THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable J.C. Nicholson presiding judge for Charleston County

Appellate Case No. 2016-002249

Green Tree Servicing LLC..Appellant

v.

Paula R. Illingworth..Respondent

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the lower court err in granting Respondent's Motion to Dismiss where the Master in Equity dismissed the previous case without prejudice under SCRCP 41(a)

II. Did the lower court err in granting Respondent's Motion to Dismiss where the new cause of action for foreclosure is created with each new monthly payment

III. Did the lower court err in granting Respondent's Motion to Dismiss where the issue of whether the dismissal of the 2014 case was with or without prejudice is moot

IV. Did the lower court err in granting Respondent's Motion to Dismiss where the Respondent moved to dismiss solely under SCRCP 41 and failed to offer any argument or evidence as to the required group required for dismissal under SCRCP 41

V. Did the lower court err in granting Respondent's Motion to Dismiss where the Respondent failed to offer any argument or evidence under any provision of SCRCP 12

   a. Did the lower court err in granting Respondent's Motion to Dismiss and failed to view the facts alleged in the complaint and any inference to be drawn therefrom in the light most favorable to the Appellant

   b. Did the lower court err in granting Respondent's Motion to Dismiss where the lower court considered matters outside of the pleadings.

STATEMENT OF THE CASE

This is an appeal from the Order Granting Defendant's Motion to Dismiss by the Honorable J.C. Nicholson dated September 20, 2016 and the Order Denying Plaintiff's Motion to Reconsider dated October 13, 2016.

STATEMENT OF FACTS

On December 18, 2008, Respondent, Paula R. Illingworth, executed and delivered to Bank of America, N.A. a Note ("Note") in the principal sum of One Hundred Seventy-Nine Thousand Two Hundred ($179,200.00) Dollars, with interest at the rate of 5.0 % per annum (R. p. 42 ¶6). Respondent promised to repay Appellant the amounts advanced under the Note. Simultaneously with the execution of the Note, and to secure the repayment of the Note and the debt, Respondent executed and delivered to Bank of America, N.A. a Mortgage dated December 19, 2008 ("Mortgage"). (R. p.42 ¶ 7) The Mortgage was recorded on January 2, 2009 in Mortgage Book 27 at Page 765 in the Office of the Charleston County Register of Deeds. (R. p. 42 ¶ 8) The subject Mortgage was assigned unto Green Tree Servicing LLC by Assignment of Mortgage dated June 25, 2013 and recorded in the Office of the Register of Deeds for Charleston County in Book 0346 at Page 832 on July 19, 2013. (R. p. 42 ¶ 9)

A foreclosure was initially filed in Case Number 2013-CP-10-5160. Respondent was served on September 4, 2013. (R. p. 66) The 2013 case was voluntarily dismissed by Appellant pursuant to Rule 41(a)(1) on January 13, 2014. (R. p. 67)

On March 27, 2014, Appellant commenced a new foreclosure action, filed as Case Number 2014-CP-10-2042 ("the 2014 Case"). (R. p. 19-33) Plaintiff was personally served on July 25, 2014, (R. p. 68) On August 22, 2014, Defendant filed a pro se answer with the court, but

did not serve same on Appellant. (R. p. 34) Unaware of the pro se filing, Appellant filed its Affidavit of Default on September 3, 2014. (R. p. 69) On September 9, 2014, the case was referred to the Master in Equity for Charleston County. (R. p. 71-72) On October 1, 2014, Appellant learned of the pro se Answer of Defendant and withdrew its Affidavit of Default. (R. p. 74-75) On March 18, 2015, Judge Scarborough dismissed the 2014 case checking the box on the Form 4C entitled "Rule 41(a)" and noting in the portion of Form 4 entitled "Additional Information for the Clerk", "Dismissed per Rule 41(a), Failure to Prosecute, Third Appearance by Defendant—Plaintiff not ready to proceed." (R. p. 2)

