THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Gordon G. Cooper
Master in Equity

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Appellate Case No. 2014-002248
Circuit Court Case No. 2011-CP-42-01489

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U.S. Bank National Association, as successor Trustee to Wachovia Bank, National Association, as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates Series 2005-12, ..... Respondent,

v.

Michael D. Lanier; Lori A. Lanier; Wells Fargo Bank, N.A.; Sweetwater Hills Homeowners Association, Inc., ..... Defendants,

of whom

Michael D. Lanier and Lori A. Lanier are the ..... Appellants.

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# INITIAL BRIEF OF RESPONDENT

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March 30, 2015

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## STATEMENT OF ISSUES

I. Consideration of Affidavits: In support of its motion for summary judgment, Respondent submitted two affidavits that detailed how much money Mr. Lanier owes under the parties' loan agreement. Mr. Lanier did not challenge or produce any evidence to rebut Respondent's accounting. Did the circuit court abuse its discretion when it considered Respondent's affidavits as proof of the amount Mr. Lanier owes?

II. Respondent's Standing: There is no dispute that Respondent is the holder of the original note, and it is the current mortgagee of the property securing the parties' loan agreement. Does Respondent have standing to prosecute this foreclosure action?

III. Right-to-Cure Letter: The parties' mortgage agreement provides that, in the event of a default, Respondent would give notice to Mr. Lanier prior to accelerating the note and that this notice would also make him aware of his right to defend himself in foreclosure proceedings. Did the circuit court correctly conclude that Respondent satisfied this contractual term by sending Mr. Lanier a letter that indicated that he was in default, gave him an opportunity to cure the default, and explained that he had a "right to refute the existence of a default" and to offer "any other defense you may have to acceleration and sale"?

## STATEMENT OF THE CASE

This case involves the foreclosure of a note that was entered between Wells Fargo Bank, N.A., and Michael Lanier on August 31, 2005, in the principal sum of $157,651 to purchase real estate in Spartanburg County. (Initial Interest Note at 1; R. p. ___.) To secure that loan, both Mr. Lanier and his wife Lori executed a mortgage covering the purchased property. (Mortgage; R. p. ___.) Wells Fargo Bank subsequently assigned its mortgage to Respondent and indorsed the note to Respondent. (Assignment of Mortgage; R. p. ___; Initial Interest Note at 4; R. p. ___.)

On March 30, 2011, Respondent commenced this litigation to foreclose on the note and mortgage after Mr. Lanier became delinquent on the loan. (Compl.; R. p. ___.) The Laniers answered the Complaint by admitting that the mortgage is a purchase money first lien on their property and that Mr. Lanier has "not made all payments on the subject note." (Ans. at 1; R. p. ___.)

On May 27, 2014, Respondent moved for summary judgment. In support of its motion, Respondent filed and served the following documents: (1) Notice of Motion and Motion for Summary Judgment; (2) Affidavit of Attorneys' Fees; (3) titles to the real estate at issue in the case; (4) the loan agreement; (5) the mortgage; (6) the planned unit development rider accompanying the mortgage; (7) the assignment of the mortgage from Wells Fargo Bank to Respondent; (8) Affidavit of Verified Statement of Account; (9) a record of payments Mr. Lanier has made on the account; (10) a letter noticing the delinquency of the account and providing Mr. Lanier an opportunity to cure the delinquency; and (11) a records custodian affidavit authenticating these materials. (Motion for Summary Judgment and Accompanying Materials; R. pp. ___–___.) On June

13, 2014, Respondent filed a second affidavit updating the amount owed on the loan. (Aff. Henry Clarke (June 6, 2014); R. p. ___.)

On August 6, 2014, Judge Cooper held a hearing on Respondent's dispositive motion. During that hearing, Respondent presented the circuit court with the original note, which was indorsed to Respondent. (Hr'g Tr. 2:21–23 (Aug. 6, 2014); R. p. ___.) The Laniers conceded during the hearing that Respondent's possession of the original note "as it stands today would give them standing" to foreclose. (*Id.* 7:24; R. p. ___.)

