

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

Appellate Case No. 2018-000436

RECEIVED
JUN 01 2018
SC Court of Appeals

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1,.....Respondent/Appellant,

v.

Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles, Defendants,

Of whom Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey are the.....Appellants/Respondents.

APPELLANTS/RESPONDENTS' INITIAL APPELLANTS' BRIEF

Andrew S. Radeker
S.C Bar No. 73743
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellants/Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	2
STANDARD OF REVIEW	11
ARGUMENT	12
Having concluded that the conditions of S.C. Code Ann. § 29-3-320 that triggered Deutsche Bank’s liability were met, the lower court was required to apply the statute, and it erred by allowing Deutsche Bank an opportunity to avoid its mandatory monetary liability under the statute.	12
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

<u>C&S Natl. Bank v. Easton,</u> 310 S.C. 458, 427 S.E.2d 640 (1993)	19
<u>City of Myrtle Beach v. Juel P. Corp.,</u> 344 S.C. 43, 543 S.E.2d 538 (2001)	11
<u>Fed. Savings & Loan Assn. of Charleston v. Bailey,</u> 316 S.C. 350, 450 S.E.2d 77 (Ct. App. 1994)	16
<u>First Citizens Bank & Trust Co., Inc. v. Blue Ox, LLC,</u> Op. No. 5532 (S.C. Ct. App. filed Jan. 31, 2018) (Shearouse Adv. Sh. No. 5 at 165)	19
<u>Goldston v. State Farm Mut. Auto. Ins. Co.,</u> 358 S.C. 157, 594 S.E.2d 511 (Ct. App. 2004)	18
<u>Jaynes v. County of Fairfield,</u> 303 S.C. 434, 401 S.E.2d 183 (Ct. App. 1991)	15
<u>Regions Bank v. Strawn,</u> 413 S.C. 206, 776 S.E.2d 72 (2015)	17, 18
<u>Shelley Const. Co., Inc. v. Sea Garden Homes, Inc.,</u> 287 S.C. 24, 336 S.E.2d 488 (Ct. App. 1985)	18
<u>Sloan v. Hardee,</u> 371 S.C. 495, 640 S.E.2d 457 (2007)	13
<u>S.C. Dept. of Hwys. & Pub. Transp. v. Dickinson,</u> 288 S.C. 189, 341 S.E.2d 134 (1986)	19
<u>Transportation Ins. Co. v. S.C. Second Injury Fund,</u> 389 S.C. 422, 699 S.E.2d 687 (2010)	11
<u>Verenes v. Alvanos,</u> 387 S.C. 11, 690 S.E.2d 771 (2010)	11
<u>Wigfall v. Tideland Utilities, Inc.,</u> 354 S.C. 100, 580 S.E.2d 100 (2003)	13

STATUTES

S.C. Code Ann § 29-3-310	10, 12, 14, 16, 18
S.C. Code Ann § 29-3-320	<i>passim</i>
S.C. Code Ann § 37-10-102	2, 6
S.C. Code Ann § 37-10-105(C)	3, 6, 7

COURT RULES

Rule 15, SCRCP	2
Rule 59, SCRCP	11

STATEMENT OF ISSUES

- I. Where the lower court ruled that Respondent/Appellant mortgagee violated S.C. Code Ann. § 29-3-320, which mandates monetary relief for its violation, did the lower court err in allowing Respondent/Appellant an opportunity to escape monetary liability for violating the statute?**

STATEMENT OF THE CASE

Respondent/Appellant 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 (“Deutsche Bank”) filed this lawsuit on October 19, 2016, against Appellants/Respondents Patricia Owens a/k/a Patricia Ann Owens (“Owens”) and Tammy M. Bailey (“Bailey”), seeking foreclosure of a mortgage of property at 111 Andrew Court, Gaston, South Carolina, and seeking reformation of that mortgage. (R. pp. ____; summons and complaint.) Bailey and Owens answered and, later, served an amended answer and counterclaim within the time of do so as of right under Rule 15, SCRCP. (R. pp. ____; answer; amended answer and counterclaim.) Their amended answer and counterclaim admitted Deutsche Bank’s allegation that “[t]he installments of principal and interest falling due from and after July 1, 2013 have not been paid although demand for payment thereof has been made.” (R. pp. ____; complaint p. 5; amended answer and counterclaim p. 3.) Bailey and Owens’ amended pleading asserted the defenses of res judicata, collateral estoppel, laches, unclean hands, waiver, and setoff or credit. (R. pp. ____; amended answer and counterclaim pp. 4-6.) Bailey and Owens 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 (usually referred to as the attorney preference statute.) (R. pp. ____; amended answer and counterclaim pp. 6-7.) The case was referred to the Honorable

James O. Spence, as Master-in-Equity for Lexington County. (R. pp. ____; order of reference.)

