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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Gordon G. Cooper
Master-in-Equity

Appellate Case No. 2016-002559
Circuit Court Case No. 2016-CP-42-02422

Fifth Third Mortgage Company.....Respondent

v.

Tracy L. Liggett and South Carolina Department of Motor Vehicles.....Defendants

of whom Tracy L. Liggett is the.....Appellant

FINAL BRIEF OF APPELLANT

Tracy Liggett, Appellant
225 Perry road
Greer SC 29651
864-999-6044

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Fifth Third Mortgage Company,

Respondent

v.

Tracy Liggett,

Appellant.

FINAL BRIEF OF APPELLANT

February 12, 2018

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STATEMENT OF THE CASE

On June 30, 2016, Respondent brought a Non-Jury Foreclosure action against Appellant for property located at 225 Perry Road Greer, SC, 29651, in Spartanburg County. (R. p. 13; Complaint)

On August 10, 2016, Respondent certified that the Appellant was served the required notice of rights and that Appellant failed, refused or voluntarily elected not to participate in any foreclosure intervention process.

On August 24, 2016, Appellant filed and Answer and Affirmative Defenses. (R. p. 17; Amended Answer and Affirmative Defenses.)

On September 15, 2016, an Order of Reference was entered that referred the Foreclosure action to Gordon G. Cooper, as Master in Equity with authority to enter a final Judgment.

On November 16, 2016, a Notice of the hearing on December 1, 2016 was sent out to Appellant. (R. p. 20; Notice of Hearing and Certificate of Mailing.)

On November 29, 2016, Appellant filed a Notice of Unavailability and requested that the hearing on December 1, 2016, be continued to allow her to be present at the hearing. (R. p. 22; Notice of Unavailability and Motion for Continuance.)

On December 1, 2016, the Master in Equity found the total debt to be $82,057.81.00.

(R. p. 2; Master's Order and Judgment of Foreclosure and Sale.)

On December 29, 2016, Appellant filed a Notice of Appeal. (R. p. 23: Notice of Appeal.)

On January 5, 2017 an Order was entered Vacating the Sale. (R. p. 11; Order Vacating Sale.)

STANDARD OF REVIEW

A foreclosure case is a case in equity. In an action at equity, the appellate Court may find facts in accordance with its views of the preponderance of the evidence. Factual findings will be affirmed unless the appellant satisfies the Court that the preponderance of the evidence is against the finding of the Court. *Lewis v. Lewis*, 392 S.C. 381, 709 S.E. 2d 650 (2011). In an action in equity referred to a master in equity like the case at bar, the appellate Court may take its own view of the preponderance of the evidence although it is not required to disregard the findings of the master or referee. *Lewis v. Premium Inv. Corp.*, 341 S.C. 539, 5 35 S.E. 2d 139 (Ct. App 2000).

The standard of review as to issues of law is *de novo*. *Moriarity v. Garden Sanctuary Church of God*, 341 S.C. 320 534 S.E. 2d 672 (2000). The *de novo* standard also applies to the trial judge's application of the law to the facts. *J.K. Construction, Inc. v. Western Carolina Regional Sewer Authority,* 336 S.C. 162, 519 S.E. 2d 561 (1999).

"An action to foreclose a real estate mortgage is an action in equity." *BB & T of South Carolina v. Kidwell*, 350 S.C. 382, 387, 565 S.E.2d 316, 319 (Ct.App.2002). On appeal from an action in equity, this Court may "find facts in accordance with its views of the preponderance of the evidence." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). Furthermore, this Court is not bound by the trial court's legal determinations. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 718-19 (2000).

ARGUMENT

I. THE LOWER COURT ABUSED ITS DISCRETION IN ENTERING FINAL JUDGMENT IN FAVOR OF RESPONDENT

A. RESPONDENT LACKS STANDING

Respondent is the mere servicer and holder of the note. Federal Home Loan Mortgage Corporation ("Freddie Mac") is the owner of the loan. In a letter dated December 9, 2015, from Freddie Mac to Appellant, Notice was provided to Appellant that Freddie Mac had purchased the Appellant's Mortgage Loan as of November 17, 2015. Despite the foregoing, the Respondent filed suit against Appellant approximately seven (7) months later on June 30, 2016.

Respondent did not provide proof that the Appellants' loan was ever legally transferred to Freddie Mac. Respondent has not provided an assignment of mortgage to Freddie Mac. If Freddie Mac did obtain legal possession of the loan, when was it transferred back to Respondent and where is the proof of that transfer? Respondent did not prove that it had standing to bring this lawsuit.

