

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas Case No. 2011-CP-10-4201
The Honorable Mikell R. Scarborough, Master-In-Equity

SC Court of Appeals

APPELLATE CASE NO. 2013-002807

NATIONSTAR MORTGAGE LLC, Respondent

v.

CARMEN D. SHEPPARD a/k/a CARMEN SHEPPARD a/k/a CARMEN DILLARD
SHEPPARD, ALAN J. SHEPPARD a/k/a ALAN SHEPPARD, TD BANK, NATIONAL
ASSOCIATION, LVNV FUNDING LLC, and DARRELL CREEK PLANTATION
HOMEOWNERS' ASSOCIATION, INC., Defendants,

Of whom CARMEN D. SHEPPARD and ALAN J. SHEPPARD are the Appellants.

FINAL BRIEF OF RESPONDENT NATIONSTAR MORTGAGE LLC

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Pursuant to SCACR 208(b)(2), Respondent Nationstar Mortgage LLC ("Nationstar") submits the following Statement of the Case.

STATEMENT OF THE CASE

On November 17, 2006, Carmen Sheppard ("Appellant") executed a promissory note ("Note") in the amount of \$880,000.00 in favor of American Brokers Conduit. (R. p. 14, lines 12-15.) In order to secure the Note, Appellant executed a mortgage ("Mortgage") on real property located at 462 Commonwealth Road, Mt. Pleasant, SC 29466 (the "Property"), and delivered that Mortgage to Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for American Brokers Conduit.¹ (R. p. 14, lines 16-21.) The Mortgage was recorded in the Office of the Register of Deeds for Charleston County in Book 608 at Page 399. (R. p. 14, lines 9-11.) The Note and Mortgage were subsequently assigned to Aurora Loan Servicing, LLC ("Aurora") on November 5, 2009 and then to Nationstar on October 11, 2012. (R. p. 14, lines 22-24.) The Appellant did not make the required payments under the Note. (R. p. 14, lines 28-30.) As of November 19, 2012, Appellant owed \$1,175,196.92 in principal, interest, charges and fees on the Note.²

In light of Appellant's default, this foreclosure action was instituted by Nationstar's predecessor in interest, Aurora³ on June 14, 2011. (R. pp. 79-86.) Aurora filed a Notice of Foreclosure Intervention pursuant to S.C. Supreme Court Administrative Order 2011-05-02-01 ("Administrative Order"), with its Complaint. (R. p. 73.) Appellant and Defendant Alan Sheppard (collectively the "Sheppards"), filed an Answer to the Complaint on July 13, 2011. (R. pp. 93-132.) On June 12, 2012, more than a year after the notice of foreclosure intervention was

¹ Defendant Alan Sheppard is not a party to the Note or Mortgage.

² The Property was sold at a later foreclosure sale and the deficiency waived. (R. p. 72.)

³ Nationstar completed its acquisition of all servicing assets of Aurora Bank FSB and its subsidiary, Aurora Loan Services, LLC on June 29, 2012.

filed, Aurora filed a Certification of Mortgage Non-Compliance indicating that the Sheppards failed, refused or voluntarily elected not to participate in any foreclosure intervention process. (R. pp. 205-206.)

