

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
EQUITY COURT

Clyde R. Davis, Special Referee

Appellate Case No: 2016-001217

Wells Fargo Bank, NA Ultimate Successor to First Union
National Bank, Respondent,

Vs.

Albert J. Sanders, a/k/a Albert Jerry Sanders, Jr., a/k/a Albert
J. Sanders, Palmetto/Carolina Funding, LLC and S.C. State
Credit Union, Defendants

Of whom Albert J. Sanders, Jr. is the Appellant.

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

I. Did the Trial Judge abuse his discretion in finding that the Appellant owned more than five (5) rental properties and was, therefore, not eligible for a loan modification under the Home Affordable Modification Program, ("HAMP"), and HAMP Tier 2?

II. Did the trial judge abuse his discretion in failing to find and conclude that the Plaintiff came to court with unclean hands and should not have been granted the equitable relief sought?

STATEMENT OF THE CASE

This action is for foreclosure of real property and improvements located at 212 Adkins Circle, West Columbia, Lexington County, South Carolina. On January 23, 2002 Albert J. Sanders, Jr executed and delivered to First Union National Bank a note in writing for the sum of \$46,611.50 with interest at the rate of 7.59% per annum. On that same date the Appellant executed and delivered to said bank a mortgage on the subject real property. The 'Great Recession' caused general financial chaos and Sanders got behind in his payments. The property in question is rental property.

On March 9, 2009 the U.S. Department of the Treasury issued uniform guidance for loan modifications under the Making Home Affordable (MHA) Program to stabilize the housing market and help struggling homeowners obtain relief. In March 2012 the Obama Administration expanded the population of homeowners who may be eligible for the Home Affordable Modification Program, (HAMP), under a new "HAMP Tier 2" alternative that further expanded the population of homeowners eligible for relief to include mortgages secured by rental property. The Appellant did not learn that the regulations had been changed and expanded to include rental property. (At that time Sanders and his counsel understood that application for relief under HAMP Tier 2 had to be presented by December 31, 2013. That deadline was extended and now the deadline is December 31, 2016.)

Foreclosure was commenced on January 25, 2011 upon the filing of a Lis Pendens and Summons and Complaint. The Defendant, Albert J, Sanders, Jr. timely served and filed an Answer wherein he alleged "unclean hands" on behalf of the Plaintiff and sought denial of the Plaintiff's prayer for relief. The case was referred to the Hon. Clyde Davis as Special Referee with leave to make appropriate findings of fact and conclusions of law with authority to enter a

final Judgment in the cause. Any appeal from the Special Referee would be directly to the South Carolina Court of Appeals or Supreme Court.

At trial Appellant argued that the Respondent knew or should have known that HAMP Tier 2 had become effective on June 1, 2012 but never advised the Appellant of that fact. On April 25, 2016 the Special Referee executed his Order and Judgment of Foreclosure and Sale wherein he found that the Appellant was not eligible for relief under HAMP Tier 2 because he owned more than five (5) rental properties. Written notice of the entry of this order was received on May 11, 2016. Appellant filed a Notice of Appeal on June 8, 2016.

ARGUMENT

I. Did the Trial Judge abuse his discretion in finding that the Appellant owned more than five (5) rental properties and was, therefore, not eligible for a loan modification under the Home Affordable Modification Program, (“HAMP”), and HAMP Tier 2?

“Officially over in 2009, the Great Recession is now generally acknowledged to be the most devastating global economic crisis since the Great Depression. As a result of the crisis, the United States lost more than 7.5 million jobs, and the unemployment rate doubled—peaking at more than 10 percent. The collapse of the housing market and subsequent equity market fluctuations delivered a one-two punch that destroyed trillions of dollars in personal wealth and made many Americans far less financially secure.” (*The Great Recession*, David B. Grusky, Bruce Western, and Christopher Wimer, pub 10/2011). Caught in this financial mudslide was the Appellant along with millions of other homeowners. Nearly four (4) million homes were foreclosed each year and some 2.5 million businesses were shuttered. (*Institute for Policy Research*, Northwestern University.)

The *Home Affordable Modification Program*, (HAMP), is a federal government program introduced in 2009 to assist homeowners in saving their homes. HAMP is part of the *Emergency Economic Stabilization Act* of 2008. As first designed, HAMP provided assistance to homeowners wishing to save their primary residence. Later, in June 2012, the program was extended to include rental property. (HAMP Tier 2, effective 6/1/2012.) (R. p. 279).

