THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Ellis B. Drew, Jr. Master-in-Equity

Case No. 2012-CP-04-1819

First Federal Bank fka First
Federal Savings & Loan
Association of Charleston,

Respondent,

v.

George A. Shira, III and
Betsey R. Shira,

Appellants.

BRIEF OF APPELLANTS

Daniel L. Draisen, Esquire (S.C Bar # 13536)
Timothy A. Nowacki, Esquire (S.C Bar # 100967)
KRAUSE, MOORHEAD & DRAISEN, P.A.
207 E. Calhoun St.
Anderson, South Carolina 29621
(864) 225-4000
Attorneys for Appellants

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II. APPELLANTS OWN TWO RESIDENCES IN ANDERSON COUNTY. APPELLANTS LIVED IN THE FORECLOSED RESIDENCE DURING THE WINTER MONTHS AND IN THEIR LAKE CONDOMINIUM DURING THE SUMMER MONTHS. DID THE MASTER ERR IN HOLDING THAT THE FORECLOSED RESIDENCE WAS NOT OWNER-OCCUPIED SO AS TO BE EXEMPT FROM THE SUPREME COURT ADMINISTRATIVE ORDER?

STATEMENT OF THE CASE

Appellants George A. Shira, III and Betsey R. Shira (collectively "the Shiras") own two residences in Anderson County, South Carolina. On May 2, 2012, Respondent First Federal Bank fka First Federal Savings & Loan Association of Charleston ("First Federal") brought this action to foreclose the residential mortgage on one of the residences given as a security by the Shiras for a loan from First Federal. First Federal alleged that this foreclosure action is exempt from the Supreme Court's Administrative Order 2011-05-02-01("Foreclosure Intervention Order"), which mandates that the lender certify that the mortgagor is not eligible for Federal loss mitigations programs prior to proceeding to foreclosure. The Shiras do not deny that they are in default on the loan.

A hearing was held on First Federal's foreclosure action on October 8, 2012 before

the Hon. Ellis B. Drew, Jr., Master-in-Equity. First Federal alleged that this foreclosure action is exempt from the Foreclosure Intervention Order because the action involves the foreclosure of property that is not an owner-occupied dwelling. The Order defines "owner-occupied dwelling" as the "principal residence of the mortgagor." The Shiras argued and presented evidence that the residence in foreclosure is an owner-occupied dwelling. At the conclusion of the hearing, the Court took the matter under advisement and instructed counsel to submit post-hearing briefs addressing the issue of the definition of an owner-occupied dwelling for purposes of the applicability of the Mortgage Intervention Order. Both parties submitted briefs.

On March 14, 2013, the Master-In-Equity issued his Order defining principal residence, finding that the mortgaged property is not the Appellants' principal residence, that the Foreclosure Intervention Order does not apply to the mortgaged property, and that First Federal may proceed with foreclosure. The Order was filed with the Anderson County Clerk of Court on March 18, 2013. The Master also issued an order and judgment of foreclosure and sale. On April 17, 2013, the Appellants filed their Notice of Appeal. The Appellants received the hearing transcript on May 31, 2013.

FACTS

The Shiras's home at 112 Horseshoe Drive in Townville (the "Residence") is the subject of this foreclosure action. (Complaint, R. at 20). Their other residence is a condominium on Lake Hartwell in Anderson. (Tr. at 21:2-7, R. at 83:2-7).

At the hearing, the Shiras provided testimony that they stay at the condominium beginning in the spring and at the Residence during the winter. (Tr. at 21:17-22:19, R. at

83:17-84:19). Mr. Shira testified that the condominium has amenities for summer time use such as a pool and a boat dock. He also stated that, but for the foreclosure action, he would have rotated back to the Residence for the winter. (Tr. at 22:14-19, R. at 84:14-19). The Residence is always kept readily occupiable. Mr. Shira testified that he maintains all the utilities, furniture, appliances, and keeps a car in the garage throughout the year. (Tr. at 22:4-13, R. at 84:4-13).

The mortgage on the Residence is subject to a second home rider. (Second Home Rider, R. at 52-53). As per its terms, the Shiras agreed that they shall occupy and keep the Residence available for their exclusive use and enjoyment at all times, and shall not subject the property to any timesharing, other ownership arrangement, or rental pool agreement.

