THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas Case No. 2011-CP-10-812
The Honorable Mikell R. Scarborough, Master-In-Equity

APPELLATE CASE NO. 2016-00155

NATIONSTAR MORTGAGE LLC

Respondent,

v.

RHONDA MEISNER,

Petitioner.

RESPONDENT NATIONSTAR MORTGAGE LLC'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN FINDING RESPONDENT HAS STANDING TO FORECLOSE?

II. DID THE COURT OF APPEALS ERR IN FINDING PETITIONER CONCEDED THE ISSUE OF SUMMARY JUDGMENT?

III. DID THE COURT OF APPEALS ERR IN FINDING THAT PETITIONER DID NOT PRESERVE HER ARGUMENT ALLEGING THAT THE MASTER IN EQUITY IMPROPERLY GAVE LEGAL AND TAX ADVICE DURING THE SUMMARY JUDGMENT HEARING?

IV. DID THE COURT OF APPEALS ERR IN FINDING PETITIONER CONCEDED THE HOUSE WAS NOT HER "PRIMARY RESIDENCE," AS DEFINED IN ADMINISTRATIVE ORDER 2011-05-02-01?

COUNTER-STATEMENT OF THE CASE

In her Petition for Writ of Certiorari to the Court of Appeals ("Petition"), Petitioner mischaracterizes or omits several key aspects of the facts in this case. Therefore, Respondent will briefly set forth those facts.

On or around October 10, 2007, Meisner executed a Note in the amount of $680,000.00 in favor of Lehman Brothers Bank, FSB ("Lehman"). (R. p. 3) That same day, Meisner also executed a Mortgage on property located at 31 Sand Dollar Drive, Isle of Palms, South Carolina 29451 (the "Property"), which secured the Note and was delivered to Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for Lehman. (R. pp. 59-60) The Note and Mortgage were subsequently assigned to Aurora Loan Services, LLC ("Aurora") on February 10, 2011. (R. p. 3) Meisner did not make required payments under the Note. (R. p. 3) As of September 16, 2013, Meisner owed $680,000.00 in principal, $142,573.91 in interest, and $80,724.14 in other associated fees and costs related to the Mortgage. (R. pp. 3-4)

This foreclosure action was instituted by Respondent Nationstar Mortgage LLC's ("Nationstar") predecessor in interest, Aurora,[1] on February 3, 2011. (R. pp. 57-63) Aurora sent a Notice of Foreclosure Intervention pursuant to S.C. Supreme Court Administrative Order 2011-05-02-01, and Meisner filed a response requesting foreclosure intervention review on June 27, 2011. (R. pp. 225-228) After repeated efforts to obtain documents required for foreclosure intervention review, Aurora filed a Certification of Compliance in November of 2011, stating that Meisner had been given a full and fair opportunity to participate in foreclosure intervention and had failed to do so. (R. pp. 225-226) The litigation resumed thereafter. On June 26, 2012, the subject Promissory Note ("Note") and Mortgage were assigned to Nationstar, and an Order

[1] Nationstar completed its acquisition of all servicing assets of Aurora Bank FSB and its subsidiary, Aurora Loan Services, LLC on June 29, 2012.

substituting Nationstar as Plaintiff in place of Aurora was issued October 23, 2012 pursuant to SCRCP 17(a), 35(c), and 25(e). (R. pp. 51-52)

The reasons this Court considers when deciding whether to grant a petition for cert. include 1) whether a case involves novel questions of law; (2) whether there was a dissent in the Court of Appeals decision; (3) whether the Court of Appeals decision conflicts with a prior decision of the Supreme Court; (4) whether substantial constitutional issues are involved; (5) whether the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court related to federal questions. SCACR, Rule 242. The Petition does not satisfy the grounds for certiorari review. The Court of Appeals was unanimous in its decision affirming the Master-In-Equity. Petitioner does not assert that this case presents any novel question of law. Furthermore, contrary to Petitioner's assertion, the Court of Appeals' decision does not contradict or misinterpret well-established law on standing, issue preservation, or issue concession. Petitioner merely repeats the same misleading and failed arguments raised in her Initial Brief submitted to the Court of Appeals. For the reasons set forth below, Respondent respectfully asks that this Court deny the Petition.

