

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY

Honorable Joseph M. Strickland, Master in Equity

Case No. 2010-CP-40-05886

Appellate Case No. 2016-001119

MidFirst Bank,Respondent

v.

Mahasin K. Bowen as Personal Representative for the Estate of Mary Lee Samuel; Mahasin K. Bowen; Cecil Samuel a/k/a Cecil A. Samuel; Charles Samuel, Jr.; Earl Hassan Samuel; Kenneth Kareem Samuel; Kilgore Marketing Solutions d/b/a RSVP Columbia; Tauheedah Maeen; Raymond Samuel a/k/a Shamsud-din Raymond Samuel; South Carolina Attorney General; South Carolina Department of Motor Vehicles, Defendants

Of Whom Mahasin K. Bowen, as Personal Representative for the Estate of Mary Lee Samuel, and individually is theAppellant

INITIAL BRIEF OF RESPONDENT


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October 17, 2016

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STATEMENT OF ISSUES ON APPEAL

- I. Does timely service and filing of a Motion to Alter or Amend Judgment stay a foreclosure sale ordered pursuant to the subject judgment until such motion is resolved?

- II. Did the Master in Equity err in granting the Respondent's Motion for Summary Judgment, effectively finding that there are no genuine issues of material fact in dispute, where:
 - a. The Defendant contested the Respondent's assertion that the mortgagors intended to mortgage any property other than the real property unambiguously described in the mortgage?
 - b. There is no finding that the contract is ambiguous, and the parties to the contract are neither parties in the case nor have appeared to assert a position?
 - c. The Respondent claims the contract is defective as a result of mutual mistake (failure to encumber a mobile home)?

- III. Did the Master in Equity err in accepting in evidence in support of the Motion for Summary Judgment: (1) an Affidavit of Indebtedness, which is inadmissible hearsay, and (2) an Affidavit of Attorney's Fees?

- IV. Did the Master in Equity err in issuing a Judgment of Foreclosure and Sale, in conjunction with the granting of the Motion for Summary Judgment, which Judgment granted relief to Respondent which was not requested in the Motion for Summary Judgment?

STATEMENT OF THE CASE

This is a mortgage foreclosure action. MidFirst Bank, Plaintiff in the Circuit Court and Respondent in this Appeal (“**Respondent**”), filed its complaint on August 27, 2010. (Complaint.) An amended complaint was filed on January 2, 2013. (Amended Complaint.) In addition to its cause of action for foreclosure Respondent sought reformation of the mortgage to include the manufactured home situated on the property. On March 15, 2013 an Answer with Counterclaims was filed by Mahasin Bowen, pro se. (Answer.)

Respondent filed a reply to Ms. Bowen’s counterclaims on April 23, 2013. (Reply.) On July 16, 2013 Respondent served discovery on Mahasin K. Bowen, in her individual capacity and as personal representative of the estate of Mary L. Samuel. (hereinafter “**Appellant**”). The discovery included Interrogatories, Requests for Production and Requests to Admit. (Requests to Admit.) On July 18, 2013 Respondent served a Notice of Deposition on Appellant. (First Notice of Deposition.) The Deposition was rescheduled by an Amended Notice of Deposition served on Appellant on August 7, 2013. (Amended Notice of Deposition.) Appellant appeared at the scheduled Deposition on August 21, 2013 and chose not to answer questions. (Transcript of Deposition of Mahasin K. Bowen, August 21, 2013, p.3-5, 11-12, 16-21, 23-24.)

The case was referred to the The Honorable Joseph M. Strickland as Master In Equity for Richland County by ordered entered on August 19, 2013 (Order of Reference.).