Deutsche Bank moved for summary judgment in its favor as to each of Bailey and Owens' counterclaims. (R. pp. ____; Deutsche Bank's motion for summary judgment.) Bailey and Owens moved for 1) summary judgment in their favor as to Deutsche Bank's claim for foreclosure, 2) summary judgment in their favor as to their counterclaim seeking a declaratory judgment, and 3) summary judgment on liability in their favor as to their counterclaim under S.C. Code Ann. § 29-3-320 for failure to enter satisfaction of the mortgage. (R. pp. ____; Bailey and Owens' motion for summary judgment.)

The master denied Deutsche Bank's motion for summary judgment and granted Bailey and Owens' motion, ruling that, under the undisputed facts, Deutsche Bank's foreclosure claim was a compulsory counterclaim in the previously concluded case of Tammy M. Bailey, et al. v. Novastar Mortgage, Inc., et al., Case No. 2013-CP-32-02210, in which Deutsche Bank was a defendant, because, if Bailey and Owens had prevailed in that case, that could have resulted in a judgment that the note and mortgage were unenforceable under S.C. Code Ann. § 37-10-105(C). (R. pp. ____; order granting summary judgment pp. 23, 27.) The master ruled that the res judicata effect of the end of the Bailey v. Novastar case precluded the foreclosure claim and satisfied the mortgage by operation of law. (R. pp. ____; order granting summary judgment pp. 23, 27, 33-34, 36-37.) The lower court, however, provided Deutsche Bank a mechanism under which it could escape monetary liability under S.C. Code Ann. § 29-3-320 by

recording a mortgage satisfaction document within a time frame set by the master. (R. pp. ____; order granting summary judgment pp. 36-37.)

The note and mortgage involved in this case were dated June 15, 1998, and were given by Owens, who was then the owner of the subject property, to NovaStar Mortgage, Inc. (R. pp. ____; complaint pp. 3-4; note; mortgage.) The note document contained a balloon provision under which, even if all the monthly payments under the note were made timely and made in their required amounts, a substantial principal balance came due on July 1, 2013, the note's maturity date. (R. pp. ____; note.) The mortgage was recorded on July 2, 1998, 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. (R. pp. ____; complaint p. 4.)

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. (R. pp. ____; order granting summary judgment p. 3.)

The note matured on July 1, 2013, and Deutsche Bank's complaint alleged that "[t]he installments of principal and interest falling due from and after July 1, 2013 have not been paid although demand for payment thereof has been made." (R. pp. ____; order granting summary judgment p. 4; complaint p. 5.)

Bailey and Owens' amended answer and counterclaim alleged the following:

A copy of a letter from Defendant Tammy M. Bailey to the Plaintiff (without its enclosures) is attached as Exhibit A to this pleading.

The letter attached as Exhibit A to this pleading and its content are incorporated herein by reference as if here set forth verbatim.

A copy of the certified mail return receipt card showing the Plaintiff's receipt of the said letter is attached as Exhibit B to this pleading.

A copy of a letter from an attorney on behalf of the Plaintiff is attached as Exhibit C to this pleading.

(R. pp. ____; amended answer and counterclaim pp. 3-4.)

Those documents were attached to the amended answer and counterclaim. (R. pp. ____; amended answer and counterclaim – exhs.) Deutsche Bank admitted the sending and receipt of these letters. (R. pp. ____; Deutsche Bank's responses to Bailey and Owens' requests to admit.) The letter from Bailey was sent to Deutsche Bank on August 23, 2016, and was a request that Deutsche Bank enter satisfaction of the subject mortgage. (R. pp. ____; amended answer and counterclaim – exh. A.) The letter enclosed a \$40.00 check to Deutsche Bank to cover any recording and processing fees associated with getting the satisfaction document recorded. (R. pp. ____; amended answer and counterclaim – exh. A.) The letter stated that the subject note matured on July 1, 2013. (R. pp. ____; amended answer and counterclaim – exh. A.) It went on to state that there was a previous lawsuit between the parties that "was directly about whether the note and mortgage were valid and enforceable[.]" that Deutsche Bank never asserted a counterclaim for foreclosure in that suit, and that the case was ended by a jury verdict against Bailey and Owens. (R. pp. ____; amended answer and counterclaim – exh. A.)

The letter from Deutsche Bank's attorney that was attached to the amended answer and counterclaim acknowledged receipt of Bailey's letter and noted Deutsche Bank's refusal to record the satisfaction. (R. pp. ____; amended answer and counterclaim – exh. C.) More than three months passed between Deutsche Bank's

receipt of the letter request and the assertion of Bailey and Owens' counterclaims through their amended answer and counterclaim in this case. (R. pp. ____; amended answer and counterclaim – exhs; Deutsche Bank's responses to Bailey and Owens' requests to admit.)