Judge Cooper orally granted Respondent's motion during the August 6th hearing. (*Id.* 9:8; R. p. ___.) He memorialized his ruling in a written judgment, which was filed on August 11, 2014. (Judgment of Foreclosure and Sale; R. p. ___.)

On August 17, 2014, the Laniers sought reconsideration of Judge Cooper's summary judgment ruling on three points:

- Whether the circuit court should have considered affidavits supporting Respondent's dispositive motion;
- Whether Respondent had standing to foreclose the note and mortgage at the time the lawsuit was filed; and
- Whether the right-to-cure letter was satisfied the terms of the loan agreement.

(Mot. for Reconsideration; R. p. ___.) Judge Cooper heard arguments on September 23, 2014, and orally denied the motion at the close of the hearing. (Hr'g Tr. 13:12–13 (Sept. 23, 2014); R. p. ___.)

On September 26, 2014, Judge Cooper filed an order denying the Laniers' motion to reconsider. (Order Denying Mot. to Reconsider; R. p. ___.) This appeal followed.

## STANDARD OF REVIEW

This Court reviews grants of summary judgment under the same standard that is applied at the trial level. *Foster v. Foster*, 384 S.C. 380, 383, 682 S.E.2d 312, 313 (Ct. App. 2009). Summary judgment should be issued when the evidence collectively shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. Courts agree that "[t]he purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

## ARGUMENTS AND AUTHORITIES

There is no dispute that at the time Judge Cooper entered judgment in Respondent's favor, Respondent was both the holder of the original note and the mortgagee. Nor does Mr. Lanier dispute that he was several years and thousands of dollars delinquent on repaying his loan.

Despite the parties' agreement about the case's only dispositive facts, the Laniers argue that summary judgment was improper. Their arguments, however, are based on nothing more than their own speculation; they did not produce any actual evidence to the trial court that would rebut entry of summary judgment, nor have they identified any law on appeal to suggest that Judge Cooper's ruling was incorrect in any way. Accordingly, Respondent respectfully submits that summary judgment should be affirmed.

### I. Judge Cooper rightly accepted and considered Respondent's affidavits regarding Mr. Lanier's account.

The Laniers' first challenge to Judge Cooper's decision arises from two affidavits that Respondent submitted regarding the amount owed on this loan. According to the Laniers, these affidavits were not sufficiently specific about indorsements on the loan

agreement itself, so the Laniers speculate that the affidavits must not have been based on the witnesses' personal knowledge and should not have been considered by the circuit court, even for information unrelated to the indorsements. (Br. of Appellants at 9.)

There are several problems with the Laniers' appellate argument. Principally, Judge Cooper indicated that he was relying on those affidavits only for purposes of establishing the amount owed to Respondent, not for information regarding indorsements on the note. But the Laniers never objected to these passages in the affidavits until after the court issued its summary judgment decision. (Hr'g Tr. 12:14–20 (Sept. 23, 2014); R. p. ___.) Their untimely objection renders this issue unpreserved for review. *See Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.").

Second, Respondent's two affidavits outlined the amounts owed in considerable detail, breaking Mr. Lanier's arrearage into eleven separate line items down to the penny. (Aff. Vivian Lighthall ¶ 4 (Apr. 15, 2014); R. p. ___; Aff. Henry Clarke ¶ 4 (June 6, 2014); R. p. ___.) Importantly, each affiant testified that these figures were derived from "my review of Wells Fargo business records." (*Id.*) This testimony unquestionably meets Rule 56(e)'s requirement that any affidavit supporting summary judgment must "be made on personal knowledge," and Judge Cooper properly relied on this sworn testimony in granting summary judgment.[1]

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[1] This Court recently held that a circuit court's consideration or striking of an affidavit is reviewed for an abuse of discretion when there are allegations that an affidavit is a sham affidavit. *McMaster v. Dewitt*, 411 S.C. 138, ___, 767 S.E.2d 451, 454 (Ct. App. 2014). The Laniers have never argued that Respondent's affidavits are sham affidavits, making Judge Cooper's reliance on Respondent's evidence here unimpeachable.