On May 1, 2015 Respondent filed a Motion for Summary Judgment. (Motion for Summary Judgment). Attached to the Motion were the following documents:

- Copy of the Note (Mot. Summ. J., Ex. 1)
- Copy of the Mortgage (Mot. Summ. J., Ex.2)

- Application of Appointment as Personal Representative for Mahasin K. Bowen for the Estate of Mary L. Samuel (Mot. Summ. J., Ex. 3)
- Copy of the Amended Complaint
- Copy of Answer of Appellant
- Copy of Respondent's Requests to Admit, Requests for Production and Interrogatories to Appellant, along with certificate of service (Mot. Summ. J., Ex. 6)
- HUD-1 Closing Statement for subject loan (Mot. Summ. J., Ex. 6)
- Copy of Appraisal from Closing (Mot. Summ. J., Ex. 6)
- Copy of Good Faith Estimate of Settlement Charges from Closing (Mot. Summ. J., Ex. 6)
- Copy of Federal Truth in Lending Disclosure from Closing (Mot. Summ. J., Ex. 6)
- Copy of RESPA Disclosure from Closing (Mot. Summ. J., Ex. 6)
- Copy of Notice of Right to Cancel from Closing (Mot. Summ. J., Ex. 6)
- Copy of Filed Mortgage Assignments (2) (Mot. Summ. J., Ex. 7)
- Affidavit of Indebtedness (Mot. Summ. J., Ex. 8)
- Affidavit of Attorneys' Fees (Mot. Summ. J., Ex. 9)
- Letter from Sandra F. Braunstein, Director, Division of Community and Consumer Affairs regarding Mortgage Loan Modifications and Regulation B's Adverse Action Requirement
- Article from Consumer Finance Law Quarterly Report on Loan Modification and Equal Credit Opportunity Act

A hearing was scheduled for Respondent's Motion for Summary Judgment on June 25, 2015. On May 4, 2015, Respondent mailed Notice of Hearing to Appellant. (Notice of Hearing.) The hearing was held on June 25, 2015, and Appellant did not attend. At the hearing Respondent presented an updated Affidavit of Attorneys' Fees (Affidavit of Attorneys' Fees dated June 24, 2015), a Waiver of Deficiency Judgment, a Record of Hearing (Record of Hearing) and a Proposed Order of Judgment and Sale.

The Court entered a Judgment of Foreclosure and Sale on July 28, 2015 and set the Sale of the subject property for September 8, 2015 (Judgment of Foreclosure and Sale). Appellant's Motion to Alter or Amend was filed pro se on August 10, 2015 (Motion to Alter or Amend). The property was subsequently sold on September 8, 2015. Respondent was the high bidder. (Report on Sale.)

By motion dated October 5, 2015 Appellant filed a Motion to Set Aside Judicial Sale. (Petition to Set Aside Sale.) On November 4, 2015 Appellant's attorney submitted a document entitled Points and Authorities. (Points and Authorities.) That same day a hearing was held on Appellant's Motion to Set Aside Judicial Sale and Motion to Alter or Amend Judgment. Counsel for Respondent did not appear until the end of the hearing. The Court allowed Respondent to submit a written response to Appellant's claims. On November 18, 2015 Respondent submitted its Memorandum in Opposition. (Memo in Opposition.) Appellant filed a Reply on November 24, 2015. (Reply to Plaintiff's Memo.)

On April 25, 2016 the Court issued its Order denying Appellant's Motion to Set Aside Judicial Sale and Appellant's Motion to Alter or Amend Judgment. (April 25, 2016 Order.) On May 6, 2016 Appellant filed a Motion to Alter or Amend the most recent Order and a Motion to Withdraw Admissions. (Motion to Reconsider dated May 6, 2016 and Motion to Withdraw Admissions.) A hearing was held on May 19, 2016, and the Appellant's motions were denied, orally.

On May 26, 2016 this appeal was filed.