The parties agreed, and public records show, that the Bailey v. Novastar action occurred, that Deutsche Bank was a defendant in that case, and that the case was tried to a final judgment in favor of Deutsche Bank and the other defendants in that case. (R. pp. ____; order granting summary judgment p. 6; transcript of Sept. 19, 2017, hearing p. 13 ln. 9-23; Bailey v. Novastar complaint; Deutsche Bank's answer in Bailey v. Novastar; other documents from Bailey v. Novastar filed in this case.)

The Bailey v. Novastar case was filed on June 27, 2013. (R. pp. ____; Bailey v. Novastar complaint.) In that case, Bailey and Owens asserted various claims against Deutsche Bank, most of which arose from the execution of the subject note and mortgage and the circumstances surrounding that. (R. pp. ____; order granting summary judgment p. 7; Bailey v. Novastar complaint.) Among the claims asserted in Bailey v. Novastar was a claim that sounded under S.C. Code Ann. § 37-10-105(C) against NovaStar and Deutsche Bank (as NovaStar's assignee) for violation of S.C. Code Ann. § 37-10-102 (commonly referred to as the attorney preference statute, under which a mortgage lender is required to ascertain a borrower's preference as to the legal counsel she desires to represent her in the mortgage loan closing) coupled with unconscionable loan terms or inducement of the mortgage loan by unconscionable conduct. (R. pp. ____; Bailey v. Novastar complaint.) Bailey and Owens' contention concerning the claims was that NovaStar did not ascertain Owens' preference as to legal counsel and

allowed the loan to be closed without attorney supervision, and, as a result, that the balloon aspect of the note was kept hidden from Owens when she signed the signature page of the note document. (R. pp. ____; Bailey v. Novastar complaint.)

Among the relief provided for in S.C. Code Ann. § 37-10-105(C) is for a court to “refuse to enforce the agreement, or a term, or part of the agreement or transaction that the court determines to have been unconscionable at the time it was made.” S.C. Code Ann. § 37-10-105(C). The prayer in the Bailey v. Novastar complaint stated that Bailey and Owens sought, *inter alia*, “all relief available under S.C. Code Ann. § 37-10-105(C)[.]” (R. pp. ____; Bailey v. Novastar complaint.)

Deutsche Bank served its answer in the Bailey v. Novastar case on September 26, 2013. (R. pp. ____; order granting summary judgment p. 6; Bailey v. Novastar complaint; Bailey v. Novastar answer of Deutsche Bank.) In a filing made in Bailey v. Novastar, Deutsche Bank stated that Bailey and Owens; claims in that case “ar[ose] out of a purported mortgage refinancing loan transaction involving a balloon note in 1998 by Plaintiff Owens” and “relate solely to [that] closing[.]” (R. pp. ____; Bailey v. Novastar motion by Deutsche Bank for summary judgment.) At no time did Deutsche Bank assert a counterclaim for foreclosure in the Bailey v. Novastar action, despite the fact that the subject note had matured at the time Deutsche Bank served its answer. (R. pp. ____; order granting summary judgment p. 8; note; Bailey v. Novastar Deutsche Bank’s answer.)

Bailey v. Novastar was tried to a jury and resulted in a verdict for Deutsche Bank and the other defendants on September 15, 2015. (R. pp. ____; Bailey v. Novastar verdict form.) Bailey and Owens’ motion for a new trial in that case was denied by

order filed June 24, 2016. (R. pp. ____; Bailey v. Novastar order denying motion for new trial.) No appeal was taken in that case.

In the instant case that is subject of this appeal, the master held a hearing on the parties' motions for summary judgment. (R. pp. ____; transcript of Sept. 19, 2017, hearing.) Bailey and Owens argued that Deutsche Bank's foreclosure claim had been a compulsory counterclaim that was required to be brought in the Bailey v. Novastar action and was thus barred by res judicata, that the mortgage was now satisfied by operation of law, and that Deutsche Bank was liable under S.C. Code Ann. § 29-3-320 for its failure to record a satisfaction document after due request. (R. pp. ____; transcript of Sept. 19, 2017, hearing.) Deutsche Bank argued that none of that was correct. (R. pp. ____; transcript of Sept. 19, 2017, hearing.) The court requested the submission of proposed orders, which counsel for the parties submitted. (R. pp. ____; transcript of Sept. 19, 2017, hearing p. 40 ln. 2 through p. 45 ln. 12; Deutsche Bank's proposed order; Bailey and Owens' proposed order.)

Neither of the proposed orders that were submitted touched upon the idea of whether Deutsche Bank should be given an opportunity to avoid liability under S.C. Code Ann. § 29-3-320 even if its failure to record a satisfaction document violated the statute, nor did either attorney advance an argument in that vein at the hearing on the motions for summary judgment. (R. pp. ____; transcript of Sept. 19, 2017; Deutsche Bank's proposed order; Bailey and Owens' proposed order.) Instead, Bailey and Owens argued that Deutsche Bank had violated that statute and that they were entitled to the relief available under it, and Deutsche Bank argued that it had not violated the

statute. (R. pp. ____; transcript of Sept. 19, 2017; Deutsche Bank's proposed order; Bailey and Owens' proposed order.)

