THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Master-in-Equity

The Honorable Mikell Scarborough

Case No. 2011-CP-10-2505

Appellate Case No. 2013-002175

Wells Fargo Bank, N.A., as trustee for WaMu Mortgage Pass-Through Certificates Series 2006-PR I Trust, ... Respondent,

v.

Marvin Smalley, Bay Club Homes Property Owners Association, Inc.,..... Defendants

Of Whom Marvin Smalley is ..... Appellant.

Final Brief of Respondent

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Statement of Issues on Appeal

The Master-in-Equity properly granted the foreclosure judgment on behalf of Wells Fargo.

Statement of the Case and Facts[1]

Appellant Marvin Smalley ("Smalley") owned real estate located at 109 Bogard Street, Charleston, South Carolina 29403. {Complaint ¶ 5; R. 11-12}. Smalley secured the property by executing the Note secured by the Mortgage to Respondent Wells Fargo Bank, N.A. as Trustee for WaMu Mortgage Pass-Through Certificates Series 2006-PR1 Trust ("Wells Fargo"). {Note and Mortgage; R. 55-59; 60-75}. JP Morgan Chase Bank, National Association, serviced this loan for Wells Fargo.[2] {Transcript dated November 19, 2012, p. 4, line 3-8; R. 26}. The foreclosure action

[1] Because the operative facts and procedural history of this case are intertwined, Chase combines its statement of the case as part of the statement of facts to limit repetition and for ease of understanding the nature of this dispute.

[2] Throughout the fact section of his brief, Smalley makes several references to the standing of Wells Fargo and Chase to pursue the foreclosure. None of these issues are before this Court. First, Smalley insinuates that Wells Fargo is not the holder of the note and mortgage. See Appellant's Br. at 1 ("Respondent Wells Fargo . . . claims to be a Florida corporation and the asserted current holder . . . ."). Second, Smalley also implies that JP Morgan Chase merely "claimed, was the servicer of the asserted loan." See Appellant's Br. at 2. Third, Smalley states that the Chase witness "could not testify as to the date of the assignment from the prior holder of the note to the plaintiff." See Appellant's Br. at 2. The master found that Wells Fargo owns the Note and Mortgage via recorded proper assignment, stating that Wells Fargo "is now the owner and holder thereof and the debt secured thereby." {Order and Judgment of Foreclosure and Sale ¶ 8; R. 2-3; Assignment; Supp. R. 2}. Smalley makes no argument as to those issues in his Appellant's Brief. Instead, Smalley limited his brief to the issue of whether proof of default was presented to the master. See Appellant's Br. at 3-4. Thus, those issues are now law of the case because an unappealed order or ruling, right or wrong, is the law of the case. See, e.g., Bone v. U.S. Food Serv., 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012); Judy v. Martin, 381 S.C. 455, 458, 674, S.E.2d 151, 153 (2009); Ables v. Gladden, 378 S.C. 558, 569, 664 S.E.2d 442, 448 (2008); Charleston Lumber Co. v. Miller Hous. Corp., 338 S.C. 171, 525 S.E.2d 869, 871 (2000); Resolution Trust Corp. v. Eagle Lake & Golf Condominiums, 310 S.C. 473, 427 S.E.2d 646, 648 (1993) (holding that the trial judge's unappealed ruling is the law of the case). Lastly, Smalley raised no argument whatsoever related to Chase's ability as servicer to initiate the foreclosure. That issue is now abandoned on appeal. Even if the argument were not abandoned, the argument lacks any merit. Bank of Am., N.A. v. Draper, 405 S.C. 214, 223, 746 S.E.2d 478, 482 (Ct. App. 2013) (holding that the mortgage servicer has standing to initiate the foreclosure action).

was initiated on the Note and Mortgage on May 3, 2010, because Smalley had defaulted on the debt secured by the Note and Mortgage. {Complaint ¶ 11; R. 13}.

The action was referred to the Master-in-Equity for Charleston County on June 14, 2011. {Order of Reference; R. 10}. The master held the foreclosure trial on November 19, 2012. {Transcript dated November 19, 2012; R. 23; Master's Order of Foreclosure and Sale dated December 27, 2012; R. 1}. At the foreclosure hearing, the master ruled that Wells Fargo's affidavit of debt was inadmissible upon objection of Smalley's counsel. {Transcript dated November 19, 2013, p. 13, lines 15-16; R. 35}. Despite that ruling, Wells Fargo's witness testified, and the master admitted into evidence that (1) Smalley missed payments, (2) interest accrued beginning from the first missed payment to the month prior to the hearing, and (3) Smalley incurred late charges for missed payments. {Transcript dated November 19, 2013, p. 15, line 15-p. 16, line 8, R. 37-38}.

Wells Fargo also introduced the Note, without objection by Smalley. {Transcript dated November 19, 2013, p. 4, lines 20-25; R. 26}. The Note stated, inter alia, that default occurred thirty days after Smalley failed to cure the overdue amount, including any late charges and accrued interest. {Note p. 3 § 7; R. 57}. Smalley introduced no evidence before the master. {Transcript dated November 19, 2012, p. 24-31; R. 46-53}. Ultimately, the master entered a foreclosure judgment in favor of Wells Fargo. {Order and Judgment of Foreclosure and Sale; R. 1-8}.

