THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr.
Circuit Court Judge

Case No. 2013-CP-10-05329
Appellate Case No. 2016-000028

JPMorgan Chase Bank, National Association, Appellant,

v.

Delilah Starr Acheson a/k/a Delilah Starr Acheson a/k/a Starr D. Acheson, individually, as Legal Heir and Personal Representative of the Estate of Joseph L. Acheson a/k/a/ Joseph Lynn Acheson, Sr., Deceased, Amber Mae Acheson Reed, Joseph Lynn Acheson, Jr., Jacob Lee Acheson and Daniel Alexander Acheson, as Legal Heirs or Devisees of the Estate of Joseph L. Acheson a/k/a Joseph Lynn Acheson, Sr., Deceased, Ronald Lee Dowell, Ruth C. Dowell, and Charleston County Revenue Collections, Defendants,

Of whom Delilah Starr Acheson a/k/a Delilah S Acheson a/k/a Starr D. Acheson, individually, and as Legal Heir and Personal Representative of the Estate of Joseph L. Acheson a/k/a Joseph Lynn Acheson, Jr., Jacob Lee Acheson, and Daniel Alexander Acheson, as Legal Heirs or Devisees of the Estate of Joseph L. Acheson a/k/a Joseph Lynn Acheson, Sr., Deceased, Ronald Lee Dowell, and Ruth C. Dowell, are Respondents.

INITIAL BRIEF OF RESPONDENTS

Alice F. Paylor, Esquire (SC # 4380)
Rosen, Rosen & Hagood, LLC
P.O. Box 893 (29402)
151 Meeting Street, Suite 400
Charleston, South Carolina 29401
(843) 577-6726
Email: apaylor@rrhlawfirm.com

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUES ON APPEAL

I. BECAUSE THE TRIAL COURT GRANTED SUMMARY JUDGMENT BASED ON THE WELL-SETTLED PRINCIPAL THAT EQUITABLE REMEDIES ARE NOT AVAILABLE TO THOSE WITH UNCLEAN HANDS, AND BECAUSE ITS ORDER DOES NOT CONTRAVENE SOUTH CAROLINA PRECEDENT, THIS COURT SHOULD AFFIRM.

II. BECAUSE APPELLANT DID NOT PRESERVE ITS ARGUMENT THAT RESPONDENTS FAILED TO PROPERLY PLEAD THE AVOIDANCE OF FORECLOSURE, IT IS NOT PROPERLY RAISED ON APPEAL.

III. BECAUSE APPELLANT FAILED TO PRESENT ANY COMPETENT EVIDENCE TO CREATE A QUESTION OF FACT AS TO ITS UNCLEAN HANDS, THIS COURT SHOULD AFFIRM.

STATEMENT OF THE CASE[1]

Appellant initiated this action against Respondents on September 11, 2013, by filing a Complaint seeking to foreclose a mortgage on property located on Folly Beach, South Carolina, owned by Respondents. (R. ___) Respondents filed an Answer and Counterclaims and an Amended Answer and Counterclaims, in both of which they asserted the affirmative defense of unclean hands, among others. (R. ___) Appellant filed a Reply. (R. ___)

Respondents moved for summary judgment based on unclean hands. (R. ___) After a hearing before the Honorable R. Markley Dennis, Jr., the Court granted Respondents' Motion for Summary Judgment and issued its Order dated October 9, 2015. Appellants moved to reconsider, and Judge Dennis denied that motion by Order, dated November 30, 2015. On January 6, 2016, Appellants filed their Notice of Appeal.

STATEMENT OF FACTS[2]

In 2008, the Appellants, Ronald and Ruth Dowell, along with their daughter, Appellant Delilah Starr Acheson, and her husband, Joseph Acheson, owned a house located at 201 E. Huron, Folly Beach, South Carolina. Mr. Acheson applied for a loan from Quicken Loans to be secured by the property. Although only Mr. Acheson was liable for the repayment of the loan, the other three property owners had to sign a mortgage in order for it to secure the loan. Starr Acheson Affidavit, R. ___.

