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
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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

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Final Reply Brief of Appellant

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Argument

I. Unclean hands does not provide an independent basis to avoid foreclosure if an attorney fails to supervise closing of the loan.

Our Supreme Court's precedent in Matrix Financial Services Corp v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (2011), controlled the issue before the circuit court. Matrix held that the unauthorized practice of law—not unclean hands—can bar a foreclosure but only for mortgages recorded after August 8, 2011. Acheson, however, claims that the doctrine of unclean hands provides an independent basis to avoid a foreclosure.[1] See Resp. Br. p. 6. However, Matrix rejected Acheson's argument that unclean hands premised solely on the unauthorized practice of law provides a second basis for such relief. Acheson cannot categorize the unauthorized practice of law as unclean hands in order to circumvent the Supreme Court's ruling in Matrix expressly limiting its ruling to mortgages filed after August 8, 2011. The circuit court erred in granting summary judgment on the basis that unclean hands bars the foreclosure.

In Matrix, the borrower argued that a loan that 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 borrower based this claim for relief on the doctrine of unclean hands. Id. at 138, 714 S.E.2d at 534. However, although the Supreme Court held that the unauthorized practice of law barred the foreclosure, the Court rejected the applicability of the unclean hands doctrine to avoid foreclosure:

> [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**.

[1] 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. 1}.

Id. (emphasis added).

This Supreme Court precedent fully controls this case. Matrix was not limited to the facts of that case, as alleged by Acheson. Indeed, the Supreme Court announced that its ruling would be prospectively applied to all mortgages that were filed after August 8, 2011.[2] Id., 394 S.C. at 138-39, 714 S.E.2d at 534. The Supreme Court's prospective application of its ruling would be rendered meaningless by Acheson. The Supreme Court did not intend its ruling to be limited to the one loan before it.

After Matrix, the Supreme Court reinforced that such relief was predicated solely on the unauthorized practice of law in BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 731 S.E.2d 547 (2012). The court held that "[i]n Matrix we reiterated that the closing of a loan without attorney supervision constitutes **the unauthorized practice of law**." Kinder, 398 S.C. at 624, 731 S.E.2d at 549–50 (emphasis added). Kinder did not create separate relief based on unclean hands. Id. The court also reaffirmed that the Matrix rule would apply outside the confines of the facts of that case and apply to all mortgages filed after August 8, 2011.[3] Id.

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[2] The Supreme Court stated that it would "apply this ruling to all filing dates after the issuance of this opinion" which was August 8, 2011. Although not relevant to this appeal, to the extent that there was any confusion regarding the 'filing date", the Supreme Court later clarified 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.

[3] There is no issue here that the mortgage was recorded after August 8, 2011. Acheson has admitted the mortgage here was closed on April 24, 2008, and recorded over three years prior to the August 8, 2011 effective date announced in Matrix. See Resp. Br. p. 2; Affidavit of Acheson, R. 42. 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. Kinder, 398 S.C. at 624, 731 S.E.2d at 550 (recognizing that because the mortgage at issue in that case "was

Unclean hands cannot be used as substitute for the unauthorized practice of law to bar foreclosure. Under Matrix and Kinder, it is the unauthorized practice of law, not unclean hands asserting the same conduct, that bars foreclosure. This Court should reverse the circuit court and remand the action to proceed with the foreclosure.

II. Chase properly preserved its argument that the circuit court erred in granting summary judgment because Acheson waived the right to assert the affirmative defense of avoidance of foreclosure.

The circuit court decision is incorrect not only because it disregards Matrix and Kinder, but, as argued in Chase's initial brief, Acheson should not have been able to assert unclean hands based on the unauthorized practice of law because it was not raised in any pleading. In their brief, Acheson argues Chase "did not preserve its argument that Respondents failed to properly plead the avoidance of foreclosure. . . ." See Resp. Br. p. 6, 6-8. This argument lacks merit.

The first step in preserving an issue for appellate review is to raise it to the circuit court with sufficient specificity. Lucas v. Rawl Family Ltd. P'Ship., 359 S.C. 505, 511, 598 S.E.2d 712, 715 (2004); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). A party raising the issue need not use the exact name of a legal doctrine in order to preserve the issue for appellate review. Stephens v. CSX Transp., Inc., 415 S.C. 182, 200, 781 S.E.2d 534, 543 (2015). The circuit court must also rule on the issue for it to be preserved for appellate review. Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2002). Chase adhered to these requirements on its waiver argument.

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recorded on April 20, 2007, well before the issuance of Matrix" then "regardless of whether an attorney participated in the closing . . . 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).

At the hearing on the motion for summary judgment, Acheson argued for the first time that an alleged lack of attorney supervision at the loan closing barred the foreclosure.[4] Chase argued in response at the hearing that Acheson waived such a defense by failing to plead it in the amended answer and counterclaim:

> As alternative defenses to the motion, I would say that this is not anything that was pled. [Acheson] had filed an answer then amended their answer about 30 days later. There is no specific allegation about the closing of the loan by attorneys. The only—there was an unclean hands defense that did not pertain to this . . . I think that it's probably a little late to be asserting these . . . .