A crucial element in any Mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose. Standing to bring a mortgage foreclosure proceeding must be established by either an assignment or an equitable transfer of the Mortgage and note prior to the filing of the Complaint.

On June 1, 2016, Appellant sent via certified mail an Error Resolution and Information Request ("ERIR") to Respondent requesting information on her loan. On June 24, 2016, Appellant received a response from Respondent stating that Freddie Mac is the owner of her loan and enclosing a copy of her Note, Mortgage, payment history and escrow notices. The copy of the Note attached to the Response did not contain an endorsement. (R. p. 61)

Courts have held that a party's lack of standing is a defect that cannot be cured by acquiring the right of standing after action has already been filed. See *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 69 (U.S. 1987) (Scalia, J., concurring) ("Subject matter jurisdiction depends on the state of things at the time of the action is brought").

There is no record or evidence in this case that the Respondent had possession of the original note or of any equitable transfer of the Note or Mortgage to the Respondent prior to the filing of the lawsuit. Freddie Mac claims ownership of the loan as of 2015.

Purportedly, the promissory note was originally executed to Fifth Third Mortgage Company See S.C. Code Ann. § 361201(b)(21)(a) (Supp. 2015) (stating a holder is "the person in possession of a negotiable instrument that is payable...to...an identified person that is the person in possession"); S.C. Code Ann. § 363301 (Supp. 2015) (noting the holder of an instrument is entitled to enforce the instrument).

Appellant argues that Respondent is not entitled to enforce the instrument, nor does it have standing to pursue foreclosure. See Rule 17(a), SCRCP ("Every action shall be prosecuted in the name of the real party in interest."); *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E. 2d 478, 481 (Ct. App. 2013) ("It is ownership of the right sought to be enforced which qualifies one as a real party in interest, rather than absolute ownership of specific property." (footnote omitted) (quoting 4 S.C. Jur. Action § 23 (1991)); *Id.* ("Generally, a party must be a real party in interest to the litigation to have standing." (quoting *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 22, 698 S.E.2d 612, 623 (2010)).

Therefore, the Respondent did not prove by a preponderance of the evidence that it had standing to foreclose and the entry of the foreclosure judgment was error.

B. RESPONDENT FAILED TO MEET CONDITIONS PRECEDENT

On August 10, 2016, Respondent certified that the Appellant was served the required notice of rights and that Appellant failed, refused or voluntarily elected not to participate in any foreclosure intervention process.

Paragraph 15 of the Appellant's Mortgage requires that a notice of default be provided to Appellee. (R. p. 73) The Complaint of the Respondent in paragraph 19 (R. p. 13; Complaint) states that a Notice of consumer's right to cure was given or was not required and all conditions precedent to the acceleration of the debt and foreclosure of the mortgage have been performed and have occurred.

A condition precedent is "any fact, other than mere lapse of time, which, unless excused, must exist or occur before a duty of immediate performance by the promisor can arise." *Ballenger Corp. v. City of Columbia*, 286 S.C. 1, 5, 331 S.E. 2d 365, 368 (Ct. App. 1985). "Words and phrases such as 'if,' 'provided that,' 'when,' 'after,' 'as soon as,' and 'subject to' frequently are used to indicate that performance expressly has been made conditional." *Cobb v. Gross*, 291 S.C. 550, 552, 354 S.E. 2d 573, 574 (Ct. App. 1987). "Whether a stipulation in a contract constitutes a condition precedent is a question of construction dependent on the intent of the parties to be gathered from the language they employ." *Id.* If there is doubt about the construction of a writing, the doubt must be resolved against the drafter and in favor of the party to whom it was delivered. *Charles v. West*, 155 S.C. 488, 494, 152 S.E. 644, 646 (1930).

Appellant contends that she was not provided with the required notice of default prior to being served the foreclosure Complaint, nor was she provided with the face-to-face interview with the mortgagor, nor was a reasonable effort made to arrange such a meeting pursuant to 24 C.F.R. Section 203.604 included herein:

(b) The mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full monthly installments due on the mortgage are unpaid. If default occurs in a repayment plan arranged other than during a personal interview, the mortgagee must have a face-to-face meeting with the mortgagor, or make a reasonable attempt to arrange such a meeting within 30 days after such default and at least 30 days before foreclosure is commenced, or at least 30 days before assignment is requested if the mortgage is insured on Hawaiian home land pursuant to section 247 or Indian land pursuant to section 248 or if assignment is requested under § 203.350(d) for mortgages authorized by section 203(q) of the National Housing Act.

