THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable Richard L. Booth, Sumter County Master-in-Equity

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Case No. 2015-000349

Wells Fargo Bank, N.A., Respondent,

v.

Delores Prescott and Wells Fargo Financial Bank (SD), Defendants,

Of Whom Delores Prescott is the Appellant.

FINAL REPLY BRIEF OF APPELLANT

Delores Prescott, *Pro se*
10 Skytop Gardens, Apt. 23
Parlin, New Jersey 08859
Appellant
(732) 485-8145

February 25, 2016

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REPLY STATEMENT OF ISSUES

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REPLY STATEMENT OF FACTS

In this present case, the only entity that has anything to gain by applying Judicial Estoppel and Res Judicata is Respondent.

The dismissal of the Appellant's bankruptcy proceeding for failure to make a stipen payment was not the functional equivalent of a discharge, as such dismissal did not constitute an adoption by the Bankruptcy Court of the debtors' characterization of her assets Saini v. Cinelli Enters., 289 AD2d 770, 773 (N. Y. App. Div. 2001).

Accordingly, although it is undisputed that the Appellant did not disclose, in her bankruptcy petition, the existence of the Trial Payment Plan Agreements with Respondent that forms the basis of her claims and defenses in this action, the doctrine of judicial estoppel does not bar this action Koch v National Basketball Assn., 245 A.D.2d 230, 231 (N.Y. App. Div.1997). Because Respondent drafted the Special Forbearance and Trial Payment Plans they must be held responsible.

Section V. of Appellant's June 17, 2013 Motion to Modify Chapter 13 Plan: Property of the Estate, Status and Obligations of the Debtor after confirmation page 7 says, "Upon confirmation of the plan, property of the estate will remain property of the estate but possession of the property of the estate shall remain with the debtor. The Chapter 13 trustee shall have no responsibility regarding the use or maintenance of property of the estate. The debtor is responsible for protecting to non-exempt value of all property of the estate and for protecting the estate from operation of a business by the debtor. Nothing herin is intended to waive or affect adversely any rights of the debtor, the trustee, or party with respect to any cause of action owned by the debtor. (R. Vol. II, p. 450). (Def. Sup. Memo (Dec. 11, 2014) R. Vol. I, p. 190).

STATEMENT OF THE CASE

June 24, 2003, Appellant refinanced the mortgage agreement with Watermark Financial Partners, LLC, at her home in Sumter, South Carolina and rescinded the loan on the same day; (Motion to Dismiss) R. pp. 74, 82, 85).

Beginning in June of 2009, and continuing through 2010, Appellant entered into a series of "Forbearance Agreements," with agents and employees of Respondent who repeatedly represented to Appellant that if she successfully completed the payments outlined in the Trial Payment Plan (TPP) agreement that she would be considered for a loan modification. (Hardship Affidavit (May 17, 2010) R. pp. 36, 37).

Appellant had informed Respondent agents that she was on public assistance. Respondent agents never informed Appellant that she was ineligible for a FHA Home Affordable Modification because she was unemployed and on public assistance Hardship Affidavit (May 17, 2010) R. ¶15, p. 38).

Respondent agents continued to represent that it would make a determination about Appellant's eligibility to receive a loan modification during 2010. Despite Appellant's completion of payments under the terms of these agreements, Respondent never made a determination on Appellant's loan modification for over a year. (Answer (May 17, 2010); R. pp. 30-31 at ¶10).

On April 12, 2010, Respondent issued a 3rd Forbearance Agreement to Appellant, but still never made any determination as to her modification, as was promised nine months earlier. The 3rd Forbearance Agreement required Appellant to pay $563.05 a month, beginning May 12, 2010, June 12, 2010 and July 12, 2010. (Hardhip Affidavit May 2010) R. ¶9-10, p. 38) and (Affidavit(Nov. 2014, Exhibit E); R. pp. 146, 151).

