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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

The Honorable Richard L. Booth, Sumter County Master-in-Equity

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Case No. 2010-CP-43-00823
Appellate Case No. 2015-000349
Opinion No. 2017-UP-046

Wells Fargo Bank, N.A., Respondent,

v.

Delores Prescott and Wells Fargo Financial Bank (SD), Defendants,

Of Whom Delores Prescott is the Appellant.

PETITION FOR REHEARING OR REHEARING *EN BANC*

Delores Prescott, *Pro se*
10 Skytop Gardens, Apt. 23
Parlin, New Jersey 08859
Appellant
(732) 485-8145

February 8, 2017

This petition is filed pursuant to S.C. Code Ann. § 14-8-90; Rules 219 and 221(a), SCACR, as well as all other applicable laws, for an order granting rehearing or rehearing en banc in this case.

Appellant Delores Prescott moves this Honorable Court to reconsider its opinion dated January 25, 2017, Opinion number 2017-UP-046 and resubmits the arguments set forth in appellants' Brief, Reply Brief and The Record On Appeal in this appeal.

Appellant respectfully submits that the court may have overlooked or misapprehended certain points, as the following shows:

I. The Court overlooked or misapprehended the facts when it found "As to the master's finding that Prescott abandoned the subject property during her bankruptcy action: Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E. 2d 505, 510 (2006) ("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 [lower] court to be persevered.")."

The Order of Summary Judgment states;

> "Because Ms. Prescott.....affirmatively abandoned her interest in the property during proceedings as part of an amendment to her Chapter 13 plan, she is estopped from disputing Wells Fargo's entitlement to foreclose its lien. Accordingly, Wells Fargo is entitled to judgment as a matter of law on its foreclosure claim." (R. p. 9)

In Plaintiffs' Post-Hearing Memorandum in Support of Plaintiff's Motion for Summary Judgment it states;

> "Ms. Prescott's decision to "abandon" the property in modified Chapter 13 plan precludes her from contesting Wells Fargo's right to foreclose, including raising affirmative defenses to foreclosure." (R. p. 183, I.)

In the Defendant's Supplemental Memorandum in Opposition to Summary Judgment it states:

> "The Defendant did not Abandon the Property to Wells Fargo, but rather, the Defendant as Debtor-Trustee, abandoned the Property from the Possession of the Bankruptcy Estate, and returned the title and rights in the property to the Defendant, individually." (R. p. 191).

"The motion to modify the Chapter 13 plan to abandon the property does not preclude the Defendant's claims related to the property, nor did it act as a promise to convey the property to the Plaintiff. (R. p. 191).

Specifically, counsel raised the facts that upon abandonment, the property was no longer property of the estate, title to the Property reverted back to the Debtor and the abandonment was not a transfer of the property to the Plaintiff, but merely an administrative act to allow the Defendant to assert her claims in state court. Noting, it is simply a necessary first step for the debtor to file counterclaim and defenses in a foreclosure action outside the bankruptcy process." Furthermore, the Order confirming the plan and resolving motions specifically reserved all the debtor's rights in the property, including defenses and causes of action (R. p. 453).

As a result, it would be unjust to prevent the Defendant from asserting her claims merely because she took the necessary steps to enable herself to assert those claims." (R. p. 192) and (R. p. 450).

In addition, a review of the record will reveal that from 2003-2013 Appellant was unaware that when her mortgage refinance with Watermark was closed without an attorney was considered an unauthorized practice of law. The specific argument to the trial court says, "subsequent to the time Prescott filed her Answer, she has discovered new information she was unaware of when she filed her Answer.....[T]he following is

the Amended Answer and Counterclaim of Prescott after she obtained counsel." (R. p. 44 and pp. 47-49 ¶16 a-f).

Defendant moved to amend her Answer to assert the defense of Unclean Hands and affirmative defenses in the state court foreclosure action on September 20, 2013. (R. p. 45 ¶6).

Plaintiff did not raise any preclusion arguments based on any of Defendant's prior three (3) bankruptcy actions at the initial hearing on the motion to amend. The court granted leave to amend by order dated December 2, 2013 (R. p. 16).

