STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Trial Court Case No. 2010-CP-10-10122
Appellate Case No. 2015-0799

US Bank National Association, as Trustee for the holders of Bear Sterns Arm Trust, Mortgage Pass-Through Certificates, Series 2005-4, Respondent,

v.

Anne B. Glassburn; Donivon D. Glassburn; The Bank of New York Mellon f/k/a The Bank of New York Indenture Trustee on behalf of the Note Holders, CWHEQ Revolving Home Equity Loan Trust Series 2007-A Trust; Tidelands Bank; Atlantic Bank and Trust, Defendants,

Of Whom

Anne B. Glassburn and Donivon D. Glassburn are Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

David K. Haller, Esquire
Haller Law Firm, PC
115 River Landing Drive, Suite 102
Charleston, SC 29492
843-224-7860
dhaller@hallerlawfirm.com

Amanda Reece
Reece Law Firm, LLC
217 Lucas Street Unit J
Mount Pleasant, SC 29464
amanda@reecelawfirm.com
843-209-9830

OTHER COUNSEL OF RECORD

S. Sterling Laney, III
Womble, Carlyle, Sandridge & Rice, LLP
550 South Main Street, Suite 400
Greenville, SC 29601
Attorney for the Respondent

Samuel H. Altman, Esq.
Derfner, Altman, & Wilborn, LLC
575 King Street, Suite B
Charleston, SC 29403

Scott B. Umstead, Esq.
Scott B. Umstead, PA
4226 Mayfair Street, Suite 100
Myrtle Beach, SC 29577

William T. Dawson, Esq.
5 Exchange Street
Charleston, SC 29402

Table of Contents

Table of Authorities

Statement of Issues on Reply

1. Were the issues of prior breach and unclean hands preserved for appellate review where they were tried below without objection, were raised before and ruled upon by the trial court in its final order, and were preserved and argued in Appellants' Rule 59 motion?

2. Is Respondent entitled to equitable relief because of its unclean hands in the transaction with the Glassburns where it induced the Glassburns to stop making payments on their mortgage loan?

ARGUMENTS

1. THE ISSUES RAISED BY THE APPELLANTS ARE PRESERVED FOR REVIEW BECAUSE THEY WERE TRIED BELOW WITHOUT OBJECTION, WERE RAISED BEFORE AND RULED UPON BY THE TRIAL COURT IN ITS FINAL ORDER, AND WERE PRESERVED AND ARGUED IN APPELLANTS' RULE 59 MOTION.

Contrary to the argument of Respondent, the issues of prior breach and unclean hands have been preserved for appellate review and the case law cited by Respondent supports this holding.[1] An issue is preserved for review when it has been tried, raised, and ruled on by the trial court. "An issue not raised to or ruled on by the trial court is not preserved for appellate review." *Allendale County Bank v. Cadle*, 348 S.C. 367, 559 S.E.2d 342, 345 (Ct. App. 2001) *citing Rock Hill Nat'l Bank v. Honeycutt*, 289 S.C. 98, 104, 344 S.E.2d 875, 879 (Ct.App.1986) ("Because the theory of unclean hands was not pled ***or raised to the trial judge*** it could not be raised on appeal."(emphasis added)). "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." SCRCP Rule 15(b).

While it is true the trial judge denied the Appellants' motion to amend their

[1] Respondent also claims the Appellants' argument relative to its faulty loan modification efforts for the Glassburns' mortgage loan are not preserved. It bases this on a blurb in the trial testimony. Respondent apparently forgets the three separate hearings held by the Master on this point resulting in a detailed order dated June 30, 2014, allowing the case to proceed to trial. Appellants' appeal of this order was dismissed by this Court on the grounds that it was not a "final judgment." See Order dated August 21, 2014 in Appellate Case No. 2014-001552.

