

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

RECEIVED

JUL 28 2016

SC Court of Appeals

JPMorgan Chase Bank, National Association, Appellant,

v.

Delilah Starr Acheson a/k/a Delilah S. 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, 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, and Ruth
C. Dowell, are Respondents

Final Brief of Appellant

Michael J. Anzelmo
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Attorneys for JPMorgan Chase Bank, National Association

Table of Contents

Statement of Issues.....	1
Statement of the Case and Facts.....	2
Standard of Review	4
Argument	5
I. The circuit court’s grant of summary judgment contravenes settled South Carolina precedent and should be reversed.	6
II. The circuit court erred in granting summary judgment because, at a minimum, a question of fact existed as to whether a licensed South Carolina attorney supervised the loan closing.	11
III. The circuit court erred in granting summary judgment because Acheson waived the right to assert the affirmative defense of avoidance of foreclosure.	12
IV. The circuit court erred in finding that an alleged lack of a second witness precluded Chase from foreclosing on the mortgage.	14
Conclusion	16

TABLE OF AUTHORITIES

	Page(s)
Cases	
<u>BAC Home Loan Servicing, L.P. v. Kinder,</u> 398 S.C. 619, 731 S.E.2d 547 (2012)	3, 5, 6, 7, 8
<u>Brockbank v. Best Capital Corp.,</u> 341 S.C. 372, 534 S.E.2d 688 (2000)	5
<u>Buyers Services,</u> 357 S.C. at 16, 292 S.E.2d at 427-28	3, 8, 9, 11
<u>Delta Apparel, Inc. v. Farina,</u> 406 S.C. 257, 750 S.E.2d 615 (Ct. App. 2013)	13
<u>Eillis v. Davidson,</u> 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004)	4
<u>Farmers' Bank & Trust Co. v. Fudge,</u> 113 S.C. 25, 100 S.E. 628 (1919)	15
<u>Fleming v. Rose,</u> 350 S.C. 488, 567 S.E.2d 857 (2002)	4, 12
<u>Hancock v. Mid-South Mgmt. Co., Inc.,</u> 381 S.C. 326, 673 S.E.2d 801 (2009)	5, 12
<u>Howard v. S.C. Dept. of Highways,</u> 343 S.C. 149, 538 S.E.2d 291 (Ct. App. 2000)	13
<u>Matrix Financial Services Corporation v. Frazer,</u> 394 S.C. 134, 714 S.E.2d 532 (2011)	2, 3, 5, 6, 7, 8, 9, 10, 14
<u>Moore v. Weinberg,</u> 383 S.C. 583, 681 S.E.2d 875 (2009)	4, 12
<u>Pye v. Estate of Fox,</u> 369 S.C. 555, 633 S.E.2d 505 (2006)	4
<u>Quail Hill, LLC v. Cty. of Richland,</u> 387 S.C. 223, 692 S.E.2d 499 (2010)	4
<u>Schmidt v. Courtney,</u> 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003)	4

<u>State of South Carolina v. Buyers Service Company, Inc.,</u> 292 S.C. 426, 357 S.E.2d 15 (1987)	2, 8
<u>Stelts v. Martin,</u> 90 S.C. 14, 72 S.E. 550 (1911)	15
<u>Turner v. Milliman,</u> 392 S.C. 116, 708 S.E.2d 766 (2011)	4
<u>Wachovia Bank, N.A. v. Coffey,</u> 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010).....	2, 3, 8, 9, 10, 11
<u>Wachovia Bank, N.A. v. Coffey,</u> 404 S.C. 421, 746 S.E.2d 35 (2013)	10
<u>Willis v. Wu,</u> 362 S.C. 146, 607 S.E.2d 63 (2004)	4
Rules	
Rule 8(c)	13
Rule 56.....	11
Rule 56(c)	4
Rule 803(6).....	12
Statutes	
S.C. Code Ann. § 19-5-510.....	12
Other Authorities	
27 S.C. Jur. <i>Mortgages</i> § 9	15

Statement of Issues

- I. The circuit court's grant of summary judgment contravenes settled South Carolina precedent and should be reversed.
- II. The circuit court erred in granting summary judgment because, at a minimum, a question of fact existed as to whether a licensed South Carolina attorney supervised the loan closing.
- III. The circuit court erred in granting summary judgment because Acheson waived the right to assert the affirmative defense of avoidance of foreclosure.
- IV. The circuit court erred in finding that an alleged lack of a second witness precluded Chase from foreclosing on the mortgage.