During a telephone status conference after the parties had submitted their proposed orders, the court directed that another proposed order be prepared ruling, *inter alia*, that Deutsche Bank be given a certain amount of time to record a satisfaction document in order to avoid liability under S.C. Code Ann. § 29-3-320. (R. pp. ____; reply memorandum in support of motion to alter or amend relief ordered pp. 1-2; transcript of Jan. 31, 2018, hearing p. 5 ln. 19 through p. 6 ln. 2.) Until then, neither party had ever raised that to the court as a possibility.

On November 28, 2017, the master-in-equity filed an order that analyzed the res judicata effect of Deutsche Bank's failure to raise foreclosure as a compulsory counterclaim in the Bailey v. Novastar action. (R. pp. ____; order granting summary judgment.) The master ruled as follows:

Here, the note subject of the mortgage had matured at the time of Deutsche Bank's answer in the earlier action, and that is the ultimate and final default under the note and mortgage. The effect of the claim arising from that default being barred by res judicata is to discharge Deutsche Bank's rights in the note and mortgage, as it neither has nor can have any other right to enforce the mortgage.

...

Deutsche Bank's rights in the note debt owed or due as a result of the maturity of the note have been discharged. That is all of the debt. The note is gone, and the mortgage is gone with it. Accordingly, Bailey and Owens are entitled to prevail on their claim for a declaratory judgment that Deutsche Bank's mortgage does not encumber the subject property.

...

The court concludes that *satisfaction*, within the meaning of S.C. Code Ann. § 29-3-310 and -320, embraces the discharge of the mortgage by operation of law, which extinguishes the mortgage. That is what has happened here, as the undisputed facts show. Bailey and Owens are entitled to summary judgment in their favor as to Deutsche Bank's liability to them under S.C. Code Ann. § 29-3-320.

(R. pp. ____; order granting summary judgment pp. 27, 33-34.)

The master granted summary judgment for Bailey and Owens on Deutsche Bank's foreclosure claim and on their declaratory judgment claim that the mortgage does not encumber the property. (R. pp. ____; order granting summary judgment p. 36.) Rather than ruling that a hearing would be set to determine the amount of monetary relief to which Bailey and Owens were entitled under S.C. Code Ann. § 29-3-320, however, the master ruled as follows:

Summary judgment in Bailey and Owens' favor is granted as to as Deutsche Bank's liability on Bailey and Owens' claim under S.C. Code Ann. § 29-3-320, as follows:

- i. The subject mortgage is satisfied;
- ii. Deutsche Bank is hereby enjoined to execute, in proper recordable form, a document showing the satisfaction of the subject mortgage and to deliver the same to the Register of Deeds for Lexington County for recording, with any fees required by that office, on or before February 23, 2018 (the satisfaction document must be received by the register of deeds by that date);
- iii. If Deutsche Bank does so, Bailey and Owens shall not be entitled to further relief under S.C. Code Ann. § 29-3-320; [and]

- iv. In the event that Deutsche Bank does not do so by that date, Deutsche Bank is liable to Bailey and Owens for the monetary relief to which they are entitled under S.C. Code Ann. § 29-3-320, and the court shall then hold a hearing to determine the amount of that relief[.]

(R. pp. ____; order granting summary judgment p. 37.)

Deutsche Bank did not make any motion under Rule 59, SCRPC, with regard to the court's order. Bailey and Owens made a timely motion to alter or amend the relief the court ordered under S.C. Code Ann. § 29-3-320, noting that the language of the statute provides that the mortgagee shall pay the monetary relief the statute provides and does not offer any exceptions. (R. pp. ____; motion to alter or amend relief ordered.) After a hearing, the court denied that motion by order filed February 12, 2018. (R. pp. ____; order on motions to alter or amend and to stay.)

This appeal followed, and Deutsche Bank served a notice of cross-appeal. (R. pp. ____; notice of appeal; notice of cross-appeal.)

STANDARD OF REVIEW

This court reviews all questions of law *de novo*. Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772-73 (2010) (“appellate court may decide questions of law with no particular deference to the trial court”). “Statutory interpretation is a question of law subject to de novo review.” Transportation Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010). “The determination of legislative intent is a matter of law.” City of Myrtle Beach v. Juel P. Corp., 344 S.C. 43, 543 S.E.2d 538, 540 (2001).

ARGUMENT

- I. **Having concluded that the conditions of S.C. Code Ann. § 29-3-320 that triggered Deutsche Bank's liability were met, the lower court was required to apply the statute, and it erred by allowing Deutsche Bank an opportunity to avoid its mandatory monetary liability under the statute.**

The master ruled that Deutsche bank had violated S.C Code Ann. § 29-3-320 and was liable to Bailey and Owens under that statute, yet he also crafted an exception under which Deutsche Bank could avoid its monetary liability under S.C. Code Ann. § 29-3-320. (R. pp. ____; order granting summary judgment pp. 33-35, 36-37.) This was reversible error.

