THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, III, Master-in-Equity for York County

Case No.: 2015-CP-46-03068

Appellate Case No.: 2016-002161

The Bank of New York Mellon fka The Bank of New York, as Trustee (CWALT 2004-2CB),..Respondent,

v.

Tara B. Barfield a/k/a Tara Burdiss Barfield, Samuel C. Barfield, SouthTrust Bank, N.A., Beneficial Financial I Inc., CACH, LLC, and The South Carolina Department of Revenue,..Defendants,

Of whom Tara B. Barfield a/k/a Tara Burdiss Barfield is the ....Appellant.

INITIAL BRIEF OF RESPONDENT

PETER M. BALTHAZOR
RILEY, POPE & LANEY, LLC
Post Office Box 11412
Columbia, South Carolina 29211
(803) 799-9993 – Office
(803) 239-1414 – Facsimile
peteb@rplfirm.com

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STATEMENT OF THE ISSUES ON APPEAL

I. ARE THE ISSUES RAISED BY APPELLANT PRESERVED FOR APPELLATE REVIEW?

II. DID THE MASTER ERR IN GRANTING JUDGMENT OF FORECLOSURE?

STATEMENT OF THE CASE

This matter involves the foreclosure of a mortgage secured by real property owned by the Appellant (hereinafter "Borrower"), which is located in York County. Respondent (hereinafter "Lender") filed a Lis Pendens, Summons, and Complaint on October 9, 2015. Borrower filed an Answer and Defenses on March 9, 2016. Borrower's Answer generally denied the allegations of the Complaint and Borrower asserted numerous affirmative defenses. Among these, Borrower asserted that Plaintiff lacked standing and was not the real party in interest. Borrower also asserted, among other affirmative defenses, that the relief of foreclosure should be barred because: (1) Lender did not provide written disclosure of the date on which the loan was sold, transferred, or assigned; (2) fraud; (3) Lender is not the owner of the Note and Mortgage; and (4) the Note and Mortgage have been rescinded.

On February 12, 2016, Lender filed with the trial court a Notice of Denial of Foreclosure Intervention pursuant to South Carolina Supreme Court Administrative Order 2011-05-02-01. [Notice of Denial] An Attorney Certification pursuant to Administrative Order 2011-05-02-01 was filed on February 12, 2016, stating that Borrower had failed to submit the requested documents for participation in foreclosure intervention. [Attorney Certification] On March 3, 2016, this matter was referred to the Master-in-Equity pursuant to Rule 53(b), SCRCP. [Order of Reference]

On August 4, 2016, Lender filed a Motion for Summary Judgment with supporting affidavit and exhibits. [Summary Judgment Motion] The Master held a hearing on Respondent's Summary Judgment Motion on August 23, 2016. Counsel for Lender appeared at the hearing. Defendant Samuel C. Barfield, pro se, also appeared at the hearing. [Hearing transcript, p. 2] Borrower did not appear at the hearing. The Master issued an Order on

September 14, 2016, granting summary judgment in favor of Lender and ordering foreclosure and sale of the real property. [Master's Order of Judgment of Foreclosure and Sale Decree] Borrower did not file a motion for reconsideration of the Master's order.

Borrower served her Notice of Appeal with this Court on October 14, 2016.

FACTS

This case involves the foreclosure of a mortgage involving real property located in York County. Borrower executed a Note on December 8, 2003 in the principal amount of $159,180.00. [Note; Summary Judgment Affidavit] Borrower promised to repay the debt at a yearly interest rate of 6.250% with monthly payments of $980.10, until the debt was paid in full. The debt was secured by a Mortgage executed on the same date on real property located in York County (hereinafter the Note and Mortgage, unless referred to individually, will be "the Loan"). [Mortgage; Summary Judgment Affidavit] The Mortgage was recorded with York County on January 22, 2004, in Book 06004 at page 00032. [Mortgage]