Statement of the Case and Facts¹

On April 24, 2008, Delilah Starr Acheson a/k/a Delilah S. Acheson a/k/a Starr D. Acheson (“Acheson”) executed a mortgage to Quicken Loans, Inc., in order to secure payment of a note executed by her husband, Joseph Acheson, that same day. {Complaint p. 2; Affidavit of Acheson; R. 11, 42}. Acheson’s sworn testimony in this matter admitted the default under the note and mortgage. {Affidavit of Acheson R. 43}.

Chase initiated this foreclosure action on September 11, 2013. {Complaint R.10}. Acheson answered and asserted as an affirmative defense that Chase had unclean hands and was “prohibited from obtaining the equitable relief of foreclosure.” {Amended Answer and Counterclaims p. 8; R. 24}. Acheson did not plead or allege that the mortgage was closed without the supervision of a licensed South Carolina attorney or that such conduct constituted the unauthorized practice of law. {Amended Answer and Counterclaims; R. 17}.

Acheson thereafter moved for summary judgment, arguing Chase could not foreclose because no attorney supervised the closing of the mortgage. {Acheson’s Motion for Summary Judgment p. 1; R. 57}. Acheson relied exclusively on Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), and State of South Carolina v. Buyers Service Company, Inc., 292 S.C. 426, 357 S.E.2d 15 (1987), to support this argument. {Acheson’s Motion for Summary Judgment p. 2; R. 58}.

Chase opposed the motion. Chase argued that neither Coffey nor Buyers Services applied because the Supreme Court precedent of Matrix Financial Services

¹ The procedural history and factual background are intertwined. Chase combines the Statement of the Case and Statement of Facts to eliminate repetition and for ease of reference.

Corporation v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (2011), and BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 731 S.E.2d 547 (2012), controlled Acheson's arguments. {Opposition to Acheson's Motion for Summary Judgment p. 5-7; Transcript of Hearing p. 5; R. 63-65, 35}. Chase also argued that, at a minimum, a genuine issue of material fact existed as to whether a licensed South Carolina attorney supervised the closing. {Opposition to Acheson's Motion for Summary Judgment p. 7-8; Transcript of Hearing p. 6; R. 65-66, 36}. Chase introduced two business records from the closing package attesting that Kevin Phillips, Esquire, supervised the closing on April 24, 2008. {Closing Confirmation and Closing Attorney's Statement, Exhibit A to Opposition to Acheson's Motion for Summary Judgment; R. 44}. Moreover, Chase argued that Acheson waived the ability to pursue this affirmative defense because Acheson failed to include the defense in her Amended Answer and Counterclaims. {Opposition to Acheson's Motion for Summary Judgment p. 3-4; R. 61-62}.

The circuit court granted the motion for summary judgment after a hearing. {Order granting Motion for Summary Judgment; R. 1}. The circuit court found that no licensed South Carolina attorney supervised the closing, and accordingly, Coffey and Buyers Services entitled Acheson to summary judgment to preclude Chase from foreclosing on the mortgage. {Order granting Motion for Summary Judgment p. 4-5; R. 4-5}. In so holding, the circuit court rejected the application of Matrix and Kinder. {Order granting Motion for Summary Judgment p.5; R. 5}.

Chase filed a timely motion to reconsider. {Motion to Reconsider; R. 88}. The circuit court denied the order on November 30, 2015. {Order denying Motion to Reconsider; R. 7}. This appeal followed. {Notice of Appeal; R. 95}.

