

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Gordon G. Cooper
Master in Equity

Appellate Case No. 2016-002559
Circuit Court Case No. 2016-CP-42-2422

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SC Court of Appeals

Fifth Third Mortgage Company..... Respondent,

v.

Tracy L. Liggett and South Carolina Department of Motor
Vehicles, Defendants.

of whom

Tracy L. Liggett is the..... Appellant.

RESPONDENT’S MOTION TO FILE BRIEF AND DESIGNATION OF MATTER OUT OF
TIME

Pursuant to Rule 263(b), SCACR, Fifth Third Mortgage Company respectfully moves the
Court to allow it to file its return brief and designation of matter after the initial filing deadline.

BACKGROUND

This case arises out of a foreclosure of real property in Spartanburg secured by a
mortgage. Tracy L. Liggett, the Appellant, obtained a secured loan from Fifth Third in October
2015 in the principal amount of \$77,169, but she defaulted almost immediately. In June 2016,
Fifth Third commenced foreclosure proceedings. Ms. Liggett answered but did not assert any
affirmative defenses or counterclaims.

By order entered on December 1, 2016, Spartanburg County Master-in-Equity, Gordon G. Cooper found in favor of Fifth Third and determined that the property should be sold via judicial foreclosure sale to satisfy the outstanding debt secured by Fifth Third's mortgage. Ms. Liggett appealed that decision.

However, in order to evade the consequences of Judge Cooper's rulings, Ms. Liggett also filed for Chapter 13 bankruptcy protection—*In re: Liggett*, Case No. 17-00028-hb (Bankr. D.S.C.)—and she initiated an action in Federal Court in efforts to stay the foreclosure sale ordered by Judge Cooper—*Liggett v. Fifth Third Mortgage*, Case No. 7:16-cv-4011-HMH-JDA (D.S.C.). The bankruptcy matter was ultimately closed and dismissed on May 19, 2017, with no impact at all on Fifth Third's interest. The Federal Court action was dismissed on September 14, 2017, and also had no impact on Fifth Third's interests. In both cases, Fifth Third appeared and defended its interests.

DISCUSSION

Rule 263(b), SCACR, vests this Court with wide latitude to modify deadlines for filing any appellate material other than a notice of appeal. As the State's courts remind, procedural rules should not be rigidly enforced, but instead should be "liberally construed" in order to achieve "substantial justice." *See Spence v. Spence*, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962), parenthetically for the proposition that "rules of civil procedure should be liberally construed to do substantial justice").

This is a routine foreclosure matter, and Ms. Liggett did not present to the circuit court any legitimate defense to enforcing the subject promissory note and mortgage. While this case was pending on appeal, though, Ms. Liggett has sought and received multiple extensions from this Court to filing her opening brief and designation of matter. The final extension was granted

on May 12, 2017, while her bankruptcy proceedings remained pending as well as the Federal Court matter. The interplay between the bankruptcy matter, the Federal Court action, and their impact on the state court litigation created confusion with respect to Respondent's filing obligations before the Court, and caused Respondent to misunderstand its filing deadlines on appeal. As can be seen by Fifth Third having counsel appear on its behalf in the Bankruptcy case and in the Federal Court action where it sought and obtained an order dismissing Ms. Liggett's claims, Fifth Third has been diligent in trying to protect its interests related to the loan which is the subject of the foreclosure action before Judge Cooper and this appeal. Accordingly, but for the confusion caused within Respondent by the multiple actions filed by Ms. Liggett, Fifth Third would have filed its return brief within the original filing deadlines set by this Court.

Based upon the above, Respondent respectfully requests an opportunity to file a return brief and a designation of matter to include in the record on appeal. There would be no prejudice to Ms. Liggett, as the posture of this appeal has not advanced beyond the stage where Respondent would naturally file these documents. And it is important that the record be clear and that the Court be fully informed as it considers Ms. Liggett's appellate arguments, which either undercut her own position or were never preserved for appellate review.

For instance, Ms. Liggett's opening appellate argument is that Fifth Third did not have standing to prosecute its foreclosure action. But the first sentence of her argument actually concedes that Fifth Third does have standing: "Respondent is the mere servicer and holder of the note." (Appellant's Br. at 7.) See *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 223, 746 S.E.2d 478, 482 (Ct. App. 2013) (holding that a servicer has standing to bring a foreclosure action).

Likewise, her next argument—that Fifth Third did not satisfy so-called conditions precedent to foreclosing on the note and mortgage—were never made to the circuit court and,

accordingly, are not preserved for appellate review. *See, e.g., State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) (“In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.”).

Finally, Ms. Liggett argues that Judge Cooper should have postponed the final hearing on this matter because she requested a continuance two days before the hearing, but her motion contained no explanation for the request beyond a state that she was generally “unavailable” to appear in court. Whether to grant a continuance is always committed to the trial court’s sound discretion, which certainly was not abused here in light of the timing and vagueness of Ms. Liggett’s request. *See Jackson v. Speed*, 326 S.C. 289, 309, 486 S.E.2d 750, 760 (1997) (“A motion for continuance is within the sound discretion of the trial court and the ruling will not be reversed without a clear showing of abuse.”).

CONCLUSION

For these reasons, Fifth Third respectfully requests leave from the Court to file its return brief and designation of matter out of time. If the Court grants this motion, Fifth Third respectfully requests a period of thirty days to prepare its filings.

SIGNATURE PAGE ATTACHED

Respectfully submitted,

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September 22, 2017

PROOF OF SERVICE

I, the undersigned Legal Secretary of the law offices of Womble Carlyle Sandridge & Rice LLP, Attorneys for Respondent, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by mailing a copy of the same, postage prepaid, to the following address(es):

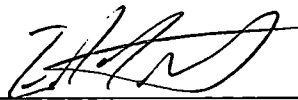
Pleading: Respondent's Motion to File Brief and Designation of Matter Out of Time

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September 22, 2017

The Honorable Jenny Abbott Kitchings
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SC Court of Appeals

Re: Fifth Third Mortgage Company v. Tracy L. Liggett and South Carolina Department
of Motor Vehicles
Civil Action No. 2016-CP-42-2422
Appellate Case No. 2016-002559

Dear Ms. Kitchings:

Enclosed please find an original and six copies of Respondent's Motion to File Brief and Designation of Matter Out of Time, along with our \$25 check for filing fees. Please return a file-stamped copy with our courier. If we can provide the Court with any additional materials or information, please do not hesitate to call on us.

With kind regards, I remain

Very truly yours,

M. Todd Carroll

Enclosures

cc: Tracy L. Liggett
Frank L. Valenta, Jr.