complaint that would have added these affirmative defenses, the issues were tried below. Both witnesses testified extensively regarding Wells Fargo's instructions to the Glassburns to stop making payments so the mortgage loan could be modified. Tr. of December 2, 2014 trial, p. 23, ln. 23- p. 24, ln. 19; p. 30, ln. 19- p. 39, ln.19. Not once at trial did Respondent's counsel object to this testimony as irrelevant, a surprise, or not raised by the pleadings. Thereafter, the trial judge specifically ruled that, while he found Donivon Glassburn credible and had heard many other mortgagors make the same assertion, that testimony alone was insufficient to meet the burden of proof for unclean hands or prior breach. Judgment of Foreclosure and Sale dated January 30, 2015 at 2-3. Subsequently, the Glassburns filed a motion pursuant to Rule 59, SCRCP, and further argued the facts and law of prior breach and unclean hands to the trial. Glassburn Defendants' Motion for New Trial or to Alter or Amend at 1-2. The trial court denied the motion, but added, "I think it's a good argument. I think you need to take that issue up. Okay? I wish you luck with that one." Tr. of March 13, 2015 hearing, p. 11, ln. 24- p. 12, ln. 1.

If anyone did not preserve their objection properly, it was Respondent, who allowed all of this to come into evidence without objection and even cross-examined the witnesses on this point. Because unclean hands and prior breach were raised before the Master and ruled on by him, the issues are preserved.

2. RESPONDENT IS NOT ENTITLED TO EQUITABLE RELIEF BECAUSE OF ITS UNCLEAN HANDS IN THE TRANSACTION WITH THE GLASSBURNS.

Apparently, from a reading of Respondent's brief, it has forgotten the relief it sought: to foreclose a mortgage signed by both Anne and Donivon Glassburn to take their family home. Trial Ex. 3. While Donivon Glassburn did not sign the note, he provided the security and is an intricate part of the overall transaction. He will lose as much as Anne Donivon—their family home. Respondent's continued attempts to cast Anne Donivon as someone who did something wrong in the face of the economic crisis is a further example of its ongoing bad faith in this matter.[2]

Although Respondent apparently argues that the Glassburns are making up the instruction from its agent to stop making payments on the loan, the record and Respondent's pattern of conduct supports such a factual finding. First, it is important to note that the Master ***did not find*** that the conversation Mr. Glassburn testified to did not occur. Rather, he noted that, "The findings that I made, and the story that Mr. Donivon Glassburn told is one that this Court hears all the time." Tr.

[2] Respondent cites *Moon v. Jordan*, 301 S.C. 161, 390 S.E.2d 488 (Ct. App. 1990) for the proposition that the doctrine of prior breach is not available to Appellants because of the Respondent's instruction to stop making payments. *Moon* actually supports Appellants' argument. "Generally, if a party by his contract charges himself with an obligation possible to be performed, he must make it good ***unless its performance is rendered impossible by*** an act of God, the law, or ***other party***. Subjective impossibility, possibility which is personal to the promisor and does not inhere in the nature of the act to be performed, does not excuse nonperformance of a contractual obligation. " *Moon* at 490. Respondent's instruction to stop making payment is the exact example of the excused conduct.

of March 13, 2015 hearing at p. 11, ln. 11-13. Mr. Glassburn testified from contemporaneously made notes. Tr. of December 2, 2014 hearing, p. 44, ln. 17- p. 45, ln. 1. While it is true this Court is entitled to a *de novo* review of the record, it does not, as the Respondent notes, "require that the Court disregard the trial court's findings, as the judge is 'in a better position' to weigh credibility and assess the testimony." *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989); Respondents' Brief at 5. The Master's finding that Mr. Glassburn was credible and that he heard the same bank conduct from others belies the Respondent's theory that the Glassburns invented the conversation.