After the dismissal of 2014-CP-10-02042, Appellant refiled the action as Case Number 2015-CP-10-2322 ("the 2015 Case") on April 23, 2015. (R. p. 35-46) After service of process, Respondent filed her Motion to Dismiss on May 26, 2015. (R. p. 76-78) After oral argument on November 13, 2015, the Motion to Dismiss was granted by Order filed September 20, 2016. (R. p. 3-5) Appellant subsequently filed a Motion for Reconsideration on October 12, 2016, which was denied by form Order filed October 13, 2016. (R. p. 79-83; R. p. 6) Appellant timely filed its Notice of Appeal on November 07, 2016. (R. p. 84-85).

This is the appeal of the dismissal of Appellant's action bearing civil action number 2015-CP-10-2322, the 2015 case.

ARGUMENT

I. The Court erred granting Respondent's Motion to Dismiss where the Master in Equity dismissed the previous case without prejudice under Rule 41(A), SCRCP.

There is no dispute but that Appellant's first foreclosure action (2013-CP-10-5160) was dismissed by Appellant pursuant to Rule 41(a) without prejudice. (R. p. 67) The issue on appeal

here, however, is the dismissal of second foreclosure action, the 2014 Case. Respondent's Motion to Dismiss asserted, and the lower court found, that the Master in Equity's dismissal of the 2014 case was with prejudice. (R. p. 3-5; R. p. 76-78) This ruling, however, is clear error as the Master in Equity both checked the box entitled "Action Dismissed 41(A)" and also handwrote "Dismissed per 41(a)" (R. p. 2). It is clear, therefore, that the Master in Equity did not intend to dismiss the action with prejudice. The court's citing of Rule 41(a) in two separate places on the Form 4 Order expresses a clear intention that the dismissal was to be without prejudice.

Equally, the Master In Equity's intention to dismiss the 2014 case without prejudice follows well established case law. The rule set forth in the cases *Bowen & Smoot v. Plumlee*, 301 S.C. 262, 391 S.E.2d 558 (1990), *Prime Medical Corp. v. First Medical Corp.*, 291 S.C. 296, 353 S.E.2d 294 (Ct. App. 1987) and *Knight v. Wagoner* 359 SC 492 597 SE 2A 894 (Ct. App 2004), which hold that a dismissal by order of the court should be interpreted as without prejudice and that a Plaintiff is entitled to a voluntary nonsuit without prejudice unless legal prejudice is shown. "If no legal prejudice is shown, the trial judge has no discretion with respect to granting a dismissal without prejudice." *Knight,* supra at 895.

At no time in this case did the Respondent assert, show or attempt to show the legal prejudice necessary to make the dismissal with prejudice. Nothing in the record establishes prejudice to Respondent. In the absence of such showing, the dismissal must be without prejudice and the Order granting Respondent's Motion to Dismiss should be reversed.

II. **The court erred in dismissing case number 2015-CP-10-2249 as a new cause of action is created with each monthly payment.**

This is a mortgage foreclosure action. A mortgage and a note are separate securities for the same debt and where a mortgage is given as additional security for the debt, "the general rule is that no mere change in the mode or time of payment, nothing short of an actual payment of the debt or an express release, will operate as a discharge of the mortgage. The lien lasts as long as the debt." *Lever v. Lighting Galleries, Inc.*, 374 S.C. 30 at 35, 647 S.E.2d 214 at 217 (2007) citing *Nichols v. Briggs*, 18 S.C. 473 (1883).