Standard of Review

On review of an order granting summary judgment, the appellate court applies the same standard as that used by the trial court pursuant to Rule 56(c), SCRCP. Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Turner, 392 S.C. at 122, 708 S.E.2d at 769. Summary judgment should not be granted when a genuine issue of material fact exists. Eillis v. Davidson, 358 S.C. 509, 520, 595 S.E.2d 817, 823 (Ct. App. 2004).

In determining whether any triable issues of material fact exist, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Fleming v. Rose, 350 S.C. 488, 493–94, 567 S.E.2d 857, 860 (2002); Willis v. Wu, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004); Pye v. Estate of Fox, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006); Quail Hill, LLC v. Cty. of Richland, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010); Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (Ct. App. 2003) (“All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party”). Summary judgment should not be granted when a genuine issue of material fact exists on the claim. See, e.g., Moore v. Weinberg, 383 S.C. 583, 589, 681 S.E.2d 875, 878–79 (2009) (affirming this Court’s finding that the existence of a genuine issue of material fact required reversal of the circuit court’s grant of summary judgment).

“Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts.” Brockbank v. Best Capital Corp., 341 S.C. 372, 378, 534 S.E.2d 688, 692 (2000). “[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.” Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 8032 (2009).

Argument

Our Supreme Court has spoken—the failure of a licensed South Carolina attorney to supervise a loan closing will only preclude a lender, or its successor, from foreclosing on a mortgage when the mortgage was recorded after August 8, 2011. See Matrix Financial Services Corporation v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (2011); BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 731 S.E.2d 547 (2012). The circuit court ignored this binding precedent and improperly granted Acheson summary judgment for a mortgage recorded on April 24, 2008. This Court should adhere to precedent, reverse the circuit court, and remand the action to proceed with the foreclosure.

I. The circuit court's grant of summary judgment contravenes settled South Carolina precedent and should be reversed.

The circuit court found that Chase could not foreclose on a mortgage recorded on April 24, 2008, because no attorney supervised the closing of the loan. {Order granting Summary Judgment; R. 5}. In so ruling, the court ignored binding Supreme Court precedent that holds such relief only exists for mortgages filed after August 8, 2011. The circuit court misapplied this rule pronounced by our Supreme Court in Matrix Financial Services Corp v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (2011), and reaffirmed in BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 731 S.E.2d 547 (2012). Thus, the circuit court erred in granting summary judgment as a matter of law. This Court should adhere to precedent, reverse, and remand the action to proceed with the foreclosure.

In Matrix, our Supreme Court addressed whether a loan closed without the supervision of a South Carolina attorney precluded the lender, or its successor, from foreclosing on the mortgage. Matrix, 394 S.C. at 138-140, 714 S.E.2d at 534-35. The court noted that “[a]ll real estate and mortgage loan closings must be supervised by an attorney” and that “closing a loan without the supervision of an attorney constitutes the unauthorized practice of law.” Id., 394 S.C. at 138-39, 714 S.E.2d at 534. As a result, the court held that a lender that closes a loan without the supervision of a licensed attorney is barred from subsequently seeking equitable relief as to that loan. Id. at 139, 714 S.E.2d at 534. The court decided to allow a borrower to assert such a defense prospectively, “apply[ing] this ruling to all filing dates after the issuance of this opinion.” Id. at 140, 714 S.E.2d at 535.

To alleviate confusion in the interpretation of which filing date the Matrix court intended, the Supreme Court subsequently clarified the prospective nature of its rule in Kinder. The court explained:

In Matrix we reiterated that the closing of a loan without attorney supervision constitutes the unauthorized practice of law. Furthermore, we held that engaging in this unlawful behavior would preclude a lender from obtaining equitable relief. However, in a substitute opinion issued on rehearing, we explained that this holding would be prospective only, stating we would “apply this ruling to all filing dates after the issuance of this opinion,” which was **August 8, 2011**. To the extent some confusion apparently exists as to what filing date Matrix referred to, we clarify now that it is the date the document a party seeks to enforce was filed.