STATEMENT OF FACTS

On or about December 23, 1999, Mary L. Samuel gave a Note whereby she promised to pay to SouthTrust Mortgage Corporation the principal sum of \$71,575.00, together with interest at the rate of 8% per annum on the unpaid balance. (Mot. Summ. J., Ex. 1) In order to secure the payment of said Note, Mary L. Samuel and Raymond Samuel did, on or about the same date make, execute, and deliver to Lender, its successors and assigns, a certain mortgage (Mot. Summ. J., Ex. 2) dated December 23, 1999 securing the property described as:

All that certain piece, parcel or tract of land, containing 5.67 acres, more or less, being a portion of a tract of land comprising 10.4 acres, more or less, situate on the northwestern side of Percival Road, about 10 miles from the City of Columbia, in the County of Richland, State of South Carolina, and being more fully shown and delineated upon a plat prepared for Effie Martin by D.T. Duncan recorded in the Office of the Register of Deeds for Richland County in Plat Book X at Page 485; less and excepting a tract containing 2.38 acres, more or less as shown on that certain plat prepared for Fred S. Breeland, Jr. by Douglas E. Plat, Sr., RLS, dated December 13, 1973 and recorded in the RMC Office for Richland County in Plat Book 44 at Page 895 and also shown on that certain plat prepared for Jo Anne B. Turner by Douglas E. Plat, Sr., RLS, No. 4041, dated 3/9/1998, and recorded in the RMC Office for Richland County in Plat Book 51 at Page 5630; and further less and excepting a tract containing 2.35 acres, more or less, situate, lying and being on the south side of Old Percival Road, about 10 miles from the City of Columbia, County of Richland, State of South Carolina, and being more fully shown and delineated upon a plat prepared for Fred S. Breeland and Mildred M. Breeland by Douglas E. Platt, Sr., dated August 24, 1976, and being bounded and measuring on said plat as follows: commencing at a pin on the southeast side of Old Percival Road and running S12°00'E along property now or formerly of Catherin Mimms and property now or formerly of Fred S. Breeland for a distance of 335.2 feet; thence turning and running S76°40'W along property now or formerly of Fred S. Breeland for a distance of 304.1 feet; thence turning and running N16°27'W for a distance of 310.7 feet along an old fence to Old Percival Road; thence turning and running N72°21'E along Old Percival Road for a distance of 330.9 feet to the point of beginning. This being the northwestern-most of property heretofore conveyed to Fred S. Breeland and Mildred M. Breeland by deed of Effie Chambers Martin Dated March 15, 1968, recorded in Deed Book D100 at Page 491.

Thereafter the Mortgage was first assigned to Mortgage Electronic Registration Systems, Inc. as nominee for Homeside Lending, Inc. by assignment recorded on December 27, 2000 in Book 469 at Page 2442. Subsequently the Mortgage was assigned to MidFirst Bank by Assignment recorded on March 21, 2008 in Book 1413 at Page 1356. (Mot. Summ. J., Ex. 3)

Mary Lee Samuel, the note maker and mortgagor, died on February 9, 2008. On August 27, 2010, Respondent filed a Complaint for Foreclosure. (Complaint.) The Amended Complaint was filed January 2, 2013. (Amended Complaint.)

On or about March 15, 2013, Mahasin K. Bowen, as Personal Representative for the Estate of Mary Lee Samuel and in her individual capacity (hereinafter "**Appellant**"), filed an Answer. (Answer.) Ms. Bowen generally denied all allegations of the complaint except that the mortgage was recorded and also alleged 27 defenses and 12 counterclaims.

On or about July 16, 2013, Respondent sent discovery including Requests for Admissions to Appellant. (Requests to Admit) Appellant did not respond to the discovery requests. At the Deposition Appellant refused to answer questions. (Transcript of Deposition of Mahasin K. Bowen, August 21, 2013, p.3-5, 11-12, 16-21, 23-24) The Requests for Admissions were deemed admitted and essentially established Respondent's case.

An Order of Reference referring the case to The Honorable Joseph M. Strickland as Master In Equity for Richland County was filed on August 19, 2013. (Order of Reference.)

Respondent filed a Motion for Summary Judgment as to all causes of action in the complaint on May 1, 2015. The Summary Judgment Motion was supported by an Affidavit of Indebtedness, the Note, Mortgage, Assignments and documents supporting the reformation cause of action, including documents from closing and the appraisal conducted in preparation for closing showing the manufactured home to be a part of the subject property. (Mot. Summ. J.) No response was filed by Appellant.

