THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Joseph M. Strickland, Master in Equity
Case No. 2010-CP-40-5886

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 dba RSVP Columbia; Tauheedah Mateen; Raymond Samuel a/k/a Shamsud-din Raymond Samuel; 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 the Appellant.

REPLY BRIEF

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December 20, 2016

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Statement of Issues

I. Does timely service and filing of a proper Motion to Alter or Amend Judgment stay the enforcement of the subject judgment until such Motion is resolved (rendering null and void any acts to enforce the judgment conducted during such stay)?

II. Did the Master in Equity err in granting the Plaintiff's Motion for Summary Judgment, effectively finding that there are no genuine issues of material fact in dispute, where:

   a. The Defendant contested the Plaintiff'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 (mortgage) are neither parties in the case nor have appeared to assert a position?

   c. The Plaintiff claims the contract (mortgage) is defective as a result of mutual mistake (failure to encumber a mobile home), but no effort is made by the Plaintiff to demonstrate how the allegedly mistaken contract is inconsistent with a prior agreement between the parties?

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, which had not been served in advance as required by Court Rules and which failed to support the amount of the requested fee?

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 the Plaintiff (e.g. "Defendant Mahasin K. Bowen's counterclaims are dismissed with prejudice"), which was not requested in the Motion for Summary Judgment?

Statement of the Case

This is a mortgage foreclosure action instituted by Respondent, MidFirst Bank. Appellant, Mahasin K. Bowen, was one of the owners of the land and mobile home, which were sold at a foreclosure sale. For purposes of this appeal, her defenses/arguments are that the mobile home was not mortgaged by a predecessor in title, that for various reasons, the granting of the Plaintiff's Motion for Summary Judgment was improper, and that the Judgment of Foreclosure and Sale was improperly enforced during the pendency of a proper Rule 59(e) Motion.

On August 27, 2010, MidFirst Bank instituted this suit in Richland County, which suit was assigned Civil Action No. 2010-CP-40-05886. On January 2, 2013, MidFirst Bank filed an Amended Complaint (R.p. 152).

On March 15, 2013, Ms. Bowen timely filed her Answer (R.p. 160) to the Amended Complaint, which responsive pleading included numerous affirmative, and other, defenses and counterclaims. She acted *pro se* and attempted to respond on behalf of other Defendants (other owners of the subject properties), as well as for herself (as Personal Representative for the Estate of Mary Lee Samuel and individually). On April 19, 2013, MidFirst Bank timely filed a Reply to the Counterclaims (R.p. 176). On August 19, 2013, the Plaintiff filed an Affidavit of Default as to the property-owners other than Ms. Bowen.

On May 11, 2015, MidFirst Bank filed a Motion for Summary Judgment (R.p. 21). This

Motion was accompanied by a Memorandum in Support of Plaintiff's Motion for Summary Judgment (R.p. 22) and an Affidavit of Indebtedness (R.p. 98).

On July 28, 2015, the Motion for Summary Judgment was heard by the Master in Equity for Richland County. An Affidavit of Attorney's Fees was filed on July 28, 2015 (R.p. 104). A Record of Hearing for Foreclosure Case was also filed on July 28, 2015 (R.p. 202).

The Master in Equity's Judgment of Foreclosure and Sale (Granting Plaintiff's Motion for Summary Judgment) was issued on July 28, 2015 (precisely as pre-prepared by the Plaintiff's counsel and submitted at the hearing) and filed on July 29, 2015 (R.p. 6).

On August 10, 2015, Ms. Bowen timely served and filed a Motion to Alter or Amend Judgment (R.p. 107).

On September 8, 2015, the subject property (land and mobile home), which was owned jointly by Ms. Bowen and other Defendants, was sold by the Master in Equity. MidFirst Bank was the successful bidder and received a deed from the Master in Equity conveying the subject property to it.

On October 5, 2015, Ms. Bowen served a Petition to Set Aside Judicial Sale (R.p. 111).

[Through this point, the owners of the subject property, including Ms. Bowen, were not represented by an attorney, the Motion to Alter or Amend Judgment had been completely ignored by the Court and MidFirst Bank, and the subject property was sold at auction without further notice to the owners.]

Ms. Bowen retained an attorney in late-October 2015; and at her attorney's request, the Motion to Alter or Amend Judgment and the Petition to Set Aside Judicial Sale were set for hearing

before the Master in Equity on November 4, 2015. Appellant, through her attorney, submitted a Points and Authorities, which was filed on November 4, 2015 (R.p. 114).

The hearing on November 4, 2015, was effectively a one-sided hearing. MidFirst Bank's primary counsel did not appear, but he was afforded an opportunity to submit a written response after reviewing the transcript of the motion hearing (R.p. 219).

Plaintiff's Memorandum in Opposition to Defendant's Motion to Alter or Amend Judgment, Petition to Set Aside Judicial Sale and Points and Authorities was filed on November 18, 2015 (R.p. 120). Ms. Bowen filed a Reply to Plaintiff's Memorandum on November 24, 2015 (R.p. 130).

On April 25, 2016, almost six months after the motion hearing, the Master in Equity issued an Order Denying Defendant's Motion to Alter or Amend Judgment, Petition to Set Aside Judicial Sale, and Points and Authorities (R.p. 18), which summarily denied (without findings/conclusions) the Motion and the Petition. This Order was received by Ms. Bowen's attorney on May 2, 2016 (R.p. 221).

