THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Case No. 2015-CP-10-03773

Appellate Case No. 2018-001445

U.S. Bank National Association, as Trustee, successor in interest to Bank of America, National Association, as Trustee, successor by merger to LaSalle Bank National Association, as Trustee for Residential Asset Mortgage Products, Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2007-RP1 ...

Respondent,

v.

Betty P. Hafez; ARF Financial Services, LLC f/k/a Advance Restaurant Finance, LLC; Comprehensive Legal Solutions, Inc.; Midland Funding, LLC; Kiawah Island Community Association, Inc.,

Defendants,

Of whom Betty P. Hafez is the Appellant.

AND

Betty P. Hafez,

Third-Party Plaintiff, Appellant,

v.

Ocwen Loan Servicing, LLC

Third-Party Defendant, Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Master-In-Equity correctly found that there was no breach of contract.
2. Whether the Master-In-Equity properly determined that Respondent's calculation of damages was correct.
3. Whether the Master-In-Equity had proper jurisdiction to hear and rule on this foreclosure.

STATEMENT OF THE CASE AND FACTS

The instant action is one for foreclosure of real property located in Charleston County, South Carolina. On August 23, 2003, E.S.E. Hafez a/k/a Saad Hafez made, executed and delivered an Adjustable Rate Note to Washington Mutual Bank, FA whereby he promised to repay the principal sum of $400,000.00 with interest at an adjustable rate initially of 3.949% per annum (the "Note"). (Pl. Ex. 2). To better secure the payment of the Note, E.S.E. Hafez a/k/a Saad E. Hafez and Betty P. Hafez made, executed and delivered a Mortgage (the "Mortgage") to Washington Mutual Bank, FA, in writing, dated August 23, 2003, covering real property located at 78 Surfsong Road, Kiawah Island, South Carolina 29455 in Charleston County. (Pl. Ex. 3). The property is more fully described in the Mortgage and is the same as that described in the Complaint. (Pl. Ex. 3 and Complaint). The Mortgage was recorded in the Charleston County Registry on September 3, 2003 in Mortgage Book L465 at Page 670. (Id). The Mortgage constitutes a valid purchase money, first lien on the subject property. (Id). The following assignments of the Mortgage appear in the Charleston County Registry:

1. An assignment from JPMorgan Chase Bank, N.A., as successor in interest to Washington Mutual Bank to Bank of America, National Association as successor by

merger to LaSalle Bank National Association as Trustee recorded on January 21, 2010 in Book 103 at Page 231. Said Assignment is invalid because no prior assignment of mortgage into the assignor, JPMorgan Chase Bank, N.A., was recorded prior to the recordation of this assignment.

2. An assignment from Bank of America, National Association as successor by merger to LaSalle Bank National Association as Trustee Bank of America, National Association as successor by merger to LaSalle Bank National Association as Trustee for RAAC 2007RP1 recorded on October 18, 2011 in Book 212 at Page 393. Said Assignment is also invalid based upon invalidity of the January 21, 2010 assignment.
3. An assignment from The Federal Deposit Insurance Corporation, acting in its receivership capacity as receiver of Washington Mutual Bank f/k/a Washington Mutual Bank, FA to JPMorgan Chase Bank, National Association by assignment recorded on May 28, 2015 in Book 0478 at Page 911 (Pl. Ex. 4).
4. An assignment from JPMorgan Chase Bank, National Association to U.S. Bank National Association, as Trustee, successor in interest to Bank of America, National Association, as Trustee, successor by merger to LaSalle Bank National Association, as Trustee for Residential Asset Mortgage Products, Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2007-RP1 recorded on May 28, 2015 in Book 0478 at Page 914 (Pl. Ex. 5).

U.S. Bank National Association, as Trustee, successor in interest to Bank of America, National Association, as Trustee, successor by merger to LaSalle Bank National Association, as Trustee for Residential Asset Mortgage Products, Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2007-RP1 is the owner and holder of the Note and Mortgage and Ocwen Loan Servicing, LLC is the loan servicer (collectively "Respondents).