Following other proceedings, Defendant filed an amended complaint which asserted Unclean Hands as a defense. The Plaintiff filed a motion for summary judgment, challenging the Defendant's right to assert the defense as a matter of law (R. pp. 189-196).

II. The Court had already held that Wachovia v. Coffey was the Applicable Non-Bankruptcy Law governing the case. (R. p. 195).

At the hearing on November 19th, 2016, the court ruled from the bench that the defendant's Unclean Hand defense is governed by the rule stated in Wachovia v. Coffey, 389 S.C. 68, 698 S.E.2s 244 (Ct. App.2010). (R. p. 195).

"In order for an issue to be persevered for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356, S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). "A party need not use the exact name or legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." Id. at 142, 587 S.E.2d at 694. (See App. Reply Brf. pp. 16-17).

Appellant's counsel adhered to these requirements both orally and in the "Defendant's Supplemental Memorandum in Opposition to Summary Judgement (R. p. 189-196).

If the issue was raised and ruled upon at trial, a Rule 59(e) motion is not required. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998).

Based on the foregoing reasoning, the master-in-equity erred as a matter of law when it ruled that Delores Prescott *"affirmatively abandoned her interest in the property during proceedings as part of an amendment to her Chapter 13 plan, she is estopped from disputing Wells Fargo's entitlement to foreclose its lien."* Appellant, Delores Prescott respectfully submits that the Appellate Court overlooked or misapprehended the law in ruling the issue is not preserved for appellate review.

III. The Court overlooked or misapprehended the facts when it found as to whether the master erred in finding Prescott submitted a sham affidavit: Cothran v. Brown, 357 S.C. 210, 218, 592 S.E. 2d 629, 633 (2004) (allowing a court to disregard a subsequent affidavit as a "sham: if submitted by a party to contradict his or her own prior sworn statement); McMaster v. Dewitt, 411 S.C. 138, 144, 767 S.E. 2d 451, 454 (Ct. App. 2014) (noting South Carolina has adopted the abuse of discretion standard in reviewing whether a lower court properly rejected an affidavit as a sham).

The master-in-equity's decision, now affirmed by this court, is inconsistent with the existing precedent in this State with regards to a "sham" affidavit. Rule 56(e) provides affidavits shall be made on issues of fact and personal knowledge.

The November 2014 affidavit is consistent with the statements in Prescott's May 2010 Original Answer (R. pp. 24-34), the May 2010 Hardship Affidavit (R. pp.36-39) and the August 2010 Sworn Statement of Financial Affairs, Bankruptcy Case 10-0552-dd (R. p. 323).

The affidavit of 2014 involves the period of 2008 through 2010 and three separate Chapter 13 cases. The affidavit is consistent and clarifies the relevant facts which led to the foreclosure complaint in the present case (See App. Brf. pp. 10-16).

The August 2010 sworn statement says;

"LIST ALL PAYMENTS ON LOANS, INSTALLMENT PURCHASES OF GOODS OR SERVICES AND OTHER DEBTS TO ANY CREDITOR MADE WITHIN 90 DAYS IMMEDIATELY PRECEDING THE COMMENCEMENT OF THIS CASE....." (R. p. 323)

Under Section 3, Payments to Creditors lists Wells Fargo Home Mortgage and list the dates of payments as May 2010 and June 2010, and the amount paid $1,126.10 "which equates to $563.05 monthly trial plan payments. The nature of the proceeding is listed as "Breach of Contract" and the Status or Disposition is listed as "Foreclosure Pending" (R. p. 324). The **DECLARATION UNDER PENALTY OF PERJURY BY INDIVIDUAL DEBTOR** is dated August 15, 2010 (R. p. 329).

