

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-10-04860

Navy Federal Credit Union, Respondent,

v.

William T. Simmons, III,
Laura Ferguson; and Ford Motor
Credit Company LLC, Defendants,

Of whom Laura Ferguson is the Appellant.

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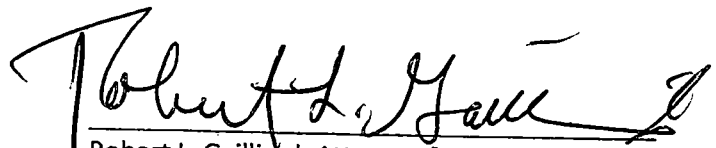
MAR 04 2019

SC Court of Appeals

INITIAL BRIEF OF APPELLANT

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TABLE OF CASES AND AUTHORITIES

- 1.) Roberson v. Southern Fin: of S.C., Inc. 365 s.c..6, 615 S.E.2d 112
- 2.) United States Bank Trust Nat' Ass'n v. Bell. 385 S.C. 364, 684 S.E.2d 199 (2009)
- 3.) Walker v. Brooks 414 S.C. 343, 778 S.E.2d 477 (2015)

QUESTIONS PRESENTED

- 1.)WHETHER THE MASTER-IN-EQUITY ERRED IN FINDING THAT AN EQUITABLE MORTGAGE EXISTED IN FAVOR OF NAVY FEDERAL CREDIT UNION AGAINST LAURA FERGUSON.**
- 2.)WHETHER THE MASTER-IN-EQUITY ERRED IN CONFIRMING A DEFAULT JUDGMENT AFTER APPELLANT'S DAUGHTER DENIED RECEIVING THE SUMMONS AND COMPLAINT.**

STATEMENT OF THE CASE

Levi Ferguson and Laura Ferguson were the fee simple absolute owners of 11 Leicester in Charleston County. They reserved a life interest in themselves and deeded the remainder interest to their grandson, William T. Simmons.

William T. Simmons, signed a note and mortgage to Navy Federal Credit Union (Navy Federal) in the sum of _____ giving his remainder interest in 11 Leicester as security for the Note. Simmons failed to make payments on the mortgage. Navy Federal responded with a foreclosure action _____ Navy Federal Credit Union v. Levi Ferguson, Laura Ferguson and Ford Motor Credit (Navy Federal v Ferguson #1). That foreclosure action was dismissed for failure to prosecute. Navy Federal waited a few years and brought (Navy Federal v. Laura Ferguson et. al) (Navy Federal #2)

Navy Federal #2 is the subject of this appeal. Navy Federal #2 was commenced on _____. This was a foreclosure action in which Navy Federal sought to foreclosed on both the life interest of Laura Ferguson and the remainder interest of William T. Simmons. The Master-in-Equity found Laura Ferguson to be in default and signed an Order of Foreclosure extinguishing Laura's life interest in 11 Leicester. The foreclosure hearing was held before the Honorable Mikell R. Scarborough, Master-in-Equity for Charleston County on _____. The amount involved on appeal is the amount of the mortgage that was foreclosed.

The date of the Master-in-Equity's Order of Foreclosure is _____. Subsequent to the Order of Foreclosure Laura Ferguson file numerous motions for relief, ALL Motions for Post-Trial relief were denied. This appeal ensued upon the denial of all the post-trial Motions. The essential question on appeal is whether the Master-in-Equity can create an

equitable mortgage and foreclose on that mortgage solely based upon a default Order in the instant case.

**1.) WHETHER THE MASTER-IN-EQUITY ERRED IN CONFIRMING A
DEFAULT JUDGEMENT AFTER APPELLANT'S DAUGHTER DENIED
RECEIVING THE SUMMONS AND COMPLAINT.**

Service in the case was by substituted service. The Affidavit of Service claims that service was effected on Jennifer Ferguson, Appellant's daughter who was residing at 11 Leicester with Appellant. Jennifer denies this and produced a witness to confirm that while a process server approached her, he (not she) declined to go into the house to serve Laure Ferguson personal. It is uncontroverted that Laura Ferguson was present at 11 Leicester and was able to receive the Summons and Complaint but the processer declined to serve her personally due to some unexplained policy. This factor should weigh against the claim of good substituted service which was disputed by two witnesses. Here the substituted service cannot be proved by a preponderance of the evidence so the Master-in-Equity just decided that he would believe the process sewer and disbelieve Jennifer Ferguson without having a good legal basis for doing so.