An order substituting Nationstar as Plaintiff in place of Aurora was entered on November 29, 2012 amending the caption of the foreclosure action to show Nationstar Mortgage LLC as the proper plaintiff and lienholder. (R. pp. 7-8.) Nationstar filed its Motion for Summary Judgment on June 5, 2013.⁴ (R. p. 143.) Nationstar served a Notice of Hearing regarding its Motion for Summary Judgment on August 16, 2013, giving notice that Nationstar's Motion for Summary Judgment would be heard September 6, 2013. The Honorable Mikell R. Scarborough orally granted summary judgment in favor of Nationstar on September 6, 2013.⁵ (R. p. 13.) A second hearing on Nationstar's Motion for Summary Judgment was held on October 2, 2013, in order to allow Nationstar to update its judgment figures. (R. p. 13.) The Honorable Mikell R. Scarborough signed the final Order and Judgment of Foreclosure and Sale ("Summary Judgment Order") in favor of Nationstar on November 19, 2013, and that order was subsequently filed on November 25, 2013. (R. pp. 10-21.) On December 23, 2013, the Sheppards filed and served a notice of appeal of the Summary Judgment Order.⁶ (R. pp. 156-164.) The Property was sold at foreclosure on January 7, 2014. (R. p. 72.) The Sheppards attended the January 7, 2014, foreclosure sale and made a motion with Master-In-Equity, Judge Scarborough, to stay that sale, which Judge Scarborough denied. (R. p. 70.) The Sheppards made a motion to stay their eviction with this Court on August 19, 2014, which has also been denied.

⁴ The caption of Plaintiff's Motion for Summary Judgment identifies "Aurora Loan Services, LLC" as the Plaintiff, however, Plaintiff's motion for summary judgment was filed after the November 29, 2012 order substituting Nationstar Mortgage LLC as the correct plaintiff and lienholder. The misidentification is a mere scrivener's error.

⁵ The order was not reduced to writing and signed by Judge Scarborough until November 19, 2014 and was later filed on November 25, 2014.

⁶ The Sheppards subsequently filed an amended notice of appeal on February 7, 2014, removing Alan Sheppard as an appellant and identifying only Carmen Sheppard as the appellant. Accordingly, Respondent addresses this appeal as being made only by Appellant Carmen Sheppard.

Appellant Carmen Sheppard now attempts to raise five (5) issues on appeal:⁷ (1) that the Master-In-Equity erred in granting summary judgment in light of alleged statements made by Defendant Alan Sheppard at the summary judgment hearing; (2) that the Master-In-Equity erred in moving the foreclosure timeline up after Appellant Alan Sheppard represented that arrangements for a loan modification had been made; (3) that the Master-In-Equity erred by allowing Nationstar to update its judgment figures in light of Appellant Alan Sheppard's alleged loan modification arrangement; (4) that the Master-In-Equity erred in designating the foreclosure proceeding as no longer subject to S.C. Administrative Order 2011-05-02-01; and (5) that the Master-In-Equity erred by "taking the Writ filed with the Clerk of Court...into his own hands."

This Court should affirm the Summary Judgment Order and dismiss this appeal for the following four reasons: (1) Appellant has failed to perfect her appeal; (2) this Court lacks jurisdiction to consider Appellant's issues on appeal; (3) Appellant has failed to preserve her issues for appeal; and (4) the Master-In-Equity properly found that Appellant's loan was no longer subject to S.C. Administrative Order 2011-05-02-01.

ARGUMENT

I. Appellant has failed to perfect her appeal.

Appellant has failed to comply with the South Carolina Appellate Court Rules by failing to timely order a transcript of the proceedings from which she appeals. Accordingly, this Court should dismiss Appellant's appeal and affirm the Summary Judgment Order.

Rule 207 of the South Carolina Appellate Court Rules requires that Appellant "shall, within the time provided for ordering the transcript, make satisfactory arrangements (including agreement regarding payment for the transcript), in writing with the court reporter for furnishing

⁷ Appellant enumerates a sixth paragraph "VI" in her issues, but this paragraph does not identify any alleged error, or issue for appeal. Therefore, Respondent addresses issues 1 through 5.

the transcript. *See* Rule 207(a)(1), SCACR. The transcript must be ordered within ten (10) days after the notice of appeal is served. *Id.* Furthermore, Appellant has a duty to furnish all correspondence with the court reporter to the parties and this Court. *Id.*