Appellant's November 2014 affidavit is based on her personal knowledge and documents were presented in support of the affidavit. The affidavit states that "**(1)** In June 2010, I made payments to Wells Fargo under the forbearance agreement then in force, **(2)** Wells Fargo received the payments before June 10, 2010 and the second on or about June 18, 2010, **(3)** Wells Fargo cashed the money order on June 12, 2010, but refused to apply the payment as shown on my statement dated August 5, 2010, **(4)** Wells Fargo's misapplication of payments prolonged the default originally encouraged by Wells Fargo and increased fees and costs which would be added to my account balance, thereby further prohibiting me from curing the default". (R. ¶17-20 p. 146)

Appellant's Answer of May 2010 is consistent with the facts in the 2014 Affidavit as follows: **(1)** Plaintiff did not disclose to Defendant that the "loan type" was not eligible for a "HMP" or "FHA-HAMP" loan modification, nor did Plaintiff disclose to Defendant that unemployment compensation cannot be used as "income" when applying for a :HMP" or FHA-HAMP modification. On or about June 2009, Plaintiff offered Defendant the first out of many "Special Forbearances" without disclosing the options available to Defendant under said guidelines. (R. p. 30, ¶10) **(2)** Plaintiff has overstated and exaggerated the amount that is owed, by not applying all payments directly to the default amount that is owed but instead applying payments as "Unapplied." (R. p. 29, ¶8).

Appellant's Hardship Affidavit of May 2010 is consistent with the facts in the 2014 Affidavit as follows: **(1)** October 2008 I became unemployed **(2)** Please note that prior to this arrangement I was not behind with my mortgage. (R. p. 36, ¶2a) **(3)** I mailed a certified check for $3,200.00 requesting that it be applied to the January 15, 2010, February 15, 2010 and March 15, 2010 payment and the remainder be applied to the outstanding balance. Therefore, my home loan should have been reviewed for a final modification as stated in the December 2009 agreement. (R. p. 37, ¶5). **(4)** I received in the mail a "Special Forbearance" dated April 12, 2010 to begin making payments of $563.05 effective May 12th, 2010, June 12th, 2010 and July 12th, 2010. The agreement states I would be considered for a permanent modification after this trial period. Please note, the agreement I signed in December 2009 stated the same, however, no permanent modification has occurred with or without employment. (R. p. 38, ¶9-10.) **(5)** I received a Foreclosure notice on Sunday,

April 18, 2010. (R. p. 37, ¶8). **(6)** I called Wells Fargo regarding the Foreclosure Notice. I was told that there is "no sale date" and as long as I make the payments per the agreement I would be fine. How is it possible for Wells Fargo Bank, N.A. to send me to Foreclosure the same time they initiate another agreement without even notifying me of their intent to do so? (R. p. 38, ¶ 11).

The prior statements in Prescott's Answer and Hardship Affidavit to the lower court are consistent with the sworn statements in her 2014 Affidavit.

The master-in-equity and the appellate court have not given any reason or justification in distinguishing between a "sham" affidavit versus one that merely corrects or clarifies genuine issues of material facts previously addressed. Appellant, Delores Prescott respectfully submit that the Appellate Court overlooked or misapprehended the law in this regard.

IV. The Court overlooked or misapprehended the facts when it found as to whether the master-in-equity erred in relying on res judicata prohibiting Prescott from proceeding on certain defenses and counterclaims; Venture Eng'g, Inc. v. Tishman Constr. Corp of S.C., 360 S.C. 156, 163, 600 S.E. 2d 547, 550 (Ct. App. 2004) ("When a bankruptcy court's order is erroneous, it is correctable only through the federal court and, under the circumstances, the trial court and this court are required to accept the bankruptcy court's order as it was rendered and entered.").

The court may have overlooked or misapprehended the fact that an Order was issued January 19, 2011 denying confirmation of the Chapter 13 Plan. (R. p. 338).

V. There are no analysis given in this opinion.

Prescott's appellate brief contains eight (8) arguments. The heading above each argument state(s):

1. DID THE MASTER IN EQUITY ERR IN GRANTING SUMMARY JUDGMENT BASED ON A MISINTERPRETATION OF THE BANKRUPTCY TERM ABANDONDMENT?

2. DID THE MASTER IN EQUITY ERR IN GRANTING SUMMARY JUDGMENT BASED ON THE DOCTRINE OF JUDICIAL ESTOPPEL?

3. DID THE MASTER IN EQUITY ERR IN BARRING APPELLANT'S COUNTERCLAIMS AND AFFIRMATIVE DEFENSES BY THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL?

