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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 INITIAL BRIEF

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October 25, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	2
I. Foreclosure Proceedings Before the Master in Equity	2
II. Ms. Liggett’s Federal Lawsuit	3
III. Ms. Liggett’s Bankruptcy Filings	3
ARGUMENTS AND AUTHORITIES	4
I. Ms. Liggett has not preserved her arguments for appellate review.	4
II. Even if the Court can address the issue of Fifth Third’s standing to foreclose, Ms. Liggett has conceded the point in her opening brief.	5
III. Judge Cooper did not abuse his discretion when he denied Ms. Liggett’s motion for a continuance.	5
CONCLUSION	7

TABLE OF AUTHORITIES

Cases

<i>Allendale County Bank v. Cadle</i> , 348 S.C. 367, 375, 559 S.E.2d 342, 346 (Ct. App. 2001)	4
<i>Bank of Am., NA v. Draper</i> , 405 S.C. 214, 222–23, 746 S.E.2d 478, 482 (Ct. App. 2013)	5
<i>In re Liggett</i> , Case No. 17-00028-hb (Bankr. D.S.C. Mar. 2, 2017)	3
<i>Jackson v. Speed</i> , 326 S.C. 289, 309, 486 S.E.2d 750, 760 (1997)	6
<i>Lennon v. S.C. Coastal Council</i> , 330 S.C. 414, 417–18, 498 S.E.2d 906, 907–08 (Ct. App. 1998)	5
<i>Liggett v. Fifth Third Mortgage</i> , Case No. 7:16-4011-HMH-JDA, 2017 U.S. Dist. LEXIS 148882, at *3 (D.S.C. Sept. 14, 2017)	3
<i>State v. Colden</i> , 372 S.C. 428, 641 S.E.2d 912 (Ct. App. 2007)	6
<i>State v. Dunbar</i> , 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003)	4
<i>State v. Lytchfield</i> , 230 S.C. 405, 95 S.E.2d 857 (1957)	6
<i>Trotter v. Trane Coil Facility</i> , 393 S.C. 637, 649, 714 S.E.2d 289, 295 (2011)	6

Rules

Rule 40(i)(1), SCRCP	6
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STATEMENT OF ISSUES

1. **Issue Preservation:** Before the circuit court, Ms. Liggett did not assert any affirmative defenses or counterclaims, did not present any evidence or arguments, and did not appear for the foreclosure hearing. Are the arguments contained in her opening brief preserved for appellate review?

2. **Standing:** In her opening brief, Ms. Liggett acknowledges that Fifth Third Mortgage Company is the “servicer and holder of the note” at issue in this case. Does Fifth Third have standing to foreclose?

3. **Continuance:** Less than 48 hours before the foreclosure hearing, Ms. Liggett filed a motion seeking a continuance of the hearing. Judge Cooper denied that motion. Did he abuse his discretion?

STATEMENT OF THE CASE

This is a routine foreclosure action, and Judge Cooper's final order should be readily affirmed by this Court.

On October 6, 2015, Fifth Third Mortgage Company and Ms. Liggett entered into a note in the principal amount of \$77,169.00. (R. p. ___; Note at 1.) To secure repayment, the parties also executed a mortgage that covered Ms. Liggett's real property in Spartanburg County, along with an accompanying manufactured home affixed to that parcel. (R. p. ___; Mortgage at 3.) Ms. Liggett subsequently defaulted on her debt. (R. p. ___; Affidavit of Debt.)

I. Foreclosure Proceedings Before the Master in Equity

Fifth Third commenced this action on June 28, 2016. (R. p. ___; Complaint.) Ms. Liggett filed an answer on August 24, 2016. (R. p. ___; Amended Answer and Affirmative Defenses to Complaint.) Despite the caption of her responsive pleading, Ms. Liggett did not actually assert any affirmative defenses in opposition to Fifth Third's foreclosure action.¹

On November 16, 2016, Fifth Third served Ms. Liggett with notice of a December 1, 2016 hearing in this matter. (R. p. ___; Notice of Hearing and Certificate of Mailing.) On November 28, 2016, Fifth Third submitted its evidence to support the foreclosure:

- Copies of the parties' note (R. p. ___) and mortgage (R. p. ___);
- An Affidavit of Debt (R. p. ___);
- An Affidavit of Attorneys' Fees (R. p. ___); and
- Additional written testimony (R. p. ___).

