

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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JAN 23 2018

SC 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,.....Appellant.

**RESPONDENT'S REPLY TO APPELLANT'S OPPOSITION TO RESPONDENT'S
MOTION FOR INVOLUNTARY DISMISSAL**

This mortgage foreclosure matter has been fully briefed by the parties. Appellant filed a supplemental Designation of Matter on July 24, 2017, along with her Initial Reply Brief. This designation purportedly added a transcript from a hearing on April 20, 2016 (designated as #13 on Appellant's Amended Designation of Matter). The hearing concerned Respondent's motion for partial summary judgment on its first cause of action for declaratory relief on the priority of its mortgage. The hearing did not address the merits of the foreclosure cause of action. Appellant did not appear at the hearing, and presented no evidence by affidavit or otherwise in opposition to the motion. (A copy of the order granting partial summary judgment is attached

hereto as Exhibit A.) Appellant has not appealed this grant of partial summary judgment to Respondent.

Respondent filed a motion to dismiss this appeal on December 27, 2017, based on Appellant's unexplained delay in receiving the transcript and preparing the Record on Appeal.

Appellant served a return to Respondent's motion on January 11, 2018.¹ The certificate of service indicates that the return was mailed to the undersigned counsel's office. However, the address on the envelope was incorrect and the return was mailed to the S.C. Department of Revenue. The Department of Revenue put the return in an envelope and Respondent received the return via mail on January 18, 2018. (Attached hereto as Exhibit B is a copy of the envelope from Appellant with the incorrect mailing address showing it was received by the Department of Revenue on January 16, 2018.)

Appellant's delay in obtaining the transcript and preparing the Record continues to go unexplained. Appellant states that she received a letter from the court reporter that the file for the transcript is corrupted. Appellant does not state when she received the letter from the court reporter.

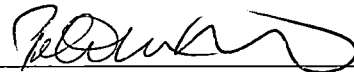
Appellant indicates that she has followed up with the court reporter in an attempt to investigate the corrupted file. Appellant sent the court reporter a letter on January 11, 2018. It appears that it was only the current motion to dismiss that prompted Appellant to take any further action to receive the transcript. Appellant's failure to communicate with this Court or the court reporter has unduly delayed this appeal.

¹ A return to a motion shall be filed within ten days from the date of service of the motion. Rule 240(e), SCACR. "Failure of a party to timely file a return may be deemed a consent by that party to the relief sought in the motion or petition." *Id.* It is unclear whether Appellant's return was filed with the Court. The South Carolina Appellant Case Management System does not have a record of the return being on file with the Court. In any event, Appellant's return was not timely, and Respondent is entitled to the relief requested in its motion.

This appeal can proceed without the transcript from April 20, 2016. That transcript is not necessary to evaluate the issues that have been preserved for review. Appellant cited to the transcript only in her Initial Reply Brief in an attempt to show that the issues raised in the appeal were raised to the trial court.² Appellant avers that during the April 20, 2016, hearing, the Master-in-Equity stated that he had read the case file. This is not the same as raising an issue to the trial judge and obtaining a ruling. Respondent is not aware of any case law indicating that a judge's review of a case file would work to preserve all issues for appeal. Such a standard would provide no incentive for a litigant to specifically raise issues and obtain rulings in the lower court. Moreover, Appellant did not appear at the April 20, 2016, hearing, and the order states that Appellant did not present any evidence. (See Ex. A) Therefore, Appellant did not raise any issues to the court at the hearing, and the transcript is not necessary to proceed with the appeal.

For the reasons stated herein, and in the motion to dismiss, Respondent moves to dismiss this matter based on the extended, unreasonable, and unexplained delay. In the alternative, Appellant moves for an Order requiring that the Record on Appeal be prepared and filed, with the exception of the transcript from April 20, 2016 (designated as #13 on Appellant's Amended Designation of Matter), so that this appeal can proceed.

RILEY POPE & LANEY, LLC



Peter M. Balthazor, SC Bar No. 68244
2838 Devine Street
Post Office Box 11412 (29211)
Columbia, South Carolina 29205
(803) 799-9993
Attorney for Respondent

January 22, 2018

² Interestingly, Appellant refers to “the last two (2) pages of the transcript” as if Appellant is already in possession of the transcript.