Payment obligations under the terms of the Note and Mortgage became delinquent causing a breach of the terms of these documents. On September 26, 2012, GMAC, the prior servicer of the loan, offered Saad E. Hafez a Trial Payment Plan to involve three trial payments: November 1, 2012, December 1, 2012, and January 1, 2013 in the amount of $2,878.64 (Pl. Ex. 6). The Trial Period Plan was a part of a two-step process to permanently modify the terms of the loan.

Though Saad E. Hafez, the sole obligor under the terms of the Note, passed away in November 2012, all of the trial period payments were made (Pl. Ex. 8). Based upon the trial payments being made, GMAC sent an offer of permanent modification (hereinafter "Offer") addressed to Saad E. Hafez without knowledge of his passing (Pl. Ex. 7). The Offer, which was only addressed to Saad E. Hafez due to his being the sole obligor under the terms of the Note, called for total monthly payments in the amount of $2,888.75 beginning February 1, 2013 with an interest rate initially of 2.000% per annum. The Offer was signed by Appellant on January 25, 2013. Appellant contends the Offer to Saad E. Hafez to be a valid and enforceable agreement between herself and Respondents although it is not signed by Respondents or GMAC and she has never made a payment in the amount called for under the terms of the offer - $2,888.75 monthly beginning February 1, 2013 and running through January 1, 2018 with the remaining payments increasing due to an interest rate increase. (Pl. Ex. 7 and 8).

Appellant sent in funds monthly in the amount of $2,878.64, the same amount as the payments called for under the Trial Payment Plan, through August 9, 2013 until the funds began to be returned based upon the loan's arrearage. (Pl. Ex. 6 and 8). Respondents properly applied the funds received to the amounts due and owing under the terms of the loan. (Pl. Ex. 8).

The Complaint was filed July 7, 2015 and alleges default based upon failure to make the monthly mortgage payments as they became due. Appellant filed an Answer, Counterclaim and Third-Party Complaint on June 21, 2016. The counterclaims and third-party claims are for (1) breach of contract (2) RESPA violations: § 1024.35 – Error Resolution (3) RESPA violations: § 1024.36 – Requests for Information (4) RESPA violations: § 1024.38 – General Servicing

Policies (5) RESPA violations: § 1024.40 – Continuity of Contact (6) RESPA violations: § 1024.41 – Loss Mitigation Procedures and (7) Vicarious Liability of Plaintiff Under Agency Theory. Appellant's claims stem from loan modification attempts that took place in 2012 and 2013. Respondents denied any liability to Appellant. Appellant subsequently passed away in December 2016.

The case was referred to The Honorable Mikel R. Scarborough, Master-In-Equity for Charleston County on January 26, 2016. (Order of Reference). A bench trial was held on March 19, 2018. An Order granting judgment in favor of Respondents as to the foreclosure action as well as Appellant's counterclaims and third-party claims was entered on July 2, 2018. This appeal followed.

STANDARD OF REVIEW

"'A mortgage foreclosure is an action in equity.'" *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 328, 755 S.E.2d 437, 440–41 (2014) (quoting *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 248, 489 S.E.2d 472, 475 (1997)). "In an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence." *Id.* (citing *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775–76 (1976)). "However, this broad scope does not relieve the appellant of his burden to show that the trial court erred in its findings." *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012) (citing *Pinckney v. Warren*, 344 S.C. 382, 387–88, 544 S.E.2d 620, 623 (2001)). "Furthermore, [the appellate court is] not required to disregard the findings of the trial judge, who was in a better position to determine the credibility of the [evidence]." *Id.* at 593, 733 S.E.2d at 109. Thus, "[t]he appellate court may affirm any

ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCRAP.

ARGUMENT

I. THE MASTER-IN-EQUITY CORRECTLY FOUND THERE WAS NO BREACH OF CONTRACT.

As the Master-In-Equity noted in his Order, underlying all of Appellant's claims is the fundamental contractual question of whether there existed a valid loan modification between the parties. The Master-In-Equity correctly found that no such loan modification existed and, as such, Appellant could not prevail on her breach of contract and RESP claims. Appellant has not presented evidence to support her assertion of a valid loan modification agreement. Even assuming *arguendo* that the alleged loan modification existed, her claims would still fail because the payments called for under the alleged loan modification were not made. As such, the Master-In-Equity's findings should be affirmed.