Kinder, 398 S.C. at 624, 731 S.E.2d at 549–50 (internal citations omitted) (emphasis added). The court noted that the mortgage at issue in that case “was recorded on April 20, 2007, well before the issuance of Matrix.” Id. As a result, the court held that **“regardless of whether an attorney participated in the closing of Mortgage 2, BAC would not be barred from recovery by the illegality.”** Id. at 624, 731 S.E.2d at 550 (emphasis added). In fact, the court went so far as to hold that **“it is unnecessary to address the factual issue of whether an attorney was present at the closing** because even if one had not been present, our holding in Matrix would allow BAC’s claims to proceed.” Id.

Thus, the South Carolina Supreme Court has left no doubt that the rule created in Matrix only applied prospectively. That rule requires that, in order for a borrower to assert the affirmative defense of failure to close the loan with the supervision of a

licensed attorney, the loan must involve a mortgage that was filed/recorded after August 8, 2011, the filing date for Matrix.

The circuit court failed to adhere to that rule. The Acheson mortgage was recorded over three years prior to the effective date of the Matrix rule. {Affidavit of Acheson p. 2; R. 43}. Thus, just as the Supreme Court clarified in Kinder, it was “unnecessary” for the circuit court “to address the factual issue of whether an attorney was present at the closing” because Chase would not be precluded from foreclosing the mortgage “regardless of whether an attorney participated in the closing” of the Acheson mortgage.

Moreover, the circuit court’s ruling that State of South Carolina v. Buyers Service Company, Inc., 292 S.C. 426, 357 S.E.2d 15 (1987), and Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010), created an independent avenue of relief to preclude Chase from foreclosing on the mortgage lacks support. Those cases do not alter the Matrix rule or otherwise allow a court to bar a foreclosure for a mortgage recorded prior to August 8, 2011.

Buyers Services cannot be used to support the relief granted by the circuit court in this matter. In that case, the State of South Carolina brought an action requesting a declaratory judgment that certain loan closing services of Buyers Services constituted the unauthorized practice of law. Buyers Services, 357 S.C. at 16, 292 S.E.2d at 427-28. The relief sought was to enjoin Buyers Services from continuing those activities unless prepared by a licensed South Carolina attorney. Id. The Supreme Court agreed with the State and held that the preparation of deeds, notes, title abstracts, and other instruments related to mortgage loans constituted the practice of law. Id. at 17-19, 292

S.E.2d at 430-33. The court further held that real estate closings and recording instruments likewise constituted the practice of law. Id. at 19, 292 S.E.2d at 433-34. The court enjoined Buyers Services from continuing those activities unless prepared by or supervised by a licensed South Carolina attorney. Id. at 17-19, 292 S.E.2d at 430-34.

However, the court did not even address whether a lender, or its successor, would be barred from foreclosing if a licensed South Carolina attorney did not supervise the loan closing. That issue was not before the court. Thus, Buyers Services does not create an independent basis to allow a circuit court to bar a foreclosure for a mortgage recorded prior to August 8, 2011.² As a result, the circuit court's reliance on Buyers Services to grant Acheson's motion for summary judgment constituted error.

The circuit court's reliance on Coffey to grant summary judgment is likewise misplaced for several reasons. First, in Matrix, the Supreme Court acknowledged the holding in Coffey that the lender came to the court with unclean hands by closing the loan without attorney supervision and, thus, was barred from seeking the equitable relief of foreclosure.³ The court noted that:

Enforcing this requirement [of attorneys at real estate closings] will come as no surprise to any lender. Lenders cannot ignore established laws of this state and yet expect this Court to overlook their unlawful disregard. We take

² The Supreme Court cited to Buyers Services in Matrix for the underlying proposition that certain activities related to loan closings can constitute the unauthorized practice of law. See Matrix, 394 S.C. at 140, 714 S.E.2d at 535. The Matrix court did not cite Buyers Services for having created the affirmative relief sought by Acheson in this matter.