On May 6, 2016, Ms. Bowen, through her attorney, served and filed a Motion to Reconsider and to Alter or Amend Order Denying Motion to Alter or Amend Judgment and Petition to Set Aside Judicial Sale (R.p. 136). This motion was argued before the Master in Equity on May 19, 2016. The Master in Equity summarily denied (without findings/conclusions) the Motion. (This was an oral Order, which has not been reduced to writing and filed.)

On May 26, 2016, a Notice of Appeal was served and was filed in this Court (R.p. 20). This Notice was filed less than 30 days after Ms. Bowen's attorney received the Order filed on April 25, 2016.

Statement of Facts

The Plaintiff, by its Amended Complaint (R.p. 152), sought to collect a debt evidenced by a promissory note, dated December 23, 1999, which was given to South Trust Mortgage Corporation by Mary L. Samuel (a/k/a Mary Lee Samuel), through an *in rem* mortgage foreclosure action, whereby it requested the sale of certain property mortgaged to South Trust Mortgage Corporation by Mary L. Samuel (a/k/a Mary Lee Samuel) and Raymond Samuel (a/k/a Shamsud-din Raymond Samuel) by mortgage dated December 23, 1999 (R.p. 142).

The said mortgage described the encumbered real property as follows:

> All that certain piece, parcel or tract of land containing 5.67 acres, more or less, with any improvements thereon, being located near Columbia, County of Richland, State of South Carolina, and being a portion of the property shown on that certain plat prepared for Jo Anne B. Turner by Douglas E. Platt, Sr., RLS, No. 4041, dated 3/9/87, and recorded in the RMC Office for Richland County 3/31/87 in Plat Book 51 at page 5630 and on a plat prepared for Ellie Martin by D. T. Duncan, recorded in the RMC Office for Richland County in Plat Book X page 485. Reference is craved to said plats for a more complete description of boundaries and measurements; be all measurements a little more or less.
>
> TMS#: 22606-01-01 (Portion).

In its Amended Complaint, the Plaintiff ignored the said legal description found in the mortgage and incorrectly asserted that Mary L. Samuel (a/k/a Mary Lee Samuel) and Raymond Samuel (a/k/a Shamsud-din Raymond Samuel) delivered a mortgage "securing the below described real property," which real property is described as follows:

> All that certain piece, parcel or tract of land, containing 5.67 acres, more or less, being a portion of said 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. Platt, Sr., RLS, No. 4041, dated 3/9/1998, and recorded in the RMC Office for Richland County 3/31/87 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, Jr. 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 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 portion 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.

See Consent Order in Richland County Case Number 2007-CP-40-6491 which reformed the mortgage legal description

Derivation: This being the same property conveyed to Jo Anne D. Turned by deed of Fred S. Breeland, Jr. and Elizabeth B. Breeland recorded June 3, 1982 in Book 611 at Page 8. This property was subsequently conveyed to Raymond Samuel by deed of Jo Anne B. Turner dated May 6, 1993 and recorded May 11, 1993 in Book 1141 at page 11. Raymond Samuel subsequently conveyed and undivided 1/3 interest to Charles Samuel, Sr. and an undivided one-third interest to Mary L. Samuel by deed dated January 23, 1995 and recorded January 31, 1995 in Book 1240 at page 751. Charles Samuel, Sr.'s undivided 1/3 interest was conveyed to Mary Lee Samuel by Deed of Distribution dated October 2, 1998 and recorded December 20, 1999 in Book 369 at page 2227. Mary Lee Samuel conveyed her undivided 2/3 interest to Raymond Samuel by Quit Claim Deed dated September 20, 2000 and recorded September 27, 2000 in Book 445 at page 2684.

Parcel Number: R22606-01-01

Property Address: 3307 Percival Road, Columbia, SC 29223

The "Consent Order in Richland County Case Number 2007-CP-40-6491" (referred to above in the latter legal description) was an Order consented to by MidFirst Bank, as the only participant directly interested in the said mortgage. Although the Amended Complaint implies to

the contrary, neither the makers of the mortgage, the lender (original mortgagee), nor any present or past owners of the mortgaged property participated in the entry of the said Consent Order.

Even as allegedly reformed (in the 2007 suit), the legal description of the mortgaged property does not include a mobile home. There is no mention whatsoever of a mobile home in the reformed legal description. Interestingly, it does not even include the routinely-inserted phrase, "with any improvements thereon."

The legal description in the mortgage refers to plats prepared for Jo Anne B. Turner (R.p. 150) and Effie Martin (R.p. 149). Neither of these plats depicts a mobile home on the subject land.

The legal description, as unilaterally reformed by MidFirst Bank, refers to the two plats mentioned above and to a plat prepared for Fred S. Breeland (R.p. 151). This plat also does not depict a mobile home on the subject land.

The mobile home in question was, at all relevant times, titled in the manner of a vehicle[1], which unquestionably determines its existence as personal property, and it was not a part of any real property, including the mortgaged real property.