The complaint reflects that under the terms of the Note and Mortgage, upon Respondent's default the entire principal and accrued shall at once become due and payable. (R. p. 19-33) A default on each monthly payment, therefore, creates a new cause of action for Plaintiff. This principle was reflected by the Florida Supreme Court in the case of *Singleton v. Greymar Associates*, 882 So.2d 1004, (Fla. 2004). In *Singleton,* mortgagee brought a foreclosure action against the mortgagor predicated on an alleged default arising from a failure to make payments due from September 1, 1999 to February 1, 2000. After the mortgagee failed to appear at a case management conference, the trial court dismissed the foreclosure action with prejudice. The mortgagee then filed a second foreclosure action, alleging a default arising from the mortgagor's failure to make payments from April 1, 2000 onward. The question before the Florida Supreme Court was whether the dismissal of the first foreclosure action with prejudice barred the second action. The Florida Supreme answered that question by ruling that the dismissal of the first foreclosure action, even if with prejudice, did not bar a second action on a later, separate default.

> "While it is trust that a foreclosure action and an acceleration of the balance due based upon the same default may bar a subsequent

> action on that default, an acceleration and foreclosure predicated upon subsequent and different defaults present a separate and distinct issue....For example, a mortgagor may prevail in a foreclosure action by demonstrating that she was not in default on the payments alleged to be in default, or that the mortgagee had waived reliance on the defaults. In those instance, the mortgagor and mortgagee are simply placed back in the same contractual relationship with the same continuing obligations. Hence, an adjudication denying acceleration and foreclosure under those circumstances should not bar a subsequent action a year later if the mortgagor ignores her obligations on the mortgage and a valid default can be proven.
>
> This seeming variance from the traditional law of res judicata rests upon recognition of the unique nature of the mortgage obligation and the continuing obligations of the parties in that relationship. For example, we can envision many instances in which the application of the [contrary view] would result in unjust enrichment or other inequitable results. If res judicata prevented a mortgagee from acting on a subsequent default even after an earlier claimed default could not be established, the mortgagor would have no incentive to make future timely payments on the note. The adjudication of the earlier default would essentially insulate [the mortgagor] from future foreclosure action on the note-merely because [the mortgagor] prevailed in the first action. Clearly, justice would not be served if the mortgagee was barred from challenging the subsequent default payment solely because [the mortgagee] failed to prove the earlier alleged default.

Id. At 1007-08 (emphasis added) (citations omitted). Finding "no valid basis for barring mortgages from challenging subsequent defaults on a mortgage and note solely because they did not prevail in a previous attempted foreclosure based upon a separate alleged default," the court concluded that claim preclusion does not bar a successive foreclosure suit based on a subsequent and separate alleged default. Id. at 1008. ¶ 29.

Similarly, in the case of *Afolabi v. Atlantic Mortgage & Investment Corp.*, 849 N.E.2d 1170 (Ind. Ct. App. 2006), the mortgagee's first foreclosure action against the mortgagor had

been dismissed with prejudice for failure to prosecute, and several years later, the mortgagee filed a new foreclosure action against the mortgagor, who had not made any payments toward the underlying debt in over ten years. The mortgagor argued that the mortgagee's first action was predicated on an acceleration of all payments due under the note and mortgage and a demand for payment, necessarily including all future payments. Id. at 1174. Because the mortgagee's claim had been dismissed with prejudice, the mortgagor argued, it was barred from pursuing the second claim. Id. The Indiana Court of Appeals rejected this argument, concluding that claim preclusion does not bar successive foreclosure claims, regardless of whether the mortgage sought to accelerate payments on the note in the first claim, where subsequent and separate alleged defaults under the note create a new and independent right in the mortgagee to accelerate payments on the note in a subsequent foreclosure action. Id. At 1175; see also *In re Rogers Townshend & Thomas, P.C.*, 773 S.E.2d 101, 104-08 (N.C. Ct. App. 2015) (holding that rule barring third action after two voluntary dismissal of same claims does not bar third foreclosure action where periods of claimed default were different).