Three days after sending the 3rd Forbearance Agreement to Appellant, Respondent initiated this foreclosure action on April 15, 2010. On Sunday April 18, 2010 Appellant was hand delivered via courier the Foreclosure Complaint from Respondent. The Complaint was filed with the Sumter County Court on April 16th, 2010 and signed April 15th, 2010 by Suzanne E. Brown, attorney at Brock and Scott representing Respondent. (Complaint (April 16, 2010); R. p. 22).

Respondent never communicated their intent to foreclose. (Hardship Affidavit (May 17, 2010) R. ¶11 p. 38).

Appellant answered the Complaint in due course. The answer also raised several affirmative defenses, including a claim that Respondent lacked standing because it did not own the note and mortgage when the foreclosure complaint was filed. (Answer (May 17, 2010); R. ¶9-14, pp. 25-27).

In paragraph 6 page 2 of Respondent's Foreclosure Complaint, Respondent states:

"[o]n July 1, 2003, said Mortgage was recorded in the Sumter County Registry in Mortgage Book 896 at Page 70. Thereafter, the Mortgage was assigned to the Plaintiff herein." (R. p. 19).

April 23, 2010 Appellant searched the Sumter County Register of Deeds. The county records indicated that Watermark Financial Partners, Inc. was listed as the Mortgagee. There was no assignment of Mortgage recorded to any successors or assigns. Watermark Financial Partners is recorded as the Mortgagee from July 2003 through May 17, 2010. (Answer (May 17, 2010); R. p. 25 at ¶6-7).

On May 17, 2010 at 01:42:30 p.m. an Assignment of Mortgage was filed with Sumter County Register of Deeds. Respondent's attorney Suzanne E. Brown is named as

Assignor and her signature appears on the Assignment of Mortgage as the Vice President of Mortgage Electronic Registration Systems (MERS) as nominee for Watermark Financial Partners, Inc. The top left corner of the document says " Prepared by and return to: BROCK & SCOTT, PLLC Westpark Center 3800 Fernandina Road, Suite 110 Columbia, SC 29210 File No.: 10-08577. (Motion to Dismiss, Exhibit H. MERS Assignment to Wells) R. p. 91).

Attorney Brown was acting as V.P. of MERS to allow Respondent to initiate the foreclosure. The document was not attached to Appellant's Complaint nor was it submitted to the Bankruptcy Court. It creates a conflict of interest when an attorney for Respondent alleges to also be the V.P. of MERS, assigning a note and mortgage to Respondent, so Respondent could bring a foreclosure action. (Motion to Dismiss); R. p. 76) three years after Respondent alleges it acquired the serving rights to the loan in 2007. (Memo in Oppos. Mot. to Dism); R. p. 95, line 4).

Respondent has not told Appellant, the State Court or the Court of Appeals when or how they became the holder and owner of the note and mortgage (Complaint (May 17, 2010); R. p. 19 at ¶6). Most specifically, during Appellant's Bankruptcy status from 2005 through 2009, which received a Standard Discharge May 4, 2009. (Exhibit. B, Summary of Schedules, Dkt. 1, Case No. 11-01994 p. 4 of 60)(D.S.C. Mar. 28, 2011) R. Vol. II, p. 343, line 2).

Appellant filed her Answer on May 17, 2010 unware of the facts regarding the Assignment and transfer of the Note. Respondent did not reply to Appellant's Answer to the Complaint. Appellant did not receive a hearing date for her Motion to Dismiss Foreclosure.

May and June 2010 Appellant made a $563.05 under the terms of the forbearance agreement then in force. (Affidavit (Nov. 2014, p.3, Exhibit E & F (R.pp. 146, 151-158).

As the result of Respondent's own conduct, it declared Appellant had violated the terms of the forbearance agreement, and refused, again, to provide Appellant with a modification determination and placed Appellant's property in "active foreclosure."

Appellant was forced to file for a second bankruptcy Monday, August 2, 2010 to save her home. (Ex. B, Sum. Sch. Dkt. 1(March 28, 2011), Case 11-01994 p.4 of 60(R. Vol. II, p. 343, line 3).