The Master-in-Equity's Finding based upon the what a "reasonable person would expect is both erroneous and has no basis in established legal principles or case law.

Finding #22 in Master-in-Equity Judgement of Foreclosure and sale is likewise in error as there is no proof of any intent on the part of Levi Ferguson and Laura

Ferguson to mortgage their interest to NAVY Federal. Indeed, by their actions that have shown they did not know that William T. Simmons secured a mortgage on their home.

In the instant case, the Master-in-Equity refused to set aside the default judgement based solely on the fact that he believed the process sever and disbelieved Jennifer Ferguson. That is error.

“An abuse of discretion in setting aside a default judgement occurs when the judge issuing the order was controlled by some error of law or when the conclusions, is without evidentiary support.” In re Estate of Weeks, 329 S.C. 251, 25, 495 S.E.2d 454, 459 (Ct. App. 1997). Roberson v. Southern Fin: Of S.C., Inc. 365 S.C.6, 615 S.E.2d 112.

On foreclosure, as the Master-in-Equity found on equitable mortgage, likewise Navy Federal had the burden of establishing Laura Ferguson's default. That was NOT done and the foreclosure against Laura Ferguson must fail for that reason. United States Bank Trust Nat' Ass'n v. Bell. 385 S.C. 364, 684 S.E.2d 199 (2009).

ARGUMENT

**I.) WHETHER THE MASTER-IN-EQUITY ERRED IN FINDING THAT AN
EQUITABLE MORTGAGE EXISTED IN FAVOR OF NAVY FEDERAL
CREDIT UNION AGAINST LAURA FERGUSON.**

First, it is clear that Laura Ferguson and her husband, Levi Ferguson did not mortgage their interest in 11 Leicester to Navy Federal. The Master-in-Equity resorted to the legal fiction of an equitable mortgage solely to protect the interests of Navy Federal and NOT in the interests of justice, fairness and in compliance with well settled law that was existed in this country for more than two hundred years.

-Navy Federal had a valid "traditional" Note and Mortgage to protect their interests in the mortgaged property

-See Mortgage signed by William T. Simmons also note. The problem is that Navy Federal loaned \$250,000.00 on the remainder interest of William T. Simmons- When Simmons did not repay the Navy Federal sought to take advantage of Levi and Laura Ferguson by foreclosing on their life interests which they did not mortgage thus the use of the equitable mortgage Navy Federal had not one but two legal means of redress to collect on their mortgage. First, they could have filed a claim against the errors and omissions policy of the attorney who certified fee simple absolute title in William T. Simmons who ONLY owned a remainder interest. Secondly, Navy Federal could have filed a claim against the title insurer who insured good title in the name of William T. Simmons. The purpose of title insurance on the property was to protect the lender (Navy Federal) in the event that a defect in the title was discovered AFTER the loan was made. Navy Federal made the conscious choice to disregard their legal means of redress to pursue an action against life tenants who had nothing to do with their mortgage to William T. Simmons.

Levi Ferguson and Laura Ferguson were both elderly, people living comfortably in their own home when Navy Federal wrongfully brought not one but two foreclosure actions against them knowing full well that the Ferguson's never mortgaged their life interest to Navy Credit.

An equitable mortgage is based upon- the intent of the parties at the making of the mortgage. *Walker v. Brooks* 414 S.C. 343, 778 S.E.2d 477 (2015). "The essential feature or essence of an equitable mortgage is the intent of the parties". *Id.* The intent of the parties is to be evaluated at the time of conveyance. 59 C.J.S Mortgages § 71. As explained in § 71:

The character of the transaction is [***6] fixed
At its inception, and as a general rule, the only
Facts and circumstances that may be considered
Determining whether the mortgage was intended
Are those which existed at the time the instrument was executed.
Subsequent developments may throw a light on the original
Meaning of the parties, however.