{Transcript of Hearing p. 5, line 19-25 through p. 6, line 5; R. 35-36}. The circuit court rejected Chase's waiver argument in granting relief based on unclean hands. The circuit court found that Chase and Chase's "predecessor in interest have unclean hands in mortgage closing in not having a lawyer close the loan . . . ." {Order granting Summary Judgment p. 6; R. 6}.

As a result, the issue was properly preserved for appellate review. Chase raised the waiver argument with specificity in the circuit court. The circuit court ruled on the issue in granting summary judgment to Acheson. Thus, Acheson's argument that Chase failed to preserve its waiver argument lacks merit.[5]

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[4] Prior to that hearing, 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; 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 R. 57}; <u>see</u> <u>also</u> Resp. Br. p. 2 (admitting Acheson admits only "moved for summary judgment based on unclean hands").

[5] Moreover, even if Appellant failed to preserve the argument, the circuit court order should be reversed. The order contradicts South Carolina Supreme Court's precedent in <u>Matrix</u> and <u>Kinder</u> as a matter of law.

III. Chase introduced competent evidence sufficient to create a genuine issue of material fact on the issue of whether a South Carolina attorney supervised the loan closing.

Acheson claims that Chase "failed to present any competent evidence to create a question of fact" as to whether an attorney supervised the loan closing. See Resp. Br. p. 9. That is false.

The party opposing introduction of evidence bears the burden to "object to its introduction and state the grounds for the objection." Roberts v. Roberts, 299 S.C. 315, 319, 384 S.E.2d 719, 721 (1989). "Evidence received without objection is competent." Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 266, 442 S.E.2d 611, 617 (1994); see also 30 S.C. Jur. Evidence § 44.

At the hearing in this matter, Chase introduced two business records from the loan closing package in which Kevin 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}. The documents were competent evidence admitted as business records kept in the ordinary course of business. See Rule 803(6), SCRE; S.C. Code Ann. § 19-5-510.

Acheson also did not object to the introduction of this competent evidence on any ground other than that the documents were inadmissible because Rule 56, SCRCP, requires affidavits in opposition to summary judgment to be filed two days prior to the hearing. {Trans. p. 7; R. 37}. However, because the evidence was not an affidavit, the documents were not subject to the affidavit time restrictions of Rule 56, SCRCP. The documents were admissible as business records kept in the ordinary course of business. Therefore, Acheson's failure to object on any proper basis eliminated any argument that the evidence was not

competent. This evidence sufficiently created a genuine issue of material fact that a South Carolina attorney supervised the loan closing.

Acheson also argues that Rule 56, SCRCP, required an affidavit from Chase in order to withstand summary judgment. See Resp. Br. p. 9. This argument is unavailing. The circuit court should consider "**all of the documents and evidence with the record**" in ruling on a motion for summary judgment. See, e.g., Higgins v. Medical University of S.C., 326 S.C. 592, 600, 486 S.E.2d 269, 272 (Ct. App. 1997) (emphasis added) ("When ruling on a motion for summary judgment, the trial judge must consider all of the documents and evidence within the record, including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits"); see also Gould v. O'Shaugnessy Realty Co., 380 S.C. 548, 557, 671 S.E.2d 79, 84 (Ct. App. 2008); Rife v. Hitachi Const. Machinery Co., Ltd., 363 S.C. 209, 213, 609 S.E.2d 565, 568 (Ct. App. 2005); BPS, Inc. v. Worthy, 362 S.C. 319, 325, 608 S.E.2d 155, 159 (Ct. App. 2005); Mulherin-Howell v. Cobb, 362 S.C. 588, 595, 608 S.E.2d 587, 591 (Ct. App. 2005).

The closing attorney documents constituted competent evidence before the circuit court. Thus, the circuit court erred in granting summary judgment because a genuine issue of material fact existed.

Conclusion

Based on the foregoing and as set forth in Chase's brief of appellant, this Court should reverse the circuit court's grant of summary judgment and remand this action to proceed with the foreclosure.[6]

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July 28, 2016

[6] In the Respondents' brief, Acheson fails to address Chase's argument that the circuit court erred in finding that an alleged lack of a second witness precluded Chase from foreclosing on the mortgage. South Carolina law is clear that "[a] mortgage executed without witnesses or with incompetent witnesses is nevertheless valid between the parties." 27 S.C. Jur. *Mortgages* § 9. See App. Br. § IV. Therefore, the circuit court erred in finding the mortgage unenforceable on this basis.

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CERTIFICATE OF COUNSEL

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

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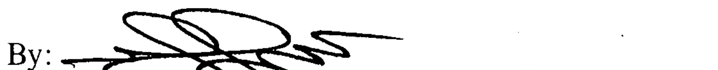
By: 

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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):

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