4. DID THE MASTER IN EQUITY ERR IN GRANTING SUMMARY JUDGMENT IN REPONDENT'S FAVOR ON APPELLANT'S AMENDED ANSWER AND COUNTERCLAIMS AS A MATTER OF LAW?

5. DID THE MASTER-IN-EQUITY ERR IN GRANTING SUMMARY JUDGMENT ON THE APPELLANT'S AMENDED ANSWER AND COUNTERCLAIM STATING TIMELY CAUSES OF ACTION AND DEFENSES AUTHORIZED BY LAW?

6. DID THE MASTER IN EQUITY ERR IN GRANTING SUMMARY JUDGEMENT ON APPELLANT'S COUNTERCLAIM STATING TIMELY CAUSES OF ACTION FOR FRAUD AND NEGLIGENT MISPRESENTATION AS A MATTER OF LAW?

7. DID THE MASTER IN EQUITY ERR IN BARRING APPELLANT'S BREACH OF CONTRACT CLAIM AS A MATTER OF LAW?

8. DID THE MASTER IN EQUITY ERR BY ASSERTING APPELLANT'S NOVEMBER 2014 AFFIDAVIT IS A "SHAM" AS A MATTER OF FACT OR LAW?

The court's opinion is this case is without explanation of the reasons for affirming the master-in-equity. Rule 220(b), SCACR states:

> **(b) Decision by the Court.** In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case. This rule does not apply to the following:
>
> **(1)** *The Supreme Court* may file a memorandum opinion dismissing an appeal, affirming or reversing the judgment appealed from, or granting other appropriate relief when, in unanimous decision, *the Supreme Court* determines that

> a published opinion would have no precedential value and any one or more of the following circumstances exist and is dispositive of issues submitted to the Court decision: (A) that a judgment of the trial court is based on findings of fact which are not clearly erroneous; (B) that the evidence to support a jury verdict is or is not insufficient; (C) that the order of an administrative agency is or is not supported by such quantum of evidence as prescribed by the statue or law under which judicial review is permitted; or (D) that no error of law appears.
>
> **(2)** The Court of Appeals need not address a point which is manifestly without merit.

Rule 220(b), SCACR (emphasis added).

Per Rule 220(b)(1), SCACR, it is only the Supreme Court that may issue a memorandum opinion that does not provide the reason for the appellate court's decision as to every point distinctly stated in the case. In as much, should the present case require a petition for Writ of Certiorari, the Supreme Court will need to know why this court decided an issue the way it did, so that the Supreme Court can fully evaluate whether Certiorari is warranted.

This court's opinion does not meet the requirements of Rule 220(b), SCACR. An opinion that does should be issued.

Appellant, Delores Prescott respectfully submit that the Appellate Court overlooked or misapprehended the law in this regard.

VI. Rehearing en banc would be proper.

"A hearing or rehearing en banc is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219(a), SCACR.

Consideration by the full court appears necessary to secure or maintain the uniformity of its decisions, as discussed above, including the decisions of:

Doe v. McMaster, 355 S.C. 306, 585 S.E.2d 773 (2003) (All real estate and mortgage loan closings must be supervised by an attorney), in which this court recognized (R. p. 66).

Coffey v. Wachovia, 389 S.C. 68, 698 S.E.2d 244 (Ct. App. 2010) (plaintiff-lender was barred from foreclosing on a mortgage that was closed without the supervision of a licensed attorney), the duty to regulate the unauthorized practice of law exists solely with the South Carolina Supreme Court, S.C. Code Ann § 40-5-10. (R. p. 195).

Coffey v. Wachovia, 389 S.C. 68, 74-76, 698 S.E.2d 244, 247-48 (Ct. App. 2010) (a foreclosure can be defeated by pleading and proving an equitable defense), in which this court recognized (R. p. 179).

Rotec Servs. v. Encompass Servs., 359 S.C. 467, 472-73, 597 S.E.2d 881, 883-84 (the court held that there was no contractual obligation breached, and as a result a claim for breach of implied covenants of that contract could not stand alone). Here, Prescott has alleged breaches of specific provisions of the contract between the parties and Wells Fargo acted in bad faith in allowing those breaches to occur. (R. p. 178).