The text of S.C. Code Ann. §§ 29-3-310 and -320 reads as follows:

Any holder of record of a mortgage who has received full payment or satisfaction or to whom a legal tender has been made of his debts, damages, costs, and charges secured by mortgage of real estate shall, at the request by certified mail or other form of delivery with a proof of delivery of the mortgagor or of his legal representative or any other person being a creditor of the debtor or a purchaser under him or having an interest in any estate bound by the mortgage and on tender of the fees of office for entering satisfaction, within three months after the certified mail, or other form of delivery, with a proof of delivery, request is made, enter satisfaction in the proper office on the mortgage which shall forever thereafter discharge and satisfy the mortgage.

S.C. Code Ann. § 29-3-310.

Any holder of record of a mortgage having received such payment, satisfaction, or tender as aforesaid who shall not, by himself or his attorney, within three months after such certified mail, or other form of delivery, with a proof of delivery, request and tender of fees of office, repair to the proper office and enter satisfaction as aforesaid *shall forfeit and pay to the person aggrieved a sum of money not exceeding one-half of the amount of the debt secured by the mortgage, or twenty-five*

thousand dollars, whichever is less, plus actual damages, costs, and attorney's fees in the discretion of the court, to be recovered by action in any court of competent jurisdiction within the State. And on judgment being rendered for the plaintiff in any such action, the presiding judge shall order satisfaction to be entered on the judgment or mortgage aforesaid by the clerk, register, or other proper officer whose duty it shall be, on receiving such order, to record it and to enter satisfaction accordingly.

Notwithstanding any limitations under Sections 37-2-202 and 37-3-202, the holder of record of the mortgage may charge a reasonable fee at the time of the satisfaction not to exceed twenty-five dollars to cover the cost of processing and recording the satisfaction or cancellation. If the mortgagor or his legal representative instructs the holder of record of the mortgage that the mortgagor will be responsible for filing the satisfaction, the holder of the mortgage shall mail or deliver the satisfied mortgage to the mortgagor or his legal representative with no satisfaction fee charged.

S.C. Code Ann. § 29-3-320 (emphasis added).

“When a statute’s terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.” Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). When a court interprets a statute, “[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.” Id. at 499. “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. If a statute’s language is plain, unambiguous, and conveys a clear meaning[,], the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100, 105 (2003) (internal citation and quotation marks omitted).

The language of S.C. Code Ann. §§ 29-3-310 and -320 provides that, when the circumstances making a mortgagee liable under those statutes for failure to record a mortgage satisfaction document after due demand are met, the mortgagee that failed to record the satisfaction is liable for the monetary relief set out in S.C. Code Ann. § 29-3-320. (R. pp. ____; motion to alter or amend relief p. 1; reply memorandum in support of motion to alter or amend relief pp. 3-4; transcript of Jan. 31, 2018, hearing p. 5 ln. 15-19, p. 8 ln. 10-21, p. 17 ln. 6-9.) No exception to that principle is given in any South Carolina statute or case law. (R. pp. ____; motion to alter or amend relief p. 1; reply memorandum in support of motion to alter or amend relief pp. 3-4; transcript of Jan. 31, 2018, hearing p. 5 ln. 15-19, p. 8 ln. 10-21, p. 17 ln. 6-9.)

Here, it is undisputed that Deutsche Bank received the request to record a satisfaction document after the final conclusion of Bailey v. Novastar, it is undisputed that a check to cover the recording and processing fees for such a document was provided with the request, and it is undisputed that Deutsche Bank let more than three months go by without recording a satisfaction document. Once the master determined that the res judicata effect of the end of Bailey v. Novastar operated to satisfy the mortgage, he had decided that all of the events that trigger liability under S.C. Code Ann. § 29-3-320 had occurred.

Comments by the master at the hearing on the motion to alter or amend relief and in his order indicate that he deviated from applying the plain terms of S.C. Code Ann. § 29-3-320 to Deutsche Bank because he thought that the point at which satisfaction had occurred was unclear or because he thought the mortgage was not satisfied until he declared it to be satisfied in his order that granted Bailey and Owens'

summary judgment motion. (R. pp. ____; order on motion to alter or amend and motion to stay pp. 6-7; transcript of Jan. 31, 2018, hearing p. 6 ln. 16 through p. 7 ln. 12, p. 11 ln. 5 through p. 13 ln. 6, p. 19 ln. 4-6.)