December 2012 Appellant found issues that appeared to be fraudulent regarding the mortgage and note attached to the Motion for Relief from Automatic Stay and Assignment of Mortgage and Note that is on file with Sumter County Register of Deeds. The bankruptcy attorney advised Appellant the fraudulent issues discovered about the mortgage were civil matters that should be addressed in state court because the property was no longer apart of the bankruptcy. (Memo in Sup. (Nov. 27, 2013) R. p. 62).

February 2013 Appellant contact Robert C. Ray of the Greenville Bar and discussed the new information that Appellant discovered regarding her mortgage documents. (Memo in Sup. (Nov. 27, 2013) R. p. 63, line 18).

March 2013 Appellant hired Mr. Ray and he contacted Brock and Scott to first seek permission to amend Appellant's *pro se* Answer in lieu of completing the Foreclosure Intervention document forwarded to Appellant. Soon after Appellant hired counsel, Respondent changed its counsel to Womble, Carlyle, Sandridge & Rice of Greenville, S.C. and representatives of the law firm contacted Appellant's counsel. Appellant's attorney had been negotiating Appellant's Amended Answer and

Counterclaim with Respondent's new attorney since April 2, 2013. (Memo in Sup.) (Nov. 27, 2013) R. p. 44).

Mr. Ray moved to amend *pro se* answer to include affirmative defenses, counterclaims and crossclaims. A Hearing was held November 20, 2013 and the Order to amend the *pro se* answer was granted December 2, 2013 and filed on the record January 4, 2014. (R. p. 16).

Based on the information discovered regarding the mortgage and assignment Mr. Ray moved to have the foreclosure case dismissed. A hearing was held on April 9, 2014. The motion to dismiss foreclosure was denied April 17, 2014 and filed on the record April 22, 2014.(R. p. 13) Respondent moved for Summary Judgement May 2014. A hearing was held November 19, 2014. (R. p. 124). The Order of Summary Judgment was decided January 9, 2015 and filed on the record January 13, 2015. (R. p. 2).

Appellant received written notice of entry for the order of Summary Judgment Friday, January 30th, 2015 at 4:53 p.m. via electronic mail from Robert C. Ray, Attorney stating the Order of Summary Judgment including emails of the decision which, resulted in the conclusion of this case. The email advised Appellant she had until February 12, 2015 to appeal the Order of Summary Judgment. (Notice of Appeal Feb. 2015) R. Vol. II, p. 216).

Counsel withdrew representation on Appeal. (R. p. 216) Appellant was not able to secure a South Carolina attorney. Appellant has prepared this reply brief *pro se*.

APPELLANT'S ISSUES ARE PROPERLY BEFORE THE COURT

I. Collateral Estoppel:

In Plaintiff's September 5, 2014 Motion to Strike or Dismiss Amended Answer and Counterclaims at page 3 is says "Plaintiff hereby incorporates all filing, documents, arguments, and authorities asserted in its pending Motion for Summary Judgment into this motion. This motion shall be supported by exhibits, written memoranda, arguments of counsel, and all other submissions permitted by the Court. Finally, Plaintiff requests that the Court consider this motion concurrently with Plaintiff's pending Motion for Summary Judgment." (R. p. 142).

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." Id. at 142, 587 S.E.2d at 694.

On November 19, 2014, the Court heard arguments regarding Respondent's Motion for Summary Judgment and Motion to Strike. Both Respondent and Appellant were represented by counsel. At close of that hearing, the Court orally ruled that the doctrines of res judicata and collateral estoppel compel that 1) the loan agreement is enforceable, 2) Appellant is in default on that note, and 3) Appellant's counterclaims fail as a matter of law. (Order of Summary Judgment, at p. 5 (Jan. 9, 2015); R. p. 6).

Collateral estoppel differs from res judicata. This distinction is explained in Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984):

"The doctrines of res judicata and collateral estoppel are two different concepts. A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of res judicata in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action.

