THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2015-001508
Case No. 2013-CP-10-6439

Wells Fargo Bank, N.A., Successor by Merger to
Wachovia Bank, National Association ..... Respondent,

v.

Robert L. Freeman .....Appellant.

APPELLANT'S RETURN TO RESPONDENT'S MOTION FOR LEAVE TO FILE A SURREPLY BRIEF

Pursuant to South Carolina Rule of Appellate Procedure 240(e), Appellant, Robert L. Freeman ("Freeman" or "Appellant"), respectfully submits this Return to Respondent Wells Fargo Bank, N.A., Successor by Merger to Wachovia Bank, National Association's ("Respondent" or "the Bank") Motion for Leave to file a Surreply Brief. For the reasons explained herein, the Motion should be denied.

1. Respondent's Motion for Leave to File a Surreply Brief should be denied because the South Carolina Appellate Court Rules do not provide for a surreply brief.

The South Carolina Appellate Court Rules are specific as to the briefs allowed—Appellant's Brief, Respondent's Brief, and Appellant's Reply Brief. See S.C.A.C.R. 208(a)-(b) (discussing the content, service, and filing for Appellant's Brief, Respondent's Brief, and

Appellant's Reply Brief). There is no provision contemplating, much less authorizing, a surreply brief. A motion for leave to file a surreply brief is not one of the motions specifically described in the rules nor one of the motions that are not described but occasionally filed and entertained by the Court. See S.C.A.C.R. 240(a)(nonexclusive list of motions and petitions); see also, Jean Hoefer Toal et al., *Appellate Practice in South Carolina*, 260-265 (2d ed. 2002) (discussing twenty-five common motions and petitions filed in South Carolina Appellate Courts).

The basis for the Bank's Motion is its disagreement with two points made by Appellant in his Reply Brief. To allow a surreply brief in this case would set a precedent for approving surreply briefs in every case. Respondents in every case are going to disagree and find fault with the arguments made by appellants in their reply briefs. The proper method to take issues with a point in a reply brief is oral argument, not through filing a surreply brief. The Bank cites no standard for when a respondent may file a surreply brief, because there is none. A surreply brief is simply not authorized under the applicable rules nor the precedent of this Court and the Supreme Court.

Not only is the Bank's Motion unusual and without any legal support in the rules, statutes, or decisions of this Court, but the requested relief is also unnecessary. As explained below, the Bank's proposed arguments are incorrect and should be disregarded.

2. Respondent's Motion for Leave to File a Surreply Brief should be denied for the additional reason that the argument it seeks to present as to the abrogation of Treadaway v. Smith is incorrect.

The Bank uses its Motion for Leave to File a Surreply Brief to rattle off its substantive arguments rather than simply making a procedural request. In its first argument on the merits Respondent accuses Appellant of misstating this Court's notation of the abrogation of Treadway v. Smith last month in Lyons v. Fidelity National Title Insurance Company. See Lyons v. Fid. Nat'l Title Ins. Co., --- S.C. ---, 2015 S.C. App. LEXIS 246, *11 (S.C. Ct. App. Dec. 2, 2015).

Contrary to Respondent's argument, this Court's opinion in Lyons expressly supports the comment in Appellant's Reply Brief that this Court abrogated at least one of its prior rulings that applied the twenty year statute of limitations in an instance where the evidence did not show the parties clearly intended the contract to be treated as sealed instrument:

> Likewise, in Treadaway v. Smith, this court found the parties to a separation agreement (incorporated into a 1974 Haitian divorce) intended to create a sealed instrument. 325 S.C. 367, 378, 479 S.E.2d 849, 855 (Ct. App. 1996), ***abrogated by*** Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 609 S.E.2d 548 (Ct. App. 2005).

Lyons v. Fid. Nat'l Title Ins. Co., --- S.C. ---, 2015 S.C. App. LEXIS 246, *11 (Ct. App. Dec. 2, 2015) (bold and underling added).

After discussing the Court's ruling in Treadway (and noting that the case was *abrogated by* Carolina Marine Handling), this Court began its discussion of Carolina Marine Handling as follows: "However, in Carolina Marine, this court concluded that the sophisticated parties to a commercial lease agreement did not intend to create a sealed instrument." Id. (citing 363 S.C. at 174, 609 S.E.2d at 551). It is clear from the Court's discussion of the cases, and its specific notation, that Treadway was *abrogated by* Carolina Marine Handling. The judicial determination as to what is necessary to show the parties' clear intent to make an agreement a sealed instrument under South Carolina law has been evolving. As this Court indicated in Carolina Marine Handling, its decision in Treadway has not withstood the test of time.

