THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

Kathy Ouzts Rushton, Special Referee

Case No. 2014-001742

Bernard Loyer, Jr. and Sherry Loyer, Respondents.

v.

S 17 Owners Association, Inc.; John L. Avent; Frances Avent; Sylvia S. Berger; Robert J. Berning; Jeanne M. Clavel; Greg Connell; Gerald Crawford; Bruce C. Douglas; Jonathan D. Dunn; Les Galazka; Michael V. Goransky; Frank L. Gougher; David E. Harris; Cathryn A. Knight; John H. Lacher; Kyle R. Larson; Laura Linn; Roger McCoig; Charles Wilmot Miller; Michael O'Brien; Carolyn M. Rischbieter; William Satcher and Belinda Smith-Sullivan,

Defendants,

OF WHOM S17 Owners Association, Inc.; John L. Avent; Frances Avent; Sylvia S. Berger; Greg Connell; Jonathan D. Dunn; Michael V. Goransky; Frank L. Gougher; David E. Harris; Cathryn A. Knight; John H. Lacher; Kyle R. Larson; Michael O'Brien; Carolyn M. Rischbieter; and Belinda Smith-Sullivan, are Appellants.

AND OF WHOM Charles Wilmot Miller is a Respondent

FINAL BRIEF OF RESPONDENT CHARLES WILMOT MILLER

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STATEMENT OF ISSUES ON APPEAL

1. Were the grounds for appeal raised by Appellants properly preserved for appellate review?

2. Did the trial court err in its order and judgment of foreclosure and sale by finding it had personal jurisdiction over the parties?

3. Did the trial court err by barring Appellants from receiving a portion of the sales proceeds resulting from the foreclosure sale?

STATEMENT OF THE CASE

On November 10, 2009, Bernard Loyer, Jr. and Sherry Loyer (collectively referred to as, "**Respondent Loyer**" or "**Plaintiff**") brought this action to foreclose the real estate mortgage ("**Mortgage**") recorded on May 2, 2006, in the office of the Register of Deeds for Edgefield County, South Carolina in Mortgage Book 1048, at Page 58. ROA 36. The Mortgage purportedly secured twenty-four (24) individual promissory notes ("**Notes**") given by Defendant S-17 Owners Association, Inc., a South Carolina non-profit corporation ("**Association**") to twenty-six (26) individuals (collectively, the "**Note Holders**") in varying amounts as follows:

Note Holder(s)	Note Amount
Avent, John L. & Frances	$10,000
Berger, Sylvia S.	30,000
Berning, Robert J.	30,000
Clavel, Jeanne M.	10,000
Connell, Greg	10,000
Crawford, Gerald & Dorothy	10,000
Douglas, Bruce C.	10,000
Dunn, Jonathan D.	5,000
Galazka, Les	25,000
Goransky. Michael V.	10,000
Gougher, Frank L.	5,000
Harris, David E., Trust	10,000
Knight, Cathryn A.	5,000
Lacher, John H.	5,000

Larson, Kyle R.	15,000
Linn, Laura	5,000
Loyer, Bernard, Jr.	40,000
Loyer; Sherry	10,000
McCoig, Roger	5,000
Miller, Charles Wilmot	15,000
O'Brien, Michael	20,000
Rischbieter, Carolyn M.	5,000
Satcher, William	5,000
Smith-Sullivan, Belinda	5,000

ROA 77.

To secure the indebtedness evidenced by the Notes, the Association executed and delivered the Mortgage to the Note Holders. (Plaintiff's Complaint) Charles Wilmot Miller ("**Respondent Miller**", and together with Respondent Loyer/Plaintiff, the "**Respondents**") and Defendant Robert J. Berning ("**Defendant Berning**") answered Plaintiff's complaint denying Respondent Loyer's right to foreclose the Mortgage and, in the alternative, cross-claimed against the Association by joining Respondent Loyer in its foreclosure of the Mortgage. ROA 27, ROA 23. The Association filed an Answer through its attorney, Bradford Owensby, Esq., and asserted a general denial of the allegations in Plaintiff's complaint. Mr. Owensby was relieved as counsel for the Association on October 8, 2013. Appellants answered Plaintiff's complaint by a general denial and failed to raise any affirmative defenses except the defense of improper venue. ROA 40; ROA 69. Appellants' motion to dismiss for improper venue was denied by Order of Honorable D. Craig Brown and the matter was referred to Special Referee Kathy Ouzts Rushton. ROA 4.