³ The Supreme Court clarified that unclean hands does not present the proper method to raise the affirmative defense of lack of attorney supervision. Matrix, 394 S.C. at 138, 714 S.E.2d at 534. Instead, the court held that the relief would be available because the failure of an attorney to supervise a loan closing would constitute the "unauthorized practice of law." Id. This is further developed in Section III, infra.

this opportunity to definitively state that a lender may not enjoy the benefit of equitable remedies when that lender failed to have attorney supervision during the loan process as required by our law.

Matrix, 394 S.C. at 140, 714 S.E.2d at 535 (citing Coffey, 389 S.C. at 76, 698 S.E.2d at 248). After citing Coffey for that proposition, the court elected to add a temporal requirement that the loan be closed after August 8, 2011. Matrix, 394 S.C. at 140, 714 S.E.2d at 535. Thus, Coffey does not present an independent basis for relief as ordered by the circuit court. Rather, Matrix establishes that any rule pronounced in Coffey applies prospectively to loans closed after August 8, 2011.

Second, the Supreme Court eliminated the portion of the Coffey decision that addressed whether a lender would be precluded from foreclosing if the loan was not closed by a licensed South Carolina attorney. In 2013, the Supreme Court granted certiorari in Coffey. See Wachovia Bank, N.A. v. Coffey, 404 S.C. 421, 746 S.E.2d 35 (2013) (“Coffey II”). In the 2013 opinion, the court recognized that “petitioner’s argument, and to a significant degree the lower court decisions in this case, center on whether Petitioner’s alleged unauthorized practice of law bars equitable and legal relief.” Coffey II, 404 S.C. at 425, 746 S.E.2d at 38. The court then held that “is not the dispositive question in this case.” Id. The court went on to rule on a different issue than did the 2010 Coffey opinion and eliminated any reference to the attorney supervision issue. Id. As a result, the portion of the 2010 Coffey analysis addressing whether a lender would be precluded from foreclosing if the loan was not closed by a licensed South Carolina attorney has been abrogated by Coffey II. Thus, the circuit court erred in granting summary judgment based on Coffey.

Third, the circuit court erred in finding that Chase “clearly knew that closing a loan without a lawyer was the unauthorized practice of law” based on the existence of Coffey. {Order granting Summary Judgment p. 5; R. 5}. As noted above, Acheson closed the mortgage at issue on April 24, 2008. Coffey did not issue until 2010. Therefore, it is illogical and incorrect to impute knowledge of the now-abrogated Coffey case to Chase in 2008.

Thus, the circuit court’s ruling that Coffey and Buyers Services create an independent avenue of relief lacks support. Those rulings cannot support the grant of summary judgment to Acheson. This Court should reverse the circuit court and remand the action to proceed with the foreclosure.

II. The circuit court erred in granting summary judgment because, at a minimum, a question of fact existed as to whether a licensed South Carolina attorney supervised the loan closing.

The circuit court also found that Chase presented no admissible evidence that a licensed South Carolina attorney supervised the loan closing. {Order granting Summary Judgment p. 4-5; R. 4-5}. This ruling constituted error. Chase submitted evidence sufficient to create an issue of fact as to whether a licensed South Carolina supervised the loan closing.

As part of its memorandum in opposition to the motion for summary judgment, Chase introduced evidence that noted a South Carolina attorney supervised the closing. Chase submitted two business records⁴ from the loan closing package in which Kevin

⁴ Acheson failed to challenge that these documents did not constitute business records. Instead, Acheson merely argued the documents were inadmissible because Rule 56, SCRPC, requires affidavits in opposition to summary judgment to be filed two days prior to the hearing. {Trans. p. 7; R. 37}. This evidence was not an affidavit, and therefore, it was not subject to the time restrictions of Rule 56,

Phillips, Esquire, of the South Carolina Bar attested to supervising the closing on April 24, 2008. {Closing Confirmation and Closing Attorney's Statement, Exhibit A to Opposition to Acheson's Motion for Summary Judgment; R. 44}.