In his Order, the Master observed that no case law addresses the definition of principal residence as pertaining to the Mortgage Intervention Order. (Orders, R. at 2). The Master found that "the context in which 'principal residence' is used in the Foreclosure Intervention Order indicates the phrase has a restricted meaning of physical presence at the property which is being foreclosed, rather than a broader meaning of domicile." (Orders, R. at 4). He found that the Shiras are not actually living at the subject property, and that they intended for the Residence to be a 'second home' because of the second home rider. He then concluded that the Residence is not the Shiras' principal residence and that it is exempt from the Mortgage Intervention Order. (Orders, R. at 4). Appellants contend such finding is in error.

I. WHEN A HOMEOWNER ALTERNATES BETWEEN TWO RESIDENCES DURING THE COURSE OF A YEAR, THE RESIDENCE WHERE THE HOMEOWNER SPENDS THE MAJORITY OF THE TIME SHOULD ORDINARLY BE CONSIDERED THE PRINCIPAL RESIDENCE.

The Master-In-Equity erred as a matter of law when he held that the definition of principal residence requires physical presence at the property which is being foreclosed at the time of the foreclosure hearing. (Orders, R. at 4). As noted in the Master's Order, principal residence is not defined in the Foreclosure Intervention Order, and no case law addresses the definition of principal residence with respect to the Order. (Orders, R. at 2). The definition of principal residence with respect to the Foreclosure Intervention Order is a matter of first impression and a novel issue of law.

When interpreting a court order, the appellate courts apply the same rules of construction as used when interpreting statues. See Greenwood Mills, Inc., v. Second Injury Fund, 315 S.C. 256, 433 S.E.2d 846 (1993) (observing that appellate courts apply the same rules of construction used in interpreting statutes when interpreting court rules). It is a cardinal rule of statutory construction that the primary purpose in interpreting statutes is to ascertain the intent of the drafter. Sloan v. S. Carolina Bd. of Physical Therapy Examiners, 370 S.C. 452, 468-69, 636 S.E.2d 598, 606-07 (2006). A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. The real purpose and intent of the lawmakers will prevail over the literal import of particular words. Id.

In a case raising a novel question of law regarding the interpretation of a statute, the appellate court is free to decide the question with no particular deference to the lower court.

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citations omitted). The appellate court is free to decide the question based on its assessment of which interpretation and reasoning would best comport with the law and public policies of this state and the Court's sense of law, justice, and right. Sloan, 370 S.C. at 466-67, 636 S.E.2d at 605-06.

The intent and purpose of the Foreclosure Intervention Order is to ensure that the citizens of this State are given full consideration for the Federal government's loss mitigation efforts known as the Home Affordable Modification Program ("HMP"). In the Administrative Order, our Supreme Court observed that foreclosures in this State were continuing without a determination as to whether the affected homeowners were properly and fully considered for the Federal government's loss mitigation efforts known as Home Affordable Modification Program ("HMP"). The United States Treasury Department (Treasury) instituted the HMP in 2008 in order to slow a rising tide of foreclosures on residential properties by incentivizing loan servicers to reduce the required monthly mortgage payments for certain struggling homeowners. Miller v. Chase Home Finance, LLC, 677 F.3d 1113, 1115-16 (4th Cir. 2012). Our Supreme Court, seeking to rectify the problem, mandated that servicers comply with certain terms and condition before proceeding to foreclosure on owner-occupied dwellings. At that time of the publishing of the Administrative Order, HMP directives provided that only owner-occupied dwellings were eligible for modification. Although the South Carolina Supreme Court issued the Foreclosure Intervention Order, the purpose of the Order is to promote the implementation of

a Treasury program within South Carolina—instructing that this Court adopt a definition of "principal residence" similar to that as defined by the Treasury.

The HMP handbook and directives do not specifically define "principal residence" but Treasury regulations governing the exclusion of gain from the sale of a principal residence provide the appropriate criteria for making this determination. Treas. Reg. § 1.121-1(b) states that:

> In the case of a taxpayer using more than one property as a residence, whether property is used by the taxpayer as the principal residence depends upon all the facts and circumstances. If a taxpayer alternates between 2 properties, using each as a residence for successive periods of time, *the property that the taxpayer uses a majority of the time during the year ordinarily will be considered the taxpayer's principal residence*

The regulation also provides, in addition to the taxpayer's use of the property, that the following non-exhaustive list of factors may be relevant: the taxpayer's place of employment; principal place of abode for family members; addresses on tax returns, government identification, and automobile registration; mailing addresses for bills and correspondence; the location of taxpayer's banks; and the location of organizations with which the taxpayer is affiliated. Treas. Reg 1.121-1(b). Further, the glossary on Treasury's HMP website defines principal residence as "the property in which the homeowner will live most of the time, as distinct from a second home or an investor property that was rented." Making Home Affordable.Gov, http://www.makinghomeaffordable.gov/learning-center/glossary/Pages/default.aspx (accessed June 22, 2013). Thus, Treasury, for the purposes of HMP eligibility, defines principal residence as ordinarily the property that a homeowner uses the majority of the time.