Here, Appellant served her notice of appeal on December 23, 2013, and, therefore, had until January 2, 2014, to order the transcript of the September summary judgment proceeding under Rule 207. Appellant failed to timely order a transcript of the September proceeding. Indeed, Appellant advised this Court on February 7, 2014, that Appellant had ordered the transcript from the foreclosure sale hearing on January 7, 2014, (the “January Hearing,”), but Appellant provided no indication on the status of the transcript from the September 6, 2013, summary judgment hearing (the “September Hearing”), from which Appellant noticed her appeal. (*See* Letter from Appellant filed Feb. 7, 2014.) Appellant subsequently attached a copy of the transcript from the September Hearing to Appellants “Application for Relief,” filed March 26, 2014, but Appellant offered no indication that the transcript was timely ordered. Accordingly, Appellant has failed to comply with the Rule 207 by failing to timely order the transcript of the September Hearing and/or failing to furnish correspondence regarding the September Hearing to counsel and the Court. Therefore, this appeal should be dismissed and the Summary Judgment Order affirmed.

II. This Court lacks jurisdiction to consider Appellant’s issues.

The issues raised by Appellant in her initial brief were issues raised at the January Hearing, not the September Hearing from which Appellant noticed her appeal. Because Appellant has failed to notice an appeal from the January Hearing, this court lacks jurisdiction to consider Appellant’s issues.

Under South Carolina law, a party intending to appeal an order entered by a Master-In-Equity must serve notice of their appeal within thirty (30) days after receipt of that order. *Rule 203, SCACR*. Indeed, “The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004).

Here, Appellant’s issues 1 through 4 are predicated on the contention that the Master-In-Equity erred by ruling that “this foreclosure proceeding was ‘[n]o longer subject to the SCSC Administrative Order 2011-05-02-01,’” in light of alleged statements by Defendant Alan Sheppard regarding loan modification “arrangement” with Nationstar. (Appellant’s initial brief pp. 1-2) Further, Appellant’s fifth issue is related to the Master-In-Equity’s denial of an “Affidavit and Writ filed with the Clerk of January 6, 2013.”⁸

Appellant’s issues are based on events at the January Hearing. Appellant did not notice an appeal from the January Hearing. Indeed, contrary to the issues presented in this appeal, Appellant’s initial brief shows that Defendant Alan Sheppard’s alleged representations regarding a modification “arrangement” were made with respect to the Sheppards’ Motion to Stay the Foreclosure sale, which was heard and denied at the January Hearing. (R. pp. 196-202.) The transcript from the September Hearing shows that no statements were made by Alan Sheppard or Carmen Sheppard related to any modification arrangement. (R. pp. 165-195.) The January Hearing transcript, however, shows that Defendant Alan Sheppard specifically stated to the Master-In-Equity, that “all we ask is that you let our attorney just deal with [Nationstar]. Let us do a Cash for Keys or something like that. We’d certainly be open to it instead of, you know,

⁸ The Writ and Affidavit were actually filed on January 6, 2014.

just losing our house.” (R. p. 201, lines 18-21.) Thus, the issues raised by Appellant in this appeal were not issues raised at September Hearing, but were instead raised at the January Hearing. Appellant does not appeal the January Hearing and, therefore, this court lacks jurisdiction to consider these issues.

Moreover, and as argued below, when an issue is not raised before the court, it is not preserved for appeal. See *Wilder Corp. v. Wilke*, 330 S.C. 71, 75, 497 S.E.2d 731, 733 (1998). Because the issues raised on this appeal were not raised at the September Hearing, they were not preserved for this appeal.

Furthermore, Appellant’s fifth issue related to the affidavit and writ filed by Appellant could not have possibly been raised at the September Hearing, as Appellant admits to not filing the affidavit and writ until January 6, 2014.

Thus, this Court lacks jurisdiction to consider the issues raised by Appellant on this appeal as Appellant has failed to notice an appeal from any order or judgment related to the January Hearing and the thirty-(30) day time frame for Appellant to appeal any order or judgment entered at the January Hearing has expired. Therefore, this appeal should be dismissed.

