

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY CIRCUIT COURT
Clyde R. Davis, Master-In-Equity

Appellate Case No.: 2016-001217

WELLS FARGO BANK N.A. Ultimate Successor to First Union National Bank,
Respondent,

v.

Albert J. Sanders a/k/a Albert Jerry Sanders, Jr. a/k/a Albert J. Sanders,
Palmetto/Carolina Funding, LLC and S.C. State Credit Union,

Defendant,

Of whom, Albert J. Sanders is the Appellant.

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case and Facts..... 1

Standard of Review..... 4

Argument

1. THE SPECIAL REFEREE ACTED WITHIN HIS DISCRETION IN FINDING
THAT APPELLANT OWNED MORE THAN FIVE RENTAL PROPERTIES
AND WAS NOT ELIGIBLE FOR LOAN MODIFICATION REVIEW UNDER
HAMP TIER 2.....5

2. THE SPECIAL REFEREE ACTED WITHIN HIS DISCRETION IN
GRANTING EQUITABLE RELIEF TO RESPONDENT.....9

Conclusion11

TABLE OF AUTHORITIES

CASES

| | |
|---|---|
| <u>Edwards v. Columbia, S.C., Teachers Fed. Credit Union,</u> 276 S.C. 89, 275 S.E.2d 879 (1981) | 9 |
| <u>Emery v. Smith,</u> 361 S.C. 207, 603 S.E.2d 598 (Ct. App. 2004)..... | 9 |
| <u>Halverson v. Yawn,</u> 328 S.C. 618 493 S.E.2d 883 (Ct. App. 1997)..... | 5 |
| <u>Hayne Fed. Credit Union v. Bailey,</u> 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997) | 4 |
| <u>I'On v. Town of Mt. Pleasant,</u> 338 S.C. 406, 526 S.E.2d 716 (2000) | 5 |
| <u>Lowcountry Open Land Trust v. Charleston S. Univ.,</u> 376 S.C. 399, 656 S.E.2d 775 (Ct. App. 2008) | 4 |
| <u>Pike v. South Carolina Department of Transportation,</u> 343 S.C. 224, 540 S.E.2d 87 (2000)..... | 9 |
| <u>Pinkney v. Warren,</u> 344 S.C. 382, 544 S.E.2d 620 (2001)..... | 4 |
| <u>Stoney v. Stoney,</u> 417 S.C. 345 790 S.E.2d 31 (Ct. App. 2016)..... | 5 |
| <u>U.S. Bank Trust Nat. Ass'n v. Bell,</u> 385 S.C. 364 | 4 |
| <u>Williamson v. U.S. Fire Ins. Co.,</u> 314 S.C. 215, 442 S.E.2d 587 (1994)..... | 9 |

STATUTES

11 U.S.C.A. §5415

OTHER AUTHORITIES

Administrative Order, 2009-05-22-01 (S.C. Sup. Ct. Order dated May 22, 2009):.....2

SCACR 220(c).....4

U.S. Department of Treasury, <https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/mha/Pages/hamp.aspx>.....2

U.S. Dept. of Treasury Supplemental Directive 12-02.....3,5,7,10

STATEMENT OF ISSUES ON APPEAL

1. DID THE SPECIAL REFEREE ABUSE HIS DISCRETION IN FINDING THAT APPELLANT OWNED MORE THAN FIVE RENTAL PROPERTIES AND WAS NOT ELIGIBLE FOR LOAN MODIFICATION REVIEW UNDER HAMP TIER 2?

2. DID THE SPECIAL REFEREE ABUSE HIS DISCRETION IN GRANTING EQUITABLE RELIEF TO RESPONDENT?

STATEMENT OF THE CASE AND FACTS

Respondent, Wells Fargo Bank, N.A. filed the instant action seeking foreclosure of property located in Lexington County and owned by Appellant, Albert J. Sanders. The foreclosure is based upon Appellant's failure to make payments required by the terms of his mortgage. (R. pp. 13-17.)

Appellant made, executed and delivered a note (hereinafter "Note") on January 23, 2002, promising to pay to the order of First Union National Bank (hereinafter "Lender") the sum of \$46,611.50 with interest at the rate of 7.59% per annum. (R. pp. 133-136.) To better secure payment of the Note, Appellant made, executed, and delivered a mortgage (hereinafter ("Mortgage")) to First Union National Bank in writing, dated January 23, 2002, covering real property in Lexington County. (R. pp. 137-142.) The Mortgage was recorded on January 28, 2002 in the Lexington County Registry in Book 6955, Page 263 and constitutes a valid purchase money mortgage on the subject property. (Id.) Thereafter, the Mortgage and its accompanying Note were transferred to Respondent by corporate merger. (R. p. 2.) Respondent is the current holder of the Note and Mortgage. (Id.)

