

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS  
ELEVENTH JUDICIAL CIRCUIT  
C/A No.: 2016-CP-32-03572

DEUTSCHE BANK NATIONAL TRUST )  
COMPANY, AS TRUSTEE FOR )  
NOVASTAR MORTGAGE FUNDING )  
TRUST, SERIES 2007-1 NOVASTAR )  
HOME EQUITY LOAN ASSET BACKED )  
CERTIFICATES, SERIES 2007-1, )

Plaintiff, )

vs. )

PATRICIA OWENS A/K/A PATRICIA )  
ANN OWENS; TAMMY M. BAILEY; )  
SOUTH CAROLINA DEPARTMENT )  
OF MOTOR VEHICLES, )

Defendants. )

ORDER ON MOTION TO ALTER OR  
AMEND AND MOTION TO STAY

**RECEIVED**

MAR 12 2018

SC Court of Appeals

This matter is before the Court pursuant to Defendants, Patricia Owens a/k/a Patricia Ann Owens (“Owens”) and Tammy M. Bailey’s (“Bailey”) (Owens and Bailey collectively, “Defendants”) Motion to Alter or Amend Relief Ordered Under S.C. Code Ann. § 29-3-320 (“Motion to Alter or Amend”), and pursuant to Plaintiff, Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 Novastar Home Equity Loan Asset Backed Certificates, Series 2007-1’s (“Deutsche Bank”) Motion to Stay Order on Motions for Summary Judgment (“Motion to Stay”). Both motions were heard January 31, 2018, with counsel for both Deutsche Bank and Defendants in attendance.

This action was commenced by Deutsche Bank on October 19, 2016, seeking foreclosure of a mortgage of property at 111 Andrew Court, Gaston, South Carolina given by Owens and seeking reformation of that mortgage. Defendants answered and, later, served an amended answer and counterclaims, raising defenses of res judicata, collateral estoppel, laches, unclean hands,

waiver, and setoff or credit. Defendants also asserted counterclaims for a declaratory judgment that Deutsche Bank holds no mortgage on the subject property or, in the alternative, that the mortgage is unenforceable; for liability under S.C. Code Ann. § 29-3-320 for failure to record satisfaction of the mortgage after due request; and for violation of S.C. Code Ann. § 37-10-102 (commonly known as the Attorney Preference Statute).

On November 28, 2018, the Court entered an Order on Motions for Summary Judgment (“Summary Judgment Order”) resolving the claims between the parties. In the Summary Judgment Order, the Court granted summary judgment in Defendants’ favor on Deutsche Bank’s foreclosure claim and on Defendants’ counterclaims for declaratory relief and as to liability under S.C. Code § 29-3-320. Defendants’ claim under the Attorney Preference Statute was dismissed as moot. The Court held that the mortgage was satisfied and enjoined Deutsche Bank to execute and record a satisfaction of the subject mortgage on or before February 23, 2018. The Court further held that if Deutsche Bank recorded the satisfaction of mortgage within the time ordered by the Court, Defendants would not be entitled to further relief under S.C. Code § 29-3-320.

Defendants now move to alter or amend the Summary Judgment Order to provide that Deutsche Bank is liable for monetary relief under S.C. Code § 29-3-320 and to set a hearing for the purpose of determining the amount of that relief. Deutsche Bank files a separate motion seeking a temporary stay of its deadline to comply with the injunction in the Summary Judgment Order. Having reviewed the pleadings as well as the briefs and other materials submitted by the parties, having heard the arguments of counsel, and being otherwise fully informed and advised in this matter, the Court makes the following Findings of Fact, Conclusions of Law, and Order:

## FINDINGS OF FACT

The following facts are undisputed and relevant to analysis of the issues that are the subject of the parties' motions:

1. This matter concerns a note and mortgage dated June 15, 1998 and given by Owens, who was then the owner of the subject property, to NovaStar Mortgage, Inc.
2. The mortgage was recorded on July 2, 1998, in Book 4743 at page 330, in the office of the Lexington County Register of Deeds, and assignments were recorded noting the transfer of the note and mortgage to Deutsche Bank.
3. Bailey is Owens' daughter and the grantee of a deed of the subject property from her mother through a deed executed and recorded after the subject mortgage.
4. There was a previous lawsuit between the parties filed June 27, 2013 in *Tammy M. Bailey, et al. v. Novastar Mortgage, Inc., et al.*, Case No. 2013-CP-32-02210 (the "Prior Action"), in which Deutsche Bank was a defendant. The Prior Action included claims by Defendants asserting that the loan terms were unconscionable and seeking relief under S.C. Code § 37-10-105(C). Deutsche Bank did not bring a counterclaim for foreclosure in the Prior Action, and that case ended in 2015 with a jury verdict against Defendants.
5. The Note matured on July 1, 2013. Bailey and Owens did not pay the balance due on the note after maturity.
6. On August 23, 2016, counsel for Bailey and Owens sent a letter to counsel for Deutsche Bank, demanding that Deutsche Bank record a satisfaction of the Mortgage on the grounds that foreclosure was a compulsory counterclaim in the Prior Action and that the mortgage was unenforceable. The letter enclosed a \$40.00 check for recording and processing fees.

