

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 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.

FINAL 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 iv

Statement of Issues on Appeal 1

Statement of the Case 2

Facts 2

Argument 4

 I. RESPONDENT FAILED TO ARGUE THAT “UNCLEAN HANDS” WAS AN IMPROPER BASIS FOR RESOLUTION OF THIS CASE SO IT CANNOT RAISE THAT ISSUE ON APPEAL, AND, EVEN IF RAISED, THE AFFIRMATIVE DEFENSE OF UNCLEAN HANDS IS THE PROPER WAY TO OBJECT TO THE MISCONDUCT OF RESPONDENT, INCLUDING THE UNAUTHORIZED PRACTICE OF LAW 4

 II. APPELLANT FAILED TO PRESENT ANY EVIDENCE COUNTERING ANY OF RESPONDENTS’ CLAIMS OF MISCONDUCT ON THE PART OF APPELLANT, SO SUMMARY JUDGMENT WAS PROPERLY GRANTED 6

 III. BECAUSE APPELLANT’S MISCONDUCT CONSISTED OF MULTIPLE INSTANCES OF IMPROPER CONDUCT, THE UNCLEAN HANDS DOCTRINE BARS THIS FORECLOSURE ACTION 7

Conclusion 8

TABLE OF AUTHORITIES

Cases

Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E.2d 735 (1943)	7
Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 643 (2011)	5
I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)	4
Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 138, 714 S.E.2d 532, 534 (2011).....	5
Pelican Bldg. Centers of Horry–Georgetown, Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993)	5
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).....	4
Straight v. Goss, 383 S.C. 180, 206-207, 678 S.E.2d 443, 457-458 (2009)	7
Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)	4
Wilson v. Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (1984)	7

STATEMENT OF ISSUES ON APPEAL

- I. RESPONDENT FAILED TO ARGUE THAT “UNCLEAN HANDS” WAS AN IMPROPER BASIS FOR RESOLUTION OF THIS CASE SO IT CANNOT RAISE THAT ISSUE ON APPEAL, AND, EVEN IF RAISED, THE AFFIRMATIVE DEFENSE OF UNCLEAN HANDS IS THE PROPER WAY TO OBJECT TO THE MISCONDUCT OF RESPONDENT, INCLUDING THE UNAUTHORIZED PRACTICE OF LAW.
- II. DID THE TRIAL COURT CORRECTLY GRANT SUMMARY JUDGMENT WHERE RESPONDENTS RELIED ON THE AFFIRMATIVE DEFENSE OF UNCLEAN HANDS RATHER THAN “UNAUTHORIZED PRACTICE OF LAW”?
- III. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT BASED ON THE TOTALITY OF THE MISCONDUCT OF PLAINTIFF AND ITS PREDECESSOR IN CLOSING AND HANDLING THE MORTGAGE LOAN AT ISSUE, INCLUDING PLAINTIFF’S FAILURES TO HAVE A LAWYER CLOSE THE LOAN, TO HAVE THE REQUISITE TWO WITNESSES AND TO WORK WITH MRS. ACHESON TO ASSUME THE LOAN?

STATEMENT OF THE CASE¹

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. 8) 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. 17) Appellant filed a Reply.

Respondents moved for summary judgment based on unclean hands. (R. 57) 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. (R. 1) Appellants moved to reconsider, and Judge Dennis denied that motion by Order, dated November 30, 2015. (R. 7) On January 6, 2016, Appellants filed their Notice of Appeal. (R. 95)

STATEMENT OF FACTS²

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. 42.

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. Acheson Affidavit, R. 42.

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. 42.

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. 42.

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. 42.

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. 42.

ARGUMENTS

I. APPELLANTS FAILED TO PRESERVE ITS ARGUMENT THAT "UNCLEAN HANDS" WAS AN IMPROPER BASIS FOR RESOLUTION OF THIS CASE SO IT CANNOT RAISE THAT ISSUE ON APPEAL, AND, EVEN IF RAISED, THE AFFIRMATIVE DEFENSE OF UNCLEAN HANDS IS THE PROPER WAY TO OBJECT TO THE MISCONDUCT OF RESPONDENT, INCLUDING THE UNAUTHORIZED PRACTICE OF LAW.