Stanley v. Kirkpatrick, 592 S.C. 169, 174, 592 S.E.2d 296, 299 (2004) (the party opposing an amendment has the burden of demonstrating it will be prejudiced by the amendment of the pleading). (R. p. 173).

Weber v. Bank of America, C/A No. 0:13-cv01999-JFA (D.S.C., Rock Hill Division, September 10, 2013) (the plaintiff alleged that he requested mortgage assistance after becoming unemployed. He further alleged the bank told him from the outset of their discussions that he was not eligible for assistance due to unemployment). By comparison, in this case, Prescott has alleged that the Bank never informed her that a modification was unavailable because of her unemployment. Furthermore, the bank never made a determination on her eligibility for a loan modification despite knowledge that Prescott was never eligible for assistance (R. p. 176).

Whitten v. Fred's Inc., 601F.3d 231 (4th Cir., 2010) (the court held a Plaintiff's failure to list certain claims in its bankruptcy documents did not prevent the party from raising them later, noting that all interested parties were aware of the claims despite the omission), the party against whom judicial estoppel is to be applied must have intentionally misled the court to gain unfair advantage. This bad faith requirement is the determinative factor. (R. p. 180).

Zinkand v. Brown, 478 F.3d 634, 638 (4th Cir. 2007) (without bad faith, there can be no judicial estoppel) (R. p. 180).

Affirming the master-in-equity, means that Prescott, along with other people of this State in the same position have *no recourse* or *private right of action* against a foreclosure plaintiff for all the wrongs the Bank and their agents have done to them while following the instructions to secure an affordable loan modification.

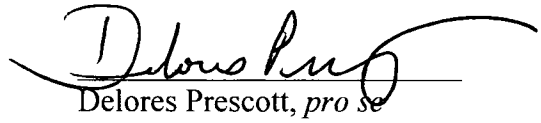
The Comptroller of the Currency of the United States examined Wells Fargo's residential foreclosure processes, as a result of which the Bank stipulated to the issuance of a Consent Order. Though not determinative of this action, the Consent Order contains

findings consistent with Appellant's allegations in her Answer, Hardship Affidavit and November 2014 affidavit.

The Consent Order notes that Wells Fargo failed to devote appropriate resources, oversight, and training to its foreclosure processes. The Consent Order required the Bank to develop a plan to ensure compliance with federal servicing guides, including those pertaining to the Home Affordable Modification Program (HAMP). In re Wells Fargo Bank, N.A., Consent Order No. AA-EC-11-19 (U.S. Office of the Comptroller of the Currency, April 13, 2011).

For all the reasons stated above Appellant, Delores Prescott pray for an order granting a rehearing or rehearing *en banc* on all the arguments in this case.

Respectfully submitted.



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February 8, 2017

CERTIFICATE OF SERVICE

The undersigned hereby certifies on the 8th day of February 2017, she served a copy of The foregoing **PETITION FOR REHEARING OR REHEARING *EN BANC*** by depositing same in the United States Mail first class, mail, proper postage, affixed, addressed to the person(s) hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es):

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February 8, 2017

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South Carolina Court of Appeals
The Honorable Jenny Abbott Kitchings,
Clerk of Court
Post Office Box 11629
Columbia, SC 29211

RE: Wells Fargo Bank, N.A., Respondent

v.

Delores Prescott and Wells Fargo Financial Bank (SD), Defendants,
Of Whom Delores Prescott is the Appellant.
Appellate Case No. 2015-000349
Opinion No. 2017-UP-046

Dear Ms. Kitchings:

Enclosed please find for filing in the above-referenced case are an original and seven copies of a petition for rehearing or rehearing en banc. I have also enclosed Proof of Service and $25.00 as the motion fee.

It would be greatly appreciated if you would file the enclosed documents and return a "filed" stamped copy in the enclosed self-addressed envelope.

Respectfully submitted,

Delores Prescott, *Pro se*

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