

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

Appeal from the Court of Common Pleas for Kershaw County, South Carolina

Jeffrey M. Tzerman, Master in Equity

Appellant Case No. 2019-001269

**RECEIVED**

OCT 10 2019

SC Court of Appeals

Wilmington Savings Fund Society, FSB, as Owner Trustee of the Residential Credit  
Opportunities Trust V-

V,.....Respondent,

v.

Shaylyn R. Anderson; Kelsney Ridge Homeowner's Association, Inc.; SC Housing Corp.,  
Defendants, Of which Shaylyn R. Anderson is the Appellant.

**INITIAL BRIEF OF APPELLANT**

William S. Koehler  
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Attorney for Respondent

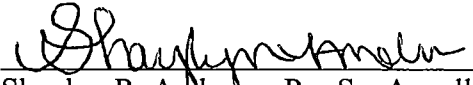
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TABLE OF CONTENTS

Table of Authorities ..... ii

Statement of Issues on Appeal..... 1

Statement of the Case..... 1

Facts .....1

Arguments:

1. DID THE TRIAL COURT ERR IN GRANTING A FORECLOSURE SALE OF THE PROPERTY OF THE APPELLANT DISPIT THE APPELLANT NOT BEING GIVE COURT MANDATED LOST MITIGATION. ....2

2. DID THE TRIAL COURT VIOLATE THE APPELLANT CONSTITUTIONAL RIGHT TO DUE PROCESS BY GRANTING THE RESPONDENT A DEFAULT JUDGEMENT. ....2

Conclusion .....3

CASES

In re Johnson D. Koola, C/A No. 18-01373-JW.....3

Supreme Court of South Carolina Administrative Order (Order No. 2009-05-22-01 .....4

**§ 1024.41 Loss mitigation procedures. RESPA (12 U.S.C. 2605(f))** .....

## STATEMENT OF THE CASE

A foreclosure action was filed against, Appellant, Shaylyn R. Anderson, in the Office of the Master In Equity Court for Kershaw County. The required Notice of Right to Foreclosure Intervention was filed on September 28, 2018. The Appellant accepted the right and returned the information to the foreclosing law firm as outlined in the notice. The appellant entered into lost mitigation negotiations with the respondent. The appellant wanted desperately to keep her home. The appellant was willing to agree to whatever it took to keep her home. Unfortunately, the appellant agreed to a modification that increased the interest rate and payment. The lost mitigation offered by the respondent was contrary to the purpose of lost mitigation.

## FACTS

Respondent, Wilmington Savings Fund Society, FSB, as Owner Trustee of the Residential Credit Opportunities Trust VV, filed a foreclosure action on appellant in the Court of Common Pleas for Kershaw County on August 25, 2018. The Notice of the Right to Foreclosure Intervention was filed on the same day. Appellant responded to the Notice of Foreclosure Intervention and entered into the Foreclosure Intervention process. A modification agreement was entered into by the Respondent and the appellant. Prior to the modification, the appellant's payment was \$1,661.00 per month. After the modification, the appellant's payment was \$1,800.00 per month.

Subsequently, the respondent reinstated the foreclosure process. Foreclosure intervention stays the foreclosure process. Therefore, the appellant had no notice of the continuation of the foreclosure proceeding and did not receive any notice from the respondent until after the foreclosure sale. The Master In Equity issued a Judgment of Foreclosure and sale pursuant to a hearing held on June 4, 2019 on June 14, 2019. Pursuant to the order the property was sold by the Master in Equity on July 1, 2019.

The respondent was able to file a notice of intent to foreclose prior to the record transfer of the property by the Kershaw County Master In Equity.

## ARGUMENT

The Master In Equity issued a Judgment of Foreclosure and sale pursuant to a hearing held on June 4, 2019 on June 14, 2019 and the subsequent sale of July 1, 2019. The sale represented a clear violation of the respondent's constitution right to due process. Sale was a taking of the appellant's property without due process of law. Appellant had no knowledge of the hearing for which the trial court ordered the sale of the appellant's property.