ARGUMENT

I. NATIONSTAR HAS STANDING AND THE COURT OF APPEALS CORRECTLY HELD THAT MEISNER CONCEDED THIS ISSUE

Foremost, the Court was correct in explaining that, because Meisner conceded the issue of summary judgment, she necessarily conceded the issue of standing. However, even if she did not concede standing, South Carolina law does not support any of Meisner's contentions that Nationstar lacks standing.

A. The Court of Appeals correctly held that Meisner conceded standing by conceding summary judgment.

The Court of Appeals determined that Meisner conceded summary judgment and therefore conceded the issue of standing. However, in her Petition, Meisner does not address whether she conceded summary judgment. Instead, she revisits the same standing arguments she raised before the Court of Appeals – the same arguments that the Court of Appeals did not consider due to the more fundamental problem with Meisner's concession of the issue at summary judgment. The Court of Appeals was correct, though, in holding that Meisner conceded summary judgment, and thus standing, for the reasons stated herein. *See infra* Section II.

B. Meisner misapplies South Carolina law in arguing that Nationstar lacks standing.

Meisner mistakenly asserts that the Court relied on *Bank of Am., N.A. v. Draper* to reach a determination that Nationstar established standing. 405 S.C. 214, 222-223 (Ct. App. 2013). This is not true. Without reference to *Draper*, the Court simply found that Meisner conceded standing because she could not dispute any of the material facts at summary judgment, which demanded a determination in favor of Nationstar. Still, for the sake of clarity, "[g]enerally, a party must be a real party in interest to the litigation to have standing." *Hill v. S.C. Dep't of*

Health & Envtl. Control, 389 S.C. 1, 22 (2010) (internal quotation marks omitted). A loan servicer is a real party in interest to a foreclosure action and has the ability to initiate a foreclosure action. *Draper*, 405 S.C. at 222-223 (citing *Bankers Trust (Delaware) v. 236 Beltway Inv.*, 865 F. Supp. 1186, 1191 (E.D.Va.1994) (concluding that both lender and servicer have standing to foreclose *even if servicer is not the holder of the mortgage*) (emphasis added)).

Meisner challenges Nationstar's standing by arguing that, because Aurora initiated the foreclosure action prior to being assigned the Mortgage and Note, it was not a real party in interest. (Petition p. 4) Aurora was a real party in interest though, because, as *Draper* recently recognized, both the lender and servicer have standing to foreclose *even if the servicer is not the holder of the mortgage*. 405 S.C. at 222-223. Therefore, even though Aurora filed the foreclosure action on February 3, 2011, and the Note and Mortgage were subsequently assigned to Aurora on February 10, 2011, Aurora had standing to bring the action. Likewise, the ensuing assignment from Aurora to Nationstar on June 26, 2012 did not preclude Nationstar from asserting its standing to foreclose as the successor in interest, as evidenced by the Order approving the substitution of Nationstar in place of Aurora pursuant to SCRCP 17(a), 35(c), and 25(e). (R. p. 51)

Since Meisner's standing argument raises no novel question of law, conflict of law, error, or any other compelling reason for this Court to consider her Petition, it cannot serve as a basis for consideration by this Court. SCACR 242

II. THE COURT OF APPEALS CORRECTLY HELD THAT MEISNER CONCEDED SUMMARY JUDGMENT

The Court of Appeals held that Petitioner conceded summary judgment. Instead of addressing that determination, Petitioner argues that Nationstar did not meet its burden of proof.

However, the Court of Appeals correctly determined that Petitioner could not avoid summary judgment based on the undisputed facts.

In support of her contention that Nationstar did not meet its burden, Petitioner refers to the "anniversary of the bankruptcy of both Lehman Brothers and its affiliate Aurora Loan Servicing, LLC." (Petition p. 9) She further states that "the Aurora assignment from MERS was filed three years into the bankruptcy of Lehman Brothers." (Id.) Petitioner cites no authority that would suggest the legal implications or relevance of these assertions. Thus, it is not clear what they have to do with whether Petitioner conceded summary judgment by failing to dispute any material issues of fact. However, Nationstar would simply assert that Petitioner has not disputed any issues of material fact. An issue of fact is "[a] point supported by one party's evidence and controverted by another's." Black's Law Dictionary (9th ed. 2009). Since there were no legitimate issues of material fact disputed, and since Meisner failed to identify any, the Court of Appeals did not err by disregarding Meisner's irrelevant factual contentions and determining that she conceded summary judgment.