A hearing on Respondent's Motion for Summary Judgment was in front of the Master In Equity on June 21, 2015, and all Defendants were notified of the hearing. (Notice of Hearing.) At the final hearing, Appellant did not appear. The Court had before it sworn statements, admitted facts and documentation from closing. (Mot. Summ. J.) The Court granted Respondent's Motion for Summary Judgment, and the sale was scheduled for September 8, 2015. (Judgment of Foreclosure and Sale)

On August 10, 2015, Appellant filed a Motion to Alter or Amend Judgment under SCRCF 59(e). (Motion to Alter or Amend, August 10, 2015) Appellant did not file a motion to stay enforcement of the Judgment.

The property was duly advertised and, on September 8, 2015, the subject property sold at foreclosure auction with the Respondent being the successful bidder. (Report on Sale)

On October 14, 2015 Appellant filed a Motion to Set Aside Judicial Sale. (Motion to Set Aside Sale) On November 4, 2015 a Notice of Appearance was filed by Leonard R. Jordan, Jr.

notifying the Court of his representation of Mahasin K. Bowen. The same day therewith Appellant filed a document entitled "Points and Authorities". (Points and Authorities)

The "Points and Authorities" sought to expand on the Motion to Alter or Amend, which itself sought to raise arguments for the first time. The motions were denied, and the Court's order was entered on April 25, 2006. (Order Denying Motions entered April 25, 2016.)

After this order Appellant filed a second Motion to Alter or Amend under Rule 59(e) and for the first time sought to withdraw her Admissions. The motions were properly denied.

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997). "In an appeal from an action in equity, the appellate court may find facts in accordance with its own view of the preponderance of the evidence." Lowcountry Open Land Trust v. Charleston S. Univ., 376 S.C. 399, 407, 656 S.E.2d 775, 779 (Ct. App. 2008). Nevertheless, "the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." U.S. Bank Trust Nat. Ass'n v. Bell, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009) (quoting Pinkney v. Warren, 344 S.C. 382, 387-88, 544 S.E.2d 620, 623 (2001)). The Court may affirm the trial court's ruling for any ground appearing in the record. Rule 220(c) SCACR ; see also On v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

ARGUMENT

- 1. THE MASTER IN EQUITY PROPERLY SOLD THE SUBJECT PROPERTY PURSUANT TO A VALID JUDGMENT OF FORECLOSURE AND SALE.**

The Judgment of Foreclosure and Sale was entered on July 29, 2015. Subsequently a Motion to Alter or Amend Judgment on August 10, 2015. (First Motion to Alter or Amend.) The Court issued a Notice of Sale which was properly advertised. The subject property was sold on September 8, 2015. (Report on Sale.)

Appellant contends the Foreclosure sale should not have occurred while a Rule 59(e), SCRCF motion was pending. This is error. Rule 62, SCRCF, governs a Stay of Proceedings to Enforce Judgment. Rule 62(b) address this issue directly. In pertinent part it states:

(b) Stay on Motion for New Trial or for Judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60...

The rule grants the Court the discretion to stay any proceedings. The rule does not require the proceedings to be stayed, and it does not automatically stay them. The party seeking to have the proceedings stayed must make a motion to do so. Stearns Bank Nat. Ass'n v. Glenwood Falls, LP, 375 S.C. 423, 425, 653 S.E.2d 274, 276 (2007). No such request was made in this case, so the Court properly sold the property.

Rule 62(b), SCRCF, makes clear that the Court's discretion to stay proceedings to enforce a judgment are the same for motions made under Rule 59 or Rule 60, SCRCF. In Stearns Bank Nat. Ass'n v. Glenwood Falls, LP, 375 S.C. 423, 653 S.E.2d 274 (2007), the Court directly ruled on the issue raised by the Appellant in this matter. The Court held:

The filing of a Rule 60(b) motion "does not affect the finality of a judgment or suspend its operation." Rule 60(b). If the debtor wishes to stay enforcement of the judgment pending the trial court's disposition of the debtor's Rule 60(b) motion, the burden is on it to make the motion under Rule 62(b), SCRCF. Whether to grant

such a stay rests in the court's discretion "on such conditions for the security of the [creditor] as are proper ..." Rule 62(b). The policy expressed in Rule 60 and in Rule 62(b) favors the creditor over the debtor.