The Supreme Court of South Carolina, pursuant to an administrative order issued by Chief Justice Jean H. Toal in *Re to Mortgage Foreclosure Actions in South Carolina* on May 2, 2011:

On May 22, 2009, I issued an Administrative Order (Order No. 2009-05-22-01) applicable to mortgage foreclosure actions subject to the Home Affordable Modification Program ("HMP") instituted by the United States Treasury Department ("Treasury"). The program applied to residential loans owned, securitized or guaranteed by the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac).

Subsequently, Treasury issued, by directive, additional guidance to servicers for adoption and implementation of the HMP for residential mortgage loans that are not owned, securitized or guaranteed by Fannie Mae or Freddie Mac. However, the HMP is only applicable to such loans if the lender or servicer has agreed to participate in the HMP. Not all lenders or servicers have so agreed.

Since imposition of my prior order, the number of foreclosure actions filed in this State has continued to increase. The trial courts having jurisdiction over such actions have reported to this Court difficulty in making final disposition of these actions as a result of failed or delayed loss mitigation efforts between lender-servicers and mortgagor-debtors. As a result, the number of unresolved foreclosure actions has increased, with a resulting burden on the resources of the Court before which the action is pending.

The courts have reported that these failures are the result of a breakdown of loss mitigation efforts that all parties find to be in their best interests, if possible. The trial courts report that such breakdowns are largely the result of difficulty in communication between lender-servicers and debtors, and the fact that foreclosure actions are proceeding to conclusion without regard to ongoing loss mitigation efforts by the parties.

I further take judicial notice of the actions of courts in other jurisdictions describing a similar breakdown in the efforts of parties to foreclosure actions to reach a resolution of defaults in payment of mortgage loans.

Therefore, based on the foregoing, and in order to insure that eligible homeowners and lender-servicers have been afforded the benefits of loan modification or other loss mitigation where possible, and to insure that the procedures for handling issues relating to such efforts are handled uniformly throughout the State, so that mortgage foreclosure actions are not unnecessarily dismissed, delayed or inappropriately concluded while loan modification or other loss mitigation efforts are being pursued, it is ordered as follows:

A. Definitions:

For the purposes of this administrative order, the following definitions shall apply:

- (1) "Mortgagor" shall include every owner, mortgagor, and debtor under the note and mortgage at issue.
- (2) "Mortgagee" shall include the owner and holder of the note and mortgage, any party acting on behalf of the owner and holder of the note and mortgage for the purpose of receiving payments, dealing with the mortgagor, or administering the loan evidenced by the note and mortgage, and any party seeking foreclosure of the subject mortgage, or otherwise acting as the agent of the owner and holder of the note in connection with the loan or the foreclosure of the note and mortgage, except for the mortgagee's attorney.
- (3) "Owner-Occupied dwelling" is defined as mortgaged real property that is the principal residence of any mortgagor.
- (4) "Court" shall include any judicial officer having jurisdiction over the foreclosure action, including any Circuit Court Judge, Master-In-Equity or Special Referee.
- (5) "Foreclosure intervention" shall include any policy, process or procedure employed by a Mortgagee for the purpose of seeking a resolution of a foreclosure action by loan modification or other means of loss mitigation.

**B. Procedure in Foreclosure Actions:**

The terms and conditions of this order shall apply to all mortgage foreclosure proceedings concerning Owner-Occupied dwellings in this State.

(1) Actions pending on May 9, 2011.

In all mortgage foreclosure actions pending on May 9, 2011, before any merits hearing in the case, or if an order of foreclosure has been entered, before any foreclosure sale, the Mortgagee shall, through its attorney of record, file with the court and serve upon every Mortgagor a notice of the Mortgagor's right to foreclosure intervention. All proceedings in the foreclosure action shall be stayed until completion of such foreclosure intervention.