This principle was reiterated most recently in the case of *Nationstar Mortg., LLC v. Brown*, 175 So3d 883, (Fla. DCA 2015), where the court held, "we have held previously that not even a dismissal with prejudice of a foreclosure action precludes a mortgagee from instituting a new foreclosure action based on a different a new date of default not alleged in the dismissed action" *Nationstar*, 175 So. 3d 823, 824 (2015). See also, *Evergrene Partners, Inc. v. Citibank, N.A.* 143 So.3d 954 (Fla 4th DCA 2014), "foreclosure and acceleration based on an earlier default does not bar subsequent actions in acceleration based upon different elements of default"; *U.S. Bank National Association v. Bartram*, 140 So.3d 1007, 1014 (Fla. 5th DCA 2014), "a dismissal

of earlier foreclosure action, whether with or without prejudice, did not bar subsequent foreclosure action based on a new default"; *Romero v. SunTrust Mortgage Inc.* 15 F.Supp. 3d 1279 (S.D. Fla. 2014) a voluntary or even involuntary dismissal of the lender's earlier foreclosure action does not invalidate the note and mortgage and does not preclude the subsequent foreclosure action for such when default of payments"; *Kaan v. Wells Fargo Bank, N. A.* 981. Supp.2d 1271.1274 (S.D. Fla 2013), "an unsuccessful foreclosure action does not subsequent a renderer mortgage forever invalid and unenforceable"

These cases follow the understanding that when a foreclosure action is dismissed the parties are returned to their original positions, adopting the same obligation contractual relations and obligations and that any acceleration that occurred becomes deaccelerated when the Court dismisses the prior foreclosure action. *Matos v. Bank of New York*, 2014 WL 3734578 (S.D. Fla. 2014).

Or, as explained by the United States District Court for the Middle District of Florida, a mortgagor may prevail in a foreclosure action by demonstrating that she was not in default on the payments alleged be in default, or that the mortgagee had waived reliance on those defaults. In those instances, the mortgagor and the mortgagee are simply placed back in the same contractual relationship with the same continuing obligations. "Hence, an adjudication denying acceleration and foreclosure under those circumstances should not bar a subsequent action a year later if the mortgagor ignores her obligations on the mortgage and a valid default can be proven" *Dorta v. Wilmington Trust Nat. Ass'n.*, 25 Fla. L. Weekly Fed. D267 (M.D. Fla. 2014).

As the *Dorta* court, explained,

> "if res judicata prevented a mortgagee from acting on a subsequent default even after an earlier claim default could not be established,

> the mortgagor would have no incentive to make future timely payments on the note. The adjudication of the earlier default would essentially insulate her from future foreclosure actions on the note – merely because he prevailed in the first action. Clearly, justice would not be served as the mortgagee was barred from challenging the subs when default payment solely because he failed to prove the earlier alleged default." *Id* at 6

Equally, this same line of reasoning has been adopted to defeat allegations that the statute of limitations bars the filing of a new foreclosure after an earlier foreclosure is dismissed. For example in *Ros v. La Salle Bank Nat. Ass'n.*, 2014 WL 3974558 (2014), the United States District Court for the Southern District of Florida, applying Florida law stated that,

> "it is well settled [under Florida law] that the dismissal of an earlier foreclosure action will not bar any subsequent enforcement of the mortgage based on continued violations of the mortgage; the plaintiff cannot proactively diminish the enforceability of mortgage simply by asserting that the statute of limitations has run for all prior defaults."

In sum, in the present case, the foreclosure in the 2014 case reflected the default that existed under the note and mortgage as of March 27, 2014. (R. p. 19-33) After that dismissal the loan was deaccelerated and the parties were returned to their original position. New monthly payment obligations arose. The subsequent foreclosure action, filed by the Appellant on April 23, 2015, which is the subject of this appeal, reflects new defaults by Respondent subsequent to the March 18, 2015 dismissal of case number 2014-CP-10-02042. (R. p. 35-46) The dismissal of the 2014 action, therefore, could not bar Appellant's foreclosure action as such action involved later, different payment obligations. The order of dismissal is therefore in error and should be reversed.