The Amended Complaint also states:

> 17. Also included as additional collateral for the subject loan transactions was a 1994/OMNI Destiny mobile/manufactured home containing serial number "036366A&B" (hereinafter "Manufactured Home"). According to the records and database of the South Carolina Department of Motor Vehicles (Hereafter "DMV"), the owners of the mobile/manufactured home are Charles Samuel and Mary Lee Samuel and Defendant Security Pacific Housing Services, Inc. is the holder of a lien on said mobile/manufactured

[1] The Judgment found that the Manufactured Home is both: "titled in the records and database of the South Carolina Department of Motor Vehicles" and never filed in said Department (the said Department "has never issued a certificate of title pertaining to the subject Manufactured Home") (R.p. 8).

home.

18. It was the intent of all parties to the subject loan transaction that i) that the Manufactured Home was already converted to be considered an improvement and/or permanent fixture of the Property, or that it would be converted as a part of this transaction; and ii) the Manufactured Home would be part of the secured collateral for the Mortgage. However, due to inadvertent error and mistake, the Manufactured Home was not described in the Mortgage. The Mortgage should be reformed to include the following statement "Also included as collateral for the subject mortgage is that certain 1994 Destiny Omni manufactured/mobile home bearing VIN number "036366A&B" and said reformation should relate back to the date of its recording.

Ms. Bowen's Answer to the Amended Complaint clearly opposes the reformation of the Mortgage, as follows:

16. . . . The said "Mortgage" is a document which speaks for itself and any characterization of it contained in paragraph 17 of the Amended Complaint is therefore denied pursuant to the applicable rules of civil procedure. . . .

17. . . . The said "Mortgage" is a document which speaks for itself and any characterization of it contained in Paragraph 18 of the Amended Complaint is therefore denied pursuant to the applicable rules of civil procedure. Moreover, Plaintiff's effort to simultaneously reform and foreclose upon the same mortgage is clearly improper.

As indicated or implied by the Amended Complaint, the Certificate of Title to the mobile home identified above reflects no lien in favor of MidFirst Bank (or any previous holder of the mortgage.)[2] The proper (probably exclusive) means of placing a lien upon a mobile home, i.e. cite the lienholder on the Certificate of Title[3], was not followed.

There is no evidence before the Court that a mobile home was intended to be a part of the

[2] Interestingly, the Amended Complaint, in Paragraphs 18. and 21.c., describes a (properly cited) lien on the mobile home title in favor of the Defendant, Security Pacific Housing Services, Inc.

[3] S.C. Code Annot. §56-19-210 provides that, "It shall be unlawful for any person to . . . mortgage in this state . . . any mobile home, unless a certificate of title has been issued therefor and is currently valid . . . ."

mortgaged property. The Memorandum in Support of Plaintiff's Motion for Summary Judgment included, as an exhibit (R.p. 78), an appraisal which vaguely mentioned a mobile home ("manufactured house"). This appraisal is not part of the evidence presented in this case, as it was not supported by affidavit.

The Amended Complaint asserts that the mortgage, which was delivered to South Trust Mortgage Corporation, was assigned, first, to Mortgage Electronic Registration Systems, Inc. as nominee for Homeside Lending, Inc. and then to MidFirst Bank. (R.p. 7)

There has been no involvement whatsoever in this case by South Trust Mortgage Corporation, Mortgage Electronic Registration Systems, Inc. or Homeside Lending, Inc. At a minimum, South Trust Mortgage Corporation, the lender (the loan originator and original mortgagee), must participate on the issue of the parties' intention with regard to the collateral for the loan.

Standard of Review; Summary Judgment Standard

"The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354

S.C. 397, 404, 581 S.E.2d 161, 165 (2003)." Penza v. Pendleton Station, LLC, 404 S.C. 198, 203, 743 S.E.2d 850 (Ct.App. 2013).

"Summary judgment should be denied where the facts, although not in dispute, are nonetheless subject to conflicting inferences. *Lyles v. BMI, Inc.*, 292 S.C. 153, 355 S.E. (2d) 282 (Ct.App. 1987). Summary judgment is also improper where the motion presents a question as to the construction of a written contract, and the language employed in the contract is ambiguous so that intention of the parties as to the legal effect of the contract may not be gathered from the four corners of the instrument. *First Citizens Bank & Trust Co. v. Conway National Bank*, 282 S.C. 303, 317 S.E. (2d) 776 (Ct.App. 1984)." Bishop v. Benson, 297 S.C. 14, 17, 374 S.E.2d 517 (Ct.App. 1988).

"Where there is ambiguity, uncertainty or doubt as to proper construction of contract, intention of the parties becomes a question of fact for the jury to determine." *Garrett v. Pilot Life Ins. Co.*, 241 S.C. 299, 305, 128 S.E.2d 171, 174 (1962). Waters v. S. Farm Bureau Life Ins. Co., 365 S.C. 519, 524, 617 S.E.2d 385 (Ct.App. 2005).

"Summary judgment is a drastic remedy that should be cautiously invoked in order not to improperly deprive a litigant of a trial of the disputed factual issues. *Murray v. Holnam, Inc.*, 344 S.C. 129, 138, 542 S.E.2d 743, 747 (Ct.App. 2001)." HK New Plan Exch. Prop. Owner I, LLC v. Coker, 375 S.C. 18, 22, 649 S.E.2d 181 (Ct.App. 2007).