No foreclosure hearing or foreclosure sale may be held in the foreclosure action until the Mortgagee's attorney certifies the following:

- (a) that the Mortgagor has been served with a notice of the Mortgagor's right to foreclosure intervention for the purpose of seeking a resolution of the foreclosure action by loan modification or other means of loss mitigation;

(b) that the Mortgagee, or its designated agent, has received and examined all documents and records required to be submitted by the Mortgagor to evaluate eligibility for foreclosure intervention;

(c) that the Mortgagor has been afforded a full and fair opportunity to submit any other information or data pertaining to the Mortgagor's loan or personal circumstances for consideration by the Mortgagee;

(d) that after completion of the foreclosure intervention process, the Mortgagor does not qualify for loan modification or other means of loss mitigation, in accordance with any standards, rules or guidelines applicable to the mortgage loan, and the parties have been unable to reach any other agreement concerning the foreclosure process; and,

(e) that notice of the denial of loan modification or other means of loss mitigation has been served on the Mortgagor by mailing such notice to all known addresses of the Mortgagor; provided, that such notice shall also state that the Mortgagor has 30 days from the date of mailing of notice of denial of relief to file and serve an answer or other response to the Mortgagee's summons and complaint.

If within thirty days after having been served with notice of the Mortgagor's rights, the Mortgagor has failed, refused, or voluntarily elected not to participate in any foreclosure intervention process, the Mortgagee, through its attorney, shall certify that fact to the Court, and the foreclosure action may proceed.

## (2) Actions filed after May 9, 2011.

In all mortgage foreclosure actions filed after May 9, 2011, the Mortgagee's attorney shall serve on the Mortgagor, along with the summons and complaint, a notice of the Mortgagor's right to foreclosure intervention.

No foreclosure hearing may be held in the foreclosure action until the Mortgagee's attorney certifies that the Mortgagee has complied with the requirements of paragraphs B (1) (a) through (e) above.

If within thirty days after having been served with notice of the Mortgagor's rights, the Mortgagor has failed, refused, or voluntarily elected not to participate in any foreclosure intervention process, the Mortgagee, through its attorney, shall certify that fact to the Court, and the foreclosure action may proceed.

## C. General Conditions.

Throughout the foreclosure intervention process and the foreclosure action, the Mortgagee shall communicate with and otherwise deal with the Mortgagor through the Mortgagee's attorney, and the Mortgagor shall have the right to deal with the Mortgagee through the Mortgagee's attorney. This includes, without limitation, submission of all required information, negotiations, and consummation of any loan modification or other loss mitigation agreement. If the Mortgagor is represented by an attorney, then the Mortgagee shall communicate with and otherwise deal with the Mortgagor through the Mortgagor's attorney.

No document, statement or evidence of any kind shared, released or exchanged exclusively for purposes of foreclosure intervention pursuant to this order shall be admissible as evidence in any subsequent proceeding. The provisions of Rule 8 of the Court Annexed Alternative Dispute Resolution Rules ("ADR Rules") shall apply to all such documents, statements or evidence, as well as to all discussions, disclosures and negotiations occurring in any foreclosure intervention process.

A Mortgagee's attorney, by proceeding with a foreclosure, represents to the Court that the Mortgagee has fully complied with all provisions of this Order.

In the event that the Mortgagor and Mortgagee agree on any loan modification or other loss mitigation plan ("Agreement"), such Agreement shall be reduced to writing, executed by the Mortgagor and Mortgagee, and served on all parties in the case. Any pending case shall be stayed, and no hearing or foreclosure sale held for 90 days following the entry of any Agreement, unless the Mortgagor shall not comply with the terms of the Agreement.

Upon any failure by Mortgagor to comply with the terms of the Agreement before the expiration of 90 days from the date of the Agreement, the Mortgagee, through its attorney, shall file and serve on all parties a "Notice of Breach of Agreement". Upon filing and service of such notice, the foreclosure action may proceed in the ordinary course.

If the Mortgagor shall be in compliance with the terms of the Agreement after 90 days, the Mortgagee's attorney shall promptly file a notice of dismissal of the action without prejudice, and the case will be dismissed. Such notice of dismissal shall be served on all parties to the action.