The next day, Ms. Liggett filed a request to continue the hearing, which was set to take place less than 48 hours later. She provided no explanation for her motion beyond a cryptic,

¹ Also despite captioning her responsive pleading as an "Amended Answer," Ms. Liggett filed only a single answer in this case.

unsupported statement that “she will be unavailable and absent from the jurisdiction of this Court from November 29, 2016 through December 10, 2016,” including the foreclosure hearing. (R. p. ___; Defendant’s Notice of Unavailability and Motion for Continuance.)

Judge Cooper denied Ms. Liggett’s motion and pressed forward with the hearing. (R. p. ___; Transcript of Testimony at 2:9–:25.) Ms. Liggett did not appear, did not submit any evidence—no documents, no written testimony, and no live testimony—and did not submit any arguments or motions in opposition to foreclosure.

By order entered on December 1, 2016, Judge Cooper issued judgment in favor of Fifth Third and authorized the foreclosure sale of the mortgaged property. (R. p. ___; Master’s Order and Judgment of Foreclosure and Sale.) Ms. Liggett did not file any post-judgment motions, but instead appealed to this Court on December 30, 2016. (R. p. ___; Notice of Appeal.) She also unsuccessfully tried to short-circuit this case through two subsequent actions, which are discussed below.

II. Ms. Liggett’s Federal Lawsuit

Two days before noticing her appeal, Ms. Liggett filed a complaint in the District of South Carolina seeking an order that enjoined enforcement of the parties’ note and mortgage. The federal court promptly dismissed her case. *Liggett v. Fifth Third Mortgage*, Case No. 7:16-4011-HMH-JDA, 2017 U.S. Dist. LEXIS 148882, at *3 (D.S.C. Sept. 14, 2017).

III. Ms. Liggett’s Bankruptcy Filings

In addition to her failed federal action, Ms. Liggett also sought bankruptcy protection from these proceedings. The Bankruptcy Court dismissed that action when Ms. Liggett failed to appear for hearings or file necessary paperwork. Order Dismissing Case in *In re Liggett*, Case No. 17-00028-hb (Bankr. D.S.C. Mar. 2, 2017) (Dkt. No. 25).

ARGUMENTS AND AUTHORITIES

I. Ms. Liggett has not preserved her arguments for appellate review.

In support of her appeal, Ms. Liggett argues that Fifth Third does not have standing to foreclose on the parties' note and mortgage (Appellant's Br. at 7–8), that Fifth Third did not satisfy "conditions precedent" to foreclose (*id.* at 9–10), and that she was denied due process (*id.* at 10–12).

However, Ms. Liggett did not make any of these arguments to the circuit court. She did not assert them below by way of motion or in-person argument. She did not present any evidence in support of these arguments. Nor did she make these arguments through any kind of post-judgment motion under Rule 54, Rule 59, or Rule 60. Ms. Liggett's failure to raise these issues at the trial level is fatal to her appeal.

It is hornbook law that this Court's appellate jurisdiction extends only to issues that have been properly preserved for review. *See Allendale County Bank v. Cadle*, 348 S.C. 367, 375, 559 S.E.2d 342, 346 (Ct. App. 2001) ("An issue not raised to or ruled on by the trial court is not preserved for appellate review."). To preserve an issue for appellate review, a party must timely raise the issue to the circuit court and receive a ruling on it. *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.").

Because Ms. Liggett did not raise any of the issues that appear in her opening brief to the circuit court, she has not preserved them for this Court's review. As such, the Court should reject her arguments and affirm Judge Cooper's decision.

II. Even if the Court can address the issue of Fifth Third's standing to foreclose, Ms. Liggett has conceded the point in her opening brief.

Though Ms. Liggett failed to preserve the issue of Fifth Third's standing for appellate review, the Court can arguably address her arguments sua sponte because standing touches on a jurisdictional issue. *See Lennon v. S.C. Coastal Council*, 330 S.C. 414, 417–18, 498 S.E.2d 906, 907–08 (Ct. App. 1998) (favorably citing federal authority that permits federal courts to raise “objections to standing” sua sponte). Even if the Court determines that this question is one that it can review, it should still affirm the circuit court's rulings because Ms. Liggett's opening brief concedes that Fifth Third has standing.