In truth, there is no lack of clarity about when the mortgage was satisfied by operation of law. “Under the doctrine of res judicata, a final judgment on the merits in a prior action will bar the parties in a second action as to matters litigated and matters which might have been litigated.” Jaynes v. County of Fairfield, 303 S.C. 434, 438, 401 S.E.2d 183, 185 (Ct. App. 1991). When final judgment was rendered in the Bailey v. Novastar case, that judgment took on its preclusive, res judicata effect, and that is what satisfied the mortgage. See id. (R. pp. ____; reply memorandum in support of motion to alter or amend relief pp. 2-3; transcript of Jan. 31, 2018, hearing p. 7 ln. 25 through p. 8 ln. 3, p. 13 ln. 14-17, p. 15 ln. 13-16, p. 15 ln. 25 through p. 16 ln. 3.)

The master’s order in this case did not satisfy the mortgage. (R. pp. ____; reply memorandum in support of motion to alter or amend relief pp. 2-3; transcript of Jan. 31, 2018, hearing p. 7 ln. 25 through p. 8 ln. 3, p. 13 ln. 14-17, p. 15 ln. 13-16, p. 15 ln. 25 through p. 16 ln. 3.) The judgment ending the Bailey v. Novastar case is what satisfied the mortgage. (R. pp. ____; reply memorandum in support of motion to alter or amend relief pp. 2-3; transcript of Jan. 31, 2018, hearing p. 7 ln. 25 through p. 8 ln. 3, p. 13 ln. 14-17, p. 15 ln. 13-16, p. 15 ln. 25 through p. 16 ln. 3.) The master’s ruling about that res judicata effect simply reflected the reality created by the final judgment in the Bailey v. Novastar case. (R. pp. ____; reply memorandum in support of motion to alter or amend relief pp. 2-3; transcript of Jan. 31, 2018, hearing, p. 6 ln. 3 through p. 8 ln. 3, p. 13 ln. 14-17, p. 15 ln. 25 through p. 16 ln. 3.)

This is a concept the law recognizes well. It is the occurrence of the event at issue – here, the end the Bailey v. Novastar case in a final judgment – that changes the landscape of rights and liabilities. As counsel argued, and as the master agreed, in a negligence case, it is not as though a person becomes negligent only when a judicial proceeding determines him or her to be so; rather, the judicial proceeding determines whether the person was negligent in the past. (R. pp. ____; transcript of Jan. 31, 2018, hearing p. 6 ln. 3 through p. 7 ln. 24.) Another analogy is to an equitable lien, which attaches to property when the conduct of the parties creates the existence of the lien, not when a court later *declares* that the conduct of the parties has created the lien. First Fed. Savings & Loan Assn. of Charleston v. Bailey, 316 S.C. 350, 356, 450 S.E.2d 77, 81 (Ct. App. 1994).

Further, the master’s concern about time frames may spring from a conflation of two different temporal points: 1) the moment at which something occurs that is an event of satisfaction of a mortgage and 2) the expiration of the three-month period under S.C. Code Ann. § 29-3-310 in which a satisfaction document must be recorded. (R. pp. ____; order on motion to alter or amend and motion to stay p. 7; transcript of Jan. 31, 2018, hearing p. 11 ln. 5 through p. 13 ln. 6, p. 19 ln. 4-6.) The latter time frame begins to run from the mortgagee’s receipt of a request under S.C. Code Ann. § 29-3-310. (R. pp. ____; transcript of Jan. 31, 2018, hearing p. 16 ln. 25 through p. 17 ln. 3.)

The lower court here seemed concerned that whether the subject mortgage was satisfied was not something that was clear to Deutsche Bank at the time that the demand for a satisfaction to be recorded was made. (R. pp. ____; order granting summary

judgment pp. 34-35; order on motion to alter or amend and motion to stay p. 5; motion to alter or amend relief p. 2; p. 11 ln. 5 through p. 13 ln. 6, p. 19 ln. 4-6.) The master perceived that this remained unclear to Deutsche Bank until the court's decision that the mortgage was satisfied as a matter of law by operation of res judicata. (R. pp. ____; order granting summary judgment pp. 34-35; order on motion to alter or amend and motion to stay p. 5; motion to alter or amend relief p. 2; p. 11 ln. 5 through p. 13 ln. 6, p. 19 ln. 4-6.)

Under S.C. Code Ann. § 29-3-320, however, any such lack of clarity or a mortgagee's confusion about satisfaction or good faith belief that a mortgage was not satisfied does not relieve the mortgagee from liability under the statute when the conditions for liability are met, as they are here. (R. pp. ____; motion to later or amend relief p. 2; transcript of Jan. 31, 2018, hearing p. 8 ln. 10-21, p. 16 ln. 5-19, p. 16 ln. 25-17.) When the conditions are met, proper demand is made, and more than three months passes from the demand without the recording of a satisfaction document, liability attaches under S.C. Code Ann. § 29-3-320. . (R. pp. ____; motion to later or amend relief p. 2; transcript of Jan. 31, 2018, hearing p. 8 ln. 10-21, p. 16 ln. 5-19, p. 16 ln. 25-17.) Good faith arguments, even about unsettled law, are not a defense and do not provide an exception. (R. pp. ____; motion to later or amend relief p. 2; transcript of Jan. 31, 2018, hearing p. 8 ln. 10-21, p. 16 ln. 5-19, p. 16 ln. 25-17.)