The Appellant did not move the Court pursuant to Rule 62(b) to stay proceedings to enforce the judgment, so the Court was correct in holding the sale. Further, had the Appellant made a motion to stay the proceedings under Rule 62(b) the Court would have had the discretion to stay the proceedings and could have properly allowed them to proceed.

2. NONE OF THE ISSUES REGARDING THE ENTRY OF SUMMARY JUDGMENT ARE PRESERVED

a. The issues raised by Appellant in her Appeal were not raised at the Summary Judgment hearing.

Appellant was served with Respondent's motion for summary judgment. (Mot. Summ. J.) Appellant did not respond. Appellant was properly notified of the time and place of hearing for Respondent's Motion for Summary Judgment. (Notice of Hearing.) Appellant did not attend. Accordingly, Appellant did not raise any arguments or objections, so those issues are not preserved for review. "It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved." Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006).

b. The issues raised by the Appellant in her Appeal were not properly raised in her Motion to Alter or Amend Judgment

In the instant appeal Appellant seeks to challenge the grant of summary judgment regarding the reformation of mortgage to include the subject mobile home. The Appellant's¹ Motion to Alter or Amend Judgment contains twenty-six (26) numbered paragraphs. The motion does not contain a single mention of the reformation cause of action or the mobile home situated on the subject property. The issues were not raised in response to the Summary Judgment motion, were not raised at the Summary Judgment hearing and were not raised in the Motion to Alter or Amend.

Attached to Appellant's Motion was an un-notarized affidavit which contains the statement:

5. Midfirst Bank requests additional collateral 1994 /Omi Destiny Mobile/Manufacture home clearly not included in the original Note/Mortgage which present genuine material facts.

This is the only statement regarding the mobile home in any documents related to the original Motion to Alter or Amend. The statement varies greatly from the issues Appellant seeks to raise now. A party need not use the exact name of a legal doctrine in order to preserve the issue for appellate review, but it must be clear the argument was presented on that ground. State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010).

It is not clear what issue Appellant was raising by the statement in the attached affidavit. On appeal Appellant seeks to delve into the intent of the parties. A challenge to the intent of the parties cannot be reasonably read into the Motion to Alter or Amend; therefore, it is not preserved for review.

¹ The Motion to Alter or Amend Judgment appears to be submitted by Appellant, but it is not entirely clear. The Defendant's attorney is listed as LegalShield on the motion coversheet. The motion coversheet is signed by Kenneth K. Samuel. The signature block on the motion itself lists the entity as "Estate of Mary L. Samuel, Mahasin Bowen"

On appeal Appellant also seeks review of evidentiary issues, related to the Affidavit of Indebtedness and Affidavit of Attorney's Fees. Appellant made no objection at the hearing on Respondent's Motion for Summary Judgment. The Motion to Alter or Amend also contains no explicit evidentiary objections. Nor can any evidentiary objections be reasonably read into the Motion. The issues regarding evidence being neither raised at the Hearing nor raised in the Motion to Alter or Amend Judgment are not preserved for review.

c. Appellant could not raise issues for the first time in her Rule 59(e) motion.

Appellant filed a motion under Rule 59(e), SCRPC, to Alter or Amend Judgment. Assuming *arguendo* that the trial court could have interpreted the motion to include the issues now raised in the appeal, those issues could not have been raised for the first time in a Motion to Alter or Amend Judgment. "A party cannot raise an issue for the first time in a Rule 59(e), SCRPC motion which could have been raised at trial." MailSource, LLC v. M.A. Bailey & Associates, Inc., 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003).