Respondent's second theory, that the Glassburns went into default because they could not afford the mortgage payments, is also not supported by the evidence. The Respondent's own records negate this theory. The payment history it entered into evidence shows that the Glassburns made 11 payments of $2,170.00 upon a trial plan being presented and continued to make those trial payments until Wells Fargo unilaterally terminated the plan. Trial Ex 5. The trial plan payment was only $739.38 less than the original payment of $2,909.38. The Glassburns never missed a payment and only stopped when Wells Fargo stopped accepting them. Tr. of December 2, 2014, p. 38, ln. 25- p.39, ln. 6. These figures further support Mr. Glassburn's testimony that making the payment would have been

close, but they would have done it to keep their family home.[3] The only reason the Glassburns ever stopped making payment is because Respondent's agent told them to or, in the case of the trial plan, it refused to accept payment from the Glassburns. The Glassburns wanted to keep their home and it is because of Respondent's inequitable conduct that they are in this court seeking further relief.

Respondent's third theory on why unclean hands should not apply is because telling the Glassburns to stop making payment is not rational for a bank. This argument is laughable in the face of the substantial litigation and public policy discussion on this topic. Wells Fargo contracted with the United States Secretary of the Treasury to offer loan modifications to individuals in distress:

> In response to rapidly deteriorating financial market conditions in the late summer and early fall of 2008, Congress enacted the Emergency Economic Stabilization Act, P.L. 110–343, 122 Stat. 3765. The centerpiece of the Act was the Troubled Asset Relief Program (TARP), which required the Secretary of the Treasury, among many other duties and powers, to "implement a plan that seeks to maximize assistance for homeowners and ... encourage the servicers of the underlying mortgages ... to take advantage of ... available programs to minimize foreclosures." 12 U.S.C. § 5219(a). Congress also granted the Secretary the authority to "use loan guarantees and credit enhancements to facilitate loan modifications to prevent avoidable foreclosures." *Id.*

---

[3] Mr. Glassburn testified on this point as follows:

Q: Prior to agreeing to the loan modification, were you ready, willing, and able to continue to make the payment that you had been making?
A: Yes. I mean, it was very, very tough financially, but that was our home. We were going to do whatever it took for us to do that.

Tr. of December 2, 2014 hearing, p. 35, ln. 5-11.

> Pursuant to this authority, ***in February 2009 the Secretary set aside up to $50 billion of TARP funds to induce lenders to refinance mortgages with more favorable interest rates and thereby allow homeowners to avoid foreclosure.*** The Secretary negotiated Servicer Participation Agreements (SPAs) with dozens of home loan servicers, ***including Wells Fargo.*** Under the terms of the SPAs, servicers agreed to identify homeowners who were in default or would likely soon be in default on their mortgage payments, and to modify the loans of those eligible under the program.

Wingod v. Wells Fargo Bank, N.A., 673 F.3d 547 (7th Cir. 2012)(emphasis added) *see also Corvello v. Wells Fargo Bank, N.A.*, 728 F.3d 878 (9th Cir. 2013).[4] Wells Fargo received ***Twenty-Five Billion ($25,000,000.00) Dollars*** in taxpayer funds from TARP to keep afloat on the condition it offer loan modifications and received more money with more modifications. http://www.cbsnews.com/news/following-the-bailout-money-to-wells-fargo/ (last checked October 15, 2015).[5] All those zeros—and the conditions that came with it-- looked pretty rational and of self-interest to Wells Fargo when it was failing in 2008. Respondent's argument that it would never rationally tell a borrower to default is completely disingenuous.

---

[4] Both the United States Seventh Circuit Court of Appeals and the Ninth Circuit Court of Appeal in *Wingod* and *Corvello*, respectively, ordered Wells Fargo to modify loans such as the Glassburns when, as is the case here, the borrower fully completed a Trial Payment Plan. The Glassburns completed the program in 2011, until Wells Fargo stopped accepting payments. The Master refused to hear any arguments on the failed 2010 modification, including the unfounded claim that the Glassburns failed to submit all documents. Had it, the Glassburns could have asserted that, by virtue of these orders, Wells Fargo is bound to modify the Glassburn loan. Accordingly, as an alternative to the other relief requested by the Glassburns, the court should remand for review of the 2010 modification.

[5] According to this article, Wells Fargo used half of these funds to purchase Wachovia and make it the second largest bank in the United States.