Such a definition better addresses the issue before this Court than the definition and supporting case law in the Master's Order. The Master's finding that the "context in which principal residence is used in the Foreclosure Intervention Order indicates that the phrase has a restricted meaning of physical presence at the property which is being foreclosed, rather than the broader meaning of domicile," relies on the holding in G.A.C. Finance Corp. v. Citizens & Southern Nat'l Bank, 234 S.C. 205, 107 S.E.2d 315 (1959). In G.A.C. Finance Corp., the court discussed criteria determining a person's county of residence to give effect to the language of a recording statute in order that third persons be provided with notice of certain instruments. The purposes of the recording statute and the Foreclosure Intervention Order are wholly different, and the definition adopted by the Master from G.A.C. Finance Corp. provides little substantive instruction as to how to determine the primary residence when a homeowner rotates seasonally between two residences.

The Master's Order also cites In re Jones, 397 Br. 765, 771 (Bankr. D.S.C. Nov. 26, 2008), which addressed not the definition of principal residence, but the issue of whether a structure on a property could be considered a residence at all. The trustee had claimed that the structure was not fit to be a residence and therefore challenged the application of the homestead exemption permitted under S.C. Code Ann § 15-41-30(1) to the structure. In re Jones, 397 B.R. at 770. Here, there is no dispute as to whether the Residence is indeed a residence.

This Court should adopt the definition of principal residence consistent with the intent and purpose of the Foreclosure Intervention Order, one which permits South Carolinians to take advantage of the Federal loss prevention programs. Thus, this Court

should hold that, between two residences, a determination as to whether a residence is a principal residence depends on the facts and circumstance but will ordinarily be where the homeowner spends the majority of their time.

II. BASED UPON THE EVIDENCE PRESENTED AT THE HEARING, THE MASTER ERRED WHEN HE CONCLUDED THAT THE RESIDENCE IS NOT APPELLANTS' PRINCIPAL RESIDENCE AND THEREFORE EXEMPT FROM THE SUPREME COURT ADMINISTRATIVE ORDER.

This Court reviews all questions of law de novo. Fesmire v. Digh, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009). Review of the trial court's factual findings, however, depends on the whether the underlying action is an action at law or an action in equity. See Townes Assocs. Ltd. v. City of Greenville, 266 S.C. 81, 85-86, 221 S.E.2d 773, 775–76 (1976) (setting forth standards of review to apply in actions at law and actions in equity).

In an action at law, the trial court's factual findings will not be disturbed upon appeal unless found to be without evidence which reasonably supports the trial court's findings. Townes, 266 S.C. at 86, 221 S.E.2d at 775. In an action in equity, the appellate court may resolve questions of fact in accordance with its own view of the preponderance of the evidence. See Wilder Corp. v. Wilke, 324 S.C. 570, 577, 479 S.E.2d 510, 513 (Ct. App. 1996) (citing Townes, 266 S.C. at 86, 221 S.E.2d at 775) (holding that because the master-in-equity heard the action, which was equitable in nature, without appeal to the circuit court, the appellate court could find the facts on appeal in accordance with its own view of the preponderance of the evidence). However, this broad scope of review does not require the appellate courts to disregard the findings at trial or to ignore the fact that the master was in a better position to assess the credibility of the witnesses. Laughon v. O'Braitis, 360 S.C. 520,

524–25, 602 S.E.2d 108, 111 (Ct. App. 2004). Here, the underlying action, a mortgage foreclosure, is an action at equity.