A trial on the merits was conducted by Special Referee Kathy Ouzts Rushton on May 19, 2014. Prior to receiving testimony, the Special Referee received and granted a motion to be relieved as counsel from Defendant Berning's attorney. ROA 10.

A Special Referee's Order and Judgment of Foreclosure and Sale was filed on June 11, 2014, ordering the sale of the Property to satisfy the indebtedness proven at trial by Respondents. ROA 9. As part of its Order, the Court found the amount due and owing on the promissory notes held by Respondent Loyer was $80,333.36 and the amount due and owing on the promissory note held by Respondent Miller was $24,346.01. ROA 13 and 14. The trial court further found the Mortgage was security for the indebtedness proven at trial by Respondents. ROA 11. The trial court received no evidence or testimony from Appellants as to whether they were the owner and holder of their respective notes or the amount of indebtedness owing under their respective notes, if any. ROA 15.

The property ("**Property**") described in the Mortgage was sold at public auction on July 8, 2014, to Twin Lakes Executive Airport LLC, a third party good faith purchaser for value, in the amount of $87,000.00. From these proceeds, $66,098.15 was disbursed to Respondent Loyer and $20,031.85 was disbursed to Respondent Miller. A Supplemental Order was issued by the Court on August 14, 2014, in order to allocate Court costs of the action among Respondent Loyer and Respondent Miller. Subsequently, the Appellants made no motion under SCRCP 59(e) to alter or amend the judgment of the trial court.

STANDARD OF REVIEW

A real estate foreclosure is an action in equity. Continental Mortgage Investors v. Quail Run Ass'n, 280 S.C. 409 (1984). In an appeal from an action in equity, tried by a judge alone, an appellate court may find facts in accordance with its own view of the preponderance of the evidence. However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the

credibility of the witnesses. Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings. United States Bank Trust Nat'l Ass'n v. Bell, 385 S.C. 364, 684 S.E.2d 199 (S.C. Ct. App. 2009).

ARGUMENTS

1. THE GROUNDS FOR APPEAL RAISED BY APPELLANTS HAVE NOT BEEN PROPERLY PRESERVED FOR APPELLATE REVIEW.

Appellants seemingly allege the trial court erred as follows: (1) trial court erred by finding it had personal jurisdiction over the parties; (2) trial court erred by failing to properly balance and consider the equities in this matter; (3) trial court erred by failing to find Respondent Miller and Respondent Loyer were unjustly enriched; (4) trial court erred by awarding Respondent Miller and Respondent Loyer an award of attorneys' fees; (5) trial court erred by requiring that Appellants prove the existence and amount of their debt at trial in order to recover proceeds from the foreclosure sale; (6) trial court erred by denying Appellants the right to a deficiency judgment; (7) trial court erred in its allocation of proceeds from the foreclosure sale; and (8) trial court erred by finding Appellants were barred from joining the foreclosure action because they had not properly cross-claimed for foreclosure in their responsive pleadings. None of the foregoing issues raised by Appellants on appeal were raised to and ruled upon by the trial court, and, as such, were not preserved for appellate review[1].

[1] To the extent this Court finds additional arguments raised by Appellants that Respondents fail to address, such arguments are not preserved for appellate review on the same basis. Further,

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. Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997). "In matters of appeal, so far as it appears, all that this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised in the lower Court and passed upon by that Court. Of course, as to questions specifically affecting the verdict, or other questions not specifically ruled on, the Court below must of necessity be given an opportunity on motion for a new trial of passing upon and correcting such matters before they can or will be reviewed by this Court on appeal. Hubbard v. Rowe, 192 S.C. 12, at 19 (1939) "[T]his Court does not recognize a "plain error" rule. Rather, it is well settled that a contemporaneous objection must be made to preserve an argument for appellate review." Washington v. Whitaker, 317 S.C. 108, at 110 (1994), (citing Taylor v. Bridgebuilders, Inc., 275 S.C. 236 (1980)).