It is uncontested that by April 1, 2012, Borrower had defaulted on the terms and conditions of the Loan by failing to make the required monthly payments to Lender. [Summary Judgment Affidavit, pp. 10] Lender sent Borrower a notice of default on December 21, 2012, informing Borrower that she must pay all past due amounts, and that if she failed to do so it may result in the acceleration of the amount due under the Loan, and that the property may be sold in foreclosure. [Exhibit D to Summary Judgment Affidavit]

Lender is the holder of the Loan and is in possession of the original Note and Mortgage. [Summary Judgment Affidavit; transcript p. 13-14] The original Note and Mortgage were presented to the lower court and to Defendant Samuel Barfield at the summary judgment hearing. [Transcript p. 13-14]

STANDARD OF REVIEW

"A mortgage foreclosure is an action in equity." *U.S. Bank Trust Nat'l Ass'n v. Bell*, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009). "In an appeal from an action in equity, tried by a judge alone, [the appellate court] may find facts in accordance with [its] own view of the preponderance of the evidence." *Id.* Moreover, the appellate court "may correct errors of law in both legal and equitable actions[,]" with no particular deference to the trial court. *Id.*

Summary judgment is warranted only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party." *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000). The moving party has the initial burden of demonstrating the absence of a genuine issue of material fact. However, once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent must come forward with specific facts showing there is a genuine issue for trial." *Garvin v. Bi-Lo, Inc.*, 337 S.C. 436, 523 S.E.2d 481 (Ct. App. 1999). The opponent cannot merely rely upon the denials made in the pleadings, but must submit some additional evidence creating a genuine issue of material fact. Rule 56(e), SCRCP; *SSI Medical Servs., Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990). If the non-

movant does not respond with specific facts showing there is an issue for trial, "summary judgment, if appropriate, shall be entered against him." Rule 56(e), SCRCP.

ARGUMENT

I. THE ARGUMENTS AND ISSUES RAISED BY APPELLANT ARE NOT PRESERVED FOR APPELLATE REVIEW.

Borrower did not attend the summary judgment hearing. Borrower did not present any arguments or evidence in opposition to summary judgment.

In response to Lender's Motion for Summary Judgment, Borrower did not file any affidavits, exhibits, or other evidence addressing any of the issues now raised on appeal. No objections were made by Borrower prior to or at the motion hearing regarding the admissibility of Respondent's Affidavit in Support of Summary Judgment. *Holroyd v. Requa*, 361 S.C. 43, 60, 603 S.E.2d 417, 426 (Ct. App. 2004) (failure to object to the introduction of evidence at the time the evidence is offered constitutes a waiver of the right to have the issue considered on appeal).

Borrower now argues on appeal that the lower court erred in "not recognizing" and applying some of the defenses that had been raised in the Answer. Borrower argues that the Loan had been rescinded, that Lender did not provide certain notices required by federal regulations, and that Lender was guilty of fraud. Borrower contends that the lower court should have recognized these issues, and that the lower court should have issued a ruling favorable to Borrower on these defenses despite Borrower not presenting any evidence to support the defenses and issues now raised. Other than generally asserting these issues and defenses in her Answer, Borrower did not raise these issues with the lower court.

In *Bessinger v. Bi-Lo, Inc.*, 366 S.C. 426, 622 S.E.2d 564 (2005), the appellant argued that the trial court erred when it "overlooked" one of the appellant's allegations. *Id.*, 366 S.C. at 434, 622 S.E.2d at 568. However, the Supreme Court held that the argument was not preserved for appeal because the appellant did not raise the overlooked issue with the trial court by way of a post-trial motion. *Id.* In the present case, Borrower did not raise the appealed issues with the trial court, either at the summary judgment hearing, or by way of post-trial motion. Since Borrower did not appear at the hearing, and did not present any arguments or issues to the trial court, Borrower appears to be attempting to invoke the plain error rule, which is not recognized in this state. *See Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 564 S.E.2d 322 (2001).

A trial court is not required to scour the pleadings and the record for issues that may provide a defense to an action. It is incumbent upon a party to raise an issue with the trial court. *Lucas v. Rawl Family Ltd. Partnership*, 359 S.C. 505, 598 S.E.2d 712 (2004); *see Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *see also I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (stating that an appellate court may not reverse the lower court for any reason appearing in the record).