Appellant argues in its Brief for the first time that the affirmative defense of "unclean hands" is not the proper manner to allege that the failure to have an attorney present at a closing bars the foreclosure of the mortgage. This issue was not raised to the Court below in either Appellant's opposition to the Motion for Summary Judgment or Appellant's Motion to Reconsider pursuant to Rule 59, SCRCivP.

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). Appellant failed to raise this issue in the Court below in either its opposition to summary judgment or its Motion to Reconsider. Appellant waived its right to argue this issue on appeal.

Even if issue preclusion does not apply, Appellant's argument lacks merit. It relies on a statement in Matrix Financial Services Corp. v. Frazer, 394 S.C. 134, 138, 714 S.E.2d 532, 534 (2011): "We do not believe the doctrine of unclean hands is the appropriate basis for resolution of this case." 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?

394 S.C. 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."

In the current case, there are 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.

II. APPELLANT FAILED TO PRESENT ANY EVIDENCE COUNTERING ANY OF RESPONDENTS' CLAIMS OF MISCONDUCT ON THE PART OF APPELLANT, SO SUMMARY JUDGMENT WAS PROPERLY GRANTED.

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), SCRCivP, 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, the question remaining to be answered is whether summary judgment was appropriate.

III. BECAUSE APPELLANT'S MISCONDUCT CONSISTED OF MULTIPLE INSTANCES OF IMPROPER CONDUCT, THE UNCLEAN HANDS DOCTRINE BARS THIS FORECLOSURE ACTION.

The South Carolina Supreme Court has 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. Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E.2d 735 (1943).” Wilson v. Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (1984).

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 deleted.] “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 deleted.] “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 deleted.] “The decision to grant equitable relief is in the discretion of the trial judge. [Citation deleted.]

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

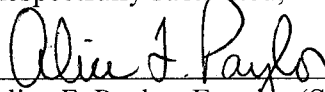
lawyer close the loan as set forth in the closing documents left with Respondents, misled the Respondents by having a lay person close the loan but subsequently having an attorney fraudulently claim to have closed the loan “by telephone.” In addition, Appellant obviously knew that two witnesses were required to attest to the mortgage, but, instead of having two persons attend the closing, had only one person witness the signatures but 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 inequity or bad faith relative to the matter in which he seeks relief.”

The trial court judge concluded that, because of all of these instances of fraudulent and bad faith conduct, Appellant was barred from foreclosing on the mortgage, and properly granted summary judgment to the Respondents.

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
July 25, 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

JP Morgan Chase Bank, National Association, Appellant,

v.

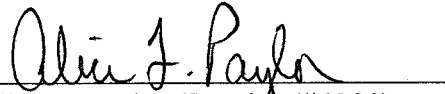
Delilah Starr Acheson a/k/a Delilah Starr Acheson a/k/a
Starr D. Acheson, individually, as Legal Heir and
Personal Representative of the Estate of Joseph L.
Acheson a/k/a/ Joseph Lynn Acheson, Sr., Deceased,
Amber Mae Acheson Reed, Joseph Lynn Acheson, Jr.,
Jacob Lee Acheson and Daniel Alexander Acheson, 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 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 and Ruth C. Dowell, are Respondents.

CERTIFICATE OF COUNSEL

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

Respectfully submitted,

A handwritten signature in cursive script, reading "Alice F. Paylor", is written over a horizontal line.

Alice F. Paylor, Esquire (#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

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

JP Morgan 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 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 and Ruth C. Dowell, are

Respondents.

PROOF OF SERVICE

I do hereby certify that I have served all counsel of record in this action with a copy of the documents herein below specified by mailing a copy of the same by United States mail, postage prepaid, to the following addresses on **July 25, 2016**:

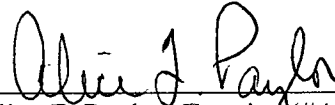
Documents: Respondents' Final Brief

Counsel Served:

Michael J. Anzelmo, Esquire
Nelson Mullins Riley & Scarborough, LLP
P.O. Box 11070
Columbia, SC 29211

RECEIVED
JUL 28 2016
SC Court of Appeals

Respectfully submitted,



Alice F. Paylor, Esquire (#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