Exhibit A to Resp.
Reply

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF YORK

Case No. 2015-~~CB-46-3068~~
201600340460

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

Filed for Record in
YORK COUNTY, SC
DAVID HAMILTON, CLERK OF COURTS
05-03-2016 At 12:19 PM.
ORDER LAND .00
OR Vol 15625 Page 176 - 179

Plaintiff,

**ORDER GRANTING PLAINTIFF'S
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

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,

RECORDED
YORK COUNTY
TAX ASSESSOR'S OFFICE
DATE 5/4/16
TAX MAP NO. 415-1-1-1-1
INITIALS LPK
DAVID HAMILTON
C.C. CLERK OF COURTS
2016 MAY -2 AM 10:05
FILED-RECEIVED
Page 176

Defendants.

This matter came before me for a hearing on April 20, 2016, on a motion for partial summary judgment filed by Plaintiff, The Bank of New York Mellon fka The Bank of New York, as Trustee (CWALT 2004-2CB) ("Plaintiff"). Demetri K. Koutrakos appeared for Plaintiff. Samuel C. Barfield appeared *pro se*. No other parties appeared at the hearing despite being given proper notice of the hearing.

Plaintiff moved for an Order granting Plaintiff partial summary judgment against Defendants Tara B. Barfield a/k/a Tara Burdiss Barfield and Samuel C. Barfield as to the First Cause of Action in Plaintiff's Complaint, asserting that there are no genuine issues of material fact, and that Plaintiff is entitled to judgment as a matter of law on this cause of action.

Based on the full record, including the arguments presented at the hearing, Plaintiff's motion, the pleadings filed herein, and the Affidavit of David Simpkins, I make the following findings and conclusions.

STANDARD OF REVIEW

Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Rule 56(c), SCRPC. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the

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nonmoving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct.App. 1997). In ruling on a summary judgment motion, the Court should consider the pleadings and discovery in determining whether there is a genuine issue of fact for trial. See *Thomas v. Waters*, 315 S.C.

The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party bears the burden of proof at trial. *Etheredge v. Richland School Dist. I*, 330 S.C. 447, 499 S.E.2d 238 (Ct. App. 1998); *Baughman v. American Telephone & Telegraph Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). On those issues where the nonmoving party will have the burden of proof, it is that party's obligation to confront the motion for summary judgment with specific facts demonstrating all elements of the claim. *Baughman, supra*.

ANALYSIS

The facts viewed in the light most favorable to the non-moving parties are:

1. On December 8, 2003, Tara B. Barfield made, executed and delivered unto Countrywide Home Loans, Inc. a \$159,180.00 Note ("Note").

2. To secure the Note, Tara B. Barfield made, executed and delivered unto Mortgage Electronic Registration Systems, Inc., as nominee for Countrywide Home Loans, Inc., a certain real estate mortgage ("Mortgage"), which Mortgage was recorded January 22, 2004, at 10:43:35 a.m., in Book 6004 at Page 32.

3. The Mortgage describes property with an address of 5088 Mariana Court, Tega Cay, S.C. 29708, which is more fully described as follows ("the Property"):

Being all of Lot 88 in Section 5 of Tega Cay as same is shown on map thereof recorded in Map Book A-254 at Page 4 in the Office of the Clerk of Court for York County, South Carolina.

Being the same property conveyed to Tara Burdiss Barfield by deed from David A. Shear and Nancy M. Shear, dated December 17, 2001 and recorded in January 18, 2001, in Deed Book 4123 at Page 216 in the Office of the Clerk of Court for York County, South Carolina. Thereafter Tara Burdiss Barfield conveyed the subject property to Tara Burdiss Barfield and Samuel C. Barfield by deed dated December 8, 2003 and recorded January 22, 2004 in Deed Book 6004 at Page 28.

TMS No. 641-05-01-088

Property Address: 5088 Mariana Court, Tega Cay, SC 29708

4. The Mortgage was assigned to Bank of New York as Trustee for The Certificateholders of CWALT 2004-02 by assignment recorded March 26, 2009, in Book 10650

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at Page 120, and then assigned to Plaintiff by assignment dated April 16, 2015, and recorded April 22, 2015, in Book 14812 at Page 123.

5. On December 8, 2003, the same day she signed the Note and the Mortgage, Tara Burdiss Barfield executed a deed conveying the Property to herself and her husband, Samuel C. Barfield, which deed was recorded January 22, 2004, at 10:42:52 a.m., in Book 6004 at Page 28 ("2003 Deed").

6. The Mortgage and the 2003 Deed were executed on the same day, December 8, 2003, and were recorded on the same day, January 22, 2004.

7. The Mortgage served to refinance a prior mortgage on the Property. That prior mortgage was given by Tara B. Barfield on December 21, 2001.

8. The HUD-1 Settlement Statement dated December 8, 2003, shows a disbursement of \$154,159.87 was made to pay off the prior mortgage.