Analysis and Argument

Appellant's arguments demonstrating that the granting of Respondent's Motion for Judgment should be reversed can be summarized as follows:

1. The Judgment of Foreclosure and Sale was improperly enforced during the pendency of Appellant's Rule 59(e) Motion.

2. The subject mortgage (which made no reference to a mobile home) was unambiguous, and no evidence has been presented by Respondent that the parties to the mortgage intended that a mobile home be included as collateral for the loan.

3. The Affidavit of Indebtedness and the Affidavit of Attorney's Fees were improperly accepted in evidence.

4. The dismissal with prejudice of Appellant's counterclaims, without request or any evaluation, was improper.

Effect of Motion to Alter or Amend Judgment

Ms. Bowen's proper Motion to Alter or Amend Judgment (R.p. 107), which was filed on August 10, 2015, was completely ignored until more than a month after the foreclosure sale. This Motion finally came to be heard on November 4, 2015.

After the Motion was served and filed, the Plaintiff proceeded promptly to enforce the subject judgment (with the advertising of the Notice of Sale), and the mortgaged property (as reformed to include the mobile home) was auctioned-off by the Master in Equity on September 8, 2015. This sale was conducted without notice to the Defendants (including Ms. Bowen) other than

the publication of the Notice of Sale, which means of notice, without more, rarely results in actual notice.

Ms. Bowen's Motion was made in accordance with Rule 59, SCRCP. The portions of Rule 59, which are relevant to this Motion, are as follows:

> **(e) Motion to Alter or Amend Judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.
>
> **(f) Time for Appeal; End of Term.** The time for appeal for all parties shall be stayed by a timely motion under this Rule and shall run from the receipt of written notice of entry of the order granting or denying such motions. . . .

Ms. Bowen's Motion was not denied until April 25, 2016--over seven (7) months after the foreclosure sale.

Ms. Bowen argues that the Plaintiff's Judgment was effectively stayed or "in limbo" after the filing of her Motion to Alter or Amend Judgment, that during the pendency of the Motion the Judgment was "not final"[4] and that therefore the Judgment could not be enforced until the said Motion was denied.

The Supreme Court and this Court have addressed this point. As stated in Elam v. S.C. DOT, 361 S.C. 9, 15, 602 S.E.2d 772 (2004), which cites Coward Hund Constr. Co. v. Ball Corp., 336 S.C. 1, 4, 518 S.E.2d 56 (Ct.App. 1999), "the *finality* of the summary judgment order was *restored* . . . upon . . . receipt of the written notice of entry of the order denying . . . [the] Rule 59(e) motion." (emphasis added) This precedent can only be read to mean that an order granting summary judgment (or any judgment) is recognized as "not final" during the pendency of a Rule

[4] Actually, it could not be enforced until more than 10 days after the said Motion was denied, in accordance with Rule 62(a), SCRCP.

59(e) motion.

This was a primary argument made by Ms. Bowen at the motion hearing on November 4, 2015 (R.p. 211). Importantly, the Plaintiff's Memorandum in Opposition to Defendant's Motion to Alter or Amend Judgment, Petition to Set Aside Judicial Sale and Points and Authorities filed on November 18, 2015 (R.p. 120) did not respond to this argument in any manner whatsoever.

On May 6, 2016, Appellant, through her counsel, served and filed a Motion to Reconsider and to Alter or Amend Order Denying Motion to Alter or Amend Judgment and Petition to Set Aside Judicial Sale filed on May 6, 2016 (R.p. 136). This Motion was argued before the Master in Equity on May 19, 2016. It was summarily denied by the Master in Equity by oral order announced at the conclusion of the motion hearing.

Genuine Issues of Material Fact in Dispute

Although Ms. Bowen raised numerous defenses and counterclaims in her Answer, at this point, where the issue is whether or not the granting of a Motion for Summary Judgment should stand, the genuine issues of material fact in dispute can be boiled down to the following:

1. Did the parties to the mortgage intend that the legal description of the mortgaged property include a mobile home (manufactured home) when reformation of the Mortgage was contested by Ms. Bowen's Answer?

2. Even if MidFirst Bank's intention mattered (which it doesn't), did MidFirst Bank intend that the mortgaged property include a mobile home (manufactured home) when it reformed the legal description many years after the mortgage was delivered, and such reformed description

made no mention whatsoever of the mobile home?

3. Did the parties to the mortgage believe that manufactured home was already converted a permanent fixture or would be converted as part of the loan transaction?

4. Was the failure to include the manufactured home in the description of the mortgaged property due to unilateral mistake or mutual mistake[5]? Was the mortgage inconsistent with a prior agreement of the parties to the mortgage?

MidFirst Bank made no mention of, much less any effort to address and explain-away, these issues of fact.

The hearing on the Motion for Summary Judgment was effectively treated similar to a default hearing. There was no court reporter, a pre-prepared, "canned" record (Record of Hearing for Foreclosure Hearing) was presented and filed immediately following the hearing, and a pre-prepared Judgment was presented by MidFirst Bank's counsel and signed (with no changes) on the same day by the Master in Equity.