Appellants, through their pleadings, at trial, and via post-trial motions, failed to raise the numerous issues for which they seek appellate review. In their pleadings, Appellants failed to assert any counterclaims, cross-claims, or affirmative defenses they seek to appeal. ROA 40. No objections or cross-examinations were made at trial to the testimony provided by Respondents concerning the amount of indebtedness claimed or exhibits entered into evidence. ROA 45 – ROA 58. And, no Rule 59(e) motion to alter or amend the Special Referee's Order and Judgment of Foreclosure and Sale was made by Appellants. So, Appellants have failed to preserve these issues for appellate review by failing to afford the trial court opportunity to pass upon the issues raised by Appellants on appeal.

Respondents request the Court affirm the findings of fact and conclusions of law made by the trial court for any ground appearing in the record, as provided by Rule 220(c); Rule 207(b)(2); and Rule 220(c), SCACR.

2. THE TRIAL COURT DID NOT ERR IN ITS ORDER AND JUDGMENT OF FORECLOSURE AND SALE BY FINDING THE COURT HAD PERSONAL JURISDICTION OVER THE PARTIES.

On appeal, and for the first time, Appellants contend the trial court had no personal jurisdiction based on insufficiency of service of process. This basis for appeal is without merit because Appellants either voluntarily appeared or waived the right to appeal on this basis. Service of the summons and complaint and voluntary appearance are the two methods of establishing jurisdiction described in SCRCP Rule 4(d). A defendant may challenge the sufficiency of service, and the sufficiency of the process itself, in a pre-answer motion or in the answer itself. SCRCP Rule 12(b). "A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process...is waived (A) if omitted from a motion in the circumstances described in subdivision (g) or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course." SCRCP Rule 12(h)(1).

a. The appeal on grounds of insufficiency of service of process is without merit because Appellants made a voluntary appearance.

Appellants appeal the order of the trial court on the basis of insufficiency of service of process on the defendants. This argument fails because all Appellants filed an answer to the complaint through their attorney, Marsha Banks, and, as such, have entered a voluntary appearance sufficient for the trial court to obtain personal jurisdiction over the parties. ROA 40.

"Although a court commonly obtains personal jurisdiction by the service of the summons and complaint, it may also obtain personal jurisdiction if the defendant makes a voluntary appearance." Stearns Bank National Association v. Glenwood Falls, LP, 373 S.C. 331 at 337; 644 S.E.2d 793 at 796 (Ct. App. 2007) "An appearance may be expressly made by formal written or oral declaration, or ***record entry***, or it may be implied from some act done with the intention of appearing and submitting to the court's jurisdiction." 4 Am. Jr. 2d Appearance § 1 (1995) (Emphasis added).

In this case, Marsha Banks was the attorney of record for Appellants. ROA 40. Ms. Banks filed an Answer, a motion to dismiss, and took all other actions consistent with representing the Appellants. ROA 40; ROA 69. Her appearance as attorney of record for Appellants goes far beyond what is required by our Courts to constitute a voluntary appearance by the Appellants. Our Supreme Court has found that a party can make a voluntary appearance without formally announcing it. See, e.g., Triangle Auto Spring Co. v. Gromlovitz, 270 S.C. 386, at 389-90, 242 S.E.2d 430, at 431 (1978). The failure of Appellants to dispute Ms. Banks's representation is compelling. At no point did Appellants question her representation during the five (5) year period this action was prosecuted. Rather, Appellants choose to assert this argument for the first time on appeal.

b. The appeal on grounds of insufficiency of service of process is not available to the Appellants because this issue was waived by Appellants.