III. Appellant did not preserve her issues for appeal.

Assuming, *arguendo*, that Appellant’s issues were raised at the September Hearing, issues 1, 2, 3 and 4 still fail. The statements that Defendant Alan Sheppard allegedly made to the Master-In-Equity at the September Hearing, which Appellant contends should have stayed the foreclosure action, were not ruled on by the Master-In-Equity and, therefore, were not preserved for appeal.

Under South Carolina law, in order to preserve an issue for appeal, the issue must both be raised and ruled upon. *Wilder*, 330 S.C. 71, 75, 497 S.E.2d 731, 733 (1998). Furthermore, if an issue raised by a party is not ruled on by the trial court, then it is not preserved unless a motion to alter or amend is filed under SCRCP 59(e). *South Carolina Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention Group*, 347 S.C. 333 (Ct. App. 2001). Thus, when an issue is not addressed in a trial court's summary judgment order, and the appellant does not bring a motion to alter or amend the judgment pursuant to Rule 59(e), the issues is not preserved. *BMW of North America, LLC v. Complete Auto Recon Services, Inc.*, 399 S.C. 444, 454-455 (Ct. App. 2012). Indeed, even if the issue is discussed by the parties at the summary judgment hearing, if the court does not rule on that issue in its summary judgment order, that issue is not preserved without a Rule 59(e) motion. *Bean v. S. Carolina Cent. R. Co.*, 392 S.C. 532, 559-560 (Ct. App. 2011). In *Bean*, although the parties discussed the possibility of additional discovery at a summary judgment hearing, the circuit court did not rule on Bean's discovery argument in its order granting summary judgment and Bean did not file a Rule 59(e) motion asking the circuit court to rule on the issue of insufficient discovery. *Bean v. S. Carolina Cent. R. Co.*, 392 S.C. 532, 559 (Ct. App. 2011). Therefore, the question of whether summary judgment was proper in light of Bean's desire to complete further discovery was not preserved for review. *Bean v. S. Carolina Cent. R. Co.*, 392 S.C. 532, 559 (Ct. App. 2011).

This same is true here. Even if Appellant's alleged representations were made at the September Hearing, the Master-In-Equity found that Appellant's loan was no longer subject to the Administrative Order based on the Certification of Compliance submitted by Nationstar's counsel. (R. p. 13.) Indeed, the Master-In-Equity did not rule that Nationstar complied with the Administrative Order despite the Sheppards' alleged loan modification arrangement, nor did he

rule that this action should not be stayed in light of the Sheppards' alleged arrangement. (R. p. 13.) Neither the Summary Judgment Order, the transcript of the September Hearing, nor the Certification of Compliance, makes any mention or determination with respect to the whether Appellant's alleged loan modification arrangement should act as a stay on all litigation, as Appellant contends. Therefore, the issues raised on appeal, and based on the alleged modification arrangement were not ruled upon. Thus, because Appellant did not file a Rule 59(e) motion,⁹ those issues were not preserved for review on appeal.

Additionally, Appellant's fourth issue specifically contends that the Master-In-Equity erred by finding the "foreclosure proceeding" was no longer subject to the Administrative Order. However, the Summary Judgment Order clearly states that "the *loan* is no longer subject to the [Administrative Order]." (emphasis added.) Thus, based on a plain reading of the Summary Judgment Order, Appellant's fourth issue was not ruled on at the September Hearing, as the Summary Judgment Order only addresses whether Appellants loan was still subject to the Administrative Order, and not the foreclosure proceeding.

Based on the above, Appellant's first four issues were not preserved for appeal, and the Court should affirm the summary judgment order.

IV. The Master-In-Equity properly found that Appellant's loan was no longer subject to the Administrative Order.

Issues 1, 2, 3 and 4 in Appellant's initial brief fail as the Master-In-Equity did not err in determining that Appellant's loan was no longer subject to the Administrative Order.

The Administrative Order provides that "if within thirty days after having been served with notice of the Mortgagor's rights [to foreclosure intervention], the Mortgagor has failed, refused, or voluntarily elected not to participate in any foreclosure intervention process, the

⁹ Appellant apparently made such a motion prior to the September Hearing, which was denied by the Master In Equity. (R. p. 17, lines 18-22.)