9. The Mortgage and the 2003 Deed were witnessed by David Simpkins, an attorney, who was employed by the law firm that closed this transaction. Simpkins states in his affidavit that an error was committed with respect to the order of recording of the Mortgage and the 2003 Deed.

10. According to Mr. Simpkins, "[t]hrough inadvertence, mistake, and/or clerical error, the 2003 Deed was recorded immediately before the Mortgage in the records of the York County Clerk of Court when it should have been recorded immediately after the Mortgage."

11. The parties to this transaction and Simpkins "intended for the Mortgage to be a first mortgage lien on the Property and for the 2003 Deed to be recorded after, and thus subject to the lien of, the Mortgage."


12. No evidence to the contrary was provided by any of the Defendants, by affidavit or otherwise.

CONCLUSION

Based upon the record presented, I find and conclude that there are no genuine issues of material fact on the issue of the recording error, and Plaintiff is entitled to have the Mortgage be deemed recorded prior to the 2003 Deed. Therefore, Plaintiff is entitled to partial summary judgment on its first cause of action for declaratory relief.

Therefore, it is ordered as follows:

A. Plaintiff's motion for partial summary judgment is granted in full, and Plaintiff is granted judgment on its First Cause of Action for declaratory relief;

Handwritten signature and initials, possibly "MK" and "#3".

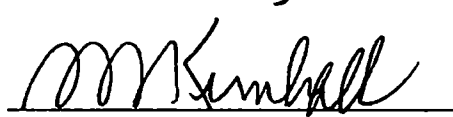
B. The Mortgage is deemed to be recorded immediately before the 2003 Deed, and the 2003 Deed is deemed recorded immediately following the Mortgage; and, this declaration relates back to the date of recording, January 22, 2004;

C. The Mortgage is a first mortgage lien on the Property, superior in all respects to the interests and liens of all defendants, including the interest of Samuel C. Barfield in and to the Property; and,

D. The York County Clerk of Court is authorized and directed to record a copy of this Order in its real estate records, and shall index this Order in the grantor, grantee, and mortgagor index under the names of Tara B. Barfield a/k/a Tara Burdiss Barfield and Samuel C. Barfield, and in the mortgagee index under Plaintiff.

AND IT IS SO ORDERED.

April 28, 2016

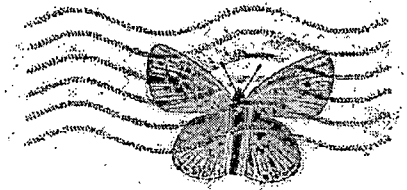

S. Jackson Kimball
York County Master in Equity

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5088 Maryland Court
Tega Cay SC 29708

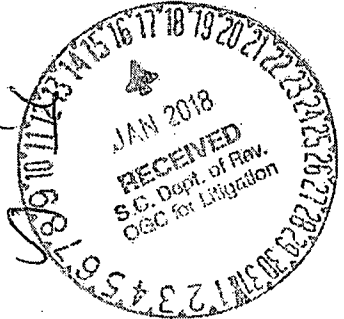
CHARLOTTE NC 282

11 JAN 2018 PM 5 L



USA
NON-MACHINABLE SURCHARGE

Riley, Pop & Caney
Post Office Box 1226
Columbia, SC 29211



29211-226505

Exhibit B to Resp.
Reply

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

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SC Court of Appeals

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,.....Appellant.

CERTIFICATE OF SERVICE

I do hereby certify that I served the Respondent's Reply to Appellant's Opposition to Respondent's Motion for Involuntary Dismissal upon the parties below herein by depositing a copy of same, this date, in the U.S. Mail, first-class postage prepaid, and addressed as follows:

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

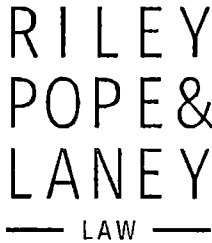


Kimberly R. Bickford
Paralegal

January 23, 2018
Columbia, South Carolina

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January 23, 2018

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JAN 23 2018

SC Court of Appeals

(Via Hand-Delivery)
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 six (6) copies of the Respondent's Reply to Appellant's Opposition to Respondent's Motion for Involuntary Dismissal, with Certificate of Service in the above-referenced matter. Please file the enclosed documents and return one (1) filed copy with my courier.

Thank you,

A handwritten signature in cursive script that reads "Kimberly R. Bickford".

Kimberly R. Bickford
Paralegal

PMB/krb

Enclosures

Cc: Tara B. Barfield a/k/a Tara Burdiss Barfield, *Pro Se* (via USPS)