On January 14, 2013, Smalley filed a motion to amend the order. {Motion to Amend dated January 14, 2013; R. 21}. The master denied the motion on September

9, 2013. {Order denying Motion to Amend; R. 9}. Smalley's notice of appeal followed. {Notice of Appeal; R. 86}.

Scope of Review

"A mortgage foreclosure is an action in equity." 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, the appellate court may find facts in accordance with its own view of the preponderance of the evidence." Lowcountry Open Land Trust v. Charleston S. Univ., 376 S.C. 399, 407, 656 S.E.2d 775, 779 (Ct. App. 2008). "However, this broad scope of review does not require an appellate court to disregard the findings below or ignore the fact that the trial judge is in the better position to assess the credibility of the witnesses." Pinckney v. Warren, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001). Notably, "the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." U.S. Bank Trust Nat. Ass'n v. Bell, 385 S.C. 364, 373, 684 S.E.2d 199, 204 (Ct. App. 2009) (quoting Pinckney, 344 S.C. at 387–88, 544 S.E.2d at 623).

Argument

The master correctly recognized that the evidence presented at the foreclosure hearing established that Smalley defaulted under the terms of the Note and Mortgage and that Wells Fargo proved the existence of Smalley's debt. Smalley now presents a red-herring argument to this Court in order to distract from the fact that he failed to introduce any evidence of payment to show he was not in default under the loan. Thus, the only evidence before the master proved Smalley's default and Wells Fargo's entitlement to foreclose.

In his brief, Smalley argues that Wells Fargo "failed to offer any evidence of default of the loan," and therefore, the master erred in entering the foreclosure judgment. See Appellant's Br. at 3-4.[3] This argument is manifestly without merit. Wells Fargo introduced evidence, through testimony and documents, which each individually established that Smalley was in default under the loan. Therefore, this Court should reject Smalley's argument and affirm.[4]

"Generally, the party seeking foreclosure has the burden of establishing the existence of the debt and the mortgagor's default on that debt." Bell, 385 S.C. at 374, 684 S.E.2d at 205. "Once the debt and default have been established, the mortgagor has the burden of establishing a defense to foreclosure such as lack of consideration, payment, or accord and satisfaction." Id.

Wells Fargo met its burden as to Smalley's default under the Note. At the hearing, Wells Fargo introduced the Note executed by Smalley. {Transcript dated November 19, 2013, p. 4, lines 20-25; R. 26}. Smalley allowed introduction of this evidence without objection. {Id.}. The Note established the time and place for

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[3] In his brief, Smalley argues that because the witness could not testify to the exact date of default then Wells Fargo failed to carry its burden. See Appellant's Br. at 4, block quote of testimony. This is a red-herring. The test is not that the lender has to establish a date of default. Rather, the lender must merely establish the existence of the default by the borrower. See, e.g., Bell, 385 S.C. at 374, 684 S.E.2d at 205.

[4] In his brief to this Court, Smalley seeks relief to have "judgment entered in favor of the Appellant" by this Court. See Appellant's Br. p. 4. However, Smalley offers no authority to support such a request. Assuming this Court reverses the master, which as set forth herein is not warranted, this Court should remand the matter to master for further action. See, e.g., LaSalle Bank Nat'l Ass'n v. Davidson, 386 S.C. 276, 281, 688 S.E.2d 121, 123 (2009) (vacating and remanding an entry of foreclosure for a new hearing on the merits after determination that the first hearing was defective); S. Atl. Fin. Servs., Inc. v. Middleton, 349 S.C. 77, 85, 562 S.E.2d 482, 486 (Ct. App. 2002) (reversing and remanding judgment of foreclosure when first hearing was defective).

payments. {Note p. 1 § 3(A); R. 55}. Smalley agreed to "pay principal and interest by making a payment every month." {Id.}. The monthly payment would be due "on the first day of each month beginning on January 1, 2006." {Id.}. Smalley also agreed that "[e]ach monthly payment will be applied as of its scheduled date and will be applied to interest before Principal." {Id.}.

The Note further provided for late charges to be assessed for overdue payments from Smalley. {Note p. 3 § 7(A); R. 57}. That section provides:

> **7. BORROWER'S FAILURE TO PAY AS REQUIRED**
>
> **(A) Late Charges for Overdue Payments**
>
> If the Note Holder has not received the full amount of any monthly payment by the end of Fifteen calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 5.0000 % of my overdue payment of Principal and interest. I will pay this late charge promptly, but only once on each late payment.

{Id.}. Moreover, Smalley would be in default by failing to pay the full amount of each monthly payment. If he failed to do so, then Wells Fargo, or its servicer, could accelerate the full balance due if the default was not cured within thirty days, as the Note provides:

> **7. BORROWER'S FAILURE TO PAY AS REQUIRED**
>
> **(B) Default**
>
> If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.
>
> **(C) Notice of Default**
>
> If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date

on which the notice is mailed to me or delivered by other means.