Mortgagee, through its attorney, shall certify that fact to the Court, and the foreclosure action may proceed.” Furthermore, and with respect to loan modifications in particular, the Administrative Order provides that “in the event that the Mortgagor and Mortgagee agree on any loan modification or other loss mitigation plan . . . such Agreement shall be reduced to writing, executed by the Mortgagor and Mortgagee, and served on all parties in the case. Any pending case shall be stayed, and no hearing or foreclosure sale held for 90 days following the entry of any Agreement, unless the Mortgagor shall not comply with the terms of the Agreement.”

Here, the Master-In-Equity found that there was a Certificate of Compliance filed by Nationstar’s counsel certifying that the Sheppards were served with a notice of foreclosure intervention and failed to respond within 30 days. (R. p. 13.) Based on that finding, the Master-In-Equity found that Appellant’s loan was no longer subject to the Administrative Order. *Id.*

Appellant contends, however, that the Sheppards’ alleged modification arrangement should fall within the protection of the Administrative Order and, therefore, the foreclosure action should have been stayed. (Appellants brief, pp. 1-2) Importantly, Appellant does not contend that the Sheppards responded within 30 days to the notice of foreclosure intervention, as required by the Administrative Order, or that the Sheppards have a written and signed loan modification agreement with Nationstar. Appellant is simply mistaken as to the scope of the Administrative Order. The Administrative Order does not allow the court to stay a foreclosure action if mortgagors: (a) have a conversation with their borrower; (b) reach some tentative agreement with their borrower; or (c) enter into any other alternative arrangement with their borrower that does not comply with the Administrative Order. (*See generally*, Administrative Order.) Thus, the Master-In-Equity did not error in finding that Appellant’s loan was no longer

subject to the Administrative Order. Therefore, Appellant's argument fails and the Summary Judgment Order should be affirmed.

V. Appellant's Recusal Argument

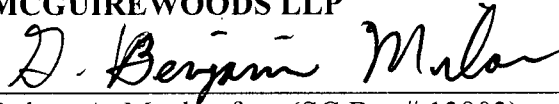
Although not set out as a separate issue, Appellant's brief contends that the Master-In-Equity submitted an "Order to Recuse," and thus had a conflict in Appellant's case. Appellant is referring to an order entered by the Master-In-Equity, Mikell R. Scarborough, relating to Case No.: 09-CP-10-5838 styled *Alan Sheppard, Ed Sheppard, Randy Bates, Eddie White, Dan Radovanick, Individually and as members of Wando River, LLC v. William O. Higgins, Trenholm Walker and Clay McCullough*, pending before the Master-In-Equity in Charleston County. Judge Scarborough disclosed in that matter that he was represented by one of the defendants in a separate federal court matter and recused himself. That order has no effect on this case and this argument should be dismissed by the Court.

CONCLUSION

For the foregoing reasons, the Summary Judgment Order should be affirmed in its entirety.

Respectfully submitted,

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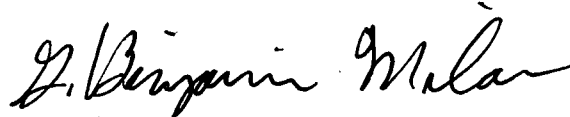
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Of whom CARMEN D. SHEPPARD and ALAN J. SHEPPARD are the Appellants.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

March 10, 2015.



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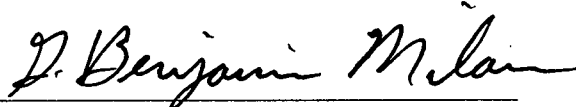
CERTIFICATE OF SERVICE

I hereby certify that the foregoing ***FINAL BRIEF OF RESPONDENT NATIONSTAR MORTGAGE LLC*** has been served upon the parties in this action by mailing a copy thereof, postage prepaid, to the following:

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This the 10th day of March, 2015.



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