On January 25, 2011, Respondent filed a Complaint for mortgage foreclosure against Appellant based upon failure to pay on the mortgage for the installments due. (R. pp. 13-17.) Appellant was personally served with Respondent's Complaint at his place of residence on January 25, 2011. (R. p. 20.) Appellant filed an Answer on February 21, 2011. (R. pp. 21-22.)

The case was referred to The Honorable Clyde R. Davis, Jr. as Special Referee on May 31, 2012. (R. p. 24.) The trial was scheduled before the Special Referee on January 12, 2016. (R. p. 28.) At trial, Appellant asserted the doctrine of unclean hands as a defense to Respondent's foreclosure action claiming that Respondent failed to solicit him for a loan modification under the Home Affordable Modification Program ("HAMP"). HAMP is a voluntary federal program designed to assist struggling homeowners with avoiding foreclosure through providing incentives to participating mortgage servicers for successful loan modifications. HAMP is the largest program within the Making Homes Affordable Program introduced by the Obama Administration in 2009. HAMP carries with it specific eligibility requirements set forth in guidelines and supplemental directives handed down by the U.S. Department of Treasury. U.S. Department of Treasury, <https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/mha/Pages/hamp.aspx>.

On May 22, 2009, the South Carolina Supreme Court issued an Administrative Order regarding mortgage foreclosure and HAMP which required foreclosing plaintiffs to include a statement in their complaint regarding the applicability of HAMP to the foreclosure action. Administrative Order, 2009-05-22-01 (S.C. Sup. Ct. Order dated May 22, 2009). Respondent complied with the Administrative Order and alleged that the loan

did not qualify for loan modification review under HAMP because the subject property was not Appellant's primary residence. (R. pp. 14-15.)

After the filing of Respondent's Complaint, The United States Treasury issued Supplemental Directive 12-02 (the "Supplemental Directive"), which expanded eligibility for HAMP review to rental properties under certain circumstances. (R. pp. 279-300.) This expanded eligibility, referred to as HAMP Tier 2, became effective June 1, 2012. (Id.) The Supplemental Directive defines rental property as, "a property that is used by the borrower for rental purposes only and not occupied by the borrower, whether as a principal residence, second home, vacation home or otherwise ("rental property"). A rental property may be eligible for HAMP Tier 2 if:

- Two or more payments are due and unpaid (rental properties are not eligible for imminent default consideration);
- The borrower certifies that he or she does not own more than five single family properties;
- The rental property is currently occupied by a tenant as a principal residence or is vacant; and
- The borrower certifies in writing that he or she intends to rent the property to a tenant or tenants for at least five years following the effective date of any permanent modification and that he or she will make reasonable efforts to rent the property on a year-round basis if the property is or becomes vacant during such period. Notwithstanding the foregoing, during such five year period the borrower may sell the property, occupy it as the borrower's principal residence, or permit any dependent, parent or grandparent to occupy the property as such party's principal residence with no rent charged or collected."

(R. pp. 283-284.)

Appellant argued at trial that Respondent was required to solicit and review him for a loan modification under HAMP Tier 2. (R. pp. 121-131.) Respondent argued that the subject loan was excluded from HAMP Tier 2 solicitation and review based upon several factors spelled out in the Supplemental Directive. (Id.) The Special Referee took the case

under advisement and the parties were given an opportunity to submit supplemental memoranda regarding the issue of HAMP Tier 2 eligibility. (Id.) Respondent submitted a Supplemental Memorandum on January 29, 2016. (R. pp. 301-305.) This memorandum supported two contentions: 1) that Appellant's property did not qualify as a rental property under the expanded eligibility of HAMP Tier 2; and 2) even if the subject property were a rental property subject to expanded eligibility, Respondent was not required to solicit Appellant for HAMP Tier 2 review. (Id.)

On April 25, 2016, the Special Referee issued an Order and Judgment of Foreclosure and Sale in favor of Respondent. (R. pp. 1-7.) The Special Referee granted the equitable relief sought by Respondent and ruled that Appellant was not eligible for a loan modification pursuant to HAMP Tier 2 based upon the evidence presented at trial showing that Appellant owned more than five rental properties. This appeal followed.

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. SCACR 220(c); see

also On v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000). Appellant asserts that the Special Referee abused his discretion in ruling in favor of Respondent. “An abuse of discretion occurs when the judge is controlled by some error of law or where the order, based upon findings of fact, is without evidentiary support.” Stoney v. Stoney, 417 S.C. 345 790 S.E.2d 31 (Ct. App. 2016). “The burden is on the party appealing from the order to demonstrate the trial court abused its discretion.” Halverson v. Yawn, 328 S.C. 618 493 S.E.2d 883 (Ct. App. 1997).