To qualify for HAMP Tier 2 eligibility the homeowner must show the following: a documented financial hardship and that he does not have sufficient liquid assets to make the monthly mortgage payments; the loan must not have been previously modified under HAMP Tier 2; the loan constitutes a first mortgage lien with a principal balance of not more than \$729,750.00; that the loan originated on or before January 1, 2009; and that the loan is secured

by a one to four-unit property that is not condemned. In addition, one or more of the following may apply:

1. The borrower is evaluated for HAMP Tier 1 following the Effective Date but fails to satisfy the eligibility requirements for a HAMP Tier 1 modification (e.g. the loan is not secured by an owner-occupied property or the borrower's pre-modification monthly mortgage payment is below the minimum 31 percent front end debt-to-income (DTI) ratio) or underwriting requirements for a HAMP Tier 1 modification (e.g. the servicer cannot achieve the target monthly mortgage payment ratio without excessive forbearance or the result of the NPV, [net present value], test is negative).
2. The borrower was evaluated for, but not offered, a HAMP modification prior to the Effective Date; provided, however, the non-approval was not due to borrower fraud or non-compliance with Section 1481 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, in which case the borrower would not be eligible for HAMP Tier 2.
3. The borrower had a payment default on a HAMP Tier 1 trial period entered into before or after the Effective Date.
4. The borrower lost good standing under a HAMP Tier 1 permanent modification entered into before or after the Effective Date and, at the time of evaluation for HAMP Tier 2, at least 12 months have passed since the HAMP Tier 1 modification effective date or the borrower has experienced a change of circumstance.
5. *The mortgage is secured by a rental property. (Emphasis added.)*
(HAMP Tier 2, effective 6/1/2012.) (R. p. 283).

It is uncontroverted that the Appellant suffered financial hardship that made it impossible for him to make his monthly mortgage payment, and that the loan in question originated prior to January 1, 2009 and that the principal balance is far less than the \$729,750.00 cap. It is also a matter of fact that the property is a single family residence. Respondent contest that the property is rental property. They cite Sanders testimony that the home was purchased for his sister who lives there and "... never paid me a dime..." (R. p. 78, Lines 7-8.) But, Sanders also testified that his sister "...would help pay the [mortgage] payments of the property." And "...she would help her [his ex-wife] and we would ... give her like a \$300.00 payment. We'd take the money back and pay the mortgage, so it was a rental, but it was family." (R. p. 116, Lines 7-14.)

HAMP defines rental property as "... a property that is used by the borrower for rental purposes only and not occupied by the borrower, whether as a principal residence, second home, vacation home or otherwise.." (HAMP Supplemental Directive 12-02, establishing HAMP Tier 2, March 9, 2012). (R. pp. 279, 283). There is no requirement for a written lease or even that the property be occupied by a tenant. (HAMP Supplemental Directive 12-02.) (R. p. 284). The borrower must, however, certify that he does not own more than five single family properties. (HAMP Supplemental Directive 12-02.) (R. p. 283).

The trial judge found and concluded that the Appellant owned more than five single family rental properties. He based this solely on the schedules that were filed in the Appellant's Chapter 11 Bankruptcy in December 2009, more than six (6) years prior to the trial and more than three (3) years before the deadline to apply for HAMP Tier 2 relief. (See copy of Chap. 11 Bankruptcy Schedule A, Case No. 09-09094). (R. p. 179). It is submitted that what the Appellant owned in 2009 is not relevant. On cross examination, Sanders was only questioned about one property, 228 Atkins Circle:

Q: And you list a number of other indebtednesses...one at 228 Atkins Circle. Do you own that particular property?

A: Like you said, sir, we're here on a specific item. That's got nothing to do with this case then, sir.

Q: I didn't ask that. I asked, do you own that property?

A: No, sir, I do not.

(R. p. 92, Lines 8-16)

It is also noted that the Appellant originally filed his bankruptcy pro se. A daunting task. When he was finally able to retain counsel a Statement of Change dated April 5, 2010 was filed

amending his Schedules, including Schedule A, Real Property. The Amended Schedule A lists only three (3) properties in his name. (Statement of Change Case No: 09-09094 filed 4/5/2010.) (R. p. 219)

In an action in equity, tried by the judge alone, without a reference, on appeal the Supreme Court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. (*Lewis v Lewis* 392 S.C. 381, 709 S.E.2d 650, (S.C. 2011), quoting *Townes Associates, Ltd. v City of Greenville* 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976), and *Dobson v Atkinson*, 232 S.C. 12, 100 S.E.2d 531 (1957)). Appellant asserts that the trial judge's finding is without competent evidentiary support, in fact, the best evidence at trial was that the Appellant personally owned less than five single family properties and would thus qualify for HAMP Tier

2.