Appellants waived their right to defend this case based on insufficiency of service of process. In Garner v. Houck, 312 S.C. 481 (1993), our Supreme Court held that a party who fails to properly raise the defense of insufficient service of process under Rule 12 waives any issues or defenses regarding service. Although our courts have not specifically addressed the degree of

specificity required in pleadings to raise such a defense, SCRCP Rule 12(b)(5) is substantially similar to its federal counterpart. In the absence of prior state law on this issue, federal cases interpreting the rule are persuasive. See Roberts v. Peterson, 292 S.C. 149, 355 S.E.2d 280 (Ct. App. 1987) (noting that where the state rule has adopted the language of a federal rule, federal cases interpreting the federal rule are persuasive). Federal courts addressing this issue have held that objections to the sufficiency of service of process ***must be specific and must point out in what manner the plaintiff has failed to satisfy the rule relating to the service provisions***. See O'Brien v. R.J. O'Brien & Assocs., 998 F.2d 1394 (7th Cir. 1993) (holding objection to service of process must be specific and point out in what manner the rules were not satisfied) (Emphasis added); In re: Highland Acres, Inc. v. Highland Acres, 1994 WL 473357 (Bankr. Mont.) ("This Court holds as a matter of law that an affirmative defense averring a "Complaint is not timely" does not provide sufficient specificity to invoke . . . the insufficiency of service of process defense of Rule 12(b), or to avoid waiver under Rule 12(g) and (h)."); *See also* White v. Johnson, 151 Ga. App. 345, 259 S.E.2d 731 (Ga. Ct. App. 1979) (noting that under Georgia law, insufficiency of service of process defense must be specifically pled or is waived). In fact, some authorities suggest "the objection to insufficiency of process or its service should point out specifically in what manner plaintiff has failed to satisfy the requirements of the service provision he utilized." 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Civil 2d § 1353 (1990).

Here, the only response in Appellants' answer that could plausibly be viewed as raising a defense of insufficiency of service of process was Appellants' response to paragraph 1 of Plaintiff's complaint. Paragraph 1 states, "[t]his is an action for the foreclosure of a mortgage upon certain real estate in Edgefield County and Aiken County, South Carolina. (Plaintiff's

Complaint). Responding to paragraph 1 in their answer, Appellants state, "[d]efendants/Co-Lenders deny paragraph 1 that the Court has jurisdiction over the parties as stated in the caption." ROA 40. This response does not comport to the pleading requirements in South Carolina sufficient to raise the defense of insufficiency of service of process. Rule 8(e)(1), SCRCP provides, "each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required." Moreover, all pleadings shall be so construed as to do substantial justice to all parties. SCRCP Rule 8(t). We will not, however, write into the pleadings allegations and defenses that are not presented. Davis v. Monteith, 289 S.C. 176, 345 S.E.2d 724 (1986). The exact nature of the jurisdictional defects complained of by Appellants are unclear (personal jurisdiction or subject matter jurisdiction) but makes no mention that any of the Appellants were not served. Additionally, the trial court was never asked to rule upon any such jurisdictional challenge by Appellants. Accordingly, Appellants failed to satisfy the pleading requirements in South Carolina to raise a defense for insufficiency of service of process.

Assuming *arguendo*, that Appellants were found to have properly raised the defense of insufficiency of service of process in their responsive pleadings, as discussed above, Appellants failed to preserve this issue for appellate review by failing to raise any objections based on insufficiency of service of process by way of motion or at the trial on the merits. Accordingly, this issue has not been preserved for appellate review.

3. THE TRIAL COURT DID NOT ERR IN BALANCING AND CONSIDERING THE EQUITIES IN THIS CASE AND BARRING APPELLANTS FROM RECEIVING ANY OF THE PROCEEDS FROM THE FORECLOSURE SALE.

Appellants allege the special referee erred in its ruling by failing to balance and consider the equities of the parties to this lawsuit by barring Appellants from recovering any proceeds from the foreclosure sale. The trial judge did not err in balancing and considering the equities in this case because Appellants had, and continue to have, an adequate legal remedy at law and the balancing of equities are not in Appellants' favor.

a. Appellants have an adequate remedy at law.