The factors to consider in determining whether the defense of collateral estoppel exists and whether the issues were actually litigated in the first suit include: whether privity exists, whether the doctrine is used offensively or defensively, and whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action. Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct. App. 1997). The party asserting collateral estoppel must prove that the issue was actually litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment. Carrigg v. Cannon, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001); See also, State v. Bacote, 331 S.C. 328, 330, 503 S.E.2d 161, 162 (1998) ("'When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim.'"); McNaughton-McKay Elec. Co. of N.C. v. Andrich, 324 S.C. 275, 482 S.E.2d 564 (Ct. App. 1996) (noting that collateral estoppel will bar relitigation of an issue that was actually litigated and necessary to the outcome of the prior lawsuit).

To establish res judicata, the defendant must prove three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986); Owenby v. Owens Corning Fiberglas, 313 S.C. 181, 437 S.E.2d 130 (Ct. App. 1993). Even when the defendant meets all of the required elements, res judicata will not be applied "where it will contravene other important public policies; the courts must weigh the competing public policies." Johns v. Johns, 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct. App. 1992).

II. Amendment of Pleadings:

In Plaintiff's September 5, 2014 Motion to Strike or Dismiss Amended Answer and Counterclaims at page 3 is says "Plaintiff hereby incorporates all filing, documents, arguments, and authorities asserted in its pending Motion for Summary Judgment into this motion. This motion shall be supported by exhibits, written memoranda, arguments of counsel, and all other submissions permitted by the Court. Finally, Plaintiff requests that the Court consider this motion concurrently with Plaintiff's pending Motion for Summary Judgment." (R. pp. 140 at ¶1, 172).

On November 19, 2014, the Court heard arguments regarding Respondent's Motion for Summary Judgment and Motion to Strike. Both Respondent and Appellant were represented by counsel. At close of that hearing, the Court orally ruled that the doctrines of res judicata and collateral estoppel compel that 1) the loan agreement is enforceable, 2) Appellant is in default on that note, and 3) Appellant's counterclaims fail as a matter of law.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." Id. at 142, 587 S.E.2d at 694.

III. Statues of Limitations:

In Plaintiff's September 5, 2014 Motion to Strike or Dismiss Amended Answer and Counterclaims at page 3 is says "Plaintiff hereby incorporates all filing, documents, arguments, and authorities asserted in its pending Motion for Summary Judgment into this motion. This motion shall be supported by exhibits, written memoranda, arguments of counsel, and all other submissions permitted by the Court. Finally, Plaintiff requests that the Court consider this motion concurrently with Plaintiff's pending Motion for Summary Judgment." (R. p. 141 at ¶3).

On November 19, 2014, the Court heard arguments regarding Respondent's Motion for Summary Judgment and Motion to Strike. Both Respondent and Appellant were represented by counsel. At close of that hearing, the Court orally ruled that the doctrines of res judicata and collateral estoppel compel that 1) the loan agreement is enforceable, 2) Appellant is in default on that note, and 3) Appellant's counterclaims fail as a matter of law.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial

court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." Id. at 142, 587 S.E.2d at 694.

IV. Abandonment of Property and Unclean Hands

On November 19, 2014, the Court heard arguments regarding Respondent's Motion for Summary Judgment and Motion to Strike. Both Respondent and Appellant were represented by counsel. At close of that hearing, the Court orally ruled that the doctrines of res judicata and collateral estoppel compel that 1) the loan agreement is enforceable, 2) Appellant is in default on that note, and 3) Appellant's counterclaims fail as a matter of law. Additionally, the Court requested further briefing on whether Appellant could collaterally attack the mortgage through an unclean hands affirmative defense and regarding the legal effect of Appellant's alleged abandoning the property during her bankruptcy proceedings. (R. p. 6 at lines 15-16).

In the present case, Respondent's Initial Brief at p. 7 line 16 states "the court requested that the parties submit additional briefing as to the legal effect of a debtor abandoning or surrendering property during bankruptcy proceedings...Ms. Prescott filed nothing."