II. Did the trial judge abuse his discretion in failing to find and conclude that the Plaintiff came to court with unclean hands and should not have been granted the equitable relief sought?

“The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.” (First National Bank of S.C. v Soden, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998). “He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief. (Wilson v Landstrom 281 S.C. 260, 315 S.E. 2d 130, (Ct App. 1984).

In this case the Bank withheld from the Appellant the fact that HAMP had been extended in June 2012 to include rental property. This after the Bank specifically claimed that Sanders was not eligible for HAMP relief because the home was not his primary residence. (See Complaint paragraph 9.) (R. p. 14). HAMP requires servicers to pre-screen all first lien mortgage loans where two or more payments are due and unpaid after the effective date, (June 1, 2012), to determine if they meet the following basic criteria for consideration under HAMP:

1. One-to-four unit residential property;
 2. Not condemned;
 3. Loan originated on or before January 1, 2009;
 4. Unpaid principal balance does not exceed \$729,750.00, and
 5. The loan has not previously been modified under HAMP.
- (HAMP Supplemental Directive 12.02) (R. p. 285).

Though proactive solicitation is not required where the loan is more than two (2) months in arrears prior to the Effective Date of June 1, 2012, servicers are required to have an internal written policy which defines what the servicer considers a change in circumstance and outlines

when a borrower will be re-valuated for HAMP. Assuming that the Bank performed the pre-screen as required, it would have known that the only reason Sanders was denied was because the home was not his primary residence.

The Home Affordable Modification Program is very complex and no borrower could be expected to keep up with all the regulations and supplemental directives adopted over the last several years, but the Bank was in a position to know the regulations. The Bank agreed to participate in HAMP.

Here the Bank went into court seeking equitable relief when it knew that the roadblock that prohibited the borrower from obtaining HAMP relief had been removed. The Bank argues that since it was not required to proactively solicit the borrower under HAMP Tier 2, its hands are clean. But the doctrine of unclean hands does not require unlawful conduct. It is only necessary that the Bank act *unfairly* to the prejudice of the other party. (First National Bank of S.C. v Soden, Id.) In Emery v Smith, 361 S.C., 207, 603 S.E.2d 598, (Ct App. 2004), this court found the husband's hands were unclean because he failed to inform the wife about his retirement. Here, the unfair conduct is further evidenced by the fact that the lender convinced Sanders to make some payments with the promise of working with him, but all the while proceeding with foreclosure. (R. p. 87, Line 24 – p. 88 line 14).

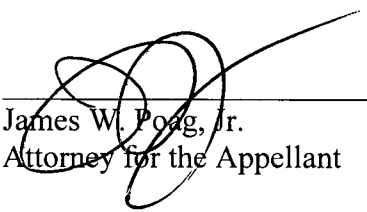
The purpose of the Making Home Affordable Program was to provide a mechanism for borrowers to save their homes even though they defaulted in the monthly mortgage payments. The Bank's intentional failure to disclose HAMP Tier 2 frustrates the purpose of the program and has prejudiced the Appellant. Wells Fargo should not be allowed to obtain equitable relief due to its unclean hands.

CONCLUSION

The trial judge's finding that Sanders owned more than five single family properties and therefore did not qualify for HAMP Tier 2 assistance is without competent evidentiary support. In fact, the best evidence produced at trial was that the Appellant personally owned less than five single family properties and would thus qualify for HAMP Tier 2. Furthermore, Wells Fargo comes into the court of equity with unclean hands due to its failure to inform the borrower that HAMP had been extended to rental properties. The Bank's unfair conduct in the matter that is the subject of this litigation prejudiced the Defendant and the Bank should not be allowed to recover in equity.

Respectfully Submitted,

December 6, 2016



James W. Poag, Jr.
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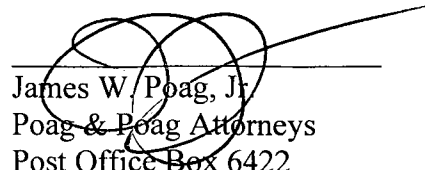
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CERTIFICATE OF COMPLIANCE WITH SCACR RULE 211(b)

The undersigned counsel for the Appellant hereby certifies that Appellant's Final Brief
complies with SCACR Rule 211(b).

December 7, 2016


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