Borrower wants to try her case in the appellate court without the issues having been raised to and addressed by the trial court. This flies in the face of the underlying rationale for issue preservation rules. *See I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). In I'On, the supreme court explained that the "losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments. . . . Imposing this preservation requirement on the appellant

is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *Id.*, 338 S.C. at 422, 526 S.E.2d at 724.

An appellate court is unable to address an issue on appeal where the appellant has not first raised an issue and sought a ruling from the trial court. Borrower has done neither, and now basically wants to try her case here in the appellate court. Borrower never gave the trial court the opportunity to consider any of the relevant facts, law or arguments for the issues now raised on appeal.

For the reasons stated herein, Borrower's issues are not preserved for appeal. Therefore, the lower court's order should be affirmed.

II. THE LOWER COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT ON LENDER'S CAUSE OF ACTION FOR FORECLOSURE OF THE MORTGAGE.

In support of its Motion for Summary Judgment, Lender submitted an Affidavit from a Vice President - Document Control for the Lender. The Affidavit and attachments thereto presented the following uncontested evidence:

1. That the Lender is the holder of a Note and Mortgage between Borrower and Lender securing the real property at issue in this action;
2. That Borrower defaulted on the terms of the Loan as of April 1, 2012;
3. That Borrower failed to apply for relief under the HAMP modification process;
4. That a Notice of Default and Intent to Accelerate was mailed to Borrower on December 12, 2012; and
5. That the amounts due and collectable under the Note and Mortgage as of July 25, 2016, exclusive of court costs and attorney fees, totaled $238,434.08, along with a

per diem interest charge of $21.32, which is continuing to accrue. [Summary Judgment Affidavit]

At the summary judgment hearing, counsel for Respondent presented these facts to the lower court. Counsel also submitted for the lower court's and parties' inspection the original Note and Mortgage.

In response to Lender's Motion for Summary Judgment, Borrower did not file any affidavits or exhibits addressing or contesting the existence of the Note and Mortgage, Respondent's status as a holder entitled to enforce the Note and Mortgage, Borrower's default on the Loan, Lender's notice of the default and acceleration of the debt, compliance with the HAMP certification, or the debt figures and amount. Moreover, no objections were made prior to or at the hearing regarding the admissibility of Lender's Affidavit in Support of Summary Judgment. *Holroyd v. Requa*, 361 S.C. 43, 60, 603 S.E.2d 417, 426 (Ct. App. 2004) (failure to object to the introduction of evidence at the time the evidence is offered constitutes a waiver of the right to have the issue considered on appeal).

Based upon the lack of a counter-affidavit or any other evidence disputing or creating an issue of fact as to any of the matters set forth above, the lower court correctly granted Lender's Motion for Summary Judgment as to the foreclosure. *Garvin*, 337 S.C. 436, 523 S.E.2d 481 (stating once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent must come forward with specific facts showing there is a genuine issue for trial).

"Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt. Once the debt and default have been established, the mortgagor has the burden of establishing a defense to foreclosure such as lack of

consideration, payment, or accord and satisfaction." *Bell*, 385 S.C. at 374-75, 684 S.E.2d at 205 (internal citations omitted). The evidence submitted by Lender without dispute establishes the existence of the debt and Borrower's default on that debt. Borrower did not meet her burden by presenting any evidence to establish a defense or an avoidance. The trial court correctly granted summary judgment in this matter.

In any event, Borrower contends in this appeal that the subject loan was rescinded under the Truth in Lending Act. Borrower sent a letter dated October 12, 2015, to the servicer of the loan stating that she was rescinding the loan. In her Answer, Borrower asserts that the letter operated to rescind the Note and Mortgage, making the Note and Mortgage void. In other words, Borrower argues that a mutual contract, entered into in 2003, and later defaulted upon, can simply be unilaterally rescinded with no ramifications to the Borrower. Borrower has not offered to return any money or the collateral to Lender.