On April 24, 2008, Jean Kellogg, a closing agent for Quicken Loans, went to the Dowells' home in Gastonia, North Carolina, where Mr. and Mrs. Dowell and Mr. and Mrs.

---

[1] Appellant's Statement of the Case contained many contested matters in contravention of Rule 208(b)(1)(C). Therefore, Respondents set forth their statement of a concise history of the proceedings.

[2] The facts come from the affidavits of the Appellants. Respondent did not file any affidavits as required by Rule 56.

Acheson were present. Ms. Kellogg came alone and introduced herself as the closing agent. She presented a large stack of documents for the four owners to sign. After the signing, Ms. Kellogg gave them a bound document entitled "2008 Mortgage Documents" and left. There was no other person with Ms. Kellogg. Appellants did not review the documents given to them at that time. Affidavit Acheson, R. ___.

After initiation of the foreclosure action, Appellant Acheson reviewed the bound documents and discovered an uncompleted form document entitled "Closing Attorney's Statement," which stated: "I closed the above mortgage loan on April 24, 2008. Prior to the execution of the Note and Mortgage by the Borrower(s), I reviewed and explained to the Borrower (s) the terms and provisions of the Note and Mortgage. Following my explanation, the Borrower(s) signed the Note, Mortgage and other related closing documents." Underneath that statement was a line with words "Closing Attorney" written under it. However, there was no attorney present at the closing. Acheson Affidavit, R. ___.

The signed mortgage that was attached to the Summons and Complaint had two witnesses, Ms. Kellogg, who was present, and Timothy L. Hall, who was not present and did not witness any of the signatures on the mortgage. Acheson Affidavit, R. ___.

Quicken Loans subsequently transferred the note and mortgage to the Respondent. Mr. Acheson made all of the required loan payments until his death on August 15, 2010. On August 20, 2010, Respondent Acheson contacted Colleen North at Chase Bank by telephone and informed her of Mr. Acheson's death and asked her to transfer the note to her. On September 7, 2010, Mrs. Acheson faxed a copy of her husband's death certificate and will to Chase. Mrs. Acheson was Mr. Acheson's sole heir under the will. Chase did not file a creditor's claim with

the estate of Mr. Acheson. The estate has been fully probated and closed in both South and North Carolina. Acheson Affidavit, R. ___.

Mrs. Acheson continued to make the loan payments and unsuccessfully tried every month when making the payments to get the name of the borrower changed to her on the loan, so that she could discuss it with Chase. Chase refused to discuss the loan with Mrs. Acheson, because she was not the "borrower," so Mrs. Acheson stopped making the payments in 2013, resulting in the filing of this foreclosure action. Acheson Affidavit, R. ___.

ARGUMENT

I. BECAUSE THE TRIAL COURT GRANTED SUMMARY JUDGMENT BASED ON THE WELL-SETTLED PRINCIPAL THAT EQUITABLE REMEDIES ARE NOT AVAILABLE TO THOSE WITH UNCLEAN HANDS, AND BECAUSE ITS ORDER DOES NOT CONTRAVENE SOUTH CAROLINA PRECEDENT, THIS COURT SHOULD AFFIRM.

The South Carolina Supreme Court has long held that "the doctrine of 'unclean hands' precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." Wilson v. Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (1984) (citing Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E.2d 735 (1943)). In another decision, the Court discussed this defense:

> "When this court is sitting in equity, and thus viewing evidence for its preponderance, we are to consider the equities of both sides, balancing the two to determine what, if any, relief to give." [Citation omitted.] "The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." [Citation omitted.] "'He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief.'" [Citations omitted.] "The decision to grant equitable relief is in the discretion of the trial judge. [Citation omitted.]

Straight v. Goss, 383 S.C. 180, 206-207, 678 S.E.2d 443, 457-458 (2009).