A look at the Supreme Court of South Carolina's decision in Regions Bank v. Strawn, 413 S.C. 206, 776 S.E.2d 72 (2015), bears this out. (R. pp. ____; motion to later or amend relief p. 2; transcript of Jan. 31, 2018, hearing p. 8 ln. 10-21, p. 16 ln. 5-19, p. 16 ln. 25-17.) In that case, the mortgagee had a good faith belief in the validity of

arguments about whether the conditions of S.C. Code Ann. §§ 29-3-310 and -320 were met with respect to an open-ended line of credit mortgage. Regions Bank, 413 S.C. at 209-12. The questions presented by that case – whether the payoff of debt under an open-ended mortgage, which could theoretically secure future advances of funds, could constitute a satisfaction under S.C. Code Ann. §§ 29-3-310 and -320 – had never been squarely answered before under South Carolina law. Id. Neither the trial court, the Court of Appeals, nor the Supreme Court gave the mortgagee an “out,” however. Id. at 209, 212. The conditions of the statute were met, and that meant liability for the monetary relief provided under S.C. Code Ann. § 29-3-320, because that is what the statute says. Id. at 209-12.

“Courts must take a statute as it is drafted and give effect to the legislative intent as expressed in its language.” Goldston v. State Farm Mut. Auto. Ins. Co., 358 S.C. 157, 177, 594 S.E.2d 511 (Ct. App. 2004). A court’s “duty is to apply the statute according to its own terms” Shelley Const. Co., Inc. v. Sea Garden Homes, Inc., 287 S.C. 24, 29, 336 S.E.2d 488, 491 (Ct. App. 1985). Courts “are not a liberty, under the guise of construction, to alter the plain language of the statute by adding words which the Legislature saw fit not to include.” Id. at 28.

The master’s order in this case determined that the judgment ending the Bailey v. Novastar case is what satisfied the mortgage. (R. pp. ____; order granting summary judgment pp. 27, 33-34.) The master had determined that “the undisputed facts show. Bailey and Owens are entitled to summary judgment in their favor as to Deutsche Bank’s liability to them under S.C. Code Ann. § 29-3-320.” (R. pp. ____; order granting summary judgment pp. 33-34.) Deutsche Bank brought no motion under Rule 59,

SCRCP, with regard to that determination. (R. pp. ____; reply memorandum in support of motion to later or amend relief p. 2; transcript of Jan. 31, 2018, hearing p. 16 ln. 4-5.) On Bailey and Owens' motion to later or amend the relief ordered, the court was bound by its previous determination and could not alter it. See C&S Natl. Bank v. Easton, 310 S.C. 458, 427 S.E.2d 640, 641 (1993).

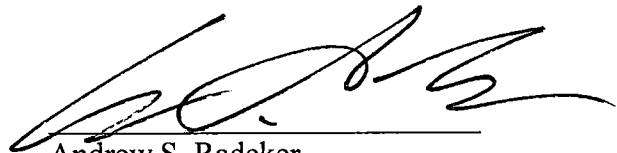
The rest is a matter of applying the unambiguous language of the statute: "shall forfeit[.]" S.C. Code Ann. § 29-3-320. "Ordinarily, the use of the word 'shall' in a statute means that the action referred to is mandatory." S.C. Dept. of Hwys. & Pub. Transp. v. Dickinson, 288 S.C. 189, 191, 341 S.E.2d 134 (1986). So it is here, as the plain words of S.C. Code Ann. § 29-3-320 state. "To impute an exception would require us to read language into the statute that is not there." First Citizens Bank & Trust Co., Inc. v. Blue Ox, LLC, Op. No. 5532 (S.C. Ct. App. filed Jan. 31, 2018) (Shearouse Adv. Sh. No. 5 at 16, 24-25). If a mortgage has been satisfied, more than three months has passed since the mortgagee has received the request contemplated by S.C. Code Ann. § 29-3-310, and the mortgagee has not recorded the satisfaction, the mortgagee "*shall* forfeit and pay to the person aggrieved a sum of money not exceeding one-half of the amount of the debt secured by the mortgage, or twenty-five thousand dollars, whichever is less, plus actual damages, costs, and attorney's fees in the discretion of the court, to be recovered by action in any court of competent jurisdiction within the State." S.C. Code Ann. § 29-3-320 (emphasis added). The amount of attorney's fees recoverable may be within the court's discretion, but whether the mortgagee is liable for these items of monetary relief is not.