The Record of Hearing for Foreclosure Hearing (R.p. 202) does not include, reflect or imply that any evidence was offered to support MidFirst Bank's argument that the mobile home was intended to be mortgaged. Instead, it simply states:

a. "Also included as additional collateral for the subject loan transaction was a 1994/OMNI Destiny mobile/manufactured home . . . . "

b. "Said Manufactured Home is titled in the records and database of the South Carolina Department of Motor Vehicles (hereafter "DMV")."[6]

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[5] The first mention of "mutual mistake" was made by MidFirst Bank in its Plaintiff's Memorandum in Opposition to Defendant's Motion to Alter or Amend Judgment, Petition to Set Aside Judicial Sale and Points and Authorities filed on November 18, 2015 (R.p. 120).

[6] The Record of Hearing also incorrectly states, "Upon information and belief, the South Carolina Department of Motor Vehicles has never issued a certificate of title pertaining to the subject

c. "The mortgage lien is properly affixed and noted on the certificate of title to said Manufactured Home in the records and database of Defendant South Carolina DMV."[7]

d. "It was the intent of all parties . . . that the Manufactured Home was already converted to be considered an improvement and/or permanent fixture of the Property, or that it would be converted as a part of this transaction . . . [and that] . . . the Manufactured Home would be part of the secured collateral for the Mortgage."

e. "[D]ue to inadvertent error and mistake, the Manufactured Home was not fully described in the Mortgage."

f. "The Mortgage's legal description shall include the Manufactured Home's information to indicate the Manufactured Home's permanent fixture status to all future parties."

As reflected by the Record of Hearing, no witness, via affidavit or otherwise, was offered by MidFirst Bank to prove the parties' intention with regard to the mobile home. All of the foregoing statements (which must be viewed as self-serving since the Record of Hearing was pre-prepared and submitted at the hearing by MidFirst Bank's counsel) constitute genuine issues of material fact in dispute.

Manufactured Home."

[7] This statement is completely misleading. The mortgagee was never stated on the mobile home title.

Reformation of Mortgage

Ms. Bowen agrees with MidFirst Bank's point that, "The Note and Mortgage are direct evidence of the terms and existence of the agreement entered into by Ms. Samuel." (R.p. 125) Ms. Bowen also agrees with MidFirst Bank's point that, "The essential question becomes the parties' intent...." (R.p. 127)

Where Ms. Bowen differs with MidFirst Bank's points is, "it is clear that the mortgage intended to encumber the manufactured home on the property and thus the mortgage should be reformed to include manufactured home." The mortgage speaks for itself. The mortgage is unambiguous; and as such, it, standing alone, must be construed to determine the intention of the parties to said instrument.

What was the parties' intention with regard to inclusion or exclusion of the mobile home? This intention must be determined from the four corners of the mortgage – if the mortgage is unambiguous (as it is). If the mortgage is deemed to be ambiguous, the parties' intention is a question of fact, which should not be decided on summary judgment.

"[T]he interpretation of a deed is a equitable matter." *Eldridge v. City of Greenwood*, 331 S.C. 398, 416, 503 S.E.2d 191, 200 (Ct.App. 1998). "The construction of a clear and unambiguous deed is a question of law for the court." *Hunt v. Forestry Comm'n*, 358 S.C. 564, 568, 595 S.E.2d 846, 848 (Ct.App. 2004). "[T]he determination of whether language in a deed is ambiguous is a question of law. The language in a deed is ambiguous if it is reasonably susceptible to more than one interpretation." *Proctor v. Steedly*, 398 S.C. 561, 573 n.8, 730 S.E.2d 357, 363 n.8 (Ct.App. 2012) (citation omitted). Penza v. Pendleton Station, LLC, 404 S.C. 198, 204, 243 S.E.2d 850 (Ct.App. 2013).

> "One of the first canons of construction of a deed is that the intention of the grantor must be ascertained and effectuated if no settled rule of law is contravened." *Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 590, 635 S.E.2d 649, 655 (Ct.App. 2006) (internal quotation marks omitted). "[O]nce a contract or agreement is before the court for interpretation, the main concern of the court is to give effect to the intention of the parties." *Williams v. Teran, Inc.*, 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976). "Moreover, in ascertaining [the grantor's] intention, the deed must be construed as a whole and effect given to every part thereof, if such can be done consistently with law." *Bennett*, 370 S.C. at 590, 635 S.E.2d at 655. When a deed is unambiguous, any attempt to determine the grantor's intent . . . must be limited to the deed itself and using extrinsic evidence to contradict the plain language of the deed is improper. See *Springob v. Farrar*, 334 S.C. 585, 590, 514 S.E.2d 135, 138 (Ct.App. 1999). Only "[w]hen the agreement is ambiguous the court may take into consideration the circumstances surrounding its execution in determining the intent." *Williams*, 266 S.C. at 59, 221 S.E.2d at 528. Penza v. Pendleton Station, LLC, *supra*, at 204-205.

"We are without authority to alter a contract by construction or to make new contracts for the parties. *Gilstrap v. Culpepper*, 283 S.C. 83, 320, S.E. (2d) 445 (1984). Our duty is limited to the interpretation of the contract made by the parties themselves . . . regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully. 320 S.E. (2d) at 447." C.A.N. Enterprises, Inc. v. South Carolina Health & Human Services Finance Com., 296 S.C. 373, 378, 373 S.E.2d 584, 586 (1988).

While from all appearances the mortgage is complete and unambiguous, should the Court conclude that it is ambiguous, the construction of the mortgage is a question of fact.