"Any modification of a written contract must satisfy all fundamental elements of a valid contract in order for it to be enforceable, including a meeting of the minds between the parties with regard to all essential terms of the agreement." *U.S. Bank Trust Nat. Assn v. Bell,* 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009) (citing *Player v. Chandler,* 299 S.C. 101, 104-05, 382 S.E. 2d 891, 893 (1989)). The construction of a clear and unambiguous contract presents a question of law for the court. *Ward v. West Oil Co.,* 379 S.C. 225, 238, 665 S.E.2d 618, 625 (Ct. App. 2008); *see also Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n,* 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). Courts are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. *C.A.N. Enterprises, Inc. v. South Carolina Health & Human Services Finance Com.,* 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988). "A court must enforce an unambiguous contract according

to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *S.C. Dept. of Transp. v. M & T Enters. of Mt. Pleasant, LLC,* 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008).

In the present case, Appellant could not have entered into a loan modification agreement because she lacked authority to do so under the terms of the loan. It is undisputed that all three of the trial payments under the 2012 Trial Payment Plan were made and properly applied to the account. (Pl. Ex. 6 and 8). Unaware that Saad E. Hafez passed away, GMAC sent the permanent modification Offer addressed to Saad E. Hafez following the conclusion of the trial period. In order for the permanent modification offer to be implemented, it needed to be signed by the obligor to the Note. (Pl. Ex. 2). Here, Saad E. Hafez was the only obligor under the clear and unambiguous terms of the Note. (Id.) Accordingly, only he could have entered into a loan modification agreement for the loan.

Without being a party to the Note, Appellant does not qualify as an obligor, and thus lacks the ability to enter into binding loan modification agreements. Appellant argues, however, that GMAC accepted the terms of the permanent modification Offer by "accepting and processing Appellant's payments from December 2012 through September 2013." (Appellant's Brief p. 9). This assertion is simply not supported by the evidence. None of the evidence presented at trial by either Respondent or Appellant indicate that Respondents ever treated Appellant as an obligor under the terms of the Note. As made clear from the comment log, Appellant was sent a letter in February 2013 regarding the permanent modification Offer. (Pl. Ex. 12). In the letter, GMAC explicitly rejected the permanent modification Offer and informed Appellant that the offer could not be accepted as it was not signed by Saad E. Hafez. (Id.). Further, the letter informed Appellant that if she intended to be appointed as Saad E.

Hafez's personal representative, she would need to submit a copy of the death certificate and a document naming herself as the executor of the estate. Neither GMAC nor Ocwen ever received these documents. Finally, the permanent modification Offer was never signed by either Respondents or GMAC, which is clear and convincing evidence that they did not agree that Appellant had authority to enter into the permanent loan modification Offer. (Pl. Ex. 7).

Even if Appellant had authority to enter into a permanent modification on Saad E. Hafez's behalf, the terms of the permanent modification Offer were not complied with. As the Master-In-Equity correctly determined, Appellant failed to make the regular monthly payments under the terms of the Offer. (Pl. Ex. 8 and Def. Ex. 5). The Offer required monthly payments in the amount of $2,888.75 to be made starting on February 1, 2013 and running through January 1, 2018 with the payments to increase thereafter based upon an interest rate increase. (Pl. Ex. 7). After the conclusion of the Trial Period Plan, Appellant continued to send in funds in the amount of $2,878.64, the amount of the Trial Period Plan and not those called for under the Offer. These incorrect payments would have each constituted a default by Appellant if the agreement was binding, and she is precluded from arguing that there was a breach by Respondent. "Where a contract is not performed, the party who is guilty of the first breach is generally the one upon whom all liability for the nonperformance rests". *Silver v. Aabstract Pools & Spas, Inc.* 376 S.C. 585, 594, 658 S.E.2d 539, 543 (Ct. App. 2008) (citing *Willms Trucking Co., Inc. V. JW Constr. Co., Inc.*, 314 S.C. 170, 178, 442 S.E. 2d 197, 201 (Ct. App. 1994)).