Third, the Laniers never disputed the amount owed during summary judgment proceedings. Even on appeal, they do not argue that there is anything inaccurate about Respondent's accounting. Given the parties' agreement on the amount owed, the Laniers' speculation about other portions of Respondent's affidavits that did not form the basis of the circuit court's ruling is irrelevant. *See Bank of Am., N.A. v. Draper*, 405 S.C. 214, 224, 746 S.E.2d 478, 483 (Ct. App. 2013) (holding that the failure to rebut portions of an affidavit that formed the basis of summary judgment precludes reversal on those unchallenged sections, even if other portions of the affidavit are challenged).

Fourth and finally, if the Laniers genuinely believed that Respondent's affidavits were defective, they could have—but did not—use any of the avenues that Rule 56 creates for collaterally attacking an affidavit. For instance, Rule 56(e) indicates that affidavits can be "opposed by depositions, answers to interrogatories, or further affidavits," but the Laniers did not utilize any of these discovery techniques despite a two and a half month delay between Respondent's service of its summary judgment motion and the hearing on that motion. Likewise, Rule 56(f) provides that a party may avoid summary judgment by seeking additional discovery, but the Laniers did not submit a Rule 56(f) affidavit. Lastly, the Laniers could have filed a motion to strike Respondent's affidavits, but they did not do that, either.

The Laniers' failure to undertake any of these processes to protect their interest on this issue underscores the fact that their appellate challenge to Respondent's affidavits is misguided and cannot serve as a basis for reversing judgment. At bottom, there is no dispute about the amount owed under the parties' loan agreement, and the Court should affirm Judge Cooper's reliance on Respondent's evidence on this undisputed point.

## II. Respondent is the real party in interest to foreclose on the note and mortgage.

The Laniers' second appellate argument is that summary judgment was improper because Respondent did not prove that it was the real party in interest at the time this foreclosure action was commenced. (Br. of Appellants at 11–12.) This argument fails both as a matter of law and as a matter of undisputed fact.

### A. The Laniers waived this argument by not challenging Respondent's standing until over three years after this foreclosure action was filed.

Rule 17(a), SCRCP, states that "[e]very action shall be prosecuted in the name of the real party in interest." Here, Respondent filed this foreclosure action in March 2011 and alleged that it "has the legal right to enforce the negotiable instrument secured by the Mortgage and is the real party in interest as defined by Rule 17(a) of the South Carolina Rules of Civil Procedure." (Compl. ¶ 3; R. p. ___.) In answering the Complaint, the Laniers both admitted and denied this allegation. (*Compare* Ans. ¶ 2 (admitting the allegations of Paragraph 3 of the Complaint); R. p. ___; *with id.* ¶ 3 (denying the allegations of Paragraph 3 of the Complaint); R. p. ___.)

Other than this ambiguous responsive pleading, the Laniers did not challenge Respondent's standing until summary judgment proceedings in August 2014, over three years after this case was commenced. This significant delay amounts to a waiver of the Laniers' challenge to Respondent's standing. *See, e.g., Bardoon Props., NV v. Eidolon Corp.*, 326 S.C. 166, 169, 485 S.E.2d 371, 373 (1997) ("A challenge to a party's status as real party in interest must be made promptly or the court may conclude the point has been waived."); *Bryson v. Bryson*, 378 S.C. 502, 509–10, 662 S.E.2d 611, 614 (Ct. App. 2008) (holding that a defendant "waived his right to challenge [the plaintiff's] status as the real

party in interest" because he did not make the argument until trial while noting that "[u]nless a party promptly challenges the opposing party's status as a real party in interest, such a challenge is waived").