Bailey and Owens were entitled to the monetary relief provided under S.C. Code Ann. § 29-3-320, and the lower court was obligated to order it. Here, Deutsche Bank let its time under S.C. Code Ann. § 29-3-320 run out long before the court issued its decision. Deutsche Bank gambled on the question of whether the court would determine that the mortgage was satisfied through res judicata. It lost the gamble. The language of S.C. Code Ann. § 29-3-320 is “shall forfeit,” not “shall forfeit . . . unless . . .”

CONCLUSION

This court should reverse the master on this point and remand for a hearing be set to determine the amount of the monetary relief to which Bailey and Owens are entitled under S.C. Code Ann. § 29-3-320. The master’s detailed and thoroughly analyzed order should remain the same in its other respects.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'A. S. Radeker', written over a horizontal line.

Andrew S. Radeker
S.C. Bar No. 73743
Harrison, Radeker & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorney for Appellants/Respondents

May 29, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

RECEIVED

JUN 01 2018

James O. Spence, Master-in-Equity

SC Court of Appeals

Appellate Case No. 2018-000436

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1,.....Respondent/Appellant,

v.

Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles, Defendants,

Of whom Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey are the.....Appellants/Respondents.

PROOF OF SERVICE

I certify that I served the foregoing initial appellants' brief of appellants/respondents by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

Michael C. Griffin, Esq.
Jonathan E. Schulz, Esq.
G. Benjamin Milam, Esq.
Bradley Arant Boult Cummings LLP
214 North Tryon St., Suite 3700
Charlotte, NC 28202

Mary R. Powers, Esq.
Brock & Scott, PLLC
3800 Fernandina Rd. Suite 110
Columbia, SC 29210

May 29, 2018


Andrew S. Radeker

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

RECEIVED

JUN 01 2018

James O. Spence, Master-in-Equity SC Court of Appeals

Appellate Case No. 2018-000436

Deutsche Bank National Trust Company, as Trustee for NovaStar Mortgage Funding Trust, Series 2007-1 NovaStar Equity Loan Asset Backed Certificates, Series 2007-1,.....Respondent/Appellant,

v.

Patricia Owens a/k/a Patricia Ann Owens; Tammy M. Bailey; South Carolina Department of Motor Vehicles, Defendants,

Of whom Patricia Owens a/k/a Patricia Ann Owens and Tammy M. Bailey are the.....Appellants/Respondents.

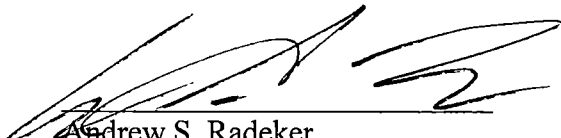
PROOF OF SERVICE

I certify that I served the foregoing designation of matter to be included in record on appeal by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

Michael C. Griffin, Esq.
Jonathan E. Schulz, Esq.
G. Benjamin Milam, Esq.
Bradley Arant Boult Cummings LLP
214 North Tryon St., Suite 3700
Charlotte, NC 28202

Mary R. Powers, Esq.
Brock & Scott, PLLC
3800 Fernandina Rd. Suite 110
Columbia, SC 29210

May 29, 2018


Andrew S. Radeker

James C. Harrison, Jr.*
Andrew S. Radeker
Taylor M. Smith IV

* Mediator/Arbitrator

**HARRISON
& RADEKER
& SMITH** P.A.
ATTORNEYS AT LAW

P.O. Box 50143
Columbia, SC 29250

(803) 779-2211
(803) 779-6700 (fax)
www.harrisonfirm.com

May 29, 2018

VIA U.S. MAIL

The Hon. Jenny Abbott Kitchings
Clerk of Court, Court of Appeals of South Carolina
P.O. Box 11629
Columbia, SC 29211

RECEIVED
JUN 01 2018
SC Court of Appeals

Re: Deutsche Bank, etc. v. Patricia Owens, et al.
Appellate Case No. 2018-000436

Dear Ms. Kitchings:

Enclosed herewith for filing in the above-referenced appeal are an original and one copy of Appellants/Respondents' initial appellants' brief and designation of matter to be included in the record on appeal.

Kindly file these documents and return a file-stamped copy thereof to this office in the stamped and addressed envelope enclosed. Thank you for your attention to this matter. Of course, if you or your staff have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am,

Very truly yours,
HARRISON, RADEKER & SMITH, P.A.



Andrew S. Radeker

ASR/

Enclosures

cc: Michael C. Griffin, Esq.
Jonathan E. Schulz, Esq.
G. Benjamin Milam, Esq.
Mary R. Powers, Esq.

LAW OFFICES
HARRISON, RADEKER & SMITH P.A.
Post Office Box 50143
COLUMBIA, SOUTH CAROLINA 29250

RECEIVED

JUN 01 2018

SC Court of Appeals

The Hon. Jenny Abbott Kitchings
Clerk of Court, Court of Appeals of South Carolina
P.O. Box 11629
Columbia, SC 29211

First-Class Mail

FIRST-CLASS MAIL

US POSTAGE

\$03.31⁰⁰



ZIP 29201
011D10606119