Once the Appellant was deemed to be in default, Respondent was under no obligation to accept any additional payments thereafter; moreover, Respondent's legal right to declare the entire balance due and right to commence a foreclosure action could not be taken away or

nullified by a partial tender. *United States Bank Tr. Nat'l Ass'n v. Bell*, 385 S.C. 364, 377-78, 684 S.E.2d 199, 206 (Ct. App. 2009) *See Allendale Furniture Co. v. Carolina Commercial Bank,* 284 S.C. 76, 79, 325 S.E.2d 530, 531 (1985); *Dargan v. Metro. Props., Inc.,* 243 S.C. 324, 325, 133 S.E.2d 821, 823 (1963); *see also Ford Motor Credit Co. v. Morales,* 279 S.C. 388, 390, 308 S.E.2d 102, 102 (1983) ("A payment of a debt is not considered made until it is accepted by the creditor with the intention of extinguishing the debt."). Based upon the foregoing, the Master-In-Equity correctly found that there was no breach of contract by Respondents and he correctly ruled in favor of Respondents as to all of Appellant's causes of action.

II. THE MASTER-IN-EQUITY PROPERLY WEIGHED THE EVIDENCE PRESENTED AND DETERMINED THAT RESPONDENTS' BUSINESS RECORDS WERE RELIABLE IN AWARDING JUDGMENT TO RESPONDENTS.

In an attempt to escape the ruling in issue one, Appellant challenged the Master-In-Equity's finding of damages. Due to the fact that Appellant lacks the ability to show that Respondent's evidence is somehow insufficient, she would like for this Court to exclusively consider the testimony of her own witness. Respondents' witness, Mr. Bankston, testified as to the amount and measure of damages resulting from the non-payment of the loan. Appellant had the opportunity cross-examine Respondents' witness as to the reliability of Respondents' business records and Appellant presented her own witness, Mr. Hodge, regarding the information contained in Respondents' business records. The Master-In-Equity ultimately found Respondents' business records to be reliable.

On cross-examination of Mr. Bankston, Appellant had an additional opportunity to question the reliability of Respondent's business records. None of the issues that are raised in

Appellant's Initial Brief were raised during cross-examination. To the contrary, Mr. Bankston testified at length regarding the accuracy of the payment histories. (R. p. __). Appellant failed to present a line of questioning that could lead the Master-In-Equity to conclude that Respondent's business records are in any way unreliable or inconsistent with its calculation of damages.

The reason Appellant did not make these assertions at trial is because they are baseless. Instead, Appellant would like for this Court to exclusively consider its own evidence. The Master-In-Equity's Order goes into great detail regarding the nature of the factual testimony presented at trial. (see Order generally). He specifically addressed the testimony of Mr. Hodge regarding the amounts due and owing on the loan in his Order. (R. p. __). Due to the fact that Mr. Hodge's recreated payment history does not incorporate the terms of the Note, the Master-In-Equity simply refused to accept that his testimony should be considered in a vacuum and to the exclusion of all other evidence presented in the case. Instead, the Master-In-Equity properly weighed the competing evidence presented and determined that Respondents' business records are reliable. It should be noted that foreclosure actions are routinely referred to the Master-In-Equity and, as a result, the Master-In-Equity is uniquely qualified, based upon his depth of experience in reviewing banking records and evidence as to those records' reliability, to make such a determination. Appellant has not presented this Court with any reasons why it should toss aside the Master-In-Equity's well-reasoned and thoughtful weighing of all of the evidence presented at trial in making his ruling Respondents' favor.

III. THE MASTER-IN-EQUITY HAD PROPER JURISDICTION TO HEAR AND RULE ON THIS FORECLOSURE ACTION AND CAUSES OF ACTION BROUGHT BY APPELLANT.

Appellant's challenge to the subject matter jurisdiction of the Master-In-Equity is without merit. In a foreclosure action, subject matter jurisdiction is proper in the Court of Common Pleas for the County where the subject property is located; Charleston County for the subject action. *Meaders Bros v. Skelton.* 234 S.C. 134, 107 S.E.2d 1 (1959).