III. **<u>The Court erred as to the issue of whether the 2014 dismissal was with or without prejudice is moot.</u>**

As set forth herein, irrespective of whether the Master in Equity's order of dismissal of the 2014 case was with or without prejudice is moot because Respondent can bring a new foreclosure action based on subsequent defaults of the Note. The same result was reached by the South Carolina Court of Appeals in Knight. *Knight v. Wagoner* 359 SC 492 597 SE 2A 894 (Ct. App 2004) In *Knight*, appellants sued respondents for adverse possession and respondents counterclaimed for trespass and conversion. At the end of the trial, the appellants moved for a direct verdict of respondents counterclaims and respondents moved for a voluntary dismissal of their counterclaims without prejudice. The trial court granted respondents motion to dismiss the counterclaim without prejudice and appellant appealed. The SC Court of Appeals affirmed the dismissal without prejudice as Appellants failed to show legal prejudice. The Court also noted that

> "Furthermore, the grant or denial of Respondent's motion for voluntary dismissal is largely rendered moot by the fact that the alleged trespasses are of a continuing nature and appear to be reasonably and practicably abatable. See *Silvester v. Spring Valley Country Club,* 344 S.C. 280, 287, 543 S.E. 2d 563, 567 (Ct.App.2001) ("A nuisance is continuing if abatement is reasonably and practicable possible.") Where there are continuing abatable invasions of one's property by another, the injury is a continuous one and each injury by encroachment gives rise to a new cause of action. See *Cutchin v. South Carolina Department of Highways and Public Transp..,* 301 S.C. 35, 37, 389 S.E. 2d 646, 648 (1990). Therefore, Respondents could file a later suit against Appellants, identical or similar to her dismissed counterclaims, regardless ****897** of the trial court's ruling on the motion at issue."

Equally here, Appellant can file a future foreclosure action based on subsequent,

future defaults of installment payments. Similar to the facts in *Knight*, the issue of whether the dismissal of the 2014 case was with prejudice or without prejudice is rendered moot as each default gives rise to a new cause of action. The Order of Dismissal should therefore be reversed.

IV. The lower court erred in granting Respondent's motion to dismiss under Rule 41, SCRCP as the grounds for an involuntary dismissal were not established.

Respondent's motion before the court was entitled a Motion to Dismiss and the stated grounds for the motion were Rules 12 and 41 of the South Carolina Rules of Civil Procedure. At the inception of the motion hearing, however, Respondent's counsel, advised the court as follows, "this is a Motion to Dismiss under Rule 41…" (R. p. 49, lines 14 - 15). Respondent thereafter proceeded solely under Rule 41, thereby abandoning any argument for dismissal under Rule 12.

Rule 41, SCRCP governs an involuntary dismissal and states as follows: "for failure of the Plaintiff to prosecute or to comply with these Rules or any order of a court, a Defendant may move for dismissal of an action or any claim against him." An involuntary dismissal, therefore, may only occur under one of three grounds: 1) failure to prosecute; 2) failure to comply with the civil procedure rules; or 3) failure to comply with any order of a court. The record, however, is devoid of any evidence offered by Respondent or arguments in support of any of these three grounds.

During oral arguments on Respondent's Motion to Dismiss, the Respondent focused exclusively on the legal effect of the previous dismissal by the Master in Equity in the 2014 case. Respondent offered no evidence, as required under Rule 41, SCRCP, that the present case, 2015–CP-10-2322, should be involuntarily dismissed due to Appellant's failure to prosecute the action; failure to comply with the civil procedure rules; or failure to comply with any order of the

court. As respondent failed to establish the grounds necessary for an involuntary dismissal under Rule 41, SCRCP, the order of dismissal filed by the court was in error.

V. The lower court erred in granting the motion to dismiss under Rule 12, SCRCP as Respondent failed to establish the required elements of Rule 12.