24 C.F.R. Section 203.604 requires that a face-to-face meeting be provided to a borrower prior to the initiation of foreclosure actions. The subject property is Appellant's personal residence. For these reasons, Respondent did not meet conditions precedent to entitle it to a foreclosure judgment.

C. APPELLANT WAS DENIED DUE PROCESS

Due process prior to the taking of one's property is a protection based in both State and Federal Law. Article I Section 3 of the South Carolina Constitution provides that property shall not be taken without due process of law. S.C. Const. art. 1, § 3. Appellant in this case, was denied due process prior to the taking of her property. Appellant has attempted to defend the lawsuit in the Lower Court to the best of her ability. She filed a Notice of Unavailability and a Motion for Continuance of the December 1, 2016 hearing on November 29, 2016. (R. p. 22; Notice of Unavailability and Motion for Continuance.) The December 1, 2016 hearing proceeded without Appellant present notwithstanding her request for Continuance and Appellant was unable to present her defenses to the foreclosure. She could not appear for the December 1, 2016, hearing for medical reasons and promptly advised the Respondent and the Court accordingly.

To have a property interest triggering due process protection, a person must "show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 430, 593 S.E. 2d 462, 470 (2004).

"Procedural due process requires notice, the opportunity to be heard in a meaningful way, and judicial review." *Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002). (Emphasis Added)

Appellant is an interested party to the property and holds title to the property via a Warranty Deed. Appellant was not heard at the December 1, 2016 hearing where her property was foreclosed on.

In *LaSalle Bank Nat'l Ass'n v. Davidson*, 386 S.C. 276, 277, 688 S.E.2d 121, 121 (2009), the court held that the failure of a judge to attend a mortgage foreclosure proceeding was a structural defect that violated the Appellants' "constitutional guarantee to procedural due process.". There, the court ordered a new trial, stating: "The purported hearing was a nullity, and the resulting order must be vacated. The judge's absence from the hearing deprived the [Appellants] of the opportunity to be heard and, thus violated their constitutional guarantee of procedural due process." *Id.* at 281, 688 S.E.2d at 123; *see also U.S. v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (stating that "certain errors, termed 'structural errors,' might 'affect substantial rights' regardless of their actual impact on an appellant's trial").

It was apparent that the Appellant contested the foreclosure. On August 24, 2016, Appellant filed Answers and Affirmative Defenses (R. p. 17; Amended Answer and Affirmative Defenses.) denying the allegations set forth in Respondent's Complaint. Even the Master-In-Equity at the hearing on December 1, 2016, was informed that Answers and Affirmative Defenses were filed in the matter and the Appellant was not present but had filed a Notice of Unavailability. The Master-In-Equity was unaware that the Appellant was Pro Se until Respondent informed him at the hearing (R. p.p. 26-27; Lines 26:9-27:3; Transcript of Testimony).

Appellant was denied due process of law prior to the taking of her property and the foreclosure judgment should be reversed.

CONCLUSION

Respondent did not prove it had standing to bring this lawsuit or that it complied with conditions precedent. Respondent did not properly compute or plead its entitlement to judgment.

Appellant also alleges that Pro Se pleadings should be considered without regard to the same technicality as pleadings of attorneys because Pro Se litigants' pleadings are generally not to be held to the same standards of perfection as lawyers. See the US Supreme Court decisions in *Jenkins v. McKeithen*, 395 US 411(1959) and *Picking v. Pennsylvania R. Co.*,151 F. 2d. 240.

Pro Se litigants have generally been given reasonable opportunity to remedy defects in order to provide the constitutional right of access to the courts which allows those who may not be able to afford legal representation a fair opportunity to litigate their claims and to represent themselves in court. See *Platsky v. C.I.A.*. 953 F.2d.25 citing *Reynoldson v. Shillinger*, 907 F. 2d. 124,16 (10th Cir. 1990); see also *Jaxon v. Circle K. Corp.*, 773 F.2d. 1138,1140 (10th Cir. 1985)(1)

Based on the foregoing, Appellant requests that the Appellate Court reverse the trial Court's Judgment against Appellant and remand to the Lower Court for further proceedings in this action.

Signature Page and Certificate of Counsel Attached

Respectfully submitted,

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February 12, 2018

CERTIFICATE OF COUNSEL

The below-signed pro se Appellant certifies that this brief complies with Rule 211(b), SCACR.

February 12, 2018

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