The first sentence of Ms. Liggett's standing argument states: “Respondent is the mere servicer and holder of the note.” (Appellant's Br. at 7.) This is certainly true—Fifth Third is a party to both the note and mortgage (R. pp. __, __), it holds the note (R. p. __), and it services the debt (R. p. __).

Fifth Third's status as both the holder and servicer indisputably gives it standing as a foreclosure plaintiff. *See, e.g., Bank of Am., NA v. Draper*, 405 S.C. 214, 222–23, 746 S.E.2d 478, 482 (Ct. App. 2013) (holding that both a note's holder and its servicer have standing to commence a foreclosure action). Accordingly, if the Court takes up the issue of standing, it should affirm Judge Cooper's decision that Fifth Third is a proper plaintiff here.

III. Judge Cooper did not abuse his discretion when he denied Ms. Liggett's motion for a continuance.

Finally, Ms. Liggett supports her newfound due process argument by noting that she requested to continue the foreclosure hearing, but that Judge Cooper denied that request. (Appellant's Br. at 10.) If the Court determines that the issue of whether a continuance should have been granted has been preserved for review, it should reject Ms. Liggett's argument.

Rule 40(i)(1), SCRPC, vests discretion in the circuit court to continue a matter for “good and sufficient cause.” This Court reviews the denial of a motion for continuance for an abuse of discretion. *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.”). When reviewing the denial of a continuance, “[o]ur appellate courts have shown great deference to trial judges in this matter.” *State v. Colden*, 372 S.C. 428, 437, 641 S.E.2d 912, 917 (Ct. App. 2007). Accordingly, “reversals of refusal of continuance are about as rare as the proverbial hens’ teeth.” *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957).

In South Carolina, “a continuance is not a matter of right, but of discretion,” and parties are warned that they “assume[] the risk” that a request for a continuance may be denied. *Trotter v. Trane Coil Facility*, 393 S.C. 637, 649, 714 S.E.2d 289, 295 (2011). Here, Fifth Third timely served Ms. Liggett with notice of the December 1, 2016 foreclosure hearing. (R. p. ___; Notice of Hearing and Certificate of Mailing.) On November 29, 2016—less than 48 hours before the hearing was to commence—Ms. Liggett filed a “Notice of Unavailability” that requested a continuance because “she will be unavailable and absent from the jurisdiction of this Court” during the hearing. (R. p. ___; Defendant’s Notice of Unavailability and Motion for Continuance.) She provided no explanation or other support for her supposed “unavailability.”

When the hearing was called, Judge Cooper confirmed that Ms. Liggett had been properly noticed, and then proceeded to resolve the case. (R. p. ___; Transcript of Testimony at 2:9–3:3.) There is nothing in the record to suggest that Judge Cooper abused his discretion in moving the case forward to conclusion despite Ms. Liggett’s unexplained absence.

On appeal, Ms. Liggett cryptically states that her absence was “for medical reasons,” but there is nothing in the record to support this assertion. (Appellant’s Br. at 10.) These unknown “medical reasons” were never disclosed to Judge Cooper and cannot provide a basis for finding that he abused his discretion. Allowing a belated, vague explanation on appeal to serve as the basis for reviewing and reversing the denial of a continuance would effectively wrest docket control away from the trial courts and add an exhausting, untenable layer of administration to this Court’s already crowded system. The Court should decline to undertake such an examination.

Accordingly, if the Court finds that the denial of Ms. Liggett’s requested continuance is preserved for appellate review, it should readily affirm Judge Cooper’s decision as a proper exercise of his discretion.

CONCLUSION

This is a routine foreclosure matter that Judge Cooper properly and efficiently resolved. Accordingly, Fifth Third respectfully requests that the Court affirm the circuit court’s decision.

Signature Page Attached

Respectfully submitted,

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October 25, 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 Opening Brief

Parties Served:

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October 25, 2017

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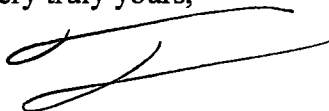
Re: Fifth Third Mortgage Company v. Tracy L. Liggett and South Carolina Department
of Motor Vehicles
Civil Action No. 2016-CP-42-2422
Appellate Case No. 2016-002559

Dear Ms. Kitchings:

Please find enclosed an original and one copy of Respondent's Initial Brief and Designation of Matter for the matter cited above. Kindly file the originals and return clocked copies in the enclosed envelope.

With kind regards, I remain

Very truly yours,



M. Todd Carroll

Enclosures

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

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