The Court having jurisdiction over the foreclosure action shall hear and determine any dispute concerning any party's compliance with this order, including without limitation, the failure of any party to act in good faith in complying with the terms of this order. In the event the Court determines that any party to the foreclosure action, or their acting agent, has failed to comply

with the terms of this order, or has not attempted to reach an agreement for foreclosure intervention in good faith, the Court may, in its discretion, impose such sanctions as it determines to be reasonable and just under the circumstances, including without limitation, the assessment of reasonable attorneys' fees and costs against the culpable party.

The Court having jurisdiction over the action shall have the authority, and may in its discretion, order the parties to submit to mediation. In such event, the mediation shall proceed in accordance with the ADR Rules.

This order remains in effect unless amended or rescinded by the Chief Justice.

IT IS SO ORDERED.

s/Jean H. Toal  
Jean H. Toal  
Chief Justice of South Carolina

Columbia, South Carolina  
May 2, 2011

The Respondent failed to offer reasonable lost mitigation, as required by the above-referenced order. The appellant entered into a modification with the respondent. The modification agreement entered into by the Appellant resulted in the Appellant paying a higher payment after the lost mitigation process. Prior to the modification, the appellant's payment was \$1,661.00 per month. After the modification, the appellant's payment was \$1,800.00 per month. **Loss mitigation**" is what the mortgage-servicing industry calls the process where borrowers and their loan servicer work together to avoid a foreclosure. The term "**loss mitigation**" refers to a loan servicer's duty to **mitigate** or lessen the **loss** to the investor (the loan owner) resulting from the borrower's default. In re Johnson D. Koola, C/A No. 18-01373-JW, a Chapter 13 order of the United States Bankruptcy for The District of South Carolina, ruled that Reasonable Lost Mitigation must be offered the party being foreclosed. Although the ruling did not require lost mitigation in the case before the bankruptcy court, the acknowledged the requirement of reasonable lost mitigation. The court in that case concluded that the debtor still had an opportunity to get reasonable lost mitigation.

Additionally, federal law requires lost mitigation as follows:

### **§ 1024.41 Loss mitigation procedures.**

**(a) Enforcement and limitations.** A borrower may enforce the provisions of this section pursuant to section 6(f) of RESPA (12 U.S.C. 2605(f)). Nothing in § 1024.41 imposes a duty on a servicer to provide any borrower with any specific loss mitigation option. Nothing in § 1024.41 should be construed to create a right for a borrower to enforce the terms of any

agreement between a servicer and the owner or assignee of a mortgage loan, including with respect to the evaluation for, or offer of, any loss mitigation option or to eliminate any such right that may exist pursuant to applicable law.

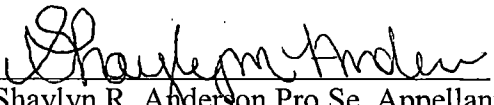
It is clear that the Respondent did not provide the required lost mitigation and required by state and federal laws. Pursuant to federal statutes and The South Carolina Supreme Court Order, law mitigation stays all legal proceeding. Therefore the appellant was not in default therefore here due process rights were violated.

### CONCLUSION

The Court erred in granting respondent's order and sale of foreclosure with giving the appellant the court ordered lost mitigation. Further, the court erred in granting a default judgement against the appellant. This case should be remanded to the trial court and the appellant be give her right to lost mitigation and due process.

**Certificate of Counsel**

The undersigned hereby certifies that the Initial Briefing complies with Rule 211(b), SCACR.

  
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October 6, 2019

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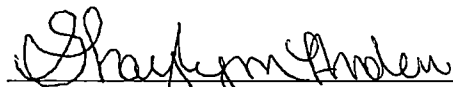
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.....Appellant.

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PROOF OF SERVICE  
\_\_\_\_\_

I, Shaylyn R. Anderson, Pro Se, Appellant, certify that I have served the Initial Brief on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on October 6, 2019 to William S. Koehler, 1201 Main Street, Suite 1450, Columbia, SC 29201.

  
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