"Where there is ambiguity, uncertainty or doubt as to proper construction of a contract, intention of the parties becomes a question of fact for the jury to determine." Waters v. S. Farm Bureau Life Ins. Co., 365 S.C. 519, 524, 617 S.E.2d 385 (Ct.App. 2005); Garrett v. Pilot Life Ins. Co., 241 S.C. 299, 305, 128 S.E.2d 171, 174 (1962).

". . . [I]f a contract is ambiguous, or capable of more than one construction, the question of what the parties intended becomes one of fact, and should therefore be decided by the jury."

Harbour Town Yacht Club Boat Slip Owners' Ass'n v. Safe Berth Mgmt., 421 F. Supp. 2d 908, 910-11 (D.S.C. 2006); Café Assoc. Ltd. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (S.C. 1991).

How can an instrument be reformed when no effort is made to present evidence of the parties' intent? The issue of the parties' intent was not addressed at the hearing on the Motion for Summary Judgment. No evidence whatsoever has been submitted by MidFirst Bank to overcome Ms. Bowen's contest of the MidFirst Bank's claim that the mobile home was intended to be mortgaged. There is no evidence:

a. from the original mortgagee, SouthTrust Mortgage Corporation, to support the allegation that the parties to the mortgage (i.e. SouthTrust Mortgage Corporation, Mary Lee Samuel and Raymond Samuel) intended that the security for the mortgage loan include a mobile home; or

b. from any holder of the mortgage (including MidFirst Bank) to support the finding in the Judgment that the parties to the mortgage (i.e. SouthTrust Mortgage Corporation, Mary Lee Samuel and Raymond Samuel) intended that the mobile home would be converted into a permanent fixture on the property.

The appraisal (to which no showing has been made that the mortgagors were privy), which is attached to the Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment (R.p. 22), does have pictures (from which there is no way to determine that the house is a mobile home rather than a stick-built house, a modular home or a manufactured house – all of which are different from a mobile home), and it does refer to the structure as "manufactured house" (rather than "mobile home") as well as "Mnfct.Ranch" and "1sty/Mnfct.Rnch" (can you imagine anyone referring to a mobile house as a ranch-style house?); but this is not evidence, as it was not

offered via affidavit by an affiant who could testify of his or her personal knowledge of the circumstances thereof, and it is, therefore, inadmissible as hearsay.

Ms. Bowen has suggested that the original lender, SouthTrust Mortgage Corporation, intended to conceal the fact that the loan involved, or may have involved, a mobile home and that the omission of any specific reference to a mobile home (via VIN and other definitive description) was intentional (R.p. 216). This theory also constitutes a genuine issue of material fact.

Mutual Mistake

"Mutual mistake" was raised for the first time by MidFirst Bank in its Plaintiff's Memorandum in Opposition to Defendant's Motion to Alter or Amend Judgment, Petition to Set Aside Judicial Sale and Points and (R.p. 120). Although belatedly mentioned, there has been no effort by MidFirst Bank to show that the respective parties to the loan (when originated) (of which MidFirst Bank was not one) mutually made a mistake in omitting reference to the mobile home.

Before a court will reform an instrument, the complaining party must show, by clear and convincing evidence, "a mutual mistake; that both parties intended a certain thing; and that by mistake in drafting of the paper did not get what both parties intended." Hann v. Carolina Casualty Ins. Co., 252 S.C. 518, 527-28, 167 S.E.2d 420, 424 (1969) (quoting Sullivan v. Moore, 92 S.C. 305, 305, 75 S.E. 497, 497 (1912)).

"The bedrock of the right to reformation [is] a meeting of the minds of the contracting parties which results in an agreement antecedent to the formal contract, which later failed through mutual mistake to conform to the agreement." Kaiser v. Carolina Life Ins. Co., 219 S.C. 456, 467,

65 S.E.2d 865, 869 (1951).

No effort has been made by MidFirst Bank to demonstrate how the mortgage is inconsistent with a prior agreement.

Although the clear and unambiguous language of the contract is controlling in contract construction cases, our jurisprudence has recognized that different considerations apply where a party seeks reformation of a contract. In such circumstances, the rules of construction, such as the ban on extrinsic evidence, do not apply. The essential question becomes the parties' intent, and "[p]arol evidence is admissible to show mistake." *S. Realty & Constr. Co. v. Bryan*, 290 S.C. 302, 309, 350 S.E.2d 194, 198 (Ct.App. 1986).

> "A contract may be reformed on the ground of mistake when the mistake is mutual and consists [of] the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it. A mistake is mutual where both parties intended a certain thing and by mistake in the drafting did not obtain what was intended." *Crosby v. Protective Life Ins. Co.*, 293 S.C. 203, 206, 359 S.E.2d 298, 300 (Ct. App. 1987).

No effort has been made by MidFirst Bank to demonstrate that all of the parties to the loan intended that the collateral for the loan include a mobile home.

Some Evidence of Parties' Intention

It would be illogical to assume that the parties to the loan (lender, South Trust Mortgage Corporation, and mortgagors, Mary L. Samuel and Raymond Samuel) intended to include the mobile home as a part of the collateral for the loan, when, on December 23, 1999 (when the mortgage was executed), the owners of record of the mobile home, according to the South Carolina

Department of Motion Vehicles database, were Charles Samuel and Mary Lee Samuel (R.p. 155), and Charles Samuel was deceased. Charles Samuel died on October 2, 1998, and his estate was bequeathed to Mary Lee Samuel, as reflected in the records of his Estate filed in the Office of the Probate Judge for Richland County in Case No. 1999-ES-40-01018 (R.p. 157).