This assertion is simply not true. The Court heard oral argument on Respondent's Motion for Summary Judgment and Motion to Strike Appellant's Amended Answer and Counterclaims November 19, 2014. During that hearing, the Court requested additional

briefing from the parties, which was provided. (See Order of Summary Judgment (January 9, 2015) at page 5) R. p. 2); (Def. Sup. Memo (Dec. 11, 2014) R. pp. 189-196).

Respondent continues to ignore that fact in 2003-2013 Appellant was unaware that when her mortgage refinance with Watermark was closed without an attorney was considered an unauthorized practice of law. Appellant's attorney, Robert C. Ray discovered the fact during the discovery process. (Amended Ans. Sept. 2013) R. pp. 44, 47 at ¶16).

South Carolina law recognizes the importance of counsel in protecting the consumer's interests in a mortgage loan transaction, and mandates that a consumer has the right to choose her closing attorney, S.C. Code § 37-10-102 . Accordingly, S.C. Code § 37-10-105 provides that when a consumer is deprived intentionally of the opportunity to choose a closing attorney, the consumer may be entitled to recover a penalty of as much as $7,500, plus attorney's fees.

V. Affidavit Not a Sham:

In Plaintiff's September 5, 2014 Motion to Strike or Dismiss Amended Answer and Counterclaims at page 3 is says "Plaintiff hereby incorporates all filing, documents, arguments, and authorities asserted in its pending Motion for Summary Judgment into this motion. This motion shall be supported by exhibits, written memoranda, arguments of counsel, and all other submissions permitted by the Court. Finally, Plaintiff requests that the Court consider this motion concurrently with Plaintiff's pending Motion for Summary Judgment." (R. p. 142).

On November 19, 2014, the Court heard arguments regarding Respondent's Motion for Summary Judgment and Motion to Strike. Both Respondent and Appellant

were represented by counsel. At close of that hearing, the Court orally ruled that the doctrines of res judicata and collateral estoppel compel that 1) the loan agreement is enforceable, 2) Appellant is in default on that note, and 3) Appellant's counterclaims fail as a matter of law.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." Id. at 142, 587 S.E.2d at 694.

Appellant's Affidavit of November 2014 is not a "[S]ham" and is in accordance with Rule 56(e) SCRCP, as issues of fact and personal knowledge. The present Affidavit is consistent with Appellant's original Answer and Hardship Affidavit prepared at the time she answered Respondent's Complaint May 17, 2010. *See* Rule 10(c), SCRCP ("A copy of any plat, photograph, diagram, document, or other paper which is an exhibit to a pleading is a part thereof for all purposes if a copy is attached to such pleading."); Lee v. Kelley, 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct. App. 1989) ("[B]y virtue of Rule 10(c), SCRCP, the attachment became a part and parcel of the complaint."); Metal Serv. Corp. v. Industr. Elec. Co., 253 S.C. 507, 509, 171 S.E.2d 703, 704 (1970) (considering materials attached to complaint when deciding defendant's demurrer to the complaint).

The Master In Equity has not given any reason or justification for this assertion in distinguishing between a "sham" affidavit versus one that merely corrects or clarifies an issue previously addressed by Appellant.

CONCLUSION

Appellant raised several issues of material fact as to the elements of these doctrines being misplaced, not properly proven and in the consistency of the statements in the counterclaims and affidavits submitted throughout this case.

For the above-stated reasons, Appellant respectfully requests that the order granting Summary Judgment be reversed and the Appellant be entitled to a determination on all claims and defenses.

CERTIFICATE OF APPELLANT

The undersigned certifies that her Final Reply Brief complies with Rule 208(b), SCACR.

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February 25, 2016

CERTIFICATE OF SERVICE

The undersigned hereby certifies on the 25th day of February 2016, she served a copy of the foregoing FINAL REPLY BRIEF by depositing same in the United States Mail first class, mail, proper postage, affixed, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

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