Respondent argues in its Motion for Leave to File a Surreply that Treadaway v. Smith was abrogated by years earlier by Moseley v. Mosier, 279 S.C. 348, 306 S.E.2d 624 (1983) and that the abrogation was confined to a different issue. However, the Lyons opinion does not mention

Moseley and specifically refers to Carolina Marine Handling as the opinion that abrogated Treadway.[1]

3. Respondent's Motion for Leave to File a Surreply Brief should be denied for the additional reason that Respondent is incorrect in its argument that Appellant introduced an unpreserved argument in his Reply Brief.

Respondent included nine pages of arguments in its Brief on additional alternative grounds for sustaining the lower court's order granting partial summary judgment to the Bank on the Appellant's defense of limitations even though the lower court did not rule on those separate arguments. **(Res. Brief, 19-28).** These nine pages of argument went well beyond additional affirming grounds for the application of the twenty-year statute of limitations. Instead, the Bank included arguments as to why the Bank believes it would be entitled to summary judgment as to Appellant's limitations defense even if the three-year statute of limitations governed.[2]

Essentially in its motion, just as it did in its Brief, the Bank impermissibly seeks summary judgment from this Court on an issue not ruled upon by the lower court. See **(App. Reply Brief, 13-14).** One of these arguments by the Bank is that each of its causes of action did not accrue until the last payment became due regardless of earlier defaults in the monthly payments. See **(Res. Brief, 26-28).** The Bank relies on cases involving installment contracts, but none the cases cited by the Bank involved the type of agreements at issue in this case. Here, the promissory notes had all reached maturity, become payable in full, but had their due dates extended by modification

[1] The Court in Carolina Marine Handling mentioned the Moseley case in a footnote. See Carolina Marine Handling, at 173, 609 S.E.2d at 551, n. 2. However, the Lyons opinion does not cite to the footnote from Carolina Marine Handling, Moseley; or the issue ruled upon in Moseley, instead the Lyons opinion cites to the entire Carolina Marine Handling opinion and states that it abrogated the ruling in Treadway.

[2] The lower court ruled that the applicable statute of limitations in this case is twenty years. **(Order, pp. 8, 10).**

agreements that required monthly interest-only payments for a little over a year. Additionally unlike the contracts in the cases cited by the Bank, the guaranties in question provided that upon the default of any payment by the borrower, the guarantor was liable for the entire amount due. The operative agreements do not come close to coming within the category of installment contracts in the cases cited by the Bank in its Brief. See **(App. Reply Brief, 13-14).**

Putting aside that the Bank is wrong on the substance of its argument, the principles of issue preservation do not apply where the lower court never ruled on the argument advanced by the Bank. The lower court ruled on the application of the twenty-year statute of limitations and did not reach Respondent's arguments as to the three-year statute of limitations that included its argument that promissory notes, modification agreements, and unconditional guaranties constituted installment contracts. The Court should deny the Bank's Motion because Appellant's argument on whether the agreements are installment contracts for purposes of the three-year statute of limitations is not an unpreserved ground for Appellant's appeal, but, rather, an argument opposing Respondent's procedurally improper request for partial summary judgment on an issue than was not ruled upon by the lower court.

CONCLUSION

For the reasons stated above, the Court should deny the Bank's Motion for Leave to File a Surreply Brief.

Respectfully Submitted,

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January 25, 2016

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PROOF OF SERVICE

I, Nancy Jane Dennis, of Pratt-Thomas Walker, P.A., hereby certify that I have served a true and accurate copy of the APPELLANT'S RETURN TO RESPONDENT'S MOTION FOR LEAVE TO FILE A SURREPLY BRIEF by U.S. Mail postage pre-paid on January 25, 2016, to counsel of record as shown below:

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January 25, 2016

The Honorable Jenny Abbott Kitchings
Clerk of South Carolina Court of Appeals
P.O. Box 11629
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RE: Wells Fargo Bank, N.A. v. Robert L. Freeman
C/A No.: 2013-CP-10-6439

Dear Ms. Kitchings:

Enclosed please find the original and six copies of Appellant's Return to Respondent's Motion for Leave to File a Surreply Brief and Proof of Service. Thank you for your courtesies and please let me know if you have any questions.

Sincerely,

Michaela Shepherd

Michaela L. Shepherd
Paralegal to Katie F. Monoc

/mls

c: Robert C. Byrd, Esquire
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