By failing to attend the summary judgment hearing and thus failing to raise any issue at trial, Appellant did not preserve any issues for appellate review.

3. THE MASTER IN EQUITY PROPERLY GRANTED SUMMARY JUDGMENT

"Summary judgment is appropriate where it is clear there is no genuine issue of material fact and the moving part is entitled to judgment as a matter of law" Brooks v. Northwood Little League, 327 S.C. 400, 489 S.E.2d 647, 648 (Ct. App. 1997). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to a judgment as a matter of law." Branch Banking and Trust, Co. v. Carolina Crank and Core, Inc., 362 S.C. 647, 651, 608 S.E.2d 896, 899 (Ct. App. 2005). "In order to resist a motion for summary judgment, the nonmoving party must

come forward with specific facts showing genuine issues necessitating trial.” Nationsbank v. Scott Farm, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995). “Once the moving party carries its initial burden, the ‘opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial.” Hedgepath v. AT&T, 348 S.C. 430, 559 S.E.2d 327 (Ct. App. 2001).

a. By failing to respond to discovery, the answering Defendants rendered the requests for admission conclusive admitted thereby leaving no genuine issue of material fact.

At no time did the Appellant shown that there is any genuine issue of material fact which would necessitate a full trial. Discovery was served upon Appellant on July 16, 2013. After several attempts to obtain discovery responses, and several attempts to set up a deposition, the discovery process was rendered moot. By failing to respond to discovery, including requests for admission, the Appellant conclusively admitted that there is no genuine issue of material fact present in this action. In South Carolina, a party’s failure to respond to Requests for Admissions render the matters listed in the requests conclusively admitted. Rule 36(a), SCRPC. See Hatchell v. Jackson, 290 S.C. 256, 349 S.E.2d 407 (Ct. App. 1986) Admissions obtained from a failure to respond to a request for admission are just as binding on a party as answers in pleadings or stipulations. Commerce Center of Greenville, Inc. v. W. Powers McElveen and Assocs., Inc., 347 S.C. 545, 554, 556 S.E.2d 718, 723 (Ct. App. 2001). “[O]ur courts have repeatedly found that failure to respond to requests for admissions deems matters contained therein admitted for trial, regardless of whether the admission concerns a matter responded to in a party’s pleadings.” Scott v. Greenville Housing Authority, 353 S.C. 639, 646, 579 S.E.2d 151, 154-55 (Ct. App. 2003).

By failing to respond to the admissions, Appellant admitted the following:

- Mary L. Samuel entered into the note under its terms;
- Mary L. Samuel & Raymond Samuel agreed to be bound by the terms of the note;
- The note was secured by the mortgage that they executed;
- The mortgage intended to include the mobile home;
- Installments of principal and interest falling due from and after February 1, 2010, have not been paid although demand for the payment thereof has been made, thereby placing Mary L. Samuel in default under the terms of the note and mortgage;
- There is now due and owing the principal sum of \$62,787.47;
- Any notice required by the terms of the mortgage or by state or federal law has been given to all applicable defendants prior to the commencement of this action;
- The answering Defendants have no legal defenses to this action;
- Mortgage Electronic Registration Systems, Inc. and MidFirst Bank are not liable for any of the counterclaims alleged;
- Mary L. Samuel and Raymond Samuel received and signed the Federal Truth in Lending Document;
- Mary L. Samuel received and signed the RESPA Servicing Disclosure on November 29, 1999; and
- Mary L. Samuel received and signed the Notice of Right to Cancel on December 23, 1999.

Given that each of these facts has been admitted as a matter of law, there was no genuine issue of material fact and summary judgment and reformation of the mortgage were properly entered in this matter.

b. The Respondent established all of the facts necessary to recover on its causes of action for foreclosure and reformation of mortgage. No specific facts were raised by the Appellant to show the necessity of a full trial.

