

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Ben N. Miller, III, Special Referee for Richland County

RECEIVED

FEB 22 2017

SC Court of Appeals

Case No.: 2010-CP-40-01571

Appellate Case No. 2016-00969

CitiMortgage, Inc.,.....Respondent,

v.

Bruce W. Gardner and First Citizens Bank and Trust Company, Inc.,.....Defendants,

Of whom Bruce W. Gardner is the.....Appellant.

RESPONDENT'S MOTION FOR INVOLUNTARY DISMISSAL OF APPEAL

Appellant filed his Initial Brief and Designation of Matter on July 19, 2016. Respondent filed its Initial Brief and Designation of Matter on September 16, 2016.

This Court wrote to Appellant on January 30, 2017, notifying Appellant that the time for serving the record on appeal had expired. The Court required Appellant, within 10 days of the Court's letter, to serve the record on appeal along with a motion requesting permission to serve and file the record on appeal outside of the filing deadlines.

On February 9, 2017, Appellant filed and served the Record on Appeal along with his motion to file the record outside of the deadlines. Appellant's motion did not state any grounds for the allowance of the filing of the record outside of the applicable deadlines.

The record on appeal filed and served by Appellant contains a certificate of compliance pursuant to Rule 210, SCACR. This rule provides, in part, that the Record on Appeal shall be served within 30 days after service of the last brief on each party who has served a brief in the matter. Rule 210(a), SCACR. This rule also provides that the Record on Appeal “shall include all matter designated to be included by any party under Rule 209” Rule 210(c), SCACR.

Respondent now moves to dismiss this appeal on the grounds that the Record on Appeal has been filed out of time, and the Record does not comply with Rule 210(c), in that Appellant has not included all of the matter designated by Respondent to be included in the Record. Moreover, Appellant has placed additional matters in the Record that were not included in Appellant’s Designation of Matter.

Attached as Exhibit A to this motion is a copy of the “Index to Record on Appeal” filed by Appellant. Attached as Exhibit B to this motion is a copy of the Designation of Matter to be Included in the Record on Appeal filed by Respondent.

Upon comparison of Exhibits A and B, it is readily apparent that Appellant did not include a majority of the matters designated for inclusion by Respondent. Appellant did not include in the Record the following item numbers as designated by Respondent: 1, 2, 3, 4, 8, 10, 11, 14, 15, 16, and 17. Most, if not all, of the items that Appellant neglected to include in the Record are materials that Respondent has cited to in its Initial Brief in this matter. Respondent’s final brief cannot be prepared without the submission of a record that includes all of the materials included in Respondent’s Designation of Matter.

Moreover, Appellant has apparently attempted to supplement the record by including material in the Record that was not listed in Appellant’s Designation of Matter. Rule 212 provides the procedure by which a party may supplement the record. Appellant has not complied

with this procedure. The materials found at pages 83 through 100 of the Record were not designated by Appellant.¹

Appellant had more than ample time to prepare and serve a record on appeal that was in compliance with the court rules. However, despite an allowance of several extra months, Appellant served a record that is in flagrant violation of Rule 210, SCACR, by not including all of Respondent's designated materials, and by including additional material that was not designated by Appellant.

This court is permitted to issue an order of dismissal "[w]henver it appears that an appellant . . . has failed to comply with the requirements of these Rules" Rule 260(a), SCACR. Respondent respectfully requests that this appeal should be dismissed for the reasons stated herein.

RILEY POPE & LANEY, LLC



Peter M. Balthazor, SC Bar No. 68244
2838 Devine Street
Post Office Box 11412 (29211)
Columbia, South Carolina 29205
(803) 799-9993
Attorney for Respondent

February 22, 2017

¹ The materials found at pages 83 to 100 of the Record have previously been submitted to this Court, but they should not be considered in the merits of this appeal.