Deutsche Bank declined to record a satisfaction in response to the letter, and more than three months elapsed prior to the filing of Defendants' counterclaims in this suit.

### ISSUES

1. Did the Court err in denying monetary damages to Defendants under S.C. Code § 29-3-320 on the grounds that Deutsche Bank's obligation to record a satisfaction of mortgage did not arise, under the circumstances of this case, until after the Court's determination that the mortgage was unenforceable by operation of law?

2. Should the Court stay the injunctive relief granted in the Summary Judgment Order as a result of the filing of the Motion to Alter or Amend?

### CONCLUSIONS OF LAW

#### I. Motion to Alter or Amend

In this action, the parties have contested (among other things) whether statutory penalties should be imposed against Deutsche Bank under S.C. Code § 29-3-210 and 29-3-320. Defendants have argued that because the Prior Action ended without the filing of a foreclosure counterclaim by Deutsche Bank, subsequent foreclosure was barred by Rule 13, and the note and mortgage were thereby "satisfied" by operation of law. Defendants have further argued that they are entitled to money damages as a result of Deutsche Bank's failure to record a satisfaction of mortgage within three months of Defendants' August 23, 2016 demand letter. For its part, Deutsche Bank has argued that the note and mortgage have never been "satisfied" within the meaning of Section 29-3-320 on the grounds that a satisfaction requires payment in full or performance of a substitute obligation agreed by the parties, and asserts that the damages provisions in the statute therefore have no application to the circumstances of this case.

In its Order on Motions for Summary Judgment entered November 28, 2018 (“Summary Judgment Order”), the Court did not fully adopt either of the parties’ positions. While the Court found that the mortgage had been satisfied, it noted that satisfaction had not occurred in the usual manner, and held that the question of whether the mortgage was satisfied remained open until the enforceability of the mortgage had been judicially determined. Accordingly, the Court issued an injunction requiring Deutsche Bank to record a satisfaction of mortgage, but held that no monetary damages would be awarded unless Deutsche Bank failed to abide by the Court’s order.

In their Motion to Alter or Amend and supporting memorandum, Defendants argue that the Court has effectively created a “good faith” exception to Section 29-3-320 where none exists in the statute. Defendants further argue that the Court’s determination that the mortgage was satisfied by operation of law means that satisfaction necessarily occurred at the time of the judgment in the Prior Action, and that upon the fulfillment of the remaining conditions in Sections 29-3-310 and 29-3-320, Defendants became entitled to the damages provided in the statute. Deutsche Bank argues that as penal statutes, Sections 29-3-310 and 29-3-320 must be strictly construed. Deutsche Bank further argues that the intent of the statutes is to incentivize mortgagees to eliminate encumbrances when the lender no longer has an interest in the property. Deutsche Bank contends that it would be inconsistent with this legislative intent to require a mortgagee to extinguish its interest on the basis of a borrower’s bare assertion that the mortgage is unenforceable, when there has been no judicial determination of that claim.

“Rule 59(e) provides a procedure for correcting manifest errors of law or fact or considering the import of newly discovered evidence. A motion under Rule 59(e) is not intended to be utilized to relitigate issues previously considered . . . .” *Beca Soc. Club, d/b/a Third Shift v. S.Car. Dept. of Revenue*, 04-ALJ-17-0014-CC, 2004 WL 3154763, at \*2 (SC Admin. Law Ct. May

27, 2004) (internal citations omitted); *see also In re Pella Corp.*, 269 F. Supp. 3d 685 (D.S.C. 2017) (noting that under federal analogue to SCRCP 59(e), a motion is granted “only in very narrow circumstances: (1) to accommodate an intervening change in controlling law, (2) to account for new evidence not available at trial, or (3) to correct a clear error of law or prevent manifest injustice.”). A party cannot use a Rule 59(e) motion to present to the court an issue the party could have raised prior to judgment but did not. *Gartside v. Gartside*, 383 S.C. 35, 43, 677 S.E.2d 621, 625 (Ct. App. 2009).