Notwithstanding the death of Charles Samuel, the certificate of title to the mobile home remained in the joint names of Charles Samuel and Mary Lee Samuel, and Security Pacific Housing Services, Inc. was listed as the holder of a lien (R.p. 155). No change in the certificate of title was made then or, in fact, until about 16 years later, after the foreclosure sale.

The certificate of title to the mobile home could not have been updated or further encumbered without a direct involvement of the Estate of Charles Samuel, deceased, to correct the mobile home title. This step would have required the involvement of Ms. Bowen, who, in late-1999, was the court-appointed Personal Representative of the said Estate. No request was made of Ms. Bowen to assist in the transfer of the title to the mobile home.

The Assignment of Mortgage from Mortgage Electronic Registration Systems, Inc. to MidFirst Bank (R.p. 96), which was issued eight (8) years after the loan closed, includes a legal description of the mortgaged property, which unquestionably does not include a mobile home.

As mentioned above (see Statement of Facts), the legal description of the mortgaged property, as reformed unilaterally by MidFirst Bank in another law suit, does not include a mobile home. This reformed legal description is identical to the description recited in the Amended Complaint (R.pp. 153 and 154). This description does not refer to a mobile home, and the plats cited in the legal description do not depict a mobile home.

Insufficiency of Support for Motion for Summary Judgment

Even if the Plaintiff could demonstrate that there were no genuine issues of material fact and that it was entitled to an order granting its Motion for Summary Judgment, it is only entitled to the relief requested and supported by competent evidence.

Were the affidavits submitted in support of the Plaintiff's Motion for Summary Judgment (the Affidavit of Indebtedness and the Affidavit of Attorney's Fees) acceptable as proper evidence?

i. Was the Affidavit of Indebtedness made on the personal knowledge of an affiant who was competent to testify with regard to the loan indebtedness?

ii. Did the Affidavit of Indebtedness satisfy the Business Records Act and Rule 803, SCRE, exceptions to the Hearsay Rule?

iii. Was the Affidavit of Attorney's Fees timely served, as required by Court Rules, in order to be accepted in evidence and considered by the Court at the hearing of a Motion for Summary Judgment, and does it support the amount of the requested fee?

The **Affidavit of Indebtedness** (R.p. 98) was improperly accepted in evidence. It is nothing more than a naked summary of the alleged debt. It is not a "business record," and no "business record" is attached to it. The Affidavit is not only not supported by a "business record," but the affiant fails to demonstrate that she is competent to "testify" concerning the matters stated in her Affidavit. All she says is: (1) she has access to the business records; (2) she reviewed those records; and (3) she has personal knowledge of how those records are maintained (in the course of MidFirst Bank's regularly conducted business activities).

This Affidavit is hearsay under Rules 801(c) and 802, SCRE, and it is inadmissible hearsay

because it fails to meet the requirements of an exception under Rule 803.

Rule 803(6) Records of Regularly Conducted Activity is the only exception to the Hearsay Rule which might be applicable here. This exception is as follows:

> **(6) Records of Regularly Conducted Activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; *provided, however,* that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Also relevant is the Uniform Business Records as Evidence Act, S.C. Code Annot. §19-5-510, as follows:

> The term "business" shall include every kind of business, profession, occupation, calling or operation of institutions, whether carried on for profit or not.
>
> A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.
>
> This section may be cited as the Uniform Business Records as Evidence Act.

The Affidavit of Indebtedness is not a "record" made at or near the time of any or event. It is nothing more than an accounting, which was prepared solely for purposes of the Motion for Summary Judgment (not regularly conducted business activities), that allegedly summarizes

almost five (5) years since the alleged default date, with no reflection whatsoever of pre-default transactions substantiating the principal balance.

The **Affidavit of Attorney's Fees** (R.p. 104) was also improperly accepted in evidence. This Affidavit does not reflect that it was timely served in the manner required by Rule 6(d), SCRCP. Rule 6(d) provides, in relevant part, as follows:

> (d) For Motions – Affidavits . . . When a motion is to be supported by affidavit, the affidavit shall be served with motion, and . . . additional or opposing affidavits may be **served not later than two days before the hearing**, unless the court permits them to be served at some other time. (emphasis added)

There is no evidence that this Affidavit was served at least two days before the motion hearing, as required by Court Rule.

It is not enough that this Affidavit was handed-out at the hearing. Ms. Bowen, *pro se*, should not be expected immediately evaluate this Affidavit and to know to object to this Affidavit at the hearing, based upon a violation of Rule 6(d); and the Court should have refused to allow this Affidavit, which was not properly served, in evidence.

Even if this Affidavit were determined to be proper evidence, there is no support whatsoever for the amount of attorney's fees ($13,602.00) claimed in this Affidavit.

The Plaintiff's request for attorney's fees--a matter of fact--has not been supported. The Plaintiff's counsel should be required to support his attorney's fee request more than to simply claim that this "case has been ongoing for five years." This point is especially important as the Plaintiff changed counsel after the suit was initiated, which raises a concern about the potential for duplicity of services. Just because an attorney's fee award is permitted by the loan documents doesn't mean that any amount requested (without support) is appropriate. The costs, too, are

unusually high, and no effort has been made by the Plaintiff to justify the amount requested.