Appellant's foreclosure complaint stated all of the necessary elements of a foreclosure action: the necessary parties, the relevant contracts and security instruments between the parties, the factual allegations, and the jurisdictional and venue allegations. In response, Respondent filed a Motion to Dismiss based on Rule 12 and Rule 41 of the South Carolina Rules of Civil Procedure. (R. p. 76) Respondent's Motion to Dismiss failed to specify under what subsection of Rule 12 she was proceeding. However, Respondent's motion to dismiss, fails under any applicable aspect of Rule 12.

A) The lower court erred in granting Respondent's Motion to Dismiss under 12(b)1 SCRCP as the lower court had subject matter jurisdiction..

Rule 12(b), SCRCP permits a Defendant to assert a defense of lack of jurisdiction over the subject matter by motion. Subject matter jurisdiction is "the power to hear and determine cases of the general class to which the proceedings in question belong." *Dove v. Gold Kist, Inc.*, 314 S.C. 235 at 237-238, 442 S.E.2d 598 at 600 (1994). The Supreme Court's definition of subject matter jurisdiction means "that there is subject matter jurisdiction so long as the complaint alleges a claim within the competence of the court and consequently, that subject matter jurisdiction, almost always exists." James F. Flanagan, South Carolina Civil Procedure (3rd Edition) 2010 at page 610. "As pointed out by Professor Flanagan, subject matter jurisdiction is not implicated by a challenge to the legal sufficiency of the complaint. Holding that the

complaint fails to properly alleged a cause of action recognized at law is a decision on the merits of the claim rather than a determination that the court lacked the judicial power to decide the case." *Id* at 613.

Most importantly, the lower court's Order specifically states "under the principle of res judicata, the Plaintiff is judicially stopped from bringing their matter again." The lower court therefore could not dismiss Appellants case under 12(b)(1) grounds as preclusive concepts such as res judicata, are not jurisdictional matters. *Mr. T. v. Ms. T.*, 378 S.C. 127, 662 S.E.2d 413 (Ct. App. 2009).

In short, there is no issue regarding subject matter jurisdiction in the present case. Additionally, Respondent offered no evidence or argument that the court lacked subject matter jurisdiction over the present case. To the degree that the order dismissing the case was based on a ruling under 12(b)(1), such a ruling was in error.

B) The lower court erred in failing to view the facts alleged in the complaint and any reasonable inferences to be drawn therefrom in the light most favorable to the Appellant.

Assuming that Respondent sought to base the motion to dismiss under SCRCP 12(b)(6), it is the elementary that, in considering a motion to dismiss a complaint based on the failure state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Doe v. Marion*, 373 S.C. 380, 645 S.E.2d 245 (2007); See also Rule 12(b)(6), SCRCP. The court, when deciding a Motion to Dismiss for failure to state a claim must consider the question of whether, in the light most favorable to Plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Plyler v.*

Burns, 373 S.C. 637, 647 S.E.2d 188 (2007). "If the facts alleged and inferences reasonably deducible therefrom would entitle the Plaintiff to any relief on any theory of the case, then dismissal for failure to state facts sufficient to constitute a cause of action is improper." *Sloan Construction Company, Inc. v. Southco Grassing, Inc.*, 377 S.C. 108 at 113, 659 S.E.2d 158 at 161(2008); Rule 12(b)(6), SCRCP.