Here, the Respondents, without a lawyer, attended a loan closing and depended on the Appellant to close it properly. However, the Appellant, obviously knowing that it had to have a lawyer close the loan as set forth in the closing documents left with Respondents, misled the Respondents by having a lay person close the loan but subsequently having an attorney fraudulently claim to have closed the loan "by telephone." In addition, Appellant obviously knew that two witnesses were required to attest to the mortgage, but, instead of having two persons attend the closing, had only one person witness the signatures and later had a person who did not witness the closing fraudulently attest to their signatures. In addition, Respondent Starr Acheson tried over and over to assume the note of her deceased husband but was always rebuffed by Appellant, because she was not the "borrower." All of these incidents, when taken together or even separately, constitute unclean hands and "the door of the court of equity [was closed] to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief."

The circuit court concluded that, as a result of all of these instances of fraudulent and bad faith conduct, Appellant had unclean hands and was therefore barred from benefitting from any type of equitable remedy. Because Appellant's action sought the equitable remedy of foreclosure, Respondents were entitled to summary judgment.

Appellant asserts that the circuit court's Order contravenes South Carolina law and, specifically, that Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (2011), is binding precedent that requires reversal and remand. Matrix held that a "lender may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as guaranteed by law." Id. at 140, 714 S.E.2d at 535. While Matrix admittedly restricts the Court's ability to deny the equitable remedy of foreclosure where the

underlying mortgage and note results from the unauthorized practice of law to those mortgage instruments filed after the issuance of the opinion, it is distinguishable.

Appellant has apparently interpreted Matrix to mean that "unauthorized practice of law" is the only basis on which a debtor can seek to have a foreclosure avoided. Contrary to Appellant's argument, Matrix does not stand for that proposition nor does it restrict the Court's ability to deny equitable remedies, including foreclosure, to a party with unclean hands.

In the present matter, the record contains numerous instances of unclean hands on the part of Appellant and its predecessor in interest, including: failing to have a lawyer close the loan (unauthorized practice of law); having a lawyer fraudulently sign a document that he closed the loan when he did not and did not talk to the mortgagors at the closing; having a second witness fraudulently sign the mortgage that he had been present when he had not been present; and failing to work with Respondent Acheson to have the loan assumed by her after her husband's death. The totality of the circumstances of unclean hands, not each item on its own, constituted the basis for the lower court's decision to bar the equitable remedy of foreclosure.

If the extent of Appellant's inequitable conduct was the unauthorized practice of law, perhaps Matrix would be applicable and, since the instruments at issue here were filed after the Matrix opinion, would allow Appellant's foreclosure action to move forward. However, that is not Respondents' argument nor the basis for the circuit court's Order.

II. BECAUSE APPELLANT DID NOT PRESERVE ITS ARGUMENT THAT RESPONDENTS FAILED TO PROPERLY PLEAD THE AVOIDANCE OF FORECLOSURE, IT IS NOT PROPERLY RAISED ON APPEAL.

Appellant argues in its Brief, for the first time, that the Respondents' failure to plead the affirmative defenses of "avoidance" and "unauthorized practice of law" waives Respondents' ability to assert that Appellant is not entitled to foreclosure. It has also argued that "unclean

hands" is not an affirmative defense that allows a Court to deny the equitable remedy of foreclosure.

These arguments were not raised to the circuit court in either Appellant's opposition to the Motion for Summary Judgment or Appellant's Motion to Reconsider pursuant to Rule 59, SCRCP.

As the South Carolina Supreme Court has held:

> "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). It is "axiomatic that an issue cannot be raised for the first time on appeal." Id. Imposing such a requirement on the appellant "is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 643 (2011); see also Pelican Bldg. Centers of Horry–Georgetown, Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993) (where an issue has not been ruled upon by the trial judge nor raised in a post-trial motion, such issue may not be considered on appeal). Because Appellant is raising this issue for the first time on appeal, it failed to preserve its argument and, therefore, waived its right to argue this issue on appeal.

Even if this argument had been preserved for appeal, it is without merit and provides no basis to overrule the circuit court.

First, the affirmative defense of "avoidance" is pled in Respondents' Amended Answer and Counterclaims. R ___, ¶ 66.