Because the Laniers waived their ability to challenge Respondent's status as a real party in interest, the Court should reject their appellate arguments on this issue and affirm the circuit court's ruling.[2]

### B. As the holder of the note and assignee of the mortgage, Respondent has standing to prosecute this foreclosure.

In addition to waiving their argument, the Laniers are simply incorrect that the Record contains no proof of Respondent's interest in the foreclosed note and mortgage. As noted above, Respondent expressly alleged in the Complaint that it was the real party in interest and had "the legal right to enforce the negotiable instrument secured by the Mortgage." (Compl. ¶ 3; R. p. ___.) When it came time to prove its case at the summary judgment hearing, Respondent produced both an assignment of the mortgage from Wells Fargo Bank to Respondent (Assignment of Mortgage; R. p. ___); and the original note, which had been indorsed by Wells Fargo Bank to Respondent (Initial Interest Note at 4; R. p. ___; Hr'g Tr. 2:21–23 (Aug. 6, 2014); R. p. ___).

The Laniers did not marshal a single piece of evidence to rebut Respondent's assertion that it is the real party in interest here, either at the trial level or now on appeal. Indeed, South Carolina law is clear that Respondent has standing to prosecute this case.

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[2] The circuit court did not make any rulings as to whether the Laniers waived their argument regarding Respondent's status as a real party in interest. However, the Record is clear that they did waive this argument by remaining silent on the point until after the parties had spent over three years fully litigating this case. Accordingly, Judge Cooper's decision can be affirmed on these additional sustaining grounds. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

*See, e.g.*, S.C. Code Ann. § 36-3-301 (providing that "the holder of the instrument" is "entitled to enforce" the note); *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009) ("A mortgage and a note are separate securities for the same debt, and a mortgagee who has a note and a mortgage to secure a debt has the option to bring an action on the note or to pursue a foreclosure action.").

Even if the Court were to credit the Laniers' argument, it would not change the outcome. Rule 17(a), SCRCP, specifically prohibits dismissal of a case "until a reasonable time has been allowed, after objection," for a real-party-in-interest defect to be cured. Assuming *arguendo* that the Laniers are correct as a factual matter that Respondent did not have standing at the time the case was filed, any such defect would have been cured by Respondent's presentation at the summary judgment hearing of the original note, which was indorsed to Respondent.[3] *See, e.g.*, *Miller v. Longacre*, Case No. 98-2010, 1999 U.S. App. LEXIS 1142, at *2–5 (4th Cir. Jan. 28, 1999) (reversing the trial court's dismissal of a quiet-title action because the plaintiff, who did not have an ownership stake in property at the time he filed suit, had "cure[d] the problem" by obtaining an ownership stake during the litigation, as provided under Rule 17(a)).[4] Accordingly, Judge Cooper's decision should be affirmed.

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[3] To be clear, there is nothing in the Record to support the Laniers' argument on this issue, nor is there any evidence to suggest that Respondent was not a real party in interest at any point in this litigation.

[4] Rule 17(a), SCRCP, is based on and contains functionally-identical language to its federal counterpart. *See* Rule 17, SCRCP, notes ("This Rule 17(a) is current Federal Rule 17(a)."). As such, the Court may rely on federal case law when interpreting the State's version of Rule 17(a). *See Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) ("Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure.").

## III. Judge Cooper correctly held that the right-to-cure letter complied with the parties' mortgage.

Finally, the Laniers seek to undo summary judgment by arguing that Respondent did not provide them with "the notice expressly required by the mortgage." (Br. of Appellants at 13.) In their view, the fact that the right-to-cure letter was not cut-and-pasted from the mortgage renders Respondent's entire case invalid. This argument is fundamentally flawed, as Respondent ***did*** provide Mr. Lanier with a letter that complied with the notice provision of the mortgage, just as Judge Cooper concluded.

Section 22 of the mortgage states that before accelerating the note in the event of a default, Respondent would provide Mr. Lanier with written notice of the default, steps to take and a deadline to cure the default, and a warning that the failure to cure the default may result in foreclosure proceedings. (Mortgage at 13; R. p. ___.) The notice was also to make Mr. Lanier aware of his rights to reinstate the loan after acceleration and to present legal and factual defenses in foreclosure proceedings. (*Id.*) Because there is nothing ambiguous about this provision, the Court is to enforce it according to its plain terms. *Lee v. Univ. of S.C.*, 407 S.C. 512, 518, 757 S.E.2d 394, 397 (2014).