Here, Appellant's complaint asserted all necessary elements for a foreclosure action. (R. p. 35-46) Whether Appellant will ultimately succeed in the foreclosure is irrelevant to the lower court's consideration of a Motion to Dismiss based on 12(b)(6) SCRCP. As this Court has stated repeatedly, a complaint should not be dismissed for failure of the pleading to state facts sufficient to constitute a cause of action merely because the Court doubts the plaintiff will prevail in the action. *Berastrom v. Palmetto Health Alliance,* 358 S.C. 388, 596 SE2d 42 (SC 2004). The lower court failed to view the facts alleged in the complaint and any reasonable inferences to be drawn therefrom in the light most favorable Appellant and the order granting the Motion to Dismiss must be reversed. *Doe v. Marion*, 373 S.C. 380, 645 S.E.2d 245 (2007)

C) <u>The lower court erred in considering matters outside the pleadings</u>

Assuming again that Respondent's Motion to Dismiss was based on Rule 12(b)(6) SCRCP, it is axiomatic that such Motion must be based solely on the allegations set forth in the complaint, and the appellate court must presume all well pled facts to be true. *Gressette v. South Carolina Elec. and Gas Co.*, 370 S.C. 377, 635 S.E.2d 538 (2006). If, however, on a motion pursuant to Rule 12(b)(6), SCRCP to dismiss for failure of the pleading to state facts sufficient to constitute cause of action, matters outside of the pleadings are presented to and not excluded by the court the motion shall be treated as one for summary judgment. *Brown v. Leverette*, 291 S.C. 364,

353 S.E.2d 697 (1987) In such instances, all parties shall be given a reasonable opportunity present all facts and materials made pertinent to such motion by Rule 56, SCRCP. *Id.*

In the present case, Respondent's argument rested on the verbiage in the Form 4 Order dismissing the previous 2014 case. (R. p. 2) Such Order, however, was not before the court. At the inception of oral argument the trial judge requested a copy of the order the 2014 case, which Respondent's attorney provided. (R. p. 51, line 20 – p. 6 lines 1-3) As the Motion to Dismiss was directed solely to the pleadings, the consideration by the court of matters outside the pleadings was in error. It is well-established that a Motion to Dismiss cannot consider matters outside the pleadings and therefore convert the motion to a Motion for Summary Judgment without prior notice to the parties. *Higgins v. Medical University of South Carolina*, 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997) The order granted Respondents Motion to Dismiss must be reversed.

CONCLUSION

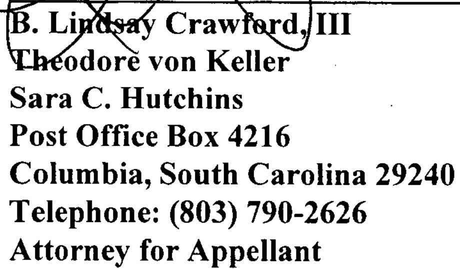
The order granting Respondent's Motion to Dismiss should be reversed for both procedural and substantive reasons. Procedurally, Respondent's stated grounds for the Motion were not established nor was evidence presented establishing the grounds required for dismissal by the Rules of Civil Procedure. Equally, the lower court erred in considering evidence beyond the Complaint and by failing to construe the complaint in the light most favorable to Appellant.

Substantially, the lower court ignored the clear intent of the Master in Equity that the 2014 action be dismissed without prejudice by expressly writing Rule 41(a) twice in the Order. Most importantly, however, the lower court erred in ignoring well established law that the 2015 action could not be dismissed with prejudice as the later, subsequent defaults by Respondent

created new causes of action which Appellant could not be barred from foreclosing upon. The Order dismissing Appellants 2015 action should therefore be reversed.

Respectfully submitted,

CRAWFORD & VON KELLER, LLC



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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

The Honorable J.C. Nicholson presiding judge for Charleston County

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Green Tree Servicing LLC..**Appellant**

v.

Paula R. Illingworth..**Respondent**

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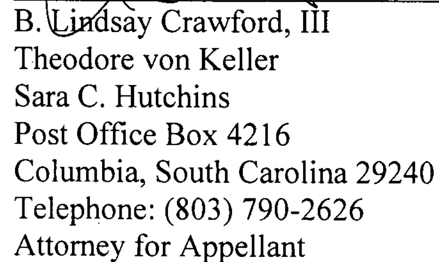
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

August 18, 2017.

CRAWFORD & VON KELLER, LLC



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