This evidence sufficiently created a genuine issue of material fact on this issue. That evidence directly contradicted Acheson's claims and created a genuine issue of material fact as to whether an attorney supervised the closing. See, e.g., Rose, 350 S.C. at 493-94, 567 S.E.2d at 860 (holding that in determining whether any triable issues of material fact exist, all ambiguities, conclusions, and inferences arising in and from the evidence will be construed in a light most favorable to the non-moving party below); Weinberg, 383 S.C. at 589, 681 S.E.2d at 878-79 (affirming this Court's finding that the existence of a genuine issue of material fact required reversal of the circuit court's grant of summary judgment); Mid-South, 381 S.C. at 330, 673 S.E.2d at 8032 ("the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."). Thus, the circuit court erred in granting summary judgment to Acheson. This Court should reverse the circuit court and remand the action to proceed with the foreclosure.

III. The circuit court erred in granting summary judgment because Acheson waived the right to assert the affirmative defense of avoidance of foreclosure.

Acheson failed to plead or even mention a defense related to the loan allegedly not being closed by a licensed South Carolina attorney. {Amended Answer and Counterclaims; R. 17}. Acheson instead attempted to avoid the foreclosure action by raising that issue in the motion for summary judgment. The failure to plead that

SCRCP. The documents would be admissible as business records kept in the ordinary course of business. See Rule 803(6), SCRE; S.C. Code Ann. § 19-5-510.

avoidance defense waived Acheson's ability to assert the issue by summary judgment. Therefore, the circuit court erred in granting summary judgment on that basis.

A party replying to a preceding pleading "shall affirmatively set forth the defenses" to avoid the relief sought. Rule 8(c), SCRCP. Specifically, the party must plead:

[A]ccord and satisfaction, arbitration and award, assumption of risk, condonation, contributory negligence, discharge in bankruptcy, duress, fraud, illegality, injury by fellow servant, laches, license, misrepresentation, mistake, payment . . . release, res judicata, statute of frauds, statute of limitations, waiver, **and any other matter constituting an avoidance or affirmative defense.**

Id. (emphasis added). "An affirmative defense is waived if not pled." Delta Apparel, Inc. v. Farina, 406 S.C. 257, 272, 750 S.E.2d 615, 623 (Ct. App. 2013); see also Howard v. S.C. Dept. of Highways, 343 S.C. 149, 155, 538 S.E.2d 291, 294 (Ct. App. 2000) (holding that the defendant "waived its right to assert the defense as it failed to raise it in its answer").

Acheson did not plead avoidance of foreclosure based on an alleged lack of attorney supervision at the loan closing. Rather, Acheson merely pleaded "unclean hands" as an affirmative defense. {Amended Answer and Counterclaim p. 8; R. 24}. Acheson then used unclean hands as the basis to seek the avoidance based on an alleged lack of attorney supervision at the loan closing in the motion for summary judgment. {Motion for Summary Judgment p. 1; R. 57}.

Acheson, however, cannot claim that the pleading of unclean hands encompasses an avoidance defense based on an alleged lack of attorney supervision at

the loan closing. Our Supreme Court has rejected that exact argument in Matrix. In considering the defendant's claim of unclean hands due to the failure of a licensed attorney to supervise the loan closing, the court held that unclean hands does not provide the proper vehicle to raise such a defense:

[Defendant] also argues that Matrix is not entitled to an equitable remedy because it closed the refinance loan unlawfully, and thus has unclean hands. **We do not believe the doctrine of unclean hands is the appropriate basis for resolution of this case.**

See Matrix, 394 S.C. at 138, 714 S.E.2d at 534 (emphasis added). Instead, the court held that the relief would be available because the failure of an attorney to supervise a loan closing would constitute the "unauthorized practice of law." Id. Thus, our Supreme Court requires a party seeking to avoid foreclosure based on the failure of an attorney to supervise a loan closing to plead the unauthorized practice of law. Unclean hands is insufficient to raise that affirmative defense. Id.