ARGUMENT

1. THE SPECIAL REFEREE ACTED WITHIN HIS DISCRETION IN FINDING THAT APPELLANT OWNED MORE THAN FIVE RENTAL PROPERTIES AND WAS NOT ELIGIBLE FOR LOAN MODIFICATION REVIEW UNDER HAMP TIER 2.

Supplemental Directive 12-02 establishes an ownership threshold of no more than five single family properties to qualify for HAMP Tier 2 review. (R. p. 283.) Appellant filed a Chapter 11 bankruptcy petition bearing U.S. Bankruptcy Court Case Number 09-09094-dd on December 4, 2009. (R. pp. 154-176.) Appellant’s bankruptcy filing created a bankruptcy estate pursuant to 11 U.S.C.A. §541 which remained open until the estate was fully administered and the case closed on November 13, 2012. (R. p. 275.) With Appellant’s bankruptcy estate being open on the date HAMP Tier 2 became effective, the Special Referee correctly considered the property Appellant owned during that time in deciding whether Appellant qualified for HAMP Tier 2 loan modification review.

Appellant asserted owning eighteen properties in total in Schedule A, filed in his bankruptcy on December 18, 2009. (R. pp. 180-181.) Six properties were specifically designated as “rental”. (Id.) The subject property was not listed as a “rental”, but rather designated as “Family” property along with three others (R. p. 180.) Three properties were listed as “In Foreclosure”. (R. p. 180.)

Appellant filed a Statement of Change and amended schedules on April 5, 2010. (R. pp. 219-243.) Appellant listed three parcels as real property assets on Amended Schedule A. (R. p. 223.) This listing is somewhat misleading and does not indicate the number of properties Appellant owns by itself. Amended Schedule B, regarding personal property, which Appellant submitted to add additional assets and to clarify his interest in various LLC’s and a Corporation, shows that Appellant continued to own more than five rental properties through ownership of LLC’s. (R. pp. 224-231.) Amended Schedule B listed Appellant as the sole member of several LLC’s with the only assets of those LLC’s being apparent rental properties. (Id.) For example, Appellant’s original Schedule A listed ownership of the property located at 205 Pine Ridge Drive, West Columbia, SC 29172 (R. p. 180.) Amended Schedule B listed that same property as owned by South Carolina Homes & Land, LLC, an LLC of which Appellant purported to have a 100% membership interest. (R. p. 226.) Amended Schedule B listed further personal assets of Appellant in the form of sixteen judgments and/or receivables for unpaid rent associated with nine separate properties (R. p. 228-229.)

Appellant neither made affirmations nor presented documentary evidence to contradict his bankruptcy filings or otherwise demonstrate that he owned less than five single family properties at any time after HAMP Tier 2 became effective. There is simply

no evidence to support a finding that Appellant owned less than five single family properties. As such, the Special Referee did not abuse his discretion in finding that Appellant was not qualified to be reviewed for a loan modification pursuant under HAMP Tier 2 because the finding that Appellant owned more than five single family properties was supported by the evidence presented at trial.

As an additional sustaining ground for the Special Referee's ruling that Appellant was not eligible for loan modification review under HAMP Tier 2, the subject property does not qualify as a rental property. The property is occupied by Appellant's sister, rent free. Appellant testified regarding the subject property that "[i]t was purchased by me for my sister who's never paid me a dime, because she was my sister." (R. p. 78, lines 7-9.) Pursuant to the Supplemental Directive, "[i]f a property is occupied as a principal residence by a legal dependent, parent, or grandparent of the borrower, but the borrower does not charge or collect rent, the property is considered a "rental property" that is occupied by a tenant for the purposes of HAMP Tier 2 requirements. (R. p. 284.) Siblings who are not legal dependents are not included in the Supplemental Directive's enumerated categories for which a borrower could charge no rent and still qualify for HAMP Tier 2 review. No evidence was presented that Appellant's sister was Appellant's legal dependent so Appellant's sister would have to pay rent for the subject property to be deemed "rental property" pursuant to the Supplemental Directive. When questioned further about any rent paid by his sister, Appellant gave a confusing answer at first and then conceded that his sister is not paying him rent for the subject property as is evidenced by the following exchange:

Q: I'm asking you, what did she pay you?

A: Now?

Q: Yes.

A: Or then?

Q: When she was the renter?

A: Along with the pay – she would help pay the payment of the property. But, I mean – okay. My wife was 20 years older than me, my ex-wife, who was a banker for 40 years. She would help her and we would – it would be as – we would give her like \$300 payment. We'd take the money back and pay the mortgage, so it was a rental, but it was family.

Q: Let me see if I can get this straight. You're saying that your sister lives there in the property?

A: That's correct.