The Note and Mortgage are direct evidence of the terms and existence of the agreement entered into by Ms. Samuel. (Mot. Summ. J. Ex. 1,2). The note endorsement and assignments demonstrate that the Note and Mortgage were properly transferred to the Respondent. (Mot. Summ. J. Ex. 1, 7). Further bolstering its motion, the Respondent submitted an Affidavit of Indebtedness, for which no objection was tendered. (Mot. Summ. J. Ex. 8). The Respondent's Affidavit clearly establishes the breach of the note and mortgage and the amount and measures of damages sustained by the Respondent as a result of the Ms. Samuel's breach.

Additionally, looking at the exhibits to the discovery and in particular the appraisal of the property utilized for the loan, it is clear that the subject property included a manufactured home and that the mortgage intended to encumber the manufactured home on the property. Thus the mortgage should be reformed to include the manufactured home. (Mot. Summ. J. Ex. 6). Specifically, in the appraisal is the language "The subject is a manufactured house." This is an extremely clear and unambiguous showing that the manufactured house located on the subject property was intended, by both parties, to be collateral for the loan. Additionally, and further evidencing the intent of the parties to include the mobile home as collateral, are pictures taken by the appraiser which were included with the appraisal as a photograph addendum. The language, combined with the photograph addendum, completely and unequivocally evidences the intent of the parties to include the mobile home as collateral for the loan.

With the copies of the note, mortgage, and the Respondent's Affidavit, the essential elements and facts of the Respondent's cause of action for foreclosure have been established. By including a copy of the appraisal, the Respondent has clearly shown that reformation was appropriate. As such there are no material issues of fact and summary judgment is appropriate. Summary judgment is appropriate when "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRPC.

c. The award of attorney's fees was proper under the terms of the note and mortgage, and given the amount of work expended in this action.

"When the contract provides for 'reasonable' attorneys' fees without specifying a rate or amount, the issue of attorneys' fees is left to the discretion of the trial judge." Dedes v. Strickland, 307 S.C. 155, 160, 414 S.E.2d 134, 137 (1992).

The Respondent is entitled to recover from the Defendants reasonable attorney's fees and court costs incurred in bringing this action, (Mot. Summ. J. Ex.2) and, as evidence of these costs expended by the Respondent in this action, the Respondent submitted two Affidavits of Attorney's Fees and Court Costs to the Court. The first was submitted with the Motion for Summary Judgment. (Mot. Summ. J. Ex. 9) An updated Affidavit was submitted at the hearing on the Motion for Summary Judgment. (Affidavit of Attorneys' Fees dated June 25, 2015.) Both Affidavits of Attorney's Fees were received by the Court without objection.

At no time did the answering Appellant raise any issue of material fact as to the amount of attorney's fees awarded to the Respondent. This case had been ongoing for five years, involved a title issue, discovery, deposition, a reply to the Appellant's sixteen page answer with

counterclaims, researching and drafting a twenty-eight page memo with over eighty pages of exhibits to counter each of the Appellant's assertions, and multiple hearings. The amount of attorney's fees awarded to the Respondent is completely reasonable given the facts of this case.

d. The Relief granted in the Judgment of Foreclosure and Sale was proper.

In her brief the Appellant contends the dismissal of her counterclaims with prejudice was improper because that relief was not specifically requested in the Motion for Summary Judgment. The dismissal was appropriate.

In its Amended Complaint Respondent prayed for, *inter alia*, "For such other and further relief as may be just and proper." (Amended Complaint, p. 8) Then in its Reply to Appellant's Answer and Counterclaim Respondent specifically requested dismissal of the Appellant's Counterclaims. Respondent prayed "That the Defendant's Answer and Counterclaims be dismissed with costs." (Reply, p. 12.) The dismissal of the counterclaims was specifically requested.