After Mr. Lanier defaulted on his loan, Respondent's servicer sent Mr. Lanier a right-to-cure letter that matched the elements listed in the parties' mortgage. It began: "Our records indicate that your loan is in default." (Letter to Michael D. Lanier (Dec. 13, 2009); R. p. ___.) It then identified how Mr. Lanier could cure the default, gave him a deadline to cure the default, and stated that failure to cure the default would result in acceleration of the debt and "terminat[ion of] your ownership in the property by a foreclosure proceeding or other action to seize the home or pursue any other remedy permitted under the terms of your Mortgage." (*Id.*) Finally, the letter concluded by

reminding Mr. Lanier that he has the "right to refute the existence of a default" and to offer "any other defense you may have to acceleration and sale." (*Id.*)

This right-to-cure letter completely tracked the notice provision of the mortgage. To challenge this unavoidable conclusion, the Laniers argue that Section 22 of the mortgage required notice of the borrower's right to defend himself against "foreclosure," but the right-to-cure letter stated that Mr. Lanier could defend himself against a "sale." This is a distinction without a difference, as the ultimate goal of a "foreclosure" suit is the "sale" of the mortgaged property. Indeed, Respondent's Complaint—captioned "Foreclosure of Real Estate Mortgage"—specifically requests that the circuit court "sell the mortgaged premises." (Compl. ¶ "Wherefore"(5); R. p. ___.) Judge Cooper rightly held that the right-to-cure letter, at a minimum, substantially complied with the mortgage's "notice" provision. (Order Denying Mot. to Reconsider at 6; R. p. ___.)

Likewise, the right-to-cure letter served its purpose by notifying Mr. Lanier that he could defend himself against foreclosure litigation, and he surely did. Despite there not being a single dispositive fact in dispute, this straightforward case is now four years old. The Laniers retained an attorney to defend this case, asserted affirmative defenses, fully discovered this case, and have now appealed the circuit court's judgment.

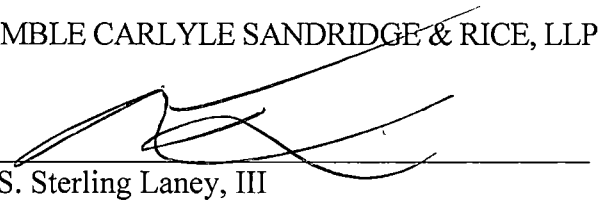
Given this significant exercise of the very rights identified in the notice letter, Judge Cooper's determination that Respondent substantially complied with the terms of the mortgage is unassailable. *See, e.g.*, *Clardy v. Bodolosky*, 383 S.C. 418, 427, 679 S.E.2d 527, 531 (Ct. App. 2009) (holding that a party substantially complies with the terms of an agreement when the adverse party receives "substantially all that he bargained for"). The circuit court's ruling on this final issue should be affirmed.

## CONCLUSION

The Laniers have not identified any legal or factual defect in the circuit court's grant of summary judgment in Respondent's favor. Indeed, there is no dispute that Respondent is the holder of the note and the current mortgagee, and that Mr. Lanier has not made payments on his loan agreement in several years. Accordingly, Respondent requests that the Court affirm Judge Cooper's rulings below and allow this foreclosure to proceed to conclusion.

Respectfully submitted,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP

By: 

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PROOF OF SERVICE

I, the undersigned Legal Secretary of the law offices of Womble Carlyle Sandridge & Rice LLP, Attorneys for Respondent, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by mailing a copy of the same, postage prepaid, to the following address(es):

Pleading: Initial Brief of Respondent

Parties Served: J. Edwin McDonnell
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March 30, 2015



The South Carolina Court of Appeals
The Honorable Jenny Abbott Kitchings
Post Office Box 11629
Columbia, SC 29211

Re: US Bank National Association v. Michael Lanier
Appellate Case No. 2014-002248

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Initial Brief of Respondent. Please file the original and return a file-stamped copy to our courier.

With kind regards, I remain

Very truly yours,

M. Todd Carroll

Enclosures
cc: J. Edwin McDonnell