Appellant relies upon *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790 (2015), for the proposition that a rescission is effective upon mailing a notice and that no further action is necessary. The Truth in Lending Act (the "Act") grants borrowers an unconditional right to rescind a loan for three days following the transaction. *Id.* at 792. After this initial three-day period, a borrower may rescind only if a lender fails to satisfy the Act's disclosure requirements. *Id.* "[T]his conditional right to rescind does not last forever . . . [and] the 'right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever comes first.'" *Id.*, quoting 15 U.S.C. § 1635(f). To exercise the right of rescission a borrower must "notify[] the creditor . . . of his intention to do so" within three years. *Id.* at 792. *Jesinoski* answered the question whether a borrower satisfies this requirement by sending a written notice or whether a borrower must file suit within the three-year statute of

repose. *Jesinoski* held that "so long as the borrower notifies within three years after the transaction is consummated, his rescission is timely." *Id.*

Jesinoski does not provide for rescission under the facts of this case. Borrower consummated the transaction at issue on December 8, 2003. Under *Jesinoski*, Borrower's right of rescission expired in 2006. Borrower does not have an unlimited right to seek rescission at any time during the life of the Loan. Once the three-year time limit elapses, a borrower's rescission right is "completely extinguishe[d]." *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 412 (1998).

Borrower also contends in this appeal that the foreclosure action should have been barred because Lender did not provide a Written Notice of Consumer Debt Assignment. Borrower claims there were two violations of Section 131(g) of the Act (15 U.S.C. § 1641(g)) and section 226.39 of Regulation Z (12 C.F.R. § 226.39), which require a Lender to provide written disclosure to a borrower no later than 30 days after the date on which a loan is sold or otherwise transferred or assigned. Borrower claims that the required notices should have been sent after the assignment of the Mortgage recorded June 5, 2012, and after the assignment of the Mortgage recorded April 22, 2015.

15 U.S.C. § 1641(g) provides that "not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer . . . ." *Id.* Appellant has not cited any authority for the proposition that a foreclosure action should be barred based on a violation of this section. While it may be true that an action is allowed for damages for violations of section 1641(g), Borrower is not seeking damages. See 15 U.S.C. § 1640(a). Therefore, the lower court did not err in not dismissing the foreclosure action based on

an alleged violation of section 1641(g). There is no authority that an action be dismissed for failure to provide any notices that might be required pursuant to section 1641(g).[1]

Finally, Borrower broadly alleges that Lender is attempting to obtain the property through fraud. Borrower asserts that Lender's fraudulent activity should bar the relief of foreclosure.

In support of her allegations of fraud, Borrower alleges that various mortgage assignments, which have all been recorded, are in violation of certain South Carolina statutes, and that certain intervening assignments "make no sense." Borrower also alleges that the owner of the loan is unclear. Borrower's defenses are without merit based on the undisputed fact that Lender is the holder of the Note and Mortgage.

Pursuant to S.C. Code Ann. § 36-3-301, the holder of an instrument is a person entitled to enforce an instrument. A holder is a "person in possession of a negotiable instrument that is payable either to bearer or an identified person that is the person in possession." S.C. Code Ann. § 36-1-201(b)(21)(a). It is undisputed that Lender is in possession of the original Note, indorsed in blank.[2] Because Lender was entitled to enforce the instrument, it had standing to pursue foreclosure and was the real party in interest. *See Bank of America, N.A. v. Draper*, 405 S.C. 214, 746 S.E.2d 478 (2013) (citing Rule 17(a), SCRCP and stating that it is "ownership of the right sought to be enforced which qualifies as one as a real party interest, rather than absolute ownership of specific property").

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[1]Lender denies that it failed to provide any required disclosures.

[2]See S.C. Code Ann. § 36-3-205(b) (stating that an instrument indorsed in blank becomes payable to bearer).

Further, any issues or alleged irregularities with the assignments of the Mortgage, which are denied, do not have any bearing on this matter. It is well-settled that the holder of a note also holds the mortgage. *See Scheider v. Deutsche Bank Nat'l Trust Co.*, 572 Fed. Appx. 185 (4th Cir. 2014) (applying South Carolina law and stating that the holder of the note is also the holder of the mortgage). It is undisputed that Lender is in possession of the Note, and that Lender is entitled to enforce the Note and Mortgage.