Had Respondent not specifically requested dismissal of the counterclaims, the Master could have dismissed them anyway. "South Carolina law permits recovery in excess of the relief requested by Plaintiff" Mosley v. Quicken Loans, Inc., No. CIV.A.1:16-cv-00384-JMC, 2016 WL 3597596, at 2 (D.S.C. July 5, 2016). See Battery Homeowners :Ass'n v. Lincoln Fin. Res., Inc., 309 S.C. 247, 250-251, 422 S.E.2d 93, 95-96 (1992) (quoting South Carolina Rule of Civil Procedure 54(c) which provides that a party shall be granted the relief to which it is entitled even if the relief was not demanded in the pleadings), Rule 54(c), SCRCF. When the Appellant did not appear at the Summary Judgment hearing dismissal of her counterclaims became relief to which Respondent was entitled.

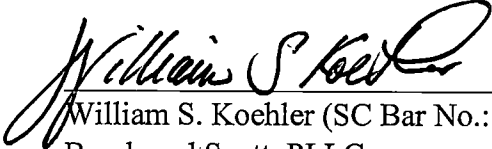
CONCLUSION

There was overwhelming evidence the Note and Mortgage were not paid. None was presented at any time to contradict Respondent's case. There was evidence from the time of the loan transaction that the subject property included a manufactured home. There was evidence the parties intended to encumber the subject property. That intent was frustrated when the manufactured home was not specifically included. The Court properly fixed this clear error with the reformation.

Respondent sought discovery to determine the basis for Appellant's claims. Appellant refused to participate. This failure established every element of Respondent's causes of action. Respondent filed a supported Motion for Summary Judgment. Appellant did not respond or attend. For a second time, Respondent proved every element of its causes of action.

Appellant sought to Alter or Amend the Judgment. That was denied. Now Appellant seeks to introduce new reasons on appeal to alter or amend the judgment. For this and the other reasons stated, this Court should affirm the judgment of the Master in Equity.

October 17, 2016


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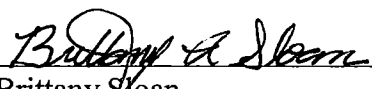
CERTIFICATE OF SERVICE

The undersigned certifies that, on October 17, 2016, Respondent's Initial Brief was served on Appellant by depositing a copy thereof in the United States Mail, first Class, postage prepaid, addressed to:

Leonard R. Jordan, Jr.
JORDAN LAW FIRM
211 Veteran Road, Suite D
Columbia, South Carolina 29209

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Served By:



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October 17, 2016

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: MidFirst Bank v. Mahasin K. Bowen, as Personal Representative for the Estate of Mary Lee Samuel, Mahasin K. Bowen; Raymond Samuel a/k/a Shamsud-din Raymond Samuel; Cecil Samuel a/k/a Cecil A. Samuel; Charles Samuel, Jr.; Earl Hassan Samuel; Kenneth Kareem Samuel; Tauheedah Mateen; Kilgore Marketing Solutions dba RSVP Columbia; South Carolina Department of Motor Vehicles

Case#: 2010-CP-40-5886
B&S file #: 08-01399

To Whom It May Concern:

Enclosed please find the original Respondent's Designation of Matters and Respondent's Initial Brief as well as a Certificate of Service for both with regards to the above referenced matter.

Thank you in advance for your assistance in this matter.

Sincerely,

Brittany R. Sloan
Legal Assistant
Brock & Scott, PLLC

cc: Leonard R. Jordan, Jr.
JORDAN LAW FIRM
211 Veteran Road, Suite D
Columbia, SC 29209

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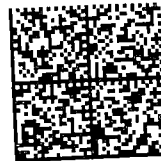
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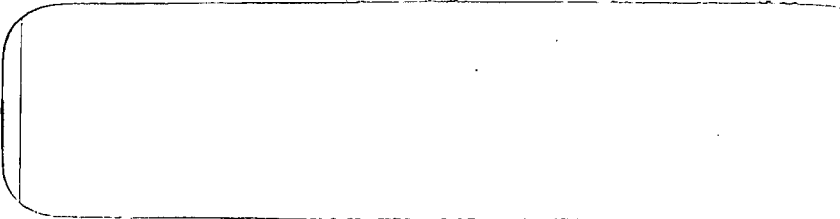
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