Q: And she is not making any payments to you; is that correct? I'm just asking you.

A: No, okay.

(R. p. 116, lines 2-21.)

To the extent that Appellant's assertion that his sister paid rent through giving he and his ex-wife money they then would use to pay the mortgage payment could be construed as a rental arrangement; said rental arrangement could not have been in place at the time HAMP Tier 2 came into effect. It was established during Respondent's case in chief, and unchallenged during Appellant's presentation of his defense, that the installments of principal and interest falling due from and after June 13, 2009 have not been paid. Hence, Appellant was not taking rent payments from his sister and paying the subject mortgage payments when the Supplemental Directive took effect in 2012. Therefore, the subject property does not qualify as a rental property subject to HAMP Tier 2 review.

2. THE SPECIAL REFEREE ACTED WITHIN HIS DISCRETION IN GRANTING EQUITABLE RELIEF TO RESPONDENT.

The Appellant's claims regarding HAMP Tier 2 loan modification eligibility are raised as an affirmative defense, specifically the defense of unclean hands. It is well-established in South Carolina that a party asserting an affirmative defense is charged with the burden of proving that defense. Pike v. South Carolina Department of Transportation, 343 S.C. 224, 540 S.E.2d 87 (2000). Appellant argues that Respondent acted unfairly toward him by not informing him of the Supplemental Directive thereby implying that Respondent had a duty to inform Appellant of a publicly available document handed down by the United States Department of Treasury. (Appellant's Initial Brief p. 10.) It is worth noting that Appellant's unclean hands assertion is designed to result in a windfall in his favor by avoiding the only remedy Respondent has regarding its loan because the underlying indebtedness has been discharged through bankruptcy. South Carolina law and public policy do not support windfalls. Williamson v. U.S. Fire Ins. Co., 314 S.C. 215, 442 S.E.2d 587 (1994); see also Edwards v. Columbia, S.C., Teachers Fed. Credit Union, 276 S.C. 89, 275 S.E.2d 879 (1981).

Appellant cites the case of Emery v. Smith, 361 S.C. 207, 603 S.E.2d 598 (Ct. App. 2004), in support of his contention that Respondent has unclean hands. In Emery, a plaintiff filed suit against her ex-husband to enforce her rights to 25% of his military retirement benefits as set forth in a settlement agreement which was incorporated in their divorce decree. This Court found that the divorce decree imposed a duty upon the husband to inform his ex-wife that he had retired and his failure to do so constituted unclean hands such that equitable defense of laches was unavailable to him. *Id.* In Emery, there was a

codified duty coupled with a violation of that duty which gave rise to the finding of unclean hands. In the instant case, there has been no violation of any duty or unfair act by Respondent.

The duties thrust upon Respondent regarding HAMP Tier 2 solicitation are spelled out in the Supplemental Directive. (R. p. 279-300.) It states:

“[s]ervicers must proactively solicit for HAMP any borrower whose loan passes the pre-screen unless the servicer has documented that the investor is not willing to participate in HAMP pursuant to the requirements of Section 1.3, Chapter I of the Handbook, *except that servicers are not required to solicit borrowers who, prior to the Effective Date:*

- *Were two or more payments delinquent and did not occupy the mortgage property as a principal residence;*
- Were two or more payments delinquent and were already solicited in accordance with the reasonable effort requirement;
- Were evaluated and determined to be ineligible for HAMP; or
- Had a payment default on a trail period plan or lost good faith standing on a permanent HAMP modification.”

(R. p. 286.) (Emphasis Added).

It is undisputed that Appellant does not and has not occupied the property as his primary residence. As stated earlier, it was established during Respondent’s case in chief, and unchallenged during Appellant’s presentation of his defense, that appellant was more than two payments delinquent at the time HAMP Tier 2 took effect. In fact, Respondent was approximately three years’ delinquent in mortgage payments when HAMP Tier 2 took effect. Respondent acted pursuant to the mandate of the supplemental directive with respect to HAMP Tier 2 solicitation. As such, the Special Referee acted within his discretion in granting equitable relief to Respondent.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the Circuit Court.

December 2, 2016

A handwritten signature in black ink, appearing to read 'Chad Burgess', written over a horizontal line.

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Defendant,

Of whom, Albert J. Sanders is the Appellant.

SCACR RULE 211(b) CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondent hereby certifies that Respondent's Final Brief complies with SCACR Rule 211(b).

December 2, 2016



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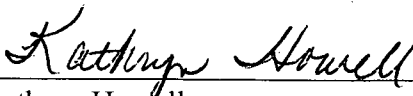
Of whom, Albert J. Sanders is the Appellant.

CERTIFICATE OF SERVICE

The undersigned certifies that, on December 2, 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:

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December 2, 2016
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