Acheson failed to adhere to that mandatory requirement. The failure to plead that avoidance defense as the unauthorized practice of law waived Acheson's ability to assert the issue by summary judgment. Therefore, the circuit court erred in granting summary judgment as a matter of law. This Court should reverse the circuit court and remand the action to proceed with the foreclosure.

IV. The circuit court erred in finding that an alleged lack of a second witness precluded Chase from foreclosing on the mortgage.

The circuit court found that the failure of "[Chase's] predecessor in interest" to have a second witness to the execution of the mortgage should also bar Chase from foreclosing the delinquent mortgage. {Order granting Summary Judgment p. 5; R. 5}.

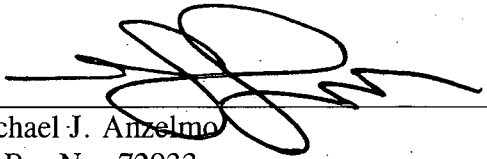
This was error. Under well-settled South Carolina law, any lack of a second witness has no impact on the enforceability of the mortgage or the ability to foreclose.

South Carolina law provides that where a mortgage is not attested by two witnesses, it is unenforceable as a legal mortgage. Stelts v. Martin, 90 S.C. 14, 16-17, 72 S.E. 550, 551 (1911). However, that does not mean the holder or servicer cannot foreclose on the mortgage. The mortgage is still enforceable between the parties as an equitable mortgage if it was actually signed by a borrower who intended it to secure a debt. Id.; see also Farmers' Bank & Trust Co. v. Fudge, 113 S.C. 25, 36, 100 S.E. 628, 632 (1919) ("Another reason why this exception cannot be sustained is that the mortgage, even without witnesses, would have been good between the parties; and the fact that the witnesses may be disqualified by interest would not have the effect of destroying its validity."). Accordingly, "[a] mortgage executed without witnesses or with incompetent witnesses **is nevertheless valid between the parties.**" 27 S.C. Jur. *Mortgages* § 9 (emphasis added). Therefore, the circuit court erred in finding the mortgage unenforceable on this basis. This Court should reverse the circuit court and remand the action to proceed with the foreclosure.

Conclusion

Based on the foregoing, this Court should reverse the circuit court's grant of summary judgment and remand this action to proceed with the foreclosure.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Michael J. Anzelmo

SC Bar No. 72933

E-Mail: michael.anzelmo@nelsonmullins.com

1320 Main Street / 17th Floor

Post Office Box 11070 (29211-1070)

Columbia, South Carolina 29201

803.799.2000

Attorneys for JPMorgan Chase Bank, National
Association

Columbia, South Carolina

July 28, 2016

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

RECEIVED

JUL 28 2016

SC Court of Appeals

JPMorgan Chase Bank, National Association,

Appellant,

v.

Delilah Starr Acheson a/k/a Delilah S. 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, 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, and Ruth
C. Dowell, are

Respondents

CERTIFICATE OF COUNSEL

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

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 
Michael J. Anzelmo
SC Bar No. 72933
E-Mail: michael.anzelmo@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Attorneys for JPMorgan Chase Bank, National Association

Columbia, South Carolina

July 28, 2016

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

RECEIVED

JUL 28 2016

SC Court of Appeals

JPMorgan Chase Bank, National Association, Appellant,

v.

Delilah Starr Acheson a/k/a Delilah S. 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, 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, and Ruth
C. Dowell, are Respondents

PROOF OF SERVICE

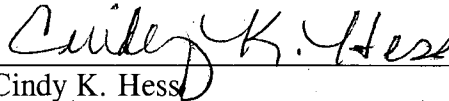
I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for JPMorgan Chase Bank, National Association, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified to the following address(es):

Pleadings: **Final Brief of Appellant**

Counsel Served:

U.S. Mail

Alice F. Paylor, Esq.
Rosen Rosen & Hagood, LLC
Post Office Box 893
Charleston, SC 29402



Cindy K. Hess
Sr. Administrative Assistant

July 28, 2016