In addition, the Judgment summarily dismissed with prejudice Ms. Bowen's counterclaims. This was done without any comments or findings, and there was no evidence that the Plaintiff made any effort to support this conclusion or that the court made any effort to evaluate this issue. The Motion for Summary Judgment did not request this relief.

The Judgment, which was issued precisely in content as pre-prepared and submitted at the motion hearing by the Plaintiff's counsel, also made curious, unsupported findings of fact, as follows:

a. The Manufactured Home is both: "titled in the records and database of the South Carolina Department of Motor Vehicles" and never filed in said Department (the said Department "has never issued a certificate of title pertaining to the subject Manufactured Home") (R.p. 8);

b. "This information [regarding the Manufactured Home] is evidenced by documentation gathered by Glenn Bradley, Private Investigator" (R.p. 8);

c. "No party related to Mary Lee Samuel has appeared, answered or come forward in this action claiming and interest in the subject property or the foreclosure as is evidenced by the Affidavit of Kelley Woody, Esquire, Guardian Ad Litem in this case." (R.p. 9)

Motion to Withdraw Admissions

Ms. Bowen has sought to withdraw her technical admissions of fact due to her failure to respond timely to the Plaintiff's First Request for Admissions (R.p. 68). She filed a Motion to Withdraw Admissions on May 6, 2016 (R.p. 140). The Master in Equity orally denied this Motion on May 19, 2016.

Ms. Bowen reserves her rights under this Motion, but she points out that there is no indication whatsoever that any of the alleged admissions were persuasive to, or even considered by, the lower court or that the court was even made aware of such admissions as part of the Motion for Summary Judgment or otherwise.

Neither the Master in Equity's Order and Judgment of Foreclosure and Sale (R.p. 6) nor the Record of Hearing for Foreclosure Case (R.p. 202) made any mention whatsoever of such admissions.

The alleged admissions by Ms. Bowen are inconsequential at this point in the proceedings, with the possible exception of Requests Nos. 5 and 9.

Request No. 5 (R.p. 69) is contrary to the written mortgage signed by Mary L. Samuel and Raymond Samuel. The mortgage says what it says, and Ms. Bowen's failure to deny this request does not change that. Ms. Bowen submits that Request No. 5 is intentionally deceptive, as the legal description recited therein is presented as a quoted provision when it is not the same as the actual legal description contained in the mortgage and, worse, it involves a re-reformed legal description. It is not the legal description stated in the Amended Complaint (R.pp. 153 and 154), (which makes no mention of a mobile home). The description had been <u>further reformed</u> to include reference to a mobile home.

Even if Ms. Bowen technically admitted that the legal description contained in the First Request for Admissions counts and that a mobile home is included in the mortgaged property, this result would not be the same for the other owners, who were not served with requests for admissions. While their failure to respond to the Amended Complaint would likely result in their technical admission of the well-pled factual allegations of the Amended Complaint, their admission would confirm that the mobile home is not included, as the reformed legal description, as set forth in the Amended Complaint, does not include a mobile home.

Request No. 9 (R.p. 70) seeks to effectively nullify the Answer served by Ms. Bowen, which effectively stands on its own as an expression of Ms. Bowen's defenses (and counterclaims) to this action.

Conclusions

The Master in Equity's Judgment of Foreclosure and Sale was improperly enforced during the pendency of Ms. Bowen's Motion to Alter or Amend Judgment, which stayed, or rendered "not final," the Judgment; and all actions taken by MidFirst Bank pursuant to the stayed or non-final Judgment are null and void.

The reformation of an ambiguous mortgage cannot be accomplished by summary judgment, as it involves a genuine issue of material fact in dispute. No evidence whatsoever was submitted by MidFirst Bank, by proper witnesses, to demonstrate that the parties to the mortgage intended that a mobile home be included as a part of the encumbered property. No suggestion of mutual mistake, based upon the mortgage being inconsistent with a prior agreement between the parties, was made at the motion hearing. Therefore, the reformation of the mortgage by summary

judgment to add a mobile home was improper.

The Affidavit of Indebtedness and the Affidavit of Attorney's Fees were improperly accepted in evidence. They do not, therefore, support the findings related to the debt evidenced by note and mortgage.

The dismissal with prejudice of Ms. Bowen's counterclaims was not included in the relief requested in the Plaintiff's Motion for Summary Judgment. The finding of the lower court that the counterclaims should be dismissed with prejudice, especially without any presentation in that regard or any evaluation whatsoever, was therefore improper.

This Court should reverse the Master in Equity's Judgment of Foreclosure and Sale (Granting Plaintiff's Motion for Summary Judgment).

Respectfully submitted,

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December 20, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Joseph M. Strickland, Master in Equity
Case No. 2010-CP-40-5886

RECEIVED
DEC 22 2016
SC Court of Appeals

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 dba RSVP Columbia; Tauheedah Mateen; Raymond Samuel a/k/a Shamsud-din Raymond Samuel; 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 the Appellant.

SCACR RULE 211(b) CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellant hereby certifies that Reply Brief complies with SCACR Rule 211(b).

Respectfully submitted,

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December 22, 2016