Sections 29-3-310 and 29-3-320 are penal statutes and “must be strictly construed, especially when the penalty may result in a windfall to the Plaintiff.” *See Kinard v. Fleet Real Estate Funding Corp.*, 319 S.C. 408, 412, 461 S.E.2d 833, 835 (Ct. App. 1995); *Dykeman v. Wells Fargo Home Mortg., Inc.*, 381 S.C. 333, 339-40, 673 S.E.2d 804, 806-07 (2009). “[T]he requirements of a penal statute must be applied in a manner which results in fairness and justice to the parties.” *Kinard*, 319 S.C. at 412, 461 S.E.2d at 835. Thus, “[a] statute is not to be read in an atmosphere of sterility, but in the context of what actually happens when human beings go about the fulfillment of its purposes.” *Id.* According to the court in *Kinard*, the legislative intent in enacting these statutes was “to provide an incentive for the mortgagee, once it no longer has a monetary interest in the mortgage loan, to promptly record the extinguishment of the lien.” *Id.* at 412, 461 S.E.2d at 835.

Prior cases interpreting Sections 29-3-310 and 29-3-320 have exhibited a legally determinable point in time at which the mortgage was “satisfied.” *See Regions Bank v. Strawn*, 413 S.C. 206, 208 776 S.E.2d 72, 73-74 (2015) (delivery of payoff check brought debt to zero); *Dykeman v. Wells Fargo Home Mortg., Inc.*, 381 S.C. 333, 336, 673 S.E.2d 804, 805 (2009) (payoff check mailed to lender); *Bostic v. American Home Mortgage Servicing, Inc.*, 375 S.C.

143, 145, 650 S.E.2d 479, 480 (Ct. App. 2007) (borrower sent lender check for payoff amount by certified mail); *Kinard v. Fleet Real Estate Funding Corp.*, 319 S.C. 408, 410, 461 S.E.2d 833, 834 (Ct. App. 1995) (parties stipulated as to date on which mortgage was paid in full). The parties have cited no prior decision interpreting the time of “satisfaction” under the statute when satisfaction occurs not by payment of the debt, but by operation of law. In the absence of precedent addressing this issue, the Court finds that requiring a legally determinable point in time for satisfaction is most consistent with the statute and case law.

Under the circumstances of this case, the Court concludes that the question of whether Defendants’ mortgage was satisfied remained upon until the Court determined that the mortgage was legally unenforceable in its Summary Judgment Order. Defendants have not shown that this conclusion is in error, and thus have not established grounds to alter or amend the Summary Judgment Order.

#### **I. Motion to Stay**

The Summary Judgment Order enjoins Deutsche Bank to execute and record a satisfaction of mortgage on or before February 23, 2018, a date eighty-seven (87) days from the date of entry and service of the Summary Judgment Order. This date was agreed by the parties in the proposed order submitted for the Summary Judgment Order.

In its Motion to Stay, Deutsche Bank complains that Defendants’ Motion to Alter or Amend, which extends the deadlines for both parties to appeal from the Summary Judgment Order, puts it at a procedural disadvantage if it records a satisfaction by the current deadline. Specifically, Deutsche Bank argues that Defendants would then be permitted to file an appeal from the Summary Judgment Order without the possibility of a cross-appeal by Deutsche Bank, because Deutsche Bank’s cross-appeal from the injunction would then be moot. Deutsche Bank

requests that the injunction to record a satisfaction be stayed to allow it a suitable period of time to record a satisfaction after the parties' deadlines to appeal have run and the Summary Judgment Order can no longer be challenged.

The Court finds that due to the extension of the parties' appeal deadlines as a result of the Motion to Alter or Amend, it is appropriate to temporarily stay the Summary Judgment Order to extend the deadline for compliance with the Court's injunction for the same period following the parties' receipt of the instant order as the parties' previously agreed to in conjunction with the Summary Judgment Order.

**IT IS THEREFORE ORDERED AND ADJUDGED:**

- A. Defendants' Motion to Alter or Amend the Summary Judgment Order is DENIED.
- B. Deutsche Bank's Motion to Stay the Summary Judgment Order is GRANTED. Deutsche Bank's time for compliance with the injunction to record a satisfaction of mortgage is stayed such that Deutsche Bank must record the satisfaction no later than eighty-seven (87) days after the parties receive notice of entry of this order, receipt of such notice to be evidenced by the date on which a Notice of Electronic Filing is sent to the parties.

**AND IT IS SO ORDERED.**

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Hon. James O. Spence  
Master in Equity

\_\_\_\_\_, 2018  
Lexington, South Carolina



Lexington Common Pleas

**Case Caption:** Deutsche Bank National Trust Company VS Patricia Owens

**Case Number:** 2016CP3203572

**Type:** Master/Order/Other

AND IT IS SO ORDERED.

S/JUDGE JAMES O. SPENCE-3068