> South Carolina recognizes the 'familiar and uncontroverted proposition' that 'the assignment of a note secured by a mortgage carries with it an assignment of the mortgage.' *Hahn v. Smith*, 157 S.C. 157, 154 S.E. 112 (1930); *Ballou v. Young*, 42 S.C. 170, 20 S.E. 84 (1894). 'The assignment of a mortgage as distinct from the debt it secures is nugatory and confers no rights upon the transferee . . . .' *South Carolina Nat'l Bank v. Halter*, 293 S.C. 121, 128, 359 S.E.2d 74, 77 (Ct. App. 1987) (citing *Hahn*, 157 S.C. 157, 154 S.E. 112); see also 55 Am.Jur.2d Mortgages § 1317 (1971).

Midfirst Bank, SSB v. C.W. Haynes & Co., Inc., 893 F.Supp. 1304 (D.S.C. 1994). The note carries with it the security, without any formal assignment or delivery. *Carpenter v. Longan*, 83 U.S. 271 (1872) (stating that "the debt is principal thing and the mortgage an accessory").

CONCLUSION

For the reasons stated herein, the lower court did not err in granting summary judgment to Lender and Lender respectfully requests this Court to affirm the lower court's judgment of foreclosure. Borrower's issues, raised for the first time in this appeal, are without merit.

RILEY POPE & LANEY, LLC

Peter M. Balthazor
SC Bar Number 68244
2838 Devine Street (29205)
Post Office Box 11412
Columbia, South Carolina 29211
Telephone: (803)799-9993
Facsimile: (803) 239-1414
Attorneys for Respondent

Columbia, South Carolina

June 27, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
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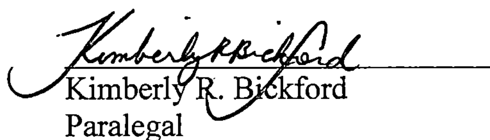
Of whom Tara B. Barfield a/k/a Tara Burdiss Barfield is the ....Appellant.

CERTIFICATE OF SERVICE

I do hereby certify that I served the INITIAL BRIEF OF RESPONDENT and DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL BY RESPONDENT upon the parties below herein by depositing a copy of the same in the U.S. Mail, first class postage prepaid, and addressed as follows:

RECEIVED
JUN 29 2017
SC Court of Appeals

Tara B. Barfield a/k/a Tara Burdiss Barfield, *Pro Se*
5088 Mariana Court
Tega Cay, South Carolina 29708-7232



June 29, 2017
Columbia, South Carolina

Kimberly R. Bickford
Paralegal

RILEY POPE & LANEY, LLC
ATTORNEYS AND COUNSELORS AT LAW

2838 DEVINE STREET
POST OFFICE BOX 11412 (29211)
COLUMBIA, SOUTH CAROLINA 29205

TELEPHONE (803) 799-9993

FACSIMILE (803) 239-1414

June 27, 2017

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JUN 29 2017

SC Court of Appeals

Ms. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: The Bank of New York Mellon fka The Bank of New York, as Trustee (CWALT 2004-2CB) vs. Tara B. Barfield a/k/a Tara Burdiss Barfield, Samuel C. Barfield, SouthTrust Bank, N.A., Beneficial Financial I Inc., CACH, LLC, and The South Carolina Department of Revenue
Calendar No.: 2015-CP-46-03068
Appellate Case No.: 2016-002161
Our File No.: 4028.00915

Dear Ms. Kitchings:

Please find enclosed the original and one (1) copy of the Respondent's Initial Brief and Designation of Matter with proof of service in the above-referenced matter. Please file the enclosed documents and return one (1) filed copy with my runner.

Thank you,

Peter M. Balthazor

PMB/krb

Enclosures

Cc: Tara B. Barfield a/k/a Tara Burdiss Barfield, *Pro Se*

Riley Pope
&Laney, LLC | ATTORNEYS AND COUNSELORS AT LAW

POST OFFICE BOX 11412
COLUMBIA, SOUTH CAROLINA 29211

TO:

Ms. Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1220 Senate St
Columbia, SC 29201