Moreover, a United States District Court judge issued an injunction against Wells Fargo for continuing the exact same conduct it claims did not happen here. "[Wells Fargo] shall not instruct, advise or recommend that borrowers go into default in order to qualify for loss mitigation relief." *United States v. Bank of America*, et al, Case 1:12-cv-00361-RMC at A-29.[6] Not only were conservations such as those testified to by Mr. Glassburn occurring, they were so common place and so unfair that a court enjoined them from continuing. It's sad, but not unexpected, that Respondent would run from its own behavior here.

Last, Respondent claims that unclean hands does not apply because the Glassburns cannot show any prejudice by the Respondent's actions of instructing the Glassburns to stop making payments. Appellants can only state how ridiculous this argument is bluntly: *there is an order from a court allowing the sale of their home to pay a debt the Glassburn were otherwise ready, willing, and able to pay.* If losing your home is not prejudicial, then equity has no purpose.

There can be no finding other than that Respondent's agent instructed Donivon Glassburn to stop making payments and that this instruction induced him to do so. But for that instruction, the loan would not have gone into "default" and

[6] This case is known as the National Mortgage Settlement. Respondent argues that the Glassburns assertion of rights under this court order constituted a surprise below. Essentially, Respondent argues that it was surprised that a court order entered against it would actually be enforced. Wells Fargo has shown a pattern of disdain for the judicial system.

this foreclosure would never have occurred. Based on this, the court should reverse the Master and find the Respondent acted with unclean hands.

CONCLUSION

For the reasons stated herein and in their initial brief, the Glassburns pray the Judgment of Foreclosure and Sale be reversed and judgment entered in favor of them returning the parties to the place where they were at the time of Respondent's breach. Alternatively, the Appellants pray the Order dated June 14, 2014 be reversed and the 2010 modification be determined the loan agreement between the parties. The appellants further pray for the relief requested in their briefs and for such other relief as the court deems just, prudent, and proper.

HALLER LAW FIRM, P.C.

David K. Haller, Esquire
115 River Landing Dr., Ste 102
Charleston, SC 29492
843-224-7860
dhaller@hallerlawfirm.com

Amanda Reece
Reece Law Firm, LLC
217 Lucas Street Unit J
Mount Pleasant, SC 29464

15th day of October, 2015

Charleston, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Case No. 2010-CP-10-10122

US Bank National Association, as Trustee for the holders of Bear Sterns Arm Trust, Mortgage Pass-Through Certificates, Series 2005-4, Respondent,

v.

Anne B. Glassburn; Donivon D. Glassburn; The Bank of New York Mellon f/k/a The Bank of New York Indenture Trustee on behalf of the Note Holders, CWHEQ Revolving Home Equity Loan Trust Series 2007-A Trust; Tidelands Bank; Atlantic Bank and Trust, Defendants,

Of Whom

Anne B. Glassburn and Donivon D. Glassburn are Appellants.

PROOF OF SERVICE

I affirm that I served the forgoing Initial Reply Brief on counsel listed below at the addressed connected with their name by placing the same in the U.S. Mail, postage pre-paid, October 15, 2015.

HALLER LAW FIRM, P.C.

David K. Haller, Esquire
115 River Landing Drive, Suite 102
Charleston, SC 29492
843-849-1384
dhaller@hallerlawfirm.com

Amanda Reece
Reece Law Firm, LLC
217 Lucas Street Unit J
Mount Pleasant, SC 29464
amanda@reecelawfirm.com
843-209-9830

15th day of October, 2015

Charleston, South Carolina

OTHER COUNSEL OF RECORD

S. Sterling Laney, III
Womble, Carlyle, Sandridge & Rice, LLP
550 South Main Street, Suite 400
Greenville, SC 29601
Attorney for the Respondent

Samuel H. Altman, Esq.
Derfner, Altman, & Wilborn, LLC
575 King Street, Suite B
Charleston, SC 29403

Scott B. Umstead, Esq.
Scott B. Umstead, PA

4226 Mayfair Street, Suite 100
Myrtle Beach, SC 29577

William T. Dawson, Esq.
5 Exchange Street
Charleston, SC 29402