Second, Appellant's argument is premised on its interpretation of Matrix that a party seeking to avoid foreclosure based on the failure of an attorney to supervise a loan closing must

plead, as an affirmative defense, the "unauthorized practice of law" and that unclean hands is insufficient to raise "that" affirmative defense. Here, Respondents have not sought to avoid foreclosure solely on the basis that an attorney failed to supervise the loan closing. Rather, it is the totality of the circumstances and the repeated instances of inequitable conduct on the part of Appellant that substantiates the finding that Appellant has unclean hands. As set forth above, Matrix does not limit avoidance of a foreclosure to instances where there has been unauthorized practice of law.

Additionally, Matrix does not hold that "unclean hands" is an improper or unavailable defense to foreclosure. The Matrix Court did state: "We do not believe the doctrine of unclean hands is the appropriate basis for resolution of ***this*** case." Id. at 138, 714 S.E.2d at 534 (emphasis added). The issues as stated by the Court in Matrix were:

> I. Did the master-in-equity err in granting Matrix equitable subrogation to the rights of the January 2001 mortgage, giving Matrix priority over Appellant's judgment lien?
>
> II. Does the doctrine of unclean hands prevent Matrix from receiving the remedy of equitable subrogation?

Id. at 136, 714 S.E.2d at 533. The Supreme Court determined that Matrix was not entitled to the remedy of equitable subrogation for a reason other than unclean hands, so that is the purpose for its statement that "the doctrine of unclean hands is [not] the appropriate basis for resolution of this case." The Court did go on to discuss the fact that Matrix had engaged in the unauthorized practice of law and, thus, "came to the court with unclean hands and thus was barred from seeking equitable relief." There is no affirmative defense of "unauthorized practice of law," and the proper defense is "unclean hands."

Because Appellant waived this argument, and also because it is without merit, this Court should affirm the circuit court.

III. BECAUSE APPELLANT FAILED TO PRESENT ANY COMPETENT EVIDENCE TO CREATE A QUESTION OF FACT AS TO ITS UNCLEAN HANDS, THIS COURT SHOULD AFFIRM.

Appellant argues that its attachment of an unsworn statement from a South Carolina attorney to its memorandum, which was delivered to Respondents' counsel at the summary judgment hearing, created a question of fact as to whether an attorney was present at the loan closing. Appellant did not present any affidavits, any pleadings, any discovery responses or admission in support of its position that it did not have unclean hands. Respondents submitted three (3) affidavits when they filed their motion, months before the hearing. Appellant simply failed to present any evidence to counter the statements in those affidavits.

Rule 56(c), SCRCP, is clear with regard to the responsibilities of the adverse party countering a Motion for Summary Judgment:

> The adverse party may serve opposing affidavits not later than two days before the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter law.

Appellant presented none of the documents allowed by Rule 56, which says in subsection (e):

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.... When a motion for summary judgment is made and supported as provided in this rule, **an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.** [Emphasis added.]

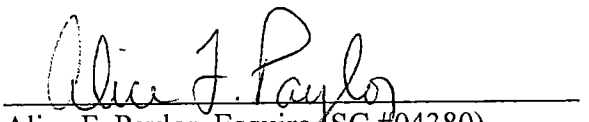
Rule 56 makes no provision allowing a document not submitted with an affidavit to be used to counter a motion for summary judgment.

Thus, summary judgment was appropriate as a matter of law based on the facts set forth in Respondents' affidavits. As set forth above, Respondents are entitled to summary judgment.

CONCLUSION

For all of the reasons stated herein, the judgment of the trial court should be affirmed.

Respectfully submitted,



Alice F. Paylor, Esquire (SC #04380)
Rosen, Rosen & Hagood, LLC
PO Box 893 (29402)
151 Meeting Street, Suite 400
Charleston, SC 29401
Phone: 843-577-6726
Email: apaylor@rrhlawfirm.com

Attorney for Respondents

Charleston, South Carolina
May 16, 2016