{Note p. 3 § 7(B), (C); R. 57}. In sum, default under the Note occurred thirty days after Smalley failed to cure the overdue amount, including any late charges and accrued interest.

Wells Fargo introduced testimony establishing that (1) Smalley missed payments causing interest to accrue from the date of the first missed payment to the time of the hearing and (2) he incurred late charges for missed payments. The following testimony was introduced at the foreclosure hearing:

Q. What is the principle [sic] balance?
A. The principle [sic] balance is $316,947.55.
Q. And what does -- what is the interest due on the loan from the **last missed payment** through October 31st [of 2013]?
A. $36,158.45.
Q. Are there any late charges on this loan?
A. Yes, $427.34.
Q. Are there any deficient taxes or insurance on the loan?
A. There is an escrow deficiency of $19,352.30.
Q. And does Chase have any other expenses or fees or accrued penalty that have—
A. There are property inspections of $112.

MR. JACKMAN: That is all on that issue, Your Honor.
THE COURT: Do you have a figure that that totals to?
THE WITNESS: Yes, sir. The total amount is $372,997.64.

{Transcript dated November 19, 2013, p. 15, line 15-p. 16, line 8, R. 37-38; Supp. R. 1} (emphasis added). This testimony established that (1) payments were missed, (2) late charges were imposed, and (3) interest accrued beginning from the first missed payment to the month prior to the hearing.

The Note contained no other provision for the imposition of late charges. Thus, the existence of late charges on the debt established that a payment must have been missed and not cured. Thus, Smalley was in default per section 7(B) of the Note. Moreover, this testimony on the amount of accrued interest further constituted evidence of default under the Note[5] because interest was to be paid first from each monthly payment and late charges remained uncured. Stated differently, the only way for accrued interest to exist would be for Smalley to be in default under the Note. Timely or cured payments would have eliminated accrued interest and late charges. The master considered the terms of the Note applicable to payment and default in conjunction with this testimony to find Smalley defaulted on the Note and the amount of the debt. Such was proper to find Wells Fargo carried its burden as to the issue of default and the amount of the debt. This Court should affirm.

Once Wells Fargo introduced the Note and the testimony regarding the default and debt, the burden shifted to Smalley to establish a defense to the foreclosure such as lack of consideration, payment, or accord and satisfaction. See, e.g., Bell, 385 S.C. at 374, 684 S.E.2d at 205. Smalley failed to do so. In fact, Smalley put forth no evidence that he was not in default, such as payment. {Transcript dated November 19, 2013, p. 24-31; R. 46-53}. He also did not challenge the existence or amount of the late charges, the amount of the accrued interest, or the amount of the total debt sought as damages at the foreclosure hearing. Thus, the **only** evidence before the master on the default issue was submitted by Wells Fargo. As noted above, the master considered

[5] Sections 3 and 7 as set forth above.

that evidence and found Wells Fargo established its entitlement to foreclosure by a preponderance of the evidence.

Moreover, law of the case requires this Court to view the amount and existence of the late fees, the amount of accrued interest, and the total amount of the debt as accurate and controlling facts. The order of judgment and sale found that late fees existed and the amount of such fees, the amount of the accrued interest, and the amount of the total debt sought as damages. {Order and Judgment of Foreclosure and Sale ¶ 12; R. 3-4}. Smalley failed to appeal from these findings in the order. See Appellant's Br. p. 3-4.[6] Thus, those issues are now law of the case. See, e.g., Bone v. U.S. Food Serv., 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012); Resolution Trust Corp. v. Eagle Lake & Golf Condominiums, 310 S.C. 473, 427 S.E.2d 646, 648 (1993) (holding that the trial judge's unappealed ruling is the law of the case). Smalley cannot contest these evidentiary findings of the master. Late charges existed on this debt as testified to at the foreclosure hearing. Accrued interest existed with the amount determined at the hearing. The debt total was established via testimony. The existence of these sums established default under the Note, as set forth above. Thus, law of the case precludes Smalley from arguing no evidence of default was presented at the hearing.

Conclusion

Late charges existed on this debt as testified to at the foreclosure hearing. Accrued interest existed with the amount determined at the hearing. The debt total was

[6] Smalley limited his brief to the issue of whether proof of default was presented to the master.

established via testimony. Smalley chose to not introduce any evidence that he did not miss those payments, incur those late charges, have the interest accrue, or that he did not owe the total debt amount. Therefore, Wells Fargo submitted sufficient evidence at the hearing to meet its burden and find that Smalley was in default by a preponderance of the evidence. It was Smalley who failed to meet his burden. This Court should reject Smalley's red-herring argument to the contrary. Thus, this Court should affirm the Master-in-Equity's judgment of foreclosure and sale.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Wells Fargo Bank, N.A., as trustee for WaMu Mortgage Pass-Through Certificates Series 2006-PR I Trust, do hereby certify that I have served all parties in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid and hand delivery, to the following address(es):

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