"The function of equity is to supplement the law, not to displace it." Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 117, 580 S.E.2d 100, 108 (2003). The basis for granting equitable relief is the impracticability of obtaining full and adequate compensation at law. Monteith v. Harby, 190 S.C. 453, 455, 3 S.E.2d 250, 251 (1939). Accordingly, equity is generally only available when a party is without an adequate remedy at law. EllisDon Constr., Inc. v. Clemson Univ. 391 S.C. 552, 555, 707 S.E.2d 399, 401 (2011) Equity aids the vigilant, not those who slumber on their rights. 30 C.J.S., Equity, §113, p. 525.

Appellants contend principles of equity require all Note Holders to share in the proceeds from the foreclosure sale. Such equitable relief should not be made available to Appellants in this matter because Appellants had, and continue to have, an adequate remedy at law. Like Respondent Miller, Appellants had full opportunity to join in the foreclosure and provide evidence of their debt at trial. However, Appellants failed to pursue the remedy of foreclosure in their pleadings and the record is replete of any evidence indicating the amount of indebtedness owing to them at the time of trial. ROA 15. Additionally, Appellants continue to have an adequate remedy at law. Assuming they are the owner and holder of a promissory note given by the Association, they still have the ability to file suit under their promissory notes against the

Association. A mortgagee who has a note and a mortgage to secure a debt has the option to either bring an action on the note or to pursue a foreclosure action. Lever v. Lighting Galleries, Inc. 374 S.C. 30, at 33, 647 S.E.2d 214, at 216 (2007)

b. The balancing of the equities in this matter are not in Appellants favor because they were not vigilant in asserting their rights

Appellants were not vigilant in pursuing the remedy of foreclosure, so the balancing of the equities are not in their favor. Courts have consistently held equity will not come to the aid a litigant who fails to diligently pursue their rights or errs in the defense or prosecution of a lawsuit. See Witmer v. Exxon Corp., 260 Pa. Super. 537, 394 A.2d 1276, 1286 (Pa. Super. Ct. 1978) (holding it is not proper to seek equitable relief where no pursuit has been made of available contractual remedies because equity aids the vigilant and not those who slumber on their rights); McKittrick v. Bates, 47 R.I. 240, 132 A. 610, 612 (R.I. 1926) ("When one who has a clear method of fully determining his rights at law voluntarily adopts improper procedure, or pursues proper procedure negligently or mistakenly, without any inducement from one having adversary interest, it is no function of equity to relieve him from the result of his erroneously conducted lawsuit."); U.S. v. Cent. Livestock Corp., 616 F. Supp. 629, 633 (D. Kan. 1985) (holding equity will not intervene if it appears the absence of a remedy at law is due to the plaintiff's failure to pursue that remedy).

Appellants made the decision, against the advice of counsel, not to cross-claim for foreclosure in their pleadings. ROA 15. And Appellants did not introduce any evidence or provide any testimony concerning the debt allegedly owed to them by the Association. ROA 15; ROA 65, lines 4-22. Due to Appellants' lack of diligence and vigilance in this case, the equities

are not in Appellants favor and should not aid Appellants in this case in the manner they suggest on appeal.

CONCLUSION

The Special Referre's decision in this matter is supported by the evidence presented at the trial of this case. For the reasons stated, the Court should affirm her judgment.

January 27, 2015

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AND OF WHOM Charles Wilmot Miller is a Respondent

SCACR 211 (B) CERTIFICATION

Pursuant to SCACR 211(b), Respondent's counsel certifies its Final Brief complies with SCACR 211(b) with regard to its content.

January 27, 2015

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AND OF WHOM Charles Wilmot Miller is a Respondent

CERTIFICATE OF SERVICE BY MAIL OF FINAL BRIEF OF RESPONDENT CHARLES WILMOT MILLER

I, Paul Simons, Jr., Attorney for Respondent, Charles Wilmot Miller, certify that I have caused Respondent, Charles Wilmot Miller's Final Brief and the within Certificate of Service By Mail in the above-captioned matter to be served via U.S. Mail on January 28, 2015, upon the counsel and parties addressed as follows:

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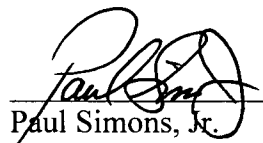

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