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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM YORK COUNTY
Court of Common Pleas

JAN 07 2016

S. Jackson Kimball, III, Master In Equity

SC Court of Appeals

Case No. 2011-CP-46-04278
Court of Appeals No. 2015-001857

Bank of America, N.A., successor by merger to BAC Home Loans
Servicing, LP f/k/a Countrywide Home Loans Servicing, LP.....Respondent.

v.

Michelle Minardi and Ameris Bank, Defendants,
Of whom Michelle Minardi is the.....Appellant.

**RESPONDENT'S MOTION TO STRIKE
MATTER FROM INCLUSION IN THE RECORD ON APPEAL**

Brian A. Calub
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Attorney for Respondent

Date: January 6, 2016

Pursuant to Rule 209(c) of the South Carolina Appellate Court Rules, Respondent Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP (“BANA”), respectfully moves that the Court strike the following from Appellant Michelle Minardi’s (“Minardi”) Designation of Matter to be Included in Record on Appeal: (1) any portion of the transcript of the July 16, 2014 deposition of Michelle Minardi, and related exhibits; and, (2) any portion of the transcript of the April 15, 2015 Rule 30(b)(6) deposition of Diane Deloney. In support of this motion, BANA shows the court the following:

BACKGROUND

In this matter, Minardi appeals from the circuit court’s July 31, 2015 order denying her Rule 59(e) motion to reconsider its May 20, 2015 order denying her motion to bifurcate and remand her counterclaims to the jury roster. On October 28, 2015, Defendant filed with this Court her Designation of Matter to be Included in Record on Appeal (Exhibit A, App. Designation) in which she has listed for inclusion in the record: the transcript of the her deposition testimony and related exhibits (App. Designation ¶ 12); and the transcript of the Rule 30(b)(6) deposition of Diane Deloney, a corporate representative of BANA (App. Designation ¶ 24). Although Minardi refers to her deposition testimony and cites extensively to the deposition testimony of Diane Deloney in her Initial Brief, there is no indication in the trial court record that the testimony from either deposition was introduced into evidence.

On February 18, 2015, Minardi argued her motion for summary judgment before the Master-in-Equity, Judge S. Jackson Kimball. (See Exhibit B, Feb. 18, 2015 Tr. p. 1.) During this hearing, Minardi’s counsel purports to quote from her deposition testimony,

(Feb. 18, 2015 Tr. p. 10, lines 8–18; p. 15, lines 1–4). But, a review of the transcript reveals that no portion of the transcript of the deposition was admitted into evidence. Additionally, no portion of the transcript of Minardi’s deposition was attached to Minardi’s motion for summary judgment. (*See Exhibit C, Def.’s Mot. for Summ. J.*)

On May 29, 2015, Defendant filed her Rule 59(e) motion for reconsideration (Exhibit D, Def. Motion for Reconsideration) and a memorandum of law in support of that motion (Exhibit E, Def. Memorandum of Law). Although Minardi cites to the deposition of Diane Deloney in both her Rule 59(e) motion and her memorandum of law, she did not attach any portion of the transcript of Deloney’s deposition to either filing.

Subsequently, at the June 30, 2015 hearing on Minardi’s Rule 59(e) motion, Minardi’s counsel refers to the deposition of Diane Deloney. (*See Exhibit F, June 30, 2015 Tr. p. 3, lines 17–22; p. 7, lines 6–12*). A review of the transcript of the June 30, 2015 hearing, however, reveals that counsel failed to admit any portion of Deloney’s deposition transcript into evidence.

ARGUMENT

The South Carolina Appellate Court Rules prohibit the inclusion of matter in the record on appeal when the matter was not presented to the lower court. *See SCACR 210(c)* (“The Record shall not, however, include matter which was not presented to the lower court or tribunal.”). As no portions of the deposition transcripts of Minardi or Diane Deloney were admitted into evidence by the lower court, the transcripts cannot be included in the record on appeal. *See id.*

The exclusion of these transcripts from the record is required despite trial counsel’s representations to the lower court of the testimony contained in the depositions.

See Cobb v. Benjamin, 325 S.C. 573, 581 n.2, 482 S.E.2d 589, 593 n.2 (Ct. App. 1997) (concluding that, despite trial counsel's depiction to the lower court of language in a contract that was subsequently struck from the record on appeal, trial counsel's depiction of the purported language of the contract could not be considered by the court); *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 184 (Ct. App. 1986) (holding that although the printed arguments of trial counsel were relevant to the appeal, the lower court properly disregarded the testimony that trial counsel claimed was reflected in depositions when those depositions had not been admitted into evidence (citing *McManus v. Bank of Greenwood*, 171 S.C. 84, 84, 171 S.E. 473, 475 (1933))).

As the Supreme Court instructed in *Henning v. Kaye*, 307 S.C. 436, 437-38, 415 S.E.2d 794, 794-95 (1992):

[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review. . . . Appellant is reminded that the Record on Appeal shall not contain any matter not presented to the trial court.

Because the trial court did not enter any portion of the transcripts of Minardi's deposition or Deloney's deposition into evidence, these documents should not be included in the Record on Appeal.

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SC Court of Appeals

CERTIFICATE OF SERVICE

The undersigned certifies that *Respondent's Motion to Strike Matter From Inclusion in the Record on Appeal* was served on Appellant's counsel by depositing a copy thereof in the United States Mail, first class, postage prepaid, addressed to:

J. Cameron Halford
Halford Niemic & Freeman, LLP
238 Rockmont Drive
Fort Mill, SC 29708

This the 6th day of January, 2016.



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January 6, 2016

VIA FEDERAL EXPRESS
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Jenny Abbott Kitchings
Court of Appeals Clerk of Court
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Columbia, South Carolina 29201

Re: ***Bank of America, N.A. v. Michelle Minardi, et al.***
Court of Appeals No. 2015-001857
Court of Common Pleas No. 2011-CP-46-04278

Dear Ms. Kitchings:


Enclosed please find an original and seven (7) copies of Respondent Bank of America, N.A.'s Motion to Strike Matter from Inclusion in the Record on Appeal regarding the above-captioned matter.

Please file the original and return a conformed copy to our office in the postage-paid envelope provided for your convenience.

Thank you for your kind consideration in this matter. Should you have any questions, please do not hesitate to contact our office.

Sincerely,

MCGUIREWOODS LLP



Brian A. Calub

BAC;jm
Enclosures

cc: J. Cameron Halford, Esq. (w/encl.)

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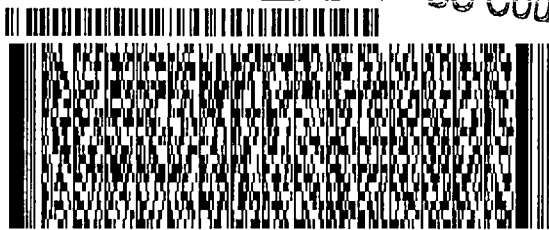
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