As argued above, between two residences, a determination as to whether a residence is a principal residence depends on the facts and circumstance but will ordinarily be where the homeowner spends the majority of their time. While it is true that the Shiras were not living at the Residence at the time of the hearing in this matter (due to the impending foreclosure action), the uncontroverted testimony presented at the hearing reflects that the Shiras use the Residence and the condominium successively. Mr. Shira testified that he and his wife moved into the condo in the spring of 2012 to stay for the duration of the summer months, and, but for the foreclosure action, he stated that that he and his wife would have returned to the Residence for the winter. (Tr. at 21:17-22:19, R. at 83:17-84:19). The Shiras keep furniture and other personal property at the Residence throughout the year. (Tr. at 22:8-13, R. at 84:8-13). The utilities are maintained at the Residence throughout the year, and the Shiras employ a landscaping company to maintain the yard at the Residence on a regular basis. (Tr. at 22:4-7, R. at 84:4-7)

In addition, the Master-In-Equity erred when he found that the second home rider indicates that the Shiras intended for the Residence to be their 'second home' and not their primary residence. The Master found that "it is clear from the evidence presented at the Hearing that the Defendants represented to the Plaintiff at the time of applying for and entering into the subject loan that they intended for the mortgaged Property to be their second home." (Orders, R. at 5).

The second home rider neither indicates the Shiras' intent nor does it preclude the

Shiras from establishing the Residence as their primary residence. By its terms, the rider requires that the Shiras shall occupy the mortgaged property and it be available for their exclusive use and enjoyment at all times. (Complaint, R. at 52-53). They may not subject the property to an ownership arrangement or any rental pool agreement, and they are not precluded from living in it year round. Contrary to the Master's finding, these terms in no way preclude the Shiras from establishing the Residence as their primary residence. That the Residence is subject to a second home rider does not mean it is the secondary.

The evidence establishes that the Shiras alternate between their two residences. Therefore, the Shiras respectfully request that this Court reverse the decision of the Master-In-Equity and find that the Residence is the primary residence, owner-occupied and therefore subject to the Mortgage Intervention Order. Alternatively, if the Court finds that the record is insufficient to make a determination, the Shiras respectfully request that the case be remanded for a hearing for factual findings on the issue of whether the Residence is the Shiras' principal residence in accordance with definition of principal residence as adopted by this Court.

CONCLUSION

For the reasons stated, Appellants respectfully request that this Court reverse the Master's holding as to the definition of principal residence, and that the Court, as a matter of first impression, define that, between two residences, a determination as to whether a residence is a principal residence will depend on the facts and circumstance but will ordinarily be where the homeowner spends the majority of their time. Additionally, Appellants request that this Court find that the foreclosed property is the Shiras' principal

residence and not exempt from the Supreme Court Administrative Order. Or, alternatively, that the Court remand this matter for hearing for findings consistent with the definition of principal residence adopted by this Court.

Respectfully submitted,

Daniel L. Draisen (S.C Bar # 13536)

Timothy A. Nowacki (S.C Bar # 100967)
KRAUSE, MOORHEAD & DRAISEN, P.A.
207 E. Calhoun Street
Anderson, South Carolina 29621
(864) 225-4000
Attorneys for Appellant

September 4, 2013

FORM 16
CERTIFICATE OF COUNSEL IN FINAL BRIEF

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
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Ellis B. Drew, Jr. Master-In-Equity

Case No. 2012-CP-04-1819

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v.

George A. Shira, III and Betsey R. Shira, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Brief of Appellants complies with Rule 211(b), SCACR.

September 5, 2013

Timothy A. Nowacki, Esq. (S.C. Bar #100967)
KRAUSE, MOORHEAD & DRAISEN, P.A.
207 E. Calhoun Street
Anderson, South Carolina 29621
(864) 225-4000
Attorneys for Appellants

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First Federal Bank fka First Federal Savings
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vs.

George A. Shira III and Betsy R. Shira.....Appellants.

PROOF OF SERVICE

I hereby certify that I have served a copy of the Brief of Appellants on Louise M. Johnson, Esq. and Sarah P. Spruill, Esq., attorneys for Respondent First Federal Bank, by depositing a copy of same in the United States Mail, postage prepaid, on September 5, 2013 addressed to Louise M. Johnson, Esq, Haynsworth Sinkler Boyd, P.A., P.O. Box 11889, Columbia South Carolina 29211-1889 and Sarah P. Spruill, Esq., Haynsworth Sinkler Boyd, P.A., One North Main Street, 2nd Floor, Greenville, South Carolina 29601.

Dated: September 5, 2013

Timothy A. Nowacki (SC Bar #100967)
Krause, Moorhead and Draisen, P.A.
207 E. Calhoun Street
Anderson, South Carolina 29621
(864) 225-4000
(864) 964-0788 facsimile
tnowacki@kmdlawyers.com
Attorneys for Appellants