Id.; see *Gregorie*, 273 S.C. at 417, 257 S.E.2d at 701 ("A court) must search for the intention of the parties at the time of the transaction and not as any of them may interpret their intentions at this time."); see also *Williams v. Griffith*, 310 Ill. App. 574, 35 N.E.2d 95, 97 (Ill. App. Ct. 1941) ("The conveyance, in such instance, takes effect when delivered, and its character is fixed that time, and the intention of the parties at that time is controlling.") HN5[The existence of an

equitable mortgage must be shown by clear and convincing evidence. *Gregorie*, 273 S.C. at 434, 257 S.E.2d at 709 (Ness, J., dissenting).

**II.) WHETHER THE MASTER-IN-EQUITY ERRED IN CONFIRMING A
DEFAULT JUDGEMENT AFTER APPELLANT'S DAUGHTER DENIED RECEIVING
THE SUMMONS AND COMPLAINT.**

Service in the case was by substituted service. The Affidavit of Service claims that service was affected on Jennifer Ferguson, Appellant's daughter who was residing at 11 Leicester with Appellant. Jennifer denies this and produced a witness to confirm that while a process server approached her, he (not she) declined to go into the house to serve Laure Ferguson personal. It is uncontroverted that Laura Ferguson was present at 11 Leicester and was able to receive the Summons and Complaint but the processer declined to serve her personally due to some unexplained policy. This factor should weigh against the claim of good substituted service which was disputed by two witnesses. Here the substituted service cannot be proved by a preponderance of the evidence so the Master-in-Equity just decided that he would believe the process server and disbelieve Jennifer Ferguson without having a good legal basis for doing so.

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In the instant case, the Master-in-Equity refused to set aside the default judgement based solely on the fact that he believed the process sever and disbelieved Jennifer Ferguson. That is error.

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CONCLUSION

For the reasons stated above Appellant prays that the Order of Foreclosure be reversed and the matter returned to the Master-in-Equity for a trial on the issues.

Respectfully Submitted,

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PROOF OF SERVICE OF A NOTICE OF APPEAL

The State of South Carolina
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell R. Scarborough, Master in Equity

Appellant Case No: 2015-CP-10-04860

Navy Federal Credit Union

Respondent,

v.

William T. Simmons, III,
Laura Ferguson; and Ford Motor
Credit Company LLC, Defendants,

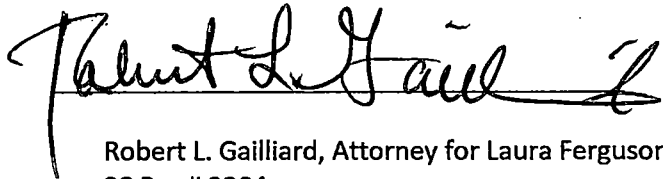
Of whom Laura Ferguson is the Appellant.

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I certify that I have served Initial Brief of Appellant by depositing a copy of it in the United States Mail, postage prepaid, addressed to attorneys of record, John B Kelchner P.O. Box 8237 Columbia, SC 294202

March 1, 2019



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V. Claire Allen Deputy Clerk
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Re: Laura Ferguson Appeal
Appellate Case No: 2018-001184

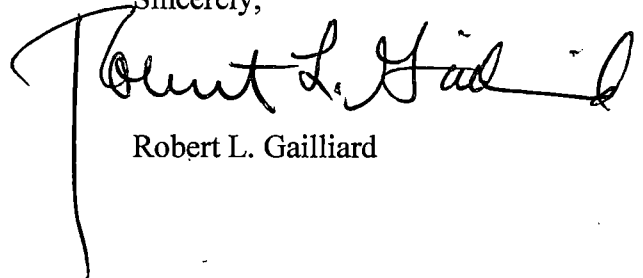
Dear Ms. Allen:

Enclosed please find the corrected Initial Brief of the Appellant, the Certificate of Counsel, Proof of Service of designated matter, and all of the corrections required by the court.

Also, enclosed please find my Motion to expand the time to submit the corrected initial brief along with my Proof of Service to all counsel of record.

RLG/drs

Sincerely,

A handwritten signature in black ink, appearing to read "Robert L. Gaillard", with a long vertical line extending downwards from the left side of the signature.

Robert L. Gaillard

Copy: Jennifer Ferguson
John B. Kelchner, ESQ.

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