More fundamentally, Meisner has again failed to point to a novel question of law, a dissent in the Court of Appeals, a Court of Appeals conflict with the Supreme Court, a constitutional issue, or a federal question that could potentially persuade this Court to consider her Petition. *See* SCACR, Rule 242. Therefore, the Petition should be denied.

III. THE COURT OF APPEALS CORRECTLY FOUND THAT PETITIONER DID NOT PRESERVE HER ARGUMENT ALLEGING THAT THE MASTER IN EQUITY IMPROPERLY GAVE LEGAL AND TAX ADVICE DURING THE SUMMARY JUDGMENT HEARING

Petitioner acknowledges that the Court of Appeals determined that this issue was not preserved for review. Oddly, she does not argue against that determination though. Instead, she points out that the Master-In-Equity's comments were "erroneous" and "confusing," presumably

in an effort to demonstrate that these comments were prejudicial. However, again, Petitioner ignores the more fundamental problem that served as the basis of the Court of Appeals' determination: Petitioner did not preserve this issue for review.

A. Meisner failed to raise this issue in her Motion for Reconsideration or otherwise explain why this is a proper subject on appeal.

When a trial court does not address an issue in its summary judgment order, and the appellant fails to raise that issue in a motion to alter or amend the judgment, the issue is not preserved. *BMW of North America, LLC v. Complete Auto Recon Services, Inc.*, 399 S.C. 444, 454-455 (Ct. App. 2012). There was no ruling in the Summary Judgment Order on Petitioner's argument related to judicial comments, and Petitioner did not raise this issue in her Rule 59(e) motion. Thus, the issue was not preserved for review. *See id.* Absent a motion for reconsideration, Nationstar cannot conceive how these comments, alerting Meisner to changes in a tax law impacting her case, could be the basis for an appeal or reversible error. Since Meisner did not preserve this argument with her Rule 59(e) motion, the Court of Appeals properly held that Petitioner failed to preserve this issue.

B. Meisner failed to show that the Master-In-Equity's comments influenced his ruling.

Even if this argument had been preserved, Nationstar is uncertain what the legal grounds for Petitioner's argument would be, as she cites no authority in support of this argument. If Meisner means to argue that the comments themselves improperly influenced the outcome of the Hearing, Counsel for Nationstar has not encountered any authority to suggest a judge's comments at a summary judgment hearing, in and of themselves, can be grounds for reversible error. This is likely because a judge's ruling at summary judgment is made as a matter of law, and any errors would be errors of law. There is a concern underlying judicial intervention in *jury trials*, but that is due to the potential for interference with fact-finding. 35 A.L.R. 5th 1

(Originally published in 1996). There is no risk of the judge improperly interfering with an outcome at summary judgment, as the outcome is determined solely by the judge as a matter of law. Since this was a summary judgment hearing, determined as a matter of law by the Master-In-Equity, the Master-In-Equity's own comments did not improperly influence the outcome.

Alternatively, Meisner might be attempting to argue that the comments are evidence of an underlying prejudice held by Judge Scarborough that deprived her of a fair hearing. A judge's conduct during a summary judgment hearing might be the basis for reversible error if there is evidence of an impartiality that deprived a party of a fair judicial proceeding. S.C. App. Ct. R. 501, Canon 3(C)(1) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."). "In applying Canon 3(C)(1), the South Carolina Supreme Court has stated that the movant or petitioner must show some evidence of the bias or prejudice of the judge." *Lyvers v. Lyvers*, 280 S.C. 361, 367 (Ct. App. 1984). Appellate courts accord great weight to a trial judge's pledge of impartiality and will question it only in limited circumstances. *Ellis v. Procter & Gamble Distrib. Co.*, 315 S.C. 283, 285 (1993) (noting that a trial judge's impartiality might be questioned when his factual findings are not supported by the record).

Here, the Master-In-Equity's comments were not improper, much less evidence of prejudice. If anything, the Master-In-Equity was attempting to help Meisner when he said to her attorney, "I think this may be something you may want to speak to your client about. . . . through December of 2013 presently the law is . . . . you get a forgiveness of debt on your principle [sic] residence . . . . so you might want to discuss with your client the prospect of whether this would be a taxable transaction if she gets foreclosed next year as opposed to this year." (R. p. 116) He went on to say, "[a]s a general rule I don't grant summary judgment on the equitable matter of