INDEX TO RECORD ON APPEAL

1. Order of Reference; April 29, 2010.....2

2. Amended Order of Reference; September 28, 2011.....4

3. Transcript of Hearing; July 12, 2012.....7

4. Special Referee’s Order of Judgment of Foreclosure and Sale Decree: June 9, 2016...55

5. Notice of Appeal to Stay the Order of Judgment of Foreclosure and Sale Decree:
May 9, 2016.....64

6. Appellant’s Initial Brief; September 21, 2017.....68

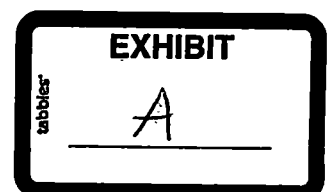
7. Designation of Matters.....79

8. Motion Complaint of Malicious Prosecution and Petition to cancel Foreclosure
Sale.....83

9. Respondent’s Return to Appellant’s Motion Complaint of Malicious Prosecution
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10. Reply to Respondent’s Return to Motion Complaint of Malicious Prosecution and
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11. Order for Motion to Stay is denied.....99



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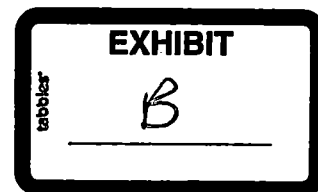
Bruce W. Gardner and First Citizens Bank and Trust Company, Inc.,.....Defendants,

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**DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

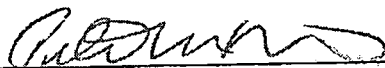
To the extent not already included in the Appellant's Designation of Matter, the Respondent designates the following materials to be included in the Record on Appeal:

1. Lis Pendens, Civil Action Coversheet, Summons and Complaint together with all attached Notices and Exhibits filed 3-9-10
2. Certificate/Certificate of Exemption filed 3-9-10
3. Service/Affidavit of Service on Bruce Gardner filed 3-11-10
4. Answer to the Complaint filed 4-5-10
5. Order of Reference filed 4-30-10
6. Amended Order of Reference filed 5-14-10
7. Order of Recusal/Judge Strickland filed 5-19-11
8. Certification of Exemption from Administrative Order 2011-05-02-01 filed 7-20-11
9. Amended Order of Reference to Appoint Special Referee/Judge filed 9-29-11
10. Motion for Summary Judgment including Affidavit of Marc Handley and all exhibits/attachments filed 7-20-15
11. Transcript of 3-9-16 hearing, pp. 1-25



12. Transcript of 3-9-16 hearing, pp. 1-25
13. Special Referees Order of Judgment of Foreclosure and Sale filed 4-28-16
14. Affidavit/Non Military Service filed 4-28-16
15. Affidavit/Attorney Fees filed 4-28-16
16. Statement of Costs filed 4-28-16
17. Waiver of Deficiency filed 5-3-16

I certify that this designation contains no matter which is irrelevant to this appeal.



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Attorneys for Respondent

Columbia, South Carolina

September 16, 2016

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PROOF OF SERVICE

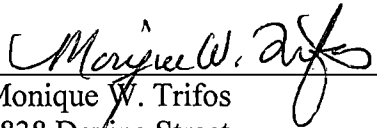
I certify that I have served the Respondent's **RESPONDENT'S MOTION FOR INVOLUNTARY DISMISSAL OF APPEAL** and this proof of service by depositing a copy of the same in the United States Mail, postage prepaid, at the address below:

Bruce W. Gardner
237 YMCA Road
Lexington, SC 29073

And

Bruce W. Gardner
P.O. Box 1531
Lexington, SC 29071

RILEY POPE & LANEY, LLC



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February 22, 2017
Columbia, South Carolina

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SC Court of Appeals

HAND DELIVERED

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

Re: CitiMortgage, Inc. vs. Bruce W. Gardner and First Citizens Bank and Trust Company,
Inc.
Appellate Case No. 2016-00969 (C/A No.: 2010-CP-40-01571)
Our File No. 4088.01014

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of Respondent's Motion for Involuntary Dismissal of Appeal as well as Proof of Service in the above referenced action.

Please return with my courier the filed copies.

Thank you for your kind assistance in this matter.

Sincerely,



Peter M. Balthazor

PMB/mwt

Enclosures

cc: Bruce W. Gardner (w/enclosures)