did not participate;

Mortgagor is in default unless the Mortgagor serves an answer within thirty days of being served the initial process or within thirty days of being served with notice that loan modification or other loss mitigation relief is denied.

The purpose of Order 2011-05-02-01 is "to insure that eligible homeowners and lender-services have been afforded the benefits of loan modification or other loss mitigation where possible, and to insure that the procedures for handling issues related to such efforts are handled uniformly throughout the State, . . ." (Or. 2011-05-02-01 p. 1) One of the reasons for the order is "the difficulty in communication between lender-servicers and debtors," (Or. P. 1) The design of the Order is to have communication between Mortgagor or Mortgagor's attorney and the attorney for Mortgagee so that there is no confusion about whether the intervention process was properly followed.

On June 7, 2011 Court Administration issued a letter providing some guidance as to Order 2011-05-02-01. The letter clearly indicates that Mortgagee's attorney's involvement is necessary to avoid a ". . . fundamental disconnect between the borrower and the lender-servicer. . ." (ltr p. 1-2) The letter further stated that courts depend on the lender-servicer's attorney to advise the trial court as to the intervention process. (ltr. p. 2) The letter points out that "the involvement of the lender-servicer's attorney at every stage of the foreclosure process is critical. . ." (ltr. p. 2) The letter stated "if a Mortgagor has already participated in a foreclosure intervention process provided by a Mortgagee, but has either failed to qualify for relief, or has defaulted under a loss mitigation agreement, the provisions of the order have been satisfied, and the Mortgagee has complied with the order."

The question is what is participation in the process and when did that participation occur?

Here, Respondent's attorney testified that:

a foreclosure action was filed against Hoag in April 2013. (Tr. P. 5, ln. 9-10)

Respondent's current attorney did not represent Respondent in the 2013 foreclosure. (Tr. P. 5, ln. 22-23)

Hoag participated in a loan modification process in the 2013 foreclosure proceeding. (Tr. P. 5, ln. 1-18)

Hoag was denied foreclosure intervention at that time. (Tr. P. 5, ln. 20-22)

The reasons for that denial. (Tr. P. 6, ln. 1-6)

Hoag filed bankruptcy in September 2013. That bankruptcy was dismissed in January 2014. (Tr. P. 6, ln. 7-11)

The 2013 foreclosure was dismissed. (Tr. P. 9, ln. 8-9)

Respondent sent Hoag a letter dated January 27, 2014 offering a foreclosure intervention process. (Tr. P. 6, ln. 20-23 and P. 7 ln. 1-7).

The Attorney's Certification Regarding Foreclosure Intervention stated that Respondent had live communication with Hoag on March 13, 2014. (Certification p. 2)

Hoag testified that she did not remember any mailing from Respondent after Hoag's bankruptcy was dismissed. (Tr. P. 11, ln. 22-25) Hoag testified that she did not receive any phone calls from Respondent after Hoag's bankruptcy was dismissed. (Tr. P. 12, ln. 8-10)

The trial court denied Hoag's motion to set aside the default because the intervention process had already been done. (Tr. P. 12, ln. 22-24) At the hearing, the court stated the reason was the intervention process that was completed in the April 2013 foreclosure. (Tr. P. 13, ln. 4-8) The order dated September 20, 2014 added the reasoning that Respondent had complied with CFPB regulations about contacting Hoag for foreclosure intervention. (Order p. 1 and 2)

What is participation in foreclosure intervention as required by Order 2011-05-02-01?

For the intent of the Order to be met, Respondent's attorney is to supervise the foreclosure intervention. This will prevent the lender-servicer said; mortgagor said that often arises in this process. For example, mortgagor says I completed the paperwork and lender-servicer says we never got the paperwork. Here, Respondent, through its attorney, testified that Respondent sent a letter to Hoag in January 2014 and had live communication with Hoag in March 2014. Hoag testified that she did not get a letter or phone call from Respondent in 2014. That defeats the purpose of Order 2011-05-02-01. That would have been avoided by a proper notice of foreclosure intervention attached to the Amended Complaint served on Hoag in April 2014. The purpose of the foreclosure intervention process fails unless Hoag is given an opportunity to notify Respondent's attorney of Hoag's request to participate in the intervention process. Respondent should be required to provide the proper notice to Hoag so that she can participate in that process.

Does Hoag's participation in a foreclosure intervention process in the foreclosure action filed in April 2013 excuse Respondent's obligation to notify Hoag of that process in a foreclosure filed in April 2014?

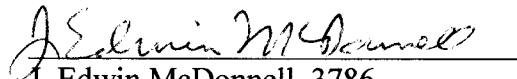
Loan modification or other loss mitigation is beneficial to both homeowners and lender-servicers. (Order 2011-05-02-01 p 1) The factors for a loan modification or other loss mitigation change with time—incomes go up and down (loan modification), a potential buyer of the home is found (short sale), homeowner decides to leave the home if paid an amount to assist with moving expenses (deed in lieu). If the process only occurs once during the life of a mortgage its intent is defeated. If a foreclosure is filed in 2011 and the intervention process is completed, but does not work, should that mean that the process is not offered in a foreclosure that is started five years later? No. A year later? No. The intervention process should be offered anytime a foreclosure is started anew. Here, the 2013 foreclosure was dismissed by Respondent. When a foreclosure action is dismissed and a new foreclosure action filed, the intervention process should be offered again. To do otherwise defeats the potential beneficial result to both homeowner and lender-servicer.

The trial court's decision to deny Hoag's motion to vacate default based on a finding that Respondent did not have to offer foreclosure intervention in the current foreclosure is wrong. It defeats the intent of the Order of the Supreme Court. This is an error of law. The decision should be reversed. Hoag should be allowed to apply for the foreclosure intervention process.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the trial court.

Respectfully submitted,



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November 9, 2014

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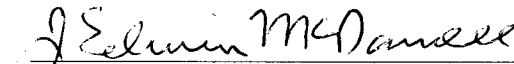
Kay S. Cassells Hoag

Appellant

CERTIFICATE OF SERVICE

Appellant's Initial Brief and the Designation of Matter to be Included in the Transcript of Record was served by mailing a copy of the same, on the date below, postage pre-paid, to the attorney stated below at the address given:

Suzanne Taylor Graham Grigg, Esq.
Nexsen Pruet, LLC
PO Drawer 2426
Columbia SC 29202
Attorney for Respondent



J. Edwin McDonnell

November 10, 2014

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November 9, 2014

Clerk of Court
S.C. Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Founders Federal Credit Union v. Kay S. Cassells Hoag, 2014-CP-12-00134

Dear Clerk:

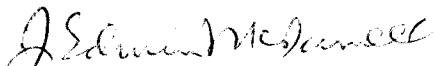
I received your letter dated November 5, 2014. I apologize my failure to advise the Court that we received the transcript of our motion hearing prior to the appeal being filed. Therefore the brief is due no later than November 10.

The original of the initial brief is enclosed along with the designation of matter for the transcript of record. A certificate of service is also enclosed. Please return a clocked copy of the certificate of service.

Your cooperation is appreciated.

If anything further is necessary, please let me know.

Sincerely Yours,


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