"In an action . . . for foreclosure, some or all of the causes of action in a case may be referred to a master or special referee by order of a circuit judge or the clerk of court." Rule 53(b), SCRCP. Indeed, "[a]ctions to foreclose liens or obtain partition of real property shall be tried by the court, and shall ordinarily be referred to a master pursuant to Rule 53." *Id.* at 71(b). "Once referred, the master or special referee shall exercise all power and authority which a circuit judge sitting without a jury would have in a similar matter." *Id.* at 53(c). The case was referred to the Master-In-Equity on January 26, 2016 without limitation. (Order of Reference). The parties proceeded to trial before the Master-In-Equity without objection to jurisdiction or mode of trial. Accordingly, it is without question that the Master-In-Equity was vested with subject matter jurisdiction over this action.

Appellant's arguments related to preemption are not compelling, nor are they consistent with the evidence presented. "The Preemption doctrine is rooted in the Supremacy Clause of the United States Constitution and provides that any state law that conflicts with federal law is "without effect"". *Priester v. Cromer*, 401 S.C. 38, 43, 736 S.E.2d 249, 252 (citing Cipollone v. Liggett Group, Inc. 505 U.S. 504, 516, 112 S. Ct. 2608, L.Ed.2d 407). Appellant quotes the case of *Longshoreman v. Davis*, 476 U.S. 380, 383 (1986) as follows, "The point is not whether state law gives the state courts jurisdiction over particular controversies but whether jurisdiction provided by state law is itself pre-empted by federal law vesting exclusive jurisdiction over that controversy in another body". This quote cuts directly against

Appellant's argument regarding preemption because she can point to no federal law vesting exclusive jurisdiction over the controversy at hand (the foreclosure action and Appellant's ancillary claims against Respondents) in another body. In other words, the existence of a federal regulatory scheme related to mortgage lending does not strip a state court of jurisdiction regarding mortgage foreclosures and ancillary causes of action. Appellant has already acknowledged as much in this action by bringing the following federal causes of action in the foreclosure case: RESPA violations: § 1024.35 – Error Resolution; RESPA violations: § 1024.36 – Requests for Information; RESPA violations: § 1024.38 – General Servicing Policies; RESPA violations: § 1024.40 – Continuity of Contact; and RESPA violations: § 1024.41 – Loss Mitigation Procedures. While all of these causes of action stem from a federal legislative and statutory structure, Appellant was content to have those causes fall within the jurisdiction of the Master-In-Equity with no jurisdictional objection…so long as he ruled in her favor. It was only upon the Master-In-Equity ruling against her that Appellant sought to divest the Master-In-Equity of jurisdiction over the entire case.

Finally, Appellant's argument related to the demand letter does not comply with the evidence presented at trial. A copy of the breach letter dated September 17, 2013 and addressed to Saad E. Hafez was admitted into evidence with no objection. (Pl. Ex. 11). Appellant presented no argument at trial that the breach letter was not authentic or that it failed to meet the requirements of the Note, Mortgage, or any applicable statute or regulation. Appellant's argument that the Master-In-Equity would have had to have made some determination as to the sufficiency of the demand letter prior to asserting subject matter jurisdiction over the case rings hollow when the Master-In-Equity was presented with no argument that the demand letter was deficient in any way.

Based upon the foregoing, the Master-In-Equity had subject matter jurisdiction over the foreclosure action as well as Appellant's ancillary causes of action and his ruling should be affirmed.

CONCLUSION

For the reasons stated above, Respondents respectfully request that the Court affirm the Master-In-Equity's Order and deny Appellant's appeal. Appellant's mischaracterization of the evidence presented and attempt to assert new arguments on appeal do not justify overturning the lower court's decision. The Master-In-Equity had subject matter jurisdiction over the case and his judgment in favor of Respondents is well-reasoned and supported by the evidence presented at trial.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that, on February 1, 2019, Respondents' Initial Brief and Designation of Matter to be Included in the Record on Appeal were served on Appellant by depositing a copy thereof in the United States Mail, first Class, postage prepaid, addressed to:

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