foreclosure of a mortgage," which if anything, revealed a prejudice against Nationstar's position. (R. p. 23) Either way, the Master-In-Equity's comments did not reveal a bias that would impact the result. He merely made a comment about tax laws that might impact Meisner's position and went on to suggest that his practice was to rule against Nationstar's position. The record reflects that Judge Scarborough was familiar with the arguments, case law, and undisputed facts and was engaged at the hearing. South Carolina courts have refused to cast doubt on a judge's impartiality in circumstances far more troubling than those at issue here. *See, e.g., Lyvers*, 280 S.C. at 367 (holding the fact that family court judge had represented counsel for husband in domestic action four years previously was not sufficient evidence to demonstrate a bias); *Mortgage Elec. Sys., Inc. v. White*, 384 S.C. 606, 616 (Ct. App. 2009) (affirming that a special referee's refusal to recuse himself in a mortgage foreclosure proceeding on the basis that referee had represented mortgagor's mother on a prior occasion was justified).

Absent any evidence of prejudice that would have deprived Meisner of an impartial hearing, Meisner cannot argue that Judge Scarborough deprived her of a fair hearing. Nor can Meisner argue that Judge Scarborough's comments themselves somehow improperly influenced the outcome of the Summary Judgment Hearing. Accordingly, even if this issue had been preserved, there was no judicial error, and Petitioner has not provided any compelling reason for this Court to grant her Petition.

IV. THE COURT OF APPEALS CORRECTLY FOUND THAT PETITIONER CONCEDED THE HOUSE WAS NOT HER PRIMARY "RESIDENCE," AS DEFINED IN ADMINISTRATIVE ORDER 2011-05-02-01

Petitioner argues that the Court of Appeals erred by ruling that she conceded that the Property was not her "primary residence." This issue was relevant only within the context of determining whether Meisner qualified for foreclosure intervention review under Administrative Order 2011-05-02-01. Meisner would not qualify for foreclosure intervention review unless the

Property was her primary residence. Meisner seems to believe that the Court of Appeals improperly held that she conceded this issue to Judge Scarborough, which deprived her of the opportunity to participate in foreclosure intervention review.[2]

Petitioner only set forth one sentence in support of this argument. (Petition p. 11) She flatly declares that the Court of Appeals should have reversed the Master-In-Equity because she claimed she owned and lived in the property at the Summary Judgment Hearing. (Id.) However, the Court of Appeals properly reviewed the record and noted that Petitioner conceded this issue to the Master-In-Equity, as indicated in the following exchanges:

> The Court: The home on the island does not qualify for legal resident status?
> Ms. Meisner: That's correct your honor
>
> (R. p. 98)
>
> The Court: All right. Well, I'll find it's not owner-occupied. That's my finding. She was served in Blythewood, South Carolina. Her tax bills are going to Blythewood, South Carolina. As you heard me say in the last case, you get one but not two in this state.
>
> (R. p. 100)

Finally, even if the property should have been considered Petitioner's primary residence, and it should not have, Petitioner would only receive the benefit of foreclosure intervention review. As indicated in footnote 2, Petitioner did in fact have the opportunity to participate in foreclosure intervention review. Thus, this issue falls far short of the grounds this Court would review to justify considering the Petition (i.e., a novel question of law, a dissent in the Court of Appeals, a Court of Appeals conflict with the Supreme Court, a constitutional issue, or a federal

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[2] Regardless of the fact that Meisner likely did not actually qualify for review as the Property likely was not a primary residence, Meisner was still provided the opportunity to participate in foreclosure intervention review. (*See* R. p. 225) Furthermore, Nationstar later provided Meisner the opportunity to participate in loss mitigation in August of 2012 but received no response. (R. p. 142) Thus, even if she had not conceded this issue, Meisner could not have been harmed by any 'primary residence determination,' as she was provided opportunities to participate in foreclosure intervention review.

question that could potentially persuade this Court to consider her Petition). *See* SCACR, Rule 242.

CONCLUSION

For the foregoing reasons, Respondent Nationstar Mortgage LLC respectfully requests that the Court deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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September 8th, 2016.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas Case No. 2011-CP-10-812
The Honorable Mikell R. Scarborough, Master-In-Equity

APPELLATE CASE NO. 2013-2694

NATIONSTAR MORTGAGE LLC

Respondent,

v.

RHONDA MEISNER,

Petitioner.

PROOF OF SERVICE

I hereby certify that the foregoing ***Return to Petition for Writ of Certiorari*** has been served upon the parties in this action by mailing a copy thereof, postage prepaid, to the following:

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